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SUBJECT: Comments on applicability of resjudicata & collateral estoppel to OL proceedings, per ASLB 810528 revised prehearing conference order. Certificate of Svc encl.

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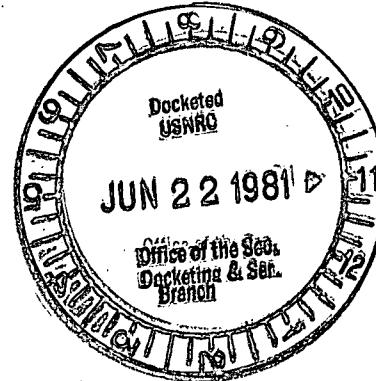
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of ) Docket Nos. 50-261 OL  
                    ) 50-362 OL  
SOUTHERN CALIFORNIA )  
EDISON COMPANY, ET AL. ) APPLICANTS' COMMENTS ON  
                    ) THE ISSUE OF THE  
                    ) APPLICABILITY OF THE  
(San Onofre Nuclear Generating ) DOCTRINES OF RES JUDICATA  
Station, Units 2 and 3 ) AND COLLATERAL ESTOPPEL  
                    ) TO OPERATING LICENSE  
                    ) PROCEEDINGS

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I

6/22/81

INTRODUCTION

In its Revised Prehearing Conference Order of May 28, 1981 the Atomic Safety and Licensing Board ("Board") directed the parties in this proceeding to submit comments on the

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following issues concerning the applicability of the doctrines of res judicata and collateral estoppel to issues which may arise at the operating licensing hearing:

- (1) Are identity of parties, or issues, or both required before a foreclosure rule (however labeled) applies?
- (2) Must the earlier proceedings have made an explicit finding on the question -- e.g., whether the Cristianitos is a capable fault?
- (3) If not, what is required for foreclosure -- that an implicit finding was made; that the earlier board somehow relied on the same or similar evidence; that the evidence was presented to the earlier board (whatever the board may have done with it); or that the evidence was merely available, but never introduced?
- (4) Which party has the burden of proof on a claim of foreclosure, bearing in mind that this may involve repeated searches of the record of the CP proceeding.

Pursuant to the Board's directive, Applicants hereby submit their comments on the above four issues.

II

THE DOCTRINES OF RES JUDICATA/COLLATERAL ESTOPPEL  
ARE APPLICABLE TO NRC PROCEEDINGS

In its landmark Farley decision the Nuclear Regulatory Commission ("NRC") considered the question of whether the doctrines of res judicata and collateral estoppel should apply to preclude relitigation in an operating license proceeding of "precisely the same contentions as those resolved in the construction permit proceedings."1/ The Commission adopted the reasoning of the Farley Appeal Board 2/ as their own and held:

"In our view, an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage. Accordingly we are in full agreement with the conclusion reached by the Appeal Board that 'res judicata and collateral estoppel should not be entirely ruled out of our proceedings, but rather applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factors in the particular case. . . .' [citation omitted]."3/

Thus, absent a "supported assertion" of changed circumstances . . . or . . . "some special public interest," principles of

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1/ Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-74-12, 7 AEC 203 (March 27, 1974).

2/ Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210 (March 7, 1974).

3/ Alabama Power Company, supra, note 1, at 203-04 (emphasis added).

res judicata and collateral estoppel apply to NRC licensing proceedings. Accord, Toledo Edison Company, Cleveland Electric Illuminating Company, (Davis-Beese Nuclear Power Station, Units 1, 2, and 3), 4 NRC 561, 566 (1976) aff'd 5 NRC 557, 566 (1977) (hereinafter referred to as "Davis-Beese") and Houston Lighting and Power Company, et al. (South Texas Project Units 1 and 2), 10 NRC 563, 566 (1979) (hereinafter referred to as "South Texas").

B. In the Absence of Strict Identity of Parties the Board May Still Apply a Foreclosure Rule to Matters Which Have Been Adjudicated on the Merits at the Construction Permit Proceeding

The Appeal Board in Farley indicated that the doctrines of res judicata/collateral estoppel,<sup>4/</sup> i.e., the "rules of foreclosure," generally require that the party against whom the doctrines are being applied have been a party (or in privity with a party) to the previous adjudication of the matter in question.<sup>5/</sup>

FOE failed to file for leave to intervene at the Construction Permit Proceeding, ("CPP") and therefore was neither a party to the CPP, nor in privity with any parties to the CPP. However, as Professor Davis suggests:

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4/ "Res judicata is the broad principle applicable to an entire cause of action, while collateral estoppel bars the relitigation of the same issues of facts." Toledo Edison Company (Davis-Beese Nuclear Power Station, Units 1,2, and 3), 4 NRC 561, n. 4 at 566.

