

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GENERAL PUBLIC UTILITIES CORPORATION, :
JERSEY CENTRAL POWER & LIGHT COMPANY, :
METROPOLITAN EDISON COMPANY and :
PENNSYLVANIA ELECTRIC COMPANY, :

Plaintiffs, :

-against- :

THE BABCOCK & WILCOX COMPANY and :
J. RAY McDERMOTT & CO., INC., :

Defendants. :

-----x

Continued deposition of GERALD CHARNOFF,
taken by defendants pursuant to adjournment,
at the offices of Davis, Polk & Wardell, Esqs.,
1575 I Street N.W., Washington, D.C. 20005,
on Tuesday, June 23, 1981, at 9:25 o'clock in
the forenoon, before Nancy A. Rudolph, a
Notary Public within and for the State of New
York.



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* * *

G E R A L D C H A R N O F F, having been

previously duly sworn, resumed and testified

further as follows:

EXAMINATION (continued)

BY MR. WISE:

Q Mr. Charnoff, yesterday we went through a number of documents, including several drafts of the contract. I have put before you this morning Plaintiffs' Exhibit 178, which is the proposal that

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2 B&W submitted to Metropolitan Edison; B&W Exhibit 88,
3 which is a December 1966 draft of the contract which
4 I believe you testified you prepared; B&W Exhibit 89,
5 which is a letter of December 29, 1966 with an
6 attached draft of the contract, which I believe you
7 also testified you prepared. The draft is dated
8 December 27, 1966. B&W Exhibit 91, which is a draft
9 of the contract dated January 27, 1967, and includes
10 various underlinings and bracketings with respect to
11 material that was added or deleted. I believe you
12 also testified you prepared that. Next is B&W Exhibit
13 92, a copy of the draft with the initials GFT on the
14 first page, and a notation "B&W Redraft 2/14/67."
15 Next, Plaintiffs' Exhibit 192, a draft dated March
16 24, 1967. And I believe that is all we discussed
17 yesterday.

18 I think we should also, to make things
19 complete, give you a copy of the final contract as
20 executed, Plaintiffs' Exhibit 193, and then you will
21 have, I think, a full set.

22 THE WITNESS: Off the record.

23 (Discussion off the record.)

24 MR. WISE: We have now given the witness
25 a copy of Exhibit 193, which has been identified

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2 in previous depositions as the execution copy
3 of the contract and it bears signatures at the
4 end. We will also put before the witness
5 Plaintiffs' Exhibit 190, which was a file
6 memorandum prepared by B&W, dated April 12, 1967,
7 concerning the negotiations.

8 Q The first thing I would like you to look
9 at this morning, Mr. Charnoff, is in Plaintiffs'
10 Exhibit 178, and if you would turn to page 15-12.

11 MR. KLINGSBERG: What exhibit is it?

12 MR. WISE: This is Exhibit 178, and we have
13 removed from the exhibit the general conditions
14 section which is numbered 15.0, and in specific
15 I am asking the witness to look at page 15-12
16 of that section and I would like him to look
17 at the paragraph numbered 15.24.4, which is
18 entitled "Contamination."

19 Q If you would also, Mr. Charnoff, open
20 Exhibit 88, which is the December 1966 draft, to the
21 page No. W 00087, which is Article V B(2), and in
22 specific on that page I would like you to look at the
23 subparagraph noted (e).

24 Would you compare 15.24.4 in the B&W
25 proposal with subparagraph (e) in your first draft

1
2 of December 1966 and tell us whether that refreshes
3 your recollection in any way as to the source of
4 subparagraph (e) in your first draft?

5 MR. KLINGSBERG: Take your time and look
6 at whatever you want to look at.

7 A I am having trouble reading the top three lines
8 of 00088. Could you read your copy to me?

9 Q Yes. Beginning at the top, "area necessary
10 to facilitate such repair or replacement and shall
11 reduce the radiation levels in such areas and from
12 such parts to permissible levels."

13 A I am sorry, what was your question?

14 Q Comparing the two, can you tell us the
15 derivation of subparagraph (e) in your first draft?

16 A Well, as I testified yesterday, when I prepared
17 this first draft, the first thing I did was look at
18 the proposed general conditions in section 15.0.
19 I also looked at various types of conditions or
20 parallel conditions, if you will, that were involved
21 in the other proposals. I believe I looked at the
22 Oyster Creek contract between General Electric and
23 Jersey Central Power & Light Company, which is a
24 sister company of Metropolitan Edison, and based upon
25 all of that, I organized the contract structure, and

specifically in looking at these warranty provisions to which I gave a lot of attention, I looked at the conditions of the warranties, and I am sure that an input into paragraph or subparagraph (e) on page 00087 had as part of its input paragraph 15.24.4 of the B&W proposal.

The only other thing that I should mention is that in the course of the negotiations with B&W, I know we focused on this type of issue and I don't remember whether we did that before or after I talked about the -- before or after I prepared this first draft. I don't recall whether we did it in the preaward discussions or -- and after the drafting of the contract or only after the drafting of the contract.

Q What do you recall of those specific discussions?

A I think I mentioned yesterday that we had, if my memory is correct, repeated discussions with B&W with respect to making the warranty more meaningful by placing on B&W a greater obligation than simply the repair or replacement of the defective part, but also to pick up some of the costs associated with the breach of warranty.

Q What was the result of those discussions?

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A Well, the result of the discussions is whatever appears in the final contract.

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Q Let's go forward then comparing the

language. After comparing the B&W proposal, Plaintiffs'

Exhibit 178, with B&W Exhibit 88, subparagraph (e)

on page W 00087, do you have any recollection of where

the first sentence of subparagraph (e) came from?

And I note, just comparing it, that it is not the same

as the first sentence in the B&W proposal.

A I can't give you a specific derivation for it.

It might have been just my own stylistic rewrite of

the B&W proposal for purposes of this first draft, and

it may have been from some other proposal. I just

don't know.

Q Did you have any objection to the language

proposed by B&W in 15.24.4 in the first sentence?

A Did I have any?

Q If you can recall now.

A At the time I drafted this first draft?

Q Yes.

A I have no recollection.

Q You have no recollection of the reason why

that language was not used rather than the language

that you used in the first sentence?

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2 A I can't recall a specific reason for that, no.

3

Q Do you agree with me that the remainder
4 of the paragraph, with the exception of the last
5 five or six words, is identical with the remainder of
6 15.24.4 in the B&W proposal?

7

A Well, if you want me to read it word by word
8 with you, I am sure -- I don't want to quarrel or
9 disagree or agree with you. I am satisfied that if
10 you think it is the same, that is fine, and if you
11 would like me to read it word for word, I would be
12 glad to do that.

13

Q I don't think it is necessary to read it
14 word for word. What I would like to do is help
15 refresh your recollection as to how we can put this
16 together and where various things came from.

17

A I don't have any doubt that one of the documents
18 was part 15 of the proposal, a very significant input
19 document.

20

Q Now, if you would look at Exhibit 89,
21 leaving Exhibit 88 open to that section, and in Exhibit
22 89, which is your draft of December 29, 1966, if you
23 would look at page 24 of the draft. I believe, again,
24 without having you read it word for word, that
25 subparagraph (e) in Exhibit 89 is identical word for

1 word with subparagraph (e) in B&W Exhibit 88.

2 I take it you don't recall any changes or
3 any discussions with anyone between drafting Exhibit
4 88 and drafting Exhibit B&W 89 concerning subparagraph
5 (e)?

