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.	)	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)	)	

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

This petition arises from a March 7, 1980, oral ruling of the Atomic Safety and Licensing Board ("Licensing Board" or "ASLB"[1/]) which, on eve of trial, would effectively reverse three prior Licensing Board Orders[2/] and would require Houston Lighting & Power Company ("Houston") to produce to adverse

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1/ Transcript of Prehearing Conference of March 7, 1980, at 603-606 (hereafter, "Tr"). The pages containing the Licensing Board ruling are annexed hereto.

2/ Order dated April 16, 1979; Order dated May 7, 1979; Order issued during prehearing conference on June 1, 1979. (Tr. 389). Copies of each of these Orders are annexed hereto.

parties certain studies and other documents prepared solely in connection with negotiations to compromise and settle this proceeding.

At the outset of discovery the Licensing Board ruled that these same studies and documents would be protected from inquiry in order to "encourage settlement negotiations and. . . protect the efforts of the parties toward that end."[3/] Houston and other parties accordingly continued to engage in good faith negotiations generating and utilizing such documents, and those negotiations are still continuing. Suddenly, on February 8, 1980, just two weeks before the close of factual discovery, the Department of Justice and the NRC Staff [herein collectively referred to as "Movants"], filed a Joint Motion to modify the ASLB's prior orders, contending, inter alia, that since settlement had not yet been consummated and trial was imminent, "continued protection would serve no realistic function." Joint Motion, p. 16.

In announcing the Licensing Board's ruling from the bench, Chairman Miller began by stating that the Licensing Board intended "to rely upon. . . [its previous] orders." (Tr. 603). The Licensing Board then went on to reverse those previous orders and

> 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,

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3/ Order, April 16, 1979 at 2. That Order was twice affirmed, see note 2, supra.

> 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. 604.

The documents in issue concern analyses, made in the context of settlement discussions and subsequent to the end of the trial of West Texas Utilities Company, et al. V. Texas Electric Service Company, et al. in the United States District Court for the Northern District of Texas,[4/] of certain aspects of hypothetical interconnection configurations considered solely for the purpose of exploring settlement of the interconnection issues involved in this proceeding.[5/] It is clear from a reading of the entire transcript of the March 7, 1980, prehearing conference that the Licensing Board ruling contemplates that the documents must now be produced. In fact, many of the documents are the same documents which are dealt with in the April 16, 1979, Order, which held that they need not be produced.

Thus the Licensing Board's March 7 ruling is doubly flawed. It errs in requiring that analyses and other documents prepared solely for the purpose of settlement discussion are discoverable in NRC proceedings. Moreover, by changing the ground rules retroactively on the eve of trial, it

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4/ These are two criteria for protection of settlement materials from discovery stated in the Licensing Board's Orders of April 16, 1979, and May 7, 1980.

5/ Analyses of this kind are necessarily predicated on assumptions which some parties to the discussion may regard as unrealistic or simply wrong. However, the settlement process, if it is to be effective at all, demands that "what if" evaluations be performed and discussed in a candid environment.

it embodies the erroneously proposition that protection granted at the outset of an NRC proceeding to materials generated in connection with settlement may be retroactively stripped away on the eve of trial if the parties have failed to achieve a compromise.

The Licensing Board's ruling works a grievous injustice upon the private parties in this case and has profound implications upon the future efforts of parties in all cases before this Commission to study or negotiate a compromise. Moreover, it significantly imperils the settlement negotiations now on-going in this proceeding. To permit Appeal Board review of its action, the Licensing Board stayed the effectiveness of its ruling until March 17, 1980. Houston accordingly petitions this Appeal Board to exercise its power of directed certification and to review and reverse the rulings of the Licensing Board. Additionally, pursuant to 10 CFR § 2.788 Houston moves the Appeal Board to continue the stay of that ruling pending appellate review.

QUESTION PRESENTED

Where the Licensing Board at an early stage of the case correctly ruled that studies and other documents prepared solely in connection with settlement negotiations would be protected from disclosure as a matter of Commission policy and law, was it error to retract that protection on the eve of trial when the governmental parties suggested that settlement might not be forthcoming?

ARGUMENT

I

THE APPEAL BOARD SHOULD EXERCISE ITS POWER OF DIRECTED CERTIFICATION TO REVIEW AND REVERSE THE ASLB'S RULING COMMANDING PRODUCTION OF SETTLEMENT DOCUMENTS

A. The ASLB's Order is Antithetical to Basic Commission Policy and Would Have a Chilling Effect Upon Compromise in NRC Cases

The ruling of the ASLB has repercussions which extend far beyond this case. It establishes a principle that, if allowed to stand, will affect the settlement environment prevailing in all cases before this Commission and will greatly inhibit the willingness of parties to consider compromise.

It is basic tenet of NRC policy that settlement and compromise are to be encouraged:

> § 2.759 Settlement in initial licensing proceedings
>
> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent that it is not inconsistent with hearing requirements in section 189 of the Act (42 U.S.C. 2239), 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. (10 CFR § 2.759).

This principle was recognized and applied in the Licensing Board's three 1979 Orders.

Settlement in cases before the NRC typically both advances the public interest and results in cost savings

of the resources of the parties and the Commission. Settlement, of course, does not arise spontaneously. It first requires parties willing to consider compromise and willing to proffer and study compromise proposals.

There simply can be no compromise reached, no settlement attained, if the parties are chilled from engaging in such compromise studies or discussions out of fear that their settlement studies and documents will be turned over to their adversaries. The chilling effect is compounded in an environment where protection of settlement materials, once extended, is subject to being withdrawn if settlement is not consummated on a schedule the trier of fact deems desirable. Few parties, no matter how well intentioned, could venture entertaining or propounding compromises in such a unstable environment. But this is precisely the result of the Licensing Board's March 7 ruling.

The effect this ruling and the principle it establishes will have upon parties in other cases is clear. It will chill settlement negotiations and compromise proposals from ever coming into existence at all. The Licensing Board's ruling is antithetical to basic Commission policy and should be certified and reversed. 6/

6/ Directed certification is particularly appropriate where, as is plainly the case here, a matter presents a significant question of law or policy. United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 76 (1976). See also, Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 12 (1979); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697 (1978), appeal dismissed for mootness, CLI-79-1, 9 NRC 1 (1979).

B. The Pending Disclosure of Confidential Documents in Discovery is an Appropriate Matter for Directed Certification Where the Underlying Issues are Significant

Directed certification is appropriate to review the pending disclosure of confidential documents where the underlying issues are significant. Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 413 (1976). 7/

The reason for this is obvious. Once the documents in question here are produced, their confidentiality will be forever lost. If Houston is to have the opportunity to obtain meaningful Appeal Board review, it must be afforded that opportunity now. The inability to obtain meaningful post-trial appellate review is a compelling factor calling for directed certification. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 11 (1979), quoting Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); see also United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant) CLI-76-13, 4 NRC 67, 76 (1976).

C. Prompt Reversal Would Help Preserve the Possibility of Settlement

Finally, as noted above, under the protection of the

7/ In Kansas Gas and Electric Company, Supra, a question as to whether a private agreement was required to be produced was deemed appropriate for immediate review. The underlying issues there were far less important both in broad effect upon Commission practice and in specific effect than those raised by Houston here.

twice-affirmed Licensing Board rulings, Houston and certain of the other parties have engaged in meaningful settlement negotiations, and those negotiations are actively on-going at the present time. While it would be inappropriate and perhaps counterproductive to speculate on settlement, Houston can truly represent to the Appeal Board that there is a genuine possibility an accord will be reached among at least some of the parties to this proceeding. (Tr. 563) This possibility is made less likely by the over-hanging sword of the Licensing Board's ruling. Directed certification and reversal would remove this impediment.

II

THE RECORD PROVIDES NO BASIS FOR THE LICENSING BOARD'S ABRUPT REVERSAL OF ITS RULINGS. TO THE EXTENT THAT THE LICENSING BOARD RULING REFLECTS CONCERN THAT DOCUMENTS HAVE BEEN WITHHELD FROM PRODUCTION WHICH DO NOT MEET THE CRITERIA FOR PROTECTION ESTABLISHED BY THE LICENSING BOARD, MEASURES WHICH DO NOT COMPROMISE THE CONFIDENTIALITY OF DOCUMENTS WHICH MEET THE CRITERIA ARE AVAILABLE TO RESOLVE THAT CONCERN.

The basis for the Licensing Board's ruling is not clear from the transcript pages which record the ruling. Indeed, there is no apparent basis for the Licensing Board's reversal of position at this late stage of the proceeding. Most confusing is the expression of reliance on previous orders, coupled with a reversal of the effect of those orders. The Licensing Board's April 16, 1979, Order extended protection to documents which were generated after the close of the trial in the district court and solely in the context of the settlement negotiations. In several places in the transcript of oral argument, members of the Licensing Board indicate a

concern with being certain that the criteria for such protection were being correctly interpreted and applied by the various parties. [8/] This concern simply fails to support the March 7 ruling.

