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The ALJ referred his ruling to the Commission under Rule 65 and on October 28 the Commission announced that it concurred in the results of the ALJ's ruling. We also announced that we would prepare a decision on the matter so that parties would have the benefit of our rationale for reaching this conclusion.

1. Evidence of Financial Need

We affirm the ALJ's ruling on the motion to exclude evidence of financial need from this phase of the reasonableness review and reserve that issue for Phase III.

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We also grant the AG's motion to adopt the same standard of care in this case that we applied in the SONGS prudence review (D.86-10-069). The standard establishes the level of competence at which the utility must operate in order to be found to have acted prudently. "The standard simply means that the utilities' actions should comport with what a reasonable manager of sufficient education, training, experience and skills using the tools and knowledge at his disposal would do when faced with a need to make a decision and act....(W)hat constitutes 'sufficient' education, training and experience for SONGS 2&3 managers should be evaluated in light of the degree of risk that the magnitude of the project and its technology posed to the utilities and their ratepayers." (SONGS, D.86-10-069, mimeo. p. 31.)

3. Summary Adjudication Based on Collateral Estoppel

The AG has argued that this Commission should take official notice of certain Nuclear Regulatory Commission ("NRC") and Atomic Safety Licensing Appeal Board ("ASLAB") orders, hereafter referred to as "NRC orders", particularly the conclusions that PG&E had not observed federally-mandated quality control procedures and that an independent verification program was subsequently required to assure plant safety.

The AG proposes that the Commission find that PG&E's shareholders, and not its ratepayers, are responsible for the direct and indirect costs incurred after the discovery of the "mirror image error" in 1981 because the NRC had determined that PG&E's practices did not conform to NRC mandated procedures intended to provide quality assurance. These procedures appear at 10 CFR part 50, Appendix B. Implicit in the AG's motion is the argument that PG&E's violations of NRC regulations, when measured against the degree of care this Commission requires in the context of ratemaking proceedings for a nuclear power plant, were imprudent per se.

Thus, the AG seeks a Commission order, based on official notice of proceedings before the NRC, that finds that the costs incurred between the time Unit 1's low power operating license ("LPOL") was suspended and then reinstated were imprudently incurred and should be excluded from rates.

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CORRECTION

THIS DOCUMENT HAS

BEEN REPHOTOGRAPHED

TO ASSURE

LEGIBILITY

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The relationship between the terms "sufficiency of education, training, and experience" and the "degree of risk" has not been consistently maintained in the ALJ's paraphrasing of the SONGS standard. As drafted in the ALJ's ruling, the sufficiency of the manager's education applies to the individual's ability simply to evaluate risk. Under the SONGS rule, the sufficiency of the education is determined in part by the degree of risk posed by the project and is relevant to establish the type of manager against whom the utility's management would be compared.

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Decision 87-12-018 December 9, 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company, for Authorization to Establish a Rate Adjustment Procedure for its Diablo Canyon Nuclear Power Plant; To Increase its Electric Rates to Reflect the Costs of Owning, Operating, Maintaining and Eventually Decommissioning Unit 1 of the Plant and to Reduce Electric Rates Under its Energy Cost Adjustment Clause Annual Energy Rate to Reflect Decreased Fuel Expense. (Electric)	Application 84-06-014
And Related Matter.	Application 85-08-025

ORIGINAL

OPINION

The Attorney General (AG) moved (1) to exclude testimony on financial need, (2) to establish a standard of care, and (3) for summary adjudication of the responsibility of Pacific Gas and Electric Company ("PG&E") for the direct and indirect costs of its actions and omissions leading to the NRC's suspension of the low power operating license for Diablo Canyon Unit 1. PG&E, the Commission's Public Staff Division, now renamed the Division of Ratepayer Advocates ("DRA"), Toward Utility Rate Normalization ("TURN"), and various intervenors responded to the motions. After hearing before the Administrative Law Judge ("ALJ") on September 30, 1987, the motions were submitted.

The written ruling of the assigned ALJ was issued on October 6. Several key parties to the case filed responses to the ruling. "Exceptions of Attorney General John K. Van de Kamp to

Administrative Law Judge's Proposed Ruling on Motion for Summary Adjudication" and "Appeal of the Administrative Law Judge's Proposed Ruling of October 6, 1987" by the DRA were filed on October 15. These were followed by "Pacific Gas and Electric Company's Comments on Administrative Law Judge's Ruling" filed on October 26 and "Memorandum in Support of Attorney General's Motion" filed by Assemblywoman Gwen Moore on October 27.

