UNITED STATES OF AMERICA

BEFORE THE

NUCLEAR REGULATORY COMMISSION

Houston Lighting & Power Co. et al. (South Texas Project, Units No. 1 and 2)	)	Docket Nos. 50-498A and 50-499A
Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units No. 1 and 2)	)	Docket Nos. 50-445A and 50-446A

ANSWER BY THE PUBLIC UTILITIES BOARD OF THE CITY OF BROWNSVILLE, TEXAS TO MOTION AND SUPPLEMENTAL MOTION BY RESPONDENT GULF STATES UTILITIES COMPANY FOR A PROTECTIVE ORDER AND AN ORDER SETTING CONDITIONS FOR COMPLIANCE WITH SUBPOENA

The Public Utilities Board of the City of Brownsville, Texas ("PUB"), pursuant to 10 C.F.R. §2.730(c) and 10 C.F.R. §2.710, hereby files its Answer to a Motion and a Supplemental Motion by Gulf States Utilities ("GSU"), filed on April 25, 1979, and April 30, 1979, respectively. These motions are in reference to a subpoena duces tecum issued by the Atomic Safety and Licensing Board ("Board") on February 26, 1979 at PUB's request, and served on GSU on March 6, 1979.

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Although the original return date on the subpoena is almost two months past, GSU, despite two extensions at its request, is still not prepared to comply with the full subpoena. GSU now attempts to avoid part of the production under the subpoena without making any showing of burdensomeness or lack of relevance. PUB undertook informal negotiations with GSU to try to speed up discovery and reduce its scope. PUB strenuously objects to GSU's representation, on the basis of these negotiations, that PUB is not really interested in the matters set forth in the schedule to the subpoena. 1/

1/ PUB is concerned that cumulative misrepresentations by various parties about PUB's approach to discovery will create an unjustified impression before this Board.

Already, with regards to the subpoenas duces tecum PUB requested be issued to the Central & South West system companies, Central & South West ("CSW") counsel inaccurately represented them as identical to the original discovery requests to Central Power & Light (CP&L), so that the Board refused to issue them. Transcript of March 20, 1979 Prehearing Conference, pp. 181. Once counsel for PUB pointed out in detail to CSW counsel the numerous reductions in size and scope of these subpoenas, CSW counsel agreed to arrange for production by the CSW companies to the subpoenas as submitted by PUB to the Board without any substantial changes.

GSU also asks the Board to shift all costs of compliance to PUB. This is totally unjustified. GSU is intimately involved in the interstate/intrastate dispute, as for example its participation in settlement negotiations in this proceeding reveals. It is not an innocent bystander. Costs of compliance with this subpoena are a legitimate business cost to GSU, because of its interest in the subject matter and because these costs are part of the expense of regulation. In relation to GSU's total resources, moreover, such costs, about which GSU has failed to provide any detailed information, are small.

GSU's Supplemental Motion seeks to impose absolute secrecy on GSU's settlement discussions with Houston Lighting & Power ("HL&P") and other parties.1/ At the outset GSU ought to disclose the minimal information requested in the subpoena for any documents as to which a claim of privilege is asserted. Such disclosure is within the policies that seek to encourage settlements, and would allow PUB and the Board to assess whether the claimed privilege is

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1/ PUB was taken by surprise by this admission, which only confirms GSU's role as a central participant in the activities under investigation by this Board.

appropriate. Under GSU's proposed total secrecy, PUB believes the only parties who will in fact be ignorant of who is dealing with whom will be PUB, possibly STEC/MEC, and the government.

Other aspects of GSU's proposed Protective Order also go farther than is necessary to protect GSU's legitimate interests, and need to be refined to conform to accepted practices.

I.

THE BOARD SHOULD NOT ORDER THE FULL SCHEDULE FOR PRODUCTION OF DOCUMENTS REPLACED BY A REDUCED SCHEDULE

GSU has mischaracterized its negotiations with PUB about informal discovery in an attempt to reduce unilaterally the number and scope of discovery requests. 1/ GSU's Motion, requesting that the Board order the substitution of another

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1/ While this Board has the power to deny or modify discovery requests on the basis of relevance or burden if these are argued specifically, GSU explicitly declines to make any argument on this basis. GSU Motion p. 8.

schedule for the schedule attached to the subpoena, 1/ leaves the impression that PUB has indicated agreement to the substitution. PUB at no time agreed to this. In the spirit of informal cooperation that this Board has rightly encouraged, PUB tried to reduce GSU's burden of compliance by proposing in effect a phased discovery procedure; that is, certain, more important categories (the March 5 schedule) could be produced first in an effort to reduce or even obviate certain additional production of documents. Until receipt of this pleading, PUB thought GSU understood that PUB did not agree to substituting the March 5 schedule for the full subpoena, especially since PUB rejected such a proposal by GSU to substitute the March 5 schedule for the full subpoena seven weeks ago. Moreover, at that time GSU represented to PUB that production under the reduced schedule could be accomplished in a week, and that the month's extension they requested was necessary only if PUB insisted on full

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1/ The full text of paragraph 1 of GSU's proposed Protective Order is as follows:

> "1. Production by Gulf States of those documents specified in the attached Schedule in lieu of the documents specified in the Schedule to Subpoena for Production of Documents attached to the Licensing Board's order of February 26, 1979, in accordance with the tmers and conditions stated below, shall be deemed full and complete compliance with the order of the Licensing Board."

compliance with the subpoena. If GSU has not been planning to comply fully, what has it been doing in the seven weeks since this discussion?

PUB would like to inform the Board, and refresh the memory of GSU, about the sequence of events and negotiations concerning this discovery request. In the third week of February, 1979, PUB prepared a subpoena for production of documents by GSU. PUB contacted an attorney for GSU, 1/ informed him of the requested subpoena, sent him a copy, and offered to work with GSU informally so as to minimize any burden. After the subpoena was signed by Chairman Miller of this Board, counsel for PUB again contacted that attorney, who apparently had given the matter little thought in the interim. Counsel for PUB advised that they were preparing to have the subpoena served. At this point GSU counsel asked what PUB was most interested in among the topics being subpoenaed. After a discussion GSU counsel asked for a written list of the areas of the subpoena that PUB considered most important so that he could confer with other GSU counsel. That request resulted in the March 5, 1979 letter and

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1/ A member of the firm which serves GSW's general counsel.

schedule (Attachment A) that GSU now claims is PUB's "true demand" for documents. 1/ GSU Motion p. 2.

As the accompanying letter explained, the March 5 schedule was drawn up "as a means of accommodation, and without prejudice to Brownsville's right to seek compliance with the NRC subpoena." 2/ PUB also clearly states in the letter that the schedule "is a subset of...the requests for documents to which GSU would be obligated to respond under subpoena." The reason for PUB proposing a reduced schedule was time. In a smaller amount of material, which could be produced quickly, PUB might find all the information it required; if not, it might be able to reduce the scope of follow-up requests based on the remainder of the subpoena schedule.

Counsel for PUB reiterated this position to GSU's Washington counsel on March 8, 1979, when Mr. Poirier, representing PUB, was contacted by attorneys from Conner, Moore & Corber, in Washington, D.C., who had been

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1/ PUB's inclusion in an NRC subpoena of items of relatively more and less interest to it is entirely proper. The March [illegible]chedule detailed topics "essential" to the preparation of PUB's case. The general standard for discovery is only that requests may lead to the discovery of admissible evidence. All the items on the subpoena schedule that were excluded from the March 5 schedule meet this standard, and GSU does not attempt to argue otherwise. GSU Motion p. 8.

2/ GSU, in quoting from the letter in its Motion at p. 2, chose not to direct the Board's attention to the end of the sentence, suggesting (inaccurately) that the phrase "means of accomodation" meant that Brownsville did intend to prejudice its right to seek compliance with the subpoena.

retained by GSU to deal with the subpoena. They professed a desire to cooperate, but there was a question as to moving the return date for the subpoena from March 13. GSU counsel said that GSU would need only a week's extension if PUB agreed, in advance of viewing materials produced, to substitute the March 5 schedule for the subpoena as issued; otherwise, GSU would require a month to comply. As the attached Memorandum to Files indicates, PUB coursel refused this deal, standing on its right to the production ordered in the subpoena. (Attachment B) It was on the basis of full production that GSU requested and received from this Board first a month's extension, and then an additional two weeks. For example, in its Motion for Further Extension of Time, filed April 9, 1979 at p. 1, GSU stated that its employees were "continu[ing] their search for material responsive to the extensive production request."

During this period, when counsel for PUB and GSU were in contact from time to time, GSU always indicated a search was proceeding both as to the full document request and for the material specified under the March 5 schedule. PUB

counsel inquired several times about production according the March 5 schedule, and was generally informed that a document search was proceeding both on the subpoena schedule and the March 5 schedule. The possibility that full production would not be available on April 25 was not mentioned until April 24. The possibility of PUB counsel travelling to Beaumont to inspect documents, if there was more than a small stack that could be copied in toto, was also frequently discussed; although GSU was thus aware that it could have allowed some searching to be done by PUB personnel, it did not take advantage of this. 1/

The Board should consider an additional reason for denying GSU's request. The Department of Justice and the Commission Staff have both indicated considerable interest in the information GSU would supply in response to the full subpoena. Both governmental bodies have suggested, as GSU is aware, that if GSU production were incomplete, they might resort to additional discovery against GSU. PUB believes

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1/ Although GSU counsel did discuss the extensive search being made, it was in the context of an explanation for the delay; no mention was made that GSU expected PUB to reimburse it for the search until a draft Protective Order was transmitted on April 24.

Justice and Staff have held off on the expectation of production based on the full subpoena. PUB's March 5 schedule, in contrast, was drawn with PUB's interests foremost, and was only recently supplied to Justice and Staff. If GSU is allowed unilaterally to reduce the scope of the subpoena, additional discovery requests from Justice and Staff are likely to be forthcoming. These would increase the burden on GSU, and create substantial additional delays in discovery.

Until very recently, PUB was at a loss to understand why GSU would be inclined to prolong the time to respond to the subpoena, even though GSU raised the possibility of delay whenever PUB did not go along with its suggestions. PUB took at face value GSU's profession of an interest in as speedy a discovery procedure as possible. The recent "Supplemental Motion by Respondent Gulf States Utilities Company for a Protective order and an Order Setting Conditions for Compliance with Subpoena", filed April 30, 1979, sheds light on the situation. GSU, along with HL&P and some of the other parties, is engaged in negotiations to settle this proceeding, GSU Supplemental Motion p. 2, discussions that undoubtedly are attempting to resolve the overall interstate/intrastate

dispute as well. PUB suspected settlement negotiations between some of the parties here have gone on without PUB, especially since the West Texas decision 1/, but PUB had no idea GSU was an active participant. In retrospect, GSU's repeated delays may be seen in a different light. If an overall settlement among investor-owned utilities could be reached, GSU might avoid the subpoena request. Not only could it thus avoid the burden of which it now loudly complains; it would have no obligation to disclose documents that might be embarassing, suggestive of complicity, or confidential and potentially harmful to business. Depending on its tactical position (of which PUB at present has no knowlege, having obtained no discovery from GSU) GSU might also find delaying discovery to be a way of putting pressure on those parties - PUB, the NRC Staff, and the Department of Justice - who are seeking through discovery to investigate fully the interrelationships of the major utilities in Texas, including GSU.

1/ West Texas Utilities Co. v. Texas Electric Service Co., Docket No. CA 3-76-0633-F (N.D. Texas Feb. 27, 1979).

