

BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)
)
COMMONWEALTH EDISON COMPANY,)
) No. 00 -0361
Petition for approval of a)
revised decommissioning)
expense adjustment rider.)
Chicago, Illinois

August 24, 2000

Met pursuant to notice at 9:30 a.m.

BEFORE:

MR. PHILLIP CASEY and MR. TERRY HILLIARD,
Administrative Law Judge

APPEARANCES:

HOPKINS & SUTTER
MR. PAUL HANZLIK and
MR. ROBERT FELDMER
Three First National Plaza, Suite 4100
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Appearing for Commonwealth Edison;

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MR. R. LAWRENCE WARREN and
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SULLIVAN REPORTING COMPANY, by
Barbara A. Richmond, CSR

JUDGE CASEY: Pursuant to the authority and direction of the Illinois Commerce Commission, I now call Docket No. 00-0361. Commonwealth Edison Company, petition for approval of a revised decommissioning expense adjustment rider.

Appearances for the record, please.

MR. HANZLIK: Paul Hanzlik and Robert Feldmeier, Hopkins and Sutter on behalf of Commonwealth Edison Company.

JUDGE CASEY: Anybody else want to state an appearance for the record?

MR. FEELEY: Steven G. Revethis and John C. Feeley appearing on behalf of the staff of the Illinois Commerce Commission, Mr. Examiner.

MS. NORINGTON: Karen Norington, Citizens Utility Board, 208 South LaSalle, Chicago 60604.

MR. JOLLY: On behalf of the City of Chicago, Conrad Reddick and Ronald Jolly 30 North LaSalle Street, Suite 900, Chicago, Illinois 60602.

MR. WARREN: R. Lawrence Warren and Martin Kaminski for the Attorney General's office, 100 West Randolph, 12th Floor, Chicago 60601 on behalf of the

people of the State of Illinois.

MS. DOSS: Leijuana Doss, Mitch Levine and Marie Spicuzza appearing on behalf of the People of Cook County, Cook County State's Attorney's office, 69 West Washington, 60602.

MR. ROSENBLUM: Dan Rosenblum, Environmental Law and Policy Center, 35 East Wacker, Suite 1300, Chicago, Illinois 60601.

MR. ROBERTSON: Eric Robertson, Leuders, Robertson and Konzen, P.O. box 735, 1939 Delmar, Granite City, Illinois 60240 on behalf of the Illinois Industrial Energy Consultants.

MR. TOWNSEND: On behalf of CITGO Petroleum Corporation, General Mills, Inc., R. R. Donnelley and Sons Company and the Metropolitan Chicago health Care Council collectively, the Chicago Area Industrial Health Care Customer Coalition. The law firm of Piper, Marbury, Rudnick and Wolfe by Christopher J. Townsend and David I. Fein, 203 North LaSalle, Suite 1800, Chicago, Illinois 60601.

JUDGE CASEY: Any further appearances? Let the record reflect that there are no further

appearances.

Before we go any further, are there any petitions to intervene that have not yet been ruled upon? With respect to Commonwealth Edison's petition, that motion is granted. That next brings us to Citizen's Utility Board and the City of Chicago's motion to compel and a motion for extension of time.

With respect to that motion, please direct any inquires directly to Examiner Hilliard.

JUDGE HILLIARD: I've read the motion and I've read the revised motion and I've read the response. Does anyone have any comments they want to make? Excuse me, one other comment, I was not able to retrieve the AG's response to the motion because the phone center is not one that is easy to access through our system. Go ahead, Counsel.

MS. NORINGTON: Good morning. With respect to the motion to compel, I just wanted to address three issues that were raised. I also have a statement that was received via fax just a few moments ago to the City of Chicago's office from Robert Ivanauskas

who was previous counsel on this case, and I can provide -- unfortunately I have one copy, but I would be certainly glad to provide that at this time.

JUDGE HILLIARD: We've got a copy machine out around the bend there if you would like to make copies. Basically our motion addresses three particular issues. Number one is confidentiality, number two to commonness and number three is prejudice to us, to the City of Chicago and CUB given the delay in our receipt of documents from Commonwealth Edison.

First, in Commonwealth's Edison's response they claim that confidential materials were returned to them, that is correct. However, none of those materials pertained to the discovery questions that were propounded on July 10th and July 13th. And furthermore not all of the responses that we received in response to the data request were confidential materials. So those nonconfidential items should have been provided to us in a timely fashion.

It was originally agreed by Commonwealth Edison, suggested by Commonwealth Edison, that we would receive those materials on or before August 2nd, and August 7th. Some of the materials we received yesterday evening at 4:30 p.m. and 4:00, between the City and CUB. Some of other documents we received Tuesday evening, and others were reviewed Monday evening and then provided to us Tuesday morning.

JUDGE HILLIARD: Tuesday what date?

MS. NORINGTON: Sorry, Tuesday of this past week, that is the 22nd.

JUDGE HILLIARD: So what's the status of production as of right now?

MS. NORINGTON: As of this moment we have received everything that was originally promised to us. We have received it kind of in piecemeal fashion throughout this week, from Monday through yesterday evening. Our witness is in the process of flying in at this moment, some of the documents that were received yesterday evening are going to be used today for cross examination of witnesses. This

leaves us, if we did not sleep last night, 17 hours to prepare for testimony today.

And we feel that we have been hampered and that our preparation has certainly been hindered as a result of not having received these documents. Certainly it cannot be the position of the Commission that it is okay to provide documents the day before a hearing or even the week of a hearing. It severely hampers our ability to prepare, and more importantly it hampers our witness' ability to provide complete testimony.

Certainly the direct testimony at this point is going to have to be either supplemented or rebuttal testimony will need to be filed because of the documents that have been received just this week.

JUDGE HILLIARD: Have all the materials that you requested to which the respondent or the applicant objected been produced to you?

MR. JOLLY: No. The second item, Item 32 has not been responded to. And given Edison's response, I think we accept their response that their objection

is appropriate. The study that was requested in Item 32, Edison had just objected to without explaining what the basis for their objection was, only that they were objecting on attorney/client privilege grounds and work product grounds.

When in their response in which they explain the study we are requesting, that it is a consultant report that Edison used to analyze the decommissioning studies that they already have had done. We agreed that that's an appropriate objection. So with respect to 32, I believe that that's no longer an issue.

However, as Ms. Norington was saying, I think in addition to the two items that we were asked for responses to, there have been plenty of late responses, part of which have been very last minute, part of which and I can show you examples, that major portions of have been redacted that we simply have not had time to review and then to approach Edison regarding the bases for their redactions. And these redactions go to the very heart of this case. And we just simply have not had

time to do it.

For example, we received this stack of documents on Tuesday, we were allowed to review them at Hopkins and Sutter's office on Monday. We receive this stacked of documents on Tuesday. While we were preparing for our case, preparing cross examination, preparing our witnesses, reviewing other discovery, we had to review this, to look at the redactions that they had, and when I met -- when we reviewed these documents at Hopkins and Sutter's office Monday Mr. Felmeier suggested if we had any problems with specific redactions we should contact them. Well, we just simply have not had enough time to do that.

JUDGE HILLIARD: When did you request the documents?

MS. NORINGTON: The documents were requested July 10th and July 13th respectively, the fifth and sixth data requests.

JUDGE HILLIARD: We're troubled by the fact that you didn't bring these problems to our attention until yesterday. I understand that you have filed

an initial motion to compel on the 18th, but we never got a copy of it, and we were not notified that a copy have had been filed. We didn't physically get a copy, we didn't get an electronic copy.

As to the revised motion we did get that yesterday, and we looked it over and that's why we are entertaining this right now. But we are not -- we're not pleased by the fact that you bring this to us at the very last moment. I understand you received the documents recently, but when you didn't receive the documents in a timely manner, that's the time to bring that to the attention of the hearing examiners.

MR. JOLLY: If I may, your Honor, there were ongoing discussions at the time, and had we received some of these documents maybe a week ago, maybe that would have provided sufficient time. But again, this stack was provided on Tuesday. We received, as Ms. Norington just said, with respect to Item 67B, I received that at 4:30 yesterday giving us 17 hours before Mr. McDonald takes the stand to comprehend

that, to go through this technical document, to talk about it with our witnesses, and prepare for cross examination.

Another example is we received responses on Tuesday and two of the responses to the sixth data request suggested that Edison -- they asked for studies regarding life extensions, any life extension studies Edison has done. Edison said they provided us one such study which we do have, and they said additional materials were available and that we should contact them to determine a mutually agreeable time at which we could review those documents.

And I'm not certain how on Tuesday, when hearings are on Thursday we can -- there can be a mutually agreeable time to review documents which goes to one of the major issues in this case.

JUDGE HILLIARD: I agree with you, subject to what counsel has to say, it appears that they have been dilatory in presenting some of these documents. It does not nay say the fact that you bringing this matter to the attention has not been as prompt as it

might have been. When you realized that there was all -- a lot of outstanding material, that's the time to bring it to our attention, not at the hearing.

Counsel, do you have comments you would like to make?

MR. HANZLIK: Yes, we do. Mr. Feldmeier will address those.

MR. FELDMIEIER: To put a little context on the comments counsel made, we have been -- we have received eight sets of data requests from the City and CUB. The arguments of counsel are directed at only two of those sets. The remaining six sets were all responded to a long time ago and there is no issue with respect to that discovery.

With respect to the fifth and sixth set, I think a big piece of the puzzle here that is not reflected by counsel's comments and it was not reflected in their papers, it was reflected in our response is that the timing of our production of these materials was to a large extent driven by the departure of Mr. Ivanauskas of CUB.

With respect to the fifth and sixth sets, I made arrangements with Mr. Ivanauskas to produce very confidential materials in early August. These materials involved board of director deliberations about the pending merger, decommission costs, license extension and other confidential things. We were preparing to produce those in early August.

On August 3rd I received a letter that I attached to my response from Mr. Ivanauskas saying in effect I'm leaving CUB, CUB has no further use of Com Ed confidential materials, I'm returning those that I have and that CUB will contact you once a new lawyer gets on the case. Under those circumstances I did not produce the additional confidential materials because the confidential materials had just come back to me.

I listened to his letter and I waited for Ms. Norington to call me. When she called me I sent to her by messenger a confidentiality agreement and I said I need to receive this and then I will produce documents. The day I receive it, I produced the documents in the sixth set of data requests that

Mr. Ivanauskas and I had discussed would be the subject of our initial production.

Four days later, your Honor, I produced the board of directors minutes to them in my office to review. They then raised certain additional requests that were beyond the scope of what Mr. Ivanauskas and I discussed and said they wanted an extension to get those requests, I said it was not subject of our agreement. But to make sure we did not have a delay in the hearings, four days later I responded to those additional requests. Our production at this point in time is complete.

Mr. Jolly indicated that he received a response yesterday. That was a response to one subpart out of the 225 they've directed to us. It was a subject of their motion to compel. We sent it to them to resolve issues. Our production is complete, their explanation of how the timing of this unfolded skips major elements involving Mr. Ivanauskas' departure. We've work very diligently to provide them with these materials.

If there there has been a delay, it's

been caused by Mr. Ivanauskas' departure and the involvement of new counsel on the case. Under the circumstances, we do not think that a continuance is appropriate. One final point, Mr. Jolly said he received responses yesterday saying that we would produce documents at a mutually agreeable time, license extension documents. Those were the written responses to requests. They reflected a production that had actually occurred, as I informed Ms. Norington this morning.

No additional documents need to be produced. Everything has been produced to them. It was the produced at the time it was produced because of Mr. Ivanauskas' departure from CUB and the confidential nature of the materials involved.

One final point, Ms. Norington has alluded to the fact that there were certain responses that were not confidential, that's really the tail of the dog here. Most of these materials were board of director materials, deliberations involving weighty issues and very confidential technical reports regarding license extension to the

nuclear units, all things that the company treats in a very confidential way.

MR. NORINGTON: Brief rebuttal, your Honor. For the record, the board of directors minutes pertained only to Items No. 57 through 62. I called Walter Hazlet of Hopkins and Sutter on August 9th, which is the day that, number one, Mr. Ivanauskas departed CUB and also the day I inherited the case.

I called and asked them if this was done and I was told that Mr. Feldmeier was handling those. I contacted -- and I was told that he was working on that and that they would get to me soon. That Friday, August 11th, I contacted Mr. Feldmeier, hearing no response I called him again on Monday August 14th. At that time he said, Oh, I'm doing a review of the documents for privilege, therefore those documents could not have been ready to deliver to Mr. Ivanauskas on August 2nd, the date that they were due to be delivered if he was still reviewing them for privilege on Monday, August 15th.

Also at that time he said I have here on my desk a copy of the confidentiality agreement with

your name on it. I said please send it over, I'll be happy to sign it, I will be out of the office for the remainder of the this afternoon. When I came in on Tuesday morning I signed the document and I returned it.

However, production was not even initiated until August 17th when I called again demanding the fifth and sixth sets of requests, and we really didn't even actually have an opportunity to view the documents until after I said I was going to have to file a motion to compel if I didn't receive them.

Mr. Ivanauskas was in the office on August 2nd, he was in the office on August 7th, those were the dates by Com Ed's own admission in their documents provided to the court that they would produce the documents on August 2nd and August 7th. He was there, he was available, he was working.

His letter to them was on August 3rd returning confidential materials that were not already produced subject to the fifth and sixth data

requests. Those things were not responded to at the time that he returned the confidential materials. And he returned them pursuant to the confidentiality agreement with them.

In other words, I couldn't look at those documents because I had yet to receive a confidentiality agreement, nor was I actively working on the case at the time. Also, the documents that Mr. Jolly was referring to were the documents that he saw on Monday. I guess counsel said, mistakenly, that this morning we did have a conversation where I was asking about specific responses that stated that documents would be available, additional documents would be available at a mutually agreeable time. Mr. Jolly was not referencing the documents that were the subject of the discussion that I had with Mr. Feldmeier this morning. He was referencing documents that were provided to us Tuesday morning.

Additionally, Mr. Feldmeier continues to term these requests as additional requests. We are simply asking for full production of the documents

that were requested in the fifth and sixth set. He has read his conversations with Mr. Ivanauskas to mean that Com Ed was going to have to give a limited response to the original request. And according to the statement provided here by Mr. Ivanauskas I'm not certain, I didn't see Mr. Jolly come up and hand you a copy.

JUDGE HILLIARD: I do have a copy, but I haven't had a chance to read it.

MR. NORINGTON: But his statement is that he never agreed to limit the disclosure, and that in his view his conversations with Mr. Feldmeier and Mr. Anderson who signed, I believe, the July 13th letter in the record, his conversations simply talked about the method of disclosure, in that certain items were going to be produced by a particular -- in a particular fashion. That's not saying that the disclosure was completely limited.

In any case, the issue here before us is that we have not received appropriate adequate time to prepare fully for the proceedings. And that there was a delay, a delay that could have been

avoided, and a delay that is not fully our responsibility. I understand that Mr. Ivanauskas left the office, however he was in the office on the dates that the documents were due to be delivered.

JUDGE HILLIARD: Did you or Mr. Ivanauskas inform the applicant that you were taking over his responsibilities in this case prior to the time he left?

MR. NORINGTON: That that was his final day? The week prior I was at the NARUK conference. When I returned to the office he was available on Tuesday, there was no mention that he was leaving. On Wednesday I appeared on another case, a status hearing in another case, one of his docketed cases, and when I returned to the office I learned that that was his last official day.

JUDGE HILLIARD: He quit with no notice to the office?

MR. NORINGTON: We were uncertain as to his final date. We were told initially that he would be available through August 15th, but on August 9th we were told that August 9th was the last date.

JUDGE HILLIARD: And when were you told that he might be available through the 15th?

MR. NORINGTON: The week prior to the week that I was at the NARUK conference, so approximately on or about July 29th or 30th.

JUDGE HILLIARD: And were any arrangements made at that time for someone to succeed him in this matter?

MR. NORINGTON: It was the understanding that Mr. Ivanauskas and I would work together to transition into his new docket, but that didn't occur because I was at the conference for that week and once I returned to the office that was the week that it was disclosed that he was leaving that week, on that particular day.

JUDGE HILLIARD: So your answer is no, there wasn't any transition made -- you didn't inform the applicant that you were taking over his responsibilities, didn't inform that you were taking over responsibilities and you didn't add your name to the service list; is that right?

MR. NORINGTON: Your Honor, I was told on August

9th that I would have responsibility for the case. On August 9th I contacted the applicant. With respect to the service list, I received a call yesterday saying that I was not included on the service list. All the other parties were aware, however, that I was participating in the case at that time. They were notified on or about August 9th or 10th.

MR. JOLLY: I just want to respond to one thing Mr. Feldmeier said. With respect to items that Mr. Feldmeier says were the formal responses regarding documents that CUB had already had access to, that is true with respect to Items 57 through 62 which deal with board of directors meetings and notes from there and documents that were provided to the board of directors.

However, what I was referring to were Items 55 and 56 which ask for copies of analyses, assessments, evaluations, studies prepared by Com Ed. And in their response, Com Ed says, Com Ed has already provided materials in this description in CUB data request 72, which we have. However, they

also say additional materials will be produced at a mutually agreeable time. And it's a similar response for 56.

Now, maybe that is what -- that is what I was referring to, I just want to make clear that that's what Mr. Feldmeier is referring to, because I recognize it was 57 through 62, these were the late filed formal responses, but with 55 and 56 there is an indication they provided just one response -- one set of documents that's responsive to these two questions, but they also indicate there are additional materials available.

MR. NORINGTON: I just want to reiterate the point that Mr. Ivanauskas was in the office on August 2nd, the day the documents were due to the delivered, August 3rd was the day that he returned other confidential materials. He was available and there for the times that production should have been complied with.

JUDGE HILLIARD: Counsel.

MR. FELDMEIERS: If I could just be brief. First I'll address Mr. Jolly's initial point. The

materials for 55 and 56 were made available to them. They also fell under the scope of 57 and 62. And when I said additional materials, those are the materials that I was referring to and you have received those materials.

Very briefly Ms. Norington's arguments are premised on the assumption that on August 3rd I should have sent over a large amount of extremely confidential documents to a lawyer who had just returned the confidential documents he had previously received to me. Contrary to his instructions that I should wait for CUB to contact me if a new lawyer was going to be appointed to the case. That's exactly what I did.

She received the materials that were the subject of these requests within dates after we got back in touch, at a lot of effort by Com Ed counsel and employees. I won't go any further, but I think our response has been diligent.

JUDGE HILLIARD: Let me read the letter. And discuss this. The materials you've received very recently, do you know which witnesses those

materials pertain to?

MR. NORINGTON: Mr. Schlissel -- for us or them?

JUDGE HILLIARD: For you.

MR. JOLLY: Mr. Speck, Mr. Berdell.

JUDGE HILLIARD: So all three of the company witnesses.

MR. NORINGTON: I might note that some of the documents -- some of the responses were in response to requests that specifically referenced various lines of their testimony and documents that were referenced within the direct testimony that the witnesses had provided.

MR. JOLLY: And I guess I would also point out that we neglected to mention this, there is a seventh CUB data request that is outstanding that asks questions regarding various Edison witnesses, and I guess the responses aren't due until Monday, and some of the questions go to Mr. Speck's testimony, so unclear how --

JUDGE HILLIARD: That's one you just served on him?

MR. FELDMEIER: It was served several days ago.

It was served by mail on the 21st.

MR. NORINGTON: Right, it was served on Monday. And at the same time, might I add, we received a second set of date requests from Com Ed, so I think we are even on that score.

MR. HANZLIK: If I might just say that as we all appreciate there has been a cascading flow of data requests in this case, and that's one of the characteristics of an administrative hearing, especially an Illinois Commerce Commission hearing.

And when Mr. Feldmeier states we responded to over 350 date requests and subparts that is no small task. We are really down to a very small piece of material here. Mr. Berdell will not be on the stand until Monday, and I submit that even though they may want to question Mr. McDonald and Mr. Speck about these materials, that the appropriate person is going to end up being Mr. Berdell.

And therefore there is sufficient time with respect to the very small packet of information that is all that is in dispute here for them to

prepare a cross examination of Mr. Berdell on Monday. If they find that the time between now and Monday is insufficient, we can take it up at that time. But to continue that case for that reason, I think, would be unfair to all the parties here, as well as to the Commission.

JUDGE HILLIARD: Can you make McDonald and Speck available on Monday if need be?

MR. HANZLIK: Mr. Speck is only available today. He has a previous commitment out of this country, and that's why it was scheduled today for him to go on. Mr. McDonald's schedule I do not know, but I know he has some scheduling problems as well. But I think when we get into the cross of Mr. McDonald, his testimony is very short direct testimony, nine pages. It is limited to the power purchase agreement.

And I think we are going to find in cross examination that it's Mr. Berdell who is the appropriate person who has whatever information that they wish to cross examine on.

MR. JOLLY: Well, a couple of things. One, this

is not the only thing that we received at last minute, there is another study which is 65 pages, there are additional materials that were received over the last few days. These are the board of director materials that we received, and I was just pointing out that there are major redactions in here which we have not had an opportunity to discuss with Edison as to the bases for these redactions. And some of these things go to the very heart of this case. And we just haven't had the time.

Secondly, I guess I'm not certain it's Mr. Hanzlik's job to tell us who we should be cross examining. We may choose to cross examine whatever witness we choose to cross examine, based on what they testify. So I would just like to point that out.

JUDGE HILLIARD: When is Speck back in the country?

MR. HANZLIK: I believe about three weeks, the 18th of September.

JUDGE HILLIARD: Mr. McDonald's available; is that right?

MR. HANZLIK: Mr. McDonald is here today, yes.

JUDGE HILLIARD: And if they want to bring him back next week, is that possible?

MR. HANZLIK: I don't know his schedule, but I believe if he's in town. Certainly we would make him available, if necessary.

JUDGE HILLIARD: It's our conclusion that the motion to extend the time for this hearing should be denied, subject to the applicant's efforts to make a pertinent witness available to respond to the questions that may be posed after analysis of these documents.

We decline to continue the hearing or extend the hearing because of Mr. -- I mean everybody has been aware for a couple of months that Mr. Speck is not available after today, and it appears to me and to Mr. Casey that it is not appropriate to delay this proceeding on the basis of the motion that has been presented to us. So that's our ruling.

MR. JOLLY: Thank you.

JUDGE HILLIARD: Are there any other motions?

MR. HANZLIK: No, sir, I would just briefly review the order of witnesses this morning, if that would be appropriate, and this afternoon.

JUDGE HILLIARD: Okay.

MR. HANZLIK: We have consulted with the parties in this proceeding, and I believe that we have the order of witnesses which is acceptable, based upon all the scheduling problems that occur for various witnesses, especially those coming in from out of town.

Today Mr. McDonald will be the first witness, followed by Mr. Speck, followed by Mr. Manshio, and then if necessary, Ms. Ebery from the Illinois Commerce Commission. Although I believe staff has attempted to obtain agreement from the parties with respect to cross examination. It may not be necessary for her to appear.

MR. REVETHIS: That's correct. It's our understanding that there is no cross examination of Ms. Ebery, unless anyone has any thoughts that are in conflict with that. We would submit Ms. Ebery's testimony by affidavit if that's agreeable, unless

the examiners have any cross for her.

JUDGE HILLIARD: How about cross examination, how much time are we going to take with these people?

JUDGE CASEY: Well, before we get to cross, direct exam, I'm just trying to get a time frame, we don't have a great deal of witnesses, but we are just trying to figure out time frames on the witnesses subject to the rule of doubling when it comes to cross. Because I know everyone tells us 10 minutes and it's always more than twice that.

MR. HANZLIK: With respect to the witnesses today?

JUDGE CASEY: Sure.

MR. HANZLIK: We have heard only from some of the parties with estimates of cross examination time for the witnesses, so I cannot give you for each of the witnesses today a total estimate.

JUDGE CASEY: Well, just so we know for future days in this hearing, we would would kind of like to have a time frame for the witnesses. With respect for today's hearing Mr. McDonald's direct exam is going to take how long?

MR. HANZLIK: Two minutes.

JUDGE CASEY: Two minutes, I'm going to hold you to that Mr. Hanzlik. And the preliminary information that you got with respect to cross is how long?

MR. HANZLIK: I think -- it was very sketchy, and I do not want to speak for the parties, but I think it was a total of 60 to 75 minutes. But we did not hear from all parties.

MR. JOLLY: One party that they did not hear from is the City. At this point we did not have any cross examination subject to the ruling to give an opportunity to review the late filed discovery responses.

MR. NORINGTON: And CUB would second that.

JUDGE CASEY: I'm sorry?

MS. NORINGTON: CUB would state the same.

MR. FEELEY: Mr. Examiner, previously we did not provide an estimate for Mr. McDonald, but we would have around 5 minutes for him.

MR. ROBERTSON: I have not seen the material that has been referred to, although I think we did ask

for copies of whatever was provided to CUB.

Mr. Townsend showed me a letter that is dated August the 22nd advising the parties that they had a right to come and look at the documents at the City and inspect them Monday or Tuesday.

I'm 300 miles south of here, I don't remember receiving the letter, it's possible that I did or if they sent it regular mail which means I haven't received it, which means I haven't had the opportunity to review the material that I asked to be provided to me in order to prepare for cross. So there is no way to cure that, unless Mr. McDonald is made available for cross examination next week so that I can look at the materials and see if I have any cross for him with regard to the material that's been produced. I do have a little bit of cross for him today.

Although, I would also point out that as far as this hearing is concerned, there is no deadline for determination of this case, no statutory deadline. There is no compelling reason why the hearing couldn't be continued to allow

parties to properly prepare for cross based on the data that's been presented, after Mr. Speck has returned from his vacation, or whatever business he has out of the country.

Absent statutory deadline, and given the circumstances, parties should be permitted to prepare properly for cross, based on the materials that are timely provided, regardless of the circumstances that led up to the situation, that's the situation that we're faced with.

MR. TOWNSEND: With regard to the letter that Mr. Robertson referred to, we did receive that yesterday, less than 24 hours prior to this hearing indicating that Edison would be willing to establish a mutually agreeable time for us to view that material. We have not been able to have time to even contact them to try to establish a mutually agreeable time.

But, again, subject to being able to review those additional documents, we do have cross examination for Mr. McDonald, and I believe the estimate that I provided previously in the range of

half an hour to 45 minutes.

JUDGE HILLIARD: Was Mr. Townsend's cross included in your estimates?

MR. HANZLIK: Yes.

JUDGE CASEY: I take it Mr. Robertson -- your motion to reconsider our ruling is denied.

MR. ROBERTSON: I thought it might be.

MR. ROSENBLUM: I will have no cross of Mr. McDonald.

MR. WARREN: If we received the letter today, it hasn't worked it's way around to my office yet. We have some cross that is, my guess, it's probably going to be maybe 15, 20 minutes that we have already prepared for today.

JUDGE HILLIARD: Is that something you told counsel about? Is that included in his estimate?

MR. HANZLIK: Yes, I have that in the estimate.

MS. DOSS: And Cook County has no cross.

JUDGE CASEY: Well, at this time -- Mr. Hanzlik, do you want to call your first witness, please.

MR. HANZLIK: Yes, if I could, just one more

housekeeping matter, and that is mention the order of witnesses in the event that some people here might not have that in mind for the next three days, that would be helpful to some parties, but if something changes with respect to one of the staff witnesses.

Tomorrow, Friday, Mr. Riley would appear, Mr. Schlissel, Mr. LaGuardia and Mr. Stevens. On Monday, Mr. Thayer would be first, Mr. Callan, Mr. Effron and Mr. Berdell. On Tuesday, Mr. O'Connor, Mr. Bodmer and Mr. Biewald. And then if we might have just two minutes I'll change over and we will bring Mr. McDonald in.

JUDGE CASEY: We will give you five minutes.

(Whereupon, there was
a short break taken.)

(Whereupon Edison
Exhibit No. 3 was
marked for identification
as of this date.)

MR. HANZLIK: Sir, would you please stand and raise your right hand for the examiners.

(Witness sworn.)

ROBERT K. McDONALD,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY

MR. HANZLIK:

Q. Sir, would you please state your full name spelling your last name?

A. Robert K. McDonald. Last name is spelled M-c-D-o-n-a-l-d.

Q. Mr. McDonald, by whom are you employed?

A. By Commonwealth Edison or Unicom Corporation.

Q. What is your position with Commonwealth Edison?

A. I am the vice president of strategic planning for the company.

Q. Mr. McDonald I show you a document that has been marked as Edison Exhibit 3 for identification by the court reporter. It has a cover page with a caption of this case. It states direct testimony

submitted by Robert K. McDonlad. It is in type written form and consists of question and answer testimony for nine pages, plus an Exhibit A attached to that testimony which is identified in the cover page to Exhibit A as power purchase agreement .

First, is that testimony which you have prepared for submission in this proceeding today?

A. Yes.

Q. Are there any changes, corrections or additions which you wish to make in your prepared testimony?

A. No.

Q. If I were to ask you these questions today, as they appear here in Exhibit 3, would your answers be the same as stated in Exhibit 3?

A. Yes, they would be.

Q. And would you please look at Exhibit A to Exhibit 3, the power purchase agreement.

A. Yes.

Q. Is that a true and correct copy of the power purchase agreement which is described in your testimony?

A. Yes, it is.

MR. HANZLIK: At this point I would ask that Mr. McDonald's prepared testimony, Exhibit 3, including Exhibit A to that testimony, be admitted into evidence. Mr. McDonald would be available for cross examination.

JUDGE HILLIARD: Any objection? The testimony and exhibit will be admitted.

(Whereupon Edison
Exhibit No. 3 was
admitted into evidence.)

JUDGE CASEY: Any cross examination --
Mr. Hanzlik, there was no additional direct?

MR. HANZLIK: That is correct.

JUDGE CASEY: Cross examination? Does anybody
want to cross examine Mr. McDonald?

MR. TOWNSEND: I believe that staff --

MR. FEELEY: They can go first. I'll go.

JUDGE CASEY: Staff, please proceed with your
cross examination.

CROSS EXAMINATION

BY

MR. FEELEY:

Q. Good morning, Mr. McDonald, my name is John Feeley and I'm one of the attorneys representing staff. I just have a very brief question for you. On your Exhibit 3, Page 6, direct your attention to Lines 273 through 276. Do you see that?

A. Yes.

Q. You refer there to Com Ed's costs of service associated with the nuclear units, correct?

A. Yes.

Q. And in your reference to that, in the previous question and answer, you state that the PPA, the energy prices for the initial term on the month by month basis, they are being determined based upon Com Ed's cost of service associated with the nuclear units; is that correct?

A. Yes, that is correct.

Q. For -- when you refer to Com Ed's cost of service associated with the nuclear units, does that cost of service include any cost of decommissioning?

A. No.

Q. So it's excluded?

A. Right.

MR. FEELEY: That's all I have, thank you.

JUDGE CASEY: Mr. Townsend.

CROSS EXAMINATION

BY

MR. TOWNSEND:

Q. Good morning, Mr. McDonald.

A. Good morning.

Q. Chris Townsend appearing on behalf of the Chicago Area Industrial and Health Care Customer Coalition. Mr. McDonald, did you perform any analysis regarding the impact that Edison's proposal would have upon the angle rates paid by typical ratepayers in various customer classes?

A. No, I did not.

Q. Did anyone at Edison try to estimate the impact that the proposal would have upon, say, a typical manufacturing customer?

A. I am not aware of any calculation.

Q. Are you aware of any calculation that was done by anyone at Edison or Unicom to try to estimate the impact a proposal would have upon a

typical hospital?

A. I am not aware of such a calculation.

Q. Are you aware for some large customers Edison's proposal would increase their electrical bills by a quarter million dollars per year?

A. I was not aware of that.

Q. In your testimony going from pages one to two, you refer to the billion dollars of savings asserted by Edison, do you see that?

A. Yes.

Q. Did you actually calculate the alleged savings to customers?

A. No, I did not.

Q. Did you prepare or rely upon any work papers?

A. I relied upon Mr. Berdell's testimony.

Q. That \$1 billion is on a nominal basis, that is, there is no present value adjustment; is that correct?

A. I would refer to Mr. Berdell.

Q. So you don't know whether or not that includes any present value adjustment?

A. I did not perform the calculation, and Mr. Berdell would be able to answer that.

JUDGE HILLIARD: Sir, could you move the microphone a little closer to yourself.

BY MR. TOWNSEND:

Q. I would like to turn your attention to Page 4 of your testimony, specifically in my copy it's lines 157 to 159. There you state that generation organization will focus on maximizing the generation and sales of low cost energy into the wholesale market. Do you see that?

A. Yes, I do.

Q. It's your testimony that the generation organization will sell power at low costs, is it?

A. No, not necessarily, it depends on market forces.

Q. Would you agree that the focus of the generation organization would be to improve the profitability of Unicom?

A. I'm sorry, it will be to improve, overall, the profitability of Exelon.

JUDGE HILLIARD: Excuse me, sir, I didn't hear

your answer.

THE WITNESS: I'm sorry. The answer is ultimately the purpose is to improve the profitability of Exelon going forward, which would be the combination of PECO and Unicom.

BY MR. TOWNSEND:

Q. Referring to Page 7, Lines 302 through 305, this is why you discuss the prices that would be paid by Edison for the generation from the Genco; is that correct?

A. Yes.

Q. You state that the prices are not intended to reflect the market prices that Com Ed would otherwise face during the initial term, but rather to keep it whole in terms of the costs it would have faced if it would have continued to own the generation; is that right?

A. Could you rephrase that question.

Q. During the initial term of the power purchase agreement, and from what I understand, there is a difference in the way that the prices would be calculated for that initial term versus

after the initial term; is that correct?

A. That is correct.

Q. And during the initial term, the prices are not intended to reflect the market prices that Com Ed would have otherwise faced; is that correct?

MR. HANZLIK: I'm sorry, otherwise faced, what does the otherwise refer to?

BY MR. TOWNSEND:

Q. Otherwise, absent the PPA, and again this is right out of your testimony on Page 7, the prices during the initial term are not intended to reflect market prices that Com Ed would have paid during the initial term absent the PPA, correct?

MR. HANZLIK: Well, wait a minute, the problem I have with the question is absent the PPA the generation is with Com Ed, so it doesn't pay market prices for this power. I don't understand the question.

JUDGE CASEY: Mr. Townsend, are you assuming that there was already a transfer?

MR. TOWNSEND: That's correct.

JUDGE CASEY: So if there wasn't a PPA and there

was already a transfer, does this reflect PPA.

MR. TOWNSEND: And again, I believe that's the assumption that is contained within that statement within his testimony. But you are correct, Mr. Examiner, that is part of the assumption as well that there is a transfer of the assets to Genco.

BY MR. TOWNSEND:

Q. The prices that are not intended to reflect the market prices that Com Ed would pay; is that correct?

A. That is correct. It is not intended to reflect market prices for output from the nuclears or coal plants or gas plants that the company had previously owned. (Change of reporters.)

Q. Instead during the initial term, the price is based upon the cost that Edison would have otherwise faced if it would have owned this generation; is that correct?

A. Yes, for the most part, that is correct.

There is a small assessment of power that may be needed above and beyond the nuclear, coal

unit and gas units that Commonwealth Edison used to own that is reflected here, but it's an extremely small piece and just goes beyond what is available from the generation that the nuclears that we currently have and those that have been sold to Edison Michigan.

Q. Exactly. So it's to assume that Edison had the same generation portfolio?

A. Yes.

Q. On the whole do you anticipate Edison's cost of generation would have been lower than the market price that Edison would have faced?

A. Are you assuming absent a transfer?

Q. Assuming that the transfer takes place --

A. Okay.

Q. -- on the whole do you anticipate that Edison's cost of generation would be lower than the market price that Edison would have faced, assuming that the --

A. Assuming the pricing of the PPA?

On the whole, my estimate would be that the pricing from the PPA would be less than

Commonwealth Edison would face in an open market.

Q. So from Edison's perspective it's better to buy from the PPA during this initial term than to just go out on the spot market?

A. Yes, that is true.

Q. Now, looking beyond the initial term under the PPA, let me try to understand how this would work. And perhaps it's best to look at a hypothetical example.

Assume that after the initial term in the PPA that the market index indicates the market price for power in Illinois is 3.5 cents per kWh. Okay?

A. Okay.

Q. Assume that Genco's cost to generate is 2 cents per kWh.

A. Okay.

Q. All else being equal, what rate would you anticipate the Genco would charge after this initial period?

A. I can't tell from those assumptions.

Q. What additional information would you need?

A. I would really need a better assessment of

the market value of base load generation at that time.

Q. We're assuming again that the market value of electricity is 3.5 cents per kWh; and let's assume that that is the market value for base load capacity.

A. That is different than the way it was stated originally where you said the assumption is based from the utility or the market value index you arrived at a three and a half cent.

This is a different value than you would get for a base load.

Q. There may be various different types of indices. Let's assume for your purposes for this hypothetical question that the base load -- we're talking about a base load index, and the base load index indicates a price of 3.5 cents and the Genco's cost to generate is 2 cents.

A. If --

Q. All else being equal, what rate would you anticipate the Genco would charge?

A. If there is a market value for the kind of

output you get from nuclear plants that is available at that time and it says that the value is three and a half cents, and if that is something that FERC would approve, then that is -- could well be the price that is negotiated.

Q. You would anticipate that the Genco would seek to charge the market price?

A. That is the intention.

Q. Assume the same facts but further assume that Genco could sell into the Wisconsin market without incurring any additional charges, and the market price in Wisconsin is 4.5 cents per kWh.

All else being equal, would you expect that Genco would sell into the Wisconsin market or the Illinois market?

A. I'm sorry, it depends on whether -- how the negotiation for that power purchase agreement between Genco and ComEd goes at that time.

If you're asking whether once there's an agreement whether they would sell in the Wisconsin market, obviously they're going to follow whatever the agreement requires.

If you're asking what is the result of the negotiation between ComEd and Genco at that time, that I can't foretell.

Q. Under the terms of the PPA after the initial term Genco is free to sell inside Illinois or outside of Illinois under the terms of the PPA; isn't that correct?

A. That is correct.

Q. And if Genco saw a financial profit to sell into the Wisconsin market versus the Illinois market, all else being equal, under the terms of the PPA, you would expect Genco to sell into the Wisconsin market; is that correct?

A. There has to be a negotiation at the time after the initial term and we have --

Q. Assuming the contracts are the same in Wisconsin versus Illinois.

A. Under -- my struggle is under your set of assumptions, I can't envision a hypothetical where the market prices are that different.

You have said there's no cost to transfer, no cost to sell. If the assumption then

is that the market price within the into -ComEd area is the four and a half cent, then that could be the basis of negotiation for the PPA.

Q. If someone in -- if a company in Wisconsin was willing to pay more for the output from the generation company than ComEd, all else being equal, would you anticipate that the company in Wisconsin would have a contract with Genco?

A. Market prices will go to what competition says they will.

If there are people in Wisconsin that want to pay four and a half cents, the market price is likely to seek that price.

Q. So your answer was yes?

A. Your hypothetical is assuming that there is a different market price in a different area with no cost of transmission or anything else to get there, it's different than what is in Illinois.

Under that hypothetical, Genco would have an incentive to try and seek a higher market price.

Q. Even if it's outside the state?

A. In the absence of a PPA, yes.

Q. And this PPA wouldn't preclude that after the initial term?

MR. HANZLIK: I'm sorry, what do you mean by the initial term?

BY MR. TOWNSEND:

Q. That's defined in the PPA, isn't it?

A. The initial term, if we're all defining it as through 2004, that is my assumption of the initial term.

I'm sorry, what was the last question?

MR. TOWNSEND: Could I have that back?

JUDGE CASEY: Sure.

(Whereupon, the record was read as requested.)

BY MR. TOWNSEND:

Q. The PPA would not preclude selling to Wisconsin after the initial term; is that correct?

A. That is correct. In the absence of a renewal of the PPA or a new PPA after that initial term, Genco would be free to sell.

Q. How is the power purchase agreement negotiated?

A. I'm sorry, during the initial term or post the initial term?

Q. The attachment to your testimony, the power purchase agreement --

A. Yes.

Q. -- how was it negotiated?

A. At this point there is no negotiation .
There is no Genco. There is no ComEd.

This is a power purchase agreement that was derived within the company, within ComEd at this point in time.

Q. So this is Edison's offer for a power purchase agreement? It isn't necessarily what Exelon Genco would agree to?

A. No, it is the PPA that we intend to establish with the Genco when it is established.

Q. Are there going to be additional negotiations with regards to the PPA?

A. No.

Q. What level of detail was paid to drafting the PPA?

A. I don't understand the question.

Q. Well, how did this document come into being? If it wasn't negotiated, it appeared somehow. I just want to know the process that brought that document about.

A. It was simply an assessment of what would be a reasonable PPA to allow this restructuring and to satisfy requirements and concerns that we felt the Commission might have in terms of financial viability and reliability.

Q. From Edison's perspective?

A. Yes.

Q. Does this agreement refer to the nuclear decommissioning trust fund?

A. It has a reference to that, I believe.

Q. Do you know where?

A. In the power purchase agreement itself?

Q. Yes.

A. Offhand, I cannot cite a specific passage.

Actually, I don't believe it does.

Q. Does it refer in any way to the collection of decommissioning expenses?

A. At this point in time, I don't have a

specific cite for you.

Q. So the prices contained in the PPA are not contingent upon Exelon Genco receiving a certain level of decommissioning payments; is that correct?

A. The prices themselves do not contemplate assumptions about decommissioning collections.

Q. The PPA has default provisions in it, doesn't it?

A. Yes.

Q. So it contemplates that the Genco might default underneath the PPA; is that correct?

A. As any contract, it provides some protections for default on either side.

Q. And one of the ways in which Genco might default underneath this contract, according to the terms of the contract, is that Genco could go bankrupt; is that correct?

A. Yes.

Q. Why is that provision in the PPA?

A. I think that is asking a legal question in terms of contracts.

That's, I would assume, a standard

provision in most contracts.

Q. That provides Edison some remedy if Genco goes bankrupt; is that correct?

A. I believe it provides the opportunity for the termination of the agreement, and then provides for the opportunity, whatever is governed by contract law in terms of remedies.

Q. Do you know what recourse Edison would have against Genco if Genco were to declare bankruptcy?

MR. HANZLIK: I'm going to object to that question as calling for a legal conclusion.

I think that is a question that has now taken us into this realm.

MR. TOWNSEND: Actually this witness is here to describe the PPA.

MR. HANZLIK: The question asked for a much broader answer than what is provided for under the PPA.

JUDGE HILLIARD: I think he can answer the question if he knows the answer.

THE WITNESS: Could you repeat the question, please?

BY MR. TOWNSEND:

Q. Do you know what recourse Edison would have against Genco if Genco were to declare bankruptcy?

A. Recourse -- my struggle is recourse for what?

Q. What would Edison do if Genco declared bankruptcy?

A. If Genco declared bankruptcy? We would have to lay out a scenario where that occurs.

ComEd would still have to acquire the power, Genco might well still be producing the power.

I can't foretell what would happen in the bankruptcy proceeding with Genco. The plants will still physically be there.

Q. What recourse would ratepayers have if Genco were to declare bankruptcy underneath the terms of the PPA?

MR. HANZLIK: Object to that question as well.

First of all, it goes beyond the scope of the testimony and the PPA.

Second, it calls for legal conclusions or

interpretations of ratepayers' rights under the Public Utilities Act.

It is beyond the scope of his testimony, calls for a legal conclusion.

MR. TOWNSEND: Actually I asked for within the scope of the PPA and, again, he's here to describe the PPA and how it operates.

I'm just trying to understand from a ratepayers' perspective how that's going to operate.

JUDGE HILLIARD: I think if the PPA doesn't address this, he can state that answer. If it does address it, I think he's asking what the PPA says on this issue.

THE WITNESS: I don't believe the PPA addresses that particular issue.

BY MR. TOWNSEND:

Q. As a matter of fact, the PPA says that the agreement is intended solely for the benefit of the parties and their successors and assigns and does not confer any rights or benefits on any third party not a signatory hereto; isn't that correct?

If you like you can refer to

Paragraph 18 of the power purchase agreement.

A. That is what that says.

Q. So under the terms of the agreement ratepayers don't have any recourse against Genco for any default?

A. I can't provide a legal opinion as to whether there are some other means where ratepayers have recourse.

This PPA doesn't address that explicitly.

Q. It does explicitly say that parties other than those who signed this and their assigns doesn't have any rights underneath the PPA; isn't that correct?

The only people who are going to sign this according to Page 20, the signature page, are Commonwealth Edison and Genco, correct?

A. It says that it does not confer any rights or benefits on any third party not a signatory hereto.

Q. What recourse would the Commission have under the terms of the PPA against Genco if Genco were to default?

MR. HANZLIK: Again, same objection that I have made earlier to speculating about what rights the Commission would have.

JUDGE HILLIARD: I think he can answer the question if he knows the answer. If he doesn't know the answer, what the document states, then he doesn't have to answer.

THE WITNESS: I don't believe the PPA addresses the Commission's rights under that scenario.

BY MR. TOWNSEND:

Q. And, in fact, again, the fact that it says that no one other than the signatories have any rights under the agreement suggests that the Commission doesn't have any rights to go after the Genco in the case of default underneath the terms of the PPA; isn't that correct?

MR. HANZLIK: Object to the form of the question. As to what is suggested, that's Mr. Townsend's conclusion. Document speaks for itself.

MR. TOWNSEND: I'm asking him whether he agrees with that or not.

JUDGE HILLIARD: You agree with the statement,
sir.

THE WITNESS: The paragraph says what it says.

MR. TOWNSEND: No further questions.

JUDGE CASEY: Any additional cross?

Mr. Robertson.

CROSS-EXAMINATION

BY

MR. ROBERTSON:

Q. Mr. Good morning, Mr. McDonald.

A. Good morning.

Q. Nice to see you again.

A. Nice to see you.

Q. I wanted to ask you about Paragraph 9-C of
the power purchase agreement which is attached to
your testimony as, what, Exhibit A?

Do you have that before you?

A. Yes, I do.

Q. Now, would you agree or disagree that it is
unlikely that ComEd and Genco will disagree on the
price to be established under the power purchase
agreement for 2005 and 2006?

A. Is the question whether we will have a negotiated PPA at that point in time?

Q. Yes.

A. I can't speculate on how that negotiation is going to go.

Q. Do you have a copy of Commonwealth Edison's response to IIEC's second set of data requests, Item No. 14?

A. I don't have it in front of me.

MR. HANZLIK: Is there a particular number, Eric, that you're looking at?

MR. ROBERTSON: I got a copy. I have to do this from memory so you'll have to tell me if I'm right.

BY MR. ROBERTSON:

Q. As I understand Paragraph 9-C, it allows Genco or ComEd to terminate the agreement if a price can't be agreed upon; is that correct?

A. Yes.

Q. And in IIEC's second set of data requests, Item No. 14, was the company asked about the implications for customers if the agreement was terminated under Section 9-C?

A. Yes, that was the request.

Q. And did the request indicate that -- the response to that request indicated that it was the position of the company that it was highly unlikely that that would occur -- and I don't have it right in front of me -- but the implication was that it was very likely they would agree on a price?

A. I'm sorry, could you restate that?

MR. ROBERTSON: Could you read it back, please.

(Whereupon, the record was
read as requested.)

THE WITNESS: That is what -- the response.

BY MR. ROBERTSON:

Q. I made a fair characterization of the response?

A. You made a fair characterization.

Q. Thank you.

A. I'm sorry, the response suggests that it would go to arbitration.

Q. Okay. Now, in your discussion with Mr. Townsend, you indicate, or if I understood correctly, you indicated that the purpose -- the

ultimate purpose of this transaction is to maximize profits for Exelon, the new merged entity; is that correct?

A. The goal of any corporation should be to maximize profits.

Q. I don't disagree with that considering who my clients are, so I don't have a philosophical dispute about that.

But that is the purpose, correct?

A. The purpose of this whole restructuring is to put portions of the business in a better position to create profits.

Q. Now, when the restructuring is completed, Exelon will be the owner either directly or through its subsidiaries of generation, transmission and distribution; is that correct?

A. Through its subsidiaries, that is correct.

Q. So the effect of the company's proposal is not to move generation to an entity that is unrelated to Exelon; is that correct?

A. That is correct.

Q. Would you turn to Page 6 of your testimony.

Now, you had some of this discussion with staff and Mr. Townsend but I would like to ask you with regard to your testimony at the bottom of Page 6, beginning at Line 271, your discussion of the development of the prices that are reflected in the PPA.

A. Yes.

Q. What were the elements of cost that were included in that price?

A. For the purposes of the PPA, we had to look at cost from different kinds of sources, the nuclear plants, the Edison Mission, coal and gas plants and possibly some market sources, if those sources weren't enough to cover load.

For the nuclear plants, what was reflected here was a price for purposes of this analysis of \$28 per megawatt hour, which was in the range of the prices we thought were -- the prices that we thought were reasonable given the range of our forecast for base load prices of 26 to \$32.

Q. I'm sorry, did you say 26 to \$32 or hours?

A. I'm sorry, dollars per megawatt hour.

Q. Thank you.

Now, what elements of cost does Genco expect to recover through that price?

A. It effectively will recover through that price its O&M and its capital costs for the nuclear plants.

Q. And by capital costs, you mean rate of return?

A. Effectively, yes.

Q. I don't know if this is subject to confidentiality or what, but I would like to know what that rate of return is.

Mr. Hanzlik, can he state that on the record?

MR. HANZLIK: No, we cannot.

Moreover, I do not believe that that is relevant to the issues that are before us as presented in our petition, so we would resist that on two grounds:

One, confidentiality, it's sensitive business information as to that assumption.

But, number two, I would resist on the

grounds of relevance to both his testimony and to this proceeding.

MR. ROBERTSON: I'm willing to deal with the first point first.

As far as confidentiality is concerned, we can wait until the end of this cross-examination, put this in a redacted or sealed portion of the transcript so the reporter has got some organized place for this. We have done that in other hearings. I don't see that as a problem.

With regard to the relevancy, the company has made the representation that Genco is taking a lot of risk in this deal, and many of its witnesses have suggested that it is important for the Commission to assure that there is adequate funding for nuclear decommissioning. That's why they want us to pay \$121 million per year.

I would respectfully suggest that it would be important for the Commission to know, at least in some way, the capability of Genco to pay decommissioning costs if it has to do so.

To the extent it has not included

decommissioning costs in its cost recovery price, the PPA, it's going to have to come up with that money somewhere. It's got to make a profit.

I think we're entitled to know and the record should be advised of what that potential profit is so we can judge whether or not they really do have the capability to pay this extra billion dollars that they say customers are going to save that has to come from somewhere.

MR. HANZLIK: No, I disagree with Mr. Robertson's characterization.

The question of whether there will be adequate monies for decommissioning funds is ultimately an NRC question. It goes far into the future, that is until 2027 or beyond.

All we're talking about here is an initial four years and an initial six-year PPA.

The profit margin calculated for the first year of the Genco's existence will have nothing whatsoever to do with whether these trust funds are going to be adequately funded up and through 2027 or beyond. That's another question.

And it's a question that is relevant to the NRC and not relevant to the Illinois Commerce Commission as we reach out into the future.

MR. ROBERTSON: We're going to have to strike a substantial portion of the company's testimony because they're the ones that have raised this issue. I didn't.

I think I'm entitled to inquire what underlies the opinion that they believe Exelon Genco is going to be able to do all these things.

It relates directly to the issues in this case. I think it's a fair question. And I'm more than willing to have it put in the record on a confidential basis.

MR. HANZLIK: We're confusing two things. The NRC has approved the transfer of the licenses and makes the determination as to whether there is sufficient assurance to decommission these stations. That is an NRC issue.

We have submitted the cost studies through Mr. LaGuardia's testimony which established the basis for the cost to decommission these

stations and the estimates of those costs that support our Rider 31 proposal.

That's what this is about, not some speculative calculation of a profit margin. The profits will be whatever they will be there. That makes no difference with respect to ultimately what goes on with respect to these decommissioning funds and the particular request here.

That should be based on Mr. LaGuardia's testimony.

MR. ROBERTSON: The company has asked the Commission to assess whether this is a good deal.

The testimony of the company is replete with statements about the obligations of customers to make payments to ensure that there is adequate funding for decommissioning.

All of these issues the company has presented, I don't see how it harms the record to put this information in on a confidential basis and the Examiners can give it whatever weight they determine is appropriate.

MR. HANZLIK: The final matter I will say, just

the last issue here on this is that the rates are frozen that are going to be charged to customers. The rates, the retail -- the rates to retail customers are frozen in Illinois. Regardless of what is going on with the Genco, those rates that we charge customers, our retail rates are frozen.

Those rates cannot be changed at any point in the future without the Illinois Commerce Commission review and approval.

So the impact on residential customers of whatever is going on with the Genco is, in terms of the retail ratepayers, up to the Commission and cannot change until the Commission approves any change.

MR. ROBERTSON: The decommissioning charge is not frozen. That's what we're here to talk about. There's lots of money here at stake. I think it should be in the record and you can give it whatever weight you think.

I don't see how it harms the company to have it in the record and let people argue it if they wish.

MR. HANZLIK: Well, it is highly confidential information because of competition in the generation business. That's what the harm is. And it is not relevant to this particular proceeding.

MR. ROBERTSON: They're not selling to anybody else but Commonwealth Edison, according to them, for six years in this case, so I don't see how it hurts them competitively.

JUDGE HILLIARD: Are any intervenors competitors to ComEd?

MR. HANZLIK: I believe that certain parties in this room represent an intervenor that could very well be -- at least one could be a competitor of ComEd, yes, of the Genco.

JUDGE HILLIARD: Who is that?

MR. HANZLIK: Pardon?

JUDGE HILLIARD: Who is that?

MR. HANZLIK: That would be Enron Corporation.

MR. TOWNSEND: We're not here appearing on behalf of Enron Corporation. I don't know if there is another attorney here representing Enron Corporation.

MR. HANZLIK: Enron has appeared in a number of proceedings with the very same counsel that is sitting here at this table today representing a coalition. That is sensitive information.

MR. TOWNSEND: Coalition of industrial and health care customers.

JUDGE CASEY: What about New Energy, is that party -- they're obviously a competitor.

MR. HANZLIK: Correct, and they I don't believe --

JUDGE CASEY: They have intervened. Isn't that who Dr. O'Connor has filed testimony on behalf.

MR. ROBERTSON: I wouldn't call them an adversary of the company in this instance.

MR. HANZLIK: This question goes beyond that intervention or that issue.

JUDGE CASEY: Just so I'm clear, has Enron intervened in this matter? I don't recall. If they have, have they signed -- have there been confidentiality agreements?

I mean, we have heard it with CUB, we have heard it with the city but --

MR. ROBERTSON: I have signed -- I think the company will confirm this, I have signed one and so has my consultant.

MR. HANZLIK: We believe they have intervened and their intervention has not been withdrawn, Enron's has not been withdrawn.

MR. TOWNSEND: I believe that they are a party to the case but not an active party to the case as those are defined within the Commission's rules.

MR. HANZLIK: I mean, the power purchase agreement is what it is.

It states out -- it states the prices. Charges to customers are fixed for the first four years because of the rate freeze.

The question leads to nothing that is relevant or can be productive in this case.

The NRC has jurisdiction over whether funding is appropriate.

If the NRC determines at various points in time it isn't, it is up to the NRC to order the Genco or the responsible party to fund the decommissioning trusts adequately.

That's the risk, one of the risks that the Genco is taking here .

JUDGE CASEY: So we're clear then, the financial viability of the Genco is of no consequence or of no relevance in the proceedings.

MR. HANZLIK: It will be of no relevance to the Illinois Commerce Commission. It is of relevance to the NRC which has the responsibility to assure radiological decommissioning and requires financial assurance requirements.

And those have been met by the Genco because the NRC has approved the transfer of the licenses to the Genco assuming we have resolution of decommissioning in this proceeding and a creation of -- the proceeding with the merger and a creation of the Genco and a transfer of the assets.

MR. ROBERTSON: Well, as usual, I respectfully disagree with Mr. Hanzlik in the context of the hearing here.

I think ComEd Witness Manshio talks about the policy of the Commission to ensure adequate decommissioning funding. Other witnesses of the

witness of the company do also.

I don't think the company can come in here and ask customers to pay \$121 million or a 45 increase in the current charge and say don't worry about the fact that the Genco may or may not be able to pay these decommissioning costs. And by the way, we promise we'll never come back and ask you for any decommissioning costs.

I'd like to explore the validity of that promise and the likelihood of it being as part of the deal here, the likelihood of it being kept, and I don't think you can make that judgment without at least taking some look at the other side of this transaction.

The company has raised the issue. They have offered never to come back. I think the agreement provides for termination under certain circumstances; it provides for what happens in the event of bankruptcy.

I think the Commission would be remiss in not at least giving some consideration to the arguments that relate to this issue and then

deciding whether or not they're worthy, not to cut it off at the very beginning on the basis of a relevancy objection when clearly there is some relevancy to this issue.

MR. HANZLIK: Let's be clear on what's being asked for.

It's a projection of a rate of return that was used for calculations apparently in some regard which was with respect to the PPAs. That's what's being asked.

It's a snapshot. It's an estimate. It's a projection. For one year, for two years, not forever obviously. We don't know what the rate of earnings is going to be by the Genco. No one can project that until we actually get in business, if they ever get in business.

But all this talk about bankruptcy, the Genco, if it is allowed to get into operation, will have resources available to it, both generating resources and market resources that are unavailable to ComEd, and thereby provide further protections to ComEd's customers because there's all of these

resources that the Genco must avail itself of to meet ComEd customer needs in the first four years of this particular agreement.

MR. ROBERTSON: If Mr. Hanzlik is right, then I think all of Mr. McDonald's testimony should be stricken because the PPA has no relevance.

The terms of PPA have no relevance and the prices that he describes and spends some time in discussing here have no relevance if we're not going to be allowed, on the basis of relevancy, to explore about the elements of those prices, how they were determined, and what components are included within the price.

JUDGE HILLIARD: Counsel, is there something you want to say.

MR. REDDICK: Yes, if I may speak on the issue. I have to agree with Mr. Robertson.

I do believe the material that he's asking about or the information he's asking about is relevant.

The Commission has a broad public responsibility. And Mr. Robertson's questions to

Mr. McDonald have established that the Commission and ratepayers would have no resource whatsoever. Under the PPA the Commission gets one chance and one chance only to get this right.

The plants are built and reside in Illinois, they will be in Illinois no matter what happens to the Commonwealth Edison, no matter what happens to Genco, and the people of Illinois can't walk away from them.

If Genco goes under, somebody is going to have to decommission those plants. Most likely it's going to be the people of Illinois. So I think its relevant for that purpose.

It's also relevant in another respect. A great deal of the company's case rests on the proposition that this is a fair resolution of the decommissioning expense issue because Genco is itself taking on substantial risks in this process -- in this proposal.

If, in fact, Genco, this -- we assume the opposite of what Mr. Robertson's questions assume, not bankruptcy, but rather high profit, the issue of

the risk, the substantial risks that Genco is taking on evaporates. There is no real economic risk if Genco expects to make very substantial profits.

So I do think there is relevancy here and it's woven throughout the case.

MR. HANZLIK: One correct -- last bite.

It is absolutely incorrect -- it's an incorrect statement of the law to say that ComEd customers and the people in Illinois are going to be responsible for decommissioning these stations. That is totally incorrect.

Under the structure that is being created, it is Exelon, it is Exelon that ultimately, because it is the parent of the Genco subsidiary that is being created, that is the entity that will have to step up to the mark, that corporate entity, which is not regulated by the Commission and cannot come to the Illinois customers for any decommissioning charges beyond what we have requested in this proceeding.

That's the entity to which the NRC will look to for reasonable assurance in the event that

Genco cannot meet its obligations to decommission.

MR. REDDICK: We have seen no documents that put the onus on Exelon.

MR. HANZLIK: That's an NRC matter. That's the NRC. That's what the NRC looks to.

JUDGE HILLIARD: Is there anybody in the room who hasn't signed the confidentiality agreement? I'd have to ask you to leave the room.

And the objection is overruled.

MR. HANZLIK: Do I understand that this portion of the transcript will be marked in camera?

JUDGE HILLIARD: Yes.

MR. HANZLIK: Thank you.

(Whereupon, further proceedings were had in camera.)

(Whereupon, end of in
camera proceedings.)

JUDGE CASEY: Will Robertson, do you have any
other cross-examination.

MR. ROBERTSON: Yes, I do, Mr. Examiner, very
briefly.

BY MR. ROBERTSON:

Q. Can you turn to Page 7 of your direct
testimony, Mr. McDonald.

A. Yes.

Q. And at the top of the page there on
Line 282, you reference an 85 percent capacity
factor that was one of the assumptions that was used
in developing a price for the PPA; is that correct?

A. That is correct.

Q. Based on your experience at Commonwealth
Edison and your observation of the improvement in
the operation of Edison's nuclear fleet and the
experience of PECO in the operation of nuclear
units, what's your expectation that the 85 percent
capacity factor is reasonable on a going-forward
basis?

A. I believe and the company believes that that capacity factor is certainly achievable.

Q. And, of course, the company had enough confidence in that to make that assumption in developing price --

A. Yes.

Q. -- for the PPA?

A. Yes.

Q. And if the company was incorrect in that assumption, then that could affect the profitability of Exelon Genco; is that correct?

A. That is correct.

Q. And it, in turn, could be a detriment to maximizing or increasing the profits for Exelon overall; is that correct?

A. Certainly there is a risk of operation on the Genco side.

Q. Now, do you anticipate that the capacity factors for the nuclear fleet could be better than 85 percent?

A. It is our intention to get them as high as possible and we believe they can -- can be better

than 85 percent.

Q. Did the company have a maximum range for capacity factors in its analysis for the units?

A. A maximum range, no. We did this analysis assuming 85 percent capacity factor. We believe we can do better in both. We don't have a set range for this PPA.

Q. Now, also at Page 7, Lines 307 to 308 -- strike that -- 313 to 316.

How -- could you explain to me how it is that the feature that you discuss here affords ComEd significant protection for its return on equity?

A. Simply that it's only going to pay for power that it actually needs. There are no separate capacity fixed cost kind of payments that it would have. Regardless of whatever load it has, it will pay for the amount of energy that it needs.

Therefore if there is significant customer switching, presumably its load demand will decrease and its payments to the Genco will decrease.

Q. Absent that feature, how could the return on

equity be adversely affected?

A. If there was a significant fixed capacity payment to be made to the Genco, and an additional energy charge, if your load goes down, that fixed payment would not decrease, presumably your revenues would have decreased however and therefore your ROE would be diminished.

Q. Last question.

A. Okay.

Q. And you're not an attorney so you may not be able to answer this.

But am I correct in my understanding that the Illinois Commerce Commission will have no jurisdiction over this agreement once this transaction is completed other than the opportunity to determine whether or not the prices in the agreement are reasonable in comparison to other alternatives available to Commonwealth Edison, if you know?

A. I don't know specifically what legal authority the Commission has as it relates to the prices in the PPA.

MR. ROBERTSON: Thanks, Mr. McDonald.

JUDGE HILLIARD: Any further cross?

Any redirect?

Did you want to cross this witness?

MR. KAMINSKI: Yes.

JUDGE HILLIARD: I'm sorry.

MR. KAMINSKI: I apologize for that. Good morning Mr. McDonald, my name is Mark Kaminski from the AG's office. Couple questions for you.

CROSS-EXAMINATION

BY

MR. KAMINSKI:

Q. Referring to Page 5 of the power purchase agreement, specifically Section 3-B, little i, 1, single little i.

A. Yes.

Q. It requires ComEd to buy all of its power from Genco at the prices set out in the appendixes A and B through the end of 2004, correct?

A. It doesn't say that it's all of its power from Genco. There are some small distributed generation plants that may be in the service

territory for reliability reasons and there may be some other small environmentally-related landfill gas plants that ComEd may still be required to own but the vast majority of everything that it needs will come from Genco.

Q. Such that the capacity equal to the amount required by ComEd to meet its service obligations --

A. Yes.

Q. -- to retail wholesale customers?

A. Yes.

Q. Under the power purchase agreement, the prices for 2005 and 2006 depend upon Genco and ComEd agreeing to a market-based price, correct?

A. That is correct.

Q. And if there is no agreement on market price then the power purchase agreement may not be in effect for the years 2005 or 2006?

A. That is -- yes, that is possible.

Q. Okay. Mr. Robertson touched on this, but additional question on Page 7 of your direct testimony, you state the ComEd will benefit from the transfer of the nuclear plants to Genco because

ComEd will no longer have to pay fixed power supply costs; rather ComEd will only be required to pay for the energy that its customers need, correct?

A. Correct.

Q. Now, does this go into effect as soon as the PPA goes into effect?

A. Yes.

Q. And will this benefit to ComEd result in lower retail electricity rates for customers?

A. Our retail rates are frozen for customers through 2004.

Q. What about for 2005 and 2006?

A. At this point I can't speculate on what the result of a Commission proceeding would be in 2005.

Q. Regarding the 85 percent capacity factor discussed with Mr. Robertson, is that the capacity factor now?

A. Is it the capacity factor today? I think for this year, the capacity factor is at least that amount, maybe a little bit higher.

Q. Okay. And with respect to the six-year term of the power purchase agreement, does that six years

represent a period that the plants will be dedicated to public service?

A. I'm sorry, I'm not sure what you mean exactly by dedicated to public service.

Q. Public utility.

Such that dedicated public service -- what I mean by that is that they would be a public utility?

A. A public utility for SEC purposes or for state regulatory purposes?

Q. State regulatory purposes.

A. It is my understanding that it would not be a utility for state regulatory purposes.

Q. Then for SEC purposes?

A. SEC purposes, it would be a utility.

Q. Does the six-year period represent a period where the plants are owned by an Illinois public utility?

A. I'm sorry. They will not be owned by ComEd or PECO.

Q. Okay. Thank you. And isn't it possible that Illinois's -- I'm sorry, Illinois customers

will receive power and energy from those plants outside the six years represented by the PPA?

A. It is possible.

MR. KAMINSKI: Thank you. I have no further questions.

JUDGE CASEY: Any other cross-examination?

Redirect?

MR. HANZLIK: Just two questions.

REDIRECT EXAMINATION

BY

MR. HANZLIK:

Q. Mr. McDonald, is there a risk that the capacity, the 85 percent capacity factor for the nuclear stations could be less than 85 percent?

Let me restate it.

Is there a risk that the 85 percent capacity factor number used in the power purchase agreement calculation could actually turn out to be lower than 85 percent in terms of actual operation of the nuclear stations?

A. There is an operating risks and it is possible that the capacity factor for the nuclear

stations could be less than 85 percent.

Q. And, in fact, in the past has the capacity factor on an average annual basis been less than 85 percent?

A. As stated in my testimony, historically the capacity factors averaged something less than that, more like 69 percent.

MR. HANZLIK: Thank you, no further questions.

JUDGE CASEY: Recross?

JUDGE HILLIARD: Subject to -- Mr. McDonald, can you tell us whether or not you're available next week if someone has a question based upon the documents that have been produced most recently?

THE WITNESS: I have a full schedule but I'll make myself available if need be.

JUDGE HILLIARD: Counsel, should it come to pass that you determine that there are questions you want to ask of Mr. McDonald, will you give him as much notice as you can by Monday morning.

Let's -- we'll reconvene about 1:00 o'clock?

MR. HANZLIK: Can Mr. McDonald step down off the

stand?

JUDGE HILLIARD: Yes.

(Whereupon, ComEd

Exhibits 4, 7 and 12 were marked
for identification.)

(Whereupon, further proceedings in
the above-entitled matter were
continued to August 24, 2000, at
1:00 p.m.)

(Afternoon session.)

JUDGE CASEY: Okay. We will get underway. Let's
go back on the record.

Mr. Feldmeier, are you going to be
conducting the examination?

MR. ROGERS: I'm John Rogers, your Honor. I will
be this afternoon.

Our first witness this afternoon is
Randall Speck.

JUDGE CASEY: Mr. Speck, do you want to stand to
be sworn.

(Witness sworn.)

RANDALL SPECK,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY

MR. ROGERS:

MR. ROGERS: Q Would you state your full name, please.

A. Randall L. Speck.

Q. Mr. Speck, I'd like you to look at ComEd Exhibits 4, 7, and 12.

Is this direct, supplemental direct, and rebuttal testimony that you have prepared for submission in this proceeding?

A. Yes, it is.

Q. And with respect to your rebuttal testimony, Exhibit 12, you have attached, have you not, 13 exhibits that are also part of your testimony?

A. Yes, RLS 1 through RLS 13.

Q. Are there any additions, corrections, or changes that you would like to make on Exhibits 4, 7, or 12?

A. On Exhibit 4, my direct testimony at Page

15, one small change. On line 20, I would change the words "more than" to "about."

JUDGE CASEY: What page was that?

THE WITNESS: Page 15, line 20, change "more than" to "about."

I have no other changes.

MR. ROGERS: Q Mr. Speck, if I were to ask you the questions set forth on these exhibits, would your answers be the same as you've included in the written documents.

A. Yes, they would.

MR. ROGERS: I move the introduction of ComEd Exhibits 4, 7, and 12, and the witness is available for cross-examination.

JUDGE CASEY: Any objection?

MR. FEELEY: No objection subject to cross.

JUDGE CASEY: One at a time.

MR. FEELEY: No objection subject to cross.

JUDGE CASEY: Counsel?

MR. WARREN: Yes, your Honor, we have an objection to the admission of this testimony on two grounds.

One, we don't believe that he's qualified as an expert to have testimony that could further the knowledge of the Commission. He is a -- admittedly in his direct testimony he has a English and, I believe, a government undergraduate degree, and, of course, he went to law school.

He has no technical background whatsoever other than the fact that he's been a lawyer, and I'm certain a very excellent lawyer, for some 20 or 30 odd years; I can't recall when he graduated from Harvard. But that in itself does not qualify him to speak to the issues that he is testifying to.

A cursory look at his testimony will show that he is commenting -- he's offering legal opinions and legal conclusions and commenting on other witnesses' testimony. That's the first objection.

The other basis for the objection is the fact that also in his direct testimony he admitted that he is the attorney, at least one of the attorneys for ComEd in the current 1999 Rider 31 case, which still open. There has yet to be an

order issued in that case.

As I'm sure the Hearing Examiners know, the record in that case has been made a part of the record in this case. Therefore, what we have is an attorney for essentially a case that he's an advocate for, he's acting as a witness for now.

Of course, that brings up rule 3.7 of the ethics code. That brings up the federal attorney witness rule that our courts have adopted, which says that you can't do both. It's just -- in fact, actually I have a quote, if I could, on what the advocate witness rule. Is this is out of the United States versus Johnston found at 690 F 2d 638. It's a 1982 Seventh Circuit case.

The advocate witness rule which articulates the professional impropriety of assuming the dual role of advocate witness in single proceedings has deep roots in American law.

Today the rule is reflected in the ABA codes of professional responsibility which states as an ethical consideration -- that's in quotes -- the roles of an advocate and of a witness are in

inconsistent. The function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively, and that's found at Page 642.

The advocate witness rule has been spoken to favorably by our courts, specifically the Fifth District and 611 NE 2nd, 1374 in the case People versus Gulley.

And it's referred to again in -- there's a Wyle, Freiberg, and Thomas versus Sara Lee, which is found at 577 NE 2d, 1344. It's a First District 1991 case.

If you look at all the testimony of Mr. Speck, you'll see that that's exactly what it is. He is commenting, giving legal conclusions. He's basing nothing more than what he expects that the Commission should rule a lawyer is what he's doing.

As a matter of fact, I think if you take the question and answer format away from his testimony, you'd be hard pressed to tell his testimony apart from an initial brief, which is

pretty much what he's doing.

So we object on those grounds, your Honor.

MS. DOSS: Your Honor, Cook County also objects for the same reasons stated by the Attorney General's office; and in addition to that, for further references with respect to the legal opinions.

With respect to his direct testimony, if you will look at pages 9 through 10, 18, 21; his supplemental direct, pages 5 through 6; his rebuttal testimony pages 53, 54, 56, page 13, those are all instances where Mr. Speck goes over the line of being a witness and actually slips into being an attorney.

Secondly, with respect to the advocate witness rule, I do have cases, Supreme Court cases for Illinois indicating that there is problems with an attorney being a witness as well. It is discretionary.

However, the fact is that Mr. Speck is still the attorney in the 99 case, which is directly

at issue in this particular case. In addition, his objectivity is suspicious because of the fact that he is a witness and more than likely he does have some conditional fee or may have some conditional fee dependent on the result in this case.

Therefore, your Honor -- and if you would like, I have certain cases, *Flynn v. Flynn*, which is 283 Ill. App. 206; *Wilkins versus the People*, 226 Ill. App. 135. I have copies of those cases and can tender them to you as well to support the objection of having Mr. Speck's testimony admitted today.

JUDGE CASEY: Any other objections?

MR. REDDICK: The City of Chicago also joins in the objection to the admission of Mr. Speck's surrebuttal testimony and parts of his direct testimony that I could identify by line number and if we get that far.

I won't repeat all that's been said before. I think Mr. Warren was very clear in describing Mr. Speck's surrebuttal testimony as no more than a brief improperly submitted as testimony. He offers commentary on the testimony and

credibility of other witnesses. That's the function of a brief, not testimony that is supposed to inform the Commission with firsthand knowledge.

But the testimony is also objectionable on other grounds. It incorporates improper hearsay, it's argumentative, and it's quite speculative.

First, Mr. Speck presents snippets from statements by others from more than a decade ago presented for their truth; not just for their truth, but also he speculates that these are the positions of those individuals today. That's hearsay.

Those snippets that he incorporates address circumstances that are remote in time and significantly different from the case here.

After presenting those hearsay statements, he opines that these witnesses might take the same position today. He applies those opinions to the facts of this case.

The questions Mr. Speck asks himself and the answers that he gives himself are argumentative, they're not presenting facts to inform the record; rather, they're presenting commentary to debate.

By labeling the surrebuttal testimony -- labeling it as surrebuttal testimony, the argument that he presents denies the declarants of the statements he incorporates any opportunity to correct his misuse or mischaracterization of their statements because they have no further opportunity to respond.

This is appropriate for briefs. We can deal with the statements of counsel in brief. But here we have a witness presenting as testimony, as fact, commentary that properly belongs in a brief.

There's little, if any, firsthand knowledge that Mr. Speck presents here. In fact, he quotes Mr. LaGuardia, who does perform the actual analysis that's at issue, any legitimate testimony in Mr. Speck's submissions is far outweighed by the improper material, and it can't be untangled from the argumentative baggage. Therefore, I think the surrebuttal testimony should be stricken in its entirety.

As to his direct testimony, there are selected portions that are, in fact, legal opinion,

and I think it's clear that accepting testimony on legal opinion would be a dangerous precedent for the Commission. We would consume endless hours debating over legal issues. There's no effective way to cross-examine a witness on his legal opinions.

JUDGE CASEY: Mr. Reddick, you refer to a surrebuttal. I see three things that ComEd has submitted; a direct, supplemental direct, and rebuttal.

MR. REDDICK: In his rebuttal, Exhibit 12. My mistake. Thank you.

JUDGE CASEY: Any other objections?

MR. ROBERTSON: I have identified some areas of this witness' direct testimony that I believe represent legal conclusions and, therefore, are properly stricken. But rather than waste a lot of time on the record, maybe let the Examiners determine whether or not the testimony stands at all. And if you wish to hear my specific objections, I will state them.

MS. NORINGTON: The Citizens Utility Board joins the Attorney General's office, Cook County, the

City, in the objections previously stated. We won't waste the Courts' time. It's the exact same issues.

MR. TOWNSEND: The Coalition also joins in the prior objections.

JUDGE CASEY: Is there anybody else that objects.

MR. ROSENBLUM: I should join. Otherwise it appears that I don't agree; for the Environmental Law and Policy Center.

JUDGE CASEY: Mr. Rogers, they're ganging up on you.

MR. ROGERS: That's all right. Let me take these things one at a time.

The first issue that was raised was whether or not Mr. Speck is qualified to testify as an expert witness in this case. There's no question that Mr. Speck's degree as an attorney disqualifies him as a witness. We're all familiar with that. There is an Illinois Appellate Court case, Stack versus Sears Roebuck, which is at 429 NE 2d, 1242 decided in 1981 that makes that quite clear.

Mr. Speck is not here testifying as a lawyer. He's testifying based on independent

qualifications that he has as an expert. They are reviewed in his direct testimony. They include lengthy experience with nuclear power issues and a decommissioning.

He has acted as an advisor to both the public utility commissions in the State of Illinois of Connecticut and in Maine on the very types of question that are involved here; that is the allocation of responsibility for decommissioning expenses --

JUDGE HILLIARD: Pull the microphone closer.

MR. ROGERS: He has testified on the very questions that are involved in this case. He has advised both Connecticut and the Maine public utility commissions on resolution of decommissioning questions.

He has negotiated resolutions of decommissioning that forced him to deal with all of the various interests that are involved to determine what is a fair resolution, including taking into account cost estimates, risks of increases in cost estimates in the future.

In addition to those roles, the recognized expertise that he acquired as a result of those activities and others that are described in his testimony, he was asked to participate in the Keystone Center's national dialogue on decommissioning matters, which went on for a year and a half. He was an active participant in that proceeding along with public utility commissioners from various states; all types of interested parties because of his expertise.

He has also written on the subject, and his publications are described in his testimony. He is an expert. He is as well or better qualified than many of other witnesses who are offering testimony on behalf of intervenors to advise the Commission and to be helpful to the Commission on the subjects that are directly involved in this case.

So I think there is no question about his qualifications to serve as an expert or his status as an attorney in some way disqualifying him or causing the expertise that he has to be disregarded.

Now, when it comes to the question of lawyer as advocate, there is absolutely no issue in this case about lawyer as an advocate. Mr. Speck is not representing Commonwealth Edison in this proceeding. He has not entered an appearance. He is not acting as an attorney in this case. He is acting as a witness.

It is true, and his testimony discloses, that in another proceeding he did represent Commonwealth Edison. As your Honors know very well, there was an effort to consolidate the two proceedings. That case is not before this panel. It was not consolidated. He is not acting as a lawyer in this matter.

The rules on disqualification of attorneys to serve as witnesses are not designed to deal with anything other than a particular case where you are both serving as attorney and as witness in the very same case, and that is not the case here.

And there are cases that make clear, again, that the fact that someone is an attorney for

a client does not qualify him -- disqualify him from serving as a witness in another case. Petrelli versus Drexel is one in which the Seventh Circuit at 94 F 3d 325 decided in 1996 that was the case.

So there is no lawyer as advocate issue to be addressed here. There is no disqualification as a result of Mr. Speck's status as a lawyer or any representation that he may have of any party in another proceeding.

Now, when it comes to the testimony itself, we can go through it page-by-page, but the fact is the testimony here does exactly what expert testimony is designed to do. It brings a person with substantial experience of dealing with these types of issues through an entire career, and particularly before a public utility commissions in giving advice to them and in dealing with national committees of the type of the Keystone Center brings all to bear in helping the Commission understand the issues that are involved in determining the reasonableness of ComEd's proposal here; assessing the risks of increases in decommissioning cost,

assessing the adequacy of funding.

The suggestion that this testimony is all a brief is just wrong. If you read this testimony, you will find that it is perhaps more factual, less advocacy than almost any of the other testimony offered by the witnesses who are tendered on behalf of intervenors, some of whom are attorneys. And at least one, Mr. Schlissel, has been -- his testimony has been accepted before this Commission on many occasions. His position as an attorney has never caused the Commission to disqualify him.

So I think that the last issue that has been raised is that there are very, very minor references in some parts of the testimony to the Public Utilities Act, to provisions of the Act, and what they provide.

I would say that on balance, they are not unlike the kinds of references that appear in the testimony of all the witnesses. That is in passing, it is occasionally necessary to give context of what it is you're talking about to describe some standard.

Frequently it is because one of the intervenor's witnesses has raised an issue about some requirement of the law that they think is or is not satisfied here.

Mr. Speck, in turn, refers to the requirement to which they have referred in their testimony and then describes factually in bringing his expertise together why ComEd's proposal is reasonable.

Now, with respect to the specific references to materials in his testimony and the hearsay objections that have been raised, that is a groundless objection. It is very clear in Illinois, *People versus Anderson* decides and in effect adopts the federal rules of evidence on the bases for an expert opinion. And it actually goes even beyond rule 703 and rule 705 and it says that an expert may rely on matters that experts would reasonably rely on in the subject matter area.

And the Illinois Appellate Court has also said in the *Lovelace versus Four Lakes Development* case, which is 170 Ill. App. 3d 387 decided in 1988

that the trial court should liberally allow the expert to determine what materials are reasonably relied upon by those in his field. And then through cross-examination that the reasonableness of the reliance and the use of those materials can be probed. And that's a matter to be taken into account in weight of testimony, as with any cross-examination.

But the references of materials on which he has relied in his testimony are admissible. What they are admissible for in the context of expert testimony is to explain the expert's opinion. And that was one of the major issues that the Supreme Court decided in *People versus Anderson* was that it isn't appropriate to say that an expert may rely and base his opinion on other materials and then not refer to them, bring them in, show what they are in order to explain his testimony.

And the Court specifically says you may do that. You may reveal the contents of the materials upon which he reasonably relies in order to explain the basis of his opinion.

Now, in addition to the admissibility of all those materials as bases for expert's opinion under the rule 703 and 705 that the Supreme Court has adopted for Illinois and broadened for Illinois, most of the exhibits to the testimony are also independently admissible. That is, many of them, Exhibits 1, 2, 3, 4, 5, 6, 7, 10, and 12 are all prior inconsistent statements from a person who will be present in this proceeding, will be testifying, will be cross-examined.

Prior inconsistent statements, many of them made under oath, are exceptions to the hearsay rule. But if even if they weren't, as bases for an expert opinion and offered for the fact that those things were said, they are all admissible.

Other exhibits are admissible and are exceptions to the hearsay rule because they're public records. Exhibit 13 is a decision of the NRC. Exhibit 11 is a public transcript of a meeting involving Maine Yankee decommissioning issues.

No. 8 is a public record of a proceeding in the United States court of appeals, in which the

United States stated its position with respect to the obligation of the DOE to pick up spent storage fuel. And No. 9 is an amendment. Some of the intervenors' testimony referred to a proposed settlement between the DOE and PECO of decommissioning spent fuel storage obligations of the DOE.

What Mr. Speck has done in response is to put the actual document, which is a public document, before the Commission as part of the basis on which he relies in explaining that the testimony that he's responding to is mischaracterizing that settlement and its effect.

So, to summarize, Mr. Speck is a qualified expert. The fact that he's an attorney does not disqualify him as an expert. There is no attorney as a witness issue in this case because Mr. Speck is not representing Commonwealth Edison in this proceeding. And the materials that are mentioned in the testimony are all admissible as bases for an expert's opinion under Illinois law and under the federal rules adopted by the Supreme Court

for Illinois.

MS. DOSS: Your Honor, if I may, Mr. Rogers wants to categorize Mr. Speck not being an attorney in this case and that the relevance of 99-0115 is not present. That is simply not true.

It is true that the Court does have discretion as far as allowing Mr. Speck to be a witness in this proceeding. It is true that you have ruled prior that 99-0115 is not the same case.

However, I don't think the Hearing Examiners or anyone in this particular proceeding can say that 99-0115 is not pertinent to this proceeding. In fact, the Hearing Examiners even permitted, allowed administrative notice of that docket. The discovery materials and the evidence that was introduced in that docket is now relevant and also admitted in this particular case.

Secondly, ComEd itself uses the same cost studies in 99-0115 in this docket. Those cost studies were represented by Mr. Speck as an attorney and they are in this particular docket and it is part of ComEd's petition.

So, again, the idea that there is no advocate witness concern is not -- is simply not true and should be cautioned because of the fact that his testimony is to the borderline of being an attorney and also he is a witness, and because of that his testimony is suspicious. It is subject to abuse.

And he has a direct link to the 99-0115, which he admits as the attorney. And now he turns around as a witness and submits testimony.

Also on the issue of whether or not Mr. Speck's testimony is necessary, I believe Mr. Hanzlik mentioned earlier many of the questions that are being asked in this proceeding can be referenced to Mr. Burdell. That is another issue which I believe the Hearing Examiners should look into as well.

I believe Mr. Speck's testimony and Mr. Burdell's testimony overlaps in many instances. So if Mr. Speck's testimony is stricken, ComEd will still be able to present its case in a manner which would achieve what it wants for its petition.

Lastly, the Illinois Supreme Court, the federal courts have also warned everyone that an advocate witness is something that is not to be accepted easily; that it should be looked into; that it's not something to be simply overlooked because of the fact that it is suspicious, that it is isn't good practice.

I think the Commission should look at that in making a decision in this proceeding as to whether they want to have a precedent where you can have an attorney in one case, and just because it was decided well, no, it's not exactly the same case but it's because they're different docket numbers, then that's okay. It shouldn't be that simple.

We all know that the 99 case is at issue. We all know that it has been taken administrative notice of. The fact that ComEd wants to have the Hearing Examiners, the witnesses including Mr. Speck to close their eyes to that is simply just, I believe, turning your nose at the law, turning your nose at the practice, and not advocating and presenting a case in a way that could be done

without such practices.

MR. REDDICK: Three very brief remarks.

One, the legal opinions in Mr. Speck's direct testimony responded to nothing the intervenors had said.

Second, there are limits to reasonable reliance by experts, and the Bench does have the authority to enforce those limits for fairness. Extracting testimony or prior statements from 10 or 15 years ago in a field that changes as rapidly as some of the witnesses in this case have indicated goes beyond, in my opinion, and certainly stretches though limits.

Finally, prior inconsistent statements are generally offered to impeach. And if the witnesses who are quoted by Mr. Speck were confronted with their prior statements, that would be unobjectionable. We would not object. But here because those statements were quoted and incorporated in the rebuttal testimony of Mr. Speck, depending on the course of examination -- and I certainly don't expect

Commonwealth Edison to give the witnesses an opportunity to explain away Mr. Speck's testimony -- it's entirely conceivable there would be no opportunity for those witnesses ever to explain to the Commission their true meaning or intent with respect to those statements.

MR. WARREN: I just have a couple, your Honor.

I never indicated that because he's a lawyer that does not qualify him for his qualifications as an witness in this case. But let's just look at some of the things that was mentioned as part of his qualifications.

Counsel mentioned that he had published a number of papers, and he's listed several of them here in his testimony. One is Legal Considerations for Product Managers; the Legal Standards for Prudent and Efficient Product Management; the Owner's Legal and Practical Responsibility for Strategic Product Management.

There's no question that as a lawyer he has expertise as a lawyer. What I'm objecting to is his expertise as -- technical expertise that he had.

No question about it that any lawyer that's been connected to any case over any period of time is going to pick up something. But that does not in and of itself qualify him to be the expert -- the technical expert in that.

Also to follow up on something Ms. Doss brought up, the documents that were generated out of the 99 Rider 31 case, the cost studies and what have you, those are documents that no doubt as attorney for that docket he helped prepare.

So you have what here is the situation where as a witness he's commenting on testimony that he helped prepare as an attorney. So rather than having to comment like the rest of us would have to do, we commented in the briefing schedules, he gets to comment or he, ComEd, gets to comment as a witness and also during the briefing period. That's two bites at the apple. That's inherently unfair to the other parties in this case, your Honor.

JUDGE HILLIARD: Anybody else?

MR. ROGERS: If I could just reply briefly.

First, off the question again on the

Loveless case about reasonable reliance in an expert's -- that's a matter that goes to weight. That's a matter that can be explored on cross-examination. That's appropriate proper place for that issue to be raised.

With respect to expertise, I think that to be fair, a review of the qualifications of this witness in comparison with those of the other witnesses who are offered on behalf of intervenors, many of whom have no knowledge at all, no personal experience with decommissioning ever, Mr. Speck is vastly more qualified.

And to selectively go through publications -- I mean, one of these that was not mentioned, the publication is called Economic Regulators' Increasing Role in Evaluating Shutdown and Decommissioning Costs of Commercial Nuclear Power Plants. That was a presentation given in October 1998 before a major decommissioning conference, the annual conference that is sponsored by the premiere firm that prepares cost estimates for decommissioning. There's just no question that

Mr. Speck is qualified.

Now, when we come to the issue of lawyer as witness, there is no prohibition against the lawyer serving as witness. The prohibition is against the lawyer serving as an attorney in the very matter and a witness at the same time.

The only thing that that rule ever leads to, if it leads to anything, is that if the person should be a witness in the case or a client proposes that he be a witness, he may be faced with the choice of either withdrawing as counsel or having the issue presented squarely; can he continue as counsel and an witness in the same case. And the Illinois courts have said -- this is a quote, Disqualification is a drastic which courts should grant only when the movant can show that the lawyer's testimony is likely to prejudice the testifying lawyer's own clients. That's Wyle versus Freiburg and Thomas, 577 NE 2d at 1354.

Mr. Speck is not an attorney representing Commonwealth Edison in this proceeding. Reference has been made to the Docket 99-0115.

And while it's not necessary, I think just to make the analysis somewhat easier, what I would propose is that we have Mr. Speck formally withdraw as counsel in Docket 99-0115 so that there's no question about an effort to continue as counsel, even though it's a different case. But whatever arguments are being made about the fact that administrative notice has been taken of part of that record that's somehow making him counsel in this case, which it does not, that under the case, the choice you're faced with is withdrawal if you were in the same case. Mr. Speck is prepared to withdraw as counsel, so the issue just disappears. That is a complete cure to an issue, even though we don't think that issue is presented.

JUDGE CASEY: It is the Examiners' ruling that with respect to the motion to disqualify the witness, that the motion to disqualify is rejected.

However, if there -- Mr. Robertson, this comes if for you -- there are specific testimony which calls for legal conclusion, those are the things that we want to know about now. And if you

have specific references to that type of testimony, we will address that now.

JUDGE HILLIARD: If there's testimony which is based upon prior statements by the witnesses, people, anybody who wants to make an objection to those -- to statements based upon those prior statements should do so now.

JUDGE CASEY: What we're getting at is if it's something that you thought is more properly impeachment, then that's also something that we need to address now.

MR. ROBERTSON: I'll identify mine, and if you want to wait and take argument on all of them or do them at a time, I'll follow whatever procedure you want to follow.

Page 2 of the direct, lines 7 through 11 beginning with the words "the" on line 7 and ending with the citation, the last citation on Page 11, it's clearly legal conclusion. It takes provisions in the Act that do not specifically, in my opinion anyway, address exactly the issue the witness is addressing here and turns them into an

interpretation of law to justify a legal point here.

In addition, the reference, there is no section 8-201.5, so it's not a good legal opinion either in the Act. So I can identify -- there are two other locations, if I you wish me to do them all at once.

JUDGE HILLIARD: Go ahead.

MR. ROBERTSON: Page 9, line 21 to the bottom of the page; top of Page 10 through line 5. Again, this is an interpretation of law that this witness made that might be appropriate in the context of a brief. It is not proper testimony. It's a legal conclusion.

Page 21, lines 7 through 20, again the witness is discussing an interpretation of Illinois law and policy under Illinois law. And, again, it is nothing more or less than purely a conclusion and may be appropriate for a brief but it is certainly not appropriate testimony.

That's all I have. I don't know if you want to wait for the others.

JUDGE CASEY: Instead of hop, skip, and jumping

all over the place, I think we'll take these. The first was Page 2, is that correct, line 7 through line 11 beginning with, The Illinois Public Utility Act establishes.

Mr. Rogers.

MR. ROGERS: This is one sentence. It is a quotation from sections of the Act. Mr. Robertson is correct that it is 59-201.5. we can make that correction.

But the testimony of the witnesses on a proceeding that has to do with the decommissioning obligations and responsibilities and allocation that prohibits witnesses from making a reference even in one sentence to the governing legal standard with a quotation I think is clearly a misapplication of any rule against offering legal opinions.

All this is doing is stating what the Public Utility Act requires, and that's certainly -- in order to put into context the testimony it's certainly permissible.

MR. ROBERTSON: This is the problem, I think the argument demonstrates it. Section 8-508.1 relates

to nuclear decommissioning trusts. It talks about the administration of the trust, the terms and conditions of the trust, what's to be done with the money in the trust. But it does not in and of itself impose any direct obligation on customers to pay anything to Commonwealth Edison for anything including but not limited to nuclear decommissioning costs.

This is this gentleman's interpretation. Now he's entitled to make that interpretation, but he's not entitled to do in the context of testimony. He's entitled to do it in briefs and Commonwealth Edison is entitled to do it.

I think it misstates -- my opinion is it is not only legal conclusion, it clearly misstates the law because he's talking about a provision in the Act that doesn't even relate to recovery from customers.

JUDGE CASEY: The quoted material within that sentence comes from where?

MR. ROGERS: The Illinois Public Utility Act.

JUDGE CASEY: I understand that. Does it come

from 220 ILCS 5-8-508.1A sub 2; does it come from 59-201.5?

MR. ROGERS: Both places. One is from one; one is from the other.

JUDGE CASEY: So we're combining the two statutes?

MR. ROGERS: There are references to both statutes, both sections of the Public Utility Act.

MR. ROBERTSON: I think the quoted language, all reasonable costs and expenses, actually comes from -- I got it on my computer. I don't want to say where it comes from exactly. I had a recollection. I should have written it down, but I didn't.

But it does combine the two provisions and makes an interpretation of the two provisions, one which doesn't even relate to recovery of costs.

MR. WARREN: Your Honor, if I might, the words "all reasonable costs and expenses" come out of the part one of that section under definitions. It's out of the definitions of, quote, decommissioning costs. It does not -- there are no words in front of the quote that says ratepayers are response for

it. It is simply part of the definition of costs.

JUDGE CASEY: The problem the Examiners have is that we do have a couple different sections of the statute combined together to come up with one phrase, one, if you will, opinion, one point. As such, we believe that, in fact, that is objectionable, and we would strike that.

