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Volume 30 (Part 3)

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

MR. LANSDALE: If you would advise me when I have 15 minutes left, I would appreciate it.

THE COURT: Very well.

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(The jury entered the courtroom.)

THE COURT: Please be seated, ladies and gentlemen.

Ladies and gentlemen, the defendant will now present its closing argument which, incidentally, ladies and gentlemen, is the last time that the defendant's lawyer will have to address the jury.

Mr. Lansdale.

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

BY MR. LANSDALE

MR. LANSDALE: If your Honor please, ladies and gentlemen of the jury:

I'm glad that Mr. Norris reminded me of that passage from my opening statement, and I repeat it:

If you're in a foot race, you don't have to pick the other fellow up; you must not trip

him."

Muny Light tripped over its own feet a few times, but CEI never tripped it up, and I hope to show that to you before I'm through.

THE COURT: Keep your voice up, I'm having difficulty hearing you, Mr. Lansdale.

MR. LANSDALE: Yes, sir.

I'm going to deal, first, with damages, which, heaven forbid that you should ever reach; but I think that consideration of the damages will point up the real issues in this case.

Mr. Norris apologized for the confusion with respect to damages.

The only reason there's any confusion is because the City's overclaiming.

They came in and they said that they wanted some 30 or 40 million dollars, huge sums of money, because they no longer had the 85-megawatt unit; but they neglected to tell you anything at all about why the 85-megawatt unit is no longer there: They know why it is not there; we do not.

{Ms. Coleman rises from her chair.}

THE COURT: Overruled.

MR. LANSDALE: And they claim that there were damages because of a difference in discount rates, which I want to speak to you about.

Now, the discount rate is a very interesting thing.

Dr. Wein is the one who testified about that, -- Dr. Wein was the City's universal expert -- and Dr. Wein ran the damages up on an inflationary percentage of his own devising and of his own determination, and when he predicted by this means what sort of income theoretically Muny would have in a future year if CEI behaves itself, he then discounted it back to the present as the law requires, as common sense will tell you he must; and he used an 8 percent figure.

Now, don't misunderstand, ladies and gentlemen of the jury, that Dr. Wein didn't understand what he was doing. You heard him tell about how close attention he paid to interest rates for his own personal investments and the like.

He discounted at 8 percent; but he knew,

as Mr. Martin knew, as everybody else knew, that the figure that he was talking about for future damages was something that Muny expected to get in the future, 20 years from now, 19 years from now, to pick the furthest date; and that what you are looking for is how much money to give him today that, if we invested at compound interest, he'd have that amount to make him whole.

Now, fortunately, we all have these hand-held gadgets and we can figure these things out for ourselves, we don't have to rely on experts. And he discounted at 8 percent and just wanted to illustrate what sort of a claim that is.

One of the claims was that in a particular year, in 2000, Muny Light would have received -- if CEI behaved itself -- a million 827 thousand dollars; and he said that is 423,000 today discounted at 8 percent. And if one invested it at 8 percent and left it at the compound interest, sure enough in 19 years you would have a million 827 thousand.

But you know, and I know, and Mr. Martin testified, that you can invest it today at 15

percent. And guess what 15 percent would give to him in 19 years? $6 million, $6,020,000.

And even at his 13-1/3 percent, which he used after the Court told him he had to use the current figure, he wasn't satisfied to use what Mr. Martin said you could get today, he had to go back three or four months. Even if you use that figure, you'd have 4-1/2 million dollars.

Now, I cite these things to you, ladies and gentlemen, as illustrative of the kind of overclaiming that we're confronted with, and how carefully you must examine the testimony that Dr. Wein has given to you on this witness stand -- as tough as it was to get out of him from time to time.

Now, fortunately, these differences don't make any real difference any more, because you may remember when Dr. Wein found out that he couldn't use 8 percent, he had to use 13 percent, he says, "Not to worry, I'll figure some new damages and I'll use a different method of escalating in the future," and in place of coming out with $45 million, or whatever he had, he came out with 64.

Now, unfortunately, however, he placed

almost all of that inflation by his second try into the future damages for the loss of the 85-megawatt unit.

Now, they're out of the case so that ploy really didn't work.

Now, I want to direct your attention to the fact that there were only three elements of alleged wrongdoing for which damages are claimed.

His Honor will instruct you that a plaintiff is entitled to recover for violations of the antitrust laws which caused them damage. And I'll get, in a moment, into a discussion of violation, but let me deal with damages first because it points up the rather restricted problem that we have here.

There's only three claims: One of them, refusal to interconnect.

The second one is this refusal to wheel PASNY power; and the third one is the free wiring program.

Now, look at the refusal to interconnect: The claim for damage does not relate to what they spent most of their time talking about: how much trouble it was to operate the plant;

what a godsend it would have been to have an interconnection, Mr. Daniels talking about how much easier his job would have been if they had had the interconnection.

They didn't make any claim because the lack of an interconnection made them unreliable and so they lost customers on that account.

This is not in their claim. The only claim they made was that if they'd have had the interconnection, they would have rehabilitated the 85-megawatt unit, and they would have repaired the 85-megawatt unit after the explosion and retrofitted it for pollution control and had it in operation. Those are the only claims they make.

Now, the 85-megawatt unit is out of the case because they didn't prove it. They didn't even begin to explain how CEI could be responsible for that; and CEI was not responsible for that.

Now, this leaves only for the refusal to interconnect, the claim relating to the so-called rehabilitation of the three 25-megawatt units.

Now, this is interesting because this claim

relates to the allegation by Mr. Hinchee.

You all remember Mr. Hinchee, and I apologize for boring you so long with the two or three days of cross-examination, but he made so many generalized claims that it seemed to me necessary to ask him about all of them.

Mr. Hinchee says that they couldn't repair their three 25-megawatt units without an interconnection.

Now, the fact of the matter is that at the time that this was going on -- not here on the witness stand but the contemporary record doesn't show -- do not show any such claim -- and one of the items of repair was so-called Boiler No. 2. And if you'll remember those fancy operations charts that we saw, the big ones on there, they showed that Boiler No. 2 went out of commission -- went out of commission in 1971 -- early in 1971 -- to be precise, March 25th, 1971, not more than a couple of weeks after Mr. Hinchee came to Cleveland, and never operated again.

Similarly, we find Boiler No. 3 -- pardon me -- Boiler No. 2 went out of commission on February 10th, before Mr. Hinchee came, and

was repaired.

Boiler No. 3 stopped operation on March 25th, 1971, and was out for 13 months.

There was nothing about an interconnection that could have helped them in any way to repair Boiler No. 2 during this interim period because Boiler No. 2 was not in operation. Anyway, it didn't make any difference whether they had an interconnection or whether they didn't have an interconnection for the repair of Boiler No. 2.

Q Now, at the very time that we're talking about -- to be precise, in November of 1971, I'm looking at PTX-2852 -- Mr. Hinchee was reporting to the Federal Power Commission about his plans to repair. And he says then that "Boiler No. 2 is going to be in operation in March of 1972."

He's talking about November, 1971 now, the date of this thing -- he says, "Boiler No. 3 is going to be in operation in January."

And he says, "Boiler No. 4 is going to be in operation in February."

Now, we have a -- and he didn't say a word to the Federal Power Commission --

remember, he was down there at the Federal Power Commission complaining about CEI not interconnecting, -- he didn't say a word in there about not being able to do it until he gets an interconnection -- and this was 18 months before they could have an interconnection under the most optimistic schedule.

The real reason that this wasn't repaired was given by Mr. Kudukis, the Director of Public Utilities, to the City Council, when he talked to them on January 15th, 1975, and one of the Councilmen said to him -- Councilman Forbes to be precise -- "You should be putting your money in 1 through 5" -- that's these three 25-megawatt unit problems -- "-- and try to get it operating."

Director Kudukis says, "The reason they are not fixed is because we don't have the capital dollars, that is the problem."

He didn't say the problem was CEI; he said the problem was not having the capital dollars. And this is not CEI's fault, that they don't have the capital dollars.

Now, I won't dwell any longer on that problem.

The next problem is the wheeling claim, the next damage claim.

The wheeling claim is divided into two parts:

Number one, the failure to get any PASNY power until sometime in 1980 when they could have had the 23 megawatts considerably earlier;

And the failure to get 7 megawatts more or 30 megawatts of PASNY power, and I wish to deal at this moment with the 7 megawatts only because that's where the extra damage is, and that's where all the damage is in the so-called future period for PASNY.

Now, that 7 megawatts rests on the following claim:

The reason that Muny Light only got 23 megawatts in place of 30 was because they made a deal with Allegheny Power, a cooperative over in Pennsylvania, that because Muny couldn't use the power right away, "Allegheny, you apply for it and we'll support it; and you'll agree that when we can have it, you'll give it to us."

And Allegheny says, "Yes."

Now, the reason that they only got 23 in place of the 30 later on was because Allegheny

was socked some additional expense for the transport of that, which they couldn't get rid of when they gave up the megawatts to Muny Light, and they had to have the 7 megawatts to compensate them for it.

So the claim is that had CEI agreed to wheel earlier, they could have gotten the whole 30 megawatts.

Now, this testimony rested on the testimony of Mr. Engle and Mr. Duncan. And, by the way, you're going to find me saying here and there some derogatory things about some of the City's witnesses.

Mr. Engle and Mr. Duncan are not in that category. I categorize them as honest witnesses having intellectual integrity -- as some of the other of the City's witnesses do.

Now, Mr. Engle is the one you really pay attention to.

Mr. Engle testified that the deal with Allegheny Power was made after CEI refused the interconnection -- I mean, refused the wheeling -- and refuse we did, make no mistake about it, we did refuse; and the deal was made after CEI refused to wheel.

Then you'll remember -- and he said that the deal was made at a meeting in New Orleans in February of 1974.

During cross-examination I showed him a letter that he had written in 1973 referring to this meeting in New Orleans where he made this arrangement, in discussing the arrangement; and when I showed it to him, I suggested to him, "Haven't you -- because there's so much time in the past, haven't you telescoped this period and didn't you really have this meeting in February of 1973?"

And he said, "Yes."

Now, the fact of the matter is that they never asked CEI to wheel until April of 1973. The deal with Allegheny was made before they ever asked CEI to wheel; and the reason they made the deal was very simple -- and it appears in the evidence:

They were concerned about the State of Vermont, which was applying for the same property, and they said, "We've got to get together and the two of us apply together for this power because if we fight about it, Vermont's liable to take it away from us."

So they joined together. And the AMP-Ohio said -- Mr. Engle said to him, "There's no way we can use it now, --" and, by the way, if CEI had agreed right away to wheel, there was no way it could be done because there wasn't any interconnection and there couldn't be for 18 or 19 months.

So they made the deal before they ever asked for the interconnection.

And I submit to you that this claim is not a valid claim; and it's a fair amount of money, by the way, it seems to me we are dealing with nothing but millions of dollars here, it scares me.

It is -- let me find it --

{Document handed to Mr. Lansdale by Ms. Doyle.}

MR. LANSDALE: It's about a million and a half dollars, a million 580 thousand dollars.

Now, let's talk about free wiring.

I'm going to pass the rest of the PASNY claim for the moment. There's no question that we refused to wheel, and there's no question that if we were obligated to wheel, there may be

some problem there for CEI, and I'll deal with that a little bit later.

On the free wiring plan:

Please remember that this rests solely upon the claim that the customers changed because of the free wiring. It does not rest in any degree upon the claim that Muny was unreliable.

Dr. Wein says, very, very finally, that they switched only because of the free wiring -- he just went for broke on that basis.

Now, what is the basis of that claim?

Outside of the fact that CEI management was laying plans to try to compete by offering this program, -- and, by the way, there's no claim that CEI was selling energy below cost; there's no claim that we were doing anything from a pricing standpoint other than meeting the competition of Muny Light.

The claim -- and Dr. Wein says -- the question is:

"Please tell us what your conclusion was as to why the customers left?

"Well, I concluded that these particular customers who received payments left because they received the payment even though outages

may have been some consideration, but the outages weren't enough to make them leave, they had to receive the payments to leave, and so when the payments were forthcoming, they switched. If they would have switched without the payments, then, of course, CEI was a rational company and it wouldn't have made the payment.

We had several customers here. We had a Mr. Banas. He testified that the Clark Controller didn't leave, and that CEI's putting the service into one point was influential in keeping them from leaving.

We had a Mr. Rados, who said he was offered $20,000 in wiring, but that wasn't enough to make him leave; and the service was just as good as that of CEI. And lo and behold, we found out that he was getting CEI power all the time because he was taking it from one of the load transfer points and, during that period, this was on continuously.

We have a contractor who said that he received payments from CEI for wiring.

We had a residential customer who said that CEI came and moved her without her consent, but

she didn't get any wiring for it.

The only direct testimony about the cause of moving is Mr. Jackman.

Mr. Jackman says that they voluntarily went to CEI -- CEI didn't solicit them, they went to CEI -- and CEI arranged to make payment. That was the deal they made, and they spent $50,000 of their own money; but the reason that they left was unreliability of service.

Mr. Gaffin made a survey, and that survey is denigrated because many of the people that were asked about it couldn't remember why they left, -- and I think that if they felt they got a big financial bonus, they might have remembered -- but, in any event, those that did remember, overwhelmingly said it had nothing to do with the case; that the reason that they left was unreliable service.

What we have -- the only real facts we have are from Mr. Jackman and Mr. Gaffin, where the customers themselves said they did not leave because of the free wiring.

And I submit that Dr. Wein's -- the universal expert -- opinion doesn't really have much validity in these circumstances.

I'm interested in one thing:

There was $700,000 total amount that CEI paid over the several years that are involved here. Muny Light paid a million dollars -- or obligated itself for a million dollars to one customer, and a part of that load was the Commodore Hotel -- which is the only customer they mentioned -- the Commodre Hotel at Euclid and Mayfield, has been there a long, long time, they took that customer away from us. This wasn't solely a new customer, only the Associated Estates part of it.

Now, I don't think I want to pause to talk about secrecy; only two or three thousand people knew about the Muny Conversion Program.

I don't know why we should have had the Muny Conversion Program where there was no Muny because it wouldn't make any sense.

That's all I'm going to talk about damages, and I do ask you to keep in mind the very limited number of acts that are claimed as a source of damage:

The refusal to interconnect; only the repair of the three small old units that went out of service in 1977; the PASNY -- refusal for

PASNY power; and, thirdly, that the free wiring program -- not unreliable service, not any of the other numerous acts going back into the '60's that we've talked about.

Now, let's turn to something else.

The Court will charge you that if the City has failed to prove that CEI monopolized or attempted to monopolize the relevant market, you must find for the defendant.

This brings up the subject of "relevant market." And you may have wondered why there is such a fuss about "relevant market."

The reason, of course, is that within the area in which CEI and Muny Light now compete, Muny Light has some 43 percent of the market and CEI has the rest, and there's been a kind of a Mexican standoff in that market since at least the '30's, perhaps earlier.

I asked, before I started my argument, that map which is on the easel be put up there. And I remind you that the yellow line is the boundary in which Muny Light served in 1939; and, for all practical purposes, that's the same area that they serve in now.

Now, if you say the relevant market is the

whole City of Cleveland, then CEI has 80 percent of the market. If you say that the relevant market is the green area, then they have 50 percent -- 57 percent. And the plaintiff would complain that because we have 80 percent of the market, therefore, we are a monopoly.

Well, our having the market outside of the competitive area has really nothing to do with any attempt by CEI to monopolize or any monopolization by CEI. And this very thin claim to potential expansion in the rest of the city is simply a construct to reach thereby this thing of 80 percent of the market that they have claimed.

Now, this rests solely upon two things:

In spite of all the list of things that Mr. Norris read to you, it rests upon the alleged plan to go to Southerly Sewage Disposal, and the alleged plan to go to the airport.

Now, his Honor will say to you that not alone must they have balance to go to these places, they must have the finances to go to them, it must be financially worthwhile for them to go, and they must really intend to do so, and hatch this: They must be prevented by

the activities or action or position of CEI.

Now, ladies and gentlemen of the jury, let's talk about Southerly, which is the closest they come.

Mr. Pofok made a financial study of that, and his study showed that if they went and built the plan down to the Southerly, they would lose money.

Under the new rates that they planned, they would have made a little money, just barely, but, if so, their rates would have been 25 percent higher than those of CEI for the same class of service.

He just made a study, that wasn't a plan to expland; and what did he do with the study? He gave it to his boss, and his boss was a Mr. Kudukis.

Mr. Kudukis, in addition to being Director of Public Utilities, was also the Chairman of the Regional Sewer Authority, the Authority which was responsible for this Southerly Sewer plant, and there the buck stops, if you please:

We don't know what happened to it. Mr. Kudukis hasn't said; Mr. Pofok doesn't know.

All we know is that the study showed it was not economically feasible for them to do so at a competitive rate, and they didn't do so.

Now, there's also a record that says that the manager of the plant was worried about their reliability -- as well he might have been. But we don't know why they didn't go; there was no plan to go; there was no effort to go beyond merely a study.

The airport: That's really stretching it.

The theory was that if the City should buy the old tank plant and acquire in the meantime a substation which was out there, they would be able to run a line out to the airport and take over the airport service from CEI.

But this was just a pipe dream. There's no evidence of any plan to do this or anything else.

I submit that the effort to create an artificial appearance of monopoly in the place where it matters by using these thin reeds to extend the market to the City of Cleveland is nothing but an attempt to an artificial construct to create the implication of a monopoly that does not exist.

And let there be no doubt about it whatsoever:

Whatever may be the fact as to outside of the competitive area, -- and I submit to you, what do you suppose under the conditions of a regulated electric utility would ever be the condition outside of this competitive area and this historic axis that we have outside of that?

There is no monopoly in the competitive area and there never has been since 1906, I believe was the earliest of the maps, and there's been no monopoly there, and make no mistake about it; and any attempt to talk about the Southerly Sewage Plant or the airport can't create a monopoly when none exists, and there's been a Mexican standoff there for more than 70 years.

Now, of course, there can be a monopoly in other ways in simply having all the market they say, although it's hard, really, to think about it if you've only got 57 percent of the market.

The definition of "monopoly power" is the power to fix prices or to exclude competition.

These definitions were really made for non-regulated businesses, because if you have a monopoly -- and this is the evil of it -- you can fix the prices. If you can fix the prices,

therefore, you must have a monopoly because, otherwise, you couldn't fix them. That's the theory.

Now, of course, here, I'm not going to waste any time myself on this power to fix prices. I submit that it's ridiculous to talk about CEI having the power to fix prices; and, if CEI did, I wouldn't have had to spend most of my life fighting lawsuits down at the Public Utilities Commission in trying to get your rates raised -- for which I apologize.

{Laughter.}

MR. LANSDALE: Now, the real reason they haven't expanded into the rest of the City, I think it's very plain.

You remember Dr. Wein talked about incremental costs being higher than average costs. What he means by that is that it's more expensive to do it now than it was in the past.

The pole line that they built down the street in 1930 cost considerably less than it will cost them to build a new pole line. And so that building new plant out into the rest of the City is going to so raise their costs that, in view of their other problems it, I

think, is highly unlikely that they would ever do so; but, in any event, it is clear that they haven't done so since 1935, and how long ago that -- 50 years -- almost 50, 45 years ago; and to talk about the potentiality of Southerly and the airport I submit is a little ridiculous.

Now, the next item is attempted monopoly.

Remember, in order to shortcut a finding for CEI, you have to find not only that we didn't monopolize, or at least find they failed to prove we monopolized, -- I submit that it's clear we haven't monopolized, all you've got to do is look at the map -- the question is: Did we attempt to monopolize?

Now, there must be specific acts by CEI in furtherance of an attempt to monopolize.

Ladies and gentlemen of the jury, the acts of attempted monopolization of which they are entitled to claim are those that they claim damage from, and those are this alleged refusal to interconnect, the failure to wheel, and the free wiring program.

Now, here we get into an interesting situation, because there are only two

competitors in the market, and there's no way that we can get a new customer without depriving our competitor of a customer.

There's no way that we can persuade an existing customer of our competitor to take from us without depriving our competitor of it.

Therefore, to adopt Mr. Norris's concept of anyone intending the reasonable and probable consequences of their acts, you would have to say in the peculiar circumstances that we are in here that we could not compete.

Now, I'm going to allude later to the fact that one of the problems in this case is that the City wants competition but they don't want to compete -- or, at least, they don't want CEI to compete.

The fact of the matter is that there is no way -- and I ask you to think about this, and, please, ladies and gentlemen of the jury, you've heard a lot of experts here, but you're the judges of the facts; and, moreover, one of the benefits of the jury system is that we are enabled to bring to bear on these factual problems what some of us call "common sense," and you have common sense, and it's been my

experience that the collective common sense of the jury is frequently, if not almost always, right.

You must deal with these things with common sense, and I ask you to think for a moment:

How would you compete without doing something to make your competitor's business a little less? In a market like we have here, I submit to you that it is an impossibility.

And you will hear from his Honor that the mere fact that by competing, we reduce Muny business, does not constitute a violation of the antitrust laws, nor does it constitute evidence that we attempted to monopolize -- and that is very important.

Now, remember, we've heard a lot about everything that happened back in the 1960's. We read some of the colorful internal memoranda of CEI -- at least, people that were trying to compete and trying to figure out how they can take the business that they want in the City of Cleveland and conduct the competition as Mr. Norris says is so beneficial to everyone in the electric business.

But the things that count are the things --

are the acts -- not the thoughts, not the words, not the claims of anybody or the internal musings; the things that count are the acts that were done within the period July 1, 1971 to July 1, 1975 for which damage is claimed.

Now, this brings me down back again to these three items:

Refusal to interconnect; PASNY power; free wiring.

And when we talk about the way -- whether these things are violations of the antitrust laws or not, the question is were these acts -- this refusal to interconnect -- and, by the way, it really isn't a refusal to interconnect that they complain of, it's the refusal to interconnect soon enough.

You may remember when he finally got down to the Federal Power Commission, CEI agreed to go ahead with the interconnection. The complaint is that we didn't go ahead with the engineering and construction in the middle of 1971.

But the question is:

Did we do these things that we did or omitted to do the things that it is claimed we

should have done, with the intent to monopolize with an evil intent solely to get them out of business, or did we do this in pursuit of valid competitive practices?

Stated another way: Was there a valid business reason for what we did?

If there was a valid business reason for what we did, then these acts do not constitute an intent to monopolize.

Now, let's deal, first, with the interconnection.

His Honor will instruct you that the purpose of the Sherman Act is to preserve competition and the competitive process, not to preserve competitors.

There's nothing in the antitrust laws whidh say that, "We want to preserve Muny Light in the market," or anybody -- or any particular competitor.

"What we want to preserve is the competitive process to the extent that it can continue."

And the competitive process here is competition in the relevant market in the green area.

And the question is: Was there business justification for what we did?

Now, let there be no doubt about it:

As I said, I believe, in my opening statement -- if I didn't, I say it now -- CEI didn't want to interconnect with Muny Light because interconnection with Muny Light gave Muny Light as much reliability as CEI had.

Now, Muny Light has things going for it CEI doesn't. They don't pay taxes, they don't pay property taxes, they don't have to earn a profit in order to induce shareholders to invest in the property to give them money to build it. They don't have to do all those -- they don't have to do those things; therefore, it's cheaper for them to operate if they operate efficiently.

CEI had some things going for it, and it was reliability.

Now, they didn't want to give Muny Light -- having a price advantage -- the only advantage CEI had, and that was reliability. So we didn't want to do it.

Now, the question -- however, remember, that we had agreed to go ahead with an

interconnection for reasons we need not dwell on, but the fact of the matter is there was no way that CEI could stand the heat of permitting Muny Light's 40,000 customers or 46,000, however, much it was, to be without power when it came right down to it.

We had agreed to go ahead with an interconnection.

You may remember that this started back in 1970 when Muny Light came to us and said, "We want a load transfer in order to put precipitators on our boilers."

For temporary purposes we agreed to do it.

Then they had a big outage and they came and said, "We had an emergency," and it was hitched up. And in the process, the load transfers were hitched up, and that process, it was agreed that the studies would be made for synchronous interconnection.

By the end of that year, Muny Light had decided that it did not want a synchronous interconnection because it couldn't afford it, but a permanent load transfer arrangement.

This was memorialized in letters which are in evidence which show that that was the

determination of Muny Light in December of 1970. Then the then Commissioner of Light and Power leaves, and after an interim of time Mr. Hinchee comes on the scene.

Now, let's see what the situation was when Mr. Hinchee arrived.

By that time, Muny Light owed CEI a million 300 thousand dollars; it hadn't paid its bills for a long time, and CEI had sued in the Common Pleas Court here to collect that million 300 thousand dollars.

And please remember, that Mr. Mayben, as part of his testimony and as part of his plan for what he would have Muny do if CEI had gone ahead, was that you cannot expect cooperation unless the bills are paid.

Mr. Hinchee didn't believe that. He believed that he could demand cooperation even though he didn't pay his bills.

Now, what situation did Mr. Hinchee find?

He found when he came in March of 1971, That in 1970 Muny Light had lost a million 900 thousand dollars.

During 1971 it was losing money; as it later turned out, it lost in 1971 a million

300 thousand dollars.

He found out that the year before Mayor Stokes had discontinued the real estate levy and had proposed an income tax; and the voters failed to approve it, and the City of Cleveland was broke. And you remember Mr. Riebe's testimony; and during the year 1971, the City General Fund ran an indebtedness -- a deficit of $13 million.

It is perfectly plain that when Mr. Hinchee arrived on the scene, the City was broke, going into debt $13 million.

Muny Light was losing money and was under water and was taking in less cash than it was obligated to pay out, and hadn't paid its bills. And he decided that he wanted a synchronous interconnection.

So what did he do?

He made a lunge at seeing if CEI would go ahead with the synchronous interconnection which the City had told CEI a few months before that it had abandoned. And when CEI said, "We won't move until we're paid," he did two or three things.

First, he went down -- he got authority to

go to the Federal Power Commission to file a lawsuit demanding interconnection. Then, although CEI had been serving Muny Light for more than a year with no questions raised, he reviewed the arrangement and said that CEI was deceiving Muny Light, overcharging it, and doing various other perfidious acts.

Now, I pause here to point out that as is clear from the evidence, Mr. Hinchee was 100 percent wrong about the bills being too high or about CEI deceiving the City in any manner, shape or form; because although pursuant to Mr. Hinchee's determination those matters were all litigated, every tribunal that looked at that question said, "CEI's bills were correct; Muny Light pay up."

Now, the reason, of course, that he engaged in all this activity was that he didn't have the money to pay the bills, he wanted a synchronous interconnection, and he was trying to somehow rather create a situation where he could require CEI to go ahead without being paid.

Remember this: Mr. Hinchee testified that, so far as he was concerned, the question

of the bills was something entirely different; that the City regarded it as a totally different question; CEI should go ahead anyhow.

I don't know about you folks, but I don't know of any case in which it is claimed that by reason of antitrust violation or any other reason, a vendor must give away his product.

And this is what Mr. Hinchee said; and I submit to you that if any other justification for CEI's attitude in this, to me, that is sufficient.

I submit to you that it is a sufficient business justification to refuse to go ahead with a device that will permit the City to take all the power it wants without paying for it, to insiste that the City get current on its bills before it does so.

And I remind you what happened when the City did get its synchronous interconnection without -- after having paid up most of its bills, it never paid another bill until we had a judgment of this court, and the bill reached more than $20 million. And if there was ever any demonstration that CEI was justified in this, that was it.

Now, I want you to remember during all this time, however, that all of this time, even though CEI was not getting paid, Muny Light was receiving power over the load transfer arrangements, and the lights were not going out because CEI was providing the power, even though it did not get paid.

Now, interestingly enough, Mr. James says that the agreement that Mr. Norris talks about in July says that the agreement was that the City would pay the bills as CEI had rendered them, leaving to later litigation whether it was correct or not.

The record shows that that was the proposal of the Federal Power Commission.

Mr. Hinchee says, "No, that wasn't agreement." The agreement was that they would pay only the undisputed amounts.

And you may remember Mr. James on the witness stand -- another honest man, by the way, the witness for the City -- had to agree when he was shown the correspondence that the City agreed that it would pay the bills as rendered, but they never did.

Now, the claim is -- the claim is that we

refused to go forward with the engineering before we found out that the City didn't mean what it said about paying its bills in full. That we should have gone ahead in this little interval between July 8th and sometime in August, I think it was, when we found out that the City did not intend to pay its bills, and we should have gone forward with the engineering then; and, if it had, they say they would have had the interconnection.

Well, of course, if we had of gone forward with the engineering then, we'd have soon fo-und out that the City wasn't going to pay its bills and didn't intend to, and there wouldn't have been an interconnection because, as Mr. Mayben said, "You have to pay the bills if you expect cooperation."

But the fact of the matter is, Mr. Norris completely overlooks the letter written by Mr. Howley immediately after that July 8th meeting -- on July 22nd, to be exact -- in which it is pointed out that there had been at that time no agreement. And you know there never was an agreement and the City never did pay its bills. And the City never did --

although it agreed to -- and CEI did not go ahead with the engineering.

I submit to you that there is plenty of business justification for that. And I do not believe that we can attribute an attempt to monopolize in a simple refusal to give a synchronous interconnection to a person not paying their bills when, at the same time, you were selling them power over load transfer points which kept them in business, kept the Muny Light customers in light.

Please remember, the obligation that the antitrust laws is concerned about and, as Mr. Hinchee testified, the Federal Power Commission was concerned about, is the public, the rate payers of the City of Cleveland, the public who is interested in the competitive process, not Muny Light.

Now, I want to get to PASNY.

There isn't any question that we refused to give them PASNY power when we could have; and that, as Mr. Hauser's letter said turning them down, "Because it would injure our competitive position."

Just think for a minute: You remember the

claim for damages for PASNY? That claim represents the amount of money that Muny Light would have saved if they'd had PASNY power.

Remember, that Muny Light has no taxes to pay, no profit to earn; and if they can get power substantially cheaper than any power that CEI can get, of course, they can substantially undersell CEI and make money.

I submit that this is -- using your common sense, please -- adequate business justification for refusing to give a facility built by CEI with the necessary foresight for its own customers and for its own benefit, in refusing to give to Muny Light the advantage of being able to undercut them in this competitive situation which had been at a Mexican standoff for so many years.

Believe me, with any kind of decent management, and with all of those cost advantages and a willingness and desire to take the additional customers within the competitive area, CEI's millions of dollars of investment there would have been substantially out the window.

Now, there's another reason. They talk

about an essential facility."

His Honor will instruct you, I believe, that there's two aspects to this so-called "essential facility" doctrine.

To illustrate what it is, this says that if someone controls a facility which is very important to the ability of a competitor to compete and it is not feasible for the competitor to get it for himself, you have an obligation to share it.

Now, please notice that there's two aspects of this:

One of them, the feasibility of the competitor to getting it for himself. That means, build a transmission line, for example -- and I'll get to that in a moment.

The other one means it's necessary or very important to their competitive process.

Now, I quite agree that getting theirs would have substantially reduced Muny Light's costs substantially below those of CEI, but there is no question at all that Muny Light did not have to have this PASNY power in order to compete.

You remember that a good many of the

things that Mr. Bingham testified to, Dr. Wein, the City's expert for all seasons, took issue with. But this study by Mr. Bingham showing that Muny Light could compete and, indeed, make money without the benefit of PASNY power is not disputed or refuted by any testimony.

The fact of the matter is that Muny Light did not need this in order to compete; they needed it in order to lower their prices lower than what they already were, but they didn't need it in order to compete on at least equal terms with CEI.

Now, this brings up the question:

Could that have done it for themselves?

Now, Mr. Anderson testified here at length -- and you heard him, and he's another fellow, along with Mr. Mayben, that I classify as a person with intellectual integrity and I don't take issue with his testimony.

But it's beside the point. Mr. Chaney never testified that Muny Light could and should start to decide for the first time in 1973, or for the first time in any one of these other periods, that they should then build the transmission line.

What he testified to was that in the periods mentioned, Muny Light could have built those lines and could have done it feasibly if they had made adequate plans to do so.

His was a feasibility study, not a construction study.

Now, as Mr. Anderson testified, planning for transmission lines takes a long time; you have to plan ahead.

I want to point out for the jury that this inability to plan, this waiting until your water is leaking from the mains or the 85-megawatt unit won't operate until they decide whether they want an interconnection or not, doesn't work in the utility business.

And, by the way, ladies and gentlemen of the jury, heaven help you if Muny Light had been the utility in the City of Cleveland rather than CEI.

But this problem of Muny Light's inability to plan and inability to be in a position to build these transmission lines -- they use a fancy word -- is endemic to Cleveland. All that means is that it's pervaded, it's characteristic of Cleveland.

You remember Mr. Merback talked about the Water Department and the Sewer Department where they don't have any competition, CEI is not there, bad CEI is not there doing bad things to them.

And the Water Department, 25 percent of their water leaks; their reservoirs are -- the roofs are falling in; they've got to spend enormous sums of money that they should have been spending years ago to keep their system in shape.

Their sewer lines -- and this was the finding not alone of Mr. Merback but the finding of the Court that reviewed this situation in a lawsuit, in the Sewer Department they had been deprived of the sewers, it's in the hands of a regional sewer authority.

It had spent more money in the last four years by double than the City of Cleveland spent in the last 40 years on the sewers. And the sewers -- the sewers are in terrible shape; the pollution problem is an embarrassment to the City, and all of us are going to be pretty concerned about the rates that we're going to have to pay because the City of

Cleveland, in the operation of those utilities in the same department with Muny Light, failed to plan, failed to spend the money necessary to keep up its facilities.

Now, let's look at Muny Light, and this -- I'm hooking this around, although this applies to other things, this ability to interconnect.

Remember, that the first recommendation the City had to build an interconnection was in 1959 when it was recommended that they would save enormous sums of money if they had a Tri-Cities interconnection.

And then -- this is something that Mr. DeMelto wanted to do, as the evidence showed, but the Mayor was cool to it.

Then they had another study by Beiswenger and Hoch in 1961 which strongly recommended this Tri-Cities interconnection.

Then Mayor Locher in 1963 announced as a fact that they were going to build the Tri-Cities interconnection, and he was on the witness stand and I asked him if he didn't announce that; and he said "Yes."

