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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE

In The Matter of)
Pacific Gas and Electric Company)
(Diablo Canyon Nuclear Power Plant)
Units 1 and 2)

Docket Nos. 50-275A
50-323A

To: Mr. Harold R. Denton, Director
Nuclear Reactor Regulation

CLARIFICATION OF NORTHERN CALIFORNIA POWER AGENCY
AND ITS MEMBERS AS TO STATUS OF PETITION FOR
INSTITUTION OF A PROCEEDING TO ENFORCE
AND MODIFY LICENSE CONDITIONS

On December 4, 1981, the Northern California Power Agency and its Members ("NCPA") filed a Petition to Enforce and Modify License Conditions in the above dockets and in Docket No. P-564A, pursuant to 10 C.F.R. §2.206. Many events have transpired since then, including the termination of Docket No. P-564A, the negotiation and filing of an Interconnection Agreement between NCPA (exclusive of Santa Clara and Redding) and Pacific Gas and Electric Company ("PG&E"),^{1/} and the filing of civil suits by PG&E against six NCPA members relating to transactions predating the new Interconnection Agreement. NCPA has made several supplementary filings in this docket, and PG&E has filed several responses. At this point, NCPA's contentions respecting

^{1/} There is a separate agreement between PG&E and Santa Clara. There is no such separate agreement between PG&E and Redding.

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the subject of this proceeding are scattered throughout the record, and the Staff of this Commission has suggested that it may no longer be obvious which concerns remain pressing.

NCPA believes that the issuance of the show cause order originally prayed for is still required by PG&E's actions and by the law. In order to simplify this proceeding, however, NCPA has prepared this clarification for the purpose of setting forth those license violations by PG&E which need to be addressed, and the appropriate action that we believe the Commission should undertake. It is NCPA's intention that the record which has been accumulated heretofore be carried forward in order to avoid wasteful refiling of documents and to preserve the representations which PG&E has made to the Commission. However, this clarification constitutes a full statement of the grievances which NCPA now seeks to press.

When the November 30, 1982 meeting took place in your conference room, your Staff had broken down the NCPA Petition as it then stood into nine separate counts. At that time, the Stanislaus proceeding was still pending, and NCPA sought modification pursuant to the NRC's statutory authority in that docket as well as in this. The nine counts were described by your Staff as follows:

- " 1. Violation of Duty to Transmit Under the License Conditions (License Condition 7A).
2. Violation of Reserve Sharing Provision (license Condition 3).

3. Violation of License Conditions 2F and 7A (Interconnection Agreements and Transmission Services).
4. Violation of License Conditions 7D and 9A (rates, charges, practices, etc. shall be subject to the regulatory agencies or courts having jurisdiction over them).
5. Violation of License Condition 7A (transmission service over the Pacific Intertie).
6. Modification of that part of License Condition 7A concerning PG&E's exit veto over certain power sales.
7. Modification of that part of License Condition 7A that does not require PG&E to transmit from hydroelectric facilities licensed to others.
8. Violation of License Condition 5 by PG&E's refusal to permit smaller entities to join the California Power Pool.
9. Recent PG&E action towards others that are inconsistent with its License Conditions."

Not all of these counts need still be urged by NCPA. NCPA is prepared to withdraw certain of these counts without prejudice since we hope 2/ that the problems which gave rise to them have

2/ One is never certain in dealing with PG&E whether the Company has conceded the point or is simply waiting for what it believes to be a more propitious moment to renew its position. For example, immediately prior to its refusal to permit Healdsburg and other NCPA members to take delivery of the WAPA energy in question in the Healdsburg suit, PG&E had agreed, "pursuant to our Stanislaus Commitments," to transmit energy from the Turlock Irrigation District and to permit Healdsburg to utilize such energy. In the instance at issue in the Healdsburg case,

[FOOTNOTE CONTINUED ON NEXT PAGE]

been or are being resolved and will not recur. Moreover, the demise of Docket P-564A, together with the grant of an operating license in this docket, have caused NCPA to modify somewhat the legal theories upon which it urges you to act. We now turn to an explication of these matters.

As we have explained in our letter of September 14, 1984, this Commission may not properly issue an operating license, absent enforcement, to an entity which has habitually violated preexisting construction permit obligations. We have sought to detail these violations in our letters of August 1 and September 14, 1984. Indeed, PG&E's response to our September 14 letter,^{3/} makes absolutely clear its position that PG&E is under no obligation whatever to offer a partial requirements contract when requested so to do under the Diablo Canyon license, but that all license obligations are met if it offers and forces a neighboring entity to accept a full requirements contract. ^{4/} We believe that position of PG&E to be frivolous, as a matter of law. As we have shown (September 14, 1984 letter), a licensee cannot so easily evade its license obligation by forcing those

[FOOTNOTE CONTINUED FROM PRECEDING PAGE]
however, PG&E refused, and now takes the position that it was under no obligation imposed by the license conditions.

^{3/} Stated in its letter of September 26, 1984, addressed to you from Jack Fallin, Esq., aside from its intemperate language.

^{4/} The Healdsburg contract, of course, is in our view not a full requirements contract under California or any other law, but PG&E asserts that it is.

for whom the license conditions were imposed to "waive" their protection in order to obtain essential services. 5/

NCPA is pressing counts 1, 3 and 4 of its enforcement petition as those counts were enumerated by your Staff , since it is these violations that are at the heart of the litigation which PG&E initiated against Healdsburg and other NCPA members. If we are correct, then PG&E has also violated License Condition 2.H.

PG&E has apparently 6/ filed separate suits against the Cities of Healdsburg, Ukiah, Alameda, Santa Clara, Lodi, and Lompoc, seeking to compel these Cities to pay PG&E for energy which they received from NCPA and which NCPA in turn had purchased from the Western Area Power Administration. The controversy arose from PG&E's refusal to transmit this WAPA energy to these Cities in what NCPA believes to have been a violation of the Diablo Canyon license conditions. Because only the Healdsburg complaint has been served, the ensuing descriptions will refer to that proceeding. PG&E's legal case 7/

5/ There might be some argument, if a neighboring entity had requested a full requirements contract initially and had not in any way been forced into it, that PG&E would be entitled to some notice before being required to provide partial requirements services. No suggestion has been made, however, that Healdsburg had requested a full requirements contract (nor could it be, since NCPA had been seeking on Healdsburg's behalf a partial requirements interconnection agreement for more than a decade).

6/ Service of the complaint has taken place only with respect to Healdsburg.

7/ As explained to the United States District Court in response to Healdsburg's petition to remove.

is based entirely upon its assertions (1) that Healdsburg was precluded, in 1982, by its contract with PG&E (referred to by PG&E as a "full requirements" contract) from being able to purchase power or energy from others, and (2) that PG&E was under no obligation to permit Healdsburg to use such energy.

PG&E served Healdsburg at that time through contracts which had been negotiated pursuant to the Diablo Canyon license conditions in response to requests by Healdsburg for partial requirements service. PG&E responded with the contracts that are the focus of the California litigation. The Healdsburg contract is dated May 5, 1981. PG&E claims that these contracts are "full requirements contracts." NCPA and its members disagree, but if PG&E's construction is accepted, then PG&E violated the Diablo Canyon license conditions when it offered these contracts in response to a request for partial requirements service, and PG&E's suit represents an attempt to profit from its violation.

Even if the 1981 contract were construed to be temporarily "full requirements," it does not exclude Healdsburg from securing other sources of electric capacity and energy. Rather, it expressly commits PG&E to "endeavor in good faith to amend, supplement or supersede this Agreement in order to accommodate Healdsburg's purchase and use of other sources of [electric capacity and energy] on terms and conditions which are just and reasonable." PG&E apparently views this language as excusing it from its obligation under its license. We do not view that language as in any way lessening PG&E's obligation

imposed by Diablo Canyon License Sections 2.F(2)f., 2.F(6), and 2.F(7), which provide that no agreement between PG&E and a Neighboring Entity can preclude subsequent agreements with others for the purchase or sale of power (interconnection agreements), and which impose a continuing obligation on PG&E to offer partial requirements and transmission service upon request.

NCPA had thought that PG&E recognized its obligations to amend its power supply contracts upon request when it allowed NCPA's members to purchase energy from Turlock Irrigation District and, on another occasion, from WAPA, but PG&E refused to do so as to the energy involved in the Healdsburg litigation, apparently since such energy would, absent such agreement, go to PG&E at a very economical rate.

In the present Healdsburg litigation, PG&E views its contractual and license obligations in a different light than it has implied from time to time in the past. In its letter to you dated September 26, 1984, PG&E's Mr. Fallin sets forth the position that once PG&E enters into a "full requirements" contract, it may ignore any and all future requests for partial requirements service. PG&E also gives little heed to its contractual obligation to allow its customers to procure power and energy from other sources. In its Opposition to Demurrer filed with the Sonoma County Superior Court on August 20, 1984, PG&E states the following:

City's claim that it purchased its power from WAPA fails to defeat the complaint. The contract requires City to pay for its full

requirements of power unless the contract was amended, and the contract has not been amended to permit the transactions City claims as a defense to this suit. The provisions of the Stanislaus Commitments are irrelevant and inapplicable.

Opposition to Demurrer at 11-12 (footnote omitted). PG&E's refusal to negotiate in good faith to allow the transaction in question apparently is of no moment either under the contract or the license conditions, in PG&E's view.

PG&E's suits against Healdsburg and other NCPA members constitute blatant and continuing violations of the Diablo Canyon license conditions, in our view. PG&E flatly refused to work out partial requirements and transmission arrangements with Healdsburg to enable Healdsburg to purchase the energy in question from NCPA and WAPA, in violation of license sections 2.F(6) and 2.F(7)a. PG&E claims that its contract with Healdsburg destroyed the applicability of these provisions of its Diablo Canyon licenses, conveniently overlooking the language of Section 2.F(2)f, which directs that no interconnection agreement may preclude the implementation of additional interconnection agreements.

By pressing its suit against Healdsburg, 8/ PG&E proclaims that it did nothing wrong by refusing to accommodate

8/ By order of February 28, 1985, the Sonoma County Superior Court (Boone, J.) has stayed the proceeding in that forum, pending referral of the issues raised in the complaint and demurrer to the FERC. PG&E has indicated that it intends to seek appellate review of the referral.

Healdsburg's requests for partial requirements and transmission service, and PG&E declares that it has no obligation under its license to accommodate such requests. This is a blatant challenge to this Commission and a direct repudiation of PG&E's obligations under its licenses. 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. If specific terms of proposed tariffs are not agreed to by its customers, PG&E may file tariffs of its choosing (consistent with its license obligations) with FERC to accommodate these transactions and allow FERC to adjudicate their justness and reasonableness, subject to refund. If PG&E does not take such action, it should be fined and its construction and operating licenses suspended.

It is essential that PG&E be required to file suitable tariffs with the Federal Energy Regulatory Commission even if PG&E and the Cities cannot "reach agreement" on appropriate terms and conditions. PG&E has a history of refusing to file tariffs until it has reached (or forced) "agreement" with its customers on the appropriate provisions, using the pressure (or "blackmail") of delay to its advantage and then presenting the Federal Energy Regulatory Commission with a take-it-or-leave-it package. Implementation of Diablo Canyon license condition 2.F(9)a requires that PG&E's offers of service be filed with FERC, where PG&E's customers may contest their justness and reasonableness.

Moreover, the Diablo Canyon license conditions should be filed in their entirety along with whatever rate schedule PG&E devises for Healdsburg et al. The Federal Power Act requires the filing of all "practices" and "regulations" affecting and relating to a public utility's rates and charges, as well as "all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. §824d(c). PG&E's failure to file the Diablo Canyon license conditions 9/ with FERC is a declaration of its view that those conditions in no way affect or relate to its filed rate schedules. In light of PG&E's open and willful license violations, such a continuing violation should not be tolerated by the NRC.

It is also important that the NRC enforce license section 2.H. Given PG&E's past history, it is all too possible that PG&E will take the necessary steps to resolve the Healdsburg controversy, but without expressly accepting its obligations under its license conditions. Accordingly, the NRC should compel PG&E to report on its license violations and the steps taken to cure them, in accordance with Diablo Canyon license section 2.H. Requiring PG&E to acknowledge proper construction of what its Diablo Canyon licenses require may be the most effective single

9/ PG&E did file Sections 2.F.(1) and 2.F.(7) of the License Conditions with the FERC when required to do so by the FERC in the E-7777 docket. Pacific Gas and Electric Co., 11 FERC ¶ 61,246 (1980), aff'd, Pacific Gas and Electric Co, et al, v. FERC, (unreported, D.C.Cir. Nos.79-1881, 80-2129, May 17, 1982). That order of the FERC, however, did not address the obligation, vel non, to file the remainder of those conditions.

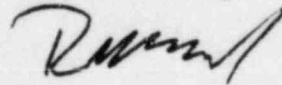
step that can be taken to prevent future license violations and to achieve the goals of the Department of Justice in agreeing to the Stanislaus Commitments in 1976.

The license conditions were imposed to protect small entities against PG&E's superior economic power. If PG&E is allowed to use its superior economic power to extract contractual terms from smaller entities that negate that protection, the conditions will have been nullified. This is the principle which PG&E seeks to establish with its present legal maneuvering, and this Commission must not allow PG&E to succeed. Since PG&E is even now arguing that it has no obligation to transmit or permit a neighboring entity to use power from others, absent a new interconnection "agreement" fully satisfactory to it (regardless of whether the other party believes it to be unjust, unreasonable and grossly unfair) and preapproved by the FERC, it is now appropriate for this Commission to interpret the license to make clear, once and for all, the obligations under the NRC license. It is also timely for this Commission to act, since the core issue which has been referred to the FERC is the question of the obligation of PG&E under the license conditions, a matter with which this Commission can most efficiently deal.

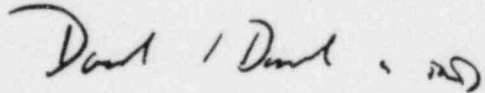
CONCLUSION

For the above-stated reasons, and those previously set out, NCPA believes the Nuclear Regulatory Commission should forthwith issue a formal notice of violation pursuant to 10 C.F.R. §2.201, setting forth a concise description of the license violations alleged herein, and, failing a satisfactory response thereto within twenty days, should institute a proceeding pursuant to 10 C.F.R. §§2.202 and 50.100 to modify, suspend, or revoke PG&E's licenses for Diablo Canyon Nuclear Power Plant Units 1 and 2 by serving on PG&E an order to show cause.

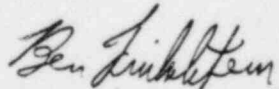
Respectfully submitted,



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March 19, 1985

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In The Matter of)
Pacific Gas and Electric Company)
(Diablo Canyon Nuclear Power Plant)
Units 1 and 2)

Docket Nos. 50-275A
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Clarification of Northern California Power Agency and Its Members as to Status of Petition for Institution of a Proceeding to Enforce and Modify License Conditions, were served on the following persons by deposit in the U.S. Mail, first class, postage prepaid, this 19th day of March, 1985.

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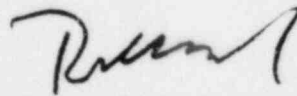
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