

UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))

Docket Nos. 50-275 O.L.
50-323 O.L.

ANSWER OF GOVERNOR DEUKMEJIAN
TO MOTION OF PG&E FOR SANCTIONS

On September 30, 1983, counsel for Governor George Deukmejian was served with a copy of the motion of Pacific Gas and Electric Company seeking sanctions against the Governor and Joint Intervenors for alleged failures to seasonably supplement interrogatory answers. PG&E contends that the Governor wrongly delayed identifying as expert witnesses two experts, Mr. Richard B. Hubbard and Prof. George Apostolakis, prior to the dates of their formal designation, September 28, 1983.

PG&E's motion is wholly unfounded. Two simple facts are entirely dispositive of the PG&E motion: that the decisions to call the two witnesses were necessarily made only last week, and that the time of their designation has worked no disadvantage on PG&E but rather innures to PG&E's benefit. The motion should be denied.

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THE WITNESSES WERE IDENTIFIED
AT THE EARLIEST POSSIBLE TIME

As the Appeal Board knows well, this proceeding has, for the benefit of the applicant, been moving on an expedited schedule. The key issues are the quality of the design and the adequacy of the Independent Design Verification Program (IDVP) to demonstrate design quality; yet the design itself is not completed and the IDVP has not even issued all its interim technical reports (ITRs). There is no final report from the IDVP yet^{1/} and the staff's Safety Evaluation Report (SER) still awaits completion. Nevertheless, PG&E expects the other parties to know the precise details of the cases they will be presenting before PG&E even has a completed design for its power plant.

Virtually all of the evidence and witnesses in this case will necessarily belong to PG&E and, to a lesser extent, to the IDVP. Therefore, counsel for the Governor has intended to establish the Governor's affirmative case, to the maximum extent possible, through the witnesses and documents of the applicant and the IDVP. (See Declaration of Michael J. Strumwasser, p. 1, ¶ 2.) One of the purposes of the discovery

^{1/} The IDVP has issued a four-volume document entitled a "Final Report," but its finality is limited to the title. As the board and the parties are well aware, that document was issued on June 30, 1983, at the direction of the Diablo Canyon Project (DCP), without conclusions on an enormous number of issues. (See IDVP Final Report, § 7.1, p. 7.1-1.)

process has been to assess the extent to which independent experts would have to be retained and presented at the hearing. That assessment, although still ongoing, had by last week reached the point where decisions about Mr. Hubbard and Dr. Apostolakis could be made. (Strumwasser Decl., pp. 3-6, ¶¶ 7, 11.)

The fact is that the applicant has the burden of going forward and the burden of proof in this case. The Governor's case is inherently a case in rebuttal. While discovery permits the Governor to identify the contours of PG&E's case, the discovery process itself, like the design of the plant, has been a continuing process. Only as a result of the depositions conducted in the last two weeks has the PG&E case -- and the underlying facts about the design of the power plant -- been known sufficiently well to permit an assessment of the need for the Governor to put on witnesses of his own at the hearing.

A. The Decisions to Call Mr. Hubbard and Prof. Apostolakis Were the Products of the Discovery Process and the Settling of Issues

The question whether to call Mr. Hubbard as a witness depended largely on the issues to be admitted by the Appeal Board for litigation and on the testimony of the applicant, IDVP, and staff witnesses.

At the August 23-24 prehearing conference, the board eliminated the issues of QA before November 1, 1981, and QA for important-to-safety structures, systems, and components under General Design Criterion 1. These decisions made it substantially less likely that the Governor would call

Mr. Hubbard as a witness -- a fact acknowledged by PG&E's counsel at the close of the prehearing conference.

(Strumwasser Decl., pp. 2-3, ¶ 5.) However, the course of discovery, especially the depositions on September 22 and 24, led counsel for the Governor to conclude that the testimony of Mr. Hubbard may be necessary and he should be designated as a tentative witness. (Strumwasser Decl., pp. 3-4, ¶¶ 6-8.)

