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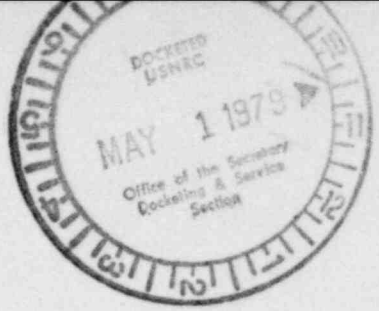

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
HOUSTON LIGHTING AND POWER CO., 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)	)	

TUGCO'S REPLY TO ANSWERS TO ITS MOTIONS FOR DISMISSAL OF CSW AND OTHER RELIEF

I. Background

On April 3, 1979, TUGCO filed its motion in the South Texas proceeding for an order barring Central Power & Light Company from seeking to obtain any relief inconsistent with the District Court decision and for summary disposition in favor of TUGCO and against Central Power & Light Company. Also on April 3, 1979 TUGCO filed its motion in the Comanche Peak proceeding to dismiss Central and Southwest, et al., as a party intervenor, or for summary disposition, and for steps leading to termination of that proceeding.

Central Power and Light Company and Central and Southwest Corporation, et al (hereafter collectively "CSW") have filed a combined answer to TUGCO's motions in both proceedings (and to corresponding motions of Houston Lighting and Power Company,

("HL&P") and the City of Austin). CSW's answer was received on April 23, 1979, which comports with the revised schedule provided in the Board's April 13, 1979 order.

Also on April 23, 1979 we received answers from the Department of Justice and Tex-La. We did not receive the answers of the NRC Staff and Brownsville until April 24, 1979.

Mindful of the Board's enjoinder that replies should be brief ones, we have not endeavored to address every point in each answer which is not well taken. We stand upon our motions and our earlier memorandum of points and authorities, and urge this Board not to accept the characterizations of our arguments by the other parties without comparing what we actually said.

We focus our reply on CSW's answer, since it is CSW whom TUGCO seeks to have dismissed and the views of the other parties are essentially advisory on that dispute between the two parties.

II. Summary Decision

Our first point is that CSW has not countered TUGCO's motion for summary disposition with the requisite statement of material facts contended to be in dispute between TUGCO and CSW in Comanche Peak. (10 C.F.R. §2-749(a) and (b)). Hence, the facts found by the District Court, having not been controverted by CSW, are to be deemed admitted. (10 C.F.R. §2-749(a)). Since the party opposing summary decision against him may not rest upon mere allegations or denials in his answer, but must set forth specific facts showing a genuine dispute of fact, and since no such specific answer was filed, the decision sought

dismissing CSW in Comanche Peak should be rendered. (10 C.F.R. §2.749(b)). Moreover, CSW did not invoke 10 C.F.R. §2.749(c), so it may not now request a continuance to supply affidavits or otherwise seek to be excused from the requirement to address the matter of showing a genuine dispute. Thus, in accordance with 10 C.F.R. §2.749(d), this Board should render summary decision in favor of TUGCO and against CSW and dismiss CSW from Comanche Peak.

Res Judicata

Our second point is that nowhere in the answer of any party to the Comanche Peak proceeding are the three principal cases relied upon by TUGCO regarding the application of res judicata to CSW in Comanche Peak[1/] distinguished. Those cases are: Williamson v. Columbia Gas and Electric Company 186 F.2d 464 (3rd Cir. 1950) cert. den. 341 U.S. 941 (1951); Norman Tobacco and Candy Company v. The Gillette Safety Razor Company 255 F.2d 362 (5th Cir. 1961); and Expert Electric Inc. v. Levine 554 F.2d 1227 (2nd Cir. 1977), cert. den. 434 U.S. 903 (1977). These authorities are discussed at pages 9 thru 11 in TUGCO's memorandum of points and authorities dated April 3, 1979. In contrast with United Shoe Machinery v. U.S., 258 U.S. 451 (1922) which

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1/ Brownsville is a party only in South Texas. Brównsville's discussion of one of the three, Williamson v. Columbia Gas & Electric, (PUB answer at 38, fn. 1/) simply does not deal satisfactorily with the application of res judicata to CSW, in attempting to argue that because the government is not barred, everyone should be treated like the government and "cloaked with the public interest" who for the moment appears to side with the government.

relates to antitrust enforcement by government agencies, those cases reveal a fundamental difference as to res judicata when private antitrust enforcement is involved. Simply stated, the law is that a private plaintiff is barred by res judicata when he seeks relief based on the same facts in the second action having lost the first. Under the authorities we rely on, CSW is barred by res judicata and must be dismissed.

