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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

RESPONSE OF DEPARTMENT OF JUSTICE TO TUGCO'S
OBJECTIONS AND MOTIONS FOR PROTECTIVE ORDERS REGARDING
CERTAIN OF DEPARTMENT'S INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS

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February 6, 1979

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I. INTRODUCTION

On January 12, 1979, the Department of Justice ("Department") served its FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS ("Interrogatories") upon Texas Utilities Generating Company ("TUGCO"). Subsequently, the Department agreed informally to a joint 30-day response period both for producing documents and for replying to interrogatories. On December 20, 1978, TUGCO formally asked the Board for more time, requesting that the deadline be moved to January 12, 1979. The Department did not oppose this motion.

On January 12, 1979, the Department was served by mail with the ANSWER OF TEXAS UTILITIES COMPANY AND ITS SUBSIDIARIES TO THE FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS FROM THE DEPARTMENT OF JUSTICE ("TU's Responses") and with TUGCO'S OBJECTIONS TO AND MOTIONS FOR PROTECTIVE ORDERS REGARDING CERTAIN OF DEPARTMENT'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS ("TUGCO's Objections"), to which this pleading responds.

At no time during the period November 22 through January 12, inclusive, did counsel for TUGCO indicate to the Department that they had problems with any of the Department's interrogatories and/or its document requests. It was only on January 12, when TUGCO's Objections were filed, that the Department became aware of these problems. This, of course, made it impossible for the Department to work with counsel for TUGCO to resolve these matters informally.

The mostly frivolous objections which TUGCO raises, coupled with the insufficient answers it has supplied to several of the Department's interrogatories and its failure to provide any documents other than those produced in the

case of West Texas Utilities Company, et al., v. Texas Electric Service Company, et al., No. CA-3-76-0633-F (N.D. Tex., Dallas Div.) ("civil case"), may well impair the ability of the Department to develop its case within the April 9, 1979, closure date for discovery. Without adequate discovery, the Board will not be presented with the fully developed records which it needs in order to render decisions in these complex proceedings.

This is not the first time the Department has encountered delays due to actions of TUGCO and/or its counsel. In the past, TUGCO has substantially slowed the Department's discovery efforts by its lack of cooperation in scheduling informal document review (three weeks), in delivering copies of the documents requested by the Department during that review (one month) and in providing a list of purportedly privileged documents (three months). This unbroken pattern of recalcitrance has been documented in the Department's monthly progress reports filed with the Board. Such a course of conduct is at variance with TUGCO's frequently stated desire to resolve expeditiously these matters before the Board. 1/

1/ See, e.g., Transcript of December 5, 1978, Pretrial Conference at 31.

At one point in its Objections, TUGCO states that, during the June 21, 1978 Prehearing Conference, the Department noted "that it would be working on a proposed factual stipulation and that it hoped it would be in a position to put forward a draft of such stipulation 'about four months into discovery'" (TUGCO's Objections at 4). TUGCO then commented that if the Department would come forward with such a draft stipulation, it might be possible to resolve many, if not all, of the disputes surrounding discovery (See TUGCO's Objections at 5). However, the Department must have command of all the facts pertinent to the proceedings before it can tender a draft stipulation. Accordingly, the Department will not be able to tender such a stipulation until TUGCO fully and faithfully discharges its discovery obligations to the Department.

II. RESPONSE TO TUGCO'S OBJECTIONS

TUGCO's Objections to the Department's interrogatories fall into three categories: (a) those that relate to the definitional section of the interrogatories; (b) those that pertain to the accompanying instructions; and (c) those that relate to specific interrogatories and/or document requests. In this Response, the Department will discuss each of these three categories separately and will demonstrate that, in

each instance, TUGCO's objections should be overruled and its motion for a protective order denied.

A. TUGCO's Objections to the Department's Definitions

TUGCO raises two principal objections with respect to the "Definitions" section of the Department's Interrogatories (see Interrogatories, Section A, at 2-5). TUGCO's first objection relates to definition A.3, and will be addressed in our discussion of TUGCO's objections to the Department's instructions.

