
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

8-18-1981

Volume 21 (Part 3)

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

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Wein - direct

1
2 Q Have you had employment with private business?

3 A Yes, I have.

4 Q What is that?

5 A Well, I was Executive Assistant to the President of
6 Slick Airways in, I believe, '51 or '52.

7 I was also -- that was a large air freight airline,
8 one of the first that was established after World War II.

9 I then, for a year or a year and a half, was
10 Director of Manufacturing of a plastics company.

11 Those are my direct working experiences.

12 I have, of course, been consultant to many
13 private firms.

14 Q Could you name a few of the firms to whom you have
15 been a consultant?

16 A Well, the most recent one was last year, and that is
17 General Motors.

18 Other firms have been the Pacific Lighting
19 Corporation in California, the gas company, and
20 Datran, and PanAmerican World Airways, and the
21 New York Central Railroad.

22 Q Have you been a consultant to any Federal agencies?

23 A Yes.

24 Q Which agencies?

25 A Well, I have been a consultant to the -- I am

1 Wein - direct

2 presently a consultant to the Antitrust Division of
3 the United States Department of Justice in their
4 case against AT&T.

5 I have been a consultant also to the Federal
6 Power Commission and to the Federal Communications
7 Commission and to the Federal Energy Regulatory
8 -- to the Federal Energy Administration, I am sorry,
9 and there may be others.

10 Q Are you a member of any professional societies,
11 Dr. Wein?

12 A Yes, I am.

13 Q Have you had any publications during your career as
14 an economist?

15 A Yes.

16 Q About how many have you participated in?

17 A Well, I don't know -- 50 or 60, somewhere in that
18 neighborhood.

19 Q What subject matters do your publications cover
20 generally?

21 A If I remember -- I can't say generally. I have been
22 doing this for 42 years, so my interests have
23 evolved over time, but they cover the following field:

24 One field was industry studies, economic studies
25 involving particularly steel, railroads, and automobiles.

1 Wein - direct

2 Secondly, they involve the regulatory problems
3 covering a wide variety of regulatory agencies,
4 transmission, gas and electric, and communications,
5 and aviation, and even banking.

6 I have also done considerable work in the
7 economics of underdeveloped countries, and the
8 U.N. published a report which I did on that subject,
9 and also I have been involved in managerial subjects,
10 and in recent years I suppose that I have been
11 heavily involved in problems with antitrust and
12 utilities.

13 Q Dr. Wein, I didn't ask you, would you name a few of
14 the societies in which you are a member?

15 A I am a member of the American Economic Association;
16 I am a member of the American Political Science
17 Association, and the Association for the Advancement
18 of Science, and I was recently asked to become a
19 member of the New York Academy of Science.

20 Q You state that you were Chief Economist of the
21 Federal Power Commission.

22 What were your responsibilities in that position?

23 A Well, I had several responsibilities:

24 My first responsibility was to build up the
25 staff, because the Division, when I joined it, was

1 Wein - direct

2 just newly created, so I have that problem.

3 Once having got a staff, I supervised the
4 staff in their studies on the two things which the
5 Federal Power Commission was concerned with, and one
6 was the regulation of electric power, and the other
7 was the regulation of natural gas.

8 I gave advice to the Commission itself since I
9 was their chief economist as well as head of the
10 Economic Division, on whatever matters that they
11 felt I could give advice on.

12 I also served as liaison for various committees
13 which the Federal Government has, and I also testified
14 in a leading case, and I also supervised the work of
15 my electric staff. As I said, I have two staffs,
16 electric and gas, in the National Power Survey, and
17 the first one which was started during the time that
18 I was at the Commission.

19 Q What was the National Power Survey, Dr. Wein?

20 A The National Power Survey was a large study which the
21 Federal Power Commission initiated, and it was
22 carried through essentially through the cooperation
23 of the electric power industry, together with the
24 personnel from the Federal Power Commission, and
25 its purpose was to bring together the knowledge,

Wein - direct

1
2 primarily, from an economic and perhaps technical
3 point of view about the electrical power industry,
4 and focusing it on various problems and giving a
5 great deal of information on generation and the cost
6 of generation, and on transmission and the cost of
7 transmission, and on distribution and the cost of
8 distribution, and the nature of the companies that
9 were involved and the different efficiencies of the
10 various sorts of generating equipment, and so
11 forth.

12 One of its major purposes was to urge the
13 coordination and interconnection of all of the
14 utilities in the country, including public and
15 private and small and large ones.

16 Q What was your role in that study, Dr. Wein?

17 A Well, as I said, I supervised the people who were on
18 the electric side of the business, and I also served
19 on one of the committees, and I also served at the
20 Commission's meetings when the National Power
21 Survey issues were concerned, and the Committee that
22 I served on I believe was called the Legal Committee.

23 Q Are you aware from your work whether there have been
24 more recent studies of the same nature?

25 A Yes. In 1970 the Federal Power Commission did

1 Wein - direct

2 another survey, and in 1977 I believe the Federal
3 Energy Regulation Commission had a national grid
4 study, and this was again on the problems of
5 interconnection and the value of it.

6 Q Dr. Wein, where did you work after leaving the FPC?

7 A Well, I was on leave from Michigan State University,
8 so I went back.

9 Q Did you do any work at Michigan State University
10 concerning public utilities?

11 A Oh, yes.

12 Q What did you do?

13 A Well, I started the Institute of Public Utilities
14 together with Mr. Amin, who was the Chairman of the
15 Board of the Consumers Power Company, and also Mr.
16 Martin Burlington, an alumnus of Michigan State, and
17 a man I met at the National Academy of Sciences meeting,
18 who was the Executive Vice-President of the
19 National Gas Company of America, a large gas company,
20 part of Peoples Gas.

21 Q What was the function of this?

22 A Well, I had in mind that the Institute should study
23 objectively various issues concerning regulation.

24 I was particularly perturbed when I was at the
25 Federal Power Commission as to how few economists,

Wein - direct

1 particularly, were really using, really studying this
2 field as an academic discipline.
3

4 It was a very popular field when I was a
5 student back in the '30's, but by 1960 that just
6 declined. The number of Ph.D.'s in economics
7 dealing with regulatory matters had reached an
8 all-time low, maybe four a year, and I had discussed
9 this with Mr. Burlingame, and he agreed, and we
10 finally got to discussing it with Mr. Amin, and since
11 we were all Michigan people, we decided to set up this
12 institute, hoping that we would develop interest and
13 stimulate academic interest in the problems of the
14 public utilities.

15 It was clearly set forth by all three of us that
16 it was to be as objective an institution as we could
17 possibly make it, and it would study regulatory
18 matters and economic matters and managerial matters,
19 and whatever was of interest, and that was the
20 purpose.

21 Q Was the Institute well regarded?

22 A Yes. It was well regarded and established, and I
23 think it was well supported by the utility members,
24 and it included, by the way, electric, gas, and
25 telecommunications, and the latter I sort of got AT&T

Wein - direct

to come into it.

Q Are there municipals, municipal utilities involved in it?

A No, I don't think so. I don't think there are municipal utilities involved. I don't know.

Q Dr. Wein, concerning your role as a chief economist of the Justice Department, the Antitrust Division, would you explain what your responsibilities were?

A Well, I wasn't the Chief Economist. I was the Principal Economist.

Q Pardon me?

A -- of the Antitrust Division.

Well, economists at the Antitrust Division, when I was there, were supposed to make investigations in which they would recommend to the attorneys as to whether they thought that there was anticompetitive practices in a particular industry, or whether they thought that there was a great deal of monopoly power, and would then recommend to the attorneys further investigations;

Another duty was that the cases -- after the cases were discussed and negotiated, then questions of relief would come in, and oftentimes the cases would not go to court, but there would be

Wein - direct

1 — negotiations to settle it, so I would give advice on
2 what is termed consent decrees; that is to say, that
3 the company and the department would, as it were,
4 stipulate certain things, and that certain
5 practices would be in the nature of relief, and
6 would be proscribed, so I had that.
7

8 In addition, I served as advisor to the
9 Assistant Attorney General in charge of Antitrust in
10 some areas in which I was particularly knowledgeable
11 about.

12 At that time it happened to be both steel and
13 automobiles and heavy industry.

14 I also served as advisor to the Attorney General,
15 Tom Clark, who later became a Supreme Court Justice,
16 on problems in the steel industry.

17 Q Did you testify as a witness during your time as
18 Principal Economist for the Antitrust Division?

19 A Yes. I was the only witness in the Columbia Steel
20 case, and that was a case brought by the Department
21 of Justice against U.S. Steel after U.S. Steel
22 bought up a company in California called Consolidated
23 Steel Corporation.

24 Columbia Steel is a wholly-owned subsidiary of
25 the United States Steel.

1 Wein - direct

2 I might add another duty I had in the Department --
3 and this is now coming back to me. It has been a long
4 time -- is that we have to write reports
5 occasionally to the Congress, and we had also to
6 advise on the disposal of surplus property.

7 During World War II the United States Government
8 had built a great deal of plants, and one of the most
9 famous was the Geneva Steel Plant out in Utah, and
10 they also built the plant out in -- the Manhattan
11 Project.

12 They built a lot of industrial property, and at
13 the end of the war that property was for sale, and it
14 was sold for whatever the Government could get for
15 it, but one of the provisions of the Surplus Property
16 Act was that the Attorney General had to give his
17 opinion as to whether a sale of this surplus property
18 would tend to violate the antitrust laws, and that
19 kind of information was then funneled down into
20 the Department of Justice, and a great deal was
21 funneled down to me, and I would have to render an
22 opinion on that.

23 Q Dr. Wein, have you had experience examining the
24 role of competition in the regulated industries?

25 A The role -- yes, I have.

Wein - direct

Q Which industries have you studied that question?

A Well, the first time I studied it was when I was working with Slick Airways, and the Slick Airways, as I mentioned, was an air freight airline, and it had an antitrust suit against the large airlines, alleging that they were attempting to eliminate Slick Airways, and so there was a large antitrust suit, and that was the first time -- and there was an antitrust action, and it never got to trial.

And I had to study the effect of competition in regulated industries, and then, being a member of the company, I was really involved overtime with the question of competition and regulation, particularly with the question of pricing and that sort of business, so that started back in 1951.

Occasionally an issue would come up where it was not all that pressing a question at the time, and then I had a very large assignment from the Federal Communications Commission in the first of their big generating proceedings involving the AT&T, and where the question was as to how rates should be set, and the effect of competition, and the effect of rate making, and different methods of rate making on competition, and the effect of the power of AT&T

1 Wein - direct

2 on competition, and that was a very large project.

3 And I was a witness for the Federal
4 Communications Commission.

5 Let me see -- I was involved also in the
6 studying of it in the Interstate Commerce Commission
7 where the question of rate making and competition was
8 involved between the railroads and the barge lines
9 and other water carriers, and that was a rather
10 important proceeding.

11 I guess that will do for a while.

12 Q What experience did you have in analyzing the effect
13 of business policies on competition or the
14 opportunity for competition in the electric
15 industry specifically?

16 A Well, starting with the -- as I say, the first little
17 bit of exposure that I had with the electric power
18 industry was really on that legal committee where
19 the question was raised, and I can't remember his
20 name, but I remember his face. He was a lawyer
21 representing American Electric Power, and the
22 question there was whether coordination would
23 violate the antitrust laws and whether that would
24 be viewed as something which the electric power
25 companies had best watch out for because here the

1 Wein - direct

2 Federal Power Commission was urging them to get
3 together in interconnections and close coordination.

4 The question really could have been raised as
5 to whether that would have been viewed as a
6 conspiracy to violate the law, and that sort of
7 business, and so the question of competition came up.

8 Also it came up occasionally with the question of
9 very low rates given to cooperatives, as to whether
10 those low rates were intended to foreclose the
11 cooperative from building their own generation and
12 that problem.

13 I really came full tilt in the hearings before
14 the Nuclear Regulatory Commission having to do with
15 the licensing of nuclear plants, and this was in
16 the Consumer Power case where the Consumer Power --
17 which is a Michigan public utility -- is building the
18 Midland Nuclear Plant, and the question was brought
19 up by the Antitrust Division because the law gave
20 them that power, to have an antitrust hearing to
21 see whether licensing of the Midland plants would
22 tend to be inconsistent or would be consistent with
23 the policies underlying the antitrust laws, and so
24 I was the witness for the Antitrust Division in the
25 Midland case, and I was also the witness for the

1 Wein - direct

2 Antitrust Division in the Alabama case, which was
3 involved again in a hearing of that nature, and
4 involved then the question of competition, and in
5 the electric industry in Central Alabama, and then
6 there was of course the CAPCO case which was again
7 the Central Area --

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

10 THE COURT: Sustained.

11 Q How many cases in all were you involved in before
12 the Atomic Energy Commission looking at the electric
13 power industry?

14 A Well, there were three cases.

15 Q What familiarity did you have with the matters of the
16 issues involved in this case before you were retained
17 by the City of Cleveland?

18 MR. LANSDALE: Objection.

19 THE COURT: Approach the bench.
20

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

23 MR. LANSDALE: We have been through
24 this case once with the witness, and he is an
25 experienced witness, and he deliberately brings

1 Wein - direct

2 the CAPCO case into it on direct examination,
3 and I don't know whether it is planned by counsel
4 or not, and I think the witness should be
5 instructed to stay out of the NRC antitrust
6 proceedings involving the CAPCO companies and
7 this company.

8 MS. COLEMAN: The sole purpose of
9 the question, your Honor, is to establish that
10 Dr. Wein had familiarity with the issues in this
11 case before he was retained by the City of
12 Cleveland.

13 We don't intend to discuss the cases, but
14 we have to identify that case by some means.

15 MR. LANSDALE: What difference does
16 it make?

17 MS. COLEMAN: And the case has been
18 mentioned to the jury. It is not a swear word.

19 MR. LANSDALE: We have already been
20 through his qualifications, and he testified last
21 time that he spent 1,000 hours studying the case,
22 so I object.

