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

Before Administrative Judges:
James P. Gleason, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

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In the Matter of :
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CONSOLIDATED EDISON COMPANY OF NEW YORK, : Docket Nos. 50-247 SP
INC. (Indian Point, Unit No. 2) : 50-286 SP
:
POWER AUTHORITY OF THE STATE OF NEW YORK, : April 7, 1983
(Indian Point, Unit No. 3) :
:
:
-----X

LICENSEES' FURTHER SUPPLEMENT TO MOTION
TO IMPOSE SANCTIONS

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DS03

INTRODUCTION

This supplement to Licensees' motion to impose sanctions against a party to this proceeding, Greater New York Council on Energy (GNYCE), its representative Dean Corren (Corren), and a consultant to GNYCE, Energy Systems Research Group, Inc. (ESRG), is based on the depositions on March 30, 1983 by Corren and Richard Rosen (Rosen), a vice-president of ESRG. Licensees also rely on a letter signed by Corren, dated March 31, 1983, which forwarded certain documents to Licensees and refused to provide other documents.

Licensees submit that the testimony at the depositions and Corren's subsequent statement of position in his letter of March 31st amply support a conclusion that Corren and Rosen together have purposefully sought to frustrate Licensees' legitimate discovery rights in this proceeding. While Corren's continuing obstinate non-production of relevant information prevents conclusive assertions about the exact extent of each participant's role, the actions of Corren and Rosen, as a team, to frustrate Licensees' conduct of discovery are clear.

Licensees have set forth the principal results of the depositions in a Summary of Results. A detailed discussion of the facts, with citation to deposition transcripts, follows. Licensees have also included a brief discussion of certain applicable legal principles.

SUMMARY OF RESULTS

The following summary conclusions are based on the depositions of Corren and Rosen, taken on March 30, 1983, Corren's letter of March 31, 1983 and the reasonable inferences to be drawn from the facts.

1. Corren asserts that GNYCE does not have to produce any drafts of the ESRG study under the theory that this study is testimony. This philosophy has apparently underlain his responses to discovery requests throughout this case. Corren's assertion is contrary to the Commission's rules of discovery and the orders in this case. In any event, Corren has waived GNYCE's right to rely on such a rule by voluntarily giving Licensees the ESRG study in mid-March 1983. Moreover, the providing of copies of an early version of the study to several individuals, including the New York Times, and the final version to other persons, including charitable foundations, constitutes a waiver.

2. Corren gave no notice to Licensees of his construction of the discovery rules notwithstanding Licensees' interrogatories calling for the production of drafts of the ESRG study. Thus, although Corren obtained a draft of the ESRG study as long ago as August or September 1982, and retains it now, he purposefully failed to respond to Licensees' interrogatories.

3. Corren considered the draft copy of the study he received final enough to distribute to at least the following persons: (1) another party to this proceeding, NYPIRG; (2) a stranger to the proceeding, unidentified by Corren other than that he is a friend of Joan Holt and lives in Westchester County; and (3) a

reporter for the New York Times, Matthew Wald. Corren refuses to produce this document now, although he has produced a later version of it to Licensees. Corren claims that he cannot now find the particular copy of the draft he had in August or September, 1982.

4. Corren asserts that he had asked Rosen to send him the appendices to the study when they were complete. Corren forwarded Licensees' interrogatories pertinent to ESRG to Rosen. ESRG, therefore, knew that Licensees sought production of the draft ESRG report. Thus, Rosen failed to comply with Corren's request to forward the appendices, to the damage of Licensees.

5. Corren received a letter in 1983 from an "outside consultant" commenting on the October 1982 version of the study. Since that version of the study was complete by late October, it seems quite likely that Corren could have learned of the completion of the report -- including its appendices -- from reading the letter. The letter is from Charles Komanoff. Komanoff is associated with Council on Economic Priorities, an economic consulting firm that often comments on the economics of nuclear power. Corren has refused to produce the letter, although he conceded at his deposition that it existed. He now claims that he can't find it. This letter is likely to be quite important substantively to Licensees. The letter constitutes an analysis of the ESRG study. It is a crucial aspect of Licensees' preparation for cross-examination of Rosen.

6. The Komanoff letter is not subject to any privilege that prevents the Board from ordering its production. Even if it is

considered as attorney work product, the unavailability of the information it contains from any other source mandates its production.

7. The non-production of the letter, from Rosen's files if Corren truly cannot find it, is ample basis for drawing negative inferences about Corren's state of knowledge of the status of the study's completion.

