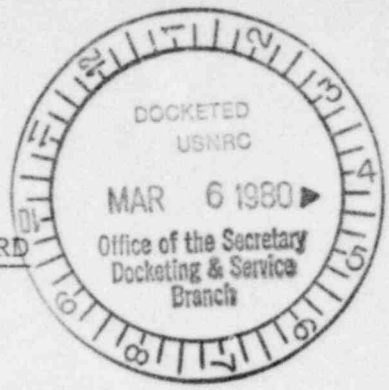

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF HOUSTON LIGHTING AND POWER COMPANY
TO JOINT MOTION OF DEPARTMENT
OF JUSTICE AND NRC STAFF

Houston Lighting & Power Company ("Houston") hereby responds to the Joint Motion of the Department of Justice and Nuclear Regulatory Commission Staff for Modification of Board's Order Regarding Protection of Settlement Discussions and for an Order to Compel Production of Certain Documents and Testimony, dated February 28, 1980 ("Joint Motion"). In this Motion the Department of Justice and the NRC Staff (collectively "Movants") seek to have the Board reverse its prior rulings and completely strip any protection from heretofore-confidential documents prepared in the course of ongoing settlement negotiations.

The Board rulings which the Movants seek reversed are the Orders dated April 16 and May 7, 1979, and an

oral ruling during the June 1, 1979, Prehearing Conference (Tr. 367). The Board's two Orders arose from a dispute between Houston and the Staff whether Houston would have to produce documents related to the "evaluation of settlement proposals." [1/] The Board declined to order such production:

> HL&P's objection is sustained as to work product involving non-testifying outside consultants . . . in accordance with our ruling at the March 20, 1979 prehearing conference (Tr. 183-185). . . . The same rule shall apply to documents generated by HL&P and other parties solely as part of negotiations to settle this proceeding. We encourage settlement negotiations and will protect the efforts of parties toward that end (10 CFR § 2.759).

Order, April 16, 1979, at 2-3. Not satisfied with this ruling, on April 19 the Staff filed a motion for reconsideration, again seeking to discover documents prepared solely for purposes of settlement.

Houston resisted this reconsideration on two grounds. One ground was that, as discussed below, the Board's April 16 Order was correct. The other was the immense practical problems which would inevitably result if Houston were required to negotiate in a fishbowl:

> Houston has recently been party to the first meaningful settlement discussions in this controversy. The parties to these discussions have agreed that their discussions and conclusions should be secret to encourage free and open discussions of sensitive problems. To expose these settlement negotiations to discovery would inhibit the candid exchange of ideas that is underway and could significantly reduce the chance of settlement.

1/ Response of Houston to Staff's Initial Interrogatory 6(e), dated February 9, 1979.

Houston Lighting & Power Company's Response to the NRC Staff's Motion for Reconsideration, dated April 30, 1979, at 4. The Board affirmed its April 16 holding:

> The Board adheres to its ruling protecting documents generated after the District Court trial and solely in connection with settlement negotiations, as necessary to encourage and protect settlement negotiations.

Order, May 7, 1979, at 2 (emphasis in original). Thus the Board carefully circumscribed the limits of its ruling.

The Board's oral ruling regarding protection of settlement documents arose from the dispute between Gulf States Utilities ("GSU") and the Brownsville Public Utilities Board ("PUB") at the June 1, 1979 prehearing conference. PUB had caused the Board to issue a third-party subpoena to GSU, and GSU had requested a ruling from the Board "to maintain the integrity of one of the prior orders of the licensing board with regard to settlement and negotiations among the parties in this proceeding" (Tr. 331). At the prehearing conference the movants here argued for disclosure of settlement documents (Tr. 349-60). The Board again affirmed its April 16 and May 7 Orders (Tr. 367).

Movants now request that the Board effectively reverse these orders to permit discovery of confidential settlement documents. Contrary to Movants' disingenuous representation that they seek merely a "modification" of the Board's prior rulings, the Joint Motion starkly reveals that

Movants seek a total destruction of the environment in which the settlement negotiations are continuing. See, e.g. Joint Motion at 17.

