April 20, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	§	
	§	
TEXAS UTILITIES GENERATING COMPANY, et al.	§	Docket Nos. 50-445 and 50-446
	§	
(Comanche Peak Steam Electric Station, Units 1 and 2)	§	(Application for Operating Licenses)

STATE OF TEXAS' BRIEF ON APPLICABILITY OF COLLATERAL ESTOPPEL DOCTRINE TO BAR RELITIGATION OF "WHISTLEBLOWER" ISSUES

Background

Charles Atchison took the stand as a CASE witness in the above-captioned proceeding on July 29, 1982, and again briefly in September 1982. He testified he had been a Quality Control inspector with Brown and Root on the Comanche Peak Steam Electric Station job. He said among other things that he had been terminated in reprisal for activity protected under the "whistleblower" provision of the Energy Reorganization Act of 1974, 42 U.S.C. §5851(a). Specifically, he said he was fired in April 1982 for filing noncompliance reports about unsatisfactory vendor-supplied pipe whip restraints. At the time of his termination, although still technically a Brown and Root employee, Atchison was attached to a non-ASME pipe whip restraint inspection group that was organizationally directly accountable to Texas Utilities Generating

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Company, one of the applicants.

If Atchison was indeed fired in reprisal for the zealous pursuit of his duties as a QC inspector, a substantial cloud would be cast over applicants' QA/QC program. The facts of the termination, therefore, are highly revelant to Intervenor's Contention No. 5, which claims in effect that the Comanche Peak QA/QC program is inadequate. In addition, the facts are relevant to Atchison's credibility as a witness before the Licensing Board and to the credibility of several of applicants' witnesses.

After Atchison's July 1982 licensing board testimony, a full scale proceeding on the subject of his termination was held before an Administrative Law Judge of the United States Department of Labor. That proceeding, styled In the Matter of Charles A. Atchison v. Brown and Root, Inc., was triggered by Atchison's complaint to the Labor Department of retaliatory firing.

The Labor Department ALJ proceeding included a three day trial in August 1982. Judge Ellin O'Shea issued a 27 page Recommended Decision in December 1982, holding that Atchison had indeed been wrongfully fired. This conclusion was at odds with the results of an investigation by the Nuclear Regulatory Commission Investigation and Enforcement Staff.

Texas's Position On Applicability of Collateral Estopppel Doctrine

The Licensing Board panel in the present case sua sponte posed the question whether the doctrine of collateral estoppel

might preclude relitigation of the cause of Atchison's termination and might bind the panel to adopt the Labor Department ALJ's findings. The panel invited briefing. The State of Texas now respectfully submits that this would be a proper case for invocation of the doctrine.

Texas says that the wrongful firing issue is an important one. It has been touched on but not fully explored at Licensing Board evidentiary hearings. Normally, additional airing of it would be amply justified, in view of the inconsistencies among the the Labor Department investigation results, the I & E staff investigation results, and testimony given in the Licensing Board and Labor Department proceedings.

In the interest of the health and safety of its citizens, Texas is concerned that the full facts be developed in this licensing proceeding about any matter that suggests wrongdoing or that implicates the integrity of the QA program at the Comanche Peak project. Therefore, Texas would move for further exploration of the Atchison termination issue--without, of course, failing to give due regard to the Nuclear Regulatory Commission order barring direct or indirect disclosure of the identities of persons interviewed by I & E staff.

But Texas contends that the necessity of time-consuming and contentious further hearings on this issue is obviated by the Labor Department ALJ decision. That decision is undergirded by full evidentiary exploration of the facts. It is entitled to be adopted by this Licensing Board panel. To avoid unfairness to

parties and to advance the policy of adjudicative economy, the Labor Department ALJ decision should be adopted.

Overview of the Policy of Collateral Estoppel

Adjudicative tribunals have as their central purpose the conclusive resolution of disputes within their jurisdictions. Application in appropriate instances of the related doctrines of res judicata and collateral estoppel furthers that purpose.

Res adjudicata applies to attempted relitigation by parties of claims based upon a same cause of action whose merits were adjudicated in an earlier proceeding.

Collateral estoppel focuses on issues rather than entire causes of action. If an issue is actually and necessarily determined by a competent tribunal, that determination is conclusive in subsequent proceedings involving parties to the earlier proceeding or their privies.

Application of both doctrines preserves fairness by protecting disputing parties from the expense and vexation of attending multiple proceedings, conserves adjudicative resources, and fosters reliance on adjudicative action by minimizing the possiblity of inconsistent decisions.

Applicability of Collateral Estoppel in the Present Case

At least since 1971, with the announcement by the United

States Supreme Court in Blonder-Tongue Laboratories, Inc. v. University of Illinois Found'n, 402 U.S. 313 (1971), (plaintiff-patentee who had sued on his patent and suffered a declaration of its invalidity is barred from relitigating validity in a later case against a different alleged infringer; "mutuality" doctrine significantly eroded), the use of conclusionary labels in the field of collateral estoppel has waned and courts and other adjudicative bodies have moved toward a more descriptive, functional approach. It is difficult, and perhaps not fruitful, to categorize all the varied considerations that come into play. Instead, this brief will recite the commentators' general formulations of the collateral estoppel "elements" and then will discuss the court and NRC cases of particular relevance to the present fact situation.

