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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

In the Matter of:

Pacific Gas & Electric Company,)
Diablo Canyon Nuclear Power Plant) Docket Nos. 50-275
Unit Nos. 1 and 2) and 50-323

BRIEF OF PETITIONERS
TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,
M-S-R PUBLIC POWER AGENCY, MODESTO IRRIGATION DISTRICT,
AND THE CALIFORNIA CITIES OF
SANTA CLARA, REDDING, AND PALO ALTO

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The Transmission Agency of Northern California ("TANC"), the M-S-R Public Power Agency ("M-S-R"), the Modesto Irrigation District ("MID"), and the California Cities of Santa Clara ("Santa Clara" or "SVP"), Redding ("Redding"), and Palo Alto ("Palo Alto") (collectively "Petitioners"), by and through counsel, Wallace L. Duncan, James D. Pembroke, Michael Postar, Lisa S. Gast, Sean M. Neal, Peter J. Scanlon and Derek A. Dyson, Duncan, Weinberg, Genzer & Pembroke, P.C., 1615 M Street, NW, Suite 800, Washington, DC 20036, respectfully tender this Brief in accordance with the Memorandum and Order issued by the Nuclear Regulatory Commission ("Commission") on August 1, 2002 ("the Order").

I. INTRODUCTION AND BACKGROUND

1. **Background.** On November 30, 2001, Pacific Gas and Electric Company ("PG&E") filed its Application for License Transfers and Conforming Administrative License Amendments ("PG&E Application") with the Commission, in which PG&E seeks the Commission's consent to transfer the operating licenses for

Diablo Canyon Power Plant Units 1 and 2 (“Diablo”). If the transfer is approved, as proposed, there would be four licensees with varying degrees of authority and responsibility, ranging from the right to use, possess and operate the plant, to the obligation to comply jointly with the antitrust license conditions presently in place for Diablo.

2. **Reorganization.** The proposed transfer is part of PG&E’s proposed bankruptcy Plan of Reorganization (“POR”). In its POR, PG&E proposes to divide PG&E, an investor-owned gas and electric utility, into four primary entities. Most of the generating assets, including Diablo, would be transferred to Electric Generation LLC (“Gen”), or its subsidiaries (*e.g.*, Diablo Canyon LLC). The electric and gas backbone transmission assets would be transferred to ETrans LLC (“ETrans”) and Gas Trans LLC, respectively. PG&E would be limited to owning and operating its residual assets, including the local distribution systems for gas and electricity.

3. Gen and ETrans will become direct subsidiaries of PG&E Corporation (“Corp”), the current parent company of PG&E. Corp will distribute the common stock of PG&E through a dividend to Corp’s shareholders. Although it will not remain under the same corporate parent, PG&E will retain substantial affiliations with Gen and ETrans through long-term agreements for the purchase and transmission of PG&E’s electric energy requirements.

4. PG&E’s Application before this Commission seeks the approval of the transfer of the Diablo operating license to Gen and Gen’s wholly owned subsidiary, Diablo Canyon LLC. Gen’s license would authorize it to possess, use and operate Diablo, while Diablo Canyon LLC would be authorized only to possess Diablo.

Recognizing the need to preserve the antitrust conditions, PG&E's Application requests the Commission to retain PG&E as a licensee, and to add ETrans as a licensee, each for the "purpose of retaining responsibility of the existing antitrust license conditions."

PG&E Application, p. 4, n.4.

5. Antitrust Conditions/Stanslaus Commitments. A significant issue for determination in this proceeding is the appropriate treatment of the existing antitrust license conditions. The antitrust conditions incorporated into the Diablo license are commonly referred to as the "Stanislaus Commitments." In 1976, PG&E, as part of its efforts to secure licensing for two nuclear power projects (Stanislaus Nuclear Project and Diablo Canyon Nuclear Project) and to address the concerns of the United States Department of Justice that PG&E had committed certain antitrust violations, agreed, in the "Stanislaus Commitments,"^{1/} to the imposition of certain licensing conditions to resolve an ongoing dispute over providing transmission services, power sales, interconnection arrangements and other services to "Neighboring Distribution Systems" and "Neighboring Entities."^{2/} MID, SVP, Redding, and Palo Alto are "Neighboring Distribution Systems" and/or "Neighboring Entities" as those terms are defined in the Stanislaus Commitments, and each has a direct interest in the preservation and enforcement of the Diablo license conditions including, in particular, the Stanislaus Commitments. .