In the instant motion, counsel for PG&E express incredulity that the Governor had not decided long ago to call Mr. Hubbard. (PG&E Motion at 12:10-13.) Yet scarcely a month ago counsel expressed confidence that the Governor could not possibly have any use for Mr. Hubbard's testimony. (Strumwasser Decl., pp. 2-3, ¶ 5.)

The tentative decision to designate Prof. Apostolakis was likewise the product of the discovery process. The Governor has, all summer, been seeking the basis for the position of PG&E and the IDVP, first heard by the Governor at the July mini-hearing on construction QA, that statistical methods are inapplicable to design verification. (Strumwasser Decl., p. 5, ¶ 10.) Accordingly, an expert in statistics and nuclear engineering was sought out and retained. (Ibid.) Because the documents released by the IDVP and PG&E contained little more than conclusory assertions, their position could not be fully assessed without taking the deposition of the statistician purportedly relied on by the IDVP and PG&E and evaluating his testimony using the services of the independent expert. This took place at the September 26 deposition of

Dr. Stanley Kaplan. The result of that deposition was the determination that the position of PG&E and the IDVP was technically unfounded and that the testimony of Prof. Apostolakis would probably be needed. (Strumwasser Decl., pp. 5-6, ¶ 11.) He was designated on September 28. (Ibid.)

B. No Party -- Including PG&E, the IDVP, and the Staff -- Has Yet Settled on Its Experts

PG&E expects the Governor to have decided long ago on his expert witnesses. In fact, no party has done so.

On September 28 -- the same day the Governor formally designated Mr. Hubbard and Prof. Apostolakis -- PG&E supplemented prior interrogatory answers by identifying ten previously undesignated expert witnesses. (PG&E's First Supplemental Response to Governor's Third Set of Interrogatories, Attachment A, pp. 27-59.) The IDVP has emphasized that its present list of seven designated witnesses does not represent its final list; the list was amended as recently as September 23.^{2/} The staff has similarly been careful to state that it has only given its "present witness list." (Staff's Answers to Governor's First Set of Interrogatories, p. 36.)

^{2/} This amendment was not done by formal filing of supplemental answers. Rather the IDVP "supplemented" its answers to the Governor's Third Set of Interrogatories to the IDVP by letter dated September 23 from David B. Raskin to Michael J. Strumwasser. Copies of the letter were served on counsel but apparently were not filed with the board.

The pace of this litigation has obviously taxed all parties, with each rushing to prepare for hearing. PG&E has no basis for claiming that the reason for the Governor's recent designations is any different than the reasons of PG&E and the other parties for identical conduct.

The motive PG&E imputes to the Governor, the desire to prevent the deposition of the experts, is patently absurd. Counsel for the Governor fully understood, as would any experienced attorney, as counsel for PG&E doubtless understood, that no late-declared witnesses would be allowed to testify without the opportunity for the adverse party to depose them. (Strumwasser Decl., p. 6, ¶ 13.) PG&E's accusations are fallacious on their face.

II.

PG&E HAS NOT BEEN PREJUDICED BY THE TIMING OF THE DESIGNATIONS

Once it is understood that PG&E was guaranteed a timely opportunity to depose the Governor's witnesses, PG&E's claims of prejudice simply evaporate.

It is incredible that PG&E can tell this board that it has been "preclud[ed] from taking the depositions" of the newly declared witnesses (PG&E Motion at 10:11-14) and that their deposition is "impossible" (*id.* at 13:22-23). Counsel for the Governor twice made it clear to counsel for PG&E that he would be given an opportunity to depose Mr. Hubbard and (the second time) Prof. Apostolakis during the week of October 3. (Strumwasser Decl., pp. 4-5, ¶¶ 8-9.) For PG&E now to claim

that it has been deprived of a chance to take these depositions suggests that the applicant wanted to be unable to depose the witnesses rather than taking their depositions. And, of course, the motion itself offers a possible explanation for that preference: PG&E would be far better off with the testimony of Mr. Hubbard and Prof. Apostolakis struck or with an opportunity to depose them after their direct testimony than it would be simply taking their depositions this week.

