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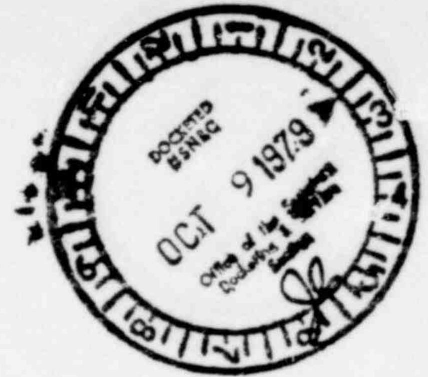

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

ORDER REGARDING MOTIONS BASED UPON DECISION OF UNITED STATES DISTRICT COURT
(October 5, 1979)

On April 3, 1979, Houston Lighting and Power Company (HL&P) and Texas Utilities Generating Company, et al. (TUGCO), filed separate motions for partial or full summary disposition of these two antitrust proceedings. These motions were essentially based upon the decision of the United States District Court in West Texas Utilities v. Texas Electric Service Company, No. CA 3-76-0633-F (N. D. Tex.). In that Federal court decision, HL&P and the Texas Electric Service Company (TESCO) were found not to have engaged in concerted action against Central Power and Light Company (CP&L) and West Texas Utility Company (WTU) in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

HL&P filed a motion for summary decision, contending (1) that collateral estoppel should be applied against CP&L (although not against the Department of Justice, NRC Staff, Brownsville, or South Texas Electric Cooperative (STEC) or Medina Electric Cooperative (MEC)) and (2) that HL&P should be dismissed from the entire proceeding.

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TUGCO filed two motions. In the South Texas proceeding, it moved to bar CP&L from seeking to obtain any relief inconsistent with the District Court decision, and for summary disposition in TUGCO's favor. In the Comanche Peak proceeding, TUGCO moved to dismiss Central and South West Cooperative (CSW) as a party intervenor or, in the alternative, for summary disposition, and for steps toward termination of the proceeding.

The City of Austin (Austin) filed its brief on the question of collateral estoppel to dispose of or limit the instant antitrust proceeding, which in effect sought to associate Austin with the relief requested by HL&P and TUGCO.

Responses in opposition to these motions were filed by the Department of Justice (Department), the Staff, the Public Utilities Board of the City of Brownsville, Texas (Brownsville), CP&L and CSW, and TEX-LA Electric Cooperative (TEX-LA). Arguments of counsel were heard at a conference held on June 1, 1979 (Tr. 217-321). By our Order entered on June 25, 1979, the parties were advised that these motions were denied, and that a dispositive order would be issued at a later date. The following opinion and decision constitutes that dispositive order.

I. RES JUDICATA AND COLLATERAL ESTOPPEL

A. Legal Principles

The major thrust of the instant motions is the termination or severe limitation of the scope of this proceeding as a result of the decision rendered in the U. S. District Court case, under the doctrines of res judicata or collateral estoppel. Although comparable in many respects, these related doctrines also have significant differences. The Supreme Court has thus described these principles:

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. 1B, J. Moore, Federal Practice ¶0.405[1], at 622-624 (2d ed. 1974); e.g., Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); Commissioner v. Sunnen, 33 U.S. 591, 597 (1948); Cromwell v. County of Sac., 94 U.S. 351, 353 (1876)."[1/]

The courts have further refined the concept of collateral estoppel to require at least four elements which must all be present before the doctrine can be given effect as to a prior action. These four elements are (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment.[2/] The party pleading collateral estoppel has the burden of proving that all the requirements of the doctrine are present.[3/]

The Appeal Board, after an extensive review of judicial authorities considering res judicata and collateral estoppel, has held that in appropriate circumstances the doctrines may be given effect in NRC licensing proceedings.

[1/] Parklane Hosiery, Inc. v. Shore, ____ U.S. ____, 99 S. Ct. 645, 58L. Ed. 2d 552, 559, fn. 5. (1979).

[2/] Haize v. Hanover Ins. Co., 536 F. 2d 576, 579 (3d Cir., 1976); Gulf Oil Corp. v. FPC, 563 F.2d 588, 602 (3d Cir., 1977); 1B Moore's Federal Practice ¶0.443[1] et seq.

[3/] 1B Moore supra, ¶0.408[1], at 954.

Thus, in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210 (1974), remanded on other grounds, CLI 74-12, 7 AEC 203 (1974), the doctrines precluded a participant in the litigation of an issue decided in the construction permit proceeding, from raising the identical issue in an operating license proceeding involving the same reactor. However, it was expressly pointed out in that case that there was no claim of either (1) significant supervening developments having a possible material bearing upon any of the issues previously adjudicated in the construction permit proceeding or (2) the presence of some unusual factor having special public interest implications (7 AEC at 216)." The Appeal Board observed that exceptions to the application of res judicata and collateral estoppel which are found in the judicial setting are equally applicable to administrative adjudication, such as competing public policy considerations involved in Spilker v. Hankin, 188 F.2d 35, 37-8 (D.C. Cir. 1951) or Tipler v. E. I. du Pont deNemours and Co., 443 F.2d 125, 128 (6th Cir. 1971). On this score it was noted that "Professor Davis has suggested a particular need for clothing an administrative agency with the discretion to decline to invoke these doctrines in the course of 'feeling its way into an undeveloped frontier of law and policy,' 2 Davis, Administrative Law Treatise, p. 566" (7 AEC at 215).

The Commissioners reviewed the foregoing Alabama Power Company case and remanded it for further development of facts as follows:

> "The principal focus of both the Licensing Board and Appeal Board in the current proceedings was whether the instant petition involved an attempt to relitigate precisely the same contentions as those resolved in the construction permit proceedings; and, if so, whether the doctrines of res judicata and collateral estoppel should apply. This is the first case in which we have

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> taken a close look at the applicability of these doctrines to our proceedings. In our view, an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Accordingly, we are in full agreement with the conclusion reached by the Appeal Board that 'res judicata and collateral estoppel should not be entirely ruled out of our proceedings, but rather applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factors, in the particular case....' Due regard for these considerations convinces us that a remand to the Licensing Board, established to rule on intervention petitions, is necessary in the circumstances of this case. Upon such remand, petitioner shall be afforded an opportunity to make a particularized showing of such changed circumstances or public interest factors as might exist with respect to this particular proceeding."[4/]

In one of the Seabrook decisions, it was contended that the Appeal Board's refusal to grant a stay of the effect of the initial decision in an earlier phase of the proceeding was res judicata on a later stay motion. The so-called doctrines of repose were held precluded from operation because the issues involved in the two proceedings, "irreparable injury" to the environment versus any "significant adverse impact" upon the environment, were deemed to be dissimilar, and also because res judicata does not apply when the party seeking it had the benefit, when he obtained the prior ruling, of a more favorable standard with respect to burden of proof than is later available to him.[5/]

In The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977), the City of Cleveland sought to preclude a certain law firm from representing one of the Applicants in an NRC antitrust proceeding, because of the firm's prior representation of the city in connection with municipal bond matters. The law firm moved to dismiss the disqualification

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[4/] Alabama Power Company (Farley Units 1 and 2), CLI-74-12, 7 AEC 203-204 (1974).

[5/] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 246, vacated on other grounds, CLI-76-17, 4 NRC 451 (1976).

proceeding on the grounds of collateral estoppel, based upon a federal district court decision which rejected the city's effort to disqualify the same law firm from representing the same electric utility in a pending civil antitrust proceeding in that court. The Appeal Board sustained the application of collateral estoppel, holding that "as a general matter, a judicial decision is entitled to precisely the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding" (5 NRC at 561). The common issue in the two proceedings was whether the Code of Professional Responsibility interdicted the law firm's representation of the public utility. It was held to be irrelevant that the NRC Staff and the Department of Justice were parties to the NRC antitrust proceeding, but not to the district court proceeding. The Staff, but not the Department, involved itself in the disqualification matter. The Appeal Board also stated:

> "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 decision concerning that subject matter may be without binding effect upon that agency,' 2 Davis, supra, §18.12 at pp. 627-28. cf. United States v. Radio Corporation of America, 358 U.S. 334, 347-52 (1959). We agree, however, with the majority of the Special Board (NRCI-76/11 at 566) that that principle does not come into play in this case.... We discern no 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." (5 NRC at 561)

