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I. The Deposition of Robert Weatherwax Must be Continued to Allow Licensee Power Authority to Complete its Examination of the Witness, and to Allow Licensee Con Edison to Commence its Examination of the Witness

Union of Concerned Scientists/New York Public Interest Research Group's (UCS/NYPIRG's) counsel has again made it impossible for the licensees to properly depose intervenors' expert witnesses, this time Robert Weatherwax, one of UCS/NYPIRG's experts on Question 1.

On Friday, January 7, 1983, licensee Power Authority of the State of New York (Power Authority) was unable to complete and licensee Consolidated Edison Company of New York, Inc. (Con Edison) was unable even to commence the scheduled deposition of Mr. Robert Weatherwax. Mr. Blum and counsel for the licensees had agreed to make available each party's California experts during one trip to California. However, the deposition of Mr. Weatherwax was terminated by Mr. Blum's refusal to insist on Mr. Weatherwax' continued availability for questioning, even though Mr. Blum was able to depose the licensees' expert witnesses at length, and until completion.

On Thursday, January 6, 1983, Mr. Blum deposed three of the licensees' experts on Question 1. During lengthy telephone conversations to arrange the depositions, in the 10 days preceding the California trip, the licensees offered their witnesses for deposition without a time limit. In fact, the licensees expected a two day deposition of their

witnesses. Mr. Blum requested that the deposition of the licensees' witnesses commence at 10:00 a.m. Mr. Blum, because of weather conditions, was approximately one hour late in beginning the deposition. The licensees, therefore, agreed to Mr. Blum's request that the deposition continue until completion, even into the evening. At the same time, Mr. Blum once again confirmed Mr. Weatherwax' availability for his deposition on the following day.

On Friday, January 7, the deposition of Mr. Weatherwax did not commence until approximately 10:45 a.m. because of a delay in arrival by Mr. Weatherwax due to weather conditions. Deposition of Robert Weatherwax at 10 (Jan. 7, 1983) (Weatherwax Deposition) (attached as Appendix 1). Immediately preceding the deposition, Mr. Blum for the first time informed the licensees that Mr. Weatherwax had two meetings to attend in the afternoon. The first meeting was scheduled for 1:30 p.m., the second for 3:00 p.m. Id. at 6-7. When pressed as to when Mr. Blum learned of these meetings, he stated that he had learned of them on the evening of January 6. Notwithstanding this, Mr. Blum neither telephoned the licensees on the evening of January 6, nor telephoned them on the morning of January 7, to inform them of these meetings. Rather, Mr. Blum waited until minutes before the deposition to reveal to the licensees Mr. Weatherwax' "conflict." Id. at 6.

Moreover, when Mr. Weatherwax was asked when he knew of these meetings, he stated that the 3:00 p.m. meeting had been tentative for quite a while, and that it had been re-confirmed on the 6th. Id. at 8. In addition, Mr. Weatherwax, in complete disregard of his scheduled deposition, arranged a second meeting for the afternoon of the 7th. Id. Notwithstanding these facts, neither Mr. Blum nor Mr. Weatherwax informed the licensees of these meetings until the deposition was ready to begin. Id. at 6.

Having made their expert witnesses available to Mr. Blum for as long as he requested, the licensees insisted that Mr. Weatherwax be made available for the remainder of Friday without interruption. This position elicited offers and then a withdrawal of offers by Mr. Blum concerning some other possible arrangements that could be made. One offer that Mr. Blum made off the record at the beginning of the day and then withdrew later (by denying having made the offer) was that the deposition of Mr. Weatherwax proceed from approximately 11:00 a.m. until 1:40 p.m., and then the licensees could return to California later in the month to continue the deposition. Id. at 85.

Another offer was for the deposition to be recessed after only approximately two and a half hours of questioning of Mr. Weatherwax. Mr. Blum then proposed a "break" in the deposition that initially would have lasted approximately four hours, id. at 87, and then later was revised downward

by Mr. Blum to a maximum of approximately three hours. Id. at 93. Such a "break" would clearly have been a major disruption to the questioning of Mr. Weatherwax, and, in fact, would have constituted a termination of the deposition. Additionally, the licensees had travel plans in connection with preparations for the January 10 hearing that would have precluded the licensees a reasonable opportunity for completion of the deposition under the circumstances offered by Mr. Blum.

The licensees declined this "offer" concerning the deposition and insisted upon their right to properly conduct a deposition for the day upon which the deposition was noticed and to which UCS/NYPIRG had agreed. Id. at 131-32. The licensees continued to question Mr. Weatherwax who, at approximately 2:35 p.m., refused to answer any further questions and, accompanied by Mr. Blum, left the deposition, thereby terminating it without the licensees' consent. Id. at 136.¹

Mr. Blum's and his witness' actions regarding this deposition evidence further disrespect for and flouting of the Nuclear Regulatory Commission's (Commission's) regula-

1. Mr. Blum discussed with Mr. Weatherwax the "chances" of the Board denying licensees' inevitable motion to continue the deposition. After Mr. Blum advised Mr. Weatherwax that the chances were better than 50/50, Mr. Weatherwax apparently decided to end the deposition at 2:35 p.m.

tions concerning depositions, and specifically fly in the face of Chairman Gleason's statement to Mr. Blum during a telephone conference on December 28, 1982, that the time required to depose a witness is under the control of the party taking the deposition, and that the party cannot be deprived of that opportunity except under extraordinary circumstances. Clearly, there were no extraordinary circumstances here. Rather, Mr. Weatherwax and Mr. Blum decided without the concurrence of the licensees that it was more important for Mr. Weatherwax to subsequently schedule and attend a conflicting meeting with one of Mr. Weatherwax's other clients than to be in attendance at a properly convened deposition in this proceeding.

Mr. Blum's behavior is part of a pattern of conduct in which Mr. Blum insists that the licensees and Staff follow the rules and regulations of the Commission and make their witnesses fully available to him for deposition, but denies the licensees proper access to depositions of proposed UCS/NYPIRG witnesses. This pattern of conduct is clear with regard to UCS/NYPIRG's witnesses Gordon Thompson, Steven Sholly, and now Robert Weatherwax.¹ In total, licensees

1. Moreover, while Mr. Blum had informed licensees earlier in the week of January 3, that Mr. Weatherwax had not completed his testimony, it became apparent through questioning of Mr. Weatherwax that he has not even begun to write his testimony. Weatherwax Deposition at 42, 44. Further, Mr. Weatherwax claimed that he did not know how most of the documents upon which he stated he would rely

were allowed only approximately two and one half hours of actual questioning of Mr. Weatherwax. Id. at 135-36.

Licensees, therefore, urge this Board to issue an expedited order compelling the continuation of Mr. Weatherwax' deposition pursuant to 10 C.F.R. § 2.740(f) (1982).

II. The Deponent Must Be Directed to Answer Oral Deposition Questions That Relate to the Witness' Possible Bias in this Proceeding

During the deposition, Mr. Weatherwax refused to answer any questions relating to the compensation he was receiving for appearing as an expert witness for UCS/NYPIRG. Weatherwax Deposition at 22-25. The basis for this refusal to answer was UCS/NYPIRG counsel's objection that such information is "confidential and proprietary . . . and that it's not relevant." Id. at 24. This objection has no legal basis.

would affect his evaluation of the Indian Point Probabilistic Safety Study (IPPSS). In fact, Mr. Weatherwax testified that he has formed no conclusions whatsoever about the IPPSS, itself. Id. at 45. Rather at Mr. Blum's direction, Mr. Weatherwax would only answer questions which went to his "tentative impressions." Id. at 47-48. Because Mr. Weatherwax was provided with a copy of the IPPSS on May 26, 1982, Letter from Paul F. Colarulli to Robert Weatherwax (May 26, 1982), and further because the testimony on Question 1 was originally scheduled for filing in August of 1982, the licensees have good cause to infer that the preparation of testimony by Mr. Blum's primary expert on the IPPSS has been delayed intentionally in a further attempt to deny the licensees their rights under the discovery schedule imposed by this Board.

It is well settled that the fact that an expert witness is compensated "may legitimately be brought out." 3A Wigmore, Evidence § 961, at 806-07 (Chadbourn rev. 1970). "Relationships between a party and a witness are always relevant to a showing of bias whether the relationship is based on ties of . . . employment, business, [or other ties]." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607(03) at 607-30, 607-32 (1981) (Weinstein's Evidence) (footnotes omitted). "[T]he court did properly permit the introduction of [the expert witness'] per diem fee for testifying in order to show his possible bias or interest." United States v. 412.93 Acres of Land, Etc., 455 F.2d 1242, 1247 (3d Cir. 1972); see Collins B. Wayne Corp., 621 F.2d 777, 783 (5th Cir. 1980) ("cross-examination of an expert witness regarding fees earned in prior cases is not improper").

In McNenar v. New York, C. & St.L. R.R., 20 F.R.D. 598, 600 (W.D.Pa. 1957), the court allowed the defendant discovery of the arrangements, nature, and origins of the parties' relationship stating that "it is [not] to be disputed that the court in its discretion may allow counsel to cross-examine an expert witness as to the amount he has received, is to receive, or expects to receive for treatment, examination or testifying, for such information has a possible bearing upon the witness's impartiality, credibility and interest in the result."

Such an inquiry is based upon the principle that discovery which relates to impeachment, particularly that which reflects possible bias, is reasonably calculated to lead to the discovery of admissible evidence. Compare 8 C. Wright & A. Miller, Federal Practice and Procedure § 2015, at 115 (1970) (Wright & Miller) (footnote omitted) (Fed.R.Civ.P. 26(b) "allows discovery even of information inadmissible at the trial if it 'appears reasonably calculated to lead to the discovery of admissible evidence.' Surely . . . proof of bias, and similar material, being themselves admissible evidence, cannot be excluded from the scope of discovery.") with In re Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), 7 N.R.C. 1038, 1040 (1978) ("In modern administrative and legal practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial.").

Because intervenor UCS/NYPIRG had no legal basis for its objection, pursuant to 10 C.F.R. § 2.740, the Board should compel Mr. Weatherwax to answer the questions that relate to the compensation he is receiving in this proceeding.¹

1. Even if matters relating to compensation could be construed to be proprietary, UCS/NYPIRG's bald assertion to that effect is unsupported under the applicable standards. See In re Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), 3 N.R.C. 408, 416-17 (1976).

III. The Deponent Must Produce Documents Identified During the Deposition Because They Directly Relate to the Substance of the Witness' Testimony

In the course of his deposition, Mr. Weatherwax identified documents on which he said he would rely during the preparation of his testimony. Specifically, he stated that "[s]ome of the [documents] that I would feel rather probably will be used are the PRA's for Indian Point as well as for the Limerick Generation Station." Weatherwax Deposition at 13. The witness added that he would also rely upon various critiques of the Indian Point PRA as well as the Brookhaven Review of the Limerick PRA. Id. Mr. Weatherwax subsequently stated that he had developed his own analysis of the Limerick PRA for the Limerick Ecology Action Committee. Id. at 27. "It's a review of the [Limerick] PRA and the preparation of a report evaluating its strong and weak points." Id. at 27-28. Further, Mr. Weatherwax observed that although a final report was "still in preparation," a "preliminary report was prepared" and had been provided to the Limerick Ecology Action Group. Id. at 28.

Licensees then requested a copy of this report stating, "it's our position that we are entitled to this report. Mr. Weatherwax says he is going to be relying . . . upon the

See also discussion infra at 11-12.

Limerick PRA and I believe the Brookhaven letter report on Limerick." Id. at 29-30 (statement of Mr. Colarulli).

