

1 (Case Caption Continued)

2 THE PUBLIC SERVICE COMMISSION
3 OF SOUTH CAROLINA
4 DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

5 IN RE: Friends of the Earth and Sierra Club,
6 Complainant/Petitioner vs. South Carolina
7 Electric & Gas Company,
8 Defendant/Respondent

9 IN RE: Request of the South Carolina Office of
10 Regulatory Staff for Rate Relief to SCE&G
11 Rates Pursuant to S.C. Code Ann. § 58-27-920

12 IN RE: Joint Application and Petition of South
13 Carolina Electric & Gas Company and
14 Dominion Energy, Incorporated for Review
15 and Approval of a Proposed Business
16 Combination between SCANA Corporation and
17 Dominion Energy, Incorporated, as May Be
18 Required, and for a Prudency Determination
19 Regarding the Abandonment of the V.C. Summer
20 Units 2 & 3 Project and Associated Customer
21 Benefits and Cost Recovery Plans
22
23
24
25

1 APPEARANCES:

2
3 MCGOWAN, HOOD & FELDER, LLC
4 BY: JAMES L. WARD, JR., ESQUIRE
5 321 Wingo Way, Suite 103
6 Mt. Pleasant, South Carolina 29464
7 843-388-7202
8 jward@mcgowanhood.com
9 Representing Plaintiff Richard Lightsey, et al.

10
11 LEWIS BABCOCK, LLP
12 BY: ARIAIL E. KING, ESQUIRE
13 1513 Hampton Street
14 Columbia, South Carolina 29211
15 803-771-8000
16 aek@lewisbabcock.com
17 Representing Plaintiff Richard Lightsey, et al.
18 (via telephone)

19
20 RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC
21 BY: TERRY E. RICHARDSON, JR., ESQUIRE
22 1730 Jackson Street
23 Barnwell, South Carolina 29812
24 803-541-7850
25 trichardson@rpwb.com
Representing Plaintiff Richard Lightsey, et al.
(via telephone)

17
18 KING & SPALDING, LLP
19 BY: DAVID L. BALSER, ESQUIRE
20 BY: JULIA BARRETT, ESQUIRE
21 1180 Peachtree Street, N.E.
22 Atlanta, Georgia 30309
23 404-572-2782
24 dbalser@kslaw.com
25 jbarrett@kslaw.com
Representing Defendants South Carolina
Electric & Gas Company, a Wholly Owned
Subsidiary of SCANA, and SCANA Corporation

1 APPEARANCES (Continued)

2
3 LAW OFFICE OF LEAH B. MOODY, LLC
4 BY: LEAH B. MOODY, ESQUIRE
5 235 East Main Street, Suite 115
6 Rock Hill, South Carolina 29730
7 803-327-4192
8 Representing Defendants South Carolina
9 Electric & Gas Company, a Wholly Owned
10 Subsidiary of SCANA, and SCANA Corporation

11
12 SCANA CORPORATION
13 BY: BRYONY B. HODGES, ESQUIRE
14 Associate General Counsel
15 220 Operation Way
16 MC C222
17 Cayce, South Carolina 29033
18 803-217-7315
19 bryony.hodges@scana.com
20 Representing Defendants South Carolina
21 Electric & Gas Company, a Wholly Owned
22 Subsidiary of SCANA, and SCANA Corporation

23
24 WYCHE, PA
25 BY: MATTHEW T. RICHARDSON, ESQUIRE
801 Gervais Street, Suite B
Columbia, South Carolina 29201
803-254-6542
mrichardson@wyche.com
Representing Intervenor Office of the
Regulatory Staff

26
27 NELSON MULLINS RILEY & SCARBOROUGH, LLP
28 BY: B. RUSH SMITH, III, ESQUIRE
29 1320 Main Street, 17th Floor
30 Columbia, South Carolina 29201
31 803-799-2000
32 rush.smith@nelsonmullins.com
33 Representing South Carolina Public
34 Service Authority, Santee Cooper

1 APPEARANCES (Continued)

2

3 MCGUIRE WOODS, LLP
4 BY: BRIAN D. SCHMALZBACH, ESQUIRE
5 Gateway Plaza
6 800 East Canal Street
7 Richmond, Virginia 23219
8 804-775-1000
9 bschmalzbach@mcguirewoods.com
10 Representing Dominion Energy, Incorporated

11 EVERSHEDES SUTHERLAND, LLP
12 BY: LEE A. PEIFER, ESQUIRE
13 999 Peachtree Street, NE
14 Suite 2300
15 Atlanta, Georgia 30309
16 404-853-8000
17 leepeifer@eversheds-sutherland.com
18 Representing Central Electric Power
19 Cooperative, Inc.

20

21

22 ALSO PRESENT:

23 KEVIN DAY, CLVS, Videographer

24 ANDREW BATEMAN

25

I N D E X

2		PAGE
3	EXAMINATION	
4	By Mr. M. Richardson	8
5	By Mr. Balser	288
6	Signature of Deponent	295
7	Disclosure Statement	296
8	Certificate of Reporter	297

9

10

E X H I B I T S

11	WENICK EXHIBITS	DESCRIPTION	MARKED
12	1	Revised Notice of Videotaped Deposition of George Wenick, Subpoena, and Certificate of Service	9
13			
14	2	Response to Motion to Compel Discovery Responses and Production by SCE&G and Dominion Energy	116
15			
16	3	Response to Motion to Compel Discovery Responses and Production by SCE&G and Dominion Energy	207
17			
18	4	Engineering, Procurement and Construction Agreement	207
19			
20	5	E-mail correspondence dated 12/22/15, BPC_VCS_00000428-429	269
21			
22	6	E-mail correspondence dated 12/22/15, BPC_VCS_00008248	269
23			
24	7	E-mail correspondence dated 11/10/14, SCANA_RP0850425	273
25			
	8	E-mail correspondence dated 12/22/15, SCANA_RP0792232-792237	284

1 THE VIDEOGRAPHER: Good morning. We are
2 on the record. Today's date is October 2nd,
3 2018. The time is approximately 9:09 a.m.
4 This will be the beginning of the deposition of
5 George Wenick.

6 Would counsel present please identify
7 themselves?

8 MR. M. RICHARDSON: This is Matthew
9 Richardson on behalf of the Office of
10 Regulatory Staff, along with Andrew Bateman.

11 MR. WARD: Jay Ward --

12 MR. BALSER: I'm sorry. Go ahead.

13 MR. WARD: Jay Ward on behalf of the
14 plaintiffs in the Lightsey case.

15 MR. SCHMALZBACH: Brian Schmalzbach for
16 Dominion Energy, Inc.

17 MR. SMITH: Rush Smith for Santee Cooper,
18 Intervenor in the PSC proceeding.

19 MS. HODGES: Bryony Hodges, in-house
20 counsel for SCANA.

21 MS. MOODY: Leah Moody, counsel for SCANA.

22 MS. BARRETT: Julia Barrett, counsel for
23 South Carolina Electric & Gas, with
24 King & Spalding.

25 MR. BALSER: David Balser on behalf of

1 South Carolina Electric & Gas and SCANA.

2 THE VIDEOGRAPHER: Counsel on the phone?

3 MR. T. RICHARDSON: Yes. Terry Richardson
4 on behalf of the Lightsey plaintiffs.

5 MS. KING: And Ariail King, likewise.

6 THE VIDEOGRAPHER: Please swear the
7 witness.

8 THE COURT REPORTER: Please raise your
9 right hand to be sworn.

10 Do you solemnly swear the testimony you
11 are about to give shall be the truth, the whole
12 truth, and nothing but the truth, so help you
13 God?

14 MR. WENICK: I do.

15 THE VIDEOGRAPHER: Counsel may proceed.

16 - - -

17 GEORGE WENICK, being first duly
18 sworn, testified as follows:

19 - - -

20 EXAMINATION

21 - - -

22 BY MR. M. RICHARDSON:

23 Q Good morning, Mr. Wenick. We are here
24 today taking your deposition pursuant to the South
25 Carolina rules, and by agreement with the acceptance

1 of service of process of the subpoena in the
2 Lightsey case, and also the Order and Notice in the
3 Public Service Commission's consolidated docket.

4 I've marked that as Exhibit 1.

5 - - -

6 (Revised Notice of Videotaped
7 Deposition of George Wenick, Subpoena, and
8 Certificate of Service marked Wenick
9 Exhibit Number 1 for identification.)

10 - - -

11 BY MR. M. RICHARDSON:

12 Q Are you familiar with that and would you
13 like to look at it to confirm?

14 A I'm familiar with it.

15 Q Okay. And if necessary, of course, we'll
16 present any compliance issues in those venues today.

17 Have you had your deposition taken before?

18 A I have.

19 Q How many times?

20 A Twice.

21 Q How recent?

22 A The most recent one was about three or
23 four years ago.

24 Q A similar circumstance, where it was
25 related to a client representation?

1 A Yes, a settlement issue.

2 Q And the other instance?

3 A The other one occurred in 1970 sometime.

4 Q Okay. Are you familiar with the Rules of
5 Civil Procedure that govern depositions?

6 A Well, I'm familiar with various Rules of
7 Civil Procedure. The Rules of South Carolina Civil
8 Procedure, I only have a glancing familiarity with.

9 - - -

10 (Mr. Peifer arrived at this time.)

11 - - -

12 BY MR. M. RICHARDSON:

13 Q What did you do to prepare for today?

14 A Well, I read the Notice of Deposition and
15 the subpoena. I did pull the South Carolina rules
16 on -- on discovery, primarily the deposition rules.

17 I tried to clear some cobwebs just sort of
18 sitting in my chair and thinking back to what had
19 happened. I looked at a few documents primarily in
20 connection with pulling together documents that were
21 responsive to the subpoena.

22 And I met with some attorneys from
23 King & Spalding, and I spoke to some -- Rush Smith,
24 representing Santee Cooper, primarily because of the
25 privilege issues.

1 I did nothing in connection with the V.C.
2 Summer plant, except as counsel to the owners of
3 that plant. And so, from my perspective, all of my
4 communications were privileged.

5 I was informed by Wallace Lightsey that
6 there had been a waiver, a limited waiver of that
7 privilege. So I tried to learn what the exact
8 contours of that are, and I'm still a little in the
9 dark about that. That's about it.

10 Q What did you -- what have you learned are
11 the contours of the waiver of the privilege?

12 A Well, I know that certain communications
13 related to Bechtel have been waived. And beyond
14 that, as I say, there is a gray area, to my mind, on
15 the edges of that -- of that topic, of that -- that
16 I don't know if the privilege is being asserted. Of
17 course, it's not my privilege. It's the privilege
18 of my clients, and they're both represented here,
19 and I anticipate that they will raise that.

20 I didn't undertake to learn about the
21 privilege to the point that I could assert it for
22 them, but I did want to understand the general
23 contours.

24 Q So for the purposes of this deposition,
25 you're not representing either of SCE&G or Santee

1 Cooper?

2 A I don't even know what that means. How
3 can you represent a party when you're being deposed?
4 I'm here as myself.

5 Q I would agree. I would agree. I just
6 want to make sure.

7 Do you have personal legal counsel?

8 A No.

9 Q You're here essentially appearing because
10 you represented the owners of the nuclear project at
11 V.C. Summer?

12 A I'm here because I received a Notice of
13 Deposition and a subpoena.

14 Q Okay. And you said you learned a little
15 bit about the waiver, but that in -- in that
16 process, you think there are still some gray areas.

17 Would you tell us what the gray areas of
18 the -- that you came up against in learning about
19 the waiver?

20 A Let me tell you why I have difficulty with
21 that question. The fact that it is a gray area
22 is -- is why I have difficulty with that question.
23 I don't know what the -- exactly what it is that
24 would be the limits of the waiver. I know certain
25 things would be outside the limits, discussions

1 about virtually everything else at the plant, but
2 there are some aspects where there is overlap, where
3 dealing with topic 1, you might reference topic 2.
4 Topic 1 is Bechtel, topic 2 is -- well, pick one --
5 any other item that is privileged.

6 So but as I say, I didn't attempt to learn
7 the extent of the waiver to the point that I could
8 assert it without assistance from the counsel for my
9 clients, namely Santee Cooper and SCANA.

10 Q Okay. And so it's fair to say today,
11 Mr. Wenick, that you will answer fully and
12 truthfully all of my questions unless you are
13 instructed not to on the basis of privilege?

14 A Right. Occasionally I may raise the
15 question myself. So the instruction may be as a
16 result of me identifying something that I think is
17 either in the gray area or outside the gray area,
18 that is, that I think is clearly privileged. And I
19 may find it necessary to consult with attorneys for
20 my clients in order to understand their position.

21 Again, the privilege belongs to the
22 client, it doesn't belong to me. I didn't waive it;
23 I didn't assert it. It's being waived and asserted
24 by the client.

25 Q And you talked about some areas that you

1 think are clearly privileged. What are those areas?

2 A Well, everything else. I was retained in
3 2011. I was -- so I was giving advice to the owners
4 on this plant, legal advice, and receiving
5 information upon which to base legal advice from
6 2011 until July of 2017. So over that six-year
7 period, there were quite a number of topics that
8 were addressed in those privileged communications.

9 Q And did that include the 2010 Bechtel
10 report or assessment?

11 A What do you mean, did that -- what's that?
12 I don't know what the reference is.

13 Q Well, your retention by the clients, did
14 it include Bechtel's work on the project prior to
15 2011?

16 A Prior to 2011?

17 Q That's right.

18 A I was unaware that Bechtel did any work on
19 the project prior to 2011. I have some knowledge of
20 the history of the project prior to 2011, but all of
21 that knowledge would have been gained after 2011.
22 And I don't know of any activities by Bechtel in
23 connection with the project prior to 2011.

24 Q Okay. And what did Mr. Lightsey tell you
25 about the waiver of the privilege that has occurred

1 already?

2 A That the certain items related to the
3 Bechtel engagement had been waived -- certain
4 communications, I should say.

5 Q And what do you mean by "the Bechtel
6 engagement"?

7 A Well, let me see. The -- there was a
8 Professional Services Agreement executed between my
9 law firm and Bechtel in 2015. So the work done
10 pursuant to that engagement is what I mean by "the
11 Bechtel engagement."

12 Q And after you heard from Mr. Lightsey
13 about the waiver of the privilege in this case, what
14 did -- what did you -- what did you do to verify or
15 to just evaluate that claim?

16 A Well, the ver -- I thought it was
17 self-verifying, that an attorney representing a
18 client, who advises me that the client has waived
19 the privilege as to certain items, I take him at his
20 word.

21 Q And did they describe what certain
22 communications as to Bechtel were part of the
23 waiver?

24 MR. BALSER: Object to the question as
25 vague, as to "they."

1 BY MR. M. RICHARDSON:

2 Q You can answer.

3 A Okay. The -- nobody identified specific
4 documents to me as being within or without the
5 privilege until I assembled certain documents that
6 were -- that I considered to be responsive to the
7 subpoena. And then I provided those documents to
8 counsel for SCANA and Santee Cooper. And since --
9 and the documents that I'm prepared to provide in
10 response to the subpoena are documents that they
11 considered to be producible.

12 So that is the clearest and, frankly, the
13 only useful direction I've been given about what
14 documents were covered by the waiver.

15 Q And so when you gathered what you thought
16 were responsive documents and provided those to
17 counsel for SCANA and Santee Cooper, what was the
18 clearest and direct -- clearest and useful direction
19 that you got about the waiver? Did you all go
20 through the documents or did --

21 A Well, we didn't go through them one by
22 one. All we got back was just word that these can
23 be produced, we're not asserting a waiver as to
24 these, and these other ones should not be produced,
25 or these third category should be produced with

1 redactions.

2 So that's, you know, that gives me a
3 pretty good idea of what's being -- what the
4 privilege is being waived to. I would consider all,
5 virtually all of those documents to be privileged
6 communications left to my own devices, but the
7 client said go ahead and produce them. I understand
8 that to be a waiver.

9 Q And I think you said it now twice. I just
10 want to make sure that we're clear that you consider
11 all of your communications that you've had, in the
12 time period from 2011 to 2017, with anyone
13 associated with Santee Cooper and SCE&G or SCANA as
14 being privileged communications?

15 A Well, I mean, all of -- if you literally
16 mean any, you know, "What's for lunch? What time
17 are you arriving to the airport?" that sort of --
18 obviously there were communications that are
19 everyday communications that I would not consider to
20 be privileged. But anything of any substance, yeah,
21 I would consider those to be privileged
22 communications.

23 Q And so you would consider all of your
24 communications that are related to the project, in
25 that time period that you were representing Santee

1 Cooper or SCE&G, as being privileged?

2 A Let me say it in my own words. I would
3 consider all communications, from 2011 to July of
4 2017 and after that, with the clients, in which I
5 either offered legal advice or received facts from
6 the client related to the offer of legal advice, to
7 be privileged.

8 Q All right. Thank you.

9 Did you do the redacting of the documents
10 that you were told included privileged
11 communications?

12 A No. There are only about a half a dozen
13 of those.

14 Q Who did the redacting?

15 A Rush Smith's firm.

16 Q Okay. And were the documents that were
17 not produced, that you had identified as being
18 responsive to the subpoena, did you produce a
19 privilege log of those?

20 A I understand that SCANA has produced a
21 privilege log to about a half a dozen documents that
22 they asked that I not produce, and that Rush Smith's
23 firm, representing Santee Cooper, has done the same.

24 Q Done the same in that Santee Cooper and
25 SCANA have identified the same documents?

1 A No, no. I'm sorry. I didn't mean to be
2 unclear.

3 I said that SCANA, SCANA's counsel had
4 prepared a privilege log. So when I said, "done the
5 same," I assume that Rush Smith had prepared a
6 privilege log, as well, and I was advised that they
7 had.

8 Q And were the privilege logs the same or
9 separate?

10 A There was no overlap.

11 Q And when you say "no overlap," you mean
12 that SCE&G identified a half dozen or so that they
13 thought were privileged and should not be provided,
14 and that Santee Cooper identified other, none
15 overlapping, other documents that should be withheld
16 on the privilege?

17 A Yes.

18 Q Okay. We were talking about the pre-2011
19 Bechtel work, and you said you're familiar with the
20 history of the project, but --

21 A Actually, we weren't talking about Bechtel
22 pre-2011, because I don't know anything about
23 Bechtel 2011. So I couldn't contribute to a
24 conversation about that.

25 Q Okay. I asked you about that, and you

1 said you're familiar with the history of the
2 project, but what I wanted to know is --

3 A Well, yeah, I said that I was familiar
4 with the history of the project, but that I had no
5 knowledge of any activity by Bechtel prior to 2011.

6 Q Thank you. And what were you hired for in
7 2011?

8 A At that time, there were four or so
9 requests -- I'll call them claims -- asserted by the
10 then contractors against the owner totaling several
11 hundred million dollars.

12 And my practice for 40-plus years has been
13 more or less exclusively dealing with construction
14 claims. So I was retained to evaluate those claims
15 and advise the owner on the -- on how to approach
16 that.

17 Q And these several hundred-million-dollar
18 claims were essentially payments that were under the
19 EPC?

20 A I'm sorry. I didn't make that clear.
21 They were construction claims for -- for extras,
22 changes to the work, and they were claims asserted
23 under the design/build contract. They were claims
24 for extra work and claims for delay, and I believe
25 there was a claim for inefficiency.

1 Q Okay. And those all existed when you got
2 hired in 2011?

3 A Yes.

4 Q And what resulted in those claims?

5 A They were resolved by an amendment to the
6 EPC contract, that is, the engineering, procurement,
7 and construction contract. I'm sorry. I'm going to
8 try to not slip into jargon, but those are bad
9 habits.

10 So the engineering, procurement, and
11 construction contract is the contract between the
12 owners, Santee Cooper and SCANA, and the
13 construction contractors consortium, which changed
14 its stripes over the years.

15 And in July of 2012, those claims were
16 resolved for something money over \$250 million. The
17 same claims on the Vogtle plant led to litigation
18 that lasted years.

19 Q All right. And what else had you been --
20 what else were you retained for over that period of
21 time?

22 A Subsequent to the resolution of those --
23 those pending claims through the July 2012 amendment
24 or change order to the construction contract -- I
25 forget exactly how it was denominated -- there were

1 more or less constant issues. I was not involved
2 weekly, let alone daily, and sometimes months would
3 go by when I wasn't involved; but as issues arose
4 under the construction contract that were in the
5 nature of a dispute between the consortium, the
6 construction consortium and the owners, I would be
7 contacted and consulted.

8 Q All right. And in those disputes and
9 issues, were you communicating with the consortium
10 or any representative or attorney of the consortium?

11 A No.

12 Q And other than --

13 A Well, when I say "no," no until at least
14 2016.

15 Q Okay. And what changed in 2016?

16 A Well, as you, I assume, are aware, there
17 was an agreement reached in October of 2015 --

18 Q Yeah.

19 A -- that did a lot of things. One of the
20 things that it did was it enshrined a dispute review
21 board for the handling of disputes. That October
22 agreement resolved all known disputes at that time,
23 and it was agreed that all disputes, until
24 substantial completion under the construction
25 contract, would be handled by the Dispute Review

1 Board rather than going to the Southern District of
2 New York, which is the venue specified for claims of
3 a certain size in the construction contract.

4 So I was engaged in connection with
5 matters before the Dispute Review Board, the DRB.

6 Q And the DRB essentially got started
7 operating -- even though it was part of the EPC
8 amendment in 2015, it really didn't get started
9 until the summer or even the fall of 2016, right?

10 A It got started when the first dispute
11 arose and there was the first referral to the DRB,
12 which was in 2016.

13 Q And then take us from there to the end of
14 your representation of the owners on the project.
15 Were there things, other than the Dispute Resolution
16 Board, disputes that you were involved with?

17 A Yes. In July of 2017, post-bankruptcy
18 now -- so we're talking about after Westinghouse --
19 Westinghouse is now the -- effectively the sole
20 participant as the contractor, and Westinghouse
21 declared bankruptcy. It was in all the papers. You
22 probably know about that.

23 Q Yes.

24 A And there was an effort to negotiate a
25 contract with Westinghouse under which they would

1 continue to support the project. And I attended two
2 or three days of face-to-face negotiations with a
3 team from Westinghouse.

4 Q And --

5 A Indeed I led the -- part of the
6 negotiating team.

7 Q And was that face-to-face meeting and
8 negotiations in July or was it back in April?

9 A I thought it was in July.

10 Q Okay.

11 A So post bankruptcy.

12 Q And what were those negotiations with
13 Westinghouse about?

14 A Well, Westinghouse had certain familiarity
15 with the design of the project, and it was -- the
16 effort was to develop an agreement under which
17 Westinghouse would continue to provide design
18 support for the project.

19 Q And was the EPC contract part of those
20 discussions?

21 A Well, the -- I understand that the EPC
22 contract has been rejected in bankruptcy. That's my
23 understanding.

24 And so Westinghouse was not -- not
25 honoring that contract. You know how bankruptcy

1 works; that they were no longer bound by that
2 obligation as a result of the bankruptcy discharge.

3 So the effort was to take the debtor, the
4 post-bankrupt entity, and enter into a separate
5 agreement under which they would provide engineering
6 support for the project on a going-forward basis.

7 Q And do you know when the EPC contract was
8 rejected in bankruptcy?

9 A Oh, gosh, no. Obviously sometime after
10 the bankruptcy -- when was the bankruptcy?

11 Q March 29th, I think.

12 A Okay. So I believe it was shortly
13 thereafter.

14 Q Okay.

15 A I didn't actually pull the -- the filings
16 from the bankruptcy court, and so all of my
17 information would have been second and thirdhand,
18 but you can get that date more readily than I can.

19 Q Sure. I was wondering if it was before or
20 after these three days of meetings in July with
21 Westinghouse that you had.

22 A My memory tells me it was before, but
23 there was no -- but immediately upon bankruptcy, it
24 was our expectation that there wouldn't be any other
25 outcome.

1 Q So to be clear, both you and your clients
2 had a clear expectation, after the Westinghouse
3 bankruptcy, that the EPC contract would be rejected?

4 A I don't recall having any conversation
5 with the clients in which they shared with me their
6 view as to what was likely to happen after the
7 bankruptcy. It was obvious to me that that would
8 happen. It did happen. It may well have been
9 obvious to everybody at the client, but I can't
10 testify to that.

11 Q Sure. And the meetings with Westinghouse,
12 who was involved on both sides of that?

13 A There were probably 20 people in the -- in
14 the room. The only one that I can say for certain
15 who was there, besides me, was Al Bynum. Everybody
16 else -- virtually everybody else was new to me.
17 Everybody on the Westinghouse side was new to me.
18 There were a number of SCANA people that I knew in
19 passing that attended some or all of those sessions.

20 Q Do you remember any of the Westinghouse
21 people that were at the July 2017 meetings?

22 A I really don't.

23 Q Do you remember who they were represented
24 by?

25 A Well, there was -- there were bankruptcy

1 lawyers; there were Westinghouse folks. I've told
2 you about all I can remember of their identities.

3 Q Okay. And after that July negotiation
4 with Westinghouse in 2017, did you have any other
5 work that you did for the owners of the project?

6 A It was contemplated that there would be
7 additional work done to negotiate the -- the
8 retention of Westinghouse. So I did a little bit of
9 work after the July meeting, but it was relatively
10 shortly thereafter that the decision was announced
11 that the plant would not -- the project would not go
12 forward. So -- and I had no role in any of the
13 wrap-up details.

14 Q Is it fair to say that once the plant was
15 abandoned, that the negotiations that you had done
16 in July were no longer relevant?

17 A It is -- it is fair to say that the effort
18 to negotiate the continued involvement of
19 Westinghouse became moot because of the decision not
20 to continue with the project.

21 Q And other than the claims that were
22 involved in 2011, when you first got hired, the DRB
23 issues in 2016 and whenever they ended, and the 2017
24 negotiations with Westinghouse after bankruptcy,
25 what other issues were you hired to represent -- or

1 did you represent the owners in the project?

2 A Well, between 2011 and 2015, there were
3 hundreds of issues that arose, some big, some small,
4 some involving hundreds of millions of dollars,
5 some, on the scope of this project, relatively
6 small, you know, tens of millions of dollars; but
7 there were -- I don't think it's an exaggeration to
8 say there were hundreds.

9 Q Was --

10 A And they were all the types of issues that
11 I do -- that I do and have made my living at for
12 40-plus years. They were construction claims,
13 interpreting the contract, who gets paid what, is
14 this an extra, does this justify some additional
15 payment or some time. It was all those kinds of
16 issues.

17 Q Was one of those issues the EPC amendment
18 in 2015?

19 A Yes, I was involved with that.

20 Q What was your involvement with the EPC
21 amendment?

22 A I did not meet with Westinghouse or
23 communicate with them directly, but I was -- but
24 lawyers for SCANA looked to me as more or less their
25 lawyer. That is, they would have the negotiations;

1 come to me. I would speak to them; I would suggest
2 language; I would suggest concepts; I would draft
3 provisions.

4 So I was deeply involved in the -- in
5 the -- in that agreement, every jot and tittle. I
6 mean, every aspect of it was something that I would
7 review and that I understood that I was being looked
8 to to provide advice.

9 Q Okay. Anybody -- who did you deal with
10 with SCANA on the EPC amendment in 2015?

11 A My primary contact was Al Bynum.

12 Q Okay. Anyone else?

13 A Well, everyone else. Everyone -- that was
14 a significant event in the life of the project, as
15 you can imagine, so everybody from the heads of the
16 two clients down to some -- some technical people,
17 and not excluding the in-house counsel.

18 Q And so the heads of the two clients were
19 Kevin Marsh and Lonnie Carter?

20 A Yes.

21 Q And you interacted with them on the EPC
22 amendment in 2015?

23 A Yes.

24 Q And the in-house counsels at the time were
25 Mike Baxley and Jim Stuckey?

1 A Mike Baxley was a -- as I understood, his
2 title was general counsel for Santee Cooper.

3 Steve Pelcher was -- I don't know if his
4 name was project counsel, but that's the way I
5 understood that he functioned.

6 So those were the two lawyers for Santee
7 Cooper that I know.

8 Q And in addition to Al Bynum, who were the
9 other attorneys at SCE&G or SCANA that you dealt
10 with on the EPC amendment?

11 A At that time, the general counsel was Ron
12 Lindsay.

13 Q And you worked with him on the EPC
14 contract amendment in 2015?

15 A Well, I had communications with him.

16 Q Okay.

17 A He was not as closely involved.

18 Q Was there anybody else, than who we've
19 named, who was closely involved in your work on the
20 EPC amendment in 2015?

21 A Everybody that they could bring to bear,
22 that there were people -- there must have been a
23 dozen people from the two firms who at one time or
24 another provided input on how that should be
25 structured.

1 Q What about any other outside counsel for
2 the owners during the 2015 EPC amendment?

3 A The only outside counsel that I recall is
4 Frank Elmore. He came in 2015.

5 Q Do you remember his role?

6 A He was brought on board by Santee Cooper.
7 And I should also say that prior to the
8 execution of that document, there were a couple
9 lawyers from Dentons who were brought on by Santee
10 Cooper in order to review that -- that amendment,
11 what we call the October 2015 amendment.

12 Q Had you worked with Dentons on the project
13 before?

14 A No.

15 Q Have you worked on -- with Dentons on the
16 project since?

17 A No.

18 Q Are you aware of Dentons working on the
19 project in any way, other than the 2015 EPC
20 amendment?

21 A No.

22 Q In those years, 2011 to 2015, in the
23 hundreds of issues that you dealt with, was there
24 any other issue as big as the 2015 EPC amendment?

25 A I don't know what -- you must be using a

1 metaphor when you talk about "as big." Can you make
2 that a little clearer to me?

3 Was the dollar value the same? I mean,
4 what are you talking about, "as big"?

5 Q Sure. As significant to the success or
6 continuation of the project.

7 A I wouldn't use those terms. The project
8 was discontinued, so -- but in any case, there are
9 certain amendments that were executed that were
10 significant. The July 2012 amendment was a major
11 step because it enabled the Santee Cooper and SCANA
12 team to avoid litigation.

13 As I said, those identical issues were
14 raised with an even higher price tag in litigation
15 with Vogtle. So we knew at that time that we were
16 facing the possibility of litigation. And avoiding
17 litigation during an ongoing project that's expected
18 to last for a long time is always a good idea.

19 So I considered that to be a -- avoiding
20 litigation in 2012, I thought, was a major
21 achievement. But I don't mean to downplay the
22 significance of the October 2015 amendment and the
23 option that was granted under that. That was
24 certainly also a very significant event in the life
25 of the project.

1 Q And the option that was granted in the
2 October 2015 amendment to the EPC was the fixed
3 price option?

4 A Yes.

5 Q In that time frame of 2011 to 2015, when
6 you were representing the owners in the project,
7 were there any other issues that you dealt with that
8 were at the same level or near the same level of
9 significance of the 2012 amendment to the EPC and
10 the 2015 amendment to the EPC?

11 A Well, a lot of the issues that I dealt
12 with were addressed in the -- in the October 2015
13 amendment. So if you want to know what issues were
14 foremost in the people's minds at that time, and
15 some of the issues that I dealt with between 2011 --
16 between 2012 and 2015, you can simply review that
17 list of resolved claims to get some flavor for that.

18 Q And where is the list of resolved claims?

19 A Well, it's in the -- it's in the October
20 amendment.

21 Q And --

22 A Although it's not a -- it's a list, and
23 then it says, "and everything else that you can
24 think of." So it's more technical than that, but
25 you know what I mean.

1 Q Yes. And the October 2015 EPC amendment
2 was the product of months, if not longer, of
3 negotiations; isn't that right?

4 A From the time that the prospect of a --
5 some sort of resolution of the outstanding issues
6 and the avoidance of imminent litigation, from the
7 time that that was first broached to the resolution,
8 it was many months, yes; I would guess four or five.

9 Q Are you familiar with the May 6, 2014,
10 what's sometimes referred to as a roll-up letter,
11 from the CEOs of the owners to the CEOs of the
12 consortium?

13 A Is that a letter that lays out some deal
14 points?

15 Q Or I would describe them, maybe, as
16 challenges to the project.

17 A Then I'm not sure what you're referring to
18 about that. I -- I would be surprised if something
19 that you've just described was not something that
20 came across my -- that -- let me rephrase that. Too
21 many negatives.

22 I would be surprised if I didn't see a
23 document that you're -- that you've just
24 characterized at the time. I just -- nothing comes
25 to mind.

1 Q All right. One of the major issues that
2 have been ongoing for the project was the module
3 construction and delivery.

4 A Yes.

5 Q And was that part of the issues that was
6 resolved by the 2015 EPC amendment?

7 A From my memory, I believe it was, yes. If
8 by "issue being resolved," was a claim related to
9 the modules resolved, I think it was.

10 Q And the drafting of the 2015 EPC amendment
11 was part of the negotiation process?

12 A Yes, that's -- as you know, lawyers
13 typically send drafts back and forth in editable
14 form and redline them and do the whole thing.
15 "Redlining" meaning highlight them so that -- so
16 that the suggested changes by party A are
17 transparent to party B. And then party B accepts
18 them and redlines those and sends them back. That
19 was the process that I observed.

20 Q And do you know how long the negotiations
21 for the 2015 EPC amendment occurred in the document
22 as you just described, redlining versions?

23 A No, I don't. I have no idea.

24 Q How long do you believe it took to
25 document the agreement of amending the EPC agreement

1 in October?

2 A Well, as I said, it was four -- at least
3 four or five months between the time that there was
4 a proposal by the -- by the contractor to avoid
5 litigation through some sort of amendment and the
6 time that the document was executed.

7 Q And how long was it for the October 2015
8 EPC amendment between agreement among the parties
9 and the actual execution of the final document?

10 A I don't think -- I don't recall. The
11 execution of the document required board approval of
12 both -- of both owner entities. And so I was less
13 focused on when that actually occurred, because I
14 thought it was near certainty that it would occur.
15 I don't believe it was long after the final document
16 was negotiated and there was an agreement in
17 principle before it was actually instituted.

18 Q And when you said the near certainty you
19 had that it would be approved was based on the fact
20 that you all had reached agreement between the two
21 negotiating teams?

22 A I said I thought it was self-evidently in
23 the best interest of the owner, and I thought that
24 something so self-evidently in the interest of the
25 owner would be approved by them.

1 Q And the approval of the owners was the
2 board approval of each owner?

3 A Yes.

4 Q And that occurred for both owners after
5 you had reached, you know, the final agreement on
6 the EPC amendment?

7 A Well, again, lawyers don't reach final
8 agreements, but once there was a document in place
9 that was blessed in principle by both sides, lawyers
10 and others, then it was presented to the boards.

11 Q And do you remember if it changed, if the
12 EPC amendment, in October of 2015, changed in any
13 way after the lawyers had reached agreement in
14 principle on both sides?

15 A Well, again, I said lawyers and others.

16 After the agreement in principle, we had a
17 document. And then those were presented to the
18 boards. And I don't recall either board suggesting
19 changes or requesting edits to the -- to the
20 document that was presented to them.

21 Q Okay. What -- in the time that you were
22 representing the owners on the project, were there
23 any other major issues that you dealt with like the
24 two amendments in 2012 and 2015 to the EPC that
25 we've talked about?

1 A Every -- everything that I -- every issue
2 that I dealt with had something in common with those
3 issues in that they were -- they were the types of
4 construction disputes that I typically address. So
5 every dispute that I handled was a contract dispute,
6 a construction dispute, a dispute about either
7 extras or delays or inefficiencies or something of
8 that type.

9 So they were -- all of the disputes were
10 like the disputes that were resolved in July of 2012
11 and October of 2015. And some of them were the very
12 same disputes indeed because, as I mentioned, the
13 July 2012 amendment was a roll-up of four or five
14 claims that were on the table at the time. The
15 October 2015 amendment was a roll-up of maybe a
16 dozen known claims, plus -- identified claims, plus
17 all other known claims.

18 Q And so after the October 2015 EPC
19 amendment, it kind of wiped the slate clean of
20 disputes by virtue of the amendment to the EPC;
21 isn't that right?

22 A All -- well, the language says all
23 disputes that were known at that time.

24 So "wipe the slate clean" is not a bad way
25 to put it; however, there were still a half a dozen

1 years to go on the project, and we obviously knew
2 there were going to be more disputes, which is why
3 we put in place the DRB, the Dispute Review Board.

4 Q And can you tell us a little bit about the
5 interim payments that occurred after the EPC
6 amendment and before the fixed price option was
7 exercised?

8 A Well, the exercise of the fixed price
9 option, to me, is not a milestone that bears on your
10 question. There were payments that were agreed to
11 be made at a fixed price until the parties could
12 arrive at a construction milestone payment schedule.
13 And that construction milestone payment schedule
14 took some time.

15 The contractor was not going to stop work
16 until -- until that could be -- until that could be
17 put in place, that would be in nobody's interest.
18 So he continued to work and he provided information
19 about what he thought his burn rate would be. "Burn
20 rate" meaning how much he would spend for a given
21 interval of time.

22 So his burn rate was suggested, just pay
23 me in order to cover my costs until we could follow
24 a -- follow the agreed procedure of putting in place
25 a construction milestone payment schedule.

1 Q And the DRB was tasked to come up with a
2 construction milestone payment schedule?

3 A There was a dispute because the parties
4 couldn't agree, and that was presented to the DRB.

5 Q And do you know when the DRB decided the
6 project's construction milestone payment schedule?

7 A I don't have that date in my head. It was
8 some -- we had hearings, and there was a -- and they
9 made the decision.

10 Q It was in late -- or fall of 2016, right?

11 A It was -- it was certainly, if by "late,"
12 the second half of 2016. I think the hearings were
13 in September, I think, so it would be sometime after
14 the hearings.

15 Q And the September hearings were in the DRB
16 on the construction milestone schedule?

17 A Construction milestone payments, yes.
18 Yes.

19 Q And the fixed -- the interim fixed payment
20 that the owners were paying the consortium after the
21 EPC contract, what was that and when did it start?

22 A I believe the first payment was in January
23 of 2016. I believe that the -- well, that's when I
24 think it started.

25 Q And it was \$100 million a month?

1 A It seems to me that it fluctuated. There
2 were certainly some months when it was \$100 million,
3 but that's not -- that's actually something -- not
4 something that I've reviewed in preparation for this
5 deposition.

6 And when I say "that," I didn't review
7 exactly when those payments were made and what their
8 exact amounts were. My memory is that there were
9 some that were 100 million. It seems to me there
10 were some less than that, but I don't -- I'm not
11 certain of that.

12 Q And you talked about Westinghouse
13 providing its burn rate information to the owners to
14 come up with that amount of monthly payments; is
15 that right?

16 A Right.

17 Q When was that information given?

18 A I don't know. I wasn't involved in that
19 aspect of the process.

20 Q But that would have had to have been given
21 before the EPC amendment, wouldn't it, to have been
22 taken into account for the fixed payments in the
23 interim?

24 A I -- you said it would have to be. I
25 don't follow your reasoning.

1 Q I thought that the October 2015 EPC
2 amendment set up the interim payment so that
3 Westinghouse would continue working on the project
4 until the construction milestone payment schedule
5 could be set.

6 A But the fixed price is the fixed price,
7 you understand. So there is -- once the fixed price
8 is set, then all payments made after a certain time
9 are payments of that fixed price. So whether you
10 pay them \$5 or \$5 million or \$100 million in January
11 of 2016, that is credited against the fixed price
12 amount.

13 Q And I'm asking: How did they come up with
14 the interim monthly payments?

15 A And I've told you that it's my
16 understanding that Westinghouse provided the burn
17 rate to the folks out at new nuclear, and that that
18 was vetted, and there was an agreement that those
19 payments would be made.

20 I wasn't -- I didn't review that data
21 provided. I was not consulted on what the amount of
22 the payments should be. And I have really nothing
23 else -- or I can't think of anything else I can tell
24 you about that.

25 Q No problem.

1 Who was -- who would have been involved in
2 that?

3 A Well, the folks at NND. There was a -- as
4 you can imagine, the owner had a significant team at
5 the plant in Jenkinsville. And those people would
6 have looked at those numbers. There was also -- but
7 I think it would have had to have been approved by
8 the executives.

9 Q And the executives on an issue like that
10 are who?

11 A Well, since I don't know who -- who
12 actually approved those numbers, I can't identify
13 people for you. But I would be surprised if all of
14 the executives weren't involved at some point in
15 evaluating that number. But I don't know that.

16 Q All right. And you're characterizing them
17 as executives. I'm just wondering who you're
18 talking about. Are we talking about Kevin Marsh and
19 Steve Byrne?

20 A I would think those people and Lonnie
21 Carter and other Santee Cooper.

22 Q And do you know who under Steve Byrne was
23 out at NND during this period of time?

24 A Well, I think everybody at NND was under
25 Steve Byrne.

1 Q And who was directly underneath him?

2 A Oh, that I don't know. I never saw an org
3 chart.

4 Q Okay. When you said that that -- that
5 that information was given to folks out at NND, you
6 didn't have anybody specific in mind, you just --

7 A No, just the team.

8 Q Okay. And do you know if these -- I think
9 you referenced that these kind of interim monthly
10 payments would be credited towards the contract
11 price.

12 Is that also described as a true -- true
13 up the payments?

14 A No. That's a different concept.

15 Q Okay.

16 A The crediting is a simple mathematical
17 function, and there was never any dispute about
18 that. The true-up is a different concept
19 altogether.

20 Q But crediting just means it's not in
21 addition to the contract amount?

22 A Right.

23 Q And the true-up means that you aren't
24 entitled to keep the amount that is fixed in the
25 interim. You actually have to either give back, if

1 you didn't actually spend it, or get more, if you
2 spent more; is that right? It trues up to the
3 actual cost?

4 A Actually, it trues up to the construction
5 milestone payment schedule, because contractors
6 don't -- they hope not to build things solely at
7 actual cost. There are a lot of other things that
8 are built into that.

9 So the idea is that we would have a
10 construction milestone payment schedule, but that
11 that would -- could not be developed immediately.
12 So that the true-up, as I understood it, was, you
13 know, pay X number of dollars for a certain number
14 of months. You'll eventually develop a construction
15 milestone payment schedule. That milestone payment
16 schedule might entitle the contractor to more or
17 less than what the monthly fixed sums were. And so
18 you true up by identifying whether it should be more
19 or less. And then money either flows to the
20 contractor or back to the owner or is credited.

21 Q And in late 2016, when the construction
22 milestone payment schedule was set, did those
23 interim payments get trued up?

24 A That was an issue for the DRB.

25 Q And did the DRB make a decision about the

1 true-up of the interim payments?

2 A They did.

3 Q And what was that?

4 A I -- I'm hesitant to characterize a
5 document that I don't have in front of me. Do you
6 happen to have the --

7 Q I'm sorry. I don't.

8 But you saying that the issue of whether
9 it gets trued up or not was presented to and decided
10 by the DRB?

11 A Yes.

12 MR. BALSER: Matthew, when you get to a
13 convenient stopping place, can we take a short
14 break?

15 MR. M. RICHARDSON: Let's go ahead and
16 stop. We'll take a quick break.

17 THE VIDEOGRAPHER: The time is
18 approximately 10:08. We are off the record.

19 (Recess in the proceedings from 10:08
20 to 10:17.)

21 THE VIDEOGRAPHER: The time is
22 approximately 10:17 a.m. We're back on the
23 record. Counsel may proceed.

24 BY MR. M. RICHARDSON:

25 Q Mr. Wenick, would you mind passing me

1 those documents that you brought today, and the hard
2 copies, too, please.

3 A Those are duplicates.

4 Q That's okay.

5 A They're for my purposes.

6 Q I'll give them back.

7 A (Handing.) Okay.

8 Q Mr. Wenick, do you know why Bechtel was
9 hired in 2015?

10 A They were hired to assist me in evaluating
11 the project in anticipation of litigation.

12 Q And what was the litigation anticipated at
13 that time?

14 A Litigation between the owner and the
15 consortium.

16 Q And what was that -- what was that
17 potential litigation about?

18 A It was about the expected and actual
19 pending construction claims concerning the project.

20 Q And what were the pending construction
21 claims?

22 A Well, if you'd hand me back my documents,
23 I would tell you.

24 Q All right. We'll come back to that.

25 And how did you decide to hire Bechtel?

1 A Bechtel was proposed as somebody who was
2 interested in conducting a review of the project,
3 and so I -- I agreed that they would be a suitable
4 entity to perform that review.

5 Q And who proposed Bechtel as being
6 interested in a review of the project?

7 A Santee Cooper.

8 Q And when did that occur?

9 A I don't know when that occurred.

10 Q Before you got involved?

11 A Oh, gosh, no. I was involved in 2011.
12 Nobody, to my knowledge, from Santee Cooper proposed
13 Bechtel prior to 2011.

14 Q Santee Cooper proposed Bechtel to do a
15 review of the project before you got involved with
16 that issue of hiring Bechtel; isn't that right?

17 A I learned in May of 2015 that Santee
18 Cooper was interested in hiring Bechtel, and I was
19 advised that there was a concern about producing
20 discoverable material.

21 Q Do you know why Santee Cooper wanted to
22 hire Bechtel to review the project?

23 A No, not in May of 2015.

24 Q Did you learn later why they wanted to
25 hire Bechtel?

1 A I received a number of explanations, not
2 always consistent with one another.

3 Q And did you come to any conclusion
4 yourself about why Santee Cooper wanted to hire
5 Bechtel?

6 A There were times when I spoke with Santee
7 Cooper personnel when they agreed that I should
8 retain them, which I did, that I should retain them
9 in anticipation of litigation, which is what the
10 retention agreement says, and there were other times
11 I learned that they wanted to use the Bechtel
12 information in the normal course of business.

13 Q And what would be using the Bechtel review
14 in the normal course of business?

15 A Using -- using information that Bechtel
16 would gather in order to advise Santee Cooper and
17 SCANA on aspects of the project.

18 Q And who did you discuss that with in May
19 of 2015?

20 A I don't recall a discussion in May. I
21 received an e-mail from Al Bynum, which is in front
22 of you right now, stating that Santee Cooper was
23 interested in retaining Bechtel. And Mr. Bynum
24 solicited my advice, and he said, "Are we just
25 creating discoverable material?" Which I understood

1 to be discoverable material in an eventual dispute
2 with the contractor, a construction dispute.

3 Q And did you have discussions with anyone
4 else about Santee Cooper wanting to hire Bechtel?

5 A I had discussions with multiple people
6 over the course of several months, both orally and
7 by e-mail, about that topic.

8 Q And did anyone else, other than Santee
9 Cooper, want to hire Bechtel to review the project
10 in 2015?

11 A Well, the initial impetus came from Santee
12 Cooper, but then the parties together agreed that I
13 should retain Bechtel in anticipation of litigation
14 of construction disputes in order to see what
15 Bechtel might be able to provide to assist us in
16 understanding the project and the nature -- the
17 cause of certain issues that led to disputes.

18 Q And did you have any discussions about
19 hiring Bechtel outside of the owners or employees of
20 the owners?

21 A Oh, my law firm buddies, I suppose. I had
22 discussions with certain other members of my law
23 firm about -- about hiring Bechtel. But other than
24 that, maybe my wife. I sometimes share with her
25 what's going on in my life, my professional life. I

1 try not to, but it leaks out. So anybody -- those
2 are the only people I can think of.

3 Q Did you have any conversations or
4 negotiations with the consortium or representatives
5 of the consortium?

6 A Not directly.

7 Q And who had those communications?

8 A I think the usual suspects, but I don't --
9 I don't specifically recall that. I recall being
10 involved in looking at Bechtel's concern about
11 limiting the information that it provided to Bechtel
12 and limiting the uses to which that information
13 could be put. But I was, again, the lawyer to the
14 lawyer. I was reviewing drafts that others had
15 prepared and -- (phone interruption).

16 Q Were there any other concerns of the
17 consortium, other than limiting the information that
18 they provided to Bechtel and the use of the Bechtel
19 report?

20 A Well, there are really a cluster of issues
21 that are related in some way to those two concerns.
22 They were concerned about providing Bechtel with
23 certain information because Bechtel is a potential
24 competitor, and maybe an actual competitor of the
25 consortium.

1 So there were -- as I said, that's one of
2 the cluster of issues that were related to limiting
3 the information that the consortium would make
4 available to Bechtel and limiting the use to which
5 it would be put.

6 There were also concerns about the manner
7 in which the information would be provided. That
8 is, it would not be provided with a large electronic
9 document dump, but rather a lot of it would be
10 simply made available in a -- in a room in hard copy
11 format.

12 But there were, as I say, a number of -- a
13 cluster of issues related to the concern about
14 limiting the flow of information from the consortium
15 to Bechtel, and limiting the uses to which that
16 information would be put.

17 Q And just so that we're all clear, the
18 consortium's concern about the use of the
19 information relates to the information that the
20 consortium was providing to Bechtel and not the
21 results of the findings of Bechtel?

22 A Well, it was both. They -- as I said,
23 they wanted to limit the uses to which the
24 information would be put, so there was a concern
25 about -- about what a report would look like and how

1 it might be used.

2 Q And at that time, prior to the formal
3 hiring of Bechtel, was there an understanding or
4 agreement about whether there would be a written
5 report?

6 A I don't recall. If you'd hand me back my
7 documents, I would tell you what -- what is in the
8 agreement.

9 I brought you electronic form because
10 that's the form in which these documents are
11 maintained. I have no obligation to provide them to
12 you in another form. I've handed them to you as a
13 courtesy so you could make notes as to what I
14 brought with me, but I would like them back if
15 you're going to continue to ask me about things that
16 touch on those documents.

17 Q Sure. No problem. And we'll go through
18 them. It's not a memory contest. I'm not holding
19 you to that.

20 The agreement you referred to, though, is
21 the PSA that was signed in early August?

22 A Yes, the agreement I'm referring to is the
23 Professional Services Agreement that I negotiated
24 with Bechtel, and that was executed in August of
25 2015.

1 Q And your -- I think we've covered this,
2 but your clients for the V.C. Summer nuclear project
3 was SCE&G and Santee Cooper?

4 A I think that the engagement was and the
5 billings went to SCANA. So SCE&G, as a -- what I
6 understand to be a subsidiary of SCANA, certainly
7 was a client, but I was primarily -- I thought of my
8 client as being SCANA and Santee Cooper and any
9 affiliated entities.

10 Q And, in part, SCANA or SCE&G was an agent
11 for Santee Cooper in the context of the project;
12 isn't that right?

13 A In the execution of the engineering,
14 procurement, and construction contract, it recites
15 that SCANA is executing that document as an agent of
16 Santee Cooper. And I believe that was pursuant to a
17 specific agency agreement that was limited to the
18 execution of that document.

19 I do not -- I have no reason to believe
20 that, in general, that they were an agent of Santee
21 Cooper or had any general agency authority.

22 Q They were just a limited agent for
23 purposes of the project?

24 A Well, I think it's much more limited than
25 that.

1 Q Okay.

2 A It was my understanding that there was a
3 separate agency agreement limited to the execution
4 of the document, and that that limited agency only
5 authorized SCANA to act as an agent for Santee
6 Cooper for the purpose of executing that document.
7 That's my understanding.

8 Q And so if SCANA or SCE&G was a limited
9 agent for Santee Cooper for purposes of the EPC
10 contract --

11 A No. Now you're changing my words.

12 Q I'm asking.

13 A Okay.

14 Q I understand your answer. I just want to
15 clarify the contours of your answer. I'm sorry to
16 be talking over each other. Let me finish the
17 question, and then you'll see if it's different.

18 A Yeah. Sure.

19 Q If SCANA or SCE&G was a limited agent for
20 Santee Cooper, for purposes of the EPC contract,
21 beyond just signing it, you just don't know that or
22 are unaware of it?

23 A I'm unaware of it. I've not seen any
24 evidence of that. And it's contrary to my
25 understanding, because I had understood that

1 subsequently, when there were other documents that
2 SCANA was going to sign as agent for Santee Cooper,
3 that there were other specific agency agreements
4 executed.

5 If SCANA had somehow been authorized to
6 act as a general agent for Santee Cooper, it seems
7 to me that those other specific agency agreements
8 would have been unnecessary.

9 Q And so for purposes of your representation
10 of the owners, with respect to the project, you
11 didn't have a greater engagement with one of the
12 owners over the other?

13 A I took -- no. And I took great care to
14 keep them both apprised of what I was doing. I've
15 represented joint ventures before. I understand
16 what they are, how they operate, and what they
17 expect from their legal counsel.

18 Q And as legal counsel to the owners on the
19 project, and specifically with respect to the
20 Bechtel assessment and report, you fully
21 communicated to Santee Cooper just like you
22 communicated with SCE&G?

23 A Absolutely.

24 Q Well, did you have an engagement letter or
25 a representation agreement?

1 A Apparently not. I've looked for that.
2 Going back to 2011, I don't remember one way or the
3 other, but I haven't been able to locate it.

4 Q I was curious why you didn't list the V.C.
5 Summer nuclear project or SCE&G or SCANA or Santee
6 Cooper on your web bio. Why is that?

7 A A lot of clients don't like to be listed.
8 And, frankly, I don't like to list my clients. I'm
9 old-fashioned that way.

10 Q I understand that, too.
11 Did either of the owners request that you
12 not list them?

13 A I don't remember ever asking them, and I
14 don't remember them ever expressing a view on that.

15 Q Did you communicate with anybody
16 representing the consortium about the Bechtel
17 assessment or the report?

18 A Yes, frequently and several people.

19 Q Who was that?

20 A Well, in the first instance, it would have
21 been the four lawyers that I've mentioned, Mike
22 Baxley and Steve Pelcher for Santee Cooper.

23 Q Can I interrupt you a second?

24 A Of course.

25 Q I believe I asked about the consortium.

1 A Oh, at the consortium.

2 Q Right.

3 A I'm sorry.

4 Q Did you communicate with anybody
5 representing the consortium?

6 A No. I think you've already asked me that
7 question. And no, I did not directly.

8 Q And that's true after the report came out,
9 as well?

10 A Yes.

11 Q You've -- we had talked about, you know,
12 you had found out that Santee Cooper wanted to have
13 Bechtel hired to review the project.

14 We were talking about why Santee Cooper
15 wanted to hire Bechtel, and I think you gave two
16 reasons. I wanted to ask about the second one, that
17 they wanted to use it in the normal course. And I
18 think you had -- just to get us back where we were,
19 I think you said you advised on aspects of the
20 project.

21 Do you know -- I mean, can you give me
22 more about what the -- what the use of the Bechtel
23 report in the normal course would be, just on
24 aspects?

25 A Well, I didn't know what the report would

1 look like, and I took steps to try to shape the
2 report so that it would be useful to me.

3 Frankly, I saw it as an opportunity to do
4 something that I, in the back of my mind, I had
5 wanted to do, and that is to bring in a construction
6 expert to advise me on certain things about the
7 project that would be useful to me in evaluating
8 issues, primarily delay issues, but also extra work
9 issues for the project.

10 Q What -- what are extra work issues?

11 A Well, a contention, for example, that
12 there was a design dictated by the Nuclear
13 Regulatory Commission of the basemat. And as a
14 result of that dictated design change, the
15 reinforcing in that mat had to be much more robust.
16 Putting in a more robust basemat entails additional
17 cost and additional time.

18 So that's one of dozens of construction
19 disputes concerning extras that could and in that
20 case did arise in connection with this project.

21 Q And when was that design change dictated
22 by the NRC, if you remember?

23 A Actually, I think that was one of the
24 items that was resolved in 2012.

25 Q Right. Okay. So in dealing with the

1 Bechtel assessment in 2015, what were some of the
2 extra work issues?

3 A Well, at the time there were about a dozen
4 that were significant enough to -- to rise to the
5 level of everybody's attention, that had price tags
6 of between 10- and more than \$100 million each.

7 Q And what were some of those, just as a --
8 give us an example.

9 A They're all listed in the documents that
10 you decided not to give back to me. And I'd like to
11 have them back.

12 Q Okay.

13 A Well, you said, "Okay." What does -- is
14 there a problem with returning those?

15 Q No. I'm just saying we'll come back to
16 it. I haven't had a chance to look at it either. I
17 thought I'd just do that at the next break.

18 A Okay. Well, then, hand me back, please,
19 the October amendment, and I can tell you what items
20 were resolved in the October amendment. You say
21 it's not a memory contest, but indeed it seems that
22 it's becoming that.

23 Q Well, I'm fine with the answer to the
24 question of what the extra work issues that you were
25 interested in on the Bechtel assessment being

1 identified as the -- as the disputes resolved in EPC
2 amendment. I'm fine with that.

3 MR. BALSER: I want the record to reflect
4 the witness has asked four times that his
5 personal copy of the documents that he brought
6 with him to the deposition that you asked for
7 as a courtesy, and he provided to you, be
8 provided back to him, and you are refusing to
9 give the witness the documents back.

10 MR. M. RICHARDSON: I'm also telling him
11 he doesn't have to answer the question. So
12 when he gets to that point, we move on.

13 BY MR. M. RICHARDSON:

14 Q Mr. Wenick, was the Bechtel report kept
15 confidential to protect the consortium in their
16 litigation over the Vogtle project?

17 A I don't -- you're asking me about the
18 Vogtle project?

19 Q That's right.

20 A To protect the -- you're asking me if the
21 Bechtel report was kept confidential to protect the
22 contractor consortium in connection with the Vogtle
23 project?

24 Q That's right.

25 A That never occurred to me till you just

1 simply -- that you had suggested it just now. I had
2 no idea what the motivations of other people at the
3 owner -- that is, at SCANA or Santee Cooper -- were.
4 That was not my motivation. That's not why they
5 were retained. That's not what their scope of
6 services defines.

7 So if you're asking me my view, no. If
8 you're asking me about the owners, I have no idea,
9 but it wasn't discussed in my presence.

10 Q And so you weren't told by your client
11 that that was one of the concerns that the
12 consortium had?

13 A I simply don't remember that being
14 mentioned.

15 Q Do you remember any discussions about the
16 consortium not wanting the Bechtel assessment or
17 report to be used or available in the Vogtle
18 litigation?

19 A Well, let me say that there was always an
20 issue about sharing anything about this project to
21 anybody, including and especially the Vogtle owners,
22 because of certain non-disclosure obligations that
23 were embedded in the EPC contract.

24 But specifically in connection with
25 Bechtel, I don't recall that discussion one way or

1 the other.

2 Q Was the -- was the Bechtel report a
3 preliminary or incomplete assessment?

4 A It was certainly preliminary. They said
5 so; and I viewed it that way, and I think everybody
6 did.

7 Q And do you know if Westinghouse ever had a
8 fully integrated resource-loaded construction
9 schedule?

10 A That issue was discussed, but I don't
11 recall what the answer was. They may have had one
12 up through commissioning. I think their contention
13 was that they did have one up through commissioning.

14 Q And what is commissioning?

15 A Well, that's -- that is the -- basically
16 the startup of the plant. So the construction is
17 substantially over, but there's more work to be done
18 in order to make certain that everything works and
19 starts up properly. And so it's the detailed,
20 time-consuming, complicated process, especially on a
21 project of this nature. So...

22 Q And the commissioning is at the end of the
23 construction project, right?

24 A Right. Correct.

25 Q Is it fair to say you don't know if they

1 ever -- if Westinghouse ever had a fully integrated
2 resource-loaded construction schedule?

3 A Well, I can't swear to it. You're
4 obviously asking me to swear to it; so I don't know
5 for certain.

6 Q Do you believe that Santee Cooper's
7 primary motive on the Bechtel assessment was to
8 secure a larger, more permanent role for Bechtel on
9 the project?

10 A You said -- okay. So there are a number
11 of words you've used in there, that their primary
12 goal was for Bechtel to do a -- the suspicion that
13 Bechtel was -- there was some self-promotion with
14 their report -- began hovering over the Bechtel
15 engagement well before the report was issued.

16 And I never -- I heard that. I credited
17 that, that there was some self-promotion involved.
18 Some people seemed to think they had some firsthand
19 information or pretty good reason to suspect that.
20 And those -- and I -- and that -- those opinions,
21 those views, filtered to me.

22 It did seem to a lot of people that they
23 saw the report as a first step in becoming the
24 owners' engineer, which is a position that is
25 expressly permitted under the EPC contract. And

1 Bechtel probably thought that they were the right
2 person to do that. And, therefore, I and others
3 looked at some of their recommendations about --
4 some of the comments about the project as being
5 made, at least in part, because of their desire to
6 become the owners' engineer.

7 Q And it sounded like you answered it on
8 behalf of Bechtel.

9 My question was: Were you familiar or did
10 you know that Santee Cooper's, one of their primary
11 motives, related to the Bechtel assessment and
12 report, was to secure a larger, more permanent role
13 for Bechtel on the project?

14 A I think that it was reported to me that
15 there were some people at Santee Cooper who -- who
16 had that primary agenda.

17 Q And who were they?

18 A I never paid attention to the names. You
19 know, I was told about family relationships between
20 people at Santee Cooper and somebody at Bechtel and
21 all that. I basically kept my head down and tried
22 to work through those issues rather than get to the
23 bottom of that.

24 Q And we talked about earlier why Santee
25 Cooper -- why Santee Cooper wanted Bechtel hired to

1 do assessment of the project. You didn't mention
2 this. I wanted to make sure that you don't know
3 that that was a primary motive of Santee Cooper,
4 wanting Bechtel to have a greater role in the
5 project.

6 A The only way I would know that firsthand
7 is if someone from Santee Cooper told me that. And
8 so someone from Santee Cooper didn't tell me that,
9 but people at SCANA told me that that was their
10 understanding of what at least some people at Santee
11 Cooper were up to.

12 And, again, the way I saw my role was it
13 was to use the Bechtel report in a way that was
14 useful to me as construction counsel in anticipation
15 of a dispute. And if other people had other
16 agendas, I tried to prevent that from interfering
17 with what I was up to, but I didn't investigate.

18 Q And did Santee Cooper ever suggest that
19 they wanted to hire Bechtel to assist you in
20 anticipation of litigation?

21 A Oh, absolutely. There were multiple
22 discussions about all of that before and after the
23 actual execution of the agreement. And the
24 agreement was in the possession of my clients. And
25 the clients agreed that I should -- agreed to the

1 terms that are in that Professional Services
2 Agreement. And that Professional Services Agreement
3 recites that they are being retained to assist me in
4 evaluating potential litigation.

5 So absolutely, the owners were absolutely
6 on board with the whole goal. And we had multiple
7 conversations and e-mails about that.

8 Q And I understand that Santee Cooper agreed
9 to hire Bechtel, at least under the PSA, in
10 anticipation of litigation. But I want to know if
11 Santee Cooper ever came up with that idea on their
12 own or suggested it themselves.

13 A The first idea was proposed, to my
14 knowledge, by me. After I received the May e-mail
15 from Al Bynum, then I responded and recited what my
16 normal approach was to retaining experts. And that
17 was in response to Al Bynum's concern that we would
18 be just creating discoverable material.

19 And in this context, I think I need to
20 explain what I understood "discoverable" to mean.
21 That's a term that lawyers use. It's not -- and it
22 has a specific meaning to lawyers. What it means is
23 that in the future dispute, through the discovery
24 made available by the Federal Rules of Civil
25 Procedure -- and I had mentioned the federal rules

1 because it was contemplated that that dispute would
2 be in the Southern District of New York -- but under
3 those rules, certain things are discoverable and
4 certain things are not.

5 So Al Bynum immediately put up a red flag.
6 The same e-mail when he advised me of the interest
7 of retaining Bechtel, Al Bynum raised a red flag
8 that any competent in-house counsel would raise in
9 that context, that are we creating discoverable
10 material.

11 And so I explained that my normal practice
12 is for my firm to retain the expert. Now, at that
13 time I wasn't certain whether they would be retained
14 as an expert for -- a testifying or non-testifying
15 expert. Again, to lawyers that has significant
16 meaning. Firms retained as testifying experts are
17 obligated to produce reports. Firms retained as
18 non-testifying experts can be -- don't have to be
19 disclosed. They don't have to provide reports.
20 Their identity doesn't have to be disclosed.

21 And so at that time it wasn't clear. But
22 in either case they were being retained, the
23 concept, beginning in May, was that they would be
24 retained as either a testifying or non-testifying
25 expert in anticipation of litigation with the

1 consortium about the normal run-of-the-mill
2 construction claims that I deal with every day and
3 have for 40-plus years of practice.

4 Now, when I say "run-of-the-mill," on a
5 \$10 billion project, they look a little less
6 run-of-the-mill. But in terms of the types of
7 claims, they were the types of claims that I deal
8 with every day.

9 Q Okay. Thank you.

10 Did the owners ever use a owners' engineer
11 on the project?

12 A I can't think of any time when that term
13 was assigned to anyone, but I don't know.

14 Q And they certainly didn't hire Bechtel,
15 after the assessment, to be the owners' engineer,
16 did they?

17 A No. A lot of things happened after the
18 assessment that -- that changed the overall
19 complexion of the project, including the October
20 amendment that we referred to.

21 Q And does that have some bearing on the
22 owners hiring an owners' engineer?

23 A Well, it -- it certainly had a -- in my
24 mind, it did. I don't know what was in the minds of
25 SCANA or Santee Cooper personnel.

1 Q But you know that the owners did not hire
2 Bechtel as an owners' engineer after the assessment?

3 A Bechtel didn't cover themselves in glory
4 with their report. I think they -- a lot of people
5 thought that they more or less disqualified
6 themselves, both because of the manner in which they
7 conducted themselves and the ultimate report that
8 they issued.

9 So no, they weren't hired as an engineer.
10 And I -- and I don't think they would have been had
11 there been no change.

12 Q And who were the folks that thought they
13 should -- they disqualified themselves through the
14 assessment?

15 A It would be easier to try to come up with
16 somebody who didn't. I don't think anybody thought
17 that Bechtel's report was what -- what we had in
18 mind. A lot of it was mooted by the October
19 amendment. They did things that they weren't asked
20 to do. They did things badly.

21 So I don't think anybody was -- thought,
22 hey, these are the guys that we really need to bring
23 in here. At least nobody ever said that to me.
24 Nobody ever said positive things about Bechtel
25 after -- after the report or after -- even after

1 their presentation in October.

2 Q I'm trying to understand what aspects of
3 the assessment and report that -- that they did that
4 you -- that they weren't asked to do, for example.

5 A Well, they weren't asked to do a
6 projection, a projection of completion. And had I
7 asked them to do that, I would have asked them to do
8 it -- do it properly rather than the way that they
9 did it.

10 Q Anything else they did that they were not
11 asked to do?

12 A I thought that they went out of their way
13 to be critical of the way in which the project was
14 being managed on the owners' side, and I couldn't
15 help but read that in the context of these comments,
16 that they were trying to ingratiate themselves with
17 the owner to become the owners' engineer.

18 Q Yeah. How do you reconcile those -- those
19 two things, that you -- you believe they were trying
20 to audition for the job, but then they were going
21 out of their way to criticize the decision-makers
22 for the hiring?

23 A The thrust of -- the way I would simplify
24 that point is: Bechtel was saying, "You don't know
25 how to do this. We do. Hire us."

1 Is that clear enough?

2 Q I mean, is that the answer?

3 A Yeah, that's -- that's a -- that's a
4 simplification.

5 But understand that I don't think that
6 Bechtel was solely motivated by self-promotion and
7 that that was solely a marketing effort. But when I
8 read the report, I couldn't help but think that some
9 of their topic areas and some of their conclusions
10 were influenced by their desire to self-promote.

11 Q And what were -- anything else that they
12 did that they weren't asked to do, other than the
13 schedule for the project and criticizing the project
14 management?

15 A Well, it's a several-hundred-page report
16 and I haven't read it in a couple years. So I -- my
17 answer is I feel certain that there is, but I can't
18 point you to anything because I didn't memorize that
19 report.

20 Q And when you talked about the people that,
21 seeing the results of the assessment and the report,
22 thinking that Bechtel had disqualified themselves, I
23 mean, you said it would be easier to figure out who
24 didn't do that. So you're saying that everybody you
25 talked to about the Bechtel report had the same

1 opinion?

2 A I'm saying that nobody said, "Hey, these
3 guys really have this nailed. They know how to
4 build this project. We need to bring them in."

5 I don't remember anything like that or
6 anything that I would paraphrase as being like that.
7 I don't recall anybody giving a glowing account of
8 Bechtel's performance, either during the assessment,
9 during the seven or eight weeks when they were
10 looking at the project, or as a result of their oral
11 presentation, or as a result of their written
12 reports.

13 Q And did the owners find that the Bechtel
14 assessment or conclusions were surprising or
15 different than they expected?

16 A In general, the -- there were too many --
17 there were just too many findings and conclusions
18 for me to say what the owner thought about every
19 single one.

20 If you want to ask me about a particular
21 conclusion or assessment or finding, I'll be happy
22 to try to give you my best memory of what the
23 thinking was, if it was ever expressed to me.

24 Q And the scope of what their work was going
25 to be was laid out in advance, right?

1 A Their -- the agreement states what they're
2 going to do in general terms. If you try to match
3 up what the agreement says with the report, I think
4 you'll become frustrated because it doesn't line up
5 very well.

6 Q And there's no question that the results
7 of the Bechtel assessment were critical of the
8 owners and, in particular, the project management?

9 A There's no question that Bechtel was
10 critical about many aspects of the project. They
11 were certainly critical of the consortium, and they
12 were critical of the owner. Those were the two
13 parties involved or two groups involved. And
14 Bechtel was critical of both.

15 Q Is it fair to say that the senior
16 management of the owners were not happy with the
17 results of the Bechtel assessment?

18 A I remember that they thought it was pretty
19 thin gruel, that that is that the -- some of their
20 comments and findings were delivered as though that
21 were the first time any issues had been identified,
22 whereas it was pointed out to me that a number of
23 the issues they were looking at were the subject of
24 frequent meetings between the owners and Bechtel.

25 So there was one category that was obvious

1 and had already been identified. There was another
2 category that was mooted by the -- by the
3 October 2015 amendment, which was already in final
4 form at the time of Bechtel's oral presentation.
5 And there was a third category where they were doing
6 things with an unreliable methodology that was
7 considered to be useless.