As set forth below, the Board's rulings protecting documents prepared solely for settlement negotiations are correct, and they have been scrupulously followed by Houston and, to the best of Houston's knowledge, by the other parties to the settlement negotiations. Moreover, the equities strongly favor continuation of the protection for settlement documents. For these reasons, Houston strongly opposes the Joint Motion.

I

THE BOARD'S PROTECTION FOR SETTLEMENT DOCUMENTS IS CORRECT

In 10 CFR § 2.759, the NRC has emphatically recognized that

> the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding.

This Board's Orders of April 16 and May 7, 1979, correctly apply that Commission policy. In accord is Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-84 (1979).

Moreover, the Board rulings closely follow established practices in federal court. Federal courts are empowered under Rule 26(c) of the Federal Rules of Civil Procedure to enter protective orders that tailor specific discovery requests to the overall objectives of the federal discovery rules. One of the objectives of both federal and state discovery rules is the encouragement of settlement negotiations. E.g., 4 MOORE'S FEDERAL PRACTICE ¶ 26.02[2], at 66 (2d ed. 1976); Developments in the Law--Discovery, 74 HARV. L. REV. 940, 944-46 (1961). The protection which the Board accorded to settlement documents is completely consistent with the use of protective orders in the federal practice to effectuate the policies underlying the discovery process.

II

THE BOARD SHOULD CONTINUE
TO PROTECT THE CONFIDENTIALITY OF
ECONOMIC AND ENGINEERING ASSESSMENTS
PERFORMED SOLELY FOR SETTLEMENT PURPOSES.

Movants seek a modification of the Board's prior orders in order to obtain discovery of documents generated after the District Court trial and solely in connection with settlement negotiations which "assess the technical feasibility and/or cost of electrical interconnection between TIS/ERCOT and SWPP." Joint Motion at 6. Movants request that the Board draw a distinction between documents revealing the posture or position adopted by a party in the course of settlement negotiations, and any engineering and economic analyses which have been generated in conjunction with settlement negotiations. It is the confidential nature of the latter which Movants have once again chosen to put before the Board.

The distinction which the Department and the Staff seek to draw simply ignores the reality of what is involved in settling any complex litigation. This case presents an enormously complex factual dispute involving sophisticated concepts of economics and electrical engineering. Any attempt to negotiate a settlement of this controversy is indeed a formidable task, for what is involved is nothing less than attempting to attain agreement upon a means of interconnecting two major power grids in a way which addresses the economic and electrical reliability concerns of each of the negotiating parties.

In this context, settlement negotiations involve much more than mere posturing. They involve complicated and detailed actual proposals and counterproposals. In addition, the serious pursuit of settlement requires a careful analysis of the cost and engineering feasibility of each party's respective proposals.

Economic and engineering assessments conducted in the context of settlement negotiations inevitably reflect the bargaining positions of the participating parties. Moreover, the data relied upon, the questions examined, and the process by which the inquiry is conducted are all indicative of the avenues of potential settlement being pursued. Not only would the outstanding differences among the negotiating parties be evidenced by the disclosure of such assessments but the areas in which the parties have reached a mutually satisfactory resolution would also be apparent upon examination and reflection. To suggest, as do the Department and the Staff, that documents pertaining to economic and engineering assessments conducted in conjunction with settlement negotiations may be disclosed without compromising the bargaining posture of the parties or the status of ongoing negotiations is simply not realistic. Modification of the Board's prior orders in the manner suggested by Movants would effectively eliminate the confidentiality that documents generated in the course of settlement have received throughout this proceeding.

A. Case Law Supports Protection of Materials Prepared Solely For and in the Course of Settlement Discussions

The Department and the Staff fail to cite any legal authority to support their position. United States v. Reserve Mining Company, 412 F.Supp. 705 (D. Minn.), affirmed, 543 F.2d 1210 (8th Cir. 1976) (en banc), the authority upon which Movants rely most heavily, is simply inapposite. In that case, the defendant had concealed the existence of hundreds of documents that were clearly responsive to various discovery requests. In a subsequent proceeding to impose sanctions for the defendant's violation of discovery rules, the defendant sought to argue that the concealed documents were immune from discovery on several grounds, including offer of compromise. The court held that the defendant's failure to identify the documents and to assert a claim of privilege from discovery at the trial precluded them from raising the argument for the first time in a proceeding to impose sanctions.

The Reserve Mining Company court went on to state in dicta that even if the defendant had asserted in a timely fashion that the concealed documents had been part of an offer of compromise, the claim would have been rejected as frivolous. The documents at issue were not documents that had been generated wholly in the context of settlement negotiations. Rather, they were documents relating to economic and technical feasibility studies which pre-existed any settlement discussion and which the defendant was attempting to shield from discovery on the theory that such studies might eventually

be addressed in settlement discussions. 412 F.Supp. at 711-12.

In contrast to Reserve Mining, the situation here does not present an instance in which a party is attempting to shield documents from discovery on the ground that the contents may eventually be the subject of settlement discussions. Rather, the documents which the Movants now seek to discover fall squarely within the confines of the Board's prior orders. These are documents which have been generated after the District Court trial and solely in connection with ongoing settlement talks.

B. There Is No Reason for Believing that any Designated Expert Witness is Relying on Settlement Materials in the Preparation of His Testimony.

The apparent concern on the part of the Department and the Staff (Joint Motion at 2) that these settlement documents will serve as a basis for the testimony of Houston's expert witnesses at trial is ill-founded. The numerous pages of deposition transcripts attached to the Joint Motion do not evidence a single instance in which a person designated as a witness in this proceeding has testified that he has relied in any way on the documents sought by the Movants in the preparation of his testimony in this case. Indeed, that question has never even been asked by attorneys for the Department or the Staff -- a certain indication that the Movants' real interest is in becoming privy to the settlement materials and not in probing further the basis for the expert testimony which will be offered by other parties.

The fact of the matter is that none of Houston's witnesses has ever relied upon any of the settlement materials nor will they be relied upon at trial. 2/

C. Movants' Asserted Grounds for Seeking to Invade Settlement Negotiations Do Not Withstand Scrutiny.

The Movants also assert that (1) the Board's prior orders have been misconstrued and misapplied by counsel; (2) objections by counsel have hindered discovery into studies regarding the feasibility of interconnecting TIS and SWPP; (3) settlement materials could reveal important information about the business justification of Applicant's conduct. Each of these contentions is totally without merit.

Counsel have scrupulously followed the Board's orders. The excerpts from depositions attached to the Movants' motion make it very clear that objections were related solely to documents developed in the conduct of settlement discussions, and after the decision of the District Court.

Counsel have not hindered Movants from discovering what studies have been made regarding the technical and economic feasibility of interconnecting TIS and SWPP. To the contrary, Houston has produced thousands of documents and has permitted thousands of pages of deposition testimony concerning that very subject. All such documents not generated solely as part of

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2/ The Joint Motion is partially predicated upon the scope of discovery concerning the trial testimony of expert witnesses. (Joint Motion at 16). However, two of the three depositions of Houston's employees which the Joint Motion cites were those of Kermit Williams and John F. Meyer, Jr., neither of whom is designated as a fact or expert witness by Houston. Mr. Simmons' expert opinions were obviously developed before the District Court trial.

settlement bargaining facilitated by the Board's prior Orders have been produced to Movants without dispute. Movants have had discovery of all the facts concerning such interconnections. The only questions Houston has objected to are those relating solely to settlement documents.

Finally, all documents which establish or reflect to Applicant's business justification for their position concerning the interconnection have been produced. Indeed, Applicant's position was established well before the District Court trial, independent of any later settlement negotiations.

D. As the Board Has Already Ruled, Participation by Non-Parties in Settlement Discussions Does not Deprive Settlement Discussions and Materials of Protection from Disclosure.

The factual dispute which underlies this proceeding, whether interconnection of ERCOT and SWPP can be effected in a manner consistent with the economic and reliability concerns of all the affected parties, is essentially the same dispute which is the subject of several related proceedings. Indeed, the Board recognized the necessity of settlement negotiations with utilities not parties to this proceeding when it extended its April 16 and May 7 orders to GSU at the June 1 prehearing conference. (Tr. 367). Despite Movants' assertions to the contrary, ongoing efforts to settle the NRC proceedings cannot possibly be isolated from efforts to attain settlement in related proceedings. Any attempt to resolve the issues in dispute by way of settlement negotiations

must necessarily transcend the jurisdictional limitations of any particular forum.[3/]

In addition, the implementation of any interconnection ultimately agreed upon by the parties will directly affect electric systems which are not parties to this proceeding. (Tr. 334-35). This is true as a matter of electrical engineering. Under these circumstances, the involvement of nonparties in negotiations and technical assessments may well be a necessary prerequisite to any negotiated settlement. The assertion of the Movants that such communications should constitute a waiver of confidentiality reflects a basic misunderstanding on the part of the Movants of the wide-ranging consequences of interconnecting two major power grids.

3/ Movant's argument that Mr. Simmons "waived" any privilege regarding settlement by entering into discussions with Mr. Sweatman, Director of Engineering and Enforcement for the Texas Public Utility Commission is not well taken. Movants ignore the fact that the Texas Public Utility Commission regulates the operations of electric companies in Texas and that an outstanding Order of the TPUC requiring that the electrical status quo in Texas be maintained as a matter of public interest, has a bearing on the parties in this case. Mr. Simmons' discussions with Mr. Sweatman are no less necessary to settlement than negotiations with affected non-parties such as GSU. See the TPUC's Orders in Docket No. 14, dated June 2, 1977 and July 11, 1977.

III

THE EQUITIES STRONGLY FAVOR CONTINUATION OF THE POLICY OF PROTECTION FOR SETTLEMENT DOCUMENTS

The inequity which would result if the Board reverses its position on the proper scope of protection to be accorded documents solely prepared for settlement negotiations is grievous. After effectively acquiescing in the Board's rulings for nine months, during which negotiations continued, the Movants attempt to spring their eleventh-hour trap and discover the candid assessments of the respective factual and legal positions of the negotiating utilities, as expressed in documents prepared solely for settlement negotiations. This attempt of the Movants should be rebuffed.[4/]

At the June 1 Prehearing Conference, Counsel for TU warned of the immense prejudice which would result to the negotiating utilities if the Board were subsequently to reverse its earlier rulings on settlement documents:

> MR. SAMPELS [Counsel for TU]: My point is: If this is a temporary or unwitting or mistaken protection, I am going to so advise my client and we're not going to have any documents, we're not going to have any such

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4/ Movants suggest, at page 11 of the Joint Motion, that since "on the eve of the hearing there is no indication that any settlement in the proceedings will be consummated . . . continued protection would serve no realistic function." Movants simply are wrong; a settlement in these proceedings is possible at this juncture, assuming negotiations can continue as they have.

> discussions. Because I think settlement discussions, by their very nature, done in a fishbowl, aren't settlement discussions; you might as well forget about it.
>
> And I think, really, I frankly find it absurd to suggest that this is a temporary condition, that suddenly, two weeks from now order didn't really mean what it said, and we're really going to have to turn all these documents over, to the extent there are any, to the world. I find that incredibly inconsistent with the encouragement of settlement discussions and the promotion of a public policy to settle, not litigate, controversies.

(Tr. 366-67). Except for the Staff's April 19 Motion for Reconsiderations, the Joint Motion is the first challenge of any type to the Board's rulings on settlement documents.

Under the protection of the Board's twice-affirmed and apparently settled rulings, Houston and certain of the other parties have continued the meaningful settlement negotiations which Houston alluded to in its April 30, 1979 responses and those negotiations are actively on-going at the present time. Indeed, the allegations upon which the Movants base their motion reveals, if anything, that Houston has focused its corporate resources towards settlement as well as litigation. While it would be inappropriate and perhaps counterproductive to speculate on the likelihood of settlement, the continuation of negotiations for now more than a year reasonably can be taken as a measure of the progress achieved. The effect upon those negotiations of a Board Order reversing its previous rulings would be devastating.

In summary, because Houston has maintained, and intends to continue, a clear distinction between confidential settlement documents protected from discovery and the

documents upon which it intends to base its defense, Movants will be in no way prejudiced by the Board's policy against discovery of settlement documents. Because disclosure and production at the eleventh hour of confidential documents prepared solely for settlement negotiations in strict reliance upon the Board's rulings would work grievous injustice upon Houston and the parties who have participated in the settlement discussion, all equitable considerations favor continuance of the Board's policy.

CONCLUSION

For the foregoing reasons, Houston requests the Board deny the Joint Motion in its entirety.

Respectfully submitted,

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