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

In the Matter of:	)	
	)	
Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1)	)	NRC Docket No. P-564-A
	)	
	)	

PACIFIC GAS AND ELECTRIC COMPANY'S
REPLY BRIEF ON ISSUES MOOTED OR TO BE
DEALT WITH ON SUMMARY DISPOSITION

I

INTRODUCTION

In its Reply Brief, Pacific Gas and Electric Company (hereinafter "PGandE") will respond to the observations made by intervenors in their opening briefs. First, PGandE will address the areas discussed in its Initial Brief; second, PGandE will address Department of Water Resources' (hereinafter "DWR") suggestions regarding procedures as to further discovery and reverse bifurcation.

II

THE STATEMENT OF ISSUES SHOULD BE REVISED TO ELIMINATE ISSUES REGARDING (a) BULK POWER GENERATION, SUPPLY AND TRANSMISSION, (b) PGandE's PAST ACTS OR PRACTICES WITH REGARD THERETO, (c) LONG TERM CONTRACTS, (d) GEOTHERMAL STEAM RESOURCES AND (e) THE SEVEN PARTY AGREEMENT

Intervenor Northern California Power Agency (hereinafter "NCPA") and intervenor Cities of Anaheim and Riverside (hereinafter "Southern Cities") did not discuss in their opening memorandum the possibility that any issue had been

mooted either by the Commitments or by subsequent events. Intervenor DWR discussed the issue briefly (Prehearing Conference Brief, pp. 8-9). DWR observed (correctly) that

> "The goal of such suggestions [that the Commitments mooted certain issues] is to exclude from the present hearing the body of documents -- comprising by far the majority of documents subject to the production -- that relate to the history of PGandE's conduct in the bulk power service market"

and suggested (wrongly) that the test of whether the Commitments mooted historical issues was whether PGandE was willing to assume the truth of the intervenor's allegations regarding PGandE's historical conduct.

DWR's suggestion is wrong because it assumes that PGandE's historical conduct is relevant. As PGandE indicated in its Initial Brief, the history of PGandE prior to the Commitments is irrelevant to the extent it is inconsistent with the Commitments and redundant to the extent it is consistent with the Commitments.

Intervenors offer no cogent reason why anyone need expend the effort to ascertain what some historical situation might have been. To the extent the historical situation is identical to that implied by the Commitments, it is clearly a waste of time to establish the situation by the most difficult, time-consuming and expensive methodology. To the extent there is an alleged difference between the history and the Commitments, DWR has suggested only that

> "under conventional antitrust analysis, whether or not PGandE's continued possession of that market power [i.e., 'enormous market power'] is unlawful turns in part on the

> method by which the power was acquired and the uses to which it has been put." (DWR Brief, p. 9.)

DWR offers no citation of authority for this allegedly "conventional" analysis, much less does it suggest any authority for the proposition that the alleged conventional historical analysis has any application to this limited regulatory proceeding.*

As PGandE suggested in its Initial Brief, if intervenors or staff believe that some particular historical issue is for some reason pertinent to the task before this Board, that historical issue can be specifically identified. The generalities propounded by intervenors on this issue tend to obscure rather than enlighten. This Board must ascertain the existing situation and evaluate its consistency with the policies underlying the antitrust laws. The more one attempts to inquire into history, the greater the burden of discovery, and the more unlikely any benefit to the public.

None of the intervenors addressed the effect of events on certain issues. PGandE can only reiterate what it said in its Initial Brief regarding long term contracts, geothermal projects and the Seven Party Agreement (see PGandE's Initial Brief, pp. 18-19).

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* Section 2 of the Sherman Act may be violated by the possession monopoly power (as distinguished from "enormous market power") if that monopoly power has been willfully acquired or maintained. United States v. Grinnell Corp., 389 U.S. 563 (1966). The only portion of this antitrust concept which has relevance to the limited nature of pre-licensing reviews should be whether there is monopoly power in a relevant market which the applicant is willfully maintaining. Even if there had been willful acquisition, the Board would have no power to impose a license condition unless the monopoly power were being willfully maintained and the construction or operation of a nuclear facility would add to the applicant's ability to maintain that situation.

III

DUE CONSIDERATION OF THE ATTORNEY GENERAL'S ADVICE REQUIRES MORE THAN HAS YET BEEN DONE IN THIS PROCEEDING

NCPA and Southern Cities have suggested that the Attorney General's advice be regarded as a law review article; DWR that it be regarded as the views of an amicus curiae. Clearly intervenors were attempting to minimize the importance of the Attorney General's advice, and they did nothing to suggest how much consideration this Board should give the advice it received here. Intervenors would be satisfied, no doubt, if the advice received here were never mentioned again. The mandate of the law is otherwise.

The suggested analogies are not very helpful. Some law review articles and amicus briefs are written by experts in the field, and others are written by law students; some are persuasive and others are not. The due consideration which the Board is required to give to the Attorney General's advice must be interpreted in light of public policy and the circumstances in the particular case. No simple test exists.

The Antitrust Division of the Justice Department is clearly expert in the antitrust field, and Congress knew that when it passed the legislation. The Joint Committee reporting on the proposed amendments rejected both the extreme view that no pre-licensing antitrust review was necessary, and the extreme view that the licensing process should be used to further whatever competitive postures the Commission on its own considered beneficial. See 91st Cong., 2d Sess., 1970 U. S. Cong. & Admin.

News, p. 4994. Congress intended the amendments to Section 105(c) to facilitate and expedite subsequent procedures. Id. at 5009. In passing the amendments, Congress committed public funds to pay for the Attorney General's review, and implicitly required the expenditure of private funds.

In this case, as of January 1975, PGandE had two lawyers and 24 legal assistants working full time to respond to the Department of Justice's inquiry. In that inquiry, the Department of Justice surveyed 29 of PGandE's central file rooms, PGandE personnel reviewed approximately 4,400,000 pages of documents, and approximately 343,000 pages were furnished to the Department of Justice for their review. (See Affidavit of J. Peter Baumgartner, dated January 23, 1975, United States v. Pacific Gas and Electric Company, Civil Action No. C-74-2627 RHS (N.D. Cal.))

As of January 1975, PGandE estimated its costs of responding to the Department's inquiry at $355,000. Id. Presumably the Department of Justice incurred substantial costs; the combined cost was easily half a million dollars. One must ask whether the public has yet received half a million dollars' worth of benefit in this proceeding? It appears that intervenors and staff want nothing so strongly in this case as to ignore all that effort and to start all over again. They offer no legislative support for this application of the "not invented here" syndrome.

On the contrary, the aforementioned practical considerations are most appropriately urged today when all regulatory agencies have been specifically enjoined "to identify and

compare [the] benefits and costs" involved in even the most critical of regulatory programs. Fact Sheet on the President's Anti-Inflation Program, October 24, 1978. In general terms, the Attorney General's advice must be given significant weight because it represents a substantial expenditure of public and private funds, as well as a substantial effort by the government agency which clearly has the greatest expertise in the antitrust field.

In a somewhat similar situation, the Supreme Court offered the following discussion of certain policy considerations:

> "The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded with appeals of this kind to review the decision of the Postmaster General in every individual instance. (Bates & Guild Co. v. Payne, 194 U.S. 106, 108 (1904))

The Court there concluded that the Postmaster General's discretion "ought not to be interfered with unless the court be clearly of opinion that it was wrong." Id. Obviously the statute there was different, but the policy considerations are similar. The Attorney General's advice here has been given no consideration at all, and the intervenors continue to ignore it and to argue that this Board must retrace all the steps taken by the Department of Justice, and more. That is clearly wrong.

Having had access for approximately one year to all the documentary evidence used by the Department of Justice, and having obtained substantial additional information through other discovery efforts, intervenors and staff must now be asked to identify specifically what was inadequate or erroneous in the Attorney General's advice and the reasons for such a belief.

IV

THE FERC HAS PRIMARY JURISDICTION OF WHATEVER ANTITRUST ISSUES ARE PROPERLY DIRECTED TO THE THREE OR FOUR CONCTRACTS PRESENTLY UNDER REVIEW BY IT

Intervenors NCPA and Southern Cities did not discuss this issue in their opening memorandum. Intervenor DWR quickly dismissed the issue by suggesting that there was a due process problem if FERC was accorded primary jurisdiction. DWR has also suggested that there might be a due process problem in giving significant weight to the Attorney General's advice.* The latter suggestion is simply groundless. It has never been suggested that due process requires an opportunity to cross-examine the Attorney General (or a judge) before giving significant weight to his opinions. Indeed, the State Attorney General who represents DWR also issues opinions (which are given "great" or "significant" weight, see Thomas v. Dept. of Motor Vehicles, 59 Cal.App.3d 731, 742 (1976); D'Amico v. Board of Medical Examiners, 6 Cal.App.3d 716, 724 (1970)), but does not anticipate that he will be cross-examined.

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* As to DWR, there is a preliminary question whether it is a "person" in the context of the due process clause of the Fifth Amendment. States of the Union are not, and have never been, so regarded. South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966).

With respect to the FERC actions, DWR ignores the fact that if it had any rights to protect, it was as able as anyone else to intervene in the FERC proceedings and, if there were any rights which it could not adequately protect in either the FERC or in this proceeding, it retains all rights to test its anti-trust allegations in the United States courts. See, e.g., United Nuclear Corporation v. Combustion Engineering, Inc., 302 F.Supp. 539, 552 (E.D. Pa. 1969).

It is no answer to a primary jurisdiction argument to say that one forgot to file a petition in the proper forum. Furthermore, it is not DWR's rights which are under examination in this proceeding. It is the public interest which is the business of this Commission, as well as the FERC. Private interests such as those of DWR are supposed to be protected elsewhere. For the reasons specified in PGandE's Initial Brief, the public interest is best served by permitting the FERC to determine the proper disposition of the contracts under its primary jurisdiction.

Mr. Justice Frankfurter commended the following philosophy in considering primary jurisdiction:

> "'. . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be

tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.' United States v. Morgan, 307 U.S. 183, 191." (Far East Conf. v. United States, 342 U.S. 570, 575 (1952))

V

DWR'S SUGGESTION THAT WE SHOULD CONSIDER CONDUCTING A SEPARATE SET OF PROCEEDINGS BASED ON IMAGINED "LIABILITY" HOLDS LITTLE APPEAL

DWR now suggests that, rather than accepting the necessary role of the Commitments as tools to limit the issues and therefore discovery, we enter into yet another series of discovery, motion practice and hearings devoted to "reverse" bifurcation. In fact, there is no procedural mechanism for "reversing" the whole litigation process as proposed by DWR, presumably because, as the leading authority puts it: "[l]ogically liability must be resolved before damages are considered." 9 Wright and Miller, Federal Practice and Procedure, at 2390. It's possible that there may be very unique situations where, for tactical reasons, an applicant might see some benefit to be gained through such an arrangement.

However, it is difficult to imagine any such benefit here because, contrary to DWR's suggestion, one must assume, based on the Attorney General's advice, that with the Stanislaus Commitments the existing situation is not inconsistent with the antitrust laws, and intervenors have the burden of proving any allegations not directly mooted by the Commitments. As a practical matter, DWR has never developed a concrete

limited issue of any kind in this case, let alone an issue so specific that PGandE could somehow benefit through "assumed" guilt.

Even if some such limited issue were to be found, DWR isn't proposing any simple determination at all. Rather it wants yet more discovery, motions and hearings paralleled by unabated discovery in the case as to liability. (DWR's Brief, pp. 17-19).

What DWR either fails to or refuses to understand is that the Commitments are part of the case on liability that intervenors must challenge in attempting to establish that there now exists a situation inconsistent with the antitrust laws that will somehow be enhanced or maintained by the project in question. Looking at the case backwards would only further confuse the role of the Commitments and further muddy what once seemed a rather ordered problem. To paraphrase Mr. McDiarmid, our present task is defining "present problems" and eliminating those past issues, whatever their historical interest, "that are not currently relevant to our problems." Assuming that all those dead issues are still viable as DWR proposes, can only lead to yet further delay in this case.

DWR's alternative suggestion regarding an order as to the discovery schedule is no more useful than it ever was.* The proposed order is a sensible enough effort -- if one views this case as an exercise in document production. It has nothing

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* PGandE has some specific problems with the proposed order which it addresses in Appendix A to this Reply.

whatever to do with the resolution of any antitrust question, or the expeditious disposition of any issue in this case.

Whenever any suggestion is made that sensible limits should be placed on discovery in this case, intervenors throw up their hands, loudly asserting that they somehow "must" touch or see every document ever generated that has anything to do with PGandE's corporate existence. Such claims, if accommodated, lead us inevitably to Chairman Miller's reference to Jarndyce v. Jarndyce, a case which, with minor updating, fits our situation precisely:

> "The lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. It's about [an antitrust review under current conditions] -- or it was once. It's about nothing but [discovery] now. We are always appearing and disappearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the [Commission] and all [its] satellites, and equitably waltzing ourselves off to dusty death, about [discovery]. That's the great question. All the rest, by some extraordinary means, has melted away." (Dickens, Bleak House, Chap. VIII)

PGandE's suggestion as to how to expedite this proceeding remains the reduction and definition of issues, as set forth in its Initial Brief and amplified in Section III, above. Only when we define more carefully what we are trying

to discover will discovery become manageable.

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APPENDIX A

Necessary Changes to Proposed Protective Order

1. Attempting to do central files and individual files at the same time would only lead to delay and confusion. (Prehearing Conference Transcript of September 27, 1978, pp. 1179 et seq.) PGandE proposed, and thought that intervenors were agreeable, a plan whereby PGandE upon request would do individual offices for a given department right after completion of the central file room material for that department. DWR's Exhibit B goes back to requiring the wasteful effort of simultaneous production. (App. B, p. 2.)

2. The proposed order sets a list of desired production areas on pp. 1 and 2, but then refers to subsequent agreement on the order of production at page 2. For the time being, as tentatively agreed in September, PGandE is following the listed areas with the exception of moving into current executive offices after completion of planning and research.

3. The proposed order seems to set a specific date, the fifteenth of each month, for movement to depository. Thus far the parties have done better with making direct ad hoc arrangements relating to numbers of documents available and microfilming scheduling.

4. The procedures relating to preparation of lists of documents withheld (App. B, p. 3) departs from the procedure

described in the record at the prehearing conference (Prehearing Conference Transcript, p. 1531). Essentially, our understanding was that within a reasonable time following completion of production, PGandE would provide intervenors with the numbers of documents withheld and descriptions of those documents. With the descriptions in front of them, intervenors could then decide which of the withheld documents, if any, warranted further effort. PGandE suggests that with that sort of procedure, it makes sense to provide for the lodging of a motion to compel by intervenors after receipt of the descriptions, rather than a prior protective order motion by PGandE based on guesswork as to just which documents will be sought.

5. The section on production by intervenors is rather vague. It should require the development of specific production procedures and DWR's draft does that, but it is equally clear that intervenors will have to meet specific production requirements just as PGandE must. Thus far PGandE has had a considerable amount of difficulty getting adequate production from Anaheim and Riverside, parties which claimed to be adequately staffed.

6. The limitation of discovery cannot be hinged to PGandE's production alone unless intervenors will guarantee that their production will be done prior to PGandE's.

7. A proposed amended production order, following DWR's format, is attached to this Appendix:

AMENDED PRODUCTION ORDER BASED ON
DWR'S APPENDIX B

The Board, having considered the various motions, papers, and evidence presented to it, as well as the oral argument of all parties, at the pretrial hearing conference held on September 25, 26 and 27, 1978 and reconvened January 23, 24 and 25, 1979 hereby orders, pursuant to 10 CFR §§2.718(e) and 2.752(c), as follows:

(A) PGandE is directed to exercise its best efforts to product documents pursuant to first production request, order of the board, and stipulation of the parties, at an approximately uniform gross rate not less than 4,000 pages per business day.

(B) PGandE production from central office files shall be completed in the following order:

(1) 33rd floor central files -- "retired executive offices file room";

(2) planning department;

(3) siting department;

(4) current executive offices;

(5) law department;

(6) warehouse files;

(7) power control office;

(8) electric operations office;

(9) financial planning and analysis department;

(10) customer operations;

(11) economics and statistics department;

(12) government relations department;

(13) engineering office;

(14) balance of engineering department;

(15) balance of rates and valuation department;

(16) hydrogeneration department (including microfiche);

(17) steam generation department;

(18) public relations department;

(19) internal auditing department;

(20) engineering research department;

(21) balance of 33rd floor.

(C) Within thirty days PGandE shall provide the board with an estimate of the volume of documents subject to review for production from non-central office files and a proposed schedule for production. PGandE should, upon request, so arrange its production schedule that non-central office files from a given department are done following production of central office files from that same department. PGandE shall continue to keep intervenors microfiling team closely informed of volumes available for production.

(D) Within a reasonable period of time after completion of production from each listed production area, PGandE will provide intervenors with the number of documents withheld and subsequently with descriptions of those documents along with the grounds upon which the documents are being withheld. Upon receipt of those descriptions, intervenors, within a reasonable period of time, will make their motion to compel any of such

documents whose withholding they wish to challenge.

(E) Intervenors are directed to establish procedures analogous to those required above, to meet their respective production obligations. Their rates of production shall be set by separate order and their production shall be in an order to be selected by PGandE.

(F) Upon completion of production pursuant to the first production request, order, and stipulation, PGandE shall promptly file an appropriate verification. Similar verifications shall be required from intervenors.

(G) All discovery shall be completed 120 days after the filing of the last PGandE or intervenor verification of completion of production or 120 days after the board rules or decision on the last pending motion to compel or motion for protective order, whichever is later.

CERTIFICATE OF SERVICE BY MAIL

William H. Armstrong certifies that he is an active member of the State Bar of California; that he is not a party to the within cause; that his business address is Three Embarcadero Center, San Francisco, California 94111; and that he caused an envelope to be addressed to each of the following named persons, enclosed and sealed in each envelope a copy of the foregoing document(s) and deposited each envelope with postage thereon, fully prepaid, in the United States mail at San Francisco, California on December 21, 1978.

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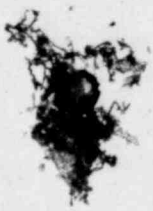

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