^{1/} See 41 Fed. Reg. 20,225-20,228 (1976).

^{2/} See generally, *Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2)*, 31 N.R.C. 595, 1990 NRC LEXIS 53, at *4-5 (1990) (discussing the history of the conditions in the context of an enforcement action order).

6. Initially, the Stanislaus Commitments were set forth in an April 30, 1976 letter and related attachments from John F. Bonner (then President of PG&E) to the Assistant Attorney General, Antitrust Division, United States Department of Justice (“DOJ”). PG&E’s letter to the DOJ made clear PG&E’s obligation to provide transmission service, power sales services and related services to Neighboring Distribution Systems and Neighboring Entities.

7. While the Stanislaus Nuclear Project was never constructed, the Stanislaus Commitments were included as part of the NRC license for PG&E’s Diablo Canyon Nuclear Project. In the Stanislaus Commitments, PG&E agreed to provide the following services, among others:

- A. The requirement that interconnection agreements provide for reserve coordination in which each of the parties maintains adequate reserves for its estimated peak firm load, and specifying that (except in specified circumstances which are not relevant) a Neighboring Entity shall not be required to carry reserves higher than those of PG&E, and PG&E is obligated to sell capacity to a Neighboring Entity for use as reserves if the capacity is available. See Stanislaus Commitments, §§ III (A), (B) and (C).
- B. The requirement that PG&E offer to coordinate maintenance schedules with a Neighboring Entity, and to exchange or sell maintenance capacity and energy when available. See id., § III (E).
- C. The requirement that PG&E sell emergency power to a Neighboring Entity if that Neighboring Entity maintains the level of minimum reserves agreed to (and vice-versa). See id., § IV.
- D. The requirement that (when it has adequate generation available) PG&E offer to sell firm, full or partial requirements power to Neighboring Distribution Systems or Neighboring Entities. See id., § VI.

- E. The requirement that PG&E transmit power pursuant to interconnection agreements for a Neighboring Entity and/or a Neighboring Distribution System, and/or others dealing in bulk power supply. See id., § VII(A).
- F. The requirement that PG&E shall include in its planning and construction programs such increases in its transmission capacity or such additional transmission capacity as may be required by a Neighboring Entity. See id. § VII(B).
- G. The requirement that 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. See id., § IX(A).

The Stanislaus Commitments are in effect through at least January 1, 2050, and PG&E, in its current aggregated structure, retains the obligations briefly described above.

II. ISSUE

8. To further assist the Commission in determining whether the transfer of the above described antitrust conditions is appropriate, and to address the various petitioners' requests for deferral, the Commission directed the applicant, petitioners and participants to submit briefs on the following issue:

Whether the Commission has statutory authority to retain or impose antitrust conditions for commercial nuclear power plants licensed under Section 104(b) of the Atomic Energy Act?

III. DISCUSSION

9. The Commission, by way of the Stanislaus Commitments, has the authority to retain, impose and enforce antitrust conditions upon the applicants in this license transfer proceeding and nothing in Chapter 23 of the Atomic Energy Act

(“AEA”)^{3/} would prohibit such enforcement. As described in detail below, as PG&E has requested with the support of various intervenors, the Commission should continue to impose and enforce the Stanislaus Commitments with the transfer of the license as requested in PG&E’s Application.

A. **The Commission has Previously Determined That the 1970 Amendments to the Atomic Energy Act Do Allow the Commission to Address Antitrust Conditions In the Context of An Application Made Under Section 104(b)**

10. PG&E applied for authorization to construct and operate the Diablo Nuclear Project, on July 15, 1968. A construction permit was issued on December 9, 1970. During the period, most power companies filed their applications with the Commission under Section 104(b), which at the time, read as follows:

The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will be compatible with the regulations and terms of license which would apply in the event that a commercial license were later to be issued pursuant to section 2133 of this title for that type of facility.

