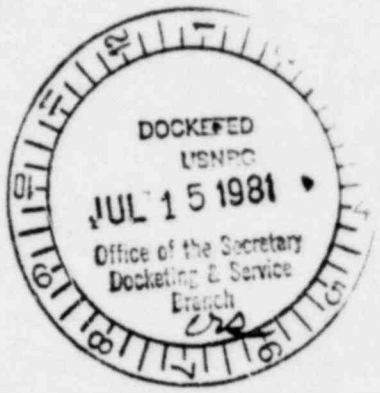
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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



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In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. P-564-A
(Stanislaus Nuclear Project, Unit No. 1)	)	July 13, 1981

MEMORANDUM AND ORDER

Pacific Gas and Electric Company (PG&E) has requested the Board to certify "to the Commission" its decision denying the joint motion of PG&E and the Commission's Staff (Staff) to suspend discovery (and in effect all proceedings) in this antitrust review until after final disposition in the courts of the litigation concerning the constitutionality of certain California statutes, whose effect would be to practically prevent PG&E from constructing a nuclear plant. We treat this request as a motion for certification to the Atomic Safety and Licensing Appeals Board, under 10 CFR 2.785(b)(1).

Our previous decision was grounded on these factors:

1. PG&E's unequivocal representation that it intends to build the Stanislaus nuclear plant, if legal obstacles raised by the California statutes are removed.

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2. The disruption of the immense effort and expenditures that have been made in organizing and training the teams of lawyers, paralegals and technical experts who are handling the discovery operation: a million and a half pages of documents have already been produced and are being analyzed, with some two and a half million more pages expected to be selected and studied. If discovery were now to be suspended, these teams who are familiar with the myriad details, issues and problems of this case would be dispersed. Reconstituting new teams several years hence, in the event of a favorable Supreme Court decision, would require duplication of time, effort and substantial funds, with a loss in the efficiency of document search and analysis that comes from several years of cumulative experience.

3. The willingness and capability of the Intervenors to pursue this proceeding on their own. Staff can reduce its participation if it so chooses,[1/] and devote its resources to what it regards as its higher priority licensing responsibilities.

[1/] In its Answer to PG&E's request for certification, Staff states that it "does not intend to withdraw from this proceeding if suspension is denied.... Rather, it is Staff's present intention to participate in the discovery phase of the proceeding to the extent possible, commensurate with its existing manpower and budget limitations, absent modification of the Board's order of June 9, 1981."

Our consideration of the voluminous record in this case as well as experience with complex and extended economic and technical litigation of this type, persuaded us that a lengthy and indefinite suspension of discovery would be wasteful to all parties and unfair to the Intervenors. We find, moreover, that the best estimate of time is that if discovery proceeds at its current rate, the antitrust review will be completed about the same time as PG&E states it will need a construction permit for Stanislaus.

The only new argument raised by PG&E in the current request is. Staff's withdrawal from participation damages PG&E because Staff might change its mind in the future and "recommend" that a hearing in this case should not have been instituted. The decision to grant or continue this hearing is a quasi-judicial decision of the Board, not that of a party litigant - Staff. In any event, we do not see that Staff's withdrawal from or diminution of further participation, perhaps affecting the possibility that it might eventually switch to support PG&E, so prejudices PG&E that this proceeding should be suspended.[2/]

We have reviewed our previous decision in the light of PG&E's request and we believe it was sound. We see no reason now to certify our decision for appeal. It does not threaten immediate serious and irreparable harm to PG&E and it does not affect the basic structure of the proceeding in a

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[2/] At the May 5, 1981 conference, Staff counsel stated, "We have always viewed the monopolization charge as well as other anticompetitive allegations against PG&E extremely seriously and we have not changed our position on the merits of those antitrust issues today" (Tr. 2944).

pervasive or unusual manner. (See e.g. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC __ (1981); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533 (1980).) It merely requires that litigation that has been in process for several years continue.[3/] In sum, we find that, on balance, suspension of discovery with its consequences of dispersal and reconstitution of the litigation teams if the Supreme Court decides in PG&E's favor, would entail greater detriment to the parties and the public than continuation of the ongoing proceeding. And after all, as we noted in our earlier order, two lower federal courts have sustained PG&E's position on the unconstitutionality of the California statutes. For all these reasons, PG&E's request for certification of the Board's decision denying the Board's motion for suspension of discovery is denied.

[3/] Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). Responding to the argument that the mere holding of a prescribed administrative hearing would result in irreparable damage, the Supreme Court stated, "Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact" at 51-52.

ORDER

For all the foregoing reasons and on consideration of the entire record in this matter, it is this 13th day of July 1981

ORDERED

That the request of PG&E for certification of the Board's decision denying the motion for suspension of discovery be denied.

THE ATOMIC SAFETY AND LICENSING BOARD

Sheldon J. Wolfe
ADMINISTRATIVE JUDGE

Seymour Wenner
ADMINISTRATIVE JUDGE

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE