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AUTH.NAME AUTHOR AFFILIATION
MCDIARMID,R.C. Spiegel & McDiarmid
MCDIARMID,R.C. California, State of, Northern CA Power Agency
RECIP.NAME RECIPIENT AFFILIATION
DENTON,H.R. Office of Nuclear Reactor Regulation, Director

SUBJECT: Responds to util 840810 ltr urging that Commission dismiss Norther California Power Agency Petition to enforce & modify license conditions.License conditions & memorandum under score need for prompt & decisive enforcement action.

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LAW OFFICES
SPIEGEL & McDIARMID
2600 VIRGINIA AVENUE, N.W.
WASHINGTON, D.C. 20037
TELEPHONE (202) 333-4500
TELECOPIER (202) 333-2974

GEORGE SPIEGEL, PC
ROBERT C. McDIARMID
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September 14, 1984

Mr. Harold R. Denton
Director, Office of Nuclear Reactor
Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Petition for Enforcement of License Conditions, NRC Docket Nos. 50-275, 50-~~276~~ 323

Dear Mr. Denton:

This will respond to the PG&E letter of Mr. Fallin and Ms. Sanderson dated August 10, 1984, urging that the Commission dismiss NCPA's Petition to Enforce and Modify License Conditions (hereinafter referred to as "Fallin Letter"). PG&E's letter clarifies its position with respect to several of the issues underlying NCPA's petition, as does its Memorandum of Points and Authorities In Opposition to Cities' Demurrer filed in Sonoma County Superior Court in the Healdsburg litigation on August 20, 1984 (hereinafter "Memorandum"). 1/ We believe that the Fallin Letter and the Memorandum underscore the need for prompt and decisive enforcement action by the Commission.

The position of PG&E in the Healdsburg litigation, together with the Fallin Letter, now make it clear, we believe, that PG&E has violated its Diablo Canyon License Conditions. Until recently, PG&E had been careful to avoid taking any public position which could be utilized to demonstrate its privately stated position that the Diablo Canyon License Conditions required it to do nothing more than

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1/ We note that Ms. Sanderson co-authored both the Fallin Letter and the Memorandum. We have attached a copy of the Memorandum to this letter. For your convenience, we have also attached the principal pleadings which Healdsburg has made in the Sonoma County court, i.e., its demurrer and supporting memorandum, and its reply to the PG&E Memorandum. PG&E's complaint is attached to the Fallin Letter.

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111

to meet with a Neighboring Entity in such a way as to be able to assert that negotiations were taking place. Now it is not only true (as it has previously been), but clearly demonstrable as a result of its pleadings in Healdsburg and its representations in this proceeding, that PG&E is treating its NRC license conditions with the same lack of respect as it has treated its statutory obligations under the Federal Power Act and elsewhere. 1/ As we demonstrate below, none of the positions taken in the Fallin Letter in attempts to avoid NRC jurisdiction is correct; several of the contentions in affirmative defense made by that Letter are unsubstantiated and factually misleading; and the legal analysis contained in that Letter is simply wrong.

1. The NRC's Authority

The Fallin Letter begins with the flat assertion that since the Diablo Canyon Project is licensed pursuant to Section 104(b) of the Atomic Energy Act, and since no antitrust intervention was filed prior to December 19, 1970, the NRC's antitrust conditioning authority, beyond the Commitments themselves, "was only that which it had under the Atomic Energy Act before license amendment -- none." Fallin Letter at 2. That analysis is entirely too facile, and is, moreover, erroneous.

NCPA filed its Petition to Enforce of December 4, 1981 under 10 CFR §2.206. In that Petition, we noted our belief that PG&E had violated several of the provisions of its license. The Petition, like NCPA's more recent letter, was filed prior to the August 10, 1984, issuance of Order CLI-84-13 (which we understand has now been stayed by order of the United States Court of Appeals for the District of Columbia Circuit). If we are correct as to PG&E's obligation under its license conditions, as we believe you have previously orally stated directly to PG&E, then PG&E is in clear violation of its license conditions, as we will show below. Under the terms of the Atomic Energy Act, the NRC can modify any license or permit when license conditions have been violated. 10 CFR §50.100 (1983). All NRC licenses are subject to modification or amendment "for cause" in accordance with NRC Regulations. 10 CFR §50.54(e) (1983). See also 10 C.F.R. §50.55(c). This authority, like the NRC's authority to suspend a license, is derived from the NRC's power under Section 186(a) of the Act, 22 U.S.C. 2236(a), to revoke a license "for failure to construct or operate a facility in accordance with the terms of the construction permit or license." Because PG&E has violated

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1/ For example, PG&E has refused to file its Diablo Canyon License Conditions with the FERC (except Sections I and VII, after order of the FERC), apparently on the basis that they impose no binding obligation upon it.

the antitrust provisions of its license and permit, its license can and should be modified so as to ensure that repeated violations of the same sort do not occur. See Virginia Electric and Power Company, 2 N.R.C. 498, 534-35, 538-39 (Licensing Board 1975), modified, 3 N.R.C. 347, 390-92 (Appeal Board), aff'd in relevant part, 4 N.R.C. 480, 492 at n.12 (1976), aff'd per curiam, 571 F.2d 1289 (4th Cir. 1978).

2. The Present Status of the Petition

The Fallin Letter states at some length (e.g., p. 3) a version of the November 30, 1982 meeting in Bethesda between you and your staff, PG&E, and NCPA. Aside from what appear to us to be clear inaccuracies on less significant matters, 1/ the Fallin Letter states that the NCPA 1981 Petition to Enforce was, by force of an asserted November, 1982 agreement, merged into and done away with when the Interconnection Agreement was finally executed by PG&E. It is certainly true that NCPA hoped that PG&E would obey its license conditions thereafter, and we had certainly hoped that your instructions to PG&E as to its obligations might be taken to heart. It is also true that NCPA agreed on November 30, 1982, to the procedures which led to the filing of the Interconnection Agreement. It is further true, as a practical matter, that if PG&E had not openly made it clear that it declined to heed the straightforward admonition which you stated as to its obligations to serve under the license conditions, NCPA would not have found it necessary to file its further letter complaints of December 7, 1983 and August 1, 1984. But we now believe it is clear enough that PG&E will comply only with its own view of the license obligations, in spite of instruction to the contrary by you and your staff. In these circumstances, we have pursued this further complaint. We are not aware of any agreement of the sort suggested by the Fallin Letter (at p. 3) by which the complaint proceeding would have expired, and it is not obvious what the terms of such an "agreement" would have been. PG&E cites none, has previously cited none, and we are unable to recall such an "agreement." While all parties may have hoped that things would be better, it does not appear that PG&E has modified its view of its license obligations (or, more particularly, its lack of license obligations), and indeed, there have been fresh license violations.

The Fallin Letter, at 5, clearly misstates NCPA's August 1 Petition at 7-8. A comparison of PG&E's

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1/ For example, the Fallin Letter refers to "only one issue" (at p. 3), while the "Agenda" which was distributed by your staff on November 30, 1982 contains six items.

characterization of NCPA's position with what NCPA actually said makes it clear that NCPA did not "complain that [the Interconnection Agreement] is the product of 'blackmail'" or "suggest[] that NCPA will repudiate any portions of the contract that it does not like." The assertion that the Interconnection Agreement "is the product of 'blackmail'" is PG&E's characterization; and although it may be accurate, it is PG&E's Freudian slip, rather than NCPA's characterization. Reference to pp. 7-8 of the August 1 Petition demonstrates that what NCPA actually asserted was:

> Second, and perhaps even more important, NCPA believes that it is essential for this Commission to establish that the license conditions do, in fact, impose an obligation of substance if they are not to be used for direct economic blackmail. PG&E has made clear to NCPA that it does not believe itself bound to provide services under the Diablo Canyon License Conditions unless NCPA is willing to accede to any and all conditions imposed by PG&E for doing so, no matter how outrageous. As noted above, PG&E has represented to the FERC its belief that it is under no obligation to provide refunds if its filing is contested and if the FERC finds the rates, term and conditions unjust and unreasonable. Indeed, PG&E has made clear its belief that it can insist on binding a Neighboring Entity not to contest such terms as it may consider unlawful on pain of having the filing withdrawn, and that it can withdraw the filing if the FERC, sua sponte, requires a change to make the filing just and reasonable.
>
> When PG&E finally agreed to file an interconnection agreement with NCPA, it was, by its terms, not to become effective until accepted by the FERC without changes. Section 9.3. Since the geothermal plant had become operational in early 1983, and since NCPA was losing some $30,000 per day by being required to purchase PG&E power instead of being permitted to utilize the output of its own resource, it was extremely important to NCPA that the FERC accept the

> Interconnection Agreement as quickly as possible, and NCPA did not contest the terms of Section 9.4, which permits PG&E to terminate service under the Interconnection Agreement on a three-year notice basis. While that Section provides that termination will not affect any rights NCPA may have under the Stanislaus Commitments, "to the extent such services are required by the Stanislaus Commitments", PG&E has made it clear that it does not believe that there are any services required under the Stanislaus Commitments. While NCPA believes that the Federal Power Act permits it to contest a filing by PG&E to terminate service, PG&E does not. The FERC left this issue open in its Order of September 14, 1983, in Docket No. ER83-683-000 which finally permitted NCPA to obtain the output from its own unit. 24 F.E.R.C. ¶61,286 at 61,588.

It is significant, we believe, that PG&E, in the Fallin Letter, does not contest any of these assertions, limiting itself to mischaracterizing them in a way to suggest that NCPA was seeking something improper. 1/ Indeed, the filings made by NCPA with the FERC stating NCPA's view of the FERC's power to review, suspend, and reject a termination notice were precisely what NCPA had told PG&E it would do in advance of PG&E's filing of the Interconnection Agreement. NCPA had also previously advised PG&E that the difference of views as to the obligations imposed by the license conditions would probably have to be resolved by the NRC if PG&E persisted in its asserted positions.

1/ After a factual statement as to the filing of the PG&E-Santa Clara Interconnection Agreement, NCPA went on to state:

> Thus, it seems quite clear that the potential for absolute economic blackmail is established, and is likely to be used again, if PG&E's interpretation of its lack of obligation under the License Conditions is permitted to stand.

This does not appear to be the segment referred to by the Fallin Letter, as it seems even less supportive of the assertions made than the segment set out in full above. This statement, however, is self-evidently true.

3. The License Terms

The Stanislaus Commitments have been in effect since 1976, as conceded at p. 6 of the Fallin Letter. 1/ Several of the License Conditions directly relevant to the Healdsburg dispute are set forth below (emphasis added throughout).

Section F.(2) requires that:

> Interconnection agreements negotiated pursuant to these license conditions shall be subject to the following paragraphs "a" through "g":
>
> . . .
>
> f. An interconnection agreement shall not prohibit any party from entering into other interconnection agreements, but may provide that (1) Applicant receive adequate notice of any additional interconnection arrangement with others. . . .

Section F.(6) provides, in directory form, that:

> Upon request, Applicant shall offer to sell firm, whole or partial requirements power for a specified period to an interconnected Neighboring Entity or Neighboring Distribution System under a contract with reasonable terms and conditions including provisions which permit Applicant to recover its costs.

Section F.(7) provides, also in directory terms, that:

> a. Applicant shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transactions and which are consistent with these license conditions. . . .
>
> . . .
>
> d. Rate schedules and agreements for transmission services provided under this Section shall be filed by Applicant with the regulatory agency having jurisdiction over such rates and agreements.

1/ Those Conditions were first added formally to the Diablo Canyon Nuclear Plant License on December 6, 1978.

Section F.(9) provides that:

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

PG&E's position, expressed in the Fallin Letter and in its pleadings in Healdsburg, is that PG&E is not bound by, and need not act in any way consistent with, any of the above sections, as we shall show.

4. The Healdsburg Facts

The Fallin Letter's description of the Healdsburg facts appears to us to be extraordinarily misleading. We furnish herewith for your convenience a copy of the relevant documents presently pending before the Superior Court in California. 1/

Article 1 of the contract between Healdsburg and PG&E, attached to the Complaint, provides:

> (a) PGandE shall sell and deliver to Healdsburg, and Healdsburg shall purchase and receive from PGandE all Power required by Healdsburg except for such Northwest Energy as may from time to time be delivered by PGandE to Healdsburg under the provisions of the NCPA-PGandE Temporary Transmission Contract.
>
> (b) Nothing in this Agreement shall be interpreted in such a way as to prevent Healdsburg from seeking to obtain Power from sources other than PGandE or developing its own sources.
>
> (c) In the event Healdsburg is able to obtain or develop Power from sources other than PGandE and still wishes to continue purchasing some Power from PGandE, at Healdsburg's request the Parties shall endeavor in good faith to amend, supplement or supersede this Agreement in order

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1/ As noted supra, PG&E's Complaint is attached to the Fallin Letter. We attach hereto Healdsburg's demurrer and supporting memorandum, its reply to PG&E's Memorandum, and all attachments to each of these.

> to accommodate Healdsburg's purchase and use of such other sources of Power on terms and conditions which are just and reasonable.

PG&E relies entirely upon Article 1(a) in its Memorandum and asserts that Articles 1(b) and 1(c) are "permissive only" and that the language "imposes no requirement on PGandE other than upon request, to endeavor in good faith with City to alter the contractual relationship on reasonable terms to accommodate other sources of power. Nothing in the contract forced PGandE to substitute power from another source." Memorandum at 8, emphasis in original.

It is abundantly clear that City did obtain commitments of power from other sources and did request PG&E to amend or supplement the agreement 1/ to permit it to utilize that power. (Healdsburg Memorandum of Points and Authorities In Support of Demurrer, Attachment 11, as to power from Turlock Irrigation District; id., Attachment 16, as to power from WAPA). It is equally clear that PG&E agreed "Pursuant to our Stanislaus Commitments" to permit the transaction involving power from TID (Id., Attachment 12). As to the transaction from WAPA, however, it is clear that PG&E flatly refused, for reasons which have absolutely nothing to do with the contract upon which PG&E relies in the Healdsburg litigation, (Id., Attachment 17). 2/ Indeed, the only reasons cited by PG&E on the several occasions on which it refused to negotiate are both irrelevant to its contract with City and not so much as mentioned by PG&E in the lawsuit 3/ (Id., Attachment 23, in response to Attachment 22; Attachments 24 and 25, in partial response to Attachment 21; Attachment 28, in response to Attachment 27). 4/

Preliminarily, of course, it may be noted that the California Commercial Code, §1203, imposes an obligation of

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1/ We need not here reach the fact that City had been seeking a more comprehensive agreement, through NCPA, for over a decade at that time.

2/ The reasons relied upon by PG&E in its refusals to negotiate are, City believes, erroneous, but the legal merit of those arguments is not at issue here.

3/ Indeed, we understand PG&E to have stated that it relies entirely upon its contract with City for its claim.

4/ In 1982, PG&E's objections were based on questions concerning WAPA's ability to sell the power in question to NCPA. In a complete turnabout, PG&E has told the Sonoma County court, Memorandum at 6, 9, that it is entitled to compensation from Healdsburg whether or not the WAPA-NCPA sale was carried out.

good faith in the performance or enforcement of every contract or duty within that Code, and §1102(3) makes it clear that the obligation of good faith, diligence, reasonableness and care prescribed by the Code may not be disclaimed by agreement. This obligation, of course, is the same obligation of a party to a contract to perform in good faith which has long been extant in California at common law. As stated in Jacobs v. Freeman, 104 Cal. App. 3d 177, 188-189 (1980), "'In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' . . . The implied covenant imposes upon the parties an obligation to do everything that the contract presupposes they will do to accomplish its purpose."

The precise terms of the contract, however, are not important for this purpose. For it is PG&E's position in the Healdsburg proceeding, together with its position as stated in the Fallin Letter, that demonstrate most clearly its view of its license conditions.

5. PG&E's Position

PG&E states its position at p. 6 of the Fallin Letter, recognizing that the Healdsburg-PG&E contract "provided for the parties to negotiate regarding the purchase from other sources by Healdsburg." It goes directly on, however, to misstate the facts as follows:

> Rejecting both alternatives, Healdsburg unilaterally declared that power received was not PGandE power and withheld payment due PGandE, thereby breaching its contract.

In fact, as is clear from PG&E's own correspondence, 1/ PG&E declined to negotiate with Healdsburg on grounds that had nothing whatever to do with its current suit, and now maintains its suit based upon its assertion, Memorandum at 9, that "City is obligated to purchase all of its power from PGandE unless the contract was amended" and that, at 10-11, "[s]ince the contract was not amended in any way relevant to this case, City had thus disabled itself by the terms of its own agreement from purchasing power from any source other than PGandE." PG&E's contention thus is that it had the unrestricted right to refuse a request by Healdsburg to permit it to purchase any portion of its energy or capacity

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1/ See Healdsburg Memorandum of Points and Authorities in Support of Demurrer, Attachments 17, 23-25, 28.

requirements from others. The Fallin Letter, at 6, states the same proposition:

> The obvious flaw in NCPA's position is that the Commitments do not purport to abrogate or amend the Healdsburg or any other wholesale power contract. In fact, the Commitments preceded the Healdsburg contract by more than five years; the parties were well aware of the Commitments while the contract was being negotiated.

The Fallin Letter goes on, at 7, to state:

> An elementary examination of PGandE's complaint . . . demonstrates no PGandE claim that it can violate or has violated the Stanislaus Commitments. That's not surprising since, as we pointed out before, the Stanislaus Commitments have no bearing on the lawsuit. 1/

PG&E's position is thus clear that, in its view, it was not obligated under its license conditions to offer Healdsburg the requested partial requirements contract, and it was entitled to force Healdsburg to agree to a full requirements contract instead. 2/ Thus, PG&E's clear position is that no Neighboring Entity or Neighboring Distribution System may rely upon PG&E's obligations to serve as stated in the license conditions, since they may be forced to sign away protections imposed by those conditions. If that position were correct, then the license conditions would truly be meaningless, in light of PG&E's proven ability to "negotiate" for more than a decade when it suits its purposes to do so.

In NCPA's view, once PG&E was requested to provide partial requirements service, it was obligated by the license conditions to offer to do so. Regardless of whether the

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1/ The sentence in the Fallin Letter following that quoted above is another misrepresentation of NCPA's position, as may be determined by comparing the cited reference in context with PG&E's characterization of it.

2/ Of course, the PG&E-Healdsburg contract was not a full requirements contract, as it required PG&E to endeavor in good faith to accommodate any alternative sources which Healdsburg might find.

license conditions modified rights under prexisting contracts, as PG&E has asserted to the FERC, it is clear that the contract at issue between Healdsburg and PG&E was an interconnection agreement negotiated "pursuant to these license conditions" within the meaning of Section F.(2) of the license conditions. The only basis of PG&E's suit against Healdsburg is that Healdsburg is required to take full requirements service from PG&E. Section F.(2)f of the license conditions provides that a contract may not preclude a party from entering into other power supply contracts. Section F.(6) of the license conditions provides that "upon request, Applicant shall offer to sell firm . . . partial requirements power" to entities such as Healdsburg. The only basis for PG&E's suit, as stated by it, is that it was not obligated and is not obligated to offer to sell partial requirements power to Healdsburg. This simply cannot be. In fact, PG&E's position constitutes confession of multiple violations of its Diablo Canyon license, not the least of which are refusals to enter into partial requirements service agreements in 1981 and 1982, and failure promptly to report these refusals to the Commission as license violations in accordance with License Condition H.

6. The License Conditions Are Not Meaningless

Healdsburg, through NCPA and separately, sought a partial requirements contract from PG&E. PG&E signed the contract attached to its Complaint as Exhibit A, which was all that it would agree to. If, as PG&E asserts, that contract is not a partial requirements contract, and moreover the significance of the license conditions disappeared once the contract was signed, then that contract bears witness to the fact that the license conditions utterly failed to restrain PG&E. This interpretation stands the intent of the Atomic Energy Act on its head.

The Stanislaus Commitments (now part of the license conditions for Diablo Canyon) were thought to be necessary by the Department of Justice in order to curb PG&E's monopoly power. If PG&E were correct, and it could force neighboring entities to negotiate away PG&E's obligations under the license conditions, the license conditions would restrain PG&E not a whit. They would in no way "remedy the situation inconsistent with the antitrust laws which the Department perceives to exist." Letter from John F. Bonner, President, PG&E, to Honorable Thomas C. Kauper, Esq., dated April 30, 1976. Nor would they "obviate the antitrust problems posed by PG&E's activities and . . . remedy the situation inconsistent with the antitrust laws which we believe has existed in Northern and Central California." Letter of Thomas E. Kauper to Howard K. Shapar, Esq., of May 5, 1976,

transmitting the Stanislaus Commitments, 41 Fed. Reg. 20,225 (1976). Indeed, if PG&E were correct, the Commitments simply permit it to continue its policy of antitrust violations, rather than, as Mr. Kauper thought, "moot the questions of anticompetitive conduct by PGandE which have come to our attention." Id. at 3, 41 Fed. Reg. at 20,226. As we now show, PG&E's interpretation of the Stanislaus Conditions is simply erroneous as a matter of law.

It is axiomatic that "no obligation of a contract can extend to the defeat of legitimate government authority." Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1872). Even Lochner v. New York, 198 U.S. 45 (1905), in which the Court rejected a state maximum hour regulation, began its analysis by conceding that the state "has power to prevent the individual from making certain kinds of contracts." Id. at 53. The limitations of Lochner did not survive; the government now can and does regulate the hours and wages of employees. Contracts establishing subminimum wages are no barrier for claims for the legal minimum; the contract falls before the law. E.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). As the court there held, it is irrelevant to the law that an employer can browbeat his employees to "waive" the benefits of the minimum wage laws, for the curbing of the superior power of the employer is one of the precise goals of such laws.

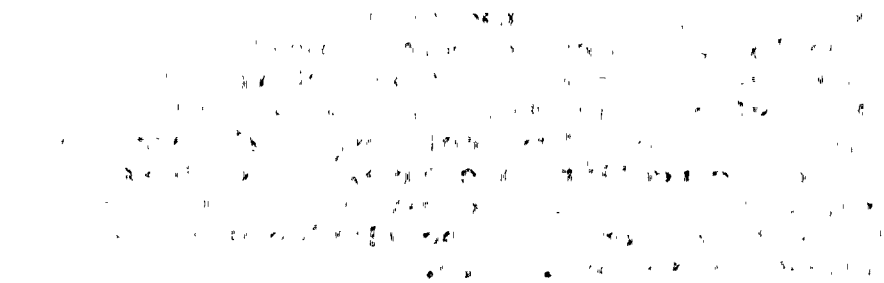
The license conditions in the Diablo Canyon license must, by statute, be obeyed by PG&E. Alabama Power Co. v. FPC, 128 F.2d 280, 293 (D.C. Cir.), cert. denied, 317 U.S. 652 (1942) ("Having received its license subject to such conditions, and enjoying such privileges as it does, subject to the severe limitations imposed by the statute, the Company cannot shuck off its obligations as a licensee and set itself up in another capacity, or avoid the comprehensive and inclusive powers of the Commission"). They represent more than a consensual agreement which may be ignored if PG&E is willing to face a civil suit for damages. A license obligation is not something which may be utilized as a bargaining chip and withheld by PG&E unless a Neighboring Entity is willing to agree to a outrageous set of terms and conditions. It is particularly offensive when PG&E uses its monopoly power to force a Neighboring Entity to contract to forego the right to contest outrageous terms of such a rate schedule, particularly since License Condition F.(9)a. provides that there will be FERC review of such rate schedule to assure that it is just and reasonable.

It is clear that PG&E cannot lawfully force Neighboring Entities to waive their rights under the license conditions. As the United States Court of Appeals for the District of Columbia Circuit said only recently, Gray v.

American Express Co., No. 83-1475 (D.C. Cir., August 31, 1984), in a very similar circumstance, statutory protections may not be waived by agreement. The Fair Credit Billing Act provides that a credit card issuer "shall not cause the cardholder's account to be restricted or closed because of the failure of the obligor to pay the amount in dispute." The cardholder agreement provided that American Express could terminate the agreement, with or without cause, at any time. In the words of the court, "American Express seems to argue that, despite [the Fair Credit Billing Act], it can exercise its right to cancellation for cause unrelated to the disputed amount, or for no cause, thus bringing itself out from under the statute." Id., slip op. at 7. This is precisely PG&E's argument, viz, that the terms of the Healdsburg contract (or any given service agreement) take the PG&E-Healdsburg relationship (or any service relationship involving PG&E) outside the scope of the Stanislaus Commitments. The court's reaction to American Express's version of this argument was as follows:

> At the very least, the argument is audacious. American Express would restrict the efficacy of the statute to those situations where the parties have not agreed to a "without cause, without notice" cancellation clause, or to those cases where the cardholder can prove that the sole reason for cancellation was the amount in dispute. . . .
>
> The effect of American Express's argument is to allow the equivalent of a "waiver" of coverage of the Act simply by allowing the parties to contract it away. . . . The rationale of consumer protection legislation is to even out the inequalities that consumers normally bring to the bargain. To allow such protection to be waived by boiler plate language of the contract puts the legislative process to a foolish and unproductive task. A court ought not impute such nonsense to a Congress intent on correcting abuses in the market place.

Id. at 7-8. Nor are these the only cases relevant to the point. See, e.g., Boatland, Inc. v. Brunswick Corp., 558 F.2d 818 (6th Cir. 1977), in which the Wisconsin Fair Dealership Law allowed terminations of a dealer only for cause, and gave the dealer 60 days in which to rectify any



claimed deficiency. In light of the legislative purpose "to equalize the bargaining power between the parties and to promote fair dealing," 558 F.2d at 823, the provisions of the law were held to supersede the dealership contract in question, which stated that it was terminable without cause on 30 days' notice.

There are numerous other contracts which have been invalidated in whole or in part as against public policy when they had attempted to force waivers of statutory rights. E.g., George Foreman Associates, Ltd. v. Foreman, 389 F. Supp. 1308 (N.D. Cal. 1974), aff'd, 517 F.2d 354 (9th Cir. 1975); United States v. Murtaugh, 190 F.2d 407 (4th Cir. 1951); Shadis v. Beal, 685 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 970 (1982). If PG&E's position, Fallin Letter at 6, that "the Commitments do not purport to abrogate or amend the Healdsburg or any other wholesale power contract" is correct (and for a change, it is certainly clear), then the Commitments are meaningless. 1/ If license conditions are meaningless, there is little basis for the people of California or the western states to have any confidence in the efficacy of the health and safety conditions contained in the Diablo Canyon licenses or in PG&E's operation of the Diablo Canyon plant. 2/ We do not believe that this is what Congress had intended; we do not believe that this is what the license conditions were drafted to achieve; and we do not believe that it is in the interest of this Commission, or, indeed, in PG&E's own long-range interest, that PG&E should be permitted to continue to utilize the Commitments to argue to the FERC that nothing needs to be done by the FERC because any and all antitrust problems have been solved by the Commitments while telling the parties involved that

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1/ Obviously, PG&E has the power to "persuade" Neighboring Entities to agree to a contract waiving rights established by the Stanislaus Commitments; were this not the case, there would have been no need for the Commitments in the first place. If the Commitments are to have any meaning, then waiver must be impossible.

2/ In this regard, PG&E's violation of the reporting requirements of Condition H of its license, which governs health and safety condition violations as well as antitrust condition violations, is particularly troubling.

obligations "imposed" by the Commitments need not be provided by PG&E unless in return for exorbitant and unreasonable terms and conditions which it will not subject to FERC scrutiny.

Respectfully submitted,

Robert C. McDiarmid /BJ

Robert C. McDiarmid
Counsel for the Northern
California Power Agency

cc: Hon. Samuel J. Chilk
Benjamin H. Vogler, Esq.
Philip A. Crane, Jr., Esq.
Malcolm H. Furbush, Esq.
Michael J. Strumwasser, Esq.
Melanie Stewart Cutler, Esq.
Donald A. Kaplan, Esq.
All Parties, Docket No. 50-275 (without attachments)

By Federal Express

Jack F. Fallin, Jr., Esq.
Shirley A. Sanderson, Esq.

Attachments

RCMcD:jbs

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Pacific Gas and Electric Company	)	Docket Nos. 50-275
(Diablo Canyon Nuclear Power	)	50-~~276~~ 323
Plant, Units 1 and 2)	)	

ATTACHMENTS TO SEPTEMBER 14, 1984 LETTER
FROM ROBERT C. McDIARMID TO HAROLD R. DENTON
REGARDING 10 C.F.R. §2.206
PETITION OF NORTHERN CALIFORNIA POWER AGENCY

Demurrer of City of Healdsburg
Memorandum of Points and Authorities
in Support of Demurrer, with
Appendices A through I
Pacific Gas and Electric Company's
Memorandum of Points and Authorities
in Opposition to City's Demurrer,
with Exhibits 1 through 5
Reply Memorandum of the City of Healdsburg
in Support of Demurrer with Appendices
A through I

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, NW
Washington, DC 20037
Telephone: (202) 333-4500

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448
Telephone: (707) 433-4842

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Defendant
City of Healdsburg, California

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, v. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. 127234 DEMURRER DATE: 9-13-84 TIME: 10:30 a.m. DEPT: 6

Defendant City of Healdsburg, California, demurs to the complaint on file herein, as follows:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That the Court has no jurisdiction of the subject of the cause of action alleged in the complaint.

WHEREFORE, defendant prays:

1. That this demurrer be sustained and plaintiff take nothing by its complaint.

2. That defendant be granted judgment for costs of suit.

3. For such other and further relief as the Court deems just and proper.

DATED: June 18, 1984.

Respectfully submitted,

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID

ROBERT CRAWFORD, ESQ.

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation

By Richard W. Nichols
RICHARD W. NICHOLS

Attorneys for Defendant
City of Healdsburg, California

CASE TITLE: PG&E v. City of Healdsburg, et al.

COURT/CASE NO: Sonoma County Superior Court, No. 127234

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814; I am over the age of eighteen years and not a party to the foregoing action.

On June 18, 1984, I served the document(s) named below on the parties in said action by placing a true copy thereof in a sealed envelope, addressed as indicated below, with delivery charges thereon fully prepaid, then delivering said envelope to a representative of Federal Express in Sacramento, California.

Document(s) Served

DEMURRER

Parties Served

ROBERT OHLBACH, ESQ.
HOWARD V. GOLUB, ESQ.
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
P. O. Box 7442
San Francisco, CA 94120

Federal Express
Airbill No. 774-907-490

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 18, 1984, at Sacramento, California.

Barbara Gordon

Barbara Gordon

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, NW
Washington, DC 20037
Telephone: (202) 333-4500

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448
Telephone: (707) 433-4842

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Defendant
City of Healdsburg, California

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, v. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. 127234 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER Date: 9-13-84 Time: 10:30 a.m. Dept: 6

TABLE OF CONTENTS

///

APPENDIX H - Pacific Power & Light Co.,
26 FERC ¶63,048 (1984)

APPENDIX I - Pacific Gas & Electric Co.,
24 FERC ¶63,001 (1983)

TABLE OF AUTHORITIES CITED

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Administrative Decisions

Federal Regulations

Miscellaneous

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ..
SPIEGEL & McDIARMID
2600 Virginia Avenue, NW
Washington, DC 20037
Telephone: (202) 333-4500

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448
Telephone: (707) 433-4842

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Defendant
City of Healdsburg, California

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, v. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. 127234 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER Date: 9-13-84 Time: 10:30 a.m. Dept: 6

Defendant City of Healdsburg, California ("Healdsburg"), submits this memorandum in support of its demurrer. For the reasons discussed in this memorandum, Healdsburg respectfully submits that Pacific Gas and Electric Company's ("PG&E") complaint should be dismissed.

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SUMMARY OF HEALDSBURG'S POSITION

PG&E is not entitled to recover under any theory on the transactions described in its complaint. The power in question, which it transmitted to Healdsburg, did not belong to it, but was delivered to PG&E by the Western Area Power Administration ("WAPA") for delivery to Healdsburg. Thus, PG&E has not been injured by Healdsburg's failure to pay PG&E for power which PG&E never owned.

PG&E has also not informed the Court of the totality of the conditions under which PG&E is required by the Federal Energy Regulatory Commission ("FERC") and the Nuclear Regulatory Commission ("NRC") to conduct its wholesale power transactions. Specifically, conditions on PG&E's Diablo Canyon licenses (parts of which were also required to be filed at the FERC) prohibited PG&E from refusing to transmit the WAPA power to Healdsburg. PG&E was also required by the express terms of the contract which it attached to the complaint to negotiate in good faith with Healdsburg to allow it to purchase from other suppliers.

Based on these facts, PG&E has not stated facts sufficient to constitute a cause of action.

Moreover, if there were any question as to the merits of PG&E's complaint, this Court is obligated to refer the issue raised by the complaint to FERC. The complex web of contractual and statutory provisions that would have to be construed, if the Court were to undertake to even consider the relief sought by this claim, is within the exclusive primary jurisdiction of the FERC. The doctrine of primary jurisdiction requires the Court to defer in the first instance to the FERC, in order to allow it

to bring its expertise to bear on the interpretation of its governing statute, regulations and tariffs, and to preserve the effectiveness and uniformity of FERC regulation in this area.

FACTUAL BACKGROUND

PG&E alleges that PG&E and Healdsburg "[o]n or about May 5, 1981, ... entered into a written contract in which [PG&E] agreed to sell and deliver to the City, and the City agreed to purchase and receive from [PG&E] all of the electric capacity and energy required by the City ...." (Complaint ¶8.) This contract, a tariff regulated pursuant to section 205 of the Federal Power Act, 16 U.S.C. §824d, was filed and "was duly accepted for filing by the Federal Energy Regulatory Commission ("FERC") ...." (Complaint ¶9.)

PG&E then alleges that, pursuant to that contract, it supplied all the City's electric requirements and that the City "has breached the contract by refusing and failing to pay" the bills rendered to it by PG&E. (Complaint ¶¶10-12.) The period at issue is May-September 1982. (Complaint ¶11.) PG&E asserts that it "has fully performed all of its obligations under the contract." (Complaint ¶13.)

The contract, which is attached to the complaint, provides, inter alia, that:

> "(b) Nothing in this Agreement shall be interpreted in such a way as to prevent Healdsburg from seeking to obtain Power from sources other than PGandE or developing its own sources.
>
> "(c) In the event Healdsburg is able to obtain or develop Power from sources other than PGandE and still wishes to continue purchasing some Power from PGandE, at Healdsburg's request the Parties shall endeavor in good faith to amend, supplement or supersede this Agreement in order to accommodate Healdsburg's purchase and use of such

other sources of Power on terms and conditions which are just and reasonable."

Contract p.3 (Exhibit A to Complaint).

As more fully discussed below, this suit is based on purchases of power by Healdsburg from a supplier other than PG&E, to which PG&E would not consent.

In addition to the contract provisions quoted above, PG&E's obligations under law include other conditions imposed by the FERC and the NRC on transactions of the sort governed by the contract. Specifically, the additional obligations, to which PG&E has obliquely referred, include the following.[1/]

The Diablo Canyon License Conditions Before the NRC

On December 6, 1978, the NRC amended PG&E's Diablo Canyon Construction Permits (CPPR-39, CPPR-69) to include certain license conditions. 43 Fed. Reg. 59,934 (1978) (Attachment 1 hereto). On September 22, 1981, the NRC issued a license to Diablo Canyon Nuclear Project No. 1 which also included those conditions. (Attachments 2-5 hereto).[2/] Those conditions

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1/ These additional obligations are proper subjects of judicial notice pursuant to California Evidence Code §§452 and 453. Appendix A to this memorandum lists all documents and facts relied on herein of which this Court is requested to take judicial notice, in accordance with section 430.70 of the California Code of Civil Procedure.

2/ Attachment 2 is the Federal Register notice of the license issuance, 46 Fed. Reg. 47,514 (1981). Attachment 3 is the official NRC order issuing the license, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 14 NRC 598 (1981). Attachment 4 is the Facility Operating License for Diablo Canyon Unit 1, as issued by the NRC on September 22, 1981. Attachment 5 is the Diablo Canyon license conditions as they appeared in the Federal Register in 1976, 41 Fed. Reg. 20,225 (1976).

were effective during all relevant periods, and are effective now. Those license conditions require PG&E to make available to neighboring entities such as Healdsburg, the Northern California Power Agency ("NCPA") and others, additional services beyond those provided for in the contracts between PG&E and Healdsburg, including transmission of power from other sources.[3/]

The FERC summarized the Diablo Canyon license conditions as "generally describ[ing] conditions under which PG&E is bound to provide services such as interconnection, transmission, access to nuclear generation, capacity and energy exchange, and reserve coordination to other utilities requesting such service." Pacific Gas and Electric Co., 11 FERC ¶61,246 at p. 61,484 (1980), aff'd without opinion, 679 F.2d 262 (D.C. Cir. 1982).

Section 2 F.(6) of the Diablo Canyon license conditions provides:

> "Upon request, Applicant [PG&E] shall offer to sell ... partial requirements power ... to an interconnected Neighboring Entity ... under a contract with reasonable terms and conditions including provisions which permit Applicant to recover its costs."

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3/ These conditions are often referred to as the "Stanislaus Commitments." On April 30, 1976, PG&E entered into an agreement with the Assistant Attorney General, Antitrust Division, United States Department of Justice. That agreement provided that, pursuant to the statutory antitrust review procedures of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135, the Department of Justice would not recommend an antitrust hearing at the NRC if PG&E would agree to the inclusion of what became known as the "Stanislaus Conditions" in its proposed NRC license for the Stanislaus Nuclear Project. That agreement further provided that, in the event that PG&E did not proceed with the Stanislaus Nuclear Project, PG&E would agree to the inclusion of those conditions in its Diablo Canyon Nuclear Project license. 43 Fed. Reg. 59,934 (1978).

The Stanislaus Commitments at 2 F.(7) require PG&E to transmit power from entities such as the WAPA to entities such as Healdsburg. That portion of the license conditions states:

> "Applicant [PG&E] shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction and which are consistent with these license conditions.... [S]uch service shall be provided (1) between two ... Neighboring Entities ...."

Healdsburg and WAPA are treated as Neighboring Entities under the Diablo Canyon license conditions.

The Diablo Canyon License Conditions Filed at the FERC

On June 2, 1980, the FERC issued an order requiring PG&E to file certain portions of the Diablo Canyon license conditions with it. Pacific Gas & Electric Co., FERC Docket No. E-7777(II), 11 FERC ¶61,246 (1980) (Attachment 6 hereto). PG&E sought rehearing of that order, which rehearing was denied on August 8, 1980. 12 FERC ¶62,097 (1980) (Attachment 7 hereto). PG&E filed Section 2 F.(7) of the license conditions with the FERC under protest on June 17, 1980. PG&E's appeal to the United States Court of Appeals for the District of Columbia Circuit of that order requiring it to make the filing with the FERC was rejected on May 17, 1982, when the FERC order was summarily affirmed. 679 F.2d 262 (Attachment 8 hereto). Thus, as of June 17, 1980, well before the date of the transactions at issue here, PG&E's obligations enforceable at the FERC included an obligation to transmit power to Healdsburg from sources other than PG&E.

Prior Modifications of the Contract

Twice prior to the events leading to this litigation, PG&E modified the contract which it has here alleged requires

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Healdsburg to purchase all of its power from PG&E. Both amendments followed the same course, and both were filed with the FERC.

Beginning March 1, 1982, Healdsburg purchased capacity and energy from WAPA, an agency of the United States government, in addition to the capacity and energy purchased from PG&E. PG&E filed with the FERC an amendatory agreement modifying its earlier-filed contract (that contract alleged as basis of this complaint) on June 20, 1983, to be effective March 1, 1982. 48 Fed. Reg. 31,295 (1983) (Attachment 9 hereto). That filing reflected the right of Healdsburg to purchase capacity and energy from WAPA beginning March 1, 1982. On August 16, 1983, PG&E filed with the FERC a contract for transmission service, dated August 2, 1983, between PG&E and WAPA providing for transmission of such power to, inter alia, Healdsburg, and requested that the FERC permit the contract thus filed to become effective on March 1, 1982. 48 Fed. Reg. 39,139 (1983) (Attachment 10 hereto).

Also on June 20, 1983, PG&E filed with the FERC an amendment to the contract which is Exhibit A to PG&E's complaint, to be effective March 1, 1982, to and including June 30, 1982. This amendment reflects the right of Healdsburg to purchase energy arranged for by NCPA from the Turlock Irrigation District

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("TID").[4/] 48 Fed. Reg. 31,295 (1983) (Attachment 9 hereto). In connection with this transaction, on September 23, 1982, PG&E tendered for filing with the FERC a contract dated June 24, 1982, providing for transmission by PG&E for NCPA of surplus energy from TID. That contract covered the period March 30, 1982, to and including June 30, 1982. 47 Fed. Reg. 44,875 (1982) (Attachment 13 hereto).

The Transactions at Issue Here

By letter dated May 3, 1982, NCPA, on behalf of its members, requested WAPA to sell it surplus energy available to WAPA during the summer of 1982 (Attachment 14 hereto). By letter dated May 7, 1982, WAPA offered to sell NCPA surplus power from May 1, 1982, on (Attachment 15 hereto). A May 11, 1982, letter from NCPA to PG&E confirmed a previous oral notification to PG&E that NCPA was entering into an agreement with WAPA for purchase of surplus power (Attachment 16 hereto). This was the same procedure that had been followed in the previous purchases from WAPA and TID. NCPA stated in its letter to PG&E its understanding that the power would be transmitted pursuant to the Diablo Canyon license conditions.

4/ Healdsburg is a member of NCPA, a public agency created by a joint powers agreement entered into pursuant to Chapter 5, Division 7, Title I of the California Government Code. On March 29, 1982, NCPA advised PG&E that NCPA had entered into a contract to purchase energy from TID that might be surplus to TID's needs during the months March through June 1982. NCPA requested, pursuant to the Stanislaus Commitments (i.e., the Diablo Canyon license conditions), PG&E's agreement to transmit this energy to, inter alia, Healdsburg (Attachment 11 hereto). PG&E responded on April 12, 1982, undertaking, pursuant to its Stanislaus Commitments, to provide such transmission service from March 30, 1982, until June 30, 1982 (Attachment 12 hereto).

On May 25, 1982, PG&E responded to NCPA's letter. It claimed the transaction would breach WAPA's contract with PG&E, and that it had no obligation to transmit under the Stanislaus Commitments.[5/] It did not claim, suggest or otherwise imply that the transaction would breach the PG&E/Healdsburg agreement (Attachment 17 hereto).

In a letter-contract dated May 28, 1982, WAPA sent NCPA the final terms for the sale of surplus energy from May 1 to September 30, 1982 (Attachment 18 hereto). NCPA approved this agreement by resolution on June 8, 1982 (Resolution No. 82-18, Attachment 19 hereto). Healdsburg executed this agreement on July 27, 1982 (Attachment 20 hereto).

By letter dated June 8, 1982, NCPA answered the concerns addressed in PG&E's May 25, 1982, letter, stated its belief that PG&E was obligated to transmit the power, pursuant to the Stanislaus Commitments (i.e., the Diablo Canyon license conditions), to Healdsburg and other cities, and said that WAPA surplus power would continue to be scheduled into the PG&E transmission systems, and that Healdsburg and other NCPA members to whom the energy was directed would recalculate PG&E bills

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5/ I.e., the Diablo Canyon license conditions.

rendered on any other basis (Attachment 21 hereto).[6/] WAPA informed PG&E of the power sales arrangements by letter dated June 11, 1982 (Attachment 22 hereto).

PG&E responded to WAPA in letters dated June 16 and June 24, 1982 (Attachments 23 and 24 hereto). PG&E asserted that WAPA had breached its statutory authority and violated its contract with PG&E. These letters also served as the substance of PG&E's response to NCPA (letter dated June 25, 1982, enclosing letters of June 16 and June 24, 1982, Attachment 25 hereto).

WAPA issued a general notice of its intent to sell surplus power during the July-September 1982 period on June 29, 1982 (Attachment 26 hereto). This notice described the PG&E/NCPA/WAPA controversy outlined above.

NCPA proposed an escrow account, pending resolution of the dispute, in a June 30, 1982, letter to PG&E (Attachment 27 hereto).

In a letter dated July 29, 1982, PG&E wrote to NCPA, claiming that six cities, including Healdsburg, had not paid their bills to PG&E (Attachment 28 hereto). It said that these cities asserted that they had purchased power from NCPA pursuant to the May 28, 1982, NCPA/WAPA agreement. PG&E said, "In effect, WAPA

6/ In response to PG&E's argument that the PG&E/WAPA contract prevented WAPA from selling power to Healdsburg, NCPA referred to PG&E's own contrary position taken in its Second Post-Hearing Brief in Pacific Gas & Electric Co., FERC Docket No. E-7777 (Phase II) (filed April 12, 1982) (excerpted as Attachment 31 hereto). In this formal, verified pleading, at page 191, PG&E said that its Contract No. 2948A CVP with WAPA "merely obligate[s] PGandE to bank power which can be used beneficially in its service area. That fact doesn't preclude CVP [i.e., WAPA] from importing power and selling it to someone other than PGandE."

is attempting to sell, and NCPA is attempting to purchase, energy that rightfully belongs to PGandE ...." PG&E also asserted that its existing FERC filed tariffs with WAPA and with the cities precluded the sales.

By letter dated August 5, 1982, the City of Healdsburg invited PG&E to negotiate over the form of escrow arrangement set up by NCPA and Healdsburg (Attachment 29 hereto).

By letter dated November 3, 1982, WAPA amended the May 28, 1982, sales agreement (Attachment 30 hereto).

ARGUMENT

I. PG&E'S COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION

PG&E seeks payment for bills it rendered to Healdsburg. Yet PG&E has not asserted in its complaint that the electricity it delivered to Healdsburg ever belonged to PG&E. In fact, WAPA delivered the energy in question to PG&E for redelivery to NCPA's resale customers, including Healdsburg (Attachments 16-20 hereto). The energy entered PG&E's transmission system at no cost to PG&E, and without any transfer of ownership to it. PG&E has not been injured in any way by energy passing through its wires, and claims no such injury.

Nevertheless, PG&E asserts that it was entitled to be paid because its contract with Healdsburg was exclusive (Complaint ¶8). This statement is a conclusion of law and does not have to be taken as true. On this crucial point the contract itself, Attachment A to the complaint, contradicts the allegation in the complaint. Articles 1(b) and 1(c) clearly provide that Healdsburg is entitled to seek power from other sources, and

that PG&E has an obligation to negotiate in good faith with Healdsburg to accommodate to other sources of supply. Moreover, as noted above, if there is any question, PG&E is not permitted by its Diablo Canyon license conditions to insist upon an exclusive contract. Indeed, the two previous contract modifications, which were filed with the FERC, demonstrate PG&E's understanding that the contract allowed for modification. 48 Fed. Reg. 31,295 (1983) (Attachment 9 hereto); 48 Fed. Reg. 39,139 (1983) (Attachment 10 hereto); 47 Fed. Reg. 44,875 (1982) (Attachment 13 hereto).

The only way PG&E could possibly have stated a cause of action is if it is permitted to refuse to transmit the WAPA power to Healdsburg. But the contract itself, and the Diablo Canyon license conditions, plainly require PG&E's cooperation. The contract, then, flatly contradicts the basic claim asserted by PG&E in its complaint.[7/] Thus, PG&E cannot have stated facts sufficient to state a cause of action.

This question is properly resolved on demurrer. In Scudder Food Products, Inc. v. Ginsberg, 21 Cal.2d 596 (1943), the court

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7/ The contract language is clear on this point and is obviously admitted to by PG&E, which attached the contract to its complaint. This should be sufficient for this Court to dispose of PG&E's purported claim once and for all. If the Court should be reluctant to dismiss the complaint on the basis of this blatant contradiction, it should treat Healdsburg's demurrer as one based on uncertainty as to the nature of the complaint, pursuant to section 430.10(f) of the California Code of Civil Procedure, and should compel PG&E to disclose exactly what obligations of the contract it claims to have "fully performed." (Complaint ¶13.) Healdsburg believes PG&E will not be able to explain its refusal to cooperate with Healdsburg, and its refusal to transmit WAPA power as required by the Diablo Canyon license conditions, which form the backdrop for this transaction, without eviscerating its purported cause of action.

affirmed dismissal upon demurrer for failure to state facts constituting a cause of action for unfair trade dealing. The plaintiff had described and attached the allegedly fraudulent containers; the court found as a matter of law that the exhibits contradicted the allegations and demonstrated no reasonable person could be misled.

PG&E is also obligated by the Diablo Canyon license conditions to transmit power from WAPA to Healdsburg. This was part of PG&E's general obligations, on file with the FERC at the time of the transactions that are the subject of this action. PG&E's complaint only states a cause of action if PG&E is alleging that it has breached the Diablo Canyon license conditions by refusing to agree that the energy transfers from WAPA to Healdsburg should be treated as transmission. PG&E's allegation that it "fully performed" under the contract (Complaint ¶13) is completely at odds with the basis on which it seeks recovery. If it has complied with the Diablo Canyon license conditions, it cannot recover.

For these reasons, PG&E has not stated in its complaint facts sufficient to state a cause of action.

II. THE COMPLAINT OF PG&E RAISES QUESTIONS WITHIN THE EXCLUSIVE PRIMARY JURISDICTION OF THE FERC

It must be made clear, if it is not already clear, that Healdsburg does not believe that it owes PG&E anything more for the delivery of the power purchased by it from WAPA than the transmission costs which are set aside in the escrow arrangement. We believe that PG&E has absolutely no right unilaterally to refuse to transmit WAPA power or to refuse on the basis of a

claimed contract right to permit Healdsburg to purchase such power. But if this Court is not persuaded as to the basic failure of PG&E's case at this stage, we believe that it is inappropriate for this Court to delve further into the details of the case at this time.

Healdsburg believes that this Court may properly determine that PG&E's complaint, as filed, fails to state facts that state a cause of action, and may dismiss it. If this Court believes, however, that there is any question that PG&E's complaint can survive a demurrer, it is apparent from the discussion above that the full consideration of the merits of this proceeding will involve moderately complex and interrelated questions of law and fact, and will require the construction of various contracts and agreements. Because these contracts and agreements are rate schedules required by the Federal Power Act to be filed with the FERC,[8/] they must be construed in light of that statute's requirements that services, rates and charges not be unjust, unreasonable, or unduly discriminatory or preferential.[9/] In these circumstances, the Court should not attempt to construe the rights and responsibilities of the parties without resort to the aid of the Commission.

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8/ Section 205(c) of the Act, 16 U.S.C. §824d(c), requires all public utilities to file all rates, schedules, classifications, practices, regulations and contracts with the FERC.

9/ Sections 205(a), (b) of the Federal Power Act, 16 U.S.C. §§824d(a), (b).

We note at the outset that PG&E has the right to seek from FERC the relief which it requests from this Court. The Commission has the authority to construe filed rate schedules, and to require their enforcement. Ordinarily, of course, that would be all that is necessary; if it is finally determined by the FERC (or by a court upon review of the FERC order, if such review is sought) that Healdsburg owes PG&E for services rendered, Healdsburg will pay. Indeed, this is a procedure consistent with the escrow agreement among the parties. If necessary, FERC can procure a court order against "any person," including a municipality, to ensure compliance with its orders. 16 U.S.C. §825m; see City of Cleveland v. Cleveland Electric Illuminating Co., 51 FPC 1250,*B reh'g denied, 51 FPC 1749 (1974);*C City of Cleveland v. Cleveland Electric Illuminating Co., 12 FERC ¶61,163 at 61,401 n.2 (1980).*D While we can only speculate why PG&E has elected to press its grievances before this Court rather than before the Commission, it is noteworthy that some of the positions already taken by PG&E herein conflict with positions taken before the Commission in Docket No. E-7777.10/ Were FERC another court, it would be appropriate to transfer this case to FERC for consolidation or

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* Those citations marked with an asterisk followed by a letter represent authorities not commonly found in California law libraries. For the convenience of the Court, copies of said authorities are set forth as Appendices B through I hereto, and lettered in accordance with the letter following the respective asterisks.

10/ See Attachment 31 hereto.

concurrent consideration with Docket No. E-7777. This is not possible, but an equivalent result can and should be achieved through deference by this Court to the Commission's primary jurisdiction.

As explained by the Supreme Court in United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956), it is sometimes appropriate for a court to suspend a proceeding pending referral to an administrative body of issues within its special competence. While a court possesses a certain degree of discretion on whether to refer questions to an administrative agency, there are circumstances where failure to suspend a proceeding and make a referral is reversible error. Western Pacific Railroad Co. presents such an example. The Court of Claims took upon itself the task of construing a rail tariff for carriage of "incendiary bombs" and determining its applicability to a shipment of napalm bombs lacking burster charges and fuses. Although no party questioned the Court of Claims' authority to construe the tariff, the Supreme Court, sua sponte, raised the question of primary jurisdiction and determined that "effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here." 352 U.S. at 65. The Court emphasized "the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied, the latter being recognized by all to be one for the Interstate Commerce Commission." Id. at 68. The obligation of a court to defer to a regulatory body for determination of matter within the agency's primary jurisdiction

governs state courts as well as federal courts. See Loomis v. Lenigh Valley Railroad Co., 240 U.S. 43 (1916) (New York court properly declined to construe tariff in deference to Interstate Commerce Commission ["ICC"]); Eastern Shore Natural Gas Co. v. Stauffer Chemical Co., 298 A.2d 322 (Del. 1972)*E (chancery court should have asserted jurisdiction over a contract case concerning sales of natural gas, but stayed any action pending the issuance of a declaratory order by the Federal Power Commission construing the contract); Humphrey Feed & Grain, Inc. v. Union Pacific Railroad Co., 199 Neb. 189, 257 N.W.2d 391 (1977)*F (district court erred by determining itself that railroad had breached duty to maintain tracks in good repair wnen court should have deferred to the ICC's primary jurisdiction); Seatrain Lines, Inc. v. Gloria Manufacturing Corp., 222 Va. 279, 279 S.E.2d 166 (1981)*G (district court erred by construing maritime tariff instead of referring issue to the Federal Maritime Commission).

In Oasis Petroleum Corp. v. United States Department of Energy, 718 F.2d 1558 (Temp. Emer. Ct. Ap. 1983), the court enumerated four factors for use in determining whether to defer initially to agency review of a matter: whether the question at issue is within the conventional expertise of judges, whether it requires the exercise of agency expertise or discretion, whether there exists a danger of inconsistent rulings, and whether a prior application to the agency has been made. 718 F.2d at 1564. All of these factors counsel submission of this dispute to FERC. The latter two considerations merit special emphasis. The

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Commission has for over ten years been conducting an investigation into allegations that various contracts entered into by PG&E and other parties are, individually or cumulatively, unlawfully anticompetitive.[11/] Certain of these contracts are implicated in this dispute.[12/] Moreover, as noted above, PG&E has made representations to the Commission which appear inconsistent with the positions which PG&E has taken, and is likely to take, in this Court. The Commission is thus uniquely qualified to view the issues raised herein in the perspective of a broad network of PG&E contracts, activities and representations. In addition, action that FERC might take in the E-7777 docket could affect the contracts implicated in this proceeding, raising the possibility of conflict and lack of uniformity should this Court proceed without preliminary referral to the Commission. Absent the E-7777 proceeding, the case for referral would be strong; in light of that proceeding, the case is compelling.

Courts have found it appropriate to refer questions and issues to FERC or its predecessor, the Federal Power Commission, under a wide variety of circumstances. See, e.g., J. M. Huber Corp. v. Denman, 367 F.2d 104 (5th Cir. 1966); Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co., 601 F.2d 1144 (10th Cir. 1979); Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir.), reh'g en banc denied, 540 F.2d

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11/ See, e.g., Pacific Power & Light Co., 26 FERC ¶63,048 (1984)*H; Pacific Gas & Electric Co., 24 FERC ¶63,001 (1983)*I.

12/ See footnote 6, supra at 10, and Attachment 31.

1085 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977); Eastern Shore Natural Gas Co. v. Stauffer Chemical Co., supra. Given the complex issues of contract construction and regulatory policy presented by this case, it would unquestionably be appropriate to refer the issues raised by this case to FERC, and Healdsburg submits that the applicable precedents in fact mandate such a referral.

CONCLUSION

For the foregoing reasons, Healdsburg's demurrer to PG&E's complaint, for failure to state a cause of action, should be sustained without leave to amend. Alternatively, this Court should sustain Healdsburg's demurrer to PG&E's complaint, without leave to amend, on the ground that primary jurisdiction over the matters set forth therein rests with the Federal Energy Regulatory Commission.

DATED: June 18, 1984.

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID

ROBERT CRAWFORD, ESQ.

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation

By Richard W. Nichols
RICHARD W. NICHOLS

Attorneys for Defendant
City of Healdsburg, California

ATTACHMENTS TO MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER, AND TO REQUEST FOR JUDICIAL NOTICE

Attachment No.

1. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Issuance of Amendment to Construction Permits, 43 Fed. Reg. 59,934 (1978).

2. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant), Issuance of Facility Operating License, 46 Fed. Reg. 47,514 (1981).

3. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 14 NRC 598 (1981).

4. Pacific Gas & Electric Co., NRC Docket No. 50-275, Diablo Canyon Nuclear Plant Unit 1, Facility Operating License (September 22, 1981).

5. Pacific Gas & Electric Co., NRC Docket No. P-564-A, Receipt of Attorney General's Advice and Time for Filing of Petitions to Intervene on Antitrust Matters, 41 Fed. Reg. 20,225 (1976).

6. Pacific Gas & Electric Co., FERC Docket No. E-7777(II), Order on Motion to Compel Filing of Certain Documents, 11 FERC ¶61,246 (1980).

7. Pacific Gas & Electric Co., FERC Docket No. E-7777(II), Notice of Denial of Rehearing, 12 FERC ¶62,097 (1980).

8. Pacific Gas & Electric Co. v. Federal Energy Regulatory Commission, 679 F.2d 262 (D.C. Cir. 1982) (affirming without opinion).

9. Pacific Gas & Electric Co., FERC Docket No. ER83-582-000, Notice of Filing, 48 Fed. Reg. 31,295 (1983).

10. Pacific Gas & Electric Co., FERC Docket No. ER83-682-000, Notice of Filing, 48 Fed. Reg. 39,139 (1983).

11. Letter dated March 29, 1982, from Robert E. Grimshaw (NCPA) to Nolan Daines (PG&E).

12. Letter dated April 12, 1982, from Nolan H. Daines (PG&E) to Robert E. Grimshaw (NCPA).

13. Pacific Gas & Electric Co., FERC Docket No. ER82-836-000, Notice of Filing, 47 Fed. Reg. 44,875 (1982).

14. Letter dated May 3, 1982, from Robert E. Grimshaw (NCPA) to David G. Coleman (WAPA).

15. Letter dated May 7, 1982, from David G. Coleman (WAPA) to Robert E. Grimshaw (NCPA).

16. Letter dated May 11, 1982, from Robert E. Grimshaw (NCPA) to Nolan H. Daines (PG&E).

17. Letter dated May 25, 1982, from Nolan H. Daines (PG&E) to Robert E. Grimshaw (NCPA).

18. Letter dated May 28, 1982, from David G. Coleman (WAPA) to Robert E. Grimshaw (NCPA).

19. NCPA, Resolution No. 82-18, June 8, 1982 (attaching NCPA Service Schedule, NCPA-WAPA Letter of Agreement [for Bonneville Power Administration energy]).

20. NCPA, Resolution No. 82-54, October 28, 1982 (attaching NCPA Service Schedule, NCPA-WAPA Letter of Agreement, signed on July 27, 1982, by Michael McDonald, City Manager of Healdsburg [for Bonneville Power Administration energy]).

21. Letter dated June 8, 1982, from Robert E. Grimshaw (NCPA) to Nolan Daines (PG&E).

22. Letter dated June 11, 1982, from David G. Coleman (WAPA) to Nolan Daines (PG&E).

23. Letter dated June 16, 1982, from Nolan H. Daines (PG&E) to David Coleman (WAPA).

24. Letter dated June 24, 1982, from Nolan H. Daines (PG&E) to William H. Clagett (WAPA).

25. Letter dated June 25, 1982, from Nolan H. Daines (PG&E) to Robert E. Grimshaw (NCPA).

26. WAPA Notice to All Customers and Interested Parties, Doc. No. N6100, June 29, 1982.

27. Letter dated June 30, 1982, from Robert E. Grimshaw (NCPA) to Nolan Daines (PG&E).

28. Letter dated July 29, 1982, from Nolan H. Daines (PG&E) to Robert E. Grimshaw (NCPA).

29. Letter dated August 5, 1982, from Michael W. McDonald (City of Healdsburg) to J. M. Sterns (PG&E).

30. Letter dated November 3, 1982, from David G. Coleman (WAPA) to Robert E. Grimshaw (NCPA).

31. Pacific Gas & Electric Co., FERC Docket No. E-7777(II), Second Post-Hearing Brief of Pacific Gas and Electric Company, filed April 12, 1982 (excerpts).

Attachment 1

[7590-01-M]

[Docket Nos. 50-275 and 50-323]

PACIFIC GAS & ELECTRIC CO. (DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2)

Issuance of Amendment to Construction Permits

The U.S. Nuclear Regulatory Commission (NRC) has issued Amendments 1 and 4, respectively, to Construction Permit Nos. CPPR-39 and CPPR-69 issued to the Pacific Gas and Electric Company for Diablo Canyon Nuclear Power Plant, Units 1 and 2, located in San Luis Obispo County, California.

The amendments provide for the addition of certain antitrust conditions. The Diablo Canyon Nuclear Power Plant is not subject to an antitrust review under Section 105C of the Atomic Energy Act, as amended. More recent nuclear power plants are subject to such review. However, in connection with the NRC's proceedings on the Stanislaus Nuclear Project, Pacific Gas and Electric Company agreed to include antitrust commitments as conditions in the Diablo Canyon licenses in certain circumstances which have occurred.

In a letter to the U.S. Department of Justice (DOJ), dated April 30, 1976, PG&E stated that, in the event a construction permit for the Stanislaus Nuclear Project was not issued by the NRC prior to July 1, 1978, PG&E was willing to have its license(s) for the Diablo Canyon Nuclear Power Plants, Units 1 and 2, amended to incorporate certain antitrust commitments. This willingness was contingent upon the DOJ advising the NRC that no antitrust hearing was necessary in connection with licensing the Stanislaus Project. The DOJ provided such advice in a letter dated May 5, 1976.

Since no construction permit for the Stanislaus Project had yet been issued, the NRC staff advised PG&E, in a letter dated September 15, 1978, of its intention to include the antitrust commitments as conditions in the Diablo Canyon Construction Permits. PG&E responded, in a letter dated September 19, 1978, stating that it had no objection to such an amendment.

The amendments comply with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. The staff has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter 1, which are set forth in the amendment.

In accordance with 10 CFR 50.91, prior public notice of these amendments was not required since the amendments do not involve significant hazards considerations.

The staff has determined that the issuance of these amendments will not result in any significant environmental impact and that pursuant to 10 CFR Section 51.5(d)(4) an environmental impact statement, or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of these amendments.

For further details with respect to this action, see (1) letters related to the amendments dated April 20, 1976, May 5, 1976, September 15, 1978, and September 19, 1978, (2) Amendment Nos. 1 and 4 to CPPR-39 and CPPR-69, respectively, and (3) the staff's related Evaluation of an Amendment to Include Antitrust Conditions in the Diablo Canyon Construction Permits.

All of these items and other related material are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. and at the Local Public Document Room located in San Luis Obispo County Free Library, P.O. Box X, San Luis Obispo, California 93406.

A copy of items (1), (2), and (3) may be obtained upon written request to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, ATTN: Director, Division of Project Management, Office of Nuclear Reactor Regulation.

Dated at Bethesda, Maryland, this 6th day of December 1978.

FOR THE NUCLEAR REGULATORY COMMISSION.

JOHN F. STOLZ,
Chief, Light Water Reactors Branch No. 1, Division of Project Management.

[FR Doc. 78-35565 Filed 12-21-78; 8:45 am]

Attachment 2

[Docket No. 50-275]

Pacific Gas & Electric Co.; Issuance of Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Facility Operating License No. DPR-76, to Pacific Gas & Electric Company (licensee) which authorizes operation of the Diablo Canyon Nuclear Power Plant, Unit 1 (the facility), at reactor core power levels not in excess of 166.9 megawatts thermal (5 percent power) in accordance with the provisions of the license, the Technical Specifications and the Environmental Protection Plan.

The Diablo Canyon Nuclear Power Plant, Unit 1, is a pressurized water nuclear reactor located at the licensee's site in San Luis Obispo County, California about 12 miles west-southwest of San Luis Obispo. The license is effective as of the date of issuance and shall expire one year after that date, unless extended for good cause shown, or upon earlier issuance or denial of a subsequent licensing action.

The application for the license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. The Commission has made appropriate findings as required by the Act and the Commission's regulations in 10 CFR Chapter I, which are set forth in the license. Prior public notice of the overall action involving the proposed issuance of an operating license was published in the Federal Register on October 19, 1973 (38 FR 29105).

The Commission has determined that the issuance of this license will not result in any environmental impacts other than those evaluated in the Final Environmental Statement and its Addendum since the activity authorized by the license is encompassed by the overall action evaluated in the Final Environmental Statement and its Addendum.

For further details with respect to this action, see (1) Facility Operating License No. DPR-76, complete with Technical Specifications and Environmental Protection Plan; (2) the reports of the Advisory Committee on Reactor Safeguards dated June 12, 1975, August 19, 1977, July 14, 1978, and November 12, 1980; (3) the Commission's Safety Evalution Report dated October 1974, Supplement No. 1 dated January 1975, Supplement No. 2 dated May 1975, Supplement No 3 dated September 1975, Supplement No. 4 dated May 1976, Supplement No. 5 dated September 1976, Supplement No. 6 dated July 1977, Supplement No. 7 dated May 1978, Supplement No. 8 dated November 1978, Supplement No. 9 dated June 1980, Supplement No. 10 dated August 1980, Supplement No. 11 dated October 1980, Supplement No. 12 dated March 1981, Supplement No. 13 dated April 1981 and Supplement No. 14 dated April 1981; (4) the Final Safety Analysis Report and amendments thereto; (5) the Final Environmental Statement dated May 1973 and the Addendum to the Final Environmental Statement dated May 1976, (6) NRC Flood Plain Review of Diablo Canyon Nuclear Power Plant Site dated September 9, 1981; and (7) Discussion of the Environmental Effects of the Uranium Fuel Cycle dated September 9, 1981.

These items are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C., and the California Polytechnic State University Library, Documents and Maps Department, San Luis Obispo, California 93407. A copy of Facility Operating License No. DPR-76 the Safety Evaluation Report and its Supplements 1 through 8 may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Licensing. Copies of Supplements 9 through 14 of the Safety Evaluation Report may be purchased at current rates from the National Technical Information Service, Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, and through the NRC GPO sales program by writing to U.S. Nuclear Regulatory Commission, Attention: Sales Manager, Washington, D.C. 20555. GPO deposit account holders can call 301-492-8530.

Dated at Bethesda, Maryland, this 22d day of September 1981.

Cite as 14 NRC 598 (1981) CLI-81-22

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
Peter Bradford
John F. Ahearne
Thomas M. Roberts

In the Matter of **Docket Nos. 50-275 O.L.**
50-323 O.L.

PACIFIC GAS
AND ELECTRIC COMPANY
(Diablo Canyon Nuclear
Power Plant, Units 1 and 2) **September 21, 1981**

Pursuant to its Immediate Effectiveness review under 10 CFR 2.764(f), the Commission, *inter alia*, (1) decides that the Licensing Board's July 17, 1981 Partial Initial Decision, LBP-81-21, 14 NRC 107, authorizing issuance of a fuel-loading and low-power testing license should become effective with respect to Unit 1, subject to documentation by the Director of Nuclear Reactor Regulation on the basis of findings to be made by him regarding certain matters specified by the Appeal Board in ALAB-653, 14 NRC 629; (2) directs that two contentions excluded by the Licensing Board from the low-power proceeding be included in the full-power proceeding (without prejudice to the Appeal Board review (and later Commission review) to the exclusion of these and other contentions in both the low and full-power proceedings); (3) denies the requests of the Governor of California and intervenors for a waiver of the Immediate Effectiveness rule for the Licensing Board's decision and certain other requests relating to the procedure for review of that decision, including stay requests; and (4) asks for the current views of FEMA regarding the adequacy of emergency planning for purposes of low-power testing at Diablo Canyon.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS REVIEW

That one party or an interested State may differ sharply with the Licensing Board's resolution of contested issues in an operating license case is not a "special circumstance" that could justify waiver of the immediate effectiveness rule, 10 CFR 2.764, pursuant to 10 CFR 2.758. This is because the immediate effectiveness rule, 10 CFR 2.764, itself deals with operating license cases only if they are contested.

ATOMIC ENERGY ACT: RIGHT TO HEARING

Nothing in Section 274 l. of the Atomic Energy Act grants to an interested State any right to bypass normal appeal and stay review procedures and to bring matters directly before the Commission prior to license issuance.

MEMORANDUM AND ORDER

The Commission has reviewed pursuant to 10 CFR 2.764(f) the July 17, 1981 Atomic Safety and Licensing Board decision authorizing issuance of a fuel loading and low power testing license, LBP-81-21, 14 NRC 107: and relevant aspects of earlier Licensing Board decisions, LBP-78-19, 7 NRC 989 (June 12, 1978), LBP-79-26, 10 NRC 453 (September 27, 1979), and two recent Appeal Board decisions, ALAB-644, 13 NRC 903 (June 16, 1981) (Seismic), and ALAB-653, 14 NRC 629 (September 9, 1981) (Physical Security).. Based upon this review and staff briefings regarding uncontested issues relative to Unit 1, the Commission has decided that the Licensing Board's July 17 decision should become effective with respect to Unit 1. The Director, Office of Nuclear Reactor Regulation, is therefore authorized to issue License No. DPR-76 permitting fuel loading and low-power testing at Diablo Canyon Nuclear Power Plant, Unit 1.

Before doing so, the Director is to document the basis for the findings that the Appeal Board has suggested or required him to make regarding:

a. guard training for the low-power license;
b. local law enforcement agency agreements; and
c. response force size for the low-power license.

The Commission does not necessarily agree with the Board's conclusion regarding the definition of the word "several" found in 10 CFR 73.1(a)(1)(i). The Commission will provide guidance on this matter at a later date. However, this has no effect on our finding that fuel loading and low-power testing may be authorized by the NRC staff during the pendency of appeals of the Board's decision.

As part of its effectiveness review the Commission has examined the disputed contentions and subjects and is convinced they hold little significance, from the standpoint of health and safety, for low-power operation. However, without taking any view on whether the Board properly excluded Contentions 10 and 12 in its low-power review, the Commission directs the Licensing Board to include them in the full-power proceeding. The Commission believes that if the contentions have any significance it would be for full-power operation. This action is without prejudice to the Appeal Board review (and later Commission review) of the exclusion of these and other contentions in both the low-power and the full-power proceeding.

The Commission has also considered the requests of Governor Edmund G. Brown, Jr. and Joint Intervenors for a waiver, pursuant to 10 CFR 2.758, of the immediate effectiveness rule in 10 CFR 2.764, the request of Governor Brown that appeals from the Licensing Board's July 17, 1981 partial initial decision be filed directly with the Commission, and the September 15 request of Governor Brown for directed certification. For the reasons stated below, these requests are denied:

a. The immediate effectiveness rule, 10 CFR 2.764, deals with contested operating license cases. That one party or an interested State may differ sharply with the Licensing Board's resolution of contested issues is not a "special circumstance" that could justify waiver under 10 CFR 2.758.

   The rule does not deprive Governor Brown of any statutory rights under section 274 l. of the Atomic Energy Act. He, as well as the other parties, will have had full opportunity, as indicated below, to present argument before the Licensing Board, Appeal Board, and Commission, either initially, on appeal, or in the context of stay motions before the Commission and the Appeal Board. Nothing in section 274 l. grants to an interested State any right to bypass normal appeal and stay review procedures and to bring matters directly before the Commission prior to license issuance.

b. With regard to the assertion that filing direct appeals with the Commission is necessary to shorten the appellate process and provide the Commission with timely opportunity to rule on the

important issues, the Commission is not persuaded that there is adequate reason to depart from its normal appellate procedures.

The Commission notes that in a Memorandum dated August 27, 1981, the Licensing Board stated that it was without jurisdiction to rule on Governor Brown's July 15, 1981 Motion to Reopen the Record to correct alleged NRC Staff misstatements regarding helicopter assistance in emergency plan notification. Jurisdiction now resides with the Appeal Board and the matter should be submitted directly to that forum if further consideration is desired at this juncture.

By letter of September 11, 1981, Joint Intervenors requested the Commission to undertake consideration of their application for a stay, presently before the Appeal Board, and to rule on that motion at the same time that it completes its effectiveness review under 10 CFR 2.764. For the reasons stated in the Appeal Board's Memorandum and Order of September 14, 1981, this request is denied.

In response to a number of comments, the Commission notes that in performing its effectiveness review, it has gone beyond the record developed before the Licensing and Appeal Boards. We took under consideration, as described below, the following material relevant to the emergency planning issue:

a. The Report of the Federal Emergency Management Agency (FEMA) concerning the August 19, 1981 emergency planning exercise at Diablo Canyon; and
b. A Memorandum to the Record from Joan Aron, NRC Office of Policy Evaluation, on the same subject.

This information bears directly upon the adequacy of emergency planning at Diablo Canyon. It is neither necessary nor reasonable that we be required to ignore it in determining whether issuance of the low-power license is in the public interest. In this case, significant negative information could have alerted the Commission to substantial problems not developed in the record (such as subsequent developments and areas not covered in the hearing). The Commission concluded this information did not raise such issues. The Commission considered the information only to this extent and did not consider whether it strengthened the record.

The Commission recognizes debatable elements in the position expressed by the staff in its proposed findings of fact and conclusions of law, that FEMA has not made a finding pursuant to 10 CFR 50.47(a) regarding the adequacy of the Diablo Canyon emergency plan for the purposes of low-power testing. Our preliminary review of the record, particularly the documents referenced in the staff SER, suggests a contrary conclusion. Our preliminary view on this matter is a factor in our decision to authorize

low-power testing. We find no adverse impact of emergency planning on public health and safety for fuel loading and low-power testing of Diablo Canyon, Unit 1.

The Commission is requesting, as of today, the current views of FEMA regarding the adequacy of emergency planning for purposes of low-power testing at Diablo Canyon. The Commission will take these views into account, together with the views of the parties, in its future actions regarding this facility.

On September 17 the Joint Intervenors requested that the Commission set a schedule for the disposition of the stay applications. This motion responded to the Appeal Board's September 14 Memorandum and Order which recited there was no need for expedition since the plant could not attain criticality before mid-October. Applicant has informed the Commission by letter of September 17 that criticality, the important milestone in the activities authorized by the low-power license, will occur no earlier than approximately 62 days after fuel loading commences. Therefore, we believe that there will be a reasonable period of time to act on stay applications before criticality and see no need to adopt a specific schedule for the disposition of stay applications at this time. Should applicant wish to reach criticality before the expiration of the 62 days, it is directed to notify the Commission of its intent at least 14 days before doing so.

The Commission denies Governor Brown's September 17, 1981 motion to defer consideration of the license to load fuel and conduct low-power testing. Governor Brown argues that because the Appeal Board imposed conditions on the issuance of a license in its September 9, 1981 decision (ALAB-653), the existing physical security plan is inadequate. The Commission has rejected Governor Brown's argument because the Board's conditions are binding upon the applicant.

The Commission also denies the September 18, 1981 Motion of Governor Brown which requests the Commission to review the regulatory impact of the security incident of July 15, 1981. The Commission has taken the incident into account in its effectiveness review and finds no need to augment the record to authorize issuance of the low-power license.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 21st day of September, 1981

*The separate views of Chairman Palladino,
Commissioner Gilinsky, and
Commissioner Ahearne follow.

SEPARATE STATEMENT OF CHAIRMAN PALLADINO

With regard to Commissioner Gilinsky's comments on emergency plannjng, I believe there is a reasonable legal position that the Commission's emergency planning requirements for low-power operation have been complied with for Diablo Canyon. I would characterize the emergency planning matter as a difficult, disputed legal issue with no clear, single answer. The Commission cannot in its immediate effectiveness review, resolve once and for all this type of issue. For me, the important fact is that all indications point to no undue risk at Diablo Canyon with respect to emergency planning for low-power operation.

COMMISSIONER GILINSKY'S SEPARATE OPINION
DIABLO CANYON LOW-POWER LICENSE

On the basis of my own review of the materials which are a part of this case and of my own visit of the Diablo Canyon plants, I concur in the result reached by the Commission. I therefore approve the issuance of a fuel-loading and low-power operating license.

I had been concerned about the insufficient number of qualified reactor operators at Diablo Canyon. That concern has been relieved by the results of the most recent NRC operator examination which assure that there will be an adequate complement of senior operators. In view of the concern over delay in this case, I would note that until these results were received a few days ago the licensee was not ready to operate the plant.

I cannot let this occasion pass without commenting on the shoddiness of the Board's decisions in this case. The Board ignored the Commission's guidance of April 1, 1981, on admitting contentions to the hearing.[1] As a result, the Board excluded a number of contentions which should have been admitted to the low-power hearing. The Commission has looked into those contentions whose exclusion was clearly wrong and concluded that they do not have much safety significance for the low-power testing phase of operation. The Commission has directed the Licensing Board to admit two of these contentions to the full-power hearing. This cured the most flagrant Board errors and ensured that the two contentions will be considered where they may be important. This step does not, however, remedy the lack of fairness in the low-power hearing. The Commission should at least have allowed the parties to comment on the significance of these contentions. There was time enough to do this but the Commission declined to ask for such comment. I should add that it remains unclear whether other contentions, which the Commission has not examined in detail, were properly excluded.

The Boards initial decision on physical security was so flawed that it was vacated in its entirety by the Appeal Board. The Appeal Board, in its own decision, corrected the Licensing Board's major errors but then inexplicably devoted the bulk of its page opinion, which was not released to the public, to a bizarre effort to demonstrate that the Commission does not mean what it says when it uses the English language.

The Board's decision on emergency planning is also seriously flawed. The Board, misled by NRC staff allegations, failed to comply with the procedures prescribed in the regulations for evaluating the adequacy of

[1] In particular, the Board rejected Joint Intervenor contentions 10, 12 and 20 on the grounds that they bore an insufficent connection with any requirements of NUREG-0737. In its Order of April 1, 1981, the Commission stated that "if a party comes forward on a timely basis with significant new TMI-related evidence indicating that an NRC safety regulation would be violated by plant operation, we believe that the record should be reopened notwithstanding that the noncompliance item is not discussed in NUREG-0737 and 0694" (CLI-81-5). The three contentions allege that various General Design Criteria are not satisfied. This, in essence, constitutes a challenge to compliance with the regulations. The contentions should have been admitted pursuant to the above-cited Commission guidance without regard to their relationship to NUREG-0737.

emergency planning.[2] Instead of systematically comparing the existing measures with the criteria specified in the regulation, the Board contented itself with reviewing a few selected matters and making an overall judgment on the adequacy of the existing measures. As a result, the Commission has had to review the record in detail to obtain a clearer picture of the present state of emergency planning.

More importantly, the Commission's emergency planning regulations provide that no operating license will be issued unless NRC receives a finding from FEMA on the adequacy of off-site emergency preparedness.[3] We do not have such a finding. Although there does not appear to be a public health and safety problem in relying on the present emergency plans for the purposes of low-power testing the fact is that the Commission has committed itself to relying on FEMA's expertise in this area. The worst effects of this are mitigated by the Commission's decision to ask FEMA for its views on the adequacy of the emergency plans for low-power operation. FEMA should respond before the plant achieves criticality if this process is to make sense. It would have been better to condition the license on receipt of a letter from FEMA on the acceptability of emergency preparedness. This the Commission declined to do. The parties to this case should, of course, be given an opportunity to comment on FEMA's finding.

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[2] 10 CFR 50.47(c) (1) provides that: "Failure to meet the standards set forth in paragraph (b) of this section may result in the Commission declining to issue an Operating License; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation." Paragraph (b) of 10 CFR 50.47 enumerates 16 standards which the "onsite and offsite emergency plans for nuclear power reactors must meet" (10 CFR 50.47(b)).

[3] 10 CFR 50.47(a) which provides that:

"(1) No operating license for a nuclear power reactor will be issued unless a finding is made by NRC that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency."

"(2) The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and capable of being implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of adequacy."

The same Board will preside over the full-power hearing. Discipline, competence, and thoroughness are essential to the integrity of our licensing process. The Commission's regulations are intended to insure due process and procedural fairness to the parties and to insure that initial decisions are of high quality. Cutting corners in a misguided effort to accelerate a hearing can result in a procedural morass and a decision which fails to survive appellate review. For example, if a fraction of the effort devoted to explaining why we do not need a FEMA finding on emergency preparedness had been devoted to obtaining such a finding, we would have resolved this point long ago.

ADDITIONAL VIEWS OF COMMISSIONER AHEARNE

I have additional comments concerning two areas: compliance with the emergency planning regulations and the Licensing Board's rulings on contentions in the reopened proceeding. As a general rule I do not believe comments of this nature are appropriate at this stage. However, these areas have been the subject of vehement disagreement within the Commission and I would prefer to have my views reflected as a public matter.

Compliance with Emergency Planning Regulations

I do not agree that issuance of the low-power decision should be conditioned on obtaining a letter from FEMA addressing emergency planning. Based on a brief review, I believe the correct approach was used and have identified no inadequacies which would justify Commission action at this time.

The Commission first discussed the appropriate requirements for low power testing in connection with Sequoyah 1. Based on that experience a general approach was developed for the next plants:

> "An. NRC/FEMA resolution of the emergency preparedness requirements for low power testing of the next few facilities (North Anna, Salem, Diablo Canyon) scheduled for decision is enclosed. The FEMA/NRC Steering Committee findings will form the basis for favorable NRR Safety Evaluations for low power testing in the area of emergency preparedness."[1]

[1] "Emergency Preparedness Requirements for Near Term Low Power Testing Authorizations," fm W. Dircks, Acting Executive Director for Operations, to Commissioners, dtd 3/25/80 (*enclosing* "FEMA/NRC Interim Agreement on Criteria for Low Power Testing at New Commercial Nuclear Facilities").

The process continued to develop.[2] However, we were consistent in assuming that Diablo would be measured against the interim criteria — just as North Anna and Salem were. Consistent with this assumption the staff's approach in Diablo is virtually identical to the Commission's treatment of Salem and North Anna.[3]

During this same time frame, the Commission was developing its emergency planning rule. A proposed rule was published in December 1979.[4] The final rule was published in August 1980 and was made effective in November 1980.[5] Unfortunately, the Commission did not address the appropriate framework for assessing the adequacy of emergency planning for low power licenses.

Although different treatment for low power operation is not explicitly recognized in the regulations, I would have expected the flexibility provided by 10 CFR 50.47(c)(1) would have accommodated the Commission's intent. However, it has been argued there may be some residual problems for the interim approach concerning §50.47(a)(2). Since the focus appears to be on a technicality caused by a failure on the Commission's part to adequately implement its intent rather than a concern about compliance with the intended standards, I do not see a basis for dealing with the issue in this decision.

Licensing Board Rulings on Contentions in the Reopened Proceeding

I believe the Licensing Board's rulings on contentions were consistent with the Commission's guidance.

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[2] "We conclude that an appropriate objective for those facilities beyond North Anna, Salem and Diablo Canyon is to assess against the upgraded NRC/FEMA criteria and making [sic] findings with regard to the significance of any deficiencies for low power testing authorizations."

"Emergency Preparedness Criteria for Low Power Testing," fm FEMA/NRC Steering Committee to H. Denton, Director of the Office of Nuclear Reactor Regulation, NRC and J. McConnell, Assistant Associate Director for Population Preparedness, FEMA dtd 3/6/80.

[3] *Compare* the Safety Evaluation Report, Supplement No. 4 for operation of Salem Nuclear Generating Station, Unit 2, NUREG-0517 Supp. No. 4 at III.B-1 (April 1980) and the Safety Evaluation Report, Supplement No. 10 for operation of North Anna Power Station, Unit 2, NUREG-0053 Supp. No. 10 at III-B-1 (April 1980) *with* the Safety Evaluation Report, Supplement No. 10 for operation of Diablo Canyon Nuclear Power Station Units 1 and 2, NUREG-0675 Supp. No. 10 at III.B-1 (August 1980).

[4] Emergency Planning Proposed Rule, 44 FR 75167 (Dec 19, 1979).

[5] Emergency Planning Final Rule, 45 FR 55402 (Aug 19, 1980).

On June 20, 1980 the Commission issued a policy statement providing guidance concerning treatment of operating license applications in light of TMI.[6] On December 18, 1980 the Commission issued a revised policy statement.[7] In both, a key decision was:

> "The Commission has decided that current operating license applications should be measured by the NRC staff against the regulations, as augmented by these requirements [NUREG 0654 and NUREG 0737 respectively; footnote omitted]. In general, the remaining items of the Action Plan should be addressed through the normal process for development and adoption of new requirements rather than through immediate imposition on pending applications."

They both also addressed litigation of TMI issues in OL proceedings. As was explained in the December statement (virtually identical to guidance found in the June statement):

> "The Commission believes the TMI-related operating license requirements list as derived from the process described above should be the principal basis for consideration of TMI-related issues in the adjudicatory process. There are good reasons for this. First, this represents a major effort by the staff and Commissioners to address more than one hundred issues and recommendations in a coherent and coordinated fashion. This entire process cannot be reproducted in individual proceedings. Second, the NRC does not have the resources to litigate the entire Action Plan in each proceeding. Third, many of the decisions involved policy more than

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[6] "Further Commission Guidance for Power Reactor Operating Licenses: Statement of Policy." 45 FR 41738 (June 20, 1980).
[7] "Further Commission Guidance for Power Reactor Operating Licenses — Revised Statement of Policy." 45 FR 85236 (December 24, 1980).

factual or legal decisions. Most of these are more appropriately addressed by the Commission itself on a generic basis than by an individual licensing board in a particular case."

With respect to the contentions issue, the December statement explicitly provided (once again virtually identical to guidance found in the June statement):

> "The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(A)(1). The Commission expects adherence to its regulations in this regard.
>
> "Also, present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be adhered to. "

On April 1, 1981 the Commission provided additional guidance for the Diablo Licensing Board.[8] The order specifically provided:

> "As we stated in the Revised Policy Statement, where the evidentiary record on safety issues has been closed, the record should not be reopened on TMI-related issues relating to either low or full power absent a showing, by the moving party, of 'significant new evidence not included in the record, that materially affects the decision.' This is in accordance with longstanding Commission practice."

The Commission provided guidance. The Board was best suited to apply that guidance to the particular case. It was more familiar with the details of the case and had the advantage of being able to personally observe the participants. Thus it was in a better position to assess the significance of the issues raised. Absent convincing arguments to the contrary, I am inclined to defer to the Board. So far I have not seen such arguments.

The Commission put a significant amount of time, effort, and resources into evaluating the implications of TMI. I believe the Commission *meant* to impose a "heavy burden" on those who wish to revisit the TMI issues. This does not mean I see absolutely no value in litigating these issues. However, I believe we are justified in requiring people to explain in detail why discussing the issues one more time is really worthwhile.

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[8] *Pacific Gas & Electric Co* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981)

Attachment 4

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

PACIFIC GAS & ELECTRIC COMPANY

DOCKET NO. 50-275

DIABLO CANYON NUCLEAR PLANT, UNIT 1

FACILITY OPERATING LICENSE

License No. DPR-76

1. The Nuclear Regulatory Commission (the Commission) having found that:

A. The application for licenses filed by the Pacific Gas & Electric Company complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations set forth in 10 CFR Chapter I, and all required notifications to other agencies or bodies have been duly made;

B. Construction of the Diablo Canyon Nuclear Plant, Unit 1 (the facility), has been substantially completed in conformity with Provisional Construction Permit No. CPPR-39 and the application, as amended, the provisions of the Act, and the regulations of the Commission;

C. The facility will operate in conformity with the application, as amended, the provisions of the Act, and the regulations of the Commission;

D. There is reasonable assurance: (i) that the activities authorized by this operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations of the Commission set forth in 10 CFR Chapter I;

E. The Pacific Gas & Electric Company is technically and financially qualified to engage in the activities authorized by this operating license in accordance with the Commission's regulations set forth in 10 CFR Chapter I;

F. The Pacific Gas & Electric Company has satisfied the applicable provisions of 10 CFR Part 140, "Financial Protection Requirements and Indemnity Agreements", of the Commission's regulations;

G. The issuance of this license will not be inimical to the common defense and security or to the health and safety of the public;

H. After weighing the environmental, economic, technical, and other benefits of the facility against environmental and other costs and considering available alternatives, the issuance of Facility Operating License No. DPR-76, subject to the conditions for protection of the environment set forth herein, is in accordance with 10 CFR Part 50, Appendix D*, of the Commission's regulations and all applicable requirements have been satisfied; and

I. The receipt, possession, and use of source, byproduct, and special nuclear material as authorized by this license will be in accordance with the Commission's regulations in 10 CFR Parts 30, 40 and 70.

2. Pursuant to Commission's Memorandum and Order dated September 21, 1981, Facility Operating License No. DPR-76 is hereby issued to the Pacific Gas & Electric Company to read as follows:

A. This license applies to the Diablo Canyon Nuclear Plant, Unit 1, a pressurized water nuclear reactor and associated equipment (the facility), owned by the Pacific Gas & Electric Company. The facility is located in San Luis Obispo County, California, and is described in PG&E's Final Safety Analysis Report as supplemented and amended, and the Environmental Report as supplemented and amended.

B. Subject to the conditions and requirements incorporated herein, the Commission hereby licenses the Pacific Gas & Electric Company:

(1) Pursuant to Section 104(b) of the Act and 10 CFR Part 50, "Licensing of Production and Utilization Facilities", to possess, use, and operate the facility at the designated location in San Luis Obispo County, California, in accordance with the procedures and limitations set forth in this license;

(2) Pursuant to the Act and 10 CFR Part 70, to receive, possess, and use at any time special nuclear material as reactor fuel, in accordance with the limitations for storage and amounts required for reactor operation, as described in the Final Safety Analysis Report, as supplemented and amended;

(3) Pursuant to the Act and 10 CFR Parts 30, 40, and 70, to receive, possess, and use at any time any byproduct, source and special nuclear material as sealed neutron sources for reactor startup, sealed sources for reactor instrumentation and radiation monitoring equipment calibration, and as fission detectors in amounts as required;

*See 10 CFR § 51.56

(4) Pursuant to the Act and 10 CFR Parts 30, 40, and 70, to receive, possess, and use in amounts as required any byproduct, source or special nuclear material without restriction to chemical or physical form, for sample analysis or instrument calibration or associated with radioactive apparatus or components; and

(5) Pursuant to the Act and 10 CFR Parts 30, 40, and 70, to possess, but not separate, such byproduct and special nuclear materials as may be produced by the operation of the facility.

C. This license shall be deemed to contain and is subject to the conditions specified in the Commission's regulations set forth in 10 CFR Chapter I and is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect; and is subject to the additional conditions specified or incorporated below:

(1) Maximum Power Level

The Pacific Gas & Electric Company is authorized to operate the facili at reactor core power levels not in excess of 5 percent (166.9 megawat thermal).

(2) Technical Specifications

The Technical Specifications contained in Appendix A and the Environmental Protection Plan contained in Appendix B attached hereto are hereby incorporated in this license. The Pacific Gas & Electric Company shall operate the facility in accordance with the Technical Specifications and the Environmental Protection Plan.

(3) Initial Test Program

The Pacific Gas & Electric Company shall conduct the post-fuel-loading initial test program (set forth in Section 14 of Pacific Gas & Electric Company's Final Safety Analysis Report, as amended), without making any major modifications of this program unless modifications have been identified and have received prior NRC approval. Major modifications are defined as:

a. Elimination of any test identified in Section 14 of PG&E's Final Safety Analysis Report as amended as being essential;

b. Modification of test objectives, methods, or acceptance criteria for any test identified in Section 14 of PG&E's Final Safety Analysis Report as amended as being essential;

c. Performance of any test at a power level different from that described in the program; and

d. Failure to complete any tests included in the described program (planned or scheduled for power levels up to the authorized power level).

(4) PG&E is authorized to perform steam generator moisture carryover studies and turbine performance tests at the Diablo Canyon Nuclear Power Plant. These studies involve the use of an aqueous tracer solution of three (3) curies of sodium-24. PG&E's personnel shall be in charge of conducting these studies and be knowledgeable in the procedures. PG&E shall impose personnel exposure limits, posting, and survey requirements in conformance with those in 10 CFR Part 20 to minimize personnel exposure and contamination during the studies. Radiological controls shall be established in the areas of the chemical feed, feedwater, steam, condensate and sampling systems where the presence of the radioactive tracer is expected to warrant such controls. PG&E shall take special precautions to minimize radiation exposure and contamination during both the handling of the radioactive tracer prior to injection and the taking of system samples following injection of the tracer. PG&E shall ensure that all regulatory requirements for liquid discharge are met during disposal of all sampling effluents and when reestablishing continuous blowdown from the steam generators after completion of the studies.

(5) Environmental Qualification (Section 7.8 SER Supplement No. 9)

a. No later than June 30, 1982, PG&E shall be in compliance with the provisions of NUREG-0588, "Interim Staff Position on Environmental Qualification of Safety-Related Electrical Equipment," for safety-related equipment exposed to a harsh environment.

b. Complete and auditable records must be available and maintained at a central location which describe the environmental qualification method used for all safety-related electrical equipment in sufficient detail to document the degree of compliance with the DOR Guidelines or NUREG-0588. Such records should be updated and maintained current as equipment is replaced, further tested, or otherwise further qualified to document complete compliance by June 30, 1982.

c. The licensee shall provide affirmation of implementation of the surveillance and maintenance program procedures prior to the issuance of a full power license, and adhere to the commitments of their September 2, 1981 submittal which will result in compliance with NUREG-0588.

(6) Fire Protection System (Section 9.5)

a. PG&E shall maintain in effect and fully implement all provisions of the approved fire protection plan and the NRC staff's Fire Protection Review in Supplements 8, 9 and 13 to the Diablo Canyon Safety Evaluation Report.

b. PG&E shall comply with Sections III.G, III.J, III.L and III.O of Appendix R of 10 CFR 50, except where NRC has approved exemptions, on a schedule consistent with the schedules for implementation specified in 10 CFR 50.48(c). By October 1, 1981, PG&E shall submit a report that identifies and justifies differences between existing or proposed fire protection features and these features specified in Sections III.G, III.J, III.L, as appropriate, and III.O of Appendix R to 10 CFR Part 50.

(7) Compliance with Regulatory Guide 1.97

Within thirty days of issuance of this license, PG&E shall submit a proposal, including an implementation schedule, for compliance with R.G.

(8) NUREG-0737 Conditions

Each of the following conditions shall be completed to the satisfaction of the NRC by the times indicated below. Each of the following conditions references the appropriate item in SER Supplements No. 10 and/or No. 12.

a. Shift Technical Advisor (Section I.A.1.1)

PG&E shall provide a fully-trained on-shift technical advisor to the Shift Foreman.

b. Shift Manning (Section I.A.1.3)

Until the plant has completed its startup test program, licensed personnel who are not regularly assigned members of the shift staff, including but not limited to the Operations Supervisor, shall not be assigned shift duties to satisfy the minimum staffing requirements for operation in Modes 1, 2, 3, 4 except for cases of emergencies such as unexpected illness. Such persons may be used, if necessary, during the period of initial fuel loading. Exceptions to this requirement may be made only after prior consultation with and approval by the NRC.

c. Management of Operations (Section I.B.1)

The Pacific Gas and Electric Company shall augment the plant staff to provide on each shift an individual experienced in comparable size pressurized water reactor operation. These individuals shall have at least one year of experience in operation of large pressurized water reactors or shall have participated in the startup of at least three pressurized water reactors. At least one such experienced individual shall be on duty on each shift during the initial fuel loading and through the startup test program whenever the reactor is not in a cold shutdown condition for at least the first year of operation or until the plant has attained a nominal 100% power level, whichever occurs first.

d. Independent Safety Engineering Group (Section I.B.1.2)

PG&E shall have an Onsite Safety Review Group.

e. Procedures for Verifying Correct Performance of Operating Activiti (Section I.C.6)

Procedures shall be available to verify the adequacy of the operating activities.

f. Training During Low-Power Testing (Section I.G.1)

PG&E shall conduct a sufficient number of repetitive tests on the reactor such that each licensed operator and supervisor would participate in at least one of the low power tests (tests 1-6) and observe two others prior to full power operation.

g. Reactor Coolant System Vents (Section II.B.1)

By July 1, 1982, PG&E shall install reactor coolant system and reactor vessel head highpoint vents that are remotely operable from the control room.

h. Post Accident Sampling (Section II.B.3)

By January 1, 1982, PG&E shall complete corrective actions needed to provide the capability to promptly obtain and perform radioisotopic and chemical analyses of reactor coolant and containment atmosphere samples under degraded core conditions without excessive exposure.

i. Relief and Safety Valve Test Requirements (Section II.D.1)

PG&E shall conform to the results of the EPRI test program. PG&E shall provide documentation for qualifying (a) reactor coolant system relief and safety valves, (b) piping and supports, and (c) block valves in accordance with the review schedule given in SECY 81-491 as approved by the Commission.

j. Containment Isolation Dependability (Section II.E.4.2)

PG&E shall limit the 12-inch vacuum/overpressure relief valve opening to less than or equal to 50 degrees.

k. Additional Accident Monitoring Instrumentation (Section II.F.1)

By January 1, 1982, PG&E shall install continuous indication in the control room of the following parameters:

(1) Containment radiation monitors.

(2) Noble gas effluent from each potential release point.

l. Instruments for Inadequate Core Cooling (Section II.F.2)

(1) PG&E shall provide a reactor vessel water level instrumentatic system by January 1, 1982.

(2) PG&E shall resolve the issue on plant computer isolation devices by January 1, 1982. PG&E shall upgrade the incore thermocouple syst... by January 1, 1982 except for the incore thermocouple in-containment connectors and junction boxes. PG&E shall replace the incore thermocouple in-containment connectors and junction boxes during the first extended outage following component availability.

m. Voiding in Reactor Coolant System (Section II.K.2.17)

PG&E is participating in the Westinghouse Owner's group effort on this item and shall conform to the results of this effort. The analysis will be submitted by January 1, 1982.

n. Sequential Auxiliary Feedwater Flow Analysis (Section II.K.2.19)

PG&E is participating in the Westinghouse Owner's group effort on this item and shall conform to the results of this effort. The analysis will be submitted by July 1, 1982.

o. Calculations for Small-Break LOCAs (Section II.K.3.30 and II.K.3.31)

PG&E is participating in the Westinghouse Owner's group effort for this item and shall conform to the results of this effort. The analysis for model justification shall be submitted by January 1, 1982.

p. Upgrade Emergency Support Facilities (Section III.A.1.2)

(1) PG&E shall have in operation the upgraded emergency support facilities by October 1, 1982 consistent with the guidance of NUREG-0696.

(2) PG&E shall maintain interim emergency support facilities (Technical Support Center, Operations Support Center and the Emergency Operations Facility) until the final facilities are complete.

q. Long-Term Emergency Preparedness (Section III.A.2)

- Functional description of upgraded capabilities shall be provided by January 1, 1982. Installation of hardware and software shall be completed by July 1, 1982. Full operational capability is required by October 1, 1982.

D. Exemptions from certain requirements of Appendices G, H and J to 10 CFR Part 50 are described in the Office of Nuclear Reactor Regulation's Safety Evaluation Report, Supplements No. 9 through 14. These exemptions are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest. Therefore, these exemptions are hereby granted. The facility will operate, to the extent authorized herein, in conformity with the application, as amended, the provisions of the Act, and the regulations of the Commission.

E. Physical Security Issues

The licensee shall maintain in effect and fully implement all provisions of the Commission approved Physical Security, Guard Training and Qualification, and Safeguards Contingency Plans, including amendments made pursuant to the authority of 10 CFR 50.54(p). The approved plans, which contain 10 CFR 2.790(d) information, are collectively entitled "Diablo Canyon Power Plant Physical Security Plan," dated May 25, 1977 with revisions dated June 3, 15, and 29, July 22 and December 29, 1977, January 31 and March 16, 1978, and May 15, 1979 as supplemented by commitments contained in Pacific Gas and Electric Company's letter of March 12, 1981 to the Chief, Licensing Branch No. 3, NRR, Nuclear Regulatory Commission; "Diablo Canyon Power Plant Guard Training and Qualification Plan", dated July 11, 1980, and the "Diablo Canyon Power Plant Safeguards Contingency Plan", dated May 1, 1980.

The approved Diablo Canyon Security Plan identified above is hereby amended to increase the minimum number of armed responders consistent with ALAB-653 (restricted) decision of September 9, 1981.

The Diablo Canyon Power Plant Guard Training and Qualification Plan shall be fully implemented and all guards fully trained and qualified by January 1, 1982 (per letter dated July 16, 1981 from the Assistant General Counsel, Pacific Gas & Electric Company, to the Chief, Licensing Branch No. 3, NRR, Nuclear Regulatory Commission). The Diablo Canyon Power Plant Safeguards Contingency Plan shall be fully implemented, in accordance with 10 CFR 73.40(b) at the time of fuel loading.

F. Antitrust Conditions

This license is subject to the following antitrust conditions:

(1) Definitions

a. "Applicant" means Pacific Gas and Electric Company, any successor corporation, or any assignee of this license.

b. "Service Area" means that area within the exterior geographic boundaries of the several areas electrically served at retail, now or in the future, by Applicant, and those areas in Northern and Central California adjacent thereto.

c. "Neighboring Entity" means a financially responsible private or public entity or lawful association thereof owning, contractually

controlling or operating, or in good faith proposing to own, to contractually control or to operate facilities for the generation, or transmisison at 60 kilovolts or above, of electric power which meets each of the following criteria: (1) its existing or proposed facilities are or will be technically feasible of direct interconnection with those of Applicant; (2) all or part of its existing or proposed facilities are or will be located within the Service Area; (3) its primary purpose for owning, contractually controlling, or operating generation facilities is to sell in the Service Area the power generated; and (4) it is, or upon commencement of operations will be, a public utility regulated under applicable state law or the Federal Power Act, or exempted from regulation by virtue of the fact that it is a federal, state, municipal or other public entity.

d. "Neighboring Distribution System" means a financially responsible private or public entity which engages, or in good faith proposes to engage, in the distribution of electric power at retail and which meets each of the criteria numbered (1), (2) and (4) in subparagraph "C" above.

e. "Costs" means all capital expenditures, administrative, general, operation and maintenance expenses, taxes, depreciation and costs of capital including a fair and reasonable return on Applicant's investment, which are properly allocable to the particular service or transaction as determined by the regulatory authority having jurisdiction over the particular service or transaction.

f. "Good Utility Practice" means those practices, methods and equipment, including levels of reserves and provisions for contingencies, as modified from time to time, that are commonly used in the Service Area to operate, reliably and safely, electric power facilities to serve a utility's own customers dependably and economically, with due regard for the conservation of natural resources and the protection of the environment of the Service Area, provided such practices, methods and equipment are not unreasonably restrictive.

g. "Firm Power" means that power which is intended to be available to the customer at all times and for which, in order to achieve that degree of availability, adequately installed and spinning reserves and sufficient transmission to move such power and reserves to the load center are provided.

(2) Interconnection

Interconnection agreements negotiated pursuant to these license conditions shall be subject to the following paragraphs "a" through "g":

a. Applicant shall not unreasonably refuse to interconnect and operate normally in parallel with any Neighboring Entity, or to interconnect with any Neighboring Distribution System. Such interconnections shall be consistent with Good Utility Practice.

b. Interconnection shall be at one point unless otherwise agreed by the parties to an interconnection agreement. Interconnection shall not be limited to lower voltages when higher voltages are preferable from the standpoint of Good Utility Practice and are available from Applicant. Applicant may include in any interconnection agreement provisions that a Neighboring Entity or Neighboring Distribution System maintain the power factor associated with its load at a comparable level to that maintained by Applicant in the same geographic area and use comparable control methods to achieve this objective.

c. Interconnection agreements shall not provide for more extensive facilities or control equipment at the point of interconnection than are required by Good Utility Practice unless the parties mutually agree that particular circumstances warrant special facilities or equipment.

d. The Costs of additional facilities required to provide service at the point of interconnection shall be allocated on the basis of the projected economic benefits for each party from the interconnection after consideration of the various transactions for which the interconnection facilities are to be used, unless otherwise agreed by the parties.

e. An interconnection agreement shall not impose limitations upon the use or resale of capacity and energy sold or exchanged under the agreement except as may be required by Good Utility Practice.

f. An interconnection agreement shall not prohibit any party from entering into other interconnection agreements, but may provide that (1) Applicant receive adequate notice of any additional interconnection arrangement with others, (2) the parties jointly consider and agree upon additional contractual provisions, measures, or equipment, which may be required by Good Utility Practice as a result of the new arrangement, and (3) Applicant may terminate the interconnection agreement if the reliability of its system or service to its customers would be adversely affected by such additional interconnection arrangement.

g. Applicant may include provisions in an interconnection agreement requiring a Neighboring Entity or Neighboring Distribution System to develop with Applicant a coordinated program for underfrequency load shedding and tie separation. Under such programs the parties shall equitably share the interruption or curtailment of customer load.

(3) Reserve Coordination

Interconnection agreements negotiated pursuant to these license conditions shall be subject to the following paragraphs "a" through "e" regarding reserve coordination:

a. Applicant and any Neighboring Entity with which it interconnects shall jointly establish and separately maintain the minimum reserves to be installed or otherwise provided under an interconnection agreement. Unless otherwise mutually agreed upon, reserves shall be expressed as a percentage of estimated firm peak load and the minumum reserve percentage shall be at least equal to Applicant's planned reserve percentage without the interconnection. A Neighboring Entity shall not be required to provide reserves for that portion of its load which it meets through purchases of Firm Power. While different reserve percentages may be specified in various interconnection agreements, no party to an interconnection agreement shall be required to provide a greater reserve percentage than Applicant's planned reserve percentage, except that if the total reserves Applicant must provide to maintain system reliability equal to that existing without a given interconnection arrangement are increased by reason of the new arrangement, then the other party or parties may be required to install or provide additional reserves in the full amount of such increase.

b. Applicant and Neighboring Entities with which it interconnects shall jointly establish and separately maintain the minimum spinning reserves to be provided under an interconnection agreement. Unless otherwise mutually agreed upon, spinning reserves shall be expressed as a percentage of peak load and the minumum spinning reserve percentage shall be at least equal to Applicant's spinning

reserve percentage without the interconnection. A Neighboring Entity shall not be required to provide spinning reserves for that portion of its load which it meets through purchases of Firm Power. While different spinning reserve percentages may be specified in various interconnection agreements, no party to an interconnection agreement shall be required to provide a greater spinning reserve percentage than that which Applicant provides, except that if the total spinning reserves Applicant must provide to maintain system reliability equal to that existing without a given interconnection arrangement are increased by reason of the new arrangement, then the other party or parties may be required to provide additional spinning reserves in the full amount of such increase.

c. Applicant shall offer to sell, on reasonable terms and conditions, including a specified period, capacity to a Neighboring Entity for use as reserves if such capacity is neither needed for Applicant's own system nor contractually committed to others and if the Neighboring Entity will offer to sell, on reasonable terms and conditions, its own such capacity to the Applicant.

d. Applicant may include in any interconnection agreement provisions requiring a Neighboring Entity to compensate Applicant for any reserves Applicant makes available as the result of the failure of such Neighboring Entity to maintain all or any part of the reserves it has agreed to provide in said interconnection agreement.

e. Applicant shall offer to coordinate maintenance schedules with Neighboring Entities interconnected with Applicant and to exchange or sell maintenance capacity and energy when such capacity and energy are available and it is reasonable to do so in accordance with Good Utility Practice.

(4) Emergency Power

Applicant shall sell emergency power to any interconnected Neighboring Entity which maintains the level of minimum reserve agreed upon with Applicant, agrees to use due diligence to correct the emergency and agrees to sell

emergency power to Applicant. Applicant shall engage in such transactions if and when capacity and energy for such transactions are available from its own generating resources, or may be obtained by Applicant from other sources, but only to the extent that it can do so without impairing service to Applicant's retail or wholesale power customers or impairing its ability to discharge prior commitments.

(5) Other Power Exchanges

Should Applicant have on file, or hereafter file, with the Federal Energy Regulatory Commission, agreements or rate schedules providing for the sale and purchase of short-term capacity and energy, limited-term capacity and energy, long-term capacity and energy or economy energy, Applicant shall, on a fair and equitable basis, enter into like or similar agreements with any Neighboring Entity, when such forms of capacity and energy are available, recognizing that past experience, different economic conditions and Good Utility Practice may justify different rates, terms and conditions. Applicant shall respond promptly to inquiries of Neighboring Entities concerning the availability of such forms of capacity and energy from its system.

(6) Wholesale Power Sales

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

(7) Transmission Services

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

b. Applicant shall include in its planning and construction programs such increases in its transmission capacity or such additional transmission facilities as may be required for the transactions referred to in paragraph (a) of this Section, provided any Neighboring Entity or Neighboring Distribution System gives Applicant sufficient advance notice as may be necessary to accommodate its requirements from a regulatory and technical standpoint and provided further that the entity requesting transmission services compensates Applicant for the Costs incurred as a result of the request. Where transmission capacity will be increased or additional transmission facilities will be installed to provide or maintain the requested service to a Neighboring Entity or Neighboring Distribution System, Applicant may require, in addition to a rate for use of other facilities, that payment of Costs associated with the increased capacity or additional facilities shall be made by the parties in accordance with and in advance of their respective use of the new capacity or facilities.

c. Nothing herein shall require Applicant (1) to construct additional transmission facilities if the construction of such facilities is inconsistent with Good Utility Practice or if such facilities could be constructed without duplicating any portion of Applicant's transmission system, (2) to provide transmission service to a retail customer of (3) to construct transmission outside the area then electrically served at retail by Applicant.

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

(8) Access to Nuclear Generation

a. If a Neighboring Entity or Neighboring Distribution System makes a timely request to Applicant for an ownership participation in the Stanislaus Nuclear Project, Unit No. 1 or any future nuclear generating unit for which Applicant applies for a construction permit during the 20-year period immediately following the date of the construction permit for Stanislaus Unit 1, Applicant shall offer the requesting party an opportunity to participate in such units, up to an amount reasonable in light

of the relative loads of the participants. With respect to Stanislaus Unit No. 1 or any future nuclear generating unit, a request for participation shall be deemed timely if received within 90 days after the mailing by Applicant to Neighboring Entities and Neighboring Distribution Systems of an announcement of its intent to construct the unit and a request for an expression of interest in participation. Participation shall be on a basis which compensates Applicant for a reasonable share of all its Costs, incurred and to be incurred, in planning, selecting a site for, constructing and operating the facility.

b. Any Neighboring Entity or any Neighboring Distribution System making a timely request for participation in a nuclear unit must enter into a legally binding and enforceable agreement to assume financial responsibility for its share of the costs associated with participation in the unit and associated transmission facilities. Unless otherwise agreed by Applicant, a Neighboring Entity or Neighboring Distribution System desiring participation must have signed such an agreement within one year after Applicant has provided to that Neighboring Entity or Neighboring Distribution System pertinent financial and technical data bearing on the feasibility of the project which are then available to Applicant. Applicant shall provide additional pertinent data as they become available during the year. The requesting party shall pay to Applicant forthwith the additional expenses incurred by Applicant in making such financial and technical data available. In any participation agreement subject to this Section, Applicant may require provisions requiring payment by each participant of its share of all costs incurred up to the date of the agreement, requiring each participant thereafter to pay its pro rata share of funds as they are expended for the planning and construction of units and related facilities, and requiring each participant to make such financial arrangements as may be necessary to ensure the ability of the participant to continue to make such payments.

(9) Implementation

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

b. Nothing contained herein shall enlarge any rights of a Neighboring Entity or Neighboring Distribution System to provide services to retail customers of Applicant beyond the rights they have under state or federal law.

c. Nothing in these license conditions shall be construed as a waiver by Applicant of its rights to contest the application of any commitment herein to a particular factual situation.

d. These license conditions do not preclude Applicant from applying to any appropriate forum to seek such changes in these conditions as may at the time be appropriate in accordance with the then-existing law and Good Utility Practice.

e. These license conditions do not require Applicant to become a common carrier.

G. This license is subject to the following additional condition for the protection of the environment:

Before engaging in additional construction or operational activities which may result in a significant adverse environmental impact that was not evaluated or that is significantly greater than that evaluated in the Final Environmental Statement and its Addendum, the Pacific Gas & Electric Company shall provide a written notification to the Director of the Office of Nuclear Reactor Regulation.

H. PG&E shall report any violations of the requirements contained in Sections 2.C(3) through 2.C.(8), 2.E, 2.F, and 2.G of this license within 24 hours by telephone and confirmed by telegram, mailgram, or facsimile transmission to the Director of the Regional Office, or his designee, no later than the first working day following the violation with a written followup report within 14 days.

I. PG&E shall immediately notify the Commission of any accident at this facility which could result in an unplanned release of quantities of fission products in excess of allowable limits for normal operation established by the Commission.

J. PG&E shall have and maintain financial protection of such type and in such amounts as the Commission shall require in accordance with Section 170 of the Atomic Energy Act of 1954, as amended, to cover public liability claims.

K. This license is effective as of the date of issuance and shall expire one year from the date of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

Harold R. Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Attachment:
Appendices A and B (Technical Specifications and Environmental Protection Plan)

Date of Issuance: September 22, 1981

NUCLEAR REGULATORY COMMISSION

[DOCKET NO. 50-298]

NEBRASKA PUBLIC POWER DISTRICT

Issuance of Amendment to Facility License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 23 to Facility Operating License No. DPR-46, issued to the Nebraska Public Power District (the licensee), which revised Technical Specifications for operation of the Cooper Nuclear Station (the facility) located in Nemaha County, Nebraska. The amendment is effective as of its date of issuance.

This amendment revises the Technical Specifications for the facility to permit the calibration of intermediate range neutron monitors on any intermediate range monitor indicator range scale in lieu of indicator range scale 10 only.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment. Prior public notice of this amendment was not required since the amendment does not involve a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental impact and that pursuant to 10 CFR § 51.5(d)(4) an environmental statement, negative declaration or environmental impact appraisal need not be prepared in connection with the issuance of this amendment.

For further details with respect to this action, see (1) the application for amendment dated March 10, 1976, (2) Amendment No. 23 to License No. DPR-46, and (3) the Commission's concurrently issued Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. and at the Auburn Public Library, 118 15th Street, Auburn, Nebraska 68305. A copy of items (2) and (3) may be obtained upon request addressed to the United States Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors

Dated at Bethesda, Maryland, this 7th day of May 1976.

For the Nuclear Regulatory Commission

DENNIS L. ZIEMANN,
Chief, Operating Reactors Branch No. 2, Division of Operating Reactors.

[FR Doc 76 14281 Filed 5 14 76 8 45 am]

[Docket No. 50-333]

POWER AUTHORITY OF THE STATE OF NEW YORK AND NIAGARA MOHAWK POWER CORP.

Issuance of Amendment to Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission has issued Amendment No. 17 to Facility Operating License No. DPR-59 issued to the Power Authority of the State of New York and the Niagara Mohawk Power Corporation which revised the Technical Specifications for operation of the James A. FitzPatrick Nuclear Power Plant, located in Oswego County, New York. The amendment is effective within 30 days of its date of issuance.

The amendment changes the Technical Specifications to specify lower limits for the reactor coolant water conductivity and chloride ion concentration.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment. Prior public notice of this amendment was not required since the amendment does not involve a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental impact and that pursuant to 10 CFR § 51.5(d)(4) an environmental statement, negative declaration or environmental impact appraisal need not be prepared in connection with issuance of this amendment.

For further details with respect to this action, see (1) application for amendment submitted by letter dated January 27, 1976, (2) Amendment No 17 to License No. DPR-59, and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C., and at the Oswego City Library, 120 East Second Street, Oswego, New York.

A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors

Dated at Bethesda, Maryland, this 30th day of April 1976.

For the Nuclear Regulatory Commission.

ROBERT W. REID,
Chief, Operating Reactors Branch No. 4, Division of Operating Reactors.

[FR Doc 76 14282 Filed 5 14 76 8 45 am]

[Docket No P 564 A]

PACIFIC GAS AND ELECTRIC CO.

Receipt of Attorney General's Advice and Time for Filing of Petitions To Intervene on Antitrust Matters

The Commission has received, pursuant to section 105c of the Atomic Energy Act of 1954, as amended, a letter of advice from the Attorney General of the United States, dated May 5, 1976, a copy of which is attached as Appendix "A"

Any person whose interest may be affected by this proceeding may, pursuant to section 2.714 of the Commission's "Rules of Practice," 10 CFR Part 2, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. Petitions for leave to intervene and requests for hearing shall be filed by June 16, 1976, either (1) by delivery to the NRC Docketing and Service Section at 1717 H Street, N.W., Washington, D.C., or (2) by mail or telegram addressed to the Secretary, Nuclear Regulatory Commission, Washington, D C 20555, ATTN: Docketing and Service Section.

For The Nuclear Regulatory Commission

JEROME SALTZMAN,
Chief, Antitrust and Indemnity Group, Nuclear Reactor Regulation.

APPENDIX A

[illegible] NUCLEAR PROJECT [illegible]

PACIFIC GAS AND ELECTRIC CO.

[Docket No P 564 A]

You have requested our advice pursuant to the provisions of Section 105c of the Atomic Energy Act of 1954 as amended in connection with the application of Pacific Gas and Electric Company to construct the San Joaquin Nuclear Project, Unit No 1

The Department has previously rendered advice on license applications for several nuclear facilities with respect to which PG&E has been an applicant The first of these was PG&E's 1971 application for a license to construct the then proposed Mendocino Power Plant, Units 1 and 2 On August 2 1971 the Department informed your predecessor Commission that certain described conduct by PG&E to foreclose the development of alternative bulk power supply sources in Northern and Central California had created a situation inconsistent with the antitrust laws and that construction and operation of the Mendocino Plant by PG&E appeared likely to maintain such anticompetitive situation Accordingly, we recommend that an antitrust hearing be held with respect to the Mendocino application Subsequent to the rendering of that advice PG&E withdrew the Mendocino application because of environmental and safety problems Thereafter the Department commenced a comprehensive investigation under the antitrust laws with a view to possible antitrust action in the district court

That investigation was nearing completion when you requested our advice on PG&E's application to participate in the San Joaquin Nuclear Project (SJNP). On November 24 1975 we advised the Commission in connection with SJNP that, in the period since our

1972 advice letter, it appeared that PG&E may have modified certain of its anticompetitive practices which were the basis for our earlier recommendation that a hearing be held. As we stated in that letter, "Whether those actions by PG&E have been such that a situation inconsistent with the antitrust laws no longer exists and or whether an antitrust proceeding on United States District Court should be instituted are matters which are currently being considered and which will shortly be resolved." We indicated that because the Department would shortly render definitive antitrust advic on PG&E in connection with the also pending PG&E application for a license to construct the Stanislaus Nuclear Project and in view of PG&E's agreement to certain limited license conditions pertaining to SJNP, no hearing would be necessary in connection with the licensing of SJNP.

Following the issuance of the SJNP advice letter, the Department and PG&E entered into discussions regarding antitrust concerns which we believed were posed by PG&E's activities affecting alternative bulk power supply sources in Northern and Central California. On February 19, 1976, March 22, 1976, April 30, 1976, PG&E, with our concurrence, requested the Commission to afford additional time for the Attorney General to render advice on the Stanislaus License Application in order that discussions between PG&E and the Department might continue.

We are now able to inform the Commission that PG&E and the Department have reached agreement on a Statement of Commitments which the Department believes will obviate the anti-trust problems posed by PG&E's activities and which will remedy the situation inconsistent with the antitrust laws which we believe has existed in Northern and Central California. The Statement of Commitments is contained in the attached letter to the Department from PG&E President John F. Bonner. For its part, PG&E denies that any of its policies or practices have been or will be inconsistent with the antitrust laws. However, it is willing to have these Commitments included as conditions to its license to construct the Stanislaus Nuclear Project. In the event that PG&E chooses not to construct the Stanislaus Nuclear Project, it has consented to have its operating license for Diablo Canyon Nuclear Power Plant, Units 1 and 2, amended to incorporate the Commitments as conditions to that license.

In our opinion, the effectuation of the Commitments will moot the questions of anticompetitive conduct by PG&E which have come to our attention. The implementation of these policies should provide competitors of Applicant with reasonable opportunities to develop competitive bulk power supply sources. Since PG&E is agreeable to having the Commission include the Company's Statement of Commitments as conditions to the Stanislaus Nuclear Project license, we conclude that an antitrust hearing will not be necessary with respect to the instant application if the Commission issues a license so conditioned.

ENCLOSURE 1

Pacific Gas and Electric Company is herewith submitting to the U.S. Department of Justice the attached statement of commitments. PGandE is willing to have the commitments included as conditions in the construction permit and operating license issued by the Nuclear Regulatory Commission for construction and operation of the proposed Stanislaus Nuclear Project, Unit 1, if the Attorney General will advise the Nuclear Regulatory Commission that no antitrust hearing is necessary in connection with the licensing of the unit. In the event that PG&E's application for a construction permit for the Stanislaus Nuclear Project Unit 1 is withdrawn, or that a construction permit for such unit is not issued by the Nuclear Regulatory Commission prior to July 1, 1978, PG&E is willing to have its licensee(s) for Diablo Canyon Nuclear Power Plant, Units 1 and 2, amended to incorporate the commitments.

As a result of its review of PG&E's activities, the Department has indicated that inclusion of commitments in the Stanislaus license is necessary to remedy an anti-competitive situation which it believes to exist. We believe that none of PG&E's activities has been or will be inconsistent with the antitrust laws and for that reason, it is our view that no conditions to the Stanislaus license are necessary. However, in order to avoid protracted litigation we are agreeable to the inclusion of the attached conditions in the license. We understand that the Department will advise the Nuclear Regulatory Commission that these conditions, which have been negotiated between the Department and PG&E, will remedy the situation inconsistent with the antitrust laws which the Department perceives to exist.

We recognize that if the Attorney General advises the Nuclear Regulatory Commission that the commitments are appropriate license conditions for the Stanislaus Nuclear Project, such advice would mean only that broader license conditions are not deemed necessary in the context of this licensing proceeding. Accordingly, the inclusion in the commitments of limited exceptions to PG&E's general commitment to transmit power in no way exempts PG&E from any legal requirement it may have under statutes other than Section 105c to transmit power in circumstances where such transmission would not be required under the commitments.

We understand that should PG&E refuse in the future to transmit power in circumstances where the commitments do not require it to transmit power, the Department reserves the right to bring legal action in an appropriate forum other than the Nuclear Regulatory Commission against PG&E if the Department concludes that such a refusal to transmit power is, under the circumstances then existing, in violation of the antitrust laws or any other Federal statutes. We also understand that the Department reserves its right to contest PG&E's interpretation of any part of the statement of commitments in the Nuclear Regulatory Commission. In setting forth this understanding, we do not mean to suggest that if PG&E were in fact to refuse to transmit power in circumstances covered by the exceptions, such refusals would violate the antitrust laws or any other Federal statutes.

PACIFIC GAS AND ELECTRIC COMPANY
STATEMENT OF COMMITMENTS

I. DEFINITIONS

A. "Applicant" means Pacific Gas and Electric Company, any successor corporation, or any assignee of this license.

B. "Service Area" means that area within the exterior geographic boundaries of the several areas electrically served at retail, now or in the future, by Applicant, and those areas in Northern and Central California adjacent thereto.

C. "Neighboring Entity" means a financially responsible private or public entity or lawful association thereof owning, contractually controlling or operating, or in good faith proposing to own, to contractually control or to operate facilities for the generation, or transmission at 60 kilovolts or above, of electric power which meets each of the following criteria: (1) its existing or proposed facilities are or will be technically feasible of direct interconnection with those of Applicant; (2) all or part of its existing or proposed facilities are or will be located within the Service Area; (3) its primary purpose for owning, contractually controlling, or operating generation facilities is to sell in the Service Area the power generated; and (4) it is, or upon commencement of operations will be, a public utility regulated under applicable state law or the Federal Power Act, or exempted from regulation by virtue of the fact that it is a federal, state, municipal or other public entity.

D. "Neighboring Distribution System" means a financially responsible private or public entity which engages, or in good faith proposes to engage, in the distribution of electric power at retail and which meets each of the criteria numbered (1), (2), and (4) in subparagraph C above.

E. "Costs" means all capital expenditures, administrative, general, operation and maintenance expenses, taxes, depreciation and costs of capital including a fair and reasonable return on Applicant's investment, which are properly allocable to the particular service or transaction as determined by the regulatory authority having jurisdiction over the particular service or transaction.

F. "Good Utility Practice" means those practices, methods and equipment, including levels of reserves and provisions for contingencies, as modified from time to time, that are commonly used in the Service Area to operate, reliably and safely, electric power facilities to serve a utility's own customers dependably and economically, with due regard for the conservation of natural resources and the protection of the environment of the Service Area, provided such practices, methods and equipment are not unreasonably restrictive.

G. "Firm Power" means that power which is intended to be available to the customer at all times and for which, in order to achieve that degree of availability, adequate installed and spinning reserves and sufficient transmission to move such power and reserves to load center are provided.

INTERCONNECTION

Interconnection agreements negotiated pursuant to these license conditions shall be subject to the following paragraphs A through G:

A. Applicant shall not unreasonably refuse to interconnect and operate normally in parallel with any Neighboring Entity, or to interconnect with any Neighboring Distribution System. Such interconnections shall be consistent with Good Utility Practice.

B. Interconnection shall be at one point unless otherwise agreed by the parties to an interconnection agreement. Interconnection shall not be limited to lower voltages when higher voltages are preferable from the standpoint of Good Utility Practice and are available from Applicant. Applicant may include in any interconnection agreement provision that a Neighboring Entity or Neighboring Distribution System maintain the power factor associated with its load at a comparable level to that maintained by Applicant in the same geographic area and use comparable control methods to achieve this objective.

C. Interconnection agreements shall not provide for more extensive facilities or control equipment at the point of interconnection than are required by Good Utility Practice unless the parties mutually agree that particular circumstances warrant special facilities or equipment.

D. The Costs of additional facilities required to provide service at the point of interconnection shall be allocated on the basis of the projected economic benefits for each

party) from the interconnection after consideration of the various transactions for which interconnection facilities are to be used, unless otherwise agreed by the parties.

E. An interconnection agreement shall not impose limitations upon the use or resale of capacity and energy sold or exchanged under the agreement except as may be required by Good Utility Practice.

F. An interconnection agreement shall not prohibit any party from entering into other interconnection agreements, but may provide that (1) Applicant receive adequate notice of any additional interconnection arrangement with others, (2) the parties jointly consider and agree upon additional contractual provisions, measures, or equipment, which may be required by Good Utility Practice as a result of the new arrangement, and (3) Applicant may terminate the interconnection agreement if the reliability of its system or service to its customers would be adversely affected by such additional interconnection arrangement.

G. Applicant may include provisions in an interconnection agreement requiring a Neighboring Entity or Neighboring Distribution System to develop with Applicant a coordinated program for underfrequency load shedding and its separation. Under such programs the parties shall equitably share the interruption or curtailment of customer load.

III. RESERVE COORDINATION

Interconnection agreements negotiated pursuant to these license conditions shall be subject to the following paragraphs A through K regarding reserve coordination:

A. Applicant and any Neighboring Entity with which it interconnects shall jointly establish and separately maintain the minimum reserves to be installed or otherwise provided under an interconnection agreement. Unless otherwise mutually agreed upon, reserves shall be expressed as a percentage of estimated firm peak load and the minimum reserve percentage shall be at least equal to Applicant's planned reserve percentage without the interconnection. A Neighboring Entity shall not be required to provide reserves for that portion of its load which it meets through purchases of Firm Power. While different reserve percentages may be specified in various interconnection agreements, no party to an interconnection agreement shall be required to provide a greater reserve percentage than Applicant's planned reserve percentage, except that if the total reserves Applicant must provide to maintain system reliability equal to that existing without a given interconnection arrangement are increased by reason of the new arrangement, then the other party or parties may be required to install or provide additional reserves in the full amount of such increase.

B. Applicant and Neighboring Entities with which it interconnects shall jointly establish and separately maintain the minimum spinning reserves to be provided under an interconnection agreement. Unless otherwise mutually agreed upon, spinning reserves shall be expressed as a percentage of peak load and the minimum spinning reserve percentage shall be at least equal to Applicant's spinning reserve percentage without the interconnection. A Neighboring Entity shall not be required to provide spinning reserves for that portion of its load which it meets through purchases of Firm Power. While different spinning reserve percentages may be specified in various interconnection agreements, no party to an interconnection agreement shall be required to provide a greater spinning reserve percentage than that which Applicant provides, except that if the total spinning reserves Applicant must provide to maintain system reliability equal to that existing without a given interconnection arrangement are increased by reason of the new arrangement, then the other party or parties may be required to provide additional spinning reserves in the full amount of such increase.

C. Applicant shall offer to sell, on reasonable terms and conditions, including a specified period, capacity to a Neighboring Entity for use as reserves if such capacity is neither needed for Applicant's own system nor contractually committed to others and if the Neighboring Entity will offer to sell, on reasonable terms and conditions, its own such capacity to Applicant.

D. Applicant may include in any interconnection agreement provisions requiring a Neighboring Entity to compensate Applicant for any reserves Applicant makes available as the result of the failure of such Neighboring Entity to maintain all or any part of the reserves it has agreed to provide in said interconnection agreement.

E. Applicant shall offer to coordinate maintenance schedules with Neighboring Entities interconnected with Applicant and to exchange or sell maintenance capacity and energy when such capacity and energy are available and it is reasonable to do so in accordance with Good Utility Practice.

IV EMERGENCY POWER

Applicant shall sell emergency power to any interconnected Neighboring Entity which maintains the level of minimum reserve agreed upon with Applicant, agrees to use due diligence to correct the emergency, and agrees to sell emergency power to Applicant. Applicant shall engage in such transactions if and when capacity and energy for such transactions are available from its own generating resources, or may be obtained by Applicant from other sources, but only to the extent that it can do so without impairing service to Applicant's retail or wholesale power customers or impairing its ability to discharge prior commitments.

V. OTHER POWER EXCHANGES

Should Applicant have on file, or hereafter file, with the Federal Power Commission, agreements or rate schedules providing for the sale and purchase of short-term capacity and energy, limited-term capacity and energy, long-term capacity and energy or economy energy, Applicant shall, on a fair and equitable basis, enter into like or similar agreements with any Neighboring Entity, when such forms of capacity and energy are available, recognizing that past experience, different economic conditions and Good Utility Practice may justify different rates, terms and conditions. Applicant shall respond promptly to inquiries of Neighboring Entities concerning the availability of such forms of capacity and energy from its system.

VI WHOLESALE POWER SALES

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

VII. TRANSMISSION SERVICES

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

B. Applicant shall include in its planning and construction programs such increases in its transmission capacity or such additional transmission facilities as may be required for the transactions referred to in paragraph A of this Section, provided any Neighboring Entity or Neighboring Distribution System gives Applicant sufficient advance notice as may be necessary to accommodate its requirements from a regulatory and technical standpoint and provided further that the entity requesting transmission services compensates Applicant for the Costs incurred as a result of the request. Where transmission capacity will be increased or additional transmission facilities will be installed to provide or maintain the requested service to a Neighboring Entity or Neighboring Distribution System, Applicant may require, in addition to a rate for use of other facilities, that payment of Costs associated with the increased capacity or additional facilities shall be made by the parties in accordance with and in advance of their respective use of the new capacity or facilities.

C. Nothing herein shall require Applicant (1) to construct additional transmission facilities if the construction of such facilities is inconsistent with Good Utility Practice or if such facilities could be constructed without duplicating any portion of Applicant's transmission system, (2) to provide transmission service to a retail customer or (3) to construct transmission outside the area then electrically served at retail by Applicant.

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

VIII. ACCESS TO NUCLEAR GENERATION

A. If a Neighboring Entity or Neighboring Distribution System makes a timely request to Applicant for an ownership participation in the Stanislaus Nuclear Project, Unit No. 1 or any future nuclear generating unit for which Applicant applies for a construction permit during the 20-year period immediately following the date of the construction permit for Stanislaus Unit No. 1, Applicant shall offer the requesting party an opportunity to participate in such units, up to an amount reasonable in light of the relative loads of the participants. With respect to Stanislaus Unit No. 1 or any future nuclear generating unit, a request for participation shall be deemed timely if received within 20 days after the mailing by Applicant to Neighboring Entities and Neighboring Distribution Systems of an announcement of its intent to construct the unit and a request for an expression of interest in participation. Participation shall be on a basis which compensates Applicant for a reasonable share of all its Costs, incurred and to be incurred, in planning, selecting a site for, constructing and operating the facility.

B. Any Neighboring Entity or any Neighboring Distribution System making a timely request for participation in a nuclear unit must enter into a legally binding and enforceable agreement to assume financial responsibility for its share of the Costs associated with participation in the unit and associated transmission facilities. Unless otherwise agreed by Applicant, a Neighboring Entity or Neighboring Distribution System desiring participation must have signed such an agreement within one year after Applicant has provided to that Neighboring Entity or Neighboring Distribution System pertinent financial and technical data bearing on the feasibility of the project which are then available to Applicant. Applicant shall provide additional pertinent data as they become available during the year. The requesting party shall pay to Applicant forthwith the additional expenses incurred by Applicant in making such financial and technical data available. In any participation agreement subject to this Section, Applicant may require provisions requiring payment by each participant of its share of all costs incurred up to the date of the agreement, requiring each participant thereafter to pay its pro rata share of funds as they are expended for the planning and construction of units and related facilities, and requiring each participant to make such financial arrangements as may be necessary to ensure the ability of the participant to continue to make such payments.

IX. IMPLEMENTATION

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

B. Nothing contained herein shall enlarge any rights of a Neighboring Entity or Neighboring Distribution System to provide services to retail customers of Applicant beyond the rights they have under state or federal law.

C. Nothing in these license conditions shall be construed as a waiver by Applicant of its rights to contest the application of any commitment herein to a particular factual situation.

D. These license conditions do not preclude Applicant from applying to any appropriate forum to seek such changes in these in accordance with the then-existing law conditions as may at the time be appropriate and Good Utility Practice.

E. These license conditions do not require Applicant to become a common carrier.

[FR Doc 76 14230 Filed 5-14-76;8:45 am]

[Docket No. 50-271]

VERMONT YANKEE NUCLEAR POWER CORP.

Issuance of Amendment to Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 22 to Facility Operating License No. DPR-28 issued to Vermont Yankee Nuclear Power Corporation which revised Technical Specifications for operation of the Vermont Yankee Nuclear Power Station, located near Vernon, Vermont. This amendment is effective as of its date of issuance.

The amendment modifies Technical Specification Table 3.1.1 to clarify and refine the requirement governing operator response to a failed instrument channel. This amendment also makes minor editorial changes to the Technical Specifications, and corrects the frequency of environmental reporting from monthly to annually consistent with the changes of Amendment No. 17 issued November 5, 1975. These changes to the environmental reporting frequency were inadvertently omitted from Amendment No. 17

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations in 10 CFR mission has made appropriate findings as required by the Act and the Commission's rules and regulation in 10 CFR Chapter I, which are set forth in the license amendment. Prior public notice of this amendment was not required since the amendment does not involve a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental impact and that pursuant to 10 CFR § 51.5(d)(4) an environmental statement, negative declaration or environmental impact appraisal need not be prepared in connection with issuance of this amendment.

For further details with respect to this action, see (1) the application for amendment dated December 8, 1975, (2) Amendment No. 22 to Licensee No. DPR-28, (3) the Commission's related Safety Evaluation and (4) Amendment No. 17 to License No. DPR-28 issued November 5, 1975, and related documents. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C., and at the Brooks Memorial Library, 224 Main Street, Brattleboro, Vermont. A copy of items (2), (3) and (4) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Director, Division of Operating Reactors.

Dated at Bethesda, Maryland, this 29th day of April, 1976.

For the Nuclear Regulatory Commission.

ROBERT W. REID,
Operating Reactors Branch No. 4, Division of Operating Reactors.

[FR Doc.76-14233 Filed 5-14-76;8:45 am]

PRIVACY ACT OF 1974

Notices of Systems of Records: Amendments of Routine Uses

On October 1, 1975, the Nuclear Regulatory Commission published in the FEDERAL REGISTER (40 FR 45332) notices of those systems of records maintained by the NRC which contain personal information about individuals and from which such information can be retrieved by an individual identified. The notices were published as a document subject to publication in the annual compilation of Privacy Act documents.

Proposed amendments of the NRC Systems of Records were published in the FEDERAL REGISTER on February 5, 1976 (41 FR 5356) proposing that the following be established as a routine use for all of the NRC systems:

Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

The amendment is intended to assure that implementation of the Privacy Act does not have the unintended effect of denying individuals the benefit of Congressional assistance which they request This amendment would obviate the written consent of the individual in those cases where the individual requests assistance of a Member of Congress which would entail a disclosure of information pertaining to the individual within a system of records.

Interested persons were invited to submit written comments on the proposed rule by March 10, 1976. No comments have been received on the proposed amendments. Accordingly, the Nuclear Regulatory Commission has adopted the amendments as proposed.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 552a of Title 5 of the United States Code, the following amendments to the Commission's Notices of Systems of Records are published as a document subject to publication in the annual compilation of Privacy Act documents.

1. The NRC Systems of Records are amended by adding the following General Routine Use to the Prefatory Statement of General Routine Uses:

PREFATORY STATEMENT OF GENERAL ROUTINE USES

The following routine uses apply to each system of records notice set forth

[¶ 61,246]

Pacific Gas and Electric Company, Docket No. E-7777(II) and Pacific Power & Light Company, E-7796

Order on Motion to Compel Filing of Certain Documents

(Issued June 2, 1980)

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr. and George R. Hall.

On August 14, 1979, the staff of the Commission filed a "Motion to Compel Filing" with the Commission. The staff requests that we direct the California Companies[1] to file certain documents as part of PG&E Rate Schedule No. 38.[2] The documents are the "Pacific Gas and Electric Company Statement of Commitments," referred to as the "Stanislaus Commitments" and included in the staff's motion as Appendix B,[3] and twenty-four other documents, listed in Appendix A to the staff's motion.

PG&E and Edison filed responses in opposition on September 17, 1979, and the Cities[4] filed their response in support of the staff's motion on the same day. On September 13, 1979, the Commission issued a "Notice of Intent to Act" so that the staff's motion would not be deemed denied by operation of law under the Commission's Rules of Practice and Procedure.[5]

In its motion, the staff relies upon two previous Commission orders in this proceeding. On December 28, 1978, we affirmed the Administrative Law Judge's ruling on the scope of this proceeding, consolidated Docket Nos. E-7796 and E-7777, and directed the companies to file "all classifications, practices, rules, regulations or contracts that in any manner affect or relate to the Pacific Intertie Agreement . . ."[6] On June 14, 1979, we denied rehearing of the December 28, 1978 order and directed the companies to comply with its filing provisions within twenty days.[7] Also in the June 14, 1979 order, we denied the staff's motion to perfect compliance but stated that Cities or the staff were free to file a motion to compel filing if they believed additional documents should have been filed by the companies.[8] On July 5, 1979, the companies filed several contracts not previously filed and described numerous other contracts which were

already on file with the Commission but which the companies stated were within the scope of the June 14, 1979 order.

The question, then, is whether the documents listed in the staff's motion to compel filing are within the purview of the directive contained in our December 28, 1978 order, which is set forth in full as follows:

> Within 30 days of the issuance of this order, all signatories of the Pacific Intertie Agreement, who are public utilities, shall file, jointly or individually, all classifications, practices, rules, regulations or contracts that in any manner affect or relate to the Pacific Intertie agreement with the Commission in Docket No. E-7777.

This order was made under our authority pursuant to Section 205(c) of the Federal Power Act.[9] Ordering paragraph (6) substantially repeats, in pertinent part, the language of Section 205(c) and of Sections 35.1(a) and 35.2(b) of the Commission's Regulations, which implement it. We explained that contracts filed pursuant to our order would be filed as subject matter in this proceeding and not merely as evidentiary background.[10] We also stated that such contracts would be subject to modification to the extent FERC authority permits.[11]

In the December 28, 1978 and June 14, 1979 orders we agreed with Edison's assertion that determination of which agreements "affect or relate to" electric service within the purview of Section 35.2(b) of the Regulations must be made by application of a "rule of reason."[12] Edison repeats its argument that the Commission must rely upon a "rule of reason" in ruling upon the instant motion and warns that literal application of the "in any manner affect or relate to" test would require the filing of "thousands or millions of documents" never contemplated by the Commission.[13]

Obviously, lines always have to drawn somewhere, and it is important to remember the context in which the staff's motion to compel filing has been made. This proceeding involves, among other things, the question whether the California Companies have unlawfully restricted access by public power authorities to transmission service over the Pacific Intertie, thereby depriving them of the opportunity to exploit alternative (and cheaper) sources of generation. As we stated in our June 14, 1979 order, at 11, no compelling reason has been presented for this Commission to adopt a limited or overly restrictive interpretation of Section 205(c) of the Federal Power Act and its underlying Regulations. At the same time, the staff must show good reason for this Commission to add to the complexity of an already difficult and protracted proceeding.

The staff alleges that the contracts it seeks to have filed involve the use of Intertie facilities by one or more of the California companies or the Los Angeles Department of Water Power (LADWP), provide for exchange of power between the Northwest and the California Companies over the Intertie, govern the transmission of Power to the State of California over the Intertie,[14] or, in the case of the Stanislaus Commitments, govern the provision of certain services by PG&E to other electric companies.[15]

The Stanislaus Commitments

The staff requests that we order PG&E to file as part of Rate Schedule No. 38 the "Pacific Gas and Electric Company Statement of Commitment" (the Stanislaus Commitments). Staff states that the Commitments are directly related to the PIA and that "their broad scope has an impact upon the other contracts under investigation as well."[16]

Essentially, the Commitments embody an agreement entered into on April 30, 1976 between PG&E and the U.S. Department of Justice (DOJ), and they are the culmination of a DOJ investigation into certain PG&E activities allegedly in violation of the antitrust laws. They have been included by the Nuclear Regulatory Commission as conditions of the license of PG&E's Diablo Canyon Nuclear Power Plant Unit No. 1.[17] They generally describe conditions under which PG&E is bound to provide services such as interconnection, transmission, access to nuclear generation, capacity and energy exchange, and reserve coordination to other utilities requesting such service.

The staff requests not only that the Commitments be filed immediately but also asserts that it is essential "that appropriate rates and tariffs be filed as soon thereafter as reasonably possible."[18] Although service has been available pursuant to the Commitments since April 30, 1976 (Tr. 348), no contracts for service have been executed.[19] PG&E acknowledges that the "commitments are presently binding . . ."[20]

PG&E concedes the relevance of the Commitments as evidence on the issue of its allegedly anticompetitive practices, and it has filed them for evidentiary purposes. The company contends, however, that the Commitments should not be filed as rate schedules or contracts affecting rate schedules, arguing that they are only the "framework for the negotiation of contracts" for possible

service *in futuro*, and that in any event the Commitments lie outside the jurisdiction of the FERC.[23] Moreover, PG&E argues, filing the Commitments more than ninety days prior to commencement of electric service would violate Commission Regulations, 18 CFR § 35.3(a).[22] PG&E argues that the Commitments do not "affect or relate to" the PIA, within the meaning of Section 205(c), in that they do not alter its terms and were in fact developed several years after its execution.[23]

Regarding the staff's suggestion that PG&E be required to file appropriate rates and tariffs as soon as possible after filing the Commitments, PG&E counters that such a filing would violate "the basic policy of the Federal Power Act which favors the negotiation of contracts between parties before review by the Commission."[24] Further, the company states that to develop and file the rates—which of necessity would be rates of general application—would be extraordinarily burdensome.

Both the staff and PG&E cite *Michigan Wisconsin Pipe Line Company*, 34 FPC 621 (1965), to support their respective positions. In that case, the FPC ruled that Mich Wis' policy regarding construction of lateral lines constituted "practices" under the Natural Gas Act, and the Commission ordered the pipeline company to include its lateral line formula as part of its tariff. The FPC held that a "practice" included company policy statements.[25] PG&E also relies upon *Transcontinental Gas Pipe Line Corporation*, 36 FPC 1058 (1966), where the FPC ordered Transco to file the formula relating to the company's lateral line policy as part of its tariff. PG&E argues that these opinions stand for the principle that the Commission only requires filing of specific "financial terms and conditions affecting customer service."[26] The Stanislaus Commitments are said not to satisfy such a principle because they do not provide specific financial terms or include mathematical formulae. In our June 14, 1979 order in this proceeding, wherein we ordered Southern California Edison to file certain contracts as part of the PIA, Rate Schedule No. 38, we rejected the argument that PG&E reiterates now, and we quoted with approval the FPC's conclusion in *Michigan Wisconsin:*

> A consistent and predictable course of conduct of the supplier that affects its financial relationship with the consumer in our opinion is a "practice" subject to the filing requirements. The filing of such a procedure as part of the pipeline tariff is not only consistent with but furthers the purpose underlying the filing and posting requirements of rate schedules. A pipeline tariff announces not only what the pipeline has done in the past but the terms and conditions upon which it would, as a matter of policy, provide service to new customers meeting the tariff's eligibility requirements. Even if the tariff were viewed as merely an informational description of existing service obligations, this description of the pipeline's actual practice would be of real benefit to both existing and potential customers, for it would show them, as well as the Commission, the terms by which gas would be sold upon completion of Section 7 proceedings.[27]

We stated that neither *Michigan Wisconsin* nor *Transco* could rationally be construed as an effort by the FPC to limit the applicability of Section 205(c) of the Federal Power Act and its pertinent Regulations.[28] There is no reason to hold that Section 205(c) applies only to financial terms and mathematical formulae.

This Commission has recently reaffirmed its policy of broadly interpreting Section 205(c) in a case involving the allegedly anticompetitive practices of an electric utility.[29] Pursuant to a discussion of the *Michigan Wisconsin* opinion, we directed the Florida Power & Light Company to file the four criteria upon which it would condition the availability of transmission service, as contained in the testimony of a company witness.

In the December 21, 1979 order in *Florida Power & Light Company*, we stated that although we did not "believe that rate schedules need contain every statement made by a utility," the circumstances required that the transmission availability criteria be included.[30] Similarly, given the context in which the question arises in this present proceeding, that is, as part of an investigation into practices allegedly restricting competition, the Stanislaus Commitments should be filed with the Commission, absent a strong reason to the contrary.

PG&E relies upon *Municipalities of Groton, et al. v. F.E.R.C.*, 587 F.2d 1296 (D.C. Cir. 1978), arguing that it supports a limited reading of Section 205(c).[31] PG&E notes that the court grounded its holding that the Commission had jurisdiction over a certain practice "affecting" a jurisdictional rate or charge because the practice directly affected the price of the jurisdictional service.[32] While PG&E's description of the court's analysis is correct, it infers too much. The holding does not suggest that a direct effect on price is the only nexus by which the Commission could justify requiring the filing of the

Commitments. A practice may affect or relate to the PIA in ways other than merely prescribing the price for service. We think this is shown clearly by a statement made to the presiding administrative law judge by counsel for PG&E:

> I think, your Honor, just to make our position perhaps clearer with respect to the so-called limited number of utilities who can have access to the Intertie in California that limited number is not limited to those who have existing—not necessarily limited to those who have existing contractual rights and PG&E points out in the evidence that under the Stanislaus commitments it agreed to provide access to the Intertie to neighboring entities and district systems such as NCPA members whenever the company has no use of the line for its own—of its own—so the scope of the access in California in terms of number of utilities who have access may not be materially different than that in the Northwest. The terms and conditions of access are somewhat different. (Tr. CH2630)

PG&E also contends that the Commission has a policy against requiring the filing of nuclear plant license conditions, relying on the FPC's October 15, 1975 order in *Virginia Electric and Power Company*, Docket No. E-9147. The VEPCO case involved a request by the staff that VEPCO be required to file certain plant license antitrust conditions, as imposed by the AEC, which conditions the staff alleged would moot several complaints made by intervenor customers in the proceeding. The intervenors themselves opposed the staff motion and argued that the conditions (in the intervenors' view) would not satisfy the complaints. Whether the licensing conditions would "affect or relate to" the electric tariffs which were the subject of the proceeding was not the issue. Clearly, the VEPCO order does not establish a Commission policy against requiring conditions such as the Stanislaus Commitments to be filed.

The Commission is not persuaded that the Commitments in their entirety affect or relate to the PIA. As noted previously, the Commitments govern provision by PG&E of various services in the future. Parts of the Commitments concern services other than transmission, such as capacity and energy exchange and access to nuclear generation. Section VII is designated "Transmission Services" and is the only part of the Commitments to refer to the Pacific Intertie itself. It provides that PG&E shall not be required to use the Intertie for transmission pursuant to the Commitments if such use would impair PG&E's "own use of this facility consistent with the Bonneville Project Act (50 Stat. 731, August 20, 1937), Pacific Northwest Power Marketing Act (78 Stat. 756, August 31, 1964) and the Public Works Appropriations Act, 1965 (78 Stat. 682, August 30, 1964)."[33] This section also governs construction of additional transmission capacity, the filing of rate schedules and agreements for transmission, and the transmission of power and energy generally, insofar as these services are consistent with "good utility practice," as defined in Section I of the Commitments.[34]

We will order PG&E to file Section 1 ("Definitions") and Section VII ("Transmission") of the Stanislaus Commitments, because they affect or relate to the PIA. We do not order the filing of the remainder of the Commitments. Our order today does not expand the scope of this proceeding.

The Other Contracts:

Attached as Appendix A to the staff's motion is a list of twenty-four other contracts which the staff alleges "affect or relate to" the PIA under Section 205(c) and our earlier orders in this proceeding.[35] The California Companies oppose the filing of most of these contracts.[36]

We are met at the outset with Edison's broad objection to the staff motion as it pertains to these contracts, to wit, that the staff fails to comply with Section 1.12(a) of the Commission's Rules and Regulations, which requires that a person filing a motion must state the grounds on which a ruling or relief is sought.[37] Edison contends that the staff's motion "omits any real mention of grounds."[38]

For purposes of its response, Edison defines grounds as "facts and discussion showing how, in this case, the particular documents sought fall within the Commission's prior orders."[39] Edison also argues that the staff has failed to carry its burden of proof that relief should be granted, in that the staff does not describe the documents or show how they affect or relate to the PIA.[40] Edison also offers a group of criteria which it suggests the Commission use in determining whether the contracts in question affect or relate to the PIA.[41] Edison concludes that none of the contested documents meets these criteria for filing.

There is considerable merit to Edison's argument that the staff has not provided detailed explanation of its grounds for filing of many of these documents,[42] and we think that in most cases the staff has not properly met its burden. As we noted previously, the staff has described the contracts in Appendix A at page 4 of its motion. There the staff alleges that the

contracts fall into three categories: those involving use of Intertie facilities by the California Companies or the LADWP, those providing for power exchange between the Northwest and the California Companies over the Intertie, and those governing transmission of power to the State of California over the Intertie. The Commission finds that although the contracts are, in most cases, within the purview of Section 205(c), as developed in our earlier order in this proceeding, other factors militate against filing. There are a few exceptions which we will address presently. Despite the staff's having shown that the contracts for the most part may affect or relate to the PIA, Edison has shown good reason why the Commission should not require that all of them be filed. Edison notes that several of the contracts are terminated or were previously filed as rate schedules which are now terminated. Documents A-5 and A-8 were filed as Rate Schedule Nos. 59 and 85, respectively, and have both been terminated.[43] The contracts designated A-12, A-13a, and A-13b were filed as Rate Schedule Nos. 79, 87 and 87.1, respectively and have all been terminated.[44] Similarly, Contracts A-14A and A-14b were Rate Schedule Nos. 89 and 89.1 and were terminated December 31, 1978.[45] Contract A-16 is a letter agreement dated January 12, 1970 and involves terms under which Emergency Service was provided between LADWP and the Bonneville Power Administration on four dates between December 30, 1968 and January 30, 1969. We see no reason to order Edison to file this contract as part of Rate Schedule No. 38. Edison also includes under its general heading of terminated documents or rate schedules Document B-2, a January 14, 1969 letter of understanding regarding the Seven Party Agreement. Edison states that this document is Exhibit L-46-15 in Docket No. E-7796. Edison does not demonstrate that this document is terminated and we find that it should be filed as part of Rate Schedule No. 38.

Edison contends that it should not be ordered to file Document A-6, the "Victorville-Lugo Interconnection Agreement," or Document A-7, the "Edison Pasadena Interruptible Transmission Service Agreement," because these contracts have already been filed as Rate Schedules Nos. 51 and 88, respectively. We see no valid reason for requiring the company to file in these dockets contracts already properly filed as rate schedules in other dockets. Further, the staff has not shown that these documents affect or relate to the PIA.

Edison has agreed to file Documents A-9 and A-10, which pertain to the DC Transmission Facilities Agreement and the Sylmar Agreement, both of which are already filed in these dockets.

Edison states that Document A-11 is a construction contract relating to the construction and ownership of a third Midway-Vincent 500 kV transmission line, which line is not part of the Pacific Intertie facilities. We will not order the company to file this document.

Edison states that Document A-1, which the staff and the Cities call the "USBR-California Companies Cost of Malin Facilities Letter," dated October 12, 1971, does not exist. Accordingly, we could not direct the company to file it.

Document A-2 is the "USBRSCE Interconnection Contract" dated July 31, 1961 and also known as the Mead Inter connection Agreement. It provides for an interconnection between Edison and the U.S. Bureau of Reclamation at the Mead Substation. Edison states that the Mead Substation is "not part of the facilities covered in the (PIA)."[46] The staff argues that it involves the use of Intertie facilities.[47] For this reason, we find that this document, based upon our review of the pleadings, should be filed as a contract which affects or relates to the PIA.

The staff offers nothing but a title for Document A-3, an "Agreement for Cooperative Use of Pacific Intertie Radio-communication Facilities (PG&E SCE SDG&E LADWP — BPA)," dated October 30, 1967. Edison counters that because the agreement was never executed it is "therefore not properly a subject for filing since it is not a contract or otherwise an operative document."[48] We agree, and we will not order the filing of this document.

Edison objects to the staff's request pertaining to the contracts governing transmission of power to the State of California over the Pacific Intertie (C-1 through C-4). Document C-1 is described as a contract between the State and certain suppliers (LADWP, SDG&E, Edison and PG&E) for sale of power for operation of the Department of Water Resources pumping operations. Edison states that this contract and its supplements have been filed as Rate Schedules 43, 43.1, 43.2 and 43.3. We will not require Edison to file them in the instant docket, but we will order them cross-referenced and made subject matter in this proceeding. We will, however, require the filing of Document C-2, which the staff calls the "Intersuppliers Contract," as it assigns rights and responsibilities among the various suppliers of power to the State over the Intertie.

Staff provides no detailed description of Documents C-3 and C-4, which concern the purchase of power from the Oroville-

Thermalito generation facilities. However, the contracts require transmission *via* the Intertie and therefore affect or relate to the PIA, and we will order that they be filed in Rate Schedule No. 38.

In addition to the contracts described so far, the staff seeks an order directing the filing of two other contracts which involve PG&E but not Edison. Document A-15 is a memorandum between PG&E and Pacific Power & Light Company providing for use of PP&L's 500 kV lines. In its Reply, PG&E states that this memorandum was superseded by the "Agreement For Use of Transmission Capacity" between PP&L and the California Companies, dated August 1, 1967, and this later contract has been filed as PP&L Rate Schedule No. 86.[49] Document B-1 is an agreement between PP&L and PG&E concerning interconnection of the two companies' systems *via* the Intertie. The staff requests an order to file this agreement, but PG&E states that it has been filed as PG&E Rate Schedule No. 29.[50] We see no valid reason for ordering PG&E to refile either of these agreements. We will, however, order that Rate Schedule No. 86 and document B-1 be cross-referenced and made the subject matter of this proceeding.[51]

As we noted previously, today's order does not expand the scope of this proceeding. Modification of the contracts ordered to be filed may be made only to the extent that the contracts affect or relate to the PIA. This is also true in the case of contracts already on file, in other dockets, which we are ordering to be cross-referenced and included as subject matter in this proceeding. Our order should not be construed as a reopening of other dockets.

Although we are directing the filing of only eight of the twenty-four contracts listed in the staff's motion, we wish to note that our order today should not be construed as limiting the use of the remaining contracts as evidence. Nothing herein prevents their introduction as evidence on any matter with which this proceeding is concerned, and we note that the relevance of most of these documents to the issues of this proceeding appears to be conceded by the parties. The decision whether to admit them as evidence is of course for the Administrative Law Judge.

The Commission orders:

(A) Pacific Gas and Electric Company shall file Section I and Section VII of the "Stanislaus Commitments" in these dockets as part of Rate Schedule No. 38 within fifteen (15) days of the issuance of this order.

(B) Southern California Edison Company shall file in these dockets as part of Rate Schedule No. 38, within fifteen (15) days of the issuance of this order the following seven documents, as described in the FERC staff's August 14, 1979 Motion To Compel Filing: A-2, A-9, A-10, B-2, C-2, C-3 and C-4.

(C) Other documents described in the staff's motion and already on file and currently in effect as rate schedules in another docket shall be cross-referenced to Rate Schedule No. 38 and given the docket number E-7777(II). These are documents B-1, C-1, and the contract which supersedes document A-15.

(D) As to all documents described in the staff's motion which are not ordered to be filed in ordering paragraphs (A) and (B) above, the staff's motion is denied.

—Footnotes—

[1] Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company, all of which are parties to this proceeding.

[2] The Pacific Intertie Agreement ("PIA").

[3] The Commitments also appear at 41 Fed. Reg. 20,255 (1976).

[4] The Northern California Power Agency (NCPA) and the Cities of Anaheim, Riverside, Colton and Azusa, California.

[5] 18 CFR 1.12(e).

[6] *Pacific Gas and Electric Co.*, Docket Nos. E-7796 and E-7777(II), order issued December 28, 1978, 5 FERC ¶ —, mimeo. at 23 (ordering paragraph (6)).

[7] *Pacific Gas & Electric Co.*, Docket Nos. E-7796 and E-7777(II), order issued 6/14/79, 7 FERC ¶ —, mimeo at 14. By orders issued January 29, and February 23, 1979, 6 FERC ¶ —, ¶ —, the Commission denied requests by Edison and PG&E for a stay of the December 28, 1978 order.

[8] *Id.* at 13. We invited filing "with the Commission" in order to "remove the burden of the Presiding Judge to rule on a motion to compel filing of documents that may or may not be forthcoming." The staff notes that the presiding Administrative Law Judge denied two previous staff motions to compel filing of the Stanislaus Commitments, ruling that the Commission should decide the question of PG&E's duty to file, pursuant to Sections 35.1 and 35.2 of the Regulations. Staff Motion to Compel Filing, p. 4, n. 4.

[9] 16 U.S.C. 824(d)(e).

[10] June 14, 1979 order, mimeo. at 9.

[11] *Id.*

[12] December 28, 1978 order, mimeo. at 22, June 14, 1979 order, mimeo. at 11.

[13] "Response of Southern California Edison Company In Opposition to the 'Motion To Compel Filing' of the FERC Staff Dated August 20, 1979" (Edison Response), at 3. Edison offers as examples contracts related to the purchase and use of materials and labor.

[14] Staff Motion at 4.

[15] *Id.* at 5

[16] *Id.* at 4.

[17] "Cities Response In Support of Staff's Motion to Compel Filing" at 6.

[18] Staff Motion at 6.

[19] "Reply of Pacific Gas and Electric Company to Staff Motion To Compel Filing" at 2.

[20] Tr. 340.

[21] PG&E Reply at 2.

[22] PG&E also states that filing the Commitments before specification of parties who would receive service violates 18 CFR § 35.10(a).

[23] PG&E Reply at 2.

[24] *Id.* at 4.

[25] The FPC defined "practice" as it is found in Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c). Provisions of that Act are read in *pari materia* with analogous provisions of the Federal Power Act. *F.P.C. v. Sierra Pacific Power Company*, 350 U.S. 348, 353 (1956).

[26] PG&E Reply at 4.

[27] 34 FPC at 626, quoted in *Pacific Gas & Electric Co.*, Docket Nos. E-7796 and E-7777 (II), order issued June 14, 1979, at mimeo. 10-11.

[28] *PG&E*, June 14, 1979 order at mimeo. 11.

[29] "Order Directing The Submission of a Transmission Tariff In Substitution for Individual Rate Schedules", *Florida Power & Light Company*, Docket Nos. ER78-19, *et al.*, issued December 21, 1979, 9 FERC ¶ —, *rehearing denied* February 6, 1980, 10 FERC ¶ 61,108.

[30] *Id.* at mimeo. 5.

[31] PG&E Reply at 3, n. 3.

[32] The "practice" was a deficiency charge incurred by the participants of NEPOOL for insufficient system capability. The Executive Committee of the pool argued (without success) that the charge "does not represent a charge for a service or transmission" 587 F.2d at 1301

[33] Staff Motion, Appendix B at 9.

[34] *Id.* at 2.

[35] For convenience of reference, we adopt the numbering and classification schemes used in the staff's motion.

[36] Edison states that it has already filed Document A-4 in its July 5, 1979 compliance filing. Exhibit 1 to Edison's Response is a tabular summary of the company's arguments in opposition to filing.

[37] 18 CFR § 1.12(a).

[38] Edison Response at 5.

[39] *Id.*

[40] *Id.*

[41] Id. at 3-4.

[42] See, for example, pages 3-4 of Appendix A to the Staff Motion, where fourteen contracts are catalogued merely by title and date.

[43] Edison Response at 6, 8.

[44] *Id.* at 9.

[45] *Id.* at 10.

[46] Edison Response at 6.

[47] Staff Motion at 4.

[48] Edison Response at 6.

[49] PG&E Reply at 7.

[50] *Id.*

[51] In the case of contracts on file in other dockets, the staff requests that we "place the docket No. E-7777(II) on those contracts and cross-reference them to Rate Schedule No. 38." (Staff Motion at 2, n. 2.). The request is not unreasonable and will be granted. We will not order the cross-referencing of the several superseded rate schedules, and cross-referencing is limited to those contracts which affect or relate to the PIA.

Attachment 7

[¶ 62,097]

Pacific Gas and Electric Company, Docket No. E-7777 (II);
Pacific Power & Light Company, Docket No. E-7796

Notice of Denial of Rehearing

(Issued August 8, 1980)

Kenneth F. Plumb, Secretary.

On July 2, 1980, Southern California Edison Company and Pacific Gas & Electric Company filed timely petitions for rehearing of our June 2, 1980 "Order on Motion to Compel Filing of Certain Documents."

At its July 30, 1980 regular meeting, the Commission agreed to take no action on the petitions for rehearing. Therefore, they are deemed denied by operation of law, effective August 1, 1980.

DECISIONS WITHOUT OPINIONS Continued

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Moss v. District of Columbia	81 2120	5/ 7/82	AFFIRMED	D.C.D.C.
National Treasury Employees Union v. Reagan	81-2109	5/ 3/82	AFFIRMED	D.C.D.C.
Ochs v. Federal Bureau of Investigation	81-1982	5/ 7/82	AFFIRMED *	D.C.D.C.
Pacific Gas and Electric Co. v. Federal Energy Regulatory Commission	79-1882, 79-1893, 80-2192, 80-2195	5/17/82	AFFIRMED	F.E.R.C.
Patrick v. Department of Transp.	81-1584	5/27/82	TRANSFERRED	M.S.P.B.
Ratner v. U. S. Postal Service	81-1725	5/19/82	AFFIRMED	D.C.D.C.
Robinson v. Shea	82-1140	5/21/82	AFFIRMED	D.C.D.C.
St. George's University School of Medicine v. Bell	81-1726	4/14/82	VACATED AND REMANDED	D.C.D.C.
Sanders v. U. S.	81-2065	4/30/82	AFFIRMED	D.C.D.C., 518 F.Supp. 728
Securities and Exchange Commission v. International Systems and Control Corp.	81-1801	5/ 5/82	VACATED AND REMANDED	D.C.D.C.
Smith v. Schweiker	81-1860	4/ 2/82	AMENDMENT ORDERED *	D.C.D.C.
Southern California Edison Co. v. Federal Energy Regulatory Commission	79-1882, 79-1893, 80-2192, 80-2195	5/17/82	AFFIRMED	F.E.R.C.
Stockton v. McGee	81-1805	5/11/82	AFFIRMED *	D.C.D.C.
Svejda v. Department of Interior	81-1913	4/ 6/82	AFFIRMED	M.S.P.B.
Texaco, Inc. v. U. S. Dept. of Energy	81-1828	5/ 7/82	AFFIRMED	D.C.D.C.
Tomascik v. Altman	81-1960	5/ 7/82	AFFIRMED	D.C.D.C.
Tranowski v. U. S. Secret Service	81-2030	4/21/82	AFFIRMED *	D.C.D.C.
U. S. v. Anderson	81-2273	5/11/82	AFFIRMED	D.C.D.C.
U. S. v. Barnes	81-1987	5/21/82	AFFIRMED	D.C.D.C.
U. S. v. Black	81-2084	5/ 7/82	AFFIRMED	D.C.D.C.
U. S. v. Brooks	81-2281	5/ 5/82	AFFIRMED AND REMANDED	D.C.D.C.

Attachment 9

[Docket No. ER83-582-000]

Pacific Gas and Electric Co.; Filing

June 30, 1983.

The filing Company submits the following:

Take notice that Pacific Gas and Electric Company (PG&E), on June 20, 1983, tendered for filing the following proposed changes in its FPC Original Tariff Volume No. 2:

Amending Agreement for Sale of Electric Capacity and Energy by Pacific Gas and Electric Company to the City of Alameda, dated May 24, 1983,

Amending Agreement For Sale Of Electric Capacity and Energy by Pacific Gas and Electric Company To the City of Healdsburg, dated May 19, 1983,

Amending Agreement For Sale Of Electric Capacity and Energy by Pacific Gas and Electric Company To the City of Lodi, dated May 4, 1983,

Amending Agreement For Sale Of Electric Capacity and Energy by Pacific Gas and Electric Company To the City of Lompoc, dated May 17, 1983,

Amending Agreement For Sale Of Electric Capacity and Energy by Pacific Gas and Electric Company To the City of Ukiah, dated May 18, 1983,

PG&E states that the proposed amendments will allow the Cities to purchase power from the Western Area Administration (Western) and surplus energy from the Turlock Irrigation District (TID) to be delivered by PG&E to the Cities under provisions of various contracts between PG&E and TID, and PG&E Western.

