

February 16, 1982

SECY-82-62



ADJUDICATORY ISSUE
(Affirmation)

For: The Commission
From: Martin G. Malsch, Deputy General Counsel
Subject: PACIFIC GAS & ELECTRIC CO.'S NOTICE OF
PREMATURITY AND ADVICE OF WITHDRAWAL IN
STANISLAUS (ANTITRUST)
82-275,223
Purpose: 51

Discussion: Background

Pacific Gas & Electric Company (PG&E) filed the antitrust information required by 10 CFR 50.33(a) for its proposed Stanislaus Nuclear Project in 1975. The construction permit antitrust review required by Section 105(c) of the Atomic Energy Act was then initiated as contemplated by NRC regulations. PG&E has submitted no other part of the construction permit application. Although the Justice Department ("Justice") reached an agreement with PG&E and recommended that no antitrust hearing be held, intervenors Cities of

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Information in this record was deleted
in accordance with the Freedom of Information
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Anaheim and Riverside, Northern California Power Agency and Department of Water Resources disagreed with Justice and requested a hearing under Section 105(c). A notice of hearing was issued on April 15, 1977 and a Licensing Board was appointed to preside. Discovery has been actively pursued both by intervenors and NRC staff, with one-and-a-half million pages of documents being produced and analyzed so far, and with some two-and-one-half million more expected to be analyzed.

Due to California's restrictive laws on new nuclear power plants and due to a reduced projection of electrical demand, however, PG&E and NRC staff on February 13, 1981 filed a joint motion to suspend discovery until final disposition of the litigation over the constitutionality of the California laws. On June 9, 1981, the Licensing Board denied this motion. PG&E sought certification of this decision "to the Commission," but the Licensing Board, treating this as a request for certification to the Appeal Board, denied the request on July 13, 1981. PG&E then filed a motion for a "Protective Order" against further discovery pending final Commission disposition of the earlier joint motion to suspend discovery. The Licensing Board, treating this as an alternative request for a stay, denied the motion.

The Licensing Board's decision refusing to suspend discovery or allow a stay was based on several considerations. The Board stated that PG&E intends to build Stanislaus once the legal impediments are removed, and that two courts have already held that the California statutes are unconstitutional. The

Board further noted that this antitrust review, under the current schedule, might not be completed until 1989, and that PG&E would need to submit its construction application at that time even under its revised time schedule. The Board also noted that the intervenors were willing to do the bulk of the work, freeing NRC staff for other proceedings. The Board considered the immense efforts and expenditures that have gone into this proceeding and noted that suspending discovery would cause a dispersal of the present teams working on this case and consequently cause a duplication of time, effort and expense were this proceeding to be recommenced. The Board then held that suspension of discovery would entail greater detriment to the parties and the public than continuation of the ongoing proceeding.


On September 18, 1981, PG&E filed with the Commission a document entitled as a "Notice of Prematurity & Advice of Withdrawal," notifying the Commission that PG&E would no longer participate in this proceeding. In effect, PG&E was asserting that it could withdraw from the proceeding without any prior NRC approval -- a position at odds with the Licensing Board ruling. Intervenors in their replies to this pleading stated that it was improper for PG&E to attempt to end-run the Licensing Board and that PG&E should not be allowed to unilaterally withdraw from this proceeding. On October 23, 1981, in response to intervenors' replies, PG&E notified the Licensing Board that it had withdrawn from this "pre-application review." In that letter PG&E stated that it had never submitted an application for a construction permit,

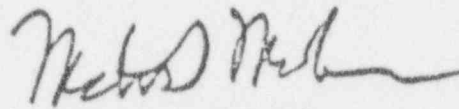
that no Licensing Board with actual licensing authority had been appointed and that it could therefore simply end its participation in this litigation. PG&E also noted that on October 7, 1981, the Ninth Circuit Court of Appeals had upheld the constitutionality of the California statutes.

NRC staff on October 26 submitted a brief in response to PG&E's Notice of Prematurity and Advice of Withdrawal. Staff maintained that this pleading should be treated as a request for withdrawal of the application and referred to the Licensing Board because the Board is "knowledgeable with respect to the background of this matter and is in the best position to consider the disposition of the pleading."

On November 16, 1981, PG&E filed a response to the NRC staff's reply. PG&E again asserted that 10 CFR 50.33(a) requires the submitting of information relating to antitrust, that this information is not part of any construction application, and that therefore "the Commission's statutory and regulatory obligations and responsibilities with respect to a construction permit application have not attached" here. PG&E also argued that the potential for substantial physical and environmental complications supports formal withdrawal rules in the case of a construction permit application, but that these considerations have no relevance here. PG&E then stated that the Commission could place whatever technical acknowledgment it wished on the fact of PG&E's withdrawal.

OGC initially advised the Commission to refer the matter to the Licensing Board (SECY-81-587), but noted that continued NRC staff participation had resource implications, and indicated that the matter would be studied further if the Commission requested. Commissioner Ahearne then requested further study. This paper is in response to that request.

A large handwritten bracket is drawn on the left side of the page, spanning from the top of the text block down to the bottom. To the left of the lower part of the bracket, the number '5' is handwritten.

