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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
)	Docket Nos. 50-275
PACIFIC GAS AND ELECTRIC COMPANY)	50-323
)	
(Diablo Canyon Nuclear Power)	(Reopened Hearing --
Plant, Units No. 1 and 2))	Design Quality
)	Assurance)

LICENSEE PACIFIC GAS AND ELECTRIC COMPANY'S
MOTION FOR SANCTIONS UPON
GOVERNOR DEUKMEJIAN AND THE JOINT INTERVENORS

Licensee moves the presiding member of this Board, and members thereof, for the imposition of sanctions upon the Governor and Joint Intervenors for failure to seasonably supplement their interrogatories as required by 10 CFR § 2.740(e)(1).

A. Facts

On June 27, 1983, the Governor filed his response to Licensee's First Set of Interrogatories. Interrogatory

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1 #2 of the first set requested, inter alia, the identity of
2 each person the Governor intended to call as a witness and
3 whether the individual would be offered as an expert. The
4 Governor responded as follows:

5 "At this time, it has not yet been de-
6 cided what witnesses will be called. At
7 the appropriate time, the Governor will
8 be prepared to exchange the lists of
9 witnesses, together with their
10 qualifications, with the applicant and
11 all other parties." (Response at p. 5)

12 On June 27, 1983, the Joint Intervenors filed
13 their response to Licensee's First Set of Interrogatories.
14 Interrogatory #2 requested inter alia the identity of each
15 person the Joint Intervenors intended to call as a witness
16 and whether the individual would be offered as an expert.
17 The Joint Intervenors responded as follows:

18 "At this time, Joint Intervenors have
19 not decided what persons, if any, they
20 may call or subpoena as witnesses at the
21 reopened hearings on the issue of design
22 quality assurance." (Response at p. 2)

23 On August 4, 1983, Licensee filed its Third Set of
24 Interrogatories upon the Governor. Interrogatory #1 was
25 identical to interrogatory #2 in the Licensee's First Set of
26 Interrogatories.

On August 11th, the Governor filed a motion for an
extension of time to answer the Second and Third Sets of
Interrogatories served upon it by the Licensee. In its

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1 motion the Governor acknowledged that the interrogatories
2 identified above were substantially the same.

3 On August 31, 1983, the Governor responded to
4 Licensee's Second and Third Set of Interrogatories. The
5 Governor responded to Interrogatory #1 of the Third Set as
6 follows:

7 "The only expert witness that the
8 Governor presently intends to call is
9 Jose M. Roeset." (Response at p. 4)

10 On September 2, 1983, the Governor filed its Third
11 Set of Interrogatories upon the Licensee. This was the
12 first set of interrogatories which sought identification of
13 Licensee's witnesses. Licensee responded in a timely manner
14 on September 19, 1983.

15 On September 7, 1983, this Board issued an order
16 for the reopened hearings on design quality assurance. The
17 order provided inter alia:

18 "All discovery shall close on Septem-
19 ber 28, 1983. . . ."

20 Subsequent to the pre-trial conference all parties
21 discussed the deposition schedule. Due to the number of
22 depositions and the location of the witnesses around the
23 country, an effort was made to arrange the schedule in a
24 manner which would permit each party to depose all
25 individuals that the party felt necessary to depose, prior

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1 to the discovery deadline. 1/ On September 15, 1983, a copy
2 of the deposition schedule was forwarded to the attorneys
3 for each party.

4 As of the date of deposition schedule, i.e.
5 September 15, 1983, the only witness listed by either the
6 Governor or the Joint Intervenors was Jose M. Roesset.

7 On September 26, 1983, Licensee received the Joint
8 Intervenors' Third Supplemental Response dated September 23,
9 1983 to Licensee's First Set of Interrogatories . This
10 supplemental response identified for the first time Dr.
11 Peter Kempthorne, whom the Joint Intervenors "intend to call
12 as an expert witness."

13 On September 26, 1983, two days before the close
14 of discovery at the deposition of one of Licensee's
15 witnesses, Dr. Stanley Kaplan, counsel for the Governor
16 orally informed counsel for Licensee of his intention to
17 call Richard B. Hubbard as an expert witness, but was unable
18 to identify on what subject he would testify. Governor's
19 counsel simply stated that their prior answers to
20 interrogatories would be supplemented "in a few days."

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23 _____
24 1/ Because the Governor's schedule took all remaining
25 deposition days and Dr. Roesset was unavailable for
26 depositions on Monday, Wednesday and Friday outside
Austin, Texas, all parties stipulated his deposition
would be taken September 29, 30, and if necessary,
October 1, 1983.

1 On September 28, 1983, the last day of discovery,
2 during a deposition of an NRC witness and only after inquiry
3 by Licensee's counsel, counsel for the Governor indicated
4 that he intended to call another expert witness, Dr.
5 Apostolakis, and that formal notice would be filed on
6 September 28 or 29. Counsel for the Joint Intervenors also
7 indicated that they too might call another expert witness,
8 but that his identity was not yet known.

9 B. Legal Argument

10 "A party is under a duty seasonably to
11 supplement his response with respect to
12 any question directly addressed to . . .
13 (ii) the identity of each person
14 expected to be called as an expert
15 witness at the hearing, the subject
16 matter on which he is expected to
17 testify, and the substance of his
18 testimony." (10 CFR § 2.740(e)(1)(ii).)

19 The term seasonably is not defined in the
20 Regulations. However, Webster's New Collegiate Dictionary,
21 1977 Ed. defines seasonably as "appropriate to the time or
22 situation." By no stretch of the imagination can the
23 supplementation of interrogatories -- which were served
24 almost 90 days earlier -- two days before the close of
25 discovery and on the last day of discovery, be described as
26 seasonable.

27 Ordinarily, this Board's authority to impose
28 sanctions arises under 10 CFR § 2.707. Resort to 10 CFR
29 § 2.707 for the imposition of sanctions presupposes the
30 existence of a discovery order entered following a motion to

1 compel pursuant to 10 CFR § 2.740. As to the identification
2 of witnesses no such order exists in this case. This
3 section is silent as to sanctions for failure to supplement
4 under 10 CFR 2.740(e)(1).

5 The instant case is analogous to situations which
6 have arisen in the federal courts in applying the sanction
7 provisions of Rule 37 Federal Rules of Civil Procedure
8 ("FRCP"). Wright & Miller, Federal Practice and Procedure:
9 Civil § 2050. Rule 37 FRCP also presupposes a discovery
10 order following a motion to compel prior to imposition of
11 sanctions for failure to comply with discovery orders.
12 However, Rule 37 is similarly silent as to sanctions for
13 failure to comply with Rule 26(e)(1) supplementation
14 requirements. 2/

15 Nonetheless, in dealing with this problem the
16 federal courts have found that it is within their inherent
17 power to impose sanctions for failure to supplement inter-
18 rogatories. See, Campbell Industries v. M/V Gemini, 619
19 F.2d 24 (9th Cir. 1980); Phil Crowley Steel Corporation v.
20 Macomber Incorporated, 601 F.2d 342 (8th Cir. 1979). That
21 this Board has such inherent authority is without dispute.

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25 2/ It should be noted that 10 CFR 2.740(e)(1) and Rule
26 26(e)(1) are identical with respect to supplementation
of the identity of expert witnesses.

1 In its Statement of Policy on Conduct of Licensing
2 Procedures CLI-81-8, 13 NRC 452 (1981), the Commission
3 described this authority as follows:

4 "The Commission's Rules of Practice
5 provide the board with substantial
6 authority to regulate hearing proce-
7 dures. In the final analysis, the ac-
8 tions, consistent with applicable rules,
9 which may be taken to conduct an effi-
10 cient hearing are limited primarily by
11 the good sense, judgment, and managerial
12 skills of a presiding board which is
13 dedicated to seeing that the process
14 moves along at an expeditious pace, con-
15 sistent with the demands of fairness.

16 Fairness to all involved in NRC's
17 adjudicatory procedures requires that
18 every participant fulfill the obliga-
19 tions imposed by and in accordance with
20 applicable law and Commission regula-
21 tions. While a board should endeavor to
22 conduct the proceeding in a manner that
23 takes account of the special circum-
24 stances faced by any participant, the
25 fact that a party may have personal or
26 other obligations or possess fewer re-
sources than others to devote to the
proceeding does not relieve that party
of its hearing obligations. When a
participant fails to meet its obliga-
tions, a board should consider the im-
position of sanctions against the of-
fending party. A spectrum of sanctions
from minor to severe is available to the
boards to assist in the management of
proceedings. For example, the boards
could warn the offending party that such
conduct will not be tolerated in the
future, refuse to consider a filing by
the offending party, deny the right to
cross-examine or present evidence, dis-
miss one or more of the party's conten-
tions, impose appropriate sanctions on
counsel for a party, or, in severe
cases, dismiss the party from the pro-
ceeding. In selecting a sanction,
boards should consider the relative im-

1 portance of the unmet obligation, its
2 potential for harm to other parties or
3 the orderly conduct of the proceeding,
4 whether its occurrence is an isolated
5 incident or a part of a pattern of be-
6 havior, the importance of the safety or
7 environmental concerns raised by the
8 party, and all of the circumstances.
9 Boards should attempt to tailor sanc-
10 tions to mitigate the harm caused by the
11 failure of a party to fulfill its obli-
12 gations and bring about improved future
13 compliance. At an early stage in the
14 proceeding, a board should make all
15 parties aware of the Commission's poli-
16 cies in this regard." 13 NRC 453-454.

10 After review of the Commission's criteria for the imposition
11 of sanctions, it is clear that this is a proper case for
12 sanctions.

13 1. Relative Importance Of The Unmet
14 Obligation

15 As this Board is fully aware, the hearings in this
16 matter involve many complex, technical issues. From the
17 time of the Commission's order in November 1981 it was
18 obvious that expert testimony was going to constitute a
19 major portion of all testimony presented in any contested
20 hearing.

21 Since the inception of the IDVP, the Joint
22 Intervenors have challenged the method which the IDVP chose,
23 i.e. engineering judgment vs. a purely statistical sampling
24 method, to conduct its design review. As a consequence,
25 Lincsee has directed numerous interrogatories to the Joint
26 Intervenors requesting the basis for their support of the

1 statistical method. In complete disregard for the Rules of
2 Discovery, the Joint Intervenors have consistently failed to
3 support their position by designating the basis for any such
4 expert opinion.

5 Depositions were painstakingly scheduled so that
6 each party would have the opportunity to examine the experts
7 proffered by the other parties. Now on the eve of the close
8 of discovery, the Joint Intervenors choose to disclose the
9 identity of a witness who will be the center of their attack
10 upon the adequacy of the IDVP. This disclosure comes at a
11 time when Licensee is precluded by the Board approved
12 schedule from examining the witness. There can be little
13 doubt that the identification of this witness should have
14 taken place prior to the formulation of the deposition
15 schedule so that Licensee would have had the opportunity to
16 examine this witness.

17 As to the Governor, assuming in the first place
18 that oral notification is sufficient to satisfy 10 CFR
19 § 2.704(e)(1), a position Licensee strenuously contests, the
20 conduct is even more egregious. Not only has the failure to
21 list Mr. Hubbard and Dr. Apostolakis as witnesses
22 effectively precluded the taking of their depositions, it
23 has also been used as a shield to protect the Governor from
24 compliance with other discovery requests in this matter.

25 As this Board will recall, Licensee filed earlier
26 motions to compel to obtain information which the Governor

1 refused to disclose. The Governor successfully opposed
2 portions of these motions on the grounds that Mr. Hubbard
3 was a consultant and not an expert witness and therefore the
4 information sought was not discoverable. This Board upheld
5 the Governor's position and precluded production of any
6 documents prepared by Mr. Hubbard.

7 2. Harm To Licensee And The Orderly
8 Conduct Of The Hearings

9 There can be no doubt that the failure to supple-
10 ment the interrogatories seasonably and identify key
11 witnesses has harmed the Licensee. The Licensee has been
12 precluded from taking the depositions of Mr. Hubbard, Dr.
13 Klemphorne, Dr. Apostolakis and others as yet unidentified.
14 Interrogatories have not been answered. Documents have not
15 been produced. In effect Licensee has been put in a
16 position of trial by surprise.