In so doing, GSU would be acting no differently than parties to this proceeding who have dragged out responding to discovery requests. At any rate, what comes clear from the Supplemental Motion is that, far from being a bystander justifiably concerned about the cost of an unexpected discovery thrust upon it, GSU is in fact a participant in the midst of the fray.

To summarize, PUB does not acquiesce in any reduction in the scope of the subpoena served on GSU. PUB's good faith efforts to work out an informal arrangement have apparently been used by GSU to delay production while it conducted settlement negotiations with others. The Board should order GSU to comply immediately with the full subpoena, and to bear the full costs of compliance.

II.

GSU CANNOT RECOVER ANY COSTS OF COMPLYING WITH THE SUBPOENA

GSU's request for the Board to order PUB to pay for all costs of discovery is altogether unjustified.1/ In fact, the Board may not have authority to order reimbursement of expenses to third parties. In any event, the very cases relied

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1/ Paragraph 2 of the draft Protective Order reads in full:

> "City of Brownsville shall bear all costs and expenses incurred by Gulf States in responding to the Licensing Board's subpoena of February 26, 1979."

on by GSU suggest that it ought to recover at best only unreasonably burdensome expenses or expenses not connected to normal business operations. Yet GSU has not even attempted to show that its expenses have been unreasonable or unrelated to normal business. As its involvement in settlement negotiations demonstrates, GSU has a vital business interest in the outcome of this proceeding and is intimately involved with other parties. Whether under the rubric of reasonable business expense or reasonable burden in supplying evidence, the Board is fully justified in requiring GSU to bear all costs associated with this subpoena. GSU also acts improperly in presenting the Board and PUB with a fait accompli, since it has already expended what it described as "hundreds of man hours", rather than discussing in advance the possible kinds of compliance that could cut costs. 1/ GSU incorrectly seeks approval in advance of a principle of full reimbursement, when the cases most favorable to reimbursement indicate that the determination must be made on an individualized and piecemeal basis.

1/ For example, by allowing PUB to inspect files that might contain relevant documents, as a way of reducing GSU's costs or by producing immediately a small part of the requested material to allow narrowing of the remainder of the discovery request. Both methods were suggested by PUB as means to cut time of response, when it appeared that the only problem was time rather than money.

In a recent decision on an identical issue, a Board of this Commission limited costs recovered to the cost of one xeroxed copy of the requested materials. Pacific Gas & Electric Co., (Stanislaus Nuclear Project, Unit No. 1), Docket No. P-564-A, Order of January 25, 1979 (on appeal) (Attachment C) In light of this case, PUB is prepared to pay GSU the reasonable xerox cost of one copy of the documents that it actually receives.

A. The NRC Does Not Have Statutory Authority to Order PUB to Reimburse GSU

GSU makes much of the similarities between Rule 45(b) of the Federal Rules of Civil Procedure, governing subpoenas for production of evidence in federal courts, and 10 C.F.R. §2.720, governing subpoenas by this Commission. GSU Motion p. 3. It ignores the crucial difference: Rule 45(b) specifically mentions power to order costs paid by the requesting party while §2.720 omits this language. 1/ In other contexts, courts have required express statutory

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1/ Rule 45(b) reads:

> For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion mde promptly and in any event at or before the time specified in the subpoena for

(footnote continued on following page)

have required express statutory language to authorize reimbursement of costs. In Turner v. F.C.C., 514 F.2d 1354 (D.C. Cir. 1975) the FCC had refused to charge legal costs of a petitioner to the radio station whose license was challenged, since it had no specific statutory authority. The Court of Appeals affirmed, holding that "before an agency may order reimbursement of expenses, it must be granted clear statutory power by Congress." Id. at 1356. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) (only Congress can authorize an exception to rule governing attorney's fees).

(footnote continued from previous page)

> compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. (emphasis supplied)

Section 2.720(f) reads:

> On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may (1) quash or modiy the subpoena if it is unreasonable or requires evidence not relevnt to any matter in issue, or (2) condition denial of the motion on just and reasonable terms. (emphasis supplied)

Rule 45(b) is not directly applicable to administrative proceedings. United States v. Friedman, 532 F.2d 928, 936 (3d Cir. 1976) (citing notes of Advisory Committee on Rules).

In a state court case, the absence of specific statutory language granting authority to charge costs of producing documents to an original party to the proceeding was held to be an expression of statutory intent that the expenses be absorbed by the utility as part of the cost of doing business. In Central Maine Power Co. v. Maine Public Utilities Commission, 395 A.2d 414 (Maine 1979), in response to a motion by a customer of the Bangor Hydroelectric Company ("Bangor Hydro"), the Public Utilities Commission issued an order making a neighboring utility, Central Maine Power ("CMP"), a party, and requiring production of documents. CMP challenged the order in the Maine Supreme Court as unconstitutional (under the 5th and 14th Amendments) and burdensome. The Court upheld the Commission. On the issue of costs, it stated:

> Whatever the wisdom or fairness of requiring CMP, in effect, to absorb the costs it must incur in an investigation instigated by a customer of Bangor Hydro, the resulting burden is unavoidable under the applicable statutes. Title 35 grants the Commission broad authority to compel the production of information from public utilities but makes no provision concerning the cost of complying with orders issued pursuant to that authority. In effect, the legislature has determined that such expenses are to be absorbed by public utilities as a cost of doing business.

395 A.2d at 432 (emphasis supplied). This Board should likewise find that GSU must absorb its expenses in complying with the subpoena.

This Board should consider an order issued by an Atomic Safety and Licensing Board on January 25, 1979, in Pacific Gas and Electric Company, (Stanislaus Nuclear Project, Unit No. 1), NRC Docket No. P-564-A. There an intervenor, the State of California Department of Water Resources ("DWR") applied for the issuance of a subpoena duces tecum under 10 C.F.R. §720 to the custodian of records of the Southern California Edison Company ("Edison"), not a party to the proceeding. After unsuccessful negotiations, Edison moved to quash the subpoena, and in the alternative requested all costs of compliance be assessed against DWR. On this point, identical to the issue of costs here, arguments were made about whether the Commission had any authority to shift costs, and whether, if it did, costs were unreasonable in the case. 1/ The Board ordered Edison to comply with the

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1/ Notice of Motion to Quash Subpoena Duces Tecum, Memorandum of Law in Support Thereof, Affidavit in Support Thereof, pp. 28-35. (Brief of Edison); Answer of Department of Water Resources to Southern California Edison Company Motion to Quash Subpoena Duces Tecum, pp. 30-38, January 15, 1979.

subpoena, and ordered DWR to pay only for the cost of copying documents it had requested. Order of January 25, 1979, p. 3.

Edison has appealed the refusal of its motion to quash. There has not yet been a decision by the Atomic Safety and Licensing Appeal Board, but it should be noted that the NRC Staff, in its Brief in Support of the Licensing Board's Order Denying Southern California Edison Company's Motion to Quash Subpoena Duces Tecum, filed April 18, 1979, argues at pp. 21-25 that there is no authority for the Commission to reimburse Edison directly or to order DWR to reimburse Edison.

The Board's order in Stanislaus did not articulate the basis for its decision. Its assessment of the cost of copying the documents, but no other costs, is explained by analogy to 10 C.F.R. §2.741(a)(1). That section, governing requests for production of documents between parties (as opposed to a subpoena duces tecum to a non-party), permits any party to request any other party to "[p]roduce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents...." Section 2.741(a)(1) thus paradigmatically divides the burden of discovery as follows: the party discovered against must produce; then the discovering party may inspect and copy.

In Stanislaus, the Board simply applied this principle to discovery against a non-party. Edison was required to bear the costs of producing a response to the request, DWR had to supply its own personnel to inspect, and had to pay for a copy of the documents. 1/

In this proceeding, the parties have all acted among themselves according to this distinction, absorbing the costs of producing, while billing the requesting party for reasonable copying costs. The Board should extend this principle to non-party production here. After all, §2.720(a) authorizes subpoenas requiring the "production of evidence," not its copying; accordingly, the subpoena commanded GSU "to make [documents] available for inspection and copying...." Subpoena p. 1. GSU, in its Motion for Extension of Time of March 7, 1979, at p. 3, asked to be treated as a party

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1/ The Stanislaus order must be understood in this way. Otherwise, the Board's order to DWR to pay costs could only derive from authority under §2.720(f) to condition denial of a motion to quash on just and reasonable terms. But the Stanislaus order contained no findings as to the reasonableness of this condition, nor any explanation of why shifting copying costs might be reasonable while shifting the other costs of complying with the subpoena was not. It seems clear that the Stanislaus decision was based on the distinction between producing and inspecting and copying set forth in 10 C.F.R. §2.741(a)(1).

under §2.741(d), governing the time for response to a request for production of documents. It should be equally willing to be treated as a party for purposes of §2.741(a)(1).

Accordingly, PUB requests the Board to order GSU to bear the full cost of producing documents in response to the subpoena. PUB is willing, in accordance with the Stanislaus ruling, to pay for xeroxing one copy of documents that it receives. 1/

B. No Circumstances in This Case Justify Allowing GSU to Recover Any Costs of Compliance With the Subpoena Even if There Was Authority to Provide Therefor

1. GSU is Not a Bystander in This Litigation, and Should Bear Costs of Discovery as a Party Would

Even if GSU's position were supportable, and this Commission could require more than xeroxing costs in this sort of proceeding, no such result would be appropriate here. Much of whatever force GSU's argument has derives from its posture as an innocent outsider beleaguered by the subpoena PUB has thrust upon it. As revealed by GSU's Supplemental Motion, GSU is an active participant in the overall controversy. It is totally inconsistent for GSU to claim the privilege accorded by this Board to HL&P, as a party trying to negotiate a settlement, and yet avoid costs of responding to discovery requests that every party in this

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1/ Any copying of documents by GSU for its own benefit, however, such as making copies for its records should be born by GSU. It is not part of the cost of compliance. See United States v. Davey, 545 F.2d 996, 1001 (2d Cir. 1976).

proceeding has absorbed. 1/ It should not be overlooked that GSU has sought to intervene in the proceeding initiated by the Central and South West Companies before the Federal Energy Regulatory Commission. 2/ (Petition for Leave to Intervene attached as Attachment D). GSU there claims an interconnection to the Texas Interconnected System would be economically advantageous to it in the Mid 1980's. Thus, although GSU is not a party in this forum, it has elected to participate in the litigation generated by the overall controversy over interstate/intrastate operation of utilities in Texas. As such, GSU should be prepared to bear the costs of litigation just as the parties before this board do. It is not the "neutral witness" it suggests itself to be. 3/

2. GSU Should Bear The Reasonable Costs of Providing Evidence

As a general rule:

> "[e]ven though the subpoena is addressed to a non-party, inconvenience occasioned by compliance with the subpoena is not a sufficient reason to quash."

1/ GSU stated, in its Motion for Extension of Time dated March 9, 1979, at p. 2, that it required "some time simply to familiarize itself with the antitrust review under way...." Its participation in settlement discussions indicates a prodigious progress in its knowledge of the case.

2/ Central Power & Light Co., et al., FERC Docket No. EL 79-8.

3/ GSU Motion p. 6, citing from In Re Grand Jury Subpoena Duces Tecum Issued to the First National Bank of Maryland Dated November 4, 1976, 436 F. Supp. 46, 48 (D. Md. 1977)

Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 762, 767 (D.C. Cir. 1965).1/ This is so for several reasons. First, every person has some degree of public duty to provide evidence, even when burdensome. "It is beyond dispute that there is a public obligation to provide evidence...and that this obligation persists no matter how financially burdensome it may be." Hurtado v. United States, 410 U.S. 578, 589 (1973), reh. denied, 411 U.S. 978 (1973). Apparently GSU does not believe this public duty extends to it when it is asked to provide information that may be reviewed by this Board.

GSU is a regulated utility, however, and customarily bears the costs of supplying information to various regulatory agencies. This is part of the quid pro quo in which GSU derives substantial advantages from its status as a governmentally sanctioned monopoly - franchises, the right of eminent domain, and so on. The costs of responding to this subpoena are among the normal costs incurred by regulated utilities GSU is simply providing information required for a regulatory agency to perform its statutory duty. The fact that a private party requested the information is immaterial. Since the subpoena request is relevant, as GSU concedes, it is pertinent to the scope of the agency's inquiry.

1/ Other cases make the same point. E.g., In re Subpoena Duces Tecum issued to the First National Bank of Maryland Dated November 4, 1976, 436 F. Supp. 46, 51 (D. Md. 1977); Pathe Laboratories v. du Pont Film Manufacturing Corp., 3 F.R.D. 11, 14-15 (S.D.N.Y. 1943).

Moreover, GSU is no stranger to the proceedings of this Commission. Even though not a party to the South Texas licensing proceedings, GSU has sought licenses for other nuclear plants from the Commission -- for example, the River Bend plant. Accordingly, within the narrower domain of regulation of nuclear energy, GSU is a regulated company deriving substantial benefits, and has a duty to share the costs of regulation by providing information subpoenaed by the agency.

Many cases reflect, as justification for requiring a non-party to bear costs, the sacrifice reasonably required for the welfare of the public. "There is a continuing general duty to respond to governmental process; in consequence, subpoenaed parties can legitimately be required to absorb reasonable expenses of compliance with administrative subpoenas." SEC v. Arthur Young & Co, 584 F.2d 1018, 1033 (D.C. Cir. 1978) (Cited at GSU Motion p. 6) (application for certiorari pending). Accord, United States v. Continental Bank & Trust Co., 503 F.2d 45, 48 (10th Cir. 1974); United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 130 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968); In re Grand Jury Subpoena Duces Tecum, etc., supra, 436 F. Supp. 46, 51; United States v. Covington Trust & Banking Co. 431 F. Supp. 352, 355 (E.D.Ky. 1977).

3. GSU's Costs Are Part of its Normal Business Costs and Are Not Recoverable

Costs of complying with a subpoena are not normally reimbursed if they are part of the normal costs of doing business. As the Court of Appeals for the Second Circuit recently held in a case involving FTC investigative subpoenas to bank holding companies:

> While the district court has the power to require the government ultimately to pay the costs of compliance, United States v. Friedman, 532 F.2d 928, 936-38 (3rd Cir. 1976); United States v. Davey, 426 F.2d 842, 845 (2d Cir. 1970), it is a matter of discretion, cf. Fed. R. Civ. P. 45(b), 81(a)(3); United States v. Friedman, supra, 532 F.2d at 937. Generally, such costs will not be a awarded unless they are found to be "not... reasonably incident to the conduct of [a respondent's] business." United States v. Davey, 543 F.2d 996, 1001 (2d Cir. 1976); United States v. Friedman, supra, 532 F.2d at 938. Cf. United States v. Farmers & Merchants Bank, 397 F. Supp. 418, 420-21 (C.D. Cal 1975). Here it is obvious that the subpoenas are directly related to the conduct of appellants' businesses. They are not mere repositories of information performing a service for the government in complying with the subpoenas.

FTC v. Rockefeller, CCH Trade Regulation Reporter ¶62, 439 (2d Cir. Feb. 1, 1979).

The most common context in which the burden of an agency subpoena or a non-party to produce documents is in the context of IRS requests to banks to produce records of taxpayers being investigated. Here the cost of a bank's

complying with an IRS summons - the issue in the Friedman case relied on by GSU - has most often been found to be a reasonable cost of doing business. E.g., United States v. Continental Bank & Trust Co., 503 F.2d 45 (10th Cir. 1974); United States v. Covington Trust & Banking Co., 431 F. Supp. 352 (E.D. Ky. 1977); United States v. Mellon Bank, N.A., 410 F. Supp. 1065 (W.D. Pa. 1976); United States v. Bremicker, 365 F. Supp. 701 (D. Minn. 1973); United States v. Jones, 351 F. Supp. 132 (M.D. Ala. 1972); contra United States v. Farmers & Merchants Bank, 397 F. Supp. 418 (D.C. Cal. 1975).

In United States v. Jones, 351 F. Supp. 132 (M.D. Ala. 1972), apart from the government's furnishing of an operator and portable copying equipment, the bank was required to bear all other expenses connected with investigation of its records, including the salary of employees assigned to the project. These expenses "are reasonably incident to the bank's normal operations, and they are reasonable expenses that the bank can and should be prepared to sustain when it opens and operates as a bank, knowing full well that some of its depositors will from time to time get investigated by the Internal Revenue Service." Id. at 134.

United States v. Friedman, 532 F.2d 928, 938 (3d Cir. 1976) required "an individualized determination that the

cost involved in complying with the summons in question exceeds that which the respondent may reasonably be expected to bear as a cost of doing business." See Securities & Exchange Commission v. Arthur Young & Co., 584 F.2d 1018, 1033 (D.C. Cir. 1978).

In Friedman the court offers an instructive example of the test, suggesting:

> A manufacturer, who may only have dealt with a taxpayer quite casually and occasionally... might not be required, as part of the cost of doing business, to make an unreimbursed record search. A bank, however, whose business is the facilitation of financial transactions, and which keeps records of all customer dealings as a matter of course, if not law, may be required to do so. United States v. Friedman, supra, 532 F.2d at 937 (footnote omitted)

The subpoena here is directly related to the conduct of GSU's business as the test is articulated in Rockefeller. PUB seeks to learn about GSU's dealings with members of TIS and other utilities in Texas; to show the extent to which GSU acts on the basis of competition of various kinds in its business in Texas; and to learn how GSU has evaluated the pros and cons of tying into the TIS system. These are not peripheral matters, as a requirement that a merchant retrieve financial records of a sometime customer would be, following Friedman. Keeping track of the documents related to these topics is part of the business operations of GSU.

There are additional reasons why this discovery is no more than an ordinary business expense to GSU. Producing the data requested by PUB is no different in kind than GSU's routine efforts to comply with regulatory orders, in return for which it derives the many benefits of a regulated utility. GSU already expends substantial sums to comply with agency regulations. In fact, much of the information requested by PUB is already essentially prepared for regulatory agencies. 1/

Moreover, as discussed more fully above, GSU is not a mere casual observer (like the manufacturer in Friedman). It is vitally affected by the substantive issues before this Board, and has actively participated in settlement negotiation in communications with Texas regulatory agencies and now in litigation before FERC.

Many categories of documents requested by PUB will likely be reviewed by GSU (if they have not been already) in connection with the engineering and economic evaluation required in the FERC proceeding or to prepare for settlement negotiations. Were GSU a party, instead of merely claiming a party's privilege against revealing settlement negotiations, these discovery costs would be a perfectly normal part of its attempt to secure business advantages through litigation.

1/ See p.36 n.1 below.

In past years GSU has also worked closely with utilities that are parties here to fend off the inquiries by federal regulatory agencies concerning interconnection. (Attachment E) Some of PUB's questions are designed to probe the extent to which GSU was aware of or acquiesced in joint activities PUB challenges before this Board. 1/

4. Relative To Its Size, The Burden, Of Compliance On GSU Is Small

GSU is not a disinterested bystander, nor is it so small that compliance costs might threaten its normal operation. 2/ It is a major utility in the region, which has had substantial past dealings with the parties to this proceeding, and which has voluntarily entered into other proceedings relating to this same controversy. In fact, its budget can certainly absorb the cost of complying with the subpoena, as part of its regulatory costs, more easily than

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1/ Compare the argument made in the Stanislaus case that Southern California Edison should bear the costs of the subpoenas because it was one of the parties that benefitted from the agreements challenged as anticompetitive.

2/ The Court of Appeals for the Second Circuit in refusing to impose costs, said, in FTC v. Rockefeller, supra, at p. 76,599, "The compliance cost...simply do [sic] not appear to us to pose a threat to the normal operations of appellants' businesses considering their size."

PUB, a small municipal that is already expending a proportionately large amount of its resources in order to try to stay on a par with the larger parties in this case. 1/ Gulf States Utilities 1978 Annual Report, at page 21, indicates operating revenues of $718 million in 1978, with operating expenses and taxes of $613 million, including $107 million in the general accounting category (other operating expenses) in which the costs of complying would probably fall. Surely there is enough leeway in a budget of this size to take care of the burden of complying with the subpoena. In proportion to its resources, GSU cannot claim the cost of complying with the subpoena is burdensome. 2/

The principle of comparing the burden of production to the respondent's resources as a measure of burdensomeness is well established. In United States v. Davey, 543 F.2d

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1/ Moreover, the Department of Justice and the NRC Staff, not just PUB, are interested in reviewing the full production of GSU in complince with this subpoena. Given PUB's small size and the general public interest in having the requested information disclosed, it seems particularly harsh to shift a large part of the cost to PUB's shoulders.

2/ PUB cannot provide any more specific discussion of the proportionality of GSU's costs, since GSU has been so vague about these costs, preferring to try to nail down its "recoupment" before revealing any information that could form the basis of a determination of unreasonableness. PUB is understandably concerned about being asked to undertake to pay what may turn out to be up to $107 million.

996 (1976), the Court of Appeals for the Second Circuit held clearly erroneous a finding that the cost of copying subpoenaed tapes was not reasonably incident to the conduct of business. The court compared the costs of compliance 1) to total company operating costs, and 2) to other amounts expended in complying with IRS regulations. "For this billion dollar company, which produces and studies some 200 tapes each year, the cost of duplicating the 37 tapes in question, estimated at approximately $1,305, would be minimal, representing but a small outlay in comparison with the other amounts which the taxpaper expends annually in cooperating with the IRS." Id. at 1001. 1/

Another court recently held that:

> "The Bank's status as an innocent record keeper does not, however, necessarily entitle it to reimbursement. ...

1/ There is another case by the same name, United States v. Davey, 426 F.2d 842 (2d Cir. 1970), that the Board should be careful to distinguish. The earlier case required compensation to a credit agency required to produce credit records. But this was exactly the service that the company provided for its livelihood, and that was the basis for the compensation.

To the extent that Public Service Company of Oklahoma, (Black Fox, Units 1 and 2), LBP-77-18, 5 NRC 671 (1977), relied on by GSU at Motion p. 9, may indicate that the Board has power under §2.720(f) as well as §2.740(c) to order compensation under some circumstances, it can be distinguished, along the same lines as the earlier Davey case, from the present situation. In Black Fox, the decision was to compensate experts "acting in their professional capacity." 5 NRC at 673. Under this rationale, PUB might owe GSU compensation if the subpoena required GSU to provide power or transmission services to PUB, or if GSU could maintain that producing documents was part of its professional capacity.

> "Relative to its net income and total resources, the Bank here suffers no greater burden than the witness or grand juror who foregoes his or her earnings in excess of the statutory attendance fees.... The bank's cost of compliance with this grand jury subpoena is part of the necessary contribution to the welfare of the public."

In re Grand Jury Subpoena Duces Tecum Issued to the First National Bank of Maryland Dated November, 1976, 436 F. Supp. 46, 51 (D. Md. 1977). 1/ Accord, FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977), (en banc), cert. denied, 431 U.S. 974 (1977), reh. denied, 434 U.S. 883 (1977) ("[T]he breadth complained of is in large part attributable to the magnitude of the producers' business operations."); Application of Radio Corporation of America, 13 F.R.D. 167, 172 (S.D.N.Y. 1952) ("Inconvenience is relative to size.")

