

Decision 88 05 064 MAY 25 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

William M. Bennett, a member of
the State Board of Equalization
a constitutional officer, and
a ratepayer (Complainants one,
et seq.)

Complainant,
vs.

Pacific Gas and Electric Company,
its corporate officers and directors)
Fred W. Mielke, Jr., John F. Bonner,
L. W. Lane, Jr., Barton W.
Shackelford, Stanley T. Skinner,
Richard H. Peterson, George A.
Maneatis, Doris F. Leonard,
Defendants One and Following.

Defendant.

Case 85-04-105
(Filed April 30, 1985)

OPINION

As a result of several previous Commission decisions and California Supreme Court orders in this case, there is only one issue remaining of complainant's five original claims against Pacific Gas and Electric Company (PG&E, defendant),¹ that is,

1 Complainant claimed that:

- a. Defendant's certificates of public convenience and necessity to construct and operate Units 1 and 2 of its Diablo Canyon Nuclear Power Plant have lapsed and are void by operation of law.
- b. PG&E has presented no practical evacuation plan for Diablo.
- c. PG&E is incompetent to construct, operate and maintain a nuclear power plant.
- d. PG&E has not demonstrated a method to safeguard the health and safety of Californians from radioactive waste material.
- e. The certificates were obtained based on fraud and deceit.

whether certificates to construct and operate its Diablo Canyon Nuclear Power Plant were obtained by PG&E based on fraud and deceit. In Decision (D.) 86-03-068, dated March 19, 1986, the Commission dismissed complainant's first four claims and ordered complainant to file the following information with the Commission and the parties to the proceeding prior to a hearing on the issue:

1. The identity of each witness he intends to call.
2. The content of the testimony of each witness.
3. What that testimony is intended to prove.

By further order, the assigned ALJ was to call a prehearing conference (PHC) to schedule the filing of the information required.

Further delay of the case occurred because:

1. Complainant applied to the Commission for rehearing of D.86-03-068.
2. Complainant also applied to the California Supreme Court for review of D.86-03-068. (S.F. No. 25015)
3. By D.86-06-025 the Commission granted rehearing of D.86-03-068 "... limited to the receipt of briefs analyzing the issue of the jurisdiction of the Commission in the area of nuclear power plants in terms of the specific allegations raised in Bennett's complaint." (Ordering Paragraph 2.)

The Supreme Court denied Bennett's petition in S.F. No. 25015 by order dated August 13, 1986. By D.87-09-042, dated September 10, 1987, the Commission affirmed D.86-03-068, dismissing defendant's allegations 1 through 4 as noted above and again ordered a PHC be set to schedule complainant's showing on the single issue of fraud and deceit. Complainant petitioned the

Supreme Court for review of D.87-09-042 and again was turned down by the Court. (S002799, Order dated January 7, 1988.)

The assigned administrative law judge (ALJ) set a PHC for January 20, 1988 to schedule the showing required of complainant by D.86-03-068 as affirmed by D.87-09-042. At complainant's request, that PHC was postponed to March 29, 1988 because the Supreme Court had not yet acted on S002799. The afternoon prior to that PHC, the ALJ received a letter from complainant's co-counsel requesting a 120-day delay of the PHC because ". . . plaintiff Bennett intends to seek certiorari from the U.S. Supreme Court to review the decisions of the P.U.C. dismissing several of his claims and narrowing the scope of the hearing before you." The ALJ called the PHC as scheduled on March 29, 1988 and complainant did not appear. The ALJ noted that the appeal to the U.S. Supreme Court would have to be filed by April 6, 1988 (28 USCA 2101(c)). The ALJ ruled that if the filing were made, the requested 120-day continuance would be granted and, if not, he would recommend to the Commission that it dismiss the remainder of the complaint. By letter dated April 6, 1988, Bennett informed the ALJ that he would not pursue review before the U.S. Supreme Court. He also stated that he believes the claims in his complaint are properly within the reasonableness review of the Diablo Canyon plant now before the Commission in Applications 84-06-014 and 85-08-025 and requested that his complaint be consolidated with those matters.

By letter dated April 18, 1988, PG&E opposes the consolidation and urges the complaint be dismissed with prejudice.

We agree with PG&E's position as set forth in its letter of April 18, 1988. Complainant has seen fit through delay to resist compliance with the order of the Commission that complainant make his showing on the fraud and deceit issue. Over two years have passed since the Commission ordered complainant to make a showing to support his claims. Several prehearing conferences have been set and postponed at complainant's request; complainant didn't

bother to appear at the last one held. Considering the sufficient opportunity complainant has been given to demonstrate if there is a factual basis for his complaint and complainant's repeated failure to do so, we can only infer that Bennett's complaint is baseless and should be dismissed. Concerning consolidation with the reasonableness review, the only remaining issue in this complaint involves the CPC&N for the plant and whether it should be revoked. We do not see that as an issue in a rate case, which is primarily what the reasonableness review is all about. The complaint isn't concerned with how much of the original cost of Diablo Canyon should go into rate base, but with an effort to force the closure of the plant altogether. We conclude that consolidation is not only improper but, if done, would disrupt and delay the reasonableness review.

We note Bennett is already a party to A.84-06-014 and A.85-08-025 and the dismissal of this complaint will not affect his participation in those proceedings.

Findings of Fact

1. The only issue remaining of the five original claims of complainant against PG&E is whether certificates to construct and operate the Diablo Canyon Nuclear Power Plant were obtained by PG&E through fraud and deceit.

2. In spite of several opportunities to do so, complainant has not pursued the remaining issue in this complaint by filing with the Commission and the parties a list of witnesses, their testimony and what that testimony is intended to prove as ordered in D.86-03-068 as affirmed by D.87-09-042 on appeal.

3. Complainant now requests that this complaint be consolidated with A.84-06-014 and A.85-08-025 for hearing.

4. The remaining issue in this case is not compatible with the issues in A.84-06-014 and A.85-08-025, and if consolidated with those proceedings, would disrupt and delay their resolution.

Conclusions of Law

1. C.85-04-105 should not be consolidated with A.84-06-014 and A.85-08-025.
2. C.85-04-105 should be dismissed with prejudice.

ORDER

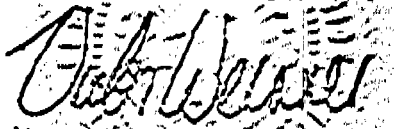
IT IS ORDERED that this complaint is dismissed with prejudice.

This order becomes effective 30 days from today.

Dated MAY 25 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Victor Weiszer, Executive Director