
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

10-27-1980

Volume 12 (Part 1)

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

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Monday, October 27, 1980

Gerber, arguments on motions



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1 MONDAY, OCTOBER 27, 1980; 9:15 A.M.

2
3 THE CLERK: City of Cleveland
4 versus the Cleveland Electric Illuminating Company,
5 C79-560.

6 THE COURT: I understand that they
7 have somebody coming over from GSA to examine the
8 situation -- well, here they are right now.

9 I understand the following exhibits may be
10 admitted without objection:

11 Plaintiff's Exhibit 3113, CEI Exhibits 546,
12 516, 681, 1035.

13 There is an objection to CEI Exhibit 1155,
14 which is the Donheiser report, and what is the
15 purpose of this exhibit, Mr. Murphy? We excluded
16 the ^{Wein} ~~line~~ report.

17 MR. MURPHY: Yes, your Honor.

18 THE COURT: Have you changed your
19 position?

20 MR. MURPHY: No, not at all.

21 We think there is material, there are material
22 differences.

23 One thing, your Honor, you recall part of
24 our objection to Dr. Wein's report was the fact
25 that he had testified in great detail during a long

1 period of time with respect to precisely the
2 things that were in the report.

3 Mr. Donheiser did not testify in great detail,
4 rather, he testified on Exhibit 1555, and it
5 contained the details that support the conclusions
6 he gave on the witness stand.

7 Secondly, Mr. Donheiser was cross-examined by
8 the City with respect to specific paragraphs in his
9 report.

10 Paragraphs of the report were read, and that
11 was not the case with Dr. Wein.

12 Thirdly, one of the issues raised by the City
13 in its cross-examination was the adequacy of the
14 documentation that Mr. Donheiser had before him,
15 and we think the report is relevant to indicate
16 the great extent of information that Mr. Donheiser
17 had in support of his conclusions.

18 THE COURT: Sustain the objection.

19 PTX 3115, there's an objection to. Mr. Murphy,
20 you are objecting to 3115?

21 MR. MURPHY: Yes, your Honor, we
22 are objecting to 3115 which is a one-page listing
23 of bond ratings for various enterprise activities
24 of the City of Cleveland from approximately 1965
25 through 1980.

1 This exhibit was used in conjunction with
2 the cross-examination of Mr. Merback. Mr. Merback
3 testified that he had -- I think the essence of the
4 cross-examination was he didn't know if this was
5 true; he wasn't going to dispute it if Mr. Norris
6 said it was. But there was, I believe, no
7 significance attached to the exhibit, nor was Mr.
8 Merback asked whether this information made any
9 difference to him. So this list by itself is
10 irrelevant.

11 THE COURT: Is the City desirous
12 of responding?

13 MR. NORRIS: When the witness stated
14 he took no objection to it, I didn't pursue it
15 further. I assumed that if there were an objection
16 to it, subject to check, he would have so indicated.

17 We think that it is relevant to the line of
18 testimony that was being given at that time.

19 THE COURT: Sustain the objection.

20 There is also a tendered exhibit, CEI 330.

21 MR. NORRIS: The City is still trying
22 to verify that, your Honor. We really don't know
23 what it consists of and we will probably have
24 further information today.

25 THE COURT: Very well. Absent

1 further matters to be considered by the Court,
2 bring in the jury.

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

5 - - - - -

6 {The jurors resumed their places in the jury
7 box.}

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

10 We are prepared to proceed.

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1 A B R A H A M G E R B E R,

2 a witness called on behalf of the defendant,
3 having been previously sworn, resumed the
4 witness stand and was further examined and
5 testified as follows:

6
7 DIRECT EXAMINATION OF ABRAHAM GERBER {Cont'd}

8
9 BY MR. LANSDALE:

10 MR. LANSDALE: If your Honor please,
11 may we have the last question read?

12 THE COURT: If we have the right
13 reporter here.

14 {The reporter read as follows:

15 "Question: What, in your view, Mr. Gerber,
16 are the factors which have governed the economics
17 of the electric utility industry?"}

18 A The most important factors are, first, the industry is
19 very capital intensive; that is, it requires an
20 investment in capital equipment per dollar value
21 revenue about seven times the average raw manufacturing.
22 There are very substantial economies of scale at all
23 levels of the industry, and the area that is of
24 particular relevance here, the distribution area,
25 there are considerable economies of scale that result

Gerber - direct

1
2 from increasing density of customers and increasing
3 use per customer.

4 The capital equipment requires a very long time to
5 construct and it has a long life, and regulation
6 requires that the investment be recovered through
7 depreciation charges over a very long period of time,
8 on average, somewhere around 30 to 33 years.

9 The customers must be directly tied with a direct
10 electrical path, physical connection, to the source of
11 the electric energy.

12 The customers can also increase their requirements
13 much more rapidly than the supplier can build the
14 facilities necessary to provide that supply, that is,
15 a customer, by simply changing a light bulb from a
16 25 watt bulb to a one hundred watt bulb, increases
17 the demand for that light four-fold, whereas, at
18 least at the present time, building the facilities
19 if it's generation could require as much as 15 years.

20 So that the supplier who also has an obligation
21 to serve and cannot maintain inventories -- because
22 electricity cannot be inventoried; it must be
23 supplied instantaneously -- must forecast and
24 anticipate the demands of the customers and start
25 the construction of facilities and install facilities

1 Gerber - direct

2 many years before the customer even anticipates that
3 his demand will grow.

4 Q Well, now, Mr. Gerber, how have these factors, in your
5 judgment, governed the structure and the operation of
6 the industry?

7 A These factors have led to the development of the
8 industry as a vertically integrated industry with most
9 of the customers in the United States being served by
10 vertically integrated utilities and by vertically
11 integrated administration. They do everything
12 starting from the generation down to the delivery of
13 the electricity to the customer's premises, and with
14 extensive horizontal integration as technology has
15 increased the scope of economies of scale our
16 standings in the area of numbers of customers that
17 can be economically served by a single system and, as
18 a result of these characteristics, the industry is
19 generally characterized as a natural monopoly
20 industry, that is, one in which a single supplier
21 can supply the entire market within a very wide area
22 at a lower cost than more than one supplier.

23 Q Mr. Gerber, you indicated that one of the results of
24 these factors has been vertical integration and
25 horizontal integration.

Gerber - direct

1
2 Are there not in numerous instances separate
3 distribution companies, some of quite small size --

4 A Yes.

5 Q -- and how do you reconcile this?

6 A Yes, there are. Incidentally, there are many of these
7 small distribution systems, largely municipals and,
8 starting in the '30's, cooperatives.

9 The start of the municipals, particularly many
10 of them, started with generation equipment but as
11 their generation equipment became obsolete, they
12 abandoned that and started to purchase power. But,
13 effectively, even though there are separate
14 institutions, that is a distribution system and
15 generation and transmission supplier, effectively, in
16 many of these cases they are economically vertically
17 integrated, that is, there is a very close relationship
18 between the electricity supplier and the distribution
19 system.

20 The Tennessee Valley Authority is a very good
21 example of that where the Tennessee Valley Authority
22 not only prescribes the rates to be charged by its
23 distribution customers but also specifies such things
24 as the design of substations, where they would be
25 located, what electrical connections should be

1 Gerber - direct

2 arranged, and so on. So that, effectively, they are
3 vertically integrated.

4 Q Well now, you have mentioned natural monopoly, Mr.
5 Gerber.

6 Is it your view that there is no competition in
7 the electric industry?

8 A No. There is some competition.

9 It is minimal, and it takes a form that is
10 somewhat different than one ordinarily would find.

11 I think Mr. Ginn described some of those forms
12 of competition last Friday.

13 Q Now, how about such things as franchise competition?

14 Is this exhibited to any market degree in the industry?

15 A Well, we hear a lot of discussions of franchise
16 competition but, again, it is relatively minor.

17 If one examines the data, one finds relatively
18 little change in the suppliers of various communities;
19 so that in practice it would appear to be very, very
20 minor, although it does occur.

21 Q Are there instances currently in which companies are
22 avoiding franchise competition, as we understand it?

23 A Oh, yes.

24 The circumstances of the industry have so changed
25 over the last decade that many companies are trying to

Gerber - direct

1
2 avoid supplying new customers.

3 Q Now, there are instances, however, of direct
4 competition in the electric utility industry of which
5 of course Cleveland is one, is it not?

6 A Yes.

7 Q Will you describe the extent to which such competition
8 exists.-----

9 A Direct duplicate of the competition in the electric
10 utility industry is very rare, and I say very rare
11 because essentially there were, say, in 1966, based
12 upon a study done at that time and published in the --
13 published in 1972, there were 38 municipalities in
14 which there were, there was direct duplicate of
15 competition, and that is 38 out of six thousand
16 sixty-one hundred municipalities with over 2,500
17 population in the United States, and I would think
18 that is very rare.

19 Now, firstly, in many of those cases the
20 duplicate of competition is more apparent than real.

21 For example, in the City of Holyoke there has
22 been a municipal system since 1903, and there is a
23 private system serving in that system, and that
24 private system by law may not serve any customer below
25 100 kilowatts of demand, and it must be an industrial

1 Gerber - direct

2 customer, so that that is a city which, while it
3 shows there is a duplicate of competition, it is not
4 really the kind of duplicate of competition we are
5 talking about in Cleveland.

6 Of the 38 cities that were identified as having
7 duplicate of competition in 1966, in 14 there are no
8 longer, there no longer is duplicate of competition,
9 and eight of them, in eight of them there have been
10 sales, and in six the municipal system sold to the
11 investor-owned system servicing in the city, and in
12 two the investor-owned systems sold out to the
13 municipality in the city. In seven there are
14 already arrangements being made to eliminate the
15 duplicate of competition, and that is 21, leaving
16 17

17 Of course, the City of Cleveland, that is the
18 situation we are discussing, and in the City of Bay
19 City, Michigan there appears to be still vigorous
20 duplicate of competition, although the City of Bay
21 City is now serving I think about half of the
22 customers..

23 In the remaining 15 there are various kinds of
24 arrangements that limit and redistribute the
25 competitive activity; for example, six of those cities

1 Gerber - direct

2 are in Texas.

3 Quite apart from the fact that the Texas
4 Public Utility Commission has a policy to encourage
5 the elimination of duplicate of competition --

6 MS. COLEMAN: Objection.

7 THE COURT: Approach the bench.

8 - - - - -

9 {Bench conference ensued on the record as
10 follows:}

11 MS. COLEMAN: I object to the
12 witness testifying about policy, your Honor. He
13 is an economist and not an attorney, and it is not
14 a proper subject of testimony.

15 MR. LANSDALE: If the policy is
16 expressed, that is a question of fact not a
17 question of law.

18 THE COURT: Overruled.

19 {End of bench conference.}

20 - - - - -

21 THE COURT: You may continue.

22 A {Continuing} In the State of Texas rate regulation is
23 initiated in the city, and the first level of regulation
24 is by the city.

25 As a result, in each of these six cities the

Gerber - direct

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2 city regulates rates, so that the rates of its own
3 utility system and that of its so-called competitor,
4 the investor-owned company in the city, are
5 regulated to be at exactly the same level so there is
6 no rate competition.

7 And as their managers put it, "Well, we try to
8 convince people that they should be good to the city
9 and buy from us sometimes."

10 Q Do you have any information with respect to Texas as
11 to the comparative rates between the duplicate and
12 others?

13 A Well, in two of the six, Sonora and Floidata, in
14 those two cities the rates established by the city
15 actually are higher than the rates served by the
16 investor-owned company, the rates charged by the
17 investor-owned company in areas outside of the city,
18 and again this is designed to keep the rates of both
19 the city and its investor-owned competitor or
20 so-called competitor, and put it in quotes, at the
21 same level, so that there cannot be any rate
22 advantage on the part of one competitor vis-a-vis the
23 other.

24 Q Now, Mr. Gerber, I direct your attention particularly
25 to the State of Missouri.

1 Gerber - direct

2 Are there any instances of direct duplicate
3 of competition in municipals in that state?

4 A Yes, and they are disappearing very rapidly.

5 Q Tell me why?

6 A Well, there are three cities in particular, and one
7 is Sykeston and Kanett and Poplar Bluff, and all three
8 receive substantial shares of their bulk power supply
9 from the, from a Federal Government hydroelectric
10 project, the Southwest Power Administration.

11 In those three cities, the municipality already
12 serves over 90 percent of the customers.

13 There are just relatively few customers served
14 by the investor-owned company interspersed, and the
15 investor-owned companies no longer seek new
16 customers, and in fact arrangements have been made
17 in a couple of cases to sell out customers in, I
18 think it was Kanett, and municipal, the municipal is
19 gradually buying out the remaining customers
20 presently supplied by the investor-owned company.

21 So that in those three situations the municipality
22 was, with the help of a very substantial increase
23 relative to their total requirements of government
24 power supply, has substantially lower rates and is
25 effectively driving the competitor out of the city.

Gerber - direct

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2 Q Now, Mr. Gerber, have you, with specific reference to
3 the City of Cleveland, have you considered the
4 factors which are the economic factors which are in
5 existence and in operation here with reference to
6 whether or not a natural monopoly situation exists?

7 A Yes.

8 Q And what is your view in that respect?

9 A I believe that the City of Cleveland is no different
10 from any other city, and that the circumstances are
11 those of a natural monopoly, and indeed the
12 consultant's reports to the city have indicated that
13 the distribution costs of the city are substantially
14 higher than you would normally find in comparable
15 cities, and we have heard some testimony here about
16 the higher costs of distribution.

17 Q Now, what in your view is the consequence of such a
18 situation?

19 A Well, under those circumstances one would expect that
20 either the competitors exercised some restraint, in
21 which case we are not talking about active or
22 vigorous competition, or one is likely to drive the
23 other out of business ultimately.

24 Q And what would be the economic effect however of --
25 withdraw that.

Gerber - direct

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2 Could conditions exist whereby in some fashion
3 competition in a duplicate area is subsidized?

4 A Yes.

5 Q And how would that occur?

6 A Well, there are several ways that it could occur.

7 In the first place, for the CEI, the duplicate
8 of area really represents a very small share of their
9 total system, so the impact of duplication there on
10 their total costs is not likely to be terribly

11 significant, but in any case, to some degree it

12 would tend to raise the average cost of CEI and
13 thereby result in higher costs throughout the system
14 to the extent that there is uniform rates as there
15 is over the CEI system.

16 For the City there are several ways that the
17 City can be subsidized.

18 First, it is in fact subsidized by the absence
19 of obligations to pay taxes, and the ability to issue
20 securities and raise money with tax-exempt bonds,
21 which give them a lower interest rate, and of
22 course to the extent that the general fund of the
23 City will make up deficits or provide funds at no
24 interest cost to the municipal electric light plant,
25 and that represents a subsidy that allows them to

Gerber - direct

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2 maintain their rates below what they otherwise may
3 have to be.

4 Q Now, did you have occasion, Mr. Gerber, to review
5 the material concerning the so-called Muny
6 Displacement Program of CEI in connection with the
7 competitive activity here in Cleveland?

8 A Yes. I looked at some of that, and I read some of
9 the testimony.

10 Q As an economist, do you have a view as to the
11 character of that program as a competitive tactic?

12 A Yes.

13 Q What is your view?

14 A Well, as a matter of fact, I testified to the
15 character of those kinds of programs, and I believe
16 it was in 1969, before the House of Representatives
17 Small Business Committee, and they had undertaken an
18 investigation of these kinds of programs, because
19 they were quite common throughout the electric
20 utility industry, being utilized largely in
21 competition with gas and oil.

22 These were, in my view, sound competitive tactics
23 which permit a utility to direct its competitive
24 efforts against the actual competitor.

25 That is, it allows the utilities to use a rifle

1 Gerber - direct

2 instead of a shotgun and direct its competitive
3 efforts to the competitor.

4 Now, the importance of this is that the utility
5 can properly compete in this way and lower the cost,
6 and this was really a way of lowering -- rather, the
7 price -- to gain customers that it otherwise would
8 not serve to receive revenues in excess of the
9 additional cost to be incurred to serve those
10 customers, because any time that the utility can do
11 that, it reduces the cost to all of its customers.

12 Notice that CEI and in fact almost all
13 utilities, or at least all utilities that I know of,
14 have abandoned these kinds of activities, had
15 abandoned them about 1973 or 1974, when costs
16 started to rise significantly, and they could no
17 longer engage in this activity at cost below
18 revenues.

19 So it is my view that CEI was engaging in a
20 sound competitive tactic, and the fact that they set
21 objectives of ten to one, as I heard here, simply
22 in my mind reflects a vigorous competitive outlook
23 in that case.

24 Q Mr. Gerber, does it make any difference in your view
25 that the activities to which we have been referring

1 Gerber - direct

2 to took place only in the area of duplicative
3 competition?

4 A No.

5 Let me go back to what I just said in response
6 to your last question:

7 The advantage of those kinds of programs is that
8 it allowed the company to pinpoint its competitive
9 activities vis-a-vis a competitor, so just as a
10 utility could offer certain kinds of inducements to
11 obtain a customer to utilize electric space heating
12 instead of gas space heating, and thereby direct
13 the competitor's effort against the gas space
14 heating, where there is a possibility of getting a
15 new customer and new usage rather than a shotgun
16 approach, hoping to hit some target.

17 In the same way in this case they were
18 pinpointing their effort in that area of the market
19 in which it would make a difference.

20 Q Mr. Gerber, directing your attention now to another
21 matter:

22 It has been claimed here that if Muny Light had
23 had a synchronous interconnection with CEI, it could
24 have built larger and more economical units.

25 Do you have any view as to this claim from the

Gerber - direct

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2 general standpoint of an economist and your experience
3 with such matters?

4 A Yes. First, I doubt it.

5 They seem to be unable to build an 85 megawatt
6 unit, but the important thing to remember is that we
7 cannot look at only the engineering of these large
8 units, and what we have heard about is that with a
9 synchronous interconnection there might have been
10 more reliability, and undoubtedly there would have
11 been, but a synchronous interconnection would not
12 save them from financial disaster.

13 A synchronous interconnection doesn't mean that
14 they buy power free, and even with a synchronous
15 interconnection, if you build too large a unit and it
16 goes down, what you are left with is the need to pay
17 all the fixed charges and all the interest on all of
18 the investments and on that large unit that is idle,
19 and then in addition go outside to buy the power that
20 that unit had otherwise been expected to provide,
21 and usually it is at fairly high cost, because over
22 an interconnection one utility sells to another, and
23 not at his cheapest cost. Those low costs are
24 saved for its own retail customers.

25 It sells at its highest cost, and we can see an

Gerber - direct

1 example of that, and it limits the size of the unit
2 that the system can build.

3 The problem that occurred when Three Mile
4 Island had its unfortunate accident was not that the
5 customer of General Public Utilities, those
6 customers were not served. That system is very
7 heavily interconnected, and their customers continued
8 to be served reliably and adequately.

9 The problem it creates is that when you have
10 such a large investment in a single piece of
11 equipment relative to the size of a system, you
12 create serious financial difficulties when that unit
13 goes down for an extended period of time.