GSU is big business; its regulatory costs are large; its efforts to maintain its position in this controversy are many and continuing. It should not be heard to complain that the relatively small costs of compliance here are an intolerable burden.

1/ A grand jury subpoena was said to be analagous to an administrative subpoena in United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

5. GSU Has Knowlingly Not Met Its Burden Of Showing Costs To Be Unreasonable

As a recent case stated:

> The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. F.T.C. v. Texaco, Inc. 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc), cert. denied, 431 U.S. 974 (1977), reh. denied, 434 U.S. 883 (1977).

As stated in United States v. Friedman 532 F.2d 928, 937 (3d Cir. 1976) relied on by GSU, Motion p. 5, "When a respondent...urges excessive burden and resists an order that is not conditioned upon reimbursement, it should also be required to produce evidence of the expense likely to be incurred in compliance with the summons."

Numerous other cases support the principle that it is up to GSU to bear the burden of proving the discovery request is oppressive. F.T.C. v. Rockefeller, supra, at 76, 599; SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied., 415 U.S. 915 (1974); Goodman v. United States, 369 F.2d 166, 169 (9th Cir. 1966); Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 762, 766 (D.C. Cir. 1965); Sullivan v. Dickson, 283 F.2d 725, 727 (9th Cir. 1960), cert. denied, 379 U.S. 984 (1965).

Any authority of the Board to shift costs would rest on a showing that they were not "just and reasonable." Yet GSU "has foregone any objection based on relevancy or burdensomeness...." GSU Motion p. 8. Since any order of this Board imposing part of the cost on PUB would have to be based on a finding that the subpoena as issued was unreasonable because burdensome, PUB does not understand how GSU can proceed in the face of its admission.

GSU has, apparently deliberately, decided not to present the Board at this time with "appropriate affidavits and schedules establishing its incurred costs...." GSU Motion p. 5 n. 4. It seeks approval of "the principle of reimbursement", id., by this Board, before it reveals what its costs are. As a result of this tactical decision, GSU's pleading for recoupment lacks all specificity. It does not provide figures for amounts it has already spent, or projected additional amounts; it does not suggest with specificity the kinds of activities that have required the effort.

GSU is certainly aware that it bears the burden of showing costs to be so oppressive as to warrant possibly shifting part of them to PUB.1/ In addition, motions before this Commission must "state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits

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1/ The Goodman case, for example, was cited at Motion p. 4.

or other evidence relied on..." 10 C.F.R. §2.730(b). This Board has repeatedly required specificity in objections to discovery requests, which in essence GSU's Motion is. This vagueness is not an oversight on the part of GSU, but a ploy - GSU apparently hopes in this discovery to recover all its expenses without having to provide justification (if not simply to delay compliance). PUB is unable to argue as persuasively as it otherwise could that the costs GSU seeks to recover are reasonably borne by GSU, since PUB has no idea specifically what those costs amount to. The Board likewise, should it rule even partially in GSU's favor, will be ruling in the dark, without any idea as to the amount or reasons for costs. On the contrary, the Board should deny any costs to GSU since it has, apparently realizing the law thereon, failed to sustain its burden of proof, and has failed to state its motion for costs with the specificity required.

Although PUB believes GSU has waived any opportunity to recover specific parts of its costs to this point because of its failure to make timely proof, PUB seeks to raise several points before the Board at this time. 1/

1/ Once again. PUB's argument is hampered by the lack of information that only GSU could have provided.

PUB should not have to pay for any of GSU's efforts in screening its documents for privilege or confidentiality. All such efforts are undertaken by GSU for its own advantage, and are not compelled by the subpoena. PUB obtains no benefit from these claims, and it would be altogether unfair to make PUB reimburse GSU for these costs.

GSU has also foreclosed some of the options that would reduce its burden. GSU counsel knew, for example, that PUB personnel were willing to travel to Beaumont. If the effort in locating documents was as great as GSU alleges, PUB personnel could certainly have done some searching in files themselves, a measure that would cut GSU costs. 1/ PUB indicated a willingness to negotiate, and could certainly have proposed a discovery compliance method in even more steps than the March 5 schedule. It has been GSU's own inclination to use recalcitrance and the threat of delay as bargaining tools that blocked this kind of informal negotiation up to this point.

1/ A number of the IRS bank summons cases adopt this procedure for lessening burden. E.g, United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 131 (3d Cir. 1967), cert. denied, 390 U.S. 921 (1968).

Most of the categories of documents requested in the subpoena are on their face not burdensome, especially given GSU's participation in the overall controversy. A number of the categories in the subpoena schedule request documents that are regularly supplied to regulatory agencies, and which GSU should have no difficulty in locating. 1/

1/ These include:

1. a) maps indicating present GSU transmission and subtransmission authorities

   b) maps indicating present GSU distribution within 50 miles of any ERCOT member

4. c) FERC Form 423 or equivalent TPUC reports

   d) FERC Form 1

   e) FERC Form 12

7. b) interconnection agreements

10. contracts or agreements between GSU and any municipally or cooperatively owned and/or operated electric utility located in whole or in part in Texas

11. GSU rates

Most of the other requests deal with the interstate/intrastate controversy. 1/ PUB expects GSU would review many of these, either in connection with the FERC proceeding, or in the course of its participation in settlement discussions. Item 5 seeks information about offers concerning participation in nuclear generating plants - an area clearly overseen by this Commission and one where PUB

1/ Documents relating to GSU's policy on the interstate issue would be produced in response to:

8. a) policy for sale of power or energy in Texas
   b) policy for joint generation in Texas

13. a) Reasons relating to why GSU does not operate in synchronism with TIS

    b) documents relating to relative advantages of interstate and intrastate operations

    c) documents relating to any study or report

14. College Station's change to buying from GSU

Additional information on the costs of generation to GSU, which might be affected by the resolution of the intrastate issue, include:

3. GSU gas supply - utilities in Texas

4. a) fuel contracts
   f) load flow diagrams

Additional information on GSU operations in Texas is required by

2. (in part) joint actions of 3 TIS members or 2 TIS members and GSU, including joint planning of transmission or generation, and joint reports or studies

6. a), b) transmission services by GSU in Texas

7. a) documents related to interconnection

assumes GSU would keep information in a readily retrievable form. One of the remaining requests, 4(b), requests production of reports to the Edison Electric Institute, which should be easy to locate. One, 16, requests copies of information supplied to other parties, which should be no burden if GSU keeps records, and which is also only fair. Only as to the remaining requests - regarding competition 1/ and GSU's knowledge of or participation in joint activities with members of the Texas Interconnected System 2/ is there any possibility that GSU would have to retrieve materials from disperate parts of its files that it might not otherwise wish to assemble for its own interest. Even as to these, GSU has made no effort to demonstrate with specificity any undue burden, with the result that the Board should deny it any recovery of costs.

1/ 9. Power supply etc. of municipals

12. Special rates - industrial competition

15. Competition between GSU and any other electric utility located in Texas

2/ Documents relating to joint actions of GSU and two or more members of TIS, or of three or more members of TIS.

III. GSU'S CLAIMS OF CONFIDENTIALITY AND PRIVILEGE ARE TOO BROAD AND SHOULD BE LIMITED

A. GSU Should Produce a List of Documents Privileged Because Directly Related to Settlement Discussion

PUB was highly surprised to learn that GSU considers its stake in this proceeding at once so low that it should not bear costs of compliance with a subpoena, and so high that, like a party, it active in settlement negotiations. GSU should be required to provide a list of documents as to which privilege is asserted, in accordance with the provision of the subpoena requesting certain information about material as to which a privilege was asserted, 1/ and in accordance with 10 C.F.R. §2.790 (b)(1), requiring specific proof for an assertion of confidentiality as privilege.

Such a list would assure that the exclusion of material, if any, is given its proper scope, and need not discourage parties to this proceeding from continuing settlement

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1/ This passage is set out in full at p. 53 below.

The protection afforded to settlement discussions is not strictly speaking a privilege, but has aspects of both a privilege and a rule of exclusion. McCormick on Evidence, §74 (2d ed. 1972). It involves a question of relevancy, as well as serving to encourage a certain kind of conduct. One consequence is that "the 'privilege,' if one chooses to call it such, is assertable only by a party...." Id. at p. 154. This is so because a person making an offer of compromise who is not a party should not be affected by whether the court admits a document or statement into evidence, since this will only affect the outcome of the dispute between parties.

talks. It would also demonstrate to the Board the extent of GSU's involvement in the overall controversy, 1/ lending support to PUB's contention that it is altogether fit for GSU to bear the costs of complying with this subpoena.

The policy protecting settlement negotiations has as its basis the encouragement of free discussion among the negotiating parties, without fear that statements made will later be used to prove any of the matters discussed. Thus, Federal Rule of Evidence 408, concerning compromise and offers to compromise, 2/ provides they are inadmissible for the purposes of proving liability, or invalidity of a claim or of the amount of a claim. For other purposes, also specifically listed in part in Rule 408, (to prove bias or prejudice, to negative a contention of undue delay, or to show an effort to obstruct a criminal investigation), the evidence is admissible. For a discussion of other purposes for which evidence of a compromise is admissible, see McCormick on Evidence §274 p. 664 (2d ed. 1972).

1/ Since GSU, a party to the negotiations, is not a party to this proceeding, PUB concludes that discussions probably ranged over other litigation related to the overall interstate/intrastate dispute. Although its overall knowledge of the settlement discussions is scanty, PUB observes that most of the parties who have gotten together are the same ones PUB alleges have acted in combination against PUB. These factors should weigh against a broad grant of privilege because of these settlement negotiations.

2/ The full text of Rule 408 is as follows:

> Rule 408, Compromise and Offers to Compromise
>
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or
> (footnote continued next page)

The treatment to be accorded matters discussed in settlement is a balancing process. Here, the policy favoring settlement negotiations, set forth in 10 C.F.R. §2.759, should be considered in light of 10 C.F.R. §2.790(b)(1), required persons asserting a claim of privilege or confidentiality to identify the documents and make a specific statement of reasons, 1/ and of Kansas Gas and Electric Company,

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(footnote 2/ from page 40 continued)

> promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (emphasis supplied).

For purposes of protecting restrictions that might bring litigation to a close, the difference between "compromise" and "settlement" is minimal. Burns v. City of Des Peres, 534 F.2d 103, 112 (8th Cir. 1976).

1/ In pertinent part, 10 C.F.R., §2.790(1) reads:

> (b)(1) A person who proposes that a document or a part be withheld in whole or part from public disclosure on the ground that it contains trade secrets or privileged or confidential commercial or financial information shall submit an application for withholding accompanied by an affidavit which:
>
> Identifies the document or part sought to be withheld and the position of the person making the affidavit, and

(footnote continued on page 42)

(Wolf Creek Nuclear Generating Station, Unit No. 17, ALAB-327 3 N.R.C. 408, 415-18 (1976). Such a statement of reasons need not make any detailed Creek description of admissions that might have been made in the course of these negotiations; in other words, no disclosure that might threaten the policy for excluding compromise offers would be required by such a list.

(footnote 1/ continued from page 41)

> (ii) Contains a full statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b)(4) of this section.

