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October 16, 1981

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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

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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, 635, 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.