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1. Evidence of Financial Need

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We also grant the AG's motion to adopt the same standard of care in this case that we applied in the SONGS prudence review (D.86-10-069). The standard establishes the level of competence at which the utility must operate in order to be found to have acted prudently. "The standard simply means that the utilities' actions should comport with what a reasonable manager of sufficient education, training, experience and skills using the tools and knowledge at his disposal would do when faced with a need to make a decision and act....(W)hat constitutes 'sufficient' education, training and experience for SONGS 2&3 managers should be evaluated in light of the degree of risk that the magnitude of the project and its technology posed to the utilities and their ratepayers." (SONGS, D.86-10-069, mimeo. p. 31.)

adequately met licensing criteria, according to the ALJ. In addition, the ALJ rests his denial on public policy grounds, since he concludes that with the significant potential rate impact of $2.5 billion at stake, public policy favors granting the litigant a hearing on the merits.

We have reviewed the responses of the parties to the ALJ's ruling. The AG argues that the ALJ has misconstrued the doctrine of collateral estoppel and erred in finding that PG&E had no opportunity or incentive to challenge the NRC's decision to suspend its LPOL. The DRA takes a similar position in its appeal of the ALJ ruling. PG&E expresses satisfaction with the ALJ's ruling and uses its Comments on the ALJ's ruling as a vehicle to rebut the arguments of the AG and the DRA. The utility also tenders a portion of a proposed exhibit, which is not a part of the record, to corroborate the ALJ's rationale. Assemblywoman Moore urges the Commission to employ the doctrine of collateral estoppel to confine the litigation in this case to genuinely contested issues of fact.

Before the conclusions reached by the NRC may be relied on to establish any fact or finding, we must examine the findings of the NRC and the relationship between these findings and the conclusions which the AG seeks us to draw, based on those findings.

The Commission has the option of taking official notice of all matters which may be judicially noticed in civil court. (20 Cal. Admin. Code Sec. 73.) Thus, a preliminary issue is whether or not the Commission chooses to take official notice of the NRC orders.

Orders of the NRC and its associated administrative bodies are accorded mandatory judicial notice under Section 451(b) of the California Evidence Code. Based on the AG's request pursuant to Evidence Code Section 453, judicial notice is also required of the NRC's official acts and records under Section 452. The NRC maintains exclusive jurisdiction with respect to the

licensing of nuclear powered electric generating plants. Along with that jurisdiction, the NRC possesses unique expertise regarding the interpretation and enforcement of its licensing regulations. The NRC orders in question concern the issuance, suspension, and reissuance of PG&E's low power operating license ("LPOL"). We observed in the SONGS case that the issuance of the LPOL is a prerequisite to commercial operation of a utility's nuclear electric generating plant.

NRC I, the NRC Order Suspending License, recites that:

1. The Diablo Unit 1 low power operating license was issued on September 22, 1981,

2. PG&E detected and reported an error in the seismic design of a containment structure in late September, 1981 and that subsequent investigation revealed additional errors,

3. The NRC staff's identification of weaknesses in PG&E's quality assurance program indicated that violations of NRC's regulations in 10 CFR Part 50, Appendix B have occurred, and

4. Accordingly, the NRC suspended PG&E's license to load fuel and conduct tests at up to 5% of rated power pending completion of specified design verification procedures.

In addition, PG&E was ordered to show cause why its license should not be suspended pending satisfactory completion of design verification. PG&E was authorized to file a written answer to the order and demand a hearing within 20 days of the date of the order. Those further proceedings were to test the truth of statements in the order that PG&E's quality assurance program suffered from, specifically, shortcomings that were identified by the NRC staff and that such information indicates that "certain structures, systems, and components important to safety at the plant may not be properly designed to withstand the effects of earthquakes, and...that violations of NRC's regulations in 10 CRF Part 50, Appendix B have occurred."

The subsequent proceedings never took place because PG&E did not demand a hearing in response to the order to show cause. PG&E did, however, undertake a design verification process in compliance with NRC directives. This resulted in NRC II, which concluded that the scope and the execution of PG&E's verification programs were sufficient to establish that Diablo Canyon Unit 1 design adequately meets its licensing criteria, and that any significant design deficiencies in that facility resulting from defects in PG&E's design quality assurance program had been remedied.

As the orders relate to the compliance of Diablo Units 1 and 2 with the NRC's LPOL licensing requirements and the issue of compliance will weigh in our determination of the period of time reasonably needed to bring the Diablo Units into commercial operation, the orders are relevant to our inquiry into PG&E's reasonableness. The question of whether PG&E performed as required to maintain its LPOL is one for the NRC's review, not ours. Since the NRC has acted on that issue, we intend to take official notice of the NRC orders that were cited and relied on by the parties in their argument on summary adjudication.

By this notice, we recognize that the NRC orders were lawfully issued. However, short of giving the NRC orders estoppel effect, as advocated by the attorney general, the parties have not adequately addressed the procedural effect of officially noticing the cited NRC orders. That is, although notice of the NRC orders may substitute for the formal proof of facts, it is unclear what facts are to be properly established by this notice. We will allow the parties twenty days from the effective date of this order within which to brief the issue of how comprehensive our official notice of the NRC orders should be and which facts should be deemed established by the NRC order. The Commission intends to expeditiously resolve the question of official notice in a subsequent order.

Although the issue of official notice of the NRC orders has not been resolved, we may address and resolve the AG's motion for summary adjudication. Let us assume that every one of the factual assertions contained within the NRC orders is a proper subject of judicial notice. Substantial authority supports the application of the doctrine of collateral estoppel to the decisions of administrative agencies. (United States v. Utah Constr. Co. (1965) 384 U.S. 394, 422.) As emphasized in Parklane Hosiery Co. v. Shore (1978) 439 U.S. 322, the vital prerequisite is that the party to be estopped had a full and fair opportunity to litigate the findings in the order. The fact that the order was issued ex parte, or that the order was based on hearsay when the party has waived its right to a hearing, is no bar to application of the rule. (Fox v. San Francisco Unified School District (1952) 111 Cal. App. 2d 885.)

Strong public policy, along with the need to conserve this Commission's adjudicatory resources, persuade us that under the appropriate circumstances, PG&E may be prevented from contesting the plain language of the NRC orders, and may be estopped to this extent. "(I)n a later action upon a different claim or cause of action, (a former judgment) operates as...a conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (Todhunter v. Smith (1934) 219 Cal. 690, 695.)

However, if the particular issue was not presented or was not within the court's power to decide in the first action, it will not be conclusively determined by the judgment. (Strangman v. Duke (1956) 140 Cal. App. 2d 185, 191.) The issue of whether the expenditures incurred by the utility to meet its licensing requirements should be included in rates is beyond the NRC's jurisdiction and was clearly not an issue in the NRC proceedings. Therefore, the NRC's order has no estoppel effect on the issue of the reasonableness of the expenditures.

In anticipation of this juncture, the AG argued that PG&E's violation of Appendix B was unreasonable within the meaning of Section 463 of the Public Utilities Code, and that pursuant to Section 463, PG&E is responsible for the entire cost of reacquiring its low power license for Unit 1 and for all expenses resulting from the delay caused by its license suspension. As summarized by the DRA, "The remaining issue concerning whether or not the costs resulting from the violations of Appendix B and the implementation of the design verification program were unreasonable is a question of law: is it unreasonable for PG&E to violate NRC safety standards?"

While it may be argued on broad policy grounds that it is reasonable to comply with federal regulations, mere compliance may not be sufficient to guarantee the prudence of utility action. Nor does it follow that all costs incurred in the course of that compliance were reasonably incurred. Likewise, it is not necessarily true that noncompliance with federal law establishes that any or all expenditures were unreasonable for ratemaking purposes.

Even if it were conclusively established that PG&E violated Appendix B of 10 CFR 50 at this time, we would not find that such violation was unreasonable as a matter of law. The hypothetical situation would be a very narrow one, and we would not on the basis of such unique facts draw a conclusion of law that would bind us in subsequent Commission proceedings, other forums or with regard to other factual situations. The parties have not squarely addressed this policy issue in their arguments on summary adjudication. Moreover, our cautious approach would be supported by the policy considerations limiting the estoppel effect of a prior decision to issues that were actually litigated and within the first court's jurisdiction.

On a practical note, we perceive limited savings in litigation resources if an affirmative decision on the motion were

granted. We agree with the DRA that even if we were to find that PG&E's violation of Appendix B was imprudent as a matter of law, we must review the actual costs incurred by PG&E to implement the remedial design verification program, the reasonableness of the delay before the LPOL was reissued, and the reasonableness of costs incurred during the delay period. The financial impact of imprudence must be established in evidentiary hearing, regardless of whether PG&E was imprudent per se, or not.

