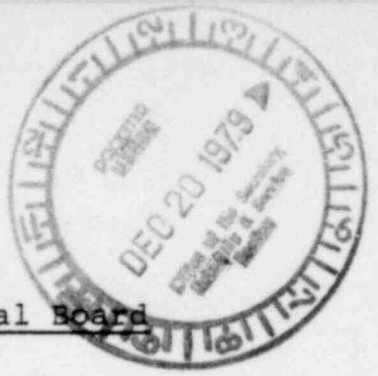

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of HOUSTON LIGHTING & POWER COMPANY THE CITY OF SAN ANTONIO THE CITY OF AUSTIN, and CENTRAL POWER AND LIGHT COMPANY (South Texas Project, Units 1 and 2)	)	Docket Nos. 50-498A 50-499A
In the Matter of TEXAS UTILITIES GENERATING COMPANY (Comanche Peak Steam Electric Station, Units 1 and 2)	)	Docket Nos. 50-445A 50-446A

RESPONSE OF CENTRAL POWER AND LIGHT COMPANY AND CENTRAL AND SOUTH WEST CORPORATION ET AL. TO PETITION OF HOUSTON LIGHTING & POWER COMPANY FOR DIRECTED CERTIFICATION

These Nuclear Regulatory Commission ("NRC" or the "Commission") proceedings, which have been consolidated for purposes of discovery, involve the operating license stage antitrust reviews for the South Texas Project and Comanche Peak nuclear facilities. Houston Lighting & Power Company ("HL&P") filed a motion for summary decision with the Atomic Safety and Licensing Board ("Licensing Board") in the South Texas Project docket on April 3, 1979, requesting that co-applicant Central Power and Light Company ("CP&L") be collaterally estopped from relitigating during the course

of the antitrust hearing fact issues which were decided against CP&L in a lawsuit in the United States District Court for the Northern District of Texas. West Texas Utilities Company v. Texas Electric Service Company, 470 F. Supp. 798 (N.D. Tex. 1979), appeal pending. Additionally, HL&P asked that, as to it, the antitrust prceeding be dismissed for all purposes. In the Comanche Peak proceeding, Texas Utilities Generating Company et al. ("TUGCO") moved that intervenors Central and South West Corporation ("CSW"), CP&L, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company ("WTU") (referred to collectively as "CSW et al.") be dismissed on the ground of res judicata. Alternatively, TUGCO asked that summary disposition be granted in favor of TUGCO and against CSW et al. or that CSW et al. be precluded on the ground of collateral estoppel from relitigating at the NRC any matter of fact or law which was litigated in the district court. As to the South Texas Project, TUGCO similarly sought to bar CP&L from seeking any relief inconsistent with the district court decision and to be granted summary disposition. The City of Austin requested that the Licensing Board dispose of or limit the antitrust reviews in these dockets because of collateral estoppel.

All of these motions were opposed by CP&L and CSW et al., the NRC Staff, the Department of Justice, the Public Utilities Board of Brownsville, Texas, and TEX-LA Electric Cooperative. After hearing oral arguments, the Licensing

Board entered an Order on June 25, 1979, denying the motions. On October 5, 1979, the Licensing Board issued a comprehensive written opinion setting forth in detail the reasons for the denial of the motions of HL&P and TUGCO. Having failed to prevail below on its collateral estoppel theory, HL&P filed a "Petition for Directed Certification and Review of the Licensing Board's Order Denying Motions for Summary Decision" with the Atomic Safety and Licensing Appeal Board ("Appeal Board") on November 9, 1979.

CP&L, a co-applicant in the South Texas Project proceeding, and CSW et al., intervenors in the Comanche Peak proceeding, hereby submit this response in opposition to HL&P's petition. In accordance with the provisions of the Appeal Board's November 13, 1979 Order, this response addresses the merits of the controversy as well as the question of whether interlocutory appellate review is warranted. As CP&L and CSW et al. demonstrate below, HL&P has not met the criteria for directed certification and the matter should not be reviewed at this time. If the Appeal Board does choose to consider the merits of the case at this time, however, HL&P's arguments do nothing to diminish the essential correctness of the Licensing Board's decision. Accordingly, HL&P's petition must be denied.

I. DIRECTED CERTIFICATION IS NOT WARRANTED IN THESE CIRCUMSTANCES

The Appeal Board's authority under 10 C.F.R. §2.718(i) to direct that a Licensing Board certify a question to the upper tribunal for decision has always been used

sparingly, for certification is an exception to the Commission's general policy against interlocutory appeals. The reasons given by HL&P for invoking the doctrine of directed certification fail to justify taking that step. Not only does the question presented by this case lack the broad significance which HL&P attempts to ascribe to that issue, but HL&P has not shown that the prerequisites to a grant of directed certification laid down in Public Service Company of Indiana, Inc. (Marble Hill Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977), have been met.

A. The Licensing Board's Ruling Is Not As Sweeping As HL&P Asserts

HL&P reads the Licensing Board's Order as establishing principles regarding the use of collateral estoppel in antitrust cases which will have a far-reaching impact upon Commission adjudications. In fact, HL&P boldly asserts that:

> In short, the Licensing Board held that collateral estoppel cannot be applied defensively in an NRC antitrust proceeding. HL&P Petition at 5.

Because of the supposed significance of the decision and its alleged effect as precedent in other NRC antitrust cases, HL&P claims that immediate review by the Appeal Board is necessary.

Regardless of how HL&P chooses to characterize the Licensing Board's Order however, the fact remains that what was before that tribunal was one specific and complex factual pattern, and it was in that setting that the Licensing Board addressed the issues of collateral estoppel and res

judicata. The Licensing Board's decision does not purport to establish a general rule concerning the defensive use of collateral estoppel in NRC antitrust proceedings, as HL&P claims, and only a strained reading of the decision could discover such a rule. As will be demonstrated in a subsequent portion of this Brief, the Licensing Board did no more than determine that given the circumstances of this case the purposes of collateral estoppel would not be served by a rigid application of the doctrine here. HL&P's characterization of the potential precedential impact of the decision is no more than simple appellate advocacy.

Moreover, because of the unusual procedural posture of this case it is unlikely that an NRC Licensing Board would again be confronted with a situation in which parties to an NRC proceeding under Section 105c had previously engaged in private antitrust litigation. It must be remembered that CP&L's petition for an antitrust hearing in the South Texas Project proceeding was filed out of time, in June, 1976, and almost two years elapsed before the Commission finally determined, based upon the advice of the Attorney General, that a hearing should be held. The proceeding in federal district court in Texas was initiated by CP&L and WTU on May 3, 1976, however, at which time it was far from certain that an antitrust hearing would be held by the NRC. Thus, the prior lack of certainty regarding NRC jurisdiction in these circumstances (a matter now settled as a result of the Commission's decision in this docket) and the timing of the district court opinion form the particular factual context

within which HL&P's motion was made. Obviously, the circumstances of the instant case are unique. Therefore, the Licensing Board's October 5 Order will not have the broad impact upon NRC jurisprudence which HL&P foresees, and thus decision does not require the immediate intervention of the Appeal Board.

B. HL&P Has Not Met The Requirements For Directed Certification

The Appeal Board has established guidelines for determining the circumstances in which it will undertake discretionary interlocutory review. Almost without exception that review has been undertaken:

> only where the ruling below either (1) threatened the party adversely affected by it with immediate serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Marble Hill, ALAB-405, supra, 5 NRC at 1192 (footnote omitted).

1. Immediate and Serious Irreparable Impact

HL&P has not attempted to show, nor could it show, that it will suffer "immediate and serious irreparable impact" if the Licensing Board's ruling stands. What that ruling means is that there will be antitrust hearings in which all parties, including CP&L and CSW et al., will participate fully. It is well established, however, that the

burden of going through with a legal proceeding can not be equated with irreparable harm. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury," Renegotiation Board v. Bannercroft Co., 415 U.S. 1, 24 (1974).

Any argument that being required to take part in an antitrust hearing in which CP&L will litigate each antitrust issue constitutes irreparable injury is especially weak in this case, for an antitrust hearing will be held in the South Texas Project docket no matter what the outcome of the instant petition. This is so because HL&P has dropped the request it made before the Licensing Board that the proceeding be dismissed as to HL&P for all purposes; thus, the only question presented here is the extent of CP&L's participation in the hearing. HL&P's change of position was apparently in recognition of the fact that the Department of Justice, the NRC Staff and the other parties who did not participate in the district court litigation could not, because of the dictates of due process, be collaterally estopped from litigating antitrust issues before the NRC. Since HL&P will have to go through with an NRC antitrust proceeding in any event, full participation in that hearing by CP&L hardly seems to be a great burden. Moreover, parties to the proceeding such as the NRC Staff will be free to call witnesses employed by CP&L and CSW et al. and develop evidence which parallels the factual record before the district court. Thus, the only sure consequence of granting HL&P's

motion would be to deprive CSW CP&L of the independent ability to take part fully in the South Texas Project proceeding, the outcome of which may profoundly affect the ability of CP&L and WTU to participate in nuclear power plants and will undoubtedly shape their future pattern of operation for decades.