UCS/NYPIRG made several objections to providing this document. The first was that, "This is not a lawsuit. It's a safety investigation." Id. at 31. The clear implication in this objection is that the procedural rights to confront witnesses and effectively cross-examine them in a deposition and later at trial is not applicable in any meaningful manner in this proceeding. This position has been rejected from the outset. The Commission has continuously indicated that this adjudicatory hearing demanded full procedural protections. See In re Consolidated Edison Co. (Indian Point, Units 2 and 3), 13 N.R.C. 1, 5 (1981) (footnote omitted) (the Board is to conduct a proceeding "using the full procedural format of a trial-type adjudication, including discovery and cross-examination."). Chairman Gleason has also observed that this is an "adjudicatory proceeding." Transcript of Proceedings at 4897 (Jan. 10, 1983).

UCS/NYPIRG counsel also objected that the report was proprietary information. Weatherwax Deposition at 32. Claims of privilege are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974) (footnote omitted).

The standards for a claim of proprietary information are "that (1) the information in question [is] 'of a type customarily held in confidence by its originator'; (2) there is 'a rational basis for having customarily held [it] in confidence'; (3) 'it has, in fact, been kept in confidence'; and (4) 'it is not found in public sources.'" In re Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), 3 N.R.C. 408, 416-17 (1976) (footnote omitted). UCS/NYPIRG has made no showing that Mr. Weatherwax' analysis of the Limerick PRA meets these standards. If anything, just the opposite is true. The study has been prepared as a critique of the Limerick PRA for use in another proceeding, and certainly will be discoverable in that proceeding. Because the analysis will probably be made public in any event, the report should be discoverable in this proceeding. UCS/NYPIRG bears the "burden of establishing the existence of the privilege," 8 Wright & Miller § 2016, at 126, and the objection in the record is barren of any specific, articulated facts that would meet the confidentiality standards of In re Kansas Gas & Electric.

Moreover, even if Mr. Weatherwax's Limerick report has proprietary characteristics, it is clear he has waived any privilege. The witness indicated that he intended to rely upon the analysis in presenting his testimony. The witness cannot make self-serving statements in a proceeding and then refuse to be cross-examined with respect to the documents on

which he has relied. See Peck v. United States, 514 F.Supp. 210, 212 (S.D.N.Y.), rehearing granted in part and denied in part, 522 F.Supp. 245 (S.D.N.Y. 1981), appeal dismissed, 680 F.2d 9 (2d Cir. 1982) (Department of Justice waived official information privilege for Task Force Report by issuing summary of its investigation; release of summary required disclosure of relevant portions of report because of possibility that different inferences than those in summary could be drawn); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 461 (N.D.Cal. 1978) (holder of privilege cannot let in part of privileged information and then seek to keep remainder out). See generally Weinstein's Evidence ¶ 511[02].

UCS/NYPIRG counsel's objection of relevance is also without foundation. Mr. Weatherwax's analysis of the Limerick PRA is clearly relevant because the witness indicated he would be relying principally on the Indian Point PRA and Limerick PRA as well as critiques of each PRA in formulating his testimony. His own analysis of the Limerick PRA, "evaluating its strong and weak points," Weatherwax Deposition at 28, is therefore clearly relevant. Even such a preliminary report of the Limerick PRA, especially in light of the fact that its the only complete critique Mr. Weatherwax has performed, id., is obviously of crucial importance to the substance of Mr. Weatherwax's testimony in

this proceeding. Therefore, pursuant to 10 C.F.R. § 2.740(f), the motion to compel the production of this document should be granted.

IV. In the Alternative, the Board Should Preclude the Testimony Because UCS/NYPIRG's Counsel has Made it Impossible for Licensees to Properly Depose UCS/NYPIRG's Expert Witness, and to Allow the Testimony Under These Circumstances Would Deny Licensees the Right to Complete Preparation of Their Case, and, Therefore, Deny Them Administrative Procedural Rights and Due Process of Law

On a motion for sanctions, three considerations are relevant: "due process for [the] licensee, due process for [the intervenor], with an overriding . . . interest in a complete evidentiary record." In re Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), 11 N.R.C. 893, 897 (1980). Here, it is clear that the incomplete deposition of Mr. Weatherwax and UCS/NYPIRG counsel's obstructionist conduct in directing the witness not to answer certain questions and produce certain documents offends the due process standards articulated in In re Metropolitan Edison Co.

With respect to the first standard, "due process for [the] licensee," to allow the testimony of Mr. Weatherwax under these circumstances would deny licensees the right to complete preparation of their case and thereby deny them their administrative procedural rights and due process of

law. With respect to the second standard, "due process to [the intervenor]," no due process right of UCS/NYPIRG would be infringed by precluding the testimony because UCS/NYPIRG has no right to offer a witness who cannot be effectively cross-examined.

With respect to the third standard, "an overriding . . . interest in a complete evidentiary record," the record is served only by evidence that is subject to the right of effective confrontation by an adverse party. Such confrontation in a complex, technical proceeding such as this can only take place by having prior knowledge of the substance of the witness' testimony and the underlying bases for it well before it is offered to the Board. To allow Mr. Weatherwax' testimony under present conditions would distort the record and possibly mislead the Board.

Moreover, preclusion is the appropriate sanction under the circumstances. In In re Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), 15 N.R.C. 1400, 1416-20 (1982), the Appeal Board articulated a four-factor test based on a Commission Policy Statement for determining the appropriate sanctions to be imposed when an obligation is unmet: (1) the relative importance of the unmet obligation and its potential for harm to other parties or the orderly conduct of the proceeding; (2) whether the default is an isolated incident or a part of a pattern of behavior; (3) the relative importance of the safety or environmental con-

cerns raised by the party; and (4) all of the circumstances.¹

With respect to the first factor, "the relative importance of the unmet obligation," the failure of UCS/NYPIRG to make available Mr. Weatherwax for a complete deposition significantly infringes on licensees' administrative and constitutional right of confrontation. The record reflects that the uncooperative attitude of UCS/NYPIRG is part of a pattern of behavior to harass licensees in their legitimate

1. In utilizing this four-factor test, the Appeal Board was principally relying on the Commission's "Statement of Policy on Conduct of Licensing Proceedings" 13 N.R.C. 452, 454 (1981):

When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions or counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

discovery requests thereby satisfying the second factor, "whether the default is an isolated incident."

