

# **Confidential Release**

**Case Number: 93-1408-EL-CSS**

**Date of Confidential Document:  
August 26, 1994**

**Today's Date:  
August 6, 2009**

**Confidential memorandum contra to motion of  
respondent Ohio Edison Company to compel  
discovery. (Redacted version filed seperately)**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE COMPLAINT )  
OF YOUNGSTOWN THERMAL, )  
LIMITED PARTNERSHIP, )

Complainant, )

vs. )

THE OHIO EDISON COMPANY, )

Respondent. )

Case No. 93-1048-EL-CSS

**RECEIVED**

AUG 26 1994

DOCKETING DIVISION  
PUBLIC UTILITIES COMMISSION OF OHIO

**CONFIDENTIAL MEMORANDUM CONTRA TO MOTION OF RESPONDENT**  
**OHIO EDISON COMPANY TO COMPEL DISCOVERY**  
**(Redacted Version Filed Separately)**

**I. Introduction**

Complainant Youngstown Thermal Limited Partnership ("Youngstown Thermal") alleges that the Service Agreement between Ohio Edison Company ("Ohio Edison") and Mahoning County for the provision of cooling service to the Mahoning County Justice Center violates the specific prohibition in R.C. 4905.33, which states:

No public utility 1) shall furnish free service or service for less than actual cost, 2) for the purpose of destroying competition.

R.C. 4905.33 (enumeration and emphasis added.)

The cited two elements are the only issues for adjudication by the Commission. Now, however, Ohio Edison asks the Commission to order Youngstown Thermal to divulge information detailing Youngstown Thermal's own costs to provide cooling service and steam heating service. Ohio Edison justifies the request by inserting a new element into the language of R.C. 4905.33: It argues that Youngstown Thermal must demonstrate that "Ohio Edison has acted with the intent to destroy viable (as distinguished from imaginary, pretended or speculative) competition." (See Memorandum in Support of Motion to Compel Discovery, p. 3, emphasis original.) Ohio Edison, however, has not cited a single legal authority or rule of statutory construction to support this supposedly "axiomatic" assertion.

As will be shown in detail below, the information sought does not fall within the scope of discovery permitted by O.A.C. §4901-1-16(B). The information is not relevant to any issue in this case, nor is it reasonably calculated to lead to the discovery of admissible evidence. Ohio Edison simply seeks to deflect the analysis of its own costs and anti-competitive purpose by shifting the scrutiny onto Youngstown Thermal. Ohio Edison's argument is devoid of merit, and its Motion to Compel should be denied.

## **II. Summary of Discovery Sought**

### **A. Ohio Edison's First Set of Combined Discovery Requests**

**Discovery Request No. 25** asks for a list of potential customers Youngstown Thermal has identified in Youngstown for cooling service by Youngstown along with the projected revenue, sales and net profits from each potential customer.

**Discovery Request No. 27** asks for the total cost, a detailed breakdown of costs, and the projected cost per ton hour which would be incurred by Youngstown Thermal to provide the cooling service offered to Mahoning County for cooling the Mahoning County Justice System.

**Discovery Request No. 28** asks Youngstown Thermal to describe its methodology and rationale for allocating costs between the heating and cooling sides of its business.

**Discovery Request No. 29** seeks the total costs or expenses allocated to the cooling side of Youngstown Thermal's business in 1993, and for the production of all related documents.

Finally, **Discovery Request No. 31** asks for the fully embedded cost on a per-unit basis to provide steam and hot water heating to Youngstown Thermal's existing customers.

Youngstown Thermal objected to each of the cited discovery requests on the grounds that they are not relevant, nor are they reasonably calculated to lead to the discovery of admissible evidence. (See Youngstown Thermal's Answers and Objections to Interrogatories Propounded in Ohio Edison Company's First Set of

Combined Discovery Requests, Attachment 1 to Ohio Edison's Motion to Compel Discovery.)

**B. Documents Requested In Deposition**

Ohio Edison also seeks documents requested in the deposition of Carl Avers, Chairman of Youngstown Thermal. A review of the partial transcript attached to Ohio Edison's Motion to Compel shows that numerous documents were discussed, but only two documents were actually requested. Specifically, Ohio Edison's counsel asked Mr. Avers to determine whether Youngstown Thermal had a written business plan and, if so, to produce it. (Avers Tr., p. 199, Attachment 2 to Ohio Edison's Motion to Compel Discovery.) On August 8, 1994, undersigned counsel responded that no formal written business plan exists. (Ohio Edison's Motion to Compel, Exhibit H.)

The second request is for calculations made by Mr. Avers regarding the projected cost of a district cooling system in Youngstown. (Avers Tr., p. 242, Attachment 2 to Ohio Edison's Motion to Compel.) Youngstown Thermal objects to the production of this cost information because it is not relevant nor is it reasonably calculated to lead to the discovery of admissible evidence. Other documents were mentioned throughout Mr. Avers' two-day deposition, but Ohio Edison did not request production.

Ohio Edison is not entitled to any of the discovery sought because Youngstown Thermal's costs are not at issue in this case. It is not an element of R.C. 4905.33 nor a defense to a claim brought under that statute that the competition sought to be

destroyed be "viable." Accordingly, none of the information sought is relevant to this action.

### III. Argument

- ▶ R.C. 4905.33 should be interpreted consistent with its plain and ordinary meaning.

R.C. 4905.33 states, in pertinent part: No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition. Ohio Edison asks the Commission to interpret this statute to prohibit such pricing only where the purpose is to destroy "viable" competition by an established provider with the "present ability" to complete a contract. Ohio Edison apparently believes that a new market entrant or a fledgling competitor fighting an established utility is unworthy of the statute's protection. The argument fails.

In Union Rural Elec. Coop., Inc. v. Pub. Util. Comm. (1990), 52 Ohio St.3d 78, 80, the Supreme Court of Ohio, in a per curiam opinion, affirmed an order by the Commission interpreting the term "electric consuming facilities" in R.C. 4933.18 (E). The Court held,

When interpreting legislation, words used in statutes must be given their plain and ordinary meaning, unless legislative intent indicates otherwise. Coventry Towers, Inc. v. Strongsville, (1985), 18 Ohio St. 3d 120, 122, 480 N.E. 2d 412, 414, see also R.C. 1.42.

The court then consulted the dictionary definition of "facility" in order to interpret the statute.

In Webster's Ninth New Collegiate Dictionary, Unabridged, (1987), p. 268, "competition" is defined alternatively as "1) the act or process of competing: rivalry; 2) a contest between rivals \*\*\*, 3) the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms \*\*\*\*" Under this definition, the dynamics between Youngstown Thermal and Ohio Edison as they bargained to win the Mahoning County Justice Center cooling load is without a doubt "competition."

Moreover, Ohio Edison fails to cite any authority to suggest that the General Assembly intended that the statute not be interpreted by its plain and ordinary meaning. There is no basis to suggest that the term competition should be modified by the adjective "viable" or any other word. Indeed, such an interpretation would be contrary to the public policy of Ohio sought to be advanced by R.C. 4905.33 -- that honest and effective competition by all competitors, large or small, established or new, must be maintained because it is in the public's best interest and ultimately results in lower prices. See In re Ohio Bell Tel. Co., Case No. 79-1184-TP-AIR, Opinion and Order (Dec. 3, 1980), Findings of Fact Nos. 9 through 11, cited in Armco v. Pub. Util. Comm., (1982), 69 Ohio St. 401 at 402.

- Ohio Edison perceived Youngstown Thermal to be "competition".

The record in this case is clear -- Ohio Edison considered Youngstown Thermal to be its competitor not only for the Mahoning County Justice Center cooling contract but for the entire cooling load of downtown Youngstown. Accordingly, Ohio Edison should be estopped from now arguing that Youngstown Thermal is not "competition."

Consider the following testimony. Jamison Rowlands, Commercial Marketing Supervisor for Ohio Edison in the Youngstown Division testified as follows:

- Q. What do you mean by Youngstown Thermal could use the jail as an anchor to establish a district cooling system?
- A. I believe the stated public intention of Youngstown Thermal was to get the business for cooling at the jail project and then expand from there into district cooling on the west end of Youngstown.
- \* \* \*
- Q. [The] threat thermal brings, what threat was it that Thermal had to Ohio Edison that you referenced here?
- A. Downtown commercial customers, those that are air-conditioned, use electric service from Ohio Edison to cool their building. I believe what I was trying to indicate there was, if Youngstown Thermal were to get into the chilled water business, the delivery of chilled water for air conditioning, our downtown customers which currently used electric in-house air conditioning equipment would then, unfortunately, from our point of view, not use those electric in-house air conditioners.

(Rowlands Tr., Exhibit A at pp. 20-21.)

Mr. Rowlands even conducted an analysis of the downtown Youngstown cooling load in an attempt to quantify the threat to



Ohio Edison. He calculated that the Youngstown Thermal threat created a "high" perceived risk of losing \$262,679 annual cooling revenue, a "moderate" perceived risk of losing \$54,493 and a "low" perceived risk of losing \$206,330 in annual cooling revenue. (See Confidential Exhibit B.) The total annual risk of loss was \$523,502 in annual cooling load. Id.

Consider also the testimony of Earl Carey, who is now the Manager of Performance Initiative Program at Ohio Edison:

- Q. Is that the threat to the revenue base you're referring to?
- A. Well, I wouldn't categorize it that way. Youngstown Thermal is a competitor and a threat to our existing cooling revenues anywhere in Youngstown. So certainly our thinking and our strategy would be to do what we can to mitigate the threat within, you know, our own --
- Q. Sure.
- A. -- strategies. The jail was potential new revenue that we wanted to get, of course, and protect. We also understood the implications of that; that Youngstown Thermal, while a competitor now, would even be more viable a competitor should that have happened. Yes, we understood that.

(Carey Confidential Tr., Exhibit C at p. 63.)

During the entire competitive process Ohio Edison feared Youngstown Thermal's threat to their existing downtown cooling load. Now, in an effort to avoid the consequences of their anti-competitive tactics, they state that Youngstown Thermal was not even a serious contender, but merely a nuisance! In fact, the threat was "viable" enough for Ohio Edison to mount a massive campaign to secure the cooling load at the Mahoning County Justice Center. That campaign continues to this day, with Ohio

Edison employees lobbying City of Youngstown officials in an effort to persuade them to vote against a proposed tax abatement ordinance which would enable Youngstown Thermal to begin their plan to offer district cooling in Youngstown even more rapidly. (Kukura Tr., Exhibit D at pp. 83-96.)

