UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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

To: Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

PROTEST OF THE NORTHERN CALIFORNIA POWER AGENCY
AND REQUEST FOR MODIFICATION AND SUSPENSION OF LICENSES

Pursuant to 10 C.F.R. § 2.206, the Northern California Power Agency (NCPA) hereby protests the inadequate reply of Pacific Gas & Electric Company (PG&E) to the Notice of Violation issued by the Director of the Office of Nuclear Reactor Regulation on June 14, 1990 (NOV), 1/ and requests that the Commission issue an order to show cause why PG&E's licenses for its Diablo Canyon Nuclear Power Plant, Units 1 and 2, should not be modified, suspended, or revoked, and for other appropriate action. 2/

1/ PG&E's Reply, dated September 28, 1990, was never served on NCPA or its counsel.

2/ On the same date that it issued the NOV, the Commission issued a Director's Decision denying in part NCPA's earlier Section 2.206 petition. NCPA declined to appeal from this denial, because the June 14, 1990 NOV presents as good or better a vehicle for obtaining relief as any that might be obtained from appeal of the Director's Decision. The Director's Decision was premature, in that the absence of any need for additional enforcement action could not be determined without awaiting PG&E's reply to the NOV. However, because the NOV itself provided for the issuance of an order to show cause absent an adequate reply from PG&E, NCPA determined that it was more straightforward to file the instant petition than to ask a court to remand the Director's Decision for the same purpose.

NCPA does not understand the point of PG&E's appeal of the Director's Decision. Apparently, PG&E believes it should have

[FOOTNOTE CONTINUED ON NEXT PAGE]

For each of the three violations identified in the Notice, PG&E was directed to specify the corrective steps that had been taken respecting the violation and the date upon which full compliance would be achieved. In each instance, PG&E denied any violation of its licenses. In one instance, PG&E stated that it would take no corrective action except as directed by a final and non-appealable court order. PG&E's reply constitutes direct defiance of the Commission, and should be quickly and decisively rejected.

The Notice of Violation issued by the Commission reflects a clear understanding of the Diablo Canyon License Conditions, also known as the Stanislaus Commitments, as representing obligations of PG&E to provide certain essential services to eligible entities on request. At various times in the past, PG&E has evidenced the same understanding of its

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[FOOTNOTE CONTINUED FROM PRECEDING PAGE]
been offered a hearing before being found to have violated its license conditions. Given the quantity of paper filed by PG&E in response to NCPA's Section 2.206 petition, PG&E certainly had a full opportunity to be heard. In any event, the Director's Decision was directed to NCPA; the findings of violation as to PG&E are contained in the NOV. PG&E's wish to contest the Director's findings of violation in a hearing can be accommodated through the procedures set forth in 10 C.F.R. § 2.202(b), (c), § 2.204, or § 2.205(d), (e), as appropriate, once the Commission determines the appropriate means of enforcement.

PG&E's confusion results from the problem mentioned above; the Director's Decision was technically premature, and should not have issued prior to resolution of the NOV. However, vacation of the Director's Decision would merely revive NCPA's 1981 Section 2.206 petition, with no different result for all concerned than the present situation. Whatever the procedural posture, the Commission must determine how best to respond to PG&E's violations of the terms of its Diablo Canyon licenses, and must offer PG&E some form of hearing (NCPA does not believe that more than a paper hearing would be necessary) before taking any concrete enforcement action, including civil fines or modification, suspension, or revocation of the licenses.

obligations. However, PG&E's response to the June 14 NOV sets forth a narrower construction of the Commitments, as representing nothing more than an "obligation to negotiate in good faith," during which time the requested service may be withheld. Adding insult to injury, PG&E deems its obligation to negotiate in good faith to be satisfied by the production of one or more "good faith" reasons for refusing to negotiate. If PG&E were correct about the meaning of the Commitments, they would not be worth the paper they are printed on. Accord, WAPA v. PG&E, 714 F. Supp. at 1049 (PG&E's position that the conditions to which it agreed in order to overcome antitrust objections reserve to it the power to veto any transmission requests simply by refusing to enter into agreements "flies in the face of common sense"). The Commission should adhere to the construction of the Commitments reflected in the June 14, 1990 NOV.

There is more than a little irony in the procedural aspect of PG&E's response. Throughout the WAPA v. PG&E litigation, PG&E insisted that the Commitments, whether considered as nuclear license conditions or as a contract between the Company and the Justice Department, could not be enforced by a court for the benefit of NCPA. See, e.g., 714 F. Supp. at 1050. PG&E maintained that the Commitments could be enforced only by the Commission or the Attorney General, pursuant to the Atomic Energy Act. Now, PG&E asks the Commission to suspend action on its Notice of Violation so that PG&E may pursue an appeal from the order of the District Court. In other words, the Commission should grant NCPA no remedy for PG&E's 1982 license violations until PG&E has exhausted its right to argue to a court

that this Commission is the only body competent to rule upon allegations of such violations. This is doublethink of a high order.

The Commission should act decisively now, precisely because it is the body with primary responsibility 3/ for enforcing the Diablo Canyon license conditions. Legal questions raised by PG&E in the WAPA v. PG&E litigation concerning the remedial powers of courts will be mooted if the Commission presses forward with its enforcement action, and prompter relief may be provided than would otherwise be the case. 4/ Contrary to PG&E's claims, there are no disputed issues of fact which need be resolved prior to the Commission taking action, and action by the Commission will not deprive PG&E of any legitimate appellate rights.

I. THE COMMISSION HAS CORRECTLY CONSTRUED ARTICLE 9 OF THE STANISLAUS COMMITMENTS, AND SHOULD ENFORCE IT FORTHWITH

NCPA addresses the third element of the Notice of Violation first, both because it is the seminal violation and because it is not focussed on the incidents at issue in the ongoing federal court litigation. Full correction of this violation, however, would limit the remaining conflicts as well. PG&E has not suggested that the Commission should delay action on the violation. PG&E simply contests the Commission's interpretation of the Diablo Canyon license conditions, a pure

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3/ PG&E would say exclusive authority.

4/ Indeed, with seasonable action by the Commission, this controversy might have been resolved long before the WAPA v. PG&E suit was filed.

question of law as to which the Commission's jurisdiction is primary and its views are entitled to deference by other bodies.

The core dispute between NCPA and PG&E over the meaning of the Stanislaus Commitments was described by NCPA in the prior § 2.206 proceeding:

> The basic issue which has divided the parties in these matters remains unresolved: The question of whether PG&E is under any obligation whatever to provide services pursuant to its Diablo Canyon License Conditions absent a contract to do so fully satisfactory to it.
>
> NCPA is of the view that the license conditions require the provision of such services on request (even if the other party has not given in to PG&E's insistence on contract terms which the other party believes unreasonable) and that PG&E is required to provide such services pursuant to tariffs which it can file at the Federal Energy Regulatory Commission, subject to a determination of that agency as to the justness and reasonableness of the terms thereof. PG&E's position, as we understand it, continues to be that it has no obligation whatever to actually provide services unless and until the other party acquiesces in all the contractual terms and conditions upon which PG&E may happen to insist. Indeed, our understanding of PG&E's position is that it need not provide services unless the 'Neighboring Entity' agrees to its terms, and foregoes its right to challenge them, even if the Neighboring Entity believes the terms insisted upon to be inconsistent with the license conditions themselves.

Letter from Robert C. McDiarmid to Benjamin H. Vogler at 1 (Dec. 7, 1983). 5/

5/ If ever there were doubt over the accuracy of NCPA's characterization of PG&E's position, such doubt would be dispelled by PG&E's reply to the NOV, and particularly by PG&E's statement, NOV Reply at 12, that "it is only when PG&E and an individual neighboring entity have reached an agreement with 'appropriate' provisions for a specific transaction that PG&E has an obligation to provide service."

In Part C of the June 14, 1990 Notice of Violation, the Director resolved this dispute in NCPA's favor. The Director noted that the Commitments require PG&E to file service schedules with FERC even if its customers do not agree with PG&E as to all terms and conditions, and that PG&E's contrary construction of its obligations would enable it to force its customers to accept service under whatever terms PG&E demands. The Director found that PG&E has violated the Stanislaus Commitments both by failing to file required service schedules and by inserting in those schedules which it had filed provisions that restrict parties from contesting and FERC from freely ruling on the rates, terms, conditions, and practices contained in the schedules.

PG&E's answer to this holding is essentially two-fold: PG&E demonstrates that FERC does not consider what PG&E refers to as "as filed" clauses in rate contracts to be per se unlawful in all cases, and PG&E argues that the Stanislaus Commitments themselves should not be construed to require PG&E to provide service in the absence of an agreement with its customer. NCPA's response is likewise two-fold, and is easily summarized.

First, the fact that "as filed" clauses (or, more accurately, regulatory veto clauses) may not be per se unlawful does not mean that they are per se legitimate. The context which produced the Stanislaus Commitments must be considered. Here, the Justice Department sought to bar PG&E's use of such clauses as part of a remedy for what it had concluded was PG&E's record of abuse of market power.

Second, the Commitments can and must be construed as the Director has construed them if they are to serve any useful

purpose. The Director's construction of the Commitments as requiring service without a customer first having to accede to PG&E's demands respecting terms and conditions is entirely consistent with the language of the Commitments. The fact that other NRC licenses contain somewhat different language than do the Stanislaus Commitments does not mean that the Commitments should be construed to be ineffectual. Moreover, PG&E's construction would lead to excessive and unnecessary litigation before this Commission.

A. The Stanislaus Commitments Do Not Permit PG&E to Limit Review of Its Agreements Through The Use of Veto Clauses

PG&E cites several agency and court decisions, mostly Natural Gas Act cases, for the propositions that negotiated contracts represent a desirable alternative to unilateral filings, and that "as filed" clauses encourage entry into such contracts. Nevertheless, there is a danger in blithely approving of "freely negotiated" service arrangements when one party possesses substantial bargaining power. And bargaining power is exactly what PG&E gains under a regulatory regime where service can be withheld for as long as it takes for negotiating parties to reach agreement, or for as long as it takes for the NRC to rule on allegations of bad faith negotiating.

The anticompetitive potential of a "veto clause," is obvious--a customer is forced to defend an unconscionable contract, lest regulatory efforts to ensure a reasonable balance in the parties' bargain result in a total denial of service. Such clauses serve to gag customers desperate to receive service

on virtually any terms. 6/ Contrary to PG&E's implication, the Commission does not view these clauses as harmless in all circumstances. As the Federal Power Commission stated in a case relied upon by PG&E, "While we cannot say that contract clauses conditioning the effectiveness of the contract on final approval of the Commission are per se either a violation of the Act or not in the public interest, the condition in this particular contract comes close to being violative of the public interest." Gulf States Utilities, 55 F.P.C. 1784, 1801 (1976).

PG&E calls such contract provisions "standard," citing as its sole support for this proposition Florida Gas Transmission Co., 51 F.E.R.C. ¶ 61,309 at 62,000 (1990). The Commission was there describing a clause in a settlement agreement "which would resolve all issues in thirty various dockets currently pending before the Commission." Id. at 61,991. That "no change" clauses are standard in settlement proposals is unsurprising, because settlements have a special status. See 18 C.F.R. § 385.602(i) (FERC regulation reserving the procedural rights of the parties when an uncontested settlement proposal is rejected or approved subject to condition). Importantly, however, if a settlement is rejected, the underlying case proceeds upon the company's original filing. NCPA is not aware that FERC considers veto clauses that allow utilities to walk away from their original

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6/ The typical posture of the parties in FERC proceedings involving "freely negotiated" contracts between PG&E and a customer is that the contracting customer supports the "non-precedential" acceptance of the contract without change, while other PG&E customers intervene in opposition, hoping that FERC will declare unreasonable provisions that PG&E may later seek to impose upon them.

filings if not approved in full to be "standard" in electric service contracts (other than PG&E's).

Nor is PG&E entirely correct when it asserts that regulatory veto provisions leave regulatory bodies free to do their job. With a veto clause in place, the regulator is basically constrained to two choices--to accept the contract without material changes, or to reject it. While rejection of such contracts will indeed ensure that unjust and unreasonable rates are not charged and unreasonable terms and conditions are not imposed, the regulator may be reluctant to take this step if it means that an essential or desirable service may thereby be precluded. Regulators can and do order changes to contracts with "as filed" clauses, but decisions to do so must always be weighed against the possibility of a party veto, which will result in denial of service and thereby produce a less desirable result than would approval of the unmodified contract.

This effect was evident in two recent proceedings in which PG&E filed, and FERC approved with modifications, interconnection agreements which PG&E negotiated with Neighboring Entities. In the first of these proceedings, FERC ordered certain modifications to the contract to protect the customer, notwithstanding a professed "desire to minimize our intervention in the terms of that bargain." Pacific Gas & Elec. Co., 42 F.E.R.C. ¶ 61,406 at 62,198, reh'g granted in part, 43 F.E.R.C. ¶ 61,403 (1988) (Turlock). On rehearing, the Commission backed off from one of these modifications, with one Commissioner commenting:

> With utmost reluctance I accede to the result we reach on rehearing. I do so because if we fail to meet the parties' objections to

> our earlier actions, PG&E will nullify the agreement and refuse to provide Turlock with any [transmission] access at all, something which in this proceeding we have no power to prevent. In Turlock's own words, we will leave the customer "between a rock and a hard place." This would not make for sound policy, despite my earlier reservations about this agreement.