The general inquiries that adjudicators make in deciding whether or not to give collateral estoppel effect (nowadays sometimes called issue-preclusive effect, due to the tireless urging of Professor Vestal) to a prior determination are summarizable as follows:

> 1. Was the determination essential to the first adjudication?
>
> 2. Was there a decision in the first proceeding that is determined to be sufficiently firm to be accorded preclusive effect?
>
> 3. Did the party against whom preclusion is asserted (or his privy) have a full and fair opportuinity to litigate the issue in the first action?

See generally C. Wright, Law of Federal Courts, 682-684 (4th ed. 1983); see also 1B Moore's Federal Practice ¶0.405 et seq.

Administrative adjudicative decisions, in addition to court decisions, are eligible for acceptance on a collateral estoppel basis. United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966). The present case is much like Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 7 NRC 1 (Commission Decision, 1978)(collateral estoppel effect given to EPA finding of no serious aquatic impact from discharges of one-through cooling water). That case established that reliance on findings of a sister federal agency with expertise in the subject area is strongly justified--particularly when the sister agency has determined a factual issue specifically entrusted to it by Congress.

The Labor Department is a sister federal agency of the NRC, and the Energy Reorganization Act of 1974 specifically entrusts to it the determination of retaliatory firing issues involving NRC license applicants and their contractors. The same statute establishes that the finding sought to be transplanted into the present case was essential to the Labor Department ALJ's decision. The wrongfulness vel non of the termination was the basic issue before the ALJ. It was the issue she was required to decide, the only ultimate issue she did decide, and arguably the only ultimate issue she was authorized to decide.

The Labor Department ALJ's recommended decision has been excepted to and is under review by the Secretary of Labor.

Nevertheless, it is sufficiently firm to be accorded preclusive effect. It was made on the merits and not merely on a jurisdictional ground or by way of summary disposition or because of limitations. It followed a fully contested trial-type proceeding. Both sides were represented by counsel. The evidentiary hearing consumed three days, resulted in a transcript over 700 pages long, and involved many witnesses on both sides and scores of documentary exhibits. The test for finality for purposes of the collateral estoppel doctrine is closely related to that for appealability under 28 U.S.C. §1291. See 1B Moore's Federal Practice ¶0.416[3]. An interlocutory ALJ order, therefore, would not be binding on this panel. But the ALJ's recommended decision resembles a final court decision that is under appeal more closely than it resembles an interlocutory order. The Secretary of Labor's review is not de novo, see 29 C.F.R. §24.6(b)("the Secretary of Labor shall issue a final order, based on the record and the recommended decision")(emphasis added). Therefore the ALJ decision is not robbed of preclusive effect. See 1B Moore's Federal Practice ¶0.416[3] at 2252 ("The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as . . . collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.").

As in Florida Power & Light Co. (St. Lucie Plant, Unit 2), 14 NRC 1167 (Licensing Board Decision, 1981), extended analysis of whether the present proposed use of collateral estoppel is offen-

sive or defensive would not be fruitful. CASE's contentions arguably are analogous to "affirmative defenses" to the license application. But that only means that CASE bears the burden of going forward with evidence sufficient to cause a reasonable Licensing Board to inquire further. The applicants bear the ultimate burden of persuading the Board that the prerequisites for permit issuance have been met. See generally Consumers Power Company (Midland Plant, Units 1 and 2), 3 NRC 101 (Appeal Board Decision, 1976)(even in a show cause hearing, applicant bears the ultimate burden of persuasion). Thus, arguably collateral estoppel in the present case would operate defensively, with CASE being in the posture of "defending" aainst the applicants' claims that they have lived up to the requirements of 10 C.F.R. Part 50, Appendix B, and have otherwise made themselves entitled to a license. Even if CASE were viewed as setting up an affirmative defense and as bearing the burden of supporting it, "[t]he prior cases have never categorized this situation as either defensive or offensive." Florida Power & Light Company, 14 NRC at 1173.

In Florida Power & Light Company, the party resisting collateral estoppel--that is, the applicant--emphasized that the burdens of proof used in the earlier proceedings were different from the burden required to be met in the Licensing Board case. The applicant's contention was that the different burdens rendered preclusion unfair. The panel disagreed, and its reasoning should be adopted by the present panel. The burdens in the Labor Depart-

ment proceeding and in this licensing proceeding are arguably the same. Atchison, of course, had the burden of supporting his complaint, but as Judge O'Shea's recommended decision made clear, he made out his prima facie case of retaliatory motivation on Brown and Root's part. Under her correct analysis, which was keyed to Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the burden then shifted to Brown and Root to articulate a legitimate, non-retaliatory business reason for the termination. In this, Brown and Root failed, despite having had full incentive to come forward with the evidence necessary to bear the burden.