The considerations listed in 10 C.F.R., §2.79(b)(14) are:

> (4) In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider:
>
> (i) Whether the information has been held in confidence by its owner;
>
> (ii) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor.
>
> (iii) Whether the information was transmitted to and received by the Commission in confidence;
>
> (iv) Whether the information is available in public sources;

(footnote continued on page 43)

On the other hand several policies are aided by requiring production of such a list. Rule 408, for example, was not intended to allow parties to immunize evidence or documents otherwise admissible simply by presenting them in

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(footnote 1/ from page 41 continued)

> (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money,if any, expended by the owner in developng the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

On the point that a specific showing must be made before discovery can be burdened, see Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405 (N.D.N.Y. 1973)

The policy favoring settlement is set out in 10 C.F.R. §2.759.

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire procding. Therefore, to the extent that it is not inconsistent with hearing requirements in section 189 of the Act (42 U.S.C. 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

the course of settlement negotiations. 1/ Just as this Board has required parties in this proceeding to assemble a list of privileged or previously produced documents, in order to insure a bona fide examination of possibly responsive documents, requiring GSU to provide a list of documents withheld would insure GSU's care in withholding only documents prepared solely for settlement discussions, notes taken at such discussions, and so on. 2/

1/ The Senate Report, in discussing its amendment to Rule 408, which was subsequently adopted by the Conference Committee, said:

> This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

Senate Report No. 93-1277 p. 10 (1974), quoted in Moore's Federal Practice Rules Pamphlet - Federal Rules of Evidence 424 (1975).

2/ We note that, in a case where an "outsider" alleges, e.g., conspiracy to monopolize, those privy to the conspiracy could scarcely be heard to argue that by adding another conspirator after suit had been brought and holding "settlement" meetings without the outsider plaintiff, the happenings at those settlement meetings, which may have been designed further to disadvanage the plaintiff, were privileged settlement negotiations.

In a somewhat similar case, information about a settlement between plaintiffs and one of the defendants in an antitrust suit was held discoverable by other defendants, on the grounds that plaintiffs could not thus conceal from the defendants its arrangments with former alleged partners. Broadway & Ninety-Sixth Street Realty Co. v. Loew's, Inc., 21 F.R.D. 347, 358-59 (S.D.N.Y. 1958).

Another advantage of a list of GSU documents is that it would help in resolving the complex problem posed by the multiple parties here. GSU's contention that it should not be forced to reveal documents that another party, HL&P, has been excused from revealing, has some plausibility. But no one knows what those documents are. Ideally, a list of documents withheld by HL&P could be compared with a list proposed to be withheld by GSU. 1/ Alternatively, HL&P could indicate which documents from a list provided by GSU had previously been the subject of its own assertion of privilege. Such a procedure would also be available for any other party who may subsequently assert privilege stemming from these same settlement discussions.

1/ The Board has ruled that HL&P need not produce even a list. Order, April 16, 1979. The Commission Staff has moved for reconsideration of this order, however. The Board should consider whether, in light of the subsequent development represented by GSU's assertions of privilege on the same basis as HL&P, a list of documents that would aid in keeping track of the privilege ought to be required by HL&P as part of any order on reconsideration.

Allowing HL&P or other parties to indicate which documents among those on a list provided by GSU would contain sensitive (privileged) information would help resolve the problem created by GSU's status as a non-party. Theoretically, GSU should not be concerned with the effect of anything it has said or done in this forum, and thus, its participation in settlement discussion should not be affected by whether its statements and documents are excluded. McCormick on Evidence, §74 p. 154 (2d. ed. 1972). Following McCormick, a party alone can claim the privilege. Id. 1/ But if the documents are neither disclosed nor described, a party such as HL&P cannot discern whether it wishes to assert the privilege, and must rely on a non-party.

Under the approach taken by the Federal Rules of Evidence, a party may under some circumstances be able to assert the privilege as to what it said as reported in, for example, notes taken by another party. This is possible because the exclusion applies at the stage of admission into evidence, so that the contents may be disclosed to other parties, although not (for purposes of finding facts) to the presiding judge or official. GSU here seeks to benefit from a privilege that HL&P might not wish to assert. If the documents were produced, HL&P and other parties could so state with certainty.

1/ Theoretically, in contrast to GSU, HL&P might be less willing to participate in settlement discussions if its actions and statements could subsequently be introduced as evidence before this Board. Therefore, as to HL&P, this Board may appropriately exclude certain documents and statements directly related to settlement.

In balancing the policy favoring settlements against requiring some further description or disclosure from GSU, it is well to bear in mind that non-admissibility does not necessarily determine discoverability. Inspiration Consolidated Copper Co. v. Lumbermans Mutual Insurance Co., 60 F.R.D. 205, 211 (S.D.N.Y. 1973). In addition, 10 C.F.R. §2.720(a) prohibits an officer issuing a subpoena from "attempt[ing] to determing the admissibility of evidence." This higher threshold is put off until a later stage of the proceeding. The documents GSU seeks to withhold could well lead to admissible evidence, even if they themselves are excluded from evidence. As GSU asserts it, the privilege would place an inappropriate heavy burden on the discovery process.

For all the above reasons, the Board should refuse to issue paragraph 16 of the proposed Protective Order as requested in GSU's Supplemental Motion, and should require GSU to submit a list of documents as to which privilege is asserted, in compliance with the instructions in the subpoena as issued.

B. GSU's Proposed Protective Order Is Broader Than Commission Practice Warrants

While PUB recognizes that GSU may be entitled to claim confidentiality or privilege with respect to certain documents that are responsive to the subpoena, it has certain objections to the part of GSU's draft Protective Order dealing with confidentiality (Sections 3-14), and privilege (Section 15).

First, paragraph 3 of the proposed Order contains a definition of "confidential business information" that PUB seeks to clarify. While the first part, a general definition, is acceptable to PUB, the specific list at the end of §3 is not, because it is too broad. 1/ The only data, information, options, offers or responses whose disclosure might potentially harm anyone relate to current studies or joint projects. The wording of paragraph 3 would apparently include information, etc, conveyed at any date. PUB requests the Board to clarify paragraph 3 by limiting the

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1/ The passage to which PUB refers describes three categories of confidential information as specifically included.

> "Such confidential information shall include, but not be limited to, data, information, or options furnished by third parties to Gulf States for the purpose of preparing and conducting a joint study of the feasibility of interconnection, the construction of jointly owned or utilized generation or transmission facilities; offers and responses with regard to participation by Gulf States or a third party in the ownership, construction or operation of any electric power facility or portion thereof; and, the terms and conditions of any contract currently under negotiation between Gulf States and any other party for the sale or supply of electric power (excluding documents covered by Paragraph 14 below)."

specific categories to current projects. 1/

In defining persons who will have access to documents designated as confidential, GSU proposes in paragraph 5(iii) to allow access to "independent consultant and technical experts and their staff who are engaged directly in this litigation...." PUB relies for much of its expertise in preparing this case on personnel employed by the City of Brownsville; it does not have the luxury of a large staff of independent experts. PUB proposes to include "PUB personnel" among the persons to whom confidential information may be disclosed. Given the relative size of GSU and PUB, and the distance between the two systems, disclosure of confidential information to PUB personnel who would themselves agree to treat the information as confidential would not be likely to cause harm to the competitive position of any party involved.

1/ PUB proposes the last sentence of paragraph three to read as follows (changes indicated):

> "Such confidential information shall include, but not be limited to, data, information, or options furnished on a confidential basis by third parties to Gulf Statesfor the purpose of preparing and conducting ~~a~~ any current joint study of the feasibility of interconnection, the construction of jointly owned or utilized generation or transmission facilities; offers and responses made or received on a confidential basis and currently under consideration by Gulf States or a third party with regard to participation in the ownership, construction or operation of any electric power facility or portion thereof; and, the terms and conditions of any contract currently under negotiation between Gulf States and any other party for the sale or supply of electric power (excluding documents covered by Paragraph 14 below)."

PUB's third point is that the proposed Protective Order makes no provision for any challenge after GSU designates a document or information as confidential. Practice before this Commission is clear that a party seeking to place restrictions on disclosure of information relevant to issue in adjudication must make a specific showing. Kansas Gas and Electric Company, (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 N.R.C. 408, 415-18 (1976); 10 C.F.R. §2.790(b). Although PUB sees no need to request GSU to demonstrate compliance with the standards approved in Wolf Creek for all confidential information, PUB will not waive its right to request such a showing from GSU where PUB may feel an assertion of confidentiality is unwarranted. Accordingly, PUB proposes that the following language be added at the end of paragraph 7 of the draft Protective Order:

> "Upon the request of any party, or by the Board upon its own motion, Gulf States shall make an appropriate showing of confidentiality for specific information or documents as to which it has claimed confidentiality. If the Board finds that Gulf States has failed to make such a showing, such information or documents shall not be treated as confidential under the terms of this Order."

Paragraph 14 of the proposed Protective Order, deals with GSU's negotiations with Sam Rayburn Dam Electric Cooperative, Inc. for participation in the River Bend Nuclear

Plant. 1/ PUB would like to receive the "summary of documents" offered by GSU. Motion p. 11; proposed Protective Order para. 14. PUB agrees with the part of paragraph 14 that allows the Board to require disclosure of specific documents to be treated as confidential, where appropriate. However, the first sentence of paragraph 14 ("Gulf States need not produce any documents required by the subpoena that relate to its proposed participation agreement with the Sam Rayburn Dam Electric Cooperative.") conflicts with the Board's power to inspect documents and require production. The second sentence is also unclear. PUB proposes modifying the beginning of paragraph 14 of the draft Protective Order as follows.

> "Gulf States need not at this time produce any documents required by the subpoena that relate to its proposed participation agreement with the Sam Rayburn Dam Electric Cooperative, Inc. for the River Bend Nuclear Plant. Gulf State shall provide a summary of documents responsive to the subpoena drafted so as not to compromise its proprietary interests."

1/ The full text of paragraph 14 is as follows:

> "Gulf States need not produce any documents required by the subpoena that relate to its proposed participation agreement with the Sam Rayburn Dam Electric Cooperative, Inc. for the River Bend Nuclear Plant. Upon request, Gulf States shall provide a summary of documents particularly requested so as not to compromise its proprietary interests. If the parties are unable to reach agreement on the sufficiency of Gulf States' response, the documents shall be submitted to the Licensing Board for in camera inspection. If the Board determines that the inspected documents may be disclosed, such disclosure shall be in accordance with the terms and conditions of paragraphs 3-13 of this Order, except that the Board may order that the documents be produced only in part of with certain deletions to protect the confidentiality of proprietary interests."

PUB has two objections to GSU's proposed treatment of documents subject to the attorney-client privilege. 1/ The instructions in the subpoena as issued provide:

> "If you claim that any document requested hereunder is privileged, with respect to each such documents, [sic] please provide the following:
>
> (a) date;
>
> (b) type of document;
>
> (c) identity of author and addressee;
>
> (d) present location and custodian;
>
> (e) any other description necessary to enable the custodian to locate the particular document;
>
> (f) the basis for the claimed privilege; and
>
> (g) a detailed description of the nature of any judicial protection alleged to be necessary to protect the privilege or confidential nature of any such document."

This Board has upheld similar instructions in discovery requests to parties. The list of privileged documents offered by GSU should be in this form.

1/ The full text of paragraph 15 of the proposed Protective order is as follows:

"15. Gulf States need not produce any correspondence or communication between Gulf States and outside counsel. Gulf States shall, upon request, furnish a list of documents with a description of each. If the privileged nature of the document is contested, the document shall be submitted to the Licensing board for in camera inspection. If the Board determines that the inspected documents may be disclosed, such disclosure shall be in accordance with the terms and conditions of paragraphs 3-13 of this Order, except that the Board may order that the documents be produced only in part or with certain deletions to protect attorney/client confidentiality."