PG&E requests an effective date of March 1, 1982, and therefore requests waiver of the Commission's notice requirements.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before July 14, 1983. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 83-18327 Filed 7-6-83; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. ER83-682-000]

Pacific Gas and Electric Co.; Filing

August 24, 1983.

Take notice that on August 16, 1983, Pacific Gas and Electric (PG&E) tendered for filing as an initial rate schedule an August 2, 1983 Contract for transmission service by PG&E for Western Area Power Administration (Western) (U.S. Department of Energy Contract No. DE-MS65-83W59055).

PG&E states that the Contract provides that PG&E will transmit power allocated by Western to the cities of Healdsburg, Lompoc and Ukiah (Cities). Western will pay PG&E the system average functionalized wheeling rate of $1.84 per kilowatt per month for this service. Ukiah will pay an additional $1.25 per kilowatt per month for wheeling over distribution facilities until they convert their delivery point to a higher voltage. Capacity delivered to the Cities will be adjusted for losses by PG&E's system average functionalized losses. PG&E respectfully submits that Western has agreed to the $1.84 per kilowatt per month rate and losses for transmission service as a negotiated rate. A metering charge of $0.03 per kilowatt per month will also be assessed to the Cities.

PG&E requests an effective date of March 1, 1982, and therefore requests waiver of the Commission's notice requirements.

Copies of the filing were served upon Western and the California Public Utilities Commission.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such petitions or protests should be filed on or before September 8, 1983. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,
Secretary.

[FR Doc. 83-23071 Filed 8-26-83; 8:45 am]
BILLING CODE 6717-01-M

Attachment 11

Northern California Power Agency
8421 Auburn Boulevard, Suite 160 Citrus Heights, California 95610

ROBERT E. GRIMSHAW
General Manager

March 29, 1982

Mr. Nolan Daines
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California

Dear Nolan:

This will advise you that NCPA has entered into a contract to purchase from Turlock Irrigation District ("TID") energy (without capacity obligation) that may be surplus to TID's needs during the months March through June 1982. Both NCPA and TID are "neighboring entities" under the terms of your definitions. I understand that there will therefore be no problem in transmitting this energy pursuant to the Diablo Canyon License Conditions from your interconnection with TID to the NCPA delivery points at Santa Clara, Alameda, Lodi, Lompoc, Healdsburg and Ukiah. Since the accounting procedures to handle such a transaction was set up in order to permit transactions with the Pacific Northwest which you allowed us for a few days earlier this year, and since no additional costs would be involved, we assume that a simple letter agreement would permit the transaction.

We assume the 1 mill transmission rate applied in the NCPA-PGandE Interruptible Transmission Service Agreement dated April 14, 1981, and which is utilized in the letter agreement between PGandE and Western Area Power Administration (WAPA) dated October 26, 1981, would apply here as well. Since your letter agreement with WAPA confirms an earlier oral agreement, we would hope that we could arrange this transaction on a telephone basis as well, and I will await your call. Since the NCPA-TID Contract is contingent upon our obtaining transmission service from PGandE, this is especially important to us. We have provided space below for your acceptance of this arrangement.

Yours very truly,

PACIFIC GAS AND ELECTRIC COMPANY

NORTHERN CALIFORNIA POWER AGENCY

Robert E. Grimshaw

Nolan Daines
Vice-President,
Planning and Research

Robert E. Grimshaw
General Manager

REG:gmg

Attachment 12

PACIFIC GAS AND ELECTRIC COMPANY

PG&E

77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

NOLAN H. DAINES
VICE PRESIDENT
PLANNING AND RESEARCH

April 12, 1982

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Blvd.
Suite 160
Citrus Heights, California 95610

Re: Interruptible Transmission Service Agreement
For T.I.D. Surplus Energy

Dear Mr. Grimshaw:

We have received your letter proposal of March 29, 1982, requesting short term transmission service of surplus energy generated by Turlock Irrigation District and purchased by NCPA for certain of its member cities. Pursuant to our Stanislaus Commitments, we will provide such transmission service on the following terms:

1. A mutually satisfactory PGandE-NCPA Interruptible Transmission Agreement for T.I.D. surplus energy is executed by both parties.

2. The rates for such delivery will be as set forth on the attached schedule. NCPA member cities purchasing surplus Turlock energy shall not receive credit against capacity purchases from PGandE under the R-1 schedule.

3. The term of the transmission agreement shall be from March 30, 1982, or as soon thereafter as permitted by FERC, until June 30, 1982. In that regard, from March 30 until a transmission agreement is executed, we expect NCPA to schedule T.I.D. energy under the procedures in the Northwest Interruptible Transmission Agreement. Of course, if we are not able to agree on a transmission contract or on rates, the schedules will be of no effect and no deliveries of energy will be deemed effected to NCPA member cities.

We anticipate there will be minor modifications to the terms of the NCPA-PGandE Northwest Interruptible Transmission Service Agreement. Mutually satisfactory amendments to the NCPA member resale contracts will also be necessary. Finally, we would appreciate a copy of the NCPA/ T.I.D. agreement before we meet to finalize these arrangements. We have provided space below for your acceptance of this proposal.

Very truly yours,

NORTHERN CALIFORNIA POWER AGENCY

By_____
ROBERT E. GRIMSHAW
GENERAL MANAGER

DATE:_____

RATES FOR SURPLUS ENERGY DELIVERED FROM
TID TO NCPA CITIES

	Energy Loss Factor	Del. Voltage	Rate mills/kwh
Santa Clara	0.960	115 kv	3.67
Alameda	0.943	12 kv	3.67
Lodi	0.960	60 kv	3.67
Lompoc	0.960	60 kv	3.67
Healdsburg	0.960	60 kv	3.67
Ukiah	0.960	12 kv	3.67

4/12/82

Attachment 13

[Docket No. ER82-836-000]

Pacific Gas & Electric Co.; Filing

October 4, 1982.

The filing company submits the following:

Take notice that Pacific Gas and Electric Company (Pacific) on September 23, 1982 tendered for filing a contract dated June 24, 1982 entitled "Interruptible Transmission Service Contract Between Pacific Gas and Electric Company and Northern California Power Agency For Surplus Energy From The Turlock Irrigation District" (Contract).

The Contract provides that, to the extent that there is unused transmission capacity available on Pacific's system, Pacific shall offer to provide non-firm transmission service for Northern California Power Agency (NCPA) to purchase surplus energy from Turlock Irrigation District for certain NCPA member cities for the period from March 30, 1982 to June 30, 1982.

The rates for interruptible transmission service provided under the Contract, as negotiated and agreed by both parties, shall be 3.67 mills/kWh plus any applicable transmission energy losses. Such rates include services for the delivery of a portion of such surplus energy to certain member cities at distribution voltage.

Pacific respectfully requests, pursuant to § 35.11 of the Commission's Regulations, a waiver of the Commission's usual notice requirements so as to permit an effective date for the Contract of March 30, 1982. Pacific also requests, pursuant to § 35.13 a waiver of the notice requirements for the termination date for the Contract of June 30, 1982.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before October 18, 1982. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 82-27903 Filed 10-8-82; 8:45 am]

BILLING CODE 6717-01-M

Northern California Power Agency
8421 Auburn Boulevard. Suite 160 Citrus Heights. California 95610

ROBERT E. GRIMSHAW
General Manager

(916) 722-7814

May 3, 1982

Mr. David G. Coleman
Area Manager
Western Area Power Administration
2800 Cottage Way
Sacramento, CA 95825

Dear Mr. Coleman:

We understand that CVP will be able in the forthcoming months to purchase from Bonneville, inter alia, a considerable amount of Northwest surplus energy. The Northern California Power Agency (NCPA) very much desires to purchase from CVP all such surplus energy which it can beneficially use.

We have been advised by our attorneys that WAPA must sell such energy to preference agencies able to purchase it before WAPA can sell it to any nonpreference entities. This duty, we are advised, was most recently enunciated in the April 6, 1982 decision of the United States Court of Appeals for the Ninth Circuit in Central Lincoln Peoples' Utility District, et al. v. Peter Johnson, as Administrator of the Bonneville Power Administration, Department of Energy, et al., Docket No. 81-7561. In that Opinion the court decided that the first quartile of Bonneville power, which is served partially with nonfirm energy, must be sold to preference entities if they desire to purchase it. In its Opinion the Court of Appeals stated (footnote omitted):

> ... City of Santa Clara, California v. Andrus, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978) is instructive on the purposes and proper interpretation of a preference clause. In Santa Clara, the Secretary of the Interior, acting through the Bureau of Reclamation, "banked" power produced pursuant to the Reclamation Project Act of 1939 (43 U.S.C. §§ 375a, 387-89, 485 et seq.) with a nonpreference customer instead of selling it directly to a preference customer. The Secretary argued that the arrangement was designed to enable him to supply the future needs of selected preference customers. 572 F.2d at 669. This court held that the provisional sale of power to a nonpreference customer when a preference customer is ready and willing to buy it contravened the purpose of the preference because the nonpreference customer would profit from low-cost power at the expense of the preference customer. Id. at 670-71. Although the court recognized that the ultimate goal of the Secretary's

> scheme was consonant with the preference clause, it nevertheless found that the interim effect was inconsistent with the preference clause, and, therefore, held the scheme invalid.
>
> The contention in the present case that the sale of nonfirm energy to Direct Service Industries serves the preference clause by creating reserves and earning revenue that can reduce the rates of all preference customers is answered by Santa Clara. BPA's policy may serve the preference clause, but the immediate effect, like that in Santa Clara, is antithetical to preference rights, and, therefore, is not consonant with the preference clause. The fact that BPA's policy may enable it to profit more from selling the nonfirm energy to the Direct Service Industries and that all of its customers would thereby benefit does not persuade us that its interpretation is reasonable. As explained in Santa Clara, the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers. BPA's interpretation to the contrary, without explicit Congressional direction, contravenes the purposes of the preference clause.

While the issue of the proper interpretation of CVP's contracts with PG&E is mooted by the Ninth Circuit opinion, since even assuming the contracts obligated CVP to void under the Ninth Circuit opinion, the fact is that PG&E has acknowledged CVP's rights to import the power and sell it to other entities. The key provision of the contract between CVP and PG&E for the Sale, Interchange and Transmission of Electric Capacity and Energy (Contract No. 14-006-200-2948A) is Article 19(e) which states:

> The United States may import for use or sale in Contractor's Service Area such Northwest Dump Energy and Exchange Energy, using the transmission capability available to the United States pursuant to EHV Contract No. 14-06-200-2947A, as can be used beneficially by Contractor in Contractor's Service Area consistent with Contractor's other obligations, as determined by Contractor. Contractor shall accept all such energy.

The better reading of this provision is that it merely imposes upon PG&E, if CVP so requests, an obligation to bank all dump energy it can beneficially use. This interpretation has now been definitively accepted by PG&E. In its Second Post-Hearing Brief in FERC Docket No. E-7777(II), which was sworn to on April 11, 1982, PG&E responded to an argument that under Contract 2948A CVP may only serve its pumping load and a narrowly defined group of preference customers and that everything else which CVP may acquire by way of resources is effectively turned over to PG&E. That argument continued that accordingly there is no incentive for CVP to import any more power than is necessary to serve its pumps and customers. PG&E responded (p. 191, emphasis added):

> There are several things wrong with this argument. First, Articles 19(d)-(f) do not say what Cities claim they do. They merely obligate PG&E to bank power which can be used beneficially in its service area. That fact doesn't preclude CVP from importing power and selling it to someone other than PG&E.*

PG&E has thus, in a formal verified pleading over the names of nine attorneys, stated that Article 19 does not preclude CVP from importing power and selling it to someone other than PG&E. This interpretation by PG&E should be considered definitive by any court which addresses the issue. PG&E should not be allowed to make one interpretation before one forum and an opposite one before any other. Therefore, it is extremely reasonable for any entity interpreting Article 19 of Contract 2948A to rely upon PG&E's sworn interpretation.

Although, as we have stated, it is the opinion of our attorneys (which we assume will be shared by your attorneys) that WAPA is under a legal obligation to offer to sell this energy to us before it can contract with a nonpreference entity and we are instructing our attorneys to protect our legal rights. We also believe that our offer to purchase will be highly beneficial to both parties and therefore desirable even without the compulsion of the preference clause. Our offer will enable CVP to obtain significant funds not otherwise available to reduce the current WAPA deficit and would thus result in a substantial increase in the revenues received by the United States Treasury. For NCPA, as a preference entity whose members in a variety of important ways have been and will continue to be cooperative with CVP, the arrangement will likewise result in substantial savings. Accordingly, NCPA offers to purchase the Bonneville surplus energy upon the following terms and conditions:

1. NCPA will purchase and CVP will sell all Northwest surplus energy obtained by WAPA which NCPA can beneficially utilize on a split-the-savings basis. This means that the rate that CVP will charge and which NCPA will pay will be one-half of the sum of (a) the incremental costs incurred by CVP for the energy scheduled and delivered into Northern California plus the incremental costs incurred by NCPA to the point where the energy is delivered into its system, and (b) the decremental cost of the energy to the NCPA members, where there is a positive swing. From time to time, the operating representatives of NCPA and CVP shall review the methods and bases used by each party to determine such costs.

2. WAPA's deliveries will be made available at an interconnection point in Northern California with the PG&E transmission system.

---

* This PG&E statement also precludes any possible limitation based upon Article 19(d) upon CVP's right to import and sell Northwest surplus or dump to others.

3. To the extent either party shall be unable to secure the necessary arrangements the obligations of the parties shall be reduced or voided. Neither party shall be liable to the other for failure to perform resulting from inability to make the necessary arrangements.

4. This agreement shall be effective during the period April 30, 1982 through December 31, 1982 and may be renewed.

Enclosed is a schedule showing the amounts of such energy which NCPA offers to purchase during the remainder of May 1982.

If these conditions are acceptable, please countersign below.

Yours truly,

ROBERT E. GRIMSHAW
General Manager

Accepted and approved:

David G. Coleman
Western Area Power Administration

Date

cc: Robert L. McPhail, WAPA

Enc.

Attachment 15

Department of Energy
Western Area Power Administration
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

MAY 7 1982

In reply refer to: N0000

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Boulevard, Suite 160
Citrus Heights, CA 95610

Dear Mr. Grimshaw:

Reference is made to our meeting of April 29, 1982, in Redding and your letter of May 3, 1982, regarding the purchase of Northwest surplus energy by the Northern California Power Agency (NCPA) that the Western Area Power Administration (Western) may acquire, in excess of Western's needs, from the Bonneville Power Administration (BPA). This letter will advise you that Western will enter into an arrangement with NCPA for the sale of surplus energy retroactive to May 1, 1982, providing suitable arrangements can be made. These include appropriate wheeling arrangements between the customer(s) and Pacific Gas and Electric Company (PGandE), and the division of available capacity and energy among the interested parties who may wish to purchase the power surplus to Western's needs.

As you are aware, Western has now entered into an agreement with BPA to load up Western's share of 400 MW on the Intertie effective May 1. Western will dispose of this power in a manner that is consistent with Western's Contracts 2948A and 2947A with PGandE or the California Pool companies. Any arrangements made to sell you or any other CVP customers surplus energy must, of course, be consistent with these contracts or any amendments that are mutually agreed upon.

As discussed with Roger Fontes of your staff on May 7, members of my staff are available to start work on the details of such an arrangement.

We are sending a copy of this letter to PGandE for their information.

Sincerely,

David G. Coleman
Area Manager

cc: PGandE, Attn: Nolan Daines

Attachment 16

NCPA

Northern California Power Agency

8421 Auburn Boulevard, Suite 160 Citrus Heights, California 95610

ROBERT E. GRIMSHAW
General Manager
(916) 722-7800

May 11, 1982

Mr. Nolan H. Daines
Vice President
Planning & Research
Pacific Gas & Electric Company
77 Beale Street
San Francisco, CA 94106

Dear Nolan:

This will confirm our previous oral notification that Northern California Power Agency (NCPA) is entering into an arrangement with the Western Area Power Administration (Western) to purchase surplus energy (without capacity obligations). This purchase is meant to satisfy NCPA member energy requirements not furnished by either Turlock Irrigation District (TID) or by their CVP allocations, beginning May, 1982, and extending for at least five months.

Both NCPA and Western are "neighboring entities" under the terms of your definitions. I understand that there will, therefore, be no problems in transmitting this energy pursuant to the Diablo Canyon License Conditions from your interconnection with Western to the NCPA delivery points. Since the accounting procedures to handle similar transactions are being set up to permit purchases from TID, and since no additional costs are involved, we assume a simple Letter Agreement is sufficient to initiate the transaction. We suggest negotiations begin immediately and be based upon the terms and conditions in our April 28, 1982 Letter Agreement.

We further assume that, following the practice established with TID, PG&E will regard this communication as establishing the last date upon which the agreement will be deemed to have commenced. Since the NCPA/Western agreement is feasible only if we receive transmission service from PG&E, your agreement is critical to us.

We have provided space below for your acceptance of this arrangement.

Yours very truly,

ROBERT E. GRIMSHAW
General Manager

cc: William Gallavan, PG&E
bcc: Roger A. Fontes
Paul Scheuerman, R.W. Beck
Dan Davidson, Spiegel & McDiarmid

_____
Nolan H. Daines
Vice President
Planning & Research
Pacific Gas & Electric Company

Attachment 17

PACIFIC GAS AND ELECTRIC COMPANY

PG&E 77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

NOLAN H. DAINES
VICE PRESIDENT
PLANNING AND RESEARCH

May 25, 1982

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Boulevard, Suite 160
Citrus Heights, California 95610

Dear Mr. Grimshaw:

We are in receipt of your letter of May 11, 1982, requesting, pursuant to the Stanislaus Commitments, transmission service for surplus energy purchased by NCPA from the Western Area Power Administration. The transmission service is requested from Tracy to NCPA delivery points. This matter was also discussed at our meeting of May 13, 1982.

As you have indicated, the transactions contemplated in your letter are premised on Western's use of Intertie capacity, which is governed by existing contracts. In that regard, PGandE does not believe that Western's attempt to use Intertie capacity to implement such transaction can take place without a breach of contract on Western's part.

While we have little difficulty reaching sensible transmission service arrangements, it is quite clear that the Stanislaus Commitments, whose definitions you referenced, contain no obligation to enter arrangements that will interfere with this Company's use of the Intertie for our customers' benefit under existing contractual arrangements. If we have misunderstood your premises, please advise us promptly as to just how these transactions are to be structured without eliciting a breach of Western's Intertie contract in a manner detrimental to PGandE and its customers.

Very truly yours,

Nolan Daines

Attachment 18

Department of Energy
Western Area Power Administration
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

In reply refer to: N6100

MAY 28 1982

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Boulevard, Suite 160
Citrus Heights, CA 95610

Dear Mr. Grimshaw:

The Sacramento Area Office of the Western Area Power Administration (Western), pursuant to its letter to you of May 7, 1982, presents its terms for the sale by Western and the purchase by the Northern California Power Agency (NCPA) of Northwest import energy made available to the Central Valley Project (CVP) by Bonneville Power Administration (BPA) which is excess to CVP project and preference customer loads. The specific terms of this letter of agreement are as follows:

1. Northwest import energy shall be defined as both Northwest surplus energy and firm energy made available to the CVP pursuant to the Western-BPA Contract No. 1406-200-3701A (-3701A) during the term of this agreement.

2. References to NCPA shall not be deemed to be a reference to the members of NCPA individually.

3. Western will purchase Northwest import energy from BPA. To the extent Western has Northwest import energy which is not needed to meet the current project and preference customer loads served by the CVP (as determined by Western), NCPA will purchase and Western will sell such excess Northwest import energy.

4. Western will deliver energy to be sold to NCPA at the Tracy substation of the United States at a nominal 230,000 volts. NCPA will be responsible for all wheeling and other costs and losses from Tracy to each NCPA member receiving energy. NCPA will also be responsible for the delivery of the energy to each of its members from the Tracy substation.

5. In the event that Western enters into agreements with other preference customers for the sale of excess Northwest import energy, Western and NCPA shall agree to a pro rata allocation of energy among the purchasers of such energy based upon their net monthly energy requirements.

6. Western will determine the amount of excess Northwest import energy delivered to each NCPA member city each month by deducting the sum of the amount of firm energy delivered during such month pursuant to such city's power sales contracts with Western plus the amount of energy delivered to such city from other sources, from such city's total energy requirements for such month. NCPA will inform Western by the ____day of each month of any adjustments that may be required. Western will bill NCPA by the ____day of each month for the total amount of excess Northwest import energy delivered to the NCPA member cities. NCPA shall pay such bill within ____days of receipt. The blanks in this section shall be filled in by mutual agreement or in the absence of such mutual agreement, in a reasonable manner as determined by Western.

7. NCPA shall pay for all Northwest import energy sold to it under this agreement at a split savings rate which shall be an amount equal to one-half (½) of the sum of the then current PGandE wholesale energy rate for energy served under the R-1 rate schedule, as such rate may be modified or replaced and the energy rate charged by the Bonneville Power Administration for energy made available pursuant to Contract -3701A or amendments thereto, and transmission and other related costs as incurred by Western or NCPA as appropriate. It is recognized that Western does not currently have established a rate based upon split savings, and further that NCPA or Western may be unable to procure the necessary wheeling from the Tracy substation. Therefore, until (a) Western applies for and FERC approves a rate based upon these split savings principles and (b) NCPA obtains from PGandE or a court or agency a final interpretation as to whether Western is able to sell and NCPA is able to beneficially purchase the energy hereunder, NCPA shall pay for energy hereunder at the pass-through or current rate (Northwest rate), and NCPA will escrow the difference between the amount billed by Western at the pass-through rate and the proposed split savings rate under a mutually agreeable escrow agreement. When both a favorable non-reversible determination is secured by NCPA, and Western has established a split savings rate, the total funds in the escrow shall be delivered to and shall become the property of Western. If these conditions do not occur, Articles 11 and 12 will apply and the funds in escrow will be released to NCPA.

8. Western shall submit bills to NCPA for energy sold hereunder in accordance with the provisions of Article H of the General Power Contract Provisions. Notwithstanding Article I of the General Power Contract Provisions, Western may terminate the sales of energy made hereunder upon any default by NCPA. If NCPA defaults hereunder because of the failure of any of its members to pay the amounts owed by such members to NCPA for energy sold hereunder, then upon Western giving written notice to NCPA, NCPA shall assign to Western the rights, claims or causes of action which NCPA has against such member for the amounts so due and Western shall become entitled to exercise all remedies which NCPA could exercise against such member.

9. The General Power Contract Provisions, effective April 1, 1979, attached hereto, are made a part of this Letter Agreement with the same force and effect as if expressly set forth herein; except that provision M shall not apply to NCPA so long as the resale of power is to the members of NCPA.

10. This agreement shall be effective during the period of May 1, 1982 through September 30, 1982.

11. If it is held in a final non-reversible decision by a court or agency of competent jurisdiction that either Western could not legally sell NCPA such import energy under this agreement, that Western did not have available such import energy to sell to NCPA under this agreement or that NCPA could not beneficially purchase such energy, then (a) NCPA shall release Western from any and all obligations under this agreement and any and all loss or damage occasioned by the failure of Western to sell or deliver such import energy to NCPA; and (b) Western shall return to NCPA, without any interest whatsoever and by means of a credit against the amount each NCPA member owes to the United States under their power sales contracts with Western, all payments made by NCPA under this agreement. The monthly billing adjustments shall be done in an expeditious manner to fully satisfy the amount to be returned to each affected NCPA member.

12. Neither party shall be liable to the other for failure to perform resulting from inability to make the necessary arrangements.

If the above terms and conditions are acceptable to you, please sign and date both originals and return one to me.

Sincerely,

David G. Coleman
Area Manager

Attachment

Robert E. Grimshaw
General Manager, NCPA

Date May 25 1982

UNITED STATES DEPARTMENT OF ENERGY
WESTERN AREA POWER ADMINISTRATION

Effective April 1, 1979

GENERAL POWER CONTRACT PROVISIONS

A. Character of Service.

Electric energy supplied hereunder will be three-phase, alternating current, at a nominal frequency of sixty (60) hertz (cycles per second).

B. Delivery of Capacity and/or Energy in Excess of Contract Obligation.

The Contractor shall not use capacity and/or energy in amounts greater than the United States' contract delivery obligation in effect for each type of service provided for in this contract except with the specific written approval of the contracting officer. Any greater use, when approved, shall not be deemed to establish in the Contractor any continuing right thereto and the Contractor shall cease any such greater use whenever requested by the contracting officer or whenever the approval expires, whichever occurs first. Nothing in this contract contained shall obligate or be construed to obligate the United States to increase any contract rate of delivery hereunder. If additional capacity and/or energy is not available from the United States, the responsibility for securing additional capacity and/or energy shall rest wholly with the Contractor.

C. Continuity of Electric Service to be Furnished.

The electric service, unless otherwise specified, will be furnished continuously except (1) for interruptions or reductions due to uncontrollable forces, as defined herein; (2) for interruptions or reductions due to operation of devices installed for power system protection; and (3) for temporary interruptions or reductions, which, in the opinion of the contracting officer, are necessary or desirable for the purposes of tenance, repairs, replacements, installation of equipment, or investigation and inspection. The United except in case of emergency as determined by the contracting officer, will give the Contractor reasonabl advance notice of such temporary interruptions or reductions and will remove the cause thereof with dili e.

D. Multiple Points of Delivery.

When electric service is furnished at two or more points of delivery under the same schedule of rates, said schedule of rates shall apply separately to the service supplied at each point of delivery; Provided, Tha where the meter readings are considered separately and the Contractor's system is interconnected between point of delivery during emergencies, the meter readings at any point of delivery will be appropriately adjusted to compensate for duplication of power demand recorded by meters at alternate points of delivery due to emergency conditions which are beyond the Contractor's control or temporary conditions caused by schedule outages.

E. Uncontrollable Forces.

Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term uncontrollable forces being deeme for the purpose of this contract to mean any cause beyond the control of the party affected, including, but not limited to, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall exercise due diligence to remove such inability with all reasonable dispatch.

F. Modification of Rates.

The rate schedule specified in this contract shall be subject to successive modification by the United States through the promulgation of superseding rate schedules. If at any time the United States promulgates a rate schedule superseding the rate schedule then in effect under this contract, it will promptly notify the Contractor thereof. Said superseding rate schedule, as of its effective date, shall become effective as to this contract unless the Contractor, by notice in writing given to the contracting officer within 180 days after notice to it by the United States of promulgation of said superseding rate schedule, shall elect to terminate this contract effective as of such date not more than three (3) years subsequent thereto as the ontractor shall therein specify. In the event of such termination, said superseding rate schedule shal' e effective during the period of the remaining unexpired term of this contract or during a period of t years from the date of notice to the Contractor of the promulgation of said superseding rate schedule, w ever period is shorter.

G. Minimum Annual Capacity Charge.

When the rate schedule in effect under this contract provides for a minimum annual capacity charge, a statement of the minimum annual capacity charge due, if any, shall be included in the bill rendered for electric service for the last billing period of each calendar year, appropriately adjusted on a pro rata basis if the full billing periods for the adjustable items (including increases or decreases in the contract rate of delivery) in the calendar year are less than 12. Fractional billing periods will not be considered in such determination. Where multiple points of delivery are involved and the contract rate of delivery is stated to be a maximum aggregate rate of delivery for all points, in determining the minimum annual capacity charge due if any, the monthly capacity charges at the individual points of delivery shall be added together.

H. Billings and Payments.

The United States will submit bills to the Contractor on or before the tenth day of each month for electric service furnished during the preceding month, and payments will be due and payable by the Contractor on the first day of the month immediately succeeding the date each bill is submitted.

I. Nonpayment of Bills.

If the Contractor fails to pay any bill when due an interest charge of two percent (2%) of the amount unpaid shall be added thereto as liquidated damages, and thereafter, as further liquidated damages, an interest charge of one percent (1%) of the principal sum unpaid shall be added on the first day of each succeeding calendar month until the amount due, including interest, is paid in full. The United States shall have the right upon not less than fifteen (15) days' advance written notice to discontinue furnishing electric service to the Contractor for nonpayment of bills and to refuse to resume same so long as any part of the amount due remains unpaid. Such a discontinuance of electric service will not relieve the Contractor of liability for the minimum charge during the time electric service is so discontinued. The rights given herein to the United States shall be in addition to all other remedies available to the United States, either at law or in equity, for the breach of any of the provisions hereof.

J. Adjustments for Fractional Billing Period.

(a) For a fractional part of a billing period at the beginning or end of service, and for fractional periods due to withdrawals of service, the demand or capacity charge, the kilowatthour blocks of the energy charge, and the minimum charge shall each be proportionately adjusted in the ratio that the number of hours that electric service is furnished to the Contractor in such fractional billing period bears to the total number of hours in the billing period involved.

(b) Whenever irrigation and/or drainage pumping service is supplied under this contract, adjustments in the demand or capacity charge and in the kilowatthour blocks of the energy charge as applicable, and in the minimum charge of the rate schedule under which service is supplied, shall be made for the fractional part of the billing period at the beginning and end of pumping service in each year in like manner as is provided for in section (a) of this article. If pumping service is supplied in conjunction with service for other purposes and is not metered separately, the billing demand for pumping service shall be considered to be the difference between the highest 30-minute integrated demand measured during the billing period and the contract rate of delivery for firm power.

K. Adjustments for Curtailments to Service.

Unless curtailment of service is due to a request by the Contractor, billing adjustments will be made if the delivery of electric energy is curtailed because of conditions on the power system of the United States which system for the purpose of such adjustments hereunder shall include transmission facilities utilized but not owned by the United States, for periods of one (1) hour or longer in duration each. The total number of hours of curtailed service in any billing period shall be determined by adding (1) the sum of the number of hours of interrupted service to (2) the product of: the number of hours of reduced service multiplied by the percentage of said reduction below the lesser of (a) the contract rate of delivery, or (b) the obligation of the United States to deliver firm power and energy as established under the operating agreement entered into pursuant to the Auxiliary Power Service article hereof, or (c) the rate of delivery required by the Contractor at the time of such reduction. The demand or capacity charge, the kilowatthour blocks of the energy charge, and the minimum charge shall each be proportionately adjusted in the ratio that the total number of hours of such curtailed service as herein determined bears to the total number of hours in the billing period involved. The Contractor shall make written claim within thirty (30) days after receiving the monthly bill, for adjustment on account of any curtailment to service, for periods of one (1) hour or longer in duration each, alleged to have occurred and which is not reflected in such bill. Failure to make such written claim, within said thirty (30) day period, shall constitute a waiver thereof. All curtailments to service, which are due to conditions on the power system of the United States, shall be subject to the provisions of this article and the Contractor shall be limited in its remedy to the relief granted by this article; Provided, That withdrawal of power and energy under contract provisions shall not be deemed curtailments to service.

L. Metering.

(a) The total electric power and energy delivered to the Contractor will be measured by metering equipment to be furnished and maintained by the United States or by its designated representative. Meters shall be sealed and the seals shall be broken only upon occasions when the meters are to be inspected, tested, or adjusted, and representatives of the Contractor shall be afforded reasonable opportunity to be present upon such occasions. Metering equipment shall be inspected and/or tested at least once each year by the United States and at any reasonable time upon request therefor by either party. Any metering equipment found to be defective or inaccurate shall be repaired and readjusted or replaced. Should any meter fail to register, the electric power and energy delivered during such period of failure to register shall, for billing purposes, be estimated by the contracting officer from the best information available.

(b) If any of the inspections and/or tests provided for herein disclose an error exceeding two percent (2%), correction based upon the inaccuracy found shall be made of the records of electric service furnished since the beginning of the monthly billing period immediately preceding the billing period during which the test was made; Provided, That no correction shall be made for a longer period than such inaccuracy may be determined by the contracting officer to have existed. Any correction in billing resulting from such correction in meter records shall be made in the next monthly bill rendered by the United States to the Contractor, and such correction when made shall constitute full adjustment of any claim between the parties hereto arising out of such inaccuracy of metering equipment.

M. Resale of Electric Energy.

The Contractor shall not sell any of the electric energy delivered to it hereunder to any customer of the Contractor for resale by that customer.

N. Power Factor.

While the Contractor normally will be required to maintain the power factor as stated in the rate schedul then in effect under this contract, the Contractor will be permitted to operate at a lower power factor when conditions are such, as determined by the contracting officer, that a lower power factor will be mutually advantageous to the Contractor and to the United States.

O. Cooperation of Contracting Parties.

If, in the maintenance of their respective power systems and/or electrical equipment and the utilization thereof for the purposes of this contract, it becomes necessary by reason of any emergency or extraordinary condition for either party to request the other to furnish personnel, materials, tools, and equipment for the accomplishment thereof, the party so requested shall cooperate with the other and render such assistance as the party so requested may determine to be available. The party making such request, upon receipt of properly itemized bills from the other party, shall reimburse the party rendering such assistance for all costs properly and reasonably incurred by it in such performance, including not to exceed fifteen percent (15%) thereof for administrative and general expenses, such costs to be determined on the basis of current charges or rates used in its own operations by the party rendering assistance.

P. Provisions Relative to Employment.

(a) This contract shall be subject to all the provisions and conditions of the Act of Congress entitled the Work Hours Act of 1962, approved August 13, 1962 (76 Stat. 357), which establishes standards for hours of work and overtime pay of laborers and mechanics employed on work done under contract for, or with the financial aid of, the United States, the same as if that Act had been specifically set forth herein.

(b) During the performance of this contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this Equal Opportunity clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor and to the Age Discrimination Act of 1967 as amended by Public Law 93-259 of April 18, 1974.

(5) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance; Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

(c) In the performance of any part of the work contemplated by this contract, the Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Q. Transfer of Interest in Contract by Contractor.

No voluntary transfer of this contract or of the rights of the Contractor hereunder shall be made without the written approval of the Secretary of Energy; Provided, That if the Contractor operates a project financed in whole or in part by the Rural Electrification Administration, the Contractor may transfer or assign its interest in the contract to the Rural Electrification Administration or any other department or agency of the Federal Government without such written approval; Provided further, That any successor to or assignee of the rights of the Contractor, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the provisions and conditions of this contract to the same extent as though such successor or assignee were the original Contractor hereunder; and, Provided further, That the execution of a mortgage or trust deed, or judicial or foreclosure sales made thereunder, shall not be deemed voluntary transfers within the meaning of this article.

R. License to the Contractor.

The United States, upon request by the Contractor, will grant to the Contractor a license or licenses to construct, install, operate, maintain, replace, or repair, either or all, upon the property of the United State. under the administrative control and jurisdiction of the Western Area Power Administration such facilities as in the opinion of the contracting officer are necessary or desirable for the purposes of this contract. Said license shall remain in effect during the term of this contract and shall expire coincidently therewith. Any facilities so installed by the Contractor pursuant hereto shall be and remain the property of the Contractor, notwithstanding that the same may have been affixed to the premises, and the Contractor shall have a reasonable time after the expiration of said license in which to remove its facilities so installed.

S. License to the United States.

The Contractor, upon request by the contracting officer, will grant to the United States a license or lice: to construct, install, operate, maintain, replace, or repair, either or all, upon the property of the Contracto: such facilities as in the opinion of the Contractor are necessary or desirable for the purposes of this contract The license or licenses so granted shall be in form and of legal sufficiency acceptable to the contracting offi: shall be and remain in effect during the term of this contract, and shall expire coincidently therewith. Any facilities so installed by the United States pursuant to said license or licenses shall be and remain the prope: of the United States notwithstanding that the same may have been affixed to the premises, and the United States shall have a reasonable time after the expiration of said license or licenses in which to remove its facilities so installed.

T. Waivers.

Any waiver at any time by either party hereto of its rights with respect to a default or any other matter arising in connection with this contract shall not be deemed to be a waiver with respect to any subsequent defa or matter.

U. Notices.

Any notice, demand or request required or authorized by this contract shall be deemed properly given mailed, postage prepaid, to the contracting officer at the address shown on the signature page hereof, on behalf of the United States, except where otherwise herein specifically provided, and to the officer signing for the Contractor at the address shown on the signature page hereof, on behalf of the Contractor. The designation of the person to be notified or the address of such person may be changed at any time by similar notice.

V. Contingent Upon Appropriations.

Where the operations of this contract extend beyond the current fiscal year, the contract is made contingent upon Congress making the necessary appropriation for expenditures hereunder after such current year shall have expired. In case such appropriation as may be necessary to carry out this contract is not made, the Contractor hereby releases the United States from all liability due to the failure of Congress to make such appropriation.

W. Officials Not to Benefit.

No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

X. Covenant Against Contingent Fees.

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

Y. National Environmental Policy Act.

Facilities to be constructed hereunder by either party hereto shall be constructed subject to compliance with the National Environmental Policy Act of 1969 (83 Stat. 852).

Z. Contract Subject to Colorado River Compact.

Where the energy sold hereunder is generated from waters of the Colorado River system, this contract is made upon the express condition and with the express covenant that all rights hereunder shall be subject to and controlled by the Colorado River Compact approved by section 13 (a) of the Boulder Canyon Project Act of December 21, 1928, (45 Stat. 1057) and the parties hereto shall observe and be subject to and controlled by said Colorado River Compact in the construction, management, and operation of the dams, reservoirs, and powerplants from which electrical energy is to be furnished by the United States to the Contractor hereunder, and in the storage, diversion, delivery, and use of water for the generation of electrical energy to be delivered by the United States to the Contractor hereunder.

THE FOLLOWING PROVISIONS ARE APPLICABLE ONLY WHEN THE ELECTRIC SERVICE TO BE FURNISHED ARTICLE PROVIDES THAT SERVICE WILL BE FURNISHED OVER THE FACILITIES OF A THIRD PARTY:

AA. Existence of Transmission Service Contract.

Inasmuch as the electric service hereunder is to be supplied over facilities not owned by the United States, the obligation of the United States to furnish electric service hereunder shall at all times be subject to and contingent upon the existence of a transmission service contract granting the United States the right to use such facilities not owned by it as are necessary to the rendering of electric service hereunder; Provided, That, if the United States acquires or constructs facilities which would enable it to furnish direct service to the Contractor, the United States, at its option, may furnish the electric service hereunder over its own facilities.

BB. Conditions of Transmission Service.

Anything to the contrary in this contract notwithstanding, when the electric service under this contract is furnished by the United States over the facilities of others by virtue of a transmission service arrangement, the electric power and energy will be furnished at the voltage available and under the conditions which exist from time to time on the transmission system over which the service is supplied. The United States will endeavor to inform the Contractor from time to time of any changes contemplated on the system over which the service is supplied but the costs of any changes made necessary in the Contractor's system because of changes or conditions on the system over which the service is supplied shall not be a charge against or a liability of the United States; Provided, That if the Contractor, because of changes or conditions on the system over which service hereunder is supplied, is subjected to the necessity of making changes on its system at its own expense in order to continue receiving service hereunder, then the Contractor may terminate this contract on not less than sixty (60) days' written notice given to the United States at any time prior to the making of said change on its system, but not thereafter; Provided further, That if the electric service requirements of the Contractor to the extent that the United States is obligated or determines that it can become obligated to furnish such requirements, are not being met or the United States advises the Contractor cannot be met because of an insufficiency of capacity available to the United States under its transmission service arrangement in the facilities of others over which service hereunder is supplied, then the Contractor may terminate this contract on not less than sixty (60) days' written notice given to the United States at any time prior to the time that the United States advises the Contractor that the needed capacity is available, but not thereafter.

THE FOLLOWING PROVISION IS APPLICABLE ONLY WHEN ELECTRIC SERVICE INVOLVES MULTIPLE POINTS OF DELIVERY FROM BOTH DIRECT AND WHEELED POINTS:

CC. Multiple Points of Delivery Involving Direct and Wheeled Deliveries.

When the United States has provided line and substation capacity under the terms of this contract for the purpose of delivering electric service directly to the Contractor at specified direct points of delivery and also has agreed to absorb wheeling allowances and/or discounts up to a specified maximum amount for deliveries of power over other system(s) to wheeled points of delivery and the Contractor shifts any of its loads served hereunder from direct delivery to wheeled delivery, the United States will not absorb the wheeling costs on such shifted load until the unused capacity, as determined solely by the contracting officer, available at the direct delivery points(s) affected is fully utilized.

RESOLUTION NO. 82-18
NORTHERN CALIFORNIA POWER AGENCY

RESOLUTION OF THE COMMISSION OF THE NORTHERN CALIFORNIA POWER AGENCY (NCPA) approving NCPA Service Schedule, NCPA-WAPA Letter of Agreement (for BPA energy).

WHEREAS, at a special meeting of the Commission of the NCPA, duly called and held on June 8, 1982, the Commission heard the report of the General Manager regarding the NCPA Service Schedule for the NCPA-WAPA Letter of Agreement, a quorum being present at all times;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE NORTHERN CALIFORNIA POWER AGENCY, as follows:

Section 1. NCPA Service Schedule, NCPA-WAPA Letter of Agreement (for BPA energy) is hereby accepted and approved as a Service Schedule to the NCPA Member Service Agreement, to be attached thereto and numbered next in order, upon execution of the Participating Members;

Section 2. The General Manager is hereby authorized and directed to execute such Service Schedule on behalf of NCPA and the Secretary is requested to transmit a copy for execution to each Participating Member.

	Vote	Abstained	Absent
City of - Alameda	Aye		
Biggs			X
Gridley			X
Healdsburg			X
Lodi	Aye		
Lompoc	Aye		
Palo Alto			X
Redding			X
Roseville	Aye		
Santa Clara	Aye		
Ukiah	Aye		
Plumas-Sierra	Aye		

ADOPTED AND APPROVED this 8th day of June, 1982.

REVISION NO. 3
FINAL
June 8, 1982

NCPA SERVICE SCHEDULE
NCPA-WAPA LETTER OF AGREEMENT
(for BPA Energy)

This Agreement, herein "Service Schedule", by and between NORTHERN CALIFORNIA POWER AGENCY, a joint-powers Agency of the State of California created and functioning under Government Code Section 6500, herein "NCPA", and its undersigned member, hereafter referred to as the "Participating Member", witnesseth:

WHEREAS, NCPA has entered into a Letter of Agreement (LOA) with the Western Area Power Administration (Western) whereby Western will sell its import energy purchased from Bonneville Power Administration (BPA) to NCPA upon request (a copy of the Letter of Agreement, dated May 28, 1982, is attached as Exhibit A to this Service Schedule); and,

WHEREAS, the Participating Member desires NCPA to request Western to sell such energy, herein called "BPA energy" and the Participating Member desires to have NCPA arrange for the transmission of such energy to their load centers;

NOW, THEREFORE, the parties hereto agree as follows:

Section 1. The Participating Member hereby requests NCPA to purchase and provide it with BPA energy. Such energy shall initially be allocated to each Participating Member based on the following percentages:

a)	Santa Clara	63.0 percent
b)	Alameda	22.0 percent
c)	Lodi	5.3 percent
d)	Lompoc	3.8 percent
e)	Ukiah	3.2 percent
f)	Healdsburg	2.7 percent

NCPA shall be authorized to reallocate such energy in accordance with data submitted pursuant to Section 3.

Section 2. The purchase of BPA energy shall be subject to all provisions of the LOA. NCPA and its agent shall not be liable for any failure of Western to sell such energy or for any lack of ability by Western or NCPA or its agents to obtain the necessary transmission service.

Section 3. NCPA is authorized to use its best judgment in allocating a proportional share of the available BPA energy and any necessary BPA or PG&E transmission capacity for the use of the Member. Each Participating Member shall, within a reasonable time, provide NCPA with such load data as NCPA may require to allocate BPA energy among the Participating Members. Each Participating Member shall take all necessary steps at its own expense to provide such required data relating to its own system. The Participating Member agrees that NCPA shall allocate such energy and transmission capacity. NCPA shall have all of the authority of the Participating Member to take any and all actions permitted or required to be taken by NCPA under the LOA and to make the needed transmission arrangements with PG&E, and the Participating Member agrees that it will not assert that NCPA lacks such authority, nor do anything that will impair such authority.

Section 4. Each Participating Member shall pay to NCPA, within ten (10) days after billing, the total amount that it would pay PG&E if it were purchasing the same amount of energy from PG&E. NCPA shall pay to Western its direct cost for purchasing the energy, and the difference between that amount and the split-savings rate will be deposited by NCPA in an interest-bearing escrow Account No. 1. The remainder of the payment from each Participating Member, minus all expenses incurred by NCPA, shall be deposited by NCPA in a separate interest-bearing escrow Account No. 2.

If the final determination is that NCPA has a right to purchase beneficially such Western energy, the amounts in escrow Account No. 1 shall be paid to Western, including interest, and all amounts in escrow Account No. 2, including interest, shall be returned proportionately to each Participating Member. If the final determination is adverse to NCPA, the total amounts in both escrow Nos. 1 and 2 will be returned proportionately to each Participating Member. Western has agreed to return the amounts paid to it, in the event of such an adverse determination, proportionately to each Participating Member by credits against future bills for electric power by Western to such Member. Any billing based on an initial allocation under Section 1 shall be reallocated and adjusted by NCPA upon the determination of actual energy delivered to each Participating Member.

Section 5. It is understood and agreed by each Participating Member that in the event of its failure for any reason to make the required payments to NCPA, then Western, upon written notice to NCPA, shall be assigned the right of NCPA to bring legal action against the Participating Member for the amount of any payment shortfall by NCPA to Western resulting from the failure of the Participating Member to make such payments.

Section 6. This Agreement has been authorized by a resolution of the governing bodies of the Participatingmembers and NCPA, and a true copy of such resolution certified by the appropriate official is attached hereto. This Agreement shall take effect as of May 1, 1982, and remain in effect until September 30, 1982.

Section 7. Time is of the essence in the execution and performance of this Agreement. Each Participating Member named in Section 1 shall execute this Service Schedule separately with NCPA, and notwithstanding the other provisions of this Service Schedule, any Participating Member named in Section 1 which fails to execute this Service Schedule within fourteen (14) days after receipt of copies thereof signed by NCPA, shall cease to be a Participating Member, and shall have no rights under this Schedule, and all BPA energy shall thereafter be allocated to the extent it may be beneficially used to the remaining Participating Members as provided herein.

NORTHERN CALIFORNIA POWER AGENCY _____
Participating Member

By: _____ Date: 6/5/82
General Manager

By: _____ Date: _____

Attachment 20

CITY OF HEALDSBURG
City Hall — Administrative Offices
P.O. Box 578
126 Matheson Street
Healdsburg, CA 95448

(707) 433-9425

August 20, 1982

Ms. Gail Sipple
N.C.P.A.
8421 Auburn Boulevard
Suite 160
Citrus, Heights, CA 95610

Dear Ms. Sipple

Enclosed for your records is a fully executed copy of the agreement between NCPA-WAPA and the City of Healdsburg.

Very truly yours,

Jean McMellon

Jean McMellon
City Clerk

JM:me

Enclosure

RESOLUTION NO. 82-54

NORTHERN CALIFORNIA POWER AGENCY

BE IT RESOLVED BY THE COMMISSION OF THE NORTHERN CALIFORNIA POWER AGENCY, as follows:

Section 1. Notwithstanding the provisions of the "NCPA Service Schedule, NCPA-WAPA Letter of Agreement (for BPA energy)" approved by Resolution No. 82-18, herein "Service Schedule", any member of NCPA who wishes to do so may enter into an agreement or agreements with Western Area Power Administration or Pacific Gas and Electric Company, or both, with respect to the terms of any escrows which are to be established in connection with the purchase by such members of BPA energy, and such agreements shall supersede the provisions of the Service Schedule with respect thereto. The General Manager is aughorized to execute any such agreement(s) pertaining to NCPA. A copy of this resolution shall be attached to the Service Schedule.

	Vote	Abstained	Absent
City of - Alameda	Aye		
Biggs			X
Gridley			X
Healdsburg			X
Lodi	Aye		
Lompoc	Aye		
Palo Alto	Aye		
Redding	Aye		
Roseville	Aye		
Santa Clara	Aye		
Ukiah	Aye		
Plumas-Sierra	Aye		

ADOPTED AND APPROVED this 28th day of October, 1982.

REVISION NO. 3
FINAL
June 8, 1982

NCPA SERVICE SCHEDULE
NCPA-WAPA LETTER OF AGREEMENT
(for BPA Energy)

This Agreement, herein "Service Schedule", by and between NORTHERN CALIFORNIA POWER AGENCY, a joint-powers Agency of the State of California created and functioning under Government Code Section 6500, herein "NCPA", and its undersigned member, hereafter referred to as the "Participating Member", witnesseth:

WHEREAS, NCPA has entered into a Letter of Agreement (LOA) with the Western Area Power Administration (Western) whereby Western will sell its import energy purchased from Bonneville Power Administration (BPA) to NCPA upon request (a copy of the Letter of Agreement, dated May 28, 1982, is attached as Exhibit A to this Service Schedule); and,

WHEREAS, the Participating Member desires NCPA to request Western to sell such energy, herein called "BPA energy" and the Participating Member desires to have NCPA arrange for the transmission of such energy to their load centers;

NOW, THEREFORE, the parties hereto agree as follows:

Section 1. The Participating Member hereby requests NCPA to purchase and provide it with BPA energy. Such energy shall initially be allocated to each Participating Member based on the following percentages:

a)	Santa Clara	63.0 percent
b)	Alameda	22.0 percent
c)	Lodi	5.3 percent
d)	Lompoc	3.8 percent
e)	Ukiah	3.2 percent
f)	Healdsburg	2.7 percent

NCPA shall be authorized to reallocate such energy in accordance with data submitted pursuant to Section 3.

Section 2. The purchase of BPA energy shall be subject to all provisions of the LOA. NCPA and its agent shall not be liable for any failure of Western to sell such energy or for any lack of ability by Western or NCPA or its agents to obtain the necessary transmission service.

Section 3. NCPA is authorized to use its best judgment in allocating a proportional share of the available BPA energy and any necessary BPA or PG&E transmission capacity for the use of the Member. Each Participating Member shall, within a reasonable time, provide NCPA with such load data as NCPA may require to allocate BPA energy among the Participating Members. Each Participating Member shall take all necessary steps at its own expense to provide such required data relating to its own system. The Participating Member agrees that NCPA shall allocate such energy and transmission capacity. NCPA shall have all of the authority of the Participating Member to take any and all actions permitted or required to be taken by NCPA under the LOA and to make the needed transmission arrangements with PG&E, and the Participating Member agrees that it will not assert that NCPA lacks such authority, nor do anything that will impair such authority.

Section 4. Each Participating Member shall pay to NCPA, within ten (10) days after billing, the total amount that it would pay PG&E if it were purchasing the same amount of energy from PG&E. NCPA shall pay to Western its direct cost for purchasing the energy, and the difference between that amount and the split-savings rate will be deposited by NCPA in an interest-bearing escrow Account No. 1. The remainder of the payment from each Participating Member, minus all expenses incurred by NCPA, shall be deposited by NCPA in a separate interest-bearing escrow Account No. 2.

If the final determination is that NCPA has a right to purchase beneficially such Western energy, the amounts in escrow Account No. 1 shall be paid to Western, including interest, and all amounts in escrow Account No. 2, including interest, shall be returned proportionately to each Participating Member. If the final determination is adverse to NCPA, the total amounts in both escrow Nos. 1 and 2 will be returned proportionately to each Participating Member. Western has agreed to return the amounts paid to it, in the event of such an adverse determination, proportionately to each Participating Member by credits against future bills for electric power by Western to such Member. Any billing based on an initial allocation under Section 1 shall be reallocated and adjusted by NCPA upon the determination of actual energy delivered to each Participating Member.

Section 5. It is understood and agreed by each Participating Member that in the event of its failure for any reason to make the required payments to NCPA, then Western, upon written notice to NCPA, shall be assigned the right of NCPA to bring legal action against the Participating Member for the amount of any payment shortfall by NCPA to Western resulting from the failure of the Participating Member to make such payments.

Section 6. This Agreement has been authorized by a resolution of the governing bodies of the Participating members and NCPA, and a true copy of such resolution certified by the appropriate official is attached hereto. This Agreement shall take effect as of May 1, 1982, and remain in effect until September 30, 1982.

Section 7. Time is of the essence in the execution and performance of this Agreement. Each Participating Member named in Section 1 shall execute this Service Schedule separately with NCPA, and notwithstanding the other provisions of this Service Schedule, any Participating Member named in Section 1 which fails to execute this Service Schedule within fourteen (14) days after receipt of copies thereof signed by NCPA, shall cease to be a Participating Member, and shall have no rights under this Schedule, and all BPA energy shall thereafter be allocated to the extent it may be beneficially used to the remaining Participating Members as provided herein.

NORTHERN CALIFORNIA POWER AGENCY

By: _____
General Manager

Date: 6/9/82

CITY OF HEALDSBURG
Participating Member

By: _____
Michael W. McDonald
City Manager

Date: 7/27/82

Northern California Power Agency
8421 Auburn Boulevard, Suite 160 Citrus Heights, California 95610

ROBERT E. GRIMSHAW
General Manager

(916) 722-7814

June 8, 1982

Mr. Nolan Daines
Vice President
Planning and Research
Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94106

Dear Nolan:

As you know, NCPA has entered into a contract with WAPA, as of May 1, 1982, for the purchase by NCPA of Bonneville energy sold to WAPA and surplus to its current project and preference customer load. That contract has been approved by the NCPA member cities. This is to inform you that, pursuant to your Stanislaus Commitments, we expect PG&E to transmit the power from Tracy to each NCPA member's load center. It is anticipated that at least through June, NCPA will purchase sufficient energy through this arrangement to displace all energy currently being purchased from PG&E.

I interpret your letter to me dated May 25, 1982, as indicating that PG&E's position is that WAPA must sell or bank all power it imports from the Northwest to PG&E and that, consequently, PG&E declines to transmit the surplus energy to the NCPA cities as I had requested. We have been advised by our attorneys that WAPA must sell such energy to preference agencies able to purchase it before WAPA can sell it to any nonpreference entities. This duty, we are advised, was most recently enunciated in the April 6, 1982 decision of the United States Court of Appeals for the Ninth Circuit in Central Lincoln Peoples' Utility District, et al. v. Peter Johnson, as Administrator of the Bonneville Power Administration, Department of Energy, et al., Docket No. 81-7561. In that Opinion the court decided that the first quartile of Bonneville power, which is served partially with nonfirm energy, must be sold to preference entities if they desire to purchase it. In its opinion, the Court of Appeals stated (footnote omitted):

> ... City of Santa Clara, California v. Andrus, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978) is instructive on the purposes and proper interpretation of a preference clause. In Santa Clara, the Secretary of the Interior, acting through the Bureau of Reclamation Project Act of 1939 (43 U.S.C §§375a, 387-89, 485 et seq.) with a nonpreference customer instead of

selling it directly to a preference customer. The Secretary argued that the arrangement was designed to enable him to supply the future needs of selected preference customers. 572 F.2d at 669. This court held that the provisional sale of power to a nonpreference customer when a preference customer is ready and willing to buy it contravened the purpose of the preference because the nonpreference customer would profit from low-cost power at the expense of the preference customer. Id. at 670-71. Although the court recognized that the ultimate goal of the Secretary's scheme was consonant with the preference clause, it nevertheless found that the interim effect was inconsistent with the preference clause, and, therefore, held the scheme invalid.

The contention in the present case that the sale of nonfirm energy to DSIs serves the preference clause by creating reserves and earning revenue that can reduce the rates of all preference customers is answered by Santa Clara. BPA's policy may serve the preference clause, but the immediate effect, like that in Santa Clara, is antithetical to preference rights, and, therefore, is not consonant with the preference clause. The fact that BPA's policy may enable it to profit more from selling the nonfirm energy to the DSIs and that all of its customers would thereby benefit does not persuade us that its interpretation is reasonable. As explained in Santa Clara, the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers. BPA's interpretation to the contrary, without explicit Congressional direction, contravenes the purposes of the preference clause.

While the issue of the proper interpretation of CVP's contracts with PG&E is mooted by the Ninth Circuit opinion, since even assuming the contracts obligated CVP to sell or bank such power to PG&E such provisions would clearly be void under the Ninth Circuit opinion, the fact is that PG&E has acknowledged CVP's rights to import the power and sell it to other entities. The key provision of the contract between CVP and PG&E for the Sale, Interchange and Transmission of Electric Capacity and Energy (Contract No. 14-006-200-2948A) is Article 19(e) which states:

> The United States may import for use or sale in Contractor's Service Area such Northwest Dump Energy and Exchange Energy, using the transmission capability available to the United States pursuant to EHV Contract No. 14-06-200-2947A, as can be used beneficially by Contractor in Contractor's Service Area consistent with Contractor's other obligations, as determined by Contractor. Contractor shall accept all such energy.

The better reading of this provision is that it merely imposes upon PG&E, if CVP so requests, an obligation to bank all dump energy it can ben ficially use. This interpretation has now been definitively accepted by PG&E. In

its Second Post-Hearing Brief in FERC Docket No. E-7777(II), which was sworn to on April 11, 1982, PG&E responded to an argument that under Contract 2948A CVP may only serve its pumping load and a narrowly defined group of preference customers and that everything else which CVP may acquire by way of resources is effectively turned over to PG&E. That argument continued that accordingly there is no incentive for CVP to import any more power than is necessary to serve its pumps and customers. PG&E responded (p. 191, emphasis added):

> There are several things wrong with this argument. First, Articles 19(d)-(f) do not say what Cities claim they do. They merely obligate PG&E to bank power which can be used beneficially in its service area. That fact doesn't preclude CVP from importing power and selling it to someone other than PG&E.*

PG&E has thus, in a formal verified pleading over the names of nine attorneys, stated that Article 19 does not preclude CVP from importing power and selling it to someone other than PG&E. This interpretation by PG&E should be considered definitive by any court which addresses the issue.

In your letter to me you asked me to advise you "as to just how these transactions are to be structured without eliciting a breach of Western's Intertie contract." It seems apparent to me that the contemplated transactions have been formally acknowledged by your attorneys to be consistent with Western's Intertie contract.

We would appreciate receiving the basis of PG&E's contrary viewpoint.

If PG&E had been willing to transmit the power to us, we would have arranged a meeting to discuss the appropriate modalities. However, in view of your refusal to transmit, such a meeting would appear to be futile. If I am wrong in this evaluation, please so informe me.

If PG&E adheres to its position, NCPA and its members intend to treat the energy they have purchased from WAPA as having been received by them, to deduct from the bills they receive from PG&E the appropriate costs for the energy that has been displaced by WAPA purchases, and to pay PG&E for the necessary wheeling.

I would very much hope that PG&E will reconsider its position so that the entire matter may be worked out on a cooperative rather than an antagonistic basis. However, my obligation is to protect the rights of NCPA and its members and, if necessary, I will take the appropriate steps to do so.

Yours truly,

ROBERT E. GRIMSHAW
General Manager

---

* This PG&E statement also precludes any possible limitation based upon Article 19(d) upon CVP's right to import and sell Northwest surplus or dump to others.

Attachment 22

Department of Energy
Western Area Power Administration
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

In reply refer to: N6000

JUN 11 1982

Mr. Nolan Daines, Vice President
Planning and Research
Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94106

Dear Mr. Daines:

The Sacramento Area Office of the Western Area Power Administration (Western) transmits herewith an authenticated copy of the Letter of Agreement (LOA) dated May 28, 1982, for the sale by Western and the purchase by the Northern California Power Agency (NCPA) of Northwest import energy made available to the Central Valley Project (CVP) by the Bonneville Power Administration (BPA) which is excess to CVP project and preference customer loads. A prefinal version of the LOA was telecopied to Glenn West on May 27, 1982, and was the subject of our meeting with you on June 3.

As we have previously discussed, it is Western's expressed desire to have the sale of Northwest import power effective May 1, 1982, through September 30, 1982. While we are aware that you have not as yet reached terms with the NCPA regarding the wheeling of such power from our Tracy Load Center to the subscribing NCPA members, Western hopes that such arrangements will soon be consummated. In the interim, Western is planning to document its energy sales to the NCPA and bill them accordingly. We would like to meet with your staff to discuss a plan for handling billing arrangements among Western, NCPA and PGandE. For the months of May and June, the energy not sold to the NCPA will be sold to PGandE under the terms of a Letter of Agreement which is currently being discussed between our two organizations. Similarly, the 400MW of capacity is proposed to be sold to PGandE under the capacity terms of the Letter of Agreement.

In the very near future, Western will notify all of its CVP customers and interested parties that any power that is excess to our project and preference customers' needs will be made available for sale on a proportional basis among the purchasers of such energy. Such energy sales will be based upon the net monthly energy requirements of each purchaser.

We look forward to meeting with your staff to effect a timely resolution of these issues.

Sincerely,

David G. Coleman
Area Manager

Enclosure

cc: Robert Grimshaw, NCPA

Attachment 23

PACIFIC GAS AND ELECTRIC COMPANY

77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

NOLAN H. DAINES
VICE PRESIDENT
PLANNING AND RESEARCH

June 16, 1982

Mr. David Coleman
Area Manager
Western Area Power Administration
2800 Cottage Way
Sacramento, California 95825

Dear Dave:

Your letter dated June 11, 1982, stated your desire to sell Northwest import power to the Northern California Power Agency (NCPA) effective May 1 through September 30, 1982, under a letter of agreement dated May 28, 1982, between Western Area Power Administration (WAPA) and NCPA. Your letter also indicated that WAPA plans to document its energy sales to NCPA pursuant to that agreement and to bill them accordingly.

As you know, it is PGandE's strongly held view that WAPA lacks either the statutory or contractual authority to engage in energy transactions such as those contemplated under the above-described letter agreement. Such a transaction would unfairly deprive PGandE's customers, retail and resale alike, of this inexpensive energy from the Northwest, a benefit that they have a lawful right to enjoy. Especially in this time of intense concern over high electric rates, PGandE cannot sit idly by while its customers' access to inexpensive surplus power from the Northwest is eroded by an unauthorized attempt to redirect that power for the exclusive benefit of NCPA customers.

We had previously indicated to you our willingness and our desire to achieve an early mutually satisfactory resolution of the uncertainty caused by WAPA's proposal to enter into this third party sale of Northwest surplus energy. Pending resolution of this matter between WAPA and PGandE, I would suggest that you continue to bill PGandE for the subject surplus energy pursuant to the

applicable provisions of Contract 2948A, instead of purporting to engage in transactions under the WAPA-NCPA letter agreement. On behalf of PGandE, I am willing to stipulate that such continued delivery and billing pursuant to the provisions of Contract No. 2948A would be without prejudice to any argument WAPA may wish to pursue regarding its authority to engage in transactions under the above-mentioned WAPA-NCPA letter agreement. This presumes, of course, that the NCPA cities which would purchase power from WAPA if the WAPA-NCPA letter agreement were in effect will, while this dispute is being resolved, continue to pay their PGandE bills as rendered under the presently effective resale rates and tariffs on file with the Federal Energy Regulatory Commission (FERC). It would be agreed by all of us, PGandE, WAPA and NCPA, that retroactive billing adjustments would be made if it is ultimately determined that transactions under the above-mentioned letter agreement were authorized and proper.

Sincerely,

Roland Daines

DEGibson(2118):pah

Attachment 24

PACIFIC GAS AND ELECTRIC COMPANY

PG&E

77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

NOLAN H. DAINES
VICE PRESIDENT
PLANNING AND RESEARCH

June 24, 1982

Mr. William H. Clagett
Deputy Administrator
Western Area Power Administration
P.O. Box 3402
Golden, Colorado 80401

Dear Mr. Clagett:

We have had a number of telephone conversations and meetings about Western's sale to NCPA of Northwest energy excess to its Project and customer needs. As you know, our concern is that this arrangement is unlawful and would unfairly deprive our customers of benefits to which they are entitled. As I stated in my June 16, 1982 letter to David Coleman on this matter, especially in this time of intense concern over high electric rates, PGandE cannot sit idly by while its customers' access to inexpensive surplus power from the Northwest is eroded by an unauthorized attempt to redirect that power for the exclusive benefit of NCPA's customers.

You recently expressed concern about NCPA's argument that PGandE has acknowledged, at page 191 of its Second Post-Hearing Brief in FERC Docket No. E-7777(II), that Articles 19(d)-(f) do not preclude Western from importing power and brokering it to someone other than PGandE. NCPA's present argument also assumes, erroneously, that Articles 19(d)-(f) govern Western's ability to sell power to third parties. They do not. The limited nature of Western's authority from Congress does. Other provisions of Contract 2948A and Contract 2947A are pertinent. The proposal Western now makes is inconsistent with such governing law and contracts.

Because it consistently mischaracterizes Article 19, NCPA has misinterpreted PGandE's argument in its E-7777(II)

Brief. The brief explicitly states that Western cannot engage in brokering of the kind now proposed. (PGandE brief, pp. 191-192.) There is no room for reasonable doubt on that point -- as we stated in the brief, Contract 2948A "does not help CVP do what it cannot legally do anyway" (PGandE brief, p. 192, emphasis added).

The statement on page 191 of our brief is not an acknowledgement that Western can broker power, as alleged by NCPA. We were, on that page of our 300-page brief, addressing specific allegations made by NCPA on an article-by-article basis; we were not at that point discussing provisions of Contract 2948A other than Articles 19(d)-(f), or other pertinent contracts. NCPA claimed that Articles 19(d)-(f) limited CVP to serving "its pumping load and a narrowly defined group of preference customers. Everything else which CVP may acquire . . . is effectively turned over to PGandE." (PGandE brief, p. 191.) We stand by the statements that Articles 19(d)-(f) do not say that, and do not foreclose all sales by CVP to entities other than PGandE. The foregoing should dispel any doubt on your part as to what was both said and intended on this point in our brief.

The arrangement Western is contemplating with NCPA exceeds Western's statutory authority, is contrary to the integration concept underlying Contract 2948A, violates specific articles in that contract (including those that do, in fact, govern the ultimate purchase of power obtained by Western), and would be inconsistent with the terms of Contract 2947A.

It might be helpful in understanding our position to keep in mind that a fundamental purpose of Contract 2948A is the integration of the PGandE and CVP electric generating systems. This purpose is clearly stated throughout the contract and in the legislative history of the Intertie. Indeed, it is this integration arrangement, and PGandE's ability to back down fossil-fired power plants on our system, that permits Western to serve its customer loads and import the Northwest power it is proposing to sell to NCPA.

Consistent with this fundamental purpose and to insure the development of adequate amounts of banked energy to meet the long-term needs of CVP's firm power customers, all imported power not immediately used to supply CVP's firm customer load has heretofore been banked with PGandE. Western now appears to be seeking to change the fundamental operating assumption on which Contract 2948A is based.

The integration of all resources pursuant to Contract 2948A is, as we also explained in our brief, consistent with and an expression of the statutory limitations imposed on Western. In 1972, NCPA asked the Bureau of Reclamation to purchase NCPA

power to replace Centralia or "otherwise." The Assistant Secretary of the Department of Interior responded as follows:

> The matter of purchasing power from NCPA "otherwise" than as a substitute for Centralia raises several separate questions. The Bureau does not have existing authority to get into the business of supplying the bulk power requirements of existing or potential preference customers in California's Central Valley. Its present authority is limited to disposing of the capacity and energy of the generating facilities of the authorized Central Valley Project not required for project purposes, together with the 400 mw and associated energy of Northwest power and the energy it acquires by purchase or exchange to firm up CVP capacity. In the final analysis, therefore, it is not the PGandE contract which puts a ceiling on the preference customer load served by CVP, as the Justice Department assumes in its August 2, letter to the Atomic Energy Commission, and as implied in your September 7 letter, but rather the limited nature of the Bureau's authority from Congress to supply power to preference customers. (Emphasis added.) (Letter of October 6, 1972.)

Western has asked Congress for authority to remove these statutory limitations. The proposed Revolving Fund legislation specifically provided for authority to act as "trustee" for third parties in making power purchases. As you know, these legislative proposals were not enacted by Congress. Thus, at the present time and until changed by Congress, under applicable law power purchases by Western must be reasonably incidental to the integration of hydroelectric power generated by CVP facilities. Contracts 2948A and 2947A provided Congressionally authorized parameters for such power purchases so as to firm-up the limited amount of CVP generation.

For fifteen years Western has purchased and imported energy for specific, authorized project purposes. Despite many opportunities to act as power broker since 1967, Western has consistently interpreted its own authority and obligations in the manner PGandE has described in this letter.

In our recent meetings, your attorneys expressed concern about NCPA's argument that a recent decision for the U.S. Court of Appeals for the Ninth Circuit, involving the sale of power by the Bonneville Power Administration, requires Western to sell its Northwest surplus energy to NCPA rather than banking it with PGandE under Contract 2948A. We do not agree with NCPA's position.

The decision of the U.S. Court of Appeals in Central Lincoln People's Utility District v. Johnson (No. 81-7561) does not invalidate Contract 2948A's requirement for the disposition of CVP resources generated or imported, does not void the limited transmission service provided under Contract 2947A, and does not expand Western's circumscribed statutory authority. In Central Lincoln, the only issue was whether certain provisions in the recently-enacted Pacific Northwest Electric Power Planning and Conservation Act justified a change in Bonneville's policy for marketing surplus, nonfirm energy. Prior to the Act, Bonneville had offered nonfirm energy first to Northwest preference customers, and only thereafter to its direct service industrial customers ("DSIs"). Bonneville argued that a provision of the new Act concerning DSI reserves could be given effect only if its marketing policy was changed so that nonfirm energy would be offered first to the DSIs, and then to the preference customers. The Ninth Circuit rejected this argument, holding that any modification of the Northwest Preference Act "should be explicit," and that "it is unreasonable to assume that Congress intended to create such a significant exception to the preference through the device of a provision referring to reserves."

Thus, in Central Lincoln a federal power marketing agency sought to change its traditional policy of offering nonfirm energy to preference customers first. In this case, on the other hand, Western contends that it can ignore longstanding policy, operating practice and contractual provisons and import energy that is "excess" to its needs so that, for the first time, this energy can be sold outside its Firm and Project Loads. Nothing in the Central Lincoln decision compels or sanctions such an arrangement.

Nor is the proposed arrangement required by the decision in City of Santa Clara v. Andrus. In that case, the Ninth Circuit did not invalidate the banking provision of Contract 2948A. It remanded to the District Court, among other things, the issue of whether the sale of power to Santa Clara ". . . would or will impair the efficiency . . ." of the Central Valley Project, whether ". . . Santa Clara was not willing or able to receive what the Secretary could sell to it . . .", and whether ". . . during certain times the Secretary did not have power available to sell to Santa Clara." In short, the banking

provisions were not held by the Court to be in violation of the preference clause.

Since the Santa Clara and Central Lincoln decisions do not invalidate the banking provisions of Contract 2948A, such provisions are fully effective and binding on Western. There is no legal authority justifying or compelling the sale of capacity or energy to a third party that would otherwise be sold to PGandE under the provisions of Contract 2948A. Even assuming, for the sake of argument, that the Santa Clara case is applicable to the proposed sale of energy to NCPA, the court specified several tests which must be met before Western would be excused from its contractual obligation to bank its surplus power. Western has not met these tests. For example, Western has not shown that the sale of energy to NCPA instead of the Contract 2948A bank accounts would not "impair the efficiency" of the CVP; nor has Western met the test that there must be a preference customer ready, willing and able to purchase such energy on a real-time basis as it is imported.

From a review of the contract between NCPA and Western, it is apparent that Western does not intend to treat the proposed sales of energy to NCPA on a real-time basis. Rather, Western seems to assume that it may implement such transaction on an after-the-fact basis in the same manner as it accounts for its sales to Firm Load and the bank accounts under Contract 2948A. Since we have no other agreement with Western which would provide for such an after-the-fact sale and accounting, we must therefore conclude that it is Western's position that the Northwest energy it proposes to sell to NCPA is governed by Contract 2948A.

With this explanation of our position concerning the E-7777(II) Brief, Western's authority under applicable law and the relevant contracts, I hope we can now have meaningful discussions concerning your proposed sale to NCPA.

We at PGandE are available to conduct further discussions with Western in an attempt to resolve this dispute.

Sincerely,

ORIGINAL SIGNED BY
N.H. DAINES

NHD:JB:hf

cc Mr. Robert McPhail
Mr. David G. Coleman
Mr. Robert E. Grimshaw

Attachment 25

PACIFIC GAS AND ELECTRIC COMPANY

PG&E + 77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

NOLAN H. DAINES
VICE PRESIDENT
PLANNING AND RESEARCH

June 25, 1982

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Boulevard, Suite 160
Citrus Heights, California 95610

Dear Mr. Grimshaw:

We are in receipt of your letter of June 8, 1982, communicating NCPA members' intention not to pay PGandE bills rendered under effective resale rates and tariffs on file with FERC.

With regard to the substantive issues affecting our decision not to transmit for NCPA Northwest power purchased by WAPA for resale to NCPA, our position is described in the attached letter to the Deputy Administrator of WAPA, dated June 24, 1982. We have also enclosed a letter to the Sacramento Area Manager of WAPA, dated June 16, 1982, which proposes an interim delivery and billing arrangement among WAPA, NCPA and PGandE while the parties attempt to resolve this dispute. We urge you to consider this proposal carefully.

Very truly yours,

Nolan Daines

N. H. DAINES

NHD:JB:hf

Enclosures

Attachment 26

Department of Energy
Western Area Power Administration
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

JUN 29 1982

In reply refer to: N6100

TO ALL CUSTOMERS AND INTERESTED PARTIES:

This letter is in regard to the sale of energy to preference entities within California which is surplus to Central Valley Project (CVP) needs.

As you are aware, the extremely wet winter and spring, both in the Northwest and here in California, have resulted in above normal runoff and high output from the hydroelectric plants. Following our public information forum in February and again through our April 2 letter, we informed you that Western was negotiating a contract with BPA to purchase surplus energy for the spring and summer months as long as it was available. This power was to be brought to California over Western's 400 MW share of the Pacific Northwest-Southwest Transmission Intertie.

At a meeting in Portland on May 3, 1982, Bonneville and Western orally agreed that Western would purchase 400 MW's of capacity with associated energy at a 60-100% load factor from May through September of 1982. Pricing for capacity would be $2.80 per killowatt-month in May and $1.44 per killowatt-month from June through September. Energy costs would be approximately six mills per killowatt-hour as long as the surplus lasted (projected to be through July 15). After July 15, Western has the option to purchase energy at BPA's New Resources rate now estimated to be about 35 mills. Since Western did not need to use this surplus Bonneville energy to meet its monthly CVP commitments, the energy was available for either banking in Account No. 2 and sold to PGandE at cost or possibly, sale to other preference entities. Delivery of such power would require appropriate wheeling arrangements between PGandE or Western, and the preference customer, as the case may be.

In late April, NCPA formally requested that they be allowed to purchase any energy that is surplus to CVP needs up to the amount of their own supplemental requirements. Western estimates the energy imports from the Northwest to be approximately 250 million kWh on a monthly basis. NCPA has indicated a need for about 125 GWH's monthly. After considerable discussion and negotiation with NCPA and PGandE, Western signed an agreement to sell surplus energy to NCPA from May to September subject to certain appropriate requirements including wheeling arrangements from Tracy to NCPA's participating entities. A copy of this agreement, signed May 28, is attached for your information. PGandE has not as yet agreed to this arrangement nor have they entered into any wheeling arrangements to deliver this power. The agreement with NCPA was conditioned accordingly in anticipation of such a position being taken by PGandE. Additional arrangements with BPA are also needed in order to consummate this agreement.

At this time the overall issue of the sale of import energy has not been resolved. It is our desire to keep you apprised of the actions to date with respect to the sale of this energy and to inquire into the needs and desires of other preference entities which might be eligible to acquire some of this energy for the July-September period. Accordingly, Western will offer to sell the import energy to eligible preference customers on the same conditions it has been offered to the NCPA for as long as the energy is excess to our preference and project customers' needs. These contracts will be subject to a determination that Western has a right and obligation to market this energy to preference entities rather than sell the energy to PGandE for banking in Account No. 2. In addition, any contract will be effective upon execution and conditioned upon appropriate wheeling arrangements being consummated. The rate for the sale of this energy is a share the savings rate (see Article 7 of the Western-NCPA Letter of Agreement).

If you believe you are qualified to purchase surplus energy from Western and will be able to acquire appropriate wheeling arrangements, you are requested to apply for this energy in writing by July 9. Please indicate the estimated amount of energy for each month you desire to purchase energy. Any application postmarked after July 9, 1982 will not be considered. We appreciate those letters of interest previously sent to us, however, reapplication pursuant to this letter is necessary and will supersede your prior letter.

Sincerely,

David G. Coleman
Area Manager

Enclosure

Northern California Power Agency

8421 Auburn Boulevard, Suite 160 Citrus Heights, California 95610

ROBERT E. GRIMSHAW
General Manager
(916) 722-7814

June 30, 1982

Mr. Nolan Dains
Vice President
Planning and Research
Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94106

Dear Nolan:

I received your letter of June 25, 1982 with its enclosures. I find the legal position you express in your June 24, 1982 letter addressed to Mr. Clagett of WAPA--that in its brief in E-7777 (II) PG&E was only asserting that WAPA could make sales of Northwest power unfettered by Article 19 of Contract 2948A while not mentioning PG&E's view that other provisions of the contract supplied the fetters--is one that confirms my worst view of lawyers. I recognize that without an agreement among our organizations, which PG&E apparently is not currently interested in negotiating, the issue will have to be determined by a court or agency.

I do suggest that pending such resolution it will be mutually beneficial for NCPA, WAPA, and PG&E to agree upon the establishment and terms of an escrow fund for the moneys which NCPA will decline to pay to PG&E under NCPA's and WAPA's view that the energy has come from WAPA and not from PG & E. The proceeds of the funds could then satisfy the obligations NCPA will owe to WAPA or PG&E after final resolution or settlement of the controversy. Such an arrangement should simplify matters considerably without prejudice to the rights of any party and may eliminate any need for PG&E to initially pay WAPA for the energy which PG&E insists WAPA is selling to it and which NCPA and WAPA insist is being sold by WAPA to NCPA.

If PG&E is interested in pursuing an escrow fund agreement, I suggest that the attorneys for PG&E, WAPA, and NCPA negotiate and draft the necessary documents. Pending a possible agreement, NCPA is establishing its own escrow funds.

Yours truly,

ROBERT E. GRIMSHAW
General Manager

cc: Dave Magaw, WAPA

Attachment 28

PACIFIC GAS AND ELECTRIC COMPANY

77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

NOLAN H. DAINES
VICE PRESIDENT
PLANNING AND RESEARCH

July 29, 1982

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Boulevard, Suite 160
Citrus Heights, California 95610

Dear Mr. Grimshaw:

As you are aware, the cities of Alameda, Healdsburg, Lodi, Lompoc, Ukiah and Santa Clara have not paid their bills for electric service provided to them by PGandE during May, 1982. These bills are now delinquent.

Each city claims that the energy was obtained under a letter agreement between the Northern California Power Agency (NCPA) and the Western Area Power Administration (WAPA) dated May 28, 1982. We understand that each of the NCPA member cities has executed a service schedule with NCPA agreeing to purchase such energy from NCPA. In the service schedule the cities also agree not to pay PGandE an amount representing an equivalent amount of energy. The cities' actions result from decisions made jointly with NCPA some time ago. NCPA informed us on June 8, 1982, that its members would refuse to pay for the energy portions of their PGandE bills from May 1982 until September 1982, which is also the term of the WAPA/NCPA agreement.

Existing contracts between WAPA and PGandE provide that such surplus hydroelectric power is purchased by PGandE. In addition WAPA has no statutory authority to purchase and resell energy in the manner contemplated in the WAPA/NCPA contract. In effect, WAPA is attempting to sell, and NCPA is attempting to purchase, energy that rightfully belongs to PGandE, thus depriving PGandE customers of inexpensive power that is lawfully theirs.

The WAPA/NCPA agreement is therefore of no legal effect, and NCPA has no such energy to sell to its city members. However, even assuming the WAPA/NCPA transaction was legal, neither WAPA, NCPA nor the cities have made the contractual arrangements necessary to dispatch and sell the Northwest energy

to the cities. In short, the energy purchased by the cities was bought from and transmitted by PGandE under existing contracts. As you know, such contracts between the cities and PGandE are also tariffs filed with the Federal Energy Regulatory Commission, and have the force of law. PGandE's contracts with WAPA providing that such surplus energy is to be purchased by PGandE are also tariffs filed with the FERC. Both the cities and PGandE must abide by those tariffs; the cities cannot legally purchase electricity or have it transmitted except under terms and conditions prescribed by FERC.

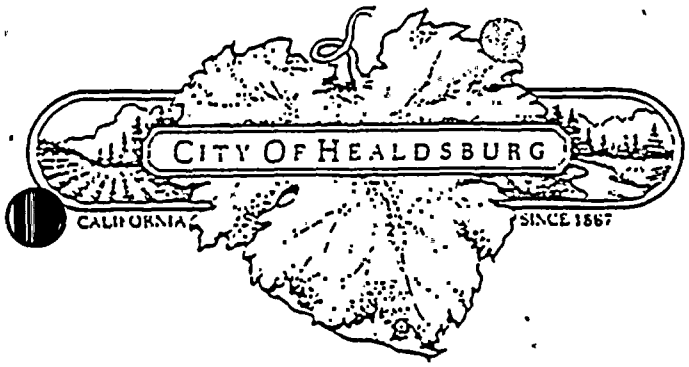
NCPA has intentionally interfered with WAPA's and the cities' contracts with PGandE. It has also joined with the cities in causing a violation of the FERC tariffs, thereby depriving PGandE and its customers of benefits and rights they are entitled to by law and under those tariffs. Further, NCPA has appropriated to itself monies owed to PGandE for the sale of energy. The energy was provided in May by PGandE. Only PGandE was entitled to monies paid by the cities for such power.

If you persist in your action, we will have no choice but to institute appropriate proceedings to protect our rights and to preserve the benefits belonging to our customers.

Very truly yours,

Nolan H. Daines

JB:ec



CITY OF HEALDSBURG
City Hall — Administrative Offices
P.O. Box 578
126 Matheson Street
Healdsburg, CA 95448

(707) 433-9425

cc: Roger

August 5, 1982

Mr. J.M. Sterns
Pacific Gas & Electric Co.
77 Beale Street
San Francisco, CA 94106

Dear Mr. Stearns:

I am writing to confirm our discussion of July 19, 1982, concerning the alleged payment owed by the City of Healdsburg to PG&E for surplus Northwest energy and to reiterate our offer to establish an escrow account that fully conforms to the provisions of the PG&E tariff.

As you know, the City considers the subject of its liability to pay PG&E for surplus Northwest energy to be a billilng dispute which under PG&E's existing tariff contemplates the establishment of an escrow account into which the disputed amounts are to be deposited unitl the matter is resolved. By letter dated June 30, 1982, from Mr. Robert Grimshaw to Mr. Noal Daines, of your company, it was proposed that such an escrow account be established for amounts related to surplus Northwest energy purchases. PG&E never responded to Mr. Grimshaw's letter. Nevertheless, the City and NCPA independently established an escrow account as contemplated by the tariff. All amounts PG&E alleges it is entitled to are deposited in this escrow account.

The City of Healdsburg is ready and willing to amend the existing escrow arrangement in any reasonable way proposed by PG&E, including a change in the financial institution or the addition of a PG&E escrow agent. We merely await a response from you as to what action PG&E desires the City to take.

Very truly yours,

Michael W. McDonald

Michael W. McDonald
City Manager

MWM:jm

cc: Robert Grimshaw
Western Area Power Administration
City Council

Attachment 30

Department of Energy
Western Area Power Administration
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

In reply refer to: N6111

NOV 3 1982

Mr. Robert E. Grimshaw
General Manager
Northern California Power Agency
8421 Auburn Boulevard, Suite 160
Citrus Heights, CA 95610

Dear Mr. Grimshaw:

In a May 28, 1982 letter agreement between the Sacramento Area Office of the Western Area Power Administration (Western) and the Northern California Power Agency (NCPA), Western agreed to sell Northwest import energy to NCPA, for distribution to several of its members. This letter provides for amendment of the terms of such agreement and includes in addition, as signatories, the NCPA member cities for which NCPA was acting in purchasing Northwest import energy. Provisions of this amendatory letter agreement supersede conflicting provisions of the May 28 letter agreement as to the signatories hereto, and shall be deemed to be effective as of the effective date of such letter agreement.

The specific terms of this amendatory letter of agreement are as follows:

1. Article 2 shall be amended as follows:

   "References to NCPA, unless otherwise specified, shall be deemed to be a reference to the NCPA or the individual members thereof of NCPA which are signatories to this agreement."

2. Article 7 shall be amended as follows:

   "NCPA shall pay for all Northwest import energy sold to it under this agreement at a split savings rate which shall be an amount equal to one-half (½) of the sum of the then current PGandE wholesale energy rate for energy served under the R-1 rate schedule, adjusted for applicable transmission and other related costs, as such rate may be modified or replaced, and the energy rate charged by BPA for energy made available pursuant to Contract - 3701A or amendments thereto, adjusted for applicable transmission and other related costs, and transmission and other related costs incurred by Western or NCPA.

   It is recognized that under this split-savings concept, any cost incurred by NCPA through payments to PGandE for its services in connection with these transactions, shall be split equally between NCPA and Western. It is recognized that Western does not currently have established a

rate based upon split savings, and further that NCPA or Western may be unable to procure the necessary wheeling from the Tracy substation. Therefore, until (a) Western obtains approval in accordance with Department of Energy regulations for power rates, of a rate based upon these split savings principles and (b) NCPA obtains from PGandE or a court or agency a final interpretation as to whether Western is able to sell and NCPA is able to beneficially purchase the energy hereunder, NCPA shall pay for energy hereunder at the split savings rate and will escrow all such amounts pursuant to and as a portion of the escrow funds required by the escrow agreements between PGandE and the NCPA member cities being executed in conjunction with this Amendment. Each NCPA member city hereby agrees with Western and NCPA that it will not take any action that would cause release of the funds in escrow without the consent of NCPA and Western, except as a result of a final non-appealable judgment or final determination by a court or agency. Such consent may be withheld by Western or NCPA solely to protect their legitimate financial interests in receipt of the payments to which they are entitled pursuant to their contracts with each other or the NCPA member cities arising out of transactions related to the energy sold under the May 28, 1982 letter agreement.

When both a favorable non-reversible determination is secured by NCPA, and Western has established a split savings rate, Western shall be entitled to the amounts due Western for the sale hereunder of surplus energy at the split savings rate, with interest as appropriate. If these conditions do not occur, Articles 11 and 12 will apply and the funds in escrow will be released to NCPA as appropriate."

3. Article 8 shall be amended as follows:

"Western shall submit bills to NCPA for energy sold hereunder in accordance with the provisions of Article H of the General Power Contract Provisions. Notwithstanding Article I of the General Power Contract Provisions, Western may terminate the sales of energy made hereunder upon any default by NCPA".

4. Article 11 shall be deleted and replaced with the following language:

"If it is held in a final non-reversible decision by a court or agency of competent jurisdiction that either Western could not legally sell NCPA such import energy under this agreement, that Western did not have available such import energy to sell to NCPA under this agreement or that NCPA could not beneficially purchase such energy, then NCPA shall release Western from any and all obligations under this agreement and any and all loss or damage occasioned by the failure of Western to sell or deliver such import energy to NCPA."

5. Article 13 shall be added as follows:

"This agreement shall be executed in a number of counterparts and shall be deemed to constitute a single document with the same force and effect as if all the parties hereto having signed a counterpart had signed all

other counterparts. Each party shall sign and deliver the duplicate original of the counterpart to Western and a composite, conformed copy will be delivered to each party".

6. The execution of this amendatory agreement by the NCPA member cities shall constitute execution of the May 28, 1982 letter agreement.

If the above terms and conditions are acceptable to you, please sign and date the original counterparts and return them to me.

Sincerely,

David G. Coleman

David G. Coleman
Area Manager

CITY OF ALAMEDA

By:

_____
Title

_____
Date

CITY OF LODI

By:

_____
Title

_____
Date

CITY OF LOMPOC

By:

_____
Title

_____
Date

CITY OF SANTA CLARA

By:

_____
Title

_____
Date

CITY OF UKIAH

By:

_____
Title

_____
Date

CITY OF HEALDSBURG

By:

_____
Title

_____
Date

NCPA

By: Robert A. Glenn

General Manager
Title

11/3/82
Date

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company, et al.	)	Docket No. E-7777(II) and Docket No. E-7796

SECOND POST-HEARING BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY

ROBERT OHLBACH
HOWARD V. GOLUB
J. MICHAEL REIDENBACH
PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
San Francisco, California 94106

MORRIS M. DOYLE
TERRY J. HOULIHAN
CHARLES A. FERGUSON
GREGORY P. LANDIS
JAMES B. LEWIS
ERIC E. FREEDMAN
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

April 12, 1982

surplus energy or exchange energy from sources located outside the Pacific NW. The record shows that pursuant to Contract 2948A CVP has imported surplus energy from as far away as the Colorado River Storage Project. (Ex. 4504.) No unequivocable public necessity was shown as to why this case-by-case approach should be jettisoned or that it was contrary to the public interest.

Second, the NW was the only location considered by the government as a likely source of surplus energy when it negotiated the contract. (Ex. 4116 (Udall-Gerdes letter) at 1-2.) That fact can't be changed.

With respect to Staff's attempt to expand Article 19(f) so that PGandE must provide banking service for any thermal power produced at federal facilities which CVP may import, we note the Bureau of Reclamation is not authorized to own anything but hydroelectric plants. Today there is only one thermal plant in the western United States (Central Arizona Project) in which the government has an interest. (Hood, CH-36,386/3 to 36,388/13.) It took a special act of Congress to authorize that. 43 U.S.C. §1523(b) (1968). No evidence was introduced to the effect that CVP has ever been prevented from importing firm power from the Central Arizona Project, much less that there is an unequivocal public necessity for PGandE to bank such power. The revision proposed by Staff would extend PGandE's obligation well beyond anything that is reasonable. It would require PGandE's customers to accept, pay for and bank any firm power imported by CVP. PGandE cannot agree to commit its customers to an arrangement with such little potential for controlling costs and there was no reason shown as to why it should.

ii. Cities' arguments about Articles 19(d)-(f) are unfounded.

Cities arguments concerning Articles 19(d)-(f) are somewhat different from Staff's. They argue that Articles 19(d)-(f) require CVP to turn over to PGandE any and all power CVP imports after serving its project and customer loads: ". . . CVP may only serve its pumping load and a narrowly defined group of preference customers. Everything else which CVP may acquire by way of resources is effectively turned over to PGandE." First NCPA Brief at 114-15. Cities argue that accordingly there is no incentive for CVP to import any more power than is necessary to serve its pumps and customers. (Id.) There are several things wrong with this argument. First, Articles 19(d)-(f) do not say what Cities claim they do. They merely obligate PGandE to bank power which can be used beneficially in its service area. That fact doesn't preclude CVP from importing power and selling it to someone other than PGandE. In fact, Cities' own witness Whitfield Russell, felt that Contract 2948A helped rather than hindered CVP to engage in sophisticated import-export transactions with entities outside the PGandE service area. (Russell, CH-18,435/8-11.) Second, the CVP

has no authority to import power for sale to others except as provided by Congress when it approved of the Intertie Program. The fact that the Contract does not help CVP do what it cannot legally do anyway, is no basis upon which to conclude that the Contract is unreasonable.

c. Article 19(g) provides a means to obtain power elsewhere and a reasonable means for PGandE to protect its electric system.

This contract provision serves dual functions. As discussed in PGandE's prior brief at pages 121-23, it is a reasonable method for addressing PGandE's valid concern that its system reliability both technical and financial may be adversely affected if CVP establishes a new source of power not otherwise contemplated by the parties when the Contract was executed. (Id.) In this regard, it operates like provisions included in PGandE's contracts with entities other than CVP, such as paragraph 3.02 of the California Power Pool Agreement (see pages 237-40, infra) and accordingly it cannot be said that its presence in Contract 2948A is evidence of discriminatory behavior toward CVP.

The second of its dual functions is to cover transactions not specified in other subparts of Article 19. The prior six subdivisions of Article 19 concern sources of power on which the parties expected CVP to rely at the time the Contract was executed. Because the United States wanted some indication that the Contract did not preclude CVP from importing power from sources not discussed specifically in paragraphs (a)-(f), the parties added Article 19(g). (Ex. 4116 (Udall-Gerdes letter) at 1.) The government has used this paragraph to its advantage, for example, to import surplus energy from the Colorado River Storage Project through the southern portion of PGandE's transmission system. (Ex. 4504.)[108]

Staff acknowledges that PGandE's concern for the integrity of its system is valid, but suggests that the means selected to accomplish the end was not the best. In Staff's view Article 19(g) should have contained detailed technical criteria in order to eliminate any possibility no matter how remote that PGandE would object to an acquisition of power by CVP for any reason other than a legitimate reason. (First Staff Brief at 137-38.) Unable to identify any technical criteria, much less a comprehensive list of criteria, that would do the job, and unwilling to admit the impossiblity of such an endeavor, Staff nevertheless requests that PGandE be ordered to do what no one else has been able to do. (First Staff Brief at 225.) Staff's argument and proposal were adequately discussed in PGandE's prior brief and that discussion will not be repeated here.

---

108 Not ruled on as of this date.

VERIFICATION

STATE OF CALIFORNIA)
)
CITY AND COUNTY OF SAN FRANCISCO)

TERRY J. HOULIHAN, being sworn, says: That he is an attorney for Pacific Gas and Electric Company, a corporation; that he has read the foregoing document and knows its contents and that the same is true to the best of his knowledge, information and belief.

Terry J. Houlihan

Terry J. Houlihan

Subscribed and sworn to before me this 11th day of April, 1982.

Helen Railsback

Notary Public
State of California

OFFICIAL SEAL
HELEN RAILSBACK
NOTARY PUBLIC — CALIFORNIA
San Francisco County
My Commission Expires Jan 21, 1984

CERTIFICATE OF SERVICE

I hereby certify that I will serve on April 12, 1982 the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Section 1.17 of the Commission's Rules of Practice and Procedure.

Executed at San Francisco, California, this 11th day of April, 1982.

Terry J. Houlihan

Terry J. Houlihan

MOODY, *Commissioner, dissenting:*

I would afford Panhandle an opportunity for hearing. I am so moved by considerations as expressed in my separate statement issued with respect to a petition filed by Phillips Petroleum Company in this same docket. I append a copy of such separate statement so this record will be complete.*

*[Editor's note: Statement reported with order issued March 18, 1974 in *Area Rate Proceeding, et al. (Hugoton-Anadarko Area)*, Docket No. AR64-1, *et al.*, 51 FPC 1038 at 1041].

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., William L. Springer and Don S. Smith.

CITY OF CLEVELAND, OHIO v. CLEVELAND ELECTRIC ILLUMINATING COMPANY, DOCKET NOS. E-7631 AND E-7633; CITY OF CLEVELAND, OHIO, DOCKET NO. E-7713

ORDER DIRECTING COMPLIANCE WITH PREVIOUS ORDERS AND DENYING MOTION

(Issued April 8, 1974)*

This matter comes before the Commission as part of the continuing controversy between the Cleveland Electric Illuminating Company (CEI) and the City of Cleveland, Ohio (City). For a prolonged period of time a critical energy situation has existed with respect to that portion of the City served by its Municipal Electric Light Plant (MELP). This is due to the fact that MELP is an isolated, poorly designed and relatively unreliable system, with a total installed capacity of 206 mw consisting of generating units in a "sad state of repair"[1] and a history of inefficient operations.[2] Consequently, on March 8, 1972, we ordered CEI to continue serving approximately 30 mw of MELP's load through five existing load transfer points and in addition ordered the parties to establish a 69 kv temporary emergency interconnection. Subsequently, on January 11, 1973, in Opinion No. 644 and order, 49 FPC 118, we ordered the establishment of a permanent synchronous 138 kv interconnection.

In ordering a permanent interconnection pursuant to Section 202(b) of the Federal Power Act, 16 U.S.C. §824a(b), the Commission cannot unduly burden the supplying utility. Under Section 202(c), 16 U.S.C. §824a(c), the terms of an emergency interconnection must be just and reasonable. With these limitations in mind and well aware of the City's record of late payment of its debts to CEI, the Commission stated in Ordering Paragraph (D) of Opinion No. 644:

> (D) Bills to the City for the continuation of the load transfer service, the 69 KV Emergency interconnection and the 138 KV permanent interconnection shall be paid within 45 days from receipt of the bill. If not paid within 45 days, 5 percent is to be added to the bill, and if not paid within a total of 60 days from the receipt of the bill then 1 percent per month, or portion thereof, will be added to the bill thereafter until paid. (*supra* at 125).

The imposition of the 5 percent charge after 45 days was intended to induce prompt payment by the City. The additional 1 percent added to bills that are not paid within 60 days is intended to compensate CEI for the cost of providing

*Rehearing denied June 3, 1974, 51 FPC 1799.

[1] Initial Brief of City of Cleveland, Docket Nos. E-7631, E-7633 and E-7713.

[2] Pages 22-25, prehearing conference record, Docket Nos. E-7631 and E-7633, February 10, 1972.

APPENDIX B

working capital where there is substantial lag time between the incurrence of the cost by CEI and payment by the City.

Because of the importance of assuring prompt payment of the City's debts to CEI, the operation of Opinion No. 644 was conditioned on the City's agreement to all terms and conditions of Opinion No. 644, including the payment provisions of Ordering Paragraph (D), quoted above. This condition to implementation of Opinion No. 644 is clearly stated in Ordering Paragraph (A) Opinion No. 644-A, dated March 9, 1973, 49 FPC 631:

> Unless Cleveland's agreement to all terms and conditions of our January 11, 1973, order is received within 15 days from the date of issuance hereof, our orders of March 8, 1972, and January 11, 1973, requiring temporary and permanent interconnections become inoperative, and CEI's application to terminate the load transfer service is granted.

Accordingly, on March 16, 1973, the City of Cleveland, by its attorney, complied with the above quoted provision and agreed in writing to all terms and conditions of Opinion No. 644.

The City has failed to comply with Opinion No. 644 in several respects. First, the City has not paid its bills to CEI as provided in Opinion No. 644, in spite of its written promise to abide by the terms of that order. This history of nonpayment precipitated CEI's motion (dated July 13, 1973) for enforcement of Ordering Paragraph (B) of Opinion No. 644. On August 2, 1973, 50 FPC 348, the Commission responded to CEI's motion by ordering the City to answer and show cause why the Commission should not, pursuant to Section 309 of the Federal Power Act, 16 U.S.C. 825(h), set aside those portions of Opinion No. 644 "which heretofore required the Cleveland Electric Illuminating Company to interconnect its facilities with those of the City of Cleveland and supply electric energy by means thereof." The City answered our Order to Show Cause on August 16, 1973, stating that it had delivered a check in the amount of $707,897.88 to CEI on August 13, 1973. Initially, CEI refused to accept the tendered payment; however, it was retendered and accepted. Accordingly, for a short time it appeared that the City would pay that portion of its debt owed to CEI which was not in controversy.

However, on January 30, 1974, CEI filed its "Motion for Determination of Amounts Due and Owing". CEI alleges that the City has made no payments since August 17, 1973. CEI requests that the Commission determine what amounts are due for services rendered during the periods February 15, 1970, through May 30, 1972 and May 30, 1972, through December 28, 1973. Attached to CEI's motion is an appendix setting out those amounts billed and those amounts paid from March 9, 1970 through January 3, 1974. The appendix indicates that no payments have been made by the City to CEI since August 17, 1973. On February 12, 1974, the City answered CEI's motion and took the position that the issues raised are now in the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit.

Aside from failing to pay its bills in accordance with the terms of our previous orders, the City has also failed to comply with those orders in other respects. The Presiding Administrative Law Judge's Initial Decision in these proceedings, July 12, 1972, was adopted by the Commission as modified in Opinion No. 644. Subparagraph (2) of Ordering Paragraph (A) of the Initial Decision orders the City to maintain a minimum operating reserve of 15% and to keep its system in good operating condition. It appears that the City has failed to maintain the required minimum operating reserve and has failed to maintain its system in good operating condition. Subparagraph (5) of Ordering Paragraph (A) orders the City to make maximum use of its own generating facilities before

requesting emergency service or the delivery of power and energy under the existing load transfer service. City has not made maximum use of its generating facilities despite the fact that it has requested and received both emergency energy and load transfer service from CEI. In addition, Subparagraph (6) orders the City to take immediate steps to relieve the conditions that made the emergency interconnection necessary and the City was also ordered to make reports with respect thereto. However, the City is not taking the steps necessary to alleviate the unreliable and inefficient nature of its electrical system, and has failed to make the required reports.

Finally, and of particular importance is the fact that Ordering Paragraph (B) of our March 8, 1972 order, 47 FPC 747, clearly states that all costs associated with the 69 kv emergency interconnection, including those incurred by CEI, will be paid by the City. It appears that the City is presently withholding payment of $62,000 owed to CEI for costs that were incurred by CEI in order to effect that interconnection. Apparently as a consequence, CEI has still not completed its work on the emergency interconnection that we ordered over two years ago.

CEI's January 30, 1974 motion is inappropriate in that nowhere has it been suggested that the terms of Opinion No. 644 were unclear or that the parties were unable to determine what rates and charges had been set down by the Commission in that order. On the contrary, the order is clear on its face. Furthermore, Opinion No. 644 has not been stayed by the United States Court of Appeals and accordingly, the order has been operative since it was issued and remains operative at this time. As stated in *Jupiter Corporation* v. *Federal Power Commission*, 424 F. 2d 783, 791 (CADC–1969):

> In the absence of a stay, the Commission's orders were "entitled to have administrative operation and effect during the disposition of these proceedings." *Dyer* v. *SEC*, 298 F. 2d 242, 244 (8th Cir. 1961). We think this includes compliance by parties subject to them.

The rates and charges for CEI's service to the City of Cleveland, as well as the other provisions for the interconnection and load transfer service that we have ordered, are clearly set forth in Opinion No. 644 and the parties subject to that order are legally bound to comply in the absence of a stay.

Furthermore, assuming that the City of Cleveland henceforth pays its bills to CEI in accordance with the terms of our previous orders, the City will not have jeopardized its position. To the extent, if any, that those orders are modified by the Court of Appeals, the City of Cleveland has more than adequate protection if the Court finds that the appropriate rates and charges are less than those which the City has previously paid. Although the Commission has no authority to make reparation orders, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944), it is not so restricted where its order, which never became final, has been overturned by a reviewing court. The underlying orders in this proceeding were subject to judicial review, and judicial review at times results in a return of benefits received under the upset administrative order. See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 200–201 (1947). An agency can undo what is wrongfully done by virtue of its order, *United Gas Pipe Line Company* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965).

The Commission finds:

(1) It is appropriate and in the public interest to order both the City of Cleveland and the Cleveland Electric Illuminating Company to henceforth comply in all respects with our previous orders in these proceedings.

(2) The Commission has thoroughly reviewed the record and history of these proceedings and finds that it is inequitable to require the Cleveland Electric

Illuminating Company to continue to provide electric service to the City of Cleveland while the City continuously fails to make payment for services previously rendered.

The Commission orders:

(A) The Cleveland Electric Illuminating Company is directed to complete its work as soon as possible on the 69 kv emergency interconnection as required by our previous order, and CEI will notify the Commission when that work has been completed.

(B) The City of Cleveland will henceforth pay CEI all sums past due to which no controversy attaches as well as accrued interest charges. With respect to that portion of any bill presently due and owing and to which controversy does attach, the City is ordered to place that sum in a special escrow account. With respect to bills for future services the City is ordered to pay CEI those sums to which no controversy attaches, as well as any interest charges that accrue. With respect to that portion of any future bill to which a controversy does attach, the City is ordered to place that sum in the same escrow account. The amounts deposited in escrow will include all interest charges accrued up to and including the date on which the disputed amounts are so placed. The sums placed in escrow will remain there pending judicial review in these proceedings, and the final escrow account balance, as well as all interest accrued while those sums were in escrow, will be distributed in accordance with the findings and order of the reviewing court. The Commission retains authority to approve the City's selection for the placement of the special escrow account.

(C) Within 15 days of this date, both the City of Cleveland and the Cleveland Electric Illuminating Company will each communicate in writing to the Commission its agreement to abide by the provisions of this order, as well as the terms and conditions of our previous orders in these proceedings. At the same time, the City will indicate the location and number of the escrow account which it is hereby ordered to establish.

(D) After the Cleveland Electric Illuminating Company has complied with this order in all respects, and in the event that 30 days from this date the City of Cleveland has failed to pay its bills to the Cleveland Electric Illuminating Company in accordance with the terms of this order, our previous orders in these proceedings requiring that the Cleveland Electric Illuminating Company continue to provide the City of Cleveland (Municipal Electric Light Plant) with load transfer service as well as temporary and permanent interconnections will be automatically vacated.

(E) The Cleveland Electric Illuminating Company's "Motion for Determination of Amounts Due and Owing", filed January 30, 1974, is denied.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer and Don S. Smith.

COLUMBIA GULF TRANSMISSION COMPANY, COLUMBIA GAS TRANSMISSION CORPORATION AND TEXAS GAS TRANSMISSION CORPORATION, DOCKET NO. CP74-80

FINDINGS AND ORDER AFTER STATUTORY HEARING ISSUING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(Issued April 8, 1974)

On September 24, 1973, Columbia Gulf Transmission Company (Columbia Gulf), Columbia Gas Transmission Corporation (Columbia Gas), and Texas Gas

y".[1] Where applicable, the Com-
rimarily, to aid it in the surveil-
panies for the purpose of rate-
on of the investing public. Under
ind ratemaking treatment must
this is one of them.
thout evidentiary support and is
issued its accounting regulations
ts authority under Sections 8, 9,
urers, as well as in this proceed-
dies notice and an opportunity to
y has presented any allegation
ssues which would require cross-
NGAA's application fails to raise
in o[illegible] financial impact of the
we h[illegible]tated above, is properly
usis. Indeed, although INGAA re-
submission of testimony, it fails
ng of substance which such testi-
o provide any such "evidentiary"
uld merely delay the determina-
plementation of the order which
of fairness to the consumer, the

ntrary to long established Com-
s announced by the Accounting
Accounting Standards Board
Public Accountants for commer-
ved in Opinion No. 583, in view
ly properly differ from commer-
nizes. The Commission's author-
m the Federal Power Act (Sec-
n 8), not from such commercial
nen[illegible] such bodies are consid-
ine[illegible]ounting principles have
s. With respect to the change in
d losses, it is sufficient to state
uestion in Opinion No. 583, and
e ratemaking policy in this rule-

), dealing with Equity Method of
g with Interperiod Tax Allocation,
-A, Docket No. R-403 (47 FPC 39).
: Costs of Pipeline Companies.
) notice it was considering adoption
issued October 31, 1969, published
17743), following which 7 pipeline
and INGAA filed *amicus* briefs in
odified its accounting order therein
this proceeding, we issued a Notice
160691, amended October 13, 1971
espondents, of whom 62 addressed
to Order No. 505).

The Commission finds:

Interstate Natural Gas Association of America and Texas Eastern Transmission Corporation's applications for rehearing filed March 13, 1974, present no new facts or points of law which were not considered in Order No. 505, or which, having now been considered, warrant any change or modification of that order, and their applications, therefore, should be denied.

The Commission orders:

The applications filed on March 13, 1974, by INGAA and Texas Eastern for rehearing of Order No. 505, are denied.

Commissioner Brooke, *dissenting.*

Commissioner Moody, *dissenting.*

BROOKE, *Commissioner, dissenting:*

Further review of the accounting treatment proposed in Docket No. R-424, based on responses to Order No. 505, have persuaded me that the regulation should not be adopted. I concur in Commissioner Moody's *dissenting* comments to the instant order.

MOODY, *Commissioner, dissenting:*

Order No. 505 does not purport to reach its result on the basis of evidence adduced through the rulemaking process; rather it attempts to translate the *ad hoc* rate determinations of Opinion No. 583, 44 FPC 314, issued August 17, 1970, in Docket No. RP69-16, *The Manufactured Light and Heat Co.*, into an accounting rule of general applicability. The motions for rehearing correctly identify the legal error implicit in such proceeding.

I *dissented* to Order No. 505. I *dissent* here again, still persuaded that we act without evidentiary support, without regard to generally accepted accounting principles and without regard to the financial impact of our accounting change. The majority must surely recognize that the result of Order No. 505 is to reduce reported per share earnings; at a time when the financing requirements of the utility industry are of such magnitude as to cause serious concern, the Commission does a grave disservice to the public interest by making financing more difficult.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer and Don S. Smith.

CITY OF CLEVELAND, OHIO v. CLEVELAND ELECTRIC ILLUMINATING COMPANY, DOCKET NOS. E-7631 AND E-7633; CITY OF CLEVELAND, OHIO, DOCKET NO. E-7713

ORDER DENYING APPLICATION FOR REHEARING

(Issued June 3, 1974)

On May 8, 1974 the City of Cleveland, Ohio (Cleveland) filed an Application for Rehearing of the Commission's April 8, 1974 order in these proceedings, 51 FPC 1250. That order, *inter alia*, directed the City of Cleveland to pay the uncontroverted portion of its present indebtedness to the Cleveland Electric Illuminating Company (CEI), as well as accrued interest. With respect to the con-

APPENDIX C

troverted portions of any present or future bills, Cleveland was ordered to place those disputed amounts in an escrow account established for that purpose.[1]

Cleveland's Application for Rehearing takes the form of a terse statement to the effect that the Commission's April 8 order was an unlawful modification of Opinion Nos. 644 and 644–A and orders[2] which are now pending judicial review and within the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit.[3] It is noteworthy that Cleveland's Application makes no attempt to document or support its position. Most significant is the fact that although Cleveland bases its Application on the assertion that the April 8 order intruded on the Court's exclusive jurisdiction, it is quite clear that neither the April 8 order nor Cleveland's compliance therewith have in any way affected the subject matter before the Court on review of Opinion Nos. 644 and 644–A.

The facts of this case are simple and clear. Pursuant to Commission order, CEI has for some time been providing substantial service to the City of Cleveland. The terms and conditions of that service are set out in several previous Commission orders, particularly Opinion Nos. 644 and 644–A. It is undeniable that the City of Cleveland had not been paying its bills to CEI even though the City continued to demand and receive substantial service from CEI. Prior to the Commission's April 8 order, Cleveland was in arrears to CEI in excess of 1.8 million dollars. The Commission's April 8 order does nothing more than attempt to effectuate the payment provisions of its previous orders in these proceedings. Those orders have never been stayed by the Commission or the courts and they are entitled to, and at all times have been entitled to, full effect pending appeal. *The Jupiter Corp. v. F.P.C.*, 424 F. 2d 783 (CADC–1969).

The Commission finds:

The City of Cleveland's May 8 Application for Rehearing fails to specify any errors in the Commission's April 8 order, with respect to which the rehearing is sought.

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[1] It should be noted that Cleveland has apparently complied with the order for which it now seeks rehearing. Accordingly, Cleveland has advised the Commission that: (a) on April 10, 1974 the City delivered to CEI a check in the amount of $369,186.14 representing the undisputed amount due CEI; (b) on May 7, 1974 the City paid CEI the sum of $124,083.83 representing interest due on the debt referred to in (a), above; (c) on May 7 Cleveland also paid CEI the sum of $55,475.70 representing the March, 1974 bill; (d) finally, again on May 7 Cleveland placed in escrow at the Society National Bank, Cleveland, Ohio, the sum of $719,762.63 representing the disputed amount between Cleveland and CEI.

[2] Dated January 11, 1973 and March 9, 1973, respectively, 49 FPC 118, 631.

[3] On April 19, 1974 Cleveland filed a motion with the United States Court of Appeals for the District of Columbia Circuit wherein Cleveland asked the Court to (1) direct the Commission to vacate its April 8 order and (2) to stay that order pending a ruling by the Court on the motion to vacate. Cleveland made the same argument to the Court that it makes here on application for rehearing, *i.e.*, that the April 8 order is an unlawful intrusion upon the Courts exclusive jurisdiction to review the previous Commission orders now before it on appeal, citing Section 313(b) of the Federal Power Act, 16 USC 825*l*.

Responding to Cleveland's motion, the Commission argued that since Cleveland had failed to apply for rehearing of the April 8 order, the Court was without jurisdiction to review that order. The Commission's response also clearly indicated that the April 8 order did not in any way modify the Commission's previous orders in these proceedings; on the contrary, the April 8 order was intended to effectuate those previous Commission orders, particularly the payment provisions of Opinion No. 644 and order, January 11, 1973.

As of this date, the Court has not acted on Cleveland's April 19 motion.

The Commission orders:

The City of Cleveland's May 8 Application for Rehearing of the Commission's April 8 order in these proceedings is denied.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer and Don S. Smith.

FLORIDA GAS TRANSMISSION COMPANY, DOCKET NO. CP74-190

FINDINGS AND ORDER AFTER STATUTORY HEARING ISSUING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(Issued June 3, 1974)

On January 18, 1974, Florida Gas Transmission Company (Applicant), filed in Docket No. CP74-190 an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of facilities necessary to establish a new delivery point for the delivery of natural gas to Florida Gas Company (Orlando Division) (FGC) for resale and distribution by FGC in Orange County, Florida, all as more fully set forth in the application in this proceeding.

Applicant proposes to construct and operate a line tap with a metering and regulating station and appurtenances at a point on its existing 6-inch Reedy Creek Lateral pipeline in Orange County. Applicant proposes to deliver up to 2,500,000,000 Btu of natural gas per day to FGC on a firm basis. FGC will use this gas to improve service to its residential and small commercial customers in its Orlando, Florida, distribution system. Pursuant to a letter agreement between Applicant and FGC dated September 28, 1973, providing for the establishment of said delivery point, it is expressly provided that the instant facilities will not be used to provide gas for additional industrial service. All gas to be sold and delivered will come from quantities already available under Applicant's existing service agreements with FGC and that no additional volumes will be sold or delivered.

The estimated total overall capital cost of the proposed installation is $25,000.00 which cost will be borne by FGC.

Due to the minor nature of the proposed facilities the Commission finds that this order does not constitute a major Federal action having any significant effect on the environment.

After due notice by publication in the Federal Register on February 6, 1974 (39 F.R. 4687), no petition to intervene, notice of intervention, or protest to the granting of the application has been filed.

At a hearing held on May 29, 1974, the Commission on its own motion received and made a part of the record in this proceeding, all evidence, including the application and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record.

The Commission finds:

(1) Applicant, Florida Gas Transmission Company, a Delaware corporation having its principal place of business in Winter Park, Florida, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of December 28, 1956, in Docket Nos. G-9202 and G-9960 (16 FPC 1118).

[¶ 61,163]

City of Cleveland, Ohio v. Cleveland Electric Illuminating Company, Docket Nos. E-7631 and E-7633; City of Cleveland, Ohio, Docket No. E-7713

Opinion No. 644-C; Opinion and Order Deciding Remanded Issues and Denying Rehearing

(Issued August 15, 1980)

Syllabus

Commission *disallows* assessment of penalty charges; *upholds* inclusion of costs attributable to excise tax in established rates; *finds* ratchet clause and energy clause in rate schedule to be legal and binding contractual agreement governing load transfer service.

[1] ELECTRIC-RATEMAKING & CORPORATE REGULATION

Rate Design

Commission *holds* that customer City has the legal right to specify which accounts its payments should be applied and that utility has corresponding legal obligation to follow City's instructions when it accepts City s payments. Thus, utility may not assess late payment charges against City by applying City's prompt payment and instructions regarding payments to other debts past due.

[2] ELECTRIC-RATEMAKING & CORPORATE REGULATION

Rate Design

The overall rate found just and reasonable in Opinion No. 644 included an approximation of cost intended to compensate utility for paying state excise tax obligation. That element of the rate was not intended to precisely reflect the actual amount paid. Thus no adjustment is required in the event that the actual tax is later found not to comport precisely with the estimate.

[3] ELECTRIC-RATEMAKING & CORPORATE REGULATION

Jurisdiction

The question of the validity of agreement between purchasing City and utility in light of the language of the City Charter is a matter of state law and not a question over which the Commission possesses jurisdiction or expertise.

[4] ELECTRIC-RATEMAKING & CORPORATE REGULATION

Contract Applicability

Rate Design

Commission *finds* ratchet clause consistent with agreement outlined in City Ordinance authorizing City's Director of Public Utilities to contract with utility. Clause does not change amount of demand but merely states that if City should

APPENDIX D

demand more power than agreed to, demand charge will be increased to that amount and not reduced should subsequent demand be produced. City could not reasonably have contemplated when enacting Ordinance that utility would be without legal recourse to insure recovery to its own costs of maintaining a reserve sufficient to meet City's demand.

[5] ELECTRIC-RATEMAKING & CORPORATE REGULATION

Contract Applicability

Rate Design

Commission *finds* energy charge in Rate Schedule not to be in excess or in contravention of the energy charge delineated in the Ordinance. Because the Ordinance is ambiguous as to the method of calculating energy charge, it would not have been reasonable for the parties to be unaware that clarification would be in order in the written agreement. Ambiguity in the Ordinance is construed adversely to City as City is the maker of the Ordinance. Commission *states* it could not equitably reform rate filing absent a showing of mutual mistake.

Reuben Goldberg, David C. Hjelmfelt, Malcom C. Douglas, Robert D. Hart, Thomas E. Wagner and June W. Wiener for the City of Cleveland, Ohio

Harry A. Poth, Jr., Robert T. Hall, III, Richard M. Merriman, Floyd L. Norton, IV, Donald H. Hauser and *James K. Mitchell* for Cleveland Electric Illuminating Company

Bernard A. Cromes for the Staff of the Federal Energy Regulatory Commission

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon and George R. Hall.

[Opinion No. 644-C]

The United States District Court for the District of Columbia rendered a judgment on February 7, 1980 in *F.E.R.C. v. City of Cleveland, Ohio, et al.*, Civil Action No. 75-2081 in which it set forth five issues to be decided by this Commission concerning the Federal Power Commission's[1] Opinion No. 644, 49 FPC 118, issued January 11, 1973; the Order of April 4, 1974 directing compliance with Opinion No. 644; Opinion No. 644-A, issued March 9, 1973, 49 FPC 631; and Opinion No. 644-B, issued May 9, 1977, 58 FPC 1638.[2] One of five issues relates to the payment of interest on late payment charges and has been resolved by the Commission by orders issued on March 27, 1980, 10 FERC ¶ 61,281, and May 27, 1980, 11 FERC ¶ 61,202. Another of the five issues relates to the proper billing for 69 kv service and is presently undergoing a hearing before a presiding administrative law judge because factual disputes need to be resolved. The other three issues are now ripe for Commission review and will be decided in this Opinion and Order. The issues as stated in the District Court's judgment are:

(1) Whether CEI properly assessed the five percent penalty charge in view of the fact that CEI disregarded the instructions of the City to apply payments to specified billings;

(2) Was CEI under Opinion No. 644 and accompanying order entitled to recover from City the Ohio Excise Tax at 4 percent or more or only at the rate actually paid by CEI;

(3) What are the rates and charges applicable to the 11 kv load transfer service for the period from February 1970 through May 17, 1972?

Penalty Charge

The Commission provided in Opinion No. 644, *supra*, that bills rendered to CEI by the City shall be increased by five percent if not paid within 45 days, and an additional one percent per month after 60 days until paid. The Commission stated that imposition of the late payment charge "should act as an inducement for prompt payment by City." [3] On ten separate occasions after issuance of Opinion No. 644, the City made payments to CEI within 45 days after bills were rendered. The City informed CEI that the payment was being made in response to the City's receipt of those bills and instructed CEI to apply the payments to those ten bills. CEI accepted the City's payment. However, CEI did not comply with the City's instruction to apply the payments to the bills the City expressly stated the payments should be credited toward. Instead, CEI applied the payment to other debts past due prior to CEI's rendering of the ten bills the City was attempting to pay. CEI assessed the five percent penalty charge against the City's account for failure to make payment on the ten above-mentioned bills within 45 days.

[1] The City has the legal right to specify to which accounts its payments should be applied. See *Wolf v. Aero Factors Corp.*, 126 F. Supp. 872 (S.D.N.Y. 1954), *Merrimack Mfg. Co. v. Bergman*, 154 F. Supp. 688 (S.D.N.Y 1957), *Holt v. Western Farm Service, Inc.* 517 P. 2d 1272 (1974), and *United States v. Beck*, 151 F. 2d 964 (1945). CEI has the legal obligation to follow the City's instruction when it accepts the City's payments. See *American Oil Co. v. Brown Paving Co.*, 298 F. Supp. 528 (D C.S.C. 1969), *Industrial Development Corp. v. U.S.*, 138 F. Supp. 63 (D.C. Ill. 1955). Opinion No. 644 states that late payment charges shall not be assessed against the City if it pays its bills promptly. The late payment provision set forth in Opinion No. 644 has apparently succeeded in inducing the City to pay promptly the ten bills rendered by CEI that have been referred to herein and we will not remove the inducement effect of that provision by permitting CEI to assess late payment charges despite the fact that there has been prompt payment.

Excise Tax

In Opinion No. 644 *supra*, the Commission provided for payment by the City to CEI of the Ohio excise tax imposed on revenues derived by CEI from wholesale business in the state. The Commission explained that this provision is proper because "a regulated public utility is entitled to recover its reasonably and prudently incurred costs . . ." [4] The Commission qualified this provision, however, by indicating its intent to "require CEI to reduce its rates and refund any excessive revenues collected under rates herein ordered in the event that it is subsequently determined that CEI is not legally required to pay this tax." [5] Ohio law requires that an excise tax of 4 percent of gross receipts be paid but that "a deduction of twenty-five thousand dollars shall be taken from the gross receipts before computing the excise tax." [6] Consequently, the actual excise tax that has been assessed against CEI has been slightly below 4 percent of gross receipts.[7] Opinion No. 644 approved CEI's proposed rate of 15.2 mills per kwh for continued 11 kv load transfer service which included, according to the staff's

estimate, 0.7 mills per kwh for the Ohio excise tax. According to the City, the 0.7 mills per kwh was derived by the application of the nominal statutory rate of 4 percent to 16.8 mills per kwh which was CEI's proposed rate exclusive of the Ohio excise tax. The City further charges that billings by CEI have included the Ohio excise tax for 11 kv load transfer service at a rate of 4.6 percent and for 69 kv service at a tax rate of 4 percent. None of these allegations are directly denied by CEI, which states it has charged only the rates established in Opinion No. 644, and that no specific percentage was used as a tax component in arriving at established rates.

Opinion No. 644 includes in the rates a cost that, according to the Initial Decision, would properly compensate CEI if it was obligated to pay the Ohio excise tax. No objection was raised during the hearing or before the Commission prior to issuance of Opinion No. 644 that the cost was improper. The only objection raised by the City was that the excise tax was not legally owed by CEI. Opinion No. 644 states that the above-mentioned cost is to be included in the rates subject to refund if no excise tax is determined by the Ohio courts to be owed by CEI. According to a decision rendered by the Board of Tax Appeals, Department of Taxation of the State of Ohio on July 8, 1974 in case number C-95, CEI is subject to the Ohio excise tax provisions.

[2] The overall rate approved in Opinion No. 644 was determined to be just and reasonable. One of the elements of that rate is an approximate cost that is intended to compensate CEI for paying its Ohio excise tax obligation. That element of the rate was not intended to precisely reflect the actual excise tax paid to the last dollar. It, as well as the other elements, were approximations. No adjustment to these assumed costs was required by the Opinion in the event that the actual tax was later found not to comport precisely with the estimate.

Demand Ratchet and Energy Charge

Opinion No. 644, *supra*, upheld *inter alia* the terms of a contract governing electric load transfer service entered into between the City and CEI and covering the period between February 4, 1970 and May 17, 1972. The contract was filed with the Commission on April 24, 1970 and was designated as CEI Rate Schedule No. 7 on July 17, 1970.[8] The City was late in paying bills rendered pursuant to the contract in February, March, April and May of 1970 and paid nothing on any of the bills for the last six months of 1970. CEI filed suit against the City for non-payment of these bills in the Court of Common Pleas, Cuyahoga County, Ohio in February of 1971. The City made further payments in March, July, October and November of 1971. However, on March 26, 1971, the City claimed the contract was not completely representative of the understanding of the parties and all subsequent payments were made under protest. The City filed a complaint with the Commission seeking adjudication of this issue on May 13, 1971. Opinion No. 644 held that under the "filed rate doctrine" the contract was legally binding from the time it was filed with the Commission. Opinion No. 644-A, *supra*, denied rehearing of this issue.

The United States Court of Appeals for the District of Columbia Circuit on January 9, 1976 remanded for the Commission's consideration the issue of whether a demand ratchet clause included in the above-mentioned contract had been agreed to by the parties.[9] Opinion No. 644-B, *supra*, held that the ratchet clause did reflect the agreement of the parties. On July 1, 1977, the Court of Appeals held that the Commission should determine whether energy charges contained in the contract filed as Rate Schedule No. 7 also reflected the agreement of the parties.[10] That is the issue before us now and we decide that issue affirmatively. Upon review, we find the

Commission's reasoning contained in Opinion No. 644-B to be correct and that the same analysis that led to the decision in that Opinion that the ratchet clause reflected the agreement of the parties applies equally as well to the energy charge issue.

The events which led to these lengthy proceedings began in December of 1969 when the City experienced a power outage. The City-owned and operated Municipal Electric Light Power Plant was unable to meet the power demands of the City. Negotiations had already been underway between City officials and CEI for the latter to provide service to the Municipal plant. As a result of the power outage, the parties attempted to reach an agreement expeditiously.

On January 9, 1970, the City's Executive Commissioner wrote a letter to the Mayor concerning the negotiations.[11] The City official informed the Mayor that specific rates had been discussed and listed those rates. At the direction of the Mayor, the Director of Public Utilities wrote to the General Counsel of CEI on January 15, 1970 informing him that the City would like to propose an agreement, and he listed the identical terms that were incorporated in the January 9 letter.[12] The Director concluded by stating that if the terms stated in the letter reflected the conclusions reached by the two parties in their negotiations, the City would like CEI to draft an agreement for signing.

In order to permit the City to purchase service from CEI, the City Council, also on January 15, 1970, enacted Ordinance 115-70 which contained the same terms as the above-mentioned letters and authorized the Director of Public Utilities to enter into a contract which did not exceed those terms.[13] On January 9, 1970, the City revoked Ordinance 115-70 and enacted Ordinance 161-70 which was virtually identical to the prior ordinance except for its handling of the costs of establishing load transfer points.[14] Ordinance 161-70 was enacted with this new provision at the behest of CEI so as to conform to the agreement reached by the parties in their negotiations as reflected in the City's letter of January 15, 1970.

On January 20, 1970, CEI wrote back to the City confirming "the understanding reached" to provide service "as requested by the City." [15] The January 20, 1970 letter, signed by both parties and filed as Rate Schedule No. 7, contained terms not included in the January 15th letter nor in Ordinance 161-70, namely, a ratchet clause, contract demand and a first step energy charge based on lower use. The differences between the rate in Ordinance 161-70 and the rate filed with the Commission are as follows:

Ordinance 161-70	*Rate Schedule No. 7*
Energy Clause	
For the first 10 millino kwh	For the first 400 kwh per kva of
. . . $0.0085 per kwh	Demand . . . $0.0085 per kwh
For all additional kwh	For all additional kwh . . .
. . . $0.005 per kwh	. $0.005 per kwh
Demand Charge	
For each kva of Demand	For each kva of Contract Demand
per month. . . . $0.30 per kva	per month. . . . $0.30 per kva

Clause	
None	The Contract Demand shall be increased or decreased as appropriate when points of connection are added or removed. If the load supplies at any point of connection exceed the amount specified and agreed upon, the Contract Demand shall be increased thereupon by the amount of such excess. The Contract Demand shall not be changed other than through the operation of the two preceding sentences.

The issue therefore is whether the parties intended to be governed by the terms of the January 15th letter which is reflected by the Ordinance or by the terms of the rate filing reflecting the January 20th letter. The City argues that the terms of the Ordinance control because the City Charter provides that a contract such as the January 20, 1970 agreement, which exceeds the Ordinance authorization, "shall be void," and because the record shows that those who signed the January 20th agreement did not understand the importance of the changes made in the rate in which case a mutual mistake has been made and reformation is the proper legal remedy.[16]

[3] As to the first argument propounded by the City, the question of the validity of the January 20th agreement in light of the language of the City Charter is a matter of state law and is not a question over which the Commission possesses jurdisdiction or expertise. This issue has been litigated in Ohio and both the Court of Common Pleas for the County of Cuyahoga, Ohio[17] and the Court of Appeals for the Eighth Appellate District of Ohio[18] in separate opinions affirmed the validity and enforceability of the January 20th letter agreement. This finding was based on the factual determination that "the letter agreement is not in conflict with either the specified sections of the Cleveland Charter or Ordinance 161-70"[19] and that the City Charter provision which prohibits the City from obligating itself to make payments in excess of that authorized by an ordinance only applies to contracts requiring the expenditure of tax revenue, not funds derived from the Municipal Electric Light Power Plant which is where the court concluded the payments were coming from. The Supreme Court of Ohio refused to entertain an appeal of the Eighth District Court decision and the United States Supreme Court denied the City's request for a writ of certiorari.[20] The City's invocation of its charter as grounds for invalidating Rate Schedule No. 7 has therefore been considered in the proper legal channels and has been found to be unjustified.

As to the City's second argument, that Rate Schedule No. 7 is unenforceable because neither party understood it substantially altered Ordinance 161-70, CEI responds that both parties understood that the Ordinance, being enacted as it was under emergency circumstances since the City was suffering a power outage, omitted many details, such as the specification of "demand." These details were to be left to the discretion of the Director of Public Utilities according to CEI, which points out that Ordinance 161-70 authorizes the Director to "enter into an agreement" and not merely to execute one. The Director entered into the January 20, 1970 letter agreement and it was also approved by the City's Assistant Director of Law on behalf of the Director of Law. CEI maintains this clearly shows that the inclusion of all additional terms constituted a completion of the parties' agreement. The staff similarly argues that the Ordinance has not been demonstrated to be at variance with the Rate Schedule filed with the Commission. This is a question which the Court of Appeals has

remanded for our consideration because the technical language involved is related to matters within the Commission's jurisdiction and area of expertise.

[4] We find that the Ordinance is indeed silent with respect to many essential terms. An essential term not included in the Ordinance is how the City would be billed for demand. Some method had to be included in the contract and the parties agreed to the ratchet method. We find that the ratchet clause is not inconsistent with the agreement outlined in Ordinance 161-70. The ratchet clause does not change the amount of demand the City seeks to consume under the Ordinance. Rather, the ratchet clause merely states that if the City should demand more power than was agreed to, the demand charge will be increased to that amount, and not reduced if the subsequent demand is reduced. Ratchet clauses are often employed in the industry to compensate the seller for maintaining a reserve for making capacity available to the buyer. The City could not reasonably have contemplated when it enacted Ordinance 161-70 that CEI would be without legal recourse to insure recovery of its own cost of maintaining a reserve sufficient to meet the City's demand.

[5] Likewise, the energy charge in the Rate Schedule is not clearly in excess of the energy charge delineated in the Ordinance. Whether the Rate Schedule formulation results in a greater or lesser charge than that contained in Ordinance 161-70 depends upon whether or not the reference to "ten million kwh" in the Ordinance relates to the amount used at each substation. Because the Ordinance is ambiguous as to the method of calculating the energy charge it would not have been reasonable for the parties to have been unaware that clarification would be in order in the written agreement. The agreement of January 20, 1970 which was filed with the Commission utilizes an "hours use" format for the energy charge for the first 400 kwh per kva of demand rather than an initial block of 10,000,000 kwh. It permits the City to purchase energy from the cheaper $0.005 per kwh block sooner than under the Ordinance if the ambiguity in the Ordinance is interpreted as CEI suggests it should be. If the Commission were to be guided by the basic tenets of contract law, the ambiguity in the Ordinance would be construed adversely to the City since it was the maker of the Ordinance. The Commission finds that the Rate Schedule is not in contravention of the Ordinance on this issue. Furthermore, we could not equitably reform the rate filing as requested by the City, in any event, because there has been no showing that the alleged mistake was mutual and that both parties understood the Ordinance to be as the City claims it ought to have been. Therefore, based on the foregoing reasons, we hold that CEI Rate Schedule No. 7 reflects the agreement of the parties and is not inconsistent with a prior oral agreement of the parties.

The Commission orders:

(A) Within sixty days, CEI shall recompute its billings to the City by excluding the five percent penalty and one percent per month penalty to the billings specified herein.

(B) The costs attributable to the Ohio excise tax that are included in the rates established in Opinion No. 644 are upheld.

(C) The letter agreement of Janaury 20, 1970 between CEI and the City, as modified, including the ratchet clause and energy clause, is the legal and binding contractual agreement between the parties governing load transfer service from February 4, 1970, through May 17, 1972.

(D) CEI shall file a report with the Secretary reflecting its compliance with Ordering Paragraph (A) and (B) within ten days of the recomputation.

(E) Rehearing of Opinion No. 644-B is denied.

(F) The Secretary shall cause prompt publication of this Opinion and order in the Federal Register.

— Footnotes —

[1] The Federal Power Commission's jurisdiction over this proceeding was transferred to this Commission on October 1, 1977. References herein to the "Commission" relating to events occurring before that date refer to the Federal Power Commission, and those references relating to events occuring after that date refer to the Federal Energy Regulatory Commission.

[2] The case began on December 12, 1975 when the Federal Power Commission filed in District Court a complaint seeking a court order temporarily and permanently enjoining the City of Cleveland from violating the Commission's April 8, 1974, 51 FPC 1250 Order Directing Compliance With Previous Orders.

The April 8 order directed the City, *inter alia*,

1) to pay Cleveland Electric Illuminating Company (CEI) all sums past due (as well as bills for future services) to which no controversy attaches, as well as accrued interest charges, and

2) to place in a special escrow account that portion of any bill currently due and owing (as well as any future bill) to which controversy does attach, pending judicial review of the Commission proceedings.

The District Court's February 7, 1980 judgment approves a settlement agreement (opposed by CEI) which refers five issues to the Commission for resolution and sets forth terms under which the City places disputed sums in escrow pending the final outcome.

[3] 49 FPC 118, 123 (1973).

[4] *Id.* at 122.

[5] *Id* at 123.

[6] Section 5727.81, Ohio Revised Code.

[7] The Public Utilities Commission of Ohio recently calculated CEI's liability for gross receipts tax on sales to the City to be 3.7 percent. See Case Nos. 79-537-EI-AIR and 79-774-EL-CMR.

[8] See Exhibit 75.

[9] *City of Cleveland, Ohio v. Federal Power Commission*, 525 F. 2d 845 (1976). This decision affirmed Opinion Nos. 644 and 644-A on all other issues.

[10] 561 F. 2d 344 (1977). On July 8, 1977 the Commission granted the City's application for rehearing of Opinion No. 644-B solely for purposes of reconsideration. This Opinion shall dispose of the rehearing application as well as the remand of the energy charge issue.

[11] See Exhibit 2.

[12] See Exhibit 3.

[13] See Exhibit 5.

[14] See Exhibit 1.

[15] See Exhibit 51.

[16] See Exhibits 36 and 37.

[17] Case No. 35002 (1975).

[18] 363 N.E. 2d 759, 50 Ohio App. 2d 275, (1976).

[19] *Id.* at 295.

[20] 434 U.S. 856 (1977).

[¶ 61,164]

High-Cost Gas Produced From Tight Formations, Docket No. RM79-76 (Texas-1)

Notice of Proposed Rulemaking by Director, OPPR

(Issued August 15, 1980)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon and George R. Hall.

[This proposed rule was published in 45 F.R. 56072 on 8/22/80 and appears at *FERC Statues and Regulations* ¶ 32,077].

[1, 2] The denial of a motion to dismiss a complaint is an interlocutory order and, as such, is not appealable unless it has determined substantial legal rights. Goldhar v. Rosenfeld, Del.Supr., 38 Del.Ch. 233, 149 A.2d 753 (1959). The question of appealability of such an Order is primarily determined by the Opinion of the Court below. Haveg Corp. v. Guyer, Del.Supr., 211 A.2d 910 (1965). It is clear, we think, that the Opinion below did not decide the underlying issue in the case at bar. Consequently, no substantial legal rights were determined by that Opinion.

The defendants argued below that there is no compensable injury in this case. The argument is twofold: first, there are policy considerations which prohibit recovery; second, even if there is an injury, it is far outweighed by the blessings of a child.

We feel that the Court below did not decide the question whether public policy bars an action such as this. The Court did hold that there is no public policy, which rests on the desirability of procreation, which bars recovery, but it failed to consider other possible policy objections. Rather, it held that the entire question should be submitted to the jury. Coleman v. Garrison, Del.Super., 281 A.2d 616, 618 (1971).

The reasoning leads to one of two conclusions: either the Court felt that there are no public grounds which bar a recovery here, or it felt that the jury should determine whether such grounds exist. We are inclined to believe that the latter was intended, for the Opinion says that "the Court should not express a particular viewpoint as the public policy of the State." 281 A.2d at 618.

[3] The result reached, we think, was an abrogation of the function of the Judge. Whether or not there is a public policy bearing on the question is a matter of law for the decision of the Trial Judge—not the jury. The Judge may not shift this burden to the jury.

[4] This being so, the Opinion and Order upon it are in effect a nullity since no substantial legal issue has been decided and the appeal must be dismissed.

[5] This leaves, however, the question of the effect of the apparent rulings on damages made in the Opinion. Since at least some of these rulings are perhaps open to the charge that they are too speculative, we think the best interests of justice require that the case be put in a fresh posture, and that the entire Opinion be refused recognition as the law of the case.

The appeal is dismissed.

EASTERN SHORE NATURAL GAS COMPANY, a Delaware corporation, Plaintiff Below, Appellant,

v.

STAUFFER CHEMICAL COMPANY, a Delaware corporation, Defendant Below, Appellee,

and

Hoechst Polymer Corporation, a Delaware corporation, Intervenor Below, Appellee.

Supreme Court of Delaware.

Nov. 6, 1972.

Action by natural gas company based on breach of contract by buyer in reselling gas, wherein plaintiff moved for preliminary injunction. The Court of Chancery, 285 A.2d 826, denied motion and dismissed and plaintiff appealed. The Supreme Court, Herrmann, J., held that claim that it was impossible to compute continuing damage alleged to be accruing from the day to day sales and that multiplicity of suits might result indicated inadequate remedy at law and dismissal of action on ground of lack of equity jurisdiction was error. The Court also held that where it appeared that

grant of preliminary injunction would have required ultimate purchaser of gas to close its plant and lay off its 150 employees and benefits to seller from preliminary injunction seemed questionable, seller was not entitled to preliminary injunction.

Reversed as to dismissal of action and affirmed as to denial of preliminary injunction and cause remanded.

1. Administrative Law and Procedure ⇐228

Doctrine of primary administrative jurisdiction permits court to avail itself of expertise of administrative agency having special competence in matter at hand.

2. Administrative Law and Procedure ⇐228

Primary jurisdiction applies where claim is originally cognizable in courts and comes into play whenever enforcement of claim requires resolution of issues which, under regulatory scheme, have been placed within special competence of administrative body, in which case the judicial process is suspended pending referral of such issues to administrative body for its views.

3. Administrative Law and Procedure ⇐228

Doctrine of primary jurisdiction comes into play when claim is originally cognizable in court of law or equity but referral to agency competent to rule preliminarily on issues which fall within its regulatory powers is authorized and, in such situations, proceedings before court are merely suspended pending referral of appropriate issues to such administrative body.

4. Administrative Law and Procedure ⇐228

Doctrine of primary administrative jurisdiction contemplates suspension of judicial proceedings, rather than a dismissal thereof, pending action of administrative agency; it is in nature of temporary abstention in deference to expertise of administrative agency and by such retention of jurisdiction and noncommittal "referral" attitude toward the administrative agency, the court has benefit of views of the agency, while at the same time avoiding any suggestion of abdication of jurisdiction of the court.

5. Administrative Law and Procedure ⇐228, 229

Doctrine of primary administrative jurisdiction is to be distinguished from rule of exhaustion of administrative remedies, requiring that claim be initiated before administrative agency prior to judicial review.

6. Gas ⇐2

Where seller of natural gas sought to enjoin buyer from redelivering gas to intervening defendant allegedly in violation of contract and buyer, shortly after filing of action, filed with Federal Power Commission a petition for declaratory order regarding lawfulness of its resales and seller filed with Commission an application to abandon service to buyer, application of doctrine of primary jurisdiction should have led to a stay of the court proceeding, rather than a dismissal. Natural Gas Act, §§ 1 et seq., 22, 15 U.S.C.A. §§ 717 et seq., 717u.

7. Courts ⇐489(1)

Determination of whether a cause of action is based on federal law is made from face of the complaint, the answer depending on the particular claims a suitor makes in a state court—on how he casts his action.

8. Courts ⇐489(1)

Claims that gas buyer in resale of natural gas sold to it violated contract with seller and that, by reason of breach, seller might be violating the Gas Act stated claim for breach of contract, not for violation of Gas Act, the claim was not within scope of the Gas Act and the presence of federal question did not create a federal case within exclusive jurisdiction of the United States district court and state court had jurisdiction. Natural Gas Act, § 22, 15 U.S.C.A. § 717u.

9. Injunction ⇐129(1)

Claim that it was impossible to compute continuing damage alleged to be accruing to seller of gas from day to day sale by buyer of varying quantities of gas to the third party in violation of contract between buyer and seller and that multiplicity of suits might result indicated inadequate remedy at law and dismissal of seller's action on ground of lack of equity jurisdiction was error.

10. Injunction ⇐136(3), 137(2)

In seller's action against buyer of gas to enjoin alleged breach of contract by buyer in reselling gas, wherein it appeared that grant of preliminary injunction would have required ultimate purchaser to close its plant and lay off its 150 employees and benefits to seller from preliminary injunction seemed questionable, seller was not entitled to preliminary injunction. Natural Gas Act, § 22, 15 U.S.C.A. § 717u.

Upon appeal from Chancery Court.

John J. Schmittinger, of Schmittinger & Rodriguez, Dover, for plaintiff below, appellant.

Januar D. Bove, Jr. and John R. Bowman, of Connolly, Bove & Lodge, Wilmington, for defendant below, appellee.

David A. Drexler, of Morris, Nichols, Arsht & Tunnell, Wilmington, for intervenor below, appellee.

Before WOLCOTT, Chief Justice, and CAREY and HERRMANN, Associate Justices.

HERRMANN, Justice:

This is an appeal from the Chancery Court's denial of the motion of the plaintiff, Eastern Shore Natural Gas Company (hereinafter "Eastern"), for a preliminary injunction restraining the defendant Stauffer Chemical Company (hereinafter "Stauffer") from redelivering natural gas, sold to it by Eastern under contract, to the intervening defendant Hoechst Polymer Corporation (hereinafter Hoechst) in violation of the contract. The appeal also lies to the granting of Stauffer's motion to dismiss the action.

I.

The opinion of the Chancery Court appears at 285 A.2d 826. The statement of facts contained therein is sufficient for present purposes, with the following (1) modification and (2) addition: (1) The contract did not specify "the amounts of gas to be delivered each day" to Stauffer (285 A.2d at 827); rather, it was a gas supply contract specifying a minimum and a maximum daily quantity. (2) Shortly after the filing of this action, Stauffer filed with the Federal Power Commission a petition for a declaratory order "in order to terminate a controversy and remove uncertainty * * * regarding the lawfulness of certain deliveries of natural gas" to Hoechst and Eastern filed with the Commission an application to abandon service to Stauffer. The petition and the application are pending before the Commission.

II.

We take up first the dismissal of the action.

In this connection, the Chancery Court stated: "[T]he defendant's motion to dismiss will be granted on the ground of lack of jurisdiction. The order to be entered, however, shall recognize plaintiff's right to transfer this case to a court of competent jurisdiction under the provisions of 10 Del.C. § 1901." (285 A.2d at 829)

The opinion below does not state specifically the basis for the Court's ruling of lack of jurisdiction. From the context of the opinion, however, the basis must be assumed to have been either the doctrine of primary administrative jurisdiction of the Federal Power Commission, or the exclusive jurisdiction of the United States Dis-

trict Court, or the absence of equity jurisdiction. In any case, we think it was error to dismiss the action.

[1-5] The doctrine of primary administrative jurisdiction permits a court to avail itself of the expertise of an administrative agency having special competence in the matter at hand. As stated in United States v. Western Pacific RR. 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956):

> "'Primary jurisdiction,' • • • applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed with the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

And as stated in Webb v. Diamond State Telephone Company, Del.Ch., 237 A.2d 143, 145 (1967):

> "The doctrine of primary jurisdiction • • • comes into play when a claim is originally cognizable in a court of law or equity but referral to an agency competent to rule preliminarily on issues which fall within its regulatory powers is authorized. In such situations, proceedings before a court are merely suspended pending referral of appropriate issues to such an administrative body. See Best v. Humboldt Placer Mining Co., 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed. 2d 350, and United States v. The Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915."

As indicated, the doctrine of primary administrative jurisdiction contemplates the suspension of the judicial proceedings, rather than a dismissal thereof, pending the action of the administrative agency. It is in the nature of a temporary abstention in deference to the expertise of the administrative agency. By such retention of jurisdiction and non-committal "referral" attitude toward the administrative agency, the court has the benefit of the views of the agency, while at the same time avoiding any suggestion of abdication of the jurisdiction of the court. Compare Pottock v. Continental Can Co., Del.Ch., 210 A.2d 295 (1965). The doctrine of primary administrative jurisdiction is to be distinguished from the rule of exhaustion of administrative remedies, requiring that a claim be initiated before an administrative agency prior to judicial review. United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); K. Davis, Administrative Law Treatise, § 20.01 (1958).

[6] Accordingly, application of the doctrine of primary administrative jurisdiction should have led to a stay, rather than a dismissal of this action.

• • • • • •

The Chancery Court indicated that Stauffer relied upon the Natural Gas Act [15 U.S.C. Ch. 15B] in support of the Federal Power Commission's primary administrative jurisdiction; that Stauffer contended that, under 15 U.S.C. § 717u, the Commission "must first rule on such alleged violation[s]" of the Act (285 A.2d at 828).

Stauffer disclaims that statement of its position, pointing out that Title 15, U.S.C. § 717u does not deal with the doctrine of primary administrative jurisdiction, a judge-made rule; that it deals, rather, with the exclusive jurisdiction of the federal district courts over violations of the Natural Gas Act. Relying upon 15 U.S.C. § 717u,* Stauffer now contends that the

* 15 U.S.C. § 717u provides:

> "The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter [Natural Gas Act] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce

United States District Court has exclusive jurisdiction over this action.

[7] The determination of whether a cause of action is based on federal law is made from the face of the complaint, the answer depending "on the particular claims a suitor makes in a state court—on how he casts his action." Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 662, 81 S.Ct. 1303, 1307, 6 L.Ed.2d 584 (1961).

[8] In the instant case, it is manifest on the face of its complaint that Eastern's claim is for breach of contract, not for violation of the Gas Act. It is nowhere alleged in the complaint that any action of the defendant Stauffer, which is not engaged in the interstate transmission of natural gas and is not amenable to the Commission's jurisdiction, constituted a violation of the Gas Act by Stauffer. The allegation of Eastern is that by reason of Stauffer's breach of contract, Eastern may be violating the Gas Act. Clearly, the claim of such breach of contract and consequence are not within the scope of 15 U.S.C. § 717u. The presence of a federal question does not necessarily create a federal case. Pan American Petroleum Corp. v. Superior Court, 81 S.Ct. at 1308. There is no merit in Stauffer's reliance upon 15 U.S.C. § 717u.

For the foregoing reasons, we conclude that it was error to dismiss the action on the basis of either the doctrine of primary administrative jurisdiction of the Federal Power Commission or the exclusive jurisdiction of the United States District Court.

* * * * * *

The above rulings clarify the presence of equity jurisdiction. The Chancery Court indicated that the answers to the federal issues presented may demonstrate irreparable injury. With the aid of the views of the Federal Power Commission upon those issues, the Chancery Court will be enabled to make a definitive ruling as to the existence of irreparable injury.

[9] Moreover, it is conceded that the quantities of gas, delivered by Eastern to Stauffer and by Stauffer to Hoechst, vary from day to day as alleged. Consequently, Eastern asserts that it is impossible to compute the continuing damages alleged to be accruing to Eastern from day to day; and that multiplicity of suits must result. This spells out "inadequate remedy at law."

Accordingly, we hold that it was error to dismiss the action on the ground of lack of equity jurisdiction.

III.

[10] We find no error in the denial of the preliminary injunction for the reason that the hardship to Hoechst and its employees, which would have resulted from the grant of injunctive relief, far outweighed any possible benefit to Eastern.

The grant of the preliminary injunction would have required Hoechst to close its plant and lay off its 150 employees. Comparatively, the benefits to Eastern are vague and uncertain: whether Eastern is in violation of the Natural Gas Act seems questionable; whether substantial sanctions would be imposed by the Commission, if there is such violation, is arguable; the effect of such possible events upon Eastern's reputation is conjectural; and damages arising from the 2% resale of gas by Stauffer to Hoechst are, comparatively, of little significance.

This balance of hardship weighs heavily against the preliminary injunction. Bayard v. Martin, 34 Del. 184, 101 A.2d 329 (1953); Turek v. Tull, 37 Del.Ch. 190, 139 A.2d 368, 374 (1958); Wilmington City Ry. Co. v. Taylor, D.Del., 198 F. 159, 197–198 (1912). For that reason the preliminary injunction was properly denied.

any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder * * *."

* * * * * *

Accordingly, the judgment below is reversed as to the dismissal of the action and affirmed as to the denial of the preliminary injunction. The cause will be remanded for further proceedings not inconsistent herewith, including action upon Stauffer's alternate motion for a stay pending the outcome of the applications of Eastern and Stauffer now before the Federal Power Commission.

Carl Vincent HENRY, Defendant Below, Appellant,

v.

STATE of Delaware, Plaintiff Below, Appellee.

Supreme Court of Delaware.

Nov. 9, 1972.

Defendant was convicted before the Superior Court, New Castle County, of assault with intent to commit murder, possession of a firearm during commission of a felony, and conspiracy, and he appealed. The Supreme Court, Wolcott, C. J., held that testimony that, two days before shooting of state trooper, defendant was in company of his friend, who said that his .22-calibre pistol was for "the pigs," that defendant said that he had something better than that, that a state trooper was fired on by such friend on following day, and that defendant was angry over impounding of his automobile which friend was driving at time of his arrest, was admissible to show anger of defendant as possible motive for shooting of trooper. The Court further held that circumstantial evidence, in order to support finding of guilt, need not be inconsistent with any other reasonable finding, but rather, with regard to both circumstantial and direct evidence, chances that evidence correctly points to guilt must be weighed against possibility of inaccuracy or ambiguous inferences with trier of fact's experience with people and events to be used in weighing such possibility.

Judgment affirmed.

1. Criminal Law ⇐1134(2)

Appeal from conviction must be decided on basis of entire record taken in light favorable to State.

2. Criminal Law ⇐538(3)

Evidence including defendant's confessions and proof of corpus delicti sustained convictions for assault with intent to commit murder, possession of firearm during commission of felony and conspiracy.

3. Criminal Law ⇐781(2)

Instruction, in prosecution for assault with intent to commit murder, possession of firearm during commission of felony and conspiracy, in regard to contradictory statements was proper where defendant had made contradictory statements to police.

4. Homicide ⇐166(3)

In prosecution for assault with intent to commit murder, possession of firearm during commission of felony and conspiracy, testimony that, two days before shooting of state trooper, defendant was in company of his friend, who said that his .22-calibre pistol was for "the pigs," that defendant stated that he had something better than that, that a state trooper was fired on by such friend on following day, and that defendant was angry over impounding of his automobile which friend was driving at time of his arrest, was admissible to show anger of defendant as possible motive for shooting of trooper.

5. Criminal Law ⇐549, 552(1)

Circumstantial evidence, in order to support finding of guilt, need not be inconsistent with any other reasonable finding,

199 Neb. 189

HUMPHREY FEED & GRAIN, INC., a Nebraska Corporation, Appellant and Cross Appellee,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation, Appellee and Cross Appellant.

No. 41088.

Supreme Court of Nebraska.

Aug. 17, 1977.

Operator of grain elevator brought action against railroad for damages arising from alleged losses of grain transported by railroad for operator and for loss of profits allegedly caused by railroad's failure to maintain in good repair a sidetrack which served premises leased to operator by railroad. The District Court, Douglas County, Burke, J., granted summary judgment in favor of railroad on claim for lost profits, granted operator judgment on a jury verdict on claim for damages for losses of grain and denied operator interest or attorney fees on its judgment, and operator appealed and railroad cross-appealed. The Supreme Court, Brodkey, J., held that: (1) evidence warranted finding that quantity of grain which operator delivered to railroad was the quantity reflected on bills of lading; (2) operator could not recover interest and attorney fees; (3) doctrine of "primary jurisdiction" applied in regard to the claim for loss of profits, and, thus, operator had to pursue such claim before Interstate Commerce Commission, and (4) railroad did not impliedly covenant that sidetrack, which served premises leased to operator, would be kept in such a state of repair and maintenance as to provide operator with full and satisfactory shipping facilities.

Affirmed in part, and in part vacated.

Clinton and C. Thomas White, JJ., concurred in result.

Boslaugh, J., dissented in part and filed opinion in which Spencer, J., joined.

1. Trial ⇐178

Trial court should direct a verdict when there is not sufficient evidence on which a jury can properly proceed to find a verdict in favor of party on whom burden of proof is imposed.

2. Trial ⇐178

Motion for directed verdict must be treated as an admission of truth of all competent evidence submitted on behalf of party against whom motion is directed and such a party is entitled to have every controverted fact resolved in his favor and to have benefit of every inference which can reasonably be deduced from the evidence.

3. Appeal and Error ⇐1003(4)

Supreme Court will not interfere with findings of a jury on a fact question unless preponderance of evidence is so clearly and obviously contrary to findings that it is duty of reviewing court to correct the mistake.

4. Carriers ⇐134

In actions by shipper against a carrier for lost goods, prima facie case is made out when: shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

5. Carriers ⇐134, 136

Correctness of weights is for the jury in an action by a shipper against a carrier for lost goods and is a fact which shipper must prove by a preponderance of the evidence. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

6. Carriers ⇐52(2), 132

Where a bill of lading reflects shipper's weight and load count, weight listed on bill is not, in and of itself, sufficient evidence of quantity of goods delivered by shipper to the carrier; shipper must produce further evidence of quantity of goods delivered to the carrier. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

7. Carriers ⇐134

In action in which operator of grain elevator sought to recover against railroad for damages arising from alleged losses of grain transported by railroad for operator, evidence warranted finding that quantity of grain which operator delivered to railroad was the quantity reflected on bills of lading. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

8. Commerce ⇐61(2)

With enactment of Carmack Amendment, Congress superseded diverse state laws with a national uniform policy governing interstate carriers' liability for property loss, and the federal law governs liability for loss or damage. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11).

9. Carriers ⇐186

Operator of grain elevator could not recover interest and attorney fees in case wherein it obtained judgment against railroad for damages arising from losses of grain within interstate shipments transported by railroad for operator, in light of fact that Congress had preempted the field in regard to interstate carriers' liability for property damage or loss and that Carmack Amendment does not provide for recovery of interest or attorney fees on loss or damage to property; overruling *Marsh & Marsh v. Chicago & N. W. Ry. Co.*, 103 Neb. 654, 173 N.W. 679 and later cases. Interstate Commerce Act, § 20(11), 49 U.S.C.A. § 20(11); R.R.S.1943, § 74–715.

10. Courts ⇐489(9)

Interstate Commerce Commission and federal courts do not have exclusive jurisdiction of claims against interstate carriers: Interstate Commerce Act does not supersede jurisdiction of state courts in cases where the decision does not involve determination of matters calling for the exercise of administrative power or discretion of Commission or does not relate to a subject as to which the jurisdiction of federal court has otherwise been made exclusive. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.) Interstate Commerce Act, §§ 8, 9, 22, 49 U.S.C.A. §§ 8, 9, 22.

11. Carriers ⇐13(2)

A charge of unlawful discrimination on part of a common carrier may be predicated on furnishing to some patrons of services or facilities which are unjustifiably denied to others. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.) R.R.S.1943, §§ 74–503, 74–513.

12. Administrative Law and Procedure ⇐228.

Primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of the issues which have been placed in special competence of an administrative body in accordance with purposes of a regulatory scheme. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.)

13. Commerce ⇐89(1)

Whether purposes of Interstate Commerce Act require that Interstate Commerce Commission should first pass on the question depends on whether the question raises issues of transportation policy which should be considered by Commission in interests of uniformity and administrative expertise. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.) Interstate Commerce Act, § 1 et seq., 49 U.S.C.A. § 1 et seq.

14. Commerce ⇐89(1)

Under doctrine of "primary jurisdiction," preliminary resort to Interstate Commerce Commission is required where the inquiry is essentially one of fact and discretion in technical matters, and when uniformity can only be secured if determination is made by the Interstate Commerce Commission. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.)

See publication Words and Phrases for other judicial constructions and definitions.

15. Commerce ⇐89(2)

Interstate Commerce Commission must make initial determination whether rail se

vice provided by an interstate carrier is reasonable. (Per Brodkey, J., with two Judges concurring and two Judges concurring in result.)

16. Railroads ⇐109, 214

Generally, railroad has duty under its state franchise to maintain and repair its lines and provide service thereon: such duty is based on railroad's obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.)

17. Railroads ⇐216

Whether or not railroad has duty to maintain spur track or sidetrack depends on whether track benefits only private interests or whether track has become part of the main line and is used to serve the public at large. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.)

18. Commerce ⇐89(14)

Where grain elevator operator's claim against railroad for loss of profits allegedly caused by railroad's failure to maintain in good repair a sidetrack, which served premises leased to shipper by railroad, involved questions whether rail service and facilities provided by such railroad-interstate carrier were reasonable and nondiscriminatory, doctrine of "primary jurisdiction" applied, and, thus, operator had to pursue such claim before Interstate Commerce Commission. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.) R.R.S.1943, §§ 74–503, 74–513, 75–115; Interstate Commerce Act, §§ 1 et seq., 1(4, 11), 3, 8, 9, 22, 49 U.S.C.A. §§ 1 et seq., 1(4, 11), 3, 8, 9, 22.

19. Railroads ⇐216

Railroad which leased certain premises to operator of grain elevator did not impliedly covenant that sidetrack, which ed such premises, would be kept in such ate of repair and maintenance as to provide operator with full and satisfactory shipping facilities. (Per Brodkey, J., with two Judges concurring and two Judges concurring in the result.)

Syllabus by the Court

1. In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier: arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages.

2. Where the bill of lading reflects the shipper's weight and load count, the weight listed on the bill of lading is not, in and of itself, sufficient evidence of the quantity of goods delivered by the shipper to the carrier. In such a case the shipper must produce further evidence of the quantity of goods delivered to the carrier.

3. In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recovered under section 74–715, R.R.S. 1943.

4. The Interstate Commerce Commission and the federal courts do not have exclusive jurisdiction of claims against interstate carriers. The Interstate Commerce Act did not supersede the jurisdiction of state courts in cases where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive.

5. A charge of unlawful discrimination on the part of a common carrier may be predicated upon the furnishing to some patrons of services or facilities which are unjustifiably denied to others.

6. Under the doctrine of "primary jurisdiction," preliminary resort to the Interstate Commerce Commission is required where the inquiry is essentially one of fact and of discretion in technical matters, and when uniformity can only be secured if determination is made by the Interstate Commerce Commission.

7. The Interstate Commerce Commission must make the initial determination as to whether rail service provided by an interstate carrier is reasonable.

8. It is the general rule that a railroad has a duty under its state franchise to maintain and repair its lines and provide service thereon. Such duty is based on the railroad's obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services.

9. Whether or not a railroad has a duty to maintain a spur track or sidetrack depends on whether the track benefits only private interests, or whether the track has become part of the main line and is used to serve the public at large.

10. Where a claim by a shipper involves the questions of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, the doctrine of "primary jurisdiction" applies.

Raymond M. Crossman, Jr., Crossman, Barton & Norris, Omaha, for appellant and cross appellee.

Daniel P. Morisseau, Omaha, for appellee and cross appellant.

Heard before PAUL W. WHITE, C. J., and SPENCER, BOSLAUGH, McCOWN, CLINTON, BRODKEY and C. THOMAS WHITE, JJ.

BRODKEY, Justice.

This is an action by Humphrey Feed & Grain, Inc. ("Humphrey"), against Union Pacific Railroad Company for damages resulting from alleged losses of grain transported by the railroad for Humphrey; and for loss of profits allegedly caused by the railroad's failure to maintain in good repair a sidetrack which serves the premises leased to Humphrey by the railroad. The District Court granted summary judgment in favor of Union Pacific on Humphrey's claim for lost profits. Humphrey received a jury verdict on its claim for damages resulting from losses of grain, and the trial court denied Humphrey interest or attorney's fees on its judgment. Humphrey has appealed from the summary judgment granted to the railroad, and from the denial of interest and attorney's fees on the judgment. Union Pacific has cross-appealed from the judgment in Humphrey's favor on the ground a verdict should have been directed. We affirm the judgment for Humphrey for damages for loss of grain, and also the denial of interest and attorney's fees. We vacate, with instructions, the summary judgment granted in favor of Union Pacific on the claim for lost profits.

In its petition, Humphrey alleged that between October 1, 1971, and December 31, 1974, it had delivered to the railroad 121 carloads of grain for shipment, and had received a bill of lading for each car which reflected the number of pounds of grain loaded aboard each car. Plaintiff alleged that each carload of grain was delivered by the defendant or a connecting carrier to a point of destination with a shortage of grain in excess of generally accepted shrinkage. Humphrey alleged that the railroad is subject to the provisions of the Carmack Amendment, Title 49 U.S.C.A., § 20, par. (11); and it was liable to Humphrey thereunder for the loss of the grain in excess of normal shrinkage. Humphrey further alleged that it had filed claims with the railroad for the alleged losses within the time provided by section 74-715, R.R.S. 1943; that the claims were not adjusted or paid by the railroad within the specified time period; and that it was therefore entitled to interest and reasonable attorney's fees under that section. Humphrey prayed for judgment against the railroad in the amount of $21,677.36, plus interest and attorney's fees.

In a separate cause of action, Humphrey alleged that it was the lessee of a portion of the railroad's right-of-way, and that there is an implied covenant under the lease that the railroad would keep its sidetrack, which serves the leased premises, in such a state of repair and maintenance so as to provide Humphrey with full and satisfactory shipping facilities. Humphrey also alleged that

the railroad had a statutory duty to keep the sidetrack in repair under section 74-503, R.R.S.1943. Humphrey alleged that the railroad has failed to maintain the sidetrack in good repair during the period from September 1, 1972, through December 31, 1974; that only three cars could be "spotted" on the sidetrack due to the disrepair; that the railroad failed to make necessary repairs despite oral demands by Humphrey; and that Humphrey received approximately 130 cars less on the average than his competitors as a result of the disrepair of the sidetrack. Humphrey prayed for a judgment against the railroad in the amount of $91,000 for lost profits incurred as a result of the alleged failure of the railroad to maintain its sidetrack in good repair.

In its answer, Union Pacific denied the shortages of grain and its liability on Humphrey's claim for damages. The railroad admitted the existence of the lease, but denied it had failed to keep the sidetrack in good repair, and denied the allegation of lost profits. Union Pacific filed a motion to dismiss the claim for lost profits on the ground that the subject matter of that claim was outside the jurisdiction of the District Court, but that motion appears not to have been ruled on by the trial court. The railroad also moved for summary judgment on the claim for lost profits, and that motion was sustained by the District Court. As previously stated, Humphrey received a jury verdict and judgment in its favor on its claim for damages incurred as a result of grain losses, but the trial court denied interest and attorney's fees on that judgment.

We first examine the contentions of the parties in regard to the judgment in Humphrey's favor on its claim for damages resulting from grain losses. The facts adduced at trial are as follows.

From October 1, 1971, through December 31, 1974, Humphrey delivered 118 carloads of grain to the railroad for shipment. Three claims for 121 carloads originally filed were withdrawn prior to or during the trial. The cars were "spotted" by the railroad on the sidetrack which serves Humphrey's business, and were loaded by Humphrey. In loading the cars, Humphrey uses a "dump" scale, which is a balance scale governed by a 560 or 600 pound weight. Grain is loaded into the scale, which automatically dumps the grain when the 560 or 600 pound weight limit is reached. A counter is automatically tripped when each dump occurs so that the number of dumps is recorded.

After a car is loaded, the railroad is notified, and its agent seals the car. The agent prepares a bill of lading, and in so doing uses the weight figure provided by Humphrey. After the grain reaches its destination, an account of sales is sent to Humphrey, which shows the weight at destination. The bills of lading and the account of sales regarding the 118 shipments involved in this case were received in evidence, and showed that the weight at destination was less than the weight at origin, taking into account the tariff of normal shrinkage of ⅛ of 1 percent, on the 118 shipments.

In support of the contention that the dump scale was accurate, Humphrey's owner testified that the weights arrived at by using the dump scale compared with weights recorded on Humphrey's truck scale. Such comparisons were made when a grain producer delivered grain to Humphrey in a truck and the grain was weighed on the truck scale. When the grain was immediately loaded on railroad cars via the dump scale, the truck scale weight could be compared to the dump scale weight. The truck scale was inspected annually by the State of Nebraska, and passed inspections for accuracy.

Humphrey also introduced evidence that one of its customers, who had a truck too large for its truck scale, would load grain on the truck via the dump scale, and the weight would be checked by weighing the truck at a scale of another elevator. Comparisons between the dump scale weight and the weight recorded on the scale of the other elevator were favorable.

Humphrey's owner testified that he had filed claims with the railroad on the 118 shipments within 90 days of settlement, which was the time he was told what the

weight at destination was, and that the claims were not adjusted or paid by the railroad.

