UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
HOUSTON LIGHTING AND POWER COMPANY, et al. (South Texas Project, Units 1 and 2)	)	Docket Nos. 50-498A 50-499A
TEXAS UTILITIES GENERATING COMPANY (Commanche Peak Steam Electric Station, Units 1 and 2)	)	Docket Nos. 50-445A 40-446A

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

Pursuant to 10 C.F.R. § 2.730(c) of the NRC Rules of Practice the Department of Justice ("Department") respectfully submits its Answer to the Motion of Houston Lighting & Power Company to Compel Production by the Department of Justice of Certain Drafts of Testimony Prepared by William E. Scott ("Motion"), filed September 10, 1979. Houston Lighting and Power Company ("HL&P") has taken Mr. Scott's deposition, has been provided with all documents Mr. Scott will rely on for his testimony and will have the opportunity to cross-examine Mr. Scott during the hearing. For reasons more fully set forth below, the Department urges the Board to deny the Motion.

I. Background

On April 3, 1979, the Department filed its response 1/ to HL&P's second set of interrogatories, dated February 9, 1979, 2/ identifying William E. Scott as a potential expert witness. On June 25, 1979, HL&P requested that the Department update its interrogatory response in anticipation of Mr. Scott's deposition. 3/ On July 11, 1979, the Department promptly provided counsel for HL&P with copies of Mr. Scott's published articles and papers which were in the possession of the Department. In addition, on July 17, 1979, the Department furnished HL&P with all the documents to which it was entitled, that were responsive to a subpoena duces tecum addressed to Mr. Scott.

1/ "Response of the Department of Justice to the Second Set of Interrogatories and Requests for Production of Documents from Houston Lighting & Power Company to the Antitrust Division.

2/ In its Motion HL&P has again challenged the good faith of the Department in providing timely discovery to HL&P. The Department's initial Response to HL&P's Second Set of Interrogatories was delayed because HL&P refused to answer the Department's first set of interrogatories, dated November 22, 1978. Chairman Miller set this matter to rest at the March 20, 1979 Prehearing Conference when he acknowledged that any delay in the discovery phase was attributable to HL&P. See Transcript at 153-55. HL&P's claim that the Department delayed in responding to interrogatory Request 2(e) as it may relate to preliminary drafts of Mr. Scott's testimony is likewise unfounded. The Department has refused to provide such documents on the ground that production of such documents is not required either by the Rules or practice of the Nuclear Regulatory Commission or by the Federal Rules of Civil Procedure.

3/ "First Supplemental Response of the Department of Justice to the Second Set of Interrogatories and Requests for the Production of Documents from Houston Lighting & Power Company to Antitrust Division."

The deposition of Mr. Scott was held on July 17-18, 1979. During the deposition, Mr. Scott stated that he had prepared and sent several preliminary drafts of his proposed testimony to the attorneys for the Department. These preliminary drafts were prepared at the request of the staff attorneys for the Department to assist them in the preparation of this case.

The Department has provided HL&P with all relevant discovery of Mr. Scott as required by the Rules of Practice of the Nuclear Regulatory Commission ("NRC") and the Federal Rules of Civil Procedure. HL&P's discovery of Mr. Scott has included interrogatory responses, document production pursuant to a subpoena duces tecum, production of published articles and papers, and a full two-day deposition. Thus, HL&P's Motion to compel disclosure of the drafts of Mr. Scott's testimony should be denied.

II. Draft Testimony of Expert Witnesses Is Not Discoverable Absent a Showing of "Substantial Need."

Discovery regarding an expert witness is governed by Section 2.740 of the NRC Rules of Practice, which is similar to Fed. R. Civ. P. 26. 4/ Fed. R. Civ. P. 26(b)(4)(A)(i) states:

4/ The NRC has consistently recognized that its discovery rules are to be interpreted harmoniously with the Federal Rules of Civil Procedure. The fact that the NRC Rules of Practice do not specifically incorporate Rule 26(b)(4), but only Rule 26(b)(3), does not affect the relevance of the Federal Rules of Civil Procedure to this proceeding. See General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 N.R.C. 461 (1978).

