
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

10-1-1981

Volume 29 (Part 2)

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

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Bingham - cross

A Yes.

Q And that is the power schedule under which you assumed that the purchases are made from that time forward?

A Yes.

Q Now, Muny did not in fact have the firm power schedule with CEI in May of 1975?

A I believe they could have.

Q Did they have a firm power schedule at that time?

A No, they did not, but they should have.

Q Mr. Bingham, did you have any involvement with the firm power negotiations?

A Yes.

Q Are you aware that it took a period of some six to eight months to work out the terms of the agreement, an agreement that was agreeable to both parties?

A It took a very short time once Muny got an R. W. Beck man on the property who told them they were losing their shirts by running that plant, and then they got it very quickly, and until that, they had really not pressed it.

I am sorry. I made a mistake. They were losing their shirts by buying emergency power when, if they would agree to CEI's offer, they could save a lot of

Bingham - Cross

money.

Q - The firm power contract that was ultimately agreed upon by the parties was different in respect of its terms on demand and power charges than the one which was originally submitted to the City, wasn't it?

A I don't recall.

Q Mr. Bingham, when was the firm power contract actually entered into between Muny Light and CEI?

A The effective date was July 1, 1966.

Q Were you here for the testimony of Mr. Loshing earlier in this trial?

A Yes.

Q Are you aware that Mr. Loshing testified concerning the City's request for firm power from CEI?

A I don't recall it specifically, but he very well might have.

Q Do you recall his testimony regarding CEI's response to such a request?

A Vaguely.

Q Was it not his testimony that CEI refused the request for firm power?

A As of what date?

Q Pardon me?

A As of what date.

Bingham - Cross

Q After July, 1971, Mr. Bingham.

A I don't specifically remember him saying that. I would have to check.

Q Do you recall the provisions of the firm power contract that were the subject of the discussions between the parties, the main provisions that were of interest between Muny Light and CEI?

A I knew it at one time, but I can't remember it now.

Q Does it refresh your recollection if I referred to the "Rider notice for changing the contract demand"?

A No. I think I would really have to go back and look at my files.

I know there were a lot of arguments over non-rate-related issues.

Q Mr. Bingham, your PASNY study assumes greater use of the gas turbines than actually was the case, wasn't it?

A It does in some years.

It assumes that they will operate the gas turbines or the combustion turbines in a manner so as to minimize their overall costs, and this is a problem that they have to solve, comparing the running rate of the combustion turbines with the equivalent purchase power costs from CEI.

Bingham -- cross

Q And your comparison was done under the assumed firm power contract; is that right?

A Well, from July of 1976 on it was done under the firm power contract.

Q And before July of 1976, it was done under your assumption of a firm power contract?

A My assumption that they would have it -- and I might add that the rates in that original firm power contract were based on 1975 costs, so that the rate originally set out was appropriate for 1975.

Q Do you know whether it would be economical to operate the gas turbines during the period of 1975 through June of 1976, under the actual power contract, under which Muny Light bought power?

A It is economic, yes.

Now, I am perfectly aware that on occasion Muny preferred to buy emergency power from CEI at a very high cost rather than operate the combustion turbine at a somewhat lower cost.

I am not quite sure why they do that.

Q Mr. Bingham, your PASNY study also assumes that for the period that you studied, the City paid its bills to CEI for power on time, doesn't it?

A We are all assuming that.

Bingham - cross

Q Pardon me?

A We all assumed that.

Q Who is "we all"?

A Mr. Mayben and I.

Q And you assumed that also?

A Sure.

Q What source of funds did you assume?

A The same source that Mr. Mayben assumed.

Q Now, Mr. Bingham, in summary, the assumptions that you used for this study are assumptions and not related -- and not what actually happened and what Muny actually did?

A Which study?

Q This PASNY study.

A Yes.

Of course, I assumed that they shut the plant down in a timely manner.

Q Mr. Bingham, if Muny did everything that you assumed that they did, which wasn't done, and they had PASNY power, would they be in a better financial position than without the PASNY power?

A Sure. They would have made more money, but they still would have made money without it.

Q I believe you used the term that "Muny would be

Bingham -- Cross

competitive."

What is your definition of "being competitive"?

A To make a profit, and they were able to charge rates lower than CEI's.

MS. COLEMAN: No further questions.

THE COURT: Redirect examination.

MR. LANSDALE: Your Honor, it is after 4:00 o'clock.

THE COURT: I understand. I assume that you are not going to be overly lengthy. If I am incorrect in that assumption, please advise me.

MR. LANSDALE: I have several questions to ask Mr. Bingham.

THE COURT: How long do you think it will be?

MR. LANSDALE: I don't know. I will give it a try, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION OF WILLIAM N. BINGHAM

BY MR. LANSDALE:

Q Mr. Bingham, there were several questions of you on cross-examination relating to your determination of the reduction in the PASNY power and free wiring claims, suggesting that you used Mr. Mayben's assumptions as to the operation of the 85-megawatt unit, Case II-A, as the so-called base case, rather than contrasting the PASNY and the free wiring program with what actually happened, and I wish to develop with you why you did that, using Mr. Mayben's estimate of the 85-megawatt unit in operation rather than what actually happened, and I would like to get at it this way:

The first element of damage used by Dr. Wein, which is the interconnection claim, is based on -- and forgive me for leading for the moment, your Honor -- is based, is it not, on the difference between Munny as Mr. Mayben estimated it actually would be operated without any generation other than the combustion turbines, and for the --

THE COURT: Mr. Lansdale, I can tell from the form of your question that this is going to be an exercise in futility to

Bingham - redirect

conclude with this witness this afternoon, so supposing we adjourn until tomorrow morning, ladies and gentlemen.

Please during the recess keep in mind the Court's admonition not to discuss this case, either among yourselves or with anyone else.

Keep an open mind until you have heard all of the evidence and the Court's instructions on the law, and until such time as the matter is submitted to you for your final deliberations and judgment.

You are free to retire to the jury room, and we will submit to you the exhibits of the day for your examination.

After you have concluded that examination, you are free to leave and return tomorrow morning. Good night.

{The jury was excused from the courtroom.}

{The following proceedings were had in the absence of the jury:}

THE COURT: Now, what exhibits?

MS. COLEMAN: May we approach the

Bingham - redirect

bench?

THE COURT:

Yes.

{The following proceedings were had at the bench:}

THE COURT: It took four minutes to get halfway through that question.

MS. COLEMAN: Aside from that, Mr. Lansdale is alluding to some material that was already brought out on direct, and I think it is inappropriate for redirect.

THE COURT: I frankly wasn't following the question too closely; however, I will review it, and if it is -- and I do wish to caution you, Mr. Lansdale, to please don't be repetitious.

If it is in evidence, you can argue from the testimony that was put in on direct examination.

We are getting into a posture where there may be an assumption -- I am not saying that there are -- that there may be an assumption that rebuttal is a proper vehicle whereby you go over what you already put in on your direct

examination, so with that in mind, let's send the exhibits to the jury.

MR. NORRIS: Your Honor, there were some exhibits that didn't go in on Monday.

MRS. RICHARDS: 3123.

MR. NORRIS: Give the list to Jim.

{Exhibit list handed to Mr. Murphy by Mrs. Richards.}

THE COURT: Is this your last witness?

MR. LANSDALE: Yes.

THE COURT: And you will be prepared to proceed tomorrow, Mr. Norris?

MR. NORRIS: Yes.

THE COURT: If we don't have the exhibits --

MR. MURPHY: May I suggest that we do it in the morning? We were going to confer with your law clerk this noon, but he was otherwise occupied.

THE COURT: All right. Please advise the jury that they won't have the opportunity of reviewing the exhibits, and I am sure they are going to be disappointed, but tell them we will have the exhibits for them tomorrow

morning.

Good night.

{Court was adjourned for the day.}

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 2, 1981

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FRIDAY, OCTOBER 2, 1981; 9:20 O'CLOCK A.M.

THE CLERK: Your Honor, this is the case of the City of Cleveland, Plaintiff, versus The Cleveland Electric Illuminating Company, Defendant, Civil Action No. C75-560.

{Discussion ensued between the Court and Law Clerks at the bench off the record.}

THE COURT: I understand that the following exhibits have been offered without objection, so they are admitted:

Defendant's Exhibits 27, 102, 247, 1231, 1307, 1040-A, 1041, 1050 through 1055, 1058, 1059, 1206, 1358, 1359, 1361 through 1364.

The following exhibits have been admitted on previous occasions, but their admission is not reflected in the transcript.

Accordingly, the following exhibits may be admitted and entered into the evidence:

Plaintiff's Exhibits 3126, 3127, 3144, 3218, 3219, and 3236.

The following exhibits are in controversy:

The Lindseth charts, net cumulative customer shifts to MELP, 1910 to 1980, which is Defendant's Exhibit 1044.

I would like to review that exhibit.

Then the following charts:

Defendant's Exhibits 1314, 1315, 1316,
and 1317, which are correlated to the testimony
of Hamilton. What are the objections to 1044?

MR. NORRIS: It is repetitious,
your Honor, with CEI Exhibit 1041.

THE COURT: Okay. How about
the next group, 1314, 1315, 1316, and 1317?

MS. COLEMAN: Your Honor, I will
speak to those.

Your Honor, could you turn your microphone
on? We are having trouble hearing you.

THE COURT: Turn me on. Maybe
I am just not talking loud enough. Can you hear
me now?

MS. COLEMAN: Yes.

THE COURT: Fine.

MS. COLEMAN: Our objections to
1314 through 1317 are twofold:

I object to the relevance of all of them.
They relate to the cities, your Honor, the
City of Cleveland, and most of the material in
them concerns cities of such a small size as to
have no bearing, even by analogy, to the issue

here.

I have a specific objection to 1314 as it is misleading, intending to suggest that there is only 38 cities where there are electric companies in head-to-head competition.

The 38 cities were drawn from Hellman, and the exhibit does not reflect that.

1316 is misleading in the same way. It is further misleading in that it seems to state that customers in only 14 cities have a choice of electric supplier, and it is inconsistent with Hamilton's own exhibit, as well as his testimony, when he acknowledged by a variety of means other than head-to-head competition, customers in the city may choose electric suppliers.

CEI-1317 is objectionable for the same reasons as I have stated. It is misleading and intending to suggest that the existence of competition between two electric companies is limited to the few cities listed there.

THE COURT: Are you desirous of responding?

MR. MURPHY: If your Honor please, the only thing I would say is,

Ms. Coleman's suggestion that all of the exhibits are irrelevant it seems to me is erroneous because Mr. Hamilton testified that the extent of duplication throughout the country is relevant in determining whether or not the distribution of electricity is a natural monopoly.

As to the other objections that Ms. Coleman makes, I suggest that they are principally argument and not objections as such to the admissibility of the exhibit.

THE COURT: Very well. I want to review those exhibits.

How about 131b, Mr. Hjelmfelt?

MR. HJELMFELT: Yes, your Honor. That exhibit is based on a reflection, a hypothetical study that has no relationship to any facts that exist in this record, and they can't have any probative value.

In addition, the exhibit states that it applies for residential and commercial service, with only industrial service not included, but on the stand Mr. Blank agreed that large commercial customers had also been taken out of the study.

MR. MURPHY: Your Honor, the only

thing I would say is that these are Mr. Blank's reports, and it reflects his factual determination of the additional revenue requirements that would be required if the City of Cleveland had duplicate service, and it is relevant to the issue of natural monopoly.

THE COURT: I will have to review that exhibit.

MR. MURPHY: And as to Ms. Coleman's objections -- and Mr. Hjelmfelt's are of the same sort -- they go to the weight the jury might want to give but not to their admissibility.

THE COURT: All right. I will have to review those exhibits.

Now, we have another set here which are
fresh in my mind.

Defendant's Exhibits 1367, 1368, 1369,
1370, 1371, and 1372.

Ms. Coleman?

MS. COLEMAN: Yes, your Honor.

The exhibits to which you refer are the slides that we viewed yesterday in connection with Mr. Bingham's testimony.

THE COURT: Yes.

MS. COLEMAN: I object to these on several grounds.

In the first place, the way in which the exhibits are framed tends to suggest that this is something sponsored by the city. And while the jury may have the opportunity to associate this slide with Mr. Bingham yesterday, once they have the full range of exhibits before them, I think it is wrong to leave them with an exhibit which suggests that it is the City's, with such terminology as "Wein Remainder" and "Martin Discount" and "Maximum City Damage Claim," when, in fact, this is an exhibit of CEI.

THE COURT: Well, that can be redacted, and you can put "Adjustment," instead of the "Wein Adjustment," just put "Adjustment."

Any further objection?

MS. COLEMAN: Well, these exhibits are all argument of CEI, in a sense it is related to my first objection, but somewhat different.

All Mr. Bingham has done here is arithmetic calculations; and where he has made assumptions,

he has made them on direct examination of counsel that are based on a flip-through of some work papers; and to suggest that these are adjustments which ought to be made on the basis of study of damages is absolutely unfounded.

THE COURT: Well, there is no difference between these charts and the other charts that have been admitted.

They're summaries of calculations and computations, which all charts are.

What other objections are there?

MS. COLEMAN: Those are the -- I object that these are inaccurate, your Honor.

I suppose your Honor would say that that's something which ought to be brought out in the course of cross-examination.

I do feel very strongly that these charts should bear on their face an indication that this is CEI's arithmetic on damages and this is not a City claim or City adjustments.

THE COURT: Mr. Lansdale?

MR. LANSDALE: I have no objection to labeling them CEI exhibits.

I think that the idea that the jury, after hearing this testimony and seeing the

charts will think that it's anything else, certainly underestimates the jury.

I can't imagine why anybody would claim that the charts are misleading or any attempt to suggest that they are the City's exhibits.

THE COURT: Well, with the proviso that the exhibits be conformed to indicating that they are CEI or defendant's exhibits and the elimination of "Wein's" name from -- where is it? Get me the exhibits.

I had them here, I don't know what happened to them.

{Exhibits handed to the Court by Ms. Doyle.}

{The Court examining the exhibits.}

THE COURT: They're all the same.

{Mr. Lansdale puts an exhibit on the screen.}

THE COURT: Well, all right. First of all, as to the -- I am addressing 1367, "Maximum City Damage Claim Based Solely on Eliminating Claim for 85-megawatt Unit" as computed by CEI, I think that should eliminate that objection.

MS. COLEMAN: What is that, 1366?

THE COURT: -7.

All right. Now then, we have Wein --
PTX-3273, -- now, that may remain as is.

However, the third line, "Wein Remainder,"
will be modified just by eliminating the name
"Wein" and just put "Remainder"; and the same
in 2, and the same in 3.

MR. LANSDALE: All right.

THE COURT: And I think that
that applies to --

MR. LANSDALE: We'll make
similar adjustments in the others.

THE COURT: All right.

And the same thing in the head note in
the 1368, "Additional Adjustment to City
Damage Claim for CEI's Refusal to Interconnect"
as computed by CEI, and I think that you can
apply that to each of the exhibits.

They may be admitted.

Now, there is a group --

MS. COLEMAN: Your Honor please,
I didn't speak to one because it was of a
different nature than the ones we just
reviewed, and that was 1372, which we object
to on the ground of relevance and on the ground

that, according to Mr. Bingham's cross-examination yesterday, he didn't know the circumstances under which Muny had sent this letter, and he's not a recipient of the letter.

THE COURT: May I see it?

May I see the letter?

{After an interval.}

MR. BINGHAM: I think it's up at the witness stand.

{Mr. Bingham obtains the exhibit from the witness stand, hands it to Ms. Doyle who, in turn, hands it to the Court.}

THE COURT: This is a letter dated August 31st, 1981, signed by Salko to CEI.

{The Court reading silently.}

{Mr. Lansdale rises from his chair.}

THE COURT: All right.

MR. LANSDALE: Yes. The relevance of that is this, if your Honor please:

The City came in here on September 10th and presented an elaborate new damage exhibit in which they substantially increased the originally-claimed damages on the ground that they were changing the inflation factor.

In the same process, they made other adjustments respecting the rate for purchased power.

Now, the price at which power purchased from persons other than CEI is purchased makes a substantial difference in the amount of damage.

Now, here, this letter dated August 31st, 10 days prior to the time they're coming in here, indicates that Muny Light is going to secure power from some other source.

Now, whether it's Buckeye or wherever, is something else; if it's from a source and if they're going to change, it's bound to be cheaper than from CEI; and this has a major effect on those damages. And the fact that they were sending us this notice ten days before they came in here with these exhibits and they did not reflect anything about it in the exhibits bearing upon the credibility of Dr. Wein and the others who did this, I submit that's relevant for this purpose.

MS. COLEMAN: Your Honor, there is nothing in the letter which says how long or how much power is involved.

And the letter simply does not bear the interpretation that Mr. Lansdale wants to put on it.

MR. LANSDALE: That is the whole problem, your Honor:

This is totally within the City's knowledge.

All we know is that they're going to get a substantial amount of power from somewhere else in the future, and it has to have an effect on these damage claims, and they didn't reflect it.

This is something that is known to the City and not to us.

THE COURT: It would appear that if there is going to be modification of power demand and if the rate at which power can be and will be purchased in the future is different than that which has been included in the testimony -- the basis for the testimony as it relates to damages -- it would only speak to damages, it would become material.

I will, at this juncture, reserve my ruling on this, with the understanding that it is a proper area of rebuttal testimony if the City so desires to proceed.

Absent that testimony on rebuttal, certainly it is admissible for two reasons:

Number one. As I have indicated, as it may or may not bear upon the issue of future damages.

And, secondly, the credibility issue.

So I'll reserve my ruling, with the understanding that it will be admitted unless it is shown that it is not material.

Now, there is also a list of unsponsored exhibits similar to those exhibits that were tendered by the City as unsponsored exhibits.

These, I understand, are being tendered by the defendant?

MR. MURPHY: Yes, that is correct.

THE COURT: I do not have a listing of those, nor do I know the reasons for objections if objections are to be taken.

I would suggest that the parties address the issue at the earliest possible time.

And since we are approaching the point where the defendant is going to rest its case, absent a final disposition by ruling as to these exhibits, I will reserve my ruling on

these unsponsored exhibits, and we can resolve it --

MR. MURPHY: If I might be heard, your Honor.

Early on in plaintiff's case I gave a list to Mr. Weiner with those exhibits that we sought to introduce as unsponsored exhibits.

He responded and agreed to the admission of some, and those have been admitted.

As to others, he indicated objection, and did so in a filing with the Court on September 28th.

We responded in writing yesterday, on October 1, so I think we're content to rest on the submission.

THE COURT: All right.

I have not had an opportunity of seeing those pleadings and responses.

We have been working on the charge and addressing the damage issue and the implications of the damage issue, so I will get around to it.

MR. MURPHY: Your Honor, I appreciate that the Court has been considered with other and more significant matters than

these exhibits, and I don't wish that the Court has to rule on them in any particular period of time, but I would simply like, however, for the record to note that we are offering, prior to the close of our case, the exhibits mentioned in our memorandum in support of the unsponsored exhibits that was filed yesterday.

THE COURT: Very well.

MR. MURPHY: Thank you.

THE COURT: And the plaintiff's objections to those exhibits to which they take exception are noted.

MR. WEINER: Yes, they are.

THE COURT: I will rule immediately upon having the opportunity of those exhibits.

And I am aware that there is another exhibit, Plaintiff's Exhibit 3097, and the City seeks reconsideration of that, and I'll review that exhibit.

MS. COLEMAN: While we're on the matter of exhibits, I have three which were used in connection with cross-examination of defendant's witnesses, and I wanted to make sure those are offered into evidence.

The first is Plaintiff's Exhibit 3298, which is a typed-up version of notes that I made on the pad here in the cross-examination of Mr. Gaffin.

Plaintiff's Exhibits 3309 and 3310 are the overlay and map that we had with Mr. Kemper yesterday, and they were put in primarily to clarify the record since it might be somewhat mysterious without the exhibits.

MR. MURPHY: I don't think I have seen those.

THE COURT: Why don't you review them at the recess and let me know what your position is, Mr. Murphy.

Okay. Let's bring in the jury.

- - - - -

{The jury was seated in the jury box.}

THE COURT: Good morning, ladies and gentlemen of the jury.

- - - - -

REDIRECT EXAMINATION OF WILLIAM N. BINGHAM {Resumed}

BY MR. LANSDALE:

Q Mr. Bingham, yesterday you were cross-examined concerning your study as to the ability of Muny Light to compete without having the benefit of PASNY power, and your assumption was that Muny Light would have or would become a generation-only utility at the time of the initiation of the interconnection between Muny Light in May of 1975, and you were directed to certain testimony by Mr. Loshing in which he was asked whether, subsequent to July of 1971, the City requested firm power on a schedule other than an emergency schedule, and you were asked whether you were aware that Mr. Loshing had said that the City's request in this respect was denied.

I invite your attention to the fact that the record shows that the question to Mr. Loshing referred to the year 1972.

At that time, Mr. Bingham, was there a synchronous interconnection between CEI and Muny Light?

A No, there was not.

Q And absent that, could Muny Light have become the kind of operation that you assumed in your study

Bingham - redirect

relative to competing without PASNY power?

A I don't believe they could have. .

In order to buy firm power, at least as I understand the term, they would have to have an interconnection.

Q What is the fact whether Muny Light in fact requested firm power very shortly after the initiation of the interconnection in 1975?

A My recollection is that the first time that I am aware of their requesting firm power was, I think, August 15, 1975.

Q And did CEI respond to that request?

A Yes, we responded, I believe, a month later, indicating our willingness to do it, and forwarding to Muny a proposed or the draft of a proposed contract.

It wasn't in super-finished form, but it had all of the necessary elements to define what we were talking about.

Q All right.

Now, turning to another matter:

You were asked whether or not in your assumption for the same study you assumed that Muny Light fired, I think the term was, all of its

Bingham - redirect

production employees.

Will you explain why you assumed that Mundy Light would do without its production employees in your study, Mr. Bingham.

A Well, it seemed to me logical that if you shut down the power plant and are not going to run it, you don't need boiler operators on the payroll, and you don't need pipefitters and sheet metal workers and all of the craft people that they had when they were operating the plant.

Furthermore, the craft people in particular were very highly paid. ~~The firm of Cresap, McCormick & Paget~~ did a study, I believe, at the request of City Council --

MS. COLEMAN: Your Honor, may we approach the bench?

THE COURT: Yes.

- - - - -

{The following proceedings were had at the bench:}

MS. COLEMAN: Your Honor, the study that Mr. Bingham refers to is CEI Exhibit 392, and that exhibit was, I believe, ruled inadmissible by your Honor last week, and I

Bingham - redirect

object to this back-door way to get it before the jury.

MR. LANSDALE: Well, I was unaware that Mr. Bingham was going to refer specifically to it by name, but it doesn't make any difference.

I submit he can use this or any other legitimate source of the information to ascertain the pay scale of Muny Light.

THE COURT: Yes, he can use it.

I mean, the fact that 392 has not been admitted in its entirety does not necessarily eliminate it from consideration in other areas providing it is done in the proper fashion.

I will overrule the objection.

{End of bench conference.}

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BY MR. LANSDALE:

Q Please continue, Mr. Bingham.

A Yes.

They had in the power plant itself, according to this report, 29 maintenance employees who were averaging \$26,600 a year in wages, and they had five electrical workers averaging about \$32,800 a year in wages, and these were very highly-paid people.

Bingham - redirect

According to my checking, the Commissioner of Light and Power in 1976 was paid about \$23,000, and these are clearly people not needed not to operate a plant, and I would think any well-run business would terminate their employment.

Q Okay, sir.

Now, Mr. Bingham, you were interrogated concerning your assumptions in making your study of the damages relating to the three 25-megawatt units to your determination of the heat rate; and your intention was invited to Plaintiff's Exhibit 1812, which is the Beiswenger & Associates report to the City of Cleveland in 1961, which refers to -- page 18 -- to a heat rate for the plant, at a time when the 85-megawatt unit was not there, of 14,200 BTU's per KWH, which was substantially lower than the heat rate which you assumed.

Will you comment further upon the validity of the utilization of that heat rate in your calculations.

A Well, when you read the report -- and let me read the whole sentence:

"The plant as a whole operates with a coal rate of 1.1 pounds per gross kilowatt hour or

Bingham - redirect

15,200 BTU's per KWH."

I get the feeling they are talking about a gross heat rate here rather than a net heat rate, and if that is the fact, and I believe it is, the net heat rate would be somewhat higher than this.

Now, in order to get a better handle than the number I sort of pulled out of the air with the aid of Mr. Mayben yesterday of 5 percent plant usage, I went back and looked at the reports of Muny to the Federal Power Commission, and this happens to be their Form 12, and it tends to report more engineering-type data, but it also includes one table showing gross generation and net generation, and for the period 1964, 1965, and 1966, I believe the station use averaged about 10 percent rather than the 5 percent number that I alluded to yesterday.

On that basis the net heat rate would be in the neighborhood of 15,800.

Now, that further would have been in 1961. For the purposes of the study that you alluded to, I was talking about the period 1973 to 1977, and this would be 12 to 17 years later.

It would also be after a number of years of

Bingham - redirect

terrible abuse of the equipment, and although it might have been rehabilitated, I don't believe without very, very large expenditures that it could have been gotten back to near the heat rate that it had in 1961, so that I still think my 18,000 is not a bad number.

Q All right.

Now, Mr. Bingham, in connection with your study of the heat rate, you testified that you utilized in one of your calculations a heat rate of 10,700 BTU's per KWH assigned to the 85-megawatt unit by Mr. Mayben according to his work papers, and you could not remember at the time you were interrogating yesterday what Mr. Mayben used the 10,700 heat rate for.

Have you since reviewed that and are you able to state that now?

A Yes.

Q Please do so.

A One minor correction first. I think the heat rate was 10,070.

Q I am sorry.

A 10070.

Q All right.

Bingham - redirect

A As far as I can tell, that has only been used in one place in the work papers, and it was used to determine whether the average fuel cost attributed to the 85-megawatt unit for 1980 was a reasonable number, and the comparison was made by taking, I believe, the Mayben-assumed cost per kilowatt hour in 1980 for that unit of, I believe, 18.13 mills, and using a 12,000 heat rate -- and I will get back to that in a second -- and determining a cost of purchased fuel of \$1.51 per million, and then comparing that \$1.51 to what other people were paying in this general area for fuel, and concluding that it was a reasonable answer.

In other words, the 18.13 mills as an average annual cost was reasonable, and that is essentially the basis on which I did my study.

Now, the number becomes 12,000 heat rate rather than 12,070 because of two adjustments that Mr. Mayben makes:

One is to reflect his assumed increase in the heat rate growing out of apparently a Munny decision not to fully repair the boiler after the explosion, and he increased the heat rate 5 percent for that.

Bingham - redirect

He also assumes in that case that he will have to install a scrubber, and that is a big thing to take sulfur out of the flue gas, and it consumes a lot of power, and he has increased the heat rate 10 percent in respect of the power used by the scrubber. It will increase the net heat rate.

And he then converts the 10,000 heat rate into a 12,000 heat rate, which he then uses to test whether his assumed average cost per kilowatt hour for fuel is reasonable in 1980.

Q Now, Mr. Bingham, one more question:

You testified yesterday that you used Mr. Hinchee's exhibit, "The Generation History of Muny Light," as a source of the output of various of the generating facilities, and it was suggested to you that this was the gross output rather than the net.

At page 11,382, Mr. Hinchee testified that, "The chart represented the megawatt hours supplied by various power resources of the City."

Have you further checked these charts in the light of Mr. Hinchee's explanation, and do you have any comment about that?

MS. COLEMAN:

Approach the bench,

your Honor?

Bingham - redirect

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MS. COLEMAN: I think we have departed far from the cross-examination at this point, your Honor.

MR. LANSDALE: Well, I think it was perfectly clear that you suggested to him that this was gross generation rather than net, and sort of took him to task for assuming that it was net, and I think he is entitled to explain why he did.

THE COURT: Yes.

MS. COLEMAN: That doesn't have to do with Mr. Hinchee.

MR. LANSDALE: You have lost me.

THE COURT: Very well. He can certainly justify his answers and his computation irrespective of what he predicates the justification on.

He certainly went into the differential between gross and net and the effect and the implications of it, that it might have upon his

Bingham - redirect

ultimate conclusion.

MS COLEMAN: Well, if the question is dealing with that, that is one thing, but these questions seem to come from way out in left field.

THE COURT: Read the question.
{Pending question read.}

THE COURT: This is precisely what you went into yesterday.

The chart was on the easel over there.

