UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	§	
HOUSTON LIGHTING & POWER COMPANY,	§	
THE CITY OF SAN ANTONIO,	§	Docket Nos. 50-498A
THE CITY OF AUSTIN, and	§	50-499A
CENTRAL POWER AND LIGHT COMPANY	§	
(South Texas Project,	§	
Units 1 and 2)	§	

REPLY OF HOUSTON LIGHTING & POWER COMPANY
IN SUPPORT OF ITS
MOTION FOR SUMMARY DECISION

After reviewing the lengthy and broad-ranging responses opposing its Motion for Summary Decision, Houston Lighting & Power Company's (HL&P) principal concern is that the Licensing Board (the Board) may be confused concerning the bases for the Motion and the nature of the relief requested by HL&P. Particularly with respect to the effect of collateral estoppel on Central Power and Light Company (CP&L), the responses filed by the Department of Justice, the NRC Staff, CP&L, and the Public Utilities Board of the City of Brownsville (PUB) repeatedly raise and argue "straw men" issues that are not presented by HL&P's Motion. This reply will therefore attempt briefly to clarify the precise nature of the Motion that HL&P has presented.

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I. HL&P HAS PRESENTED TWO SEPARATE AND DISTINCT ISSUES IN ITS MOTION FOR SUMMARY DECISION

HL&P's Motion consists of two entirely separate parts: first, a request for collateral estoppel against CP&L with respect to certain fact findings made by Judge Robert Porter on February 27, 1979, in West Texas Utilities Company, et al. v. Texas Electric Service Company, et al., No. CA 3-76-0633-F (N.D. Tex.);[1/] and second, a request for dismissal of the entire proceeding as to HL&P based on past and prospective developments in other forums that make an antitrust hearing before the NRC unnecessary and wasteful. These two requests for relief should properly be viewed independently as separate motions since they are based on completely distinct legal considerations. For example, even if the NRC in its discretion should decide to proceed with an antitrust hearing, it should not ignore the clear

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1/ Contrary to the Department's belief (Response by the Department of Justice at 4-5), this part of HL&P's Motion is not based on 10 C.F.R. 2.749, the NRC's rule comparable to the motion for summary judgment rule under the Federal Rules of Civil Procedure. Application of collateral estoppel against CP&L would not mean that there were no genuine issues for the Board to hear, at least with respect to evidence that might be presented by the Department, the NRC Staff, PUB, or STEC/MEC. A ruling for HL&P on this part of its Motion would simply mean that CP&L could not relitigate the fact issues decided by Judge Porter.

and compelling case for the application of collateral estoppel against CP&L.

The following statements summarize what HL&P does and does not contend with respect to the different issues of collateral estoppel and dismissal:

A. Application of Collateral Estoppel Against CP&L

(1) HL&P contends that collateral estoppel should be applied against CP&L;[2/] HL&P does not contend that collateral estoppel should be applied against the Department of Justice, the NRC Staff, PUB, or STEC/MEC (See HL&P's Motion for Summary Decision at 10, n.10).

(2) HL&P contends that collateral estoppel should be applied against CP&L with respect to seven basic fact findings made by Judge Porter, which are clearly identified on pages 11 through 13 of HL&P's Motion and set out again in Appendix A of this Reply;

(3) HL&P does not contend that collateral estoppel against CP&L should be applied with respect to any ultimate legal conclusions made by Judge Porter beyond the scope of

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2/ The application of collateral estoppel against CP&L would operate against Central and South West Corporation (CSW) and all of its subsidiaries because they are all clearly in privity with CP&L. CSW and all of its subsidiaries have intervened in the Comanche Peak proceeding. CSW was also a party in the Federal District Court proceeding as one of the defendants named in HL&P's counterclaim.

Section 1 of the Sherman Act, including legal conclusions based on Section 5 of the Federal Trade Commission Act, Section 105(c) of the Atomic Energy Act, or any provision of the Public Utility Regulatory Policies Act.

(4) HL&P contends that any difference between the legal standards of Section 1 of the Sherman Act and Section 105(c) of the Atomic Energy Act does not and should not prevent the Board from applying collateral estoppel against CP&L with respect to Judge Porter's seven basic fact findings (See HL&P's Motion at 14-16).

(5) HL&P contends that Judge Porter's seven basic fact findings preclude CP&L from showing any violation of the antitrust laws or any inconsistency with the policies of the antitrust laws with respect to HL&P (See HL&P's Motion at 15-16); HL&P does not contend that other parties to this proceeding should be precluded because of collateral estoppel from attempting to prove "a situation inconsistent with the antitrust laws."

B. Dismissal of the Entire Proceeding Against HL&P

(1) HL&P contends that it should be dismissed from the entire proceeding not solely because of the effect of collateral estoppel on CP&L, but also because of developments

in other forums which should cause the NRC to exercise its discretion and dispense with any antitrust hearing as to HL&P.

(2) HL&P does not contend that the NRC lacks jurisdiction under Section 105(c) to hold an antitrust hearing as to HL&P or that any other agency, including the Federal Energy Regulatory Commission (FERC), has primary jurisdiction with respect to the issues raised in this proceeding.

(3) HL&P does contend, however, that the NRC has inherent discretion to terminate a proceeding with respect to one or more parties when it finds that termination would serve the public interest and would be consistent with the NRC's responsibilities under the Atomic Energy Act (See HL&P's Motion at 19-22).

(4) HL&P contends--contrary to assertions made by the Department of Justice, the NRC Staff, CP&L, and PUB[3/]--that

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3/ See Response by the Department of Justice at 8-9; Answer of the NRC Staff at 14 n.2, 18-19; Answer of CP&L at 30-31; Response of the PUB of Brownsville at 44. The authorities cited by HL&P with respect to the Federal Trade Commission and the National Labor Relations Board support the proposition that federal agencies have inherent discretionary authority to terminate proceedings before them. See HL&P's Motion at 20-21. The issue is one of first impression before the NRC; significantly, none of the parties opposing HL&P's Motion cites any NRC decision supporting the argument that the Justice Department--and not the NRC--controls the question of whether one or more parties to a proceeding under Section 105(c) can be dismissed in furtherance of the public interest.

even after an antitrust hearing has been initiated pursuant to the recommendation of the Attorney General, the NRC still retains its discretionary authority to terminate a proceeding as to one or more parties if such termination would serve the public interest.

(5) HL&P does not contend that dismissal of the proceeding as to HL&P should preclude PUB from pursuing any antitrust complaints it may have against CP&L (See HL&P's Motion at 5 n.6).4/

If the foregoing statements concerning the nature and bases of HL&P's Motion for Summary Decision are properly understood, most of the arguments made by the opposing parties become irrelevant. The critical point, however, is that the two issues of collateral estoppel and dismissal must be considered separately and independently. The application of collateral estoppel against CP&L rests on sound legal precedents that leave little, if any, room for administrative discretion: since the requirements for the doctrine are met in this case, collateral estoppel must be applied against CP&L.

4/ Recognizing the devastating impact for antitrust purposes of Judge Porter's finding that there was no competition between CP&L and either HL&P or TU, PUB argues that perhaps CP&L, HL&P, and TU were engaged in a conspiracy not to compete (Response of the PUB of Brownsville at 7). Not surprisingly, PUB fails to cite any evidence in support of this bald assertion.

The question of dismissing HL&P from the entire proceeding, on the other hand, inevitably involves the exercise of discretion by the NRC. Unlike the collateral estoppel issue, there are no clear requirements for dismissal of an antitrust hearing: the NRC is free to decide this question based on whatever considerations it deems relevant to the public interest.

In the following sections of this reply brief, HL&P will seek to accomplish two objectives: first, to demonstrate that the requirements for collateral estoppel against CP&L are clearly met; and second, to respond succinctly to the arguments from opposing parties suggesting that the NRC should not exercise its discretion to dismiss HL&P from the proceeding.

II. THE BOARD SHOULD ESTOP CP&L FROM RELITIGATING JUDGE PORTER'S SEVEN BASIC FACT FINDINGS

In arguing against any application of collateral estoppel to this proceeding, Respondents misstate the law of collateral estoppel and overstate the relief sought by HL&P. The application of collateral estoppel that HL&P seeks against CP&L is well within the traditional requirements and limits of that doctrine. All of the elements necessary for collateral estoppel are present. When the requirements for estoppel are met, a court or an administrative tribunal must apply it unless compelling circumstances are shown that outweigh

the need for repose and make relitigation essential.[5/] No such compelling circumstances are present here. To the contrary, collateral estoppel is necessary to protect HL&P, to expedite the proceedings, and to serve the public interest.