> A party may through interrogatories require any other party to identify each person whom [it] expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

The Department has already fully complied with this portion of Rule 26 by identifying Mr. Scott as an expert, stating the subject matter of his expected testimony, stating the substance of the facts and opinions of his expected testimony, and furnishing a summary of the grounds for each of Mr. Scott's opinions both in its initial response to HL&P's interrogatories on April 3, 1979, and in the Department's supplemental response of July 13, 1979. Both of these documents were produced prior to the taking of Mr. Scott's deposition.

Rule 26(b)(4)(A)(i) permits discovery of the aforementioned items only through interrogatories. Rule 26(b)(4)(A)(i) neither requires nor contemplates that any documents of an expert witness be produced. 5/ Accordingly, HL&P's request for copies of Mr. Scott's draft testimony does not fall within the ambit of Rule 26(b)(4)(A)(i).

The discovery of documents prepared by expert witnesses in anticipation of litigation or trial is governed by Fed. R.

5/ "Under the Rule [26(b)(4)(A)(i)] as framed, [the information to be elicited from the expert] must be sought by interrogatory rather than by deposition . . . . If that is insufficient, the party needing the information may move the court for permission to take the deposition of the expert [under Rule 26(b)(4)(A)(ii)]." 4 Moore's Federal Practice ¶ 26.66[3] at 26-482 n.3.

Civ. P. 26(b)(3). Under Rule 26(b)(3), "documents . . . prepared in anticipation of . . . trial by or for another party" may be discovered "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Courts have thus refused to require production of an expert's report absent a showing of necessity. See, e.g., United States v. 145.31 Acres, 54 F.R.D. 359 (M.D. Pa. 1972). 6/

Courts and administrative agencies have broad discretion in determining whether the circumstances justify disclosure pursuant to Rule 26(b)(3). Generally, owever, "the factors to be taken into account in the exercise of [that] discretion [are] the importance of the information sought in the preparation of the case of the party seeking it, and the difficulty it will face in obtaining substantially equivalent information from other sources if production is denied." 4 Moore's Federal Practice ¶ 26.63[3] at 26.419-42 (footnotes omitted) ("Moore's"). In order to demonstrate "substantial need," the party seeking discovery must show either

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6/ The only reported case which has dictum to the contrary is In Re IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39 (N.D. Cal. 1977) (Motion to compel production was denied on ground of being overly broad. There is no indication that "drafts of testimony" were considered by the court to be among those documents being sought.)

that "the evidence in the case is wholly or largely in the control of one of the parties" or that "the documents . . . sought are directly related to the subject matters of the suit." 4 Moore's ¶ 26.64[3] at 26-419 n.7.

In its Motion HL&P has made no claim nor provided any justification to support a finding of "substantial need." The Department is not wholly or largely in the control of the evidence in the case. Indeed, the engineering facts regarding the applicants are peculiarly within the exclusive control of HL&P. HL&P obviously exercises considerably more control over engineering evidence than does the Department. Thus, even if HL&P is not granted access to Mr. Scott's draft testimony, HL&P can easily obtain "substantially equivalent information from other sources. . . ." 4 Moore's ¶ 26.64[3] at 26-419-42. 7/

Finally, HL&P's Motion is bereft of any suggestion that if production is denied HL&P will be "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). As applied to the statements of potential witnesses this portion of Rule

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7/ HL&P's Motion does not suggest that the Department has endeavored to conceal the relevant facts of this case. The Motion is framed only in terms of seeking Mr. Scott's opinions, not any underlying facts.