Recommendation:

Martin G. Malsch
Deputy General Counsel

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Attachments:

1. Draft Order
2. PG&E's Notice of Prematurity
& Advice of Withdrawal
3. Memo. & Order 7/13/81

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Tuesday, March 2, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT February 23, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an open meeting during the week of March 8, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

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ATTACHMENT 1

ATTACHMENT 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

release

DOCKETED
USNRC
SEP 21 1981
Office of the Secretary
Docketing & Service
Branch

FILED
SEP 22 1981
U.S. NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY,)
(Stanislaus Nuclear Project,)
Units 1 and 2.)

Docket No. P-564-A
NOTICE OF PREMATURETY,
AND ADVICE OF WITHDRAWAL

On July 11, 1975, Pacific Gas and Electric Company (PGandE) provided to the Commission "Information Requested by the Attorney General for Antitrust Review." That information was furnished pursuant to 10 CFR 50.33(b), which calls for a potential applicant for a nuclear construction permit to file such information with the Commission not more than thirty-six nor less than nine months prior to its submittal of any part of its application for a construction permit. At the time, PGandE anticipated becoming an applicant for a construction permit for what was identified as the "Stanislaus Nuclear Project" within the time period specified in the regulation.

No construction permit application has ever been filed for the Stanislaus Project. Further, over time, the prospects for the project have changed. Because of certain restrictive legislation passed by the State of California and challenged by PGandE, the viability of any yet to be constructed nuclear facility in California is in doubt. The litigation concerning those statutes is not finally resolved and no new nuclear construction will be undertaken by PGandE

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until that problem is eliminated. Also, PGandE's loads and its projected needs have changed so that the need for a facility like the Stanislaus plant is now viewed as some fifteen years off in the future. Accordingly, independent of the outcome of the litigation concerning the California legislation, PGandE has no plan to apply for any construction permit relating to the Stanislaus site for another eight years.

Because no permit application has been filed, no Atomic Safety and Licensing Board with authority to license a Stanislaus facility has ever been convened. The only process ever undertaken in this docket has been a pre-application antitrust review controlled by a Board specially convened for that purpose. The Attorney General's advice, rendered in 1976, was to the effect that such a review was unnecessary.

PGandE has continued to cooperate in discovery related to this review for some time. The cost in personnel and equipment required to produce the enormous volume of documents covered by demands made by various intervenors and endorsed by the assigned antitrust Safety and Licensing Board, has been extensive and burdensome. In view of the uncertainty engendered by California's restrictive legislation and the remoteness in time of any actual application, the expense of continued participation in this costly exercise is no longer justified.

In an effort to accommodate all concerned, PGandE attempted, by a motion in which it was joined by the NRC Staff, to suspend the discovery process so as to coordinate that process more sensibly with both the ongoing litigation over California's nuclear laws and with the changes in the timing of the Company's resource plan. That effort was rebuffed by intervenors and rejected by the antitrust review Board. A request to certify the issue of suspension to the Appeals Board was also denied.

This will serve formally to advise the Commission that if pending litigation over state controls is determined adversely, no project will be constructed; that due to changed circumstances PGandE has no plans for seeking a construction permit for the Stanislaus Project until a point well beyond that set for initiating an antitrust review; and that, accordingly, PGandE is withdrawing its participation in this pre-application docket. Since there seems to be no established protocol for advising the Commission that a pre-application proceeding has become premature and is being withdrawn, this notification is provided in the same format as the July 11, 1975 information that initiated the process. PGandE will seek to make orderly arrangements for the return

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or preservation of discovery material.

Respectfully submitted,

PACIFIC GAS AND ELECTRIC COMPANY

By Malcolm H. Furbush
MALCOLM H. FURBUSH,
Senior Vice President and
General Counsel

ROBERT OHLBACH
PHILIP A. CRANE, JR.
JACK F. FALLIN, JR.

Philip A. Crane, Jr.
PHILIP A. CRANE, JR.

September 18, 1981.

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 September 18, 1981:

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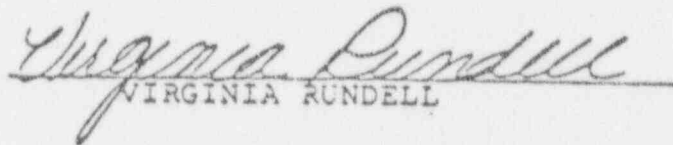
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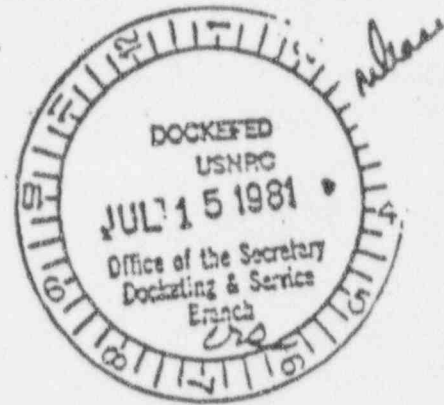
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ATTACHMENT 3

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 No. 1)

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Docket No. P-564-A

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.

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 Intervenor. 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

^{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

Sheldon J. Wolfe
ADMINISTRATIVE JUDGE

Seymour Wenner

Seymour Wenner
ADMINISTRATIVE JUDGE

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE