NRC PUBLIC DOCUMENT ROOM

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
	)	

MOTION FOR PROTECTIVE ORDER BY
PACIFIC GAS AND ELECTRIC COMPANY

Pursuant to 10 C.F.R. § 2.740(c), Pacific Gas and Electric Company (hereinafter "PGandE") hereby moves for a protective order that PGandE not be required to answer certain interrogatories (as detailed below) in the Fourth Set of Interrogatories propounded to it by the Department of Water Resources (hereinafter "DWR"), and that it not be required to answer any of said interrogatories until 60 days after DWR (and the other parties) provide their answers to the interrogatories served upon them by PGandE on January 25, 1979. Good cause exists for the granting of this motion, for the reasons set forth fully below.

I

ANSWERS TO THESE INTERROGATORIES SHOULD BE DEFERRED UNTIL 60 DAYS AFTER DWR RESPONDS TO PGandE'S FOURTH SET OF INTERROGATORIES TO DWR

On January 25, 1979, PGandE served on DWR and the other parties a set of 248 contention interrogatories. On February 16, 1979, DWR served a motion for protective order with respect to that set of interrogatories setting forth its objections, most of

2260 035

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which were relatively minor. It argues, among other things, that the PGandE contention interrogatories were premature because discovery was incomplete, on the one hand, and

> "On the other hand, the burden of responding at the present time is enourmous [sic]. Assuming the interrogatories are modified in a manner consistent with these objections, the answers will still cover hundreds of pages and will require the full time efforts of counsel and their support staff for weeks, perhaps even months. Were the board to order these interrogatories answered at this stage of the proceedings, it would be effectively preventing intervenors from making any further progress on the analysis of documents that have been produced and are being produced by PG&E." (DWR Motion, p. 2.)

The implication was, of course, that if DWR did not have to answer PGandE's interrogatories, it could devote full attention to document analysis.

On April 2, 1979, DWR served its fourth set of interrogatories to PGandE, 331 pages long, including 631 interrogatories, plus subparts. DWR's claim that providing hundreds of pages of answers would take staff time away from document analysis should be equally applicable to the hundreds of pages of interrogatories which it chose to write instead. DWR offers to agree to an extension of time for PGandE to answer part A of its interrogatories (no such offer is made as to part B) -- an extension not later than "the date on which answers are required of DWR to the Fourth Set of Interrogatories Propounded to DWR by PGandE." (DWR Interrogatories, p. 4.) That is unacceptable for three reasons.

2260 036

First, the Board will recall that at the September 1978 prehearing conference, the Board requested that efforts be made to define and clarify the issues in the case by the time of the January 1979 prehearing conference. PGandE awaited with interest the results of that process but, to put it bluntly, there was no clarification or definition by intervenors or Staff, all of whom still pleaded that, while they were more clear than ever that there were many and serious antitrust problems, they needed a great deal more time before they could tell the Board or PGandE exactly what they were. As PGandE stated when it served its contention interrogatories, the contention interrogatories were designed to focus the process of issue definition and clarification.

Part A of DWR's interrogatories is, in large part, a reversal of PGandE's contention interrogatories. Whereas PGandE's interrogatories tend to focus, DWR's tend to proliferate. For example, PGandE's first two questions ask whether any of PGandE's activities under the license would create a situation inconsistent . . . and, if so, for details.

DWR's first two questions ask what PGandE's activities under the license will be, without any limitation to activities which anyone has any remote suspicion will cause any antitrust problem. Presumably no one in the case is interested in a description of every single activity which needs to be performed at a nuclear facility, yet that is what DWR has asked. As a matter of logic and sense, intervenors and Staff should be required first to identify what their contentions are; then it would be

2260 037

appropriate to ask for PGandE's response. Requiring PGandE to respond to DWR's "reverse contention" interrogatories would be a consummate waste of time.

This observation is especially true for the questions which ask PGandE to establish a negative. See, e.g., Interrogatory No. 97, which asks "Do you contend that PGandE does not have the ability to refuse to wheel power . . ."; ability is defined to mean "the physical capacity . . ." Of course PGandE has the physical capacity to say "no," but so does every individual or corporate entity. That truism has no significance to this case, and it is ridiculous to request, as DWR does in Interrogatory No. 98, that PGandE set forth every fact, etc., which establishes that PGandE can say "no."

Second, DWR served its interrogatories over two months after PGandE served its interrogatories on DWR. DWR can advance no reason why it should be entitled to answers first, or even contemporaneously. Intervenors have often complained in this case that their rights to discovery are threatened or hindered. PGandE has equal rights to discovery, and it is as entitled to answers to its interrogatories as any other party. In fairness, PGandE should not be required to answer this set of interrogatories until 60 days after DWR answers the fourth set of interrogatories from PGandE, which have been outstanding for nearly three months.

Third, the foregoing is especially true in this instance because many of the interrogatories being asked by DWR are clearly mirrors of the interrogatories originally submitted by PGandE. It

2260 038

would be an amazing twist of the discovery rules to permit a party to avoid answering interrogatories by simply turning the interrogatories around and sending a reverse set to be answered first by the party originally asking the questions. In its motion for protective order, DWR said

> "There is no question that PGandE is entitled to appropriate discovery of the parties' contentions and the factual and legal bases of those contentions." (DWR Motion, p. 1.)

Those sentiments ought to result in answers to PGandE's interrogatories, not 631 interrogatories to PGandE with a demand that they be answered first. DWR is, literally, out of line.

II

SOME INSTRUCTIONAL AND DEFINITIONAL MATERIAL IS IMPROPER OR UNCLEAR

1. DWR refers in several places to the date of expected expiration of the Stanislaus operating license. PGandE is not aware of any provision for operating licenses to expire, and DWR should be required to clarify its meaning in this respect.

2. The definition of "PGandE" is overbroad. DWR defines it to include

> "successors, predecessors, subsidiaries, affiliates, assignees, divisions, departments, units or subunits, any other entities providing electrical service . . . the stocks or assets of which have been acquired by Pacific Gas and Electric Company"

and also the "present and former officers, directors, agents, employees and consultants of all of the above." This definition is clearly overbroad. Applied to the first interrogatory, it would require PGandE to identify the activities of an indeterminate

2260 039

number of individuals who may once have been employed by PGandE or a number of other companies. Taken literally, it means that if someone who is a retail customer of PGandE and who was once employed by PGandE as a secretary might use power emanating from the Stanislaus facility, that person will have to be identified. Presumably that is not what DWR wants to know, but that is what its definition would require.

Similarly, Interrogatory No. 287 requires a statement of PGandE's policy or policies with respect to its nuclear facilities insofar as the policy or policies may affect other electric utilities' access to nuclear power. Because of the definition, the interrogatory requires a statement not only of the corporate policy, but of the individual policy of every present and former employee of PGandE which, if it is anti-nuclear, might have some effect on the whole question of nuclear power. Other examples are numerous, but the point is that if DWR really wants to know in some particular instance what all of PGandE's former and present employees are doing or have done, that should be specifically requested.

A similar problem exists with respect to the terms "successors," "subsidiaries," "affiliates" or "assignees." PGandE does not know what company is referred to by its "successors." The activities of PGandE's subsidiaries and affiliates are not related to any of the issues in this case so far as PGandE is aware; again, if a specific piece of information is required, it should be specifically requested. The term "assignee" is vague,

2260 040

and PGandE is not at all sure what is the supposed reference. PGandE believes that the term "PGandE" in the interrogatories ought to be limited to "PGandE and the companies to which it has succeeded or which it has acquired in form or in substance."

3. The definition of "situation" is no definition at all. It refers to section 105(c) of the Atomic Energy Act, which does not define "situation" either.

III

INTERROGATORY NOS. 1-6 ARE OVERBROAD

These interrogatories ask what PGandE's activities under the license will be and what the situation will be. The only activities which are relevant to this case are activities which may create or maintain a situation inconsistent with certain antitrust laws, and the only situations which are relevant would be situations inconsistent with those laws. These interrogatories should therefore be stricken. Once the other parties have identified activities which they believe may create a situation inconsistent, PGandE may be asked to respond to specific interrogatories. The approach taken in these interrogatories is a waste of time because it lacks any focus whatever.

IV

INTERROGATORY NOS. 7-10 & 47-286
SHOULD BE STRICKEN BECAUSE THEY ARE
OVERBROAD AND REQUEST PGandE TO ESTABLISH
A NEGATIVE PROPOSITION, WHICH IS NOT REQUIRED

These interrogatories are, in effect, mirrors of PGandE's contention interrogatories. A typical example is

2260 041

Interrogatory No. 7: "Do you contend that PGandE's activities under the license will not create a situation inconsistent with the antitrust laws?" Everyone knows PGandE's answer to that question, and it is a waste of time to ask it. Asking all of the facts on which PGandE bases such a contention is equally foolish. It would necessarily be limited to the fact that there is no fact suggesting otherwise. Once someone suggests facts indicating that there is a situation inconsistent, PGandE can be asked to respond, but it is foolish to go through the sort of exercise posed by these interrogatories.

V

INTERROGATORY NO. 415 IS AN IMPROPER ATTEMPT TO DISCOVER TRIAL PREPARATION MATERIALS

Interrogatory No. 415 asks whether PGandE's counsel has interviewed, etc., anyone to evaluate evidence or render opinions on the litigation, which interview, etc., was "wholly or in part for the purpose of preparing for the hearing." 10 C.F.R. § 2.740(b)(2) provides for discovery of documents and tangible things prepared in anticipation for a hearing only on a showing of substantial need. This provision is virtually identical to Rule 26(b)(3), F.R.C.P. There is no such provision in the N.R.C. rules for the discovery of non-documentary trial preparation materials; Rule 26(b)(4), F.R.C.P., was not incorporated in the N.R.C. rules, and thus the general provisions of the federal work product rule apply. The material requested in this interrogatory is clearly work product, which is not discoverable in the absence

2260 042

of a showing of good cause. Good cause could only be established if any such person were to be a prospective witness. The interrogatory is improper as to consultants who are not to be called as witnesses.

VI

INTERROGATORIES REQUESTING INFORMATION REGARDING RETAIL AND RESIDENTIAL SALES INFORMATION ARE IRRELEVANT

In the series of interrogatories beginning with Interrogatory No. 416, PGandE is asked to provide information or estimates regarding total retail electricity sales and total residential electricity sales. There is no issue in this case relating to retail or residential sales, and the information is not relevant to the subject matter involved in the proceeding and is not reasonably calculated to lead to the discovery of admissible evidence.

VII

INTERROGATORY NOS. 367-394 ARE HYPOTHETICAL AND IRRELEVANT

These interrogatories ask, in essence, whether various agreements could have been executed if the Commitments had been in effect at the time of execution, and whether any provision of these various agreements is inconsistent with the Commitments. These interrogatories, like others in this set, examine the question from the wrong end. DWR has copies of the Commitments and of the contracts specified. It is as able as PGandE to read the documents and determine whether any provisions appear to be inconsistent. DWR should first identify apparent inconsistencies,

2260 043

then determine whether any such inconsistencies are significant to this litigation and, if so, then ask PGandE some questions about them. The approach taken seems designed to produce the maximum amount of effort for the least amount of result.

Beyond that, there is no apparent purpose to the exercise. Even if the Commitments would have prohibited some provision(s) of the identified agreements, such evidence would neither be relevant nor reasonably calculated to lead to the discovery of admissible evidence. It is the Commitments which define the existing situation, and the issue here is whether the construction and operation of the Stanislaus nuclear facility would create or maintain a situation inconsistent with the antitrust laws. Even if one assumes that there was an anticompetitive provision in some contract which could not have been agreed to consistent with the Commitments, the construction of a nuclear facility will have nothing to do with the creation or maintenance of such a provision. Indeed, since the Commitments are the result in part of PGandE's interest in Stanislaus, it can be argued that the interest in the nuclear facility has prevented the creation of such provisions in the future.

VIII

MANY INTERROGATORIES REQUEST DATA FOR PERIODS PRIOR TO THE 1960 CUT-OFF PREVIOUSLY ESTABLISHED BY THE BOARD

In a series of interrogatories commencing with Interrogatory No. 416, and proceeding with every fourth interrogatory thereafter, DWR asks for a great deal of data for every year

2260 044

from 1947 forward. This Board previously determined that, in the absence of a showing of good cause, 1960 would be the cut-off for discovery purposes. DWR has not attempted to show any good cause, and PGandE objects to those interrogatories on that basis.

IX

INTERROGATORY NOS. 424-631 ASK PGandE FOR DATA REGARDING OTHER ENTITIES; OTHER MORE LIKELY SOURCES SHOULD BE PURSUED FIRST

In the series of interrogatories beginning with Interrogatory No. 424 and proceeding to the end of the set, DWR inquires as to various historical and projected data regarding the sales, purchases, system load, and generating and transmission capacity of various other entities. The first other entity as to which DWR seeks information from PGandE is DWR. Much of the historical information should be available in the public record but, more importantly, the best source for this data is the entity in question. PGandE can think of no good reason why DWR has requested PGandE to provide data regarding other systems, including that of DWR.

DWR also seeks this sort of information about NCPA; one wonders why DWR did not send interrogatories to NCPA if it merely wanted the information. The interrogatories appear to be designed to impose the maximum burden on PGandE regardless of the likely usefulness of the data obtained. Before PGandE should be required to answer such interrogatories, DWR should be required to make a

2260 045

showing why it needs information from PGandE as to DWR's own system, why PGandE rather than NCPA should be the target of interrogatories about NCPA's system, and why PGandE rather than the other entities identified should be required to provide information regarding the systems of these other entities rather than seeking the information from the other entities themselves.

It should be especially noted here that DWR has shown no reluctance to pursue at least one other entity -- Southern California Edison -- with what has been described as a monumentally large document request. It is most curious that DWR should have been reluctant to pursue discovery against other entities, particularly an entity which is a party to this litigation -- NCPA.

X

CONCLUSION

PGandE requests that it not be required to provide the information described in sections II through IX, above, and that answers to all of DWR's fourth set of interrogatories be deferred until 60 days after the service by DWR of its answers to PGandE's fourth set of interrogatories to it. If PGandE were required to answer all the interrogatories as posed, the effort would involve some diversion of resources from the on-going document production. While PGandE cannot quantify that diversion, it is certain to be

2260 046

as substantial as that which DWR complained of in its motion for protective order with respect to PGandE's fourth set of interrogatories to DWR and others.

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2260 047

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CERTIFICATE OF SERVICE BY MAIL

Mary Tobias certifies that she is not a party to the within cause; that her business address is Three Embarcadero Center, San Francisco, California 94111; and that she 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 April 23, 1979.

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