26 "usually turns on whether the party requesting production of the statements can question the witness himself. This in turn depends first upon the availability of the witness and his willingness to give a statement, and second on the memory of the witness." 4 Moore's ¶ 26.64[3] at 26-421 n.8. Thus, where a witness such as Mr. Scott has been the subject of interrogatories, deposition and document production, a motion to require additional discovery will ordinarily be denied. See, e.g., Boyce v. Visi-Flash Rentals Eastern, Inc., 22 Fed. R. Serv. 2d 1445 (D. Mass. 1976); United States v. Real Estate Board of Metropolitan St. Louis, 59 F.R.D. 637 (E.D. Mo. 1973). 8/

HL&P has neither alleged nor shown any inadequacies in Mr. Scott's responses during his two-day deposition. Absent an allegation and a showing that existing discovery devices are inadequate, it would be inappropriate to mandate production of further documents from Mr. Scott. See Tinder v. McGowan, 15 Fed.R. Serv. 2d 1608 (W.D. Pa. 1970). Finally, the possibility that Mr. Scott's draft testimony might yield useful impeachment information clearly does not warrant

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8/ Production has been required if the document is unique and cannot be duplicated through deposition or interviews. Uniqueness may exist, for example, as to a photograph of the scene of an accident where the scene may have changed. See, e.g., Scuderi v. Boston Insurance Co., 34 F.R.D. 463 (D. Del. 1964). No such uniqueness exists regarding Mr. Scott's draft testimony.

production of the drafts pursuant to Rule 26(b)(3). Cf. United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga. 1976). See generally 4 Moore's ¶ 26.64[3] at 26.433 n.14 ("Most courts . . . have held that a mere suspicion of impeaching material is not sufficient to justify ordering the production of witness statements.") (case citations omitted).

On the few occasions on which the NRC has addressed this specific issue, it has adhered to the legal precepts outlined in the above cited cases. In the Alabama Power Company proceeding 9/ the Board held that the Department was not required to produce draft materials of an expert witness under Section 2.740(b)(2) of the NRC Rules of Practice. 10/ Chairman Glaser ruled that in the absence of a showing of "compelling need," opposing counsel could sufficiently inquire into differences between draft and final versions of an exhibit on cross-examination without the production of the draft exhibits. 11/

9/ Alabama Power Company (Joseph M. Farley Plant, Units 1 and 2), Docket Nos. 50-348A, 50-364A.

10/ Id. at 1933 et seq. (transcript of December 18, 1974).

11/ Id. at 1934, 1944. Chairman Glaser stated that:

> I consider this rule to be similar to Federal Rule 26(b)(3) of the Rules of Civil Procedure, and the same exact requirement is there; and drawing on my own experience, I know many times we've been allowed to inquire into the substance of notes taken by parties without actually being able to obtain the notes themselves, they being protected.

Id. at 1944.

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In Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-443, 50-444, LBP-75-28, 1 NRC 513 (1975) ("Seabrook"), the Board expressly denied a motion to compel discovery of certain draft testimony on the ground that "it appeared to be in the form of trial preparation material of counsel." 1 NRC at 514. In attempting to distinguish Seabrook, HL&P asserts that "the basis upon which the Board reached a different decision [than that sought by HL&P] is unclear." (Motion at 7). What is unclear is HL&P's attempt to distinguish Seabrook, not the Seabrook holding itself. HL&P seems to argue that Seabrook is inapplicable because the Board here "has already determined that documents prepared by a testifying expert in preparation for trial are subject to discovery." (Id.) HL&P's reliance upon the June 1, 1979 Prehearing Conference ruling in support of this assertion is, however, misplaced. The only issue decided by the Board at that time was that "working papers" 12/ of a testifying expert were producible. The term "working papers" does not include drafts of testimony, and HL&P has not cited any authorities to the contrary. Indeed, the Department's research has not disclosed any judicial cases in which draft testimony was even sought, much less required to be produced.

12/ Transcript at 414.

Protection of drafts of testimony from discovery would not be inconsistent with the Board's June 1, 1979, ruling that opposing counsel has the right to obtain the facts and data the expert is relying on for his testimony. The Department has provided or identified to HL&P all material relied upon by Mr. Scott to date and recognizes its obligation to provide or identify any additional material which Mr. Scott may rely on for the testimony he ultimately gives in this proceeding. HL&P has deposed Mr. Scott and will have the opportunity to cross-examine him on his conclusions and the manner in which he arrived at those conclusions. 13/

III. As a Matter of Policy, Draft Testimony of an Expert Witness Should Not Be Producible Absent Special Circumstances.

The purported justification for seeking the production of Mr. Scott's draft testimony is that it will enhance HL&P's cross-examination of Mr. Scott. (Motion at 5.) The Department respectfully submits that draft testimony is an inherently unsuitable tool for cross-examination and that as a matter of policy the NRC should generally refuse to allow its use for that purpose. Because draft testimony is not an appropriate subject for cross-examination, the

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13/ See Statement of Chairman Miller at page 121-22 of the transcript of the June 21, 1978 prehearing conference in this proceeding quoted at 16, infra.

NRC should generally not permit discovery of draft testimony absent special circumstances. 14/ Moreover, disclosure of an expert's preliminary draft testimony will impair the process by which expert testimony is prepared and presented to the Commission.

A. Disclosure of Preliminary Draft Testimony Will Not Enhance Cross-Examination of Expert Witnesses.

An expert witness is charged with the responsibility of formulating an expert opinion regarding the facts of a particular case. Such a witness is different from a "fact" witness, whose sole responsibility is to give an accurate rendition of factual circumstances relevant to the case which occurred generally before he contemplated any role as a witness. In contrast, an expert witness is responsible for explaining the significance of the facts in a case. The function of "fact" witnesses is essentially reporting, whereas the role of the expert is interpretive.

In order to discharge his responsibilities, the expert witness ordinarily undertakes an evaluative process that entails a continuous, intensive examination of incomplete factual data during different stages of discovery. Thus, the expert is constantly absorbing new

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14/ NRC Rules of Practice, 10 C.F.R. § 2.743(b) require testimony to be filed in written form unless otherwise ordered by the Board. This necessarily contemplates that drafts of the testimony will be prepared. Under HL&P's interpretation of the Board's June 1, 1979 ruling, all parties would have to provide copies of each version of each witnesses' draft whenever opposing counsel makes that a part of his discovery request.

information, and attempting to reconcile this information with his earlier conclusions. At some point during this evolutionary process the expert's factual base will meld with his professional judgment, and a set of final conclusions will emerge.

In the course of formulating his testimony, the expert will customarily, perhaps even necessarily, consider and reject a host of different tentative conclusions and means of presenting his conclusions. In order to facilitate his thought processes the expert witness may decide to record some or all of these tentative conclusions as they emerge during the analytical process. These tentative conclusions may not, however, even accurately reflect the thoughts of the expert at any particular stage in the analytical process because they are understood by the expert to be subject to change upon further analysis. The mere fact that the expert has recorded any particular set of these tentative conclusions does not, then, necessarily mean that he endorsed them in the past or that he will endorse them in the future. The only opinions which are necessarily endorsed by the expert are those that he recognizes as being final conclusions which are reflected in his final testimony. To require an expert to defend each of his tentative conclusions

merely because he has reduced them to writing would mean that he would have to defend and explain conclusions which even when recorded he may not have endorsed. He would have to defend every subsequent conclusion to justify any revision he may have later made regardless of whether his final testimony incorporates any of those conclusions.

There is no necessary or probative relationship between the tentative and final conclusions. Because of their ephemeral character, tentative conclusions would not be an appropriate tool for testing final conclusions. The validity of final conclusions reached by an expert stand by themselves and should be tested by the underlying facts of the litigation, not by draft testimony. Since the strength of the final conclusions can adequately be tested by interrogatory, deposition and cross-examination at trial, it would serve no useful purpose to go behind his recorded testimony and delve into the recesses of the expert's mind as reflected in his preliminary draft testimony. Allowing the use of draft testimony will thus divert attention from the central issues of the case into tangential matters. Although draft testimony might be rich with opportunity to embarrass and frustrate the expert witness, it is not likely to yield anything of genuine probative value.

Permitting discovery of draft testimony would be tantamount to isolating a particular step in the expert's thought process, with the attendant risk of exaggeration. What is important at trial are the conclusions expressed by the expert witness in his final testimony, not the manifold preliminary conclusions which the expert may have conceived in the course of formulating his final conclusions.

