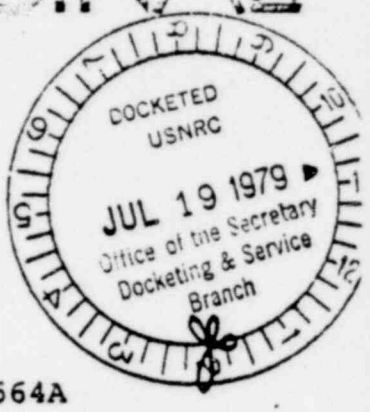
FERA

ORIGINAL



UNITED STATES OF AMERICA

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

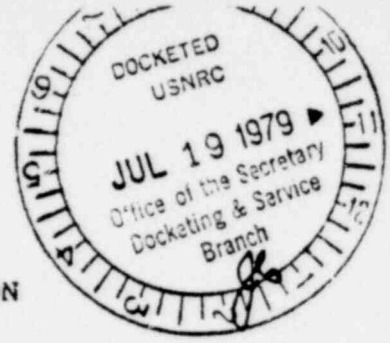
STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES' ANSWER TO PETITION BY SOUTHERN CALIFORNIA EDISON COMPANY FOR COMMISSION REVIEW

GEORGE DEUKMEJIAN, Attorney General
of the State of California
SANFORD N. GRUSKIN
R. H. CONNETT
Assistant Attorneys General
H. CHESTER HORN, JR.
MICHAEL J. STRUMWASSER
Deputy Attorneys General

Attorneys for State of California
Department of Water Resources

1027 186

7909250711



UNITED STATES OF AMERICA

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES' ANSWER TO PETITION BY SOUTHERN CALIFORNIA EDISON COMPANY FOR COMMISSION REVIEW

The State of California Department of Water Resources (DWR), respondent here and intervenor in the proceedings below, hereby answers, pursuant to the provisions of 10 CFR section 2.786(b)(3), the petition of Southern California Edison Company (Edison) for Nuclear Regulatory Commission review of the decision of the Atomic Safety Licensing Appeal Board in Pacific Gas and Electric Company (Stanislaus Nuclear Project Unit No. 1) ALAB-550 (June 15, 1979) 9 NRC___.[1/]

I

DECISION OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In this case the commission is performing its pre-licensing antitrust review of the application of Pacific Gas and Electric Company (PG&E) for authorization to construct

---

1. All citations herein to the decision that is the subject of Edison's petition are in the form "ALAB-550, p. __" with page numbers refering to pagination of the slip opinion.

and operate Unit No. 1 of the Stanislaus Nuclear Project. (Atomic Energy Act of 1954, as amended, § 105c, 42 U.S.C., § 2135(c).) DWR, the Northern California Power Agency, and the Cities of Anaheim and Riverside, California, were permitted to intervene upon verified petitions containing allegations to the effect that PG&E has combined with Edison and San Diego Gas and Electric Company to divide California's bulk power markets and that the companies have agreed not to compete with each other, have monopolized transmission in their respective allocated markets, have conspired to deprive other utilities of opportunities to compete with them for economical sources of bulk power, and have combined to deny other utilities opportunities to coordinate. The Atomic Safety and Licensing Board, with copies of the major contracts before it and officially noticeable, granted the petitions and ordered an antitrust hearing. (Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1) LBP-77-26 (1977) 5 NRC 1017.) This decision was affirmed by the appeal board. (Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1) ALAB-400 (1977) 5 NRC 175.)

In August 1978, DWR applied for and was issued by the licensing board a subpoena duces tecum directed to Edison's custodian of records, Edison moved to quash the subpoena, and a day-long hearing on the motion was held on January 24, 1979. That hearing resulted in the licensing board's decision of January 25, 1979, denying the motion to quash, subject to seven conditions narrowing the scope of the subpoena. The

order also denied Edison's request for reimbursement for its costs of searching its own files for responsive documents. Edison then appealed to the appeal board, which rendered the decision it now seeks to have reviewed.

In its decision, the appeal board determined that the subpoena duces tecum had been lawfully issued pursuant to 10 CFR section 2.720 and section 161c of the Atomic Energy Act of 1954, as amended,[2/] (42 U.S.C § 2201(c).) (ALAB-550, pp. 4-19.) The appeal board also found that the scope of the subpoena, as conditioned by the licensing board, was neither overly broad nor unduly burdensome (ALAB-550, pp. 20-26), and went on to hold that Edison was properly denied reimbursement for its search costs (id., pp. 26-34). Finally, pursuant to the agreement of counsel for DWR, the appeal board modified the order of the licensing board by requiring that certain documents available from PG&E need not be produced by Edison, and, as thus modified, affirmed the licensing board's order. (Id., pp. 35-36.)

II

THE ISSUES WERE RAISED BEFORE THE APPEAL BOARD

DWR does not dispute here Edison's representation (petition, p. 3) that the issues raised in its petition were raised before the appeal board.

---

2. Edison erroneously cites to the predecessor of section 161c, section 12(a)(3) of the Atomic Energy Act of 1946 (60 Stat. 755), as the operative statute. (Petition, pp. 2, 4.) As noted by the appeal board, these provisions of the 1946 act were reenacted without material change in 1954. (ALAB-550, p. 11.)

III

THE DECISION OF THE APPEAL BOARD WAS CORRECT

Of its original army of 31 exceptions taken to the licensing board's order, Edison asks this commission to resuscitate only three survivors. DWR respectfully submits that these three points are no more meritorious than the 28 already interred, and that the remaining three should be accorded their richly earned peaceful rest.

A. The Subpoena Duces Tecum is Authorized by the Atomic Energy Act and the Commission's Regulations

Edison first contends that the regulation governing subpoenas, 10 CFR section 2.720, does not provide for subpoenas directing a third party (i.e., a person not a formal party to a proceeding) to appear at a pre-hearing deposition.

Edison offers no authority for this proposition. Rather, it principally relies on the use of the word "evidence" in section 2.720(a). Edison argues, again without authority, that things become "evidence" only at a hearing or trial. As the appeal board noted, Edison's argument was rejected by the Supreme Court in NLRB v. Wyman-Gordon Co. (1969) 394 U.S. 759. Edison's argument is also refuted by rule 45 of the Federal Rules of Civil Procedure, which states that a subpoena directing attendance at a deposition may require production of documents "which constitute or contain evidence. . . ." Edison's linguistic argument runs counter to

common English usage[3] and is refuted by the plain language of the federal rules and by the universal understanding of section 2.720 of this commission's regulations.

Edison then argues that if section 2.720 was intended to authorize pre-hearing discovery, the regulation is unlawful on the ground that it exceeds the authority of the commission. Edison's sole authority for this remarkable proposition, Federal Maritime Commission v. Anglo-Canadian Shipping Co. (9th Cir. 1964) 335 F.2d 255, was shown by the appeal board to be wholly inapplicable. (ALAB-550, pp. 16-18.)

Edison's interpretation of the commission's statutes and regulations defies logic and ignores its implications. Is it conceivable that Congress intended to deprive the NRC of the power to subpoena non-parties? Since the commission's subpoena power is identical for health and safety reviews and antitrust proceedings, an affirmative answer would leave this commission powerless to obtain crucial evidence in the hands of a third party that might, for example, prove an applicant for a license unfit for that license or prove that the subject of a license revocation proceeding had violated the commisssion's regulations regarding the operation of a facility. Congress would be amazed to learn that it had so

---

3. For example, a policeman at the scene of a crime looks for "evidence" at the scene of a crime, not for "things" that may someday be promoted to "evidence" in a trial. And should he catch a person destroying a "thing" of evidentiary significance, that person could be prosecuted for destruction of "evidence" — notwithstanding the fact that the destruction insured the matter would never be an exhibit at trial.

enfeebled this commission. The suggestion that NRC process cannot compel the production of documents prior to the convening of a hearing is likewise absurd. Given the enormous documentary records of NRC proceedings, composed of documents culled from much larger masses of tangible evidence, such an interpretation would be unworkable. The NRC would doubtless be forced to turn to a stratagem, offered Edison by a member of the licensing board in this proceeding, of convening a hearing to receive the evidence and then calling a multi-month recess while the parties review the produced evidence. Such a procedure – which would apparently be legitmate under Edison's interpretation of the law – scarcely dignifies the administrative process, and this commission should not impute to Congress the intention to require such farcical procedures for the discharge of the commission's duties.

B. The Subpoena is Neither Unduly Broad Nor Unreasonably Burdensome

Edison next aserts that the subpoena duces tecum is overbroad and unduly burdensome. Both the appeal board and the licensing board found that the subpoena, as conditioned, sought documents which were "reasonably relevant" to the inquiry. Both found that while compliance with the subpoena would impose some burden on Edison, only an undue burden is grounds for quashing a subpoena – a standard that Edison totally failed to meet.

Edison seeks here to construct a wall between its own practices in the wholesale power market and those of PG&E. The proper time and place to construct that wall is

not now and not in this petition; rather, the wall should have been constructed years ago, when PG&E and Edison entered into the various transactions that are the subject of this prelicensing antitrust review. Edison points out that a number of the subpoena's categories appear to be directed to its own practices, rather than those of PG&E. Edison would be right in concluding from that observation that the documents sought are irrelevant only if it is assumed that Edison's practices are independent of those of PG&E, rather than the results of contracts, combinations, and conspiracies in restraint of trade. In other words, Edison would short circuit the commission's investigation by having it assume at the outset that the allegations of conspiracy are unfounded and, by that assumption, deprive the commission of access to the very evidence that would prove the allegations.

C. Edison is Not Entitled to Compensation For its Costs of Searching its Files For Relevant Documents

The appeal board correctly determined that, on the facts of the present case, Edison has not shown itself to be entitled to compensation for compliance with the subpoena.

In evaluating Edison's claim to a right to compensation, it must be remembered that, unlike in district court, where one who seeks and obtains a subpoena directed to a third party may be compelled to defray the costs of subpoena compliance (Fed. Rules of Civ. Proc., rule 45(b)(2)), but where that party's payments become an allowable cost, which can be recovered upon prevailing (28 U.S.C. § 1920),

in the NRC one who prevails cannot obtain an award of costs. Failure to recognize the significance of this distinction would produce results ironic in their injustice, as this case well illustrates. DWR contends that Edison has evidence of its conspiracy with PG&E to violate the antitrust laws, which conspiracy requires special license conditions before this agency can authorize construction of the Stanislaus Project. Edison's request amounts to a demand that evidence of PG&E's conspiracy with Edison be unavailable to the commission unless it or an intervening party pays PG&E's co-conspirator for making the evidence available, a payment that would not be recoverable from either conspirator even after the evidence establishes the truth of the contentions.

Edison claims to find authority for its right to compensation by selectively taking from a very mixed line of cases a few in which banks and accountants whose customers or clients were under investigation by a government agency were compensated. That is not the proper standard for judging this case. Edison is not PG&E's banker. It is not PG&E's accountant. Edison is PG&E's co-conspirator. It has not simply thrown its doors open to the public, leaving itself defenseless against the consequences of having an occasional customer suspected of misdeeds with which the banker or accountant is totally uninvolved. All of the transactions involving PG&E and Edison that are the subject of this hearing were entered individually with the knowledge and approval of Edison's highest levels of management, who are fully

chargeable with knowledge of legal consequences of their actions. Edison has chosen to produce and deliver to its customers power and earn profits for its shareholders by engaging in transactions with PG&E that this commission finds it necessary to investigate. Justice and reasonableness compel that the beneficiaries of these transactions – Edison's ratepayers and shareholders – properly must bear the corresponding costs of these transactions.

IV

COMMISSION REVIEW IS UNECESSARY

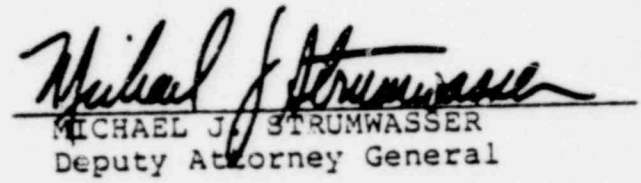
Contrary to Edison's contentions, the decision of the appeal board follows est lished NRC jurisprudence and conforms to the common understanding of the law held by the licensing boards, appeal boards, and litigants before this commission. The decision properly recognizes that the NRC has been given and has assumed the tools necessary to fulfill its regulatory functions. Edison has failed to identify any error in the appeal board decision with respect to any question of fact, law, or policy.

Edison's arguments have now been fully made in lengthly briefs and in hundreds of pages of transcipt. Two boards have fully considered and rejected Edison's positions without a single member of either board dessenting. Justice does not now require another administrative hearing; it

requires production of the documents sought by the subpoena to permit the licensing proceedings to progress. DWR respectfully urges that the petition be denied.

DATED: July 16, 1979

GEORGE DEUKMEJIAN, Attorney General
of the State of California
SANFORD N. GRUSKIN
R. H. CONNETT
Assistant Attorneys General
H. CHESTER HORN, Jr.
MICHAEL J. STRUMWASSER
Deputy Attorneys General

By 
MICHAEL J. STRUMWASSER
Deputy Attorney General

Attorneys for State of California
Department of Water Resources

1027 196

CERTIFICATE OF SERVICE

I hereby certify that copies of the State of California Department of Water Resources' Answer to Petition by Southern California Edison Company for Commission Review and this certificate were served upon each of the following by deposit in the United States mail, first class postage prepaid, this 16th day of July 1979.

Joseph Hendrie, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Victor Gilinsky, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard Kennedy, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Peter Bradford, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John Ahearne, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Alan S. Rosenthal, Chairman
Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar, Member
Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Member
Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Marshall E. Miller, Esq.
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

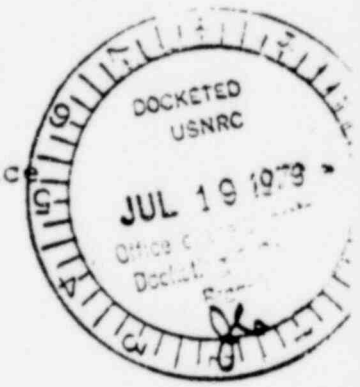
Seymour Wenner, Esq.
Atomic Safety and Licensing Board
4807 Morgan Drive
Chevy Chase, Maryland 20015

Edward Luton, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph J. Saunders, Esq.
Mark Levin, Esq.
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530



Joseph Rutberg, Esq.
Benjamin H. Vogler, Esq.
Jack R. Goldberg, Esq.
David J. Evans, Esq.
NRC Staff Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome Saltzman, Chief
Antitrust and Indemnity Group
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Philip A. Crane, Jr., Esq.
Jack F. Fallin, Jr., Esq.
Glen West, Esq.
Pacific Gas and Electric Company
77 Beale Street, 31st Floor
San Francisco, California 94106

1027 197

Morris M. Doyle, Esq.
Terry J. Houlihan, Esq.
William H. Armstrong, Esq.
Meredith J. Watts, Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111

John C. Morrissey, Esq.
Vice President and General Counsel
Pacific Gas and Electric Company
77 Beale Street, 31st Floor
San Francisco, California 94106

Richard L. Meiss, Esq.
Pacific Gas and Electric Company
77 Beale Street, 31st Floor
San Francisco, California 94106

George Spiegel, Esq.
Robert C. McDiarmid, Esq.
Daniel I. Davidson, Esq.
Thomas Trauger, Esq.
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Sandra J. Strebel, Esq.
Peter K. Matt, Esq.
Bonnie S. Blair, Esq.
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Clarice Turney, Esq.
Office of the City Attorney
3900 Main Street
Riverside, CA 92521

Gordon W. Hoyt
Utilities Director
City of Anaheim
P.O. Box 3222
Anaheim, California 92803

Everett C. Ross, Director
Public Utilities Commission
City Hall
3900 Main Street
Riverside, California 92501

Atomic Safety and Licensing Appeals
Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

David N. Barry III
Thomas E. Taber
Eugene Wagner
2244 Walnut Grove Avenue
P. O. Box 800
Rosemead, CA 91770

Irwin F. Woodland
Arthur L. Sherwood
Robert A. Rizzi
Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, CA 90071

MICHAEL J. STRUMWASSER
Deputy Attorney General