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Volume 11 (Part 2)

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

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Donheiser - cross

Q You didn't talk to anybody that had either worked for Muny Light during the period of your study or prior to the period of your study; is that correct?

A That's true.

Q You didn't talk to anybody who was in City Council, did you?

A That's true.

Q You didn't talk to anybody at the City Planning Commission, did you?

A That's true.

Q You confined yourself, as you have stated in your report, to reading material supplied to you by Squire, Sanders & Dempsey; is that correct?

A Yes, it is. Or -- may I just add?

Q Yes.

A -- material that we decided that we needed and Squire, Sanders & Dempsey obtained for us.

Q So that you have no first-hand knowledge of whether Mr. Hinchee is a good utility manager or not, do you? First-hand knowledge?

A I think the record speaks for itself.

MR. NORRIS: May I ask that the question be read and that an answer be requested from the witness, please, your Honor?

Donheiser - cross

THE COURT: Read the question
back, please.

{The question was read by the reporter.}

A If I understand the meaning of "first-hand,"

first-hand meaning direct observation of how he
performs, I have none.

Q On page 10 of your report, Mr. Donheiser, you state
that your team formulated preliminary hypotheses
in accordance with the team's reading progress?

A Yes.

Q Is that correct?

A That's correct.

Q That's in Paragraph 7, is that correct?

And when you talked about reading progress, you
had reference to the reading material that you have
already identified, is that correct?

A What page was that?

Q That was on page 10, paragraph No. 7.

A That's correct.

Q Mr. Donheiser, did CEI's lawyers provide you with
any reading material that suggested that Muny Light
might have been properly managed over the last
several years?

A Virtually all the evidence, all the data which we

Donheiser - cross

looked at, pointed to massive failure.

MR. NORRIS: I would request that the answer be stricken and I would request that the witness be requested to answer the question.

THE COURT: The answer may stand.

It is a responsive answer.

Q Is it fair to state, Mr. Donheiser, that your firm never had an opportunity to consider both those points of view, of either proper management quality and effectiveness or mismanagement, prior to your coming to a conclusion? You have never really had a chance to look at both sides of the issue; isn't that a fair statement?

A In most situations that Arthur D. Little would be asked to review, the question of management is really a marginal one. That is, we have a business that is either thriving, losing money but not at a state where it should have been reorganized a number of years ago.

So it's a hard question for me to answer --

Q I'm sure it is.

A -- directly.

Q I'm sure it is.

THE COURT: Let him finish his

Donheiser - cross

answer.

MR. NORRIS:

I thought the witness

was through.

A I would like -- Could that question be restated?

THE COURT:

Restate the question.

Q Let me put it this way, Mr. Donheiser.

Isn't it true that the kind of assignment that your team received in this situation was quite different from the normal management review assignment that Arthur D. Little received where there are no personal interviews, where you are instructed to look at a printed record and try to form a judgment about management effectiveness? Isn't that a very unique kind of assignment in your experience at Arthur D. Little?

A Yes, it is a unique experience.

Q Didn't you actually focus on mismanagement to the exclusion of management?

A The vital signs of MELP were, from a business standpoint, in a business management standpoint, were gone.

Q Mr. Donheiser, I will try to ask the question again, but may I direct your attention to page 11 of your report, Paragraph No. 9, the first sentence

Donheiser - cross

states:

"How does the Arthur D. Little approach to mismanagement compare with what the literature of management or public administration suggest."

Did I read this correctly?

A Yes.

Q Isn't it a fact that your focus was on mismanagement instead of management; isn't that a fair statement?

A No. We looked at planning.

Now, it turns out that they planned but couldn't implement. We didn't turn the proposition around. We had to look at criteria like planning, and based on how they performed against these criteria we were able to make a judgment.

Q All right, let's go into that. On page 1 of your report you state that "Any organization which formulates plans for anticipating future needs and then repeatedly ignores those plans is guilty of mismanagement."

Is that a fair statement of what you said?

A Well, I say "It is thoughtlessly placing the organization's future in peril," yes. Yes.

Q Did I read your words correctly?

A Yes. Yes, sir.

Donheiser - cross

Q Now, the plans that you are having reference to, that you say Muny Light repeatedly ignored, those were the capital improvement programs of the City Planning Commission, weren't they?

A That was the wish list of MELP.

Q Well, excuse me --

THE COURT: Just a minute.

A The City Planning Commission did not originate those requests.

Q I understand that.

But do you know, Mr. Donheiser, what the capital improvement program really is in the City of Cleveland?

A What it is or ought to be?

Q I asked the question:

Do you know what it is?

A I think -- haven't I answered that question before?

Q Well --

A All right.

Q Not to my satisfaction.

Do you know what it is?

A Well, it is a mechanism by which an agency like MELP can bring its needs to the attention of its board of directors, the City Council.

Donheiser - cross

Q Well, Mr. Donheiser, isn't it a fact that every division of City Government and every department in City Government did the same thing MELP did and they came in with a wish list that found its way, after City Planning Commission involvement, into the capital improvement program; isn't that a fact?

A I didn't study the capital requests of other agencies.

Q So you don't know, do you, in answer to my question?

A Could you restate the question?

MR. NORRIS: If the Court would ask the reporter to read it back.

THE COURT: Read the question back.

{Record read.}

THE COURT: If you know.

A I don't know.

Q The chart that you had up on the screen that showed the -- excuse me. Let me get that.

MR. LANSDALE: Do you want that on the screen?

MR. NORRIS: No. I'm afraid I don't have that.

Yes, Jack, could I borrow that?

MR. LANSDALE: That one?

Q Mr. Donheiser, on the overhead screen is CEI Exhibit

Donheiser - cross

520, and I believe you were describing the history of the 85 megawatt unit and you stated that the unit was not implemented for a very long period of time.

Would you identify which bar that is that you are talking about?

A The period in which it was not implemented?

Q No. Which bar is the one that you are referring to?

A The top bar.

Q The top bar.

What do you see for the years 1962 and 1963 on your chart?

A It is blacked out.

Q That means this is another year where there was no activity of any kind with respect to that unit, is that correct?

A No physical activity.

Q It is a fact, isn't it, that there was engineering work done in 1962 on that big unit, is that right?

MR. LANSDALE: You say '66?

MR. NORRIS: '62.

THE COURT: '62.

Q Is that right?

A Yes, sir.

Q There was work done with respect to financing that unit

Donheiser - cross

in 1963, wasn't there?

A Yes, sir.

Q Now, this representation on CEI Exhibit 520 you have drawn from the capital improvement program, is that correct?

A Yes, sir.

Q In the view of a management consultant, is it appropriate to analogize the capital improvement program to a long-term capital budget that might be utilized in private industry?

A Yes.

Q Long-term capital budgets are quite customary in private industry, aren't they?

A They are.

Q Is it also customary that long-term capital budgets are amended from time to time?

A What is customary in a corporate capital budget is that a good portion of the projects which are listed get implemented. It is absolutely true that it gets amended.

What is striking here is the fact that MELP really didn't implement virtually any of the programs which it needed to.

Q What happens to the capital improvement program after

Donheiser - cross

it is passed by the City Planning Commission?

A Well, in the '60's, evidently a hearing was held. Prior to that, I'm not sure. I think they may have passed it directly on to the City Council.

Q Well, now, what is the Mayor's estimate, Mr. Donheiser?

A The Mayor's estimate is the -- that is the operating budget.

Q Well, at what time, Mr. Donheiser, did City Council approve the capital improvement program, if you know?

THE COURT: In what time frame?

Annually or at this time span up here?

Q During the 12-month time frame of any given year, when did City Council approve the capital improvement program?

A I don't know the month that they approved the capital improvement program.

Q But City Council approved the capital improvement program at some time during the year; is that your testimony, if you know?

A I don't know.

Q Isn't it a fact that the Planning Commission made no attempt to bring in the capital improvement program within the available funds that the City had

Donheiser - cross

to use for capital? Isn't that a fact?

A I'm not aware of it.

Q Isn't it a fact that the provisions for Muny Light in the capital improvement programs were neither realistic nor attainable for Muny Light?

A In one case that I can think of, the answer to that is true, and that was the --

Q That they were unattainable, you mean?

A I can only think of one case where that was so, yes.

Q What was that case?

A That was the proposition that -- and this occurred in the '70's, when MELP was in financial straits. It was suggested that the City purchase CEI's property in Cleveland.

Q Well, now, in 1965 that was one of the years for which you studied the capital improvement program, wasn't it?

A Yes.

Q Would you agree that in that year, the City Planning Commission's capital improvement program included \$5,138,000 for Muny Light in that capital improvement program?

A How much, sir?

Q \$5,138,000 for Muny Light projects. Would you agree.

Donheiser - cross

with that?

A I will accept it.

Q Do you have any idea what the City Council finally appropriated in its appropriation ordinance for Muny Light capital programs in that year, sir?

A I don't.

Q Would you be surprised to learn that when City Council, the Board of Directors of Muny Light and you have characterized them, passed the appropriation ordinance in 1965, instead of having \$5,138,000 for capital projects for Muny Light, it had less than a third of that, about 1-1/2 million dollars? Would you accept that?

A I believe that is probable, yes, sir.

Q What about the year 1969? Have you got any idea of the amount of money of Muny Light projects that were in the capital improvement program compared with what actually got passed by City Council in the appropriation ordinance? Do you have any idea at all?

A No, I do not.

Q Would you accept the proposition that in the capital improvement program in 1969 there were \$2,613,000 of Muny Light programs? Would you accept that, subject to check?

Donheiser - cross

A Yes.

Q Would you also accept, subject to check, that when City Council passed its appropriation ordinance to run Muny Light that only 17 percent of that amount or \$443,650 was included for capital projects for Muny Light? Would you accept that?

A Yes.

Q Would you also agree with me, sir, that when City Council passed its appropriation ordinance that at that point those capital programs were realistic and were attainable by Muny Light?

A I certainly can't answer yes to that.

Q Would you agree that once the funds were appropriated by City Council, then Muny Light had something more than a wish list to work against? Would you agree with that?

A Could you rephrase that question?

Q Would you like to have it read back to you?

A I would prefer to have it rephrased but --

THE COURT: He says he doesn't understand it. He would like to have it rephrased, Mr. Norris.

Q Mr. Donheiser, is it good consulting practice to measure management performance against realistic and

Donheiser - cross

attainable goals rather than against wish lists?

A This wish list was essential to survival.

MR. NORRIS: May I interrupt you, please, and ask the Court for a direction? That is a question that I believe can be answered yes or no. As an expert --

THE COURT: Just a minute, Mr. Norris. You know what the procedure is. Why don't you adhere to the procedure?

Ladies and gentlemen, let's take a short recess. It's about that time. Please adhere to the admonitions.

{The jurors left the courtroom.}

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THE COURT: Approach the bench.

{Bench conference ensued on the record as follows:}

THE COURT: Are we going to start this procedure all over again? Now, what have my instructions been to you throughout this trial?

MR. NORRIS: I apologize.

THE COURT: Don't apologize. What are my instructions?

MR. NORRIS: No dialogue with the

Donheiser - cross

witness.

THE COURT: Why don't you adhere to it?

MR. NORRIS: I was angry and I apologize, your Honor.

THE COURT: Now, the question I would like to ask is what has been the materiality of this examination of this witness for the last 20 minutes?

MR. NORRIS: The materiality is that the witness doesn't know what he's talking about.

THE COURT: Well, I don't know how you arrive at that conclusion. All I know is that the thrust of his testimony is that MELP Has been mismanaged and it has had what he characterizes as a wish list that has never been capable of implementation.

You spent the last 15 minutes here proving that it couldn't be implemented because of some business with Council.

What has that got to do with the main thrust of his testimony? That's precisely what he testified to. Does it make a difference whether it was the inability to implement the wish list was the

Donheiser - cross

1
2 fault of the Commissioner of MELP or the failure
3 of Council to provide funds, or whatever? That's
4 what I have been having difficulty understanding
5 and following in your cross-examination.

6 Of course, there has been no objection. I
7 don't know why there hasn't been any objection.
8 This is completely immaterial.

9 MR. LANSDALE: Because I kept thinking
10 it was helping.

11 THE COURT: I can see that. That's
12 the very thrust of your argument.

13 MR. LANSDALE: Yes, sir.

14 MR. NORRIS: Well, your Honor, this
15 man is supposed to be a management consultant.
16 He has virtually no credentials to carry out the
17 kind of assignment he has been asked to carry out
18 here. He is making judgments that are not
19 professionally supported. He is making judgments
20 that he has never had experience in making before
21 and good management consulting practice that he
22 agreed to at the beginning of my --

23 THE COURT: Mr. Norris, you know,
24 I'm going to tell you something. At the conclusion
25 of all of the evidence in this case you are going

Donheiser - cross

to be permitted to argue to the jury as to this fellow's qualifications or lack thereof and the qualifications or lack thereof of every other expert that's testified here. It's not for me to judge beyond the fact that he has presented credentials that support conclusions.

My only question to you was what has been the materiality of all the examination, and you still haven't answered that question.

MR. NORRIS: I was trying to, your Honor.

THE COURT: Why don't you address it instead of taking me off on tangents like you always do?

MR. NORRIS: Well, I am trying to, your Honor.

THE COURT: Like I keep telling you, when I ask you a question, I would appreciate an answer instead of trying to take me off on a tangent.

MR. NORRIS: I'm not trying to take you off on a tangent.

THE COURT: That's been tried by more experienced people than you.

Donheiser - cross

MR. NORRIS: I am not trying to do that.

THE COURT: All right.

MR. NORRIS: But this man is not the expert he presents himself as and my questions are designed to let the jury see that, and it's a credibility question.

THE COURT: If it's a credibility question, my only comment is it's a very unique way of attempting to attack credibility because the line of questioning that you pursued for the last 15 minutes had no bearing whatever, at least in my humble opinion, both upon credibility --

MR. NORRIS: Credibility as an expert, because he testified at the outset of the cross-examination that he agreed with certain basic management principles that he is violating in terms of trying to judge Munny Light --

THE COURT: Mr. Norris.

MR. NORRIS: May I finish, your Honor?

THE COURT: No, because I am not interested in the rest of your argument. Do you know why? Because you are not responding to my

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Donheiser - cross

question again.

I am not talking about what he started out testifying to. I agree perhaps the first part of your cross-examination went to credibility. I could well understand that. What I am asking you about is the materiality of this last 10 or 15 minutes.

MR. NORRIS: Because he's making a judgment comparing performance to principle and the plans he's trying to hold MELP up to are plans that --

THE COURT: -- that they couldn't perform, according to your cross-examination that under no circumstances could have been implemented.

MR. NORRIS: It's like every other department in City government.

THE COURT: And that's another thing I wanted to discuss with you. You may very well have opened up the door by those questions, the same as your associates on the defense may have opened up the door as to another area of examination, as to the materiality of evidence of inefficient operation of departments other than MELP, because you have now brought into issue

Donheiser - cross

whether or not all departments of municipal government are operated on the same predicate, which, of course, makes my job a little more difficult here because I had just finished writing an opinion ruling out a certain line of examination.

Has that been issued? It should have been issued. I don't know if the parties have read it.

But you may have very well opened the door -- I don't know; I will have to read the transcript -- just as, as I say, the defense may very astutely have done the same thing.

MR. LANSDALE: We have reviewed the record, your Honor, and we think not, but that's the argument.

THE COURT: Well, fine. Okay.

{End of bench conference.}

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{Recess taken.}

THE COURT: Bring in the jury.

You may proceed, Mr. Norris.

BY MR. NORRIS:

Q Mr. Donheiser, if Muni Light needed a capital improvement, it could go directly to City Council

Donheiser - cross

without going through the City Planning Commission, couldn't it?

A That is my understanding, yes. That was an informal approach as opposed to the more formalized CIP.

Q But just as valid they could go directly to City Council without going through the CIP process, is that correct?

A Yes.

Q You said that with respect to the Tri-Cities interconnection, I think you said "So they planned on doing this." But are you aware of the fact that the Mayor of the City of Cleveland was never agreeable to that Tri-Cities interconnection? Are you aware of that?

A Yes, I am aware of it. But I am also aware that the Tri-Cities interconnection persisted through the '60's, it was dropped, but was reinstated in the capital improvement program.

Q Do you think there would be any chance of the Tri-Cities interconnection actually being implemented if the Mayor was opposed to it?

A I am not familiar with the politics of Cleveland.

Q Addressing your attention to Exhibit 51b. I have put that on the overhead screen.

Donheiser - cross

It is your testimony, is it not, that this is your representation of the lag between planning and implementation, is that correct?

A No.

Q It is an explanation of how the planning implementation lag is crucial to understanding the condition which the -- the catastrophic condition in which MELP eventually found itself.

Q Now, in your report you stated that you could find no evidence of CEI contributing to Muny Light's what you have called failure cycle in generation; is that correct?

A That is essentially correct, yes.

Q Now, one of the key elements in this circle is the deferring of routine maintenance; is that correct?

A Yes.

Q Would you agree that a permanent interconnection, had it been in operation in 1973, would have improved Muny Light's operation?

A I don't know the answer to that, and I don't think anyone else does. But I do know that Burns & Roe, who was their consultant, advised them that they shouldn't have a synchronous interconnection in 1968.

Q You are saying that you don't know the answer to the

Donheiser - cross

question of whether or not a permanent interconnection would have improved Muny Light's operation? Is that your testimony?

THE COURT: He just answered the question, Mr. Norris.

Q Was it competent planning, Mr. Donheiser, for Muny Light to seek a permanent interconnection with CEI in 1971?

A Was it competent planning to seek an interconnection with CEI?

Q In 1971.

A They should have sought a connection with someone, yes.

Q Was it competent planning for Muny Light to seek PASNY power in 1972 and 1973?

A It might have been even better if they would have sought and implemented a plan to get PASNY power in 1958 or '59.

Q What about the answer to my question? Was it competent planning to seek PASNY power in 1972 and '73?

A PASNY power is preference power. It comes in at a lower rate. Certainly.

Q Was it competent planning for Muny Light to seek wheeling from CEI in 1973?

Donheiser - cross

A If I understand these questions, you are asking me to comment on examples of competent planning at a time when Muny Light had already failed.

It is our thesis that the implementation follow-up was inadequate earlier on. It isn't so much an indictment of Muny's planning. It is the follow-up.

Q Mr. Donheiser, you have testified that it was competent planning for Muny Light to seek PASNY power in 1972 and 1973.

Was it not also competent planning for Muny Light to attempt to get wheeling to bring that power into the City of Cleveland?

THE COURT: When, Mr. Norris?

Q In 1973.

A I suspect they should have done it earlier. So I don't know. I can't really say that that was an example of competent planning.

Q Now, you have drawn your conclusions, I believe, at least from reading your report, that Muny Light was the victim of its own mismanagement, and you based that principally upon the operating results and the financial results that you have been exposed to; is that correct?

A And the reports of how MELP was unable to supply its

Donheiser - cross

customer base with a reliable source of power.

Q Well, now, with respect to the financial results and the operating results, is it theoretically possible that external factors over which Muny Light had no control could have contributed to hurting Muny Light's operating results and financial results?

A Yes, and we said that political factors operating through the Council undoubtedly did have an effect financially.

Q Now, Mr. Donheiser, if a large number of Muny Light customers were paid substantial sums of money to switch from Muny Light to CEI and, as a result of that, Muny Light lost \$1 million a year in revenue, this would hurt Muny Light's operating results, would it not?

MR. LANSDALE: Object.

THE COURT: Approach the bench.

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{Bench conference ensued on the record as follows:}

MR. LANSDALE: This is clear beyond the scope of the direct. It's clearly argument.

MR. NORRIS: He has based his testimony, your Honor, in part upon the operating

Donheiser - cross

1 results and the financial results, and it is not
2 beyond the scope of the direct because there are
3 lots of other factors that could have an impact
4 on those results over which Muny Light had no
5 control.
6

7 THE COURT: Why don't you ask the
8 question then, "What other factors"?

9 MR. NORRIS: I did, and I got a
10 speech.

11 THE COURT: I don't recall you
12 asking him that question.

13 MR. NORRIS: Well, it's cross
14 examination --

15 THE COURT: I understand that.

16 MR. NORRIS: I don't want to --

17 THE COURT: But, Mr. Norris, I
18 don't think you fully understand cross-examination,
19 or perhaps I don't. I don't know. Yes, you are
20 permitted a broader latitude in cross-examination,
21 but this business of trying to place a characterized
22 question before the witness and then precluding
23 him from explaining the answer is improper and
24 that is precisely the style that both you and
25 Mr. Weiner have followed throughout this trial.

Donheiser - cross

Now, I indulged it, initially, during the plaintiff's portion of this case, but you will recall that I told you that I would not permit it any further when we had our last discussion about your style on cross-examination and your failure to adhere to the Court's admonition.

Now, all I am asking you to do is to ask proper questions, and you are not asking proper questions. Now, if you want to take a lesson from Mr. Hjelmfelt or Ms. Coleman, perhaps that would be of assistance to you, but you are not asking proper questions.

MR. NORRIS: Your Honor, I have asked this witness whether or not the deprivation of \$1 million a year could have an influence on the operating results.

THE COURT: No, that was not your question at all. You know what your question was? Highly improper, characterized. And there is nothing in the evidence to show that CEI paid anybody any money. If there is, perhaps I have missed it.

Read the characterized question back.

{The reporter read as follows:

Donheiser - cross

"Q Now, Mr. Donheiser, if a large number of Muny Light customers were paid substantial sums of money to switch from Muny Light to CEI and, as a result of that, Muny Light lost \$1 million a year in revenues, this would hurt Muny Light's operating results, would it not?"

THE COURT: You show me any evidence any place where that question is supported by any fact.

MR. NORRIS: There is no evidence that there were direct payments.

THE COURT: All right.

MR. NORRIS: I agree with you.

THE COURT: All I am telling you to do is to ask proper questions.

MR. LANSDALE: May I make another comment?

THE COURT: Yes.

MR. LANSDALE: The part I object to as well and that is to say that the deprivation of \$1 million a year has effect on the operating results but it's argumentative to suggest as to the reason. It has nothing to do with the case and I object on that ground.

Donheiser - cross

THE COURT: I sustained the
objection.

{End of bench conference.}

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THE COURT: Sustain the objection.

BY MR. NORRIS:

Q Mr. Donheiser, would you direct your attention to
Plaintiff's Exhibit 2579 which is on the easel to your
left?

This exhibit shows CEI's cumulative revenue gains
from customers which left Muny Light as a result of
what is known as CEI's Muny Displacement Program.

Can you see that exhibit from where you are
sitting?

A Yes.

Q Addressing your attention to a period from 1956 to
1974, the revenue gains that are shown on that
exhibit from the Muny Displacement Program approximate
\$3 million in estimated annual revenue, if you will
address your attention to the vertical axis on the
left of the exhibit.

You see what I am referring to?

A Yes.

Q My question, Mr. Donheiser, is that since whatever the

Donheiser - cross

revenue gain for CEI would have been during this period from 1966 to 1974, since Muny Light annual revenues would have been reduced by a like amount, did you take that factor into consideration in reaching your conclusions that Muny Light's operating and financial results proved that Muny Light was mismanaged?

A We believe that customer loss occurred because MELP was unable to provide reliable service and did not have the capacity and customer loss was a natural event.

Q If there were a large loss of revenue by Muny Light over which Muny Light had no control, that certainly would affect the operating and financial results of Muny Light, would it not?

A But we believe that can be traced to mismanagement.

MR. NORRIS: I would ask that the witness be requested to answer the question, your Honor.

THE COURT: No. The answer may stand, Mr. Norris. It is precisely what we discussed here at the side bar.

Read the question back and read the answer.

{Record read.}

Donheiser - cross

BY MR. NORRIS:

Q Is it your testimony that it would affect the operating result?

A They couldn't serve this people, and that lack of service was attributable to the planning implementation lag which I discussed previously.

Q How do you know they couldn't serve these people if they were serving them?

A Because their capacity as measured by firm capability was not sufficient to meet their peak demands.

Q Are you aware that when the Muny Displacement Program was eliminated by CEI that there was an immediate migration of customers back to Muny Light in the next year; are you aware of that fact?

A I am aware that there were some minor shifts of customers back and forth, yes.

Q In 1973, Mr. Donheiser, the net gain that CEI experienced was 255 customers. They stopped their program in the middle of 1973, according to the testimony that is in this case, and in the very next year CEI no longer had a net gain, it had a loss of 63 customers, and the swing from 255 plus minus 63, would you consider that a significant shift?

Donheiser - cross

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2 A I would not. I think it is perfectly explainable in
3 light of the fact that MELP had lower rates and
4 particularly were constrained -- that they denied
5 themselves the capacity to pass through higher fuel
6 costs and their rates were lower. So at some time
7 it is possible that you could get a shift like that,
8 particularly in the early '70's.

9 Q Would you agree that was a significant shift?

10 A I would say that shift is very insignificant in
11 explaining the condition in which MELP found itself.

12 Q Are you aware during 1970 and 1971 that Muny Light
13 was able to receive load transfer service from CEI
14 without any requirement that Muny Light have all of
15 its units in operation?

16 A Would you read the question?

17 THE COURT:

Read the question

18 back, please.

19 {Record read.}

20 A No.

21 Q Are you aware, Mr. Donheiser, that after May, 1972,
22 for approximately a four-year period, Muny Light was
23 unable to obtain maintenance power from CEI? Are
24 you aware of that fact?

25 A Yes.

Donheiser - cross

1
2 Q In your professional opinion, could the inability of
3 Muny Light to obtain maintenance power have an impact
4 on its operating and financial results?

5 A I believe that by the time frame that you are
6 discussing now, the die was cast and that so much
7 damage had been done that these questions are
8 rather minor.

9 Q You didn't take that into consideration in arriving
10 at your conclusions, did you?

11 A We took it into consideration.

12 Q Show me in your report where you took into
13 consideration the fact that Muny Light was unable to
14 get maintenance power from May, 1972 forward. Please
15 show me in your report where you took that into
16 consideration.

17 A We don't think that is essential in explaining
18 MELP's mismanagement, and it is demonstrated failure
19 here.

20 Q You stated that you took that into consideration. I
21 would like to ask --

22 A Yes, we considered it and we decided that was not
23 important.

24 Q Is there anything in your report that so indicated?

25 A No. That was a discussion.

Donheiser - cross

Q Addressing your attention to Plaintiff's Exhibit 2823, which is on this easel, it represents Muny Light's operating history during 1972. Can you see that, Mr. Donheiser?

A Barely.

Q Well, addressing your attention to the dark-red blocks, this set of blocks indicates the operation, the on times of the gas turbines.

You are familiar with the gas turbines, aren't you?

A Yes.

Q The top block indicates the on times during 1972 of the big units.

Are you familiar with that?

A Yes.

Q And this block in here represents the on times of Boilers 1, 2, and 3 and then Turbines 8, 9, and 10.

So I'm asking you to address your attention to the dark-red blocks in Plaintiff's Exhibit 2823.

A This is the gas turbines?

Q That is right.

A Yes.

Q Now, would you agree that the gas turbines, from your study of the literature in this matter, were purchased

Donheiser - cross

originally to be peaking units?

A Yes, that is correct.

Q Would you agree from the pattern of on times in the year 1972, that the gas turbines were certainly not operated as peaking units? Would you agree with that?

A They were not operated solely as peaking units because the condition of the plant, 53rd Street in particular at this point, had deteriorated and they did not have sufficient reserves to do anything but rely so heavily on gas turbines.

Q What units were operating at East 53rd Street in 1972, Mr. Donheiser?

A To my knowledge, none.

Q And as a matter of fact, if you will address your attention to the months of April, June and October in 1972, during the periods that the big unit was down, the gas turbines were operated virtually as base load equipment, weren't they?

A Yes, and that just illustrates not only the fact that 53rd Street was down, but that Lake Road had severe boiler and turbine problems as well.

Q Would you agree, Mr. Donheiser, that during 1972, had Muny Light been able to obtain maintenance power, that it might not have had to have operated its gas

Donheiser - cross

turbines as base load units when the big unit was out of service? Would you agree with that?

A It might have become solely a distributor of electricity.

MR. NORRIS: I would ask that the answer be stricken as being unresponsive and ask that the witness answer my question, your Honor.

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

{The last question and answer were read by the reporter.}

THE COURT: That is responsive, Mr. Norris.

Q Operating those gas turbines as base load units contributed to hastening their wearing out, didn't it, Mr. Donheiser?

A Oh, it contributed to a variety of things, part of which was their operating expenses for fuel, and it tightened the financial noose substantially.

Q What about the wearing out of the equipment? Do you agree that operating these kinds of combustion turbines as base load units --

A Of course. But they should never have been in that position, and that position was the result of what happened in the '50's and '60's.

Donheiser - cross

Q Addressing your attention to Plaintiff's Exhibit 2624, Mr. Donheiser, that shows the operations for the year 1973. Can you see that from there?