- ▶ **The threat Ohio Edison perceives is real: Youngstown Thermal is ready, willing and able to enter district cooling in downtown Youngstown.**

Youngstown Thermal does not believe that it is required to prove it is a viable competitor in order to maintain this action, and thus its cost information and finances are irrelevant. However, assuming for the sake of argument that "viability" and "ability to perform" is at issue, the evidence supports a finding that Youngstown Thermal is indeed a viable competitor ready, willing and able to enter the Youngstown cooling market.

Carl Avers, Chairman of Thermal Ventures, Inc. has the experience needed to bring district cooling to Youngstown. He has been involved in the business of district heating and cooling for twenty-five years. (Avers Tr., Exhibit E at p. 26.) Mr. Avers is also Chairman of Pittsburgh Thermal, Limited Partnership, a company which heats and cools 28 buildings in Pittsburgh, and San Francisco Thermal, Limited Partnership, a company which provides steam service for heating and cooling applications to 200 buildings in downtown San Francisco. (Avers Tr., Exhibit E at pp. 10-11). Mr. Avers has been involved in the planning, construction and/or operation of central cooling

facilities, including those in San Diego, Nashville and Memphis. (Avers Tr., Exhibit E at pp. 238-239). He has consulted with a number of cities in the United States concerning the development of district cooling systems. (Avers Tr., Exhibit E at p. 239.)

The City of Youngstown voted on July 20, 1994 to approve an ordinance granting Youngstown Thermal a franchise to furnish central heating, cooling and hot water service to the public in the City of Youngstown. (See Exhibit F.) Mr. Avers has considered at least three options to begin district cooling in Youngstown. (Avers Tr., Exhibit E at p. 242.) The least expensive option is to begin with a satellite plant, costing several hundred thousand dollars. (Avers Tr., Exhibit E at p. 242). Youngstown Thermal has purchased a building adjacent to its current facility that can be used to house the chillers for a district cooling facility. (Avers Tr., Exhibit E at pp. 13, 219-220). A financing commitment from National City Bank has been secured in an initial amount of \$200,000, which amount will be adjusted upward once actual construction plans have commenced. (Avers Tr., Exhibit E at p. 249). Schematic engineering drawings of a district cooling plant have been commissioned and received. (Avers Tr., Exhibit E at p. 258). Mr. Avers has contacted equipment manufacturers and can obtain cooling equipment with a lead time of a few weeks. (Avers Tr., Exhibit E at p. 259). Youngstown Thermal has a contract for cooling with one customer, commitments for cooling from three or four other entities, and strong interest from a number of other buildings in downtown

Youngstown. (Avers Tr., Exhibit E at p. 263). Its competition is viable.

Ohio Edison also attacks Youngstown Thermal as lacking a "present ability to perform" cooling the Mahoning County Justice Center. A present ability to chill the jail isn't needed. The jail will not require cooling until September, 1995. Although he had initial fears about performance, Daniel Marinucci, Legal Advisor/ Project Administrator of the Mahoning County Justice Center, addressed those concerns in the proposed contract with Youngstown Thermal and he "recommended to the Building Commission that the contract had all the protections in for them, and that adequate assurances had been obtained." (Marinucci Tr., Exhibit G at pp. 26-27). In addition, Mahoning County Facilities Manager, Govind Thakkar, recommended that the County enter into the proposed contract with Youngstown Thermal. (Thakkar Tr., Exhibit H at p. 43).

Indeed, in late September, 1993, the Building Commission voted to enter into a contract with Youngstown Thermal for cooling the jail, the specific terms of which were to be negotiated within thirty days. Eventually, however, Ohio Edison was victorious and the Service Agreement at the heart of this case was signed on December 22, 1993 by Ohio Edison and the Mahoning County Commissioners.

#### **IV. Conclusion**

Ohio Edison claims it is entitled to Youngstown Thermal's cost information for one reason -- to use as a defense to show

that Youngstown Thermal is not viable "competition" and therefore not entitled to complain under R.C. 4905.33. For all of the foregoing reasons, the Commission should conclude that Ohio Edison is not entitled to the discovery because the information sought is not relevant to this case nor will it lead to the discovery of admissible evidence. Ohio Edison's Motion to Compel must be denied.

VORYS, SATER, SEYMOUR AND PEASE

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Youngstown Thermal,  
Limited Partnership

## STATE OF OHIO

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

CASE NO. 93-1408-EL-CSS

In the Matter of the Complaint  
of YOUNGSTOWN THERMAL, LIMITED  
PARTNERSHIP,

Complainant,

VS.

OHIO EDISON COMPANY,

Respondent.

DEPOSITION

OF

JAMISON W. ROWLANDS

DEPOSITION taken before me, Mary J. Snyder, a Notary  
Public within and for the State of Ohio, on the 20th Day of  
June, A.D., 1994, pursuant to agreement and at the time and  
place therein specified, to be used in the aforesaid cause  
of action, pending before the Public Utilities Commission of  
Ohio.

## APPEARANCES

Atty. Sarah J. Cruise  
On Behalf of Complainant

Atty. James W. Burk  
Atty. Michael R. Beiting  
Atty. George W. Rooney, Jr.  
On Behalf of Respondent

## ALSO PRESENT

Mr. Jeffrey Bees, Youngstown Thermal,  
Limited Partnership

1 A Uh-huh.

2 Q This was common knowledge then?

3 A I believe at the Building Commission  
4 meetings that I attended, Mr. Avers from Youngstown Thermal  
5 indicated that. And I'd also, I think in this time frame,  
6 seen an article in the Youngstown Vindicator which  
7 specifically mentioned that Youngstown Thermal viewed the  
8 Mahoning County jail project as an anchor for their system.

9 Q Okay. If you could look at the last  
10 sentence in that paragraph, you state, "Although Youngstown  
11 Thermal has suffered a set-back, we will continue to  
12 proactively work with downtown customers to counter the  
13 threat Thermal brings"?

14 A Uh-huh.

15 Q Was this the threat to the downtown air  
16 conditioning customers that Ohio Edison currently has that  
17 Mr. Kukura was talking about in the performance appraisal?

18 A I'm sorry, could you repeat that?

19 Q Uh-huh. The threat Thermal brings, what  
20 threat was it that Thermal had to Ohio Edison that you  
21 referenced here?

22 A Downtown commercial customers, those that  
23 are air-conditioned, use electric service from Ohio Edison  
24 to cool their building. I believe what I was trying to  
25 indicate there was, if Youngstown Thermal were to get into

1 the chilled water business, the delivery of chilled water  
2 for air conditioning, our downtown customers which currently  
3 used electric in-house air-conditioning equipment would  
4 then, unfortunately, from our point of view, not use those  
5 electric in-house air conditioners.

6 Q Okay.

7 MR. BURK: Could you read  
8 back that answer, please?

9 (Whereupon the record was read as requested.)

10 Q Okay, Mr. Rowlands, Exhibit 105 is your  
11 September 27, 1993, monthly report; is that correct?

12 A Yes.

13 Q And as you had the month before, you  
14 reported on what was going on with the Justice Center and  
15 the competition between Youngstown Thermal and Ohio Edison  
16 for that contract; is that correct?

17 A Yes.

18 (Whereupon the reporter marked for identification  
19 Exhibit 142.)

20 Q Mr. Rowlands, I'm handing you what we have  
21 marked as Exhibit 142, and this appears to be your December  
22 23, 1993, report to Mr. Kukura on your commercial activities  
23 for that month; is that accurate?

24 A Yes.

25 Q And it appears that in this report you are



CONFIDENTIAL

DOWNTOWN THERMAL - DOWNTOWN CUSTOMERS

POTENTIAL LOSSES	ADDRESS	ANNUAL COOLING LOAD (IN KW)	ANNUAL COOLING USAGE (IN KWH'S)	ANNUAL COOLING REVENUE	COOLING COST (CENTS/KWH)	TOTAL ANNUAL USAGE (IN KWH'S)	TOTAL ANNUAL REVENUE	PERCEIVED RISK
NEW COUNTY JAIL	360 W. COMMERCE	620	1,288,000	\$110,000	\$0.085	6,000,000	\$570,000	HIGH
POWERS AUDITORIUM	266 W. FEDERAL	150	37,632	\$6,080	\$0.161	208,328	\$34,450	HIGH
HOME SAVINGS & LOAN	277 W. FEDERAL	208	220,800	\$33,349	\$0.151	1,113,440	\$128,129	HIGH
VINDICATOR	VINDICATOR SQ.	110	176,400	\$20,144	\$0.114	651,600	\$62,442	HIGH
VINDICATOR PRINTING	S. CHESTNUT ST.	178	452,000	\$38,026	\$0.084	3,704,000	\$283,835	HIGH
HISTORICAL SOCIETY	151 W. WOOD ST.	64	63,240	\$5,043	\$0.080	459,120	\$42,996	HIGH
ST. COLUMBA	154 W. WOOD ST.	64	44,640	\$7,845	\$0.176	291,240	\$38,416	HIGH
MINIMUM SECURITY JAIL	300 W. COMMERCE	145	290,000	\$26,100	\$0.090	1,040,000	\$104,000	HIGH
OHIO ONE CORP.	25 E. BOARDMAN	137	78,240	\$16,112	\$0.206	238,800	\$29,731	HIGH
SUBTOTAL		1676	2,650,852	\$262,678				
COUNTY COURTHOUSE	120 MARKET ST.	221	110,680	\$21,945	\$0.198	2,217,120	\$211,284	MODERATE
COUNTY JAIL	21 W. BOARDMAN	72	70,000	\$7,260	\$0.104	743,320	\$80,850	MODERATE
MAHONING BANK	26 MARKET ST.	210	195,852	\$20,044	\$0.102	1,780,469	\$162,063	MODERATE
M&J REALTY	107 S. CHAMPION	42	29,760	\$5,244	\$0.176	192,000	\$23,087	MODERATE
SUBTOTAL		545	406,292	\$54,493				
METROPOLITAN BLDG.	1 W. FEDERAL	183	99,520	\$20,502	\$0.206	1,293,680	\$131,287	LOW
BANK ONE	10 W. FEDERAL	224	384,720	\$31,400	\$0.082	1,469,520	\$146,867	LOW
PHAR-MOR BLDG.	20 W. FEDERAL	300	386,726	\$43,203	\$0.112	2,689,480	\$208,309	LOW
DOLLAR BANK	18 WICK AVE.	342	471,968	\$43,082	\$0.091	6,742,400	\$480,506	LOW
RENAISSANCE BLDG.	51 S. CHAMPION	118	314,432	\$26,060	\$0.083	2,411,192	\$170,348	LOW
INTERNATIONAL TOWERS	25 MARKET ST.	150	240,000	\$26,400	\$0.110	2,397,200	\$151,339	LOW
ERIE TERMINAL BLDG.	112 W. COMMERCE	42	80,242	\$8,003	\$0.075	403,334	\$21,675	LOW
STAMBAUGH BLDG.	44 CENTRAL SQ.	120	60,700	\$9,680	\$0.139	375,000	\$47,527	LOW
SUBTOTAL		1479	2,046,310	\$206,330				
TOTAL		3700	5,103,554	\$523,502				

CONFIDENTIAL

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STATE OF OHIO

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

CASE NO. 93-1408-EL-CSS

In the Matter of the Complaint  
of YOUNGSTOWN THERMAL, LIMITED  
PARTNERSHIP,

Complainant,

VS.

OHIO EDISON COMPANY,

Respondent.

DEPOSITION

OF

EARL T. CAREY

DEPOSITION taken before me, Mary J. Snyder, a Notary  
Public within and for the State of Ohio, on the 14th Day of  
June, A.D., 1994, pursuant to notice and at the time and  
place therein specified, to be used in the aforesaid cause  
of action, pending before the Public Utilities Commission of  
Ohio.

CONFIDENTIAL

NAGY-BAKER COURT REPORTING  
(216) 746-7479

1 wasn't the jail because that was new revenue; the threat to  
2 the revenue base was the rest of downtown Youngstown, which  
3 if Youngstown Thermal got into the jail, they'd get a  
4 foothold into downtown Youngstown?

5 A Well --

6 Q Is that the threat to the revenue base  
7 you're referring to?

8 A Well, I wouldn't categorize it that way.  
9 Youngstown Thermal is a competitor and a threat to our  
10 existing cooling revenues anywhere in Youngstown. So  
11 certainly our thinking and our strategy would be to do what  
12 we can to mitigate that threat within, you know, our own --

13 Q Sure.

14 A -- strategies. The jail was potential new  
15 revenue that we wanted to get, of course, and protect. We  
16 also understood the implications of that; that Youngstown  
17 Thermal, while a competitor now, would even be more viable a  
18 competitor should that have happened. Yes, we understood  
19 that.

20 Q Okay. And you also understood that, given  
21 government regulations with respect to refrigerants and the  
22 like, traditional cooling customers would be asking for  
23 answers to questions they have about the efficiency of their  
24 equipment in the face of new kinds of refrigerants; isn't  
25 that true?

## STATE OF OHIO

## BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

CASE NO. 93-1408-EL-CSS

In the Matter of the Complaint  
of YOUNGSTOWN THERMAL, LIMITED  
PARTNERSHIP,

Complainant,

VS.

OHIO EDISON COMPANY,

Respondent.

DEPOSITION

OF

RICHARD KUKURA

DEPOSITION taken before me, Mary J. Snyder, a Notary  
Public within and for the State of Ohio, on the 23rd Day of  
June, A.D., 1994, pursuant to agreement and at the time and  
place therein specified, to be used in the aforesaid cause  
of action, pending before the Public Utilities Commission of  
Ohio.

## APPEARANCES

Atty. Sarah J. Cruise  
On Behalf of Complainant

Atty. James W. Burk  
Atty. Michael R. Beiting  
On Behalf of Respondent

## ALSO PRESENT

Mr. Jeffrey Bees, Youngstown Thermal,  
Limited Partnership

1 had drafted and taken to Mayor Ungaro's office. You said  
2 you did not believe that a letter had ever been sent by the  
3 Mayor; is that right?

4 A Correct.

5 Q Okay. Do you know whether the Mayor  
6 contacted any Commissioners in the time period between  
7 October 20 and the final vote on October 26?

8 A No, I don't.

9 Q Are you familiar, Mr. Kukura, with two  
10 requests that Youngstown Thermal has made for tax abatement  
11 to the Youngstown City Council?

12 A Oh, yes.

13 Q And were you present at a meeting last  
14 week at which those tax abatement requests were discussed?

15 A Yes, I believe it was last Wednesday they  
16 were on the legislative agenda for Youngstown City Council.

17 Q Have you spoken to anyone in City Council  
18 or the Board of Control about those tax abatement issues?

19 A Yes.

20 Q Who have you spoken to?

21 MR. BURK: I'm going to  
22 object to this whole line of questioning as irrelevant, but  
23 you can go ahead and answer.

24 Q Who have you spoken to about that?

25 A Mayor Ungaro, Law Director Romero,

1 R-O-M-E-R-O.

2 Q Just those?

3 A No, no, no.

4 Q Okay.

5 A One, two, three -- all seven council  
6 people, plus the president of council, in different varying,  
7 pardon me, in varying degrees.

8 Q All right.

9 A Some just a couple of words; some more.

10 Q All right. Let's start with Mayor Ungaro.  
11 What was your conversation with him about concerning this  
12 tax abatement request?

13 A Prior to last Wednesday's meeting, I go  
14 earlier than they start, let's say, and I pick up a copy of  
15 the legislation that's going to be processed that evening.  
16 And looking through it, I saw the, which I understand now  
17 are two pieces for Youngstown Thermal as you identified for  
18 tax abatement.

19 Q Okay. And my question was, what was your  
20 conversation with Mayor Ungaro about?

21 A Okay, his name was up at the top of the  
22 legislation, meaning that he was the sponsor of it, so I  
23 asked him basic questions so I could learn what, what the  
24 intent of that legislation was. All I get to see is the  
25 first page, and it's really not specific.

1 Q Were there other tax abatement requests  
2 being considered other than Youngstown Thermal's two?

3 A Yes.

4 Q Did you ask the Mayor about any of those  
5 others?

6 A I did not ask about those. I made  
7 reference to them.

8 Q When did you see Mayor Ungaro?

9 A It would be prior to beginning of caucus a  
10 week ago Wednesday.

11 Q What did Mayor Ungaro tell you about the  
12 tax abatement requests?

13 A Basically he said that he signs what his  
14 folks put in front of him.

15 Q All right. What about these other people  
16 that you mentioned, the Law Director, what was your  
17 conversation with the Law Director about?

18 A Actually when I was talking with the  
19 Mayor, the Mayor asked him to come over and provide basic  
20 information on that particular two pieces of legislation.

21 Q And it's Mr. Romero?

22 A Yes, Edwin.

23 Q Edwin. What did Mr. Romero tell you about  
24 the tax abatement?

25 A He told me it was for the equipment to use

1 by Thermal to produce chilled water.

2 Q Okay. Did you express any opinion about  
3 whether tax abatement should be approved or not?

4 A Yes.

5 Q What opinion did you express?

6 A I expressed to them that my understanding  
7 of tax abatement is that it is a tool that is used for  
8 development in order to bring new jobs, in this case into  
9 the City of Youngstown; also to retain jobs that they have  
10 that are threatened or mentioned to be going, looking at  
11 going somewhere else.

12 And it seems that this excluded, if my understanding is  
13 correct of what tax abatement is created for, then it seems  
14 that Youngstown Thermal was not a legitimate application of  
15 tax abatement because if, bottom line, if Youngstown City  
16 did not provide tax abatement to Youngstown Thermal for this  
17 equipment, the question you would have to answer, I think,  
18 and look at is, where would they take this equipment; where  
19 would they take these new jobs which make up the economic  
20 development?

21 They wouldn't take them down to Boardman, which is just  
22 south of Youngstown. They wouldn't take it to Columbus,  
23 because they want to set up this machinery in downtown  
24 Youngstown. So in effect, it's a waste of taxpayer's money  
25 to provide a tax abatement to any utility for things that



1 they need to put downtown in order to serve their customers.  
2 The way we look at it, it's our responsibility; so we go  
3 ahead and do our stuff.

4 Q Did you tell the Mayor or Mr. Romero or  
5 for that matter any of the individuals you talked to about  
6 this your opinion that tax abatement may, in fact, not be  
7 legal?

8 A Oh, I never used that term. I -- I didn't  
9 think about -- I didn't even think about the legality. I  
10 just thought it was not proper to provide tax abatement to a  
11 utility.

12 Q Are you aware as to whether Ohio Edison  
13 has ever received tax abatement in any of the communities  
14 that it operates in?

15 A I am not aware of any tax abatement.

16 Q Okay. Now, you mentioned that you spoke  
17 to all -- there's seven councilmen?

18 A Plus the president.

19 Q Okay. What about, is there a Finance  
20 Director?

21 A Yes, Dave Bozanich, David.

22 Q Did you speak to Mr. Bozanich, is it?

23 A I did. I did. I had forgotten, yes.

24 Q And did you speak to these people  
25 individually or as a group or in varying clumps?

1 A Yeah, it really did vary. The majority  
2 individually. The initial conversation was talking with the  
3 Mayor, and then he invited the Law Director over, and the  
4 councilman was standing there, so --

5 Q So did you speak to all of these  
6 individuals before the meeting last Wednesday morning?

7 A Wednesday afternoon.

8 Q Or Wednesday afternoon?

9 A Yeah, caucus begins at 4:30. I did not  
10 have a chance to speak with everyone prior to caucus  
11 beginning. And I attempted to talk with the rest of them  
12 between caucus and the formal council presentation. And  
13 Bozanich I actually didn't get to until after they,  
14 everything was completed Wednesday night.

15 Q And what did you say to these other  
16 individuals that you spoke to?

17 A Basically I expressed my understanding,  
18 the same as I did to the Mayor, my understanding of tax  
19 abatement, how it's supposed to be used, what would happen  
20 if, if it were not extended to Youngstown Thermal here. I  
21 mentioned the fact that right now Ohio Edison is in the  
22 process of updating our equipment downtown, and we're  
23 spending, started out \$10 million; I think probably it's up  
24 to \$12 million now.

25 We asked for -- this is what I told them -- we asked

1 for no tax abatement and really didn't think that we should  
2 have any. We feel that it's our responsibility to provide  
3 facilities that will provide customers downtown and  
4 throughout the city with electric service. It's our job,  
5 our responsibility. If we are not able to do what we feel  
6 we need to do, we apply to the Commission for a rate  
7 increase. And if Thermal felt that they didn't have the  
8 funds to do what they wanted to do, they should in turn  
9 apply to Youngstown City for it, for a rate increase.

10 In effect what they're asking for is a rate increase in  
11 the form of a tax abatement, and 75 percent of that tax  
12 normally goes to the school system. So what they're doing  
13 is using the kids' money for --

14 Q What was the outcome of the meeting last  
15 Wednesday with respect to Youngstown Thermal's two tax  
16 abatement issues?

17 A Okay, when -- I don't want to go too far  
18 back here -- but in caucus they review each piece of  
19 legislation individually, and the purpose of that then is  
20 they'll lump all of these pieces that they're going to pass  
21 together into one big package and suspend the readings then  
22 during the formal session of council. So when they got to  
23 the two pieces for tax abatement for Youngstown Thermal, one  
24 of the council people objected to providing tax abatement to  
25 a utility, and he asked for a separate vote on those two

1 pieces of legislation.

2 And at that time a second council person proposed that  
3 they simply pass it on to a second reading rather than do  
4 either of the -- either the suspension in passing or else  
5 give it a separate reading and vote on it then. He  
6 suggested they give it a second reading, which would in turn  
7 give them an opportunity to learn more about it, and council  
8 as a whole agreed to that.

9 Q Who was the council person who objected?

10 A Councilman Robert Jennings.

11 Q Robert Jennings?

12 A Yes, J-E-N-N-I-N-G-S.

13 Q Who was the second council person who  
14 spoke up?

15 A Lock, L-O-C-K, Beachum, B-E-A-C-H-U-M.

16 Q Had you spoken to Mr. Robert Jennings  
17 prior to the beginning of the meeting?

18 A Very, very few words. He was the  
19 councilman that by chance happened to overhear some of my  
20 conversation, some of a conversation between the Mayor and  
21 the Law Director and myself. I tried to talk with him  
22 before, as caucus was starting, but they hammered us into  
23 our seats, so I really couldn't do very much there. He  
24 took --

25 Q I'm sorry.

1 A He would have done it on his own. He  
2 didn't need me. His feelings are such that he's not very  
3 amorous towards utilities as a group.

4 Q Do you know Mr. Jennings?

5 A Do I know him?

6 Q Yes.

7 A Yes.

8 Q Between the time that you picked up the  
9 list of the legislation to be considered and the time that  
10 the meeting started, you had these conversations with Mayor  
11 Ungaro and the people you mentioned to me. Did you contact  
12 anyone here at the general office or in the Youngstown  
13 Division about whether this tax abatement issue would be, I  
14 think your words were, a legitimate application of tax  
15 abatement moneys?

16 A I contacted no one in the general office.  
17 Doug Elliott was definitely not at this meeting, so the next  
18 morning I left him a voice message, prior to beginning of  
19 the day, to tell him that there was an issue of tax  
20 abatement regarding a certain company, Youngstown Thermal,  
21 and that I thought he and I should talk about it and discuss  
22 it.

23 Q And did you do that?

24 A At some later time. I do believe it was  
25 the following day.

1 Q Do you attend these City Council meetings  
2 for Ohio Edison?

3 A Yes.

4 Q Is that one of the requirements of your  
5 employment, so to speak, that you attend these meetings?

6 A It's one of my responsibilities, yes. I  
7 have that assignment, Youngstown City.

8 Q What was your conversation with Mr.  
9 Elliott about the following day?

10 A I described to him, I would hope,  
11 identically to what I just described to you; told him about  
12 the conversation with the Mayor, finding the stuff and  
13 talking with the Mayor and Romero, the Law Director, and  
14 Jennings overhearing it some, and then trying to talk with  
15 the other council people individually, and told him that it  
16 was given a second reading. It was not suspended; it was  
17 not voted on. Well, in effect, it was voted on separately  
18 because they gave it a second reading. Basically it was a  
19 report of what had transpired the prior evening.

20 Q And did Mr. Elliott agree with the actions  
21 you had taken up to that point?

22 A Yes.

23 Q And did he ask you to take any further  
24 action regarding this tax abatement proposal?

25 A Yes.

1 Q And what did he ask you to do?

2 A To talk with the other council people that  
3 I had not had the opportunity to talk with in much the same  
4 way that I had talked with the ones I had the opportunity to  
5 talk with.

6 Q And the purpose of talking to these  
7 individuals would be to persuade them to vote against the  
8 tax abatement issue?

9 A Actually it was to encourage them to  
10 support Councilman Jennings' position, which I took to be in  
11 opposition to providing Thermal with the tax abatement.

12 Q Okay. So stated a different way, to join  
13 with Councilman Jennings -- are they referred to as  
14 councilmen?

15 A Yes, except for the council lady.

16 Q Okay. To join with Councilman Jennings in  
17 opposing this tax abatement issue?

18 A Yes.

19 Q And what have you done since that meeting;  
20 have you talked to any of the other council people?

21 A Yes.

22 Q Who else have you spoken to since meeting  
23 with Mr. Elliott?

24 A Okay, very briefly with Councilman  
25 Jennings again, phone; Councilman Beachum, phone. I left

1 Councilman Naples a message on his phone that I would like  
2 to talk with him about this legislation. I talked with  
3 Councilwoman Anna Marie Nameth, N-A-M-E-T-H, very briefly.  
4 Well, not since, not since, not since last Wednesday's  
5 meeting or my conversation with Mr. Elliott on Thursday, I  
6 did not talk with Councilman McNally. I talked with  
7 Councilman Fortune, Councilman Nittoli, N-I-T-T-O-L-I, and  
8 Council President Sammarone, S-A-M-M-A-R-O-N-E.

9 Q Were all of those conversations by  
10 telephone, or were there some that were in person?

11 A Subsequent to the review with Mr. Elliott,  
12 they've all been by telephone.

13 Q Have all of these conversations been  
14 basically the same as the one that you told me about before  
15 at the council meeting?

16 A Yes, it was my, my attempt to make them  
17 all the same.

18 Q So when you call these council people and  
19 speak to them on the telephone, just basically what do you  
20 say to them?

21 A Exactly what I said to you. My  
22 understanding of tax -- I refer to the specific legislation  
23 and to what transpired and offer them my, shall we say,  
24 interpretation or understanding of tax abatement and  
25 encourage them to support Councilman Jennings in his



1 opposition to.

2 Q Have any of them agreed to oppose the  
3 issue with Councilman Jennings?

4 A A number of them expressed agreement with  
5 his objection to providing the tax abatement to Thermal.

6 Q Which council people would those be?

7 A Beachum.

8 Q That's the last name?

9 A Beachum, yes, I'm sorry; Lock Beachum.

10 Q Oh, okay.

11 A Anna Marie Nameth, Jim Fortune, John  
12 Nittoli, and Chuck Sammarone.

13 Q And those individuals that you've just  
14 named have stated to you that they have concerns about the  
15 tax abatement issue also?

16 A For Youngstown Thermal. Now, some have  
17 general concerns about tax abatement, but I -- I made no  
18 attempt to address that.

19 Q Were all of the issues for decision last  
20 week at the City Council meeting tax abatement issues?

21 A Oh, no, no.

22 Q But there were other tax abatement issues  
23 decided that day?

24 A Three others.

25 Q Three other tax abatement issues?

1 A Correct.

2 Q And were they approved or disapproved?

3 A Approved. They were passed under  
4 suspension of readings.

5 Q What companies were those for, if you  
6 remember?

7 A I don't remember the names. They were  
8 basically what we called earlier today industrial customers,  
9 manufacturers of some product who in turn employed people  
10 and paid taxes in the community.

11 Q Have you ever previously taken action with  
12 respect to another competitor's tax abatement proposals, or  
13 is this the first time you've come across this?

14 A It's the first time -- pardon me, if we  
15 just look at what you call competitors, I would consider  
16 that other providers of energy. I know of no other instance  
17 where a provider of some kind of energy service has asked  
18 for a tax abatement. Ameritech, the local telephone  
19 company, had requested and was the beneficiary of tax  
20 abatement, but not directly. Tax abatement was provided for  
21 the new building which they occupy, and they brought  
22 additional jobs in. But they lease the building, so this  
23 evidently is the legal arrangement for providing a tax  
24 abatement where a utility is involved.

25 Q The tax abatement for Youngstown Thermal

1 that we've been discussing is tax abatement for what  
2 purpose?

3 A Two.

4 Q All right.

5 A One for, well, I'll say, my words, a  
6 chilled water system; and two, for a steam system.

7 Q Where would the chilled water system  
8 provide service to?

9 A I have no idea, other than generally  
10 downtown.

11 Q Somewhere in downtown Youngstown?

12 A That's where Thermal's plant is.

13 Q Okay.

14 A Doesn't -- I don't know what they, what  
15 they have in mind, really.

16 Q Do you know what Youngstown Thermal's  
17 ability is to go forward with building a chilled water  
18 system if they don't get the tax abatement?

19 A Do I know? No. But there were  
20 considerable questions about that at the regular Building  
21 Commissioners meetings.

22 Q So there had been concern expressed at the  
23 Building Commission meeting about the jail, that do we know  
24 for sure whether Youngstown Thermal can get this chilled  
25 water system up and running in time to service the jail?

BEFORE THE PUBLIC UTILITIES COMMISSON  
OF OHIO

- - -

COMPLAINT OF YOUNGSTOWN )  
THERMAL, LIMITED PARTNERSHIP )  
AGAINST OHIO EDISON COMPANY )  
REGARDING UNAUTHORIZED )  
PUBLIC UTILITY COOLING ) CASE NO.  
SERVICE, DISCRIMINATORY ) 93-1408-EL-CSS  
SELF-DEALING AND PROPOSED )  
SALE OF UTILITY SERVICE AT )  
LESS THAN ACTUAL COST FOR )  
THE PURPOSES OF DETROYING )  
COMPETITION. )

- - -

Deposition of CARL E. AVERS, a Witness  
herein, called by Ohio Edison Company for  
cross-examination pursuant to the Ohio Rules of  
Civil Procedure, taken before me, the  
undersigned, Tracy Lynn Rowland, a Stenographic  
Reporter and Notary Public in and for the State  
of Ohio, taken at the law offices of Vorys,  
Sater, Seymour & Pease, Suite 2100, 1375 East  
Ninth Street, Cleveland, Ohio, on Friday, June 3,  
1994, commencing at 10:00 o'clock a.m.

COPY

1 Q. In what form?

2 A. Steam absorption cooling.

3 Q. Using what kind of equipment?

4 A. I do not recall the manufacturer's name of  
5 the equipment.

6 Q. Approximately how many miles of piping is  
7 involved in Pittsburgh?

8 A. Approximately 3 miles of pipe trench, of  
9 which there are four pipes in that system:  
10 chilled water supply, chilled water return, a  
11 steam supply and a condensate return. Except for  
12 those customers where we provide hot water, then  
13 there's a hot water supply and return.

14 Q. Could you describe the physical facilities  
15 of San Francisco Thermal, Limited Partnership?

16 A. The system has two plants and approximately  
17 11 miles of underground steam pipes, no  
18 condensate return. There are five boilers in the  
19 primary steam station called Station T and two  
20 boilers in a separate steam plant called  
21 Station S.

22 Q. What's the capacity of the boilers?

23 A. At Station T, boiler 7 is 100,000 pounds  
24 per hour, number 6 boiler is 100,000 pounds per  
hour, and boilers 3 through 5 are approximately

1 you believe it to be accurate?

2 A. Yes.

3 Q. You mentioned that one of your duties as  
4 chairman of these different organizations is to  
5 set policy?

6 A. Yes.

7 Q. Did you have any input in your capacity as  
8 chairman with the formation of these different  
9 entities?

10 A. This formation was developed by the law  
11 firm of Jones, Day.

12 Q. Could you describe for the record, sir,  
13 what the business of Youngstown Thermal, Limited  
14 Partnership is at present?

15 A. Yes. It's a steam utility that's regulated  
16 by the Ohio Public Utilities Commission, and it  
17 supplies steam service to about 50 buildings in  
18 Youngstown, Ohio.

19 Q. Has Youngstown Thermal, Limited Partnership  
20 ever provided any cooling service?

21 A. No.

22 Q. Could you describe for the record, sir,  
23 what the business of Pittsburgh Thermal, Limited  
24 Partnership is?

25 A. It provides district cooling and district

1 heating, both steam and hot water, to about  
2 28 buildings on the north side of Pittsburgh.

3 Q. Could you describe for the record, sir,  
4 what the business of San Francisco Thermal,  
5 Limited Partnership is?

6 A. It provides a steam service to  
7 approximately 200 buildings in the downtown area  
8 of San Francisco. It provides heating service,  
9 domestic hot water, and it provides steam for  
10 cooling of several buildings.

11 Q. What was the last part, sir? Steam for --

12 A. Steam for cooling purposes, cooling energy.

13 Q. Directing your attention to Exhibit 82,  
14 sir, and specifically to the portion relating to  
15 Thermal Ventures, Inc., is that a corporate  
16 entity?

17 A. It is.

18 Q. Do you know what state it's incorporated  
19 in?

20 A. Delaware.

21 Q. Does this exhibit correctly indicate that  
22 you are a 50 percent shareholder of that entity?

23 A. I am.

24 Q. And that Mr. Mahoney is the other  
25 50 percent shareholder?

BEFORE THE PUBLIC UTILITIES COMMISSON  
OF OHIO

COMPLAINT OF YOUNGSTOWN )  
THERMAL, LIMITED PARTNERSHIP )  
AGAINST OHIO EDISON COMPANY )  
REGARDING UNAUTHORIZED )  
PUBLIC UTILITY COOLING ) CASE NO.  
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SELF-DEALING AND PROPOSED )  
SALE OF UTILITY SERVICE AT )  
LESS THAN ACTUAL COST FOR )  
THE PURPOSES OF DETROYING )  
COMPETITION. )

Continued Deposition of CARL E. AVERS, a  
Witness herein, called by Ohio Edison Company  
for cross-examination pursuant to the Ohio Rules  
of Civil Procedure, taken before me, the  
undersigned, Tracy Lynn Rowland, a Stenographic  
Reporter and Notary Public in and for the State  
of Ohio, taken at the law offices of Vorys,  
Sater, Seymour & Pease, Suite 2100, 1375 East  
Ninth Street, Cleveland, Ohio, on Thursday,  
June 30, 1994, commencing at 10:00 o'clock a.m.

COPY



1 would be located where in conjunction with the  
2 Mahoning County Justice Center?

3 A. 255 North Avenue.

4 Q. Where on this map is the Mahoning County  
5 Justice Center located?

6 A. Across the street from that block.

7 Q. Which street?

8 A. Belmont Avenue.

9 Q. Would it be directly across the street from  
10 that block?

11 A. It encompasses the whole block directly  
12 across the street from that item that's called  
13 "chiller plant."

14 Q. Does Youngstown Thermal have a facility  
15 already at that location?

16 A. We own the property. That's the location  
17 of our heating plant. And we own the building  
18 which would house the chillers at that location.

19 Q. The building that would house the chillers  
20 would be a building different than the one that  
21 houses the heating facilities?

22 A. It is a building that is presently  
23 unoccupied that's physically adjacent from the  
24 heating plant that used to house the DC  
25 generators when DC power was generated at that

1 location.

2 Q. The planned location for the chillers is in  
3 a building separate from your heating building?

4 A. Yes.

5 Q. But next-door to it?

6 A. It's really all part of the same building,  
7 but it's really a separate building. They  
8 physically are attached. There are three  
9 buildings physically attached, and it's called  
10 one because it occupies a totally enclosed space.

11 Q. Does Youngstown Thermal own the property --

12 A. Yes.

13 Q. -- on which this facility is planned?

14 A. Yes.

15 Q. There is also a chiller plant shown on the  
16 right side of this map. Do you see that?

17 A. Yes.

18 Q. What would that be?

19 A. That's a generic representation of a  
20 satellite plant that would be built in that area.

21 Q. And there's also a block at the top of this  
22 map. What is that, sir?

23 A. That's the Youngstown State University  
24 central heating and cooling plant.

25 Q. So that's where their chiller equipment is

1 had discussions with the County concerning that  
2 activity, as well as the activity that I  
3 described in my prior answer.

4 Q. Sir, what's the estimated cost of building  
5 a central cooling facility in downtown  
6 Youngstown?

7 MS. LARSON: Objection. You can  
8 answer.

9 THE WITNESS: That depends. The  
10 full -- a full-size district cooling system in  
11 downtown Youngstown could cost between 6 and  
12 \$10 million. However, a smaller facility would  
13 cost less, and I couldn't answer the question  
14 unless that was more fully framed. But it would  
15 be -- you could begin a cooling service for 2 or  
16 \$3 million, for example, on a reduced scale.

17 BY MR. ROONEY:

18 Q. Have either you or Mr. Mahoney ever built a  
19 central cooling facility?

20 A. Yes, I have.

21 Q. All right. And when and where?

22 A. I built the downtown district cooling  
23 system in San Diego. I was the project engineer  
24 and manager of the corporation that developed,  
25 implemented, installed, started up and operated

1 that system.

2 Q. Okay. Is that the only one?

3 A. No. The system in Nashville, Tennessee, I  
4 was the chief engineer for the corporation and  
5 its general manager that oversaw the engineering,  
6 construction, start-up, staffing, and operation  
7 of that large-scale district cooling system.

8 Q. Are those the only two?

9 A. I have consulted with a number of cities  
10 around the United States concerning the  
11 development of district cooling systems and have  
12 done extensive engineering feasibility studies  
13 and preliminary designs on a number of district  
14 cooling systems and specifically designed and  
15 oversaw the design and preparation of  
16 construction documents for a large-scale district  
17 cooling system in Memphis, Tennessee.

18 Q. Memphis, Tennessee?

19 A. Memphis, Tennessee.

20 Q. How much did the San Diego cooling system  
21 cost?

22 A. It was built in about 1970, and in 1970  
23 dollars, it was in the 3 to \$5 million investment  
24 category.

25 Q. How much did the Nashville facility cost?

1 because we objected.

2 THE WITNESS: I'm not sure that I  
3 can find it, actually. I know I've done it on a  
4 scratch pad, and it may be someplace in my  
5 office, which is a mess.

6 MR. ROONEY: If you can, try to  
7 find that.

8 THE WITNESS: Sure.

9 MR. ROONEY: And give it to your  
10 counsel, and I guess we'll have to talk about the  
11 objection.

12 BY MR. ROONEY:

13 Q. From recollection, sir, what was the range  
14 of figures contained on that document as far as  
15 cost of a Youngstown cooling facility?

16 MS. LARSON: Objection. Answer  
17 if you know.

18 THE WITNESS: We have looked at  
19 one that would cost \$8 million, and we have  
20 looked at ones that would cost like 2 or \$3  
21 million, and we've looked at satellite systems  
22 that would be several hundred thousand dollars.

23 BY MR. ROONEY:

24 Q. And which did you have in mind when you  
25 were bidding on the Mahoning County Justice

1 on it. We would build it out of alternative  
2 funds up to some stage where we could do the  
3 process that we do with respect to the financial  
4 package. It's done in series, not -- it's done  
5 in parallel with construction and other  
6 activities.

7 Q. I appreciate that. But my question was, to  
8 this date, has Youngstown Thermal put together a  
9 package which could be put out for bid for the  
10 Youngstown facility?

11 A. We have specifically been approved by the  
12 National City Bank for a loan for a  
13 nondescriptive cooling system, which we would  
14 call our first phase.

15 Q. I presume --

16 A. That loan is -- its size is not  
17 determined. It has been approved based on a  
18 nominal amount, but to be adjusted when we know  
19 the actual construction dollars.

20 Q. What's the nominal amount?

21 A. I think it's \$200,000.

22 Q. I presume that some documents had to be  
23 given to National City in conjunction with that  
24 submission?

25 A. No, they were not. Banks lend money

1 A. In 1993. Let me clarify. You said "design  
2 drawings." Drawings have been made. I would  
3 characterize them as being more schematic  
4 engineering drawings at this stage as opposed to  
5 construction drawings, just to be specific.

6 Q. Who prepared those schematic drawings?

7 A. Thermal Group in Nashville, Tennessee.

8 Q. Are they any relationship to Youngstown  
9 Thermal?

10 A. They are a consulting engineering group  
11 that's not affiliated legally. However, they do  
12 work on an ongoing basis for our company in all  
13 three locations, Pittsburgh, San Francisco and  
14 Youngstown.

15 Q. Have any bid packages been prepared --

16 A. No.

17 Q. -- as such? Who will be preparing bid  
18 packages?

19 A. Thermal Group.

20 Q. What's the timetable for that?

21 A. They will be developing some of that work,  
22 late summer, early fall of this year.

23 Q. Have the equipment manufacturers been  
24 selected for the chilling equipment?

25 A. We have talked to manufacturers. And we

1 may have one piece of equipment that we own in  
2 Pittsburgh, we may relocate it to Youngstown.

3 Q. Has Youngstown Thermal worked with any of  
4 these manufacturers in relation to a timetable  
5 for construction of a facility?

6 A. Yes, we have.

7 Q. When is it planned that the equipment would  
8 be installed in the facility?

9 A. The type of equipment that we would  
10 probably use in the initial phases is equipment  
11 that would be supplied by NuTemp. They're in  
12 Chicago. And that equipment is reconditioned  
13 equipment. They specialize in remanufacturing of  
14 equipment, and it has short lead times because  
15 they keep it in stock.

16 Q. Okay. What do you mean by "short lead  
17 time"?

18 A. Weeks, a few weeks.

19 Q. I take it there's no contractor lined up  
20 yet because no bids have --

21 A. We have an ongoing business relationship  
22 with them. We have both leased and purchased  
23 chillers from them over the last three years, and  
24 we have a strong business relationship with them,  
25 such that if we wanted to buy equipment it would



Second Reading 6/27/9

MAYOR

YOUNGSTOWN

Suspend & Pass 7-20-94

APPROVED  
DEPARTMENT OF LAW

ORD-94-307  
AN ORDINANCE

615767  
SUSP.

GRANTING TO YOUNGSTOWN THERMAL LIMITED PARTNERSHIP, ITS SUCCESSORS AND ASSIGNS, THE FRANCHISE AND RIGHT TO ERECT, CONSTRUCT, OPERATE, MAINTAIN AND USE THE NECESSARY PIPES, CONDUITS, VALVES AND SUCH OTHER FIXTURES AND APPLIANCES, OVERHEAD AND UNDERGROUND, AS MAY BE DEEMED BY IT OR THEM NECESSARY OR ESSENTIAL TO ENABLE IT OR THEM TO TRANSMIT AND RECOVER STEAM, WATER AND CONDENSATE OVER, THROUGH, ALONG AND UNDER THE STREETS, ALLEYS, HIGHWAYS, WAYS, SIDEWALKS AND PUBLIC PLACES OF THE CITY OF YOUNGSTOWN, STATE OF OHIO, FOR THE PURPOSES OF FURNISHING CENTRAL HEATING AND COOLING AND HOT WATER SERVICE TO THE PUBLIC IN THE CITY OF YOUNGSTOWN; AND PROVIDING THAT THIS ORDINANCE SHALL TAKE EFFECT AND BE IN FORCE FROM AND AFTER THE EARLIEST PERIOD ALLOWED BY LAW, AND SHALL REMAIN IN FORCE FOR A TERM OF TWENTY-FIVE YEARS. FURTHER, REPEALING ORDINANCE NO. 80-499, PASSED IN COUNCIL ON JUNE 25, 1980.

\* \* \*

WHEREAS, Youngstown Thermal Limited Partnership, effective November 1, 1991, assumed ownership and operation of the central steam and water plant and distribution system for the purpose of furnishing central steam service to the public in the City of Youngstown, State of Ohio; and

WHEREAS, the City of Youngstown has granted to Youngstown Thermal Corporation by Ordinance 80-499, attached as Exhibit A, the franchise and right to furnish its central steam service to the public, pursuant to Section 715.34 of the Ohio Revised Code, and now wishes to transfer that right to Youngstown Thermal Limited Partnership; and

WHEREAS, the City of Youngstown wishes to amend said franchise.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF YOUNGSTOWN, STATE OF OHIO:



## SECTION 1

That the Youngstown Thermal Limited Partnership (Youngstown Thermal), its successors and assigns, said assignment requiring the approval of the City of Youngstown, is hereby granted a franchise and right to erect, construct, operate, maintain and use necessary pipes, conduits, valves and such other fixtures and appliances, overhead and underground as may be deemed by it or them to be necessary or essential to enable it or them to transmit and recover steam, water and condensate over, through, along and under the streets, alleys, highways, ways, sidewalks and public places of the City of Youngstown, Ohio, for the purposes of furnishing central heating and cooling and hot water service (hereinafter, "steam service") to the public in the City of Youngstown, State of Ohio under the authority of 715.34 Ohio Revised Code, 4905.03 (A)(9) Ohio Revised Code and 1723.02 Ohio Revised Code. An assignment of the cooling service franchise and right to an entity known as Youngstown Thermal Cooling, Limited Partnership, which shall share the same ownership as Youngstown Thermal, is hereby approved. Such assignment shall take effect upon the filing of notice thereof with the Clerk of the Council. The franchise fee obligation under Section 8 of this franchise shall be apportioned equally between the two companies.

## SECTION 2

That the location of all new pipes, conduits and such other fixtures and appliances as may be deemed by Youngstown Thermal to be necessary or essential to enable it to furnish its central steam and cooling service shall be done by Youngstown Thermal, its successors and assigns, upon permits issued by the Deputy Director of Public Works of the City of Youngstown, in accordance with Chapter 909 of the Youngstown Codified Ordinances, as amended. Whenever it shall be necessary for Youngstown Thermal to make excavations in connection with the construction, operation and maintenance of its distribution system in, along, over, under, across and upon the street and alley rights of way and public grounds in the City of Youngstown, such work shall be performed in such a manner as to impede as little as possible travel on said streets, and as approved by the City of Youngstown. Youngstown Thermal shall leave all highways, streets, alleys and public grounds, sidewalks, waterlines, sewers and other underground facilities upon which it may enter for the purposes herein authorized, in as good condition as they were at the time said excavation and work were started. Youngstown Thermal shall maintain a bond in the amount of Twenty Thousand Dollars (\$20,000.00) which shall be available for the City of Youngstown to utilize in the event Youngstown Thermal fails to restore streets or public grounds to their original condition within a reasonable period of time after making excavations. Said bond shall also be available, in addition to any insurance provided under Section 3 herein, to indemnify the City of Youngstown for any damage to public property resulting from leakage from Youngstown Thermal's

### SECTION 3

That Youngstown Thermal, its successors and assigns, shall protect, indemnify, defend and hold harmless the City of Youngstown against any and all claims for damages which may in any way arise from the exercise of the rights and privileges herein granted. Youngstown Thermal shall maintain insurance to cover and protect itself and the City of Youngstown as an additional named insured against all claims which may arise from the operations of Youngstown Thermal or its steam system. Copies of Youngstown Thermal's currently effective certificate of insurance showing the City as an additional-named insured shall be provided to the City of Youngstown's Law Department. The amount of such insurance against liability due to physical damages to property shall be not less than Five Million Dollars (\$5,000,000.00) for damage to the property of any one person in any one occurrence and not less than Ten Million Dollars (\$10,000,000.00) for damages to the property of two or more persons in any one occurrence; and against liability due to bodily injury or death of persons not less than Five Million Dollars (\$5,000,000.00) for injury or death to any one person in any one occurrence and not less than Ten Million Dollars (\$10,000,000.00) for injury or death to any two or more persons in any one occurrence. A certificate of insurance is attached as Exhibit "A". Upon termination of said insurance, this Franchise terminates.

### SECTION 4

That the City of Youngstown shall protect and indemnify Youngstown Thermal, its successors and assigns, against any and all demands resulting from any activity of the City of Youngstown and affecting the rights and privileges herein granted to Youngstown Thermal.

### SECTION 5

That the Youngstown Thermal shall have thirty (30) days from the passage and legal publication of this Ordinance to file with the City Clerk a written acceptance of the terms and conditions of this Ordinance pursuant to Section 4909.34 of the Ohio Revised Code.

### SECTION 6

That Youngstown Thermal shall provide to the City of Youngstown's Director of Law timely copies of all notices, filings, applications and all other documents submitted to the Public Utilities Commission of Ohio (PUCO) concerning or affecting Youngstown Thermal's operations.

#### SECTION 7

That, pursuant to Section 715.34, 1723.02 and 4905.03 (A)(9) Ohio Revised Code, the City of Youngstown reserves the right to regulate, at intervals of not less than five (5) years, the prices which Youngstown Thermal may charge for steam services, provided that this franchise does not affect City Ordinance 85-552 which imposed an interim and temporary rate which governs steam rates until such time as a new rate is established by Ordinance and City Ordinance 86-235 which was optional for customers affected by such rate. Said ordinances are attached as Exhibit B (85-552) and Exhibit C (86-235) and incorporated as if fully rewritten herein. A separate rate ordinance for cooling shall be required before cooling services can be provided under this franchise.

#### SECTION 8

Youngstown Thermal shall, as a condition of receiving this franchise, pay to the City of Youngstown, (c/o Director of Finance), a franchise fee of Five Thousand Dollars (\$5,000.00) per year; said franchise fee shall increase annually by a percentage equal to the prior years increase in the consumer price index for the local area as compiled by the local Chamber of Commerce. The first year's franchise fee shall be payable concurrent with acceptance of this franchise by Youngstown Thermal. Thereafter, the annual franchise fee shall be payable on the anniversary date of the franchise.

#### SECTION 9

In the event Grantee makes an application to the PUCCO to abandon service to any part or all of its service area, Youngstown Thermal shall send a copy of any such application to each of its then existing customers.

#### SECTION 10

That Ordinance No. 80-499 (Exhibit D), passed in Council on June 25, 1980, is hereby repealed in its entirety.

#### SECTION 11

That this ordinance shall take effect and be in force from and after the earliest period allowed by law, and shall remain in effect for a term of twenty-five years, unless sooner terminated as provided herein. The City of Youngstown hereby reserves the right at any time for cause to repeal or to properly amend this ordinance or to revoke the privileges herein granted in whole or in part. Cause is defined as the failure to comply with the requirements of this ordinance or Ohio Law applicable to Public Utility Heating or cooling companies. Youngstown Thermal shall be in default of its franchise if Council finds, after providing notice and an opportunity to be heard, that Grantee has abandoned or discontinued steam service or has materially failed to comply with the terms of

Passed in Council this 20<sup>th</sup> day of July, 1994.

Charles P. Sammons  
PRESIDENT OF COUNCIL

ATTEST:

Shirley A. Williams  
CITY CLERK

APPROVED: This 21<sup>st</sup> day of July, 1994.

Paul H. Hays  
MAYOR

STATE OF OHIO  
BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO  
CASE NO. 93-1408-EL-CSS

In the Matter of the Complaint )  
of YOUNGSTOWN THERMAL, LIMITED )  
PARTNERSHIP, )  
Complainant, ) DEPOSITION  
VS. ) OF  
OHIO EDISON COMPANY, ) DANIEL F. MARINUCCI  
Respondent. )

DEPOSITION taken before me, Mary J. Snyder, a Notary Public within and for the State of Ohio, on the 17th Day of May, A.D., 1994, pursuant to Subpoena and at the time and place therein specified, to be used in the aforesaid cause of action, pending before the Public Utilities Commission of Ohio.

APPEARANCES  
Atty. John Winship Read  
On Behalf of Complainant  
Atty. James W. Burk  
Atty. Michael R. Beiting  
On Behalf of Respondent  
Atty. Vincent E. Gilmartin  
On Behalf of Deponent

ALSO PRESENT  
Mr. Jeffrey Bees, Youngstown Thermal,  
Limited Partnership  
Mr. Richard Kukura  
Mr. Jamison W. Rowlands,  
Ohio Edison Company

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13 OBJECTIONS AND MOTIONS:  
14 BY MR. GILMARTIN: PAGE(S) 34-35, 63-67, 101  
15 BY MR. READ: PAGE(S) 181, 204

1 EXHIBITS INTRODUCED OR REFERRED TO:

2 MARINUCCI EXHIBIT NO. 40 - PAGE 6  
3 PAGE 85 NO. 51 - PAGE 140  
4 PAGE 85 NO. 52 - PAGE 141

44 - PAGE 111 NO. 57 - PAGE 157  
45 - PAGE 113 NO. 58 - PAGE 159  
46 - PAGE 119 NO. 59 - PAGE 160  
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23 - PAGE 123 NO. 29 - PAGE 173  
50 - PAGE 126 NO. 32 - PAGE 173  
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STIPULATIONS

It is stipulated and agreed by and between counsel for the parties hereto that this deposition may be taken at this time, 8:55 a.m., May 17, 1994, at 300 West Commerce Street, Youngstown, Ohio.  
It is further stipulated and agreed by and between counsel that the deposition may be taken in shorthand by Mary J. Snyder, a Notary Public within and for the State of Ohio, and may be by her transcribed with the use of computer-assisted transcription; that the witness will read and sign the finished transcript of his deposition.

(Whereupon the reporter marked for identification Exhibit 40.)

WHEREUPON,  
DANIEL F. MARINUCCI,  
of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposes and says as follows:

EXAMINATION:

By Mr. Read  
Q State your name for the record, please.  
A Daniel F. Marinucci, M-A-R-I-N-U-C-C-I.  
Q Have you testified before?  
A Yes.  
Q I'm very guilty of interrupting witnesses before they stop talking, and I will do my very best not to start talking before you finish. Please do the same. The record will read a lot better. For whom are you employed?  
A I'm self-employed.  
Q What do you do for a living?  
A I'm an attorney; I'm an engineer; I'm a building official; and presently I am the legal advisor/project administrator for the Mahoning County Justice Center.

Q Presently do you do any other work?  
A Yes, I do.  
Q What's that?  
A I have some law practice going on and some engineering work. But for the most part of it, I've given up all my extra clients to serve this one client.  
Q Do you maintain a law practice somewhere?  
A I had, yes, I did. I gave most of it up.  
Q Lake County, Ohio.  
A Where do you live?  
A Right now temporarily I live in Canfield.  
Q But I use as my permanent residence 260 Nelmar Drive in Painesville, Ohio.  
A And what's your business address?  
A I work out of this trailer, if that's what you mean, here.  
Q Yes.  
A It's 300 West Commerce Street.  
Q And do you have a contract associated with

6 offered, they were going to generate the cold water from a  
 7 plant right across the street from the jail; right?  
 8 A I'm not too sure where they were going to.  
 9 Q Okay.  
 10 A They were going to generate, their  
 11 proposal, they were going to generate cold water.  
 12 Q Right.  
 13 A That may not be the right name, though.  
 14 Q It may be Acorn E-Vac, may be the right name.  
 15 Q So you're saying that -- again, I guess  
 16 the record's not clear enough for me, and I want it to be  
 17 precise, if you don't mind. So you're saying you did harbor  
 18 a particular fear that Youngstown Thermal could not turn on  
 19 the cold water at the date it was telling the county it  
 20 could; is that right?  
 21 A There was questions in my mind whether  
 22 that Youngstown Thermal could have completed all their  
 23 construction in a timely manner.  
 24 Q Okay.  
 25 A And if they couldn't, I wanted to protect  
 the owner. Yes, that was a major concern and fear that I

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1 had.  
 2 Q Okay. Now, and you're saying that that  
 3 concern is different than the generalized concern you have  
 4 about any supplier; is that right? You testified here a few  
 5 minutes ago that you as a contract administrator are  
 6 concerned about all the contractors?  
 7 A Right.  
 8 Q And all the suppliers?  
 9 A Right.  
 10 Q And you want to do your job for your  
 11 client to build in the assurances in the contract for the  
 12 person who's hired you to protect it?  
 13 A That's what I'm trying to do, yes.  
 14 Q Okay. And what I'm trying to get at is  
 15 whether your concerns about Youngstown Thermal were more  
 16 heightened than for other prospective contractors at the  
 17 jail; and I understand you to have said yes, that's the  
 18 case; is that right?  
 19 A My concerns about Youngstown Thermal  
 20 diminished when the criteria that I needed in the contract  
 21 was agreed to by the principals of Youngstown Thermal, and  
 22 it was a fight to get to that point.  
 23 Q Okay. But they agreed; right?  
 24 A And until they agreed, I had every fear,  
 25 number one, that they couldn't perform; number two, that

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1 they couldn't perform by the date specified; and number  
 2 three, whether or not they would be around. So once they  
 3 agreed to the terms that we wanted in the contract, those  
 4 fears diminished, and I even recommended to the Building  
 5 Commission that the contract had all the protections in for  
 6 them.  
 7 Q Okay. So you did agree and they agreed --  
 8 A Who's "they"?  
 9 Q -- at one point? Youngstown Thermal.  
 10 They agreed to the adequate assurances that you as the  
 11 contract administrator were demanding?  
 12 A That's correct.  
 13 Q Okay. Had you ever gone to see Youngstown  
 14 Thermal's district cooling capability in the north side of  
 15 Pittsburgh?  
 16 A No.  
 17 Q Are you aware that others from the  
 18 Youngstown jail project had?  
 19 A No, I'm not aware of that.  
 20 Q Do you know the north side of Pittsburgh?  
 21 Do you know --  
 22 A What do you mean by that?  
 23 Q Do you know generally that's the Three  
 24 Rivers Stadium, Allegheny General Hospital, that area?  
 25 A Right, right.

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1 A Are you aware that Youngstown Thermal has  
 2 a district cooling system that encompasses Allegheny General  
 3 Hospital and the Allegheny Center Mall area and residential  
 4 area?  
 5 A They represented that to us; right.  
 6 Q Do you have any reason to disbelieve that  
 7 representation?  
 8 A No, no, I'm not saying that I disagree  
 9 with it or --

1 point to in operation. Not right, when I looked, when we  
 2 looked at --  
 3 Q When you say E-Vac, for the record, sir --  
 4 A Oh, the plumbing system, the plumbing  
 5 system. When we looked at --  
 6 Q Is E-Vac a company?  
 7 A Yeah, they're international; right.  
 8 Q Okay. So when you refer to E-Vac in this  
 9 record --  
 10 Q A reader of that record might suggest from  
 11 your answer or might interpret from your answer that you  
 12 did?  
 13 A No, the reader of that record can  
 14 interpret whatever they want.  
 15 Q Okay. So I'm trying to --  
 16 A First of all, I can't see that this has  
 17 any bearing on what I personally feel.  
 18 Q So it was July 1995 changed then now to  
 19 September 1995 as a turn-on-the-systems date; right?  
 20 A Yes, substantial completion date; right.  
 21 Q When will the first inmates actually serve  
 22 time at this jail?  
 23 A Assuming we hit that date, then you  
 24 have -- you'd have your -- your punch lists would be going  
 25 on, and then you'll have your testing of all the equipment.

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1 Say that takes 30 days. I would say by Thanksgiving time,  
 2 October, end of October, I would say. Barring no problems,  
 3 you know.  
 4 Q What was the second addendum to your  
 5 contract?  
 6 A Financial.  
 7 Q What do you mean?  
 8 A I was on hourly, and they put me on lump  
 9 sum and incentives and strictly financial.  
 10 Q And that's a public record; if I want to  
 11 find out what it is, I could get that?  
 12 A Sure. I'll gladly tell you if you really  
 13 want to know.  
 14 Q No. Do you have a financial incentive for  
 15 bringing the project home earlier than on schedule?  
 16 A Basically it's, how I understand it,  
 17 it's -- it's, with 10 percent over the construction cost, if  
 18 I could bring it in under that, I get an incentive.  
 19 Q I read about the guy in L.A. that brought  
 20 the Santa Monica Freeway home for \$200,000.  
 21 A Yeah, if I scheduled that project, I would  
 22 have done the same thing, too.  
 23 Q Do you have an incentive like that built  
 24 into your contract?  
 25 A No, I see what you're saying, time

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1 constraint.  
 2 Q Right.  
 3 A No, it's basically dollars. If I can  
 4 bring it in under 10 percent, I get 2 percent of the  
 5 difference, something like that it is.  
 6 Q Now, the issue in this case before the  
 7 Public Utility Commission has to do with the contract that  
 8 Ohio Edison and the Commissioners, not the commission,  
 9 signed. Are you aware of that contract?  
 10 A I am aware that they signed a contract,  
 11 yes.  
 12 Q What role did you play in the execution of  
 13 that?  
 14 A As actually, in execution of that  
 15 contract, no role.  
 16 Q How about the negotiation?  
 17 A But I want to qualify that because --  
 18 Q Go ahead.  
 19 A It has to be qualified because we were  
 20 involved in negotiating the contract with Ohio Edison, and  
 21 we were involved in negotiating the contract with Youngstown  
 22 Thermal. And when the Building Commission voted on which  
 23 way they were going --  
 24 Q Well, they voted twice, didn't they? They  
 25 flip-flopped, didn't they?

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1 A They voted a thousand times it seemed  
 2 like.  
 3 Q Didn't they flip-flop?  
 4 A I guess.  
 5 Q Go ahead.  
 6 A But at the point they decided where they  
 7 were going to the point of heating and cooling and energy,

STATE OF OHIO  
BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO  
CASE NO. 93-1408-EL-CSS

In the Matter of the Complaint )  
of YOUNGSTOWN THERMAL, LIMITED )  
7 PARTNERSHIP, )

8 Complainant, ) DEPOSITION  
9 VS. ) OF  
10 OHIO EDISON COMPANY, ) GOVIND THAKKAR  
11 Respondent. )

DEPOSITION taken before me, Mary J. Snyder, a Notary  
Public within and for the State of Ohio, on the 18th day of  
May, A.D., 1994, pursuant to Subpoena and at the time and  
place therein specified, to be used in the aforesaid cause  
of action, pending before the Public Utilities Commission of  
Ohio.