23 THE COURT: Overruled. Proceed.

24 {End of bench conference.}

25 - - - - -

1 Wein - direct

2 THE COURT: Read the question.

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

5 "Q What familiarity did you have
6 with the matters of the issues involved in this
7 case before you were retained by the City of
8 Cleveland?"}

9 A Well, I had studied some of the issues involved in
10 this case in the antitrust hearing at the Nuclear
11 Regulatory Commission.

12 THE COURT: Sustain the objection.

13 The jury will disregard the answer.

14 Approach the bench.

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

18 THE COURT: It appears to be that
19 that was a deliberate answer, and I have instructed
20 counsel that that is not part of this case.

21 MS. COLEMAN: I am sorry.

22 THE COURT: This witness should
23 not be testifying to it.

24 Now, let's stop these tactics. Let's proceed.

25 MS. COLEMAN: It is not a tactic.

1 Wein - direct

2 THE COURT: Let's proceed.

3 MS. COLEMAN: I just want to
4 establish his background.

5 THE COURT: Let's proceed.

6 MR. LANSDALE: I ask that the
7 witness be instructed, if your Honor please,
8 again, if he doesn't have sense enough to do it
9 on his own.

10 THE COURT: This is deliberate.
11 The witness knows better.

12 MS. COLEMAN: I object.

13 {End of bench conference.}

14 - - - - -
15 THE COURT: Ladies and gentlemen,
16 it is 2:30 and time for your afternoon recess.

17 Please keep in mind the Court's admonitions.
18 You are free to go.

19 {The jury was excused from the courtroom.}

20 - - - - -
21 THE COURT: Approach the bench.
22 {The following further proceedings were had
23 at the bench:}

24 THE COURT: Ms. Coleman, if this
25 witness persists in this kind of conduct, I am

1 Wein - direct

2 going to take sanctions and impose those sanctions.

3 This is a qualified witness, and he heard the
4 testimony of the previous trial, and any reference
5 to the antitrust activities of the Nuclear
6 Regulatory Commission has been unequivocally
7 taken out of this case.

8 You know it, and every counsel for the City
9 knows it, and the witness should know it.

10 Now, if it happens again, there is going to
11 be a problem, and you instruct your witness
12 accordingly.

13 MS. COLEMAN: Let the record show
14 there is a stipulation that was read to the jury
15 that mentioned this proceeding.

16 THE COURT: Not the antitrust
17 aspect. This witness is deliberately going into
18 the antitrust aspect.

19 MS. COLEMAN: He hasn't spoken of
20 it, your Honor.

21 {The following proceedings were had in the
22 Court's chambers out of the hearing and
23 presence of the jury.}

24 THE COURT: First of all, I want
25 to indicate to counsel -- and I have had the

1 Wein - direct
2 question and answer read back to me -- read the
3 question and the answer back, Roy, please.

4 THE COURT REPORTER: "What familiarity
5 did you have with the matters of the issues
6 involved in this case before you were retained
7 by the City of Cleveland?

8 "A Well, I had studied some of the
9 issues involved in this case in the antitrust
10 hearing at the Nuclear Regulatory Commission."

11 THE COURT: Which is in direct
12 violation of my orders; not one order, it is an
13 order of February 15th, 1978, an order of
14 February 17th, 1978, an order of August 19th,
15 1979, recognizing the prejudicial order; and,
16 again, in July of 1978, finally in -- I mean,
17 July 28, 1980, and August 18, 1980.

18 We're on the verge of a mistrial here; you
19 know that, don't you?

20 MS. COLEMAN: Well, at the last
21 trial --

22 THE COURT: Here, you have got a
23 situation where already the jury knows that there
24 were proceedings -- I certainly permitted
25 proceedings before -- allusion to proceedings

1 Wein - direct

2 before the Federal Power Commission and the NRC
3 so long as it did not reflect upon any of the
4 antitrust allegations in those proceedings.

5 And in evidence thus far is the fact that
6 the NRC has ordered or was responsible for
7 ordering wheeling.

8 Now, you have this fellow coming in here and
9 deliberately -- and I say that, "deliberately"
10 interjecting into this case matters that were
11 specifically excluded from -- by this Court --
12 creating -- well, telling the jury that there
13 were antitrust proceedings before the Nuclear
14 Regulatory Commission.

15 I have never seen anything so unethical,
16 I really haven't.

17 MS. COLEMAN: I take exception to
18 that, your Honor.

19 THE COURT: You may take
20 exception with it any way you wish, Ms. Coleman;
21 it ma- not be your fault, but it certainly is
22 your witness's fault.

23 Now, I have heard this man testify during
24 the course of the last trial, and he engaged in
25 these identical tactics throughout the testimony.

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Wein - direct

and he's starting right off in the same form and same manner; and it's very difficult for me to believe that that was not a calculated answer, designed to convey to the jury the very thing that this Court has excluded.

MS. COLEMAN: That's not the fact, your Honor.

It refers back to a question permitting me to have asked in the last trial.

THE COURT: I'm not reflecting upon your question; I'm reflecting upon his answer.

MS. COLEMAN: Neither the witness, nor we, your Honor, have any interest here except to litigate the issues in this case, not to bring in any other matter.

THE COURT: Don't make a speech to me, Ms. Coleman, I can see what's happened.

MS. COLEMAN: May I refer to the prior transcript?

THE COURT: I can see what is happening, and this is not the first case that I have tried; it's not the first case that -- the first witness that I have listened to that's

1 Wein - direct

2 engaged in this type of -- these types of tactics.

3 {After an interval.}

4 THE COURT: This is my order of
5 August 10th, 1979:

6 "Accordingly, for the foregoing reasons,
7 during the course of trial no party shall, in the
8 presence of the jury, allude to, refer to, or
9 attempt to convey, either directly or indirectly,
10 in any manner the findings, conclusions,
11 determinations or substance of any NRC or FPC
12 administrative determination as such determination
13 reflects upon the defendant's acts alleged here
14 to be in violation of Sections 1 or 2 of the
15 Sherman Act.

16 "The Court is mindful, however, that
17 occasions may arise during the trial when a party
18 deems it necessary to discuss or to elicit
19 testimony concerning proceedings before the
20 NRC or the FPC. In those instances, counsel
21 shall request a determination by the Court as to
22 the propriety and necessity thereof; which
23 request shall be made outside of the hearing
24 of the jury."

25 Do you have anything to say about this.

1 Wein - direct

2 Mr. Lansdale?

3 MR. LANSDALE: Yes, sir.

4 I am deeply troubled about it, and I'm
5 reflecting in my mind whether to ask your Honor
6 for a mistrial.

7 And I confess, at this moment, I don't know
8 what to do, but I'm pretty upset about it. I was
9 upset when it came up the first time.

10 THE COURT: I understand that you
11 would be upset.

12 MR. LANSDALE: And I'm not -- I
13 don't want to make a motion for a mistrial merely
14 to make a record. I don't want to make a motion
15 for a mistrial unless I want it.

16 And I don't know -- I haven't concluded at
17 this instant --

18 THE COURT: If this was not a
19 sophisticated witness, I could overlook it. But
20 I have watched this man and I have listened to
21 this man testify, and he is a very deceptive
22 person.

23 What is the pleasure of the parties?

24 MS. COLEMAN: May I be heard,
25 please?

1 Wein - direct

2 THE COURT: Yes, you may be
3 heard, certainly.

4 MS. COLEMAN: Thank you.

5 In the first place, we do not intend and we
6 have not referred to the findings of the NRC
7 as referred to in the order your Honor read.

8 As to the particular question which I
9 asked, I was permitted to ask essentially that
10 same question in the prior trial; and my sole
11 purpose was to refer -- to ask that question,
12 which I was permitted to ask previously, and
13 simply to establish that in other proceedings
14 the witness had some background --

15 THE COURT: Ms. Coleman, --

16 MS. COLEMAN: -- that is relevant
17 here.

18 THE COURT: -- I accept your
19 statement; I accept your statement.

20 I'm not referring to your question -- read
21 the question and the answer back, please.

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

24 "Q What familiarity did you have with
25 the matters of the issues involved in this case

1 Wein - direct

2 Now, this man has told the jury that -- they
3 recollect the order of the Nuclear Regulatory
4 Commission -- it was the result of
5 anticompetitive or antitrust issues that were
6 involved in that case which are the same issues
7 that are involved in this case.

8 I don't know what other conclusion you can
9 come to.

10 MS. COLEMAN: You are a lot more
11 steeped in this, if I may, your Honor.

12 THE COURT: I'm not steeped in
13 this.

14 Listen, really, you're looking at a fellow
15 that has absolutely no desire whatsoever to sit
16 through another trial of this case.

17 Here we are now in the seventh week of this
18 case going on the eighth week, and here I'm
19 confronted with this thing, and that's all it
20 takes, that's all it takes is a slip of the
21 tongue, that's all it takes.

22 I don't know what to do.

23 I await your pleasures.

24 MR. LANSDALE: I would like to have
25 an opportunity to consult with my client.

1 Wein - direct

2 THE COURT: All right.

3 I don't care. Do you have your client here?

4 MR. LANSDALE: Sir?

5 THE COURT: Do you have your
6 client here?

7 MR. LANSDALE: Not one that can make
8 this decision.

9 I will have to talk to him over the phone.

10 THE COURT: All right. I'll see
11 you.

12 Believe me, Ms. Coleman, I don't want to
13 reflect on you, and I'm saying to you that having
14 watched you perform, I cannot say that you placed
15 a question with an ulterior design because I
16 don't think that you're that kind of a person;
17 and that I think that you do know how to ask
18 questions, the question is perfectly proper.

19 But, I'm sorry, I can't say the same thing
20 about your witness. He's a very nice fellow, a
21 very personable fellow, but I certainly do not
22 approve of his tactics.

23 Go ahead and ask your client {addressing
24 Mr. Lansdale.}

25 [Mr. Lansdale and Mr. Murphy left the Court's

1 Wein - direct

2 chambers.}

3 THE COURT: Off the record.

4 {The Court and counsel for the plaintiff
5 conferred off the record.}

6 MR. NORRIS: Let's just step out
7 for a minute.

8 {Counsel for the plaintiff left the Court's
9 chambers.}

10 {After an interval.}

11 {Thereupon chambers conference continued
12 as follows:}

13 MR. LANSDALE: Your Honor, we
14 prefer not to move for a mistrial at this time.

15 THE COURT: Okay.

16 I think we ought to put into the -- have
17 you talked to Dr. Wein?

18 MS. COLEMAN: Yes, I have.

19 THE COURT: All right. I think
20 I ought to say something to him on the record.

21 MS. COLEMAN: Shall I ask him to
22 come in?

23 THE COURT: You want it in here?
24 I am just going to give him some background as to
25 what the situation is here and request that he not

1 Wein - direct

2 allude to, either directly or indirectly, to
3 these matters. I will just read my order, so
4 we can do it out there.

5 Okay, let's go.

6 MR. NORRIS: Your Honor, if you
7 don't mind, I would prefer that you do it in here,
8 just because of his health situation.

9 THE COURT: I am going to treat
10 him very nicely. I won't do anything to upset him.

11 MR. NORRIS: Does the Court mind
12 doing it in chambers?

13 THE COURT: Well, the only thing
14 that concerns me at this juncture is this:

15 We have a situation where, you know, I
16 constantly have in the back of my mind the
17 apprehension of the sequestration of the jury,
18 and I don't particularly know what the treatment
19 of this incident is going to be in the newspapers,
20 and I think that it ought to go in in context;
21 mainly, it should be a balanced approach..

22 And my thinking is that I am going to address
23 it to both sides as it relates to the Federal
24 Power Commission hearing and the decision that
25 is rendered therein, and the Nuclear Regulatory

1 Wein - direct

2 Commission, and the decision that was handed down
3 in that case.

4 And just call counsel's attention to the
5 Court's rulings, and request that all witnesses,
6 including Dr. Wein, on both sides heretofore
7 be instructed so as to comply with the Court's
8 order. That is all. And I think it should be
9 put forward in a balanced manner, so let's
10 proceed.

11 MR. NORRIS: You intend to do it
12 out of the hearing of the jury?

13 THE COURT: Oh, yes.

14 {End of chambers conference.}

15 {The following proceedings were conducted
16 in the open courtroom in the absence of the
17 jury:}

18 THE COURT: Please be seated.

19 So that we do not have a recurrence of what
20 has just transpired, the Court is desirous of
21 bringing to the attention of the parties certain
22 of its previous orders in this case.

23 The parties are aware that the Court has
24 addressed this very issue on a number of
25 occasions by formal order; namely, February 15,

Wein - direct

1
2 1978, the Court overruled the defendant's
3 motion urging the collateral estoppel resulting
4 from a certain Federal Power Commission ruling.

5 February 17, 1978, the Court overruled a
6 plaintiff's motion for invoking collateral
7 estoppel resulting from a certain ruling of the
8 Nuclear Regulatory Commission.

9 On August 19, 1979, the Court ordered --
10 issued another order recognizing the prejudicial
11 effects and issued a protective order.

12 The Court again, on July 28, 1980, again
13 addressed the issue, and finally on August 18,
14 1980, addressed the issue.

15 The issue evolved as a result of a decision
16 of the Federal Power Commission on July 12, 1972.

17 The presiding examiner for the Federal Power
18 Commission entered his decision on the petition
19 of the City of Cleveland for a permanent
20 interconnection with CEI.

21 That decision was later adopted by the FPC
22 on January 11, 1973.

23 Subsequently, if my recollection serves me
24 correctly, that decision was ultimately affirmed
25 by the Washington, D.C. Court of Appeals.

1 Wein - direct

2 At page 16 of the initial decision, the
3 Administrative Law Judge concluded:

4 "Finally, the City's allegations that its
5 difficulties in maintaining service to its
6 customers are due in whole or in part to CEI's
7 anticompetitive practices are not supported by
8 the record in this consolidated proceeding.
9 This record indicates that the City's past
10 inability to furnish reliable, dependable
11 service on the MELP System to its own customers
12 has been due primarily to incompetent management
13 and inefficient operations.

