UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 O.L. 50-323 O.L.
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

JOINT INTERVENORS' RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY'S MOTIONS FOR SANCTIONS

Pacific Gas and Electric Company's ("PGandE") motion for sanctions upon Governor Deukmejian and the Joint Intervenors is frivolous and should be summarily rejected by this Appeal Board. Although the motion, which seeks to preclude the testimony of certain witnesses, is patently without merit, its filing by PGandE is not altogether unexpected. In fact, a similar motion for preclusion of testimony was filed by PGandE prior to the last set of licensing hearings in the Diablo Canyon proceeding in January 1982, again on the purported ground that then-Governor Brown and the Joint Intervenors were intentionally obstructing the discovery process. There, however, because the witnesses had been listed early in the discovery period, PGandE

alleged instead that although timely listed, the witnesses offered by the Governor and the Joint Intervenors were insufficiently prepared at the time of their depositions by PGandE and, indeed, had intentionally failed to prepare in an attempt to subvert PGandE's hearing preparation. Needless to say, the licensing board dismissed PGandE's motion out of hand.

PGandE's most recent motion should be similarly rejected. First, the Joint Intervenors have not failed to supplement their answers in a timely manner. To the contrary, supplements to interrogatory responses listing expert witnesses were mailed by Express Mail to all parties within a day of the decision to offer their testimony at the hearing. PGandE's bald suggestion that the Joint Intervenors have purposely withheld the identity of contemplated experts is simply absurd and is totally without support in its motion. While PGandE might prefer earlier supplementation, such notice was simply not possible under the circumstances of this proceeding, circumstances brought about in large part by PGandE itself in seeking termination of discovery and a hearing before the IDVP has even completed its review.1/ As the Joint Intervenors have

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1/Obviously, the Joint Intervenors would prefer to be in a position where decisions regarding testimony could be made at an earlier date. However, due to limitations on resources, the accelerated hearing schedule and feverish pace of discovery and, most importantly, the fact that the IDVP is only now approaching its conclusion, detailed preparation of our own case has necessarily been deferred until as much as possible of the IDVP has been completed. PGandE's belief that the timing of notice regarding expert testimony has been determined by some conspiracy to prevent its preparation is simply contrary to fact.

repeatedly urged, a more deliberate schedule for hearing after completion of the audit is a far fairer, more orderly, and more logical way to proceed. Typically, PGandE has simply dismissed the Joint Intervenors' suggestion as a tactic of "delay."

Second, contrary to PGandE's apparent conviction, the Joint Intervenors have absolutely no intention of subverting PGandE's preparation for hearing. In fact, we have repeatedly expressed our willingness to permit PGandE to depose our witnesses at a time mutually convenient, even after the close of discovery if schedules permit. PGandE has refused, choosing instead to seek an order from this Board precluding the testimony of our witnesses. Obviously, that is PGandE's decision. However, the Joint Intervenors resent the implication underlying PGandE's motion that the Joint Intervenors have any intention to disregard the rules of the Commission or this Board's admonition to abide by those rules or, further, to hinder PGandE's efforts to prepare for hearing. The individual witnesses were announced promptly once the decision to submit testimony by them was made. Prior to such a decision, the supplementation sought by PGandE could not have been made because, simply stated, there was no information to provide.

Finally, the law is clear in the federal courts that before a preclusion order will be issued relating to a necessary element of a case, "there must be some showing of wilful disobedience or gross indifference to the rights of the adverse party, deliberate callousness or intended negligence."

5A Moore's Federal Practice, ¶37.03[2], at 37-7 (revised ed. 1981) (footnote omitted); see, e.g., State of Ohio v. Arthur Anderson & Co., 570 F.2d 1370, 1375 (10th Cir.), cert. denied, 439 U.S. 833 (1978); Dorsey v. Academy Moving and Storage, Inc., 523 F.2d 858 (5th Cir. 1970) (Windom, J.); Campbell v. Johnson, 101 F.Supp. 705 (S.D.N.Y. 1951). No such showing has been or could be made in this case. Throughout this proceeding, the Joint Intervenors have sought to comply with their discovery obligations, and they have, in fact, supplemented the interrogatory response in question in a timely fashion. Further, the Joint Intervenors have expressed their willingness to permit further discovery in the form of depositions of the expert witnesses even after the stipulated close of discovery. Under the circumstances, PGandE's request for preclusion is utterly without legal or factual basis.

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For the reasons stated, the Joint Intervenors submit that PGandE's motion for sanctions should be summarily denied.

DATED: October 4, 1983

Respectfully submitted,

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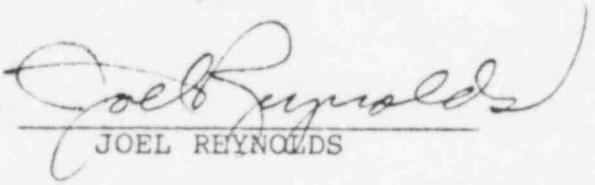
By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 1983, I have served copies of the foregoing JOINT INTERVENORS' RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY'S MOTIONS FOR SANCTIONS, mailing them through the U.S. mails, first class, postage prepaid.

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