

10-6-1981

Volume 30 (Part 5)

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

Follow this and additional works at: <https://scholarlycommons.law.case.edu/clevelandcei>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Litigation Commons](#)

Recommended Citation

District Court of the United States for the Northern District of Ohio, Eastern Division, "Volume 30 (Part 5)" (1981). *City of Cleveland v. The Cleveland Illuminating Company, 1980*. 118.
<https://scholarlycommons.law.case.edu/clevelandcei/118>

This Book is brought to you for free and open access by the Transcripts at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in City of Cleveland v. The Cleveland Illuminating Company, 1980 by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

1 Bridge Co. 134 F. 973, 978 {N.D. Ky. 1904},
2 Aff'd., 141 F. 51 {6th Cir. 1905}.

3
4 REFUSAL TO DEAL

5
6 As the Court has previously indicated, the
7 plaintiff's charges in this case include the
8 allegations that the defendant {1} unlawfully
9 refused to wheel or to allow the transmission
10 of electric power from other suppliers to the
11 City, over transmission lines owned or
12 maintained by CEI, and {2} unlawfully refused
13 to interconnect with the City's electric
14 power system. In assessing these particular
15 contentions, ladies and gentlemen of the Jury,
16 you must consider the following principles.

17 As a general rule, the Sherman Antitrust
18 Act places no duty upon a successful business
19 enterprise to share with its competitor the
20 advantages achieved by the development of a
21 better product or a service by or through
22 superior planning and management. Thus,
23 unless the successful business enterprise
24 possesses monopoly power, the Sherman Antitrust
25 Act imposes no duty upon it to deal with a

1 competitor. However, if a successful business
2 enterprise possesses or maintains monopoly
3 power, added obligations may be imposed upon
4 it which would not attach in the ordinary
5 refusal to deal context.

6
7 Byars v. Bluff City News Co., Inc., 609 F.2d
8 843, 854, 855 (6th Cir. 1979);
9 U.S. v. Colgate & Co., 250 U.S. 300, 307 39 S.Ct.
10 465, 468 (1919);
11 Berkey Photo, Inc. v. Eastman Kodak Co., 603
12 F.2d 263 (2d Cir. 1979), cert. denied, 444
13 U.S. 1093, 100 S.Ct. 1061 (1980).

14
15 Accordingly, if you should determine, in
16 accordance with the foregoing instructions,
17 that CEI possessed monopoly power in the relevant
18 market during the July 1, 1971 through July 1,
19 1975 period, you must then determine whether
20 CEI unlawfully refused to deal with MELP during
21 the aforesaid period. The Court instructs you
22 in this regard that, as a general principle,
23 Section 2 of the Sherman Antitrust Act
24 "prohibits only those refusals to deal which
25 under the particular circumstances of a case

1 are unreasonably anticompetitive."

2
3 Mid-Texas Communications v. American Telephone
4 and Telegraph Co., 615 F.2d 1372, 1389 {5th Cir.}
5 cert. denied, 101 S.Ct. 286 {1980}.

6
7 In determining whether a refusal to deal
8 under the facts and circumstances presented is
9 "unreasonably anticompetitive", the Jury must
10 assess the overall ^①market impact of the
11 conduct under scrutiny. In ascertaining
12 whether a refusal to deal is unreasonably
13 anticompetitive in nature and effect, you should
14 also consider the extent to which, if at all,
15 the refusal to deal was justified by
16 considerations of ^②fairness and efficiency
17 and/or by ^③valid business reasons.

18
19 Byars v. Bluff City News Co., Inc., supra.

20 Berkey Photo, Inc. v. Eastman Kodak Co., supra.

21 Mid-Texas Communications Systems, Inc. v.

22 American Telephone and Telegraph Co., 615 F.2d 1372,

23 1387-1389 {5th Cir.}, cert. denied, 101 S.Ct.

24 286 {1980}.

25

1 ESSENTIAL FACILITY

2
3 In determining whether the defendant
4 unlawfully refused to deal with the City, you
5 may consider, in addition to the above
6 instructions, certain other principles which
7 concern what is termed in antitrust law the
8 "essential facility" doctrine. As this Court
9 has previously instructed, the Sherman Act,
10 as a general rule, imposes no duty upon a
11 successful business enterprise to share with its
12 competitor advantages achieved by the development
13 of a better product or service or through superior
14 planning, foresight and management. This general
15 rule does not necessarily apply, however, in
16 instances where an enterprise maintains control
17 over a scarce or "essential" facility which
18 cannot practicably be duplicated. Under such
19 conditions, the Sherman Act may impose upon the
20 enterprise controlling such a facility, the
21 duty to permit others fair and reasonable
22 access thereto.

23 A particular facility, in order to be
24 considered "essential", need not be
25 indispensable for the competitor seeking to

1 avail of its use. Rather, it is sufficient if
2 duplication of the facility would be economically
3 infeasible and, in addition, denial of its
4 use would inflict a severe competitive handicap
5 upon the prospective user thereof.

6 Accordingly, a duty to provide fair and
7 reasonable access to an essential facility arises
8 in this context only in the event the jury
9 determines that the plaintiff has proven, by a
10 preponderance of the evidence, that:

11 1. It was not reasonably feasible for the
12 plaintiff to have constructed its own transmission
13 lines to obtain PASNY power; and

14 2. The denial of access to the use of
15 defendant's transmission facilities would have
16 severely impacted upon the plaintiff's ability
17 to compete in the relevant market.

18 If you find that the plaintiff has proven
19 the existence of each of the two elements above,
20 by a preponderance of the evidence, you must
21 further consider whether the defendant exercised
22 control over its transmission facilities in an
23 unfair or unreasonable manner. In making this
24 determination, the jury may consider:

25 1. The extent to which, if at all, the

defendant engaged in the practice of wheeling power to other enterprises similarly situated to the plaintiff;

2. The extent to which, if at all, the denial of access was justified by valid business reasons; and

3. The extent to which, if at all, "significant considerations of fairness or efficiency" served to justify the denial of access.

Byars v. Bluff City News Co., Inc., supra.
Hecht v. Pro-Football, Inc., 570 F.2d 982
{D.C. Cir. 1977}, cert. denied, 436 U.S.
956 {1978}.

"IF YOU FIND" IS DEFINED

Ladies and gentlemen of the Jury, I should advise you that whenever I use the expression "if you find", or "if you conclude" in this charge in relation to a conclusion arrived at by the Jury, it always means: If you find by, or conclude from a preponderance of the evidence as I have hereinbefore defined that term.

PLAINTIFF - CARRIED BURDEN OF PROOF

If it be your conclusion that the plaintiff has proved by a preponderance of the evidence both elements of a monopolization in violation of the Sherman Antitrust Act, then in that event, the Jury will find in favor of the plaintiff as to this issue.

PLAINTIFF - FAILURE OF PROOF

If, however, it be the Jury's conclusion that the plaintiff has failed to prove by a preponderance of the evidence one or both of the two required elements of a monopolization, then in that event, you will find in favor of the defendant as to this issue.

ATTEMPT TO MONOPOLIZE

The plaintiff has also claimed that the defendant "attempted to monopolize" the relevant market. An attempt to monopolize a relevant market is a separate offense under Section 2 of the Sherman Act.

The four elements that the City must prove by a preponderance of the evidence to establish an attempt to monopolize are:

1. The existence of a relevant market;
2. A specific intent on the part of CEI to monopolize that relevant market;
3. Performance of some act or acts by CEI in furtherance of the specific intent to monopolize even though such act or acts are insufficient to accomplish the intended monopolization; and,
4. That both elements - the intent and the act - must appear and together result in a dangerous probability that monopolization will sooner or later occur.

Devitt & Blackmar, Vo. 3 Sec. 90.29;

United States v. Griffith, 334 U.S. 100, 105-106, 68 S.Ct. 941, 944-45 {1948} specific intent required};

Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 279 {specific intent};

Spectrofuqe Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 {5th Cir. 1978}, cert denied, 440 U.S. 939 {1978} {specific intent; dangerous

1 probability; relevant market};

2 Mowery v. Standard Oil Co. of Ohio, 463 F.

3 Supp. 762, 772 {N.D. Ohio 1976} affirmed

4 without opinion, 590 F.2d 335 {6th Cir. 1978}

5 {relevant market; specific intent; dangerous

6 probability};

7 Associated Radio Service Co. v. Page Airways,

8 Inc., 624 F.2d 1342, 1357 n.24 {5th Cir. 1980};

9 Lorain Journal Co. v. United States, 342 U.S.

10 143, 72 S.Ct. 181, 184 et seq. {1951}.

11
12 {The Ninth Circuit Court of Appeals has rejected

13 the concept that relevant market must be proven

14 as an element of an attempt to monopolize

15 claim, and has adopted an additional element

16 to be proven in an attempt case, namely, that

17 the over acts be of a "predatory" or

18 anticompetitive nature. See Carpet Seaming

19 Tape Licensing v. Best Seam, Inc. 616 F.2d

20 1133, 1141 {9th Circ. 1980}; Purex Corp.

