

Decision No. 86403

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PROJECT SURVIVAL, a California
corporation,

Complainant,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,

Defendant.

Case No. 9952
(Filed July 30, 1975;
amended December 5
and 12, 1975)

Gerald P. Parsons and Walter V. Hays, Attorneys at
Law, for Project Survival, complainant.
Richard A. Clarke, Robert L. Harris, and James
Allan Kaylor, Attorneys at Law, for Pacific Gas
and Electric Company, defendant.
Donald F. Lundgren, for Creative Initiative
Foundation, interested party.
Walter H. Kessenick and James Squeri, Attorneys at
Law, for the Commission staff.

ORDER OF DISMISSAL

Project Survival filed this complaint on July 30, 1975. The primary thrust of the complaint was to seek injunctive relief restraining Pacific Gas and Electric Company (PG&E) from certain alleged political activities, advertising, and other alleged pro-nuclear power activities, particularly with respect to the Nuclear Power Plants Initiative (Proposition 13) which was before the voters in the election held on June 8, 1976. The complaint was twice amended.

Both parties engaged in extensive discovery proceedings. Examiner Donald B. Jarvis held prehearing conferences and hearings on preliminary motions on November 18, 1975 and December 5, 1975, and an additional hearing on preliminary motions on March 12, 1976. The hearing on the merits was calendared for 29 days of hearing, commencing on March 22, 1976. After commencement of the hearing on March 22, 1976, counsel for Project Survival moved to dismiss the complaint without prejudice. PG&E opposed the motion and, in the alternative, contended that if the motion be granted the complaint be dismissed with prejudice.

The presiding examiner made the following ruling:

"EXAMINER JARVIS: Well, first I would like to indicate that under Rule 63, I have no power to grant a motion that ultimately disposes of the case; however, I do have the power to indicate preliminarily what my opinion is and to refer the matter to the Commission.

"It is my opinion that the complainant's Motion to Dismiss be granted.

"I see no useful purpose to have the hearing go on without the complainants, and to have Mr. Clarke put in evidence on the issues, that would be one-sided.

"I think these issues are far too important to be decided on an ex parte or one-sided record.

"And I don't think it would be very meaningful to the Commission to have that type of record to dispose of the constitutional and other interests that we have explored here.

"So I will, at the conclusion of my remarks, temporarily remove the hearing from the calendar and take the motion under submission with my recommendation to the Commission that an order be forthcoming dismissing.

"I will give the parties, if they have any ancillary motions, ten days to file the motions with ten days to respond." (RT 350-51.)

The matter was temporarily removed from the Commission's calendar. Thereafter, the parties filed motions dealing with ancillary matters. The presiding examiner issued an Examiner's Ruling which correctly determined the ancillary matters.

The remaining issue before the Commission is the motion to dismiss. Included in Project Survival's ancillary motions was a modification of the motion to dismiss. Project Survival asked in the alternative that the complaint be dismissed without prejudice or that the matter remain off calendar subject to being restored on appropriate motion until December 31, 1977, when, if no action were taken, it would be dismissed with prejudice.

The Commission is of the opinion and finds that since PG&E was prepared to proceed with the hearing on the date set therefor, and the matter was removed from the calendar because Project Survival indicated that it did not wish to proceed and moved for dismissal of its complaint, a Damoclean pleading should not be held over PG&E and the complaint should be dismissed. The Commission is further of the opinion and finds that the dismissal should be without prejudice. While an attempt to resuscitate this particular complaint should not be permitted, some of the issues sought to be raised herein may be germane to other proceedings which are or may be before the Commission. The Commission has not addressed itself to the merits of this complaint.

A dismissal with prejudice could bring into play the specter of procedural wrangling (res judicata, collateral estoppel, etc.) in other proceedings. Therefore, the complaint should be dismissed without prejudice.

IT IS ORDERED that Case No. 9952 is dismissed without prejudice.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 21st
day of SEPTEMBER, 1976.

William J. Lyons President
James L. Stetson
Leonard Hon
Robert Bateman Commissioners

Commissioner D. W. Holmes, being
necessarily absent, did not participate
in the disposition of this proceeding.