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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER COMPANY	)	NRC Docket Nos. 50-498A
PUBLIC SERVICE BOARD OF SAN ANTONIO	)	50-499A
CITY OF AUSTIN	)	
CENTRAL POWER AND LIGHT COMPANY	)	
(South Texas Project, Unit Nos.	)	
1 and 2)	)	
	)	
TEXAS UTILITIES GENERATING	)	NRC Docket Nos. 50-445A
COMPANY, et al.	)	50-446A
(Comanche Peak Steam Electric	)	
Station, Units 1 and 2)	)	

NRC STAFF'S OBJECTIONS TO INTERROGATORY #3  
PROPOUNDED BY HOUSTON LIGHTING & POWER  
COMPANY AND MOTION FOR A PROTECTIVE ORDER

On March 12, 1979, the NRC Staff responded to the "Second Set Of Interrogatories And Request For Production Of Documents..." filed by Houston Lighting & Power Company ("Houston"). The Staff respectfully requests this Board to issue a protective order with respect to interrogatory #3 of said interrogatories pursuant to 10 CFR 52.740(c) of the Commission's Rules of Practice.

Pursuant to interrogatories one and two, the Staff, as requested, has provided to Houston the names of the fact and expert witnesses who may testify on behalf of the Staff in this proceeding. However, interrogatory #3 requests <sup>1/</sup> that the Staff identify any expert or consultant, past or present, who has performed work for the Staff in this proceeding "but

1/ Interrogatory #3 provides:

"3(a). Identify each expert or consultant who is performing or who has performed work for the Staff in connection with this proceeding but who is not expected to testify.

(b). Specify the scope of work performed or to be performed by each expert or consultant."

who is not expected to testify" (emphasis added). This request collides with Rule 26(b) of the Federal Rules of Civil Procedure. That provision in relevant part provides:

(4) Trial Preparation: Experts' Discovery of facts known and opinion held by experts, otherwise discoverable under the provisions of subdivided (b)(1) of the rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance and the facts and opinions to which the expert is expected to testify, and the summary of the grounds for each opinion...

(B) (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial as provided in Rule 35(b) 2/ or upon a showing of exceptional circumstances under which it is impracticable for the parties seeking discovery to obtain facts or opinions on the same subject by other means. Rule 26(b)(4)(A)(i), (B).

Houston has not demonstrated any "exceptional circumstances" whereby it is impracticable for it to obtain facts or opinions which relate to this proceeding. Indeed, the Staff has made available to Houston, even prior to the Staff's written response to Houston's interrogatories, the names of the Staff's engineering and economic experts (and consultants) who are expected to testify in this proceeding. Moreover, Houston has retained its own experts with respect to the same subject matter.

2/ The Rule 35(b) exception does not apply to this proceeding because it pertains only to examinations by physicians.

An instructive case interpreting Rule 26 is Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co., 60 FRD 205 (S.D.N.Y., 1973). After observing that the party seeking the protective order had made its books and records available to the party seeking discovery, the district court concluded that access to these records was sufficient to defeat a claim of "exceptional circumstances." The court perceptively observed:

To hold otherwise would tend, at least in this case, to expose the theories and opinions that were sifted to arrive at the theory of the claim for relief with the aid of an expert. This sort of material is withheld from discovery not because it is work product... but because it is unfair to compel discovery of the consultative opinion of an expert who will not testify on the subject matter. It is easy enough for the moving party to obtain his own expert opinion based on the facts and figures discovered.... 60 FRD 205.

Thus, courts following the Federal Rules have refused to permit discovery against non-testifying expert witnesses in the absence of a showing of "exceptional circumstances." In re IBM Peripheral EDP Devices Antitrust Litigation, 77 FRD 39 (N.D. Cal., 1977); Galella v. Onassis, 487 F.2d 986, 996 n.13(h), (2nd Cir. 1973); Seiffer v. Topsy's International, Inc. 69 FRD 69 (D.C. Kansas, 1975). As noted by the Seiffer court, supra.,

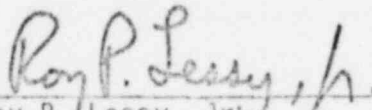
the overall design of the discovery rules must be kept clearly in focus in evaluating the merits...The crucial point is that Rule 26 of the Federal Rules of Civil Procedure overrules and limits the more general provisions of the remaining discovery machinery... 69 FRD 72.

The Seiffer court is one of the few courts to detail the burden of the party seeking to prove "exceptional circumstances" necessary to override the protection of the Federal Rules afforded an expert consulted but who will not offer testimony. The Seiffer court adopted the language of

Rule 26b in concluding that it is necessary to demonstrate that it is impracticable to obtain facts or opinions on the same subject by other means, before permitting discovery of the consultative opinion of an expert who will not testify, 69 FRD 72. Inasmuch as the Staff has identified for Houston the experts it intends to use as witnesses during the hearing, and that these experts cover the entire subject matter of expert opinion which the Staff has sought or will seek with respect to this proceeding, the Staff believes that Houston cannot meet its burden of establishing "exceptional circumstances."

Wherefore, Staff hereby moves the Board for a protective order relieving it from the obligation of responding to Houston's Interrogatory #3.

Respectfully submitted,

  
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Roy P. Lessy, Jr.  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 15th day of March 1979.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF'S OBJECTIONS TO INTERROGATORY #3 PROPOUNDED BY HOUSTON LIGHTING & POWER COMPANY AND MOTION FOR A PROTECTIVE ORDER in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of March, 1979.

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