21 v. Procter & Gamble Co., 596 F.2d 881 {9th

22 Cir. 1979}.

23

24

25

SPECIFIC INTENT - DEFINED

In deciding the question of whether there has been an attempt to monopolize, you are instructed that the phrase "special intent" means more than merely an intention to engage in any act. Specific intent, as used in the Sherman Antitrust Act, is an intent to commit the practices forbidden by the Act. Thus, in order to prevail on its attempt to monopolize charge, it is not enough for the City to demonstrate only that CEI "wanted to win the competitive struggle". Rather, it is incumbent upon the City to prove by a preponderance of the evidence that CEI specifically intended to remove its opposition by unfair or unreasonable means.

Stated differently, since preservation of competition is at the heart of the Sherman Antitrust Act, the specific intent required to be proved by the City in connection with its attempt to monopolize charge is an intent by CEI to attempt to remove or exclude competitors from the field of competition by practices that were and are unreasonably

1 anticompetitive and thus unlawful.

2
3 Northeastern Telephone Co. v. American Telephone
4 and Telegraph Co. 651 F.2d 77, 85 {2d Cir. 1981};
5 Associated Radio Service Co. v. Page Airways,
6 Inc., 624 F.2d 1342, 1357 n.24 {5th Cir. 1980},
7 cert. denied, 101 S.Ct. 1740 {1981}.

8
9 INTENT - DEFINED - PROOF OF

10
11 The term "intent" as used in this charge is
12 the purpose or aim or state of mind with which
13 a person acts or fails to act. Ordinarily, it
14 is reasonable to infer that a person intends
15 the natural or probable consequences of acts
16 knowingly done, or knowingly omitted. So, in
17 the absence of evidence in the case which leads
18 the jury to a different or contrary conclusion,
19 you may draw the inference and find that any
20 person involved intended such natural and
21 probable consequences as one standing in like
22 circumstances, and possessing like knowledge,
23 should reasonably have expected to result from
24 any act knowingly done, or knowingly omitted,
25 by such person. An act, or a failure to act,

1 is knowingly done if done voluntarily and
2 intentionally, and not because of mistake or
3 accident or other innocent reason.

4 Intent may be proved by indirect or
5 circumstantial evidence. Indeed, it can
6 rarely be established by any other means.
7 While witnesses may see and hear, and so be
8 able to give direct evidence of what a person
9 does or fails to do, of course there can be
10 no eyewitness account of the state of mind
11 with which the acts were done or omitted; but
12 what a person does, or fails to do, may
13 indicate either intent, or lack of intent to
14 act.

15 Unless otherwise instructed, in
16 determining any issue involving intent, the
17 jury may consider all the facts and
18 circumstances in evidence in the case,
19 which may aid determination of state of mind.
20

21 Associated Radio Service Co. v. Page Airways,
22 Inc., 624 F.2d 1342, 1357 n.24 {5th Cir., 1980},
23 cert. denied, 101 S.Ct. 1740 {1981}..
24
25

DANGEROUS PROBABILITY - DEFINED

The term "dangerous probability" as used in this charge means the implementation of conduct, business practices and procedures which would, if successful, result in the achievement of monopoly power and which, though falling short, nevertheless approaches so close as to create a "dangerous probability" of monopoly power being acquired. That is to say, the term "dangerous probability" denotes the employment of unreasonably anticompetitive conduct, business practices and procedures which present a substantial and real opportunity of success in achieving monopoly power.

A "dangerous probability" of monopolization is established if plaintiff has demonstrated by a preponderance of the evidence that:

1. The defendant possesses sufficient resources to create a reasonable likelihood that it can achieve monopoly power, as that term has been previously defined; and

2. The defendant has performed overt acts in furtherance of that goal.

American Tobacco Co. v. United States, 328 U.S.
781, 785 {1946};

Sam S. Goldstein Industries, Inc. v. Botany
Industries, Inc., 301 F. Supp. 728 {S.D. N.Y.
1969};

Lorain Journal Co. v. United States, 342 U.S.
143 {1951};

Swift & Co. v. United States, 196 U.S. 375 {1905};
United States v. Aluminum Co. of America, 148
F.2d 416 {2d Cir. 1945};

Associated Radio Service Co. v. Page Airways,
Inc. 624 F.2d 1342, 1357 n.24 {5th Cir. 1980},
cert denied, 101 S.Ct. 1740 {1981};

Union Leader Corp. v. Newspapers of New England,
Inc., 284 F.2d 582 {1st Cir. 1960}, cert.
denied, 365 U.S. 833 {1961}.

PLAINTIFF CARRIED BURDEN OF PROOF

If it be your conclusion, ladies and
gentlemen of the Jury, that the plaintiff has
proved by a preponderance of the evidence all
four elements of an attempt to monopolize as
that term has hereinbefore been defined for
you, then in that event you will find in favor

1 of the plaintiff as to this issue.

2
3 PLAINTIFF - FAILURE OF PROOF
4

5 If, however, it be your conclusion that
6 the plaintiff has failed to prove by a
7 preponderance of the evidence any one or more
8 of the four elements of an attempt to monopolize
9 as that term has hereinbefore been defined for
10 you, then in that event you will find in favor
11 of the defendant as to this issue.
12

13 PLAINTIFF - CARRIED BURDEN OF PROOF
14 AS TO ONE OR BOTH ISSUES
15

16 If the Jury concludes that the plaintiff
17 City has proved by a preponderance of the
18 evidence that the defendant CEI has either
19 monopolized and/or attempted to monopolize
20 the retail sale of electric power within a
relevant geographic market in violation of the
Sherman Antitrust Act, then, the Jury shall
proceed to consider and determine whether such
monopolization and/or attempted monopolization
was a proximate cause of damage to the City.

1 PLAINTIFF - FAILURE OF PROOF
2 AS TO BOTH INITIAL ISSUES
3

4 If, however, the Jury concludes that the
5 plaintiff City has failed to prove by a
6 preponderance of the evidence that the defendant
7 CEI has either monopolized or attempted to
8 monopolize the sale of retail electric power
9 within a relevant geographic market in violation
10 of the Sherman Antitrust Act, then, in that event,
11 the Jury need not deliberate further and it
12 shall return a verdict in favor of the
13 defendant CEI.
14

15 PROXIMATE CAUSE - DEFINED
16

17 Before the plaintiff may recover for any
18 injury claimed, it must prove by a preponderance
19 of the evidence the nature and extent of its
20 injuries and that such injuries were
21 proximately caused by the acts or omissions of
22 the defendant as charged.

23 The term "proximate cause", means that cause
24 which directly produces an injury or damage.
25 It is an active as distinguished from a remote

1 cause or condition. Proximate cause is not
2 necessarily the cause nearest in point of time,
3 nor in point of distance, but it is that cause
4 which, either alone or in conjunction with other
5 causes, in a natural and continuous sequence,
6 unbroken by any efficient intervening cause,
7 produced the injury or damage, without which it
8 would not have occurred.

9 A particular result may have only one
10 direct or proximate cause, or it may have more
11 than one direct and proximate cause, where
12 several direct causes combine to produce a
13 single result. Injury or damage, therefore,
14 may be the result of a single direct and
15 proximate cause, or may result from several
16 direct and proximate causes which combine to
17 produce a single result.

18 Accordingly, in order to establish that
19 its injuries were proximately caused by the
20 defendant's acts or omissions, plaintiff must
21 prove by a preponderance of the evidence that
22 the charged acts or omissions were a
23 "substantial factor" in bringing about or
24 actually causing the injury or damage.
25 Although the plaintiff is not required to

1 demonstrate that the defendant's unlawful acts
2 or omissions were the sole proximate cause of
3 the plaintiff's injuries, a causal connection
4 between the antitrust violation or violations
5 and the damages suffered must nevertheless be
6 proven "as a matter of fact and with a fair
7 degree of certainty."

8 The plaintiff cannot recover by merely
9 showing that it is possible for the acts or
10 omissions of the defendant to have caused
11 plaintiff's injuries or damages. In order to
12 recover, therefore, the plaintiff must prove
13 by a preponderance of the evidence that its
14 injuries were a direct and proximate result of
15 the defendant's violation of the Sherman
16 Antitrust Act, if any were proved.

17
18 Continental Ore Co. v. Union Carbide & Carbon
19 Corp., 370 U.S. 690, 702, 82 S.Ct. 1404, 1412
20 {1962}.

21 Shreve Equipment, Inc. v. Clay Equipment
22 Corp., 650 F.2d 101, 105 {6th Cir. 1981};
23 Hecht v. Pro-Football, Inc., 570 F.2d 982,
24 996 {D.C. Cir. 1977} cert. denied 436 U.S.
25 956 {1978}.

1 Comfort Trane Air Conditioning v. Trane Co.,
2 592 F.2d 1373, 1383 {5th Cir. 1979},
3 Hollebe & Co. v. Produce Terminal Cold Storage
4 Co., 532 F.2d 29, 36 {7th Cir. 1975}.
5 Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d
6 183, 187 {2nd Cir. 1970}.
7 Handgards, Inc. v Ethicon, Inc., 601 F.2d
8 986, 999 {9th Cir. 1979} {Kennedy concurring}.