The authorities discussed by CSW (answer at 28) do not answer the question of the res judicata effect on CSW of the District Court decision. In fact, they confirm that different considerations of public policy apply to government agencies as antitrust litigants than to private litigants. Thus, Sam Fox Publishing Company v. U.S. 366 U.S. 683 (1961) is to the effect that, just as the government is not bound by private antitrust litigation to which it is a stranger, private parties similarly situated (i.e., in cases to which they are strangers) are not bound by government litigation, and hence, not being bound by the outcome, may not intervene. It is wholly consistent with the Court's reasoning in Sam Fox to add that private parties are of course bound, indeed barred, by private antitrust litigation as to which they were, far from strangers, the instigators. CSW should not be permitted to tag along in subsequent government antitrust litigation to obtain essentially the same relief based on the same alleged grievances simply because this Board may decide the government agencies are not precluded.[2/]

2/ CSW seems to argue that because there are some different parties in the NRC antitrust proceeding, who have not previously litigated the matter, that factor somehow entitles CSW to litigate it again. There is no basis for the view that as between the parties to the earlier litigation the presence of additional parties in the subsequent litigation has any bearing.

The heart of CSW's answer in this regard is a singular non sequitur. At page 18 of the answer, they say "Because CP&L and CSW, et al., have demonstrated that there are strong due process and public policy reasons for not excluding the NRC Staff and the Department of Justice from participating in the Commission's antitrust review, it follows that it would be pointless to bar CP&L and CSW, et al". (Emphasis supplied). The conclusion does not follow at all. CSW says it will assist in developing a full record and that most of the same witnesses and evidence will be considered whether or not it participates. The argument continues to the effect that, such being the case, judicial economy would not be served by barring CSW. CSW does not respond to the point made by TUGCO (pages 14-15 of our memorandum of points and authorities) that the doctrine of res judicata serves not only judicial economy, but to prevent a different judgment in a second action from impairing rights or differences that were settled by the first action.

If nothing else, TUGCO is entitled to one less adversary (or group of adversaries) when that adversary previously selected another forum to present the same facts to achieve the same ends -- and failed. If CSW, et al., thought that the more favorable forum or the more generous standards to them were those available in an administrative proceeding before the NRC, then it should not have brought the District Court action. Having made that choice and having lost, the Board should not condone CSW's use of this proceeding to avoid the effect of the judicial proceeding which it instituted.

CSW relies[3] on Maher v. City of New Orleans 516 F.2d 1051, 1057 (5th Cir. 1975) and Defenders of Wildlife v. Andrus 77 F.2d 448 (D. D.C. 1978) for the propositions, respectively, that a common fact nucleus in earlier and later litigation between the same parties does not in and of itself establish res judicata and for the proposition that res judicata may not apply even though the cases involved may concern the same set of facts, (some of the same) parties and the same legal issues.

The Maher decision is of no help to CSW for it is bottomed on the peculiar law of Louisiana (see Appendix A) and the court acknowledges that it might well have reached a different result applying general federal law.

Equally irrelevant here is the Defenders of Wildlife case. That case is explained when it is realized that the result in a subsequent action by a non-party was asserted as a bar in the first action by the defendant in both actions. The court made clear that a non-party (the State of Alaska) in the first action would be rewarded for abstaining from intervention in that first action, forum-shopping, and instituting a second action, if such tactics were condoned and the later ruling given collateral estoppel effect. (See Appendix B).

CSW claims that it is pursuing different remedies because NRC action would result in a different type of relief (license conditions versus injunctive relief). This is disingenuous. The end result is the same: interconnection of TIS with the Southwest Power Pool. It is the same relief. CSW themselves at pages 31-32 acknowledge that the end result of the FERC action and the NRC action would be the same and it is clear that the

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3/ Answer, pp. 4-5.

District Court action was all a part of the same package, i.e., an attempt to achieve interconnection of the TIS with the Southwest Power Pool in order to preserve the holding company status of CSW.

CSW also asserts that the findings or conclusions of the District Court regarding Section 105.c of the Atomic Energy Act, Section 5 of the Federal Trade Commission Act and Section 2 of the Sherman Act were gratuitous. TUGCO has already dealt with the Federal Trade Commission Act and Atomic Energy Act arguments at pages 13 - 15 of its memorandum of points and authorities. In a nutshell, if CSW denies the District Court's jurisdiction to make those findings, then its remedy lies in a direct appeal to a Federal Court of Appeals and not in a collateral attack before an administrative agency which would put the agency in the position of sitting in review over a U.S. District Court.

As to Section 2 of the Sherman Act, CSW can appeal that also. But CSW claims that Section 2 issues were not before the court. CSW attached, as Appendix 1 to its answer, the District Court's Pretrial Order. As will be seen from Section 1, second paragraph of that Order (pages 1 - 2), whatever may be the case as to plaintiffs' complaint being confined to Sherman Act Section 1, it is clear beyond peradventure that, as counter defendants, CSW raised and were entitled to litigate Section 2 of the Sherman Act in defense against HL&P's counterclaim that CP&L was in anticipatory breach of the South Texas project participation agreement. It simply cannot be denied that the case was tried under Section 2 as well as Section 1 of the Sherman Act and, even absent familiarity with the District Court record, it is obvious upon a moment's reflection that Section 2 issues con-

cerning the validity of the contract are indistinguishable from Section 2 issues as a basis for affirmative relief. And since the evidence in a rule of reason §1 case overlaps the evidence on a §2 case (markets, etc.), and since, in federal practice, the complaint conforms to the evidence, §2 issues were in the case.

Finally, CSW, et al., rely upon Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-349, 4 NRC 235, 246-47, vacated on other grounds CLI 76-17, 4 NRC 451 (1976) and cases cited 4/ for the proposition that where the government is a party, there are different legal standards, and the standard in the earlier case was more favorable to the party invoking the estoppel than in the later case, that party cannot rely on the prior determination in its favor as against the government. The short answer to all of this is that it merely deals in contexts other than antitrust with the same principle followed in United Shoe Machinery, supra, i.e., that piecemeal governmental enforcement under separate statutes is permissible in some circumstances. As such, res judicata against the NRC Staff would be an uphill fight. But that rule has nothing to do with CSW's party status: whether it is equitable or consistent with res judicata or otherwise legally proper to permit CSW to continue as an intervenor in this case. The rule for private litigants is that they are entitled to one and only one chance to litigate based on one series of transactions or occurrences. Just as in Norman Tobacco, supra, where the plaintiff,

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4/ U.S. v. National Association of Real Estate Boards 339 U.S. 485 (1950) and U.S. v. Konovsky 202 F.2d 721 (7th Cir. 1953).

having been unsuccessful in a contract action involving a refusal to deal, was held barred by the result of that action in his later private antitrust suit alleging the same refusal to deal, so is CSW barred here.

Respectfully submitted,

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Maher v. City of New Orleans, 516 F.2d 1051 (1975)

The Fifth Circuit permitted litigation in the federal courts of the claimed unconstitutionality of a historic preservation ordinance under the due process and just compensation clauses of the Fifth Amendment to the United States Constitution, despite prior litigation in the state courts on the question whether the New Orleans City Council had acted ultra vires.

The Louisiana Supreme Court in the prior state litigation had excluded constitutional issues from its decision on the ground that such were not raised in the trial court, and decided only that the City Council had not exceeded its authority. Reciting that factor, the Fifth Circuit's entire analysis of collateral estoppel was,

> "It is thus difficult to perceive in what manner the state court proceeding can operate in the case sub judice to estop [plaintiff below] from airing his [federal constitutional] allegations."

The Circuit Court's more extended discussion of res judicata, declining to apply that principle, relies on Louisiana law, which had earlier been noted as taking

> ". . . a more narrow perspective on doctrines of repose than do jurisdictions whose rules derive from the common law. Res judicata in Louisiana is stricti juris, forbidding relitigation only on the ultimate judgment rendered, but not extending broadly to matters that 'might have been litigated' . . ." (footnotes omitted) (516 F.2d at 1056).

In its discussion of res judicata, the Court cited (516 F.2d cert. 1057) prior discussions on repose in that circuit which dealt with: similar conduct at different times (common law

applied; res judicata denied); successive actions on contract and tort arising out of the same franchise dispute (Louisiana law applied; successive actions permitted); a new theory of relief for damage arising out of same occurrence under same insurance contract (common law applied; res judicata upheld); and contractual indemnity under similar provisions in different documents (common law applied; res judicata upheld). Turning to the case before it, the court made clear that the key to the result it reached was that the plaintiff could have brought a second proceeding in the state courts to assert his constitutional claims. It said,

> "We need not decide whether the same result would obtain had the initial suit been brought in the federal court operating under federal rules and policies respecting joinder of claims arising from a common factual basis. All we decide here is that, under the configuration of this case, entwined with local Louisiana pleading and practice rules, disposition of the merits is not foreclosed by res judicata." (516 F.2d at 1058).

Stripped to its essentials, then, the res judicata holding of the Fifth Circuit in Maher is bottomed on the consideration that Louisiana law permits a plaintiff to institute successive proceedings on the same facts. As such, it is no help to CSW as a statement of the general law of res judicata.

Defenders of Wildlife v. Andrus
77 F.R.D. 448, 11 ERC 1232 (D.D.C. 1978)

The treatment of res judicata by the District Court in Defenders of Wildlife is conclusory and is not bottomed on the usual reasoned analysis of the tests for application of that doctrine. CSW has quoted the reasoning of the court regarding res judicata, and we may paraphrase: different plaintiffs in the two cases sought to protect different interests and sought to obtain different remedies against the same defendant. The court concluded that collateral estoppel rather than res judicata would apply. Even though the elements of collateral estoppel were present, to apply that doctrine would be unjust in the circumstances. The District Court acted to prevent rewarding a non-party for tactics it did not condone.

The key question on the merits was whether inaction of the Department of Interior to prevent the State of Alaska from conducting wildlife management (wolf kills) on Federal Bureau of Land Management lands, when it had the power to do so under the BLM Organic Act, constituted a "major federal action" for NEPA purposes. Plaintiff environmental organization obtained a preliminary injunction from the U.S. District Court for the District of Columbia in the first action against defendant as Secretary of the Department of the Interior. The State of Alaska, which had refrained from intervening in the D.C. proceeding (and which had not been joined), instituted its own suit against Interior in the U.S. District Court in Alaska. It there sought to prevent Interior from interfering with its wolf kill program

on the subject federal lands. The environmental organization (plaintiff in the D.C. proceeding) intervened as a party defendant in the Alaska litigation in order, according to the District of Columbia Court, to protect that court's judgment. The Alaska Court reached a different result on the "major federal action" question from that of the D.C. Court, but entered only declaratory relief and did not restrain Interior from complying with the D.C. Court's preliminary injunction.

The disposition of the entire proceeding (i.e., on necessary parties, res judicata, and collateral estoppel) was seen by the D.C. District Court as necessary to avoid rewarding the State of Alaska for tactics of which the court took a dim view; abstaining from the first suit, forum-shopping, obtaining a different result in a subsequent suit, and then inducing Interior to use the result of the second suit as a bar to the first suit.

As will be obvious from the foregoing discussion, our case as to the res judicata effect of the District Court judgment on CSW is a very different one from Defenders of Wildlife. CSW is a plaintiff in both cases. The ultimate relief sought is the same in both cases. The series of transactions or occurrences (the situation) on which CSW relies are the same, and there is no question of forum-shopping by a stranger to the litigation or by the party invoking res judicata, nor of any attempt by TUGCO to "end run" an original tribunal by going off to a second one, obtaining declaratory judgment, and bringing it back to the first tribunal as a bar. CSW chose the District Court forum. Indeed, were CSW successful in maintaining participation in this

NRC proceeding, and were it to reach a different result, the District Court might well decline to give estoppel effect to the NRC result by analogy to the Defenders of Wildlife decision.

Defenders of Wildlife is instructive in other ways. For example, it relies on the Restatement of Judgments for the proposition (with reference to collateral estoppel on conclusions of law) that

> "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result." (District Court's emphasis omitted, emphasis supplied)

In other words, even for purposes of collateral estoppel on conclusions of law, the rule is that where causes of action arise out of the same subject matter or transaction the determination is conclusive between the parties in a subsequent action even where the causes of action (here used in the sense of remedies) may be different.

A further observation regarding the above quoted extract from the Restatement of Judgments as quoted by the District Court may be in order. The District Court emphasized the final phrase of that quotation (i.e., that a question of law is not conclusive if injustice would result) in reaching the conclusion that it would be inequitable to apply collateral estoppel against the plaintiffs. CSW has made no showing why the application of estoppel to it as to conclusions of law would be inequitable or

would result in injustice to it. We submit that it cannot do so. It already has had its day in court. It has its appeal. It should be confined to that appeal.

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(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "TUGCO's Reply to Answers to its Motions for Dismissal of CSW and Other Relief" in the above captioned matters dated April 30, 1979, were served upon the following persons by deposit in the United States mail, first class, postage prepaid,or by hand delivery as shown by an asterisk, this 30th day of April, 1979:

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