14 "A contrary conclusion was reached by the
15 Atomic Safety and Licensing Board of the NRC
16 in its initial decision of January 6th, 1977,
17 upon review of petitions for licenses to
18 operate the Davis-Besse and Perry Nuclear Power
19 Stations."

20 And in that case the Nuclear Regulatory
21 Commission held in effect and in substance that
22 the issuance of licenses to construct nuclear
23 plants would create conditions inconsistent
24 with the Sherman Antitrust Act unless certain
25 conditions were adopted by and implemented by

1 Wein - direct

2 the defendant herein.

3 Basically, to summarize the substance of the
4 Court's rulings in addressing these issues in
5 its order of August 18, 1980, the Court said:

6 "The aforesaid order in limine reflects the
7 Court's considered judgment that the probative
8 value of certain of the administrative findings
9 or determinations, and conclusions in the question
10 is decisively outlined by their prejudicial
11 attributes. It is, for instance, the Court's
12 firm conviction that the introduction of certain
13 of the FPC and NRC findings and determinations,
14 which, incidentally, are premised upon
15 materially different legal standards than those
16 applicable herein."

17 Referring back to the Court's memorandum and
18 order of August 19, 1979:

19 "Would necessarily entail a substantial risk
20 that members of the jury would, irrespective of
21 the evidence adduced in this de novo proceeding,
22 arrive at a verdict by either assigning the
23 administrative determinations controlling weight
24 or, at a minimum, by affording the same entirely
25 unwarranted deference.

Wein - direct

In addition to this readily apparent undue tendency to suggest decision on an improper basis, Advisory Committee Note to Rule 403, the presentation herein of what the Court has previously described as the discordant and inconsistent findings of the FPC and the NRC would appear to occasion the very jury confusion Rule 403 was designed to alleviate.

The Court further went on to say in its order of August 10, 1979:

"Accordingly, for the foregoing reasons, during the course of trial, no party shall, in the presence of the jury, allude to, refer to, or attempt to convey, either directly or indirectly, in any manner the findings, conclusions, determinations, or substance of any NRC or FPC administrative determination as such determination reflects on the defendant's acts alleged herein to be in violation of Sections 1 or 2 of the Sherman Act. The Court is mindful, however, that occasions might arise during trial when a party deems it necessary to discuss or to elicit testimony concerning

1 Wein - direct

2 proceedings before the NRC or the FPC. In those
3 instances, counsel shall request a determination
4 by the Court as to its propriety and necessity
5 thereof, which request shall be made outside of
6 the hearing of the jury.

7 Dr. Wein, and I address myself to both
8 counsel, so that this situation may not occur
9 in the future, thereby jeopardizing the
10 continuance of this trial or result in a
11 mistrial, the Court is requesting that the
12 lawyers instruct their witnesses of the
13 implications of the inconsistent rulings of the
14 NRC and the FPC, and more particularly impress
15 upon them this Court's order dated August 10
16 of 1979, which I will again read:

17 "During the course of trial, no party
18 shall in the presence of the jury allude to,
19 refer to, or attempt to convey, either directly
20 or indirectly, in any manner the findings,
21 conclusions, determinations or substance of any
22 NRC or FPC administrative determination as
23 such determination reflects upon the
24 defendant's acts alleged herein to be in
25 violation of Sections 1 or 2 of the Sherman Act."

1 Wein - direct

2 Do you understand that, Dr. Wein?

3 DR. WEIN: Yes.

4 THE COURT: Please conform to it.

5 DR. WEIN: I will.

6 THE COURT: Do counsel understand?

7 Mr. Norris?

8 MR. NORRIS: Yes, your Honor.

9 THE COURT: Do you understand

10 my request here?

11 MR. NORRIS: Yes, your Honor.

12 THE COURT: Mr. Lansdale?

13 MR. LANSDALE: Yes, your Honor.

14 THE COURT: And this request

15 accordingly becomes an order of this Court,

16 which the Court will enforce.

17 Now, I regret to say that we have passed
18 the adjournment hour. Perhaps it would be
19 advisable at this time if we submitted the
20 exhibits of the day to the jury for their
21 examination, and I will have the usual
22 admonition as to their conduct delivered to the
23 members of the jury in writing if counsel agree.

24 MR. NORRIS: Yes.

25 MR. LANSDALE: Yes.

1 Wein - direct

2 THE COURT: Very well. Thank
3 you, Dr. Wein. You may step down.

4 What are the exhibits?

5 MS. COLEMAN: Your Honor, the
6 exhibits have been agreed to.

7 THE COURT: Fine. Very well.
8 Suppose we put them on the record:

9 Defendant's Exhibit 1171, 321, 347.

10 Plaintiff's Exhibit 2486, 372, 565, 2, 1788,
11 332, and 351, 350, 1779, 176, 400, 175, 798,
12 799, 797, 564, 333, 2036, 302, 708, 550.

13 The following have been previously
14 admitted:

15 321, 3178, 337, 174, 352, 3107, 2631.

16 The following have not been offered at
17 this time:

18 245 and 557.

19 Those are defendant's exhibits. Are you
20 objecting?

21 MR. NORRIS: They were not
22 being offered. I used them in my examination of
23 Mr. Moore, and I am not offering them.

24 THE COURT: Very well. Thank you.

25 {Court was adjourned.}

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Thursday, August 20, 1981

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1980

1 THURSDAY, AUGUST 20, 1981; 9:25 O'CLOCK AM.

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

7 THE COURT: Is the witness
8 prepared?

9 MS. COLEMAN: Yes, your Honor.

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

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

15 I think we are prepared to proceed. You
16 may proceed, Ms. Coleman.

17 MS. COLEMAN: Thank you, your Honor.

18 - - - - -
19
20 DIRECT EXAMINATION OF DR. HAROLD H. WEIN {Resumed}

21
22 BY MS. COLEMAN:

23 Q Good morning.

24 Dr. Wein, what data and documents, if any, did you
25 review to respond to the requested study?

Wein - direct

1
2 A I have reviewed many documents. Among them I have
3 reviewed Government reports, including CEI reports
4 to the Federal Power Commission, Muny Light reports
5 to the Federal Power Commission, and corporate
6 reports to CEI and to the stockholders, and also
7 from the Securities and Exchange Commission, and
8 various industry statistics showing capacity in the
9 various aspects of electric power.

10 Also numerous, very many documents were provided
11 to me by counsel, which are CEI documents as well
12 as Muny documents, maps -- well, just a great
13 variety of things in addition to the various
14 academic materials having relevance to this case.

15 Q Have you reviewed any of the exhibits in this case?

16 A Yes, I have.

17 Q Have you reviewed any of the testimony that has been
18 given thus far?

19 A Yes, I have.

20 Q Did you have anyone prepare studies for your use in
21 connection with the analysis that you made?

22 A Yes, I did.

23 Q What studies did you have prepared?

24 A Well, I had the following:

- 25 1. In order -- a study by RPI, which is a

1 Wein - direct

2 company in Cleveland, to determine the number of
3 occupied family dwelling units in the City of
4 Cleveland, and how many of those were served by MELP
5 or Muny Light.

6 And, also, that company provided similar data on
7 the businesses and institutional facilities in the City
8 of Cleveland and those which were served by Muny Light
9 and those which were not.

10 All this was broken down by census tract.

11 Q Pardon me.

12 Is there any other study that you had prepared?

13 A Yes.

14 I had a study -- a survey done, which I designed
15 but was executed by a very large professional
16 organization, designed to determine the factors that
17 influence residential customers to take one service
18 as against another service; to look into the effects
19 of rates along this line, to ask them about

20 reliability and various matters which I thought would
21 be of relevance to this case as well as of possible
22 use to the Muny Light System for commercial purposes.

23 Q Dr. Wein, based on your review and background, could
24 you tell us how many systems are engaged in the
25 generation or transmission, distribution of electric

Wein - direct

power in this country?

A Well, as of 1977, according to the Department of the Energy, there were approximately 3,400 systems.

Q And who owns these systems?

A Well, about 90 percent of them are what might be called public or almost public systems.

That means that they are owned either by municipalities or by agencies of the Federal or State Governments or by rural electric cooperatives.

Q Who owns the remainder of the systems?

A Well, roughly 7 or 8 percent, the remainder of the systems are owned by investors.

Q Are there any instances of businesses that generate electricity incidental to their manufacturing operations?

A Oh, yes, there are.

Q What types of industry would you find that generation of electricity incidental to the manufacturing operations?

A Well, there are a variety of industries which do that.

They vary, of course, over time; but they would include industries which generate -- which need a great deal of steam or would generate a great deal of heat in their processes.

1 Wein - direct

2 And that would include the steel industry as
3 one, the electrometallurgical industry, ferroalloy
4 is another, the aluminum, magnesium industries could
5 be a third.

6 And, in times past, the list was much larger, it
7 included textile mills, paper mills, cement plants,
8 many, many industries in the history of the United
9 States used to produce their power.

10 Q How is that power applied when it is generated by the
11 industry?

12 A Well, it's essentially used to operate their own
13 electrical equipment, and they do it because it was
14 cheaper for them to do that since a great deal of the
15 heat or the steam could be used in producing
16 electricity, and so they did it.

17 In the earlier days, some of them actually sold
18 directly to ultimate consumers because they had more
19 electricity than they could use, and so they sold it to
20 ultimate consumers.

21 Q Dr. Wein, in terms of retail sales made by electric
22 utilities, about how much is made by the publicly-owned
23 and how much by the privately-owned?

24 A Well, roughly about a fifth is made by the
25 publicly-owned, and the rest by the privately-owned.

Wein - direct

1
2 Q In terms of generating capacity, how do we find that
3 among the investor-owned utilities and the
4 publicly-owned utilities?

5 A Well, the investor-owned utilities, although they are
6 very much fewer, have much more capacity, roughly
7 about the same proportions, about four-fifths and
8 one-fifth.

9 Q What about in case of transmission, ownership of
10 transmission?

11 A Somewhat higher, perhaps 85 percent.

12 Q Dr. Wein, does every electric utility perform the
13 functions of generation, transmission, and
14 distribution --

15 A No.

16 Q -- of electric power?

17 Could you give us examples of utilities which
18 perform only one or two of those functions?

19 A Well, most of the 3,400 systems that exist perform
20 only one, that is to say, distribution.

21 There are some systems which perform only
22 generation.

23 I have in mind, in the State of Ohio, the Ohio
24 Valley Electric Corporation, there are -- which is
25 an investor-owned utility owned by a consortium of

1 Wein - direct

2 investors.

3 And there are, if I recall, two generating plants
4 in the Southern System which do only generation that
5 are owned by two subsidiaries of the Southern System.

6 The Southern System is a holding company which
7 operates in Georgia and Alabama and Mississippi.

8 And there are some Federal Systems that do only --
9 that also, I believe -- well, there are some Federal
10 systems that only generate.

11 Q Is there a term in economic use to describe the
12 utilities which are engaged in all three functions?

13 MR. LANSDALE: Objection.

14 THE COURT: Approach the bench.

15 - - - - -

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

18 MR. LANSDALE: I object to this
19 because throughout the last trial the witness
20 almost never testified to his own opinions. He
21 was always asked what an economist would say,
22 and I object.

23 I have no objection to his using his
24 belief as to what other economists do, but I
25 can't cross-examine other economists, and I

1 Wein - direct

2 object to asking a witness what economists do.

3 MS. COLEMAN: It is only a turn of
4 the phrase.

5 MR. LANSDALE: This is what I think
6 you believe, but on review of the record, this guy
7 testified to almost no opinions of his own, but
8 it was always "economists," and that I object to.

9 I do not object to the specific question,
10 but I want to get it on the record now.

11 THE COURT: Read the question.

12 {Question read by the reporter as follows:

13 "Q Is there a term in economic use
14 to describe the utilities which are engaged in
15 all three functions?"}

16 THE COURT: Overruled.

17 Again, what is the purpose of this testimony?

18 MS. COLEMAN: I have to get some
19 vocabulary established so it can be used with
20 understanding.

21 THE COURT: Let me look at my
22 notes. The last thing that was of probative
23 value were the studies that he conducted.

24 What difference does it make if there are
25 3,400 generating and distribution systems throughout

1 Wein - direct

2 the United States and 90 percent are owned by
3 public companies and the balance by private
4 industry. What has that got to do with this
5 case?

6 MS. COLEMAN: It takes place in
7 that industry. It is a brief description --

8 THE COURT: We have been lined
9 up here now for eight weeks. This is about --
10 yes, with the jury selection it has been eight
11 weeks, and this is about the fortieth witness,
12 and I would like to get down to the issues
13 ~~involved in this case, the material issues, and~~
14 get away from the generalities that we constantly
15 keep going into and don't mean anything to the
16 case.

17 I will overrule the objection. You may
18 proceed.

19 {End of bench conference.}

20 - - - - -

21 THE COURT: Read the question.

22 {Question read by the reporter as follows:

23 "Q Is there a term in economic use to
24 describe the utilities which are engaged in all
25 three functions?"}

Wein - direct

1
2 A Yes.

3 Q What is that term?

4 A Vertical integration.

5 Q Is that fairly unique to the electrical industry?

6 A No, it is not.

7 Q What inferences do you draw from the existence of
8 electrical companies which do not engage in all three
9 functions?