With respect to the third factor, "the relative importance of the safety or environmental concerns raised," this factor should not be "at all decisive" when "there is "little but the bare contentions upon which to rely." Id. at 1419. "This factor is of more importance during the later stages of a proceeding when the contentions have been fleshed out and parties have submitted testimony." Id. Because UCS/NYPIRG has yet to present Mr. Weatherwax' testimony and will allow his deposition only on terms unilaterally dictated, preclusion of Mr. Weatherwax' testimony is appropriate under this third factor.

With respect to the fourth factor, "all other circumstances," this has been interpreted to mean that the Board should "tailor the choice of sanctions to mitigate the harm caused by a party's failure to fulfill its obligations and to bring about improved future compliance." In re Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), No. 50-322-OL, slip op. at 19 (Dec. 22, 1982). Here, the sanction is remedial in that it does not let UCS/NYPIRG profit from its misconduct, but does not unduly penalize it. In In re Long Island Lighting Co., No. 50-322-OL, slip op. at 23 (emphasis added), the Board found "our sanction deeming the refusal of any party to make its witnesses available . . . to be an abandonment of its right to present

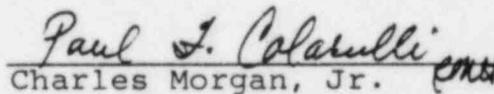
the subject witness and testimony." That is the precise situation presented here.

Therefore, in the alternative, the licensees request that the testimony of Mr. Weatherwax be precluded pursuant to 10 C.F.R. § 2.707.

Respectfully submitted,


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Dated: January 17, 1983

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

-----)

In the Matter of:) Docket Nos. :
CONSOLIDATED EDISON COMPANY OF NEW YORK)
(Indian Point Unit 2) 50-247 SP
)
POWER AUTHORITY OF THE STATE OF NEW YORK) 50-286 SP
(Indian Point Unit 3)

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Sheraton Plaza Hotel
6101 Century Boulevard
Los Angeles, California
Friday, January 7, 1983

DEPOSITION OF ROBERT WEATHERWAX

1 PROCEEDINGS

2 Whereupon,

3

4

ROBERT WEATHERWAX,

5

called for examination by counsel for PASNY, having been

6

first duly sworn by the Notary Public, was examined and

7

testified as follows:

8

EXAMINATION BY COUNSEL PASNY

9

BY MR. COLARULLI:

10

Q. Good morning, Mr. Weatherwax.

11

A. Good morning.

12

MR. COLARULLI: Mr. Blum, you have informed us —

13

MR. BRANDENBURG: Just this moment for the first

14

time.

15

MR. COLARULLI: You have informed us that Mr.

16

Weatherwax has a conflict for the deposition this

17

afternoon. In fact, he has two conflicts.

18

Up until immediately preceding this deposition,

19

we were under the impression that he would be

20

available for most of the day. I believe you were

21

going to communicate with him that the deposition could

22

last somewhere in the range of four to six or seven

1 hours.

2 We have a problem if Mr. Weatherwax now is
3 unable to be here to complete his deposition, as I
4 thought we had understood he would.

5 Could you for the record tell us what the
6 conflict in the schedule is?

7 MR. BLUM: Yes. Dr. Weatherwax has two meetings that
8 I gather were set up within the last day, since I was
9 informed of them for the first time last night. There is
10 one at 1:30, which he is willing to miss in order to keep
11 the deposition going, and there is another one at 3:00,
12 which he says it's critical that he attend.

13 Let me ask Dr. Weatherwax a question. Would it
14 be at all possible for you to return after the 3:00
15 meeting is over or to have them come to where you are?

16 THE WITNESS: Yes. Actually, that would be
17 possible. That would be possible. We could go --
18 Later on I would suspect the meeting would adjourn at
19 5:00 or 5:30. I was scheduled out on a 7:00 flight and I
20 could postpone that.

21 MR. BLUM: There would be a later flight to
22 Sacramento?

1 THE WITNESS: I'm willing to stipulate there
2 must be.

3 MR. BRANDENBURG: Would you describe for us the
4 nature of your conflicting engagements, Mr. Weatherwax?

5 THE WITNESS: I have a meeting at 1:30 to
6 discuss safety analysis of the shuttle space vehicle
7 that's being done under sponsorship of the U.S. Air Force
8 Weapons Laboratory in Albuquerque.

9 I have a meeting at 3:00 to discuss a geothermal
10 power plant and a brine power plant in Imperial County
11 with my principal client, MDG Thermal Corporation.

12 MR. BRANDENBURG: Can you tell us when those
13 engagements were set up?

14 THE WITNESS: The engagement at 1:30 was set up
15 yesterday. The engagement at 3:00 had been tentatively
16 planned for a week. It had been off again, on again.
17 One of the major participants in it was unsure of his
18 ability to be present, and that was not firmed up until
19 yesterday at about 3:30 that he would indeed be able to
20 be here for it.

21 MR. BRANDENBURG: Was it your understanding
22 yesterday that you would be here for your deposition

1 one.

2 MR. COLARULLI: As we stated, it was our
3 understanding that Mr. Weatherwax would be available the
4 bulk of the day.

5 I guess for the record, we should state that it
6 is now 10:46. Mr. Weatherwax was slightly delayed
7 because of coming in from the airport.

8 THE WITNESS: Fog at the airport, yes.

9 MR. COLARULLI: I would suggest, Mr. Blum, we go
10 forward at the point. I find a four or five-hour break
11 in the afternoon unacceptable, but we certainly should
12 get started and get in as much as we can and see where we
13 are at that point.

14 MR. BLUM: That sounds good.

15 BY MR. COLARULLI:

16 Q. Mr. Weatherwax, just to clarify one point, do
17 you have a PhD in any field?

18 A. No, I do not. I have a Masters of Science
19 degree.

20 Q. Do you go by the name of Mr. Weatherwax or Dr.
21 Weatherwax with your clients?

22 A. Actually, that varies. I have spent substantial

1 were going to rely?

2 A. No.

3 Q. Do you know any of the documents upon which you
4 rely for your testimony?

5 A. Yes.

6 Q. Could you list them for us?

7 A. Some of the ones that I would feel rather
8 probably will be used are the PRA's for Indian Point as
9 well as for the Limerick Generation Station, Bourne and
10 Green's Reliability Technology, William Feller's Theory
11 of Probability, Volumes 1 and 2, Tables of Physical
12 Parameters, some such name which is kind of the bible of
13 physical science for those types of probability and
14 statistics tables.

15 I will be relying upon testimony of others in
16 the proceeding that I'm privy to and find relevant to my
17 testimony.

18 MR. BLUM: You mention the PRA guide?

19 THE WITNESS: Yes, that's right. There are a
20 series of reports, the Brookhaven Review of the LGS,
21 Limerick Generating Station PRA, Sandia review of the
22 Indian Point PRA, the series of other NRC contractor

1 testimony?

2 A. I was engaged in some preparatory work that
3 would have resulted in a product being a report to them
4 which could have been turned into testimony but was not
5 to have been by me.

6 Q. That preparatory work that you did during the
7 June-July '82 time frame now forms the basis of your
8 testimony that you are now working on?

9 A. No. The total sum and substance of it was what
10 will turn out to be approximately perhaps 15 to 20
11 percent of the hours at the most, 15 to 20 percent,
12 perhaps 10 to 15 percent, of the hours I will invest in
13 preparing the report for them.

14 As with normal circumstances, the early going is
15 somewhat of a start-and-stop type of exercise where one
16 merely becomes familiar with the contents of the materials,
17 surveys, the literature and has some focus on really what
18 the questions are.

19 Q. Mr. Weatherwax, are you being compensated for
20 your services by UCS or any other intervening group in
21 this proceeding?

22 A. Yes.

1 Q. Are you charging the same type of compensation
2 that you do for other clients?

3 MR. BLUM: I'll object to that. The witness can
4 answer if he chooses.

5 MR. COLARULLI: There is no choice, unless you
6 are instructing the witness not to answer on some
7 privileged ground.

8 (There was a conference between the
9 witness and counsel.)

10 MR. BLUM: We have decided to take the position
11 that that's confidential and proprietary information, and
12 the witness is instructed not to answer.

13 BY MR. COLARULLI:

14 Q. Just so we're clear on what it is you are not
15 answering, the question was is the compensation that you
16 are receiving in this proceeding from UCS or any other
17 intervenor group comparable to compensation which you
18 normally receive from other clients that you have?

19 MR. BLUM: Yes, we understood the question.

20 MR. COLARULLI: You are instructing the witness
21 not to answer?

22 MR. BLUM: Yes.

1 BY MR. COLARULLI:

2 Q. Mr. Weatherwax, how much are you being
3 compensated by UCS in this proceeding?

4 MR. BLUM: Objection. The witness is
5 instructed not to answer.

6 MR. COLARULLI: What's the basis of your
7 objection?

8 MR. BLUM: That it's confidential and
9 proprietary information and that it's not relevant.

10 MR. COLARULLI: How is it confidential?

11 MR. BLUM: He is being compensated, and the
12 details of how much he is being compensated is not
13 something you are entitled to know about.

14 MR. COLARULLI: How is it confidential and
15 proprietary information? Whose confidential and
16 proprietary information is it?

17 MR. BLUM: Sierra Energy, which is the agency
18 that Mr. Weatherwax heads and works for.

19 MR. COLARULLI: Mr. Blum, are you taking the
20 position that the amount of compensation that an expert
21 witness receives in a trial or administrative trial is
22 not a factor which the trier of fact should be informed

1 of concerning his expertise, his compensation, whether it
2 varies among clients? Are you taking that position that
3 is not a proper factor that goes to the weight of the
4 expert's opinions and testimony and possibly even bias?

5 If you are not taking that position, then I
6 suggest you allow the witness to answer this question.

7 MR. BLUM: That would address only the ground of
8 relevance. It would not address the other ground, that
9 it's proprietary information of Sierra Energy.

10 BY MR. COLARULLI:

11 For the record to be clear, you are instructing
12 Mr. Weatherwax not to answer this question on the ground
13 of relevance and on a claimed ground of confidentiality
14 and proprietary information of Mr. Weatherwax's
15 organization. Is that correct?

16 MR. BLUM: Yes. I'll clarify the ground a little
17 more if you want, that there is some basis for holding
18 this as proprietary and confidential information and
19 there is not sufficient relevance or materiality of this
20 information to outweigh that claim in this proceeding.

21 BY MR. COLARULLI:

22 Q. Mr. Weatherwax, could you describe for us the

1 Energy Systems who is a prime contractor to the Air Force
2 Weapons Laboratory in Los Alamos to review the safety of
3 isotope-powered space vehicles.

4 MR. BRANDENBURG: Read back the last two
5 questions and answers.

6 (The record was read by the
7 Reporter from Page 26, Line 10
8 to Page 27, Line 13.)

