

APR 10 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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)

ORDER CONCERNING STAFF'S MOTION TO COMPEL
FURTHER ANSWERS BY HOUSTON LIGHTING & POWER COMPANY
(April 16, 1979)

On March 23, 1979, the Staff filed a motion to compel further answers, by Houston Lighting & Power Company (HL&P) to the Staff's first set of interrogatories. A response to this motion was filed by HL&P on April 11, 1979. It appears from the response that the parties have negotiated part of their differences, a practice which the Board commends.

HL&P has agreed that insofar as requested documents have been made available to other parties in various fora, such documents will be listed or described by document numbers in response to the Staff's requests. Such descriptions are to be made by HL&P in regard to Interrogatories 1, 2, 4, 6, 8, 15, 23(b), 32(b) and 33.

HL&P is to furnish the Staff with an updated list and identification of documents as to which it asserts a privilege. However, HL&P's objection is sustained as to work product involving non-testifying outside consultants used by it in preparing for trial, in accordance with our

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ruling at the March 20, 1979 prehearing conference (Tr. 183-85). This ruling applies to work product involved in document requests contained in Staff Interrogatories 1(d), 1(e) and 33(c). 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).

The following document responses shall be made available for inspection by the Staff, and if copies are requested, the reasonable cost of copying shall be paid by the Staff: Documents responsive to production requests contained in Staff Interrogatories 4(f), 8(d), 27, 37(a), 42(a), 43-45.

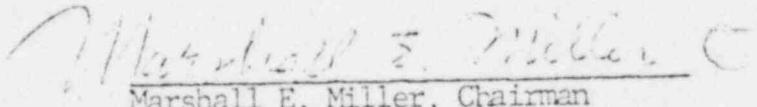
HL&P's objections are sustained to Staff Interrogatories 37(a) and 42(b), insofar as the Staff seeks to compel HL&P to prepare a map that it does not possess and does not maintain in the normal course of business. A party may require the production of an existing document for discovery purposes, but it cannot require the preparation of a document it merely wishes were in existence.

Further responses are to be furnished by HL&P to Interrogatories 1(g), 2 (d), 8(c), 10(a)-(c), 11, 13, 15-17, 20(a), 23(a), 23(c), 26, 32(a), 32(b) and 49.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Dated at Bethesda, Maryland
this 16th day of April 1979.


Marshall E. Miller

1 CHAIRMAN MILLER: What kinds of documents would you
2 be contemplating? You could use the hypotheticals, but you
3 may not have some in certain areas. Just what are you talking
4 about?

5 MR. SAMPELS: If I sit down and have a discussion
6 with the NRC staff and we generated a document that includes
7 certain possible license conditions, we're discussing those
8 license conditions, of possible compromises in that area, I
9 certainly think that falls within the concept of a document
10 prepared solely for the purpose of settlement discussions.

11 If I do that with the Department of Justice, I think
12 it falls within that category. If I talk with the Department of
13 Justice -- which I did, with Ms. Harris -- and had a discussion
14 with her with respect to possible areas or approaches to set-
15 tlement and I put a file memorandum as a result of that discus-
16 sion, I think that falls within that category. And I should
17 think that a file memorandum that she might prepare --

18 CHAIRMAN MILLER: I would have no difficulty in con-
19 sidering that such documents, developed solely for negotiat-
20 ing purposes, should be protected under our order. We decided
21 to establish no blanket universal privilege, but we did shield,
22 at least temporarily, documents generated solely for negotia-
23 tions subsequent to the entry, I think it was in January 1979,
24 of the district court decision.

25 MR. SAMPELS: My point is: If this is a temporary

1 or unwitting or mistaken protection, I am going to so advise my
2 client and we're not going to generate any documents, we're not
3 going to have any such discussions. Because I think settlement
4 discussions, by their very nature, done in a fishbowl, aren't
5 settlement discussions, you might as well forget about it.

6 And I think, really, I frankly find it absurd to sug-
7 gest that this is a temporary condition, that suddenly, two weeks
8 from now or a month from now, we will find that the order didn't
9 really mean what it said, and we're really going to have to turn
10 all these documents over, to the extent there are any, to the
11 world. I find that incredibly inconsistent with the encourage-
12 ment of settlement discussions and the promotion of a public
13 policy to settle, not litigate, controversies.

14 CHAIRMAN MILLER: Well, there are several things that
15 occur to the Board. First of all, there doesn't seem to be any
16 well-defined motion asking us to rescind, modify, and specify
17 aspects or anything else, our two orders, which, together, give
18 a certain measure of protection from produceability; that is to
19 say, discovery of documents produced subsequent to the Texas
20 court decision and generated solely for the purpose of negotiat-
21 ing matters that came about as a result thereof.

22 That's as far as we have gone. We could not and have
23 not given King's X in perpetuity and in all proceedings. We
24 frankly can't bind the courts. We can't establish how long
25 they enforce any kind of absolute privileges. So, obviously,

1 these documents you are talking about have the effect, under our
2 order, of at this time being shielded from discovery. Discovery
3 in this case, as you know, is not infinite. That's as far as
4 we have gone.

5 Now, I don't know what the big hullabaloo is about,
6 because we don't have the power and never purported to shield
7 absolutely nor to immunize forever from any type of inquiry,
8 including possibly our own, if it became material. It would be
9 difficult to see how it does. We don't know quite what the
10 issues are.

11 MR. JABLON: Your Honor, if I may. This arose out of
12 a specific request at Brownsville. All Brownsville asked and
13 all Brownsville is asking this Board to rule upon --

14 MR. WOLFE: Say it again, please.

15 MR. JABLON: All Brownsville asked and all Brownsville
16 is asking this Board to rule upon is the following proposition:
17 To the extent that Gulf States claims that certain documents are
18 privileged as settlement discussions, first, we do not seek
19 production of those documents or showing them to us or anybody
20 else.

21 Second, we simply asked that they provide a summary
22 of documents as to which privilege is asserted. The reason we
23 have requested that summary is not because we question the good
24 faith of counsel or anybody else, but we have a situation where
25 parties appear to be talking concerning matters which one could

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Order Regarding Discovery Motions
(May 7, 1979)

I.

The Staff filed a motion on April 19, 1979 asking the Board to reconsider four (4) areas of its Order of April 16, 1979, in connection with the Staff's motion to compel further answers by HL&P. The latter company filed its response to the motion for reconsideration on April 30, 1979.

(1) The Staff asked that indexing be provided for documents previously made available in response to Interrogatories 3, 5, 7 and 31. HL&P has agreed to this request, so no ruling is required.

(2) The Staff seeks the production of studies prepared by non-testifying outside consultants. The Board has ruled that the use by counsel of consultants not to be called as witnesses is protected as part of an attorney's trial preparation which is not subject to discovery (Tr. 185). However, a different rule obtains as to the studies or analyses of others

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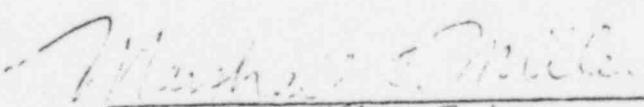
which a witness has used or will use in the preparation of his testimony or studied for cross-examination or other testimonial purposes. Such studies or documents should be produced, and HL&P has agreed to do so, subject to one exception. That exception relates to documents a corporate officer has reviewed in his capacity as an officer of a company involved in litigation, but which he does not intend to rely upon in his testimony. This exception is valid and will be sustained.

(3) 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.

(4) The Board adheres to its ruling that HL&P is not required to create transmission maps which it neither possesses nor generates in its normal cause of business. The cited requirements of transforming computerized data into printouts, or the translation of foreign language documents, are inapposite to the Staff's request.

It is so ordered.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Marshall E. Miller

Dated at Bethesda, Maryland

this 7th day of May 1979.