TUGCO's other objection in this first category pertains to definition A.8, which provides, in pertinent part, that:

Requests concerning a subject or item should be understood to include possible or contemplated actions as to such subject or item. (Interrogatories at 5.)

TUGCO would have the Department append language requiring "no more than a reasonable inquiry of likely officers as to their recollection of contemplated actions, and limited to such contemplated actions as reached the stage of discussion among senior management" (TUGCO's Objections at 3).

The Department has no objection to TUGCO's interpreting the definition at issue so as to require only a reasonable inquiry of those persons likely to be possessed of relevant knowledge. Indeed, the NRC discovery rules do not require

more than that, and the Department expects no more. Because of the varying interpretations which can be placed upon the phrase "senior management," the Department does object, however, to limiting responses to "such contemplated actions as reached the stage of discussion among senior management."

B. TUGCO'S Objections to the Department's Instructions

1. The Department's Instruction, Contained in Section C of Its Interrogatories, Requiring that Purportedly Privileged Documents Be Delivered to the Board Under Seal, Is Based Upon Sound Practical and Policy Considerations and Is Not Unduly Burdensome

The first instruction contained in the Department's Interrogatories to which TUGCO objects is that portion of Section C, "Period Covered and Privilege", which reads:

All documents for which privilege is claimed shall be submitted to the Licensing Board under seal no later than the last day for this document production. (Interrogatories at 6.)

TUGCO maintains that this procedure will unnecessarily burden the Board. (See TUGCO's Objections at 3.) In a list mailed to the Department in late December, 1978, TUGCO indicated that approximately 96 pages of documents had been excepted, on the grounds of privilege, from the informal document production earlier made to the Department.

To date, TUGCO has identified no additional purportedly privileged documents. 2/ Whether the delivery of so few documents would constitute a burden is for the Board, not TUGCO, to decide.

Even more importantly, there are sound practical and policy considerations justifying this instruction. Those considerations are discussed at length in the RESPONSE OF THE DEPARTMENT OF JUSTICE TO HOUSTON LIGHTING & POWER COMPANY'S OBJECTIONS AND MOTION FOR A PROTECTIVE ORDER REGARDING THE DEPARTMENT'S DISCOVERY REQUEST, Section IIC, at 9-12, being filed simultaneously with this pleading, and need not be repeated here. Suffice it to say that, for the reasons discussed there, TUGCO's objections to the instruction contained in Section C of the Department's interrogatories should be overruled.

2. The Department's Instruction, Permitting TUGCO to Identify Documents Already Provided to the Department in Lieu of Furnishing Further Copies, is Neither Unduly Burdensome Nor Inconsistent With the Board's Order Governing Discovery

TUGCO further objects to the Department's instruction contained in Section E.1, as well as in Definition A.3,

2/ Nor has TUGCO produced to the Department any additional documents. This is one of the subjects addressed in detail in the Department's motion to compel, which is being filed along with this Response.

which directs that where requested documents have already been produced to the Department informally, it is sufficient for TUGCO to identify those documents (indicating to which requests they respond) rather than to provide extra copies of them. TUGCO maintains that this instruction, included by the Department to spare needless duplication, is "burdensome and uncalled for and inconsistent with the letter and spirit of the stipulation of the parties regarding discovery in other proceedings and the Licensing Board order on the same subject." (TUGCO's Objections at 3-4.)

TUGCO's objection is bottomed on the notion that it should not be asked to perform any tasks in connection with these proceedings which it has not already performed in connection with other previous or pending actions. Moreover, TUGCO seems to contend that the Department is obliged to accept the fruits of those previously performed tasks in the exact form in which they were offered to opposing parties in the other actions.