Now, we don't know why the City didn't do this, -- this is something else that the

City knows and we don't -- but the fact of the matter is that '59, '69, '79, for 20 -- more than 20 years the City has had before it recommendations to build interconnections economic for them to build themselves, and they haven't done it. And if, by the way, they had built the interconnection -- and we had this suggestion that these lines are so long it's too long for Muny to build -- if, by the way, they had built the interconnection to Painesville, they would have been 40 or more percent of the way to the Pennsylvania border already.

If they had built the interconnection to Orville, they would have been more than the distance down to interconnect with Ohio Power and Ohio Edison.

The fact of the matter is that the reason that Muny Light is in the shape it's in today, and CEI is in the shape it's in today, is because one planned and did the prudent thing when it was time to do so, and the other didn't. Because if you'll look back, -- and remember those maps in 1906, 1910, and 1914, when Muny built, the position of Muny Light and CEI in the City of Cleveland was not all

at it, they don't know what they're talking about because they haven't made an elaborate computer study."

And Mr. Kemper, he was only talking about a limited area, and it wasn't a random sample, and you can't deal with that.

Interestingly enough, another witness that the City did not dispute -- and we have no contrary testimony on rebuttal even from Dr. Wein -- is Mr. Blank.

You remember young Mr. Blank, who made a study of the costs that would be sustained if Muny Light and CEI divided up the City 50/50 the whole City.

You may remember that he showed beyond peradventure that the costs of CEI to serve half of the City of Cleveland but spread over the whole city was substantially more than the cost is even with the duplication that does exist.

Now, I must confess that I have the most extraordinary difficulty with this. It just doesn't seem to me that it requires a whole passel of experts to know that to build twice as many electric lines as you need is

going to make service to each customer cost more than if you didn't.

Believe me, Dr. Wein says -- mind you, he doesn't say it isn't so, he doesn't say that Cleveland is not a natural monopoly market, what he says is, we don't know enough to know.

Well, I wonder how much you have to know in order to know, particularly when Dr. Wein says that distribution systems are ordinarily viewed as local monopolies.

It would seem to me what that means is you need a study to find out that it isn't a natural monopoly rather than an elaborate study that he says that you and I are too complex to understand to find out whether it is a local monopoly or not.

Now, what is the significance of natural monopoly?

The antitrust laws are designed -- the Court will tell you -- to preserve competition. And if you have a natural monopoly, and if you don't have a Mexican standoff like we had here in Cleveland for so many years where, in a sense, you don't agree, one party is going to go out of business eventually because if the prices

that they're entitled to make; and I quite agree. But if it is a choice that they're entitled to make, then they must live with it and they must pay the price. And the price in this case happens to have been $34 million of the City's money. And I submit to you that it's a little bit much to say that its competitor must provide this selfsame $34 million.

Now, there's a lot more I believe I could say, but I want to just talk about a few interesting aspects of this thing: Muny Light wants competition, but it doesn't.

I thought that one of the most interesting things that happened in this case was Mr. Norris's cross-examination of Mr. Lindseth concerning the utilization of the Muny Displacement Program or the operation of the Muny Displacement Program in 1965.

You remember that Mr. Lindseth testified there had been a lot of talk about -- a great deal in 1965 -- Mr. Lindseth testified that under his -- when he was chief executive, they started the Muny Displacement Program in about 1959 -- '58 or '59 when they woke up to the fact that Muny Light then having beefed up

its distribution system in about -- and having planning for this new big unit -- were stepping up competition for the first time.

Remember, there had been in effect a sort of a tacit understanding, an unspoken agreement between them since the mid-1930's that they really wouldn't compete with each other. All of a sudden CEI woke up to the fact that Muny Light had changed the rules, and this was about 1958 or 1959. And one of CEI's reactions was to start the so-called Muny Displacement Program.

You may remember that Mr. Norris put on the screen this exhibit here -- and I can't read the number because it's cut off at the bottom -- but, in any event, what it shows is from 1961 through 1974, total customers gained by CEI, total customers lost by CEI, and the difference.

This shows that in 1961, Muny Light gained 123 more customers than it lost.

In 1962, 188 more than it lost.

Well, in 1963, however, CEI was geared up and it got more than it lost.

I say "geared up". That really isn't so.

Muny Light was beginning to have troubles with its reliability.

Then in the next year, 1964, CEI got 60 more -- 34 more customers than it lost.

Then in 1965, it got 98 more customers than it lost; and its net gain from this little renewed competition figure was then 62.

So that by 1965, CEI had gained back a few more than the customers that Muny had taken away from it by this renewed competition in late '59 and '60.

Mr. Norris says, "Don't you think that having met the competition --" I think was the word he used -- "Don't you think having gotten back all your loss, that CEI should have really quit then?"

He said, "Don't you think that was enough to do?"

So now I ask you: What he's asking is not competition; what he's saying is shouldn't CEI have stopped competing at that time and gone back to this Mexican standoff period, this live-and-let-live period of the past 30 years.

But this was not something that Muny Light