Turlock, 43 F.E.R.C. at 62,037 (Trabandt, Comm'r, concurring) (emphasis added). In voting to approve a subsequent PG&E-customer agreement, the same Commissioner observed:

> In all candor, if there were another acceptable way at this time to provide the Modesto Irrigation District (Modesto) with access to the Pacific Gas & Electric Company (PG&E)'s transmission system I would be tempted to dissent. However, as in [Turlock], we must make do with the situation as it presents itself and I acquiesce in the Commission's decision to allow the parties to amend their contract, rather than reject it outright.

Pacific Gas & Elec. Co., 44 F.E.R.C. ¶ 61,010 at 61,055 (Trabandt, Comm'r, concurring in the result), reh'g denied, 45 F.E.R.C. ¶ 61,061 (1988) (Modesto). 7/

PG&E may be correct that enforcement of veto clauses serves to encourage agreements by protecting the balance of benefits and burdens which the parties have negotiated, Reply to

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7/ NCPA notes in passing that, in each of these cases, the customer in question had made substantial concessions in negotiations to obtain services from PG&E that could be viewed as less than what should have been available for the asking under the Stanislaus Commitments. FERC sometimes takes the view that it cannot or at least should not enforce NRC license conditions, e.g., Toledo Edison Co., 12 F.E.R.C. ¶ 61,315 at 61,726 (1980), and Commissioner Trabandt's comments indicate that the Commission was following that policy in these cases. Indeed, in Modesto, the Commission did not respond to NCPA's allegation that the PG&E-Modesto contract conflicted with the Stanislaus Commitments. 44 F.E.R.C. at 61,047, 61,152-53. But cf. PG&E, 49 F.E.R.C. ¶ 61,116 at 61,497 (1989) (Stanislaus Commitments are subject to FERC's review to the extent that they affect or relate to PG&E rate schedule).

NOV at 11, but whether this is a good or a bad thing turns on whether one considers that such agreements are likely to be in the public interest. Compare Modesto, 44 F.E.R.C. at 61,048 (accepting the PG&E-Turlock contract, as modified by the Commission, "as an arms-length agreement"), with id. at 61,055 (Trabandt, Comm'r, concurring) (expressing doubt on this point "[g]iven the relative strengths of the parties"). 8/ PG&E does not explain in its reply to the June 14, 1990 NOV, nor has it ever adequately explained, how PG&E's market power is or even could be appreciably restrained by the Stanislaus Commitments under PG&E's construction of its obligations thereunder. The Director's analysis on this point in the June 14, 1990 NOV is entirely sound.

FERC's most recent decision involving a PG&E interconnection agreement illustrates the converse of the problem caused by the veto clauses in Turlock and Modesto. In an order issued on October 31, 1990 in Docket No. ER90-567, FERC ordered substantial modifications to an interconnection agreement between PG&E and the Sacramento Municipal Utility District (SMUD). The agreement provides that it will become "effective on the date FERC accepts it for filing and allows it to become effective without material change or condition unacceptable to either party." In the final ordering paragraphs of its opinion, FERC

8/ Cf. Tejas Power Corp. v. FERC, 908 F.2d 998 (D.C. Cir. 1990) (FERC order accepting settlement agreement reversed, with the court finding that FERC had placed too much weight on the mere fact of the parties' agreement. The court could find no factual basis for FERC's presumption that the agreement was not the product of one side's superior market power and accordingly represented a fair balancing of interests. Nor could the court join in FERC's assumption that an agreement serving the parties' interests would protect the public's interest).

permits the agreement, as modified to alleviate FERC's concerns, to take effect "on the date service commences," but appears to leave open the possibility that PG&E might refuse to commence service rather than accept FERC's modifications. PG&E, 53 F.E.R.C. ¶ 61,145 (1990). The potential impact of the veto clause, then, is to permit PG&E to deny service to SMUD merely by refusing to acquiesce in FERC determinations that certain terms and conditions of service are unjust and unreasonable. 9/

This Commission should also be aware of the limits to PG&E's statement, NOV at 9, that it does not include the "as filed" provision in its unilateral filings. PG&E's unilateral filing of a Transmission Rate Schedule to SMUD in FERC Docket No. ER89-49 contained provisions in Section G.2 reserving PG&E's right to cancel service or force renegotiation of terms and conditions should FERC subsequently make changes to the terms of the schedule which PG&E might find unacceptable. The FERC Staff found these provisions reserving a veto power to be extremely objectionable, and the Commission concurred, modifying or eliminating them in accordance with Staff's position. PG&E, 53 F.E.R.C. ¶ 61,146 (1990). 10/

In short, "as filed" clauses may have legitimate uses and advantages in some contexts, but they are subject to abuse

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9/ This assumes, of course, that FERC will not repeat its performance in Turlock and decide to back down on rehearing rather than provoke abandonment of the agreement with loss of service to SMUD.

10/ FERC's order was issued on October 31, 1990, and it seems likely that PG&E will seek rehearing. Nevertheless, FERC's actions clearly illustrate its lack of tolerance for rate schedule provisions which purport to give PG&E the right to undercut regulatory decisions.

when utilities with market power can obtain unconscionable contracts and then shield them from full regulatory review through the threat of a veto. For some companies, the historical record of abuse of market power is such that the public interest is best served by a blanket prohibition of such clauses. The Stanislaus Commitments reflect such a determination with respect to PG&E, a determination which was wholly warranted and, as subsequent events have shown, still is. Moreover, the very premise of a veto clause is that the filing utility is free to deny service if it wishes. The purpose of the Stanislaus Commitments was to strip PG&E of that freedom, and PG&E's veto clauses accordingly strike at the very heart of the Commitments.

B. The Stanislaus Commitments Do Not Permit PG&E to Withhold Service Until A Customer Gives In To The Terms That PG&E Demands

With regard to PG&E's remarkable contention that the Stanislaus Commitments do not require it to file a rate schedule and commence provision of service unless and until agreement has been reached with its customer on all terms and conditions of service, this does not comport with even PG&E's contemporaneous understanding of the Commitments. In late 1976, a senior Justice Department official represented that PG&E and the Justice Department agreed with the following statement regarding Article 7(b) of the Commitments: "Wheeling rates would be a matter for determination by the appropriate regulatory commission absent agreement between the parties to the proposed transactions."