TUGCO's arguments are wholly without merit. First, the July 13, 1978 Order of the Board (embodying the parties' stipulation) cannot be construed as supporting TUGCO's position. To the contrary, directive 3 of that Order (at 7)

mandates that any party shall be allowed to obtain discovery beyond that obtained in other actions, and directive 5 (id.) imposes upon TUGCO the obligation to "cooperate to provide the other parties to this proceeding mutually convenient access to the materials covered by this order and the opportunity to obtain copies of such materials".

The Department, following both the spirit and the letter of this Order, began its discovery effort last fall by informally reviewing, and requesting copies of, the documents produced by TUGCO (and others) in connection with the civil case. Those documents had not been structured according to topic, nor did they seem to relate to particular discovery requests in the civil case. That this was considered a satisfactory discovery effort in another action does not foreclose the Department in these proceedings from directing that, in response to its formal discovery requests, documents be produced in a meaningful fashion, that is by identifying the interrogatory to which they relate. This is nothing more than the Department would ask in any proceeding and it does not believe it must accept less simply because the parties here were previously involved in somewhat similar litigation.

TUGCO complains that:

for the Department to cast upon TUGCO the burden of determining which of the documents the Department requested and already has should be matched with what questions in its current interrogatories and document requests is for the Department to have TUGCO do its indexing. It would be unduly burdensome and expensive for TUGCO to have to match up documents already provided with after-the-fact questions, especially where the questions do not reflect an effort to avoid duplicative discovery. (TUGCO's Objections at 4).

It stretches credulity to believe that TUGCO could respond fully to the Department's interrogatories without going through all of its documents and, by matching up those documents with the Department's individual requests, ascertain which of the documents have already been produced to the Department (pursuant to its informal discovery), and which now need to be produced.

Contrary to TUGCO's assertion, the interrogatories were expressly designed to avoid duplicative discovery. Not once has TU identified the particular responses which allegedly are duplicated by the Department's interrogatories. Nonetheless, despite the Department's attempt to avoid duplicative requests, despite the differences between these proceedings and the civil case and despite the fact that discovery in the civil case closed over a year and a half ago, no new documents were produced by TUGCO in response to

the Department's interrogatories. Moreover, there was no indication or assertion by TUGCO that it had made any file search of materials produced since discovery in the civil case closed on July 15, 1977, or that it had searched its files relating to new areas explored in the Department's interrogatories.

In order for the Department to be assured that a complete search has been undertaken in connection with the Department's interrogatories, it is essential that TUGCO indicate to which requests particular documents, including those previously produced, respond. The Department maintains that Instruction E.1, and the procedures it establishes for identifying documents and relating them to particular discovery requests, are reasonable, necessary and not unduly burdensome.

C. TUGCO's Objections to Specific Requests in the Department's Interrogatories

Finally, TUGCO objects to particular interrogatories and document requests contained in the Department's interrogatories numbered 4, 7, 9, 16, 20, 21, 23 and 25. TUGCO's objections to each of these interrogatories will be discussed individually below. Some of those objections lack any proper foundation; others can be easily met without the Board issuing a protective order. The Department again

reiterates that, had TUGCO indicated during the period between November 22 and January 12 that it perceived problems with the Department's interrogatories, the Department would have attempted to alleviate those problems.

1. Interrogatory 3

TUGCO first objects to the Department's third interrogatory, which states:

- (a) Describe in detail the reasons, factors or policies which were considered by HL&P and/or TESCO in determining to disconnect on May 4, 1976, from other Electric Utilities with which they had been interconnected.
- (b) Provide all documents which relate to the response to this interrogatory. (Interrogatories at 9.)

TUGCO objects to this interrogatory because it employs the phrase "[d]escribe in detail". This phrase simply expresses the general good faith requirement which must be met by any party responding to interrogatories, namely that as much detail must be provided as is reasonable. The first set of interrogatories filed in these proceedings by TUGCO, along with Houston Lighting and Power Company, employed a similar phrase, "specify the exact details", in questions 17 and 20(b). Such phraseology is both common and appropriate in discovery requests. Any objection by TUGCO to the use of that phrase is frivolous and should be overruled.

