WASHINGTON, D.C. 20555

OFFICE OF THE
COMMISSIONER

August 14, 1979

Memorandum for: Samuel J. Chilk
Secretary

From: Richard T. Kennedy

Re: SECY-A-79-59 -- ALAB-550 (IN THE MATTER OF PACIFIC GAS & ELECTRIC COMPANY, ET AL)

I agree fully with the Appeal Board's resolution of the first and second of the three issues of which Southern California Edison Company ("Edison") seeks review, namely the authority of the Licensing Board to issue a subpoena to a non-party and the relevance/burdensomeness of that subpoena. However, I believe there are significant questions raised -- both as a matter of law and equity -- by the Appeal Board's determination that Edison (a non-party to this antitrust proceeding) must foot the bill for over $100,000 in search costs incurred in complying with a subpoena issued at the behest of the California Department of Water Resources ("DWR"). I would, therefore, have accepted review of the third of the three questions brought before us.

In denying Edison's request that any subpoena issued against it be conditioned upon reimbursement to it by DWR of search costs, the Appeal Board relied upon cases in which the Courts were asked to reimburse search costs incurred by non-parties responding to requests arising out of IRS or FTC investigations of possible statutory violations. As the Court in one of the cases cited by the Appeal Board (in footnote 26) noted, IRS investigations are similar to Grand Jury investigations in that they are granted broad powers and any costs incurred in complying with investigatory requests are not normally reimbursed. See U.S. v. Covington Trust & Banking Co. 431 F. Supp 352 (E.D. Ky. 1977).

The distinction between those cases and the one at bar is evident. The Stanislaus case involves a licensing proceeding and is, essentially, a contest between private parties. The costs were not incurred in the course of a government investigation of possible statutory violations by the applicant, let alone by Edison. The party seeking the documents, is an agency of the State of California, (and a party to the Stanislaus proceeding) and is certainly as capable of paying the search costs as is Edison, which has no direct interest in the Stanislaus plant.

Finally, the standard used by the Appeal Board offers little guidance to licensing boards or parties and, in my view, embodies a standard so broad as to be all-inclusive. I would have preferred that the Commission itself determine the appropriate standard to be applied for reimbursement when non-parties incur substantial search costs as a result of subpoenas arising out of NRC proceedings. At the very least, as a matter of equity, a non-party should not be required to absorb substantial search costs when the party seeking the documents is equally capable of reimbursement.

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*/ For example, in U.S. v. Farmers & Merchants Bank, 397 F. Supp 418 (C.D. Cal. 1975) the court explicitly addressed the question of the appropriate test for reimbursement of compliance costs to non-parties. The Court defined a cost of doing business as one predictably part of the business, one which falls upon all equally, and one which was specifically evaluated by the legislature and imposed by it upon those engaged in a given business. While this case also arose in the context of an IRS investigative summons there is little reason to believe that a standard less protective of non-parties should be imposed where the party seeking the documents is capable of reimbursing costs and is not a governmental entity which is charged by Congress with enforcing the governing statutory regime.

cc: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne
L. Bickwit, OGC