Our review of the parties' responses has led us to the same general conclusion as that reached by the ALJ, although by a somewhat different route. We agree that the AG's motion for summary adjudication should be denied. However, because our opinion is being rendered subsequent to the issuance of the ALJ's ruling and after consideration of the parties' various responses, this opinion supersedes the ruling of the ALJ. Moreover, we emphasize that today's order is limited to a consideration of the pleadings and arguments presented on the AG's motion for summary adjudication and does not, unless expressly stated herein, constitute the law of the case.

Prompted by this concern, we clarify that any of the conclusions contained in the ALJ's ruling which are not consistent with the reasoning of this order shall have no effect on the disposition of issues later in the case. In this order we do not characterize PG&E's strategy in response to NRC I. Likewise, we have no record on which to judge the potential rate effect of a grant of the AG's motion. Parties shall be guided by this decision rather than the ruling in their presentation of the case.

Findings of Fact

1. The Attorney General (AG) moved (1) to exclude testimony on financial need, (2) to establish a standard of care, and (3) for summary adjudication of the responsibility of Pacific Gas and Electric Company ("PG&E") for the direct and indirect costs of its

actions and omissions leading to the NRC's suspension of the low power operating license for Diablo Canyon Unit 1.

2. PG&E, the Commission's Public Staff Division, now renamed the Division of Ratepayer Advocates ("DRA"), Toward Utility Rate Normalization ("TURN"), and various intervenors responded to the motions. After hearing before the ALJ on September 30, 1987, the motions were submitted.

3. The written ruling of the assigned Administrative Law Judge ("ALJ") was issued on October 6.

4. The AG, DRA, PG&E and Assemblywoman Moore filed responses to the ruling.

5. For reasons of administrative and judicial efficiency, evidence of PG&E's financial need for rate relief may be considered in Phase 3 of this proceeding.

6. It is reasonable to evaluate PG&E's prudence in this case under the same standard we have used to evaluate SCE and SDG&E's prudence in the SONGS case.

7. On November 19, 1981, the NRC ordered the suspension of PG&E's low power operating license due to the NRC staff's investigation which indicated that violations of 10 CFR Part 50 Appendix B had occurred, among other things. (14 NRC 950).

8. The AG seeks a Commission order, based on official notice of proceedings before the NRC, that finds that the costs incurred between the time Unit 1's low power operating license was suspended and then reinstated were imprudently incurred and should be excluded from rates.

9. Implicit in the AG's motion is the argument that PG&E's violations of NRC regulations, when measured against the degree of care this Commission requires in the context of ratemaking proceedings for a nuclear power plant, were imprudent per se.

10. The AG argues that PG&E's violation of Appendix B was unreasonable within the meaning of Section 463 of the Public Utilities Code, and that pursuant to Section 463, PG&E is

responsible for the entire cost of reacquiring its low power license for Unit 2 and for all expenses resulting from the delay caused by its license suspension.

11. Regarding the NRC orders cited by the AG in his moving papers, the parties have not sufficiently briefed the question of which facts asserted by those orders are the proper subject of judicial notice.

12. The financial impact of imprudence must be established in evidentiary hearing.

13. The substantive conclusions of the ALJ which are not necessary to our order should be disregarded.

Conclusions of Law

1. Evidence of PG&E's financial need for rate relief is irrelevant to the issues to be litigated in Phase 2 of this proceeding, that is, the reasonableness of PG&E's acts in planning, licensing, and constructing Diablo Canyon Units 1 and 2.

2. The AG's motion to establish a standard of care consistent with the SONGS decision (D.86-10-069) should be granted.

3. The following rephrasing of the SONGS standard should be substituted for the standard contained in the ALJ's ruling:

> A utility's actions should comport with those a reasonable manager, with appropriate education, training, and experience would take in light of the available information and circumstances. What constitutes "sufficient" education, training and experience should be evaluated in light of the degree of risk that the magnitude of the project and its technology posed to the utility, its ratepayers, and the public. When dealing with a nuclear project that constitutes a substantial financial, operational, and technological risk, the standard against which the reasonable manager should be measured is high.

4. The Commission has the option of taking official notice of all matters which may be judicially noticed in civil court.

5. It is appropriate to take official notice of the NRC's orders because (a) the orders relate to PG&E's compliance with the NRC's licensing requirements, (b) the NRC has exclusive jurisdiction to issue the operating licenses of nuclear electric generating plants, and (c) because the issue of compliance is relevant to our determination of the reasonable period of time needed to bring the Diablo units into commercial operation, a critical issue in determining whether unreasonable costs were incurred.

6. The Commission intends to take official notice of the cited NRC orders but must entertain briefs by the parties to identify which facts asserted by the NRC orders are to be established under the doctrine of judicial notice stated at Sections 451(b) and 452 of the California Evidence Code, and if so, whether they should be given collateral estoppel effect.

7. PG&E is not collaterally estopped to introduce evidence of the reasonableness of its acts although such acts may have been considered previously by the NRC in its issuance of 14 NRC 950 because the issue of reasonableness for ratemaking purposes is not within the NRC's jurisdiction to determine.

8. Assuming that official notice most favorable to the position of the AG is taken, the motion for summary adjudication should be denied as a matter of law since the issue of reasonableness was not within the jurisdiction of the NRC to determine.

10. This opinion confirms and supersedes the ALJ ruling of October 6, 1987.

O R D E R

Now, therefore, IT IS ORDERED that:

1. The motion of the Attorney General to exclude testimony of financial need from Phase 2 is granted. Testimony regarding cost effectiveness is also excluded from Phase 2.

2. The motion of the Attorney General to establish a standard of care is granted. The standard of care to be used in determining the reasonableness of PG&E's actions in constructing Diablo Canyon Units 1 and 2 is set forth on page 3 of this Opinion.

3. The motion of the Attorney General for summary adjudication is denied.

4. The AG, PG&E, and the DRA shall file with the Commission and serve on the parties briefs on the question of how comprehensive should be the Commission's official notice of NRC I within 20 days of the effective date of this order.

5. All parties are expected to proceed with due diligence to complete discovery, including requests for stipulations and admissions.

This order is effective today.

Dated December 9, 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102

December 11, 1987

Parties of Record in
Application 84-06-014 and
Application 85-08-025

Enclosed are copies of the Commission's Decision concurring in the ALJ's ruling of October 6, 1987 and the agenda draft on the matter. The draft decision was not mailed prior to the meeting because of an internal misunderstanding.

Opinions which are not subject to comment after evidentiary hearing pursuant to Public Utilities Code section 311 are not provided to parties prior to Commission action. The Commission's Opinion was not issued after evidentiary hearing. However, due to the public interest in the Diablo Canyon reasonableness review, the Commission has made an exception to normal procedure. There was no system in place for the uniform circulation of the draft. I apologize for the misunderstanding and expect it will not reoccur.

Sincerely,

Evelyn C. Lee
Legal Advisor to Commissioner Vial

Decision 87 12 018 DEC 9 1987

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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In his October 6 ruling, the ALJ reviews the two NRC decisions relied on by the AG. He declines to give collateral estoppel effect to NRC I (Order of November 19, 1981, 14 NRC 950) on the bases that the order was signed ex parte, the issue of PG&E's compliance with safety regulations was not adjudicated, and

the factual statements in NRC I are ambiguous. The ALSAB order of March 20, 1984, (19 NRC 571) referred to as "NRC II", did not address the matter of compliance, but rather the sufficiency of PG&E's verification program to demonstrate that Unit 1 design adequately met licensing criteria, according to the ALJ. In addition, the ALJ rests his denial on public policy grounds, since he concludes that with the significant potential rate impact of $2.5 million at stake, public policy favors granting the litigant a hearing on the merits.

We have reviewed the responses of the parties to the ALJ's ruling. The AG argues that the ALJ has misconstrued the doctrine of collateral estoppel and erred in finding that PG&E had no opportunity or incentive to challenge the NRC's decision to suspend its LPOL. The DRA takes a similar position in its appeal of the ALJ ruling. PG&E expresses satisfaction with the ALJ's ruling and uses its Comments on the ALJ's ruling as a vehicle to rebut the arguments of the AG and the DRA. The utility also tenders a portion of a proposed exhibit, which is not a part of the record, to corroborate the ALJ's rationale. Assemblywoman Moore urges the Commission to employ the doctrine of collateral estoppel to confine the litigation in this case to genuinely contested issues of fact.

Before the conclusions reached by the NRC may be relied on to establish any fact or finding, we must examine the findings of the NRC and the relationship between these findings and the conclusions which the AG seeks us to draw, based on those findings.

The Commission has the option of taking official notice of all matters which may be judicially noticed in civil court. (20 Cal.Admin. Code sec.73). Thus, a preliminary issue is whether or not the Commission chooses to take official notice of the NRC orders.

Orders of the NRC and its associated administrative bodies are accorded mandatory judicial notice under section 451(b) of the California Evidence Code. Based on the AG's request pursuant to Evidence Code section 453, judicial notice is also required of the NRC's official acts and records under Section 452. The NRC maintains exclusive jurisdiction with respect to the licensing of nuclear powered electric generating plants. Along with that jurisdiction, the NRC possesses unique expertise regarding the interpretation and enforcement of its licensing regulations. The NRC orders in question concern the issuance, suspension, and reissuance of PG&E's low power operating license ("LPOL"). We observed in the SONGS case that the issuance of the LPOL is a prerequisite to commercial operation of a utility's nuclear electric generating plant.

NRC I, the NRC Order Suspending License, recites that:

1. The Diablo Unit 1 low power operating license was issued on September 22, 1981,

2. PG&E detected and reported an error in the seismic design of a containment structure in late September, 1981 and that subsequent investigation revealed additional errors,

3. The NRC staff's identification of weaknesses in PG&E's quality assurance program indicated that violations of NRC's regulations in 10 CFR Part 50, Appendix B have occurred, and

4. Accordingly, the NRC suspended PG&E's license to load fuel and conduct tests at up to 5% of rated power pending completion of specified design verification procedures.

In addition, PG&E was ordered to show cause why its license should not be suspended pending satisfactory completion of design verification. PG&E was authorized to file a written answer to the order and demand a hearing within 20 days of the date of the order. Those further proceedings were to test the truth of statements in the Order that PG&E's quality assurance program suffered from, specifically, shortcomings that were identified by

the NRC staff and that such information indicates that "certain structures, systems, and components important to safety at the plant may not be properly designed to withstand the effects of earthquakes, and ...that violations of NRC's regulations in 10 CRF Part 50, Appendix B have occurred."

The subsequent proceedings never took place because PG&E did not demand a hearing in response to the order to show cause. PG&E did, however, undertake a design verification process in compliance with NRC directives. This resulted in NRC II, which concluded that the scope and the execution of PG&E's verification programs were sufficient to establish that Diablo Canyon Unit 1 design adequately meets its licensing criteria, and that any significant design deficiencies in that facility resulting from defects in PG&E's design quality assurance program had been remedied.

As the orders relate to the compliance of Diablo Units 1 and 2 with the NRC's LPOL licensing requirements and the issue of compliance will weigh in our determination of the period of time reasonably needed to bring the Diablo Units into commercial operation, the orders are relevant to our inquiry into PG&E's reasonableness. The question of whether PG&E performed as required to maintain its LPOL is one for the NRC's review, not ours. Since the NRC has acted on that issue, we intend to take official notice of the NRC orders that were cited and relied on by the parties in their argument on summary adjudication.

By this notice, we recognize that the NRC orders were lawfully issued. However, short of giving the NRC orders estoppel effect, as advocated by the attorney general, the parties have not adequately addressed the procedural effect of officially noticing the cited NRC orders. That is, although notice of the NRC orders may substitute for the formal proof of facts, it is unclear what facts are properly established by this notice. We will allow the parties twenty days from the effective date of this order within

which to brief the issue of how comprehensive our official notice of the NRC orders should be and which facts should be deemed established by the NRC order. The Commission intends to expeditiously resolve the question of official notice in a subsequent order.

Although the issue of official notice of the NRC orders has not been resolved, we may address and resolve the AG's motion for summary adjudication. Let us assume that every one of the factual assertions contained within the NRC orders is a proper subject of judicial notice. Substantial authority supports the application of the doctrine of collateral estoppel to the decisions of administrative agencies. (United States v. Utah Constr. Co. (1965) 384 U.S. 394, 422.) As emphasized in Parklane Hosiery Co. v. Shore (1978) 439 U.S. 322, the vital prerequisite is that the party to be estopped had a full and fair opportunity to litigate the findings in the order. The fact that the order was issued ex parte, or that the order was based on hearsay when the party has waived its right to a hearing is no bar to application of the rule. Fox v. San Francisco Unified School District (1952) 111 Cal. App. 2d 885.)

Strong public policy, along with the need to conserve this Commission's adjudicatory resources, persuade us that under the appropriate circumstances, PG&E may be prevented from contesting the plain language of the NRC orders, and may be estopped to this extent. "(I)n a later action upon a different claim or cause of action, (a former judgment)operates as...a conclusive adjudication as to such issues in the second action as were actually litigated and determined int he first action. (Todhunter v. Smith (1934)219 Cal.690, 695.)

However, if the particular issue was not presented or was not within the court's power to decide in the first action, it will not be conclusively determined by the judgment. (Strangman v. Duke (1956) 140 Cal.App.2d 185,191.) The issue of whether the

expenditures incurred by the utility to meet its licensing requirements should be included in rates is beyond the NRC's jurisdiction and was clearly not an issue in the NRC proceedings. Therefore, the NRC's order has no estoppel effect on the issue of the reasonableness of the expenditures.

In anticipation of this juncture, the AG argued that PG&E's violation of Appendix B was unreasonable within the meaning of Section 463 of the Public Utilities Code, and that pursuant to Section 463, PG&E is responsible for the entire cost of reacquiring its low power license for Unit 1 and for all expenses resulting from the delay caused by its license suspension. As summarized by the DRA, "The remaining issue concerning whether or not the costs resulting from the violations of Appendix B and the implementation of the design verification program were unreasonable is a question of law: is it unreasonable for PG&E to violate NRC safety standards?"

While it may be argued on broad policy grounds that it is reasonable to comply with federal regulations, mere compliance may not be sufficient to guarantee the prudence of utility action. Nor does it follow that all costs incurred in the course of that compliance were reasonably incurred. Likewise, it is not necessarily true that noncompliance with federal law establishes that any or all expenditures were unreasonable for ratemaking purposes.

Even if it were conclusively established that PG&E violated Appendix B of 10 CFR 50 at this time, we would not find that such violation was unreasonable as a matter of law. The hypothetical situation would be a very narrow one, and we would not on the basis of such unique facts draw a conclusion of law that would bind us in subsequent Commission proceedings, other forums or with regard to other factual situations. The parties have not squarely addressed this policy issue in their arguments on summary adjudication. Moreover, our cautious approach would be supported

by the policy considerations limiting the estoppel effect of a prior decision to issues that were actually litigated and within the first court's jurisdiction.

On a practical note, we perceive limited savings in litigation resources if an affirmative decision on the motion were granted. We agree with the DRA that even if we were to find that PG&E's violation of Appendix B was imprudent as a matter of law, we must review the actual costs incurred by PG&E to implement the remedial design verification program, the reasonableness of the delay before the LPOL was reissued, and the reasonableness of costs incurred during the delay period. The financial impact of imprudence must be established in evidentiary hearing, regardless of whether PG&E was imprudent per se or not.

Our review of the parties' responses has led us to the same general conclusion as that reached by the ALJ, although by a somewhat different route. We agree that the AG's motion for summary adjudication should be denied. However, because our opinion is being rendered subsequent to the issuance of the ALJ's ruling and after consideration of the parties' various responses, this opinion supercedes the ruling of the ALJ. Moreover, we emphasize that today's order is limited to a consideration of the pleadings and arguments presented on the AG's motion for summary adjudication and does not, unless expressly stated herein, constitute the law of the case.

Prompted by this concern, we clarify that any of the conclusions contained in the ALJ's ruling which are not consistent with the reasoning of this order shall have no effect on the disposition of issues later in the case. In this order we do not characterize PG&E's strategy in response to NRC I. Likewise, we have no record on which to judge the potential rate effect of a grant of the AG's motion. Parties shall be guided by this decision rather than the ruling in their presentation of the case.

Findings of Fact

1. The Attorney General (AG) moved (1) to exclude testimony on financial need, (2) to establish a standard of care, and (3) for summary adjudication of the responsibility of Pacific Gas and Electric Company ("PG&E") for the direct and indirect costs of its actions and omissions leading to the NRC's suspension of the low power operating license for Diablo Canyon Unit 1.

2. PG&E, the Commission's Public Staff Division, now renamed the Division of Ratepayer Advocacy ("DRA"), Toward Utility Rate Normalization ("TURN"), and various intervenors responded to the motions. After hearing before the ALJ on September 30, 1987, the motions were submitted.

3. The written ruling of the assigned Administrative Law Judge ("ALJ") was issued on October 6.

4. The AG, DRA, PG&E and Assemblywoman Moore filed responses to the ruling.

5. For reasons of administrative and judicial efficiency, evidence of PG&E's financial need for rate relief may be considered in Phase 3 of this proceeding.

