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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2	Docket No. 50-275 and 50-323-LT

PETITION OF THE NORTHERN CALIFORNIA POWER AGENCY FOR LEAVE TO INTERVENE, CONDITIONAL REQUEST FOR HEARING AND SUGGESTION THAT PROCEEDING BE HELD IN ABEYANCE

Pursuant to 10 C.F.R. §2.1306 and the Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments and Opportunity for a Hearing published at 67 Fed. Reg. 2455 *et seq.* (January 17, 2002), the Northern California Power Agency petitions for leave to intervene, conditionally requests a hearing, and moves to hold these proceedings in abeyance pending clarification of whether PG&E, the licensee now operating under protection of Chapter 11 of the Bankruptcy Code as the debtor in possession ("the DIP"),[1] is permitted to proceed with

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[1] For clarity, NCPA employs the following reference standards:

PG&E – the original public utility, prior to its filing for bankruptcy.

The DIP – the debtor in possession under Chapter 11 of the Bankruptcy Laws; proponent of these filings.

PG&E-R – the restructured public utility to be spun off as an independent company after PG&E emerges from bankruptcy.

Holding Company – the Holding Company (which will be renamed) after emergence from bankruptcy, that will hold (among other things) the DIP's generation, transmission and gas transportation subsidiaries, but will be independent from PG&E-R.

Gen – the new subsidiary to hold generating assets.

ETrans – the new subsidiary to hold electric transmission assets.

GTrans – the new subsidiary to hold gas transportation and storage assets.

Nuclear – Diablo Canyon LLC, the entity which would own the Diablo Canyon facilities if the proposal is approved.

the Plan of Reorganization ("Plan" or "POR") which the instant filing is intended to implement.

I. COMMUNICATIONS

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II. NCPA

NCPA is a public agency engaged in the generation and transmission of electric power and energy. NCPA was created by a joint powers agreement dated July 19, 1968, as amended, entered pursuant to Chapter 5, Division 7, Title 1 of the California Government Code commencing with Section 6500. The Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Port of Oakland, Redding, Roseville, Santa Clara and Ukiah, and the Turlock Irrigation District and the Truckee Donner Public Utility District are members of NCPA. The Association of Bay Area Governments, Bay Area Rapid Transit, Lassen Municipal Utility District, Placer County Water Agency, Plumas-

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Gen Sub LLCs – the individual LLCs under Gen that will own individual generation projects.

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Sierra Rural Electric Cooperative and the Cities of Davis and Santa Barbara are associate members of NCPA.

NCPA seeks intervention on behalf of itself and its members, including those members that are signatories to the NCPA/PG&E Interconnection Agreement. The antitrust license conditions which are a part of the licenses in these dockets were established pursuant to an agreement of April 30, 1976, between the current licensee and the Assistant Attorney General, Antitrust Division, United States Department of Justice, the necessity for which was in turn determined based upon the results of an investigation by the Antitrust Division into concerns raised by NCPA and some others. NCPA has been held to be a third party beneficiary to that agreement, capable of enforcing the agreement to the license conditions in district court. *United States v. Pacific Gas and Elec. Co.*, 714 F. Supp. 1039 (N.D. Cal. 1989), *appeals dismissed per stipulation*, No. 91-16011 (9th Cir. Mar. 20, 1992).

This Commission has issued a Notice of Violation as to those antitrust license conditions in which licensee was found to have been in violation of its obligations to NCPA. *Pacific Gas & Elec. Co.*, 31 N.R.C. 595 (1990), *petition for review dismissed*, No. 90-1463 (D.C. Cir. Mar. 5, 1992)

III. BASIS FOR INTERVENTION

NCPA and its member municipal electric utilities participate in the California markets. That participation is currently premised on a number of existing contractual obligations between PG&E and NCPA (including the NCPA IA and PG&E's Diablo Canyon License Conditions) and between PG&E and the Western Area Power

Administration ("Western") (including Contract 2948A). Both NCPA and Western are "neighboring entities" under the terms of the license conditions.

The filings which initiated the above-captioned dockets are among those the DIP has submitted, before this Commission and elsewhere, to give effect to its proposed plan of reorganization and emergence from bankruptcy, currently pending before the Federal Bankruptcy Court in California. That battery of filings proposes to reallocate these contractual and license obligations among various subsidiaries. NCPA therefore has an interest not represented by any other party to this proceeding to ensure that those commitments are protected.

The changes proposed by the DIP would fundamentally alter the existing market and regulatory structures in California, which may well impact NCPA and its members. In particular, and as here applicable, the DIP, which currently provides high and low voltage firm transmission service as well as reserve sharing and energy sales services to NCPA which are required under the antitrust conditions, would divide itself into many separate entities, no one of which would be capable of providing all of these services. Moreover, the instant filing is a part of a plan to place each of the many generation assets now owned by the DIP into a separate limited liability corporation (Gen Sub LLC), each of which in turn is owned by a new corporation to be named Electric Generation LLC (or "Gen"). The DIP has also filed proposals seeking approval to effectuate elements of the POR at the Federal Energy Regulatory Commission ("FERC") (under the Federal Power Act and Natural Gas Act) and at the Securities and Exchange Commission ("SEC") (under the Public Utility Holding Company Act of 1935). It has sought approval from

the Bankruptcy Court for its view that it need not seek approval from the State of California.

In the instant case, the DIP has sought to place Gen. ETrans and PG&E-R on the license for antitrust condition purposes.[4] This Commission, in the published Notice, has *sua sponte* raised the question of whether it is desirable to include ETrans and PG&E-R. NCPA views the question of whether the licensee, by splitting itself into multiple pieces, can avoid liability for the license conditions that were imposed upon its property to cure serious anticompetitive problems, as one that is of very significant importance to NCPA for its continued existence. In this instance, in which the disaggregating licensee did not itself seek to evade the license obligation, but this Commission has raised the question of whether it should itself release licensee's successors and assigns from the obligations applicable to the assets acquired, the issue is of even higher importance. NCPA's participation is in the public interest.

IV. SUGGESTION THAT PROCEEDING BE HELD IN ABEYANCE

This filing is a part of the multi-docket filing series at this Commission, the FERC and the SEC, in which the DIP proposes to implement the Plan it has submitted in the bankruptcy court for its reorganization. The Plan of Reorganization ("Plan" or "POR"), as to which the DIP *may* eventually be authorized to seek creditor approval (and which the DIP currently has proposed to the bankruptcy court), is described in the First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company, dated December 19, 2001.[5]

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[4] Gen and Nuclear would be the licensees for health and safety purposes.

[5] The Plan is filed in *in re Pacific Gas and Elec. Co.*, Case No. 01 30923 DM, U.S. Bankruptcy Court,

The transfer for which approval here is sought cannot take place until and unless the Plan is confirmed by the bankruptcy court. NCPA is an active participant in the bankruptcy process, and is attempting to follow the various iterations of the plan which the DIP has there proposed.[6] Partially because the Plan is rather protean in nature, and seems to change by the week as questions are raised in the bankruptcy proceeding, NCPA has not yet determined whether the plan, if the DIP is ever permitted to present it to the creditors for approval, warrants support in the bankruptcy process (subject to whatever conditions this Commission, the SEC and the FERC may require). The Plan is currently changing as the DIP seeks approval of the disclosure statement, since the plan and the disclosure statement must be finalized and the disclosure statement approved by the court before they can be submitted to creditors for a vote. The actions for which the DIP ultimately will require approval of this and other Commissions will be required to conform to the ultimate Plan (although each of the Commissions to which filings to permit implementation of the Plan are submitted will be expected to modify or condition the proposals in the filings as each is authorized to do under the legislative authority under which it acts).

The filings here are thus made by the DIP to conform with a version of the POR which has been presented to the court in the bankruptcy proceeding, but not yet approved, or even approved to the extent of permitting the Plan and the disclosure statement to be

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N.D. Cal., San Francisco Div. That document, and other documents related to the bankruptcy proceeding may be obtained directly from the court's website, http://www.canb.uscourts.gov/canb/Documents.nsf/4fa6cc9d77741519882569e50004dce6/5af0e0251bff3de888256a400073f921?OpenDocument, or from PG&E's own website, http://www.pge.com/006_news/current_issues/reorganization/court_docs/adversary.shtml.

[6] One of NCPA's member-customers, Palo Alto, is a member of the Official Creditor Committee.

circulated among the creditors for the purpose of seeking support. The application presently before the Commission reflects the POR submitted to the court on September 20, 2001. A First Amended Plan of Reorganization was submitted to the court on December 19, 2001. The court is still entertaining objections to the Disclosure Statement, which has changed significantly since the Disclosure Statement and Plan on which these filings are based.

While the filings of the DIP suggest that the Plan is sufficiently final to be a basis to ask this Commission for its approval, NCPA suggests that it is not. Before a POR and the Disclosure Statement describing the Plan can be placed before the creditors, and votes solicited on its behalf, the current procedural structure in the bankruptcy court envisions that:

- The court must determine that the Disclosure Statement appropriately describes the POR and the consequences of approval of the POR, and
- The court will decide on an argument that the Plan is not confirmable as filed. The court anticipates making an initial ruling either that it is clear that the Plan does not meet legal standards for confirmation (in which case the DIP would have to propose a new POR, or at least significantly revise the POR and begin the disclosure process anew)[7] or that it is not clear that the Plan does not meet those standards (in which case a version of the POR may be permitted to go to the creditors to solicit their vote, although the court will not make a final determination that the POR would be confirmable at this time).

Bankruptcy Judge Montali has announced that he does not anticipate completing the task of review of the disclosure statement until mid-February, at the earliest. The preliminary determination as to whether the POR as now proposed is unconfirmable on its face will be made on the basis of presentations made by the DIP and the California

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[7] Of course, it is not clear that this could be accomplished within the exclusivity period, as currently extended, and thus alternative plans proposed by others could then be considered as well.

Public Utilities Commission ("CPUC"), various Departments and Agencies of the State of California, and others on January 25, 2002, but that preliminary determination has not yet been made. A further complicating factor is that the CPUC has been permitted to outline an alternative POR with quite different consequences from that presented by the DIP, although the exclusivity period in bankruptcy (during which only the DIP can propose a POR) has been extended for all creditors other than the CPUC until June 30, 2002. That alternative POR outline will be presented by the CPUC to the court, as currently scheduled, on February 13, 2002.[8]

These issues are not trivial. They involve quite serious issues of Constitutional law, as well as issues of comity between Federal and State agencies. The entire proposal of the DIP in this proceeding, for example, is based upon an assumption that the federal bankruptcy judge can and will override the provisions of State of California law which prohibit, *inter alia*, the sale of generation facilities owned by any public utility prior to January 1, 2006.[9] As noted above, Judge Montali has taken under advisement the basic question of whether it is clear that he cannot override those and other provisions of the California Code. If he determines that it is clear that he cannot do so, it is anticipated that he would not permit the Plan in its present form to go forward; if he determines that it is not clear, it is anticipated that he will permit the Plan to go forward, and will determine at a later stage whether he can, and if he can, whether he should, preempt.

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[8] NCPA does not understand that the court anticipates that the material which the CPUC files on February 13 would be submitted to the creditors as an alternative plan of reorganization (and indeed there are specific limits in bankruptcy to the ability of parties to even propose alternative plans during the exclusivity period) but it is reasonable to assume that that material will be considered by the court in the resolution of the question as to whether the Plan is unconfirmable on its face.

[9] Cal. Pub. Util. Code §377, as amended in January 2001. Cal. Pub. Util. Code §851 (2000) also requires the approval of the CPUC for disposition of assets.

Thus it is entirely possible that further – and possibly quite major – changes to the POR will be made before the Debtor is permitted even to seek approval, much less seek confirmation if the Plan obtains adequate support among the creditors. In short, the Plan is not yet final, or even necessarily close to being final. In these circumstances, what the DIP is seeking from this Commission – at this date – is essentially an advisory ruling in the form of a declaratory judgment, since it is clear that the DIP does not now have the authority to perform even if the relief its filing seeks were granted by this Commission, the FERC and the SEC.[10] While the procedure sought by the DIP might, in the ordinary bankruptcy, make sense *after the Plan is finalized*, so that the only remaining question, if the Plan achieves the necessary votes,[11] would be the conditions or modifications required by this Commission, the FERC, and the SEC, in this case it is clear that there may well be further changes in the POR, as well as significant controversy as to whether the DIP is correct that the court can, under the bankruptcy laws, even consider whether it should override otherwise applicable state laws. Thus it is not at all clear that there is yet a case or controversy before this Commission which would support the process sought, and it is clear that the issues presented are not yet quite ripe for adjudication. Even the Declaratory Judgments Act, 28 U.S.C. 2201-2202, requires an actual controversy as a basis for jurisdiction. *See, also*, U.S. Const., Art. III, §2, Cl. 2. The Court has also made it clear that a case "is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. U.S.*,

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[10] The SEC filing under the Public Utility Holding Company Act was made on January 31, 2002.

[11] In most cases in bankruptcy the court has a pretty good idea of how the voting will come out before the plan is finalized and submitted to the creditors.

523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985)).

Thus NCPA suggests that the Commission hold this proceeding in abeyance, but only until the POR is finalized for submission to the creditors and the submission to the creditors is approved by the court.[12] At that time, once the DIP has amended its filings before this Commission to conform to the POR that is approved for submission, NCPA suggests that the Plan will be sufficiently final to warrant consideration by this Commission. NCPA does not support a Motion (which we expect the State of California interests to file here as they did at FERC) to reject. The DIP is correct that the interest of those participating in the West Coast markets, and of the markets themselves, calls for proceeding with the applications as soon as it is clear what the bankrupt estate is authorized to propose, so that the participants in the market can look forward to some certainty of relationships. This interest does not support getting the answer wrong in the haste to get an answer (as happened in the FERC initial approval of the California restructuring), but it does support moving forward with consideration of the filings necessary to seek to implement the POR, once the POR is finalized and the necessary amendments to the filings here made.

