5/27/81

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF DEPARTMENT OF WATER RESOURCES TO "PACIFIC GAS AND ELECTRIC COMPANY'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF JOINT MOTION TO SUSPEND DISCOVERY AND MOTION ACTIVITY"

Notwithstanding section of 2.730 of the rules of the Nuclear Regulatory Commission,[1/] Pacific Gas and Electric Company has filed "Pacific Gas and Electric Company's Supplemental Memorandum in Support of Joint Motion to Suspend Discovery and Motion Activity" (hereafter "Supplemental Memo"). Since PG&E urges on the Atomic Safety and Licensing Board in the Supplemlental Memo new arguments in favor of the Joint Motion, should the board choose to entertain the Supplemental Memo, rather than striking it as unauthorized, Intervenor State of California Department of Water Resources

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1/ "(c) Answers to motions. Within ten (10) days after service of a written motion, . . . a party may file an answer in support of or opposition to the motion, . . . The moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or Assistant Secretary." (10 C.F.R. § 2.730.)

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asks the board to consider this response. For the convenience of the board, we follow here the organization of PG&E's Supplemental Memo.

I & II

RELATIONSHIP OF THIS PROCEEDING TO THE PREEMPTION LITIGATION

Nobody disputes the proposition that the future of the Stanislaus Project can be affected by the ongoing litigation concerning preemption of California's nuclear laws.[2/] But the assumption that the final word -- in either direction -- will come from this case may not be warranted. Among the issues before the Ninth Circuit are not only the preemption question but also jurisdictional issues of standing, ripeness, exhaustion of administrative remedies, and the like. The present case may not result in any decision on the preemption question, on which two district courts have ruled in favor of PG&E. Interestingly, PG&E has never stated what it would do about Stanislaus if it gets no decision on the merits in the

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2/ PG&E states, apparently to suggest that the judgment of the two district courts in PG&E's favor may be reversed, that "[o]bviously the State of California and the Attorney General's office" take the position that the state laws are constitutional. (Supplemental Memo, p. 2.) As PG&E once knew well, the Attorney General's formal opinion is, like the opinion of the two district courts and as PG&E urges, that the state laws are unconstitutional. (See 61 Ops. Cal. Atty. Gen. 159 (1978).) The Attorney General accordingly has declined to represent the state officer defendants in the federal court litigation.

pending case. Furthermore, a decision in favor of either party could bring significant legislative or regulatory changes that might well alter the fortunes of the project.

The point here is that the entire industry regulated by this commission is experiencing difficulties siting and building nuclear power generation facilities. Not only legal impediments but adverse financial conditions make virtually every proceeding before this commission subject to doubts akin to those raised here. It makes no sense for the commission to follow every development in the preemption litigation like one would hang on every pitch in the final inning of the world series. Unless and until PG&E's management decides that the uncertainties compel it to abandon all plans for the project, the daily vicissitudes should not be permitted to be used by the utility to turn a proceeding on and off for its convenience or advantage.

III, IV, & V

TIMING AND THE PUBLIC INTEREST

The other perturbation in Stanislaus' fortunes that PG&E seeks to exploit is the allegedly delayed need for construction of the facility. This, PG&E urges, offers the NRC an opportunity for a more leisurely hearing of the antitrust allegations, relaxation PG&E finds to be in the public interest.

A good deal of this argument is based on the now-familiar reference to pending litigation in the Federal

Energy Regulatory Commission, which, PG&E has been urging here for the last five years, will dispose of the antitrust problem in Northern and Central California any minute now. And for five years PG&E has ignored the fact that DWR is not a party to that litigation.

As for the mortality of elderly witnesses, DWR and this commission are to be satisfied with PG&E's speculation that "one would suppose that in the 20 months of FERC hearings any witness who had anything worthwhile to contribute would have been called by one of the parties." (Supplemental Memo, p. 4.) PG&E's phrasing is careful. Counsel know they cannot represent that that has in fact occurred, much less that the examination of witnesses has proceeded in that forum in a manner helpful to this case. All information at DWR's disposal demonstrates the soundness of this board's early decision to proceed with this case without regard to the ebb and flow of other ongoing litigation.

PG&E also suggests that the problem of dying witnesses can be overcome by taking depositions to memorialize testimony, pursuant to rule 27 of the Federal Rules of Civil Procedure. Assuming the availability of that procedure to whatever forum PG&E suggests intervenors use, and assuming that the notice pursuant to rule 27 can be used to obtain for the parties the documents on which to base such depositions, where is the saving to PG&E or anybody else, and how is the public interest served by what would amount to at most a movement between forums?

Finally, PG&E urges, again echoing past claims, that the historical evidence will be irrelevant to a plant to be constructed in the 1990's. This is nothing more than a repackaging of PG&E's claim that evidence of its history of monopolization is irrelevant to antitrust review under section 105c of the Atomic Energy Act. Wrong then, wrong now.

VI

PG&E'S VIOLATION OF DISCOVERY ORDERS AND NRC RULES

PG&E calls DWR's allegations concerning the unilateral, unauthorized termination of document production by PG&E "wrong and irrelevant." As to the "wrong" part, the Supplemental Memo identifies no factual error in DWR's assertions. Perhaps PG&E thought it had documented them in the letter described as Exhibit A to the Supplemental Memo (presumably the March 25 letter, not enclosed in our copy of the Supplemental Memo but provided separately at the time of its mailing). As DWR has shown in its responding letter of April 22, PG&E has neither refuted nor disputed any material allegation DWR made, although it predictably views its own conduct in a different light.

The claim that DWR's charges are irrelevant to the Joint Motion simply ignores the implications of rewarding PG&E's continuing violation of this board's orders, the stipulation PG&E signed, and the rules of the commission. To do so would not only be a gross injustice to the parties here, it would tell other litigants before the commission that they can embark upon similar violations with impunity.

VII

PREJUDICE TO INTERVENORS

Finally, PG&E dismisses intervenors' claims of prejudice from the disbanding and subsequent resurrection of their litigation support efforts. PG&E points out that NCPA and the Cities have the FERC to sustain their counsel, ignoring the value to them of parallel, rather than sequential, litigation of related cases.

As to DWR, which has no other cases pending in which it seeks relief from PG&E's anticompetitive practices, PG&E's position is even more remarkable. PG&E would have this board believe that it is only DWR's counsel, and not DWR itself, that wishes to pursue antitrust relief. According to PG&E,

> "[i]t is noteworthy that DWR has filed no document conveying its management's eagerness to continue spending money in this case. PGandE submits that the NRC should not be required to continue this proceeding simply to provide congenial employment for members of the Attorney General's Office." (Supplemental Memo, p. 8, emphasis in original.)

Such a position is unworthy even of one who would sail the seas PG&E has embarked upon in this proceeding. DWR could as easily point out that PG&E has "filed no document conveying its management's eagerness" to suspend this proceeding. After all, the NRC should not be required to abdicate its antitrust responsibilities merely because counsel for PG&E find the results of their professional efforts in this case unsatisfying.

PG&E's statement is, of course, nonsense. Parties speak through their counsel. For PG&E's benefit, we restate here that the management of the Department of Water Resources

management of the Department of Water Resources remains determined to obtain relief from the situation inconsistent with the antitrust laws that PG&E has created.

PG&E's perception of a lack of resolve on the part of those injured by its conduct may provide the explanation why PG&E alone among the California Power Pool companies has refused to reach agreement with DWR on future power arrangements. DWR continues to place its hopes for antitrust relief with this commission and expects that in the course of an uninterrupted Stanislaus proceeding either PG&E will come to recognize DWR's resolve to obtain antitrust relief and reach an accommodation with it or have such an accommodation imposed in the form of license conditions.

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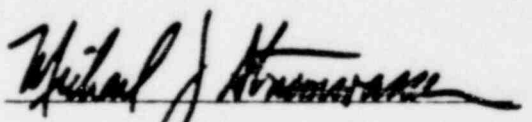
By 

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of Department of Water Resources to "Pacific Gas and Electric Company's Supplemental Memorandum in Support of Joint Motion of Suspend Discovery and Motion Activity" and this certificate were served upon each of the following by deposit in the United States mail, first class postage prepaid, this 27th day of April, 1981:

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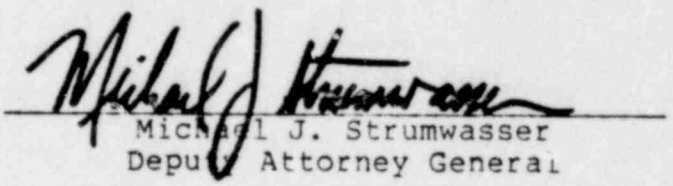

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