Secondly, GSU assumes that any document it is not entitled to withhold as privileged should be treated as confidential. GSU is apparently confused on this point. Simply because a document contains communications between, for example, attorney and client, does not necessarily mean it contains "information which concerns and relates to the trade secrets or other confidential business plans, procedures, relationships or arrangements of any kind which, if disclosed, have the potential of causing harm", the definition of confidential business information in paragraph B of the proposed Protective Order. The determination of absolute privilege (for whatever reason) and of limitations on disclosure for reasons of confidentiality are distinct. Non-privileged documents are not automatically confidential, as proposed paragraph 15 now provides. PUB agrees that GSU should be able to make a separate assertion of confidentiality, in accordance with paragraphs 3-13 as amended by PUB's proposals in this document. PUB requests the Board to effect the following changes in paragraph 15 of the proposed Protective Order:

> "15. Gulf States need not at this time produce any correspondence or communication between Gulf States and outside counsel. Gulf States shall, upon request, furnish a list of such documents with a description of each, in accordance with the Instructions relating to claims of privilege in the subpoena served on Gulf States. If the privileged nature of the document is contested, the document shall be submitted to the Licensing board for in camera inspection. If the Board determines that the inspected documents may be disclosed, ~~such disclosure shall be in accordance with~~

~~the terms and conditions of paragraphs 3-13 of this Order, except that~~ the Board may order that the documents be produced only in part or with certain deletions to protect attorney/client confidentiality[.]; and if Gulf States asserts a separate claim of confidentiality, such disclosure shall be in accordance with the terms and conditions of paragraphs 3-13 of this Order."

CONCLUSION

The position taken by Gulf States in its Motion hinders smooth and expeditious discovery. GSU refuses to produce according to the full scope of the subpoena. It has refused to produce anything at all to PUB unless PUB formally agrees to replace the full subpoena, and it now asks the Board to endorse it refusal. GSU refuses to pay the costs of comlying with the subpoena, even though it is concerned enough about this case to work with a number of the parties here towards a negotiated settlement. GSU also asserts extremely broad claims of privilege and confidentiaity which, if it prevails, will allow GSU to refuse to provide any information at all about certain issues.

For the reasons discussed above, PUB requests this Board to order GSU to comply with the full terms of the subpoena; to bear all costs of compliance other than reasonable xerox costs for one copy of documents requested and received by PUB; and to comply with the terms governing

claims of confidentiality and privilege as set forth in the attched proposed Protective Order.

Respectfully submitted,

Robert C. McDiarmid

Marc Poirier

Marc R. Poirier
Attorneys for the Public
Utilities Board of the City
of Brownsville, Texas

Law Offices of:
Spiegel & McDiarmid
2600 Virginia Avenue, NW
Washington, D.C. 20037
(202) 333-4500

May 10, 1979

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JOHN MICHAEL AGRAGNA
CYNTHIA S. BOGORAD
(MASSACHUSETTS BAR ONLY)
GARY J. NEWELL
MARC R. POIRIER

ATTACHMENT A

March 5, 1979

Benjamin H. Hughes, Esquire
Orgain, Bell & Tucker
P.O. Box 1751
Beaumont, Texas 77704

Re: Houston Lighting & Power Company, et al.
(South Texas Project Units No. 1 & No. 2)
NRC Docket Nos. 50-498A, 50-499A

Dear Mr. Hughes:

As we discussed today by telephone, although the Public Utilities Board of the City of Brownsville, Texas ("Brownsville") has prepared a subpoena for production of documents to Gulf States Utilities Company ("GSU") in the above proceeding, informal cooperation will be advantageous to GSU as well as Brownsville, and will speed the preparation of our case. In the interest of cooperation, I am enclosing, as you requested, a list of topics on which we consider it essential to have access to GSU's documents for inspection and copying. This list is drawn from, and is a subset of, the requests for documents to which GSU would be obligated to respond under subpoena. We propose it to you as a means of accomodation, and without prejudice to Brownsville's right to seek compliance with the NRC subpoena.

I am telecopying to you a copy of this letter and the attached schedule so that you may confer right away with the GSU counsel you have contacted. I expect to be in touch with you very shortly about this matter.

Very truly yours,

Marc Poirier

Marc R. Poirier
Attorney for the Public Utilities Board of the City of Brownsville, Texas

MRP:ps
Enclosure

2259 185

SCHEDULE

A. Maps sufficient to indicate all actual and projected GSU transmission and subtransmission lines located within the State of Texas. (1(a))

B. All documents relating to each offer of participation in any nuclear electric generating unit located in Texas, made or received by GSU; all documents relating to participation, actual or potential, by any electric utility in the South Texas Units, including the terms and conditions, limitations or restrictions of such participation. (5(a) & (b))

C. All documents relating to GSU policy for sale of power, establishing terms for sale of power, or to interconnected operation or transmission services by GSU to municipally or cooperatively owned and/or operated electric utilities located in whole or in part in the state of Texas. (Parts of questions 6,7,8,9,10,11)

D. All documents relating to policy for participation by any utility located in whole or in part in Texas in any generation facility of which GSU is whole or part owner. (8(b))

E. All principal documents relating to each reason why GSU does not operate in synchronism with any electric utility that is a member of TIS; all documents relating to relative advantages to any electric utility of operation solely within the state of Texas and operating in interstate commerce; all documents relating to any study or report by any electric utility, or by any state or federal agency that regulates electric utilities, the subject of which relates to, in whole or in part, potential operation of any electric utility or utilities actually operating solely within the state of Texas so as to place such utility or utilities into interstate commerce (including documents relating to communications between GSU and any other electric utility relating to any such study or report) (13(a), (b) & (c)).

F. All documents relating to the wholesale sale of power and/or energy by GSU to College Station, Texas, including rates and terms and construction of interconnections and/or transmission lines. (14(a), (b) & (c))

G. All documents relating to actual, potential, possible or contemplated competition between GSU and any other electric utility located in Texas. (15)

Brownsville file

ATTACHMENT B

FROM: Marc Poirier

DATE: March 8, 1979

SUBJECT: GSU SUBPOENA

I just received a phone call from Bob Rader & Mark Wetterhahn of Conner, Moore & Corber (202)833-3500. Gulf States has just retained them to deal with the subpoena.

Basically, they want to cooperate in some way, but don't know what's involved for GSU. They would like:

(a) A joint motion (or agreement by us to their motion) to extend the return date on the subpoena to March 19. By that time they would object or agree to a schedule.

(b) They would like a formal agreement substituting the schedule attached to my March 5 letter to Benny Hughes (items A-G) for the schedule attached to the subpoena. They say (in response to the language in the letter concerning Brownsville reserving the right to enforce the subpoena if an accomodation doesn't work out) that we would have an independent enforceable contract right based on the agreement to substitute.

They want an answer by Friday early. Suggestions?

Friday, March 9, 1979:

Unable to get an arrangement with Rader & Wetterhahn. They said if we didn't agree to substitute the shorter schedule attached to the Hughes letter, without knowing whether they would produce or object, they would ask for a month instead of a week extension. after consultation (with McDiarmid) I told them to go ahead on the basis of the full subpoena. I think once they have an idea of how much is involved* (and which way the wind is blowing at the NRC) they may be amenable to a reduced list.

Also note that the shorter list, while substantively accurately reflecting our priorities, was drafted in haste and should be reworded before incorporation into a formal agreement.

I have notified all parties by phone that documents will not be produced on monday.

Also, CP&L switched deposition dates concerning Union Carbide! Their date is now Thursday, March 15 (Dupont is now the 16th).

Marc Poirier

2259 188

cc: R. McDiarmid
R. Jablon
B. White

* i.e., they don't know at all what GSU has that is responsive

ATTACHMENT C

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	
	)	Docket No. P-564-A
(Stanislaus Nuclear Project, Unit No. 1)	)	
	)	

ORDER

(January 25, 1979)

On August 24, 1978, intervenor State of California Department of Water Resources (DWR) applied for a subpoena duces tecum directed to the custodian of records, Southern California Edison Company (Edison). The Atomic Safety and Licensing Board executed the subpoena duces tecum on August 28, 1978, and it was thereafter served upon Edison. On December 29, 1979, Edison, by means of a special appearance, filed a motion to quash the subpoena duces tecum. Answers were filed by DWR on January 15, 1979, and by the Staff on January 12, 1979. On January 24, 1979, the Board heard oral argument on the motion.

The motion to quash the subpoena duces tecum is denied, subject to the following conditions:

(1) With respect to categories (1) and (2), Edison need only produce all documents it produced in Federal Energy Regulatory Commission dockets E-7796 and E-7777(II), plus all documents responsive to the FERC production requests that postdate Edison's production in the FERC. In addition, all documents responsive to the FERC production requests but withheld on claim of privilege shall be the subject of a new claim of privilege, which shall, if necessary, be adjudicated by this Board.

(2) With respect to categories (3) and (6), Edison may exclude from production all documents unrelated to bulk power services.

(3) With respect to category (5), the phrase "nuclear power plant projects generally" shall be understood to apply only to documents discussing the general topic of nuclear power plant projects, as opposed to specific sites or facilities.

(4) With respect to categories (5), (7), (8), and (9), the documents to be produced are limited to electric utilities doing business in the State of California or to transactions taking place in whole or in part in the State of California.

(5) Category (10) is deleted from the subpoena duces tecum.

(6) With respect to all categories, Edison may omit the following from production pursuant to the subpoena duces tecum: (a) all correspondence between Edison and DWR and all documents bearing notation of carbon copies having been sent to DWR; (b) routine bills, dispatcher schedules, and facility maintenance records; (c) copyrighted matter (statutory copyright only), where Southern California Edison is not the

holder or assignee of the copyrights; (d) documents dating prior to January 1, 1960; (e) documents identical to any other document that has been produced; and (f) documents relating exclusively to current or future ongoing negotiations between Edison and the Department of Water Resources, and those portions of documents relating in part to such negotiations as relate exclusively to such negotiations.

(7) DWR shall compensate Edison for its actual costs of duplicating one copy of each document copied for production to DWR.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller
Chairman

Dated at San Francisco, California,
this 25th day of January, 1979.

2259 191

ATTACHMENT D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Central Power & Light Company	§	
Public Service Company of Oklahoma	§	
Southwestern Electric Power Company	§	Docket No. EL79-8
West Texas Utilities Company	§	

PETITION TO INTERVENE
OF
GULF STATES UTILITIES COMPANY

Gulf States Utilities Company (Petitioner) hereby petitions for leave to intervene in this proceeding, and in support thereof states:

I.

The exact legal name of Petitioner is Gulf States Utilities Company. Petitioner is a corporation organized and existing under the laws of the State of Texas, with its principal office at Beaumont, Texas. Persons to whom correspondence and communications concerning this petition are to be addressed are:

Cecil L. Johnson, Esq.
Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

Benny H. Hughes, Esq.
Orgain, Bell & Tucker
Beaumont Savings Building
Beaumont, Texas 77701

II.

The captioned companies have filed an application requesting, among other things, an order requiring interconnection with the Electric Reliability Council of Texas (ERCOT). The applicants suggested that the Commission, on its own motion, initiate proceedings and issue orders with respect to the physical connection of the facilities of Houston Lighting & Power Company (HL&P) (a member of ERCOT) and the facilities of Petitioner.

Petitioner is a member of the Southwest Power Pool and is interconnected at fourteen points with other utilities in the State of Louisiana. Petitioner does have an emergency 138 kv open tie with HL&P which was established in 1958 and has not been used since 1967. Due to the small size of this tie and the development of the two systems, use of this tie now would probably be feasible only if a portion of Petitioner's load in that region were isolated.

Petitioner has developed its system on the basis of no interconnections with ERCOT and does not presently need an interconnection with HL&P nor does it believe that a single interconnection between Petitioner and HL&P would be operationally feasible. However, based upon current system planning, which includes proposed construction by Petitioner of additional generation in the western portion of its system, an interconnection with HL&P during the mid-1980's would appear to be the best economic alternative for Petitioner.

III.

Exhibit D of applicants' application indicates that an interconnection between Petitioner and HL&P could be made at Petitioner's Porter Substation. On Exhibit F of that petition, applicants present certain data apparently based on that interconnection being made in 1982. Petitioner presently has no EHV facilities in the Porter area. At one time, Petitioner did have plans to place in service, by 1982, an extension of its 500 KV transmission system to the Porter area. Petitioner's current plan is now to extend the 500 KV system to the Porter area by 1986. Apparently based on Petitioner's former plans, applicants did not include the cost ($48.5 million) for extending Petitioner's EHV system to Porter in the computations shown on said Exhibit D.

IV.

Based upon the specific suggestions regarding Petitioner in the applicants' application and upon Petitioner's interest in future interconnection with HL&P, Petitioner believes that it has an interest which may be directly affected, which is not adequately represented by existing parties and as to which Petitioner may be bound or seriously affected by the Commission's action in this proceeding.

V.

It is in the public interest that Petitioner be represented in order to protect its interest and help to assure that an appropriate and complete record is made upon which this Commission may rest its decision and that action is not taken which does not duly take into account Petitioner's expected future need for interconnection.

WHEREFORE, Petitioner respectfully requests that it be permitted to intervene in this proceeding and be treated as a party hereto, with a right to have notice of and to appear at all hearings, to file pleadings, to produce witnesses and evidence, to examine and cross-examine witnesses, and to be heard by counsel and other representatives, and that it be granted such other and further relief as may be proper.

Respectfully submitted,

GULF STATES UTILITIES COMPANY

By: _____
Benny H. Hughes
Its Attorney

Dated at Beaumont, Texas,
this 28th day of March, 1979

CERTIFICATION

Benny H. Hughes, being first duly sworn, deposes and says that he is attorney for Gulf States Utilities Company; that he has read the foregoing "Petition to Intervene of Gulf States Utilities Company"; that the statements contained therein are true to the best of his knowledge, information, and belief; and that he is authorized to file it with the Federal Energy Regulatory Commission.

_____
Benny H. Hughes

SUBSCRIBED AND SWORN TO before me this 28th day of March, 1979.

_____
Notary Public in and for
Jefferson County, Texas

My Commission Expires:
4-30-79

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of §1.17 of the Rules of Practice and Procedure.

Dated at Beaumont, Texas, this 28th day of March, 1979.

Of Counsel for:

Gulf States Utilities Company
P. O. Box 2951
Beaumont, Texas 77704

ATTACHMENT E

G. E. RICHARD

October 17, 1969

Mr. P. H. Robinson

Dear Perk:

In accordance with our 'phone conversation, attached is draft of our proposed letter to Don Martin.

We will withhold forwarding this letter until we have had an opportunity to have your comments and suggestions.

Attachment

17

EMM-1

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GULF STATES UTILITIES COMPANY

October 13, 1969

Mr. Don L. Martin
Regional Director
Fort Worth Regional Office
Bureau of Power
General Power Commission
319 Taylor Street
Fort Worth, Texas 76102

Dear Mr. Martin:

We have reviewed your report on interregional connection possibilities of the Texas Interconnected System and have the following comments to make.

In this report, you have made some assumptions that are completely invalid as far as the Gulf States Utilities Company system is concerned. Your suggested rating a 3,000 mw for the three EHV lines mentioned in this study is high. We rate transmission lines of this kind at SIL ~~ratings~~. Rating these lines at thermal ratings produces unrealistic reliability ratings. We would rate these lines as follows:

500 kv line - 1,000 mw

345 kv line - 600 mw each

We take no issue with your rating of 1,500 mw for the purpose of this study.

You point out that the construction of these lines would increase the reliability of both the Texas Interconnected System and the Southwest Power Pool. This is a valid statement. However, in order to determine whether an increment of increased

17

JMM-1

2259 197

October 22, 1969

Mr. Donald L. Martin
Regional Engineer
Regional Office
Federal Power Commission
819 Taylor Street
Fort Worth, Texas 76102

010182

Dear Don:

We are reviewing your Report on Interregional Connection Possibilities and will give you our comments as soon as possible; however, it may be necessary for us to ask for an extension of time beyond the 30 days, as our engineering staffs are very busy at this time preparing next year's budgets.

Sincerely yours,

Glenn E. Richard
Chairman of the Board

cc: Mr. P. H. Robinson, President
Houston Lighting & Power Co.
Post Office Box 1700
Houston, Texas 77001

RECEIVED
OCT 1969
J. M. McREYNOLDS

2259 198

HOUSTON LIGHTING & POWER COMPANY

October 24, 1969

Mr. Donald L. Martin
Regional Engineer
Regional Office
Federal Power Commission
819 Taylor Street
Fort Worth, Texas 76102

Re: PWR-FW

Dear Mr. Martin:

This is to acknowledge receipt of your letter of October 7 and attached report of August, 1969.

In accordance with your request, we are reviewing this report and will, as soon as possible, give you our comments.

Very truly yours,

/s/ P. H. Robinson

PHR/mw

bcc - Messrs. C. A. Tatum
T. L. Austin, Jr.
Glenn E. Richard
D. S. Kennedy 10-31-69
Roy Tolk "
O. W. Sommers "
Dexter Kinney "
Sim Gideon "
J. R. Welsh "
B. M. Davis "

2.11
A-3

GULF STATES UTILITIES COMPANY
POST OFFICE BOX 2951 • BEAUMONT, TEXAS 77704

November 17, 1969

010170

Mr. J. M. McReynolds
Houston Light & Power Company
Fannin and Walker Streets
Houston, Texas 77001

Dear John:

Attached is a draft of our proposed letter to Mr. Don L. Martin.

Please let me have your thoughts or comments.

Yours very truly,

S. L.

S. L. Adams
Vice President
Engineering and Production

2259 200

SLA/ejm

November 17, 1969

Mr. Donald L. Martin
Regional Engineer
Regional Office
Federal Power Commission
819 Taylor Street
Fort Worth, Texas 76102

Dear Don:

We have reviewed your Report on Interregional Connection Possibilities of the Texas Interconnected System and have the following comments to make:

1. Firm Savings

We do not agree that the suggested interconnection between the Southwest Power Pool and the Texas Interconnected System would produce firm savings to the Southwest Power Pool. The members of the SWPP presently plan the addition of new generation taking into consideration the planned reserves of its neighbors. These proposed ties would not allow Gulf States Utilities Company to reduce their reserves below the present planned margin.

2. Potential Savings

Our report to you dated January, 1968, set forth our thinking concerning the items listed under the above heading. Our position has not changed on this.

If you deem it desirable, we are willing to meet with you to further discuss your report of August, 1969.

Yours very truly,

G. E. Richard
Chairman of the Board

bcc: Mr. P. H. Robinson
President
HLGP

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Marc Poirier

Marc R. Poirier
Attorney for the Public Utilities Board of the City of Brownsville, Texas

May 10, 1979

2259 204

Law offices of:
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2600 Virginia Avenue, NW
Washington, D.C. 20037
202-333-4500

Houston Lighting & Power Company
Electric Tower
P.O. Box 1700
Houston, Texas 77001

2.11
X4.3

November 24, 1969

010194

Mr. Donald L. Martin, Regional Engineer
Regional Office
Federal Power Commission
819 Taylor Street
Fort Worth, Texas 76102

Re: PWR-FW

Dear Mr. Martin:

This is in response to your letter of October 7, transmitting copy of Federal Power Commission staff study relating to suggested interregional connections between members of the Texas Interconnected System and certain companies in the Southwest Power Pool. Your letter requested comments on this staff report and states that the FPC staff report is based largely on a joint study made by representatives of Gulf States Utilities Company, Texas Power & Light Company and Houston Lighting & Power Company as embodied in a report to the FPC dated January, 1968. The purpose of the joint study was to evaluate the economic and technical feasibility of establishing interconnections for parallel operation between TIS and the Southwest Power Pool.

Your letter also indicates that a similar letter and copy of your staff report were sent to Texas Power & Light Company, Gulf States Utilities Company, Oklahoma Gas and Electric Company, Southwestern Electric Power Company and Southwestern Public Service Company. Being a major participant in Texas Interconnected System, our comments must relate to the Texas system but we wish it understood that we are not a spokesman for any of these companies nor for TIS.

Several basic concepts of operation have guided and given continuity and coherence to the evolution of the Texas Interconnected System over a quarter of a century -- they are:

1. Each member is responsible for developing its own generation and transmission with reserves normally self-sufficient to cover spinning reserve, firm power and load growth requirements. However, the combined reserves of the member systems are at all times readily available to any member during any emergency.

2259 205

2. Bulk-power intercompany transmission lines are normally operated, lightly loaded, to the end that the maximum amount of total reserve capacity may be transmitted to any member during a serious short-term or long-term emergency situation.

3. Although consideration for economy is inherent in the planning of bulk power supply for each member of TIS as well as for the entire interconnected system, reliability has always been the primary consideration. This concept was adopted by TIS long before the Northeast blackout in 1965.

4. Full coordination of transmission interconnections, generation, relaying, communications, frequency control and governor response to transient conditions and abnormal load change have been achieved. To insure the highest order of system bulk power reliability, continuing joint studies are carried on to determine load flow and stability under normal and abnormal conditions projected into the future.

It appears to us that, although the proposals in the FPC staff report are based upon the information contained in our joint report of January, 1968, the diametrically opposite conclusions drawn by the FPC staff must result from an entirely different operating philosophy than that inherent in the practices of TIS. The FPC staff report concludes that interconnections between Texas and other systems may be justified through economics achieved by deferring or reducing new planned future generating plants and consequent reduction of reserves and adequacy of bulk system power supply. We strongly disagree with this concept of operation.

The Houston Lighting & Power Company, both as an individual company and jointly with the eight other members of TIS, is dedicated to insuring an adequate and reliable electric supply throughout a region of 195,000 square miles. Even if interconnections were established with other regions, we would not willingly reduce our reserves because we have found from experience that (1) unpredictable large increases in load may appear due to extremely high temperatures such as existed in the summer of 1969, (2) there is a continuing serious possibility of long time forced outages on large generating units or essential components, (3) large industries are coming into being in a shorter term than new system capacity can be added, and (4) other imponderables.

We accept full responsibility to our customers in making available

an adequate and low cost supply of electric power for all their needs when needed and without threat of curtailment. We are accountable to our regulatory bodies, as well as our customers, for acceptable performance in the discharge of this trust. Reduction of reserves to justify interregional interconnections is a course that could lead to disaster and is incompatible with our concept of reliability.

We believe that a high order of reliability is achieved through full coordination of all systems within a geographical area of manageable size. There must be adequate built-in capacity of both generation and transmission to accommodate load growth and to provide maximum insurance against brownouts or blackouts. TIS has long possessed a high order of reliability for these reasons.

In summary, we must respectfully disagree with the conclusion reached in the FPC staff report of August, 1969. We reaffirm that the conclusions set forth in our report of January, 1968, supported as they are by more than 25 years' operating experience, are in the best interest of the users of electric service in this most rapidly developing region of the nation.

Very truly yours,

P. H. Robinson
President

PHR/mw
cc - Messrs. T. L. Austin, Jr., Texas Power & Light Company
Glenn E. Richard, Gulf States Utilities Company
J. Robert Welsh, Southwestern Electric Power Company
D. S. Kennedy, Oklahoma Gas and Electric Company
Roy Tolk, Southwestern Public Service Company
B. B. Hulsey, Jr., Texas Electric Service Company
C. A. Tatum, Jr., Texa Utilities Comp
Barney M. Davis, Central Power & Light Company
O. W. Sommers, City Public Service Board
Dexter Kinney, City of Austin
W. S. Gideon, Lower Colorado River Authority
Roff W. Hardy, West Texas Utilities Company
T. M. Austin

2.1
2.2
2.4.3
2.1 (1)

Dallas Power & Light Company

Dallas, Texas

R. J. GARY
VICE PRESIDENT - SYSTEM OPERATION

November 25, 1969

To All Members:

Texas Interconnected System
Administrative Committee

Attached is a copy of the minutes of the meeting of the Administrative Committee held on Tuesday, November 4, 1969 in Houston, Texas.

Yours very truly,

R. J. Gary

Attach.

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JMM-1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket Nos. 50-498A
	)	50-499A
HOUSTON LIGHTING AND POWER COMPANY	)	
THE CITY OF SAN ANTONIO	)	
THE CITY OF AUSTIN AND	)	
CENTRAL POWER AND LIGHT COMPANY	)	
	)	
(South Texas Project, Units Nos. 1 and 2)	)	

PROTECTIVE ORDER

WHEREAS, by subpoena of the Atomic Safety and Licensing Board ("Licensing Board") in these proceedings dated February 26, 1979, Gulf States Utilities Company ("GSU") was, at the request of Public Utilities Board of the City of Brownsville, Texas ("PUB") pursuant to 10 C.F.R. §2.720, commanded to make available for inspection and copying the documents described in the Schedule attached to said subpoena;

AND, WHEREAS no good cause has been shown for reducing the scope of the subpoena, or for imposing any costs other than reasonable copying costs on PUB;

AND, WHEREAS documents and information responsive to this subpoena may contain confidential material or be privileged so as to justify imposing conditions for compliance under 10 C.F.R. §§2.720(f) and 2.740(c) as set forth below;

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IT IS HEREBY ORDERED THAT:

1. GSU shall immediately make available for inspection and copying all documents that it has prepared in response to the subpoena or to the shorter schedule provided by PUB to GSU on March 5, 1979. GSU shall immediately take steps to produce documents in compliance with the remainder of the subpoena schedule.

2. PUB shall reimburse GSU for the copying costs for each copy it receives of a document produced in response to the subpoena. GSU shall bear all other costs and expenses incurred by it in responding to the subpoena.

3. As used herein, "confidential business information" is information which concerns and is related to the trade secrets or other confidential business plans, procedures, relationships or arrangements of any kind which, if disclosed, have the potential of causing harm to the competitive position of the person, firm, partnership, corporation or other organization from which the information was obtained and as to which that person, firm, partnership or corporation could claim confidential treatment pursuant to 10 C.F.R. §2.740(c). Such confidential information shall include, but not be limited to, data, information, or options furnished on a confidential basis by third parties to GSU for the purpose of preparing and conducting any current joint study of

the feasibility of interconnection, the construction of jointly owned or utilized generation or transmission facilities; offers and responses made and received on a confidential basis currently under consideration by Gulf States or a third party with regard to participation in the ownership, construction or operation of any electric power facility or portion thereof; and, the terms and conditions of any contract currently under negotiation between Gulf States and any other party for the sale or supply of electric power (excluding documents covered by Paragraph 14 below).

4. Any documents produced in response to the subpoena of February 26, 1979, which are asserted by GSU to contain or constitute such confidential business information shall be so designated in writing and shall be segregated from other information being produced. Such documents produced by GSU shall be clearly and prominently marked on their face with the legend: "GULF STATES CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER," or a comparable notice. As used herein, "document" shall include all contents or any portion of any document so designated. Only in camera disclosure of such documents shall be made at any hearing before the Nuclear Regulatory Commission ("Commission"), the Licensing Board or the officer presiding over this proceeding.

5. Confidential document permission produced in accordance with the provisions of paragraph 4 above shall not be disclosed to any person other than: (i) counsel for parties to this proceeding, including necessary secretarial and clerical personnel assisting such counsel; (ii) qualified persons taking testimony involving such documents or information and necesary stenographic and clerical personnel thereof; (iii) PUB personnel, independent consultants and technical experts and their staff who are engaged directly in this litigation; (iv) the Commission, the Licensing Board, the presiding officer, or Commission's Staff.

6. Confidential business information submitted in accordance with the provisions of paragraph 4 above shall not be made available to any person designated in paragraph 5(i) and (iii) unless they shall have first read this Order and shall have agreed, in writing: (i) to be bound by the terms thereof; (ii) not to reveal such confidential business information to anyone other than another person designated in paragraph 5; and (iii) to utilize such confidential business information solely for purposes of this proceeding.

7. If the Commission or the Licensing Board orders that access to or dissemination of documents designated confidential shall be made to persons not included in paragraph

5 above, such documents shall be accessible to or disseminated to such other persons only upon the conditions and obligations of this Order. Such persons shall agree in writing to be bound thereby prior to such access or dissemination. Upon the request of any party or by the Board upon its own motion, GSU shall make an appropriate showing of confidentiality for specific information or documents as to which it has claimed confidentiality. If the Board finds that GSU has failed to make such a showing, such information or documents shall not be treated as confidential under the terms of this Order.

8. Any confidential document shall be submitted to the Commission, Licensing Board or the presiding officer only in connection with a motion or other procedure within the purview of this proceeding, and shall be submitted under seal in the manner dscribed in paragraph 4 above. Any portion of a transcript in connection with this proceeding containing any confidential documents submitted pursuant to paragraph 4 above shall be bound separately and filed under seal. When any confidential documents submitted in accordance with paragraph 4 above is included in an authorized transcript of a deposition or exhibits thereto, arrangements shall be made

with the court reporter taking the deposition to bind such confidential portions and separately label them "GULF STATES CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER." Before a court reporter receives any such document, he or she shall have first read this Order and shall have agreed in writing to be bound by the terms thereof. Copies of each such signed agreement shall be provided to Gulf States.

9. Any document produced and designated as confidential pursuant to paragraph 4 above is to be treated as such within the meaning of 5 U.S.C. §522(b)(4) and 18 U.S.C. §1905, subject to a final ruling, after notice, by the Commission, Licensing Board, the presiding officer, or the Commission's Freedom of Information Act Officer to the contrary, or by appeal of such a ruling, interlocutory or otherwise.

10. The Commission's Staff shall take all necessary and proper steps to preserve the confidentiality of, and protect GSU's rights with respect to, any confidential documents designated by GSU in accordance with paragraph 4 above, including, without limitation, (a) notifying Gulf States promptly of: (1) any inquiry or request by anyone for the contents of or access to such confidential

documents (other than those authorized pursuant to this Order) under the Freedom of Information Act, as amended, 5 U.S.C. §522, and (ii) any proposal to declassify or make public any such confidential document; and (b) providing Gulf States at least seven days after receipt of such inquiry or request within which to take action before the Commission, the Board, its Freedom of Information Act Officer, or the presiding officer, or otherwise to preserve the confidentiality of such confidential documents.

11. If confidential documents produced in accordance with paragraph 4 are disclosed to any person other than in the manner authorized by this Order, the person responsible for the disclosure shall immediately bring all pertinent facts relating to such disclosure to the attention of Gulf States and the presiding officer, and, without prejudice to other rights and remedies of GSU, make every effort to prevent further disclosure by him or by the person to whom the document was improperly disclosed.

12. Nothing in this Order shall abridge the right of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, the Licensing Board or the presiding officer concerning the status of confidential documents.

13. Upon final termination of this proceeding, each person subject to this Order shall assemble and return to Gulf States all confidential documents as well as all other documents containing confidential business information produced in accordance with paragraph 4 above, including all copies of such mattter which may have been made, but not including copies containing notes or other attorney's work product that may have been placed thereon by counsel for the receiving party. All copies containing notes or other attorney's work product shall be destroyed, and certification of same shall be made to GSU. Receipt of material returned to GSU shall be acknowledged in writing. This paragraph shall not apply to the Commission, the Board, the presiding officer and the NRC Staff, which shall retain such material pursuant to statutory requirements and for other recordkeeping purposes, but may destroy those additional copies in its possession which it regards as surplusage.

14. GSU need not at this time produce any documents required by the subpoena that relate to its proposed participation agreement with the Sam Rayburn Dam Electric Cooperative, Inc. for the River Bend Nuclear Plant. GSU shall provide a summary of documents responsive to the supoenae drafted so as not compromise its proprietary interests. If the parties are unable to reach agreement on

the sufficiency of Gulf States' response, the documents shall be submitted to the Licensing Board for in camera inspection. If the Board determines that the inspected documents may be disclosed, such disclosure shall be in accordance with the terms and conditions of paragraphs 3-13 of this Order, except that the Board may order that the documents be produced only in part of with certain deletions to protect the confidentiality of prorietary interests.

15. GSU need not at this time produce any correspondence or communication between Gulf States and outside counsel. GSU shall, upon request, furnish a list of such documents with a description of each, in accordance with the Instructions relating to claims of privilege in the subpoena served on GSU. If the privileged nature of the document is contested, the document shall be submitted to the Licensing board for in camera inspection. If the Board determines that the inspected documents may be disclosed, the Board may order that the documents be produced only in part or with certain deletions to protect attorney/client confidentiality; and if GSU asserts a separate claim of confidentiality, such disclosure shall be in accordance with the terms and conditions of paragraphs 3-13 of this Order.

16. GSU need not at this time produce any documents generated by GSU and any other parties solely as a part of negotiations to settle this proceeding. GSU shall provide a summary of documents as to which privilege is asserted in compliance with the instructions in the subpoena. If the parties are unable to reach agreement on the sufficiency of GSU's response, documents in question shall be submitted to the Licensing Board for in camera inspection. If the Board determines that the inspected documents may be disclosed, such disclosure shall be in accordance with the terms and conditions of paragraphs 3-13 of this Order, except that the Board may order that the documents be produced only in part of with certain deletions to protect the privilge to settlement negotiations.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Dated at Bethesda, Maryland
this _____ day of _____, 1979

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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Houston Lighting & Power Company et al. (South Texas Project, Units No. 1 and 2)	)	Docket Nos. 50-498A and 50-499A
	)	
	)	
	)	
Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units No. 1 and 2)	)	Docket Nos. 50-445A and 50-446A
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing ANSWER BY THE PUBLIC UTILITIES BOARD OF THE CITY OF BROWNSVILLE, TEXAS TO MOTION AND SUPPLEMENTAL MOTION BY RESPONDENT GULF STATES UTILITIES COMPANY FOR A PROTECTIVE ORDER AND AN ORDER SETTING CONDITIONS FOR COMPLIANCE WITH SUBPOENA in the above captioned proceeding to be served on the following by deposit in the United States mail, first class, postage prepaid, or as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission internal mail system this 10th day of May, 1979.

* Marshall E. Miller, Chairman
Atomic Safety & Licensing Board Panel
Nuclear Regulatory Commission
Washington, D. C. 20555

* Sheldon J. Wolfe, Esquire
Atomic Safety & Licensing Board Panel
Nuclear Regulatory Commission
Washington, D. C. 20555

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* Joseph Rutberg, Esquire
Antitrust Counsel
Counsel for NRC Staff
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* Chase R. Stephens, Chief
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