A Yes, I see it now.

Q Now, the evidence in this case is that Muny Light's big unit had increasing difficulty as time went on.

Let me ask you this question. Had Muny Light had a parallel interconnection in operation during 1973, would that fact have had any impact at all on Muny Light's operating and financial results for 1973?

A I think that is a loaded question. If they could have gone to straight distribution at this point, they might have lost a lot less than they did lose.

Q It's a fact, isn't it, that the lack of a permanent interconnection contributed materially to the continued wearing out of Muny Light's equipment? Is that not a fact?

A I would not accept that. I would prefer to explain it in some other way.

Q Isn't it also a fact that CEI's requirement that before load transfer service could be supplied, Muny Light had to have all of its operating equipment on line, isn't that a fact that that contributed to

Donheiser - cross

the operating and financial results in 1973?

MR. LANSDALE: Object.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: The requirement to operate equipment was a requirement of the Federal Power Commission order and I object to your argumentative characterization as to the reason.

MR. NORRIS: It was only --

MR. LANSDALE: If counsel would ask the questions in place of proceeding with argument, we would get along better.

MR. NORRIS: It was only a requirement with respect to emergency service. There was no obligation, there was no impediment upon CEI to continue to give the same kind of maintenance power after 1972 that it did before, and that was at your own election that you would not provide that.

MR. LANSDALE: I stand on my objection. The question is objectionable and

Donheiser - cross

improper because it is argumentative, and I object to it.

THE COURT: Well, gentlemen, as the witness has pointed out, he is having difficulty answering your questions, Mr. Norris, because of his previous answers, and this again goes back to what we discussed up here before.

This witness has testified at least three times that questions that you are directing to him in a time frame of 1972 and 1973 are really irrelevant as far as his testimony is concerned because his testimony is, at least on three previous occasions, that by that time MELP was in such bad condition because of poor management during the 1950's and 1960's that it really didn't make any difference and it didn't have that much impact, that it was insignificant.

You are trying to take these questions with your questions out of context and this is an improper way to do it.

MR. NORRIS: I think the witness is --

THE COURT: If you want to persist in this type of questioning, even though I have

1 Donheiser - cross

2 told you to desist, I am just going to let him
3 explain every answer. So it's your election, sir.

4 MR. NORRIS: Well, I object to the
5 conduct of the witness. I think the witness is
6 being cute.

7 THE COURT: These are the facts of
8 life. Unfortunately, when you are trying a lawsuit
9 there are many times when you get answers that you
10 don't like, but if you ask the question, you are
11 stuck with the answer.

12 Now, again, I have watched this witness. I
13 see nothing in his demeanor. He is trying to
14 answer your questions and there is nothing that
15 reflects upon his credibility to me.

16 Now, as I say, you may not like his answers
17 but perhaps if you ask proper questions, you may
18 get better answers. I can't help it that you
19 insist on following this practice and procedure.

20 MR. NORRIS: Well --

21 THE COURT: You haven't followed
22 my instructions, incidentally, throughout this
23 entire trial. So go ahead.

24 Read the last question back to him.

25 You have this propensity, Mr. Norris, if

Donheiser - cross

something comes out contrary to your thinking, you immediately point a finger and accuse the witness. You have done that two or three times in this case.

MR. NORRIS: And I think when I have done it, it has been with justice.

THE COURT: That may very well be your opinion, Mr. Norris, but it certainly has not been apparent to me.

MR. NORRIS: That is my opinion.

THE COURT: Well, fine. You are entitled to your opinion. It's a free country.

{The last question was read by the reporter.}

THE COURT: Sustain the objection. That is not a precisely accurate question supported by the facts in this case.

Let's proceed, gentlemen, please.

{End of bench conference.}

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BY MR. NORRIS:

Q Mr. Donheiser, you drew attention in your direct testimony to the delays that Muny Light experienced in the planning for its big unit. I believe you pointed to a stretch of years of when the unit was

Donheiser - cross

still in the planning stage, but it had not yet been constructed and not yet commenced.

Is this something that you have experienced in the electrical utility industry in your experience, not just Muny Light, but other companies had the matter of slipping construction programs from time to time?

A In the case of Muny Light, the slippage was -- had catastrophic results. Ordinarily one doesn't see the results of project slippage so graphically and so dramatically as we were able to see by looking at the reports.

Q Have you looked at the CEI records with respect to some of its units that have slipped in the last four or five years?

A No.

Q Are you aware of the fact that in CEI's 1974 annual report the Perry unit out east of Cleveland was scheduled to be in service in 1980 for Unit No. 1 and 1982 for Unit No. 2?

A I don't know the specifics of it. But I do know that CEI must have done contingency planning which enabled them to provide service on an uninterrupted basis, and that's a major difference between CEI and MELP.

Donheiser - cross

Q Are you aware, Mr. Donheiser, that with respect to CEI's plans for the Perry unit, that by the 1977 annual report the Unit No. 2 had been slipped another year; are you aware of that?

A Again, CEI was providing service to MELP today, so it must have done some contingency planning which enables it to offset any slippage like that.

Q Mr. Donheiser, we had talked about the Muny Displacement Program a little while ago. Was any material with respect to that presented to you by CEI's lawyers for your study?

A Would you read the question?

THE COURT:

Read the question

back, please.

{Record read.}

A We were aware -- yes.

Q What material was submitted to you with respect to the Muny Displacement Program?

A We had numbers on -- CEI supplied some numbers on customer loss.

Q Do you remember were those CEI memos that were supplied to you?

A I believe so. But we were able to get MELP's side of that picture as well and we didn't only rely on

Donheiser - cross

CEI, although there is a reference in my report to the CEI numbers.

Q Where is that reference, please?

A In the reports?

Q Yes.

A It is in connection with a table, a very short table that we have, and it really was included for illustrative purposes.

Here it is, Table 15.

However, I would like to add --

Q Excuse me just a minute. Would you tell me where --

A Table 15, page 67.

We also had in our possession the Bergman-Gaskill report which contained MELP's view of this.

Q Table 15 talks about customer shifts from 1967 forward.

Did you have any information with respect to customer shifts prior to that time?

A I have seen some information, yes.

I recall seeing it.

Q Would you think that customer shifts that occurred in the period from 1967 to 1971 could have contributed to a worsening financial picture for Muny Light?

A Yes. But they didn't cause it. I think that we have got to shed out cause and effect here. I think this

Donheiser - cross

is an effect not a cause.

Q Mr. Donheiser, you had put Figure 4 in your report dealing with the failure cycle on the financial side, and as I recall your report and your own testimony, you were suggesting that the limited external financing, the insufficient reinvestment, the service deterioration, all of those things contributed to customer loss.

Would you agree that the elimination of the Munny Displacement Program might have reduced some of the customer loss that you have depicted on this chart?

A I don't know. If so, it was minor.

Q When was East 53rd Street shut down, to your knowledge?

A It was shut down in dribs and drabs in the late '60's.

Q Do you know when it was finally shut down, finally?

A Well, I think that 1970 is about the last year that we have any indication that any hours were put on any of the generators. That is my recollection. But that is based on the information I think that we received on turbine hour use, utilization.

MR. NORRIS: Would Mr. Schmitz

hand the witness Plaintiff's Exhibits 144 and 1772.

Q Am I correct, Mr. Donheiser, that the material listed on page 109 of your report, Appendix C, sets forth the

Donheiser - cross

CEI documents and the other materials upon which you relied in reaching your conclusion?

Is that correct?

A No. I don't recall seeing these particular documents.

Q You did not take these documents, therefore, into consideration in reaching your conclusions; is that correct?

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: The witness said he didn't see the documents. I object to asking him repetitious questions and putting in argument.

THE COURT: Overruled.

{End of bench conference.}

- - - - -

THE COURT: Overrule the objection, although the answer is obvious if he didn't see the documents.

Did you take them into consideration in your report?

THE WITNESS: No, your Honor.

Q Mr. Donheiser, were you aware of the fact that during

Donheiser - cross

1972 and 1973, CEI's objective was to obtain at least 10 times as much revenue in Muny Light conversions as it lost from conversions of CEI customers to Muny Light?

A It is not clear to me -- and I have stated this before -- that customer loss at this point can explain the situation which Muny Light found itself in.

Q I understand. I wonder if you can answer the question that I put to you. Were you aware of the fact that I stated?

A As such, no.

MR. NORRIS:

Mr. Schmitz, would

you kindly hand the witness Plaintiff's Exhibits 3107, 1973, 1974, 1975, 1978, 1979, 10, 141, 261, and 682.

Q Would you kindly look over that set of documents, Mr. Donheiser?

{Pause.}

A Yes.

Q Mr. Donheiser, which of those documents did you take into consideration in forming your conclusions that you have testified to here today?

A I can't recall that we saw any of the documents there. However, I can only speak for myself. It was a team

Donheiser - cross

effort and it's possible it was seen by someone else.

However, I am quite aware of the number of shifts between CEI and MELP by year, irrespective of the source.

Q But as the team leader you are not personally familiar with any of the exhibits I just handed to you?

A But I am familiar with the numbers and I am familiar with the letters.

Q I didn't quite hear the answer to my question.

A Am I familiar with these particular documents?

Q Yes.

A No.

Q I draw your attention to a memorandum that has already been admitted into evidence, Mr. Donheiser, and just to speed things up let me ask you questions about it and I will read a couple of sentences.

This is a 1959 document. I take it by 1959 the management or mismanagement ballgame wasn't yet over, in your opinion; is that a fair statement?

A The failure of MELP -- yeah, they still had options open in 1959. That's correct.

Q I want to read to you from a CEI memorandum and ask you whether or not any of the practices Muny Light was engaging in in 1959 represented good management, as

Donheiser - cross

you are a management consultant. .

"As part of this promotion to increase revenues MELP is doing many of the delayed necessary things to improve service such as offering more three-wire service throughout the area, beefing up transmission lines, reconditioning and improving substations, extending or proposing to extend distribution in certain areas and a general upgrading of service."

Would that be evidence of good management, in your opinion?

A I think it would be evidence of the reaction of a sales person to competition.

Q What about this next sentence?

"In addition, they have decreased the waiting period for the installation of their street lighting and have cut down the outage time in the replacement of burned out or damaged street lights."

Would that be any evidence, in your opinion, of good management?

A I never said that they didn't do anything right. The fact of the matter is that they functioned, they turned on the switch every now and then, but that doesn't detract from the main thrust of my argument, in my opinion.

Donheiser - cross

Q What I have read to you you would agree would represent good management or would you disagree with that?

A If it were accurate.

Q Well, are you suggesting that it is not accurate?

A No. I suggested that someone in Sales might look at MELP somewhat differently than either I or top management might look at them. I don't know the author of the document.

MR. NORRIS: Would you hand the witness Plaintiff's Exhibit 3054, please.

THE COURT: It is 4:00 o'clock, Mr. Norris. Perhaps this would be an opportune time to adjourn for the day. I see that the jury is eager to retire to the jury room and look at the exhibits of the day. So we will permit them to do that, subsequent to which they can go home.

Ladies and gentlemen, during the adjournment of court please do not discuss the case either among yourselves or with anyone else. Keep an open mind until you have heard all of the evidence and instructions of the Court 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 final judgment.

Donheiser - cross

Good night. Have a nice evening.

{Jury excused.}

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

THE COURT: Yes.

- - - - -

{Bench conference ensued on the record as
follows:}

MR. NORRIS: I object to the Court
interrupting my cross-examination with respect to
this particular document I was questioning him on.

THE COURT: Oh, Mr. Norris, please.

MR. NORRIS: And I object to not
being able to finish the questions with respect
to that document. It is six minutes before 4:00.

THE COURT: I have 4:00 o'clock,
Mr. Norris, and this is the time, or as close
thereto as we adjourn every evening. Now, take
your objections, please.

MR. NORRIS: I have taken my
objections.

{End of bench conference.}

- - - - -

THE COURT: Do you have any

1 exhibits that must be addressed?

2 Mr. Norris, is it all right if I proceed here
3 at this time or are you busy with something else?

4 MR. NORRIS: I didn't know you were
5 proceeding, your Honor. Of course.

6 THE COURT: The Court had not
7 been adjourned.

8 Are we prepared, gentlemen?

9 I understand there are certain exhibits to be
10 considered at this point in time. CEI Exhibit
11 347 has been admitted.

12 PTX 3103 has been previously admitted.

13 What is the situation as to CEI Exhibits 1140,
14 1176 and 1175? Are those offered?

15 MR. MURPHY: Yes, your Honor, they
16 are being offered.

17 THE COURT: These are transparencies,
18 apparently, that have been utilized.

19 MS. COLEMAN: Your Honor, 1140 is not
20 a transparency.

21 THE COURT: I am sorry, I have
22 it listed as such.

23 MR. MURPHY: 1140, your Honor, is
24 Mr. Bingham's report as to outages to which he
25 testified yesterday.

1 THE COURT: Is there an objection
2 to 1140?

3 MS. COLEMAN: There is objection to
4 1140, your Honor. It purports to be a summary of
5 the outage reports, but it actually is not, and I
6 object to the insertion of other matters in here.

7 THE COURT: May I see the exhibit,
8 please?

9 MS. COLEMAN: It appears on the first
10 page and on others, your Honor, the portion
11 indented is not a summary of the outages at all.

12 THE COURT: Here it is. I have it
13 right here.

14 You are objecting to something in the first
15 page?

16 MS. COLEMAN: Well, there are
17 repeated instances of this, your Honor, but for
18 your benefit in just examining it, on the first
19 page, about midway through the page, there is a
20 variety of commentary inserted. I don't object
21 to the summary of inferences of outages, but I
22 do object to this matter inserted here.

23 THE COURT: Are you directing the
24 Court's attention to the following in parentheses
25 "(MELP had a buss fault due to freeway salt

1 contamination to the structure at the west of the
2 plant}" and what follows?

3 MS. COLEMAN: What follows through the
4 end of the parentheses.

5 MR. MURPHY: Your Honor, if I may
6 be heard on that. I think an accurate
7 characterization of Mr. Bingham's testimony in this
8 regard was that he relied principally on the Muny
9 Light outage report, but in addition, relied upon
10 reports kept by the CEI system dispatchers in the
11 performance of their duties.