B. Disclosure of Preliminary Draft Testimony Will Impair the Preparation of Expert Testimony.

Since it is common for expert witnesses to record tentative conclusions in order to enhance their analyses, requiring the disclosure of draft testimony would constitute a serious intrusion into the evaluative process commonly undertaken by expert witnesses. This would likely inhibit the manner in which experts conduct their analysis because they would be apprehensive that at some future point it would be necessary to identify and defend under cross-examination each thought which they conceived during their analysis. The chilling effect of disclosure would manifest itself in a deterioration in the quality of expert opinion, which would redound to the detriment of the fact-finding process at trial.

Requiring disclosure of draft testimony would also impair the ability of attorneys to present their evidence and to consult with their expert witnesses. The attorney's role with respect to draft testimony is no different than it is with

respect to oral testimony. Draft testimony of an expert witness serves the same function as do oral testimony preparatory conferences. If oral testimony were to be used, it could not seriously be contended that opposing counsel has the right to participate in any or all of the preparatory conferences that an attorney has with his own expert witness. Since draft testimony stands on the same footing as oral consultations, the long-standing rule prohibiting disclosure to opposing counsel is equally applicable. A contrary rule would simply cause attorneys to avoid the use of written testimony or to undergo the charade of taking verbatim notes of their conferences with experts so that the expert's preliminary analysis would not be subject to discovery. The end result would be deterioration in the quality of expert testimony received at NRC hearings.

Finally, the use of draft testimony will consume enormous amounts of valuable judicial and administrative resources because the avenues of inquiry are likely to be limitless. This will result in endless cross-examination with no promise of evidentiary benefit. Indeed, in this very proceeding, the Board, for similar reasons, has ruled that the testimony of the witnesses will be "live" rather than prefiled in written form as called for in section 2.743(b). Transcript of First Prehearing Conference, June 21, 1978 at 120-23. Thus, when the NRC Staff requested that the testimony of

expert witnesses be filed in written form in advance of the hearing, Chairman Miller made the following response:

> CHAIRMAN MILLER: We have found in these antitrust hearings of this kind almost everybody is an expert. People sitting beside you are experts. The man on the stand is an expert and the man opposing him next week is an expert.
>
> Remember, these are all public utility men that have been in the business for years.
>
> Our experience is, when you get into written direct testimony you prolong very significantly the cross-examination. You get 50 or 100 pages of direct testimony and counsel starts off, the gospel for the day is page 7 and he goes on for a week.
>
> Then he goes to page 14, then he comes back to 9, and I tell you, that written testimony on the part of engineers, utility experts and economists, we found that -- that why we exchange of summaries. [sic] That will enable you to know what in essence he's going into.
>
> You will have discovery. If you want to know, take his deposition.
>
> You will have a witness list in advance. We want you to give your witness list as you go along. In other words, don't wait until the end.
>
> Now, he's going to testify, fine.
>
> Take his deposition. You can ask him a lot of questions without bothering your mother, so to speak, that you are not going to want to ask here when you have many under oath. That is the reason for depositions. They aren't used nearly enough in our judgment.

Surely, HL&P is not now contending that the Board, in its June 1, 1979 ruling reversed sub silentio its ruling of

June 21, 1978 and opened up discovery to include drafts of testimony. Such an interpretation would cause an even greater evil than that which the Board sought to prevent, i.e., prolonged and fruitless cross-examination conducted on the basis of tentative conclusions instead of final testimony.

IV. Conclusion

For all of the foregoing reasons, the Department respectfully requests this Honorable Board to deny the Motion by HL&P to compel the production of draft testiomony of the Department's engineering expert witness, William E. Scott. Due to the significance of the issue before the Board, the Department also requests the opportunity for oral argument on this matter.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TEXAS UTILITIES GENERATING COMPANY (Comanche Peak Steam Electric Station, Units 1 and 2)	)	Docket Nos. 50-445A 50-446A

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing ANSWER OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO THE MOTION OF HOUSTON LIGHTING & POWER COMPANY TO COMPEL PRODUCTION BY THE DEPARTMENT OF JUSTICE OF CERTAIN DRAFTS OF TESTIMONY PREPARED BY WILLIAM E. SCOTT has been made on the following parties listed hereto this 26th day of September 1979, by depositing copies thereof in the United States mail, first class, postage prepaid.

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