14 Q Mr. Gerber, moving now to still another subject:

15 How do you define as an economist relative
16 geographic market for an economic analysis in that
17 context?

18 A Well, I think the key word is "relevant" and that is
19 what creates the difficulties in defining relative
20 market.

21 The market must be defined in a way that is
22 relevant to a specific consideration, usually an
23 antitrust consideration, and most of the time that
24 you heard the term "relative market" it is in an
25

1 Gerber - direct

2 antitrust context.

3 It depends on the context and the relevant market
4 is that market which is pertinent to the examination
5 of specific kinds of relationships among firms.

6 Q Now, confining yourself to the geographic market
7 rather than the product market, have you examined
8 the materials available in this case with a view to
9 reaching a determination as to the relevant geographic
10 market?

11 A Yes.

12 Q Do you have an opinion on this subject?

13 A Yes, I do.

14 Q Will you tell us what it is?

15 A I must say it's a difficult conclusion and I wrestled
16 with it quite a bit, and I have considered that the
17 relevant market is the duplicative area in the City
18 of Cleveland.

19 Q Will you tell us what the basis of your conclusion is?

20 A Yes. I considered whether the relevant market is
21 the entire city of Cleveland or just the duplicative
22 area, and I was conscious of the fact that CEI
23 always has had some concern with regard to the
24 possibility that the Municipal Electric Light Plant
25 would extend -- under certain circumstances would

1 Gerber - direct

2 extend its service throughout the city and drive CEI
3 out of the city.

4 However, in reviewing the materials it seemed to
5 me that, if one is to really evaluate the relevant
6 geographic market for purposes of retail sales and
7 is interested in considering the potential market as
8 well, one has to take in account and can't avoid the
9 fact that the City of Cleveland, or, that is, MELP,
10 has not extended its service area, has not extended
11 its distribution lines beyond the existing duplicative
12 area for some three decades.

13 It shows no sign of having either the will --
14 despite many recommendations that they do so --
15 either the will or the resources to extend the
16 market beyond the existing duplicative area.

17 Under those circumstances, it seemed to me
18 that the market that was relevant for analyzing the
19 relationships, the competitive relationships
20 between MELP and CEI was the market in which there
21 presently exists duplication, giving also some
22 weight to the fact that no customer has an
23 alternative to choose service from a supplier that
24 doesn't have a direct physical connection to that
25

1 Gerber - direct

2 customer.

3 Q Mr. Gerber, it's been suggested that one must consider
4 what has been denominated the area of price influence
5 in considering the relevant market as relevant to
6 the consideration of the competition between CEI and
7 Muny Light in this case.

8 Do you have a view on that?

9 A Yes.

10 Q Please tell us what it is.

11 A I don't think that is a valid view.

12 United Parcel Service has uniform rates
13 throughout the country. To suggest that the local
14 truckers in San Francisco that may be providing
15 delivery service from I. Magnun to homes is part
16 of the relevant market in analyzing the possibility
17 of competition for delivery of packages from May's
18 to residences in the City of Cleveland makes no
19 sense to me.

20 Clearly, if there is ease of entry, there would
21 be price influence, and if there were significant
22 events of price influence, one might want to look
23 further to determine whether it affects the scope of
24 the relevant market. But there is no evidence of
25 price influence, by the way.

1 Gerber - direct

2 The fact that rates are uniform throughout the
3 CEI area is not an indication of price influence. I
4 would suggest quite the contrary, that it is an
5 indication of no price influence.

6 In those cities where there has been duplicative
7 competition and, with the exception of Texas where
8 the cities control the rates so they are equal for
9 both parties, in many of those cities where there is
10 duplicative competition, you find the investor-owned
11 company -- as in the case of the Dalles,
12 Oregon, Springfield, Oregon -- the investor-owned
13 company has maintained rates in that duplicative
14 area below the rates

15 So quite the contrary in this case. I would
16 think the fact of uniform rates in the CEI area
17 suggests the absence of price influence. And
18 price influence alone would not be a sufficient
19 indication of anything.

20 MR. LANSDALE: I have no further
21 questions.

22 THE COURT: Cross-examination?

23 MS. COLEMAN: May I approach the
24 bench, your Honor?

25 THE COURT: Yes.

Gerber - direct

- - - - -

{Bench conference ensued on the record as follows:}

MS. COLEMAN: I may need to make use of the projector during his cross-examination.

MR. LANSDALE: No problem.

MS. COLEMAN: Maybe we could have a break to arrange that.

MR. LANSDALE: Where do you want it?

MS. COLEMAN: I would bring it around the table so I could reach it.

THE COURT: Okay. Set it up. Let's proceed.

{End of bench conference.}

- - - - -

{Short pause.}

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CROSS-EXAMINATION OF ABRAHAM GERBER

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2
3 BY MS. COLEMAN:

4 Q Mr. Gerber, in the past seven years there has been a
5 lot of use of the term "natural" -- natural foods,
6 that kind of thing.

7 When you used the term "natural monopoly," you
8 don't mean that in the same sense that you use it in
9 the commercial area, do you?

10 A I don't understand the question.

11 Q There are factors which are not natural which have
12 led to the existence of one utility serving a certain
13 area, are there not?

14 A No. I think the factors that have led to one utility
15 ...serving a certain area are natural in the economics
16 of the industry and, in fact, the industry was invented
17 that way by Mr. Edison.

18 Q One light bulb, one light company; is that your
19 testimony?

20 A He invented a light bulb, a transmission line, a
21 generator -- all the devices necessary for them to
22 operate to serve a specified area which, as I recall,
23 was one square mile in Manhattan.

24 Now, the fact that technology has progressed
25 since then so that the one-square-mile may now be

1 Gerber - cross

2 one thousand square miles doesn't change the basic
3 principle.

4 Q So it is your testimony that the whole development of
5 the electric industry where one company serves one
6 area is purely natural development without any other
7 considerations; is that correct?

8 A If I knew what you meant by "purely natural," I
9 might be able to answer you.

10 I will try it again this way.

11 Q No, I just --

12 A The development --

13 THE COURT: Just a minute. You
14 asked the question. Let him answer it.

15 A I don't know what you mean by "purely natural," but
16 what I mean is that the industry has developed as it
17 has because of the economic characteristics of the
18 industry that were inherent in the nature of the
19 industry, and that is what I mean by "natural."

20 Q And that there are no other factors at all; is that
21 correct?

22 A No other factors? There might be. I don't think of
23 any right now, but you might suggest some.

24 Q Well, in fact, when the industry developed, there
25 was more than one company serving a locality in a

1 Gerber - cross

2 number of instances, were there not?

3 A Exactly so, and they demonstrated the natural monopoly
4 characteristics of the industry. There was --

5 Q It was a policy decision, wasn't it?

6 THE COURT: Let him finish his
7 answer, please.

8 A There were several alternative ways of approaching
9 this.

10 There were some areas in which there were
11 duplicative systems driving each other into bankruptcy
12 until they were reorganized; there were systems
13 established for the sole purpose of having nuisance
14 value to be bought out at significant profit; and
15 there were situations where there were many systems
16 serving clearly-defined areas within the city.

17 For example, Consolidated Edison Company in
18 New York has the name Consolidated because it was a
19 consolidation of a large number of systems. They
20 were not competing in duplicative areas but, given
21 the technology of the time and the limited geographic
22 scope for transmission and distribution, they each
23 served limited parts of the city.

24 There are today some 112 cities which are
25 served by more than one company. Portland, Oregon,

1 Gerber - cross

2 for example, is served by Portland General Electric
3 and Pacific Power and Light. They have clearly
4 delineated service areas. They do not duplicate,
5 they do not compete with each other in that regard.

6 Light serves Queens and
7 Consolidated Edison serves the rest of New York
8 City. New York shows up as an area in which more
9 than one company serves in the city, but there are
10 clearly denominated areas.

11 And one could go through a great number of
12 others.

13 Q I didn't ask about those. I asked you whethr it
14 was your testimony that there were any other factors
15 other than industry development which led to the
16 situation where there was only one utility serving a
17 given area.

18 A Oh, governmental policy.

19 Q As I understand your testimony, it is that it's only
20 economic factors --

21 THE COURT: Approach the bench.

22 That's not what it said.

23 - - - - -

24 {Bench conference ensued on the record as
25 follows:}

Gerber - cross

1
2 THE COURT: We might as well
3 understand one another. You are asking him a
4 question and you are starting that same format
5 that's been followed by Mr. Norris, and that is
6 you are characterizing questions and you are
7 including conclusory statements in your questions.

8 Now, the witness has responded to your
9 questions and he is not about to buy your
10 interpretation or your edited form of his answer.

11 Now, I recognize that this is cross
12 examination but you can't in cross examination
13 put words into a witness's mouth, Ms. Coleman.
14 So why don't you just, instead of trying to be
15 tricky in these forms of questions, place proper
16 questions.

17 MS. COLEMAN: I am placing leading
18 questions, which is proper.

19 THE COURT: I say they are improper.
20 Now go back and ask proper questions.

21 MS. COLEMAN: I would ask the
22 witness to be instructed to answer yes or no when
23 I ask a question.

24 THE COURT: He has answered every
25 question.

Gerber - cross

1
2 MS. COLEMAN: With a long
3 elaborate something that goes into New York City
4 and --

5 THE COURT: My dear, when you ask
6 a question, you might not like the answer but you
7 are bound by the answer.

8 MS. COLEMAN: Not when it is not
9 responsive, your Honor.

10 THE COURT: I don't wish to argue
11 with you.

12 MS. COLEMAN: I don't either.

13 THE COURT: Now go back and ask
14 proper questions.

15 {End of bench conference.}

16 - - - - -

17 THE COURT: I believe he's
18 answered that question. Please rephrase the
19 question.

20 BY MS. COLEMAN:

21 Q Mr. Gerber, do you recall giving testimony in
22 Washington, D.C., on June 15, 1976?

23 A The chances that I gave testimony that date are
24 probably pretty good, but I do not remember
25 specifically.

Gerber - cross

1
2 Q Do you recall giving testimony at Silver Spring,
3 Maryland, on that day?

4 A I have given testimony in Silver Spring, Maryland,
5 also, but I can't tell you that I recollect it unless
6 you identify it more specifically.

7 Q Do you remember giving testimony in a matter relating
8 to the Nuclear Regulatory Commission on that date?

9 A I have testified before the Nuclear Regulatory
10 Commission many, many times and I really can't identify
11 that by date.

12 THE COURT: Why don't you ask him?

13 If you are desirous of using the deposition, Ms.
14 Coleman, you are free to use it. He says that he
15 may have. If you would like to place the question,
16 "Do you recall this question being asked of you
17 and do you recall this answer being given", you
18 are free to do so.

19 Now, let's proceed and move it along.

20 BY MS. COLEMAN:

21 Q Do you remember this interchange, Mr. Gerber?

22 "Mr. Smith: Mr. Gerber, would you tell
23 us what you regard to be the natural competitive
24 forces regulating and restraining the electric
25 utility industry today?"

1 Gerber - cross

2 "Mr. Reynolds: I did not hear all of
3 that. Can I have it read back?

4 "{The question was read back.}"

5 "The Witness: That is a tall order.

6 "Mr. Smith: Are there any?

7 "The Witness: Yes. One that is not
8 regulated

9 Do you recall that question?

10 A Yes.

11 Q And that answer?

12 A Vaguely, I recall.

13 Q So it is the result of policy decisions in some
14 instances, is it not, that there is one company
15 serving rather than two?

16 A I think I answered one of your early questions about
17 five or ten minutes ago that I thought that if you
18 were looking for other factors there was probably
19 Government policy as well. So I would certainly
20 believe that Government policy regulation reflects
21 Government policy. Yes, that's a factor.

22 Q And there are other factors as well, aren't there, in
23 terms of the plans and projects of the utility
24 manager at the time the electric energy was
25 developing? Isn't that right?

Gerber - cross

1
2 A I don't know. I don't know what you are referring to.

3 Q Are you familiar with the work of Mr. Emery Troxel?

4 A Generally. It's been a long time since I have seen
5 any of it.

6 Q He's a historian and economist and has examined the
7 development of the industry?

8 A I know who he is.

9 Q And he's written a book called "Economics of Public
10 utilities"?

11 A Yes.

12 Q Mr. Troxel made this statement, Mr. Gerber:

13 -"Natural monopolies, they say, are common
14 characteristics of utility industries. The term
15 implies, of course, that the control of public
16 utility service in a market is somehow 'naturally'
17 or inherently monopolistic, that the rivalry
18 between unregulated companies is inevitably
19 eliminated and one company ultimately dominates the
20 market which several companies once occupied.
21 Consolidations and mergers of rival utility firms
22 were, to be sure, common in the histories of
23 utility industries, yet designation of utility
24 industries as natural monopolies did not explain
25 the process by which the managerial control was

Gerber - cross

concentrated. Utility financiers and managers, like corporate financiers and managers in general, wished to eliminate or control rival firms."

Do you agree with that passage, Mr. Gerber?

Gerber - cross

{Go to next page}.

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Gerber - cross

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2 A Let me make several comments on that.

3 First, I cannot agree or disagree with a
4 paragraph that is taken out of context.

5 Secondly, he's talking about utilities generally,
6 does not even mention electric utilities, and that is
7 often the case where they talk about utilities,
8 generally.

9 And, thirdly, to say managements have responded
10 in a way that paragraph says they responded says
11 nothing about whether they responded to the inherent
12 economic facts in the industry. Of course,
13 management would have to respond or nothing would
14 happen.

15 Q The testimony which you gave about other cities where
16 there is what you call duplicate competition wasn't
17 based on your own travel to each of these cities,
18 was it?

19 A Oh, I have been to some of them.

20 Q But your testimony about the broad range of them
21 wasn't based on a personal visit to each of them, was
22 it?

23 A No, it was not.

24 Q If there are two 138 KV lines running side by side,
25 connecting two substations, Mr. Gerber, is that

Gerber - cross

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duplication?

A You mean there are two substations and two 138 KV lines between those two substations?

Q Right.

A You haven't given me enough information to know.

Q You can't tell just from that description, can you?

A No, ma'am.

Q You have to look into questions of the load on the lines; isn't that correct?

A Yes.

Q And you have to look into the question of the length of the line; isn't that correct?

A I don't know if the length of the line is relevant.

Q Well, you can't tell by looking at a situation whether the two lines duplicate each other or not, can you?

A Well, if you mean by duplicate that one line is redundant, no, you can't tell just by looking at the fact that there are two lines there.

Q And you, personally, can't because you are not an engineer, are you?

A Probably so. I can't tell.

Q You are not an engineer?

A In some cases I might be able to tell.

I am not an engineer and in most cases I

1 Gerber - cross

2 probably couldn't tell.

3 Q And an engineer could only tell by looking at the
4 factors we have described just now; isn't that right?

5 A Among other things.

6 Q The way you put together the information which was the
7 basis for your testimony about other communities was
8 based on a kind of survey that you did; isn't that
9 right?

10 A It was more than that.

11 Q It was based on a telephone survey and looking at
12 documents, isn't that correct?

13 A And also listening to testimony by municipal managers.

14 Q In other proceedings; is that what you are referring
15 to?

16 A Oh, yeah. I was rather actively involved in Texas.

17 Q Was this survey conducted by asking the same
18 questions to each of the people involved?

19 A Essentially, yes.

20 Q Did you conduct the survey yourself?

21 A No. I had my staff conduct it.

22 Q Was the information recorded on a standard form?

23 A Nope.

24 Q Just note-taking; is that correct?

25 A That's correct.

Gerber - cross

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2 Q And you also looked over laws and contracts relating
3 to the situation; right?

4 A In some cases where there were such laws and
5 contracts.

6 Q I think you testified yesterday you are not an attorney;
7 is that right?

8 A That's right.

9 Q And your assistant who looked over the document isn't
10 an attorney, either, is she?

11 A That's right.

12 Q The sample that you took for the purpose of your survey
13 was taken from this 1966 study; isn't that right?

14 A That wasn't a sample. It was the universe.

15 Q You just testified there's 112 communities where there
16 are two utilities serving the community; right?

17 A Yes, but I also testified there are only 38 where
18 there was duplicative competition.

19 Q You made that determination of the 38 just on the basis
20 of the 1966 book, didn't you -- the 1971 book?

21 Pardon me.

22 A I made that determination based on Richard Helman's
23 findings in his doctoral dissertation which
24 subsequently was published as a book, yes.

25 Q Rather than on examination of the 112 recorded in 1979

Gerber - cross

1 as having two utilities?
2

3 A Well, I have seen the list and I am fairly familiar
4 with many of those situations, but I haven't gone into
5 detail or called every one of them, although I have
6 had my staff call the commissions in those states
7 where there are cities which are served by two or
8 more systems.

9 Q It was based on Mr. Helman's statement that there was
10 what you called duplicative competition that you
11 focused in on those 38 cities; is that correct?

12 A Principally, yes.

13 Q The statement of duplicative competition doesn't
14 necessarily mean there's twice the amount of
15 equipment in that city, does it?

16 A Depends on where you draw the line.

17 Q Well, the word "duplicate" means two, but we aren't
18 really talking about double the amount of equipment,
19 are we?

20 A Well, in most cases you don't have both systems
21 supplying the entire system; so there wouldn't be
22 double. It would tend to be double in the areas in
23 which they duplicate.

24 Q It was your testimony that duplication has ended in
25 14 communities; is that correct?

1 Gerber - cross

2 A That's correct.

3 Q By duplication, you mean duplication of equipment?

4 A I mean duplication of supplier. There is only one
5 supplier now serving and that one supplier would be
6 in the position of rationalizing the system to
7 eliminate any duplication that may exist.

8 Q But you don't know of your own knowledge whether
9 there is duplicate equipment still there or not;
10 right?

11 A Specifically, no.

12 Q In fact, in some cases your survey reported that the
13 company which remained in the town acquired the
14 equipment that the other company had owned in the town;
15 isn't that right?

16 A Yes, but if you read the survey, you will notice it
17 also said it acquired the equipment and was in the
18 process of either eliminating some of it, changing
19 some of it around, and that's exactly what one might
20 expect.

21 Q Is all the information which you gathered about
22 these communities contained in the work papers that
23 you provided to counsel?

24 A Probably.

25 Q But you are not sure?

Gerber - cross

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2 A Well, I know a lot of things about some of these
3 situations that are in my head because I have been
4 there, I have talked to people there, and it hasn't
5 been put down on the work papers.

6 Q Was your conclusion based on this telephone survey
7 and the other sources you described that competition
8 imposes economic and social costs on the community;
9 isn't that correct?

10 A I didn't reach that conclusion from this survey.

11 Q You drew on the survey to reach that conclusion,
12 did you not?

13 A No, ma'am.

14 Q The survey has nothing to do with that conclusion?

15 A No. These conclusions I drew from a lot of other
16 things. The conclusion I drew on the survey is
17 whatever remaining duplicative competition exists
18 is disappearing and disappearing fairly rapidly.

19 Q So you didn't refer to the survey at all in coming
20 to the conclusions about why competition was
21 disappearing rapidly; is that right?

22 A Of course not.

23 Q One of the communities you studied was Fort Wayne,
24 Indiana, was it not?

25 A Yes.

Gerber - cross

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2 Q And you cited that as one of the 14 where the
3 community is now served by one utility; right?