When and if it is clear what changes to the current congeries of filings are necessary to conform to the POR as approved for submission to the creditors, the DIP should amend the pleadings as it believes necessary, and of course intervenors should be

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[12] NCPA assumes, for this purpose that it is not unlikely that the DIP will be permitted to modify its POR and disclosure statement and move forward to seek to obtain creditor approval. We believe that the inherent assumption of the State of California is that the DIP will not be permitted to go forward. Of course, the determination by the court as to whether DIP may proceed is expected in the relatively near future.

permitted to amend their protests and interventions so that all parties are addressing the same set of issues. NCPA believes that the issues are clear enough that the process in this Commission can move forward if the DIP is permitted to move forward with the presentation of its POR to creditors, and suggests that the interests of all parties will be served by the Commission holding onto the dockets as presently configured, subject to modification as it may develop, so that the proceedings can move as expeditiously as is consistent with due process in these matters involving the future of the economy and electrical markets on the West Coast, as well as the legitimate business interests of the DIP.

V. NCPA HAS RELIED UPON THIS COMMISSION'S ABILITY TO ENFORCE THE ANTITRUST LICENSE CONDITIONS

As noted more briefly above, the antitrust license conditions imposed upon PG&E (now the DIP) developed as an agreement between PG&E and the Department of Justice Antitrust Division as a means of closing an investigation which had been developed based upon the treatment of NCPA by PG&E. As the April 30, 1976 letter from John F. Bonner, then President of PG&E stated (at p. 1) [13] "we understand that the Department will advise the [NRC] that these conditions, which have been negotiated between the Department and PGandE, will remedy the situation inconsistent with the antitrust laws which the Department perceives to exist." The advice letter of the Attorney General [14] noted that the Department believed that adoption of the license commitments transmitted therewith would "obviate the anti-trust problems posed by PG&E's activities." Those

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[13] That letter of April 30, 1976 is enclosure 1 to the advice of the Attorney General printed in 41 Fed. Reg. 20225 (1976).

[14] *Supra*, footnote *13*.

antitrust license conditions, known as the "Stanislaus Commitments," were eventually added to the Diablo Canyon licenses, consistent with the 1976 letter from Mr. Bonner.

While the first NCPA/PG&E Interconnection Agreement was negotiated based upon the Stanislaus Commitments, and filed with FERC in 1983, neither the addition of the Diablo Canyon license conditions nor the execution of the IA caused an end to the disputes with respect to what NCPA deemed the violation of the license terms. While most disputes were not brought to the attention of this or other commissions, some were. In one dispute, which wound up in the United States District Court (N.D.Cal.), NCPA was held by Judge William Schwarzer to be a third party beneficiary to the 1976 agreement, capable of enforcing the agreement to the license conditions in district court. *United States v. Pacific Gas and Elec. Co.*, 714 F. Supp. 1039 (N.D. Cal. 1989), *appeals dismissed per stipulation*, No. 91-16011 (9th Cir. Mar. 20, 1992).

In a variant of that dispute, on June 14, 1990, the NRC Director, Office of Nuclear Reactor Regulation, issued a Notice of Violation ("NOV") by PG&E of its License Conditions, based in part upon the events described in Judge Schwarzer's decision discussed above. A copy of that letter and NOV, with the attached Director's Decision, are attached as Attachment 1 hereto.[15]

The letter and NOV found violations of License Conditions (6) (Wholesale Power Sales), (7)a (requiring transmission of power), (7)d (requiring that PG&E file a rate schedule for requested transmission with FERC), and (9)a (making rates, charges, terms and practices subject to FERC's approval). With respect to the latter, the NOV found

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[15] The Director's Decision attached with the letter and NOV is reported at *Pacific Gas & Electric Co.*, DD-90-3, 31 N.R.C. 595 (1990), *petition for review dismissed*, No. 90-1463 (D.C. Cir. Mar. 5, 1992).

that PG&E had violated the condition by refusing to file non-agreed upon contracts, and insisting on filing language making the agreement conditioned upon FERC's acceptance of all provisions thereof, without change.

> License Condition (9)a requires PG&E to file service schedules with the FERC even if the parties do not agree to all of the proposed terms and conditions. The purpose of License Condition (9)a is to resolve any conceptual differences in the proposed service schedule at the FERC. . . . [which] has jurisdiction over the transmission and sale of energy required under the license conditions.

Pacific Gas & Elec. Co., 31 N.R.C. at 602.

Significantly, the NRC notes with approval Judge Schwarzer's conclusion that the requirement that PG&E negotiate in good faith had not been met by a refusal to agree to or even to seriously consider the positions urged by NCPA (*id.* at 601).

Following the decision of Judge Schwarzer, the parties had been engaged in an extensive negotiation to revise the IA (as it had previously existed) in ways that reflected both the ways in which the electrical world had evolved since the early 1980s and NCPA's need for greater specificity in terms of its operations and PG&E's obligations. On November 15, 1991, and November 18, 1991, PG&E and NCPA respectively submitted a (then unsigned) settlement agreement, and NCPA conditionally withdrew its request for enforcement action previously filed at the NRC. These filing letters are attached as Attachment 2a and 2b, hereto. A copy of the Settlement Agreement, with its Attachment 1 ("Implementation of Stanislaus Conditions") was executed by NCPA on November 15, 1991 and by PG&E on November 20, 1991, and filed with the NRC promptly thereafter, and is attached as Attachment 3, hereto.

The Settlement Agreement itself provided for filings with FERC which avoided argument about the appropriate transmission rate to be applied to the power which Judge Schwarzer had held NCPA was entitled to have purchased and that PG&E was obligated to have wheeled, and for the permanence of Judge Schwarzer's result.

As particularly relevant here, section 2.1 of the Settlement Agreement spelled out PG&E's obligations to NCPA (emphasis supplied):

> 2.1. PG&E will implement the Stanislaus Commitments as to NCPA and its present and future members, and to other Neighboring Entities and Neighboring Distribution Systems as set forth in Attachment 1 hereto, which Attachment is incorporated by this reference into this Settlement Agreement as though fully set forth herein. PG&E's obligation to abide by the Stanislaus Commitments in the manner set forth in Attachment 1 shall extend for so long as the Commitments are included in any federal license held by PG&E, *but in any event shall not be extinguished prior to January 1, 2050.*

Section 4.1 of the Settlement Agreement also contained a statement that:

> PG&E also conditions its agreement to this settlement on the NRC accepting and acknowledging in writing that the Implementation of Stanislaus Commitments, attached hereto as Attachment 1, is an appropriate interpretation and implementation of and will meet PG&E's obligation, as to NEs or NDSs, under antitrust license condition (9)a.

Attachment I, the Implementation of Stanislaus Commitments, provides for several things. Section 1 deals with the IA and possible successor Rate Schedules. In the event that it is proposed to terminate the IA, and if NCPA makes a request for services at least fourteen months prior to the proposed termination, then (emphasis supplied):

> PG&E and NCPA shall negotiate in good faith towards a successor interconnection agreement. Should the parties fail to execute a successor agreement within four months, PG&E shall file with [the FERC], subject to refund, and not less than seven months prior to the proposed date of

> termination of the then-effective rate schedule a successor interconnection rate schedule (IRS) under which PG&E *shall provide NCPA with such services as NCPA may request to the extent set forth in the Stanislaus Commitments, or are at the date of NCPA's request being furnished by PG&E to NCPA or another Neighboring Entity or Neighboring Distribution System pursuant to commitment 5 of the Stanislaus Commitments as set forth in section 3, below,* but if such services exceed or go beyond those PG&E is obligated to provide by the Stanislaus Commitments, PG&E may, at its option, provide either the services requested by NCPA or the services PG&E is obligated to provide pursuant to the Stanislaus Commitments. . . . . PG&E's filing shall propose an effective date for the IRS coincident with the proposed date of termination of the then-effective rate schedule, and the then-effective rate schedule shall not terminate, and service under the then-effective rate schedule shall continue, until it is superseded by a successor rate schedule, subject to refund, as specified above. *The IRS shall comply with and be subject to the Stanislaus Commitments and this implementation agreement* . . . .
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> If such IRS as filed includes rates and charges that would increase the total annual payments by NCPA for services to be provided under the IRS by more than 15 percent per year over the total annual payments for services under the predecessor rate schedule, then, at NCPA's option, until FERC issues a final order establishing rates no longer subject to refund under the IRS rates and charges under the IRS will not increase in any year by more than an amount which will increase NCPA's total annual payments by 15 percent per year.

The NRC (through a letter from the Director, Office of Nuclear Reactor Regulation, dated January 13, 1992) accepted the settlement, finding that it provided a satisfactory response to the NOV and Director's Decision. A copy of that letter of January 13, 1992 is attached as Attachment 4 hereto.

While that set of disputes was eventually settled, the disputes between PG&E (and the DIP as its successor) and NCPA have not ended. Indeed, on August 30, 2001,

the DIP filed at the FERC – over the objection of NCPA – its Notice of Termination of the current NCPA/PG&E IA, in FERC Docket No. ER01-2998-000. In substance, the DIP proposed to turn its obligation to provide firm transmission to NCPA over to the California Independent System Operator, as of April 1, 2002. NCPA protested and moved to reject that filing on September 28, 2001. The FERC has not yet acted.

Because the proposed termination would, in NCPA's view, fail to fulfill the licensee's obligation to provide the firm transmission services itself (or even to assure that the same quality of transmission were provided by another as agent), NCPA has taken the position at the FERC that the filing is in breach of licensee's obligations to NCPA and to this Commission. While this issue has been raised at FERC, NCPA reserves the right to raise it with this Commission if not satisfactorily addressed at FERC.

In short, the disputes which necessitated the license conditions have not gone away with time, as some might have anticipated (and hoped) they would do. The license conditions have remained important and alive for the licensee and for NCPA for the more than quarter century period since they were adopted.

VI. CONDITIONAL REQUEST FOR HEARING

A. Introduction

1. Background

On December 6, 1978, Pacific Gas & Electric Company's construction permits for its two Diablo Canyon Nuclear Power Plant units were amended to include as license conditions the so-called "Stanislaus Commitments," which were contained in a letter agreement that PG&E had reached with the U.S. Justice Department in connection with PG&E's application for a construction permit for the proposed Stanislaus Nuclear Project. 43 Fed. Reg. 247 (NRC 1978). When Facility Operating License Nos. DPR-80

and DPR-82 were issued to PG&E for the Diablo Canyon units, the Stanislaus Commitments were included as Appendix C to each license. The Stanislaus Commitments impose a number of obligations on PG&E with regard to its electric utility activities. The commitments were negotiated because of the Justice Department's belief that PG&E was engaging in activities inconsistent with the antitrust laws. The Commission has subsequently entertained complaints by NCPA that PG&E has violated these license conditions, and indeed the Commission has found that PG&E violated several of these commitments. *See, Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, DD-90-3, 31 N.R.C. 595 (1990), *petition for review dismissed*, No. 90-1463 (D.C. Cir. Mar. 5, 1992).

2. The DIP's Application

The DIP proposes to remain a licensee for Diablo Canyon, in the form of PG&E-R, but also to add three more corporations to the license: Gen, Nuclear, and ETrans. Nuclear [16] would be licensed to own the two nuclear units, and its parent, Gen, would be licensed to operate them. PG&E-R and ETrans would neither own nor operate the units, but would remain on the license in order to preserve this Commission's ability to enforce what are now licensee's obligations under the Stanislaus Commitments. The DIP's proposal reflects the present definition of "Applicant" in the section (I)a of the Commitments (and in the present license conditions): "Pacific Gas and Electric Company, any successor corporation, or any assignee of this license." ETrans and

[16] Each of the Gen Sub LLCs is to be established with an extremely modest capitalization ($100), and an income of $1 per annum, to be paid by Gen. Gen will have complete authority to do anything it desires with the resources technically owned by any LLC, and to collapse or terminate each Gen Sub LLC if and when desired.

PG&E-R would qualify as "successor corporations" under this definition were the DIP to carry out its proposed POR.

3. This Commission's Notice

Following a description of the changes to the Stanislaus Commitments proposed by PG&E in its license application, the Commission states the following in its public notice:

> Notwithstanding the proposed changes to the antitrust conditions proffered as part of the amendments to conform the licenses to reflect their transfer from PG&E to Gen and Nuclear, the Commission is considering specifically whether to approve either all of the proposed changes to the conditions, or only some, but not all, of the proposed changes, as may be appropriate and consistent with the Commission's decision in Kansas Gas and Electric Co., *et al.* (Wolf Creek Generating Station, Unit 1), CLI–99–19, 49 NRC 441, 466 (1999). In particular, the Commission is considering approving only those changes that would accurately reflect Gen and Nuclear as the only proposed entities to operate and own Diablo Canyon.

67 Fed. Reg. at 2456. The Commission would thereby modify the antitrust conditions in the Diablo Canyon licenses by removing PG&E and one of its successor corporations from the commitments, and thereby removing those entities from the Commission's jurisdiction and freeing them from liability for civil fines for license violations.

B. NCPA's Position

NCPA has been concerned about its ability to enforce obligations entered into by PG&E, but which would be distributed among the many progeny proposed in the POR. NCPA has raised the issue in the bankruptcy proceeding, and following a discussion suggested by Judge Montali, believes that it has agreed with DIP on the terms of a stipulation. That stipulation will, when executed by all parties and submitted to the court, ensure that NCPA and its members will not be impaired in their ability to enforce

obligations by the disaggregation proposed by the DIP in this proceeding, if this Commission approves the proposal made by the DIP to add the necessary successor parties to the license for purposes of the antitrust conditions. Thus NCPA will not, conditional upon the final completion of that stipulation, object on these grounds to the approval by this Commission of the proposal as made by the DIP, if and when the proposal is ripe for approval, as discussed above, nor will it request a hearing. NCPA does object, however, to the result suggested in this Commission's *sua sponte* proposal to modify the conditions agreed to by the parties to eliminate any of the necessary successors to PG&E which the DIP has proposed to add to the license, and requests a hearing on this application should the Commission view that as a possible result. Should the stipulation which NCPA believes has been reached with the DIP not be completed, NCPA reserves the right to modify its pleadings on this issue within the period set by the Notice of this application for the filing of comments.

