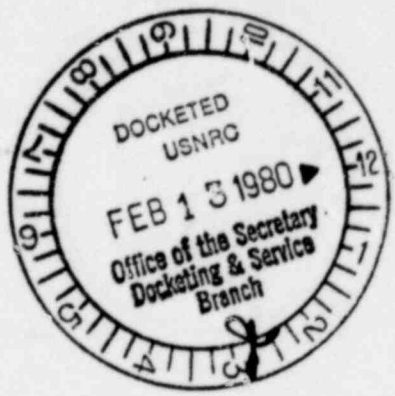
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman
Dr. James C. Lamb, Member
Dr. Emmeth A. Luebke, Member

In the Matter of	)	
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	)	Docket Nos. STN 50-498 OL STN 50-499 OL
(South Texas Project, Units 1 and 2)	)	

MEMORANDUM AND ORDER CONCERNING CCANP MOTIONS
(February 12, 1980)

On January 16, 1980, Citizens Concerned About Nuclear Power, Inc. (CCANP), an intervenor in this operating license proceeding, filed two motions: (1) a motion to compel the Applicants to bear expenses of copying in responding to CCANP's discovery requests; and (2) a motion to compel the Applicants to provide discovery on Saturdays. The Applicants oppose both motions. The Staff opposes the first but takes no position on the second (although it offers certain comments). No other party has responded. We deal with each of these motions below.

1. In its motion to compel Applicants to bear expenses of copying, CCANP seeks an order requiring the Applicants to provide copies, at their expense, to CCANP of documents which are

responsive to CCANP's discovery requests.[1/] In support of this request, CCANP states that it considers the discovery process in NRC proceedings to be "essentially parallel" to discovery in "normal judicial proceedings" and that, in such proceedings, "the party whose records are subpoenaed, requested by interrogatory, or called for in a notice of deposition bears the cost of reproducing such documents." CCANP cites no authority in support of this proposition. But it does note that it followed this course in responding to the Applicants' discovery requests.

On the other hand, as the Applicants and Staff point out, the NRC rules which deal with the production of documents through discovery provide only for the making available, and the inspection and copying, of those documents. 10 CFR §2.741. Where comparable, NRC rules may be construed in accord with similar provisions of the Federal Rules of Civil Procedure. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457 (1974). Under the Federal Rules, however, a party requesting production of documents for inspection must generally bear the costs of reproducing those documents. 4A Moore's Federal Practice, §§34.19[2], 34.19[3] (1978); Niagara Duplicator Co. v. Shackleford, 160 F.2d 25, 26-27 (D.C. Cir. 1947); Barrows v. Koninklijke Luchtvaart Maatschappij, 11 F.R.D. 400, 401 (S.D.N.Y. 1951).

1/ As we understand it, copies have already been furnished to CCANP, and CCANP has agreed to pay for them; but the Applicants have agreed to reimburse CCANP for this expense if ordered to do so.

We may, of course, have the authority to authorize the relief requested by CCANP. For under 10 CFR §2.740(c), we may "make any order which justice requires to protect a party * * * from * * * undue burden or expense." See also Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-77-18, 5 NRC 671 (1977). In construing a similar provision of the Federal Rules, however, the court in Niagara Duplicator Co. v. Shackleford, supra, found the shifting of expenses authorized there by the lower court to be an abuse of discretion. Whether or not that would always be the case, it seems clear that absent a very strong showing of exceptional circumstances, the relief sought by CCANP would not be proper under the NRC Rules of Practice. Absent such a strong showing of exceptional circumstances, the shifting of expenses must be analogized to the fee shifting which, without specific statutory or other authorization (not here present), has been held to be improper. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

CCANP's justification for expense shifting appears to be based almost solely on its understanding of "normal judicial proceedings." As we have indicated, however, the "normal" practice in both NRC proceedings and proceedings directly subject to the Federal Rules is for the party seeking discovery to bear the cost of reproducing documents. Insofar as we are aware, there are no exceptional circumstances here which would justify our departure from the general rule applicable in NRC proceedings.

(The circumstance that the discovery rules are likely to have a differing relative financial impact on different parties is not an exceptional circumstance; it is likely to be present in most proceedings.) That being so, CCANP's motion must be generally denied.

In one respect, however, CCANP is equitably entitled to some relief. Because it undoubtedly misunderstood what the "normal practice" is in NRC proceedings, it apparently furnished to the Applicants copies of documents which they requested without charging for such copies. If CCANP had been aware of "normal" NRC practice, it might well have merely made available for inspection and copying the documents in question, leaving the Applicants with the expense of copying. Moreover, the protective arrangement worked out between the Applicants and CCANP with respect to certain QA records required CCANP to reproduce various documents for eventual transmission to the Applicants. See our Memorandum and Order Modifying Discovery Schedule, dated January 16, 1980. In these circumstances, we believe it equitable and consistent with the terms of 10 CFR §2.740(c) for the Applicants to reimburse CCANP for the cost of copies of documents which CCANP sent them in response to their discovery requests. Alternatively, the Applicants may wish to furnish an equivalent number of "free" copies to CCANP or to waive reimbursement for that number of documents.

2. CCANP's other motion seeks an order which would require the Applicants to make available documents for selection and

copying on Saturdays. As phrased, the motion seeks a general ruling, although in context it appears to relate only to documents stored at the construction site and examination sought on Saturday, January 26, 1980 (later changed to Saturday, February 2, 1980).

The basis of CCANP's motion appears to be matters of convenience to it — e.g., the distance of the site from San Antonio (where CCANP's headquarters and counsel are located), the desirability of limiting the number of trips which CCANP must make to the site, and the unavailability on weekdays of at least one expert witness whose presence at the site is said by CCANP to expedite the discovery process. In opposition, the Applicants note that, under the Federal Rules, documents are required to be produced during reasonable business hours (citing Harris v. Sunset Oil Co., 2 F.R.D. 93 (W.D. Wash. 1941)). They also point to the extra expense (overtime) and inconvenience to them of permitting examination of documents at the site on Saturdays.

In ruling upon this motion, we are being asked to balance the convenience of one party against the convenience of the other. We do not believe that it is possible to do so equitably on a general basis, as sought by CCANP. Rather the balance must take into account the particular circumstances of each request for discovery on Saturdays. As the Staff points out (citing Miller v. International Paper Co., 408 F.2d 283, 292-93 (5th Cir. 1969) as well as Sunset Oil, supra), the case law supports the position

that discovery is conducted during normal business hours, that Saturdays are generally considered beyond normal business hours, but that the matter of weekend discovery is a matter that should be discussed maturely among the parties so that an amicable agreement can be reached based upon mutual convenience. This course of action has been followed in this case, where, as we understand it, CCANP was given access to the documents at the site on Saturday, January 12, 1980, and was to be afforded access on February 2, 1980, if necessary. We regard the circumstances which gave rise to access on those two days as justifying Saturday discovery, but we cannot agree that discovery on Saturdays generally should be mandated.

Because CCANP obtained the particular Saturday discovery to which its motion was primarily directed, we dismiss its motion. We urge the parties to attempt to work out amicably any further requests to engage in discovery on weekends. This dismissal is without prejudice to further attempts by the parties to bring to our attention particular disputes concerning weekend discovery which they are unable to resolve to their satisfaction.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman

Dated at Bethesda, Maryland,

this 12th day of February, 1980.