9 THE WITNESS: Two points of clarification.
10 That's Sierra Energy and Risk Assessment.

11 I failed to mention, now during the readback,
12 that we are doing a probabilistic financial risk model as
13 well. We have produced a code called PIDAN, a
14 probabilistic investment decision analysis model that is
15 used to project the potential return on investment and
16 other financial parameters for a geothermal brine
17 generation station in Imperial County.

18 BY MR. COLARULLI:

19 Q. Mr. Weatherwax, could you further describe for
20 us the work in which you are engaged for the Limerick
21 Ecology Action Committee, I believe was the name?

22 A. It's a review of the PRA and the preparation of

1 a report evaluating its strong and weak points.

2 Q. Is that report still in preparation?

3 A. Very unfortunately, yes.

4 Q. Have you published any articles or smaller
5 reports concerning the Limerick PRA?

6 A. None at this time. Excuse me. Scratch that,
7 please.

8 A preliminary report was prepared, and I must be
9 more careful with my dates.

10 Please understand, without the records in front
11 of me, I'm not certain, but I think it is on the order of
12 October of 1981.

13 Q. October 1981 is the date which you completed a
14 preliminary study of the Limerick PRA?

15 A. I would clarify that in two ways. It's circa
16 October 1981 and it was a series of questions and a brief
17 summary of what I thought to be peculiarities and unusual
18 aspects of the report.

19 Q. Has that report been published or provided to
20 your client?

21 A. Yes. It was provided to my client.

22 Q. Has it been published or filed in any proceeding?

1 A. No.

2 Q. You say that involves and the report concerns a
3 review of the Limerick PRA. Is that correct?

4 A. Revision 2 I think, yes.

5 Q. Revision 2 of the Limerick PRA?

6 A. Yes.

7 MR. COLARULLI: Mr. Blum, we would request
8 provision of a copy of that report.

9 MR. BLUM: UCS does not have a copy of that
10 report. That is in the possession of the other client,
11 which is the Ecology Action Group.

12 THE WITNESS: It may just be LEA, Limerick
13 Ecology Action.

14 MR. BLUM: Whether that could be made available
15 would depend upon their willingness to provide you a copy.
16 Perhaps we could give you the person to get in contact
17 with for that group.

18 BY MR. COLARULLI:

19 Q. Mr. Weatherwax, do you have a copy of this
20 preliminary report?

21 A. Yes, but not with me.

22 MR. COLARULLI: Mr. Blum, it's our position that

1 we are entitled to this report. Mr. Weatherwax says he
2 is going to be relying in his testimony upon the Limerick
3 PRA and I believe the Brookhaven letter report on
4 Limerick, and we believe, since he is your expert witness
5 and not ours, that you are obligated to ascertain whether
6 or not a copy of this report can be obtained.

7 MR. BLUM: What is the name of the woman you
8 mentioned -- Judy?

9 THE WITNESS: I was afraid you would ask me that.

10 MR. BLUM: Dr. Weatherwax will consult with a
11 particular client for whom that report has been prepared
12 and will determine whether they are willing to provide
13 you with a copy.

14 If they are not and you wish to take the
15 position that I am obligated to go out and seek a copy of
16 that unpublished material for you, we can cross that
17 bridge when we come to it.

18 MR. COLARULLI: Mr. Blum, we would appreciate a
19 prompt response to our request.

20 THE WITNESS: As a matter of clarification, it's
21 standard procedure for us in our work to treat all the
22 reports provided as proprietary to the client and for the

1 client to have sole discretion as to --

2 MR. BLUM: In order to satisfy your request for
3 promptness, we will try to arrange so that you can
4 directly contact the person who would be authorized to
5 give you this information, and we are trying to now find
6 the name and telephone number of that person.

7 MR. COLARULLI: Mr. Blum, you can discuss with
8 Mr. Weatherwax the name and number of that person. This
9 is a lawsuit, Mr. Blum, and we believe you are obligated
10 to provide us this information we requested.

11 MR. BRANDENBURG: Our request to you, Mr. Blum,
12 is in the nature of discovery in this proceeding.

13 MR. BLUM: This is not a lawsuit. It's a safety
14 investigation.

15 MR. COLARULLI: It's an administrative
16 proceeding in front of the Atomic Safety Licensing Board,
17 which was formed under the Nuclear Regulatory Commission.
18 It's an adjudication according to the General Counsel of
19 the Nuclear Regulatory Commission.

20 I do strike the word "lawsuit" but an
21 adjudication which is subject to all the procedural
22 regulations and requirements of the Nuclear Regulatory

1 Commission. We believe we are entitled to it and you are
2 obligated to provide us prompt discovery in this case,
3 including documents upon which your expert witness is
4 relying.

5 I can go on to other questions, unless you have
6 another comment to make.

7 MR. BLUM: Are you relying on that document?

8 THE WITNESS: No, not particularly at all. It
9 was written before the BNL letter report, and it reviewed
10 a version of the Limerick analysis which has been
11 substantially and almost interminably modified in Versions
12 3, 4 and 5.

13 I would be relying upon the Version 5, the
14 Limerick Generating Station analysis.

15 MR. BLUM: I think we can strike the request for
16 that particular document, since in addition to it being
17 proprietary information of another client, it's now
18 something that he will not rely upon in this hearing.

19 MR. COLARULLI: Mr. Blum, I think you are trying
20 to drag out and waste our time on this point. We're
21 trying to move ahead as quickly as possible.

22 Our position is that it's relevant, that since

1 Less substantive items such as proofreading,
2 running down reports, handling work that is sometimes
3 uncharitably called gopher work, though essential, would
4 be done by others for me.

5 Q. So there is no one else in a substantive way
6 involved in your work on Indian Point?

7 A. No.

8 Q. Mr. Weatherwax, are you familiar with the Indian
9 Point Probabilistic Safety Study?

10 A. Yes, to some degree.

11 Q. Have you read it?

12 A. No.

13 Q. Have you read parts of the study?

14 A. Yes.

15 Q. Could you identify for us which parts of the
16 study you have read? Possibly by the topics might be
17 easiest to begin with.