1. This Commission's Antitrust Review Jurisprudence

The Atomic Energy Act incorporates an antitrust component because of Congressional intent that this governmentally-subsidized technology be used for public benefit rather than mere private gain. However, the administration of the Act by this Commission and its predecessor, the Atomic Energy Commission, has frequently reflected an absence of enthusiasm for the agency's assigned role. Most famously, at a time when the Act provided for antitrust review only of commercial licenses for nuclear electric plants, the AEC licensed all power reactors as experimental facilities. In order to bring the Act's antitrust provisions into play, Congress had to amend the law.

In 1991, the NRC reached the conclusion, remarkable on its face, that although the "[t]he 40-year license term in [AEA] section 103.c, which necessitates license renewal, was adopted for antitrust and financial reasons rather than safety or common defense and security reasons," the Act neither contemplates nor authorizes a new antitrust review when a licensee seeks to renew its license. *Nuclear Power Plant License Renewal*, 56 Fed. Reg. 64,943, 64,960, 64,969 (1991). On review, the D.C. Circuit deferred to the Commission's construction of the statute as "permissible," but also noted that "[p]etitioners' argument is not insubstantial" and suggested that "the NRC could have accepted petitioners' arguments and determined to conduct antitrust review" in connection with license renewal. *American Pub. Power Ass'n v. USNRC*, 990 F.2d 1309, 1313-14 (D.C. Cir. 1993). Accordingly, the Commission's practice of not conducting antitrust reviews in connection with license renewals represents not simple compliance with a statutory mandate, but a policy choice on the part of the Commission which is subject to review and reversal should circumstances so warrant.[17]

In its *Wolf Creek* order, the Commission turned its attention to the question of whether antitrust reviews should be conducted when a nuclear plant license is transferred. The Commission determined that "the statute does not explicitly address the issue of antitrust authority over post-operating license transfer applications," and therefore turned to legislative history for "additional guidance on Congressional intent." *Wolf Creek*, 64 Fed. Reg. 33,916, 33,923. Finding nothing directly on point, the Commission concluded:

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[17] *See In The Matter of Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1): Memorandum and Order,*, CLI-99-19, 49 N.R.C. 441, 64 Fed. Reg. 33,916 ("*Wolf Creek*") at 33,923 (1999), (discussing *Chevron*, *State Farm*, and their progeny).

> There is no evidence in the statutory text or history that Congress expected the Commission to conduct antitrust reviews of post-operating license transfers. In such a detailed statutory scheme, Congressional silence on such transfers seems to us tantamount to an absence of agency authority. At the least, it cannot be said that Congress *required* antitrust reviews of post-operating license transfers.

Id. at 33,923. Turning to its regulations, the Commission noted that 10 C.F.R. Part 50, Appendix L required submission of antitrust information in connection with license transfer applications, but observed that this did not establish a regulatory presumption of Section 105.c antitrust reviews in license transfer proceedings:

> [T]here are other Section 105 purposes which could be served by the information. Such information could be useful, for example, in determining the fate of any existing antitrust license conditions relative to the transferred license, as well as for purposes of the Commission's Section 105b responsibility to report to the Attorney General any information which appears to or tends to indicate a violation of the antitrust laws.

Wolf Creek, 64 Fed. Reg. at 33,924. However, lest anyone get the impression that the Commission had any enthusiasm for its use of the Appendix L information for this task, the *Wolf Creek* order went on to state the Commission's sense of its mission in this area:

> For this Commission to use its scarce resources needed more to fulfill our primary statutory mandate to protect the public health and safety and the common defense and security than to duplicate other antitrust reviews and authorities[22] makes no sense and only impedes nationwide efforts to streamline and make more efficient the federal government.

[22] Theoretically, the Section 105c.(5) standard of "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" is broader than any use elsewhere in antitrust law enforcement since no actual violation is required. As a practical matter, however, it is difficult at best to even envision a competitive situation which satisfied the Section 105 standard for relief but would not warrant relief under traditional antitrust statutes, which have been broadly construed by the courts. For example, Section 5 of

> the FTC Act has been held to empower the FTC "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws." *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966). Thus, there will be no realistic gap in antitrust law enforcement if the NRC no longer performs antitrust reviews of post-operating license transfer applications.

Id at 33,925-26. In short, the Commission has plainly stated that it believes that it has more important things to do than to administer section 105 of the Act.

One important point that must be made about the *Wolf Creek* order is that it is entirely *dictum*, because of the presence of antitrust license conditions in the *Wolf Creek* license. As the Commission explained:

> Whether or not the Commission conducts a "significant changes" review of post-operating license transfer applications, it still must consider the fate of any existing antitrust license conditions under the transferred license.... The license conditions on their face, the nature of the license transfer, and perhaps the competitive situation as well, would need to be considered to determine what action were warranted in a given case....
>
> While the issue of the appropriate treatment of existing antitrust license conditions in the past would have been addressed as part of the "significant changes" review of license transfers, there will need to be some means provided for consideration of the matter in connection with transfers of licenses with existing antitrust license conditions. In such cases, the Commission will entertain submissions by licensees, applicants, and others with the requisite antitrust standing that propose appropriate disposition of existing antitrust license conditions. Here, antitrust license conditions are attached to the Wolf Creek license. We therefore direct all parties to this proceeding (and other persons with an interest in the license conditions) to submit letters to the Commission addressing the disposition of the conditions....[23]
>
> [23] Consideration of the Wolf Creek antitrust license conditions is not inconsistent with our holding that the NRC need not conduct "significant changes" antitrust reviews of license transfers, for the Wolf Creek conditions were imposed at a licensing stage (initial licensing) when the NRC undoubtedly had antitrust authority. The Commission plainly has continuing authority to modify or revoke its own validly-

> imposed conditions. *See Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI–92–11, 36 NRC 47, 54-59 (1992).

Wolf Creek, 64 Fed. Reg. at 33,926. Because of this, no person was aggrieved by the *Wolf Creek* order, making judicial review of the Commission's policy statement unavailable.[18]

Following the *Wolf Creek* order, the NRC issued a notice of proposed rulemaking proposing to eliminate any requirement for submission of antitrust information with an application to transfer a nuclear plant license. *Antitrust Review Authority: Clarification*, 64 Fed. Reg. 59,671 (1999). Although the NOPR quoted the language from *Wolf Creek* regarding the possible usefulness of antitrust information in license transfer proceedings, particularly where an existing license included antitrust conditions, *id.* at 59,673, the NOPR contained no analysis whatsoever of whether to retain all or any of the existing antitrust information submission requirement for these purposes. This defect was noted by the American Public Power Association in its comments on the NOPR, to which the Commission responded as follows in its order issuing its final rule:

> It is true that there may be a number of post-operating license transfers that involve nuclear facilities whose (transferor) licensees are subject to antitrust license conditions imposed by the NRC as a result of the construction permit (or initial operating license) review. In such cases, consideration must be given to the appropriate disposition of the existing license conditions. This was addressed in the Wolf Creek decision. The Commission stated that it would entertain proposals by the parties as to the proper treatment of existing license conditions. Wolf Creek at 466. In fact, that is precisely what the Commission did in the Wolf Creek transfer case itself, although, because the parties reached a settlement, no decision was required by the Commission. The

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[18] *See, Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998); *ACLU v. FCC*, 823 F.2d 1554, 1575-79 (D.C. Cir. 1987).

> Commission continues to believe that this approach is workable and that retention of the reporting rule for all post-operating license transfer cases where there are existing antitrust conditions is unnecessary. For example, the proper disposition of existing antitrust conditions may be obvious and agreeable to all involved in some cases, or in other cases may be satisfactorily accomplished after considering submissions by the applicants and others much less burdensome than the full scope reporting urged by APPA. In other cases, such reporting might be unnecessary for some transfer applicants, or could be burdensome out of proportion to the benefits. While the possibility cannot be ruled out that the entirety of the information covered by the current rule may be useful or even necessary in some cases to achieve proper disposition of antitrust license conditions, that does not warrant a generally applicable rule that *all* transfer applicants must submit the full scope of information covered by the current rule. Even in cases where it is determined that the current scope of information—or even more—is necessary to dispose of existing antitrust conditions, the Commission is not powerless to obtain and make available the necessary information in the absence of the current rule. The Commission has ample power to require (on its own initiative or at the request of another) whatever information is deemed necessary or appropriate to carry out its responsibility to assure appropriate disposition of existing antitrust license conditions. *See, e.g.*, Atomic Energy Act sections 161b, c, i, o and 182; 10 CFR 2.204, 50.54(f). The Commission need not retain what it considers at best to be an overly broad reporting requirement for the limited purpose of deciding the fate of existing antitrust conditions in certain post-operating license transfer cases. Indeed, in the only case of that nature that has occurred recently—the Wolf Creek case itself—the reporting requirement proved entirely unnecessary when the applicants agreed that the existing antitrust conditions should apply to the entire, post-transfer organization, as APPA has acknowledged (APPA Comments at 9).

Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649, 44,656 (2000).

To summarize, the Commission does not conduct antitrust reviews under Section 105.c in operating license transfer proceedings, but it will consider the

disposition of existing antitrust conditions in connection with license transfers pursuant to its inherent authority to modify or revoke license conditions. *See, Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI–92–11, 36 N.R.C. 47 (1992), *petition for review dismissed sub nom. City of Cleveland v. USNRC*, 68 F.3d 1361 (D.C. Cir. 1995). For purposes of this proceeding, as was the case in *Wolf Creek*, this may be a distinction without a difference.

C. The DIP's Proposal Would Not Substantively Alter The Diablo Canyon Antitrust License Conditions

As noted above, the Diablo Canyon Antitrust License Conditions presently bind "Pacific Gas and Electric Company, any successor corporation, or any assignee of this license." The DIP proposes to amend the text of these license conditions to make express reference to the relevant successor corporations of PG&E—ETrans and PG&E-R—and to Gen, the assignee (with Nuclear) of the operating licenses. NCPA does not view these amendments as substantive, and accordingly neither supports nor opposes them. While it is true that the DIP would exclude Nuclear from the scope of the antitrust license conditions, that corporation has essentially no capital and no assets, and is wholly controlled by Gen, so its exclusion from the antitrust license conditions as proposed by the DIP is inconsequential.

D. The Commission's Proposal Would Necessitate Opening The Equivalent Of A Section 105.c Inquiry

Although PG&E does not propose to make any substantive amendment to the Diablo Canyon antitrust license conditions in its license transfer application, this Commission suggests that it may do so in order to "accurately reflect Gen and Nuclear as the only proposed entities to operate and own Diablo Canyon." 67 Fed. Reg. at 2456. As

noted above, this would constitute a substantive amendment to the Diablo Canyon license conditions by limiting their scope. NCPA suggests that "proposals by the parties as to the proper treatment of existing license conditions"[19] are correct and this Commission's suggestion incorrect.

Removal of Pacific Gas & Electric Company from the Diablo Canyon antitrust license conditions would immediately render the definitions of "Service Area," "Neighboring Entity," and "Neighboring Distribution System" (Conditions (1)b, (1)c, and (1)d, respectively) unintelligible, because neither Gen nor Nuclear will have ever served retail customers "now or in the future." Because neither Gen nor Nuclear will be in the business of interconnecting with others, Condition (2) will be effectively eliminated, as will Conditions (3)a, (3)b, (3)d, (3)e, (4), and (6). Because neither Gen nor Nuclear will own transmission facilities, Condition (7) will be eliminated as well. Condition (8) would be nominally unaffected by the Commission's proposal, but this condition expired by its own terms several years ago. Of the substantive license conditions, therefore, the Commission proposes to obliterate all but perhaps conditions (3)c and (5). It is not at all clear that the Commission enjoys statutory authority to make changes this drastic by itself.

The Commission's notice contains no explanation for its proposal. While it is true that Gen and Nuclear will be the only proposed entities to own and operate Diablo Canyon, the Commission certainly should not ignore the fact that ETrans LLC, which is proposed to inherit the DIP's transmission facilities, will be a sister company of Gen, both of which will be wholly owned by Newco. Allowing a nuclear licensee to nullify

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[19] *Antitrust Review Authority: Clarification,*, 65 Fed. Reg. at 44,656 (2000).

antitrust license conditions by means of a simple shuffling of corporate assets is manifestly improper. Likewise, the DIP's proposal to spin off the remains of the present licensee to shareholders, thereby separating the ownership of the DIP's generation and transmission assets from the DIP's distribution assets and franchised service areas, provides no obvious basis for reducing the DIP's antitrust obligations and those of its successors to which it has properly volunteered to assign the license burdens.

If the Commission elects to initiate an inquiry of the magnitude suggested in its notice, then NCPA respectfully suggests that the streamlined hearing procedures of 10 C.F.R. Part 2 Subpart M, which do not allow for discovery or cross-examination, are manifestly inappropriate for this purpose. In promulgating those regulations, the Commission emphasized that they did *not* cover requests for license amendments "that involve changes in actual operations." *Streamlined Hearing Process for NRC Approval of License Transfers*, 63 Fed. Reg. 66,721, 66,728 (NRC 1998). A license transfer that affects antitrust conditions, and certainly a license transfer in which the Commission proposes to substantively modify or eliminate antitrust conditions, would not meet this description, and therefore should not be within the scope of Subpart M. As the Commission noted in promulgating the Subpart M regulations, those regulations are appropriate to amendments which are "essentially administrative in nature." 63 Fed. Reg. at 66,727. The Subpart M regulations allow for the use of additional procedures when appropriate, 10 C.F.R. § 2.1322(d) (2001), and this would certainly apply to the inquiry that this Commission suggests, which appears to be more appropriately conducted pursuant to 10 C.F.R. Part 2, Appendix A, Section X (2001).

The Diablo Canyon antitrust license conditions have been relied upon as the legal framework upon which numerous contractual relationships have been constructed. Many entities have made extensive investments and forgone litigation in reliance on the continued effectiveness on the Stanislaus Commitments. If the antitrust license conditions are to be modified by exclusion of the successor interests, those protected by those license conditions would have to reconsider their position in the bankruptcy proceeding and at FERC, which presumably is among the reasons why the licensee proposed to properly include its successors and assignees in the current application.

If the Commission intends to consider substantive changes to the Stanislaus Commitments, then in accordance with the discussion in its Antitrust Review Authority: Clarification rulemaking, 65 Fed. Reg. at 44,656, it should require the DIP to submit the antitrust information required by 10 C.F.R. Part 50, Appendix L; so as to establish a sufficient evidentiary record to permit a sound decision on whether the antitrust license conditions should be eliminated, weakened, or, for that matter, strengthened.[20]

Accordingly, NCPA respectfully (but conditioned upon the completion of the stipulation referred to above) requests that the NRC grant the DIP's application for transfer of its license in the manner proposed by the DIP, which is intended to preserve the Stanislaus Commitments as presently in effect. If the Commission instead contemplates making substantive amendments to the Stanislaus Commitments, as proposed in its notice, then NCPA submits that the Commission must require PG&E to

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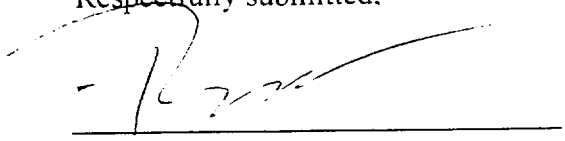
[20] *See, Perry*, 36 N.R.C. at 58 n.39, finding that consideration of additional antitrust conditions in a proceeding initiated by a licensee seeking to amend or eliminate existing conditions "could be sound policy" in light of the fact that "the policy of insulating the licensee from continuing antitrust proceedings may not have ... any ... force" in such a proceeding.

submit antitrust information in accordance with Appendix L, and that hearings be scheduled to consider what changes may be appropriate to the license conditions in connection with the DIP's proposed restructuring.

CONCLUSION

For the foregoing reasons, NCPA submits [21] that the instant application should be held in abeyance until the bankruptcy court concludes that the POR may go forward, and that the application here should be approved, if the POR remains in substantially the same form, as proposed by the licensee, without the amendments suggested by this Commission in its Notice.

Respectfully submitted,



Robert C. McDiarmid
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Lisa G. Dowden

Attorneys for
the Northern California Power
Agency

Law Offices of:
Spiegel & McDiarmid
1350 New York Avenue, NW
Suite 1100
Washington, DC 20005-4798
(202) 879-4000

February 6, 2002

[21] Conditioned upon the completion of the stipulation before the bankruptcy court.

CERTIFICATE OF SERVICE

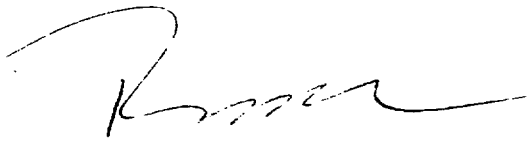
I hereby certify that I have on this 6th day of February, 2002, caused the foregoing document to be sent by e-mail or facsimile, and also by first-class mail, properly stamped and addressed, to the Applicant and to all participants pursuant to 10 C.F.R. §2.1313 as follows:

Richard F. Locke, Esq.
Pacific Gas & Electric Company
77 Beale Street
B30A
San Francisco, California 94105

David A. Repka, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005

General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff



Robert C. McDiarmid

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1350 New York Avenue, NW
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Washington, DC 20005-4798
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ATTACHMENT 1

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

June 14, 1990

Pacific Gas and Electric Company
77 Beale Street, Room 1451
San Francisco, California 94106
Attn: Mr. J. D. Shiffer, Vice President
Nuclear Power Generation

In the Matter of
Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant, Units 1 & 2
Docket Nos. 50-275A & 50-323A

SUBJECT: NOTICE OF VIOLATION FOR DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 & 2

Gentlemen:

This letter concerns violations of NRC antitrust license conditions for your Diablo Canyon facility. These violations involve your refusal to provide partial requirements wholesale power and transmission services to a group of California cities (members of the Northern California Power Agency) who were attempting to purchase power from the Western Area Power Administration (WAPA). Your refusal to provide these services was premised on your claim that these cities were obligated contractually to purchase all of their wholesale power requirements from PG&E. These issues were contested before the United States District Court for the Northern District of California which, on June 8, 1989, ruled that three of these cities, Healdsburg, Lompoc and Santa Clara, were not full requirements customers and that you had violated your contract with them and had failed to meet your power supply commitments under the NRC license conditions. See U.S. v. Pacific Gas and Electric Company, 714 F. Supp. 1039 (N.D.CA, 1989). In addition to your refusal to provide these services required by the license conditions, contrary to the intent of the license conditions, you have included language in service schedules and tariffs filed with the Federal Energy Regulatory Commission (FERC) for services provided by the license conditions which precludes interested parties from contesting the terms and conditions of these filings.

Based upon the District Court's findings and other information that we have obtained, including filings made by aggrieved parties to the NRC, violations of Diablo Canyon license conditions (6), 7(a), 7(d) and 9(a) have been established as set forth in the enclosed Notice of Violation. With respect to your violations of conditions 6, 7(a), and 7(d), the only enforcement action being taken against you at this time is to require you to report in writing regarding the steps you have taken to comply with the District Court decision. No other enforcement action is now being taken since that decision appears to provide sufficient remedial action to require you to comply with these license conditions. With respect to your violation of condition 9(a), you are required to report to us whether you have discontinued filing schedules and tariffs which restrict

others from contesting terms and conditions of tariffs filed pursuant to the license conditions and advise us of the steps you have taken or intend to take to eliminate the restrictive language from existing tariffs and schedules for services required by the Diablo Canyon license conditions.

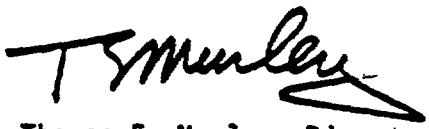
Accordingly, pursuant to 10 C.F.R. § 50.54(f), you are required to submit to this office, within 30 days of receipt of this Notice of Violation, a written statement under oath or affirmation of the steps you have taken and intend to take to comply with the District Court's June 8, 1989 decision and to remove restrictive provision from tariffs and schedules as discussed above. After reviewing your response to the Notice, including your proposed corrective actions, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

In accordance with section 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter and its enclosures will be placed in the NRC Public Document Room.

The responses directed by this letter and its enclosures are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub. L. No. 960511.

Should you have any questions concerning this letter, please contact us.

Sincerely,



Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosures:
1. Notice of Violation
2. Director's Decision

cc: Robert C. McDiarmid, Esq.
Spiegel & McDiarmid
1350 New York Ave., N.W.
Washington, D.C. 20005-4798

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

NOTICE OF VIOLATION

The Nuclear Regulatory Commission (NRC) has identified several violations by Pacific Gas and Electric Company (PG&E) of antitrust license conditions a part of the Diablo Canyon facility. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 CFR Part 2, Appendix C (1990), the violations are listed below:

A. VIOLATION OF ANTITRUST LICENSE CONDITION (6)

Antitrust license condition (6) reads as follows:

(6) Wholesale Power Sales

Upon request, Applicant shall offer to sell firm, full or partial requirements power for a specified period to an interconnected Neighboring Entity or Neighboring Distribution System under a contract with reasonable terms and conditions including provisions which permit Applicant to recover its costs. Such wholesale power sales must be consistent with Good Utility Practice. Applicant shall not be required to sell Firm Power at wholesale if it does not have available sufficient generation or transmission to supply the requested service or if the sale would impair service to its retail customers or its ability to discharge prior commitments.

Contrary to the above, in 1982 the Northern California Power Agency (NCPA), a Neighboring Entity, and the City of Healdsburg, a Neighboring Distribution System, requested partial requirements power from PG&E, as part of an attempt by them to purchase part of their bulk power supply from the Western Area Power Administration (WAPA). PG&E refused to sell partial requirements power as requested.

B. VIOLATION OF ANTITRUST LICENSE CONDITIONS (7)a AND (7)d

Antitrust license condition (7)a reads as follows:

(7) Transmission Services

a. Applicant shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction and which are consistent with these license conditions. Except as listed below, such service shall be provided (1) between two or among more than two Neighboring Entities or sections of a Neighboring Entity's system which are geographically separated, with which, now or in the future, Applicant is interconnected, (2) between a Neighboring Entity with which, now or in the future, it is interconnected and one or more Neighboring Distribution Systems with which, now or in the future, it is interconnected and (3) between any Neighboring Entity or Neighboring Distribution System(s) and the Applicant's point of direct interconnection with any other electric system engaging in bulk power supply outside the area then electrically served at retail by Applicant. Applicant shall not be required by this Section to transmit power (1) from a hydroelectric facility the ownership of which has been involuntarily transferred from Applicant or (2) from a Neighboring Entity for sale to any electric system located outside the exterior geographic boundaries of the several areas then electrically served at retail by Applicant if any other Neighboring Entity, Neighboring Distribution System, or Applicant wishes to purchase such power at an equivalent price for use within said areas. Any Neighboring Entity or Neighboring Distribution System(s) requesting transmission service shall give reasonable advance notice to Applicant of its schedule and requirements. Applicant shall not be required by this Section to provide transmission service if the proposed transaction would be inconsistent with Good Utility Practice or if the necessary transmission facilities are committed at the time of the request to be fully-loaded during the period of which service is requested, or have been previously reserved by Applicant for emergency purposes, loop flow, or other uses consistent with Good Utility Practice; provided, that with respect to the Pacific Northwest-Southwest Intertie, Applicant shall not be required by this Section to provide the requested transmission service if it would impair Applicant's own use of this facility consistent with Bonneville Project Act, (50 Stat. 731, August 20, 1937), Pacific Northwest Power Marketing Act (78 Stat. 756, August 31, 1964) and the Public Works Appropriations Act, 1965 (78 Stat. 682, August 30, 1964).

Antitrust license condition (7)d reads as follows:

(7) Transmission Services

d. Rate schedules and agreements for transmission services provided under this Section shall be filed by Applicant with the regulatory agency having jurisdiction over such rates and agreements.

Contrary to the above, as set forth in U.S. v. Pacific Gas and Electric Company, 714 F.Supp. 1039 (N.D.CA, 1989), in 1982 PG&E failed to provide transmission services and file a transmission tariff in response to requests from NCPA and the City of Healdsburg for the purchase of wholesale power from WAPA.

C. VIOLATION OF ANTITRUST LICENSE CONDITION (9)a

Antitrust license condition (9)a reads as follows:

(9) Implementation

a. All rates, charges, terms and practices are and shall be subject to the acceptance and approval of any regulatory agencies or courts having jurisdiction over them.

Contrary to the above, PG&E has included the following language or similar language in tariffs filed with the Federal Energy Regulatory Commission (FERC) pursuant to requests for service under the Diablo Canyon license conditions:

> This agreement shall become effective on the date it is permitted to become effective by FERC; provided the agreement is expressly conditioned upon FERC's acceptance of all provisions thereof, without change, and shall not become effective unless accepted. [Emphasis added]

The underlined language above is not consistent with the intent of the license conditions in that it provides PG&E with an unfair advantage in its dealings with other power systems in the Northern California bulk power services market. Such language effectively precludes interested parties from contesting the terms and conditions of the service schedule -- thereby stalling any agreement or resolution of differences between PG&E and parties that may wish to take service under the license conditions and potentially forcing these parties to take service under whatever terms PG&E provides. Examples of these provisions are contained in PG&E's tariffs with the City of Healdsburg dated April 20, 1981 and with NCPA dated July 29, 1983. License condition (9)a requires PG&E to file service schedules with the FERC even if the parties do not agree to all of the proposed terms and conditions. The purpose of license condition (9)a is to resolve any conceptual differences in the proposed service schedule at the FERC, which has jurisdiction over the transmission or sale of energy required under the license conditions. PG&E has failed to file the required service schedules or has included provisions in service schedules that restrict the FERC from ruling upon rates, terms, and practices as is the customary practice for such filings before the FERC.

Pursuant to the provisions of 10 CFR 2.201, Pacific Gas and Electric Company is hereby required to submit a written statement to the U.S. Nuclear Regulatory Commission, ATTN. Director, Office of Nuclear Reactor Regulation, Washington, D.C. 20555, within 30 days of the date of the letter transmitting this Notice.

This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each violation: (1) the corrective steps that have been taken and the results achieved and (2) the date when full compliance will be achieved. If an adequate reply is not received within the time specified in this Notice, an order may be issued to show cause why the license should not be modified, suspended, or revoked or why such other action as may be proper should not be taken. Consideration may be given to extending the response time for good cause shown.

FOR THE NUCLEAR REGULATORY COMMISSION

Thomas E. Murley, ~~Director~~
Office of Nuclear Reactor Regulation

Dated at Rockville, MD
this 14th day of June 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION
Thomas E. Murley, Director

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

DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

I. INTRODUCTION

The Northern California Power Agency (NCPA), in petitions dated December 4, 1981 and August 1, 1984, as well as a filing dated March 19, 1985 clarifying these two petitions, requested the Director of the Office of Nuclear Reactor Regulation (Director) to take certain enforcement actions against the Pacific Gas & Electric Company (PG&E) for allegedly violating the antitrust license conditions applicable to the captioned nuclear units. As detailed below, I have withheld my decision in this proceeding until now at the request of NCPA, in anticipation of a resolution of the issues among the parties, either through a combination of negotiation, arbitration or litigation.

