

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

MOTION OF HOUSTON LIGHTING & POWER COMPANY TO COMPEL  
PRODUCTION BY THE DEPARTMENT OF JUSTICE OF CERTAIN  
DRAFTS OF TESTIMONY PREPARED BY WILLIAM E. SCOTT

I. Background

Pursuant to 10 CFR §2.740(f), Houston Lighting & Power Company ("Houston") respectfully moves the Board for an order compelling the Department of Justice ("Department") to produce certain drafts of testimony prepared by the Department's engineering expert witness, William E. Scott.

On February 9, 1979, Houston served on the Department Houston's Second Set of Interrogatories and Requests for Production of Documents to the Antitrust Division, U.S. Department of Justice. Discovery Request 2 read as follows:

2. (a) Identify each expert witness who the Division expects to call in this proceeding.
- (b) State the qualifications and credentials of each such expert witness.

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(c) Provide a summary of the testimony which each such expert witness is expected to offer.

(d) State the basis for each conclusion or opinion each such expert witness expects to present or draw in his/her testimony.

(e) Identify all documents prepared by, for, or under the supervision of each such expert witness, or reviewed or relied upon in any way by such expert in the performance of his/her duties, formulation of his/her conclusions or opinions, or preparation of his/her testimony, including particularly work papers, status reports, preliminary outlines and memoranda, and communications between such expert in the Division, any party to the proceeding, or any person with knowledge in any way relied upon by such expert, and provide copies of any such document not already in the possession of Houston.

(f) Identify each such party to the proceeding and any person with knowledge in any way relied upon by such expert with whom such expert has communicated.

On February 22, 1979, the Department of Justice filed a motion for an extension of time wherein it argued that production of the information and documents sought by Houston was premature. Houston filed a response opposing an extension on February 27, 1979.

The Board heard oral argument on this issue at the March 20, 1979, Prehearing Conference. The Department's motion for an extension of time was granted to April 3, 1979, (Tr. 148-60 and Prehearing Conference Order of April 4, 1979), and the Department was instructed to respond to Houston's discovery request by that time. The Board also ruled that the Department need only respond on the basis of what the Department knew at the time that they issued the advice letter initiating this proceeding. This limitation on discovery seems to have been predicated on the Board's understanding, after hearing the argument of the

Department's counsel, that the Department had not yet formulated even a partial witness list.

On April 3, 1979, the Department, in compliance with the Board's order, filed a response to the discovery request. William E. Scott was identified as one of the two expert witnesses whom the Department expects to call to testify during the hearing. The Department refused to produce any documents responsive to Houston's discovery request 2.(e) calling for (inter alia) the production of documents prepared by, for, or under the supervision of each expert witness. The Department cited the Board's Prehearing Conference Order of March 20, 1979, for the proposition that the Department was not required to produce any documents responsive to discovery request 2.(e) at that time.

As of June 25, 1979, the Department still had not furnished any documents responsive to discovery request 2.(e). Accordingly, in preparation for the deposition of Mr. Scott, counsel for Houston requested by letter that the Department provide any supplementary documents or information responsive to Houston's discovery request. On July 11, 1979, the Department furnished to Houston copies of Mr. Scott's published articles and papers which were in the possession of the Department. A list of these documents is contained in the First Supplemental Response of the Department dated July 13, 1979.

Additional documents were furnished to Houston on July 17, 1979, in compliance with a subpoena duces tecum addressed to Mr. Scott requesting certain documents in his possession. As for other documents, the Department stated in its supplemental response:

To the extent that interrogatory 2(e) seeks additional information, the Department objects on the ground that such a request is beyond the scope and purpose of Rule 26(b)(4).

The deposition of Mr. Scott was held on July 17-18, 1979. During the course of his deposition, Mr. Scott revealed that he has been serving as an expert witness for the Department since January of 1979, <sup>1/</sup> and that he has already prepared and sent to the Department's counsel several drafts of his expected testimony in this proceeding. <sup>2/</sup> Houston requested on the record at the deposition that the Department produce copies of Mr. Scott's draft testimony, but the Department refused. <sup>3/</sup>

The drafts of Mr. Scott's testimony are responsive to discovery request 2.(e). As a result of the Department's refusal to voluntarily produce such documents, Houston respectfully moves the Board for an order compelling production.