42 U.S.C. § 2134 (b) (1964). The Atomic Energy Commission, the predecessor of this Commission, determined that the licenses of commercial facilities should be issued under

^{3/} 42 U.S.C. § 2011-2297h.

Section 104(b). Section 104(b), as compared with Section 103,^{4/} did not require a finding that the facility was of “practical value” for commercial purposes, pursuant to Section 102.^{5/} “Practical value,” in this context is defined as exhibiting technical feasibility and competitiveness with conventional power plants.^{6/} In addition, during this time, licensing under Section 104(b) presumably foreclosed the need to conduct pre-licensing antitrust reviews.

11. In *Cities of Statesville, et al. v. Atomic Energy Commission*^{7/}, the applicants, in late 1966, applied to construct, use and operate nuclear reactors under Section 104(b) of the AEA before the Atomic Energy Commission. Shortly after the applications were filed, several municipal organizations sought to intervene in the proceedings and argued that the proposed ventures violated the spirit of the antitrust laws. The petitioners were denied intervenor status before the Commission’s Licensing Board, and, upon review, the Commission similarly denied the interventions. The Commission found, in relevant part, that it had no authority to consider antitrust violations when considering a grant of authority under Section 104(b). The intervenors appealed to the Court of Appeals for the District of Columbia Circuit seeking to have the denial of their interventions overturned. In deciding this issue, the Court also addressed the sub-issue of whether antitrust concepts apply to grants of authority under Section 104(b). The Commission determined that it had made no “practical value” findings, thus, Section 103

^{4/} 42 U.S.C. § 2133 (1964) (addressing licensing of commercial facilities).

^{5/} 42 U.S.C. § 2132 (1964).

^{6/} *Determination Regarding Statutory Finding of Practical Value*, 31 Fed. Reg. 221 (1966).

^{7/} 441 F.2d 962 (D.C. Cir. 1969).

was inapplicable. The applications were being granted under Section 104(b), where antitrust considerations were inapposite.

12. The Court upheld the Commission's decision. The Court, however, clearly required the Commission to address antitrust issues in the future. The Court decided that, for operating licenses, "if the trade [had] shown that these nuclear reactors are competitive in the commercial sense and it is clear that a commercial license is appropriate, then the Commission must consider, under section 105(c), anticipatory antitrust impact."^{8/} The Court thus required that the Commission evaluate, during the operating license stage of the license proceedings, whether the nuclear facility should be subject to an antitrust review. Furthermore, the Court stated that the "Commission has the statutory obligation to report to the Attorney General any information it might receive 'with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the [antitrust laws], or to restrict free competition in private enterprise.'"^{9/} In applying this broad requirement, the Court, interpreted the AEA as affording the Commission, "police" power over the activity of licensees, with respect to the matter of trade restraints.^{10/}

13. As the questions regarding both (1) practical value, and (2) under which circumstances an antitrust review should apply were ripe for clarification, Congress pushed to enact changes to the AEA to address these issues (the "AEA

^{8/} *Id.* at 974.

^{9/} *Id.* at 973-974 (citing 42 U.S.C. § 2135 (b) (1964)).

^{10/} *Id.* at 974.

Amendments”).^{11/} On December 19, 1970, Section 104(b) was amended to read as follows:

As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefore for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

42 U.S.C. § 2134 (b) (2000).^{12/} The AEA Amendments eliminated the need for a practical value analysis under Section 102, required that all pending construction permit licenses issued after December 19, 1970, with limited exceptions, be issued pursuant to Section 103, and established formal antitrust review procedures.^{13/}

14. This Commission recognized that there are three licensing categories for nuclear power plants as a result of the AEA Amendments: (1) power plants that had previously been given operating licenses under Section 104(b) were treated as having completed the licensing process and were exempted from any further antitrust review; (2) power plants in the planning stage, which no construction permits had been filed, would be considered as not having begun the Commission licensing process, and, thus an antitrust review would be required prior to issuing a construction permit; and (3) power plants with construction applications pending or which had not received an

^{11/} Pub. L. No. 91-560, 84 Stat. 1472 (1970) (codified as amended sections of 42 U.S.C.).

^{12/} There have been no substantive amendments to this provision since the AEA Amendments of 1970.

^{13/} See *Toledo Edison Company, et al.*, 3 NRC 331, 1976 NRC Lexis 96, *18 (1976) (“*Toledo Edison Co.*”).

operating license prior to December 19, 1970. Power plants in the last category may be subject to antitrust review at the discretion of the Commission.^{14/} It is clear that PG&E's Diablo facility fell within the confines of the third category since PG&E had received its construction permit on December 9, 1970, shortly before the AEA Amendments were enacted, but had not applied for an operating license. PG&E did not file an application for an operating license until after the AEA Amendments were in full effect, on October 10, 1973.

15. The Commission recognized that, with respect to nuclear projects in the third category, the AEA Amendments require that an antitrust analysis be conducted at some point. Similar to the Court of Appeals' guidance in *Cities of Statesville*, the Commission interpreted the AEA Amendments to require the Commission to conduct some type of antitrust review. In *Toledo Edison Co.*, the Commission determined that the AEA Amendments required that "where an operating license application for what was in effect a commercial power reactor remained to be acted upon after the 1970 cutoff date and antitrust review had earlier been sought and denied for the reasons [previously explained], new section 105c(3) directed that such antitrust review was nevertheless to be conducted, if requested in writing within a specified period."^{15/} The Commission further espoused the view that it could grant an applicant, which was subject to the grandfathering provisions of the AEA Amendments, "-- in advance of [an]

^{14/} *Id.* at *19-20.

^{15/} *Id.* at *22.

antitrust review -- either a construction permit or an operating license (as the case might be) subject to modification in accordance with the ultimate outcome of that review.”^{16/}

16. In addition, the Commission also addressed a question that impacts the issue posed by the Commission in this proceeding, *i.e.*, Whether an operating license should be granted without antitrust review in circumstances where the construction permit for that plant was granted prior to the AEA Amendments?^{17/} The applicants in the *Toledo Edison Co.* proceeding sought to have the Commission grandfather the operating license in addition to the construction permit issued prior to AEA Amendments. Opposing parties, including DOJ, argued that, if the Commission were to grant the applicants’ request, the Commission would be rewriting the statute. The Commission determined that an antitrust review would be necessary, and that such a review must be conducted prior to issuance of the operating license.^{18/} Although the question presented was not directly addressed by the AEA Amendments, the Commission made its decision by adhering to the dual congressional intents of avoiding delay in licensing nuclear facilities, but not at the expense of antitrust review.^{19/}

17. The Commission’s review of these issues in *Toledo Edison Co.*, shortly after the AEA Amendments were adopted, is important in analyzing licenses issued in that time frame and should carry significant weight now in the Commission’s

^{16/} *Id.* at *21.

^{17/} *Id.* at *27.

^{18/} *Id.* at *33.

^{19/} *Id.* at *32.

deliberation in this case.^{20/} PG&E's application for an operating license for Diablo was reviewed at the same time as the Commission was issuing its decision in *Toledo Edison Co.*^{21/} Under *Toledo Edison Co.*, the Commission recognized that it had the authority to undertake an antitrust review of an applicant, in those circumstances in which a construction permit was issued prior to the AEA Amendments, but in which the operating license would be applied for and issued after the AEA Amendments. Clearly, Diablo's licensing process is analogous, and under the authority and rationale of *Toledo Edison Co.*, an antitrust review of the operating license could have been undertaken.