12 THE COURT: Well, let me read it,
13 Mr. Murphy, please.

14 MR. MURPHY: Yes, your Honor.

15 THE COURT: What is the basis for
16 the objection, Ms. Coleman?

17 MS. COLEMAN: It is now two-fold,
18 your Honor.

19 My understanding is this document is
20 supposed to be a summary of the instances of outages
21 which support the transparencies which we just
22 discussed. The material in parentheses doesn't
23 have a relation to the transparencies. It does
24 have a relation to time or instance of outages.
25 To the extent this material is derived from CEI's

1 records, we have a right, under the Federal
2 Rules of Evidence, to see those records, if your
3 Honor permits this material to be included in the
4 exhibit, to make a determination whether it is an
5 accurate summary.

6 We are able to check material against our own
7 records, but not against CEI's records, your Honor.

8 THE COURT: Well, it may go out.
9 Block it out.

10 And again, this goes back to the two weeks
11 that we spent prior to the commencement of
12 presenting evidence to the jury where we went
13 through all of these exhibits and both sides
14 agreed as to the authenticity and accuracy of the
15 content of the documents.

16 MS. COLEMAN: Not this document.

17 MR. MURPHY: If I might add, your
18 Honor, Mr. Bingham testified at pages 5221
19 through 5222 with respect to how CEI went about
20 handling this material.

21 THE COURT: Let me see that.

22 MR. MURPHY: It starts at the
23 bottom of the page, your Honor.

24 {Pause.}

25 THE COURT: Ms. Coleman, I have

1 read the pertinent testimony here, which reads
2 as follows. This is of Mr. Bingham.

3 "Question: What is CEI 1140, Mr. Bingham?

4 "Answer: This is an exhibit that was
5 prepared under my direction which tabulates
6 outage data from various Muny and CEI reports.
7 These are outages of Muny substations or feeders
8 or customers or whatnot. It covers the period
9 from the beginning of 1970 until May 4th, 1975.

10 "Question: Have you analyzed these reports
11 in order to develop -- arrive at conclusions
12 respecting to the time, the duration and number
13 of outages?

14 "Answer: Yes.

15 "Mr. Lansdale: Would you put on the screen,
16 Mr. Murphy, CEI Exhibit 117b.

17 "Question: I show you on the screen, Mr.
18 Bingham, CEI Exhibit 117b. Was that prepared by
19 you or under your direction?

20 "Answer: It was prepared under my
21 direction.

22 "Question: Will you please tell us what
23 that shows?

24 "Answer: This is the results of our
25 analysis using the various reports I have referred

1 to or sources of the duration of outage that was
2 created or occurred whenever the load transfer
3 services we furnished were either utilized or
4 terminated.

5 "Every time one of those load transfer points
6 was energized it required a dead buss transfer so
7 there would be a short outage.

8 "We went through the Muny major outage
9 reports, our own dispatcher's logs and the like,
10 and listed every load transfer indicated and the
11 duration of the outage that occurred. The vast
12 majority of this information comes from Muny major
13 outage reports.

14 "We then divided it into the groups indicated
15 there, those that range from zero to five minutes,
16 six to ten," and so forth.

17 Now, it would appear from this testimony and
18 from the qualification of this witness that
19 Exhibits 1140 and 1176 were derived from
20 essentially the same information and were used
21 in conjunction with each other. The information
22 appearing on these exhibits is the result of an
23 examination of CEI reports, Muny major outage
24 reports, and "The vast majority of this information
25 comes from Muny major outage reports."

1 It would appear when you read this information
2 in context with the testimony, that the information
3 appearing on the documentation results from the
4 source material which was alluded to in the
5 testimony, and it would appear that if there was
6 question as to this, the appropriate time to address
7 it would have been during cross-examination.

8 But let me ask you this, Mr. Murphy. What is
9 the purpose of this?

10 MR. MURPHY: Your Honor, the purpose
11 of this is to show the outages suffered by Muny
12 Light during the relevant period and the reasons
13 for those outages. We are being blamed, your
14 Honor, by the plaintiff for causing all sorts of
15 outages on the Muny system and thereby resulting
16 in the loss of customers, principally due to the
17 load transfer arrangements. The load transfer
18 report prepared by Mr. Bingham demonstrates to
19 the contrary, we believe, your Honor, and we
20 intend to argue therefrom, with that plus the
21 testimony Mr. Bingham presented yesterday.

22 But I submit, your Honor, that Exhibit 1140
23 is not simply redundant of testimony presented
24 because of the obvious detail of it, the
25 itemizations of it, and we think it is properly

1 admissible into evidence.

2 I might point out, your Honor, that the
3 City's only objection immediately before trial to
4 this exhibit was to its authenticity and accuracy.
5 Mr. Bingham has testified as to both.

6 And Ms. Coleman previously mentioned that she
7 was entitled to back-up data. This is the first
8 time we have had such a request from the City.
9 We didn't have it at the time we first gave this
10 exhibit to the City.

11 If the City wants to look at the back-up data,
12 that is fine with us. But I do want to point out
13 we never have received such a request previously.

14 THE COURT: Ms. Coleman, are you
15 desirous of responding?

16 MS. COLEMAN: Your Honor, I don't
17 think any of the testimony read from the
18 transcript of Mr. Bingham yesterday at all
19 contradicts the arguments that I have made to you.

20 He testified that he put this together to
21 show data to show the occurrence of outages and
22 the time of outages, and I am not objecting to
23 the presentation of that data. I am objecting to
24 the insertion of other matter in this which he did
25 not discuss, which he did not use to derive his

1 transparency and which is not subject to
2 cross-examination or even check because it
3 apparently comes from CEI records.

4 THE COURT: Mr. Murphy?

5 MR. MURPHY: Your Honor, I don't
6 think Mr. Bingham said that the sole purpose for
7 which he prepared that report was to prepare the
8 transparency.

9 With respect to its accuracy and the
10 accuracy of information on it, your Honor, they
11 could either get the records, which they have never
12 asked for, or they could cross-examine Mr.
13 Bingham about the accuracy, which they never did.

14 THE COURT: Well, I'm going to
15 admit the evidence subject to two conditions:
16 Number one, that you submit the supporting data --
17 I think that the document has been adequately
18 qualified -- submit the source data to the
19 plaintiff and, in the event that the plaintiff
20 is desirous of cross-examining Mr. Bingham as
21 to the source data, I will extend to them the
22 privilege of recalling Mr. Bingham for that
23 purpose.

24 MR. MURPHY: Yes, your Honor.

25 THE COURT: What about -- well, we

1 just addressed 1176, did we not?

2 MR. WEINER: Your Honor, we have no
3 objection to any other CEI documents on the list
4 from yesterday, October 22.

5 THE COURT: Just so we maintain
6 the record, there is no objection then, I take it,
7 to 1176, 1175, 549 -- which I understand has
8 been admitted previously -- 79, 383, 3098 and 3041,
9 all of which have been admitted previously.

0 The following exhibits have not been admitted
1 and I take it are offered at this time.

2 MR. MURPHY: Yes, your Honor.

3 THE COURT: CEI 1036, 1022,
4 1169, 1170, 1171, 1172.

5 Any objection?

6 MR. WEINER: No objection.

7 THE COURT: CEI 469 has been
8 admitted. CEI 1178 admitted.

9 All of them may be admitted and you will
0 provide the source material to Ms. Coleman
1 forthwith concerning 1140.

2 There are a number of exhibits that have
3 been identified today. I take it that counsel have
4 not had an opportunity of deciding whether or not
5 there will be objections. CEI Exhibit 1035,

1 Plaintiff's Exhibit 2550, 2251, 3109.

2 CEI 246, 1155, 525, 520 and 516. We will address
3 those first thing in the morning.

4 Anything further?

5 MR. MURPHY: Your Honor, I have
6 one thing further, if I might.

7 THE COURT: Sure.

8 MR. MURPHY: Actually two small
9 things. The first is we would like to move into
10 evidence Stipulation of Fact 31, 32 and 33.

11 These, your Honor, --

12 THE COURT: Just a moment. Let
13 me look at them.

14 MR. MURPHY: Yes.

15 {Pause.}

16 THE COURT: Yes, 31, 32 and 33.

17 MR. WEINER: We have no objection,
18 your Honor.

19 THE COURT: All right.

20 MR. MURPHY: Your Honor, we would
21 also move into evidence at this time three other
22 exhibits to which I think the City has no objection:
23 CEI 361, CEI 554 and CEI 1114.

24 In addition, I would move into evidence two
25 exhibits to which I think the City --

1 THE COURT: Well, just a moment.
2 Are there any objections to those?

3 MR. WEINER: No objection, your
4 Honor.

5 THE COURT: All right.

6 MR. MURPHY: I would also move into
7 evidence two exhibits to which I think the City does
8 have objection: CEI 442 and 443. These are
9 statements and questions prepared by Mr. Francis
10 Gaul, a member of City Council and Chairman of
11 the City Council Public Utilities Committee, a
12 document that was prepared in 1972.

13 THE COURT: What is the basis for
14 offering these?

15 MR. MURPHY: Your Honor, the basis
16 for offering them is that these are statements made
17 by a member of the City Council concerning the
18 condition of the Muny Light Plant in 1972 and
19 describing causes for that condition. That
20 certainly is a material issue in this case.

21 You may recall, your Honor, that Mayor
22 Voinovich, when he testified in this case, said
23 that the City Council was the Board of Directors
24 of Muny Light. In that respect, your Honor, a
25 member of the City Council is a member of the

1 Board of Directors of Muny Light and his
2 statements can be otherwise proper admissions
3 against the City of Cleveland in a case of this
4 sort.

5 MR. WEINER: I object on the grounds
6 of hearsay and relevancy, your Honor. This is
7 one councilman's statement at some point in time
8 not in his official capacity as chairman of any
9 council committee. It is not a position of the
10 Board of Directors as such. It may not even be a
11 position as a member of the Board of Directors.
12 It certainly is a hearsay statement not
13 attributable to the City.

14 MR. MURPHY: Your Honor, if I may
15 be heard?

16 THE COURT: All right.

17 MR. MURPHY: The statement of the
18 director of a corporation is certainly admissible
19 as an admission, whether or not he is speaking for
20 the entire Board of Directors or not. It may go
21 to the weight of the document, but it may not go
22 to its admissibility.

23 THE COURT: Well, I see attached
24 to this also an editorial from two newspapers
25 plus other things.

1 MR. MURPHY: Your Honor, we would
2 agree with the deletion of the newspaper articles.
3 They obviously are not admissions of the City of
4 Cleveland.

5 MR. WEINER: The charts were prepared
6 by CEI, were they not?

7 MR. MURPHY: I have no knowledge in
8 that respect, your Honor.

9 THE COURT: Well, my understanding
0 is that this gentleman is still around, isn't he?

1 MR. MURPHY: Yes, your Honor, I
2 believe he is.

3 THE COURT: Wouldn't the best
4 evidence be his testimony?

5 MR. MURPHY: Your Honor, I don't
6 think it is necessary for us to put him on.

7 THE COURT: Unless you want to
8 put on the writers of the two newspaper
9 editorials.

0 Very well. Tomorrow morning, gentlemen,
1 8:30.

2 {Court adjourned for the evening.}

3 - - - - -
4
5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Friday, October 24, 1980

Donkersel, Martack, Ginn, Gertel

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1980

1 FRIDAY, OCTOBER 24, 1980; 8:55 A.M.

2
3 {The following proceedings were had in the
4 absence of the jury.}

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

9 THE COURT: Before we call the
10 jury, Mr. Norris, last night when we adjourned
11 at 4:00 o'clock you took exception to the Court's
12 ruling -- well, it wasn't a ruling, the
13 adjournment hour. I permitted you to put that on
14 the record; however, I don't recall you listing
15 a reason for your objection.

16 If you would like to list for the record
17 the reasons for your objection or the manner in
18 which you were prejudiced, you are free to do so.

19 MR. NORRIS: The subject at hand,
20 your Honor, was a document, Plaintiff's Exhibit
21 3054, and the jury was excused before we got
22 through with that discussion.

23 THE COURT: Well, you just picked
24 it up and you just gave it to him and directed
25 his attention to it. It was a new subject.

1 MR. NORRIS: I had read two
2 sentences from page 3 of that document and was
3 trying to develop a line of questioning with the
4 witness with respect to good management practices
5 on Muny Light's part and I think it would have been
6 more appropriate for counsel to have finished with
7 that line of question at that time before dismissing
8 the jury.

9 THE COURT: You feel you were
10 prejudiced? If so, state the reason so the record
11 is clear.

12 MR. NORRIS: I felt that I was
13 prevented from developing testimony which at that
14 point in time would have been favorable to the City.

15 THE COURT: Well, my question is
16 do you feel that you were prejudiced, and what
17 can't you do this morning that you couldn't do last
18 night? That's what I am asking you, Mr. Norris,
19 and I wish you would respond to me if you can.
20 I ask simple questions and I get these answers.

21 MR. NORRIS: The witness has had
22 an opportunity to discuss what his answers will be.

23 THE COURT: Discuss with whom?

24 MR. NORRIS: With counsel.

25 THE COURT: Well, why don't you ask

1 him that. If he did, that goes to the jury, if
2 he did.

3 MR. NORRIS: Well, I just don't think
4 it would be unusual for him not to have discussed
5 this with counsel.

6 THE COURT: I wish you would quit
7 surmising. It's just beyond me, just beyond me,
8 these things that you read into the proceedings
9 that have absolutely no factual basis whatsoever.

10 MR. NORRIS: Well, your Honor --

11 THE COURT: Let's get on with it.

12 MR. NORRIS: Our presentation was
13 criticized at one point similarly and a similar
14 allegation was made against the City's lawyers,
15 that we were asking for a recess in order to
16 coach the witness during the recess and there
17 was no basis in fact.

18 THE COURT: No, that's not it at
19 all. My comment at that time -- that was the
20 Court's comment -- was that it appeared to me that
21 it was a design request for a recess and I recall
22 it very well. Ms. Coleman was examining Dr.
23 Wein, and I have a notation of it in my minutes.

24 MR. NORRIS: And her purpose at
25 that point was that she was concerned about Dr.

1 Wein's health and that's why she wanted a recess.

2 THE COURT: That was only one
3 instance.

4 Let's proceed. Do you have something to say,
5 Mr. Lansdale?

6 MR. LANSDALE: I will withdraw the
7 comment I was about to make.

8 THE COURT: Bring in the jury.

9 I take it that you have no statement as to
10 the prejudice that was suffered by the plaintiff
11 as a result of the adjournment, at least I
12 haven't heard one at this juncture.

13 Let's proceed.

14 {The foregoing proceedings were had out
15 of the presence of the jury.}

16 - - - - -

17 {The jury was seated in the jury box.}

18 THE COURT: Good morning.

19 {Chorus of good mornings.}

20 THE COURT: You may proceed,
21 Mr. Norris.

22 - - - - -
23
24
25

CROSS-EXAMINATION OF ALAN DONHEISER {Resumed}

BY MR. NORRIS:

Q Mr. Donheiser, as of late 1965 and early 1966, what is your understanding of Muny Light's record to its customers with respect to continuity of service?

