UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE BY THE DEPARTMENT OF JUSTICE TO HOUSTON LIGHTING & POWER COMPANY'S MOTION FOR SUMMARY DECISION; TUGCO'S MOTION TO DISMISS CSW AS A PARTY INTERVENOR OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION, AND FOR STEPS TOWARD TERMINATION OF PROCEEDING; TUGCO'S MOTION FOR AN ORDER BARRING CP&L FROM SEEKING TO OBTAIN ANY RELIEF HEREIN INCONSISTENT WITH THE DISTRICT COURT DECISION AND FOR SUMMARY DISPOSITION IN FAVOR OF TUGCO AND AGAINST CP&L; AND CITY OF AUSTIN'S BRIEF ON QUESTION OF COLLATERAL ESTOPPEL TO DISPOSE OF OR LIMIT THE ANTITRUST PROCEEDING BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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Pursuant to the Atomic Safety and Licensing Board's Order of April 13, 1979, the Department of Justice ("Department") hereby responds to (1) Houston Lighting & Power Company's Motion for Summary Decision ("HL&P's Motion"); (2) TUGCO's Motion to Dismiss CSW as a Party Intervenor, or, in the Alternative, for Summary Disposition, and for Steps

Toward Termination of Proceeding ("TUGCO's Motion to Dismiss"); (3) TUGCO's Motion for an Order Barring CP&L From Seeking to Obtain any Relief Therein Inconsistent with the District Court Decision and for Summary Disposition in Favor of TUGCO and Against CP&L ("TUGCO's Motion for an Order"); and (4) City of Austin's Brief on Question of Collateral Estoppel to Dispose of or Limit the Antitrust Proceeding Before the Atomic Safety and Licensing Board ("Austin's Motion").

BACKGROUND

On January 30, 1979, United States District Court Judge Porter issued a Memorandum Opinion and Order in West Texas Utilities Company, et al. v. Texas Electric Service Company, et al., No. CA 3-76-0633-F (N.D. Tex.) ("Dallas Decision") 1/, in which Houston Lighting and Power Company ("HL&P") and the Texas Electric Service Company ("TESCO") were found not to have engaged in concerted action against Central Power and Light Company ("CP&L") and West Texas Utility Company ("WTU") in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

1/ Corrections to that opinion were issued, and judgment was entered, on February 27, 1979.

Almost two months later, at a prehearing conference in the instant proceeding, counsel for both HL&P and Texas Utilities Generating Company ("TUGCO") 2/ advised this Atomic Safety and Licensing Board ("Board") that they intended to file motions 3/ to prevent CP&L from relitigating findings of fact which had been decided adversely to CP&L and WTU in the Dallas Decision. 4/ This Board ordered that initial briefs be filed by April 3, 1979 with answering briefs due by April 16, 1979 and reply briefs due by April 20, 1979. 5/ Pursuant to that Order, on April 3, 1979, (1) HL&P's Motion, (2) TUGCO's Motion to Dismiss, (3) TUGCO's Motion for an Order, (4) a Memorandum of Points and Authorities in Support of TUGCO's Motion to Dismiss ("TUGCO's Memorandum"), and (5) Austin's Motion were filed. By Order dated April 13, 1979, this Board extended the date for filing answering briefs until April 23, 1979, and extended the date for filing reply briefs until April 27, 1979. Pursuant to the Board's Order, the Department hereby responds to the motions and memorandum filed by HL&P, TUGCO and Austin.

2/ TUGCO, a subsidiary of Texas Utilities Company, is to operate the Comanche Peak facilities as agent for the plant's joint owners, one of which is TESCO, also a subsidiary of Texas Utilities Company.

3/ Tr. 88, 97.

4/ Tr. 93, 94.

5/ Tr. 143-148.

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I. THE RELIEF REQUESTED IN THE MOTIONS OF HL&P, TUGCO AND AUSTIN IS EITHER NOT PROVIDED FOR BY LAW OR NOT PROPERLY SOUGHT

Neither the HL&P, TUGCO, nor Austin Motions clearly indicate the exact nature of the relief being requested or the legal authority being relied upon. All of the movants appear to be seeking some combination of dismissal, partial dismissal, summary disposition, partial summary disposition or an invocation by the Board of vague and largely undefined equitable powers to limit, or not consider at all, the issues which have been raised in these proceedings. To eliminate any confusion in this regard, the Department will initially attempt to identify specifically the relief which each movant is requesting. The Department will then address the relatively similar reasons relied upon by all of the movants in support of their positions.

HL&P's Motion appears to request that the Board grant summary disposition in its favor and against CP&L, in the Docket Nos. 50-498A and 50-499A ("South Texas proceeding"). 6/ Leaving aside, temporarily, the substantive basis for its motion, HL&P has not followed the proper procedure for seeking summary disposition. The pertinent Nuclear Regulatory Commission ("NRC" or "Commission") rule, 10 C.F.R. 2.749, provides, in relevant part:

6/ HL&P's argument in support of this portion of its requested relief is founded on the doctrine of collateral estoppel, which HL&P specifically states is not applicable to any parties to the South Texas proceeding other than CP&L. See HL&P's Motion at 10, n. 10.

> There shall be annexed to the motion [for Summary Disposition on Pleadings] a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue. 7/ (Emphasis added) 8/

HL&P attaches no such statement 9/ and, therefore, its motion, insofar as it is a motion for summary disposition, is fatally defective and should be rejected on procedural grounds. 10/

7/ This NRC rule goes on to require that any party serving an answer opposing a motion for summary disposition should annex to its answer "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." Since neither HL&P nor Austin appended to its motion the required statement, the Department cannot file an opposing statement with its answer. Notwithstanding the Department's inability to file such an opposing statement, it is incumbent upon the Department to inform this Board that it is the Department's present position that there are genuine issues as to each of the material factual holdings in the Dallas Decision relied upon by HL&P in support of its motion. Until discovery is completed the Department will not be in a position to specify which facts and issues are not in dispute. TUGCO's statement, while appearing to comply in form with the requirements of Rule 2.749, is nonetheless inadequate since it wholly relies for its factual support on the Dallas Decision which as is discussed hereinafter, cannot be applied against the Department.

8/ See also, In the Matter of Pacific Gas & Electric Company, (Stanislaus Nuclear Project, Unit No. 1), LBP-77-45, 6 NRC 159 (1977).

9/ HL&P's Motion does include, a list of factual findings in the Dallas Decision, followed by a list of the issues in controversy in the South Texas proceeding (HL&P's Motion at 11-14). By merely regurgitating the district court's factual findings, however, HL&P has not satisfied the requirements of Rule 2.749.

10/ The problems caused by a failure to attach the required statement to a motion for summary disposition are fore-
(continued)

HL&P also appears to be requesting an additional form of relief, namely that the South Texas proceeding be dismissed (or terminated) as to HL&P (see, e.g., HL&P's Motion at 1, 32). The granting of this relief would bar any party, not just CP&L, from presenting evidence regarding the issues raised in the Department's advice letter of February 21, 1978.

HL&P is understandably unable to cite either statute or rule which empowers the Board to dismiss the South Texas proceeding in the manner requested. Rather, HL&P argues the "appropriateness of administrative restraint," "comity and rational administration of the Atomic Energy Act," and the Commission's "inherent power to dismiss proceedings if dismissal serves the public interest and is consistent with the Commission's responsibilities under the Atomic Energy Act." (HL&P's Motion at 19). This laundry-list of amorphous generalities is followed by the bald assertion that:

(footnote continued)
shadowed by the final paragraph of HL&P's Motion, which asks, in pertinent part:

> That CP&L be collaterally estopped from relitigating or attempting to relitigate any of the fact issues decided against it by the United States District Court, for the Northern District of Texas in West Texas Utilities Company, et al. v. Texas Utilities Service Company, et al., No. CA3-76-0633-F. (HL&P's Motion at 32)

Without the required statement, it is impossible to know which "fact issues" HL&P contends should be the subject of summary disposition.

> If the Commission decides, in light of events which have occurred since the start of the antitrust review, that continued proceedings would be wasteful, duplicative, or would not substantially further the policies of the Act, the Commission has the discretion to order dismissal. (HL&P Motion at 19-20).

In support of this proposition, HL&P cites four cases, none of which are apposite here. Three of those cases, Drug Research Corporation, 63 FTC 998, 14 Ad. L.2d 482 (1963); First Buckingham Community, Inc., 73 FTC 938, 23 Ad. L.2d 423, 427 (1968); and Progressive Mine Workers of America, Dist. No. 1 v. National Labor Relations Board, 189 F.2d 1 (7th Cir. 1951), 11/ stand for the proposition that certain administrative agencies (namely the Federal Trade Commission and the National Labor Relations Board) have the power to dismiss complaints (or take similar action) if, for example, the issuance of a cease and desist order would serve no useful purpose 12/ or if the impact on

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11/ The fourth case cited by HL&P, Moog Industries v. FTC, 335 U.S. 411, 413 (1958), stands solely for the proposition that if an administrative agency (there the Federal Trade Commission) has decided a question pursuant to the authority vested in it by Congress, that decision should not be overturned on appeal by a court, in the absence of a patent abuse of the agency's discretion.

12/ In First Buckingham Community, Inc. supra, it was found that the allegedly illegal behavior had been effectively terminated by the intervening enactment of the Civil Rights Act of 1968. Nonetheless, the FTC was careful to point out that "[i]f it should transpire, however, that we are mistaken in this regard, the matter can always be reopened if necessary."

(continued)

commerce arising from the complained of behavior is not substantial enough to warrant exercise of the agency's jursidiction. 13/

The cited cases are thus distinguishable from the instant proceedings since the statutory scheme governing proceedings of the Commission requires the Commission to conduct an antitrust hearing whenever the Attorney General recommends that such a hearing be conducted. 14/ Thus,

(footnote continued)
73 FTC at 947. That is not the case in South Texas where, if the Board dismissed the instant proceedings (assuming arguendo that it had the power to do so), and issued an operating license, it might not have another opportunity to adjudicate the issues raised in the Department's advice letter. See Commission's Order of June 15, 1977.

13/ See Progressive Mine Workers of America, Dist. No. 1 v. National Labor Relations Board, supra, which hinged on the fact that the National Labor Relations Act, 29 USC §151 et seq., requires that the activities of a business entity accused of unfair labor practices must affect interstate commerce before being subject to the jurisdiction of the Board.

14/ In its April 5, 1978 Order (which set in motion antitrust procedures with respect to the South Texas plant), the Board expressly acknowledged this specific statutory responsibility:

> When the Attorney General recommends an antitrust hearing on a license for a commercial nuclear facility, we are required to conduct one. That is the clear implication of the statutory language and the pertinent legislative history. [Quoting, in a footnote, Section 105(c)(5) and citing S. Doc. No. 91-1247 and H.R. Rep. No. 91-1470, 91st Cong., 2nd Sess., p. 30 (1970) (Report by the Joint Committee on Atomic Energy on Amending the
> (continued)

once the hearing process is triggered, the Board "shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws", Section 105c(5) of the Atomic Energy Act, 42 USC 2135c(5) (emphasis added). The Board may not, as a matter of discretion, terminate the hearing process prior to making these statutory findings. 15/ Consequently, HL&P's request that the Board prematurely abort this proceeding squarely contradicts the Board's statutory mandate.

Taking a different tact than HL&P, TUGCO has filed two motions. One, filed in the South Texas proceeding, requests an order barring CP&L from seeking to obtain any relief inconsistent with the Dallas Decision (or relitigating matters contained therein) or for an order granting

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(footnote continued)
Atomic Energy Act of 1954 to provide for Prelicensing Antitrust Review of Production and Utilization Facilities)] (Board's April 5, 1978 Order at 2, emphasis added).

Indeed, even TUGCO admits, in its Memorandum at 5: "There is some doubt whether this Board has been delegated the discretion to terminate this proceeding without hearing in the absence of a settlement (except where all proponents of license conditions were precluded)."

15/ This is not to say, of course, that the Board may not grant a proper motion for summary disposition or similar relief provided for in its rules as part of the prehearing or hearing process. By ruling on a motion for summary disposition, for example, the Board would, in effect, be fulfilling its statutory obligation to make a finding as to whether the activities at issue would create or maintain a situation inconsistent with the antitrust laws.

summary disposition in favor of TUGCO and against CP&L. The second motion, filed in Comanche Peak, seeks dismissal of CSW as a party intervenor or, in the alternative, summary disposition in favor of TUGCO and against CSW, or an order precluding CSW from relitigating any matter of fact or law which was decided in the Dallas Decision.

In both of its motions, TUGCO cites, inter alia, 10 C.F.R. 2.718, 2.743(h) and 2.749, as the rules pursuant to which it is requesting relief. 10 C.F.R. 2.718, provides that the presiding officer in a NRC proceeding "has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order" and lists some of the powers necessary to accomplish those ends. None of the listed powers authorizes the Board to dismiss a party or terminate these proceedings for the reasons cited by TUGCO. With respect to TUGCO's reliance on 2.743(h), it bears noting that TUGCO has failed to attach an official or certified copy of the Dallas Decision. As for TUGCO's reliance on Rule 2.749, see footnote 7 at 5.

Finally, Austin, rather ambiguously, captioned its pleading "City of Austin's Brief on Question of Collateral Estoppel to Dispose of or Limit the Antitrust Proceeding Before the Atomic Safety and Licensing Board." Thus,

the exact nature of the relief sought by Austin is not apparent from the caption and cannot be gleaned from the pleading itself. Austin's Brief in effect seeks to associate Austin with the relief sought by HL&P and TUGCO. Therefore, the arguments made by the Department with respect to the motions filed by HL&P and TUGCO also apply to Austin.

Despite the variations in forms of relief requested, (and ignoring the recurring procedural defects and the inappropriate nature of some of those forms of relief), the reasons cited by HL&P, TUGCO and Austin in support of their motions are by and large the same. Those reasons basically comprise one of two arguments: (1) the doctrine of collateral estoppel and/or res judicata, bar one or more of the parties to the South Texas and/or Comanche Peak proceedings from relitigating issues and/or facts decided adversely to that party or those parties in the Dallas Decision and; (2) apart from the doctrines of collateral estoppel and res judicata, it would not be in the public interest or in the interest of judicial economy to conduct the instant proceedings in view of the recent filing by CP&L of an application pursuant to the Public Utility Regulatory Policies Act of 1978, the Order of the Texas Public Utilities Commission in Docket No. 14, and the injunction issued by Judge Porter in the Dallas Decision. As will be set out below, neither of these arguments justifies any of the various forms of relief requested by the movants.

II. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL, DO NOT BAR THESE PROCEEDINGS

Although comparable in many respects, the doctrines of res judicata and collateral estoppel differ in their precise application and effect. Res judicata prevents the relitigation of an entire claim or cause of action. Collateral estoppel prevents the relitigation of a single issue, even though that issue may have been originally litigated as part of a cause of action different from that of the subsequent proceeding. The classic statement of the doctrines of res judicata and collateral estoppel and the way in which those doctrines differ is contained in Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1876):

> There is a difference between the effect of a judgment as a bar or estoppel against prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters

> arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. (Emphasis added).

See also, Parklane Hosiery Co. v. Shore, ____ U.S. ___, 47 U.S.L.W. 4079, 4080, n.5 (January 9, 1979) and cases cited therein.

Thus, to apply the doctrine of collateral estoppel to a controverted fact, there must exist an identity of issues between the prior and subsequent actions, the party against whom collateral estoppel is to be applied must have been either a party or in privity to a party in the prior suit, and the prior action must have resulted in a final judgment to which determination of the controverted fact was essential. The party pleading collateral estoppel has the burden of proving that all the requirements of the doctrine are present. 1B Moore, Federal Practice and Procedure, ¶ 0.408[1], at 954.

The Department discusses below the applicability of the doctrines of res judicata and collateral estoppel to administrative proceedings, as well as the four elements of collateral estoppel that must be proven to invoke the doctrine.

A. Res Judicata and Collateral Estoppel Should Be Used Sparingly In Administrative Proceedings

It is clear that the doctrines of res judicata and collateral estoppel are applicable to administrative hearings, United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); In the Matter of Alabama Power Co. (Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212-213 (1974), remanded on other grounds, CLJ 74-12, 7 AEC 203 (1974). 16/ Courts have held, however, that those doctrines should be applied more sparingly in administrative proceedings than in judicial proceedings. See e.g., United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973).

16/ HL&P cites In the Matter of The Toledo Edison Co., et al. (Perry Nuclear Plant, Units 1 and 2), ALAB-378, 5 NRC 577 (1977), for the proposition that district court decisions always have the same collateral estoppel effect in administrative proceedings as they have in judicial proceedings. (HL&P's Motion at 9). Unfortunately, HL&P has failed to discuss the critical factor upon which that decision turned: both in the district court action and in the NRC proceeding the standard for disqualification of counsel was the same -- the identical section of the Code of Professional Responsibility. 5 NRC 557, 562. By contrast, in the present situation, the Dallas Decision resolved a claim based upon an explicit violation of section 1 of the Sherman Act; at issue in this proceeding is the different, and broader, standard of Section 105c of the Atomic Energy Act. Thus, it is clear that Toledo is not applicable to the instant proceeding.

TUGCO cites three additional cases for the same proposition, In the Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), (LI-78-1), 7 NRC 1 (1978), In the Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977), and In the Matter of Alabama Power Company, (Farley Plant, Units 1 and 2),ALAB-182, 7 AEC 210 (1974). However, none of these cases is applicable to the present situation. In the first two cases parties were held to be collaterally estopped from litigating certain issues in the NRC based on prior findings by the Environmental Protection Agency ("EPA") regarding the environmental effects of the

(footnote con't on next page)

One of the most important considerations underlying the cautious approach to applying these doctrines in administrative proceedings is that there may be a bifurcation of responsibilities between courts and administrative agencies. See Cartier v. Secretary of State, 506 F.2d 191, 197 (D.C. Cir. 1974). Thus, although courts and administrative agencies may analyze the same factual situations, they do so from different perspectives. This is certainly true here, since the NRC has specific antitrust review responsibilities under Section 105c of the Atomic Energy Act (42 U.S.C. 2135c) which require the NRC to examine situations which may also form the basis for litigation under the antitrust statutes in federal and state courts.

Another important consideration which cautions against mechanically applying these doctrines is that there may be differing standards of proof in judicial and administrative proceedings. See Young & Co. v. Shea, 397 F.2d 185, 188 (5th Cir. 1968). This, of course, is precisely the situation here because the quantum of proof necessary to establish a violation of the Sherman Act is substantially higher than to prove an inconsistency with the antitrust laws under Section 105c. In the Matter of Consumers Power Company

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Seabrook cooling system because Congress had deliberately increased EPA responsibility in this area and decreased that of the NRC under the National Environmental Policy Act to avoid concurrent jurisdiction. In the third case, the same intervenor attempted to raise the same issues under the same statute in the operating license phase of the Farley Plant after having obtained adverse rulings in the construction permit phase.

(Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 907-909 (1977) ("Midland"). As the Shea court indicated in discussing this factor:

> [T]he fact that a worker could not convince a jury that he had suffered an injury should not estop him from attempting to convince a Commissioner that he was injured inasmuch as the standard of persuasion is less before the Commissioner than before the court. 397 F.2d at 189.

Thus, since it is easier to establish a violation of Section 105c than a violation of the Sherman Act, it follows that collateral estoppel and res judicata should only be applied very prudently in the present proceeding.

An additional factor which bears on the applicability of collateral estoppel and res judicata relates to the differing kinds of relief separate statutes may dictate. In American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, (1974), the court noted that, if the relief sought in one action is fundamentally different from the relief sought in the other, then automatic application of collateral estoppel or res judicata would be less appropriate. In the present action, the relief attainable under the Sherman Act varies significantly from the relief available under the Atomic Energy Act. In particular, the Commission has a limited, unique responsibility to withhold unconditioned licenses if the activities under those licenses would "create or maintain a situation inconsistent with the antitrust laws." Structuring of nuclear power plant license conditions to remove antitrust problems is unique to the NRC.

B. Applicants Have Not Established That There Is an Identity of Parties

Crucial to any application of collateral estoppel is that the party against whom collateral estoppel is to be applied must have been a party to, or in privity with a party to, the prior litigation. Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (3rd Cir. 1976); Prehearing Conference Order No. 1, In the Matter of Florida Power & Light Company (South Dade Plant), Docket No. P-636A (dated July 29, 1976) ("South Dade"). It is a violation of due process for a judgment to be binding on a litigant who was not a party nor privy to the prior litigation and has never had an opportunity to be heard. Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079, 4081 n.7 (January 9, 1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

In South Dade the applicant, Florida Power & Light Co. ("FP&L"), was involved in an NRC antitrust proceeding before a Licensing Board in which the City of Gainesville ("Gainesville"), Florida and approximately 20 other cities intervened. During the course of the NRC proceeding, FP&L was also a defendant in a federal district court antitrust

action brought by Gainesville, which alleged that FP&L and Florida Power Corporation ("FPC") had entered into an illegal territorial agreement. After receiving a verdict in its favor, FP&L filed a motion to strike from the list of issues adopted by the Licensing Board all allegations that it had conspired with FPC in violation of section 1 of the Sherman Act. The Licensing Board indicated in its order that this motion to strike was founded upon a theory of collateral estoppel or perhaps res judicata.

Even though the Board found that both proceedings involved the same general subject matter, i.e., allegations of territorial agreements, the Board denied FP&L's motion on the grounds that a lack of identity of parties foreclosed the application of the collateral estoppel doctrine. More specifically, the Board found that whereas Gainesville had acted exclusively in its own behalf in the district court action (as did CSW in its district court action here), the presence in the NRC proceeding of additional parties (the NRC staff and 20 other Florida cities) required the Board to refute the contention that there was an identity of parties between the district court action and the NRC proceeding. In reaching the decision that an identity of parties was necessary to invoke the collateral estoppel doctrine the Board relied heavily on Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 329 (1971), which was cited with approval in Parklane Hoisery Co., Inc. v. Shore, 47 U.S.L.W. 4079 (January 9, 1979) .

In the present proceedings, CP&L was the only party involved in the Texas federal court action; neither the Department nor any of the other parties and intervenors were involved or connected with that case. In South Dade the Board recognized that allegations that antitrust violations have occurred should be fully litigated before an Atomic Safety and Licensing Board, particularly where the Department and the staff are involved. The Department, the staff, and the other parties and intervenors (with exception of CP&L) have never had the opportunity to address the allegations underlying this proceeding, and will never have that opportunity if the Board grants the motions filed by HL&P, TUGCO, and Austin.

C. Applicants Have Not Established That There Is an Identity of Issues

As noted above, a prerequisite for applying the doctrine of collateral estoppel is the existence of an identity of issues between the prior and subsequent proceedings. Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079 (January 9, 1979). As the court emphasized in Neaderland v. Commissioner, 424 F.2d 639, 642 (2d Cir.), cert. denied, 400 U.S. 827 (1970):

> Collateral estoppel is confined, however to "situations where the matter raised in the second proceeding is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." Commissioner of Internal Revenue v. Sunnen, 33 U.S. 591, 599-600, 68 S. Ct. 715, 720, 92 L. Ed. 898 (1948). Even if the issue is identical and

> the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially "the same bundle of legal principals that contributed to the rendering of first judgment"

Thus, issues may differ between proceedings, even where the proceedings concern substantially identical facts, because of the application of different statutory standards to those facts. Where, as here, the prior and present proceedings arose under different statutes, the Board should be reluctant to apply collateral estoppel. As stated in Tepler v. E. I. du Pont de Nemours and Co., 443 F.2d 125, 128-129 (6th Cir. 1971):

> Absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statue. [Citations omitted.] This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary.

See, e.g., United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922); Title v. Immigration and Naturalization Service, 322 F.2d 21 (9th Cir. 1963); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).

Because of the significantly different substantive standards in Section 105c of the Atomic Energy Act and Section 1 of the Sherman Act, an identity of issues cannot exist between the district court proceeding and the instant proceeding. As the Appeal Board held in Midland at 6 NRC

892, 907-911 (1977), the standard of inconsistency with the antitrust laws contained in Section 105c is a broader and less stringent standard than that required to show a violation of the antitrust laws. For example, under Section 105c it is appropriate to show such matters as inconsistencies with antitrust policies and Section 5 of the Federal Trade Commission Act; evidence of such an inconsistency would not, of course, necessarily be sufficient to prove a violation of the Sherman Act. This is not to suggest, however, that explicit violations have not occurred in the present situation. The point is simply that the governing standard here is far broader than, and not limited to, explicit violations of the antitrust laws. 17/ Indeed, it is necessary only to contrast the list of issues adopted by this Board with the narrow scope of the allegations made in the Dallas district court action (limited to concerted refusal to deal), to realize how much wider are the sweep of issues attendant to the present proceeding. 18/

17/ Similarly, the Licensing Board in South Dade, rejected a collateral estoppel and res judicata argument on the ground that the legal standards of the Sherman Act and Section 105c of the Atomic Energy Act are so different that an identity of issues in an NRC proceeding and a judicial proceeding is necessarily foreclosed.

18/ In the Dallas federal court action, CP&L alleged that a concerted refusal to deal with it by HL&P and TESCO violated Section 1. In the present proceeding, the focus is the relationship between applicant investor-owned utility companies, their individual and joint relationships vis-a-vis municipal and cooperative systems, both within and

(continued)

Equally on point is the decision of the Atomic Safety and Licensing Board In the matter of The Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3) and The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-77-1, 5 NRC 133 (1977) (collectively referred to as the "TECO Proceeding"). In that case, applicant Toledo Edison Company ("TECO") argued unsuccessfully that the rejection by the Licensing Board in the Midland proceeding of allegations of a territorial agreement between TECO and Consumers Power Co. should be applied in the TECO Proceeding. Even though the same territorial agreement was involved in both proceedings, the differing roles this alleged agreement played in the two separate NRC proceedings was sufficient to deny the invocation of the collateral estoppel doctrine. 5 NRC 133, 215, n. 105 (referring to pp. 5181-5182 of the trial transcript). Similarly, the mere fact that an alleged concerted refusal to deal was involved in the Dallas district court proceeding, and was found not to violate the

(footnote continued)
without the state of Texas, as well as considerations involving both section 1 and 2 Sherman Act violations. There is simply no way in which the district court could have entertained this broad a range of antitrust issues, since the plaintiff in that action was CP&L alone.

Sherman Act, does not foreclose the consideration of that alleged group boycott within the unique focus of the present proceeding. Thus, the primary focus of the District Court inquiry was the effect of the concerted refusal to deal on CP&L whereas the present proceeding will include extensive inquiry into the effect of the alleged group boycott on many electric systems in Texas, Oklahoma, Arkansas, Louisiana and New Mexico in addition to the effect on CP&L. Given the different focus of the inquiry this Board may well find a concerted refusal to deal, based on the effect on systems other than CP&L, even if the Dallas Decision is assumed to be correct.

D. It Would be Imprudent to Consider the Dallas Decision As a Final Decision For the Purpose of the Present Motions

Although there is some support for the proposition that, despite the pendency of an appeal, a decision of a district court can be considered a final judgment for the purposes of collateral estoppel or res judicata, it would be imprudent to consider the district court opinion as a final judgment for the purpose of deciding the present motions. It is undisputed that Judge Porter's opinion is subject to appellate review. Tr. 105-110. If the present proceeding was terminated because of the Dallas Decision, the subsequent reversal or modification of that Decision would require the Board to reinstate the proceeding thus causing very serious delay and inconvenience for both the Board and the parties. In addition, if the proceeding were reinstituted just prior

to the issuance of an operating license for the plants in question, the NRC would have to withhold issuance of a license absent a final decision on antitrust matters. See In the Matter of The Toledo Edison Co. et al. (Davis-Besse Nuclear Power Sation Unit No. 1) ALAB-323, 3 NRC 331 (1976).

If it were necessary to reinstate this proceeding after the operating license is issued, it might be necessary to revoke that license until the resolution of the antitrust issues. In view of the serious consequences that could result if the Dallas Decision is utilized as the basis for terminating this proceeding and that Decision is later reversed, the public interest indicates that the present proceeding not be stayed. 19/ Although it may be argued that a reversal of the Dallas Decision is unlikely, there is no assurance, of course, that reversal will not occur. 20/

19/ See Tr. 110.