A professor who was an expert in grain science testified on behalf of Union Pacific. In summary, his testimony was that grain loses weight during shipment due to loss of moisture, and that the amount of weight loss depends on the water content of the grain and the humidity. Another expert witness, a supervisor of weights, testified that dump scales are not regarded as accurate scales in the industry. Evidence was adduced to the effect that dump scales are inaccurate if not properly maintained and kept in good repair. An analysis of Humphrey's records indicated that, during the relevant time period, 33 percent of its shipments were overweight, 61 percent were underweight, and 6 percent were even, when Humphrey's dump scale weights were compared to the destination weights. The evidence also showed that Humphrey's dump scale was not cleaned and inspected in accordance with the recommendations of the manufacturer of the scale.

[1] Union Pacific contends that the trial court erred as a matter of law in overruling its motion for a directed verdict at the close of all the evidence, and in overruling its motion for judgment notwithstanding the verdict. In so arguing, the railroad relies on the rule that the trial court should direct a verdict when there is not sufficient evidence upon which a jury can properly proceed to find a verdict in favor of the party upon whom the burden of proof is imposed. See *Moats v. Leinemann*, 188 Neb. 452, 197 N.W.2d 377 (1972). In this case, however, we believe there was sufficient evidence upon which the jury could proceed to find in favor of Humphrey.

[2, 3] A motion for a directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; and such a party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Laux v. Robinson*, 195 Neb. 601, 239 N.W.2d 786 (1976). This court will not interfere with the findings of a jury on a fact question unless the preponderance of the evidence is so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. *Dort v. Swift & Co.*, 193 Neb. 606, 228 N.W.2d 588 (1975). Under these rules, the question presented is whether the evidence, and reasonable inferences therefrom, was sufficient for the jury to find by a preponderance of the evidence that grain losses occurred during the shipments.

[4–6] Humphrey's claim was brought under Title 49 U.S.C.A., § 20, par. (11), which provides that a railroad is liable for loss of property caused by it. In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. See, *Missouri Pacific R. R. Co. v. Elmore & Stahl*, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964); *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. R. Co.*, 106 Neb. 149, 182 N.W. 967 (1921). The question of the correctness of weights is for the jury and is a fact which the shipper must prove by a preponderance of the evidence. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. R. Co., supra.* Where the bill of lading reflects the shipper's weight and load count, the weight listed on the bill of lading is not, in and of itself, sufficient evidence of the quantity of goods delivered by the shipper to the carrier. *Dublin Co. v. Ryder Truck Lines*, 417 F.2d 777 (5th Cir., 1969). In such a case the shipper must produce further evidence of the quantity of goods delivered to the carrier.

[7] In this case Humphrey produced not only the bills of lading, but also evidence in regard to the accuracy of its dump scale, and testimony that the weight reflected on the bills of lading was in fact the weight of

the grain loaded in the railroad cars. Union Pacific introduced evidence that the dump scale was inaccurate, and that it had not been properly maintained and cleaned. The evidence clearly raised a fact question for the jury, and the evidence introduced by Humphrey was sufficient for the jury to find by a preponderance of the evidence that the quantity of grain Humphrey delivered to the railroad was the quantity recited on the bills of lading. Therefore, it was proper for the trial court to overrule Union Pacific's motions for a directed verdict and for judgment notwithstanding the verdict; and the railroad's contention to the contrary is without merit.

[8, 9] We next turn to the question of whether the District Court erred in denying Humphrey interest from the date of its claims against the railroad and reasonable attorney's fees on its judgment for damages resulting from losses of grain. It is uncontroverted that the shipments were interstate shipments, and that Union Pacific's liability for losses is governed by Title 49 U.S.C.A., § 20, par. (11), known as the Carmack Amendment, which imposes liability of a carrier for the full actual loss, damage, or injury to property of the shipper. With the enactment of the Carmack Amendment, Congress superseded diverse state laws with a national uniform policy governing interstate carriers' liability for property loss, and the federal law governs liability for loss or damage. *New York, N. H. & H. R. R. Co. v. Nothnagle*, 346 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); *Sweeney v. Morgan Drive Away, Inc.*, 394 F.Supp. 1216 (D.Colo., 1975); *Vacco Industries v. Navajo Freight Lines, Inc.*, 63 Cal.App.3d 262, 133 Cal.Rptr. 628 (1976). The federal law does not authorize the allowance of attorney's fees in an action for loss or damage to property in shipment. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U.S. 186, 31 S.Ct. 164, 55 L.Ed. 167 (1911); *Sutherland v. Ringsby Truck Lines, Inc.*, 549 P.2d 784 (Colo.App., 1976); *T. I. M. E.—DC, Inc. v. Southwestern Historical Wax Museum Corp.*, 528 S.W.2d 901 (Tex.Civ.App., 1975).

Although there is no provision in the Carmack Amendment providing for recovery of interest or attorney's fees on loss or damage to property, section 74–715, R.R.S.1943, provides: "Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the State of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after such claim, stating the amount and nature thereof, accompanied by the bill of lading or duplicate bill of lading or shipping receipt, showing the amount paid for or on account of such shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent of the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven percent per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee, to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction; and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney's fee, to be fixed by such court or courts; Provided, in bringing suit for the recovery of any claim for loss or damage, as herein provided, if the consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest shall not recover the

interest penalty or attorney's fees herein provided." Humphrey contends that it is entitled to interest from the date of its claim and attorney's fees under section 74–715, R.R.S.1943. Union Pacific contends that Congress has preempted the field of law concerning interstate carriers' liability for property loss, and that therefore section 74–715, R.R.S.1943, may not constitutionally be applied in cases involving interstate commerce.

It is clear that the District Court was correct in denying Humphrey interest from the date of filing its claims. An award of interest is in the nature of damages. 22 Am.Jur.2d, Damages, § 179, p. 256. The Carmack Amendment does not provide for an award of interest from the date of filing a claim, and, as stated previously, it governs liability for loss or damage to property in interstate shipments. Humphrey cites no authority to support its proposition that interest is merely a cost of litigation, and that interest from the date of filing a claim may be awarded under a state statute such as section 74–715, R.R.S.1943, in cases governed by the Carmack Amendment. The interest provisions of section 74–715, R.R.S. 1943, cannot be applied in cases involving interstate shipments, as Congress has preempted the field with a national uniform policy governing interstate carriers' liability for property loss or damage.

The question of whether the District Court erred in denying Humphrey reasonable attorney's fees under section 74–715, R.R.S.1943, raises additional questions. In *Marsh & Marsh v. Chicago & N. W. Ry. Co.*, 103 Neb. 654, 173 N.W. 679 (1919), this court held that the provisions regarding attorney's fees in section 6063, R.S.1913, now section 74–715, R.R.S.1943, could be applied in cases involving an interstate shipment, stating: "The statute under consideration provides for the allowance of attorney's fees in all cases where claims for loss or damage for which a common carrier may be liable shall not be adjusted and paid within a fixed period. By this statute no attempt is made to regulate interstate commerce. Neither is the imposition of attorney's fees to be considered as a penalty; rather it is to be considered as a part of the costs incurred in the action, although not so denominated in the statute. The allowance is clearly in the nature of costs. It is not a fixed sum to be recovered as a part of the judgment, but its amount is to be fixed by the court." See, also, *Schneider v. Davis*, 109 Neb. 638, 192 N.W. 230 (1923); *Eckman Chemical Co. v. Chicago & N. W. Ry. Co.*, 107 Neb. 268, 185 N.W. 444 (1921). Unless the decisions in *Marsh & Marsh v. Chicago & N. W. Ry. Co., supra*, and later cases were erroneous and should be overruled, the District Court erred in denying Humphrey reasonable attorney's fees under section 74–715, R.R.S.1943.

The Supreme Court of the United States has not specifically ruled on the validity of state statutes like section 74–715, R.R.S. 1943, but the case of *Missouri, Kansas & Texas Ry. Co. of Texas v. Harris*, 234 U.S. 412, 34 S.Ct. 790, 58 L.Ed. 1377 (1914), is relevant. That case involved the validity of a Texas statute which permitted recovery of attorney's fees, relating to the collection of claims not exceeding $200, in amount against any person or corporation doing business in Texas for personal services rendered or for labor done, for material furnished, or for any claim for lost or damaged freight. The court found that the statute was a police regulation designed to promote the prompt payment of small but well-founded claims, and that it had a broad sweep which only incidentally included claims arising out of interstate commerce. The court concluded that it did not directly burden interstate commerce, and that therefore it was not repugnant to the commerce clause of the Constitution or in conflict with federal law concerning interstate carriers. It was there stated: "The local statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the State may enforce it in such a case as the present."

Subsequent to the *Harris* case, Texas amended its statute so that it is now similar

to section 74–715, R.R.S.1943. In *Thompson v. H. Rouw Co.*, 237 S.W.2d 662 (Tex. Civ.App., 1951), the court held that attorney's fees could not be awarded under the new Texas statute in cases involving property loss in interstate shipments. The court noted that the *Harris* case turned on the fact that the old Texas statute permitted a nominal and limited fee on small claims. The court found that the rule in *Harris* was not applicable to the new Texas statute, and that Texas could not extend an interstate carrier's liability for losses beyond the damages recoverable under the Carmack Amendment. *Thompson v. H. Rouw Co.*, *supra*, was approved by the Supreme Court of Texas in *Southwestern Motor Transport Co., Inc. v. Valley Weathermakers, Inc.*, 427 S.W.2d 597 (Tex., 1968). Florida also has a statute similar to section 74–715, R.R.S. 1943, and Florida courts have also held that attorney's fees may not be recovered under that statute in cases involving interstate shipments. See *Allied Van Lines, Inc. v. Brewer*, 258 So.2d 496 (Fla.App., 1972). Nebraska appears to be the only state which has permitted recovery of attorney's fees in cases brought under the Carmack Amendment. See Annotation, 37 A.L.R.3d 1125.

In *Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed. 115 (1922), section 6063, R.S. 1913, now section 74–715, R.R.S.1943, was challenged on the ground that its provision awarding attorney's fees violated the constitutional guarantees of due process and equal protection. Although that case involved an intrastate shipment, and did not involve the issue of preemption as raised in the present case, the court's characterization of attorney's fees is relevant. The court upheld the statute against attack on due process and equal protection grounds, stating that common carriers may be required to meet their duties in regard to prompt payment of a valid claim, and "that a reasonable *penalty* may be imposed on them for failure to promptly consider and pay such claim, in order to discharge delays by them. This penalty may be in the form of attorney's fees." (Emphasis supplied.) It is clear that the court viewed an award of attorney's fees under section 74–715, R.R.S.1943, as a penalty, and not simply as a cost of litigation.

The above authorities indicate that the rationale underlying *Marsh & Marsh v. Chicago & N. W. Ry. Co.*, *supra*, is no longer valid. Section 74–715, R.R.S.1943, in effect imposes a penalty on carriers who violate its provision requiring that carriers adjust and pay claims within 90 days of an interstate shipment. The award of attorney's fees under section 74–715, R.R.S.1943, has been characterized as a penalty by the United States Supreme Court in *Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co.*, *supra*. Section 74–715, R.R.S.1943, is not limited to recovery of nominal attorney's fees on small claims, but purports to apply to all interstate shipments regardless of the size of the claim. The Texas and Florida cases discussed above are persuasive that section 74–715, R.R.S.1943, may not be constitutionally applied to interstate shipments. Therefore, insofar as *Marsh & Marsh v. Chicago & N. W. Ry. Co.*, *supra*, and later cases hold that attorney's fees may be recovered in cases involving *interstate* shipments, they are overruled. The District Court was correct in denying Humphrey attorney's fees and interest under section 74–715, R.R.S.1943, in this case.

The final question for resolution is whether the District Court erred in granting summary judgment in favor of Union Pacific on Humphrey's claim for lost profits. Humphrey contends that the railroad has a duty to repair the sidetrack which serves its premises under the common law, the Constitution and Statutes of Nebraska, and an implied covenant of the lease of part of the railroad right-of-way to Humphrey from Union Pacific. Union Pacific contends that it is under no duty to construct or maintain sidetracks to suit the needs and uses of individual shippers located along its lines, absent a special agreement or contract; and that the Interstate Commerce Commission has exclusive primary jurisdiction of Humphrey's claim.

Although Humphrey devotes its argument to the duty of a railroad to maintain public sidetracks located on the railroad right-of-way, resolution of the question raised by Humphrey's claim for lost profits requires an examination of the specific allegations in its petition. Humphrey alleged that from 1972 to 1974 the railroad "permitted its side track servicing plaintiff's place of business to get in such a state of disrepair that only three cars could be spotted on said side track at one time. Plaintiff, on many occasions, made oral demands on defendant's agents to repair said side track; but defendant failed and refused to make the necessary repairs. During said period and because of the state of disrepair of defendant's side track, plaintiff received approximately 130 cars less on the average than other grain elevator operators at Monroe, Platte Center, Tarnov and Farmer's Elevator in Humphrey, Nebraska." Humphrey alleged that it lost profits of $700 per car, praying for total damages of $91,000.

Although Humphrey has cast its claim in terms of the alleged failure of the railroad to repair its sidetrack, the essence of its claim is that the railroad did not afford reasonable and equal terms, service, facilities, and accommodations to all persons engaged in the operation of grain elevators; and did not afford reasonable car service to Humphrey because of the limited number of cars that could be spotted on the sidetrack. Humphrey's suit is not one in equity to require the railroad to repair the sidetrack, nor does it involve the power of the Nebraska Public Service Commission to require a carrier to repair its equipment under certain conditions. See s. 75-115, R.R. S.1943. Therefore the primary question is not simply whether the railroad has a duty to repair the sidetrack, but whether Humphrey may maintain an action for lost profits in the courts of this state on the ground that the railroad discriminated against Humphrey in regard to facilities and car service by permitting a sidetrack to fall in disrepair. For the reasons that follow, we conclude that Humphrey may not maintain such an action in the courts of this state because the Interstate Commerce Commission has primary jurisdiction of such a claim.

[10] The provisions of the Interstate Commerce Act, Title 49 U.S.C.A., Ct. 1, et seq., apply to common carriers engaged in the transportation of passengers or property by railroads in interstate commerce. Section 1, par. (4), requires that it shall be the duty of every common carrier to provide and furnish transportation upon reasonable request therefor. Section 3 prohibits common carriers from giving undue or unreasonable preference or advantage to any particular person or company. Section 1, par. (11), provides that it shall be the duty of every carrier to furnish safe and adequate car service and to establish just and reasonable practices with respect to car service. Under section 8 of the act, a common carrier shall be liable to any person for the full amount of damages sustained in consequence of any violation of the provisions of the act. Section 9 provides that any person claiming to be damaged by any common carrier under the act may either make complaint to the Interstate Commerce Commission, or may bring suit in its behalf for the recovery of damages in any District Court of the United States of competent jurisdiction. Although the Interstate Commerce Act establishes comprehensive rights and duties of interstate carriers and gives the Interstate Commerce Commission and the federal courts jurisdiction of all suits for damages under sections 8 and 9, federal courts do not have exclusive jurisdiction of claims against interstate carriers. Section 22 of the act provides that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *." Therefore, the act "did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." *Pennsylvania*

R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 35 S.Ct. 484, 59 L.Ed. 867 (1915); see, also, *Union Transfer Co. v. Renstrom*, 51 Neb. 326, 37 N.W.2d 383 (1949).

[11] Section 74–513, R.R.S.1943, provides: "Every railroad corporation shall give to all persons and associations fair, equal, prompt and impartial service and accommodations in furnishing, delivering and transporting cars, and in delivering and transporting commodities, merchandise, produce and other property, without discrimination or favoritism, whether the industry receiving or shipping commodities, merchandise, produce, or other property, or the sidetracks by which it is served, is located on or off such railroad company's right-of-way." See, also, section 74–503, R.R.S. 1943, which requires railroads to afford reasonable and equal facilities to persons engaged in the operation of grain elevators. Insofar as Humphrey's claim rests on the common law and the statutes of Nebraska, its claim is essentially one of discrimination in facilities under sections 74–513 and 74–503, R.R.S.1943. A charge of unlawful discrimination on the part of a common carrier may be predicated upon the furnishing to some patrons of services or facilities which are unjustifiably denied to others. 13 Am. Jur.2d, Carriers, § 198, pp. 717, 718. Since the Interstate Commerce Act has not superseded the jurisdiction of state courts generally, Humphrey was entitled to bring its claim in the District Court, but only if a decision would not involve "matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." *Pennsylvania R. R. Co. v. Puritan Coal & Mining Co., supra.* Union Pacific does not contend that the subject matter of Humphrey's claim for lost profits has been made exclusive in the Interstate Commerce Commission and that Congress has preempted the field. It does, however, contend that the doctrine of primary jurisdiction applies.

[12, 13] The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme. Whether the purposes of the Interstate Commerce Act require that the Interstate Commerce Commission should first pass on a question depends on whether the question raises issues of transportation policy that should be considered by the commission in the interests of uniformity and administrative expertise. See, *United States v. Western Pacific R. R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); *Interstate Commerce Commission v. Baltimore & Annapolis R. R. Co.*, 398 F.Supp. 454 (D.Md., 1975); *Interstate Commerce Commission v. Maine Central R. R. Co.*, 505 F.2d 590 (2d Cir., 1974); *Hewitt v. New York, N. H. & H. R. R. Co.*, 284 N.Y. 117, 29 N.E.2d 641 (1940). Preliminary resort to the Interstate Commerce Commission is required where the inquiry is essentially one of fact and of discretion in technical matters and when uniformity can only be secured if determination is made by that Commission. *Agricultural Services Assn., Inc. v. Commonwealth*, 210 Va. 506, 171 S.E.2d 840 (1970). The Interstate Commerce Commission must make the initial determination as to whether rail service is reasonable. *Elgin Coal Co. v. Louisville & Nashville R. R. Co.*, 411 F.2d 1043 (6th Cir., 1969). Allegations of discriminatory car service, for example, fall squarely within the policy of primary jurisdiction of the Interstate Commerce Commission. *Taylor County Sand Co. v. Seaboard Coast Line R. R. Co.*, 446 F.2d 853 (5th Cir., 1971). The effect of the application of the doctrine of primary jurisdiction is to preclude resort to the courts in the first instance, or to preclude the court from supplying a remedy, or passing upon particular issues until the issues have been passed upon by the administrative agency. 2 Am. Jur.2d, Administrative Law, § 795, p. 699; Davis, Administrative Law of the Seventies, § 19.01, p. 435 (1976).

Humphrey contends that the doctrine of primary jurisdiction is not applicable in this

case because the issue presented is only a legal one of whether the railroad had the duty to maintain its public sidetrack. It contends that the issue is not one of fact calling for the exercise of administrative discretion or expertise, and that therefore the doctrine of primary jurisdiction should not apply. See *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922).

[16–18] We believe that this contention is erroneous. It is the general rule that a railroad has a duty under its state franchise to maintain and repair its lines and provide service thereon. *Interstate Commerce Commission v. Maine Central R. R. Co., supra; Bivins v. Southern Ry. Co.*, 247 N.C. 711, 102 S.E.2d 128 (1958). A railroad's duty to operate and maintain its lines is based on its obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services. See 74 C.J.S. Railroads § 124a, p. 557, § 390, p. 939. Whether or not a railroad has a duty to maintain a spur track or sidetrack depends on whether the track benefits only private interests, or whether the track has become part of the main line and is to serve the public at large. See, *Alton R. R. Co. v. Illinois Commerce Commission*, 305 U.S. 548, 59 S.Ct. 340, 83 L.Ed. 344 (1938); 74 C.J.S., Railroads, § 124b, p. 558. The question of whether Union Pacific had a duty to repair the sidetrack in this case, however, is not, in and of itself, dispositive of Humphrey's claim. Even assuming, without deciding, that the railroad was under a duty to maintain the sidetrack as part of its main line, a determination of whether Humphrey is entitled to lost profits involves the question of whether the sidetrack facilities in fact provided it by Union Pacific were reasonable and nondiscriminatory as compared to those facilities made available to the public at large, and particularly to Humphrey's competitors. The nature of the controverted question and the nature of the inquiry necessary for its solution is the determining factor in regard to application of the doctrine of primary jurisdiction. *Great Northern Ry. Co. v. Merchants Elevator Co., supra.* Humphrey's claim in this case involves the question of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, and raises factual questions which can best be determined by the Interstate Commerce Commission due to its expertise and ability to establish uniform rules concerning the reasonableness of facilities provided by interstate carriers. Therefore it would appear that the doctrine of primary jurisdiction applies in this case, and Humphrey must pursue its claim before the Interstate Commerce Commission.

[19] Humphrey's claim for lost profits was also based on the allegation that there is an implied covenant in its lease that the railroad would keep its sidetrack in such a state of repair and maintenance so as to provide Humphrey with full and satisfactory shipping facilities. Such an allegation is without merit in this case. Although Humphrey sets forth the general rules in regard to implied covenants in its brief, it cites no cases which hold that such a covenant may be implied in a lease of land by a railroad to the operator of a grain elevator, and we have found none. The lease is silent in regard to the sidetrack. Although Humphrey was entitled to expect the railroad to conform to the applicable laws concerning its duties to provide reasonable facilities to Humphrey on a nondiscriminatory basis, such duties cannot be elevated to the status of an implied covenant in the lease. Absent a contract between Humphrey and the railroad in regard to the sidetrack, the railroad's duties with respect to the sidetrack are only those required by law, and not one of an implied covenant.

We note that the District Court granted summary judgment in favor of Union Pacific on Humphrey's claim for lost profits. In view of our holding that the doctrine of primary jurisdiction applies in this case, the District Court should not have resolved the issues raised by Humphrey's claim for lost profits under the common law and the law of Nebraska. Therefore we vacate the summary judgment granted in favor of Un-

ion Pacific on Humphrey's claim for lost profits under the common law and Nebraska law, as the District Court should have deferred jurisdiction on that issue to the Interstate Commerce Commission. We affirm the judgment in favor of Humphrey on its claim for damages resulting from grain losses, and affirm the denial of interest from the date of its claims, and attorney's fees.

IRMED IN PART, AND IN PART V[illegible]TED.

CLINTON and C. THOMAS WHITE, JJ., concur in the result.

BOSLAUGH, Justice, dissenting in part.

I dissent from that part of the majority opinion which vacates the summary judgment for the defendant on the cause of action for lost profits.

The petition alleged the defendant had violated "its statutory and contractual duties" to keep the sidetrack "servicing plaintiff's place of business" in repair. There was no allegation that the public or any person other than the plaintiff had b[illegible]n injured by the defendant's failure to [illegible]r the sidetrack. There was no issue as to whether the defendant had failed to provide adequate and suitable sidetracks for public use in Humphrey, Nebraska.

The plaintiff's right to recover depended upon proof that the defendant had breached a duty which it owed to the plaintiff. Unless the plaintiff could establish that the defendant owed a duty to the plaintiff to maintain the sidetrack in good repair, the plaintiff could not recover damages resulting from the failure to repair the sidetrack. In my opinion the primary issue here was whether the defendant owed a duty to the plaintiff to repair the sidetrack.

The petition alleged that the defendant had both a contractual duty and a statutory duty to the plaintiff to repair the sidetrack. The record shows conclusively that the de[illegible]ant had no contractual duty to repair sidetrack.

To establish a statutory duty the plaintiff relied upon section 74–503, R.R.S.1943, which requires railroads operating in Nebraska to "afford reasonable and equal terms, service, facilities and accommodations" to all shippers. The railroads, however, are not required to furnish such facilities free of cost to the shippers. In *Missouri Pacific Ry. Co. v. Nebraska*, 217 U.S. 196, 30 S.Ct. 461, 54 L.Ed. 727, a statute requiring railroads to construct and maintain sidetracks at their expense to serve elevators constructed on the right-of-way was held invalid.

Sections 74–504 and 74–508, R.R.S.1943, provide a remedy for shippers who want a sidetrack constructed and maintained on the right-of-way adjacent to and opposite an industry. Under these sections the shipper may be required to share in the cost of constructing and maintaining the sidetrack. The plaintiff did not attempt to proceed under these sections.

I would affirm the summary judgment for the defendant on the cause of action for lost profits.

SPENCER, J., joins in this dissent.

199 Neb. 216

Robert J. GOLONKA, Appellant,

v.

John W. GATEWOOD, Appellee.

No. 40889.

Supreme Court of Nebraska.

Aug. 31, 1977.

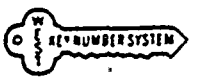
Patient brought medical malpractice action against surgeon arising out of surgery for removal of tumor. The District Court, Douglas County, Clark, J., entered judgment for surgeon, and patient appealed. The Supreme Court, Spencer, J., held that failure to give tendered instruction as

[3, 4] We are not convinced, as Hamby argues, that law enforcement officers can protect an owner's property and themselves from claims over lost or stolen property by simply sealing and removing personal luggage as a whole. Without a record of the contents of such luggage, police are bereft of any means to verify what property was actually present at the time of its taking. Further, if the basis behind the inventory search is to protect any valuables which might be present, it is illogical to prohibit law enforcement officials from searching those areas wherein valuables are more likely to be kept. *In re One 1965 Econoline, etc.*, 109 Ariz. 433, 436, 511 P.2d 168, 171 (1973). A number of courts have adopted this view. *See United States v. McCambridge*, 551 F.2d 865, 870–71 (1st Cir. 1977); *United States v. Davis*, 496 F.2d 1026, 1031–32 (5th Cir. 1974); *State v. Walker*, 119 Ariz. 121, 579 P.2d 1091 (1978); *State v. Floyd*, 120 Ariz. 358, 586 P.2d 203 (Ariz.App. 1978); *State v. Undorf*, 210 Kan. 1, 499 P.2d 1105 (1972); *Mackall v. State*, 7 Md.App. 246, 255 A.2d 98 (1969) (automobile not owned by defendant); *State v. Vigil*, 86 N.M. 388, 524 P.2d 1004 (1974); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971). Still others have ruled exactly opposite. *See United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978); *State v. Prober*, 98 Wis.2d 345, 297 N.W.2d 1 (1980).* Indeed, the opening of an unlocked brief case to inventory its contents is somewhat similar to the opening of the unlocked glove compartment for the same purpose as occurred in *Opperman, supra*. The expectation of privacy was approximately the same for each.

Our recent decision in *Abell v. Commonwealth*, 221 Va. 607, 272 S.E.2d 204 (1980), specifically declared invalid the search of a *locked* briefcase seized from the defendants' automobile; but there, unlike the instant case, we were concerned with a search incident to an arrest and not an inventory search of an automobile.

We therefore uphold the search of Hamby's briefcase as the result of a lawful inventory of its contents, and the decision appealed from will be

Affirmed.



SEATRAIN LINES, INC.

v.

GLORIA MANUFACTURING CORPORATION

Record No. 791401.

Supreme Court of Virginia.

June 12, 1981.

Manufacturing corporation brought suit against shipping corporation alleging that the latter had misclassified cargo and consequently imposed a higher tariff rate than that sanctioned by the Federal Maritime Commission. The district court awarded manufacturing corporation an amount in damages, and it appealed to the circuit court. The Circuit Court, City of Newport News, Douglas M. Smith, J., denied motion by shipping corporation to dismiss for lack of jurisdiction, and entered judgment for manufacturing corporation, and it appealed. The Supreme Court, Stephenson, J., held that determination of whether manufacturing corporation's cargo was properly classified for purposes of tariff rates by shipping corporation which contracted with manufacturing corporation to ship its cargo was within the primary jurisdiction of the Commission, as the classification of cargo and the interpretation of maritime tariffs are within the peculiar expertise of that agency; therefore, trial court lacked jurisdiction to determine the issue.

Reversed and dismissed.

* *See also United States v. Benson*, 631 F.2d 1336 (8th Cir. 1980). *Cf. United States v. Bloomfield*, 594 F.2d 1200 (8th Cir. 1979).

1. Administrative Law and Procedure ⇐228

Under the doctrine of primary jurisdiction, a court should defer a case to the agency created by Congress for regulating the subject matter when that procedure would secure greater uniformity and consistency in the regulation of business entrusted to a particular agency, or when judicial review would be more rationally exercised, by preliminary resort from ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

2. Administrative Law and Procedure ⇐228

Doctrine of primary jurisdiction does not oust judicial review, but instead merely postpones it.

3. Shipping ⇐103

Determination of whether manufacturing corporation's cargo was properly classified for purposes of tariff rates by shipping corporation which contracted with manufacturing corporation to ship its cargo was within the primary jurisdiction of the Federal Maritime Commission, as the classification of cargo and the interpretation of maritime tariffs are within the peculiar expertise of that agency; therefore, trial court lacked jurisdiction to determine the issue in suit by manufacturing corporation following dispute of shipping corporation over its tariff rates.

Anita O. Poston, Vandeventer, Black, Meredith & Martin, Norfolk, on briefs, for appellant.

Marla J. Melman, E. D. David, Jones, Blechman, Woltz & Kelly, P. C., Newport News, on brief, for appellee.

Before CARRICO, C. J., COCHRAN, COMPTON and STEPHENSON, JJ., and HARMAN, Senior Justice.

STEPHENSON, Justice.

Gloria Manufacturing Corporation (Gloria) sued Seatrain Lines, Inc., alleging that Seatrain had misclassified cargo and consequently imposed a higher tariff rate than that sanctioned by the Federal Maritime Commission. The district court awarded Gloria $41.38, and it appealed to the circuit court. Seatrain filed a motion to dismiss for lack of jurisdiction, asserting that the Federal Maritime Commission had primary jurisdiction over the claim. The circuit court denied the motion and, after hearing the evidence, entered judgment for Gloria in the amount of $1,822.36.

The sole question in this appeal is whether the Federal Maritime Commission has primary jurisdiction over issues concerning the classification of cargo pursuant to tariffs filed with the Commission.

In 1973, Seatrain and Gloria entered into a contract whereby Seatrain agreed to ship Gloria's cargo to Port-au-Prince, Haiti, and Gloria agreed to pay Seatrain in accordance with the terms and rates provided in the United States Atlantic & Gulf-Haiti Conference tariff schedule. Like other tariffs for water shippers, this tariff was filed with and approved by the Federal Maritime Commission. The tariff schedule imposes a different shipping charge for different classifications of cargo. A dispute arose between Seatrain and Gloria respecting the proper classification of Gloria's cargo.[1]

[1, 2] The United States Supreme Court has applied the doctrine of primary jurisdiction in a variety of cases involving administrative agencies. This doctrine provides that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of

1. For example, Gloria contended that work tables should have been classified as class 10, "Furniture, N.O.S., Actual value not over $0.00 per freight ton"; Seatrain classified the tables as class 2 because no written statement of value was submitted by the shipper. Gloria contended that steel bins should have been classified as class 5, "Shelving, I. S. [Iron, Steel] or Wood"; Seatrain classified the bins as class 1, "Cargo, General, N.O.S., Not Hazardous" because it felt that bins were not shelving.

administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574, 72 S.Ct. 492, 494, 96 L.Ed. 576 (1952). It is particularly appropriate for a court to defer to the agency when that procedure would secure greater "[u]niformity and consistency in the regulation of business entrusted to a particular agency" or when judicial review would be "more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.* at 574-75, 72 S.Ct. at 494. The doctrine does not oust judicial review, but instead merely postpones it.[2] *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 83 S.Ct. 1715, 1736, 10 L.Ed.2d 915 (1963).

[3] Although the Supreme Court has invoked the doctrine of primary jurisdiction in a number of cases involving the Federal Maritime Commission, *see, e. g., Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970); *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 52 S.Ct. 30, 76 L.Ed. 518 (1932), it has not addressed the issue presented in this appeal. However, in *United States v Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), the Court explained when the Interstate Commerce Commission is to have primary jurisdiction in cases involving the classification of cargo under railroad tariffs.

> [W]here the question is simply one of construction the courts may pass on it as an issue "solely of law." But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that "the enquiry is essentially one of fact and of discretion in technical matters," then the issue of tariff application must first go to the Commission.

Id. at 65–66, 77 S.Ct. at 166.

We feel that the reasoning applied by the Court in railroad tariff cases is equally applicable here. The classification of cargo and the interpretation of maritime tariffs are within the peculiar expertise of the Federal Maritime Commission. The determination of whether Gloria's cargo was properly classified is, therefore, within the primary jurisdiction of the Commission.

Since the trial court lacked jurisdiction, its judgment will be reversed and this action will be dismissed.

Reversed and dismissed.

2. An order of the Federal Maritime Commission is subject to review by a United States Court of Appeals. 28 U.S.C. § 2342(3).

[¶ 63,048]

Pacific Power & Light Company, Docket No. E-7796-007;
Pacific Gas and Electric Company, Docket No. E-7777-000

Initial Decision on Investigation of the California Power Pool, the Pacific Intertie Agreement and Related Contracts

(Issued February 10, 1984)

Thomas L. Howe, Presiding Administrative Law Judge.

Appearances

Malcolm H. Furbush, Robert Ohlbach, Howard V. Golub, J. Michael Reidenbach, Morris M. Doyle, Terry J. Houlihan, Charles A. Ferguson and *Gregory P. Landis* for Pacific Gas and Electric Company

Irwin F. Woodland, Paul G. Bower, Arthur L. Sherwood, Joseph B. Schubert, Steven H. Nesenblatt, B. Glenn George, John R. Bury, David N. Barry, III, William E. Marx, Thomas E. Taber, Joseph A. Vallecorsa, Jr., Ann P. Cohn, Allen Hyman, Herbert G. Gleitz, Richard M. Merriman, Brian J. McManus, Michael K. Hammaker, Rollin E. Woodbury and *Harry A. Poth, Jr.*, for Southern California Edison Company

Gordon Pearce, C. Edward Gibson, J. A. Bouknight, Jr., E. Gregory Barnes, Charles Daly, Albert V. Carr, Jr., Wayne Jefferies, Sherman Chickering, Barton M. Meyerson, C. Hayden Ames and *Shand Green* for San Diego Gas & Electric Company

George Spiegel, Robert C. McDiarmid, Daniel I. Davidson, Thomas C. Trauger, John Michael Adragna, Robert A. Jablon, James C. Pollock and *Samuel Karp* for Northern California Power Agency. (filing on behalf of itself and its members, the Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding Roseville, Santa Clara and Ukiah, California, and the Plumas-Sierra Rural Electric Cooperative) and the Cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara and Ukiah, California; *James N. Horwood* for the Cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara and Ukiah, California; *Martin McDonough* for Northern California Power Agency; *Fredrick D. Palmer* and *James D. Pembroke* for the City of Santa Clara, California

Sandra J. Strebel, Peter K. Matt, Bonnie S. Blair, Cynthia S. Bogorad and *Stephen C. Nichols* for the Cities of Anaheim, Riverside, Colton and Azusa, California

Richard K. Pelz for Department of the Interior

Harvey L. Reiter, Melvin G. Berger, Charles F. Reusch, John J. Bartus, Joseph Karger, A. Hays Butler, Barbara K. Kagan, Jane C. Murphy, James V. McGettrick, Rhodell G. Fields, Jonathan Paff, Daniel Lamke, G. Kimball Williams, Richard V. Mattingly, Jr., Daniel Behuniak, Glen Ortman and *Gloria Sodaro* for the Staff of the Federal Energy Regulatory Commission

Procedural Background

Docket No. E-7796-007

Termination of the proceeding in Docket No. E-7796-007 (formerly E-7796) was ordered by the Commission, [1] Opinion No 175, 23 FERC ¶ 61,402, June 22, 1983. The present Initial Decision deals with the other dockets. The terminated docket is retained in the title, however, to avoid any confusion that might arise from its omission, as it is the lead docket in the consolidation with Docket No. E-7777-000 (formerly E-7777 (Phase II)) and has appeared on the orders, pleadings and hearing dealing with Docket No. E-7777-000 since the consolidation.

APPENDIX H

Docket Nos. E-7777-000 and ER76-296

Docket No. E-7777 commenced on September 29, 1972 when Pacific Gas and Electric Company (PG&E) filed a wholesale rate increase. Northern California Power Agency (NCPA) [2] intervening, alleged that PG&E had engaged in anticompetitive behavior, and requested rejection of the filing, or alternatively, acceptance upon condition that PG&E's anticompetitive behavior be eliminated. By order issued November 27, 1972 [48 FPC 1153], the Commission accepted the filing without condition, suspended the rate increase for five months, and set the matter for hearing.

Staff moved on September 25, 1973 to dismiss and remove all matters relating to the issue of anticompetitive conduct from Docket No. E-7777. The motion was granted by the then presiding administrative law judge. On November 7, 1973, NCPA moved for extraordinary relief. Cities and NCPA alleged:

> that PG&E has entered into various contracts which, through their restrictive and anticompetitive nature, have strengthened a purported monopoly over generation and transmission facilities in northern and central California to the detriment of Cities and NCPA.

51 FPC 1030, 1031. The Commission said, Id.:

> The relief either requested or implied by the various allegations would entail: (1) the adjustment of PG&E's rates to Cities and NCPA to account for the alleged anticompetitive activities; (2) the direction by this Commission to PG&E to wheel power; and (3) the review and possible amendment of the ... contracts to remove anticompetitive provisions.

The contracts in question were PG&E's contracts with: (1) San Diego Gas and Electric Company (San Diego) and Southern California Edison Company (Edison) known as the California Power Pool (FPC Rate Schedule No. 27); (2) the United States Bureau of Reclamation (FPC Electric Tariff Original Volume No. 4), usually called Contract No. 2948A; (3) Sacramento Municipal Utility District (SMUD) (FPC Rate Schedule No. 45) hereafter called the SMUD Contract; and (4) the Seven Party Agreement (FPC Rate Schedule No. 105). 51 FPC 1030, 1032, fn. 1. The Commission said it lacks authority to order proposed rate adjustments or wheeling but it does have the authority, in proper circumstances, to amend certain provisions of contracts on file with the Commission. 51 FPC 1030, 1033. The Commission instituted a second phase of the proceeding and set it for hearing, saying:

> We view with deep seriousness and concern the charges made by Cities against PG&E and believe they warrant a full and complete investigation. The Section 206 proceeding herein ordered will allow for such investigation and provide the appropriate forum for the presentation and development of a complete evidentiary record concerning the alleged anticompetitive activity and conduct of PG&E. If, for example, after hearing and decision PG&E is found, by virtue of contract provisions subject to FPC jurisdiction, to have restricted the ability of its customers to develop their own generation, or limited customers' access to alternate supply sources, this Commission will not hesitate to order contract reform or other measures as are necessary to eliminate such practices.

51 FPC 1030, 1033 (March 14, 1974), *reh den.*, 51 FPC 1543 (May 15, 1974).

On June 24, 1974, the Cities of Anaheim, Riverside, Colton, and Azusa, California (Southern Cities) petitioned to intervene in Docket No. E-7777. Southern Cities alleged that the California Power Pool operated in such a manner as to restrict the ability of Southern Cities to plan and develop power supply resources. By order dated May 12, 1975, the Commission granted the petition, designating Edison a party respondent.

The Commission granted Staff's June 5, 1974 motion to remove from Docket No. E-7777 (Phase II) those issues relating to the justness and reasonableness of the Seven Party Agreement and to consolidate such severed issues with those in Docket No. E-7796. The Commission noted, however:

> As Northern Cities point out, some of the issues in Docket No. E-7777 (Phase II), after severance, may continue to overlap issues in Docket No. E-7796, after consolidation. For example, The Seven Party Agreement would seem to be relevant in Docket No. E-7777 (Phase II) to the question of whether the four contracts under investigation therein are part of a plan or pattern of anticompetitive conduct of Pacific Gas and Electric Company, as the Northern Cities claim ...

52 FPC 58, 60 (July 8, 1974).

On November 26, 1975, PG&E filed in Docket No. ER76-296 an amendment to the SMUD contract. The Commission instituted a Section 206 investigation of the amendment concerning its anticompetitive aspects, permitted NCPA to intervene, and consolidated Docket No. ER76-296 with Docket No. E-7777 (Phase II). 55 FPC 1307. The Commission noted that sales by SMUD to

PG&E are beyond its jurisdiction, and the amendment "is jurisdictional only insofar as SMUD's proposed new capacity affects the amount of standby capacity and energy [PG&E] must furnish to SMUD." (P. 1308)

On August 9, 1978, Staff moved for clarification as to the scope of Docket No. E-7777 (Phase II). I ruled that the allegations of anticompetitive transmission practices by the members of the California Power Pool, with respect to the Pacific Intertie, were within the scope of this proceeding, and that measures other than revision of the contracts under review may be appropriate if anticompetitive conduct is found to exist. On December 28, 1978, the Commission affirmed, stating:

> Although prior Commission orders do refer to four contracts as the subject of inquiry, the Commission's March 14, 1974 order makes clear that transmission access was found to be a relevant issue . . . Thus, the terms of the Pacific Intertie Agreement, which concerns access to a transmission system which could be used to transmit power from "alternative supply sources" to NCPA, Southern Cities, and other customers, are an appropriate subject of inquiry for this proceeding . . . The Pacific Intertie Agreement has been filed with this Commission. Because the Pacific Intertie Agreement is a subject of this proceeding, so must those contracts that affect or relate to that agreement be subject to this proceeding.

5 FERC ¶ 61,305 at p. 61,655.

The Commission also consolidated Docket Nos. E-7796-007 and E-7777-000, and ordered that in Docket No. E-7777-000 (1) Edison file the D. C. Intertie and Sylmar agreements with the Commission, and (2) that Edison, PG&E and San Diego file with this Commission "all classifications practices, rules, regulations, or contracts that in any manner affect or relate to the Pacific Intertie Agreement." 5 FERC at pp. 61,651, 61,658, *reh. den.* 7 FERC ¶ 61,267, June 14, 1979. [3] In denying rehearing the Commission made clear at pp. 61,564-5 that practices as well as contracts affecting or relating to the Pacific Intertie were to be the subject matter of Docket No. E-7777-000 and "subject to modification to the extent of the Commission's authority."

The United States Court of Appeals for the District of Columbia Circuit affirmed without opinion. *Southern California Edison Co. v. F.E.R.C.* (D.C. Cir. Nos. 79-1893 and 80-2195 (May 17, 1982)). Inter alia, the Court also affirmed the Commission's order, 11 FERC ¶ 61,246 at p. 61,488, that PG&E file portions of its nuclear license condition (the Stanislaus Commitments), as a "practice" under Section 205(c) of the Federal Power Act. *See Pacific Gas and Electric Co. v. F.E.R.C.*, D.C. Nos. 79-1881 and 80-2129 (May 17, 1982). These Commission orders of June 2, 1980, 11 FERC ¶ 61,246, required the filing of additional contracts affecting the Pacific Intertie Agreement. [4]

After Staff moved for partial summary adjudication of certain issues against Edison in accordance with Commission Opinion No. 62 in *Southern California Edison Company*, Docket No. ER76-205, 8 FERC ¶ 61,198 (1979), on January 2, 1980, I granted the motion in part, finding that the Commission's determination that Edison engages in head-to-head competition and fringe competition with Southern Cities summarily disposes of those competition issues in these proceedings.

In response to argument that wheeling of power might be ordered pursuant to the Commission's powers under Federal Power Act § 211 (PURPA), I ruled that this was not proper in this proceeding because PURPA proceedings were not within the scope of this proceeding, and the necessary formal requirements of a PURPA proceeding had not been followed. Order As To Scope of Proceedings, July 20, 1982. That order noted that to attempt to give relief under PURPA without notice would deny the parties their due process rights to present evidence on the PURPA requirements, and any relief granted in this proceeding must be on other grounds. The order was issued to forestall motions to reopen the record and other possible motions in connection with possible PURPA relief.

What Docket No. E-7777-000 Is and Is Not

Docket No. E-7777-000 originated as a complaint against PG&E in a rate case and was expanded by the Commission into an investigation of certain specified contracts to determine whether they are anticompetitive individually or as a group. These contracts are the Pacific Intertie Agreement, the California Power Pool, the PG&E-SMUD agreement and Contract 2948A. The Commission has ruled that additional contracts and practices affecting Pacific Intertie Agreement are also within the scope of the proceeding. Edison and San Diego are parties to the Pacific Intertie Agreement and the California Power Pool and are parties to or may be affected by other contracts which affect the Intertie Agreement. PG&E, San Diego and Edison have filed such contracts and practices, the most important of the practices being those set forth in PG&E's Stanislaus Commitments. This proceeding is not a general investigation of anticompetitive practices of PG&E or any other companies, although other arrangements and practices of the various companies would properly be considered in so far as they might throw light

upon allegedly anticompetitive aspects of the contracts and practices being investigated

Hearing

A limited hearing in Docket No E-7796-007 was held prior to the consolidation of that docket with Docket No E-7777-000, the present proceeding. Originally the Helms and Pit license proceeding, Project No. 2735-001, et al. and Docket No. E-7777-000 were assigned to different judges. Since the license proceedings involved a general investigation of all PG&E's alleged anticompetitive actions, any investigation into particular anticompetitive actions of PG&E with respect to the contracts that are the subject of Docket No. E-7777-000 were also properly the subject of the license investigations. When it became apparent that the background information and many issues in this proceeding would overlap with those in the Helms license proceeding, Chief Judge Wagner assigned both proceedings to me. This allowed joint hearings to be held before a single judge and enabled a single record to be made on the common issues. A joint hearing transcript comprised over 45,000 pages, with both volumes and pages numbered with the prefix "CH" for "Consolidated-Helms." (Matters relevant to the license proceedings alone were dealt with in a separate transcript.) By agreement and request of the participants, the exhibits in the joint hearings were numbered as follows:

> Staff, beginning with 1,000, NCPA 2000, Southern Cities 3,000, PG&E 4,000, San Diego 5,000, Edison 6,000, NCPA Southern Cities 7,000.

By reason of the consolidation of Docket No. E-7796-007 and Docket No. E-7777-000, the transcript of the limited hearing in the former case became available as part of the record in the latter docket as well, and the exhibits in the limited hearing (designated with the prefix "L" for "limited") are also part of the record in Docket No. E-7777-000.

The record is over 48,000 pages, over 3,000 exhibits, and over 250 items by reference, many of which are lengthy. The hearing in these proceedings took over two and a half years. According to one staff memorandum, more than one million pages of documents were produced in discovery. In an effort to hold the hearing within bounds, cross-examination after the first year of hearing was limited and a great deal of the proffered evidence was limited.

The rule set forth by the Commission is that evidence may be excluded where it is not of a kind which would affect fairminded persons in the conduct of their daily affairs. This is not the rule, however, which has been applied customarily in proceedings before this Commission Administrative Law Judges (including this one) have inclined to the view expressed by some courts of appeal, that admission of evidence should be liberally allowed. In general, the rule has been to let questionable evidence in and then disregard it. A judge will generally not be reversed for admitting evidence. Courts have pointed out that admitted evidence may be disregarded, whereas the exclusion of evidence may result in a remand and additional hearing. In the majority of hearings where questionable evidence is allowed to come in, it is evidence that would add comparatively little time to hearing and deciding the case. In these proceedings, however, there was a considerable volume of evidence that would be subject to exclusion under the test set forth in the Commission regulations. If this evidence were to be admitted, essential fairness would necessitate reasonable cross examination and rebuttal of it. While a judge might be tempted to admit such evidence and then disregard it after hearing, Counsel could not be sure which evidence would be disregarded. Counsel in an important case could hardly permit such admitted evidence to stand without probing cross examination and attack by any available rebuttal which in turn would be subject to cross examination and surrebuttal. As nearly as I could estimate, the excluded testimony would have resulted in adding at least six months to the hearing which even without such testimony became one of the longest in the history of administrative law.

Events Subsequent to Hearing

After the close of the record there were numerous additional developments including new contracts. Orders as to admission of evidence issued. There were extensive motions and the rulings thereon, including motions to reopen the record and to consider additional evidence. Some of these matters were troublesome in view of the further development of the situation. In any developing situation, however, there must come a time when new events, new situations and new evidence should no longer prolong the hearing. For reasons appearing later in this Initial Decision, this proceeding will be kept open, which will permit further action, in certain respects, as new circumstances may require.

I. The California Power Pool Agreement (CPPA)

The original California Power Pool Agreement was signed December 14, 1961, by San Diego, Edison, California Electric Power Company, and PG&E. The present amended pool agreement between the same parties,

except California Electric Power Company, which was merged with Edison (CPPA, Exh 6097, Item by Ref Q-1), became effective July 20, 1964.

The pool also actively involves the largest municipally owned utility in the United States—the Los Angeles Department of Water and Power (LDWP)—in its meetings, deliberations, and operating practices, although LDWP is not a formal member. In turn, LDWP serves as liaison for the three smaller municipally owned utilities in Burbank, Glendale, and Pasadena. SCE also serves as liaison with its resale customers, including the Cities of Anaheim and Riverside. The end result is that the California Power Pool is the coordination vehicle for major generating entities in most of California, an area of about 140,000 square miles.

The agreement sets forth the contractual terms and conditions governing the interconnected operation of the Area Systems of the three utilities. It provides for each party to operate its system continuously and in parallel with each system of a party with which it shares an interconnection, and for the maintenance of interconnections in good operating condition. The agreement requires each party to provide minimum margins of capacity resources, energy resources, and spinning reserve, and makes provision for the pooling and sharing of the reserve margins possessed by the parties.

The definition of Area System according to the terms of the agreement is the following:

> Area System of a Party is its System together with (a) each other system of a Third Party with which it normally operates in parallel by means of facilities and under agreements which result in effectively integrating their loads and resources from an operating standpoint, and (b) generating plants in California, not included above, substantially all the output of which is sold to the Party and integrated into the Party's System. Through this provision the loads and resources of an integrated Third Party are included with those of the Party and will affect the obligations of the Party to the Pool. These Third Party systems, through their integration contracts with a Party, indirectly receive the reliability benefits of the pool backing up the supply of the Party with whom they are integrated.
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> The Area System of PG&E includes: (1) its System, (2) the Systems of Central Valley Project (excluding Project pumping), Sacramento Municipal Utility District, City and County of San Francisco, those generating plants of East Bay Municipal Utility District, Merced Irrigation District, Oroville-Wyandotte Irrigation District, Tri-Dam Project of Oakdale and South Joaquin Irrigation Districts, Placer County Water Agency, and Yuba County Water Agency. The Southern California Edison Company Area System includes its System plus the System of the Metropolitan Water District. The San Diego Gas and Electric Company Area System includes only its System.

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A key point of the agreement is the concept that each party plans and constructs resources on a basis that provides at least certain minimum reserve margins. As a result, each party not only is able to fulfill its obligations, but may also rely upon the availability of such reserve margins from the other members if necessary. Each party is obligated (1) to operate its system in such a manner as to minimize disturbances that might impair service to the customers of other parties, (2) to maintain frequency at approximately 60 cycles within limits to be set by the Board of Control, and (3) to take care of its own reactive [kilovolt]-ampere requirements.

The services provided for in the agreement are all subject to certain specified conditions. A party can be required to furnish a service only out of its available capacity resources and then only to the extent that it can do so (1) without jeopardizing service to its own customers and other parties to which it is furnishing service of a higher priority, and (2) without interfering with obligations to third parties if such obligations existed at the time the pool was formed or created thereafter in accordance with the agreement.

The services provided for in the agreement are the following:

1. Short-Term Firm Service—By mutual agreement, a party may make capacity available and furnish energy to another party for up to 45 days, subject to renewal by mutual agreement. The effect of such service is to require the committed capacity to be excluded from the capacity resources of the supplier and, subject to some limitation to permit its inclusion in the capacity resources of the receiver. The purchase, sale, or exchange of firm capacity and energy for longer periods may be the subject of separate agreements.

2. Emergency Service—In the event of an emergency on the system of a party, that party has the right, if it is using all of its own spinning reserve, to receive service from the spinning reserves of the other parties for 2 hours. The amount of spinning reserve that

may be demanded under this provision depends on the amount of spinning reserve the receiving party is obligated to maintain under the agreement. There is no charge for emergency service as long as the receiver does not require energy in excess of 2 hours, and does not exceed its spinning reserve entitlement at any time after the first ½ hour. However, the energy must be returned.

If the emergency continues for more than 2 hours and if the party in trouble is using diligence to utilize its available resources, it is entitled to receive capacity and energy from the other parties for up to 60 days to replace its lost or interrupted capacity. The rate for emergency service that continues for more than 2 hours, or where the receiver exceeds its spinning reserve entitlement at any time after the first ½ hour of service is contained in a rate schedule.

3. Economy Capacity Service—By mutual agreement, a party may make capacity available and furnish energy to another party subject to notice of discontinuance sufficient for the receiver to place alternative capacity in service. The receiver is not, however, entitled to more than 24 hours notice. The effect of such service is to require the committed capacity to be excluded from the supplier's spinning reserve and subject to some limitation, to permit its inclusion in the resources of the receiver. The rate for such service is contained in a rate schedule.

4. Economy Energy Service—By mutual agreement, a party may sell economy energy to another party. Such service is interruptible without notice. The rate for such service is contained in a rate schedule.

5. Capacity Resources Standby Service—In the event of a capacity resource deficiency on the system of a party, that party may, if its own resources are fully loaded, call upon the other parties for capacity and energy for up to 7 days for the purpose of supplying firm customer loads. After the 7 days, the service can be renewed. The rate for such service is contained in a rate schedule.

6. Energy Interchange Service—Under this service, the intermediate system, which initially is that of the Southern California Edison Company, receives energy for the account of the receiver from the supplier of one of the aforesaid services (plus energy necessary to offset estimated energy losses) and delivers to the receiver an equivalent amount of energy so received for its account. The rate for such service is contained in a rate schedule.

The agreement requires each member to provide minimum margins of capacity resources, energy resources, and spinning reserve. These requirements, which are not intended to serve as standards of sound operating practice, merely establish the absolute minimum amount of resources believed necessary to preserve the reliability of the pool and to permit the furnishing of services provided for in Section 8 of the agreement.

The electric customers in the service areas of all three of the parties receive the following benefits:

1. Dependability of Service—In the event of an emergency loss of power supply sources on its own system, each party is able to provide more dependable service because of access to the spinning reserves of the other parties.

2. Reduction of Capital Expenditures—Each party has been able to reduce its capital expenditures below what they otherwise would have been because of (1) the resources credit that each of the companies takes through the sharing of installed reserves, and (2) the availability of the reserve resources of the other parties in the event of an emergency or scheduled outage.

3. Reduction in Operating Expenses—Each party has been able to reduce its operating expenses below what they otherwise would have been because they are able (1) to rely upon the spinning reserves of the other parties and (2) to draw upon the least expensive available source of power in the pool.

The pool provides valuable benefits to the public. Pool operations, which make available additional emergency assistance from the other pool members, benefits the public served by such a party by improving the reliability of service. In fact, although not specifically designed to do so, the pool may incidentally benefit interconnected third parties in cases of necessity. Those pool operations that reduce operating costs below what they otherwise would have been are passed on to retail and wholesale customers in the form of a lower cost of service.

Power Pooling in the Western Region, February, 1981, FERC-0054, pp. 139-44.

A Board of Control is established by Paragraphs 10.01 and 10.02, of one representative (plus an alternate) from each Pool member, with salaries and expenses borne by the member represented. Except for calling meetings, election of Chairman and Vice Chairman, and appointing committees

(Paragraphs 10.04 and 10.05), actions and recommendations of the Board of Control require unanimous consent (Paragraph 10.03). The Board is to

(a)(1) review and coordinate planning

(2) recommend construction or improvement of resources, interconnections and other facilities

(b) establish procedures for exchange of information

(c) determine the load each interconnection can transmit under normal conditions

(d) to prescribe metering, recording and billing procedures and other procedures necessary to implement terms of the CPPA

(e) to prescribe operating procedures, and criteria for providing services under the CPPA, including rules as to scope of authority of dispatchers to implement rights and duties under the CPPA

(f) to recommend establishment of certain administrative positions

(g) to recommend to each member establishment and procedures of centralized dispatching and billing to aid in administering the CPPA and for sharing costs thereof.

