UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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

PACIFIC GAS AND ELECTRIC COMPANY'S
COMMENTS ON NRC STAFF RESPONSE TO NOTICE
OF PREMATURITY AND ADVICE OF WITHDRAWAL

Pacific Gas and Electric Company (PGandE) has been served with copies of a Nuclear Regulatory Commission Staff Response commenting on PGandE's September 18, 1981 Notice setting forth the prematurity of further pre-application review in this matter and advising the Commission of PGandE's decision to withdraw from further pursuit of such review.

Staff has not taken issue with the substantive logic of PGandE's decision to bring this matter to a close, recounting in its Response its position that given the actual status of PGandE's plans "it is difficult to justify the continuing expenditure of money, time and efforts on this proceeding." 1/ However, Staff does raise formal objection to the manner in which the Company framed the advice of withdrawal.

1/ Staff Response at 2.

Staff's Response deals not at all with the plain words of the Commission's basic regulation calling for the pre-application filing of information for the Attorney General "at least nine (9) months but not more than thirty-six months prior to the date of submittal of any part of the application for a class 103 construction permit." 2/ In this case, nothing but that pre-application information, now six years old and long since resolved with the Attorney General, exists. No "part of the application" has ever been filed. Staff takes a position that would make nonsense of the words of 10 C.F.R. §50.33a, contending that the information which must preceed "any part" of the application itself constitutes such an application. In taking this position, Staff makes no argument that the contents of a §50.33a filing, either in general or in this case, are such as to make it factually a construction permit application. Instead, the Response references only a procedural rule (10 C.F.R. §2.101(a)(5)). 3/ 10 C.F.R. §2.101, in fact, describes the applications it seeks to reach in terms which quite plainly do not undo the unmistakable terms of §50.33a, i.e., "An application for a license . . . shall be filed" (§2.101(a)(1)); "Each application for a license for a facility, or for receipt of waste radioactive material . . . (§2.101(a)(2)); ". . . a tendered application for a construction permit or operating license for a construction

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2/ 10 C.F.R. §50.33a.

3/ Response at p. 3.

permit or operating license for a production or utilization facility . . ." §2.101(a)(4). (Emphasis added). In subpart (a)(5), which Staff specifically cites, the rule states only that "information required of applicants by Part 50 of this chapter . . . may [be] . . . in three parts." It then goes on to specifically cross reference and subordinate itself to §50.33a, commanding that: "information required by §50.33a shall be submitted in accordance with the time periods specified in §50.33a". (Emphasis added).

Thus, contrary to Staff's reading, §2.101(a)(5) says nothing about three "parts" or "portions" of a construction permit or operating license application; instead it quite explicitly provides only that certain "information" "may" be provided in segments and specifically subordinates its timing provisions to the authorizing language of §50.33a which, in turn, sharply distinguishes between the document that initiated this review and "any part of the application".

Having significantly underread §2.101(a)(5), Staff proceeds to cite decisions relating not to pre-application "information" but to "applications" themselves. 4/ PGandE's

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4/ First, Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3) ALAB-622, 12 NRC 667 (1980); ALAB-652, ___ NRC ___, dated September 3, 1981, involved termination of a construction permit proceeding after limited work authorizations (LWAs) under 10 C.F.R. §50.10(e)(1)(3) were issued. Needless to say, to get to the point of the issuance of LWAs required that a complete application be on file and two partial initial decisions issued. 12 NRC at 668. Similarly, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1) Docket No. 50-376CP, Licensing Board Memorandum and Order dated February 18,

Notice was taken in straightforward response to the facts of its situation and the terms of both §50.33a and §2.101(a): there simply are no formal requirements relating to a situation where pursuit of pre-application "information" has become untimely under the rules and no longer makes substantive sense. PGandE has carefully explained both the factual basis and the common sense consequences of its decision in response to various Intervenor's positions. 5/ The situation is one in which the Commission's statutory and regulatory obligations and responsibilities with respect to a construction permit application have not attached for the simple reason that there is no such application. Accordingly, PGandE must respectfully disagree with Staff that further expenditure of "money, time, and effort" on the part of the Commission, the Licensing Board, PGandE or anyone else are somehow required by rules relating only to the

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4/ Cont'd

1981, involved the question whether an applicant could withdraw an application without prejudice. The Licensing Board's memorandum did not treat the issue of whether there was an application. The Licensing Board recites that the applicant had provided information required for the Staff's review of the environmental and safety aspects (slip op. at p. 4) and that a notice of hearing had been published in the Federal Register (Id. p. 2). The Appeals Board decision earlier in the same matter, ALAB-605, 12 NRC 153 (1980) resolved affirmatively the question whether a licensing board had the authority to dismiss a construction permit application for mootness upon abandonment of the project. Once again there was no question regarding the completeness or nature of the application.

5/ See October 16, 1981 letter to Chairman Miller and Licensing Board Members, attached as Exhibit "A".

unwinding of construction permit applications. In the construction permit application situations the potential for substantial physical and environmental complications supports the employment of formal withdrawal rules, a factor having no relevance here.

Staff seems to feel that the formal recognition of PGandE's withdrawal which it seeks must somehow come from the Licensing Board rather than the Commission. That would seem to pile formality on formality. The Information Requested by the Attorney General was filed with the Commission, and it would seem the Commission is perfectly competent to render whatever technical acknowledgement it is that Staff would like to see. So far as the details of document preservation or disposal, as we put it in our letter to the Licensing Board:

> "PGandE has already offered to negotiate with Intervenors in an effort to set such conditions. Intervenors are currently spending a great deal of effort attempting to revive a permit application that was never there, and no time thinking about the practical details of document disposal." 6/

With respect to the substantive logic of shutting down this proceeding, we would also quote from the October 16th letter:

6/ Exhibit "A", p. 3.

"The wisdom of that step has, if anything, been affirmed by subsequent events. On October 7, 1981, the United States Court of Appeals for the Ninth Circuit reversed the District Court's decision invalidating California's restrictive nuclear laws, thus substantilly increasing the continuing uncertainty over the use of any site in California."

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN & ENERSEN
MORRIS M. DOYLE
WILLIAM H. ARMSTRONG
Three Embarcadero Center
San Francisco, CA 94111

PACIFIC GAS AND ELECTRIC COMPANY
MALCOLM H. FURBUSH
JACK F. FALLIN, JR.
RICHARD L. MEISS
Post Office Box 7442
San Francisco, CA 94120

By Richard L. Meiss
RICHARD L. MEISS

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

November 13, 1981.

PACIFIC GAS AND ELECTRIC COMPANY

77 BEALE STREET, SAN FRANCISCO, CALIFORNIA 94106 TELEPHONE (415) 781-4211
P. O. BOX 7442, SAN FRANCISCO, CALIFORNIA 94120 TELECOPIER (415) 543-7813

ROBERT OHLBACH
VICE PRESIDENT AND GENERAL ATTORNEY

CHARLES T. VAN DEUSEN
PHILIP A. CRANE, JR.
HENRY J. LaPLANTE
JOHN B. GIBSON
ARTHUR L. HILLMAN, JR.
CHARLES W. THISSELL
DANIEL E. GIBSON
ACK F. FALLIN, JR.
JOSEPH I. KELLY
ASSISTANT GENERAL COUNSEL

GILBERT L. HARRICK
GLENN WEST, JR.
HOWARD V. GOLUB
JAMES C. LOBSDON
ROBERT L. BORDON
PETER W. HANSCHEN
RICHARD F. LOCKE
DAVID L. LUDWIGSON
WILLIAM H. EDWARDS
F. RONALD LAUPHEIMER
ROBERT R. RICKETT
DAVID J. WILLIAMSON
BRUCE R. WORTHINGTON
SENIOR COUNSEL

EDWARD J. McGANNEY
DAN GRAYSON LUBBOCK
BERNARD J. DELLASANTA
JOSHUA BARLEY
JOSEPH S. ENGLERT, JR.
ROBERT L. HARRIS
DOUGLAS A. GOLESBY
J. PETER BAUMGARTNER
JOHN N. FRYE
J. MICHAEL REIDENBACH
INGRE E. SAMSON
SHIRLEY A. WOO

DAVID W. ANDERSON
DIANA BYKONAUSEN
LEIGH S. CASSIDY
AUDREY DANIES
DONALD D. EARLDSON
PATRICK G. GOLDEN
PAULA T. MAINES
RICHARD C. JONES
HARRY M. LONG, JR.
JOHN R. LOY
ROBERT E. MCLENNAN
RICHARD H. MOSS
SHIRLEY A. SANDERSON
JACK W. SHUER
KENNETH YANG

NATHAN T. ANNAND
STEVEN P. BURKE
PAMELA CHAPPELLE
GARY P. ENSINAS
DAVID E. GILBERT
STEVEN F. GREENWALD
JOAN M. JAFFE
MYRNA E. LINDON
JESSICA LORING
A. KIRK MCKENZIE
RICHARD L. MEISS
ROBERT J. PETERS
JO ANN SHAFFER
LOUISE E. VINCENT
ATTORNEYS

October 16, 1981

Marshall E. Miller, Esq.
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Seymour Wenner, Esq.
Atomic Safety and Licensing Board
807 Morgan Drive
Chevy Chase, Maryland 20015

Sheldon J. Wolfe, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Pacific Gas and Electric Company
(Stanislaus Nuclear Project Unit No. 1)
NRC Docket No. P-564-A

Dear Chairman Miller and Members of the Board:

Following Pacific Gas and Electric Company (PGandE)'s formal advice to the Commission of our intention to withdraw from this pre-application review, various intervenors have filed various papers. The gist of these papers seems to be a complaint that PGandE has somehow acted immorally in drawing attention to the fact that there is no application for a construction permit in this case, that none would be filed within the time frames set forth for initiating pre-application review, and that PGandE was no longer going to pursue advance review.

Department of Water Resources (DWR) seeks to support these claims by mischaracterizing PGandE's decision as simply an attempted "overruling" of this Board's denial of a joint motion by PGandE and the NRC Commission Staff to suspend proceedings. In fact, it was the very finality of that decision and the Board's subsequent refusal to

EXHIBIT "A"

certify the issue that forced PGandE to cease its attempt to continue on with this docket.

The item initiating this advance review was PGandE's information for the Attorney General, a document which, in accordance with Commission regulation must be presented prior to any part of the construction application. (10 C.F.R. §50.33a) No such application has ever been filed.

DWR's present complaint is based on a citation to the Commission's rules relating to procedures for withdrawing construction permit and operating license applications. 1/ Yet, as is conceded, 2/ there are no such applications here. Simply put, there is no rule relating to the "withdrawal" of a jurisdictional pleading that has never been made. Accordingly, PGandE undertook to signal its position in a filing duplicating the format employed in 1975 to initiate Justice Department review.

DWR makes the extraordinary argument that this Board must now reach out and compel the creation and filing of a construction permit application by PGandE and must subsequently compel PGandE to pursue and secure the grant of that construction authorization, solely in order to secure for DWR a desired "level of participation". Nothing short of such a result would suffice, since the "level of participation" DWR demands is one sufficient to "adjudicate the case" and there can be no "adjudication" of the antitrust issues before this Board absent an actual, issued, permit or license with "adjudicated" conditions.

For authority, DWR has offered the resolution of an action by "The United States as assignee of . . . claims and demands for contractual overpayments" based on a contractual "dispute clause", in which a subcontractor contracted to submit the issue in question to the AEC. 3/ The issue posed was "what law applies to the interpretation of a disputes clause in a subcontract under a contract to perform work on a government project and how such a clause should be interpreted." 4/ PGandE has not entered into any contract with DWR or any other intervenor to submit general "antitrust" disputes to this Board, the Commission, or any other entity for resolution. If DWR felt it had such a contract, it was free to display it, it has not.

1/ DWR "Answer" at 3.

2/ DWR "Answer" at 4.

3/ DWR "Answer" at 6, U.S. v. Taylor (5th Cir. 1964) 333 F.2d 633, 636, 639.

4/ U.S. v. Taylor, supra, 333 F.2d 633, 635.

The only "invitation" arguably implied in PGandE's filing of information with the Attorney General, was an invitation to the Department of Justice to accomplish the Attorney General's review, a process that has long since been completed. PGandE and the Attorney General agreed on a set of commitments in 1976 which have now been cemented into PGandE's Diablo Canyon construction permits. Since the Department of Justice specifically and formally recommended against any further review proceedings, it is difficult to see how anyone could extract from PGandE's relationship with Justice a "contract" compelling the continuance of such a review.

Intervenors suggest that, despite the absence of any construction application, the rules relating to withdrawal may still be "instructive" as to the desirability of providing the Board with some special ability to condition PGandE's withdrawal. In this case, PGandE has already pursued the possibility of suspending on conditions rather than withdrawing. Both Intervenors and the Board unequivocally rejected that proposal.

Neither DWR nor Intervenors have addressed the major procedural consequence of the lack of a construction permit application in this case, i.e., no Safety and Licensing Board with the authority to issue a construction permit or an operating license for the Stanislaus site has ever been convened. Had a construction permit application been filed, a request to withdraw that application would have been addressed, not to this Board assigned only the investigation of "antitrust" issues, but to the Board charged with actual licensing authority.

To the extent that Intervenors are requesting the establishment of reasonable conditions for the preservation, return, or other disposition of previously produced materials PGandE has already offered to negotiate with Intervenors in an effort to set such conditions. Intervenors are currently spending a great deal of effort attempting to revive a permit application that was never there, and no time thinking about the practical details of document disposal.

With respect to DWR's motion for "censure," PGandE regrets that DWR's counsel has once again indulged his penchant for intemperate language. After the Board denied suspension and followed it with a denial of stay requests, PGandE, while re-evaluating the sense of continuing on with this docket, did return to preparing responses to interrogatories and initiating responses to DWR's request for computer materials. In the interval prior to filing the Advice of Withdrawal, overriding document production requirements relating to this Company's Helms and Diablo projects physically prevented any immediate return to full scale production.

PGandE has taken this opportunity to respond to Intervenors' various papers in order to assure this Board that PGandE's decision to

file formal notice of prematurity 5/ was not lightly made and was not prompted by any effort to somehow use "stealth", etc. in an effort to interfere with the administrative process. There simply came a time in the course of this matter when PGandE had to act, as accurately as it could, to withdraw from an advance review proceeding which no longer had any regulatory or practical connection with the real timing of its plans. The wisdom of that step has, if anything, been affirmed by subsequent events. On October 7, 1981, the United States Court of Appeals for the Ninth Circuit reversed the District Court's decision invalidating California's restrictive nuclear laws, thus substantially increasing the continuing uncertainty over the use of any site in California.

Very truly yours,

JACK F. FALLIN, JR.

JFF:vlr

cc: Service List

5/ No Intervenor has suggested that this matter is not premature under the clear terms of 10 C.F.R. §50.33a. DWR obscurely argues that the requirement that a review like this "shall" be commenced "not more than thirty-six months" prior to application really says "should" rather than "shall." But other than that unsupported argument from desire, it makes no effort to deny the now evident lack of fit between §50.33a's requirements and this case.

CERTIFICATE OF SERVICE BY MAIL

Virginia Rundell, hereby certifies that she is not a party to the within cause; that her business address is 77 Beale Street, San Francisco, California, 94106; 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 and deposited each envelope with postage thereon, fully prepaid, in the United States mail at San Francisco, California, on November 13, 1981:

Honorable Thomas L. Howe
Administrative Law Judge
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

George Spiegel, Esq.
Robert C. McDiarmid, Esq.
Daniel I. Davidson, Esq.
Thomas C. Trauger, Esq.
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Marshall E. Miller, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Steven R. Cohen, Esq.
Edward J. Terhaar
Department of Water Resources
1416 - 9th Street
P. O. Box 388
Sacramento, CA 95802

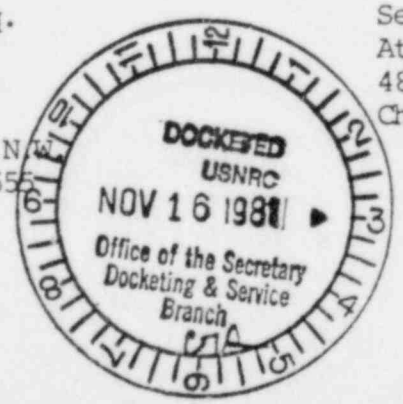
Jerome Saltzman, Chief
Antitrust & Indemnity Group
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Donald A. Kaplan, Esq.
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

Sandra J. Strebel, Esq.
Peter K. Matt, Esq.
Bonnie S. Blair, Esq.
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20555

Seymour Wenner, Esq.
Atomic Safety and Licensing Board
4807 Morgan Drive
Chevy Chase, Maryland 20015



Sheldon J. Wolfe, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph Rutberg, Esq.
Benjamin H. Vogler, Esq.
Jack R. Goldberg, Esq.
Ann P. Hodgdon, Esq.
NRC Staff Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael J. Strumwasser, Esq.
Deputy Attorney General of California
3580 Wilshire Blvd., Suite 600
Los Angeles, CA 90010

H. Chester Horn, Jr., Esq.
Deputy Attorney General
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Clarice Turney, Esq.
Office of the City Attorney
3900 Main Street
Riverside, CA 92521

Chairman Palladino
Office of the Commission
U.S. Nuclear Regulatory Commission
Wasshington, D.C. 20555

Commissioner Gilinsky
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Alan S. Rosenthal, Esq., Chairman
Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Bradford
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Ahearne
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Roberts
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Virginia Rundell
VIRGINIA RUNDELL