The Appeal Board also rejected the Staff's position regarding discretionary application of collateral estoppel, stating "nothing said by us in Farley suggests that, absent overriding competing public policy considerations (and here none has been shown), an administrative agency is free to withhold the application of collateral estoppel as a discretionary matter." (5 NRC at 563-64, fn. 7)

The effect of a state court decision interpreting certain provisions of an operating license regarding required governmental approvals, was considered by the Appeal Board in Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-399, 5 NRC 1156 (1977). The licensing board had described the court's ruling as "somewhat" the law of the case. In reversing, it was stated that "[t]here is no collateral estoppel because the Commission Staff was not a party to the New York litigation." (5 NRC at 1167). It was held that even if the parties had been identical, the Commission would not be bound by a court decision in a collateral litigation. The Appeal Board further stated:

> "In discussing the problem of conflicting decisions on the same question by administrative agencies and courts, Professor Jaffe says: 'In cases where an order is directed to future relationships, the decision of that agency which has the major and continuing responsibility should prevail.' L. Jaffee, Judicial Control of Administrative Action 135 (1965). In the case at bar, that would mean that this Commission would have the primary responsibility for interpreting the terms of the license which it issued." (5 NRC at 1168, fn. 44)

The most recent discussion of the principles of collateral estoppel appears in the antitrust decision on the merits in The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC ___ (September 6, 1979). In that case, it was contended that a decision of the Federal Power Commission favorable to an applicant on the issue of anticompetitive practices, should have been treated as a collateral estoppel. Finding that the standard which governed the FPC's decision on whether to order an interconnection was different from NRC's duty under Section 105c of the Atomic Energy Act, the Appeal Board said:

> "Where the legal standards of two statutes are significantly different, the decision of an issue under one statute does not give rise to collateral estoppel in a litigation of a similar issue under a different statute. See United Shoe

Machinery Corp. v. United States, 258 U.S. 451 (1922); In re Yarn Processing Patent Validity Litigation, 498 F. 2d 271, 278-279 (5th Cir. 1974); Tipler v. E. I. duPont deNemours & Co., 443 F. 2d 125, 128-29 (6th Cir. 1971); Pacific Seafarers, Inc. v. Pacific Far East Line, 404 F. 2d 804 (D. C. Cir. 1968), cert. denied, 393, U.S. 1093 (1969)." (Slip opinion, p. 209)

It also appeared that the Intervenor City obtained the primary relief it sought from the FPC, and that if the findings on anticompetitive conduct had gone the other way, it would not have made any difference in the relief granted. It was therefore stated:

> "Thus, the findings were not necessary , the Federal Power Commission's decision and therefore do not constitute collateral estoppel in later litigation. Norton v. Larney, 266 U.S. 511, 517 (1925); Haize v. Hanover Ins. Co., 536 F. 2d 576 (3rd Cir. 1976); Lombard v. Board of Education of City of New York, 502 F.2d 631, 637 (2d Cir. 1974); Eastern Foundation Co. v. Creswell, 475 F. 2d 351 (D.C. Cir. 1973); Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, 344 F. 2d 300, 306-07 (9th Cir.), cert. denied, 382 U.S. 826 (1965); Restatement (Second) of Judgments §68, Comment h (Tent. Draft No. 1, 1973)." (Slip opinion, pp. 210-11)

B. Identity of Issues and Standards

In applying the foregoing legal principles, consideration must be given to the comparability of the issues involved in the two proceedings when the application of res judicata or collateral estoppel is invoked. Issues are not identical if the second action involves the application of a different legal standard, even though the factual setting of both proceedings may be the same.[6/] Thus the same historical facts may be involved in two actions, but the legal significance of the facts may differ because different legal standards are applicable to them.[7/]

6/ Peterson v. Clark Leasing Corporation, 451 F. 2d 1291, 1292 (9th Cir. 1971); 1B Moore's Federal Practice ¶0.443[2].

7/ James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459, fn. 8 (5th Cir. 1971), cert. denied 404 U.S. 940 (1971).

Here, the District Court suit involved a civil action for injunctive relief by CP&L based upon alleged concerted refusals to deal by HL&P and TESCO, in violation of Section 1 of the Sherman Act (15 U.S.C. §1). The plaintiffs claimed that the defendants violated the Sherman Act "by having unlawfully combined, conspired or contracted between themselves and with others' to preclude the interstate flow of electricity (Pre-Trial Order, p. 1). The final order in that case prohibits CP&L from permitting electricity it receives from the South Texas Project to enter interstate commerce "as long as CP&L remains a participant in the STP agreement and as long as that agreement remains in force."

The instant proceeding involves a finding under §105c(5) whether the activities under the license would create or maintain a situation inconsistent with the specified antitrust laws (42 U.S.C. §2135(c)). Such an inquiry covers a broad range of activities considerably beyond the scope of the "violation" standard of Section 1 of the Sherman Act. It is well established that in a Secton 105c proceeding, it is not necessary to show an actual violation of the antitrust laws.[8/] As the Joint Committee on Atomic Energy described it,

> "The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is the mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws." (Joint Committee Report at 14-15)

[8/] Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 908-912 (1977).

In Davis-Besse, supra, the Appeal Board noted that "Of course, any violation of the antitrust laws also meets the less rigorous standard of Section 105c of the Atomic Energy Act -- inconsistency with the antitrust laws" (Slip opinion at p. 207, fn. 277). It was also stated:

> "If the hearing record demonstrates with 'reasonable probability' that an anticompetitive situation within the meaning of section 105c would result from the grant of an application, the Commission may refuse to issue a license or issue one with remedial conditions. Findings of actual Sherman or Clayton Act violations, however, are not necessary. Under section 105c, procompetitive license conditions are also authorized to remedy situations inconsistent with the 'policies clearly underlying' the antitrust laws." (Footnotes omitted) (Slip opinion at p. 8)

The scope of Section 105c proceedings also includes consideration of §5 of the Federal Trade Commission Act, which permits proscription of unfair or deceptive business practices that infringe neither the letter nor the spirit of the Sherman and Clayton Acts.[9/] The Appeal Board has described the sweep of Section 105c antitrust review as follows:

> "It is to be recalled that in Section 5 proceedings proof of a full-blown violation of the Sherman or Clayton Acts is not required; there need only be shown a 'conflict with the basic policies of [those] Acts' (citing FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); Atlantic Refining Co. v. FTC, 381 U.S. 357, 369-70 (1965); FTC v. Texaco, Inc., 392 U.S. 223 (1968); L. G. Balfour Co. v. FTC, 442 F. 2d 1, 9 (7th Cir. 1971) because, as has been explained, 'the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act...to stop in their incipiency acts and practices which, when full blown, would violate those Acts...as well as to condemn as 'unfair methods of competition' existing violations of them.' FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966), quoting FTC v. Motion Picture Adv. Co., 344 U.S. 392, 394-95 (1953). Section 105c similarly applies to situations in conflict with the policies underlying the antitrust laws. Like Section 5 of the FTC Act, Section 105c was also designed by Congress to 'nip in the bud any incipient antitrust situation,' albeit via the NRC prelicensing review process.

[9/] FTC v. Sperry & Hutchinson Co., 405, U.S. 233, 239 (1972).

> Wolf Creek I, supra, ALAB-279, 1 NRC at 572 (quoting the Joint Committee Report, p. 14). This similarity in purpose and standards leads us to agree with the staff that Section 5 precedents may be helpful guides to determining whether a situation not violative of the antitrust laws is, nevertheless, inconsistent with their underlying policies."[10/]

There are substantial differences between the standards and issues involved in the Sherman Act, Section 1 suit based on restraint of trade by concerted action as alleged in the District Court litigation, when contrasted with the issues involved in this proceeding arising from allegations of monopolization (Sherman Act, Section 2), unfair methods of competition (FTC Act, Section 5), and inconsistency with underlying policies of antitrust laws (Section 105c). Where, as here, the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in the litigation of similar issues under a different statute.[11/] The same rule applies to attempts to invoke the doctrine of res judicata, where the question is whether the second suit is based on the same cause of action as that involved in the first suit.[12/] The causes of action here, if that term is to be used, are significantly different in the District Court suit and this Section 105c proceeding.

[10/] Midland, supra, 6 NRC at 911-12.

[11/] Davis-Besse, supra, Slip opinion at p. 209. See United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922); In re Yarn Processing Patent Validity Litigation, 498 F. 2d 271, 278-79 (5th Cir. 1974); Tipler v. E. I. duPont de Nemours & Co., 443 F. 2d 125, 128-29 (6th Cir. 1971); Pacific Seafarers, Inc. v. Pacific Far East Line, 404 F. 2d 804 (D. C. Cir. 1968), cert. denied, 393 U. S. 1093 (1969).

[12/] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 247 (1976); The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 563 (1977).

C. Parties

It would be a violation of due process fo: a judgment to be binding on a litigant who was not a party nor privy to the prior litigation, and who therefore never had an opportunity to be heard.[13/] In recognition of this principle, HL&P has stated in its motion that no attempt is being made to apply collateral estoppel against the Department of Justice, the Staff, Brownsville, or STEC/MEC.[14/] However, HL&P also moves that as a matter of discretion, "this proceeding be dismissed as to HL&P for all purposes."[15/]

There are strong public policy reasons why the Department and the Staff, as statutory parties to this proceeding, should not be collaterally estopped or hindered in conducting the full antitrust review under Section 105c which they have sought. The Commission has described the public interest implications of NRC antitrust review as follows:

> "The NRC's role is, in our view, something more than a neutral forum for economic disputes between private parties. One evidence we have of this flows from the role of the Attorney General and the express requirement that his views be obtained. If a hearing is convened, we think it should encompass all significant antitrust implications of the license, not merely the complaints of intervening private parties. If no one else performs this function, NRC staff should assure that a complete picture is presented to licensing boards."[16/]

[13/] Parklane Hosiery, Inc. v. Shore, __ U.S. __, 99 S.Ct. 645, 653-58 L. Ed. 2d 552 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

[14/] HL&P Motion, p. 10, fn. 10.

[15/] Id., p. 32; Reply of HL&P, pp. 4-7 20-27.

[16/] Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), CLI-78-12, 7 NRC 939, 949 (1978). See also Scenic Hudson Preservation Conference v. F.P.C., 354 F. 2d 608, 620-21 (2nd Cir. 1965), cert. denied, 384 U.S. 941 (1966); Michigan Consolidated Gas Co. v. F.P.C., 283 F.2d 204, 226 (D.C. Cir. 1960), cert. denied, 364 U.S. 913.

We agree with the Staff's position that a selective invocation of collateral estoppel to apply to CP&L and CSW would have only a procedural effect in this proceeding, because neither the Staff nor the Department was in privity with the parties in the District Court suit. Hence, either or both governmental parties could, and probably would, include in their presentation here a Sherman Act, Section 1 case against HL&P and TUGCO (Answer of Staff in Opposition to Motions, p. 6). Other Intervenors such as Brownsville are likewise not in privity with the parties in the court suit, and intend to assert a wide range of antitrust issues in this proceeding (Response of Brownsville, pp. 3-6).

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. It is not unlikely that some witnesses would be used in common. Since there will be an evidentiary hearing in any event, there would be no "considerations of economy of judicial time"[17/] in applying collateral estoppel, but rather more time would probably be expended in attempting its selective application.

[17/] Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212 (1974).

D. Issues Essential to Prior Judgment

One of the required elements for applying collateral estoppel is that the determination of the issues made in the first action was necessary and essential to the outcome of that prior action.[18/] The District Court in effect found that the so-called intrastate-only policy allegedly followed by the defendants neither "creates or maintains a situation inconsistent with the antitrust laws" (Section 105c), nor constitutes "an unfair method of competition" (§5, FTC Act). The Court had before it only one aspect of these proscriptions, that revolving around the issue of unreasonable restraint of trade under Section 1 of the Sherman Act. There were no allegations or issues concerning monopolization under §2 of the Sherman Act, or unfair methods of competition under Section 5. The Court's "additional findings" regarding Section 5[19/] and Section 105c[20/] were unnecessary and immaterial to the determination of the Section 1, Sherman Act cause of action. Such findings may be regarded as dicta, to which collateral estoppel does not attach.[21/]

Only the Federal Trade Commission is empowered to make an initial finding whether a practice is an unfair method of competition under Section 5. The Supreme Court has stated:

[18/] Parklane Hosiery, Inc. v. Shore, __ U.S. __, 99 S. Ct. 645, 58 L. Ed. 2d 552, 559, fn. 5 (1979); Alabama Power Company, supra, 7 AEC at 213.

[19/] Conclusion of Law #20.

[20/] Conclusion of Law #22.

[21/] Consumer Product Safety Commission v. Anaconda Co., __ F. 2d __ (D. C. Cir., Jan. 31, 1979).

"A court cannot label a practice 'unfair under Section 5. It can only affirm or vacate an agency's judgment to that effect.' 'If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.' SEC v. Chenery Corp., 318 U.S. 80, 92 (1943)."[22]

Similarly, 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, and if so what license conditions should be required as a remedy. The Commission has thus described the statutory policy regarding NRC antitrust review:

"But other policies are also reflected in Section 105c, viz, that a government-developed, monopoly-like nuclear power electricity generation not be utilized in ways which contravene the policies contained in the various antitrust acts. Section 105c is a mechanism to allow the smaller utilities, municipals, and cooperatives access to the licensing process to pursue their interests in the event that larger utility applicants might use a government license to create or maintain an anticompetitive market position."[23]

Since the NRC and not the court has been given the responsibility of making the "inconsistent with" findings and possible license conditions under Section 105c, the District Court findings in this regard are not binding here. It is not necessary for us to decide whether the District Court exceeded its jurisdiction in making such findings, as argued by the Staff,[24] the Department,[25] Brownsville,[26] and CP&L and CSW.[27] It is sufficient to hold that the doctrines of collateral estoppel and res judicata do not apply to these findings.

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[22] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249 (1972).

[23] Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), CLI-78-12, 7 NRC 939, 946 (1978).

[24] Answer of the NRC Staff, pp. 5, 9.

[25] Response by the Department of Justice, p. 26.

[26] Response of the Public Utilities Board, pp. 10, 27.

[27] Answer of Central Power and Light Company, p. 11.

E. Exceptions Based on Public Policy

It has been recognized by both the Appeal Board and the Commission that exceptions to the application of res judicata and collateral estoppel which are found in the judicial setting, are equally present where administrative adjudication is involved. One such exception is the existence of broad public policy considerations or special public interest factors which would outweigh the reasons underlying the doctrines.[28] The unique nature of NRC antitrust review as linked to licensing considerations, constitutes such a special public interest factor in this context.

In South Texas, the Commission held that Congress intended that it should review antitrust allegations "primarily, if not exclusively, in the context of licensing...."[29] Although holding that in the field of antitrust NRC's expertise is not unique and that it was not given broad antitrust policing powers independent of licensing, its special role in this area was thus described:

> "Through the licensing process, we can effectuate the special concern of Congress that anticompetitive influences be identified and corrected in their incipiency. No nuclear power can be generated without an NRC license and the licensing process thereby allows us to act in a unique way to fashion remedies, if we find that an applicant's plans may be inconsistent with the antitrust laws or their underlying policies."[30]

This unique function of the NRC licensing process also involves making a judgment or estimate as to the future, in considering what effect activities

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[28] Alabama Power Company, supra, 7 AEC at 203-04, 213-16.

[29] Houston Lighting & Power Company, et al. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1316 (1977).

[30] Id., at 1316. See also Davis-Besse, supra, slip opinion at p. 35.

under the license would have on the competitive situation. The regulatory scheme established by Congress in Section 105c proceedings was designed to "nip in the bud any incipient antitrust situation", albeit via the NRC licensing review process.[31/] As Professor Davis has observed, "when the legislative intent is to vest primary power to make particular determinations concerning a subject matter in a particular agency, a court's decision concerning that subject matter may be without binding effect upon that agency." (2 Davis, Administrative Law Treatise, §18.12 at 627-28 (1958))

The Appeal Board has quoted with approval the above observation of Professor Davis, although it was held not applicable to a claim by the City of Cleveland that a law firm which had formerly represented it in bond matters, should be precluded from representing an opposing applicant in an NRC antitrust proceeding.[32/] In that case, there was no discernible legislative purpose that NRC only should resolve such a common issue, involving the construction of the Code of Professional Responsibility as interdicting the law firm's representation of another client.[33/] The facts in that case are quite different from the instant situation. That issue concerned a rather peripheral matter which did not essentially involve the unique NRC role in a Section 105c proceeding. Here, the very nature of the NRC antitrust review and the significant responsiblities borne by the Department and the Staff, evoke special public interest factors which preclude the application of collateral estoppel or res judicata.

31/ Midland, supra, 6 NRC at 912. See also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 571-72 (1965).

32/ The Toledo Edison Company, supra at p. 5, 5 NRC at 561.

33/ Id., at 562.

II. OTHER STATUTES, OTHER PROCEEDINGS

The moving parties additionally argue that the enactment of PURPA[34/] and its vesting of FERC with the power to order wheeling and interconnection, eliminates the need for a Section 105c antitrust review involving allegations of anticompetitive conduct and requests for interconnection and wheeling. However, the legislative history[35/] and the language of PURPA[36/] clearly establish that it was not intended to divest NRC or any other antitrust tribunal of jurisdiction, nor to require deferral of such matters to FERC. During Senate consideration of the Conference Report, Senator Metzenbaum, a manager of the bill and a member of the conference committee, stated:

> "It was not the intent of the conferees to modify in any way the rights of parties in presenting and prosecuting allegations of anticompetitive conduct before the Federal and State courts, or before administrative agencies, including the FERC and the Nuclear Regulatory Commission. Both have legal obligations to consider antitrust issues. Where any of these agencies presently have the authority to order transmission, coordination or other relief pursuant to a finding of anticompetitive conduct, undue discrimination or unjust and unreasonable rates, terms, conditions or the like, this authority would not be disturbed. The act does not limit the present authority of these agencies in this regard.
>
> "Thus, a party which has been denied wheeling services for anticompetitive reasons will not be hindered by this legislation from proceeding in the Federal courts or elsewhere. Likewise, the authority of the NRC in conducting an antitrust review under the provisions of the Atomic Energy Act of 1954, as amended, would not be affected by this extremely limited wheeling authority granted to FERC under this new legislation. These two agencies are charged with different responsibilities with respect to wheeling. FERC's new authority is conditioned on conservation, efficiency, reliability, and public interest. NRC's authority relates to correcting or preventing a situation inconsistent with the antitrust laws." (124 Cong. Rec. 517, 802 (daily ed., October 9, 1978))

[34/] Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

[35/] House Rep. No. 95-1750, 95th Cong., 2d Sess at 68, 92.

[36/] Section 214 of PURPA.

Accordingly, it cannot be held that proceedings by FERC based upon this statute in any way supersede the instant NRC proceeding.

The moving parties next cite the order issued by the Texas Public Utility Commission (TPUC) in its Docket No. 14, to support their contention that this NRC proceeding should be terminated. The TPUC order required CP&L to disconnect its radial tie into Oklahoma, which had put it and other interconnected utilities into interstate commerce. This order is presently under vigorous attack in state and federal courts, based on the constitutional considerations of a state placing an undue burden on interstate commerce.[37/] We do not need to decide grave constitutional issues, but we hold that our statutory responsibilities under Section 105c cannot be impaired or limited by a state agency. We do not assume that TPUC would take any action resulting in unnecessary confrontation.

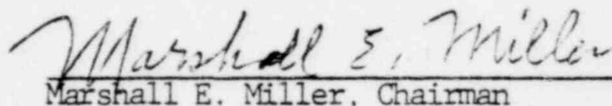
The movants have also cited the injunction issued by the District Court as another reason to terminate or sharply limit the instant proceeding. That order provides in pertinent part that "CP&L is hereby permanently enjoined from permitting power it receives from STP to enter interstate commerce as long as CP&L remains a participant in the STP Agreement and as long as §8.2 of that agreement remains in force." Since it is contended that §8.2 of the participation agreement is inconsistent with the antitrust laws by its intrastate commerce limitation, this Board could, if the evidence required it, approve a license condition excising or reforming that section of the agreement. The District Court's injunction does not bar NRC remedies, nor require the dismissal of this proceeding.

[37/] In addition to proceedings in the state district court of Texas, the State of New Mexico has petitioned the United States Supreme Court to hear this case under its original jurisdiction (New Mexico v. Texas, Original Action No. 82).

For the foregoing reasons, the motions of HL&P and TUGCO are denied. We are not persuaded that interlocutory review is necessary or appropriate and hence decline the requests to certify the questions raised in these motions to the Commission or the Appeal Board (10 CFR §§2.718(i), 2.730(f)).

It is so ordered.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD



Marshall E. Miller, Chairman

Dated at Bethesda, Maryland
this 5th day of October 1979.

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