The responsive briefs commit two errors in their assertions that the seven basic fact findings made by the District Court are not the same as the issues CP&L has placed in controversy before this Board.[6/] First, the briefs do not address the specific issues that HL&P

5/ "Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy..." 1B Moore, supra note 2, ¶0.405[11] at 783 (footnote omitted). See also, Montana v. United States, 99 S.Ct. 970, 978 (1979), in which the Supreme Court emphasized the importance of collateral estoppel and stated that the doctrine must be applied absent a showing of exceptional circumstances that would result in injustice or unfairness; Gordon County Broadcasting Co. v. F.C.C., 446 F.2d 1335, 1336 (D.C. Cir. 1971) ("While we accept the general rule that flexibility rather than technical procedural specificity is the keynote in applying res judicata in administrative proceedings,...there have been no 'compelling' circumstances shown to justify relitigation when weighed against the need for administrative finality"); United States v. Anaconda Co., 445 F.Supp. 486, 496 (D.D.C. 1977) (when the requirements of collateral estoppel are met, it must be applied even if the second tribunal disagrees with the conclusion of the first).

6/ See Response of the PUB of Brownsville at 12-15; Response by the Department of Justice at 19-23; Answer of the NRC Staff at 3-6; Answer of CP&L at 10-13.

seeks to estop CP&L from relitigating. Second, the briefs erroneously state and apply the legal tests for determining the identity of issues.

HL&P carefully set forth the precise issues that CP&L raised, litigated, and lost in the District Court, and raised again here. (HL&P's Motion for Summary Decision at 11-14; Appendix A to this Reply). None of the responsive briefs contradict the accuracy of this statement of the issues. Instead, the briefs assert that the issues cannot be identical because: (i) the legal standards governing Section 1 of the Sherman Act and Section 105 of the Atomic Energy Act differ;[7/] (ii) the burdens of proof governing the District Court and the Board differ;[8/] and (iii) the proceedings and jurisdiction of the tribunals differ.[9/] To the extent that these differences are present, they do not preclude the application of collateral estoppel by HL&P against CP&L.

7/ See Response by the Department of Justice at 19-23; Answer of CP&L at 12-14; Response of the PUB of Brownsville at 12-16.

8/ See Response by the Department of Justice at 15-16; Answer of the NRC Staff at 6-7; Response of the PUB of Brownsville at 15-16.

9/ See Response by the Department of Justice at 14-16; Answer of CP&L at 19-25; Response of the PUB of Brownsville at 23-28.

The legal standard governing the District Court's judgment was whether HL&P had violated Section 1 of the Sherman Act by deciding to operate on an intrastate basis. In the present proceeding, the legal question is whether HL&P's decision is "inconsistent with the antitrust laws," including Section 1. Even if the legal standard governing this proceeding is broader than the Sherman Act, however, the factual and evidentiary issues basic to CP&L's case in both proceedings are identical.[10/] A fact issue determined in one suit does not lose its validity or preclusive effect in a subsequent proceeding simply because that fact determination is offered to support a different legal theory or a claim arising under a different statute.

10/ The factual issues that CP&L litigated and lost in the District Court and seeks to relitigate before this Board are set forth in Appendix A to this Reply and in HL&P's Motion at 11-13. The identity of the underlying evidentiary issues is obvious and has been acknowledged by CP&L:

> "MR. MILLER: That's right. But I, having participated in the trial in Dallas, I can tell you that the proof is essentially identical. There are a series of agreements, written agreements, to which these companies are signatory. There are a series of oral agreements established through deposition testimony and other testimony of witnesses, and it is going to be the same evidentiary presentation, at least as far as we're concerned."

In the Matter of Texas Utilities Generating Co., et al. and Houston Lighting & Power Co., et al., Docket Nos. 50-445A, 50-446A, 50-498A, 50-599A, Prehearing Conference of December 5, 1978 (Tr. at 55) (Emphasis added).

If the presence of a different legal theory or statute was sufficient to defeat the application of collateral estoppel, the doctrine could not exist. In arguing that different legal theories, statutes, or standards make the presence of identical issues impossible, the responsive briefs prove too much. Unlike res judicata, collateral estoppel by definition applies when the second proceeding arises under a different cause of action than the first:

> That different legal conclusions may flow from a single fact finding, however, does not alter the existence of that fact finding. The distinguishing feature of the doctrine of collateral estoppel is that it precludes in a second or subsequent suit the relitigation of fact issues actually determined in a prior suit regardless of whether the prior determination was based on the same cause of action in the second suit.

James Talcott, Inc v. Allahabad Bank, Ltd., 444 F.2d 451, 459 (5th Cir.), cert. denied, 404 U.S. 940 (1971). See also, Azalea Drive-in Theatre, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976).

