UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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



RESPONSE OF THE PUBLIC UTILITIES BOARD
OF THE CITY OF BROWNSVILLE, TEXAS TO
THE PETITION OF HOUSTON LIGHTING & POWER COMPANY

The Public Utilities Board of the City of Brownsville, Texas ("Brownsville"), in accordance with the Appeal Board's Order of November 14, 1979, hereby files its response to the Petition of Houston Lighting & Power Company for Directed Certification and Review of the Licensing Board's Order Denying Motions for Summary Decision, filed November 9, 1979. If the Appeal Board determines to direct certification of the issue, it should affirm the Licensing Board's refusal to allow preclusive effect against Central

Power and Light Company ("CP&L") and Central and South West Corporation ("C&SW") of findings of fact made in West Texas Utilities Company, et al. v. Texas Electric Service Company, et al., 470 F. Supp. 798 (N.D. Texas, 1979), appeal docketed No. 79-2677 (5th Cir.).

## I. APPLICATION OF COLLATERAL ESTOPPEL AGAINST ONE OR TWO PARTIES HERE WILL ONLY COMPLICATE THE PROCEEDING WITHOUT ANY OF THE BENEFITS THE DOCTRINE IS SUPPOSED TO PROVIDE

Brownsville's interest, in filing this Response, is to assure that the hearing in this case is not complicated by an attempt to apply collateral estoppel against one party.

Since Brownsville was not a party to the District Court proceeding, and is not in privity with any party there, it cannot be bound by the findings of the District Court. Parklane Hosiery Co., Inc. v. Shore, ___ U.S. ___, 99 S. Ct. 645, 653 n. 7 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).

Brownsville plans a presentation on a number of antitrust issues in this proceeding. 1/ Central Power & Light is a licensee, and will remain throughout this proceeding, even if precluded from relitigating certain issues affirmatively as to HL&P. C&SW's interests and resources

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1/ This was the basis of its participation, as summarized by the Board's Order Granting Intervention, dated September 19, 1978.

> PUB contends that CP&l should be permitted interstate operation, and that the action of HL&P and others in refusing to deal with interstate electric utilities amounts to anticompetitive conduct inconsistent with Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), and with Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). PUB also contends that the actions of CP&L, HP&L and others have denied it access to the bulk power exchange market, low-cost preference power, transmission and coordination, as well as efficient generation including nuclear generation. As relief, PUB asks that the South Texas operating license be conditioned to mandate continued interconnection, prohibit refusals to interconnect or to transmit power, interstate or intrastate, to coordinate, pool and share reserves, and to require CP&L to make a good faith offer of participation in nuclear facilities. Order at 2.

will continue to be involved through its affiliate CP&L throughout this proceeding. H&LP is also a licensee, and its burden of litigation will not be substantially reduced by application of collateral estoppel.

The Licensing Board correctly described the complications that would ensue were it to apply collateral estoppel only against CP&L and C&SW.

> Inasmuch as there will be an antitrust evidentiary hearing in this proceeding covering a wide range of complex issues among multiple parties, we see no advantage in applying collateral estoppel or res judicata to HL&P alone. On the contrary, a good deal of confusion and lost time would probably result from an effort to identify evidence which could be admitted as to some parties but not others. The activities under the license of all of the licensees will be analyzed in some detail to determine whether they will create or maintain a situation inconsistent with the antitrust laws. If the Department and the Staff are not collaterally estopped by the court action, as we hold, they may be assisted in presenting their evidence by having CP&L present an affirmative case. Order at p. 13.

The authorities cited by the Licensing Board, discussed below, support the Board's basic analysis. Without providing a full-scale analysis, Brownsville will summarize

the four major legal arguments in the Order, with some additional authority, argument and comments, and will rebut a few major arguments made by HL&P.

## II. THE BOARD CORRECTLY REFUSED TO APPLY COLLATERAL ESTOPPEL BECAUSE THE ISSUES AND LEGAL STANDARDS BEFORE THE COMMISSION UNDER §105(c) OF THE ATOMIC ENERGY ACT ARE NOT IDENTICAL WITH THE ISSUES AND STANDARDS THAT WERE APPLIED BY THE DISTRICT COURT IN RULING ON THE ALLEGED VIOLATION OF §1 OF THE SHERMAN ACT

The Licensing Board amply explained why the scope of its investigation under §105(c) of the Atomic Energy Act, 42 U.S.C. §2135(c), covers a range of activities considerably beyond the scope of a violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Order at 8-11, and authorities cited therein.

This principle has sometimes been discussed as whether the second suit is under a different statute from the first. E.g., United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125, 128-30 (6th Cir. 1975), cited in Alabama Power Co., (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 213, 214, rem. on other grounds, CLI74-12, 7 A.E.C. 203 (1974). In this

instance there are two statutes, with the Atomic Energy Act's antitrust review being considerably broader.

The principle is more precisely articulated, as the Licensing Board did in its order, as a question of whether legal standards in the two proceedings differ. As the Fifth Circuit said, in a case relied on by HL&P at p. 10 of its Response for the contrary proposition:

> "There are circumstances when the same historical factual circumstance may be involved in two actions, but the legal significance of the fact differs in the two actions because different legal standards are simultaneously applicable to it. This is a very narrow exception to the rule with respect to identity of issues, however, and is applicable only when there is a demonstrable difference in the legal standards by which the facts are evaluated. See Moore's Federal Procedure ¶0.443(2)."

James Talcott, Inc. v. Allahabad Bank, 444 F.2d 451, 459 n. 8 (5th Cir.) (citation omitted), cert. denied sub nom. City Trade & Industries, Ltd. v. Allahabad Bank, Ltd., 404 U.S. 940 (1971).

## III. THE FACTS AS TO WHICH HL&P ASSERTS COLLATERAL ESTOPPEL EFFECT EMBODY THE LEGAL STANDARDS OF §1 OF THE SHERMAN ACT

HL&P admits to the principle that when the legal standards of two statutes are different, it may be appropriate

not to apply collateral estoppel. It disputes the Board's application, asserting the principle should not apply to facts. HL&P Petition at 10-12. Yet most, if not all, of the facts HL&P has asserted as a basis for collateral estoppel, HL&P Petition at 8, contain within them legal standards based on §1 of the Sherman Act, 15 U.S.C. §1. For example, finding (vi), that HL&P and TESCO acted reasonably in opposing interstate commerce, is an ultimate fact derived from an application of the "rule of reason" under the Sherman Act. See 470 F. Supp. at 831-32. Finding (i), that HL&P and TESCO did not engage in concerted action, is again a technical "legal fact," since the Court found there were contracts limiting sales to intrastate commerce, 470 F. Supp. at 818, but that they were, in the District Court's view, not concerted action within the Sherman Act, because the parties could cancel the contracts. Id.

Likewise, the finding of no competition in any relevant market (finding iii), was explicitly tailored to §1 of the Sherman Act, and the Court refused to consider what it felt to be a different definition under Section 2. 470 F.2d at 819. Brownsville notes that a different standard for

defining the relevant markets has been applied by this Commission. E.g., Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-452, 6 NRC 892 (1977). Further, several of HL&P's asserted facts rely on a notion of competition (findings (ii), (iii), (iv), and (v), and finding i as well, since it derives in part from a determination that "concerted action" must involve anticompetitive intent, 470 F.2d at 817) that is shaped by §1 of the Sherman Act. In addition to the District Court's limitation of its discussion on competition derived from a limited definition of relevant market, the Court apparently omitted consideration of potential competition, which the Licensing Board would consider under the §105(c) standard. It also dismissed as de minimis under §1 of the Sherman Act competition that it did find to exist. 470 F.2d at 820, 822.

Thus, if the facts that are asserted by HL&P had been given collateral estoppel effect by a Licensing Board, they would have limited the Board to a consideration based on the District Court's interpretation of §1 of the Sherman Act. This would be a derogation of the Licensing Board's statutory authority and duty under §105c of the Atomic Energy Act.

IV. BECAUSE THERE ARE NUMEROUS NEW PARTIES IN THIS PROCEEDING, INCLUDING TWO GOVERNMENT AGENCIES, COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED

The Licensing Board discussed the difficulties that an application of collateral estoppel could create for the numerous new parties before the Commission, including the governmental parties as acting in the public interst (NRC Staff and the Department of Justice) and parties such as Brownsville who seek to raise additional antitrust issues, also in the public interest. Order at 12-13. Brownsville has discussed the practical policy implemented by the Licensing Board's order at pp. 2-4 above.