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1/ Deposition of William E. Scott at 178-82.

2/ Id. at 18-19. Indeed, Mr. Scott revealed that he transmitted a complete first draft of his testimony to the Department's attorneys in March of 1979. In spite of this fact, the Department refused to respond to discovery request 2.(e) in April. The Department's refusal was predicated on the Board's order at the March 20, 1979, Prehearing Conference. The basis for that order was the Board's understanding that "they [the Department] don't have a partial witness list now." (Tr. 159).

3/ Id. at 19-32, 173-75 and 254-53.

II. The Department Should Be Compelled to Produce the Draft  
Testimony of Expert Witness William E. Scott

A. The Board's Previous Order Disposes of the  
Department's Objections

The Board held at the June 1, 1979 Prehearing Conference that relevant documents prepared or reviewed by testifying experts are discoverable and must be produced upon the request of another party. <sup>4/</sup> (Tr. 408-15). It is far too late for the Department to argue that documents prepared or reviewed by experts who are expected to testify in this proceeding are immune from discovery.

As Chairman Miller has pointed out, discovery of such communications is important to enable other parties and the Board itself to evaluate the credibility of the witness. (Tr. 408 and 412). Further, such discovery assists the inquiry on cross-examination into the bases for an expert's opinion. As also discussed at the Prehearing Conference, an expert's opinion may be qualified by the basis of that opinion, and the other parties have a legitimate interest in learning on cross-examination how the expert arrived at his ultimate conclusion. (Tr. 408 and 412, remarks of Chairman Miller).

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<sup>4/</sup> The Board's Order was based upon a thorough analysis of the relevant case law. Both Houston and the Nuclear Regulatory Commission's Staff submitted extensive briefs relating to the production of documents generated by expert witnesses. See Motion of Houston to Compel the NRC Staff to Provide Fuller Responses to Houston's Second Set of Interrogatories and Requests For Production of Documents (March 26, 1979), and the Staff's Answer (April 30, 1979). The objection which the Department now asserts under Fed. R. Civ. P. 26(b)(4) simply seeks to reargue the Board's earlier ruling.



The distinction that the Department apparently seeks to draw between the relevance of draft testimony and the final version of testimony is without substance. <sup>5/</sup> As noted by the Board, drafts may be uniquely valuable resources offering insight into the formulation of a witness' testimony which are not available from examining the final product alone.

MR. LESSY: I have seen a situation where all working papers are exchanged X times prior to cross-examination, but not early in the beginning, when a man first sits down to work. He might change his opinion.

Suppose the man changes his opinion eight times, okay?

MR. BOUKNIGHT: That's exactly what we want.

CHAIRMAN MILLER: It would affect his credibility when he got up here for the 9th time. It might just affect it very substantially. And that is really one of the things that people are trying to look at, and that the Board would do anyway, obviously.

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5/ Houston's discovery request 2.(e) called for the production of all documents prepared by or under the supervision of each expert witness, including work papers, preliminary outlines and memoranda, and communications between the expert and the Department. Drafts prepared by the Department's engineering expert in preparation for his testimony in this proceeding, copies of which were sent to counsel for the Department, are clearly responsive to that discovery request.

The only objection to discovery request 2.(e) raised by the Department in its First Supplemental Response was based on Rule 26(b)(4). Not until the deposition of Mr. Scott did the Department argue that Houston's discovery request calls for the production of irrelevant documents. Deposition of William C. Scott at 22-23, 173-74 and 184. Even if Mr. Scott's draft testimony was not relevant, which it clearly is, the Department has by its silence waived its right to object to Houston's discovery request.

Now, it may be that he is changing for good and sufficient reasons eight times, and he will tell us about it. Again, there may be other factors, and we will sort of want to know about them.

His testimony is subject to evaluation. And what you are suggesting is certainly one of the things that one looks for in any witness.

(Tr. 414-15). Thus, the fact that testimony is in draft form does not render the testimony any less relevant or discoverable.

The Board's order requiring the production of documents generated by a testifying expert in preparation for hearing recognizes only one exception. The Board has ruled that documents prepared by counsel which contain nothing but the mental product of counsel are not discoverable. (Tr. 423). Obviously, a witness' own drafts of testimony do not fall into this exception.

The Department has grounded its refusal to produce Mr. Scott's drafts upon the decision in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-75-25, 1 NRC 513 (1975), which denied a motion to compel the discovery of certain draft question and answer testimony. The Seabrook Board reasoned that the draft testimony which the testifying expert had prepared constituted trial preparation material of counsel. However, the Board in this proceeding has already determined that documents prepared by a testifying expert in preparation for trial are subject to discovery. The basis upon which the Seabrook Board reached a different decision is unclear. The issue of work-

product protection was not extensively briefed, <sup>6/</sup> and the Board's order disposed of the issue in one paragraph. <sup>7/</sup>

The basis for the Board's decision in this proceeding is quite clear, however. This is a complex antitrust proceeding. The testimony of expert witnesses will be of the utmost importance in resolving the contested factual issues. The Board has rightly determined that documents generated by a testifying expert will assist in evaluating the credibility of the expert and the bases of his opinions. Under these circumstances, the Board's decision to permit discovery of documents generated by testifying experts is most logical.

The draft testimony of Mr. Scott is not only within the letter of the Board's prior ruling, it is at the heart of that ruling. Unlike the draft testimony in Seabrook, which was prepared in conjunction with counsel, <sup>8/</sup> Mr. Scott indicated at his deposition that his draft testimony was written without the direct assistance of counsel. <sup>9/</sup> These drafts reflect the

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<sup>6/</sup> See Motion to Compel Discovery, Nos. 50-443 and 50-444 (Atomic Safety and Licensing Board, February 18, 1975), and Answer to Motion of New England Coalition on Nuclear Pollution to Compel Discovery, Nos. 50-443 and 50-444 (Atomic Safety and Licensing Board, February 28, 1975).

<sup>7/</sup> Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-75-28, 1 NRC 513, 514 (1975).

<sup>8/</sup> Answer to Motion of New England Coalition on Nuclear Pollution to Compel Discovery, Nos. 50-443 and 50-444 (Atomic Safety and Licensing Board, February 28, 1975).

<sup>9/</sup> Deposition of William E. Scott at 183.



independent thoughts and analyses of a testifying expert, not the thoughts and analyses of counsel, and the Board has clearly indicated that such work performed by testifying experts may not be kept confidential. (Tr. 399-415). 10/

Finally, Houston submits that it would be unwise for the Board to modify its prior ruling to carve out a special exception for testimony drafts. Draft testimony should not be accorded any greater immunity from discovery than other draft documents prepared by a testifying expert. To distinguish between draft reports, analyses and summaries on one hand, and draft testimony on the other, is to make a distinction without a difference. Regardless of the term chosen, what is being referred to is the expert witness' analysis of a given fact situation -- in other words, that which he may be asked to testify about at the hearing. Referring to a document as testimony, a report or a summary does not alter the nature of the document. To grant some sort of privileged status to documents labeled "draft testimony" rather than "draft report" or "draft analysis" would encourage parties to categorize and/or label all documents dealing with an expert's potential testimony as "draft testimony" in a deliberate effort to immunize them from discovery. Clearly such a result would be unacceptable and would pose a significant threat to the discovery process. The creation of such a problem can be avoided by simple adherence to the Board's

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10/ In any event, the only documents which the Board allowed to be protected in its earlier order were those which reflected nothing but the thought processes of counsel. (Tr. 423) Testimony drafts prepared by an expert witness in consultation with counsel clearly would not be protected under this ruling.

prior ruling requiring the production of all documents prepared by a testifying expert witness.

B. No Claim of Privilege Should be Entertained at This Stage

The Department has clearly waived any privilege specifically applicable to these drafts of testimony. Despite Houston's instructions, the Department failed to list and describe the drafts as privileged. The Department also failed to request a protective order against either the general instruction requiring such listing or the specific document production request at issue. 10 CFR §§2.740(c) and (f).

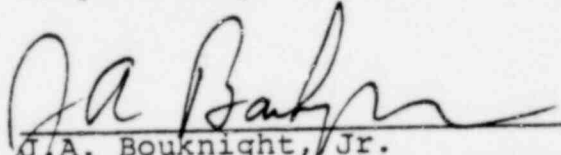
Houston does not intend to stand on formality, however. More than a question of technical compliance is involved here. The Department not only did not produce Mr. Scott's draft testimony, it did not even disclose its existence. Had the Department followed the procedures specified for claiming privilege and/or filed a request for a protective order against the discovery request, this matter would have come before the Board many months ago for orderly resolution, just as the similar argument made by the Nuclear Regulatory Commission's Staff was heard and resolved at the June 1 Prehearing Conference. The existence of these drafts came to light only through Mr. Scott's testimony in the course of his deposition - a deposition that the Department's counsel requested be postponed on the ground of prematurity. Where failure to comply with instructions in a discovery request or with the Commission's regulations results in, or threatens, substantive

prejudice to the rights of the discovering party, the rules should be enforced strictly.

III. Conclusion

Houston has now waited more than seven months to obtain the production of all documents responsive to discovery request 2.(e). There is no reason to delay production of these documents any longer. For all the reasons stated herein, Houston respectfully moves this Board for an order compelling the Department of Justice to produce the draft testimony of its engineering expert witness William E. Scott.

Respectfully submitted,

  
J.A. Bouknight, Jr.  
Attorney for Houston Lighting  
& Power Company

BAKER & BOTTS  
3000 One Shell Plaza  
Houston, Texas 77002

LOWENSTEIN, NEWMAN, REIS, AXELRAD  
& TOLL  
1025 Connecticut Avenue, N.W.  
Washington, D.C. 20036

OF COUNSEL

BAKER & BOTTS  
1701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

DATED: September 10, 1979

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Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing:

Motion of Houston Lighting & Power Company to Compel  
Production by the Department of Justice of Certain  
Drafts of Testimony Prepared by William E. Scott

were served upon the following persons, by hand \*, or by deposit in  
the United States Mail, first class postage prepaid, this 10th day  
of September, 1979.

- |  |  |
|--|--|
| * Marshall E. Miller, Esquire<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555  | Mr. Jerome D. Saltzman<br>Chief, Antitrust and Indemnity<br>Group<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555  |
| * Michael L. Glaser, Esquire<br>1150 17th Street, N.W.<br>Washington, D.C. 20036   | J. Irion Worsham, Esquire<br>Merlyn D. Sampels, Esquire<br>Spencer C. Relyea, Esquire<br>Worsham, Forsyth & Sampels<br>2001 Bryan Tower, Suite 2500<br>Dallas, Texas 75201 |
| * Sheldon J. Wolfe, Esquire<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555  | Jon C. Wood, Esquire<br>W. Roger Wilson, Esquire<br>Matthews, Nowlin, Macfarlane<br>& Barrett<br>1500 Alamo National Building<br>San Antonio, Texas 78205                  |
| Atomic Safety and Licensing<br>Appeal Board Panel<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555                    | * Frederic D. Chanania<br>Office of the Executive Legal Director<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555   |
| * Chase R. Stephens, Supervisor (20)<br>Docketing and Service Branch<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555 |  |

1143 312

Charles G. Thrash, Jr., Esq.  
E.W. Barnett, Esq.  
Theodore F. Weiss, Esq.  
J. Gregory Copeland, Esq.  
Baker & Botts  
3000 One Shell Plaza  
Houston, Texas 77002

R. Gordon Gooch, Esq.  
Steven R. Hunsicker, Esq.  
Baker & Botts  
1701 Pennsylvania Avenue  
Washington, D.C. 20006

\* Roy P. Lessy, Jr., Esq.  
Michael B. Blume, Esq.  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Roff Hardy  
Chairman and Chief Executive  
Officer  
Central Power and Light Co.  
P.O. Box 2121  
Corpus Christi, Texas 78403

G.K. Spruce, General Manager  
City Public Service Board  
P.O. Box 1771  
San Antonio, Texas 78203

Mr. Perry G. Brittain  
President  
Texas Utilities General Co.  
2001 Bryan Tower  
Dallas, Texas 75201

R.L. Hancock, Director  
City of Austin Electric Utility  
P.O. Box 1086  
Austin, Texas 78767

G.W. Oprea, Jr.  
Executive Vice President  
Houston Lighting & Power Co.  
P.O. Box 1700  
Houston, Texas 77001

Richard D. Cudahy, Esq.  
Joseph Gallo, Esq.  
Robert H. Loeffler, Esq.  
Isham, Lincoln & Beale  
1050 17th Street, N.W.  
Suite 701  
Washington, D.C. 20036

Michael I. Miller, Esq.  
David M. Stahl, Esq.  
Martha E. Biggs, Esq.  
James A. Carney, Esq.  
Isham, Lincoln & Beale  
One First National Plaza  
Chicago, Illinois 60603

Don R. Butler, Esq.  
Sneed, Vine, Wilkerson, Selman  
& Perry  
P.O. Box 1409  
Austin, Texas 78767

Jerry L. Harris, Esq.  
Richard C. Balough, Esq.  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767

Joseph B. Knotts, Jr., Esq.  
Nicholas S. Reynolds, Esq.  
Debevoise & Liberman  
1200 17th Street, N.W.  
Washington, D.C. 20036

Don H. Davidson  
City Manager  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767

Jay Galt, Esq.  
Looney, Nichols, Johnson & Hays  
219 Couch Drive  
Oklahoma City, Oklahoma 73102

Knoland J. Plucknett  
Executive Director  
Committee on Power for the  
Southwest, Inc.  
5541 East Skelly Drive  
Tulsa, Oklahoma 74135

John W. Davidson, Esq.  
Sawtell, Goode, Davidson & Tioilo  
1100 San Antonio Savings Building  
San Antonio, Texas 78205

Douglas F. John, Esq.  
Akin, Gump, Hauer & Feld  
1333 New Hampshire Avenue, N.W.  
Suite 400  
Washington, D.C. 20036

1143 313



\* Ronald Clark, Esq.  
Frederick H. Parmeter, Esq.  
Susan B. Cyphert, Esq.  
Energy Section Antitrust Division  
U.S. Department of Justice  
414 11th Street, N.W. #9412  
Washington, D.C. 20004

Morgan Hunter, Esq.  
Bill D. St. Clair, Esq.  
McGinnis, Lockridge & Kilgore  
Fifth Floor  
Texas State Bank Building  
900 Congress Avenue  
Austin, Texas 78701

W.S. Robson  
General Manager  
South Texas Electric Cooperative,  
Inc.  
Route 6, Building 102  
Victoria Regional Airport  
Victoria, Texas 77901

Robert C. McDiarmid, Esq.  
Robert A. Jablon, Esq.  
Marc R. Poirier, Esq.  
Spiegel & McDiarmid  
2600 Virginia Ave., N.W.  
Washington, D.C. 20036

Kevin B. Pratt  
Texas Attorney General's Office  
P.O. Box 12548  
Austin, Texas 78711

William H. Burchette, Esq.  
Frederick H. Ritts, Esq.  
Law Offices of Northcutt Ely  
Watergate 600 Building  
Washington, D.C. 20037

Tom W. Gregg, Esq.  
P.O. Box Drawer 1032  
San Angelo, Texas 76902

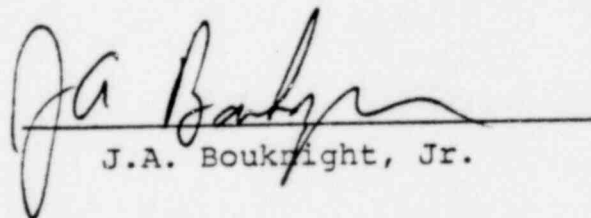
Leland F. Leatherman, Esq.  
McMath, Leatherman & Woods, P.A.  
711 West Third Street  
Little Rock, Arkansas 72201

Paul W. Eaton, Jr., Esq.  
Hinkle, Cox, Eaton, Coffield &  
Hensley  
600 Henkle Building  
P.O. Box 10  
Roswell, New Mexico 88201

Robert M. Rader, Esq.  
Conner, Moore & Corber  
1747 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

W.N. Woolsey, Esq.  
Dyer and Redford  
1030 Petroleum  
Corpus Christi, Texas 78474

Donald M. Clements, Esq.  
Gulf States Utilities Company  
P.O. Box 2951  
Beaumont, Texas 77704

  
J.A. Bouknight, Jr.

1143 314