2. Interrogatory 4

TUGCO next objects to the Department's fourth interrogatory, which reads:

In order of their relative importance, describe the underlying policies or bases upon which HL&P and TU justify their refusal to engage in the interstate transmission or reception of electrical power or energy or to be interconnected with any other Electric Utility engaged in interstate commerce; provide any documents which state or describe these policies or bases. (Interrogatories at 9.)

TUGCO objects to that portion of this interrogatory which directs that its reasons for particular conduct be ranked "in order of their relative importance." Simply listing a universe of facts which may have led to a certain course of conduct provides an imbalanced and incomplete explanation of why that particular course of conduct was undertaken. The interrogatory asks only that TUGCO distinguish between determinative and non-determinative reasons or policies. Such a request is not unduly burdensome and does not justify the issuance of a protective order. This objection should, therefore, be overruled.

3. Interrogatory 7

The Department's seventh interrogatory reads:

(a) Identify every occasion upon which TESCO either threatened to open or in fact did open any or all of its interconnections with West Texas Utilities Co. (b) With

respect to each such occasion identified in response to (a), describe and/or identify all individuals involved in either threatening to open or in actually opening interconnections, the surrounding circumstances, the substance of any such threats, the recipient(s) of any threats, and the response(s) of all involved individuals or entities to any threatened or actual disconnections. (c) In addition, identify and describe each reason, justification, or policy which led TESCO either to threaten disconnection or actually to disconnect from WTU. (d) Provide all documents which relate to the response to this interrogatory. (Interrogatories at 10-11).

TUGCO objects to this interrogatory because of its use of the term "threats," maintaining that such language is argumentative. Ironically, TUGCO employs the very same term ("threaten") in response to interrogatory 3(a) when it characterizes purported conduct of Central and Southwest Corporation (TU's Responses at 3). This phrase is descriptive, not argumentative, and the suggested substitutes ("advised" or "notified") are not acceptable because they do not convey the idea that a sanction would be imposed, namely disconnection, if a particular course of conduct were embarked upon. Consequently, TUGCO's objection to this interrogatory should be overruled.

4. Interrogatory 9

The Department's ninth interrogatory states:

(a) Identify each and every occasion, if any, upon which HL&P and/or TU communicated with West Texas Utilities Company or Central

Power & Light Company the subject of possible interstate operation by WTU or CP&L, giving the date(s) of any such communication(s), the surrounding circumstances, the individual(s) so communicating, the recipients of any such communication(s) and the response(s), if any, of those recipients. (b) Provide all documents which relate to the response to this interrogatory. (Interrogatories at 12.)

TUGCO claims "there can be no assurances that all occasions of communication and all documents involved have in fact been obtained despite good faith efforts to that end." (TUGCO's Objections at 6). This argument overlooks the fact that the NRC rules and the Department's interrogatories require only that a party make a good faith effort to respond in a reasonably complete fashion. Consequently, TUGCO's objection and request for a protective order should be overruled.

5. Interrogatory 16

The Department's sixteenth interrogatory reads:

(a) State for every wholesale customer of HL&P and TU: the full name or title of the customer; complete address of the customer; and the amount of wholesale power purchased by that customer by year for the period 1950-1978. (b) State all requests received by HL&P and/or TU for wholesale service whether or not such service was ever provided, specifying when the request was received, by whom the request was made, and whether the requesting party was at the time of the request engaged in interstate commerce. (c) Provide all documents relating to the response to this interrogatory. (Interrogatories at 15.)

TUGCO's objection to this interrogatory is, in effect, a request for additional time in which to respond. Had this matter been brought to the Department's attention during the period when TUGCO was drafting its response, a mutually agreeable arrangement might have been reached which would not have impeded the discovery process. The Department has no objection to a reasonable extension of time in which to compile the information sought. The Department also has no objection to allowing some flexibility regarding the form in which the requested data is furnished, provided that TUGCO's ultimate response contains every item of information sought in the interrogatory. Again, TUGCO's objection and request for a protective order are unnecessary and should be overruled.

6. Interrogatory 20

The Department's twentieth interrogatory states:

In reference to the formation of ERCOT, identify each occasion upon which any employee of HL&P or TU engaged in any communication with any other party, individual or entity, specifying the substance of each such communication, the employee of HL&P or TU who made it, the date, the recipient of the communication, and the recipient's response, if any, relating to:

- (a) the advisability of limiting membership in ERCOT to Electric Utilities engaged only in intrastate commerce;

(b) concern about possible antitrust implications of so limiting membership to intrastate Electric Utilities only;

(c) alternative devices or understandings, either formal or informal, whereby Electric Utilities engaged in interstate commerce could be foreclosed from membership in ERCOT without this being made an explicit requirement for membership; and

(d) provide all documents relating to (a)-(c) above. (Interrogatories at 16-17.)

TUGCO's objection, i.e., that it would be virtually impossible to catalogue every communication relating to the subject of the interrogatory, is similar to its objection to interrogatory 9. The Department therefore reiterates here what it said there. Nothing less than a good faith effort to respond in a reasonably complete fashion is acceptable, and a good faith effort to uncover evidence of any and all communications regarding the subjects described, whether or not in written form, is all the interrogatory asks.

As for TUGCO's objection to identifying which of its documents respond to the twentieth interrogatory, the Department would ask the Board to consider the arguments set forth in Section II.B 2 of this Response.

7. Interrogatory 21

The Department's twenty-first interrogatory reads:

In reference to the agreement, understanding, or contractual arrangements whereby HL&P and TU reconnected following their

disconnection of May 4, 1976, identify and specify in detail:

(a) the occasions, instances, and dates upon which negotiations between HL&P and TU, employees relating to possible reconnection occurred;

(b) the precise agreement, understanding or contractual arrangement whereby the reconnection was effected;

(c) any conditions that HL&P and/or TU insisted upon, requested or solicited from the other as a requirement before reconnection could be effected;

(d) any contacts or communications from Electric Utilities other than HL&P and TU pertaining either to reconnection or new interconnections, and the response of HL&P and TU to those communications;

(e) any conditions that HL&P or TU insisted upon, requested or solicited from other Electric Utilities as a requirement before either Company would consider reconnection; and

(f) provide all documents which relate to (a)-(e) above. (Interrogatories at 17-18.)

TUGCO's objection to interrogatory 21, namely that it has been fully addressed in the discovery materials and testimony from the civil case, again presupposes that the civil case is equivalent to this proceeding. This assertion overlooks the fact that TUGCO has an obligation to provide acceptable and complete interrogatory responses in this proceeding. The mere fact that testimony in another forum may relate to this interrogatory is not an acceptable

interrogatory response. Consequently, TUGCO's objection should be overruled.

8. Interrogatory 23

The Department's twenty-third interrogatory states:

(a) Describing the circumstances and providing the date, persons participating, and facilities inspected, identify each occasion upon which employees of HL&P and/or TU (including attorneys retained by either Company) visited the generating plants, relays, installations, or equipment of the other Company, either alone or accompanied by employees of the Company owning the facility, for the purpose of inspecting any relays, mechanical devices, or other equipment designed to prevent the flow of electrical power or energy in interstate commerce;

(b) Describing the circumstances and providing the date, persons participating, and facilities inspected, identify each occasion upon which employees of HL&P or TU visited the generating plants, relays, installations, or equipment of any other company, entity or Electrical Utility (i.e., other than HL&P or TU) for the purpose of inspecting any relays, mechanical devices, or other equipment designed to prevent the flow of electrical power or energy in interstate commerce;

(c) Identify each occasion, occurrence, or date upon which any employee of HL&P or TU requested, provided or received any pamphlets, printed material, reports, or other written matter, pertaining to the installation or maintenance by any Electrical Utility, of any relays, mechanical devices, or other equipment designed to prevent the flow of electrical power or energy in interstate commerce, specifying the date, requested material, material received or provided, and the individuals involved;

(d) estimate how much money has been expended, if any, since 1965 by HL&P and TU for the purpose of seeking to inspect relays, mechanical devices, or other equipment of another Electrical Utility or entity to ascertain whether any electrical power or energy was flowing from that equipment into interstate commerce; and

(e) provide all documents which relate to (a)-(d) above. (Interrogatories at 19-20.)

TUGCO objects to this interrogatory on the grounds of its burdensomeness and, further, that it would require TUGCO to conduct a study in order to respond. TU's summary response is completely unacceptable. It does not identify any individuals, occasions, locations, or facilities inspected. While the Department recognizes that it may not be possible for TUGCO to identify and document each relevant inspection, it is clear that TUGCO is in the best position to ascertain who made any such inspections and the dates and details of such inspections. The interrogatory and the discovery rules direct only that reasonable efforts guided by good faith be undertaken to ascertain the details regarding any inspections relevant to the Department's twenty-third interrogatory. The summary response offered does not satisfy this standard.

The Department does not agree that a study would have to be performed in order to answer this interrogatory. Nonetheless, if TUGCO will provide the basic data, the Department will assess it.

TUGCO's objection and request for a protective order with respect to interrogatory 23 should be overruled, and TUGCO should be directed to answer the interrogatory in accordance with the good faith standard indicated above.

9. Interrogatory 25

The Department's twenty-fifth interrogatory states:

(a) Describe in detail how the desire, practice, preference, or policy of HL&P and TU to operate exclusively in intrastate commerce has affected, influenced, controlled, or modified the design of physical facilities, plants, transmission facilities, or any other construction engaged in by the two Companies; (b) state whether or not the maintenance of intrastate status or operation on the part of HL&P and TU had any impact, influence, effect, or consequences upon the cost of the physical facilities, plants, transmission facilities, or other construction costs borne by the two Companies; (c) indicate an approximate figure representing how much additional cost, if any, was borne by HL&P and TU since 1965 in undertaking new construction or maintenance of existing facilities as a result of any policy or desire to remain exclusively in intrastate operation; (d) state in detail what assumptions and calculations were employed to prepare a response to subsection (c) of this interrogatory; and (e) identify every individual, person or employee of HL&P or TU who decided, or participated in deciding, to design, construct, or build any facility or modify any existing facility in such a manner that the owner Company would not become engaged in interstate commerce. (Interrogatories at 20-21.)

TUGCO objects to this interrogatory on the grounds that it is based on a hypothetical premise, would require a study


to be performed, and that it is argumentative. If TUGCO believes that this interrogatory rests on a hypothetical premise, TUGCO should simply state its belief and supply the assumptions and data that led it to reach that conclusion. Given the continuous planning and engineering studies that utilities of the size of Texas Utilities Company must undertake, the Department doubts that TUGCO would have to perform a new study in order to answer this interrogatory. If the contrary is true, TUGCO should supply the basic data to enable the Department to make its own analysis.

Consequently, TUGCO's objection and request for a protective order with respect to interrogatory 25 should be overruled, and TUGCO should be directed to answer the interrogatory.

III. CONCLUSION

For the reasons stated above, the Department urges this Board to overrule all of TUGCO's objections to the Department's Interrogatories and to deny TUGCO's motion for a protective order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing RESPONSE OF DEPARTMENT OF JUSTICE TO TUGCO'S OBJECTIONS AND MOTIONS FOR PROTECTIVE ORDERS REGARDING CERTAIN OF DEPARTMENT'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS has been made on the following parties listed hereto this 6th day of February, 1979, by depositing copies thereof in the United States mail, first class, postage prepaid.

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