PG&E protests that it "simply cannot prepare for depositions prior to the week of October 10-14." (PG&E Motion at 14:24-25.) One can easily imagine what PG&E would say if counsel for the Governor were to ask for special consideration because it "simply cannot prepare" for a deposition. The dreaded taboo of delay would be invoked and the Governor would be accused of engaging in a "clear pattern of obstructive and delaying behavior." (PG&E Motion at 11:3-4.) Apparently PG&E proposes a different standard for evaluating its own needs to prepare for trial.

The timing of the depositions of Mr. Hubbard and Prof. Apostolakis will presumably be resolved with the ruling on the Governor's motion to modify the schedule. The postponement of the filing of direct testimony will permit the taking of these depositions, as well as the others required, in an orderly fashion before the filing of direct testimony.

The key point here is that any depositions must precede the filing of direct testimony of the deponent. Otherwise the witness is at an enormous disadvantage and the party taking the

deposition has an unfair advantage. Having the direct testimony before him, the attorney taking the deposition has much more than a simple deposition: he has two complete opportunities for a complete cross-examination of the witness. For this very reason, counsel for PG&E has zealously objected to any questions of his deponents about the substance of their prepared testimony and instructed them not to answer any such questions. Elementary fairness dictates that the same rules apply to the depositions PG&E takes.

PG&E claims to be threatened by "trial by surprise" (PG&E Motion at 10:15-16) and cries that it "will be required to speculate on [the Governor's] position and must prepare testimony without any understanding of the opposition's case" (PG&E Motion at 10:21-23). By ignoring the detailed contentions filed by the Governor and Joint Intervenors and the over 200 pages of interrogatory answers the Governor has given PG&E, PG&E once again exaggerates in an effort to advance a fundamentally false claim of prejudice. The fact is that the only effect of the timing of these designations is to permit PG&E to take the depositions of Mr. Hubbard and Prof. Apostolakis closer to the hearing date -- a preference of PG&E's counsel. (Strumwasser Decl., p. 2, ¶ 4.)

III.

CONCLUSION

The substance and tone of PG&E's motion ill befit a public utility and an applicant for an NRC license. A fair reading of PG&E's motion makes it clear PG&E is representing

to this board that the Governor and Attorney General of California have made witnesses unavailable to evade discovery obligations (PG&E Motion at 12:23-13:4), intend not to conduct the hearing in an orderly and expeditious manner (PG&E Motion at 13:24-14:2), and are engaging in a course of conduct intended to obstruct and delay the proceeding (PG&E Motion at 11:3-4, 15:14-16). Each of these charges is false.

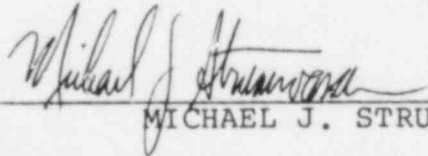
Litigation of this complexity, proceeding at the expedited rate of this case, presents circumstances that impose burdens on all the parties. Unfounded assertions of bad faith and worse make no contribution to the efforts of the parties and the board to discharge their serious duties in a responsible manner.

PG&E has consistently given this board and the commission a string of projected completion dates for the power plant and the IDVP's work that have unfailingly proven to be wrong. Nevertheless, the Governor accepts these as good faith errors in planning and execution and does not speculate about possible ulterior motives for such miscalculations. PG&E would be wise in the future to accord the other parties the same courtesy; speculation about parties' motives cannot redound to PG&E's benefit.

