

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

HOUSTON LIGHTING & POWER COMPANY'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND DEPOSITION TESTIMONY BY
THE PUBLIC UTILITIES BOARD OF BROWNSVILLE AND ITS
EXPERT WITNESS, JOHN W. WILSON

Houston Lighting & Power Company (Houston) moves the Atomic Safety and Licensing Board (the Board) to issue an Order compelling the Public Utilities Board of the City of Brownsville (PUB) and its expert witness, Dr. John W. Wilson, to produce all documents referring or relating to or setting forth Dr. Wilson's analysis or consideration of the so-called market for the generation of electric power by nuclear-fueled generators (the nuclear power market), and to thereafter make available Dr. Wilson for cross-examination on deposition concerning such market. In the alternative, Houston moves the Board to Order that if PUB and Dr. Wilson continue to refuse to produce such documents and give such testimony, Dr. Wilson

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will be precluded from offering testimony on this market at the hearing.

During the course of discovery Houston has served interrogatories and document requests on the PUB that sought to discover the relevant markets to which PUB's expert witness will testify. Subsequently, on December 19, 1979, PUB filed its Further Supplemental Response to Houston's First Set of Written Interrogatories, which set forth its allegations of relevant markets in Interrogatory Nos. 24, 33 and 34.

On March 24-26, 1980, Houston, Texas Utilities, and C&SW deposed PUB's expert economic witness, Dr. John W. Wilson.^{1/} Dr. Wilson testified that he was the principal author of the market analysis contained in PUB's Further Supplemental Response; and when asked to set forth the relevant markets to which he will testify, Dr. Wilson referred counsel to Interrogatory Answer Nos. 24, 33 and 34 in that pleading.

Included among the relevant markets in Interrogatory Answer Nos. 24, 33 and 34 is the so-called nuclear power market. Dr. Wilson admitted that this was a market of his own making and that the nuclear power market had never been adopted by a single court or regulatory agency. Moreover, when counsel for Houston attempted to discover Dr. Wilson's workpapers on this market, the witness maintained that not one scrap of paper relating to this market

^{1/} Dr. Wilson had been deposed previously for part of a day on December 20, 1979 and (after a hiatus due to Dr. Wilson's personal schedule and illness of counsel) on February 8, 1980. On both occasions Dr. Wilson indicated that his analysis of this case was only superficial and that he had more work to do. The deposition in March sought to explore his final conclusions and analysis and his work relating thereto.

has been generated in this case, except for the pleading item referring to the market. Nor has the PUB furnished Houston or other parties with any documentation of Dr. Wilson's work on this new market.

Questioning then revealed that Dr. Wilson was retained as an expert witness in a civil suit filed in federal district court in Florida, The Fort Pierce Utilities Authority of the City of Fort Pierce, et al. v. Florida Power & Light Company, Civil Action No. 79-5101-Civ-JLK (S.D. Fla.), and that Dr. Wilson was proposing his so-called nuclear power market as a relevant market in that proceeding. As soon as counsel for Houston sought to question the witness on the nature of his work on that market in the Fort Pierce case, counsel for PUB instructed his witness not to answer any questions concerning the nature, scope or details of his work on the nuclear power market in that proceeding. A unanimous and vigorous objection by all counsel present was unavailing to change PUB's position.^{2/}

Counsel for PUB's ostensible reason for his instruction was that the law firm of Lowenstein, Newman, Reis, Axelrad & Toll (LNRAT) was both representing Houston in this proceeding and the defendant in the Fort Pierce case. Why this should prevent discovery of relevant matters in this case was unarticulated; and indeed, PUB's counsel admitted that the information Houston was

^{2/} Houston requested the Reporter to expedite the portions of the deposition pertinent to this motion. While they have not yet arrived, waiting further does not seem productive under the circumstances.

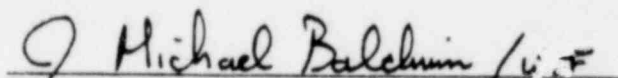
seeking would not be immune from discovery in the Fort Pierce case. Nevertheless, in an attempt at conciliation, counsel from LNRAT offered to leave the deposition and to have the sought-after testimony taken under an appropriate protective order. PUB's counsel and his witness, however, remained intransigent.

Dr. Wilson is seeking to advance his novel theory in two forums at once. This being so, he can hardly be heard to object to full discovery of his work in each forum. Nor should he be allowed to hide the work that he has done toward developing his theory by associating it only with the more slowly developing of the two cases in which he propounds that theory.

Houston is faced with an expert witness proffering testimony on a relevant market of his own concoction while simultaneously denying Houston the discovery it needs to meaningfully cross-examine the witness on his conclusions. There is no documentation of the so-called nuclear power market in this case beyond the conclusory market definition authored by the witness as a pleading item. There is no precedent for the market in reported decisions, as the witness admits. The single other instance in which this witness (or, it would seem, any witness) has analyzed the nuclear power market as a relevant market in an antitrust proceeding is Dr. Wilson's work in the Fort Pierce case. Houston believes that it cannot be afforded a full and free cross-examination of Dr. Wilson without access to his analysis in that case.

Therefore, Houston requests that the Board order PUB and its expert witness to produce all documents in their possession, custody or control that refer or relate to or set forth any analysis of the nuclear power market by Dr. Wilson or his firm in the Fort Pierce case. Furthermore, Houston requests an Order compelling Dr. Wilson to attend a deposition to be taken after such document production and to respond to questions concerning the analysis revealed by the documents or otherwise done of the nuclear power market. In the alternative, if the requested documents and deposition testimony are not obtained, Houston requests an Order precluding Dr. Wilson from offering testimony at the hearing on the so-called nuclear power market.

Respectfully submitted,


J. Michael Baldwin

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Power Company

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DATED: April 3, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| |) | |
| (Comanche Peak Steam Electric |) | |
| Station, Units 1 and 2) |) | |

ORDER REGARDING RESPONSES TO
HOUSTON LIGHTING & POWER COMPANY'S
MOTION TO COMPEL

On April 3, 1980, Houston Lighting & Power Company filed Houston Lighting & Power Company's Motion to Compel Production of Documents and Deposition Testimony by the Public Utilities Board of Brownsville and its expert witness, John W. Wilson. Copies of that Motion and an accompanying cover letter were hand-delivered to the Public Utilities Board on that date.

The Board finds that there is good cause for a modification of the schedule to respond to said Motion. Therefore, pursuant to 10 CFR § 2.711(a), the Board orders the following schedule be adopted:

| | |
|----------------|---|
| April 10, 1980 | Responses hand-deliveries to the Board and Houston by the Public Utilities Board (and any other responding party) |
| April 11, 1980 | Conference call to resolve issues raised by this Motion |

Counsel for Houston will be responsible to arrange the conference call between the Board, the Public Utilities Board, any other party responding to the Motion, and itself.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Dated at Bethesda, Maryland
April , 1980

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| (Comanche Peak Steam Electric |) | |
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing:

1. Letter to the Board from Douglas G. Green
2. Houston Lighting & Power Company's Motion to Compel Production of Documents and Deposition Testimony by the Public Utilities Board of Brownsville and Its Expert Witness, John W. Wilson
3. Order Regarding Responses to Houston Lighting & Power Company's Motion to Compel

were served upon the following persons, by hand*, or by deposit in the United States Mail, first class postage prepaid, this 3rd day of April, 1980.

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