MS. COLEMAN: I think we are talking about those charts over there {indicating}, your Honor.

THE COURT: Yes. It was taken from there and placed over here {indicating}, and that is the chart that the jury requested that I remove.

Overrule the objection.

{End of bench conference.}

- - - - -

BY MR. LANSDALE:

Q Do you have the question in mind?

A Yes.

Q Will you go ahead and continue, please.

Bingham - redirect

A Mr. Hinchee's description, I think it was something that megawatt hours supplied by the various sources and resources of the City isn't particularly enlightening; however, since it includes various classes of power purchased from CEI, ordinarily one would expect that it was all on a net basis.

The power purchased from CEI essentially is on a net basis, and this was the basis of my assumption.

However, I find, checking some other records, and doing some more scaling off that --

THE COURT: Off of what? What is "that"?

THE WITNESS: That colorful chart standing in the corner, and I am sorry, but I don't know the number.

THE COURT: What is the number?

MR. LANSDALE: I think it is 3031.

MR. MURPHY: It is Plaintiff's Exhibit 3031.

THE WITNESS: Yes, and I think it is 3030 that covers the preceding period?

MR. MURPHY: Yes.

A {Continuing} All right. One or the other of those two exhibits, and comparing against the Muny form

Bingham - redirect

FPC Form 12, that reports where they report monthly gross generation -- I am sorry -- monthly net generation, and we can find that the amount we scale off here appears to be about enough higher to account for the station use.

So we have reached the conclusion that those are gross kilowatt hours.

It leaves me a little surprised as to what the chart now means because I think that is a mixed bag.

MR. LANSDALE: All right. No further questions.

THE COURT: Recross-examination.

RECROSS-EXAMINATION OF WILLIAM N. BINGHAM

BY MS. COLEMAN:

Q Mr. Bingham, what years did you say you studied to determine station use?

A I think it was 1964, 1965, and 1966.

Q What stations did Muni have operating to provide power to its system at that time?

A The Lake Road plant, including the topping turbine which supplied some steam to the East 53rd Street

Bingham - recross

station.

Q And that station was also being operated at that time; right?

A Using steam supply from the Lake Road station, as best I can determine.

Q When we talk about station use, that includes a variety of uses of power, to run pumps and lighting and other house power requirements of the generating station; isn't that right?

A Yes.

Q What station -- the period of Mr. Mayben's study is 1974 and forward, isn't it?

A Yes.

Q And at that time the Lake Road station is the only, was the only station being used, wasn't it?

A Yes.

MS. COLEMAN: No further questions.

MR. LANSDALE: No further questions, your Honor, and subject to the admission of the exhibits, the defendant rests.

THE COURT: Very well.

You may step down.

MR. NORRIS: May we approach the bench?

Bingham - recross

THE COURT: Yes.

- - - - -

{The following proceedings were had at the bench:}

MR. NORRIS: The City has four motions to make at the close of the defendant's case, for a directed verdict.

THE COURT: Put them on the record.

MR. NORRIS: The first is that we think the evidence points to the conclusion with which reasonable minds could not differ that CEI possesses monopoly power by virtue of its power both to control prices and its power to exclude competition.

We think that on the first branch of that motion, the power to control prices, that the evidence points to this conclusion, notwithstanding the regulatory authority of the PUCO, which according to the cases is simply another fact of market life.

On the second branch of the motion, the power to exclude competition, we think that the evidence of CEI's market share in the City

Bingham - recross

of Cleveland measured as the evidence shows by customer's electric sales and the electric revenues, all in the 80- to 90-percent range, is an indication of monopoly power.

We think that when the Court puts into the equation also the other factors that the only two competitors in the market -- the entries and the barriers to entries of other competitors, and the fact that CEI exercised control over essential facilities, namely, the interconnection and the transmission grid, that all of these, neither of which could feasibly have been duplicated by the City, and the denial of that significantly harmed the City, and we believe, your Honor, that those factors point indisputably to the proposition that CEI possessed monopoly power in the relative market, and that is our first motion.

THE COURT: Overruled.

MR. NORRIS: Secondly, we would move for a directed verdict on the proposition that CEI wilfully maintained that monopoly power, and the evidence has shown that CEI engaged in conscious and wilful business

Bingham - recross

practice that inevitably resulted in the exclusion and elimination of the competition and potential competition, and of course I am referring to the Muny Displacement Program evidence, and I refer to the evidence of the refusal to interconnect.

THE COURT: Is it the claim of the plaintiff that these practices were unreasonably exclusionary?

MR. NORRIS: Your Honor, on this branch of the motion it is the City's position that they don't have to show that these practices were unreasonably exclusionary.

We think that that test comes into play if and when the defendant has carried its burden of proof on the natural monopoly issue.

THE COURT: How can you justify that statement with Byars?

MR. NORRIS: Because the cases hold that -- Learned Hand, for example --

THE COURT: Berkey and Byars are after Learned Hand.

MR. NORRIS: Both Berkey and Byars do not require a specific intent under a

Bingham - recross

monopolization claim because all they require is conscious and wilful conduct.

THE COURT: Byar and Berkey says the conduct must be unreasonably exclusionary.

MR. NORRIS: We believe a proper reading of those cases simply requires an antitrust plaintiff to show that in a monopolization claim that the defendant, once possessing monopoly power, simply engaged in conscious and wilful acts.

THE COURT: The reading of those cases and other circuits, including the Ninth, the Seventh, and the Sixth, indicates that their conclusions are contrary to your conclusions.

MR. NORRIS: Well, we of course believe that this conduct was unreasonably exclusionary, and we are in this branch of our motion urging upon the Court our conclusion that in order to demonstrate a wilful maintenance of monopoly power, that it is not necessary to show more than the defendant engaged in wilful business practices.

As a matter of fact, the cases show -- and

Bingham - recross

I am talking about Griffen where the United States Supreme Court said that if the practices indicate an attempt by the defendant to gain competitive advantage, that that does satisfy the test on the wilful maintenance of monopoly power.

Griffen doesn't close the door. Griffen didn't address -- All I am saying to you is that it appears to me at this juncture, Mr. Norris, that there has been a significant emergence of a more definitive recognition of the conduct that would be required to demonstrate the exercise of monopoly power, and Berkey and all of the latest cases, '79, '80 and '81 interpret Berkey and Byars and a number of districts to say that the conduct must be unreasonably exclusionary, but, anyway, just put your position on the record and proceed with your motion.

MR. NORRIS: The evidence of the Muni Displacement Program and the refusal to interconnect and the refusal to wheel and the refusal to provide the City with the benefits of coordinated operations, and indeed the denial

Bingham - recross

unreasonably exclusionary, and therefore on both bases the City submits that its motion for directed verdict ought to be granted, and that the City has shown, and the evidence has shown, that CEI's business conduct was for the purposes of maintaining its monopoly, and therefore both branches of the monopolization claim are subject to directed verdict.

THE COURT: Mr. Lansdale.

MR. LANSDALE: If your Honor please, I have two comments to make:

Number one, there has been the question of monopoly, and the motion assumes the issue of relevant market which is very much an issue here, and this area, whether it is the area of competitive overlap or the whole City of Cleveland, and the claim on the motion for directed verdict rests entirely on the assumption that the market is the entire City of Cleveland, which is to say -- at least there is a difference of opinion about it.

We think that the evidence does not admit any other conclusion other than it is the area of competitive overlap, in which the

Bingham - recross

market share is quite substantially different from anything any court has assumed shows monopoly power.

Secondly, we submit as a matter of law that we don't have the power to control prices.

Thirdly, on the question of ability to exclude competition, the claim for that rests entirely upon our failure as they view it to rescue Munny Light from the results of its own mismanagement for 70 years or more, and Munny Light has survived despite the presence of CEI; and for plaintiff to claim that CEI has the power to exclude competition, I submit, is wrong on its face, and I have nothing to add to your Honor's comment about Berkey and the Byars case.

As to the Alcoa case, I submit it is no longer good.

THE COURT: Overruled. Proceed to the next one. We could go on and on. Let's go to your third motion, please. I am not going to waste a lot of time on the motions, but put your position on the record and let's proceed.

Bingham - recross

MR. NORRIS: Yes.

In response to Mr. Lansdale's comments about the market, we think the motions are well taken regardless of which relevant market it is considered.

The third motion is that the City would move for a directed verdict, that CEI attempted to monopolize the sale of retail firm power in the City of Cleveland and/or the area overlap as Mr. Lansdale refers to it; that CEI engaged in practices that were unreasonably ~~anti-competitive and unreasonably exclusionary,~~ which shows specific intent on the part of CEI to monopolize the sale of retail firm power in the City of Cleveland.

We believe that the evidence that has been alluded to previously, the Munny Displacement Program, the refusal to wheel, and the refusal to interconnect, and the refusal to grant coordinated access, supports our motion for a directed verdict.

THE COURT: Overruled.

MR. NORRIS: Then fourthly, we move that the City of Cleveland is not a

Bingham - recross

natural monopoly for the distribution of retail firm power, and we seek a directed verdict on that issue.

THE COURT: Overruled.

Your motions are the same as they were in the close of your case?

MR. LANSDALE: I will await my motions until the plaintiff has finished rebuttal.

THE COURT: All right. Let's proceed.

{End of bench conference.}

THE COURT: Ladies and gentlemen of the jury, the defendant has now rested its case, and we now proceed to offer the plaintiff an opportunity of rebuttal, and we may proceed.

MR. NORRIS: I will call Mr. Joseph Pandy.

THE COURT: Now, gentlemen, let's keep in mind the purposes of rebuttal.

Rebuttal is not to reintroduce into evidence the testimony that either party introduced during the course of their direct

Bingham - recross

cases. That would merely be repetitious.

The purpose of rebuttal is to rebut any new matter that may have been introduced during the course of the defense, and the evidence will be limited to that type of testimony.

You may proceed.

- - - - -

J O S E P H P A N D Y,

having previously been called as a witness,
and previously having been sworn, and now
being called as a rebuttal witness, was
examined and testified as follows:

DIRECT EXAMINATION OF JOSEPH PANDY {Rebuttal}

BY MR. NORRIS:

MR. NORRIS: Mrs. Richards,

would you give Mr. Pandy CEI Exhibit 1372.

{After an interval.}

Q Mr. Pandy, while Mrs. Richards is getting that letter,
is the City presently drawing power from Buckeye?

A Yes, we are.

Q And how much power is the City entitled to under
the contract between the City and Buckeye?

A The contract provides for 30 megawatts of assured
or firm power from Buckeye.

Q Now, under what circumstances could the City obtain
more power than 30 megawatts?

A By mutual agreement the two parties can agree to
increase the 30 megawatts to 50 megawatts, and
that mutual agreement has to be evidenced in
writing.

Pandy - direct

Q Is there any writing, any such mutual agreement?

THE COURT: Mr. Norris, we have been through this, and this is in the record.

Now, you are cautioned that I don't want you to be repetitious in rebuttal.

MR. NORRIS: May I approach the bench?

THE COURT: Yes.

{The following proceedings were had at the bench:}

MR. NORRIS: Your Honor, this is evidence that goes to the exhibits that the Court reserved its ruling on this morning.

I am trying to lay a foundation so it is understandable to the jury what the significance is of 1372, and that was the purpose.

THE COURT: All right.

{End of bench conference.}

THE COURT: You may proceed.

MR. NORRIS: May we have the question read.

Pandy - direct

THE COURT: I don't think there is a question before the witness. He just answered that any additional power above 30 megawatts must be by mutual agreement by evidence in a written document.

BY MR. NORRIS:

Q Now, Mr. Pandy, is there in existence any writing evidencing a mutual agreement between Buckeye and the City of Cleveland to increase from 30 megawatts to 50 megawatts under the contract?

A No, there is not.

Q In connection with your contract between the City and CEI, how much notice is required under the contract to change the contract demand?

A Six months' notice is required.

Q And do you have in front of you CEI's Exhibit 1372?

A Yes, I do.

Q And that is the letter from Mr. Salko to Mr. Fitzgerald of CEI indicating that effective March 1 the contract demand will be 30,000 kilowatts; in other words, purchasing power as of March 1, 1982, at 30,000 kilowatts rather than at the current demand rate; is that a fair summary of the import of this letter?

Pandy - direct

A Yes. It was written to comply with the six months' provision that I just described.

Q Now, what is the contract demand today with respect to the contract between CEI and Munny Light?

A It is higher than this 30,000 figure.

It is, I believe, 60,000 at the present.

Q What was the purpose for sending Mr. Salko, sending CEI Exhibit 1372 to CEI?

A To comply with the six months' notice requirements that they want to change the demand in March of 1982.

Q What was Munny Light's reason for wanting to change the demand for March of 1972?

A We are hopeful of receiving additional power from Buckeye at that time.

Q Do you have any written mutual understanding with respect to that power as of March, 1982?

A No, we do not.

Q What is the source of the power that you anticipate getting in March of 1982, that underlay the writing of CEI Exhibit 1372?

A It is an allotment of power from Buckeye to the City of Hamilton, Ohio. Hamilton has a contractual right to that power, but their manager, John Engle,

Pandy - direct

indicated to us that he has excess capacity, and he does not actually require that Buckeye Power at that time, and he has consented to allow us to schedule it subject to his call if he would need it.

Q And does this notification to CEI, CEI Exhibit 1372, does that indicate that from this point forward all CEI is ever going to be selling to Muny Light is 30,000 kilowatts under the present contract?

A No.

Q What would you have to do, Mr. Pandy, in order to raise the amount of purchased power that Muny buys from CEI back up to the present level from the 30,000 level that you have now dropped it to for the month of March, 1982?

A - We would have to write them another letter, six months in advance of the date that they wanted to change.

Q And if you wrote such a letter today on the 2nd of October, 1981, telling CEI that you wanted to increase the contract demand, at what point in time could you get the increased contract demand from CEI?

A Six months from this date, or it would be about April 2nd, 1982.

Q Thank you.

Pandy - direct

MR. NORRIS: Mrs. Richards,
would you kindly hand Mr. Pandy the series of
photographs that are marked PTX-3143 through
PTX-3141.

{After an interval.}

BY MR. NORRIS:

Q Mr. Pandy, I am going to put up on the screen a
transparency of PTX-3133.

Mr. Pandy, were you in the courtroom when Mr.
Gerber testified during the defendant's case?

A No, I wasn't, but I have read his testimony.

Q And are you aware of the fact that Mr. Gerber
stated with respect to this exhibit, PTX-3133, that
it looked like duplication to him?

--- MR. LANSDALE: --- May I approach the
bench?

THE COURT: Yes.

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

MR. LANSDALE: I don't think any
reference to Mr. Gerber's testimony is
appropriate rebuttal.

On this particular picture, Mr. Gerber said

Pandy - direct

it looks like duplication, that he admitted it looks like duplication, and Mr. Kemper testified as to what these pictures actually were.

The rest of the exhibits in the list given to Mr. Pandy are pictures of other parts of CEI lines that involved the presence on the streets of both transmission and distribution, and I submit that in no sense is it rebuttal of anything.

We have not put on any testimony except in explanation of the pictures handed to Mr. Gerber, anything about these matters.

MR. NORRIS: With respect to the exhibit on the screen, 3133, the question that I put just now is preliminary only for continuity purposes, because I then intend to call Mr. Pandy's attention to the explanation that Mr. Kemper made yesterday that Mr. Pandy has --

THE COURT: You can't do that, Mr. Norris. That is highly -- a highly improper method of cross-examination.

You can ask this gentleman what these photographs depict and whether they depict

Pandy - direct

duplication, but you can't ask him, "Now, yesterday so-and-so testified to this and this and this, and now I am going to ask you these questions."

This becomes argument which you can make during the closing argument as to the credibility of Mr. Gerber, but you are not going to have this man testify to the fact that Mr. Gerber testified inaccurately.

MR. NORRIS: May I just point out that Mr. Lansdale in his direct examination of Mr. Bingham and on his redirect examination called attention to the testimony of Mr. Hinchee.

THE COURT: Only after Ms. Coleman opened the door.

Now, let's proceed. You are free to proceed and ask him what these pictures depict, because that is rebuttal if they do not depict what Mr. Kemper and --

MR. LANSDALE: Mr. Gerber said they look like it, and Kemper explained what they were.

THE COURT: Let's proceed.

MR. NORRIS: One clarification, I

1 Pandy - direct

2 would seek leave to point to the specific
3 testimony made by Kemper.

4 THE COURT: I just said I am
5 not going to permit you to do that. You can do
6 it under the proper circumstances, and that is
7 not a proper circumstance.

8 {End of bench conference.}

9 - - - -

10 THE COURT: Read the last
11 question back.

12 MR. NORRIS: I will withdraw the
13 question, your Honor.

14 BY MR. NORRIS:

15 Q Mr. Pandy, can you identify PTX-3133 that is on the
16 screen?

17 A Yes. It's a photograph of Mayfield Road at the
18 intersection of Green Road, looking to the west.

19 Q And was this photograph taken either by you or under
20 your direction?

21 A Yes, it was taken by the City's photographer under
22 my direction.

23 Q And would you indicate, please, what it is a picture
24 of?

25 And I call your attention to -- particularly to

Pandy - direct

the utility poles that are shown on both the left side and the right side of Mayfield Road.

A It shows CEI electric facilities.

The pole line on the south side being a double circuit 33 KV subtransmission circuitry, and --

Q Excuse me.

When you say "south side," which side of the photograph are you referring to?

A To the left of the picture.

And on the right side of Mayfield Road, on the north side, is a CEI -- I believe it's a 13,000-volt electric circuit.

It also shows street-lighting circuitry, some telephone cable, and traffic signalization.

Q Mr. Pandy, on the right side -- or that would be the north side -- on the right side of the photograph, which is the north side of Mayfield Road, is that correct?

A Yes.

Q All right.

What is the height of the CEI poles that are shown in the right side of the photograph?

A They're 50-foot Class 3 poles.

Q And what lines are strung on these 50-foot poles?

Pandy - direct

A The 13,000-volt circuit and some street lighting equipment.

Q Now, on the left side of the photograph -- which would be the south side of Mayfield, is that correct?

A Yes.

Q -- on the left side, how high are the CEI poles that are on the left side of the photograph?

A They're higher than the 50-footers, they're approximately 60 feet.

I was unable to determine exactly how high they were because the brands were missing.

Q What do you mean by "the brands were missing"?

A Poles are branded, they have an imprint on them that shows their height and class.

Q And do they also have an identifying number on them?

A Yes, they do.

Q I call your attention to the pole that is at the extreme left side of the photograph.

Were you able to determine the identifying number on that particular pole?

A Yes, it is a CEI pole, it has a CEI number on it.

Q And do you have that number?

A Yes, I do.

Pandy - direct

1
2 Q What is it?

3 {The witness obtains a paper from his
4 jacket pocket.}

5 A It's CEI No. 63682.

6 Q Now, Mr. Pandy, coming back to the right side of
7 the picture where the shorter pole, 50-foot pole is
8 running down the north side of Mayfield, you say it
9 has 13,000-volt lines running down that side of
10 Mayfield, is that correct?

11 A Yes.

12 Q Now, I notice that there are three lines that go
13 across Mayfield from the 50-foot pole over to the
14 60-foot pole, No. 63,682.

15 What kind of lines are those?

16 A Same as on the north side, they're 13,000-volt.

17 Q Now, what else is located on Pole 63,682?

18 A There is street lighting circuitry; there is head
19 guys going to the left or to the east to the next
20 pole down; there is support for the traffic signal
21 at that intersection.

22 Q Are the other poles, Mr. Pandy, on the south side of
23 Mayfield Road shown in PTX-3133 approximately the
24 same height and type as what you have identified
25 for pole 63,682?

Pandy - direct

A Yes, they are.

Q In your judgment as a utility expert, Mr. Pandy, is there sufficient clearance for those 3 -- 13,000-volt lines that cross Mayfield Road and are attached to Pole 63682?

A Yes, there is; they built it that way on 63682.

Q Would there be adequate clearance, in your view as a utility expert, if those 13,000 line were also run down the south side of Mayfield on the other 60-foot poles that are shown in the left side of that photograph?

A Yes; they're the same height poles.

Q Mr. Pandy, address your attention to PTX-3138.

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

THE COURT: Approach the bench.

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

MR. LANSDALE: We are proceeding under photographs of other areas.

There is nothing on direct about this. I don't know what he has in mind; but we have no

Pandy - direct

testimony in our case about these.

MR. NORRIS: Your Honor, the other photographs that I would like to put in front of the jury in the series that I have identified are similar photographs taken either by Mr. Pandy or under his direction of CEI poles in different parts of the City of Cleveland showing CEI lines on both sides of the street.

And CEI, during its defense, has made a big thing out of duplication, and the City wants to indicate that CEI is, just as a normal utility matter, guilty of the same factors that they criticized Munny in terms of duplication of facilities; and we think this is rebuttal to the defense that CEI put in of a natural monopoly.

MR. LANSDALE: I submit, your Honor, that showing pictures of one pole line of distribution facilities and another pole line of transmission lineup facilities, which are different facilities for different purposes and necessary for the system is a totally different proposition than duplication of distribution facilities, and --

THE COURT: It certainly is.

Pandy - direct

Mr. Norris.

MR. LANSDALE: -- we have nothing
in the case about that.

THE COURT: Are you going to be
prepared to show that there is a duplication of
facilities as a competitive matter?

MR. NORRIS: Your Honor, the
witness will testify with respect to that the
two lines of poles were not necessary, that one
of the pole lines, distribution, clearly --

THE COURT: He didn't testify
to that in the last trial, did he.

All I know from the testimony is that they
have two different kinds of poles, and my
immediate respons is, so what?

MR. NORRIS: Well, I will ask
him that on the 13,000, is that a distribution
line, and the other picture --

THE COURT: So far he has
testified to nothing that isn't in evidence.

All it is is a repetition of former
direct examination and cross-examination.

MR. NORRIS: No.

Mr. Kemper testified, your Honor, that

Pandy - direct

they couldn't put these on the same side of the street because there wasn't adequate clearance, and --

THE COURT: It seems to me -- well, okay.

This is the area between Euclid and Mayfield?

MR. LANSDALE: Yes, sir.

THE COURT: There is testimony there was some sort of objection on the part of the officials of Euclid as to the height of the poles they could utilize, --

MR. LANSDALE: Yes, sir.

THE COURT: -- that was the basis for stringing --

MR. LANSDALE: We had a separate line.

Other photographs were taken in this series in the City of Cleveland where there was no such request that the CEI put their lines on different sides of the street.

THE COURT: Well, in a sense, it's rebuttal.

But I would suggest, Mr. Norris, that you

Pandy - direct

view the jury's response to your examination;
just watch, watch them.

Go ahead.

I was watching them during the last
examination of Mr. Pandy, and -- just proceed.

Overruled.

{End of bench conference.}

- - -

BY MR. NORRIS:

Q Mr. Pandy, on the earlier exhibit, PTX-3133 that we
had on the screen just before this one, the
13,000-volt line that was run down the right side
of the photograph, is that a distribution system
line?

A Yes, it is.

Q Now, would you kindly identify for the jury
PTX-3138?

A It's a photograph looking along West 130th Street
in the City of Cleveland, looking to the southeast.

It was taken approximately in front of the
City's Water Division West Park Service Center.

Q And whose lines are depicted on PTX-3138?

A CEI's.

Q And is either one of those lines shown on that

Pandy - direct

photograph a distribution line?

A The lines to the right of the photo are.

Q And what are the lines to the left of the photo?

A They appear to be 33 KV subtransmission.

Q And is this located in the City of Cleveland?

A Yes, it is.

Q Did you attempt to make a determination as to whether or not the City of Cleveland required these lines to be placed on opposite sides of this thoroughfare?

A To the best of my knowledge, it did not.

Q Address your attention, please, to the other photographs in this series from PTX-3133 through PTX-3142.

Mr. Pandy, were all of these photographs taken either by you or under your direction?

{The witness examining the photographs.}

A Yes, they were.

Q And do they all depict CEI lines on both sides of the thoroughfares shown in the pictures?

A Yes.

Q And are all of those photographs of thoroughfares in the City of Cleveland?

A No. The first ones are in South Euclid, the

Pandy - direct

Mayfield-South Green photos are in South Euclid.

Q And what were the other photos in the series?

A The others are in Cleveland.

MR. NORRIS:

No further questions.

- - - - -

CROSS-EXAMINATION OF JOSEPH PANDY

BY MR. LANSDALE:

Q Mr. Pandy, those heavy cables on the poles on the right in that Exhibit 3138 are telephone cables, are they not?

A If you mean the lower cables, yes, they are telephone --

Q Those heavy lines, --

A Yes, sir.

Q -- telephone cables.

And the other exhibits that you referred to, were there lines on both sides of the street in each case, one line is for local distribution, and the other line is a transmission line, is it not?

A That's my understanding, yes.

MR. LANSDALE:

No further questions.

- - - - -

1 THE COURT: Call your next
2 witness.

3 MR. NORRIS: Mr. Donald Hauser,
4 your Honor.

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

8 THE COURT: Approach the bench.

9
10
11 {The following proceedings were had at the
12 bench:}

13 MR. LANSDALE: I object to calling
14 Mr. Hauser.

15 The reservation which Mr. Norris made at
16 14,314 of the record says that:

17 "The rest of Mr. Hauser's examination would
18 have dealt with the transmission line issue,
19 and I will defer going into that kind of
20 material because it is more appropriately
21 reserved for the rebuttal case," and Mr. Norris
22 reserved the right to calling him back.

23 And I commented that I did not concur
24 that it is proper rebuttal.

25 And your Honor said, "if the evolution of
the evidence warrants recalling Mr. Hauser for

1 further examination on rebuttal, it may be done."

2 I submit that there is nothing in the
3 plaintiff's case to which Mr. Hauser can
4 properly be called on rebuttal.

5 He's been an attorney for the company, and
6 he's not -- isn't in charge of transmission
7 planning, construction, or the acquisition of
8 property for the purposes of transmission
9 lines; and the material which I have seen which
10 Mr. Norris appears to be desirous of getting in
11 are excerpts from material from the report of
12 the CEI to the Ohio Power Siting Commission.

13 Mr. Hauser has no responsibility for that,
14 and I object to calling Mr. Hauser for rebuttal
15 purposes on cross-examination, number one.

16 And, under these circumstances, it's not --

17 THE COURT: He can't call him
18 for cross-examination, he can call him as his
19 own witness at this juncture.

20 MR. LANSDALE: But it's -- he
21 can't --

22 THE COURT: Except for cross -
23 examination as to this, the specific area of
24 reservation.

25 MR. NORRIS: Your Honor, --

MR. LANSDALE: He can't know what Mr. Hauser will testify to.

THE COURT: I'm not clairvoyant either.

MR. NORRIS: Your Honor, as I stated in the record at the point that Mr. Lansdale has identified, the additional material that I was reserving my right to recall him for goes to the rebuttal of the Chaney testimony.

Mr. Hauser testified in the first trial that he was deeply involved in the matter of land acquisition on the rights of way for CEI transmission facilities, and the evidence showed in the first trial -- and will show again here, your Honor -- that CEI had normal difficulty in constructing its own transmission line through the identical areas that Mr. Chaney said Munny Light would in a couple of years.

Part of Mr. Chaney's testimony was that had Munny Light moved properly after Hauser turned down our request in August of '73, that Munny could have been experiencing cost savings within a couple of years.

Now, your Honor, there is evidence that I

intend to adduce through Mr. Hauser which I submit is appropriate, as upon cross-examination, which is the delay that CEI experienced in going through these same municipalities which Mr. Chaney indicates Muny Light could have just breezed through with no problem.

For example, the evidence will show that CEI had extreme delays of three, four, five years even for a small transmission line that may be a couple of miles, three miles, --

THE COURT: Shhh.

MR. NORRIS: -- and we think, your Honor, that that is a direct reason in rebuttal for the defense CEI puts on that Muny Light had to build its own transmission.

MR. LANSDALE: If your Honor please, Mr. Chaney did not testify as to when Muny Light could have or should have started this construction.

Mr. Chaney confined his testimony to feasibility.

He did not testify when they should have started, when planning should have started, or anything else along those lines.

This is an entirely different question.

1 When planning should have started for these
2 lines, when preparation for them should have
3 started is another question entirely.

4 Mr. Chaney did not get into that; and to
5 say that this is rebutting of Mr. Chaney's
6 testimony to show that CEI, for some particular
7 line, may have started planning ten years before
8 it was put in service, has nothing to do with
9 this case.

0 I submit that this is not proper rebuttal.

1 MR. NORRIS: Well, the impression
2 that Mr. Chaney has left was that Muny could
3 have moved in any one of three different time
4 periods, and one of them is '72-'73, when he
5 specifically said that the benefits -- cost
6 benefits -- I think we can get the transcript
7 citation -- would have been accruing to Muny
8 within a couple of years.

9 And, of course, that was his testimony,
0 that if Muny had shut down its unit it kept in
1 cold standby and built transmission lines to
2 any one of four different points and then
3 purchased power for its own load, that Muny
4 would have been experiencing these tremendous
5 cost savings within a matter of a couple of

years.

Now, your Honor, the reason that the City wants to put on rebuttal evidence through Mr. Hauser on cross-examination is to show that that is not consistent with the facts.

MR. LANSDALE: Your Honor, Mr. Norris did not listen to Mr. Chaney's testimony.

THE COURT: Yes.

If you are desirous of calling Hauser, you are free to call him as your witness. But, certainly, the reservation didn't go to the area of testimony that you're --

MR. LANSDALE: May I have a word on that, please?

MR. NORRIS: I thought I did, your Honor.

I thought I indicated at 14,314 that the reservation dealt with the transmission line issue, and I will defer going into that kind of material because it is more appropriately reserved for rebuttal.

THE COURT: Mr. Norris, your sole intent about stating your position -- you're not listening to what is being said -- what Mr. Lansdale says is that Chaney did not go

into the feasibility and the times as to when it should be started, and how it should be constructed, and so forth.

I'm sorry, he did go into --

MR. LANSDALE: Feasibility.

THE COURT: -- the feasibility aspect of it.

MR. NORRIS: Yes, he did.

THE COURT: He didn't go into the mechanics of it, the implementation.

And this man is not -- I don't know if he's even qualified to testify as to construction.

MR. WEINER: Could I speak on it?

The feasibility he testified to was on the basis that the line was being constructed and -- used for the whole year of 1974.

And all three of the lines that he hypothesized about, he hypothesized would have been in existence in 1974 the entire year.

That was based on his testimony that the decision point for moving forward -- one of the decision points was August, 1973; and it all depends upon when that line is in existence.

The testimony of Mr. Hauser goes to the issue of how long --

1 MR. LANSDALE: Well, he testified to
2 that.

3 MR. WEINER: -- based on CEI's
4 experience of building the same type of line.

5 THE COURT: He is not an
6 engineer.

7 MR. WEINER: It's a problem in
8 building lines --

9 MR. NORRIS: Resistance from the
0 community.

1 THE COURT: Well, I'm going to
2 permit him -- I'm not going to permit him to
3 testify as to engineering matters.

4 MR. NORRIS: Right.

5 THE COURT: I'll see how the
6 testimony goes.

7 What I'm going to tell you right now,
8 that you're going to have difficulty having
9 house counsel testify to what Mr. Weiner has
0 just indicated you think you want him to
1 testify to.

2 But let's proceed.

3 MR. NORRIS: The other thing that
4 I wanted to point out, your Honor, is that he
5 did testify that he was intricately involved in

the acquisition of land for transmission lines,
not as an engineer.

THE COURT: Let's proceed.

{End of bench conference.}

- - - - -

D O N A L D H. H A U S E R,
of lawful age, called as a witness as on
cross-examination by the plaintiff, in
rebuttal, having been previously duly
sworn, resumed the stand and testified
further as follows:

THE COURT: You will be
testifying under the same oath that has been
previously administered.

CROSS-EXAMINATION OF DONALD H. HAUSER

BY MR. NORRIS:

Q Mr. Hauser, during the decade of the 1970's, CEI
built many miles of transmission lines in the
Northeast Ohio area, is that correct?

A In the '60's and '70's, CEI built many miles of
transmission lines.

Hauser - cross

Q Now, what responsibility did you have with respect to the CEI building of transmission lines?

A As I testified before, I have been a lawyer with CEI since 1951, so my primary responsibilities are that of a lawyer advising the company, its officers and employees, with regard to various matters, including transmission lines.

If there was any litigation involving the transmission line, of course, this would require lawyers, myself or someone else employed directly by CEI, or lawyers outside of CEI which we would employ to handle various legal matters.

Q And am I correct, Mr. Hauser, that part of your duties in the CEI legal department got you involved in the matter of purchasing land rights for transmission lines?

A Between 1964 and 1975, the real property element reported to me, and the principal responsibility of that element was to acquire and dispose of property needed by the company in carrying out its business enterprise. This, of course, would include transmission lines.

Q So that the work of the Real Property Section was carried out under your direction and control?

Hauser - cross

A Yes, between 1964 and 1975.

Q Between 1964 and 1975.

Then I take it that you also were personally involved in litigation and other legal matters involving the transmission lines?

A Yes, I was.

Q The CEI transmission lines?

A Yes.

Q Now, would it be a fair statement, Mr. Hauser, that during the 1970's that CEI routinely encountered difficulties in completing the construction of its transmission lines?

MR. LANSDALE: I object.

THE COURT: Sustain the objection,

Mr. Norris.

MR. NORRIS: Mrs. Richards -- or,

Dave, why don't you put up the map, PTX-3162.

{Mr. Weiner complies.}

BY MR. NORRIS:

Q Mr. Hauser, I am showing you PTX-3162, which is a map, and there is an overlay on top of it which is PTX-3311.

And you recognize that -- you recognize the representation on that map of various of CEI's

Hauser - cross.

transmission lines?

A Yes.

Q And were you in the courtroom when Mr. Chaney testified?

A I think I was here a portion of the time he testified. I'm not certain I was here the entire time.

Q Do you recall or are you aware that Mr. Chaney identified four different routes that, in his opinion, could have been used by Muny Light to have constructed transmission lines out to the Pennsylvania border and to other locations?

A Yes.

Q And would you notice on PTX-3162, do you notice that Mr. Chaney's four routes have been marked in dotted red lines that emanate out from the City of Cleveland; do you see those represented there?

A Yes, I do.

Q And could I just trouble you to point those out for the members of the jury, the red lines depicting Mr. Chaney's route?

{The witness steps down to the easel.}

A This line goes along the shores of Lake Erie to the Pennsylvania border {indicating} is one of them.

Hauser - cross

That would be Penelec over there.

This line which, again, goes westerly from the City of Cleveland into Elyria {indicating}, that would be a tie with Ohio Edison.

And this line would be a tie with either Ohio Edison or Ohio Power.

Q And is it accurate, Mr. Hauser, that the lines shown by Mr. Chaney that you have just pointed out to the jury are either next to or parallel many of CEI's own transmission lines?

MR. LANSDALE: I object.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

MR. LANSDALE: The exhibit speaks for itself, and "parallel" or "next to" is a relative term.

This witness is not conversant with the surveying done. You are going to have a witness of your own that has indicated the things that you are now going into.

I object to taking this witness to show and tell on your exhibit.

Hauser - cross

MR. NORRIS: Your Honor, my purpose is to show that the lines put forward by the defendant's expert are right next to each other in many respects.

THE COURT: Well, let me ask you this, Mr. Norris:

Are you going to show through testimony that CEI lines were built the same -- during the same time period?

MR. NORRIS: Yes -- well, not -- what I'm going to show is that during 1970 -- may I borrow your exhibit, please, for just a minute?

{Mr. Lansdale hands his copy of the exhibit to Mr. Norris, and Mr. Norris places it before the Court.}

MR. NORRIS: This exhibit map shows, your Honor, about a dozen communities, showing where the CEI lines and the Chaney lines go; and the testimony that I intend to elicit from Mr. Hauser -- part of it -- is that in every one of those jurisdictions that is marked in blue, CEI had litigation and other delays resulting from the officials of the

1 Hauser - cross

2 community -- either the community brought a
3 lawsuit to enjoin CEI's lines, or the PUC;
4 and that the same kind of delay that caused
5 CEI to be held up in its attempts to build
6 transmission lines into these identical areas
7 Mr. Chaney has referred to, and for the same
8 time period, the 1970's, I want the jury --

9 THE COURT: Over the same land?

10 MR. NORRIS: Through the same
11 municipalities, your Honor, not necessarily over
12 the same land; because it's a fair inference
13 that --

14 THE COURT: Sustain the
15 objection.

16 Let's proceed.

17 I sustain the objection to that question.
18 Let's proceed.

19 You are free to develop whatever you want
20 to develop.

21 {End of bench conference.}

22 - - - - -
23 THE COURT: You may proceed.

24 BY MR. NORRIS:

25 Q Mr. Hauser, during the 1970's, was CEI, in its

Hauser - cross

1 attempt to build transmission lines, met with local
2 resistance from individuals and from various
3 municipalities?
4

5 A Yes, in certain cases.

6 Q And is it a fair statement that during the 1970's
7 there was an increasing level of litigation in an
8 attempt to stop CEI in its transmission line
9 construction?

10 MR. LANSDALE: I object.

11 THE COURT: Approach the bench.

12 - - - - -

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

15 MR. LANSDALE: If your Honor
16 please, the power of the City to construct
17 transmission lines is derived from Article XVIII
18 of the Ohio Constitution, a self-executing
19 provision with which other municipalities under
20 the Blue Ash case may not interfere.

21 Now, to say that the power of the City of
22 Cleveland in building its transmission lines
23 are the same as the legal problems of CEI is
24 without foundation.

25 I spent a good part of my life in trying

Hauser - cross

these cases, and CEI's support rests upon the power rights. The State's Hot Wires Act has no application to the municipalities; the Ohio Power Siting Commission Act in its major aspects has no application to municipalities; and to try to use legal difficulties that CEI had as a proxy for the legal difficulties which the City may have is simply not supported either by law or by fact.

THE COURT: Read the last few questions back.

{Record read by the reporter as follows:

"Q Mr. Hauser, during the 1970's, was CEI, in its attempt to build transmission lines, met with local resistance—from individuals and from various municipalities?

"A Yes, in certain cases.

"Q And is it a fair statement that during the 1970's there was an increasing level of litigation in an attempt to stop CEI in its transmission line construction?"}

THE COURT: I told you initially, Mr. Norris, you are free to pursue this line of questioning if you lay a proper

Hauser - cross

foundation.

Now, to do that, you have to show that the authority of the parties are similar, that -- I am just talking now without -- having just been confronted with the issue -- the authority of both parties was identical or substantially similar; that they were going over the same land or substantially identical land; that it was during the given period that we were confronted with in the CEI construction; that you had seen conditions prevailing -- and you're going to have to address these really on a case-by-case basis; --

MR. NORRIS: Your Honor, --

-- THE COURT: -- and you're going to have to identify -- you can't say "resistance", you have to -- "resistance" is a conclusion -- you have to testify as to the fact, and the jury will decide whether or not, under the facts and circumstances of any given situation, it was a resistance.

MR. NORRIS: This is exactly what this gentleman testified to in the first trial.

THE COURT: I don't care --

1 Hauser - cross

2 MR. NORRIS: It's a fact, your
3 Honor.

4 THE COURT: There wasn't any
5 objection.

6 MR. NORRIS: It's not a conclusion;
7 but let me address the utility.

8 Mr. Lansdale well knows the Ohio Power
9 Siting statute has no application to any line
0 started in construction prior to October 23, 1974,
1 and the evidence that I will be adducing from
2 Mr. Hauser is with respect to the period of time
3 prior to that.

4 Now, their own documents indicate that even
5 after October, 1974, they have had
6 monumental difficulties -- even up to the
7 present time on the Perry-Harding line, which
8 is before the {inaudible}, having lost their
9 first battle on it.

0 THE COURT: I don't know why
1 they're there.

2 MR. NORRIS: Well, on the
3 question of authority, the City submits that
4 the power of CEI under eminent domain is
5 substantially the same as any power that CEI

Hauser - cross

says the City could exercise.

Now, sure, the City of Cleveland is a home rule community, home rule municipality; but, under the Constitution, these other municipalities through which the Chaney lines would have to travel is not a clear issue, as Mr. Lansdale would submit that the City of Cleveland can go walk all over any other municipality, and if there is resistance evidenced by, for example, the City of Richfield, --

THE COURT: I have sustained the objection.

MR. NORRIS: I'm just trying to respond to the Court's injunction that substantially similar issues do exist, your Honor.

THE COURT: You're free to proceed with this line of questioning if you lay a proper foundation.

Your last question was objectionable.
Sustain the objection.

MR. NORRIS: Well, may I have a short break?

THE COURT: No, we can't -- we didn't start until late; I want to go until noon.

1 Hauser - cross

2 MR. NORRIS: I would like an
3 opportunity, in view of the Court's ruling, to
4 have a short break to review the --

5 THE COURT: All right.

6 MR. NORRIS: -- testimony so that
7 I can conform with the Court's direction.

8 THE COURT: Okay.

9 We'll take a short recess.

10 {End of bench conference.}

11 - - - - -

12 THE COURT: Ladies and gentlemen,
13 we'll take a short recess and then we will
14 resume.

15 Please, during the recess, keep in mind
16 the Court's admonition.

17 {Recess had.}

Hauser - cross

THE COURT: Approach the bench.

MR. NORRIS: Your Honor, in view of the Court's ruling, I would very much request a recess until after lunch so that I may begin with Mr. Hauser after the luncheon break.

I thought that the exhibits that were admitted at the first trial would be admitted here, and the objections that have been raised and the Court's ruling would suggest that I am in error on that.

I, in the meantime, I would ask leave to raise with the Court the pardon issue of the special interrogatory on damages, and I wonder if you would let the jury go, and then we can resume with the jury and the testimony after lunch, but in the meantime, we can take up the special interrogatory.

THE COURT: I have no objection in permitting the jury to go to lunch, so you can tell them to go to lunch, Steve.

They are under the admonition now, and tell them to return at 1:30.

What is the special interrogatory?

MR. WEINER: In light of our

Hauser - cross

conference in chambers yesterday and the Court's consideration of how to deal with the damages, we took our hand at trying to draft an interrogatory to address the questions and concerns that the Court raised, and I just thought it might be expeditious to offer it now, and the Court could take a look at it, and we will give one to counsel, and I thought if it is convenient to the Court that maybe we could reach a resolution if possible before Dr. Wein's testimony on Monday, so we don't get into a problem with his testimony.

THE COURT: I have no objection to resolving it at the earliest possible time if we can resolve it.

It is more or less just a general verdict form.

MR. WEINER: Right; delineating, as Northeastern would have done, the three different areas of the City claim, so a reviewing court could determine which of the three areas --

THE COURT: I don't want to pass on it now, but it certainly is -- these are

Hauser - cross

the avenues that I have been thinking about, but I haven't formalized it yet in my mind.

MR. WEINER: We understand that.

The introduction of course is based on the four earlier interrogatories.

THE COURT: Right.

MR. WEINER: And No. 2 is the monopolization or attempt to monopolize, and No. 3 is the proximate cause, and 4 is the revised natural monopoly along the lines the Court said yesterday.

We are not obviously locked into it either, but we thought it might be worthwhile trying to resolve it before Dr. Wein's testimony so there are no problems on that. Okay.

THE COURT: Yes.

Really, it has merit, but why don't we give it some thought.

MR. WEINER: Today?

THE COURT: Well, I don't know. Are you people going to be around tomorrow morning?

MR. WEINER: Yes.

THE COURT: We are going to be

Hauser - cross

here, so maybe we will give you a call.

MR. NORRIS: I would like to
make it late in the morning if it is possible.
I have got a conflict earlier in the morning.

{Further discussion ensued off the record.}

THE COURT: Okay., Let's go to
lunch.

{Luncheon recess had.}

1 FRIDAY, OCTOBER 2, 1981; 1:40 O'CLOCK P.M.

2
3 THE COURT: Please be seated.

4 Did the parties have an opportunity of
5 reviewing that proposed interrogatory?

6 MR. LANSDALE: We have, your
7 Honor, but we need to review them in light of
8 the other interrogatories.

9 THE COURT: I would suggest,
0 Mr. Weiner, I think you overlooked one aspect
1 of it.

2 You don't address the cumulative aspect of
3 damages.

4 MR. WEINER: I gave that some
5 thought.

6 MR. LANSDALE: I think that in
7 view of this new departure on damages that
8 the cumulative aspect loses significance.

9 THE COURT: It could be, but
0 I think we are on the right track.

1 MR. WEINER: Okay.

2 THE COURT: Bring in the jury.

3 - - - - -

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

CROSS-EXAMINATION OF DONALD H. HAUSER {Resumed}

BY MR. NORRIS:

Q Mr. Hauser, are you familiar with the transmission line, the CEI transmission line known as the Mansfield-Harding line?

A Yes.

Q And am I correct that CEI plans to be interconnected with Ohio Edison through the Mansfield-Harding line?

A That would be an additional interconnection with Ohio Edison.

Q And am I also correct that CEI's practice is to have close liaison with Ohio Edison with respect to political clearance necessary for this transmission line to be built to municipalities in the Ohio Edison territory?

A I am not sure what you mean by "close," but certainly we attempt to keep ourselves apprised of the progress of Ohio Edison with regard to the portion of that line that they are responsible for.

MR. NORRIS:

Mrs. Richards,

would you give Mr. Hauser PTX-2303, if you will, please.

{After an interval.}

Q Mr. Hauser, what is PTX-2303, if you please?

Hauser - cross

A It is the planning budget report of the Public Information and Legal Group, dated December 14, 1973.

Q And in your role of corporate solicitor in the early 1970's you were familiar, were you not, with planning budget reports such as PTX-2303?

A Yes.

Q Would you turn to page 21, if you would, please, of PTX-2303.

Do you see at the top of the page, paragraph number 10, making reference to the continuation of close liaison with Ohio Edison?

MR. LANSDALE: Objection.

A Yes.

Q And would you accept the truth of that statement?

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

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

MR. NORRIS: The purpose, your Honor, is that the witness has kind of demurred on the question of close liaison, and this is of course part of the Public Information and

1 Hauser - cross

2 Legal Group's planning report for December 14,
3 1973.

4 MR. LANSDALE: In the first place,
5 the question is a generality, and he answered
6 that they attempted to keep in close liaison
7 with Ohio Edison with respect to the portion of
8 the line that they were responsible for, and
9 this is not consistent with that, that is
10 No. 1, and No. 2, what difference does it make?
11 The problems of CEI and Ohio Edison and the
12 problems of the City of Cleveland are not the
13 same, and the rules are not the same, and the
14 laws are not the same, and I object to it.

5 THE COURT: How can this
6 witness testify to this document?

7 MR. NORRIS: I will put a
8 qualifying question, because he had the
9 responsibility for the preparation of this
0 document, and he so testified.

1 THE COURT: Wait a minute.

2 You see, you already have forgotten what
3 I told you before the recess.

4 Mr. Norris, before you can attempt to go
5 into this type of material, apart from the

Hauser - cross

relevance of this document, you have to lay a foundation, and you haven't done that.

MR. NORRIS: I will repair that, your Honor.

{End of bench conference.}

- - - - -

BY MR. NORRIS:

Q With respect to PTX-2303, the planning budget report of the Public Information and Legal Group, Mr. Hauser, before these reports became final, you had the responsibility for reviewing them; is that correct?

A I was one of the people that would review them and have input to them.

Q And you did participate then in the reviewing of the document which is marked PTX-2303 before it became final?

A Yes.

Q And am I correct that these portions of this report that had to do with acquisition of right-of-ways and acquisition of the land for transmission facilities are portions of the report that you, sir, would have reviewed?

A Yes.

Hauser - cross

Q And therefore, am I correct, that the reference on pages 19, 20 and 21, to the securing of political clearance for various high-voltage transmission lines, that portion is something that you would have reviewed before it became final?

A Yes, although I would not have had the primary responsibility for the material that is covered there.

Q BUT I believe you testified this morning -- did you say the Real Estate Group was reporting to you at the time from 1964 to 1975?

A That is correct, but the primary responsibility for political clearance was that of an element other than that one that reported to me.

Q I understand. Was it in the Public Information and Legal Group?

A Yes.

Q What do you mean by "political clearance"?

A It was and is the policy and practice of The Illuminating Company that we would -- for example, in planning for and implementing plans for a transmission line, before plans were finalized, to contact each political subdivision, whether it was a municipality, county, township, or a regional planning group, to present our preliminary plans to

Hauser - cross

them with an effort to reach some agreement with regard to the -- we are talking about transmission lines, the route of the transmission line itself, and we found that this was very important from a number of standpoints:

{1} -In actual building transmission lines, if you can reach agreement with the people from whom -- the neighborhood or the city or the village, that is a benefit to everyone concerned.

Q Now, addressing your attention again to the map that is on the easel showing the Chaney Proposed Transmission Routes for Munny Light and the Mansfield-Harding line that you have testified about, those two routes are in close proximity for a certain portion of the way, are they not?

A Yes.

Q And with respect to the Mansfield-Harding line, that particular line is presently in litigation, is it not?

A That portion of the line for which Ohio Edison is responsible is in litigation.

CEI's portion of the line -- in fact, I think it is built.

Q Would you kindly point with the pointer to the

Hauser - cross

location on the map of the Mansfield-Harding line.

A {Pointing}.

It is in the dark-green area.

Q And that goes through the cities of Macedonia and
Twinsburg; is that correct?

A That is correct.

Q And initially in the trial court, at any rate,
Macedonia and Twinsburg won the litigation?

MR. LANSDALE: I object. It has
nothing to do with this case.

THE COURT: Sustain the
objection. The jury will disregard the
question.

MR. NORRIS: May I approach the
bench?

THE COURT: Yes.

- - - - -

{The following proceedings were had at the
bench:}

THE COURT: State your objection.

MR. LANSDALE: This is not CEI in
the first place, this is Ohio Edison, and in the
second place, the requirements are not similar.

The so-called 1905.65 statute applies to

1 Hauser - cross

2 CEI and not to Ohio Edison, and not to Muny
3 Light, and the circumstances are not the same,
4 and I object to the whole line.

5 THE COURT: Well, you haven't
6 been objecting.

7 You know, Mr. Norris, you think that
8 laying a foundation is to ask the gentleman,
9 "Have you ever seen this document," or, "Did
10 you participate in it," and that is not laying
11 the foundation for this type of interrogation.

12 And I told you how to do it. If you don't
13 understand what I am telling you, I am not going
14 to tell you again.

15 You haven't laid a foundation, and I will
16 sustain the objection.

17 MR. NORRIS: I would like to make
18 an offer of proof that one of the Chaney
19 routes closely parallels the Mansfield-Harding
20 line.

21 THE COURT: Paralleling is not
22 enough to lay a foundation. You have to show
23 that the conditions that existed are far more
24 precise than being similar.

25 MR. NORRIS: The City submits

Hauser - cross

that the City carries its burden of showing reasonably similar circumstances if it can show that a CEI experience in general is in the same time reference, and in general the same area of the county, that they were held up for seven years in the construction of this Mansfield-Harding line.

THE COURT: What does that prove?

MR. NORRIS: That proved that the existence that could be anticipated from the Muni Light construction of lines that Mr. Chaney was proposing and could easily have taken the same amount of time was the same kind of resistance and same kind of litigation thereby making Mr. Chaney's inference about having the costs and savings available to Muni within the two-year period are totally unbelievable.

THE COURT: It is pure speculation. Let's proceed.

{End of bench conference.}

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THE COURT: I will sustain the objection. Lay a proper foundation for these questions.

Hauser - cross

BY MR. NORRIS:

Q Mr. Hauser, in your efforts to get political clearance for the CEI transmission lines, is there first an effort to reach agreement with the cities involved?

A Yes.

Q And then if agreement is not reached, then what happens?

MR. LANSDALE: Objection.

THE COURT: Sustain the objection.

I just told you you have to lay a foundation.

Q Mr. Hauser, on the far easel is a chart bearing Exhibit No. PTX-3308, and this information -- it has been stipulated by counsel between the parties that this information represented is accurate information.

I call your attention to the Inland-Macedonia line on the map to the left.

Now, that -- can you point out for the jury the location of the Inland-Macedonia line?

A Yes.

Q Starting from Inland?

A Starting from Inland.

Q Am I correct, Inland is a substation of CEI in the City of Cleveland?

Hauser - cross

A Inland is the substation of CEI.

I don't believe it is shown. I am sorry, it is shown here, yes {indicating}.

This is the Inland substation.

Q Excuse me, Mr. Hauser, you are pointing to a substation within the yellow area which depicts the City of Cleveland; is that correct?

A That is correct.

Q And you are addressing yourself to PTX-3162 with the overlay 3311?

A Yes.

Q And would you then trace for the jury the route of the Inland-Macedonia line?

A Yes.

From the Inland substation, it is the dark-blue, I believe, line, and I will trace the route.

It goes to Garfield Heights, Maple Heights, Bedford, and over into --

Q Stop at the Macedonia, please.

A Yes.

Q Now, is that approximately a 10-mile distance?

A I don't see a scale on the map.

Q There is a scale on the map, and assuming that the scale is accurate, and would you agree that that is

Hauser - cross

approximately a 10-mile distance?

A Yes.

Q And that particular line was then to connect with a longer line which would ultimately extend from Inland to Macedonia, and then up to Perry; is that correct?

A That is correct.

Q Now, addressing your attention to the exhibit to the right, PTX-3303, what was the date of the first job order on the Inland-Macedonia portion of that CEI transmission line?

A The exhibit has two dates, 12-71 and 6-72.

Q Well, if you would --

A -- and the footnote shows that the 12-71 date is for the Perry-Macedonia portion, and the Footnote No. 6 shows it for the Macedonia-Inland portion.

Q And what was the first date of service on this Macedonia-Inland portion of the line, and I refer you to the next-to-the-last column on the right, and there is a Footnote No. 4 associated with that data.

A Thank you. 1977.

Q And that was just for a partial portion of that line, was it not?

Hauser - cross

A Yes.

Q And the Chaney proposed route, could you step back to the map, please, and would you trace that portion of the Inland-Macedonia line that parallels one of the Chaney routes on that map.

MR. LANSDALE: I object.

THE COURT: Approach the bench.

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{The following proceedings were had at the bench:}

MR. LANSDALE: I hate to keep coming up, but the fact of the matter is that there is no showing that the problems confronting the CEI are the same legally and factually as the problems confronting Muny Light.

Muny Light is not subject to a Hot Wires Act, and they are not subject to the individual regulation of the individual cities, and CEI is, and they are not subject to the problem of the interplay of the trans-community lines as against local rights, and it is not the same thing.

The City proceeds under a constitutional mandate, and it is not subject to the Hot Wires Act.

Hauser - cross

CEI does, and apart from the showing of the factual similarity, and I object to this continuous line of questioning.

MR. NORRIS: I would like to be heard.

Mr. Lansdale says that the City is not subject to the Hot Wires Act, but that is a misunderstanding with respect to the issue before the Court.

The statutes of the State of Ohio gives the municipality the authority to approve the placement of poles and wires within their municipality.

Now, the Hot Wires Act was a particular statute that exempted companies like CEI from that approval power of a municipality.

And the litigation that arises or did arise under the Hot Wires Act was whether or not the approval power of the municipality still survive in this particular situation, and that is the kind of litigation that Mr. Lansdale fought in Painesville; but for Mr. Lansdale to say that Muny is not subject to the Hot Wires Act is a non sequitur because Muny Light is still

Hauser - cross

subject to the same approval power that exists in other municipalities, and when Mr. Chaney suggests that Muny Light could build transmission lines to the Pennsylvania border, going through the municipality that had the same home rule power to approve the placement of poles and wires, it is not an answer to that to say that Muny Light is not subject to the Hot Wires Act, because that is an exception, but Muny Light, what they would be subject to, however, is the right of the approval of those municipalities through whose territory Muny Light would proceed to build, and that is what creates the same kind of delay and community resistance to any transmission line, whether you are a municipally-owned power company or privately-owned power company, and therefore I think that it is perfectly legitimate, a perfectly legitimate question, and that I have shown that by the very fact that more municipalities were objecting, as I think the Court can take judicial notice of, with the spate of litigation with respect to trying to stop transmission lines going through their

1 Hauser - cross

2 communities, and this is why I am trying to
3 demonstrate the kind of experience that CEI
4 had in relatively the same period of time and
5 relatively the same geographic area, and you
6 could reasonably infer to have affected Muny
7 Light's efforts in a two-year period.

8 MR. LANSDALE: Mr. Norris, I believe
9 this is, in an understanding of the Hot Wires
10 Act, it requires us to show a necessity for
11 the line, a need for the line, and that it is
12 safe, and a lot of other conditions, and if we
13 show then that if it is for service beyond the
14 community itself, we may build it.

15 A municipality pursues its rights of
16 eminent domain for the purposes of the utility
17 by the express right under Article XVIII of
18 the Ohio Constitution, and the only limitation
19 on this is that it may not destroy another
20 community's public use of its own streets, and
21 there is no similarity whatsoever between the
22 powers which a local community has to obstruct
23 and require agreement and changes, and whatnot,
24 of CEI.

25 There is no relationship between that at

Hauser - cross

all and the power which it had with reference to the municipality.

It has no power as it does with respect to CEI to make them approve the need for the line, and the propriety of the location, and the safety features of it, and the City is immune from that.

MR. NORRIS: Let me tell you why I disagree.

THE COURT: What is the difference from 'an eminent domain filed by a privately-owned public utility and that exercised under the Constitution?

MR. LANSDALE: Because the exercise by a private utility is under a statutory grant of the legislature which is subservient to the home rule constitutional powers of the municipality which is self-executing, which the Court has held in two or three cases, and the cases make it clear that the only limitation put on it is that they may not destroy an existing use.

MR. NORRIS: Well, I would submit --

Hauser - cross

THE COURT: The Blue Ash case.

MR. LANSDALE: That is the one where they tried to take a street.

MR. NORRIS: Mr. Lansdale is arguing that because the Constitution permits the City of Cleveland to have an electric power company, that then the City of Cleveland can go through any other municipalities that it wants to, and I think that is in error, your Honor, because the same constitutional provisions, Article XVIII.

THE COURT: That is not what the Supreme Court of Ohio says.

MR. NORRIS: Well, your Honor, the constitutional provisions --

THE COURT: Here is the case. Read it.

MR. NORRIS: -- the constitutional provisional power of a municipality is found in the same Article XVIII as the power of the municipality to have an electric system, plus the fact that the statutes, both before and after, continue to give the municipality the right of approval, and I will cite your Honor

Hauser - cross

to those statutes.

THE COURT: Well, you still haven't answered the Blue Ash case.

And again, Mr. Norris, you have the added distinction -- you have a private entity proceeding in one instance, and in the other instance you have a public entity proceeding and dealing with another public entity, and the mere fact that a municipality was dealing with a private enterprise one way does not necessarily indicate that it will deal with another municipality in the same way, or, as a matter of fact, deal with another private entity in the same way.

I don't know what the particular fact situations are underlying any given piece of litigation, be it eminent domain, or be it for any other reason.

Maybe it is price, and maybe the private entity at the time it was proceeding with the eminent domain proceedings was not willing to pay the consideration requested either by a private landowner or to conform with certain requirements of a municipality.

Hauser - cross

You can't conjecture that a factual situation under one particular piece of litigation would necessarily or could necessarily be interposed upon another situation.

We get back to the same thing that the City is constantly being attempted to do in this case; namely, predicating inference upon inference upon inference, and you can't do that.

MR. NORRIS: Your Honor, the Blue Ash case I don't think goes beyond putting a limitation upon the exercise of the constitutional authority given to the home rule statute in the Constitution.

I think it is improper for Mr. Lansdale to suggest that just because the Blue Ash case says to the City of Cincinnati that you can't come and appropriate a public street in some other municipality, just because you want to expand your airport, and you can't look at that from that -- from the proposition that Mr. Lansdale would suggest, that the City of Cleveland would have no trouble putting a transmission line through municipal cities with the same home rule

Hauser - cross

power because of the right of approval -- the right of approval, your Honor, has to be -- and I agree with you -- has to be looked at on a case-by-case basis, and I think that an attempt by Mr. Lansdale to extend Blue Ash does not avail because you see you have to look at it on a case-by-case basis, and what the City is saying is that if it is a reasonable inference, a reasonable inference that transmission lines, whether they are owned by a private investment firm or a publicly-owned company, the authorities and local municipalities are not going to be any happier with the transmission lines that come through regardless of who is the owner.

THE COURT: I am not at this juncture willing to accept that statement.

I agree with you 100 percent that you have to approach it on a case-by-case basis, and that is what I am telling you to do in laying a foundation, and you have to show -- originally, when you attempted to go into this, I said you were going to have to -- you were going to have difficulty to prove it, as I

Hauser - cross

projected your examination in trying to get this out, and again you have to show that there is some basis for the underlying or some factual basis for the underlying objections that will be and would exist in the situation that the City would be confronted with, which is difficult for me to see how you are ever going to be able to do it.

MR. NORRIS: I submit this -- that Twinsburg, for example -- that Mr. Chaney's projections, one of his lines was to go through Twinsburg -- okay.

CEI had litigation with Twinsburg.

Now, it was in the name of Ohio Edison, but that doesn't make a difference.

I think a fair inference is that if Twinsburg is upset and under its home rule power --

THE COURT: Why?

MR. NORRIS: Let me finish.

If Twinsburg attempts to block a transmission line that Ohio Edison and CEI want to put through, Twinsburg, I think the reasonable inference is that the Municipal

Hauser - cross

Light Plant's transmission lines would similarly arouse the same need for approval in Twinsburg, and there is some evidence of the fact that you would have that litigation to delay it.

THE COURT: Mr. Norris, you have to know what the causes of the objections are.

Now, if you can show -- I don't know, maybe the City of Twinsburg got its nose out of joint because somebody came in there and attempted to negotiate that was abrasive or for whatever reason, maybe because he had a red tie or a green tie, I don't know.

MR. NORRIS: That is a huge burden for the City to demonstrate.

THE COURT: And that is why I said earlier on that it was difficult for me to see how you were going to do it.

MR. NORRIS: Well, I do not believe that we need to go that far in sustaining our burden to make this relevant.

THE COURT: Unfortunately I am the one that decides that, and I have decided against you.

Hauser - cross

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

THE COURT: Go ahead.

MR. NORRIS: On all of the evidence that Mr. Hauser testified to on the first trial and the evidence that is contained in various of the CEI documents with respect to the delays that they experienced in the '70's in their attempts to put transmission lines through local communities, and I submit that that is relevant, and the jury ought to have a chance to hear it.

THE COURT: It may be relevant if you can lay the proper foundation, but you have to show a similarity, the underlying causes for the objections or the hypothetical opposition that you are going to get, and as I said to you, as I said all along, you lay a proper foundation, and you are free to go ahead.

MR. NORRIS: Your Honor, I submit that the underlying cause --

THE COURT: -- and if you tell me you can't lay a proper foundation, then you can't go ahead.

1 Hauser - cross

2 MR. NORRIS: Well, I submit that
3 I carry my burden on laying a foundation by
4 demonstrating that both transmission -- that
5 both going through municipalities at the same
6 time period and relatively the same location,
7 and that should be a sufficient foundation to
8 demonstrate the difficulties that I had, and if
9 it is the same time period and under the same
10 location, that Munny would have the same kind
11 of problems.

12 THE COURT: Very well. I am
13 saying that you have to show underlying cause.

14 MR. NORRIS: All right. I don't
15 know what you want -- whether you want to keep
16 the jury here when I put the offer of proof into
17 the record, but I definitely want to put it in.

18 THE COURT: Put it in right now.

19 MR. NORRIS: All right.

20 Mr. Chaney's proposed lines, as shown on
21 the map, PTX-3162 -- and you are laughing at me,
22 Mr. Lansdale.

23 MR. LANSDALE: No, I am laughing
24 at something else.

25 MR. NORRIS: You are looking at the

- Hauser - cross

jury and laughing at me while I am making the offer of proof.

MR. LANSDALE: Then you will have to feel insulted. It was the furthest thing from my thoughts.

THE COURT: Gentlemen, gentlemen. Let's get on with the business.

Put your proffer on.

MR. NORRIS: Mr. Chaney's proposed routes shown on the map, PTX-3112, and the overlay, 3311, intersect at least six --

THE COURT: Wait a minute. You are not going to put in an argument. If you have a proffer of facts --

MR. NORRIS: I am going to proffer facts.

THE COURT: Proffer the testimony that would be elicited.

Now, let's proceed in the proper fashion.

You people have different conceptions of legal procedures than the majority of lawyers have that practice here all the time. You are giving a legal argument. Now, proffer the testimony.

1 Hauser - cross

2 MR. NORRIS: As Mr. Hauser
3 testified to in the first trial at Transcript
4 2670, and following the first trial I drew his
5 attention to the planning reports for the
6 Public Information and Legal Group for 1972,
7 1973, 1974, and 1975 --

8 THE COURT: Mr. Norris, why
9 don't we just proffer the pages.

10 MR. NORRIS: PTX-2301, 2302, and
11 2303, and 2304.

12 Now, in the case of the Avon-Richfield
13 line, and this is PTX-2304, at the bottom
14 of page 10, there is a reference to litigation
15 over the Avon-Richfield line.

16 THE COURT: Mr. Norris, just
17 proffer the pages and put it in instead of
18 wasting time.

19 MR. NORRIS: That is why I
20 suggested that I be permitted to put in my
21 proffer without having the jury sit here,
22 because I think I have the right to put it in
23 in the way I want it in.

24 THE COURT: Give me the pages,
25 and we will put it in the record, and let's get

Hauser - cross

on with it.

You don't have a right to stand up here and waste all this time.

I am giving you an opportunity to make your proffer.

MR. NORRIS: In the November 1, 1972 report, PTX-2304, the specifics of the litigation problems of the Avon-Richfield line, the Clague-Edgewater line, the Lark line, and the Valley-Harding line, and the Juniper-East line, are set forth on pages 10, 11, and 12, of that exhibit, and if permitted to go forward with the cross-examination of Mr. Hauser, I would elicit at this time testimony in this trial as I did in the first trial with respect to the delays encountered by CEI in their attempts to construct those transmission lines.

THE COURT: So far you haven't given us a proper proffer of anything, but go ahead.

MR. NORRIS: You asked me to proffer the page numbers.

THE COURT: Yes. Proffer the page numbers of the testimony and let the

Hauser - cross

testimony speak for itself.

MR. NORRIS: The testimony of Mr. Hauser starts with Transcript 2670.

THE COURT: Gentlemen, pay attention here, will you?

MR. NORRIS: At transcript 2753, wherein Mr. Hauser was testifying with respect to the Avon-Richfield line, the Clague-Edgewater line, the Lark line, the Valley-Harding line, and all of the materials set forth in PTX-2304 at the indicated pages, and furthermore --

THE COURT: Well, you can't proffer what that says. You can proffer what his testimony was, because how do you know what his testimony would be beyond what he has already testified to?

MR. NORRIS: The 2304 and PTX-2303, they both have full descriptions of the litigation that CEI was subjected to in their attempts to build transmission lines, and I assume that the witness, because he reviewed these documents, particularly with respect to the transmission right-of-way litigation,

Hauser - cross

were accurate before they were finalized, and I assume that he would testify in the same way that the exhibits are written.

Now --

THE COURT: It is a rather broad assumption.

MR. NORRIS: Well, if he testified differently this time than he did the last time, that would be a question of credibility.

THE COURT: I am not saying that. I am saying that his testimony at the previous trial speaks for itself, and it is there, and what he testified to concerning certain other exhibits is certainly beyond the scope of the proffer on cross-examination.

MR. NORRIS: The reason I say that --

THE COURT: It doesn't make any difference.

MR. NORRIS: He already testified that he approved these before they were finalized.

Well, on the question of relevance, the reason that the City submits that this testimony

Hauser - cross

is relevant and that it is being proffered --

THE COURT: Mr. Norris, I am not disagreeing, and I am not precluding any evidence.

What I am saying is that you have to lay a foundation, and if you do, you are free to go ahead.

MR. NORRIS: Part of my proffer is that I think I have laid an adequate foundation, because --

THE COURT: We have been through that one before.

MR. NORRIS: I haven't finished.

And I would like to get this on the record, that part of my foundation that I would lay, if permitted to do so, was that Mr. Chaney's proposed line intersects six of these lines, Avon-Richfield, Juniper-Eastlake, Ashtabula-Erie, Perry-Macedonia-Inland, and Juniper-Canton, and Mansfield-Harding, and they also overlap the following three lines, at least the following three lines, Juniper-Canton, Perry-Mansfield-Inland, Ashtabula-Erie, and additionally, Mr. Chaney's lines passed municipalities where litigation

Hauser - cross

has already been encountered by CEI and/or its partner, Ohio Edison, with respect to the Eastlake-Perry-Ashtabula line in Painesville, the Mansfield-Harding line.

Now, I offer into evidence PTX-3308, which is this exhibit that you have in front of you, which shows the length of time that it took CEI to build certain other transmission lines, and the exhibit has already been verified with opposing counsel, and there is no question about its accuracy, and it shows that all of the lines set forth upon which this exhibit shows their length and the date of the initial job order, and it shows the date of the initial right-of-way job order, and the date of the first actual in-service, and the final column, in the final column on the right it shows the actual time from the initial job order to in-service, and it varies from three years, six years, seven years, eight years, ten years, and then with respect to the lines that are not yet complete, the Perry-Hanna and the Perry-Macedonia-Inland, the defendant is projecting at the present time between

Hauser - cross

12 and 16 years for total completion time from initial job order to in-service, and the City submits that that is relevant to the Chaney testimony, and I offer 3308 into evidence.

THE COURT: You are free to introduce it if you lay a proper foundation. Let's proceed.

MR. NORRIS: Is the Court ruling?

THE COURT: I say that you are free to introduce it if you lay a proper foundation.

If you are offering it at this time, the objection is sustained.

I don't know when you are going to offer it. If you are offering it now, I will sustain the objection, and if you can lay a proper foundation, it may be material, and it may become admissible. That is all I am saying at this juncture.

Let's proceed.

{End of bench conference.}

Hauser - cross

MR. NORRIS: Could I have a
minute to confer with Mr. Weiner?

THE COURT: Yes.

{Mr. Norris and Mr. Weiner conferred out
of the hearing of the jury and off the record}.

BY MR. NORRIS:

Q Mr. Hauser, I think the last thing I asked you to do
was to trace for the jury the portion of the
Inland-Macedonia line that is coincident with the
line that Mr. Chaney had proposed.

 Could you just put your pointer on that
portion of that line again?

A {The witness complies.}

Q And what is CEI's present projection as to the
length of time that it will have taken when that
Inland-Macedonia line is ultimately put into
service?

 What is the length of time that CEI is
presently projecting in the reports to the Ohio
Power Siting Commission?

MR. LANSDALE: I object.

THE COURT: Approach the bench.

Hauser - cross

{The following proceedings were had at the bench:}

MR. LANSDALE: I object.

He has to lay the foundation for this.
We have just got through going over --

THE COURT: I just finished
telling you, Mr. Norris.

Don't you understand what I'm telling you?
Don't you have any idea of what it is to lay a
foundation?

Don't you understand what I am trying to
tell you?

You go back and you ask -- I sustained the
objection to this; you go back and you ask the
same question.

Now, will you stop? Will you stop doing
this?

MR. NORRIS: There is no way,
your Honor, that I can predict what the kind
of objection would be for a hypothetical line
that Mr. Chaney has proposed.

THE COURT: Mr. Norris, lay a
proper foundation, and you can go ahead with
this.

Hauser - cross

If you can't lay a proper foundation, please go on to something else.

If you don't have anything further, you can dismiss this witness or sit down.

I can't tell you any more than I have told you. I have tried to tell you how to proceed. If you don't understand, that's your problem.

{End of bench conference.}

THE COURT: ' The first thing we have to do, Mr. Norris, is to lay a proper foundation.

BY MR. NORRIS:

Q Mr. Hauser, what was the nature of the dispute between the cities of -- well, take the City of Twinsburg, the dispute between the investor-owned utility companies that wanted to build the Mansfield-Harding party line through Twinsburg?

A As I understand the dispute between Ohio Edison and the City of Twinsburg was the route of the line through Twinsburg; it was not a question as to whether or not the line would go through; it was a question of which route through the city the line

1 Hauser - cross

2 would follow.

3 Q And what was the specific objection that Twinsburg
4 had to the route that was proposed by the
5 investor-owned utility?

6 A I'm not sure as to specifics, other than they wanted
7 it someplace else within the City of Twinsburg
8 than that proposed by Ohio Edison.

9 The same thing was true with Macedonia.

10 Q With respect to the Inland-Macedonia line, are you
11 familiar with the reasons why the communities --
12 well, were the communities resisting in any way,
13 shape, or form, the laying of the -- building of
14 the Inland-Macedonia line through their community?

15 A This Macedonia-Inland line was one of those subject
16 to the jurisdiction of the Ohio Power Siting
17 Commission and, as I recall, there were several
18 communities that entered appearances there.

19 But, in that case, other than the proceedings
20 before the Ohio Power Siting Commission, there
21 was no litigation; and, again, we were able to work
22 with the communities on that line and reach an
23 agreement as to its location.

24 Q With respect to the Juniper-Canton line, can you
25 point that out on the map?

1 Hauser - cross

2 {The witness leaves the witness stand.}

3 A Again, we start at Juniper, and it's a dark-blue
4 line and follows through Macedonia, Twinsburg,
5 Streetsboro, Ravenna, and Rootstown, and south.

6 Q And approximately how long a line is that?

7 {After an interval.}

8 Q Over 50 miles?

9 A Yes.

10 Q And are you aware of approximately how long it took
11 CEI to build that?

12 MR. LANSDALE: Objection.

13 THE COURT: Yes; sustained.

14 Q Mr. Hauser, that particular line tracks one of Mr.
15 Chaney's routes, does it not?

16 A Yes.

17 Q Were there any objections registered by any
18 municipalities through which that corridor
19 passed in the building of the Juniper-Canton line?

20 A Certainly we didn't have any litigation with
21 municipalities, and I can't really recall any
22 objections.

23 Again, it was our practice to contact the
24 municipalities, townships, counties, regional
25 planning commissions in an effort to work out an

Hauser - cross

agreement; and with regard to that line, we didn't have much difficulty working out an agreement.

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

THE COURT: Sure.

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{The following proceedings were had at the bench:}

MR. NORRIS: I would proffer that the witness would have said in six years they had built the Juniper-Canton line if permitted to so testify.

And in order to speed up the proceeding, I would have next gone to Eastlake-Ashtabula, which I presume would be governed by the same rulings that your Honor has made a line 43.7 miles long which the witness located on the map, that took over 10 years to build.

That this line commencing at Eastlake was about 15 miles east of the Munny Light Plant and it would terminate in Ashtabula, which is about 15 miles west or maybe a little bit more west of Penelec.

And one of the lines that Mr. Chaney was

Hauser - cross.

proposing Muny Light to construct was from the Muny plant out roughly parallel to the same line that is known as the Eastlake-Ashtabula line, and that it would, of course, have been the 43.7 miles of the Eastlake-Ashtabula line plus the 30 or 35 miles in addition.

With that proffer, I will take the witness off the stand.

THE COURT: As you understand, the proffer may stand.

The Court is not precluding you from proceeding with the line of questioning providing you lay the proper foundation for all of the areas.

So --

MR. NORRIS: But, your Honor, just so that I can respond to that, I really believe that the Court is imposing upon the City a kind of a burden under the guise of laying a foundation as an impossible burden to sustain because there is no way, your Honor, that we, in trying to rebut the inferences drawn in Mr. Chaney's testimony, where he processed hypothetical lines that Muny could

Hauser - cross

have built, there is no way I can tell the Court what the witness could testify as to what the specific kinds of delays might have occurred with respect to Mr. Chaney's hypothetical lines.

THE COURT: Well, Mr. Norris, you must concede that there comes a time in some trials where a proper foundation cannot be laid.

I don't know if that is the situation here.

A proper foundation could have well been laid if an appropriate causation -- similar causation were demonstrated, but that is not the situation; and it may be such that the City cannot lay a proper foundation. If that's the case, they can't get the evidence in; it's that simple.

MR. NORRIS: Mr. Chaney is permitted to hypothesize these lines without any more specificity than I have used.

THE COURT: That's his prerogative; he's an expert.

MR. NORRIS: Sure, your Honor.

But if the City attempts to try to rebut that but cannot point to the experience that the City had in the same general area without

Hauser - cross

being more specific than even Mr. Chaney was,
I respectfully submit that is an improper burden.

THE COURT: I'm not going to
say it again; but, I say, you are not
foreclosed from proceeding if you lay a proper
foundation.

Thus far, the City has not laid a proper
foundation.

So let's proceed.

If you're through with this witness, the
proffer may stand, and he may be released from
testifying.

{End of bench conference.}

MR. NORRIS: Thank you; your
Honor.

No further questions.

MR. LANSDALE: No questions, your
Honor.

THE COURT: You may step down.

THE COURT: Call your next
witness, please.

MR. WEINER: Your Honor, we

would like to call Mr. Anderson.

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A L L E N E . A N D E R S O N ,
of lawful age, called as a witness on behalf
of the plaintiff in rebuttal, being first
duly sworn, was examined and testified as
follows:

DIRECT EXAMINATION OF ALLEN E. ANDERSON

BY MR. WEINER:

Q Would you please state your name and address?

A My name is Allen E. Anderson, and I live at 3311
East 68th Court in Indianapolis, Indiana.

Q What has been your education, Mr. Anderson?

A I have a Bachelor of Science degree in electrical
engineering from Louisiana Tech University.

 I've also done a little graduate work on
NBA, and have several courses in -- in-service
courses that I've attended.

Q What year did you graduate from Louisiana Tech?

A In 1963.

Q What were you asked to do in connection with this

Anderson - direct

case?

A I was asked to review a study prepared by the Black & Veatch engineering company that dealt with the construction of a transmission line through -- or that Muny Light would use to acquire firm power from outside its own service territory.

Q Whom do you work for, Mr. Anderson?

A I am employed by R. W. Beck & Associates.

Q The same firm that Mr. Mayben is employed by?

A That's correct.

Q What office of the Beck firm do you work out of?

A Indianapolis.

Q How long have you worked for Beck?

A Approximately five years.

Q Where were you previously employed?

A Before I joined R. W. Beck, I worked for Gulf States Utilities Company, a large electric investor-owned utility company that operates in Texas and Louisiana.

Q How long did you work for Gulf States?

A Just about 13 years.

Q Could you briefly summarize the duties and jobs you had at Gulf States over those 13 years?

A Yes.

Anderson - direct

I was initially assigned by Gulf States to its Western Division, which is an operating division in Texas just immediately north of Houston.

In that area, I had responsibility for transmission-distribution system planning, operation, construction, and -- well, design.

In that job, I was responsible for planning distribution systems, designing distribution lines, and following up on the construction of substation transmission line projects as well as trouble-shooting customer complaints and outage situations.

Q How long did you do that for, approximately?

A That was about the first six years.

I was transferred to the Lake Charles Division, where my responsibilities related to the construction of substation facilities, for the most part, to serve the large industrial customers in that area.

From there, I was transferred and promoted into the Systems Engineering Department, where I was responsible for a three-man crew -- three-man team that had the responsibility for designing transmission lines and substations for the Lake Charles Division.

From that job, I was transferred and promoted into the Standards Department where I was responsible

Anderson - direct

for development and -- developing and maintaining substation standards, and was -- I served as a consultant to people in the Design Department.

From there, I was transferred into the Marketing Department -- System Marketing Department, where I functioned -- I was an industrial analyst and worked on some special problems with System Engineer -- System Marketing was studying at that time.

Q Mr. Anderson, are you a registered engineer?

A Yes; I'm registered in Louisiana, Indiana, Michigan and Ohio.

Q Could you briefly describe the duties you carried out for R. W. Beck in the six years you've been an employee of R. W. Beck?

A Yes.

My initial assignment with R. W. Beck was to serve as design engineer for the Hoosier Engineering Company, Engineering Division, which is located in Bloomington, Indiana.

I was -- I served there as their design engineer and helped them solve design problems that they were facing and also develop for them a standard distribution substation that they continued to use.

Anderson - direct

After completing that assignment which took -- was about six months, I moved into the area that I am operating in now, which is primarily transmission and distribution system planning.

I also participated in power supply analysis studies and have done work in the transmission-distribution planning area for cities such as Anderson, Indiana, {inaudible}, and Rochester, Minnesota.

I have also assisted the City of Cuyahoga Falls, Ohio, negotiated a 138 KV interconnection with Ohio Edison and served in a similar capacity for the City of Crawford in their negotiations with the Public Service of Indiana.

Q Mr. Anderson, can you tell us what you mean by "System Planning"?

A Yes.

When we do a System Planning study, we look at the load, the current system of the client, and their load conditions, look at their load -- forecasted load increase or changes in their load condition, and analyze their existing system and determine what would be required to either maintain it as a good system or to improve

Anderson - direct

it to meet future requirements.

Q Would you tell us what you did to carry out your assignment in this case?

A Well, in this case, I -- the first thing that I did was to review the reports of Mr. Chaney and Mr. Markos and the route maps that they prepared and -- to familiarize myself with the lines that they were proposing.

Following that, I came to Cleveland and spent three days in the city walking the -- walking and riding and looking at the proposed line routes.

Following that -- during that time, I took some photographs, acquired some aerial photographs of Cuyahoga County, and took those maps back to our office in Indianapolis and laid out on the aerial photographs the various routes and located some potential possible pole locations, and used those to determine the basis of construction cost estimates and, subsequently, from the cost estimates, construction schedules.

Q Did you do anything else in connection with your assignment?

A Yes.

Following those, I attended the trial and

Anderson - direct

listened to the testimony of Mr. Chaney and Mr. Markos, and also spent some time in the office of the Ohio Power Siting Commission to see what relevant information I could gain there about what other -- what had been done in the state.

Q - Mr. Anderson, did you have any help in carrying out your assignment?

A . Yes.

. I had assistance here in Cleveland from the Charles P. Bramen Company, a firm of real estate appraisers, and Mr. Bramen himself and Bob Potuski helped me in locating the proposed corridors and in taking some of the photographs here in the City and finding access to the different routes in the City.

I also had assistance from our firm from Don Chambliss, who is the head of our Construction Cost Estimating Group, and Ray Garrison, who is one of his employees, and Mr. Fred Ruckhouse, who is responsible for the firm's construction supervision activities.

Q Mr. Anderson, may I ask you to look at the Black & Veatch proposal at this time from the time frame of 1973, specifically, September of 1973, after

Anderson - direct

the CEI wheeling denial.

Would the Black & Veatch proposals be feasible alternatives for Muny Light, in your opinion?

A No; in my opinion they would not have been feasible.

Q Why not, Mr. Anderson?

A Well, the first thing you have to do is put yourself back into the time frame that the decision would have been made and look at what the conditions were.

And at -- in the fall of 1973, Muny Light was operating its 85-megawatt unit and was buying -- had -- was in the process of constructing a 138 KV synchronous interconnection down to CEI's power plant.

They had requested wheeling of PASNY power, as I understand it, and that was the denial that triggered the decision point that Mr. Chaney described in his proposal.

The first thing is this proposal doesn't really address that question.

The synchronous interconnection was being initiated, and what Muny Light wanted to do was to gain access to the low-cost PASNY power.

Anderson - direct

Q Mr. Anderson, did you come to any conclusions as to whether the proposal of Mr. Chaney was a feasible proposal?

A No, I felt like the proposal was not feasible because it really didn't represent a reliable firm power supply.

Q What do you mean by that?

A Well, the proposed line that -- as I understood, Mr. Chaney's proposal was to construct a line -- one of four different lines that ranged in length from 30 to 75 miles, and to back up those lines with the rehabilitated 85-megawatt power plant held in cold standby and the combustion turbines and possibly the dead load transfers.

Now, the problem with that is that the reason that doesn't represent a reliable firm power supply is that when the line tripped out, -- and we know that it would -- when the line failed, the entire service area of Muny Light would be in the dark until either the line could be repaired or the combustion turbines could be placed in service or load transfer points could be activated. There would be a significant time when most, if not all, of the Muny Light System would be in the dark.

Anderson - direct

And that is just not good power supply planning.

Q Mr. Anderson, when you use the word or phrase "trip out," what do you mean by that?

A Well, "trip out," I guess, is a trade word, but the breakers at each end of the line trip or open; so when a fault occurs -- for instance, if a storm blew the breeze through the line or blew down poles, the breakers on each end would open, and that's what we refer to as "tripping out."

Q Mr. Anderson, what difference, in your opinion, is there between the Black & Veatch proposal and the Muny Light System generating with a synchronous interconnection?

A Well, with the system generating -- with Muny Light generating in a -- with a synchronous interconnection in operation, if the 85-megawatt unit had to trip off the line or cease generating power, instantaneously the synchronous interconnection would begin to supply power to the system so there would not be an outage, the service to customers would not be interrupted as a result of that event.

With the proposal of the Black & Veatch proposal, if the line tripped out, service would be interrupted until some manual operation was carried