20/ The Department notes that in the South Dade proceeding, a district court verdict in favor of the defendant was reversed on appeal. See Gainesville v. Florida Power & Light Co., 573 F. 2d 292 (5th Cir. 1978), cert. denied ___ U.S. ___ (1979). Prior to the appellate reversal the defendant had unsuccessfully attempted to have a Licensing Board strike an allegation which had been resolved in favor of the defendant in the trial court.

E. Various Findings Contained in the Dallas Decision Were Not Necessary to That Decision

Collateral estoppel may only be applied where there has been a final judgment in the prior suit, and where the issue in question was actually litigated and essential to the judgment rendered. In Fibreboard Paper Prod. Corp. v. East Bay Union of Machinists, Local 1304, 344 F.2d 300, 306 (9th Cir.), cert. denied, 382 U.S. 826 (1965), the court stated:

> It is also the rule that where estoppel by judgment is asserted, the earlier determination must have been of a question of fact essential to the earlier judgment. As noted in the Restatement of the Law of Judgments, § 68, the problem of collateral estoppel by judgment only arises "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment" (emphasis added). See comment "o" under that section. "The rules stated in this section are applicable only where the facts determined are essential to the judgment. Where the jury or court makes findings of fact but the judgment is not dependent upon these findings, they are not conclusive between the parties in a subsequent action based upon a different cause of action."

In the present situation numerous findings and conclusions of the district court were not essential to its decision. Most importantly, conclusion of law #22 which

tracks the language in Section 105c of the Atomic Energy Act, and finds the absence of a situation inconsistent with the antitrust laws, was not essential to the court's holding. Not only was Section 105c not at issue, but the district court has no jurisdiction to make ab initio determinations under that act. Conclusion of law #22 in the Dallas Decision is purely gratuitous and is of no legal effect.

For the reasons discussed in the preceding sections, application of the doctrines of collateral estoppel and/or res judicata to the South Texas and/or Comanche Peak proceedings would be inappropriate. HL&P's, TUGCO's and Austin's Motions, to the extent they are based on either or both of those doctrines, must therefore be denied.

III. ACTION BY OTHER BODIES RELATED TO THE ISSUES IN THESE PROCEEDINGS CANNOT JUSTIFY DISMISSAL IN THE PUBLIC INTEREST, OR IN THE INTEREST OF JUDICIAL ECONOMY

After first seeking application of the doctrines of collateral estoppel and/or res judicata, HL&P, TUGCO and Austin argue that, even as to those parties and/or issues with respect to which those doctrines do not strictly apply, it would not be in the public interest, or in the interest of judicial economy, to conduct these proceedings. In support of this argument, the movants rely on the recent filing by CP&L of an application pursuant to the Public

Utility Regulatory Policies Act of 1978, the Order of the Texas Public Utility Commission in its Docket No. 14 and the issuance of an injunction in the Dallas Decision. The movants' arguments are wholly without merit.

A. The Public Utility Regulatory Policies Act of 1978 Was Not Intended by Congress to Affect or Foreclose The NRC From Discharging its Responsibility To Weigh the Competitive Consequences of Issuing a Proposed License

HL&P, TUGCO, and Austin argue that these proceedings should be terminated because one of the parties, CP&L, has exercised its statutory right to seek interconnection and wheeling under the recently enacted Public Utility Regulatory Policies Act of 1978 ("PURPA"). 21/ PURPA was enacted on November 9, 1978, as part of the comprehensive energy legislation designated as the National Energy Act. Title II of PURPA amends the Federal Power Act to give the Federal Energy Regulatory Commission ("FERC") additional, but limited, authority to order interconnections and wheeling between electric utilities. 22/

21/ Pub. L. No. 95-617, 92 Stat. 3117 (1978).

22/ Section 202 of PURPA adds Section 210 to the Federal Power Act which grants to the FERC authority to order interconnection under certain circumstances.

Section 203 of PURPA adds Section 211 to the Federal Power Act which grants to the FERC authority to order wheeling under certain circumstances.

Any order issued by the FERC under Section 210 or 211 of PURPA must meet the requirements of Section 212 of the Federal Power Act (a new section added by Section 204 of PURPA). Section 212 places certain limitations on the FERC's authority to insure that a utility that is subject to the order does not suffer any uncompensated economic loss.

On February 9, 1979, CP&L filed an application under this new statutory authority requesting the FERC (under Section 205 of the Federal Power Act) to exempt it from orders (Docket 14) of the Texas Public Utility Commission, 23/, preventing voluntary coordination and, further, requesting interconnection of facilities, provision of transmission services and related relief (under Sections 202, 210, 211 and 212 of the Federal Power Act). HL&P, TUGCO and Austin have intervened at the FERC in opposition to CP&L's application, and now argue that the instant proceedings should be terminated since the issues will be resolved by the FERC.

Taking their arguments collectively, the movants contend that the FERC is a more appropriate and better qualified tribunal and that it can, under the new powers given to it by PURPA, grant "all" the relief that would be available in the instant proceedings. The Department believes that the movants' reliance on PURPA is wholly misplaced because it is contrary both to the express language in PURPA and to the clear intent of Congress in passing PURPA. It is equally clear that the issues to be considered and the standards to be applied in these proceedings are substantially different than those in the FERC proceeding. Finally, the "relief" which CP&L seeks, or which the FERC may grant under PURPA, would not necessarily

23/ See infra, at 36-39.

constitute the type of adequate and appropriate relief that this Board would be required to impose after an affirmative finding under Section 105c(5) of the Atomic Energy Act.

1. Termination of these Antitrust Proceedings Because CP&L has Applied for Interconnection and Wheeling under PURPA Would Be Contrary To The Language and Congressional Intent of PURPA

It is clear, both from the express language in PURPA and the underlying legislative history, that PURPA is not apposite to these proceedings and does not affect the availability of antitrust relief sought by the Department and other parties herein.

Section 214 of PURPA makes clear that PURPA is not to be construed as affecting any other statutes unless specifically provided for by PURPA.

> SEC. 214 PRIOR ACTION: EFFECT ON OTHER AUTHORITIES . . .
>
> (b) OTHER AUTHORITIES -- No provision of this title or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision

of law except as specifically provided in this title.

In addition to the express language in the statute, 24/ the legislative history, as evidenced by the Conference Report, clearly shows that Congress intended PURPA to be "strictly neutral" with regard to the application of the antitrust laws and not to raise any potential primary jurisdiction issues (Conference Report at 68). 25/

24/ Section 204 of PURPA adds Section 212 to the Federal Power Act, which provides in Subsection (e):

> No provision of section 210 or 211 shall be treated --
> (1) as requiring any person to utilize the authority of such section 210 or 211 in lieu of any other authority of law, or
> (2) as limiting, impairing, or otherwise affecting any authority of the [FERC] under any other provision of law.

25/ The Conference Report states, in relevant part:

> Section 4 of the conference substitute sets forth a disclaimer to the effect that Federal and State antitrust laws are not affected by the conference substitute and such laws will continue to apply to electric and gas utilities to the same extent as prior to enactment of this substitute. Similarly the section contains a disclaimer to the effect, that the authority of the Secretary of Energy and the Commission under other provisions of law respecting unfair methods of competition or anticompetitive acts or practices is not affected. The conferees intend that the provisions of the conference substitute be strictly neutral and not add or subtract from the immunities and defenses available under such laws nor add or subtract from authorities contained in such laws.
>
> The conferees intend to preserve the jurisdiction of the Federal and State courts in

(continued)

Moreover, Section 4 of PURPA expressly provides that PURPA does not affect "the applicability of the antitrust laws to any electric or gas utility." While Section 105c of the Atomic Energy Act is not an antitrust law, 26/ it is nonetheless clear from the legislative history that Congress did not intend PURPA to detract from the jurisdiction of the NRC.

During Senate consideration of the Conference Report, Senator Metzenbaum, one of the managers of the Bill and a member of the conference committee, stated:

(footnote continued)

> actions under antitrust laws, whether or not the parties to such actions could have sought remedies under this legislation.
>
> Specifically with regard to certain authorities to order interconnections and wheeling under title II, it is not intended that the courts defer actions arising under the antitrust laws pending a resolution of such matters by the Federal Energy Regulatory Commission. The conferees specifically intend to preserve jurisdiction of Federal and State courts to resolve, independent of the Commission, such actions, including for example, cases where a refusal to wheel electric energy is alleged to be in violation of such laws. The court should be able to act whether or not action by the Commission under the provisions in title II can be requested or would be justified. In this way, the courts have jurisdiction to proceed with antitrust cases without deferring to the Commission for the exercise of primary jurisdiction. Conference Report at 68.

26/ A common definition of the antitrust laws is contained in Section 1 of the Clayton Act 15 U.S.C. §12. This definition does not include a reference to the Atomic Energy Act.

> It was not the intent of the conferees to modify in any way the rights of parties in presenting a[nd] prosecuting allegations of anticompetitive conduct before the Federal and State courts, or before administrative agencies, including the FERC and the Nuclear Regulatory Commission. Both have legal obligations to consider antitrust issues. Where any of these agencies presently have the authority to order transmission, coordination or other relief pursuant to a finding of anticompetitive conduct, undue discrimination or unjust and unreasonable rates, terms, conditions or the like, this authority would not be disturbed. The act does not limit the present authority of these agencies in this regard.
>
> Thus, a party which has been denied wheeling services for anticompetitive reasons will not be hindered by this legislation from proceeding in the Federal courts or elsewhere. Likewise, the authority of the [NRC] in conducting an antitrust review under the provisions of the Atomic Energy Act of 1954, as amended, would not be affected by this extremely limited wheeling authority granted to FERC under this new legislation. These two agencies are charged with different responsibilities with respect to wheeling. [FERC's] new authority is condition[ed] on conservation, efficiency, reliability, and public interest. NRC's authority relates to correcting or preventing a situation inconsistent with the antitrust laws. 27/

It is thus evident that the movants reliance on PURPA as a reason for terminating these proceedings is contrary to the express intent of Congress.

27/ 124 CONG. REC. S17, 802 (daily ed. Oct. 9, 1978) (emphasis added). A copy of 124 CONG. REC. S17, 800-S17, 809 (daily ed. Oct. 9, 1978) is attached hereto.

2. FERC's Limited Authority to Order Interconnections and Wheeling Under PURPA Does Not Resolve the Antitrust Concerns Which This Board Must Address Under Section 105c(5) of the Atomic Energy Act

The movants contend that PURPA grants to the FERC comprehensive authority over interconnection, wheeling and coordination such that "all" the relief a utility was seeking under Section 105c could be obtained from the FERC. The language in the relevant sections of PURPA does not support the movants' contention. The FERC's interconnection authority under Section 202 can be used only after it has determined that the interconnection, in addition to being in the public interest and meeting the requirements of Section 204, would:

> (A) encourage overall conservation of energy or capital;
>
> (B) optimize the efficiency or use of facilities and resources; or
>
> (C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies. ... 28/

Likewise, the FERC's authority to order wheeling under Section 203 can be used only after it has determined that the wheeling, in addition to being in the public interest and meeting the requirement of Section 204 of PURPA, would:

28/ Section 210(c)(2) of Federal Power Act (added by Section 202 of PURPA).

(A) conserve a significant amount of energy;

(B) significantly promote the efficient use of facilities and resources; or

(C) improve the reliability of any electric utility system to which the order applies, ... 29/

PURPA is an attempt by Congress to grant additional limited authority to the FERC to order interconnection and wheeling as a means of conserving energy, increasing efficiency, and improving reliability. Absent PURPA, it is unlikely that utilities would pursue voluntarily these goals unless they could obtain substantial direct economic gains. While some of the considerations underlying PURPA (e.g. efficiency) also underlie the antitrust laws, PURPA was not intended to prevent or undo anticompetitive conduct by electric utilities as was Section 105c. Thus, the focus of the FERC's consideration of CP&L's application will not be on antitrust issues.

Senator Metzenbaum noted this contrast between the "limited" authority granted to FERC under this new legis-

29/ Section 211(a)(2) of Federal Power Act (added by Section 203 of PURPA). Section 211(c) requires the preservation of existing competitive relationships.

lation, which was conditioned on "conservation, efficiency, reliability, and public interest," and the NRC's authority relating to correcting or preventing a situation inconsistent with the antitrust laws. 30/ It is thus apparent that the required findings set forth in PURPA which must precede the issuance of interconnection or wheeling order are in no way a substitute for the standards this Board must supply in an antitrust hearing pursuant to Section 105c(5) of the Atomic Energy Act.

B. The Order Issued By the Texas Public Utility Commission in its Docket No. 14 Should Not Preempt the Board from Acting in These Proceedings

The movants also cite the Order of the Texas Public Utility Commission ("TPUC") in its Docket No. 14 in support of their argument that the Board should terminate these proceedings. This contention is without merit.

The Order in Docket 14, in essence, did two things. First, it required CP&L to disconnect its radial tie into Oklahoma. That tie had placed CP&L, and other Texas utilities with which it was interconnected, in interstate commerce. Second, Docket 14 mandated that no member of the Texas Interconnected System ("TIS") could disconnect from TIS without the prior approval of the TPUC.

30/ See comments at 124 CONG. REC. §17,801-2 (Oct. 9, 1978).

The first aspect of the TPUC Order is currently under vigorous legal attack in several different fora. At present, the primary focus of litigation is the Texas state district court in which the Order is being contested on the grounds that it violates both state and federal constitutional law. In light of the overwhelming body of precedent foreclosing any state from placing an undue burden on interstate commerce in analogous situations, 31/ it would be most surprising should this element of the Docket 14 Order survive constitutional scrutiny. 32/

31/ Two particularly applicable cases are Philadelphia v. New Jersey, ____ U.S. ____; 98 S. Ct. 2531 (1978); and Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

32/ So serious is the apparent inconsistency between the Docket 14 Order and the federal Constitution, that on December 29, 1978 the State of New Mexico petitioned the United States Supreme Court to hear this case under its original jurisdiction alleging that the Docket 14 Order is an unconstitutional burden on interstate commerce. See ORDER FOR APPEARANCE, MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT. New Mexico v. Texas, Original Action No. 82. On March 9, 1979, Texas responded with its BRIEF IN OPPOSITION. The Supreme Court then directed that New Mexico file a reply brief by April 25, 1979.