10 A That they can exist without engaging in all three.

11 Q Are there municipal-owned systems that perform all
12 three functions?

13 A Yes, there are.

14 Q In terms of the number of the electrical utilities,
15 has there been much change over time in that number?

16 A Yes, there has.

17 Q What change has there been?

18 A Well, we have essentially two time periods in which to
19 view it.

20 The electric industry is approximately 100 years
21 old in the United States, and from its inception
22 up until the mid-'30's there was a great decline in
23 the number of municipal electric systems, and there
24 was also a large increase in the size of private
25 systems up until the middle '30's when the Public

1 Wein - direct

2 Utility Holding Company Act was passed.

3 Q Has there been a change in that distribution since
4 that Act?

5 MR. LANSDALE: Objection.

6 THE COURT: Sustain the objection.

7 Please, Ms. Coleman, let's get to probative
8 evidence as it relates to this particular case,
9 if you please.

10 Q Dr. Wein, are you familiar with the term, "economies
11 of scale"?

12 A Yes, I am.

13 Q Would you please explain what that means?

14 A Well, the term has two senses which economists use.

15 The first refers to the equipment or machinery
16 that is used to produce a particular produce or service;
17 for example, if one looks at an airplane, one will see
18 various sizes of airplanes all the way up to the huge,
19 wide-bodied airplanes like the Boeing 747, and if one
20 is asking what is the cost per unit of capacity in
21 this example, where a unit of capacity would be a
22 seat, a passenger seat or a passenger seat mile, and
23 if one says, "Suppose I operate all of these airplanes
24 at full load" -- and a wide-bodied plane might hold
25 400 passengers, and a small plane might hold 50,

Wein - direct

and one says, "What would it cost per seat mile or per passenger mile to operate these planes when they are loaded, fully loaded," and then economies of scale, if there are, would say that it is cheaper for the biggest airplane, and it is most expensive for the smallest airplane, so that is one sense which is saying, "What is the cost per unit of output when a piece of machinery or equipment is operated at the full capacity, and when it is operated in its most efficient manner, and that is the first sense of it."

The second sense of it is when we are concerned not with airplanes but with airplane companies.

Now, you want to know whether the largest passenger airline companies produced the cheapest cost; and if it is true that the larger of the airline companies have the cheaper costs per passenger mile, then one would say, yes, there are economies of scale in the company, in the organization; so that you have to distinguish these two senses.

One refers to equipment operating at optimal conditions and machinery and plant, and the second

1 Wein - direct

2 refers to companies in a particular industry operating
3 at their best way to find out whether in fact a large
4 company has economies of scale.

5 Q Does the company with the largest piece of equipment
6 necessarily have economies of scale in terms of the
7 company?

8 A No, it doesn't.

9 Q Dr. Wein, in the context of the electric industry, are
10 there economies of scale in the equipment since?

11 A Yes.

12 Q And in what areas?

13 A Well, particularly in generation facilities and in
14 transmission facilities, very minor in distribution.

15 Q In what respect are there economies of scale in
16 generation?

17 A Well, a large generating machine of a particular
18 type, that is to say, if you are concerned with a
19 generating unit which is based on coal, and you took
20 them from little machines like 5 megawatts all the
21 way up to big coal machines, such as a 700 or
22 800 megawatts, then you will find that the capacity
23 cost per unit of output, and not the cost of the
24 machine -- the cost of the big machine would be
25 very much more expensive than the little ones, but

1 Wein - direct

2 the cost of what you paid to buy the equipment and
3 install it and get it into operating condition,
4 the capacity cost of the big machine at full load
5 would be much less than the capacity cost of the
6 small machine.

7 Secondly, you find if these are a particular
8 period of time that we are talking about -- because
9 as technology continually advances, you can't compare
10 machines of different vintages -- but if you were to
11 take the machines all being made today, you would
12 find generally that certain operating expenses, in
13 addition to its capacity costs will be less for the
14 larger machine on the average, although there is a
15 wide variety, a wide range, depending upon the
16 nature of the fuels used, and in this case the
17 nature of the coals used, and what part of the
18 country they were in, and so forth.

19 Q Are there limits to the benefits of the larger
20 scale generating equipment?

21 MR. LANSDALE: Objection.

22 THE COURT: Approach the bench.

23 - - - - -

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

1 Wein - direct

2 MR. LANSDALE: I object on the
3 ground that the witness is testifying to matters
4 as to which he was not qualified as an expert.
5 I listened to this gentleman outline his
6 qualifications for nearly 40 minutes yesterday,
7 and I did not hear one word about his experience
8 or training in the operation of an electric
9 utility, the organization of the electric
10 utility business, nor the technical matters to
11 which he is now referring.

12 Some of the things he is now referring to are
13 such matters of common knowledge that I wouldn't
14 impose an objection, but now he is starting in
15 to telling us what the limits of the economies
16 of scale are, and I don't think he knows, and I
17 certainly don't think he has been qualified to
18 say.

19 MS. COLEMAN: Your Honor, he will
20 testify only to that which he does know, and as
21 an economist who has worked in this industry,
22 he is familiar with some aspects, both of
23 economies of scale and of their limitations.

24 MR. LANSDALE: A whole lot of us
25 can read material about these things, and some

Wein - direct

things are common knowledge in the industry, but for him to come in and tell us what the limits of economies of scale are, I submit that he is not qualified to say.

THE COURT: Read the question and answer.

{Record read.}

THE COURT: I will overrule objection. If he knows, he can testify. You can go into it on cross-examination, Mr. Lansdale.

{End of bench conference.}

THE COURT: Overrule the objection. The witness may answer the question if he knows.

THE WITNESS: May I have the question read?

THE COURT: Yes.

{The question was read by the reporter as follows:

"Q Are there limits to the benefits of the larger scale generating equipment?"}

A Yes.

Q What are they, to your knowledge?

Wein - direct

1
2 A Well, in every technical period there is a state of
3 the art for any piece of equipment, including
4 generation, so before World War II you wouldn't have
5 found 800 megawatts --

6 MR. LANSDALE: Objection.

7 THE COURT: Please answer the
8 question. Listen to the question.

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

11 "Q . . . What are they, to your knowledge?"}

12 A Well, essentially what happens is that in a given
13 technology the reliability of very large units become
14 less, particularly if the large units are on the outer
15 limits of what has been used in the last several years,
16 so that their down time increases.

17 Secondly, the increase in the cost of the
18 advantages -- in the cost of capital -- becomes very
19 much limited as you get larger and larger, and so
20 that for any particular period of time there is always
21 what is viewed as a reasonably optimum, reasonably
22 maximum size, and you find that utility companies --
23 and not only utility companies, but other companies --
24 do not build them beyond that.

25 As technology shifts, the sizes may change.

1 Wein - direct

2 Q Are there any other factors which affect whether a
3 large machine will be the less cost?

4 A Oh, yes, but certainly there are many factors.

5 Q What are those that you are familiar with?

6 A Well, I think the first question was whether there are
7 limits to the economies of scale.

8 Now, as I defined that before, that is measured
9 when the unit is operating at its full capacity.

10 Now, this question, if I understand you
11 correctly, is, are there limits, and are there reasons
12 why you would not put in the very large machines -- is
13 that the question? I am not sure now.

14 Q If the company has a large generating unit, what
15 factors would reflect the contribution that unit
16 makes to its cost?

17 A Well, if a company has a large generating unit, it
18 will make contributions to its cost, that is to say,
19 its efficiency depends on how long it is operated,
20 so if I have an 800-megawatt generating plant that I
21 operate three hours a day, it is not going to be a
22 very efficient machine, any more than I would if I
23 had to haul two tons and bought a twenty-ton truck.

24 So, simply to have a large machine doesn't mean
25 you get any more efficiency. You have to use it a

1 Wein - direct

2 great deal of the time.

3 So it is the utilization that determines its cost.

4 Q Is vertical integration, as you defined it, necessary
5 to obtain economies of scale in generation?

6 A No. Vertical integration by itself is not necessary
7 to obtain economies of scale in generation.

8 Q How can an isolated generating firm take advantage of
9 these economies of scale in generation?

10 A Well, an isolated generating firm of what size?

11 If we are talking about ordinary-sized firms, say in
12 the neighborhood of 3,000 megawatts of capacity or
13 less, or 5,000 megawatts of capacity or less, an
14 isolated generating firm has a choice.

15 Suppose I were to bring it down to the current
16 scale of this case, and suppose it were an isolated
17 generating system such as Muny Light, and of the
18 capacity of 200 megawatts, a small system. It faces
19 a dilemma of whether it goes to larger units to
20 supply its peak load or whether it goes to smaller
21 units.

22 MR. LANSDALE:

I object, if your

23 Honor please.

24 THE COURT:

Approach the bench.

25

1 Wein - direct

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

4 MR. LANSDALE: Here we go again.

5 He is asked a simple question, and he is
6 launching into a long explanation.

7 I object to this question, and I am going
8 to object every time, even if I have to rise
9 every time and get up at every question.

10 I object to his exclusions into matters that
11 are not responsive to the question.

12 THE COURT: Read the question
13 and answer.

14 {Question and answer read by the reporter.}

15 THE COURT: I think the answer
16 is responsive. I will overrule your objection.

17 MR. LANSDALE: All right.

18 {End of bench conference.}

19 - - - - -
20 THE COURT: Overrule the objection.

21 Let's proceed.

22 BY MS. COLEMAN:

23 Q Dr. Wein, you stated that that firm would have a
24 dilemma in choosing between larger units or smaller
25 units --

1 Wein - direct

2 THE COURT: Let's ask the next
3 question.

4 You don't have to repeat the last answer,
5 just ask the question.

6 That's why we're having these objections.

7 Will you kindly proceed?

8 MS. COLEMAN: I will.

9 BY MS. COLEMAN:

10 Q Dr. Wein, would you please explain why that choice is
11 a dilemma, and what are the considerations on each
12 side?

13 A Well, it's a dilemma for the following reasons:

14 A small system if it wishes to obtain economies
15 of scale has to put in a large unit.

16 Suppose, for example, it were a system like Muny
17 Light was during the damage period or any period, if
18 it has a load of 100 megawatts and it puts in a
19 hundred-megawatt unit, it would have a great deal
20 more economies of scale than if it put in a 10-megawatt
21 unit. But it would have no reliability, because any
22 time that machine could go down. Every generating
23 equipment has an inherent probability of an outage,
24 whatever it is, depending on its type and species.

25 So --

Wein - direct

Q Are you assuming that that is the only --

A No, that's -- I'm not.

It has that choice; if it had 100, it couldn't make it because it couldn't sell dependable capacity, it could sell firm capacity.

Well then, it has another choice, and -- it has a whole series of choices:

It could put in two fifty units. If it put in two fifty units and it had a load of 100 megawatts, it could only supply fifty units, because it has to keep one unit in reserve in case the first unit went down.

So it would have to buy 100 units in two 50-megawatt machines, one of which would be idle, and, in order to give it firm capacity, could only sell the 50 unit, so that the ratio of its idle capacity is equal -- it is 100 percent -- it equals actually what it could sell. And you can see, that the smaller the units get, the more reliable the system becomes, and the ratio of the unused capacity to the used capacity is very small.

So, for example, it could theoretically buy a 1-megawatt machine and then -- and have 101 units, each one can produce 100 -- 1 megawatt and, all told,

1 Wein - direct

2 it would have 100 megawatts, and only 1 megawatt would
3 be idle; and, therefore, it would have a very low
4 ratio of unused machines to total machines.

5 But the problem then is that a 1-megawatt machine
6 is extremely inefficient compared to a 50-megawatt
7 machine. So the dilemma then is this:

8 The more it chooses to go for reliability, the
9 parity becomes -- on the size -- its costs go up; and
10 the more it chooses to go for low costs, its reliability
11 goes down, and neither of these are a very pleasant
12 alternative.

13 Q Has there been a change over time in the importance of
14 the economic considerations affecting the dilemma that
15 you have described?

16 A Yes.

17 Q What change has there been?

18 A Primarily in the importance of the cost of fuel in
19 generation as -- when fuel is very cheap; as it was
20 before World War II, for example, the systems were not --
21 the dilemma always existed, but it was not as sharp and
22 as severe because the cost in efficiency wasn't so
23 great because fuel was very cheap.

24 But, now, when fuel becomes very expensive, you
25 can't go any longer with real small units, and so the

Wein - direct

dilemma then is pushing -- isolated systems, when and if they have to make that choice, pushing them towards the larger machines.

Q Is there a way for the isolated system to remove itself from the dilemma that you have described?

A Well, there are two ways for an isolated system:

One is to give up generation and simply go out of the generating business; and the second is to try and get an interconnection, a synchronous interconnection with another electric utility.

Q How does that -- does it permit the utility to remove itself from the economic dilemma that you have described?

MR. LANSDALE: Objection, if your Honor please.

THE COURT: Approach the bench.

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

MR. LANSDALE: We are getting into the actual operation of a public utility as to which this witness has not indicated one iota of qualification.

THE COURT: Read the question back.

1 Wein - direct

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

4 "Q How does that -- does it permit
5 the utility to remove itself from the economic
6 dilemma that you have described?"}

7 MR. LANSDALE: The witness said
8 something about the way it does this is to seek a
9 synchronous interconnection.

10 THE COURT: Yes; he said
11 isolated systems face an alternative of, one,
12 giving up its generating capacity; and the other
13 is to go to a synchronous interconnection.

14 MR. LANSDALE: A synchronous
15 interconnection.

16 I submit, your Honor, that this gentleman
17 has not qualified himself to testify to the
18 operations of a public utility system.

19 MS. COLEMAN: He's not testifying
20 to operations; he's testifying to economics of
21 the public utility --

22 THE COURT: Well, he's -- I mean,
23 you insert the word "economics."

24 The mere fact that you have a characterization
25 that it's economics or affects the economics of

1 Wein - direct

2 it, doesn't necessarily mean that he is not
3 getting into areas beyond his scope of expertise.

4 MS. COLEMAN: He has expertise in
5 the question of the costs of doing business.

6 THE COURT: Why can't we get down
7 to the costs of these things, which, actually,
8 is his area of expertise, and not -- I can go
9 back through a lot of these questions, and they
10 go into areas that are beyond his field.

11 Read the question back.

12 I don't think this particular question is
13 objectionable as such, but if we will just get
14 down to what he's here to testify for instead of
15 trying to get this man to testify to areas that
16 don't concern him really.

17 Let's proceed.

18 Overrule the objection; let's go.

19 {End of bench conference.}

20 - - - - -
21 THE COURT: Read the question back,
22 please.

23 MS. COLEMAN: I'm sorry, your Honor?

24 THE COURT: I would like to have
25 the question read back.

Wein - direct

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

"Q How does that -- does it permit
the utility to remove itself from the economic
dilemma that you have described?"}

THE COURT: You may answer.

A It removes itself from that dilemma in that it gives
it the reliability even if it has a large -- when it
makes a choice of a large unit.

Q Does it permit the utility to obtain other advantages
in operations?

A Yes.

Q Can you describe those with which you are familiar?

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

THE COURT: Approach the bench.

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

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

THE COURT: Read the question
back.

{The pending question was read by the reporter.}

1 Wein - direct

2 MR. LANSDALE: If your Honor please,
3 we are getting in deeply into operations.

4 We have got testimony running out of our ears
5 in this case --

6 THE COURT: What did you say?

7 MR. LANSDALE: We have got testimony
8 running out of our ears in this case about
9 interconnection, the advantages of interconnection,
10 all the goodies that Munny Light expected to get
11 out of an interconnection, from people who -- some
12 of them knew what they were talking about -- at
13 least, were qualified to --

14 THE COURT: Yes; he's not
15 qualified.

16 MR. LANSDALE: And this man is not
17 qualified to do that.

18 And for this man to repeat in his way the
19 same thing we have been over about the
20 advantages and the disadvantages of
21 interconnection and the like, I submit is not
22 admissible and he is not qualified to testify
23 about it, it is repetitive of testimony already
24 in the case, and I object.

25 THE COURT: Do you want to be

1 Wein - direct

2 heard?

3 MS. COLEMAN: Yes, I do, your
4 Honor.

5 I hear, on the one side, complaints about
6 the time taken to qualify this witness and, on
7 the other side, that he's not qualified.

8 He is qualified, and if it is necessary to
9 go through that --

10 THE COURT: Well, --

11 {The paper in the court reporter's
12 stenotype machine was jamming up and the court
13 reporter hurriedly removed it from the machine
14 while the Court was speaking.}

15 THE REPORTER: I'm sorry.

16 THE COURT: Now, you see, you
17 have forever lost my words of wisdom.

18 {Laughter.}

19 THE COURT: The question is not
20 whether this witness is or is not qualified.

21 Certainly he is a qualified economist.
22 But, as I understand his objection, his objection
23 is that he is not a qualified engineer to be
24 testifying to technical matters in the area
25 beyond his scope of expertise.

Wein - direct

1
2 MS. COLEMAN: If your Honor
3 please, --

4 THE COURT: I have got to agree
5 with that.

6 MS. COLEMAN: Your Honor please,
7 Mr. Lansdale's proposition seems to be that only
8 the man at the controls can say how it operates,
9 and only the man that writes the checks to pay
10 the bills knows how much it costs, and I submit
11 that that's not true.

12 Someone who works in utility economics is
13 familiar and would have an understanding in this
14 case about those kinds of issues.

15 We are not concerned with every screw and
16 bolt --

17 THE COURT: Well, I agree with
18 what you're saying: That he is permitted to
19 testify as to generally-accepted standards.
20 But when he gets -- when he departs from that and
21 starts getting into the technical areas, then
22 he's foreclosed.

23 Another basis for the objection, as I
24 understand it, is that this is merely cumulative
25 and repetitious of testimony that's already in,

Wein - direct

and that is very true.

Now, you certainly are permitted to -- in the case of an expert -- to utilize all the testimony that has heretofore been admitted and to direct to him in the form of a hypothetical question the necessary factual evidence required for him to express his opinion without the necessity of having to go back over all of this material that I have heard during this trial at least four or five times.

So let's proceed in that frame of presentation.

Let's go.

{End of bench conference.}

THE COURT: Are you under control, Nick?

THE COURT REPORTER: Yes.

{Laughter.}

THE COURT: Overrule the objection.

THE WITNESS: I have forgotten what the question was.

THE COURT: Read the question back, please.

MS. COLEMAN: I'll give my question

1 Wein - direct

2 again.

3 BY MS. COLEMAN:

4 Q Doctor, are there other advantages which a firm would
5 have from having an interconnection, to your knowledge?

6 A Yes.

7 Q Would you describe those, briefly?

8 A Well, one, there is the ability of a firm to plan when
9 it wishes to have its necessary maintenance. It does
10 this by obtaining maintenance power. All that is is
11 a term for saying, one utility tells another, "I'm
12 going to be down, I would like to do my planned
13 maintenance such and such a period, and do you have
14 any maintenance power to give me?"

15 That's one thing you get for interconnection --
16 from an interconnection.

17 A firm has a possibility of -- if it has an
18 interconnection -- it has the possibility of getting
19 seasonable power.

20 Seasonable power simply is power which is
21 available during a certain part of the year at low
22 rates because the firm which is generating it has
23 excess capacity.

24 So, for example, a big system like TVA has a
25 certain peak at a certain time of the year.

Wein - direct

Another system -- well, let me put it this way:

A big system, say, like TVA is down at a certain time of the year in the sense that it has excess capacity. Its peak is, let's say, in the wintertime; and there are other systems with whom it's interconnected or with whom it can transmit power through the facilities of another system which has a peak in the summertime and so it needs that power; and so the utility which has a winter peak can sell it to the utility which has a summer peak, and vice-versa, so both of them are taking advantage of this ability to exchange power with each other and, therefore, they are able to cut their peak -- they're able to provide -- need less capacity to meet their peaks, so this is another example of it.

Another example is termed "economy interchange"; and this is simply a situation where two systems are interconnected, one may have a demand that's high at a peak hour of the day, and the other one may have a demand that's low; and the one that has a high demand will shop around to see whether he can get another company which has more efficient generating units available to sell him the power rather than put his own less efficient units on the line, and

Wein - direct

it's good for both companies.

So these are examples of other kinds of benefits that you get out of interconnection.

Q Dr. Wein, let's turn to another subject, if we may.

What is competition?

A Competition is the rivalry of firms to obtain business.

Q How do firms rival each other for business?

A Well, they offer various attractions to who they think their customers are.

Q Would you give examples of attractions the firms might use to attract business?

A Yes.

First, there is, of course, prices.

Secondly, there is quality of the product or service.

Third, there are such things as credit terms.

Fourth, there are other kinds of service.

Fifth, it may be billing procedures are less onerous. Nobody likes to pay his bills, but some ways of paying them are less onerous than others.

So there are a variety of ways.

And, finally, companies advertise, that is to say, many companies advertise.

Q What are the advantages of competition?

Wein - direct

1
2 A The advantages are that it gives consumers a choice;
3 that's the first advantage.

4 The second advantage is that it puts pressure on
5 the companies that are competing with each other.

6 If, for example, Company A chose a lower price
7 than Company B, Company B is going to have to decide
8 whether it wants to meet this price or do something
9 else to keep its sales.

10 It might have to meet the price, and this makes
11 -- if the company is inefficient, meeting the price
12 of a competitor is going to force that company to
13 do everything it can to become as efficient.

14 The third, it puts this kind of pressure on
15 companies to improve their quality. Their price may
16 be the same, but it is not a good car, so it has
17 to improve the quality of its product.

18 Fourth, it is held by most economists -- I
19 believe that myself -- that competition forces the
20 companies to keep up with the latest technology and
21 to make innovations to make new things, new ways
22 of building a better mousetrap, if you will; it does
23 that.

24 Finally, what economists -- to sum this up --
25 say is that competition results in two things:

Wein - direct

It allocates the economic resources of the company in accordance with the desires of the consumers; and

Two. It forces the firms who are involved to become efficient as possible.

And this is the -- essentially the economic advantages of competition.

Q Dr. Wein, what significance, if any, is there of the number of competitors in a market on the existence of competition or the possibility of competition?

A Well, it has great significance for competition.

Q Would you explain what that is?

A Yes.

Well, economists call markets or industries in which you have a great many competitors who are competing with each other, they call them perfect competitive markets.

An example would be, for example, a market for wheat.

There are thousands of sellers and many, many buyers; and where you have that many sellers, no seller -- I mean, Farmer Jones in Nebraska and Farmer Smith in Iowa don't know each other, don't care whether they know each other, have very little

1 Wein - direct

2 influence on the price of wheat because there are
3 thousands of farmers all over the United States and
4 Canada, and Australia, and Argentina producing
5 wheat; and the Farmer Smith and Jones, if he
6 doesn't take the market price of wheat doesn't sell
7 his wheat.

8 So when you have many, many, many competitors,
9 they -- each one of them has virtually no influence
10 on the price.

11 So the number then of competitors in that kind
12 of market is a very significant market, and this is
13 a term which economists use, that perfect competitive
14 market.

15 Q In what type of market -- is there a kind of market
16 where you would see any one seller having influence
17 on others?

18 A Yes.

19 Q What is the characteristic of that type of market?

20 A Well, in -- where sellers influence each other, the
21 sellers, there are few sellers in the market.

22 They know who each one is; they know essentially
23 what their capacities are; and so if you had three
24 or four or five sellers, they each have a significant
25 amount of the total capacity and, therefore, what they

1 Wein - direct

2 do is going to influence the price.

3 See, the difference essentially is Farmer
4 Smith doesn't sell enough wheat to influence the
5 supply of wheat; whereas, if we had four or five
6 producers in a market, let's say, one had 30 percent,
7 another 15, and whatnot. But, anyway, they each
8 have such a significant control over the supply
9 that what they do is going to influence the price,
10 and, as a consequence, each one of them must take
11 into account what the other does; and it's not
12 solely a question of influence in price, it's also
13 a question of influence in all the other inducements
14 which I have mentioned that competitors attempt to do.

15 Q Dr. Wein, you have used in your discussion the term
16 "market."

17 Would you explain what you mean by "market"?

18 A Yes. There are two senses to a market:

19 The first is the product.

20 It's clear that General Motors is not competing
21 with AT&T. I mean, they're both large companies,
22 but General Motors sells motor vehicles, and AT&T
23 sells telecommunication services.

24 So the first thing in a market is you have to
25 say the companies are dealing with the same product

Wein - direct

or service, that's the first dimension of it.

The second dimension of it is the area of the market. And my example of the wheat market, that's clearly a market which is pretty nearly world-wide.

Not all products are in national markets. Some of them are in very smaller restrictive markets.

So the second sense is the geography of it.

You have to then say: Product market, and you have to designate an area, a geographic area where this competition or these sales are taking place.

Q Dr. Wein, how do you determine what products are in the same product market?

A Well, if the products --

MR. LANSDALE:

I object, if your

Honor please.

THE COURT:

Approach the bench.

 {The following proceedings were had at
 the bench:}

MR. LANSDALE:

The product market

has been defined in this case.

I object to a lecture from this witness
 about product markets.

MS. COLEMAN:

Your Honor, we felt

1 Wein - direct
2 that it was important to simply define the term
3 and to have Dr. Wein explain the difference
4 between retail and wholesale power.

5 At that juncture, I was going to approach
6 the bench, so I will do it now.

7 THE COURT: Sustain the objection.

8 Product market here has been defined, as a
9 matter of law, as to retail sales of electrical
10 energy.

11 MS. COLEMAN: That is true.

12 THE COURT: So there is no
13 necessity of confusing the issue.

14 Let's proceed.

15 MS. COLEMAN: We won't refer to
16 wholesale market, just to wholesale power, your
17 Honor, that the term to be used, I recognize that
18 in your Honor's order.

19 THE COURT: Sustain the objection.

20 You may proceed.

21 MS. COLEMAN: Well, may I have, at
22 this juncture, either an instruction from your
23 Honor on the market, or may the witness testify
24 that he was advised by counsel that the market
25 is --

Wein - direct

1
2 THE COURT: Either way.

3 MS. COLEMAN: Either way; fine.

4 How would you like me to do it? Would you
5 like me to -- I'll question the witness.

6 THE COURT: All right.

7 MS. COLEMAN: I don't have the
8 order at hand.

9 THE COURT: It's just it is the
10 retail sale of electric energy is the product
11 market.

12 {End of bench conference.}

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Wein - direct

Q Dr. Wein, what is the relevant product market in this case?

A Well, I have been informed by counsel that the Court has decided that it is the sale of retail firm power.

Q Dr. Wein, as to this geographic market, what tests do you use to determine the geographic area of the market?

A There are several tests that you use.

Q Would you explain them, please.

A Yes.

First, I would like to say that one cannot measure a geographic market in the same way I measure the square feet in this room.

There are zones of indeterminacy.

The criteria are as follows:

First, if you have two firms, A and B, let's say, that are selling the same product, whatever it is, or service, whatever it is, you will say that they aren't in the same geographic market if the action of one firm has some sort of influence on the action of another. That is one test.

The second test is where they look to similar customers to sell their services to, either actually, now, or in the future, potentially; and they will look

Wein - direct

to certain customers in this geographic area.

Third, customers in the geographic area, you can consider them either an actual or potential source of supply, so that is the second thing.

And the third is you look to see what the realities of the business conduct is, and look to see the actual way a firm has grown and whether its growth has embraced a particular area; so you sort of have to take into account these three factors.

Q Dr. Wein, are you finished?

A Well, I would like to give an example, but you can ask me.

Q Dr. Wein, in the context of the electric power industry, are there considerations special to that industry which you use in defining the scope of the geographic market?

A Yes; there are some considerations which are special, not only special to the electric power industry, but other industries of the same sort, but essentially in the electric power industry, the customers usually have a particular supplier.

We don't have 27 food stores to which we might possibly go. We generally have only one company in a particular period of time which supplies us the

Wein - direct

power, so that individual customers usually are hooked up to somebody, and if you had two companies, they would be hooked up to either one or the other, really.

They may be hooked up to both, so that there is this question of being attached to a system where you buy food one day, and you can go down to the grocery market, and another day you go down to another one, so you don't have this kind of flexibility in the power industry.

That is a characteristic of the industry like the power industry, and also like gas and like telephone service, and so forth.

Q What considerations come into play in determining how broad a geographic market is in that industry?

A Well, there are two sorts of things:

One, of course, is a legal kind of hurdle. Various states have laws which prohibit the moving around of electrical systems and combining companies within a certain territory, so there are legal provisions which confine companies.

The second is the ability of potential competition where there are no legal barriers to another firm in the electric power industry attempting to compete or attempting to expand its

Wein - direct

system.

This firm can do so, and even if it doesn't do so, the question as to whether it potentially can do so, and given the fact that it can potentially do so, will have an influence on the other company in the industry.

So to that extent the regional market is pretty much determined in this industry by those criteria.

Q What criteria would you use to determine who is a potential competitor?

A Well, the first is that there is no legal limitations in this industry on the firm being a potential competitor; that is to say, he has authority to sell in a particular geographic area, so that is number one.

Number two, a potential competitor, having crossed the legal hurdles, is also one who has the necessary resources; that is to say, the background and the knowledge and the resources to serve customers in that geographic market, so that would be the second test.

Q Are there particular kinds of competition that you would find in the electric industry that bear on this question of the scope of the geographic market?

1 Wein - direct

2 bench, your Honor?

3 THE COURT: Sure.

4 - - - - -

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

7 MS. COLEMAN: Your Honor, I have
8 testimony to proffer with regard to areas which
9 you have ruled out from the testimony during the
10 morning.

11 THE COURT: Okay.

12 As I told your associate counsel, the
13 procedure -- the proper time for a proffer is
14 immediate subsequent to or immediately before
15 the Court's ruling, and precluding the
16 testimony and not any time subsequent.

17 I will permit it at this juncture, but in
18 the future, if you fail to make the proffer
19 timely, I am not going to permit it to be made
20 at some subsequent time, be it hours or days
21 later.

22 One of the purposes of a proffer, of
23 proffering testimony is to give the Court some
24 idea of what the testimony may be, so that it may
25 take it into consideration in its ruling.

1 Wein - direct

2 You may proffer.

3 MS. COLEMAN: Thank you, your
4 Honor. I understand.

5 I believe the first matter to which
6 objection was sustained was when Dr. Wein was
7 beginning to discuss and respond to a question
8 of whether the number of firms in the industry
9 has changed, the period before the Holding
10 Company Act and the period after the Holding
11 Company Act, and he would have testified to the
12 increase in concentration up to that point, and
13 some slight decrease after that point, and he
14 would have testified as to the present
15 concentration of the industry.

16 Given your Honor's order -- I am changing to
17 another subject --

18 THE COURT: What do you claim
19 is the probative value of that, that proffered
20 testimony? How is it relevant and material to
21 this case? Is it an opinion to be expressed in
22 this case, or is it just talk?

23 MS. COLEMAN: It is background
24 information about the industry, your Honor,
25 where this issue is taking place.

1 Wein - direct

2 THE COURT: All right.

3 MS. COLEMAN: I did not ask Dr.

4 Wein about the advantages obtaining through
5 interconnection in the form of coordinated
6 development, given your Honor's prior rulings.

7 THE COURT: What prior rulings
8 are you talking about?

9 MS. COLEMAN: In the previous
10 case.

11 THE COURT: Okay.

12 MS. COLEMAN: If he were asked
13 about other advantages from interconnection, he
14 would have testified to the possibility of
15 joint construction of generating units and other
16 aspects of coordinating construction and
17 development of generating facilities.

18 On the last item where Dr. Wein was not
19 permitted to testify as to how a product market
20 is determined, he would have defined the test
21 as to product market, as the product which is
22 the same as or substitutable for some other
23 product; and further, he would have defined
24 wholesale power as distinguishing it from
25 retail power by the persons to whom it is sold

1 Wein - direct

2 and the quantities in which it is sold.

3 THE COURT: And what is the
4 purpose of that testimony in view of the
5 Court's previous ruling defining the product as
6 a matter of law as being the retail sale of
7 electrical energy?

8 MS. COLEMAN: The purpose of
9 defining wholesale power was to define a term
10 that he may be referring to. As your order
11 recognizes, it is still a matter which relates
12 to the controversy here, although you have
13 ruled that it is not a relevant market.

14 It is just a definition of terms.

15 THE COURT: Anything further?

16 MR. LANSDALE: No, sir.

17 THE COURT: All right. You may
18 proceed.

19 {End of bench conference.}

20 - - - - -

21 THE COURT: Read the question.

22 {Question read by the reporter as follows:

23 "Q Are there particular kinds of
24 competition that you would find in the electric
25 industry that bear on this question of the scope

1 Wein - direct
2 of the geographic market?

3 "A Yes.

4 "Q What are those, please?"

5 THE WITNESS: May I add to it, or
6 shall I start over again?

7 THE COURT: Either way.

8 THE WITNESS: I will start over.

9 BY MS. COLEMAN:

10 Q Would you describe another form of competition which
11 is pertinent to the electric industry determining the
12 scope of the geographic market in that industry?

13 A Yes. -The first is the franchise competition, and
14 what this means is the competition between two or
15 more electric systems for the authority to serve a
16 particular geographic region, either a town or a
17 municipality, or any region, political region, which
18 has that authority to grant a franchise to the
19 company to operate its town or city.

20 This is competition between two systems, and then
21 for all the customers in that particular town or city,
22 and if one customer gets it, it has that power.

23 Q One company?

24 A If a company gets it, I mean, it has the ability to
serve all. It may not serve all, it may just have

Wein - direct

the authority.

It is possible for two companies to have that authority to serve in a particular city, as in the City of Cleveland, both the Muny Light and the CEI have the authority to serve the entire city.

The second type of competition is yardstick competition. Yardstick competition is competition by comparison, and it is, in effect, one of the basic means by which consumers judge the superiority of one seller over another.

In the context of the electric power industry, as I say, and as I explained, consumers generally don't shop around like they would for groceries.

In the context of the electric power industry, yardstick competition is a comparison not only by consumers within the particular area, but by public officials who may have authority to review conditions of service or rates.

It may be done by consumer groups, or it may be done by the media.

It is, in effect, the use of information and the comparison between the two systems.

Now, it is relevant for geographic because one wouldn't necessarily, for example, compare the rates

1 Wein - direct

2 of CEI or the rates and conditions of service of the
3 Municipal Light Plant with the rates of the Los
4 Angeles Board of Water and Light, which is a very
5 large municipal system, because there is no point
6 in making such a comparison.

7 One might compare the rates of CEI with the
8 rates of Muny, and one might even compare the rates
9 in Ohio. It depends upon -- with the rates in
10 another section of Ohio, and it depends upon the
11 purpose, but in Ohio, since we have territorial
12 limitations, the yardstick in competition is
13 something which a regulatory agency such as PUCO
14 might engage in to perhaps pressure, to put pressure
15 on it, but it is also the sort of thing which
16 managers of companies and executives do themselves.
17 They always look to see how they were doing with
18 respect to whomever they consider to be their
19 competitors.

20 So CEI would look to see how well it is doing
21 against Muny and vice-versa.

22 So the yardstick competition and franchise
23 competition are the forms of competition which go to
24 determine the general geographic significance of the
25 market, plus the other forms which I have mentioned

1 Wein - direct

2 of potential competition in terms of customers in the
3 area viewing somebody as a source of supply, and
4 companies viewing each other as competitors.

5 Q Dr. Wein, based on your studies of data and documents
6 and that which you have reviewed, and your background
7 in this area, did you reach an opinion as to what the
8 relevant geographic market is in this case?

9 A Yes, I did.

10 Q And what conclusions did you reach?

11 A Well, it is at least the City of Cleveland, and in
12 some areas beyond the City of Cleveland.

13 Q Dr. Wein, I would like to ask you what reasons you
14 have for coming to that opinion about the scope of
15 the market?

16 A Well, let me enumerate them, and not necessarily in
17 the order of importance, but as they occur to me:

18 The first, of course, is that both the City of
19 Cleveland; that is to say, both the Municipal
20 Electric Light Plant owned by the City of Cleveland
21 and the CEI, both have the authority to serve in
22 the City.

23 Secondly, I studied the Municipal Electric
24 Plant to find out just approximately how much of
25 the city does it serve; not in terms necessarily of

Wein - direct

1
2 the area, but that is -- that isn't terribly relevant
3 in terms of small amounts of areas such as a block
4 or two, but in terms of the proportion of the various
5 sorts of customers that are in the City of Cleveland,
6 and I found out that the Municipal Light Plant
7 served approximately 70 percent of the population of
8 the City of Cleveland in terms of the occupied
9 family dwelling units, and that is based on a Census
10 figure where they serve 133 out of 200 Census tracts.

11 Secondly, the study --

12 Q Dr. Wein, excuse me, I think perhaps you misstated
13 yourself.

14 What is the fact as to the area that your study
15 served, is served by the City of Cleveland, as
16 opposed to the percent of customers?

17 A Well, I don't know what the square miles of the City
18 are.

19 Q Did you examine that with regard to the number of
20 Census tracts?

21 A Yes.

22 Q And what did you find?

23 A I found that 133 out of approximately 200 Census
24 tracts had customers served by Muny Light, so that is
25 some index of the square miles; but Census tracts are

Wein - direct

1
2 varying in their square miles.

3 Q Did that study also indicate to you information with
4 regard to the proportion of Cleveland's businesses
5 which are in the Census tract that Muny serves?

6 A Well, yes.

7 Businesses that are reported as such to the
8 Census -- I found out that they serve approximately
9 75 percent of the businesses in the City of Cleveland.

10 Q Dr. Wein, are you stating that Muny serves 75
11 percent of the businesses or 75 percent of the
12 Census tracts?

13 A I said, no, not 75 percent of the businesses, but
14 that the Census tracts in which Muny Light has
15 business customers are approximately 75 percent of the
16 total businesses reported by the Census, so that if
17 you took each Census tract where Muny Light serves
18 75 percent of the total businesses in the City of
19 Cleveland, as shown by the Census, are in those
20 Census tracts where Muny Light serves.

21 Q I see; and similarly it was around 76 percent of
22 institutional kinds of buildings in the same sense?

23 A Not that Muny Light serves 76 percent of the
24 institutions, but in the Census tract, where Muny
25 Light is concerned, it has some service, 76 percent

1 Wein - direct
2 of the institution buildings are located.

3 Now, I also --

4 Q What further reasons did you have to conclude that
5 the City of Cleveland was at least relevant, at
6 least a breadth of relevant market?

7 A Well, I also considered the extension of the areas
8 where, for example, Muny Light provides power for
9 traffic lights and street lights in the City,
10 particularly street lights, which is a very large
11 load, and this goes to a very large part of the
12 City, and Muny Light also services, does maintain
13 many of the street lights that CEI supplies the
14 energy for.

15 MR. LANSDALE: I object.

16 THE COURT: Approach the bench.

17 - - - - -

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

20 THE COURT: Read that last
21 testimony back.

22 {Record read.}

23 MR. LANSDALE: I pass for the
24 moment what the maintenance of street lights has
25 to do with the relevant geographic market, but

1 Wein - direct

2 the testimony -- this is not what the testimony
3 shows.

4 We have been all over this with Mr. Hinchee,
5 and we got the contracts in evidence, and out
6 of 23,000 street lights there are only 700 that
7 are actually owned by the City of Cleveland
8 which CEI supplies the power for, and the
9 ones -- and whether Muny Light maintains all
10 those or not, you can't tell from the evidence,
11 number one; and number two, if the City maintains
12 its own street lights, I think that this witness
13 is attempting, which is the fact, I think this
14 witness is attempting to suggest something
15 entirely erroneous, and I object to it.

16 MS. COLEMAN: I think probably he
17 misstated what he said about the maintenance of
18 street lights as opposed to other types of
19 maintenance work.

20 THE COURT: Read the last question
21 and answer again.

22 {Record read.}

23 THE COURT: I will sustain the
24 last sentence in the answer, where he said that
25 Muny Light also services CEI, does maintain many

1 Wein - direct
2 of the street lights that CEI supplies the
3 energy for.

4 {End of bench conference.}

5 - - - - -
6 THE COURT: Read the last part
7 of that answer.

8 {The last part of the answer was read by
9 the reporter as follows:

10 "A and Muny Light also services,
11 does maintain many of the street lights that CEI
12 supplies the energy for."}

13 THE COURT: That part may be
14 stricken.

15 MS. COLEMAN: Would you bring the
16 overlay, 3240 over on the map, please.

17 {After an interval.}

18 THE COURT: What is the number?

19 MS. COLEMAN: 3240.

20 BY MS. COLEMAN:

21 Q Dr. Wein, when you were referring to Muny Light
22 providing street lighting, did you have reference to
23 the information --

24 THE COURT: Can all the jury see?

25 I am sorry, Ms. Coleman.

1 Wein - direct

2 MS. COLEMAN: I appreciate it.

3 Thank you.

4 THE COURT: Now, can everyone
5 see? All nod your head yes.

6 {All jurors indicating affirmatively.}

7 THE COURT: Dr. Wein, can you
8 see it?

9 THE WITNESS: Yes.

10 BY MS. COLEMAN:

11 Q Dr. Wein, did you have reference to the information
12 presented on this exhibit when you testified
13 concerning where Muny Light provided street lighting?

14 A Yes.

15 Q About what percentage does street lighting represent
16 of Muny Light's load?

17 A Well, it is a very large proportion.

18 Street lighting and other municipal services --

19 MR. LANSDALE: I object.

20 THE COURT: Yes, I will sustain
21 the objection. If he knows he may answer, but
22 he can't conjecture.

23 A Well, yes, I did know the number. It is somewhere
24 around, for street lighting alone, somewhere around
25 12 percent of the load, something in that nature.

Wein - direct

It is not trivial.

Q Dr. Wein, you were in the process of listing the reasons for your conclusions that the City of Cleveland was at least the scope of the geographic market here.

Did you have further considerations?

A Yes, I do.

Q What are those?

A Well, as I indicated, the criteria which makes a geographic market -- this is where a company competes for it -- that is one, and the Municipal Light Plant has competed for markets which are beyond the areas where it has residential customers, and even beyond the area where it presently serves. It has attempted to get such markets.

Also, its competitor in the City viewed it as being able to compete for areas outside its present service.

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

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

MR. LANSDALE: There is no evidence

1 Wein - direct

2 in this case that competitors were able to
3 compete in the areas outside.

4 The only evidence that I am aware of which
5 even remotely bears on this is one of the
6 exhibits that Mr. Moore was examined about
7 yesterday, and it does not represent the
8 generalization to which the witness referred,
9 and I object to this witness proceeding under
10 that assumption.

11 MS. COLEMAN: I will ask the
12 witness for the basis for that statement, and
13 then I will proceed to put that into evidence.

14 THE COURT: Put what into
15 evidence?

16 MS. COLEMAN: The evidence from
17 which he draws that conclusion.

18 THE COURT: The evidence from
19 which he draws the conclusion should be in
20 evidence before he can draw the conclusion from
21 it.

22 MS. COLEMAN: It is in evidence.

23 THE COURT: Where? I am trying
24 to recall where it comes into evidence.

25 MS. COLEMAN: His testimony went

1 Wein - direct

2 to the question of CEI's perception of Muny Light
3 as a competitor, and there are a variety of
4 exhibits on that issue.

5 One particular one to which Mr. Lansdale
6 has referred has been plotted on the map, and we
7 are just coming to showing that plotting of the
8 exhibit.

9 It shows that the CEI Residential Sales
10 Department perceived that Muny was a potential
11 competitor for some apartment buildings which are
12 beyond the area where Muny Light presently had
13 service.

14 THE COURT: We are talking about
15 The Associated Company?

16 MS. COLEMAN: No. There is a list
17 of apartment buildings on Plaintiff's Exhibit 203b,
18 your Honor.

19 THE COURT: How does that comport
20 with the Solomon decision -- Hays v. Solomon?

21 MS. COLEMAN: As to what aspect?

22 THE COURT: That specifies in
23 rather precise language these areas of what are
24 the necessary factors or criteria required to
25 establish a potential area of competition.

Wein - direct

1
2 MS. COLEMAN: That was cited for
3 something else last week.

4 THE COURT: I would have to check
5 it.

6 It says that it can't be after the fact.

7 MS. COLEMAN: That is not after the
8 fact. It is during the damage period.

9 THE COURT: But you also have to
0 show that affirmative action, that steps were
1 taken during the period of the alleged competition
2 which disclosed that the competitor, number one,
3 had undertaken affirmative plans to enter the
4 market; and number two, that it had the
5 capability of entering the market; and number
6 three, that it had the financial wherewithal of
7 entering the market.

8 MS. COLEMAN: The Muny Light Plant
9 was already in the market at that time, so that
0 we don't have the invisible competitor here.

1 THE COURT: Maybe we are talking
2 about two different things.

3 Are we talking about now about the extension
4 to Southerly and Westerly?

5 MS. COLEMAN: We haven't brought

1 Wein - direct

2 that out yet. That is not what we are talking
3 about right at the moment.

4 THE COURT: Maybe I am
5 disoriented.

6 MR. LANSDALE: He already talked
7 about the yardstick stuff, which is another term
8 to apprise influence, and it is obvious what she
9 is getting into now is an exhibit that was put
10 into evidence from Mr. Moore yesterday, and I
11 have got the record which covers that, and I
12 propose to object to its going into evidence.

13 The witness has stated that CEI perceived
14 the ability of the City to compete, and it is
15 perfectly plain that you are proposing to
16 bring on the material in Exhibit 2036 which was
17 used yesterday, and which was testified with
18 Mr. Moore, which Mr. Moore did not author,
19 but somebody else's memo to him, which he
20 testified about at pages 14,595 of the record.

1 THE COURT: Let me see the
2 exhibit. Do you have the exhibit?

3 MR. LANSDALE: I have the exhibit --
4 I am sorry. I don't have it.

5 {After an interval.}

1 Wein - direct

2 I have got a copy, but it has marks on it.

3 {Exhibit handed to the Court.}

4 THE COURT: I have reviewed
5 2036, which really doesn't mean anything to me
6 in its present form.

7 It shows the name of a certain apartment
8 and suites.

9 MS. COLEMAN: The exhibit that we
10 are going to use with Dr. Wein is an overlay with
11 that map with the location shown by stickers on
12 the map.

13 MR. LANSDALE: Please do not
14 understand that I concede the addresses that you
15 have assigned to these various items.

16 MS. COLEMAN: Well, if you advise
17 me of the problem, I think we can deal with it.

18 MR. LANSDALE: You gave it to me
19 at 6:00 o'clock last night.

20 THE COURT: I still don't
21 understand the basis for the objection.

22 MR. LANSDALE: The objection is that
23 the witness stated, and I maintain the witness
24 states that CEI perceived Munny Light as having
25 the ability to compete in areas substantially

Wein - direct

outside of their own map of geographic area, and he is going to proceed to -- and the evidence does not show this, and my reference to this, your Honor, is, and my perception is, that this is what the witness bases his statement on, and my objection is that this is not an adequate foundation for him to make that generalized statement; that is to say, the statement of a salesman to somebody internally in CEI for the purposes that we do not know, and we have not been asked about, and all Mr. Moore said was he read the memo, and that is what the memo states.

THE COURT: Well, I have reviewed the memo, and it doesn't mean anything to me.

Right now his testimony is that there is an effective area of competition within the boundaries of the City of Cleveland.

MS. COLEMAN: Correct.

THE COURT: Now, we are now moving to what appears to be a document that contains a whole series of names.

Are these within the City of Cleveland, or are they outside of the City of Cleveland?

1 I don't know. This is what I am asking. I can't
2 rule on the objection.

3 MR. LANSDALE: May I have the
4 probative answer read to which the objection was
5 made, if he can find it?

6 THE COURT: Sure.

7 {Record read.}

8 MR. LANSDALE: That is my objection.
9 The evidence is not so in this context, and my
10 belief is that it is based entirely on this
11 memorandum, and I object to the witness making
12 these conclusory statements.

13 THE COURT: I don't know. As I
14 say, you are anticipating something, and I don't
15 know what the evidence is going to be. Maybe
16 Ms. Coleman can enlighten me on it.

17 Certainly, as I indicated, the proper
18 procedure is that if he is going to express an
19 opinion, he should express the opinion upon
20 facts, established facts in the evidence, and he
21 can't express his opinion and create the
22 damage and create an inference, or whatever the
23 situation may be, that is not supported by the
24 evidence in this case.

25 I don't know. You tell me, Ms. Coleman.

Wein - direct

1
2 MS. COLEMAN: Let me just say at
3 the outset, I was proceeding through a list of
4 factors, and then I was going to come back to
5 them.

6 At this point I come back to this question,
7 the question of CEI's perception of the Muny
8 Plant as a competitor in the Cleveland market.
9 It is stated in terms of the entire City of
0 Cleveland, and there are various exhibits in
1 this case bearing on that.

2 One of them is this document, and the fact
3 that when you look at the locations of these
4 buildings, some of them are located -- they are
5 all located, I believe, in the City of
6 Cleveland, and some are located in the areas
7 where Muny doesn't presently have service.

8 The memo speaks for itself in terms of what
9 is being stated by it.

10 There are present CEI accounts that might
11 switch to Muny Light, and those have been met.

12 The map is an overlay to that map.

13 MR. LANSDALE: I don't think its
14 salesmen in the Sales Department is bound by
15 an internal memo.

1 Wein - direct

2 What I object to is that this witness is
3 coming forth to characterize what is not
4 warranted by the evidence.

5 I submit that you have to show a basis first
6 before we are going through a characterization,
7 and this is what the witness did throughout the
8 last case, and I am determined to stop it if I
9 can.

0 MS. COLEMAN: The rules permit a
1 situation where he would do nothing but state his
2 opinion.

3 THE COURT: That is right.

4 MS. COLEMAN: And then I bring out
5 the facts which support it.

6 The rule clearly authorizes him to state his
7 opinion.

8 THE COURT: Yes; that is right,
9 but he can't express an opinion on anything that
10 is not in evidence.

11 He can express his opinion at any juncture
12 of the case.

13 MR. LANSDALE: But he expressed an
14 opinion as to what the evidence showed.

15 THE COURT: So you are free to

1 Wein - direct

2 proceed if you lay a proper foundation.

3 MS. COLEMAN: Well, if your Honor
4 please --

5 THE COURT: And Mr. Lansdale,
6 I am going to say that it is premature, because I
7 don't know where those addresses are, and if it is
8 established that these are within the boundaries
9 of the City of Cleveland, or the other areas
10 that we have discussed here, I am not going to
11 change my ruling from the last case.

12 MR. LANSDALE: I apologize for
13 being premature, but I am continually confronted
14 with this situation, and this witness is making
15 unfounded statements.

16 THE COURT: Let's proceed.
17 Start over, Ms. Coleman.

18 If he could separate and distinguish his
19 answers -- his answers included two things; the
20 first of which was not objectionable, and the
21 second became objectionable, that was the
22 objectionable part, which throws into jeopardy
23 the entire answer.

24 MS. COLEMAN: I guess I would move
25 at this point to request that we determine

Wein - direct

whether he can use the exhibit that he is going to use.

THE COURT: What is the exhibit?

MS. COLEMAN: The overlay there.

THE COURT: He can use any one if he is using it properly.

MR. LANSDALE: I have been over these addresses, and as far as we were able to determine, at least one is wrong.

I have not had an opportunity to check the addresses against where you have placed the marks on the thing.

MS. COLEMAN: Perhaps the thing to do is to permit Mr. Lansdale to do so during the lunch hour, and we will proceed with the use of that exhibit after lunch.

MR. LANSDALE: I had planned to have somebody check the exhibit during the lunch hour.

THE COURT: Is this going to the defendant's thrust of the case in that the geographic market was limited to the 20 square miles -- the 30 square miles within the boundary of the City of Cleveland?

MR. LANSDALE: Yes; this is the issue.

Wein - direct

1
2 THE COURT: I am not going to
3 change my ruling from the previous case as to what
4 evidence is admissible.

5 MR. LANSDALE: Well, you haven't
6 heard all the evidence.

7 THE COURT: I am just telling
8 you, I am going to be consistent, either
9 consistently right or consistently wrong.

0 MR. LANSDALE: Consistency may
1 require a change in results.

2 THE COURT: Let's move to
3 something else, and you can check it later.

4 {End of bench conference.}

5 - - - - -

6 THE COURT: Ladies and gentlemen
7 of the jury, we are going to go on until certain
8 facts can be checked, certain addresses can be
9 checked, and we will pick up this line of
0 questioning later today.

1 BY MS. COLEMAN:

2 Q Dr. Wein, are there other criteria which you looked to
3 in coming to your opinion as to the scope of the
4 geographic market?

5 A Yes.

Wein - direct

Q Would you list the remaining criteria, please, and we will return to them later to elaborate on them.

A All right.

If I may make a few notes first.

{After an interval.}

THE COURT: Would you like us to read it back?

THE WITNESS: I think I would just jot it down. Thank you.

{After an interval.}

A {Continuing} Well, if I may repeat, just listing them, and that is sort of a catalogue for myself, and I have already mentioned one and that is authority, and I have already mentioned the yardstick, and I mentioned influence.

I have already mentioned where customer perceives themselves, or they perceive customers who are outside their area who Muny Light thinks that it would be worthwhile to serve if they could get the customer, and also I mentioned that the personnel of CEI have viewed Muny Light as a potential competition in acquiring customers outside their present service areas; and I believe that is all I can mention at the moment, other than the fact that they, in my opinion,

Wein - direct

have the requisite resources for potentially -- either have the requisite resources or can obtain them to serve the City of Cleveland.

Potentially -- and I don't mean when I say "serve the City of Cleveland," I don't mean to say that they would serve every customer within the City of Cleveland.

I mean to say that they would serve enough of the customers of the City of Cleveland so that their influence on their competitors would extend to the whole city.

And finally -- well, let me put it at that.

MS. COLEMAN: May I approach the bench?

THE COURT: Yes.

- - - - -

{The following proceedings were had at the bench:}

MS. COLEMAN: May we have read at this juncture Stipulations 25, 36 and 45?

MR. LANSDALE: No objection to 25.

MS. COLEMAN: And 36.

MR. LANSDALE: No objection to 36.

MS. COLEMAN: And 45.

1 Wein - direct.

2 MR. LANSDALE: No objection.

3 MS. COLEMAN: Thank you.

4 THE COURT: All right.

5 {End of bench conference.}

6
7 THE COURT: Ladies and gentlemen
8 of the jury, Stipulation No. 25 reads as
9 follows:

10 "Plaintiff, the City of Cleveland, is a
11 municipal corporation, organized and existing
12 under and by virtue of the Constitution and
13 laws of the State of Ohio and the Charter
14 adopted by the people of Cleveland. Since 1906,
15 the City has conducted an electric power business.
16 Since 1912, such business has been conducted
17 under the provisions of Article XVIII of the
18 Ohio Constitution and under the Charter and
19 ordinances of the City. The City conducts this
20 business through its Division of Light and
21 Power, a part of the Department of Public
22 Utilities. The Municipal Electric System is
23 sometimes referred to as Muny Light or MELP."

24 Stipulation No. 3b reads as follows:

25 "CEI was incorporated under the laws of

Wein - direct

Ohio in 1892 and furnishes electric service to an area of approximately 1700 square miles in Northeastern Ohio including greater Cleveland, extending about 100 miles along the south shore of Lake Erie west from Pennsylvania. It is a public utility and an electric light company as defined by the Ohio Revised Code. More than 98 percent of the company's operating revenues are derived from the sales of electric energy. The balance is derived from sales of its steam heating utility. As of February 28, 1979 CEI had 4,796 employees, more than 95,000 shareholders and more than 700,000 customers. Its principal place of business is in Cleveland, Ohio and its principal offices are located in the Illuminating Building, 55 Public Square."

Stipulation No. 45 reads as follows:

"CEI has franchises to provide retail electric service in the various municipalities in its service area other than the Cities of Painesville and Cleveland. It has a franchise in the City of Cleveland received directly from the State of Ohio many years ago. None of such franchises is exclusive."

1 Wein - direct

2 MS. COLEMAN: Thank you, your

3 Honor.

4 May I approach the bench?

5 THE COURT: Surely.

6 - - - - -

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

9 THE COURT: Off the record.

10 {The Court made a statement off the record.}

11 MS. COLEMAN: Your Honor, it's
12 approaching the luncheon recess, and I want to
13 go back to the area that I was just discussing
14 and give Dr. Wein a chance to check his exhibits.

15 THE COURT: No problem.

16 {End of bench conference.}

17 - - - - -

18 THE COURT: Ladies and gentlemen
19 of the jury, since we are rapidly approaching the
20 noon hour, perhaps this would be an opportune
21 time for us to recess for lunch, which we will do.

22 In the course of the recess, you will keep
23 in mind the Court's admonition, namely, you are
24 not to discuss the case either among yourselves
25 or with anyone else; you are to keep an open

1 Wein - direct

2 mind until such time as you have heard all of
3 the evidence in the case, the Court's instruction
4 as to the law and the application of the law to
5 the facts as you ultimately find them to be,
6 and until such time as the matter is submitted
7 to you for your final deliberation and judgment.

8 Now, with that, ladies and gentlemen, you
9 will return here at 1:30.

10 Thank you very much.

11 MR. NORRIS: Your Honor, may we
12 approach the bench before you leave?

13 THE COURT: Ladies and gentlemen,
14 you are free to go.

15 {The jury left the courtroom, and the
16 following proceedings were had at the bench out
17 of their hearing and presence.}

18 - - - - -
19 MR. NORRIS: Your Honor, the City
20 would inquire of the Court whether there is any
21 possibility that we could have a ruling on the
22 memorandum that we filed August 3 in support of
23 our request for production of reports and work
24 papers of CEI's witnesses.
25

1 I'm not aware that CEI has filed any response
2 to that request, and because the defendant's case
3 is rapidly approaching, we would call to the
4 Court's attention once more our request filed
5 August 3 and would request a ruling thereon.

6 MR. LANSDALE: I stand on my --

7 THE COURT: I have completely
8 overlooked that.

9 Let me review that and I will get back to
10 you.

11 MR. NORRIS: Thank you, your Honor.

12 MR. LANSDALE: I have not filed a
13 response.

14 I stand on what is stated in my letter to
15 counsel which is included in the materials. And
16 I can assure your Honor, that I will not -- that
17 they will have ample opportunity --

18 THE COURT: Let me review it.

19 You know, my historical position on this
20 type of a thing is a free exchange of expert
21 witness reports.

22 I don't know what unusual circumstances
23 attach to this particular case, but, in order
24 to expedite trials, I have always suggested to
25 counsel a free exchange of expert reports.

1 MR. LANSDALE: We just got through
2 with two items in the last day or two, and --

3 [Mr. Lansdale and Mr. Murphy conferred off
4 the record.]

5 MR. LANSDALE: -- three items, and
6 I can assure your Honor we have the
7 possibility of testimony, depending upon what is
8 said, by witnesses yet to come, which we have
9 made no decision and as to which we have not
10 completed our preparation.

11 THE COURT: Well, certainly, you
12 are not required to present any written reports
13 of witnesses that you do not intend to utilize.

14 However, before making a formal ruling, I
15 would like to suggest to counsel that where there
16 is a clear expectation of using a witness and
17 the reports are available -- as it applies to
18 both sides -- that those reports be exchanged to
19 facilitate cross-examination of the witnesses.

20 I will review that sometime today, Mr.
21 Norris.

22 MR. NORRIS: Thank you, your
23 Honor.

24 THE COURT: I can't say during
25 the lunch hour, but --

1 MR. NORRIS: No, no; thank you
2 very much.

3 THE COURT: -- the first thing
4 in the morning.

5 {Luncheon recess had.}

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1 THURSDAY, AUGUST 20, 1981; 1:45 O'CLOCK P.M.

2
3 THE COURT: Bring in the jury.

4 MR. LANSDALE: Your Honor, may I
5 approach the bench?

6 THE COURT: Yes.

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

9 MR. LANSDALE: Your Honor, not
10 long before the recess this witness testified into
11 Muny's expansion into areas which they do not now
12 serve, and that Muny has or can get the requisite
13 resources, and I want to move to strike that
14 testimony on the ground there is no support in
15 the record for it.

16 THE COURT: I think you can go
17 into it on your cross-examination. Let's
18 proceed.

19 {End of bench conference.}

20
21
22 DIRECT EXAMINATION OF DR. HAROLD H. WEIN {Resumed}

23
24 BY MS. COLEMAN:

25 Q Dr. Wein, returning now to the list of factors which

1 Wein - direct

2 you stated that you considered in reaching your
3 opinion, you stated that you placed reliance on the
4 proportion of the Census tracts in which Muny
5 rendered service.

6 Would you indicate what precisely you were
7 relying on.

8 A Well, I was relying on the fact that Muny served
9 in Census tracts, 133 out of 200, in which the Census
10 divides the City of Cleveland, 200 more or less;
11 and those 133 Census tracts contained approximately
12 70 percent of the occupied family dwelling units of
13 the entire City of Cleveland and approximately 75
14 percent of the stores and businesses of that nature,
15 and approximately 75 percent of the institutional
16 buildings.

17 THE COURT: 76 percent.

18 THE WITNESS: Well, approximately
19 75.

20 MS. COLEMAN: Mr. Kurdziel, is the
21 witness's microphone on?

22 LAW CLERK KURDZIEL: Yes, it is.

23 BY MS. COLEMAN:

24 Q Dr. Wein, where is the percentage of the City's
25 population and businesses which is in those Census

1 Wein - direct

2 tracts which Muny has some service input?

3 A When one is dealing with a geographic market, one
4 looks to where the bulk of the customers are.

5 One doesn't necessarily count the area, one
6 essentially looks to the customers, and this is an
7 indication that customers are spread throughout the
8 City, 133 Census tracts out of 200 is scattered all
9 through the City of Cleveland.

10 MS. COLEMAN: Mrs. Richards, would
11 you bring the overlay that's on top behind to
12 expose the second one on the map?

13 {Mrs. Richards complies.}

14 MS. COLEMAN: Yes; thank you.

15 BY MS. COLEMAN:

16 Q Dr. Wein, you referred to as another criterion --
17 excuse me.

18 You referred to as another criterion where Muny
19 was seeking customers. What evidence did you rely
20 on in using that as a criterion?

1 A Well, Muny was seeking customers in various pumping
2 stations and in the airport serving the City of
3 Cleveland and, also, pumping stations serving the
4 County.

5 And some of these pumping stations -- Southerly

1 Wein - direct

2 in particular -- lies outside the area in which it,
3 Muny, is doing business has other customers.

4 Similarly, for the airport, that is outside the
5 yellow area, which is essentially there had been
6 many customers, seeking business to -- outside that
7 area.

8 So that is one of the facts, Muny is seeking
9 business not only where it happens now to be but
0 where it thought it would be advantageous for it to
1 try and obtain other business, where it happens not
2 now to be.

3 Q Dr. Wein, you also referred to as a consideration in
4 your judgment CEI's -- or the perception of personnel
5 at CEI as to the City of Cleveland as a market.

6 What did you rely on for that conclusion?

7 A Well, various documents that I have come across in
8 which CEI -- amongst them, for example, a document
9 that I examined, the Form 10-K, which is a form which
0 CEI submits to the Securities and Exchange Commission
1 when it wishes to get permission to sell bonds.

2 And if we -- and it refers to competition in the
3 City of Cleveland, it uses -- it says something to
4 this effect -- and I'm paraphrasing it -- CEI faces
5 competition in the City of Cleveland from the

1 Wein - direct

2 Municipal Electric Light Plant; that sort of thing.

3 Other documents in which they're -- various
4 CEI executives referring to the possibility of Muny
5 Light possibly competing for various projects,
6 apartment projects, which are outside the City of
7 Cleveland, some of which were under construction.

8 Also pointing out that -- not "outside the City
9 of Cleveland," I'm sorry, but outside the area
10 determined on this map in solid yellow, outside that
11 area, where they thought that Muny might possibly
12 compete for some of their projects.

13 Also showed some projects which Muny had
14 outside -- in fact, customers outside the City of
15 Cleveland, but on the edges of it, the perimeter;
16 and that is another piece of evidence.

17 MS. COLEMAN:

Mrs. Richards, --

18 pardon me.

19 A {Continuing} Still another piece of evidence, there
20 has been the detailed consideration by the CEI of all
21 of the conditions affecting the Municipal Light
22 Plant, and, particularly its comparisons of rates in
23 every class of service that Muny offers, that is to
24 say, residential and commercial and industrial and
25 governmental and traffic lights, and so forth.

Wein - direct

1
2 And it is referring to these rates and comparing
3 its own rates there. And, finally, to the offer to
4 give Muny Light an interconnection conditioned on
5 the Muny Light System raising its prices to equal
6 the prices of CEI.

7 That seemed to be a rather significant
8 indication. That, plus all these other factors, led
9 me to think that the market was at least the City of
10 Cleveland, so that I came to that conclusion.

There are other things of similar nature
affecting comparison of terms and conditions,
comparing CEI's conditions with respect to certain
kinds of service provided to commercial customers
and industrial customers as against the type of
service that the Municipal Light Plant provides.

MS. COLEMAN: Mrs. Richards, would

you give the witness, please, Plaintiff's
Exhibit 253b.

{After an interval.}

Q Referring to the first of the several factors which
you have just listed, Dr. Wein, and looking at page
17 of Plaintiff's Exhibit 253b, would you identify
this document, first of all?

A Yes.

1 Wein - direct

2 Q What is it?

3 A This is a prospectus of the Cleveland Electric
4 Illuminating Company.

5 They are trying to sell \$100 million of first
6 mortgage bonds, and I think it is -- I can't quite
7 read it -- I think it says \$60 million of first
8 mortgage bonds in different years, and the date on
9 it is 1975.

10 Q Is this an example of the type of document that you
11 relied on in terms of CEI's description of where it
12 completed?

13 A Yes. That is that sort of document, and I have
14 relied on this.

15 MS. COLEMAN: Mrs. Richards, would
16 you give the witness, please, Plaintiff's Exhibit
17 2037.

18 {After an interval.}

19 BY MS. COLEMAN:

20 Q Is this also one of the documents, items that you
21 referred to in your testimony, Dr. Wein?

22 A Yes. This is one of them.

23 Q How did you determine from this document anything about
24 where persons at CEI perceived Muny as a competitor?

25 A Well, I noted who wrote this document and to whom it

1 Wein - direct

2 was sent.

3 They are both executives at CEI, having to do
4 with marketing and sales, and that area of the
5 company which is certainly involved in competition,
6 and I was aware of what the possibilities were along
7 competitive lines; and secondly, to see what these
8 meant, I had under my supervision, I had these
9 companies -- they were not companies. They were
10 essentially new buildings, and apartment houses,
11 and I had them plotted on a map to see just where
12 they were, and --

13 MS. COLEMAN:

Mrs. Richards,

14 would you bring the third overlay over, and would
15 you note the exhibit number, please, for the
16 record.

17 MRS. RICHARDS:

3261.

18 BY MS. COLEMAN:

19 Q PTX-3241?

20 MRS. RICHARDS:

No. 3261.

21 Q Dr. Wein, would you identify Plaintiff's Exhibit
22 3261?

23 MR. LANSDALE:

I object, if your

24 Honor please.

25 THE COURT:

Approach the bench.

1 Wein - direct

2 - - - - -

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

5 THE COURT: I don't have a copy
6 of it.

7 MS. COLEMAN: It is an overlay.
8 There are no copies.

9 THE COURT: What is the basis of
10 the objection?

11 MR. LANSDALE: My objection, if
12 your Honor please -- well, preliminarily I wish
13 to say that we have checked the location on the
14 map, and we have taken off No. 6.

15 MS. COLEMAN: I took that off.

16 MR. LANSDALE: And we find they
17 were accurately plotted. That is not my
18 objection.

19 My objection is again to the use of this
20 document for the purpose stated.

21 The witness just got through testifying that
22 he assumes that this is a determination by a sales
23 executive of CEI as to the determination as to
24 where competition is perceived, and I suppose
25 this goes back to the loose testimony that there

1 Wein - direct

2 were various executives at CEI that regarded it,
3 and there is no evidence that these people are
4 executives at CEI, and we know counsel has not
5 called Mr. Knappe, and we know he is a salesman
6 in the field, and I object to using this document
7 with the very sketchy testimony concerning it in
8 the record to represent this as the position of
9 CEI or CEI executives, and particularly showing
10 the overlay with the suggestive excerpt from the
11 exhibit itself.

12 And I submit that this witness ought not to
13 be permitted to testify. It is an extremely
14 careless approach of this witness of the
15 characterization of the testimony. It is
16 typical of their characterization of various CEI
17 executives, and they come out with the damned
18 document from one salesman in the field written
19 to someone who is obviously not an executive.

20 MS. COLEMAN: Your Honor, I submit
21 there is a plaintiff's exhibit, and I believe it
22 is 795 that establishes Mr. Knappe's position as
23 head of the Builders Section of the Residential
24 Sales, and we can establish his position through
25 that means, and we have had the testimony of CEI