18. Although the Commission's December 6, 1978 "Issuance of Amendment to Construction Permits" in the Diablo licensing proceeding states that Diablo was "not subject to antitrust review under Section 105C of the Atomic Energy Act, as amended," the Commission did not foreclose its ability to enforce the antitrust conditions, which it included in the Diablo construction permits.^{22/} The Commission's statement regarding antitrust review must be analyzed in the context of the time and circumstances in which it was made, *i.e.*, the Commission had issued *Toledo Edison Co.*, DOJ had raised antitrust issues with respect to PG&E's conduct to foreclose the

^{20/} The Commission's decision in *Toledo Edison Co.* is consistent with decisions of the Court of Appeals in *Cities of Statesville, et al.* See also *Toledo Edison Co. and Cleveland Electric Illuminating Co., et al.*, 10 NRC 265, 1979 NRC Lexis 40, *7, n.5 (1979) (Certain construction permits were exempted from pre-licensing antitrust review, but operating licenses for those plants were not exempted).

^{21/} See *Pacific Gas and Electric Co. (Diablo Canyon)*, 16 NRC 756, 1982 NRC Lexis 100, *2 (1982) (The operating license was applied for on October 10, 1973, but was not issued until August 1982).

^{22/} 43 Fed. Reg. 59,333, 59,934 (1978).

development of alternative bulk power supply,^{23/} the Stanislaus Commitments were negotiated, and the Commission still had pending before it the operating license for Diablo. The Commission amended the Diablo construction permits on December 6, 1978 to include the Stanislaus Commitments only after ensuring that the “amendments compl[ied] with standards and requirements of the Atomic Energy Act of 1954, as amended.”^{24/} The Commission recognized that antitrust concerns, raised as a result of AEA Amendments, should be addressed in the Diablo licenses. The Commission, by amending the Diablo construction permits to include the Stanislaus Commitments without an antitrust review, accommodated the competing congressional interest of avoiding delay in licensing and addressing antitrust issues. The Commission should continue to recognize that the Stanislaus Commitments meet the legislative intent of the AEA Amendments.

B. The Stanislaus Commitments Provide the Commission With the Authority to Retain and Impose Antitrust Conditions In This License Transfer Proceeding

19. The Commission amended the PG&E’s Diablo construction permits to incorporate the Stanislaus Commitments on December 6, 1978. The Stanislaus Commitments were also incorporated into the Diablo operating license when it was issued in 1982. The Stanislaus Commitments were agreed to by the DOJ and PG&E in 1976 to “moot questions of anticompetitive conduct by PG&E” which had come to the attention of DOJ.^{25/} The Stanislaus Commitments, once incorporated in PG&E’s Diablo

^{23/} *Receipt of Attorney General’s Advice* 41 Fed. Reg. 20,225, 20,226 (1976).

^{24/} 43 Fed. Reg. at 59,934.

^{25/} 41 Fed. Reg. at 20,226.

construction permits, eliminated the need for an antitrust hearing in the proceedings surrounding the later application for an operating license.^{26/}

20. The Stanislaus Commitments are not only a part of a contract between PG&E and the DOJ, but are also an integral part of the Diablo license conditions.^{27/} In *United States v. PG&E*, the court determined that the Stanislaus Commitments were part of a contract entered into by PG&E and DOJ, and that third party beneficiary claims could be filed before the court.^{28/} Further, many entities, including some of the parties in this proceeding, have relied upon the efficacy of the Stanislaus Commitments. Such reliance on the Stanislaus Commitments includes the Bankruptcy Court-approved Settlement Stipulation among the Northern California Power Agency, Palo Alto and PG&E, dated February 6, 2002 (PG&E Bankruptcy Docket No. 6150), incorporated into the PG&E POR, as amended (PG&E Bankruptcy Docket No. 6053). Moreover, numerous other historical reliances on the Stanislaus Commitments by these and other parties have also been described and confirmed in *United States v. PG&E*, both as a license condition and as a contract, including as follows:

In addition to being NRC license conditions, the Stanislaus Commitments are part of a contract between PG&E and the Department of Justice under which the DOJ dropped its antitrust investigation of PG&E in return for PG&E's agreement to include the Commitments as part of its Diablo

^{26/} *Id.* Although the letter was applicable to the Stanislaus Nuclear Project, it is clear that once the Stanislaus Commitments were incorporated into the Diablo licenses, thus, the need for an antitrust proceeding in those dockets was also eliminated.

^{27/} *See Pacific Gas and Electric Co. (Diablo Canyon)*, 31 NRC 595, 1990 NRC Lexis 53, *10-11(1990) (The operating license was applied for on October 10, 1973, but was not issued until August 1982).

^{28/} 714 F. Supp. 1039, 1051 (N. D. Cal. 1989).

Canyon license. See 41 Fed. Reg. 20276 (1976). WAPA, NCPA and the Cities are entitled to sue as third party beneficiaries

Id. at 1051. Clearly, if the DOJ had doubted the NRC's power or right to retain and enforce the Stanislaus Commitments, the DOJ would not have proposed this the adoption of the Stanislaus Commitments as a solution to such an important antitrust settlement. Moreover, billions of dollars of investments have been made by California municipal utilities in reliance upon this critical antitrust protection, which was addressed by the Stanislaus Commitments. Further, the Commission, in a Notice of Violations issued after the aforementioned District Court case, also determined that the Stanislaus Commitments were not only a contractual obligation, but were also license conditions that "attached to [PG&E's] Diablo Canyon nuclear plant."^{29/} Inasmuch as the Commission has previously upheld petitions for the enforcement of the Stanislaus Commitments as antitrust license conditions to the Diablo licenses and found that the license conditions are applicable to the Diablo nuclear plant, and since numerous parties would be detrimentally affected if the Stanislaus Commitments were not transferred, the Commission should continue its practice of enforcing and imposing the Stanislaus Commitments as license conditions that attach to PG&E's Diablo nuclear plant.^{30/} PG&E's obligations under Stanislaus Commitments, and the California municipal utilities' rights as third party beneficiaries to the Stanislaus Commitments, are essential to California municipal utilities' public power and municipal functions and to their protection from anti-competitive and predatory trade practices.

^{29/} 1990 NRC Lexis 53, *13.

^{30/} *Id.*

21. Further, the terms of the Stanislaus Commitments are designed to accommodate the license transfer from PG&E to Gen (Diablo Canyon LLC), with reorganized PG&E and ETrans also as licensees. The Stanislaus Commitments outline the requirements for interconnection, reserve coordination, emergency power, other power exchanges, wholesale power sales, transmission services, access to nuclear generation, and implementation, all of which affect Neighboring Entities and Neighboring Distribution Systems.^{31/} PG&E has made a commitment to these principles. The Stanislaus Commitments recognize that any successor corporation, or any assignee, would be placed in the shoes of PG&E to ensure that the antitrust provisions would be enforced regardless of a change of ownership or license transfer.^{32/}

22. The Commission should grant PG&E's request to have the Diablo license, including the Stanislaus Commitments, transferred to Gen (Diablo Canyon, LLC), with ETrans and reorganized PG&E as additional licensees.

IV. CONCLUSION

23. For the foregoing reasons, the Petitioners respectfully submit that the Commission (1) has statutory authority to retain and impose antitrust conditions for commercial nuclear power plants licensed under Section 104(b); (2) has consistently recognized the Stanislaus Commitments as license conditions attached to the Diablo

^{31/} 41 Fed. Reg. at 20,226-20,228 (1976).

^{32/} The Stanislaus Commitments define "Applicant" as "Pacific Gas and Electric Company, any successor corporation, or any assignee of this license." 41 Fed. Reg. at 20,226.

Canyon Nuclear Power Plant Units 1 and 2; and (3) should transfer the Stanislaus Commitments license conditions as requested in the PG&E Application.

Dated: August 22, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by U.S. Nuclear Regulatory Commission in this proceeding by U.S. Mail. Dated at Washington, D.C., this 22nd day of August, 2002.

A handwritten signature in cursive script, appearing to read "Wallace L. Duncan", written over a horizontal line.

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