4 A Yes.

5 Q You are aware, aren't you, that the City of Ford
6 Wayne is trying to revoke that agreement because of
7 the tremendous rate increase they experienced after
8 the agreement was made, aren't you?

9 A I am aware there are some people who have brought a
10 lawsuit.

11 Q And the purpose of that lawsuit was as I described,
12 was it not?

13 A Yes.

14 Q Now, in relying on Mr. Helman for your information
15 about the 38 communities, did you also review
16 what he had to say about the existence of competition
17 in those communities?

18 A I read his book some time ago.

19 Q In the terms of the question of whether there is
20 double the amount of equipment when there are two
21 companies, Mr. Helman didn't make that finding, did
22 he?

23 A I don't recall.

24 Q Well, in fact, he found a number of instances where
25

Gerber - cross

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2 there were instances of pole-sharing between the two
3 companies in the town, did he not?

4 A Oh, that happens. There is pole sharing in Fort Wayne,
5 or there was when there were two systems serving there.

6 Q And he also came to the conclusion that in terms of
7 the extent of duplication, we are really only talking
8 about a zero to 15 to 25 percent; isn't that correct?

9 A I don't remember his numbers. I doubt that it is
10 zero.

11 Q In the survey that was conducted you came to some
12 conclusions about the reasons that competition had
13 ended in those towns, did you not?

14 A In some cases, yes.

15 Q And isn't it a fact that the problem which the
16 municipal systems that sold out to investor-owned
17 utilities faced was a lack of access to economies of
18 scale?

19 A Not necessarily, no.

20 Q Well, you --

21 A Pacific Power and Light sure doesn't lack access to
22 economies of scale.

23 Q Pacific Power and Light is not a municipal system, is
24 it?

25 A No, but they had to sell out to a municipal system.

1 Gerber - cross

2 Q I didn't ask you about that situation. I asked you
3 about a situation where a municipal system sold out to
4 a private system.

5 A The answer is no because in many instances those
6 systems were buying wholesale power from the same
7 system that was competing with them at the
8 distribution level, and if one can assume that
9 regulation was reasonably effective, they had the
10 same access to power supply that their competitor had
11 and the difficulties came about in the distribution
12 system.

13 But if you look at the record of many of these
14 distribution systems, you find that in many cases
15 these systems failed to maintain the distribution
16 facilities, inflation caused substantial increase in
17 costs, substantial capital expenditures were
18 required to rehabilitate the systems, there were
19 many competing municipal activities for those funds,
20 and the choice was to get rid of the distribution
21 system to obtain capital available for other
22 purposes.

23 And if you read some of them, there were some
24 situations where they sold the system because it
25

Gerber - cross

1
2 was the only way they could get sufficient standing
3 to sell municipal bonds for the sewer and water
4 facilities.

5 So, no, it is not the failure to get access to
6 economies of scale.

7 Q The City of Alligon, Michigan, had no
8 interconnection, did it?

9 A That's right. The City of Alligon did not
10 have an interconnection despite the fact that the
11 Lake Superior Power Company offered them an
12 interconnection, as I recall might have been the case
13 here in Cleveland.

14 Q You didn't explore the terms upon which an interconnection
15 was offered in Alligon, Michigan?

16 A No, I did not.

17 Q Your assistants simply talked to the investor-owned
18 utility there in Michigan?

19 A That is right.

20 Q The City of Bessemer also did not have an interconnection
21 at the time it went out of business; isn't that right?

22 A I don't recall. I would have to check that.

23 Q And the City of Commerce, Texas, did they have an
24 interconnection at the time they went out of
25 business?

Gerber - cross

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2 A I don't think that is true.

3 Commerce, Texas, as I recall it was getting
4 wholesale power from Pesco, I believe, and by virtue
5 of the fact that it had an interconnection -- it
6 couldn't get power otherwise.

7 Q Your information about whether the distribution
8 system was a burden is based mainly on the recital
9 in the contract that you looked at?

10 A I don't understand the question.

11 Q You testified a minute ago there was no economy of
12 scale and it had something to do with the distribution
13 system.

14 That conclusion is based on the statement and
15 some of the contracts that you read; isn't that right?

16 A Oh, no. It is also based on some of the experts
17 from the Regulatory Commission, their decisions in
18 those cases, and based on a lot of other situations
19 that I looked at in detail.

20 I have had occasion in the past to look at
21 specifically, to look at situations in Pennsylvania
22 and in Ohio, and have specifically examined the
23 reasons that municipal electric systems sell out,
24 and it was almost invariably, at least invariably
25 in the case of Ohio and Pennsylvania, in case of

Gerber - cross

1 those municipals, for the reasons I indicated.

2
3 Q Is that a study that you have available here with you
4 in court today?

5 A No. I don't know -- I prepared it for another
6 proceeding, and it was filed there, and I don't have
7 it for this purpose. I didn't even look at it for
8 this purpose.

9 Q Well, in fact, there are many small systems in business
10 today, aren't there?

11 A Of course.

12 Q And it is possible for a small system to maintain its
13 independence and viability and be in participation
14 and in cooperation with other systems; right?

15 A I have no quarrel with their viability.

16 I am suggesting that it is difficult when there
17 is active duplicate of competition for those
18 systems to maintain their viability in a natural
19 monopoly market.

20 As a matter of fact, in all those cases there
21 is not that direct competition, and of course they
22 can live with interconnections and memberships in
23 all sorts of intercompany arrangements.

24 They don't compete with each other. They
25 cooperate.

Gerber - cross

1
2 Q The kind of cooperation you are talking about, Mr.
3 Gerber, includes what you have referred to in your
4 testimony as some arrangements limiting competitive
5 activity; isn't that correct?

6 A In my testimony I was referring to the 38
7 municipalities that presumably had duplicative
8 competition, and I pointed out that 14, in 14 there
9 was no longer duplicate competition, and in 7 there
10 were contractual arrangements for eliminating it,
11 and in the remaining -- and in 15 of the remaining
12 17 there were various kinds of arrangements to
13 eliminate competition at the distribution level
14 among those systems.

15 I said nothing about the kind of cooperation
16 that one finds when you have interconnections among
17 systems.

18 Q The type of arrangements that you are talking about,
19 one of them you characterized as non-rate competition;
20 is that right?

21 A That is wrong.

22 Q And the situation you found in Oregon was that two
23 utilities were engaging in rate competition; is that
24 right?

25 A If you are referring to the situations in Dalls and

Gerber - cross

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2 Springfield, in those two cities Pacific Power and
3 Light reduced its rates to the level of the rate of
4 the local municipal systems.

5 These rates were lower than the rate it charged
6 throughout the rest of its system, and because of
7 the policies of the Oregon Commission, which
8 effectively precluded their continuing to charge
9 lower rates in those cities while the customers
10 elsewhere were subsidized, subsidizing their
11 competition, they sold the system in the Dalls,
12 and in the case of Springfield, they sold out to the
13 municipal system.

14 Q And that was the situation where the municipal
15 system was able to sell power at a lower cost than
16 the private system; is that right?

17 A That was a situation in which the municipal system
18 was getting hydroelectric power from Bonneville, a
19 government agency, and an extraordinary rate that
20 you couldn't believe back here in the East, and was
21 able to sell that power at retail at the distribution
22 level at lower rates than Pacific Power and Light,
23 yes, ma'am.

24 Q Now, of the communities that you studied, the
25 whole 38 of them, there were only rare situations

Gerber - cross

1
2 where the two companies in the town had equal rates;
3 is that correct?

4 A There were six in Texas, that is six out of the 38.

5 Q And the remainder you didn't find that situation?

6 A As to the remainder, I really don't know. I don't
7 recall.

8 We did look at typical electric bills, and
9 there were differences.

10 Q So there was rate competition in those localities;
11 right?

12 A To the extent that the rates were different -- there
13 were different rates, whether it represents rate
14 competition, I don't know.

15 My impression is that at least insofar as the
16 investor-owned company is concerned, they set
17 their rates in accordance with their costs throughout
18 their entire system, with uniform rates throughout
19 the system without regard to what the rates were by
20 the municipal system in that locality, and that is
21 what you find in Cleveland.

22 The Cleveland Electric Illuminating Company sets
23 its rates for the entire system based on its costs,
24 to recover its costs, without regard to rates that
25 MELP charges.

Gerber - cross

1 Q You didn't inquire of the other utilities as to what
2 their rate-setting practices were, did you?

3 A In some cases I knew, but where I didn't know, I
4 didn't inquire.

5 Q And you found that there were other types of competition
6 going on in the towns which you studied in your
7 survey; right?

8 A Not really very much. It was interesting that when
9 you talked to these people -- and again we had
10 occasion to talk to many of these people under oath --
11 and they described the fact that if a customer came
12 into town and the other utility is closer, they
13 would send them to the other utility, and they
14 really don't have serious problems. And in many
15 cases the competition is illusory to the extent that
16 they pretty well recognize that the small
17 municipal distribution company is not capable of
18 serving large industries, and so they defer those
19 customers to the larger investor-owned system. So
20 it is a complex.

21 The overall that you see in most of these
22 cases, and I suspect that about the only exception
23 is, the only exception I can think of, is the
24 City of Bay City, Michigan, and Lubbock, Texas,
25

Gerber - cross

1
2 but overall one finds, to the extent there is
3 competition, it is really a very, very suppressed
4 and modified gentlemanly kind of thing, where they
5 talk to each other, and if a customer, for example,
6 in one of these Texas communities asks to change
7 suppliers because the city trash collector kicked the
8 dog, as they put it, then they will check back and
9 forth to see if they pay their bills, because they
10 find a lot of customers want to change to avoid
11 paying a bill. And so it is a restrained and
12 modified kind of competition.

13 Q In many of the cities if the customer wanted to
14 switch, the customer could switch; right?

15 A That is right, and in many of the cases the customer
16 could switch if he made a request, because no one was
17 going to come and solicit his business.

18 Q Mr. Gerber, do you agree that competition as it is
19 ordinarily conceived is two or more energy sources
20 competing in the market for marginal gains as
21 opposed to one thinking of knocking the other out of
22 the market?

23 A No.

24 Q You do not?

25 A No.

Gerber - cross

1
2 Q Do you recall writing an article with Mr. Melcher
3 regarding competition in the energy market?

4 A Well, I seem to recal some testimony before the
5 Senate Antitrust Committee on that, and as I recall
6 we talked about competition being, well, maybe I just
7 misunderstood the "out of context" but I don't recall
8 that, and I don't agree with two suppliers trying to
9 knock each other out, that that represents ordinary
10 competition.

11 That suggests natural markets in which only one
12 can survive.

13 Q That is what I was asking you.

14 Now, in that testimony before Congress that was
15 then published in a book, wasn't it?

16 A It was published as part of the hearings of a
17 Congressional Committee, but whether it was published
18 in a book, I don't recall. It may have been.

19 Q One of the reasons that you gave in characterization
20 to competition -- withdraw that.

21 In that situation you were talking about a party
22 that you mentioned earlier in the testimony, weren't
23 you, and not competition between gas and electric
24 companies?

25 A Maybe I could tell you better if you read the quote,

1 Gerber - cross

2 but just out of context it is difficult for me.

3 That testimony was I think in 1970, and I have
4 done a lot of things since, and I can't remember
5 very specifically back to 1970.

6 Q You gave a prepared statement to the Subcommittee on
7 Antitrust and Monopoly on the Committee on the
8 Judiciary on May, 1970?

9 A I just said it was about 1970, yes, that is better
10 than 10 years ago.

11 Q And part of the discussion was about competition
12 between electric and gas; is that right?

13 A At that time I can't imagine that we discussed that
14 subject without discussing that topic, but I don't
15 remember specifically.

16 Q One of the considerations in looking at electric and
17 gas competition is competition for customers on the
18 margin, and it was because there is no overwhelming
19 choice by consumers, either for electric or gas; isn't
20 that correct?

21 A At that time that was probably true, but I do know
22 now what that meant.

23 You either went for gas or you went for electric,
24 and whichever one, the other lost. It was an either/or
25 situation.

Gerber - cross

1
2 Either you had electric heating, an electric
3 heating system or gas, and you didn't have a
4 combination gas-electric system.

5 Q In terms of that market, where the electric is
6 competing with gas, the electric company can't hope
7 to knock the gas company entirely out of the
8 business; isn't that correct?

9 A Well, they can hope to do so, but they probably would
10 have difficulty.

11 Q Well, realistically what they look forward to in the
12 electric industry is to gain customers on the margin;
13 isn't that correct?

14 A Yes.

15 Q And the reason for that is because gas is not
16 universally preferred, nor is electricity universally
17 preferred as a way to obtain all energy resources
18 for the home and business; isn't that right?

19 A For most people that is true.

20 Q Mr. Gerber, in connection with the preparation of your
21 testimony, did you review the various consumer
22 surveys which CEI commissioned during the period
23 from 1970 through 1976?

24 A At the moment I don't recall any. I may have seen them.
25 I saw a lot of documents. I don't recall.

Gerber - cross

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MS. COLEMAN:

Mr. Schmitz, would you

hand the witness Plaintiff's Exhibits 1840, 1841
and 1843.

{After an interval.}

BY MS. COLEMAN:

Q Do these refresh your recollection, Mr. Gerber?

A I think I saw them and thumbed through them, but I
never really reviewed them.

Are these all the same, just different years?

Q That is correct.

A Yes. I think I just looked through them, thumbed
through them very briefly, and I never really looked
at them carefully.

Q They show, don't they, that a large number of Cleveland
citizens felt it is a good idea to operate a
municipal light system?

A I thumbed through them and I reviewed them hastily,
and I really can't tell you unless you want to give
me some time to look at them.

Q Do you agree, Mr. Gerber, that to the extent competition
can be preserved and encouraged without adverse
effects on the allocation of reserves, that it is
required to preserve and encourage competition,
and there is no advantage to be gained by throwing it

Gerber - cross

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2 away?

3 A That is a nice generalization which I think almost
4 anybody would agree.

5 Q And you do?

6 A Sure. That is what the antitrust laws are all about.

7 Q Do you believe that if something is pro-competitive,
8 from an economic point of view, that that is good?

9 A Not in an absolute sense, no.

10 If it is pro-competitive and deals with requirements
11 in other respects, it is not necessarily good; and
12 we make policies all the time about such matters,
13 what we will allow to be imported from Japan, whether
14 we are going to help Chrysler, and we do a lot of
15 things with regard to whether it is pro-competitive,
16 because in an absolute sense it is not the only
17 relevant question.

18 Q The question of whether we helped Chrysler was
19 resolved in the affirmative, wasn't it?

20 A That is exactly the point.

21 That would not -- that was not necessarily
22 pro-competitive. It helped to subsidized what
23 appeared to be an inefficient producer.

24 Q It is not pro-competitive to have a third supplier
25 of automobiles?

Gerber - cross

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2 A Not when that third supplier can survive only through
3 subsidies, if that should be the case, and I don't
4 know the details, but I am just indicating to you that
5 there are many situations in which we make decisions
6 that go beyond the question of whether it is
7 pro- or anti-competitive.

8 We can ask the Japanese not to ship automobiles
9 or electronic equipment to the United States, and that
10 is not pro-competitive.

11 There are a lot of considerations. We have
12 price supports for wheat, and you have to look at
13 more than whether it is pro- or anti-competitive.

14 Q Would you use the word "competitor" -- do you include
15 when you use that word, do you include in the meaning
16 both the actual and the potential competitor?

17 A That is the context that I am using the word.

18 Q Do you agree it is better to have more competitors
19 or potential entrants than fewer?

20 A It depends on the circumstances; not in the electric
21 utility industry.

22 Q Do you recall giving testimony in Washington, D.C.,
23 September 2nd, 1980?

24 A I don't know the exact date, but I have given testimony
25 in Washington very recently, at the Federal Regulatory

Gerber - cross

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2 Energy Commission.

3 Q And do you remember being asked this question:

4 "Q I believe you testified that competition
5 should be determined where feasible, and where
6 feasibly it improves performance; is that correct?

7 "A Can you show me where I said that.

8 "Q Turn to page 2872 of the transcript.

9 "A The transcript is garbled, but that is
10 essentially what I said.

11 "Q I believe you also indicated where
12 feasible that that is a benefit -- you said that at
13 2873; is that correct?

14 "I believe that testimony is on line 7, 8 and 9?

15 "A I am going to stick by that, where
16 feasible it is better to have more competitors or
17 potential entrants than less."

18 Do you recall those questions and answers?

19 A Absolutely, and I would repeat it again, and I stand
20 by it.

21 Q Do you believe that independent of regulation utilities
22 feel a great deal of pressure to control costs to
23 the full extent possible?

24 A You say "independent of regulation"?

25 Q Independent of regulation.

Gerber - cross

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A Yes.

Q The reason for this is because utilities recognize the public is sensitive about rate levels; isn't that right?

A That is one reason.

Q And do you feel that public dissatisfaction with utility failure to control costs might lead to pressure in the community for the community to deny the franchise to the investor-owned utility or develop a municipal system?

A It could happen.

Q And if the municipal utility already existed, the same type of competitive pressure is there to the extent the customers prefer the municipal utility because of its lower rates; isn't that right?

A Sure. That was what CEI had to be concerned about.

Q When you were talking about features of the electric industry, Mr. Gerber, I would like to ask you some questions about the various features that you pointed out.

A Yes.

Q The first one that you -- pardon me -- I may not be putting this in order.

One of them that you mentioned was the probable

Gerber - cross

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2 lead time and planning; is that right?

3 A Yes.

4 Q The utility has to look forward to estimate demand?

5 A Yes.

6 Q And it has to consider what the future consumption of
7 the customers will be?

8 A Yes.

9 Q And also it has to look at what happens to the
10 consumers in light of government plans for changes in
11 the community; isn't that right, things like highways
12 and urban renewal?

13 A If you mean do utilities have to take into account
14 municipal activities in projecting their loads, of
15 course they do, yes, among other things.

16 Q Right.

17 A If they are going to tear down half of the city, they
18 have to take that into account.

19 Q And they try to keep records of those kinds of
20 events being planned by the City; is that right?

21 A I would assume that a good load forecaster would
22 keep, try to keep track of that.

23 Q One of the things that a utility can do to take the
24 edge of problems in its planning is to coordinate
25 with other utilities; isn't that right?

Gerber - cross

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2 A That is such a vague question, I don't know how to
3 answer it.

4 Q Well, if the utility has underestimated what its load
5 is going to be, if it had coordinated relationships
6 with other utilities, it can make arrangements to buy
7 power to serve the additional demand?

8 A Not necessarily. Sometimes it might and sometimes
9 you have a problem that they both have reinforced
10 each other unduly optimistically in their forecasting.
11 It varies.

12 Q And if inside the pool they have all reinforced each
13 other's low forecast, they would have to look outside
14 of the pool?

15 A To the extent that others have capacity available.

16 Nobody, I might add, plans 10 or 15 years ahead
17 to have excess capacity to help their neighbors, and
18 it wouldn't be ordinary and prudent for any utility
19 to rely on that.

20 In fact, in your present regulatory systems,
21 any utility that tried to have excess capacity to
22 help its neighbor couldn't get a license to build
23 the facility.

24 Q But sometimes because of an unforeseen circumstance
25 excess capacity will develop?

Gerber - cross

1 A For short periods of time.

2 Q And there will be excess facilities sitting around?

3 A For short periods of time.

4 Q Well, if the work on the facilities is not complete,
5 it may be sitting around in perpetuity; isn't that
6 right?

7 A You mean if there is an unfinished --

8 Q Yes; I do mean if there is unfinished capacity.

9 A -- that it would be sitting around in perpetuity?

10 Q Right.

11 A I don't know of any such situation where that has
12 happened, but I suppose it could.

13 Q Are you familiar with the cancellation of the
14 Davis-Besse No. 2 and Davis-Besse No. 3 units?

15 A Sure.

16 Q Those are not complete?

17 A That is right, but they were in the very early
18 stages of construction, as I recall.

19 Q So they are partially complete, excess capacity;
20 is that right?

21 A No. They have no meaning as capacity. They can't
22 do anything.

23 If you want to get two kilowatts of electricity
24 out of them, you can't get it.
25

Gerber - cross

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Q Nevertheless, when you buy a kilowatt hour from CEI, you are buying for that capacity, for that known capacity, are you not?

A I really don't know what kind of rate treatment the Ohio Commission has given to that capacity.

It is not capacity. Again, let me repeat, it is not capacity. It is money that was spent, but it is not capacity.

Q Now, another feature of the electric industry that you claim was significant was the question of capital intensiveness?

A Yes.

Q And you made a comparison to the manufacturing industry in terms of extent of capital investment?

A Right.

Q And there are a lot of other industry sectors in the country?

A Sure.

Q And some are a lot closer to the electric industry than manufacturing?

A Yes; the railroads are closer.

Q And mining is closer?

A Not really.

Q Did you study mining?

Gerber - cross

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2 A Well, I looked at the numbers in connection with a
3 review of some erroneous figures that were put into
4 an article by a man named Primo, and that is why I had
5 an occasion, and what he failed to take into account
6 is that the mining industry, in the mining industry
7 they capitalized drilling expenses, and so they
8 overstated really the capital investment, but treated
9 properly, it would not be as large, although in the
10 mining industry there is large capital investment
11 per dollar of revenue.

12 Q And that capital investment is larger than the
13 capital investment in manufacturing per dollar of
14 revenue, isn't it?

15 A Well, really, I can't say.

16 While I found a flaw in the numbers, I really
17 didn't try to figure out the correct number, and if I
18 had seen the correct number, I don't recall it.

19 Q And you made something of a study of the relationship
20 of the capital plan of the utility to revenue; isn't
21 that right?

22 A Yes.

23 Q And you were focusing just on private utilities; is
24 that right?

25 A Class A and Class B utilities, yes.

Gerber - cross

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Q Which are investor-owned utilities?

A Yes.

Q And your studies show -- and you have looked at this question over a period of years; is that right?

A I have had numbers for quite a few years, yes.

Q -- and your numbers from the period since 1974, showed that the ratio of utilities' capital to its revenue has declined?

A Just as you would expect.

Q And that means the utility plant is somewhat declining in terms of its importance of the cost of the product to the consumer; right?

A To a very insignificant degree. It is still important.

The reason the ratio declined is that there has been a sharp increase in the price of fuel used by the utility, so that the dollars of revenue reflect a very large component of fuel costs, and that tends to depress the ratio, but really the capital investment is still very substantial.

Q Now, as another feature of the electric industry that you relied on was, I think what you called the direct link from the source of power to the customers; is that right?

A Yes.

Gerber - cross

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2 Q And now, do you agree that where there is multiple
3 ownership along the line of that path from the
4 source to the customer, that is not a relevant factor?

5 A It depends on what questions you are asking. It
6 may be relevant to some questions and not to others.

7 It is not relevant to the question of whether
8 that path can carry the electricity.

9 Q In fact, the need for the customer to have service
10 can be satisfied as long as there is a path, no
11 matter who owns the distribution system, and if someone
12 else owns the source of power?

13 A That is right. The electrons don't know anything
14 about ownership; that is right.

15 Q Now, your testimony was that the customer can choose
16 service only if they have a direct physical connection,
17 and that is true before the light switch goes on; is
18 that right?

19 A There has to be a connection for the light switch to go
20 on.

21 Q But the customer can make a decision between suppliers
22 before the point that the electric supply is hooked up
23 to his house?

24 A In most cases he cannot.

25 Q If there are two suppliers in the neighborhood, he

Gerber - cross

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2 can make a decision; right?

3 A Sometimes he can, and sometimes he can't.

4 In many cases there are rules and agreements
5 among the utilities or rules by the regulatory
6 agencies which specify that a utility with the
7 line closest to the customer will serve, irrespective
8 of the customer's choice.

9 There are other situations such as Cleveland
10 where, if there is some line connected to a
11 customer, and the customer comes to one or the other
12 of the suppliers, and they choose -- well, I suspect
13 in situations they have no choice, they have an
14 obligation to serve but if the City chooses to
15 build the facilities, the line to the customer, to
16 the customer's house, that would give the customer a
17 choice, but the City would then have to choose to
18 make the investment in the facilities to get to that
19 house or business or whatever.

20 Q Do you believe -- do you know if one finds an electric
21 utility that considers itself to be in competition
22 and behaved in ways that reflect that belief, and
23 shape its performance in ways that reflect that
24 belief, that is one bit of evidence that there is
25 competition going on?

Gerber - cross

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A Is that from the deposition in the Texas case?

Q No, it is not.

A If utilities actively behave as though they are in competition with a supplier to a customer and respond in ways to acquire business, yes, they were in competition, and then competition has meaning and effect on performance.

Q Mr. Gerber, at the beginning of your testimony this morning you defined a natural monopoly industry as one where a single supplier can supply the entire market at lower cost than more than one supplier can.

Is that the usual definition of a natural monopoly given by an economist?

A I think that is well accepted, yes, ma'am.

Q And the definition refers to a firm supply in the market, doesn't it?

A Yes, usually.

Q We are not talking about a piece of equipment; right?

A No.

Q And would you agree that the firm is a single company with its own decision-making organization, such as a corporation or partnership?

A Well, you see, in these situations that is the usual definition of a firm, but it depends on the level

1 Gerber - cross

2 at which you want to examine this.

3 In some respects the firm's distinction, the
4 distinction is between firms and entities, and may
5 be viewed, it may be viewed as artificial, and from a
6 real point of view you may have to look at it as an
7 integrated entity.

8 So I am not sure quite how to answer your
9 question.

10 Q Well, that is a definition of a firm as economists
11 use it?

12 A A firm is usually viewed as a single business
13 organization.

14 Q And CEI is a firm; right?

15 A I believe so.

16 Q And when economists or businessmen specify a term,
17 they don't mean just the physical property. They
18 also mean the human resources, employees, cash,
19 and management, and all those features; right?

20 A I can't possibly answer that.

21 People talk about firms and businesses and all
22 sorts of things having very different meanings and
23 different contexts.

24 In some cases businessmen talk about a firm in
25 the way that you describe it, and in other cases not.

Gerber - cross

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2 as efficiently as possible, and now you said the one
3 firm is inefficient.

4 It is entirely possible that the firm may not be
5 achieving optimal efficiency, but still be at
6 substantially lower cost than the two efficient
7 companies or the two efficient firms could serve.

8 Also, it is possible in a natural monopoly that
9 one firm may be so very inefficient, in which case
10 I would want to reexamine the regulatory authorities,
11 but it may be so inefficient that two firms
12 operating very efficiently would be more efficient
13 than the one firm; but you assume a reasonable
14 degree of efficiency when you are talking about the
15 one firm.

16 Q Also, in making this assumption about your definition
17 of natural monopoly, are you talking about the firms
18 supplying at total social cost at less than more than
19 one firm would supply; is that not so?

20 A First, I would not make an assumption about a natural
21 monopoly. I described the conditions of a natural
22 monopoly, but I think it is true in general that although
23 we have done so little up until recently to incorporate
24 social costs, meaning the environmental impact, and so
25 on, but essentially that is also an important

Gerber - cross

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2 element.

3 One of the elements leading to natural monopoly is
4 the social costs almost from the beginning of
5 distribution, because one of the significant social
6 costs of duplication is the duplication of
7 distribution lines, lines all over the streets, and
8 that becomes apparent from being unsightly, and
9 could be dangerous, and if you look at some of the
10 responses in the reports that I did on why some of
11 these municipals where there was duplicate competition
12 wanted to go out of business, it was precisely for
13 that reason. It was terribly unsightly to have all
14 these poles up and down the streets with wires
15 criss-crossing all over the place. That is a
16 social cost.

17 Q And there are other kinds of social costs as well,
18 are there not?

19 A Yes.

20 Q And those can be distinguished between private
21 costs to the firm and its operation?

22 A Yes, and more and more, yes.

23 Q And if there is regulation which requires action by
24 the firm; isn't that right?

25 A Sure.

Gerber - cross

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Q And you have in mind the ecology and the environmental pollution requirement which requires some action by the firm to abate pollution?

A Principally.

Q Now, there are other kinds of social costs which cannot be so easily quantified; is that right?

A Name one and I will consider it. That is possible.

Q But in terms of the definition of natural monopoly, the feature of it is that where the single supplier can supply the entire market at lower social cost than more than one supplier can do it; is that right?

A At low total cost?

Q Totally, socially and private.

A That is correct.

Q When the Commission defines the term "natural monopoly," they are not assuming it was always a natural monopoly, are they?

A I think the Commission talks about a firm -- they talk about industry characteristics tending toward natural monopoly, and obviously you can't assume that it always has been anything in any kind of industry over time. Technology changes and circumstances change, and markets change, and one has to look at these particular circumstances.

Gerber - cross

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2 Q So the definition assumes certain sets of conditions;
3 isn't that right?

4 A The definition is subscribed by a certain set of
5 conditions, and whether those conditions prevail at
6 any point in time is something to examine.

7 Q And one of the conditions is technology, as you just
8 stated; is that right, the state of technology?

9 A An important element affecting the conditions leading
10 to a natural monopoly, yes it is.

11 Q So if the technology changed over a period of time,
12 a firm which had a natural monopoly might lose it;
13 right?

14 A It could happen.

15 Q And the demand is another --

16 THE COURT: Suppose we take a short
17 break at this time. It is after 11:00 o'clock.
18 I am sure the jury would like a little stretch.
19 Please, ladies and gentlemen, keep in mind
20 the Court's admonition. We will be back in about
21 10 minutes.

22 {Recess taken.}

23

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1 Gerber - cross

2 MS. COLEMAN: Could you read the
3 last question, please?

4 THE COURT: We've got the wrong
5 court reporter.

6 MS. COLEMAN: Bear with me if I
7 repeat.

8 BY MS. COLEMAN:

9 Q Mr. Gerber, I believe we were talking about the
10 considerations in determining whether a firm is a
11 natural monopoly in a given market and I asked you
12 about the effective technology.

13 I believe the question which I asked you before
14 we broke was whether, if demand for the product
15 changed, that might have a bearing on whether a firm
16 would continue to be a natural monopoly.

17 A It could, depending on the kind of industry.

18 Q That's happened, in fact, with the railroads, has it
19 not?

20 A No, not in the sense we are talking about here.

21 The railroads are not a natural monopoly in the
22 sense that they compete with water and trucking and
23 air freight in the same way that an electric utility
24 is not a natural monopoly with respect to competition
25 with gas and oil, but for the purposes of examining

Gerber - cross

1 rail travel and rail traffic, freight traffic,
2 railroads tend to be natural monopolies in the sense
3 that one rail line can serve the traffic between two
4 points more efficiently than duplicate rail lines,
5 depending on the level of demand.
6

7 Q At the time that the railroads first were created
8 and set tracks across the country, it was considered
9 at that time that railroads were natural monopolies
10 at that time for long-distance transportation, were
11 they not?

12 A For the most part, unless you were located along the
13 Mississippi and Ohio Rivers.

14 Q But now they are no longer considered the only possible
15 way to provide long-distance transportation across
16 the country; right?

17 A Depending on the market, I would consider them still
18 probably a natural monopoly in, say, the
19 transportation of coal, in the absence of barge --
20 the availability of a river for river transportation.
21 It depends on the location.

22 Q And it depends on the technology available and it depends
23 on the demand for service, right?

24 A Yes.

25 Q Now, every firm, no matter what their market, works

Gerber - cross

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2 with certain elements of production -- materials,
3 fuel, labor and money; is that right?

4 A Yes.

5 Q In various combinations?

6 A Yes.

7 Q And those might be referred to as inputs of the firm's
8 production?

9 A Yes.

10 Q And if the cost of input changes drastically, that
11 can have an effect on whether the firm continues
12 to be a natural monopoly; isn't that right?

13 A I suppose it could.

14 Q And there have been drastic changes in the input
15 cost of the electric power industry in the last 10
16 years, haven't there?

17 A Yes, that's true. It's probably intensified the
18 natural monopoly characteristics of the industry.

19 Q The cost of capital has about doubled, hasn't it?

20 A About double in ten years is about right.

21 Q Cost of fuel has gone up even more than double, hasn't
22 it?

23 A Yes.

24 Q And new plants, no matter whether coal-fired or
25 nuclear, cost three or four times what they did in

Gerber - cross

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1969?

A Yes.

Q And this implies that the costs of additional product from the electric industry are rising as well; is that right?

A Yes.

Q You referred to economies of scale as a feature of the electric utility industry; is that right?

A Yes.

Q Now, economies of scale aren't a sufficient condition to conclude that there is natural monopoly, are they?

A It's an important condition. Probably not sufficient.

Q But it is not sufficient, is it?

A That's right.

Q Because there are a lot of industries which have economies of scale which aren't natural monopolies; correct?

A That's correct. That's why I said all of those conditions that I described, all of those factors that I described, combined, make for a natural monopoly, not any one of them.

Q In fact, in terms of economies of scale in generation, the benefits of larger and larger generation are tending to be limited now, aren't they?

Gerber - cross

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A I'm not sure I know what you mean.

Q Well, in the first place --

A It's still the case that as you increase the size of a generating unit, the costs per unit of capacity tend to decline.

Q In the first place, as you increase the size of the generating unit, you also lower reliability, do you not?

A Not necessarily.

Q But it is possible; right?

A Anything is possible.

Q And there are less advances in the sizes of units, the increases of scale of units, than there were previously; right?

A At the outer limits of size the technology is such that there are relatively small changes increasing the size. Relative to the average size generating unit that most utilities have, there is still ample room for economies of scale.

Q In terms of economies of scale overall, it is a fact, is it not, that those economies of scale at a certain point tend to end and in fact a larger firm experience is what are called diseconomies or disadvantages of scale; isn't that right?

Gerber - cross

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- 2 A In theory, that's correct, but technology can change
- 3 that.
- 4 Q That, in fact, has been the experience in the American
- 5 electric utility industry, hasn't it?
- 6 A No, I wouldn't say that. There are still economies of
- 7 scale, and TVA was enjoying economies of scale that
- 8 are substantially larger than the largest private
- 9 system in the United States.
- 10 Q Well, you are familiar, are you not, with the writings
- 11 in the field by Christianson and Green?
- 12 A Yes.
- 13 Q In fact, you have quoted from them on other occasions,
- 14 have you not?
- 15 A On one other occasion, yes.
- 16 Q And they have made a study of economies of scale
- 17 very recently in the generating industry, haven't they?
- 18 A Yes.
- 19 Q This is a drawing of a curve showing economies of
- 20 scale, isn't it, Mr. Gerber?
- 21 A I can't tell. I can't read the Y axis.
- 22 Q The Y axis? You mean the vertical axis, right?
- 23 A Yes.
- 24 Q It says "Average cost dollar per 1,000 per KWH,"
- 25 which means kilowatt hours; right?

Gerber - cross

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A Yes.

Q And this curve shows, does it not, that at a certain point of production the line starts to turn up, doesn't it?

A That's what the curve shows.

Q And what one would understand that to mean is at this certain point there start to be disadvantages of getting this large; isn't that right?

A That's what the curve says.

MR. LANSDALE: May I approach the

bench, if your Honor please?

THE COURT: Yes, you may.

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{Bench conference ensued on the record as follows:}

MR. LANSDALE: I come up not to object

so much as to the specific question but we've gone on for a considerable time now about economies of scale in generation. There is no claim here, it is not necessary to deal with questions of natural monopoly and generation.

The only claim in respect to natural monopoly is in distribution, which seems to me to be the only thing relevant.

Gerber - cross

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2 I'm not trying to restrict the investigation
3 of natural monopoly theory, but it seems to me
4 we are going pretty far afield into whether or not
5 if a generating unit gets to be too big there is
6 a diseconomy.

7 CEI clearly is not anywhere near the place
8 on that scale that shows the diseconomies involved,
9 and I submit that going into all this detail about
10 natural monopoly and economies of scale in
11 generation doesn't have any relevance at all.

12 MS. COLEMAN: Your Honor, I think
13 this is clearly within the scope of the direct,
14 the claim that there were natural economies of
15 scale in all the features of the electric
16 industry here, and I mean to examine into that
17 and what its shortcomings might be.

18 I will go into distribution as well, but I
19 would like to take them one at a time.

20 THE COURT: Well, I have been
21 having great difficulty following the
22 cross-examination, but I don't know if it is
23 going to credibility or going to substance or
24 what it is going to. But I suppose if I am to
25 take a broad approach to cross-examination, we

1 Gerber - cross

2 will see what develops here. But I assume you are
3 going to connect this up somehow?

4 MS. COLEMAN: Yes, your Honor.

5 THE COURT: Let's proceed.

6 {End of bench conference.}

7 - - - - -

8 THE COURT: Overrule the objection
9 at this juncture.

10 BY MS. COLEMAN:

11 Q Mr. Christianson and Mr. Green, who did the study from
12 which this is an illustration, wrote in their article
13 reporting on that study, Mr. Gerber:

14 "We conclude that a small number of extremely
15 large firms are not required for efficient production
16 and that policies designed to promote electric
17 power generation cannot be faulted for sacrificing
18 economies of scale."

19 Do you agree with their assessment?

20 A No.

21 Q Before we go on to another subject, Mr. Gerber,
22 are you familiar with where CEI would stand on this
23 curve?

24 A Oh, I think I have a pretty good idea. If what you
25 are asking me is what their total output is --

Gerber - cross

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Q Right, their total kilowatt hours output.

A -- it's somewhere around the point of inflection of the curve.

Q By that you mean where it dips down?

A Somewhere between 15 and 20 billion kilowatt hours.

Q Right in this area? {Indicating.}

A Yeah. But I am not suggesting at all that that curve represents where CEI is on its own cost curve.

Q In terms of this curve, which is based on a look at the national industry, a company which is on this flat part has very little to gain from proceeding further along in terms of output, doesn't it?

A No.

Q Isn't that what the curve shows?

A That's what the curve shows but, apart from the fact that there were a great many flaws in that study where the data they used was wrong, because I checked it, I might also point out that Christianson and Green made comment that the firms that were single firms, achieved their size as single firms rather than through pooling, where the ones that showed continuing declining costs as they went up to the larger size.

So, for example, American Electric Power was one

Gerber - cross

of the firms they mention in that respect. American Electric Power is up there in the 55 or 60 billion kilowatt hour range.

Q And, in fact, their conclusion was that American Electric Power was showing significant diseconomies of scale?

A I don't recall that at all. I thought they said they were showing economies of scale.

Q In this study we are looking at right now is one you said you weren't familiar with, didn't you?

A No. I think you asked me if I was familiar with the Christianson and Green study that I quoted from, and I said yes.

Q I asked if you were familiar with Christianson and Green and you said yes; right?

A Yes.

Q And they have, in fact, done a number of studies, haven't they?

A Oh, I think two that have been published.

Q The one you quoted from concerned pooling, right?

A Yes.

Q And this one concerns economies of scale, which is this study?

A Yes. The one on pooling in which they made this

Gerber - cross

comment about single firms still showing economies of scale came later than the early one. More recent.

Q In the context of their study of economies of scale they stated:

"Not only was a large portion of all power produced in the flat region of the curve" -- that lower part -- "but 67 percent was produced by the American Electric Power Company which showed significant diseconomies of scale."

A I don't recall that, but the Securities and Exchange Commission didn't seem to think so and on those grounds approved the acquisition of Columbus and Southern Ohio Electric Companies by AEP.

And from my own experience I don't think that's right, that is, the Christiansen-Green results are right.

Q The fact is economists differ in their assessment of the electric industry; is that right?

A Oh, I can hardly think of a subject that economists don't differ on.

Q And agency conclusions about what should be done in the industry may vary; is that right?

A It could.

Gerber - cross

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Q They don, in fact, don't they?

A It's such a broad question I really can't say.

If you ask me about a specific subject, I might have a comment, but as a generality, I suppose various agencies in various places could disagree about almost anything.

Q In fact, in terms of your study you found some situations where the Government policy favored competition and somewhere it did not; is that right?

A No. I can't think of any place where Government policy favored competition in the electric utility industry.

Q In terms of your study now.

A That's the way I understood your question.

Q You found situations, did you not, where the Government policy permitted two utilities to provide service in the same town; right?

A I found situations where Government policy permitted the existing duplication of service in the same town, but I found no situation in which they had the approval of governmental policy and, indeed, in every case that I can recall government policy frowned upon it.

In Texas they wished it would go away and they

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Gerber - cross

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2 could get certified areas. In Ohio the Legislature
3 passed a law requiring that boundary lines be mapped
4 in specified service areas. In Iowa they did the
5 same thing. In South Dakota they did the same thing.

6 In fact, in every case, Government policy has
7 been counter to duplication in competition, has
8 encouraged cooperation, in fact, and in fact
9 Government policy has been to encourage cooperation
10 in this industry of a kind that would be frowned upon
11 in almost any other kind of competitive industry.

12 Q And it is true, isn't it, Mr. Gerber, the Government
13 policy has also frowned upon conduct which would be
14 frowned upon in any other industry?

15 A I don't know to what you are referring.

16 Q Well, in your study of Oregon you found, did you not,
17 that the State Commission there found upon the
18 discrimination in pricing that the private utility
19 was engaging in?

20 A In Oregon there was a Government policy, first, to
21 eliminate, although they did not say they had to
22 eliminate, discriminatory pricing, I might add.
23 All they said with regard to Pacific Power and Light
24 pricing in those duplicative areas such as the
25 Dalles and Springfield was that, if they charged

Gerber - cross

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2 lower rates in those cities than they charged in the
3 rest of their system, they could not compensate that
4 by having the rest of their system make up the
5 difference and the stockholders would have to bear the
6 burden. That's all they said.

7 Now, they may very well have recognized that
8 this would discourage that kind of pricing, but they
9 also said it would be desirable to eliminate
10 duplicative competition because of its inefficiency
11 and waste.

12 Q That was the decision of that agency that you are
13 referring to, is that right?

14 A That's correct.

15 Q In Texas are you aware of the fact that the Texas
16 Public Utilities Commission recently approved
17 switch-over tariffs specifically to enable
18 customers to switch service from one utility to
19 another so long as they pay the cost of switching?

20 A I know there is one case where they imposed a charge
21 for meter renewal and replacement, which is the kind
22 of extra charge that would tend to discourage
23 switch-overs.

24 Q But if the consumer wanted to switch over, they could
25 do so under that directive, couldn't they?

Gerber - cross

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2 A That's correct. But if you make the price higher,
3 you certainly tend to discourage them from doing so.

4 Q Because people respond to price differentials; right?

5 A Generally, they do.

6 Q Let's turn to the City of Cleveland.

7 In what product market do you claim there is a
8 natural monopoly?

9 A The retail distribution of electricity.

10 Q What is the geographic scope of the area where you
11 claim there is a natural monopoly?

12 A I think there is a natural monopoly probably in the
13 entire City of Cleveland. These circumstances are
14 appropriate for natural monopoly in the entire City
15 of Cleveland.

16 Q You have just defined before the break natural
17 monopoly as where one firm can serve at lower total
18 cost.

19 You believe CEI is that one firm in the City of
20 Cleveland?

21 A Well, it is probably the case that CEI is that one
22 firm, but irrespective of which firm it is, I would
23 expect that one firm could probably serve at lower
24 cost than two firms.

25 Q Was there always a natural monopoly in the City of

Gerber - cross

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2 Cleveland, Mr. Gerber?

3 MR. LANSDALE: May I have that question
4 read?

5 THE COURT: "Was there always a
6 natural monopoly in the City of Cleveland, Mr.
7 Gerber?"

8 A Very early in the history of the electric industry in
9 Cleveland it was probably the case that the natural
10 monopoly circumstances embraced subareas of the City
11 of Cleveland, that is, the technology was such that
12 there was natural monopoly but it may very well have
13 been in an area that was smaller than what really
14 is the rather arbitrary political boundaries, just
15 as there was in many cities. For example, New York.
16 There was a natural monopoly. It just was smaller
17 than perhaps the entire City of New York.

18 Q How long has there been a natural monopoly in
19 electric retail distribution in the City of Cleveland?

20 A I think probably from the outside of the industry.

21 Q Are you aware there has been competition in the
22 distribution of retail electric power since 1914?

23 A Of course.

24 Q Do you believe that CEI can serve the City of
25 Cleveland at lower total cost because of its

Gerber - cross

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2 generating resources?

3 A Oh, that's one reason.

4 Q Its generating resources are located throughout the
5 City of Cleveland, aren't they?

6 A Pretty much.

7 Q And in fact, some of them are jointly owned with its
8 CAPCO partners, are they not?

9 A Some are, but they are not in the service area of
10 CEI.

11 Q No, they are not. They are in Pennsylvania, aren't
12 they?

13 A Some are.

14 Q Some are located, and others shared facility with
15 the company other than the CAPCO partners in
16 Pennsylvania; right?

17 A A non-CAPCO partner in Pennsylvania, did you say?

18 Q CEI shares an electric facility in Pennsylvania with
19 the Pennsylvania Electric Company, doesn't it?

20 A At the moment, I don't recall anything.

21 Q Are you familiar with the Seneca pump storage plant?

22 A Oh, yes, yes.

23 Q That's a way of storing electricity there at the
24 Seneca pump storage, isn't it?
25

Gerber - cross

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2 A It's correct, stored in the form of water.

3 Q And when the water is let run out, it is a means of
4 retrieving the electric power; isn't that right?

5 A You generate electricity to use in a pump, you pump
6 the water up behind the dam, and then when you need
7 the electricity, you get somewhat less, about two
8 thirds of what you used to pump it up. You get it
9 back when you let the water run back through the dam,
10 through a turbine.

11 Q So CEI can draw power from Seneca pump storage in
12 Pennsylvania and its CAPCO purchasers to provide
13 generation in the City of Cleveland; right?

14 A CEI spent a lot of capital to cooperate in building
15 plants on which it can draw to meet its capacity
16 requirements, of course.

17 Q So that it is through affiliations with other firms
18 that CEI might provide power at lower total cost in
19 the City of Cleveland; is that right?

20 A No, it is not affiliated with other firms.

21 Q It has agreements with other firms; right?

22 A Oh, sure.

23 Q And through those agreements it shares some generating
24 facilities; right?

25 A It shares ownership in participation in other generating

Gerber - cross

1 facilities, yes.

2
3 Q So there is more than one firm involved in providing
4 total power at lowest cost in the City of Cleveland;
5 is that right?

6 A There is more than one firm involved in providing
7 total power at lowest cost almost every place in the
8 United States; since I know of no significant utility
9 in the United States that isn't interconnected with
10 other utilities from whom it draws power.

11 Q Yet your definition of natural monopoly is where one
12 firm can provide service at lowest total cost?

13 A We haven't even been discussing distribution. Of
14 course, that's the definition. In the distribution
15 market that's a natural monopoly. The fact that there
16 may be cooperation doesn't mean there is a natural
17 monopoly. The fact that there may be, to support
18 the economies of scale, reflects a contract between
19 two firms may let us say its natural monopoly is
20 much larger market and jurisdiction business but to
21 maintain separate corporate identities getting this
22 wider horizontal integration by virtue of agreements
23 rather than mergers.

24 Q When we went through a definition of natural monopoly
25 before the break, you stated it in terms of a firm

Gerber - cross

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2 which provided the product at lowest total cost, did
3 you not?

4 A No, you stated it in terms of a firm with the lowest
5 total cost.

6 I pointed out, I think several times, that there
7 can be, in effect, natural monopoly and integration
8 even though you have separate corporate identities.
9 The effective economic integration is as though they
10 were one, even though you maintain separate corporate
11 identities.

12 Q That was in your direct when you were talking about
13 TVA, wasn't it?

14 A I think I used TVA as an example.

15 Q And you used TVA as an example because in this
16 specific situation TVA exerted certain control over
17 the way in which power was marketed to the ultimate
18 consumer; right?

19 A That was one reason. They also exert considerable
20 control over the market.

21 Q And that's true just in the situation of TVA, right?

22 A What is just true?

23 Q That you have an effective single firm because
24 perhaps the supplier is controlling some features in
25 the way in which the power is marketed, ultimately?

Gerber - cross

A Oh, no. You find a high degree of vertical integration effectively between wholesale suppliers and wholesale customers where a supplier specifies delivery points, where a supplier specifies a lot of design work for the distribution, where there is a lot of close contact between supplier and customer, there the contracts are as long as 45 years, which gives you the same effect even though, technically, they have separate corporate identities.

Q You were not talking about that circumstance here in Cleveland?

A Between the Cleveland Electric Illuminating Company and MELP?

Q Right.

A Not at all.

Q Although the CEI company does have influence over the price at which Muny Light must market its power at retail, doesn't it?

A I am not sure what you mean by that, but if you mean by that that it appears that MELP has some concern about keeping its rates in some relationship to the rates of CEI, I suppose it does.

Q And those rates also have some relationship to the wholesale charges by CEI, do they not?

Gerber - cross

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2 A I am not sure that they do at all. The wholesale
3 charges by CEI certainly affect the cost, but what
4 MELP chooses to do about this is pretty much within
5 their control. If they are trying to recover cost,
6 then, of course, that's a cost they would have to
7 recover.

8 Q If CEI is the only power supplier for Muny Light,
9 then the cost reflects the CEI wholesale cost
10 as opposed to some other wholesale cost; is that
11 right?

12 A That's true whenever anybody is the wholesale
13 supplier to a wholesale customer.

14 Q Let me understand then. Your testimony about CEI
15 being a natural monopoly is only concerned with the
16 distribution of power in the City of Cleveland; is
17 that correct?

18 MR. LANSDALE: I object. May I
19 approach the bench?

20 THE COURT: Yes.

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

24 MR. LANSDALE: I don't believe that
25 this witness has testified that CEI is a natural

Gerber - cross

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2 monopoly. What this witness has testified that
3 distribution of electric energy in Cleveland is a
4 natural monopoly market and he is testifying, I
5 think, in response to your question that the
6 probabilities are that, looking at the whole
7 City of Cleveland, that CEI would probably do it
8 cheaper -- could be the one that would do it the
9 cheapest. But this witness has not testified that
10 CEI exerts a natural monopoly and I object to the
11 suggestion.

12 MS. COLEMAN: I thought that's
13 what he had just got done telling me, but I've
14 got to respond to what he says rather than what
15 you say about it. If I have misstated it, I am
16 sure he will correct me. I'm trying to understand
17 what it is he is saying. I'm trying to get down
18 to that point.

19 THE COURT: Well, if he understands
20 the question, he may answer.

21 {End of bench conference.}

22 - - - - -
23 THE COURT: Read the question back,
24 please.

25 Mr. Gerber, if you understand the question, you

Gerber - cross

may answer. If not, we will have it rephrased.

{The pending question was read by the reporter.}

A I think what my testimony went to up until now has been with respect to natural monopoly and the distribution of electric power in the City of Cleveland, but I do believe that CEI is a natural monopolist in a water area, as you yourself, by your questioning, have suggested.

Q And do you distinguish between an active monopoly in distribution and in generation, Mr. Gerber?

A You can make that distinction.

Q I want to understand what you are saying.

A Yes. The fact is that, since there are economies of scale still to be achieved, as you have indicated, CEI apparently can achieve only through cooperative arrangements with other utilities, suggestions that CEI can greatly expand the scope of the market it serves and the load it serve and continue to achieve economies of scale on its own, that is, if its load grew, it would not have to be cooperating with others to achieve these economies of scale, which suggests that the natural monopoly market is much wider than the market that CEI now serves.

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Gerber - cross

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2 Q Except that much wider market is served by more than
3 one firm, isn't it?

4 A There is no one market that is served by the more
5 than one firm. Each of the firms may be below the
6 optimum size of the natural monopoly market, but each
7 has its own natural monopoly market.

8 Q Then the market isn't this large area, you are saying;
9 it is the market served by the individual firm?

0 A Depends on what it is you want to examine the market
1 for. If you want to try to define the optimum size
2 of the natural monopoly market for generation, you
3 would probably want to look at something considerably
4 larger than CEI or possibly something even larger
5 than CAPCO.

6 Q We want to examine the economic situation here to
7 determine whether one firm can serve at lower total
8 cost than two.

9 What market should we look at, Mr. Gerber?

10 A If you are talking about distribution, which seems to
11 me is the relevant market for our consideration, one
12 would look at the duplicative areas in the City of
13 Cleveland.

14 Q Is it your testimony that there is a natural monopoly
15 and distribution in each of the towns and suburbs around

Gerber - cross

the area?

A Oh, yes.

Q And as to each of these separately, CEI is a natural monopolist?

A Whatever firm is serving in those cities is a natural monopolist who can serve more efficiently and at lower cost than any combination of firms would serve in those markets.

Q How do you know that they can serve more efficiently and at lower cost than any combination of firms can serve?

A Because I think that is true in Cleveland and they all are even smaller than Cleveland.

Q To find out whether one can serve at lower total cost than any combination, you have to study every combination, don't you?

A No, I don't really think so.

Q Well, you have to study all the facts we discovered earlier, the technology and the demand and the cost of the distribution?

A There are some things that are so obvious that it doesn't require elaborate studies; and that's one of those that is so obvious.

Q And you just kind of know that?

Gerber - cross

A Based on nearly 30 years of experience, yes.

Q But you have conducted no specific study to determine whether one firm can provide this service cheaper than the City of Cleveland; is that right?

A Did I look at the City of Painesville to determine whether the second supplier would reduce the cost of what the City of Painesville could do alone? No.

Did I make a specific study of the City of Cleveland to see to what extent the cost would be reduced? No.

But there has been testimony in this proceeding by CEI and there has been a report by the consultant to the city with regard to the cost of distribution of the Municipal Electric Light Plant indicating that their costs are inordinately high compared to the similarly-sized municipal systems, which suggest that it is a natural monopoly condition and it would be lower cost for one firm to serve rather than two.

Q Then the answer, Mr. Gerber, is you have made no study; is that right?

A I have not made an engineering study.

THE COURT: How long are you going to be with the witness yet, Ms. Coleman? If you are going to be any period of time, it is now

Gerber - cross

quarter after 12:00, perhaps this would be --

MS. COLEMAN: I think it may be a good time, your Honor.

THE COURT: Perhaps this would be an opportune time for us to recess for lunch, and we will resume at 1:30. Please, during the break, adhere to the Court's admonition. Thank you.

{Court was in recess for the lunch period.}

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MONDAY, OCTOBER 17, 1980; 1:45 P.M.

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3 THE COURT: Please be seated.
4 Call the jury.

5
6 {The jury was reseated in the jury box.}

7 THE COURT: You may proceed.

8 MS. COLEMAN: May I approach the
9 bench, your Honor?

10 THE COURT: Yes.

11
12 {Bench conference ensued on the record as
13 follows:}

14 MS. COLEMAN: I have asked that we
15 begin by reading a stipulation, Stipulation No.
16 79.

17 MR. LANSDALE: No objection.

18 THE COURT: All right.

19 {End of bench conference.}

20
21 THE COURT: Ladies and gentlemen
22 of the jury, Joint Stipulation No. 79 reads as
23 follows:

24 "The former Ohio Revised Code Section 4905.261
25 {repealed on July 12, 1978, by Ohio Revised Code,

1 Section 4933.83} limited competition between
2 privately-owned electric utilities for customers
3 already served by a public utility {but did not
4 limit competition for new customers} and present
5 Ohio Revised Code Sections 4933.81 to 4933.90
6 prohibit competition between privately owned electric
7 utilities in the retail sale of electric energy.

8 "Neither Ohio Revised Code, Section 495.261
9 did apply nor Ohio Revised Code Sections 4933.81
10 to 4933.90 do apply to limit a municipal utility's
11 competition for retail sales of electric energy
12 because a municipal corporation derives
13 authority to provide electric energy to consumers
14 from Article 18 of the Ohio Constitution, adopted
15 in 1912, and it is not lawful for the Ohio
16 Legislature to restrict such activity by municipal
17 corporations.

18 "There is nothing in Ohio to prevent
19 municipal utilities from competing directly with
20 private utilities in the retail sale of electric
21 energy."

22 MS. COLEMAN:

Thank you.

23 BY MS. COLEMAN:

24 Q Mr. Gerber, before we broke for lunch you indicated
25 you had not done any studies to determine whether in

Gerber - cross

fact there is a natural monopoly in the City of Cleveland. In fact, the only study you referred to was one, I believe, by Mr. Kemper; is that right?

A I think I said that there is a natural monopoly market in Cleveland as there is every place. The only question is the size of that market.

Q I asked whether you had done any studies and your answer was no; wasn't it?

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

THE COURT: You are getting into that same pattern again, Ms. Coleman.

MS. COLEMAN: The witness gives a non-responsive answer, your Honor.

THE COURT: No, it is not. You misstated what his testimony was. I don't know if you did that deliberately or inadvertently, but that was not his testimony and you should have known that was not his testimony. Then you follow up with another question designed to create an inference that he misstated somewhere in his testimony an answer to your question.

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Gerber - cross

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2 Now, I have told you to stop that.

3 MS. COLEMAN: Your Honor, I
4 misremembered it. Let's have that last question
5 and answer read back, please.

6 THE COURT: Let's proceed. I have
7 told you and I don't want to tell you again.

8 MS. COLEMAN: Do you have the last
9 question and answer?

10 THE COURT: Are you going to go
11 back to the lectern?

12 MS. COLEMAN: I will, your Honor,
13 but I would like to hear the last question and
14 answer.

15 THE COURT: Please go back to the
16 lectern. I will have the last question and answer
17 read. Don't argue with me.

18 {End of bench conference.}

19 - - - - -
20 THE COURT: Read the last two
21 questions and answers.

22 MS. COLEMAN: Before lunch.

23 THE COURT: Ms. Coleman, would
24 you kindly let me direct the court reporter to
25 read it back?

Gerber - cross

{The record was read by the reporter.}

THE COURT: That's precisely what your question was and your paraphrasing his answer is inaccurate.

MS. COLEMAN: May I approach the bench?

THE COURT: Yes, you may.

- - - - -

{Bench conference ensued on the record as follows:}

THE COURT: I'm getting tired of that conduct you are displaying and you better comport yourself in a professional manner.

MS. COLEMAN: Would you please read the last question and answer before lunch?

{The last question and answer before the lunch period was read by the reporter.}

THE COURT: Let's proceed.

MS. COLEMAN: Thank you.

{End of bench conference.}

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THE COURT: You may proceed, Ms. Coleman.

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Gerber - cross

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BY MS. COLEMAN:

Q Your testimony before lunch, Mr. Gerber, was you had made no engineering study whether there was a natural monopoly market; is that correct?

A I have made no engineering studies.

Q You referred this morning, I believe, to the testimony of another witness on the subject. Were you referring to Mr. Kemper?

A I believe it was Mr. Kemper. And I also referred to a study by consultants to MELP that seemed to infer the same thing by stating that the distribution costs of MELP were inordinately high.

Q There was no analysis of the reason for their being high, was there, by those other consultants?

A I don't recall the details.

Q And as far as Mr. Kemper's study is concerned, he just looked at a few neighborhoods in Cleveland; is that right?

A As I recall, he looked at some sample neighborhoods.

Q Those weren't random samples, were they?

A I think he said they weren't.

Q He said they weren't?

A I think that's what he said.

Q And he was examining just certain distribution costs;

1
2 is that right?

3 A Yes.

4 Q He, in fact, examined all the distribution costs of
5 adding more customers to the CEI system, according to
6 Mr. Bingham; isn't that right?

7 A I know there are some costs excluded. I don't recall
8 the details.

9 Q And, in fact, the study Mr. Kemper did doesn't look at
10 all the costs to provide service to the customer, does
11 it?

12 A No. Obviously, he was looking only at distribution
13 costs.

14 Q And it doesn't look at all the social benefits and
15 costs involved in a supplier providing service to
16 customers, does it?

17 A I don't know what you mean by "social benefits."

18 Q If there are social costs, are there not social
19 benefits?

20 A Well, I assume there are benefits to some members of
21 society or they wouldn't spend their money to buy the
22 service.

23 Q Mr. Kemper's analysis didn't take into account all
24 the possible costs and benefits in a producer
25 providing electricity to a consumer, did it?

Gerber - cross

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: I submit Mr. Kemper is the man to interrogate about this.

I object to further interrogation of this witness about what Mr. Kemper did.

MS. COLEMAN: He's relying on it as a resource. He's an expert. He's able to say what its limitation and value is to him as an expert.

MR. LANSDALE: He never in his direct testimony, he did not state any reliance on Mr. Kemper. He cited Mr. Kemper to you in your cross-examination.

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

{End of bench conference.}

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THE COURT: You may proceed,

Ms. Coleman.

BY MS. COLEMAN:

Q In your direct testimony, Mr. Gerber, you referred,

Gerber - cross

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2 I believe, to the situation where gas and electric
3 companies were competing, and you testified that the
4 electric companies abandoned some of their promotional
5 programs in about 1973 or 1974; is that correct?

6 A Yes.

7 Q And it was your testimony that they did so because
8 they were experiencing increased costs; is that
9 correct?

10 A Yes.

11 Q In fact, the gas companies were also experiencing
12 increased costs; right?

13 A Yes.

14 Q And this phenomenon of experience and increased
15 costs in the mid '70's is something that affected
16 the electric utilities, not just in their competition
17 with the gas companies, but as a general matter; isn't
18 that right?

19 A Generally costs generally rose in the electric utility
20 industry.

21 Q Do you agree some restraint of competition is due to
22 the fact of above-average cost so that every time
23 you had a customer or added load, you tended to
24 increase your average cost, and the faster you proceed,
25 the faster your average cost rises, and that tended

Gerber -cross

1 to dampen the utilities to seek new load?

2 A That is true.

3 Q Isn't it a fact, that it is your opinion that all the
4 costs of utility service have risen in that fashion,
5 so that the incremental costs are higher average
6 costs?

7 A Incremental, totally, are above average total cost.

8 I would use -- whether I would use the term as
9 "all costs" I am not sure.

10 Q You would use that to refer to the incremental costs,
11 even of distribution, wouldn't you?

12 A Now, there, you would have to be a little bit more
13 definite.

14 If you are talking about the incremental costs
15 of distribution for serving the existing customer,
16 it is probably still below-average cost.

17 If you are talking about incremental costs of
18 extending service to new customers at the distribution
19 level, then the incremental costs are above-average
20 costs.

21 Q Now, when you have this kind of cost situation, Mr.
22 Gerber, one can't immediately tell then whether it will
23 be beneficial to a utility to take on additional
24 customers; isn't that right?
25

Gerber - cross

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2 A It depends on the circumstances.

3 If you have a line going down the street, and let
4 me repeat, if you have a line going down the street,
5 and there is another line of another company going down
6 the same street, it would be cheaper for one of those
7 suppliers to supply all the customers on that street,
8 and the only question beyond that is how many more
9 streets you would want to embrace within the natural
10 monopoly market, and if you have a line going down
11 the street already in place, the incremental costs of
12 adding customers on that street that you don't already
13 serve may be quite low and below average costs.

14 Q It depends whether it will be in fact below average
15 cost?

16 A No, ma'am.

17 It seems to me clear that if you have a line going
18 down the street serving half the customers on the
19 street, that the other half of those customers can
20 probably be added to the service at incremental costs
21 substantially below -- and I am talking about
22 distribution costs -- substantially below average
23 costs, because the additional facilities would be
24 extraordinarily small.

25 Q It depends on the capacity of the line, doesn't it?

Gerber - cross

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2 A Not really. It probably depends principally on the
3 capacity of the transformers.

4 Q It depends --

5 A -- in the area of the city that we are talking
6 about, where my understanding is that average use is
7 fairly low for residential customer, and it probably
8 wouldn't take much in the way of additional
9 transformer capacity.

10 Q Well, it depends on how much the line can hold and
11 how much it is holding, doesn't it?

12 A You mean how much the line can carry?

13 Q That is right.

14 A Well, the little I know about CEI's distribution
15 practices, I would expect it could carry the additional
16 customers.

17 The limitations and distributions generally
18 are -- it is not the line itself, but the transformers
19 on the pole, usually.

20 Q As a matter of economics, Mr. Gerber, whether the
21 customer can be added at a lower incremental cost
22 depends on all the costs involved in adding them,
23 doesn't it?

24 A I am trying to outline what those costs might be.

25 The poles would stay the same, or if it was

Gerber - cross

1
2 an underground service, the underground system would
3 stay the same, and essentially you might have to
4 increase the capacity of the transformers, and that is
5 about all, unless you are in a situation where you
6 have not hooked up the house to the main primary,
7 in which case you would have to draw a line to the
8 house, but that is a very small cost.

9 About 45 percent of the distribution costs
10 represent the costs of simply setting up the network
11 in the first place, and once you have got that in
12 place, the incremental costs on that same line down
13 the street gets to be quite small, and most likely
14 would be substantially below-average costs.

15 Q And the costs of that distribution network is a small
16 part of the total cost of getting the product to
17 the customer?

18 A If you were to add in generation and transmission the
19 cost of the distribution facilities, including the
20 capital costs of those facilities, probably represents
21 somewhere between 25 or 30 percent of the total
22 investment.

23 Q You are looking --

24 A -- the total investment of the electric utility.

25 Q In the distribution facility?

Gerber - cross

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2 A Right.

3 Q Is that true for CEI?

4 A I don't recall the exact numbers. Maybe it is a little
5 higher for CEI, because of the proportion of
6 underground distribution.

7 Q It is actually substantially less than that, isn't it?

8 A Not that I know of.

9 Q In terms of a situation where you have distribution,
10 a distribution system, and there aren't really
11 economies of scale in a distribution system, are there?

12 A I believe there are.

13 Q Those don't relate to the capacity of the line so
14 much as the density, do they?

15 A You asked me about economies of scale and
16 distribution, and it involves a lot of things.

17 There are economies of scale in engineering,
18 where you have a larger distribution system, where
19 you present more of a challenge for good engineering,
20 and you have lower inventory costs, and lower cost
21 of crews, emergency crews, and you use them more
22 efficiently, and there are many factors that enter
23 into the determination of what is efficient and
24 where you get your economies of scale, and, yes,
25 I believe that there are significant economies of

Gerber - cross

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2 scale to be achieved in distribution and are
3 achieved in distribution.

4 Q Whether they can be achieved depends on all the
5 circumstances that we went through before, doesn't it?

6 A I don't understand your question, what circumstances?

7 Q The market, the situation of the demand in the market,
8 and the technology, and those kinds of features.

9 A Given the existing level of demand and the existing
10 technology in the electric utility industry and the
11 distribution at the present time, there are
12 economies of scale I believe in distribution.

13 Q Is that based on some study that you did?

14 A That is based on my experience and my review of
15 distribution and in a lot of places, a lot of areas,
16 and my familiarity with a lot of engineering
17 organizations and a lot of utilities, and what I have
18 seen among distribution systems and municipal
19 systems, and so forth.

20 Q You have testified that the cost of generation is
21 part of the cost of getting the power to the
22 consumer; is that correct?

23 A If there is no generation, there is no power, so it
24 would have to be part of the cost.

25 Q And the economies of scale in terms of the generation

Gerber - cross

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2 may have some effect in that final cost to the
3 consumer; right?

4 A I am not sure I understand the question, but if you
5 are asking me will exploitation of economies of scale
6 reduce costs, of course it will in generation or any
7 other activity.

8 Q Isn't it true, Mr. Gerber, that the relative gains
9 in terms of economies of scale if you are on the high
10 end of the scale, they are small, whereas if you are
11 on the low end, the economies you gain by going to a
12 larger generator are proportionally greater?

13 A If you do it effectively, and if you don't build an
14 85-megawatt unit that doesn't operate.

15 Q You made a study comparing the cost of building a
16 small coal-fired unit, a 100 megawatt unit, to a
17 large scaled nuclear unit; is that right?

18 A I don't know what you are referring to. I have made
19 such comparisons many times.

20 Q And when you made those comparisons, and assume the
21 small coal-fired unit was owned by a municipal system,
22 and the large nuclear unit is owned by an investor-owned
23 utility with its financing charges, and you found that
24 the coal-fired unit could be equal to or cheaper than
25 the production of the nuclear unit, didn't you?

Gerber - cross

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2 A There was one case that I looked at in connection with
3 another proceeding in which I pointed out that,
4 given subsidization of the small coal-fired unit, it
5 was possible for the subsidized entity to achieve
6 dollar costs, not real costs, but dollar costs, in
7 the coal-fired unit; the coal-fired unit, the smaller
8 unit -- than could be achieved or equivalent to those
9 costs that could be achieved in the larger nuclear
10 units.

11 But that was only true because of the subsidy
12 available for the coal-fired unit, and it would not
13 be true otherwise.

14 Q When you talk about subsidies, you are referring to
15 the fact that the municipal system has a lower
16 cost of money than the investor-owned utility in that
17 analysis?

18 A No, I am talking about the fact that the municipal
19 utility has a lower cost of money by virtue of
20 legislation or constitutional provisions that grant
21 that lower cost of money to the municipal utility.

22 Q And under those circumstances you found that the
23 cost of production from the small unit and the large
24 unit were comparable; isn't that right?

25 A In that one case, yes.

Q By the way, how many different products do you believe

Gerber - cross

1
2 that CEI produces?

3 MR. LANSDALE: Objection. May I
4 approach the bench?

5 - - - - -

6 {Bench conference ensued on the record as
7 follows:}

8 MR. LANSDALE: I specifically object
9 to this question because the product market here,
10 as established by the law of this case, is the
11 retail sale of electric energy, and I object
12 more generally to this continual interrogation
13 into areas that have nothing to do with the case.

14 What difference does it make what the CEI
15 generatation costs are and what other companies
16 may have, equal to or different than, and the
17 costs of generation have nothing to do with this
18 case.

19 We are dealing with this distribution of
20 electric energy and at retail and the market
21 being either the City of Cleveland or the area
22 of competitive overlap, and I submit that this
23 ranging around in these other parts of the
24 industry have nothing to do with the case and
25 was not opened up on direct examination.

1 Gerber - cross

2 THE COURT: Would you like to
3 respond, Ms. Coleman?

4 MS. COLEMAN: The witness's testimony
5 was that a natural monopoly is judged by the total
6 cost of service, and further, he testified that
7 among the costs are generation as well as
8 distribution.

9 Questions about generation are germane,
10 particularly the question I just asked the witness,
11 and that relates to natural monopoly theory analysis,
12 your Honor.

13 THE COURT: In what respect?

14 MS. COLEMAN: The way it will be
15 linked up will be clear later.

16 THE COURT: In what respect?

17 MS. COLEMAN: A firm which is
18 involved in producing a number of products may
19 be subject to different analyses as to whether it
20 is a natural monopoly.

21 THE COURT: I will sustain the
22 objection. Proceed.

23 {End of bench conference.}

24 - - - - -

25 THE COURT: You may proceed.

1 Gerber - cross

2 Ms. Coleman.

3 BY MS. COLEMAN:

4 Q Is it your testimony, Mr. Gerber, in turning to
5 another subject, that the relevant market for retail
6 firm power is just the area where Muny Light has
7 distribution facilities?

8 A Where we have both Muny Light and CEI have distribution
9 facilities.

10 Q Did you review the exhibits offered on the subject
11 of relevant market by CEI in this case?

12 A I reviewed a lot of documents. I don't know that I
13 identified any of them as relevant market. I saw a
14 lot of documents on numbers of customers and where
15 they are located, and so forth.

16 Q Did you hear the testimony to the effect that there
17 are two areas of the City where Muny Light serves
18 almost exclusively?

19 A I believe I recall that.

20 Q And yet you include those areas as part of the relevant
21 market; is that correct?

22 A No. I think I said the relevant market was the area
23 of duplicate of competition. I am fairly certain
24 that is the way I defined the relevant market.

25 Q Do you have a particular geography in mind when you

1 Gerber - cross

2 talk about that?

3 A Sure, the area in which both have distribution
4 facilities, which has been defined on that map.

5 Q And you include in that geographic area that you have
6 in mind the places where Muny Light serves most of
7 the customers; is that right?

8 A I include in that area the places where Muny Light
9 serves most of the customers, but nowhere does Muny
10 Light serve all the customers, because my understanding
11 is that CEI does not overbuild or try to duplicate
12 Muny Light's facilities in those areas where it
13 does not have, presently have facilities and Muny
14 Light already serves.

15 Q And the basis of that is testimony of some of the
16 witnesses that you have heard?

17 A I don't recall whether it is testimony or discussions
18 I have had with people from CEI.

19 Q Are you aware CEI has facilities in the Collinwood
20 area, Mr. Gerber?

21 A Not specifically at this moment. It wouldn't surprise
22 me.

23 Q Are you aware the Collinwood area is one of the areas
24 Municipal Light got its start in by annexing the
25 Village of Collinwood?

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Gerber - cross

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A Yes.

Q And that CEI now has facilities in that area; right?

A I will take your word for it. I don't know, specifically.

Q As far as your further analysis of what you call the relevant market, if the City competed for a customer in the area which it does not now serve, you do not include that as part of the relevant market; is that correct?

A Relevant market can never be described with great precision. There is always some slopover.

If I found there were a situation where the City were actively competing for a customer or a group of customers and its competition was a realistic possibility and there was a realistic possibility that it was going to build facilities to serve that customer, I would probably want to include that in the relevant market. And there may be such few areas.

But as I say, one cannot possibly define a relevant market -- at least I have never seen it defined -- with great precision so that there is no fuzziness at the edges. I would expect there would be some fuzziness. And there may very well be some cases like that.

Gerber - cross

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2 Q You mentioned the question of subsidies.

3 Do I understand your testimony correctly that you
4 find there being subsidies in the Cleveland market to
5 both CEI and Muny Light?

6 A I'm not aware of any subsidies to CEI except possibly
7 some relatively minor subsidies which have been made
8 generally available to utilities in the form of
9 function control bonds.

10 The subsidies I have identified, which are
11 certainly not available to CEI, are the ability to
12 finance with tax-exempt bonds, which make possible
13 lower interest rates, and the freedom from paying
14 income taxes, among other taxes.

15 Q Well, CEI has a reduced obligation to pay income
16 taxes where it can meet the standards for that,
17 doesn't it?

18 A I don't understand what you are talking about.

19 Q CEI can take advantage of the rules for accelerated
20 depreciation for its equipment; right?

21 A Yes, but that's not a subsidy.

22 The tax law provides a certain basis for
23 taxes. That's a little bit like saying if you
24 imposed a 100 percent tax on all profits made by CEI
25 and then said, "Okay, you can have a break. We will

Gerber - cross

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2 give you 10 percent of that back," that that 10 percent
3 reducing the tax to 90 percent is a subsidy. That's
4 not the case.

5 CEI pays taxes like every other corporation in
6 the United States and the tax laws are very
7 complicated just as they are for individuals. The
8 fact of the matter is they have to abide by the tax
9 laws and pay taxes.

10 Now, the municipality doesn't even make out a tax
11 return because they are exempt from all Federal
12 income taxes.

13 Q Which is --

14 A If somebody buys a municipal bond and gets interest
15 on that bond, he pays absolutely no taxes. When
16 somebody buys a bond representing a debt obligation
17 to CEI, he pays the existing tax rate on whatever
18 interest he gets on that bond, and that makes a
19 substantial difference.

20 Q And all those features flow from the legal structure;
21 isn't that right?

22 A Sure, and the legal structure is often used to
23 provide subsidies to certain entities for various
24 purposes.

25 Q In fact, another form of subsidy provided is the

Gerber - cross

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2 power of eminent domain for public utilities; isn't
3 that right?

4 A No, that's not right. I don't view that as a subsidy.

5 Q By permitting the purchase of land for less than a
6 willing seller might want; is that correct?

7 A I don't see that it does that at all. It gives the
8 utility, or whatever the entity that has the power
9 of eminent domain, the power to acquire land and
10 arrange for purchase, but the seller, if he doesn't
11 like the price, is free to go to Court and fight as
12 hard as he likes to get the maximum price he can get
13 and the Court will decide on a fair price.

14 That's hardly a subsidy. It's a power, but it's
15 not a subsidy.

16 Q The Court may decide on a price that is less than the
17 seller wanted to get; is that right?

18 THE COURT: Approach the bench.

19 - - - - -

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

22 MR. LANSDALE: I ask the jury be
23 instructed that the legal standard is the
24 willing buyer / willing seller price for
25 condemnation either by municipality or public

Gerber - cross

1
2 utility.

3 I object to this interrogation.

4 MS. COLEMAN: I object to the
5 instruction.

6 I have no further questions on it.

7 THE COURT: Tell me the propriety
8 of your examination.

9 MS. COLEMAN: The witness has
10 testified about subsidies.

11 THE COURT: First of all, you are
12 characterizing your question.

13 Read the original question back.

14 {The reporter read as follows:

15 "Q In fact, another form of subsidy
16 provided is the power of eminent domain for public
17 utilities; isn't that right?"}

18 THE COURT: That's not a subsidy
19 and you know it's not. To characterize it as a
20 subsidy is highly irregular.

21 The law provides procedures and rules
22 regarding condemnation proceedings.

23 MS. COLEMAN: That's correct, your
24 Honor.

25 THE COURT: And you know what

Gerber - cross

1 they are, don't you?

2 MS. COLEMAN: I do.

3 THE COURT: What are they? You
4 just told me you know what they are. Tell me
5 what they are.

6 MS. COLEMAN: I'm not able to recite
7 them now, your Honor.

8 THE COURT: What are you asking
9 questions for that you don't know anything about?

10 MS. COLEMAN: I didn't say I know
11 nothing about it.

12 If the witness believes it is a form of subsidy,
13 he can answer yes. If he doesn't, he can answer no.

14 THE COURT: That's not so at all,
15 Ms. Coleman, and you know it is not so.

16 Am I going to start having the same problem
17 with you I do with Mr. Norris and Mr. Weiner
18 where you are characterizing questions and
19 including conclusory statements in your question,
20 raising inferences and inuendos not supported by
21 the facts?

22 MS. COLEMAN: It's for the witness
23 to respond, your Honor.

24 THE COURT: Please desist from it.
25

Gerber - cross

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2 Let's go back.

3 {End of bench conference.}

4 - - - - -

5 THE COURT: Ladies and gentlemen of
6 the jury, the jury is instructed to disregard the
7 questions and answers as they relate to
8 condemnation proceedings and the inferences
9 raised as a result of the questions.

10 Please ask proper questions and let's
11 proceed, Ms. Coleman.

12 BY MS. COLEMAN:

13 Q There are a variety of ways, Mr. Gerber, that the
14 utility industry has benefited from acts of the
15 Federal Government' isn't that correct?

16 A I suppose it is possible. I don't know. Maybe you
17 can enlighten me and indicate some, and I will tell
18 you whether I think that's a benefit or not.

19 Q One is the development of nuclear technology?

20 A No, I don't think that's true.

21 Q Another is the Federal statute which limits the
22 liability of utilities in case of nuclear accident?

23 A No, I don't think that's true.

24 Q That saves on insurance cost, does it not?

25 A No, I don't think that's true.

1 Gerber - cross

2 Q Let's go back to the question of subsidies in the
3 Cleveland market, Mr. Gerber.

4 Do you believe that in a situation where a
5 utility lowers its prices in one area and maintains
6 the same price in surrounding areas for electric
7 power that the customers in the surrounding area
8 are, in effect, subsidizing the lower price in the
9 first area?

10 A Let me see if I understand the question because you
11 used language ambiguously.

12 Do you mean a utility lowered the price in one
13 area --

14 Q Right.

15 A -- and maintained a higher price in other areas?

16 Q Maintains a different and higher price in other areas.

17 A It may or may not.

18 Q Wasn't it your testimony on direct that that was a
19 subsidy?

20 A No. If you look at my testimony, you will see that I
21 pointed to two specific cases, one of the Dalles
22 and one in Springfield, Oregon, and there was also a
23 situation in Portland, Oregon, in which the
24 Commission of the State, the regulatory agency, said
25 that the utility may maintain lower rates in those

1 Gerber - cross

2 duplicative areas that it maintains in other areas
3 but the other areas will not be charged rates that
4 would reflect, cause subsidization for those
5 duplicative areas.

6 That's what I said about subsidies in those
7 cases.

8 Q In a case such as we have just been discussing where
9 a system is competing with a smaller system in one
10 area and also has customers in a broader area, you
11 believe, do you not, that it is destructive competition
12 for the large system to reduce its rate below cost
13 and recoup its losses elsewhere by charging higher
14 rates to customers elsewhere in the system?

15 A I believe it is an undesirable type of competition to
16 encourage.

17 Q Mr. Gerber, your theory is that natural monopoly
18 market leads you to the conclusion that only one
19 system can survive in the market, is that correct?

20 A That's not my theory. It is commonplace in the
21 economic literature, going way back.

22 Q Do you believe that?

23 A I believe that the distribution level is more efficient
24 and more economic for a single supplier to serve and
25 for multiple suppliers to serve, and that is the

Gerber - cross

1 characteristic of a natural monopoly market.

2
3 Q Do you contend that that will necessarily result in
4 only one supplier serving?

5 A Unless there are some artificial restraints on the
6 competition, one supplier is likely to drive the other
7 supplier out of business or, in the alternative,
8 both may go bankrupt and will have to have a
9 reorganization of a new supplier to serve.

10 Q When you talk about artificial restraints, you include
11 in that if one of the suppliers has a lower cost of
12 power than the other?

13 A That's not an artificial constraint.

14 Q So in the situation in Oregon where the municipal
15 system had access to the Bonneville to Power
16 Authority, you didn't consider that an artificial
17 restraint; is that right?

18 A The fact is the City of Springfield and the Dalles
19 had access to low-cost Bonneville power and,
20 therefore, was able to underprice the competing
21 system, Pacific Power and Light. That's not
22 artificial restraint. That was the fact.
23 And so they ended up buying out the Pacific Power and
24 Light facilities in those communities.

25 Q Do you believe that for a utility in such a market as

Gerber - cross

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2 you described to want to be the survivor is a
3 reasonable attitude for that utility?

4 A Well, I can't imagine anybody being in any kind of
5 business in which there was competition that would
6 drive one or the other of the suppliers out of
7 business and not wanting to be the survivor.

8 Q How is your view affected if that utility that we are
9 talking about does not believe it will be the sole
10 survivor unless it takes actions to hasten the
11 decline of its competitor?

12 A I can't answer that question unless you tell me what
13 kind of action.

14 I would expect both suppliers, both competitors,
15 to take competitive action and to engage in competitive
16 activity. But if you are talking about competition,
17 that's what the word means, that's what it is all
18 about -- rivalry to take customers away from your
19 competitor -- and if that's what they do, that is
20 exactly what I would expect them to do.

21 Where they were not doing that, then I would
22 suspect there was some artificial restraint or
23 collusion.

24 Q You make a distinction, don't you, between types of
25 competition?

Gerber - cross

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2 A Again, that's broad. I don't know what you are
3 referring to.

4 Q You have used the term "destructive competition,"
5 at times, haven't you?

6 A Yes, I have used that term at times.

7 Q And I understand you define one of the aspects of
8 destructive competition as that which results in the
9 deterioration of quality of service?

10 A Yes.

11 Q And then you would consider the destructive competition
12 the act of one competitor which results in the
13 deterioration of service by its competitor to those
14 customers?

15 A No, no, no. I would characterize destructive
16 competition as that competition in which two
17 competitors in an actual monopoly market are so
18 vigorously competing and seeking to cut costs and
19 rates against each other that they do so at the
20 sacrifice of their liability and quality of service,
21 and there are many ways that this can happen.

22 If you are pressed very hard to compete,
23 price-wise, in an actual monopoly market, you would
24 want to drive your price down to out-of-pocket costs,
25 and if you can reduce the out-of-pocket costs, you

Gerber - cross

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2 can drive the price down even more, despite the fact
3 that, by the way, you are not recapturing your capital.

4 One way of cutting your out-of-pocket cost is to
5 ignore all maintenance. This could have disastrous
6 effects not only on the liability of service but on
7 safety. You can design facilities or operate facilities
8 in ways that impinge to a greater degree on the
9 environment.

10 There are many ways in which you can cut those
11 costs.

12 You can respond more slowly to emergencies,
13 cut the number of emergency crews you keep available
14 in the event of a storm, take much more time to
15 restore service after an outage.

16 There are many ways you can cut cost if you are
17 in that kind of competitive price situation in what
18 otherwise would be a natural monopoly market, all done
19 by the competitors in an effort to survive.

20 That's what I would characterize in a natural
21 monopoly market as destructive competition. It is
22 destructive of the service and destructive of the
23 competitors.

24 Q Do you agree that, in general, no private party should
25 have the power to arbitrarily limit another party's

Gerber - cross

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2 options even though they may think that the party is
3 making the wrong choice?

4 MR. LANSDALE: May I have that question
5 read?

6 {The question was read by the reporter.}

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

9 THE COURT: Approach the bench.

10 -----
11 {Bench conference ensued on the record as
12 follows:}

13 MR. LANSDALE: I don't believe this
14 is a question for a witness to answer, purported
15 expert or not. This is a moral question. This
16 is a question of law. This is a question of
17 antitrust policy or something. I am troubled
18 by it.

19 THE COURT: Read the question back
20 to me, please.

21 {The pending question was read by the
22 reporter.}

23 THE COURT: Have you finished your
24 objection?

25 MR. LANSDALE: Yes, sir.

Gerber - cross

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2 THE COURT: Are you desirous of
3 responding?

4 MS. COLEMAN: Yes, your Honor. The
5 question goes to methods of competition, the
6 witness has spoken before on this subject. I
7 want to see if he still holds the same views that
8 he did.

9 THE COURT: Well, I suppose this
10 is cross-examination. Overrule the objection.
11 He may answer.

12 {End of bench conference.}

13 - - - - -
14 THE COURT: Read the question back,
15 please.

16 {The pending question was read by the
17 reporter.}

18 THE COURT: If you understand the
19 question, you may answer.

20 A I have been asked the question before in another context,
21 so I recognize it.

22 There are too many buzz words in that question to
23 answer to it makes sense. You will have to define what
24 you mean by "arbitrary," under what circumstances and
25 what is involved. I can hardly begin to answer that

Gerber - cross

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2 philosophically, and it is a philosophical question.

3 I guess my rights begin where your nose ends or
4 something. Somebody said something like that. It's
5 so general I can't answer it.

6 Q Mr. Gerber, I believe you have testified that you have
7 testified before Congressional Committees; is that
8 correct?

9 A Yes.

10 Q And in those situations the committee is trying to
11 decide what policy to make for the country; is that
12 correct?

13 A As a general matter, I guess that's what committees
14 of Congress do.

15 Q With regard to the particular matter before it?

16 A General matter. That's what committees of Congress
17 try to do. I assume they do not have hearings out
18 of idle curiosity.

19 Q But in the context of Congress, the question is,
20 "What policy shall we make?" Is that correct?

21 A "What legislation shall we pass."

22 Q Which is somewhat the same thing; right?

23 A I don't want to quibble with you about your
24 terminology.

25 Q When you come to testify before Congress, you are

1 Gerber - cross

2 coming to recommend a certain approach; is that
3 correct?

4 A If I recall, in all three cases I testified I think
5 I have testified at the request of the Chairman of the
6 Committee and I really didn't ask what he had in mind.
7 He asked that I respond.

8 Q But your response dealt with a particular recommendation
9 on the policy being decided, didn't it?

10 A No. We didn't make any policy recommendations when we
11 testified before the Senate Antitrust Committee.

12 We did comment on the distribution of promotional
13 policy and promotional practices before the
14 Small Business Committee and I guess in a sense that
15 we suggested it was desirable, that was the policy
16 recommendation.

17 I had testified before the House Committee on
18 Finance and Astronemics on the energy shortage in
19 1971 and 1972, and I guess most of it was
20 descriptive of the causes of the shortage and I
21 suppose that implied certain kinds of policy
22 recommendations and I may have made some.

23 Q Well, you see a difference then between describing
24 a situation and recommending what might be desirable
25 in a situation, do you not?

Gerber - cross

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2 A You are asking me a very broad question. I really
3 don't know what you are referring to.

4 There is a difference between description of what
5 is and a description of what ought to be.

6 Q And as an economist, when your task is to describe
7 what is, you must take policies as they are, isn't that
8 right, as a given?

9 A I may be aware of the policies. I may want to take
10 them into account in making an analysis and an
11 evaluation. I did not have to accept the policy, or
12 whatever you want to call them, as given and appropriate.

13 Well, I will stop there.

14 Q Well, that could be changed through an action of the
15 Congress as we were saying; right?

16 A Some can; some can't.

17 Q But for the purpose of describing the situation,
18 you must take them as they are; right?

19 A Well, I couldn't very well describe a situation
20 adequately or accurately without recognizing that
21 there are certain policies.

22 MS. COLEMAN: Your Honor, I have no
23 further questions.

24 I would like to introduce two exhibits at
25 this juncture.

Gerber - cross

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2 THE COURT: You may approach the
3 bench.

4 Do you have any redirect?

5 MR. LANSDALE: No, sir.

6 - - - - -

7 {Bench conference ensued on the record as
8 follows:}

9 MS. COLEMAN: That's a substitute
10 for --

11 MR. LANSDALE: Beg pardon?

12 MS. COLEMAN: That is your substitute
13 for the one previously given that number. I hope
14 that doesn't cause confusion.

15 THE COURT: Our substitute?

16 MS. COLEMAN: Yes. You gave me that
17 revised version of one we had prepared. You
18 checked the numbers and made some substitutions.
19 The other exhibit is 2662, which is an existing
20 exhibit.

21 THE COURT: What is the purpose
22 of this?

23 MR. LANSDALE: I object on relevance.
24 I understand we have checked the figures, so the
25 figures are all right.

Gerber - cross

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2 MS. COLEMAN: That's the other
3 exhibit, your Honor.

4 MR. LANSDALE: Is that another one?

5 MS. COLEMAN: I don't have extra
6 copies of that. That's an existing exhibit,
7 2662.

8 {End of bench conference.}

9 - - - - -

10 THE COURT: Ladies and gentlemen
11 of the jury, while we are examining these
12 exhibits, maybe this would be an appropriate time
13 for you to take a little stretch back in the jury
14 room.

15 Please adhere to the Court's admonition, and
16 we will call you when your presence is desired.
17 Thank you.

18 {The jurors left the courtroom.}

19 - - - - -

20 {The following proceedings were had in the
21 absence of the jury.}

22 THE COURT: What is the purpose
23 of this 3074?

24 MS. COLEMAN: They both are to the
25 same purpose. The purpose is to show both

COLUMBIA LAW LIBRARY

Gerber - cross

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2 companies were making money during the time they
3 were competing.

4 MR. LANSDALE: Of course, one set of
5 net income, and the other set is returns, earnings,
6 and it is not so. Both copies were made during
7 this period from 1969 to 1979. They ran a deficit
8 by the continual decline of the retail earnings.

9 If it is offered for the purposes of
10 showing Muny was making money, I will agree
11 during that period of time that we were not.

12 Then if it is offered to show they were
13 making money, it is not so.

14 THE COURT: I will sustain the
15 objection if the exhibit is inaccurate.

16 What about 3074?

17 MR. LANSDALE: That is not inaccurate,
18 but I submit that it is irrelevant.

19 THE COURT: Well, it has net
20 income for the Cleveland Electric Illuminating
21 Company for the year 1970 to 1979, and then it
22 is the year adjusted amount, thousands of
23 dollars, and the adjusted amounts, thousands of
24 dollars, and the amount.

25 And they go to the bottom of the page; and

1 Gerber - cross

2 it says "CEI financial records, 1980, 1979 data
3 CEI annual report:

4 "{1} Restated to reflect flow-through
5 account to liberalized depreciation effective
6 January 1, 1960, through, {1965, ten-year
7 review}."

8 And then the footnote, "Stated to reflect
9 change in the accounting for property tax, 1968,
10 ten-year review."

11 I don't know what the purpose is -- to show
12 the amount of money that they are making?
13 I suppose it is to show that it is profitable.

14 MR. LANSDALE: I think there is some
15 design to show the restatement of net income to
16 reflect the accounting depreciation.

17 There are provisions under the tax laws
18 which combined with the requirements for uniform,
19 for a uniform system of accounts, whereby the
20 depreciation is accounted for on a straight-line
21 basis, and for tax purposes it is accounted for
22 by fast write-up, and this is a deferral after
23 the flop-over period.

24 Of course, the taxes increase, and I object
25 to it as an attempt to show an extremely

Gerber - cross

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2 complicated thing in a prejudicial way. It is
3 attempting to show it increases income without
4 showing the counter effect, and it is extremely
5 complicated, and it has no relevance to this case.

6 THE COURT: Well, it is the footnote
7 that concerns me, and that is why I raised the
8 question.

9 Similarly, if you want to show income, that
10 is one thing, but to this point in time -- the
11 accounting practices in fact that this corporation
12 or any other corporation took advantage of
13 accounting practices authorized and approved by
14 and accepted by the IRS to enhance income certainly
15 is not material to this issue unless you can show
16 me how, and to characterize that as a subsidy,
17 again, if that is the intent, it would be highly
18 inappropriate.

19 MS. COLEMAN: Well --

20 THE COURT: I take it that is the
21 purpose?

22 MS. COLEMAN: No. I didn't make this
23 up. I got this whole sheet from Mr. Lansdale.

24 MR. LANSDALE: We didn't check the
25 figures for your benefit. We are not promoting this.

COURT REPORTER

Gerber - cross

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2 MS. COLEMAN: I am describing the
3 origin of the document.

4 MR. LANSDALE: I beg your pardon. The
5 origin is not us. You requested us to check
6 figures for you, and we had the courtesy to do it.
7 Don't you attribute this to me.

8 MS. COLEMAN: I am not making myself
9 clear, I am afraid.

10 THE COURT: Well, let's do this:
11 If the source and the footnotes go out -- I
12 don't know what the implications of the adjusted
13 amount is, the adjusted amounts for 59 through
14 67 are -- and 54 through 61.

15 MR. LANSDALE: What happened, your
16 Honor, was that there was a change in the
17 regulatory policy which enabled us to change
18 accounting policies, and the published figures
19 were restated to conform, and that is the reason
20 it happened in a restated way.

21 MS. COLEMAN: I am not trying to do
22 anything devious. I took it as it was.

23 THE COURT: I am sure that is true.

24 MS. COLEMAN: You are saying I
25 misrepresented, and I left the figures off.

COURT LAW LIBRARY

Gerber - cross

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2 THE COURT: At least I don't think
3 that you are doing anything consciously to
4 misrepresent a situation, otherwise I would tell
5 you, but I don't think that is the situation.

6 If this thing can be -- really, I don't
7 think the jury is going to understand it anyway,
8 talking about the restated accounting practices,
9 but if the purpose is to show income for whatever
10 it is, it may go in, for whatever it is worth,
11 it may go in, and the bottom may go out, and on
12 this one, if it is not accurate, 2662, that can't
13 go in.

14 MR. LANSDALE: That was offered and
15 you expressly stated that it was offered to show
16 Muny Light was making money during the same
17 period, and it doesn't show any such thing.

18 MS. COLEMAN: It shows what it
19 shows, obviously.

20 THE COURT: Wait a minute. What
21 years are you objecting to here, Mr. Lansdale?

22 MR. LANSDALE: I don't say that the
23 figures are inaccurate, but Ms. Coleman said it
24 was offered to show Muny Light was making money
25 during the same period, and what it shows is of

COURT LAW LIBRARY

Gerber - cross

1
2 course that the return earnings started to decline
3 precipitously beginning in 1960 to 1969, and the
4 decline began in 1968, from 1968 to 1969, and Munny
5 lost money, and from 1969 through whatever -- I
6 forget -- and to say it is offered in conjunction
7 with this to show earnings, it is just not so.

8 THE COURT: Well, the figures are
9 right?

10 MR. LANSDALE: The figures I assume
11 are right.

12 THE COURT: If the figures are
13 right, and you can agree on the figures, then it
14 can go in, and it may be utilized to draw -- well,
15 it may be utilized for the purposes of argument to
16 comment upon the facts and any logical inferences
17 that may derive therefrom, providing the inferences
18 are accurate, so if she has inadvertently misconstrued
19 or misstated what she meant to say, it does not go
20 to the document. The document is accurate, so
21 the document may go in, and the other document
22 may go in, conditioned upon what I indicated.

23 MS. COLEMAN: Someone masking the
24 footnotes?

25 MR. LANSDALE: It is the segregation --

CORNER LAW LIBRARY

1 Gerber - cross

2 let me consult my accounting people.

3 THE COURT: All right. I don't
4 understand it, and I don't know how the jury is
5 going to understand it.

6 {End of bench conference.}

7 - - - - -
8 THE COURT: Okay. We will take a
9 short break.

10 {Recess taken.}

11 THE COURT: Please be seated. Call
12 your next witness.

13 MR. LANSDALE: If your Honor please,
14 we have no more witnesses.

15 I wanted to request before we close our
16 evidence, the reading of joint stipulations 269
17 and 270, and I also have a motion with respect
18 to the matter to take up with respect to the
19 exhibit that we have tendered without a witness,
20 because, depending on the Court's ruling, we may
21 have to call witnesses representing it.

22 THE COURT: Are there any objections
23 to 269 and 270?

24 MR. LANSDALE: Those are supplementary
25 ones. You have to look at two different ones.

COURT LAW LIBRARY

Gerber - cross

1 That is two different separate sheets.

2 {After an interval.}

3 MR. NORRIS: No objections.

4 THE COURT: What is the exhibit to
5 which contention is taken.
6

7 MR. LANSDALE: It is Exhibit, CEI
8 330, and what it is, if your Honor please, it is
9 a document produced by the City of Cleveland in
10 discovery in the NRC proceedings known as Document
11 218, which is listed in their submission with the
12 affidavit accompanying of 1, 2, 3, 4, 5, 6, 7, 8,
13 9, 10, 11, 12, 13, 14, 15 separate people, as to
14 the submission.

15 The plaintiff has taken a position that he
16 doesn't know anything about the document and they
17 cannot agree to its authenticity and as it having
18 come from the files and part of the business
19 records of the City.

20 I contend that that is somewhat surprising
21 in view of the affidavit submitted to the regulatory
22 commission. It is one signed by Mr. Pofok and one
23 signed by Mr. Hjelmfelt, and one signed by Mr. Hart,
24 and then --

25 THE COURT: I am not privy to any

Gerber - cross

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of that.

MR. LANSDALE: Sir?

THE COURT: I don't know what you are talking about.

MR. LANSDALE: I understand, sir.

If I may submit this to you, this document that I have in my hand is the response of the City of Cleveland to interrogatories in the NRC proceeding, and in the back they list by number the documents which are included, and this one is Document 218, and they support the whole document, interrogatories, and document submissions, and the like, by the affidavits of all these numerous people.

{Documents referred above handed to the Court.}

MR. LANSDALE: If the authenticity of this thing is --

THE COURT: Where are the affidavits?

MR. LANSDALE: In the back, sir.

THE COURT: This document is listed as Document 218 on page 214?

MR. LANSDALE: Yes.

CLEVELAND LAW LIBRARY

Gerber - cross

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2 THE COURT: -- of the document
3 inventory:

4 Now, where are the affidavits?

5 MR. LANSDALE: In the very back,
6 in that heavy document. It starts with an
7 affidavit by Mr. Pofok and one by Mr. Hjelmfelt
8 and --

9 THE COURT: Let me read it.

10 I take it that the applicants who submitted
11 these interrogatories was CEI, or this is
12 "In Re the matter of the Toledo Edison Company
13 and Cleveland Electric Illuminating Company
14 and Davis-Besse nuclear power station Unit No. 1,
15 and Perry nuclear power plant units 1 and 2" --

16 MR. LANSDALE: There were several
17 parties in which CEI was one, and the
18 interrogatories were by the applicants and the
19 response was made by the City of Cleveland.

20 THE COURT: The request for
21 production -- I should say the response for
22 the request for production was implemented with
23 documents listed in the document inventory.

24 MR. LANSDALE: Yes, sir, and the
25 only one we are concerned with is No. 218.

1 Gerber - cross

2 THE COURT: I understand that.

3 Are the documents referenced in any of the
4 interrogatories or responses thereto?

5 MR. MURPHY: Your Honor, I don't
6 believe so.

7 The way this evolved was -- I forget the exact
8 date, but it was the winter of 1974-75 -- after
9 the applicants filed their request for production,
10 I went over to the Public Utilities Department
11 with Mr. George Moore from CEI and we reviewed
12 a substantial number of documents over a two-day
13 period and asked that some be copied.

14 And the response that was forthcoming there
15 was made after we had identified the documents we
16 wanted to have copied.

17 THE COURT: Would you like to
18 respond on behalf of the City?

19 MR. NORRIS: Your Honor, we have
20 made inquiry of the Munny Light personnel as well
21 as former Munny Light personnel whose names are
22 listed in that document. We simply are unable
23 to find out anything about it.

24 We do not contest that this was produced
25 as Mr. Murphy described.

CORBIS LAW LIBRARY

Gerber - cross

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2 I would like to refresh my recollection as to
3 the affidavits described. We have done our best to
4 determine the origin and authenticity of that
5 document and we, frankly, do not know what it
6 consists of.

7 THE COURT: Yes, you certainly
8 should be permitted to review the affidavits
9 of the submitting parties.

10 It is obvious from the document, taken in
11 its entirety, it is an official document that was
12 on file before the Nuclear Power Commission for
13 the purposes of that hearing. Certainly, the
14 document to which issue is taken at the moment
15 is listed on the last page, namely, 214 of the
16 document, as a potential customer file, so,
17 obviously, it has some official standing as a valid
18 document.

19 But supposing that the City reviews its
20 supporting affidavits and perhaps that would
21 eliminate the necessity for the Court to enter a
22 ruling.

23 MR. LANSDALE: If your Honor please,
24 we also submit, and I understand it is without
25 objection, Defendant's Exhibit 1179.

CORNER LAW LIBRARY

Gerber - cross

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2 THE COURT: The meeting before the
3 Public Utilities Commission and City Council in
4 City Council Room, City of Cleveland, Ohio,
5 January 15 and 15, 1975, and apparently it is the
6 excerpts of colloquy between the then
7 Director of Utility Kudukis and President of
8 Council Forbes.

9 MR. WEINER: We have no objection.
10 Just two pages, I believe; is that correct?

11 THE COURT: Yes. It may be
12 admitted.

13 MR. LANSDALE: And subject to the
14 other exhibits and subject to the reading of
15 these stipulations, we rest our case, your Honor.

16 THE COURT: Very well.

17 MR. NORRIS: Your Honor, we will
18 have four motions, and does your Honor care to
19 have us go forward at the moment?

20 THE COURT: Yes.

21 Supposing, rather than do that, we are
22 approaching 4:00 o'clock. It's 25 minutes to.
23 You have four motions?

24 MR. NORRIS: Yes, your Honor.

25 THE COURT: Is the defense

1 desirous of motioning the Court, also?

2 MR. LANSDALE: We were going to wait
3 until we found out whether the plaintiff rested.
4 We will have some motions when plaintiff rests.

5 THE COURT: I am confident that
6 everybody has motions.

7 Well, gentlemen, in view of your thinking,
8 supposing we bring back the jury and I shall
9 read Stipulations 269 and 270 to them, and I
10 will permit them to retire for the day, adjourn
11 for the day, view the exhibits of the day, and
12 then they can go home and, hopefully, we will
13 be prepared to proceed tomorrow morning at the
14 usual hour.

15 {The foregoing proceedings were had in the
16 absence of the jury.}

17 - - - - -

18 {The jurors resumed their places in the jury
19 box.}

20 THE COURT: Ladies and gentlemen
21 of the jury, the Court has been requested to read
22 to you Joint Stipulation No. 170 which reads as
23 follows:

24 "The 1970 National Power Survey of the
25 Federal Power Commission contained data for 1965

CENTRAL LAW LIBRARY

1 through 1967 which stated that there were 243
2 electric utility systems not interconnected with
3 a network of at least 500 megawatt of generating
4 capacity."

5 I am also requested to read Stipulation No.
6 269:

7 "Until May, 1971, the City of Cleveland never
8 filed a complaint or otherwise petitioned the
9 Federal Power Commission to order CEI to provide
10 an interconnection between CEI and Muny Light."

11 With that, ladies and gentlemen, since there
12 are matters to be resolved between the Court and
13 counsel at this juncture, then your services will
14 no longer be required for the day, supposing
15 you retire to the jury room, review the exhibits
16 of the day and then you shall be free to go on
17 your way, go home, and return tomorrow at the
18 usual time and, hopefully, we will be prepared to
19 proceed at 8:45.

20 Needless to say, you are to keep in mind
21 the Court's admonition not to discuss the case
22 either among yourselves or with anyone else,
23 keep an open mind until you have heard all of
24 the evidence in the case and until such time as
25 you have heard the instructions of the Court as to

1 the law and the application of the law to the
2 facts of the case and until it is submitted to you
3 for your final deliberations and your judgment.

4 With that, ladies and gentlemen, you are free
5 to retire to the jury room, and Mr. Schmitz shall
6 supply you with all of the documents of the day.

7 Thank you and good night.

8 {The jurors left the courtroom.}

9 - - - - -

10 {The following proceedings were had in the
11 absence of the jury.}

12 THE COURT: Yes, Mr. Norris. You
13 may proceed.

14 MR. NORRIS: The City will have
15 four motions at the moment, your Honor. The
16 first will be with respect to a directed verdict
17 on the case pursuant to Rule 50{a} of the
18 Federal Rules of Federal Procedure. The second
19 will have to do with natural monopoly, the third
20 will have to do with the permanent defenses in the
21 pleading and, fourthly, the counterclaims
22 asserted by CEI.

23 If it please the Court, I will address a few
24 brief remarks to the first motion.

25 The City moves, pursuant to Rule 50{a} of

1 of the Federal Rules of Civil Procedure, that
2 liability should be found against the defendant
3 as alleged by the City in its amended complaint.

4 The City submits that with the Interstate
5 Commerce requirement, pursuant to the Court's
6 order, the City has demonstrated that CEI has
7 monopoly power in the retail firm market for
8 electric energy both in the 1,700-square-mile
9 service area and in the City of Cleveland.

10 The City also submits that it has demonstrated
11 that CEI has maintained and wilfully sought to
12 expand its monopoly position in each of the
13 relevant markets. This has been done by a
14 variety of acts including the following:
15 Refusing to interconnect with Muny Light, conducting
16 a program to undermine Muny Light's customer
17 base by providing to outside electrical
18 contractors free wiring and other services not
19 permitted under CEI's rate filing and that these
20 services and wiring benefits were provided to
21 Muny Light customers to get them to switch to
22 CEI's service; thirdly, by refusing to wheel
23 for PASNY power for the benefit of Muny Light.

24 The City's motion is also premised on the
25 proposition that it has been demonstrated that CEI

1 has taken actions constituting bottleneck
2 monopolization in its refusal to permit the City
3 to have access to CEI's transmission grid for the
4 wheeling of PASNY power to Muny Light and,
5 likewise, the City has demonstrated that CEI has
6 attempted to monopolize the relevant market for
7 retail firm electric energy and that CEI had a
8 specific intent to so monopolize, and the City
9 asserts that it has demonstrated that there was
10 a dangerous probability of such an attempt to
11 monopolize succeeding, and this attempt to
12 monopolize has been done by the same as
13 described above and is a part of a plan to
14 complete an unlawful market dominant in its
15 entire 1,700-square-mile service area.

16 So pursuant to Rule 50(a), the City
17 respectfully requests a directed verdict on
18 the issue of liability as alleged in the
19 amended complaint.

20 THE COURT: Are you desirous of
21 responding, Mr. Lansdale, to this motion?

22 MR. LANSDALE: Yes, your Honor.

23 I would, I suppose, but for the waiving
24 provision of Rule 50, have joined in these motions,
25 that is, in an attempt to submit it to the Court;

1 however, dealing one by one with the points
2 of the plaintiff, the plaintiff suggests that
3 they have proven monopoly power. He hasn't
4 explained how he has shown monopoly power or
5 it has shown monopoly power. I suppose that
6 this rests upon the percentage of the market,
7 depending on how you define market.

8 Within the relevant market, as we view it,
9 the percentages are not such as show under the
10 cases monopoly power, that is, there is less than
11 60 percent of the market in the defendant.

12 On the question of market, I submit and
13 will at the close of the case move again that
14 your Honor find the relative geographic market to
15 be the area of competitive overlap, and I point
16 out that the case for potential competition
17 extending beyond the area of competitive overlap
18 rests solely upon Mr. Hinchee's suggestion that
19 they might serve the Southerly Sewage Disposal
20 Plant. They started talking about this in Mr.
21 Hinchee's time with the Munny Light. It has been
22 seven years since Mr. Hinchee left Munny Light and
23 nothing has happened yet, and in the exhibit
24 which shows the \$9.8 million bond issue which was
25 attempted in 1974, among the projects listed to be

1 funded with that bond issue, this transmission
2 line to the Southerly Sewage Disposal Plant is
3 conspicuous by its absence. And even if that be
4 taken to be a suggestion of potentiality, the
5 potentiality shown by such a transmission line
6 falls far short of the balance of the City of
7 Cleveland.

8 So I submit that from a structural standpoint,
9 no monopoly power has been shown.

10 From the standpoint of what the evidence
11 shows as to the indicia of monopoly power, the
12 plaintiff mentioned, Mr. Norris has mentioned on
13 and the reason he
14 mentioned it is on an average.

15 As to the lawful maintenance of monopoly or
16 monopoly power, if we do not have it, we couldn't
17 have lawfully maintained it, but I will deal with
18 all this because that would apply, of course,
19 equally to an attempt to monopolize.

20 On undermining the customer base, as I heard
21 his argument, it rests solely upon the fact that
22 the things done with respect to the pre-wiring
23 program or the Muny Conversion Program within
24 the competitive area were not offered in other
25 areas of the company's service area.

CONSULTANT LIBRARY

1 If there is anything that is clear in
2 antitrust law, it is the ability of a competitor
3 to meet competition, and the evidence is quite
4 clear on this and I submit that there is no dispute
5 in the case that what CEI was doing was meeting
6 competition and, in any event, there has been not
7 the slightest showing of predatory conduct as
8 that is defined by the cases.

9 With respect to wheeling and refusing to
10 interconnect.

11 With respect to wheeling, of course, this
12 presents, as we have submitted to your Honor
13 before, a strict legal issue of are we, under
14 the circumstances, bound to help our competitor
15 to obtain advantages not available to CEI.
16 Without rearguing that point, we have argued it
17 before, we submit that we are not.

18 On refusal to interconnect, I have been
19 prepared to argue on the refusal to interconnect
20 the same argument I make with wheeling, but I
21 have no necessity to do this because the
22 evidence doesn't show any refusal to interconnect.

23 What the evidence shows is that Munny Light
24 could have had an interconnection very early on,
25 within 18 months or two years or sometime in

1 1970. All they had to do was pay their bill.
2 And the evidence on this is not disputed. Mr.
3 Hinchee attempted to dispute it, Mr. Ardery at
4 first disputed it, but when the written evidence
5 was shown, when the evidence was laid before
6 them, it was clear it was CEI's unwavering
7 position that, unless and until the City paid
8 its bills and paid its bills in full, subject to
9 any later litigation as to the amount and
10 refund of any portion thereof, but CEI would not
11 move forward on the engineering. It never
12 wavered from that position and the City never
13 wavered from its position of refusing to pay
14 the bills, and it's as simple as that.

15 This was within the Muny Light's control and
16 all CEI asked them to do was to do what they were
17 legally obligated to do and what subsequent
18 events have confirmed that they were legally
19 obligated to do.

20 Now we go to bottleneck. Of course, there
21 is no bottleneck here. There is no case which
22 adopts the so-called bottleneck theory by a
23 firm or an individual acting unilaterally.

24 All of the cases involve conspiracy. All
25 of the cases involve competitors

1 banding together to exclude another competitor.
2 And this, of course, is recognized by the Sixth
3 Circuit in the Beyers case which has been
4 previously submitted to your Honor, and on page
5 79-307 of the CCH copy of that opinion, Judge
6 Keith, in reciting the various categories of
7 pieces of refusals to deal says:

8 "Third, there is the contest in which a
9 group of competitors control an indispensable
10 facility which cannot be easily duplicated. This
11 is the classic case where the bottleneck theory
12 applies."

13 And they cite Terminal Railroad and the
14 Gemco cases, which, of course, are the leading
15 cases, particularly the St. Louis Terminal
16 Railroad case.

17 These all involve what are, in effect,
18 joint monopolies, or however you wish to
19 characterize them. Whatever they are, they
20 are the competitors that were already in
21 business refusing to let a new entry join the
22 group.

23 That is not what our case is here. It is
24 something entirely different and there is no
25 bottleneck, and I will submit that we are entitled

1 to a ruling that no refusal to deal here was
2 unlawful.

3 And in point of fact, none of the acts,
4 none of the things which it has said CEI did
5 to Muny Light are cases in which CEI did anything.
6 This is an allegation respecting a refusal to
7 deal. The only acts that we are accused of
8 committing which are really acts are the
9 so-called Muny Conversion Program, and the
10 evidence on that is quite clear and undisputed
11 and we submit to your Honor it would be error
12 to permit the jury to find otherwise.

13 THE COURT: Mr. Norris?

14 I am particularly interested in your
15 responding to the argument concerning refusal
16 to interconnect and the bottleneck theory.

17 MR. NORRIS: Well, on the
18 bottleneck theory, your Honor, we think
19 Otter Tail is a case where the bottleneck concept
20 was applied by the Court where there was a
21 unilateral refusal by a power company to make
22 available its transmission grid. We don't think
23 the fact that Gemco and Terminal Railroad
24 involved more than a single firm makes
25 inapplicable the bottleneck theory under