6 A I don't recall any discussion at one particular
7 point in time or another, no.

8 Q Let me next ask you to look at the January
9 27, 1967 draft, B&W Exhibit 91, and if you would turn
10 to page 25 of the draft and look at subparagraph (e),
11 you will note that in that subparagraph certain
12 language has been added and underscored; other
13 language has been bracketed, presumably to note its
14 proposed deletion.

15 Let me first say that having compared
16 subparagraph (e) in the January 27th draft to
17 subparagraph (e) in the December 29th draft, I can
18 state for you that the underlinings and bracketings
19 accurately reflect the changes from the December 29th
20 draft to the January 27th draft.

21 A That is not true.

22 Q All right, where do you find a difference?

23 A The term "shall" on the first line of (e) in
24 Exhibit 91 should not have been underscored.
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Q With the exception of the underscoring of the word "shall," the underlinings and bracketings accurately reflect the changes from the December 29th draft.

Do you recall the reasons and any of the discussions that surrounded the change from the December 29th draft in subparagraph (e) to the January 27th draft?

A Yes. I don't know that I could relate it specifically to the drafts, but I think I can. I prepared these drafts and spent some time after preparing them discussing them with Jim Pickard, and I know that we either did that in a large meeting with everybody present or we did it at a number of private meetings here in Washington where we talked about making warranties more meaningful, and I know that this concept came out of my discussions with Jim Pickard. I cannot tell you whether I raised it or he raised it, but I know that he and I together were the ones who developed this concept.

Q Do you recall whether this concept was discussed with B&W prior to it being inserted in the draft? And by "this concept," we are referring to the addition of a clause which states: "Met Ed shall

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share equally with B&W the cost of decontaminating..."

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MR. KLINGSBERG: That is a very complicated question. I want to hear the question back.

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(Question read.)

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A The answer is no.

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Q You don't recall one way or the other?

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A That's correct.

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Q Would you look next at Exhibit 92, which is the copy of the draft marked B&W Redraft, February 14, 1967, and turn to page W 00297. On that page the language of subparagraph (e) appears in the original typewritten form exactly as it appeared on the January 27, 1967 draft, Exhibit 91, except certain portions have been typed over, and following that it appears that someone has in pencil or pen marked out various sections.

Are you familiar with who did the marking on subparagraph (e)?

A The typing or the handwritten marking?

Q Either, as opposed to the underlying typewritten form which is identical to Exhibit 91, your January 27, 1967 draft.

A All the typewritten changes of deletions and changes were B&W's.

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Q Which deletions did B&W make on subparagraph (e) in Exhibit 92?

A They deleted the insert that we had put in in Exhibit 91 on line 1 and line 2, I guess.

Q And had they added anything?

A Yes.

Q What did they add?

A They went back to their original proposal.

Q Which was what?

A To insert the terms "at Met Ed's own expense."

Q Did that also require the change in subparagraph (3)(c) on the following page, W 00298?

A I am sorry, what reference was that?

Yes, that looks like a consequential change to follow the change on W 00297 that we were discussing.

Q That eliminated the phrase "and its share of the cost of the related decontamination" from subparagraph (c); is that correct?

A It appears to be.

Q Would you next look at Plaintiffs' Exhibit 192, which is the March 24, 1967 draft, and look at page 28 and 29 of that draft and tell us if you agree with my reading that subparagraph (e) on pages 28 and 29 appears to be a retyped version of subparagraph

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2 (e) in the February 14, 1967 draft incorporating the
3 handwritten and typed changes that appear on the face
4 of Exhibit 92?

5 A It certainly appears to be correct.

6 Q Now, after having gone through this
7 evolution of this clause, can you recollect any of the
8 specific conversations you had with anybody from B&W
9 concerning the proposal for a sharing of decontamination
10 costs and the elimination of that proposal and
11 reversion back to the original language?

12 MR. KLINGSBERG: I object to the form of
13 the question.

14 MR. WISE: You may go ahead and answer it.

15 A The question was, can I recall any conversations?

16 Q You had earlier testified that you and
17 Mr. Pickard met and that you had made certain attempts
18 to make the warranty, I believe you used the words
19 more meaningful. What I would like to know now is,
20 aside from that general comment, does looking at this
21 evolution in these various drafts enable you to tell
22 us about any specific conversations you had regarding
23 these specific changes that we have?

24 A Specific conversations with B&W?

25 Q Yes.

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A Yes, I can remember confronting Mr. Beisel and Mr. Favret on this issue, and they dug their heels in and said they didn't want to do it.

Q Is that the extent of your recollection of that conversation?

A I know that it was a much more extended conversation, but I can't recall words that either party said.

Q Do you remember in general what they said, other than they wouldn't go along with what you had proposed?

A No, I don't think so.

Q Did they insist that Met Ed bear the full decontamination cost under the warranty?

A Yes, that was their position, that under the warranty they felt they should only have to do what they were proposing to do in the way of repair or replacement.

Q Now, let me refer you back to the February 14th draft which is Exhibit 92. If you would look at the performance warranty, and in particular at the remedy section which occurs at pages 22 and 23 of that draft. On that page there is a subparagraph (b) and next to it, just to the left, is an asterisk

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2 which someone has crossed out, and looking down at the
3 asterisk --

4 A 00293, am I on the next page?

5 Q No, the next page, 00294, and you see
6 subparagraph (b) there.

7 A Yes.

8 Q And immediately to the left of the (b)
9 is an asterisk which someone has in hardwriting
10 marked out, and the asterisk, the footnote at the
11 bottom of the page, says: "B&W Addition," and that
12 is underscored.

13 A Yes.

14 Q Do you recall B&W requesting the addition
15 of subparagraph (b) to the performance warranty?

16 A I have no recollection of that one way or the
17 other.

18 Q If you would look at the next exhibit,
19 which is Plaintiffs' Exhibit 192, the March 24th
20 draft, and specifically again refer to the performance
21 warranties and the remedy provisions with respect to
22 them which appears at page 26, carries over onto
23 page 27 of the draft, will you agree with me that the
24 addition on the February 14, 1967 draft was
25 incorporated into the March 24, 1967 draft, Plaintiffs'

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2 Exhibit 192?

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A If that was an addition, and I assume it was,
4 it appears to be the same paragraph, yes.

5

Q Do you recall any discussions as to why
6 that addition was made?

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A No. The issues would be the same, but I don't
8 know why it was made. I don't know why it was not
9 even in the earlier drafts, if it was not.

10

Q Well, we can help you on that one. If
11 you would look at B&W 91, which is the January 27th
12 draft, and again to the remedy section with respect
13 to the performance warranties which appears at pages
14 22 and 23, I believe you will find that there is no
15 decontamination provision under the remedy section.

16

A Right.

17

Q So just let me make sure we have got the
18 record clear.

19

After looking at the January 27th draft,
20 the February 14th draft, and the March 24th draft,
21 you are not able to tell us of any conversations or
22 any recollections that you have of discussions
23 concerning the insertion into the February 14th draft
24 by B&W of a decontamination clause in connection with
25 the performance warranty?

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2 A I assume there were, but I don't have any
3 recollection.

4 Q Was it your understanding at the time that
5 these negotiations occurred that the contract as
6 finally negotiated provided that in the event of any
7 breach of warranty, Met Ed would bear the expense of
8 decontamination?

9 MR. KLINGSBERG: Could I have that back,
10 please.

11 (Question read.)

12 A I have no recollection of that at all. As
13 a matter of fact, I am curious as to whether the final
14 contract contains the provisions that we looked at.
15 It may or may not, but I really don't have any
16 independent recollection of that.

17 Q Well, let me show you Plaintiffs' Exhibit
18 193. We can at least satisfy your curiosity on that
19 point. First looking at the performance warranties
20 and the remedy sections therefor, if you will turn to
21 page 26 of the executed contract, you will see
22 subparagraph (b). If you like, you may compare that
23 with subparagraph (b) in the March 24, 1967 draft.
24 I believe you will find they are identical.

25 A O.K.

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Q With respect to the design, workmanship and materials warranty, you may turn to page 28 and it carries over onto page 29. You will find subparagraph (e), which I believe is also identical to the March 24, 1967 draft.

A Thank you.

Q So after looking at the final executed contract, does that in any way help you to answer my earlier question, whether you had any understanding at the time this was negotiated and executed as to whether for breach of warranty Met Ed was required to bear the expense of any decontamination?

A I really have no generalized recollection other than what I see in this final executed document, and that tells me that for those specific warranties, those clauses apply.

Q Were there any other warranties in this contract other than those contained in Article V?

A I would have to look at them. I doubt it, but I don't remember.

Q Well, I don't think you need to take the time now. You have no recollection of any such warranties?

A That's correct.

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2 MR. KLINGSBERG: You are talking about
3 expressed warranties?

4 MR. WISE: I am talking about warranties.

5 MR. KLINGSBERG: I object to that question.

6 MR. WISE: The question has been answered.

7 MR. KLINGSBERG: What?

8 MR. WISE: I said the question has been
9 answered. You may have your objection.

10 MR. KLINGSBERG: I assume you are not
11 having any difficulty with the fact that my
12 objection and the answer came more or less at
13 the same time so it was registered a second
14 later.

15 Q Let me ask you to look at Exhibit 89 now,
16 which is your December 29, 1966 draft, and in particular
17 I would like you to look again at the remedy section
18 under the design, workmanship and materials warranty
19 section at page 26, subparagraph (c).

20 Do you recall putting that section in your
21 draft?

22 A I have no recollection of putting it in.

23 Q Do you have any recollection as to what
24 you meant by the first sentence of that subparagraph
25 (c)?

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A I have no recollection as to what I meant at the time I did whatever I did.

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Q Do you have any recollection of any conversations with anyone concerning the first sentence of subparagraph (c)?

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A No.

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Q Would you look now at the final executed contract, Plaintiffs' Exhibit 193, and turn to page 30. I believe that is the same subparagraph (c) that appears in your December 29, 1966 draft, although there are some changes to the second half of that clause. Would you look just at the first sentence of it and tell us if it is not identical to what you drafted on December 29, 1966.

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A It is not --

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MR. KLINGSBERG: Wait, wait.

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MR. WISE: If you are worried about who

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drafted what, I mean, I can change the question.

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MR. KLINGSBERG: Would you do that.

20

21

Q Would you tell us whether or not the provision in Plaintiffs' Exhibit 193, the final executed copy, is not the same as the first sentence in B&W Exhibit 89, the December 29, 1966 draft?

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A The two sentences appear to be identical except

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2 that in one case the term Babcock & Wilcox is spelled
3 out, and in the other it is B&W.

4 Q Would you next look at -- I put before you
5 Plaintiffs' Exhibit 178, which is the B&W proposal,
6 and I would like to refer you to part 15.14 which
7 appears at page 15-6 of the portion of Plaintiffs'
8 Exhibit 178 you have before you. That section is
9 entitled "Loss or Damage to Property and Injury to
10 Persons."

11 Would you put next to it Defendants'
12 Exhibit 88 and specifically page W 00093, Defendants'
13 Exhibit 88 being your draft of December 1966, first
14 draft of December 1966 --

15 MR. KLINGSBERG: What page is that?

16 MR. WISE: W 00093.

17 Q Now, looking at subparagraph 4 that appears
18 on page W 00093 of your December first draft and
19 comparing it to the second paragraph of section 15.14
20 in the B&W proposal, is it correct that with the
21 exception of changing the words "purchaser and
22 company" into "Metropolitan Edison and Babcock &
23 Wilcox," respectively, the typewritten portion of your
24 December 1st draft is identical to the B&W proposal?

25 MR. KLINGSBERG: I might say that on all

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2 of these that in order to save time, we are not
3 stepping to actually do proofreading, but more or
4 less are accepting what you say, subject,
5 obviously, to checking it later on if there is
6 some error.

7 MR. WISE: That is acceptable.

8 A It appears to be the same, yes.

9 Q Did you understand what was meant by the
10 second paragraph in the B&W proposal, section 15.14?

11 A I hope I did.

12 Q What did you understand it meant?

13 A I have no idea. You are asking me now what
14 I understood it meant 14 years ago?

15 Q Yes.

16 A I have no idea.

17 Q Now, on Exhibit 88, your December first
18 draft, the last four and a half lines have been
19 stricken in hand and a handwritten insertion has been
20 made. I believe we went over yesterday what that read.
21 I think you read it into the record.

22 Do you recall your reason for striking
23 the last four and a half lines and making the
24 insertaion you did?

25 A Yes. I am sure I do recall it. Could we go

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2 through those words again -- I can't read it terribly
3 well -- I have on this copy again.

4 Q If you would look at Exhibit 89, which is
5 your December 29, 1966 draft, the next in order, and
6 turn to page 31, you will find the same subparagraph
7 4, I believe, which appears to be identical with that
8 subparagraph as it appears in the first December draft
9 except for the concluding lines which, upon my
10 comparison, appear to incorporate the handwritten
11 changes that appeared on the first December draft.

12 A O.K., I think I did testify to you yesterday --

13 MR. KLINGSBERG: That was asked and
14 answered yesterday.

15 A Yes. I could repeat it.

16 I was intent on, when I reviewed this first
17 draft that I prepared, to be sure that I was
18 discussing matters or limiting these kinds of
19 exculpatory causes, that I was limiting them to
20 matters relating to or arising out of this scope of
21 work that B&W was providing under this particular
22 contract, not under any other contract or independent
23 of these contracts.

24 Q Did you have any understanding at the
25 time that you struck the last several lines from the

1
2 B&W proposal as to the effect upon Met Ed's right to
3 recover in the event of a nuclear incident?

4 A You are talking about the deletion, not the
5 insertion?

6 MR. KLINGSBERG: There is no question yet.

7 THE WITNESS: Yes, he did. He asked a
8 question.

9 Q I am talking about looking at the B&W
10 proposal which contains language beginning "or
11 regardless of negligence when resulting in whole or
12 part, directly or indirectly, from nuclear reaction,
13 nuclear radiation or radioactivity, contamination,
14 whether controlled or uncontrolled." That language
15 was eliminated in your first December 1966 draft
16 in handwriting.

17 A Yes.

18 Q And it appears to be out of the December
19 29, 1966 draft as well; correct?

20 A Correct.

21 Q And my question is: did you have any
22 understanding at the time as to what the elimination
23 of that language from the draft would do in the event
24 of a nuclear incident?

25 MR. KLINGSBERG: Wait a second. You are

1
2 now talking about the striking of the language
3 in Exhibit 178, regardless of negligence
4 resulting in whole or in part, et cetera, as
5 distinguished from what we were talking about
6 earlier, which was the substitution of some
7 different language about performance of the
8 contract, et cetera.

9 MR. WISE: That's correct. I am not
10 interested in the handwritten insertion. I am
11 interested in the handwritten deletion.

12 MR. KLINGSBERG: What was stricken out,
13 O.K.

14 Q Did you have any under understanding at
15 the time as to what the striking of that clause, what
16 change that would make in the operation of this
17 contract?

18 A Yes.

19 Q What was your understanding?

20 A I believe I struck it because I thought that
21 that was covered by the Price-Anderson Indemnification
22 Act and that it was unnecessary.

23 Q Now, if you would look at Exhibit 91,
24 B&W Exhibit 91, and turn to -- the next in order,
25 that is the January 1967 draft. Turn to page 31 of

1
2 that draft. I believe you will agree that with the
3 exception of the description or wording used to describe
4 the facilities which apparently changed slightly,
5 that the paragraph is otherwise identical to the
6 December 29, 1966 draft.

7 A Generally that is correct.

8 Q Now, if you would look at B&W Exhibit 92,
9 turn to page 31, B&W Exhibit 92 being the February
10 14, 1967 draft which contained B&W's comments on the
11 January 27th draft.

12 A Page what?

13 Q Page 31.

14 MR. KLINGSBERG: This is 92. Is there
15 a W number?

16 MR. WISE: Yes, it is W 00303. Up at the
17 top it is page 31.

18 A The W again, means what?

19 MR. KLINGSBERG: It means it comes from
20 your files.

21 THE WITNESS: Now, what am I supposed
22 to be examining?

23 Q If you would look at subparagraph (4) on
24 that page and compare it to subparagraph (4) on the
25 earlier draft, the January 27th draft, and tell us

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2 if the language which appears at the bottom of that
3 subparagraph and is double underscored, if you recall
4 where that language came from.

5 MR. KLINGSBERG: Compare page 31 with
6 which?

7 MR. WISE: Compare page 31 of the February
8 14th draft with page 31 of the January 27th
9 draft.

10 MR. KLINGSBERG: What exhibit is that?

11 MR. WISE: The January 27th draft is Exhibit
12 91, B&W Exhibit 91. The February 14th draft
13 is B&W Exhibit 92.

14 MR. KLINGSBERG: What page?

15 THE WITNESS: What page on Exhibit 91?

16 MR. WISE: On Exhibit 91 it is page 31.
17 On Exhibit 92 it is also page 31. It makes it
18 easy.

19 A What was your question?

20 Q Have you had a chance to compare those?

21 A The paragraphs?

22 Q Yes.

23 A Yes.

24 Q You will note that on Exhibit 92, the
25 February 14th draft, someone has added four lines and

1
2 they are each double underscored.

3 My question is: do you have any
4 recollection of who added those lines?

5 A I don't have a specific recollection. My
6 understanding is these were added by B&W in the course
7 of their comments on my draft.

8 Q Do you recognize the handwriting
9 immediately to the left of the addition?

10 A Yes, that is mine.

11 Q What does it say?

12 A "Delete because of NELIA and P-A and this is so
13 broad it would apply to fuel fab at B&W site." And
14 that confirms what I recalled just a moment ago, that
15 the reason I had deleted this language from the
16 original B&W proposal is that I thought it was
17 unnecessary because of the third-party liability
18 insurance that is covered by the Price-Anderson
19 Indemnification Act, and NELIA stands for the Nuclear
20 Energy Liability Insurance Association third-party
21 liability insurance that provided the first cover of,
22 I think, at the time \$60 million. And then it was
23 followed by Price-Anderson above that until \$560
24 million. That is the comment on the left.

25 The second part of that comment which

1
2 says "this is so broad it would apply to fuel
3 fabrication at a B&W site" meant to say this would
4 apply even to negligence or happenstance involving
5 a nuclear release at a Babcock & Wilcox site. And
6 you will notice that there is a handwritten insert
7 on the next to the last line of that paragraph which
8 appears to be in Fox Trowbridge's handwriting which
9 was intended to reply to my concern about the fact that
10 this was so broad as to cover fuel fabrication
11 incidents at a B&W site.

12 Fox apparently suggested inserting the
13 term "resulting from incidents at the site."

14 Q Let me ask you first with respect to your
15 comment about the clause being so broad it would
16 apply to fuel fab situations at a B&W site. Did you
17 have in mind damage to property that belonged to
18 B&W at that site?

19 A I don't honestly know. Again, as I think I
20 told you, I was trying to limit all of these kinds of
21 clauses to activities provided or services provided
22 by Babcock & Wilcox in connection with this particular
23 contract, and so I was concerned -- and I am sure my
24 memory is correct on this -- that the way this would
25 have read is there would have been some sort of

1
2 indemnification and hold harmless by Met Ed for,
3 I guess, any liability B&W would have to anybody else,
4 I guess, for an incident at its own site, whether or
5 not that was related indeed to fuel fabrication for
6 this particular plant, and I felt that that was too
7 broad. That was the general approach I had.

8 Q Isn't it correct that at the time you
9 understood that under Price-Anderson Met Ed would be
10 protected by insurance and indemnification and a cap
11 from liability to third parties?

12 A Met Ed would be protected -- let me say that I
13 don't know that I can say. I don't know what I
14 thought at that time on that.

15 (Record read.)

16 A I know that I knew Price-Anderson and what it
17 provided for, and I know that I knew that Met Ed wasn't
18 protected by Price-Anderson for incidents at its site
19 or in the course of transportation to and from that
20 site. I also know that I knew that Met Ed was not
21 protected under Price-Anderson for an incident at a
22 fuel fabrication site, whether or not it included or
23 involved Met Ed fuel.

24 Q Do you have any recollection as to why
25 you crossed out your handwritten notation at the

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left margin?

A I can't tell you that I crossed it out.

Q Do you have any information as to who crossed it out or as to why?

A I have no knowledge as to who crossed it out. I can't identify that X.

Q With respect to the handwritten notation in the right-hand margin which reads "hold for INS decision" --

A To me it says "discussion" and that is probably Fox Trowbridge's handwriting.

Q Do you have any information as to what that notation refers to?

A Yes. At one point or another, I don't know whether Mr. Mestres was at whatever meeting this was discussed at, but I do recall that B&W wanted to have a discussion on all insurance and liability questions later when Mr. Mestres was able to be prepared to deal with these matters, and so we took some of these matters and said we will discuss them later.

Q Do you recall whether that discussion ever took place?

A I am not sure.

Q Would you look now --

1

2 A I believe it did.

3 Q You believe it did?

4 A Yes. I can remember going up to Reading for
5 a meeting on that issue.

6 Q Do you recall who was there?

7 A No, but I am sure Mr. Mestres must have been
8 there, but I can't recall.

9 Q Do you recall what happened during the
10 meeting?

11 A No.

12 Q Do you recall what was said?

13 A No.

14 Q Do you recall what subjects were discussed?

15 A I don't have any specific recollection of what
16 was discussed, no.

17 Q Just so that we complete the chronology,
18 would you look at Plaintiffs' Exhibit 192, which is
19 the March 24th draft. Would you take a look at page
20 34.

21 A Wait a minute. I am not with you. 192?

22 Q That's right. Take a look at page 34,
23 subparagraph (4) which carries over onto page 35,
24 and again subject to Mr. Klingsberg checking up on
25 me, would you agree that the language in the March

1
2 24th draft is the same as that that appears in the
3 February 14th draft, incorporating the deletions
4 and additions that are marked on the February 14th
5 draft, including Mr. Trowbridge's handwritten comment,
6 "resulting from incidents at the site"?

7 A That appears to be correct.

8 Q And to finish it out, if you would briefly
9 look at Plaintiffs' Exhibit 193, which is the executed
10 contract, and again subject to Mr. Klingsberg having
11 an opportunity to proofread one against the other,
12 would you agree that the language of subparagraph (4)
13 appearing on page 34, carrying over onto page 35,
14 is identical to the March 24, 1967 draft?

15 A It appears to be.

16 (Whereupon, a recess was taken.)

17 BY MR. WISE:

18 Q Mr. Charnoff, looking at Exhibit 92,
19 which was the February 14th draft with B&W's comments,
20 and specifically looking at the B&W addition of the
21 final four lines that are underscored, just so the
22 record is clear, do you recall any discussions with
23 anybody at B&W concerning why they wished to insert
24 that language?

25 A I can remember saying that I thought it

1
2 superfluous, and I remember, because of the Price-
3 Anderson Act provisions, and I can remember people
4 from B&W apparently wanting it, and my feeling, if
5 you insist on it, fine.

6 There were also some discussions about
7 concern with regard to the Price-Anderson Act not
8 being renewed because the Price-Anderson Act was
9 originally enacted in '57 for a ten-year period. Then
10 it was renewed again in '65 or '66 for another ten-
11 year period, and some people in the industry, including
12 B&W people that were at those meetings, raised
13 questions of "what happens if Price-Anderson is not
14 renewed?" And I pointed out to them that in the
15 early 1960's there was an amendment to Price-Anderson
16 that assured utilities and vendors that if they had
17 received a construction permit, and a part or a
18 condition of the construction permit was the Price-
19 Anderson agreement, which was provided by law and
20 regulation, that that went for the life of the plant
21 even if Price-Anderson was not later renewed. I
22 remember having that discussion with Favret and
23 Beisel, and I think with Mestres.

24 Nevertheless, I think they were
25 uncomfortable with the possibility of Price-Anderson

1
2 not being renewed or some legislative change, so it
3 was in that concept that they kept changing. I
4 recall my attitude: it was no skin off my back; it
5 is just unnecessary.

6 Q Do you have any recollection of anyone
7 from B&W indicating that they thought the language
8 was broader than Price-Anderson?

9 A No, I don't think so.

10 Q Do you have any recollection of any
11 discussion of subparagraph (4) in any of the forms
12 as it appears in any of the contracts we looked at
13 this morning with B&W concerning whether the clause
14 as a whole covered things beyond the Price-Anderson
15 Act?

16 A Oh, I think we would agree that the first part
17 is not -- does not relate to Price-Anderson. I think
18 we had no problem for that. That was for other than
19 nuclear risks. It was the latter part that I
20 understood, and I think they understood, to be
21 concerned with third-party liability Price-Anderson
22 type problems. So that the clause taken as a whole,
23 and it does go beyond Price-Anderson insofar as it
24 goes to non-nuclear risks, as you might call them.

25 Incidentally, as I look at this X on my

1
2 handwritten note and the arrow there, as I told you,
3 I can't recall who X'd it out, but I am sure it was
4 X'd out so that it wouldn't be typed in as a result
5 of that arrow there when the thing was retyped;
6 or, I am pretty sure that is what it must have been
7 as to why it was X'd.

8 Q But going back now to the language of the
9 paragraph as a whole, subparagraph (4), do you recall
10 any discussion as to whether or not the paragraph
11 related to things other than third-party liability?

12 MR. KLINGSBERG: Wait a second. Could
13 I have that question read back.

14 (Question read.)

15 MR. KLINGSBERG: I think that was just
16 answered. If you want it again --

17 THE WITNESS: No, no, it was a different
18 question before.

19 A The answer to your question is no.

20 Q Still looking at B&W Exhibit 92,
21 subparagraph (4), looking down at the fifth line down
22 from the top, the phrase beginning "loss of or damage
23 to any property located on or off the site whenever
24 or wherever occurring," and it continues, did you
25 understand the words "any property" as used in that

1
2 phrase to refer only to third-party property?

3 A I just don't recall any discussion of that
4 subject and I am having a hard time understanding what
5 I thought at the time of those particular words.

6 Q Did you understand the words "on or off
7 the site" at the time it was incorporated in this
8 draft?

9 A I am sure I understood the words at the time.

10 Q But you have no recollection of it now?

11 A I have no recollection of discussions on it.
12 I am thinking of it. I can certainly give you a
13 judgment now as to what it might have meant, but I
14 can't give you any recollection today of what I
15 thought then.

16 Q I would like you to look at your December
17 29, 1966 draft, Exhibit 89, and turn, if you will,
18 to page 29 of the draft attached to the exhibit. At
19 the top of that page is the heading for Article VII
20 which is entitled "Indemnity and Insurance," and
21 beneath that, part A. entitled "Metropolitan Edison."

22 Would you look at subparagraph (1) and
23 tell us what your recollection is of that that was
24 intended to cover.

25 MR. KLINGSBERG: You are asking for his

recollection of his understanding?

MR. WISE: Yes, a recollection of his understanding.

A I can't give you a recollection of my understanding.

Q Do you have any recollection as to whether or not the insurance to be provided under that subparagraph was to cover Met Ed property?

A I am having trouble having a recollection. I am being affected really by a review of the words as distinguished from having any recollection of discussion.

Q Putting aside recollection of discussion, all I want to do is find out whether you can remember anything about paragraph (1), subparagraph (1) under Article VII, and specifically whether that clause was designed to require insurance under certain circumstances from Met Ed property; that is all I want to know.

A The reason I am having trouble with that, I am influenced by the words "until the equipment is finally accepted" and I don't have any recollection as to whether that meant Met Ed property or property of the supplier prior to it becoming Met Ed property,

1
2 and I have no recollection of that.

3 Q Do you have any recollection of the
4 considerations that went into drafting this particular
5 subparagraph?

6 A All I remember in connection with this is a
7 meeting or meetings where Ray Wirtz, I think his name
8 was, was the insurance manager, came down to talk to
9 me about conventional insurance, and I remember
10 discussions with him and I think with B&W, but I
11 can't relate it specifically to this particular
12 paragraph as distinguished from this general section.

13 Q Was this paragraph intended to cover
14 property on site?

15 MR. KLINGSBERG: Again, when you say
16 "intended," this comes from, if you trace it
17 back, I believe, to the B&W draft and B&W
18 language, so when you ask, "was this intended,"
19 I assume you are saying his understanding.

20 MR. WISE: He also included it in his
21 first and second draft and these are drafts
22 that didn't even go to B&W.

23 A Your question was: was it intended to apply
24 to property on site? Was that your question?

25 Q Yes.

1
2 A I really have no recollection of that because
3 I don't remember whether risk of loss passed when the
4 property arrived on site or sooner. I really have no
5 recollection of that.

6 Q Would you look at page 17 of the contract
7 draft that you prepared, the December 29th draft,
8 Exhibit 89. On that page I believe there is a
9 subsection titled "B. Risk of Loss." Would you look
10 at subparagraph (1) which reads: "Title to the
11 equipment and systems supplied by Babcock & Wilcox,
12 and risk of loss thereof shall pass to Metropolitan
13 Edison upon delivery of such equipment and systems
14 in an undamaged condition to the unloading point
15 at the Three Mile Island site or offshore near the
16 plant site if an offshore unloading point is designated
17 by Metropolitan Edison for barge delivery." There is
18 a final sentence which I don't believe is relevant.

19 Does that help refresh your recollection
20 as to when the risk of loss was to pass to Metropolitan
21 Edison under the draft that you prepared?

22 A Yes, and I remember it now that I look at that.
23 I remember trying to relate insurance obligations to
24 passage of title and if this says what it says, then
25 all I can do is give you a current interpretation of

1

2 that as it applies to page --

3 Q Page 29?

4 A Page 29.

5 Q The opening lines of subparagraph (1)
6 on page 29 concerning insurance are: "From the date
7 that risk of loss of or damage to the equipment and
8 systems furnished hereunder passes to Metropolitan
9 Edison..." and then the paragraph continues.

