

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 IN LIMINE TO  
EXCLUDE PROFFERED EXPERT TESTIMONY OF CARL STOVER

Houston Lighting & Power Company (Houston) respectfully requests that the Atomic Safety and Licensing Board (the Board) issue an Order excluding from the hearing any expert opinions or conclusions proffered by the Department of Justice (the Department) through Mr. Carl Stover.

On February 9, 1979, Houston filed its Second Set of Interrogatories to the Antitrust Division of the Department (the Second Set), which sought identification of the Department's fact and expert witnesses. The Department provided the names of fact and expert witnesses in response to these interrogatories on April 3, 1979. One individual listed as a fact witness was Mr. Carl Stover, a consultant with the C. H. Guernsey Company in Oklahoma City, Oklahoma. (Copy annexed as Exhibit A.)

On July 24, 1979, counsel for Houston travelled to Oklahoma City and deposed Mr. Stover, who was represented at his deposition by his personal counsel, Mr. Jay Galt. Throughout the deposition, counsel for Houston was prevented by Mr. Galt and counsel for the Department (Ms. Judith Harris) from asking Mr. Stover about his expert opinions. Mr. Galt represented that Mr. Stover had not been retained as an expert witness by the Department, and on this basis Mr. Galt instructed Mr. Stover not to answer questions on matters concerning opinions arrived at by virtue of consulting work that Mr. Stover had done for other parties. Ms. Harris agreed with the position taken by Mr. Galt and likewise objected to questions in the deposition that called for expert opinions.<sup>1/</sup>

On January 15, 1980, Ms. Susan Cyphert, an attorney for the Department, wrote a letter to counsel for Houston expressing the Department's intention not to call Mr. William E. Scott as an expert engineering witness. In Ms. Cyphert's letter of the 15th she took the position that the Department "does, however, anticipate providing engineering testimony through individuals who have already been designated as expert witnesses in this proceeding."

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<sup>1/</sup> Mr. Stover and his counsel also refused to produce documents generated by the witness during his employment by the Power Procurement Group, a group of West Texas rural electric cooperatives. Individual group members have likewise refused to produce such documents and Houston has moved to compel. See Houston's Motions to Compel Production of Documents by Elton McGinnes and Parker Wetzal, both dated March 26, 1980.

On January 21, 1980, Houston filed its Fourth Set of Interrogatories to the Antitrust Division of the Department (the Fourth Set). The singular subject of the Fourth Set was the identity of the expert witnesses upon whom the Department would rely for expert engineering testimony in this proceeding, as alluded to in Ms. Cyphert's letter of January 15, 1980. Houston sought an identification of such witnesses, the extent and duration of their employment relationship with the Department, a summary of the experts' testimony and the bases therefor, and identification of documents upon which the experts would rely.

On February 4, 1980, the Department filed its Response to Houston's Fourth Set, in which the Department apparently in light of its elimination of Mr. Scott, for the first time listed the name of Mr. Carl Stover as its expert witness. The Department's complete answer to Interrogatory No. 1(a) is quoted below:

Department's Response to HL&P Interrogatory  
1(a)

The Department has not presently determined that it will rely on any specific expert engineering witness to provide engineering testimony at trial. The Department anticipates, however, that it may chose to adopt part or all of the anticipated testimony of the expert engineering witnesses, who have already been designated by the other parties to these proceedings. HL&P has or will have deposed all of these expert engineers by the close of discovery other than Carl Stover. The Department will inform HL&P prior to March 1, 1980, if it will rely on Mr. Stover to provide expert testimony so that he may be deposed during the expert

deposition period in March.<sup>1/</sup>

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<sup>1/</sup> Carl Stover was already deposed by HL&P on July 24, 1979, as a potential fact witness to these proceedings.

The Department's answers to the other questions in the Fourth Set stated that it had no idea of what expert testimony, if any, Mr. Stover might give on the Department's behalf. (Copy annexed as Exhibit B.)

Houston was not content to be confronted with a so-called expert engineering witness who had been instructed by his own counsel and counsel for the Department at his previous deposition not to answer questions concerning his expert opinions. Consequently, on February 19, 1980, Houston filed its Motion to Compel the Department to provide complete responses to the interrogatories in Houston's Fourth Set with respect to Mr. Stover. The Department's response to Houston's Motion, filed March 5, 1980, again pled ignorance as to what expert testimony Mr. Stover might give on its behalf: "The Department has no relationship or understanding with Mr. Stover as to the substance of his potential testimony other than what was revealed at his July 24, 1979 deposition." That, of course, was the deposition at which Houston was forbidden to ask Mr. Stover about any of his expert opinions.

At the March 7, 1980 prehearing conference, the Board required the Department to fully answer Houston's interrogatories with respect to the proposed expert testimony of Carl Stover.

Counsel for Houston there pointed out that the Department had merely referred Houston to Mr. Stover's non-expert deposition and had indicated an inability to provide discovery beyond that point, and the Board held this unacceptable.<sup>2/</sup>

However, on March 11, 1980 counsel for Houston received a telephone call from Ms. Cyphert of the Department. She represented that the Response of March 5, 1980 contained the sum total of the Department's knowledge concerning Mr. Stover's testimony, and that the Department simply was not able to provide a full answer to the interrogatories and at that time and could not even add anything to its previous inadequate response. Ms. Cyphert informed counsel from Houston that she was requesting information from Mr. Stover and that the Department would provide Houston with further information as to the scope of Mr. Stover's testimony and the other information sought by the interrogatories in the Fourth Set. It was represented that this information would be forthcoming soon. Given these representations about the inability of the Department then to provide the discovery the Board had ordered, counsel for Houston agreed in good faith to wait a reasonable

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<sup>2/</sup> MR. GREEN: We have in the Department's pleading a statement that the Department has no understanding as to the substance of Mr. Stover's potential testimony other than what was revealed in his prior deposition - -

MR. GLASER: Well, yes, but they are going to examine him on direct examination, so they ought to know what he's going to say.

MR. GREEN: Well, that's what we think.

MR. GLASER: Your motion has been granted.

MR. GREEN: Thank you. (Tr. 630)

amount of time for the Department to provide that information.<sup>3/</sup>

Houston's letter of March 13, 1980 concerning the matter explained at some length that in addition to the Department's failure to fully answer Houston's interrogatories, the Department's continuing threat to call Mr. Stover as an expert witness, combined with the position taken by Mr. Stover's attorney and counsel for the Department in his July 24, 1979 deposition, made it impossible for Houston to conduct any meaningful discovery into Mr. Stover's expert opinions or the bases therefor. Houston's counsel requested immediate confirmation that the Department had retained Mr. Stover as an expert witness and that Houston would be allowed to ask Mr. Stover for his expert opinions during his re-deposition. Counsel for Houston also sought discovery through the Department of the documents upon which Mr. Stover would rely in his testimony.

The Department's response was a telephone call the next day in which Ms. Cyphert repeated her position that she could not tell Houston what she did not know, promised again to keep Houston informed as to any information the Department received about Mr. Stover and to do so shortly, and neither provided any information nor addressed any of the concerns Houston had raised.

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<sup>3/</sup> An exchange of correspondence between counsel followed memorializing this agreement. (Letter from Douglas G. Green to Susan B. Cyphert, dated March 13, 1980; letter from Susan B. Cyphert to Douglas G. Green, dated March 12, 1980, copies annexed hereto as Exhibits C and D.)

Now, on the eve of trial, the Department still has never provided any further information as to Mr. Stover's purported expert testimony, nor addressed any of the problems raised by Houston's letter of March 13, 1980.

Indeed, during the deposition of Gordon Taylor, on April 3, 1980, Mr. Green again requested that Ms. Cyphert address herself to the concerns expressed in his March 13 letter and the Board's Order of March 7, 1980, directing the Department to provide full responses to Houston's interrogatories concerning Mr. Stover. Ms. Cyphert's response was that she still had no further information to give Houston on Mr. Stover, his relationship to the Department or the substance of his expert testimony.<sup>4/</sup>

On April 4, 1980, counsel for Houston called Mr. Jay Galt, Mr. Stover's attorney, and learned that Ms. Cyphert had recently contacted Mr. Stover concerning his employment by the Department as an expert witness, but that Mr. Stover had declined the assignment. Furthermore, Mr. Galt reiterated the position that Mr. Stover would not render expert opinions because he has not been retained as an expert witness. When counsel for Houston confronted Ms. Cyphert with the substance of this telephone conversation and requested an explanation of Mr. Stover's status as an expert witness for the Department, Ms. Cyphert responded that (1) the infor-

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<sup>4/</sup> Taylor Dep. at 9. See also pages 1-11, 256-61, 304-05, copies attached as Exhibit E.

mation as related by Mr. Galt was true; (2) that Mr. Stover "is who he is" (whatever that means); and (3) that if Houston wanted to know what Mr. Stover was going to say, it should seek to compel him to say it (even though Mr. Stover, of course, would have no idea of what he would be asked to say at the hearing).<sup>5/</sup> Since then the Department still has not been forthcoming.

In short, the situation now is this: we are on the eve of trial; trial briefs are in the writing, and with respect to Mr. Stover, the Department is still at the starting gate. In pleading after pleading, representation after representation, Houston's efforts have been rebuffed.<sup>6/</sup> With trial imminent, the Department cannot be permitted now suddenly to come forward with Mr. Stover's expert testimony. It simply is far too late. Nor can the Department justify its rebuffs of Houston's inquiries on any principled basis. At this juncture, Houston does not have the opportunity to defend against whatever opinions Mr. Stover might have.

Assuming *arguendo* it is permissible for the Department to extract expert opinion testimony in this trial from

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<sup>5/</sup> Taylor Dep. at 256-61.

<sup>6/</sup> Indeed, after Mr. Stover declined employment by the Department, counsel for the Department failed to reveal this fact to Houston. On the day before counsel for Houston contacted Mr. Stover's attorney, counsel for the Department represented to counsel for Houston that there had been no change with respect to the expert testimony of Mr. Stover from the position previously taken. (Taylor Dep. at 6.)

an unwilling third party, the Department has no less an obligation to apprise opposing parties of these opinions and facilitate their discovery.<sup>7/</sup> Here, the Department has simply ignored that obligation. Even Houston's good faith agreement, after the Board's March 7 ruling, to give the Department a reasonable amount of additional time to live up to those obligations, has been taken advantage of, and disregarded.

Indeed, the Department revealed for the first time on April 4, 1980 during the Taylor deposition that it has never deemed itself obliged to apprise Houston of the scope of Mr. Stover's expert testimony, and asserted in the most cavalier fashion that if Houston wants to know Mr. Stover's expert opinions it should re-depose him. (Tr. 258-61.) But it is not up to Houston to compel Mr. Stover to testify about expert opinions generally, and hope to cover those which the Department might rely on at trial. The Board already rejected precisely this contention, finding it groundless, and the Department has known this for over two months. (March 7, 1980 Transcript at 626-30.) Moreover, as Houston pointed out in its March 13 letter, Mr. Stover has already refused on deposition, with the Department's encouragement, to answer any opinion questions whatsoever.

7/ Indeed, this Board has already set forth the policy that:

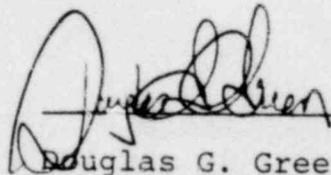
A party has an affirmative duty to seek the requested information from its own employees and others, and to make full, fair disclosure.

Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-05, 9 NRC 193, 196 (1979).

Houston now seeks a ruling that Mr. Stover will not be called by the Department as an expert witness to give testimony in this matter. Mr. Stover has rejected the Department's proffer of employment as a testifying consultant or otherwise. The Department has joined Mr. Stover's attorney in refusing to allow Houston to discover his work-product or to question him about his expert opinions in general. The Department has refused to give Houston any clue as to the content, scope or bases for whatever testimony it intended to extract from Mr. Stover. Yet throughout this byzantine sequence of events, the Department has endeavored to keep Houston guessing with respect to Mr. Stover and his testimony.<sup>8/</sup>

Accordingly, Houston respectfully requests that the Board enter an Order directing that the Department may not seek to present evidence at the hearing in this matter concerning the expert opinions or conclusions of Mr. Carl Stover.

Respectfully submitted,



Douglas G. Green

Attorney for Houston Lighting &  
Power Company

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<sup>8/</sup> In the meantime the Department has tentatively resurrected its original expert engineering witness, William Scott, whose elimination was the ostensible reason for Mr. Stover's "expert" designation in the first place.

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