A Well, in 1966, there was a significant Memorial Day outage, and this outage was the occasion for several memoranda to be written, particularly -- I will have to go back -- I think it was Chief Electrical Engineer Kramer who wrote a memo indicating that they were in a very tight and awkward situation in respect to supply.

Q But generally speaking, would you say Muny Light's continuity of service had been good up to that point in time?

A I would say its service was unusual for a utility, in that it curtailed loads, and utilities generally are very reluctant to curtail loads.

Q Up to that same point in time, Mr. Donheiser, would you say that Muny Light's service and workmanship was generally good?

A I have no knowledge of their workmanship.

Q Would you say that as of 1965, 1966, that Muny Light's customers were very satisfied with the Muny Light

Donheiser - cross

service?

MR. LANSDALE:

I object, if your

Honor please.

THE COURT:

Overruled.

If he knows -- I don't know how he can tell if they were satisfied. That is looking into somebody else's mind. But he may answer if he can.

A I will answer it this way:

I think anybody who was receiving service at a 15 percent differential would have some cause to be satisfied provided that there was continuity of service.

Q Did the CEI attorneys ever bring to your attention any marketing group, planning, projects, or other CEI memoranda or documents that reported on the good workmanship and the good service and the general customer satisfaction of Muny Light's customers during the 1965-1966 period?

A I can't remember.

Q You mean they might have?

A Yes, they might have.

Q But you can't now remember whether they actually did?

A That is correct.

Q Did the CEI attorneys bring to your attention any CEI

Donheiser - cross

documents that reflected CEI's recognition of the fact that an interconnection between CEI and Muny Light would be the best solution to Muny Light' operating and financial problems?

A It seems to me that they did, but I can't cite the particular document.

MR. NORRIS: Mr. Schmitz, would you give Mr. Donheiser a copy of Plaintiff's Exhibit 2631, please.

{After an interval.}

Q Have you ever seen Plaintiff's Exhibit 2631 before today -- do you have that in front of you?

A Yes.

Q Yes.

Have you ever seen that document before today?

A I will have to refresh my memory here.

{After an interval.}

A I have not seen this document.

Q Addressing your attention to the bottom of page 4 of Plaintiff's Exhibit 2631; do you see the last three lines on that page:

"An interconnection appears to be the best solution of MELP's operating, financial problems."

Do you see that language in the last three lines

Donheiser - cross

on the page?

A It says, "D. E. F."

Q Yes, sir.

The last three lines on the page:

"An interconnection appears to be the best solution of MELP's operating and financial problems."

Do you see that?

A Yes.

Q Is there any place in your report where you have given recognition to that fact, or possibility, if not a fact, that an interconnection would be the best solution to Muny Light's operating and financial problems?

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

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

THE COURT: It's 2631.

MR. LANSDALE: If your Honor please, I object to this examination or this line of examination as being far beyond the scope of the direct.

Donheiser - cross

This witness was not making a determination of what was right for Muny Light or what would have helped them. He was making an appraisal of what Muny Light actually did and the disastrous effects thereof -- did or didn't do. To interrogate him as to whether something else would have helped them or whether something would have been better is far beyond the scope of his testimony. I object to it.

MR. NORRIS: The witness has given an opinion that the Muny operation was the victim of its own mismanagement, and I want to know whether or not the witness, in forming that opinion, took into consideration other external causes that might have contributed to the financial result that Muny Light had no control over.

MR. LANSDALE: I submit he hasn't been asked this at all.

THE COURT: That's very true.

Let me ask you this, Mr. Norris. I recall that the witness said he never saw the document. How can you go into it if he never saw the document? How can you examine him on it?

Donheiser - cross

MR. NORRIS: I am not examining him on the document.

THE COURT: Well, you certainly are. You are examining this gentleman in front of the jury. Here's the sequence of your examination: "Calling your attention to PTX 2631, have you ever seen it?" "No." "Now, direct your attention to page" -- what was it? 4?

MR. NORRIS: Um-hmm.

THE COURT: Then you ask him a question concerning an excerpt from this. You are reading into the record the document that he has never seen.

MR. NORRIS: He has said that he's never seen that document.

THE COURT: Yes, but you are creating the inference there is some implication between his testimony and this document.

MR. NORRIS: Well, I could have asked the question without reference to the document.

MR. LANSDALE: You sure could have.

THE COURT: That's what the objections were all about all along, these

Donheiser - cross

inuendos and these inferences and characterizations that you are constantly trying to raise by these questions you are asking and the method in which you are asking it.

MR. NORRIS: I find nothing in his report that indicates he took this kind of external factor into consideration.

MR. LANSDALE: So what?

THE COURT: Mr. Norris, you see, you shifted gears on me again. That was not my question.

We are discussing here your method of interrogation which is highly improper, and I have told you it is highly improper, and at one point I told you if you didn't desist I was not going to let you examine any further, but it seems to be of no avail.

Let me ask you something. Don't you know what I am telling you or are you just arbitrarily disregarding what I tell you?

MR. NORRIS: I am not arbitrarily disregarding what you tell me.

THE COURT: Well, why do you keep doing it then? It's got to be one or the other.

Donheiser - cross

MR. NORRIS: I will follow the
Court's admonition.

THE COURT: Please do. It's getting
to be exasperating.

{End of bench conference.}

- - - - -

THE COURT: You may proceed, Mr.
Norris; however, please phrase the question in a
proper fashion and proceed in the proper fashion.

BY MR. NORRIS:

Q Mr. Donheiser, is there any place in your report where
you acknowledge the possibility that the lack of a
permanent interconnection between CEI and Muny Light
could have contributed to Muny Light's operating and
financial problem?

A My approach to the problem was fundamentally to apply
the criteria of what MELP planned to do against what
they actually accomplished.

Now, it happens that they planned for a very long
time to get an interconnection with the Muny grid and
that plan remained throughout the 1960's and
remained throughout a very turbulent period and a
period of very difficult production and very narrow
margins, reserve margins.

Donheiser - cross

They didn't accomplish that and I take their measure in terms of their inability to do what they said they wanted to do.

MR. NORRIS: Your Honor, I would request that the question be read to the witness and I would submit that the answer is unresponsive to the question.

THE COURT: No, Mr. Norris. I will have the question and the answer read, however, I followed the question, I have listened to the question and I have followed the answer and the answer is responsive. Not only that, but this witness has answered that same question in the same manner at least three or four times and he's answered that his analysis is predicated upon his evaluation of management during a period of 1950's and 1960's and, by the time these later dates came along, the condition of MELP, from his testimony appears to have been a fait accompli. That's how he's answered this question and it is responsive to your question.

So please place another question and please don't be repetitious.

BY MR. NORRIS:

Donheiser - cross

Q Do you have any opinion, Mr. Donheiser, as to what the fuel savings could be for Muny Light in the 1960's had there been a permanent interconnection between CEI and Muny Light?

A A permanent synchronous interconnection in the 1960's?

Q Yes.

A I don't know.

Q If a permanent synchronous interconnection between Muny Light and CEI could have saved a half a million dollars in fuel costs for Muny Light, would that have been a sufficiently large savings to have warranted your including that in your analysis?

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

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: I object again to it being beyond the scope of the direct. There's not any evidence that this man found anything, any plan of Muny Light, any plan to interconnect with CEI. I repeat, his testimony is that he studied the plan and the extent to which they were able

Donheiser - cross

1 to carry out their plans and the consequences of
2 the failure to do so. To interrogate him on a
3 what if basis that has no foundation in the
4 evidence is totally beyond the scope of the
5 direct and is irrelevant.
6

7 MR. NORRIS: The witness has
8 supported his testimony by reference to the
9 operating results of Muny Light, and in testing
10 the reach of the witness's analysis that underlies
11 his conclusions that he's testified here to, with
12 evidence already in the case that CEI admitted
13 that half a million dollars a year in fuel savings
14 alone could have resulted from a permanent
15 interconnection, I simply want to --

16 THE COURT: In the 1960's?

17 MR. NORRIS: In the 1960's. I
18 wanted to know if he took that fact into
19 consideration in reaching his conclusion.

20 MR. LANSDALE: It just goes by me
21 in the night as to what that hypothesis has to
22 do with what the actual facts were. The actual
23 facts were there was no interconnection, that
24 Muny never planned for one, and this is not a
25 question of --

1 Donheiser - cross

2 THE COURT: Well, Mr. Lansdale, in
3 the event that there had been planning for this
4 and in the event that there had been requests
5 in the 1960's for a synchronous interconnection,
6 this could very well be material, and it is
7 cross-examination.

8 MR. LANSDALE: Yes.

9 THE COURT: However, my recollection
10 is that the requests for an interconnection were not
11 made until the 1970's.

12 MR. NORRIS: Mayor Locher testified
13 that he directed his staff to seek an
14 interconnection --

15 THE COURT: When?

16 MR. NORRIS: -- in 1966. And you
17 will recall, your Honor, that there was a
18 memorandum written to the Mayor's office from
19 Muny Light and then there was a letter that there
20 has been a lot of discussion about written from
21 Muny Light to CEI. CEI's admitted that the letter
22 was written and mailed and the letter recites the
23 fact of a meeting.

24 Now, Mr. Besse has disputed the fact. He
25 couldn't find any record in his diary that he

Donheiser - cross

actually attended a meeting on the day in question.
But I asked Mayor Locher what the procedures were --

THE COURT: My recollection is I ruled that out, that that letter never went in.

MR. NORRIS: He testified he instructed his Director and Commissioner to seek the interconnections, and that's in the record and that's in 1966.

The other part of my presentation is that this 1969 memorandum from Mr. Loshing recognizes -- I don't know what page it is but I can show you -- in fuel savings alone the permanent interconnection would result in savings of half a million dollars a year.

THE COURT: You want to say something, Mr. Lansdale?

MR. LANSDALE: Yes. I want to be heard on this.

Number one, we did not admit that the letter was written and mailed.

Number two, it was perfectly clear that whatever the fact was, we didn't receive it.

Number three, whatever directions Mayor Locher gave, it is clear they weren't carried out.

1 Donheiser - cross

2 Number four, the fact that intra-CEI
3 documents speculating about what Muny should or
4 shouldn't do, they have nothing to do with plans of
5 Muny and Muny's failure to implement these plans.
6 And even if it be true they wrote such a letter,
7 there is no evidence they ever followed up on it
8 and this is, in and of itself, a management
9 failure.

10 The point I am trying to make is that this
11 interrogation to ask this witness to decide or to
12 comment concerning how Muny would have benefitted
13 had it done certain things which it didn't do has
14 absolutely nothing to do with the testimony that
15 he's given and the things that he's studied and
16 given an opinion on.

17 MR. NORRIS: If the witness is
18 putting so much reliance on the mismanagement
19 that was responsible for producing the dreadful
20 operating results and financial results, I want to
21 know how far beyond the mismanagement evidence
22 that he looked at did he go.

23 I think it stands to reason, just because
24 you have a bottom line that shows bad financial
25 operation and bad financial results, that for

Donheiser - cross

this witness to say that was exclusively the fault of mismanagement, which I understand him to say, I think is startling, and my purpose here is to find out what other elements did he consider that might have had the same result or might have contributed to the same result of the poor financial showing.

THE COURT: Well, as I say, in that context it is permissible. But again we get back to the underlying factor that's been a thread throughout this case and that is intention without implementation which leads to the areas of speculation and hypothesis to which the defendant is objecting.

You can hypothecate any situation, but if there is no fact to support the hypothecation, you can't ask the question. It's very basic.

Now, as I said before, I think that this could be material if, number one -- you have to lay a foundation -- there was an intent. There may be some indication of intent by Locher's testimony, albeit it is very marginal, that he requested his staff to seek an interconnection. There is nothing in the evidence to my recollection, beyond the letter that was supposedly

1 Donheiser - cross

2 written that was denied to have been received by
3 CEI and which is not in evidence, to show that any
4 staff member ever undertook implementation of his
5 request in the 1960's --

6 MR. NORRIS: But your Honor --

7 THE COURT: And, sceondly, whether
8 or not they had the capability at that time of
9 doing these things.

10 This man has testified from an examination of
11 the documents that he's seen that they have since
12 1954 had good intentions to do certain things but,
13 as you so aptly pointed out on your
14 cross-examination, the City couldn't do the things
15 because Council never appropriated money for them
16 during the 1950's and 1960's. And even if they
17 had the staff to go ahead and do these things,
18 they didn't have the money and there was no way
19 they were going to get the money.

20 That's what the evidence shows. Now you are
21 going to come in and say what if?

22 MR. NORRIS: Mr. Lansdale is in
23 error when he says he hasn't admitted the
24 writing and mailing of that letter. He tried to
25 withdraw that admission and the Court --

Donheiser - cross

THE COURT: Permitted it.

MR. NORRIS: No, you didn't. You entered an order that said you would not permit at this late date of the trial the withdrawal of that and that's an admission that the letter is written and mailed.

THE COURT: Is that my order?
{To the law clerk.}

MR. NORRIS: And it is appropriate for the jury to infer if the letter was mailed, it was received.

THE COURT: Assuming that's so -- and I have to check -- you still haven't got the other aspects.

MR. LANSDALE: {To Mr. Murphy} This letter that {inaudible}. Did we admit it was written and mailed?

MR. MURPHY: I think that's the way your order read, that we were not permitted to withdraw our admission as to its mailing but as to its receipt. The second was an internal memorandum to which we were permitted to withdraw our entire admission. There were two exhibits.

MR. NORRIS: That's right.

Donheiser - cross

1
2 MR. LANSDALE: We are concerned here
3 with the letter.

4 THE COURT: Whatever my ruling is.
5 But assuming that the letter was written, there is
6 a denial it was ever received.

7 But apart from the letter, just going on
8 Locher's testimony that he instructed his people
9 to do it, there is nothing to show that they did in
10 fact do it or that they had the money to do it.

11 MR. NORRIS: The letter shows, your
12 Honor, that they did the best they could. There's
13 a tremendous amount of evidence in here on the
14 refusal of CEI. They have admitted they resisted
15 an interconnection, they didn't want the
16 interconnection. They objected to evidence that
17 the City --

18 THE COURT: Assuming that's so,
19 you showed yesterday that under no circumstances
20 could you have gone ahead with an interconnection,
21 anyway.