18 A. What I will mention is somewhat defective in
19 that I have not looked at the report or read it since
20 July of this last year, but at that time I had completed
21 an Alice in Wonderland traipsing through the study once
22 and compiled a much more detailed review of it, table of

1 and I hope I have read a portion of each of them and
2 would so answer. I may have missed one, but I
3 intentionally tried to sample from each of them.

4 BY MR. COLARULLI:

5 Q. Will your testimony in this case relate to all
6 the sections of the Indian Point study?

7 MR. BLUM: We mentioned earlier that he really
8 hasn't prepared the testimony yet. I don't see how you
9 can expect him to answer that definitively.

10 Are you asking for his best guess now what it
11 will later include?

12 MR. COLARULLI: I'm asking as to his state of
13 knowledge today and his intentions concerning testimony
14 he's going to present in this case.

15 THE WITNESS: I would intend to emphasize the
16 areas prior to I guess what's called the first pinch
17 point there, the areas associated with triggering of core
18 damage and also to look at the containment breaching
19 considerations to a lesser degree and at the propagations
20 of radionuclides and the uptake of the nuclides and the
21 impact on the population to a much lesser degree. That
22 would be my intention.

1 MR. BRANDENBURG: Can I have that answer back?

2 (The Reporter read the preceding answer.)

3 BY MR. COLARULLI:

4 Q. Mr. Weatherwax, have you formed any opinion as
5 to the validity of these areas of the study on which you
6 say you are going to testify?

7 A. No. Certainly no informed judgments have I made.
8 I have reviewed it, have certain preliminary impressions
9 of the report.

10 Q. You have been in the possession of this document
11 which was provided to you by the licensees since last May
12 or June of '82 and you have no opinions as to the
13 validity of this study?

14 A. Yes. I believe that's what you just asked me
15 and that's what I'm just responding.

16 Q. Do you have any uninformed opinion? Do you have
17 any tentative conclusions?

18 A. I have certain tentative impressions as to what
19 I believe the study is.

20 However, to clarify it, I have not been working
21 on the study during this period. There is a concept
22 called having to work for a living and working for paying

1 specific amount of time or just to a general estimation,
2 range?

3 MR. COLARULLI: I'm asking what his present
4 intention as to the days that he will spend between now
5 and the end of the month in preparing for this case.

6 MR. BRANDENBURG: He has testified, Mr. Blum, he
7 has some 160 hours per month spent on unrelated matters.

8 So the question occurred to Mr. Colarulli and
9 myself as to exactly what portion of this witness' time
10 would be devoted to the matters that we're here concerned
11 about.

12 THE WITNESS: It would be some time between a
13 quarter and a half man level.

14 BY MR. COLARULLI:

15 Q. I do not understand that terminology.

16 A. I'm surprised in the free enterprise system you
17 have not encountered that.

18 Q. We lawyers don't speak in terms of man levels.

19 A. Somewhere between 40 and 80 hours basing that on
20 a 160-hour month.

21 Q. Mr. Weatherwax, concerning your tentative
22 conclusions about the IPPSS study and those areas upon

1 which you will be testifying --

2 MR. BLUM: Just for clarification, he said he
3 had tentative impressions, not tentative conclusions.

4 BY MR. COLARULLI:

5 Q. Concerning your tentative impressions about
6 those areas, could you elaborate by area what your
7 tentative impressions are of the validity of the IPPSS?

8 A. At the validity of the IPPSS?

9 MR. BLUM: I'll object to that question, to the
10 form in which it's asked.

11 Are you asking does he have specific concerns or
12 are you asking has he made what he would consider to be a
13 preliminary judgment as to the adequacy of the study? If
14 it's the second answer, it's likely to be no.

15 BY MR. COLARULLI:

16 Q. I'm asking of your many tentative, if there are
17 many, tentative impressions, do you have any criticisms
18 of the way in which the material you have read was
19 presented, was researched, was modeled or analyzed, et
20 cetera?

21 A. I cannot believe that it required that many
22 pages to convey it. That is a clear impression I have,

1 Weatherwax says he is going to cancel his 1:30 meeting
2 and then proceed until approximately 2:30, 2:40, which is
3 approximately an hour and 20 minutes from now, at which
4 point we would have had less than four hours of
5 deposition.

6 We're willing to accommodate that important 3:00
7 meeting that Mr. Weatherwax has and we're also willing to
8 accept the offer that you made this morning on the record
9 that we could resume the deposition for two or three
10 hours at a later date.

11 MR. BLUM: No, that was not the offer I made
12 this morning. As a matter of fact, I did not make any
13 offer this morning.

14 What I said was we could explore the possibility
15 of something, that I would have to talk to with Dr.
16 Weatherwax. The offer that we are making, and first of
17 all, let me clarify my understanding.

18 It was our understanding we were not going to
19 impose a specific time limit on today's deposition. We
20 were going to impose a requirement that we complete it in
21 one day. We had among us discussed a collective
22 expectation that the deposition would likely run in the

1 both meetings, and you seem to be unwilling to do that.

2 We accept, if it is your decision, that you
3 refuse to allow him to attend the first meeting and we'll
4 accept your decision on that and give up on that meeting.

5 The second one, there is no way he can give up
6 on, but we will make him available for the time you need
7 today. It's not easy to reassemble people on different
8 dates. We don't have anywhere near the resources you do.
9 I'm not going to be able to make that another flight to
10 California, for example, and we agree we're going to
11 complete it today and we will have plenty of time to do
12 it.

13 MR. BRANDENBURG: As I understand it, the
14 interruption of the deposition which you propose in order
15 to accomodate Mr. Weatherwax would extend from 2:30 to
16 6:00, which I do say is a somewhat long lunch hour.

