7/2/81

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)	)	

ANSWER OF DEPARTMENT OF WATER RESOURCES TO REQUEST FOR CERTIFICATION

Applicant Pacific Gas and Electric Company has requested the Atomic Safety and Licensing Board to "certify its decision" denying the Joint Motion by Pacific Gas and Electric Company and the NRC Staff to Suspend Discovery and Motion Activity (Joint Motion) "to the Commission for its decision." Intervenor State of California Department of Water Resources urges the board to deny PG&E's request.

In order to respond to the request, some decoding is required to determine just what PG&E is requesting. At page 1 of the request we read:

> "Under the provisions of Section 2.781(i) of the Commission's Rules, this is to request that the Board certify its decision in this matter to the Commission for its decision."

On page 2, PG&E characterizes its request as follows:

> "For the reasons given above, Pacific Gas and Electric Company hereby requests the certification of these issues to the Commission."

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We assume that the request is in fact made under section 2.718(i). And although the regulation is phrased in terms of a request to the commission, we trust it is understood by all that it is in fact a request for certification to the Atomic Safety and Licensing Appeal Board. (10 C.F.R. § 2.785(b)(1); Houston Lighting and Power Company (South Texas Project, Units 1 and 2) ALAB-637 (1981) 13 NRC ---; Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-382 (1977) 5 NRC 603, 604 n. 1.)

This brings us to the most challenging interpretation called for by the PG&E request: What is the question it seeks to have certified? The request identifies no question, but rather asks simply for an immediate appeal of an interlocutory ruling, in plain contravention of commission rules proscribing such appeals. (10 C.F.R. § 2.730(f).) Presumably the question PG&E would like this board to ask the appeal board is, "Were we wrong in denying the Joint Motion?" Perhaps as a gesture to the rules and common NRC practice, PG&E would accept the rephrasing of each of its putative grounds for the Joint Motion as a question and have them certified to the commission seriatim for reevaluation. In any event, we respond to the request on the assumption that, were the board otherwise inclined to grant it, it could find some intelligible question to propound to the appeal board.

Turning to the substance of the request, we first examine the legal standards applicable to a request for

certification. The commission has an "explicit policy disfavoring interlocutory review." (Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1) ALAB-635 (1981) 13 NRC ---; see also Project Management Corporation (Clinch River Breeder Reactor Plant) ALAB-326 (1976) 3 NRC 406.)

The appeal boards have repeatedly said that requests for certification are to be granted only infrequently and then only when a decision of the licensing board (1) threatens immediate serious and irreparable harm that cannot be remedied on appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual way. (Houston Lighting and Power Co. (South Texas Project, Units 1 and 2) ALAB-637 (1981) 13 NRC ---; Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1) ALAB-588 (1980) 11 NRC 533; Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2) ALAB-572 (1979) 10 NRC 693; Offshore Power Systems (Floating Nuclear Power Plants) ALAB-517 (1979) 9 NRC 8; Public Service Company of Indiana (Marble Hill Generating Plant, Units 1 and 2) ALAB-405 (1977) 5 NRC 1190.) The appeal boards have shown a strong aversion to certification of "entirely procedural" questions absent extraordinary circumstances. (Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1) ALAB-361 (1976) 4 NRC 625.) Accordingly, it has repeatedly refused to entertain certification of questions concerning scheduling matters.

(E.g., Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants) ALAB-401 (1977) 5 NRC 1180; Consumers Power Company (Midland Plant Units 1 and 2) ALAB-344 (1976) 4 NRC 207; Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility) ALAB-296 (1975) 2 NRC 671; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-295 (1975) 2 NRC 668.) Likewise, the appeal boards have shown a disinclination to become involved in discovery disputes before licensing boards. (E.g., Consumers Power Company Midland Plant Units 1 and 2) ALAB-634 (1981) 13 NRC ---; Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-438 (1977) 6 NRC 638; Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2) ALAB-318 (1976) 3 NRC 186.) Indeed, the appeal boards have refused to entertain such interlocutory appeals even when questions were actually certified to it by licensing boards. (E.g., Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-634 (1981) 13 NRC ---; Consumers Power Company (Midland Plant Units 1 and 2) ALAB-438 (1977) 6 NRC 638; Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-405 (1977) 5 NRC 1190; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-293 (1975) 2 NRC 660; Commonwealth Edison Company (Zion Station, Units 1 and 2) ALAB-116 (1973) 6 AEC 258.)

In summary, one who seeks via certification interlocutory review of an order governing the scheduling of

discovery must surmount formidable obstacles placed by the commission and the appeal boards in the path of such manuevers. Examination of PG&E's request shows it to be no match to the task.

PG&E gives two reasons for certification. First, it asserts that the board's ruling on the Joint Motion

> ". . . raises a major issue concerning the propriety of compelling continuing cost expenditures in connection with a proceeding whose future is contingent on separate litigation beyond the Commission's control in a situation where the prospective applicant has expressly accepted the risk of any project delay occassioned by a suspension to allow completion of that separate litigation." (Request for Certification, p. 1.)

Other than adorning this sentence with the word "major," PG&E offers no explanation why this issue is fit for special interlocutory review. It certainly fails to meet the established test for certification: The licensing board's denial of the Joint Motion scarcely "threatens [PG&E] with immediate and serious irreparable harm which could not be remedied by a later appeal, . . . " (Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1) ALAB-588 (1980) 11 NRC 533.) The only alleged "injury" alluded to by PG&E is the incurring of litigation expenses, and it is well established that "'[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" (Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility) ALAB-296 (1975) 2 NRC 671, quoting from Renegotiation Board v. Bannercraft Co. (1974)

415 U.S. 1.) Nor can it be said that denial of the Joint Motion "affects the basic structure of the proceeding in a pervasive or unusual manner." (Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1) ALAB-588 (1980) 11 NRC 533.) It merely permits the proceeding to continue on the course it was already following, without the unusual and potentially hazardous diversion proposed and rejected in the Joint Motion.

The second reason given by PG&E for certification is its doubt concerning

> " . . . the propriety of compelling continued cost expenditures in a case where the NRC Staff, whose support for a hearing (the Justice Department recommended no hearing be held), was a major factor in initiating the proceeding, has declared an intention to withdraw if a suspension is denied. Such a compelled withdrawal in a case where suspension is a fully available alternative damages the prospective license holder (the Board's decision considered only intervenors) by eliminating Staff's ability to continually test its initial recommendation for hearing against active involvement in the case." (Request for Certification, pp. 1-2.)

The dubious factual underpinnings of this claim are suspect,[1/] but even more intruiging is the remarkable legal theory

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1/ How can PG&E claim that staff's "support for a hearing . . . was a major factor in initiating a hearing . . . "? The staff filed no petition, no request for a hearing, and made no allegations. The intervention licensing board made its decision to order a hearing, as it was compelled to do, solely on the basis of intervenors' allegations. (Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1) LBP-77-26 (1977) 5 NRC 1017.) While the board noted that staff had concluded a hearing was warranted and found staff's recapitulation of allegations helpful (Id. at 1030-31), staff's contribution to the decision could have no legal effect. Indeed, one can describe staff's contribution as "major" only by concluding that without staff's summary of the petitions

on which it is grounded. PG&E claims a right to a favorable recommendation to the board from the commission's regulatory staff. Where such right is created has not been specified, nor is it explained what the staff is expected to do if it concludes its initial recommendation in favor of a hearing was erroneous. (Does PG&E expect the staff to recommend that the decision granting a hearing be revoked?) Plainly PG&E does not understand the function of the staff. Staff is available to assist the commission and it officers in the discharge of their duties. (See 10 C.F.R. § 1.42(e)). While the staff is a party to the proceeding (10 C.F.R. § 2.701(b)), PG&E is no more entitled to the staff's continued participation than, for example, DWR is entitled to the continued participation of the other intervenors. The most PG&E stands to lose is the recommendation of another party

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Fn. 1/ (con't.)

the board would not have recognized that intervenors had established their right to a hearing. We certainly do not believe that to be the case.

And what reason has PG&E for expecting further participation by the staff to result in a more favorable recommendation from it? Staff's last formal submission on the matter found continued justification for the hearing. (NRC Staff's Submission of Selected Discovery Documents Resulting from PG&E's Production of "Green-Dotted" Documents, July 9, 1979.) As recently as the May 5, 1981, conference, staff counsel reported that, after 1.5 million pages of PG&E document production, staff has not changed its position on the allegations against PG&E. (Tr., p. 2944.) The image of PG&E sitting by the side of the road waiting for staff to change its position looks to us like a scene from Waiting for Godot.

to the case, and, in fact, that of a party whose recommendations thus far have been no boon to PG&E. Besides, any point PG&E thinks the staff might raise in PG&E's defense could, presumably, be raised by PG&E itself. Only if PG&E is incapable of representing its own interest in this case--a possibility for which the regulatory system is understandably unforgiving--is it possible that PG&E can be injured by the absence of an actively participating staff in this proceeding.

Comparison of PG&E's request for certification to the applicable legal standards makes it clear that PG&E has presented no question that can properly be certified for interlocutory review. DWR respectfully urges that the request be denied.

Dated: July 2, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer of Department of Water Resources to Request for Certification and this certificate were served upon each of the following by deposit in the United States mail, first class postage prepaid, this 2d day of July, 1981:

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