5/ Alabama Power Company, supra, note 2 at 212-213.

"[In an administrative proceeding the doctrines of res judicata should] be relaxed or qualified in any desired degree without destroying its essential service. The doctrine is at its best as applied to an adjudication of past facts;...The doctrine should be applied to avoid the freezing of administrative policies, while at the same time preventing unnecessary relitigation of the same claims or issues."<sup>6/</sup>

Thus, even though FOE was not a party or in privity with any parties at the construction permit proceeding, a more relaxed application of the rules of foreclosure is warranted. FOE should not be allowed to relitigate issues determined in Applicants' favor at the construction permit stage (without having to show changed circumstances or overriding public need) simply because it chose not to file a petition to intervene in the CPP.

Such a result is clearly suggested by Section 185 of the Atomic Energy Act in which Congress expressed its intent that at the operating license stage only "additional information needed to bring the original application up to date" needed to be filed, and accordingly considered.<sup>7/</sup> Moreover, such a result is warranted under the Commission's stated policy "that fairness to all the parties... and the obligation of administrative agencies to conduct their functions with efficiency and economy, requires that

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6/ Davis, K., 2 Administrative Law Treatise 627 (1958).

7/ Atomic Energy Act of 1954, 42 U.S.C. 2235 (emphasis added).

Commission adjudications be conducted without unnecessary delays."<sup>8/</sup>

C. The Foreclosure Rule Requires a Prior "Final Adjudication" of the Issue Sought to be Foreclosed at the Operating License Stage

In Farley, the Appeal Board set forth the "general principles relating to the application and effect of [res judicata and collateral estoppel].<sup>9/</sup> Those general principles included the following guidelines for licensing boards:

"Res judicata comes into play in circumstances where (1) there has been a final adjudication of the merits of a particular cause of action, claim, or demand by a tribunal of competent jurisdiction; and (2) one of the parties to that adjudication (or a person in privity with such party) subsequently seeks to advance or defeat the same cause of action, claim or demand in either (a) the same suit or (b) a separate suit involving the parties to the first action or their privies. Cromwell v. County of Sac., supra, 94 U.S. at 352-53; (Commissioner v. Sunnen, supra, 333 U.S. at 597; Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955)). Given those circumstances (and [absent changed circumstances or overriding public policy]) the earlier adjudication is deemed to conclude the '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'. Cromwell, 94 U.S. at 352.

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8/ 10 CFR Part 2 Appendix A.

9/ Alabama Power Company, supra, note 2 at 212-213.

"For its part, collateral estoppel does not require an identity between the two causes of action, demands or claims. It is enough that the issues of law or fact previously receiving final adjudication are the same as those being now asserted -- and that that adjudication was by a tribunal empowered to consider and decide those issues.

Commissioner v. Sunnen, supra, 333 U.S. at 598; Tait v. Western Md. Ry., 289 U.S. 620, 623 (1933); United States v. International Bldg. Co., 345 U.S. 502, 504-05 (1953).

Unlike res judicata, however, collateral estoppel can serve to conclude only 'those matters in issue or points controverted, upon the determination of which the [earlier] finding or verdict was rendered'. Cromwell v. County of Sac., supra, 94 U.S. at 353.<sup>10/</sup>

The appropriate procedure for determining what constitutes "final adjudication" (i.e., "what is required for foreclosure"<sup>11/</sup>) was also established by the Appeal Board in Farley:

"Thus, for example, if it appears . . . that the dispute respecting the applicability of res judicata [or collateral estoppel] to one or more particular contentions boils down to whether, in the prior proceeding, the issue(s) sought to be raised by the contention(s) in question had been fully adjudicated, the intervention board may settle the question by examining the decision in that proceeding and, if necessary, the underlying pleadings and evidence. Depending upon what conclusion is arrived at, the intervention petition will be either granted or denied." (Footnote omitted.)<sup>12/</sup>

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10/ Id. (emphasis added).

11/ Revised Prehearing Conference Order (May 28, 1981) at 13.

12/ Alabama Power Company, supra, note 2 at 219.

Although the above guidelines are somewhat general, the decisions of prior Boards and the Commission indicate a desire that licensing Boards be given some flexibility in applying the rules of foreclosure to their specific case. Thus, there are no hard and fast rules which require Boards to forbid any further discussion only in those cases where "the earlier proceedings have made an explicit finding on the question -- e.g., whether the Cristianitos is a capable fault."<sup>13/</sup> Rather, the Board is apparently expected to solicit arguments from all parties to the proceeding and examine the decision and underlying pleadings and evidence below in determining whether the issue in question has been "actually litigated and determined by a valid and final judgment."<sup>14/</sup> If such a finding is made the Board is required to order that the matters in issue or points controverted are concluded.

The best example in the case at bar of an issue which should clearly be subject to the rule of foreclosure is whether the Cristianitos is a capable fault. Applicants have contended throughout the operating license proceedings that FOE is foreclosed from any further discussion of this issue at the operating license hearings

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<sup>13/</sup> Revised Prehearing Conference Order, supra note 11, at 13.

<sup>14/</sup> Houston Lighting and Power Company, et al. (South Texas Project Units 1 and 2) 10 NRC 563, 566 (1979).

because the issue was "fully adjudicated" at the construction permit stage, i.e., evidence of its non-capability was presented by witnesses at the hearings,<sup>15/</sup> a discussion about its non-capability can be found in the NRC Staff's Safety Evaluation Report ("All of the available evidence indicates that the Cristianitos fault is inactive when evaluated using procedures described in 10 CFR Part 100, Appendix A,...")<sup>16/</sup> and the Board's Findings of Facts in its construction permit decision contain explicit findings regarding the Cristianitos Fault.<sup>17/</sup> Furthermore, FOE has failed to make any "supported assertion" of changed circumstances or special public interest (as required by Farley) which weigh against application of res judicata or collateral estoppel and until such evidence is produced any questions or discussion regarding the capability of the Cristianitos must be barred.

D. The Party Pleading Foreclosure Has the Burden of Proving that All Requirements Are Met

In South Texas the licensing Board held that "the party pleading collateral estoppel [or res judicata] has the

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<sup>15/</sup> Southern California Edison Company, et al. (San Onofre Nuclear Generating Station Units 2 and 3), LBP-73-36, RAI-73-10, 929, 939 (October 15, 1973).

<sup>16/</sup> Safety Evaluation of the San Onofre Nuclear Generating Station Units No. 2 & 3, at 16 (October 1972).

<sup>17/</sup> Southern California Edison Company, et al., supra, note 15 at 937.

burden of proving that all the requirements of the doctrine are met".18/

Thus, if, for example, Applicants take the position that Intervenors are raising a question that has previously been fully adjudicated, they will have the ultimate burden of proving this "affirmative defense".19/ However, as the Appeal Board in Farley indicated, if the assertion of res judicata is viewed in the light of an affirmative defense, the Intervenors "must be afforded an opportunity to respond to the assertion".20/

Farley further suggests that the Intervenors, in their response must produce some evidence that "[s]ince the conclusion of the prior proceeding there has been a material change in factual or legal circumstances"21/ which warrants the reconsideration of the contention. Thus, if the Intervenors do not ultimately produce some evidence that calls into question the basis for prior determination of the contention, the contention is barred from any further consideration. If they do produce some evidence the contention is not barred, and the existence or non-existence

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18/ Houston Lighting and Power Company, et al., supra, note 14 at 566.

19/ Alabama Power Company, supra, note 2, at 218.

20/ Id.

21/ Id. at 219.

of changed circumstances must be resolved by the hearing board. Such a resolution is likely to involve oral or written argument and an examination of the decision of the prior proceeding including the underlying pleadings and evidence.

### III

#### CONCLUSION

In order to avoid the rehashing of issues "fully adjudicated" at the construction permit stage, the Board is expected to apply with full force the doctrines of res judicata and collateral estoppel.

In ultimately deciding whether an issue has been fully adjudicated and therefore should be foreclosed from any further discussion, the Board may examine the decision of the earlier proceeding and the underlying pleadings and evidence. If there is any evidence that the issue was considered on the merits no further discussion is warranted absent a supported assertion by the party opposing foreclosure of changed circumstances or the existence of some special public interest factors.

An example of an issue where the foreclosure rule can and should be applied in the case at bar involves the question of the capability of the Cristianitos Fault. The record in the case below is replete with findings of fact, oral and written testimony that was subject to cross-examination, and NRC Staff analysis (e.g., the Safety

Evaluation Report) on this issue. Thus, it is clear that this issue was fully determined on its merits (the standard established in Farley, Davis Beese, and South Texas for applying the foreclosure rule) and should not be relitigated at the operating license stage.

Dated: June 22, 1981

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PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the City and County of San Francisco, California.

I am over the age of eighteen years and not a party to the within entitled action; my business address is 600 Montgomery Street, 10th Floor, San Francisco, California 94111.

On June 19, 1981, I served the attached APPLICANTS' COMMENTS ON THE ISSUE OF THE APPLICABILITY OF THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO OPERATING LICENSE PROCEEDINGS in said cause, by placing a true copy thereof enclosed in the United States mail at San Francisco, California addressed as follows:

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