22 MR. NORRIS: No, I didn't, your
23 Honor. You are overstating what I was showing
24 yesterday.

25 What I was showing yesterday --

Donheiser - cross

1
2 THE COURT: Why you showed it, I
3 don't know.

4 MR. NORRIS: Let me state it.

5 THE COURT: Go ahead.

6 MR. NORRIS: As you say counsel is
7 interrupting, so let me finish my statement.

8 THE COURT: Certainly. Absolutely.
9 Go right ahead.

10 MR. NORRIS: The thing I was pointing
11 out was he was making an invidious comparison
12 between Muny Light's inability to execute the
13 capital programs that were included in the capital
14 improvement program and the point I was trying to
15 register with the witness is that it's not good
16 management consulting practice to measure
17 management performance against goals that are not
18 realistic and obtainable.

19 THE COURT: Why? Why weren't they
20 realistic and obtainable? There's the thrust of
21 it right there. And you developed the fact that
22 they were unrealistic and unattainable because
23 there was no money to perform them.

24 MR. NORRIS: But wait a minute,
25 your Honor. There was money for capital outlay.

Donheiser - cross

That was in the ordinance. And the management consultant, if he wants to measure the quality of management, he should look at their records of executing those things for which there was money.

THE COURT: Wait a minute. As I understand the evidence here, the thrust of it is that the City was not able to do it. MELP is part of the City.

MR. LANSDALE: That's precisely correct.

THE COURT: You can't isolate this out.

MR. NORRIS: But if, your Honor, --

THE COURT: Read the question back.

MR. NORRIS: He isn't testifying as to whether the management effectiveness of City Council was such and such. He's testifying as to the management effectiveness of Muny Light.

MR. LANSDALE: I beg your pardon.

THE COURT: I think you are missing the boat there completely.

MR. LANSDALE: Yes.

THE COURT: And I would suggest that you read your own motion in limine concerning the testimony of this other fellow --

Donheiser - cross

testimony is being offered --

THE COURT: What testimony?

MR. NORRIS: The reason I am trying to elicit -- whether or not this witness considered external factors over which the Muny Light management had no control, I want to know whether he did take other things into consideration or whether he simply got a conclusion first as given by CEI's lawyers and then looked for things to validate that.

THE COURT: If that's what you are attempting to prove -- I thought your examination on cross-examination was very effective for about the first 15 minutes and you completed that, but as I indicated to you yesterday, ever since the first 15 or 20 minutes of that examination I don't know where you have been going and what the purpose of it was, primarily that cross-examination concerning the inability of the City to perform many of its desires because of a lack of financing and inability to get financing through the City Council.

As far as the proposition you just advanced, you are perfectly free to explore that in a

Donheiser - cross

proper manner and I'm not prohibiting you from doing that and I will not prohibit you from doing that. All I'm asking you, Mr. Norris, is to keep it relevant and to keep it in context.

Read the question back.

{The pending question was read by the reporter.}

THE COURT: Sustain the objection.
Let's proceed.

It is sustained not as to substance. If a proper foundation is laid -- I want to emphasize this -- he is permitted to go into this.

MR. LANSDALE: All right.

{End of bench conference.}

- - - - -

THE COURT: You may proceed, Mr. Norris. If the proper foundation is laid, you may pursue this further.

BY MR. NORRIS:

Q In the electrical utility business, Mr. Donheiser, what are the benefits to a utility company from having a permanent synchronous interconnection with a neighboring utility company?

A Well, it can lay the groundwork for agreement which

Donheiser - cross

1 enable both utilities to draw on the most efficient
2 generators at the optimum times.

3 Q A utility company that operates in an isolated mode
4 would have no one to turn to for back-up or reserve
5 sharing? It would only have its own resources to
6 rely upon; is that correct?

7 A Yes.

8 Q And when that isolated utility company then interconnects
9 with a neighbor, are there operating savings that can
10 result from such an interconnection?

11 A That is theoretically true, but it is often difficult
12 to get agreements over how the benefits of the
13 agreement should be distributed between the two partners.

14 Q Well, in your experience, what kind of savings have you
15 ever become aware of that have flown to one of the two
16 interconnected partners that resulted from the
17 interconnection?

18 A Well, they can be substantial.

19 Q Well, give me an example of a type of saving that could
20 accrue to an interconnected utility company because
21 of the interconnection.

22 A Well, the peaks may occur at different times between
23 the two utilities. That is one example; so that it is
24 conceivable that a utility with more efficient
25

Donheiser - cross

generating capacity can be drawn on and utilized more efficiently and more hours demanded from that unit.

Q And from what would the efficiencies come, Mr. Donheiser, using energy over the interconnect, as distinguished from having to generate all of your own electricity? What kind of savings might accrue from the interconnection -- I mean, would it come from less wear and tear on the equipment, for example; is that one source of savings?

A That is possible.

Q Would it possibly come from a fuel cost saving, so that the purchased power over the interconnection, if it is at a sufficiently attractive level, might save the utility company in the way of excessive fuel cost; is that a possibility?

A Surely.

Q It could?

A Yes.

Q In your analysis of the Muny Light situation in the 1950's and 1960's, did you take into consideration in your analysis any fuel cost savings that might have accrued to Muny Light as a result of an interconnection with CEI?

THE COURT:

Read that question.

1 Donheiser - cross

2 please.

3 {The pending question was read by the
4 court reporter.}

5 MR. NORRIS: This is the very
6 thing that we just discussed up here at the bench,
7 in which there was an objection, and I said to lay
8 a proper foundation.

9 MR. NORRIS: I want to know if he
10 took that into consideration in his analysis.

11 THE COURT: Approach the bench,
12 please.

13 - - - - -

14 {Bench conference ensued on the record as
15 follows:}

16 THE COURT: This is the very thing
17 we spent ten minutes up here discussing.

18 You have to lay a foundation, and you go back
19 and you start all over again completely ignoring
20 what I said.

21 MR. NORRIS: I laid the foundation,
22 your Honor.

23 THE COURT: Well, you haven't laid
24 a foundation.

25 Now, unless you are going to proceed in the

Donheiser - cross

proper manner, we will have to terminate this cross-examination right here. You haven't laid a foundation at all. You are asking the same questions that you asked before. You have to show that they did something.

MR. NORRIS: He had knowledge about what they did.

THE COURT: Well, if he doesn't have knowledge, then how are you going to prove it? Why are you asking him the question?

MR. NORRIS: There are other witnesses, but this witness is expressing an opinion.

THE COURT: Wait a minute. Let's go back to what you just said. Where in the evidence is there any testimony to the fact, concerning the fact, concerning the ability and the implementation, or I should say, the implementation and the ability to implement an interconnection in the 1950's and 1960's, which is the thrust of your question?

As a matter of fact, there is nothing in the evidence to show that there was any consideration of it in the '50's.

Donheiser - cross

1 MR. NORRIS: That is right.

2 MR. LANSDALE: May I make a comment?

3 There is in evidence, I believe, the fact that
4 in 1952 the Federal Power Commission suggested an
5 interconnection, and Muny Light said that they
6 didn't want any part of it.

7 MR. NORRIS: As did CEI.

8 MR. LANSDALE: Yes, both parties said
9 they didn't want it, and insofar as the '60's is
10 concerned, there is no evidence whatsoever.

11 THE COURT: All right. He just
12 got through asserting it, that there was a
13 request and a refusal, and that is exactly what
14 you just said.

15 MR. NORRIS: Let me say this:

16 This witness in his report is criticizing
17 Muny Light for high operating costs in 1973, and
18 there is all kinds of evidence in the record with
19 respect to the request and refusal in 1971.

20 MR. LANSDALE: That is not the
21 question.

22 THE COURT: That is not the
23 question.

24 Again, Mr. Norris, we can go back to the
25

Donheiser - cross

1 testimony. The testimony is that in the 1950's
2 and 1960's, those were the areas of mismanagement --
3 those were -- that was the time frame of
4 mismanagement, and by 1970 and 1973 and thereafter
5 they were in such bad shape that whatever they
6 did --

7
8 MR. NORRIS: But as far as the
9 assessment of damages here -- if the jury finds it
10 was because of CEI's conduct, they could award
11 damages for that.

12 THE COURT: Listen to what you just
13 told me.

14 {Record read by the court reporter.}

15 THE COURT: What has that got to do
16 with this fellow's testimony?

17 MR. NORRIS: They have not shown
18 any ability in the 1960's to finance an
19 interconnection.

20 You said that to me, and my response to that
21 is that because there was no possibility of getting
22 an interconnection from CEI, because of their
23 attitude and the stonewalling attitude, there
24 is nothing to go to City Council for.

25 THE COURT: That is not the way

Donheiser - cross

you brought it out in the testimony.

I am going to sustain the objection, and I direct you again, Mr. Norris, please keep it relevant and material, and if you can't lay a proper foundation, go on to something else.

Would you do that for me, please?

MR. NORRIS: Yes.

{End of bench conference.}

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THE COURT: You may proceed, Mr.

Norris.

BY MR. NORRIS:

Q Would you turn to page 75 of your report, Mr. Donheiser, and turn to numbered paragraph 66 on that page.

You stated there:

"That the City had not, prior to the end of 1971, publicly recognized the importance of the synchronous interconnection between Muny Light and CEI."

And I am referring to the last sentence on page 75. Do you see that?

A Yes, sir.

Q Did the CEI attorneys make you aware of the fact that the Mayor of the City of Cleveland had written a letter to CEI in 1965, indicating that the City had

Donheiser - cross

1
2 long desired it to have an interconnection between
3 Muny Light and CEI, and indicated that he was willing
4 to consider an interconnection on a business basis
5 without unfair strings attached?

6 A Would that be February 17, the February 17 letter?

7 Q Yes.

8 A I am aware of that letter, yes.

9 Q February 17, 1965, Plaintiff's Exhibit 603.

10 Is that referenced anywhere in your report?

11 A I don't know. I certainly have seen the letter, and
12 it was not clear to me that Mayor Locher really was
13 referring to an interconnection as we just discussed it.

14 That is, it was not clear to me whether he was
15 referring in terms of a synchronous interconnection.

16 MR. NORRIS: Would you hand the
17 witness Plaintiff's Exhibit 603, please, Mr.
18 Schmitz?

19 {After an interval.}

20 Q Is this the letter that you stated that you have seen,
21 Mr. Donheiser?

22 A Just a moment and I'll answer the question.

23 {After an interval.}

24 It doesn't seem to me that the Mayor, who after all is
25 a non-technical person -- he is using the word

Donheiser - cross

1 "interconnection" and it certainly is not clear to me
2 that he means a synchronous interconnection,
3 particularly, because he was being advised by that time
4 that he needed interim power, and I would like to
5 mention that there is a letter from the Commissioner
6 that is contemporary with that letter in 1966, which
7 advises Mayor Locher, and it is by the Commissioner
8 of Light and Power, and he says that this memo or
9 letter is concurred by Chief Electrical Engineer
10 Kramer and the Superintendent of Operations, that
11 they wanted interim power, 15,000 to 20,000 kilowatts
12 from CEI of interim power until the new generator is
13 put into service.
14

15 So I think that interconnection is a word of art
16 which the Mayor, it seems to me, in light of the
17 circumstances, has used imprecisely.

18 Q I call your attention to the first sentence in the
19 letter, Mr. Donheiser, the letter by Mr. Besse, and
20 this refers to your letter of February 12, 1965, at
21 which you suggest that the municipal electric light
22 system equalizes rates; and so forth.

23 A Yes.

24 Q Are you familiar with Mr. Besse's letter of February
25 12 of 1965?

Donheiser - cross

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2 A Yes, but I have to refresh my memory. I don't have it
3 here.

4 Q Well, if Mr. Besse -- well, I will say to you as a
5 proposition that Mr. Besse was referring to a
6 synchronous parallel interconnection in his letter of
7 February 12, and if that is an accurate assumption,
8 would you think it is fair that Mayor Locher was using
9 the word interconnection in the same way that Mr. Besse
10 was in his letter?

11 A Not at all necessarily.

12 Q When did you first become aware of the letter,
13 Plaintiff's Exhibit 603? When did you first see it,
14 recently, or when you did your study?

15 A Well, this is PTX 603?

16 Q Yes.

17 When did you first see that?

18 A I really don't know. It must have been very early on,
19 but I certainly -- well, I don't recall -- the letter
20 is not burning in my memory, but I am certainly
21 familiar with the conditions of this letter.

22 Q Thank you.

23 Would you turn to page 48 of your report, please.

24 In Paragraph 42, as I read that, you are
25 criticizing Muny Light for pursuing a load transfer

Donheiser - cross

1 service instead of pursuing a permanent interconnection;
2 is that a fair summary of that paragraph?

3 A Yes, sir.

4 Q Did CEI's attorneys provide you with information
5 concerning the City's attempts to get a permanent
6 interconnection with CEI?

7 MR. LANSDALE: May I have the question
8 read? I object.

9 THE COURT: Sustain the objection.

10 A I think I have to answer the question generally --

11 THE COURT: Just a minute. The
12 objection has been sustained.

13 Ask another question, please.

14 BY MR. NORRIS:

15 Q Well, your paragraph again on page 48, and you are
16 stating -- "would strain to explain why MELP pursued
17 the seemingly inadequate objective of commencing
18 arrangements with CEI for a small amount of energy in
19 what was to become a handful of 11 KV load transfer
20 points which would not allow synchronous interconnection."

21 My question is, are you aware of the fact that
22 the City did attempt to get more than a handful of
23 11 KV load transfer points which would not allow
24 synchronous interconnection?

25 MR. LANSDALE: Objection.

Donheiser - cross

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2 THE COURT: Sustained. This is
3 precisely what we discussed up here. There is no
4 evidence to this date of such facts.

5 Now, please proceed and ask proper questions.

6 BY MR. NORRIS:

7 Q On page 59 of your report you are comparing Muny
8 Light's financial position with the financial position
9 of 29 other medium-to-large-sized municipal utility
10 companies in the United States; is that correct?

11 A Yes, sir.

12 Q And on the next page, Table 11, you show calculations
13 with respect to the operating ratio of Muny Light as
14 compared to the operating ratios calculated on an
15 equivalent basis of some 28 or 29 other municipal
16 utilities; is that correct?

17 A Yes, sir.

18 Q Are you aware of the fact that there are various other
19 kinds of ratios that one might use to compare the
20 balance sheet itself of utility companies -- I mean,
21 operating ratios are not the only comparisons, are
22 they?

23 MR. LANSDALE: Objection.

24 THE COURT: Overruled.

25 A Operating ratios are not the only way to look at the

Donheiser - cross

health of a utility, but they are an important insight into what is going on.