17 This situation will have a definite impact on the
18 orderly conduct of the hearings. First, it will greatly
19 impair Licensee's preparation of pre-filed testimony.
20 Rather than addressing a position set forth in an expert
21 deposition, Licensee will be required to speculate on that
22 position and must prepare testimony without any
23 understanding of the opposition's case. Second, by not
24 having discovered these opinions and their basis, Licensee
25 will be required to conduct examination of these witnesses
26 in a deposition format rather than as cross-examination.

1 This will slow down what is already conceded to be a long
2 and complicated hearing.

3 3. A Clear Pattern Of Obstructive And
4 Delaying Behavior

5 On April 21, 1983, this Board issued its order
6 reopening the design quality assurance issue. The order
7 provided in part:

8 "We expect to proceed as promptly as
9 possible, consistent with the demands of
10 fairness, in resolving the design quality
11 assurance issue now before us in the
12 reopened proceeding. All parties there-
13 fore should be prepared to bear the
14 heavy burdens that accompany the expedi-
15 tious litigation of an issue as complex
16 as this one. See Statement of Policy on
17 Conduct of Licensing Proceedings,
18 CLI-81-8, 13 NRC 452, 453-454 (1981).
19 In addition, we emphasize to all parties
20 the importance of complying with the
21 Rules of Practice, and caution them that
22 failure to abide by the agency's prac-
23 tice rules will not be tolerated." At
24 5-6.

25 On July 22, 1983, Licensee requested this Board to
26 grant motions to compel which had been filed with respect to
its first sets of interrogatories and requests for produc-
tion served upon the Joint Intervenors and the Governor.
Although this Board denied the oral request for a ruling the
Board implicitly restated its position with respect to the
April 21, 1983 order.

In its replies to the Governor's and Joint Inter-
venors' responses to its motions to compel, Licensee pointed
out to this Board the continuing failure of both the

1 Governor and the Joint Intervenors to comply with legitimate
2 discovery requests. Moreover, Licensee accurately predicted
3 the conduct of the Governor with respect to the identity of
4 witnesses. As noted in Licensee's Reply of August 4, 1983:

5 "In answer to Interrogatory No. 2, re-
6 questing identification of witnesses,
7 counsel for the Governor have said that
8 no determination had been made as of
9 that date. It is hard to imagine that
10 with the time remaining and the com-
11 plexity of the issues involved, that
12 such a decision has not yet been made.
13 As with other information requested, an
14 eleventh-hour revelation will be ex-
15 tremely prejudicial and burdensome to
16 Licensee. Frankly, we find it implausi-
17 ble that counsel for the Governor have
18 not yet decided to use Mr. Hubbard and
19 Dr. Roesette [sic] as expert witnesses
20 in the forthcoming hearings." Reply of
21 Licensee, p. 14, fn. 7.

22 No such prediction as to the Joint Intervenors was
23 made at that time since, rather than indicating a decision
24 on who would be called, the Joint Intervenors stated that
25 they had not decided whether any one would be called, and as
26 far as Licensee knew, Joint Intervenors had not even
retained a consultant. In fact, Joint Intervenors have led
all parties to this proceeding to believe that they would
not call any witnesses but would ride the coattails of the
Governor.

Further evidence of a pattern of delay can be
found in the Governor's conduct with respect to the answers
to the second and third set of interrogatories. With full
knowledge of continuing discovery obligations the

1 "consultants," now witnesses, for the Governor were
2 conveniently permitted to become unavailable making the
3 Governor unable to respond to the interrogatories within the
4 time requested.

5 Rather than file a motion for an extension of time
6 when the Governor first knew it would not be able to
7 seasonably comply, the Governor waited until the day before
8 the answers to the second set of interrogatories were due to
9 request the extension. The Board and parties received the
10 request after the answers were due, thus at least in part
11 rendering the motion a fait accompli. The request asked for
12 an extension until August 31, 1983. This Board granted the
13 extension until August 26, 1983. However, the Governor was
14 unable to respond by that time and once again at the
15 eleventh hour informed the Board and the parties at the
16 prehearing conference of that fact. This Board granted a
17 further extension until the 31st, the date originally
18 requested by the Governor.

