UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO PETITIONS OF TEXAS UTILITIES GENERATING COMPANY, HOUSTON LIGHTING & POWER COMPANY, AND CENTRAL AND SOUTH WEST CORPORATION, et al., FOR DIRECTED CERTIFICATION AND REVIEW OF THE LICENSING BOARD'S MARCH 7, 1980 ORDER REGARDING PRODUCTION OF DOCUMENTS

Pursuant to a March 13, 1980 Order of the Atomic Safety and Licensing Appeal Board ("Appeal Board"), the Department of Justice ("Department") submits this Memorandum in Opposition to the Petitions filed by Texas Utilities Generating Company ("TUGCO"), Houston Lighting & Power Company ("HL&P"), and Central and South West Corporation, et al. ("CSW"). 1/ These

1/ Petition of Texas Utilities Generating Company for Directed Certification of March 7, 1980 Licensing Board Ruling Requiring the Production of Settlement Documents and for Extension of Stay Pending Review and Decision, March 12, 1980 ("TUGCO Petition"); Petition of Houston Lighting & Power Company for Directed Certification, Interim Stay, and Review of Licensing Board Order Commanding Production of Documents Prepared Solely for Settlement Negotiations, March 13, 1980 ("HL&P Petition); Petition of Central and South West Corporation, et al., for Certification of Order Granting Joint Motion of Department of Justice and the Nuclear Regulatory Commission Staff for Modification of the Board's Order Regarding Protection of Settlement Discussions, March 12, 1980 ("CSW Petition").

petitions seek certification and review of a March 7, 1980 order of the Atomic Safety and Licensing Board ("Licensing Board"). This order was issued in response to a Joint Motion by the Department and the Nuclear Regulatory Commission Staff ("NRC Staff") 2/ which sought production of documents, and testimony relating to those documents, which had been withheld by HL&P and TUGCO, allegedly in violation of earlier Licensing Board rulings.

This Memorandum addresses the following issues: (1) whether interlocutory review by the Appeal Board is warranted, and (2) whether the Licensing Board correctly interpreted and applied its earlier rulings by holding that "settlement privilege" did not preclude discovery of the documents sought by the Department and the NRC Staff.

I.

BACKGROUND

On April 16, 1979, the Licensing Board issued an Order which provides, in pertinent part, that:

> ". . . documents generated by HL&P and other parties solely as a part of negotiations to settle this proceeding [need not be produced]." [Emphasis added] 3/

The Licensing Board reaffirmed this Order in its May 7, 1979 "Order Regarding Discovery Motions" and in its

---

2/ Joint Motion of the Department of Justice and the 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, February 28, 1980.

3/ Order Concerning Staff's Motion to Compel Further Answers by Houston Lighting & Power Company, April 16, 1979, at 2.

subsequent instructions to counsel at the June 1, 1979, Prehearing Conference, which concerned documents produced by Gulf State Utilities. On February 28, 1980, the Department and the NRC Staff filed a joint motion seeking clarification and modification of these Licensing Board orders on the ground that the orders had been misconstrued and misapplied by HL&P and TUGCO. The joint motion alleged that by failing to produce the disputed documents and by instructing deposition witnesses not to answer questions about the documents, HL&P and TUGCO have hindered meaningful discovery in a key area of factual inquiry, i.e., whether factual studies have been made which assess the technical feasibility and/or cost of electrical interconnections among the Texas Interconnected System ("TIS"), Electric Reliability Council of Texas ("ERCOT") and the Southwest Power Pool ("SWPP"). The Department and the NRC Staff contended that such documents could reveal important information about the business justification for Petitioners' conduct, which is a central issue the Licensing Board will consider at trial. Accordingly, the Department and the NRC Staff moved for an order to compel production of documents regarding said interconnections and testimony from certain named HL&P and TUGCO officers and employees regarding such documents.

On March 7, 1980, the Licensing Board heard oral argument on the joint motion and issued a ruling from the bench granting the motion in part. Chairman Miller stated:

> [W]e are going to allow the production of the documents which relate to studies or other materials bearing a reasonable relationship to the issue or issues of the feasibility of interconnection, whether from the technical, economic, or other point of view, insofar as it touches, reasonably, upon matters of business justification which have arisen or may arise. (Tr., p. 604).

The Licensing Board stayed the effectiveness of its order to March 17. On March 12, TUGCO filed a petition seeking review by the Appeal Board of the Licensing Board's order.

On March 13, the Appeal Board issued an Order granting a stay of the Licensing Board's order until March 24, directing all parties wishing to support TUGCO's petition to file pleadings by March 14, and permitting the Department and the NRC Staff to file responsive pleadings by March 20. This Memorandum in Opposition is submitted by the Department pursuant to the Appeal Board's Order of March 13.

II.

THE PETITIONS FOR DIRECTED CERTIFICATION SHOULD BE DENIED

The TUGCO, HL&P and CSW Petitions for directed certification should be denied because they do not meet the standards applicable to interlocutory appeals under the Nuclear Regulatory Commmission Rules of Practice. 10 C.F.R. § 2.1, et

seq. Interlocutory appeals at the Nuclear Regulatory Commission ("NRC") are governed by Rule 2.730(f), which provides:

> (f) Interlocutory appeals to the Commission. No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session. 10 C.F.R. §2.730(f)

The only exception to this blanket prohibition against interlocutory appeals is that Licensing Board orders ruling on petitions to intervene and/or requests for hearings may be challenged through an interlocutory appeal. 10 C.F.R. §2.714a. Since the Licensing Board has refused to refer this matter to the Appeal Board, Petitioners bear a heavy burden in persuading the Appeal Board that the issues raised in the Petition require "prompt decision...to prevent detriment to the public interest or unusual delay or expense...." 10 C.F.R. § 2.730(f).

The Appeal Board has consistently followed a stringent standard in reviewing requests for interlocutory appeals. Thus, for example, in Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2, ALAB-405, 5 NRC 1190)1977), the Appeal Board stated:

> Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical mattger, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. 5 NRC at 1192

The Petitioners cannot meet either of the tests set forth by the Appeal Board.

A. The Licensing Board's Order Poses No Threat of Immediate and Serious Irreparable Impact on Petitioners

To satisfy the first part of the NRC's two part standard for certification, Petitioners must prove both that the alleged harm would be serious, and that the effect of the alleged harm would be immediate and irreparable.

The allegedly serious harm which Petitioners claim would result from the Licensing Board's order is the claimed effect of that order on certain settlement negotiations to which the Department is not a party. Petitioners baldly assert that the Licensing Board order would cause "a breakdown in the settlement negotiations" (TUGCO Petition, p.7), would "chill settlement negotiations and compromise proposals from ever coming into existence at all" (HL&P Petition, p.6), and that "[a]n order requiring parties to disclose generally all documents generated in connection with settlement would very likely frustrate the [NRC] policy favoring settlement stated in Rule 2.759" (CSW Petition, p. 3). The Department

readily concedes that production of "all documents generated in connection with settlement" might impede the prospects for settlements, since "all" documents relating to settlement might include strategy papers or offers to compromise which could prove embarrassing if introduced in a trial. Such sensitive materials are properly protected under a limited "settlement privilege."

Petitioners overlook the fact that in the present case the challenged order does not require disclosure of all settlement documents. Rather, the Licensing Board carefully limited its order to:

> . . . documents which relate to studies or other materials bearing a reasonable relationship to the issue or issues of the feasibility of interconnection . . . insofar as it touches, reasonably, upon matters of business justification which have arisen or may arise. (Tr., p. 604).