17 Is my understanding correct?

18 MR. BLUM: We had talked about 2:40 to most
19 likely 5:30, possibly earlier if it's in the vicinity of
20 the Westwood/Wilshire area.

21 For example, if it can be at the place where Mr.
22 Weatherwax's meeting is at, we might be able to resume at

1 deposition completed today. We are willing to go on as
2 long as you need to complete him today. Altogether there
3 is a two-hour period when Mr. Weatherwax must be away.
4 Let's resume quickly so you can get as many questions
5 asked as possible in the time that you choose to take
6 advantage of.

7 MR. BRANDENBURG: So we're clear, Mr. Blum, and
8 while the witness is on the telephone, would you identify
9 for us which two-hour period it is you are proposing that
10 we interrupt the deposition? From when to when?

11 MR. BLUM: It's slightly more than two hours.
12 It's a period of 2:40 until sometime ranging from 5:00 to
13 5:30, depending on the precise time that the meeting ends
14 and where we have to assemble.

15 MR. COLARULLI: So it could be as much as three
16 hours?

17 MR. BLUM: Yes, although we're willing to forego
18 a lunch hour. It should be set off for that.

19 MR. COLARULLI: The record should reflect that
20 it's now 27 minutes past 1:00, that we took a short
21 five-minute break. I believe it was approximately 12:45,
22 that we came back on the record, around five past or ten

1 We, of course, have continued the offer of
2 coming back subsequently in the evening to complete the
3 testimony.

4 BY MR. COLARULLI:

5 Q. Mr. Weatherwax, I would like you to examine on
6 Page 24 answer to No. 76.

7 MR. BLUM: The witness posed a question to you
8 and it is serious, because for him to get there exactly
9 on time, he has to leave in five minutes.

10 MR. COLARULLI: You are telling me only five
11 minutes and now you are engaging in a colloquy.

12 MR. BLUM: Do you want us to stretch it slightly
13 beyond five minutes?

14 MR. COLARULLI: I would like Mr. Weatherwax to
15 stay as long as he can, hopefully the rest of the
16 afternoon.

17 MR. BLUM: Since we are going to have to leave
18 quickly, will you please now accept or reject our offer
19 to resume the deposition after 5:00?

20 MR. COLARULLI: We have already stated our
21 position, and that is that this deposition, which we have
22 only been in less than two and half hours of actual

1 deposition, is supposed to proceed and I will continue to
2 ask questions.

3 If Mr. Weatherwax, as we stated before, leaves,
4 then we'll leave.

5 MR. BLUM: Do you want us to come back? "Yes"
6 or "No"?

7 MR. COLARULLI: I assume he's not coming back
8 since he is leaving now.

9 MR. BLUM: We are offering to come back. It's
10 up to you. Don't assume. Decide.

11 MR. COLARULLI: Mr. Blum, try not to be
12 professorial all the time. We have made our statement on
13 the record. Mr. Weatherwax leaves at 2:40 and then that
14 will terminate the deposition. Obviously, no one is
15 coming back.

16 I have only a few minutes left under your time
17 schedule.

18 Q. Will you please read the first sentence of the
19 answer on Page 24?

20 MR. BLUM: While he is reading that, I would
21 like to state for the record that it's Mr. Colarulli and
22 Mr. Brandenburg's decision that the deposition will not

1 Q. So it is your view that a properly done PRA has
2 a role in the decision-making process as to the continued
3 operation of the nuclear power plant?

4 A. I think it certainly does have a role.

5 MR. BLUM: In order to get you there, we have to
6 leave?

7 THE WITNESS: Yes

8 MR. BLUM: Gentlemen, if you do decide to bring
9 us before the board, we would request that you include
10 all pertinent portions of the transcript so as not to
11 misrepresent the conditions under which the deposition
12 was terminated.

13 MR. COLARULLI: We have never misrepresented
14 anything in this proceeding. If we decide to file a
15 motion or take any other action, we will act as we always
16 have, which is in good faith.

17 MR. BLUM: Thank you.

18 MR. BRANDENBURG: Just so we're clear, I think
19 it might help to sum up the time sequence, which is the
20 deposition has been conducted today. I have taken notes
21 throughout this morning's session and my notes reflect
22 the deposition commenced at 10:40. I believe the

1 reporter has an independent notice of that. We broke at
2 approximately 12:45 to what turned into an extended --

3 THE WITNESS: We broke at 1:00. That's when my
4 alarm was set for.

5 MR. BRANDENBURG: We recommenced at 1:30 and
6 it's now 2:36.

7 MR. BLUM: The 1:30 is not correct.

8 MR. COLARULLI: We recommenced questioning of
9 the witness at that point.

10 MR. BLUM: There was an extended colloquy over
11 our attempts to get the deposition to continue today
12 which were turned down.

13 MR. COLARULLI: It's now 2:36.

14 MR. BLUM: But the actual time of adjournment
15 was more like ten minutes, and that I think occurred
16 partly in your response to your request that I conference
17 with you in the hall, which I did.

18 MR. COLARULLI: The actual questioning during
19 this afternoon's questioning has lasted from 1:30 to 2:30.
20 Thank you.

21 THE WITNESS: I would continue if a change of
22 mind is to be made --

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
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In the Matter of)	
)	
CONSOLIDATED EDISON COMPANY OF)	Docket Nos.
NEW YORK, INC.)	50-247 SP
(Indian Point, Unit No. 2))	50-286 SP
)	
POWER AUTHORITY OF THE STATE OF)	Jan. 17, 1983
NEW YORK)	
(Indian Point, Unit No. 3))	
)	

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 1983, I caused a copy of Licensees' Motion for Expedited Order Compelling Continuation of Deposition, Answers to Oral Deposition Questions, and Production of Documents, or in the Alternative, to Preclude Testimony of Robert Weatherwax, and memorandum in support thereof, to be served by first class mail, postage prepaid on the following:

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