APPEARANCES

Atty. Sarah J. Cruise  
On Behalf of Complainant

Atty. James W. Burk  
Atty. Michael R. Beiting  
On Behalf of Respondent

Atty. Linette Baringer  
Assistant Mahoning County  
Prosecutor, On Behalf of Deponent

ALSO PRESENT

Mr. Jeffrey Bees, Youngstown Thermal,  
Limited Partnership

Mr. Jamison W. Rowlands  
Mr. Richard Kukura,  
Ohio Edison Company

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OBJECTIONS AND MOTIONS: (NONE)

EXHIBITS INTRODUCED:

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66 - PAGE 44  
67 - PAGE 50  
68 - PAGE 68

71 - PAGE 82  
72 - PAGE 84  
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74 - PAGE 109  
75 - PAGE 119  
76 - PAGE 122  
77 - PAGE 124  
78 - PAGE 168

STIPULATIONS

It is stipulated and agreed by and between counsel  
for the parties hereto that this deposition may be taken at  
this time, 9:15 a.m., May 18, 1994, at the Mahoning County  
Courthouse, 120 Market Street, Youngstown, Ohio.  
It is further stipulated and agreed by and between  
counsel that the deposition may be taken in shorthand by  
Mary J. Snyder, a Notary Public within and for the State of  
Ohio, and may be by her transcribed with the use of  
computer-assisted transcription; that the witness will read  
and sign the finished transcript of his deposition.

(Whereupon the reporter marked for identification  
Exhibit 65.)

WHEREUPON,  
GOVIND THAKKAR,  
of lawful age, being by me first duly  
sworn to testify the truth, the whole  
truth, and nothing but the truth, as  
hereinafter certified, deposes and  
says as follows:

EXAMINATION:

By Ms. Cruise

Q Could you please state your name for the

record?

A Govind Thakkar, G-O-V-I-N-D,

T-H-A-K-K-A-R.

Q Mr. Thakkar, my name is Sarah Cruise, and  
I represent Youngstown Thermal in this case which is pending  
before the Public Utilities Commission. Today I'm going to  
be asking you questions about your involvement in the  
Mahoning County jail project, as well as some questions  
about your background and some other matters.

Now, we have marked as Exhibit 65, which the Exhibits  
have run chronologically forward from the first deposition  
to today's, a copy of the subpoena which was served on you.  
Do you recognize that?

A Yeah.

Q Okay. And you were served with that

subpoena?

A Yes.

Q Now, that subpoena asked for you to  
produce certain documents today; is that right?

A Sure.

Q Okay. And did you, upon being served with  
that subpoena, go through your records and collect what you  
felt was responsive to that?

A Yes.

Q Okay. Mr. Thakkar, have you had your  
deposition taken before today in any other cases?

A Yeah.

Q Okay. There are a few ground rules which  
help everything go more smoothly. The first is that, since  
the court reporter is taking down everything that everyone  
in this room says, if you could please remember to keep your  
voice up and to answer audibly.

A Okay.

Q In conversation everyone tends to shake

their head --



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1 getting capitals. You know, small businesses have that  
2 product. If chilled water was readily available, why invest  
3 \$30,000 in a chiller. So I mean, there's something in the  
4 area you can tap off type deal.  
5 Q A chilled water service?  
6 A Chilled water service.  
7 Q Which Youngstown Thermal provides; right?  
8 A They could.  
9 Q Could provide?  
10 A That's right.  
11 Q All right. Now, you recommended at an  
12 October 22 Building Commission meeting that the county enter  
13 into the proposed contract with Youngstown Thermal; is that  
14 right?  
15 A There was a motion made there, yes; and it  
16 was, yeah.  
17 Q And that decision was based on the fact  
18 that this would benefit the entire county, but it would not  
19 benefit the jail project; is that what I understand your  
20 testimony to be? Why don't you tell me why you made the  
21 recommendation to go with Youngstown Thermal on October 22.  
22 A The reasons we gave you there. There'll  
23 be chilled water available in downtown. Commissioners were  
24 looking forward to that. We would save \$350,000 in capital  
25 if Building Commission and the end user agreed with the

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1 scenario and the contract. Yes, I mean, if we were -- see,  
2 that capital savings was another equally important and  
3 critical consideration in it, too. And that was -- that was  
4 also at the focal point, at the center point, too.  
5 (Whereupon the reporter marked for identification  
6 Exhibit 66.)  
7 Q I'm handing you Deposition Exhibit 66. Do  
8 you recognize this document, Mr. Thakkar?  
9 A Yeah.  
10 Q And at the time that you came to Mahoning  
11 County in September, was this the offer on the table by Ohio  
12 Edison?  
13 A There were too many offers made. There  
14 were too many. I mean, I -- there are quite a few of them.  
15 There were tons of offers. I mean, every meeting they would  
16 change something; both would change something and come back  
17 to me, hey, this is what we can do, okay. So there were  
18 many, many proposals on the table.  
19 Q In your experience with your other  
20 negotiations for energy, was this negotiation process any  
21 different?  
22 A I think, being a county, and I thought --  
23 I thought there were many interested parties in it. I don't  
24 know whether because they are taxpayers or because they  
25 are -- they have their own agendas or what; I don't know.

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1 But there were many interested parties in this  
2 decision-making process than elsewhere. Elsewhere it was a  
3 business. It works for us, do it. We save money. We are  
4 happy. There were -- there were more than --  
5 Q So it wasn't just the bottom line?  
6 A Right. The bottom line and the service  
7 consideration were the major issues elsewhere. Here, there  
8 were many, many interested parties here.  
9 Q Was the back and forth in the offers --  
10 let's take first in Ohio Edison's offers -- was that more  
11 heated than your experience with your other energy  
12 contracts?  
13 A Say it again, please.  
14 Q Well, was the intensity of the  
15 negotiations stronger in this situation with Ohio Edison  
16 than it had been in your experience elsewhere?  
17 A They were -- they -- I mean, elsewhere  
18 even, they didn't want to give up 13 percent when I  
19 negotiated with Illuminating Company at St. Luke's. I mean,  
20 it -- I mean, they are losing maybe million, seven hundred  
21 thousand dollars of revenue for the same power. So it's  
22 back and forth, back and forth. But there were no public  
23 hearings and other things, you know. I mean, you don't have  
24 to have, invite public in that. You just do it on a  
25 one-on-one basis, and they argue with you and then

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1 Q Between the September 22 board meeting and  
2 the October 26 vote on this, would you say that you had  
3 daily contact with representatives from Ohio Edison?

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1 can't do that; we'll do this type deal. So I mean, I think  
2 it's -- it's -- in that respect it's same thing.  
3 Q Did you have the impression that getting  
4 the jail project, the cooling of the jail project, was very  
5 important to Ohio Edison?  
6 A Say it again. Say it again.  
7 Q Did you have the feeling from all of your  
8 discussions with Ohio Edison that getting this cooling  
9 contract was very important to them?  
10 A In their heart --  
11 MR. BURK: What discussions?  
12 MS. CRUISE: I'm just asking  
13 him for his own mental impression right now, and then I'll  
14 ask about the discussions.  
15 A I -- Ohio Edison wanted to help county  
16 conserve costs. Anybody, salesman, hey, my proposal is  
17 better; take it. I thought they were -- they were equally  
18 concerned to sell me the best, most economical services for  
19 my jail. It was at their heart to sell me the best service  
20 that they were sold on. And I -- it was -- yes, it is  
21 not -- I mean, regardless, they got, what, the cooling;  
22 that's beside the point.  
23 But they were selling a product to me, and they were --  
24 they thought that product was, was the best and was the most  
25 competitive and was the most beneficial to the county, and I

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1 should buy their product. No different from Youngstown  
2 Thermal. Hey, we are the best; our product will do this,  
3 this, this, this to you, and you buy our product. I thought  
4 that that's what it was.  
5 Q So you felt that Ohio Edison had the best  
6 interests of the county at heart in making its offers?  
7 A Absolutely. They were looking at our  
8 bottom lines because they were -- they were equally  
9 concerned that, hey, we should get the best for our money;  
10 and because I have to maintain all these facilities, they  
11 were looking at our interest, yes.  
12 Q Why don't you look again at this Exhibit.  
13 What was the offer at this particular time? I believe it's  
14 dated August 13 of 1993. What was your understanding of the  
15 offer by Ohio Edison at this time? What was the  
16 per-ton-hour charge in the offer of August 13, 1993?  
17 A Fourteen cents.  
18 Q And that was fixed for how many years?  
19 A Five years.  
20 Q And there was a \$50,000 payment towards  
21 the purchase of the chillers?  
22 A Yeah.  
23 Q What other aspects of this offer made it  
24 favorable to the county? What else was good about this  
25 offer for the county? I mean, the 14 cents, you felt that

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1 that was a very good offer for the county to pay for the  
2 electricity; is that right?  
3 A Sure.  
4 Q And the 14 cents being fixed for five  
5 years was adequate for your purposes?  
6 A There was a renewal for the same rate for  
7 another five years, too.  
8 Q So there was a possible ten years at 14  
9 cents per ton hour?  
10 A Yes.  
11 Q If at the end of five years Ohio Edison's  
12 Rate 21 was less than 14 cents, the county could opt to go  
13 with that?  
14 A True.  
15 Q And then you got \$50,000?  
16 A Right.  
17 Q Now, you just said there were many, many  
18 offers; is that right?  
19 A Yeah.  
20 Q How were these offers communicated by Ohio  
21 Edison?  
22 A They all were presented to the, to the  
23 special meetings or to me, and I would bring it to the  
24 commission. Or there were quite a few -- there were --

1 cents; is that right?  
2 A Yeah.  
3 Q Now, at some point in time I understand  
4 that the number of ton hours anticipated for the jail was  
5 increased from 770,000 to 1,120,000; is that right?

**CERTIFICATE OF SERVICE**

A copy of the foregoing Confidential Memorandum Contra Ohio Edison Company's Motion to Compel Discovery (Redacted Version Filed Separately) has been sent this 26<sup>th</sup> day of August, 1994 by facsimile transmission and by regular U.S. mail, first class, postage prepaid, to James W. Burk, Esq., Ohio Edison Company, 76 South Main Street, Akron, Ohio 44308 and George W. Rooney, Esq., Roetzell & Andress Co., L.P.A., 75 East Market Street, Akron, Ohio 44308, Attorneys for Respondent The Ohio Edison Company; and by regular U.S. mail, first class, postage prepaid to James Gainer, Esq., Assistant Attorney General, Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43266-0573, Attorney for Public Utilities Commission of Ohio.

  
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