9
10 PLAINTIFF PREVAILS

11
12 If it be your conclusion that the plaintiff
13 City has proved by a preponderance of the
14 evidence:

15 1. That the defendant CEI monopolized part
16 of the trade or commerce of the states . . . as
17 those terms are used in Section 2 of the
18 Sherman Antitrust Act; and/or

19 2. That the defendant CEI attempted to
20 monopolize part of the trade or commerce of
21 the states . . . as those terms are used in
22 Section 2 of the Sherman Antitrust Act; and

23 3. The defendant's activities proximately
24 caused damage to the plaintiff City's business
25 or property;

1 You may in that event proceed to consider CEI's
2 defense of natural monopoly, as explained and
3 defined more fully hereafter.

4
5 DEFENDANT PREVAILS

6
7 If, however, you conclude that the plaintiff
8 has failed to prove by a preponderance of the
9 evidence:

10 1. That the defendant CEI monopolized any
11 part of the trade or commerce of the states . . .
12 as those terms are used in Section 2 of the
13 Sherman Antitrust Act; and

14 2. That the defendant CEI attempted to
15 monopolize any part of the trade or commerce of
16 the states . . . as those terms are used in
17 Section 2 of the Sherman Antitrust Act; or

18 3. The defendant's activities proximately
19 caused damage to the plaintiff City's business
20 or property;

21 Then, in that event, you need go no further in
22 your deliberations and you shall return a verdict
23 for the defendant. Stated differently, if you
24 conclude that the plaintiff has failed to prove
25 by a preponderance of the evidence that the

defendant either monopolized or attempted to monopolize part of the trade or commerce of the states, or that any such conduct proximately caused damage to the City's business or property, then you must return a verdict in favor of the defendant.

Ladies and gentlemen, perhaps this would be an appropriate time for us to take a short break, about ten minutes, and we will come back and I will finish it up.

Please keep in mind my admonition: Even though you have heard the closing arguments of counsel and the evidence and part of the Court's instructions on the law, you are still, nevertheless, not to discuss the case either among yourselves or with anyone else until such time as I have formally submitted the matter to you for your final deliberation and judgment.

{Short recess had.}

PLAINTIFF PREVAILS

As I have previously indicated, if you

1 the Jury conclude that the plaintiff has proved
2 by the preponderance of the evidence that the
3 defendant monopolized or attempted to
4 monopolize the identified relevant market and
5 that the acts and/or conduct of the defendant
6 were the proximate cause of damage to the
7 plaintiff's business or property, you must
8 then proceed to consider and determine
9 the origin of the monopoly power. Stated
10 differently, you must proceed to determine if
11 the monopoly power possessed or maintained by
12 the defendant resulted from a "natural
13 monopoly."

14 The defendant in this case has denied that
15 it monopolized, attempted to monopolize, or
16 willfully maintained monopoly power within the
17 relevant geographic market.

18 The defendant has affirmatively asserted
19 that if it has a monopoly or if it possesses
20 monopoly power, such monopoly is a "natural
21 monopoly", which was "thrust upon it" as a
22 result of normal growth and development as a
23 consequence of superior product, superior
24 service, superior business acumen such as
25 better management, or better planning than

1 than possessed or exercised by its competitor,
2 the City, and not through unreasonably
3 exclusionary or restrictive conduct.
4

5 NATURAL MONOPOLY - AFFIRMATIVE DEFENSE
6

7 The defense of "natural monopoly" has
8 been affirmatively asserted by the defendant
9 CEI against the plaintiff's charges of
10 monopolization, and/or attempted monopolization,
11 accordingly, the burden of proof as to this
12 defense is upon the defendant by a preponderance
13 of the evidence.
14

15 NATURAL MONOPOLY
16

17 In considering the issues of monopolization,
18 and attempted monopolization, it does not
19 necessarily follow that the possession and/or
20 maintenance of monopoly power by a defendant is
21 conclusive that it unlawfully "monopolized"
22 or attempted to monopolize the relevant market.
23 The defendant may not have unlawfully achieved
24 monopoly power; such power may have been thrust
25 upon it. Thus, the origin of monopoly power, if

1 it is found to exist, may be critical in
2 determining its legality.

3
4 United States v. Aluminum Co. of America,
5 148 F.2d 416, 429, 430.

6
7 Although willful acquisition or
8 maintenance of monopoly power may ordinarily
9 be inferred from the unreasonable exclusion
10 of competition from the relevant market there
11 are, nevertheless, situations in which an
12 inference of monopolization absent a showing of
13 specific unfair practices could be improper.

14
15 Pac. Eng. & Prod. Co. of Nev. v. Kerr-McGee
16 Corp., 551 F.2d 790, 795 (10th Cir. 1977).

17
18 One such situation is where a defendant
19 has a "natural monopoly", that is, "where a
20 market is so limited that it is impossible to
21 produce at all and meet the cost of production
22 except by a plant large enough to supply the
23 whole demand."

24
25 United States v. Aluminum Co. of America, supra

1 at 430.

2
3 In the economic sense, natural monopoly is
4 monopoly resulting from economies of scale, a
5 relationship between the size of the market and
6 the size of the most efficient firm such that
7 one firm of efficient size can produce all or
8 more than the market can take at a remunerative
9 price, and can continually expand its capacity
10 at less cost than that of a new firm entering
11 the business.

12
13 Hecht v. Pro Football, Inc., 570 F.2d 982, 990
14 {1977}; C. Kaysen and D. Turner,
15 Antitrust Policy, 191 {1959},

16
17 Accordingly, the "characteristics of
18 a natural monopoly make it inappropriate to apply
19 the usual rule that success in driving
20 competitors from the market is evidence of
21 illegal monopoly."

22
23 Greenville Pub., Inc. v. Daily Reflector, Inc.
24 496 F.2d 391, 397 {4th Cir. 1974}.

1 Stated differently, in a two-firm industry,
2 the exclusion of one firm necessarily results in
3 a monopoly. This result does not necessarily
4 mean that the survivor violated the antitrust
5 laws.

6
7 Pacific Engineering & Prod. Co. of Nev. v. Kerr-
8 McGee Corp., 551 F.2d 790 {10th Cir. 1977}.

9
10 A person, firm, or corporation does not
11 necessarily violate the Sherman Act merely
12 because it foresees that a market is only
13 large enough to permit one successful
14 enterprise, and intends that its enterprise
15 shall be that one and that all other
16 enterprises shall fail / To prove that
17 an individual, firm or corporation violates
18 the Sherman Antitrust Act, in competing in a
19 natural monopoly market, there must be evidence
20 that said individual, firm, or corporation which
21 foresees a fight to the finish intends to use
22 or actually does use unfair or predatory
23 tactics.

24 Thus, a natural monopoly market does not
25 of itself impose restrictions on one who

1 actively, but fairly competes for it, any more
2 than it does one who passively acquires it.

3
4 Union Leader Corp. v. Newspapers of New England,
5 Inc. 284 F.2d 582 {1st Cir. 1960}.

6
7 PREDATORY - UNFAIR CONDUCT - DEFINED

8
9 The terms "predatory" or "unfair" as
0 used to describe conduct or activity which
1 violates the Sherman Antitrust Act have no
2 well-defined meaning. However, the conduct or
3 practices of the defendant should be deemed
4 "predatory" or "unfair" only if such acts or
5 conduct or the overall impact of such acts or
6 conduct are unreasonably anticompetitive and
7 thus unlawful.

8
9 Byars v. Bluff City News Co., Inc., 609 F.2d
0 843, 860 {6th Cir. 1975}

1 "Predatory" or "Unfair" conduct is
2 characterized by an attempt to triumph in a
3 relevant market regardless of competitive merits
4 on the basis of artificial restraints on the

1 competitive process, which restraints not only
2 have a significant effect to eliminate competitors
3 unfairly, but which also confer no net benefits
4 of superior efficiency on the public in the
5 process.

6
7 Areeda & Turner III, Antitrust Law, 626 {1978}.

8
9 A form of predatory conduct alleged by the
0 City in this case is the giving of wiring
1 allowances by CEI in connection with its Munny
2 Displacement Program. In this sense, predation
3 may be defined as the deliberate sacrifice of
4 present revenues for the purpose of driving
5 rivals out of the market and then recouping the
6 losses through higher profits earned in the
7 absence of competition.

8
9 Areeda & Turner, supra, Par. 711 b quoted in
0 Northeastern Telephone Co. v. American Telephone
1 & Telegraph Co., 651 F.2d 76, 86 {2d Cir. 1981}.

2
3 You are instructed further that the
4 price of a product or the giving of allowances
5 having the effect of reducing price, even if

1 provided at below cost, may not necessarily be
2 predatory in nature if it was fairly and
3 reasonably designed to meet a lower price
4 already being charged by a competitor.

5
6 Union Leader Corp. v. Newspapers of New England,
7 Inc., 284 F.2d 582, 586-7, {1st Cir. 1960}, rev'g on
8 this point, 180 F. Supp. 125 {D.Mass. 1960}, cert.
9 denied, 365 U.S. 8333 {1961}; ICL Peripheral
10 Leasing Corp. v. IBM Co., 458 F. Supp. 423, 433,
11 {W.D. Cal. 1978}; International Air Industries,
12 Inc. v. Air Excelsior Co. 517 F.2d 714, 725-6,
13 {5th Cir. 1975}, cert. denied, 424 U.S. 943
14 {1976}.

15
16 You should keep in mind, however, that a
17 monopolist who reduces prices to some point
18 above marginal or average variable cost might
19 conceivably be held to have engaged in a
20 predatory act because of other aspects of its
21 conduct.

