FERA

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. P-564-A
(Stanislaus Nuclear Project, Unit No. 1)	)	

PETITION OF SOUTHERN CALIFORNIA EDISON COMPANY FOR REVIEW BY COMMISSION

538 109

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PETITION OF SOUTHERN CALIFORNIA EDISON COMPANY

FOR REVIEW BY COMMISSION

Southern California Edison Company ("Edison"), specially appearing, hereby petitions the Nuclear Regulatory Commission for review of a Decision dated June 15, 1979 of the Atomic Safety and Licensing Appeal Board (ALAB-550), the "Decision", on the grounds that the Decision is erroneous with respect to important questions of fact, law and policy, as more particularly stated in this Petition. This Petition is submitted pursuant to Section 2.786(b) of the Rules of Practice of the Commission (the "Rules") and any other applicable rule.

I

SUMMARY OF DECISION OF WHICH REVIEW IS SOUGHT

The present docket is, in essence, an antitrust inquiry to determine whether the construction or operation of Unit 1 of the Stanislaus Nuclear Project by Pacific Gas and Electric Company ("PGandE") would create or maintain a situation inconsistent with the antitrust laws. Edison is not a participant in this Project, it is not a party to nor has it participated in this docket except in connection with its receipt of a subpoena duces tecum.

538 111

Edison's involvement in this docket began when, during August 1978, Intervenor the State of California Department of Water Resources (the "DWR") applied for and had issued a subpoena duces tecum calling for the production by Edison of ten categories of documents. Specially appearing, Edison moved to quash this subpoena. By means of an Order issued January 25, 1979, the Licensing Board denied Edison's motion to quash, subject to certain conditions. Exceptions were filed and briefed and, by means of its Decision, the Appeal Board affirmed the Order of the Licensing Board with one minor modification. The resulting subpoena to Edison is referred to herein as the "Subpoena".

The Decision concluded that Section 2.720(a) of the Rules permitted the broad-based subpoena of discovery material from non-parties, that Section 12(a)(3) of the Atomic Energy Act of 1946 (the "Act") authorized such discovery and that the subpoena categories, although "quite broad in scope", were "not unreasonably so given the wide reach of the antitrust issues" (Decision at 24). Apparently concluding that the cost of compliance with the Subpoena would not "likely" exceed $400,000 (Decision at 25), the Appeal Board concluded that the standard for reimbursement should be whether the documents involved were "directly related to the conduct of the business" of Edison, that the documents subpoenaed were "related to (Edison's) business activities" and refused reimbursement to Edison (Decision at 33-34). The only modification to the subpoena made by the Appeal Board was to relieve Edison of the requirement to produce some (but not all) of the subpoenaed documents which were available from PGandE and other Intervenors.

538 112

II

THE MATTERS RAISED IN THIS PETITION WERE PREVIOUSLY RAISED BEFORE THE APPEAL BOARD

Each of the matters raised by this Petition was specifically raised before the Appeal Board and addressed in the Decision. The question of whether the Rules and enabling Statute permit such non-party discovery subpoenas is discussed in the Decision at pages 4-19, the propriety of the scope of the Subpoena is addressed at pages 20-26 and the question of reimbursement of the costs of production at pages 26-34.

III

THE DECISION OF THE APPEAL BOARD WAS ERRONEOUS

While a number of points were raised by Edison during the course of this proceeding, three basic points were erroneously decided by the Appeal Board and are addressed in this Petition. Edison believes that these three points are each of sufficient magnitude and future import as to necessitate review and consideration.

A. The Decision erroneously concludes that the Commission's Rules and the Atomic Energy Act permit broad-based discovery of non-parties. The Subpoena to Edison was purportedly issued pursuant to Rules 2.720(a), 10 C.F.R. ¢ 2.720(a). That Section permits the issuance of subpoenas for "the production of evidence;" it does not relate to other than hearings, where documents become "evidence", as distinguished from just discovery materials. Nowhere in Section 2.720(a) did the Commission delegate the power to issue prehearing non-party subpoenas. To the contrary, it is clear from Section 2.720(e), for instance, that subpoena production is to be made during the course of a hearing. That

538 113

subparagraph provides for proof of service to be made with "the officer before whom the witness is required to testify or produce evidence. . . ." Section 2.740 is the Commission's procedure for obtaining prehearing discovery, not Section 2.720, and Section 2.740 does not even arguably provide for prehearing subpoena of discovery documents from non-parties. There has been no reported decision which has heretofore found that Section 2.720 (or any other section) authorized prehearing subpoenas for documents directed to non-parties.

Federal Maritime Commission v. Anglo-Canadian Shipping Co. (9th Cir. 1964), 335 F.2d 255, is in point. In that case the court looked at the enabling statute which gave the agency the power to subpoena documents and found a specific agency rule permitting a prehearing discovery subpoena to non-parties to be improper and unenforceable (335 F.2d at 260). The Court compared other statutes which authorized prehearing discovery of non-parties, which very specifically addressed the discovery question, and concluded that:

> "(T)he very fact that it was deemed necessary for Congress to enact an explicit statute authorizing subpoenas duces tecum in order for the agency to exercise that power is an indication of a purposeful withholding of the somewhat similar, but far more potent, power to order production of documents for discovery purposes. . . ." (335 F.2d at 260.)

The underpinning of any construction of Section 2.720 to allow discovery subpoenas of non-parties would be Section 12(a)(3) of the Act, 42 U.S.C. ¢ 2201(c), and that statute simply does not specifically authorize discovery of non-parties. Under the holding in the Anglo-Canadian Shipping case, the Act does not authorize the construction of Section 2.720 made by the Appeal Board in its Decision. The Decision's construction of Section 2.720 and of the Act were plainly wrong. 538 114

B. The Subpoena categories are overly broad, burdensome and oppressive. It is evident that the Subpoena categories reviewed by the Decision are not reasonably restricted to only relevant documents, there was absolutely no showing made that the documents sought were needed by DWR in connection with this docket nor that Edison was the best source for the documents sought nor that DWR did not already have or have access to the documents sought.1/

The argued authority for issuance of this Subpoena to Edison, Section 2.720(a) of the Rules, provides for the subpoena of "evidence," not just "documents." As stated by the court in United States v. Theodore (4th Cir. 1973), 479 F.2d 749, 754, an agency, with subpoena power, "is not to be given unrestricted license to rummage through the office files of (a non-party) in the hope of perchance finding information." The subpoenaed document categories here are simply not defined to cover relevant documents and to exclude irrelevant documents.

The Licensing and Appeal Boards both erroneously sought to justify the sweeping nature of this Subpoena upon the ground that Edison's conduct (separate and apart from PGandE's) was somehow of relevance to the hearings in this docket since allegations against PGandE included allegations concerning agreements to which Edison was a party. Document category 7 in the Subpoena, for instance, calls for Edison to produce documents "relating to reserve requirements and system

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1/ In fact, it is clear that the vast bulk of the documents covered by this Subpoena have been or are in the possession of DWR or available to DWR through parties to this docket.

reliability of the Southern California Edison System."[2/] By its terms, this category has nothing to do with the activities of PGandE. The Appeal Board simply concludes, rather than addressing each of the document categories separately, that the Licensing Board had arrived at its result after a "careful and thoughtful analysis". Decision at 24. The Chairman of the Licensing Board made it clear, however, that the standard for proper subpoena scope which was applied did not include the requirement that the documents subpoenaed necessarily be relevant. In addressing counsel for Edison he said, "If your company has practices which are wholly divorced from PG&E and have no bearing upon it, that would become apparent when you produce the documents." (Transcript of January 24, 1979 Hearing ("Transcript"), at 1890.) In discussing category 8, which called for Edison to produce documents "relating to" interconnection or integration of the Edison system with "other electric utilities", counsel for Edison inquired as to whether this would cover documents relating to "interconnection of Edison with a utility . . . that has no common boundary with PGandE." The Chairman replied:

> "That is possible and we will compare that with PG&E. If they are the same, that's fine. If they are different, we will find out why we don't know (sic)." (Transcript at 1903.)

Other document categories involved are similarly so wide ranging and so patently unrelated to PGandE and the issues in this docket as to be shocking. Category 4 covers all documents relating to bulk power transactions with the Pacific Northwest, whether or not

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2/ The Appeal Board's statement in its Decision that this document category (and eight others) was reduced in scope by the Licensing Board is incorrect.

538 116

PGandE was involved. Category 5 covers all documents "relating to" nuclear power projects generally or four specific projects named, whether or not PGandE was involved. Category 9 covers all documents "relating to" either the benefits or detriments to Edison "or any other electric utility" of bulk power service transactions "with others."3/

Given the undeniable burden which would be imposed upon Edison in searching its files to produce the documents involved in this Subpoena, the Subpoena categories are patently overbroad, they are not properly enforceable and the Decision was erroneous in sanctioning them.

