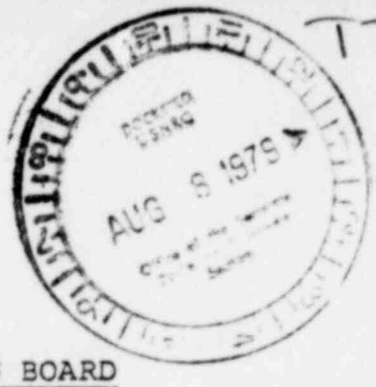

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
HOUSTON LIGHTING & POWER COMPANY, THE CITY OF SAN ANTONIO, THE CITY OF AUSTIN, and CENTRAL POWER AND LIGHT COMPANY (South Texas Project Unit Nos. 1 and 2)	)	NRC DOCKET NOS. 50-498A 50-499A
	)	
TEXAS UTILITIES GENERATING COMPANY, ET AL (Comanche Peak Steam Electric Station, Unit Nos. 1 and 2)	)	NRC DOCKET NOS. 50-445A 50-446A

ANSWER OF HOUSTON LIGHTING & POWER COMPANY
IN OPPOSITION TO THE MOTION OF THE
DEPARTMENT OF JUSTICE
TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS
WHICH HOUSTON CONTENDS ARE PRIVILEGED

The Department of Justice ("Department") seeks to compel Houston Lighting & Power Company ("Houston") to produce documents that are protected from discovery by reason of the attorney-client privilege and/or the work product doctrine. The contested documents concern: (1) communications between Houston's employees, or between a nontestifying outside consultant and Houston's employees, relating to the work of nontestifying consultants performed in anticipation of litigation at the direction of counsel, and (2) communications which Houston's attorneys or nontestifying experts provided to

1008 330

Mr. D. E. Simmons. Both these categories of documents are within the letter and spirit of previous Board orders maintaining the confidentiality of such documents. The distinctions that the Department draws in its motion are unpersuasive, and the Department's attempt to side-step these previous rulings should not be permitted to succeed.

I. DOCUMENTS PERTAINING TO THE WORK PERFORMED BY NONTESTIFYING EXPERTS IN PREPARATION FOR LITIGATION ARE PRIVILEGED AND NOT SUBJECT TO DISCOVERY

The Department seeks to compel the production of eleven documents pertaining to the work performed by nontestifying experts that Houston has retained in preparation for litigation in this and related proceedings. Houston maintains that communications relating to the work performed by nontestifying experts are privileged from discovery, and that therefore these contested documents need not be produced.

Resolution of this dispute is controlled by the Board's ruling at the March 20, 1979 Prehearing Conference. (Tr. 183-85 and Prehearing Conference Order of April 4, 1979). At that conference, the Board heard argument on the objection raised by the Nuclear Regulatory Commission's Staff ("Staff") to an interrogatory posed by Houston. That interrogatory asked the Staff to identify its nontestifying experts and to describe the scope of their work. The Board held that the names and scope of work performed by nontestifying experts retained by a party are beyond the scope of permissible discovery. (Tr. 183-85).

The Department alleges that the present dispute is distinguishable from that addressed by the Board's ruling of March 20, 1979 because that ruling addressed the immunity from discovery of communications between counsel and nontestifying experts, while the present dispute concerns documents to which counsel is not a party.

The Department's effort to distinguish away the Board's ruling of March 20, 1979 fails to come to grips with the thrust of that decision. The decision was not one of form but of substance. The Board established that parties will not be permitted to conduct discovery into the scope of work which is performed by other parties' nontestifying experts. Even the names of such experts were found to be beyond the scope of discovery. (Id.). Disclosure relating to the work of such nontestifying experts inherently reveals part of counsel's preparation and foreshadows the theories and lines of analysis on which counsel intends to rely, which is inconsistent with 10 CFR § 2.740 and the Board's ruling. Disclosure here would create the very prejudice to Houston's preparation of its case that the Board's March 20, 1979 ruling was intended to prevent.

All of the documents that the Department seeks were generated in conjunction with a study performed by Houston's nontestifying expert, Mr. Stagg. This study was directed by counsel in preparation for litigation. Houston assigned several of its employees to assist the nontestifying expert in

the performance of his study. The employees' duties included such functions as furnishing data to the expert and reviewing the preliminary results of the expert's analysis. The eleven contested documents are either communications between such specially assigned employees, or communications between one of such employees and one of Houston's nontestifying experts.[1/] All of the documents pertain to the study being conducted by the nontestifying expert Mr. Stagg, and the Department's efforts to reach those documents amount to nothing more than an effort to circumvent the Board's prior ruling.

The nontestifying experts retained by Houston must be able to draw upon the resources of the client corporation. Counsel must be able to look to technically skilled employees of the client corporation for assistance in planning and evaluating the work of outside experts in highly technical areas such as this. Surely, the Board was aware of these practical realities in the first instance and intended its ruling to have substance. The distinction which the Department now proposes emphasizes form over substance and is inconsistent with the policies of the Commission's regulations and the Board's previous order.

1/ Two documents are communications between an employee and nontestifying expert Braitman. However, these documents are similar to the others in that they pertain to the work being conducted by nontestifying expert Stagg.

Document number 234 is a memorandum written by Mr. D. E. Simmons in regard to the work of Mr. Stagg. This document may not have been communicated to any other person. As discussed in Part II of this Answer, Mr. Simmons is Houston's corporate officer with direct responsibility for this litigation.

Each of the eleven documents which the Department seeks qualifies for protection under the Board's order of March 20, 1979. To permit discovery of these documents would therefore contradict the Board's prior ruling and render meaningless the protection afforded by that ruling. Accordingly, Houston respectfully requests that the Board deny the Department's motion to compel production.

II. THE BOARD SHOULD NOT ORDER PRODUCTION OF DOCUMENTS PROTECTED BY HOUSTON'S ATTORNEY-CLIENT PRIVILEGE OR THE WORK-PRODUCT PROTECTION

In a second area of dispute, the Department generally seeks unquestionably privileged documents that Houston's attorneys or non-testifying experts provided to Mr. D. E. Simmons, Houston's corporate officer directly responsible for the direction of this litigation.[2/] The Department bases its claim on the mere fact that Mr. Simmons has also been designated an expert witness in this proceeding. Thus, the Department reasons without support, Mr. Simmons might rely on these documents in preparing testimony and therefore, the documents must be produced. This argument misstates the law, miscomprehends the facts, and should be rejected.

2/ Houston has determined that Document 208 was provided to Mr. Simmons in preparation for his testimony before the Texas Public Utilities Commission, and this document will be provided to the Department.

A. The Department seeks documents which are unquestionably privileged

There is no dispute that four of the documents the Department seeks would normally be protected from discovery by the attorney-client privilege.[3/] For example, Document 195 is a memorandum from Mr. Copeland, an outside counsel for Houston, to Mr. Simmons discussing the Committee on Power for the Southwest, a potential intervenor in this proceeding.

Similarly, the remainder of the documents which the Department seeks normally would have qualified immunity from discovery as the work product of Houston's attorneys or non-testifying experts.[4/] This Board recognized this immunity and made it available to all parties in the March 20, 1979 Pre-hearing Conference (Tr. 183-85). There can be no question that these nine documents are work product. For example, Document 198 is an April 15, 1977 memorandum circulating an analysis by Abe Braitman, a nontestifying outside expert retained in anticipation of litigation, to three of Houston's attorneys, with a copy to Mr. Simmons.

3/ These documents are 195, 236, 266, and 268. All are memoranda from Houston's attorneys to Mr. Simmons, alone or as a member of Houston's corporate control group, discussing facets of this proceeding.

4/ These are documents 198, 207, 208, 238, 242, 243, 244, 260, and 275. It is important to realize that documents furnished to Mr. Simmons by Houston's attorneys additionally become protected by attorney-client privilege where they contain legal advice.

It is settled law that communications subject to the attorney-client privilege are absolutely protected from discovery unless the privilege is waived. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968). See 8 C. Wright & A. Miller, Federal Practice & Procedure: Civil, §2017 (1970); 4 Moore's Federal Practice ¶26.60[2] (2d ed. 1970). Similarly, under 10 CFR §2.740(b)(2) and FRCP 26(b)(3), work product enjoys a qualified immunity from discovery and must be protected unless the moving party demonstrates "substantial need" and the inability "to obtain the substantial equivalent of the materials by other means." See 8 C. Wright & A. Miller, Federal Practice & Procedure: Civil §2025 (1970); 4 Moore's Federal Practice ¶26.64[3] (2d ed. 1970).

Thus, in the absence of a waiver of Houston's attorney-client privilege or a sufficient showing of necessity by the Department for Houston's work product, the documents which the Department seeks cannot be produced.

B. Mere access by Mr. Simmons to the contested documents does not waive attorney-client privilege or work product immunity

It is likewise settled law that review of privileged materials by a member of a corporate control group does not waive any applicable privilege. E.g. Natta v. Zletz, 418 F.2d 633, 637-38 (7th Cir. 1969); Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 32-39 (D. Md. 1974). The Department

appears to assert, however, that Houston waived its attorney-client privilege or work product immunity with respect to documents merely by furnishing the documents to Mr. Simmons. This assertion has no support in law, and in fact directly contradicts the law of this case.

In its April 19, 1979 Motion for Reconsideration,[5/] the NRC Staff sought to have this Board compel Houston to produce documents prepared by nontestifying outside experts and reviewed by Mr. Simmons. Houston had properly claimed work product protection for these documents, and further argued that Mr. Simmons had a right to review privileged documents in his capacity as an officer for Houston. On May 7, 1979, this Board rejected the Staff's request:

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

May 7, 1979 Order at 1-2 (emphasis added, footnote omitted). This law of the case should apply even more strongly to documents protected by the attorney-client privilege (which has absolute

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5/ MOTION BY THE NRC STAFF FOR RECONSIDERATION OF THE BOARD'S ORDER OF APRIL 16, 1979 CONCERNING THE STAFF'S MOTION TO COMPEL FURTHER ANSWERS BY HOUSTON LIGHTING & POWER COMPANY, dated April 19, 1979.

protection from discovery) than to the work product doctrine's "qualified immunity." Thus, it is clear that the Department must demonstrate reliance by Mr. Simmons on the documents in question before they can be ordered produced.

C. Mere speculation by the Department as to Mr. Simmons reliance on the documents cannot defeat Houston's unquestionable assertions of privilege.

To circumvent the Board's May 7, 1979 Order (as quoted above), the Department reasons that, since it is difficult to determine whether or not Mr. Simmons will rely on any given document in formulating his testimony, all privileged documents to which Mr. Simmons has had access should be produced to the Department. This reasoning cannot be supported legally or factually.

The Department's assertion that Mr. Simmons has relied on all communications with his attorneys and outside consultants in forming his expert opinions has no basis in fact or logic. Mr. Simmons' deposition and trial testimony in the District Court case set forth his expert opinions and the facts underlying those opinions. The Department has transcripts of both Mr. Simmons' deposition and the trial.

To this day, Mr. Simmons has not identified even one of the documents the Department seeks, or the facts therein, as being material upon which he relied in forming his expert opinions.

The Department's implication that the documents listed in Appendix C have contributed to the basis for Mr. Simmons' expert opinions is pure conjecture. Courts faced with similar arguments have repeatedly ruled that mere speculation or conjecture about the nature and contents of privileged documents is wholly insufficient to justify disregarding the attorney-client privilege or the protection for work product. E.g., J. H. Rutter Rex Manufacturing Co. v. NLRB, 473 F.2d 223, 234-35 (5th Cir.) ("utter speculation" insufficient showing to override work-product protection), cert. denied, 414 U.S. 822 (1973); Hauger v. Chicago, Rock Island & Pacific Railroad Co., 216 F.2d 501, 508 (7th Cir. 1954) (no showing of good cause based on "guess, conjecture or suspicion"); United States v. Chatham City Corp., 72 F.R.D. 640, 643 (D. Ga. 1976).

Thus, for all these reasons, it is clear that the Department's motion is legally and factually deficient, and should be denied.

Respectfully submitted,

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Date: August 6, 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing: ANSWER OF HOUSTON LIGHTING AND POWER COMPANY IN OPPOSITION TO THE MOTION OF THE DEPARTMENT OF JUSTICE TO COMPEL PRODUCTION BY HOUSTON OF CERTAIN DOCUMENTS WHICH HOUSTON CONTENDS ARE PRIVILEGED, dated August 6, 1979, were served upon the following persons by deposit in the United States Mail, first-class postage prepaid, this 6th day of August, 1979.

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