In the first place there is no basis whatsoever in the Joint Motion or elsewhere in the record for suspecting that the Board's Orders have not been complied with strictly. The transcript of the March 7, 1980, prehearing conference reflects the Licensing Board's uncertainty as to the nature of the documents in issue, but that uncertainty results from the Licensing Board's decision, on June 1, 1979, not even to require listing of the documents withheld, because such lists would betray the confidentiality of the underlying documents. The Licensing Board's complete about face, moving abruptly from its original posture of solicitous protection of settlement materials to a position of summarily ordering that all such documents be produced, cannot be explained by anything contained in the record.

Several measures were available to the Licensing Board to assure that its Orders are being correctly interpreted and complied with short of simply requiring that all documents be produced. As counsel for Houston suggested during oral argument before the Licensing Board, the Licensing Board could require that lists containing descriptions of the documents be submitted for its review, or it could require affidavits by officers of the parties withholding documents from production addressing precisely the application of the criteria prescribed

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8/ See e.g., Tr. 479-80, 557-58 and 593.

by the Licensing Board to the documents in issue. [9/] Finally, to the extent that any question remains after lists and affidavits had been received, a special master could have been appointed to review the questioned documents in camera.

Simply discarding a privilege or protection established pursuant to policies adopted by this Commission because questions might arise as to its practical application in a particular case is not an option legally available to a Licensing Board.

9/ Tr. 560, 574-76.

III

GRANTING A STAY PENDING REVIEW IS NECESSARY TO PROTECT THE POWER OF THE APPEAL BOARD TO GRANT MEANINGFUL RELIEF

Pursuant to 10 CFR § 2.788, the Appeal Board should extend the stay of the March 7 ruling until appellate review is complete. As noted earlier, the Licensing Board stayed its ruling until March 17 to permit Houston to seek directed certification (Tr. 622-23). Unless that stay is extended, Houston would be required by the terms of the Licensing Board's ruling to produce the documents in question, and the Appeal Board would lose the power to grant meaningful relief. The requested stay therefore is especially appropriate and should be granted. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-307, 3 NRC 17, 18 (1976) (ex parte stay granted to prevent disclosure of confidential information pending Appeal Board review.).

A. The Requested Stay Satisfies Each of the Requirements of 10 CFR § 2.788(e)

10 CFR §2.788(e) sets forth the factors which govern the issuance of a stay:

> In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:
>
> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

The application of these factors here squarely militates in favor of the stay.

1. Likelihood of success on the merits

With respect to the likelihood of success criterion, "an exaggeratedly refined analysis of the merits" is inappropriate. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 635 n.11 (1977). A substantial likelihood of success is all that is required. Here, Houston has amply demonstrated that the Licensing Board's ruling should be reversed; the required showing under 10 CFR § 2.788(e)(1) is satisfied.

2. Irreparable injury

The erroneous disclosure of confidential settlement documents constitutes irreparable injury. Wolf Creek, supra, 3 NRC at 18. This injury will not be mitigated by any protective order which might be entered below (Tr. 605), because even under the terms of such order disclosure will be made to adverse parties.

3. Effect upon other parties

If the settlement studies and documents are produced, the same irreparable injury experienced by Houston would also be suffered by C&SW and TU, the other negotiating

utilities. The effect of a stay upon the Movants is nil and would preserve the status quo. Movants cannot be heard to complain that a stay would delay their receipt of the documents. As the Licensing Board held, their motion for production was not "seasonably filed" and should have been submitted "when this matter first came up in July, or certainly by Fall. . ." (Tr. 604). Had they filed their motion in a timely fashion this matter would have been resolved long ago. Trial in this proceeding in any event is not scheduled until May 14, 1980, over two months away.

4. Public interest

Granting a stay will protect the public interest because the likelihood of settlement in this case will be enhanced. Moreover, the Appeal Board thereby will preserve its jurisdiction to resolve the fundamental policy questions at the heart of this controversy. Those interests outweigh the desires of the Movants, unseasonably expressed only after a lapse of many months, to obtain tactical advantage in the litigation.

B. The Balancing of the Equities Here Strongly Favors Granting the Interim Stay

In Marble Hill, the Appeal Board recognized that the decision for a stay rests on a balancing of the four 10 CFR § 2.788(e) factors:

> Our past practice in applying has not been to require that movants prevail on each one. Rather, we have balanced them all: "the strength or weakness of the showing by the movant on a particular factor influences. . . how strong his showing on the other factors must be. . . ." Public Service Co. of New Hampshire (Seabrook Units 1 and 2), ALAB-333, 4 NRC 10, 14 (1976).

Marble Hill, supra, 6 NRC at 632. Here, Houston has demonstrated that all four factors weigh heavily in favor of a stay.

CONCLUSION

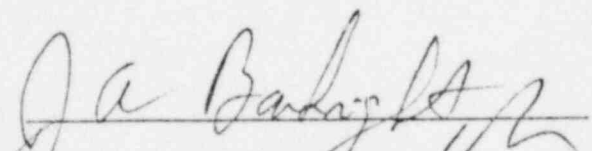
This case presents a situation where Houston and the other negotiating parties are being penalized for having attempted in good faith to compromise this matter in an environment where they were encouraged to do so by the Licensing Board. The Licensing Board's ruling is inimical in the extreme to basic Commission policy and principles of fundamental fairness. Its repercussions upon NRC settlement practice are both serious and destructive. For all of the foregoing reasons, Houston petitions the Appeal Board to:

(1) Grant directed certification of the Licensing Board's March 7 ruling;

(2) Stay that ruling pending appellate review on the merits; and

(3) Reverse the Licensing Board's March 7 ruling ordering production of confidential studies and other documents prepared solely for settlement negotiations.

Respectfully submitted,



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solely prepared in connection with settlement subsequent to February 18, 1979. If they were not, we were in error. I cannot, at this time, make any representation to the Board with regard to the specifics of those objections. I didn't see this document filed by Brownsville until about 6 o'clock last night.

CHAIRMAN MILLER: All right. Thank you.

I think we have heard, rather amply from all counsel. It's a complex matter and it's one that, in a sense, you can, perhaps, have some conflict in underlying principles.

We are, however, going to rely upon the orders that we entered and as explained by the Board in the transcript of the June 1, 1979, pre-tiral 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 Rule as amended; in other words, the changes made by the codification of the Rules of Evidence from the Common Law Rule as to factual matters, for example, contained in discovery.

But, the shielding of positions taken; I think we indicated there that we did not establish any blanket or universal privilege. We shielded temporarily certain documents generated solely for negotiations. So, it was carried

farther; we went farther by pointing out that this did not give King's X; which I suppose it may be a term used in childhood games, but, King's X means that if you don't have King's X you don't have the prerogatives of sovereignty forever and in all places, in case anyone missed the illusion.

We were not giving King's X in perpetuity and in all proceedings; this was a very clear warning, I believe. Discovery is not going to go on forever; that's as far as we have gone today. 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 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.

We regard that motions, however, as not being seasonably filed; we think that the counsel should have filed them when this matter first came up in July, or certainly by Fall, and so we are therefore, not going to delay these proceedings. We are not going to allow further discovery in the sense of depositions, interrogatories, and the like.

The production of these documents; we are going to

rely upon the integrity of all counsel involved. We are confident that they are all men of professional integrity and we are going to ask them to make a searching inquiry of their respective clients to be sure that all documents which bear reasonable relationship to the matters set forth are produced. We are going to ask the parties to prepare an appropriate order so that the documents, at least initially, are going to be obtained by counsel who's responsibility will be to insure the accuracy and completeness of the collection of them and in the turning them over under a protective order to designated counsel for the Department of Justice and the Staff.

While this will give the counsel for the Department of Justice and the Staff the opportunity to inspect, we ask them to exercise reasonable judgment not to carry the matter further or to carry to any greater extent than is absolutely necessary, given the lateness and unseasonableness of the situation as we find it. If there is to be any further use, it would only be pursuant to a further direct order of this Board, which will be made after a full presentation of the facts, in camera, if necessary, upon notice to all counsel and parties.

Now, I'm going to be out of town in trial for several weeks and I have got several trials and so do some of my associates. We are going to enter rulings here today; they will be followed up by some, perhaps, written explanations

by either acting chairmen, which would be either of my colleagues, Mr. Glaser or Mr. Wolfe, and though they will have the full force and effect of a Board action.

Now, on this subject, are there any questions, clarifications, or otherwise? That's one, two, three.

MR. CHANANIA: Mr. Chairman, this is a small matter, I believe.

I think you stated, if I heard you correctly, that counsel were able to inspect these documents under the terms of protective orders which have been the general run of the case --

CHAIRMAN MILLER: Yes, you're correct.

MR. CHANANIA: -- so far; that would include members of our immediate Staff, like engineers.

CHAIRMAN MILLER: That is correct. It would include members of your technical staff who would sign the same protective order, or at least be subject to the same inhibitions: full protection.

But, you would be entitled to show them under your direct supervision to only those technical members that it's necessary to disclose to and observe the spirit as well as the wording of what we are doing; we are giving you a chance to look and inspect and to have your experts look at; but we want them fully protected and we want to protect, as far as we can, under those circumstances, the confidentiality