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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

MEMORANDUM OF DEPARTMENT OF JUSTICE IN RESPONSE TO
 PETITIONERS' MEMORANDUM OF ADDITIONAL AUTHORITIES
 SUBMITTED PURSUANT TO THE APPEAL
 BOARD'S MARCH 28, 1980 ORDER

Pursuant to the March 28, 1980 Order of the Atomic Safety and Licensing Appeal Board ("Appeal Board"), the Department of Justice ("Department") submits this Memorandum in Response to Petitioner's Memorandum of Additional Authorities. On March 28, 1980, the Appeal Board requested the parties to provide any:

"additional authority as to whether the courts do or ought to recognize the existence of a privilege against discovery of documents (containing otherwise discoverable information) because of a relationship of one kind or another between those documents and the settlement process." (emphasis in original)

The Order permitted the parties to file an initial brief by April 4, 1980, and a responsive brief by April 9, 1980. Department did not file an initial brief pursuant to this Order because the Department's initial pleadings in this appeal discussed all of the authorities which the Department believed were relevant to the Appeal Board's Order of March 28. After reviewing the pleadings filed by Petitioners in response to the March 28 Order, the Department continues to believe that there is no judicial or statutory precedent which recognizes a privilege against "discovery of

documents (containing otherwise discoverable information) because of a relationship of one kind or another between those documents and the settlement process." As demonstrated below, the authorities cited by Petitioners simply confirm the existence of a limited "settlement privilege" at the discovery stage which shields only those portions of documents that contain offers of settlement, but does not bar disclosure of factual information contained in any such documents. Accordingly, the Department urges the Appeal Board to affirm the Order of the Atomic Safety and Licensing Board ("Licensing Board") which requires production of factual information contained in documents that may also contain settlement offers.^{1/}

Petitioners' pleadings raise essentially three arguments:

(1) that a "settlement privilege" exists which shields from

^{1/} The assertions contained in Houston Lighting and Power Company's ("HL&P") April 7, 1980 motion to preclude the Department from filing a brief are unfounded and are nothing more than an attempt by HL&P to divert the Appeal Board's attention from the substantive issues that are the subject of this appeal. The initial conclusion reached by the Department, i.e., that no additional legal authority exists which was responsive to the Order of March 28, was also reached by the Staff in its Memorandum filed on April 4, 1980. The Department understands that the Staff's pleading was filed on that date only because of its perceived advisory role to the Appeal Board and not from any reading of the Appeal Board's Order of March 28, 1980, different from that of the Department. In any event, the instant Memorandum does not raise new arguments, it is limited to responding to arguments raised in Petitioners' pleadings filed pursuant to the March 28 Order.

discovery all documents which in any way relate to settlement; (2) that documents generated in relation to settlement discussions are protected by the attorney "work product" privilege; and (3) Rule 408 of the Federal Rules of Evidence does not require discovery of the documents sought by the Department and the NRC staff.

The authorities relied upon by Petitioners do not support the proposition that factual information contained in settlement documents are shielded from discovery. For example, in Magnaleasing Inc. v. Staten Island Mall, 76 F.R.D. 559 (E.D.N.Y. 1977), the document sought was the actual settlement agreement itself. The court properly protected the settlement portions of that agreement but allowed discovery of factual information contained in the agreement in order to avail plaintiffs of "useful and necessary information." Id. at 561. Thus, Magnaleasing supports the Department's right to obtain factual documents which assess the technical feasibility and/or cost of certain interconnections even if those documents were generated in the settlement process. In City of Groton v. Connecticut Light & Power Company, 84 F.R.D. 420 (D. Conn. 1979), the court denied discovery of documents that apparently contained only the actual settlement language agreed upon by the parties, and did not contain factual information.

For the first time in this proceeding, Petitioners belatedly raise the argument that attorney "work product" is the basis for immunizing the factual documents sought by the Department and NRC

Staff. The strength of this argument is severely undermined by the untimely manner in which it has been raised. However, assuming arguendo, that the documents are indeed "work product", the documents are not immunized from discovery if a showing of substantial need is established under Rule 26(b)(3) of the Federal Rules of Civil Procedure. The arguments and supporting transcript citations contained in the Department's initial Motion to Compel, filed on February 28, 1980, amply demonstrate a compelling need for these documents since all other attempts to discover the information contained therein have been to no avail. Moreover, Petitioners are in a better position than the Department and the NRC Staff to produce the type of factual information which is contained in the documents that Petitioners seek to conceal. Finally, the sought after documents do not appear to constitute "work product" because the information contained in those documents appears to have been the product of engineers, not lawyers. At the March 27, 1980, hearing, counsel for Texas Utilities Generating Co. ["TUGCO"] described the documents we seek as two and a half file drawers of computer studies, apparently prepared by company engineers (Tr. pp. 19-20). At the March 7, 1980, hearing before the Licensing Board, counsel for Houston Lighting and Power Co. ["HL&P"] alluded to the fact that HL&P's documents were also engineering studies done over a two month period of time. [Tr. 561, 563-565]. There is, therefore, no indication that these documents contain any attorney input, thereby obviating any claim to a privilege based in whole or part on attorney "work product."

Petitioners also argue that the documents sought by the Department and Staff are not admissible at trial under Rule 408 and, therefore, are not discoverable. [TUGCO Memorandum

at 2-6, HL&P Memorandum at 12-13]. Even assuming that the sought-after documents are inadmissible under Rule 408, this would not preclude discovery of those documents because discovery may be obtained against information which is not admissible as evidence. Moreover, Rule 408 only applies to admissibility and does not control discovery. In any event, the Department believes that the documents as to which the Licensing Board has compelled production may be admissible at trial because they appear to contain factual information that is relevant to issues that are central to this proceeding. Indeed, at the March 27, 1980, oral argument in front of the Appeal Board, counsel for HL&P seems to have conceded that the documents subject to the Licensing Board's Order contain a wealth of factual information and that these documents could be admissible at the hearing:

MR. MOORE: One final question under 408: if in a settlement discussion the plaintiff -- the defendant says to the plaintiff, "I ran over, Plaintiff; and here's a hundred thousand dollars and offer to settle this case," and the plaintiff refuses it. The defendant then takes the stand and says, "I didn't run over him."

What, what evidence, or what use, can the settlement be used for?

MR. BOUKNIGHT: It can be used, and it should be able to be used. And the distinction between that and this is that there aren't any underlying facts that are available in these documents that aren't available elsewhere. [Emphasis added] [Tr. 122, 123]

Thus, counsel's description of the requested documents clearly shows that these documents do not contain settlement language or offers of settlement that might be excluded from admissibility

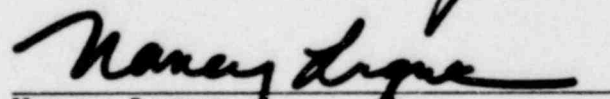
by Rule 408, but instead contain factual information. ^{1/} Petitioners continue to fail to specify the exact nature and circumstances surrounding the genesis of the documents belie Petitioners' argument that this factual information is somehow inseparable from settlement language contained in the documents. Accordingly, this information is "otherwise discoverable" and ultimately admissible at trial.

Therefore, for the foregoing reasons, the Department respectfully requests that the Appeal Board deny Petitioners' Motions to reverse the Licensing Board's Order of March 7, 1980, and compel immediate production of those documents responsive to the Joint Motion of the Department and Staff, dated February 28, 1980.

Respectfully submitted,


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April 9, 1980

^{1/} In its initial Petition to this Board (at p.3), HL&P characterized the documents as ones which "concern analyses made in the context of settlement discussions", (emphasis added). Likewise, CSW's initial Petition (at p. 4) states the documents were merely "settlement related appraisals" or "documents prepared in connection with settlement discussions."

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COMPANY (Comanche Peak Steam)	50-446A
Electric Station, Units 1)	
and 2))	

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Memorandum of Department of Justice in Response to Petitioners' Memorandum of Additional Authorities Submitted Pursuant to the Appeal Board's March 28, 1980 Order has been made on the following parties listed hereto this 9th day of April, 1980, by depositing copies thereof in the United States mail, first class, postage prepaid.

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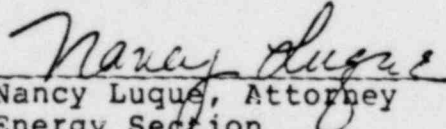
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