MR. NORRIS: Mr. Schmitz, would you hand the witness Plaintiff's Exhibits 3110, 3111 and 3112.

{After an interval.}

Q I have handed you three exhibits, Mr. Donheiser, and I address your attention first to 3110, which is a schedule showing the long-term debt comparison to gross plant ratio.

Are you familiar with those kinds of ratios in the electrical utility business?

A Yes, sir.

Q And are you aware that in the Federal Power Commission published data on municipal systems, that that is one of the ratios that they describe?

A Yes.

Q And subject to your right to check the calculations, would you agree that Plaintiff's Exhibit 3110 shows that this particular measurement in 1965, 1967, and 1969, shows that Muny Light's ratio was better than average of the 27, 28, and 29 municipal systems that you used in your calculations in Table 11?

A Well, I think long-term debt in Muny's case is a

Donheiser - cross

statistic which leads to very misleading results, because paradoxically, even though MELP was in dire financial straits in the '70's, its long-term debt was declining, and what was really happening here was that the bankers for MELP shifted from conventional sources to its vendors, and by 1969 they were already deferring payments.

Q Yes. You testified to that yesterday.

A Right.

Q My question is, subject to your right to check these calculations, when Municipal Light, when their balance sheet is compared to the balance sheets of the 28 or so other municipal systems that you used in your Table 11, isn't it a fact that at least by this measurement Muny Light is above average?

A I would say this is an irrelevant measure of MELP's situation.

Q You say "irrelevant." But would you challenge the fact that it is an accurate representation, do you?

A It is accurate in the sense that the FPC says long-term debt -- they see long-term debt in a very conventional way.

Q Turn to Plaintiff's Exhibit 3111.

Would you agree that this is another test that

Donheiser - cross

the FPC does recognize in its published statistics with respect to municipal electric systems?

A Yes.

Q Would you also agree, subject to your right to check, that Plaintiff's Exhibit 3111, which at this time compares long-term debt to net plant ratio, would you agree that Muny Light's balance sheet compared to the other municipal systems that you have used in your samples, at least by this test, shows it to be above average?

A Yes, I have the same comment about this one.

Q Turning your attention to Plaintiff's Exhibit 3112, would you also agree in the FPC published data on municipal electric systems, that the equity ratio is another test that they do include in your published statistics?

A Yes, they do, but this is irrelevant, because Muny Light simply wasn't making enough money, and if you don't make enough money, you eventually start dipping into capital, which was in fact what happened.

And if I can use an analogy, I would say it is like a person who owns a house but doesn't have money to pay the heating bill.

Q Would you agree that, subject to your right to check,

Donheiser - cross

that Plaintiff's Exhibit 3112 shows that at least by this measurement Muny Light was above average when compared in 1965, 1967, and 1969, to the electric utility companies run by the municipalities that you used in your samples?

A I don't know how others would see this, but I certainly wouldn't use it as an index of relevant strength.

Q Would you have any reason to doubt the accuracy of your numbers?

A Sitting here, I can't doubt the accuracy of the numbers.

Q Subject to your right to check, and if you would check on that, I would appreciate it.

There is evidence in the record, Mr. Donheiser -- strike that.

Did CEI's attorneys describe to you the terms and conditions of the type of interconnection that CEI was willing to affect with Muny Light during the 1960's?

A I have an understanding of the general approach to interconnection.

Q What was your understanding?

A That CEI required or asked for rate equalization on the basis that the benefits of the MELP operation were

Donheiser - cross

narrowly confined geographically.

Q Do you think it was bad management on Muny Light's part not to agree to rate equalization in the 1960's?

A I think rate equalization would have been preferable, a preferable alternative to the way in which they pursued rate policies from the early '60's on, yes.

Q Is it possible that had Muny Light agreed to rate equalization in the 1960's, that that would have resulted in further migration of Muny Light's customers away from Muny Light to CEI?

A I think we have some real questions as we did this study, whether or not Muny Light was really a viable business by 1966 and 1977, and rate equalization -- I can't say exactly how the City would have dealt with rate levels at this point. I don't know.

Q Would it have been a relevant consideration for Muny Light's management to take a look at that rate equalization, that it might indeed have caused them to lose customers to CEI?

A I would say that they would have to consider it.

Q In your analysis of Muny Light's operation and the effectiveness of its management during the 1960's, is it your testimony that Muny Light, or what is your testimony with respect to the refusal to agree

Donheiser - cross

to rate equalization as being an indication of mismanagement?

A Well, one of the arguments here, it seems to me, was that part of the rate equalization approach or proposition discussed was street lighting.

Now, MELP on its own cut street lighting, the rates to the City, in 1964, as I recall; so in a way they got part of the bargain. They took an action which represented an objective of CEI's or a condition that CEI was laying down, but they never got the interconnection.

Q I understand what you are saying, and you are correct, and there is evidence in this case that in addition to the rate equalization, that CEI was seeking, that the Muny Light charge to the City for street lighting was to be reduced.

A Yes, it was.

Q But my question is, do you point to that as bad management on Muny Light's part, not to agree to rate equalization on those terms?

A Well, I can't imagine a worse event occurring than the reduction of street lighting rates at precisely the time that they needed to squirrel money away for capital expansion.

Donheiser - cross

Q So from a management standpoint, it would have been preferable for Muny Light to have continued to receive revenue from the general funds at that time at the same level it had been receiving and for street lighting purposes; is that what you are saying?

A Yes, if I understand the question.

Q But you are not saying that good management in the 1960's would have required Muny Light to agree to CEI's rate equalization conditions; is that right?

A Well, I think the point is that they voluntarily acquiesced -- not acquiesced to that condition, but enacted a rate structure which fulfilled part of that objective.

Q Didn't they refuse to acquiesce to that rate equalization condition?

A Formally, yes, they did, but in 1961 they cut the rates.

Q I am not talking about street lighting rates. I am talking about rate equalization for the private customers; is that what you understand?

Let's talk about rate equalization, and that was with respect to the private customers.

A Yes, all right.

Q Now, Muny Light refused to agree to rate equalization

Donheiser - cross

for private customers; isn't that correct, in the
1960's?

MR. LANSDALE: I think I might object
to the question.

THE COURT: Approach the bench.

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{Bench conference ensued on the record as
follows:}

MR. LANSDALE: I think that is a
misleading question. The situation was that Muny
Light would equalize its rates, and Muny Light
refused this proposition, and it is not a fair
question to ask, and it doesn't comport to the
evidence to just ask in an isolated way, did they
refuse to equalize rates.

THE COURT: Mr. Lansdale, I really
must say that you can't ask his questions for him.
He can ask it if he is desirous of it, and if you
are desirous of rehabilitating your witness, you
are free to do so.

MR. NORRIS: He studied the
operation, he certainly understands the procedure.

THE COURT: Overruled.

{End of bench conference.}

Donheiser - cross

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THE COURT:

Read the question.

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

"Now, Muny Light refused to agree to rate equalization for private customers; isn't that correct, in the 1960's?"}

A Yes.

Q Was that bad management on Muny Light's part?

A You are asking me should they have done it or shouldn't they have?

A I am asking you whether, in your opinion, Muny Light's refusal to agree to rate equalization to private customers in the 1960's was, in your opinion, bad management on Muny Light's part?

A With the benefit that I have of hindsight, and looking at the inexorable developments that occurred later on, I think that they should have agreed to equalize rates.

Q But management, when it was making its decision, then they don't have the benefit of hindsight, and I am asking you, in your professional opinion regarding MELP's management in the 1960's, when they were confronted with the decision to be made, and they made the decision not to equalize rates; and my

Donheiser - cross

question is whether at that point in time, without the benefit of hindsight, can you say that that was an act of bad management on Muny Light's part?

A I believe they are on the horns of a dilemma, and I believe that they were aware of it at the time, and the reports of the Citizens League and the Hoover Commission reports during 1964 through 1966, those reports showed in fact that some real decisions had to be made and there was insufficient revenue and they had to confront the mode of operations which they had been conducting for many years and they had to look at alternatives to it.

If they raised rates, they were in the dilemma this way. If they raised rates, they could no longer contend that they were a hardstick. They might lose customers, but at the same time they would have additional revenues, and they would have had revenues which would have allowed them to become a comparatively efficient distributor.

Q Unless those revenues were siphoned off through non-remunerative applications like free street lighting or something like that; correct?

A Could you rephrase the question?

Q You are saying, Mr. Donheiser, that if Muny Light had

Donheiser - cross

agreed to the rate equalization on private customers and Muny Light would have had additional revenues to operate its business with; is that what you just said?

A Yes.

Q And if there were reductions, for example, in street lighting, in the street lighting rate --

A Yes.

Q So that 'at the same time increased income was coming from private customers, there was reduced income coming from the public customers, and it could well cancel out the revenue increase from the private customers, couldn't it?

A Well, I think here is where we have the classical problem in a conflict of viewpoints between general government and the enterprise activity of government as to where the benefits should be distributed, whether they should be distributed throughout the city or they are to be confined to a particular service area.

Q And management's function is to operate its entities whether it is a private entity or public, so as to achieve its purpose and objectives; that is the role of management, isn't it?

A Yes.

Donheiser - cross

Q So, coming back to this dilemma that Muny Light's management was in in the 1960's, with respect to the decision, should we agree to the rate equalization on private customers or should we not agree to the rate equalization on private customers, I simply want to know if their refusal to agree to that, if you point to that as evidence of bad management on their part?

MR. LANSDALE: Objection.

THE COURT: Overruled. He may answer.

A May I have the question rearead.

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

THE COURT: Do you understand the question?

THE WITNESS: Yes.

THE COURT: All right. You may answer it.

A I think management here has to include the City Council, MELP's Board of Directors, and the Mayor.

I think the refusal to equalize in my opinion was ill-advised.

Q And so your testimony is that the refusal to agree to rate equalization was a bad management decision in

Donheiser - cross

your opinion; is that right?

MR. LANSDALE: Objection.

THE COURT: That is just what he
said, that it was "ill-advised."

MR. NORRIS: All right. No further
questions.

THE COURT: Redirect.

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REDIRECT EXAMINATION OF ALAN DONHEISER

BY MR. LANSDALE:

Q Mr. Donheiser, you were interrogated with respect to
your lack of interviews with Muny Light personnel.

Please tell us whether or not you believe that
interviews with Muny Light's personnel is either
necessary or desirable in connection with the study
that you were making?

A I think it is important to draw a distinction between
the work that I did here and what we ordinarily consider
to be a management audit.

A management audit necessarily involves an analysis
of how well management is doing at a moment in time.
It is a snapshot.

Donheiser - redirect

And my firm usually goes into the firm and talks to the top management and forms impressions about how they were doing.

The criteria that you use in that type of management audit, that criteria often is an impression of really subjective and objective notions of what constitutes good management.

In the Muny Light case we have a long history of documentation, we have a long history of public and private documentation, we have people, officials of MELP, members of the City Council, mayors, who have put themselves on record as to how they perceive events contemporarily with the actual occurrence of those events.

I would say that to categorize what I did, it's a combination of looking -- well, it's a combination of history and management, and I think that the fact that Muny Light failed removes a lot of questions which one would have in a management audit about the nature of how things were going to come out in the future.

In the study that we did we have the benefit of hindsight and we have the benefit of hindsight over a very long period, and I think it was a rare

Donheiser - redirect

opportunity to look at an organization like MELP, or any governmental unit, in this way.

Q Mr. Donheiser, you were asked whether you had any first-hand knowledge about Mr. Hinchee, the Commissioner of Light and Power from about March of 1971 until sometime in 1973.

What is the fact as to whether first-hand knowledge in the sense that you used it then about Mr. Hinchee was relevant to your inquiry?

A I never met Mr. Hinchee but I do know from the record, from the FPC record, from the memos that were written, that Mr. Hinchee -- I feel that I have first-hand knowledge of what he was talking about.

When Mr. Hinchee came into MELP in 1971 he said, at least in the FPC transcript in 1974, that MELP was destroyed in 1971.

We have other evidence from Mr. Bergman in late 1970 that conditions were deplorable.

So there is corroboration of the utterances of these public officials and we were in a position to feel that we have a pretty intimate knowledge of what happened.

That could be called first-hand. I don't know exactly what the meaning of "first-hand" is in a

Donheiser - redirect

study like this.

Q Mr. Donheiser, there was some fair amount of cross-examination relative to the failure of City Council to authorize the capital improvement programs requested by the people who were operating Muny Light and the City Planning Commission with certain years \$5 million being asked before and \$2 million responded and in other years the discrepancy is different.

What part did these failures of City Council to authorize requested capital improvements play in your reaching your conclusion as to mismanagement?

A The really important needed capital outlays of the 1950's and 1960's were expressed to Council via the capital improvement program and the capital budget, and the fact that that was not an important process left MELP without any effective way of systematically financing and expressing their needs.

Q Well, was this a part of the basis for your determination that mismanagement occurred?

A Yes, it was.

Q Now, you were interrogated concerning the tri-cities interconnection, so-called, recommended by the outside consultants to the city, and you were

Donheiser - redirect

asked whether you were aware that the Mayor of the City had stated he was opposed to this proposed interconnection.

How did you view that circumstance as part of your analysis of the existence or non-existence of mismanagement?

A Well, it shows that the Mayor really wasn't in touch with the needs of MELP and I can't imagine on what basis he might have decided that it was not needed but it certainly was a bona fide need of MELP, at least as expressed by the officials at MELP.

Q Whether or not the officials expressed it, did you regard this as a bona fide need for MELP at the time you reviewed it?

A Yes.

Q Now, your attention was invited to Table 11 in your report, which is at page 60.

MR. LANSDALE: I wonder if you could

put that on the screen, Mr. Murphy. That is CEI

Exhibit 528, the slide.

Q Do you have that in front of you, Mr. Donheiser?

A Yes.

Q Tell me what the term "operating ratio" means. What is operating ratio?

Donheiser - redirect

A Well, the operating ratio, basically, tells us how well a business can pay its bills. And here we divided it as operating expense less interest on debt and depreciation divided by operating revenues. So, essentially, it is expenses over revenues, if you will.

Q Expenses divided by revenues?

A Yes.

Q That is to say, how close expenses come to equalling or exceeding its revenue?

A That's right.

Q A company which has a comfortable margin of revenues over expenses is, of course, in better shape than a company whose expenses exceed or closely approach revenues?

A That's true for you and I as well as the company.

Q What did your study show as to the operating ratio of Muny Light during the period that is reflected on this chart, which is 1961 to 1969, compared with the operating ratios of the municipal utilities with which you compared?