10 So again, are you able to tell us whether
11 or not subparagraph (1) was intended to cover Met Ed
12 property on site?

13 A I can give you a current interpretation, but
14 I can't go beyond what I just told you in terms of
15 recollections.

16 Q You have no recollection one way or the
17 other?

18 A I think I have told you. All that comes to mind
19 as I look at this is I remember trying to relate risk
20 of loss and insurance provisions and obligations
21 and then we can read these paragraphs and see what
22 they say, but I have no other recollection as such,
23 no.

24 Q Let me ask you to turn to the letter,
25 the cover letter that accompanied your December 29,

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1966 draft. The cover letter is from you to Mr.

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Neidig, and if you would look at the second page of

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your cover letter and the final paragraph at the

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bottom which is numbered 6, entitled "Insurance,"

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would you read the first paragraph under 6 and tell

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us if that helps to refresh your recollection as to

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what you had in mind with respect to subparagraph

9

(1) under Article VII-A?

10

MR. KLINGSBERG: Can I have the question

11

back after he is finished reading it.

12

(Record read.)

13

MR. KLINGSBERG: That is at page 29 of the

14

same exhibit?

15

MR. WISE: That's correct.

16

A The memory it invokes was, and it is triggered

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by the sentence "We have limited this to insurable

18

risks," was some effort on my part to perceive what it

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was B&W was striving for and to commit us only to

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getting that kind of insurance that we could get, and

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if I recall correctly, I remember thinking that if

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B&W had no title or equity insurance interest of

23

some sort in the property, I didn't know how B&W could

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be a named insured. That is the memory that it

25

invokes.

Q Does it help invoke any memory as to what this insurance was going to cover in general, even in the broadest sense?

A Well, it was to cover damage to the equipment being provided by B&W, I think. I believe that's right.

Q Now, looking at the letter and taking the last sentence of the carryover paragraph on the third page of the letter, the sentence which reads: "Depending upon Met. Ed. policy, however, Met. Ed. might wish to simply hold B&W and its suppliers harmless and to obtain waivers of subrogation from the insurers for the benefit of B&W and its suppliers."

Do you have any recollection of what you had in mind concerning the possibility of Met Ed holding B&W and its suppliers harmless as a substitute for the insurance that is mentioned in the subparagraph (1), Article VII-A?

MR. KLINGSBERG: I object to the form of the question.

A I am not sure I do. Could you restate it?

Q What were you suggesting in that sentence of your letter?

MR. KLINGSBERG: Are you suggesting that he

1
2 was suggesting something other than what the
3 sentence said?

4 THE WITNESS: I'm sorry?

5 MR. KLINGSBERG: I said he is suggesting
6 that the sentence suggests something other than
7 what the sentence says.

8 MR. WISE: I am asking him to explain what
9 it was he was suggesting.

10 MR. KLINGSBERG: Whether he recollects.

11 A The only recollection I have is I was trying to
12 find some way to meet the problem of this business of
13 having B&W being a named insured with respect to some
14 of the equipment that it was supplying, but I can't
15 recall anything more than that.

16 Q Were you suggesting the use of a hold
17 harmless device of some sort?

18 A I take it that is what the letter says. I
19 don't have a recollection of that.

20 Q Did you have an understanding at the time
21 as to what was meant by a hold harmless agreement?

22 A I hope I did.

23 Q Did you understand that such an agreement
24 might be used to cover the equipment and systems that
25 were being furnished to Met Ed even after title had

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passed to Met Ed?

3

A Would you repeat that again?

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Q Did you understand that a hold harmless agreement could be used to cover equipment and systems that belonged to Met Ed?

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7

A I'm sorry. That is a different question than what you said before.

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

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(Record read.)

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A Yes, for the period of time while there was a B&W obligation with respect to that equipment, that is, prior to acceptance, I was looking at that particular point in time when property was moving from one party to the other and B&W nevertheless continued certain obligations that it had with regard to it.

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Q And you understood that the words "hold harmless" could refer to Met Ed property as well as property belonging to other persons?

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A I don't know that I used these terms in the letter to Mr. Neidig as any words of art or anything else, so I really can't tell you what I was thinking specifically when I wrote this specific letter. I can't tell you that today.

25

Q Would you look at the following paragraph

1
2 in your letter which reads: "We have also limited the
3 hold harmless agreement proposed by B&W to harm
4 caused by the negligence of Met. Ed." And there is
5 a reference to subparagraph (4) of VII-A, which I
6 believe is the clause that we have been discussing at
7 some length this morning, involving Met Ed's
8 indemnification under certain circumstances with B&W.

9 Did you mean anything different by the
10 words "hold harmless" as they appear in the paragraph
11 referring to subsection (4) that I just read to you
12 from your letter than you meant by the words "hold
13 harmless" appearing just a few lines above it in the
14 carryover paragraph in your letter?

15 A I really have no idea whether I meant to use
16 that term in an identical way or in a parallel way.

17 Q Did you have any understanding that the
18 words "hold harmless" were a term of art that was
19 restricted to only liability to third parties?

20 A I have to assume I did, but I don't know whether
21 I did.

22 Q You don't remember one way or the other?

23 A That's correct.

24 Q You don't remember why you used the words
25 "hold harmless" in the carryover paragraph?

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2

A The carryover paragraph being --

3

4

5

Q The one in subsection (1) concerning insurance for equipment and systems prior to final acceptance.

6

7

A I'm sorry, are you talking about the carryover paragraph in the letter to Mr. Neidig?

8

Q Yes.

9

A The first paragraph of item 6?

10

Q Yes.

11

12

A I cannot tell you today why I used that term in that paragraph at that time.

13

14

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Q Did you ever consider in the drafting work that was done on subparagraph (4) of Article VII-A whether the words "indemnifies and holds harmless" would cover more than liability to third parties?

18

19

A I don't recall that either.

Q Do you recall having any discussions with any person concerning that question?

20

A No.

21

22

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24

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Q Do you recall any writings other than those we have shown you today and yesterday concerning the meaning of the words "indemnifies and holds harmless" as they appear in subsection (4) of Article VII-A?

A I don't remember that we spent any time at all

on the meaning of those words.

Q Looking at B&W Exhibit 92, page 31 of the draft -- this is the February 14, 1967 draft that contains B&W comments -- and looking at the language inserted by Mr. Trowbridge, "resulting from incidents at the site," do you have any understanding as to what Mr. Trowbridge's insertion was to mean?

A I can only understand that in terms of my comment on the left-hand side of the page -- are we looking at 31? I'm sorry.

Q Page 31, yes.

MR. KLINGSBERG: Which exhibit is this?

MR. WISE: Exhibit 92.

A Yes, I understand that as his response to the second part of my marginal note on the left-hand side with regard to my concern relating to an incident involving a B&W fuel fabrication program, I think.

Q Well, I guess my question is directed at your understanding of the words "incidents at the site." Does that mean, for instance, an event such as the accident at Three Mile Island, as you understood it at the time?

A Yes. I understood that whole added clause that B&W had initially deleted and then put back in as

1
2 relating to a large nuclear incident of the type
3 covered by Price-Anderson. That would apply to an
4 incident such as recently occurred at Three Mile
5 Island.

6 Q Now, would you look at Plaintiffs' Exhibit --

7 A You will notice, if you look at page 31A
8 of the same draft, that I made a similar type of
9 comment in the left-hand side of the margin, and the
10 Trowbridge insert seems to apply to that type of
11 concern.

12 Q Could you read your comment on that page?

13 A It says "What about an accident at B&W's plant
14 involving Met Ed owned fuel?"

15 Q What were you concerned about there?

16 A It is a parallel type of observation that I made
17 on the previous page, and I must have been concerned
18 there about loss or damage to Met Ed owned fuel,
19 and it was really the breadth of this language that
20 was the parallel observation to the one made previously.

21 Q And you were concerned that this language
22 might well prevent Met Ed from recovering damages
23 as to its fuel?

24 MR. KLINGSBERG: I object to the question.

25 We are now in clause B.

1
2 MR. WISE: What is the basis of the
3 objection?

4 MR. KLINGSBERG: The basis of the objection
5 is it wasn't clear that we are now talking about
6 a different clause.

7 MR. WISE: It is now clear that we are
8 talking about a different clause.

9 Q Could you answer the question.

10 A What was the question?

11 (Record read.)

12 A I believe so.

13 Q Would you now turn to Plaintiffs' Exhibit
14 178 and look at section 15.10 which appears at page
15 15-3.

16 A What paragraph?

17 Q We are on 15.10 of 15-3 of Plaintiffs'
18 Exhibit 178 which is the B&W proposal.

19 A I'm sorry.

20 Q Plaintiff's Exhibit 178, the B&W proposal.

21 Now, if we would all turn to page 15-3
22 of that exhibit, and on that page there is section
23 15.10 which is titled "Company Liability."

24 Now, if you would next take B&W Exhibit 88,
25 which is the first December 1966 draft, and turn to

1
2 page W 00101.

3 Has everybody found that?

4 If you would look at that page, on
5 Article XII titled "Consequential Damages."

6 Have you got that?

7 A Yes.

8 Q Now, if you would compare Article XII
9 in your first December draft to section 13.10 in the
10 B&W proposal and tell us whether the language in your
11 December draft as originally typed before any
12 handwritten changes were made was identical to the
13 language proposed by B&W in Exhibit 178?

14 A It certainly appears to be, with the exception
15 of identifying "the company" which appears in the
16 proposal as Babcock & Wilcox in the draft contract.

17 Q Did you understand the meaning of Article
18 XII when you incorporated it into your draft of
19 December 1966?

20 A I hope I did.

21 Q Do you have any recollection of your
22 understanding of it today?

23 A No.

24 Q Or rather, do you have today an
25 understanding of your -- what you meant?

1
2 A I have no recollection today of a specific
3 understanding with regard to these specific words.
4 I mean, that is, this clause as distinguished from
5 similar clauses, that I might have seen other
6 arrangements generally in the same basic time frame,
7 but I have no specific recollection of what I thought
8 these words might or might not have meant.

9 Q Now, looking at B&W Exhibit 88, you will
10 note that in handwriting someone has crossed out the
11 last four typewritten words which read "from any
12 cause whatsoever" and penciled or penned in the words
13 "out of the performance of this contract."

14 I believe yesterday you testified that
15 that was your handwriting; is that correct?

16 A That is correct.

17 Q Do you have any recollection of any
18 discussions with anyone concerning that change?

19 A Yes, I do recall an explanation of this kind of
20 change with Favret and Beisel. I can't tell you that
21 it is specifically this one rather than some of the
22 others, but as I said, any clause that limited our
23 rights against B&W or purported to limit those rights,
24 I wanted those related to the services or equipment
25 performed by B&W under this contract as distinguished

1
2 from other activities by B&W independent of the
3 contract or other activities by B&W under any other
4 contracts.

5 Q Let's look at your December 29, 1966
6 draft, Exhibit 89. If you would turn to page 40, you
7 will note that on that page Article XII appears, and
8 I believe, without having you read word for word, that
9 Article XII in the December 29th draft is identical
10 with Article XII in your first December draft but
11 incorporating the handwritten deletion and addition.

12 A That appears to be correct.

13 Q Would you next look at the January 27th
14 draft which is B&W Exhibit 91, and take a look at
15 page 40 again, which also contains Article XII,
16 the consequential damages clause, and with the
17 exception of the shortening of Babcock & Wilcox to
18 "B&W," would you agree that there are no differences
19 between the December 29th draft and the January 27th
20 draft?

21 A That appears to be correct.

22 Q Next, would you look at B&W Exhibit 92,
23 which is the February 14, 1967 draft. Again turn to
24 page 40, which also contains Article XII titled
25 "Consequential Damages." You will note that on that

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page the last seven words "out of the performance of this contract" have been typewritten over and dashed out. Do you know who took that material out?

4

5

A Well, I assume the typewritten deletion was a B&W proposal, accompanied by the B&W proposal to go back to the original language.

6

7

8

Q They had typed in the words "from any cause whatsoever"?

9

10

A Yes.

11

Q And double underscored that?

12

A That's right.

13

Q Now, someone has crossed those words out and handwritten in some additional material. Do you know whose handwriting that is?

15

16

A That appears to be Trowbridge's handwriting.

17

Q Can you read it?

18

A "Out of the construction or operation of the Three Mile Island nuclear station."

19

20

Q Did you have any discussions with Mr. Trowbridge concerning this change?

21

22

A I don't remember any specific one. I vaguely recall perhaps even being at the meeting when we arrived at this language.

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24

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Q Do you recall any of the discussions

1
2 concerning this change?

3 A I think I made the same speech as to what I
4 was trying to do, that I had given you just a few
5 minutes ago, and I don't really recall the B&W
6 response.

7 Q Do you recall anything anybody from B&W
8 said as to why they were unhappy with the language
9 as proposed in the January 27, 1967 draft?

10 A No.

11 Q Did anybody from B&W ever tell you why
12 they were opposed to that language?

13 A They may have. I don't remember.

14 Q Do you have any recollection as to
15 anything anybody from B&W said as to why they wanted
16 the language "from any cause whatsoever"?

17 A No. I am sure we talked about it because
18 these things don't just happen, but I can't recall the
19 specifics of any conversation.

20 Q Just so that we finish this up, do you
21 recall any discussion at any time with anyone about
22 the language that appears in Mr. Trowbridge's
23 handwriting?

24 A No. I vaguely recall a sense that those words
25 are about what I was intending with my change, but

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I don't know that we spent a lot of time on it. I do recall a discussion of it because, as I say, you don't move from one proposal to another, to another, without some discussion. I don't remember it being a very heated matter.

7

Q Do you remember who proposed these words?

8

A I have a feeling Fox Trowbridge.

9

Q Do you have a feeling or a recollection?

10

A No, a recollected feeling.

11

Q Did he propose them during the course of

12

a meeting or at some other time?

13

A No, that's why I think I was even at the meeting.

14

My recollection was -- yes, I have a recollected

15

feeling of Fox proposing that and I was saying O.K.

16

and I think it was at that meeting.

17

Q And you don't remember anything more

18

specific than that?

19

A No.

20

Q For the sake of completeness, let me ask

21

you to look at the final contract, Plaintiffs' Exhibit

22

193. If you would look at page 45, the final -- the

23

Article XII appears on that page, entitled

24

"Consequential Damages."

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Again subject to someone doing a better

1
2 job of proofreading than I have, can we agree that the
3 final language on this article is identical with the
4 language on the February 14, 1967 draft incorporating
5 the handwritten deletions and additions by Mr.
6 Trowbridge?

7 A You have got a good proficiency as a proofreader.
8 I don't quarrel with that.

9 MR. WISE: We will take a few minutes
10 break.

11 (Whereupon, a recess was taken.)

12 BY MR. WISE:

13 Q Mr. Charnoff, you testified yesterday that
14 you had very minor involvement in the TMI-2 contract,
15 and we covered that. I would like now to ask you
16 whether you were involved in any other contracts
17 aside from the contract for TMI-1 what we have been
18 discussing this morning and the contract for TMI-2
19 that we discussed briefly yesterday, between B&W and
20 Met Ed?

21 MR. WISE: Could you read that question
22 back.

23 (Question read.)

24 A I really wasn't involved in any of those
25 other contracts.

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Q Have you had any involvement, for instance, in the 1973 and 1974 master services contract?

A No.

Q Any involvement in the 1975 long-term training contract?

A No, I didn't even know it existed.

Q Would that also be true for the 1977 expanded scope master services contract?

A That is correct.

Q Mr. Charnoff, were you ever involved in any of the fuels contracts between B&W and Met Ed?

A Yes, absolutely. Yes, I was thinking of Three Mile Island-2 when I answered your questions. I did do extensive work on the TMI-1 fuel contract with Babcock & Wilcox.

Q Do you recall during those negotiations any discussions concerning insurance and indemnification?

A In that broad sense, no. I do recall seeing a letter when I was getting some documents together for you, I guess, between Mr. Bartnoff of, let's see, he is now President of Jersey Central Power & Light, but I think he was then in the GPU Service Corporation

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2 in charge of the Fuels Division or whatever it might
3 have been, and I believe Don Minner, who I think was
4 the principal negotiator for B&W, and there was a
5 letter from Bartnoff to Minner which was based upon
6 some indications between me and Bartnoff which related
7 to a change in the clause that paralleled the one we
8 were talking about this morning that B&W was proposing,
9 that I think we rejected. What's the number of that
10 clause?

11 MR. WISE: Off the record.

12 (Discussion off the record.)

13 Q Article VII-A(4), as it appeared in the --
14 A Nuclear steam supply system contract.

15 Q What did the letter say about that, as
16 best you can recollect it? I don't happen to have a
17 copy of it here with me.

18 A Mr. Minner -- can you give me a page reference
19 to that clause?

20 Q Why don't you look at the final contract,
21 Plaintiffs' Exhibit 193, and it appears on page 34 and
22 carries over to page 35.

23 Let me ask you as a preliminary question,
24 with respect to most of the, if you will, commercial
25 terms and conditions, was the TMI-1 NSSS contract

1
2 used as the basis for the drafting of the fuels
3 contract for TMI-1?

4 A Yes. The understanding was that where there
5 were similar provisions in the nuclear steam supply
6 system arrangements, we would not try to renegotiate
7 those again in the fuel contract, and when we looked
8 again at the comments by Mr. Minner, I think it was
9 either in the form of a comment or on a draft I had
10 prepared -- I think I did prepare the fuel contract --
11 in connection with the provision paralleling VIX-A(4),
12 Mr. Minner proposed a change in the language that
13 related to "when due to the negligence of Met Ed,"
14 and there may have been some other related changes.
15 But I recall that, and I think he wanted language
16 like "when other" -- well, I better not speculate about
17 it. He was substituting some new language on that, and
18 I took exception to that, communicated that to Mr.
19 Bartnoff, who in turn communicated it to Mr. Minner.
20 And frankly, I had forgotten about it until I had
21 seen that letter, and I don't even know how it came
22 out in the final fuel contract.

23 Q Do you recall any other discussions or
24 communications concerning the insurance
25 indemnification clauses in the fuels contract?

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A No.

Q And do you recall any discussions or communications regarding the consequential damages clause in the fuels contract?

A No.

Q And just to clear up -- I am not sure whether I asked you this or not -- but with respect to the NSSS contract for TMI-1, do you recall any discussion with anyone concerning the meaning or effect of the consequential damages clause? I think I earlier asked you specifically about the language that Mr. Trowbridge had inserted and the deletions that B&W and you had negotiated. I am now broadening my question to any discussions about the meaning or effect of the clause or any part thereof.

A I don't remember any. That does not mean that there weren't any.

MR. WISE: I don't believe I have any more questions at this time.

MR. KLINGSBERG: I would like to take 15 minutes or so to go over our notes and see whether we have any cross-examination.

(Whereupon, a recess was taken.)

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2 BY MR. KLINGSBERG:

3 Q Mr. Charnoff, would you look, please, at
4 Exhibit 178, which is the Babcock & Wilcox proposal.
5 Page 15-10, paragraph 15.24.1, the second paragraph
6 reads: "No warranty express or implied not contained
7 in either this article or in the section of this
8 proposal entitled 'Performance' shall be applicable."

9 Now, would you look at your draft which is
10 Exhibit 88.

11 MR. WISE: That is B&W Exhibit 88.

12 MR. KLINGSBERG: B&W Exhibit 88.

13 Q If you can flip through the whole of
14 Exhibit 88, and in particular focus on the comparable
15 provision which begins at page W 00085 and goes over
16 onto the next page.

17 Am I correct that in preparing Exhibit 88
18 you omitted the paragraph in the B&W proposal,
19 Exhibit 178, which I have just quoted?

20 A That appears to be correct, yes.

21 Q And was that an intentional omission on
22 your part?

23 A Yes.

24 Q What was your intent in eliminating that
25 paragraph from your draft?

1
2 A Simply an attempt to broaden whatever we could
3 get from Babcock & Wilcox and to avoid what appeared
4 to be, to me at the time, a narrowing of their
5 obligations.

6 Q Now, during the course of various drafts,
7 if Mr. Wise will accept my proofreading of the
8 contracts, that clause from Exhibit 178 never got
9 inserted back into any of the drafts which we have
10 reviewed or into the final contract.

11 Did you have any discussions with B&W
12 representatives about that paragraph which we have
13 quoted into the record?

14 A Yes. I generally remember telling them that I
15 deleted it for the purpose I told you, and that if
16 they had any specific implied warranties that they
17 wanted to have that applied to or to specifically
18 make inapplicable, they could come back to me.

19 Q Is that all you recall of the discussions?

20 A That is correct. I don't ever recall that they
21 did come back.

22 Q Now, I would like to focus your attention
23 on what has been referred to as the portion of the
24 warranty provision relating to decontamination, about
25 which you were asked a number of questions, both in

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2 drafts as well as in the final contract, and in Exhibit
3 193 the clause appears on page 26 which is part of
4 Article V, entitled "Plant Warranties," and it
5 appears again at page 28, both references under the
6 remedy provisions to the warranty clause.

7 My question is: do you recall any
8 discussions with Babcock & Wilcox of the provision
9 relating to decontamination or any discussion of who
10 bears the cost of decontamination, other than in the
11 context of effectuating a repair or replacement of
12 a part under the warranty provisions?

13 A No.

14 Q Do you recall that B&W had any discussion
15 of decontamination provisions or who bears the cost
16 of decontamination in the event of a nuclear accident?

17 A No.

18 MR. KLINGSBERG: I have no further questions.

19 MR. WISE: I have no additional questions.

20 (Time noted: 12:25 p.m.)

21

22

Gerald Charnoff

23 Subscribed and sworn to before

24 me this day of 1981.

25

CERTIFICATE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I, NANCY A. RUDOLPH, a Notary
Public of the State of New York, do hereby
certify that the continued deposition of
GERALD CHARNOFF was taken before
me on June 23, 1981 consisting
of pages 126 through 190;

I further certify that the witness had
been previously sworn and that the within
transcript is a true record of said testimony;

That I am not connected by blood or
marriage with any of the said parties nor
interested directly or indirectly in the matter
in controversy, nor am I in the employ of any
of the counsel.

IN WITNESS WHEREOF, I have hereunto set my
hand this 12th day of July, 1981,

Nancy A. Rudolph
Nancy A. Rudolph