At the March 7, 1980 hearing, counsel for HL&P indicated that studies concerning the economic feasibility of interconnection have been prepared (Tr., p. 571), but that such studies would not "serve as a final basis for settlement" (Tr., p. 568). Documents of this nature would not reveal any settlement offers or strategies, and so their production would have no apparent chilling effect on future negotiations. In short, the purportedly serious consequences of which Petitioners

complain simply would not arise from the narrowly defined order which has actually been issued by the Licensing Board.

Moreover, Petitioners should not be permitted to obtain the requested relief simply by suggesting that they will or will not undertake a particular course of action. The parading of horribles, i.e., abandoning settlement discussions, does not furnish a tribunal with a legally sound basis for issuing a particular ruling. Rather than speculating on how Petitioners might respond to an adverse ruling, the Licensing Board carefully limited its order to a specific set of documents, described above, in order to strike an acceptable balance between Petitioners concerns about settlement discussions and the legitimate need of the Department and the NRC Staff to obtain factual information which is critical to one of the ultimate issues in this case.

Both TUGCO and CSW cite Florida Power & Light Company (St. Lucie Plant, Unit No. 2), Docket No. 50-389-A, LBP-79-4, 9 NRC 164 (1979) in support of their claim that certification is warranted. That case does hold that production of "settlement documents because they are settlement documents" would be inconsistent with the NRC policy favoring settlement. (Id. at p. 184) But the NRC also emphasized that:

> "Here Florida Cities is not seeking documents which may also happen to be related to settlement talks, it is directly seeking settlement papers." Id.

In the instant case, the Department did not seek and the Licensing Board did not order production of "settlement papers" as such. Rather, the Licensing Board has ordered production of some studies which might in some way be related to settlement discussions, but which contain factual analyses of the crucial interconnection issue. Hence, while Florida Light & Power is apposite to the instant proceedings, it does not support the arguments raised by Petitioners.

Petitioners' claim that enforcement of the Licensing Board's order would result in immediate and irreparable injury is based on the fact that documents, once produced, cannot be "unproduced." As such, Petitioners' position is no different from that of any party displeased with a Licensing Board ruling on a discovery question. In light of the Appeal Board's clearly enunciated policy that interlocutory appeals will be permitted only in exceptional circumstances, Petitioners cannot demonstrate the required level of immediate and irreparable harm by simply pointing out that discovery cannot be undone at a later date.

The safeguards contained in the Licensing Board's March 7, 1980 order are particularly pertinent in this regard even though they are largely ignored in Petitioners' pleadings. The Licensing Board made production of the disputed

documents to the Department and the NRC staff subject to a protective order, and did not reach the question of what use could be made of the documents at trial. Moreover, the Licensing Board denied the request of the Department and the NRC Staff to use the disputed documents directly in depositions or interrogatories. Thus the only immediate consequence of production of the disputed documents would be to inform the Department and the NRC Staff of factual studies prepared by Petitioners which may reach conclusions inconsistent with positions which Petitioners will take at trial--hardly the sort of immediate and irreparable injury which constitutes an exceptional circumstance warranting an interlocutory appeal.

Balanced against the minimal harm to Petitioners which might arise from denial of certification, the Appeal Board should consider the genuinely immediate and irreparable harm which may face the Department if certification is granted. On March 27, 1980, the deposition of TUGCO's designated expert engineering witness, E. D. Scarth, will take place in Dallas. On April 4, 1980, the deposition of the designated expert engineering witness for HL&P, D. Eugene Simmons, will take place. Although the Licensing Board order does not permit the Department to examine these deponents directly concerning the studies in dispute here, the factual information contained in those may be explored, and could be crucial to the Department's trial preparation.

On April 14, 1980, the Department is obligated to designate trial witnesses and to provide a summary of their proposed testimony as well as to submit briefs which will outline the Department's legal and factual theories. Any significant delay in the production by Petitioners of the disputed studies will jeopardize the Department's ability to meaningfully use the studies in the remainder of discovery in the manner contemplated by the Board.