HL&P's chief reason for claiming that directed certification of this matter is appropriate is the alleged inability to obtain fully effective appellate review of the question if that review is deferred to a later date. Supposedly, if CP&L fully participates in the antitrust hearing and the Appeal Board then decides that that party should have been collaterally estopped, it would be too difficult for the Appeal Board to segregate or disregard the portion of the record tainted by CP&L's participation. Not only does CP&L have every confidence in the ability of the Appeal Board to do just that if necessary, but it also seems obvious that HL&P is taking a shortsighted view of the matter of post-trial review. If the Appeal Board were to grant certification, reverse the Licensing Board and order that the hearing be held without the participation of CP&L on certain issues, CP&L would, at the conclusion of the hearing, appeal the collateral estoppel question to the Commission and, if necessary, to the Court of Appeals. Should either of those bodies agree with the Licensing Board that CP&L is not

collaterally estopped, there would have to be another hearing at which CP&L would be accorded full participation rights on the issues in question. Certainly the interests of administrative and judicial economy would be far better served by holding the complete hearing now, rather than relitigating a few years from now those portions of the case from which CP&L participation was barred. This is especially true in view of the fact that CP&L and the other parties to the NRC proceeding have engaged in extensive discovery over a period of many months. Now that the parties have prepared and the hearing has been scheduled to begin in early 1980, it seems pointless to restrict CP&L's participation, for the discovery and preparation would only have to be done over in the future should CP&L prevail on the collateral estoppel issue at a higher appellate level.

2. Effect Upon the Conduct of the Hearing

The second part of the Marble Hill test for directed certification concerns whether the ruling below will affect the basic structure of the proceeding in a pervasive or unusual manner. That the collateral estoppel question does not affect the "basic structure" of the proceeding as that term is used by the Appeal Board is apparent from an examination of cases in which the issue has been discussed. In Offshore Power Systems (Floating Nuclear Power Plants),

ALAB-517, 9 NRC 8 (1979), an intervenor sought to have the Appeal Board review the rejection of a contention by the Licensing Board. The Appeal Board declined to order certification, explaining:

> Secondly, were we to take up the matter and resolve it in intervenor's favor -- i.e., direct the admission of its contention -- the only consequence would be a trial of this issue now; the proceeding would otherwise continue unaffected. In other words, this is not a situation where the basic conduct of the hearing would be adversely affected unless we acted. 9 NRC at 12 (citation omitted).

Thus, Offshore Power Systems establishes that whether or not a particular issue is tried during a hearing does not adversely affect the basic structure of the proceeding; similarly, in this case, which parties participate on a given issue does not have an adverse effect upon the basic conduct of the hearing as that phrase is used in this context.

An example of a matter which would have a pervasive effect upon the actual conduct of a hearing is the Licensing Board ruling which was the subject of a directed certification motion in Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565 (1977). In that case the Licensing Board had ordered that prospective NRC Staff witnesses be excluded from the hearing room while other parties' witnesses testified. Finding that an extraordinary situation existed, the Appeal Board granted certification because the Licensing Board's rulings threatened "to impede rather than aid the

full development of the record." 5 NRC at 568. Similarly, the Appeal Board granted certification in The Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752 (1975), to review the propriety of the appointment of a special master to determine certain discovery claims. Without certification, had the appointment later been found to have been improper, the entire hearing would have been held for naught. That is another instance in which a ruling would affect the basic structure of a proceeding, a situation not present here.

For these reasons, the instant question does not fall within either of the two types of situations which, under the usual test, would warrant interlocutory review by the Appeal Board.

C. HL&P Has Not Met Even The Standards For a Referral

In addition to establishing the Marble Hill test set forth above, the Appeal Board has stated that, at a very minimum, a party asking that the certification authority of §2.718(i) be invoked must establish that a referral under §2.730(f) would have been proper. That is, the party must show that, failing certification, the public interest will suffer or an unusual delay or expense will be encountered. The Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, supra; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975).

Here there have been no allegations by HL&P that the public interest will suffer absent the grant of directed certification, nor is it possible to imagine any way in which the public interest could be affected by the grant or denial of certification in this case. In addition, no delay will result from a denial of certification and, as explained above, there will be little or no additional expense for HL&P as a hearing must be held in the South Texas Project case in any event.

For the reasons set forth above, the petition of HL&P for directed certification must be denied.

II. THE LICENSING BOARD'S DECISION WAS CORRECT AND IN ACCORD WITH JUDICIAL AND ADMINISTRATIVE PRECEDENTS

Should the Appeal Board decide to grant the petition for directed certification and review the Licensing Board's decision on the collateral estoppel question, that decision must be affirmed. An examination of the facts of this case, together with the applicable law, demonstrates that the Licensing Board correctly followed both judicial precepts and NRC precedent in determining that CP&L and CSW et al. could not be collaterally estopped from participating in these Commission antitrust proceedings. HL&P's attack on this ruling is premised upon the notion that the Licensing Board has decided that "the doctrine of collateral estoppel is not applicable in any NRC antitrust proceeding." HL&P Petition at 7. This allegation, echoed throughout the petition,

is part of HL&P's campaign to divert attention from the facts of this situation by portraying this case as the definitive statement on the use of collateral estoppel at the NRC. Such tactics, however, cannot obscure the fact that, because of the specific circumstances present here, collateral estoppel does not apply. The future of collateral estoppel in other Commission antitrust proceedings is irrelevant to the determination of the question before this Appeal Board.

In analyzing the Licensing Board decision below, the starting point must be the four criteria which the courts have established as prerequisite to applying the doctrine of collateral estoppel. The four elements, all of which must be present before a party may be collaterally estopped, 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. Haize v. Hanover Insurance Co., 536 F.2d 576 (3d Cir. 1976); Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977). A review of these factors demonstrates that they are not met in the instant case.

A. The Issues Are Not Identical Because Different Legal Standards Are Involved In the District Court And NRC Proceedings

At one point in HL&P's petition, the claim is made that CP&L and CSW et al. should be barred, on grounds

of collateral estoppel, from raising in these NRC proceedings seven "key" issues of fact allegedly resolved by the district court in the previous litigation. HL&P Petition at 7-9. The findings concern the issues of concerted action, competition, market definition, injury to competition, anticompetitive intent, reasonableness and injury in fact. According to HL&P, these seven factual determinations made by the district judge do not lose their validity in the Commission proceeding simply because the fact determination is proferred to support a different legal theory. Later in the petition, however, HL&P asks the Appeal Board to bar CP&L and CSW et al. from relitigating any of the fact issues decided against them in federal court. HL&P Petition at 18. This makes it difficult to discern the exact nature of the relief HL&P is seeking.

The Licensing Board correctly rejected HL&P's position on collateral estoppel, relying upon the principle expressed in James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 n.8 (5th Cir.), cert. denied, 404 U.S. 940 (1971), that:

> 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. See, e.g., Capps v. Whitson, 157 Va. 46, 160 S.E. 71 (1931). 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 Practice ¶0.443 [2]. 444 F.2d at 459 n.8.

The Ninth Circuit has applied this concept, stating that issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits is the same. Peterson v. Clark Leasing Corporation, 451 F.2d 1291 (9th Cir. 1971). In Peterson, it was held that a California state court determination of the adequacy of financial records could not preclude a federal court from making that same factual determination because a different legal standard was to be employed.

In following this principle that the use of different legal standards renders issues non-identical, the Licensing Board was not plowing new ground in the area of administrative law, as HL&P suggests. Not only has the principle been recognized by the Appeal Board as recently as last September in The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC ___, (Sept. 6, 1979) (Slip op. at 209) (Opinion of Mr. Sharfman), but it has been applied in other federal administrative forums as well. The Department of the Interior Board of Land Appeals, citing Peterson, has held that "Collateral estoppel does not foreclose an action on the same transaction or set of facts when the subsequent action requires the application of a different legal standard." United States v. Elodymae Zwang, 83 I.D. 280, 286 (1976). The Board of Land Appeals found that a federal district court decision would not work as collateral estoppel in a subsequent Department of the Interior proceeding because different legal standards were applicable in each instance.

The fact that different legal standards did obtain in the district court and NRC proceedings is so obvious that it is difficult to see how the matter can reasonably be the subject of dispute. The narrow inquiry before the district court was simply whether the two plaintiffs there were injured, or threatened with injury, from an ongoing violation of Section 1 of the Sherman Act which should, according to traditional equitable concepts, be enjoined under Section 4 of the Clayton Act. The instant proceeding under Section 105c of the Atomic Energy Act, however, includes consideration of Sections 1 and 2 of the Sherman Act as well as Section 5 of the Federal Trade Commission Act.* Moreover, as the Licensing Board pointed out, the standard governing the NRC hearing is whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws, a considerably broader standard than that employed by the district court, which was only concerned with an outright violation of Section 1 of the Sherman Act.

In assessing the scope of the NRC hearing, it must be remembered that remedial license conditions under Section 105c would be warranted by proof of conditions which ran counter to the policies underlying the antitrust laws, even where no actual violation of a statute was found. Consumers

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*The District Court specifically refused to allow CP&L and WTU to amend their complaint to assert a violation of Section 2 of the Sherman Act.

Power Company (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 908 (1977). That precept was recently reiterated by the Appeal Board in Davis-Besse, ALAB-560, supra, (Slip op. at 8). The nature of the legal standard applicable in a Section 105c proceeding is explained in detail in the following passage from the Joint Congressional Committee on Atomic Energy Reports which accompanied the 1970 amendments to that section:

> 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 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 (emphasis supplied).

An examination of that passage, which was also quoted by the Licensing Board, demonstrates convincingly the great disparity between the Section 105c standard and the standard which governed the district court's decision. In view of this disparity, it is evident that, under the principles quoted above, the issues in the two proceedings cannot be deemed to be identical and the district court's findings cannot collaterally estop CP&L and CSW et al. from pursuing

certain matters in the Commission hearings. Simply put, because the first of the four criteria has not been met, collateral estoppel does not apply to this situation. Because of this, HL&P's claim that the evidence which CP&L and CSW et al. plan to present may be identical to that presented in the district court litigation is irrelevant. More importantly, however, those parties have never represented that the proof presented at the two forums would be the same. The quotation HL&P relies upon to support its allegation (HL&P Petition at 9), when read in context, clearly shows that what was being discussed was proof as to concerted action, not proof of the case as a whole. In any event, because the legal standards at the two proceedings are different, it is very likely that the proof offered at the NRC will be different from that adduced in district court.

Before leaving the matter of the identity of the issues in the two proceedings it should be pointed out that HL&P's characterizations of what the district court decided are not entirely correct. For example, HL&P contends that the district judge found that:

> (ii) There is no direct competition between CP&L and eithe HL&P or TESCO. (470 F. Supp. at 820, 837-38) HL&P Petition at 8.

But the cited portions of the district court Order do not support this broad assertion, for the district court stated:

> First, there is no direct competition between the plaintiffs and defendants except in the limited dual certification

areas or fringe areas of WTU and TESCO which is only determined [sic] competition. 470 F.Supp. at 820 (emphasis supplied).

Moreover, the district court states that in fact there is "de minimus [sic] competition" for industrial customers and for wholesales and purchases; 470 F.Supp at 837-38. While it would seem that the district court felt that such competition as it found to exist did not merit Section 1, Sherman Act protection (a finding unique to antitrust law), it is clear that the Licensing Board has its own obligation to determine precisely the scope of that competition and whether it merits protection under Section 105c of the Atomic Energy Act.

Thus, because different legal standards govern the two proceedings, collateral estoppel does not apply.*

B. The Licensing Board Possesses Discretion In Determining The Applicability Of Collateral Estoppel

HL&P contends that an NRC Licensing Board, the same as a court, has no discretion in determining whether to apply collateral estoppel. HL&P is wrong on both counts. In assessing the applicability of collateral estoppel it should be remembered that this is a discretionary doctrine which expresses a salutary policy of benefit to society and

*As the first element of collateral estoppel is so clearly lacking, there is no need to reach the question of whether the other three factors are present. With regard to HL&P's seven "Key issues," however, CP&L and CSW et al. concede that those three tests appear to have been met. In the absence of an identity of issues between the two proceedings, however, this fact is without legal significance. As to any other issues of fact, HL&P's allegations are too vague to enable a judgment on the last three factors to be made.

to the parties of putting an end to litigation. It is not an inexorable rule of law. IB J. Moore, Federal Practice ¶0.405[11], at 783-84 (2d ed. 1974). Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Defenders of Wildlife v. Andrus, 77 F.R.D. 448 (D.D.C. 1978). A court, for example, may refuse to apply collateral estoppel, even if all of the elements of that doctrine are present, because of broad public policy considerations. A federal district court did just that in United States v. Anaconda Co., 445 F. Supp. 486 (D.D.C. 1977).

Moreover, apart from the general discretionary nature of collateral estoppel, an exception to the rule that a court decision will be accorded collateral estoppel effect in a later administrative proceeding has been created because of the overlapping jurisdictions of agencies and courts. The Atomic Energy Commission recognized this fact in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974), when it held that res judicata and collateral estoppel should not be entirely ruled out of Commission 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." This same theme was struck again in a decision in this docket, Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977).

In addition, as Professor Davis has explained in his treatise on administrative law:

> But 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 David, Administrative Law Treatise, §18.12 at 627-28 (1958).

An NRC Appeal Board specifically recognized this exception to the applicability of collateral estoppel in administrative proceedings in The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977). That case involved an attempt to disqualify a law firm from representing one of the applicants in an NRC antitrust hearing. The motion was opposed on the ground that a federal district court decision had previously rejected the identical disqualification attempt in a civil antitrust proceeding in that court. While acknowledging the exception to collateral estoppel, the Appeal Board found no circumstances which would preclude application of the doctrine in that instance.

HL&P also errs in challenging the Licensing Board's assertion that the NRC possesses unique antitrust review authority. On the contrary, decisions of the Commission and the Appeal Board make clear that those tribunals recognize the scope and importance of the antitrust jurisdiction which has been committed to the NRC. In Florida Power & Light Company (St. Lucie Plant, Unit No. 2), CLI-78-12, 7 NRC 939 (1978), the Commission focused on one of the

purposes of Section 105c:

> 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. 7 NRC at 946.

With respect to the public interest implications of Section 105c, the Commissioners in St. Lucie explained:

> 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. 7 NRC at 949.

In a decision in the South Texas Project docket, the Commission stated, with respect to its ability to prescribe remedies:

> Through the licensing process, we can effectuate the special concerns 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. CLI-77-13, supra, 5 NRC at 1316.

The passage from Scuth Texas Project, CLI-77-13, supra, quoted by HL&P in its petition at page 17 does not refute what has just been said concerning the special nature of the NRC's pre-licensing antitrust review. A look at the complete text of that passage reveals that the Commission was contrasting its role in the health and safety area, in which its expertise is unique and its jurisdiction continues throughout the term of a license, with its role in the antitrust field, in which its expertise is not unique and its jurisdiction is limited once a reactor has been constructed and is operating. This recognition of an obvious fact does not detract from the importance or breadth of the NRC's antitrust review jurisdiction when that jurisdiction is being properly exercised, as in the present proceedings.

Because an administrative agency does possess discretion in applying collateral estoppel and because there are exceptions to that doctrine based upon public policy considerations, the Licensing Board acted properly in considering factors such as the unique nature of NRC antitrust review in reaching its decision.

C. The Adoption of HL&P's Position Would Have Absurd Consequences

HL&P seeks to limit the participation of CP&L and CSW et al. in the antitrust hearings in these dockets. The extent to which HL&P is requesting that this participation be curtailed is not clear, as is discussed in

Section IIA above. However, in any event, the inevitable result of the adoption of HL&P's position would be a chaotic and infinitely complicated hearing, for every time that CP&L or CSW et at. put witnesses on the stand, the Licensing Board would have to determine whether the testimony would impinge upon one of the findings of fact from the district court case. This process would be made more difficult by the discursive nature of the district judge's opinion, which contains "findings of fact" throughout the 34 page decision as well as in the 8 page appendix. Furthermore, the Licensing Board would next have to decide whether the "finding of fact" was essential to the district court's decision, a necessary element to invoke collateral estoppel.

These factors would render the implementation of collateral estoppel in the instant proceedings unworkable, if not impossible. For this reason the Licensing Board's decision does not have the effect of eliminating forever the doctrine of collateral estoppel in NRC hearings, but rather serves to preserve the doctrine for use in an appropriate proceeding.

III. CONCLUSION

For the reasons set forth above, HL&P's petition for directed certification must be denied. If the Appeal

Board does decide to order certification and review this matter, the decision of the Licensing Board must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response Of Central Power And Light Company And Central And South West Corporation Et Al. To Petition Of Houston Lighting & Power Company For Directed Certification were served upon the parties named in the attached service list by depositing same in the United States mail, first class, postage prepaid, this 14th day of December, 1979.

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