UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	NRC Docket No. P-564A
	)	
PACIFIC GAS AND ELECTRIC COMPANY (Stanislaus Nuclear Project, Unit No. 1)	)	
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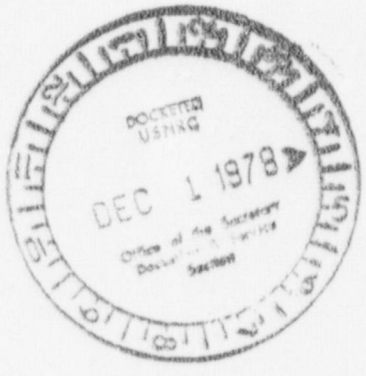
PREHEARING CONFERENCE BRIEF OF THE DEPARTMENT OF WATER RESOURCES



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TOPICAL INDEX

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The State of California Department of Water Resources submits this brief in response to the directive of the Atomic Safety and Licensing Board at the September 29, 1979, prehearing conference. This brief sets forth DWR's views on the legal questions posed by the board and also contains DWR's recommendations, made in the form of motions contained below, on the procedural decisions to be made by the board in bringing this case to hearing.

In part I of this brief we respond to the board's questions regarding the legal significance of the advice rendered by the U.S. Attorney General pursuant to section 105c of the Atomic Energy Act of 1954 as amended (42 U.S.C. § 2135). Part II discusses the practical and legal implications of the Stanislaus commitments as they relate to the

disposition of this proceeding. In part III we respond to the board's questions regarding the effect on this case of other antitrust proceedings against PG&E that have been conducted and are being conducted in other forums. And in part IV we deal with the board's questions regarding the possibility of expediting the proceeding, including DWR's recommendations for the procedures to be followed to hearing.

I

THE ATTORNEY GENERAL'S ADVICE

Section 105c(5) of the act (42 U.S.C. § 2135(c)(5)) provides that if an antitrust hearing is held by the Nuclear Regulatory Commission,

> "The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, . . ."

As the Chairman of this board has observed, neither the commission nor any other regulatory agency has had occasion to interpret the meaning of the phrase "due consideration" in a context like section 105c. (Tr. 1535-36.) The question, then, of the legal significance of the Attorney General's advice is one of first impression.

The legislative history of the provision, which was added to the act in 1970 (Pub. L. No. 91-560 (Dec. 19,

1970)), provides little illumination. The Joint Committee's report merely recites the statutory provision and adds that the Attorney General's advice, if utilized by the commission, must be made a matter of record. (H.R. Rep. No. 91-1470, 2d Sess.,[1/] pp. 30-31 (1970).) The hearings that led to the amendment of section 105c contain occasional, ambiguous references to the weight to be accorded the Attorney General's advice. What references there are tend not to be statements of congressional intent regarding the respect the commission should give the Attorney General's opinion, but rather seem merely to acknowledge as inevitable that the commission will be impressed by the Department of Justice's views. (E.g., Hearings before the Joint Committee on Atomic Energy on Prelicensing Antitrust Review of Nuclear Power Plants, 91st Cong., 1st Sess., pt. 1,[2/] at pp. 124-26 (1969); Hearings before the Joint Committee on Atomic Energy on Prelicensing Antitrust Review of Nuclear Power Plants, 91st Cong., 2d Sess., pt. 2,[3/] at p. 469 (1970).)

Further confounding analysis of section 105c(5) is the fact that the section fails to distinguish between advice that a hearing is required and advice that a hearing is not required. Similarly, no distinction is recognized between situations in which the Justice Department is participating as a party and those in which it declines to participate.

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1. Hereinafter cited as "Joint Committee Report."
2. Hereinafter cited as "1969 Hearings."
3. Hereinafter cited as "1970 Hearings."

The term "due consideration", as used in a context like section 105c, has no well-established meaning in the law. While analysis is rendered more difficult by the absence of apposite authority, it is somewhat simplified by the limited options available. Roughly speaking, the Attorney General's advice can be treated in one of only two possible ways: either as evidence or as, in effect, the views of an amicus. We think it clear that the commission cannot treat the views of the Attorney General as evidence, and therefore we conclude that it is properly treated as the views of an amicus, to be accorded whatever weight their logic and persuasiveness commands.

The principal impediment to treatment of the advice as evidence is the manifest unfairness of according such status to legal opinion when the foundation for the opinion cannot be probed by the parties. Although Congress obviously contemplated that the advice would be accompanied by "an explanatory statement as to the reasons or basis therefor" (§ 105c(1); see also Joint Committee Report at pp. 28-29 ("this requirement is only fair and reasonable, and it should help facilitate and expedite the subsequent procedure.")), a cursory examination of the Attorney General's Stanislaus advice letter demonstrates that such explanation falls far short of the basis for an opinion to be admitted in evidence. The advice letter is largely limited to transmitting the

Stanislaus commitments; the six-paragraph letter authored by Justice contains four paragraphs reciting the history of the application and previous PG&E applications, one paragraph disclosing that negotiated license conditions have been arrived at, and a final paragraph containing conclusory assertions that "effectuation of the Commitments will moot the questions of anticompetitive conduct by PG&E . . . ." Obviously, assuming the Attorney General could be qualified as an expert witness on the subject, he could not be permitted to testify as to his opinions expressed in that letter in the absence of a substantial factual foundation wholly absent from his letter of advice.

For the Attorney General's advice to be treated as evidence, due process would require that the parties be accorded full discovery and cross-examination in order to determine the factual basis of the advice. There is some question whether, under any circumstances, Congress contemplated such a probe. During the Joint Committee hearings, a witness for Southern California Edison Company expressed concern that a recommendation of a hearing could adversely affect a utility's financial position; an exchange regarding the fairness of allowing the Attorney General's advice to be formulated in camera seems to suggest that the basis of the opinion is susceptible of examination.[4/] (1970 hearings at

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4. "Mr. BARRY [counsel to Southern California Edison]. Let me clarify that. I think we meant at that point what took place before he published his advice in the Federal Register, we could not, we don't know; there is no public record developed as to what he considers when he formulates his advice and gives it.

[Continued.]

p. 457.) But two years earlier Assistant Attorney General Donald F. Turner testified that cross-examination of the Department of Justice regarding its advice would be improper.[5/]

Accordingly, if the Stanislaus advice letter is to be treated as evidence in this proceeding, DWR requests that the board so advise us now so that appropriate proceedings

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Footnote 4 continued.

"Mr. NEDRY [special counsel to Edison]. In other words, his advice is formulated on an in-camera proceeding.

"Mr. REICH [special counsel to the Joint Committee]. But you may, under the Joint Committee bill -- is that not true -- question him in regard to the basis for his advice, and thereby have some opportunity to have the benefit of cross-exmination?

"Mr. BARRY. After the damage has been done, though, and the pronouncement has been published in the Federal Register. Yes, you could.

"Chairman HOLLIFIELD. I think that clears that point." (1970 hearings at p. 457.)

5. "Mr. CONWAY [Joint Committee Executive Director] . . . . If you were to come before the AEC and give testimony to support your findings [that issuance of a license would create or maintain a situation inconsistent with the antitrust laws], would you have any objection to subjecting yourself to cross-examination by the applicant?

"Mr. TURNER. Oh, certainly we would. A lawyer for a party doesn't subject himself to cross-examination. What the Attorney General would be rendering would be simply a legal opinion, . . ." (Hearings before the Joint Committee on Atomic Energy on Participation by Small Electrical Utilities in Nuclear Power, 90th Cong., 2d Sess., pt. 1, at p. 68.)

can be had. DWR will require discovery against the Department of Justice,[6] and an opportunity to present evidence at the hearing on the adequacy of the basis for the Department of Justice's conclusion. DWR will further request that the board make specific findings of fact on the adequacy of that basis, the sufficiency of the department's review, and the soundness of its conclusion.

In Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3) 6 A.E.C. 312, 315 (1973), a licensing board determined that if the Department of Justice declines to participate in antitrust proceedings before the commission,

> "The Department is not a party to these proceedings; and should the Commission accept the recommendations of the Board contained herein granting the various petitions to intervene, the Board would regard the Department's present status as that of 'amicus curiae.'"

The serious problems outlined above would be avoided by this board's following that precedent and treating the Stanislaus advice letter as the opinion of an amicus. It would then be

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6. In any event some discovery will have to be directed to Justice -- but discovery of a different sort, intended for far different purposes. To date DWR plans only to seek from Justice evidence on the meaning of the commitments and PG&E's objectives in their negotiation. Examination of the adequacy of the Attorney General's discharge of his duties under section 105c would call for discovery of a fundamentally different nature.

entitled to whatever weight it commands by the force of its logic. The parties would be indirectly supporting or attacking the letter by proving their substantive cases, and the board could, at the close of the hearing, consider the advice in the light of the evidence adduced without the need to reach any express findings regarding the adequacy of the advice.

II

THE STANISLAUS COMMITMENTS AND THE SCOPE OF THIS PROCEEDING

At various times in this proceeding, it has been suggested that the agreement between PG&E and the Department of Justice to the Stanislaus commitments renders moot all previous historical complaints regarding PG&E's anticompetitive conduct and renders a hearing on the history of PG&E's conduct unnecessary. A substantial portion of PG&E's motion for summary disposition was directed to precisely that proposition. In a similar vein, it has been suggested that inquiry into specific contracts no longer in effect (e.g., the Seven Party Agreement (see Tr., p. 1519)), or certain anticompetitive practices PG&E now represents it has abandoned can be dispensed with. The goal of such suggestions is to exclude from the present hearing the body of documents -- comprising by far the majority of the documents subject to production -- that relate to the history of PG&E's conduct in the bulk power services market.[7/]

7. Interestingly, at different times PG&E has suggested that discovery is improper if it does not relate to historical matters. (See Tr., p. 1522.)

There exists a simple test of whether or not resolution of the historical issues is necessary to an evaluation by this board of the adequacy of the commitments: Is PG&E prepared to have this board, in adopting license conditions, assume that intervenors' allegations regarding PG&E's historical conduct are true? If PG&E is so prepared, DWR is prepared to have discovery in this case correspondingly limited. The fact that PG&E has thus far resisted this suggestion demonstrates that resolution of the historical issues is relevant to an assessment of the need for additional license conditions.

The underlying reason why history remains a part of this proceeding can be readily identified. The Stanislaus commitments do little or nothing to diminish the enormous market power PG&E has had and continues to have in the bulk power services market. Under conventional antitrust analysis, whether or not PG&E's continued possession of that market power is unlawful turns in part on the method by which the power was acquired and the uses to which it has been put. As long as PG&E continues to cling to its right to attempt to prove that its market power was not acquired and has not been used in a manner inconsistent with the antitrust laws, resolution of this historical question regarding its acquisition and use will be necessary in this case, and the Stanislaus commitments cannot be said to have rendered these issues moot.

III

THE EFFECT OF OTHER PROCEEDINGS ON THIS CASE

It has sometimes been suggested that the present proceedings can be simplified because various entities have been pressing antitrust claims against PG&E for several years in other forums. Any hope that those other proceedings could have the effect of narrowing the scope of this case would be misplaced.

Prior to the filing of its petition to intervene in this case, the Department of Water Resources had never been party to any proceeding in any court or administrative agency in which allegations regarding the conduct of PG&E under the antitrust laws was at issue. DWR has never litigated any of the claims it makes here in any other forum.[8/] We are aware of some past and current litigation between PG&E and the other intervenors in this case, but DWR is not a party to any of those cases and is not in privity with any of those parties. Therefore, it is unnecessary to inquire

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8. On December 23, 1977, subsequent to the commencement of this case, PG&E filed with the Federal Energy Regulatory Commission a proposed rate change for its Rate Schedule FPC No. 36, which is a contract between DWR and PG&E, Southern California Edison, and San Diego Gas and Electric for the sale, exchange, and transmission of extra high voltage power. (FERC Docket No. ER-78-163.) DWR responded on January 31, 1978, with a protest, complaint, motion to reject, petition to intervene, and request for a hearing, in which DWR made certain of the antitrust allegations made in this proceeding. FERC has yet to rule on (or even acknowledge) the DWR filing, and the docket has been dormant for nearly a year now.

further into any possible ground for limiting this proceeding on the basis of litigation taking place elsewhere; DWR was not a party to any other case and was not in privity with any party to any other case against PG&E involving these allegations, and it cannot be deprived of a full hearing on them here. (Cappaert v. United States (1976) 426 U.S. 128, 146-47.)

IV

BRINGING THIS PROCEEDING TO A FAIR AND EXPEDITIOUS CONCLUSION

At the September prehearing conference, the board urged the parties to explore ways in which resolution of this case can be expedited. DWR has given considerable thought to this matter and offers the following observations and recommendations.

In evaluating any proposal for expediting the case, a single crucial question must be answered: Are the intervenors and staff going to be required to prove their allegations regarding PG&E's historical conduct? Since the vast bulk of the documents to be produced pursuant to the first joint production request are addressed to the historical issues, an answer in the affirmative leads inescapably to the conclusion that a large body of additional documentary evidence will have to be produced in order for intervenors and staff to be given a fair opportunity to meet their burden of proof. A negative answer to the question would permit a

substantial shortening of the discovery schedule; but for the case to be so simplified, PG&E would have to be willing to make concessions it apparently is not now prepared to make.

We have also given careful thought to the board's suggestion that, assuming historical facts are still relevant, the parties may be able to strike some of their original allegations on the basis of what they have learned from the PG&E files thus far. We believe a careful examination of the suggestion demonstrates that our work to date with the documents cannot possibly have that effect. The statement of issues in this case has been derived from the allegations made in pleadings verified by people familiar with the electric utility industry in California. It must be presumed that the affiants sincerely believed the allegations to be true and provable. Examination of the documents received to date for support of these allegations can have resulted in one of two conditions. Either supporting documents have been found or they have not. If the documents reviewed to date support the allegations made in the petitions, the parties can scarcely be expected now to agree to have such allegations stricken; and it would call for more than mere heroics to expect that a party would be so satisfied with the evidence obtained thus far that it would be willing to forego access to all other documents relevant to the subject,

including documents available to PG&E that might be offered at hearing in support of an unanticipated defense of PG&E's conduct. If, on the other hand, the documents reviewed thus far fail to contain evidentiary support for the allegation, the party who made the allegation in good faith would be entitled to believe that the supporting evidence simply resides in files from which production has not yet been obtained.[9/] Thus, no matter what the content of the documents that have been made available, they could not be expected to induce any intervenor to abandon any of its allegations.

Furthermore, DWR remains convinced that the organization of the documents in PG&E's files is such that one could strike a majority of the issues without appreciably reducing the production burden. No matter how many issues there are, practically all the same files must be pulled, and each piece of paper in each file must be read thoroughly enough for the paralegel to know what it is about. Once the paralegal is familiar with the document production request, the act of determining whether the document fits one of the prescribed categories necessarily takes far less time than acquisition of an understanding of a document's contents. And reduction of the number of categories would have only slight effect on the total time required to determine whether a given document must be produced.

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9. In fact, our experience to date with the documents has tended to verify our beliefs. We certainly have found nothing in any of the documents that would lead us to believe that we will be unable to prove any of our allegations.

However, one suggestion made by the board at the prehearing conference does, we think, hold promise for a possible shortening of the proceeding. That suggestion involved bifurcation of the issues in order to permit a trial of the remedy issues first and thereby possibly obviate the need for trial on the liability issues altogether. We believe the advantages of such a procedure justify the board's entering an order to that effect, and, as more fully set forth below, we so move. If the case is not to proceed in such a fashion, we see no alternative to proceeding substantially in the manner proposed by DWR at the September prehearing conference. Accordingly, should the board deny the motion in part IV(A) of this brief, DWR moves in part IV(B), below, that an order similar to that sought in September be entered.

A. Motion For Bifurcated Hearing

During the September discussion of the possibilities for trimming discovery in this proceeding, the board suggested the possibility of a "reverse bifurcation" of the hearing. As we understood it, the suggestion involved a trial of the remedy- or license-condition-phase of the proceeding prior to a second trial involving liability issues. DWR's motion is based on that proposal. We believe it represents a method of proceeding to hearing which will expedite resolution of this substantial controversy while protecting the rights of

all parties to a full and fair hearing. In view of the commission's rules authorizing the board to "regulate the course of the hearing and the conduct of participants" (10 C.F.R. § 2.718(e)) and to "enter an order . . . which limits the issues or defines the matters in controversy to be determined in the proceeding" (10 C.F.R. § 2.752(c)), the proposed order appears well within the board's authority.

DWR's motion, embodied in the proposed order attached to this brief as Appendix A, offers the board and the parties several important advantages. First, it makes possible the resolution of the difficult issues regarding relief before the parties could possibly be prepared to try the liability issues that require the great bulk of discovery. Second, it permits the parties to evaluate the attractiveness of settlement after learning what relief may be available but before the lengthy trial on liability. Third, it takes advantage of the structure of PG&E's files -- much of which is easily separable on a chronological basis -- by deferring production of the great majority of the documents regarding the history of PG&E's conduct; production of historical documents then can take place simultaneously with preparation and hearing of the remedy issues.

The foundation of DWR's proposed order is the preparation and trial of remedial issues prior to trying the substantive liability of PG&E. The first phase of the proceeding would focus on a carefully defined set of issues

which must be resolved in order to determine the types of license conditions, if any, which may be necessary in this case. Having resolved those issues, we would then proceed in the second phase to determine whether as a matter of fact PG&E's activities warrant the imposition of those license conditions. Those issues which will require proof during phase I of the proceeding and those which will be set forth as allegations which are presumed true for purposes of phase I, are to be carefully defined. Because it is to be assumed in phase I that the activities alleged actually took place and are inconsistent with the antitrust laws or their underlying policies, the limitations and scheduling concerning both phases of discovery are clearly established.

The key feature of the proposed procedure is the trial of the remedy related issues during the first phase of the hearing. (Proposed order, para. 1.) The notion underlying this procedure is that the board will be provided an early opportunity to determine the license conditions which would be justified by the allegations of the parties. (Proposed order, para. 2.) DWR envisions that in attempting to prove the market situation, evidence will be permitted dealing with the existing bulk power arrangements between PG&E and other entities in the market area, how those contractual arrangements operate in practice, PG&E's current and future policies and practices with respect to its competitors or

potential competitors, and the effect, if any, of the Stanislaus commitments on the market situation. (Proposed order paras. 2(a)(i)-(iii).) Evidence would also be introduced concerning the economic consequences of the competitive situation. (Proposed order, para. 2(a)(iv).) Finally, evidence would be introduced on the issue of whether additional license conditions are necessary and, if so, what those conditions should be. (Proposed order, para. 2(b).)

This phase I hearing will be based in part on a compendium of all allegations made by the intervenors regarding PG&E's historical activities and the inconsistency of those activities with the antitrust laws. (Proposed order, para. 3.) This compendium, referred to as the joint statement in the proposed order, will initially be agreed to by the intervenors with subsequent periods for comment by both PG&E and the NRC staff. (Proposed order, paras. 3(a)(i) and (ii).) Upon completion of the comment period, the board issues an order finalizing the joint statement of allegations, which would then serve, together with whatever findings the board makes concerning the current market situation, as a basis for its ruling on the need for and scope of license conditions. Furthermore, it will be assumed in phase I that the competitive situation found to exist is inconsistent with the antitrust laws. (Proposed order, para. 3(b).)

The amount of discovery necessary to prepare for the phase I hearing is, of course, substantially less than

that which would be required for a full antitrust review hearing. Consequently, the proposed order sets limits with respect to the amount of discovery necessary and the amount of time available in which to conduct discovery for the purpose of preparing for the phase I hearing. An important feature of these limitations is the reduction in the immediate document production burden on PG&E by limiting its obligation to produce only those documents dated after January 1, 1976, roughly the date on which the Stanislaus commitments were known to PG&E to be final. (Proposed order, para. 4(a).) This document production would be carried out consistent with PG&E's current obligations under the board's document production order and the stipulation of the parties and would terminate in approximately nine months time. (Proposed order, para. 4(b).) At the same time, the parties would be free to take any depositions and propound any interrogatories they felt necessary to prepare for the trial of those issues provided for in paragraph 2 of the order. All such discovery would terminate three months after the completion of document production. (Proposed order, para. 4(c).) Following the completion of discovery, a relatively short period is set aside for the preparation of final issue limiting documents, trial briefs and final prehearing conferences by the board concerning the phase I hearing itself. (Proposed order, para. 4(d).)

Upon completion of phase I of the proceeding, preparations will be made for scheduling phase II. Phase II of the hearing will be the trial on the subject of PG&E's liability under the antitrust laws. (Proposed order, paras. 5(a) and (b).) Under DWR's proposal, details of the scheduling for phase II are left for determination after completion of phase I since the completion date for phase I is unknown at this time. The one exception to this scheduling deferral is the production of documents. The proposed order provides for commencement of document production, to the extent not completed in phase I, immediately upon the completion of phase I document production. (Proposed order, para. 6.) Since the completion of document production remains the largest obstacle to commencement of the hearing on liability, it should recommence as soon as possible and continue while the phase I hearing is in progress.

The reverse bifurcation plan, if immplemented, will place all the parties in the unique position of having the opportunity to dispose of the entire proceeding at the end of phase I. We arrive at that position because the competitive situation in which the Stanislaus project will operate will have been fully developed during the phase I hearing. All of the intervenors' allegations regarding PG&E's liability will have been fully examinined in the context of that competitive situation. The impact of Stanislaus commitments will have been fully litigated. The board

will have made all of its rulings regarding nexus and it will have identified what license conditions, if any, are called for.

The likelihood of terminating the proceeding at the end of phase I -- without the need to try the liability issues -- should not be underestimated. PG&E has made it clear that it bases its defense largely on the Stanislaus commitments and the claim that they render any additional relief unnecessary. That defense will be fully litigated in phase I. If PG&E prevails, the other parties will have no incentive to try liability, since it would get them no new relief. On the other hand, if that defense fails, PG&E will be left in phase II with only its traditional defense (e.g., monopoly power thrust upon it, approval by regulatory agencies, etc.). With all due respect to the skilled defense counsel it employs, we believe PG&E will, under those conditions, recognize the minimal prospects it has for prevailing, and we believe it would have to give settlement serious consideration. Furthermore, the board's decision in phase I could result in an intermediate position between the positions of the various parties that could well induce the parties to forego a costly liability trial.

Even if both phases of the case must be tried, this proposal can be expected to speed up disposition of the case. By overlapping discovery for phase II with the trial of phase I, the total time required should be reduced. The

procedure also offers increased opportunity for simplification of the liability issues and possible shortening of the phase II trial.

DWR is well aware of the dilemma that the board faces as a result of the tension caused by its obligation to provide a full and fair hearing and its legitimate desire to reduce the burden of achieving that goal. We are convinced that this tension stems, in large part, from the asymmetry between those issues about which the parties are least certain how the board will rule -- the relief issues -- and those which engender the largest discovery burdens -- the liability issues. DWR's proposal seeks to take advantage of that asymmetry by permitting the resolution of the high-uncertainty, low-discovery issues at a date earlier than would otherwise be possible. DWR believes that the proposal for reverse bifurcation provides the only feasible opportunity for reducing the burden we all face while protecting the parties' rights to a full and fair hearing. We therefore move the board to enter the proposed order.

B. Alternative Motion for Order Establishing Discovery Schedule For A Single Hearing.

Should the board decline to enter the bifurcation order requested by DWR, we presently can see no alternative but to proceed to hearing in the manner proposed by DWR in September. None of the other suggested short-cuts protects intervenors' rights to a full and fair hearing. We therefore

move the board for an order substantially like the proposed order appearing in Appendix B to this brief.

The proposed order is largely the same as the one proposed by DWR in September. All the reasons given by DWR for that order, which are set forth in our motion of September 14, 1978, remain valid today. We therefore incorporate them in the present motion without fully setting them forth in this brief. However, certain changes and circumstances have compelled modifications in the proposed order, and we explain those changes here.

The most important of the changes is the altered status of the warehouse documents. PG&E has repeatedly reassured the other parties that under its document storage procedures, only very old documents having no importance to current operations and issues are sent to the warehouse. We were specifically led to believe that the files were generally sent to the warehouse only after they had first been stored in the company's thirty-third floor interim storage facility, a location surveyed by the other parties during document production. (See, e.g., Tr., pp. 1057-1064.) Intervenors and staff had correspondingly consigned to a low priority discovery from the warehouse and had agreed to base production requests solely on examination of the transmittal slips prepared by PG&E staff in the course of storing documents there. The transmittal slips were first obtained by the

parties shortly before the September prehearing conference and were microfilmed for examination after the conference.

Upon examination of the transmittal slips in the last two months, we discovered that an enormous volume of highly relevant documents has been transferred to the warehouse in the past 15 months--a large fraction of them right after the first joint production request was propounded and another large group immediately before intervenors and staff commenced on-site examination of documents at PG&E headquarters.[10/] Among the documents were hundreds of files of recent vintage and highly relevant to the issues in this case. For example, in 1978 alone scores of files were transmitted to the warehouse regarding the California Power Pool, the Pacific Northwest Intertie, the Department of Water Resources, the Sacramento Municipal Utility District, the United States Bureau of Reclamation, Municipalization, and at least a dozen files bearing the enticing title "antitrust." The propounding parties are currently completing their coordination of the list of files from which production will be sought, and a copy of that list will be provided to PG&E and the board before January 23.

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10. At our November meeting with PG&E, we discussed the timing of these document movements. PG&E denied any intention to mislead the other parties and claimed the coincidences were purely the result of operational requirements. We have chosen not to invest the resources necessary to verify these claims. At the least, we believe that PG&E was obliged to advise the other parties of the fact that its prior characterizations of the warehouse were no longer accurate.

Although we cannot determine accurately the number of pages that will have to be produced from the warehouse, it appears clear that a much more substantial production of warehouse documents will be required than was earlier thought. Our requests for an opportunity to examine the warehouse files have been refused by PG&E. Accordingly, we are no longer in a position to represent to the board--as we did earlier (see Tr., pp. 1402-1403)--that production from the warehouse will not significantly increase the production burden.

We have therefore modified the proposed order to provide for prompt review and production from warehouse files. The order also requires PG&E to provide the board and the parties with an estimate of the volume of documents subject to production from those files for which no estimate has yet been provided. Finally, the provisions of the proposed order regarding claims of privilege have been modified along the lines pursued at the prehearing conference in September. (See Tr., pp. 1530-31.)

Intervenors and staff remain willing to undertake responsibilities for on-site review of warehouse and private files to expedite completion of discovery. In addition, we intend to continue to work with PG&E to identify categories of documents that can be eliminated from production. And we remain willing to work with PG&E on any procedure that would

simplify or speed production without prejudicing our rights to access to all relevant evidence.

Therefore, DWR hereby respectfully moves the board to enter an order substantially like that provided in Appendix A to this brief. If the board declines to do so, DWR moves the board for an order substantially like that provided in Appendix B. While under either course of action substantial additional time will be required for the hearing and disposition of this case, we believe these are the only two alternatives available to the board that fully protect the rights of all parties and lead to a full and fair hearing of the issues before the board.

DATED: December 1, 1978.

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Appendix A

PROPOSED ORDER REGARDING BIFURCATION OF HEARING

The board, having considered the various motions, papers, and evidence presented to it, as well as the oral argument of all parties, at the pretrial hearing conference held on September 25, 26 and 27, 1978, and reconvened January 23, 24 and 25, 1979, hereby orders, pursuant to 10 CFR §2.718(e) and §2.752(c), as follows:

1. The hearing in this proceeding shall proceed in two phases. Phase I shall deal with the issues specified in paragraph 2 of this order concerning the need for additional license conditions. Phase II of the hearing shall deal with the issues specified in paragraph 5 of this order concerning PG&E's historical activities and concerning the relationship of the situation found to exist with the antitrust laws and policies underlying those laws.

2. During the phase I hearing, the board will take evidence limited to the following issues:

a. The competitive situation in the relevant markets, including:

i. Operative contractual arrangements for bulk power services;

ii. PG&E policies or practices regarding competition for bulk power services;

iii. The effect, if any, of the Stanislaus commitments on any of PG&E's policies or practices

as developed pursuant to subparagraphs (i) and (ii);

iv. The economic consequences flowing from the competitive conditions.

b. Whether any license conditions are necessary and appropriate to remedy the competitive situation found to exist following the proof described in subparagraph (a) of this paragraph, assuming that that situation is inconsistent with the antitrust laws and the policies underlying those laws.

3. For purposes of the phase I hearing only, it will be assumed that all allegations of the intervenors regarding the applicant's conduct are true and that the alleged situation is inconsistent with the antitrust laws and the policies underlying those laws.

a. For purposes of implementing this paragraph, intervenors shall file a joint statement consolidating all their respective allegations concerning activities of the applicant which are inconsistent with the antitrust laws or the policies underlying those laws.

i. Intervenors shall file the joint statement by October 1, 1979.

ii. The applicant may file any comments or proposed modifications to the joint statement by November 1, 1979;

iii. The NRC staff may file any comments or proposed modifications to the joint statement or the comments by the applicant thereon by November 15, 1979.

iv. The board shall approve a final joint statement on December 1, 1979, which shall set forth all allegations determined to be in controversy for purposes of the phase I hearing.

b. For the purpose of resolving the issues set forth in subparagraph (b) of paragraph 2 of this order, all allegations contained in the final joint statement shall be deemed true and considered part of the current competitive situation.

4. The schedule for resolving issues encompassed by the phase I hearing shall commence in the following manner:

a. Document production will proceed consistent with the board's order and the stipulation of the parties concerning production of documents in all respects except that applicant need only produce documents dated later than January 1, 1976;

b. Production of documents described in subparagraph (a) of this paragraph shall be completed no later than September 30, 1979;

c. All other forms of discovery concerning issues encompassed by the phase I hearing shall conclude by February 1, 1980;

d. The hearing on the issues described in paragraph 2 of this order shall commence on May 5, 1980;

e. The board shall issue the initial decision on the issues described in paragraph 2 of this order following the conclusion of the phase I hearing.

i. In the event that the board determines that license conditions are necessary to remedy the assumed situation inconsistent with the antitrust laws, the initial decision shall describe what those license conditions shall be;

ii. The board's decision concerning the necessity and scope of any license conditions shall be final. Any license conditions found by the board in phase I to be necessary and appropriate shall not attach to the license unless intervenors prevail at the phase II hearing.

5. Following completion of the phase I hearing, a schedule will be established for the conduct of the hearing of phase II of this proceeding which shall encompass the following issues:

a. Whether the allegations set forth in the final joint statement of the intervenors regarding the activities of the applicant are true and whether those activities are inconsistent with the antitrust laws and policies underlying those laws;

b. Whether the situation found by the board with respect to the issues tried pursuant to paragraph 2a of this order is inconsistent with the antitrust laws or the policies underlying those laws.

6. The schedule established for the phase II hearing pursuant to paragraph 5 of this order shall encompass all phases of discovery and other prehearing matters except that the document production ordered by the board in its order concerning production of documents dated January 18, 1978, shall, to the extent not completed pursuant to paragraphs 4a and 4b of this order, commence on October 1, 1979.

APPENDIX B

ALTERNATIVE PROPOSED ORDER

The board, having considered the various motions, papers, and evidence presented to it, as well as the oral argument of all parties, at the pretrial hearing conference held on September 25, 26 and 27, 1978 and reconvened January 23, 24 and 25, 1979 hereby orders, pursuant to 10 CFR §§ 2.718(e) and 2.752(c), as follows:

(A) PG&E is directed to produce documents pursuant to first production request, order of the board, and stipulation of the parties, at an approximately uniform rate no less than 4,000 pages per business day.

(B) PG&E production from central office files shall be completed in the following order:

(1) 33d floor central files--"retired executive offices file room";

(2) planning department;

(3) siting department;

(4) current executive offices;

(5) law department;

(6) warehouse files;

(7) power control office;

(8) electric operations office;

(9) financial planning and analysis department;

(10) customer operations;

(11) economics and statistics department;

(12) government relations department;

(13) engineering office;

(14) balance of engineering department;

(15) balance of rates and valuation department;

(16) hydrogeneration department (including microfiche);

(17) steam generation department;

(18) public relations department;

(19) internal auditing department;

(20) engineering research department;

(21) balance of 33d floor.

(C) Within thirty days PG&E shall provide the board with an estimate of the volume of documents subject to review for production from non-central office files, information sufficient for the parties to agree on the order in which production is to be undertaken, and a proposed schedule for production. PG&E should allocate its resources in such a fashion that production from non-central office files in each department or office is completed at approximately the same time as production from that department's or office's central files is completed. PG&E shall insure by the fifteenth

of each month that all available documents have been placed in the depository.

(D) No later than sixty days after completion of production from each department or office, PG&E shall make its motion for protective order for all documents originating in the central and non-central office files of the completed department or office that were withheld from production. Prior to such motion, PG&E shall have advised the propounding parties of the documents it intends to withhold and the parties shall seek to resolve as many claims as possible without need of a ruling by the board.

(E) Intervenors are directed to establish procedures analogous to those required above, to meet their respective production obligations. Their rates of production shall be proportional to that of PG&E, and production shall be in an order that accommodates the needs of PG&E.

(F) Upon completion of production pursuant to the first production request, order, and stipulation, PG&E shall promptly file an appropriate verification.

(G) All discovery shall be completed 120 days after the filing of PG&E's verification of completion of production or 120 days after the board rules on the final PG&E motion for protective order, whichever is later.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Prehearing Conference Brief of the Department of Water Resources and this certificate were served upon each of the following by deposit in the United States mail, first class postage prepaid, this 1st day of December 1978.

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