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UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the matter of:

HOUSTON LIGHTING AND POWER COMPANY, ET AL.
(SOUTH TEXAS)

-AND-

TEXAS UTILITIES GENERATING COMPANY, ET AL.
(COMANCHE PEAK)

Place: Bethesda, Maryland

Date: March 7, 1980 **Pages:** 472 - 691

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of:	
HOUSTON LIGHTING AND POWER COMPANY, ET AL	
"TH TEXAS)	Docket No. 50-489A, 50-499A
TEXAS UTILITIES GENERATING COMPANY, ET AL	50-445A, 50-446A
(COMANCHE PEAK)	

Commission Hearing Room
East-West Towers
4350 East-West Highway
Bethesda, Maryland

Friday, March 7, 1980

The above-entitled matter was discussed at the hearing, commencing at 9:30 a.m., with Marshall E. Miller, as presiding Chairman.

BEFORE:

MICHAEL L. GLASER
MARSHALL E. MILLER
MR. WOLFE

On behalf of Texas Utilities:

MR. M. D. SAMPLES
DENNIS AHEARN

On behalf of the NRC Staff:

FRED CHANANIA
JOSEPH RUTBERY
ANN HODGDON

On behalf of the Department of Justice:

SUSAN CYPHERT

On behalf of Houston Lighting and Power Company:

GREG COPELAND
DOUG GREEN

On behalf of South Texas and Medina Electric Cooperatives:

DOUGLAS F. JOHN

On behalf of Central and Southwest Corporation:

WILLIAM BURCHETTE:

On behalf of the Public Utilities Board of the City of Brownsville:

MARC R. POIRIER

P R O C E E D I N G S

CHAIRMAN MILLER: Good morning, ladies and gentlemen.

Well, the next chapeter of South Texas/ Commanche Peak will come to order.

I suppose that this is an oral hearing upon certain motions to which have been added about 12 or 14 other motions; they have been coming in every day and we still would like to hear from you on all of them. So, this is the day that all of you get to speak your peace and the Board will rule, insofar as it can and hopefully will be able to cover, at least preliminarily, all of the matters that come up. We know that you have been working very hard; we see the number of depositions, document production, the things that you have done; and we commend counsel both for the amount and volume of work that's going into this case and it's preparation for trial and of your demonstrated ability to resolve among yourselves, for the most part, many of the kinds of questions that are troublesome to experienced counsel in the midst of complex discovery. There are some, of course, that you solicit our interest in and we appreciate hearing from you. We appreciate even more, though, the volume that we know that you have resolved or are resolving by way of negotiations and mutual

consideration of the requirements and necessities of each as they may come up when you take your turns, hopefully

The first motion that we have is the joint motion of the Department of Justice and the NRC Staff for modification of the Board's order regarding the protection of settlement discussions and for an order to compel production of certain documents and testimony, filed on February 28, 1980.

Before we do that, so that we may have a complete record, would counsel and parties please identify themselves of the record? We will start at the left here.

MR. SAMPLES: M. D. Samples appearing on behalf of Texas Utilities, along with Dennis Ahearn.

MR. CHANANIA: I'm Fred Chanania representing the NRC Staff; and with me is Joe Rutberg and Ann Hodgdon, also of the NRC Staff.

MS. CYPHERT: Good morning. My name is Susan Cyphert; spelled C-Y-P-H-E-R-T. I'm representing the Department of Justice this morning.

MR. COPELAND: I'm Greg Copeland representing Houston Lighting and Power Company in Houston, Texas. With me this morning is Doug Green from here in Washington.

MR. JOHN: I'm Douglas F. John representing the South Texas and Medina Electric Cooperatives.

MR. MILLER: My name is Michael Miller representing Central and Southwest Corporation and its subsidiaries.

MR. BURCHETTE: My name is William Burchette. I'm here today on behalf of Tex-La Electric Cooperative of Texas, Incorporated.

CHAIRMAN MILLER: Thank you. Any one that we have let put? I take it that's all the counsel or parties who will be participating in our oral arguments and hearings on motions here today.

Mr. Chanania, do you have --

MR. CHANANIA: Yes. I have one preliminary matter.

Yesterday, we filed a motion for a 30-day extention of time based upon the unavailability of Mr. Robert H. Hartley who is our designated expert engineering witness. And, the basis of the motion was the Mr. Hartley was unavailable for medical reasons and we hand-delivered some copies of the motion to some parties; I delivered some this morning. The rest were set out and I just wanted to make sure that everyone did have a copy of that motion, since we felt it may have a bearing upon or may be important in relation to some of the other motions which might come up today.

If the Board wishes, we can take up that motion first.

CHAIRMAN MILLER: Yes. We received copies of

our motion. Let me say preliminarily that we will probably deny it just so that we won't have something in here that's fouling up the questions. We are willing to give consideration of some of your problems; we may show some flexibility. But, it's too far gone in the day with this preparing for trial and going for trial; we are hemmed in by trial settings of Members of the Board on other cases. We just don't feel that we can for any party grant an across-the-Board 30-day extention or matters of that kind.

We will consider, as we get into it, whatever problems you might have; in as much as the Department of Justice is able to move ahead, we've got parties and we've got counsel and we've witnesses. And, in a very significant degree and extent, we feel we must adhere to our evidentiary hearing dates and those things which are anchored or linked to it.

We will pick up any special problems that you might have and we have some discretion, I think; we could interupt order of proof or that kind of thing, Mr. Chanania, but we do not intend to make any changes in our trial settings which we must hold firm.

MR. CHANANIA: Would you like to take up this potential flexibility then at a later time?

CHAIRMAN MILLER: At a later time today, yes.

Anything else preliminarily?

All right, then, we will start off with the joint motion of the Department of Justice and the Staff. Who wishes to go first on that? Ms. Cyphert?

MS. CYPHERT: Your Honor, if I may, I think I will take the lead-off position on this one this morning and Mr. Chanania may have some things he wishes to add for more clarification perhaps that I may have left out.

The Department and the Staff have brought this motion at this date because we felt that we are now well into the final last-minute preparation for trial and we wanted to give all the necessary benefit to all the parties if a settlement could be effectuated in this situation.

And, apparently, that will not be the case.

I can at least represent for the Department that there are no ongoing settlement discussion of any nature ongoing with the Department at this time with either representatives from the TU companies or with Houston Lighting and Power.

One of the key issues in these proceedings was set forth by the Board in its December 15, 1978 order regarding discovery and consolidation. And that Issue No. 4 is really what we are addressing today. That issue reads, what are applicant's policies, purposes, or practices with

respect to intrastate only operation and what conduct or activities have applicant's engaged in to enforce intrastate only operation or to maintain that statis?

The Department has claimed and will claim at trial the HL&P and TU have operated and have planned their systems in such a way that they have created an inconsistency with the antitrust laws and that the intrastate only method of operation has been and will continue to be inconsistent with the antitrust laws in policy.

Both Houston and HL&P have claimed in numerous forms including the Nuclear Regulatory Commission, that their actions have not been take pursuant to any violation of the antitrust laws and furthermore, that their systems have been operated and planned in such a way that intrastate only operation is the most reliable and economic method of doing business.

Now, the briefs that we have received last night from Houston and TUGO say that they will not rely or use any of these factual studies that apparently have been prepared --

CHAIRMAN MILLER: We'd like to go a little bit farther and we will do it right now and ask that all counsel address it: in that respect we have noted that those studies are not to be used, relied upon, or the basis, in whole or

part of any witness' testimony. We have not seen any clear-cut statement to the effect that those studies, those discussions, those documents, whatever they may be, are not essentially inconsistent with or in conflict with any previous positions taken by these parties.

That we are interested in covering.

MS. CYPHERT: That is our point exactly. We believe that, presumably, the reason they say they are not going to rely upon these studies is that they will, in fact, show or will tend to support the position of Justice and NRC that not only is interconnection feasible, but, perhaps it is more economic than has been previously represented either in this forum or in other forums.

CHAIRMAN MILLER: Do you have any basis for that conclusion?

MS. CYPHERT: We do not, your Honor, except that the most recent studies that we have in this matter are dated 1977. If for no other reason, it seems to me that the years that have passed, obviously, there have been some changes and in the Perper (?) proceeding, the groups that involved over there are studying the feasibility of interconnection.

Now, presumably, if it was impossible, that groups would not be spending the time and effort in doing it

and we claim --

CHAIRMAN MILLER: Well, those dates you gave us are not within the so-called, even qualified immunity for discovery purposes, are they, 1977?

MS. CYPHERT: I'm sorry; I am having difficulty hearing you now.

CHAIRMAN MILLER: I say the dates that you gave or at least the dates that you mentioned, 1977, is not within the ambit or purview of the even qualified privilege.

MS. CYPHERT: Well, those documents we have. I can give you a listing which I have with me today of what we do have.

CHAIRMAN MILLER: No. What I'm asking is that you made the statement and I and the rest of the Board, I believe, are interested in knowing whether or not there are any conflicts or inconsistencies of a substantial nature between representations made to this Board made in various pleadings by these utilities and what you consider to be the factual situation which should be explored in this are of controversy.

Now, in your response, you gave me 1977; that's not responsive because I know very well that the order doesn't even purport to cover matters except those subsequent to the Federal Court decision. So, therefore, we would like

precise and responsive answers, if possible; and if not, of course, just tell us.

MR. GLASER: Well, the answer is, you don't know; isn't that so?

MS. CYPHERT: That was just my point: we don't know what's in the studies. If you take a look at the deposition transcript attached to the motion, every time we get any where near close to something, we have been precluded; we have been stopped from even finding out the most elementary issues, such as: we don't know who prepared the documents; we don't know who has seen the documents; we don't even know if these documents have, in fact, been used at settlement negotiations; we don't know if the parties on the other side of the settlement negotiations have even seen the documents; we don't know when they were prepared; we don't know if they were prepared after the June 1, 1978 hearing at which I argued or raised some of these issues with Mr. Miller before.

And to the extent --

CHAIRMAN MILLER: You can't even tell when, as a result of your inquires, when they were prepared or whether they were prepared before or after the judgment or desicion of the Federal District Court?

MS. CYPHERT: No, sir. We do not know that infor-

CHAIRMAN MILLER: All right. We will be interested in your documentation on that.

MS. CYPHERT: Now, to the extent -- now, counsel appeared to have represented in their briefs and I must admit, that I got them last night; I have read all of them twice and perhaps I have missed something.

But, it seems to me that they have not made a distinction that those specific studies were prepared after June of this year -- of 1979. And, we believe, probably, that they were prepared before that period of time.

They claim they were prepared in reliance on the Board's orders and subsequent to that date. We assume that that may not be the case, but it may be.

CHAIRMAN MILLER: We will inquire of counsel as they appear sequentially; but, we would like you to cover, if you don't know; fine. We are not saying that you should or are required to, but tell us what you know and what you don't know. And, I won't say when, I don't want to get into that triology. Let us know the state of the Department's knowledge on the information.

MS. CYPHERT: Our knowledge is that there are presumably settlement negotiations, we think or we have been able to fair it out, that there are presumable negotiations going on that there may be two sets of them: one with

Central -- the Central Southwest system; and one with the Gulf states. Or there may be, in fact, one overall study: we just don't know.

But, at least we know there have been negotiations with Central and there have been some type of studies or negotiations that relate to Gulf States' utilities. And, one of the reasons that we attempted, I might put this as a footnote at this time, your Honor, to bring this to your attention at this date or earlier this week is today, in Bomont, Texas there are depositions ongoing against -- or we are taking depositions of officers and employees of Gulf States' utilities and I know that at least as there have been numerous settlement privilege objections raised in different areas and at some point, you know, we have got to get a determination by the Board as to what we are going to be able to ask and what meaningfully we can do at these depositions.

CHAIRMAN MILLER: You will probably get that today.

MS. CYPHERT: So, as a footnote, I wanted to bring that to your attention.

But, presumably the reason that they will be rely on these studies is that they will actually support the position the Department and that the NRC is going to take. Now, the Board's order in April of '79, said that you were

extending the settlement privilege to cover documents generated by Houston and by other parties solely as part of negotiations to settle this proceeding at the NRC.

And, we do not know if these documents, in fact, were generated for this purpose only or were they generated for something else and are being used in this or how -- really, we know very little about the documents. So, that's also a problem for us.

I think the best thing for me to do at this point is to let you know what we don't want: we do not want internal memorandum of the officers, of the lawyers, or the types of things which would say, we think we can get four out of five things; or we are going to accept proposal one versus proposal two or we will take certain portions of proposal one versus proposal two. We are not interested in strategies, the barginning, the posturing; we want the objective factual studies that presumably will show or have at least a significant bearing and assist not only the Department and the NRC, but this Board in determining whether or not interconnection between TIS, or the Texas Interconnected Systems and the Southwest Power Pool are feasible and what the cost of that is today.

I was trying to think, basically, of a hypothetical and the one I came up with is if there was a nuclear accident

in a plant and if I represented a public utility and I was trying to determine whether or not somebody who had manufactured a type of machine; they had done it or installed it in such a way that they showed liability because they were negligent. Presumably, is we were interested in settlin the case, there might be some objective study made to see, you know, whether in fact machinery was installed right, whether it was working, whether valves were turned on or not turned on, et cetera. And, if in fact that there was a study made that showed that the machinery, in fact, was put in such a way that showed negligence on the part of the manufactured product and settlement discussions broke down and we went to trial, that factual piece of evidence not only is admissible under 408, but clearly it has a probative value which is important. Presumably, it has -- it is an ojective piece of tangible evidence which goes to show the merits or not the merits of the case. It would not show, in fact, that it was put together for purposes of settlement negotiation; it wouldn't show barginning intent of the parties. Presumably, it has a nature about it that is pure in the sense that it is objective.

We assume, although we don't know, we assume that the studies that we are interested in getting are prepared by engineers who have made a scientific evaluation of cer-

tain facts. And, that's all we want. We believe that it would be not only important for us to get it, but also helpful to this Board in the longrun.

CHAIRMAN MILLER: Let me inquire, Ms. Cyphert.

MS. CYPHERT: Yes, sir.

CHAIRMAN MILLER: Have you addressed any interrogatories along those lines inquiring whether or not there have been such studies that you have just now described for the Board?

MS. CYPHERT: I know that we have asked interrogatory requests asking -- either er or the NRC have --

CHAIRMAN MILLER: Well, that precisely.

MS. CYPHERT: -- that has asked for studies that relate to the feasibility.

CHAIRMAN MILLER: Well, that isn't quite what you have just described. The kinds of things that you feel --

MS. CYPHERT: Well, I don't have the complete set of interrogatories --

CHAIRMAN MILLER: Pardon me -- the kinds of things that the Department that it is entitled to and you just described them rather aptly.

Now, I then ask you whether or not any interrogatory, any written interrogatories with such precision of description have been addressed to any of these parties so

that you would have the information without going into the merits of confidentiality or not, but so that you would be able to have a factual basis for the statements that you are making here today.

Have such interrogatories been addressed, and if so, what has been the response?

MS. CYPHERT: Yes. I believe there have been interrogatories that addressed that issue. Now, whether or not they have been that specific --

MR. GLASER: Excuse me. The interrogatories have been very broad that you have addressed and they haven't specifically asked for the documents that you just described; isn't that true in the state of the case?

MS. CYPHERT: That is true, sir.

MR. GLASER: Okay, so you haven't asked for interrogatories specifically, asking for documents that you just described to the Board that the Department and the Staff would now like to have.

MS. CYPHERT: All right. A specific interrogatory requesting to see these documents; that is correct.

Now, perhaps if the Board believes that that is the appropriate juncture of us to take at this point, obvioulsy, we will do that.

CHAIRMAN MILLER: We would have thought that it

would have been appropriate a long time ago to have us all here today with these far-reaching questions that have obviously, when we started looking at your attachments, been the subject of objections and not only objections, but instructions not to answer.

We take instruction by counsel not to answer very seriously. We think that the instruction should be given by the Board, largely. Now, it is permissible where you have such matters as privilege whereby the answer in whole or in part could reveal that which is claimed to be privileged which we would expect to be brought to the Board's attention pretty quickly, as a matter of fact.

We look with disfavor upon any lawyer telling any witness, whether it is his client or not, not to answer questions, especially when it's objection to the form, relevance, or matters of that kind. Let the witnesses answer over the objection; we will rule. We recognize that in this kind of thing, you have the problem. We would have expected parties, including the Staff and the Department, to have brought this to our attention a long time ago; and certainly to have sharpened the reference by appropriate interrogatories so we know a little more specifically what we are talking about without revealing the confidential nature of it.

Do the best you can with what you have in telling us precisely what the facts are now as we go on -- we've asked you several questions; don't substitute generalities for specific responses.

MS. CYPHERT: We have sent a broad interrogatory.

MR. GLASER: But, you sent the interrogatory after the protection order was issued by the Board; so, presumably it wouldn't have covered the documents that you now seek, at least it can be interpreted that way; isn't that true?

MS. CYPHERT: Well, it is our understanding that there is a continuing obligation to up-date --

MR. GLASER: Well, I understand about the continuing obligation; of course there is. But, there is also an order which the Board issued last June that covers any response in any interrogatory; isn't that so?

MS. CYPHERT: Yes, I'm sorry. I don't understand your point.

MR. GLASER: Go ahead; never mind.

MS. CYPHERT: Okay.

We did not -- let me address the two specific things you've raised, Mr. Miller. We have sent an outstanding interrogatory request which has asked for all the studies of whatever nature that relate to these issues. We have not -- I admit, we have not rifled a specific inquiry into

this.

Presumably, the documents should be responsive -- I believe that they are responsive to that interrogatory request.

Now, if in fact we have not been as careful as we should have been and we need to do that, we will do that.

The second point I specifically want to address --

CHAIRMAN MILLER: Let me interrupt, just briefly, not to be discourteous, but to tell you why we are asking. You have objected and you are perfectly entitled to statements of counsel which are not sworn or verified committments of parties, necessarily as such, in their briefs which have been rapidly file because of the repeatedity with which you have approached this.

Now, we are confronted with, as a Board, we are going to ask counsel to state, fairly and candidly, what the factual situation is without going into condifentiality until we rule one way or the other on it; but you are going to get, perhaps, less persuasive evidence to you as a lawyer and as a representative of the Department of Justice then you would have gotten had you asked some rather precisely phrased interrogatories and gotten sworn answers.

So, we may have to do today, in coming to a decision, with evidence that is not necessarily the best

evidence, but I'm pointing out to you now some of the reasons that are underlying it and not doubt, you will think of others as you go along and give us the best evidence that you can when you come to it; and when you can't, well, let us know so that we can do the next best thing: that's I think, the framework in which perhaps you will want to address this.

MS. CYPHERT: And the second issues; you were concerned about the timing of the motion. We took the Board's order in June basically to say, you want to foster settlement negotiations by this privilege; and that essentially, we were waiting to see if, in fact, something was going to happen, that was one thing.

The second thing is a good number of these depositions that we refer to have only been taken within the last 30 days, and we have gotten the transcripts back for them. So, the wealth of the evidence, at least which relates to the higher-ups within the company has been taken fairly recently; these are not depositions that have been taken six months ago.

Now, there are, I think, there were one or two examples that were taken in the early Fall of this last year; but, the remainder of them are very recent. I think the most recent one that we cited probably was Mr. Swetland

which was, I think, less than 14 days ago.

I believe that in fact we have really stated what we want; we have told you really what we don't want. We believe that the factual studies are highly relavent and central to the issues in this case. We believe that they will show or they may show facts which contradict the defense that TU and HL&P will put on at trial.

We belive that requesting this material is consistent not only with 408, which I would point out clearly provides that such factual materials are admissible at trial as well as being discoverable; but consistent also with the rule and the law here at the NRC as cited in Florida Power and Light. I only want to spend just a second to distinguish our situation from that only insofar as the documents that were asked for by the moving party in that situation were much more far-reaching; they basically asked for everything involved in the settlement negotiations.

We are only asking for the factual data.

I would quote to the Board from that decision, a party may not cease upon settlement negotiations as a devise to diffuse damning evidence against it. We believe that's what's been done here.

CHAIRMAN MILLER: Staff? Who else wishes -- this is a joint motion, so I assume that the Staff wishes to be

heard next.

MR. CHANANIA: Yes, Mr. Chairman.

At the outset, I would indicate that as is the case with the Department of Justice, the Staff has not presently engaged in any settlement discussions with the parties.

In addition, I would also emphasize the narrow focus of what kind of materials we seek by this motion. There are, at least it is Staff's belief, that within each of the companies that are involved in these settlement negotiations, there are various computer programs and a certain amount of very recent data, both which would go into studies such as load flow studies or stability studies. And, it is this kind of objective data that both the company relies upon in its day-to-day operations as well as plugging it in, if you will, to a study which would assess the engineering feasibility of various patterns of interconnections that might have been considered by the parties.

As with the Department, we are unsure of exactly what is out there; what has been studied, what kinds of studies have been run to be able to more narrowly focus the motion in part because when, particularly, during the depositions, the questions have been asked as to what

evaluations have been made of various proposals in, for example, the CSW application at FERC; the questions have been barred by objection of counsel.

We certainly -- while that is not a statement sworn under oath, we took that as -- or that essentially cut-off the information flow to the Staff through the deposition process, at least.

And, in terms of the interrogatories, I would point, at least, by one example to Interrogatory No. 4 in the Department's -- I believe it's their initial set of interrogatories to the Houston Lighting and Power.

CHAIRMAN MILLER: Do you want to read the interrogatory and the answer that you consider to be material here?

MR. CHANANIA: Yes, I will.

I will say that the interrogatory that I'm reading from is from HL&P's additional response of the 27th day of February, 1980. So, I'm assuming that they translated it correctly from the original response which I do not have with me.

CHAIRMAN MILLER: That's sufficient.

MR. CHANANIA: It says, in order of their relative importance, describe the underlying policies or basises upon which HL&P and TU justified their refusal to engage in the interstate transmission or reception of electric power,

electric/coal power, or energy or to be interconnected with any other electric utility engaged in interstate commerce; provide any documents which state or describe these polices or basises.

In tracing through HL&P's responses to this interrogatory, both from the initial response dated January 11 or thereabouts, 1979, and then there was a first supplemental response of April 27, 1979, Houston Lighting and Power had never mentioned the Stag Study, for example. For the first time on February 27 of this year, they mention the Stag Study as one of the basises and one of the documents that they intend to rely upon.

CHAIRMAN MILLER: You were going to read their answer, weren't you?

MR. CHANANIA: Well, I can read their answer, certainly, on February 27 the answer is --

CHAIRMAN MILLER: Or at least those portions -- we would rather have it directly read by you so we know we are hearing it directly and precisely.

But, you don't read the whole thing if you don't want, Mr. Chanania.

MR. CHANANIA: Okay. The problem is that if I run through the three responses, I'll be up for about two hours reading.

CHAIRMAN MILLER: Oh, I see. We don't want that.

MR. CHANANIA: They are rather long. I will say that the response of February 27 is short and it is the first time that the Stag Study is mentioned, and this is the supplementary answer of February 27; the December 17, 1979 Study entitled Economic Evaluation of Alternative Generation Expansion Plans for Electric Liability, counsel of Texas and Southwest Power Pool, which was performed for Houston by Stag Systems, Inc., supplement to Houston's prior response.

Houston believes that the Department has already been furnished a copy of this report.

Now, previously, this is not the Stag Study that has not been mentioned and during the deposition process when inquires were made about work that was being done by HL&P employees relating to the Stag Study and information which would have been given to him, those questions were objected to and indeed, the witnesses were not allowed to answer on advise of counsel.

I will point out that in the April 27 response, on Page 14, Houston Lighting and Power says, to paraphrase Mr. Jordan's testimony until such a study is done referring to one between IRCOT and the Southwest Power Pool there is no way to answer the question of whether or not the

money required to make the interconnection can be justified and whether or not the service to the customer is going to be improved.

Apparently, Mr. Jordan as well feels that the studies are important and central to his company's position.

CHAIRMAN MILLER: Well, now I think you have read to us the portion where the Stag Study so-called is included in a response of February 27, 1980, further responses of Houston Lighting and Power.

Now, you then made the statement that at least on one occasion in the course of taking depositions some counsel have instructed some witness not to answer questions which reasonable related to the Stag Study. Now, we would like to have that verified.

MR. CHANANIA: Okay. I -- this occurred during the deposition on John Myer and I unfortunately do not have the page references with me. I thought they were in the selections which were attached to the motion --

CHAIRMAN MILLER: Well, when was that deposition taken?

MR. CHANANIA: There are selections on the -- it was September 13, 1979 and there are selections from that deposition there which talk about the CSW proposal to the FERC and the question is on Page 73, did you perform any

review after objection as to inquiring into any settlement contacts, the question is, well, I should start backwards a little bit --

CHAIRMAN MILLER: Now, is this referring to the Stag Study which is the linkage we requested? Or, should it have been as you are arguing it?

MR. CHANANIA: It simply was not clear since he was not permitted to testify as to what evaluations he had done within the settlement context. As far as outside the settlement context --

CHAIRMAN MILLER: Pardon me; let me explain.

MR. CHANANIA: Okay.

CHAIRMAN MILLER: Do you content that the question as asked and either the response given or the direction not to answer by counsel reasonably should have contemplated and related to the Stag Study later listed as a document to be relied on and not so mentioned; is that your position?

MR. CHANANIA: Frankly, I don't know because I do not know whether at that time HL&P intended to rely upon the Stag Study. All that I do know is that on February 27, they told us they were going to rely upon the Stag Study. But, prior to that time, we were not permitted to be able to inquire as to this person's work on the Stag Study or input.

CHAIRMAN MILLER: Ms. Cyphert may be able to help us; I take it that's the reason she has risen. If not, you may tell us why you have risen.

MS. CYPHERT: I've risen, your Honor, because I have the deposition transcript of Mr. Myer. I think I found the right page citation and I just want to check with Mr. Chanania.

CHAIRMAN MILLER: Good; thank you. That would be helpful.

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MR. CHANANIA: I appreciate the assistance of Ms. Cyphert to clear this up. Page 64 and 65 of this deposition transcript, this is one instance of when the question was asked.

I will read the question: when you say, quote, the Stag System work, unquote, is there a particular study that was involved or that you were referring to when you say Stag System work. And the answer was, as Mr. Copeland outlined previously, Stag is our consultant in the proceedings and we have done various input information for these necessary studies.

A little later on the page, Page 65, Mr. Copeland objects and says at the bottom of that page, but I want you to know right now that we are not going to get into the details of Mr. Stag's Study through Mr. Myer or any other

witness employeed by the Houston Lighting and Power Company.

CHAIRMAN MILLER: Did he say why? Which counsel was this or who is Mr. Copeland?

MR. CHANANIA: Mr. Copeland is in the room.

CHAIRMAN MILLER: Oh, we'll hear from him on that, then.

Well, what did he rule now? Read me his ruling again.

MR. CHANANIA: He says, but I want you to know right now that we are not going to get into the details of Mr. Stag's Study through Mr. Myer or any other witness employeed by the Houston Lighting and Power Company.

CHAIRMAN MILLER: What was the date of that?

MR. CHANANIA: September 13, 1979.

CHAIRMAN MILLER: When did you bring that to the Board's attention? Is this the first time?

MR. CHANANIA: Well, until February 27, 1980, which was last week, we were not aware that that was going to be a basis of or at least they had not answered that interrogatory as relying upon that as one of the basises for their position.

MR. GLASER: I'd like to ask the Department of Justice and the Staff when it reached the judgment that they had to have these documents. It's been troubling me

why all of a sudden on the 28th of February we have a motion when objections were asserted in the transcripts of witnesses as far back as last September.

MS. CYPHERT: I think I tried to address that as frankly as I can. We took the Board's order in June to say that in initial portions of discovery that this was going to be a limited settlement privilege to see what would happen.

We wanted to see what was going to happen. We came to this determination to try to file that motion after the last week, I think probably the last week of December, early part of January, the end of December, I'm trying to remember now; we have had so mand depositions, but during that last week, the principle officers of TU were employeed and there were a number of instances, some of which were cited for you in the motion, where settlement privilege was raised.

Very frankly, we only have so many bodies; most of which are in Texas on a full-time basis just taking depositions. I'm sure you've looked at the monthly reports and can see that we have not been sitting around. We have tried to get to this motion as soon as possible. Particularily we also wanted to get to the deposition of Dale Scarth because we expected that that was going to be raised at his

transcript, too. We wanted to have a complete record before the Board to show you that it just wasn't one or two people that were going to do this and we were -- we would have been back here again prematurely which perhaps we were in raising this issue in June before the depositions began. We wanted to say, okay, we have made the effort, we have asked the questions, we have the record, here it is and this is what has happened. And, we don't -- perhaps to allay some of your fears, we don't anticipate that what we are asking is going to cause any disruption in the trial schedule. We intend to be ready to go on ahead; we just want those studies and we will work with them in the time inbetween.

To the extent that we need to go back or the Board feels they will let us go back and determine anything that we need to in deposition from those documents, we will sandwich those in and we will finish them by the close of factual discovery.

MR. GLASER: Which is when?

CHAIRMAN MILLER: February 28 with certain exceptions we ran over; the terminal date was February 28 for factual --

MS. CYPHERT: It closes next Friday, your Honor, at this point.

MR. GLASER: That's what I thought. The Board

extended it until the 14th of March; that's this coming Friday, a week from today; isn't that correct?

MS. CYPHERT: Next Friday; that's correct, sir. But, we do not intend to hold up these proceedings for this.

MR. GLASER: Well, what do you propose to do, come to the Board with leave to take depositions outside of the cut-off date if you get the studies?

MS. CYPHERT: What we would like to do, first of all, is just to take a look at the studies and see whether or not we need to go back and depose -- we may not need to do that.

We have expert depositions already scheduled for Mr. Simmons and Mr. Scarth, two of the people whose deposition transcripts are attached; so that takes care of them already. And, it may well be that we don't need to talk with any of the other people since we can really address the issues to those -- a lot of the issues to those two who are ongoing.

So, for that reason, we feel that our motion at this date is to going to cause any distruption of the trial schedule if, in case, that was on your mind which I guess I thought it was.

MR. GLASER: You don't foresee the need to take

the depositions of the two experts who were involved with any studies that you might get if the Board were to grant your request?

MS. CYPHERT: That is possible; but we have, presumably, to the close of the month of March to conclude our expert depositions. And, although as -- I have my trial calender here with me; we've got one a day or sometimes two a day. We will get them done.

MR. GLASER: You have to talk fast, I guess, if you are going to get them done.

MS. CYPHERT: I'll do my best.

MR. WOLFE: Well, Ms. Cyphert, while you are up, please.

MS. CYPHERT: Sir?

MR. WOLFE: I'm sort of confused as to exactly what the Department of Justice's position is and I guess this also extends to, obviously, to the Staff's position; are you saying that such documents as the Stag Study even though you haven't seen it, come within our orders and you think that our orders as to discoverability and settlement, insofar as they relate to settlement, that such an order should be modified or are you saying from what you suspect that such documents really are not privileged. They are or they are not.

If they are, then you suggest that we should modify

our order, or are you saying they are not privileged at all?

MS. CYPHERT: Well, we argued that they were not privileged and we have argued that the documents are not privileged, period.

MR. WOLFE: In other words, they did not form part of any negotiation discussions, you suspect?

MS. CYPHERT: Well, I'm trying to call out a factual piece of paper that has, presumably, scientific or expert, you know, technical evaluations from discussions which were had about the document.

We want the documents. The Department felt that the proper way of bringing this to the Board's attention was in a motion to modify its previous order that these documents were going to be granted some type of limited form of settlement privilege in the initial portions of discovery program. That's what the Board's order was. I think Mr. Miller said that we recognize that there is no settlement privilege but we are going to try to foster settlement in this case, and we are going to provide a limited privilege during initial stages of discovery and so for that reason, we assumed that for at least the initial portions of this case, that those documents had been granted some type of special treatment by the Board.

So, we have never changed our position that they are not privileged; but, we are also asking now that you

rescind any special privilege which may have been used to blanket these particular pieces of paper.

I hope that is clarified.

MR. GLASER: Can I ask one questions along those lines: the documents that you have described or attempted to describe that the Department would wish to obtain, we claim are otherwise discoverable under 408; is that correct?

MS. CYPHERT: That's correct.

MR. GLASER: And, they are discoverable because they may show inconsistencies with the defenses of the parties in this proceeding?

MS. CYPHERT: Exactly. They go to show or not show the factual allegations of the parties. Yes, sir; that's correct.

I think that there was a question that you raised about the Stag Study which before I sit down I think needs to be clarified.

There are several Stag Studies. I don't know how many there are, but I can tell you the ones that we have. There was one that was used in the Civil Court proceedings and the date on that is '77. We have that one. We received on fairly recently which was dated December '7, which relates to alternative generation expansion plans.

Now, we can't tell from the deposition transcripts that Mr. Stag has also be involved in these settlements

or these studies which were produced or whatever, had been worked on in relationship with the settlement thing. We think that he has. So, before Mr. Copeland or somebody from HL&P gets up and says, you know, they have the Stag Studies, I want you to know that there are several Stag Studies and we have two of them.

Now, there may be more and there may not be. We just don't know; we haven't been able to tell from the depositions.

CHAIRMAN MILLER: Well, your responses or those of Mr. Chanania have indicated that certain Stag Study or Studies are listed in a recent filing in additional responses to documents or studies relied on.

MS. CYPHERT: Yes, sir.

CHAIRMAN MILLER: We then asked, when that should have been revealed if the contention is that that's the kind of study that witnesses improperly instructed not to answer.

MS. CYPHERT: Well, the problem is we don't know.

CHAIRMAN MILLER: In response, you and Mr. Chanania located and have cited to us transcript references which, unless the Stag Studies now turn out to be different kinds, appeared to be responsive to your contention.

Clearly, are we now going to have some different kinds of studies so that we have got a gap between that which is going to be relied on by the recent disclosure as being

different from that which the witness was told he didn't have to respond to? Or, do we have a direct confrontation as we originally thought we had?

MS. CYPHERT: Well, I think the best was I can answer that is to say, we just don't know, because we don't know the totality of the studies that exist. We know that there are other one out there.

CHAIRMAN MILLER: All right. We'll inquire of counsel, then, if you don't know. We thought we had it pinned down a little better than appears to be. We'll try to find out what the actual situation is in fairness to everyone.

MS. CYPHERT: Very well. I apologize because I have been standing up during Mr. Chanania's time.

CHAIRMAN MILLER: That's all right. We'll give you whatever time you need. Go ahead.

MR. CHANIA: By way of clarification, I think that the -- you should also be aware that Mr. Stag and his studies because we have been unable to find out precisely what they were or what he has done, he is one example which, at least, comes out most clearly.

But, by being prevented from inquiring as to what kinds of studies or evaluations HL&P personnel, for example, have done with relationship to the CSW proposal at FERC, we simply don't know what else is there. So, it's difficult

to identify what studies and what kind of specific scientific data might be there.

I will also say that as far as Mr. Stag is concerned, it is -- he may or may not be under the non-testifying outside consultant rule which the board has established to givern discovery for these proceedings. It was not clear whether or not he gets to -- he falls unde the umbrella of that as well as settlement or whether it's one or the other.

In addition, I will add that the -- two things: one is that our reading of the transcript of June 1, 1979, and references, Page 368. And I believe it was yourself, Mr. Miller, who is speaking where you indicate that at least at that time in your comment, that you don't have -- quote, we don't have the power and never purported to shield absolutely nor immunize forever from any type of inquiry including possibly our own if it became material, and this was in relationship to the settlement documents.

In addition, the Board's order, I believe it's May 7, indicates on the second page, that the Board adheres to its ruling protecting documents generated after the District Court trial and solely in connection with settlement negotiation. Because of the inability of the deposition process to reveal whether or not this was, indeed, solely relating to settlement, these studies, whatever might be there, the Staff at least feels that the burden does shift

to the other parties to indicate, at least maybe identify, what studies are there and then be able to tell us whether or not that's solely in the context of settlement.

CHAIRMAN MILLER: If you had made a motion in September, October, Novemeber, December, we probably could have found out for you.

MR. CHANANIA: Well, I believe that the reasons for the difficulties in making that motion at that stage have already been outlined and I don't know if there is really any more than I can add.

CHAIRMAN MILLER: Well, they may have been outlined, but they sure got past me. I still don't have a satisfactory answer.

You didn't do it; I know you have been busy and I gave you a certain amount of credit for that, but if it's as significant as you tell us that it is, and we are not denigrating it in any way, then we are at a loss to understand when you start having these objections that you felt were not warranted by the scope and intent of our rule. We don't know why then you didn't come to us, in some fashion, written motion of otherwise, because we have piles of paper; you haven't hesitated to correspond with us. We don't know why if it was this important why we are hearing of it now when we are getting down to the last couple of months before trial and everybody say, my God, stop something

catastrophic is happening or not happening. If you are contending now that there is something about that rule as we entered it, discussed it twice, your quotations are perfectly accurate both what I and others said in the transcript and the orders, and the solely was underscored, if I recall it, by the Board in its written second order. After and solely; weren't those words underscored? My memory was that we intended them to be emphasized.

Obviously, solely was a matter; it's a follow-up matter in the Federal Rules of Evidence, as a matter of fact. You can't immunize for all purposes, forever, simply by having a part of a discovery process during negotiations. So, we indicated what the parameters were to you; we singled it back a year ago or whatever the entry of it was and that's why we are trying to find out now what you're basing your present contention that there is something improper on and what the substance of it is so we can give some kind of a ruling that will both respect the underlying principles of law, which we believe we were adhering to and to seek essential justice to all parties.

We are having trouble because you keep listing things by in a rather diffused fashion; they change shape, form, and time and everytime we try to pin it down, and we think maybe we have then it turns out well, maybe it's something else and so forth.

So, do the best that you can, but there is a certain inprecision creeping into your arguments and it makes it very difficult for us to follow the full measure of relief that you are seeking at this stage.

But, proceed.

MR. CHANANIA: The final point that I wanted to make was that the Staff, as you know, is not an electric utility and does not have a large group of engineers or computers at its disposal to be able to make studies on its own and indeed, is and will rely upon Mr. Hartley, its expert engineer, in order to evaluate studies and to form his expert opinions as to whether the --

CHAIRMAN MILLER: You are now going into the Staff's motion at this date to extend everything for 30 days or something; is that where you are headed?

MR. CHANANIA: Not at all. I'm only indicating that since you pointed out the timing of the motion was important to you, I was indicating that in terms of the Staff resources which we available, we have been evaluating all studies and all information that's been coming in as much as possible. But, at this stage --

CHAIRMAN MILLER: You're giving us an answer about an engineer and in that question, we are asking you as a lawyer; why in the world didn't you get a clarification of rule if you contend that you have been repeatedly frustrated

in the course of depositions extending back, at least as I reason them, into October and this is going on and on and lawyers are telling witnesses don't answer and you don't even file a motion; that's a lawyer. You don't need an engineer for that.

MR. CHANANIA: As pointed out by Ms. Cyphert, there were a large number of crucial depositions of the main engineers of Houston Lighting and Power and I'm not positive about TU at this point, but certainly there two experts were deposed during February of this year and that's as recent as, you know, it's less than a month ago.

And, as we pointed out, we were attemting to make sure that we had investigated all possible avenues before we came to the Board and I guess that's all that I can say.

MS. CYPHERT: Your Honor, if I may. Something you said troubled me. I want to try to clarify it. You said don't know what we want and we relief we want.

The relief we want are the objective, presumable, factual engineering studies that have been prepared that relate to the feasibility of interconnecting TIS with IRCOT and the economic evaluation of that.

CHAIRMAN MILLER: Feasibility and cost of interconnection.

MS. CYPHERT: That's correct; that's what we want.

CHAIRMAN MILLER: And, not prepared solely for pur-

poses of settlement discussions or negotiations.

That's where we get into the -- you know, that's what the issue is. That's what we ought to be looking at.

MS. CYPHERT: All right. Our concern is that first of all, we don't know what documents were prepared solely for the settlement of this NRC proceeding; I tried to make the point clear in my initial and if I didn't, I want to make it now, because we haven't been able to ask the questions.

But, even assuming --

MR. GLASER: Excuse me. That's precisely why Mr. Miller suggested that during the course of depositions if you had a problem with the Board's ruling, you should have filed a motion at that point.

I never would have allowed that to happen in any case I was trying.

MS. CYPHERT: I don't know what to say; I really don't. I'm at a loss at this point.

MR. GLASER: Well, that troubles the Board that you waited all of this time. Apparently, since September you have had an inkling that you might want to have these documents and that they might be otherwise discoverable under 408 and you waited until the last deposition was taken in mid-February and now you present us with the motion and you go all the way back to September depositions.

MS. CYPHERT: In defense we have been raising, we

thought this was going to be a potential problem before we started the depositions in the June pre-trial conference. And, I thought at that conference that Mr. Miller told us that all these things may be true, but we are going to make a special privilege up here to cover all of these things.

And, if it's too early and if we are premature , we didn't really have the appropriate foundation and record; and that is the third time we had argued it.

I think our feeling was that if we are going to come back again, we better be prepared to present a compelling case to you. Now, will all due respect --

CHAIRMAN MILLER: Not necessarily compelling, just not general and not hypothetical; and there is a world of difference between the two.

When we were rolling in June, we didn't have any examples. By September, which you file now, we see you have them; specific and precise.

MS. CYPHERT: Apparently we made the wrong value judgment in terms of timing; I can't undo that today. There is nothing I can tell you that's going to make any difference in that regard.

CHAIRMAN MILLER: Well, can you undo what you didn't do when you took numerous depositions that you've told us about where apparently the matter was raised time after time.

Are you asking us to undo that which you didn't do

at the time and you ask us to do it today as a reasonable motion and grounds for relief that you seek from this Board now?

MS. CYPHERT: What I'm asking for are some documents. That's the first thing and the most important thing of what we are seeking are the documents themselves.

We have two experts coming up. The Board doesn't need to do anything regarding that if we can ask those questions relating to Mr. Scarth and Mr. Simmons.

We have one more week of factual discovery to the extent that we can select, you know, there's got to be a value judgment made as to who's remaining. We will attempt, if we feel we've got to, to go back and do those; we are not asking you to undo anything. We are asking you to give us the documents and give us the chance. It's going to be hard on us, too. But, we felt that we had to have a compelling record when we came back. Apparently, we didn't need that much; you would have entertained the motion before. But, we took the Board's reading from the three previous orders very seriously and I feel somehow that there is nothing that we can say that's going to make any difference to you on that issue. We have tried to do this in a way that we thought would be satisfactory to the Board, in good faith and that's where we are.

But, I want you to know that my most critical con-

cern is getting those documents.

MR. GLASER: Well, don't be mislead by anything we might have said so far; we are not suggesting that you might not get the relief you're seeking. We need to hear from other counsel on the mater.

MS. CYPHERT: Yes, I understand that. But, I wanted to clarify because I, you know, I appreciate your guidance in terms of, perhaps, what we should have done and I suppose in all things in life you can look back and say, you know, we made the wrong value judgment, perhaps we did.

Now, I don't want to speak for the NRC, but I will speak for the Justice Department in that we have tried to put our resources where we thought we could, do the job that we had ahead of us, we made a value judgment as to what we needed in order to win this motion and when we came back to bring it to you again, it would be our fourth time before you on this topic area.

We believe that these documents have never been privileged; they aren t now to the extent that the Board wanted to give the other parties a chance to perpetuate or to have a settlement -- we defer to you in that and we feel that these particular factual studies regardless are not settlement documents; these are facts -- what we are looking for are factual evaluations.

I suppose or I believe that if you took the documents that we are looking for and gave them to somebody who knew nothing about this law suit, that they couldn't tell if that was a document that had related to settlement in any way. We believe that what we are looking for, really, is something that contains a factual evaluation.

And, for that reason, we believe that it is not covered by a settlement privilege even one created by the Board and for that reason, we think --

MR. WOLFE: So, getting back to my question of some time ago, your answer then is that such documents are not privileged and therefore, you really don't need a modification of the prior Board's orders; is that what you are saying now?

MS. CYPHERT: We argued that and the Board, I thought in June of last year, said, well, we are going to create a special exception here to foster settlement.

Now, we have never backed off of the contention that there is no settlement privilege that covers those and I think we reinterated that in our brief this time before you. But, to the extent that you have carved-out that exception, we would seek a modification of it.

CHAIRMAN MILLER: Ms. Cyphert, you keep referring to our creation of an exceptional privilege and you puzzle me there. We didn't create anything; we followed the Rules of

Evidence especially the recent and modern version of the Federal Rules of Evidence with the scope of it; that's why we underscored the date, the time sense, and more importantly, solely. We covered the context of the modifications of the statement of the rule; we are familiar with the legislative history which one of you attached which showed that there were two different version; they did change the Common Law Rule of Evidence.

We didn't create anything; we merely followed existing Rules of Evidence; our puzzlement then is why you didn't in pursuing whatever it is you wanted and why you don't now, in asking us to do whatever it is you want us to do now, and if it's purely prospective, of course, that's something else. But, we didn't create anything; there seems to be, perhaps, some misunderstanding. I'm sorry about that. But, all you had to do was follow the Federal Rules of Evidence.

That's what the compass of it is; so, we neither created nor are we now un-creating or creating anew or carving exceptions to anything. We are just following the normal present day modern Rules of Evidence especially as they were codified in the Federal Rules of Evidence.

So, if you look at it in that context, maybe you can answer the question that you have been asked. What you are asking us to do, because it bears upon your own analysis of the underlying reasons for the rules stated by us, twice

by written motion, and once or twice in the course of a transcript of discussions.

MS. CYPHERT: Well, we claim the documents that we are after are not pursuant or not covered by any privilege at all, period.

CHAIRMAN MILLER: Then, what you are saying is that either they were prior to the given date, or they were not generated solely for the purposes of discussions or both; isn't that what you are saying?

And, that there were then the qualifications that you don't immunize by taking something otherwise discoverable and injecting it, willy-nilly into negotiations.

Now, those are the three factors that are inherent in the rule, the Federal Rules of Evidence, as stated and as we understood it of our own. Now, if they are not privileged, even the qualified privilege for the encouragement for settlement discussion as you contend, then in what respects, if you haven't already covered them, do they not have that qualified privilege, particularly the three factors or any one of the three which we have now managed to elucidate.

I suppose it's the one that says, not solely, isn't it? Or, perhaps the one that says, it's otherwise discoverable and they are trying to put an iron curtain where they shouldn't.

MS. CYPHERT: Yes, sir.

CHAIRMAN MILLER: All right. Those are two things.

Now, we are trying to find out what are the facts with relation to those two factors which would render them not subject to qualified privilege; not because we created a rule or not because we are about to destroy a rule we created, but because it's a normal Rule of Evidence.

Now, you may have covered it; I don't suggest that you haven't. But, I'm trying to get on the same wavelength with you in analyzing the problem so that we can try to do something constructive both in analyzing it and doing whatever would be indicated.

MS. CYPHERT: Yes, I see. We claim the documents aren't privileged. We claim that they are otherwise discoverable. They are factual, probative pieces, we believe, of evidence. And for those reasons, they should be turned over to us, pursuant to our original interrogatory request.

MR. GLASER: And these would be documents prepared after June 1, 1979, and were used in settlement discussions among the parties?

MS. CYPHERT: Yes, sir. Or to the extent they're ones that have not been turned over before June of '79 that we don't have either.

MR. GLASER: But, they are otherwise discoverable even though --

MS. CYPHERT: Yes, sir.

MR. GLASER: And, why is that?

MS. CYPHERT: Because they have a factual basis that goes to prove or disprove the issues of the case. They have a probative bearing on the issues that this Board must consider and these particular ones that are going to go to the heart of the issue is whether or not TIS and IRCOT can be connected and the cost of the interconnection.

Thank you very much for your patience.

CHAIRMAN MILLER: All right. We'll hear now from opposing counsel.

MR. SAMPLES: Before getting into what I would call any argumentative matter, I think it might be helpful to trace a little bit more history.

Prior to -- sometime prior April 16, 1979 an interrogatory or interrogatories were directed to Texas Utilities and others in this case inquiring into, among other things, the existance of technical studies with respect to the electric feasibility or economic impact of interconnection.

I think that's a probably decent shorthand rendition of what the interrogatories cites the kind of data they sought.

And objection was leveled at that interrogatory to the extent that it would require parties to divulge information prepared solely in connection with settlement

discussions.

The Board took up argument on that objection and on April 16, 1979, issued it's first order in this proceeding stating that documents repared solely in connection with settlement discussions were protected. In the same respect, the documents in connection with non-testifying experts was protected. Now, I'm giving a shorthand version of the Board's order; I'm not trying to bury any terms of it.

The Staff who had sought that data, filed a motion for the Board to reconsider its order challenging the correctness of the order and on the 19th of April, I think, the Board reaffirmed its order -- excuse me, on May 7, 1979, the Board said, no, we are going to ahere to our order that was issued on April the 16th. We encourage settlement discussions. The Nuclear Regulatory Commission encourages settlement discussion, et cetera, et cetera, et cetera. We are going to adhere to the order.

Then, again, the Staff and the NRC didn't like the order and moved again to obtain data prepared solely in connection with settlement discussion and on June 1, the Board again said, no, we are going to adhere to our original order.

MR. GLASER: Mr. Samples, may I interject myself here. Let me just ask you straight out: does your client have any documents which are in existance, any studies of the

kind that the Department of Justice would like which were not prepared after the District Court case and were not prepared solely for purposes of the settlement discussion?

MR. SAMPLES: Certainly and absolutely not.

MR. GLASER: And, you know that of your own personal knowledge?

MR. SAMPLES: I certainly do.

MR. WOLFE: Well, let me follow that through, then.

Subsequent to June of '79, are there such documents in existance as to which you have refused to produce that were actually discussed with and/or given to other companies with whom you were negotiation settlement?

MR. SAMPLES: Well, let's see if I can answer that.

Documents that we have declined to deliver in accordance with the Board's order have, I'm certain, been dicussed with the people involved in the settlement discussions.

MR. GLASER: But, wait a minute; you say in accordance with the Board's order. Does that mean that they were prepared after District Court case ans solely for the purpose of discussing settlement? That was Mr. Wolfe's question to you, I think.

MR. SAMPLES: Well, if it is, yes.

MR. GLASER: We was asking the second prong of what I started to ask you.

MR. SAMPLES: Okay, well let me make it clear; the

answer to the question is yes.

No document have we declined to produce falls outside of the Board's order; in other words, any document which was prepared before the District Court decision, they've got. Any document prepared after the District Court decision, that was not prepared solely for settlement discussions, they have.

We are not withholding any document that was not prepared solely in connection with settlement discussions and the District Court judgment.

CHAIRMAN MILLER: Let me ask you: would you describe now for us, for the record, the documents which have been and are being withheld. You need not go into matters you contend now are privileged, but give us a sufficient description of what they are, what they consist of, who made them, who they were discussed with; let us know once and for all the factual basis of this whole dispute.

What documents that you contend are within the Board's order both as to timing and solely in connection with settlement are you withholding -- by you, I mean your associates and parties aligned in the same fashion and to the extent that you can tell us.

MR. SAMPLES: No, I cannot; and I'll tell you why.

First of all, I'm not an electrical engineer; secondly, I'm not at the negotiating table talking about

electrical engineering matters; and thirdly, if I tried to get involved in it with my client they would fire me.

CHAIRMAN MILLER: Well, now, we want to avoid the last.

MR. SAMPLES: Oh, I know. Frankly, I don't know. Coming to Washington becomes somewhat frustrating from time to time.

CHAIRMAN MILLER: However, when privilege is claimed and it's not just this particular quasi-privilege let's call it of compromise; whenever any privilege is claimed and documents are not produced in response whether it be to a deposition, interrogatories, or otherwise, it is incumbent about those claiming the privilege to give a sufficent description of what it is that's being withheld, under whatever claims of privilege, sufficient to identify the document, the source of it, and the nature of it, but without reviewing the confidential aspects.

Now, this is where we should have been back in September, as we have been inquiring with counsel here, but let's get to it now since we are here and we don't want anybody fired but neither do we want any dodging; if you can't supply the information. let's find out who can and how we can arrange to have it so the Board can consider it. We want to know the basis of the documents which are claimed to be privileged and have been fairly successfully withheld.

MR. SAMPLES: Mr. Chairman, I want to answer that question, but I wish you would indulge me just a little bit to go on and make a few more points.

CHAIRMAN MILLER: All right. Carry that in your mind, then, as being e bottom line we will get back to, but you may go right ahead and give us your reasoning.

MR. SAMPLES: Absolutely; I'd be glad to do that.

On June the 1st, 1979, this Board ruled. July the 17th, 1979, 17 days later counting the weekends, we had a deposition of a senior planning engineer at Texas Utilities.

CHAIRMAN MILLER: What's the date and what's the name.

MR. SAMPLES: I said the date was July 17, 1979.

CHAIRMAN MILLER: And, who was the witness.

MR. SAMPLES: Roy Parks. I remember it quite well because I happened to have drawn the bean on that particular deposition.

CHAIRMAN MILLER: You had the du y and we're glad. Now, tell us what happened; I've got the date and I've got the man in mind.

MR. SAMPLES: I believe that the Department, certainly, was represented as well as the Staff and --

CHAIRMAN MILLER: Well, if they weren't, they should have been. What happened?

MR. SAMPLES: Questions were asked about -- the same

question here with respect to economics, feasibility, et cetera, and I did instruct Mr. Parks -- I felt like I had a duty to my client and I was doing it in accordance with the Board's order -- don't talk about documents prepared solely for the deposition purposes --

MR. GLASER: And, I presume that you had looked at such documents in advance you knew what they were.

MR. SAMPLES: I knew generally; although, I don't understand all engineers.

And, he didn't answer. Now, that was on July 17, 1979; 17 days after this Board, for the third time, reaffirmed its order. They were taking the deposition of an important engineering employee of my client.

Now, I must say, also, that prior to July 17, 1979, I went back to Dallas from Washington, after we had argued this confidentiality thing, and I said to my client, who had been then engaged in settlement discussions and who were continuing to be in settlement discussions, I said, client, we had a hearing in Washington and we went over this confidentiality thing for the thrid time and I made a big point up there in Washington that if we couldn't rely upon the continued efficacy of the proprietary nature of the confidentiality nature of settlement discussions, then I was going to tell you not to engage in them anymore; but, we were assured that this was a permanent order and that we

weren't going to be, in effect, double-crossed.

And, I just point to this item in the transcript, 366, 67, in this case, where I made that statement.

Pursuant to that assurance, settlement discussions had been ongoing and I must say to you and I represent to you here and now, that settlement discussions at least of the sort we are trying to do for this case probably have a greater opportunity of producing some meaningful results than any time in the past three or four or five years since this controversy has gone on.

MR. GLASER: Well, I heard this morning, that there aren't any settlement discussions; is that correct or is that incorrect?

MR. SAMPLES: That is absolutely incorrect. Apparently, if you don't talk to certain people, there's no settlement discussions; but there are more than one party to this litigation.

MR. GLASER: Yes, I'm aware of that.

MR. SAMPLES: Now, let me speak to that: I've had settlement discussions with the Department of Justice and I must say I have delivered to them in writing, in writing, license conditions that we feel would be appropriate in this litigation that would satisfy and I represent whether they agree or not it makes no difference, that would satisfy every concern that I understand that they have raised in this

litigation, except answering one of the so-called issues here, frankly I'll speak about that in a minute, and that is the intricacies, complexities of this whole interconnection case. But, there are more quesitons in this case than interconnections by a long shot, which I won't go into.

Yes, I delivered it to them; I haven't even got a response from them but they say they won't talk to me unless I give them 100 percent of the package . Well, I'm --

CHAIRMAN MILLER: Don't get into your negotiations now. In fairness to all of you, we don't want to know who striked John; we just are happy to give you the opportunity and now we are looking at the evidentiary rule.

.. SAMPLES: I will try to hold it down, but frankly, sitting through this argument earlier, I guess I'm a little bit of a racehorse and it's hard for me to just sit there --

CHAIRMAN MILLER: That's all right. Remember, racehorses get to the finish -- remember, I've got a bottom line that you are going to be pondering so go ahead.

MR. SAMPLES: I'm working on that other 10 percent that goes in the package to see if we can settle this case. Interconnection is a very complex thing involving a myriad of issues, involving multiple utilities that aren't here before this Board and are not here before this Commission and as a matter of fact, over at FERC, who afterall has maybe

the exclusive or at least the primary juristiction in the United States governing interconnection per se.

CHAIRMAN MILLER: We are willing to exceed to that; that's true.

MR. SAMPLES: They have a study group going consisting of Lord knows how many different people; I don't know, maybe 30 or 40, all electrical engineers. Eveybody involved in those seem to have knowledged that it is so complex that it takes X number of time and years to get it done.

Nevertheless, we are working on the people that seem to have precipitated the interconnection issue per se, trying to find out if there's a way to solve -- not just legal issues, but the electrical issues, et cetera and so forth. Those were the settlement discussions I'm talking about. We are working diligently and as I said, I represent to you that there seems to be, from my lawyer-prospective, making more progress than they have ever made before.

Now I'm going to try to address you issue: very recently the lawyers have now in effect been injected into the settlement discussions themselves. Until this very recent time lawyers, at least to my knowledge, haven't been involved in these quote, settlement discussions, end quote, or studies, in quotations.

Frankly, right or wrong, and I think they are right, my client takes the position that when it comes to technical

electrical engineering matters and economics, they don't need lawyers to tell them how to do it.

MR. GLASER: They are probably right.

tape 3

MR. SAMPLES: And, I think they are right. I am not sitting with our electrical engineers when they are working on these matters; I am not sitting in the room with that electrical engineer and the electrical engineer with CSW, for example, if that who it happens to be and hear what they say.

I do know the general category of things --

MR. GLASER: Yes, sure you do; otherwise you couldn't review the document and make a judgment that it wasn't producible.

MR. SAMPLES: That's right. Well, also --

MR. GLASER: You've been practicing long enough in these kinds of cases to know what's producible and what's not and whether or not you should assert or instruct your client not to answer, so you made the judgment.

So, I think you can answer our question.

MR. SAMPLES: No, I can't answer your question because I can't answer because I can't list these things, okay?

MR. GLASER: Well, who can in your company? Is there a company officer that can?

MR. SAMPLES: I'm sure there are and I don't want

evade your question, because, frankly, I want to be and I think I have been totally cooperative.

But, I'm not on the witness stand; I'll tell you what I know, but we even had an argument at the last hearing on June 1; somebody says from the Staff of the NRC, well, look, if you are not going to order us to give them the studies, at least tell them to list them. I oppose that and you all went along with it.

But, I do know, specifically, the studies and have evaluated --

CHAIRMAN MILLER: What did we go along with? I didn't follow you.

MR. SAMPLES: You went along with my objection to a request by the Staff to at least identify and list this data.

CHAIRMAN MILLER: That was last year, wasn't it?

MR. SAMPLES: June 1, 1979; that's right. That's the order we relied upon and were going forward with.

CHAIRMAN MILLER: Well, at that point, I won't say that point in time, but at that point, we were talking more or less hypothetically. We were also being assured by all parties that they wanted to negotiate; we felt that we should encourage them and we didn't require you to give us any optimistic version of the results. We were quite willing to follow the policy of the Commission, of the Courts, of every-

body involved with negotiations.

However, I think that you also, or somebody's quoted the language, we also indicated and stated, it's in the transcript, that we were addressing it ad hoc, we weren't saying forever or before everybody that we would be prepared to look at it; you are familiar with that, too, which was somewhat of a qualification; if you are going to say that you went back and said, forever, forever, forever.

Are you familiar with the quotation that I'm talking about?

MR. SAMPLES: I'm familiar with it, but as far as I'm concerned it's taken out of context --

CHAIRMAN MILLER: Well, probably so, because everything is taken out of context if you don't have the totality of the original, but certainly it was stated where I -- sombody, I think I said, that's as far as we have gone. Our two order give a certain measure of protection, a certain measure of protection from produciblilty; that is to say discovery of documents produced subsequent to the Texas Court decision, that's a finite point that you can locate, and generated solely for the purpose of negotiating matters that came about as a result thereof.

And, in a later written order, I recall we underscored the solely, so that was a matter that you and everybody exercised judgment on when you instructed a witness not to

answer or when they permitted you to. Now, that solely is a matter, a criterion and that's what we are asking. We are not asking you to make yourself into an expert, but as a lawyer you certainly made a judgment.

Now, we went on to say, that's as far as we have gone -- this is last year -- we could not and have not given King's X in perpetuity and in all proceedings. These documents have the effect, under our order, at this time of being shielding from discovery. Discovery in this case, as you know, is not infinite; that's as far as we have gone. We don't have the power and never purported to shield absolutely nor to immunize forever from any type of inquiry including possibly our own if it became material.

Now, I trust that you brought that language or that concept to your client's attention, because it certainly qualified any totality concept either as to scope, extent, or timing and we did there indicate, I believe, in fairness to all counsel that in our proceeding we were certainly going to reserve the power to examine when the rule itself was being carried out or not carried out as counsel sought. We reserved the right to look at and to see what essential justice was required and we were allerting you and hopefully you client if you reported or if they read the transcript, there are certain qualifications that we wanted to get in balance when you tell us what you did and what you relied on

because you, necessarily, as you've indicated to us, relied upon the whole and not just some fragment.

Now, within that context, go ahead and tell us what you told your client that you feel you're free to report to us and more essentially, what the basis was for declining to produce X, Y, and Z documents, without going into the details which neither you nor I could probably do as engineers but in any event, in what context were they solely and so forth. That's all we want to know.

MR. SAMPLES: Well, if I can remember all of your questions: first of all, I agree that nothing is forever, but I think this sort of a rule rises to just about the highest level I can think of; that is, I don't expect as a general matter in litigation to have the rules changed.

CHAIRMAN MILLER: Not the rules, but the application of them; whether or not they are solely, whether or not they follow-up in the rule whether you are trying in immunize something that has been otherwise produced.

MR. SAMPLES: No.

CHAIRMAN MILLER: Well, those qualifications are carried with them and then we agree 100 percent.

MR. SAMPLES: I agree. If I'm trying to immunize something that I shouldn't be, then I need to be drawn and quartered or thrown out of this proceeding or whatever.

CHAIRMAN MILLER: Just look at it. We don't want --

MR. SAMPLES: I think that I've got a very clear conscience about trying to do what this Board ruled. I think that --

CHAIRMAN MILLER: We don't suggest otherwise; we don't suggest that you were deliberately trying to do anything. But, we want to look at what you did and why you did it.

MR. SAMPLES: Okay, but one other thing, what the Department is saying is that they've never liked this rule it was wrong when it was entered; and it's still wrong. And, what we really want are the studies that you told us precisely they couldn't have.

Now, the studies and evaluations to the extent that I could put -- any description of them involve such things as what kind of or how much -- let me see if I can really do it.

CHAIRMAN MILLER: Well, take one when you told him not to answer; that was very obvious and clear to you. Tell me a few of those where you said, don't answer because you must have had some standard and that's what I want to look at.

MR. SAMPLES: Well, let me put it this way: interconnection of one utility with another utility, because of the physics of electricity have an impact on each other, because when you put two generators together, they have got

to run at the same cycles --

MR. GLASER: Mr. Samples, we are very familiar with that principle, all right?

MR. SAMPLES: Well, I'm not trying to be --

MR. GLASER: I know; we are very familiar with that principle.

CHAIRMAN MILLER: We've had a lot of testimony on another case on that, is what we are saying. So, go ahead, we are following you and we are with you.

MR. SAMPLES: I'm only doing my best to answer your question, and I'm sure I'm doing a very bad job but let me see if I can get it that way.

But, anyway, impact due to interconnection can have a reliability impact, it can have an economic impact. You try to measure things, say, okay, well how much should you pay because of this impact -- okay? That's one area that has been the subject of this -- if we are going to compromise this thing, who's going to pay what? What is the fair way to share this economic impact that necessarily results from interconnection?

And, you have to try to measure it and argue it and this sort of thing.

MR. GLASER: Well, that's not the kind of document that the Department of Justice is seeking, if I understand what they say. They say they are looking for some factual

studies on the feasibility of interconnection; they are not interested in how you share the cost. They just want to know if it can be done in the first place.

I think that's what they are asking for and those kind of documents that you just described, if I understand what you're saying, I think would probably be covered by 408 of the rule and not, therefore, producible.

MR. SAMPLES: Well, I think all the studies we got are covered by --

MR. GLASER: Well, now, we know what the law is but I think we may have a disagreemtn on the facts as we know them.

MR. SAMPLES: Well, it sounded to me like the Department is saying that I was guilty of purjury --

MR. GLASER: I didn't say that now; they are not saying that. They don't know what you are guilty of; they are saying --

MR. SAMPLES: They just think we are.

MR. GLASER: Well, they think everybody is who's not on their side, you know.

CHAIRMAN MILLER: Okay. Let's not be sensitive about it, but recognize now, as counsel, and that's all we are asking you to be, a lawyer, that your client, I believe, from time in memorial has taken the position that among other reasons why you shouldn't engage in whatever it is they

wanted your company to do, that there were certain business justifications as to the difficulty and not possibility of synchronous interconnection and many other things; I think that has been said in documents filed here and other agencies, in court; there probably were some findings on it.

Now, the other side is seeking to test whether or not that is correct, whether or not that is true. And, in testing it, they have the belief, correct or not, that there have been studies made which may in part be for settlement purposes, but which in part are also going to the fundamental basis of whether that representation that your client has made to the Board is accurate, is correct; nothing about personality.

MR. SAMPLES: What representation is that, Mr. Chairman?

CHAIRMAN MILLER: The representation that there were certain technical, infeasibilities of synchronous connection and operation.

MR. SAMPLES: No, we have never take that position.

CHAIRMAN MILLER: All right, then we will explore it because I understood, as speaking again, in shorthand --

MR. SAMPLES: That gets back to what are the issues in this case.

Frankly, I think --

CHAIRMAN MILLER: All right, what are they? On

interconnection, what are they?

MR. SAMPLES: I don't see; I frankly don't see that as being an issue in this case.

CHAIRMAN MILLER: Well, let's find out now; you say that's not an issue. I just want to take one step at a time.

What are the issues regarding interconnection and its feasibility or its nonfeasibility either from a technical or an economic point of view that you say are or are not in this case? Let's just see if we can't cover that much.

MR. SAMPLES: Frankly, I don't think interconnection, per se, is in the case, top, side, or bottom. Now, I don't know whether everybody agrees with me or not, but that's my view.

Anybody can, if they spend enough money, presumably, can hook two wires together and -- .

CHAIRMAN MILLER: If you don't recall whether these matters have been described as issues in briefs and things, we will find out from other counsel as we go along and give you an opportunity, and if I'm expressing inaptly why, forgive me, but I had the distinct and clear impression that there was an ongoing issue in this and all the other proceedings as to the feasibility or nonfeasibility, either technically or economically, of synchronous interconnection and operation of various systems.

MR. SAMPLES: Well, what I really said was that we have not ever taken the position and do not take the position that you cannot interconnect, as ab absolute matter, two utilities or two groups of utilities. We are talking about what effects interconnections have, et cetera, but we have never taken --

CHAIRMAN MILLER: That should then -- whether it can or physically should one, because of techinical or economic or other reasons. All right, then we have got, certainly, the nub of an issue here that is being controverted.

MR. SAMPLES: But, the questions -- the reason that I say we are dealing, obviously, with licenses and we have gotten into, somehow, this interconnection issue directly involved here.

I have not heard anybody in this case state that they wanted access to energy generated by these nuclear sites, but they could not get access to those -- to that energy because they were outside the State of Texas and there was no wires there to carry it. Nobody outside the State of Texas, that I know about, is seeking ownership to the energy from nuclear plants; that's what I'm talking about and obviously the issue here is whether or not whatever our conduct is, you know, it violates the antitrust law.

I just can't see and haven't yet been able to

understand what bearing does the real ultimate question of interconnection, per se, or as a matter of fact, have to do here. But, you know, maybe --

CHAIRMAN MILLER: Well, it had a lot to do in Auderton (?), which was the first case that very clearly, I guess, said electric utilities are subject to antitrust laws, at least some of them.

MR. SAMPLES: No, no; we admit that --

CHAIRMAN MILLER: So, wheeling, interconnection, use of -- transmission whether by displacement or directly and so forth, it seems to be through once antitrust laws were being applied, one way or another, or even with the standards applicable to us. I guess that's the overall relevancy situation with regard to interconnection.

But, I'm still curious as to what position your client is taking as to synchronous interconnection. I may have to dig it out because I don't have your briefs here, but I think a position has been taken.

MR. SAMPLES: Well, one thing we are taking is that we have done nothing, whether ir involves interconnection or anything else that is violative of the antitrust law, and we have taken the position and our expert will so testify about the effects of interconnection. Any witness we put on this stand to testify, if we do get into relevancy on interconnection, and I suspect that we are going to get into that,

despite my views, is going to be subject to the full ambient of cross-examination by anyone involved. And, I'm sure among other things, that witness is going to testify that if you interconnect or that he believes that interconnection would have an adverse affect on reliability and he'll describe why.

MR. GLASER: Well, we don't want to have the Department of Justice taking the deposition of a witness who appears in front of us at trial. That's why they are here asking for some documents --

MR. SAMPLES: No, no. I want him to be able to be deposed fully, frankly -- we are not going to bring any of these people who have been working on this settlement in here as witnesses in this case. We will try to consciously to avoid that. We are not going to try to put any evidence on -- that they have generated in support of our theory of this case.

We are going to bring witnesses here that are going to be subject to full and deponents are going to fully cross-examined. We are not trying to use any of this material as affirmative piece of evidence.

CHAIRMAN MILLER: Well, can you represent further than that that not only are you going to use is and of course you wouldn't use it if it were adverse to your contentions or proof, but can you or can somebody representing your client

represent to us that in addition that none of these studies whether privileged or not, whether disclosed or not, are in fundamental conflict or fundamentally inconsistent with the positions taken at trial by your witnesses who do testify and in the pleadings that you have filed heretofore; now, that's the step that nobody has yet taken, you see.

MR. SAMPLES: Yes. I can certainly make the representation. I am not, personally, going to permit any witness to get up and testify to something that I know is fundamentally wrong --

MR. GLASER: That's not the question.

CHAIRMAN MILLER: That isn't what I asked you.

MR. GLASER: The question was; do you have any documents in your client's possession that are inconsistent with position you are taking in this proceeding?

MR. SAMPLES: No.

MR. GLASER: That's the question.

MR. SAMPLES: No, certainly not.

MR. GLASER: And, you are representing that of your own personal knowledge as counsel for TUGO.

MR. SAMPLES: Well, I'm representing it to the extent that I know.

MR. GLASER: All right then.

MR. SAMPLES: And I should know.

CHAIRMAN MILLER: Now, wait a minute. You're not

an engineer and neither am I. We've gone over that ground.

Now, you may be perfectly honest, which I am sure you always are and your honesty and intregity are not being impugned at all -- let me assure of that -- however, there are things that you don't know and there are things that I don't know and we could both make the statements such as you made and be 150 percent in error; in other words, we'd have to talk to technical who did.

MR. SAMPLES: All I'm saying is, you asked me a question and yes, I will make that representation.

CHAIRMAN MILLER: Okay.

Now, next: who in positions to know and to make a study judgment familiar with the documents and the matter that have gone on in negotiations can make a similiar statement; whether or not he agrees with you, can make a statement which is truely and factually correct; so that we know that having given the shield of protection for negotiating purposes, that you haven't generated some materials which, perhaps not producible within the rules, nonetheless, are in fundamental conflict with what you and your client and your witnesses in all honesty and intregity will represent to this Board at trial.

We want to be sure that nothing slips through, because of different people working on different things; we want to bring together in one place your client and the Board.

MR. SAMPLES: Oh, I assume -- I'm certain that that could be accomplished, but let's just watch what we are getting into. We are getting into a circular matter. So many people get up and say, yes, that's true and yes, that's true; and you say, well, you know, I'm not satisfied with that. I just want somebody else to look at this stuff. I want to see if you are lying or not.

CHAIRMAN MILLER: Well, I said I was setting aside intregity; I was willing to take factual accuracy by witnesses or persons competent with background, study, education, and training to make the judgment and to tell me in some fairly formal manner; that was all that I asked.

And, you said, it's possible.

MR. SAMPLES: I don't see why not, but I think we are embarking in an area that's --

CHAIRMAN MILLER: We're not embarking so far that this Board would not permit any witness, would not permit any party to come in here and having had the benefit of a quasi-privilege to negotiate, put on evidence which knowingly or unknowingly that everybody involved was not true, it was false and if the documentation could be followed through, could be shown to be such. That, we would not tolerate; any reason, any manipulation of legal principles.

And, that's what the further question is that I

posed to you and this respects your right to rely upon what we said, the right of your coming to negotiate and so forth. But, we want to be assured -- that's the bottom line that I spoke to you about -- we want to be assured that having done that in good faith and we are sure that you are in good faith, that nonetheless, that testimony that comes to us is going to be true and accurate or if there are qualifications, we are told about it, voluntarily, not being dredged out by somebody's cross-examination. I'll go into that before this day is over.

We feel that there's a duty of affirmative disclosure of facts before this Board which is not limited to health, safety, or NEPA matters. We think it extends to antitrust. We will discuss that with all lawyers before we get into a trial situation that goes into the preparation of witnesses and it goes into disclosures to the Board in the affirmative sense.

So, we are imposing upon your client and you as their counsel duties that you may regard as more owners or higher than you have in court. And, you would be correct, but we don't want any misunderstanding, so we will discuss those separately.

But, this aspect of it that we are now discussing, the bottom line, gets very close to that whole concept.

MR. SAMPLES: Well, I don't know the difference

in your mind as the standards I consider myself an officer of this Board as I do an officer of the court when I appear before it.

And, I think I have an understanding of what that is and I think I have been true to that. I will not tolerate in any proceeding, purjury or wrongs as a lawyer; on the other hand, I also am a lawyer and I have a duty to my client and as long as I hold a license, I'm going to protect that right. I don't mean that as a challenge to you --

CHAIRMAN MILLER: We don't take it as a challenge, but we tell you by the same token, your client as a party before this Board has an obligation which may transcend to either your interpretation of it or your understanding of you in court, and we don't intend to let you as lawyer get between that duty of party to any Board either; so we are each setting out -- and we are not saying this in anger -- we are setting it out fairly because we may be talking about two different things.

MR. SAMPLES: Well, I don't perceive in my own mind as I stand here, at least frankly, anything that as a lawyer I'm hooking my hat on in terms of what you have done on this settlement matter --

CHAIRMAN MILLER: I agree.

MR. SAMPLES: and privileged issues and frankly --

CHAIRMAN MILLER: Can your engineers s[illegible] the same

thing? If they can, then you've answered the bottom line. We have answered as lawyer; we accept it; no question of your integrity, sir.

Now, can your engineers in position to know make the same statement to the Board?

MR. SAMPLES: I have not put them under an inquisition and I have not said, now, you know, is there anything about this -- I haven't done --

CHAIRMAN MILLER: As them nicely. We just want to know the answer; we don't want you to twist their arms.

MR. SAMPLES: They might not think that I've got enough sense to put them in --

MR. GLASER: Mr. Samples, I believe that you have the obligation to do that.

MR. SAMPLES: Oh, well, I've done that. Yes, sir. I've done enough to tell ycu what I have done and frankly, I think I've gone quite a ways in the representations that I have made to you.

One last thing, and I'll sit down and shutup: I do represent to you, at least as a lawyer, that what is going on here really hasn't anything to do with these studies. And, I really believe that.

The Department wants more time for this case; the NRC Staff wants more time fo- this case --

MR. GLASER: They are not going to get it.

CHAIRMAN MILLER: We told you that we are going to trial as scheduled; you know that.

MR. SAMPLES: Okay. If we get into this --

MR. GLASER: That's the end of the discussion on that point, sir.

MR. SAMPLES: I just want to make a point, though: if we get into this, I think that it's going to have at least a threat, because what she wants to do she can't do in time, et cetera. I don't want to postpone and you have made your point clear and I'm not arguing with you on that; in fact, I don't intend to be arguing with you all on anything.

CHAIRMAN MILLER: Please feel free to, we don't take it personally, just as we don't want you to -- we want you to be perfectly free to express you views to whatever extent you deem necessary both for yourself professionally and your client. We respect your rights in that regard; we are lawyers, too.

MR. SAMPLES: Okay. I appreciate you giving me an opportunity to speak.

CHAIRMAN MILLER: Okay. We'll take a short recess at this time.

(Whereupon, the hearing was recessed at 11:15 a.m. for a break and commenced again at 11:25 a.m.)

CHAIRMAN MILLER: Okay, Mr. Copeland, I guess you are to be heard from next.

MR. COPELAND: I think it's appropriate that I go next.

CHAIRMAN MILLER: Fine. You may proceed.

MR. COPELAND: I don't have any formal presentation because I wasn't sure how this thing was going to go this morning, so let me just answer the questions that came up that may be the easiest thing to do.

First of all, I met with my client, Mr. Simmons, who is our lead expert witness inhouse on this matter. I met with him Tuesday of this week, after I got this motion.

I asked Mr. Simmons, is there anything in these studies that is fundamentally inconsistent with our position in this case, and he told me no. That settles that question as far as I'm concerned.

CHAIRMAN MILLER: Then, you would have no objection to him being asked that question in a deposition and responding fully and candidly under oath?

MR. COPELAND: To that one question, I would have no problem.

CHAIRMAN MILLER: Well, that's the first question. Go ahead.

MR. COPELAND: Secondly, I think I'm glad Mr. Samples went first because I, like him, was somewhat in distress and a little bit angry about some of the innuendoes that have been made about my conduct and these depositions.

I think if you read the objections I made, they don't bear any resemblence to the characterization put forth by Mr. Chanania. For example, Mr. Chanaia said I attempted to cut him off on asking questions about the evaluations that were done of the CSW/FERC proposals. I would direct your attention to the documents that they attach to their motion, specifically Page 74 --

CHAIRMAN MILLER: Which number is that; can you tell me --

MR. COPELAND: Of the Myer deposition.

CHAIRMAN MILLER: Is that an appendix? They attached Appendix A and so forth.

MR. COPELAND: These things aren't paginated in order, so it's very tough to find.

CHAIRMAN MILLER: Okay, I think I have it: September 13, 1979, deposition of J. F. Myer, Jr.?

MR. COPELAND: Yes, sir. On Page 74, right in the middle of the page, beginning at Line 10, Mr. Chanania askes me, he said, just in the interest of saving time, do I understand that you would intend to instruct the witness not to answer on any question that I would have as to any work he's done relating to the CSW proposal which was made with FERC. And, my answer was, I obviously haven't done that. I will let you ask him about that.

Now, if you will look over at Page 76 --

CHAIRMAN MILLER: Well, wait; it goes on then, no, I think maybe that was the Stag and I assume that's the Stag Study you have been telling us about, and then you say, do not ask the gentleman questions about the proposal with FERC and that's why and so forth I wanted to get to the clarification. My objectio relates only to work he might have done to provide information to people within Houston Lighting and Power who are working on the settlement of the CSW. Now, if you wanted to ask him if they have, if they have filed any plans with FERC or studies and so on, that he has analyzed, you can ask him that.

And, Mr. Chanania then responds, I guess it's my understanding from what you had told me that all work he had done relating to the SW filing with FERC in this proposal were in the context of settlement, so it would be useless, you know, I can go on and ask questions but that's what I was trying to find out; from the context of settlement, you say, well, let me clarify -- go ahead -- document studies filed with FCC, transmission, load flow, all that kind of stuff. You said in the FERC proposal, he meant the transmission lines and they showed in their application to FERC, make it clear why I'm instructing or what I'm instructing him not to answer. That is only with respect to work that he's done in connection with the settlement discussions.

MR. COPELAND: Yes, sir. And, I think that was

an entirely appropriate instruction to my witness based on the orders of this Board, which were that one, work that had been done by Houston in the context of settlement was immune from discussions; and two, two is that when we were here last Summer, I offered to list these documents. Mr. Samples objected to that; he and I don't always get along about everything.

CHAIRMAN MILLER: Who overrruled whom on that one.

MR. COPELAND: You overruled me; you went with Mr. Samples.

CHAIRMAN MILLER: Sorry; I wish I hadn't.

MR. COPELAND: So, Mr. Chairman, my point is that when these questions came up in the deposition, it was pretty tough as a lawyer sitting there to try and stop in inquiry into settlement discussions when the Board had ruled that you couldn't even ask what documents had been done.

What was I supposed to do --

CHAIRMAN MILLER: I think we didn't want to chill you; we didn't want to chill at that time, which was early in the game. We didn't want to chill ongoing negotiations so that it would be a reasonable opportunity. I think that's why we pointed out, it isn't forever and it isn't even permanent in this case.

But, I understand your problem -- you did have a problem. What I'm wondering is, on Page 76, when you expli-

cated the basis for your instruction of the witness not to answer, were you taking into consideration both the time factor in our order that was subsequent to the Federal District Court decision, and were you also taking into consideration that it was solely in connection with settlement discussions?

MR. COPELAND: Absolutely.

CHAIRMAN MILLER: And, I don't see it expressed there and this doesn't mean that you didn't; but what I'm trying to find out is when you made the judgment and when you were in communication with your witness, did you make clear that it was only those things solely, not done in part 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 met with me witness. He had a subpeona that was issued to him. He said, what do I have to produce? I sat down with John and sat down with every other witness I had and said, these are the orders from the Board. These are what you have to produce and these are not what you have to produce.

When we get into the deposition, John, 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.

MR. COPELAND: I'm sorry. I just mis-spoke when I said slop over.

The point was that when you are sitting in a deposition, Mr. Chairman, and you can see the questions are leading right into the settlement and it's easier to instruct the witness at that time, to remind him to be careful that when he answers, that he's getting into an area that relates to the settlement: that's my only point.

MR. GLASER: Well, that's part of the problem here, Mr. Copeland, I think from what I have -- as I looked at the

transcript, it would be easy for the witness to misunderstand your instructions.

MR. COPELAND: Well, there wasn't any doubt about it because I told him what the rulings were of the Board before we went into the deposition. We knew what documents they were; I know the documents; he knew the documents; there was no doubt about what the documents were; there was no doubt about that fact that thos documents were generated solely for the purpose of the settlement discussion; there was just no question about it.

CHAIRMAN MILLER: How could we verify that for the record without going into what you consider to be areas that you should be free to negotiate about?

I ask that because you can see what the problem is with the Department and the Staff; they think that there were studies, some of which may have been solely and some not or for different reasons; and that's the problem that we are really wrestling with.

The Board's order wasn't just the totality or there wasn't this any slop over order. It was very precise; solely and when you get down to solely, a nonlawyer engineering witness might view it differently, perhaps. We don't know, but it's possible.

MR. COPELAND: No, sir; not in this case. There's no question about it. It's just that simple.

CHAIRMAN MILLER: Well, then perhaps we could take you up on your previously made offer to list and describe all of the documents that were not produced or are being withheld on the basis of solely generated for negotiations and the like, with sufficient descriptions so we and your witnesses, whether they testify or don't testify at trial, would know exactly what they were so everyone would be dealing with everything on the table and yet you would be having the protection of the solely generated documents for negotiations remaining in that statis.

Now, you seem to be more knowledgeable in dealing directly with your witness and I don't know whether it's because of the nature of the subject matter or the relationship or what; but it sounds like you might be in a postion to give the Board some definitive, precise, verified enlightment.

MR. COPELAND: If I'm going to be allowed to give my opinion and enlighten the Board, then I'm delighted because what I'd like to tell the Board, frankly, is that the Justice Department is off on the wild goose chase, as far as I'm concerned.

CHAIRMAN MILLER: Well, that's the bottom line; let's take the top lines that lead to the conclusion and we maybe able to resolve this thing.

MR. COPELAND: All right, sir.

Right now, this case is over in another proceeding.

It involves, I don't know how many -- I tried to count them up and I got about 20 major electrical utility companies that were involved in the joint studies that are being done in that proceeding. Those studies are going forward; I think all the lawyers here are optimistic that that is a place to finally resolve this case. I've made the point before and I don't mean to belabor it; but, there are numerous -- the whole Middlesouth System, for example, is involved in those studies. They aren't a party to this proceeding; they are taking the position that they are affected by this interconnection so they are in the studies. We are all over there studying.

I talked with Mike Miller before we came back in here and I said, Mike, do you agree with me that it's going to take months, if not years, to complete those studies? And I think he agrees with that it is.

In fact, one of the attachments that the movements attached to the -- the very first one that they attached, they asked Mr. Simmons, how long is it going to take to complete these studies? He said, in my opinion, two years.

My point is that these studies that they are after were done in two months. They could not be --

CHAIRMAN MILLER: You say they are superficial?

MR. COPELAND: Yes, sir. They couldn't possibly be comprehensive studies that have addressed the ultimate

issues in this case.

CHAIRMAN MILLER: Well, by virtue of their superficiality, are they inconsistent or in conflict with some of the conclusions that have been brought up in this case or that may be; namely, the whole question of the interconnection and the feasibility --

MR. COPELAND: Excuse me, sir, I'm sorry. I talked to may client and he told me no; that they are not fundamentally inconsistent with our position.

CHAIRMAN MILLER: Then, really, you shouldn't have much objection to saying, look at the things.

MR. COPELAND: Mr. Miller, you know, I've been worried all morning long that when I got up to start answering these questions, that that was going to be exactly the response and I'll tell you, I don't think that's a fair question to ask once we get up here and we confidentially or we confide to this Board what's in those things.

It's the principle that's involved; this Board said we want you to settle this case and we are going to encourage you to settle this case and we are going to give you a shell to work within to do that.

We took that and ran with it, sir. There are three people in this room that have been invclved in this case from the first day: Mr. Samples, myself, and Mr. Miller.

Mr. Samples already gave you his opinion. My

opinion is we are closer to settlement in this case, among the private parties, than we have ever been since the day I've been involved in it. We took you sincerely, sir; we went out and tried to settle this case. I think if we get reversed on this, we are being punished for trying to do that.

Now, let me say one other thing about these settlement discussions: Mr. Chanania said that the NRC doesn't own an electric utility company; well, that's right. The people that own the electric utility companies are the people that are trying to settle this case, because they are the ones that have to lay the money out to do; they are the ones that are going to be affected.

I can't believe that the Government finds it surprising that the private parties would try to settle this case among themselves. You just can't settle, you know, a case in a forum like this, with everybody in this room. It's like having the owner of the Baltimore Orioles call the whole team in and say, okay, fellows; now, we are going to sit down and we are going to negotiate a contract that's going to make everybody on the team happy. You could imagine how far that would go.

I can't think of any other questions that came up that I need to respond to.

CHAIRMAN MILLER: Well, my colleague asked me and

let me put it to you: do we understand you to say, yes, that there are studies and that there are studies which at least go into some aspects of the feasibility of interconnection, whether technical, economic, or whatever; and that those studies would not or are not in conflict with positions taken by the utilities involved? That's with respect, now, to feasibility and so forth of interconnection.

MR. COPELAND: Well the utilities involved disagree, sir, about the positions.

CHAIRMAN MILLER: But, your utility?

MR. COPELAND: My client took the studies; they looked at them and they concluded, based on my discussions with them, that that wasn't devastating to their case.

I'm sure that Mr. Samples' client took those studies and made their interpretations of them. I'm sure that Mr. Miller took those studies and made their interpretations --

CHAIRMAN MILLER: Do they all come to the same conclusions?

MR. COPELAND: I do not know, sir. I haven't sat down with Mr. Miller's client to find out what conclusions they drew. They did not prepare --

CHAIRMAN MILLER: So, these studies that you are privy to, you know were studied by the clients of others, including both attorneys and technical people; but you don't

have any judgment as to whether their conclusions are the same as the conclusions of yourself and your client or not.

MR. COPELAND: I didn't conclude anything. As far as I know, no other lawyer concluded anything.

CHAIRMAN MILLER: Well, then, you sat down with your clients and said, my goodness, there's nothing here that would be harmful to our case and both of you said, great, I don't know what they are making such a to-do about it; you just told me that.

MR. COPELAND: No, sir.

CHAIRMAN MILLER: Well, I misunderstood you then.

MR. COPELAND: I said, is there anything in here that's fundamentally inconsistent with our case.

MR. GLASER: How do you know that as an attorney, an officer of this --

MR. COPELAND: I took my client's word for it; I am like Mr. Samples without an engineering degree.

MR. GLASER: Well, I have a lot of trouble with that response, Mr. Copeland, because as a practicing attorney, I know I have an obligation to look at documents and make a judgment in order to comply with Court orders, the Board order, or whatever the case may be; and to make sure that the client is responding appropriately to lawyers --

MR. COPELAND: That's a fair question.

MR. GLASER: And, I don't like to hear any lawyer

give me the response that he has to -- that you just gave me, because I --

MR. COPELAND: I'll answer your question, sir.

I looked at the documents. I read what my client had prepared in analyzing the documents. My client is right.

MR. GLASER: Very well.

MR. COPELAND: As far as I'm concerned, as a lawyer who has to come in here and try this case --

MR. GLASER: That's all you were asked.

MR. COPELAND: Fine.

CHAIRMAN MILLER: Now, next you were asked whether from your advantage point you had any reason to believe that the conclusions you and your client came to, with reference to the same issues, or either agreed to or not disagreed to by any of the other two counsel and their clients that you mentioned.

MR. COPELAND: Well, I think that's the problem, Mr. Miller; these were not studies where everybody sat down and reached a joint conclusion as utility companies involved in this case.

They each ran certain things and they each drew their own conclusions from that. As you know, there is a lot of argument in this case among engineers, econimists, utility management people about what conclusions you do, in fact, draw from these studies. And, I think that --

CHAIRMAN MILLER: You say there is a lot of disagreement? Are you including these unrevealed studies?

MR. COPELAND: I've not met with Mr. Miller or his client.

CHAIRMAN MILLER: I know what you haven't done; but tell me what you have done.

MR. COPELAND: Sir, I have talked with me client. I have asked by client the questions that I told you I asked him and I got the response; that's as much as I've done.

CHAIRMAN MILLER: Well, I'm referring to the disagreement among experts of many stripes, of different parties in this case; and I'm inquiring whether those disagreements reflect, in part at least, these so-called immunized studies that you have some familiarity in the point of view of your own client, and I think you've shown the ability to answer.

MR. COPELAND: I don't know.

MR. GLASER: Well, do you have an understanding that --

MR. COPELAND: I'll tell you this, they didn't serve as the final basis for settlement.

CHAIRMAN MILLER: We don't want to get into settlement, see.

MR. COPELAND: Well, the point is that those -- the studies were done back, when. The settlement discussions are still going on and they have been going on for a year

since then.

So, obviously nobody has looked at them and said, hey, this is the answer to the case and we are going to settle based on these documents.

CHAIRMAN MILLER: We are not asking about settlement; that's why we gave you the opportunity to discuss settlement What we are trying to find out is whether there have been studies in place made subsequent to the Federal Court decision which have a reasonable bearing upon one of the issues we are going to hear testimony under oath; namely, whether or not there is business justification or infeasibility of interconnection and snychronous operation.

Now, that's the central point; that's the pea that's under the shell and I don't care how many times you are going to talk about different companies, different preceptions, whatever; that's our problem and that's what we are asking counsel to address themselves to and if they can't we are asking them to contact the responsible experts in their own client's organization who can give us those answers. That's where the crunch is.

MR. COPELAND: Maybe I don't understand the question. Are you asking me and my client to render an opinion as to whether the documents show some fundamental inconsistency of the position of a other party?

CHAIRMAN MILLER: No, your own party.

MR. COPELAND: That's the question I thought you were asking me, sir.

CHAIRMAN MILLER: Of your own party, your own client.

MR. COPELAND: Of my own client? I've answered that question. The answer is no.

CHAIRMAN MILLER: What is your own client's position then on whether or not interconnection and snychronous operation is feasible, in the terms on which the issue has been dicussed in briefs and the like. I won't go into the intricacies of it.

Well, now if it's so obvious and you know it, why do you have to confer? Why can't you just tell me? That's what makes me wonder what is clear and what isn't clear.

MR. COPELAND: I wasn't conferring with anybody. I'm just trying to get my thoughts together because you just asked me a question that's going to require a 15 minute speech.

CHAIRMAN MILLER: My gosh; I thought that's the question I asked in the first 2 minutes of this whole discussion this morning.

MR. COPELAND: Okay. Like Mr. Samples, I'm sure that if my clients were to answer the question, is it technically feasible to interconnect the Southwest Power Pool and TIS with synchronous interconnection, they would have to say it's technically feasible to do.

CHAIRMAN MILLER: Economically?

MR. COPELAND: No, sir. They do not think it's economically feasible.

CHAIRMAN MILLER: Well, I ask you both; now, I wasn't trying to be quibbled with. I said, technically or economically feasible and I think that's a shorthand term we are familiar with.

Now, dont' give me a quibble.

MR. COPELAND: Sir, I'm just having trouble understanding the question. I apologize; I'm not trying to put --

CHAIRMAN MILLER: We are having trouble understanding the answers; we are not saying this critically of any counsel, but we know what we were told in pleadings. We know what we read in cases; we know what these proposed findings incur. We've had a whole panoply of briefs on this whole subject and when we get down to it, all at once it gets awful fuzzy, time-related, maybe this, mish-mash.

MR. COPELAND: Sir, the studies that we are talking about don't address, as far as I recall the technical feasibility of interconnecting the two power pools.

CHAIRMAN MILLER: Economic or any other feasibility question?

MR. COPELAND: There is a question there about the economics.

CHAIRMAN MILLER: Then, the overall answer has to

be yes, they do bear, in part, upon an ongoing issue.

And a position taken by your client --

MR. COPELAND: They bear in part, but as I said earlier, it's really a wild goose chase; I don't think they bear much in any way.

MR. GLASER: And, these studies were one which were produced after the District Court case and as you stated, solely for the purpose of discussing settlement among the parties in this proceeding, at least the private parties any way.

MR. COPELAND: Yes, sir.

MR. WOLFE: Then, as I understand you, Mr. Copeland, you don't have a real objection to the production of these documents; they just merely hold to the Board's earlier rulings, earlier orders and say that these orders, having been issued, that these documents should not be produced.

MR. COPELAND: No, sir; I think my feelings are different than that. I think as matter of fundamental fairness that these documents should not be produced.

MR. GLASER: Well, that's what Mr. Wolfe is saying, that they are not being produced because of the wording of the Board's order.

tape 4

MR. COPELAND: Okay. I hadn't finished what I was saying. I think that more fundamentally than that, what' going to happen when these studies are produced is that the

Government is going to want to retake the depositions of all of our people to find out why they did or didn't do something on the basis of these studies. That's the only place they can be going.

MR. WOLFE: What is we only premit the discoverability of these documents and don't allow written interrogatories or depositon. That won't prolong the trial, will it? If as you say, these documents don't -- are not inconsistent with your earlier positions or your present positions.

MR. COPELAND: What's the purpose of doing that? I mean if it has no evidentiary value in this --

MR. WOLFE: We don't know whether it does or not.

CHAIRMAN MILLER: You're giving us a legal answer, counsel, which you are entitled to do, but I think we have indicated previously we are trying to cut through legalisms and we are trying to get down to facts, basic fairness, basic justice before this Board, operating as a quasi-adjudicatory capacity. We are not going to be fobbed off with definitions and split infinitives and all that.

Now, legalisms, we can understand; we are lawyers. But, what we are trying to find out is whether or not these documents should be -- these studies should be produced. It's been suggested if you have some problem, and I don't know why we solve the question of producibility by looking at the impact or trying to figure out what somebody is going

to do; that's like a witness trying to out-guess a cross-examiner.

Why don't we decide whether or not they are fairly within the rule as we ennunciated it and as is set forth in the Federal Rules of Evidence. If it is, then they are producible no matter what the consequences and that's not, once again, consequences to be hanged. Why do we look at peripheral matters when we are trying to get a clear statement of a central question.

MR. COPELAND: I'm sorry, Mr. Miller. I don't know how to respond to that question. I thought that the Board's interpretation of the law was, were these documents generated solely for the purposes of settlement discussions. My answer to that is, yes, sir, they were. And, I assumed that that ought to end the discussion, as a matter of fairness and as a matter of law.

CHAIRMAN MILLER: All right, then, how do we find out whether or not they were produced solely for that purpose or whether they were, in part, for some other purpose or whether they were, in part, necessarily the type of expert evidence that had to be adduced in order to sustain the position taken in your pleadings as an issues in this case.

Now, how do we find out which it is?

MR. COPELAND: Well, I have told you that; if

you won't accept my representation as a lawyer and as an officer of this court, then I'll go get an affidavit from my client. He'll tell you that the documents were generated solely for the purpose of the settlement.

CHAIRMAN MILLER: You're not a witness, sir, and we don't expect you to be a witness. We expect you to be a lawyer.

Now, if in order to -- if you are telling us now, in order to find out whether or not all of these documents or each document which is being sought was produced within the terms of the rule solely for purposes of negotiation and settlement, if it's necessary, we can bring the witnesses in and put them under oath and examine them.

Now, if that's what we have to do, we will do it. And, in short order; we are not going to extend the time of commencing trial, but we are just trying to get your suggestion as to how we can resolve this. We don't expect or want counsel to either put their credibility on the line one way or the other; we don't expect you to be witnesses. We expect you to be counsel and you are advocates.

MR. COPELAND: Sir, I offered to list these documents last Summer. I'm not trying to --

CHAIRMAN MILLER: Are there any more now than were in existance then?

MR. COPELAND: I really don't know.

CHAIRMAN MILLER: The answer is yes, I believe from what's been said. Well, the Stag Study and the dates --

MR. COPELAND: Sir, that has nothing to do -- you know.

CHAIRMAN MILLER: Oh, you're not a Stag man?

MR. COPELAND: Yes, sir, I am. Mr. Stag works for us.

CHAIRMAN MILLER: Okay. I thought it was an area outside of your own kinds of --

MR. COPELAND: Mr. Chanania just went off on a complete rabbit trail. The Stag Studies have nothing to do with settlement in this case.

CHAIRMAN MILLER: It seems to me we should be able to skip down to things that don't have to do it and do it in fairly short order by witnesses who are knowledgeable and who have information of the facts and who can testify under oath.

If it's as clear as you gentlemen, then I don't see why the proof of it should be so difficult.

MR. COPELAND: Sir, I have offered to list the studies; I will provide an affidavit from my client saying that those are the studies. That I will do; that ought to be the most expeditious way --

CHAIRMAN MILLER: No. I don't know what it's going

to say; I don't know what a listing is going to show. I really can't tell. I'm not competent to say that.

MR. SAMPLES: Mr. Chairman, can I make a potential recommendation that might solve this; I don't know.

CHAIRMAN MILLER: Go ahead.

MR. SAMPLES: Because I'll be just about as anxious to hear as maybe you will -- Mr. Miller has been a rather serious adversary of mine since about January, 1974, on this matter; and we have not seen eye to eye on most issues. I would be interested in his statements to the Board as to whether or not, A, the studies that at least hs is aware of that we participated in were prepared solely for the purposes of settlement discussions after the District Court judgment; and B, that there is nothing in those evaluations that is fundamentally contrary to the position which we are asserting in this case.

My understanding is he says, yea, to both of those statements; they were solely for settlement discussions and B, there was nothing fundamentally inconsistent in those evaluations on the positions we are taking.

CHAIRMAN MILLER: What does the word fundamentally mean as --

MR. SAMPLES: Your Honor, I picked it up from you. It sounded like a good word to me.

CHAIRMAN MILLER: What I meant was other than super-

ficial, but I didn't mean for it to be a trigger which could be another shell to find out what the pea's under.

MR. SAMPLES: To me, if was something different between the spliting of a hair and less than constituting purjury of a witness.

CHAIRMAN MILLER: Well, that purjury proof is far over, but I'll pursue the hair. Mr. Miller, go ahead.

MR. MILLER: Well, with Mr. Samples serving as Master of Ceremonies, I guess I'll now take my turn.

I would first like to clear up the mystery attachment to the pleadings that we filed with respect to the joint motion. There is attached to the response, the Central Southwest Corporation, about five pages of a deposition of Mr. Hulzy taken in these proceedings. The attachment is not referred to in the body of the motion. It is a direct relfection of trying to orchestrate the filing of a paper in Washington that's being prepared in Chicago by an attorney who is taking the depotition in Madison, Wisconsin; which was my situation this week.

I should say that from a superficial reading of the attachment, it might be thought that it bears on this question of whether or not there has been any abuse of the settlement privilege; in deed, in the colloquy that is contained in the attachment, I think I even used

those words when Mr. Slicker and I got into it during the deposition of Mr. Hulzy.

What happened subsequent to the interchange which is found in the attachment and which is not reproduced there is that we then had a recess; Mr. Hulzy and Mr. Slicker conferred and Mr. Hulzy came back and answered the question that had perviously been objected to on the basis of settlement purposes.

CHAIRMAN MILLER: He was then permitted to answer the question which the transcript reflects he was instructed not to answer?

MR. MILLER: That's correct. I, too, am mindful of the requirement of bringing these matters to the Board or Court in a timely fashion; although I must say that my own view is that we ought to save the Board's time for truly important and significant discovery disputes and there have been a number of instances throughout this whole discovery process where all parties have, perhaps, been excessive in the examination or objections to examinations and upon reflection, I think all of us have decided that we will not pursue the remedies that we might otherwise be entitled to.

Be that as it may.

Turning to the next --

CHAIRMAN MILLER: Pardon me. At some point, you

said that you are going to move to re-open all of these depositions and get to the bottom of this.

MR. MILLER: Yes, sir; that's what I said.

CHAIRMAN MILLER: I take you said it meaning it and that to you, it was a fundamental or at any rate a significant matter; is that correct?

MR. MILLER: Well, Mr. Slicker and I had had a long morning, Mr. Miller; and Mr. Slicker and I had had many long mornings and afternoons and as I'm sure you know, from your experience as a practicing attorney, there is a technique of how attorneys deal with one another in depositions when there isn't a presiding officer present to resolve disputes.

MR. GLASER: We've seen a great deal of that.

CHAIRMAN MILLER: We know what you mean.

MR. MILLER: The weight of your arguments, so to speak, and there are many ways of weighing arguments.

However --

CHAIRMAN MILLER: Well, you've just learned the way to do it, and Mr. Copeland ruled on it.

MR. MILLER: Fair enough.

I occupy kind of an unique position here, I think.

CHAIRMAN MILLER: Kind of an inbetween?

MR. MILLER: Well, not really inbetween. You know, in our litigating posture, we are parallel with the Depart-

ment of Justice and the Nuclear Regulatory Commission Staff in many respects.

With respect to this motion, however, we oppose it and oppose it wholeheartedly for a variety of reasons; many of which have already been expressed by Mr. Samples and Mr. Copeland.

As Mr. Copeland said in his remarks, there are three of us in this room who have a longest history with this controversy; I'm one of them. It involves deeply held opinions with respect to the evaluation of complex technical matters. It involves the commitment of large amounts of money by private entities. It involves a whole host of other entities; smaller municipal and cooperative utilities. It involves Regulatory Commissions in at least four states. It involves other Federal agencies in addition to this one.

It is a controversy which has generated a deep division among the participants. Mr. Samples said that he and I haven't agreed on very much, but that's one thing we do agree on. He and I haven't seen eye to eye on anything since this thing started. And, I think it's fair to say that those sentiments have gotten to the point where it involves the executives and engineers of the industrial utilities that are primarily at issues as well.

My point is that settlement is a very tender pro-

cess in a situation like this. I would like to add my represenatation to those that you have already heard that settlement is ongoing. It hasn't been continuous, but it has been ongoing and I agree with Mr. Copeland's evaluation that the current settlement negotiations are one that hole a great deal of promise for a start -- and I emphasize a start -- for the resolution of the entire problem.

I think that Ms. Cyphert and Mr. Chanania quite properly pointed out to the Board that they are not a part of the process, presently; that's not a deliberate slight; it's not done with any lack of awareness that without the concurrence of all of the parties to a proceeding there is not settlement package which will finally dispose of the matter and allow the tribunal, in this case the Licensing Board, to pass on the settlement and then hopefully, dispose of the proceeding.

But, we had to start somewhere and I seemed that there was the best shot at beginning the process among three major investor-owned systems in Texas, and that's where we've begun and that's where we've continued our efforst throughout this period of time that's comprised within the scope of the Board's order.

I think it would be tragic, really, if at this point documents were disclosed or order disclosed which were

created in good faith under the auspices of this Board's order and advise given by me and the other gentlemen who spoke in here, that they would be protected.

It would have had the effect, really, of setting an artifical and unknowable time limit on our settlement negotiations which would have been, I think in the circumstances of this case, totally unrealistic.

Quite apart from this case, I think it would set a very dangerous and counter-productive precedent for resolution of disputes before Licensing Boards generally.

CHAIRMAN MILLER: Would you address yourself, in that context, both to your order which we understand as consistent with the Federal Rules of Evidence and the applicable rule? In what respect what is sought from the Board a matter which is so basically unfair and contrary to the desire to have reasonable opportunities for settlement negotiations or causing to tell us how tragic it would be.

MR. MILLER: Well, because, Mr. Chairman, if I understand what, you know, I read the joint motion and what the joint motion asked for was that all the documents be turned over; that was the prayer for relief; that's the conclusion; that's found in the conclusion.

CHAIRMAN MILLER: Well, I'll check that, but I believe it was all the documents which bore upon this question

of the feasibility of interconnections and all of its ramifications.

Well, now, do you understand that there is no area of intergation considering what the Board said and you referred to it and we discussed it at the pre-hearing conference. And, the statement by us that it wasn't forever, but it was to give a reasonable time and opportunity but that we didn't give anybody King's X.

Would you explain to us how in some fashion our even considering documents -- let's stick to documents for the moment rather than depositions -- would be so basically unfair as to justify your characterization?

MR. MILLER: Well, I'm sorry. Is your question, sir, whether the Licensing Board -- it would be unfair to have the Licensing Board consider these documents?

CHAIRMAN MILLER: Yes, of consider in some way to determine the question of whether or not certain documents were generated solely for negotiations; it's the solely that we underscored and you understand what we meant by it.

MR. MILLER: I understand that.

It seems to me that in order for you to have as a Licensing Board to have an appreciation of whether or not a particular computer print-out, a particular diagram, or whatever -- I just used those by way of example because I can't give you the details of what these documents are --

but I assume because they were generated by engineers and used by engineers in their discussions that they were, in fact, technically oriented.

You're going to require an explanation. You're going to require some understanding of how the document bore on the negotiating process. And, once you start down that pathn, I think that the ability to conduct negoations is irrevocably impaired. You are the tryers of fact in this matter if it goes to litigation. And, to have disclosed to you just so you can evaluate whether the settlement privilege was made in good faith because the assertion of the settlement privilege was made in good faith, which is really what I think we are talking about here, would inevitably involve you in an analysis of Houston Lighting and Power's negotiating position; TU's negotiating position; and most dear to my heart, the Central and Southwest negotiating position.

I don't know how you could departmentalize your review of those pieces of paper and then settlement did not eventuate, consider the evidence that was placed before you in the course of this proceeding without it being colored, at some extent, by the documents that were generated during the settlement process.

CHAIRMAN MILLER: Let me reverse that and ask how you and other counsel and parties can differentiate those

studies that were made allegedly solely for generation from the kinds of studies that one would expect necessarily to be made to put on proof considering the contentions which are the infeasibility situation; that's where it gets very close.

MR. MILLER: Well, it certainly does get very close, but in your question, you were really quite precise. 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 similiar 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 similiar, then one could not honestly say that looked at in this context, they were solely, they were generated solely for settlement.

They were generated and they were necessary for several purposes, one of which and perhaps largely is settlement, but if you are going to put on your proof to sustain a postion you have taken pleadings of infeasibility

those studies are going to have some significance or else they are all going to be irrelavent and we don't even have to worry about them.

MR. MILLER: No, sir. I want to be absolutely clear about this: let's take a load flow study, that's a study that's been produced by every party, I assume, without knowing the specifics, that load flow studies may have been created during the course of the settlement process so that the parties could evaluate what a particular interconnection configuration would mean. And, begin to consider what the economics of a settlement might be.

That document which was generated in connection with the settlement negotiations, we are not going to put it on and I understand from the representations in the pleadings filed by TU and Houston that they are not going to use those as a basis.

CHAIRMAN MILLER: Well, we might inquire, perhaps, if they were put on, they would be harmful to your case and theirs; and you would have a very good reason for not putting them on. That's what we are trying to verify.

The statement doesn't preclude, you see that fact that having been made that in whole or in part they are adverse to the position taken hitherto and possiblty taken in testimony, and that that is a very good and compelling reason for trying to put the iron curtain down.

Now, this is a possibility; I don't say that there is anything to suggest nor do I say there is anything to remove it.

MR. MILLER: I don't -- as I stand here today, I am prepared to represent to you that none of the documents that were prepared in connection with settlement are fundamentally inconsistent with positions taken by the party.

CHAIRMAN MILLER: Well, are they superficially inconsistent or intermediately inconsistent?

MR. MILLER: Well, I wanted to address the question of fundamentally --

CHAIRMAN MILLER: Well, that's what I've got to look at when you qualify it. Go ahead.

MR. MILLER: -- because it seems to me that that's important.

Clearly, in the process of compromise one is going to draw back from a position that is asserted during the process -- during the litigating posture. That's inherent in the settlement process.

The second thing that seems clear to me is that is, in fact, these documents were consistent with all three party's positions in this room, we would have had a case settled; we would be --

CHAIRMAN MILLER: We would have thought so, too, frankly. Which suggests to us that they are not even con-

sistent with each other's positions, let alone with the position which may be sought by Justice.

MR. MILLER: The question is fundamental inconsistency.

CHAIRMAN MILLER: Well, that's what I was afraid of. I'm sorry I used the word fundamental; I notice that it was picked up repeatedly, because there again, we've got a legalism.

MR. MILLER: No, it really isn't a legalism, Mr. Chairman.

CHAIRMAN MILLER: Well, fundamentally is being used or could have been used here when we are discussing these things as a shield of a certain kind; in other words, if there are qualitative differences between positions taken or to be taken in trial as distinguished from those being taken -- haven been taken in negotiations -- that's of interest to this Board.

Now, you have had your opportunity for negotiations. We have had less than a year, whatever it was we gave it to you. But, instead of looking at the negotiating posture, from what's it has been described to us, you better start looking at the litigating posture because you are within two months of trial.

MR. MILLER: Absolutely.

CHAIRMAN MILLER: Well, those are the things that

we are starting to look at and we want to be sure that what we are getting is the evidence, the total evidence, to all parties, to yourself; and remember, your client at some point, has been on both sides of some of these cases. It's being accused of anti-competitive conduct, too, as well as accusing its partners.

So, therefore, we've all got some inconsistent positions and this Board is interested in having put on the table, tested by cross-examination -- in advance if possible, but we don't insist on it, by discovery -- of the basic and fundamental documents and studies of everybody. And, we seem to be getting an awful lot of shilly-shally by definition or otherwise as we try to probe it.

I'm putting it to you frankly my impression, now, at the end of this morning's conferences. I wonder what it is that we are not getting and why; and I don't intend to have this rule that we set up, as we understood it, or we intend to have our procedures used in any way to be less than complete and totally candid to everybody.

MR. MILLER: All right. Mr. Chairman, I would like to respond to that in the following way: the qualified privilege that was established by this Board's orders is in many ways analogous to the attorney-client privilege. It is an evidentiary privilege. It shields from disclosure facts, opinions, and so forth for other reasonable purposes.

Let's put this in the context of the attorney-client privilege, if you will.

CHAIRMAN MILLER: Okay, let's do; which has certain limitations that you know of. Put those limitations in, too; it's a client's privilege and it's for certain purposes. It protects information disclosed by client to attorney in coming back only insofar as it affects it. It's not an attorney's umbrella and it's not for the convenience of counsel.

Put all that in and let's pursue the analogy.

MR. MILLER: All right.

It seems to me that in order to foster that privilege, the client is entitled to an analysis of his attorney of what the consequences would be if he took a position 180 degrees from that which he takes in a litigating posture.

What happens if I plead guilty instead of pleading innocent --

CHAIRMAN MILLER: Or nolo contrendere.

MR. MILLER: Or nolo contrendere.

CHAIRMAN MILLER: Which has some very significant aspects in certain proceedings as we all know.

MR. MILLER: Yes, indeed.

CHAIRMAN MILLER: And, that's getting very close to an analogy, by the way, nolo contrendere.

MR. MILLER: Pardon me?

CHAIRMAN MILLER: The nolo contrendere concept is getting very close to our analogy rather than a plea of guilty or not guilty; or an admission of guilt or non guilt.

Watch that nolo contrendere because that's getting in some of these competing principles.

MR. MILLER: Well, but, I don't think that anyone would suggest that my candid appraisal with my client of taking a nolo plea as opposed to a not guilty and his chances at trial would ever be inquired into by any tribunal.

CHAIRMAN MILLER: I think we would agree with you on that. This is a criminal case and you are giving advise and you are basing it on information given to you by the client. You are within the attorney-client privilege in its classical form; go ahead.

MR. MILLER: All right. I think the analogy carries over to what the --

CHAIRMAN MILLER: Oh, that's just the beginning; get into civil law. Get into those where tortes or fraud are involved; get into many of the intricacies of attorney-client and information derived from other sources of in the presence of other parties; the many ramifications which remove attorney-client privilege; that's what I asked you to follow as well.

MR. MILLER: All right. But, we've assumed from the

very beginning, number one, that the privilege that was memorialized, if you will, in this Board's order is a valid privilege. You said so yourself; you said that this would -- you weren't creating a new privilege, all you were doing was applying that privilege that's expressed in the Federal Rules of Evidence and there are other policy considerations that are developed in the NRC's rule of practice and so forth.

CHAIRMAN MILLER: Correct; we agree with you.

MR. MILLER: All right. That's the fact. Then, it somehow and the documents are otherwise validly within the privilege, it seems to me that you can't cut it off as of a certain date on motion and really, just reverse yourself.

CHAIRMAN MILLER: That's not what we are talking about, Mr. Miller; let's not talk about things that we are not considering. We are not being asked -- we are certainly not concerning changing the ramifications of our order.

We are inquiring of counsel how we can determine whether or not these studies are within the order; namely, solely and how are we going to get solely and fundamentally on these various qualifying statements of counsel who are not witnesses, properly so, who are not under oath, properly so, who are making as though it should be dispositive.

MR. MILLER: Well, Mr. Chairman, when I stand up in front of a tribunal like this one, I regard myself as under oath.

CHAIRMAN MILLER: We know that; that's not the question.

You're not a witness and we don't expect you to be a witness.

MR. MILLER: I think you are, and the other parties, are entitled to rely on representations that are made by counsel.

CHAIRMAN MILLER: We do and we would, within the scope of your expertise and your knowledge; as is with any expert.

But, if you're not an engineer and you are going into the engineering subject and you weren't privy to some of the things that went on among the engineers in the negotiations we could perfectly and honestly say, no, nothing happened and be 150 percent wrong. That's all we are looking at.

MR. MILLER: Well, I'll second Mr. Copeland's suggestion that if it will be of assistance to this Board, I will obtain an appropriate affidavit from a knowledgeable engineering person at Central and Southwest who will address these issues.

CHAIRMAN MILLER: We'll take that under consideration; this might be a method, keeping your opportunity to negotiate in good faith and yet be insured that we are not opening up a situation where you can insulate one group of witnesses from another in a fashion that, when we come to trial, we want

the totality of all the evidence.

MR. MILLER: Well, I must say that we are not quite as large as TU; we have a small corp of people who, unfortunately, must do double duty. They negotiate when they have to, and they also testify when they have to.

CHAIRMAN MILLER: Well, that opens up the scope of their testimony very considerably.

MR. MILLER: Yes, it certainly does.

CHAIRMAN MILLER: And, we appreciate that because it brings more fact to bear.

MR. MILLER: Now, the last thing I would like to address is Brownsville's response.

Frankly, I'm at a loss to understand how in the context of what are also ongoing settlement negotiations with that entity, a reponse which suggests that we have been not forthcoming in discovery can be made.

They are the ones we are negotiating with and I sat in a conference room in Dallas, Texas in the beginning of February with one of Mr. Poirier's associates, George Speigel, his client, Mr. Roundtree, top executives of our client and we talked about everything. We talked about this case; we talked about wheeling; we talked about all the things that we have asserted to be privileged.

And, we don't want to negotiate with anybody in the fishbowl. And, I can't -- frankly, I'm at a loss to under-

stand how Brownsville can take the position that it does in its brief.

CHAIRMAN MILLER: Are you through with --

MR. MILLER: Yes, sir, I am.

CHAIRMAN MILLER: Thank you.

MR. POIRIER: Mr. Chairman, and Members of the Board, first let me introduce myself because I arrived a little late; my name is Marc Poirier and I'm a determined representative for the Public Utilities Board for the City of Brownsville, Texas.

I want to apologize for arriving late; I was on the phone about another matter which I want to discuss this afternoon, with your permission.

CHAIRMAN MILLER: That's all right. A, we are glad you are here; B, we'll take up the other matter this afternoon and we'll be glad to hear your comments on the things. that you've heard while you've been here.

MR. POIRIER: Okay. Let me start out by saying that I do not know anything about the studies that have been the specific subject of the remedy requested by Justice and the NRC Staff.

The reason for this is that Brownsville is not focused on the intrastate-interstate issue in this case. We are relying on the Government to do a thorough job and we hope that this Board will take into consideration the opinions of

their attorneys as to what is necessary in order form them to do the kind of investigation that they need.

Brownsville does, however, have an opinion the scope of the settlement privilege and the way it's been used by the parties as set forth in the comments which were filed yesterday. In several of the depositions of officers of Central Power and Light Company have come up against assertions of settlement discussion privilege which we were very surprised by --

CHAIRMAN MILLER: Be specific, if you will.

MR. POIRIER: Okay. For example, one of the examples that we attached to the deposition of Mr. Price, who is the vice-president, the questions was asked by John Davidson, one of the attorneys for the Public Utilities Board, at what time Central Power and Light decided to increase its -- the amount of an off-peak interruptable contract with Texas Power and Light. That occurred some time during the Summer of 1979 and the reason it is relevant is because after the increase occurred, Central Power and Light purchases power that otherwise might have been available to Brownsville.

That as asserted to be part of a settlement negotiation.

CHAIRMAN MILLER: Is that Pages 130, 131 of the deposition you attached?

MR. POIRIER: Yes, I believe that is so.

MR. SAMPLES: May I have a copy of your paper?

CHAIRMAN MILLER: Yes, I'm sorry. Pass it around and let's be sure that everyone has a copy.

MR. POIRIER: Yes, I'm not sure that everyone has got one.

CHAIRMAN MILLER: It's Attachment A, Price deposition that was attached to the response or the comments of Brownsville which was filed or received by us on the 6th and is also dated the 6th. Does everyone have a copy? All counsel are entitled to see what we are talking about.

MR. SAMPLES: Mr. Chairman, I'm going to have to make a change of may airplane reservation.

CHAIRMAN MILLER: Why don't we take an hour's recess for lunch, which will give everyone any opportunity, perhaps, to regroup and we are sure not going to be finished in any short time. We've got a lot of other motions.

If you gentlemen and ladies are going to go t trial in two months, you've got some things we better rule on one way or the other. I think I've got a stack of motions here that high, so be prepared to move on to them. I hope more swiftly because this was a central matter and it also, pardon the expression, does have a spill-over effect on some of the other matters because we are exploring trial practice, really.

MR. SAMPLES: I don't mean to interrupt, but I do need to make a change in my flight.

CHAIRMAN MILLER: Well, that's all right; you have interrupted, but it's 12:25 which I think is a good time to break for lunch.

MR. POIRIER: I can finish briefly now or finish right after lunch.

CHAIRMAN MILLER: Finish briefly after lunch. Maybe make it briefer because then you will have a chance to find out what our friend here has to say. One hour, please.

(Whereupon, the hearing was recess one hour for lunch and resumed again at 1:30, p.m.)

CHAIRMAN MILLER: All right. We will resume.

I think we had a 3-minute speaker here.

MR. POIRIER: Thank you, sir. I'm glad to pick up again. I'm not sure who requested it, but I was just running through the examples that we have provided in our comments on the joint motion. I can just refer to the other ones briefly that we have provided. Mr. Price's deposition, by the way, took place on October 2, Mr. Borsheld's deposition took place January 10 or 11, I'm not sure which and his deposition continued in February.

Other topic areas as to which as assertion of settlement discussion privilege precluded further inquiry in the case of Mr. Price, the Justice Department attorney was unable to get answers to questions about Central Power and Light's transmission planning, passed offers of participation

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in the South Texas project and again in Mr. Borsheld's deposition, Mr. Borsheld being the chief engineer for Central Power and Light, Brownsville asked a question about Central Power and Light's transmission planning, which was part of the settlement discussions.

Now, let me make clear our problem: we disgree with those assertions of settlement privilege, but we have chosen not to bring this up the Board, partly because it has been asserted inconsistently and I think necessarily so. The logic behind these assertions is such that just about any factual matter as to which Brownsville has a grivence with any of the parties and tries to discuss it with them, automatically and apparently becomes part of settlement privilege.

Now, I think that's extremely counter-productive to any settlement. If we cannot find out anything, if we cannot discover facts about transmission planning or contract or capacity or past activities of Central Power and Light, in the case of Brownsville, we are really in a bind.

And, I think the key word in your earlier orders is the word solely; and I believe that is where the company has gone astray.

For our purposes, the remedy we are seeking is a clarification of the order. I want to refer briefly with a clarification to make clear that it's limited to discussions

or to documents, but not which is produced solely for settlement negotiations.

Finally, I just want to refer briefly, I know Brownsville has had a lot of negotiations with Central Power and Light and Central and Southwest because are try to buy power because our present power contract is going to expire in a year or a little more than a year. We are trying very hard to get transmission; we are trying now tc get that, if we can, in the South Texas project. And, to characterize everyone of those approaches in negotiations is automatically settlement when, as far as I know, the specific issue of this proceeding and Brownsville's position in this proceeding isn't brought it defeats the whole purpose of the privilege in the first place.

I was not at the meeting that Mr. Miller referred to; I tried to confer my understanding with Mr. Speigel but I was not able to reach him at lunch. But, I recall that he informed me before that it was not a settlement discussion. So, maybe we have some problem with the scope of definition but, it seems clear to me that the order should be clarified by the Board for purposes of what's left of discovery, for purposes of future testimony in the course of the hearing in this case.

CHAIRMAN MILLER: All right. Has everyone had an opportunity to be heard now who hasn't be heard hither to?

MR. MILLER: Mr. Chairman, I would just like to respond very briefly, if I might, to Mr. Poirier.

Looking at the document that is entitled petition to intervene by the Public Utilities Board of the City of Brownsville. And, under a heading that is entitle, effective proceedings on petitioners, their references to interstate operation which is asserted would enable PUB to bargine for competitively priced power; that the PUB would require wheeling, since Brownsvills is surrounded by CP&L service territory; they as that there be some restriction on CP&L's sale of energy from the South Texas project in the inter-state market becuase they claim that they are entitled to have their share of that instead; and I believe that those are the main substative points.

The dispute with Brownsville encompasses like the dispute between my clients, TU, and Houston, in forums other than this one; FERC being the most noteable one, Texas Public Utilities Commission being another.

The discussions to which I referred earlier took place in the context, if you will, of some sort of local settlement of the differences between the Public Utilities Board of Brownsville and my client.

I will endeavor to -- well, I will determine whether or not the privilege that has been asserted and referred to in the Brownsville document relates to matters that were

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

in which they were, at least, in part entered into.

MR. CHANANIA: Thank you.

MR. SAMPLES: Two points, Mr. Chairman.

First, I would like to know whether or not the Board would amend that order, at least to this extent, that in the event documents are produced that the Staff and the Department of Justice will never, at least in this case, object to their admissibility in this case.

CHAIRMAN MILLER: I can't go that far, because I don't know; there could be self-serving documents that you can't expect them to be bound in advance on.

I think we are going to have to take it on an ad hoc basis.

MR. SAMPLES: Well, this is a one-way street then; they can look at them and if they find something they like to use, fine; and if they find something they don't like, then, am I going to be prevented from bringing that to your attention?

CHAIRMAN MILLER: Not necessarily. The normal rules of admissibility will prevail as though this never happened; both for you and for them. If they are going to be admissible, they will be admissible; if they are not going to be admissible, they won't be. And, this will not bear upon the admissibility one way or the other.

Now, it may have an affect on foundation proof; it

wouldn't be fair to you that they got to see them and then they say, oh, we are going to object; we don't know whose engineers and we don't like your proof. Now, to that extent, yes, but remember, that's foundation proof. That doesn't bear one way or the other on ultimate admissibility in a trial sense.

MR. SAMPLES: That's good enough for me.

CHAIRMAN MILLER: Okay. Yes, we'll do that.

MR. SAMPLES: The second point is that I respectfully request this Board to reasonably or give us a reasonable stay of this order because unless I'm instructed to the contrary, which I do not expect to be, we will make an effort to reverse this Board's ruling with respect to these documents and that will include the taking whatever steps we think we can take, whether it --

CHAIRMAN MILLER: You're entitled to do that; and we certainly want to respect it. However, we are approaching trial and we don't want to delay the proceedings.

How much time would you require in the sense of a stay for that purpose?

MR. SAMPLES: Well, maybe some of these experts on NRC procedures could help me. I'm not sure how much time realistically it would take to find out if the Appeal Board if that's where we went, for example, would even consider any sort of a certification issue. That's all I'm asking.

CHAIRMAN MILLER: You have a right to make the application. Let's ask Mr. Chanania if he is familiar with the NRC procedures, both at the appellate and the trial level.

MR. CHANANIA: I hesitate to speak for the Appeal Board directly, of course --

CHAIRMAN MILLER: We know you won't bind them.

MR. CHANANIA: But, I know there have been instances that I have been involved with in which the turn-around time between the Board's order, such as we have had today, and the filing of papers before the Appeal Board and their decision has been in terms of a week or so.

CHAIRMAN MILLER: I think that's correct. That's our experience, too.

We will give you one week from the time the transcript is available and we enjoy the reporter to try to make that transcript available in 24-hours or thereabouts.

MR. SAMPLES: Based upon that expert advise, that sounds reasonable to me.

CHAIRMAN MILLER: You will get it Monday, I think, in any event.

MR. GLASER: We'll suspend the effectiveness of it until a week from Monday, the 17th of March.

CHAIRMAN MILLER: Right; March 17.

MR. SAMPLES: Will I get the transcript Monday?

MR. GLASER: I presume you will, if you ordered a

rush copy.

CHAIRMAN MILLER: We've talked to the reporter and we agree that you will be able to have the transcript bright and early Monday; that you will have, then, one week until -- you have to and including March 17, 1980, for stay for purposes of attempting to obtain appeal or whatever other remedies you may seek.

MR. SAMPLES: Now, and I said two things but I really have three.

CHAIRMAN MILLER: Okay, have another one; have one on us.

MR. SAMPLES: I have learned or at least think that I have learned a little bit in the past that when you lose a ruling, that you have got to take it that way and exercise your legal remedies, which we are going to do.

I would like to inform the Board or say to the Board, this is no threat, it may be that if we can't get the relief we think we are entitled to at the NRC, it's possible that we will elect to force the Staff -- I hate to use those harsh words -- to enforce the order in court.

I would like to have, if the Board would care to give them to me, their reactions to that in that I don't want to do something that we think we have a legal right to do and honestly feel we have a legal right to do; but only to find that I am so severely castigated with sanctions from this Board that I lose my right to protect my client's --

MR. GLASER: Let me stop you right there; I think I can speak for the Board.

I just can't imagine why you would even bring the subject up. Of course, you won't be sanctioned in any way; we can pursue whatever right you want to pursue wherever you would like.

MR. SAMPLES: Including a declination to turn over the documents and that would leave the Staff in a position of having to go to Federal Court to enforce it.

CHAIRMAN MILLER: Well, they might just go to trial.

There are all sorts of possibilities; we don't intend to anticipate. We intend, as a Board, to proceed with this trial as scheduled; if we are told by a higher authority of any kind to cease, desist, or slow down, we will. But, until we are told that, we won't. We don't give you Kings' X -- you know what King's X is -- you just stop and take a breath now for a week or 10 days, because we intend to go ahead with our schedule.

You have a full right, but there will be no punitive action by this Board to proceed to try to stop us and --

MR. SAMPLES: Well, I just wanted to mention --

MR. GLASER: Mr. Samples, I suggest that you do a thorough search of the Atomic Energy Act and find out what penalities your client might be subject to if, in fact, you refuse to turn over documents and if the Staff does proceed

and the Department does proceed and gets a Court order requiring -- there may be some penalities involved and I think you ought to look at that.