8 Q Well, what was that?

9 A Oh, that was the schedule projection.

10 Q And whose conclusion was that, that it was
11 unreliable and useless?

12 A Well, among others, it was mine.

13 Q And who else?

14 A I don't think anybody ever voiced a
15 disagreement when I expressed my opinion. I did it
16 in writing and orally to both clients, and nobody
17 ever said, "Well, no, I think that's -- I think they
18 got it right."

19 Everybody -- there were no dissents that I
20 recalled from my somewhat forcefully expressed
21 opinion that it was -- well, it certainly wouldn't
22 be used and couldn't be used in a court of law. It
23 wouldn't pass a Daubert test. You know what a
24 Daubert test in federal court is, right? A Daubert
25 test is when you challenge the methodology of an

1 expert to determine whether it was sufficiently
2 reliable for that test -- expert to testify. This
3 was far short of that. But it was even worse than
4 that. Even by their own admission, they couldn't do
5 enough -- they hadn't done enough analysis to get
6 reliable projections. And when I say "their own
7 admission," I'm saying Bechtel said those words.

8 Q And so what did -- what analysis did you
9 do, other than using your training and experience to
10 read the report, to conclude that they had used
11 unreliable methodology in their schedule assessment?

12 A Well, if you take off the table my
13 training and experience, then you don't leave me
14 with much.

15 Did I go to third parties? No.

16 Did I consult authoritative texts on
17 scheduling? I did, yes.

18 Q Which -- what are those?

19 A Well, the AACE International is an
20 organization of people who do scheduling. It's
21 mainly Americans, but it's -- there are some
22 Canadians and Brits involved. And they establish
23 more or less recommended practices in various areas
24 of forensic analysis related to construction,
25 costing, for instance, scheduling.

1 And so I -- I've used those, their
2 recommended practices as authoritative texts in
3 disputes before. It is readily available, easily
4 reviewed, easily understood, something that I
5 understood. And I looked at what Bechtel did and
6 measured it against recommended practices and found
7 that it fell far short.

8 Q And the recommended practices that you
9 identified to compare it to were for determining a
10 high confidence level or a -- or a what?

11 A Well, recommended practices for a schedule
12 analysis, which includes both a prospective and
13 retrospective, so forward-looking and
14 backward-looking. It addresses both.

15 Q And the forward-looking, you know, has
16 different aspects of analysis.

17 And I'm asking: Of the recommended
18 approaches, you know, you've got different types of
19 appraisals. Same with -- same with forward-looking
20 schedule analyses.

21 Which recommendations from -- that you
22 went and consulted and compared what Bechtel asked
23 to do to see if they had reliable methodology?

24 A Well, I actually prepared a lengthy e-mail
25 on this point. I think it's Recommended Practice

1 Number 29 of the AACE International. And what it
2 says is it defines different levels of schedule, so
3 that there can be a common understanding among cost
4 engineers and contractors and owners as to the
5 detail and the uses of various schedules.

6 Bechtel said that they did a level 2
7 schedule, which is something you can basically do on
8 a whiteboard. And a level 2 schedule cannot be used
9 for the purposes to which Bechtel put it.

10 And the foundation of the schedule was
11 even worse, because the foundation was their own, I
12 would say, "guess," but their estimate. I suppose
13 they were bringing their training and experience to
14 bear, but it's not the sort of thing that gets the
15 attention of construction lawyers, because it was
16 little more than a guess. And it had parameters of
17 plus or minus -- no -- plus-eight months or so.

18 So it was so -- I'm going to use a
19 technical term here -- squishy in its detail, and so
20 poorly underpinned in its foundation, and such a
21 high level, meaning level 2 -- level 1 is the
22 highest level, basically start and finish.
23 Level 2 says here is a half dozen or a dozen
24 activities. Level 3 then gets into detail.

25 They used a level 2 schedule to tell the

1 owner what the expected completion date was when the
2 contractor had bet \$900 million in liquidated
3 damages on quite a different schedule.

4 So when I look at that, look at what
5 people -- what skin they had in the game, look at
6 the contractor who's signing up for potentially
7 \$900 million in damages for being late relative to
8 the schedule he committed to, versus a -- the
9 Bechtel group, who had seven or eight weeks, a
10 limited budget, and limited access to information,
11 and what they were projecting for completion, I
12 just -- I just didn't put much stock in it. And
13 that was immediate and consistent. I immediately
14 had that reaction when they made their oral
15 presentation in October of 2015.

16 Q And did you ever analyze Westinghouse's
17 schedule for the project?

18 A No. That's what I had hoped Bechtel would
19 do. But Bechtel told us in October that they tried
20 to download the schedule, but it just took too long,
21 so they stopped trying to download it.

22 So -- and I was flabbergasted. When they
23 said that to me, I then asked a few questions:
24 "Tell me about your methodology." Because unless
25 you can tell me what your methodology is, dates mean

1 nothing to me. I mean, go to a soothsayer and read
2 tea leaves. Anybody can come up with dates. Tell
3 me how you arrived at your dates.

4 And when they told me what their method
5 was, I was basically done with Bechtel.

6 Q And did you ever ask Westinghouse what
7 their method was for determining the schedule for
8 the project?

9 A Oh, I know what the schedule was. This
10 schedule was a -- was a detailed critical path
11 method, CPM method, which is computerized. What it
12 does is it takes -- it's an algorithm. It takes
13 activities, breaks down the job into, in this case,
14 tens of thousands, perhaps hundreds of thousands of
15 activities, identifies start and finish dates,
16 identifies the connectors. Is this going to -- is
17 this activity A going to start when activity B ends,
18 or is it going to start 10 days later, or is it
19 going to precede activity B, what are the
20 relationships. And all of that is put into a
21 computer, but it's simple math.

22 So I understood that methodology. That's
23 the methodology that's been in place for, oh, I want
24 to say the last 60 years. And they used a Primavera
25 software in order to do the calculations of this

1 algorithm. And -- and that was the schedule that
2 Bechtel attempted to download but stopped trying to
3 download.

4 And without -- without downloading that
5 and coming to grips with what the actual schedule
6 was, from that point on, Bechtel was just in the
7 dark.

8 Q Did you ever ask or analyze Westinghouse's
9 schedule for the project?

10 A No. That's what I understood Bechtel was
11 going to do.

12 Q Okay. And?

13 A But they didn't.

14 Q And although you know that they used the
15 computerized algorithm and Primavera to come up with
16 their schedule, do you know how many items is
17 appropriate for a project of this size in a detailed
18 schedule?

19 A Yeah. The activities, I think, is the
20 term you're reaching for.

21 Q How many activities?

22 A I don't. I don't. I know that there were
23 a lot in this schedule, which is why it took so long
24 for Bechtel to attempt to download it and why they
25 aborted that attempt.

1 Q Do you know even what the ballpark is, in
2 terms of within 10,000 activities, how many would be
3 expected on a project like this?

4 A No. On a \$10 billion project, I just
5 don't have a feel for that.

6 Q You're not actually an expert yourself
7 either in analyzing schedules for projects?

8 A I consider myself to be an expert at
9 analyzing schedule analyses, not in actually
10 performing the analyses.

11 Q Did you ever analyze the owners' schedule
12 assessments that were done internally?

13 A No.

14 Q Did you ever ask or find out what schedule
15 level the owners were using?

16 A No.

17 Q How about Westinghouse? Did you ever ask
18 Westinghouse or find out what level their schedule
19 was?

20 A Well, I assume that their schedule was
21 the -- was the highest level, just what -- the
22 information that is currently on the table would
23 suggest that to you, with tens of thousands, perhaps
24 hundreds of thousands of activities. It was as
25 highly detailed as a schedule could be.

1 Q Is it possible for a schedule to be too
2 detailed as to be unuseful or unhelpful to the
3 project?

4 A There are -- there are mechanisms for
5 simplifying schedules. You put documents in what's
6 referred to as a hammock. So you may have 50
7 electrical activities in level 4, quadrant X, but
8 you may put those into a hammock so that it's all
9 one activity, which shows the start date of the
10 earliest start of the activity and the end date of
11 the latest start activity. So huge schedules can be
12 managed and kept and actually put in a person's head
13 through the use of these simplifying methods or
14 hammocks.

15 Can things get too complicated for a human
16 to understand? Of course. But as I said, there are
17 strategies for dealing with that.

18 Q And isn't what you described the way that
19 you kind of zoom out to a lower-level schedule so
20 that it is digestible by a group that -- for
21 example, the CEOs sitting around a table?

22 A You don't zoom it out to something that
23 can be put on a whiteboard. Once you get to that
24 level, then you're not really -- you're not using
25 the data in the schedule.

1 And that's not what Bechtel did. Bechtel
2 did not take the contractor's schedule and put
3 everything into hammocks, and then try to project
4 it. That was not their technique. They described
5 their technique in detail in their report, and they
6 also described it orally, and that's not what they
7 did.

8 But that is something that could be done.
9 And I would expect -- I don't know why Bechtel
10 didn't do that. If they were trying to simplify
11 things so they could present it to a CEO, then they
12 could have taken the schedule and done the
13 simplifying process that I just described to you.
14 But that's not what they did.

15 Q Do you know if it was possible to do the
16 simplifying process that you're suggesting with the
17 Westinghouse's schedule, detailed schedule data?

18 A I -- my belief is that it would have been,
19 but I didn't attempt that process, and Bechtel
20 didn't do it. So I have no evidence that it was
21 actually done.

22 Q And you actually have no idea about
23 Westinghouse's detailed schedule because you didn't
24 ask about it, and you didn't look at it, and you
25 didn't analyze it, did you?

1 A I have a lot of ideas about Westinghouse's
2 schedule. It was done with P6 Primavera software.
3 It was done with predecessors and successors and
4 activities and durations. And I had hoped that
5 Bechtel would look under the hood, so to speak, of
6 the schedule and get to the bottom of it and advise
7 me. That's what being retained in anticipation of
8 litigation -- that's certainly one aspect of what I
9 would expect them to do.

10 Q And you didn't look under the hood at all
11 about what the Westinghouse schedule was like and
12 whether it could be used in the way you're saying
13 Bechtel should have used it? You didn't do any of
14 that analysis, did you?

15 A Okay. That's three questions. Which one
16 do you want me to answer?

17 Q All three of them.

18 A No. Give them to me one at a time.

19 Q You didn't look under the hood at all
20 about what the Westinghouse schedule was like, did
21 you?

22 A If by "looking under the hood" you mean
23 load it on my desktop or other computer and run the
24 data myself or produce reports myself, no, I didn't
25 do that.

1 Q How about did you go talk to anybody who
2 had done any of those things with the Westinghouse
3 schedule?

4 A There were -- there were people in NND who
5 felt they understood the Westinghouse schedule and
6 didn't have the -- had objection that it was too
7 complicated or too many activities or couldn't be
8 simplified. I only learned of those people sometime
9 in 2016.

10 Q So you didn't have any conversations with
11 anybody back in and around the Bechtel assessment
12 report about Westinghouse's schedule?

13 A I did. I just didn't have any discussions
14 with the group that was stationed in Jenkinsville,
15 that was working with the schedule on a daily basis,
16 about what their view of the schedule was, until
17 2016.

18 Q And so you didn't know whether the
19 Westinghouse schedule could be used in the way that
20 you're saying Bechtel should have used it, do you?

21 A I had every reason to believe that it
22 could. When we actually did a deep dive -- and when
23 I say, "we," I wasn't, again, at the computer
24 terminal -- but we did a deep dive into those
25 schedules in 2016 as we were attempting to develop a

1 construction milestone payment schedule. And I saw
2 nothing about the schedule that was in any way
3 unusual or anything that would have prevented a
4 competent construction expert from getting to the
5 bottom of what was going on in that schedule.

6 Q When you did the deep dive, in 2016, of
7 the Westinghouse schedule, did you-all have complete
8 access to all the detailed schedule data?

9 A I believe that we did.

10 Q Did you come across anything with respect
11 to Westinghouse schedule information that you-all
12 didn't have or couldn't get, and that became an
13 issue in the 2016 construction milestone payment
14 schedule process?

15 A There were some discovery issues that
16 arose in the DRB along those lines, and I don't
17 recall the details of that precisely.

18 Q But on behalf of the owners in that
19 process, you had all the data you needed from
20 Westinghouse for a schedule and the budget to
21 determine the construction milestone payment
22 schedule?

23 A We had -- there's always something more
24 you can ask for, and we did ask for more. We felt
25 we had a good handle on the schedule sufficient to

1 develop our own construction milestone payment
2 schedule. We hired a consultant at that time for
3 that purpose, and he assisted us -- or they assisted
4 us in that effort.

5 So we felt -- felt that at the DRB
6 hearing, we had a well-defended proposal for the
7 construction milestone payment schedule.

8 Q And who was the consultant you hired
9 during that process?

10 A Secretariat --

11 Q And they were asked --

12 A -- like the race horse.

13 Q -- to do what?

14 A Well, they were asked to assist in the
15 development of the construction milestone payment
16 schedule.

17 Q And what level of schedule did the owners
18 use for developing that construction milestone
19 payment schedule?

20 A I believe it was the Bechtel schedule.

21 Q From the report?

22 A No. From living it, from interacting with
23 various witnesses and -- I'm sorry.

24 Q You just said "Bechtel." Maybe you meant
25 Westinghouse.

1 A Oh.

2 Q I asked: "What level of schedule did the
3 owners use for developing the construction milestone
4 payment schedule?"

5 A Yeah, you're right. I did. I misspoke.
6 Thank you for catching that.

7 It was the Westinghouse schedule. You
8 couldn't do it with a level 2 schedule, because the
9 construction milestone payment schedule attempts to
10 tie payment amounts to activities. And you wouldn't
11 have nearly enough activities from a level 2
12 schedule unless you wanted to have a dozen
13 milestones, which would -- wasn't what anybody
14 wanted.

15 Q A level 2 schedule would only have about a
16 dozen points?

17 A No. Well, I'm trying to give you an order
18 of magnitude. And -- and thank you for pointing
19 that out. I don't really mean to say that a level 2
20 schedule only has a dozen points. But a level 2
21 schedule does not have the -- isn't fine-grained
22 enough to prepare a construction milestone schedule.

23 Q And so when, on behalf of the owners, you
24 were developing the construction milestone payment
25 schedule in 2016, you had access to the detailed

1 Westinghouse schedule data?

2 A I understand that that's what -- that's
3 what was used as the basis for -- for both sides.
4 That is, both sides tied various payments to
5 activities in the schedule. When I say
6 "activities," I'm talking about specific activity
7 numbers in the Westinghouse schedule.

8 Q And in using the Westinghouse schedule,
9 did you ever come across or hear about or discuss
10 constrained dates?

11 A Constrained dates are more or less taken
12 for granted. They always occur, because you're
13 trying to identify major milestones on a project,
14 and you constrain the dates because you want to
15 understand what -- whether you're going to meet that
16 milestone at the -- at the sometimes the promised
17 time period and sometimes just a target time period.
18 So you constrain the dates to figure out whether
19 you're going to meet that milestone.

20 That's my principal experience with
21 constrained dates. I suppose I've seen a schedule
22 that didn't have them, but I work primarily in the
23 power industry, and they are routinely used to
24 identify milestones.

25 Q Did you have any specific experience with

1 constrained dates in this project?

2 A I think I learned that Westinghouse, like
3 any other contractor on a power project, had
4 constrained dates. I think I had that information a
5 long time ago.

6 Q Do you remember any of the dates that were
7 constrained in the -- in the schedule?

8 A I don't. I don't.

9 Q And when you want to use this computer
10 algorithm to determine what the commissioning date
11 or the substantial completion date would be, isn't
12 it true you have to release the constrained dates?

13 A I think, generally speaking, that's --
14 you'd want to release the dates and let the schedule
15 run in order to -- to avoid hiccups in the
16 computations. That's my understanding.

17 Q And do you know if that was done on this
18 project, the constrained dates were released to
19 determine the substantial completion dates?

20 A I don't know one way or the other. Again,
21 that would require me to look under the hood. And I
22 don't keep Primavera on my laptop.

23 Q And do you know if --

24 A I used to. When I was learning about
25 scheduling, I used to, but I don't anymore.

1 Q And do you know if in the context of
2 coming up with the construction milestone payment
3 schedule, whether the constrained dates in the
4 schedule were released?

5 A I don't remember any discussion about it
6 one way or the other.

7 Q You, I think, are familiar with that
8 Bechtel had some trouble getting information and
9 documents about the project when they -- when they
10 started?

11 A That trouble actually began before they
12 started. That's when Westinghouse was asserting
13 that they would not give free access to -- to
14 information.

15 Q And do you know how Westinghouse asserted
16 that?

17 A Yes. They proposed a document that
18 embodied the agreement as to the way in which
19 information would be made available and the uses to
20 which it would be put.

21 Q And how did that get resolved, if it ever
22 got resolved?

23 A Well, I don't actually remember if there
24 was a document executed, although it seems to me
25 there must have been. There -- a document was

1 circulated back and forth for some months.

2 Q And do you know why SCE&G would not have
3 provided complete access to all of its engineering
4 and scheduling documents to Bechtel?

5 A Oh, I was talking about Westinghouse. I
6 have no reason to believe that the premise of your
7 question is accurate. That is, you said, why didn't
8 SCE&G do something? I think they probably did.
9 That is, more specifically, I think that they -- I
10 have no reason to believe that the owner did not
11 make available to Bechtel all of the information
12 that Bechtel requested as part of its assessment.

13 Q So as far as you know, the only problems
14 with access to information, documents, and data was
15 with the consortium's cooperation with Bechtel?

16 A Yes.

17 Q And the owners agreed to hire and pay for
18 the Bechtel assessment, right?

19 A Yes. Well, the owners agreed that I would
20 hire them, and that they would -- that they would
21 fund the effort.

22 Q And who gave the approval to, you know, to
23 make the hire?

24 A I can't think of an individual. The
25 agreement was circulated. It was approved by the

1 lawyers. Again, the four lawyers that I've
2 mentioned all looked at that document. I don't know
3 who else they consulted or showed the proposed
4 Professional Services Agreement to, but I was
5 authorized to retain Bechtel, and I did.

6 Q And both SCE&G and Santee Cooper approved
7 your hiring them and spending a million dollars on
8 the assessment, right?

9 A Yes.

10 Q Do you know why the Bechtel report was
11 withheld from the -- from ORS and the Public Service
12 Commission?

13 A Nobody at the ORS ever contacted me about
14 the Bechtel report. I don't know and haven't
15 investigated whether the privileges that so clearly
16 attach to that document in the context of any
17 litigation with Westinghouse would attach to that
18 document in the context of the ORS or anybody else,
19 because I just have never had a situation where that
20 came up. I don't know the legal answer.

21 All I was focused on was not providing it
22 to the contractor and in the litigation that I was
23 anticipating in the Southern District of New York.

24 Q And the -- you've told us this before, but
25 the 2015 EPC amendment was finalized prior to the --

1 even the Bechtel presentation was made?

2 A No. The sequence is -- the document, the
3 form of the document, the agreement in principle was
4 in place as of October 22nd, the date of the Bechtel
5 assessment. It was not approved by the boards until
6 later. So that's the chronology, as I remember it.

7 Q And -- but it was within days of the
8 presentation that the EPC contract was executed,
9 right? I mean, it was executed in October 2015, so
10 it couldn't have been more than a week.

11 A You mean the amendment to the EPC
12 contract.

13 Q The amendment.

14 A It is true that shortly after the oral
15 presentation by Bechtel on October 22nd, the boards
16 approved the -- the amendment. I don't think
17 Westinghouse approved it until much later. It may
18 even have been the end of the year.

19 You understand there was a lot of movement
20 of the pieces on the chessboard associated with that
21 agreement. And getting that done took some months,
22 as I remember it.

23 For instance, Westinghouse bought
24 Stone & Webster, and CB&I was released, and Fluor
25 was brought in as a consultant. So those are the

1 pieces on the chessboard I'm talking about.

2 I think that took, if I had to guess, I'd
3 say the end of December, but I'm not sure when that
4 all happened. But there had to be both -- all of
5 those pieces had to be in place before the agreement
6 was -- was formally effective. It may have been
7 signed in October but not effective until approved,
8 is the way I remember it.

9 But if you'd give me back my documents, I
10 could give you a better answer, but you apparently
11 don't want to do that.

12 Q The EPC amendment had the -- had the
13 effect of, seems like, of undermining the usefulness
14 of the assessment or the report for any potential
15 litigation against the consortium; isn't that right?

16 A The relationship between the October 2015
17 amendment and the Bechtel assessment is real, but
18 it's complicated. And I can't assent to what you
19 said as being accurate.

20 Q And you already told us the EPC amendment
21 resolved all known claims.

22 A Right, but it created new -- it created
23 possibilities for new ones.

24 Q Possibility of future claims under the EPC
25 amendment?

1 A Yeah. That's the \$900 million in
2 liquidated damages is what I'm talking about. You
3 know what liquidated damages are, right? Liquidated
4 damages are damages that typically are agreed to be
5 paid to the owner for the contractor's late
6 completion.

7 We had new completion dates in that
8 October amendment. That's why I say it's
9 complicated. We had new completion dates, but we
10 had a possibility of as much as 920-some million
11 dollars worth of liquidated damages if the -- if
12 Westinghouse didn't meet those new dates.

13 So the chance of litigation -- frankly,
14 the likelihood, the near certainty of litigation
15 occurred to me within a few months of that
16 agreement. There was a certain euphoria when we got
17 the agreement signed and all that, "Oh, we've
18 resolved all these claims." But, you know, the next
19 day dawns and you have to look ahead, and we did.

20 Q So the EPC amendment's approval, as of
21 that date, there were no owner claims against the
22 consortium?

23 A No. Again, if you'd hand me back your
24 documents, I could read to you the language so that
25 the record was clear and my testimony was accurate.

1 MR. M. RICHARDSON: Hand that back to him
2 (handing).

3 BY MR. M. RICHARDSON:

4 Q Please let me know if that's not the right
5 document that you're asking for.

6 A That's not the right document I'm asking
7 for. Oh, wait. I'm sorry. It is. It is the right
8 document.

9 Q Okay.

10 A I apologize.

11 Q I think we just want to be clear that I'm
12 understanding you, that at the time of the EPC
13 amendment approval, there were no owner claims
14 against the consortium.

15 A What the agreement says is that it gives a
16 list of items A through H, then goes on to say
17 that's not an exhaustive list of all claims,
18 disputes, and amounts that are satisfied by this
19 October 2015 amendment. It being the parties'
20 intent that all disputes outstanding under the EPC
21 agreement or concerning the project as of the
22 effective time are settled and resolved. By way of
23 further clarifications under this October 2015
24 amendment, the parties waive and settle any and all
25 claims currently pending or threatened by either

1 party against the other party, and of any and all
2 claims currently known or reasonably foreseeable by
3 either party against the other party.

4 So that's fairly broad, but that's what
5 the agreement provided.

6 Q And where are you reading from in the
7 agreement?

8 A That's page 2, the bottom of the page,
9 paragraph 3.

10 Q Thank you.

11 And after reading that, you can -- you can
12 confirm what I'm asking, that at the time right
13 after the EPC amendment approval, the owner had no
14 current claims against the consortium, right?

15 A The -- yeah, but that the approval -- and
16 this does also clarify for me the effective time of
17 the agreement.

18 And paragraph 1, page 1 of the agreement
19 says: "The parties agree that this October 2015
20 amendment will be a binding obligation between the
21 owner and Westinghouse upon approval of the boards
22 of directors of both owners" -- so that would be
23 Santee Cooper and SCANA -- "and the authorization of
24 the board of SCPSA," which is the -- I'm sorry.
25 That is --

1 Q Santee Cooper.

2 A Santee Cooper -- "for its management to
3 execute the necessary documentation and execution of
4 those documents."

5 So that's one of the special agency
6 agreements that I referred to before.

7 "Which shall become effective upon the
8 consummation of the transaction. And in the event
9 it's not" -- I'm sorry. "In the event the
10 transaction is not consummated by March 31, 2016,
11 this October 2015 amendment shall be null and void
12 in all respects."

13 So there were other issues that needed to
14 be resolved. Westinghouse's board of directors had
15 to approve this, and Westinghouse's board of
16 directors wasn't going to approve it until all these
17 other pieces were in place. That is, that there was
18 a closing of the purchase of Stone & Webster from
19 CB&I, CB&I is released, and so forth and so on.

20 Q And when did that occur?

21 A I don't have that date in my head. I
22 think it was the end of the year.

23 Q And -- but we know it occurred?

24 A Oh, there's no question about that.

25 Q So the October 2015 EPC amendment was not

1 only approved and executed, but also became
2 effective in 2015, right?

3 A Well, it's assuming that it was done by
4 the end of the year. And I do assume that, but I
5 don't know that. Then yes, assuming that all of
6 these approvals were given and the effective time
7 was in 2015, then the release, yes, would have been
8 in 2015.

9 Q And the release is what we talked about
10 before, all known disputes, waiving and settling all
11 disputes, including those reasonably foreseeable?

12 A Yeah. It's the -- it's the disputes
13 specified in paragraph 3 on page 2 of the
14 October 2015 amendment.

15 Q And any new claims or problems that
16 occurred among the owners and the consortium
17 wouldn't have been part of the Bechtel assessment
18 that was completed in 2015, would it?

19 A Well, there were retrospective and
20 prospective aspects of the Bechtel report, that is,
21 backward-looking and forward-looking. Certainly the
22 schedule assessment was forward-looking. Some
23 aspects of the criticism of management had both
24 backward-looking and forward-looking implications.

25 So I guess I wouldn't assent to your

1 questions. It oversimplifies.

2 Q So how would you use the Bechtel
3 assessment in a -- in a dispute that arose after the
4 effective date of the 2015 EPC amendment?

5 A The Bechtel assessment that I thought that
6 I was going to get when they were retained in July
7 would have been an analysis of schedule that would
8 have enabled me to respond to any -- any claims that
9 Westinghouse raised, as well as the claims that were
10 pending at that time concerning delays to the
11 project.

12 So the -- it's going to be really hard for
13 me to answer your question about what use I planned
14 to put to the Bechtel report unless we have some
15 clarity about when, because in May, we all thought
16 that it was going to be an assessment and we didn't
17 want it to be discoverable. And I saw it as an
18 opportunity to gain information that would be useful
19 in addressing some of the disputes that were on the
20 table at that time.

21 When the -- by the time the oral
22 presentation was made, I, frankly, didn't have much
23 interest in what Bechtel had to say. I didn't
24 attend the presentation, although I listened in for
25 a time, a brief time. And as we move forward in the

1 calendar, the schedule assessment became more and
2 more concerning to me if it were to be discovered in
3 a future dispute, because of comments that are made
4 with very little accessibility and information, very
5 little time, not enough money, not enough resources
6 to do a proper investigation.

7 So I was concerned that an analysis that
8 they themselves characterize as preliminary could be
9 used in future disputes after -- not disputes that
10 were resolved here, obviously. But I was brought
11 in, as I understood it, because of my training and
12 experience in these matters. And my training and
13 experience told me you need to think about being in
14 a courtroom in southern Manhattan in 2021-2022.

15 What are the issues that are going to arise? What's
16 going to matter to you and to your clients in that
17 litigation?

18 And that's -- and that affected my view of
19 the uses of the Bechtel report. So as you move
20 along in time, my view of the Bechtel report
21 changed, but I didn't know what it was. What I
22 hoped it was going to be useful was one thing. When
23 I finally got it, it was another thing. And then as
24 we move further in the calendar, it became a third
25 thing.

1 Q The Bechtel findings on schedule were a
2 big problem for the project with the PSC, wasn't it?

3 A I have no idea. I don't know why it would
4 be.

5 Q You don't know that information given to
6 the owners that suggests that the substantial
7 completion dates were years later than they were
8 telling the PSC, and that it was part of the
9 approved schedule, would be a problem for the
10 project?

11 A If someone walked up to me on the street
12 and said, "Hey, your project is going to be late,"
13 is that something that I think is significant,
14 should -- should give some credibility to the point
15 that I go around to regulators and tell them? No.

16 Now, Bechtel did a lot more than that, but
17 frankly, to me, their methodology meant that that
18 was little more than someone tapping me on the
19 shoulder and saying, "You know, all these new plants
20 are late. You're going to be late."

21 Q Did you know or did someone at SCE&G or
22 Santee Cooper -- probably just SCE&G -- tell you
23 that the substantial completion dates needed to be
24 in no later than 2020 in order for the production
25 tax credits to be realized for this project?

1 A Oh, sure. I knew all about the production
2 tax credits. There's also -- I also knew that there
3 was effort afoot to move that date backward. And I
4 think that Vogtle's either achieved that or is
5 working on that.

6 So, you know, I'm not sure -- yeah, I knew
7 that.

8 Q Okay. It made it sound like you didn't --
9 you didn't -- you didn't think that the dates moving
10 had any impact on the project. I just wanted to
11 make sure.

12 A The dates didn't move.

13 Q Okay.

14 A What you're referring to is some
15 assessment with an unreliable methodology suggesting
16 that the dates would move. On the other hand, we
17 have one of the Marquis names -- it used to be the
18 Marquis name before the bankruptcy -- committing to
19 up \$900 million behind the date that they had just
20 committed to.

21 So which one has more validity in my mind?
22 Well, obviously the Westinghouse dates that were
23 backed up by these liquidated damages promises had
24 much more validity than some guess from -- from
25 Bechtel. By the way, I say "guess" as a shorthand,

1 because I gave you what I think is a detailed
2 response on the Bechtel methodology. It was more
3 than a guess, but their methodology tells me it
4 wasn't much more than a guess.

5 Q Are you familiar with the 2017 schedule
6 analysis post bankruptcy done by SCE&G?

7 A No.

8 Q Are you aware that SCE&G actually
9 confirmed the schedule that Bechtel suggested was
10 the case and showed that Westinghouse's schedule was
11 not reliable?

12 A I have not heard anything about that.
13 Therefore, whatever representation you're making
14 about what's in that, I can't affirm or disagree
15 with.

16 Q I'm just wondering if you are aware of any
17 of that.

18 A I don't know if that's an accurate
19 statement, and I have no information about any
20 post-bankruptcy schedule analysis.

21 MR. M. RICHARDSON: Can I have that
22 Complaint, Federal Complaint, the first thing
23 you showed me this morning that you were trying
24 to get the names off of?

25 You were getting the names off of it.

1 THE COURT REPORTER: (Handing.)

2 BY MR. M. RICHARDSON:

3 Q Do you know Ms. Iris Griffin?

4 A It seems to me I've met an Iris somewhere
5 along the line, but I'm not sure if that's your
6 Iris.

7 Q She's the CFO of SCANA.

8 A Oh, no, then -- was she previously on
9 their board?

10 Q I don't know.

11 A Okay. Well, I can't think when I would
12 have met her in her current position. I wouldn't
13 have, in fact. My last dealings with -- well, it
14 predates her, my last dealings with those parties.

15 Q You talked about earlier being involved
16 with Westinghouse in July, three days of meetings in
17 July of 2017?

18 A I did, yes.

19 Q Did you all have any conversations at that
20 time about the schedule?

21 A I don't recall any. The purpose was to
22 hire them as a professional to provide support. And
23 I don't remember -- they were not committing to a
24 schedule in that document, and I don't remember a
25 schedule being discussed.

1 Q Who decided to remove the schedule
2 assessment from the Bechtel report?

3 A Well, there was some suggestion that
4 the -- that there be two reports. And the history
5 of it was that I proposed some edits to the report
6 because I thought those edits would be -- were, A,
7 inaccurate, done with -- that is, the edited
8 material was inaccurate, was done with insufficient
9 time and insufficient resources and insufficient
10 access to information, and -- and was critical and
11 could be damaging to any eventual litigation between
12 the owner and the contractor.

13 So I suggested those edits. And the back
14 and forth between Bechtel and me with involvement of
15 the client, it was agreed that they would do two
16 reports, one of which was the schedule assessment,
17 and the other addressed the project assessment.

18 Q And in those edits that you proposed, did
19 anybody else contribute to those edits or tell you
20 to make those edits?

21 A The initial version of those edits were
22 done by me and me alone.

23 Q Are those the ones to the November 12th
24 draft report that you sent on -- you know, that had
25 all the blackout on the draft report?

1 A My edits were submitted to Bechtel with
2 redactions in their -- in their draft report, and
3 they had blackouts, yes.

4 Q Did you do any other edits than those
5 redactions essentially?

6 A The only edits that I sent to Bechtel were
7 done once in a document that would use the entire
8 assessment as the base document, and then had
9 blackouts of -- of suggested edits.

10 Q And you were solely responsible for those
11 edits?

12 A Yes.

13 Q And no one at SCE&G told you to remove the
14 schedule assessment from the report?

15 A No one told me to do it, no.

16 Q Did you discuss it with anyone at SCE&G or
17 SCANA?

18 A I know that SCANA was aware of two
19 reports, and that there would be a schedule report
20 and a -- I'm sorry. I know that Santee Cooper was
21 aware because -- but I don't know that from my
22 memory. I know that from a document that -- that's
23 in my production in which Bechtel is advising Mike
24 Baxley directly that the two reports had been sent
25 to me.

1 Q And did Steve Byrne ask you to -- to
2 remove material from the draft Bechtel report?

3 A I don't recall Steve Byrne giving any
4 direction about the content of the draft report.

5 Q Did anybody at SCE&G ask you to either
6 soften or take out language critical of the owners'
7 project management?

8 A I don't recall anybody giving me a
9 direction to do that. I was -- I understood that I
10 was authorized to make edits, as I would normally
11 do, to a -- to this report in order to address the
12 discovery issue.

13 As you know, the federal rules categorize
14 experts into two groupings, the testifying experts
15 and non-testifying experts.

16 An issue that has been very in the fore --
17 in the forefront of my thinking for years has been
18 what you do with testifying experts, and are those
19 draft reports discoverable. But as you probably
20 know, in 2010, there was an amendment to the federal
21 rules that -- that said that those draft reports
22 were not discoverable, in essence cloaking
23 interaction between attorneys and testifying experts
24 with privilege.

25 As to non-testifying experts, there's an

1 absolute privilege. They don't even need to be
2 identified.

3 I was concerned, though, that with -- if
4 this report were circulated, it would eventually get
5 out. So I wanted to edit the report so that it
6 would not damage the owner in the eventual
7 litigation. And it was known that I was doing that.
8 But there was -- in the initial edits, there was no
9 direction, there was nobody at my side telling me,
10 "Delete this," and there was nobody who said, even
11 in general terms, "Delete this."

12 I understood that I was authorized as
13 counsel to identify things that I thought would be,
14 A, incorrect or misleading or based upon
15 insufficient information that could possibly be
16 damaging to the owner in future litigation, and
17 that's what I did.

18 Q And who did you provide drafts of the
19 Bechtel -- the draft Bechtel report to?

20 A Martyn Daw.

21 Q Well, he's at Bechtel, right?

22 A Yeah. He's the one I sent my notes to,
23 right.

24 Q I'm asking who -- when you got the draft
25 report, who did you provide it to?

1 A You know, I don't know who all I did it to
2 because I haven't gone through to try to identify
3 from the e-mails. And I -- this is one of those
4 situations where my memory of what I did with the
5 report doesn't give me those kinds of details.

6 I could sit down and go through the
7 e-mails one by one and puzzle that out because I
8 feel certain that it went by e-mail, but I don't
9 know who it was.