There may be circumstances in which the same facts are involved in two actions, but the legal significance of the facts differs in the actions because different legal standards are involved. However, this is a "very narrow exception to the rule with respect to identity of issues" and applies "only when there is a demonstrable difference in

the legal standards by which the facts are evaluated." 444 F.2d at 459, citing 1B Moore's Federal Practice, ¶0.443(2). The legal standards involved here, both of which involve application of the federal antitrust laws, are not so demonstrably different as to alter the significance of the factual issues.[11/]

HL&P is not suggesting that every judicial determination that a plaintiff has failed to prove a violation of an antitrust statute will estop that plaintiff under Section 105(c). However, the judicial determination involved in the District Court case rested on factual issues and findings that are identical to those involved in this proceeding. Significantly, Respondents offer no suggestions as to how CP&L can show that HL&P's actions offended the concerns and policies underlying the antitrust laws without necessarily relitigating the facts and evidence already fully contested and decisively lost.

The burden of proof in the District Court is not so different from the burden of proof in this proceeding as to preclude the application of collateral estoppel. The best example of a situation in which a substantial variance

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11/ PUB's argument places heavy emphasis on the fact that Section 105 is anticipatory in nature (see Response of the PUB at 15), but fails to note that the evidence presented in the District Court covered the economics of intrastate operation for 20 years into the future. (Order at 43-45).

in the burden of proof makes collateral estoppel inappropriate is the effect of issues concluded in a criminal proceeding on a later civil suit. The rule is that the Government is not estopped to relitigate in a civil proceeding an issue it lost in a criminal case because the burden of proof in the criminal case is greater than in the civil action. E.g., Helvering v. Mitchell, 303 U.S. 391 (1938); Nederland v. Commissioner, 424 F.2d 639 (2d Cir. 1970). Respondents urge that the burden of proof in this administrative proceeding (i.e., "inconsistency with the antitrust laws") is less stringent than that governing the District Court suit (i.e., violation of the Sherman Act) and that collateral estoppel should therefore not apply.12/

Respondents do not, however, state what the differing burdens of proof are. It is unclear whether they are asserting that this Board will accept fact findings on a standard significantly lower than the preponderance of credible evidence. More important, the briefs confuse the burden of proof required to establish facts with the burden required to establish the ultimate legal significance of these facts. See Young & Co. v. Shea, 397 F.2d 185, 188 (5th Cir. 1968).

12/ See Response of the PUB of Brownsville at 16-17; Answer of NRC Staff at 6-7; Response by the Department of Justice at 15-16.

The difference, if any, between "inconsistency with the antitrust laws" and violation of the Sherman Act is a difference in legal standard, not a difference in burden of proof. And as discussed above, any differences in these legal standards should not preclude the application of collateral estoppel in this case.

HL&P is seeking to estop CP&L from relitigating issues concerning the existence of certain facts. The evidence CP&L will offer in this proceeding to prove the existence of those facts is admittedly the same evidence already heard and decisively rejected by the District Court.[13/] There is no indication that this Board's standard of proof with respect to the existence of facts is so much lower than the District Court's as to require HL&P to relitigate the same issues and the same evidence against CP&L.

Similarly, the proceedings and jurisdictional responsibilities of this Board are not so different from the Court's as to allow CP&L to nullify the binding effect of a properly rendered judicial decision. The law is clear that if the traditional requirements of collateral estoppel are met, administrative agencies are bound by prior court determinations of the same fact issues. See, e.g., Lentin v. Commissioner of Internal Revenue, 226 F.2d 695 (7th Cir.

13/ See note 10 supra.

1955); Westgate-Sun Harbor Co. v. Watson, 206 F.2d 458 (D.C. Cir. 1953); George H. Lee Co. v. FTC, 113 F.2d 583 (8th Cir. 1940); see generally, 2 K. Davis, Administrative Law Treatise, § 18.11 (1958).[14/] The NRC follows this general rule. See Toledo Edison Co., et al., (Davis-Besse Nuclear Power Station, Units 1, 2, and 3, Perry Nuclear Power Plant, Units . and 2), ALAB-378, 5 NRC 557, 563; Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212-13, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974), cited in Toledo Edison Co., supra.

Respondents, however, argue that collateral estoppel is applied with great flexibility in the administrative context, and that an agency has great discretion to ignore, reject, or limit the effect of judicially determined issues in an agency proceeding[15/]. The briefs overstate the legal principles recognizing such flexibility and misapply them to this case. The Appeal Board in Toledo Edison stated that:

> 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.

14/ Similar concerns are involved when preclusive effect is sought for prior administrative decisions in later judicial proceedings. E.g., Farmington Dowel Products v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1961); United States v. Radio Corp. of America, 358 U.S. 334 (1959); United States v. Anaconda, 445 F. Supp. 486 (D.D.C. 1977).