In an action brought by the United States against PG&E to recover payment for energy sold by the Western Area Power Administration (WAPA) and used by several cities in California, the United States District Court of the Northern District of California (District Court) issued a ruling on June 8, 1989 that dealt with many of the same issues raised by NCPA before the Nuclear Regulatory Commission (NRC) in its 10 CFR Section 2.206 petitions. United States of America v. Pacific Gas and Electric Company, 714 F. Supp. [illegible] The District Court's ruling was made in the context of

across motions for summary judgment, partial summary judgment and motions to dismiss. I have relied upon many of the findings made by the District Court to conclude that while PG&E may have at times acted in a manner inconsistent with the clear intentions of the Diablo Canyon antitrust license conditions, most of the issues raised by HCPA before the NRC have been mooted. Consequently, although a notice of violation is being issued with this Decision, I am not taking any further enforcement action against PG&E at this time.

However, in light of the conclusions reached by the District Court regarding PG&E's non-compliance with the Diablo Canyon license conditions*, I am specifically requiring PG&E to report to me in writing within 30 days of its receipt of this order regarding the steps it has taken and plans to take in the future to comply with the District Court ruling.**

II. BACKGROUND

During the antitrust review of the Stanislaus Nuclear Project (Stanislaus) conducted by the NRC staff and the staff of the Department of Justice (Department), the Department, via letter dated May 5, 1976 to Howard K. Shapar, Executive Legal Director, from Thomas E. Kauper, Assistant Attorney General, Antitrust Division, advised the NRC staff that PG&E (also the Stanislaus applicant) was engaged in activity that was inconsistent with the antitrust laws. As a result of the Stanislaus antitrust review, certain licensing commitments (Commitments) were made by PG&E to the Department that, according to the Department, obviated the need for an antitrust hearing before the NRC if the

* Although the District Court cited PG&E's non-compliance with the Stanislaus Commitments made to the Department of Justice, they are identical to the Diablo Canyon license conditions.

**An additional violation not dealt with in the District Court's decision concerns license condition 9(a). For this violation, I am requiring PG&E [illegible] and the steps PG&E

Commitments were incorporated in the Stanislaus license with the full force and effect of antitrust license conditions.

In the letter transmitting the Commitments to the Department, John F. Bonner, President of PG&E, stated that,

> In the event that PGandE's application for a construction permit for the Stanislaus Nuclear Project Unit 1 is withdrawn, or that a construction permit for such unit is not issued by the Nuclear Regulatory Commission prior to July 1, 1978, PGandE is willing to have its license(s) for Diablo Canyon Nuclear Power Plant, Units 1 and 2, amended to incorporate the commitments.

Subsequently, by letter dated September 15, 1978, Jerome Saltzman, Chief, Antitrust and Indemnity Group, Office of Nuclear Reactor Regulation, NRC, advised PG&E Vice President and General Counsel John C. Morrissey that no construction permit had been issued for the Stanislaus Nuclear Project to date and pursuant to the letter accompanying the Stanislaus Commitments, the NRC staff intended to amend the Diablo Canyon construction permits to incorporate the Stanislaus Commitments. Mr. Morrissey, by letter dated September 19, 1978, advised Mr. Saltzman that PG&E had no objection to amending the Diablo Canyon licenses by incorporating the Stanislaus Commitments as license conditions. The Diablo Canyon construction permits were amended to include the Stanislaus Commitments as license conditions on December 6, 1978 (43 Fed. Reg. 247, December 22, 1978).

A. NCPA's Petitions

Pursuant to 10 CFR Section 2.206, a petition requesting enforcement action against PG&E was filed with the Director on December 4, 1981 by NCPA. In its petition,

NCPA alleged that PG&E had violated portions of the Diablo Canyon license conditions dealing with transmission services and interconnection agreements. In response to inquiries by the NRC staff, NCPA supplemented its initial petition on three occasions. After meeting separately with each of the parties, the Director conducted a joint meeting with counsel and officials of both NCPA and PG&E in November of 1982 in an effort to resolve the dispute between the parties. As a result of the joint meeting, the parties agreed to negotiate further and, if necessary, to submit to binding arbitration pursuant to the relevant rates, terms and conditions of an interconnection agreement and the associated transmission problems. The NRC agreed to await the outcome of the negotiations and any ensuing arbitration before proceeding further with its review of NCPA's petition. Negotiations did not prove fruitful and the issues in controversy were ultimately submitted to arbitration. Lengthy arbitration proceedings were conducted by an official of the Federal Energy Regulatory Commission (FERC), who agreed to act in the capacity of an arbitrator independently from his official position at the FERC. As a result of the arbitration, the parties reached an accord on the interconnection agreement and associated transmission services and the agreement was accepted for filing at the FERC and made effective on September 19, 1983.

NCPA's 1981 10 CFR Section 2.206 petition primarily addressed PG&E's alleged refusal to transmit power and energy associated with NCPA's Geysers generating units. When the two parties signed the interconnection agreement discussed above, many of the issues raised by NCPA in its 1981 petition were seemingly resolved. However, on August 1, 1984, NCPA filed with the Director a petition that renewed its petition for enforcement action filed in December of 1981. The thrust of the renewed petition differed from the initial petition and

centered around the interpretation of whether the contracts between PG&E and individual NCPA member systems were full requirements contracts or partial requirements contracts. The distinction is significant in that a full requirements contract would, ostensibly, preclude each NCPA member system from participating in all of the benefits associated with the license conditions -- at least until the full requirements contract was terminated.

The dispute that precipitated NCPA's 1984 petition resulted from a complaint filed by PG&E in California state court which sought to compel the City of Healdsburg, California (Healdsburg), a NCPA member system, to pay PG&E for energy that NCPA had purchased from WAPA. PG&E transmitted the power over its system to Healdsburg but maintained that Healdsburg was precluded from purchasing the WAPA power because of its full requirements contract with PG&E. Healdsburg denied PG&E's allegations and stated that its contract with PG&E was not a full requirements contract, but a contract that specifically allowed Healdsburg to seek alternative (to PG&E) sources of power and required PG&E to negotiate in good faith to provide partial requirements power to Healdsburg. NCPA member cities established an escrow account for the purchased power and in April 1988, the United States through WAPA brought suit against PG&E, NCPA and its member cities to recover payment for power sold.

In a subsequent filing to the Director dated March 19, 1985 (Clarification Filing), NCPA attempted to clarify its 1984 petition and narrow many of the outstanding issues involving PG&E and NCPA that had been pending before the NRC. As a result of extensive discussions among the parties, as well as the staff, NCPA indicated in its Clarification Filing that it was, ". . . prepared to

withdraw certain of these counts without prejudice . . . ." At the same time NCPA proposed withdrawing many of the allegations raised against PG&E, NCPA highlighted several remaining areas of alleged anticompetitive activity by PG&E that, according to NCPA, were violations of the Diablo Canyon license conditions. In a letter dated May 29, 1985 to NCPA counsel, the Director closed out NCPA's allegations identified by NCPA as no longer outstanding issues and indicated that the staff was reviewing NCPA's renewed allegations of PG&E's non-compliance with the following license conditions:

(2)f--Interconnection agreements,

(7)a--Providing transmission services,

(7)d--Filing rate schedules and agreements for transmission services,

(9)a--Implementing rates, charges and practices subject to the appropriate regulatory body.

B. District Court Proceeding

At the same time NCPA was pursuing its 10 CFR Section 2.206 action against PG&E before the NRC, the state court proceeding discussed supra was moved to the District Court. Although the District Court Judge indicated that the proceeding before his court was not an action to enforce the Atomic Energy Act, he concluded that the Stanslaus Commitments were a part of a contract between PG&E and the Department of Justice and that NCPA was entitled to sue PG&E, as a third-party beneficiary of said contract, to enforce its rights under the contract.

Accordingly, several of the issues in controversy before the District Court were identical to those identified by NCPA in the pending petition now before the NRC. The issues relevant to the NRC proceeding involved an interpretation of whether the NCPA member systems' contracts with PG&E were full requirements contracts, requiring the members to purchase all of their wholesale power requirements from PG&E, or partial requirements contracts that would allow the member systems to purchase less than 100% of their wholesale power needs from PG&E. The NCPA member systems asserted that their contracts allowed them to not only purchase less than all of their wholesale power requirements from PG&E, but that under the Stanislaus Commitments (as well as the Diablo Canyon license conditions), PG&E was obligated to transmit partial requirements power over its facilities to the NCPA member systems.

On June 8, 1989, the District Court ruled that the PG&E contracts with three of the NCPA member Cities, Healdsburg, Lompoc and Santa Clara, did contain alternate power clauses that enabled these Cities to shop for alternate power suppliers in the wholesale bulk power services market. The Court cited the following provisions in the Cities' contracts to buttress this conclusion:

> (b) Nothing in this Agreement shall be interpreted in such a way as to prevent [the City] from seeking to obtain Power from sources other than PG&E . . . .
>
> (c) In the event [that the City] is able to obtain . . . Power from sources other than PGandE and still wishes to continue purchasing some Power from PGandE, at [the City's] request the Parties shall endeavor in good faith to amend, supplement or supersede this Agreement in order to accommodate [the City's] purchase and use of such other sources of Power on terms and conditions which are just and reasonable. [United States of America v. Pacific Gas and Electric Company, supra, at 1052-1053.]

The Court also ruled that the PG&E contracts with three other NCPA member Cities, Alameda, Lodi and Ukiah, were full requirements contracts because ". . . they were obligated to purchase all of their energy requirements from PG&E . . . " The Court ruled that there was no provision in the contracts with these three Cities that provided for partial requirements sales or good faith efforts to negotiate less than full requirements agreements.

III. DISCUSSION

On August 1, 1984, NCPA filed with the Director a petition for enforcement of antitrust license conditions against PG&E pursuant to 10 CFR Section 2.206. The petition identified several instances of alleged non-compliance with the antitrust license conditions attached to its Diablo Canyon nuclear plant. On March 15, 1985, NCPA filed a Clarification Filing (representing NCPA's most recent allegations) requesting the Director to take enforcement action against PG&E for its alleged violation of license conditions (2)f, (7)a, (7)d and (9)a.

The common thread running throughout both the District Court proceeding discussed supra and NCPA's August 1, 1984 10 CFR Section 2.206 petition alleging that PG&E has not complied with its Diablo Canyon License conditions revolved around the interpretation of whether the PG&E contracts with the individual NCPA member cities were full or partial requirements wholesale power contracts. The District Court concluded, and I concur, that the wording in three of these contracts, with the Cities of Healdsburg, Lompoc and Santa Clara, requires PG&E, upon request, to engage in "good faith" discussions and negotiations that would enable these Cities to purchase wholesale power from sources other than PG&E. According to the record established in the District Court proceeding, PG&E did not live up to its power supply contracts with these three Cities.

> PG&E's failure to comply with the contractural obligation to negotiate in good faith precludes it from objecting to the invocation of the alternate power clauses by these three Cities. [United States of America v. Pacific Gas and Electric Company, supra, at 1053.]

PG&E did not cooperate with the Cities of Healdsburg, Lompoc and Santa Clara when the Cities requested PG&E to transmit energy from WAPA. Under these power supply contracts, PG&E is obligated, upon request, to negotiate in good faith the amendment of each power supply contract--thereby providing these three Cities with the option of purchasing power from sources other than PG&E. PG&E has taken the position that its contracts with these Cities are full requirements contracts and consequently has no obligation to negotiate a partial requirements agreement with the Cities or file rates with the FERC that would apply to partial requirements sales to the Cities.

In assessing the merits of the allegations against PG&E, the staff concurs in the findings of the District Court Decision. The District Court Decision substantiates many of the allegations raised by NCPA in its 10 CFR Section 2.206 petition pursuant to PG&E's non-compliance with its Diablo Canyon license conditions. Based upon the District Court Decision and the filings before the NRC addressing PG&E's alleged non-compliance with its Diablo Canyon license conditions, I have concluded that PG&E has violated license conditions (6), (7)a, (7)d and (9)a. License condition (6) requires PG&E to " . . . sell firm, full or partial requirements power for a specified period to an interconnected Neighboring Entity or Neighboring Distribution System . . . . " NCPA and the City of Healdsburg have requested a filed tariff and the purchase of partial requirements power from PG&E subsequent to the implementation of the license conditions. PG&E has refused to provide these services. In conjunction with

this request(s) for partial requirements service, NCPA and Healdsburg also requested PG&E to file tariffs and provide transmission services. Pursuant to license conditions (7)a and (7)d, PG&E is required to file, with the appropriate regulatory body, rate schedules and agreements for any partial requirements service and provide the necessary transmission service(s). PG&E, as the District Court found, refused to file the appropriate rate schedules and provide these services.

Moreover, PG&E has included the following language or similar language, which is inconsistent with the license conditions, in tariffs filed with the FERC pursuant to the license conditions (e.g., the PG&E/Healdsburg power supply contract and the PG&E/NCPA interconnection agreement):

> This agreement shall become effective on the date it is permitted to become effective by FERC; provided the agreement is expressly conditioned upon FERC's acceptance of all provisions thereof, without change, and shall not become effective unless so accepted.

This language is not consistent with the intent of the license conditions in that it provides PG&E with an unfair advantage in its dealings with other power systems in the Northern California bulk power services market. Such language effectively precludes interested parties from contesting the terms and conditions of the service schedule--thereby impeding the resolution of any problems or differences of interpretation between PG&E and parties that may wish to take service under the license conditions and potentially forcing these parties to take service under whatever terms PG&E provides. License condition (9)a requires PG&E to file service schedules with the FERC even if the parties do not agree to all of the proposed terms and conditions. The purpose of license condition (9)a is to resolve any conceptual differences in the proposed service schedule at the FERC.

The FERC has jurisdiction over the transmission or sale of energy required under the license conditions. To circumvent this jurisdiction by failing to file the required service schedules or by including provisions in the service agreements which restrict FERC's input and jurisdiction is a violation of license condition (9)a.

In addition to the violations I have already identified, NCPA in its Clarification Filing has requested the Director to take additional enforcement action against PG&E. NCPA alleged that PG&E violated license condition (2)f by not entering into a partial requirements wholesale power agreement with Healdsburg. License condition (2)f addresses interconnection agreements and states that, "An interconnection agreement shall not prohibit any party from entering into other interconnection agreements . . . . " However, the PG&E/Healdsburg contract in question that has purportedly prevented the initiation of a partial requirements contract is a power sales agreement, not an interconnection agreement. From the data reviewed by the staff in this proceeding, there is no indication that PG&E has violated license condition (2)f.

NCPA requested the NRC to direct PG&E to withdraw its civil suits filed against six NCPA member cities requesting, inter alia, payment for sales to member systems for power received from WAPA. NCPA stated that, "If the license conditions are to have any effect, PG&E must be directed to withdraw these suits and file tariffs to effectuate the power purchase transactions at issue." [Clarification Filing, p. 9.] The District Court Decision mooted this request. The District Court ruled on the merits of PG&E's arguments and suggested that PG&E file the necessary rates with the FERC if PG&E wanted to collect payment for the transmission and sale of partial requirements service to the Cities of Healdsburg,

ompoc and Santa Clara. Thus, NCPA's request to the NRC to direct PG&E to file rates with the FERC was addressed and resolved by the District Court.

NCPA continues in its Clarification Filing by requesting that, " . . . the Diablo Canyon license conditions should be filed [with the FERC] in their entirety along with whatever rate schedule PG&E devises for Healdsburg et al." The license conditions do not address the terms and conditions of rate schedules. This particular area of expertise falls within the jurisdiction of the appropriate regulatory body--usually the FERC--and for this reason, the staff relies on the appropriate regulatory body to implement the different agreements required by NRC license conditions. Diablo Canyon license condition (9)a is the governing license condition in the instant proceeding--it reads as follows:

> All rates, charges, terms and practices are and shall be subject to the acceptance and approval of any regulatory agencies or courts having jurisdiction over them.

Given the fact that this directive is included as a license condition in the Diablo Canyon license, there is no need to require PG&E to file the license conditions with the FERC.

Finally, NCPA in its Clarification Filing makes the argument that if PG&E has violated its license conditions as alleged, then PG&E also violated the portion of its license, Section 2.G, (NCPA incorrectly identifies this section as 2.H) that requires the licensee to notify the NRC of any violations of the requirements contained in the license--including the antitrust license conditions. Given the nature of the violations of the antitrust license conditions

ted infra and the fact that these issues were the subject of lengthy court proceedings, it is not reasonable to conclude that PG&E violated the requirement to notify the NRC within 24 hours of the occurrence of a violation. However, as I indicated earlier, I am requiring PG&E to report to me in writing within 30 days of its receipt of this Decision regarding the steps it has taken to comply with the District Court's ruling.

IV. CONCLUSION

Based upon the reasons set forth above, it is my decision that PG&E has violated certain of its Diablo Canyon antitrust license conditions. However, other than the issuance of a Notice of Violation and the requirement that PG&E provide information to the staff within 30 days of its receipt of this Decision, I am taking no other enforcement action at this time since it is my decision that the June 8, 1989 District Court Decision provides the necessary remedial action that requires PG&E to comply with the Diablo Canyon antitrust license conditions.

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland
this 14th day of June, 1990.

ATTACHMENT 2a

Pacific Gas and Electric Company

77 Beale Street
San Francisco, CA 94106
415/973-4684

Gregory M. Rueger
Senior Vice President and
General Manager
Nuclear Power Generation

November 15, 1991

PG&E Letter No. DCL-91-274

Dr. Thomas E. Murley, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: In the Matter of Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant, Units 1 and 2
Docket Nos. 50-275A and 50-323A

Subject: Supplement to Reply of Pacific Gas and Electric Company to Notice of Violation for Diablo Canyon Nuclear Power Plant, Units 1 and 2, dated June 14, 1990, and Director's Decision Under 10 CFR 2.206 dated June 14, 1990

Dear Dr. Murley:

This letter supplements the September 28, 1990, response of Pacific Gas and Electric Company (PG&E) to the above captioned Notice of Violation (NOV) and Director's Decision, regarding alleged violations of certain conditions of PG&E's operating licenses for Diablo Canyon. This letter provides information in response to the November 19, 1990, Protest of the Northern California Power Agency (NCPA) and Request for Modification and Suspension of Licenses filed by NCPA pursuant to 10 CFR 2.206 (November 19, 1990, 2.206 Petition). This letter also provides the November 15, 1991, report that PG&E and NCPA committed to provide in our September 12, 1991, joint request.

Enclosed is a draft conditional settlement agreement that PG&E and NCPA have reached to resolve all issues associated with the NOV, Director's Decision, and November 19, 1990, 2.206 Petition. Under this settlement, PG&E and NCPA have agreed on the corrective actions PG&E must take in response to the NOV and in fulfillment of the antitrust conditions on PG&E's Diablo Canyon licenses. These corrective actions include:

1. Implementation of a contract with certain NCPA members in a manner which fulfills PG&E's obligations under license conditions (6), (7)a, and (7)d, and which resolves the issues subject to cross-appeals of a judgment entered by the United States District Court for the Northern District of California in U.S. v. PG&E, No. C-88-1600-VRW. In connection with this corrective action, PG&E requests that the NOV and Director's Decision be revised to clarify that the United States District Court did not find that PG&E had violated condition (6), and did not find that NCPA members with full requirements contracts entered into subsequent to condition (6) may modify such contracts upon demand under condition (6).

2. Implementation of license condition (9)a in a manner that includes an obligation by PG&E, under certain circumstances, to unilaterally file a rate schedule at the FERC to provide services to present or future NCPA members consistent with its license conditions, where voluntary, bilateral negotiations for such services fail.

PG&E and NCPA's settlement agreement is expressly conditioned on the NRC accepting the settlement as fulfilling PG&E's obligations under its license conditions in response to the NOV. The settlement is also conditioned on NCPA's withdrawal with prejudice of its November 19, 1990, 2.206 Petition, and termination of any NRC action on the Petition. The settlement also requires PG&E to dismiss its petition to review the Director's Decision in the U.S. Court of Appeals for the D.C. Circuit (PG&E v. NRC, et al., No. 90-1463), and to dismiss with prejudice its pending suits against six NCPA members in various California state courts. Finally, the settlement requires all parties to dismiss their appeals of the District Court's 1991 amended judgment in the U.S. v. PG&E case, supra.

If the NRC approves this settlement as complying with the NOV, nearly ten years of disputes between PG&E and NCPA will be resolved amicably. In addition, future disputes over interpretation of PG&E's obligations under the antitrust conditions in its Diablo Canyon licenses hopefully will be avoided because of the prospective certainty this settlement brings to the parties' commercial relationship. For this reason, PG&E requests that you accept this settlement within 60 days as fulfilling its license conditions and the requirements of your June 14, 1990, NOV and Director's Decision. Representatives of PG&E and NCPA would be happy to meet with NRC Staff in the near future to discuss this settlement and to answer any questions. Please feel free to call me at (415) 973-4684 if you have any questions or if you would like to arrange such a meeting.

Subscribed to in San Francisco, California this 15th day of November 1991.

Respectfully submitted,

Pacific Gas and Electric Company

By _____
Gregory M. Rueger
Senior Vice President and
General Manager
Nuclear Power Generation

Subscribed and sworn to before me
this 15th day of November 1991

_____
Bianca E. Zelnik, Notary Public
for the City and County of
San Francisco, State of California

My commission expires July 30, 1995

OFFICIAL SEAL
BIANCA E. ZELNIK
NOTARY PUBLIC - CALIFORNIA
San Francisco County
My Commission Expires July 30, 1995

Howard V. Golub
Christopher J. Warner
Richard F. Locke
Attorneys for Pacific
Gas and Electric Company

By _____
Christopher J. Warner

ATTACHMENT 2b

SPIEGEL & McDIARMID

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MATTHEW F KNITTNER
CARRIE G COSTELLO

November 18, 1991

Mr. James Taylor
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Pacific Gas & Electric Company
(Diablo Canyon Nuclear Power Plant,
Units 1 and 2), Docket Nos. 50-275A,
50-323A.

Dear Sir:

The Northern California Power Agency ("NCPA") hereby conditionally withdraws its request of November 19, 1990 that the Commission take enforcement action based on the reply of the Pacific Gas & Electric Company ("PG&E") to the Notice of Violation ("NOV") issued by the Commission on June 14, 1990. The basis for NCPA's conditional withdrawal is the attached unexecuted settlement agreement between PG&E and NCPA. While this document is unexecuted, we understand that it has now been approved for execution by the management of both parties. As part of this proposed settlement agreement, PG&E will take actions and undertake commitments which, in concert, address NCPA's concerns respecting the adequacy of PG&E's reply to the NOV.

The two violations found by the Commission in sections A and B of the NOV concerned PG&E's efforts to obstruct a transaction by which NCPA sought to purchase energy from the Central Valley Project in California for resale to the City of Healdsburg, California. As the settlement agreement reflects, PG&E has now agreed to implement the transaction in question for Healdsburg as well as for two other cities, so further enforcement action relating to license conditions 6 and 7 would

now be moot, as stated in the Director's Decision accompanying the NOV, DD-90-3, 31 N.R.C. 595 (1990). 1/

As to the violation found by the Commission in section C of the NOV, and with regard to PG&E's asserted obstruction of the efforts of three other cities to participate in the same transaction, which were also among the matters raised in NCPA's November 19, 1990 petition, the parties have tentatively reached a mutually agreeable settlement, which resolves other disputes for the future and for the past.

The third violation found by the Commission addressed language found in two contracts before the Commission: the 1981 PG&E-Healdsburg power supply contract, and the 1983 interconnection agreement between PG&E, NCPA, Healdsburg, and other NCPA members. The 1981 Healdsburg contract was superseded by the 1983 interconnection agreement, and the 1983 agreement is itself about to be superseded by a new interconnection agreement to be entered into as part of a global settlement of several pending FERC proceedings. See Pacific Gas & Electric Co., 56 F.E.R.C. ¶ 61,373 (1991). Accordingly, the immediate subjects of the finding of violation are no longer a source of concern or a basis for enforcement action.

On the more general subject of PG&E conduct raised by the third violation, NCPA is satisfied with the specific commitments proposed to be made by PG&E in the attached settlement agreement. In general, PG&E will agree to provide service to Neighboring Entities and Neighboring Distribution Systems through unilaterally filed rate schedules on those occasions where negotiations fail, and will agree that service under such unilaterally filed rate schedules may not be terminated on account of adverse regulatory action. Additionally, timetables will be spelled out which we hope will eliminate future disagreements over PG&E's Stanislaus Commitments obligations. With these clear commitments on PG&E's part, customers will be free to reject what they may regard as coercive, one-sided contracts offered by PG&E, and clauses such as the one quoted in section C of the NOV in voluntary contracts should not be deemed per se violations of the Stanislaus Commitments in all instances, as the NOV might be read to suggest

---

1/ NCPA understands that PG&E will request that the NRC make clear that the District Court decision in U.S. v. Pacific Gas and Electric Company, 714 F. Supp. 1039 (N.D. Ca. 1989), which is mentioned in section B of the NOV in connection with license condition 7, does not conclude that there has been a violation of license condition 6. NCPA does not object to that request, since it does not believe that the NRC relied solely upon the district court's conclusions in issuing the NOV.

and as NCPA believes might indeed be the case absent the specific commitments contained in this proposed settlement agreement.

In conclusion, as a result of the attached conditional settlement, NCPA is now satisfied with PG&E's responses to the matters raised in the Commission's Notice of Violation, and accordingly sees no point in further enforcement action. Since the settlement agreement attached is conditional upon NRC action, NCPA is willing to withdraw its request of November 19, 1990, conditional upon acceptance of the full settlement package by the NRC and its implementation by PG&E.

Yours very truly,

Robert C. McDiarmid
Attorney for the Northern California
Power Agency

RCMcD:

cc: Dr. Thomas E. Murley
Mr. Harry Rood
Joseph Rutberg, Esq.
Lawrence J. Chandler, Esq.
Giovanna Longo, Esq.
Mr. Michael McDonald, NCPA

ATTACHMENT 3

SETTLEMENT AGREEMENT
BETWEEN
NORTHERN CALIFORNIA POWER AGENCY
AND
PACIFIC GAS & ELECTRIC COMPANY
RESPECTING
NUCLEAR REGULATORY COMMISSION DOCKETS NOS. 50-275A AND 50-323A,
PACIFIC GAS & ELECTRIC COMPANY
(DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2)

PARTIES

This conditional Settlement Agreement is made as of this 20 th day of November, 1991, by and between the PACIFIC GAS AND ELECTRIC COMPANY ("PG&E") and the NORTHERN CALIFORNIA POWER AGENCY ("NCPA"). PG&E and NCPA are hereinafter referred to individually as "Party" and collectively as "Parties."

RECITALS

1. WHEREAS PG&E, a corporation organized under California law, is engaged, among other things, in the business of generating, transmitting, and distributing electric power and energy in northern and central California and elsewhere;

2. WHEREAS NCPA is a public agency engaged in the generation, sale, purchase and exchange of electric power and energy and was created by a joint powers agreement dated July 19, 1968, as amended, by the member cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara and Ukiah, and the Plumas-Sierra Rural Electric Cooperative, and which also presently includes the Truckee-Donner Public Utility District and the Turlock Irrigation District;

3. WHEREAS, on April 30, 1976, the Pacific Gas and Electric Company set forth a Statement of Commitments which it agreed to accept as conditions to any construction permits or licenses

issued for its proposed Stanislaus Nuclear Project (hereinafter referred to as the Stanislaus Commitments);

4. WHEREAS, on December 6, 1978, the Stanislaus Commitments were incorporated in the construction permits for PG&E's Diablo Canyon Nuclear Power Plant, Units 1 and 2, and they have been incorporated in all ensuing low power and full power licenses for the Diablo Canyon units;

5. WHEREAS, on December 4, 1981, the Northern California Power Agency petitioned the Nuclear Regulatory Commission to suspend, modify or revoke PG&E's Diablo Canyon licenses and permits on account of its alleged violations of the Stanislaus Commitments;

6. WHEREAS, in May 1982, PG&E denied NCPA's request to provide transmission service in connection with the effort of NCPA to purchase certain energy for six of its members, the cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara, and Ukiah, California ("Cities") from the United States of America, Western Area Power Administration;

7. WHEREAS, the Cities refused to pay PG&E for energy which they had attempted to purchase through NCPA in May-September, 1982, but placed funds into escrow pursuant to agreements with PG&E;

8. WHEREAS, PG&E filed with the Federal Energy Regulatory Commission on August 16, 1983, an Interconnection Agreement with NCPA, which was approved and took effect on September 14, 1983, superseding PG&E's prior power sales agreements with the cities of Alameda, Healdsburg, Lodi, Lompoc, and Ukiah, California;

9. WHEREAS, on November 28, 1983, PG&E served a suit in California state court against the City of Healdsburg under their recently superseded power sales agreement to collect the unpaid balance on its bills for the period May-September, 1982;

10. WHEREAS, on August 1, 1984, NCPA supplemented its pending § 2.206 petition to bring the Healdsburg suit to the attention of the NRC and contended that it evidenced a further violation of the Stanislaus Commitments;

11. WHEREAS, on March 19, 1985, NCPA withdrew without prejudice certain elements of its 1981 enforcement petition, and clarified its 1981 and 1984 petitions;

12. WHEREAS, in November, 1985, PG&E served state court suits against Alameda, Lodi, Lompoc, Ukiah, and Santa Clara, California which were substantially similar to the suit served against Healdsburg in 1983;

13. WHEREAS, PG&E's suits against the Cities are presently stayed;

14. WHEREAS, on April 28, 1988, the United States brought suit against PG&E, NCPA, and Cities in federal district court to, insofar as pertinent here, collect payment for energy provided in May-September, 1982;

15. WHEREAS, on June 8, 1989, the district court issued a Memorandum and Order, reported at U.S. v. Pacific Gas and Electric Co., 714 F. Supp. 1039, granting, insofar as pertinent here, summary judgment in favor of Healdsburg, Lompoc and Santa Clara, but against Alameda, Lodi and Ukiah, in their dispute with PG&E over the 1982 energy transactions;

16. WHEREAS, on June 14, 1990, the Commission issued a Notice of Violation against PG&E alleging certain violations of PG&E's Diablo Canyon antitrust license conditions, and a Director's Decision, DD-90-3, reported at 31 N.R.C. 595, making certain findings underlying the NOV and denying other relief requested by NCPA in its March 19, 1985 petition;

17. WHEREAS, on September 21, 1990, PG&E timely filed a petition for review of the aforesaid Director's Decision (Pacific Gas & Electric Co. v. NRC, No. 90-1463 (D.C. Cir.)), which proceeding is now stayed;

18. WHEREAS, on September 28, 1990, PG&E responded to the Notice of Violation, requesting that the NOV and the associated Director's Decision be vacated or stayed in part, and denying any violation of its nuclear licenses;

19. WHEREAS, on November 19, 1990, NCPA filed an enforcement petition with the NRC challenging the adequacy of PG&E's response to the Notice of Violation;

20. WHEREAS, on April 25, 1991, the federal district court entered a final Amended Judgment in the action brought against PG&E, NCPA and the Cities by the United States; 1/

21. WHEREAS, PG&E has appealed from the Amended Judgment, and NCPA and the cities of Alameda, Lodi and Ukiah have cross-appealed;

22. WHEREAS, PG&E and NCPA have entered into a wide-ranging settlement of numerous disputes and have released numerous claims, but have excepted from prior settlements and releases the proceedings addressed herein;

23. WHEREAS, certain NCPA Members are not parties to the NCPA-PG&E Interconnection Agreement, but are Neighboring Entities or Neighboring Distribution Systems as defined in the Stanislaus Commitments;

24. WHEREAS, NCPA and PG&E desire to settle the disputes addressed herein; and

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1/ Sometimes herein referred to as "the Amended Judgment."

25. WHEREAS, each Party represents and warrants that its undersigned representatives have been duly authorized to enter into this Settlement Agreement.

NOW THEREFORE, in consideration of the covenants and conditions herein set forth, the Parties agree as follows:

1. CONTRACT PROCEEDINGS

1.1 PG&E will file with FERC an agreed upon transmission rate schedule and any necessary modifications to the superseded power supply contracts of the cities of Healdsburg, Lompoc and Santa Clara to permit implementation of the Amended Judgment. The transmission charge shall be 1 mill per kilowatt-hour. NCPA will support PG&E's filing.

1.2 PG&E will release the funds placed in escrow by Healdsburg, Lompoc and Santa Clara, and will refund payments made under protest by Santa Clara relating to the disputed 1982 energy transactions, less any transmission charges payable to PG&E, in accordance with the terms of ordering paragraph 16 of the Amended Judgment.

1.3 PG&E will retain the funds placed in escrow by Alameda, Lodi, and Ukiah, in accordance with the terms of ordering paragraph 21 of the Amended Judgment.

1.4 PG&E will pay $6 million to NCPA.

1.5 PG&E, NCPA, Alameda, Lodi and Ukiah will withdraw their respective appeals and cross-appeals from the Amended Judgment, which will become final.

1.6 No motion to vacate the Memorandum and Order reported at 714 F. Supp. 1039 shall be made or supported by any Party.

1.7 PG&E will withdraw with prejudice its six state court suits against the Cities (Pacific Gas and Electric Co. v. City of Alameda, No. 569904-1 (Alameda County Super. Ct.); Pacific Gas and Electric Co. v. City of Healdsburg, No. 127234 (Sonoma County Super. Ct.); Pacific Gas and Electric Co. v. City of Lodi, No. 169313 (San Joaquin County Super. Ct.); Pacific Gas and Electric Co. v. City of Lompoc, No. 144796 (Santa Barbara County Super. Ct.); Pacific Gas and Electric Co. v. City of Santa Clara, No. 537572 (Santa Clara County Super. Ct.); Pacific Gas and Electric Co. v. City of Ukiah, No. 47426 (Mendocino County Super. Ct.)).

2. DIABLO CANYON LICENSE CONDITION ENFORCEMENT PROCEEDINGS

2.1 PG&E will implement the Stanislaus Commitments as to NCPA and its present and future members, and to other Neighboring Entities and Neighboring Distribution Systems as set forth in Attachment 1 hereto, which Attachment is incorporated by this reference into this Settlement Agreement as though fully set forth herein. PG&E's obligation to abide by the Stanislaus Commitments in the manner set forth in Attachment 1 shall extend for so long as the Commitments are included in any federal license held by PG&E, but in any event shall not be extinguished prior to January 1, 2050.

2.2 NCPA will withdraw with prejudice its enforcement petition of November 19, 1990~~, as set out in the letter conditionally withdrawing its request for further enforcement which is filed together herewith.~~ 11/18/91 11-14-91

2.3 PG&E will withdraw its petition to review the Director's Decision reported at 31 N.R.C. 595.

3. SETTLEMENT, RELEASE AND DISMISSAL OF OUTSTANDING DISPUTES AND CLAIMS

3.1 By this conditional Settlement Agreement, and upon satisfaction of the condition. described in Section 4 and the completion of the actions described in Section 1 and 2 above, the Parties compromise, settle and release all disputes and claims involved in NCPA's December 1981, August 1984 and November 1990 § 2.206 petitions, as supplemented and clarified, and in and underlying the NOV and Director's Decision, except insofar as such claims were adjudicated in the District Court's June 8, 1989 decision (U.S. v. Pacific Gas and Electric Co., 714 F. Supp. 1039 (N.D. Cal. 1989)) and were the subject of the Amended Judgment entered April 25, 1991 in that action.

3.2 Except as otherwise provided in this conditional Settlement Agreement, each Party agrees that it will state no claim, assert no right, and seek no remedy or relief, whether in the form of money damages, refunds, license conditions or interpretations of license conditions, requests for provision of service or for modification of rates, charges, terms or conditions of service, investigations, or otherwise, in any judicial, administrative, or other proceedings, for or based on facts, circumstances and conditions (including actions or failure to act of any Party, alone or with others, and including entry into agreements, the terms and conditions of such agreements, and the nature of performance or non-performance under such agreements) which are alleged in NCPA's December 1981, August 1984 or November 1990 § 2.206 petitions, as supplemented and clarified, or underlying the NOV or the Director's Decision, or in the proceedings identified in Subsection 1.7 above (except insofar as they were adjudicated in U.S. v. Pacific Gas and Electric Co., supra, and were the subject of the Amended

Judgment), or for the continuation of any such facts, circumstances or conditions up to and including the date of this Settlement Agreement.

3.3 By agreeing to this settlement and release, neither Party waives any rights to state claims or seek relief against the other Party for facts, circumstances or conditions prior to the date of this Settlement Agreement which are not alleged in the records of these proceedings specified in Subsection 3.1 above. By agreeing to this settlement and release, neither Party waives any rights to state claims or seek relief against the other Party for facts, circumstances or conditions in existence after the date of this Settlement Agreement, irrespective of whether such facts, circumstances or conditions are different from facts, circumstances or conditions existing prior to this Settlement Agreement. For purposes of this Subsection 3.3, the terms and conditions of agreements entered into prior to the date of this Settlement Agreement and still in effect will be deemed to be facts, circumstances or conditions in existence after the date of this Settlement Agreement.

3.4 The Parties agree that this settlement and release will have no application to the following proceedings, as and to the extent specified: U.S. v. Pacific Gas and Electric Co., No. C-88-1600 (N.D. Cal.), as to matters adjudicated in that proceeding and the subject of the Amended Judgment, except that the Parties agree to dismiss their respective appeals of the Amended Judgment entered April 25, 1991; Pacific Gas and Electric Co. v. U.S., No. 36-89 C (U.S. Claims Ct.).

4. CONDITIONS PRECEDENT TO SETTLEMENT

4.1 This settlement is conditioned on the Nuclear Regulatory Commission's acceptance of this settlement as fulfilling PG&E's obligations under the Stanislaus Commitments and the NOV, and terminating further action with regard to NCPA's

November 19, 1990 § 2.206 petition, which has been conditionally withdrawn. 2/ PG&E also conditions its agreement to this settlement on the NRC accepting and acknowledging in writing that the Implementation of Stanislaus Commitments, attached hereto as Attachment 1, is an appropriate interpretation and implementation of and will meet PG&E's obligation, as to NEs or NDSs, under antitrust license condition (9)a. Should the Commission fail to issue an order satisfactory to the parties, then the Settlement Agreement will be withdrawn and all parties will be returned to the status quo ante.

4.2 This Settlement is conditional upon the agreement of Alameda, Lodi and Ukiah to join NCPA in dismissing their cross-appeal from the Amended Judgment.

4.3 Within thirty (30) days of receipt by PG&E and NCPA of notice that the NRC has taken the action specified in Subsection 3.1, the Parties will carry out the actions specified in Sections 1 and 2.

5. GENERAL PROVISIONS

5.1 Submission of Settlement. Upon the signing of this Settlement Agreement, the Parties will promptly submit it to the NRC as an offer of settlement of NCPA's December 1981, August 1984 and November 1990 2.206 petitions, as supplemented and clarified, the NOV, and the Director's Decision, and will request the NRC to accept this Settlement Agreement as a complete resolution of all claims in those petitions and proceedings. Each Party will provide to the other upon request appropriate information and documentation to prepare or otherwise support the joint offer of settlement before the NRC and any other proceeding

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2/ PG&E also will seek clarification of the basis for the conclusions in section A of the NOV, as set forth in the accompanying request.

concerning this settlement before any other regulatory agency, when acceptance or approval of such application is necessary for the arrangements contemplated herein.

5.2 Obligation to Support. The Parties will make every reasonable effort to support, defend, and protect this Settlement Agreement before the NRC, FERC, the California Public Utilities Commission and any other regulatory authority or court of competent jurisdiction which has as an issue before it this Settlement Agreement or its operation or effect.

5.3 No Admission. Neither the execution of, nor any consideration provided in, this Settlement Agreement will be deemed an admission of any liability by any Party. No Party makes any admission concerning the validity or invalidity of any claims made in any proceeding settled, dismissed, terminated or withdrawn by or as a result of this Settlement Agreement.

5.4 Integration. This Settlement Agreement constitutes the complete and final expression of the agreement of the Parties as to its subject matter and is intended as a complete and exclusive statement of the terms of their agreement which supersedes all prior and contemporaneous oral or written offers, promises, representations, negotiations, discussions and communications concerning this Settlement Agreement.

5.5 No Precedent. Nothing contained in this Settlement Agreement shall establish any precedent beyond this agreement, except as provided herein. This Settlement Agreement shall not be submitted as evidence of contract interpretation in any proceeding other than those which involve interpretation of the obligations entered into pursuant to this agreement.

5.6 Amendment. This Settlement Agreement may be amended only by a written instrument duly executed by the Parties.

5.7 Governing Law. This Settlement Agreement will be interpreted, governed by, and construed under the laws of the State of California or the laws of the United States, as applicable, as if executed and to be performed wholly within the State of California.

5.8 Captions. All captions, headings and titles in this Settlement Agreement are provided for convenience only and are not intended to have any meaning or effect on the contents of this Agreement, its scope or its interpretation.

PACIFIC GAS & ELECTRIC COMPANY

By: _____
Name: Robert J. Haywood
Title: Vice President - Power Planning and Contracts

Date: November 20, 1991

NORTHERN CALIFORNIA POWER AGENCY

By: _____
Name: Michael W. McDonald
Title: General Manager

Date: 11/15/91

ATTACHMENT 1

IMPLEMENTATION OF STANISLAUS COMMITMENTS

1. PG&E-NCPA Interconnection Agreement and Successor Rate Schedules. In the event that it is proposed to terminate the Interconnection Agreement between PG&E and NCPA and its signatory members dated July 29, 1983, as amended, or any successor agreement or rate schedule, and NCPA makes a request for services at least fourteen months prior to the proposed date of termination, PG&E and NCPA shall negotiate in good faith towards a successor interconnection agreement. Should the parties fail to execute a successor agreement within four months, PG&E shall file with the Federal Energy Regulatory Commission, subject to refund, and not less than seven months prior to the proposed date of termination of the then-effective rate schedule a successor interconnection rate schedule (IRS) under which PG&E shall provide NCPA with such services as NCPA may request to the extent set forth in the Stanislaus Commitments, or are at the date of NCPA's request being furnished by PG&E to NCPA or another Neighboring Entity or Neighboring Distribution System pursuant to commitment 5 of the Stanislaus Commitments as set forth in section 3, below, but if such services exceed or go beyond those PG&E is obligated to provide by the Stanislaus Commitments, PG&E may, at its option, provide either the services requested by NCPA or the services PG&E is obligated to provide pursuant to the Stanislaus Commitments. No such filing shall contain termination provisions which provide for shorter notice periods than are consistent with the negotiation and filing provisions of this section. PG&E's filing shall propose an effective date for the IRS coincident with the proposed date of termination of the then-effective rate schedule, and the then-effective rate schedule

shall not terminate, and service under the then-effective rate schedule shall continue, until it is superseded by a successor rate schedule, subject to refund, as specified above. The IRS shall comply with and be subject to the Stanislaus Commitments and this implementation agreement, and it shall not contain any provision giving PG&E the right to withdraw service or terminate the agreement on account of adverse regulatory action or positions taken by NCPA before any governmental agency or court.

If such IRS as filed includes rates and charges that would increase the total annual payments by NCPA for services to be provided under the IRS by more than 15 percent per year over the total annual payments for services under the predecessor rate schedule, then, at NCPA's option, until FERC issues a final order establishing rates no longer subject to refund under the IRS rates and charges under the IRS will not increase in any year by more than an amount which will increase NCPA's total annual payments by 15 percent per year. For the purpose of measuring a change in payments by NCPA, the change will be measured from PG&E's proposed effective date for the IRS, and the amount of the change will be calculated by subtracting the total annual payment for services under the predecessor rate schedule from the total annual payment for such services under the proposed IRS, holding constant PG&E's total system costs and NCPA's resources and loads. After FERC issues a final order establishing the rates in the IRS no longer subject to refund, the limitation imposed by this provision will no longer apply. NCPA shall pay PG&E the difference, if any, between the rates paid prior to such final order and the rates authorized by FERC in its final order, with interest. If any "true-up" amount owed by NCPA pursuant to the foregoing exceeds 25 percent of the total annual payments under the IA, NCPA shall be entitled to amortize the "true-up" payment over a three year period, subject to interest.

2. Interconnection Services to Neighboring Entities and Neighboring Distribution Systems. Upon eighteen months advance written notice of any Neighboring Entity ("NE") or Neighboring Distribution System ("NDS") for an interconnection or similar agreement, such agreement to supersede any then-existing contract or rate schedule for power, transmission or interconnection services, PG&E agrees to negotiate in good faith towards a successor agreement to provide such interconnection, transmission and power services as may be requested by such NE or NDS. If the parties fail to reach agreement, no later than 7 months prior to the requested effective date PG&E shall file unilaterally with FERC, subject to refund, an interconnection or similar rate schedule (IRS) to provide, at a minimum, requested services to such NE or NDS as are set forth in the Stanislaus Commitments. No such filing shall contain termination provisions which provide for shorter notice periods than are consistent with the negotiation and filing provisions of this section. The IRS shall comply with and be subject to the Stanislaus Commitments and this implementation agreement, and it shall not contain any provision giving PG&E the right to withdraw service or terminate the agreement on account of adverse regulatory action or positions taken by the customer before any governmental agency or court.

If such IRS as filed includes rates and charges that would increase the total annual payments by such NE or NDS for services to be provided under the IRS by more than 15 percent per year over the total annual payments for services under the predecessor contract, if any, then, at the customer's election, until FERC issues a final order establishing rates no longer subject to refund under the IRS, rates and charges under the IRS will not increase in any year by more than an amount which will increase such customer's total annual payments by 15 percent per year. For the purpose of measuring a change in payments by such customer, the change will be measured from PG&E's proposed

effective date for the IRS and the amount of the change will be calculated by subtracting the total annual payment for services under the predecessor contract or rate schedule from the total annual payment for such services under the proposed IRS, holding constant PG&E's total system costs and the customer's loads and resources. After FERC issues a final order establishing rates in the IRS no longer subject to refund, the limitation imposed by this provision will no longer apply. Such customer shall pay PG&E the difference, if any between the rates paid prior to such final order and the rates authorized by FERC in its final order, with interest. If any "true-up" amount owed by such customer pursuant to the forgoing exceeds 25 percent of the total annual payments under the predecessor contract, such customer shall be entitled to amortize the "true-up" payment over a three year period, subject to interest.

3. Services Offered To Others. In the event that PG&E should offer any customer services described in commitment 5 of the Stanislaus Commitments which are not available in an interconnection agreement or IRS with NCPA or another NE or NDS, NCPA or such other NE or NDS may request that its rate schedule be amended to provide for such services. Unless the services which are thus requested pursuant to this Section 3 are inconsistent with the terms of that rate schedule and would materially upset the balance of benefits and burdens in such rate schedule, PG&E will provide them, or the parties will attempt to negotiate a means by which to provide them. If PG&E and the customer fail to negotiate a suitable amendment to such rate schedule within three months of the request, then PG&E shall unilaterally file with FERC a rate schedule amendment setting forth the rates, terms and conditions for such service, including any appropriate limitations on availability, to be effective, subject to refund, no later than nine months from the date of the request, subject to Commission review and provisions for refund.

The amendment shall not be conditioned on acceptance by FERC without material change. PG&E shall not be obligated to provide capacity or energy which are not then available to it, to acquire capacity or energy from other sources, or to undertake any long term planning obligation in connection with this provision or in the provision of services under this Section 3 beyond that provided in any applicable contract or rate schedule with the NE or NDS.

4. Service Pending Resolution of Legal Issues. Any question on the part of PG&E concerning the legal or contractual authority of PG&E, NCPA or another NE or NDS to enter into an agreement for service or to engage in a transaction related to a request for service under the Stanislaus Commitments shall not relieve PG&E of its obligation to negotiate in good faith or to file unilaterally a rate schedule. If such issues are not promptly resolved during the initial negotiations, PG&E will initiate efforts to resolve any such question in an appropriate forum prior to filing a rate schedule within the time period specified herein, or PG&E may make a conditional filing with FERC in compliance with this agreement, the provision of service under such rate schedule to be subject to resolution by FERC of the legal or contractual issues raised by PG&E, as set forth below. In any such filing, PG&E may propose reasonable terms and conditions to protect the interests of its ratepayers, shareholders, officers and employees in the event that service is rendered in a fashion which is later determined to contravene legal or contractual obligations. If the service is requested by NCPA, and if such service involves only power accounting changes, rather than changes in power flows, such service will be deemed to be provided to NCPA as of the date requested, except that service shall not commence within 90 days after the initial request for service unless a lesser period has been agreed to. If PG&E has promptly initiated efforts to resolve such questions

in an appropriate forum prior to or contemporaneous with the filing of the rate schedule, and the issue has not yet been decided by that forum, it may propose such reasonable terms and conditions which will make the provision of services contingent upon the resolution of the issue. PG&E has the right to deny service pending such resolution, but if it elects to do so, its filing shall include proposed compensation to the customer, subject to regulatory review as to adequacy as a part of the rate schedule, to be paid in the event that such resolution is in favor of the customer and to the extent that service would have been provided but for the PG&E's election. In the case of PG&E and NCPA, the parties will cooperate in seeking expedited resolution by FERC (or another decisional body) of these issues.

5. Settlement Terms. PG&E has undertaken unilateral filing obligations in this Implementation of Stanislaus Commitments, and the parties understand that as a result of those obligations, PG&E has the right to attempt to negotiate, in any bilateral or multilateral agreement which is negotiated in conformity with obligations under the Stanislaus Commitments, provisions which in substance:

condition the effectiveness of such agreement on regulatory approval or acceptance without material change or modification,

require the parties to negotiate to restore the original balance of benefits or burdens in the event of such material change or modification or in the event of subsequent adverse regulatory action,

require the parties to support and defend such agreement before governmental agencies or courts.

PG&E shall not include in any unilaterally filed rate schedule any provision giving PG&E the right to withdraw service or terminate the rate schedule in the event of adverse regulatory action or positions taken by NCPA or any other NE or NDS before any governmental agency or court.

ATTACHMENT 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

January 13, 1992

Robert C. McDiarmid
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798

Dear Mr. McDiarmid:

SUBJECT: Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275A, 50-323A

In a petition of November 19, 1990, on behalf of the Northern California Power Agency (NCPA), you requested that, in accordance with Section 2.206 of Title 10 of the Code of Federal Regulations (10 CFR 2.206) the Director of the Office of Nuclear Reactor Regulation issue an order enforcing the Diablo Canyon antitrust license conditions. You asserted that the Pacific Gas & Electric Company (PG&E) was violating antitrust license conditions (6), (7)a, and (7)d by refusing to sell, transmit, and tariff partial requirements power to six NCPA member systems and was also violating antitrust license condition (9)a by imposing "as-filed" conditions in agreements, schedules, and tariffs for service and by refusing to provide service to NCPA member systems except as required by an executed contract. You requested that the Commission modify, suspend, or revoke the Diablo Canyon licenses or take other appropriate action.

While the U.S. Nuclear Regulatory Commission (NRC) was considering your allegations, NCPA and PG&E began settlement negotiations, reaching a final settlement of the matters raised in NCPA's § 2.206 Petition on November 20, 1991. The settlement agreement provides that upon the NRC's acceptance of the Settlement Agreement, NCPA shall withdraw its Petition.

In a letter of November 15, 1991, PG&E requested that the NRC clarify its June 14, 1990, Notice of Violation (NOV) and Director's Decision (DD-90-3) regarding the violation of antitrust license condition (6). The Director's Decision explicitly found that PG&E violated antitrust license condition (6) by refusing to sell partial requirements power to the NCPA member systems of Healdsburg, Lompoc, and Santa Clara. The NOV cited PG&E for violating that

license condition because PG&E refused to sell partial requirements power to NCPA and Healdsburg. The NOV merely repeated the finding of DD-90-3 and was intended to neither expand nor reduce the scope of the violation stated by DD-90-3.

The NRC staff has reviewed the settlement agreement and finds that it resolves Petitioner's allegations and provides a satisfactory response to the June 14, 1990, Notice of Violation and Director's Decision. Because the public interest appears to be satisfied by the final settlement and NCPA's commitment to withdraw its Petition, no further action will be taken by the staff in this matter.

Sincerely,

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

cc:
Gregory M. Rueger
Senior Vice President and General Manager
Nuclear Power Generation
Pacific Gas & Electric Company
77 Beale Street
San Francisco, California 94106

NCPA
NORTHERN CALIFORNIA POWER AGENCY
180 Cirby Way • Roseville, CA 95678

(916) 781-4200
(916) 783-7693 FAX

VIA FAX TRANSMITTAL

January 31, 2001

Mr. Gordon R. Smith
President and Chief Executive Officer
Pacific Gas & Electric Company
Mail Code - B32
P. O. Box 770000
San Francisco, CA 94177

Dear Smith:

PG&E has given notice of termination of the Interconnection Agreement between the Northern California Power Agency (NCPA) and itself ("the IA"), as of a date now set at March 31, 2002. This letter will serve as a formal reminder that we have previously provided a request for continuation of the transmission and other services provided by the IA.

Attachment 1 (entitled "Implementation of Stanislaus Commitments") to the Settlement Agreement between NCPA and PG&E which resolved the NRC finding that PG&E was in violation of its *Diablo Canyon* license conditions appears to be directly relevant here. That Settlement Agreement was submitted to the NRC on November 18 and 19, 1991, and resulted in a "no further action" letter from the NRC dated January 13, 1992.

Attachment 1 provides, in pertinent part (as relevant for this purpose at paragraph 1), that:

> In the event that it is proposed to terminate the Interconnection Agreement between PG&E and NCPA and its signatory members dated July 29, 1983, as amended, or any successor agreement or rate schedule, and NCPA makes a request for services at least fourteen months prior to the proposed date of termination, PG&E and NCPA shall negotiate in good faith towards a successor interconnection agreement. Should the parties fail to execute a successor agreement within four months, PG&E shall file with the Federal Energy Regulatory Commission, subject to refund, and not less than seven months prior to the proposed date of termination of the then-effective rate schedule, a successor interconnection rate schedule (IRS) under which PG&E shall provide NCPA with such services as NCPA may request to the extent set forth in the Stanislaus Commitments . . . .

The language goes on in some detail thereafter, and you will wish to examine it yourself.

We remind you that on March 14, 1997, then NCPA General Manager Michael McDonald sent PG&E a formal notice that NCPA requested a continuation of the Firm Transmission Service and other services provided pursuant to the IA. We reiterate that request, if it is necessary to do so. PG&E has not begun negotiations under the March 14, 1997, request, and thus it is conceivable that your organization did not recognize the March 14 letter as being a notice pursuant to the NRC settlement. Thus, we call that obligation to your attention, as well as to the fact that PG&E's obligation to NCPA under the NRC settlement extends to the year 2050. See the Settlement Agreement itself, at ¶ 2.1.

We look forward to working with your negotiation team. Please contact Don Dame at (916) 781-4207, as he will be the point of contact for your team.

Sincerely,

GEORGE FRASER
General Manager

GF/TG/dg
5.61

cc: Judi K. Mosley, PG&E
Don Dame
Tom Green

bcc: Bob McDiarmid
Lisa Dowden
Roger Fontes
Jim Whalen
Al Parsons
Tom Breckon
Tom Lee
Les Pereira
Kevin Smith
Dale Lain