22
23 California Computer Products, Inc. v. IBM
24 Corp., Supra, 613 F.2d at 743.
25

1 Thus, in determining whether certain practices
2 or conduct are sufficiently "unreasonably
3 anticompetitive" in nature and effect as to be
4 deemed "predatory" or "unfair", the overall
5 market impact of the practices or conduct must
6 be assessed.

7
8 Byars, Supra.

9
10 DEFENDANT PREVAILS

11
12 If the Jury concludes that the defendant
13 has proven by a preponderance of the evidence
14 that the relevant market here in issue, namely,
15 the retail sale of firm electric power in the
16 relevant geographic market as you the Jury
17 find, is a "natural monopoly" market, and if
18 you find that the defendant has neither
19 monopolized nor attempted to monopolize said
20 market by unfair or predatory means, then in
21 that event, the Jury shall proceed no further,
22 and your verdict shall be for the defendant.
23
24
25

PLAINTIFF PREVAILS

If the Jury concludes that the defendant has failed to prove by a preponderance of the evidence that the relevant market here in issue, namely, the retail sale of firm electric power in the relevant geographic market as you the Jury find, is a "natural monopoly" market, or if the Jury finds that the defendant has monopolized or attempted to monopolize said market by unfair or predatory means, and if the Jury further finds that the plaintiff has proven by a preponderance of the evidence that the defendant either monopolized or attempted to monopolize the relevant market and the acts of the defendant proximately caused damage to the plaintiff's business or property, the Jury shall proceed to consider the amount of damages, if any, and your verdict shall be for the plaintiff.

DAMAGES - ANTITRUST

If you find for the plaintiff in accordance with the foregoing instructions, it

1 then becomes the Jury's responsibility to
2 determine the actual damages which the
3 plaintiff has suffered by reason of the
4 violations of the antitrust laws. The Jury's
5 concern is only with determining the amount of
6 damages, if any, which would reasonably place
7 the plaintiff in a position financially
8 equivalent to that position the plaintiff would
9 have occupied, but for any unlawful acts of
0 the defendant. You are not to concern yourself
1 with the judgment to be entered by the Court
2 in the case.

3 Devitt and Blackmar, Fed. Jury Prac. &
4 Instructions Sec. 90.39 at 192-193.

In determining the amount of actual
damages, if any, sustained by the plaintiff,
you are instructed that the Jury may award only
such damages as may have been sustained as the
direct and proximate result of defendant's
unlawful acts. While the plaintiff has the
burden of proving by a preponderance of the
evidence that any damages which it sustained
were a proximate result of an antitrust

1 violation, the plaintiff is not required to prove
2 with exactitude or mathematical precision the
3 extent of the damages. Damages, however, must
4 be proved with reasonable certainty; that is
5 to say, to form the basis for a verdict,
6 damages cannot be based on mere speculation or
7 guesswork or an interested or calculated guess.
8 Damages must be proved by facts from which
9 their existence is logically and legally
10 inferable.

11
12 Zenith Radio Corp. v. Hazeltine Research, Inc.
13 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77 {1969};
14 Bigelow v. RKO Pictures, Inc. 327 U.S. 251, 264,
15 66 S.Ct. 574, 579 {1946}.

16
17 The only acts or omissions of the defendant
18 for which plaintiff may recover damages in this
19 case are those acts or omissions which occurred
20 during the period beginning July 1, 1971, and
21 ending July 1, 1975, the date this lawsuit was
22 commenced. Plaintiff is entitled to recover,
23 however, all damages, if any, which are the
24 direct and proximate and natural result of those
25 acts or omissions transpiring during the July 1,

1 1971 -- July 1, 1975 period, including such
2 damages as may have continued or resulted
3 therefrom after the suit was commenced by the
4 plaintiff. However, plaintiff cannot recover, in
5 this action, any damages which are a result of
6 the continuation of the charged antitrust
7 violations which occurred after the action was
8 commenced, or which were the result of the
9 performance of any acts, if any, in violation of
10 the Sherman Antitrust Act after the action
11 was commenced.

12
13 15 U.S.C. Sec. 16f(1).

14
15 In determining the amount of damages, if
16 any, due the plaintiff, the Jury is instructed,
17 as a matter of law, and despite any evidence
18 to the contrary, that the plaintiff may not
19 recover any damages which are alleged to result
20 from that loss of generating capacity sustained
21 by Muny Light as a consequence of the failure
22 of the 85-megawatt generating unit. That is
23 to say, you may not hold the defendant
24 answerable in damages for any loss stemming
25 from or attributable to that loss of generating

1 capacity occasioned by the demise of MELP's
2 85-megawatt unit.

3
4 Memorandum and Order of September 24, 1981.

5
6 You are further instructed that the
7 plaintiff may not recover damages for any portion
8 of its injury which the plaintiff could have
9 avoided through the exercise of reasonable
0 care and prudence since the law imposes upon an
1 injured party a duty to take all reasonable steps
2 to mitigate its damage and reduce its loss.
3 Thus, if a plaintiff fails to avail itself of
4 reasonable measures to limit its damages when
5 such measures are available, the plaintiff cannot
6 recover damages for the portion of its injury,
7 if any, which could have been so avoided.

8 In determining whether the plaintiff failed
9 to take reasonable measures to mitigate its
0 damages, you must keep in mind that the law
1 does not impose upon a plaintiff the absolute
2 duty to utilize every measure which could
3 have conceivably reduced its damages, but
4 only those measures which are reasonably
5 practicable under the circumstances.

1 3 Devitt and Blackman, Fed. Jury Prac. and
2 Instructions Sec. 86.06 {1980 Supp.}.
3 See Also cases in Antitrust Civil Jury
4 Instructions {1980}, Section of Antitrust
5 Law American Bar Association at p. 184 through
6 186.

7
8 FUTURE LOSSES

9
10 Damages may include the loss of net
11 revenues, if any, reasonably anticipated from
12 the future conduct of the business. In
13 considering the element of future profits
14 {or income} in determining damages, if any were
15 sustained by the plaintiff, the Jury is
16 instructed that if the plaintiff is unable
17 to earn future net revenues or income which
18 would otherwise accrue to it but for a
19 violation of the antitrust laws, then the
20 plaintiff should be compensated for those
21 damages. The term "future revenues" as used
22 in these instructions means net revenues and
23 is determined by subtracting from the gross
24 revenues the costs and expenses of procuring
25 the revenues.

1 In determining whether the evidence in this
2 case justifies a damage award designed to
3 compensate the plaintiff for anticipated future
4 losses, that is, for losses reasonably
5 expected to accrue after the year 1980, you
6 must consider the extent to which, if at all, it
7 is reasonable to predict anticipated losses
8 for future years. For example, evidence has been
9 introduced by the City in this case which projects
10 anticipated future losses for a period of
11 approximately 20 years. The Court instructs
12 you that you may accept this projection if you
13 find that it constitutes a reasonable prediction,
14 or alternatively you may reject the projection
15 if you are persuaded that reasonable persons
16 would not, in the ordinary affairs of life,
17 act or rely upon such a projection. Similarly,
18 you may decrease the projection by any number
19 of years you find reasonable and warranted by
20 the evidence, or, conversely, increase the
21 number of years if you find such an increase
22 reasonable, always bearing in mind, that
23 future losses, like damages generally, must
24 be proven with reasonable certainty, and
25 cannot be based upon mere speculation or

1 guesswork.

2
3 Drayton v. Jiffree Chemical Corp., 591 F.2d 352,
4 364 {6th Cir. 1978}.

5
6 FUTURE LOSSES - INFLATION

7
8 If the Jury resolves that the evidence in
9 this case justifies a damage award designed to
10 compensate the plaintiff for anticipated future
11 losses, you may, in determining the amount of
12 such future losses, consider future increases or
13 decreases in the purchasing power of money.
14 In short, you may, in determining the amount of
15 future damages to be awarded, if any, take into
16 account the effects of future inflation.

17
18 Morvant v. Construction Aggregates Corp.,

19 570 F.2d 626, 632 {6th Cir. 1978};

20 Drayton v. Jiffree Chemical Corp., 591 F.2d 352
21 {6th Cir. 1978};

22 Sauers v. Alaska Barge, 600 F. 2d 238 {oth
23 Cir. 1979};

24 Doca v. Marina Mercante Nicaraguense, S.A.,
25 634 F.2d 30 {2d Cir. 1980}.

1 You will recall that evidence has been
2 adduced in this case which projects to the year
3 2000 a single average inflation rate of 7%.
4 There has also been adduced evidence that the
5 applicable projected inflation rates are:

6 1. 9.5% for the period 1981 through
7 1988; and

8 2. 5.33% for the period 1989 through
9 2000. Tr. 16,352-53.

10 In applying the inflation rate to future
11 damages, the jury may either:

12 1. Apply whatever specific inflation
13 rate you find applicable to each specific year
14 wherein you find future damages; or

15 2. Apply the single average inflation
16 rate of the total future damage period to any
17 specific year of that period wherein you find
18 damages.

19
20 You are instructed that the various
21 estimates of future losses that have been
22 introduced into evidence in this case have
23 incorporated the foregoing projected inflation
24 rates. Accordingly, if you the Jury find
25

1 from the evidence and/or from your common
2 knowledge of inflation that the identified
3 projected inflation rates represent reasonable
4 predictions of future inflation, you need not
5 make any adjustment to the future damage
6 estimates to account for the effects of future
7 inflation. However, if you find from the
8 evidence presented and/or from your general
9 knowledge of inflationary trends, that
10 reasonable persons would not, in the ordinary
11 affairs of life, act or rely upon one or more
12 of the projected inflation rates, you may in
13 that event adjust either - upward or downward, -
14 the future damage estimates by applying the
15 projected inflation rate or rates which you
16 the Jury find reasonable and appropriate.

17
18 Drayton v. Jiffee Chemical Corp., supra at 364;
19 Taenzler v. Burlington Northern, 608 F.2d 796,
20 801 {8th Cir. 1979}.

21
22 FUTURE LOSSES - DISCOUNTING TO PRESENT VALUE

23
24 If the Jury should find that the plaintiff
25 is entitled to a verdict and further find that

1 the evidence in the case justifies a damage
2 award representing anticipated future losses to
3 be sustained by the City, then it becomes the
4 duty of the Jury to ascertain the present worth
5 in dollars of such future damage, since the
6 award of future damages necessarily requires that
7 payment be made now for a loss that will not
8 actually be sustained until some future date.
9 Under these circumstances, the plaintiff will
10 in effect be reimbursed in advance of the
11 loss, and so will have the use of the money
12 which it would not have received until some
13 future date, but for the verdict.

14 In order to reasonably adjust for the present
15 use, interest free, of money representing a lump
16 sum payment for anticipated future loss, the Court
17 instructs the Jury, as a matter of law, that
18 the Jury must discount, or reduce to its present
19 value, the amount of the anticipated future
20 loss, - as that amount may have been adjusted
21 by one or more projected inflation rates, -
22 by taking {1} the interest rate for a reasonably
23 safe investment prevailing at the time of trial
24 which the plaintiff could be expected to
25 receive on the investment of the lump sum.

1 payment, together with {2} the period of time
2 over which the future loss is reasonably
3 certain to be sustained; and then reduce, or
4 in effect deduct from, the total amount of
5 anticipated future loss whatever that amount
6 would be reasonably certain to return or
7 earn, if invested at such rate of interest
8 over such period of time; and include in the
9 verdict an award for only the present value -
10 the reduced amount - of the total anticipated
11 future loss.

12 Stated differently, the present value of
13 future damage, if any, may be calculated by
14 adjusting anticipated future losses by an
15 appropriate projected inflation rate or
16 rates over a period of time that the loss is
17 reasonably certain to be sustained, and then
18 by discounting that sum by deducting therefrom
19 the income to be derived during such period
20 from the investment of the lump sum award
21 at the interest rate for a reasonably safe
22 investment prevailing at the time and place
23 of trial, as you the Jury shall find.

1 Instructions, Sec. 85.13 at 124-25.

2
3 In the event the Jury should resolve that
4 the evidence in this case justifies an award
5 for future losses, the Jury is instructed that
6 the various estimates of future damages
7 introduced into evidence by the parties not
8 only incorporate a projected inflation rate, as
9 hereinbefore explained, but also incorporate
10 the particular discount rate at which each of the
11 respective parties maintain any award of
12 future damages should be discounted. For
13 example, the future damage estimates presented
14 on behalf of the City incorporate a proposed
15 discount rate of approximately 13.3 percent
16 while the future damage estimates presented
17 on behalf of CEI incorporate a proposed
18 composite discount rate of approximately
19 15 percent.

20
21 Transcript at pp. 16,343; 18,494-95.

22
23 The Court instructs the Jury that it may
24 accept, but is not required to accept, either
25 of the foregoing proposed discount rates if the

1 Jury finds, from a preponderance of the evidence,
2 that such discount rate represents the interest
3 rate for a reasonably safe investment prevailing
4 at the time and place of trial. In the event
5 that the jury resolves that one of the proposed
6 discount rates represents the prevailing
7 interest rate, the Jury is instructed that it
8 need not, in order to discount to present value,
9 make any adjustment to those future damage
10 estimates which already incorporate the
11 particular discount rate you the Jury find
12 appropriate.

13 The Jury would be required, however, to
14 adjust any future damage estimate which fails
15 to incorporate the particular discount rate you
16 the Jury find appropriate by applying, in
17 accordance with the foregoing instructions,
18 that discount rate the Jury finds constitutes
19 the interest rate for a reasonably safe
20 investment prevailing at the time and place of
21 trial.

22
23 DAMAGES - DISCLAIMER

24
25 The fact that I have instructed you as to

1 the proper measure of damages as apply in
2 antitrust cases is not and should not be
3 construed by you the Jury as intimating any
4 view of the Court as to which party or parties
5 are entitled to prevail in this case.

6 Instructions as to damages are given only
7 for your guidance in the event you should find
8 for the plaintiff.

9
10 JUDGE'S IMPARTIALITY

11
12 Furthermore, ladies and gentlemen of the
13 Jury, the Judge's position in this trial is one
14 of impartiality. Any suggestive action or
15 statement to the contrary indicating an
16 inclination in favor of any of the parties
17 hereto should be disregarded by you the Jury.
18 The Court has not expressed nor has it
19 intended to express any opinion as to the
20 witnesses, their credibility, or what inference
21 or inferences should be drawn from the evidence
22 adduced during the proceedings, and
23 particularly, no expression or opinion has
24 been intended by the Court as to which side
25 should prevail.

1 I instruct you that in your consideration
2 of this case, you are to disregard any information
3 about the case derived or received from any
4 sources outside of this trial. If for some
5 reason you had inadvertently read any newspaper
6 article, or heard any radio broadcast or
7 telecast relative to this case, the Court
8 instructs you that you are to disregard
9 entirely such information in the consideration
10 of this case, and you are to confine your
11 consideration solely to the evidence adduced
12 during the trial.

13
14 VERDICT

15
16 The verdict must represent the considered
17 judgment of each juror. In order to return a
18 verdict, it is necessary that each juror agree
19 thereto. In other words, your verdict must be
20 unanimous.

21 It is your duty, as jurors to consult
22 with one another and to deliberate with a view
23 of reaching agreement, if you can do so without
24 violence to individual judgment. Each of you
25 must decide the case for yourself, but do so

1 only after an impartial consideration of the
2 evidence with your fellow jurors. In the
3 course of your deliberations, do not hesitate
4 to re-examine your own views and change your
5 opinion if convinced it was erroneous.

6 You are not partisans. You are the sole
7 judges of the facts. Your sole interest is to
8 ascertain the truth from the evidence.

9 Upon returning to the jury room, ladies
10 and gentlemen, you will select one of your
11 members to act as foreman or forelady. Such
12 person will preside over your deliberations and
13 be your spokesman.

14 You will have with you in the jury room
15 those exhibits which have been marked for
16 identification and received as evidence in
17 this case. You will also have, to assist you
18 in your deliberations, a copy of the instructions
19 of law which you are to apply in arriving at a
20 verdict in this case, namely, the instructions
21 of law which I have just conveyed to you.

22 You will also have with you a Special
23 Verdict form for your use in incorporating
24 five written interrogatories. The Jury shall
25 answer in writing the Special Interrogatories,

1 or as many of them as may be necessary, according
2 to the specific explanations and directions
3 contained therein.

4 Upon answering the Special Interrogatories,
5 or such of them as may be necessary, each juror
6 shall attest his or her acknowledgment of the
7 answers by signing the Special Verdict form at
8 the designated place on the last page of the
9 Special Interrogatories. Keep in mind, as I
10 have previously indicated, that the law
11 requires that all six of your number agree upon
12 any verdict.

13 If it becomes necessary during your
14 deliberations to communicate with the Court,
15 you may send a note through the court attache or
16 bailiff; but, please, never attempt to
17 communicate with the Court other than by a
18 writing signed by your foreman or forelady.

19 Bear in mind you are not to reveal to the
20 Court or to any person how the Jury stands
21 numerically or otherwise until you have reached
22 a unanimous verdict.

23 You may now take this case, give it your
24 fair consideration, and return a verdict that
25 conforms in your honest judgment to the facts

1 as you find them from the evidence and in
2 accordance with the instructions which I have
3 given to you. Be fair and just to the plaintiff
4 and equally fair and just to the defendant.

5 I further instruct you, that until the
6 Jury returns its verdict, you shall not
7 discuss the case with anyone, except among
8 yourselves when all members of the Jury are
9 present in the jury room for purposes of
10 deliberation with a view toward arriving at a
11 verdict.

12 Now, before we proceed further, ladies
13 and gentlemen, I have alluded in the instruction
14 to a Special Verdict Form.

15 The Special Verdict Form reads as follows:

16 Ladies and gentlemen of the Jury, this is
17 a Special Verdict Form for your use incorporating
18 five written interrogatories. The Jury is
19 instructed to carefully read the enclosed
20 interrogatories. The Jury shall then answer,
21 in writing, the Special Interrogatories, or as
22 many of them as may be necessary, according to
23 the specific explanations and directions
24 contained therein. In answering the Special
25 Interrogatories, or as many of them as may be

1 necessary, the Jury shall in each instance
2 apply the instructions of law given to you by
3 the Court, a copy of which has been furnished
4 the Jury to assist in your deliberations.

5 Upon answering the Special Interrogatories,
6 or such of them as may be necessary, each juror
7 shall attest his or her acknowledgment of the
8 answer by signing the Special Verdict Form at
9 the designated place on the last page hereof.
10 Keep in mind, that the law requires that all
11 six of your number agree as to the answers to
12 each of the interrogatories.

13 The jury foreman shall thereafter affix
14 his or her signature as the case may be at
15 the designated place on the Special Verdict
16 Form.

17 The interrogatories and the forms for them
18 are very simple, ladies and gentlemen; if you
19 would just read them carefully and follow
20 the instruction, you will have no problems
21 whatsoever in complying with the Court's
22 instruction.

23 Special Interrogatory No. 1 reads as
24 follows:

25 "Do you the Jury find, from a preponderance

of the evidence, that the relevant geographic market for retail firm power between July 1, 1971 and July 1, 1975 is:

"1. The approximate 30-square miles within the geographic boundaries of the City of Cleveland wherein the electric systems of CEI and Muny Light both served customers?"

. There is a place for "Yes" or "No."

"2. The geographic boundaries of the entire City of Cleveland?"

A place for "Yes" or "No." And

"3. Other: "

"Yes" or "No."

Then the interrogatory goes on to say:

"If the Jury answers 'Yes' to No. 3 above, describe the geographic area you find constitutes the appropriate relevant geographic market."

In other words, ladies and gentlemen, just check in the appropriate place whatever your answer will be.

"Note: If the Jury shall answer 'Yes' to one of the above questions, the Jury shall thereafter proceed to answer both Paragraph {A} and Paragraph {B} of Interrogatory No. 2."

1 "Special Interrogatory No. 2 reads as
2 follows:

3 "{A} Do you the Jury find from a
4 preponderance of the evidence, that the
5 defendant CEI, during the period July 1,
6 1971 through July 11, 1975 monopolized the
7 relevant market found by the Jury to exist?

8 "Yes" or "No".

9 "{B} Do you the Jury find from a
10 preponderance of the evidence, that the defendant
11 CEI, during the period July 1, 1971 through
12 July 1, 1975 attempted to monopolize the
13 relevant market found by the Jury to exist?

14 "Yes" or "No."

15 Then the interrogatory goes on to say:

16 "The Jury shall answer both paragraph
17 {A} and Paragraph {B} of Interrogatory No. 2.

18
19 "If the Jury's answer to either Paragraph
20 {A} or Paragraph {B} above, or both paragraphs,
21 is 'Yes', the Jury shall proceed to answer
22 Interrogatory Number 3.

23 "If the Jury's answers to Paragraphs
24 {A} and {B} above are both 'No,' the Jury
25 shall deliberate no further, and shall return

a verdict in favor of the defendant, and enter such verdict on the last page of this Special Verdict Form."

And you will see there is a place for that entry.

"Interrogatory No. 3 reads as follows:

"If the Jury concludes that the defendant CEI either monopolized or attempted to monopolize the relevant market, does the Jury further find, by a preponderance of the evidence, that the conduct and activity of the defendant CEI during the period July 1, 1971 through July 1, 1975 proximately caused damage to the business or property of the City of Cleveland?"

Then there is a place to enter "Yes" or "No".

"If the Jury's answer to Interrogatory No. 3 is "Yes", the Jury shall proceed to answer Interrogatory No. 4.

If the Jury's answer to Interrogatory No. 3 is "No", the Jury shall deliberate no further, and shall return a verdict in favor of the defendant and enter such verdict on the last page of this Special Verdict Form" where

1 I have indicated to you.

2 If circumstances require to answer
3 "Special Interrogatory No. 4, it reads as
4 follows:

5 "{A} Do you the Jury find, from a
6 preponderance of the evidence, that the relevant
7 market for purposes of this case is a 'natural
8 monopoly' market?"

9 There is a place to answer "Yes" or "No".

10 "If the Jury's answer to Interrogatory No.
11 4{A} is 'Yes', the Jury shall proceed to
12 answer Interrogatory No. 4{B}. If the Jury's
13 answer to Interrogatory No. 4{A} is 'No', the
14 Jury shall proceed to answer Interrogatory No.
15 5, leaving Interrogatory No. 4{B} unanswered."

16 Interrogatory No. 4{B} reads:

17 "Do you the Jury find, from a preponderance
18 of the evidence, that the defendant has
19 monopolized or attempted to monopolize the
20 relevant market by unfair or predatory means?"

21 Then there is a place to answer "Yes" or
22 "No."

23 "If the Jury's answer to Interrogatory
24 No. 4{B} is 'Yes', the Jury shall proceed to
25 answer Interrogatory No. 5.

1 "If the Jury's answer to Interrogatory
2 No. 4{B} is 'No,' and if the Jury's answer to
3 Interrogatory No. 4{A} is 'Yes,' the Jury
4 shall deliberate no further, and shall return a
5 verdict in favor of the defendant and enter
6 such verdict on the last page of this
7 Special Verdict Form."

8 SPECIAL INTERROGATORY NO. 5 reads as
9 follows:

10 "If your answer to either Paragraph {A} or
11 {B} or both {A} and {B} of Interrogatory No. 2
12 is 'Yes', and if your answer to Interrogatory
13 No. 3 is 'Yes', and if your answer to
14 Interrogatory No. 4{A} is 'No', or your answer
15 to Interrogatory No. 4{B} is 'Yes', the Jury
16 shall in that event, and only in that event,
17 return a verdict in favor of the plaintiff, and
18 shall proceed to decide in what amount, if
19 any, measured in dollars and cents, it finds,
20 from a preponderance of the evidence, the
21 property and business of the plaintiff city was
22 damaged. State such amount, if any, in the
23 space provided below according to your
24 findings with respect to each of the
25 following:

1 "{A} What damages, if any, do you find
2 were sustained by the City as a result of CEI's
3 refusal to interconnect?"

4 There is a place for dollars, and a place
5 for "None".

6 "{B} What damages, if any, do you find
7 were sustained by the City as a result of
8 CEI's refusal to wheel PASNY power?"

9 Again {1} and {2}, the same, the amount,
10 if you so find; a "None" if you so find.

11 "{C} What damages, if any, do you find
12 were sustained by the City as a result of CEI's
13 free wiring program:

14 "Again, here you have three areas:

15 "{1} For the period July 1971 through
16 1980?

17 "{2} For the period 1981 through 1988?"
18 and

19 "{3} For the period 1989 through the
20 year 2000?"

21 And you will respond to the appropriate
22 section.

23 "All six jurors must agree on the answers
24 to the written interrogatories, and each juror
25 shall attest his or her acknowledgment of the

1 answers, by signing this Special Verdict Form
2 at the designated place below."

3 And we have indicated where your names are
4 and where your signatures should go.

5 Ladies and gentlemen, there is no need
6 for each of you to sign each page of the
7 interrogatories, such as Interrogatory No. 1
8 and Interrogatory No. 2. All of you must sign
9 the form on the last page as indicated; and
10 if you follow the instructions on a page-by-page
11 basis you should have no problems whatsoever.

12 At this juncture, I would like the six
13 alternate jurors to retire to the jury room
14 and gather your belongings and come back to
15 the jury box.

16 Can you do that for me now, please?

17 {The alternate jurors complied with the
18 Court's request.}

19 THE COURT: Approach the bench,
20 gentlemen.

21 {Bench conference ensued on the record as
22 follows:}

23 THE COURT: Anything further,
24 Mr. Weiner?

25 MR. WEINER: Yes.

1 May I have the Special Verdict Form there?

2 I think it asked two times for PASNY.

3 THE COURT: We can look at that.

4 MR. WEINER: Okay.

5 There are a couple of -- we would like to
6 renew our objections, that is, as far as each
7 one --

8 THE COURT: No; your objections
9 and exceptions are noted, and they may stand.

10 MR. WEINER: Like with PASNY,
11 I think there may have been one time where the
12 Court inadvertently misspoke himself. Without
13 a copy of the instructions, there is no way
14 I can check it for sure -- or I have not.

15 THE COURT: Well, I'm sure that
16 I didn't because I read it very closely.

17 In any event, they're going to have the
18 written charge.

19 MR. WEINER: Just three things,
20 your Honor.

21 We would -- we take exception to the Court
22 leaving out the language that it used in its
23 preliminary charge at page 30 on the purpose
24 of the Sherman Antitrust Act.

25 THE COURT: You entered those

1 objections.

2 MR. WEINER: I don't think --

3 I think that is a new one.

4 You left out the term "contributing cause"
5 in defining proximate cause. That was at page
6 45 and 46 of the preliminary.

7 And you left out the language following
8 the Hecht decision, page 50 under the natural
9 monopoly charge, which was rejected in total.

10 Those are three specific -- additional.

11 THE COURT: Mr. Lansdale?

12 MR. LANSDALE: No, your Honor; we
13 stand on our previous objections.

14 MS. COLEMAN: I have one in this
15 matter of the relevant market power issue.

16 We would submit that the Jury finds either
17 that CEI had the power to exclude competition
18 or to control prices despite competition or
19 market share. I don't think your instruction
20 required a finding on both market shares and
21 --

22 THE COURT: Well, your exceptions
23 are noted.

24 {End of bench conference.}

25 - - - - -

THE COURT: Now, ladies and gentlemen of the jury, you are free to retire to the jury room.

Since it is beyond the lunch hour, you are free to go to lunch and return here at -- what time? 1:30, 2:00 o'clock?

It's now twenty minutes to 1:00.

2:00 o'clock. Return at 2:00 o'clock and then you will proceed, as I have instructed you, to elect your foreman or forelady and undertake your deliberations in accordance with the instruction that the Court has given you.

You are free to go.

{Thereupon the six members of the Jury left the courtroom, and the following further proceedings were had out of their hearing and presence.}

- - - - -

{The alternate jurors having returned to the jury box, the Court addressed them as follows:

THE COURT: Ladies and gentlemen, at the outset of this case, several alternate jurors were selected to serve in the event that the Jury or any member thereof was

1 unable to fully discharge assigned duties.

2 The Court requests that the alternate
3 jurors report to the alternate jury room
4 assigned to the alternate jury each day at
5 the designated hour until such time as the
6 deliberating jury completes its deliberations
7 and fully discharges its duties and returns a
8 verdict in this case and until such time as the
9 alternate jury is discharged by the Court.

0 You are to keep in mind during this
1 entire period of time that you are not to
2 discuss the case either among yourselves or
3 with anyone else, including if you should meet
4 any of the deliberating jurors, unless at some
5 future time the Court orders you otherwise,
6 nor are you to read any newspaper accounts of
7 the trial, listen to any radio broadcasts or
8 view any television broadcasts until the
9 Court discharges the alternate jurors.

0 With that, ladies and gentlemen, Mr.
1 Samford will escort you to your jury room
2 where you may relax and you can go to lunch,
3 come back at 2:00 o'clock, the same as the
4 other members of the Jury, and then we will
5 notify you when the other jury is adjourned for

1 the day.

2 Thank you.

3 {The alternate jurors left the courtroom
4 and the following further proceedings were
5 had out of the hearing and presence of the
6 Jury:}

7 - - - - -

8 MR. NORRIS: Your Honor, --

9 THE COURT: Now, gentlemen,
0 as you know, the Court is required to monitor
the Jury, which it will do, and will be
required to oversee its conduct.

Are you desirous or will you be
desirous of being notified or being here when
the Jury goes to lunch or adjourned for the
close of the day at 4:00 o'clock?

Needless to say, if there are any
inquiries, the Court will immediately notify
counsel and we will undertake responding to
the inquiries as a unit. I will not consider
anything absent either the parties or
representatives of either of the parties.

As to the perfunctory matters of taking
the exhibits in in the morning and excusing
the Jury for lunch and excusing them at the

1 close of the day, if you're desirous of being
2 here, I want you to be here promptly at the
3 designated time.

4 MR. LANSDALE: I understand your
5 Honor is going to dismiss the Jury at 4:00
6 o'clock each day?

7 THE COURT: Well, initially.
8 {Laughter.}

9 THE COURT: I'm flexible; I'm
10 not committing myself to any given time.

11 Generally, ordinarily I will dismiss them
12 at 4:00 o'clock. I'll require them to come in
13 here at 9:15. We've been pretty demanding on
14 them to be here at 8:30 every day until 4:30
15 every day, they have been long days, and they
16 probably have been even longer for them since
17 they are confined in that room over there
18 {referring to the jury room}. At least we've
19 had the opportunity of walking around without
20 being confined.

21 So I think 9:15 to 4:00 is a reasonable
22 period of time for deliberation.

23 MR. NORRIS: Your Honor, you
24 are sending in the two exhibit indices along
25 with the copy of the charge, is that right?

1 THE COURT: Yes.

2 I have --

3 MR. MURPHY: Your Honor, with
4 respect to the indices, I just received -- there
5 are, in fact, two indices prepared by the
6 plaintiff; one a chronological one, and one in
7 numerical order by exhibit number.

8 It was my understanding that the agreement
9 was to --

10 THE COURT: Work it out among
11 yourselves.

12 If you can't work it out among yourselves,
13 I will resolve it.

14 There's no necessity to get involved in
15 these little mechanical things.

16 Is there anything of consequence that you
17 desire to ask me?

18 MR. MURPHY: Your Honor, the
19 only thing is, there was one exhibit, CEI Exhibit
20 1360 which your Honor was going to rule on.

21 THE COURT: That's a number to
22 me.

23 MR. MURPHY: It's the report
24 of Mr. Blank.

25 THE COURT: Oh. Let me take a

1 look at it.

2 One other thing, gentlemen:

3 Again, the Court delegates to counsel the
4 responsibility of examining and verifying all
5 of the exhibits that go to the Jury, and it's
6 your responsibility to see that no exhibits go
7 to the Jury that should not go to the Jury and
8 all exhibits admitted in evidence go to the Jury.

9 Thank you very much, gentlemen, and Ms.
0 Coleman; I didn't think this day would ever
come.

MR. NORRIS: Thank you, your
Honor.

THE COURT: Incidentally, I
think that we have the copy of the charge that
is going to go to the Jury, it's available for
examination if you want to examine it -- I think
you already have -- it's there.

{Thereupon Court was adjourned for the
luncheon recess.}

- - - - -

WEDNESDAY, OCTOBER 7, 1981; 2:00 O'CLOCK P.M.

{The jurors reported directly to the jury room and commenced their deliberations; and the alternate jurors reported to a jury room on the first floor of the building.}

- - - - -

{Thereupon, at 4:05 o'clock p.m., the jury entered the courtroom and the following proceedings were had.}

THE COURT: Ladies and gentlemen of the Jury, it is now 4:00 o'clock and it's time to go home.

Please, during the adjournment of court, keep in mind my admonition: Don't forget you are the judges of these facts and you alone; don't discuss the case with anyone or do any of those things I told you not to do.

With that, you're free to go.

What time do you want to come in tomorrow morning?

THE FOREMAN: That's what we are asking: What kind of schedule we should follow?

1 THE COURT: 9:15, 9:30?
2 JUROR NO. 6: 9:30 will be fine.

3 THE COURT: 9:30. All right.

4 Be here at 9:30, go directly to the jury
5 room, and the exhibits and everything will
6 remain in there.

7 I don't want you to start your deliberations
8 until all six of you are there. When all six of
9 you are there, then you may proceed with your
10 deliberations.

11 Good night, have a nice evening.

12 {Thereupon the jury left the courtroom;
13 and the Court, accompanied by Law Clerk
14 Kurdziel and the court reporter went down to
15 the courtroom on the first floor.}

16 {Thereupon the alternate jurors entered
17 the courtroom and the following proceedings
18 were had:}

19 THE COURT: Ladies and gentlemen
20 of the Jury, it's now 4:00 o'clock or a little
21 bit after, and we will adjourn for the day.

22 Please, during the adjournment of court,
keep in mind the Court's admonition, namely,
you are not to discuss this case with anyone or
among yourselves, read any newspaper accounts,

1 listen to any radio broadcasts, or view any
2 television broadcasts about this case until
3 such time as I have directed you otherwise.

4 We will see you tomorrow morning. What
5 time would you like to come in, about 10:00?

6 ALTERNATE JUROR NO. 3: What time are the
7 jurors coming in?

8 THE COURT: The other jurors?

9 ALTERNATE JUROR NO. 3: Yes.

10 THE COURT: They will get here
11 around 9:30.

12 ALTERNATE JUROR NO. 3: Two of us are
13 riding together, that's why I want to know.

14 THE COURT: I don't want you to
15 discuss the case with the other juror when
16 riding together.

17 ALTERNATE JUROR NO. 3: Yes.

18 THE COURT: Well, you will have
19 to come a little earlier; the others can come in
20 at 10:00 o'clock.

21 Good night, have a nice evening.

22 {Thereupon court was adjourned until
23 Thursday, October 8, 1981, at 9:30 o'clock a.m.}

24 - - - - -
25

1 THURSDAY, OCTOBER 8, 1981, 9:30 O'CLOCK A.M.

2
3 {The jurors reported directly to the Jury
4 room and resumed their deliberations; and the
5 alternate jurors reported at 10:00 o'clock a.m.
6 to a jury room on the first floor of the
7 building.}

8 - - - - -

9 {Thereupon at 11:55 o'clock a.m., the Jury
10 entered the courtroom and the following proceedings
11 were had.}

12 THE COURT: Good afternoon,
13 ladies and gentlemen, it is time to go to lunch,
14 so you're free to go to lunch.

15 Keep in mind the Court's admonition:

16 You are not to discuss this case either
17 among yourselves or with anyone else except at
18 those times when you are all gathered in the
19 jury room for purposes of deliberation.

20 You're free to go to lunch and come back
21 at 1:30, 1:15?

22 THE FOREMAN: We're going to come
23 back at 1:00 o'clock.

24 A JUROR: 1:00 o'clock.

25 THE COURT: 1:00 o'clock, okay.

Have a nice lunch.

THE FOREMAN: Should we keep that
outside door locked?

THE COURT: Yes.

THE FOREMAN: Because the
maintenance man came in, and we locked it.

THE COURT: Then when you want
to come in, you can either come into our chambers
and they'll let you in, or if that door is open
{referring to the door leading from the courtroom
to the jury room}, you can go in there.

See you later.

THE FOREMAN: All right.

{Thereupon the jurors left the courtroom;
and the Court, accompanied by one of the law
clerks and the court reporter, went to the
courtroom on the first floor where the alternate
jurors were assigned to the jury room thereof.}

{The alternate jurors entered the
courtroom and the following proceedings were had.}

THE COURT: Ladies and gentlemen
of the jury, it is now the noon hour, so you are
free to go to lunch.

Keep in mind the Court's admonition that
you are not to discuss this case with anyone or

1 among yourselves until such time as the Court
2 instructs you otherwise, or until such time as
3 you are finally discharged.

4 You are free to go to lunch and return at
5 what time?

6 For the record, return at 1:30.

7 {Thereupon the luncheon recess was taken
8 until 1:00 o'clock p.m. for the deliberating
9 jury, and until 1:30 for the alternate jurors.}

10 - - - - -
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 TUESDAY, OCTOBER 8, 1981, 1:00 O'CLOCK P.M.

2
3 {The jurors reported directly to the jury
4 room at 1:00 o'clock p.m. and resumed their
5 deliberations; and the alternate jurors reported
6 to a jury room on the first floor of the building
7 at 1:30 o'clock p.m.}

8 - - - - -

{Thereupon, at 1:55 o'clock p.m., the
Court and respective counsel entered the
courtroom and the following proceedings were had
out of the hearing and presence of the Jury.}

LAW CLERK SCHMITZ: City of Cleveland,
Plaintiff, versus The Cleveland Electric
Illuminating Company, Defendant.

This is Civil Action No. C75-560.

THE COURT: Bring in the Jury.

- - - - -

{The Jury entered the courtroom and the
following proceedings were had in their hearing
and presence.}

THE COURT: Please be seated,
ladies and gentlemen.

LAW CLERK SCHMITZ: Members of the Jury,

1 at this time the Court would like to take your
2 attendance.

3 Please signify your presence.

4 John E. Malacky.

5 JUROR NO. 1: Here.

6 LAW CLERK SCHMITZ: Cathey Dawkins.

7 JUROR NO. 2: Here.

8 LAW CLERK SCHMITZ: Shirley J.

9 Zavarella.

10 JUROR NO. 3: Here.

11 LAW CLERK SCHMITZ: Amelia M. Kuzan.

12 JUROR NO. 4: Here.

13 LAW CLERK SCHMITZ: Carolyn S. Meador.

14 JUROR NO. 5: Here.

15 LAW CLERK SCHMITZ: Deborah L. Dolyk.

16 JUROR NO. 6: Here.

17 LAW CLERK SCHMITZ: Members of the
18 Jury, have you agreed upon a verdict?

19 THE FOREMAN: {Juro No. 1} Yes, we have.

20 {Law Clerk Schmitz obtained the Special
21 Verdict Form from the Foreman, handed it to the
22 Court; and after the Court examined same, the
23 Court handed it back to Law Clerk Schmitz.}

24 LAW CLERK SCHMITZ: "We, the Jury,
25 having answered the above foregoing Special

1 Interrogatories, as herein indicated, herewith
2 return our verdict to the Court as follows:

3 "For the Defendant."

4 THE COURT: Approach the bench.

5 - - - - -

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

8 THE COURT: Here's the Special
9 Verdict Form, and here is the answers to the
10 Interrogatories.

11 {The Court lays the documents before counsel.}

12 MR. NORRIS: Let me see 2.

13 {Document shown to Mr. Norris by Mr.
14 Lansdale.}

15 MR. NORRIS: I don't see Question
16 2.

17 THE COURT: They haven't gotten
18 to it yet.

19 MR. NORRIS: Okay.

20 MR. LANSDALE: Didn't monopolize.

21 THE COURT: There are no other
22 answers.

23 MR. LANSDALE: There are no other
24 answers.

25 MR. NORRIS: Yes.

1 THE COURT: I want you to pole
2 the Jury, ask them if it's their verdict.

3 Pole the Jury, then counsel will approach
4 the bench and place on the record any comments
5 that counsel is desirous of placing on the record
6 before I dismiss the Jury and discharge them.

7 {End of bench conference.}

8 - - - - -

9 LAW CLERK SCHMITZ: Members of the Jury,
0 is this your verdict, that you find for the
1 defendant?

2 THE JURORS: Yes.

3 LAW CLERK SCHMITZ: So say you all.
4 John E. Malacky, is this your verdict,
5 that you find for the defendant?

6 THE FOREMAN: It is.

7 LAW CLERK SCHMITZ: Cathey Dawkins?

8 JUROR NO. 2: Yes.

9 LAW CLERK SCHMITZ: Shirley J. Zavarella?

0 JUROR NO. 3: Yes.

1 LAW CLERK SCHMITZ: Amelia M. Kuzan?

2 JUROR NO. 4: Yes.

3 LAW CLERK SCHMITZ: Carolyn S. Meador?

4 JUROR NO. 5: Yes.

5 LAW CLERK SCHMITZ: Deborah L. Dolyk?

1 JUROR NO. 6: Yes.

2 THE COURT: Approach the bench,
3 gentlemen.

4 - - - - -

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

7 THE COURT: Is there anything
8 that the plaintiff is desirous of placing on
9 the record?

10 MR. NORRIS: Not at this time,
11 your Honor.

12 MR. LANSDALE: No, your Honor.

13 THE COURT: Okay. That's all.

14 {End of bench conference.}

15 - - - - -

16 {The Court and Law Clerk Schmitz conferred
17 off the record.}

18 THE COURT: Ladies and
19 gentlemen of the Jury, this concludes a proceeding
20 that commenced on the 18th of June of this year.
21 It's been a long and arduous trial on behalf of
22 the Court, counsel, and the parties.

23 The Court is desirous of extending to you
24 our deep appreciation and thanks for your
25 attention and your interest, conscientious

endeavors throughout this long period of time.

Particularly on the part of the Court, I wish to express my appreciation for your indulgence and attention and courtesy and express the opinion of all parties for your conscious efforts in arriving at a verdict in this case.

Since we have received the verdict, that concludes your duties and you are discharged and you are free to go about your way.

I might say to you that this Court has no policy as to the communications with the lawyers or any other parties. You may, if you so desire, discuss the matters with counsel.

On the other hand, if you are not desirous of so discussing your activity, you need not. I have no policy as to that.

So you are free to return to the jury room, gather your belongings and go about your way, while I go downstairs and discharge the alternates.

So thank you very much, and it has been a pleasure being with you.

THE FOREMAN: Thank you, your Honor.

1 THE COURT: You may go.

2 Thank you.

3 {Thereupon the jury left the courtroom, and
4 the following further proceedings were had.}

5 - - - - -

6 THE COURT: Bring the other
7 jurors up here {addressing Law Clerk Kurdziel.}

8 {After a short interval the alternate
9 jurors entered the courtroom and the following
10 proceedings were had.}

11 THE COURT: Ladies and gentlemen,
12 we have reached that point in the trial where
13 the Court may discharge you from any further
14 duties.

15 The deliberating jury has arrived at a
16 verdict and entered that verdict with the Court,
17 it being a verdict in favor of the defendant.

18 The deliberating jurors having concluded
19 their assigned duties have been discharged.

20 Accordingly, the Court is in a position at
21 this juncture of the case to discharge the
22 alternate jurors since it is quite obvious
23 that your services are no longer needed,
24 although they may have been.

25 So, accordingly, ladies and gentlemen, you

are discharged.

Before going, I would like to express to you on behalf of the lawyers, their clients, and particularly on the part of the Court, deep appreciation for your attention and the interest that you have displayed during the entire course of this long and arduous trial.

Particularly we appreciate your indulgence for the long period of time that you were required to serve. Recognizing, of course, that you did not have the opportunity of participating in the ultimate verdict, nevertheless, you have served a very important function throughout this trial.

Thank you very much, and you will be free to leave and go about your business.

Before you go, the Court wishes to express to you that it has no policy as to your discussing this matter after your discharge with either the lawyers or anyone else. If you are desirous of discussing it, you are free to do so. On the other hand, if you are not desirous of discussing the case or any aspect of it, there is no responsibility on your part of doing so.

So, with that, thank you very much. It's

1 been a pleasure to work with you and to know
2 each and every one of you. Perhaps one of
3 these days we'll see each other again, although
4 I doubt very much that you're going to be
5 called for additional duty because you have
6 exhausted your service time, and I don't think
7 that that's going to particularly bother you.

8 {Laughter.}

9 THE COURT: Thank you very much;
10 you are free to go.

11 {Thereupon the alternate jurors left the
12 courtroom.}

13 - - - - -

14 THE COURT: The Special Verdict
15 Form is up here for anyone who wishes to look at
16 it.

17 {Thereupon court was adjourned.}

18 - - - - -
19
20
21
22
23
24
25

C E R T I F I C A T E

We, JoAnne Pavolino, Roy Thompson, Jr.,
Nicholas M. Czompoly, Dennis A. Parise, Kathleen
Tomallo, and Susan K. Manning, Official Court
Reporters in and for the District Court of the
United States for the Northern District of Ohio,
Eastern Division, do hereby certify that the
above and foregoing is a true and correct
transcript of the proceedings herein.

Official Court Reporter

Official Court Reporter

Official Court Reporter

Official Court Reporter

Official Court Reporter

Official Court Reporter