15/ See Response by the Department of Justice at 14-16; Answer of CP&L at 19-25; Response of the PUB of Brownsville at 23-28.

ALAB 378, supra, 5 NRC at 561. The rule could not be otherwise.

Contrary to the position asserted by Respondents, no agency has the power to ignore or reject collateral estoppel. To assert such a power is, simply put, to assert the power to nullify judicial findings and decisions. As the Supreme Court has held:

> Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.... It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113-14 (1948); see also, Robinson v. Vollert, 411 F. Supp. 461, 474-75 (S.D. Tex. 1976) (HEW cannot usurp adjudicatory function of courts by reviewing adequacy of court-ordered desegregation plan).

There are circumstances in which administrative proceedings mandate a more flexible application of collateral estoppel. However, these circumstances are carefully limited, and no showing has been made that they are present in this case. To the contrary, the limited application of the doctrine HL&P invokes is well within traditional legal standards. As the Fifth Circuit has recently stated:

> The judicial concepts of res judicata are sometimes relaxed in the administrative

> process. 2 K. Davis, Administrative Law Treatise § 18.03 (1958). They are only relaxed, however, when the policies underlying res judicata are not applicable to the administrative process. 2 K. Davis, Administrative Law Treatise § 18.02 (1958). Therefore, because certain administrative agencies must be amenable to changing policies and necessities of enforcement, collateral estoppel is not normally applied to conclusions of law made by the agencies. No such policy considerations mitigate against the application of collateral estoppel to facts previously adjudicated, however. See West v. Standard Oil Company, 278 U.S. 200, 49 S.Ct. 138, 73 L.Ed. 265 (1929). Indeed, all the judicial policies behind collateral estoppel apply.

Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978) (Emphasis added).

Respondents also argue that the Board should reject the application of collateral estoppel against CP&L because it would interfere with the Board's jurisdiction and proceedings under the Atomic Energy Act.[16/] This argument is simply erroneous. This is not a situation in which the second tribunal has exclusive jurisdiction over issues intimately related to those determined by the first proceeding. The cases cited in support of Respondents' argument all concern such preemption problems. E.g., Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir. 1955), cert. denied, 350 U.S. 825 (1955) (issues resolved in state

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16/ See Response of the PUB of Brownsville at 23-26; Answer of CP&L at 19-25.

court contract case denied preclusive effect in federal court Sherman Act suit); United States v. Radio Corporation of America, 358 U.S. 334 (1959) (FCC rulings on antitrust questions denied estoppel effect in subsequent Sherman Act suit); Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987 (1955) (contract issues resolved by arbitration denied estoppel effect in federal court Sherman Act suit).

None of these cases are in point. The NRC does not have exclusive, preemptive jurisdiction to determine antitrust questions. To the contrary, this Commission has recognized that it shares responsibility for enforcing this nation's antitrust policies with several other tribunals, including federal district courts:

> There are strong policy reasons why this Commission has expansive health and safety jurisdiction, which continues through the lives of outstanding licenses. Nuclear power is an area of considerable technical complexity. Its governance should be entrusted to an agency which embodies that particular expertise. But in the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry.

Houston Lighting & Power Co., et al., (South Texas Project, Unit Nos. 1 & 2) CLI-77-13, 5 NRC 1303, 1316 (1977). Thus there is no

basis for urging the rejection or limitation of collateral estoppel to protect the exclusive jurisdiction of the NRC. To the contrary, there is support for looking to and relying on the decisions of antitrust issues made by other tribunals.[17/]

Finally, the Department of Justice raised the possibility of appellate reversal of the District Court's judgment as a basis for denying collateral estoppel effect to issues determined by that judgment.[18/] This is simply an incorrect statement of the law. It is settled that the pendency of an appeal of the District Court's judgment does not suspend its operation as collateral estoppel. Finality for the purpose of res judicata and collateral estoppel is not the same as immutability. See 1B Moore's Federal Practice, ¶ 0.416[3], at 2254; Kurek v. Pleasure Driveway & Park District, 557 F.2d 580 (7th Cir. 1977); American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, 9 n.3 (5th Cir. 1974); Overseas Motors, Inc. v. Import Motors Ltd., Inc., supra, at 51.

17/ Even when a problem of exclusive jurisdiction is present, a court cannot simply reject the application of collateral estoppel, but must weigh the policy of preemption against the "equally strong" policy of finality which underlies the doctrine of collateral estoppel. Overseas Motors, Inc. v. Import Motors Ltd., Inc., supra, 375 F.Supp. at 521. Respondents again prove too much in seeking to deny any collateral estoppel effect to the District Court's findings.

18/ See Response by the Department of Justice at 23-25.

Thus, the District Court's fact findings that CP&L seeks to relitigate in this proceeding satisfy all of the requirements for collateral estoppel. HL&P's right to avoid needless and repetitive litigation by CP&L, and the public's right to finality and repose, require that collateral estoppel be applied.

III. THE NRC SHOULD ASSERT AND EXERCISE ITS DISCRETION TO DISMISS HL&P FROM THIS ANTITRUST PROCEEDING

All of the Respondents, and the Department most vigorously, have argued that the NRC cannot stop this proceeding as long as the Department wills that it go forward.[19/] The issue, squarely put, is whether the Department or the Commission controls an antitrust proceeding before the NRC. In HL&P's view, an advice letter recommending the commencement of a hearing does not strip the NRC of its discretionary authority to terminate a proceeding when it is apparent that continuation would be wasteful, duplicative and would not further the policies embodied in Section 105 of the Act (See HL&P's Motion at 21-22).

In support of its Motion, HL&P has cited decisions concerning other agencies which recognize that a federal agency has the discretionary authority to control its own docket. The Department has cited no case law to the contrary, and has

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19/ See Response by the Department of Justice at 8-9; Answer of the NRC Staff at 14 n.2, 18-19; Answer of CP&L at 30-31; Response of the PUB of Brownsville at 44.

attempted to rely upon the Commission's order of April 1978, in which the issue was initiating, not dismissing, an antitrust proceeding. The question is admittedly one of first impression before the NRC, and the Board's decision in this case will have a significant impact in shaping the scope of this agency's antitrust jurisdiction. Accordingly, HL&P respectfully urges that the Board reject the proposition that the Department has exclusive control of NRC antitrust cases, and affirm the Commission's discretionary authority to terminate proceedings that would not serve the public interest.

In addition to contending that the NRC has no authority to terminate this proceeding, Respondents argue strenuously and repetitiously that continuation of this proceeding would promote the public interest. With one notable exception, these arguments largely fail even to tackle, much less refute, the statement supporting dismissal in HL&P's Motion for Summary Decision (See HL&P's Motion at 22-30). One novel argument, however, deserves mention because it illustrates the problem of relief and the relationship of this case to the FERC proceeding.

The Department, the NRC Staff, and CP&L all argue that the NRC can ignore the injunction issued by the Federal District Court against CP&L on the theory that the NRC can "reform" Section 8.2 of the STP Participation Agreement to

cure its alleged anticompetitive effects.[20] The Department, for example, contends that Section 8.2 may be inconsistent with the antitrust laws because it limits participation to intrastate companies.[21] These arguments mischaracterize Section 8.2 as well as the effect which that provision has on this proceeding. Section 8.2 does not control participation in the STP; that was not the purpose of the provision, nor has HL&P ever attributed that meaning to the provision. Section 8.2 simply assures that no participant in the STP will pursue an objective that would unreasonably affect the operation of another participant's electric system or the electric systems of others with which the participants are interconnected.

Judge Porter found the evidence to be undisputed that unilateral efforts by CP&L to establish synchronous interconnections with SWPP would be so disruptive that the STP could not even operate and that CP&L was (through CSW)

20/ Response of the Department of Justice at 39-40; Answer of the NRC Staff at 15; Answer of CP&L at 34. For CP&L and the other Respondents to indicate that they may urge what would be in effect a circumvention of Judge Porter's injunction raises serious questions beyond the scope of this brief.

21/ Response of the Department of Justice at 39-40.

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irrevocably committed to this course of action.[22] The Court also found that CSW was engaged in an effort to force all of the STP Participants into Mode 4 which would have an adverse operational effect on all members of TIS.[23] In short, the Court recognized that CSW wanted to change the entire method of operation within TIS to a method of operation not contemplated at the time the STP Participation Agreement was signed, and that there could be no clearer example of a violation of the Agreement.

CP&L did not present a single witness to oppose HL&P's counterclaim. Nor did CP&L, as implied in its response (Answer of CP&L at 5), seek simply money damages or injunctive relief. CP&L asked the Court to appoint a special master to, in effect, oversee the whole question of interconnecting TIS and SWPP:

> Plaintiffs' Complaint requests only injunctive relief against a continued violation of Section 1 of the Sherman Act. Specifically plaintiffs ask that this Court declare that the joint TESCO-HLP policy of refusing interconnections with utilities outside Texas violates Section 1, and enter a permanent injunction restraining defendants from disconnecting with plaintiffs once plaintiffs commence completely interconnected, centrally dispatched operation with PSO and SWEP. This injunction would form the basis

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22/ Memorandum Opinion at 57 (January 30, 1979).

23/ Id. at 57-58.

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> for a Mode 4 type operation. The TESCO-WTU interconnection agreement is one blatant manifestation of the concerted refusal to deal which has been created and policed by the defendants. The intrastate restriction in that agreement should therefore be specifically declared unlawful. This Court could thereafter retain jurisdiction, or refer this matter to a special master under Rule 53 of the Federal Rules of Civil Procedure, to ensure that payment for the facilities which HL&P or TU would have to construct to permit a Mode 4 type operation would be allocated among the parties hereto on a fair and reasonable basis considering the relative benefits which a Mode 4 operation would confer.24/

Thus, CSW clearly recognized that its ultimate goal -- Mode 4 -- would indeed impose costs on HL&P and TU, and it must follow that Mode 4 would interfere with the transmission systems of the STP participants. The Court quite wisely brought the whole matter to a halt by granting the injunction requested by HL&P. This injunction gives the STP participants the options of agreeing on adequate compensation or refusing to participate in Mode 4, and does not involve the Court in those matters.

If the Board in this proceeding chooses to follow the advice of the Department and others by considering reformation of Section 8.2, it will have no choice but to involve itself in the enormously complex questions of compensation

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24/ Plaintiffs' Trial Brief at 5 (September 28, 1978)(Emphasis added).

for the changes that must be made in numerous electric systems within TIS and SWPP in order to accommodate the far-reaching effects of interconnecting those two systems. By suggesting the need for a special master, CSW clearly recognized in the District Court that involvement in these questions was the inescapable conclusion of the relief it was requesting. The Board must presume that a similar request will follow here because there is simply no other way to "reform" Section 8.2.

The point is simple. It is no secret that CSW (and thus CP&L) wants to interconnect TIS and SWPP (i.e., Mode 4) -- it has in fact filed an application at the FERC asking for such an interconnection. Interconnection of these two major power systems would be a massive undertaking involving, directly or indirectly, approximately 40 bulk transmission and distribution systems. HL&P merely suggests that if CSW can still manage to move forward under the burden of the orders by the PUC and the District Court, the FERC should logically be the forum for final resolution of this controversy. CSW and CP&L have had their day in court on the antitrust implications of this controversy. The remaining issue is an interconnection issue and the NRC can,

and should, recognize that the FERC is a more appropriate forum for such a proceeding.[25]

CP&L suggests that the NRC has ordered interconnections as part of the relief granted in other antitrust proceedings, but fails to mention that what is involved here is totally different from any of the situations that led to the negotiated license conditions cited by CP&L (See Answer of CP&L at 32 n.12). Those cases all involved simple interconnections providing access by a small system which was isolated from the power grid surrounding its system.[26] This case

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25/ In arguing that the NRC should exercise its antitrust jurisdiction notwithstanding the concurrent jurisdiction of the FERC with respect to interconnection of TIS and SWPP, the Department suggests that HL&P's refusal to make an interconnection could be unreasonable, and thus a violation of the antitrust laws, even though the party seeking the interconnection could not satisfy Section 202 of PURPA by showing that the interconnection would encourage the conservation of energy or capital, optimize efficiency, or improve reliability. (See Response by the Department of Justice at 33-35). This extreme argument is puzzling to say the least.

26/ Moreover, it is not accurate to say, as CP&L does, that the NRC has ordered interconnections. It has not. It has imposed conditions to require licensees to interconnect to other systems where such interconnections are technically feasible and where the benefits of the interconnections exceed the costs. Reliability and costs are, of course, the issues in dispute over CSW's interconnection proposals.

involves interconnection of two major power grids, and all of the complexities attendant thereto. By way of example, CSW's application at the FERC requests as part of its relief an order requiring Gulf States Utilities Company (Gulf States) and HL&P to build a direct interconnection because such an interconnection is an integral part of Mode 4. Presumably, all parties would agree that the NRC would not have the authority to order an interconnection between HL&P and Gulf States, which is not even a party to this proceeding, as part of a condition on the STP operating license.

The claims by parties like Tex-La are no more appealing. From an electrical engineering standpoint, there is absolutely no way in which Tex-La's intrastate members can coordinate with its interstate members unless TIS and SWPP are interconnected. HL&P does not believe that the NRC can exercise jurisdiction over all of the members of TIS and SWPP through conditions imposed on the Comanche Peak operating license. Furthermore, if the NRC should decide not to proceed with this case, Tex-La is not without remedy: its intrastate members have intervened in the FERC proceeding, and they can pursue their arguments for interconnection in that forum.