Even should this aspect of the Docket 14 Order survive current litigation, its continued operation would in no way foreclose these evidentiary proceedings or the granting of appropriate relief. The existence of the Docket 14 Order cannot undermine the statutory responsibilities imposed upon this Commission by Section 105c. If the Board finds that activities under the NRC licenses would create or maintain a situation inconsistent with the antitrust laws, the Board is statutorily required, under Section 105c(6), to affix sufficient conditions to the license to remove or obviate this inconsistency. The obligations imposed upon the Board by federal statutes cannot be delimited by a state agency. 33/

In any event, at this point, there is no reason to assume that any relief granted by this Board would necessarily conflict with any TPUC Order in effect at that time. However, even if we assume that the granting of appropriate relief by the Board would prompt a potential conflict with the Docket 14 Order, it would then be appropriate for the TPUC to reconsider its earlier position in light of the Board's order. It seems implausible to assume that the

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33/ Cf. Federal Power Commission v. Southern California Edison Co. et al., 376 U.S. 205 (1964).

TPUC, a state agency, would promote or maintain any serious conflict with the NRC, not only because the NRC is a federal agency, but also because of the NRC's preeminent and unique responsibilities in the area of nuclear licensing.

As to the second aspect of the Docket 14 Order, namely that no current member of TIS can disconnect from any other member without the prior approval of the TPUC, neither the Department nor the current litigation contests the validity of this aspect of the Order. It appears that HL&P (HL&P's Motion 23-26) has misinterpreted that portion of the Docket 14 Order as it pertains to the current proceedings. The TPUC simply ordered that TIS should remain interconnected. This order applies whether TIS is exclusively intrastate or whether, for whatever reason, TIS members should enter interstate commerce. There is no potential or actual conflict between this aspect of the Docket 14 Order and the power of this Board to grant appropriate relief.

C. The Injunction Issued by Judge Porter in the Dallas Decision Does Not Preclude the Board from Issuing Appropriate Relief in These Proceedings

Movants have also cited the injunction contained in the Dallas Decision as another factor which forecloses the Board from conducting these proceedings. This contention must be rejected for a number of reasons. First, the Dallas

litigation was concerned solely with the South Texas project; neither the evidence introduced at trial nor the court's decision have any applicability to the Comanche Peak proceeding and to the serious antitrust allegations made against TUGCO therein.

Secondly, in reference to the injunction, HL&P has misstated Judge Porter's Order. HL&P states that the court "has permanently enjoined CP&L from going into interstate operation as long as it remains in STP". (HL&P's Motion at. 23.) Unfortunately, HL&P has failed to quote the full language of the injunctive statement:

> I find that under the evidence in this case plaintiff CPL's conduct threatens a violation of Section 8.2 of the STP agreement and CPL is hereby permanently enjoined from permitting power it receives from STP to enter interstate commerce as long as CPL remains a participant in the STP Agreement and as long as §8.2 of that agreement remains in force. Dallas Decision at 59 (emphasis added).

It thus becomes quite clear that Judge Porter's injunction is designed to protect the continued operation of section 8.2 of the South Texas Project participation agreement. Since the Department contends that this provision of the agreement may be inconsistent with the antitrust laws (by limiting participation in effect to those electrical

utilities engaged exclusively in intrastate commerce), part of the relief the Department may request of this Board at the conclusion of the evidentiary hearing(s) would entail either excision or reformation of this provision to cure its anticompetitive effects. Of course, if the Board concludes that section 8.2 is inconsistent with the antitrust laws, the concern that Judge Porter sought to allay through his injunction evaporates since no license will issue if Section 8.2 remains in force.

V. CERTIFICATION OF ANY QUESTION ARISING OUT OF THE PRESENT MOTIONS IS CONTRARY TO NRC PRECEDENT

HL&P (HL&P Motion at 31) and TUGCO (TUGCO Memorandum at 20-22) suggest that if this Board should deny their motions to dismiss CP&L as a party to these proceedings and/or their motions for summary disposition, it should certify the questions raised in their motions to the Atomic Safety and Licensing Appeal Board ("Appeal Board"). 34/ In

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34/ TUGCO also requests that the Board:

> initiate steps to consider, or refer to the Commission for consideration, the impact of the District Court decision (and other recent developments such as the Public Utility Regulatory Policy Act of 1978) on the question of whether the Commission's discretionary initiation of the instant proceeding should now be reconsidered. (TUGCO's Motion to Dismiss at 2.)

In that the Department has just discussed (in the foregoing sections) all of the reasons why the cited events have no impact on these proceedings, no more need be said on this aspect of TUGCO's Motion.

effect, the movants are seeking an interlocutory appeal of any Board order denying their motions.

Certification and interlocutory review are specifically governed by 10 C.F.R. §2.730(b), which generally proscribes interlocutory appeals. As the Appeal Board explained in Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1191 (1977), its workload is so heavy that it can take only the most pressing questions for interlocutory review. In Public Service Company of Indiana, the Appeal Board made plain that interlocutory review would be granted only when the ruling below threatened the party affected by it with immediate, serious and irreparable harm which, as a practical matter, could not be alleviated by later appeal, or when the order below affected the basic structure of the proceeding in a pervasive or unusual manner. In the instant situation none of the movants have even attempted to demonstrate that they meet either of these criteria.

The simple denial of motions to dismiss and/or for summary disposition based on the doctrine of collateral estoppel are nothing more than routine procedural rulings with respect to which the Appeal Board, in applying the

above standards, would be reluctant to interfere. These matters are interlocutory as to HL&P, TUGCO and Austin. If these movants still wish to obtain appellate review of a denial of their motions by this Board, the appropriate time for such review is at the conclusion of the upcoming evidentiary hearings after this Board has rendered its decision(s) therein.

VI. CONCLUSION

For all the foregoing reasons, the motions filed by HL&P, TUGCO and Austin are wholly without merit and should be denied in their entirety.

Respectfully submitted,

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In many cases a widow may wish to turn over the operation of a small business to another individual or even a family member. The carryover basis would impose a large capital gains tax on the sale of the business, even though much of the capital gains tax arises from inflation-induced appreciation, the sale of the family business can only be accomplished at great loss to the widow, and considerable administrative and tax counseling cost to all concerned. One alternative to this scenario is to merge the family business with a larger publically held corporation. This action would allow the widow to receive income producing stock from the company, tax free, but it also hastens the process of large corporations dominating the economic scene. Can we in Congress not see, and see plainly, the tragedy of this course?

The small businessman is penalized in another way by the carryover basis provision. The fresh start rule of the carryover basis provision (small businesses with unlisted securities) is determined by arbitrarily prorating the value of the business from the time it began until the value at the date or death of its owner. Once again, the owner of a small business is encouraged, by the carryover basis, to effect a tax-free merger with a larger company. Instead of encouraging the continuation and growth of small businesses, the 1976 act accelerates the trend toward concentration of business activity in large corporations. As a rancher, I am particularly disturbed by the effects the carryover basis will have on estate planning for ranchers and farmers. Valuation rules which value the ranch or farm as an agricultural operation rather than its highest and best use could benefit many farmers. Unfortunately the 1976 law restricts these rules so that many deserving parties fail to qualify.

Mr. President, it is particularly important to point out how estate tax planning for ranches and farms is becoming more complex in Wyoming even without the complications created by the carryover basis. As Wyoming, Colorado, Montana, and other Western States provide the Nation with coal and uranium, the farmer and rancher in these areas is faced with a unique burden. There are few ranchers who would willingly sell their land to a coal company and abandon a way of life that is unique to the Western States. Selling one's land outright to the coal company would force the rancher to pay enormous capital gains tax. Coal companies and ranchers have met an accord by agreeing to a tax-free exchange of one ranch for a comparable piece of property. In this way, the rancher can continue with his way of life, and the energy company can get on with its business of recovering the minerals and providing energy to the Nation.

However, one step has been left out of this exchange. If this process is repeated a number of times, we see an artificial inflation of land prices. The Internal Revenue Service is entirely disinterested in the peculiarities of land valuation in energy producing States: it only wishes to look at "comparable sales data in order to determine the estate tax value of agricultural land." The income tax laws as to capital gains tax and tax free exchanges cause a type of activity that further inflates the apparent value of ranch land. This increases the estate tax value of ranch land, and in turn increases the estate tax problems for ranchers, whether or not they receive any benefits from the energy development activities. Under these circumstances it is evident that the Western States will be hit even harder by the 1976 act than other agricultural regions of country.

In conclusion, I support the measures in this bill which provide for a delay in the carry-over basis provision.

Mr. HUDDLESTON. Mr. President, I ask unanimous consent that Roger LeMaster, of my staff, be permitted the privileges of the floor during the debate and voting on the tax legislation before the Senate.

The PRESIDING OFFICER. Without objection, it is so ordered.

PUBLIC UTILITY RATES—CONFERENCE REPORT

NATIONAL ENERGY CONSERVATION POLICY ACT—CONFERENCE REPORT

The PRESIDING OFFICER. The hour of 2 p.m. has arrived. Under the previous order, the hour having arrived, the Senate will now proceed to consider en bloc the conference reports on H.R. 4018 and H.R. 5037, the time for debate to be limited to 1 hour to be equally divided and controlled by the Senator from Washington (Mr. JACKSON) and the Senator from Wyoming (Mr. HANSEN).

The Senate proceeded to the consideration of the conference reports on H.R. 4018 and H.R. 5037.

The PRESIDING OFFICER. Who yields time?

Mr. METZENBAUM. Mr. President, assuming that the Senator from Washington will be agreeable thereto, I ask unanimous consent to yield myself 10 minutes on his time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, before us now are the National Energy Conservation Act and the Public Utility Regulatory Policies Act—two of the five components of the national energy plan.

May we have order in the Senate, Mr. President?

The PRESIDING OFFICER. The Chair points out that the staff who are in the Chamber are in here at the courtesy of the Senate and when they leave they should leave quietly so we may have order in the Senate.

Mr. METZENBAUM. I thank the Chair.

These bills reach us none too soon.

In spite of the President's call to arms in April 1977, Americans are today using more energy than ever before.

Our dependence on foreign oil has deepened.

And the Nation's urgent need for a coherent energy plan is even more clear and obvious now than it was a year and a half ago.

Both of the conference reports before us are the end result of countless hours of deliberation.

Both represent extraordinary efforts by the Committee on Energy and Natural Resources and the House conferees to deal with issues of truly staggering complexity.

I want to commend the conferees for their long, hard work on this legislation. I believe that the Senate and the Nation as a whole is in their debt.

But, Mr. President, I must state that I have conflicting feelings about these conference reports.

I believe that these two bills are first steps and small ones at that.

They are good as far as they go, but they do not go nearly far enough.

Mr. President, I believe that the Congress had the opportunity to enact the kind of tough conservation and utility rate reform legislation that this country is going to need in the long run.

But because the lobbyists for the utilities did their work well and because the administration decided not to support mandatory conservation measures, we wound up with legislation that is a mere shadow of what it could have been.

We did not, in other words, finish the job. And because we did not, I know and the Senate knows that in the future, these issues will come before this body time and time again. They will come before us as long as our people use more energy than the Nation can afford.

But, Mr. President, to say that these conference reports represent only a first step is not to say that they do not represent a positive step.

They do.

I say to the chairman of the Energy Committee, Senator JACKSON, with his indulgence, I assumed it would be permissible for me to take 10 minutes of the time. Is that all right with Senator JACKSON?

Mr. JACKSON. Mr. President, I yield to the Senator retroactively whatever time he has used and prospectively so it comes up to 10 minutes.

Mr. METZENBAUM. I appreciate the consideration of the chairman of the Energy Committee.

Both bills include sound provisions that will achieve energy savings and begin to reduce our need for foreign oil.

And both bills show the Nation and the world that we have begun to address problems that we have for far too long ignored.

The National Energy Conservation Policy Act is an important piece of legislation.

For the first time, it requires utilities to offer assistance to customers in assessing the energy efficiency of their homes. This program will save energy. It will make people more aware of the possibilities of conservation. And it will permit homeowners to save money.

In addition, the bill makes Federal funds available to weatherize the homes of our low-income citizens. It also provides financing and loan insurance for energy-conserving home improvements and for installation of solar energy systems. It encourages schools, hospitals, and buildings owned by units of local

governments to become more energy efficient. And it will bring about a reduction in the energy needed to run industrial equipment, home appliances and motor vehicles. Once again, this is a good beginning.

But it is also important to consider what this legislation fails to do. The conservation bill originally contained a measure that would have said to the car makers of America "The time has come when you can no longer make an oversized gas-guzzling automobile. In the national interest, cars must be more energy efficient."

But although we are said to face the moral equivalent of war, the minimum mileage standards which I proposed, and which were overwhelmingly adopted by the Senate did not survive the conference. The administration refused to support the Senate position.

And, Mr. President, another section of the original bill would have said to the manufacturers of industrial motors "The time has come for you to make motors that are as energy efficient as possible, not as inexpensive as possible." The potential energy savings here was the equivalent of over 200,000 barrels of oil per day.

But this, too, was unpalatable—unpalatable not only to a majority of the conferees but also unacceptable to the same administration that had brought the energy situation to our attention in the first place.

In August of 1977, I conducted hearings on several mandatory measures that included minimum mileage standards, minimum efficiency standards for industrial motors, and retrofit for home heating units. Together, these initiatives would have produced savings of close to three-quarters of a million barrels of oil equivalent per day. Yet at those hearings a spokesperson for the administration, while acknowledging the soundness of these proposals, indicated that the administration could not support them.

Turning briefly to the Public Utility Regulatory Policies Act, I would like to point out that there is probably no issue in my State of Ohio, and I suspect, in the country as a whole, that has stirred as much public protest as the budget-busting rise in utility bills over the last few years. In 1977, alone, utility bills rose $13.4 billion and totaled over $60 billion.

As proposed by the President and passed by the House, the Public Utility Regulatory Policies Act was an attempt to get a handle on these tremendous increases. The bill sent to the Senate would have mandated that certain energy conservation standards be applied in State regulatory proceedings for retail rates. The Senate, in its wisdom, decided that it was best to leave the responsibility for setting retail electric rates with the States. Thus, the conference report before us today requires only that the States give full consideration during an open hearing process to a number of standards which have the potential for conserving energy.

It is this hearing process that contains the most promising aspect of this bill. For the first time, the Congress has assured the electric consumers of this country that their voice will be heard. And Mr. President, I should point out that not only will the consumer's voice be heard, but the conference report provides that if the individual or individuals who "substantially contribute" to the ultimate determinations of the hearings may be compensated for their efforts. This is a great victory for the consumer, who will finally be able to compete on an even footing with the utility industry of this Nation. I would like to commend my colleagues on the Conference Committee for preserving this provision.

The conference report on the Public Utility Regulatory Policies Act also requires the Federal Energy Regulatory Commission to make a thorough review of the fuel adjustment clause within individual States.

Mr. President, no single item has done more to undermine the rate setting procedure than the fuel adjustment clause. As a recent congressional study underscored, 80 percent of the increase in the last year in utility bills resulted from the fuel adjustment clause. In my own State of Ohio alone, more than $1 billion was passed on to the consumers by reason of the fuel adjustment clause, almost eight times as much as all the increases permitted through normal rate proceedings. I personally believe the fuel adjustment clause has outlived its usefulness.

I hope that FERC will review these clauses promptly, and that this review will result in their termination, or at the very least, greater protection for the consumer.

Mr. President, I also want to point out to my colleagues that the conference report retains a Senate provision authorizing up to $2 million for the National Regulatory Research Institute located at Ohio State University. In keeping with the philosophy of the conference report, which retains ultimate control in the States, the National Regulatory Research Institute will provide State regulatory authorities with independent expertise on regulatory policy issues and with improved data retrieval systems. As the author of this provision, I am pleased that the conference report affirms our support for this important institution, and seen fit to include it.

In closing Mr. President, let me reiterate my mixed feelings about these two bills before us. Both bills take a step forward in conserving energy, and it is for that reason that I support them. Nonetheless, it is equally clear that both bills fall far short of what is needed. We cannot, and should not, continue to rely almost exclusively upon increasing the price of energy as the sole method of saving energy. Mandatory conservation measures have the potential to save an enormous amount of energy. We should move with dispatch in that direction.

And one further word about this legislation. The chairman of our committee, as well as the ranking minority member have shown great tenacity, patience, perserverance, and personal consideration for all of the members of the committee over a long and difficult period.

The PRESIDING OFFICER (Mr. CHILES). The Senator's 10 minutes have expired.

Mr. METZENBAUM. I ask for 2 more minutes.

Mr. JACKSON. I yield 2 additional minutes to the Senator from Ohio.

Mr. METZENBAUM. I appreciate the consideration of the Senator from Washington.

I am personally grateful to both of them for their leadership and the many accommodations accorded me. And the staff, Dr. Dan Dreyfus, Dr. Ben Cooper, and Jim Bruce has been totally helpful, understanding, and responsible. We owe them a great debt of gratitude. They were most helpful and I thank them much. I am proud that our committee has such able personnel. We could not do our job without them.

I appreciate the consideration that has been accorded me personally by Senator JACKSON and by Senator HANSEN as well. Their leadership in the many endeavors in which they were involved and the staff is also to be commended.

WHEELING AND INTERCONNECTION PROVISION OF PURPA

Mr. President, during consideration of the Public Utilities Regulatory Policies Act, we considered some changes in the Federal Power Act which would give the Federal Energy Regulatory Commission authority to order interconnection and wheeling services among utilities. Such authorities would allow for a more reliable and efficient electric system in this Nation. Many of the original proposals were not adopted and a more limited authority for FERC to issue interconnection and wheeling orders was adopted.

In granting FERC authority to issue wheeling orders under section 203 of the act, the conferees provided that the Commission may act only when it finds that the order is in the public interest and that the order would: First, conserve significant amounts of energy; second, significantly promote the efficient use of facilities and resources; or third, improve the reliability of any electric utility system to which the order applies. There are, to say the least, good reasons for granting the FERC such authority.

Individual electric utility systems need to have adequate reserves in the event some of its generating facilities or transmission lines become inoperable. Unfortunately, to provide for such situations, many utilities have overbuilt. They have made large capital investments in generating facilities which stand idle most of the time. And which add considerably to consumer costs.

A better solution would have been one that has been proposed in legislation by several of my colleagues, but most prominently by the late Senator Lee Metcalf. His proposal would create a national grid. The concept behind this legislation is to provide a reliable national network of transmission facilities so that when one area is power short, energy could be moved across transmission lines to prevent blackouts like we have seen in New York and New England in recent years, and the threat of blackouts which we in Ohio faced this past winter. The bill

pending before us would certainly not create a national grid. However, it would grant to FERC some authority so that we could prevent wasteful overconstruction of new generating and transmission facilities and make better use of existing facilities.

There are terms and conditions other than the three which I have mentioned which must be met before FERC can issue a wheeling order.

One central element or thread tying together the other conditions and restrictions on FERC's authority reflected the desire of the conferees that the legislation be neutral with respect to all affected. Section 4 provides that "nothing in this act or any amendment made by this act affects: First, the applicability of the antitrust laws to any electric or gas utility; or second, any authority of the Secretary or of the Commission under any other provision of law (including the Federal Power Act and the Natural Gas Act) respecting unfair methods of competition or anticompetitive acts or practices." The concept of neutrality is specifically mentioned in the statement of the managers.

Under the language of section 203 adopted by the conferees, FERC is prohibited from issuing a wheeling order unless the Commission determines that the order "would reasonably preserve existing competitive relationships." As noted in the statement of the managers, the FERC is not "required to maintain or protect in any manner any relationship between utilities which is unlawful under the antitrust laws."

There has been, in the last few years, a trend among municipal electric utilities, rural electric cooperatives, and smaller investor-owner utilities to join together and construct generating facilities to serve their own loads as opposed to purchasing power at wholesale from large investor-owned utilities. In some instances, the transmission of the electricity from the generating station to the municipal systems or others owning and operating that facility may not be possible in the absence of wheeling arrangements with an intervening utility. An order to require wheeling of such electricity under those circumstances, or to permit the more efficient plants in a cooperative fashion, would not, of course, be regarded as an action which would disrupt existing competitive relationships.

Mr. President, I would like to emphasize that all this language about competition in section 203 is not intended to prohibit wheeling merely because there is any change in the competitive relationships between utilities; rather, the change must be "substantial." Let me take an example where two utilities are in competition for the same customer in a service area not otherwise protected by State law. If one of those utilities would need wheeling services from the other in order to serve the new customer, there is no absolute ban on such an order from FERC if all other necessary tests can be met. The legislation says that such an order to serve the new customer would have to significantly alter" the competitive relationships between the two utilities. FERC may determine that it would not significantly alter" such relationships and could thus issue a wheeling order.

I am also concerned about the amount a utility must pay for an interconnection or for wheeling services. The language of section 204 requires that such costs include any "reasonably ascertainable uncompensated economic loss." The costs include those ascertainable at the time of the order or any time thereafter. Both present and future costs should, of course, be those associated with the services provided pursuant to the interconnection or wheeling order. Otherwise, there would be endless speculation on "what-if" costs.

It was not the intent of the conferees to modify in any way the rights of parties in presenting a prosecuting allegations of anticompetitive conduct before the Federal and State courts, or before administrative agencies, including the FERC and the Nuclear Regulatory Commission. Both have legal obligations to consider antitrust issues. Where any of these agencies presently have the authority to order transmission, coordination or other relief pursuant to a finding of anticompetitive conduct, undue discrimination or unjust and unreasonable rates, terms, conditions or the like, this authority would not be disturbed. The act does not limit the present authority of these agencies in this regard.

Thus, a party which has been denied wheeling services for anticompetitive reasons will not be hindered by this legislation from proceeding in the Federal courts or elsewhere. Likewise, the authority of the NRS in conducting an antitrust review under the provisions of the Atomic Energy Act of 1954, as amended, would not be affected by this extremely limited wheeling authority granted to FERC under this new legislation. These two agencies are charged with different responsibilities with respect to wheeling. FARC's new authority is condition on conservation, efficiency, reliability, and public interest. NRC's authority relates to correcting or preventing a situation inconsistent with the antitrust laws.

Mr. President, let me again state that, while I might like to have seen some other things in this legislation, I am pleased with many aspects of it. We have granted many important rights to the electric consumers and we have granted to the Federal Energy Regulatory Commission some authority to make our nationwide electric system more reliable and efficient. This is, of course, in the best interest of all consumers. I believe this legislation is a step in the right direction and should be adopted.

I thank the Senator from Washington.

The PRESIDING OFFICER. Who yields time? The Senator from Wyoming.

Mr. HANSEN. Mr. President, I yield myself such time as I may require.

I am concerned with clarifying the interpretation of a particular part of this conference report. It was my understanding that the agreement that was reached indicated that this law would not override State procedural law except in very limited circumstances. The paragraph which concerns me is 111(b)(1) which specifies that certain determinations which the State must make shall be (A) in writing, and (C) available to the public. There is no problem with those items. However, subparagraph (B) indicates that the determination must be "based upon findings included in such determination and upon the evidence presented in the hearing."

The statement of managers indicates that if State law conflicted, this section would "override State procedural law to the extent of such conflict."

Looked at very narrowly, I think those words have the potential for some mischief, and should be clarified. The statement of managers is helpful in that it does go on to say that:

> The procedural features of the process of consideration and determination, including such concepts as the nature of evidence and the relationship, if any, between findings and the record of a proceeding, shall be governed by State law. State law governs on such matters as burden of proof, standard for review in State courts, and in any other matters not inconsistent with the requirement of this title.

There are two questions I would like to ask the manager of the bill to further amplify this statement of the managers. To begin with, I note that all of paragraph 111(b)(1) applies to the "determination referred to in subsection (a)." That determination, as I understand it, is the determination of whether or not the Federal standards are "appropriate to carry out the purposes of this title." After the determination has been made as to whether a standard is appropriate to carry out the purposes of the title, subsection 111(c) then allows the State the further discretion or whether or not to implement the standard even if it has determined that such standard would be appropriate to carry out the purposes of the title.

Now, my understanding is that the requirement that the determination be based upon findings and upon evidence refers to the determination of whether the standard would carry out the purposes of the title, and not to the State's discretion to implement or not implement the standard. I ask my friend from Washington, is that correct?

Mr. JACKSON. That is my understanding.

Mr. HANSEN. My second question relates to the process of judicial review of any Commission decision. My concern is that the word "based" in the requirement that the determination be based upon findings and upon evidence could be construed to create new Federal procedural findings contained within it. If the State proceedings.

It is rather my understanding of the intent of this section is only that there must be some connection between the determination as to appropriateness to carry out the purposes of the title and the findings or evidence.

However, the nature and quality of the connection required is strictly a matter for State law, as indicated in the statement of managers when it stated that burden of proof, standard for review and other matters were up to State procedure in State courts. Thus, if the

State standard of review is the "arbitrary and capricious standard," then all that is required by this section is that it not be arbitrary and capricious to have made the indicated determination upon the findings contained within it. If the State standard is "scintilla of evidence," then that is the standard for the connection required. Is that an accurate understanding of the intent of the language in 111(b)(1)(B)?

Mr. JACKSON. That is my understanding.

Mr. HANSEN. I thank the Senator for those answers. They confirm my understanding that the States are not required to conform their ratemaking to these Federal precepts. I am happy to see this outcome, because I do not think that our State utility commissions are too stupid to adopt good ideas and reject bad ones.

I am puzzled at just what we think this bill will now accomplish. State commissions already have this same power, and are now using it. I do not believe that having to listen to David Bardin's lawyers will help them very much.

Similarly, the wholesale rate provisions are now properly hedged about with so many restrictions that it is unlikely that this section will cause much change other than more work for lawyers. Senator JACKSON stated on Saturday that this bill was not intended to get the Federal Government into economic contests between utilities. Without this so-called economic wheeling, there is unlikely to be much wheeling at all.

Furthermore, interconnection and wheeling do not produce any additional energy, just as almost all of the President's energy package does not produce any new energy.

Mr. President, if this bill is properly interpreted by the courts, I do not believe it does very much harm. But I believe our standards for legislation should be higher than that. I believe that America will be better off without the complication and regulation introduced by this bill. We need substance, not symbolism, and this bill now provides little but symbolism.

I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

The Senator from Washington.

Mr. JACKSON. Mr. President, the purpose of section 505(e) of title V "Crude Oil Transportation Systems" is to make clear that this title does not repeal, supplant, or replace the provisions of existing Federal law governing permits, rights-of-way and other authorizations for construction and operation of crude oil pipelines or other crude oil transportation systems.

Section 505(e) of title V provides that, notwithstanding the other provisions of this title, any application for a Federal permit, right-of-way or other authorization under other provisions of law for a crude oil transportation system eligible for consideration under this title shall be accepted and reviewed by the appropriate Federal agency under the provisions of existing law. Section 505(e) also provides that any determination with respect to such an application shall be in accordance with the provisions of section 509(a) of this title.

Section 509(a) of Title V provides that all Federal officers and agencies must insure expedited processing, to the maximum extent practicable, of all actions necessary to determine whether to issue, administer or enforce rights-of-way across Federal lands and to issue Federal permits in connection with, or otherwise authorize, construction and operation of any crude oil transportation system. Section 509(a) provides that such expedited processing shall be afforded "(a)fter issuance of a decision by the President approving any crude oil transportation system."

It should be noted, however, that, in many instances, determinations on applications for Federal permits, rights-of-way or other authorizations submitted pursuant to the provisions of existing law as provided for in section 505(e) will be made, in accordance with the provisions of existing law, directly by the agency head or his designee rather than by the President. For example, if no applications are made under title V and the Presidential decisionmaking procedure in title V is not initiated, applications under existing law would be acted upon by the appropriate Federal officers and agencies without regard to the provisions of section 507(a) or the other provisions of this title. In this and other cases in which a formal determination on such an application is made by a Federal official other than the President, in accordance with existing law, the provisions of section 509(a) are intended to be applicable at that point in the administrative process without need for consideration of decisionmaking directly by the President, to any future actions which that agency may be required to undertake to implement that decision. Thus, for example, if an agency head grants an application for a right-of-way across Federal lands submitted pursuant to the provisions of section 505(e) and existing law on behalf of a crude oil transportation system, thereafter the provisions of section 509(a) requiring expedited procedures for approved systems shall apply with regard to all actions necessary to implement that determination.

Finally, under title V an applicant for permits, rights-of-way, and other authorizations for a crude oil pipeline or transportation system may choose to apply under title V of this act, under the Mineral Leasing Act of 1920 and other appropriate provisions of existing law, or under both title V of this act and the provisions of existing law. The conference committee does not intend that applicants who have previously applied for permits under existing law and made substantial expenditures and commitments processing such applications would be required to elect the new procedure exclusively. Rather, it is intended that an application under both procedures may be maintained. Thus, an applicant for permits submitted in accordance with the provisions of existing law may have the appropriate Federal agency continue to process its applications under existing law even if the applicant chooses to also submit an application under the provisions of section 504 of title V. In addition, the submission of applications for Federal permits, rights-of-way or other authorities filed on behalf of a competing crude oil transportation system pursuant to the provisions of section 504 shall likewise have no effect on the continued processing of applications for permits, rights-of-way or other authorizations submitted pursuant to existing law.

Mr. MARK O. HATFIELD. Mr. President, when the Senate was considering the energy conservation conference report on Saturday, October 7, I engaged in a colloquy with the distinguished chairman of the Energy and Natural Resources Committee regarding the utility conservation programs required by this legislation. I have one further question I would like to address to the Senator about these programs.

Section 216(d)(3) exempts utilities from the prohibition on supply, installation, or financing of conservation measures "where a law or regulation in effect on or before the date of enactment of this Act either requires, or explicitly permits, the public utility to carry out such activities." My question of the chairman involves the word "regulation." Is my assumption that an order or ruling of a State public utility commission or similar body constitutes a regulation for the purposes of this exemption?

Mr. JACKSON. The Senator is correct. An order or ruling of a State public utility commission requiring or explicitly permitting a utility to supply, install, or finance conservation measures would qualify that utility for the exemption under section 216(d)(3) of this bill, if that order or ruling is in effect prior to the date of enactment of this act.

Mr. MARK O. HATFIELD. I thank the Senator for his clarification.

Mr. JACKSON. Mr. President, I suggest the absence of a quorum at this time, and ask that it come out of the time on both sides equally.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, is the time controlled at this point?

The PRESIDING OFFICER. The time is under the control of the Senator from Washington (Mr. JACKSON) and the Senator from Wyoming (Mr. HANSEN).

Mr. ROBERT C. BYRD. Will the Senator from Washington yield me 5 minutes?

Mr. JACKSON. Mr. President, I yield 5 minutes to the distinguished majority leader.

Mr. ROBERT C. BYRD. Mr. President, the conference report on the National Energy Conservation Policy Act (H.R. 5037) is a bill for people. It would set in motion a national effort to insulate and weatherize residential and public buildings. Energy savings realized by facilitating retrofitting and other conservation improvements would be significant. The bill also would help to increase the use of

solar energy as a substitute for nonrenewable energy resources.

In addition to conserving energy, the National Energy Conservation Policy Act should help consumers cope with energy inflation. The bill provides for better information about energy savings associated with residential conservation measures, access to private or public financing, and energy efficiency standards for major household appliances.

Direct assistance to owners of houses or multifamily structures is both informational and financial. Information is provided pursuant to a residential energy conservation program. Under this program, a utility is required to provide energy conservation information to owners of residential buildings with four units or less, if requested.

A utility would serve as project manager to inspect the building; suggest conservation measures and project their energy cost savings; supply lists of lenders, suppliers, and contractors; offer to arrange to have conservation measures installed; and offer billing and repayment arrangements as a part of monthly utility bills.

A utility would be prohibited from lending more than $300 per customer and could not supply or install energy conservation measures. A State residential energy conservation plan must include standards and procedures to assure that each utility will charge fair and reasonable prices and interest rates in connection with its conservation program.

Financial assistance is provided in the form of grants, Federal home improvement loan insurance, loans at market interest rates, and subsidized loans. Grants for making energy conservation improvements for low-income homeowners are available through 1980. Grants are also available to multifamily structures financed or insured by the Department of Urban Development for elderly, handicapped, low- or moderate-income families. Among eligible multifamily projects, priority is given to those in financial difficulty because of high energy costs.

Eligibility for loans and insured loans is restricted to low- and moderate-income applicants, except for solar energy loans. They are available to all families during the next 5 years. A taxpayer, however, could not receive a solar loan and also take advantage of the solar energy tax credit.

Promoting the use of solar energy is another policy designed to conserve oil and gas. To show the merits and reliability of solar energy, the National Energy Conservation Policy Act provides for demonstration of solar heating and cooling in Federal buildings.

In addition, the bill directs the Federal Government to procure photovoltaic systems for its own use. Purchases are to be made over a 3-year period. The intent is to stimulate early development of photovoltaic production capability in the private sector.

Energy conservation in the public sector also would be enhanced by another requirement. All Federal buildings must be retrofitted by January 1, 1990 in order to assure maximum life-cycle cost-effectiveness. Each Federal department or agency is directed to conduct a preliminary energy audit to determine the best way to make each building more energy efficient. New Federal buildings would have to be designed and constructed so that cost considerations would be determined on the basis of life-cycle costs to the maximum extent practicable.

The conference report also seeks to make progress on the industrial conservation front. The primary focus is on pumps and motors. The Department of Energy is directed to evaluate them in order to determine standard classifications according to energy efficiency. If the evaluation shows that procedures for testing and labeling the energy efficiency of pumps and motors are appropriate, DOE may prescribe test procedures and require labeling.

The conference report is a significant part of the President's comprehensive energy policy. It not only contributes to the energy conservation objective, but also it plays a role in the import control strategy. I compliment Chairman JACKSON and the Senate energy conferees for the well thought-out energy conservation programs set forth in this document.

Mr. President, the fanfare and drama surrounding the natural gas debate may dwarf Senate Consideration of the conference report on the Public Utility Regulatory Policies Act of 1978 (H.R. 4018). It would be short-sighted, however, to overlook the potential contribution gas and electric utilities can make toward achieving our national energy goals.

This economy is a voracious consumer of electricity and natural gas. We use both throughout our residences and at work. Almost 30 percent of the total amount of energy we consume is used to generate electricity. As a source of energy, natural gas accounts for about 30 percent of all energy used.

After the 1973–74 oil embargo and sharp increases in energy prices, the need to re-examine electric and gas utility regulatory policies became increasingly more apparent. The emphasis of the utility conference report on conservation, cost control, and retail rate reform is intended to help consumers cope with higher energy prices.

This is particularly important in light of the emerging natural gas policy pertaining to wellhead pricing. The utility conference report is no less important for the contribution it could make to achieving our energy conservation and import control goals.

This conference report provides the public, both directly as intervenors and indirectly through Federal and State regulatory authorities, with a framework for conducting a national examination of utility policy. The report establishes Federal standards which a State regulatory authority or unregulated utility must consider in setting or designing rates.

In determining whether to adopt any of these standards, a State regulatory agency must evaluate how the standard, such as time of day rates or seasonal rates, relates to the act's purposes of which there are three: energy conservation by the ultimate end user; efficient use of generating and related facilities, including conservation of imported energy, and equity for ratepayers.

The conservation and rate reform standards must be considered formally on a utility-by-utility basis and within 2 years after the date of enactment. Reasons for rejecting any standard must be put in writing, based on evidence established during a hearing, and made part of the public record of the proceedings.

After considering the Federal standard, the conferees expect that a State regulatory agency or unregulated utility will adopt those which seem likely to accomplish the purposes of the act. As a result, gas and electricity would be used more efficiently, greater quantities of energy would be conserved, and consumers would have service rate options in order to hold down their utility bills. This should help to stretch domestic energy supplies and reduce imports without endangering economic growth or fueling inflation.

The framework for reviewing utility policy and adjusting it to the new energy environment offers advantages which go beyond greater conservation, energy efficiency, and rate equity. It preserves existing regulatory relationships. This means that local conditions will continue to dictate local policies. At the same time, it encourages flexibility and innovation. Indeed, the beauty of the conference report is that it is a national policy which is responsive to each State's needs without penalizing a State which does not fit the norm.

In addition to reviewing electric and gas retail rates, the conference report provides for three other policies to help conserve energy and contain costs. The Federal Energy Regulatory Commission is required to promulgate regulatory policies which favor industrial cogeneration facilities. This includes a provision to insure that a utility buys or sells cogeneration power at fair rates.

Stretching power supplies and reducing long-run costs are expected to result from a national, interconnected power grid. To this end, the FERC is authorized to require physical interconnections of electric power transmission facilities. To promote even greater reliability, conservation, and efficiency, the FERC is authorized to order utilities to provide transmission services between two noncontiguous utilities.

The bill promotes diversification of sources of power to generate electricity. One source that has been underutilized is water power, particularly small hydroelectric projects. Hydroelectric power contributes only about 5 percent of the energy we consume, but in certain areas its contribution could be expanded significantly by developing small projects. This would ease demand for fossil fuels. For example, New England imports large quantities of fossil fuels, yet the region is crisscrossed by the kind of fast flowing rivers necessary for small hydroelectric projects.

The conference report provides loans for feasibility studies and construction. Preference is given to applicants who do not have access to alternative financing.

This short substantive summary of the

utility conference report highlights those policies which make it an essential component of President Carter's comprehensive energy plan. The modifications made by the conferees in the Senate and House versions are significant improvements and refinements of the original proposal.

I think this is an excellent example of the Congress and the administration working together to tackle our energy problems in away which preserves the role of the State and keeps decisionmaking flexible and responsive to local needs. I commend Senator JACKSON and the other conferees for their success.

Mr. JACKSON. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time be charged equally to both sides.

The PRESIDING OFFICER. Without objection, it is so ordered.

The second assistant legislative clerk proceeded to call the roll.

Mr. JACKSON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. JACKSON. Mr. President I yield 5 minutes to the distinguished Senator from Kansas.

The PRESIDING OFFICER. The Senator from Washington has 1 minute remaining.

Mr. JACKSON. In behalf of Senator HANSEN, I yield 5 minutes to the Senator from Kansas. There is no problem on it.

The PRESIDING OFFICER. Without objection, the Senator from Kansas is recognized.

Mr. DOLE. Mr. President, the Senate is considering two of the energy conference reports. Some of us are concerned about the so-called gas guzzler tax and the provisions in this bill concerning EPCA standards and penalties on large automobiles. As I understand it, the EPCA penalties are going to be doubled. I should like to make a brief statement, then yield to the distinguished Senator from Michigan.

I am a conferee in the energy tax conference where we are discussing so-called gas guzzlers. The issue is should Congress require the consumer who buys the big car to pay an extra tax on the car. That may sound good on the surface, and to some it does. However, in effect, Congress is telling people what kind of car they can drive.

The guzzler tax is bad policy. Studies have shown it will probably put thousands of people out of work. In addition, the tax discriminates against a certain class of people who cannot afford to pay the added tax. Those with large families and those with small bank accounts will be denied the right to have a car that might fall in this category. Some of us feel that there will be every effort by the auto companies to follow the EPCA standards by the automobile industry. They have all told me the standards will be met. The guzzler tax is a tax on automobiles based on miles per gallon. However, in a letter from the Joint Committee on Taxation, a letter given to me last December, that states if the EPCA penalties are doubled, the imposition of the gas guzzler tax would have no energy impact. The tax saves no energy.

It seems to me the passage of this conference report would make the so-called gas guzzler tax an unnecessary and punitive symbol of what I consider to be a very deficient, defunct energy program. What I am suggesting to the distinguished Senator from Michigan is that there are provisions in this bill concerning EPCA standards and penalties on automobiles. There is a discussion in the so-called tax conference about the very same issue. If, in fact, we are going to double the penalties, it seems to this Senator that we have said to the industry, "Comply with the standards and meet the standards, or you are going to have a very substantial penalty to pay."

That should be enough. I do not know any reason for overkill in this area.

Much of the discussion on the so-called gas guzzler is much like the three-martini lunch. It makes good political speeches. A lot of people felt there should be additional taxes on a larger car until they realized that people who make those cars will be out of work and people with large families could not afford by pay the extra tax. It is a discriminatory tax and I hope with this bill, there will be no further need for the tax.

I shall appreciate any comments from the Senator from Michigan.

(Mr. HODGES assumed the chair.)

Mr. RIEGLE. I thank the Senator for yielding. I think he has made a very important point on this issue. We recognize that by establishing the fleetwide averages as we have under the law, requiring that car manufacturers will get 27.5 miles per gallon from the average car in 1985, really gives us what we need to see that we are getting the mileage from our automobiles that we need to have from the point of view of energy consumption and other international goals. I think the move that has been made here in this particular conference report to solve this issue is a very constructive one. I hope, as has been suggested, that the other conference committee will take a careful look at the ground that has been plowed here, with a very substantial part having been played by my friend from Kansas.

I might just say something with respect to what are often called the larger vehicles, named gas guzzlers. When we are speaking of a situation where a family perhaps has a need for a vehicle to transport six passengers or, in some cases, eight or even more passengers, the idea that somehow we are better off with smaller vehicles, maybe forcing them to have two cars and driving two cars to get from one point to another, rather than one larger vehicle that can handle a family of a larger size, would be false economy of the most extreme kind. I think the proposal that has been put forward here to hold the gas guzzler tax in abeyance and to have that go into effect only if the industry should fail to meet the industrywide standards is an excellent proposal. We forego nothing in terms of assurance that we shall meet the goals that we want. Failing that—which no one anticipates, I might say. All the evidence is to the contrary, that we are on track in making the kinds of mileage improvements that will bring us out in terms of those standards. Should that fail to happen, we can have the gas guzzler tax in abeyance and that can be considered at that time. That would be the time to consider using it, of course, and not beforehand.

Mr. President, I congratulate the energy conferees on presenting to the Senate a valuable and important piece of legislation. I am confident that this bill will make a dramatic contribution to our long-range energy conservation efforts.

When this bill was before the Senate last year, I offered an amendment to delete a provision that was included in the legislation at that time. That version would have imposed an outright ban on the sale of automobiles that did not meet certain minimum miles-per-gallon standards. I opposed that provision because I felt that it imposed unnecessary constraints on consumer freedom of choice, because it would have prevented those who needed large and relatively inefficient cars—such as families with station wagons—from purchasing them, and because it would have contributed almost no additional energy savings to those already achieved by the fleetwide standards passed by the Congress.

Mr. President, I am very happy to note that, after carefully considering this issue, the conferees have decided to adopt my position, and have deleted the minimum mileage standards from the conference report they have now placed before us. I commend them for the wisdom of their judgment in this regard, and for the alternative which they have recommended, namely an authorization that the Secretary of Transportation, at his discretion, be permitted to raise the civil penalties for violation of the current energy efficiency standards. This would apply to the penalties now specified for failure to meet the fleetwide averages which the Congress first adopted in the Energy Policy and Conservation Act of 1975. The Secretary could raise those penalties if he determined that it would result in energy savings, and would not result in adverse economic impact.

I believe that the Congress took a very sound step when it adopted the fleetwide average mileage standards. They will lead to very large energy savings, particularly with the very tough standards mandated by the Secretary of Transportation. And I have every reason to believe that the automobile manufacturers are making, and will continue to make, a good faith effort to meet those standards. I believe that they will be successful in so doing, and I hope that those of us in the Congress will not prejudge their efforts.

I raise this point, Mr. President, because I understand that the conferees on another portion of the energy bill, that dealing with energy taxes, are considering the matter of imposing a gas guzzler tax, which consumers would be required to pay when purchasing energy-inefficient automobiles. I hope that the conferees on that portion of the bill will display the same wisdom as the conser-

vation conferees have with respect to auto fuel economy, and will not impose a still, regressive tax on the American public on the faulty assumption that the automakers are not going to meet the current requirements in the law.

There is widespread agreement that if the fleetwide mileage standards are met, then an additional gas guzzler tax on top of those standards will not significantly improve energy conservation. The Department of Energy, in a report on this subject states:

If manufacturers meet the EPCA standards, as they have stated they will, it appears that the gas guzzler tax would have insignificant results.

That fact was reiterated by Bernard Shapiro, chief of staff of the Joint Committee on Taxation, with respect to staff estimates of energy savings accruing from the gas guzzler tax.

I cannot imagine why anyone would want to impose an onerous tax on automobile purchasers if that tax would result only in minimal energy savings. I can, therefore, only conclude that the tax is still under consideration because some of us do not believe that the automakers will meet the fleetwide averages, and do not even want to give them the opportunity to prove that they can. If that is indeed the problem, then there is a very simple solution, and one which has been proposed by my colleague from Kansas, Senator DOLE: Hold the gas guzzler tax in abeyance until it is established that the industry has failed to meet the standards. If, and only if, the standards are not met, does it begin to make sense to impose a gas guzzler tax. But let us not saddle the American consumer with a hefty tax increase, ranging from $200 up to $3,850, if that measure would not help us to make any significant progress toward our national goal of reducing energy consumption. And let us not, in effect, declare the automakers guilty of the crime of failing to meet the fuel economy standards that the Congress and the Department of Transportation have established, before they have had the opportunity to demonstrate that they can or cannot meet those standards.

The energy conservation conferees have acted wisely in deleting the minimum mileage standards and in leaving open the possibility of increasing penalties for failing to meet the fleetwide averages. The increased penalties will, I am sure, provide a sufficient incentive for the industry to put forth every effort to meet the standards. I hope the energy tax conferees will see the logic of this decision, and will impose a gas guzzler tax only as a contingency measure.

I commend the Senator from Kansas, also, and hope that other energy conferees will take a look at what has been done here. I think it marks a way in the future that is fair. It meets our energy requirements; at the same time, we see to it that we do not impose by Government mandate things that will be counterproductive in terms of the very goals we want to meet.

Mr. DOLE. I thank my colleague from Michigan. I appreciate his remarks and I concur with his statement.

I might add that a distinguished Member of the House, Representative JOHN DINGELL, has been very active in this area. There is some hope that we can reach some accord on the contingency plan that has been mentioned by my friend from Michigan. Perhaps a modification that would indicate a guzzler tax in 1980 at 1979 tax rates, make the tax rates permanent at the 1984 levels in 1985 and eliminate the first-line tax for the years 1983, 1984, and 1985. That is a compromise that, at least, has been circulated. At least, it has been presented to some of the House conferees and it will be presented some time soon to those of us who are Senate conferees to see if some agreement can be reached.

I think a better plan would be to adopt the contingency plan discussed by the distinguished Senator from Michigan. In other words, the EPCA standards are met the tax will not go into effect. Why punish the consumer? If the standards are met, why punish the manufacturer? I did not know this was a revenue-raising measure. With this provision it would be an outright punitive measure that I do not think should be adopted. If we cannot do what the Senator from Michigan suggests, I hope we will do better than we are doing now, with some compromise.

GEOTHERMAL RESOURCES IN "RENEWABLE RESOURCES"

Mr. DURKIN. The definition of "small power production facility" as contained in title II, section 201, includes a facility which produces electric energy solely by the use of, among other things, "renewable resources." Recent Department of Energy research indicates that substantial geothermal hot dry rock resources may exist in New Hampshire in addition to the large steam and geopressurized brine reserves known to exist across the Nation. Is it intended that, for the purposes of this act, all types of geothermal resources are included within the term "renewable resources"?

Mr. JACKSON. Yes.

RETAIL RATES—STATE DISCRETION SECTIONS 111 THROUGH 124

Mr. DURKIN. Am I correct in understanding that the principal purpose of the standards provisions of sections 111 and 113 is to require the States to give full and fair consideration to each of those standards, but they are to have a broad discretion as to whether or not to actually implement or adopt the standards?

Mr. JACKSON. The Senator is correct.

Mr. DURKIN. And we are not trying to displace other legitimate concerns of the States over other regulatory objectives or purposes?

Mr. JACKSON. No; we are not.

Mr. DURKIN. If a State should decide that one or more of these standards under section 111 would tend to encourage conservation or efficient use of facilities and resources or more equitable rates but might well result in other adverse consequences which the State PUC has authority, pursuant to State law, to take into account, such as the hardship to consumers or utilities, then the State could use these other factors as a basis for refusing to implement or adopt such standards?

Mr. JACKSON. The Senator is quite correct.

Mr. DURKIN. As I read it, the statement of managers makes it quite clear that the State regulatory authority has to consider the standards of section 113 within 2 years and does not have to undertake their consideration whenever an intervenor or a participant raises them in a rate proceeding. While no similar statement is made concerning the section 111 standards, section 112(a) provides that the State may give strong weight to its previous determinations on such standards. Am I correct in my interpretation that such prior determination may, in appropriate circumstances govern the outcome?

Mr. JACKSON. The Senator's interpretation of these provisions is absolutely correct.

Mr. DURKIN. Where the words "to the maximum extent practicable" appear in the bill, as they do in various places in sections 111 and 113 is it the intent of the legislation that the State regulatory agency will to determine what is the maximum extent practicable?

Mr. JACKSON. Yes.

CLARIFICATION SECTIONS 210, 211, 212 REGARDING SERVICE AREA OF THE TENNESSEE VALLEY AUTHORITY—ENERGY

Mr. RANDOLPH. Sections 210 and 211 of the energy conference report on public utilities provide authority for the Federal Energy Regulatory Commission to issue orders to the Tennessee Valley Authority which might in some instances be in potential conflict with section 15(d) of the Tennessee Valley Authority Act as amended in 1959.

Section 212(f) of the conference report specifically deals with this potential conflict. I wonder if the managers of the conference report would clarify two points for future reference with regard to these provisions:

First, it is my understanding that this legislation does not purport to amend the Tennessee Valley Authority Act and, specifically, that it is the intention of the conferees none of the prohibitions against service outside the established Tennessee Valley Authority service area stated in section 15(d) of that act, are reduced or modified—is that correct?

Second, section 212(f)(2)(D) indicates that Congress may authorize Tennessee Valley Authority service in accordance with a Federal Energy Regulatory Commission order even where such service might be in conflict with the prohibitions of section 15(d) of the Tennessee Valley Authority Act. It would be my understanding that this subparagraph is a restatement of similar language in section 15(d) of the Tennessee Valley Authority Act and that Committee jurisdiction for such action would remain with the Senate Environment and Public Works Committee—is that correct?

Mr. JACKSON. The Senator is correct on both points.

Mr. CRANSTON. Mr. President, I was

cosponsor of the conduit hydroelectric facilities provision of this bill, which is now section 213, and I would appreciate a clarification of the explanation of section 213 that appears in the conference report. It is my understanding that, in conference, the House agreed to state in the conference report a congressional intent that expedited licensing procedures applied when an applicant for an exemption under this provision is denied such an exemption by the Federal Energy Regulatory Commission. Such a statement is contained in the report. However, the explanation of section 213 does not reflect what I believe was a further matter of agreement among the conferees; namely, that applications for exemptions for hydroelectric plants meeting the conditions specified in the amendment will be expeditiously processed by the Commission. Although it is not necessary to state that in the conference report, it would be helpful if the chairman could verify for the Record that such an expedited exemption review process is intended by this amendment.

Mr. JACKSON. Senator CRANSTON's understanding of the conference agreement is correct. It was agreed that applications for exemptions be processed expeditiously, and that in such instances as the Commission determines that a conduit hydroelectric facility does not qualify for an exemption, an expedited licensing procedure would be adopted.

Mr. JACKSON. Mr. President, how much time is left altogether on both sides?

The PRESIDING OFFICER. The Senator from Washington had 1 minute, the Senator from Wyoming has 10 minutes.

Mr. SCOTT. Mr. President, I am glad to yield 3 minutes to the distinguished Senator from Montana.

Mr. MELCHER. I thank the Senator for yielding the time. I shall only speak briefly on a problem that we endure with the Alaska oil flowing through the Alaska pipeline to Valdez at about 1.2 million barrels per day, and then having a glut of Alaska crude oil on the west coast.

Part of the bill dealing with regulatory rate reform and present in the conference report before us deals with a speedup in the time frame of arriving at a Federal decision on whether or not building permits will be issued for a pipeline to serve the Northern Tier States and the Midwest by construction of such a pipeline.

The time frame that was called for as the bill passed the House approximately a year ago was an environmental impact statement being completed by December 1 of this year, and that is the agreement of the conferees and is a portion of the conference report before us.

The reason to hasten the Federal decision was to make sure construction of an approved pipeline could start, could move forward. The requirement does not require a Federal decision in the affirmative. It just says, "Reach that decision quickly."

There is no requirement that State law would be pre-empted by this Federal law. Indeed, the decision on a seaport for the only applicant, the Northern Tier Pipeline Co., would use as its Pacific coast terminus, Port Angeles in the State of Washington.

The Washington State Legislature in 1977 approved by wide margins the location of such a terminal at Port Angeles. However, the decision is up to the State Siting Council of the State of Washington.

The PRESIDING OFFICER. The Senator's 3 minutes have expired.

Mr. SCOTT. Mr. President, I yield the remainder of the time on this side to the distinguished Senator from Washington.

Mr. JACKSON. I thank my colleague from Virginia.

I yield 2 minutes to the Senator.

Mr. MELCHER. I thank the distinguished Senator.

The PRESIDING OFFICER. The Senator is recognized for an additional 2 minutes.

Mr. MELCHER. The application by Northern Tier is before the Washington State Siting Council and the critical point, as an environmental issue, is definitely whether or not an oil port at Port Angeles is acceptable. The Governor of the State of Washington, and I suspect members of the State siting council in the State of Washington, have asked, "Where is the Federal position on this, and if it is important, what is the Federal Government doing?"

I think this is the answer to that question. We are in the process of passing legislation that would expedite the environmental impact statement and the decision by the President whether or not to grant permits to a pipeline company, such as Northern Tier Pipeline.

It is important that the timeframe for reaching that decision will be early in 1979 because it is important that construction can start during the late spring months or early summer months of next year. This bill expedites the Federal decision process and if that is an affirmative decision and the Washington State Siting Council also reaches a favorable decision on the Northern Tier pipeline construction could start promptly.

It is for that reason, Mr. President, that this portion of the conference report deals directly with the method to reach a decision, to see whether or not the Federal permits will be granted, and, if so, then the State of Washington can see the importance that both the Congress and the executive branch of the Federal Government place on that pipeline, to help serve the Nation, remove the oil glut from the west coast that is caused by the Alaskan production.

Again, I thank the distinguished Senator for yielding me the time.

The PRESIDING OFFICER. The Senator from Washington.

Mr. JACKSON. Mr President we are now in the process of completing the President's legislative program which was submitted to the Congress on April 20 of last year.

The program consisted of five parts. The first, coal conversion; the second, utility rate reform; the third, energy conservation; the fourth, natural gas pricing; and the fifth, the taxing provisions.

When the Senate votes today, it will have completed four of the five parts of this package.

Mr. President, this has been a very difficult period for all of us who had the responsibility of trying to put together the beginning—and I emphasize and underline "the beginning"—of a national energy policy.

We will be debating for a long time as to how much energy we can save in terms of barrels-of-oil equivalent. I would give a rough estimate of about 3 million barrels of oil a day by 1985, give or take a few hundred thousand barrels.

Mr. President, this estimate does not include the taxing features, but I would be the first to remind my colleagues that we have a long way to go.

I would hope that when we have completed our work this week by final action in the House, that we will use this as the foundation to really get underway in the next Congress a program that can bring about more effective energy conservation, better discipline, may I say, in the utilization of our energy resources, and to truly move in developing not only the conventional resources available to us, such as coal, oil, and gas, but also synthetic fuels. We want to find some answers to the problems plaguing the nuclear power industry, especially the issue of standardization of reactors and the elimination of the problems that now beset us in waste disposal. At the same time we want to push the other sources of energy that offer such promise, sources such as solar energy, fusion, biomass, and a long list of others that are in the research and development stage.

So our effort today is a beginning, nothing more than that. But I think it is a good beginning. I think it is a good signal to our friends abroad that we can invoke a certain discipline in the United States in connection with the development of a meaningful energy policy.

Mr. President, as I conclude my remarks, I want to say how much all of us appreciate the help and support from our staff on both sides of the aisle.

I want to, especially in connection with the energy conservation bill, single out the following people: Ben Cooper, Jim Bruce, Debby Merrick, and Pete Smith from the majority staff, and Tom Imeson from the minority staff.

In connection with the utility rate reform bill, again, Jim Bruce, Dan Dreyfus, Ben Cooper from the majority staff, and Dan Bogg from the minority staff.

Mr. President, I believe that concludes the time allotted to us.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. Will the Senator withhold that?

Mr. JACKSON. Yes.

Mr. RANDOLPH. Mr. President, I commend my colleagues in the Senate for their constructive deliberations on the energy conservation policy and electric rate reform sections of national energy legislation. This represents the final step, in the Senate, of formulating a policy which will become the Nation's first comprehensive energy plan, a plan I have been calling for since 1959. The

19-month debate on the energy issue has clearly demonstrated that the Senate and the energy conference committee felt major modifications were necessary to the President's energy program before it could be presented to the American people as a blueprint which will be used to direct our energy efforts in the long term.

Many people, including some in the administration and the Senate, have held that the modifications made in the conference compromise defeat the purpose of national energy legislation. I am convinced the compromise on policy issues debated today will conserve energy and reform energy use patterns on a large scale basis.

The conservation portion of the national energy plan will offer a variety of incentives to middle-class homeowners and low-income renters to install such fuel-saving measures as insulation and solar heating equipment. Federally backed loans and grants are included, as well as doubling fines on automobile manufacturers who fail to meet fleet-wide mileage standards under existing law.

Electric and gas utilties will perform a major role in informing rate payers about their individual conservation needs. Utilities will offer to arrange for installation of insulation in their customer's homes to be paid for through utility bills. Schools, hospitals, and local governments would receive Federal grants to carry on conservation programs.

Electric rate reform will require State utility commissions to consider a variety of energy-saving rate reforms. The bill would give broad rights to consumers and the Federal Government to intervene in State utility proceedings and to fight for reforms. The Federal Government would gain the power to order various types of power-sharing arrangements among utility systems.

Important reforms that each State commission would consider are time-of-day or seasonal rates that are highest during the times of peak use for the system. Commissions would consider prohibiting discriminatory rates against solar, wind and other small power systems, procedures to protect ratepayers against abrupt termination of service, and prohibitions against charging ratepayers for promotional or political advertising.

To take advantage of energy conservation opportunities will require changes with respect to land use, technology, utilization of the labor force, and consumer behavior. The most important contribution can take place by having the cooperation of individual citizens. We should not wait to act until we are forced to do so. The energy conservation and utility rate reform provisions of the energy bill will enable a more gradual increase in production levels required, while successfully lowering costs to the consumer through their own initiatives.

I am confident this final energy plan emerging from Congress will be an excellent starting point for resolving all complex energy issues.

I emphasize "starting point," because this legislation will continue to be adjusted and refined to fit the changing energy needs of the country.

Decisions made in the 95th Congress, together with the Carter administration, private industry, and our total citizenry will do much to guarantee energy use policies which will strengthen America.

Mr. President, I commend the able chairman, Senator JACKSON of Washington, and the other members of the Energy and Natural Resources Committee. They deserve our thanks as energy conferees for the time and careful attention they have given to each section of this energy legislation. By working together at a well-reasoned pace Americans can comprehend and solve their energy problems. Passage of this legislation gives a clear signal to the American people that Congress does not intend to create another uncertainty accompanying the natural scarcity of oil and gas by being unclear and indecisive on Government policy concerning energy.

Mr. BARTLETT. Mr. President, despite my opposition to the conference report on the Public Utility Regulatory Policies Act of 1978, it may be useful to point out that the legislation at least accomplishes one positive thing in sections 201 through 204, pertaining to interconnection and wheeling for electric utilities.

The history of these provisions, in both the House Committee on Interstate and Foreign Commerce and the Senate Committee on Energy and Natural Resources, shows that one of the problems these provisions are designed to meet is the apparent lack of an appropriate forum in which to resolve the so-called Texas problem. The Electric Reliability Council of Texas, know as ERCOT, contains the major portion of the electric utilities in Texas and has apparently operated in electrical isolation from the rest of the United States for a number of years, except during periods when this area was specially exempted from Federal jurisdiction. In this respect Texas is unique, since the rest of the country is entirely interconnected and, by reason of its interconnections, is subject to the jurisdiction of the Federal Energy Regulatory Commission.

A number of public utilities operating both within and outside the State of Texas have sought to achieve electrical interconnection between ERCOT and the Southwest power pool, but they have been strongly opposed by several of the major utilities in ERCOT. The old Federal Power Commission, which has become the Federal Energy Regulatory Commission, has felt that it had no jurisdiction over the Texas utilities because of their isolation, and hence was powerless to decide whether or not it was in the public interest that they be interconnected with the Southwest power pool. Whatever the merits of this controversy may be, practically everyone who has seriously addressed the question agrees that there should be full authority in the Federal Energy Regulatory Commission, either on its own motion or on the motion of any of the utilities involved, to hold hearings and decide whether it is in the national interest that the isolation of ERCOT be terminated by any adequate system of interconnection and the necessary coordination to accompany it, or whether the status quo should be maintained.

Of course, the provisions of this legislation to which I refer have, in various respects, application to matters other than the Texas problem, but it is reassuring that these provisions are designed to adjudicate the Texas problem fully and comprehensively based on the standards set forth in the law, so that whatever solution may best serve the public interest may be reached. The interest of a large population served by many utilities is involved here, as is the interest of the entire United States in a reliable electrical energy supply.

Mr. HUDDLESTON. I would like to have a clear understanding of the situation as to Tennessee Valley Authority under the interconnection and wheeling provisions in sections 202, 203, and 204 of the conference report.

In 1959, the TVA Act was amended to give TVA authority to issue a large amount of bonds to finance TVA's power program. The same statute imposed restraints or prohibitions against TVA's expanding its power supply area beyond the area supplied by TVA on July 1, 1957 (16 U.S.C. 831 n-4). The conference report will give to FERC authority to order TVA to interconnect with other utilities or to participate in wheeling arrangements under certain conditions; however, these new provisions of law do not provide authority for TVA to take any action which TVA would be prohibited from taking under the 1959 TVA Act.

Mr. JACKSON. That is correct. Section 204 of the conference report specifically provides for a procedure to insure that any FERC order related to interconnection or wheeling which involves TVA is subject to review to determine if such a violation would occur. If such review is requested by any aggrieved person, the order is stayed. If it is determined after an evidentiary hearing and any judicial review thereof that such a violation would occur, the order is further stayed. This stay could then only be lifted by specific congressional authorization. In short, this provision makes it clear that the status quo with respect to limitations on TVA as set out in the TVA Bond Act is to be maintained.

Mr. HUDDLESTON. In various provisions of sections 210, 211 and 212 of the Federal Power Act, as it would be amended by sections 202, 203 and 204 of the conference report, which relate to interconnection and wheeling, I find the phrase "electric utility affected by the order" or "affected electric utility" or similar phrases.

In order to avoid confusion as to what these phrases mean, it is specified in the Statement of Managers under section 204 that the utilities involved in an interconnection arrangement; the utility ordered to wheel; or the buyer and seller in an arrangement for the sale or exchange of power; or any utility whose systems, operations, or costs or revenues would be affected by a requested order and the related arrangements; and the

customers of such utilities have an opportunity to participate in the proceeding and hearing. As I understand it, a utility having such right to intervene and participate will be considered a "utility affected by the order." This should not be confused with the explanation in the statement of managers under section 203, which relates to wheeling, that for the purpose of providing notice of the filing of an application for wheeling with FERC, "affected electric utility" includes, as a minimum, the two electric utilities which have made the arrangements for the sale of power as well as the utility being requested to wheel power.

Mr. JACKSON. The Senator's interpretation of our intent is correct.

Mr. MAGNUSON. I want to congratulate my colleague and good friend on the many months of hard work that he and the other conferees have put in on this important legislation. I know it has at times been a trying experience, and the very fact that the Senate is able to vote on an energy package is a testament to his hard work and determination. I believe that there is going to be a number of beneficial effects that will flow from this legislation, not the least of which is an increased confidence abroad in the ability of the United States to get its energy situation under control. While I am pleased that this package of legislation is now finally moving toward final enactment, I do believe that there are a few small items that still need to be clarified. I have discussed them already with the distinguished chairman of the Energy Committee, and he has suggested a colloquy to put to rest, once and for all, the fact that several legislative provisions in this package could be subject to unintened interpretations.

Mr. JACKSON. The distinguished chairman of the Appropriations Committee is correct. While I do not believe that any of these provisions will lead to unintended interpretations, I share his desire to create sufficient legislative history to put this matter to rest.

Mr. MAGNUSON. My concern really relates to matters affecting our home State of Washington and other coastal States as well. As you know, title V, entitled "Crude Oil Transportation Systems," could affect the location of a crude oil transshipment port on the west coast to serve northern tier and inland States. One of the potential sites for such a system is in the State of Washington. Therefore, it is important that there be no confusion about the exact intent of this legislation.

Mr. JACKSON. I fully understand your concerns. One section that might be misread to affect coastal States like Washington is section 505(b)(2)(B). This section says that applications for the expedited siting procedures provided for in the bill must comply with statutes such as the Federal Land Policy and Management Act. The statutes listed are obviously not exclusive; the application must comply with all applicable laws. For example, application for a system in Washington would have to comply with the federally approved State coastal management plans in the State of Washington under the Coastal Zone Management Act of 1972, or any other relevant Federal law.

Mr. MAGNUSON. I thank the Senator for that clarification. I assume that the criteria for approval of a system listed in section 507(b)(1)(A), which mentions environmental impacts has as its intent the minimization of environmental risks, and that an application could seek to reduce both risks imposed by the proposed project itself and existing risks as well.

Mr. JACKSON. That is correct. For example, the State of California is now considering the reduction of existing pollution sources in conjunction with the consideration of approval of the proposed Sohio pipeline from Los Angeles to Midland, Tex.

Mr. MAGNUSON. I think that this is a worthy goal. In Puget Sound, for example, we have experienced a tremendous increase in tanker traffic over the last several years as the Canadian pipeline delivery of oil has diminished. I would assume that any proposed project which would reduce the very real risks imposed by this existing tanker traffic would be a positive factor in the Secretary's consideration of a possible application for a siting decision in our area. It could mean that there would be a proposal, for example, to hook up the existing refineries to any new pipeline in an effort to reduce the risk associated with tanker traffic serving Washington refineries. While I am no supporter of new pipelines in the State of Washington, if there is going to be one, it should consider ways to reduce all environmental risks, including those that exist today.

Mr. JACKSON. That is correct. As you know, this issue is addressed in the joint explanatory statement of the committee of conference on page 102.

Mr. MAGNUSON. I thank the distinguished Chairman of the Committee on Energy and Natural Resources. There is one further matter that concerns me because it has the potential for misunderstanding. In section 508(a), there is a procedure by which the President could propose to Congress the waiver of certain laws if he finds that such a waiver would facilitate the construction or operation of either the so-called Sohio project or one of the projects approved under the criteria we have already referred to. While Congress would have the opportunity to consider such a proposal by either passing or failing to pass a joint resolution, it nonetheless raises the question of congressional intent in allowing for such a procedure to exist in the first place. What is the intent with respect to this waiver procedure?

Mr. JACKSON. This legislation is intended to be expediting legislation. While I cannot foresee at this moment exactly what Federal law might be proposed to be waived, the waiver would be used to facilitate construction or operation of any system approved under section 507. In other words, this provision is designed to speed things up once a decision has been made.

Mr. MAGNUSON. I thank my distinguished colleague for this explanation. Since it is meant only to expedite implementation of a decision to approve a potential project, I think it is fair to say that it is not intended to modify those laws that would affect that decision in the first place. For example, in the case of our State of Washington, Public Law 95-156 prohibits the construction of any new major crude oil transshipment facility east of Port Angeles, Wash. Obviously, waiver of that law would not be an expediting matter; it would fundamentally affect whether or not a possible project could move forward at all. This procedure cannot be used to waive laws that govern whether or not a siting decision is made; it applies only to expediting legislation. Existing laws prohibiting siting of oil port facilities are not eligible to be waived under this procedure.

Mr. JACKSON. That is correct.

Mr. MAGNUSON. I appreciate the efforts of my colleague to clarify these matters, and again wish to congratulate him on the extraordinary effort he has invested in trying to help this Nation formulate a sensible energy policy.

ORDER OF BUSINESS

(The following proceedings occurred earlier and are printed at this point by unanimous consent:)

Mr. JACKSON. Mr. President, I ask unanimous consent that my remarks that I am about to make, and the action that the Senate may take, occur immediately after the completion of the discussion on the two pending conference reports.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE 1978 AMERICAN K2 EXPEDITION

Mr. JACKSON. Mr. President, in June 1978, the 1978 American K2 Expedition set out to climb K2, the second highest mountain in the world. On September 6 and 7, 1978, four members of the expedition achieved this goal, thereby becoming the first Americans ever to stand atop the summit of this treacherous mountain.

K2, a mountain in the Karakoram Range of the Himalayas on the border between Pakistan and China, reaches a height of 28,250 feet above sea level, making its summit the second highest point in the world, only 750 feet lower than the peak of Mount Everest. K2 is one of the most difficult and challenging mountains to climb in the world.

Indeed, in the world of mountaineering, the summit of K2 is one of the least accessible places on Earth. Although many attempts have been made to scale its heights, K2 has been ascended just twice, by an Italian team in 1954 and by a Japanese team in 1977. Five previous American expeditions have been unsuccessful in their attempts to reach the summit.

The 1978 American K2 Expedition was organized by James W. Whittaker of Seattle, Wash. The expedition's goal was to attempt to climb K2 during the summer of 1978 by the hazardous, virgin northwest ridge. The expedition consisted of 13 team members, in-

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing RESPONSE BY THE DEPARTMENT OF JUSTICE TO MOTIONS FOR SUMMARY DECISION AND/OR SUMMARY DISPOSITION BY HL&P, TUGCO, AND AUSTIN have been made on the following parties listed hereto this 23rd day of April, 1979, by depositing copies thereof in the United States mail, first class, postage prepaid, or by hand service where * appears or by express mail where ** appears to the right of the name.

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