B. The Licensing Board's Order Will Not Affect the Basic Structure of the Proceedings in a Pervasive or Unusual Manner

The second part of the standard for directed certification, as set out in Public Service Company of Indiana, supra, concerns the effect of the disputed issue on the "basic structure of the proceeding." Although both parts of the standard must be met for directed certification, neither HL&P nor CSW address the "basic structure" aspect of the standard. TUGCO does mention the issue, but begs the central question by asserting that the second criterion

> "...is seen to be easily satisfied by the fact that settlement of these proceedings, or parts thereof, prior to the hearing must of necessity drastically affect this proceeding by leading to the removal of parties or issues or both." (TUGCO Petition, pp. 9-10)

A settlement would of course change the basic structure of any proceeding. But the real question here is whether settlement discussions in which neither the Department nor the NRC Staff are involved, and which apparently have been underway for almost one year, should now preclude the Department and the NRC Staff from obtaining studies to which they are

otherwise entitled. With a firm trial date less than two months away, the Department submits that the time has long since passed for the Petitioners to shield relevant documents by reference to settlement proceedings in which the Department is not involved. Moreover, even assuming that the parties to the ongoing settlement negotiations did reach a settlement, this would not terminate these proceedings because any such settlement would not include the Department and the NRC Staff. Hence TUGCO has presented no sound reason for arguing that production of the disputed studies would effect the basic structure of this proceeding.

III.

THE LICENSING BOARD'S MARCH 7, 1980 ORDER SHOULD BE UPHELD BECAUSE IT IS WITHIN THE BOARD'S LEGAL DISCRETION AND IS CONSISTENT WITH EARLIER BOARD RULINGS

The Licensing Board's March 7, 1980 order is challenged by Petitioners both on the grounds that the order allegedly infringes the so-called "settlement privilege" and on the grounds that the order is somehow unfair to Petitioners because it purportedly differs from earlier Licensing Board rulings. The Department submits that neither contention is factually or legally supportable.

A. Petitioners Do Not Challenge the Licensing Board's Power to Issue the Order in Question

It is revealing that Petitioners do not question the legal authority of the Licensing Board to order production of the disputed documents. The Petitioners do contend that the order is inconsistent with NRC policy favoring settlement,

but that issue--discussed at length below--was fully briefed and argued before the Licensing Board and does not bear on the power of the Board to issue its order. Similarly, the Petitioners argue that the Licensing Board's order is contrary to the spirit of Federal Rule of Evidence 408--also discussed below--but Petitioners cannot escape the fact that Rule 408 governs the admissibility of documents and so is not controlling on questions of discovery. Finally, Petitioners argue that the Licensing Board's March 7, 1980 order is inconsistent with earlier related rulings, but Petitioners cannot and do not question the Licensing Board's authority to interpret and implement its own rulings. Thus, at bottom, the present appeal simply seeks to re-litigate a decision of the Licensing Board with which Petitioners disagree but which, by their silence on the subject, they concede that the Licensing Board had full authority to make.

B. The Licensing Board's Order Is Consistent With NRC Policy Favoring Settlement and With Federal Rule of Evidence 408

Section 2.759 of the NRC Rules of Practice provides, in pertinent part, that

> ". . . 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 Department certainly takes no exception to this admirable policy. More to the point, nothing in the Licensing Board's order requiring the production of certain documents can fairly be said to run contrary to the broad guideline laid down by

Rule 2.759. Petitioners evidently feel that a Licensing Board ruling barring production of the interconnection studies might promote certain settlement discussions. But after a lengthy hearing in which the competing interest of the Department in access to documents bearing on a central issue of this case was also considered, the Licensing Board exercised its discretion by ordering production of the documents for limited purposes and subject to a protective order. Petitioners have raised no argument not already thoroughly aired before the Licensing Board for overturning that Board's lawful exercise of its discretion in ordering production of the interconnection studies.

A more complex issue is the applicability to the present dispute of Federal Rule of Evidence 408:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or 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.]

The Department has consistently taken the position that Rule 408 controls admissibility of evidence at trial, and has no necessary bearing on discovery. 4/ But assuming

---

4/ Section 2.740(b) of the NRC Rules of Practice specifically governs the scope of discovery. This NRC Rule is substantially broader than Rule 408 of the Federal Rules of Evidence because it permits:

arguendo that Rule 408 is an appropriate guide for discovery, the Licensing Board's March 7, 1980 ruling requiring production of feasibility studies of interconnection is fully consistent with Rule 408. The feasibility studies in question are neither evidence of an offer "to compromise a claim" nor "[e]vidence of conduct or statements made in compromise negotiations." Rather, the disputed studies are "otherwise discoverable" material which Rule 408 specifies need not be excluded "merely because it is presented in the course of compromise negotiations."

The Licensing Board repeatedly emphasized at the March 7, 1980 hearing that the "quasi-privilege" established for settlement documents in April 1979 was designed to track the provisions of Rule 408. (Tr. at pp. 512, 519-22, 527, 548, 559 and 603-04). In keeping with the narrow scope of Rule 408, the Licensing Board's original order in April

---

(footnote cont'd)

> ". . .discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things...It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. §2.740(b)(1).

The documents covered by the Licensing Board's March 7, 1980 order clearly fall within the ambit of Section 2.740(b)(1).

1979 extended the quasi-privilege only to documents generated "solely as part of negotiations to settle this proceeding." (April 16, 1979 Order, supra; emphasis supplied.) But the difficulty of determing whether a document was produced solely for settlement purposes is well illustrated by the following exchange between counsel for CSW and the Chairman of the Licensing Board:

> MR. MILLER: . . . You asked how we could differentiate those studies that were generated during settlement from the kinds of studies that will be presented as evidence here.
>
> There will, probably, be very little difference to the extent that a computer print-out is used to evaluate the impact of interconnection and that is an issue in this proceeding. The kind of study would be very similar to the ones that the engineers use to evaluate compromise, a drawing back from positions that are taken in litigation in an effort to get it over with.
>
> CHAIRMAN MILLER: Well, in that event if they are going to be very similar, then one could not honestly say that looked at in this context, . . . they were generated solely for settlement.
>
> The were generated and they were necessary for several purposes, one of which and perhaps largely is settlement . . .." (Tr. p. 586)

It is apparent that Petitioners' counsel gave the Licensing Board's order regarding the quasi-privilege for settlement materials a far broader scope than the Licensing Board intended. At the March 7, 1980 hearing the following revealing colloquy concerning deposition instructions to witnesses took place between counsel for HP&L and Licensing Board Chairman Miller:

"CHAIRMAN MILLER: . . . [W]hat I'm trying to find out is when . . . you were in communication with your witness, did you make clear that it was . . . not things that you would have to do otherwise to put on your proof in this case, but solely for ongoing settlement: did you make that judgment and was it clear to your witness?

MR. COPELAND: It was, because I . . . sat down with every . . . witness I had and said, . . . if they ask you a question that slops over on to the settlement, I'm going to instruct you that that's an area of settlement and you don't have to answer questions about that.

CHAIRMAN MILLER: Now, wait a minute; it wasn't just slopping over into an area, it was solely; that's the distinction that I'm trying to keep in your mind and mine. Let's rule-out the slop over stuff, now.

MR. COPELAND: No slop over. I told him if it related to settlement, he didn't have to.

CHAIRMAN MILLER: Solely related to settlement.

MR. COPELAND: Solely related to settlement.

CHAIRMAN MILLER: Well, now, that's a key word and you keep telling me what you said and it doesn't show up and I'm wondering if it showed up in a meaningful way to your witness, because that is the key to what we were trying to say and yet there could be honest misunderstandings.

I'm beginning to wonder if there wasn't mass confusion between us and counsel and counsel and their witnesses." (Tr., pp. 557-58.)

Mr. Copeland subsequently explained that he mis-spoke when he used the term "slop over," but in the next sentence, Mr. Copeland again referred to the standard as "relates to settlement" instead "relates solely to settlement," although

the latter standard was consistent with the Licensing Board's quasi-privilege. Accordingly, the Licensing Board ruled that the Department should be permitted to view the documents which have been withheld by Petitioners due to their apparent failure to appreciate the significance of the "solely" restriction in the Licensing Board's order.

The importance to the Department of obtaining the interconnection studies is that they may contain information which contradicts positions which Petitioners will take at trial and which therefore would not be introduced by Petitioners. Since the Department has not yet seen the studies it cannot confidently assert that such contradictions will be found. However, several comments by Petitioners' counsel at the March 7, 1980 hearing raised questions for the Department and, apparently, for the Licensing Board as to whether those documents may, in fact, contain information which contradicts the position petitioners will take at trial. Counsel for for all three Petitioners would only assure the Licensing Board that the interconnection studies were not "fundamentally inconsistent" with the positions their clients would take at trial. (Tr. pp. 546, 562, 588.) Counsel for CSW also admitted that "there is a lot of argument in this case among engineers, economists, utility management people about what conclusions you do, in fact, draw from these studies," and that if the studies "were consistent with all three party's positions in this room, we

would have had a case settled . . ." (Tr. pp. 567, 588.) In short, the possibility that the studies are inconsistent with the positions Petitioners will take at trial cannot lightly be dismissed.

In conclusion, the Licensing Board's order is consistent with NRC policy favoring settlements, both because Petitioners have not shown how the narrowly drawn order would in fact jeopardize any ongoing settlement discussions, and because the general NRC policy favoring settlements does not preclude the Licensing Board from considering competing policies such as the importance of obtaining the fullest possible discovery of evidence bearing on a central issue about to be contested at trial. With respect to Federal Rule of Evidence 408, the Licensing Board's order only covers studies which are neither offers to compromise nor "evidence of conduct or statements made in compromise negotiations" and which therefore are not within the scope of Rule 408. Petitioners may disagree with the Licensing Board's order, but they have presented no legal grounds for reversing the Licensing Board's exercise of its discretion in ruling on this discovery question. Having failed to show a legal defect in the Licensing Board's order or to demonstrate that the Licensing Board's order represented an abuse of discretion, the order should be affirmed.

c. Petitioners' Misinterpretation of the Licensing Board's Original Orders Does Not Constitute Justifiable Reliance

Petitioners assert that the Licensing Board's March 7, 1980 order reversed or rescinded earlier rulings, and then

conclude that the order is "fundamentally unfair" (CSW Petition, p. 6), "smacks of entrapment" (TUGCO Petion, p. 14), and "works a grievous injustice upon the private parties in this case" (HL&P Petition, p. 4). Such characterization of the effects of the order once again begs the real issue, namely, whether the March 7, 1980 order is compatible with earlier Licensing Board rulings on the scope of the quasi-privilege for settlement documents. The Department contends that Petitioners misinterpreted and misapplied the earlier Licensing Board rulings and so cannot now cry foul play when the Licensing Board took the only action it could to correct Petitioners' mistake. Indeed, Petitioners invited the Licensing Board to take such corrective action by failing to adhere strictly to the Licensing Board's admonitions regarding the tentative and limited scope of "settlement privilege."

At the March 7, 1980 hearing the Licensing Board made abundantly clear that the order complained of by Petitioners was consistent with earlier rulings which established the quasi-privilege for settlement documents. However much Petitioners may regret the outcome, they cannot seriously question that the Licensing Board's interpretation of its own orders is authoritative and conclusive. At the June 1, 1979 pre-trial conference and at the March 7, 1930 hearing, Chairman Miller used identical language to emphasize that prior Licensing Board rulings "never purported to shield absolutely nor to immunize forever from any type of inquiry"

the types of documents at issue here. (Tr. of June 1, 1979 Pre-Trial Conference, p. 368; Tr. of March 7, 1980 hearing, p. 536.) Chairman Miller was equally explicit at the June 1979 pre-trial conference and at the March 7, 1980 hearing that the original orders extended only to documents generated solely for settlement discussions (Tr. of June 1, 1979 Pre-Trial Conference, p. 368; Tr. of March 7, 1980 hearing, pp. 559, 593) -- a point of emphasis which apparently had been overlooked or disregarded by Petitioners. Consequently, in issuing the now disputed order from the bench, Chairman Miller left no doubt that the Licensing Board was simply enforcing rather than revising its earlier rulings:

> "CHAIRMAN MILLER: We are . . . going to rely upon the orders that we entered and as explained by the Board in the transcript of the June 1, 1979, pre-trial conference on Pages 366 to 368, where we attempted to lay down the application of the rule itself, which we did not regard as being unique, we regard the rule as tracking the Federal Rules of Evidence as amended. . .
> . . . I think we indicated there that we did not establish any blanket or universal privilege. We shielded temporarily certain documents generated solely for negotiations. . . We didn't purport to shield absolutely or immunize forever any type of inquiry, including possibly our own if it became material.
>
> So, within that context, we are going to allow the production of documents which relate to studies or other materials bearing a reasonable relationship to the issue or issues of the feasibility of interconnection. . ." (Tr., pp. 603-04; emphasis supplied.)

In short, any reliance by Petitioners on an interpretation of the "settlement privilege" which was at odds with the Licensing Board's March 7, 1980 order was simply incorrect and cannot be parlayed by Petitioners into a justification for reversing the Licensing Board's order. To do otherwise would mean that the Department, not Petitioners, would bear the burden resulting from Petitioners' misreading of the Licensing Board's earlier orders.

IV.

CONCLUSION

For the foregoing reasons, the Department respectfully requests the Appeal Board to deny certification of Petitioners' appeals. If the Appeal Board does certify Petitioners' appeals, the Department then requests that the Appeal Board uphold the March 7, 1980 ruling of the Licensing Board concerning production by Petitioners, subject to a protective order, of the interconnection studies described in the Licensing Board's order.

Respectfully submitted,

Susan Braden Cyphert

David A. Dopsovic

Kenneth M. Glazier

Attorneys, Energy Section
Antitrust Division
U.S. Department of Justice
(Telephone: 202-724-6667)

Dated: March 20, 1980
Washington, D.C.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Memorandum of the Department of Justice in Opposition to Petitions of Texas Utilities Generating Company, Houston Lighting & Power Company, and Central and South West Corporation, et al., for Directed Certification and Review of the Licensing Board's March 7, 1980 Order Regarding Production of Documents has been made on the following parties listed hereto this 20th day of March, 1980, by depositing copies thereof in the United States mail, first class, postage prepaid.

Alan S. Rosenthal, Esquire
Chairman
Michael C. Farrar, Esquire
Thomas S. Moore, Esquire
Atomic Safety & Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

Michael L. Glaser, Esquire
1150 17th Street, N.W.
Washington, D. C. 20036

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

Samuel J. Chilk, Secretary
Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jerome E. Sharfman, Esquire
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Chase R. Stephens, Secretary
Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jerome Saltzman
Chief, Antitrust and Indemnity Group
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. William C. Price
Central Power & Light Co.
P. O. Box 2121
Corpus Christi, Texas 78403

G. K. Spruce, General Manager
City Public Service Board
P.O. Box 1771
San Antonio, Texas 78203

Perry G. Brittain
President
Texas Utilities Generating
Company
2001 Bryan Tower
Dallas, Texas 75201

R.L. Hancock, Director
City of Austin Electric
Utility Department
P. O. Box 1088
Austin, Texas 78767

G. W. Oprea, Jr.
Executive Vice President
Houston Lighting & Power
Company
P. O. Box 1700
Houston, Texas 77001

Jon C. Wood, Esquire
W. Roger Wilson, Esquire
Matthews, Nowlin, Macfarlane
& Barrett
1500 Alamo National Building
San Antonio, Texas 78205

David M. Stahl, Esquire
Isham, Lincoln & Beale
Suite 325
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036

Michael I. Miller, Esquire
James A. Carney, Esquire
Sarah N. Welling, Esquire
Isham, Lincoln & Beale
4200 One First National Plaza
Chicago, Illinois 60603

Roy P. Lessy, Esquire
Michael Blume, Esquire
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Jerry L. Harris, Esquire
City Attorney,
Richard C. Balough, Esquire
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767

Robert C. McDiarmid, Esquire
Robert A. Jablon, Esquire
Spiegel and McDiarmid
2600 Virginia Avenue, N.W.
Washington, D. C. 20036

Dan H. Davidson
City Manager
City of Austin
P. O. Box 1088
Austin, Texas 78767

Don R. Butler, Esquire
1225 Southwest Tower
Austin, Texas 78701

Joseph Irion Worsham, Esquire
Merlyn D. Sampels, Esquire
Spencer C. Relyea, Esquire
Worsham, Forsythe & Sampels
2001 Bryan Tower, Suite 2500
Dallas, Texas 75201

Joseph Knotts, Esquire
Nicholas S. Reynolds, Esquire
Debevoise & Liberman
1200 17th Street, N.W.
Washington, D. C. 20036

Douglas F. John, Esquire
Akin, Gump, Hauer & Feld
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D. C. 20036

Morgan Hunter, Esquire
McGinnis, Lochridge & Kilgore
5th Floor, Texas State Bank Building
900 Congress Avenue
Austin, Texas 78701

Jay M. Galt, Esquire
Looney, Nichols, Johnson & Hayes
219 Couch Drive
Oklahoma City, Oklahoma 73101

Knoland J. Plucknett
Executive Director
Committee on Power for the Southwest, Inc.
5541 East Skelly Drive
Tulsa, Oklahoma 74135

John W. Davidson, Esquire
Sawtelle, Goode, Davidson & Tioilo
1100 San Antonio Savings Building
San Antonio, Texas 78205

W. S. Robson
General Manager
South Texas Electric Cooperative, Inc.
Route 6, Building 102
Victoria Regional Airport
Victoria, Texas 77901

Robert M. Rader, Esquire
Conner, Moore & Corber
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

R. Gordon Gooch, Esquire
John P. Mathis, Esquire
Steven R. Hunsicker
Baker & Botts
1701 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Robert Lowenstein, Esquire
J. A. Bouknight, Esquire
William J. Franklin, Esquire
Lowenstein, Newman, Reis, Axelrad & Toll
1025 Connecticut Avenue, N.W.
Washington, D. C. 20036

E. W. Barnett, Esquire
Charles G. Thrash, Jr., Esquire
J. Gregory Copeland, Esquire
Theodore F. Weiss, Jr., Esquire
Baker & Botts
3000 One Shell Plaza
Houston, Texas 77002

Kevin B. Pratt, Esquire
Assistant Attorney General
P.O. Box 12548
Capital Station
Austin, Texas 78711

Frederick H. Ritts, Esquire
Law Offices of Northcutt Ely
Watergate 600 Building
Washington, D.C. 20037

Donald M. Clements, Esq.
Gulf States Utilities Company
P.O. Box 2951
Beaumont, Texas 77704

Mr. G. Holman King
West Texas Utilities Co.
P. O. Box 841
Abilene, Texas 79604

W. N. Woolsey, Esquire
Kleberg, Dyer, Redford & Weil
1030 Petroleum Tower
Corpus Christi, Texas 78474

Susan B. Cyphert, Attorney
Energy Section
Antitrust Division
Department of Justice