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IV. CONCLUSION

PUB vigorously criticizes HL&P for attempting "to short circuit this proceeding" and, ironically enough, for seeking to relitigate the issue of whether an antitrust hearing in this case is really necessary. (See Response of PUB at 47, 49). Similar charges are made by other Respondants. This line of argument, however, totally ignores the highly significant events that have occurred in a Federal District Court and the United States Congress since the NRC last considered the need for continuation of this proceeding. These recent developments, it should be added, are directly relevant to the interconnection controversy that prompted and continues to motivate the antitrust review of the STP nuclear plant.

Anyone who takes the time for a careful and thoughtful reading of Judge Porter's opinion can hardly conclude that the Dallas litigation was narrow or abbreviated.[27/] Since the Dallas proceeding occurred in a judge-tried, rule of reason context, Judge Porter properly adopted an expansive approach toward the admission and consideration of evidence; even a cursory review of the transcript and the documents admitted in evidence proves

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27/ For those who experienced the trial in Dallas, it was surprising indeed to read PUB's completely unsubstantiated suggestion that CP&L may have deliberately withheld evidence that would have supported its antitrust charges against HL&P (See Response of the PUB at 20).

this point. Under these circumstances, HL&P submits that to ignore the Federal District Court's decision would be contrary to the well-established principles of decisional economy and fairness which the Supreme Court has so recently emphasized.[28] Because waste and delay are the inevitable consequences of an unnecessary proceeding, HL&P urges that its Motion for

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28/ If there were any doubt concerning the Supreme Court's trend favoring collateral estoppel as established in Parklane Hosiery Co. v. Shore, 99 S.Ct. 645, 649 (1979), the Court reiterated the importance of collateral estoppel and res judicata on February 22, 1979 as follows:

> . . . Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. Southern Pacific Railroad, supra, 168 U.S., at 49, 18 S. Ct. at 27; Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. U.S., 99 S.Ct. 970, 974 (1979).

Summary Decision, and particularly its request for the application of collateral estoppel against CP&L, be granted in all respects.

Respectfully submitted,

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Dated: April 30, 1979

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APPENDIX A

COMPARISON OF DISTRICT COURT'S SEVEN BASIC FACT FINDINGS WITH CP&L'S ALLEGATIONS IN THIS PROCEEDING

The District Court found that:	CP&L has asked this Board to find that:
(i) HL&P and TESCO did not engage in concerted action to confine their operations to intrastate commerce, and did not engage in any conspiracy to restrain trade or concerted refusal to deal. (Order at 26-28).	(1) HL&P combined with TU (the parent company of TESCO) to refuse to deal with CP&L.
(ii) There is no direct competition between CP&L and either HL&P or TESCO. (Order at 30-31, 61).	(2) CP&L and HL&P are in direct competition.
(iii) With respect to plaintiffs' theory of indirect competition, defendants' alleged refusal to cooperate in the "coordinated services market" had no adverse effect on competition in any "downstream markets"--inter-fuel markets, self-generation markets, wholesale markets, or retail markets, including competition for new industrial customers. (Order at 34-37, 61-62).	(3) HL&P has a dominant position which it uses to monopolize or attempt to monopolize CP&L's and HL&P's service areas. (4) HL&P's and TU's refusal to deal in interstate commerce had a detrimental impact on CP&L by preventing possible savings from interstate operations.
(iv) Defendants were not motivated by any anticompetitive intent in their decision to disconnect from CP&L and WTU on May 4, 1976. (Order at 39, 62).	(5) HL&P's action in disconnecting from CP&L on May 4, 1976 was an unfair method of competing with CP&L. [See also (ii) in opposite column]
(v) CP&L and WTU suffered no economic loss or threatened harm as a result of defendants' disconnection on May 4, 1976. (Order at 39, 49, 62).	[See (4) above]
(vi) There is no relevant market in which plaintiffs and defendants compete. (Order at 34-37, 61-62).	[See (2) and (3) above.]

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(vii) HL&P and TESCO acted reasonably in opposing interstate operation. (Order at 53-54, 63).	[See (4) and (5) above.]
Source: District Court's Findings of Fact, Memorandum Opinion (January 30, 1979).	CP&L's Petition for Leave to Intervene and Request for Hearing Out of Time at 8-13 (June 4, 1976).

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING 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, et al. (Comanche Peak Steam Electric Station, Unit Nos. 1 and 2)	§ § § § § §	Docket Nos. 50-455A 50-446A

AFFIRMATION OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon all counsel and persons listed on the attached Service List on this the 30th of April, 1979.

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