I have some experience with it and that's why I suggest it to you.

MR. SAMPLES: Well, the reason I mentioned it is because, you know, whatever action we take is bound to receive some animosity and we are going to try to make good judgment as lawyers --

MR. GLASER: We will see you here May 14.

MR. SAMPLES: We're ready to go to trial.

MR. GLASER: Very well.

MR. SAMPLES: There's no question about that.

CHAIRMAN MILLER: Very well, anything further?

MS. CYPHERT: Yes, Mr. Miller.

For purposes of clarification in our planning, we have depositions scheduled now for the 27th, or I guess we have an application before the Board for expert depositions for the 27th dna the 28th; that's Mr. Scarth, who is the designated --

CHAIRMAN MILLER: What's the name or caption of your motion? Let's find out who has it.

MS. CYPHERT: There is a joint application of the Department and NRC Staff for issuance of subpoenas and limited extention of time to complete expert testimony and that was

for a 1-day extention from the --

CHAIRMAN MILLER: Joint application of the Department and NRC for issuance of subpoenas and limited extention of time and so forth, filed February 28, 1980.

I have seen any responses to this; are you aware of any responses?

MS. CYPHERT: I am not, sir.

CHAIRMAN MILLER: So, who's that against?

MS. CYPHERT: It's not against anybody.

MR. GLASER: You are seeking to take two depositions Mr. Scarth and Mr. Simmons and you want them on or before April 2nd rather than --

MS. CYPHERT: Well, let me -- there are two points: Mr. Scarth is the expert engineer for TU and Mr. Simmons has been designated as one of the expert engineers for HL&P.

We had arranged for Mr. Scarth and we were trying to put him in Dalls on the 27th and the 28th; and then we would go on to Houston the following Monday morning, which is the 31st.

Now, we asked, if necessary, to have these three days. I don't think it would take that long.

CHAIRMAN MILLER: Well, what is it that you are asking? What do you want?

MS. CYPHERT: Well, first of all, we would like to have the subpoenas issued.

CHAIRMAN MILLER: The subpoenas will issue. Do you have them prepared? Hand them up and we will --

MS. CYPHERT: They are attached to our application, your Honor.

CHAIRMAN MILLER: Originals?

MS. CYPHERT: Yes, sir; better be.

MR. GLASER: Well, we don't know that we have the original motion here.

MS. CYPHERT: It was filed at the same time the joint motion was and I can give you my copy.

MR. GLASER: Never mind.

CHAIRMAN MILLER: All right. You've got signed subpoenas. Go ahead.

MS. CYPHERT: All right. The second question --

CHAIRMAN MILLER: Wait a mintue. This counsel wants to be heard.

MR. SAMPLES: Well, I don't know whether you want to discuss Mr. Scarth or not, but I do have a comment to make about that deposition.

We did not know that this matter was going to come up today. We still have time, do we not, to file our response to that motion and it would say, among other things, Mr. Chairman, that the deposition of Mr. Scarth was taken by agreement of the parties, the date selected by agreement of the parties, the pre-condition or at least a clear understanding

between the parties when February the 12the and 13th were selected, we wanted to get the deposition taken at that time to avoid any deposition of Mr. Scarth during the month of March or thereafter.

I have seen no showing of cause for them, less than a month after they have taken his deposition, to come in and notice it again.

MR. GLASER: Well, is he an xpert witness or is he a fact witness or is he both?

MR. SAMPLES: He's the expert witness.

MR. GLASER: He's an expert witness and they've deposed him once?

MR. SAMPLES: Twice.

MR. GLASER: And they are deposing him again on other matters that they haven't touched upon or they are proposing to?

MR. SAMPLES: Well, there was no restriction on what they could inquire of Mr. Scarth in their depositions. This is an example of continued harassment.

CHAIRMAN MILLER: Well, they are not limited -- we don't regard harassment to constitute the taking of more than one deposition of a witness who has information, expert or otherwise, in a trial that involves substantial matters.

Now, if they proceed to be on to matters they have gone into before and shouldn't again, that's different. But,

we have no indication of that point.

We will expect the Department of Justice to limit their interrogation to matters not previously covered and which should not have reasonably have been expected to be previously covered by the witness; can you do that, Ms. Cyphert?

MS. CYPHERT: Yes, sir.

CHAIRMAN MILLER: Any problem with it?

MS. CYPHERT: No, sir.

MR. GLASER: There's no agreement between the Department of Justice and your firm, was there, Mr. Samples, regarding the number of times --

MR. SAMPLES: The agreement was with the Department of Justice and --

CHAIRMAN MILLER: Did you file it? Is it in writing? Look, we are down with 60 days from trial; we don't have time to say who struck John; we're sorry. We ask all of you to observe your professional integrity and honor your agreements.

But, we are not going to sit in judgment on each and every one.

The subpoenas are issued.

MR. COPELAND: Mr. Chairman?

CHAIRMAN MILLER: Yes.

MR. COPELAND: I just found out yesterday that Mr. Simmons cannot be available on the days that are in the --

MR. GLASER: Well, when can he be available?

MR. COPELAND: He told me he could be available on the days of Mr. Scarth's deposition or he could be available a couple of days --

CHAIRMAN MILLER: Well, who is deciding on the availability of these witnesses?

MR. COPELAND: Sir, we have never had problems among counsel on scheduling depositions for the witness' availability. All I'm trying to ask you, sir, is not to issue the subpoena until I've had a chance -- we are not trying to stop them form taking the --

CHAIRMAN MILLER: The subpoena is issued, but you may ask it not be served until you can work it out; if you don't work it out, the subpoena will continue with it's vitality. Either work it out or go ahead with it; we don't have time any more for arrangements. We want to move this thing and we want to move it expeditiously.

Now, I hope that you can; if you've got a reasonable grounds, we'll expect necessarily to be reasonable with you.

MS. CYPHERT: I'll be glad to work with Mr. Copeland on scheduling a time, your Honor.

CHAIRMAN MILLER: But, we are not going to hold up a condition on everything this Board does from here on out.

These two subpoenas are issued. You may step forward, get them, confer with opposing counsel and try to work out, by agreement, those matters which are convenient to them

and to the witness. Failing that, serve your subpoenas and get on with it.

Next.

MS. CYPHERT: I have a --

MR. COPELAND: Sir?

CHAIRMAN MILLER: I think I gave her the floor. Is this a new matter now?

MR. COPELAND: I'm trying to get some clarification based on what she said as to how we are to handle these settlement documents in these depositions.

MS. CYPHERT: That was the reason I was still on my feet, because I wanted to have a --

CHAIRMAN MILLER: Okay. Let's hear from you on that.

MS. CYPHERT: All right. We have --

CHAIRMAN MILLER: Make it practical, make it fair, and make it simple, and make it quick.

MS. CYPHERT: All right. We have two depositions coming up; Mr. Scarth and Mr. Simmons. Both of those people were asked about these documents before. They refused to give an answer. We would like to ask that question again.

Can we or can't we?

CHAIRMAN MILLER: Can you or can't you what?

MS. CYPHERT: Ask the questions that we were not allowed to ask before.

MR. GLASER: You may ask the questions; we ruled just

a moment ago.

MS. CYPHERT: And, if we ask those same questions, can there be -- are they allowed to raise the settlement privilege again? Do we have to call the Board on this matter? I would like to get it straightened out now, because I have a feeling it's going to come up.

CHAIRMAN MILLER: Well, I would hope that counsel are aware of what the Board has rule; the significance and the meaning of it and we would not have any dilatory actions. We have no indication that counsel are not in good faith and are going to honor the ruling of the Board. They may object to it; they may appeal. They are entitled to do that; but I have no indication that they are not going to obey it.

MS. CYPHERT: All right. This is one other small, I guess, I think I understand what you are saying.

The other portion of this is that as practical matter, I don't even know if we are going to have the documents in our hands by that date.

So, we will go forward with the depositions --

CHAIRMAN MILLER: I think you will have some in hand; I think counsel are going to turn them over with the exception of a few -- we have given him one week.

We don't expect this to be long and drawn out, one way or the other.

MS. CYPHERT: All right. Should we notify the Board

if we don't have the document in hand when we go to do these two depositions, because, obviously, that's something we want to ask about.

CHAIRMAN MILLER: Well, let me inquire of counsel: is there any reason --

MS. CYPHERT: I just see it as a practical problem.

MS. CYPHERT: Let me inquire of counsel, to whom you will be addressing these requests for documents; most of whom, I think, have in mind at least some of the documents involved.

Is there going to be any problem getting them turned over under protective order to the Department in time for them to make meaningful use , if otherwise permissible, in the course of their depositions?

MR. COPELAND: Sir, I had understood Mr. Samples' request for stay ran as to all of us.

CHAIRMAN MILLER: No.

MR. COPELAND: Well, I apologize.

CHAIRMAN MILLER: I'm sorry. Don't ever assume that.

MR. COPELAND: Well, I'm glad we got that clarified.

CHAIRMAN MILLER: That's why I said, don't the rest of you sit back and think you've got King's X for a week or 10 days; I meant just that.

Only counsel who's -- wherever he is and whatever he's doing and whatever anybody else does, you are each on your own.

We expect to go forward and we expect all of you to

go forward with us to the extent that you don't otherwise secure some higher authority's ruling which prevents it.

MR. COPELAND: Well, I would request the same stay.

CHAIRMAN MILLER: I don't think we will grant it. Why do you request a stay?

MR. COPELAND: Sir, we are going to appeal the order.

CHAIRMAN MILLER: But, you had all the documents, you were prepared to file a list. We don't want any kind of frivilous appeals here now.

MR. GLASER: Mr. Samples, I think, objected on the record some time ago and he made a specific request: he's been very consistent with his earlier position.

MR. COPELAND: I don't mind listing the documents, I'm just asking for a stay --

CHAIRMAN MILLER: We know you don't, but we don't want any more delays.

MR. GLASER: You can file your appeal. Mr. Samples made a request for stay on behalf of his client; he doesn't represent your client.

You can file your appeal and if you ask us for a stay, you better show some good cause.

MR. SAMPLES: May I just say this?

The documents involved -- I'm not the only one--

MR. GLASER: Are they joint documents prepared by

three parties; is that what you are telling us?

MR. SAMPLES: No, I'm telling you that some of the documents were prepared solely for settlement discussions very well may be in the possession, for example, of another party to this case; and I don't want to lose my legal rights by me being the only one having the stay --

MR. GLASER: I see. You mean more than one copy has been distributed and you don't want to dispose yours but they might be required to expose theirs?

MR. SAMPLES: Sure. Yes. Then, you know, I've not protected myself and I think if the Board would, please, consider at least extending the stay to all parties for this period of time because --

MR. MILLER: I would make the same request as Mr. Copeland on behalf of Central and Southwest. We also ask for a stay.

MR. GLASER: In light of your representation, I think the Board is willing to extend its stay -- the effectiveness of its order until a week from Monday.

It's going to issue then and unless you get us turned around or until you get your papers filed with the Appeal Board or wherever you go, it's going to issue.

MR. SAMPLES: Well, I -- you know, the week, I'm perfectly willing to take Mr. Chanania's suggestion that we ought to be able to get some kind of a determination out of

the Appeal Board in a week.

Now, I'm just trying to protect the legal rights; I'm not really arguing with the Board --

MR. GLASER: In light of what you are telling us, Mr. Samples, if the documents that you are seeking to protect from disclosure are in the hands of other parties who are in this proceeding, we have no alternative but to extend the stay.

MR. SAMPLES: And, we have a private agreement, as well as the Board.

So, I really appreciate that.

MR. GLASER: That sounds reasonable.

CHAIRMAN MILLER: Okay. It will be done.

MR. SAMPLES: Thank you, Mr. Chairman.

MR. CHANANIA: I would ask only that in the interim while the parties are seeking certification of this to the Appeal Board that the parties also endeavor to collect the documents so that if, indeed, the order issues in one week, in terms of the Staff and the Department's trial preparation and preparation for the depositions themselves, that they are ready to go as soon as we get some kind of ruling from the Appeal Board or this Board order issues, I guess, it's on the 17th.

And, I would ask -- I think I heard two things today a little earlier and I would like some clarification from at

least Mr. Samples as to exactly what the situation is. Is the one week grace period, I suppose until the 17th, the time when you expect to take to file your certification or are you going to file your certification before that and expect to hear from the Appeal Board by the 17th?

MR. GLASER: Well, that's something you need to discuss with Mr. Samples outside of this hearing room; that's taking up the Board's time on matters which are irrelavent.

Our order is going to either be effective the week from Monday, the 17th of March; is that understood?

MR. CHANANIA: That's understood.

MR. GLASER: Unless it's stayed by a authority, it's going to issues, like a mandate in a court, it issues. Okay?

CHAIRMAN MILLER: We might observe it would be wise on the part of all counsel to start assembling these documents because it's entirely possible the Appeal Board or others might want to know what you are talking about with a little more precision than presently appears.

So, if you assemble the documents or the bulk of them, you will all be in a much better position to remove it from the realm from the hypothetical; we are not ordering it, because that's your responsibility. We are not telling you what to do, but for our purposes, we would certainly expect that forthwith that these documents are starting

to be collected and you might well wish to have it that way for whatever future course you have as well.

All right. Anything further on this point?

MR. SAMPLES: It's possible that I don't even have a document that falls in the category --

CHAIRMAN MILLER: It would be higher hypothetical, wouldn't it?

All right. We'll move on then to the next motion.

I guess, Ms. Cyphert, are you the one that had this joint application -- we already covered that one now, haven't we?

MS. CYPHERT: Sir, for the subpoenas, yes, sir.

CHAIRMAN MILLER: Yes, show that that joint application of the Department of Justice and the NRC Staff for issuance of subpoenas and limited extention of time for completion to expert testimony filed February 28 --

MS. CYPHERT: Yes, sir; and those were the subpoenas that you just signed.

CHAIRMAN MILLER: Filed February 28, 1980, jointly by the Staff and by the Department of Justice has been granted; the subpoenas, or subpoenas duces tecum as the case may be, have been signed by the Chairman and delivered to the Department of Justice who is to confer with opposing counsel to agree where possible upon time and place and failing that, to proceed with the service of the subpoenas and the taking of

the depositions.

MS. CYPHERT: Very good, your Honor.

CHAIRMAN MILLER: Next. What's the next motion?

MR. GLASER: Well, there's a motion of Houston Lighting and Power to compel the Department of Justice to provide interrogatory answers with respect to proposed expert testimony of Carl Stover.

Mr. Green, I believe you filed that motion on the 19th of February and the Department of Justice did respond.

What's the problem here with this situation, in light of the Department's response?

MR. GREEN: I have a response from the Department of Justice and read it about three times and I really find it an enigma.

As you recall from our motion, Mr. Stover was originally designated are a fact witness and they took his deposition in Oklahoma City and found out what facts he knew.

The Department's response is that they don't really know anything more than transpired in this deposition, apparently, from their response, they intend to ask him opinion questions at the hearing, but they really don't know what he's going to say, what studies he might rely on, and they don't reveal in here what questions they might ask him.

So, we are not any more enlightened than we were before we filed the motion as to what his expert testimony might be about.

MR. GLASER: Ms. Cyphert?

MS. CYPHERT: Yes. I did not bring those pleadings here today. But, what I know is in that -- our answer; that's it. Mr. Stover is not under contract to us in the sense that a lot of times you have an expert witness who you pay and you consult with and that type of thing; he represents another group of people, some of which are -- have been designated by the Staff and the Department as factual witnesses. He represents a lot of really small cooperatives in different parts of the State.

MR. GLASER: Does the Department intend to examine this witness on direct examination?

MS. CYPHERT: Yes, sir.

MR. GLASER: Your motion is granted, Mr. Green. Would you provide Mr. Green with whatever information he is seeking in the interrogatory?

MS. CYPHERT: I have -- I mean, that's it.

MR. GLASER: Well, if you have, you have. The order is going to be issued showing that the motion of Houston Lighting and Power to compel the Department of Justice to provide in interrogatory answers with respect to the proposed testimony of expert witness Carl Stover is granted.

We'll look at the interrogatory and make the order more specific when it issues.

MS. CYPHERT: Excuse me, Mr. Glaser; when I answered it, I gave them all the information that we know, so I don't know what we are supposed to do.

MR. GLASER: Then, you will just repeat it in your response and I presume that's what you'll do.

We are not practicing law for the Department or for any applicant in this proceeding.

MS. CYPHERT: All right. I just wanted to be sure that you knew that we gave them the information.

MR. GLASER: I don't understand it, Mr. Chairman.

MR. GREEN: Well, your Honor --

CHAIRMAN MILLER: Who signs these interrogatory answers under oath, by the way?

MS. CYPHERT: I will sign that one, your Honor.

CHAIRMAN MILLER: Under oath?

MS. CYPHERT: Yes, sir.

CHAIRMAN MILLER: All right. Verified by --

MS. CYPHERT: Yes. I don't mind verfying, you know, our response --

CHAIRMAN MILLER: Remember, if you have to testify now, if we get any problem, you withdraw as counsel, you know that, don't you?

MS. CYPHERT: Yes.

CHAIRMAN MILLER: Okay. Any time counsel has to be called as a witness for whatever reason, we expect a withdraw.

MS. CYPHERT: I'm sorry; maybe I'm losing something.

CHAIRMAN MILLER: Let me say it again, now listen carefully: any time any lawyer in any pending case before us testifes for any reason --

MS. CYPHERT: If a lawyer testifies?

CHAIRMAN MILLER: Just as you said you were prepared to. If you are going to verify under oath.

MS. CYPHERT: Oh, I thought you wanted me to verify to the interrogatory answers.

CHAIRMAN MILLER: That's swearing under oath. Okay. If there gets to be a question as to the substance of your verification or anything about a matter that you have, you will then be required to be available for testifying and whether or not you are called to testify, you will then withdraw as counsel in this case. Okay?

MS. CYPHERT: For tne rest of the entire proceeding?

CHAIRMAN MILLER: Yes, ma'am. That's why we are telling you --allerting you now. We don't expect counsels to --

MS. CYPHERT: I see the problem you are allerting

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me to; thank you very much.

CHAIRMAN MILLER: Very well. Next.

MR. GREEN: Your Honor, may I just make one comment on that?

CHAIRMAN MILLER: I'm sorry; go ahead.

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 that 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.

MR. WOLFE: All right. We have the motion of the Department of Justice to compel HL&P to supplement its response to the Department's first set of interrogatories and request for production of documents and that was filed on February 28, and HL&P filed a response on March 6th.

Has this matter been settled between the parties, Ms. Cyphert?

MS. CYPHERT: Well, I informed the Board when I filed the motion against Houston, I did not know they had sent a pleading to me, so they crossed in the mail.

I am at a loss, because we have had very few -- the amount of interrogatory answers we have from Houston, but if that's what they say -- that's all they have after reviewing all the evidence in the case, I suppose that I'll have to rely upon that.

MR. WOLFE: No, that wasn't the thrust, I don't think, of your response, was it --

MS. CYPHERT: What we asked for -- a response, we had not had an update for some months. And, during the period of time I sent the motion, we had another one come in the mail.

MR. WOLFE: I understand that what has crossed in the mail are HL&P's supplemental responses, which I understand in the main, do supplement any outstanding questions or interrogatories.

Now, that is so; is it not -- I've forgotten your name, I'm sorry.

MR. GREEN: Doug Green, sir.

MR. WOLFE: Mr. Green, yes.

MR. GREEN: Yes, sir. We reviewed all of our interrogatory answers to see which ones needed supplementation and we supplemented those we believed required it.

In light of the Department's motion where they listed some interrogatories we didn't supplement, we are in the process of going back over and double-checking those to make sure that any possible supplementation will be given.

And, we will do that as soon as possible.

MR. WOLFE: Then, there is still one outstanding response that you are still working on; isn't that correct?

MR. GREEN: Yes, there is. That's one that we actually inadvertently didn't file before and I called counsel for the Department and Counsel for the Staff to advise them of what that response was.

MR. WOLFE: All right. With that representation by Mr. Green, what the Board will do will be to deny your motion without prejudice and if for some reason the outstanding supplementary response is not filed or these various other outstanding supplementary responses are not filed, then renew your motion.

MS. CYPHERT: Very well, your Honor. We also had a pending one on TU; I don't know if that was --

MR. GLASER: That's a similar motion, but to TU; is that not correct?

MS. CYPHERT: Yes, sir.

MR. SAMPLES: Well, the only thing with TU, we are diligently trying to get the material and we are going to files the answers.

MR. GLASER: When will you file --

MR. SAMPLES: We'll file on or before March 14.

MR. GLASER: The same rule ought to apply that Mr. Wolfe related on the record insofar as the Department's

motion involving Houston Lighting and Power.

MR. SAMPLES: Sure.

MR. GLASER: Motion is denied without prejudice to renew if you don't supply by March 14.

MR. SAMPLES: Right.

MS. CYPHERT: Very well.

CHAIRMAN MILLER: Now, we have what looks like a letter dated March 5, 1980, to the Members of the Board. wherein the Department of Justice, the Staff, and counsel for Central and Southwest Corporation and Tex-al join in requesting a pre-trial conference at the Board's earliest convenience to clarify several procedural matters.

You've got a pretty fast pre-trial conference, in effect, here today --

MS. CYPHERT: Yes, and we appreciate it, your Honor.

CHAIRMAN MILLER: What is it that you would like to take up now in that regard?

MS. CYPHERT: Well, I think I'll speak first to some procedural issues and Mr. Burchette will address one of the other issues that's contained herein.

The Board issued an order on -- I'm sorry, Mr. Samples --

MR. SAMPLES: Could I rise just a moment?

CHAIRMAN MILLER: Yes.

MR. SAMPLES: Just to call into question the procedures here.

I'm not a practicioner of any note at all before this Board. Mr. Joe Knotts is. In order so that discovery in this case didn't come to a screeching hault, so that everybody involved in depositions in various places had to close things down to come here today, he among other lawyers in the case in Chicago diligently deposing people -- now, I haven't even seen that letter; I've heard about it. Joe Knotts, I don't think, has even heard about it, although I can't absolutely swear to that.

I really suggest to the Board to have a real pre-trial hearing -- it may not be best for productive purposes -- but, I would think that the guy who is going to be primarily in charge of the case, needs to focus on these procedural matters.

And, I'm not at all trying to stop the Board's consideration of things; but I am suggesting that we are missing some key people who really ought to be here to address these issues.

CHAIRMAN MILLER: Well, we are sympathetic, but I must tell you again that we are sorry; we are going to have to go full speed.

I've got three settings; I'm catching an airplant Sunday and I'm going to be out of action for 10 days, go back for 2 weeks.

This is the last chance, effectively, to participate

as a Board Member with you ladies and gentlemen. So, while I can appreciate and we'll try to be flexible in the event that you are really prejudiced in any way, if it hurts anywhere, we will try to work something out; but, in the meantime we would just like to go forward and take care of as much as we possibly can.

But, we will respect your rights and if there is something that we haven't looked at or overlooked or that your trial counsel, you feel, should have something to say about it, we will give you the opportunity.

MR. SAMPLES: Thank you.

CHAIRMAN MILLER: Proceed.

MS. CYPHERT: I direct the Board's attention to their order of December 14, which set forth the calender and the obligations of the parties that relate to trial preparation and on April 14, the Board has ordered that the Department and Central and the NRC and Tex-al and Brownsville, our obligations are to file witness lists, concise summaries or testimony, initialed exhibits, and trial brief.

CHAIRMAN MILLER: We mean exhibits which you have shown to all other counsel and they have initialed as evidence that they have seen them so we don't take trial time for such purposes.

Is that what you understood we meant?

MS. CYPHERT: We weren't sure, but I have a --

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CHAIRMAN MILLER: We want lawyers to show all their exhibits and do it reciprocally and each of you initial to show you received -- this doesn't mean you waive anything or you stipulate unless you say so.

But, it does mean that you have seen it, so we don't take an hour every day of trial time to pass around these documents. Now, these are the exhibits that you are going to use. Show them and have them initialed by -- just as you do in Federal Court in pre-trial practice where the pre-trial examiner has you initial proposed exhibits.

MS. CYPHERT: All right. I'm sorry; I have been in Federal Court; I've never been in a court where I've done this and that's why I didn't know, exactly, what you had in mind. Now, let me --

MR. GLASER: Haven't you had all your exhibits marked in advance?

MS. CYPHERT: All right. Let me give you an example of what I have in mind and what we have thought about as a group in order to save time and to consolidate efforts here so that we are prepared to go forward on the date we are supposed to. And, we want to be sure that this is in accordance with what the Board has in mind.

All right. Rather then the Department designating 2,000 documents and the NRC designation 2,000 and Tex-al designating 2,000, et cetera. And, there may be lots of dupli-

cations, which there probably would be; that we jointly put in a set of exhibits that wouldn't bind any particular party to using all of them or any of them or whatever; but that there would be one group that would go forward rather than 5 or 6 sets of duplicated materials.

CHAIRMAN MILLER: So far as they are joint exhibits, you are free to do it. However, that doesn't mean that you can pull back and somebody say, gee, I wish I hadn't done that and I'm going to start raising foundation proof questions.

We want you to do it, but we want you to know that you are waving certain things by doing it. Do it knowingly and we have no problem.

MS. CYPHERT: All right. The exhibits that we are thinking about and let me give you my idea of what I am expecting and I may be wrong and please clarify so I understand better. I have never practiced before the NRC before and I don't want to make any mistakes, if that's possible.

CHAIRMAN MILLER: You are doing very well, and we appreciate it.

MS. CYPHERT: All right. Now, what I would anticipate doing, is we are designate a couple boxes of documents and I put them in folders such as these with an exhib' and I wanted to ask you how they should be marked. I mean, normally, they are marked Government, GX -- whatever it is. So, we couldn't do that with joint --

CHAIRMAN MILLER: Well, sometimes they are marked DJ 1 through 1,000 and they have them separated. That's what they did in the Farley Case was the Department of Justice being DJ and the Staff had some other designation.

Now, if you want joint, you can put joint, DJ, Staff, John Brown, whatever; just so we are clear and then have a list of them. Make tables so that you will attach them and pass them around so that we will know which ones are joint, which ones are DJ only, and so forth. And, have a master list and break it down; if you do that with the numbers, we'll be able to file and the court reporter, even though there is a 100,000 documents, will keep them straight.

MS. CYPHERT: Okay. What I wanted to clarify, though, was if, for instance, we put -- you want all these people to make designations of which ones they, in fact, will put in evidence? I don't think that's what you are asking.

CHAIRMAN MILLER: No.

MS. CYPHERT: Okay. I just wanted to clarify that.

CHAIRMAN MILLER: No. What we want is to have you assemble them -- in the Farley Case which had 27,000 pages of testimony and 1,000's if not 100,000's of documents, they used notebooks and they stacked up from here to breakfast. But, they had tabs in them; that was the Department of Justice only.

And, then we were able to, when the time came, have them identified and so forth. But, there is some indication

that you have offered to opposing counsel and to all other counsel the opportunity to inspect these documents, so we don't have to give them an extra time to say, I didn't see that one.

We want you, in advance, just as you do in court, when you have pre-trial hearings, pre-trial conferences, and sometimes we used to have here in the District, a pre-trial examiner who would have you initial these documents to show you has seen them; that's all -- that you've seen them.

MS. CYPHERT: All right. Now, let me give you the practical problem and see if we can figure this out.

Assuming out of that 10,00 documents or let's just say there are 3,000 documents that all the parties, the moving parties are going to designate, okay? And, put little labels on them and put them in a table.

Assuming that 600 of them came from TU, a 1,000 of them came from HL&P, et cetera. Are we required to get them those documents back before April 14 and then give them to us and then get them back from them?

CHAIRMAN MILLER: Not if you can identify them. I don't think you'll find any opposing counsel who are also having a problem with the housekeeping chores which are considerable of handling 1,000's of documents.

I think that if you will identify so that they can go to their own files and say, we've got them --

MS. CYPHERT: In other words, we got this from HL&P's file, we got this from whoever's file.

CHAIRMAN MILLER: Just as long as you can indentify so that they can readily, if they have to go and figure everything out -- they are as busy as you are -- then it won't work.

But, if you identify them and they do have them aad they can readily find that they do, I think you will find that you have complied with the rule.

MS. CYPHERT: Let me tell you what we will do, then.

CHAIRMAN MILLER: Well, don't tell us, because later on you are going to say, well, we said you could do so-and-so. Now, don't involve us in your trial practice.

MS. CYPHERT: Well, I want to be sure that I'm not doing anything that's wrong and I have tried two cases in Federal Court and in both of those cases, there was never anything initialed ahead of time. There was also never anything stipulated to in terms of authenticity.

That's the reason I'm asking the question.

Now, what we intend to do, or at least as I understand our plan of action is that we will jointly sponsor X number of exhibits. And, there will be provided to the parties -- they are going to get a copy of these as being the pool of exhibits from which the different parties may make individual selections to use at trial; an index so that they

know what the document is.

CHAIRMAN MILLER: Are you familiar with Rule 36? Admissions requested?

MS. CYPHERT: Well, yes. I'd like to --

CHAIRMAN MILLER: All you want is the admissions of the authenticity of these documents from the people who are in position to do it.

MR. GLASER: You don't have to haul somebody up here and put them on the witness stand and ask them if he wrote this letter and to lay the foundation for its admission.

Is that what you are asking us about?

MS. CYPHERT: The next question I was going to ask is --

MR. GLASER: Get a stipulation from counsel that they won't oppose the authenticity of the document that you are offering, even though it's a carbon copy.

CHAIRMAN MILLER: Nine out of ten times you will get the stipulation, even under the 10,000. The one that you don't, then use your rule requesting admissions and they will tell you why they don't. They won't admit its authenticity and they will tell you why and you can then prepare the foundation if there truly be one.

Now, that doesn't happen very often; you will find that dealing mutually with each other with commons problems, there will be stipulations if there is no question.

Now, one thing watch out, when you have carbon copies, for example, somebody is going to want to be sure that the carbon copy is exact and that there is not some other copy with some handwritten notes on there that might have some significance -- now, you may have to work some of those things out, but these are just practical matters that lawyers will handle among themselves, I assure you.

MS. CYPHERT: All right. So, on April 14, we will give them the documents we designated and ask them then to initial those copies.

CHAIRMAN MILLER: Well, give them to them tomorrow. No, what I'm saying is don't sit on rigid dates; you should be doing this all along. We pointed out that they are 100's of documents and be doing it, as far as we set those dates, as to it would be ongoing.

But, do the best that you can ongoing.

MS. CYPHERT: Your Honor, we have been accummulating documents on a weekly basis that would astound you.

MR. GLASER: Well, during these depositions, didn't you identify documents and ask witnesses to decribe them and so forth?

MS. CYPHERT: I understand that you are getting impatient, but I really think that you need to listen --

MR. GLASER: Go ahead. I don't understand what your problem is and I apologize. You seem to have some problem

with understanding procedure and I don't think our procedure is any different than --

MS. CYPHERT: Maybe somebody else should address it because I think that a lot of people don't understand; I don't think I'm the only c . I'm the only one that's standing up here.

MR. GLASER: Well, what is your understanding of the rule in the Federal Court from the two cases that you tried?

MS. CYPHERT: All right. What we did is we put stickers on them, put them in folders, gave a list of the documents to the other side; this is what we are going to use. All right?

And, after they got those documents, if there were ones that they had particular problems with, they made a motion that we have authenticity problems as to the following documents, or there were no authenticity problems in one of the cases.

So, I don't understand -- I've never used an initialing system before and I assume that --

CHAIRMAN MILLER: If you c n think of some better way for you to be able to show that you've called this bunch of documents to the attention of other counsel, that they ahve seen them and have had an opportunity to object to them, to stipulate if they will or not -- if you can think of some other way -- we didn't invent initialing and we could care less how you do the housekeeping, to tell you the truth.

MS. CYPHERT: All right. What I'm trying to say is -- on the 14th of April, we are planning and we are expecting that we'll have all these things in little folders to box them out to everybody with an index. We can do that.

MR. GLASER: Sounds appropriate.

CHAIRMAN MILLER: Well, let's see; does anybody -- let me ask counsel who had probably more experience than two cases -- and I don't say this in a belittling way -- procedure is something that you learn partly by doing and getting hit over the head.

Does anybody have any problem or suggestion as to how we can expedite the procedure to the benefit of all?

MR. SAMPLES: I don't even know -- I'm sorry to say this -- but, I can't understand what the issue is here.

CHAIRMAN MILLER: We have provided in our schedule to have documents, among other things, initialed by a certain date to show they have been displayed; that's all.

MR. SAMPLES: I don't care how she identifies the documents. So long as I --

MR. GLASER: As long as you know what it is and not fooled at trial and not surprised; that's the purpose of the --

CHAIRMAN MILLER: Mr. Miller?

MR. MILLER: I really think that the major reason to bring this to the Board's attention was to make absolutely

certain that the parties who were generally aligned on one side of this proceeding, may jointly designate a group of documents and go forward on that basis.

I think that we can work together to --

CHAIRMAN MILLER: All of you can do that.

MR. MILLER: -- get objections to authenticity; there are a lot of ways of doing it. Displaying the documents is one; designating the documents or listing is another -- we'll work it out, I'm sure.

MS. CYPHERT: Okay, fine.

CHAIRMAN MILLER: Whatever is easiest. Confer with counsel and you may be able to do it by lists, for example, where they are able to identify quickly.

MR. SAMPLES: I just don't want any substantive confusion to creep into that; if they have designated an expert and if they have listed him; if they say he is going to rely upon X, Y, and Z document, then I want to be able to go to this group of documents and find out what the Government's witness is going to rely on --

MR. GLASER: Absolutely.

MR. SAMPLES: And, if he's then going to turn around, well, I'm also relying on this other joint designated document --

MR. GLASER: Well, I'm going to tell you, if that comes up in this trial, you are going to see some very, very

quick rulings from this Board about the admissibility of that person's testimony if he relied on documents that you didn't know about.

MR. SAMPLES: All right. Because a joint designation could lead to something --

CHAIRMAN MILLER: Now, recall that you are going on the next step where we've asked for a concise summary of the witness' testimony; that is to include either the exhibits themselves or copies of exhibits that they are going to rely on in their testimony of which you are summarizing.

There is where I think you will find them rather than at this stage.

MR. SAMPLES: I don't want their confusion of this mass designation to make it impossible for me to know what their witness is going to rely on and which specific document that Ms. Cyphert's witness as opposed to Mr. Miller's witness is going to rely on.

MR. GLASER: Well, Mr. Samples, make like you are in the United States District Court for the Northeren District of Texas and just assume that we are going to rule on the same thing that a judge would down there in regard to admissibility of exhibits and pre-trial exchanges and so on.

MR. SAMPLES: I'll be glad to rely on those rules; I just didn't want this exchange here to sort of modify things.

MS. CYPHERT: Okay, and the second issue related to

witness summaries.

CHAIRMAN MILLER: All right. That's what we want to discuss with you now.

Is there some question in your mind about the nature of the summaries? Or, does there seem to be a problem, Mr. Chanania -- oh, go ahead; we'll hear from you now.

MR. AHEARNE: Thank you. I just want to make one thing perfectly clear -- to use an overworked cliche -- and that is that they are talking about this April 14th date. I want to be absolutely sure that they are not trying to say that they have -- the Texas Utilities is going to have to have looked at all of those documents and given them back to them by April 14th. We've got until April 28th or whatever it is to do.

And, I want to make absolutely sure that they are not trying to change that.

CHAIRMAN MILLER: We're not changing the times. They are set up.

Okay, now, Mr. Chanania?

MR. CHANANIA: We are having some difficulties with an absolute April 14th deadline. In the first place, Mr. Hartley's deposition was scheduled for March and under the present circumstances, it is against his doctor's order that he be deposed during that month.

So, that's one problem which spills into April

CHAIRMAN MILLER: Well, do you want to take these problems one at a time?

MR. CHANANIA: I think that the deposition problem can probably be worked out by counsel, informally; it need not --

CHAIRMAN MILLER: Since you may not see us again and we don't want to have thousands of motions flooding in on us. Better do what you want to do now.

MR. SAMPLES: Well, to the extent the expert discovery needs to go beyond the cut-off date which is presently in the Board's pre-hearing order of I believe it was December 5, but I'm not exactly --

CHAIRMAN MILLER: We know what you mean.

MR. CHANANIA: Then, if the parties can work out an agreeable time in April, I want to check that that would be agreeable to the Board.

CHAIRMAN MILLER: What is your motion; to extend the time for the taking of Mr. Hartley's deposition until a fixed date in April?

MR. CHANANIA: That would be fine.

CHAIRMAN MILLER: What date not later than do you wish to select?

MR. CHANANIA: It in part depends upon the doctor's letter which I do not have in my possession. I spoke with him yesterday and he talked 30 days.

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CHAIRMAN MILLER: Well, look at some in April you are going to -- the man may be dead by then, hopefully not. We don't to gamble; we don't want to cast the auspices or cut open sheep or anything else.

What is the last date you are going to have Mr. Hartely available and if not, you jolly well will have a substitute. Name your date in April. I can't give you much better then that.

MR. CHANANIA: Okay. April 20th.

CHAIRMAN MILLER: All right. Is that day of the week?

MR. CHANANIA: I have not idea.

MR. SAMPLES: May I speak to the date on Dr. Hartley's deposition?

CHAIRMAN MILLER: Yes, go ahead.

MR. SAMPLES: I'd like to ask the Board now for authority to issue a subpoena on Dr. Hartley's doctor should we feel like --

CHAIRMAN MILLER: Present your subpoena and we will sign it.

MR. SAMPLES: Okay.

CHAIRMAN MILLER: You have a right to interrogate as a matter of alledged illness or whatever character; we have a right to take the deposition -- if you are not satisfied with the doctor's letter -- the doctor's deposition.

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Present your subpoena and we'll sign it.

MR. SAMPLES: I just wanted to bring it up so that we didn't have --

CHAIRMAN MILLER: No problem. By the way, the 20th turned out to be a Sunday, I believe.

MR. CHANANIA: Just so that we are not missing each other, the doctor is in the process of sending me a letter; I do not have it at the present time. But, as stated in the motion, he is under doctor's orders not to do any work for 30 days.

CHAIRMAN MILLER: You know, it's the doctor they want to depose, now, not your witness.

MR. CHANANIA: I understand.

CHAIRMAN MILLER: Okay. Now, the doctor can work for 30 days.

MR. CHANANIA: I just want to make sure that Mr. Samples understands exactly the state of my knowledge right now.

MR. SAMPLES: You will give us the name and the address of the doctor, I assume.

MR. GLASER: I would hope that your doctor would provide you with the diagnosis and the prognosis of Dr. Hartley or Mr. Hartley.

MR. CHANANIA: He has given me some indications, although he has to examine Mr. Hartley after the 30-day

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period is over.

But, what he told me yesterday was --

CHAIRMAN MILLER: Well, look; let's not get into that. Your doctor is going to be deposed; he's going to find out and he's going to testify precisely and you go from there. Either the witness comes in or you get a new witness.

Now, your date turned out to be Sunday; do you want to pick up another date?

MR. CHANANIA: Sure, the 21st.

CHAIRMAN MILLER: Okay, granted; April 21, 1980.

MR. CHANANIA: The other matter which relates directly to this and I'm not trying to try the Board's patience but this is a matter of concern --

CHAIRMAN MILLER: Go ahead. You've got yourself another hour and you can try anything you want. In another hour, then our patience will be tried because I've got to arrange for my ride home.

Proceed.

MR. CHANANIA: It relates to the selection and designation of trial exhibits for Mr. Hartley.

As you know, he is the Staff's only designated engineering expert. He's been in the evolutionary process of forming his opinions and indeed, this month was in a sense the culmination of figuring out precisely the parameters of his testimony and what he was doing to rely upon.

It is going to be extremely difficult, since we are not, at least according to the doctor's orders, going to communicate with him before -- or at least on the eve of April 14th to be able to with certainty say, every document which is in this pool of documents to be readied by April 14th will, indeed, comprise and will have everything that Mr. Hartley will rely upon.

I assume that 90 - 95 percent will be in there, but I can't say for sure nor can I say what Mr. Hartley had in mind as far as generating exhibits or charts or whatever he would have in mind for the Board himself.

All I can is that to the extent that we would be able to supplement our -- both the portions of the trial brief which would necessitate this kind of information as well as the documents, we would ask leave of the Board to be able to do that.

CHAIRMAN MILLER: We can't once again speculate and give you some unusual type of order that counsel later say we fashioned. We're not fashioning anything; we're free to file any motion you want to at any time.

We understand your situation; we urge you to do the best you can. We suggest that when it gets right down to a critical point, the Staff maybe shouldn't put all its eggs in one expert; but that's your trial choice. We are not going to dictate to you but we are not going to delay the

trial. We will go along with you to a certain extent on the taking of depositions; but, I think the Staff had better sit down and make a very firm hard judgment so that if the Staff wants to have some expert's testimony, they will take the measures necessary and you're getting a 60-days notice of when we start trial.

MR. CHANANIA: That's right --

CHAIRMAN MILLER: And, we hope it will work out as you hope it will work out, but we are not giving you any guarantees.

MR. CHANANIA: And, as I understand the Board may or may not have ruled the first thing this morning, but I understand the Board's ruling to deny our motion --

CHAIRMAN MILLER: Did rule and will rule again; we deny your motion for continuance 30 days or any other time.

MR. CHANANIA: And by asking for leave at this point, if necessary, to supplement that trial brief in designation of exhibits, I was only addressing the matter of flexibility which Mr. Glaser, I believe, mentioned this morning with reference to that; we have not, in this regard, sought any delay of the trial date itself.

Nor do we believe --

CHAIRMAN MILLER: We understand that; we do have discretion and we will try to use it wisely. We will point out to you and you are going to have to make a showing of

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good cause in any such application. It can't be anything that's either unfair to the other parties who are proceeding to trial and it can, under no circumstances, jeopardize the commencement of trial.

Now, within those limitations, we will exercise whatever discretion we can and I think you will probably find that your fellow attorneys will be understanding or your situation.

MR. CHANANIA: That may or may not be; I cannot foretell the future either in that regard.

CHAIRMAN MILLER: Well, we're not going to bind ourselves; you know what the dates are. You're to file briefs and so forth. You can certainly file whatever is available and you will take whatever risk there is in showing good cause for supplementation.

And, if you are correct, why, no doubt, a correct answer will be given to you; but, we are not going to bind ourselves in advance.

There always a discretion in the Board and we would exercise it reasonably, but we do expect you to move ahead, Mr. Chanania, and we've signaled you twice now that you've got an expert who's ill or for any other reason is problematical -- the problem is yours and not the Board's.

And, we suggest that you might want to make a good hard decision as to whether you want to get yourself another

expert; but that's a judgment you will have to make and please try to make it seasonably because you are going to be bound by the results. I don't think we can make it any plainer than that.

Ms. Cyphert?

MS. CYPHERT: When we were detoured I was trying to get a clarification on the summaries of testimony?

And, we would like to do that same thing; which is put in a summary of all of the moving party's people so that you would not have, say --

CHAIRMAN MILLER: Well, wait a minute. We are trying this case separately and you are not all just going to gang up; you've got certain witnesses that you are going to call as Department of Justice. We expect to have a summary of the prospective testimony just as you would make an opening statement to a jury; that's a statement of counsel. We understand you might or might not get all that you think, but give fair notice to everybody on the Board.

Then, the witness testifies under oath directly -- by the way, with the summary of testimony, include also the exhibits or descriptions of exhibits that he will rely on or studies so once again, there is fair notice to everybody.

Yours comes first; two weeks later come the opposing party's. Do it individually.

MS. CYPHERT: You're talking about for the experts,

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what they may rely on --

CHAIRMAN MILLER: I'm talking about every witness you call. We don't want any joint witnesses. We want each counsel to be responsible.

Now, you can work it out in a practical way where you might be leaning on one witness and Mr. Chanania the next; we don't care how you manage that. But, we don't want everybody -- a joint witness is nobody's witness; we expect counsel to bear responibility. You're vouching not only for the integrity but for the confidenc of your witnesses. Don't diffuse; don't spread that.

MS. CYPHERT: Fine. I just wanted to be sure. The Board then, for instance, let's assume that Joe Jones, everybody wants the Board to take not of Joe Jones; so you are going to get 5 or 6 summaries of what Joe Jones is going to testify to?

CHAIRMAN MILLER: Who intends to call Joe Jones and ask him the direct questons.

MS. CYPHERT: Fine. All right. I have a better clarification now.

CHAIRMAN MILLER: That gives you the answer. Whoever is going to call him as a witness and ask him the questions, as under direct examination, certianly has to have a summary.

Now, if somebody else thinks they are going to use him in part and it may not be included in that; it's their

responsibility then to file an additional summary from their point of view.

But the one who is going to call as for lead counsel for that witness, then furnishes the summary. Others chip if necessary, if they can't concur that that summary will fairly reflect what they might ask leave to go into as in direct.

Do you understand me?

MS. CYPHERT: Yes, sir.

CHAIRMAN MILLER: Do you have a problem?

MR. CHANANIA: In that regard, would it not be simpler to, if indeed, Joe Jones will be called by three parties to have one witness summary for Joe Jones to which the three parties subscribe and then amongst themselves --

CHAIRMAN MILLER: Why don't you do it separately? When you get these joint subscriptions, I find that you've got more dog-gone arguments or who said what when Joe Jones starts to show a little bit of a deviation and that's when the hair gets sharp, ladies and gentlemen, and I don't at that point want to decide who put Joe Jones on there and vouch for him.

Let the one called him vouch for him; let the others chip in as they wish. Take them separately by like lawyers; this is the best way to do it.

MS. CYPHERT: Thank you, that helps very much.

CHAIRMAN MILLER: Did you have anything further, Ms. Cyphert, on the procedure?

MS. CYPHERT: There is an issue about which trial is going first and Mr. Burchette, I think, has some comments on that and perhaps other counsel do.

CHAIRMAN MILLER: I think Mr. Miller may have had something --

MR. GLASER: Mr. Miller, there, was on his feet and I think he wants to address this, but there is a Central and Southwest objection pending that I don't believe we ruled upon, perhaps I'm wrong. In regard to the second set of interrogatories and request for production of documents by the City of Brownsville.

MR. MILLER: Yes, sir. Although I don't have those papers with me and I'm really not prepare to address them.

MR. GLASER: We'll rule on it by written order rather then hear an argument on the subject.

MR. MILLER: I would just like to state that we occupy a dual position with respect to being a proponent and a defendant -- well, however you want to put it. We are a proponent, vis-a-vis of TU and Houston and an oponent or defendant with respect to the City of Brownsville.

And, so we will be, with the Board's permission adopting our two-face posture, if you will, and meeting the deadlines that seem appropriate, given our position, vis-a-vis on the parties.

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CHAIRMAN MILLER: Yes, use your judgment on that, Mr. Miller. We recognize and appreciate your raising the point. In some things, it would be fair if you went on the first wave along with Staff, say, and the Department.

On others, you would be more responding and in that event, it would be reasonable to permit you, by designating clearly, what the issues are as to which we are responding later as a respondant, we would use our discretion to grant that.

We understand the procedure and you designate it with clarity.

MR. POIRIER: Sir, Mr. Glaser brought up a moment ago the issue of the Brownsville second set of interrogatories. I am prepared to discuss it; if you prefer, I'll deal with --

MR. GLASER: Well, Mr. Miller is not and I think he would be at a disadvantage, so we are going to rule on it by written order.

MR. POIRIER: Fine. I would like to point out that under the normal rules of the Commission, we would have until Monday to file a written response, which we intended to do.

MR. GLASER: We'll wait for your response.

MR. POIRIER: Fine.

MR. WOLFE: All right. One other matter before we to to some other subject; there is also outstanding this

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motion of HL&P with regard to the Staff's witness, Dr. Norman Lerner. The HL&P's motion was filed on March 5; there has been no response.

Are you prepared to argue, or should we await your written --

MR. CHANANIA: We were planning on filing a written response, as well. And, if the same ruling would pertain, that would be fine.

MR. WOLFE: Yes, but, now this is under some gun is it not, Mr. Green, if the deposition is to be taken?

MR. GREEN: Well, you Honor, yes, the deposition is the 17th of March, your Honor; and it is important for us to be able to get documents in response to our subpoena sufficiently in advance of that deposition to be able to utilitze them.

We suggested the 15th of March, which I believe is a Saturday; we would be willing to take receipt of the documents on that Saturday and use them to prepare for the deposition.

CHAIRMAN MILLER: What's wrong with that? Does anybody have any problem with it?

Would you want the documents to be produced not later than the 15th of March?

MR. GREEN: Yes, that's correct.

CHAIRMAN MILLER: All right, and then take the

deposition of the witness in question the following Monday?

MR. GREEN: Yes.

MR. GREEN: Yes, well then, Staff, you will have to have your response in then by no later than -- hand-delivered no later than Tuesday of next week so that the Board will have the opportunity to review and to issue an order upon it.

MR. CHANANIA: That's correct. I believe that that is the the expedited date sought by Houston and that was the date that we were planning on filing our response by.

MR. GREEN: All right. Fine. Then you file your response on Tuesday and the Board will act on it by written order.

MR. CHANANIA: Thank you, your Honor.

MR. GREEN: Mr. Chairman?

CHAIRMAN MILLER: Yes, go ahead.

MR. GREEN: Mr. Chairman, there is one other outstanding motion which the Board hasn't mentioned today --

CHAIRMAN MILLER: We are not through with motions; we still got some in our quiver, but go ahead.

MR. GREEN: Oh, pardon me, your Honor. Well, I was referring to Houston's motion to compel responses by certain deponents that was filed February 22nd.

CHAIRMAN MILLER: Yes, that's the one that you are

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talking about whispered consultations and the like. Very well. I've got it here. I wasn't forgetting you.

MR. GREEN: All right. I was a little concerned because the time for response is past. And, we have received no response.

CHAIRMAN MILLER: Well, are there any others -- let's see if that is the last. I was saving that one for the last.

MR. CHANANIA: I believe, if I might inteject, that the Staff has 15 days to respond to a motion.

CHAIRMAN MILLER: Well, we are starting to fall short in time, now; let's not start relying on how much time. If you've got an objection, we can state it. We sent the word and I notified the Staff by telephone that we were going to take up all motions today. Now, we expect you to know what you are talking about; we don't expect you to just stand there on the timely rules because we'll foreshorten it.

MR. CHANANIA: If that's the case then, your Honor, since we -- since Monday, this coming Monday is indeed the response date, I was not aware that you were accelerating all motions in terms of whether or not the responses had been filed.

CHAIRMAN MILLER: Regardless; that was the word I instructed by secretary to send; sorry if you didn't get it but that's what I meant and she called you twice.

MR. CHANANIA: And, if that's the case then today, then I will be glad to argue that motion right now.

CHAIRMAN MILLER: Go right ahead.

MR. GREEN: Well, your Honor, it's our motion and I'd be happy to go first or second --

CHAIRMAN MILLER: Well, maybe he's going to concede.

MR. GREEN: Fine. I'll wait with expectation.

MR. CHANANIA: I suppose what I meant was that I would oppose the motion.

CHAIRMAN MILLER: Oh, okay. All right, then.

MR. GREEN: Your Honor, I don't have too much to add to what's in our pleading. We took the deposition of Mr. Hartley and not less than 27 times during that deposition we found the witness was interrupted by counsel who had a whispered consultation with him.

Now, and at times as you can see from the appendix to the motion, his answers abruptly stopped after the whipsered consultation; we would say, well, I'll stand on my previous answer, and would stop what he was saying.

Now, the Board has ruled and I'll just quote briefly what the Board said: the Board said, quote, for the information for all counsel, this rule that disclosure is required will apply to oral consultations with counsel by testifying witnesses as well as written communications.

Now, that's the ruling of the Board and we believe

it's a good ruling. We don't object to counsel conferring with his witness, but we do object to having these consultation occur repeatedly and not being able to find out what counsel has told the witness.

As we said in our pleading, we can't in the middle of a hearing walk up to the witness stand, whisper for 5 mintues, go back to your table and object when the examing counsel askes something.

MR. GLASER: Some have tried it in front of tribunals of this Board. It doesn't work in front of us.

MR. GREEN: Well, your Honor, I've seen some try it, too, and they always lost and that's why I thought that was wrong.

And, that's the basis for our motion and for our objection to that practice.

CHAIRMAN MILLER: Well, in part, we did anticipate this problem and in an effort to be fair and to give counsel advance warning that if you are going to talk to witnesses that go on the witness stand and testify, the witnesses are going to be subject to interrogation as to what they were told and we made that clear some time ago; I don't have the document in front of me, but I clearly recall it because we've had it come up in other cases that we have all sat upon.

That was our ruling then and we are not about to change it now. But, maybe in the application of the rule,

Mr. Chanania wants to call our attention to.

MR. CHANANIA: Yes, Mr. Miller. Unfortunately, Houston Lighting and Power failed to provide that Board with the fully relavent portions of that transcript.

According to our attachments and there apparently there was a double-Xeroxing on our attachments. They provided Page 208.

And, since we have not filed our response and I don't believe you have Mr. Hartley's deposition Pages 207 and through 209 of that deposition in your hands and unfortunately I do not have a copy with me today since I was not aware we were going to argue this motion --

CHAIRMAN MILLER: What is it that you want to do, Mr. Chanania?

MR. CHANANIA: Pages 207 through 209 show that the --

CHAIRMAN MILLER: We have what, 208?

MR. CHANANIA: Yes -- show that the Staff already has voluntarily disclosed to counsel for HL&P at that deposition precisely the nature of the conversations which were involved.

CHAIRMAN MILLER: Well, if it was disclosed, it was moot; so he's not going to ask you to do it again, I'm sure.

MR. CHANANIA: This is why we are opposing this motion as being --

CHAIRMAN MILLER: Well, now, the motion is different. It's an explication of a rule that we thought we laid down which is to the effect; once again, it's a witness who's testifying, whether the witness here, whether it's a witness at t deposition, we don't want anybody to come between that witness, testifying under oath, and the Board.

We don't want counsel to be ruling on it; we don't want counsel to be interpreting; we don't counsel to be testifying. Now, if you'd like -- if you are going to insist on whipsering, I would say first of all, don't do it too often because it disrupts the taking of a deposition; use judgment and discretion.

But, in any event, frequently, less frequently, or seldom, the witness can be asked what he was told and the witness is going to be required to answer and he'll answer while it's fresh in mind and we don't want any lawyer telling the witness he doesn't have to answer; he wants to take it up with the Board. You are putting you on notice now. If you interrupt a witness for any purpose, he is going to answer what you told him.

Is there any question about that?

MR. GREEN: No, your Honor, I'd just like to say that it was stated in our motion that Page 207, which Mr. Chanania referred to, never showed up in our copy of the transcript. It did, in fact, contain a representation by

counsel as to what he had told the witness not to answer.

MR. CHANANIA: Well, in fact, 209 says precisely what the witness was advised.

CHAIRMAN MILLER: So long as you don't try to ursurp the function of the Board, which is to rule on testimony whether by deposition or here. so long as you don't try to tell a witness not to answer, then if you want to -- if opposing counsel wants to talke, you are perfectly entitled to have the record show that he conferred with counsel for 45 seconds; I now wish to ask you, Mr. Witness, what was said, as it's fresh in your mind, just tell me what you said and what he said as best you recall; and you are entitled to get the answer then and there.

MR. GREEN: Thank you, your Honor.

CHAIRMAN MILLER: Okay, any question about that now?

MR. CHANANIA: Not at all, except that I would request that the Board's ruling be extended to where there is a recess taken in that regard.

CHAIRMAN MILLER: Well, now you have a serious question there. Normally, at trial we would apply such rule and instruct witnesses under cross-examination not to confer with counsel.

We have a problem where the witness is a party because a party does have the right and his counsel may have to confer, so we have to make an exception in that regard.

If there not be objection, we would like to follow the same rule that we will in trial, which you are approaching and you want to all start getting used to the rules; under cross-examination stay away from him under the cross-examination is concluded that way no one can suppose that he's been coached or anything; it looks better and it is better. Unless it's a party or unless in the case of a corporation, you might have one witness who has got to sit there and confer substantively. Now, there, we have to make the exception. We do instruct counsel and witness as a matter of integrity not to go into matters that are being cross-examined. But, we are not going to tell them that they can't confer because they can.

That's the rule we generally follow, ladies and genltemen.

MR. SAMPLES: Just one thing on expert witnesses, because there has been a considerable amount of them.

It seems to me that with respect to expert witnesses and particularly in the extent of the amount of conversation that has been going on and counsel is putting himself in the position of being designated as a witness to explore exactly what cause there was between the lawyer and counsel.

And, what I'm trying to do is trying to avoid this coaching that we feel might be occurring between and

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expert witness and the counsel.

CHAIRMAN MILLER: Well, the Board prefers to avoid even the appearance of coaching.

Well, let me say now, as lawyers, there's coaching and coaching: certainly counsel have a right, in these proceedings as in court and perhaps it's their responsibility, to know what a witness is going to testify to -- to go over the testimony in that sense. Where the line comes, and it's not always a bright line, we don't expect coaches to be influenced, subject of suggestion, preparation of a script, any of those matters which result not in the witness' direct and meaningful testimony, but rather, it's coming either in combination with counsel or some other witness or going by the script and that's why in this antitrust case, we departed from what is the usual practice in other types of proceedings.

We've asked you not to prefile written direct tesimony. We want the direct testimony to come and we'll rule as we go along; we think it's both fair and we think that the Board gets direct testimony and we don't get a re-hashed script, which is what we are trying to avoid.

So, this bears upon, I think, Mr. Chanania, what you have in mind and what counsel has suggested, efforts to avoid even the appearance of coaching a witness, whether on the stand, at recess, or even in advance.

Now, what do you suggest?

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MR. CHANANIA: Since, naturally that Staff does not have a client in the sense of the attorney-client privilege which is enjoyed in this instance by other parties, it appears that all consultations which we have during the depositions, during the recesses will, indeed, have to be revealed by the witness.

By the same token, when we are asking questions on deposition and the attorney leans over and whispers to the witness or, indeed, takes a recess, in some cases, between question and answer, how -- it is impossible for us, without being able to inquire of that witness to know --

CHAIRMAN MILLER: Inquire, inquire, inquire.

MR. CHANANIA: And, the witness should be --

CHAIRMAN MILLER: Absolutely. We just said we don't bar the witness and lawyer from talking; we do not say or imply at any time that you can't immediately ask him what was; there's your prophylatic.

MR. CHANANIA: Fine. Thank you for that clarification.

CHAIRMAN MILLER: And, that has nothing to do with the attorney-client privilege; that's a matter where the counsel is engaging in consultation with client or visa versa on the witness stand, he's then testimonial in character; and you may then inquire as to what was said because it could affect this testimony, whether it be credibility, bias, whatever the factors could be.

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You have that right; we haven't taken it away from anybody. The Staff's in exactly the same position as anyone else; just asking what, if anything, was said.

MR. CHANANIA: Thank you for that clarification.

CHAIRMAN MILLER: Does anyone have any question on that score? I thought we all understood, but I want to be sure that --

MR. BURCHETTE: Mr. Chairman, with respect to that March 5 letter that you referred to earlier, my concern is the consolidation issue and just where we are heading on that; are we truly consolidated? Based on your December 5, '78 order, it seems to me that some other motion for consolidation should be filed if, indeed, we are going to consolidated for hearing purposes.

CHAIRMAN MILLER: Well, certainly, thank you. That's something that we should discuss.

We had in our original order refused to consolidate as such; we did consolidate for discovery purposes so that all of us, through experience, could learn to what extent these matters are, not necessarily identical, but overlapping and similar.

It seems to us that you have been any to handle, as counsel, through some complicated discovery, depositions and the like, apparently, without too much problem.

But, we are going to ask you now, I think we would

perfer to keep it consolidated for trial purposes if it doesn't put anyone at n unreasonable disadvantage because it certain has the economies of time, effort, and the like.

We do have a discretion; there may be certain areas, for example, somebody may be a party to one case and not the other; there may be areas where we would have to make discrete rulings at to th effect of certain testimony or witnesses or even parties.

But, if that's only 5 percent and 95 percent could go as consolidate, it would seem to be efficient. But, perhaps we are misperceiving what your problems are, so we'll hear from counsel in that regard.

What do you recognize?

MR. BURCHETTE: Well, I'm not sure that I have a particular with it, Mr. Chairman; what I'm concerned about, obviously, we are more connected to the Camanche Peak and have very little interest in the South Texas project.

But, it seems to me that, if indeed, this thing is going to be consolidate, that we ought to at least have the opportunity to have the opinions of those who want it consolidated as setout in some form, as you indicated in your December 5 order. We need some -- what are the reasons why this case should be consolidated?

CHAIRMAN MILLER: Well, let's talk about it right now. I've given you several: efficiency, time of the Board, time of attorneys, time of some witnesses --

MR. BURCHETTE: Excuse me, Mr. Chairman, one problem that I had is obviously -- this crosses both ways and I understand that. That is two bites of the apple as far as Texas Utility Company and HL&P are concerned.

And, I'd like to have some clarification as to what the Board has in mind, if anything, as far as how to handle that during the course of the hearing.

Not all the issues and certainly not all the facts are related to both companies.

CHAIRMAN MILLER: Maybe you better explain a little further what you mean by two bites of the apple, in that respect.

MR. BURCHETTE: Well, I'm not saying this is necessarily wrong, either, Mr. Chairman, I'm just saying that what might happen -- we have a situation, obviously, involving Texas Power and Light Company, very little involvement with HL&P, but yet if the case is consolidated as I understand it, HL&P will certainly have an opportunity to cross-examine as with TP&L.

CHAIRMAN MILLER: Well, they are different parties, aren't they?

MR. BURCHETTE: Yes, sir, they are.

CHAIRMAN MILLER: Well, we may impose restrictions on repetitive cross-examination even though parties have a right separately, we might, in certain areas, but there again

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we give counsel the right first of all to show in what respect his position, his client's position is or may be different.

So, we indulge it in the beginning of the cross-examintion and it begins just to be repetitious and the parties aren't that far apart in their positions anyway.

We may impose some timelimits, but that's simply a matter of practicality in trial.

MR. BURCHETTE: Well, simply what I'm concerned about and I think you understand what I'm concerned about is having the same questions -- you just addressed that -- being posed by the two different companies to the same witness.

CHAIRMAN MILLER: Well, what difference does that make?

MR. BURCHETTE: Well, we just think that -- we have two projects in two proceedings and the issues are not all the same.

CHAIRMAN MILLER: Well, what if you get different answers to the same questions? Wouldn't that be interesting?

MR. BURCHETTE: That's the problem.

CHAIRMAN MILLER: No, that's no problem at all; that's interesting.

MR. BURCHETTE: Well, I think I have gotten some of your thoughts and that's what I really wanted to find out, but I think that we still have something -- we ought to have something from the other parties as to what they think of the consolidation.

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CHAIRMAN MILLER: All right. We'll hear from counsel. If it becomes unfair to you or anyone else, I mean we'll either consider it now or in an application to us, we will keep on openmind on it. We just had the feeling that up until now, that it was possible to go ahead and continue as a consolidated case.

But, we'll hear from counsel.

MR. MILLER: Mr. Chairman, I agree with the goals of economy and efficiency and not going through the same testimony in two separate proceedings that's identical.

There is one technical matter that I really ought to bring to your attention: that is the fact that while I believe there substantial overlapping of the parties in both proceedings, the Houston Lighting and Power Company is not a party to the Comanche Peak proceeding. And, I don't know whether that makes a difference if the cases are consolidated; I don't think it does.

And, I don't think it ought to necessarily restrict their right of examination or cross-examination, but it's something that really ought -- these matters, too, ought to be addressed. I'm not sure -- the fact that you don't have complete identity of parties in a consolidated proceeding really means.

CHAIRMAN MILLER: Does it really make any difference? So are my associates on the bench here. We are trying to think

what practical or substantive difference it would make and frankly, we don't see any, but perhaps we are overlooking something.

MR. MILLER: Well, I would assume that if there was a discrete issue limited to the Comanche Peak proceeding, it might at least be arguable; but Houston would have no right to examine or cross-examine a witness on that issue.

CHAIRMAN MILLER: This might be; present it to us at whatever time you feel it has significance and we would rule on it. But, we would then have a background of knowing what the issues are and the evidence and we would seek to protect, at any time, anyone being put at a disadvantage because of such matters as parties to one and not the other or anything else that would be unfair.

We will do that and we just don't see a blanket matter or that there should be an inhibition to consolidation leaving that as a safety valve for all of you.

MR. BURCHETTE: Mr. Chairman, that's precisely what I was getting at -- Mr. Miller was much more articulate than I. I think if you will check the record back, Mr. Glaser, I think it was you who suggested a long time ago that if there were genuine interests that HL&P had with the Comanche Peak proceeding, that they should seek to intervene.

That was another reason why we were concerned; we

had not seen such intervention in these two cases.

CHAIRMAN MILLER: Well, not having seen an intervention and everything else remaining the same, then don't you think it likely that HL&P would not be permitted to cross-examined on a case to which it was not a party and as to which it sought no intervention nor allerted the Board or counsel in advance that it might want to inquire?

MR. GLASER: Or expressed any interest in it?

CHAIRMAN MILLER: WE are not binding ourselves, that would very likely be the ruling, because we require fairness and we require advance notice wherever possible of all counsel. It would not be fair to lay back and then seek to take an unfair advantage of a matter or an issue of discrete series of issues to which you were not a party and had not allerted anyone -- counsel or Board -- in advance.

And, that would be the same kind of approach we would take to any problems which we are not taking the time now to try to sort our and it's rather obvious and you wish to call them to our attention; but that would be the basis upon which we would handle the two cases, consolidated for trial purposes and discrete issues upon the showing of good cause upon an appropriate showing.

Let's take a 5-minute break.

(Whereupon, the hearing recessed for 5 minutes.)

CHAIRMAN MILLER: I think you asked for the floor, counsel?

MR. POIRIER: Thank you, I just wanted on behalf of Brownsville address the issue of consolidation briefly.

I am concerned that because Brownsville is a party only to South Texan proceeding, consolidating the proceedings may lengthen things a little bit but I think I can sense which way the wind is blowing in terms of the overall concerns of this proceeding.

There were some comments that one of you made just before we took out recess about not being able -- the parties to only one proceeding not being able to cross examine -- parties to the other proceeding. I would like to point out, you may want to wait until later to rule on it, but there are issues such as competition in which parties that are not in the South Texas proceeding may nevertheless have a lot of relevant evidence to offer, and I am concerned to preserve that kind of examination.

MR. GLASER: Then you ought to file the motion for intervention if you have an interest which should be expressed to the Board and will advance the cause in this case and you are not in the case, you better file something with the Board very quickly to show cause why

it was not done before this.

MR. POIRIER: Thank you.

MR. COPELAND: On that point, could I get a clarification, Mr. Miller as I understood it, that when we are consolidated with TU that as to any common issue we have, we will be allowed to cross examine on that issue, even though we have not officially intervened in the proceeding.

CHAIRMAN MILLER: Wait a minute, combination as to what, I don't understand.

MR. COPELAND: If there are not any common issues, and I don't understand why the Board being consolidated frankly.

CHAIRMAN MILLER: Well, because there are a good many consolidated issues, I don't know what your particular situation is. The issues generally in these two cases in large part are common, yes, right. Now, we don't know specifically though discreetly as to each particular entity. If you have a problem, you think there are matters that you would want to participate in where you are not a party, we do recommend that very promptly that you get petitions for leave to intervene as to issues in such and such.

MR. COPELAND: Well, quite honestly sir, I

thought there would have been a motion for consolidation file sitting out in common issue so that we could have made a reasonable decision as to whether or not the consolidation was appropriate or not.

CHAIRMAN MILLER: Well, you are given a chance right now and you are 60 days from trial to tell us what you think is reasonable is unreasonable. That is why we are here.

MR. COPELAND: Well, I just found out about the letter last night. I didn't realize there was a motion for consolidation pending --

MS. CYPHERT: There isn't.

CHAIRMAN MILLER: Do you want to have ten days in which to file a response?

MR. COPELAND: I believe that would be appropriate, yes, sir, I do --

CHAIRMAN MILLER: All right, we will give all parties ten days in which to file with the Board their suggestions, their recommendations pertaining to consolidation or non-consolidation in whole or in part of these two causes.

MR. COPELAND: Thank you.

CHAIRMAN MILLER: Order will be entered then without any further argument shortly after the receipt

and studied by the Board of these written presentations, okay.

MR. BURCHETTE: Mr. Chairman, if I might, that is the precise reason that I wanted to raise this today is because as I understood your previous order, we needed a motion of some kind before consolidation which has not been on the table.

MR. GLASER: Well, we will consider the letter of March 5th a motion for consolidation.

MR. COPELAND: It is not.

CHAIRMAN MILLER: Well, all right, in case that it isn't the Board sua sponte is going to consider the question of consolidation, gentlemen, I am not going to stand the technicalities.

The Board has the power and discretion in sua sponte to raise these matters procedurally.

Now, we are raising it. The Board provisionally believes the consolidation will be helpful but we are not going to rule with finality, because we are going to give you ten days in which to present your views, we ask you to be as explicit as you can and to show the horrible consequences if that be your position with a little bit more and simply horror or hope or whatever. But, within the object of presentation, your views will be gladly

considered, our provisional ruling will not bind us if you can show us that you want to spend another six months with it, with trial A following trial B; be our guest.

You have got ten days, file them and then we will then rule.

MR. GLASER: Mr. Chairman you had me frightened there since I wanted to raise that with the parties about how long this case is going to take and don't think we ought to be told the fifth of May when we have our file hearing conferences going to take eight months, because you are not going to get it.

So, I think at some appropriate time, let us say by mid-April, the Board ought to be informed in writing how long the case is going to take to be tried, that is point Number 1.

Number 2 and that would assume consolidation or non-consolidation, we oughta have an order out by then. I mean whatever the case may be.

Secondly, on the fifth of May, I think we ought to be prepared to discuss the sequestration of witnesses. The parties do have a right to that in Federal Court and it is not clear whether you have such a right here, but I think you ought to hear from experienced counsel, this is a complicated case, we have a lot of expert witnesses,

some fact witnesses and the Board would like to know at least on that date what the attorneys believe about the sequestration and whether the Board should impose such an order, and exactly what type of sequestration order should be imposed.

CHAIRMAN MILLER: Do we have any questions now about these or other matters?

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MR. GREEN: Yes. Mr. Chairman, I rise with some trepidation, because I would like to ask for a little clarification --

CHAIRMAN MILLER: Sure.

MR. GREEN: -- on the large ruling with respect to the settlement material.

CHAIRMAN MILLER: Sure, go right ahead.

MR. GREEN: It's come to our mind as we're unclear as to what these documents are produced, just what the scope of inquiry at depositions might be.

CHAIRMAN MILLER: We said they're not going to have depositions of those.

MR. GREEN: There are some depositions, though, scheduled at the end of March.

CHAIRMAN MILLER: Okay.

MR. GREEN: We're concerned, for example, can the department take one of these documents and ask one of

Houston's engineers look at this document, why didn't you settle on this basis, why didn't you agree to do this?

CHAIRMAN MILLER: Now, that's clearly out of bounds. That's clearly negotiation settlement. You don't even have to ask us about that.

MR. GREEN: Well, I think it's important.

CHAIRMAN MILLER: The department didn't seek the documents for that purpose. That was made very clear at the outset of this morning.

MR. GREEN: Well, okay.

MR. GLASER: The department and the staff are getting them under a protective order for their own use in these proceedings. Interms of where we are, we specifically precluded discovery as such, depositions and interrogatories on those.

Now, of course, they may have the information. They're not free to ask a witness about the document, it's simply to protect the lawyer. They are free to ask the witness, expert or otherwise, about facts, opinions, other things that are related to his testimony, objective testimony or the testing by cross-examination of his deposition testimony. But, this is proper use of information. It does not depend upon or we would not permit the use at that point of the document.

If we get into a serious question and I don't thing that we would, but if we got into a question of perjury or something we would expect an appropriate motion to be filed promptly with a copy of the deposition attached. We'll send it down for hearing and we'll look into it.

We do not expect this to happen. So, we're saying that having the information enables everybody to get the facts and that should be sufficient at this point. If it goes any deeper than that we'll all get together on an emergency basis.

MR. GREEN: Your Honor, perjury was the farthest thing from my mind. What's on my mind is the prospect of settlement in this case which we don't wish to ashew just because of the ruling of the Board today. I'm afraid that ecreon (?) documents in depositions could affect the possibility of settlement.

I understand that your statement just made, Your Honor, to be that we not anticipate inquiry in depositions on these settlement documents.

CHAIRMAN MILLER: On the settlement documents, yes.

MR. GREEN: Thank you.

CHAIRMAN MILLER: On the substance of them though on some of the facts that could be involved. The

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fact that they're discusses in negotiations doesn't mean that they're otherwise admissible or produceable or subject to inquiry. Don't you understand the difference? It's the further refinement of the rule. You were given a certain qualified privilege I'd say. But, you couldn't by putting things in - by them coming in I really got in there by ipso facto, immunization from discovery.

Now, the same is going to be true in your depositions which are presently scheduled. We're not allowing depositions on the document themselves nor discovery in the documents per se. But, insofar as they go into subjects, certainly those are subject to inquiry. But, it's not because that you're going to show or be permitted to show a document. It's because it's in the witness's fat little head. That's what you're inquiring into, you see, or could be possibly if it is.

Let me ask counsel for the department and the staff. Do you understand our ruling to have any different implications?

MR. CHANANIA: I think I have a specific application which might help me clear up my mind. Lets assume that we're going to depose Mr. Simmons as scheduled and lets assume that there is a document which is a load flow study or something of a technical nature or perhaps a

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costing study of transmission facilities. He is on record as having certain opinions as to the feasibility or infeasibility of interconnection both from a cost and engineering viewpoint. What I would like to do with this document which is an obviously a late study later than early studies which he has testified to, I would like to say have you seen this document? If so, are you basing --

CHAIRMAN MILLER: Now, wait a minute. Now you're using the document subject to a protective order. That's the reason for the protective order. It's protected against disclosure to anybody. It's for your use and your use.

MR. CHANANIA: There have been portions of depositions which have been sealed already in this proceeding. I would suggest that that would be one method of accomplishing this. The problem comes in is precisely what you brought up Mr. Miller is that I cannot crawl inside Mr. Simmons head to find out his thought processes. I would like to know if his opinion which he is enunciating today is based at all upon that document? Because that --

CHAIRMAN MILLER: Instead of that document, why don't you take that information and describe it to him reasonably specifically and cross-examine the way lawyers cross-examine hostile witnesses. You don't have to have

the document to ask the man what the basis for and would it make any difference if so and so start. You start getting so hypothetical that you're going to alert him he better stop and think because he's testifying under oath.

MR. GLASER: I would think you'd want to read whatever you might have produced for you and study to know them and if you think they present facts that you might want to ask the particular witness about, you can ask him about the facts. You can't show him the document and ask him if he relied upon it. The documents are being produced on a protective order. But, you ought to know what's in those documents. You can ask him hypothetically whether or not some given set of facts would change his opinions he's previously expressed. It seesm to me that's fundamental.

MR. CHANANIA: Does the Board anticipate a trial that in terms of if indeed the document represented has some facts in it which he contradicts Mr. Simmon's testimony? Is the Board contemplating extending this into trial so that we cannot even inquire as to whether Mr. Simmons has seen, for example, this hypothetical document?

MR. GLASER: Well, when we get into trial I think we'll probably be confronted with those kind of questions. I'm sure that the Board will rule upon the admissibility

of those sort of questions at the time. I don't think any jurist at this stage in any trial could you tell you in advance what he's going to do two months down the road.

CHAIRMAN MILLER: Point A, look at them, see what they do or do not reveal. Go from there.

Yes?

MS. CYPHERT: I have a different question. Where will the trial be?

CHAIRMAN MILLER: Here.

MS. CYPHERT: In this busy building?

CHAIRMAN MILLER: A couple of months day after day you'll be here you'll start stacking your files up there. As the seasons change you'll be very tired of this courtroom. It gets very hot in the summer. We were here for a year on the Farley Antitrust. We do intend to be here another year, let me make that clear. But, nonetheless, this is where you will labor. Hopefully by cooperating with each other and the Board you can fore shorten that because there's a bunch of testimony that's repetitious can be stipulated. There's many, many things that you can do if you wish and it will both make the record easier to simulate and get rulings and will certainly make it a lot eas.er on you and your witnesses. So, we recommend you to start thinking along those lines.

MR. CHANANIA: Mr. Miller, I do have one more question. My understanding of the Board's availability is not precise at this point. If in fact a motion needs to be filed early next week, for example, as I understand it there will be Board members available to rule on motions which come up in the near future.

CHAIRMAN MILLER: Yes.

MR. CHANANIA: We need not try to get in under the wire today.

CHAIRMAN MILLER: That's correct. Either my colleagues or I will serve as Chairman or Acting Chairman. I will be tied up substantially in trial the next month or so. But, either my colleagues will serve as Acting Chairman, Mr. Wolfe, Mr. Glaser. Feel free to bring before them any emergency or other matters that you may have and solve them as soon as you can before I get home.

Anything further?

Thank you, very much. We'll see you.

(Whereupon, the hearing was adjourned at 3:25 p.m.)