Letter from Joseph J. Saunders to Robert C. McDiarmid at 7 (Nov. 10, 1976). This alone is enough to refute PG&E's entire claim. 11/

PG&E's principal argument is predicated on language in Article 7(a) of the Stanislaus Commitments that certain services shall be provided "pursuant to interconnection agreements." From this language, PG&E concludes that "it is only when PG&E and an individual neighboring entity have reached an agreement with 'appropriate' provisions for a specific transaction that PG&E has an obligation to provide service." Response to NOV at 12. 12/ PG&E errs in assuming that an agreement must be reached for there to be an "interconnection agreement" pursuant to the Commitments.

It has long been the practice at FERC, and at its predecessor agency, the FPC, that unexecuted "agreements," including "interconnection agreements," are accepted for filing when parties cannot reach consensus on rates, terms and conditions for service. For example, in Columbus Water & Light Dep't v. Wisconsin Power & Light Co., 3 F.E.R.C. ¶ 61,067 (1978), the Commission summarily rejected the company's argument that it was prevented from filing a service contract with the Commission

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11/ PG&E has suggested in the past that a distinction may be drawn between general terms and conditions of service, which must be agreed upon, and rates, which may be left for final resolution by FERC. A distinction between rates and other terms and conditions of service finds no support in either the language of the Commitments or the regulatory scheme of the Federal Power Act.

12/ PG&E has on occasion gone further and taken the position that service may not be provided until an agreement has been reached, reduced to writing, filed with FERC, and accepted by FERC without material change. However, none of these preconditions are insisted upon in those instances where PG&E elects to be cooperative. See WAPA v. PG&E, 714 F. Supp. at 1049 (citing instances where transmission was provided prior to negotiation and filing of agreements).

by the customer's refusal to execute it: "We find such logic to be untenable. Nothing prevented WP&L from filing the unexecuted agreement with the Commission." 3 F.E.R.C. at 61,191. Cases involving specifically the filing of unexecuted interconnection agreements include Louisiana Power & Light Co., 17 F.E.R.C. ¶ 63,020, aff'd and adopted, 17 F.E.R.C. ¶ 61,230 (1981), Mississippi Power & Light Co., 12 F.E.R.C. ¶ 61,220 (1980), and Union Electric Co., 7 F.E.R.C. ¶ 61,201 (1979). 13/ Cases predating the formulation of the Stanislaus Commitments include Indiana & Michigan Electric Co., 52 F.P.C. 977 (1974) (proceedings initiated by the filing of unexecuted agreement), and Alabama Power Co., 51 F.P.C. 1315, 1316 (1974) (Commission notes practice of accepting unexecuted service agreements for filing). In light of the number of Natural Gas Act cases cited by PG&E, it is not unreasonable to note PG&E's familiarity with the practice of filing unexecuted service agreements under that statute. See City of Palo Alto v. PG&E, 12 F.P.C. 1417 (1953).

In light of this clearly established practice, there is no logical or textual basis for PG&E's inference from the language of the Stanislaus Commitments that PG&E and its customer must reach agreement on terms and conditions of service before any obligation to serve arises. The Notice of Violation readily explains why such an inference should not be drawn--the Commitments under PG&E's construction would serve little if any

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13/ In Louisiana Power & Light, the proposed interconnection agreement was rejected as being unjust, unreasonable, and discriminatory; in the other two cases the filings were dismissed for failure to include information required by the Commission's regulations. The flaws in these three filings have no bearing on NCPA's point: that there is no rule against the filing of unexecuted interconnection agreements.

useful purpose. One does not remedy a historical pattern of refusals to provide service by imposing an obligation to provide service only upon, and in the event of, mutual agreement. 14/

PG&E's present construction of the Stanislaus Commitments as constituting only commitments to negotiate contradicts numerous representations by PG&E in the past, including representations to this Commission, that the Commitments actually require service. NCPA has cited these representations to the Commission in prior pleadings. Judge Schwarzer detailed some of these PG&E representations and found them persuasive. 714 F. Supp. at 1048-51. He recognized that accepting PG&E's present view that the Commitments impose not obligations to serve, but merely obligations to negotiate, would rob PG&E's past words of their meaning. Id. at 1050 & n.14. 15/

PG&E seeks to support its position by quoting from the license conditions for St. Lucie 2, which, unlike the Stanislaus Commitments, expressly require the company upon request to "immediately file a service agreement at the Federal Energy Regulatory Commission" in the event of a failure to agree regarding required transmission services. Reply to NOV at 12. To NCPA, the significance of this provision cited by PG&E to the

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14/ Only rarely does PG&E actually refuse to negotiate; the difficulty lies in PG&E's propensity to negotiate ad infinitum, or at least until it exhausts the resistance of its adversary.

15/ The published opinion only hints at the views expressed by Judge Schwarzer during oral argument in response to PG&E's counsel's efforts to "interpret" past PG&E comments on the nature of its obligations under the Commitments. E.g., in response to the argument discussed at 714 F. Supp. 1050 n.14, Judge Schwarzer remarked: "I'm sorry Lewis Carroll isn't here today. This is really Alice in Wonderland if I ever heard it. . . . I don't know how you could really expect me to follow that kind of argument if I understand it." Transcript at 32 (May 19, 1989) (attached).

matter at hand is that it demonstrates conclusively that the term "agreement" in NRC antitrust conditions is understood to embrace unexecuted agreements as well as executed agreements. That the immediate filing requirement is not spelled out in Article 7(a) of the Stanislaus Commitments in the same words as appear in the St. Lucie 2 license is of no moment. Article 7(a) of the Stanislaus Commitments says that service shall be provided, and Article 9(a) says all service provided shall be under terms which are subject to regulatory review. The filing obligation follows logically.

PG&E also cites a condition in the Vogtle Units 1 and 2 licenses requiring the company to file "an appropriate transmission tariff available to any entity." Reply to NOV at 12. This is a requirement of a different order--that a company, in advance of any specific service request from any particular entity, offer service under a generic "one size fits all" tariff. One may concede that the Stanislaus Commitments may not impose this sort of obligation on PG&E and still recognize that the Commitments impose upon PG&E something more than an obligation to enter into negotiations. 16/

If the Commitments were to bear PG&E's process-oriented construction, i.e., that the Commitments establish nothing more than an obligation on PG&E's part to negotiate in good faith while it withholds service, then their effective implementation would require the NRC to adjudicate rapidly any complaint alleging bad faith negotiating by PG&E. This is so because delay

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16/ The Vogtle conditions arguably come close to imposing "common-carrier"-like obligations on Georgia Power.

in adjudication would prolong the denial of service and create severe pressure on the complaining party to make concessions to PG&E not justified under the terms of the Commitments in order seasonably to obtain service. Under the Commission's substantive-oriented construction of the Commitments set forth in the NOV, however, issues of good or bad faith in negotiating fall by the wayside, as service is provided promptly while FERC adjudicates the justness and reasonableness of the terms of the agreement offered by PG&E as the basis for service. Of these two constructions, the latter is far more reasonable from an administrative point of view, as well as a far more efficient remedy.

Accordingly, the text of the Stanislaus Commitments does not support PG&E's view that PG&E may refuse to provide service unless and until a customer agrees to PG&E's terms. To the extent that the text of the Commitments might be deemed unclear or ambiguous in this respect, the ambiguity must be resolved against PG&E on the basis of (a) the November, 1976 letter setting forth the Justice Department's and PG&E's construction of the Commitments, (b) other past representations of PG&E, (c) consideration of the purpose of the Commitments to limit PG&E's ability to abuse its market power, (d) considerations of administrative feasibility, and (e) incontrovertible evidence that the use of the term "agreement" in other NRC license conditions does not imply the existence of a final or indeed any agreement between the licensee and its customer.

As the Commission is well aware, it is quite common for antitrust conditions in nuclear plant licenses to require a

licensee to "agree" to provide certain services, or to provide service pursuant to a "contract" or "agreement" subject to regulatory review. If PG&E is correct here, the implications extend far beyond Diablo Canyon. Two decades of licensing decisions would be compromised. The Commission must firmly stand by the interpretation set forth in the NOV to protect its regulatory program.

For all of the above reasons, NCPA submits that the Commission should reaffirm its construction of the Stanislaus Commitments as requiring PG&E to file and provide service under unexecuted agreements if agreement cannot seasonably reached with an eligible customer, and as barring PG&E from demanding the inclusion in its agreements of regulatory veto clauses. An order to show cause should promptly be issued inquiring why PG&E's Diablo Canyon licenses should not be modified, suspended, or revoked absent action by PG&E to bring itself into full compliance with Section 2.F.9(a) of those licenses, and clear acknowledgment by PG&E of its obligations as a licensee as determined by this Commission.

II. PG&E HAS VIOLATED ARTICLE 6 OF THE COMMITMENTS WITH RESPECT TO ALL SIX NCPA CITIES

The Notice of Violation finds that PG&E violated Article 6 of the Stanislaus Commitments by refusing to supply partial requirements power in 1982 in response to requests from NCPA and Healdsburg. PG&E answers, Reply to NOV at 4-5, that this finding is contrary to the decision of Judge Schwarzer in WAPA v. PG&E, which held that PG&E had properly refused to supply partial

requirements power to cities which had entered into full requirements contracts with PG&E after the Stanislaus Commitments had taken effect. NCPA submits that PG&E's violation of the Stanislaus Commitments is manifest, and that to the extent that Judge Schwarzer's decision might be read to exonerate PG&E in part for its actions, the NRC nonetheless possesses sufficient additional information, not available to Judge Schwarzer, to find license condition violations as to cities which Judge Schwarzer held were properly denied service. 17/

Before discussing this issue in detail, it is necessary to consider the scope of the June 14, 1990 NOV. The NOV speaks of NCPA's and Healdsburg's requests that PG&E accommodate their efforts to purchase power from WAPA in 1982. This reference would appear to reflect the pleadings filed in connection with NCPA's previous Section 2.206 petition, which focused on the facts underlying the case of PG&E v. City of Healdsburg, No. 127234 (Super. Ct. Sonoma Cty, Cal., corrected stay order entered Feb. 28, 1985). However, while NCPA's petitions to the Commission focused solely on the Healdsburg transaction, NCPA's requests to PG&E actually concerned purchases of power for six cities: Healdsburg, Lompoc, Santa Clara, Alameda, Lodi, and

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17/ Curiously, PG&E urges the Commission to suspend enforcement action on Article 7 of the Commitments, where the Commission agreed with Judge Schwarzer's conclusions, yet PG&E urges the Commission to immediately reverse its finding that PG&E violated Article 6 of the Commitments because that finding supposedly conflicts with Judge Schwarzer's conclusions. PG&E has a rather one-sided view of procedural fairness.

PG&E is not the only party with a right to appeal from Judge Schwarzer's ruling. In any event, as noted below, NCPA would urge this Commission to rule now on all issues, independent of the status of the federal court litigation.

Ukiah. Because it refers to NCPA's and Healdsburg's requests, the NOV is susceptible to the construction reflected in PG&E's Response, viz, that it applies to NCPA's requests on behalf of all six cities. NCPA is not certain what the Director intended the scope of the NOV to be, but believes strongly that PG&E violated the Stanislaus Commitments with its conduct towards all six cities. 18/

PG&E has consistently contended that its power supply contracts with the six cities in effect at that time were full requirements contracts. NCPA has consistently contended that the contracts do not differ materially and that each city was entitled to partial requirements service under the Stanislaus Commitments. Judge Schwarzer focussed on 1981 arrangements to accommodate the cities' purchase of certain Northwest energy from PG&E. Healdsburg, Lompoc, and Santa Clara signed new contracts with PG&E in 1981, while Alameda, Lodi, and Ukiah declined new contracts, opting instead for simple amendments of their preexisting contracts. Judge Schwarzer found that language in the new Healdsburg, Lompoc, and Santa Clara contracts reserved those cities' rights to seek partial requirements service from PG&E. 714 F. Supp. at 1052-53. The language in question obliged PG&E to negotiate in good faith to amend the power contracts to

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18/ While the scope of the NOV is unclear, the Director's Decision cannot be construed as addressing the claims of cities other than Healdsburg. Because the specific facts relating to the other cities' contracts were not provided to the NRC, the Director never had before him any information that would have permitted him to judge the merits of a controversy not factually identical to Healdsburg's. A Director's Decision under § 2.206 is neither more nor less than explanation for a denial of relief in whole or in part, and cannot be construed to address the merits of matters beyond the scope of the § 2.206 petition at issue.

permit the cities' use of other sources of power. However, because the 1981 amendments to the contracts of the cities of Alameda, Lodi, and Ukiah did not include similar language, Judge Schwarzer found that those cities had willingly forgone their opportunity to seek partial requirements service from PG&E under the Stanislaus Commitments. Id. at 1052.

With this understanding of the facts, Judge Schwarzer framed the issue before him as "whether the Stanislaus Commitments allow the Cities unilaterally to terminate or modify full requirements contracts with PG&E made after the Commitments took effect." 714 F. Supp. at 1052. He concluded, quite reasonably given his understanding of the facts, that "[t]o the extent that the Cities obligated themselves to take their full requirements from PG&E in exchange for PG&E's obligation to supply them, they cannot look to the Stanislaus Commitments for an escape clause." Id.

While Judge Schwarzer considered the facts to be black and white, and effectively found a clear waiver of rights by Alameda, Lodi, and Ukiah, the truth is considerably grayer, even without the benefit of information not before the court. In NCPA's view, the language relied upon by Judge Schwarzer in the Healdsburg, Lompoc, and Santa Clara contracts is not of great moment, for it does nothing more than restate PG&E's construction of its obligations under Articles 6 and 7 of the Stanislaus Commitments, i.e., that PG&E must offer to accommodate the cities' requests to purchase power from other entities. If, as Judge Schwarzer seems to assume, the other cities could have obtained similar language in amendments to their own contracts,

their failure to accept such language might have reflected caution, not waiver of rights.

It is also quite significant that PG&E twice agreed to amend all six cities' contracts to accommodate other NCPA energy purchases in 1982. Although Judge Schwarzer characterized these transactions as occasions where "PG&E has not insisted on compliance with the full requirements provision" of the three cities' contracts, 714 F. Supp. at 1052, the fact of the matter is that PG&E's contemporaneous statement was that it was making the amendments "pursuant to our Stanislaus Commitments." Nor, at the time, did PG&E claim the existence of "full requirements contracts" as a barrier to the transaction at issue here. This claim was first made in PG&E's lawsuit against Healdsburg, and demonstrates that the entire "full requirements" issue was an afterthought on PG&E's part. 19/

More important than any of this is the facts which were not mentioned in Judge Schwarzer's opinion. The first of these is that the Alameda, Lodi, and Ukiah contracts cannot be understood as voluntary commitments to take full requirements power from PG&E in exchange for PG&E's obligation to provide for the cities' full requirements. At the time of these contract amendments, PG&E and NCPA had been in negotiation for years on arrangements under which NCPA would become the cities' primary

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19/ Compare Letter from Nolan Daines to Robert E. Grimshaw (Apr. 12, 1982) (agreeing to accommodate purchase of energy by same six cities "[p]ursuant to our Stanislaus Commitments," and noting the need to make conforming amendments to the member cities' contracts) with Letter from Nolan Daines to Robert E. Grimshaw (May 25, 1982) (refusing to accommodate the transaction at issue here on the theory that the Stanislaus Commitments do not require PG&E to facilitate WAPA's purported breach of WAPA's contract with PG&E) (letters attached).

power supplier, with transmission service to be provided by PG&E. The only reason that the cities still had individual power sales contracts with PG&E was PG&E's and NCPA's inability to conclude their negotiations. By the time of the 1981 amendments, the contracts were understood by all concerned to be vestigial, interim arrangements.

As this Commission has now held, PG&E's conduct during these negotiations violated the Stanislaus Commitments in that PG&E was obliged to file an interconnection agreement with NCPA without demanding that NCPA first accede to all of PG&E's terms. NCPA ultimately sought relief from this Commission in its Petition of December 4, 1981. Thus, when Judge Schwarzer states that the three cities could have sought partial requirements contracts from PG&E but did not, he fails to ascribe any significance to the fact that the cities were in fact seeking at that time to recast their entire service relationship with PG&E, and had an appropriate complaint pending with the Commission at the time of the 1982 requests for service.

This Commission must also recognize something that Judge Schwarzer did not--that the Healdsburg clause which Judge Schwarzer construed as a reservation of rights could in fact have been viewed as the opposite. The Stanislaus Commitments require PG&E to provide service via filed, unexecuted agreement if the parties cannot reach agreement. The Healdsburg clause, on the other hand, could be interpreted as making the provision of partial requirements service contingent on successful negotiations. The three cities' refusals to sign new contracts with PG&E in 1981 containing such an objectionable clause was

motivated by their desire not to waive their rights under the Commitments; the cities certainly cannot be viewed as having surrendered their rights under the Commitments, at least without further factual investigation.

The bottom line on the waiver issue is that, during the entire life of the Stanislaus Commitments, all negotiations with PG&E have been poisoned by PG&E's position that it need provide no service without an executed contract. It is incontrovertible that NCPA had been seeking new power supply arrangements for all of its member cities during the time in question. It is incontrovertible that PG&E's negotiating posture during that entire period was unlawful. It is incontrovertible that the three new contracts and three contract amendments entered into by PG&E and the six cities in 1981 were interim agreements that would never have been necessary had PG&E complied with its obligations under the Commitments. None of the cities wished to continue taking full requirements power from PG&E in 1981, and this Commission, with its knowledge of the underlying facts, cannot hold otherwise. Finally, it is incontrovertible that, had the Commission promptly issued in 1981 or early 1982 the construction of Article 9 of the Commitments that it issued in June 1990, and enforced that construction, the PG&E-NCPA interconnection agreement would have been filed, and the cities' contracts superseded, prior to the events which gave rise to the PG&E v. Healdsburg and WAPA v. PG&E litigation.

In sum, PG&E's contention that the six NCPA cities voluntarily entered into full requirements contracts with PG&E in 1981, and thereby waived their right under the Stanislaus

Commitments to demand partial requirements service, is absurd and must be rejected. PG&E did not at the time assert that the cities' existing contracts precluded them from buying power from WAPA, and if it had its assertion would have violated the Commitments at the time. PG&E's present assertion that it was not obliged to amend the six cities' contracts to permit them to purchase power from WAPA in the summer of 1982 constitutes a repudiation of its obligations under the Commitments, and this Commission should undertake appropriate enforcement action.

III. THE COMMISSION'S DETERMINATION THAT PG&E HAS VIOLATED ARTICLE 7 OF THE COMMITMENTS IS CORRECT

The Commission finds that PG&E violated Commitments 7(a) and 7(d) by failing to provide transmission to NCPA and Healdsburg in the summer of 1982, as set forth in Judge Schwarzer's decision in WAPA v. PG&E, 714 F. Supp. 1039. PG&E asks that the Commission withhold action on this finding pending all appeals from that decision. Alternatively, and to the extent that the Commission's ruling does not rely on Judge Schwarzer's decision, PG&E argues as a matter of law that it should not be found to have violated the Commitments by its refusal to participate in what it believed to be an improper transaction.

NCPA opposes PG&E's request for a stay of this enforcement action. There is more than sufficient information before the Commission to support the action notwithstanding the status of the WAPA v. PG&E proceeding. Indeed, the prospect that action by the Commission would moot portions of the WAPA v. PG&E proceeding argues in favor of prompt Commission action. PG&E

attempts to buttress its request by citation to a purported request by the Cities that a decision in this docket be withheld. Reply to NOV at 6, citing Director's Decision at 1. The only instance of which NCPA is aware in which NCPA requested that the Commission should withhold action in this docket was in connection with the November 30, 1982 meeting described in the Director's Decision at 4. 20/

On May 29, 1985, as described in the Director's Decision at 6, then-Director Harold R. Denton promised "appropriate action under Section 2.206 in the near future" on the matters not withdrawn by NCPA, i.e., those matters discussed in the June 14, 1990 Director's Decision. Dr. Denton's letter accepted NCPA's decision to withdraw without prejudice certain allegations raised in NCPA's original Section 2.206 petition, an action which NCPA took in hopes of expediting the proceedings. NCPA does not understand why over five years were required for the NRC to act on the remaining matters, and NCPA does not read the Director's Decision as blaming NCPA for the agency's delay. In any event, PG&E's reliance on a supposed NCPA request for stay is not well taken.

On the merits, PG&E maintains that, because it allegedly believed in good faith that WAPA had the statutory and contractual authority to sell certain power to PG&E but not to

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20/ At that meeting, PG&E and NCPA agreed to enter into arbitration to settle the terms of the interconnection agreement that would ultimately replace the PG&E-City contracts at issue in the PG&E v. Healdsburg and WAPA v. PG&E litigation. After PG&E informed this Commission that the interconnection agreement had been accepted for filing by FERC and was in effect, NCPA was asked whether the proceeding could now be closed. NCPA responded, in the December 7, 1983 letter excerpted at page 5, supra, that important issues remained unresolved.

NCPA, PG&E was not obliged to transmit the power or to file a rate to cover the transaction. 21/ PG&E contends that it should not be put to the "impossible choice" of either providing service which may injure its customers or third parties, on the one hand, or violating the terms of its nuclear plant licenses, on the others. Reply to NOV at 7. PG&E makes a straw man argument.

The issue here, ultimately, is one of self help. PG&E asserts that, as a "responsible utility," it should not be required to file a rate schedule to wheel power which it believes WAPA lacks the statutory authority to sell, and that, should it ultimately prove mistaken in its belief, well, that's too bad, because absent a filed wheeling schedule, the transaction could not have taken place. In other words, PG&E asserts the power to block a transaction whenever it can produce any supposedly plausible basis for objecting to it, regardless of the subsequently determined validity or invalidity of the objection. This isn't the law, and it isn't what the Stanislaus Commitments require.

If PG&E felt that its customers were threatened with irreparable injury from conduct by WAPA which was ultra vires, it

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21/ A third argument raised by PG&E is that NCPA was requesting service prior to the filing of a rate schedule, a practice which the Federal Power Act supposedly bars. This is refuted by PG&E's own actions in facilitating other contemporaneous transactions, where the rate schedules were filed long after the transactions were concluded. See 714 F. Supp. at 1050.

PG&E is obliged to make a filing to accommodate the transaction, with any necessary request for a retroactive effective date. Obviously, if FERC will not grant the waiver of notice necessary under Section 205(d) of the Federal Power Act to permit the filing to take effect at the desired time, PG&E cannot be held to account for FERC's decision. However, PG&E should not be permitted to escape from its filing obligation by asserting its self-serving belief that FERC could not accept the filing.

should have sought judicial relief. If PG&E felt that it was being injured by conduct by WAPA in derogation of WAPA's contractual obligations pursuant to Contract 2948A, PG&E was by all means free to sue WAPA for damages under its contract. What PG&E urges the Commission to find is that these are not adequate remedies, and that the Stanislaus Commitments leave PG&E free unilaterally to block transactions through refusals to provide service whenever it contends that such transactions are improper.

PG&E could never have met the judicial standards for injunctive relief in the PG&E v. Healdsburg and WAPA v. PG&E controversies. PG&E's provision of the service requested by NCPA would not have resulted in any conceivable irreparable injury to PG&E, to its other customers, or to third parties. Had PG&E provided the requested service, and had its legal position respecting WAPA's authority to sell power to NCPA later prevailed in court, certain accounting entries would be reversed and checks issued. Yet PG&E's position is that the Stanislaus Commitments permit PG&E to write its own injunction against the federal government, as it were, by refusing to provide a transmission path for a transaction to which PG&E excepts.

While NCPA is not certain what it means for a corporate entity to "believe" something, the Commission should note PG&E's President's assertion, Reply to NOV at 7, that PG&E has believed, does believe, and will believe until all appeals are exhausted, that WAPA lacked the capacity to sell surplus Northwest power to NCPA and its member cities in the summer of 1982. Judge Schwarzer described various aspects of PG&E's views on this point as "absurd," "verg[ing] on the frivolous," "so lacking in merit

as not to warrant further discussion," and "tortuous and obscure." 714 F. Supp. at 1046. PG&E has a remarkable ability to tenaciously adhere to a "good faith belief" when its corporate self-interest is at stake. 22/ To confine PG&E's obligations under the Stanislaus Commitments to the boundaries of PG&E's good faith beliefs is to eviscerate the Commitments, and to invite litigation before this Commission over PG&E's mindset.

Accordingly, the Commission correctly concluded that PG&E's refusal to provide requested transmission services violated the Stanislaus Commitments. This conclusion is valid regardless of whether PG&E prevails on appeal on its whipsaw construction of Contract 2948A 23/ or its curious views concerning the limits of WAPA's statutory powers. The Commission need not and should not reach the question of WAPA's legal authority in this proceeding; it need only find that the Stanislaus Commitments do not permit PG&E to leverage its litigation positions into insurmountable barriers to service. A finding that PG&E violated its licenses by its conduct accordingly does not interfere in any way with PG&E's ability to press its legitimate non-license condition arguments on appeal.

22/ One can only hope and pray that this attitude does not carry over to matters relating to radiological health and safety.

23/ As Judge Schwarzer noted, 714 F. Supp. at 1046-47, PG&E's present construction of Contract 2948A also contradicts prior representations in regulatory proceedings.

IV. THE COMMISSION SHOULD PROMPTLY ISSUE AN ORDER TO SHOW CAUSE IF PG&E WILL NOT ACCEPT THE FINDINGS OF THE NOTICE OF VIOLATION AND INSTITUTE COMPREHENSIVE CORRECTIVE ACTION

NCPA respectfully wishes to call the Commission's attention to the final footnote in Judge Schwarzer's opinion, which is critical of the consequences of the "hostility and distrust" which have resulted from "a war between PG&E and NCPA that has dragged on for nearly twenty years." 714 F. Supp. at 1060 n.29. While Judge Schwarzer directs his frustration at the parties and their lawyers, NCPA believes that to a great extent the present unhappy situation is the result of massive regulatory dysfunction. It is not fair to place on the parties the entire blame for their failure to resolve their many and important disputes.

An antitrust investigation against PG&E instituted by the Federal Power Commission in 1974, and inherited by FERC two years later, remains unresolved. Hydro licensing proceedings pitting PG&E against NCPA and its members, which involved antitrust issues as well as engineering disputes, were frozen by FERC for years until special legislation led to their termination. Here at the NRC, it has taken years to obtain formal action on an enforcement complaint filed in 1981, notwithstanding NCPA's December, 1983 plea emphasizing the need for clarification of PG&E's license obligations, and NCPA's effort in 1985 to simplify the issues before the Commission.

PG&E pointedly notes, Reply to NOV at 2, that it has now completed interconnection agreements with all of the principal electric utilities in its control area. Most if not all of these agreements were negotiated by PG&E during the pendency of NCPA's

1981 § 2.206 petition. During this entire time, PG&E's negotiating posture has been one of refusing to provide service required by its Stanislaus Commitments until it obtained full agreement from its customer to PG&E's terms. All such agreements, then, are products of conduct by PG&E in contravention of its Diablo Canyon licenses as presently construed by the Commission, conduct which placed extreme pressure on neighboring utilities to accede to PG&E's demands, reasonable and otherwise.

NCPA's point in raising this history here is not to criticize the Commission for its past inaction, or to blame the Commission for the inaction of others, but to urge the Commission not to shrink now from promptly and forcefully following through on its June 14, 1990 Notice of Violation. PG&E urges the Commission to wait, and points to prospective appellate proceedings as a basis for waiting. PG&E always urges regulatory bodies to wait. Waiting buys PG&E time, time to bend opponents to its will, time for people to move on and for the political environment to change, time to prolong the status quo and forestall the day of reckoning. The appellate proceedings to which PG&E refers might lead to a remand, to a trial, to more years of litigation. "Wait," PG&E says, always "wait." 24/

24/ PG&E's conduct has certainly contributed to the delay in timely resolving the dispute concerning the 1982 power sales. The PG&E v. Healdsburg litigation was stayed in 1985 to permit PG&E to take up certain issues with FERC, issues as to which FERC possessed clear primary jurisdiction. PG&E has never done so, and in fact it actively opposed FERC action on a 1988 petition by WAPA raising the same issues. Ironically, Judge Schwarzer declined a request that he stay the WAPA v. PG&E litigation in deference to FERC's primary jurisdiction on the points raised in WAPA's FERC petition, explaining that he viewed FERC as institutionally incapable of resolving disputes in a seasonable

[FOOTNOTE CONTINUED ON NEXT PAGE]

The Commission should not wait; it should press forward and give life to the Commitments, whose wholesale violation has contributed and continues to contribute to litigation and problems throughout PG&E's service area. Certainly, there is no conceivable basis for any delay whatever in enforcement of Article 9. 25/ This single act might go far to help bring to a close the long war between PG&E and NCPA, something which the Stanislaus Commitments were intended to do in 1976. In a commentary as valid now as it was nearly two millennia ago, "If not now, when?" 26/

The NRC's position on Article 9 comes as no surprise to PG&E; it was made clear in the November 30, 1982 meeting presided over by Dr. Denton. The author of PG&E's response to the Commission's NOV, its current president, George Maneatis, was present at that 1982 meeting as an active participant. PG&E did not acquiesce in the NRC's views then, just as it does not acquiesce now. Unfortunately, it seems that strong action by this Commission, and not mere words, will be necessary. 27/

[FOOTNOTE CONTINUED FROM PRECEDING PAGE]
fashion. FERC dismissed WAPA's petition (and cross-petitions filed by NCPA and PG&E) as moot in the wake of Judge Schwarzer's ruling. WAPA v. PG&E, 49 F.E.R.C. ¶ 61,219 (1989).

25/ PG&E argues that the Director's finding of violation of Article 9 is incorrect, but not that it is premature. PG&E appears to request a stay of action only with regard to the Director's finding of violation of Article 7.

26/ Mishnah, Pirke Avot 1:14 (attributed to Rabbi Hillel).

27/ The Director's Decision determines that PG&E shall not be held to account for its past failures to promptly report to the Commission its violations of the Stanislaus Commitments. The longer that the Commission permits PG&E to adhere to PG&E's self-serving interpretation of its licenses, even when it knows that the NRC views the licenses differently, the longer PG&E will evade this Commission's oversight and frustrate appropriate enforcement.

To remedy its violations of Article 9, PG&E should be directed to file to remove the offending veto provisions from all FERC rate schedules in which they appear. 28/ PG&E should also declare that all contracts containing such clauses are open for renegotiation pursuant to the Stanislaus Commitments at the option of its customers, and that if negotiations with its customers fail it will file unexecuted, superseding agreements with FERC that will be subject to that agency's unfettered regulatory jurisdiction.

To remedy its violations of Articles 6 and 7, PG&E should be directed to file with FERC unexecuted agreements to permit the transactions at issue in the WAPA v. PG&E litigation. NCPA would encourage the NRC to stipulate that its ruling on this point is intended to be without prejudice to arguments which PG&E may wish to pursue on appeal from Judge Schwarzer's decision concerning WAPA's statutory and contractual capacity to sell the power at issue. However, the NRC should not permit PG&E to continue to maintain in court that its refusal to file modifications of its contracts with the NCPA Cities stands as a bar to judicial relief. 29/

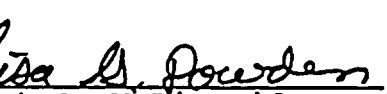
28/ See Letter from Thomas E. Murley to J.D. Shiffer at 2 (June 14, 1990).

29/ NCPA fully expects PG&E to argue on appeal that aspects of Judge Schwarzer's order require PG&E to provide service that is contrary to filed rate schedules, in contravention of Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981). See 714 F. Supp. at 1054. By enforcing its decision that PG&E must make all filings necessary to effectuate NCPA's and the Cities' requests for service, the Commission will deprive PG&E of legal arguments which it is now in a position to press only because of its license violations.

Given PG&E's propensity for strained argument, it is entirely appropriate for the Commission to modify the Diablo Canyon licenses to make clear beyond peradventure the nature of PG&E's obligations. Furthermore, if PG&E refuses to take necessary remedial action in accordance with the Commission's findings, fines or suspension of its licenses to induce compliance are plainly in order.

WHEREFORE, NCPA respectfully requests that the Commission reject PG&E's Reply to the June 14, 1990 Notice of Violation, and institute appropriate proceedings under 10 C.F.R. §§ 2.202, 2.204, 2.205, 50.54(e), and 50.100.

Respectfully submitted,



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November 19, 1990

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