10 Q Did you circle it -- circulate it to
11 anyone?

12 A It was narrowly distributed, but I don't
13 remember exactly to whom or when.

14 Q And if you had provided it to someone at
15 SCE&G, would you have also provided the draft report
16 to Santee Cooper?

17 A I don't think I ever provided any
18 significant information to one of my clients and not
19 provide it to the other. So my belief is that both
20 clients had -- if I had circulated the draft report,
21 that is, the draft report prior to my proposed
22 edits, it would have gone to both parties. But I
23 just don't know if I did that or when I did that, if
24 I did.

25 Q And who with the client, either of the

1 owners, did you discuss the draft Bechtel report
2 with?

3 A I discussed it with both clients.

4 Q And who at those clients?

5 A There would -- it would certainly have
6 been the four lawyers, but I think others, the
7 executives.

8 Q And the four lawyers would be Baxley,
9 Pelcher, Lindsay, and Bynum?

10 A Yes.

11 Q And the executives would have been whom?

12 A Well, I know Lonnie Carter and Kevin Marsh
13 were aware of the draft report, and I would have
14 had -- did have discussions with them about that.
15 There were other people who attended meetings, in
16 and out, or participated in discussions, but I have
17 less clarity about exactly which others.

18 Q And what about Steve Byrne? Did you have
19 discussions with him about the draft Bechtel report?

20 A You know, I don't actually remember a
21 discussion with Steve Byrne about the draft report,
22 but he may have been in a meeting where we discussed
23 it.

24 Q What about Jimmy Addison? Did you discuss
25 the draft Bechtel report with him?

1 A It's less likely that I discussed it with
2 Jimmy Addison, because he didn't attend as many
3 project meetings as others.

4 Q And how did you have these discussions
5 about the draft Bechtel report? Was it over the
6 phone, by e-mail, or in-person meetings?

7 A All of those.

8 Q And did you have any of those discussions,
9 meetings, or calls prior to your providing the edits
10 to Mr. Daw?

11 A Yes.

12 Q And what were the discussions about
13 making changes to the report?

14 A Well, just would we make changes or would
15 we circulate the draft report in its raw form.

16 Q And was there any discussions about
17 specific edits?

18 A I don't recall anybody giving me direction
19 about what to take out or what to leave in from --
20 from the draft report.

21 Q Did you all have discussions at that point
22 about not having a report?

23 A Yes, there was some discussion about, A,
24 not having a report at all, and then once the draft
25 report came out, about not ever putting it in final.

1 Q And who didn't want a report at all?

2 A Well, it changed. This was a fluid
3 situation where people were taking different
4 positions sometimes within the same week, where they
5 would say, "Oh, we want everybody to have the draft.
6 Oh, we want -- we want only the attorneys to look at
7 it. Oh, we want -- we want it because our board
8 wants it. Oh, we don't want it at all because we
9 think that it's mooted and not worth anything."

10 So people were changing positions in ways
11 that were very confusing to me. And when I say
12 "confusing," I'm trying to do what the client wants
13 to do. I make a recommendation. My recommendation
14 was to edit the report. And then I'm getting
15 conflicting information from the client. I've got
16 two clients, and even within the clients there may
17 have been disagreement and people were shifting
18 positions. And I might get direction from one
19 person at Santee Cooper, but some other direction
20 from somebody else at Santee Cooper.

21 So it was a fluid situation and confusing
22 and difficult to summarize in the way that I know
23 you'd like me to.

24 Q How did you decide what to do?

25 A I followed my normal practice, which I

1 understood I was authorized to do, which was to send
2 back my edits to Bechtel.

3 Q Did you get any clarity from the clients
4 at that stage?

5 A No. If by "clarity" you mean take out
6 this sentence, leave in that sentence, take out this
7 paragraph, leave in this finding, there was no
8 item-by-item, line-by-line direction from the owner.

9 The owner, having worked with me now for
10 some four years, trusted me to make the proper
11 judgment about what would be best to remove if we
12 were ever to face litigation with the contractor.

13 MR. M. RICHARDSON: Let's stick with your
14 recommendation or request and take a break for
15 lunch, if that suits.

16 THE WITNESS: Okay.

17 THE VIDEOGRAPHER: The time is
18 approximately 12:07. We are off the record.

19 (Recess in the proceedings from 12:07
20 to 1:11.)

21 - - -

22 (Response to Motion to Compel
23 Discovery Responses and Production by
24 SCE&G and Dominion Energy marked Wenick
25 Exhibit Number 2 for identification.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -

THE VIDEOGRAPHER: The time is approximately 1:11. We're back on the record. Counsel, you may proceed.

BY MR. M. RICHARDSON:

Q Mr. Wenick, I want to talk a little bit about the Dispute Resolution Board claim that was back in -- made in -- I think it was filed in August 1 of 2016.

Do you remember that you needed additional time to repair and file that claim about the milestone schedule?

A Additional time beyond what?

Q To file the claim. It was -- it involved -- an extension was needed, so additional payment had to be made in kind of the --

A I have no idea what you're talking about.

Q Okay. Tell me -- tell us what Secretariat was -- or what specifically was the construction milestone payment schedule they were asked to consult on?

A They were asked to develop one with the assistance from the folks at Jenkinsville.

Q And Jenkinsville is --

A That's the site of the plant.

1 Q The new nuclear group?

2 A I'm sorry.

3 Q The new nuclear group?

4 A Yeah. I've heard them referred to as the
5 NND group, I guess, New Nuclear Development,
6 perhaps, but NND group at Jenkinsville.

7 Q Did Secretariat have some work on a cash
8 flow schedule or a cash flow curve?

9 A There were various cash flow curves that
10 were in play, and Secretariat may have contributed
11 to one of them or more.

12 Q Do you know that during that process of
13 the Dispute Resolution Board, in setting the
14 construction milestone payment plan, that -- and as
15 part of the EPC contract and fixed price option,
16 that Westinghouse had accepted financial
17 responsibility for cost overruns?

18 A I know that Westinghouse accepted
19 financial responsibility for any costs in excess of
20 the fixed price once the fixed price option was
21 exercised.

22 Q And did you also realize that that
23 implicated the financial viability of Westinghouse
24 going forward?

25 A I had no reason to believe that when we --

1 when we negotiated that document.

2 Q All right. But I'm talking about in --
3 during the Dispute Resolution Board in setting the
4 construction milestone payment schedule in 2016.

5 A Okay. And what is your question?

6 Q Did you know that your clients expected
7 that Westinghouse would be cash short?

8 A What I knew was that we were motivated to
9 structure the milestone payment schedule so that
10 only actual costs would be covered. That's one.
11 And, two, that the contract proceeds would not be
12 exhausted before the end.

13 Q All right. And that is essentially the
14 benefit of the bargain for the owners, right, in the
15 EPC amendment, the fixed price option that you're
16 talking about?

17 A Well, it creates a lot of benefits to the
18 owner of the -- of the EPC amendment and fixed price
19 options. It's a lengthy document. We resolved
20 claims; we instituted a DRB; we increased the
21 liquidated damages; and we had the option,
22 subsequent to the amendment, to fix the price of the
23 contract going forward.

24 Q And did you understand that, because of
25 that amendment and the fixed price option, that

1 Westinghouse may be cash short at some point in the
2 execution of the contract?

3 A Well, it was either that or the owner
4 pays -- paid more money. I mean, it's one or the
5 other. It's a zero-sum game. Either they run out
6 of money at the end or the owner steps forward and
7 funds more. But that's what fixed price is all
8 about.

9 Contractors apparently are in the business
10 of giving fixed prices, knowing that if they can't
11 complete the project for that fixed price, they're
12 going to go into their pocket.

13 Q Yes. And did you know that your clients
14 knew that almost under every scenario, that
15 Westinghouse was going to come out cash short under
16 that arrangement?

17 A That's contrary to what I know. What I
18 know is that there were a number of projections of
19 cost based upon different assumptions, some of which
20 would be in excess of the fixed price and some would
21 not.

22 Q So you're not aware that your clients said
23 that the owners project the total cost of the
24 building -- of building the units is greater than
25 the cost of the option, and that's why the owners

1 are electing the fixed price option?

2 A What I told you is what I know, that there
3 were a number of projections using the former
4 payment regime, where there were four components,
5 four buckets: Fixed price, firm price, target
6 price, and T&M. Those are the four buckets.

7 And there were a number of ways of looking
8 at the costs going forward using those four buckets.
9 And we -- and I saw comparisons run of that with a
10 fixed price option. And the owners' conclusion was
11 the fixed price option was superior, which is why
12 they elected it. Indeed if they had concluded that
13 they would pay more money on the fixed price option,
14 I would think that the boards would not have
15 approved.

16 Q And was Secretariat running the cash flow
17 models for the owners to make that conclusion?

18 A The cash flow models that you -- that were
19 run in October of 2015 and before that preceded
20 Secretariat's engagement. So no, they were not
21 involved in the -- in the projections that led to
22 the evaluation and ultimate approval of the October
23 amendment.

24 Q But in terms of exercising the fixed price
25 option, that actually occurred in 2016, didn't it?

1 A That's when it was actually exercised, but
2 the -- the agreement with the option was evaluated
3 well before that. It was evaluated when the
4 agreement was entered into in October of 2015.

5 Q And circumstances change between the year
6 that passed, between when the EPC amendment was
7 negotiated and agreed upon and when the fixed price
8 option was actually exercised, didn't it?

9 A Nothing particularly comes to mind that
10 occurred in that interim between the exercise of the
11 fixed price option and the October 2015 amendment.
12 If you tell me what you have in mind, I'll tell you
13 whether I think that affected the issue.

14 Q For example, the owners were paying
15 \$100 million a month, including beyond the number of
16 months that were in the EPC or the interim
17 agreement.

18 A But that's not -- that's not a change.
19 That was contemplated in the October amendment.

20 Q Five months were contemplated in the -- in
21 the October amendment, correct?

22 A I don't know. You still have the -- no,
23 you don't. Actually, I have it here, so I can
24 answer that question.

25 I do believe that the time period set

1 forth in the -- in the amendment was exceeded, and
2 therefore the fixed price payments were extended,
3 because there was nothing to put in its place. But
4 I can tell you in a minute how many months, if that
5 matters to you.

6 It's six months from the effective time.
7 So that would take you -- I believe the first
8 payment was January, so that would take you to June.

9 Q Right. And do you know how many payments
10 were made?

11 A I don't know, but I think the fixed price
12 option was exercised before you got to the end of
13 that six months. I think it had to be. I think it
14 was, in any case.

15 Q And did it go into effect before the DRB
16 ruling in -- in late fall of 2016?

17 A Yeah, by -- I don't know -- six months or
18 so.

19 Q When did you learn that Westinghouse was
20 having financial difficulties?

21 A That was disputed up until the time they
22 filed bankruptcy. People trying to run a business
23 often dispute any rumors of financial hardship until
24 the facts are indisputable.

25 So I didn't -- you said when did I know

1 they had financial hardships? I knew it when they
2 filed bankruptcy.

3 When did I suspect it? Well, sometime
4 before that, but I can't put a date on it.

5 Q And when you looked up the payments in the
6 EPC amendment, what -- were you in paragraph 12?

7 A You should have asked me a minute ago.

8 Yeah, paragraph 12 on the bottom of page 4
9 mentions that if the parties fail to agree to a
10 construction milestone payment schedule by the date
11 that is six months from the effective time.

12 Now, I think the effective time was when
13 the Westinghouse board approved the October
14 amendment, which I believe occurred at the end of
15 December. And then there were payments in January,
16 February, March, April, May, and June. Those are
17 your six months. So that is the time that the
18 matter then became ripe for referral to the DRB. So
19 that would be another 60 days. So that would be the
20 end of August, right? End of July, end of August.
21 And the DRB hearings were held the beginning of
22 September.

23 So I think that's more or less what was
24 contemplated. What happened is what was
25 contemplated.

1 Q The parties contemplated making more of
2 those \$100 million a month payments than was in the
3 contract?

4 A What the parties contemplated was that if
5 the parties did not agree to a construction
6 milestone payment schedule within six months, the
7 matter would be referred to the DRB within 60 days.
8 And that's what was contemplated.

9 Q And what do you think was contemplated
10 about a delay in the decision by the DRB on the
11 construction milestone payment schedule for the
12 monthly payments?

13 A I don't think that's addressed in this
14 agreement, and that wasn't the focus of my review.

15 Q Were you involved in that issue while the
16 DRB claims and decisions were going on?

17 A If by "that issue" you mean the
18 continuation of payment -- is that the issue you
19 mean?

20 Q Yes.

21 A I was involved in discussions about
22 continuing to pay. And it was -- the common sense
23 approach is that if a contractor's out there
24 continuing to work, and spending tens of millions,
25 perhaps hundreds of millions of dollars a month,

1 maybe the owner ought to continue to pay them until
2 some alternative mechanism was put in place. I
3 think that common sense approach was adopted.

4 Q And were you aware that Westinghouse was
5 continuing and refusing to give any meaningful
6 construction project expenditure information over
7 that six-month period?

8 A NND was dissatisfied with the amount of
9 information. They were giving -- Westinghouse was
10 giving the information that Westinghouse wanted to
11 give, and NND, and eventually I, wanted to have
12 more.

13 Q And you and the owners did not get that
14 additional expenditure information from
15 Westinghouse?

16 A Through the DRB process, we did gain some
17 additional information than what we first got. We
18 didn't have full transparency into their books.

19 Q Did you all think that Westinghouse was
20 negotiating in good faith during that time?

21 A Bad faith is not a claim that I level
22 lightly. They were doing what they thought was in
23 their best interest. The owner was doing what they
24 thought was in the owner's best interest. Sometimes
25 the elbows got sharp, but I'm not sure that bad

1 faith is something that I would adopt certainly in
2 hindsight.

3 Q You would not adopt that even in
4 hindsight?

5 A Yeah, I wouldn't really adopt that in
6 hindsight. I think -- I think -- I think
7 Westinghouse was surprised by their own financial
8 condition.

9 Q They were -- they were refusing to provide
10 you all information they'd agreed to provide you
11 during this process; isn't that right?

12 A The agreement wasn't -- I would say it's
13 not right, because I don't think there was an
14 agreement that was -- that had sufficient clarity
15 that it could be enforced. Had there been an
16 agreement with sufficient clarity to be enforced, we
17 would have requested the DRB to enforce it.

18 Now, that doesn't mean that we didn't
19 complain that we didn't have enough information. We
20 did. We wanted to complete the transparency
21 concerning Westinghouse's expenditures and their
22 projections, and we didn't have complete
23 transparency.

24 Q But you all knew that in the first six
25 months of 2016, that the owners had paid

1 \$600 million to Westinghouse, right?

2 A That's the math, six times 100,000.

3 Q And do you know what the construction
4 progress over the same period was?

5 A That was also disputed. Westinghouse had
6 their record of what it was. We had a conflicting
7 record that showed less progress.

8 Q And even during this interim period, the
9 failure to meet milestones meant that they didn't --
10 shouldn't be paid even the \$100 million; isn't that
11 right?

12 A There were no milestones. So when you say
13 their failure to meet milestones, that question
14 doesn't make any sense to me. Can you clarify that?

15 Q Yes. For the June billing period, the
16 owners had accepted Westinghouse's milestones and
17 payment schedule, which had 27 milestones, and
18 requested a payment of \$156 million for the month.
19 Are you familiar with that?

20 A I -- I don't -- no, I'm not. I don't --
21 well, I was familiar with it at the time. I don't
22 recall it. I don't know what you're talking about.

23 Q Okay. And then were you aware that only
24 four of those 27 were completed, which would have
25 meant a payment of just \$23 million?

1 A Are you talking about an evaluation done
2 of those payments in hindsight or are you talking
3 about what was known in June or July of 2015?

4 Q When the invoicing occurred in June of
5 2016.

6 A Okay. And you're saying that when the
7 invoicing occurred in June of 2015, someone said,
8 "Hey, Westinghouse is behind schedule. We shouldn't
9 pay them"?

10 Q That's right. June of 2016.

11 A Yeah, okay. They may have.

12 Q And were you aware at that time that even
13 though the EPC amended contract had been in effect
14 for at least six months, that, you know, that that
15 rate of progress meant that the construction
16 schedule had slipped already?

17 A Nobody knew that. That was -- that was
18 un -- well, it was unknown and unknowable. There
19 were changes made to management that -- and hope
20 sprang eternal.

21 Q And if your clients were, maybe not
22 including you, but having those precise
23 conversations, it's just that you weren't part of
24 that. You just didn't know that those were the
25 circumstances?

1 A I know that I was involved in discussions
2 about the milestone payment schedule. The owner was
3 committed to -- under the agreement, was committed
4 to pay the first six payments.

5 I'm not aware of any circumstances under
6 which the owner could have said, "Well, despite
7 agreeing to pay six payments of \$100,000, I'm not
8 going to do it because you're not making sufficient
9 progress."

10 There's just no contractual basis for
11 doing that. And as complicated as construction law
12 can be, it all comes down to the contract. And this
13 was an executed amendment.

14 Q Were you aware that during this time, in
15 midsummer 2016, that Westinghouse told your clients,
16 the owners, that it was in a condition of financial
17 extremis on the project?

18 A No, and that's -- and I don't know if
19 that's true. And whether it's true or not, no one
20 ever told me that.

21 Q What did you hear about Westinghouse's
22 financial difficulties in 2015?

23 A Which -- what difficulties are you talking
24 about?

25 Q Cash flow problems, you know, in

1 particular, you know, the project that it had
2 undertaken as being a loss leader for it to be a
3 nuclear -- new nuclear construction company.

4 A What I know is that Westinghouse
5 repeatedly said, including under oath, that they
6 would finish the project; that if there were losses,
7 they would absorb them, but they were committed to
8 the plant. They were marketing the plant abroad.
9 They were -- they had a very profitable refueling
10 operation going that relied on a certain -- well,
11 that would benefit from a certain backlog of
12 existing AP1000 plants.

13 So they repeatedly said, as I say, and
14 including under oath, that they were committed to
15 performing. They also said that, "The more you pay
16 us per month, the more work we can do," which again
17 is logical. They didn't want to dip into their
18 pocket any earlier than necessary.

19 Q And so were you aware that even though
20 they were hopeful and willing to -- and said they
21 were willing to bear financial losses on this
22 project, were you aware that they had financial
23 difficulties as a firm that would allow them to
24 actually realize, you know, their hope?

25 A I didn't have any concerns about their

1 financial condition until -- until I heard about
2 Toshiba, which had -- and I'm sorry if I say it in a
3 funny way. I learned to say that on this job. Like
4 everybody else, I've always said "Toshiba," but
5 apparently that line over the O means you emphasize
6 it, so I picked up that habit.

7 But when Toshiba developed a whole series
8 of problems with other divisions, that's when I
9 personally became concerned about the ability of
10 Westinghouse to go forward. Up till then, I
11 thought, well, you've got another household name.
12 You have Westinghouse first, and now you've got
13 Toshiba. And plus, there are Japanese cultural
14 issues that come into play that suggested to me
15 personally that -- that they would stick it out,
16 even if it meant paying more than the fixed price.

17 When Toshiba started having problems with
18 other divisions, then I began to be concerned.

19 Q And when did you learn about Toshiba's
20 financial difficulties?

21 A Oh, I don't know, but it's in all -- it's
22 in all the papers. Again, you can go back and look
23 it up. I suspect it was the very beginning of 2017.
24 That seems to be about right.

25 Q Are you referring to the accounting

1 scandals that became public?

2 A Well, there were accounting scandals, but
3 those accounting scandals revealed a problem with
4 the financial condition of the company. And people
5 don't -- I mean, you can refer to it offhandedly as
6 an accounting scandal, but what it really was was
7 the divisions were losing money at a rapid rate.

8 And that caused me to be concerned -- and
9 I think it was in the beginning of 2017 -- about
10 whether Westinghouse would stick around, either
11 because they'd be sold off or Toshiba would be
12 raiding Westinghouse. Those would all -- that's all
13 speculation, by the way, but that was my
14 speculation.

15 Q And when you started to become personally
16 concerned about Westinghouse's financial viability
17 and sticking around, did you do anything with the
18 owners about that?

19 A Well, I know eventually the owners hired
20 bankruptcy counsel.

21 Q And who did they hire?

22 A Reed Smith, the Pittsburgh -- their
23 flagship is Pittsburgh, although they're a national
24 firm these days. And they hired some -- you know,
25 some people out of Reed Smith.

1 Q And do you remember when that was?

2 A I don't.

3 Q Were you involved in that at all?

4 A I was.

5 Q Did you secure bankruptcy counsel for the
6 owners?

7 A If by "secure," did I -- did I call around
8 and interview? Yes, I did. But I didn't retain
9 them, which is implied by the term "secure."
10 Obviously, they were retained by the owners.

11 Q And did you point them to Reed Smith?

12 A Yeah, I recommended Reed Smith after --
13 after looking around. We -- first of all, we
14 thought that they would file in Pittsburgh, so that
15 was the first thing, because Westinghouse is
16 traditionally a Pittsburgh company, and their main
17 office is -- was still in Cranberry Township, just
18 north of Pittsburgh. So we thought that they would
19 file there or in New York.

20 The people at Reed Smith that I spoke to
21 were experienced in both venues. They ended up
22 filing in New York. But yeah, that was my
23 recommendation.

24 Q And did you all -- in discussing the EPC
25 amendment, did you-all talk about the Westinghouse's

1 financial security?

2 A No. That was -- no one mentioned it in my
3 presence, and that was the farthest thing from my
4 mind.

5 Again, I grew up in the Pittsburgh area.
6 Westinghouse to me was like Coke in Atlanta. I
7 mean, just a company, gold standard, always going to
8 be there -- always been there, always going to be
9 there.

10 Q Were you -- you weren't aware that Santee
11 Cooper was raising liquidity concerns about
12 Westinghouse in 2015?

13 A I can't think of a single time when
14 anybody mentioned liquidity concerns in my presence
15 until at least a year later, and probably more.

16 Q What were the reasons why the Toshiba
17 parent guaranteed payments were increased as part of
18 the EPC amendment?

19 A You're conflating a number of things.
20 The -- the construction contract had certain
21 implications in case of a termination for default.
22 Those implications only touched on four -- on two of
23 the four pricing components. So there's a firm
24 price, fixed price, target price, and T&M.

25 T&M, time and materials, was actually a

1 very small component. The fixed price was not a
2 problem. That was mainly equipment, as I remember.
3 And the firm price sounds like a synonym. It's not
4 quite. The firm price could escalate, but otherwise
5 was fixed. It could escalate according to an
6 inflation formula.

7 The target price was where the problem
8 was, because the target price was essentially time
9 and materials with an opportunity for bonus or
10 penalty if you didn't meet the target. Well, they
11 had blown through the target. So essentially there
12 was a situation in place under which the contractor
13 was doing most of the work that was exposed to
14 financial risk under the target price work.

15 But under the construction contract, the
16 only components that would be implicated in case of
17 a termination for default were the fixed price and
18 the firm price components.

19 I can -- in fact, I think I pulled that as
20 one of the items in Exhibit 4 here, because it's a
21 little tricky, and I didn't want to misstate it.
22 But what it says is that if the unpaid balance of
23 the firm price and fixed price exceeds the cost of
24 finishing those two components, then the contractor
25 has to pay the owner. If the costs of those two

1 components is less, then -- then the owner has to
2 remit the funds to the contractor.

3 Well, those were not where the real risks
4 were in October of 2015. The real risks were in the
5 target price. Now, when you convert the entire
6 contract to the fixed price, an implication of that
7 is that the owners' rights upon termination for
8 default are expanded. I don't think Toshiba knew
9 that. I'll tell you that that was -- that was an
10 implication that we were aware of, but in the
11 negotiation with Westinghouse, I don't think they
12 raised it.

13 However, they ultimately -- when Toshiba
14 paid the amounts under their guarantee eventually,
15 they honored that -- that increased exposure that
16 resulted from converting everything. But that
17 was -- there were only a handful of people that were
18 aware of that mechanism, because that's in the
19 weeds.

20 Q Was that new in the EPC amendment or was
21 that --

22 A No. That was new in the fixed price.
23 That's once you convert from these four buckets to a
24 single bucket, then these rights -- it's on page 83
25 of the EPC agreement -- these rights then become

1 expanded so that the -- the entire contract becomes
2 subject to this provision. So that -- so if the
3 entire contract costs more than the fixed price
4 after the termination for default, then Westinghouse
5 owes that and Toshiba backs up that.

6 Q Up to its limit of its guarantee?

7 A Up -- yeah, right.

8 Q And that's one of the problems here,
9 right, is that wasn't enough to cover the balance?

10 A Well, nobody knows what the balance is
11 because there was -- because it wasn't finished.
12 This formula assumes completion of the work. So you
13 say "one of the problems." There were a lot of
14 problems. But one of the problems that was overcome
15 in the negotiation with Toshiba -- or Toshiba.
16 Sorry -- is that they accepted that, yes, the
17 completion would exceed the fixed price amount. So
18 there was a negotiation there up to the full amount
19 of the guarantee.

20 Q And there's no question about that, is it?
21 Once bankruptcy occurred, I mean, your clients did a
22 detailed internal analysis and figured out that the
23 total amount to complete the project was in excess
24 of 7- or \$8 billion from that point?

25 A I don't know those figures, but they

1 certainly did an evaluation that persuaded them that
2 now that the fixed price was gone, it made more
3 sense to pull the plug than it did to spend more
4 money to complete -- or enough money to complete the
5 project.

6 Q And so let's go back to the consideration
7 of Westinghouse's financial stability.

8 In the EPC amendment negotiations,
9 obviously, if the project gets built, it works
10 great; if Westinghouse doesn't fail, it works great.
11 But it didn't.

12 And the question is: Did you all know how
13 much Westinghouse was at risk under the fixed price
14 option?

15 A Well, it was either their risk or our
16 risk. You see, the risk is on the table. If we get
17 a fixed price option, the risk goes to Westinghouse.
18 If we don't get the fixed price option, the risk
19 stays with the owner under the target price.

20 So it's -- again, it's a zero-sum game.
21 If that -- if that job is going to overrun greatly
22 under the four components with the target price, all
23 of that money was going to come from the owner. The
24 owner was contractually obligated to pay it.

25 So once it was -- the fixed price option

1 was put in place, that risk was shifted to
2 Westinghouse. So that's why at the time, and in
3 hindsight, I think that was the owner's best option,
4 at the time and in hindsight.

5 Q Assuming a two -- a two-sided decision
6 tree, right? I mean, because there's another risk
7 that's implicated once you choose the fixed price
8 option, and that is the risk of failure or
9 bankruptcy and repudiation of the agreement by
10 Westinghouse.

11 A Okay. Do you want me to tell you why I
12 disagree with that?

13 Q Sure.

14 A So under the former regime, the idea
15 presumably is that how it's paid for is not going to
16 affect the cost. So let's say you have a tremendous
17 overrun under the four buckets. And what we're
18 really talking about is the huge overrun under the
19 target price component, which is effectively T&M.
20 So then the owner is going to pay all of that,
21 right? The owner is going to pay every dime, plus
22 markup, that the contractor incurs, because that's
23 the nature of the target price component.

24 Once Westinghouse takes that on, well, I
25 guess you could say there's a risk of them going

1 bankrupt. But the owner can come forward and take
2 that risk back if he wanted, but the owner didn't
3 want it back. There was -- there was no downside to
4 the owner. The worst that happens is that you come
5 up in the same place. That is, you say, "Okay. You
6 can't afford to pay to complete the job under the
7 fixed price option, so we'll fund you more money."

8 But it's never going to be more than you
9 would have paid under the target price, so there is
10 no increased risk. There is no risk of Westinghouse
11 going bankrupt because the owner never is going to
12 be any worse off than they were before they executed
13 the fixed price option.

14 Q So you all just didn't -- you all -- I
15 mean, I guess, the question is: Did you do anything
16 to assess the risk and the fallout from that
17 Westinghouse's possible bankruptcy or not being able
18 to perform?

19 A I just told you my assessment. My
20 assessment is that there was no risk in the sense
21 that the worst that happens is the owner pays what
22 it was going to pay before you execute that option.
23 That's the worst that happens. Because under the --
24 under the -- before the execution of the fixed price
25 option, the owner had an obligation to pay

1 Westinghouse no matter what it took to complete the
2 job.

3 So if Westinghouse runs out of money and
4 says, "We need more money," and come to the owner
5 with their hand out, that's -- what their hand is
6 out for is never going to be what the owner was
7 contractually obligated to pay before the exercise
8 of the fixed price option.

9 Q I appreciate it, and I'm not trying to be
10 obtuse, but what I forget is is that you're not
11 involved really in this litigation, so you don't
12 realize that -- that there are -- there were risks
13 and real losses realized under the circumstances,
14 because it didn't get constructed.

15 A I have no idea what this litigation is
16 about.

17 Q Okay.

18 A But -- but under your -- under your
19 supposition that we don't have a fixed price option,
20 the owner then gets -- is paying money hand over
21 fist under the target price, and eventually decides,
22 "Wait a second. I'm now in -- whatever we are -- in
23 2017, and I can see that I've got another 8 million
24 to pay."

25 So the implications for whoever else is

1 involved or -- I know there are plenty of people
2 that were damaged. Bankruptcy tends to leave a lot
3 of bodies in its wake. However many people were
4 damaged would have been damaged pretty much in the
5 identical way and at the same time. The owner would
6 have said, "No, I can't pay any more under the
7 target price. I've got to terminate the contract,"
8 or -- if there is no fixed price option.

9 On the fixed price option, we've got
10 Westinghouse going bankrupt. The owner always could
11 have said just on the eve of bankruptcy, "Hey,
12 contractor, we'll go back to the other regime.
13 We'll continue to pay them." But I don't think
14 anybody would be happy with that outcome, because
15 then you'd be paying whatever millions of dollars or
16 billions of dollars it would take to finish from
17 that point.

18 So, you know, if I'm getting a little
19 heated or rapid in my delivery, it's because these
20 issues were -- were -- had been thought about for a
21 long time. And the -- and I was in favor of the
22 fixed price option because I was thinking about a
23 lot of these issues, not particularly maybe
24 bankruptcy, but a lot of these other issues. And I
25 saw no downside. And in retrospect, I see no

1 downside. That's not what caused the bankruptcy.

2 The bankruptcy -- the bankruptcy could
3 have been avoided if the owner had simply said,
4 "Okay. Forget about the fixed price option. We'll
5 convert it back to T&M." Then you're back to where
6 you started.

7 Q And when the EPC contract got repudiated,
8 isn't that exactly where the contractor -- I mean,
9 where the owners kind of got put back into it?

10 A No, a lot more happened when the contract
11 got repudiated. There was no -- the real work was
12 being done by Fluor, and after the 2015 --
13 amendment. F-L-O-U-R. And Fluor was working for
14 Westinghouse. Westinghouse was basically doing the
15 design work, and Fluor was basically doing the
16 construction work.

17 So when Westinghouse repudiates, they're
18 gone. Fluor is owed a bunch of money. There's a
19 reassessment of the cost to complete, and the owners
20 decided it didn't make sense.

21 But I don't see -- I really don't
22 understand how any issues with the fixed price
23 option changed the dynamic or the risk relationship
24 of the parties except to reduce the risk of the
25 owner, because the owner is not in the driver's

1 seat. The owner is not in the driver's seat when
2 they have the obligation to pay the target price.
3 They've got to continue to pay or breach the
4 contract or terminate.

5 Q And maybe -- maybe that's where, you know,
6 I'm taking for granted and we're not talking about,
7 is could the owner have terminated if they concluded
8 that the -- that either the cost or the schedule
9 was -- was much -- much bigger or longer?

10 A Sure. And then -- and then they would
11 have faced the identical problem that they faced in
12 July of 2017: What do we do with Westinghouse now
13 terminated? It was repudiated in bankruptcy.

14 In fact, in your hypothetical, if there's
15 a termination, you're in the same boat. You've got
16 a certain amount of costs to complete. You've got
17 an issue of getting -- well, getting the IP data
18 from Westinghouse, and you've got an issue of
19 whether Westinghouse is going to participate to
20 support you. So you've got the same bundle of
21 issues. You know, change the names a little bit,
22 not much.

23 Q In November 2014, this is back, you know,
24 when the Westinghouse had provided this different --
25 rebaselining of the schedule and a different

1 estimate, at completion, of a billion dollars.

2 Do you remember that?

3 A Wait. When are you talking about, now?

4 Q November of 2014, November 10th of 2014.

5 It was actually a meeting right here about the
6 billion dollars Westinghouse estimate at completion.

7 Do you remember that? There was a series
8 of meetings.

9 A There was a series of meetings, and there
10 was a push to get a rebaseline schedule. I mean,
11 we're scrambling the chronology a little bit because
12 we've been talking about 2015 and 2016 primarily.

13 Prior to that time, there was -- yes,
14 there was a lot of issues -- there were a lot of
15 issues with getting a useful schedule out of -- out
16 of Westinghouse in 2014. I don't think it started
17 in 2013. I think 2014 is right. Of course, Shaw
18 was involved then, I believe. I think that was even
19 before CB&I got involved.

20 Q So as we're -- we know, in 2014, it's what
21 led in part to the EPC amendment, right? I mean,
22 there was -- there was this effort at rebaselining
23 the schedule, and there was an estimate at
24 completion that showed that there was a substantial
25 increase in the cost. And that was this billion

1 dollars EAC that was -- that was talked about in
2 late 2014.

3 A Yeah. I -- well, if you say it was late
4 2014, I'm not going to dispute that, but I don't
5 have those dates in my head. I just didn't go back
6 and refresh my recollection on 2014, but I know
7 those -- those discussions occurred. I know what
8 the EAC is. I know what it was projecting. I know
9 that eventually there were threats of suit, that
10 CB&I was prepared to walk, and all those kinds of
11 things, although I think that was a little bit
12 later.

13 Q And in 2014 is when the owners had stopped
14 payment because of some of the construction delays.
15 And, in part, because of the delays, the progress
16 payments had gotten ahead of the milestones.

17 A I was directly involved, so I know about
18 that.

19 Q Right. And then there was a series of
20 three meetings on November 10th, November 14th, and
21 December 3rd in 2014, kind of dealing with not only
22 Westinghouse's estimate at completion and schedule,
23 but SCE&G's internal EAC validation. Do you
24 remember using that?

25 A I never heard the word "EAC validation"

1 put together. I know what the EAC is. It's a
2 spreadsheet of certain projected costs. But I don't
3 know about a validation. And those meeting dates
4 don't ring a bell with me.

5 Q And did you know that there was both an
6 EAC from Westinghouse that was a billion dollars and
7 there was an EAC from the --

8 A CB&I.

9 Q No. From the owners, an internal EAC.

10 A No. But, I mean, that would seem to be
11 the sort of exercise you'd expect an owner to
12 perform.

13 Q All right. And then soon after these
14 meetings, there's a March 12th, 2015, petition for
15 modification of the schedule for the project with
16 the Public Service Commission. Are you familiar
17 with that?

18 A I was aware that there were steps taken
19 intermittently to advise the Public Service
20 Commission of South Carolina of the projected
21 completion dates, including efforts to get approvals
22 of adjusted completion dates, but I don't -- I'm
23 not -- that date doesn't ring a bell as when that
24 happened.

25 Q Were you aware that in order to finance

1 the project, that the project -- the approved
2 schedule and budget on file with the PSC had to be,
3 you know, within 18 months of the actual schedule?

4 A I was aware that the -- there was some
5 constraint related to the schedule, and that there
6 was a what -- a confidence range permitted. And 18
7 months, I don't remember that particularly, but...

8 Q And were you aware that after the
9 rebaselining of the schedule by Westinghouse, that
10 the approved schedule needed to be modified with the
11 Public Service Commission?

12 A I don't -- I know, in general, there --
13 that there was an effort by the owner to keep the --
14 what they believe was the likely completion date in
15 sync with what they were telling the Public Service
16 Commission. I thought they were -- they made a
17 great deal of effort to do that.

18 Q And I think you can look on the front page
19 of Exhibit 4. You'll see somebody created a little
20 chart of those substantial completion dates.

21 A Yeah. Actually, I did that.

22 Q Okay. And is --

23 A And that's just because I find it
24 especially challenging to keep a set of two dates in
25 my mind when they changed these three -- you know,

1 in these three different documents. I just did that
2 for my own --

3 Q And the first one is the original EPC
4 contract dates, right?

5 A Right.

6 Q And the second one we talked about is the
7 2012 adjustment --

8 A Yes.

9 Q -- to the schedule.

10 A Correct.

11 Q And then the third one you've got is the
12 2015 modification?

13 A Yeah, correct.

14 Q And that's the one that I'm talking about.
15 That had to be changed with the PSC.

16 And what I really want to ask you, just to
17 cut through this, is: Were you involved at all with
18 the -- with the testimony by the owners,
19 particularly SCE&G, in seeking the modification to
20 the schedule and budget?

21 A I was consulted about -- about the terms
22 of the October 2015 agreement because I was seen as
23 the person who had the best handle on all the
24 implications of that.

25 And so to the extent that I was consulted

1 about -- about a presentation to the Public Service
2 Commission, I believe it was limited to that issue,
3 you know, make certain that we have properly
4 characterized the -- the October 2015 terms.

5 I don't know if -- whose presentation it
6 was, but it was presentations of executives who were
7 not familiar with all of the details of that
8 agreement. So they naturally turned to their
9 lawyer, who was involved. And Al deferred to me --
10 Al Bynum deferred to me on those issues.

11 Q And did you have any involvement with the
12 estimate at completion or the budget testimony
13 involved in the 2015 modifications?

14 A No. In fact, I didn't understand the
15 budget, because the budget was -- it was always
16 expressed in -- I think this is right -- always
17 expressed in 2007 dollars, and always expressed as
18 the 55 percent that SCANA had of the project,
19 because that's all that was presented. And those
20 numbers just were different from the numbers that I
21 was used to dealing with. So I never looked into
22 those. I never had a handle on those numbers.

23 Q Were you asked to find bankruptcy counsel
24 in 2016?

25 A I don't remember when it was.

1 Q Okay. You were asked to find project
2 bankruptcy counsel, though, right?

3 A That's right, and we did. And the date of
4 that engagement is -- it should be easy to find.
5 And -- and I was asked to locate them shortly before
6 they were located.

7 Q Okay. On March 21 of 2016, there was a
8 joint board meeting at the Columbia Hilton. Do you
9 remember being there, where you discussed the
10 declining financial condition of Toshiba and what
11 the owners should do to -- about the project?

12 A I did attend a meeting, a joint meeting of
13 the boards of the two companies, in Columbia in
14 2016. And I was not asked any questions, and I
15 didn't offer any comments. I was there in case any
16 issues came up. And I don't remember any discussion
17 of the type that you -- that you described.

18 Q Do you remember who requested that you get
19 bankruptcy counsel for the project?

20 A I think it was a joint decision on the
21 part of the owners, but I don't remember which
22 individual asked me to do that.

23 Q Do you remember that Santee Cooper was the
24 owner that was requesting bankruptcy counsel in
25 2016?

1 A I believe that both parties were. Well, I
2 don't know about 2016, so I don't know if that date
3 is correct. I do know that Santee Cooper was
4 interested in getting bankruptcy counsel and had
5 sought and perhaps consulted with somebody from your
6 firm or rather -- no, with Rush's firm, that's who
7 it was -- consulted with somebody at Rush's firm who
8 felt they couldn't take the matter because they had
9 a suspicion of a conflict with Westinghouse.

10 But there's no question that Santee Cooper
11 wanted a recommendation, as did SCANA.

12 Q And do you remember what you did to
13 identify bankruptcy counsel for the project?

14 A It's what I would normally do. I know
15 lawyers in Pittsburgh that I've had dealings with
16 over the years, who practice at the highest levels,
17 and I asked for their recommendations.

18 Q And how long did it take to find
19 bankruptcy counsel?

20 A Once I began those calls, it didn't take
21 long.

22 Q Did -- after Santee Cooper first asked
23 about getting bankruptcy counsel on the project,
24 did -- did anyone tell you not to secure or not to
25 identify bankruptcy counsel?

1 A First of all, the first time the
2 bankruptcy counsel issue was raised, it wasn't -- it
3 wasn't "Go get bankruptcy counsel." It was, "Gee,
4 do we need bankruptcy counsel? Would it be
5 beneficial?" so forth and so on.

6 From the time that I was told to get
7 bankruptcy counsel to the time I got bankruptcy
8 counsel was a very short time, a matter of weeks.
9 And during that time, nobody told me not to get
10 bankruptcy counsel.

11 Q Do you remember that period of weeks?

12 A No, I don't.

13 Q And when you say when you were told, the
14 client asked you to get bankruptcy counsel, do you
15 remember who that was?

16 A No, but I understood that both parties
17 were interested in getting it. I didn't -- I didn't
18 take a lot of care in distinguishing between
19 requests from SCANA and requests from Santee Cooper.
20 I viewed them as joint clients, and that if there
21 was ever any doubt, I -- when one requested
22 something, I'd go to the other, but there was seldom
23 any doubt.

24 A lot of these meetings were joint
25 meetings, so representatives of both clients were

1 present.

2 Q Now, when the issue of bankruptcy counsel
3 first came up, did you believe or think that it was
4 not necessary at that time?

5 A When the issue was first raised, I did
6 think it was not necessary.

7 Q And why --

8 A I was not direct -- you know, when
9 attorneys are directed to do something, they do it.
10 So there were discussions about hiring bankruptcy
11 counsel before I was asked to get bankruptcy counsel
12 or recommend bankruptcy counsel.

13 Q And I agree with you, which is why I keep
14 kind of pressing the point is I'm trying to figure
15 out if you have any memory whatsoever of who told
16 you or asked you to get bankruptcy counsel. And --
17 and just as importantly, when it was first
18 discussed, who told you you don't need to worry
19 about getting bankruptcy counsel?

20 A Nobody told me you don't have to worry
21 about it, that I remember. And when it was first
22 discussed, I wasn't asked to do it. It was
23 discussed.

24 Q Did you have any involvement with Dentons
25 as bankruptcy counsel?

1 A No.

2 Q Just going back to this, when -- your EPC
3 amendment and Westinghouse's financial condition.
4 Did you all know or discuss at all that Westinghouse
5 could use bankruptcy to get out of the EPC contract?

6 A Well, did I know that? As an attorney, I
7 know that any corporation, any individual can
8 repudiate a contract in bankruptcy.

9 But did I -- did I think that that was
10 likely or possible? No, I didn't. Again, the idea
11 of Westinghouse filing bankruptcy was completely
12 strange to me until they -- they were on the verge,
13 because it just -- perhaps I was at fault for that,
14 but I just didn't see it coming. I absolutely
15 didn't see it coming.

16 Q Okay. When you all amended the EPC
17 contract and the fixed price option was out there,
18 was there any agreement or strategy not to exercise
19 it until later in 2016?

20 A My -- my -- I don't recall anybody saying
21 that we shouldn't exercise it. The majority of the
22 discussion in October, and in advance of the
23 agreeing to the October amendment, was two pieces,
24 of the amendment itself and of the option.

25 So I kind of viewed the acceptance of the

1 agreement as preceding the exercise of the option,
2 but that the exercise of the option was inevitable.
3 It just made sense.

4 Q Did the exercise of the fixed price option
5 require the construction milestone payment schedule
6 to be established?

7 A Well, there was -- unless and until the
8 other regime was replaced -- well, let me back up.

9 Once you convert, then you can't use the
10 other regime. You know, the target price goes out
11 the window because there's no, you know, cost plus
12 arrangement. T&M goes out the window. There's no
13 time and material arrangement.

14 The schedules associated with fixed price
15 and the firm price go out the window, so something
16 has to take its place. And what was agreed to, to
17 take its place, were the interim payments, and then
18 the construction milestone payment schedule.

19 You know, it is fair to say that in the
20 original construction contract, there were
21 construction milestone payment schedules. And those
22 were tied to the fixed price and the firm price
23 components of the contract price. So what we needed
24 to do was replace those with one that would embrace
25 the entire lump sum agreement.

1 Q And the interim payments of \$100 million a
2 month, that started in 2016 and continued through
3 most of that year, was in part because Westinghouse
4 was needing cash flow and needing to be a certain
5 level of cash being paid in order to ramp up, for
6 example, with Fluor. Didn't Fluor onboard in early
7 2016?

8 A I believe they were on board then.

9 The project is about as massive as you can
10 expect a \$10 billion project to be, and every single
11 day they were spending millions. So I don't think
12 there was any expectation on anybody's part, the
13 owner of the consortium, that the contractor would
14 continue working without any payment at all at the
15 same level it had been working. And that was not in
16 the owners' interest, nor in the contractor's
17 interest.

18 Every time we extended those payments,
19 there was gnashing of teeth, there was
20 disappointment, but it was recognized as being the
21 best of two bad options. The one is to pay the
22 money, and the other is to not pay the money and the
23 contractor stops work.

24 Q And we had talked earlier about
25 Westinghouse giving burn rate information to the

1 owners. I mean, part of the reason for the
2 100 million a month, and having extended beyond what
3 the contract called for, was to ensure that the
4 contractor continued working on the project pending
5 the construction milestone payment schedule
6 conclusion in the DRB, right?

7 A The money was paid on a monthly basis in
8 order to ensure that the contractor continued
9 working.

10 Q And without that \$100 million,
11 Westinghouse told you and the owners that it would
12 not be able to continue working on the project?

13 A Well, they didn't tell me, and they may
14 have told the owners that. Nobody needed to tell me
15 that, though, for me to know it. Contractors don't
16 spend tens of millions or \$100 million a month for
17 months on end without being paid. They just don't
18 do it.

19 Q And were you part of, in this 2016 time
20 frame leading into the DRB and the construction
21 milestone payment schedule -- we talked earlier
22 about Westinghouse not being fully forthcoming with
23 its financial information.

24 Isn't it -- isn't it true that once those
25 payments started, it was about four to six months

1 before you all even heard back from Westinghouse?

2 A Well, that question is confusing to me.

3 What is the four- to six-month time period? Between
4 what and what are you asking?

5 Q So when they started getting paid
6 \$100 million --

7 A In January 2016?

8 Q Right. Westinghouse stopped communicating
9 with the owners, didn't it?

10 A No. No. They had -- there were meetings
11 with NND before I even got involved in the
12 construction milestone payment schedule issue that
13 began almost immediately.

14 And these were both face-to-face meetings,
15 as well as a lot of communications by e-mail, and
16 documents exchanged and a lot of information, all of
17 which was reviewed and digested in preparation for
18 the DRB hearing.

19 Q And the owners weren't getting the
20 information from Westinghouse that they needed, did
21 they?

22 A They were not getting all the information
23 that they wanted. There's no question about that.

24 Q And in fact, during that period of time of
25 paying \$100 million a month, the parties, the owners

1 and the consortium, were supposed to come to an
2 agreement on the construction milestone payment
3 schedule, right?

4 A Well, yes, it was an agreement to agree.
5 And, you know, that has a certain meaning to
6 lawyers. It's something you wish to avoid, but
7 sometimes it's unavoidable.

8 There was an agreement to agree to a
9 milestone payment schedule, but it was also
10 contemplated that, guess what, the parties might not
11 agree, which is why we set up the DRB and
12 specifically referenced the DRB as the way to
13 resolve the parties' inability on their own to come
14 to an agreement. Certain things are foreseeable,
15 namely -- and one of those was when the parties
16 agreed to agree, it was foreseeable that they might
17 not. And they didn't.

18 Q And isn't it true the reason they didn't
19 agree was because Westinghouse wasn't providing any
20 information during this period of time when they
21 were getting paid \$100 million a month?

22 A My perception is that the reason that they
23 didn't agree is that they wanted more money sooner,
24 and the owner wanted to pay less money later. And,
25 you know, that's also foreseeable, but that's what

1 happened.

2 Q And during this time, the owners knew that
3 Westinghouse wasn't accounting for the \$100 million
4 that it was being paid each month; isn't that right?

5 A I don't know what kind of information --
6 well, I know some of the information that
7 Westinghouse was provided in order to help arrive or
8 attempt to arrive at an agreed milestone payment
9 schedule.

10 There was no obligation on Westinghouse's
11 part in the -- in the October amendment to justify
12 the \$100 million. That was a -- I don't believe
13 there are any conditions on the obligation to pay
14 that for the first six months. I think Westinghouse
15 actually provided more information than they were
16 obligated to provide concerning where that money
17 went, not nearly as much as what NND wanted during
18 their negotiations. Because that's where the
19 negotiations started. It wasn't until those
20 negotiations broke down that I got involved.

21 Q And so your understanding from your client
22 was that Westinghouse was providing more information
23 than required to document what it was doing with the
24 \$100 million a month during that period of time?

25 A Well, since -- since my reading of the

1 document is that they had zero obligation to justify
2 those first six months, any information they
3 provided for those six months was more than they had
4 to. But let's not confuse that with the information
5 that NND wanted to develop the construction
6 milestone payment schedule going forward. That's
7 where the complaints were related to the development
8 of that payment schedule going forward.

9 And the Westinghouse was saying, "We're
10 giving you more than enough," and the NND was
11 saying, "No. We need this, we need that, we need
12 something else." And -- but the parties did
13 exchange draft schedules. It's just that the
14 schedules had the disconnect that I referred to
15 earlier. Westinghouse wanted more money sooner, and
16 the owner didn't agree.

17 Q Did SCE&G oppose hiring Bechtel at first?

18 A I don't recall anything that could have
19 been interpreted as opposing hiring Bechtel. I've
20 referred to, and you have in front of you, an e-mail
21 that I received in May where Al Bynum first advised
22 me of Santee's interest in retaining Bechtel. And
23 he said -- he said, in essence, "Do you think it's a
24 good idea or are we just creating discoverable
25 material?"

1 As I said before the break, when he
2 referred to "discoverable material," to me, as a
3 lawyer, that meant exactly what he meant. That
4 meant to me what he intended, namely that we need to
5 be careful about bringing in somebody to prepare a
6 report, because those reports can be taken out of
7 context.

8 In fact, in another e-mail that you have
9 in front of you, I wrote to Mike Baxley, and
10 explaining to him by using concrete examples of a
11 case that I was involved with, where an expert
12 report was prepared based upon insufficient
13 information prior to discovery, with limited access
14 to data, but -- and the owner resisted producing it.
15 We were able to force production because it was
16 being used in the normal course of business rather
17 than in anticipation of litigation. And the case
18 settled shortly after that.

19 So I laid all that out in an e-mail.
20 These are not abstract issues. These are things
21 that I've lived with, lived through. And I was
22 trying to bring that experience to bear in
23 connection with -- with my client. I think that's
24 why they hired me, to bring that kind of experience
25 to bear.

1 Q Let's just go ahead and talk about that a
2 minute. That past experience you had about
3 engineering experts for a construction project, that
4 was in litigation in the '80s, from the Western
5 District of Pennsylvania?

6 A Yes.

7 Q And that involved a coal fire plant where
8 the opposing party had hired an expert to assess
9 potential legal claims and not just the project,
10 right?

11 A Right.

12 Q Okay. And then that assessment was done
13 during construction, but before litigation, right?

14 A It was before there was a reasonable
15 expectation of litigation. That was the finding.

16 Q Okay. And then you moved to compel its
17 disclosure and had it successfully produced to you,
18 right?

19 A That's correct.

20 Q And then you used it in the litigation,
21 once it arose, about the claims that the opposing
22 expert had analyzed, right?

23 A Right.

24 Q Okay. And then you all settled that case?

25 A On favorable terms to my client, as you

1 can expect.

2 Q Right. So just to contrast that or to
3 compare it, rather, to here, the analysis by Bechtel
4 was about the project and its challenges, including
5 the schedule, right?

6 A The -- the retention of Bechtel was done
7 to assist me in evaluating anticipated claims in
8 litigation. That's what the agreement says. That's
9 what Bechtel signed up for.

10 Now, what they actually did is not exactly
11 in line with that. But what they were retained for
12 was to help me. When the -- the idea of bringing in
13 Bechtel was first floated, Al was -- Al Bynum was
14 concerned about discoverability, as was I, but I
15 also thought, this -- these folks should be able to
16 help me in understanding what's going on with this
17 contractor who was threatening suit.

18 Q And I know that the agreement says it
19 was -- it was done in anticipation of litigation.
20 But you also just, I think, said the first time that
21 it was to help you analyze claims.

22 A Well, help me understand the claim
23 environment. But, now, understand that my principal
24 focus at the time was on understanding their
25 schedule. And I know what schedule consultants can

1 do with a schedule. And I expected that Bechtel, of
2 their 40- or 50,000 employees, they would find
3 somebody who could do what claims consultants --
4 what forensic schedulers do, which is get into a
5 schedule, find out if there are any -- if there's
6 anything being done that disguises problems with
7 their performance.

8 Q And when you say "schedule," you're
9 talking about the construction schedule for the
10 project?

11 A Yeah. I'm sorry. It's the P6 schedule,
12 the Primavera software schedule that was in place at
13 the time. I wanted to understand where that was
14 going, because that's where the big money would be.

15 As I said, in the October amendment, the
16 possible exposure is in excess of \$900 million. So
17 understanding the scheduling issues was actually
18 more important than understanding the issues related
19 to extra work. And it's those scheduling issues
20 that drove a lot of the payment disputes that had
21 preceded that agreement.

22 Q And if the schedule was going to be years
23 longer into the future, the costs would be even more
24 than 900 million in excess of the current budget,
25 wouldn't it?

1 A Time is money, so we would expect that --
2 that any delays in construction would be expensive
3 to Westinghouse. And -- well, at that time
4 Westinghouse/CB&I meant eventually just
5 Westinghouse, because I had no idea that CB&I was
6 going to leave the picture.

7 So yes, certainly the longer things take,
8 the more expensive they get. I wanted to make
9 certain that that expense stayed on Westinghouse's
10 side and wasn't passed on to us in the form of a
11 delay claim, which would both negate the
12 \$900 million in liquidated damages and expose the
13 owner to additional payment for delay. And the
14 Bechtel report helped me not at all in that -- in
15 that assessment.

16 Q But your -- and it's fair to say that the
17 primary motivation for wanting this expert
18 consultant was to analyze the Westinghouse project
19 schedule and whether it was accurate or had
20 challenges that could -- could not be resolved; is
21 that right?

22 A No. I think that's a simplification.

23 Q Okay.

24 A They were retained to do a lot of things.
25 The contract says that. Plus, they were instructed

1 by people as to what they wanted. So I wouldn't
2 simplify it.

3 And I will tell you that what I wasn't
4 looking for was a projection, because what I wanted
5 to know was: Tell me about the schedule that's in
6 place right now. And what -- what are they
7 projecting right now? And what are the problems
8 with the schedule that they're using?

9 I didn't ask them to come up with their
10 own level 2 schedule based upon a bunch of
11 assumptions that even they wouldn't back up and
12 characterize as preliminary.

13 Q But there's no question that you wanted
14 them to look at the scheduling problems that had
15 been part of the project?

16 A That's what I wanted; although, frankly,
17 eight weeks, a million dollars, that's probably not
18 enough to get that job done.

19 Q But that's what you hired them to do?

20 A That's what I was hoping that they would
21 do.

22 Q And when they came back on October 22nd or
23 even November 12th, and you were so unhappy with
24 what they -- the product was, what did you do then
25 to get what you -- what you wanted?

1 A Okay. By that time, I had lost interest
2 in Bechtel. They -- my primary focus at that time
3 was the amendment, because the amendment was going
4 to resolve a lot of claims, and was putting in place
5 a lot of new terms. And I didn't see where Bechtel
6 was going to be of any assistance.

7 And when they made their oral presentation
8 on October 22nd, I remember dialing in. They
9 started in to the schedule projections. I asked
10 them what methodology they used, and they described
11 it. And I've described it here today.

12 And from that point on, I -- I discounted
13 anything they had to say, because what they were
14 doing, in my judgment, was less than useless.

15 Q And so for your purposes, it was
16 worthless?

17 A And for anybody's purposes. That is, if
18 you want to know -- let's say that I did ask them to
19 do a projection. Then I'd want them to do something
20 other than follow the methodology that they did. I
21 would have said, "Look, you spent a couple hours
22 trying to download the schedule. All right. Spend
23 the rest of the day. Download the schedule. I want
24 you to tell me what's in Westinghouse's schedule. I
25 don't want you to come up with your own schedule

1 based on a bunch of guys sitting around the room, no
2 matter how experienced they may be, and having them
3 give their guesses about how long various components
4 are going to be; and then do a Monte Carlo on those
5 guesses; and then you get a sort of average of all
6 the guesses as a product of the Monte Carlo," which
7 is, you know, and people don't say it much anymore,
8 but garbage in, garbage out.

9 You've got estimates that are then Monte
10 Carlo'd. And then you come out with estimates that
11 now look like they're something. They're nothing.
12 They're not useful. That was my judgment then and
13 now.

14 And so they didn't give me what I wanted.
15 They didn't give me any understanding, any insight
16 into what was really driving the project, driving
17 Westinghouse's schedule. And they gave me something
18 that was different that I also thought was unuseful.

19 Q And --

20 A And I shared those feelings with my
21 client.

22 Q And you even hung up early on
23 October 22nd, on the phone call?

24 A I did. I was done with them. But I
25 wasn't that interested in them to begin with. I was

1 in Columbia that night. If I had been interested in
2 Bechtel on October 22nd, I would have flown up that
3 morning.

4 By that point, I was pretty much done with
5 them because most of what I understood they were
6 doing would be mooted by what I was really
7 interested in, which was the October agreement.

8 Q And you didn't hire them specifically to
9 analyze claims like in your past experience that you
10 had?

11 A Well, I didn't identify numerical claims,
12 but I did expect them to assess the project from a
13 claim point of view. That's -- that's why you hire
14 somebody in anticipation of litigation.

15 Q But it wasn't -- the assessment wasn't for
16 any specific legal claims?

17 A I did not give them an enumerated list of
18 legal claims. I actually understood that I was
19 dealing with an entity that would have the
20 sophistication to realize that an analysis of a
21 project of this nature, including a schedule
22 analysis, which they said they were going to do,
23 would include an analysis of any issues in the
24 schedule, any delays, any anomalies in the -- in the
25 activities. I was wrong.

1 Q How was the report in anticipation of
2 litigation on October 22nd, 2015?

3 A It was when they were retained.

4 Q Okay. But I mean, on October 2015,
5 October 22nd, 2015 -- you don't even stay on the
6 phone the whole time -- how was the Bechtel
7 assessment and report that was forthcoming at that
8 point, how was that in anticipation of litigation?

9 A As I understand it, the measure is was
10 there a reasonable expectation of litigation at the
11 time that the party was retained. And you don't
12 lose that subsequently. The -- whatever privilege
13 there is related to that document, whatever --
14 whatever the Rules of Civil Procedure provide with
15 respect to a document prepared under those
16 circumstances persists.

17 It doesn't go away just because, oh, now
18 we don't think there are claims. Well, how about if
19 the next day, you think there are claims? It's not
20 a blinking light. It's not a privilege that you
21 have one day, and then lose the next, and then maybe
22 get it back the third day. That's not my
23 understanding of the law anyhow.

24 Q And is there a way to -- I mean, is the
25 report -- how was the report in anticipation of

1 litigation in February of 2016, when it was issued?

2 A Same answer. It was always in
3 anticipation of litigation, except that in February
4 of '16, now I'm more concerned about the new
5 liquidated damages regime which is -- which is put
6 in place under the October amendment. And that
7 regime has real teeth in it.

8 As I said, I've cited the figure of
9 \$900 million multiple times today because that's an
10 eye-watering figure. That's a significant number.
11 And to some extent, I viewed my principal
12 responsibility at that time as ensuring that -- that
13 nothing happened to damage the ability of the owner
14 to pursue that claim if and when the contractor
15 completed, if it were appropriate.

16 Q And the contract you're talking about in
17 February is the EPC amendment, right?

18 A Well, the EPC contract is the contract.
19 The amendment doesn't replace the contract; it
20 supplements it; it amends it. So what I'm talking
21 about is the project.

22 Q Right. And the liquidated damages regime
23 that you were then concerned about wasn't in effect
24 during the Bechtel analysis, was it?

25 A You asked me about February 2016. Now are

1 you changing the time period in your question?

2 Q No. Part of your answer was it's because
3 I was concerned at that point about the liquidated
4 damages regime, that was the stepped-up amount.

5 A Right. And you asked -- but prior to
6 that, you cited February of 2016.

7 You said, "Why is it in anticipation of
8 litigation in 2016?"

9 I said, "Same answer, namely that the
10 privilege attached when they were retained and kept
11 there." But in addition, there was -- there was
12 that anticipation of litigation in 2016, because we
13 did have that new regime, that \$900 million regime
14 for liquidated damages in place at that time.

15 Q But not when the Bechtel was doing its
16 assessment?

17 A Well, we can talk about any one of these
18 time periods, and you get to pick, but you can't
19 pick them all at the same time. So just tell me
20 what period you want me to discuss, and I'll discuss
21 it.

22 Q I want to talk about the period of time
23 when you were first asked to get involved with the
24 Bechtel assessment. That was, I think you said, in
25 May.

1 A Yeah. In fact, I'd like my documents back
2 because those would help me.

3 Q (Handing.)

4 A Thank you.

5 Yes. So on May 20th, Al Bynum wrote me a
6 very brief e-mail. He says: "Santee Cooper wants
7 to hire Bechtel pursuant to the attached proposal."
8 And there's a parenthetical about that proposal.
9 "I'm curious to see if you see any problems from
10 this. Are we just creating discoverable material?"

11 Now, as I've said, "discoverable
12 materials" tells me that Al is doing his job as
13 project counsel. He's sensitive to the issue of
14 litigation and what would be discoverable in
15 litigation. He's looking to me as outside counsel
16 to advise him on that issue of whether we're just
17 creating discoverable materials.

18 Q And that was the first time you were in
19 conversations about the Bechtel hiring or
20 assessment?

21 A I don't remember anything earlier than
22 this, and I've searched my records and I don't see
23 any indication of any knowledge prior to this. So
24 this is -- I would say that this, to the best as I
25 can determine, is the first time that I learned of

1 Bechtel in connection with the project in any
2 capacity.

3 Q Okay. And so you weren't part of the
4 discussions between Bechtel and the owners in
5 February of 2015, were you?

6 A I don't know that there were discussions
7 in February of 2016, but in any case -- I'm sorry --
8 in 2015, but in any case, I wasn't part of those
9 discussions.

10 Q And did you know that both sides,
11 including your clients, had agreed, prior to your
12 involvement, that the Bechtel assessment would not
13 review attribution of past impacts with the validity
14 of any pending or future claims?

15 A I believe that's inaccurate based upon
16 the -- what you just said.

17 So you asked me if I knew something that I
18 considered to be inaccurate. No, I didn't know
19 that, and I don't think that's accurate. Otherwise,
20 I would not have gotten an e-mail from project
21 counsel. Al was considered to be fairly senior,
22 from my perception, and I understood this to be
23 reaching out to me for my opinion, not that they had
24 already reached a decision, and that this was simply
25 a waste of an e-mail.

1 Q And the analysis that was done essentially
2 would focus on the cost and schedules to improve the
3 trajectory of the project? Is that part of what you
4 were told when you were asked to come in to the
5 negotiations about hiring Bechtel?

6 A The -- attached to Al Bynum's e-mail of
7 May 20 was a proposal. And one of the things that
8 was in that proposal, it was the sentence, quote:
9 "For clarity, this team will not evaluate the
10 ownership of past impacts or validity of pending or
11 future claims."

12 And I wrote to Al, on May 22nd, and said
13 that I disagreed with that. And I said: First, I
14 have trouble seeing how Bechtel could come to
15 understand, quote, the issues that have caused
16 impacts to date, closed quote, without evaluating,
17 quote, the ownership of past impacts, closed quote.
18 That seems illogical. Second, and more important,
19 we need to prevent Bechtel's product from being
20 discoverable.

21 This is in May, before they were retained.
22 This was always the understanding that I had with
23 the owner. We need to prevent Bechtel's product
24 from being discoverable. To do that, we need to
25 establish that we were hiring Bechtel in

1 anticipation of litigation or to prepare for trial.
2 We will likely not be able to do so if Bechtel,
3 quote, will not evaluate the owner's past impacts or
4 validity of pending or future claims.

5 So I specifically objected to that
6 language in the Bechtel proposal. And it's not in
7 the document that they signed, the Professional
8 Services Agreement, because of my objection.

9 Q And isn't -- wasn't your objection because
10 if you didn't insist on that change, there would be
11 no argument that it could be protected from being
12 discoverable?

13 A Oh, I think that's pretty much an
14 overstatement. All of these issues are -- are based
15 upon a cluster of facts. They're fact-intensive
16 inquiries.

17 We could have an agreement that said I'm
18 not retained in anticipation of litigation, but
19 prove that in fact it was in anticipation of
20 litigation. So I don't know the particular language
21 of an agreement is going to be dispositive on that
22 question.

23 As I've said, I've litigated this
24 question, and it turns upon the facts of what the
25 parties knew and anticipated. But certainly the

1 agreement language is important as one of those
2 things.

3 Q And as soon as you got involved, and the
4 client had raised the question of shielding it from
5 discoverability in the future at some circumstance,
6 you said, "We've got to make sure and put this
7 language in that it's in anticipation of
8 litigation," didn't you?

9 A Yeah. And I explained that to both
10 clients with as much clarity as I could muster.

11 For instance, another one of these e-mails
12 that I have here is an e-mail that I wrote to Mike
13 Baxley on July 14, 2015, again, before Bechtel's
14 retained. And that's when I cited the Western
15 District of Pennsylvania issue.

16 And I think it's important that this be
17 read into the record, because it helps you to
18 understand why a construction litigator would be
19 concerned about a report prepared at these early
20 stages.

21 What I said is that: "We learned of the
22 existence of the report and requested production,
23 but the other party refused, contending that the
24 report was privileged. We then successfully moved
25 to compel production. The report in that case was

1 highly favorable to my client and its production
2 quickly led to a settlement on highly favorable
3 terms. The other side settled because it recognized
4 it would have a nearly impossible task if it
5 attempted to persuade the fact finder to ignore the
6 report. In short, the consultants hired by the
7 other side effectively" -- and I put in quotes,
8 "decided the dispute," because they didn't literally
9 decide it, but they effectively led to the
10 disposition of the dispute -- and I'm picking up
11 again -- "when it wrote its report, although the
12 report was preliminary and prepared without the aid
13 of discovery. The same could happen here with the
14 Bechtel report. We should give careful thought to
15 whether we want to put Bechtel in the position of
16 possibly deciding any eventual dispute based upon a
17 seven-week review."

18 That was my concern then and that
19 continued to be my concern: Preliminary, limited
20 access, worked to a budget. We've done it in a
21 short amount of time, and without the aid of
22 discovery. And if that is later presented in a
23 dispute in the Southern District of New York, on a
24 \$900 million liquidated damages claim, there could
25 be things in that report that we would regret being

1 in evidence.

2 And so I felt and do feel today that it
3 would have been irresponsible for me to allow this
4 process to go forward without ensuring that I had
5 some control over it, and that it was done in
6 anticipation of litigation in fact. And it was
7 done, in fact, in anticipation of litigation.

8 Q Until it was complete, though, right?

9 A Well, it wasn't done at all once it was
10 complete. It was done, though. It wasn't done in
11 anticipation of anything because it was over.

12 Q So based on your past experience with this
13 other case and Mr. Bynum's question of
14 discoverability in his e-mail, you made it your
15 primary purpose to shield this report from future
16 disclosure and discoverability, right?

17 A I made it my primary purpose to ensure
18 that this report would not be discoverable in a
19 dispute in the Southern District of New York against
20 the contractor concerning issues that might be
21 impacted by that report, because I was concerned
22 that that report -- before I got it in July, in this
23 e-mail, I was concerned that it might say something
24 based upon limited access, limited time, limited
25 budget, and the like, that might be damaging. Once

1 I got it, I was concerned that it did, in fact, say
2 things that could be damaging in that eventual
3 lawsuit.

4 Now, as to -- you used the broad term
5 "disclosure." I have no idea whether this
6 arrangement shielded it from any other types of
7 disclosure. That's not what I look at. That's not
8 what I was retained for. It's not what I was asked
9 to do. I have no idea whether retaining them in
10 anticipation of litigation has any implications for
11 other disclosures that the owner might be obligated
12 to make.

13 What I was concerned about at the time
14 was, and rightly, I believe -- I believe today, I
15 believed then -- rightly, was that this would be
16 disclosed in litigation with the contractor.

17 Q And you pointed out the e-mail in July of
18 2014, when some of these discussions were coming to
19 a head, about how to structure the hiring of
20 Bechtel. And do you also remember that your client,
21 at least the counsel for Santee Cooper, on both the
22 13th and the 15th, did not agree with you?

23 A Mike went back -- went hot and cold. I
24 explained these issues to Mike in detail. Mike was
25 a South Carolina judge, as you know. And I felt

1 that he would understand these issues. And every
2 time I -- not every time. Several times when I
3 would end the conversation with Mike, I thought he
4 agreed with me. Mike's a very polite, accommodating
5 person, and maybe that was the politeness that I was
6 misinterpreting. But I understood that, when I was
7 talking with him, that he agreed with me. I
8 understood, when I was talking to Lonnie Carter
9 about these issues, that he agreed with me.

10 And then something would happen, and I'd
11 get a word back that they would try to move it back.
12 Maybe they were getting pressure from their board or
13 something else. So I was getting conflicting advice
14 from the same person, not to mention from different
15 people in the same entity, not to mention different
16 people from the two different entities. So I was
17 getting a lot of input, and it was not consistent.

18 Q Were you aware that your client, Santee
19 Cooper, wanted the Bechtel assessment and a written
20 report for the reasons that you described as the
21 normal course, that is, recommendations about how to
22 get this project on schedule and how to do it?

23 A I did. I did. That was one of the
24 reasons -- that was one of the things that they
25 wanted. And it's my understanding of the law --

1 again, I'm a lawyer, so I view these things through
2 that prism -- that a report of this nature can be
3 used to -- for in the normal course -- let's use
4 that term -- without destroying the privilege so
5 long as the primary purpose of the retention was in
6 anticipation of litigation. That's my understanding
7 of the law.

8 So I want -- so to the extent Santee
9 Cooper expressed an interest in having the report
10 available to it in order to guide judgments about --
11 in the normal course of business, I wanted to ensure
12 that that didn't conflict with and in any way
13 supersede the primary purpose, the purpose mentioned
14 in the Professional Services Agreement, the purpose
15 that I discussed both with Mike Baxley and Al Bynum,
16 namely the purpose of in anticipation of litigation.

17 Q And are you aware that until you got
18 involved in the summer of 2015, that nobody had
19 mentioned hiring Bechtel in anticipation of
20 litigation?

21 A Until May, I had no idea that there were
22 any discussions of hiring Bechtel at all. So I had
23 no idea of them hiring Bechtel either in
24 anticipation -- in anticipation of litigation or
25 otherwise.

1 But I thought that I -- I thought, in my
2 interactions with my client, that we had come to an
3 agreement that that would be the basis for the
4 retention. I got buy-in on the agreement that says
5 that.

6 Now, I don't think Mike Baxley, a judge
7 from South Carolina, would have approved that
8 agreement if he thought it was a sham. Nor do I
9 think that the in-house counsel for SCANA would have
10 approved that agreement if they thought it was a
11 scam. It said what I wanted to do with Bechtel, and
12 it said it loud and clear, and it said that they
13 were retained in anticipation of litigation.

14 Q And there's no question, I don't think, in
15 anybody's mind that it was your primary purpose to
16 have the Bechtel assessment, retention, and reports
17 as its primary purpose in anticipation of litigation
18 in order --

19 A That's right.

20 Q -- to shield it from disclosure?

21 A And if anybody objected to that, they
22 should have said so when they were looking at the
23 Professional Services Agreement which defines the
24 parameters of that -- of that engagement, and there
25 was none. So I had every reason to believe and did

1 believe at that time -- despite the back and forth
2 about assessment and whether it was or was not in
3 anticipation of litigation, I had every reason to
4 believe and did believe that the clients had bought
5 in on the basis for the retention. Why wouldn't I?
6 What else would I think?

7 Q Other than your clients not objecting to
8 your primary purpose of -- of labeling this
9 assessment as in anticipation of litigation, do you
10 have any reason to think that they were hiring
11 Bechtel or wanted Bechtel to be hired --

12 A Yes.

13 Q -- in anticipation of litigation?

14 A Yes, because you didn't specifically say
15 the agreement itself.

16 Also, there were multiple discussions with
17 Mike Baxley and Steve Pelcher and Ron Lindsay and Al
18 Bynum about this exact issue. And I explained to
19 them multiple times my viewpoint. And I had
20 understood that they had accepted that; that they
21 thought that there was an opportunity to use it for
22 what I would call the normal course of business, but
23 they recognized my points. And I thought they
24 deferred to my judgment.

25 Q And wasn't it Santee Cooper's legal

1 counsel's judgment, on July 13th, that if you insist
2 on hiring them for the purpose of giving legal
3 advice, that it would result in the failure of this
4 assessment? Didn't he tell you that?

5 A I don't remember that. If that's in an
6 e-mail. But that comment, setting aside whether he
7 said it or not, makes no sense to me.

8 Q I mean, he --

9 A When I say it makes no sense to me, I fail
10 to see how retaining Bechtel for the purposes of
11 preparing for litigation would cause the assessment
12 to in any way fail. That's -- that's somewhat
13 illogical.

14 Now, you know, Mike is a tremendously
15 sophisticated guy and was a judge. I don't know
16 that he was ever a litigator. So maybe our
17 perspectives were quite different.

18 Q Neither here nor there, but he was.

19 I think it's -- he says to you: "I am
20 concerned that hiring Bechtel through legal counsel
21 and certain phrases in the proposed agreement that
22 Bechtel is hired for the purpose of assisting
23 counsel in giving legal advice to the owner will
24 result in the failure of this initiative."

25 And then he continues on the 15th after

1 your response to him, and he says that: "It is my
2 understanding that the owner's CEO met with Bechtel
3 earlier this week and there's change in previous
4 thinking on this, away from litigation, towards open
5 disclosure of findings among the parties."

6 You remember there had been months of
7 discussions about hiring Bechtel before you ever got
8 involved at all.

9 A I didn't know that. How would I know
10 that?

11 Q But you know that now, don't you?

12 A You said that. I haven't seen any
13 evidence of that. I mean, I don't mean to
14 disrespect your representations, but I have no
15 knowledge of any contacts prior to May, presumably
16 sometime before May 20, since there's already a
17 proposal. But I didn't know of those -- those prior
18 contacts.

19 But in any case, consider the quote that
20 you've repeated now of Mike Baxley saying that if we
21 include that language, the assessment will fail.
22 Well, ultimately we did approve that language. We
23 did include that language in the document. He
24 approved that document.

25 So I can only assume that he changed his

1 mind. He says in July, before the document's
2 executed, that if we include that, the assessment
3 will fail. But then he approves the language in the
4 ultimate agreement that has that language. So he
5 must have changed his mind about whether the
6 assessment would fail if that language were
7 included.

8 Q Do you --

9 A But that gives you some sense of why I say
10 that there was a lot of back and forth about the --
11 this and related issues, when I thought there was an
12 understanding, and then they backtrack. And then
13 come forward again, I think there's agreement, we're
14 proceeding forward, and then there's someone that
15 says, "Well, no. I dissent."

16 And that was happening. And I'm dealing
17 with two clients, but I understood that when I
18 retained Bechtel, that issue was resolved, because
19 that language is in the agreement and that agreement
20 language was approved by attorneys for both parties.

21 Q And we all -- we all struggle with not
22 knowing what we don't know. But did you know how
23 long Santee Cooper had been trying to get Bechtel or
24 some third-party assessment done of the project?

25 A As I said, I learned about it on May 20th.

1 And there's nothing in the -- in Al's document that
2 suggests that they've been kicking this around for a
3 long time. In fact, the way Al introduces it to me,
4 Santee Cooper wants to hire Bechtel. He doesn't
5 say, "Well, as you know, we've been kicking Bechtel
6 around for months and months and months, and now
7 they finally want to hire them."

8 No. Al is telling me for the first time.
9 And I had no reason to believe that this was more
10 than, you know, a couple days, a couple weeks old,
11 and didn't -- and didn't assume that.

12 Q Right. I'm not trying to say it's your
13 fault. I'm just saying there are other things
14 happening, obviously.

15 A I have no doubt, but I'm -- you're the
16 only witness that's in front of you, so I guess
17 you're getting what you're getting.

18 Q Thank you.

19 Can you understand that trying to make it
20 for litigation purposes, like what Santee Cooper was
21 concerned about, would actually undermine the
22 cooperation needed from the consortium?

23 A That was an issue that -- that was
24 addressed in the context of discussions about the
25 NDAs and similar types of assurances that the

1 consortium wanted; so yes, I was aware.

2 Q And even -- and so the result of forcing
3 it into this agreement that says it's for litigation
4 actually had the effect of causing problems with the
5 consortium's cooperation in providing documents and
6 information to Bechtel, didn't it?

7 A I can't -- I can't agree with your
8 speculation about Westinghouse's motives. My
9 understanding of Westinghouse's reluctance to give
10 up information was that Bechtel was a competitor,
11 one; and, two, they didn't particularly want the
12 owner to know certain things that they considered to
13 be confidential.

14 MR. BALSER: Matthew, we've been going for
15 about two hours. Do you want to take a short
16 break?

17 MR. M. RICHARDSON: Sure. You've got to
18 give me a signal.

19 THE VIDEOGRAPHER: The time is
20 approximately 2:57, and we are off the record.

21 (Recess in the proceedings from 2:57
22 to 3:08.)

23 THE VIDEOGRAPHER: The time is
24 approximately 3:08 p.m. We are back on the
25 record. Counsel, you may proceed.

1 BY MR. M. RICHARDSON:

2 Q No question that SCE&G was in favor of
3 hiring Bechtel before or when they -- when you
4 actually hired them, right?

5 A I certainly understood that they agreed to
6 the hiring of Bechtel.

7 Q And you believe Kevin Marsh, for example,
8 was in favor of hiring Bechtel before October 22nd,
9 2015, right?

10 A Well, they were already retained.

11 Q Right. And do you have any reason to
12 think that he did not want Bechtel hired or doing an
13 assessment before October 22nd, 2015?

14 A At some point, there was skepticism
15 expressed about the hiring of Bechtel by various
16 people, primarily people at SCANA as opposed to
17 Santee Cooper.

18 I mentioned earlier that there was some
19 suggestion that Bechtel was looked at as something
20 less than an honest broker by some people because of
21 the perceived interest that Bechtel had in being
22 retained for what would promise to be a very
23 lucrative contract for Bechtel in connection with
24 the \$10 billion project.

25 So I -- I would resist assenting to any

1 categorical statements like that. That just
2 doesn't -- I think there was a certain skepticism
3 about Bechtel that preceded the issuance of the
4 report, and possibly even the retention.

5 Q But you know that the senior leadership of
6 SCANA certainly became opposed to Bechtel on
7 October 22nd, 2015, when the presentation was given,
8 don't you?

9 A I had no idea. As you've characterized
10 it, I think, accurately, I called in and
11 participated briefly. It was not a webinar, so I
12 didn't see any of their slides. I wasn't able to
13 gauge the reactions of the people in the room. I
14 can't even tell you with any confidence who was in
15 the room.

16 So to ask me what anybody was thinking on
17 October 22nd, we're not going to get anywhere.

18 Q And after that is really what I'm more
19 interested in, because you had -- after the
20 presentation was given, a draft report was given,
21 you were having conversations with both sets of your
22 clients.

23 A Yeah, the other thing that I should
24 mention is that a number of the members of the
25 Bechtel team were characterized as being somewhat

1 abrasive. I didn't experience that. I didn't see
2 that, so I can't say that they were abrasive. That
3 tends to be a subjective characterization, in any
4 event. But a number of people felt that about their
5 report or about their team, team members in
6 particular, a number of whom left Bechtel shortly
7 after that. And so I think there were a number of
8 reasons that people looked at Bechtel with a
9 jaundiced eye even before getting their
10 presentation.

11 Now, I have no idea whether Kevin Marsh or
12 anybody else thought Bechtel had identified anything
13 useful in their report. I've mentioned to you that
14 some of those things fell into the category of,
15 "Well, yeah, we've known about that for a long time
16 and we talk about it weekly with the contractor," or
17 "No. We disagree." Or the third thing is, "Gosh,
18 you're -- you're just completely off base there."

19 So to suggest that, prior to October 22nd,
20 everything -- everybody thought Bechtel was a hero,
21 and afterwards, some people changed their minds, I
22 think that would be a false characterization.

23 Q It also sets up kind of extremes that I
24 didn't ask about. What I was asking --

25 A It does set up extremes, that's true. But

1 I think that there was an implication in your
2 question that somehow something changed dramatically
3 on October 22nd. And that's not my -- my
4 impression, but -- for the reasons that I mentioned.

5 Q You can confirm for us, though, that
6 SCANA's executives, senior executives, in particular
7 Kevin Marsh and Steve Byrne, after they heard and
8 saw Bechtel's findings and recommendations, became
9 hostile to Bechtel's assessment and the issuance of
10 a report?

11 A I've never seen Kevin Marsh or Steve Byrne
12 act with any hostility towards anything, so I can't
13 confirm that. Did they -- did their suspicions
14 about or did their opinions of Bechtel degrade even
15 further after March 22nd? I don't know. I wasn't
16 that aware of or have information about what their
17 view of Bechtel was.

18 Q Well, forgive my characterization. You
19 could confirm for us that SCANA senior executives,
20 in particular Kevin Marsh and Steve Byrne, after
21 they heard and saw Bechtel's findings and
22 recommendations, were against the release of any
23 written report?

24 A No. At one point, I have a very clear
25 recollection that Kevin Marsh wrote me an e-mail

1 saying that he wanted the written report.

2 It was a moving target, as I've said.
3 I've got multiple clients, multiple representatives
4 of different clients. But I think there was one
5 point, well after October 22nd, when Kevin
6 specifically said he wanted a written report.

7 Q And I hope we look at that. That was
8 November 30th, after he already knew you had a copy
9 of the draft report, right?

10 A Well, I believe I got the report on
11 November 28th. Is that right?

12 Q 12th.

13 A 12th. Okay.

14 So yes, obviously it was after that. And
15 he would have known that I received that, so -- in
16 any case. So you knew that what you were trying to
17 get me to agree to was false?

18 Q No.

19 A That's why you asked me the question?

20 Q No. You answered a different question.

21 A Oh, okay.

22 Q What I'm asking is not that he wanted to
23 see the report after he knew you had it, but rather,
24 he didn't want one issued at all. You never heard
25 from him or Steve Byrne that they wanted a written

1 report issued?

2 A You know, that -- again, that's not
3 consistent with my memory. At one point, Martyn Daw
4 wanted to issue the last bill. And it seems to me
5 that I remember him saying that he thought that the
6 oral presentation completed their services. And I
7 said, "No. That's not consistent with my -- with
8 my -- with my direction, that the oral presentation
9 didn't complete your services."

10 So people were saying a lot of different
11 things, and they weren't always consistent from week
12 to week. But I can say, from this point on, Steve
13 definitely didn't want it, or from this point on,
14 Kevin did want it, or during this interim, he did
15 want it, then he didn't want it.

16 The e-mails are what they are, and you can
17 go through them and identify various times when
18 people said they wanted the report and various times
19 when the same person might say they didn't want the
20 report. It was a very fluid situation for everybody
21 but me. I had my own views, and they were pretty
22 consistent.

23 Q And you didn't want anything done that
24 might end up making a Bechtel report discoverable?

25 A Discoverable in the litigation with the

1 contractor, because I know that this lawsuit
2 involves a lot more than -- than whether that report
3 would be discoverable in a lawsuit with the
4 contractor. So all I know is that that was my
5 concern. I didn't want it to be discoverable in a
6 lawsuit with the contractor.

7 In some ways, I view that eventual dispute
8 as my client. I mean, granted, my client were
9 living human beings who were representing
10 corporations, but I was hired to protect that
11 dispute and to ensure that that dispute had the most
12 favorable outcome. And whether that was settlement
13 or whether that was successful litigation, that was
14 my goal.

15 And so I was always focused on that
16 dispute. And whether it would be discoverable in
17 any other context didn't show up on my radar screen;
18 it wasn't something that I would be competent to
19 give legal opinions about; it wasn't something that
20 I did give legal opinions about.

21 Q Do you know about the productivity factors
22 and labor ratios with respect to the Westinghouse
23 schedule?

24 A I knew a lot about those issues with
25 respect to a lot of different things. That was one

1 of the key points of analysis.

2 Q And were there other mitigation plans like
3 those, those two issues, that were necessary to
4 justify the schedule?

5 A The other mitigation plans besides what?
6 Let me -- let me just address what the mitigation
7 plans were, in my mind, at least those that were
8 foremost at that time. And foremost was, one, the
9 conversion alone should have incentivized the
10 contract, because he's now not being paid
11 essentially costs plus. When you're being paid
12 costs plus for your labor and your supervisors,
13 there's not as much incentive to hold those costs
14 down because you're getting the plus. So just by
15 converting it to a fixed price, you think you're
16 creating a greater incentive to the contractor to be
17 more efficient.

18 Two, you're jettisoning CB&I. I feel
19 certain that nobody at Westinghouse is exchanging
20 Christmas cards with anybody at CB&I. They were not
21 friends on the job, and they didn't stay friends
22 afterwards. And that friction was not a good thing
23 for the project.

24 Three, you were bringing in Fluor. It's
25 my understanding, my recollection -- you can check

1 me on this -- but Fluor built Unit 1. The units
2 that were the subject of the EPC contract were Units
3 2 and 3. Fluor had roots in South Carolina. They
4 were local boys. They felt that they could trust
5 them and that they would make a difference.

6 So everybody was optimistic that those
7 productivity factors could be influenced initially,
8 at least, could be influenced by those three factors
9 and others. But those are the three that come to my
10 mind.

11 Q And when I -- when I was asking about
12 productivity factor, I was speaking of, you know,
13 the craft, manual labor on the job --

14 A Sure.

15 Q -- and the ratio, essentially, that's
16 given for the productivity factor, and then labor
17 ratios as to indirect versus direct. But you named
18 some others.

19 My -- my bigger question is: Were you
20 aware that the Westinghouse schedule depended on
21 both the implementation and success of those
22 mitigation plans and not -- and was not based just
23 on the realities of the project at the time?

24 A The realities of the project had just
25 changed in the ways that I described. But I was

1 certainly aware that on this job, as on any job,
2 that labor and productivity and ratios affect costs
3 and typically time performance. But we were -- we
4 were aware at that time that for Westinghouse to
5 achieve the contract successfully at -- within the
6 time period given, then they would have to improve
7 certain things. And we thought that they would do
8 it because the incentive, because of getting rid of
9 CB&I, and because of bringing in Fluor.

10 I would also say that the price, from
11 Westinghouse's viewpoint, was in excess of what they
12 were projecting as their cost. It's my
13 understanding that the fixed price number was
14 arrived at because Westinghouse was giving a
15 projection, and -- and Steve Byrne said, "Well, if
16 we paid you another" -- I think it was \$500 million,
17 but I'm not certain of that -- he said, "if we paid
18 you a little bit more, would you agree to convert
19 this to a -- to a fixed price?"

20 So Westinghouse thought they could do it.
21 In fact, the fixed price was in excess of what they
22 were projecting at the time of what it would cost
23 them. So we thought that this was a realistic
24 schedule and a realistic budget, and that they could
25 be profitable at -- at the agreed fixed price

1 number.

2 That was all -- that was -- everything
3 that we had, everything that I had, at least, was
4 telling me that. Now, if there were internal
5 numbers being run, I don't know about that. But --
6 but it looked like they could perform given the
7 changes in the project.

8 Q And we -- I think we've already talked
9 about the 2014 internal EAC review, right? That was
10 calculating the cost, not what Westinghouse was
11 giving, but testing the -- vetting those numbers and
12 testing the validity of that.

13 So you just say, when you're answering
14 about that you thought not only was it a good deal,
15 but you thought Westinghouse was going to make a
16 profit on the fixed price option --

17 A Well, it was --

18 Q -- you're not speaking on behalf of the
19 owners, are you?

20 A I'm telling you what the -- no. I'm
21 always telling you -- I'm not speaking on behalf of
22 the owners in this deposition. I'm speaking -- I'm
23 answering your questions about what was known at the
24 time. And that was one of the things that I knew at
25 the time and one of the things that the owner knew

1 at the time.

2 And I haven't sat down and lined up the
3 EAC with the fixed price number, but -- recently. I
4 did it then, and I don't remember being worried
5 about that.

6 Q Did you ever see the internal EAC numbers?

7 A The only EAC I saw was the -- was the
8 contractor's EAC, and that was in a spreadsheet
9 form. And I had a copy of the spreadsheet. And I
10 manipulated it and I worked with it. I did, you
11 know -- ran various scenarios. I tried to analyze
12 it and tried to understand it.

13 Q And did you have any opinion about the
14 reliability of the realistic nature of the
15 assumptions on the labor productivity factors or the
16 labor ratios?

17 A When?

18 Q In late 2014, at the end of the
19 rebaselining.

20 A Oh, I don't have a clear recollection of
21 what I thought about the -- about the EAC in 2014.
22 As I said, I didn't really review all seven -- six
23 years of my involvement in preparation for this
24 deposition. I just didn't look at much from 2014 at
25 all.

1 Q Yeah. And I wouldn't have gone back and
2 asked you about it again. I think you've already
3 told us you weren't -- weren't familiar with it,
4 except that was part of your answer. You said that
5 you saw the contractor's EAC.

6 Were you referring to the 2014, the
7 August 2014 EAC?

8 A That's what I -- actually, that's the only
9 one that I was aware of by the contract or by the
10 owner. I think you're right, it's August of 2014,
11 and it's an Excel spreadsheet.

12 Q And -- and who were you working with in
13 the owners on that issue?

14 A Well, the same group of people that I've
15 mentioned here.

16 Q But not with the EAC group?

17 A I didn't -- I didn't meet anybody from
18 NND, except Jeff Archie, if he's considered part of
19 NND, until 2016.

20 Q Uh-huh. And what purpose were you doing
21 this, your own analysis of the owner -- excuse me --
22 of the consortium's EAC in 2014?

23 A I wanted to understand if we were in
24 trouble, because right then we still had the four
25 buckets. And I was -- I learned pretty early in the

1 process that the bucket to keep an eye on was the
2 target, target price bucket. And I wanted to
3 understand if we were -- just what they were
4 projecting with respect to the target price.

5 And as I remember it, it's fairly -- it's
6 a bit of a challenge to take the EAC and figure out
7 what's in what bucket, because it wasn't carved up
8 that way, but I wanted to understand that.

9 Q And when you said that you thought that
10 the owner believed that Westinghouse would make a
11 profit off of the fixed price option, who -- what's
12 that based on?

13 A That's -- actually, that's based upon
14 something that I heard Steve Byrnes say. And he
15 actually didn't use the word "profit," so I don't
16 want to quote him or paraphrase him inaccurately.

17 What he said was that the Westinghouse
18 came to him and said, "This is what we're projecting
19 to complete."

20 And Steve said, "Well, how about if we
21 paid you X number of dollars more, would you agree
22 to a fixed price?"

23 So whether Steve understood that to be
24 profit or Steve thought their projections were too
25 low, I don't know. But I've told you what I -- what

1 I understand.

2 Q And did you have a discussion with Steve
3 so you'd understand what he -- why he was willing to
4 offer an additional \$500 million under this
5 current --

6 A I -- no, I never had any follow-up issues
7 or questions for Steve about that.

8 - - -

9 (Response to Motion to Compel
10 Discovery Responses and Production by
11 SCE&G and Dominion Energy marked Wenick
12 Exhibit Number 3 for identification.)

13 - - -

14 (Engineering, Procurement and
15 Construction Agreement marked Wenick
16 Exhibit Number 4 for identification.)

17 - - -

18 BY MR. M. RICHARDSON:

19 Q I've got an Exhibit 3 and 4, which are
20 basically the same thing, but I've only got one copy
21 of Exhibit 3.

22 Exhibit 3 is the entire June 11th, 2018,
23 filing by SCE&G in the Public Service Commission
24 labeled, Response To Motion To Compel Discovery and
25 Responses and Production by SCE&G.

1 A Do you want me to just hand it down?

2 Q The fewer hands, maybe the better

3 (handing).

4 A Do you want me to read this?

5 Q Nope.

6 MR. SMITH: Does it have a Bates number,
7 by any chance?

8 MR. M. RICHARDSON: It's a filed document.
9 If you look in the right side --

10 MR. SMITH: If somebody just will specify
11 what the date is so we can find it.

12 MR. M. RICHARDSON: It's the June 11th --
13 I've already said it on the record, but it's
14 the June 11th, 2018, filing in the PSC by
15 SCE&G.

16 MR. SMITH: Okay. Thanks.

17 MR. M. RICHARDSON: It was also filed in
18 the federal court action on August 3rd with
19 some, but not all, of the excerpts. All of the
20 exhibits, I mean.

21 MR. SMITH: Thanks.

22 BY MR. M. RICHARDSON:

23 Q I wanted to -- I'm going to ask you about
24 Exhibit 4. But you met with the owners in late 2014
25 about a scheduling expert; isn't that right?

1 A You know, my copy is really awful. Is
2 this -- do you know what this Exhibit 4 is?

3 Q It's December 17th, 2014, notes by
4 Mr. Steve Byrne.

5 MR. BALSER: I don't have it. Where is
6 that?

7 MR. M. RICHARDSON: That's one of the
8 exhibits that's not in the copy you all have.
9 He's got the master copy. The other two, you
10 do. I can give you a copy of it if you'd give
11 me one second.

12 MR. BALSER: I'd like to have a copy if
13 you're going to examine the witness about it.

14 MR. M. RICHARDSON: That's Exhibit 5. I
15 need Exhibit 4. Actually, I don't have it
16 either.

17 BY MR. M. RICHARDSON:

18 Q You probably haven't seen these before,
19 but do you remember having a negotiation pre-meeting
20 about experts with Mr. Byrne --

21 A I remember --

22 Q -- and others?

23 A -- raising the issue of engaging experts
24 with the group. This was obviously well in advance
25 of the Bechtel issue, but it's consistent with the

1 purpose to which I wanted to put Bechtel, because I
2 felt that I, as a construction lawyer, would benefit
3 from having a team brought in, you know, someone
4 like a Navigant or a Secretariat, to evaluate
5 schedule, look at cost. And I believe that there
6 were new claims being asserted at this time.

7 So in any case, I don't -- I can't,
8 independent of this Exhibit 4 --

9 Q You don't have any memory?

10 A Well, I have a lot of memories, but
11 independent of the exhibit, I wouldn't necessarily
12 say that I raised the issue of forensic accounting
13 and schedulers on December 19th of 2014. But I
14 would say, independent of that exhibit, that I did
15 raise that issue with the owners. All of our
16 meetings were in the -- in the main conference room,
17 not the boardroom, the main conference room. And I
18 remember being in that conference room with
19 representatives of both clients and making that
20 point.

21 Q Uh-huh. And do you see that these are
22 notes about your confidential communications with
23 your client about what became the Bechtel assessment
24 and, in particular, your legal advice about
25 construction scheduling assessment?

1 A Actually, this is essentially illegible to
2 me. I don't -- I won't say that every word is
3 illegible, but it's -- the copier skidded, and
4 consequently it's duplicated.

5 And you tied this to the Bechtel
6 engagement. Certainly when Bechtel was raised, I
7 saw an opportunity -- I thought I saw an opportunity
8 to have them do something that I'd mentioned
9 earlier, but Bechtel would not have been the entity
10 that I recommend.

11 Q At that time?

12 A Really more or less any time.

13 Q Would you agree that SCE&G agreed with
14 you, as its counsel, a recommendation to hire
15 Bechtel to ensure that the project was on track to
16 be completed on time and on budget?

17 A I don't see any mention of Bechtel in this
18 document.

19 Q I've moved on from that document. I'm
20 just asking you a question.

21 A Oh, I'm sorry. So could you -- would you
22 read back the question?

23 Q Sure. No problem.

24 Would you agree that SCE&G agreed with
25 your recommendation to hire Bechtel to ensure the

1 project was on track to be completed on time and on
2 budget?

3 A No. No. I -- that's not what my
4 recommendation was concerning Bechtel.

5 So there's parts to that question. Did
6 they agree to the engagement? Obviously, they
7 agreed to the engagement. They approved the
8 Professional Services Agreement. They paid the
9 money. But the purpose that you defined there is
10 still -- I don't associate that with the retention
11 of Bechtel.

12 Q And Bechtel actually assessed whether the
13 project was on track to be completed on time and on
14 budget, didn't it?

15 A They formed an opinion on that, albeit
16 preliminary, and with, what, some percentage of
17 confidence on schedule.

18 The budgetary viewpoint was moot by that
19 point because they were assuming that the owner was
20 going to have to pay based upon the productivity
21 factors and the ratios that were in place, and they
22 would have to pay under the four-bucket payment
23 scheme.

24 So Bechtel was -- you know, kind of missed
25 the boat or they were -- no, they didn't miss the

1 boat. They were moot by that time.

2 Q And in their conclusion of their
3 assessment, they concluded the project was not on
4 track for its approved budget or construction
5 schedule; isn't that right?

6 A Bechtel's conclusions are what they are.
7 They made a projection, albeit preliminary and
8 without a hundred percent confidence, and with a
9 wide range of possible dates of when the project
10 would be completed, based upon an unreliable
11 methodology. That's what they did.

12 And that was not, of course, what I
13 recommended in December of 2014 or any time.

14 Q When you first started talking about the
15 Bechtel retention with Al Bynum, did he tell you
16 that Bechtel had already executed a form of the
17 proprietary data agreement that was in the EPC
18 exhibit 01?

19 A No. But I did learn that in 2015. But
20 that was -- you understand that was -- if I remember
21 correctly, that was an exhibit to the construction
22 contract that anybody had to sign basically to even
23 talk to anybody from the project. That wasn't the
24 key document from the contractor's perspective. In
25 fact, I think I signed one of those.

1 Q Will you turn to Exhibit 12?

2 A Yeah. (Witness complies with request.)

3 Okay.

4 Q You mentioned Jeff Archie before. Who is
5 he?

6 A He is -- he reports to Steve Byrne. He
7 may be a direct report. I'm not sure. But he's
8 with SCE&G.

9 MR. BALSER: I don't have Exhibit 12.

10 MR. M. RICHARDSON: Can you look for 7?
11 July 16, 2015.

12 MR. BALSER: Just tell me what it is. We
13 may be able to pull it up on the computer.

14 MR. M. RICHARDSON: Sure. It's an e-mail
15 with the subject, Videoconference, from Jeffrey
16 Archie to Steve Byrne.

17 MR. BALSER: Got it.

18 MR. SMITH: And the date? I'm sorry. I
19 missed the date.

20 MR. M. RICHARDSON: July 16, 2015.

21 BY MR. M. RICHARDSON:

22 Q Do you know who he's referring to as
23 Crosby in this e-mail?

24 A Yeah, Mike Crosby.

25 Q And do you see the second sentence that

1 says: "He's softening on the George Wenick issue"?

2 A Yeah. I didn't realize I had an issue.

3 Q We've heard --

4 A Yes, I see that.

5 Q I think we know what your issue is, don't
6 we?

7 A Well, so Mike is softening on the issue.
8 Does that mean he's coming around to my point of
9 view on the issue? What is the issue that we know
10 it is?

11 Q What is the issue that's being talked
12 about here?

13 A Well, I don't know. This didn't -- wasn't
14 sent by me or to me or copied to me.

15 Q Let's go to the next sentence. Maybe that
16 will clue us in: "We need to consider if focusing
17 on precluding discovery."

18 Do you know what SNC is?

19 A No. I was going to ask you.

20 Q Have you ever heard of Southern Nuclear?

21 A What's the C stand for?

22 Q Company, probably, but part of the Vogtle
23 ownership.

24 A Oh, no. What's the "engaging Wenick"
25 thing? That makes no sense to me, because I've been

1 engaged for four years by this time.

2 Q I know you don't remember this or didn't
3 know it, but the Bechtel hiring had been going on
4 for months before you got involved.

5 So it would be --

6 A Well, I knew about it in May, so -- but
7 that's -- I don't know what "engaging Wenick." When
8 did they engage me, to do what?

9 Q I think when Al Bynum called -- contacted
10 you.

11 You may not have known, but let's move on.

12 What -- do you know what the more
13 important part of this, which is the "precluding
14 complications with the litigation that the
15 consortium is very interested in"?

16 A Yeah, you asked me about that earlier.
17 And I -- I don't recall that angle, that is, the
18 angle that involved the litigation between the
19 contractor and the Vogtle owners as being a concern
20 of the consortium. I take Steve at his word, but I
21 just don't remember that being brought up to me.

22 Q In part, because you weren't talking to
23 the consortium at all about this issue, were you?

24 A No, but these types of things -- well, no.
25 I wasn't talking to the consortium about any types

1 of issues. The first dealings I had directly with
2 the consortium were in 2016 in connection with the
3 DRB.

4 Q But you were the attorney advising both
5 Steve Byrne and Jeff Archie on this issue, weren't
6 you?

7 A Which issue is that?

8 Q Bechtel retention.

9 A I was advising Steve Byrne and Jeff Archie
10 on Bechtel retention in July of 2015. There's no
11 question about that.

12 Q And in this e-mail, there's no question
13 that they were discussing the reason to engage you
14 to complete the hire of Bechtel; isn't that right?

15 A No. They were talking about more of a
16 driver there. They apparently have in mind at least
17 two drivers, and perhaps a number of drivers, and
18 they're saying that one of them that they think
19 should be more prominent relates to precluding
20 discovery by SNC, because that is something the
21 consortium is interested in and resonates with Mike.

22 THE VIDEOGRAPHER: Excuse me, Mr. Wenick.

23 Can you get the paper off?

24 THE WITNESS: Sorry.

25 BY MR. M. RICHARDSON:

1 Q So isn't it -- isn't it true, in your
2 advising the owners on this issue in this time
3 period, that Santee Cooper was needing to be
4 convinced to have this be an attorney retention for
5 anticipation of litigation?

6 A I've said repeatedly today that there were
7 various times when Santee Cooper was more focused on
8 getting an assessment related -- that they could use
9 for the normal course of business than on
10 anticipation of litigation; and that they several
11 times expressed that preference, and several times
12 reversed themselves or took the opposite position
13 and agreed with me.

14 And then ultimately, when the Professional
15 Services Agreement was circulated, it was approved,
16 which I'd just note it's not the first time, but as
17 unequivocal acceptance that they would follow my
18 strong recommendation on that issue.

19 Q And today you've talked repeatedly about
20 this Southern District of New York litigation that
21 you were concerned about, based on the venue clause
22 of the EPC contract.

23 A Right.

24 Q Is -- are you aware of any communications
25 that refer to that litigation in relation to the

1 hiring of Bechtel?

2 A There was no -- there was no litigation at
3 that time, but there were multiple -- there were
4 multiple communications about an eventual lawsuit
5 with the owner. And I explained my view on what you
6 call "this issue," the issue with the Bechtel
7 retention, in the context of that litigation, which
8 everybody understood I was talking about when I
9 talked about in anticipation of litigation.

10 We didn't talk about when it would be
11 filed or -- I'm not sure we even talked about the
12 venue. But I can talk to you as a lawyer about what
13 the contract says and what I had in my mind. I have
14 been in that courthouse. I know what it's like.
15 And I anticipated that that's where this whole thing
16 would play out in my sunset years.

17 Q And you suggested that this was -- that I
18 would call this your issue, but in fact, it's your
19 clients calling it your issue, isn't it?

20 A I'm not sure what they're calling the
21 George Wenick issue. It's certainly plausible to
22 believe that it's -- it's what you suggest, but I
23 don't know that, so I can't testify to that.

24 Q Could it be anything else?

25 A I don't -- you know, a lot of people have

1 issues with me. It could be a dozen things. They
2 might not like my ties. I don't know. Who knows?

3 As I said, it's plausible that they're
4 talking about the retention of Bechtel, but it's
5 also plausible that there were other matters that
6 fit this description. I haven't given it much
7 thought since I was just handed this 10 minutes ago.

8 Q And considering your issue of wanting to
9 make sure the Bechtel assessment or report wasn't
10 discoverable, you never had any concern or thought
11 that it was in anticipation of litigation or
12 discoverability in litigation that did not involve
13 your clients?

14 A No, I didn't care. I can see why the
15 consortium might care, but I didn't care.

16 Q But you also did not believe that the
17 assessment or the report could be protected from
18 discoverability based on litigation that did not and
19 could not involve your clients; isn't that right?

20 A Actually, I thought I made clear that I
21 didn't have a view on that. And it's not -- it's
22 not that I'm agnostic. It's that I just never
23 thought about it. That's -- that's a hypothetical
24 that didn't occupy me for a moment.