8. Corren's January 1983 explanation of his non-production of the ESRG study was that supplemental information as to the availability of the ESRG study was "still not available to GNYCE". Corren's answer, as revealed by his deposition, was based on either (1) a possible telephone contact with ESRG in October-November or (2) no investigation whatsoever. If it was the former, it is likely that Corren would have learned of the completion of the study thus revealing his January 7, 1983 answer that the study was still not available to be false. If, on the other hand, he made no investigation at all prior to sending the January 7, 1983 letter, Corren purposefully kept himself ignorant of the facts.

9. The appendices to the ESRG study were completed in October 1982. ESRG distributed the entire study to ten or more persons, including public foundations and anti-nuclear activist groups elsewhere in the country. Corren spoke to ESRG in September-October 1982 about the study and, possibly, in the period October-November 1982. It is reasonable to conclude that he had ample opportunity to learn that the study, and particularly the appendices which he was ready to produce for Licensees was completed.

DISCUSSION OF FACTS

A statement of the facts concerning this matter, as they were known to Licensees on March 17, 1983, is set forth in Licensees' Motion to Impose Sanctions, dated March 17, 1983 (Motion). This supplement details additional facts that have become known since then, largely as a result of the Board-ordered depositions of Corren and Rosen.

Licensees have sought since June 1982 to obtain the reports, documents, working papers and other materials, draft or final, prepared by ESRG as a part of its study of the economic consequences of a shutdown of the Indian Point plants. See Licensees' First Set of Interrogatories and Document Requests Under Commission Question 6 (June 9, 1982), Item Nos. 22, 23 and 24.

On March 30, 1983, Licensees took depositions from Rosen and Corren, as authorized by the Board on March 29, 1983, concerning the circumstances surrounding Corren's failure to produce the ESRG study. Licensees sought, through these depositions, to discover whether the non-production of the ESRG study, including the report itself, any ESRG documents to be used as exhibits and the working papers, had been intentional.*

* The deposition of Rosen was already scheduled for March 30th. To accomodate Rosen's schedule and in reflection of the short time prior to the commencement of the cross-examination on Question 6, Licensees took Rosen's and Corren's depositions at the conclusion of Rosen's already-scheduled deposition. This schedule led to Licensees conducting the depositions of Rosen and Corren on a compressed time basis, without adequate documents.

These depositions, together with Corren's letter, dated March 31, 1983, concerning his policy on responding to discovery requests, have provided significant information concerning the preparation of the ESRG study and the intentions of Corren and Rosen as respects the production of the study to Licensees.

Corren detailed his early contact with ESRG prior to the April 1982 pre-hearing conference (Corren Dep. Tr. 4-8). Corren indicated that ESRG agreed prior to the April 1982 pre-hearing conference to perform this study (Corren Dep. Tr. 9).

ESRG commenced preparation of the Indian Point shutdown study in mid-1982 at the request of GNYCE. While Corren predicted at the April 1982 prehearing conference that the ESRG study would be completed by early July, the deadline was not met by ESRG. Corren cannot recall whether he attempted to contact ESRG to discover the status of the study (Corren Dep. Tr. 25), although he might have (Corren Dep. Tr. 24-25). He explained his disdain for the deadline on the basis that he "might have seen [the Commission's July 27, 1982] order coming or those events taking place ..." (Corren Dep. Tr. 25). Corren confirmed that Rosen prepared the July 14, 1982 answers to Licensees' interrogatories with respect to the ESRG study (Corren Dep. Tr. 18).

In August or September, Corren received a draft copy of ESRG's study (Corren Dep. Tr. 27). Moreover, Corren testified that he still had that copy (Corren Dep. Tr. 27).

Q. Do you have that document with you today that you received?

A. Not that -- no, not that particular copy.

Q. Do you have it in your files or just not with you?

A. It is not with me, but I do have it, I believe.

Q. I would ask you to produce that particular document, if it is possible; we'll send a messenger to pick it up tomorrow or work out some arrangement.

A. Fine. If you want to send a messenger tomorrow, that is fine. (Emphasis added)

(Corren Dep. Tr. 27). Nevertheless, as noted above, the day after the depositions Corren refused to produce this early draft of the ESRG report, although he had produced, voluntarily, the October 1982 version. Corren argued that (1) he was not obliged to do so and (2) that he could not find it.

This position was communicated by a letter to counsel for the Power Authority of the State of New York, Charles M. Pratt, concerning (1) the production of two documents identified at the March 30th depositions, (2) the forwarding of copies of certain exhibits marked at the depositions and (3) the production of additional correspondence. Corren's letter, dated March 31, 1983, revealed starkly his philosophy of production of documents.

I have not included the first ESRG draft report which I received in September, 1982 because, as I have always held, I do not believe you are entitled to draft testimony. (Emphasis added)

The theory which Corren apparently thus set forth, has apparently governed his conduct in producing documents in this case:

Licensees are not entitled to drafts of the ESRG report. A copy of Corren's March 31st letter is attached to this analysis as Exhibit "A".

Although Corren refused to give the August-September draft of the ESRG report to Licensees, he has distributed it widely to other parties. Corren admitted that he "gave a copy to some other people to review for me" (Corren Dep. Tr. 30). Copies of the initial ESRG report went to Joan Holt, NYPIRG's representative in this proceeding; a friend of Joan Holt's who lives in Westchester County; and Matthew Wald, New York Times reporter (Corren Dep. Tr. 30).

Corren communicated his comments on the draft report to ESRG in September or October 1982 (Corren Dep. Tr. 31). These comments were mostly typographical corrections (Corren Dep. Tr. 32). During September, Corren and Rosen had a conversation (Rosen Dep. Tr. 10). A month to six weeks later, the report was final (Rosen Dep. Tr. 10), yet Rosen and Corren claim that the report was not forwarded to Corren nor did Rosen tell Corren the report was completed.

On December 3, 1982 Licensees attempted, informally, to obtain more complete responses to certain of their interrogatories, including the three interrogatories concerning the ESRG study. Corren explained his basis for responding to this informal request. He may have contacted ESRG in October or November 1982 (Corren Dep. Tr. 36-37). He did not, however, contact them during December (Corren Dep. Tr. 36-37).

The only other basis for the answer Corren gave to Licensees' December 1982 informal effort to obtain more complete responses to interrogatories was the following "understanding":

A. My basis was simply that I had asked ESG for the supporting appendices which are what I consider the discoverable material in the fall, and they said they weren't ready yet, and at this point my understanding was still that they weren't ready.

My understanding was all along that they would send them to me as soon as they were ready, and I hadn't received them yet.

(Corren Dep. Tr. 37).

Rosen, whose deposition was curtailed by the time restraints noted above, stated that the October 1982 study had been sent to approximately 10 other parties, including at least two foundations, the Rockefeller Family Associates and the Veatch Fund (Rosen Dep. Tr. 8). The study was sent to these foundations with the expectation of recovering from them the cost of the study (Rosen Dep. Tr. 7 & 8). Rosen agreed to identify the recipients of the study if it was possible (Rosen Dep. Tr. 5). Rosen also stated that this study "was available generally by the end of October". (Rosen Dep. Tr. 5) and was possibly sent to the Union of Concerned Scientists (Rosen Dep. Tr. 6). Rosen identified David Nichols, one of Corren's contacts at ESG (Corren Dep. Tr. 8), as a person at ESG who might know to whom the study was sent. Corren claimed that he had no knowledge whatsoever of Rosen's forwarding of the ESG study, including its appendices, to those persons (Corren Dep. Tr. 40). Since the date of deposition, neither Rosen nor Corren has identified to Licensees the recipients of the study.

Corren conceded that he was aware that the ESG study was sent to one other person, however, to Charles Komanoff (Corren Dep. Tr. 41). Komanoff is a well-known economic consultant. Corren

announced that he had talked to ESRG during the January-March 1983 period and learned that the study was to be forwarded to Komanoff. It is not clear whether the study was forwarded directly from ESRG to Komanoff or was transmitted through Corren. In any event, Corren spoke to Komanoff both before the study was sent to him and afterwards (Corren Dep. Tr. 41). Komanoff sent Corren a copy of his comments on the ESRG study, approximately five pages in length and that Corren testified that he "certainly" had this copy (Corren Dep. Tr. 41-42). Corren, however, refused, on March 31st, to produce this document (see Exhibit "A"). Corren testified, although the ESRG study was completed by the time it was sent to Komanoff, that he continued to assume that ESRG had sent Komanoff what ESRG had sent Corren, the early, out-of-date version of the study, without the appendices (Corren Dep. Tr. 44). Corren did not explain this anomalous possibility. The Komanoff letter, therefore, may well be significant evidence of intention to withhold disclosure of the study. It may reveal details about the existence of the study that explain the sequence of events. Corren's non-production of this letter, and the study itself, are nothing more than a blatant refusal to follow the normal rules of discovery. In addition, as an analysis of the ESRG report, it could constitute an important source of substantive information about the study. The Komanoff letter may detail the strong points of the ESRG study, areas that could be investigated and weak areas of the study.

Corren also indicated that he considered ESRG's production of the appendices and the body of the study to be produceable by ESRG

on different schedules (Corren Dep. Tr. 44-45). Corren did not expect the study itself until the April 12, 1983 filing deadline. The appendices, however, he expected to receive earlier.

DISCUSSION OF LAW

A. Drafts of the ESRG Study Are Producible

NRC regulations provide that a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. 10 CFR § 2.740(b)(1). Licensees seek to obtain production of the August-September draft of the ESRG study. That document is relevant, at the least, to the issue of Corren's state of mind in not producing the ESRG study. In addition, it may be relevant to the substantive issues covered by the ESRG study. Corren's claim that the August-September version is not producible because it is draft testimony is without merit. The Commission has ordered production of draft testimony by an expert witness, even after the party decided that the witness would not testify in the proceeding. In the Matter of Houston Lighting and Power Company (South Texas Project, Units 1 and 2) and Texas Utilities Operating Company (Commanche Peak Steam Electric Station, Units 1 and 2). Nuclear Reg. Rptr. CCH ¶30,446 (February 14, 1980). In that case, NRC Staff unilaterally decided that production of the preliminary drafts was not necessary since it would not call the witness. The Commission, however, found that "discovery is an important pretrial tool, and it is not to be subject to possible manipulation or arbitrary conduct by any party or counsel". Id.

It has been held that drafts and preliminary revisions of any documents prepared in connection with the litigation by or under the direction or supervision of any witness expected to be called as an expert witness during the trial are produceable. Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp., 74 F.R.D. 594 (D.Conn. 1977) (followed in In Re IBM Peripheral EDP Devices Antitrust Legislation, 77. F.R.D. 39 (N.D.Cal. 1977)). The court in Quadrini noted the highly technical nature of the lawsuit, 74 F.R.D. at 594, and stated that expert testimony would be crucial to the resolution of the complex and technical factual issues in the case. Moreover, the court recognized that discovery of draft or preliminary materials is necessary to effective cross-examination. Finally, discovery of the reports of experts, including the reports embodying preliminary conclusions, could also guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date. 74 F.R.D. at 595.

The drafts of the ESRG study are not protected by any privilege when the ESRG study has been intentionally distributed or made available to third parties. 8 Wigmore, Evidence (McNaughton rev. 1961) § 2311; see United States v. Blackburn, 446 F.2d 1089 (5th Cir. 1971) (communications between defendant and his lawyer "were not privileged, since third persons were present at the time communications were made:"); United States v. Landof, 591 F.2d 36 (9th Cir. 1978) (presence of a third person who was not "acting as an attorney or an agent at the meeting" destroyed the privilege). In this case, the document which Corren

now claims is non-producible is no longer protected, if it ever was. Corren admits that the document was distributed to another party to the proceeding, an apparent stranger to the proceeding, and to a New York Times reporter.

B. The Komanoff Letter Is Not Protected From Disclosure By Any Privilege

Komanoff's letter commenting upon the ESRG study must also be produced by GNYCE or Rosen, if otherwise not available, because it is not protected by either the attorney-client or work product privilege.

The attorney-client privilege fails to cloak the Komanoff letter with its protection for the simple reason that Komanoff is neither client nor attorney in this proceeding. Corren identified him as an "outside consultant" whose opinions concerning the subject matter of these hearings were rendered to Rosen, the witness. The privilege is designated to secure subjective freedom of mind for the client in seeking legal advice. 8 Wigmore on Evidence (McNaughton Rev. 1961) § 2317(2).

The Komanoff letter also fails to come under the shield of the work product doctrine. It is a letter from a non-lawyer extraneous to this proceeding. Even if the Komanoff letter can be defined as covered by the work product doctrine, in this case it should be produced because Licensees would be unduly prejudiced by non-production of the letter. Because of the highly complex and technical nature of the testimony on the economics of closing Indian Point, any drafts and comments on those drafts would be helpful to preparation of Licensees'

case. See, Quadrini, supra. It is essential to effective cross-examination and can also guard against the possibility of a sanitized presentation before the Board. Id. Licensees will be severely prejudiced if this document is not produced. It is unavailable from other sources.

C. The Presumption Arising From Non-Production of Evidence

Failure to produce the Komanoff letter raises a presumption that the letter contains material of negative impact to GNYCE's case. See 2 Wigmore, Evidence, § 278 (McNaughton Rev. 1961). While such an interference is circumstantial in its nature, it could be treated as an admission of (1) the falsity of Corren's claims as to his knowledge of the existence of the draft ESG study or (2) Corren's purposeful or reckless disregard of the facts.

CONCLUSION

The decisions of Corren and Rosen not to produce (1) the first draft of the ESG study, (2) the October 1982 version of the ESG study and (3) the Komanoff letter commenting on the ESG study were purposeful and constitute an intentional effort to frustrate the legitimate discovery rights of Licensees. Licensees request that the Board grant Licensees relief:

(1) Directing Corren and Rosen to produce the letter from Komanoff commenting on the ESG study;

(2) Directing Corren and Rosen to produce a copy of the August-September version of the ESG report discussed above; and

(3) Imposing sanctions on Corren and Rosen for their intentional non-production of the ESRG report and the Komanoff letter. In particular, Licensees seek to preclude use of the October 1982 ESRG study and to preclude the further participation of Rosen and Corren in this proceeding. While licensees seek to present the Board with a full record, elemental principles of fairness require the imposition of sanctions to prevent Rosen and Corren from profiting by their decision to withhold the August-September draft report and the Komanoff letter.

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Dated: April 7, 1983

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March 31, 1983

Mr. Charles Pratt, Esq.
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BY HAND

Dear Mr. Pratt,

Pursuant to your requests for documents during my deposition yesterday, I am including with this letter several items.

These include:

- 1) Licensees' exhibit 2
- 2) Licensees' exhibit 3
- 3) Licensees' exhibit 4
- 4) Licensees' exhibit 5

I have not included the first ESRG draft report which I received in September, 1982 because, as I have always held, I do not believe you are entitled to draft testimony. You already have copies of the actual testimony prior to its due date. The original draft would be of no value in preparing your defense, and the particulars of the original draft have no relevance to the subject of the board-ordered deposition. Similarly, the Komanoff comments on the report are not discoverable. In addition, since the final testimony in no way relies on the Komanoff comments, there is no basis in this proceeding for your having a right to them. In any case, it also happens that I can't find them.

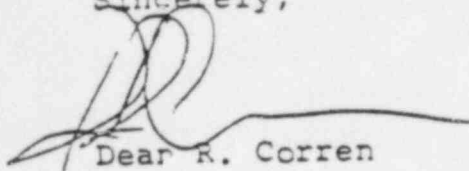
While examining my files today I found four pieces of correspondence between myself and John Stutz of ESRG which I had forgotten about. These are regarding the initial stage of the ESRG project to study early retirement of nuclear reactors, and include:

- 5) Letter from John Stutz to Dean Corren dated February 10, 1982
- 6) Draft ESRG proposal, Early Retirement of Existing Nuclear Power Plants, dated February, 1982 (with my comments)
- 7) Letter from Dean Corren to John Stutz dated February 18, 1982
- 8) Another letter from Dean Corren to John Stutz for use in support of the ESRG proposal, dated February 18, 1982

Mr. Charles Pratt, Esq.
March 31, 1983
page two

The foregoing information will augment the deposition to make the record on this question of GNYCE's intent as complete as possible.

Sincerely,

A handwritten signature in dark ink, appearing to be 'R. Corren', with a long horizontal flourish extending to the right. The signature is written over the typed name 'Dear R. Corren'.

Dear R. Corren

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.)
(Indian Point, Unit No. 2))

POWER AUTHORITY OF THE STATE OF NEW YORK)
(Indian Point, Unit No. 3))

) '83 APR 19 AIO:19

) Docket Nos.

) 50-247 SP

) 50-286 SP

) April 7, 1983

Certificate of Service

I hereby certify that I have served copies of: LICENSEES' FURTHER SUPPLEMENT TO MOTION TO IMPOSE SANCTIONS to the service list below on this 7th day of April, 1983 by depositing it in the United States mail, first class.

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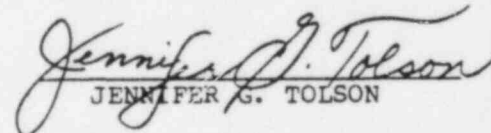
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