19 Finally, and the most serious evidence of this
20 pattern, is the identification of witnesses when discovery
21 was essentially closed and at a time when the Governor and
22 Joint Intervenors knew full well that depositions of these
23 witnesses would be impossible.

24 This obvious course of obstructive and delaying
25 conduct can lead to only one conclusion: the Governor and
26 Joint Intervenors have never had any intention and do not

1 now have any intention of conducting this hearing process in
2 an orderly and expeditious manner as ordered by the Board.
3 In fact, Licensee feels secure in predicting that a motion
4 to continue the hearing dates will be the next weapon in
5 their arsenal of delay.

6 C. Sanctions

7 It is apparent that sanctions must be imposed for
8 this conduct. Licensee requests as a sanction that Dr.
9 Kempthorne, Mr. Hubbard, Dr. Apostolakis and any others yet
10 to be identified be precluded from testifying in this
11 hearing. Licensee believes this sanction to be both fair
12 and equitable when considered in view of the conduct of the
13 Governor and Joint Intervenors, and the extreme prejudice
14 being inflicted upon the Licensee as a result of the
15 conduct.

16 In addition, the complete disregard for this
17 Board's authority, as evidenced by this conduct, demands no
18 less. As an alternative and by no means a diminution of the
19 merit and reasonableness of the aforementioned sanction,
20 Licensee requests this Board to permit the Licensee to
21 depose the witnesses after the filing of testimony by all
22 parties on October 8, 1983. Due to the task of preparing
23 testimony and exhibits during the week of October 1-8,
24 counsel for the Licensee simply cannot prepare for the
25 depositions prior to the week of October 10-14. In
26 addition, if Mr. Hubbard or others is to be a witness the

1 Governor and the Joint Intervenors must produce documents
2 and supplement answers to interrogatories prior to any such
3 deposition in order for the deposition itself to proceed in
4 an orderly manner.

5 Finally and most importantly, despite the
6 inappropriate conduct of the Governor and Joint Intervenors,
7 Licensee strongly urges this Board to maintain the present
8 schedule which calls for the commencement of the hearing on
9 October 24, 1983.

10 CONCLUSION

11 This Board has the inherent authority to apply
12 appropriate sanctions for failure to comply with the
13 Commission's Rules of Procedure and thus throughout the
14 discovery process the Governor and Joint Intervenors have
15 engaged in a concerted course of conduct to delay these
16 proceedings. The final act of delay has precluded Licensee
17 from its right to discovery in preparation for the hearings.

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1 This unseemly conduct should not be indirectly rewarded by
2 this Board. Accordingly, we request that the Board order
3 sanctions against Joint Intervenors and the Governor in
4 accordance with the Commission's Rules of Practice.
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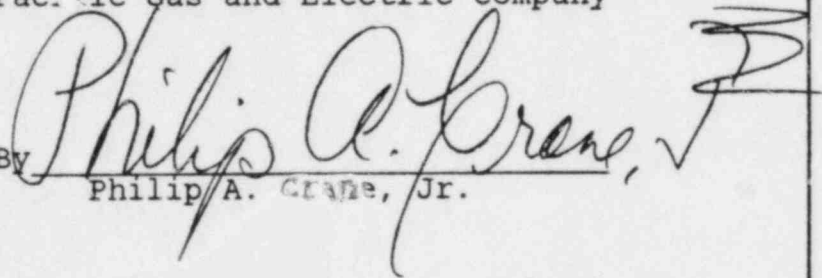
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23 DATED: September 29, 1983.
24
25
26

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
)
Diablo Canyon Nuclear Power Plant,)
Units 1 and 2)
)

Docket No. 50-275
Docket No. 50-323

CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (have) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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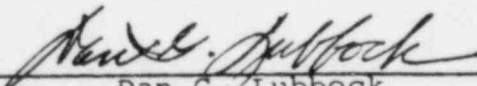
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