25 What did occupy me was -- was the

1 litigation with the contractor. I think I made
2 clear that I had never researched, never considered,
3 and don't know the answer to the question of whether
4 retaining Bechtel in anticipation of litigation with
5 the contractor cloaks that document with any sort of
6 privilege in any other venue, in any other forum. I
7 just don't have a view on that.

8 You know, lawyers don't offer -- shouldn't
9 offer views on things they don't know anything
10 about. And I don't know anything about that.

11 Q And your advice to ensure the Bechtel
12 retention was in the context of both attorney-client
13 privilege and in anticipation of litigation, was
14 based in part on the risk of unfavorable results of
15 that expert opinion or assessment?

16 A Not just unfavorable, unfavorable and
17 half-baked, to use a colloquialism. Unfavorable,
18 but based upon incomplete information.

19 And think back to my e-mail to Mike
20 Baxley. I said that that expert in that case in the
21 Western District of Pennsylvania didn't have all the
22 facts. It was a preliminary report. Nonetheless,
23 in the context of litigation, you know what it's
24 like. You get that report. You stand up in front
25 of a judge or a jury, you wave it and say, "Their

1 own expert said such and so."

2 And then you come back and say, "Well,
3 yeah, he said that, but he had limited access, he
4 only had eight weeks, I only paid him a million
5 dollars. And besides, you know, things were
6 changing, and so forth and so on, and they didn't
7 have the qualifications."

8 Fine. And what do they remember? They
9 remember the waving of the report, not all your
10 qualifications. So I didn't even want to allow
11 those arguments to be made. And that's -- that's
12 not a position that I've developed for this case.
13 That's more or less been my practice when I deal
14 with experts. And I deal with experts all the time,
15 sometimes four or five experts on a matter.

16 Q And after you executed the Professional
17 Services Agreement with Bechtel, did you do anything
18 to work with them to ensure they were providing, you
19 know, consulting services to you?

20 A No. And that was one of my
21 disappointments about the whole dynamic. I would --
22 first of all, I wouldn't have set it up with a
23 million-dollar fee. I would have set it up, "This
24 is what I want. Give me your billing rates."

25 Frankly, setting up with a million-dollar

1 fee means that Bechtel is going to work to a budget,
2 and they're going to make a profit and do as much as
3 they -- they're going to be honest about it, but
4 they're not going to do more than what they can do
5 for a million dollars profitably.

6 So I -- I was unhappy with the way it was
7 set up. But I thought if that's the way the owner
8 wants to set it up, fine, but I want to use it for
9 my purposes in understanding this job and preparing
10 for litigation with the contractor.

11 Q And after you entered into the PSA
12 agreement with Bechtel, did you really have any
13 interactions at all with them or with the assessment
14 until the October 22nd preliminary presentation?

15 A No.

16 Q And did you stay on the phone on the
17 October 22nd presentation long enough to hear that
18 they reported that the completion dates for Unit 2
19 would need to be adjusted 18 to 26 months out, to
20 sometime after December 2020, and that the
21 completion date of Unit 3 would need to be adjusted
22 24 to 36 months out, to sometime in 2022 or 2023?

23 A What I remember about that is that there
24 were dates -- they were talking about their
25 assessment. At a certain point, I interrupted with

1 a question of their method, because without
2 understanding the method, the dates would mean
3 nothing to me. As I said, it would be little more
4 than someone tapping me on the shoulder and saying,
5 you know, "All these nuke plants finish late."

6 "Okay. Fine. That's no -- that's no use
7 to me at all. Tell me what your methodology is."
8 So I interrupted.

9 And if I heard those dates, I didn't mark
10 them in my mind. You know, two sets of dates -- you
11 know, we've got all these dates moving around. They
12 propose two sets of dates. Did I hear them?
13 Probably, but I don't remember that, because I
14 remember thinking whatever is coming out is going to
15 be useless: Unreliable methodology. Not enough
16 time. You said it's preliminary. You said words to
17 the effect, "In order to give you any meaningful
18 projections, we have to do a lot more work."

19 They said those words, and then they --
20 they lay out the numbers. Well, by that time, I've
21 stopped listening. I may have still been on the
22 phone, probably was, but I stopped listening because
23 I don't care if they say tomorrow or five years from
24 now or 20 years from now. It means nothing to me.
25 If you don't have a reliable methodology, your

1 result is not useful to a construction litigator.
2 It's just not.

3 Q And Bechtel's preliminary report said that
4 its assessment was based on the current civil
5 progress and performance that would remain
6 unchanged.

7 A Sure. And that's another reason to
8 discount it, although that wasn't foremost in my
9 mind. The -- I told you all the reasons that it was
10 believed that that would improve.

11 So I think every assumption they made was
12 a worst-case scenario assumption, but that was --
13 that was not the core of my objection to their
14 analysis. The core of my objection was their
15 methodology.

16 Q And in contrast, you know, because I think
17 that's one of the comparisons we have, is that SCANA
18 was repeatedly disclosing that its anticipated
19 completion dates that were being reported were
20 subject to a number of mitigation measures that the
21 consortium was seeking to implement. Isn't that
22 right?

23 A Yeah.

24 Q And, I mean, it seems like that means that
25 the SCE&G knew at the time that it was reporting

1 substantial completion dates of 2019 and 2020, that
2 it was having to assume the mitigation measures
3 would be both implemented and successful.

4 A Well, I don't know what they were
5 reporting. I assume they were reporting July 31 of
6 2019 and July 31 of 2020, which were the dates in
7 the October 2015 amendment, which is -- are the
8 dates that the contractor committed to in a very
9 serious meaningful way.

10 And it was everybody's expectation that --
11 you call them mitigation measures, but there were a
12 whole series of things that were -- that were very
13 real to the owner that were being changed, not just
14 an effort by the owner to do typical construction
15 mitigation, where you work overtime and do all those
16 kinds of things. There were changes in personnel,
17 bringing in Fluor. There was the incentive in
18 deleting the target price and going to fixed price.
19 There were all sorts of things that would
20 encourage -- not to mention the \$900 million, which
21 I've already mentioned so many times, the
22 \$900 million incentives that the contractor had to
23 meet those dates.

24 So there were a lot of things going on
25 that caused me and others to believe that those were

1 real dates, those were achievable dates.

2 Q But none of those mitigation plans that
3 were actually used or even discussed in this project
4 at that point were successful or even made a
5 difference in either the budget or the construction
6 schedule for this project?

7 A I have no reason to say that. I'm not
8 sure why you say it.

9 Q Do you have any reason to dispute it?

10 A I think that Fluor was more effective at
11 building this job once they got their arms around it
12 than CB&I. So yeah, I guess that's a reason to
13 dispute it.

14 Q What's the metric of that or what's
15 your -- what gives you that impression?

16 A I'm relying largely on feedback from the
17 NND folks who did things -- Fluor, once they got
18 their arms around the job, which took a bit, were
19 doing better.

20 But we'll never know. We'll never know
21 because of the bankruptcy. Who knows what they
22 could have achieved had this job normalized, but it
23 didn't. It went into bankruptcy. This job didn't
24 have -- wasn't cancelled because of schedule. It
25 was cancelled because of the bankruptcy.

1 Q If it cancelled because of the bankruptcy,
2 what were you doing for three days in July
3 negotiating with Westinghouse?

4 A Well, I didn't know that there was going
5 to -- there was an effort to see if there was --
6 well, what I was doing in July was what I said I was
7 doing. I was attempting to negotiate a contract
8 with Westinghouse to continue to go forward with the
9 project.

10 But the ultimate reason for the
11 cancellation, as I understand it, had little to do
12 with schedule and everything to do with the
13 bankruptcy, namely the repudiation of the fixed
14 price contract and the fact that we're now opening
15 up the owner to the exposure of all costs to
16 complete.

17 Q We talked about this a little earlier, but
18 I didn't actually use it then. I feel like maybe I
19 should use it now, continuing the theme of maybe we
20 just don't know what we don't know.

21 Are you familiar with a filing in federal
22 court, June 29th of this year, by SCE&G against
23 members of the Public Service Commission?

24 A No. Oh, is that the injunction, where
25 they sought the injunction?

1 Q The injunction action for the temporary
2 rate relief.

3 A Everything I know about that came from a
4 newspaper article --

5 Q Newspaper article.

6 A -- so I don't know very much.

7 Q And you know the CFO of SCANA is one of
8 the ones who signs, under Sarbanes-Oxley, of SEC
9 filings and public disclosures?

10 A That's my understanding of the act.

11 Q And were you -- I think I've asked you
12 this, but were you aware that in a verified
13 statement by that CFO of your client, during the
14 time in which you were representing them in the
15 summer of 2017, that "After a careful assessment of
16 Westinghouse internal data, which only became
17 available following the bankruptcy filing, SCE&G
18 concluded that despite Westinghouse's repeated
19 representations and guarantees to the contrary, the
20 consortium likely would not have been able to
21 complete Unit 2 until December 2022, and Unit 3
22 until March 31, 2024"?

23 And then they went on to talk about
24 determining the total cost to complete the units
25 would be 8.8 billion in future dollars, an increase

1 of over a billion dollars from the estimate from
2 2016.

3 Are you surprised, I guess, to find -- to
4 find out that your client had actually done a
5 detailed analysis and essentially corroborated the
6 Bechtel findings?

7 A I don't know how detailed their analysis
8 was, and I don't think those corroborate the Bechtel
9 findings. Bechtel findings were done in 2015. A
10 lot happened between 2015 and 2017 to affect the job
11 and when it would be completed. So the premise of
12 your question, I disagree with.

13 Q Actually, it looks like not a lot happened
14 in that period of time, given the conclusions that
15 your client came to in the summer of 2017.

16 A Okay. Then Bechtel assumed a lot would
17 happen. If a lot didn't happen, that was a change
18 in circumstance. They did not -- nobody verified
19 the Bechtel findings, to my knowledge. And that
20 doesn't change my opinion of that, what you just
21 read.

22 Q Do you agree that the key takeaway from
23 the Bechtel presentation was that the construction
24 schedule was at risk if progress and performance did
25 not change?

1 A No. I eventually got the slides, and
2 there were a lot of issues that they raised in their
3 slides. There were multiple slides. The schedule
4 was just a few of them.

5 I think that's probably an accurate
6 characterization of the review on schedule, but I
7 don't know that that's the key. In fact, that's the
8 least significant from the viewpoint, for instance,
9 of Santee Cooper, which wanted information, an
10 assessment of the project that would be useful in
11 managing the project.

12 Telling somebody you're going to finish
13 late doesn't help you manage anything. Telling them
14 that you need a more robust owner management team
15 tells you something that you can use. Telling me,
16 "You're going to be late," I'm not sure where that
17 gets you, especially the way they did it.

18 Q Well, and you know, obviously, that there
19 were a lot of recommendations about how to deal with
20 this key takeaway from the Bechtel presentation;
21 isn't that right?

22 A I'm not sure that there were anything I'd
23 consider to be particularly useful recommendations
24 on scheduling.

25 Q Are you aware of Santee Cooper's Bechtel

1 Action Plan?

2 A Not by that name. I may know of some --

3 Q Okay.

4 A -- information.

5 Q And --

6 A But not really -- it didn't come out of
7 the schedule assessment. It came out of -- whatever
8 action plan I'm aware of -- I don't know it by that
9 name, Bechtel Action Plan, but I know that there
10 were some -- some efforts to address certain issues
11 that had been raised by Bechtel, but not scheduling
12 issues. Because scheduling issues, that's just a
13 projection of completion. That doesn't tell you
14 what to do to perform better as an owner on the
15 project. It was the other -- it's the other items
16 in the project assessment that might give you those,
17 although most of those are already known.

18 Q Who is Paul Singer or Singing?

19 A Yeah, I think he's the King & Spalding
20 lawyer, isn't he?

21 Q The bankruptcy lawyer?

22 A Yeah, I think so.

23 Q Okay.

24 A I never met Paul, but I've spoken to him
25 on the phone several times.

1 Q If you'll turn to Exhibit 31 in that --

2 MR. M. RICHARDSON: What exhibit is this?

3 THE COURT REPORTER: The last one we
4 marked was 4.

5 MR. M. RICHARDSON: Okay.

6 BY MR. M. RICHARDSON:

7 Q In Exhibit 3. In the back of it is
8 Exhibit 31. Do you see another set of handwritten
9 notes?

10 A I do.

11 Q According to Steve Byrne's notes here of
12 another third-party assessment call in January 14th
13 of 2016, you see that your name is listed on the
14 fourth line down?

15 A I do.

16 Q Do you remember meeting with these folks,
17 Lonnie Carter, Baxley, Crosby, Pelcher, and
18 Cherry --

19 A Yes.

20 Q -- Marsh --

21 A Yep.

22 Q -- Addison, Byrne, Ron Lindsay, and Bynum?

23 A I don't remember all these people being
24 there. I'm not saying I disagree that they were
25 there, but I remember having a meeting in the middle

1 of January with a bunch of folks from both clients.

2 THE VIDEOGRAPHER: Excuse me, Mr. Wenick.

3 THE WITNESS: Sorry.

4 BY MR. M. RICHARDSON:

5 Q You see there's the third entry for you
6 down -- it's almost smack-dab in the middle. Do you
7 know the shorthand for change, delta character?

8 "If we don't change their prediction,
9 we'll be viewed as the owners' opinion, dash,
10 consequences."

11 Do you see that?

12 A I don't know what that delta means, "If we
13 don't" something, the -- but my view that a
14 consultant will be viewed as expressing the owners'
15 opinion, and that there would be consequences in
16 litigation, is consistent with what I've been
17 telling you all day, which was my concern that
18 their -- that their report would be taken as the
19 owners' internal opinion.

20 I don't know what "If we don't," I don't
21 know what that is, because there was never any
22 discussion, that I'm aware of, of trying to get
23 Bechtel to change their prediction. I know exactly
24 what I asked Bechtel to edit, and I never asked them
25 to change anything. I asked them to delete things,

1 but I didn't ask them to change anything.

2 Q A deletion could be fairly characterized
3 as a change to a draft report, couldn't it?

4 A You couldn't -- no, not a change to a
5 prediction. This doesn't just say change their
6 report. It says "change their prediction," "if we
7 don't change their prediction."

8 There was never any discussion of changing
9 Bechtel's prediction. There was just -- I just
10 proposed deleting certain things in their report.
11 Frankly, it's not my practice to try to change
12 anything that a consultant says. Sometimes I ask
13 them to address things they didn't address.
14 Sometimes I ask them not to address things that they
15 have addressed.

16 But I think it would be unwise and,
17 frankly, I wouldn't want to work with a consultant
18 who would -- who would change an opinion because I
19 asked him. And so that's not my practice, and I
20 didn't do it here, and I didn't discuss doing it
21 here.

22 Q And I'm not suggesting you did. What I
23 might suggest is --

24 A I think you were.

25 Q Well, let me clarify then.

1 A Yeah.

2 Q I might suggest that this isn't written in
3 complete sentences and it is written in shorthand.

4 A Yeah.

5 Q And the comment is, "If we don't change,
6 then their prediction will be viewed as an owners'
7 opinion."

8 A But I don't know, changing what?
9 You're --

10 Q Well, you've already answered that
11 question, and that's to delete the schedule from the
12 draft report.

13 A Well, I don't -- I don't know that. If we
14 don't change their report, their prediction will be
15 viewed -- I didn't think the report was going to be
16 discoverable at all, but if it was going to be
17 released, I wanted it to be released in the least
18 damaging form possible.

19 So I don't -- I -- I'd suggest you ask
20 Steve Byrne. All I can tell you is that I never
21 discussed changing Bechtel's prediction, and never
22 discussed asking Bechtel to change any of the
23 opinions that they expressed in their report.

24 Q But you did discuss and actually changed
25 the report, didn't you?

1 A Most people would understand the
2 difference between delete and change. And deleting
3 something is one thing. You're taking it out
4 altogether. Changing something is rephrasing
5 something, to me. And I can't imagine that I would
6 have failed to be clear about that.

7 Q What if the delta represented deletion
8 instead of just change?

9 A What if it meant, you know, any number of
10 things? You can --

11 Q Why don't you tell us your best
12 recollection of what you were saying on this call.

13 A My best recollection is that -- I think it
14 was a face-to-face, actually.

15 Q Meeting?

16 A My best recollection is that I was
17 repeated -- more or less saying what I said to Mike
18 Baxley in July of 2015, which is that when reports
19 get out, they are viewed as the owners' opinion.
20 Even if they're produced with incomplete facts and
21 they're labeled "preliminary," they are still --
22 they still can be damaging. And they were in the
23 case that I cited to them, and in other cases.

24 So I would have -- I've taken that
25 position consistently from July of 2014 through

1 January 2015.

2 Q And if Bechtel's prediction on the
3 schedule was actually an owner's opinion, what would
4 the consequences have been?

5 A Well, the consequences would have -- to my
6 mind, would have -- in the context of the litigation
7 with the contractor, would have exposed the
8 contractor's claim for \$900 million of liquidated
9 damages to a variety of defenses, superior
10 knowledge, estoppel, possible waiver, bad faith, a
11 number of legal theories that would have undercut a
12 claim for not having a million dollars.

13 And believe me, when you get into those
14 kinds of claims, every single issue is litigated to
15 its death. And I didn't want to add another issue
16 to the stack if that litigation actually occurred.

17 Q And as their lawyer, you were aware of
18 other consequences, too, for these owners if the
19 Bechtel prediction on the schedule was seen as the
20 owners' opinion of the schedule; isn't that right?

21 A If this were the owners' opinion of the
22 schedule, the owner would have said this was their
23 opinion of the schedule. And they didn't do that.
24 And I don't think it was their opinion of the
25 schedule.

1 And they -- and besides, they were told
2 this on October 22nd. All this talk about getting a
3 reported account came much after the owner was told
4 Bechtel's prediction. And nobody at the owner said,
5 "Hey, I'm persuaded by Bechtel."

6 Q On January in 2016, you-all are having
7 this meeting. You're telling them that it's got --
8 that the report's got to be changed because there
9 are consequences, and it's not just in the potential
10 anticipated litigation.

11 A Why do you say that? That's --

12 Q You know that.

13 A That's what I was hired for.

14 Q Okay. So you just didn't have any opinion
15 and you didn't give them any advice on consequences
16 beyond what was a potential future anticipated
17 litigation?

18 A I gave an overview of why we engaged
19 Bechtel. I'm just counsel. I'm looking for
20 guidance. I'm your -- I'm your construction counsel
21 looking for guidance. I don't want this report
22 issued at all, but if it's issued, I want it with
23 certain deletions so that it does the minimum damage
24 in a \$900 million liquidated damages claim. It's
25 really as simple as that.

1 Now, what other -- what other issues the
2 owner was -- was dealing with, I don't have an
3 opinion on that.

4 Q Did you have any discussions about
5 disclosure of the Bechtel report to Office of
6 Regulatory Staff?

7 A The only discussion I had about disclosure
8 is to the extent that I don't know what your
9 disclosure obligations are. I don't think the
10 Bechtel report has any merit, and it was prepared
11 with an unreliable method. But I don't know if you
12 have to report every piece of information that comes
13 to you even if you discount it, even if you consider
14 it to be an unreliable method, even if your attorney
15 is telling you that it's not useful.

16 But I was not regulatory counsel, I was
17 not disclosure counsel in any context, and never
18 offered an opinion as what they should do concerning
19 any of those disclosures.

20 Q Well, I mean, that's leaving out a pretty
21 big part of this issue, isn't it?

22 A What's leaving out?

23 Q You're talking about the attorney saying
24 there's no merit to this report, there's no
25 useful -- it's not useful, but I don't know what

1 your disclosure obligations are.

2 A I don't, because I don't. Does a party in
3 this context have to disclose every rumor that's
4 circulated at the job site, every opinion of a -- of
5 some person who thinks they understand nuclear
6 construction and gives advice? Do they have to
7 report it all? I don't know. That's just not what
8 I do.

9 I don't -- I don't advise people on
10 disclosures in any context. What I advise them on
11 is construction disputes. And so my advice related
12 to the construction dispute that I anticipated with
13 the contractor on this project.

14 Q And --

15 A If they had other concerns, I know they
16 had other counsel. They had counsel in the PSC
17 proceeding, they had disclosure counsel, and that
18 was their bailiwick.

19 I'm actually pretty careful not to try to
20 practice law outside of my field. That's when
21 lawyers get into trouble. I don't like -- I don't
22 want to get into trouble. So I don't advise them on
23 those other issues.

24 Q And in this case, with this assessment and
25 report, you cloaked it in privilege --

1 A From the get-go.

2 Q -- and gave it to your client saying,
3 "This is not discoverable"?

4 A In the litigation with the construction
5 contractor. All of my discussions were about the
6 construction contractor.

7 As I've said repeatedly, I don't know
8 whether the privilege attaches in any other
9 proceeding against any other party. I simply don't
10 know the legal answer to that. I don't even know if
11 there's a clear answer, but I haven't looked at it.
12 I haven't even, you know -- I haven't even peeked to
13 try to understand whether the privilege that
14 attaches to a document prepared in anticipation of
15 the litigation -- of litigation by a non-testifying
16 expert has any privilege in any other context than
17 the litigation that is anticipated. It may well. I
18 can understand that it might. I can understand
19 other arguments going the other way, but I don't
20 have an opinion on that and never did.

21 Q Were you aware that the owners, your
22 clients, have actually adopted your position about
23 the report and maintained that privilege and
24 protection, at least until this year?

25 A I -- I am aware of that, and they might be

1 right or they might be wrong. I'm a complete
2 agnostic on the issue. I know what they've done.
3 They didn't do it at my direction or my request or
4 based upon my legal opinion. I know what they've
5 done. And presumably at some point it will be
6 determined whether that was a correct position or
7 not, but I don't have an opinion on it.

8 Q Did you have any discussions about it in a
9 different context than the construction litigation?

10 A I don't recall any such discussions and,
11 gosh, I hope not. I don't think I did.

12 Q Did you have any discussions about
13 disclosure of the Bechtel report to the Public
14 Service Commission?

15 A No.

16 Q How about any discussion about disclosure
17 of the Bechtel report in response to requests for
18 information from the Office of Regulatory Staff or
19 the Public Service Commission?

20 A No.

21 Q Nobody in either of your clients came back
22 to you and said, "We're being asked for this. Can
23 we turn it over or not?"

24 A Okay. Now, there is a request that -- I
25 want to turn to my clients and see if they're going

1 to object.

2 MR. M. RICHARDSON: You can ask them.

3 MR. BALSER: Let's go off the record and
4 let me confer with the client -- I mean, the
5 witness.

6 THE VIDEOGRAPHER: The time is
7 approximately 4:21. We are off the record.

8 (Recess in the proceedings from 4:21
9 to 4:29.)

10 THE VIDEOGRAPHER: The time is
11 approximately 4:29. We're back on the record.
12 Counsel may proceed.

13 BY MR. M. RICHARDSON:

14 Q Mr. Wenick, neither of your clients came
15 back to you and said, "We're being asked for the
16 Bechtel report, and can we turn it over or not,"
17 did they?

18 A No. But you asked a broader question.
19 And there was a subpoena issued to Bechtel. And
20 Bechtel advised me of that fact, as they were
21 obligated to do under the Professional Services
22 Agreement.

23 Q And what did you do when Bechtel notified
24 you that they had received a subpoena?

25 A I reached out to my clients and had

1 certain communications with them.

2 Q And the subpoena you're talking about was
3 recent in this pending litigation?

4 A Actually, I don't recall. I didn't
5 double-check. It was a -- I don't recall.

6 Q Let's just go with the temporal element.
7 Was it recent, in the last --

8 A Well, define "recent." We've been talking
9 about dates back in 2011. It was last year, I
10 believe.

11 Q Four or five months ago?

12 And who did you contact at your clients
13 after Bechtel told you they got a subpoena?

14 A I spoke to Jim Stuckey at one point.

15 Q And before getting the communication from
16 Bechtel about their receiving a subpoena, when is
17 the last time that you talked about disclosure of
18 the Bechtel report?

19 A It may well be the January 14, 2016,
20 meeting, but it would be in that time frame.

21 Q You don't remember anyone coming to you
22 before the Bechtel subpoena and asking about whether
23 the Bechtel report could be disclosed or should be
24 disclosed to any governmental agency or entity?

25 A I don't remember because it didn't happen.

1 Q Okay. And just to be certain, did you
2 have any discussions about disclosure of the Bechtel
3 assessment as opposed to the report?

4 A No, not except in the context of the
5 litigation with the owner if it came to pass. That
6 was the only disclosure discussions that I had.

7 Q The discussions we've already talked
8 about?

9 A Yes, exactly.

10 Q You weren't involved in any decision about
11 not disclosing the Bechtel report to the Public
12 Service Commission or Office of Regulatory --

13 A That's correct, I was not involved.

14 Q Did you ever instruct anybody at SCE&G,
15 SCANA, or Santee Cooper not to disclose the Bechtel
16 report to the Public Service Commission or ORS?

17 A No.

18 Q Do you know if anyone ever disclosed the
19 Bechtel report to ORS or the PSC?

20 A Everything I know about that I learned
21 from the newspapers, and they've had a lot of fun
22 with that issue.

23 Q Now, I want to ask you: What are all of
24 the drafts and presentations and versions of the
25 Bechtel report that you're familiar with? And not

1 testing your memory. Just tell me if you recognize
2 these, and if you don't, stop me.

3 There was an October 2015 draft report
4 prior to even the presentation.

5 A I've never seen it.

6 Q Okay. There was an October 22nd, 2015,
7 presentation to the executives.

8 A I received that the first week or so of
9 January 2014 -- 2015 -- 2016. Do I hear '17? Yes.
10 So it was -- yeah. I requested that from Martyn Daw
11 and received it in January of 2017.

12 Q So even though you were on the phone for
13 some period of time of that October 22nd call, you
14 didn't actually receive the October 22nd, 2015,
15 presentation, written presentation, until January of
16 2016?

17 A No. I didn't -- I didn't receive it prior
18 to that time, and I didn't see it at the time of the
19 call.

20 Q Why did you request it in January?

21 A I was asked to request it by somebody
22 representing the client in anticipation of the
23 meeting of January 14, 2016.

24 Q And who was that?

25 A I'm not certain.

1 Q Which client?

2 A I believe it was SCANA.

3 Q And was there any reason why that you --
4 it was suggested that you should request it for that
5 meeting?

6 A I don't recall a reason given. When a
7 client asks me to do something, I do it.

8 Q Was there another instruction, like to
9 look at a particular part, or anything?

10 A No. I think they wanted me to have the
11 full picture, but I don't know that. That's what --
12 that's my surmise.

13 Q Did you do anything else, other than
14 review it for that meeting, with the October 22nd
15 presentation?

16 A No. I'm not even sure I reviewed it for
17 that meeting, but I suppose I must have.

18 Q There is a reference to a November 9th,
19 2015, draft report. Are you familiar with that one?

20 A No. I've only seen four versions of
21 the -- of the Bechtel report. One was the November
22 report that includes everything; the second one was
23 my redacted version of that same document; the third
24 and the fourth were the project assessment and
25 schedule assessment of February 2016.

1 So those are the only four versions that
2 I've seen of any report from Bechtel, if that helps
3 you.

4 Q Yes. Those were the next four I was going
5 to ask you about.

6 A Okay.

7 Q And also the October 22nd presentation, to
8 the extent that that qualifies.

9 A As I told you, I have seen that.

10 Q We've already talked about Santee Cooper
11 pushing for the -- for the hiring of Bechtel. But
12 isn't it also true that Santee Cooper was pushing to
13 get the Bechtel report, get a copy of the Bechtel
14 report?

15 A Well, you know, throughout this
16 deposition, you've referred to wasn't Santee Cooper
17 doing this or SCANA saying that. And you understand
18 that those are corporate entities, and I didn't
19 think of them as corporate entities. I thought of
20 them as individuals.

21 And I haven't brought up that point until
22 it mattered, and it matters now, because there were
23 certain people at Santee Cooper that wanted the
24 report, and other people who told me other times
25 that they didn't need it or didn't want it. So I

1 was getting conflicting information even from Santee
2 Cooper. So that's my answer to your question.

3 Q And we know the counsel, general counsel
4 was asking for it. So who was -- who was telling
5 you they didn't need it?

6 A There was a time that Lonnie Carter gave
7 me very clear direction that they didn't want it.
8 And part of my frustration on that issue at the time
9 was that I was getting mixed signals from one of my
10 clients. I mean, let alone what they saw between
11 themselves -- I mean, what, if any, degree to which
12 they didn't see eye to eye between themselves.

13 So I was getting mixed signals. And
14 eventually I did what I did. And that's all -- I
15 did it all by e-mail.

16 Q And you did not give the clients the draft
17 report at all, did you?

18 A You know, that's what I don't -- I don't
19 remember. I'm deferring to the record, because the
20 record is pretty clear on what I was sending to whom
21 and when. And I didn't write down the chronology.
22 I didn't go back and try to reconstruct it. It's
23 there. And if it's interesting to you, you can
24 reconstruct it.

25 Q And the conflicting messages you were

1 getting from one of your clients, Santee Cooper,
2 from Lonnie Carter and general counsel, did that
3 result in your deciding not to provide them the
4 report?

5 A No. They eventually got the report, as I
6 remember.

7 Q The final report?

8 A Yeah.

9 Q But there was a substantial amount of
10 communications, including voicemails and e-mails and
11 even offers to come down to your office without
12 taking notes, just to get a look at the report. And
13 that was all refused, wasn't it?

14 A I wouldn't say it was refused. It just
15 didn't come to pass. There were -- before the first
16 suggestion could be implemented, somebody had some
17 different suggestion. And then that suggestion was
18 superseded by another. And that's kind of the way
19 it went.

20 The report, separate from the schedule
21 report, contains everything that's in the assessment
22 except for the schedule section. And I believe they
23 did have and eventually did get -- and it's in the
24 e-mails as to when -- the project assessment report
25 of February as opposed to the schedule assessment

1 report. They knew they weren't getting the schedule
2 assessment report, and they seemed fine with that.
3 They understood that the schedule assessment was
4 separate.

5 Q And in November and December and January,
6 you didn't provide Santee Cooper a copy of the draft
7 report. And I was wondering if there was somebody
8 who told you not to provide it to them.

9 A There were discussions about how to handle
10 that. And those discussions, if they ever -- if at
11 any time Santee Cooper said unquestionably, "I don't
12 care what SCANA says. I want the report," I would
13 have given it to them.

14 It's my recollection that every time they
15 asked for it, they would then retract that request.
16 That's my recollection.

17 Q Is that your recollection also when Santee
18 Cooper's general counsel was asking to come down
19 before a meeting in December just to see the report
20 so --

21 A I was fine with that meeting. As I said,
22 something happened that superseded that proposal.
23 So I was fine with the proposal to have the meeting.
24 The meeting never took place. I think that's clear.

25 Q And they never saw a copy of the draft

1 report?

2 A I don't believe that I sent them a copy of
3 the draft report.

4 Q And did it --

5 A What I had wanted to do was send them the
6 report with my redactions.

7 Q And did you do that?

8 A No, because -- because I was dealing with
9 Bechtel at the time, and that didn't lead to a
10 report with my redactions. So I didn't send them
11 something that had my blackouts in it. I didn't see
12 the point of that.

13 Q Did anyone at SCANA or SCE&G ever ask you
14 not to provide Santee Cooper with a copy of the
15 report?

16 A I don't recall either client asking me to
17 treat the other client differently or -- but
18 specifically to your question, "Don't provide it,
19 for goodness sakes. Don't provide it. I know
20 they're asking for it, but don't provide it."

21 No. If they'd asked for it, I'd give it
22 to them.

23 But I wanted to -- to the extent possible,
24 I wanted to bring the two parties in alignment on
25 what would happen. And when they were disagreeing

1 about the best course forward, there was never
2 direction to do something, but they were disagreeing
3 on what the best process was.

4 But if they said, "Look, I disagree with
5 SCANA. Send it to me," obviously I'd send it to
6 them. They're my client. I'd try to talk them out
7 of it, but I'd send it to them. But it never got to
8 that point. It was always, "Well, all right. I
9 understand what SCANA is saying," or "I understand
10 what Santee Cooper is saying. Let's talk about this
11 some more. Let's see if we can develop something
12 else."

13 These were partners who had been involved
14 with this job for a long time, and they -- they were
15 trying to work things out so that they could agree
16 on something. And even though SCANA had a
17 55 percent share, and therefore was the majority, I
18 never saw them pull rank. They wanted to cooperate.
19 They thought they were going to be in bed together
20 for, you know, for another many years and had been
21 for many years. And plus, they'd be operating the
22 plant in the future for many years.

23 So they were trying to accommodate each
24 other. And when they would have an agreement, I'd
25 give my opinion. I'm not bashful about that.

1 You've seen that. But then they would try to work
2 it out. And if they couldn't come to an
3 agreement -- there was never a time when one said,
4 "Well, I don't care what SCANA says. Send it to
5 me," or "I don't care that Santee Cooper is asking
6 for it. I don't want you to send it." That never
7 happened. That's not the nature of these people;
8 not the nature of their relationship.

9 Q Not as to your clients -- I understand
10 your testimony there -- but you did tell Bechtel not
11 to send them directly to your clients, right?

12 A Yes, and the client didn't want me to send
13 them directly to them. They wanted me to do what
14 I -- what I intended to do all along, which was
15 review the report. Sending a raw report to the
16 client, that's really not good litigation practice.

17 Q What about the final report?

18 A "The final report," meaning the assessment
19 report?

20 Q Right.

21 A Right. I think they have that.

22 Q But didn't you tell Bechtel not to send
23 that directly to Santee Cooper?

24 A At a time, I didn't want them to send it
25 because there was a confusion about what the parties

1 wanted.

2 You can find an e-mail in which I've given
3 probably four or five different conflicting
4 directions to four or five different people because
5 my clients were giving me four or five different
6 directions. But ultimately what happened, I don't
7 think anybody disagreed with.

8 Q And as part of that instruction to
9 Bechtel, you told them not to even communicate
10 directly with employees of Santee Cooper, didn't
11 you?

12 A Well, I told them on the issue of the --
13 of the report, that they were to communicate with
14 me, that I would advise the clients. And that is
15 indeed a term that they had agreed to in the
16 Professional Services Agreement, that their
17 communications would be with me; but the direction
18 would be with me, as more observed in the breach,
19 though.

20 Q You know, you've maintained that there's
21 always -- it was always the client who didn't insist
22 or didn't follow through on asking and getting a
23 draft or the final report, but you understand
24 there's -- they were -- after months of asking for
25 it and not getting it, you can understand why they

1 were communicating directly with Bechtel, can't you?

2 A I didn't say object -- that I didn't
3 understand why they were doing it. It's just it was
4 contrary to the lines of the communication that I
5 thought I'd set up. But they did. And ultimately,
6 you know, there's a back and forth where Martyn Daw
7 and Mike Baxley and I are sending e-mails between
8 and among each other. And ultimately we agree that
9 we're going -- that I agreed I was going to copy
10 Mike on the communications with Bechtel.

11 And then after that, Martyn Daw wrote
12 directly to Mike Baxley and copied me. That's when
13 he told him, "I've now delivered the project
14 assessment report and the separate schedule report."

15 Q So that final report, you got the two
16 separate reports, and then you sent to the lawyers,
17 the four lawyers you're talking about, the project
18 assessment report?