6. It is reasonable to evaluate PG&E's prudence in this case under the same standard we have used to evaluate SCE and SDG&E's prudence in the SONGS case.

7. On November 19, 1981, the NRC ordered the suspension of PG&E's low power operating license due to the NRC staff's investigation which indicated that violations of 10 CFR Part 50 Appendix B had occurred, among other things. (14 NRC 950).

8. The AG seeks a Commission order, based on official notice of proceedings before the NRC, that finds that the costs incurred between the time Unit 1's low power operating license was suspended and then reinstated were imprudently incurred and should be excluded from rates.

9. Implicit in the AG's motion is the argument that PG&E's violations of NRC regulations, when measured against the degree of

care this Commission requires in the context of ratemaking proceedings for a nuclear power plant, were imprudent per se.

10. The AG argues that PG&E's violation of Appendix B was unreasonable within the meaning of Section 463 of the Public Utilities Code, and that pursuant to Section 463, PG&E is responsible for the entire cost of reacquiring its low power license for Unit 2 and for all expenses resulting from the delay caused by its license suspension.

11. Regarding the NRC orders cited by the AG in his moving papers, the parties have not sufficiently briefed the question of which facts asserted by those orders are the proper subject of judicial notice.

12. The financial impact of imprudence must be established in evidentiary hearing.

13. The substantive conclusions of the ALJ which are not necessary to our order should be disregarded.

Conclusions of Law

1. Evidence of PG&E's financial need for rate relief is irrelevant to the issues to be litigated in Phase 2 of this proceeding, that is, the reasonableness of PG&E's acts in planning, licensing, and constructing Diablo Canyon Units 1 and 2.

2. The AG's motion to establish a standard of care consistent with the SONGS decision (D.86-10-069) should be granted.

3. The following rephrasing of the SONGS standard should be substituted for the standard contained in the ALJ's ruling:

> A utility's actions should comport with those a reasonable manager, with appropriate education, training, and experience would take in light of the available information and circumstances. What constitutes "sufficient" education, training and experience should be evaluated in light of the degree of risk that the magnitude of the project and its technology posed to the utility, its ratepayers, and

the public. When dealing with a nuclear project that constitutes a substantial financial, operational, and technological risk, the standard against which the reasonable manager should be measured is high.

4. The Commission has the option of taking official notice of all matters which may be judicially noticed in civil court.

5. It is appropriate to take official notice of the NRC's orders because (a) the orders relate to PG&E's compliance with the NRC's licensing requirements, (b) the NRC has exclusive jurisdiction to issue the operating licenses of nuclear electric generating plants, and (c) because the issue of compliance is relevant to our determination of the reasonable period of time needed to bring the Diablo units into commercial operation, a critical issue in determining whether unreasonable costs were incurred.

6. The Commission intends to take official notice of the cited NRC orders but must entertain briefs by the parties to identify which facts asserted by the NRC orders are to be established under the doctrine of judicial notice stated at sections 451(b) and 452 of the California Evidence Code, and if so, whether they should be given collateral estoppel effect.

7. PG&E is not collaterally estopped to introduce evidence of the reasonableness of its acts although such acts may have been considered previously by the NRC in its issuance of 14 NRC 950 because the issue of reasonableness for ratemaking purposes is not within the NRC's jurisdiction to determine.

8. Assuming that official notice most favorable to the position of the AG is taken, the motion for summary adjudication should be denied as a matter of law since the issue of reasonableness was not within the jurisdiction of the NRC to determine.

10. This opinion confirms and supercedes the ALJ ruling of October 6, 1987.

O R D E R

Now, therefore, IT IS ORDERED that:

1. The motion of the Attorney General to exclude testimony of financial need from Phase 2 is granted. Testimony regarding cost effectiveness is also excluded from Phase 2.

2. The motion of the Attorney General to establish a standard of care is granted. The standard of care to be used in determining the reasonableness of PG&E's actions in constructing Diablo Canyon Units 1 and 2 is set forth on pages 3-4 of this Opinion.

3. The motion of the Attorney General for summary adjudication is denied.

4. The AG, PG&E, and the DRA shall file with the Commission and serve on the parties briefs on the question of how comprehensive should be the Commission's official notice of NRC I within twenty days of the effective date of this order.

5. All parties are expected to proceed with due diligence to complete discovery, including requests for stipulations and admissions.

This order is effective today.

Dated DEC 9 - 1987, 1987, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners