UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Marshall E. Miller, Chairman
Sheldon J. Wolfe
Seymour Wenner

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Stanislaus Nuclear Project, Unit 1) Antitrust

Docket No. P-564-A

June 9, 1981

MEMORANDUM AND ORDER

Pacific Gas and Electric Company (PG&E) and the Nuclear Regulatory Commission's Staff (Staff) have filed a joint motion to suspend discovery in this antitrust proceeding, which in effect would stay all proceedings until after final disposition of the litigation in the courts concerning the constitutionality of certain California statutes. These statutes, if valid, would practically prevent PG&E from constructing a new nuclear plant. Intervenors, the State of California Department of Water Resources (DWR), Northern California Power Agency (NCPA) and the Cities of Anaheim and Riverside, California (Cities), vigorously oppose the motion.

I. BACKGROUND

A. The California Nuclear Statutes

In June 1976, California adopted amendments to the Warren-Alquist State Energy Resources Conservation and Development Act (Cal. Pub. Resources Code, §25,000 et seq.) that, insofar as here relevant, prohibited the

construction of new nuclear plants until a state commission determined that proper means exist for the disposal of high-level nuclear waste. The state commission has determined that it cannot so find, and consequently new nuclear plants cannot be approved in California at present. In 1978, PG&E challenged the California nuclear laws, and in 1980 it obtained a judgment in the federal district court declaring the statutes unconstitutional on the ground that the Atomic Energy Act of 1954[1/] preempted this area (Pacific Gas & Electric v. State Energy Resources, 489 F. Supp. 699 (E.D. Cal. 1980)). A separate action, brought by a group of nonutility plaintiffs, also resulted in a judgment declaring the high level waste disposal provision unconstitutional on the same ground (Pacific Legal Foundation v. State Energy Resources, 472 F. Supp. 191 (S.D. Cal. 1979)).

Appeals from both judgments were taken to the United States Court of Appeals for the Ninth Circuit. The two cases were consolidated and under expedited procedures they were briefed, argued and submitted in October, 1980. Whatever the decision of the Ninth Circuit, efforts will undoubtedly be made to obtain review by certiorari by the Supreme Court.

B. PG&E's Present Plans for Stanislaus

PG&E's plans to build Stanislaus have been delayed for two reasons: the "legal impediment" of the litigation concerning the California nuclear statutes; and postponement in its baseload power needs. For these reasons, it has pushed back the time when it will need Stanislaus power by three or four years from its earlier estimate.

[1/] 42 U.S.C. §2011 et seq.

However, PG&E states unequivocally that it intends to build Stanislaus if the legal obstacles raised by the California states are removed (Oral argument, May 5, 1981, Tr. 2926). It will need the Stanislaus power by 1997 and "In the context of our December, 1980 program that would mean the requirement for a Stanislaus construction permit would occur sometime in 1989". (Affidavit of Barton W. Shackleford, submitted by PG&E in this proceeding, March 2, 1981).[2/]

C. History of This Proceeding

The instant antitrust proceeding under §105c was instituted in October, 1976 following PG&E's submission of antitrust information in connection with its proposed Stanislaus nuclear power plant. This proceeding was instituted by intervention petitions filed by the Intervenors, notwithstanding the recommendation of the Attorney General that no hearing was necessary. On May 5, 1976 the Department of Justice advised NRC that it had reached an agreement with PG&E on a Statement of Commitments, which "the Department believes will obviate the antitrust problem posed by PG&E's activities and remedy the situation inconsistent with the antitrust laws."[3/] It has been held that an antitrust hearing may be required notwithstanding a contrary recommendation by the Attorney General, where antitrust issues are raised by intervenors pursuant to notice of opportunity for hearing.[4/]

[2/] Movants in memoranda and oral argument frequently add the adjectives "earliest" or "possible", but these and similar qualifying phrases do not appear in Mr. Shackleford's affidavit.

[3/] Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-77-26, 5 NRC 1017, 1023 (1977).

[4/] Id, affirmed ALAB-400, 5 NRC 1175, 1178 (1977). See also Kansas City Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 65 (1975).

The Staff has generally supported the need for an antitrust hearing in this proceeding, and it has participated actively in discovery. The Attorney General has elected not to participate in this hearing.

Following the resolution of numerous procedural problems, and pursuant to discovery orders issued by the Board, during the last two years PG&E has produced about a million and a half pages of documents which the parties have been analyzing, a number of which have been copied. It is estimated that there are one and a half to two times that number remaining The Intervenors have also been producing documents for PG&E's inspection and copying.

II. THE MOTION TO SUSPEND

The reason given by Staff in the joint motion for suspending discovery is:

> "Considering the current status of the application, as described by PG&E, it is difficult to justify the continuing expenditure of money, time and efforts on this proceeding."

On oral argument, Staff advanced a second reason: Because of the pressing need to finish the hearings for operating licenses for nuclear plants that are almost completed, Staff has redirected its people and efforts to these matters. It questions whether it has the people and resources to participate now in the Stanislaus discovery proceedings. However, the Staff has never altered its position that there is sufficient evidence of monopolization or other anticompetitive conduct by PG&E to require a hearing to resolve such allegations and review the proposed license conditions.

We understand and accept Staff's decision to devote its limited resources to its high priority licensing responsibilities. Staff has

contributed to this antitrust proceeding and its participation would be missed. However, the statutory duty of NRC to conduct antitrust proceedings under §105c(5) cannot be avoided or diluted by Staff manpower preferences, where the Intervenors have established their right to a hearing.

Intervenors in this case are represented by able and experienced antitrust counsel, including assistant Attorneys General of the State of California. They have adequate financial means, they have expended great time and effort over four years, and they wish to continue this case either without the Staff or with its limited participation. The issues and the lines of discovery have been mapped out and over the next few years activities will focus on the completion of document discovery and preparation for hearing -- matters which may lie almost entirely in the hands of these parties. Accordingly, we do not see any reason why capable Intervenors should be deprived of the opportunity to continue their efforts to vindicate their alleged antitrust interests in the proposed Stanislaus plant. The Staff may participate to any degree that it desires, and the Commission will continue to provide a §105c forum to hear and decide the case.

PG&E's reasons for suspending discovery are that because of legal uncertainties and its changed power needs, the construction permit for Stanislaus will not be needed until 1989; therefore the requisite antitrust review does not have to completed until then.

Intervenors estimate that at PG&E's recent rate of production, document production and inspection will not be completed until 1985. With analyses, copying, other procedural matters, preparations for hearing, motions, hearing,

and decisions by the Board and the Appeal Board, the antitrust review would probably finish about the time the construction permit decision is due -- 1989.

If discovery were to be suspended, the teams of lawyers and paralegals of the parties who are familiar with the problems and now functioning would be dispersed. Reconstituting new teams several years hence would take time and require duplication of time, effort and substantial funds already expended. The vested efforts of legal teams familiar not only with antitrust cases but also with this unusually complex one, render acceptance of this wasteful procedure unwarranted and unfair to the Intervening parties.

Throughout this proceeding, the Board has consistently urged the parties to resolve all or part of the issues by reasonable compromises. We will continue to encourage and press them to settle these matters.

III. CONCLUSION

Most of the reasons advanced for suspension of discovery have existed since this proceeding began. Given PG&E's firm intention to build Stanislaus if the legal questions are resolved in its favor, its need for a license by 1989, the massive time-consuming discovery and other problems in this proceeding, and the demonstrated desire and ability of the Intervenors to assure full ventilation of the antitrust issues, it would be wasteful and inexpedient to suspend discovery -- and as a practical matter, the proceeding itself.

Accordingly, the joint motion of Staff and PG&E is denied. Discovery will be resumed promptly in accordance with the prior stipulations of the parties and the directions of the Board.

ORDER

For all the foregoing reasons and based upon a consideration of the entire record in this matter, it is this 9th day of June, 1981,

ORDERED

That the joint motion of PG&E and the Staff to suspend discovery in this proceeding is denied, and discovery shall be resumed by the parties in accordance with their prior agreements and consistent with the Board's orders and directives;

That the parties are directed to confer and negotiate in good faith to settle some or all of the issues involved in this proceeding; and

That written reports shall be filed by September 15, 1981, regarding the status of negotiations and discovery.

THE ATOMIC SAFETY AND LICENSING BOARD

Seymour Wenner
ADMINISTRATIVE JUDGE

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Judge Sheldon J. Wolfe concurs with this decision but was unavailable to sign the order.