The plain fact is that PG&E's allegations are untrue
and the motion that relies on them is without merit.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION
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Docket Nos. 50-275 O.L.
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DECLARATION OF MICHAEL J. STRUMWASSER

I, Michael J. Strumwasser, declare:

1. I am Special Counsel to the Attorney General of California and have been assigned by the Attorney General to serve as lead counsel in representation of Governor George Deukmejian in the proceedings concerning the licensing of the Diablo Canyon Nuclear Power Plant. My responsibilities for the Diablo Canyon litigation include the determination of the witnesses to be called by the Governor, which I do in consultation with the other attorneys on the case.

2. In the course of planning the Governor's case, we have long intended to rely principally on witnesses and documents of Pacific Gas and Electric Company (PG&E) and the Independent Design Verification Program (IDVP) to the maximum possible extent. This reliance was based mainly on the fact that nearly all the firsthand knowledge and documentary evidence would be in the hands of those parties and their witnesses.

3. The prehearing conference of August 23-24, 1983, permitted us to assess our needs for independent expert witnesses in the light of the issues admitted by the Atomic Safety and Licensing Appeal Board. That assessment led me to conclude that it would be necessary to have an expert witness on structural engineering. Accordingly, on August 31, 1983, we designated Prof. Jose Roesset as a prospective expert witness. At that time, I did not intend to call any other expert witnesses at trial.

4. We made Prof. Roesset available to PG&E for deposition on September 29 and 30. No other witness in this case has been made available for more than one day of deposition, but we accommodated PG&E, whose counsel stated that he would need more than one day for Prof. Roesset. It was the express desire of counsel for PG&E that the deposition of Prof. Roesset come as late as possible, which we satisfied by stipulating that his deposition may be taken after the September 28 date set for the board for the end of discovery.

5. During the course of the August 23-24 prehearing conference, two rulings were made that had special implications for the decision whether to call additional expert witnesses. First, the board ruled that PG&E's quality assurance (QA) program would not be an issue at the hearing, except the QA program since November 1, 1981. Second, the board ruled that it would not entertain contentions concerning the failure of PG&E to have any QA program for structures, systems, and components important to safety but not safety-related pursuant

to General Design Criterion 1 of Appendix A to part 50 of the commission's regulations. We had expended considerable time and money on preparation of those issues, and that work relied heavily on the services of Mr. Hubbard. These two rulings made it substantially less likely that the Governor would need to call Mr. Richard B. Hubbard as a witness. In fact, Mr. Norton, counsel for PG&E, said to me at the conclusion of the prehearing conference substantially the following: "I guess you won't be calling Hubbard as a witness now, right?" I said I was unsure. He asked, in effect, what possible testimony Hubbard could now offer. I pointed out that we still needed to look at the post-November 1, 1981, QA program.

6. Indeed, prior to the prehearing conference, we had been reviewing the evidence on PG&E's QA program without particular reference to date. I therefore had no clear view on what evidence, beyond that produced by PG&E and the IDVP, would be necessary for the Governor's case. Following the prehearing conference, I began reviewing the question of what evidence should be presented and whether Mr. Hubbard's testimony would be useful. That review led me to the conclusion that testimony would be required of Mr. Hubbard only if the PG&E and IDVP witnesses on the post-November 1, 1981, QA program -- principally Messrs. Warren Raymond, Stephen Skidmore, and Roger Reedy -- failed to give the testimony we expected.

7. The depositions of Messrs. Raymond, Skidmore, and Reedy were taken by Deputy Attorney General Peter H. Kaufman on September 24, 24, and 22, respectively. Because of the

intensive schedule of depositions at that time, I was unable to confer with Mr. Kaufman about the substance of the depositions until Sunday night, September 25. That conversation led me to the tentative conclusion that direct testimony from Mr. Hubbard would be useful. I discussed the matter with Mr. Hubbard the morning of September 26, during the car ride from the San Francisco Airport to downtown San Francisco, where I would be taking the deposition of Dr. Stanley Kaplan. While I remained uncertain of the matter, the conversation tended to confirm my tentative opinion that Mr. Hubbard should be called as a witness. While I was still not certain that we would be calling Mr. Hubbard, I decided that we should make a tentative designation of him as an expert witness to allow PG&E to take his deposition.

8. Accordingly, before commencement of the Kaplan deposition the morning of September 26, I advised Mr. Norton that we had decided to call Mr. Hubbard as a witness and I stated that he would be made available for deposition the week of October 3. Mr. Norton replied that he would try to prevent Mr. Hubbard from testifying on the claim that the designation came too late; failing that, he said he would want to take the deposition of Mr. Hubbard the week of October 10, after his direct testimony would be filed. I said that we would not agree to have his deposition postponed until after the filing of direct testimony.

9. On September 30, I spoke by telephone with Deputy Attorney General Susan Durban, who was in Austin, Texas, at the

deposition of Dr. Roesset. She informed me that Mr. Norton was expressing distress at the designation of Mr. Hubbard. I asked her to repeat to Mr. Norton my earlier offer to have Mr. Hubbard depose the week of October 3, and to add that Prof. Apostolakis was also available for deposition that week. I am informed by Ms. Durbin and believe she so advised Mr. Norton.

10. Ever since the July mini-hearing on construction quality assurance, I have been aware of the position of the IDVP on the inapplicability of statistical techniques to the verification program, although I did not understand the underlying technical basis of the opinion. I therefore sought an expert in nuclear engineering and statistics to serve as a consultant and possible expert witness. In August I identified and reached Prof. Apostolakis and retained him as a consultant. We met several times in August and September. Our discussions of the technical issues left it unclear whether expert testimony from him would be necessary -- largely because neither of us could glean from any of the IDVP documents known to us or from the general literature what the technical basis was for the IDVP-PG&E position.

11. On September 26, Prof. Apostolakis accompanied me to the deposition of Dr. Kaplan. In the course of that deposition I asked questions designed to probe the theoretical basis of Dr. Kaplan's position, which, according to PG&E interrogatory answers, was that statistical techniques were inapplicable to design verification. At the end of the Kaplan deposition, we

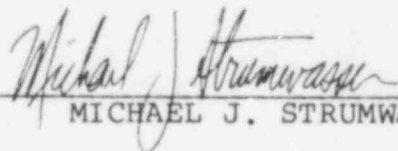
felt we understood his position as well as it could be understood and that it was not technically sound. Accordingly, we agreed in conversations on the night of September 26 and on September 28 tentatively to designate Prof. Apostolakis as an expert witness.

12. Both Prof. Apostolakis and Mr. Hubbard have been and are available for deposition this week at the convenience of PG&E. No request for their deposition has been made. Nevertheless, I have asked Mr. Hubbard to prepare the documents sought by PG&E for his deposition and expect that those documents can be made available to PG&E the week of October 3 as well. The corresponding documents of Prof. Apostolakis are, of course, a much smaller body, and can readily be made available at any time.

13. At no time have I or my colleagues failed to disclose or delayed disclosure of any expert witness we intended to call at the hearing in this case. Neither I nor my colleagues sought to disadvantage PG&E by the timing of the designations of an expert witnesses. It has been my assumption throughout this case that any expert witness we called would be deposed before being allowed to testify. Thus, I have realized that any delay in designation of an expert witness could well lead to the expert being deposed later in discovery, to the advantage of those taking the deposition.

I declare under penalty of perjury that the foregoing
is true and correct.

Executed at Los Angeles, California, on October 4,
1983.


MICHAEL J. STRUMWASSER

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))

Docket Nos. 50-275 O.L.
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused copies of the foregoing Answer of Governor Deukmejian to Motion of PG&E for Sanctions served on the following by U.S. Mail, first class (except for those persons marked with an asterisk ("*"), to whom the envelope was posted Express Mail), postage prepaid.

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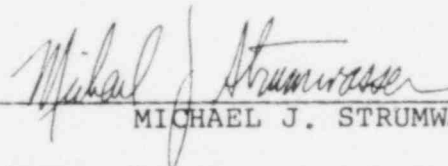
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