A Well, with the exception of 1963, which was MELP's best year financially, it ranks dead last when compared with comparably sized utilities.

Donheiser - redirect

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Q By dead last, do you mean --

A 21 out of 21.

Q Do you mean by that that the margin between its revenues and expenses was smaller than any of the rest of the companies?

A Yes, sir.

Q How about the other years? You said it was dead last in the year which was its best year financially. Did the rest of the period show a similar poor ranking?

A Yes.

Q Now, Mr. Donheiser, there had been certain suggestions denigrating or suggesting some denigration of the material which you looked at. There seems to be some suggestion of something wrong with who handed it to you.

Would you turn to page 109 of your exhibit 155?
This is Appendix C of your report, is it not?

A Yes, sir.

Q This is the list, is it not, of the documents specifically referenced to the statement or conclusions which are stated in the written part of your report, is it not?

A That's correct.

Q Do these comprise all of the documents that you looked

Donheiser - redirect

at in the course of your study?

A Not at all. We looked at more documents. We looked at other documents and didn't include them in this study for one reason or another, the main one being that they might be secondary sources, they might not be as clear. There could be other technical reasons why we did not reference those other documents, or they may be irrelevant.

Q In any event, there are 143 listed here, and I don't intend to take you through each one of them, however, I do wish to direct your attention to some of them as illustrative of the kinds of documents you looked at.

I call your attention particularly to a report which is Item 5 entitled "Griffin, Hagan and Associates report, 1947."

What kind of report is that?

A Griffin, Hagan and Associates in 1947 looked at the entire operation of the Muny Light plant.

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

THE COURT: Yes, you may.

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{Bench conference ensued on the record as follows:}

Donheiser - redirect

MR. NORRIS: I didn't go into the Griffin-Hagan report on cross. I think this is beyond the scope of cross.

THE COURT: You did go into the source material that he used. You went into that quite extensively and where he got it.

MR. LANSDALE: Yes.

THE COURT: He certainly has the right to rebut that.

MR. LANSDALE: Certainly.

{End of bench conference.}

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THE COURT: You may proceed, gentlemen.

MR. LANSDALE: I have forgotten where we were.

THE COURT: You asked what the Griffin-Hagan report was.

BY MR. LANSDALE:

Q Was this a report by consultants employed by Muny Light?

A Yes, it was.

Q Or the City of Cleveland?

A Yes.

Donheiser - redirect

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2 Q Did your summary examine such consultants' reports
3 which were rendered to Muny Light by the City's
4 consultants from time to time over the entire period?

5 A Oh, yes.

6 Q For example, I note Item 8, is that a similar report
7 in 1953?

8 A The Burns & McDonald report, are you talking about?

9 Q Burns & McDonald, Item No. 8.

10 A Yes. That was an engineering consultant's report
11 on expansion.

12 Q Item 4, "1948 Official Statement," what is that?

13 A That was a prospectus which was issued pursuant to
14 two 25-28 megawatt units which were installed at
15 Lake Road by 1953.

16 Q Were there similar consultants' reports, either
17 management consultants or engineering consultants or
18 the like, over the years, over the entire period
19 that you surveyed?

20 A Yes, indeed. There were a number of them that
21 appeared sporadically.

22 Q Now, look at Items 14 to 22. What kind of documents
23 were those?

24 A Well, here we have the capital improvement program
25 which is a statement of the needs, the capital

Donheiser - redirect

outlay needs of Muny Light as expressed by the Muny Light officials.

Q Is this a City document or what?

A It's a City document. Yes, indeed, sir. The requests are placed, are filled out by MELP.

Q Over how many years of those documents did you look at?

A Offhand, I can't say exactly but it's more than 20 years. We took them right from the 1955-60 document right on up through the 1970's when the format changed.

Q All right, sir. Were you confined in any way as to the documents that you looked at?

A No, sir.

Q In response to a question from Mr. Norris about the debt equity ratios and the like of Muny Light, you made a statement that Muny was shifting to bankers from debt to its vendors?

A Yes.

Q Would you explain what you mean by that?

A Well, very simply, to get working capital they were forced into either getting it from the City, which in a way they did, but they also were able to extract it from people who sold services and goods to the City and, in particular, they delayed payment

Donheiser - redirect

to East Ohio Gas, CEI, as everyone is well aware, and others.

Q Your statement then is that they gained capital by simply not paying their bills?

A Oh, yes. They would have been out of business without it.

Q Mr. Donheiser, you were asked whether or not it wasn't the role of management to achieve its objectives.

What, if any, knowledge does management have or should management have in formulating appropriate objectives?

A Management should be much freer than MELP's management was to determine what its needs are to be.

MR. LANSDALE: Thank you. I have no further questions.

THE COURT: Recross?

- - - - -

RE CROSS-EXAMINATION OF ALAN DONHEISER

BY MR. NORRIS:

Q In response to a question Mr. Lansdale asked you, you stated that Muny Light had failed.

To your knowledge, is Muny Light in business

Donheiser - recross

today?

A It is in business on a different basis than it hoped to be in business and it is certainly in business on a very different basis than it was 20 years ago.

Q To your knowledge, do Muny Light's revenues exceed its costs today?

A Today? I don't know today.

Q You testified with respect to the Painesville - Orrville - Cleveland interconnection proposal that was current in the 1960's and if my notes are correct you stated that was a bona fide need of MELP; is that correct?

A I believe so, yes.

Q One of the documents that is in evidence in this case is a letter from the Chairman of the Board of CEI, Mr. Lindseth, dated June 27, 1963, addressed to Mayor Locher, and with respect to the Painesville - Cleveland - Orrville connection Mr. Lindseth had this to say. And I want to read this and then I want to ask a question about Mr. Lindseth.

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

- - - - -

Donheiser - recross

{Bench conference ensued on the record as follows:}

MR. LANSDALE: This is covered by stipulation, if your Honor please, and I object to the interrogation with regard to the letter.

I'm trying to find the number.

THE COURT: Is the letter in evidence?

MR. NORRIS: It is in evidence.

MR. LANSDALE: Yes, it is in evidence, but the matter of the --

MR. NORRIS: Mr. Lansdale asked about the position of the Mayor, the Chief Executive of the City of Cleveland, with respect to this.

THE COURT: Overruled.

{End of bench conference.}

- - - - -

THE COURT: You may proceed.

BY MR. NORRIS:

Q Mr. Donheiser, Mr. Lindseth in a letter to Mayor Locher in 1963 had this to say about the Painesville - Orrville - Cleveland proposed interconnection:

But the trend is definitely toward the type of

Donheiser - recross

isolated tie-in proposed as between Cleveland, Orrville and Painesville, which is unsound both economically and engineeringwise and for which a figure of \$5 million was quoted as the cost. This expenditure would indeed be an extravagant waste of money."

I take it that you disagree with what Mr. Lindseth said in that letter; is that correct?

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

THE COURT: Overruled. He may answer.

A I don't know what that Muny tie could have been and what it could have done in the early 1960's myself. This was a period in which the Power Authority of the State of New York was entering into long-term contracts to sell municipalities preference power and I don't know what the availability and potential would have been, and I am not sure that Mr. Lindseth was addressing himself to the potential that Muny might have had to have access to low cost preference power.

Q But you said it was bad management on Muny's part not to go into that intertie, didn't you?

Donheiser - recross

1
2 A Well, they certainly indicated that that was a
3 preferred approach to meeting some of their generating
4 problems.

5 Q The Mayor was against it, wasn't he?

6 A In that particular year, yes, but I don't know if he
7 was against it at all times.

8 Q Do you know that he was in favor of it at any time?

9 A I don't know, but I do know that it appeared year after
10 year, including after 1965, in the capital improvement
11 program, so it popped up again.

12 So someone must have thought it was feasible,
13 politically.

14 Q If we have the Mayor opposed to it in 1963 and Mr.
15 Lindseth opposed to it in 1963, in your
16 professional opinions they were both incorrect; is
17 that right?

18 A I think that in view of what the engineering consultants
19 had advised Muni Light -- that is, Beiswenger-Hoch
20 in 1961 and 1962 -- that it was feasible and could
21 be done and demonstrated the efficacy of it, yes, I
22 think they were wrong.

23 MR. NORRIS: No further questions.

24 MR. LANSDALE: May I approach the
25 bench?

Donheiser - recross

THE COURT: Yes.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: I would ask your Honor read Stipulation No. 35 at this time. It's already been read, but I would like to have it read again.

{End of bench conference.}

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THE COURT: Stipulation 35 reads as follows, ladies and gentlemen:

"In 1961 consultants retained by the Cities of Cleveland, Orrville and Painesville issued a report that summarized the findings of the consultants on a possible interconnection among the electric systems of said cities. The consultants found such an interconnection be economically feasible and, if constructed, could result in substantial cost savings for the three municipal systems involed.

"Except for one year between the years 1961 and 1968 the construction of a tri-city tie line was listed in the annual six-year capital

Donheiser - recross

1 improvement programs submitted to the Mayor by
2 the Cleveland City Planning Commission. It was,
3 however, never constructed.
4

5 "The CEI asserted in a communication
6 addressed to the City, and believed, that such a
7 project was ill-conceived and uneconomical compared
8 to the economy and reliability which would be
9 achieved for the City by interconnection with the
10 CEI and an equalization of Muny Light's rates
11 with those charged by the Illuminating Company
12 as fixed by Public Utilities Commission of Ohio
13 or the Regulatory Authority of the City, as the
14 case might be from time to time."

15 MR. LANSDALE: I have no further
16 questions, your Honor.

17 THE COURT: Very well.

18 Ladies and gentlemen, supposing we take our
19 morning recess at this juncture.

20 Please, during the recess, adhere to the
21 Court's admonition, and we will return in about
22 ten minutes.

23 {Recess taken.}

24 - - - - -
25

1 {The following proceedings were had in the
2 absence of the jury.}

3 MR. LANSDALE: May I approach the
4 bench, if your Honor please?

5 THE COURT: Yes.

6 MR. LANSDALE: The next witness, if
7 your Honor please, is Mr. Merback, and I want to
8 state we intend to confine his testimony to other
9 sections of the Department of Utilities rather
10 than the Muny Light system.

11 MR. NORRIS: Are you intending to
12 have a voir dire, a secret voir dire, to
13 establish the showing that the Court mentioned
14 in his next-to-the-last paragraph?

15 MR. LANSDALE: That's the reason I
16 am confining this to those two departments. I
17 think there is already evidence these are part
18 of the same department and run exactly the same
19 way. The evidence is clear on that. And if
20 more evidence was required, we submitted a brief
21 outlining this.

22 MR. NORRIS: I got that and read it,
23 but the Court's order talks about the necessity
24 of a preliminary showing that the financial
25 part of the other operating divisions were

1 virtually added to those which precipitated the
2 financial difficulty of Muny Light.

3 MR. LANSDALE: The financial plight
4 of them -- Certainly the end result of this
5 testimony is for the purpose of showing they are
6 in exactly the same condition Muny Light was as a
7 result of the operation of the same factors.

8 MR. NORRIS: We understand they
9 are in the same department and had the same
10 director and that sort of thing.

11 MR. LANSDALE: They --

12 MR. NORRIS: However, what I would
13 like to say, if I may, is that if you look at
14 Mr. Merback's exhibits, you don't find the
15 kind of financial plight in either water or sewer
16 that you find in Muny Light; and I read the
17 Court's order to require preliminary things
18 before we even went into those two.

19 THE COURT: Yes. If need be, a
20 voir dire examination will be available concerning
21 the similarities of operation.

22 I don't think there is any question about
23 the fact that structurally -- Let me put it this
24 way. I don't think there is any question of fact
25 about the table of organization and authority,

1 namely, Mayor, Department of Utilities, and
2 the Director of the Department of Utilities,
3 Commissioner as to each of the three divisions
4 of the Public Utilities Commission; nor is there
5 any difference in the planning and operational
6 control of the three divisions nor their
7 responsibility to the City Council. Nor is
8 there any difference as to the source of their
9 funds and their responsibilities.

10 Now, I don't know how the plaintiff in this
11 case is going to proceed. That's why I left the
12 door open. As I understand it, the thrust of the
13 testimony as it relates to the divisions, the
14 two divisions other than the Division of Light
15 and Power, it is that absent the causal effect,
16 the charged causal effect, namely, the
17 anticompetitive predatory actions of CEI, the
18 other two divisions, namely, sewer and water,
19 had similar financial and management problems.

20 As I say, at this juncture I am unaware of
21 how the testimony is to proceed. It would appear
22 to me that where the similarities have been
23 established as to the operational control,
24 logistical control, financial control and
25 responsibility and delegation of authority and

1 responsibility, we then move into an area of,
2 number one, what was the situation as it related
3 to Muny Light {2} what was the financial
4 condition or the plight, if any, that existed as
5 to each of the other two divisions?

6 Now, at this juncture I don't really see
7 the necessity for a voir dire examination because
8 in the event the defendant proceeds to establish
9 the plight and fails to do so in the minds of
10 the jury, or in the mind of the defendant, that
11 is really a matter to be argued to the jury from
12 the facts as they have been developed.

13 If they succeed, that again is a fact or
14 conclusion to be argued to the jury.

15 The facts as to the condition of each of
16 these -- as a matter of fact, all three of
17 these divisions -- is a question of fact to be
18 decided by the jury.

19 I am sure the plaintiff is going to argue
20 that, number one -- you have already indicated
21 this -- the financial plight of Muny Light at
22 the present time is such that it is not in
23 financial straits, that it is making a profit,
24 and certainly the defendant, from the facts before
25 the jury, is going to argue conversely and I am

1 sure the defendant at this juncture is going to
2 attempt to show that there were certain
3 financial and operational conditions that
4 existed in each of the other two departments.

5 That is fact, whatever that may be. What
6 may be inferred from those facts is argument,
7 and I am sure that both sides are going to arrive
8 at diverse conclusions.

9 So at this juncture I don't see any basis
10 for a voir dire. If one develops, I will be
11 pleased to accommodate counsel for voir dire
12 examination. But just to have a voir dire
13 examination for the sake of a voir dire examination
14 is a waste of time.

15 MR. NORRIS: Well, the City's
16 position is that in order for the jury to infer
17 that any mismanagement that might exist in the
18 Sewer Department or Water Department -- let's
19 assume there is mismanagement in the Sewer
20 Department or Water Department -- in order for
21 any inference to be drawn that because there is
22 mismanagement in those departments there,
23 therefore, must be mismanagement in Muny Light
24 is a big leap in faith.

25 THE COURT: No, no, that is not