

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



THE ATOMIC SAFETY AND LICENSING BOARD

Marshall E. Miller, Esquire, Chairman
Michael L. Glaser, Esquire, Member
Sheldon J. Wolfe, Esquire, Member

In the Matter of)	
)	
HOUSTON LIGHTING AND POWER COMPANY, et. al.)	Docket Nos. 50-498A
)	50-499A
(South Texas Project,)	
Units 1 and 2))	
)	
TEXAS UTILITIES GENERATING COMPANY, et al.)	Docket Nos. 50-445A
)	50-446A
(Comanche Peak Steam Electric Station,)	
Units 1 and 2))	

ORDER MODIFYING HEARING SCHEDULE
(December 14, 1979)

The Department of Justice (Justice) filed a motion on November 30, 1979, requesting the Board to modify the hearing schedule set forth in its Order of July 24, 1979. Justice sought to extend the period of discovery beyond December 31, 1979, and to advance the date of commencement of the evidentiary hearing and the precedent filing of witness lists, summaries of testimony and trial briefs. Justice also requested the issuance of subpoenas for the depositions of witnesses to be scheduled in January and February 1980.

On December 5, 1979, the Public Utilities Board of the City of Brownsville, Texas (Brownsville) filed a response in support of Justice's motion. It stated that certain transcripts of depositions and documents to be produced had not yet been received, and that

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additional time for discovery would permit a more thorough preparation in advance of hearing. CSW, et al. also supported the motion, and listed a number of depositions which should be taken. It also stated that the parties had been diligent in pursuing discovery, and that in the 97 business days between July 17 and November 30, 1979, various parties participated in 68 depositions in 15 different cities, some simultaneously.

On December 10, 1979, TUGCO filed an opposition to the motion, controverting many facts asserted in the motion, stating that good cause for delay was not shown and that opposing parties had not been diligent in discovery. It moved to quash the subpoenas which had been issued and for other relief. A similar opposition was filed by Houston Lighting and Power Company (HL&P) on December 11, 1979.

I.

It is apparent from an examination of the monthly discovery reports filed by all parties, as well as various discovery motions which have been made from time to time, that very extensive use has been made of interrogatories, document production requests and depositions. While there may be some disputes as to when certain depositions could have been scheduled, nevertheless all counsel appear to have diligently pursued extensive discovery. Even before the pending motions regarding scheduling were made, the Board had come to view the present schedule dates as somewhat unrealistic if

not possibly unfair. Accordingly, Justice's request for the issuance of subpoenas for depositions to be taken in January and February, 1980, was deemed reasonable and the subpoenas were signed before the balance of the motion and the responses thereto were considered.

It is important for all relevant matters to be thoroughly explored in discovery, both to insure the completeness of the record and to enhance the capability of sharpening issues and reducing trial time. It should also be noted that some of the parties have had the benefit of a trial touching upon some of the disputed facts in the prior federal court antitrust proceeding.^{1/} Justice and the Staff

^{1/}TUGCO at pp. 16-17 of its Opposition to the Motion belittles the argument of Justice regarding the impact of the HL&P appeal of the Board's Order respecting collateral estoppel as not applicable to this court decision, stating that the "Appeal Board has set December 14, 1979 for completion of briefing this matter." However, we note that on December 12, 1979, TUGCO filed with the Appeal Board its "TUGCO's Response to and Joinder in Houston Lighting and Power Company's Request for Directed Certification and Review of Rulings on Collateral Estoppel and Summary Decision." By this document "TUGCO supports and joins in the petition of" HL&P for directed certification and review of our Order of October 5, 1979, and files a 34-page brief in support of TUGCO's own position below, which was not previously the subject of any requested appellate review. TUGCO further states that "...these appeals must be heard now or not at all", and that the "question presented goes to the very heart of participation on all issues by an intervening party" (TUGCO's Response etc., p. 3). It is not clear from these filings that the matters under review, as well as the time and involvement of counsel, could not impact on the previous schedule for conclusion of discovery and commencement of the evidentiary hearing.

have not had this advantage, as well as certain smaller parties to this proceeding who regard themselves as partially dependent upon those governmental parties to develop the evidence in a complex and expensive Section 105c proceeding. The motion of Justice to modify the schedule will therefore be granted.

The motion of TUGCO to quash the 23 subpoenas issued at the request of Justice is also denied. These subpoenas allegedly call for testimony relevant to the issues of competition in the electric utility industry in Texas, access to nuclear power plants, other sources of generation and transmission, and interstate-intrastate operation of Texas electric utilities (Justice's Motion, p. 7). These are significant issues in this proceeding and we can perceive no good reason to prevent their development by all parties.

II.

Both HL&P and TUGCO have raised other questions regarding discovery procedure upon which they are entitled to relief. It is asserted that these respondent parties have not been informed what theories of antitrust misconduct or supporting facts will be presented by Justice or the Staff. Interrogatories concerning fundamental antitrust issues such as competition and relevant markets have not been fully answered, and depositions of the expert witnesses have furnished little substantive information (Response of HL&P, pp. 2-4; TUGCO's Opposition, pp. 13-16). It would be manifestly unfair to shield expert witnesses from discovery on the grounds that they have

not yet reached conclusions upon which they will give opinion testimony.

Accordingly, the revised schedule will give additional time for the discovery of expert witnesses after the factual discovery has been terminated. The parties who are essentially defending against an affirmative finding of anticompetitive consequences under Section 105c (HL&P, TUGCO, et al.) shall also be permitted to file their trial briefs and witness summaries two (2) weeks after the other parties file such documents. In this connection, all parties are directed to make their expert witnesses available for discovery seasonably upon reaching their conclusions as the facts are developed. It is expected that preparation of opinion testimony by expert witnesses will proceed concurrently with on-going factual discovery, and will not be unreasonably deferred or delayed.

III.

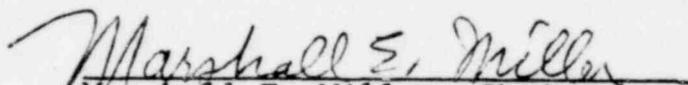
All prior schedules are hereby rescinded, and the following schedule shall control the conduct of these proceedings:

- February 29, 1980 - Completion of all fact discovery.
- March 28, 1980 - Completion of expert discovery, including testimonial, documentary, exhibits and opinion evidence.
- April 14, 1980 - Filing of witness lists, concise summaries of testimony, initialed exhibits, and trial briefs by the Staff, Justice and other complaining parties.

- April 28, 1980 - Filing of witness lists, concise summaries of testimony, initialed exhibits, and trial briefs by HL&P, TUGCO and other responding parties.
- May 5, 1980 - Final prehearing conference pursuant to 10 CFR §2.752.
- May 14, 1980 - Evidentiary hearing.

It is so ordered.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Marshall E. Miller, Chairman

Dated at Bethesda, Maryland
this 14th day of December 1979.

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