In terms of precedent, this principle alone has defeated application of collateral estoppel in City of Richmond v. United States, 422 U.S. 367, 373 n. 3 (1975). The Court refused to give collateral estoppel effect to a prior Fourth Circuit holding that there was no discrimiantory purpose behind an annexation of territory into the City of Richmond. The Court found participation in the later suit, but not in the former, of the United States and the Attorney General controlling. Even though other parties had par-

ticipated in the first suit, there was no estoppel as to them either. Presumably the participation of the Government invested the suit with a public interest that was not to be precluded by a previous private suit. In the present proceeding, the participation of the Department of Justice and the NRC Staff, as well as the public nature of any Commission proceeding, insulate it and all its parties from the application of collateral estoppel.

The same conclusion was reached by the Board in the Prehearing Conference Order No. 1 in Florida Power & Light Company (South Dade Plant), NRC Docket No. P-636-A (July 29, 1976) (unpublished order). 1/ There the Applicant sought to have certain allegations stricken on the basis of a finding in District Court of no violation of §1 of the Sherman Act in a case involving one of the intervenors before the Board. As to the intervenors, they had never had an opportunity to present evidence and arguments, so that Board determined that due process prohibited estoppel. South Dade Order at 5. NRC Staff could not in any event be restricted in its right to have the matter litigated in the public interest. Id.

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1/ This Order was discussed briefly before this Board in the March 20, 1979 Prehearing Conference in the South Texas and Comanche Peak cases. Tr. pp. 121-26.

Furthermore, the factual and legal issues before the Board and the District Court were held to be so different that it was inappropriate to preclude even the intervenor who had participated in the court suit. Id. at 5-6. The Board determined that it had a statutory responsibility to examine the entire situation, not just the single violation alleged before the court. Id. at 6.

This South Dade decision arose in a very similar context to the present Petition, and serves as further precedent for the Licensing Board's action. 1/

V. COLLATERAL ESTOPPEL SHOULD BE HAVE BEEN APPLIED BECAUSE THE DISTRICT COURT MADE FINDINGS NOT ESSENTIAL TO ITS DECISION, AND BECAUSE THE NUCLEAR REGULATORY COMMISSION'S AUTHORITY UNDER §105c OF THE ATOMIC ENERGY ACT SHOULD NOT BE INFRINGED

As the Licensing Board pointed out, some of the findings of the District Court were not essential to its

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1/ At page 14 of its Petition, HL&P argues that this principle would preclude any application of collateral estoppel before the Commission since Commission Staff participate only in Commission proceedings. This is an oversimplification. If a matter is tangential to the governmental party's responsibilities, collateral estoppel would likely be appropriate; if the matter is central, it might well not be.

decision. Order at 14-15. The Board referred primarily to a number of conclusions of law apparently based on regulatory statutes.

The Licensing Board did not decide whether the District Court had exceeded its jurisdiction. Id. at 15. Rather, since "only the NRC is empowered to make the initial determination under Section 105c whether activities under the license would create or maintain a situation inconsistent with the antitrust [laws], and if so what license conditions should be required as a remedy[,]" collateral estoppel did not apply. Id.

Similar reasoning was employed by Judge Learned Hand in Lyons v. Westinghouse Electric Corporation, 222 F.2d 184 (2nd Cir.), cert. denied, 350 U.S. 825 (1955), in rejecting the possible collateral estoppel effect of state court findings on federal antitrust claims.

> "The grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that make up the wrong." 222 F.2d at 189-190.

The Appeal Board itself articulated this principle in Toledo Edison Company, (Davis-Besse Nuclear Station, Units 1-3), ALAB-378, 5 N.R.C. 557, 561 (1977) (relied on for the contrary principle by HL&P at Petition, p. 12). The Appeal Board said:

> "It is quite true that 'when the legislative intent is to vest primary power to make particular determinations concerning a subject matter in a particular agency, a court's decisions concerning a subject matter may be without binding effect upon that agency.' 2 [K.] Davis, [Administrative Law Treatise], §18.12 at pp. 627-38 [1958]."

The Appeal Board also indicated it was proper to look for a "legislative purpose that this Commission resolve such an issue independently of a court's resolution of the same issue in an antitrust proceeding before it involving the same parties." Id. 1/

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1/ On the facts in Toledo Edison, where the issue was whether a law firm had a conflict of interest that would preclude it from representing a party before the Commission, the Appeal Board did apply collateral estoppel. This issue was "peripheral." Order at p. 17.

VI. IT WOULD NOT BE IN THE PUBLIC INTEREST, UNDER THE CIRCUMSTANCES OF THIS PROCEEDING, FOR THE LICENSING BOARD TO APPLY COLLATERAL ESTOPPEL

The Licensing Board's discussion on this point presents the Commission's antitrust review authority as invested with a particular public interest, especially since it deals with incipient situations as well as past events. Order at 16-17.

To Brownsville, a significant factor is that application of collateral estoppel here would hinder the Commission in its duty to take all the evidence. This issue was discussed at length in one of the key precedents before this agency on the issue of collateral estoppel.

> "[T]he Commission and this Board have the positive duty to accept and hear all relevant evidence. It makes no difference whether that evidence pertains to past or present practices of the Applicant (whether or not connected to nuclear generating plants), to contracts approved by other state and federal regulatory agencies, or to items which have previously been the subject of litigation in other forums. By receiving evidence on such matters, we would in no way be usurping the function of other governmental bodies, which are not charged with any responsibilities under this Act. Nor would we be sanctioning the relitigation

> of past cases, since there has never been a past case raising the issue spelled out in Section 105c."

Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-73-5, 6 A.E.C. 85, 86 (1973) (emphasis in original), aff'd 7 A.E.C. 210, vacated and remanded on other grounds 7 A.E.C. 203 (1974).

HL&P argues that the logic of the Licensing Board's decision would make it impossible for collateral estoppel ever to apply to the Commission's antitrust review of nuclear licenses. Petition at 5, 7, 9. We do not think the opinion has to be read that broadly. While it may well be that Congressional intent was to allow the Commission to determine independently whether and how to prevent a situation inconsistent with the antitrust laws, under some circumstances a Licensing Board might appropriately refuse to reconsider some fact established in a prior ligitation. Under the circumstances here, however, the focus of the District Court case is too different for it to affect the much broader NRC case. Just as important, the facts HL&P asserts are too broad. They are intertwined with legal conclusions and qualifications that should not be imposed on the Licensing

Board. In part this is the result of the style in which the District Court approched the task of discussing the facts and making findings. This is evidenced by the fact that HL&P did not quote directly simple statements of the facts from the District Court opinion, but was obliged to present as its facts one-sentence summaries of two and three page sections of the Court's discussion.

In another situation, it might well be possible to show certain limited facts clearly and properly decided that could be adopted by the Commission on the basis of the collateral estoppel doctrine.

## VII. THE APPLICATION OF COLLATERAL ESTOPPEL INVOLVES A CERTAIN MEASURE OF DISCRETION

HL&P argues that there is no discretion in applying collateral estoppel. "When the elements of collateral estoppel are present, ... the NRC must apply collateral estoppel, just as any other administrative agency or court." Petition at 14. The cases it cites do not support this statement; they are only examples of specific situations where collateral estoppel was appropriate. The cases cited by the Licensing Board, and by Brownsville in this Response, demonstrate a range of situations in which it has been found

appropriate not to apply collateral estoppel. Clearly discretion to apply collateral estoppel is not unfettered, but a decision to proceed for public policy reasons, or because of changed circumstances, 1/ or because one of the criteria of collateral estoppel is absent, does require the exercise of judgment. As a general rule, "flexibility rather than technical, procedural specificity is the keynote in applying res judicata in administrative proceedings ...." Gordon County Broadcasting Co. (WCGA) v. FCC, 446 F.2d 1335, 1338 (D.C. Cir. 1971). 2/

CONCLUSION

For the foregoing reasons, if the Appeal Board determines to direct certification of the issue at this time, it should affirm the Licensing Board's decision, under the circumstances of this case, not to give collateral estoppel effect to the fact issues delineated by Houston Lighting and Power Company as decided against Central Power & Light in West

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1/ See Commissioner v. Sunnen, 333 U.S. 591 (1948).

2/ On the facts of this case, the reviewing court decided the Federal Communications Commission had not abused its discretion in applying res judicata.

Texas Utilities Co. v. Texas Electric Service Co., 470 F. Supp. 798 (N.D. Tex. 1979).

Respectfully submitted,

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