C. Any enforcement of the Subpoena should be conditioned upon advancement to Edison of its cost of producing the documents requested. Undisputed evidence was presented by Edison that production of documents under the Subpoena would be extraordinarily expensive and disruptive for Edison. The Affidavit of Mr. Lowell Dosch established that the cost to Edison to search its files for such documents would be between about $1.50 and $2.00 per page of document produced, given that Edison has approximately 50 departments and divisions, each with its own files, it has more than 80 outlying facilities and more than 13,000 employees Mr. Dosch's uncontradicted Affidavit also established that the search for and production of such documents would entail great inconvenience to Edison operating personnel and operations and would cause very substantial interference with the duties and activities of each person from whom files are taken or used and would result in the loss of

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3/ Even counsel for DWR had to concede the difficulty of this category: "(9) is somewhat amorphous - more amorphous than we would like it to be." (Transcript at 1905.)

538 117

working files of Edison during any such search or production. Counsel for DWR, in a letter which was submitted as evidence, itself acknowledged that production under the Subpoena would call for approximately 200,000 pages and would take approximately 12 months and nearly two person-years of time.

As the Appeal Board held, this Commission has power to condition enforcement of a subpoena duces tecum on "just and reasonable terms" under Section 2.720(f) and that includes conditioning enforcement on the advancement or reimbursement of costs. Under both the Federal Rules case law there is ample authority for the propriety and indeed the necessity of reimbursing a non-party for expenses incurred in producing documents. As stated by the District Court[4/] the question is "what financial burden is reasonable to require a third party to bear in producing its records for the purpose of aiding the government in investigating someone else?" United States v. Farmers and Merchants Bank (C.D. Cal. 1975), 397 F.Supp. 418, 419. The answer is:

> "(I)t would be unreasonable to expect a (non) party (bank) . . . to bear anything other than nominal cost in complying with a government summons . . . .
>
> "(E)ven though the government would label the cost of complying with a summons as a 'cost of doing business.' This 'cost' is not predictably part of the banking business, does not fall upon all equally, and was not specifically evaluated by the legislature and imposed by it upon all those who do a banking business. Although the statute demands compliance with legitimate summons, it is silent on the issue of reimbursement. Given that silence, and the dictates of the Due Process Clause, this court feels that it would be unreasonable to expect a (non) party . . . to

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4/ This is the same District within which any judicial enforcement of the present Subpoena would take place.

> bear anything other than nominal costs in complying with a government summons. The duties of a citizen to this government, see United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), do not run so far as absorbing a $2500 expense in aid of a government investigation of a third party." (397 F.Supp. at 419, 420-421.)

In adition to remedying the injustice of requiring a non-party such as Edison (and its ratepayers) to incur the costs of production in a proceeding in which it is not a party, other salutory purposes would be served by a requirement of advancement or reimbursement of costs. As Judge Teitelbaum stated in United States v. Friedman (W.D. Pa. 1975), 388 F.Supp. 963, 970, aff'd in part, rev'd in part (3d Cir. 1976), 532 F.2d 928:

> "(T)he best means to insure compliance with each of the three elements set forth above (aimed at reducing the scope of a non-party subpoena) is to obligate the (agency) to pay the (party producing documents) the actual costs of seaching their records. . . .
>
> "My reasoning is obvious. Faced with the obligation to pay the cost of such a search, the (agency) will impose upon itself those limitations which will insure that the records sought do exist and are in possession of the third parties upon whom the summons are issued, that the records do have a bearing on (relevant issues), and that the (agency) has exhausted all other and less costly alternatives to obtain the same documents."

While the Commission still has the opportunity to condition enforcement of this Subpoena upon payment by DWR of the costs for production of the documents involved, it should and must do so.

The Decision's simplistic deni of reimbursement based on the unexplained conclusion that the documents subpoenaed are "directly related" to Edison's business is erroneous and cannot be condoned.

538 119

IV

WHY COMMISSION REVIEW SHOULD BE EXERCISED

As indicated, on each of the three major points discussed above, the Appeal Board came to an erroneous conclusion. On each of these points there has been no prior decisional precedent from the Commission and in each instance the issues involved are of sufficient importance to justify consideration and review by the Commission. Edison submits, therefore, that this Petition should be granted, the Commission should itself review the issues raised and permit further briefing by the parties.

DATED: June 29, 1979

Respectfully submitted,

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538 120

CERTIFICATE OF SERVICE

I hereby certify that copies of the PETITION FOR REVIEW BY COMMISSION and this Certificate were served upon each of the following by deposit in the United States mail, first class postage prepaid, this

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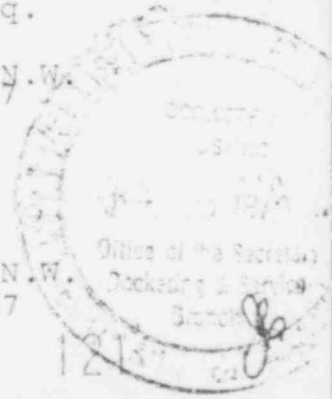

538 121

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