
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

9-14-1981

Volume 25 (Part 2)

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

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Donheiser - cross

A Yes.

Q Well, I ask you to turn to the Burns & McDonnell report, the very first part, the "Long-Range Program for Future Expansion," and this is on page 1-1; and isn't it a fact that the consultants were identifying, "20,000 KV of additional load that was anticipated to come from the Water Department because the Water Department was expected between 1953 and 1970 to phase out its steam plant and to replace the coal-fired system plant with electrification, so they would be purchasing load from Muni Light rather than operating their own coal-fired system plant."

Is that not correct?

A It sounds reasonable.

Q And isn't it a fact that that additional load growth from the Water Department did not materialize?

A Mr. Norris, all the demand for MELP power was -- considering the fact that MELP only served part of the City of Cleveland, it is hard to say if they lost anything by virtue of the fact that a particular project did not demand that power, because there were others that could.

MR. NORRIS: May I have the question read?

Donheiser - cross

THE COURT: Read the question and
make your answer responsive.

{Pending question read by the reporter.}

A Yes.

Q Mr. Donheiser, would you now look at the table of contents of the Burns & McDonnell report, Exhibit 355, and this index, the very front of the report, shows seven different recommendations made by Burns & McDonnell.

Do you see what I am referring to that is there identified as "Parts," and Part 1 is the "Long Range Program for Future Expansion," and Part 2 is "Storeroom," and "Machine Shop."

Do you see that?

A Yes.

Q Now, in all there were seven recommendations, do you agree?

A Yes.

Q And isn't it a fact that Munny Light implemented every single recommendation contained in the Burns & McDonnell report, excepting the long-range program for future expansion that we have just talked about -- I will withdraw that question. Let me do it one at a time.

1 Donheiser - cross

2 Looking at Part II, Mr. Donheiser, "Storeroom
3 and Machine Shop," there were recommendations made to
4 Muny Light, and my question is, did Muny Light
5 implement those recommendations with respect to
6 storeroom and machine shop?

7 A I believe that they did.

8 Q Part 3 deals with "Coal and Ash Handling."

9 That was tied to the additional generating
10 capacity recommended in Part 1, wasn't it?

11 A Yes.

12 Q And the recommendations in Part B, therefore, were
13 deferred as were the recommendations in Part 1, and
14 would you agree?

15 A Yes.

16 Q Pardon me?

17 A Yes.

18 Q Part 4 deals with, "Method of Operation."

19 Is it a fact that Muny Light implemented those
20 recommendations contained in Part 4 under
21 "Method of Operation"?

22 A Part 4 wasn't implemented.

23 Q It was not.

24 A Part 4?

25 Q The recommendations contained in Part 4, under the

1 Donheiser - cross

2 heading, "Method of Operation."

3 Is it your testimony that those recommendations
4 were not followed by Muny Light?

5 A I am going to have to read this section.

6 Q You don't know?

7 A I don't know if I don't know.

8 Q All right.

9 Turn to Section 5. The recommendations in Part 5
10 are with respect to "Service and Supply Headquarters."

11 It is a fact that Muny Light followed those
12 recommendations?

13 A I believe so.

14 Q Part 6 deals with "Transmission and Substation
15 Facilities."

16 It is a fact that Muny Light implemented all of
17 those recommendations with respect to "Transmission
18 and Substation Facilities," isn't it?

19 A I don't know, but I will accept it as a fact.

20 Q And Part 7 deals with the "Organization Chart,"
21 and in this part Burns & McDonnell made various
22 recommendations about reorganizing the working
23 staff and reducing the employee complement, and so
24 forth; is that correct?

25 A Yes.

1 Donheiser - cross

2 Q And it is a fact that Muny Light implemented those
3 recommendations, isn't it?

4 A I think I would have to give you the same answer as
5 on Section 4.

6 Q That you don't know whether you don't know?

7 A That is right. I would have to review it. I would
8 have to check that out. I haven't read this in some
9 time.

10 Q Isn't it also a fact that Burns & McDonnell recommended
11 that Muny Light put in a diesel start-up unit?

12 A Burns & McDonnell suggested that MELP put in a
13 start-up unit or tie-in at the Nottingham Pump
14 Station with CEI, and the tie-in with the Nottingham
15 Pump Station with CEI in the early '50's was a
16 preferred and easier way of handling the problem,
17 and MELP on its own chose the diesel start up.

18 Q Muny Light did put in a diesel generator for start up
19 purposes, didn't it?

20 A Yes.

21 Q And in the early 1950's is it your testimony that
22 Muny Light chose not to have a tie-in with CEI at
23 the Nottingham Pump Station?

24 A Yes.

25 Q And is it also your testimony that that was a mutual

1 Donheiser - cross

2 point of view shared by both CEI and Muny Light in
3 the early 1950's?

4 A I have no knowledge of what negotiations went on with
5 CEI for the tie-in at the Nottingham Pump Station.

6 Q As a part of your preparation for this testimony, did
7 you not study a 1952 FPC report?

8 A Yes. That was 1952, yes.

9 Q And the Burns & McDonnell report is 1953?

10 A That is correct.

11 Q And is it not a fact that in the FPC report of 1952,
12 the staff person making that report is reflecting
13 conferences that he had with CEI on the one hand
14 and Muny Light on the other?

15 A Yes; that is correct.

16 Q And the staff report in 1952 indicates that CEI
17 didn't want to interconnect with Muny Light, and at
18 that point in time Muny Light didn't want to
19 interconnect with CEI; is that correct?

20 A That is correct, but they had in mind a more
21 substantial tie-in than the Nottingham Pump Station.

22 Q But what I asked you is essentially your recollection
23 of the FPC staff report, and you would agree with
24 that; is that right?

25 A Yes.

1 Donheiser - cross

2 Q All right.

3 Mr. Donheiser, would you please take your report --
4 and I believe it is 1155 -- is that the right number?

5 A Yes, sir.

6 Q And would you turn to page 5.

7 Now, at the top of that page one of the things
8 you say was -- actually, this is a report setting
9 forth the conclusions that you reached after you and
10 your colleagues at Arthur D. Little finished this
11 analysis; is that right?

12 A Yes.

13 Q And one of the conclusions that you reached was that
14 the -- and I am quoting:

15 "MELP appears to have been disabled by 1970."

16 Is that correct?

17 A Yes, sir.

18 Q And you on this same page make reference to an
19 exhibit that is Figure 1 in your report, the next
20 page, page 6, and you identified that as the "MELP
21 Failure Cycle," and on page 5 you call it a
22 "Downward Spiral of Failure."

23 Would you explain why it was in your opinion
24 that it was a downward spiral of failure from Muny
25 Light?

Donheiser - cross

A MELP failed to build needed capacity. As a result it wasn't easily able to take out its equipment for routine maintenance, so they used the equipment -- they used the generators and boilers more than was judicious, so that that is a maintenance deferral, and that led to breakdowns, and in turn we have a vicious cycle where breakdowns lead to further losses in firm capacity.

So it is a domino effect, and that is the concept.

Q On page 5 you say that, "The spiral is displayed on Figure 1 which indicates that MELP's fatal flaw was a reluctance to build plant and needed equipment, and it resulted in generating strain and breakdown and ultimately disablement"?

A Yes; that is the thesis.

Q Now, what you are saying is that this condition had manifested itself before MELP even got into the year 1971; is that what you are saying?

A Yes, sir. This is the result of a long process.

Q And that in effect MELP was dead by the end of 1970, and that is your testimony?

A They were disabled.

Q Now, you are saying also, in answer to one of Mr.

Donheiser - cross

Lansdale's questions, that a permanent synchronous interconnection between Muny Light and CEI would have helped Muny Light in its operations; is that correct?

A I think that is true, yes, the availability of bulk power, yes.

Q And are you saying that in this long history that you studied from, I think you said, the '30's, when you went back for planning purposes, that from the '30's up to the end of the 1960 decade, that even if Muny had had an interconnection when they asked for it, for example, in 1966, that that would not have changed the --

MR. LANSDALE: Objection.

MR. NORRIS: May I ask the question?

THE COURT: Finish the question --
Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

THE COURT: Obviously he is objecting to your referring to this 1966 time frame.

Donheiser - cross

MR. NORRIS: It is in evidence,
your Honor.

MR. LANSDALE: It is not. I object
to an assertion of the fact that Munny Light
requested an interconnection in 1966. It is not
a fact. That has not been proven.

MR. NORRIS: It has.

PTX-44 and -45 are in evidence, and those
exhibits are the result -- one was a letter that
was written to Mr. Besse, and the young woman
who typed the letter was on the stand and
identified it.

MR. LANSDALE: I am well aware of
what you are talking about, and we do not agree
that Mr. Besse was ever asked for an
interconnection. It is denied and disputed, and
I object to this statement as a fact.

MR. NORRIS: Let me finish my
statement.

PTX-45 -- do you have -45 there also?

THE COURT: Keep your voices down.
I am not going to tell you people this any more.

{After an interval.}

MR. NORRIS: I didn't have a

Donheiser - cross

chance to finish my statement, but I will let the Court read that first.

{After a further interval.}

MR. NORRIS: Your Honor, the evidence is that when Judge Locher was on the stand, Mr. Lansdale showed him a newspaper story that ties into this July, 1966 date, but the newspaper story indicated that he was instructing his staff to go to CEI to get an interconnection, and Mr. Kudukis was the Director of Finance, and it is shown in PTX-45 that they had a meeting with Mr. Besse and Mr. Howley on June 15, 1966, and PTX-45 is in evidence, and it is a memorandum from Mr. DeMelton, and the memorandum records the fact that a meeting was held and CEI refused to accede to the City's request for an interconnection unless Munny Light agreed to raise its rates, so there is evidence of the meeting in July of 1966, and I should be permitted to ask the question.

MR. LANSDALE: We deny having received such a letter, as your Honor knows.

THE COURT: I will overrule the

1 Donheiser - cross

2 objection.

3 {End of bench conference.}

4 - - - - -

5 THE COURT: Read the question.

6 {Pending question read by the reporter as
7 follows:

8 "Q And are you saying that in this
9 long history that you studied from, I think you
0 said, the '30's, when you went back for planning
1 purposes, that from the '30's up to the end of
2 the 1960 decade, that even if Muny had had an
3 interconnection when they asked for it, for
4 example, in 1966, that that would not have
5 changed the --"

6 Q {Continuing} -- would not have changed the opinion
7 that you expressed that as of 1970 Muny Light was
8 disabled?

9 A Yes, sir.

0 Q And would you explain -- I will get into it in more
1 detail later -- would you explain, please, the kinds
2 of documents that you used in making your study that
3 you are testifying to here today.

4 Q We used consultants reports. We used internal
5 memorandum. We used post mortems of the Public

1 Donheiser - cross

2 Utility Committee, the Committee on Public Utility.

3 Q Of the City Council?

4 A Yes.

5 Q What do you mean by "post mortem"?

6 A For instance, a 1975 report which looked back at
7 the reasons that MELP had --

8 Q These are reports, you mean?

9 A Yes.

0 Q Committee reports?

1 A Yes, sir.

2 Q Okay.

3 Well, what other kinds of documents?

4 A Well, we looked at the financial documents, and we
5 had some material on turbine use that I guess
6 originated originally in the Duquesne Interrogatory.

7 Q Did you have CEI memoranda?

8 A CEI memoranda?

9 Q Yes.

0 A I think there was one small document.

1 I had basically very little in the way of CEI
2 memoranda that I recall.

3 Q What about correspondence between CEI and Munny Light?

4 A I saw a few examples of that.

5 Q And who selected the -- take the CEI memoranda, for

Donheiser - cross

example, who selected the CEI memoranda that you looked at?

A Well, my recollection was that from newspaper accounts we knew that there were a couple of letters, and we requested them.

Now, in addition to that, I think that there were one or two letters that came with the original file.

Q Let's talk about that.

I believe on page 7 of your report you made some reference to that, Mr. Donheiser -- yes, at the top of the page, on page 7, you state that, "Counsel," meaning Squire, Sanders & Dempsey?

A Yes.

Q "Counsel presented Arthur D. Little with the theory that MELP was mismanaged."

Is that correct; is that right?

A There was a hypothesis that it was mismanaged, yes, sir.

Q But this statement is correct, that it was presented to you by CEI's lawyers?

A That was their speculation, yes, sir.

Q But the purpose of your study was then to see if you could validate that theory; is that right?

Donheiser - cross

A No, sir. That was not the purpose.

Q Well, let's read on.

You say in your report on page 7:

"Counsel presented Arthur D. Little with the theory that MELP was mismanaged and wanted to know if it was a valid theory and if it was, would we so testify."

Is that correct?

A That is correct.

Q All right.

Now, your response was that you wouldn't offer any guarantee; you would have to look at the file before you could agree that you testify that MELP was mismanaged; is that a fair summary?

MR. LANSDALE: Object, if your Honor please.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: Counsel reads one sentence and then he makes an incorrect allusion to the balance of it, and I object unless --

THE COURT: If you're going to

1 Donheiser - cross

2 use the document, read from the document, you
3 are free to do so, but be consistent; you don't
4 paraphrase it.

5 MR. NORRIS: All right, your
6 Honor.

7 {End of bench conference.}

8 - - - - -

9 THE COURT: Sustained as to
0 form.

1 You may rephrase the question.

2 BY MR. NORRIS:

3 Q Following the first sentence on that page which we
4 just read, Mr. Donheiser, then your second sentence
5 is:

6 "The Arthur D. Little response was that we could
7 offer no guarantee that the theory could be validated
8 but that the staff would be willing to make a cursory
9 review of the data from which it would decide whether
10 or not further analysis was warranted."

11 And -- that's correct, isn't it?

12 A Yes.

13 Q And I'm trying to find the place where you mentioned
14 the document.

15 THE COURT: Well, supposing you

Donheiser - cross

do that during the lunch hour.

MR. NORRIS: All right, your Honor. That's a good idea.

{Laughter.}

THE COURT: Ladies and gentlemen, it's now noon, and we will recess for lunch.

Please keep in mind the Court's admonition which, again, I cannot express upon you more strongly than I have the importance of it.

1:30.

{Luncheon recess had.}

- - - - -

TUESDAY, SEPTEMBER 15, 1981; 1:45 O'CLOCK P.M.

THE COURT: Please be seated.

Call in the jury.

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

THE COURT: You may proceed,

Mr. Norris.

MR. NORRIS: Thank you, your Honor.

- - - - -

CROSS-EXAMINATION OF ALAN DONHEISER {Resumed}

BY MR. NORRIS:

Q Mr. Donheiser, we were talking about the sources of the documents that you reviewed, and would you turn to page 7 and 8, and as I see -- I am sorry -- of your report, which is 1155, and the documents that I find mentioned on those two pages essentially are files of documents furnished to you by Squire, Sanders & Dempsey, and some additional materials furnished by CEI, and financial documents, consultants' reports, and on page 8 certain types of special tabulations or compilations made by CEI, and

Donheiser - cross

additionally documents that were called to your attention by Squire, Sanders & Dempsey.

Is that a fair summary of what you had to work with?

A I think that you should understand that when you do an investigation of this type, that the procedure is for one document to suggest another document, and it is really a form of network, and I think in the rear of the report we have indicated all the documents that we have obtained and used -- or, I should say, that we used for this report, and they are quite extensive, and some of them reflect our own initiation and independent data gathering.

Q And that when you needed a document supplied, it was of course to Squire, Sanders & Dempsey that you directed that request?

A Not necessarily, no.

Q What about documents that might have come either from CEI's file or Muny Light's files?

Those kinds of requests you would have directed to Squire, Sanders & Dempsey; is that right?

A That is correct, but there was data on the City of Cleveland, and there was financial data that we extracted ourselves without recourse to

Donheiser - cross

Squire, Sanders & Dempsey.

Q Now, I think that you were directing my attention to Appendix C at the back of your report, is that correct?

A Yes.

Q I'm sorry?

A Yes.

Q And with respect to memoranda or letters -- that's all I'm going to talk about, memoranda or letters that you have seen coming from Muny Light -- I see that in this Appendix C that you have directed my attention to, that on page 109, there is a letter, which is Item 3-A, that's a Muny Light letter that you would have seen, is that right?

A Yes, sir.

Q And on page 111, Item 52, is a letter from Mr. Klementowicz, and you would have seen that?

A Yes, sir.

Q And on page 112, No. 61, there is a memorandum from Mr. Harkins to Mr. Sarisky in the Mayor's office, August 18th, 1966, you would have seen that?

A I'm sorry, what is the number of that?

Q 61, Mr. Donheiser.

{After an interval.}

Donheiser - cross

A Yes, sir, I've seen that.

Q And then on the next page, there is a letter --
No. 73 is a memorandum, and No. 77 is a memorandum,
and those are all Muny Light letters and memos which
you have seen, is that right?

A That's correct.

Q And then on the next page, 114, 97 is a memorandum
to Director Gaskill, and you've seen that?

A 114?

Q That's on page 114, it's No. 97.

A 97.

{After an interval.}

A Yes, sir.

Q And then on page 115, there is a memorandum, No. 107,
and there is a letter, 113, and you've seen both of
those, is that right?

A Yes, sir.

Q Would you now turn to your work papers, please, that
were supplied to us before the trial?

These are your set of work papers, please, that
you used in preparing your report.

A I'm having trouble identifying that.

Are you talking about the whole exhibit or --

Q Well, the first page of this set of work papers that

Donheiser - cross

were supplied to us by your attorneys starts out, "Annotated Bibliography," then you have got a section "Interconnection, Selected Historical Highlights, 75 Megawatt Turbo Generator Notes," it's this sheaf of papers.

I can show you mine.

A I'm not sure where that's to be found.

MR. NORRIS: Well, Mr. Lansdale, is there any chance that he has brought his work papers with him?

MR. LANSDALE: If you'll tell us what you're talking about specifically, we'll make an effort to find it, Mr. Norris.

MR. NORRIS: Well, I'm talking about all of them.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

THE COURT: What papers are we talking about?

MR. LANSDALE: I don't know what papers we're talking about.

We have furnished you as much stuff as we

Donheiser - cross

can from him.

MR. NORRIS: You furnished all of this, so I want to ask him questions about it and I want to know if he has any copies.

Normally they bring copies of their work papers; we did.

MR. LANSDALE: Well, I appreciate that.

I personally don't have them in mind.

If you will call his attention to specific sheets, I'll hope he'll have them; I don't know.

MR. NORRIS: Well, could the Court inquire if he does have them?

MR. LANSDALE: Why don't you show the witness what you're talking about?

MR. NORRIS: May I, your Honor?

THE COURT: Sure.

{Mr. Norris steps to the witness stand showing the witness the papers and conferring off the record and out of the hearing of the jury.}

{End of the bench conference.}

- - - - -

MR. NORRIS: Would you get them all out?

Donheiser - cross

{After an interval.}

Q All set?

A Yes.

Q Mr. Donheiser, thank you for pulling out both work papers.

Would you first get in front of you the four-page set that is entitled, "Interconnection, Selected Historical Highlights."

A Yes, I have that.

Q Now, at the bottom of page 1 there is a mention of a June 3rd, 1966 letter from Commissioner Fakult to Mayor Locher, so that is on this Munny Light letter that you have seen; is that right?

A I am sorry. Where is that located?

Q The last entry at the bottom of the first page of that set of documents.

A "Commissioner Fakult writes Locher"?

Q "-- on need for interconnection," and that is a 1966 entry, isn't it?

A Yes.

Q So that is the letter that you have seen in your review?

A Yes.

Q On the next page, also in the year 1966, there is

Donheiser - cross

another letter making reference to DeMelto, do you remember who he was?

A Yes.

Q Who was he?

A He was the Director of the Department of Public Utilities.

Q And he ran Muny Light at that point in time, did he not?

A He was the Director. He was the Director for some time.

Q On the top of this second page -- I am directing your attention to -- it is indicated in your work papers, "DeMelto writes Besse to start negotiations for emergency interconnection July 19, 1966."

Is that a letter that you would have seen in your review?

A I am not sure whether I saw that letter or a reference to it.

Q The next line states, "Meeting with DeMelto, Besse, Fakult, and Howley, July 19, mystery meeting."

Now, do you recall seeing a memorandum or letter from the -- from Commissioner DeMelto or anyone else that supports that entry?

A No.

Q Where would that entry have come from?

A There was discussion on interconnection with counsel.

Donheiser - cross

and we were made aware that this was a contentious --
this was a contentious entry.

Q What about the first entry, "DeMelto writes Besse to
start negotiating for emergency interconnection
July 19."

You are saying that this is the first reference
to the Munny Light letter that was in your work papers
that you hadn't seen; is that what you are telling me?

A I just don't recall this letter.

Q Well, if it is in this set of work papers --

A Yes.

Q Isn't it reasonable that you would have seen it before
you put this into your work paper notes?

A No. These work papers --

Q No -- what about the other letter that we have
identified?

MR. LANSDALE: Objection.

THE COURT: Read the question.

Let's answer the question.

Q I am sorry. Go ahead.

A These work papers were meant to offer a shorthand
overview of some of the issues and don't constitute
final product in any way.

They are an attempt to show as many available

1 Donheiser - cross

2 facts and semi facts as possible. There are no
3 conclusions here.

4 Q I understand, and I didn't mean to imply there are
5 conclusions here.

6 I am just trying to find out what it was you
7 reviewed in reaching your conclusions, and my question,
8 again, and I am not clear on the answer --

9 A Well, I did not see a letter, the July 19th letter.

0 I don't remember the "DeMelto writes Besse to
1 start negotiations for emergency interconnection."

2 MR. NORRIS: Would you give Mr.

3 Donheiser PTX-44, Mrs. Richards, please.

4 {After an interval.}

5 THE COURT: Are you looking for

6 No. 44?

7 MR. NORRIS: Mrs. Richards, maybe

8 it is there.

9 THE COURT: This is my copy.

10 MR. NORRIS: Thank you, your Honor.

11 Q Mr. Donheiser, please look at PTX-44, which is already
12 admitted into evidence.

13 A {The witness complies.}

14 Q Have you had a chance to review it?

15 A Yes, sir.

Donheiser - cross

Q And that is a letter dated July 19, 1966, from Mr. DeMelto to Mr. Besse?

A That is correct.

Q Does that refresh your recollection that you have seen that particular letter prior to this moment?

A I don't remember seeing this particular letter.

Q Is it possible that somebody else on your team would have seen that letter for this to have appeared in your work notes?

A Yes, it is.

Q And did you review all of these work notes before they were finalized?

A Yes, I most certainly did.

Q So you would have reviewed this work note at some point in time prior to reaching your final conclusion?

A I don't see how this in any way has any effect on my final conclusion.

THE COURT: Read the question,
and please answer the question.

{The pending question was read by the
reporter.}

A Yes.

Q On this same page, under 1970, there is a letter from Commissioner Turkel to Mayor Stokes, and it

Donheiser - cross

gives a January 9 date, and that is another letter that you would have seen in the preparation of your report; is that correct?

A Yes.

Q And right under it there is a letter from Director Stefanski dated January 15, 1970, and you would have seen that letter?

A I am not sure. We examined literally hundreds of documents, and I just don't remember the contents of all of them, particularly on a reference to a work paper.

Q Now, what about the last entry on the page, and there is a letter where the Director of Finance, Mr. Dearborn, is writing Mayor Stokes with respect to a bond ordinance for \$5 million needed for the interconnection.

Do you see that?

A Yes.

Q Do you remember seeing that letter?

A Yes, I do.

Q Under the 1970 category, the second item, and that is the one that you can't recall seeing from Mr. Stefanski to Mr. Howley dated January 15 -- now, immediately below that there is a reference where Mr.

Donheiser - cross

Howley replies to Mr. Stefanski about agreement, and that has got a date of January 20th.

Do you remember seeing that letter from CEI to Director Stefanski?

A I am foggy on that. I don't know.

This is another letter, and it is in the work papers, and I simply don't recall the letter.

Q What about the next entry, and that is the second next entry, "Howley writes to Bergman," and that is a September 30th date.

Do you recall that letter?

MR. LANSDALE: May I approach the bench?

THE COURT: Yes.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: I don't know whether counsel is attempting a memory contest, and if he is, I don't think that is right; but if you have a question to ask about a specific letter, perhaps we should ask the question about the letter and get it out. I object.

THE COURT: It is a credibility

Donheiser - cross

issue.

This man testified he came to these conclusions and he looked at these documents, and he says he doesn't remember them.

MR. LANSDALE: I appreciate that, but to ask for a continued memory situation --

THE COURT: That is what credibility is.

I will overrule the objection. Proceed.

{End of bench conference.}

THE COURT: The objection is overruled.

Read the question.

{Pending question was read by the reporter as follows:

"Q What about the next entry, and that is the second next entry, "Howley writes to Bergman," and that is a September 30th date.

"Do you recall that letter?"}

A Yes, I think I do.

Q On the next page, Mr. Donheiser, there are a couple of CEI memoranda which makes reference to -- and one is in the year 1972, and one is a third entry on the

Donheiser - cross

page, "George Moore prepares a memorandum," and it has got a January 10th date on it.

Do you remember that one?

A Yes.

Q How about four entries down, "Hauser prepares internal memorandum with admission that CEI was not anxious to proceed with 138 KV interconnection"?

A No; I never saw that.

Q I see.

A That is really a milestone.

A number of these are milestones, and they have -- the nature of their admission to this thing is to complete a record and provide some reference points for some of the substantive memoranda that we considered.

Q I am trying to find out what you did consider, and let me ask you about this Hauser entry, internal memoranda.

It is possible or likely that somebody on your team did review that?

A I don't think so.

Q You don't think so?

A No, I don't believe so, no.

Q Well, how many of the other entries that are in this

Donheiser - cross

set of work papers are here even though nobody on your team saw them?

A Could you restate that question?

THE COURT: Read the question.

{Question read by the reporter.}

A The fact of the matter is that the correspondence between CEI and MELP and the City and CEI was not considered to be an essential part of the determination whether or not MELP was mismanaged, and as a consequence there are a number of insertions in the work papers that are there only to provide a complete story, if you will, with milestones.

Q Well, who would have inserted this particular reference, "Hauser prepares internal memorandum with admission that CEI was not anxious to proceed with the 138 KV connection August 26, 1972"? Who would put them in the work papers and nobody on your team saw that.

A I would say it got inserted into the work papers as a result of an oral conference with counsel.

Q Who did it?

A I did.

Q You put it in?

A Yes.

Donheiser - cross

Q And so in this case -- and you are talking about a letter that was written August 26, 1972, and you never saw the letter, but on the basis of that conversation you have inserted this note; is that correct?

A That is correct.

Q Thank you.

Turn to the next page, please, the second entry, and this is under the year 1974, and that is a reference to a letter from Mr. Mayben to Bob Hart.

Do you recall -- do you recognize those two gentlemen as being associated with the City?

A No.

Q Do you remember seeing that particular letter?

A Let's see -- where is that now?

Q That is on page 4, the second year under the year 1964.

A And this is on interconnection?

Q It's --

A The second entry --

Q The second entry says -- starts with the word "Mayben."

A All right.

Q Do you remember seeing that letter?

{The witness reading silently.}

A I would like an opportunity to look at that letter.

Donheiser - cross

Q Do you now recall whether you saw that letter?

{Mr. Lansdale rises from the chair.}

THE COURT: Are you objecting?

MR. LANSDALE: Yes; I want to
approach the bench.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the
bench:}

MR. LANSDALE: This witness did
not testify to anything on direct beyond the
year 1971, and this interrogation is now
reaching into '72 and '74, and I object to it.

It is beyond the scope of the direct and,
indeed, so far it has nothing to do with the
opinions that he has expressed.

I appreciate the thrust and the purpose of
some of it, but I submit that it's going beyond
the period. It is no wonder that he doesn't
specifically remember some of the things; he's
only testified up to 1971, and I object to going
beyond the scope of the direct.

MR. NORRIS: It seems to me that
anything that I find in the expert's report or

Donheiser - cross

expert's work papers that are the basis of that report, I can put question to him about because the issue --

MR. LANSDALE: Because the what?

MR. NORRIS: -- because the issue here is whether or not this report --

MR. LANSDALE: I beg your pardon?

MR. NORRIS: -- the issue here, Jack, is whether or not his report means anything, and he's presenting himself and you presented him as an expert, and it is my position that his report is meaningless unless I can go into these kind of areas.

MR. LANSDALE: I have presented -- attempted to present an opinion as to what Muny's condition was in 1971, that's all.

I have not offered this witness as to anything about Muny Light's condition subsequent to 1971.

THE COURT: I might say this, Mr. Norris, that you haven't laid a proper foundation for the question, albeit that you are prepared to use the work papers to attack his credibility providing that the foundation question, namely:

Donheiser - cross

"Did you rely upon this document in forming your opinion?"

If the answer to that is "Yes," then you may inquire further.

But just because you have a stack of work papers does not necessarily mean that this man saw or was required to see or relied upon.

MR. NORRIS: Your Honor, I --

MR. LANSDALE: If your Honor please --

THE COURT: Just a minute. One at a time, please.

MR. NORRIS: I believe I have it in my notes. I put the question to him:

"Aren't these the work papers that you used in preparing your report?"

That, to my mind, --

MR. LANSDALE: That's a collective question.

THE COURT: You have to identify the document you relied upon.

You're perfectly free to go and ask him, and I don't care what period of time it is.

MR. LANSDALE: Now you are four years beyond the report.

Donheiser - cross

{End of bench conference.}

- - - - -

THE COURT:

You may proceed,

Mr. Norris.

BY MR. NORRIS:

Q Tell me, what was the procedure that you and your team members followed?

I think you said Mr. Smith, and Mr. Carter, and Mr. James, were those the three people on your team?

A Yes.

Q Now, what procedure did you set up for the processing of this tremendous amount of material that you have identified?

A Well, it occurred in stages.

Initially, we looked at a relatively small sample of documents and we examined these rather intensively for about a month.

Following that, -- at this point, we could see very easily that there was a good substantial case that MELP was mismanaged.

After that, we literally went on a search for all kinds of documents, some of them proved to be relevant, some of them proved not to be relevant, and these letters having to do with interconnection were

Donheiser - cross

of the latter category, they were not germane to the conclusions that we reached; and I'm not sure exactly what you're asking me about these letters?

Q Well, I'm asking you what your procedure was, and you have answered that question in part.

Let me ask you this:

Did the four of you take different areas for your in-depth analysis?

A I would say that we had different emphasis, but we essentially went over the same material --

Q Now, --

A -- and looked at it in a different light.

Q All right.

But I have been provided with four sets of historical highlights:

One that we have been talking about deals with interconnection;

One that we have been talking about -- I'm sorry -- another one deals with the big unit;

The big one deals with Plans, Consultants Recommendations, Self-Study, Selected Comments;

And the fourth one is Finance.

Now, did you yourself review all four of these sets of summaries?

Donheiser - cross

A I wrote them.

Q And did any one of the four team members have principal responsibility for Finance?

A Yes.

Q Who was that?

A John Carter; he's here.

Q What about the Plans, Consultants' Recommendations, who had principal responsibility for this group of documents?

A I did.

Q And what about the 75 Megawatt Turbogenerator Notes, who had principal responsibility for this group of documents?

A I had primary responsibility for that.

Q And what about this last one, the Interconnection, Selected Historical Highlights, who had responsibility for that?

A I did.

Q So that all of the items contained in this set that we have been talking about, those notations would have been put on paper by yourself?

A Yes.

Q Now, let me ask you this:

The documents that are identified here in the

Donheiser - cross

Plans, Consultants' Recommendations, that set, would you get that in front of you, please?

{The witness complies.}

Q That's a three-page set of notes, is that correct?

A Yes.

Q And it runs from 1937 to 1976, is that right?

A Yes.

Q Who had principal responsibility for this?

A I did.

Q And did you rely upon the material listed in these three pages in arriving at your conclusion?

A They were important in arriving at my conclusion, yes.

Q Take the one that's headed, "Finance".

{The witness complies.}

Q That's a four-page set, and I think you said Mr. Carter had principal responsibility for that area?

A For that area, that's correct.

Q And let me ask you:

The four -- strike that.

This compilation runs, does it not, from 1911 to 1978?

A Yes.

Q And let me ask you whether or not the materials summarized on these four pages were important in the

Donheiser - cross

team's arriving at its conclusions?

A Not necessarily.

Q Were any of the items set forth in these --

A Yes, --

Q I didn't finish asking my question.

Were any of the items set forth in these four pages important to the team in arriving at its conclusions?

A Yes, they were.

Q And which were important and which were not important, can you categorize them? Were they important up to a certain year and not important after that, or were they not important up to a certain year, how would you categorize that for me?

A It's very hard to say.

What we have here is a road map.

We had literally thousands of facts. The most difficult part of a job like this is organizing your facts.

And if you attach years to certain events, even if they be hearsay, for instance, 1911, we have a notation "City votes \$2 million bond issue for 15 megawatts at East 53rd Street."

I never saw the indenture, and I have no

Donheiser - cross

intention of ever seeint the indenture and, frankly, I don't care to see the indenture and it is not necessary.

That's the type of item that these work papers contained, --

Q And --

A It's a curiosity.

Q So what you're saying is that some of the items reflected on these four pages you relied upon and some you didn't?

A Yes, I think that's correct.

Q All right.

What about the set entitled "75 Megawatt Turbogenerator Notes," --

A Yes.

Q -- did -- by "Yes," you mean you have it in front of you?

A Yes.

Q Thank you.

Now, let me ask you this:

Did you -- did your team rely upon the documents that are listed in this set of notes for arriving at its conclusions?

A I would have to answer the same way as the last set of

Donheiser - cross

notes:

Some of the items are important, and some are trivial, and some are from secondary sources.

Q But the fact that they're listed here means that somebody on the team reviewed them and was familiar with them?

A I just said that some of these items are of historical interest and were not intended to be looked at in any depth and do not have a bearing on the central conclusions about mismanagement of MELP.

Q Did the team come to any conclusions that you did not agree with?

A Offhand, I can't recall any.

Q And the conclusions that are set forth in your report would, therefore, represent not only your business judgment but the judgment of everybody else on the team, is that a fair statement?

A I believe that's a very fair statement.

Q Would you turn to page 96 of your report, please?

{The witness complies.}

Q Actually 95, from page 95 to 106, you are describing, are you not, many broad scale studies of utility management effectiveness that have been performed by Artnur D. Little?

Donheiser - cross

A That's correct.

Q Now, the first one that we see is the Boston Edison job that was undertaken early in 1974 of whether and how Boston Edison should expand its residual fuel oil storage capacity.

Do you recall Arthur D. Little doing that work?

A I do recall it.

Q Now, do you know whether or not, in the performance of that task, Arthur D. Little was presented with a theory at the outset of the task as to what the answer should be?

MR. LANSDALE:

I object, if your

Honor please.

A Every research job --

THE COURT:

Sustain the objection

as to form.

Restate the question.

You may proceed in substance.

BY MR. NORRIS:

Q With respect to this task that Arthur D. Little undertook as to whether and how Boston Edison should expand its residual fuel oil storage capacity, were there alternate answers to that question that were possible?

Donheiser - cross

A Yes.

Q And did Arthur D. Little undertake to identify as many alternative answers to that question as they could before selecting the answers that they came up with?

A No, not necessarily at all.

In every job that I have ever worked on -- in every scientific inquiry that I know of, you have to formulate a hypothesis --

Q Let me ask you this:

Were there interviews of Boston Edison personnel in connection with this work?

A I'm sure there was.

Q And --

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

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: This is the same stuff we were through yesterday about interviewing the City's people.

I object to --

Donheiser - cross

THE COURT: You are trying to do the same thing that you tried to do yesterday, Mr. Norris.

MR. NORRIS: I haven't mentioned the City.

THE COURT: But you're doing it -- you're backdooring the subject; the end result is the same.

MR. NORRIS: I think it's appropriate, your Honor.

THE COURT: Sustain the objection. Now, let's get on with this. I don't want to keep dwelling on the same thing over and over again.

MR. NORRIS: I would like to put on the record my proffer that the City should be permitted to demonstrate to the jury that this particular study was not aided by personal interviews, and that that goes to the quality of the conclusions that are reached in the study.

Furthermore, Mr. Donheiser has provided as part of his report a dozen different management effectiveness evaluations that Arthur D. Little has done, and I want an opportunity to show

1 Donheiser - cross

2 that in normal management consulting practice,
3 when Arthur D. Little has to draw a judgment
4 such as CEI asked him to draw in this case,
5 necessarily it involves two things:

6 Letting Arthur D. Little go in on an objective
7 basis without having been given a pre-conceived
8 theory.

9 Secondly, to give them access to personnel,
10 whether they're existing personnel or retired
11 personnel, so that they could improve the quality
12 of their review.

13 And --

14 MR. LANSDALE: Your Honor, I object --

15 MR. NORRIS: -- I would also like
16 to say that I would like to put the question to
17 Mr. Donheiser as to whether he ever interviewed
18 any prior Muni Light employees that were active --

19 MR. LANSDALE: If your Honor please --

20 THE COURT: Just a moment.

21 MR. NORRIS: -- that were active
22 during the period that he studied, during the
23 '30's up to 1971.

24 THE COURT: Unless you are
25 prepared to show these other areas of inquiry

Donheiser - cross

in that the interviews suggested by your proffered statement were -- in an adversary proceeding were ethical questions as to the propriety of counsel involving the adversary witnesses and --

MR. NORRIS: I am not so prepared.

THE COURT: Fine.

Sustain the objection.

Let's proceed.

{End of bench conference.}

- - - - -

THE COURT: You may proceed.

Mr. Norris.

BY MR. NORRIS:

Q The next -- not the next one -- let's skip Eastern Utilities Associates, and let's skip Idaho Public Utilities Commission -- on page 98, you described an assignment which Arthur D. Little undertook for Kansas State Corporation Commission, a comprehensive review of management and procedures.

Were you given -- was Arthur D. Little, in that instance, given in advance any theory as to whether or not the Kansas State Corporation Commission was mismanaged?

Donheiser - cross

A I really don't know anything about the Kansas State Corporation Commission job --

Q Another --

A -- and don't pretend to.

Q What about the Missouri Public Service Company assignment that you described on page 98 that Arthur D. Little recently completed a general review and evaluation of the management effectiveness and operating efficiency of the Missouri Public Service Company.

My question is:

Was Arthur D. Little, at the inception of that assignment, given any conclusion in advance that the Missouri Public Service Company was mismanaged?

A I would say that, in general, when a Public Service Commission that is a regulatory body brings in a consultant to look at an investor-owned utility, there is a question in the mind of the regulatory agency as to whether or not mismanagement was present.

Q That was not my question.

I would request that the Court ask that the question be reread.

Donheiser - cross

THE COURT: Read the question
back, please.

{Question read by the reporter.}

A I don't know.

Q Would you look then -- just to speed this along, there are half a dozen more of these assignments that are listed in your report, sir, from page 99 all the way over to 106 and, in one way or another, they're all related to the review of management effectiveness, isn't that right?

A By and large, yes.

Q I want to ask you just to flip the pages and tell me whether, in any of those assignments, -- and there are one, two, three, four, five, six, seven, eight, nine -- I count nine assignments -- and I would like you tell tell me whether, in any one of those nine assignments, Arthur D. Little was given in advance a theory that the particular organization being studied was mismanaged?

A Mr. Norris, this is the real world and, in New York State, it was well known that Con-Edison was having a variety of problems.

Some of them were so-called mismanagement; they had problems with Big Alice; they were overstaffed;

1 Donheiser - cross

2 these problems were discussed ad nauseum.

3 When they got Arthur D. Little -- when they
4 contracted with Arthur D. Little, certainly there was
5 a hypothesis that Con-Edison was mismanaged.

6 Q In all departments which they checked or --

7 A I can't answer that question "all departments."

8 There is no organization that is mismanaged in all
9 departments, in all phases, and that all people are
0 not doing the job that they're supposed to be doing.

1 Q Okay. This is the first one.

2 Now, what about the other eight that I asked
3 you about:

4 Are there any of these others where you were
5 given a hypothesis going in that the organization was
6 mismanaged, or were you left free to come to whatever
7 conclusion you thought was appropriate?

8 A I don't think that the question is even pertinent in
9 some of these other cases.

10 Northeast Utilities, the Ohio Power Siting
11 Commission, I don't think it was -- in Ohio that
12 Power Siting involved questions of mismanagement.

13 I don't know what you're driving at.

14 Q Well, Mr. Donheiser, we have to take these one at a
15 time.

Donheiser - cross

Look at page 103.

{The witness complies.}

Q A. D. Little did a job for PASNY, right?

A Yes.

Q It had to do with management systems, correct?

A Yes.

Q And you were confirming those aspects of PASNY's management that effectively served the Authority's present and future needs, is that a correct statement of the assignment?

A Yes.

Q Were you in that instance given any pre-conceived theory about whether it was good management or bad management?

MR. LANSDALE: I object, if your Honor please, and I would like to approach the bench.

THE COURT: Approach the bench.

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

MR. LANSDALE: I object to -- very strenuously to counsel in the manner of examination here, and I should have gotten up a

Donheiser - cross

little bit sooner.

THE COURT: I'm surprised that you didn't.

MR. LANSDALE: Were you given a hypothesis or were you given -- free to reach a conclusion.

This witness's testimony is perfectly clear as to what he did, and for counsel to suggest time after time that he was reaching a mandated conclusion is not only erroneous, it is insulting, and clearly and certainly not the proper way to interrogate a witness; and I submit to suggest time after time that there is something improper with what he has been doing, where he has a mandated conclusion is contrary to the facts and objectionable examination.

MR. NORRIS: Your Honor, the methodology that was used in this management review was totally different from any methodology that A. D. Little has performed before with respect to a management review as disclosed by their own report, and I want an opportunity to have the jury understand that.

THE COURT: Well, I'm permitting

1 Donheiser - cross

2 you to do that.

3 However, the form of your questions
4 characterize an unsupported conclusion.

5 Read the question back, please.

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

8 "Q Were you in that instance given
9 any pre-conceived theory about whether it was
10 good management or bad management?"}

11 THE COURT: "Pre-conceived".

12 MR. NORRIS: Sure.

13 THE COURT: You are not given a
14 theory --

15 MR. NORRIS: That's what his
16 report says, your Honor.

17 THE COURT: Well, you are free
18 to pursue the credibility of his report in a
19 proper manner and with proper questions.

20 And what I say to you is:

21 Please do not characterize in your questions
22 or incorporate conclusory, unsupported facts.

23 Now, with that, you are free to proceed.

24 {End of bench conference.}

25 -----

Donheiser - cross

THE COURT: Please rephrase the question.

Mr. Norris, you are free to pursue this subject.

{After an interval.}

THE COURT: Do you have the microphone on {addressing the witness}?

{The witness attaches the microphone to his tie.}

BY MR. NORRIS:

Q Mr. Donheiser, you have testified that, in this case, you were presented by Squire, Sanders & Dempsey with a theory that MELP was mismanaged and they wanted to know if this was a valid theory.

My question with respect to the Power Authority of the State of New York job that A. D. Little did, which you describe on page 103, I would like to know whether or not A. D. Little was given a theory that PASNY was mismanaged and asked to validate that or to determine whether or not it was a valid theory?

{After an interval.}

A I was not part of the case team, I don't know.

I can only say that it is not unusual in situations like this to be presented with initial

Donheiser - cross

2 hypotheses. It's the same in all areas of
3 scientific inquiry, that you have to formulate a
4 hypothesis, you examine it, you shoot it down.

5 You move on to the next hypothesis, you examine
6 it, you shoot it down.
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Donheiser - cross

Q Mr. Donheiser, on page 105 you described a job by A. D. Little, a job that they did for Washington Public Power Supply System, and there they were conducting a management review of the organization?

A Yes.

Q In that instance was Arthur D. Little presented with a theory that the Washington Public Power Supply System was mismanaged at the inception of the task?

A Again, I wasn't on this team, but it wouldn't surprise me that it was a hypothesis.

Q But you don't know?

A I don't know.

Q Is it true that the kind of assignments that your team received in this situation was quite different from the normal management review assignments that Arthur D. Little typically received?

A Typically we do what are called management audits.

What we did here was not a management audit. We had a different set of problems.

The environment was entirely different, and I am quite comfortable with the particular approach that we chose.

In a management audit we have a number of -- let's call them speculative problems concerning the

Donheiser - cross

way in which an organization is being run.

We go in, and we examine the data, and we talk to people, and we formulate our findings.

In this particular case it was much different because there was no question that MELP had literally gone bankrupt years ago, so we were more in the role of a forensic physician trying to establish why the patient died after he had died.

Q And the patient had died, in your vernacular in 1970, by 1970?

A Approximately that time, yes, sir.

Q Now, are you familiar with a work entitled, "The External Control of Organizations," by Jeffrey Pfeffer and Gerald Salancik?

A No.

Q Let me read a paragraph, and I want to ask a question about it.

"The key to organizational survival --"

MR. LANSDALE: I object.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: He said he is not familiar with it.

Donheiser - cross

1 MR. NORRIS: It is a work in his
2 field of specialty, and I need to determine whether
3 or not he agrees with the principles that other
4 management consultants have.

5 THE COURT: Well, if you can't
6 qualify it.

7 MR. NORRIS: I can read him an
8 opinion from other experts.

9 THE COURT: No, you can't.

10 If you can qualify this fellow as an expert,
11 or if you can qualify this as a document that
12 experts in this witness's field generally rely
13 upon, then you can.

14 So far all you asked him is, "Have you read
15 the document," and he says, "No."

16 MR. NORRIS: I am asking him if
17 he is familiar with the professors -- okay.

18 {End of bench conference.}

19 - - - - -

20 THE COURT: You may read from
21 the document if you can qualify it as a document
22 generally utilized in this field of expertise.

23 Q Do you know the name of Professor Jeffrey Pfeffer?

24 A I have heard of him.

25 Q Have you seen anything that Professor Pfeffer has

Donheiser - cross

written?

A Offhand, no.

Q Offhand, no?

A No, I haven't.

Q Do you know that Professor Pfeffer is an expert in the field of management consulting, your field?

A I have heard that.

Q And what about Professor Gerald Salancik; are you familiar with the fact that Professor Gerald Salancik is an expert in the management consulting field?

A Yes. There are many experts in the management consulting field.

Q And are you aware of the fact that Professor Salancik has written learned treatises?

A No.

Q Thank you.

THE COURT: Ladies and gentlemen of the jury, perhaps this would be an opportune time to take our afternoon recess.

Please during the recess keep in mind the Court's admonitions, and we will resume very shortly. Thank you.

{Recess taken.}

1 TUESDAY, SEPTEMBER 15, 1981; 9:25 O'CLOCK A.M.
2

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

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

9 THE COURT: Gentlemen, I have
0 something to take care of on another matter, but
1 before I do that, I want to address the exhibits
2 that are outstanding.

3 Has there been any resolution?

4 MR. NORRIS: Yes, your Honor.

5 We were in error when we made our objection
6 last night on the technical basis.

The exhibits were new exhibits, we didn't
realize that they were. But the exhibits, your
Honor, that Mr. Merback used in his testimony that
were on the screen and from which he read during
his testimony, we submit that the testimony is
the best evidence and that it would be improper
for these exhibits to now go back also to the jury.

7 THE COURT: Well, they're no
8 different than many of the other exhibits that the

Donheiser - cross

THE COURT: Please be seated.

Call the jury in.

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

THE COURT: You may proceed.

MR. NORRIS: Thank you, your

Honor.

BY MR. NORRIS:

Q Mr. Donheiser, I would like to ask you whether you agree with this as a principle in the area of management consulting in your experience:

"The key to organizational survival is the ability to acquire and maintain resources.

"This problem would be simplified if organizations were in complete control of all of the components necessary for their operation.

"However, no operation is completely self-sustained. Organizations are imbedded in an environment comprised of other organizations, and they depend on those other organizations for the many resources they themselves also require."

Do you agree with those statements and principles in the management consulting specialty?

A I believe it is an observation that I agree with.

Donheiser - cross

I would hesitate to call it a principle.

Q Forget the word "principle" and then the word
"observation" -- then you would agree with that?

A Yes.

MR. NORRIS:

Mrs. Richards, give

Mr. Donheiser PTX-3279.

{After an interval.}

Q While she is coming up with that, are you familiar
with the PIMS strategic planning institute?

A Yes.

Q I hand you PTX-3279 entitled, "A Letter on the
Business Strategy," and do you recognize that as a
publication of the Strategic Planning Institute? --
and this exhibit is authored by one of the staff
persons at the Strategic Planning Institute,
Sidney Scheffler. Are you familiar with him?

A No, I am not.

Q Are you aware of the fact that the Strategic Planning
Institute did a study of over one thousand businesses
in the data bank that was available to them and to
certain conclusions and made certain studies as a
result of that analysis of the one thousand
businesses?

A Yes.

Donheiser - cross

Q Now, in this exhibit there are nine basic findings on business strategy that have been published by this Strategic Planning Institute, and I would like to ask you if you agree with these findings:

Finding No. 1: "Business situations generally have in a regular and predictable manner."

Would you agree with that?

A This is a finding, and you are asking me if I agree with the findings, or are you asking me whether or not I agree with the proposition in general?

Q The proposition in general -- strike that.

You had no involvement at all with this business study?

A No.

Q All right.

I am just asking you as a matter, as a general proposition, in your field of specialty, would you agree that business situations generally "behave in a regular and predictable manner"?

A Not necessarily.

Q Well, to what extent would you agree with it?

A I would agree that business situations change during periods of tremendous innovation which disrupt continuity in the business environment.

Donheiser - cross

I don't really know what is served by arguing about whether I agree or disagree.

Q I am not arguing. I am just asking if you do.

A Well, there is a certain benign appeal in the statement, but it is not exactly true, but it may have applied to the one thousand businesses that they surveyed.

Q Look at the Finding No. 2, and I would ask you if you agree with that:

"All business situations are basically alike in obeying the same laws in the marketplace."

A Well, again, it is a very benign statement.

Assuming that one can identify laws of the marketplace, I would find it difficult to relate to just this simplistic view of a complicated phenomenon that is called the economy.

They won't get the Nobel Prize for this, believe me.

Q Read the paragraph that is under that finding, and just tell me whether you agree with the thrust of that paragraph.

A It is far out.

Really, I can't relate to it.

Q Let's turn to the third finding. Would you agree

Donheiser - cross

with this:

"The laws of the marketplace determine about 80 percent of the observed variances and operating results across different businesses."

A That is saying that supply and demand determine about 80 percent of the various -- I would say that is true. It may be true.

I would say that if they poled business enterprises or heavily regulated business enterprises, they might have come up with a different finding.

Q Let me see -- look at the second paragraph under that:

"This means that the characteristics of the served market of the business itself and of its competitors constitute about 80 percent of the reasons for success or failure, and the operating skill or look of the management constitutes about 20 percent."

Would you agree with that statement?

A 80-20, 70-30, there is some truth to it.

Q Then the last paragraph:

"Another way of stating Finding 3 is to say that doing the right thing is more important than doing it well, and being in the right place in the

Donheiser - cross

right way is 80 percent of the story, and operating that business in a skillful or lucky way is 20 percent of the story.

Would you agree with that, given instead of 80-20, if we changed that to read, "Being in the right business in the right way is 70 to 80 percent of the story, and operating that business in a skillful or lucky way is 20 or 30 percent of the story."

Would you agree?

A No, I wouldn't, and furthermore, I would point out that they are selling a service called strategic planning, and this type of conclusion supports the particular type of approach or technique they are selling in their business, and it is a self-serving statement.

It may be true of the one business they looked at, I don't know, but I don't happen to necessarily agree with it.

I still think that management counts.

It is not a question of being in the right beer business at the right time, necessarily. It is also how you run your brewery.

Q With respect to -- thank you.

With respect to the mass of materials that were

Donheiser - cross

supplied to you for your study, were any materials furnished to you which showed that Muny Light had good management?

A There are fragments.

Q Can you remember one of the fragments?

A Well, there was a rejoinder that was issued to the Citizens League.

Q A what?

A A rejoinder to the Citizens League report in 1964 and 1965, and that was by Mr. DeMelto and the City Council.

Q Well, that was a fragment that represented good management on Muny Light's part?

A Well, it was a self-serving defense.

They were being attacked.

Q I am just wanting to know in your judgment, sir, whether or not there was anything that was supplied to you that reflected good management on the part of Muny Light, and you have identified this rejoinder.

Did I understand your testimony correctly?

A Yes.

Q And do you recall what it was about that particular document that you thought reflected good management on the part of Muny Light?

Donheiser - cross

A No.

You are misinterpreting my answer. I am simply saying that there are things contained in there, there are claims made there, claims in that rejoinder that they are doing better than the criticisms that were leveled against them by the Citizens League.

Q I am not asking you, sir, about the claims that may have been made or not made.

My question to you was whether or not you in your judgment, sir, show anything that was supplied to you that reflected good management on the part of Muny Light?

A The proponents of the materials that we looked at would not support the position that Muny Light was well managed at all.

MR. NORRIS: May I have the question read?

THE COURT: Read the question.

{Question read by the reporter.}

A Yes.

Q Can you give us an example?

A Well, I think it was generally agreed that the distribution system of Muny Light was pretty good.

Donheiser - cross

Q What kind of a document -- you didn't make any on-site study of the distribution system?

A Oh, no.

Q You simply are reflecting an opinion that you formed after reading something; is that right?

A That is right.

Q Now, do you recall what it was that you read?

A No, I can't, offhand.

Q Now, in what respect was Muny Light doing a good management job concerning the distribution and transmission system?

A Well, evidently it was of sufficient capacity in a number of areas in the city to permit growth if they so desired to grow, and the engineering apparently was good.

Q Well now, I did ask you about the management. I am not talking about just about plant in operation and poles and lines.

I am asking you whether or not you recall anything that reflected good management on the part of Muny Light.

Do you understand my question?

A Yes. Certainly there is no question that Muny Light was managed, and some of it had to be good.

Donheiser - cross

Q Can you give us any other examples that you recall that reflected -- that you looked at -- that reflected that management at Muny Light was good?

A Not really.

Q Coming back to your opinion that as of 1970 Muny Light was disabled; it was your opinion, was it not, that the underlying issues causing that disability were that Muny Light officials did not address their attention to, first, the maintenance of Muny Light's generating and service capabilities, and secondly, adequate cash flow?

A No. The fundamental issue which I addressed was the lack of planning and the lack of planning implementation to create the capacity that they needed when they needed it in the '60's, particularly in the mid-'60's when outages started.

As a result of that there were difficulties in performing maintenance.

Q Now, I ask you to turn to page 35 of your report, and about at the bottom third of the page you have the following quote:

"Our retrospective look at what MELP officials said compared and contrasted with what they accomplished suggest that despite the need to direct

Donheiser - cross

attention to the underlying issues; that is, maintenance of MELP's generating and service capability, by means of assuring adequate cash flows, MELP chose to politicize and evade them."

And my question is -- I take it from that, Mr. Donheiser, that you were identifying the underlying issues as being the two things that I have just asked you about; {1} the maintenance of MELP's generating and service capability, and secondly, by means of assured adequate cash flows, and I am wanting to know, do you agree with that?

A They were underlying issues. They were not the only ones, and certainly the ability to maintain adequate cash flows I have testified to already as being a major factor in its demise.

Q So that as of this time -- and you are talking about late 1970 and early 1971, is that correct?

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

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: The first part starts

Donheiser - cross

out "Early '60's," was a period of confusion, and so on, and then the witness says, "You are talking about 1971," and to suggest something different.

MR. NORRIS: May I borrow your exhibit?

{After an interval.}

MR. NORRIS: On page 5 the witness states in his report, "MELP appears to have been disabled by 1970," and I am now asking him whether these were the underlying issues, and he says, "Yes," so I am trying to get him to clarify, is he restricting it to 1970, or is he willing to go beyond that.

MR. LANSDALE: I object to reading one sentence out of the middle of a paragraph talking about the early '60's and then saying that you are talking about 1971 right now.

THE COURT: Read the question back.

{Question read.}

THE COURT: I will sustain the objection. Rephrase your question.

{End of bench conference.}

Donheiser - cross

THE COURT:

You may proceed.

BY MR. NORRIS:

Q Mr. Donheiser, you have already testified that in your opinion as of 1970 Muny Light was disabled?

A Yes, sir.

Q Now, did you also mean that -- did you form an opinion as to whether or not Muny Light was disabled in 1971?

A Yes.

Q Was it?

A Yes.

Q Did you form an opinion as to whether or not Muny Light was disabled beyond 1971?

MR. LANSDALE:

I object.

THE COURT:

Overruled.

A Yes.

Q Was it?

A Yes.

Q And how far did you take your study?

A Well, we ended it, I think, much the way we began it.

There were certain threads that went longer than others, but we did not look at this in depth after 1971.

The intensity dropped off, and the financials went to -- they dropped off in 1971; however, I read

Donheiser - cross

the McCormich & Paget report which came in in 1976, and I wanted to be aware of what continuity had occurred in the development of MELP's management processes.

Q You did study things up to as far as 1978?

A Something like that.

Q In your opinion Munny Light was disabled in 1970 and 1971.

Was it also disabled in 1972?

MR. LANSDALE: I object, if your Honor please, I would like to approach the bench.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: I limited my direct examination to pre-1971, to that period, and I object to counsel being permitted to carry the interrogation into the later decade.

We have presented no testimony on direct examination respecting anything beyond 1971, and I object to any inquiry about it.

MR. NORRIS: This witness has studied in depth from the '30's up as far as 1978.

1 Donheiser - cross

2 Now, he says toward the tail end of that
3 period it falls off.

4 Sometimes he studied finances up as far as
5 one year, and then on something else as far as
6 another year, and I simply want to know.

7 THE COURT: What if he did --
8 they didn't go into it on direct examination.

9 I will sustain the objection. Proceed.

10 {End of bench conference.}

11 - - - - -

12 BY MR. NORRIS:

13 Q Now, let's go back to where we were on page 35.

14 The two factors that you identified on page 35
15 of the underlying issues were the matter of
16 generating and service capability, on the one hand,
17 and adequate cash flows on the other hand, and you
18 formed a conclusion that Muny Light didn't pay enough
19 attention to those two factors; is that correct?

20 A Yes.

21 Q And the failure to pay attention to those two
22 factors contributed in your opinion to Muny Light
23 being disabled in 1970 and 1971?

24 A Yes, sir.

25 Q Now, in 1971, if Muny Light had wanted to improve its

Donheiser - cross

cash flow, how could it have done that?

A It could have increased rates.

Q And it could have increased rates for its private customers and it could have increased rates for street lighting; is that correct?

A Yes.

Q And would it also have contributed to a more adequate cash flow if Muny Light had deferred other cash items that Muny Light didn't need to pay?

A That they didn't need to pay?

Q Or were not obligated to pay.

A Like what, for instance?

Q Well, let's take, for example, the deferring of debt service and outstanding bonds that the City Council had imposed upon the general fund, the obligation of paying, and on the other hand, Muny Light was actually paying it even though not obligated to -- that is a for instance.

A Yes. That is money that MELP owes the city.

Q And it would have improved Muny Light's cash flow and made it more adequate had Muny Light ceased making those payments and permitted the General Fund to make those payments, would you agree to that?

A How could they do that --

Donheiser - cross

MR. NORRIS: May I have the
question read.

{Question read by the reporter.}

A Yes.

Q And if Muny Light got an ordinance passed that would have been an appropriate way for the debt service to be deferred, and would you agree with that?

A I would say it would be a very inappropriate way, because we are talking about an institution which was created as a "yardstick" by which to judge the investor-owned utility, and the rules of the game are laid out, and this would be a gross violation of those rules; and furthermore, it just goes to show how close MELP was to the City, that MELP wasn't the stand-alone champion or yardstick that it sometimes pretended to be.

Q Mr. Donheiser, assume for the moment that the City Counsel passed an ordinance in 1971.

A Yes.

Q -- to defer a half a million dollars per year of debt service.

A Right.

Q In your opinion would it have been that management for Muny Light to have followed the ordinance that

Donheiser - cross

was passed under those circumstances?

A Well, I think it is an equivocation.

MR. NORRIS: Your Honor, may I

have the question read.

{Question read.}

A I would call it good survival, but in terms of real management, looked at in its totality, I would say it is atrocious. They made Muny the ward of the city.

Q Who did?

A Council.

Q City Council?

A The Mayor and the City through its cash infusion --

THE COURT: Gentlemen, let's

have an answer and then a question, and let him

finish the question, and let's not be argumentative,

please.

Q Mr. Donheiser, you testified that it was Muny Light's management that was poor, and I am asking you to assume that an ordinance is passed such as we described deferring debt service in the year 1971.

A Yes.

Q And I am asking you whether or not good management on the part of Muny Light would have been to continue

Donheiser - cross

making the debt service payment, notwithstanding the ordinance; is that your testimony, sir?

A Muny Light was set up as a separate and distinct entity.

For the City to make cash infusions in this form to relieve MELP from its obligations is a negation of all the rules that allow one to evaluate a stand-alone operation.

MR. NORRIS: May I have the question read.

THE COURT: Read the question and the answer.

{Last question and answer read by the reporter.}

THE COURT: Have you concluded your answer?

THE WITNESS: Yes.

BY MR. NORRIS:

Q My question then is you fault Muny Light's management for having stopped making the debt service payment in 1971?

A What are you calling "management"?

Q Let's start with the Commissioner.

Do you fault the Commissioner of Muny Light in

Donheiser - cross

1971, Mr. Warren D. Hinchee, for having followed the dictates of the ordinance deferring debt service?

Was that bad management on Mr. Hinchee's part?

A When Mr. Hinchee came in in 1971 --

Q Will you answer my question?

A He was only a portion of management.

If we are talking about management, I have testified that management of Muni Light has to be considered in terms of City Council, the Mayor, the Director of the DPU, and the Commissioner, and everybody else who has anything to do with this.

Q So you are not faulting Mr. Hinchee?

THE COURT: That was not the answer. Listen to the answer --

Q I would like to know; I would like to know where you fix the responsibility.

Is this whole shooting match guilty of mismanagement; is that what you are saying?

A That is exactly the point of our study. The buck never stopped. It just went around and around and around in perpetuity.

Q All right.

Mr. Donheiser, you are aware that an ordinance was passed on June 28th, 1971, deferring debt service

Donheiser - cross

Q And do you fault the 33 councilmen who all voted in favor of that ordinance and their basis for having done so?

A I was not in Cleveland at the time. I don't know what was on the political agenda, but it is clear that politics entered into the decision to provide oxygen to a dying patient.

Q Do you fault the 33 councilmen for voting in favor of that ordinance?

A Sure.

Q Now, let's talk about the underlying issues, the generating and service capability.

How could Munny Light have improved its generating and service capability, and we are talking about reliability, aren't we, really?

A Yes.

Q All right.

How could Munny Light, from your study, have improved its reliability in 1971?

A In 1971 they were in a whole, and they didn't have adequate generating capacity, and they negotiated for an intertie which was of not sufficient size to support the massive failures of the generating equipment which occurred.

Donheiser - cross

Q Which intertie are you referring to -- the load transfer service?

A Yes, the load transfer service.

Q All right.

A There was about 27 megawatts capacity, although I think they extracted more from it at certain times.

Q All right. We will come back to that.

When you say they negotiated for the load transfer service, you are talking about the Stefanski letter of January 15, 1970, that was mentioned in your notes, is that correct?

A I do not know precisely anything about the negotiations precisely.

I do know that they had a series of load transfer points, and I am acquainted with how they worked in general.

Q Do you remember ever seeing the letter that initiated this process, Mr. Stefanski, who was the Director of Public Utilities, and he wrote to Mr. Howley on January 15, 1970, and he asked for service.

Do you recall seeing that letter?

MR. NORRIS: Would you find that exhibit number for me, David.

Q {Continuing} Do you recall seeing that letter?

Donheiser - cross

A What was the number on it?

Q All right. I think I can find it.

{After an interval.}

Q It is PTX-1488.

Mr. Donheiser, I will have the letter brought up to you.

My question is whether or not you had seen PTX-1488 before?

A I do believe I had seen it.

Q Yes; and one of the important elements of that request from the City is set forth in the first paragraph on the second page of that letter, where Mr. Stefanski was indicating, "That the temporary tie-in arrangement that you are referring to is but a first of a three-phase project between CEI and the City, which, when completed, would provide a permanent tie-in."

Did you understand that?

A Yes.

Q And he also records the pledge made by CEI in good faith to continue negotiations, "to effect a permanent tie-in," and you were aware of that at the time you reached your conclusion; is that correct?

A Yes, I was.

Donheiser - cross

Q Now -- thank you.

Now then, I had asked you what Muny Light could have done to improve the reliability in your view, and you then made reference to a load transfer service that got us off onto this little digression.

Would you kindly continue your answer. What could Muny Light have done to become more reliable in 1971?

A Well, they could have gotten another big cash infusion from the City and proceeded to build a connection with whoever would be willing to supply them with that power, and then go into the retailing business.

Q Would you agree that one of the things that would have improved their reliability in 1971 would be if they had gotten a permanent synchronous interconnection with CEI?

A If they had a permanent interconnection with CEI in 1971, with a bulk power agreement to supply all their power, they would have been in better shape.

In fact, they would have been in better shape in the mid-'60's if they had given up on their plants and purchased their power from CEI.

Q Well, I want to stay in 1971.

Is it your testimony that that is one of the

Donheiser - cross

things that would have improved Muny Light's reliability had they effected a permanent interconnection with CEI?

A It is a good fairy question, and if they would have had it, and if they would have had it under ideal terms, and it appeared out of the blue, yes, it would have helped.

Q Now, this big cash infusion that you mentioned, was a cash infusion so they could renovate their generators, their generating equipment?

A No. The money was for the intertie.

Q Well, would it have improved the reliability in 1971, had they renovated their generating equipment?

A Probably not.

Q Probably not?

A That is right.

Q All right. Now, I would like to understand the basis for that.

If we have the 85-megawatt unit that is inflicted with problems, and it keeps going out of service, why is it that you say renovating that would not have improved its reliability?

A Because there is no indication that the Muny Light organization was very skillful in handling that generator.

1 Donheiser - cross

2 It involved a high-pressure boiler, and it
3 involved control systems that were rather sophisticated
4 for the work force, and mismanagement would probably
5 have resulted in the same type of ending for that
6 unit, no matter what.

7 Q So if they got this big cash infusion, in your
8 opinion, they shouldn't have bothered to renovate
9 the big unit or gas turbines or anything else?

0 A In my view, if they had a cash infusion, they should
1 have abandoned their plant and resold electricity.

2 Q Where would they get it from?

3 A They would buy it from CEI or Ohio Edison, or I don't
4 know who.

5 Q Now, are you aware of the fact that, in early 1971
6 the gas turbines had not been completed in their
7 installation?

8 A Yes; they were being used.

9 Q Well, in what respect was the installation incomplete?

0 A They had not been accepted. They were not accepted
1 from the manufacturer until 1972.

2 Q Isn't it a fact that they were operational on oil, but
3 as of early 1971, the compressors had never been put
4 in, so the gas turbines were not operational as they
5 were designed to be on either oil or gas; is that not

1 Donheiser - cross

2 your recollection?

3 A Would you rephrase the question.

4 THE COURT: Read the question.

5 {Question read.}

6 A Do we have an exhibit showing hours of operation?

7 Q I would ask --

8 A I would like to see that before I answer the
9 question.

0 MR. NORRIS: I would ask the
1 Court to have him answer the question.

2 THE COURT: Read the question.
3 Can you answer the question, and if you can't,
4 we will rephrase it.

5 {Pending question read by the reporter
6 as follows:

7 "Q Isn't it a fact that they were
8 operational on oil, but as of early 1971, the
9 compressors had never been put in, so the gas
10 turbines were not operational as they were
11 designed to be on either oil or gas; is that not
12 your recollection?"}

13 A They operated on oil.

14 Q Was it bad management for Muni Light to complete the
15 installation of the gas turbines in 1971, Mr. Donheiser?

Donheiser - cross

A Well, if you look at the decision to purchase the gas turbines in the context of the plans which Muny Light had and the recommendations of their consultants going back many years, they were forced into a position of buying the gas turbines as a quick fix or quick remedy for some of their generating problems.

Q I asked you whether or not it was bad management in 1971 for Muny Light to complete the installation of the gas turbines.

Now, can you answer that?

A Well, having purchased them, they should install them. That is a requirement of management.

Q What else would have improved Muny Light's reliability in 1971? -- your Honor, I see you are looking at your watch. I will finish this line of questions in a minute or two.

THE COURT: All right.

Q Let me suggest something to you --

MR. LANSDALE: I object.

THE COURT: Are you objecting to my looking at my watch?

MR. LANSDALE: I object to the question.

THE COURT: Approach the bench.

Donheiser - cross

{The following proceedings were had at the bench:}

MR. LANSDALE: I submit that having this witness list the things from an operational standpoint that would have improved their operation goes substantially beyond the basis of the questioning.

It is a problem of management, and not a problem that this witness is here for. He is not here as an expert on the design of the plant, and the way to remedy the operating deficiencies of the Muny Light, rather than the management, and I object to any further interrogation along this line.

MR. NORRIS: This witness has testified as to the mismanagement of Muny Light, and he has identified two underlying issues.

One of them is the lack of reliability, and in an attempt to test his opinion and see what is based upon, I think I have a right to go into these things, because he is presenting himself as being familiar enough with these factors to draw a conclusion that they were mismanaged on the basis of those factors.

Donheiser - cross

THE COURT: Well, you are certainly free to do that within his area of expertise.

However, if you start getting into the area of technicalities and the engineering, I don't think this fellow is an engineer.

MR. NORRIS: I haven't asked him that question. I only restricted myself to the conclusions that this witness has submitted.

THE COURT: Read the question.

{Question read.}

THE COURT: That is a technical question.

His testimony is that they didn't have reliability.

Now, if you want to pursue and cross-examine him as to the basis of his conclusion as to what a lack of reliability has in the area of management and policy making, you are free to do that, but when you ask a question like this, that is an area beyond his expertise, and you are free to proceed.

MR. NORRIS: Let me put another couple of questions.

1 Donheiser - cross

2 THE COURT: Okay.

3 {End of bench conference.}

4 - - - - -

5 BY MR. NORRIS:

6 Q Mr. Donheiser, you testified with respect to
7 personnel matters and management matters and
8 financial matters.

9 In 1971, would it have improved Muny Light's
0 reliability in your judgment if it had hired
1 additional competent engineering personnel?

2 MR. LANSDALE: Objection.

3 THE COURT: Overruled.

4 A I believe they were too far gone at that point.

5 Q You mean that hiring additional competent engineering
6 personnel ordinarily would improve reliability, but
7 in this particular situation it would not have; is
8 that right?

9 A That is probably true.

0 Q Well, is it true or not?

1 A It is true.

2 Q All right.

3 Now, would you adopt training programs for the
4 operating personnel at Muny Light in 1971, and would
5 that have promoted reliability of the system in your

Donheiser - cross

opinion?

A. Hardly.

Q It would not have?

A No.

Q If they had a better training program, do you think that they could operate their machines better?

A If they had machines to operate.

Q Didn't they have machines to operate?

A They were down for parts.

Q Well, not all of them?

A Well, a good many.

Q Was anything operating in 1971?

A Well, at one point there were 35 megawatts of firm that I know of.

Q Was anything operating in 1971 to your knowledge?

A Yes.

Q Thank you.

MR. NORRIS: Your Honor, we will pick this up tomorrow.

THE COURT: All right.

Ladies and gentlemen, it is beyond 4:00 o'clock, and we will adjourn for the day.

I see that it is not raining outside, so you will be able to get home without getting wet.

Please during the recess keep in mind the Court's admonitions; you are not to discuss the case with anyone, not even among yourselves, and you are to keep an open mind until such time as you have heard all of the evidence and the Court's instructions on the law and the application of the law to the facts, and until such time as the matter is submitted to you for your deliberations and judgment.

Now, with that, you are free to go, and we will send in the exhibits if there are any.

Thank you and good night. We will see you in the morning at 8:30.

{The jury was excused from the courtroom.}

- - - - -

THE COURT: Now, gentlemen, I have CEI Exhibits 1181, 1182, 1185, 1359, 355, PTX-44 -- that has already been admitted. That may go to the jury.

PTX-3279 may go to the jury. That has already been admitted.

And 355 -- I am sorry --

MR. NORRIS: I am sorry. Are these the exhibits that were used in the direct of Mr. Donheiser?

THE COURT: 1181 is a comparison of MELP with other municipalities. That is a transparency that was on the board -- on the screen.

MR. NORRIS: No objection.

THE COURT: CEI-1182 is a chart of the MELP financial operations, which was a transparency.

MR. NORRIS: I object to that because the witness has already testified to it.

THE COURT: The transparency may not go in; however, a reduced copy may go in.

CEI-1188, CIP, 1961 through 1971. That is a transparency.

MR. NORRIS: The transparency is different from the exhibit.

THE COURT: That may not go in; however, a copy may.

MR. NORRIS: Well, your Honor, if anything is to go in, I submit that it should only be the CEI Exhibit 1185, from which the transparency was made.

THE COURT: Yes.

MR. MURPHY: That is acceptable to us.

THE COURT: Yes.

MR. MURPHY: We agree with that.

THE COURT: All right; and

CEI-1359, MELP reserve generating capacity, and that is a transparency, and the document from which the transparency was made may go in.

There is the Burns & McDonnell study of 1953, and that has already been admitted, so that may go in.

PTX-44, letter, City to CEI, 7-19-66, and that has been admitted on 7-17-81, so that may go to the jury.

We also had PTX-3279, which I don't know what it is -- wait a minute. Let me check my notes.

MR. MURPHY: Your Honor, that is the PIMS letter as a business strategy. We don't object to that.

THE COURT: It may go in if you are offering it.

MR. NORRIS: Yes, your Honor.

THE COURT: And then we have CEI-1155, A. D. Little study of MELP.

MR. NORRIS: We object.

THE COURT: And CEI 1183,

1 standards of sound management, which is a
2 transparency, and the original from which that was
3 made may go in.

4 What are the objections as to A. D. Little,
5 to the A. D. Little study? I take it that is
6 the Donheiser report?

7 MR. MURPHY: Yes, your Honor.

8 MR. NORRIS: Your Honor, it has
9 numerous problems.

10 It is prejudicial because -- well, it is
11 inaccurate. I can give you inaccuracies in 12
12 places.

13 It contains numerous highlighted sections
14 that tend to highlight just the bad things and
15 not the good things, and it is argumentative.

16 THE COURT: Isn't that generally
17 what all these exhibits are intended to do? I
18 mean, maybe I am missing the boat here.

19 MR. NORRIS: I wouldn't say the
20 City's exhibits are like that. They are
21 objective.

22 THE COURT: I see.

23 MR. NORRIS: With respect to the
24 Donheiser remarks, they are not simply expressions
25 of opinion. They are argumentative and

1 conclusory, and I can cite the Court to pages
2 11, 18, 21, 27, 28, 42, and 43, 44, 57, 82, and
3 87; and if the Court wants further examples, I
4 will give them.

5 THE COURT: I will be pleased
6 to review those pages.

7 MR. NORRIS: It refers to many
8 places -- in many places to material that was
9 not in the record, and Mr. Donheiser testified as
10 to what his opinions are, and we think it is
11 prejudicial for this particular document to go
12 back to the jury.

13 THE COURT: Very well. I will
14 consider that under the same conditions that I
15 have considered the other reports.

16 MR. NORRIS: The other exhibit
17 that we have from yesterday is 3276, the exhibit
18 that I used with Mr. Merback, "Net Income
19 of Munny Light, Water Division and Sewer
20 Division."

21 MR. MURPHY: We object to that,
22 your Honor.

23 Mr. Merback said, number one, they didn't
24 know whether these were actually the figures
25 that they purported to be; and number two, that

1 there was no valid comparison between them,
2 because of a different accounting basis used,
3 in any event.

4 THE COURT: I will have to
5 review that.

6 MR. NORRIS: I would like to
7 submit that I believe Mr. Merback was willing to
8 accept my representations that these were from
9 audited financial statements.

10 THE COURT: Let me review the
11 record in conjunction with the exhibit.

12 Take those other exhibits in to the jury.

13 Now, is the City prepared to supply the
14 Court with the information that it requested
15 yesterday so that it may rule upon the outstanding
16 motions for directed verdict which I think I
17 ought to rule on as quickly as possible.

18 MR. NORRIS: Your Honor, --

19 THE COURT: Because I am
20 afraid that the defense may rest its case
21 tomorrow before I have an opportunity to make
22 my ruling, and I wouldn't want that to happen.

23 MR. NORRIS: To keep you out of
24 that difficulty, we do have a document, and I
25 have not had a chance to review it this afternoon.

and I would like that opportunity before I turn it in.

THE COURT: All right. Give it to me the first thing in the morning.

MR. NORRIS: I can give it to you tonight, and I want the opportunity to make a final review.

THE COURT: All right, fine.

MR. WEINER: There were three exhibits admitted with the agreement of counsel, but I don't think the record reflects their being admitted. They are 3127, 3236, and 3144.

Joe was handling those, too.

MR. MURPHY: I will accept Mr. Weiner's statement. I will check, and if there is a problem, I will advise you.

THE COURT: All right. I will withhold those until tomorrow morning.

{Court adjourned for the day.}

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Wednesday, September 16, 1981

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1980

1 WEDNESDAY, SEPTEMBER 16, 1981; 9:30 O'CLOCK A.M.

2
3 {Thereupon the following proceedings ensued
4 for the record in the absence of the Court and
5 the jury:}

6 MR. NORRIS: I would like to put
7 something on the record before we start, please.

8 I am going to ask Mr. Lansdale if he will
9 show the following exhibits to the witness, and
10 after the witness has had a chance to review
11 these exhibits, I am going to ask the witness
12 whether or not he had an opportunity to review
13 these documents in the preparation of the report
14 which is CEI Exhibit 1151, and then also whether
15 or not the witness relied on any of the
16 information set forth in these documents, and
17 the numbers of the exhibits are as follows:

18 PTX-38, 538, 54, 1512, 1516, 2860, 2679,
19 3054, 628, 603, 497, 513, 4445, 2631, 539,
20 1488, 123, 2582, 1518, 1515, 1790, 2630, 257,
21 682, 144, 1772, 3061; and then CEI-1002, and
22 CEI-1168.

23 And I have collected these into a stack,
24 and I will be prepared to hand them over for
25 the witness's inspection at his convenience at

1 a break or sometime not during court time.

2 MR. LANSDALE: Well, I don't
3 intend to agree to this during some break.

4 If you want to take the witness off the
5 stand and give me a chance to do it, it is all
6 right with me.

7 MR. NORRIS: Then --

8 MR. LANSDALE: You have got a big
9 bunch of papers that you are talking about.

10 MR. NORRIS: Let's do this.

11 I will finish my cross-examination --

12 MR. LANSDALE: I think it is not a
13 bad idea.

14 MR. NORRIS: -- I will finish with
15 my cross-examination, and if he hasn't had a
16 chance to do this, we will agree to take him off
17 the stand and put him back on to answer the
18 questions.

19 MR. LANSDALE: First, I think it is
20 better to do it right now, and we have a natural
21 break in the thing now.

22 MR. NORRIS: All right. Here they
23 are.

24 MR. LANSDALE: We will have to get
25 the Judge's permission.

1 Jim, are you ready to start with him right now?

2 MR. MURPHY: Sure.

3 MR. NORRIS: Well then, let's go
4 back and see the Judge.

5 MR. LANSDALE: All right. Give me
6 that stack of stuff now.

7 {The proceedings in the absence of the Court
8 and jury came to a close.}

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

12 LAW CLERK KURDZIEL: Your Honor, this is
13 Civil Action No. C75-560, City of Cleveland
14 versus The Cleveland Electric Illuminating
15 Company.

16 THE COURT: Please be seated.

17 {The Court and Law Clerk Kurdziel conferred
18 off the record.}

19 MR. NORRIS: Your Honor?

20 THE COURT: Yes, sir.

21 MR. NORRIS: Mr. Lansdale and I
22 have discussed the possibility of trying to save
23 time.

24 I have 32 or 33 exhibits that I wanted to
25 put questions to Mr. Donheiser with respect to

1 as to whether or not he saw them and whether or
2 not he used them in making his report, and Mr.
3 Lansdale and I dictated into the record before
4 court started this morning the identification of
5 these exhibits and, with your approval, we would
6 both recommend that Mr. Donheiser be permitted to
7 be taken off the stand at this moment so that
8 after he has had a chance to review those
9 documents, we can speed up his cross-examination.

10 THE COURT: Very well.

11 MR. LANSDALE: That's correct.
12 It's agreed, your Honor.

13 THE COURT: All right.

14 Bring in the jury.

15 - - - - -

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

19 THE COURT: Who are we going to
20 put on?

21 MR. MURPHY: Your Honor, Mr.
22 Magruder.

23 THE COURT: Good morning,
24 ladies and gentlemen.

25 Please be seated.

1 Ladies and gentlemen of the jury, we're
2 going to put another witness on the stand and,
3 after this witness has concluded his testimony,
4 Mr. Donheiser will be recalled for the
5 conclusion of his cross-examination.

6 MR. MURPHY: Your Honor, we
7 would call Mr. Sam Magruder, please.
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S A M M A G R U D E R,

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

DIRECT EXAMINATION OF SAM MAGRUDER

BY MR. MURPHY:

Q Would you state your name please, sir?

A Yes. My name is Sam Magruder.

Q Where do you live, please?

A I currently live in St. Louis, Missouri.

Q What is your business or profession?

A I'm an electrical engineer, and I'm currently
employed by Quali-Tex {phonetic} Systems Company,
in St. Louis, Missouri.

Q What did Quali-Tex Systems Company do?

A We were manufacturers representatives, and we
represented approximately 30 companies in the
St. Louis and surrounding markets.

Q For how long did you work for Quali-Tex?

A 1978, almost three years.

Q Prior to your employment with Quali-Tex, for whom
did you work?

A I worked for Westinghouse Electric Corporation.

1 Magruder - direct

2 Q How long did you work for Westinghouse?

3 A Approximately sixteen years.

4 Q Could you describe for us, please, your employment
5 history with Westinghouse.

6 Why don't you start with the beginning and work
7 up to when you terminated your employment.

8 A Okay.

9 I graduated from the University of Missouri in
10 1963, and immediately upon graduation I went to work
11 for Westinghouse in Pittsburgh, Pennsylvania, and I
12 was there about a year in the Systems Division, and
13 we designed control systems for devices like circuit
14 breakers and generators and equipment of that nature.

15 Then I transferred to Buffalo, New York where
16 the control equipment was actually manufactured, and
17 I worked there for three years.

18 Then I went to Chicago, Illinois for five years,
19 and I was called a District Engineer, and in that
20 capacity I assisted field salesmen in specifying
21 electric equipment.

22 Then I came to Pittsburgh, Pennsylvania, as a
23 Manager in the Field Service Division, called the
24 Engineering Service Division, and in 1972 I
25 transferred to Cleveland, Ohio, and I was here in

1 Magruder - direct

2 Cleveland from 1972 to 1974.

3 In 1974 I became an Engineering Manager of the
4 Switch Gear Division in the St. Louis, Missouri office,
5 and I transferred there, where I stayed until I left
6 the company and resigned in 1978.

7 Q Mr. Magruder, in the course of your employment with
8 Westinghouse, what experience did you have in
9 designing, engineering, and administering the
10 construction of interconnections, electrical
11 interconnections?

12 A In the broadest sense of the term, I suppose of the
13 whole 16 years, at one time or another during that
14 16 years I was constantly involved in the designs and
15 specifications and installation of the equipment of
16 that nature, many dozens of projects.

17 Q You say "many dozens of projects."

18 Do you mean dozens of projects concerned with
19 interconnections?

20 A Yes.

21 Most power systems have an interconnection
22 somewhere.

23 Q Mr. Magruder, what month in 1972 did you come to
24 Cleveland?

25 A I came in May of 1972.

1 Magruder - direct

2 Q What were your duties in Cleveland with Westinghouse?

3 A I was called the District Engineering Service
4 Manager, and during my tenure here in Cleveland, I
5 managed the activities of between 17 and 23 field
6 engineers, and we had a number of purposes, but
7 basically stated, our purpose was to provide whatever
8 engineering support the Westinghouse Electric
9 Corporation needed in Cleveland and surrounding
10 territories.

11 Q Mr. Magruder, did you assist sales people prior to
12 the time Westinghouse had a contract to do particular
13 kinds of work?

14 A Yes, I did.

15 Q To what extent?

16 A Usually a typical negotiation would involve perhaps
17 many divisions of Westinghouse, and when the salesmen
18 were first called by our customers, many times they
19 would need to get me involved if it were of a high
20 degree of engineering that was involved, and
21 particularly when it was about time to get the
22 order, when those last minute details involving
23 engineering had to be put down on paper.

24 Q Were you commonly involved in the preparation of
25 contract documents for Westinghouse?

1 Magruder - direct

2 A Very much so.

3 The engineering and installation of equipment is
4 very important in contract writing, and many terms
5 and conditions involving that installation have to be
6 set down; so generally I was involved in all of them.

7 Q Mr. Magruder, I want to draw your attention this
8 morning to certain work done by Westinghouse in
9 connection with the construction of a 69 KV
10 interconnection between the Lake Road plant of Muny
11 Light and the Lake Shore plant of CEI.

12 Were you involved in that project?

13 A Yes, I was.

14 Q Mr. Magruder, in connection with your involvement,
15 did you have in the course of your work any
16 conversations with employees of CEI?

17 A Not at all, never at no time during that project did
18 I mention, talk to, or even hear about anyone from
19 CEI.

20 Q Mr. Magruder, when did you become involved in the 69
21 KV project?

22 A I became involved November 1st, 1972.

23 MR. MURPHY: Kathy, would you hand

24 Mr. Magruder CEI Exhibit 1308, please.

25 {After an interval.}

1 Magruder - direct

2 would include the equipment, and its installation,
3 and to provide for that termination.

4 Q In considering the 69 KV interconnection as a whole,
5 what part of it was Westinghouse going to be
6 constructing or concerned with the construction of?

7 A Well, at the time I got involved, shortly after I got
8 this letter, I went over to the job site to see what
9 was there firsthand, and there was an existing
10 line, transmission line, that ended very close to
11 the Muny Light substation.

12 And we were going to, in effect, provide for the
13 power connections between that transmission line that
14 someone else had already built and an existing oil
15 circuit breaker that was in the Muny Light
16 substation, and then put in the associated relaying
17 and meter equipment to go with that.

18 MR. MURPHY: Kathy, would you
19 hand Mr. Magruder, please, Plaintiff's Exhibit
20 2941 and 2942.

21 {After an interval.}

22 Q Start with 2941, if you want, Mr. Magruder, and would
23 you identify that for us.

24 A 2941 is a letter that Gary January had written to
25 the City of Cleveland on May 10, 1972.

1 Magruder - direct

2 Q Did it concern the 69 KV project?

3 A Yes, it did, and it gave a very general definition of
4 some of the equipment that might be required.

5 Q Would you now look, please, at Plaintiff's Exhibit
6 2942, and please identify that document.

7 A Right.

8 That is a June 13, 1972, supplementary letter
9 from Mr. January, expanding on the May 10 letter,
10 and again giving a very general bill of materials
11 and an estimated price.

12 Q Mr. Magruder, approximately when were these letters
13 provided to you?

14 A When did I first see these letters?

15 Q Yes.

16 A I first saw those letters around November 1st.

17 Q 1972?

18 A Right.

19 Q Mr. Magruder, did those letters provide adequate
20 information for Westinghouse to draft or prepare
21 contract documents for the 69 KV interconnection?

22 A No.

23 Q What other information was necessary?

24 A Three things -- when I received these letters, I was
25 a bit upset that we would be getting a contract on

1 Magruder - direct

2 such a general documentation of six months earlier.

3 There were three things that needed to be done;
4 a more definitive bill of materials, a more specific
5 bill of materials was required, and a list of the
6 exact work that we were going to do was required, and
7 then the materials and conditions of that sale, none
8 of which was included in any of these documents.

9 Q Mr. Magruder, after seeing those two documents, what
10 did you set out to do to correct these deficiencies?

11 A Well, the very nature of my job was to help
12 Westinghouse Electric Corporation get business and to
13 serve customers in the City of Cleveland.

14 So rather than send Mr. January packing, I
15 decided that we would write a counter offer ourselves
16 further defining the requirements of this project and
17 send that back to the customer.

18 MR. MURPHY: Kathy, could you

19 please hand Mr. Magruder CEI Exhibits 1293 and

20 1313?

21 {Ms. Doyle complies.}

22 BY MR. MURPHY:

23 Q Mr. Magruder, let's start with CEI 1293.

24 Would you identify that document, please?

25 A Right.

1 Magruder - direct

2 This is a cover letter that came to Westinghouse
3 from the City of Cleveland stating that attached is a
4 contract.

5 Q And what is CEI Exhibit 1313, please?

6 A That's the actual contract.

7 Q The one that was sent to you with the letter of
8 November 5th?

9 A Correct.

10 Q Mr. Magruder, what was your reaction upon receiving
11 this letter and this proposed contract?

12 A Quite surprised.

13 Q Why was that?

14 A Well, I was going to be responsible for this project
15 and the bills and profits and money that would be
16 associated with it, and I was not about to commit my
17 company to such a contract based on the documentation
18 that had been provided.

19 There was no definition of the equipment to be
20 provided or -- I was not about to accept this
21 contract.

22 Q Mr. Magruder, if you will look at page 2 of CEI
23 Exhibit 1313, the proposed contract that the City
24 sent you in November.

25 I notice near the top of the second page there

1 Magruder - direct

2 is a reference to the Westinghouse "proposal" of
3 June 13, 1972.

4 What reaction did you have to the characterization
5 of the letter of June 13 as a Westinghouse proposal?

6 A Well, I would hardly call it a proposal.

7 A salesman's estimate -- functional estimate of a
8 few pieces of equipment that might be provided or
9 required for a job would hardly be called a proposal.

10 Q Mr. Magruder, upon receipt of the proposed contract
11 from the City, what did you do?

12 A Well, this contract came very shortly after I got
13 Gary January's letter telling me we were going to get
14 it. I certainly didn't expect to get it five days
15 later.

16 I would also point out in the contract it
17 clearly said \$68,900 was the selling price. That's
18 a large sum of money to be committed blindly.

19 What I proposed that we do was to write our
20 own specification based on the data that we had been
21 given, and send it back to the City as a counterproposal.
22 Rather than let an order get away, it might be a way
23 of salvaging it.

24 In the end, it turned out that it did.

25 Q Mr. Magruder, would you tell me, please, what the

1 Magruder - direct

2 custom in the electric industry is as to who typically
3 prepares contract specification documents?

4 A Typically, in my business -- and in the electrical
5 industry, for that matter, most other businesses that
6 I have become involved in -- normally the customer
7 who is buying the equipment writes the specifications.

8 Q Why is it so?

9 A Well, -- or, in some cases, they hire a consulting
10 engineering firm who will prepare those
11 specifications for them.

12 Number one, it provides that necessary
13 definition of the equipment and work to be done; it
14 is absolutely necessary.

15 Number two, it provides the specification that
16 can be sent to more than one supplier for competitive
17 pricing.

18 It's a very important aspect.

19 Q What is the danger, if any, when the party who tries
20 to get the contract drafts the specification, --

21 A Well, the danger is --

22 Q -- from the buyer's point of view?

23 A From the buyer's point of view, had I -- my surprise
24 would certainly have been, had I known that I was
25 going to be the supplier, there is a strong temptation

1 Magruder - direct

2 to jack the price up to make sure that you're going
3 to make necessary profits.

4 Q Mr. Magruder, what is the fact as- to whether the
5 City ever prepared specifications, to your knowledge,
6 for the terminal work at the Muny Light end of the
7 69 KV interconnection?

8 A Not to my knowledge.

9 I certainly never saw such specifications.

10 Q Mr. Magruder, before I switch gears on you there:

11 You were about -- you were telling us that you
12 set out to prepare the contract specification.

13 How did you get the information necessary to do
14 so?

15 A Well, along with Mr. January's letter of November 1st,
16 there were a number of handwritten notes that contained
17 data of some of the equipment requirements.

18 I also visited the job site several times to
19 look over the installation; and then I also met with
20 the City of Cleveland personnel to get their comments
21 about what was required, put all that together and
22 prepared our proposal.

23 MR. MURPHY: Kathy, would you
24 hand Mr. Magruder, please, CEI Exhibit 1295?

25 {Ms. Doyle complies.}

Magruder - direct

BY MR. MURPHY:

Q Mr. Magruder, would you please identify the document that has been marked as CEI-1295?

A Yes.

This was our counterproposal sent to the City of Cleveland on December 19th, 1972.

Q Were the specifications that you prepared included as part of your counterproposal?

A Absolutely.

Q What was the date of those specifications?

A December 18th is the date of the specifications, so we sent the quotation letter the next day.

Q Would you describe for us, briefly, what the Westinghouse contract document consisted of?

A It consisted of -- well, the cover letter that Mr. Gary January wrote to the City, and then attached to that cover letter was our specification of the equipment, of the work to be done, and of the terms and conditions of the contract.

Q When you say "terms and conditions of the contract," would you be a little bit more specific about what you mean?

A There are a number of things that we made it a point at Westinghouse to always include with every

1 Magruder - direct

2 quotation to the customer, certainly, every contract
3 that we ever signed.

4 One of those was the terms of payment. We liked
5 to define when we expected to get our money; a very
6 important aspect.

7 We like to define things we were and were not
8 going to be responsible for in the installation of
9 those projects; and a number of other legal
10 attachments that we always included with contracts.

11 Q Mr. Magruder, after transmitting your proposal on
12 December 19th, 1972, when did you next hear from the
13 City of Cleveland?

14 MR. MURPHY:

And, Kathy, would

15 you hand Mr. Magruder CEI Exhibit 1294, please?

16 {Ms. Doyle complies.}

17 A Yes.

18 This was -- this was a letter that I --

19 Q First, identify the letter for us.

20 A This was a letter that we had written the proposal
21 on the 18th of December, and there was a substantial
22 amount of money involved and a nice order for us,
23 I was anxious to get that order.

24 And I talked to Mr. January a number of times
25 to find out where is the contract? How did our

1 Magruder - direct

2 offering -- are we going to get an order and proceed?

3 And, lo and behold, one day I got a letter
4 dated February 5th, 1973 from a Mr. Rego, who is
5 an Assistant Director of Law -- or was at the time --
6 for the City of Cleveland, telling me that our
7 contract or our counterproposal was unacceptable.

8 Q Did Mr. Rego indicate what he was going to do --

9 A Yes.

10 Q -- in light of your contract being unacceptable?

11 A: Yes.

12 He was going to offer a counter counterproposal
13 and, in essence, he says that, "Your proposal is
14 unacceptable and we are in the process of drawing up
15 another contract which we will forward to you
16 shortly."

17 Q What was your reaction upon receipt of this letter of
18 February 5, '73?

19 A My first reaction was I thought: Well, we have
20 lost that order. It's been two months or thereabouts
21 and we haven't gotten an order yet, somebody else is
22 going to get it.

23 I sort of wrote it off, first of all, and
24 unofficially forgot about it, quite frankly.

25 Q Were you pleasantly surprised that you ever received a

1 Magruder - direct

2 redraft of the proposed contract from the City?

3 A Yes, we were.

4 MR. MURPHY: Kathy, would you hand

5 Mr. Magruder CEI Exhibit 1296, please.

6 {Ms. Doyle complies.}

7 THE WITNESS: Thank you.

8 BY MR. MURPHY:

9 Q Would you identify that document, please?

10 A Yes.

11 This is the -- this is the counter counter
12 contract that we did receive from the City of
13 Cleveland.

14 There was a cover letter attached from the City
15 with this contract that's not here, and I think it
16 was about the middle of March when we got this, and
17 it came as a pleasant surprise.

18 Q That's the middle of March, 1973?

19 A Right.

20 Q Mr. Magruder, I'd like you, please, to put in front
21 of you both CEI-1295, which is the Westinghouse
22 proposal of December 19, 1972, and CEI-1296, which
23 is the counterproposal that you received from the
24 City in the middle of March, 1973, and I would like
25 you to tell us, please, how the draft sent by the

1 Magruder - direct

2 City approximately three months after you had sent a
3 draft to the City are different from your draft?

4 A Basically, it doesn't differ at all, it was the same
5 document.

6 The cover pages that came with the contract
7 changed the date at which the contract would become
8 effective. Other than that -- and the price change,
9 it was very important.

10 Q Mr. Magruder, try to be very specific for me, because
11 the letter from Mr. Rego of February 5, '73 says the
12 City was going to prepare a redraft of the contract.

13 Will you tell us in what particulars the City
14 document in mid-March, '73 differ from your document
15 of mid-December, 1972?

16 A Well, in the body of the contract, that is, the
17 definition of the equipment, the work to be provided,
18 and the terms and conditions, it didn't differ at all.

19 The cover page that came with it referred to
20 the ordinance that was passed and various other
21 things that -- there were two dates changed in that
22 portion of it.

23 Q Mr. Magruder, let me ask you, please, to look at
24 CEI-1296, particularly Exhibit A, that which is the
25 letter that Westinghouse sent on December 19, 1972.

1 Magruder - direct

2 Do you find that?

3 A Yes, I do.

4 Q I would like you to look at the second page of that
5 Exhibit A.

6 A Yes.

7 Q Is there a line on the second page indicating
8 acceptance by Mr. Ackmann of Muny Light --

9 A Yes, --

10 Q -- of your proposal?

11 A Yes, there is.

12 Q What is the date indicated when Mr. Ackmann accepted
13 the Westinghouse proposal?

14 A It's very blurred. It's either "1/4" or "1/14/73."

15 Q That is approximately two months prior to the date
16 you got the redrafting from the City?

17 A Yes.

18 Q Mr. Magruder, moving on.

19 Did Westinghouse find the contract that you
20 received in mid-March satisfactory?

21 A Yes.

22 Yes, we certainly did: We wrote it.

23 Q Mr. Magruder, if the City had accepted your draft on
24 or about the date that you sent it in mid-December,
25 '72, was Westinghouse prepared at that time to go

1 Magruder - direct

2 forward on the terminal work at the Muny Light end of
3 the 69 KV interconnection?

4 A Yes.

5 Q Mr. Magruder, upon receipt of the contract, would you
6 describe for us how you proceeded to get the job
7 underway?

8 What did you have to do?

9 A Well, actually, we had very little to do.

10 We had to get the equipment on order.

11 Simply stated, in our proposal that equipment
12 was detailed, so it was just a matter of getting ahold
13 of the suppliers, getting the equipment on order.

14 Q Mr. Magruder, I would like to ask you a series of
15 questions, if I might, describing the actual work that
16 Westinghouse did in a graphic way.

17 Would you mind stepping to the easel --

18 A Okay.

19 {The witness steps to the easel.}

20 Q -- and do a little drawing for us, if you would, --

21 A Okay.

22 Q -- showing schematically what work Westinghouse did, --

23 A Let me show you --

24 Q -- how it fit into the --
25

1 Magruder - direct

2 A Let me show this as simply as I can.

3 If I drew a line through here representing the
4 69 KV transmission line that was existing when I
5 got involved, and it came out and terminated here
6 at a telephone or line pole right at the Muny
7 substation; and if I were to draw a square block
8 here {indicating}, and we always refer to it as a
9 MELP project, and I call that "MELP" and you
10 understand it may have changed since that time.

11 Q A different acronym is used at different times?

12 A Yes.

13 Okay. If I drew a picture and said that this
14 was the MELP power plant and substation combined,
15 what we did -- there was an existing oil circuit
16 breaker, and I will draw that up here {indicating},
17 and I will call that "O" for "oil circuit breaker,"
18 and what we are going to do, we were -- first of all,
19 we will run a line from that existing 69 KV
20 transmission line down to the oil circuit breaker
21 that was already connected to the MELP system.

22 As a matter of fact, that particular breaker was
23 used for another purpose, and what that other purpose
24 was I have forgotten, but we had to disconnect it
25 from what it previously was used for to use it for

Magruder - direct

1 the new purpose, and then we installed this
2 instrument transformer and other protective
3 equipment on this line.
4

5 We put in some current transformers used to
6 detect current flow, and then put in potential
7 transformers, and the symbol is this
8 {indicating}, and that measures the voltage, and
9 then we put in lightning arresters, and the
10 purpose of that is to protect this equipment in the
11 event of a lightning stroke on any of the lines or
12 surrounding substations, and so forth.

13 And there were other things involved that are
14 secondary pieces of equipment, and we had to protect
15 these with fuses and some other things that were not
16 of a direct functional nature.

17 Q Mr. Magruder, have you finished?

18 A No.

19 Q Okay. Go on.

20 A Then we also, inside the powerhouse itself, we put a
21 relay cabinet, and I will call that "R," and then we
22 put in a meter cabinet, and I will call that "M,"
23 and then we ran wires from these cabinets out into
24 the switch yard outside the plant to these devices,
25 and also -- excuse me -- over to the breaker, and we
ran wires over to the oil breaker. So the purpose

1 Magruder - direct

2 of relaying circuitry was to protect this transmission
3 line, this connection, and the MELP system, so it
4 would trip and close this circuit breaker in the
5 event of troubles, and the purpose of a metering for
6 this is to measure the current and power flow and
7 various other metering variables.

8 Now I am finished.

9 Q Overall, Mr. Magruder, what is the function of all
10 of that equipment -- which I hate to suggest to you --
11 but it looks like hieroglyphics from here.

12 Would you describe what the function is.

13 A Okay. Let me back up.

14 I will give a designation of "A" to this, and
15 the metering devices outside, and I will call the
16 relay panels "B," and this would be "C."

17 The purpose of this equipment outside was to
18 detect the power flow, to detect the current and
19 voltage, and to feed those signals back into this
20 equipment.

21 You might say that was the eyes and ears of
22 this brain.

23 The purpose of the oil circuit breaker, that
24 was the device that actually does the switching.
25 In the event of short circuits, that opens that

1 Magruder - direct

2 opens that circuit and clears those problems.

3 The purpose of relaying equipment was to --
4 the relaying equipment all measured currents and
5 detected short circuits or other abnormal conditions
6 like overloads, and it would trip that oil circuit
7 breaker and the metering equipment simply kept
8 track of the power flow, how much in and how much
9 flowing out, and so forth.

10 Q Mr. Magruder, why don't you return to your seat.

11 A Okay.

12 Q Mr. Magruder, in your experience, to what extent does
13 the equipment that I described -- that you described
14 for us at Westinghouse, was it typical in an
15 electrical interconnection?

16 A Yes, it was very typical, and in every interconnection
17 I was ever involved in it had the same kind of
18 equipment to one degree or another.

19 Q Mr. Magruder, without this equipment can an
20 interconnection be operated synchronously?

21 A My answer to that question is that in my
22 professional engineering opinion, to operate a tie line
23 that could be operated synchronously, meaning that
24 there might be generation capabilities on both
25 ends of that line, it would be unsound engineering

1 Magruder - direct

2 practice to operate without that equipment.

3 Q Why is that?

4 A Number one, you could have a short circuit in the
5 transmission line, and if there were not that relaying
6 to trip that oil circuit breaker, it would burn that
7 line down, and there would be no means of
8 interrupting the short circuit.

9 Q Mr. Magruder, the evidence in this case has shown that
10 in about December of 1972, shortly after
11 Westinghouse became involved, the 69 KV line was
12 energized and operated non-synchronously, and did
13 you observe the connection that was made at that time
14 in the course of your work?

5 A Yes, I did.

6 During the time I was out there gathering the
7 data that we previously talked about to prepare my
8 proposal, I was in the switch yard, and I noticed
9 that there was a temporary cable connection between
10 the MELP buss and that 69 KV transmission line.

1 Q Do you have an opinion as to whether the arrangement
2 at that time was prudent?

3 MR. HJELMFELT: Objection.

4 May we approach the bench?

5 THE COURT: Yes.

- - - - -

1 Magruder - direct

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

4 MR. HJELMFELT: Your Honor, there is
5 no foundation. This witness has testified that
6 he had no conversation with any CEI people at
7 all, and there is no showing he knows anything
8 that was attached at the CEI end.

9 He doesn't know what kind of relaying or
10 what kind of circuit breakers.

11 MR. MURPHY: What I will do is,
12 I will ask him, based upon what he observed,
13 and what he observed only, was the operation
14 prudent at the time, and if he can answer that
15 question --

16 THE COURT: He can testify as to
17 his observations, and he can express his opinion.

18 Needless to say, it is subject to credibility
19 brought out on cross-examination.

20 I will sustain the objection as to the form
21 of the question.

22 {End of bench conference.}

23 - - - - -

24 THE COURT: I will sustain the
25 objection as to form, not substance.

1 Magruder - direct

2 of times in light of recent developments, and I
3 think this is a proper current version, Dave.
4 You ought to check it.

5 MR. HJELMFELT: The stipulation
6 already has been read.

7 MR. MURPHY: Not in our part of
8 the case, not by us.

9 MR. HJELMFELT: It was read during
10 Mr. Pofok's cross-examination, I believe.

11 THE COURT: Well, we will read
12 it again. We have read a number of them more
13 than once. Let's proceed.

14 {End of bench conference.}

15 - - - - -

16 THE COURT: Ladies and gentlemen,
17 Stipulation 268 reads as follows:

18 "On September 16, 1980, an Administrative
19 Law Judge of the Federal Energy Regulatory
20 Commission issued his initial decision
21 concerning the proper billing for 69 KV
22 service after an evidentiary hearing had been
23 held before him, at which time employees of both
24 the City and CEI testified.

25 "The Administrative Law Judge found that

1 Magruder - direct

2 the 69 KV interconnection was operated in
3 accordance with Commission orders, and that CEI,
4 therefore, properly billed the City the 69 KV
5 rate prescribed in FPC Opinion No. 644.
6 Further, if one were to assume, arguendo, that
7 the Commission did not prescribe the method of
8 operation for the 69 KV interconnection when
9 the switch was closed, CEI nonetheless operated
10 this interconnection in a prudent manner to
11 preserve the integrity of its system and to
12 minimize the possibility of service interruptions
13 to a much larger number of customers including
14 residents of Cleveland.

15 "It further found that CEI billed the City
16 for such service at rates which are just
17 unreasonable.

18 "The initial decision of the Administrative
19 Judge was affirmed by the Commission on February
20 15, 1981. On April 7, 1981, the Commission
21 denied the City's application for rehearing and
22 oral argument.

23 "On June 5, 1981, the City filed an appeal
24 from the Commission's order to the United States
25 Court of Appeals for the District of Columbia,

1 Magruder - direct

2 which appeal is presently pending."

3 MR. MURPHY: Thank you, your
4 Honor.

5 BY MR. MURPHY:

6 Q Mr. Magruder, I am not certain that I ever received
7 an answer to my question as to whether or not in your
8 opinion it was prudent for the interconnection to be
9 operated in the way it was in December of 1972.

10 THE COURT: He answered that,
11 didn't you?

12 THE WITNESS: I thought that I did.

13 THE COURT: Certainly.

14 MR. MURPHY: Okay. I apologize.

15 THE COURT: Proceed.

16 MR. MURPHY: Kathy, would you hand
17 the witness Plaintiff's Exhibit 3220, please.

18 THE COURT: What number?

19 MR. MURPHY: 3220, a plaintiff's
20 exhibit.

21 {After an interval.}

22 Q Mr. Magruder, would you please describe Plaintiff's
23 Exhibit 3220.

24 A Yes. This is a letter from Mr. Sener of The
25 Cleveland Electric Illuminating Company to Mr.

1 Magruder - direct

2 Ackmann of the City of Cleveland, on February 5,
3 1973.

4 Q What is attached to the letter, please?

5 A There are a list of comments on the specifications
6 that I had prepared on December 18, 1972.

7 Q Now, Mr. Magruder, did the comments come to your
8 attention more or less contemporaneously with
9 February 5, 1973?

10 A Yes.

11 Q Would you tell us, please, what is the fact as to
12 whether those comments ever were incorporated into
13 the final contract document?

14 A They were not incorporated.

15 Q Could you tell us, please, how you know this?

16 A Well, two reasons:

17 Number one, I got that final contract in the
18 middle of March, roughly a month and some days later,
19 and the contract I received in March was exactly the
20 same thing I had written in December and did not
21 include those changes.

22 Q Mr. Magruder, after you received the contract from
23 the City in mid-March of 1973, approximately how long
24 did it take Westinghouse to complete the work?

25 A It took us approximately -- we finished up in early

1 Magruder - direct

2 1974.

3 We basically finished. There were a few odds and
4 ends that remained to be done after January of 1974.
5 It took us approximately ten months, of which eight
6 months of that time was equipment delivery.

7 MR. MURPHY: Kathy, would you show
8 Mr. Magruder Exhibit 88.

9 {After an interval.}

10 Q Would you identify CEI Exhibit 88, please.

11 A This is a letter I wrote to George Pofok of the City
12 of Cleveland, defining our progress and anticipated
13 finish dates as of December 3rd, 1973.

14 Q Does the letter accurately state the status of the
15 terminal work at the Muny Light end at the 69 KV
16 interconnection as of December 3rd, 1973?

17 A Yes, I think it does.

18 We didn't complete it exactly as I defined it,
19 but we were fairly close.

20 We finished early in 1974.

21 MR. MURPHY: I have no further
22 questions.

23 THE COURT: Mr. Hjelmfelt.

24 - - - - -
25

1 CROSS-EXAMINATION OF SAM MAGRUDER
2

3 BY MR. HJELMFELT:

4 Q Good morning, Mr. Magruder.

5 A Good morning.

6 Q I understand you said that interconnections are
7 common in the industry?

8 A Absolutely. We refer to them as tie lines.

9 Q You distinguish -- do you distinguish between a tie
10 line and an interconnection?11 A It is the same thing. Interconnections usually tie
12 two things together.

13 Q Usually two different utilities?

14 A Not always. Sometimes an industrial customer and a
15 utility, and sometimes two industries.

16 Q Sometimes two industries operate synchronously?

17 A Sometimes, particularly if they are in joint venture.

18 Q And they do that because that is advantageous to their
19 operation?

20 A Correct.

21 Q With respect to the drawing that you put up there,
22 am I correct that there would also have been some
23 timing devices?24 A Well, the relays themselves are all inherently timed
25 devices.

1 Magruder - cross

2 Q Were there also additional timers with those relay
3 devices; do you recall?

4 A I don't remember exactly, but I am sure there were.

5 Q And there was also -- there were also some communications
6 equipment installed; is that correct?

7 A Right.

8 Q Do you know when this equipment -- you say it was
9 installed in early 1974?

10 A We finished up early in 1974.

11 We actually began installation sometime in early
12 December or late November.

13 Q And after this equipment was installed, it would
14 permit that interconnection to be operated
15 synchronously; is that correct?

16 A That is right. It would permit it.

17 Q As a matter of fact --

18 A It wouldn't make it happen, but it would permit it to
19 happen.

20 Q That is what it was there for?

21 A Right.

22 Q Now, you talked about it not being prudent to operate
23 synchronously prior to that time; but you don't know
24 what type of relay devices were available on the
25 CEI end; is that correct?

1 Magruder - cross

2 A Correct.

3 Q So you don't know, I take it, who would be at risk,
4 whether it would be the City at risk or CEI at risk
5 in operating synchronously prior to the installation
6 of this equipment?

7 A You mean without that equipment?

8 Q Yes.

9 A I would say that they would both be at risk.

10 Q Regardless of what kind of relaying devices CEI might
11 have had or where CEI's circuit breakers may have
12 been located?

13 A Well, that is -- I am not sure I can answer that
14 question, not knowing anything about the CEI
15 breaker. I can make no statement about their risk.

16 Q Thank you.

17 A I have no idea where that power came from.

18 Q Right. Thank you.

19 Now, the actual installation work was
20 subcontracted, was it not?

21 A Yes, it was.

22 We hired a construction company to assist us
23 under the direction of my engineers to install that
24 equipment.

25 We did not physically do the labor.

1 Magruder - cross

2 Q And that was Colliers Engineering?

3 A Yes.

4 Q And do you recall at one time that Colliers had to
5 pull off the job because the equipment wasn't available
6 to continue the work?

7 A No, I don't.

8 Q Could you identify for me the role that Mr. Gary
9 January played in this contracting?

10 A Gary January was the salesman for Westinghouse
11 Electric Corporation who called on the City of
12 Cleveland.

13 Q And he was the direct contact, the principal contact
14 with the City?

15 A Right.

16 Q How about Mr. Dajuro?

17 A Jim Dajuro was a District Engineer who worked in
18 Pittsburgh, Pennsylvania, with Gary January.

19 Q And what did he do with respect to this project; do
20 you know?

21 A He helped support the field sales power -- the
22 Power Systems Field Sales Organization.

23 Q In what way?

24 A In an engineering fashion.

25 Q And can you be more specific as to what sort of thing

Magruder - cross

1
2 he would do?

3 A I think he helped make sales presentations to
4 customers, and that was his main job.

5 Q Did he assist in identifying the appropriate types of
6 equipment?

7 A I am sure that he did. I do not know the man very
8 well, and I honestly really don't know exactly what
9 he did do.

10 Q Do you know that he was involved in this particular
11 project?

12 A As a matter of fact, he is the guy who helped us in
13 the project, and he derived the relay settings that
14 we essentially set for the protective relay panel.

15 Q Who was Mr. Shatts?

16 A He was one of my field engineers.

17 Q And he worked in your office?

18 A Yes.

19 Q What was his job?

20 A He directed that project for us.

21 Q Is he the one who was out on the job on a daily basis,
22 working with Colliers?

23 A Yes.

24 Q And did he also have any duties with respect to
25 testing the equipment afterwards?

1 Magruder - cross

2 A He didn't do the testing.

3 We sent other people out to do the testing. He
4 may have participated in some of the testing.

5 Q Do you recall that after the equipment was installed,
6 that there were problems with excessive heating of the
7 TD-5 time delay relay?

8 A No.

9 Q Or that you had to correct the wiring on the phase
10 shifters?

11 A I recall we had to do a normal amount of troubleshooting
12 which involved corrective actions.

13 Q But you don't remember the specifics of this job?

14 A I don't recall that they were in the least abnormal.
15 You always have a few things that fail.

16 Q Do you know Mr. Behrand -- what was his function,
17 what was his role in this?

18 A I don't recall. He was involved in the project as
19 well as a number of other engineers in our department.
20 I can't tell you specifically what he did.

21 Q Now, you indicated surprise that shortly after
22 coming to Cleveland, and I take it in November of
23 1972, that -- when did you come to Cleveland?

24 A May of 1972.

25 Q Okay; so you had been here from May to November, and

1 Magruder - cross

2 that is the first time that you heard that you were
3 going to get a contract from the City?

4 A You know, I may have heard in very casual passing,
5 but that is the first official notice that I had of a
6 pending order of that magnitude.

7 Q And up until that time all the contacts were through
8 Mr. January; is that correct?

9 A I don't know that for a fact. There may have been
10 other people involved.

11 Q Some of these other people we mentioned, like Mr.
12 Dajuro?

13 A Possibly.

14 Q And I take it when you received the contract on
15 November 6, when you received this letter from Mr.
16 January on November 1st, you were surprised that your
17 files were so skimpy; is that correct?

18 A Yes. I guess I was.

19 I was surprised that we were going to get a
20 contract based on what had gone on before.

21 Q And ordinarily when a salesman -- when a salesman comes
22 to you with a fairly complete file just before the
23 contract was ready -- or would he come to you fairly
24 early in the process?

25 A Usually fairly early in the process, provided the

1 Magruder - cross

2 customer knew what he wanted.

3 Q So that if the City was going through a period when
4 its requirements were changing, Mr. January may have
5 held off before coming to talk to you?

6 A I would have no way of knowing that.

7 Q That would be a typical situation where he would hold
8 off before involving you?

9 A That would be a situation. I am sure there are other
10 situations that would make him hold off going to this
11 division.

12 Q In any event, he developed a skimpy file at the time
13 he came to you, November 1st?

14 A There was a skimpy file. I don't know if he developed
15 it or someone else.

16 Q Some of the other people that were involved?

17 A Right. There was definitely a skimpy file.

18 Q Okay.

19 Now, you got the copy of the contract November 6th;
20 isn't that correct?

21 A Yes.

22 The first contract from the City of Cleveland, we got
23 that November 6th.

24 Q And at that point you determined it was necessary to
25 draw up a more complete set of specifications?

1 Magruder - cross

2 A Yes, I did.

3 Q And you did that based on the file material available
4 to you, or did you seek more information?

5 A I sought more information.

6 Q And how did you seek additional information?

7 A I visited the job site to look at the equipment
8 myself, and I talked with City people, trying to get
9 their definition of what they wanted.

10 Q Now, had Mr. January visited the job site?

11 A Had he visited prior to my going there?

12 Q Yes.

13 A No, not that I am aware of.

14 Q Had anyone from Westinghouse visited the job site
15 previously?

16 A I have absolutely no way of knowing that.

17 Q There was certainly nothing in the file to indicate
18 that; is that correct?

19 A That is correct.

20 Q And this process took you about a month and a half to
21 develop the specification; is that correct?

22 A That is correct.

23 Q Now, you indicated that there is a problem with
24 letting the supplier prepare the specifications
25 because there is a strong tendency to jack up the price.

1 Magruder - cross

2 Did Westinghouse jack up the price in this case?

3 A Absolutely not. I wish I had known that we were
4 without competition, quite frankly.

5 Q You mean when there is no competition, you can charge
6 higher prices, is that correct?

7 A Let me say this:

8 You don't cut a job to the bone and then sweat
9 losing money.

10 Q So without competition the price goes up?

11 A I would say as a general rule of thumb, if I am a
12 supplier, I am not going to cut my price to the
13 competitive minimum like I might do in a competitive
14 situation.

15 Q That is why we have competition?

16 A Exactly.

17 Q Now, you sent back your counterproposal in December,
18 and then you got a letter saying the City was going
19 to come up with a counterproposal, and then you
20 didn't really know what was going on for a while,
21 and then it was with great surprise that you got the
22 contract; is that correct?

23 A Exactly.

24 Q I take it that during this period Mr. January
25 wasn't having much contact with the City?

Magruder - cross

1
2 A I have no way of knowing. I didn't follow him around
3 all day.

4 Q Did Mr. January work for you?

5 A No. He worked for the Power Systems Division, a
6 separate entity of the company.

7 Q So the sales people were not under you?

8 A No.

9 Q But they had to go to you for help on the contract?

10 A Correct, just like they went to the Breaker
11 Division to buy breakers and to the Transformer
12 Division to buy transformers.

13 Q So your company doesn't organize everything that is
14 focused on a sale in one spot. You break it up into
15 different divisions?

16 A That is correct.

17 Q Did you review Mr. January's cover letter before it
18 went on; that is, the December 19 counterproposal?

19 A Yes, I did review that cover letter.

20 Q And you didn't have any complaints about it?

21 A I did have some complaints about it.

22 Q Were any changes made?

23 A In the cover letter, as a result of my complaints?

24 Q Yes.

25 A Mr. January wanted to write the quotation letter,

1 Magruder - cross

2 and my concern was to insure that we were going to
3 get an accurate project for a reasonable amount of
4 money, and the commercial relationship with the
5 customer in writing the quotation letter to send
6 that proposal was Mr. January's responsibility, and
7 he wanted to write the letter in the way it was
8 written, and that is how it was written.

9 I didn't see anything particular wrong with it.

10 Q You were more concerned with the form than the
11 factual areas?

12 A Yes.

13 Originally we had included -- I remember we had
14 included CT's and PT's.

15 We ended up using existing units that the City
16 had which is fine. It had no change in the
17 functional specifications. Having it come out of
18 the City's warehouse was fine with me.

19 Q And some of the changes were based on requirements
20 by CEI; is that correct?

21 A I have no idea.

22 Q So you don't know whether this final paragraph on
23 the first page by Mr. January is correct where he
24 says "By requirement of the Cleveland Division of
25 Light and Power and CEI, we have requested to add