JUDGE HILLIARD: For the record, that's Page 2 of the direct from line 7 beginning with the word "the" and ending on line 11 the same page after the .5.

MR. ROGERS: Should I address the Page 9 point?

JUDGE CASEY: I'm not sure which one was next.

MR. ROBERTSON: It was Page 9 beginning at line 21 to the bottom of the page and top of Page 10 through the end of line 6.

MR. ROGERS: This, again, is a question and answer that puts into context referring to an obligation of the Department of Energy to take care of spent nuclear fuel that has been discussed by many of the witnesses.

The first sentence is merely a reference to the obligations described in the Nuclear Waste

Policy Act and contract.

Then beginning with line 26, there is a preface which states, In violation of the statute and in breach of this contract, which is the position of nuclear utilities in this country.

It goes on and says a factual statement, DOE has not yet begun to accept spent nuclear fuel and publicly represents that it will not be removing such fuel until at least 2010. That's a statement of fact. This witness knows it. It is true, and it's relevant.

It goes on and says, In fact, DOE may not complete a permanent repository for spent fuel by 2010, and thus it may not commence performance until substantially later. That, again, is a factual statement. It is not a legal conclusion. Nothing at all objectionable about that statement.

It goes on and says, Until DOE performs fully and removes all spent nuclear fuel, nuclear power plant owners are expected to remain responsible for on-site storage and attendant costs. Again, a factual statement.

So I think that except for the first reference to the Act which, again, is benign. It's an effort to put into context something that has been raised by the other witnesses on what statute we're talking about, this is primarily a factual statement.

JUDGE HILLIARD: Has there been a determination by any court that there's been a violation of the statute in the contract?

MR. ROGERS: Yes, the court of appeals has made that determination.

JUDGE CASEY: Mr. Robertson, your second objection will be overruled.

MR. ROGERS: The third was on Page 21, line 7 through 20.

This is a reference to provisions, again, of the Illinois Public Utility Act by section and by quotation, all of which support the statements that are preceded. And it is introduced with the statement that Illinois law reflects these policy considerations. And goes on to quote the statute.

It is an indication of the sections of

the Act that are supportive of the witness' testimony and the policies that he's encountered in other jurisdictions, Connecticut and Maine as well.

Again, I see nothing objectionable about the witness bringing these matters to the Commission's attention. I think it's helpful.

Obviously, it is not a legal opinion that binds the Commission. The Commission will decide the law on its own. But it is helpful to know that the factual testimony the witness is given is supported and that the policies are reflected in Illinois law in these provisions that are quoted.

MR. ROBERTSON: The section of the Act that the witness refers to, 8-508.1 CIII, Roman numeral III, really deals with the right of customers' refunds in the event the utility transfers its nuclear units. It doesn't grant any authority for a utility to transfer nuclear unit.

What this legislation contemplates is a matter of pure legal speculation. Commonwealth Edison is entitled to make that argument in a brief. It is pure legal conclusion. It is inappropriate.

Also, in all due respect, the same thing applies to the reference to Section 16-114. It's our position that that language relates to the type of utility is entitled to make a tariff filing. It is a description. It is not something that enables a utility to take action in relation to decommissioning costs.

JUDGE CASEY: Are you referring to that reference on line 20 that said --

MR. ROBERTSON: That's correct. And, again, Edison is certainly entitled to make these arguments in the context of a brief, but it's not proper testimony.

JUDGE CASEY: With respect to this particular round, the Examiners find objectionable the sentence that begins on line 11 where it says "it recognizes that" and ends on line 13 with the word "entity;" additionally, the sentence beginning on page -- excuse me, on line 17 beginning with the word "thus" and ending with the citation on line 20.

Before we go any further, with respect to the sentence beginning on line 7 and that citation,

is there any question that that quoted language is not within that specific statute?

MR. ROBERTSON: I'll read it to you.

In the event a public utility sells or otherwise disposes of its direct ownership interest or any part thereof in a nuclear power plant with respect to which a nuclear decommissioning fund has been established, the assets of the fund shall be distributed to the public utility to the extent of the reductions in its liability for future decommissioning after taking into account the liabilities of the public utility for future decommissioning of such nuclear power plant and the liabilities that have been assumed by another entity.

JUDGE CASEY: Mr. Robertson, it's contained within there. That language will survive the testimony.

However, for future reference, if on line 10 where the sentence ends with the word "established," there shouldn't be a period there because the quote goes on. And that in itself makes

it appear as though that is where it stops. That's not where it stops.

MR. ROBERTSON: If I can beg your indulgence for one thing, there's a part of this that I think is key which makes it a legal conclusion, and that is subparagraph 3, parens little 3, which is referenced here which precedes the language that I just read to you.

Little Roman numeral III says, The following restrictions shall apply with regard to the administration of each decommissioning trust.

The statement here implies that the legislature was authorizing or intending to authorize or suggesting that it would authorize transfer of nuclear units.

Clearly when you read the entire section, it relates to the administration of a nuclear decommissioning trust. It doesn't stand for the proposition that's announced here.

One can make an interpretation of it as one wishes in the context of a brief, but clearly given the context in which the language appears, the

purpose of the subsection, which is to identify the elements, restrictions that apply to the administration of the trust, it doesn't stand for the proposition that the utility has the right to transfer the nuclear units.

JUDGE CASEY: Thanks, but we're going to stay with what we got.

MR. ROBERTSON: Okay. Thank you. That's all I have.

JUDGE CASEY: Next?

MS. DOSS: Cook County had the same objections raised by Mr. Robertson, and I won't rehash those since the ruling has been made.

But in addition for the direct testimony, Page 18 starting with line 11, "the department" and ending with line 15, we also ask that that be stricken since that that information is given on the basis of Mr. Speck as an attorney.

MR. ROGERS: That is not a legal opinion. That is a reference to a factual matter. That is a matter of public record, and that is supported by an exhibit, RLS 8, to Mr. Speck's rebuttal testimony.

JUDGE CASEY: The objection to that testimony will be overruled.

MS. DOSS: For supplemental direct, pages 5 through 6 starting with line 5 and continuing on Page 6 through line 15, again, Cook County makes the objection that this -- although we do realize these are in response to questions that were asked, Mr. Speck gives more of a legal response as opposed to a response by a witness. The detail of citation and the way the entire answer is structured, it's more of an attorney response as opposed to a response by a witness in this proceeding.

MR. ROGERS: On this issue, the question of being helpful to the finder of fact when we've been specifically asked to address a subject and give the Hearing Examiners the information, the fact that we also support that answer with citations that will enable the Hearing Examiners to verify that it's correct, I think that's hardly the type of material that should be stricken.

JUDGE HILLIARD: That's overruled.

MS. DOSS: For rebuttal testimony --

JUDGE CASEY: I'm sorry, Ms. Doss, which one?

MS. DOSS: Rebuttal on Page 13 beginning with lines 25 and going to line 14, again, Cook County makes the objection that this particular reference that he negotiated Connecticut Yankee, again, he doesn't indicate whether it was as an attorney or as a witness and -- with anything.

And since it's not shown on the face of the testimony itself, Mr. Speck is an attorney, and the testimony seems to indicate that he negotiated as an attorney. And, again, this is testimony that would not have presented by a witness who was not an advocate as well.

MR. ROGERS: Again, this direct testimony explains that he acted as a policy adviser and negotiator and in some proceedings as counsel to both Connecticut and to Maine.

This is a factual statement that just emphasizes the qualifications this witness has in this area of resolving decommissioning. This is not a legal opinion at all, and the issue of lawyer as a witness, of course, has already been ruled on by the

Hearing Examiners.

MS. DOSS: Again, your Honor, I would make the same argument in that also that he may have been privy to information that again would not be privy to other witnesses, and it does go over the line of him being a witness.

MR. ROGERS: There's certain no rule that because Mr. Speck is an attorney who has done policy advising in Connecticut that he can't testify in Illinois.

JUDGE CASEY: The objection is overruled. But that particular paragraph talks about whether or not there's going to be reductions, and there's going to be some factual information about whether or not there was or wasn't. So the objection is overruled.

MS. DOSS: Page 46, lines 20 through 22, again, Mr. Speck makes representation in his testimony that ratepayers have a legal obligation. Again, that's a legal conclusion. That is yet to be determined and ask that lines -- Cook County that asks lines 20 through 22 be stricken.

MR. ROGERS: Again, the first part of that

sentence is a passing reference to an obligation that is contained in the Public Utilities Act.

The second half, again, is in the area that all of the witnesses have expressed views on the policy considerations that the Commission should take into account, and there's nothing objectionable about that. It is what all the witnesses are saying is what should the Commission's role be, what factors should they take into account.

JUDGE CASEY: One moment, please.

JUDGE HILLIARD: The first half of the question -- statement up to the word "law," the objection is overruled as to that part of the statement. From that point on and until the end of the sentence, the objection will be sustained. That's line 21 and 22 on Page 46.

MS. DOSS: And on Page 53 beginning with line 11 and ending with line 13, again Mr. Speck makes a legal conclusion with respect to the legal standard and obligation for ratepayers to pay reasonable decommissioning charges.

MR. ROGERS: Once again, I think we could go

through all the other witnesses' testimony and find passing references to what people ought to be doing. I think this is excessive to pick out a little sentence like that. It's not really what the point of reference is to legal conclusions striking is aimed at. This makes the testimony understandable.

MS. DOSS: Your Honor, actually, could I rephrase the passage that I would like. I would like lines 11 on Page 53 all the way through line 2 on 54 to be stricken. I apologize. And for the same reasons; that it is -- at the very end on line 2 he says, ComEd's proposal meets the proper legal test. That is a legal conclusion.

JUDGE CASEY: Mr. Feeley, that particular section is actually addressing something your witness has proffered. I would be interested to hear what your position is on whether or not this is stricken. Because if they're referring to what your witness says is a legal standard, should that also being be stricken?

Ms. Doss, is that what you're suggesting as well.

MS. DOSS: Well, actually, lines 9 through 11, he indicates reference to Mr. Riley's testimony and just simply quotes it. That's the way I read it.

My concern is the response after that on line 11 where it starts, Rather the legal standard --

JUDGE CASEY: Is not the quoted section what that witness believes is a proper test.

MR. FEELEY: We're not moving to strike this section.

JUDGE CASEY: I didn't think you would be.

MS. DOSS: Your Honor, you're right. It would be. It starts with 9, 9 all the way through, 9 all the way through 54, line 2.

JUDGE CASEY: Just so we're clear, though, then since you feel this is objectionable because there's some reference to a legal standard, I can assume then you'll be objecting to Mr. Riley's testimony when he refers to it.

MS. DOSS: Yes, if there's a legal conclusion. Your Honor, it's not a feeling. This is a legal conclusion, with all due respect.

JUDGE CASEY: Your objection is overruled.

I'm sorry Mr. Townsend, I didn't mean --

MR. TOWNSEND: There's also a reference to Mr. Bodmer's testimony. Mr. Bodmer's not testifying as to legal standard in that case. He's testifying with regards to the policy that he believes the Commission should focus on.

JUDGE CASEY: So is your point then that it's objectionable or not objectionable.

MR. TOWNSEND: I believe that the conclusions that are reached within the testimony are objectionable. The statement, for example, that the legal standard is -- it begins at line 11 continuing to line 13 certainly is objectionable.

The legal conclusion that ComEd's proposal meets that proper legal test, it makes two legal conclusions; first, what the proper legal test is, and, secondly, whether or not Edison's proposal actually meets that test. Both of those are legal conclusions.

JUDGE CASEY: At this juncture the objections are overruled.

Next?

MS. DOSS: That's it, your Honor. Thank you.

MR. WARREN: I have a couple -- actually, I have more than a couple, but most of them have been taken up by the others, so I just have a couple left.

On Page 2 of the direct testimony, lines 21 through 25 that last sentence, Without ComEd's proposal to transfer decommissioning liability and the concomitant risk to the Genco and to limiting collections, ratepayers would be required to pay whatever reasonable costs are necessary to complete the decommissioning without limit, that's clearly a legal conclusion and that's clearly a comment or an interpretation on the statute, which is improper.

MR. ROGERS: This is a factual statement about the situation that would apply. It is certainly not offered as a statement of law, and, of course, the witness cannot say what the law is or will be. That's for the Commission to decide. But as a factual statement of explaining the consequences of approving or not approving ComEd's proposal, that's certainly appropriate for this witness to state.

JUDGE CASEY: The objection is overruled in that the opinion, if it is legal opinion, doesn't offer anything that the Hearing Examiners may or may not already know.

MR. WARREN: Exactly, your Honor. That's been the whole point of this whole exercise is that what he's offering does not do anything to further the knowledge of the Hearing Examiners or the Commission, and that is what is improper about the offering of his testimony in general.

JUDGE CASEY: I understand your point.

MR. WARREN: One other one on Page 13 at lines 3 through, I guess, 6, Under the normal Rider 31 process, it is possible that decommissioning costs for Byron and Braidwood will increase to reflect secondary site contamination, and ratepayers will be responsible for those costs. That, again, is clearly an interpretation of the Rider 31 process which is a legal opinion and legal conclusion.

JUDGE CASEY: Do you want a moment to review it?

MR. ROGERS: No, I'm familiar with the testimony. The first part of this is a factual statement that

is based in part on decommissioning cost estimates prepared by Mr. LaGuardia and on statements in Mr. LaGuardia's testimony that there is this secondary site contamination issue.

In this proceeding we're proposing to put all these risks behind ratepayers for one limited amount of money. That's what the witness is indicating. But that's a factual statement about one of the risks, and there's plenty of factual support for it that ratepayers are facing if this proposal is now accepted.

JUDGE HILLIARD: Objection is overruled.

MR. WARREN: That will be all, your Honor.

JUDGE CASEY: Thank you.

MR. REDDICK: The portions of the direct testimony that I was going to address have been already addressed by the others, so I'll skip those. All of my remarks relate to the rebuttal testimony of Mr. Speck.

JUDGE CASEY: Not surrebuttal?

MR. REDDICK: Not surrebuttal. I try not to make the same mistake more than once. I'll come up with

a new one.

There are ten items, and I've done my best to select those things that met the criteria defined in the Bench's ruling. So I don't know if we have to argue each one individually, but I'll go slowly in case we do.

Beginning on Page 13, lines 2 through 19, here we have an extended quote from Mr. Biewald in a 1987 case involving the Palos Verdes nuclear power station in California.

MR. ROGERS: This is the subject that was addressed generally in the opening remarks about the permissibility in an expert's testimony of relying on other materials which are admissible as part of the testimony under Illinois law in People versus Anderson when they help to explain the witness' testimony.

The witness is responding to -- and this is rebuttal testimony -- to testimony offered by Mr. Biewald in which he takes one position in this proceeding. It is relevant to this witness, and it can be explored on cross-examination

of this witness in evaluating the opinions that are offered by a testifying expert such as Mr. Biewald to know that he has said the opposite in other proceedings no matter when that was.

And if on cross-examination counsel wishes to bring out that facts have changed and somehow reconcile the 180-degree difference in his testimony here and his testimony in many other proceedings, they can do that on cross-examination.

But this witness is entitled to rely on these documents and to excerpt them in his testimony and provide the backup exhibits so that the Hearing Examiners can see them in context and make their own conclusions as part of his testimony.

And, again, I refer to a quote from People versus Anderson. There is no hearsay problem here. What the Court says is -- this was a case of relying on reports in another proceeding. Here we are relying on sworn testimony, so it's a much higher standard of authenticity and trustworthiness of the statements that are made.

The Court says, Although the contents of

the reports relied upon by Dr. Katz would clearly be in admissible if offered for their truth, the defense seeks to allow the expert to disclose the underlying facts and conclusions not for their truth but for the limited purpose of explaining the bases for the expert witness opinion. For this limited purpose, the statements do not constitute hearsay and therefore be allowed -- can be allowed.

So there's no question as bases for an expert opinion they can be allowed; as prior inconsistent sworn statements, they can be allowed.

MR. REDDICK: May I very briefly?

JUDGE CASEY: You may speak if you want.

JUDGE HILLIARD: You already won.

MR. REDDICK: Then I'll shut up.

JUDGE CASEY: Lines 2 through 18 are out from the word "indeed" through the word "testimony".

MR. FEELEY: What were the lines again?

JUDGE HILLIARD: Page 13 line 2 beginning within "indeed" through 18 ending with "testimony."

MR. REDDICK: The next instance that I refer to

is on Page 16 beginning at line 8 and continuing to the next page through line 3.

Here we have discussion of Mr. Biewald's 1986 remarks regarding the Apple Canyon Plant. And, again, this is very similar to the other instances of site where I would make the argument Mr. Rogers didn't, which is if he wants to confront Mr. Biewald with these prior statements, he may certainly do so during cross-examination.

JUDGE HILLIARD: So your argument is the same?

MR. REDDICK: Yes, it is.

JUDGE HILLIARD: Is your argument the same?

MR. ROGERS: Yes, it is.

JUDGE CASEY: I just want to be clear. Page 16 answer beginning on line 8?

MR. REDDICK: Line 10 -- I'm sorry, line 8, As Mr. Biewald recognized --

JUDGE CASEY: So he can still answer no?

MR. REDDICK: He can still answer no.

JUDGE CASEY: Through which line, I'm sorry.

MR. REDDICK: The following page, line 3.

JUDGE CASEY: That objection will be sustained

beginning on line 8 with the word "as" going through Page 17 line 3, the word "costs." The answer "no" will remain.

MR. REDDICK: Beginning on line 8, I suppose we could leave the question and the yes. But following that, there is a compendium of quotations from past testimony by Mr. Biewald, so I would suggest that we begin a deletion at line 12, and that carries through to line 28.

The quotation on the following page is from Docket 99-0115 and should remain.

JUDGE CASEY: On this one, the answer is that he goes along with Mr. Rogers' argument where a witness or an expert can rely on another statement. That's certainly different from what we saw in the ones that we've previously stricken. Here we're agreeing with it and --

MR. REDDICK: Well, I continue to make a distinction between reliance and argument. Simply quoting a statement that's consistent with his own opinion is not necessarily he relied on that in forming his opinion, his expert opinion that he's

presenting in the testimony. That's quite a bit different from quoting something that agrees with you as part of your argument.

(Whereupon, there was a change
of reporters.)

(Whereupon City Cross
Exhibit No. 2 was
marked for identification
as of this date.)

(Whereupon the following
proceedings were had in camera)

(Whereupon, end of in
camera proceedings.)

JUDGE CASEY: Please proceed.

CROSS-EXAMINATION

BY

MS. DOSS:

Q. Mr. Speck, are you withdrawing as the attorney of record in Docket No. 99-0115?

A. I am willing to do that.

Q. So you will be doing that before this proceeding ends?

A. I will do that before this proceeding ends.

JUDGE HILLIARD: We talked about this. We don't have any authority to rule on or to compel him to withdraw from that.

If he chooses to do so he doesn't do so in the context of this proceeding. You have to submit that to the clerk in the other proceeding.

THE WITNESS: If it will facilitate my testimony, I'm glad to do that.

MS. DOSS: I was asking a question in regards to the way in which the testimony should be taken.

JUDGE HILLIARD: Okay.

BY MS. DOSS:

Q. Now, Mr. Speck, could you tell us your professional experience with respect to low-level waste disposal?

A. Both with regard to the Connecticut Yankee and the Maine Yankee decommissioning, I examined the low-level radioactive waste disposal costs in both of those estimates in great detail, and there were a number of witnesses, particularly at Connecticut Yankee that testified about the availability of low-level waste disposal, the cost of low-level waste disposal and how those costs increased over time. And I became very familiar with it as a result of that.

Furthermore, more recently, at the beginning of this year, I represented the State of Connecticut in negotiations with the State of South Carolina for -- to join the -- for South Carolina to join the Northeast Low-level Radioactive Waste Compact with New Jersey, and so I participated in dozens -- at least dozens of meetings with the people in Barnwell, South Carolina, who have operated the Barnwell facility, the people at Chem

Nuclear, with people in South Carolina who have been responsible for the low-level waste disposal facility there.

I spent a very long day in Columbia, South Carolina, negotiating the rates that would be applied under the new compact and looking -- as a part of that we looked historically at how those costs had increased over time.

And that compact -- I should say as well, we prepared a proposal rule, rulemaking process for the compact commission.

We took testimony from witnesses on the availability and the desirability of South Carolina coming into the compact, including the impact it would have on other states.

And then they -- I worked also closely with the legislative council and the governor's office in South Carolina to develop the legislation on the low-level waste compact in South Carolina.

And that legislation was passed and signed by the governor in June, and then the compact added South Carolina as a member as of July 1st.

So I participated very intensively on that in the first six months of this year.

Q. Was that as an attorney or as a policy advisor?

A. Well, I clearly am an attorney, but it was working with the governor's office in New Jersey, Connecticut and South Carolina.

Q. As an attorney?

A. As an advisor more than an attorney, really, because I -- it was not so much the legal aspects but it was negotiating with the people in South Carolina, trying to build a consensus of all of the people who were involved, including environmental groups, the Sierra Club was very actively involved, and it was more in the nature of working cooperatively with all of those interests to build a consensus, and then working with the governor's offices in the three states to effectuate that consensus.

Q. But were you hired as an attorney?

A. It's hard to say.

Q. I mean --

A. I did not appear in court in any proceeding.

Q. Did you charge legal fees?

A. I charged fees based on my hourly rate.

Q. As an attorney?

A. I work for a law firm so. . .

Q. All right. Have you written any articles regarding low-level waste?

A. Specifically low-level waste, no.

Q. Do you have any experience with low-level waste in Illinois?

A. I have only to the extent that I reviewed the Vance study that was prepared, and I'm also generally familiar with the Central Midwest Compact Commission and its work.

Other than that, no, I haven't done anything specifically in Illinois.

Q. Okay. When you refer to Vance, you're referring to ComEd's -- that's Gene Vance, that was someone that was employed by ComEd to do a study regarding low-level waste?

A. He was a witness, I believe, in the '97 Rider 31 proceeding.

Q. Okay. Now, are you familiar with Michael Klebe of the Illinois Department of Nuclear Safety?

A. No.

Q. Are you familiar with Thomas Ortciger who's the director of the Illinois Department of Nuclear Safety?

A. I do not know him, no.

Q. Do you know Paul Corpstein who's general manager of Chem Nuclear Systems for Illinois?

A. For Illinois, no. I know the Chem Nuclear -- some of the Chem Nuclear people in South Carolina.

Q. Have you ever worked with the Illinois Low-Level Radioactive Waste Task Group?

A. No.

Q. Do you know what it is?

A. Not specifically, no.

Q. Do you know any of the members of the Illinois Low-Level Radioactive Waste Task Group?

A. No.

Q. Have you ever advised any clients in Illinois with respect to low-level waste?

A. Other than my participation in Docket
99-0115?

Q. Yes.

A. No.

MS. DOSS: Your Honor, at this time, I ask that
the testimony on Pages 25 through 27 be stricken.

JUDGE HILLIARD: What exhibit?

MS. DOSS: Rebuttal, page -- Edison's Exhibit 12
be stricken on the basis that Mr. Speck is not an
expert with respect to low-level waste, particularly
in Illinois and cannot testify as an expert with
respect to that issue.

JUDGE CASEY: What were the pages again?

JUDGE HILLIARD: 25 and 27.

MS. DOSS: Page 25 starting with Line 5 and
extending to Page 27 ending with Line 20 which says
license expire. Because of a prior ruling on Page
27 and 28 on the top of 28, that testimony was
already stricken.

MR. ROGERS: The issue addressed on Pages 25
through 27 is availability and cost of low-level
waste disposal.

Mr. Speck has testified about very, very significant experience with the only disposal facility that is available in South Carolina, the Barnwell facility. He's got vast experience there.

That is each state does not have their -- there aren't 50 disposal areas. The one that he knows about is the one that anyone could know about.

And whether he knows the names of Illinois officials has nothing at all to do with the vast experience he has with low-level waste costs and availability of disposals, so there's no basis for striking this testimony.

MS. DOSS: Your Honor, I do have further cross, and if at this time I can hold my motion and continue with my cross and make it at the end.

JUDGE HILLIARD: Okay. Go ahead.

BY MS. DOSS:

Q. Mr. Speck, with respect to Page 26 of your rebuttal testimony, Line 17, when you say that ComEd has a 7.48 percent escalation rate for burial charges, how is that calculated?

Did you calculate that figure?

A. I did.

Q. How did you calculate it?

A. Let me see if I can recreate it.

I think I simply substituted 4.11 percent for the 4.73 percent that had been used in Docket 99-0115.

And then using the weighting factors leaving the labor and the other escalation factors the same, I calculated the charge -- the escalation rate that would have to be necessary for low-level waste burial if you were using a 4.11 percent escalation factor instead of 4.73.

Q. Okay. Now, did you rely on New Reg 1307 for that?

A. Not at all.

Q. Are you familiar with New Reg 1307?

A. I am generally familiar with it.

Q. Have you ever used New Reg 1307 for the purposes of determining the burial escalation rate?

A. I have used it to calculate the NRC minimums in certain circumstances, and so for that purpose, yes, I have.

Q. But did you do it for this case?

A. I did not do it for this case because it wasn't necessary.

All I was trying to establish here was that instead of the 10 percent bandwidth that had been assumed by some of the witnesses, in fact, what was assumed in ComEd's calculations was a 7.48 percent.

It had nothing to do with New Reg 1307.

Q. Did you use Rider 31 in your calculation?

A. Only to the extent that I looked at the weighting factors for the three different types of escalation, types of cost.

Q. So you didn't review Rider 31 as far as calculating the 7.48 percent?

A. Again, it wasn't necessary.

I was simply trying to determine what the burial escalation rate would be if you used a 4.11 percent instead of a 4.73 percent overall escalation.

Q. Do you know where you get the burial escalation rate from if it had -- if these numbers

weren't available?

A. Well, I believe the record in Docket 99 -0115 indicates that the burial rate escalation had been 22.4 percent for the previous three years.

Q. But you didn't do that calculation?

A. I didn't do that calculation myself but I understand -- I did look at the record.

Q. Did you question that calculation?

A. As I recall there was no reason to question it.

Q. Could you question that calculation? In other words, could you do the calculation yourself?

A. I suppose if I had a calculator and the raw data I probably could, but I have not attempted to do it myself, no.

Q. Do you think you have the expertise to do that type of calculation?

A. I can operate a calculator.

Q. So you believe it's just operating a calculator?

A. If I have all the raw data and the formulas that are required, I think that's that all there is

to it.

I might add that there are a number of other sources for the escalation rate for low-level waste, not only for the last three years which was covered in the Rider 31 proceeding in 1999, but also in New Reg 1307 over a period of about 14 -- 12 or 14 years, I believe, and then there are other sources that go back as far back as 25 years indicating that the low-level waste burial charges have escalated at a rate around 21 percent.

MS. DOSS: Your Honor, I ask that that be stricken. There was no question pending and I didn't ask about New Reg 1307.

JUDGE HILLIARD: Overruled.

BY MS. DOSS:

Q. Are you familiar that Utah has a low-level waste facility?

A. Yes, Envirocare. It's currently licensed to take only class A waste.

Q. Are you aware that they recently asked for a permit to accept class B and C low-level waste?

A. Yes.

Q. And isn't it true that if they get approved to accept low-level waste for types A through C, then that's another facility that's available besides South Carolina for disposal?

A. South Carolina will not be available after 2008. And, in fact, after 2001, it begins to bring it down very dramatically so that effectively if Envirocare gets its license extended to the other classes of waste, they will be the only facility that's available because the capacity in South Carolina will be taken up with compact commission states, New Jersey, Connecticut and South Carolina.

Q. Now, isn't it true that Utah's low-level waste facility for disposal is considerably less than South Carolina's, the cost?

A. It depends on what type of waste you're talking about.

Q. Well, currently, if they're only licensed for A, isn't it considerably less than South Carolina's?

A. It depends on the specific waste that's involved. I know that right now --

Q. Okay. Could you tell me what the current costs are -- are the current -- what's the current cost to dispose waste at Utah?

A. Impossible for me to say. I don't really know. But I do know --

Q. All right. That's the only question right now -- your Honor, I'm just asking --

A. I would like to explain my answer.

JUDGE HILLIARD: He stopped. You want to ask another question, go ahead.

BY MS. DOSS:

Q. So you don't know the cost to dispose low-level waste at Utah currently? And wait, so --

JUDGE CASEY: Is that a question?

MS. DOSS: No.

BY MS. DOSS:

Q. So -- but is it possible that ComEd could use Utah as a proxy for low-level waste disposal?

A. I think that would be unwise.

Q. Why is that?

A. Because I think right now Envirocare is very aggressively marketing its space. I think that will

end once the Barnwell facility is no longer available because right now what they're doing is trying to compete directly with Barnwell.

That's why it's difficult to make a comparison between the two because they are bidding against each other for this one-year period when Barnwell remains available to most of the states.

And the expectation, I think, generally in the industry is that once Barnwell is no longer available, Envirocare will have, in effect, a monopoly and will charge monopolistic rates at that point, similar to what Barnwell had charged for many years.

Q. Okay. But isn't it true that Utah, the Utah facility, in determining cost for low-level waste, could be considered in the calculation?

A. And I believe it is in TLG's analysis. A great deal of the waste actually is slated to go to Envirocare.

Q. Now, are you familiar that in Illinois there is a decline in low-level waste, in the volume of the low-level waste?

A. That generally has happened throughout the industry but it does not apply to decommissioning plants.

Q. So you would agree that when it comes time closer to decommissioning, that the volume of low-level waste would increase?

A. Dramatically.

Q. Are you aware that there was a study done in Illinois that determined that it was not economically feasible at this particular time to have a facility open in Illinois because of the decline in volumes of low-level waste?

A. I'm not familiar with the specific study.

Q. Okay. So are you familiar with a paper that was presented in 1998 on March 3rd entitled modeling the impact of declining waste volumes for input to the economic and development strategies of new level -- new low-level radioactive waste disposal facilities for Illinois?

Are you familiar with that study?

A. No. And I don't think that study would change my view.

My view is really based on the difficulty of siting low-level waste facilities in any state.

Connecticut and New Jersey, where I have some great familiarity, spent 15 years actively trying to site a low-level waste disposal facility and were unable to do so primarily because of intense local community opposition.

And that has proved true, I know, in Texas and in other states as well. And I doubt that Illinois will be immune from those kinds of pressures.

Q. Now, would you agree or disagree with this statement:

It is not until waste volume generation rates increase due to the decommissioning of the nuclear power stations that the facility becomes economically viable, meaning the low-level radioactive waste facility?

A. I don't know that.

Q. So you don't -- you're not sure if it's an economic decision for the state of Illinois to develop a low-level waste facility?

A. I don't know. I certainly believe that if they expect to have a low-level waste facility, by the time that the first ComEd plants require decommissioning, they will have to have started already --

Q. Okay.

A. -- locating it, because it's just that long a process.

Q. All right. But you -- but like you say, you're not familiar with the Illinois radioactive -- Low-Level Radioactive Waste Task Group, correct?

A. No, and I know that there have been similar task groups in Connecticut and New Jersey that attempted to locate sites for low-level waste disposal and were unsuccessful.

Q. Now, isn't it possible that the state could finance low-level waste disposal?

In other words, if ComEd needed to dispose of low-level waste that the state could also provide financing for that as well instead of actually siting a facility?

A. I'm not sure I understand.

Q. If the low-level waste disposal, isn't it true that -- or do you believe that the state could also provide some type of financing or facilitate the disposal of that waste whether it's within Illinois or out of the state?

A. It is certainly possible for a state to subsidize through taxpayer funds a low-level waste disposal.

I'm not familiar with any state that has done that.

Q. Okay. But it is possible regardless of where they get the funds from, that it is possible that that could be done?

A. Well, again, drawing on the experience in Connecticut and New Jersey, in order to, as the people in South Carolina put it, sweeten the deal, Connecticut and New Jersey agreed to pay \$12 million to South Carolina as an upfront payment to give them incentive to join the Northeast Compact.

All of that money, however, was ratepayer money. It was not taxpayer money. And it had been collected for the specific purpose of locating a

facility that New Jersey and Connecticut waste generators could use.

And so it was the \$12 million, although it was paid by the state, was, in effect, was actually money that had been contributed by ratepayers.

Q. So, in other words, you're saying that if Illinois financed the low-level waste, it would be money that ratepayers have already paid for purposes of decommissioning?

A. Not necessarily. It wouldn't be in those two states.

Q. But it could?

A. In those two states it was money that had been collected separate and apart from decommissioning costs. Hadn't been part of the decommissioning costs at all, but it had been collected as an assessment on nuclear waste generators within the state.

And primarily those were the utilities owning the nuclear power plants and they then included that in their request to be reimbursed by

ratepayers.

Q. Okay. Do you know --

JUDGE HILLIARD: Miss Doss, I want to tell you, according to our schedule, you got about five minutes left.

MS. DOSS: That's fine.

BY MS. DOSS:

Q. Do you call -- do you know or have you ever contacted Illinois with respect to disposal of low-level radioactive waste?

A. Do I know or have I contacted?

Q. Have you contacted on behalf of ComEd or do you know if ComEd has ever worked with Illinois with respect to the low-level waste disposal?

A. ComEd I'm sure has, but I'm not familiar with that.

Q. Okay.

MS. DOSS: Your Honor, I'd just like to approach the witness and show him the study that was done on behalf of the -- about the Illinois --

JUDGE HILLIARD: Do so.

BY MS. DOSS:

Q. See if you're familiar with this. It's called modeling the impact of declining waste volumes.

Have you ever seen that document?

A. No.

Q. Do you have any knowledge of any of the information in that document?

A. I would have to review the entire document. You want me to do that?

Q. Yes. Could you.

A. This is going to take a while because it's multi-page, eight, nine pages long.

MR. ROGERS: I think we should have a more specific question than does he have any knowledge of anything in a document that he's never seen.

MS. DOSS: If you have never seen the document, that's fine.

JUDGE HILLIARD: You're withdrawing your question?

MS. DOSS: I want to know if he has ever seen that document.

THE WITNESS: No.

JUDGE HILLIARD: The answer is no.

MS. DOSS: That's fine. No further questions.

JUDGE HILLIARD: With regard to your motion to strike his testimony, we have reviewed that and, I mean, it appears from your questioning that low-level waste disposal is a national issue and that his lack of familiarity with specifics in Illinois is not a sufficient bar that we should strike his testimony, so the motion is overruled.

MS. DOSS: Okay. Thank you, your Honor.

JUDGE HILLIARD: According to our schedule, you want 10 to 15 minutes.

MR. WARREN: I may not be that long, your Honor.

JUDGE CASEY: Please proceed.

CROSS-EXAMINATION

BY

MR. WARREN:

Q. Good afternoon, Mr. Speck. My name is Larry Warren. I'm with the Attorney General's Office.

A. Good afternoon.

Q. You don't have a finance degree, do you, Mr. Speck?

A. No, I do not.

Q. You don't have an accounting degree; is that correct?

A. No, I do not.

Q. You're not a certified public accountant?

A. No, I'm not.

Q. You don't have an engineering degree; is that correct?

A. I have been accused of having an engineering degree but I do not.

Q. You do not have one.

In fact, you don't have any degree in any science related disciplines; is that correct?

A. No, I do not.

Q. Okay. Referring to Page 33 of your rebuttal testimony.

A. Yes.

Q. At Lines 10 and 11, you state that the 1999 Rider 31 docket would have permitted an escalation rate of 4.73 percent; is that correct?

A. The proposal in that docket would have permitted a rate of 4.73 percent.

Q. Right. In fact, the Commission has yet to issue an order in that docket; is that correct?

A. That's my understanding.

Q. Okay. Then referring to Page 37 of your rebuttal testimony, on Line 10, isn't it true that you stated that the reason for deferring the decommissioning of the Zion units was the need to continue operating the spent fuel pool to provide extended spent fuel storage --

A. That was --

Q. -- is that correct?

A. One of the reasons, I believe.

Q. That was one of the reasons?

A. Yes. There were other reasons as well.

I believe they needed to use it as a capacitor -- anyway, there were other load balancing reasons for doing it as I recall.

Q. If I show you the Zion PSDAR and refer you to Page 13 of that, would that refresh your memory as to what the other reasons were?

A. I believe this addresses a different question, though.

It just simply says that the decommissioning schedule that is proposed here in the PSDAR is contingent on three key factors, and doesn't necessarily say that these were the factors that led to choosing the schedule that is presented.

I think it's a different issue.

Q. Okay. So your testimony is that these are not the other reasons for having the SAFSTOR at Zion, is that correct?

For the record would you just read what those three bullet points are?

A. Access to licensed low-level radioactive waste disposal sites, removal of spent fuel and GTCC waste from the site, and timely funding of the decommissioning activities.

Certainly the first I don't believe was a reason for choosing to defer decommissioning because there is a licensed low-level -- or there was at the time the Zion decision was made, there was a licensed low-level radioactive waste disposal site at Barnwell, so that was not a reason.

I think these are reasons that relate to

being able to complete the schedule that is presented in the PSDAR.

Q. Okay. Thank you.

Referring you now to Page 40 of your rebuttal testimony, a sentence that begins on Line 8 and ends on Line 13.

At one point in that sentence, I believe it's at Line 13, you refer to Efron direct testimony of \$900 million as the underfunded amount for decommissioning?

A. I see that.

Q. I'm sorry?

A. I see that.

Q. Are you sure you don't mean overfunded instead of underfunded?

A. No.

Q. Could you show me in the Efron direct testimony where it says that -- where Mr. Efron states that the decommissioning funds would be underfunded by \$900 million.

By the way, your cite is wrong there. It's at Page 21 and not 22.

MR. ROGERS: Mine shows 22.

THE WITNESS: I believe it's Page 22, Lines 3 through 6, where he says if 20-year license extensions are ultimately authorized for each of the ComEd operating nuclear units, then decommissioned funds available would exceed the reasonably expected decommissioning costs by over \$900 million.

BY MR. WARREN:

Q. That's the direct testimony of Efron?

A. Yes. And I believe his proposal then is to reduce the collections or the available funds by \$900 million and I believe that would underfund decommissioning by \$900 million.

Q. That's what you believe. That's okay.

A. Given the analysis that I have done in my testimony.

Q. Thank you.

Referring to Page 45 of your rebuttal testimony, Lines 8 through 12, it's the sentence, during a similar period ComEd decommissioning cost estimates increased from an average of \$95 million per unit in 1992 and then you cite a case with

an '82 docket number.

Do you mean 1982 there instead of 1992?

A. Yes. You're absolutely right.

Q. Okay.

A. Thank you.

Q. The \$95 million that you're referring to on Line 9 there, is that -- that's in 1982 dollars then; is that correct?

A. Yes.

Q. Okay. Was that 1982 decommissioning cost estimate based on any site specific analysis?

A. I do not believe the 95 million estimate was a site specific estimate.

Q. You mean the \$95 million?

A. Right.

JUDGE HILLIARD: Is this an '82 proceeding or a '92 proceeding.

Q. It's an 82 proceeding?

A. 82.

MR. WARREN: That's all the questions we have.

Thank you.

MS. DOSS: Your Honor, could I ask one question?

I know --

JUDGE HILLIARD: One question.

MS. DOSS: Just one question.

FURTHER CROSS-EXAMINATION

BY

MS. DOSS:

Q. Just want to make sure, Mr. Speck, Leijuana Doss on behalf of the people of Cook County, one question.

Isn't it true that ComEd uses for its cost studies a low-level waste disposal cost at an Illinois facility?

A. It is a hypothetical Illinois facility that was analyzed by Gene Vance, yes.

Q. And it was used as -- in this cost study that's in this proceeding?

A. It's a hypothetical facility that does not exist.

Q. But it was used as the cost study for ComEd?

A. Yes.

MS. DOSS: Okay, thank you.

MR. ROGERS: Could we take a short break?

JUDGE CASEY: We're going to take a five-minute break.

(Whereupon, Peoples Cross Exhibit No. 6 was marked for identification.)

JUDGE CASEY: Back on the record.

JUDGE CASEY: Did you want to get a --

MR. WARREN: It's the Zion PSDAR report. It's dated February 14, 2000.

JUDGE CASEY: PSDAR?

MR. WARREN: Right. We move for it to be entered into evidence.

JUDGE HILLIARD: I can't remember, is this a document that he had seen before and was able to discuss?

MR. ROGERS: I don't believe so.

THE WITNESS: I wasn't asked.

MR. ROGERS: He was just shown one page with three reasons and asked what he thought they were.

JUDGE CASEY: This is regarding the three factors within that?

MR. WARREN: Yes.

JUDGE CASEY: If I recall, your response was not -- that those were not necessarily the three factors that were considered for --

THE WITNESS: Not in making the decision on that schedule, but those were factors that would affect the schedule that was presented.

JUDGE CASEY: What page, counsel --

MR. WARREN: 13.

JUDGE CASEY: -- were we referring to, do you recall?

MR. WARREN: 13.

JUDGE CASEY: 13.

MR. ROGERS: It does appear that this didn't really relate to his testimony.

JUDGE CASEY: Well, it did and it didn't. He asked if these were the three factors.

JUDGE HILLIARD: He said no.

JUDGE CASEY: He said not necessarily.

JUDGE HILLIARD: I think we're prepared to admit Page 13 of Exhibit 6.

MR. WARREN: Are you calling this Exhibit 6?

JUDGE CASEY: We're doing it --

JUDGE HILLIARD: Cross Exhibit 6, we're going to number them all sequentially.

So when you have a chance, you might want to modify the exhibit and just put in Page 13 instead of the whole thing.

Mr. Reporter, please note that.

JUDGE CASEY: Before we go further, was that -- was this a confidential document?

MR. ROGERS: I think this is a public document.

MR. TOWNSEND: Was that a confidential document?

MR. WARREN: I don't believe it was. There's nothing on here that it's marked confidential. There's no indication that it is.

MR. ROGERS: I agree with that.

JUDGE CASEY: Okay. It will be -- Page 13 will be admitted.

Mr. Townsend.

MR. TOWNSEND: Thank you.

CROSS-EXAMINATION

BY

MR. TOWNSEND:

Q. Good afternoon, Mr. Speck. Chris Townsend

appearing on behalf of the Chicago Area Industrial and Health Care Coalition.

A. Good afternoon.

Q. Okay. In your opinion, did Edison's revisions substantially improve its proposal?

A. In my opinion the proposal was reasonable as originally presented.

The revisions make it more favorable for ratepayers.

Q. Substantially more favorable?

A. No. I think it's more favorable. But in my view, the likelihood of there actually being a surplus is very small and so it gives ratepayers some protection, but I think it is not a substantial change.

Q. You indicated to Mr. Jolly, I believe, that Edison will reconsider making the transfer at all if this petition is denied. Do you recall that?

A. That's my understanding.

Q. What's your -- what's the basis for your understanding?

A. I believe that has just been represented to

me by counsel. I don't have any factual basis other than that.

(Change of reporters.)

(Whereupon, there was a change of reporters.)

MR. TOWNSEND: Q Did Edison ever identify a lesser amount than it would accept.

A. Not that I'm aware of.

Q. I know Mr. Jolly explored this with you, but I'm not sure I understood what your actual answer was.

Yes or no, is Edison's proposal necessary for Genco to become competitive in your opinion?

A. I would say yes, but I'd like to explain that, if I might.

Q. That's why we have redirect.

Would a lesser amount still allow Genco to become competitive?

A. Given the risks that are involved, I'm not sure a lesser amount would be adequate to make the transaction economically viable.

Q. It would have to be that exact amount that's

represented in the petition; is that your testimony?

A. I believe that that amount is -- I haven't done the economic analysis, so I really can't say.

But my opinion is that that amount, given the risks that are undertaken by the Genco and the amount of the unfunded estimated decommissioning costs now, anything much greater than that -- anything greater than that at all would probably tip the balance, could well tip the balance. Again, I have not done the economic analyses.

Q. Right. For example, you didn't determine the run return on equity that's projected for the Genco?

A. No.

Q. You didn't determine the internal rate of return on equity for the Genco?

A. No.

Q. You didn't determine the rate of return -- strike that.

You didn't compare the rate of return the Genco would realize with Edison's proposal as opposed to without Edison's proposal?

A. No.

Q. Did you perform any analysis to determine market based rates that Genco would be able to charge?

A. I did not think that was relevant to my testimony.

Q. Did you compare the market -- strike that.

Are you familiar with Edison's power purchase option tariff?

A. No, I don't think I am. Unless I know it by some other name, I don't think I am.

Q. Have you ever heard of Edison's PPOMI tariff?

A. No.

Q. So I take it you didn't try to determine what impact this would have on any of Edison's other tariffs; is that correct?

A. That was not the purpose of my testimony, no.

Q. Did you perform any analysis regarding ratepayer impacts associated with Edison's proposal?

A. I, of course, read the testimony that

included some of the projected ratepayer impacts,
but other than that, I didn't do anything --

Q. You didn't perform any analysis?

A. No, I didn't think that was necessary.

Q. On your direct testimony, Page 22 lines 11
and 12, you indicate that the decommissioning costs
are going to fall short by at least a billion
dollars; is that right?

A. In nominal dollars, yes.

Q. How will Exelon Genco make up the shortfall?

A. That was not part of my testimony.

Q. Have any thoughts?

A. They would be speculation on my part. I'm
sure they've analyzed that and have determined that
they can do that.

Q. Were you hired by Edison or Exelon in this
case or Unicom?

A. I was hired by counsel.

Q. On behalf of Edison Exelon --

A. ComEd.

Q. If you were advising Exelon Genco, would you
tell them to he accept this deal?

MR. ROGERS: That's beyond the scope of his testimony.

JUDGE HILLIARD: Overruled.

THE WITNESS: I would have to have a great deal more information. As to whether this is good or bad for Exelon Genco, I assume that made that judgment themselves on the basis of information they have. I think this is a good deal for ratepayers.

MR. TOWNSEND: Q Would it be a good deal for ratepayers if Genco accepted all of the remaining decommissioning liability.

A. All of the remaining decommissioning liability, you mean everything that's unfunded as of today with no additional contributions?

Q. Correct.

Would that be a good deal for ratepayers?

A. I don't think it would be because I don't think the transaction would go forward.

Q. Assuming it did go forward, would that be a good deal for ratepayers?

A. That's a hypothetical that I really can't subscribe to, and I just don't know how to answer it

because --

Q. You can't conceive of that in your mind; you can't conceive of how that might work?

A. Going forward with a transaction that would be so one-sided like that I just can't conceive of the Genco going forward on that basis. That would be --

Q. Let's make some of the assumptions with regards to the return on equity, for example, that you didn't determine. Let's assume that Genco is going to make a billion dollars a year.

Again, I'm asking you from the ratepayers' perspective does it make sense, is it a good deal if Genco accepts the decommissioning liability?

A. I start from a different premise. My premise is that --

Q. I'm asking you to accept my premise. That's what --

A. What is your premise?

Q. -- the purpose of the hypothetical question was.

A. What's your premise again?

Q. That the transaction goes forward, Genco makes a billion dollars, and ratepayers are not required to make my further payments towards nuclear decommissioning liability.

From a ratepayer's perspective, is that a good deal?

A. If ratepayers were only looking at the amount that they pay rather than the overall picture of what is good for decommissioning nuclear power plants, from that very narrow and, I think, unreasonable perspective, yes, it would be good for ratepayers, if all you're looking at is whether ratepayers get paid less.

Q. If Genco is making a billion dollars a year, it still could cover the costs of decommissioning going forward if it's making a profit of a billion dollars a year, couldn't it?

A. I don't know whether it could or not. Depends on what decommissioning costs are.

Q. Under any of the proposals, have you seen decommissioning costs of more than a billion dollars

a year?

A. Depends on what escalation factors you use. I have seen figures that indicated that the nominal costs at the end of license extension or some other time period were in the 40, \$50 billion range.

Q. Are you a decommissioning contractor?

A. No. I have worked a good deal with decommissioning contractors.

Q. Have you ever worked at a nuclear power plant to decommission a plant?

A. As an employee, no.

Q. Are you a statistician?

A. No.

Q. When were you first asked to interpret Illinois law with regards to decommissioning?

A. I wasn't asked to interpret Illinois law.

Q. When did you first interpret Illinois law with regards to decommissioning?

A. I think I just described Illinois law. I didn't mean to interpret Illinois law. I'm not an expert in Illinois law.

Q. That's helpful.

When were you first asked to describe Illinois law?

A. Well, it was incidental to the work I was doing to prepare my direct testimony. So that would have been in May this year, something like that.

Q. So in the context of the 99-0115 case, you weren't asked to describe anything with regards to Illinois decommissioning law?

A. My role in that proceeding was to conduct -- primarily to conduct cross-examination and to develop factual materials, which I did.

Q. Did Edison consult you regarding the timing of filing a petition in this instant proceeding?

A. No.

Q. When did Edison first discuss with you its desire to file its petition in the instant proceeding?

A. It was sometime in the spring. I don't know exactly. I don't recall exactly.

Q. What was the context of that, context of that conversation?

A. I was asked by Edison's counsel -- ComEd's

counsel whether I would be available to discuss in testimony policy implications of the proposal that ComEd was making with regard to decommissioning.

Q. Did you ever talk with Edison about filing the petition in this proceeding before a proposed order issued in the 99-0115 proceeding?

A. No.

Q. You did understand that that was the effect of them filing this petition, didn't you?

A. I knew that there had not been a decision in the 99 Rider 31 proceeding at the time when the petition was filed in this proceeding.

Q. Did you discuss with Edison the possibility that the outcome of the 99 decommissioning case would result in Edison's annual decommissioning rate being less than \$121 million?

A. No.

Q. But that is one possible outcome of that proceeding, isn't it?

A. Among many outcomes, yes, that is one possible outcome.

Q. Have you discussed strategy with Edison with

regards to requesting that the Commission not move forward in that proceeding while this instant proceeding is pending?

A. No.

Q. In your direct testimony at Page 16, you discuss the ways in which the fund might perform.

Do you see that?

A. Yes.

Q. What is the probability of poor investment performance?

A. I did not assess the probability.

Poor as compared with the projections that ComEd makes?

Q. Correct.

A. I did not evaluate that, and I'm not sure it would be possible to evaluate the probabilities very realistically over the next 35 years.

Q. Did you attempt to determine the probability of investment performance exceeding the rates that Edison has assumed?

A. No, for the same reason.

Q. Assume that Edison's revised proposal is

adopted; assume further that there is a technological fix for decommissioning discovered in 2003 that will result in the cost of decommissioning being reduced by 50 percent.

Are you with me?

A. I am.

Q. So the cost of decommissioning would fall from 56 billion to 2.8 billion; is that your understanding?

A. In 2000 dollars.

Q. All else being equal under Edison's revised proposal, what amount of refund would ratepayers be entitled to?

A. I can't calculate that off the top of my head. I don't know.

Q. In 2000 dollars we're going to fund the decommissioning fund at 5.6 billion dollars, correct?

A. Yes -- no, that's not correct. That's not correct. We're funding at a level below 5.6 billion dollars.

Q. Do you know what that level is?

A. Offhand I think in nominal dollars it's a billion dollars.

Q. I'm sorry?

A. In nominal dollars it's a billion dollars less.

Q. So it would be 4.6 billion dollars?

A. I'm not sure you can make that calculation exactly that way. It's something less than 5.6 billion is all I can tell you definitively.

Q. What is the date that the last plant will be physically decommissioned?

A. Based on ComEd's assumptions and their estimates now?

Q. Yes.

A. I'd want to look at the Byron and Braidwood analyses to be able to tell you that. I don't really know. Sometime in the late 2020s or early 2030s, but I'd have to look at those estimates -- or those estimates and schedules.

Q. It's beyond 2025?

A. Yes.

Q. So the date that consumers would receive the

refund that we discussed in that hypothetical example of billions of dollars would be sometime after 2025 under Edison's revised proposal; is that right?

A. Yes.

Q. I'd like to direct your attention to Page 8 of your rebuttal testimony, lines 20 to 21. There you say the Genco benefits from selling power in a competitive market.

Do you see that?

A. Yes.

Q. How will Genco benefit by selling power in a competitive market?

A. I'm not sure I am completely qualified to say. It's been represented to me that Genco believes that they will be able to benefit from a competitive market by having fewer or no regulatory restrictions.

One thing that I can think of off the top of my head is that you will not have the kind of what's called regulatory lag between the time when a request is made to change rates and the actual

implementation of the rates so that the Genco would be able to react better to the marketplace and, therefore, would be able to benefit from operating in a competitive market rather than a regulated market.

Q. When you say they'll be able to react better, what do you mean they'll be able to react better?

A. More quickly.

Q. React how?

A. It would be able to change prices and rates in a way that they can react in the marketplace instantaneously rather than waiting for regulatory approval.

Q. Will Genco obtain more profits as a result of this?

A. Well, as I believe Mr. McDonald testified this morning, they are in the business to make a profit, and I assume they would not be doing this if they didn't think it was going to be profitable.

Q. So one of the benefits is that they'll be able to charge more for their output?

A. Or they will be able to reduce their costs sufficiently to be able to make a greater profit.

Q. Okay. Let's take the first instance.

If they increase their charges for their output, who will be paying those higher prices?

A. During what period of time?

Q. As the Genco continues to operate. Is there a difference? Explain to me who will pay the higher prices for whatever period of time you can think of.

A. My understanding is that if there are higher prices -- and I'm not sure that there will be. As I indicated, it may not be a function of higher prices but lower costs. But as I understand it, ComEd's rates are frozen through 2004, so ratepayers would not pay it.

Q. Through 2004. Beyond 2004 they could?

A. I assume that they could. I really don't know.

Q. You didn't look that part of the law?

A. No.

Q. Okay. Let's take the other language. There could be a benefit to the Genco, and that is that

the plants are run more efficiently.

Is that a fair characterization of the other way that the Genco could benefit?

A. Yes.

Q. Did you perform any analysis that suggests that Edison is not currently operating its plants efficiently?

A. Whether there could be improvements in their efficiency if they're operated as a Genco, I don't know. I did not do any study.

Q. Are you familiar with the lost revenue approach to stranded cost recovery adopted under Illinois law?

A. No.

Q. Are you familiar with the lost revenue approach?

A. That's not my area of expertise, I'm sorry.

Q. Do you know if Edison has financial incentives to operate efficiently now?

A. I don't know whether they're explicit, but I suspect that there are some incentives to operate efficiently. There are certainly safety incentives

that would have the effect of operating more economically, more efficiently.

Q. Would you agree that those who benefit from nuclear generation should be required to pay for decommissioning?

A. Could you repeat that, please.

Q. Do you agree that those who benefit from nuclear generation should be required to pay for decommissioning?

A. I think it's difficult to make an exact match between those who benefit and those who pay for decommissioning.

There have been a variety of models that have been considered and in some cases adopted over the years for distributing the costs of decommissioning over the life of a nuclear power plant. And some of them have been very front end loaded; others have attempted to spread the costs over a longer period of time, sometimes especially if a plant gets shut down before the expected --

Q. I'm sorry to interrupt you.

I'm going to move to strike this answer.

It was a simple question of whether or not he agreed with a policy statement and we've heard about other models that may have been adopted, that there might not be exact matches. I'm just trying to find out whether he agrees with the policy?

MR. ROGERS: I think the answer is responsive and the witness is entitled to explain --

JUDGE HILLIARD: I think he was trying to answer your question. Go ahead.

THE WITNESS: Could you read back the last part of my answer, please.

(Record read as requested.)

THE WITNESS: Frequently if the plant gets shut down before the expected end of the life, it create some imbalances. And a perfect example of that is Maine Yankee which came in in 1982 -- I'm just trying to give you the background for my answer.

In 1982 Maine Yankee asked for accelerated decommissioning cost collections because they believed at that point the plant was likely to shut down before the end of its licensed life.

The FERC said, No, you've got to use the

entire licensed life. They did that; proceeded until 1996, and the plant should down so that it ended up people who were not receiving power from Maine Yankee ended up paying for the decommissioning costs.

So it's difficult, if not impossible, I think to match precisely the people who receive power from the nuclear plant with those who pay for the decommissioning.

MR. TOWNSEND: Q Do you agree as a general policy that those who benefit from nuclear generation should be required to pay for decommissioning; as a general policy, is that a good policy.

A. I think it is an objective that can cannot be achieved and --

Q. Is it a good objective?

A. It is a reasonable objective among other reasonable objectives.

Q. Rebuttal testimony, Page 7, lines 1 to 3.

A. Yes.

Q. What is the probability that decommissioning

costs will be greater than estimated?

A. I haven't run a Monte Carlo simulation, which is what you have to do. And I'm not sure even then it will be reliable because you can't really make those probability judgments very accurately.

Q. What is the probability that there will be a surplus?

A. Same answer. I haven't made the analysis, but I think it would be very difficult to do that.

Q. Having not done any analysis -- strike that.

Lines 5 to 6 you talk about an analogy where an owner contracts for construction on a fixed price basis.

Do you see that?

A. Yes.

Q. Now, some owners would choose a time and material basis rather than a fixed cost; is that correct? It's not your testimony that fixed contracts are always better than time and material contracts, is it?

A. No.

Q. Sometimes fixed contracts are worse than

time and material contracts?

A. They're different, and you would choose one over the other for different reasons.

Q. Assume that the contractor knows the time and materials that it would cost to perform the task but the owner does not.

Some contractors in that situation might seek to take advantage of the owner; would you agree?

A. It depends on the circumstances.

Q. Some might?

A. They might try, but they might be unsuccessful, too.

Q. The more educated the building owner is, the less likely it is that the contractor would be able to take advantage of the owner, right?

A. I don't know that I can say in a general sense that's true. I don't know.

Could you read your question again or ask your question again?

Q. The more educated that the owner is about the time and material costs, the less likely it is

that the contractor would be able to take advantage of the owner, all else being equal?

A. Not necessarily.

Q. Assume that regardless of whether this is a time and material contract or a fixed cost contract, the contractor must perform efficiently; that is, the contractor will operate the same regardless of whether it's a time and material contract or a fixed contract fixed rate contract.

Would you agree that in that situation, all else being equal, the owner might be better off entering into a contract based upon time and materials rather than a fixed rate contract?

A. You're asking me to make an assumption that I think is contrary to fact that under fixed price contracts and time and materials contracts contractors act differently.

Q. Let's assume that the efficiency is overseen by a regulatory body and the regulatory body ensures that it will be done efficiently. That's the assumption.

A. To the maximum level of efficiency?

Q. Same level of efficiency. Efficiency is taken out of the equation.

A. I don't think you can take efficiency out of the question because that's part of the reason you'd choose a fixed price contract over a time and materials contract. You want to give incentives for greater efficiency.

Q. So that if there is no incentive for greater efficiency, there's no incentive to enter into the fixed contract, there's no reason to enter into the fixed contract?

A. Well, it's difficult for me to imagine a situation in which there wouldn't be greater -- at least potentially greater efficiency under a fixed price contract than a time and materials contract; although there are ways to construct a time and materials contract where you have incentive provisions and other mechanisms that could act in the same way as a fixed price contract. But fixed price contracts produce incentives, economic incentives.

Q. You're an attorney right?

A. Yes.

Q. Can't deal with this hypothetical, though; just makes you melt down -- I'll withdraw it.

Let's go to Page 8, line 13. Can you please describe to me the inefficiencies inherent in cost of service regulation?

A. That's what I was referring to earlier as the time lag inability to react immediately to the market.

Q. Can't charge higher prices because the regulatory body has stopped you from doing that?

A. Or lower prices to be able to compete.

Q. Focusing solely on the generation market, under Edison's proposal, all else being equal, will Edison's customers pay more for generation than they are today?

A. Through 2004 they will not for sure.

Q. This thing doesn't stop in 2004, does it?

A. My understanding is that in 2005 and 2006, which is the only time when they will be paying for -- where there is a contract that may be -- where the nuclear units may supply power to ComEd's

customers -- I'm sorry. I lost my train of thought.
Could you ask your question again?

Q. Sure. Looking out into the future, not just to 2004 because 2004, it's going to be the same whether or not this proposal goes through or not in terms of cost of generation to consumers, right?

A. That's my understanding.

Q. I guess we're looking beyond 2004.

Focusing solely on the generation market under Edison's proposal, all else being equal, will Edison's customers pay more for generation than they are today?

A. Than they are today, I have no idea.

Q. Than they are expected to today?

A. I have no idea. It will depend on what the market is at the time.

Q. But ratepayers will accept the risk under Edison's proposal that the market price will increase?

A. I think whether ComEd makes a proposal or not, they're going to have that risk.

Q. Are you familiar with Edison's fuel

adjustment clause?

A. No, I'm not. I really can't say, but it -- I can't say.

Q. So looking at the bigger picture, you don't know with combining generation and decommissioning costs whether this is going to be a good deal for consumers or a bad deal, do you?

A. I think it's going to be a good deal for consumers.

Q. On the decommissioning side. But you don't know anything about what the impact is going to be on the generation side, do you?

A. I think being able to get to shed the risks that are involved in decommissioning is a benefit for ratepayers regardless of what the market price of electricity is.

Q. Let me understand that statement.

Shedding that risk has a certain dollar value that can be assigned to it, doesn't it?

A. I don't think it can be -- I don't think you could give a definitive dollar value to that today.

Q. You can get a ball park dollar value for

that benefit to consumers, can't you?

A. You would have to make assumptions about what the probabilities of the risks are, and that is, I think -- when you're looking at 35 years, it's very difficult to do that.

Q. Edison, through a number of pieces of testimony including in its original petition and including in your testimony, claims that there's a billion dollars of savings to customers, so there is some way to try to quantify that amount, isn't there?

Granted that that billion dollars isn't really a billion dollars if you do the present value of the money, there is some way to quantify that value, isn't there?

A. That's a different quantification, qualitatively different quantification. It doesn't require assumptions. It simply requires looking at what ComEd's collections would be under the 1999 Rider 31 and comparing that with the collections under the proposed rider.

Q. Would you agree that economists would be

able to assign a value to Edison's proposal?

A. They would have to make assumptions about the probabilities of various events occurring, and I believe those probabilities have no basis in fact and it would be a pure guess and pure speculation.

Q. Page 9 of your rebuttal testimony, you talk about the auction proposal by Mr. Bach; do you see that?

A. Yes.

Q. Do you believe that Exelon Genco would be a bidder in the auction?

A. Well, it's my opinion there would be no bidders.

Q. Exelon Genco could get a better deal if it put a lower bid than what's it's currently bidding as a result of this petition, couldn't it?

A. I don't believe that there -- that any bidders would come forward to bid on the decommissioning liabilities and the fund given the level of risks and uncertainties that exist.

Q. That's exactly the deal that Exelon Genco is buying into, though, isn't it; they are accepting

those liabilities?

A. With some compensation from ratepayers that mitigate those risks to a level that they find acceptable.

Q. Page 12 of your rebuttal testimony, lines 7 through 9 you reference Connecticut Yankee?

A. Yes.

Q. Why did Connecticut Yankee's new management bring in personnel who had managed at Yankee Atomic?

A. I don't know firsthand why the board made that decision.

Q. Do you think it was a prudent move?

A. Yes.

Q. Why?

A. Because the management at Northeast Utilities who had previously run Connecticut Yankee had not done an adequate job and they really needed new management to come in and manage the decommissioning.

Q. Was it a benefit that the new team that came in had experience at Yankee Atomic?

A. I'm sure it was.

Q. Are you an expert in predicting general inflation?

A. No.

Q. Have you looked at the Energy Information Agency's forecast with regards to inflation?

A. General inflation?

Q. Yes.

A. No.

Q. Have you looked at Data Resources Institute's forecast with regards to general inflation?

A. No.

Q. Would you agree that all else being equal as inflation rates increase, nominal interest rates increase?

A. There is certainly a relationship, as I understand it.

Q. So your answer is yes?

A. There is a linear relationship, as I understand it.

Q. Did you review the year-by-year projections for decommissioning outlays for each of Edison's

plants?

A. Not in detail.

Q. Did you determine what percentage was labor versus materials?

A. I've looked at those numbers, but I did not review that in detail, no.

Q. How about decommissioning labor rates?

A. What about decommissioning labor rates?

Q. Did you review those labor rates?

A. I looked at the TLG estimates and particularly their buildup of the unit costs based on labor rates and -- but other than that, just for general familiarity, I didn't do any study of labor rates.

Q. All you did was read the other pieces of testimony?

A. Well, I'm generally familiar with the way TLG constructs their estimates and how they derive their labor rates.

Q. Did you perform any independent analysis to confirm any of the figures offered by Edison?

A. What do you mean by any of the figures

offered by Edison? Any of the numbers that are in the TLG estimate, for instance?

Q. Yep.

A. I did do an independent analysis to determine whether the \$374 per cubic foot for low level waste disposal was reasonable within the context of what I knew about low level waste disposal charges in 1996, and I concluded that it was.

Q. When you said you did an analysis, you just thought about it and concluded that?

A. I looked at the Barnwell rate schedule.

Q. So you compared two different numbers?

A. Well, it's a little more complicated than that. You have to convert the Barnwell weight based into the volume based number, but yes.

Q. Now, in doing that did you put together any work papers?

A. No.

Q. Just look at the number -- I guess I don't understand how you could have done that analysis without having some kind of work paper?

A. I did it on my computer, and I didn't save any of the calculations --

Q. Instantaneously didn't go back and double-check; just punched it up on your computer?

A. Yes.

Q. Didn't save it?

A. No.

Q. Is that the way you tell most of your expert that you have when your an attorney to prepare -- I withdraw that.

Rebuttal testimony, Page 3, line 21 to 22
you say that decommissioning costs should be allocated fairly; is that correct?

A. Yes.

Q. What is a fair allocation between ratepayers and the Genco?

A. Basically, the proposal that ComEd has made where the ratepayers pay a portion of the remaining unfunded decommissioning costs and the Genco assumes the liabilities and the risks related to that. That is a fair allocation of the responsibilities.

Q. How did the \$121 million figure come about?

A. It's the number from the 1999 Rider 31 proceeding.

Q. That was never approved by the Commission, was it?

A. No, but it was certainly the number that I believe based on looking at the record was supported in the record.

MR. TOWNSEND: Move to strike. That was clearly a statement about what he was doing as an attorney in a case where he was the attorney.

MR. ROGERS: He's asking the witness to talk about the 121. He's trying to be helpful. He asked where it came from, and he told him.

MR. TOWNSEND: No. He told me that he thought that was the right number, and of course he thought that was the right number. He was the attorney for that.

MR. ROGERS: You wanted to know where it came from, and he told you.

MR. TOWNSEND: He told me then --

JUDGE HILLIARD: Overruled.

MR. TOWNSEND: Q When you thought it was the

right number, Edison was paying you to be their attorney, weren't you.

A. Edison was paying me. I like to think at least that I am bigger than just representing my client.

Q. If you didn't believe in \$121 million per year but Edison told you to advocate that, would you still have advocated the \$121 million?

A. I might very well have withdrawn as counsel on that basis. Been known to do that in the past.

Q. Just so I'm clear, you think that it's fair to allocate 4.6 billion dollars in decommissioning costs to ratepayers and zero to the Genco?

A. I don't think there is a zero allocation to the Genco.

Q. The best number that we have -- strike that.

I have some questions about confidential material, a short line of questions. I don't know if there's anyone in the room that --

JUDGE CASEY: Anyone present that has not signed a confidentiality agreement?

MR. TOWNSEND: It does relate to Exhibit

No. 2.

JUDGE HILLIARD: You want to stick around?

You're good for No. 2. You want to stick around?

JUDGE HILLIARD: Anybody else?

You're going to be a half hour or less?

MR. ROBERTSON: Depends on how long his answers are. They haven't been too short, so it could be a half hour or more. I'll try not to take that long.

JUDGE CASEY: Off the record.

(Discussion off the record.)

JUDGE CASEY: Back on the record.

So the record is clear, we are no longer in camera.

Mr. Robertson.

CROSS-EXAMINATION

BY

MR. ROBERTSON:

Q. Okay. After listening this afternoon, I want to make sure I understand your position on something. I think I do.

It's your position that the Act imposes an obligation on ratepayers to pay all reasonable

costs and expenses necessary to decommission ComEd's nuclear stations at the time of decommission; is that correct?

A. Yes.

Q. Are there any circumstances in your mind under which ratepayers would be relieved of that obligation?

A. Yes.

Q. What are they, please?

A. If there had been some imprudent conduct on the part of the nuclear plant owner, I think there may be some circumstances under which ratepayers would not be required to pay all of those costs.

Q. What if the plant is going to be useful?

A. I have very hard time understanding that concept in the context of decommissioning because every decommissioned plant is by definition shut down and no longer producing power, so I don't think useful applies.

Q. What about a circumstance where the plant is in operation for a year and the owner of the plant as a regulated utility is permitted to sell or

transfer this plant to a third party and the third party has no obligation to sell collected power from the unit back to the regulated utility.

Is that a circumstance under which customers should be required to continue to pay nuclear decommission costs?

A. I believe they still have an obligation to pay the decommissioned cost because the plant was initiated under a regime of regulation where the ratepayers, in my view, committed themselves to ultimately decommissioning the plant because once it's started operation, it's got to be decommissioned.

Q. Can you identify for me in the Illinois Public Utilities Act or any other utility act that you're familiar with that imposes the obligation on electric customers to purchase electricity from the utility?

A. Could you repeat that, please.

Q. Yes. Can you identify for me in the Illinois Public Utilities Act or any other public utilities act with which you are familiar a

statutory obligation that imposes an obligation on the utility customer to buy electricity from that utility as long as the customer's in their service territory?

A. I'm not familiar one way or the other whether that exists.

Q. Do you believe that to be the case.

Do you believe -- what state do you live in?

A. I haven't considered the question.

Q. What state do you live in?

A. The District of Columbia, which is not a state.

Q. -- gas and electric?

A. Pardon?

Q. What utility serves there?

A. PECO, yes.

Q. Leaving aside your legal experience, does common sense tell you that you have a legal obligation to purchase electricity from that utility?

A. Yes.

Q. As long as you're living in the service territory?

A. Yes.

Q. If you build a house and you want to sit at home and freeze in the dark, you've got to pay that utility for electricity that you don't purchase?

A. No. Only if you're going to purchase electricity, I would purchase it from that utility.

Q. So you do agree with me that there is no legal obligation on the part of the customer to purchase the utility's product?

A. No. That's true.

Q. In fact, the legal obligation is on the utility to offer the product, isn't it?

A. I assume so.

Q. So there is no regulatory bargain that says that a customer has to pay the costs of the utility absent purchasing some product from the utility?

A. I believe that's correct.

Q. Now, if the utility takes the -- if the utility takes a generating plant and it sells that generating plant to a third party and it no longer

sells electricity from that plant to its customers in its service territory and the electricity from that plant is sold to people in Samoa, do you believe customers in that service territory still have the obligation to pay any of the production or operating costs for that plant?

A. Production and operating costs , no.

Q. Do you consider nuclear decommissioning to be a part of the cost of operation of a nuclear plant?

A. It's a part of the costs of producing power from the plant that are incurred as soon as the plant becomes operational.

Q. Sort of like depreciation spread over -- strike that --

A. Not necessarily, no.

Q. Now, let's go back to my example. Let's suppose in our hypothetical the law changes and the utility is suddenly authorized to enter into competitive market where it will be free to price its product in the market as opposed to regulated prices, okay, and the plant's been in existence for

one year and it came into existence in a regulated environment but the environment changed. Customers are now permitted to purchase from whom they want. The utility is now permitted sell to whom it wishes. It sells the plant to a third party. It's been in operation for only a year. And the entire output for the plant is sold to people in Samoa as opposed to people in the utility's service territory.

Under that circumstance, do you believe that customers in the utility service territory should be obligated to pay the decommissioning cost for that plant over the next four years or over its life?

A. I certainly think they have an obligation to pay the decommissioning cost now. Whether they have an obligation to pay them forever, I don't know.

But I know in other analogous circumstances, ratepayers are obligated and I think appropriately obligated to pay the decommissioning costs even though they are no longer receiving service from the plant.

Q. What decommissioning costs do the customers

in Samoa pay?

They get all the benefit of the plant.

Do they pay any of the decommissioning costs?

A. No.

Q. Okay.

A. They may or may not. I don't know. They may or may not.

Q. Your feeling is that the regulatory construct that you are putting forward here would allow in my hypothetical example the utility to continue to collect nuclear decommissioning costs from the customers who have had the benefit of the plant for one year who don't get the benefit of the plant for the next 39 years who get none of the output from the plant after the first year; is that correct?

A. I don't know that there is one circumstance in which that has actually occurred.

Q. I'm not asking you for circumstances in which it's occurred. I'm asking you whether or not your regulatory construct that you're putting

forward here to this Commission would allow that to happen?

A. Yes, I think so.

Q. Okay.

A. I don't think --

Q. I have nothing further.

JUDGE CASEY: As in no further questions?

MR. ROBERTSON: No, I have nothing further that requires his response. There was no question pending.

Q. Now, would you please refer again to Page 3 of your direct testimony. In there you talk about the fact that -- you talked about this earlier today, so I'm not going to try to go over all those issues.

You talked about the fact that Genco will assume approximately one billion in estimated decommissioning expense; is that correct?

A. In nominal dollars, yes.

Q. Now, these other risks that we've been talking about today and that you've talked about with others extensively, do those add to the billion

dollars?

A. They have the potential the risk to add to that billion dollars, yes.

Q. That's not an insignificant amount of money, correct?

A. A billion dollars for you and me, it's significant.

Q. How do you think Genco would recover that billion dollars plus all this other risk, the dollar values associated with that?

A. I haven't examined that question.

Q. Do you think Commonwealth Edison has?

A. I don't know.

Q. Would you think Commonwealth Edison would be here making this proposal if it had not?

A. I feel certain that they have considered the question and believe that they will be able to handle that plus currently estimated decommissioning expenses plus the risks that are involved and that I have described.

Q. Again, still at Page 3 you say that one of the benefits here is matching the benefits of power

produced with the cost of ratepayers producing the power; is that correct?

A. Yes.

Q. And in order for that to be true, ratepayers have to receive the power produced?

A. Well, I simply cite that as an additional benefit. And in this instance ratepayers, will receive the benefit of power produced during the period of time when they continue to have decommissioning cost obligations.

Q. Do you know if there are any class of ratepayers in Illinois who will -- in the Edison service territory who won't receive that benefit during the initial term of power purchase agreement?

A. I do not know.

Q. If there were such a class, would this necessarily be a true statement?

A. Well, it would be equally true under ComEd's proposal as under the existing regime, because under the existing regime, as I understand it, the Rider 31 charge is to all ComEd customers. That would not change.

Q. Your statement is not based upon the existing situation here. Your statement here is based on the fact that the benefits of the power produced will be going with the costs to the ratepayers who are getting the power produced; is that correct?

A. As I said earlier in response to other questions, there's really not a way to absolutely match the decommissioning costs with the power used. I think this is a good surrogate for doing that, and it's probably the best that can be achieved.

Q. Would another way of allocating the cost would be to say the total output of the unit is a hundred kilowatt hours and current customers are going to get 50 kilowatt hours of that benefit or output and new customers are going to get 50 percent, let's allocate 50 percent of the decommissioning responsibility to the new customers.

Would that way be equitable?

A. I'm not sure I understand your hypothetical. Could you repeat it for me, please.

Q. Sure. If we were to allocate a nuclear

decommissioning responsibility on the basis of who received the power, we know that there are two classes of customers who receive the power; one, we'll call the ComEd bundled customers, and the other we'll call the new market customers. And we can establish that 50 percent of the output of the unit will go to the new market customers and 50 percent will go to ComEd's bundled service customers.

Do you believe it would be equitable to allocate the costs of the nuclear decommissioning among those two customer groups 50-50?

A. That would be one way of approaching it. I'm not sure that's the only equitable distribution.

As I indicated earlier, there have been over the years a number of different approaches to try to match decommissioning costs with the customers who actually use the power, and they have been more successful -- some more successful, some less successful.

Q. If we did it that way, that would certainly confirm the benefit that you describe in

subparagraph or sub item C here at line 8 and 9,
Page 3, wouldn't it?

A. As, I think, ComEd's proposal does as well.

Q. Have you ever even seen or done anything in
this big business that could have been improved
upon?

A. Probably not. Engineers are fond of saying
that the perfect displaces the good.

Q. I'll tell you a joke about engineers when
we're done.

JUDGE CASEY: Why don't we go off the record for
just a moment.

(Whereupon, there was a change
of reporters.)

(Whereupon, the following
proceedings were held
in camera.)

BY MR. ROBERTSON:

Q. On the bottom of page 10 of your direct at Line 23, you have a parenthetical there. And at Line 24 you refer to FERC. What was -- I don't want to get into a big long discussion, but I'm curious what FERC's jurisdiction over this matter was, how was that established?

A. They were a full sale power purchase agreement that the owners of Connecticut Yankee and Maine Yankee executed with themselves basically that had to be approved by the FERC in order to charge those rates, wholesale rates that then got passed on to retail customers in various jurisdictions in New England.

Q. So the FERC had the jurisdiction to determine whether or not retail customers in that circumstance would pay nuclear decommissioning?

A. No, they decided what the wholesale rates that would be charged to the utilities who owned the power plants, and then under established documents that they were entitled to pass -- those utilities

ratepayers in particular states, retail rates.

Q. So the utilities agreed among -- I'm not trying to be cute, but I'm going to try to simplify this. They essentially negotiated a contract among themselves which was approved by the FERC. And in that contract they agreed that they would collect nuclear decommissions from their customers and FERC approved the overall contract?

A. Yes.

Q. Do you know that Commonwealth Edison has made a promise here, or has represented to the Commission that they won't try to collect nuclear decommissioning from customers after 2006 if their proposal is adopted?

A. I'm aware of Mr. Berdell's testimony.

Q. Now, once this is all over, the Illinois Commerce Commission will no longer have jurisdiction over this matter, will it?

A. I assume that is correct, I don't know that.

Q. So Commonwealth Edison will never have to ask the Illinois Commerce Commission whether or not they can recover decommissions cost, will it?

A. Well, they have agreed that they will not.

Q. Well, I mean -- but they can agree they will not because they don't have to, do they?

A. Well, if they agreed to, they won't, they can't. I don't understand your question.

Q. You're a lawyer and I'm a lawyer, okay. And 10 years from now or 5 years from now the Illinois Commerce Commission no longer has jurisdiction over these contracts, or over these units, or over what costs Commonwealth asks the FERC to approve in the context of a negotiated contract; is that correct?

A. Well, I presume that they still have jurisdiction over the retail rates that Com Ed charges, and they could contest those retail rates on the grounds that improved for some reason, I don't know anything about Illinois law on that point, but that's my assumption.

Q. Absent -- I don't want to get into that, they can get into that in a brief, but absent that ability, wouldn't Com Ed at least in theory have the ability to simply put these costs into a contract and ask for approval of the contract without ever

referencing the Illinois Commerce Commission, if you know?

A. Well, I wouldn't expect Com Ed to do that. If they've made a commitment that they are not going to do that, I believe that would be a binding commitment that they would not be able to renege on. And -- I concur in whatever the Commission can do to make sure make sure that that does not happen, because I think that's the real benefit of this arrangement that Com Ed has proposed, is that decommissioning costs will not be assessed against ratepayers after 2006. That's the core of the benefit.

Q. But they were assessed against the ratepayers in New England, correct, without the approval of the local commissions pursuant to a contract that was negotiated by the utilities; isn't that true?

A. And the commissions intervened in a proceeding at the FERC and were successful in reducing those collections.

Q. Absent the intervention, the state would

have a right to do, just like anybody in this room, they didn't have a legal authority to simply order the utilities not to recovery those costs; isn't that true?

A. The state of Maine contests, and they did in fact in court contest it, and they were partially successful. Not completely successful, but partially successful in challenging that in federal court in Maine.

Q. Do you agree that that is a serious question in this matter, and that the Commission should consider --

A. I think the Commission should take steps to insure that after 2006 ratepayers will not be obligated any further for decommissioning costs, I think that is appropriate.

Q. Would you go to Page 17 of your direct testimony. Line 16 and 22?

A. Yes.

Q. If the -- there you state, in fact it is possible that some of Com Ed's currently operating plants will not even operate until the end of their

licensed lives, thus truncating time for the decommissions trust fund to grow and exacerbating the risk that will be born entirely by the Genco under Com Ed's proposal of the charting fund fall; is that correct?

A. Yes.

Q. Now, if the decommissioning -- if the time for the decommissioning trust fund to grow is not truncated, would there be any exacerbation of the risk under this statement?

A. Do you mean if decommissioning were postponed until the original time when it was planned?

Q. I really didn't have a particular event in mind, I was more trying to understand if the opposite was true, if it's not truncated, then there would be no more exacerbation. It just seems logical to me that if you said truncating time exacerbated the risk, then the absence of truncation, if you will, will not exacerbate the risk?

A. Generally I think that's accurate.

Q. And would it also be possible under the circumstances of this statement, all else equal that lengthening the time for the decommissioning trust to grow would not only not exacerbate the risk, but reduce the risk?

A. It's certainly possible. I don't think it's likely, but it's possible.

Q. Could you turn to your supplemental testimony, Exhibit 7?

JUDGE CASEY: Where at Mr. Robertson?

MR. ROBERTSON: Page 4.

BY MR. ROBERTSON:

Q. All else equal, would you agree or disagree that Genco has the potential to have the benefit of Com Ed's nuclear fleet for almost half their expected operating life?

A. The potential in the sense that there is some possibility that that could occur?

Q. Yes.

A. There is some possibility that that could occur.

Q. Could you turn to your rebuttal testimony on

Page 48?

A. Yes.

Q. Now, your discussion here in Paragraph C of the power purchase agreement?

JUDGE CASEY: Is there a particular line?

MR. ROBERTSON: Yes, Lines 1 and 2 is where it begins the discussion.

JUDGE CASEY: Thank you.

BY MR. ROBERTSON:

Q. You suggested shortening the decommissioning or collection prior to -- I don't want to ask you that question.

With regard to your statement under Com Ed's proposal it will not collect decommissioning costs from customers in 2005 and 2006 if it does not purchase power from Genco. You describe that as a benefit to customers; is that correct?

A. I think it is an added protection for ratepayers.

Q. Is that protection in part a function of the likelihood that Com Ed and Genco will be able to reach agreement on pay rates in 2005 and 2006?

A. No, I think the parties anticipate at this time that they will reach an agreement, and that the collection will continue and power will continue to be supplied. But ratepayers are protected in the event that they don't reach that agreement, for whatever reason.

Q. At Page 51, Line 5, you use the phrase -- the word scale.

A. Yes.

Q. Is it correct to infer from your testimony that there is some level of reduction in the amount of money being proposed for recovery for Com Ed that would not result in NRC finding that there was inadequate financial assurance for funding of decommissioning?

A. No, I didn't mean to imply that. I don't know that.

Q. Do you know whether or not -- were you involved in the presentation to the NRC by the company?

A. Not at all.

Q. Do you know any of the details of the

presentation?

A. Not at all.

JUDGE CASEY: Mr. Robertson, this will be your last question, you want to make it a good one.

BY MR. ROBERTSON:

Q. Do you know whether or not the nuclear decommissioning funds provisions of the Illinois Public Utilities Act require that refunds be made to customers from the individual trusts for each nuclear unit to the extent the balance in the trust exceeds the cost of decommissioning as each nuclear unit is decommissioned?

A. I don't know that level of detail.

MR. ROBERTSON: Okay. I understand the hearing examiners, I'm not going to get an argument, I have substantial amount of cross left here. I've tried to edit some out. I would like to continue to cross, but I understand that I'm not going to be allowed to do that, so I want to make a record that I believe that my inability to finish the cross is prejudice to the position of my clients. Thank you.

MR. ROSENBLUM: I will not have any cross.

JUDGE CASEY: Is there any other cross?

JUDGE HILLIARD: CUB?

MR. NORINGTON: No, I'm passing.

JUDGE CASEY: Just so the record is clear, that an estimate of cross was given, that estimate was a half hour. Mr. Robertson was given in excess of nearly 40 minutes for that cross. There was a proviso based on the answers, and the answers did not appear to be rambling or excessive. They were actually quite succinct compared to some of the answers that were given before. Mr. Hilliard.

MR. ROBERTSON: Can I make a statement, Mr. Examiner?

JUDGE HILLIARD: Sure.

MR. ROBERTSON: I don't disagree with the statements of the hearing examiner. This is an important case, there is no statutory time element for determination. This witness could come back tomorrow morning. I could be allowed to continue. I understand the reasons and I understand there has to be a procedure in these cases.

I'm not intending any disrespect but

given the nature of the case and the importance of the issues, I don't think it's appropriate to cut off their cross examinations, but I will abide by the ruling.

EXAMINATION

BY

JUDGE HILLIARD:

Q. Mr. Speck, in response to one of Mr. Robertson's questions you indicated that the Commission should take steps to protect ratepayers from Com Ed or Genco coming back and collecting this money at some later time. Can you suggest what steps those might be?

A. It might be requiring contractual language between Genco and Com Ed that would prohibit them essentially from collecting further decommissioning costs. I haven't thought about other possible options. There may be many other possible options, but I do believe it is important for the Commission to, in essence, enforce this agreement that Com Ed has entered into that they will not make further decommissions collections from ratepayers after 2006

because that is the essence of this proposal.

Q. In your experience in this industry, have there been any other agreements like that, are there any models that we might look at?

A. There is a somewhat different model. It was adopted by the Maryland Public Services Commission in connection with the Baltimore Gas and Electric transfer of the Calvert Cliffs plant. The details are very, very different, but they did enter binding orders that this would be the decommissioning costs collections, and there would be no more than this amount. And those collections could continue for quite some time, much longer than the provisions in Com Ed's proposal. But I think that might offer at least some model.

Q. In your direct testimony at Page 15, you state that Com Ed's proposed a 4.74 percent escalation rate for decommissioning cost for 1999 and 2000. But in your rebuttal testimony on Page 26 you state that Com Ed proposed rate was 4.73 percent. Do you know which was is correct?

A. Excuse me, I missed both of those page

citations.

Q. Page 15 in your direct.

A. Okay.

Q. And Page 26 in your rebuttal.

A. I don't know offhand, but I believe it was a fraction in between 4.73 and 4.74, so it depends on the rounding, and I just don't know which is the correct answer. I'm sure that can be provided.

Q. In Docket 99-0015 is it correct that Com Ed recommended an escalation factor of 4.73?

A. Yes, I believe that's right.

Q. And the 4.73 reflects an annual escalation rate of 10 percent for the low level waste disposal?

A. Yes, I believe that's right.

Q. Could you tell me what the 4.11 escalation rate in this proceeding is supposed to represent?

A. I wasn't responsible for that at all, and I understand that Mr. Berdell is in a position to testify about that. I don't think I have enough knowledge to testify as to exactly how it was done. I believe, though, that it was the escalation rate that would be necessary in order to have full

collections, and full decommissioning cost collections based on \$5.6 billion estimate through 2006.

So it represents essentially the risk that Com Ed -- or that Genco, rather, is assuming the difference between 4.73 percent and 4.11 percent. It's just a measure of that risk.

Q. What escalation rate do you believe is reasonable?

A. Based on the facts, I think an escalation rate of something like 7.8 percent is reasonable, and the reason for that is that the actual low level waste escalation was about 22.4 percent, not 10 percent. And if you use that number, the 22.4 percent, you get an escalation organization, overall escalation rate of 7.8 percent. I think that is a more likely outcome. I think that is what is likely to happen in the future or at least a very real possibility.

Q. On Page 15 of your direct testimony, you indicate that the escalation rate for decommissioning costs for '99 and 20000 should have

been more than 8 percent?

A. I modified that in my errata. I think about 8 percent, that's the 7.8 percent, 7.81 percent, I think that I was referring to earlier. The original number that had been proposed was in Com Ed's Rider 31 in 1999 was a little over 8 percent. But the actual number that was finally used was 7.81 percent.

Q. On Page 45 of your rebuttal, you discuss changes in decommission cost estimates. And you state that Com Ed's decommissioning cost estimates were 95 million per unit in '92?

A. That should be '82.

Q. Is that number based on site specific cost estimates?

A. No. It wasn't site specific at that point. Very few people were really doing site specific estimates in the early '80s.

Q. On Page 48 of your rebuttal, and this is a matter that Mr. Robertson discussed with you a little bit. You indicate that shortening the decommissioning period fewer years, but maintain the

same collection rate would certainly increase the risk for Genco; is that correct?

A. Yes.

Q. And why is that?

A. Because usually you would be taking out \$242 million in collections, but leaving the risk the same. And so the risk of underfunding at that point would be certainly greater, \$242 million greater because you will have provided that much fewer in ratepayer collections.

Q. The revised proposal, as I understand it, is that Com Ed would not want to collect the 120 million in years five and six of the agreement unless they were purchasing power from Genco?

A. Right.

Q. But the agreement doesn't seem to indicate, or the proposal doesn't seem to indicate how much power they would be proposing to purchase. In the event that the amount of power that Com Ed purchased was 1 percent of the -- some minimal percent average of the amount that customers in their service area needed, do you think it appropriate to scale down

the decommissioning collections from the ratepayers in those years?

A. Well, my understanding of the power purchase agreement, and again I read it just like anyone else, but my understanding is that it is basically an all or nothing kind of purchase. It is to purchase all of the power for the nuclear units in 2005 and 2006 at an agreed upon price or there is no agreed upon price, and you don't purchase anything.

Now, I really hadn't considered the possibility that some portion of the output of the nuclear plants might be purchased by Com Ed, that kind of scale and arrangement might make some sense, I don't know.

JUDGE HILLIARD: Mr. Robertson?

MR. ROBERTSON: Yes, sir.

JUDGE HILLIARD: We have a proposal to make here. Can you estimate how much time it would take you to finish your cross examination?

MR. ROBERTSON: If you give me a couple of minutes to pick through the questions, part of my problem is I wanted to edit out what I was trying to

do and read through it. If you give me a couple of minutes to read through I can let you know.

JUDGE CASEY: We are going to go off the record at this time.

(Whereupon, there was an off-the-record discussion.)

CONTINUED CROSS EXAMINATION

BY

MR. ROBERTSON:

Q. If you go to Page 3 of your rebuttal testimony, you state that -- I'm sorry it's Page 3 of your direct. You state that the Com Ed proposal eliminates the substantial risk of cost increases for Com Ed customers, is that correct, in your description here of the benefits of proposal?

A. Which line did you say?

Q. Well, let me ask it this way, is that one of the benefits of the proposal?

A. Is what one of the benefits?

Q. The protection of ratepayers from the substantial possibility of cost increases at Lines 3 and 4?

A. Decommissioning cost increases, yes.

Q. Now, you describe some of those risk of cost increases at Page 8 of your direct testimony; is that correct?

A. I don't know that I describe the specific risks there, but I began to introduce that issue there, yes.

A. Now, you've already stated that these risks are a cost in addition to the \$1 billion; is that correct.

A. Yes.

Q. Now, is there a range of costs associated with these risks that you've reviewed?

A. I have not attempted to quantify them for the reasons I have stated earlier.

Q. In order to determine whether or not Genco would find this financially acceptable, wouldn't one have to note what the dollar value of those risks were?

A. I don't think so because I don't believe it's possible to place a definitive dollar value on them and they have to be valued more qualitatively

than quantitatively.

Q. So you are saying Genco is accepting a financial risk into infinite without trying to measure the dollar value of that risk?

A. I don't know whether they have tried to measure it or not.

Q. You are saying for your purposes it wasn't necessary for you to do so to arrive at that conclusion; is that correct?

A. That's correct.

Q. Now, could you turn to Page 2, I believe of your rebuttal, Lines 15 and 16?

A. Yes.

Q. Isn't it true that the immediate effect of Com Ed's proposal if it's adopted in this proceeding is an increase in the decommissioning charges paid by customer?

A. Yes.

Q. Now, Page 3 of your rebuttal, Lines 14 to 18. You suggest that an economic regulator should act to insure adequate collections of decommissioning charges in order no insure that the

plants can be decommissioned safely and completely;
is that correct?

A. Yes.

Q. Now, would one of the ways to insure that be
to keep the plants in a regulated status?

A. That would be one mechanism to do it. I
don't think that's as advantageous to ratepayers.

Q. Would your statement apply to a generating
plant operated and built by an unregulated entity, a
nuclear generating plant?

A. What do you mean would my statement apply?

Q. Well, would it be true to say that in an
unregulated environment, in a purely competitive
environment, there would be no economic regulator to
insure that this was done?

A. Correct. And the NRC under those
circumstances has a different mechanism for
requiring financial assurance. It has to be in
essence a bond that has to be placed. So if there
is not a mechanism for collecting from ratepayer,
the NRC requires a different kind of financial
assurance, qualitative and different.

Q. Now, Page 6 of your rebuttal. You reference at Line 8, I believe, Com Ed's revised proposal; is that correct?

A. Yes.

Q. When you say revised proposal, are you talking simply about the revisions that Com Ed made in its rebuttal testimony, or are you talking about Com Ed's proposal including the revisions?

A. Com Ed's proposal including the revisions in Mr. Berdell's rebuttal testimony.

Q. You are not suggesting that under the revised proposal the customers would lose the benefit that Com Ed describes of \$1 billion in savings of decommissioning costs, are you?

A. No, they would still have that same benefit. Plus additional benefits.

MR. ROBERTSON: I'm done, but I move to strike the last part of the answer as nonresponsive.

JUDGE CASEY: Could you please read back the last question with the last answer.

(Whereupon, the record
was read, as requested.)

JUDGE CASEY: The motion to strike the additional after no -- where it starts about the additional, that's stricken.

MR. ROBERTSON: For the record, I would like to thank the hearing examiners for their indulgence.

JUDGE CASEY: You are welcome, Mr. Robertson.
Redirect.

MR. ROGERS: No redirect.

JUDGE CASEY: Well, then this matter is continued to tomorrow morning at 9:00 a.m.