Texas anticipates that the applicants will argue that collateral estoppel would be unfair because not they, but Brown and Root, were complained against in the Labor Department proceeding. They were not formally made parties and as far as Texas knows did not "pull a laboring oar" with Brown and Root in the sense spoken of by the Supreme Court in Montana v. United States, 440 U.S. 147 (1979)(Unites States approved pleadings and paid attorneys fees and costs for its construction contractor in state court suit by contractor for declaration of non-liability for state gross receipts tax; United States also directed contractor's appeal in state court, and appeared and submitted amicus briefs). In this connection, Texas assumes that applicants' simultaneous brief on this issue will tell the full facts of theirs participation, if any, in the Labor Department proceeding.

The applicants' non-party status in the Labor Department proceeding does not automatically defeat collateral estoppel.

"There are many situations in which a nonparty will be bound." C. Wright, Law of Federal Courts 684 (4th ed. 1983); see also 1B Moore's Federal Practice ¶0.411. Texas contends that the interrelated doctrines of privity and virtual representation justify adoption of the ALJ's findings despite the applicants' non-party status.

Southern California Edison Co. (San Onofre, Units 1 and 2), 15 NRC 688 (Appeal Board Decision, 1982), acknowledged the potential availability of the virtual representation doctrine in NRC proceedings. The Appeal Board was reviewing a Licensing Board decision giving preclusive effect, in a licensing proceeding, to a finding made in the construction permit proceeding. The issue was the earthquake potential of a fault. The intervenors in the licensing proceeding were a group of citizens (semble) who had not been parties to the construction permit proceeding.

The Appeal Board held that the Licensing Board had erred in precluding the new intervenors from relitigating earthquake issues. "The standard for determining whether persons or organizations are so closely related in interest as to adequately represent one another . . . [is whether] legal accountability between the two groups or virtual representation of one group by the other [is shown]." 15 NRC at 695-96. The Appeal Board held that neither of these things was shown, although it applied the harmless error rule and affirmed the Licensing Board decision. "Even in its broadest readings," said the Appeal Board opinion, "the privity concept has not encompassed the situation of a generally shared viewpoint." Id. at 696.

Texas contends that Brown and Root and the applicants are so intricately intertwined as to make preclusion proper in this case. The question of virtual representation is one of fact for the trier of fact. See Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975), cert. denied, 423 U.S. 908 (1975)(county, though not a party to earlier court proceeding where title to land was given to Aerojet-General, held estopped in later court proceeding to relitigate title to land). Although the burden of proof probably belongs to applicants, see Blonder-Tongue, 402 U.S. at 333 (burden of avoiding issue preclusion is on the party asserting lack of full and fair opportunity to litigate), Texas contends that the facts are so clear and convincing as to make placement of the burden academic.

One crucial link between Brown and Root and the applicant is a statutory link. The Energy Reorganization Act of 1974, 42 U.S.C. §5851(a), lumps together license applicants and their contractors and subcontractors. In other words, but for Brown and Root's status as applicants' subcontractor, Atchison would have had no statutory ground of complaint for his retaliatory termination.

The impetus for firing Atchison came not from Brown and Root at all, but from Mr. Brandt, who was a TUGCO employee. Mr. Purdy, who was Atchison's actual supervisor, only followed Mr. Brandt's and Mr. Tolson's directions in firing Mr. Atchison. Thus Brown and Root acted in this matter merely as an agent of applicants.

Normally joint tortfeasors are not thought to be so intertwined as to be each other's virtual representatives. But applicants and Brown and Root in the present case were more like aiders and abettors than like joint tortfeasors, as the duty to refrain from wrongful firing rested equally on them both and arose out of statute, not out of the common law. Moreover, the ultimate responsibility for having an adequate QA program--which necessarily includes not firing inspectors for conscientious inspecting--rested not upon Brown and Root but upon applicants. See 10 C.F.R. Part 50 Appendix B ("applicant may delegate to others . . . the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility therefor"). The fortuity that made Atchison a nominal Brown and Root employee should not be given the effect of releasing the applicants from their responsibility.

The applicants obviously had full notice of the Labor Department proceeding. Their employees testified in that proceeding. There is no overriding reason of public policy that weighs against viewing Brown and Root as their virtual respresentative in that proceeding.

Conclusion

Texas contends that the Labor Department ALJ findings--that a QC inspector was fired in reprisal for his having filed noncompliance reports, which was a protected activity--should be

accepted by the present panel on a collateral estoppel basis.

Respecfully submitted,

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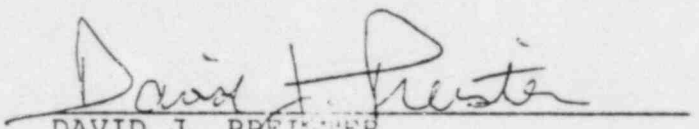

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	§	Operating Licenses)
(Comanche Peak Steam	§	
Electric Station, Units	§	
1 and 2)	§	April 20, 1983

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing State of Texas' Brief on Applicability of Collateral Estoppel Doctrine to Bar Relitigation of "Whistleblower" Issues in the above-captioned matter, were served upon the following persons by deposit in the United States mail first-class postage prepaid, or by ~~Federal~~ Express (Mail), where indicated, this 20th day of April, 1983:

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