19 A Right.

20 Q And said distribute it as you will?

21 A Yes, exactly.

22 Q As you need.

23 A Yeah. I wanted to limit the -- for all
24 the reasons I've talked about, I wanted to limit the
25 circulation.

1 Q And you all had talked about how to
2 distribute that final report, hadn't you?

3 A I don't know. Maybe.

4 Q Do you remember coming up with a plan to
5 have numbered copies that were specific to
6 individuals?

7 A No. I wasn't involved in that. I don't
8 doubt that that was implemented or at least
9 suggested. But I more or less trust adults to be
10 adults, so I wouldn't do something as controlling as
11 that, and I wasn't aware it was done.

12 Q So after all the effort over those many
13 months to, you know, protect the -- protect the
14 report, once it was final and you sent it to the
15 lawyers for the clients, you didn't really care what
16 they did with it?

17 A No, I wouldn't say that. I still wanted
18 to limit the circulation. The only use that was
19 made of it after that point, to my knowledge, is
20 that there was an effort to extract from the
21 assessment report certain information that some
22 people, not everybody, some people thought might be
23 beneficial in guiding the owner going forward.

24 So there was information extracted. And
25 all I said to them is, "You're going to extract the

1 information. The primary purpose was in
2 anticipation of litigation. I'd rather you not
3 circulate the report itself, but if you want to
4 extract some of these recommendations in the normal
5 course, that's fine."

6 I just didn't want the normal course to
7 predominate over the "in anticipation of
8 litigation." But if they wanted to do that, that
9 was fine. I think that's the use they made of it,
10 but that's kind of when it left my control.

11 Q And isn't it true that's the only use that
12 was made of the Bechtel assessment report?

13 A Well, it certainly wasn't used in
14 litigation because there was no litigation. So --
15 well, I don't know if that was the only use.

16 Q And what happened to the schedule report?

17 A Nothing much. It resides somewhere
18 electronically in this office. It can be printed
19 out. I gather you have a copy. What do you mean,
20 "What happened to it?" Nothing happened to it.

21 Q I guess, when were you asked for it?

22 A I don't know that I was ever asked for it.

23 Q How did it get out of this office, I
24 guess, is my question.

25 A You know, it may have been in connection

1 with the Bechtel business. That is, I'm not sure
2 that my -- that my electronic copy did. It may have
3 been produced in response to the subpoena to
4 Bechtel. I'm not sure. I don't recall sending the
5 schedule report to the client, and I haven't seen a
6 record of that.

7 Q Did any of -- anybody from either of your
8 clients ever ask for the schedule assessment report?

9 A I don't believe so. As I said, I saw the
10 e-mail that reminded me that Martyn Daw advised Mike
11 Baxley that the two reports were sent, a project
12 assessment report and a schedule report. I don't
13 recall anybody ever asking that I produce to the
14 client the schedule report.

15 Q And you talked about that there might be
16 recommendations or something from the report that
17 could be pulled out and used.

18 Do you know about the, what's called the
19 CORB or the Construction Oversight Review Board?

20 A An entity like that sounds vaguely
21 familiar, but I wasn't involved in setting it up or
22 staffing it or advising them.

23 Q Okay. And you mentioned a minute ago
24 about what was taken out of the draft report.

25 Was there anything other removed, other

1 than schedule information, in your edits?

2 A In my initial edits or in the ultimate?

3 Q Let's start with the initial edits.

4 A Because there was only one edit.

5 Q Okay. That was going to be the follow-up.

6 A Yeah, there was one edit. And in my
7 initial edits, yes, I addressed schedule and I
8 addressed comments critical of the owner, the sort
9 of things I wouldn't want to be read in open court
10 in the Southern District of New York.

11 There were a lot of other edits. You have
12 the document. You can do a comparison. There were
13 a lot of things that were -- that I asked to be
14 deleted from the report.

15 Q And all of those changes were just
16 deletions. You didn't rewrite, reword?

17 A I didn't -- I didn't change a word or
18 propose to change a word.

19 Q Is it your memory that there's anything
20 about scheduling you didn't remove?

21 A Yes, there is a brief discussion of
22 schedule in the -- in the document, as I remember
23 it, in the what's called the Project Assessment
24 Report of February 2016.

25 Q There was a wording change that I wanted

1 to ask you about in the November 12th draft report.
2 It said that an assessment of the project schedule
3 was also performed.

4 And instead of that being removed, it was
5 actually changed to read in the final report, "A
6 specific assessment of the project schedule is not
7 included in this report."

8 A Yeah. Everything that was done in order
9 to extract the schedule information was done by
10 Bechtel without my input. And any changes to
11 wording that you just -- I had no involvement with
12 and, frankly, I wasn't aware of it. But it makes
13 sense that you modify certain things, but...

14 Q So you would have removed that statement
15 in your edits. And the fact that they left a
16 modified version in the final report was their work?

17 A Yeah. The process was I sent them my
18 redacted version, which you've seen, and then
19 discussed with Martyn Daw separating the schedule.
20 And then I had no role in the next step until I
21 received the two reports.

22 Q One of the changes that occurred was this
23 reference to this November 9th, 2015, Bechtel report
24 issued to SCH. And that's the initials for your law
25 firm.

1 A Yeah.

2 Q I'm wondering if you know whether there
3 was ever a November 9th report or --

4 A I've only seen one draft report. And I
5 don't -- I know it's November, November 8th. What
6 is the date of the draft report that you have?

7 Q The one that you actually received was
8 November the 12th.

9 A Okay.

10 Q And -- but that draft actually referenced
11 a November -- November 9th version.

12 A Okay. Does that -- does that draft that
13 you have in front of you reference the November 12th
14 version? I'm asking because I wonder if they have a
15 November 9th version they sent me on the 12th.

16 Q No.

17 A Do they refer to two separate?

18 Q They refer to two separately, yeah.

19 A Okay.

20 Q In the final report, the November 9th date
21 is changed to November 12th. And then they add the
22 fact that the February 5th final report was issued
23 at SCH, as well.

24 A Okay. So the final report doesn't
25 reference a November 9th.

1 Q It does not.

2 A I don't think there was one. They
3 probably just caught an error, but it wasn't -- I
4 didn't catch the error. I didn't instruct them to
5 make the change.

6 Q I was just curious.

7 One of the changes, one of the rewordings
8 in the conclusion deals with the schedule, and I
9 wanted to ask you about that.

10 What was removed in the final report,
11 which had been in the November 12th report, is
12 Bechtel's assessment, based on certain assumptions
13 of Units 2 and 3 commercial operation dates,
14 indicate new COD Unit 2, December 2020 to
15 August 2021, and Unit 3, 2022 to 2023.

16 That was removed. So those were specific
17 dates --

18 A Right.

19 Q -- that were removed. And what was added
20 back in is: "While the consortium's engineering,
21 procurement and construction plans are integrated,
22 the plans and schedules are not reflective of actual
23 project circumstances."

24 A Right. When you extract every reference
25 or all the most significant references to schedule,

1 there is a certain amount of stitching up you have
2 to do. But all of that was done by Bechtel, not at
3 my request or direction.

4 Q And did you see that before it became
5 final?

6 A No. No. The -- what I got is -- what I
7 got from Bechtel, after we talked about splitting
8 it, is the form that it existed, and I never saw it
9 before I actually received it.

10 Q But you assumed that when you received the
11 final report, that it had removed those sections
12 that you wanted to be removed from the
13 November 11th --

14 A No, I didn't remove all of them. It only
15 removed the schedule section.

16 Q The schedule section.

17 A There were other sections that I wanted
18 them to remove that they wouldn't remove.

19 And I also asked them to add what Martyn
20 Daw -- he's a Brit -- he said a health warning. I
21 don't know if that's some term --

22 Q Yeah. What is that?

23 A That means this is preliminary, you know,
24 it's under -- things to make it clear that you
25 really shouldn't rely on this report.

1 And he called it a health warning, you
2 know, don't operate heavy machinery while reading
3 this report, that sort of thing.

4 He was fine with that because it was so
5 obviously preliminary, and Bechtel had said that on
6 October 22nd when they gave their presentation. But
7 I asked him what -- "Gosh, I don't see that."

8 And he said, "Well, since we did the
9 separation we talked about, we didn't think the
10 health warning was necessary, but it does say in the
11 report that it's preliminary, and so forth. So, you
12 know, you should be satisfied with that."

13 And I wasn't going to go back to the well.

14 Q And on October 22nd, it was a preliminary
15 presentation of their assessment well, you know,
16 before any kind of report was even drafted, for that
17 matter.

18 A I think that's a mischaracterization.
19 They never did any more analysis than they did as of
20 October 22nd. All they did was write it up.

21 Q And so you asked for this health warning,
22 and they didn't actually put it in?

23 A They put in some modified version that
24 wasn't what I thought we had agreed to, but it was
25 something.

1 Q There was a removal I wanted to ask you
2 about from the draft report to the final that said:
3 "It is our confident opinion that the costs will
4 indeed continue to increase to and very likely
5 beyond the level of the fixed price option."

6 Is that something that you remember
7 removing?

8 A No, I don't. In fact, when they -- I
9 don't know that they had information about the fixed
10 price option when they initially made their
11 presentation or in their draft, so I'm not sure
12 where that comes from.

13 Q Was there a level of a fixed price option
14 in the EPC prior to the 2015 amendment?

15 A No.

16 Q But remember, at the time of the final
17 report, the 2015 EPC amendment was not only
18 finalized and executed, but had been fully approved
19 and was in operation, right?

20 A The -- the amendment was approved. I
21 don't think the fixed price option had been
22 exercised.

23 Q Right.

24 A And if we didn't -- frankly, if we didn't
25 think the costs were going to exceed the fixed price

1 amount, that would mean that we thought we could
2 save money if we stuck with the old buckets. And we
3 didn't think that, although there was -- people were
4 running different scenarios.

5 My judgment at the time was that the owner
6 would save money by doing that. And what you're
7 reading there is consistent with that.

8 Q Which made the answers that you gave about
9 Steve Byrne earlier so surprising. I mean, I didn't
10 know that anybody on the owner's side had any
11 inclination.

12 A Well, what I'm repeating to you is the
13 conversation about the negotiation with
14 Westinghouse. They weren't privy to our numbers.
15 We were running our own scenarios.

16 So they were -- so Westinghouse felt it
17 could complete profitably because it was -- I think
18 it was, honestly, \$500 million above their cost
19 projection.

20 And Steve at the time said, "Fine." And
21 it wasn't until later -- that conversation, I
22 believe, occurred in July. And we were running our
23 alternate scenarios in -- in October and November --
24 I'm sorry -- September and October of 2015.

25 And I was very much attuned to that

1 because I was being looked to to explain the fixed
2 price option, whether it was a good idea. And so I
3 wanted to get -- understand what -- if this, then
4 that, if this, then that, if this, then that, sort
5 of thing. And that's a complicated effort involving
6 multiple disciplines and the rest, but that's what
7 we did.

8 Q And to put it in context, that was Steve
9 Byrne's negotiating position with Westinghouse, not
10 an actual internally held belief that --

11 A I don't know what Steve believed at the
12 time when he was negotiating. I'm not sure that
13 he -- but sequentially he would not have been privy
14 to the -- to the -- these alternate scenarios
15 because, at least to my knowledge, they weren't run
16 until later.

17 MR. M. RICHARDSON: I want to mark two
18 exhibits.

19 - - -

20 (E-mail correspondence dated
21 12/22/15, BPC_VCS_00000428-429,
22 marked Wenick Exhibit Number 5 for
23 identification.)

24 - - -

25 (E-mail correspondence dated

1 12/22/15, BPC_VCS_00008248, marked Wenick
2 Exhibit Number 6 for identification.)

3 - - -

4 MR. M. RICHARDSON: Pass these to the
5 witness. These are copies for the three of you
6 all (handing).

7 MR. BALSER: Thank you. Here you go,
8 George (handing).

9 BY MR. M. RICHARDSON:

10 Q I'm handing you what's been marked Wenick
11 Exhibit 5 (handing). It's an e-mail on
12 December 22nd, 2015, from Martyn Daw to you, copying
13 some other folks.

14 A This is the e-mail exchange that I
15 referred to earlier.

16 Q Right. And if you'll notice on the back
17 is page 2, which is the attachment, a PDF, that
18 includes Bechtel's balance invoice for the report.

19 A Okay.

20 MR. BALSER: This is 5?

21 MR. M. RICHARDSON: 5 is the one at 7:38.

22 6 is the one at 7:45.

23 BY MR. M. RICHARDSON:

24 Q And if you'll look at Exhibit 6, which
25 responds to Mr. Daw, your response to Mr. Daw --

1 A Daw.

2 Q Daw. Thank you -- essentially you're
3 surprised, right, that he's considering it final and
4 complete at this point?

5 A Well, I don't know if "surprised" is the
6 right characterization. I wrote what I wrote. It
7 was contrary to my understanding. And I think
8 that -- well, I don't know. I don't know the
9 sequence of events here.

10 I wrote my e-mail response at 7:45 p.m.
11 I'm not always at the office at that time. I may
12 have -- but it was the same day. I suspect that I
13 reached out. So it wasn't a surprise one way or the
14 other.

15 He says, "That's okay. I want to confirm
16 it with my client because I'm not going to take
17 Bechtel's word for it."

18 So I reached out to the client and --
19 although I said I spoke to him this week instead of
20 just now. So I don't know. I'm not sure that
21 "surprised" is the right word, but it was contrary
22 to what my direction was from the client as of
23 December 22nd, which was they wanted the -- that I
24 was to request a copy of the PowerPoint. So I
25 alluded to that earlier.

1 And also advised that: "We will
2 eventually want a final copy, but hold off on
3 providing it." So that, you know, speaks for
4 itself.

5 Q And we had talked about your being asked
6 to request a copy of the presentation. And that's
7 referred to in this e-mail, as well.

8 Does that refresh your memory that maybe
9 you've been asked earlier?

10 A Well, I said the first week of January.
11 It seems to me that I did ask again, maybe, so it --
12 it suggests to me that maybe I had to ask twice.

13 Q And you also -- you're very careful in
14 this e-mail. There's a lot of "I's" in it, except
15 one place. In the last sentence, you're telling
16 them: "I was -- I was told to tell and advise you.
17 I was told to advise you, Bechtel, that we will
18 eventually want a final copy of the report."

19 A Yes. My client -- I was -- you're right,
20 I was careful with my pronouns. The "we" embraced
21 the clients.

22 I spoke -- I asked the question: "I spoke
23 to the CEO. I have a different understanding. I
24 was directed. I was also told that we will
25 eventually," meaning the client. So you're right.

1 The pronoun change was intentional.

2 Q And the "we" referred just to the clients?

3 A Yeah.

4 Q Okay.

5 A Who else? Sorry.

6 Q That's why I'm asking.

7 MR. M. RICHARDSON: Let's mark this
8 Exhibit 7.

9 - - -

10 (E-mail correspondence dated
11 11/10/14, SCANA_RP0850425, marked Wenick
12 Exhibit Number 7 for identification.)

13 - - -

14 BY MR. M. RICHARDSON:

15 Q Excuse me. I found the other exhibit we
16 were missing. Just remove that from the back of it.

17 MR. BALSER: Exhibit 4 is removed. So
18 Exhibit --

19 THE WITNESS: Exhibit 7?

20 MR. BALSER: Exhibit 7 is going to be a
21 one-page exhibit?

22 MR. M. RICHARDSON: That's right.

23 MR. BALSER: Okay.

24 THE WITNESS: Yeah, because we looked at
25 the other page previously.

1 BY MR. M. RICHARDSON:

2 Q You know, we had talked about this time
3 frame. And although you're not copied on this,
4 these e-mails, you're starring in them.

5 Do you remember or did you work and talk
6 with Carlette Walker --

7 A I don't --

8 Q -- regularly?

9 A I don't see any mention of me in this
10 e-mail.

11 Q The very first line.

12 A Can you point me to it?

13 Q If you read the very first line of text in
14 the first e-mail, Carlette Walker is telling Jimmy
15 Addison that "I also had the benefit of talking with
16 George Wenick."

17 A Oh, okay. I'm sorry.

18 Yeah. Carlette was a financial type and
19 was providing information to me, I believe, related
20 to some of the projections.

21 Oh, I'm sorry. I need to reset the clock.
22 We're in 2014.

23 Q That's right. This goes back into
24 November --

25 A Yeah.

1 Q -- 2014.

2 A Yeah. Well, but what I said about
3 Carlette Walker still goes. She was one of the
4 people I looked to for financial data.

5 And I see there's a reference to the EAC
6 in the initial e-mail down at the bottom of the
7 page.

8 But what's your question?

9 Q If you follow from the bottom, you can see
10 that this is part of the discussion of the
11 rebaselining of the schedule, and then the EAC that
12 came from Westinghouse. Can you tell that? And if
13 you look at the very --

14 A I don't see any reference to schedule in
15 the first e-mail. Can you point me to the reference
16 to the schedule that you're talking about?

17 Q On the very bottom, do you know who Dukes
18 Scott is?

19 A I don't.

20 Q Okay. You see in the second line of the
21 very bottom e-mail, it talks about updates on the
22 EAC and the delay negotiations?

23 A Yeah, I do see that.

24 Q Okay.

25 A But that's -- that's -- I'm not sure that

1 you'd want to conflate that with the rebaseline. I
2 think -- I think this -- well, okay.

3 I see what you're interpreting as related
4 to the rebaselining. I'm not sure that it does.
5 The rebaselining was an internal exercise by the
6 contractor. It was not something that was subject
7 to negotiations. So that's why I don't read this --
8 that sentence the way you do.

9 Q No problem. But it informed the EAC that
10 was provided by the consortium in August of 2014,
11 didn't it?

12 A Wait. It informed?

13 Q Yeah. I mean, delay means cost. We
14 talked about that, on a construction project.

15 A Well, there seem to be two different
16 things going on here. One is the EAC. Those are
17 the updates. And then the separate thing is the
18 delayed -- delayed negotiations. I think at this
19 time that the -- the negotiations in question may
20 relate to some sort of time extension that they
21 thought -- that the contractor thought they were
22 entitled to, but I'm not quite certain.

23 Q You don't -- you don't know what they're
24 talking about?

25 A No, but I know what delay in negotiations

1 are. So I feel confident in saying that they're not
2 talking about the rebaseline. Precisely what they
3 are talking about, I can't help you.

4 Q But they're talking about the construction
5 schedule delay, aren't they?

6 A They're talking about negotiations with
7 the contractor related to a delay. Now, whether
8 that's acceleration dollars or whether that's
9 delayed completion and delayed claim dollars, I
10 don't know. Contractors like to get acceleration
11 dollars. So I don't know what the negotiations are.
12 And I'm reluctant to speculate, and I think I've
13 given you some examples of why speculation could
14 lead you astray.

15 Q And you see that what's essentially the
16 middle e-mail from Kevin Marsh to Jimmy Addison
17 copying Carlette Walker? It's talking about a
18 message to ORS.

19 A Yeah, I see that.

20 Q Okay. And it also talks about -- the last
21 line is that: "We should not get into any details
22 of the discussions to date."

23 A Well, I think what Kevin Marsh is saying
24 there is that there will be more discussions to
25 come, and he can't predict the outcome. That seems

1 to be his basis for saying they didn't want to get
2 into the details of the discussion.

3 But, again, I don't have any knowledge to
4 bring to bear to give you an interpretation of this
5 language.

6 Q Uh-huh. Well, and the question really is
7 about the first one, which is: What were you
8 talking with Carlette Walker about in the context of
9 these negotiations?

10 A I don't know. Who redacted it for
11 privilege?

12 MR. BALSER: We did.

13 THE WITNESS: Okay. So apparently someone
14 is asserting a privilege with what I talked to
15 Carlette about, and I'm going to defer to that
16 exercise of the privilege.

17 BY MR. M. RICHARDSON:

18 Q Well, I don't --

19 A But I don't recall it anyhow, so we don't
20 even get there.

21 Q Do you know who Kenny is that they're
22 referring to in the middle e-mail, "I talked with
23 Kenny this morning"?

24 A I don't.

25 Q You got that big exhibit there? I think

1 it might be 3.

2 A I do, yes.

3 Q There's an Exhibit 5 we may have talked
4 about. You see that's a --

5 A I have it. Just hold on a second.

6 Q I'm sorry.

7 A Okay. I have Exhibit 5 in front of me.

8 Q You see these are notes from a phone call
9 with you?

10 A Yes.

11 Q Do you remember that?

12 A I remember that there were notice of
13 claims that Westinghouse filed. Based on the date,
14 I could probably find the Westinghouse notice and
15 give you an answer, but based on this, I can't.

16 It was clearly a payment dispute. The
17 fact that it's a round number suggests it was one of
18 the milestone payments in the original contract, but
19 that's about all I can tell you.

20 Q I want to -- I want to ask you about this
21 second entry. It's got "Kenny, question mark"
22 beside it.

23 A Yeah, I don't know if that has anything to
24 do with the phone call with me.

25 "We revised schedule with PSC without" --

1 I have no idea what that means, and I wasn't
2 involved in revising schedules with the PSC or
3 talking to -- who was I talking to anyhow? Do we
4 know?

5 Q Kevin Marsh.

6 A It was Kevin Marsh. Okay. And Kevin said
7 these are his notes?

8 Q Well, SCE&G has.

9 A Okay.

10 Q I think we can take their word for it.

11 A Okay. Then I will accept your
12 representation.

13 Q Or theirs.

14 A No. I'll accept your representation that
15 they had said that.

16 Q Okay.

17 A And then, yes, I will accept their
18 representation. So I'm accepting two
19 representations.

20 "Can we revise schedule with PSC without
21 commitment?" I have no idea what that means. I
22 know who PSC is, but revising the schedule without
23 commitment to costs, I'm not sure what that means.

24 Q Do you remember having a conversation with
25 Kevin Marsh about the claim and talking about PSC

1 revisions?

2 A I don't -- no. Those -- I feel fairly
3 confident that those two entries are unrelated; that
4 the claim here is a milestone payment claim that we
5 denied because, I believe -- as I said, the
6 \$70 million, the round number gives it away. I
7 believe that that was a dispute that we had, that we
8 didn't want to make a milestone payment because
9 they -- the schedule had been adjusted twice since
10 the original contract, and if we paid them according
11 to the existing payment schedules, we would pay them
12 100 percent of these milestones before they were
13 finished.

14 And I think you're familiar with that
15 issue. And I suspect that's what it has to do with.

16 Q So could the schedule actually refer to
17 the payment schedule as opposed to the construction
18 schedule?

19 A I don't -- I don't know -- I don't know
20 why Kevin is -- Kevin Marsh is linking a revision to
21 the schedule with commitment to cost. The only
22 relationship that I'm aware of related to these
23 milestone payments and the issue of whether the
24 schedule for payments should be changed because of
25 the time extensions that had been granted.

1 So I can't -- I can't help you with that.
2 It looks like he's repeating this issue about
3 looking for experts, forensic accounting, civil
4 engineering, scheduling, which was about the date of
5 the meeting that you showed me before.

6 Q Right. And so does that refresh your
7 recollection at all about the --

8 A No. It looks like I told him that on the
9 17th. And then on the 19th, two days later, we had
10 a meeting when I told him that. It says "meeting
11 Monday," which would mean the 17th would be a
12 Saturday. And I don't recall ever talking to Kevin
13 Marsh on a Saturday, but maybe then.

14 Q All right. I think we might have talked
15 about this, but were you aware that Bechtel had
16 already executed a proprietary data agreement with
17 SCE&G before your involvement with the Bechtel
18 assignment?

19 A You did already ask me that. I didn't
20 know that they -- when I received Al Bynum's e-mail
21 in May of 2015, I did not know that Bechtel had
22 already signed the NDA that anybody who has anything
23 to do with the project has to sign. I later learned
24 that they had signed it, but that wasn't really
25 what -- that wasn't enough for the contractor, for

1 the consortium.

2 Q But you didn't even -- you didn't even
3 know that after you got involved.

4 A No, I eventually did. There's some
5 reference to that, some passing reference, but
6 that -- in my view, that's a relatively low-level
7 agreement. It's the minimum that anybody involved
8 with the project has to sign under the terms of the
9 construction contract, under the terms of the EPC
10 contract.

11 I don't think that Santee Cooper could
12 have even met with Bechtel until they had signed
13 that.

14 Q SCE&G?

15 A Well, I'm saying -- you told me Santee
16 Cooper met with them before May. I'm saying that as
17 I think about the way in which that NDA was supposed
18 to function, I don't see how they could have even
19 had a preliminary meeting with Bechtel without
20 getting Bechtel's signature on that NDA, because
21 they would have wanted to talk about the project in
22 a way that would have violated the EPC agreement if
23 they -- unless the third party, Bechtel, had signed
24 an NDA.

25 So even at the interview stage, they'd

1 want an NDA.

2 Q And do you know -- did you know that they
3 had a July 8th, 2015, kickoff meeting with SCE&G and
4 Santee and Bechtel, and were set to go with the
5 third-party assessment, and just waiting on the
6 agreement to be signed?

7 A I didn't remember that, but I've seen that
8 I was told that in an e-mail. So I knew of it at
9 the time or shortly thereafter.

10 Q And also that it was -- at that time it
11 had been agreed that it would be between the owners
12 and Bechtel?

13 A That what would be between the owners?

14 Q The agreement.

15 A I don't remember that, and obviously it
16 didn't pan out that way. So once again, people made
17 a decision and then reversed themselves.

18 Q Well, and they all --

19 MR. M. RICHARDSON: Let's go ahead and
20 make this an exhibit, then.

21 - - -

22 (E-mail correspondence dated
23 12/22/15, SCANA_RP0792232-792237,
24 marked Wenick Exhibit Number 8 for
25 identification.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -

MR. M. RICHARDSON: Can you tell me what the last one is on your desk?

THE WITNESS: The last one I have is 7.

MR. M. RICHARDSON: We'll make it 8 then.

MR. BALSER: It's getting late. Where are you? We said 5:00.

MR. M. RICHARDSON: Right. We're not going to finish, that's all. In fact, I know Jay Ward has already had to leave to catch his flight. So you tell me how long you want to go or can go.

MR. BALSER: I'd say, if you're not going to finish, we ought to let the witness have a -- you know, end the day when he's ready.

THE WITNESS: Okay. I'm ready.

MR. M. RICHARDSON: Could I make a request that -- that we do one more -- just one more thing. We won't go to this exhibit, but I do need to deal with this one other thing. I just want to confirm with him about the -- about the production.

MR. BALSER: And I'm going to have one follow-up question I'm going to need to ask.

MR. M. RICHARDSON: No problem.

1 Where is the folder for this? I'm going
2 to need to have that back. It might be in this
3 one right here (indicating). See if you can
4 find it.

5 It is Exhibit 8, but we're going to pick
6 that up.

7 BY MR. M. RICHARDSON:

8 Q Mr. Wenick, last question for the day.

9 We talked about and received from you the
10 thumb drive. And confirm for me that we have given
11 you back all of your paper copies that you had
12 today.

13 A Yes, it appears so. Yes.

14 Q And that you have -- you collected and
15 provided all documents subject to -- that were
16 responsive to the subpoena request?

17 A I believe that I have, yes.

18 Q And you provided --

19 A Except for those to which people asserted
20 privilege.

21 Q Right. But you didn't do that. You
22 collected all of them --

23 A Right.

24 Q -- and gave a complete set to both
25 clients?

1 A Right. But I did not give a complete set
2 to you because of the privilege asserted.

3 Q And so they came back to you and said,
4 "These are the ones we want you to withhold"?

5 A Yes.

6 Q And I believe that Mr. Smith has indicated
7 he has the privilege log and will provide it to us?

8 MR. SMITH: I e-mailed it to you earlier,
9 you and Jay.

10 MR. M. RICHARDSON: Today?

11 MR. SMITH: Yeah.

12 MR. M. RICHARDSON: And that privilege log
13 covers both clients?

14 THE WITNESS: No.

15 MR. BALSER: We have -- we have a separate
16 privilege log we e-mailed to you, as well, and
17 we have a hard copy for you, as well.

18 MR. M. RICHARDSON: Okay. Good.

19 BY MR. M. RICHARDSON:

20 Q And then when -- so when you got it back
21 from the two different owners, you did two things.
22 One, you removed all of the documents that each
23 owner indicated was privileged, and you also
24 redacted certain documents at their direction?

25 A No, I didn't do any redactions. I

1 substituted PDFs of the MSG files that contained the
2 redactions for the MSG files.

3 Q So you actually received the redacted
4 version back from the clients?

5 A I did.

6 Q Okay. And then from that, you produced
7 all the non-privileged and the redacted documents on
8 the thumb drive that you gave us today?

9 A I did, yes.

10 Q And you left the privilege log to the
11 two --

12 A They told me they would take care of it,
13 and I think they have.

14 MR. M. RICHARDSON: That's all I had to
15 put on the record about that.

16 MR. BALSER: Okay. I'm just going to ask
17 a few quick follow-up questions, and then we'll
18 call it a day.

19 - - -

20 EXAMINATION

21 - - -

22 BY MR. BALSER:

23 Q Mr. Wenick, very early in the day, you
24 mentioned a phone call, I believe, that you received
25 from Wallace Lightsey --

1 A Yes.

2 Q -- in which you were informed that your
3 clients had waived the privilege. Did I hear you
4 correctly?

5 A Yes.

6 Q When did you receive that phone call from
7 Mr. Lightsey?

8 A Well, the best way for me to answer that
9 is to look at the Notice of Deposition. So it would
10 have been between the time that I received that
11 notice and today. The notice is dated September 17,
12 2018. So it would have been within the last,
13 roughly, two weeks.

14 Q And tell me what you recall about that
15 telephone conversation.

16 A Mr. Lightsey asserted to me that -- that
17 both SCANA and Santee Cooper had waived the
18 privilege as to anything related to the Bechtel
19 report. And to back up his position, he sent me
20 certain documents that he's intended documented that
21 waiver by SCANA. And he said, "If you need anything
22 from Santee Cooper, please tell me."

23 Well, of course I didn't rely on
24 Mr. Lightsey, so I did my own investigation after
25 that.

1 Q Okay. Did he ask you anything
2 substantively about your work on the matter?

3 A No, he did not.

4 Q What was the purpose of the call, as you
5 understood it?

6 A He -- he called because he wanted --
7 actually, it was before I received the notice,
8 because he called and he wanted to coordinate
9 schedule. And really that was -- that was all it
10 was. And so it would have preceded the September 17
11 notice, now that I think of it.

12 Q Did you have an understanding as to who
13 Mr. Lightsey represented?

14 A He told me.

15 Q And who did he tell you he represented?

16 A The Office of Regulatory Staff.

17 Q Throughout the day today, you've been
18 asked repeatedly questions about discoverability or
19 disclosure of the Bechtel report. And you've been
20 fairly religious in making clear that your concern
21 about disclosure and discoverability related only to
22 disclosure and discoverability of the Bechtel report
23 by Westinghouse in potential litigation between the
24 owners and the consortium; is that correct?

25 A I hope -- I hope that I've made that

1 clear, because that is my view.

2 Q And just so the record is crystal clear on
3 the point, you at no time during your representation
4 of SCE&G or Santee Cooper in this matter were
5 concerned about or considered whether the Bechtel
6 report could be disclosed or discoverable to the
7 Public Service Commission of South Carolina,
8 correct?

9 A Correct. That was never my concern, and
10 that concern was never expressed by my clients in my
11 presence.

12 Q And you were never concerned or thought
13 about or analyzed disclosure and discoverability of
14 the Bechtel report to the Office of Regulatory
15 Staff?

16 A Correct.

17 Q And at the time that you were asked by the
18 client to -- clients to engage Bechtel as a
19 consulting expert for you, that was well before the
20 October amendment to the EPC, correct?

21 A Yes. I think -- I think I dated it with
22 some precision by reference to the e-mail that
23 was -- that e-mail was in May of 2015.

24 Q And at that time, the prospect -- that is,
25 as of May 2015, the prospect of litigation between

1 the owners and the consortium was very real, was it
2 not?

3 A It was very real. They had already
4 initiated litigation on the Vogtle project. They
5 were not shy about going to court. I know their
6 lawyers. I know they're aggressive and they're,
7 again, not shy about going to court. And we had
8 substantial disputes of hundreds of millions of
9 dollars between the parties. And litigation seemed
10 imminent. And shortly after May, litigation was
11 expressly threatened.

12 Q By the consortium?

13 A By the consortium against the owners.

14 Q And once -- now fast forward to
15 February 2016. We have the EPC amendment which
16 released all of those claims that were very real at
17 the time that the Bechtel engagement occurred.

18 And you've testified about the fact that
19 there was still the prospect down the road of
20 potential litigation between the consortium and the
21 owners over potential liquidated damages in the
22 future.

23 A My -- every instinct that I could bring to
24 bear, based upon my training and experience, told me
25 that this contractor was going to pursue claims, and

1 that they could well be substantial liquidated
2 damages issued or litigated at the end of the
3 project.

4 And I say "at the end of the project"
5 because the DRB would resolve -- would address
6 claims and suspend some during the project.

7 But I anticipated that, frankly, that that
8 would be my last case in my professional career, and
9 that it was likely to happen.

10 Q And in February of 2016, you were
11 concerned that a half-baked, methodologically
12 unsound report that wasn't protected by the
13 privilege could eventually be used against the
14 owners in litigation with the consortium if it were
15 not properly protected under the attorney-client
16 privilege; is that correct?

17 A Yes. And then those -- you are repeating
18 to me words that I've used to characterize the
19 Bechtel report, half-baked, based upon an unsound
20 methodology. And, of course, there were other ways
21 in which I explained my concern about that report
22 and how it could be misused to the owners' detriment
23 in litigation with the contractor.

24 MR. BALSER: That's all I have. Thanks.

25 MR. M. RICHARDSON: Anybody else need to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

put something on the record today?

All right. We'll reconvene as soon as we can get it scheduled.

THE VIDEOGRAPHER: All right. The time is approximately 5:43. This will suspend today's deposition of George Wenick. We are off the record.

- - -

(Deposition was adjourned at 5:43 p.m.)

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DISCLOSURE STATEMENT

STATE OF GEORGIA:

COUNTY OF FULTON:

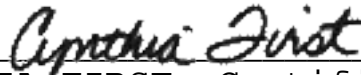
Pursuant to Article 10.B of the Rules and Regulations of the Board of Court Reporting of the Judicial Council of Georgia, I make the following disclosure:

I am a Georgia Certified Court Reporter. I am not disqualified for a relationship of interest under the provisions of O.C.G.A. 9-11-28(c).

I am an independent contractor acting on behalf of EveryWord, Inc. My office was contacted by Mr. Richardson to provide court reporting services for this proceeding.

EveryWord, Inc. will not be taking this proceeding under any contract that is prohibited by Georgia law.

This the 2nd day of October 2018.



CYNTHIA FIRST, Certified Court Reporter Georgia Cert. No. 2721 Registered Professional Reporter Certified Realtime Reporter

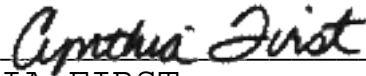
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Cynthia First, Registered Professional Reporter, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.



CYNTHIA FIRST
Certified Court Reporter
Georgia Cert. No. 2721
Registered Professional Reporter
Certified Realtime Reporter