Power Pooling in the Western Region, *supra*, continues, pp. 145-9:

Both the PG&E and SCE systems of and by themselves are as large as some power pools. For that reason, each of these areas can presently justify constructing the largest size units currently available from manufacturers. Therefore, the principal area of coordination is a result of the strong transmission interconnection that exists between the SCE and PG&E systems—three 500KV a-c lines.

Under the pool agreement, there is an obligation for each of the parties to submit the latest forecast of loads and resources to the Board of Control at 6-month intervals (paragraphs 9.01 and 10.06(b)). Through these reports and other data each of the parties is familiar with the plans and expectations of the other parties.

A capacity resources deficiency occurs when the available capacity resources to a party are less than the capacity resources requirements under the pool agreement, that is, 110 percent of its peakload or 10-percent margin. There are other variations. The deficiency could be 110 percent of the peakload for that day, or it could be the sum of 105 percent of its peakload plus its capacity resources out of service because of scheduled maintenance for that same day.

An energy resources deficiency occurs when a party's energy resources during a month are less than its energy resources requirement. The energy resources requirement is defined as the actual energy requirements for that month plus the energy capability of the generating units out of service for scheduled maintenance, plus 50 percent of the energy capability of the largest generating unit included in the capacity resources and not out of service during that month. . . . In simple terms, the units have to serve the energy load, and, in addition, there must be provision for some amount of reserve energy. In the pool agreement, this provision is 50 percent of the energy capability of the largest generating unit not out of service during the month for each party. Finally, the agreement does not impose a penalty for an energy resources deficiency, it simply requires any party having a deficiency to use due diligence to correct the situation as soon as possible.

Each party is presently required to maintain a spinning reserve equal to at least 7 percent of its peak demand on that day. However, a party does not incur a spinning reserve deficiency unless it goes below 5 percent. If a spinning reserve deficiency is incurred for two successive half-hourly determinations, the payment is $0.10 per kW-day. Several provisions excuse the deficient party from making any payment for such a deficiency for a specified time. The most commonly used provision for excusing payment is an emergency on a party's system.

If a party has an emergency and incurs a spinning reserve deficiency, it is entitled to draw on the spinning reserve of the other parties. There is no payment for emergency service as long as the deficient party neither receives energy longer than 2 hours after the emergency, nor exceeds its spinning reserve entitlement after the first ½ hour. The spinning reserve entitlement is equal to the spinning reserve requirement, which is 7 percent of peak demand for the day. If either of the two specified limits is exceeded, then the party will be considered as receiving emergency service at the rate provided in the appropriate schedule. If the emergency lasts for less than 2 hours, any energy received shall be returned to the supplier as soon as practicable at a mutually satisfactory time . . .

To achieve the anticipated benefits of a pool requires that each party bring to the pool a minimum level of reliability in its system. For example, the California Power Pool Agreement prescribes that the

minimum level of installed reserve is 10 percent. If there were no enforcement provisions, one of the incentives to maintain the 10 percent would be lost. Those members that were maintaining 10 percent or greater would be supporting the deficient members, who would be achieving the benefits of not having installed capacity of its own by relying on that of the other members. That is, the benefits of the pooling would not be distributed on an equitable basis. Also, any party that lets its installed reserves drop to 10 percent would be doing so with the understanding that other members of the pool were maintaining at least 10 percent. Otherwise, they would need to have a larger reserve margin if they wished to maintain the same level of reliability.

In the area of maintenance planning, the scheduled outage of any major component of the bulk transmission system would be taken only after consultation with other systems that might be affected. The normal requirement for such an outage request is 72 hours, so that each of the parties can have adequate time to assess what the impact of that outage will be on its system. Typically, it is a practice of the parties to avoid scheduled outage of transmission facilities during periods of high customer requirements. By providing 72-hours notice, it is often possible for a system that has held up on some needed maintenance work to coordinate it with the outage request of another party. The pool companies regularly update their schedules for major generating unit maintenance. These schedules are currently updated as often as once a month, and the information is exchanged to identify periods in which shifts in these maintenance programs are called. This practice prevents too many very large units from being out of service at the same time. This coordinating function has been extremely important in times of drought and at times when there was an interruption in the normal supply of fuel.

... Good communications at both the dispatcher and scheduling levels, as well as higher levels of operating management, are paramount to the success of operations under the California Power Pool Agreement. The companies have provided the dispatch organization with a highly sophisticated and redundant communication network for voice communication as well as channels of communication for indicating the status of the backbone EHV system that interconnects them. At those times of the year when loads are highest, the dispatchers communicate with one another by 9:00 a.m. each morning to provide a forecast of that day's anticipated load and the resources available to meet that load. Similarly, at midnight of each day, there is an exchange of information regarding the actual peak and the level of spinning reserve at the time of the peak for each of the major California electric utilities. As the day progresses, dispatchers quote incremental and decremental costs at delivery points, and indicate whether power is available for sale or would be purchased if the price were right. Whenever there is a significant loss of resources on any of the pool systems, this fact is communicated to the other dispatching organizations. Should loss of a major resource represent a threat to the reliability of one of the parties or to the pool, the overall reliability of the pool is almost immediately assessed to see if any other actions are required. In the event of sudden emergencies, the design features of each of the systems are automatically brought into play and the status of events made known to the dispatchers through modern data collection and display facilities.

The California Power Pool companies have not established a centralized dispatch. The board has examined this situation as they observed centralization and regional control being adopted in other regions of the country. The board's conclusions are that the sought after benefits of centralization can be achieved now with existing agreements. In some regions of the country the utilities involved in a pooling arrangement believed it was in their best interest to relinquish some of their prerogatives and assign them to another level of hierarchy. However, in view of the fact that within the PG&E control area there are a number of irrigation districts, a State project, a Federal project and municipal and district projects that are integrated into the operation, it should be apparent that the PG&E power control group performs not only the function of centralized control for a large electric utility, but also many of the functions that typically get assigned to a pool dispatching office. By way of comparison, the PG&E control area geographically and in terms of load is approximately equal to that of New England. Much the same could be said of the SCE system and its dispatch organization. PG&E, SCE, and SDGE are evaluating the potential benefits of increased pooling. In 1980, PG&E, SCE and the Los Angeles Department of Water and Power will participate in a modified Florida-type brokering scheme along with many other WSCC utilities.

The California Power Pool has no formal independent planning organization.

NCPA, Southern Cities and Staff maintain that the CPP serves to maintain dominant control by the parties to it over transmission, reserve sharing, emergency power and coordination services within California. It is also claimed that the CPPA prevents small utilities from entering into transactions on an efficient and economical basis with other utilities by provisions which allegedly penalize a small system on the basis of size, or through provisions which permit arbitrary veto of transactions by existing members of the CPP.

Cities and Staff complain of the lack of a membership provision. It is claimed that this gives each CPP member the unfettered discretion to exclude a potential member such as NCPA from the benefits of pooled operations in California. These benefits are stated to be reserve and emergency services, and economies of scale.

PG&E and Edison state that there is no membership provision because the CPPA was designed only for interconnection and coordination of the original members' systems. PG&E also states that specific criteria are impossible to spell out, and that consideration of new members is best accomplished on a case-by-case basis, such as when membership was offered to SMUD and LADWP. (PG&E Initial Brief, pp. 130-31.) Finally, the companies maintain that there has been no adverse effect in NCPA and Southern Cities not being members, since the Southern Cities and NCPA's member cities currently receive service from Edison and PG&E, and that totally open membership would diminish the reliability of the Pool. Edison states the CPPA is "open to any utility qualified to assume and perform the obligations imposed upon each member of the agreement." (Edison Initial Brief, p. 87.) Edison argues the only type of entity capable of being added to the CPPA as it is structured and operates would be a utility which is fully resourced and maintains its own control area.

During the course of this proceeding, unusual animosity was demonstrated between counsel for NCPA and counsel for PG&E. In an effort to eliminate unpleasant exchanges, they were finally ordered not to address each other directly, but only to address the bench. One PG&E counsel complained that an NCPA attorney had pushed him and physically taken papers from him during a recess. All this raised some questions as to whether the parties should be ordered to enter into relations where cooperation and coordination are necessary, and mutual trust and good will are important if not essential. I was pleased, therefore, to find that the personal relations between the NCPA members' executives who were here to testify and the PG&E executives whom they encountered in my presence were not only courteous, but also cordial and friendly. While it might be difficult for the lawyers involved to work together, no difficulty in cooperation between the executives of NCPA members and PG&E executives has appeared. I did not observe all the NCPA members' executives, and the present executives of the central organization have come into office since the hearing. What I saw, however, indicates that relationships between PG&E and NCPA members' executives and technical personnel will not impede cooperation and coordination in their operations or in those of a common pool.

Animosity was not observed between attorneys for Southern Cities and those for Edison, PG&E and San Diego, or between attorneys for NCPA and those for Edison and San Diego.

A power pool arrangement is a voluntary arrangement, *Central Iowa Power Cooperative v. F.E.R.C.*, 606 F. 2d 1156 (D.C. Cir. 1979) (MAPP); Federal Power Act, § 202(a), and the voluntary nature is to be encouraged.

> The Commission had authority, however, under section 206 of the Act, 16 U.S.C. § 824e (1976), to order changes in the limited scope of the Agreement, including the addition of pool services, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract [that was] unjust, unreasonable, unduly discriminatory or preferential" *See Municipalities of Groton v. F.E.R.C.*, 190 U.S. App. D. C. at 404-06, 587 F. 2d at 1801-03 . . . the Commission should consider the policies of the Federal Power Act in making a determination under this section. This does not mean, however, that a pooling plan is unlawful under section 206 merely because a more comprehensive arrangement might better achieve the purposes of section 202(a). To so conclude would undermine Congress's determination that coordination under section 202(a) be voluntary.

Id. at 1168

It has been argued that it will deter power pooling if utilities which agree to a pool among themselves are required to extend the benefits of the pool to small entities which cannot contribute proportionately in exchange for the benefits they receive. It is further argued that it is reasonable discrimination, and not undue discrimination, to extend membership only to those who will benefit the other members in return for the benefits the other members confer on them. In the CPPA, for instance,

emergency power is furnished for two hours in some circumstances (Section 8.06), with no provision for payment, although the power must be returned later. Each of the present members of the CPP can furnish emergency power to the others, and thus reciprocate for the power that may be supplied it Smaller entities, if admitted to the Pool, could not reciprocate in any meaningful amount, and would be more likely to take than to give.

Nothing, however, requires that the CPPA parties preserve the present provision for emergency power as it now is. The CPPA may be amended to provide a reasonable charge for such emergency service, which charge may cover the full cost. To require the present Pool members to render service without just compensation would be illegal. Any charge would have to be filed with this Commission, and may not be more than just and reasonable

It is established that entities receiving service may be divided into categories if the differences between them result in significant differences in the services rendered, or in the cost of such services. Lower rates for higher volumes, or for interruptible service, or for off-peak service are not unreasonable in themselves (although a particular differential may be found unreasonable). There may not be discrimination between entities that is not justified by differences in the services rendered or in the costs of rendering such services. An electric utility which has undertaken to provide a particular service to some may not refuse to provide such service to others in similar position where it has the facilities and capacity to serve them. Whether the others are in a similar position is a question of fact. The others are not in sufficiently different position to justify denial of service if the differences can be compensated for by higher rates or reasonable adjustments to services. A power pool agreement may be amended to provide reasonable compensation for services, and different charges may be provided for different categories so long as the categories and charges are just and reasonable. Again, the charges will be subject to review by this Commission.

Where it is feasible to provide an applicant with the same services given Pool members at reasonable rates that compensate fully for the cost of the services rendered, I conclude that the proper course is not to exclude the applicant, but to include it while providing for compensatory rates. It is preferable to adjust the rates for all members rather than to provide a new separate schedule for new members, but this does not prevent separate categories and charges where this is reasonable and not unduly discriminatory.

In MAPP, the Court of Appeals affirmed the Commission, which held smaller generating systems should be included in the pool "so long as they provide compensation for the true value of transmission services whether in kind or in money," and directed participants and the Commission staff to develop a formula for fair compensation to be paid by those participants unable to reciprocate for transmission in kind Id., at 1172. While the ruling was with respect to transmission, the same principle should be applied to other services. For what is provided them, members should reciprocate or pay reasonable charges.

NCPA and Southern Cities had no generation as of the conclusion of the hearing in these proceedings. Future generation was planned, however, and some was under construction.

The benefits of the CPPA are (1) reserve sharing, (2) emergency service, (3) economies of scale, and (4) joint planning. Some of these benefits overlap.

As of the close of the record, only the planning function was of use to NCPA and Southern Cities, since the other three were benefits in connection with generation which the Intervenors had not established. Future generation is being planned, however, and other generating alternatives are being examined. I conclude that access to the planning aspects of the CPPA should be granted to any area entities seeking membership and affirmatively engaged in building or designing significant generating facilities. To open participation in the CPPA planning to any who may be merely considering the possibility of future generation may be too burdensome; we are not presented with that question here. Neither do we need to decide where the line must be drawn between those who are sufficiently entered upon a course leading to future generation to render their inclusion in planning necessary to avoid undue discrimination, and those who are not It is proper for those admitted to the planning function to bear their just and reasonable share of the costs of the planning operation. What that share may be is not now before us.

Under the CPPA, each member controls its own building of generating plants. Planning and development are not controlled by the decisions of the Pool members as a group, but by the decisions of the individual member with respect to its own needs. Members may cooperate and coordinate, they may alter their individual investments and plans for generation in the light of what others are doing, but they cannot be compelled or prevented by the other members. There are

reserve requirements, but how these reserve requirements are to be met is in the hands of the member obligated, and not of a central planning body

It is unnecessary in connection with planning to consider the question of how control is to be exercised, and the weight of votes to be cast. In these planning provisions, we have neither the problem of the small system that may have little or no voting power, nor that of the large system that does not want its future controlled by the votes of lessor entities. All that new members of the CPPA are to be given is an ear and a voice in connection with planning, not a vote. They must be allowed to participate in the planning sessions, and must be furnished with the knowledge there available to others, and allowed to express their views on the potential plans for the members' areas. Conversely, they must furnish information and hear others' views.

In MAPP, *supra*, the Court of Appeals affirmed "the Commission's decision that the failure to include non-generating distribution systems in MAPP is not anti-competitive and does not render the Agreement inconsistent with the public interest." *Id.*, at 1165. In MAPP, however, there were differences from the CPPA.

> " ... non-generating distribution systems that desire to enter the generating business may submit construction plans to MAPP for consideration and may attend MAPP meetings at which long-range plans are discussed."

Id., at 1165. I conclude that non-generating California distribution systems should be accorded here what was accorded them by MAPP, and that NCPA should be permitted to represent its member utilities if they so desire.

The Commission modified MAPP so any distribution company interconnected with a MAPP participant that wishes to construct generation facilities "is assured of eligibility for pool membership, and the consequent benefits of reserve sharing, when the facilities are operational." *Id.*, at 1165. The CPP should be similarly modified here. NCPA should be treated as a distribution company for this purpose.

In *MAPP*, there was a pre-existing membership provision that was altered. Here there is no membership provision. The present members are directed to draft an appropriate membership provision and submit it for approval.

I do not construe *MAPP* to require admission to full membership of entities with only insignificant generating facilities, or tiny shares in larger generating facilities. (See page 19, which requires participation in the planning function only for those building or planning *significant* generating facilities.) The membership provision may provide reasonable standards.

Paragraph 1.29 of the CPPA should be redrafted to exclude the assumption that there are only three parties to the agreement.

Paragraphs 3.02 and 8.01 have had similar allegations leveled against them. Paragraph 3.02 states:

> Each Party reserves the right to continue or renew existing agreements and enter into additional agreements with any Third Party for the purchase, sale, exchange, and/or transmission of capacity and/or energy; provided, however, that unless the Parties mutually agree otherwise in writing, no Party shall enter into any such additional agreement with a Third Party whose System is not included in the Party's Area System if the effect of such additional agreement would be either
>
> (a) to obligate the Party to stand by or protect any supply of power for such Third Party unless the Party is providing Spinning Reserve equal to its obligations for such service in addition to that otherwise required under this Agreement.
>
> (b) to obligate any other Party to furnish directly or indirectly to any such Third Party capacity, energy, and/ or transmission service, or
>
> (c) to result in a Capacity Resources Deficiency, and Energy Resources Deficiency or a Spinning Reserve Deficiency or a conflict with any obligation under this Agreement.

NCPA claims this provision restricts the ability of a pool member to contract with a third party through a potentially arbitrary veto.

First, with regard to Paragraph 3.02(b), PG&E Witness Kaprielian has interpreted this language to mean that it does not prevent a member from offering some of its own transmission to a third party, but only prohibits a party from obligating one of the other parties without approval. CH-1481. Edison interprets this provision similarly. CH-1625-1626; CH-1862-1867. NCPA states the language as presently worded is not in accordance with the interpretation. (NCPA Initial Brief, p. 172.) PG&E states in response that there is no unequivocal public necessity to rewrite the paragraph, since the members of the Pool already know what it means. They may, but possible future applicants may not.

The clause should be redrafted to reflect Mr. Kaprielian's interpretation

Second, there is also a question as to whether Paragraph 3.02 applies to the situation in which a third party located within the control area of a Pool member deals with other Pool members. Kaprielian states it does not. CH-1868; CH-20,985-86. Edison agrees with this interpretation. NCPA has no problem with the desirability of this interpretation, but cannot reconcile the interpretation with the language. PG&E again responded that no necessity exists for revision. The provision should be redrafted to reflect Mr. Kaprielian's interpretation.

The third problem with Paragraph 3.02 concerns its effects upon sales by a third party located outside the service area of any Pool member Under the provisions of 3.02(a), a member cannot obligate itself to stand by or protect any supply of power unless (1) it is providing spinning reserves equal to its obligations or (2) the other members agree in writing. Again, there is a problem of interpretation. Witness Mitchell states the provision, rather than requiring the party to spin 100% of the contemplated transaction, only requires a party to spin 7% of the entire transaction (pursuant to Paragraph 7.01 as modified). CH-1867-68. Edison states that NCPA's incorrect interpretation is based on early Pool documents, and has never been interpreted to require spinning of 100% of the entire transaction. (Edison Answering Brief, pp. 248-49.) The ambiguous spinning requirement should be redrafted with specificity.

NCPA also argues that the provision gives the other members unfettered discretion to veto transactions where the Party does not have the spinning reserves to back up the transaction. NCPA argues that in the past Edison has forced every major contract it has to be exempted from this provision. Edison states that Intervenors and Staff can point to no instance where the provision has been utilized to forestall any proper transactions. (Edison Answering Brief, p. 250.) PG&E argues that the provisions need to remain to protect the pool's reliability.

This provision was drafted to ensure a Pool member, unless it agrees, does not become responsible for another member's folly in guaranteeing standby for a third party's supply of power if that supply is questionable. The purpose of this provision cannot be applied in a discriminatory manner, however. If NCPA acquires generation and becomes a member of the CPPA, it must be treated like anyone else so long as the circumstances are similar. It must also be allowed to buy spinning reserve from other members at just and reasonable rates. The fact that as a member it can refuse to waive the provision in question for other members if it is not treated fairly may discourage discrimination against it. It is hoped that the various members will be able to work together and not carry into their Pool dealings the animosity that has partly risen from and also been one of the causes of so much litigation. If not, the Commission may entertain a petition to deal with the situation by amendment of the CPPA or otherwise.

The elimination of the provision has not been shown to be required. It has not yet been used to discriminate, or to obstruct. If it is, the doors of this Commission are open. Since it appears to have a valid purpose, it will not be deleted at this time.

Similar attacks have been made upon Paragraph 8.01(b) of the CPPA The section states:

> (b) In order to protect the Parties from unknown and unreasonable risks and to avoid inequities, no Party shall take service hereunder to stand by or protect any supply of power for its Area System or the System of a Third Party if such supply of power is obtained from a generating source not included in the Area System of a Party, provided, that there shall be excepted from this paragraph any source under contract to a Party on the date hereof and any other source which the Parties mutually agree in writing to except herefrom.

As described by NCPA Witness Westfall

> ... if NCPA were to purchase a block of power from the Northwest it .. would be precluded from receiving any standby or reserve service from SCE or SDG&E without approval of all parties to the Agreement ...

CH-753. The provision is present to protect the reliability of purchases of power from outside sources. Kaprielian agrees with the interpretation, but stated, "I do not believe there would be any problem" because he is convinced the CPP companies would apply the standard to a resource imported by NCPA. CH-1483. NCPA claims this provision has been applied in a very lax manner in the past, with permission sometimes never given in writing, or projects sometimes interpreted to be within a system to avoid the provision. NCPA claims this, coupled with the fact that no transaction has ever been delayed or cancelled as a result of Paragraph 8.01, shows that the provision is unnecessary.

As with Paragraph 3.02, the provision was drafted with the intent to promote reliability of the pool. It must not be used, however, to discriminate against small potential members.

For this reason, the provision will be allowed to stand, but it must be applied in a non discriminatory manner. It shall also be revised to include Staff's recommended revision (Initial Brief, p. 246) that the purchase be allowed as long as it is as reliable as other resources owned, purchased or controlled by any other Party as of the date of the Commission's final order in this proceeding.

Paragraph 5.01 of the CPPA provides two standards for the Capacity Resources Requirement, which shall be the greater of the two. The first standard is 110% of a member's Peak Demand for that day. The second is the sum of 105% of the Peak Demand for that day plus the amount of Capacity Resources out of service for scheduled maintenance at the time. Witness Westfall argues this discriminates against a entity such as NCPA which meets a portion of its peak load through firm purchases from another party. NCPA claims that since by definition a firm purchase is backed by the reserves of the seller, the buyer should not also have to maintain reserves to guarantee it.

In answer to NCPA's contention is the testimony of Edison Witness Whyte, CH-29,854:

Q. Mr. Westfall (at Tr CH-8443) criticizes CPPA Paragraph 5.01 by suggesting that the Capacity Resource Requirement should be reduced for any member which is purchasing "firm power" since the seller of that "firm power" must provide reserves. In your opinion can a purchaser of "firm power" prudently avoid providing reserves for that "firm power"?

A. No. The extent to which purchased "firm power" can be relied upon to carry load on the purchaser's system is a function of many variables, among which are the conditions on the system where the power is generated, the contract terms and conditions, and the transmission arrangements. For example, Edison has an arrangement with Portland General Electric where Edison exchanges firm power. Portland has the right, however, to curtail service to Edison if necessary to avoid curtailing service to its own customers. Also, the connecting transmission lines must be available. At Edison, as I have said, we use loss of load probability techniques to recognize these factors. I should also note that reserves are necessary to provide for regulating margin and for load forecast uncertainty whether or not power is being supplied under "firm" contracts.

There appear four objections to NCPA's argument. First, the contract: Mr. Whyte has pointed out that a "firm" sale is not necessarily an unequivocal commitment to deliver power. Second, conditions on the seller's system Mr. Whyte did not specify these, but at least two are readily apparent. The level of the seller's reserves may or may not be equal to the reserves required of CPP companies, if it is not, the reserve levels for the firm purchase would not provide the same margin of safety as would the purchaser's own reserves. There may also be other conditions on the seller's system which would render its power supply less reliable than generation by CPP members. What these conditions may be is not specified, nor does the CPPA provide standards. Third, if there is a transmission line between the seller and the buyer, that transmission line may be subject to interruption; no matter how much power Portland General may have available, it cannot be gotten to California if the Intertie lines are out of service. Fourth, Mr. Whyte states reserves are necessary to provide for regulating margin and load forecast uncertainty.

I conclude that the criteria which should be met are these: (1) the purchased power must not only bear the label of firm power, but the contractual obligation to furnish it must be part of seller's first priority load, not interruptible where the seller's retail customer needs require it; (2) the reserves on the seller's system must be as high as those required of CPP members; (3) aside from reserves, the reliability of seller's system should not be jeopardized by conditions on it; and (4) the transmission link between seller and buyer must not be susceptible to interruption to any appreciable extent unless there are sufficient alternate transmission routes, not susceptible to interruption to any appreciable extent, to transmit the seller's power to the CPP at some point or points so there is no loss of power to the Pool through the failure of transmission to the buyer. All these standards are for the protection of the Pool, not of the buyers, and should be so construed.

For a small utility in the PG&E or Edison area, a PG&E or Edison guarantee of delivery of power will be as good as its own reserves. If the linkage with PG&E or Edison fails, there will be no burden upon the Pool. For the small utility in PG&E's area, guaranteed power from PG&E should require no other reserves than PG&E's. The same is true for Edison's area.

A slightly different problem arises when a small utility in Edison's area buys firm power from a member of the CPP other than Edison. If one of the Southern Cities buys firm power from PG&E, there should be no problem. PG&E's rate to the small utility would include the cost of reserves for such power, and those reserves would be available to the Pool as a whole even if they could not reach the small utility because of some transmission problem

outside PG&E's area. There would be no burden on the Pool as a whole affecting reliability, because PG&E's reserves would take care of it. The same is true if a utility in PG&E's area buys from Edison or San Diego

If the small utility buys from another small utility Pool member which does not itself have adequate reserves, and must resort to the Pool to make good its deficiencies, a burden will be placed upon the Pool. Either the selling small utility or the buying utility must compensate the Pool for the deficiency, or must make good the deficiency by buying reserves from a member of the Pool that does have them available.

When there is a deficiency in the reserves of the seller, and seller purchases reserves to make up the deficiency, seller needs only to purchase what is lacking, not the entire amount of reserves needed to back up the firm power sold. For example, if seller has sufficient reserves to back up one half the firm power sold, seller need arrange only for additional reserves sufficient to back up one half the amount of the firm power sale, not the entire sale. Under the same circumstances, if the buyer purchases the necessary reserves to make up seller's deficiency, buyer need purchase only the reserves necessary to back up one half the amount of the firm power purchase.

PG&E has raised the question of a seller's reserves being less reliable than those of Pool members. There is no provision in the CPPA for measuring the quality of reserves. If this is thought to be a problem, an amendment to the CPPA may be submitted in this proceeding to provide for it. We do not now have the record necessary for drafting such an amendment.

As to conditions on a seller's system, other than reserves, which might render power purchased from it less reliable than a purchase from PG&E or Edison, the conditions cannot be spelled out here on the basis of this record. While such conditions may be imagined, including reckless management, inadequate maintenance on the system, and threatening environmental conditions such as possible interruption of service by avalanches or forest fires, neither the record nor the CPPA make any attempt to enumerate them or to provide standards or methods for determining whether conditions exist endangering seller's reliability. The CPPA may be amended to provide a means for determining if such conditions exist. Until this is done, firm power which meets the other standards here set forth should not require reserves provided by the buyer because of conditions on the seller's system.

Such entities as LADWP, SMUD, and CVP are so interconnected with CPPA members that the transmission standard is satisfied. Deliveries from the Northwest, on the other hand, may be subject to transmission interruptions The burden of such interruptions falls upon the Pool as a whole, if a purchaser does not have the necessary reserves. A small utility without such reserves may not be excluded from the Pool, but must be permitted to arrange in advance for reserves at just and reasonable rates. The small utility must pay for any such service, and not demand revision of the Pool requirements so that it would receive service for nothing. To hold otherwise would require the larger utilities to render service without compensation.

The reserves for load forecast uncertainty on seller's system will be covered by the seller's reserves. The reserves for load forecast uncertainty on the buyer's system will not be covered by seller's reserves unless specific arrangements are made between seller and buyer. If no such arrangements are made, these reserves will have to be provided by buyer, purchased from someone else, or provided by the Pool. The general statement that firm purchases are supported by the reserves of the seller is not entirely true, since that portion of the reserves necessary for load forecast uncertainty on the buyer's system is not provided by the purchase of a specific amount of firm power. Of course, if the firm power purchase is an arrangement for all the buyer's requirements, the reserves for load forecast uncertainty will be included in seller's obligation, and if seller's reserves, and transmission for them, meet the criteria previously set forth, no other reserves for load forecast uncertainty should be required. If, however, the firm purchase is limited to a fixed amount, then reserves for load forecast uncertainty on buyer's system must be provided in some other manner.

The reserves for load forecast uncertainty are but a part of the necessary total reserves Reserves to take care of generating outages, for example, should be encompassed in the seller's system. It is not proper for the CPPA to provide, then, for no credit for the reserves available along with the firm power, and the clause in paragraph 5.01 is improper in this respect. It must be modified.

If the buyer's reserves in a particular category, which are available to support the firm power sold, fall short of that required by CPPA of its members, there still must be a credit for the reserves that are available. For example, if reserves of 2 MW are required for 20 MW, and seller has only 1 MW of reserves for each 20 MW of its load, a credit of 1 MW must be allowed buyer toward its total reserves

requirements, assuming the transmission and other criteria are satisfied

In other words, the amount of reserves in any category which a buyer of firm power must furnish shall not be computed as a percentage of peak load minus firm power purchased. It should be computed as total reserves required (a percentage of peak load) minus the seller's reserves available to buyer. If the reserve percentage is required to be 5 percent, the peak load 40 MW, the firm purchase is 10 MW and the seller's reserves available to buyer are 3 MW, the algebraic computation of the required reserves is five percent of 40 MW, or 2 MW. It is *not* five percent of (40-10) MW, or 1.5 MW The reserves that buyer must purchase equals (2-3) MW, or 1.7, not 2 MW, as it would be if no credit were given for seller's reserves. This method of computation may be applied to all categories of reserves. In view of this determination, regulating margin need not be separately considered.

The Pool members shall submit a revision of Paragraph 5.01 drafted in the light of this Initial Decision and the proceeding shall remain open for the purpose of approving, modifying or redrafting the Pool members' revised provision that is required to be submitted.

NCPA also claims Paragraph 5.01 discriminates against small systems by requiring them to carry more installed reserves in relation to their system peak than large pool systems. This is because NCPA speculates that it will possibly rely on one very large generating unit, and it would be obligated to maintain reserves in an amount equal to the greater of (a) 110% of its peak demand for a given day or (b) the sum of 105% of its peak demand *plus* its capacity resources out of service because of scheduled maintenance. When the large plant is out of service for maintenance, NCPA would be required to carry large reserves in relation to its load. In contrast, an entity such as PG&E does not rely on a single large unit. Any PG&E unit will generate a small part of PG&E's load, and when the unit is out of service it will not greatly affect the reserves required.

Assuming an entity with a Peak Demand of 100MW, which has one 70MW plant down for scheduled maintenance, the Capacity Resources Requirement would be 175MW. Without the provision requiring 105% of Peak Demand plus the 70MW plant out of service, the Capacity Resources Requirement would be 110MW, of which 70MW would be out of service. This would leave only 40MW to service a 100 Peak Demand. With the provision requiring 105% of Peak Demand plus the 70MW plant out of service, there would be 105MW to service the 100MW Peak Demand. This does not seem an unreasonable requirement. Paragraph 5.01 exists to promote reliability NCPA can purchase reserves. It can continue to enjoy the economies of scale through joint ownership. CH-33,359, CH-23,235-37 It can also reduce, although not eliminate, the effect of maintenance through careful scheduling (Edison Initial Brief p. 63). To some extent this is not possible, but a power pool is not required to eliminate all the handicaps under which a small utility must operate because of its size. A pool cannot, of course, create additional handicaps by undue discrimination.

Paragraph 5.03 establishes a payment for capacity resources deficiencies:

> Any Party incurring a Capacity Resources Deficiency shall thereupon become obligated to pay as liquidated damages to the Parties entitled thereto under paragraph 5.04, two dollars ($2.00) for each kilowatt of such Capacity Resources Deficiency for each calendar month and any fraction thereof until such Capacity Resources Deficiency is completely removed and for each of the next twelve (12) calendar months thereafter.

It is clear that some deficiency charge under Section 5.03 is justified. *New England Power Pool Agreement* (NEPOOL), Opinion No. 775, 56 FPC 1562, 1581 (1976). While, as in NEPOOL, smaller systems will have more difficulty avoiding the charge, it appears the charge is necessary. NEPOOL stated the deficiency charge should be based upon actual kilowatt shortfall. The charge in NEPOOL was $22 per kilowatt year, plus an additional percentage of that charge; here the charge is $2 per month, or $24 per year. Here, however, the charge continues for twelve calendar months after the capacity deficiency is removed. In NEPOOL, the $22 approximated costs as estimated by the Working Committee, here the basis for the charge has not been shown. In NEPOOL, the Commission said that the $22 had not been shown to be unjust or unreasonable. The $2 per month ($24 per year) has not been shown to be unjust and unreasonable here. The number is so close to that approved in NEPOOL that it is not suspect. The additional twelve-month charge however, has not been shown to have any basis It will be ordered eliminated. The CPPA members may, however, submit a proposed provision providing for any charge which they can establish as just and reasonable. Such charges may differ from past charges in rate design as well as amount.

Paragraph 6.01 of the CPPA requires any member to have energy resources equal to the sum of (1) its Energy Requirements for a

month, (2) the Energy Capability of the generating units included in its Capacity Resources out of service on scheduled maintenance during that month, and (3) 50% of the Energy capability of the largest generating unit included in its Capacity Resources not out of service on scheduled maintenance that month. As with Paragraph 5.01, Intervenors and Staff claim this prevents small utilities who wish to rely on large generating units from participating in the Pool, and thus it discriminates against them.

Initially, NCPA claimed that the provision was ambiguous, in that PG&E witness Kaprielian stated that the apparent discriminatory effect of the provision is lessened by the fact that a "credit" is given for the emergency capability for units out of service. NCPA initially said that the provision did not appear to be in harmony with that statement. (NCPA Initial Brief, p. 195.) NCPA apparently backed off upon hearing Mr. Kaprielian's explanation of how the provision has been read:

> A member's "Energy Requirements" are defined by paragraph 1.23 as its "total energy demand, expressed in kilowatt hours, on all power sources of its Area System" during the month. The kinds of energy sources a member can count toward fulfilling its paragraph 6.01 obligation are described in paragraph 1.24 as "the aggregate dependable load carrying ability, expressed in kilowatt hours, of its Capacity Resource" during the month. Par. 1.24. The "Capability Resources" of a member include the sum of the capabilities of all electric generating units, whether in or out of service during the month, and all purchased firm power, less the amount of firm power made available to other Pool members. Par. 1.08. Since the requirement of Paragraph 6.01(b) to maintain energy resources equivalent to the capability of units out of service for scheduled maintenance can be discharged simply by counting the energy capability of the same units under paragraph 1.24, the net requirement is that a Pool member maintain resources capable of producing energy sufficient to cover the energy demand on its system for that month plus energy reserves equivalent to 50% of the capability of its largest generating unit in service for that month. (Kapriellian, CH-1490/2-5.) When each Pool member maintains resources capable of producing at least this quantity of energy,the reliability of the Pool is assured. (Kapriellian, CH-1463/7-9.)

Relying upon this testimony, I find no redrafting is necessary.

NCPA also quotes certain member dissatisfaction with the provision as reason to have it removed This is not enough. Differing opinions on how to achieve reliability are not grounds for requiring a change That current members disagree is some evidence, however, that future members may successfully campaign within the Pool itself to delete or amend the provision. This voluntariness is at the core of power pool arrangements. The provision was designed to ensure reliability, and not to promote discrimination. While small systems may be affected in ways not experienced by larger entities, in the absence of undue discrimination this is permissible.

Paragraph 7.01 is the CPPA's spinning reserve requirement. This is determined on the basis of a Party's peak demand on a given day. NCPA objects that, like Paragraph 5.01, it requires an entity to keep reserves for that part of its load that is met through firm purchases, and NCPA argues this in essence requires that the firm purchase be backed by reserves twice: once by the seller and once by the buyer.

The seller's reserves are included in any firm purchase. As stated in regard to Paragraph 5.01, power purchased from a distant utility may be more of a risk than power owned outright. If purchased power is PG&E's or Edison's guaranteed power, it is virtually as reliable as the customer's own power, and if it cannot be delivered it will place no burden on the Pool. The same reasoning and standards previously set forth in connection with Paragraph 5.01 apply here. Paragraph 7.01 should be amended so a buyer need not provide spinning reserve for guaranteed power sold by a CPPA member with adequate spinning reserves under the standards previously provided, or from any other supplier if the purchase meets those standards previously established in connection with Paragraph 5.01: (1) unequivocally guaranteed power, (2) backed by reserves at least equal to CPPA standards, (3) from a seller with transmission to the CPPA not subject to appreciable chance of interruption. The CPPA may also incorporate standards or means for determining if conditions exist on seller's system that endanger a seller's reliability, and making reasonable provision for reserves to offset such conditions.

Staff alone objects to Paragraph 7.03, which sets up a spinning reserve deficiency penalty charge, claiming the charge bears no relationship to the costs incurred by the other members.

A deficiency charge of some sort seems reasonable to provide incentive to the members to maintain the proper reserves. As required in

the NEPOOL opinion, *supra*, regarding capacity charges, the charge is based on an actual kilowatt shortfall, and there has been no showing the amount charged is clearly excessive.

That amount is 10 cents per kW of the largest spinning reserve deficiency incurred by a Pool member in a day. It is stated to be liquidated damages. A Pool member may be excused from payment under certain specified circumstances, and the charge may be changed from time to time by the Board of Control. If so changed, it is a rate change which must be filed with this Commission. While the circumstances excusing payment seem sufficiently explicit so they should not lend themselves to abuse, [8] they must be applied without discrimination.

Paragraph 8.02 deals with priority of service. NCPA fears that the provision would require that service to a non-party would come behind service to any of the CPPA parties, constituting a bar to dealing with entities within another party's control area. Edison and PG&E say that this section specifically deals only with transactions between CPPA parties. This has been confirmed by testimony. Mitchell CH-1878-79; Kapriellian CH-1492 and CH-22,177. The language refers to transactions "between a Party and another Party." No revision is necessary.

NCPA and Staff contend Paragraph 8.06, like Paragraphs 5.01 and 6.01, imposes a penalty on small systems which are relying on large generating units.

Paragraph 8.06 states that in the event of an emergency, a Party uses its own spinning reserves first, and to the extent that is insufficient, it can draw upon the spinning reserves of other parties, without charge, for two hours as long as it does not draw more than 7% of its daily peak load (the amount of its spinning reserve requirement). NCPA concludes that since PG&E's peak load provides a larger reservoir for emergency service than would NCPA's peak load, if NCPA relied on a single large unit it would incur a penalty, while large operators such as PG&E rarely would incur charges for excess. (NCPA Initial Brief, p. 199.) NCPA asks the provision be revised.

It appears that NCPA and Staff are in effect arguing that small operators are not getting enough free service. NCPA need not necessarily rely on large units. The provision does not appear to have been drafted with discriminatory intent. Staff Witness Newton testified that charges for emergency service are not uncommon. CH-17,276-77, 17,290. The provision may stand.

NCPA argues for the removal of Paragraph 8.08(f), claiming that it effectively precludes a party from providing standby service to the system of any other entity not included in its area system.

A reading of the provision makes it clear that this is merely a clause preventing a Pool member in an emergency situation from obligating the spinning reserves of another Pool member (which it is receiving due to the emergency conditions) to provide standby service to third parties, without the other Pool member's consent. I find this provision not unreasonable.

The Intervenors attack Paragraph 8.09, saying the provision operates to penalize a utility that operates a single large unit. The provision allows a Pool member, upon request, to supply capacity for a period of seven days to another Pool member with a Capacity Deficiency. Such a request may be renewed. NCPA claims the provision is ambiguous, in that it is not clear whether the availability of capacity resource standby service is limited to seven days, or whether the limitation is eliminated by the fact the service may be renewed. Kapriellian stated the seven days is to only give a review period to determine whether the conditions for continued service are met (CH-1494) and is not meant as a limitation.

The provision appears to be unambiguous. The seven-day period is not a limitation on the service which may be rendered.

Intervenors and Staff contend Paragraph 11.03 provides for a division of markets. That paragraph states:

> Nothing in this Agreement shall be construed as providing, directly or indirectly, for any cooperative furnishing of electric utility service by any party within the system of any other party.

This provision is not a division of markets. It does not prohibit or require anything; it merely states what the CPPA does *not* do. There is no evidence it has been interpreted or applied to justify or require an improper practice. In the absence of such evidence, no revision will be required.

It has been urged that rulings of the Board of Control should be filed with this Commission as supplements to the CPPA. Paragraph 10.06 of the CPPA defines the authority of the Board. Except for Paragraphs 10.06(c), (d) and (e), and the catch-all (h), the Board's power is only to review, recommend, and establish information procedures. Under (c), the Board determines the load capacity of each Interconnection; under (d) the Board determines metering, recording and billing

procedures, and any other procedure the Board "may determine to be necessary" to implement the CPPA terms, under (e) the Board prescribes operating procedures and criteria for providing services under (b) the Board may take all other actions authorized or required of it by the CPPA. Paragraph 7.03 provides the Board may change the charges for Spinning Reserve Deficiency, or in some instances forgive the charges. A change in charges would have to be filed with the Commission even if this Initial Decision said nothing about it. It is apparent that rulings of the Board of Control may affect substantive rights of parties to the CPPA, although most rulings would not do so. Accordingly, I direct that Paragraph 10 be amended to provide that all rulings of the Board be filed with this Commission in this proceeding, as supplements to the CPPA, and that such filings be made. The proceeding will remain open for the purpose of receiving any such Board rulings and considering objections to them.

At present, each CPPA member is represented on the Board of Control. This may be altered if the parties wish to submit a suitable amendment to the CPPA in this proceeding. Admission to the planning function need not mean representation on the Board. It may not be necessary to give every generating member direct representation on the Board where such membership is greatly expanded. The provision for unanimous decision may be impractical with a larger membership. These questions were not argued, and need not now be decided. So long as a proposed revision of the CPPA is on these points is just and reasonable, the parties are entitled to frame it as they wish.

It has also been urged that the Pool minutes interpreting the Pool provisions and Board rulings be filed as supplements to the CPPA. I decline to order this. The Pool minutes are available to all present and future Pool members, and are subject to production as evidence in any proceeding in which they are relevant. In my view, they are not properly considered as supplements to a filed rate schedule. The Board of Control rulings go beyond interpretation and establish new rules, and may therefor be considered as establishing additional terms of the rate schedule. This Commission has not, however, required interpretations of rate schedule provisions by a utility, or the minutes of a utility's Board of Directors dealing with interpretations, to be filed as rate schedule supplements.

II. The Pacific Intertie

The Pacific Intertie is considered to be the greatest electrical transmission achievement in this country in this century. It established high voltage, high volume long distance transmission between northern Oregon and its terminal near Los Angeles, the greatest distance over which commercial electrical transmission had ever been accomplished in this country, and in the greatest volume that long distance transmission had ever reached anywhere in the world. One component, a direct current line, was the first major dc transmission line in this country, and was completed through difficult terrain in the face of skepticism on the part of some engineers as to whether the proposed technology would work. After an initial period in which some "bugs" were dealt with, the dc line proved to be successful beyond the expectations of most of its proponents in providing low-cost long distance transmission.

The engineering feat of design and construction was complemented by the difficult political maneuvering and compromising necessary to work out the details among the conflicting interests and demands of the Northwestern states, California, Canada, municipal utilities, private utilities, the Bureau of Reclamation and other state and federal agencies. Senators, Congressmen, governors, cabinet officers and President Johnson became involved.

Basically, the Intertie system consists of two 500 kV lines from Oregon into California and one 800 kV line to the east from Oregon through Nevada and southern California. The system is described in more detail in Southern Cities' initial brief at page 13:

> The two 500 KV ac lines begin at the John Day Dam on the Columbia River. The first leg of each line, from John Day 89 miles to Grizzly Substation in Oregon, is owned by the Bonneville Power Administration ("BPA"). From Grizzly 178 miles to Malin Substation near the California Oregon border ("COB"), one line is owned by BPA and the other by Portland General Electric Company ("PortGE"). From Malin 94 miles to PG&E's Round Mountain Substation, one line is owned by the United States Bureau of Reclamation ("USBR"). The second line is owned by Pacific Power & Light Company ("PP&L") as far as the Indian Spring Tower and by PG&E from the Indian Spring Tower to Round Mountain. Both lines then proceed southward through PG&E's service area 425 miles, through the Table Mountain, Vaca dixon (one line only goes to this substation) Tesla and Los Banos Substations to Midway Substation. From Midway the lines are owned by Edison and continue south into Edison's service area to Edison's Vincent Substation, a distance of 113 miles.[1] From

Vincent the two lines, also owned by Edison, extend an additional 47 miles to Edison's Lugo Substation. The AC Intertie traverses a total distance of 946 miles (Moody 7/1587-88). A 230 KV line owned by USBR from Round Mountain to Cottonwood is also officially a part of the Intertie. It does not, however, connect directly to the USBR Intertie line which runs from Malin to Round Mountain.

The dc Intertie line runs 846 miles from the Celilo Converter Station near The Dalles in northern Oregon, through Nevada and California to the Sylmar Converter Terminal near Los Angeles. BPA owns the line in the Northwest as far as the Nevada-Oregon border (NOB). From the NOB to and including the Sylmar Station, the line is owned 50% by the Los Angeles Department of Water and Power (LADWP) together with the Cities of Glendale, Burbank and Pasadena, and 50% by Edison. Edison owns and operates 230 KV transmission lines which interconnect Sylmar with Vincent (Moody 7/1588).

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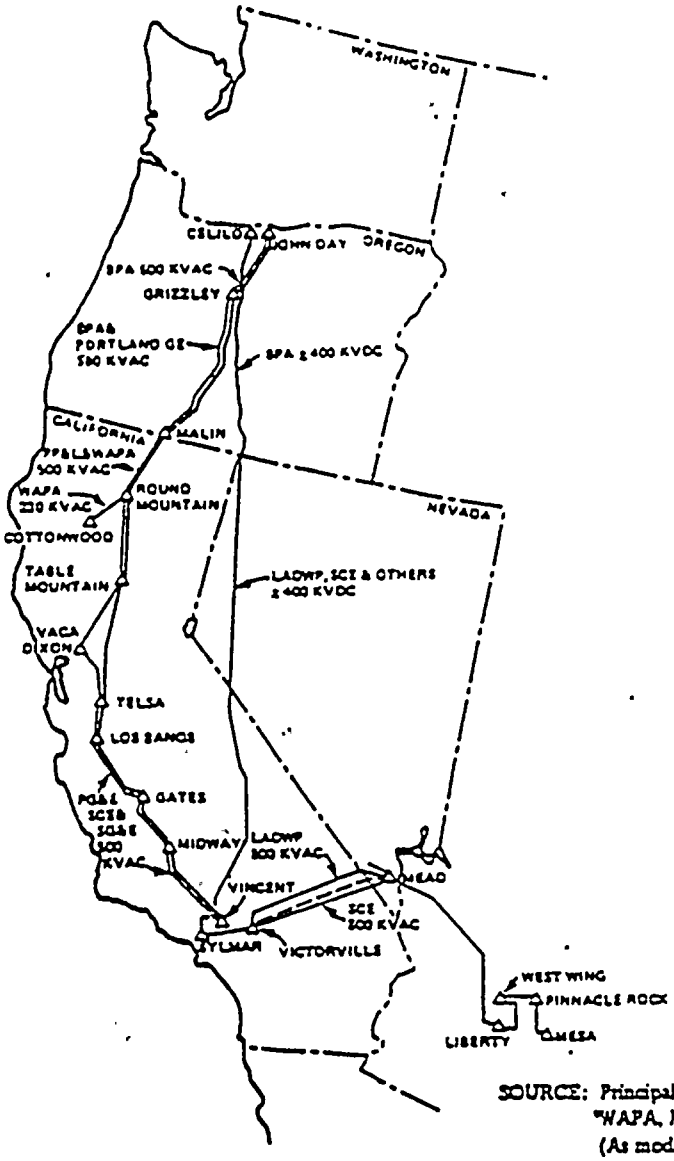
[1] There is a third 500 KV AC line from Midway to Vincent, owned one-half by PG&E and one-half by SCE, which is not considered part of the Intertie (Moody, 263/31855-56).

The Intertie is shown on the map on page 65,197. The 500 kV ac Intertie lines in the PG&E area are owned by PG&E.

The two 500-kV a-c lines were constructed and went into operation 1968 and 1969, respectively, following the original proposal for interconnection of the Pacific Northwest and Southwest Regions. As a part of the synchronized loop or doughnut network, the a-c interties are subject to unscheduled power or circulating flow. The rated capacity of the a-c intertie is 2,500 MW, assuming no loop flow. The d-c intertie, for which, the loop flow is not a factor, was constructed and placed in operation in May 1970. With transmission losses, the delivery capacity of that line is about 1,400 MW. The line has recently been uprated by about 20 percent by increasing the current rating of the converters from 1,800 to 2,000 amperes. Plans exist to increase the voltage rating from ±400 to ±500 kV, which will increase the capacity to about 2,000 MW. Current uses of both the a-c and d-c interties include capacity sales and firm and nonfirm energy sales.

Power Pooling in the United States, FERC-0049, pp. 139-41.



SOURCE: Principal Power Facilities Western U.S., WAPA, Map No. A-2, December 1979. (As modified).

FIGURE 4—Pacific Northwest-Southwest Intertie, from Power Pooling in the Western Region. FERC-0054, page 30

The Intertie at the close of the record had 10 users. CVP and DWR use 28% of the ac Intertie capacity. CH-1680. SMUD was allotted capacity, which varied over the years. Burbank, Glendale, LADWP and Pasadena together are allocated 50% of capacity of the dc Intertie line. The rest of the Intertie capacity, both ac and dc, is allocated 50% to PG&E, 43% to Edison and 7% to San Diego. CH-1680. These final three percentages reflect the relationship between the three companies' daily energy peak load demands at the time the Intertie Agreement was consummated. CH-1174. These companies have used the ac capacity not utilized by any of the others. PG&E provided some limited interruptible transmission to NCPA since the close of the record, and since at least early 1978, Edison has offered interruptible transmission service on the Pacific Intertie to the Southern Cities (Mitchell CH 1806, 1812-1813 Ex. 6039). Edison's offer to provide such interruptible transmission service was accepted by the Southern Cities of Anaheim and Riverside, and "Matrix interruptible transmission service Agreements" were executed and filed with the Commission in January 1981. Edison FERC Rate Schedule Nos. 129 and 130. The Cities of Colton and Azusa subsequently filed similar "Matrix Agreements." Edison FERC Rate Schedules 160 and 162.

Intertie usage at the California/Oregon or Nevada/Oregon borders as of the close of the record was as follows.

	500 kV ac lines	800 kV (±400kV) dc line	Total
LADWP	0	560	560
Pasadena	0	32	32
Burbank	0	54	54
Glendale	0	54	54
CVP	400	0	400
DWR	300	0	300
SMUD	0	0	0
PG&E	900	350	1250
Edison	774	301	1075
San Diego	126	49	175
Total	2500MW	1400MW	3900MW

Moody CH-1595. SMUD's usage was zero because it had not used its allotted transmission and the companies contended it had thereby lost it. By Commission decision after the close of the record, SMUD was found entitled to receive up to 200 MW of transmission service over the Intertie.

Different parts of the Intertie were built by different entities. Owners of different segments or shares therein were agencies of the United States (BPA and CVP), municipal utilities (LADWP, Glendale, Burbank and Pasadena), Edison, PG&E, Portland General Electric Company, and Pacific Power & Light Company (PP&L). PP&L turned over operation of its segment to PG&E. San Diego contributes to the operation and maintenance costs proportionate to its allotted use of the line. SMUD and DWR contributed nothing to the construction cost, but pay at a set rate for their transmission service. All others with firm arrangements to use the Intertie contributed capital.

NCPA and Southern Cities contend PG&E, Edison and San Diego controlled the Intertie arrangements and wrongly excluded them and other municipals from any allotment of Intertie capacity.

The Intertie when planned and first built was sought as an outlet for the quantity of unused hydro power from the Northwest caused by the surplus water accumulated in the mountain snows which on melting fills the Northwest reservoirs to the point where the water must be run through the turbines or wasted by spilling. The Intertie looked to transmission of this hydro electric power from the Northwest, and possibly Canada, to areas in California, where power was more expensive. It also provided the means for the sale of Canadian Entitlement Treaty power to the California utilities. It made possible the exchange of power between California and the Northwest so that each of these regions could obtain power from the other during its own peak periods and return it at the other region's peak periods, which are different both in time of day and time of year. Not only do the daily peak periods in the Northwest occur at different hours than they do in California, but the Northwest peaks occur in the winter when power is needed for heating, and much of the California peaks occur in the summer when power is needed for air conditioning. With the sharp escalation in the cost of thermal generation, starting with the oil embargo of 1973, Northwest hydroelectric energy became an increasingly inexpensive source of energy in relation to the alternatives. The Intervenors' desire for this cheap Northwest power has

occasioned much of the litigation here, in other agencies and in the courts This cheap power would be available to California entities only if transmission were available, and transmission requires access to the Pacific Intertie

In the last few years, however, this Northwest hydro electric power is no longer as cheap as it was and prices within the next year are expected to rise sharply. The Northwest has increased its own need for power and has undertaken to build thermal (including nuclear) plants to meet anticipated needs, as well as increasing the Northwest area's demand for available hydro electric power. In short, not as much hydro electric power is available from the Northwest for sale in California, and what there is is no longer as cheap. Access to the Intertie will be less advantageous now to the Intervenors than it might have been earlier, but increases in other generating costs still leave access to the Intertie desirable. The ability to exchange power between the Northwest and California to serve their different peaking times is still important, but this is of less value to the Intervenors so long as their own generation facilities are limited. They had none at the close of the record, but some were planned, and we are informed the first are now on line.

The Intervenors (except Redding, which is served by CVP exclusively) are all served by PG&E or Edison, with some NCPA members also getting power from CVP and some of the Southern Cities purchasing energy elsewhere. There is no question of their not receiving sufficient electricity. Essentially what is at stake here is the cost of power. PG&E and Edison make the point that cheap power from the Northwest and the economic advantages of power exchanges reduce PG&E's and Edison's cost and rates to everyone they serve (including resale customers), and the Intervenors who are resale customers share in the benefits of Intertie use in this respect.

The costs to and rates charged by the various municipalities may be reduced if access to the Intertie is given them, but there will be a corresponding increase in the cost to PG&E and Edison and an increase in their rates to cover the cost increase assuming full retail rate recovery of costs. The stockholders of PG&E and Edison will not lose money, nor will the executives of PG&E and Edison have their salaries reduced. Essentially what we deal with here is the question of whether the consumers supplied by the municipalities will have their rates reduced while other customers of PG&E and Edison find their rates increased. The rates charged by many of the municipalities appear to be below those charged by PG&E and Edison, although direct comparison is difficult because the methods of charging rates differ.

The first contention we must deal with is that PG&E, Edison and San Diego operated in concert (1) to prevent the building of a Federal Intertie line or a privately owned Intertie line which would have accorded transmission to all, and (2) to exclude the municipalities from access to the Pacific Intertie line.

As to how the Intertie came about, I rely on the testimony of Witness Charles F. Luce, Chairman and Chief Executive Officer of Consolidated Edison Company of New York. Before he became Under Secretary of the Interior, he was Administrator of Bonneville Power Administration from February 1961 to September 1966. CH-38,571. Mr. Luce was called as a witness by me after it became apparent that he had more knowledge of the origin of the Intertie arrangements than any other living man In his testimony he impressed me as being truthful and forthright in the extreme and I accept his version of the facts, as set forth in Volume CH-313 of the record, as the best available to us and superior to the version some have sought to piece together from documents.

Mr. Luce's testimony indicates that the main impetus for the creation of the Intertie in the form that eventually materialized came from within the United States Government Mr. Luce was one of those at the center of the efforts that culminated in the Intertie. He was one of the three United States negotiators of the treaty between the United States and Canada relating to the cooperative development of water resources of the Columbia River Basin. CH-38,578. This treaty was essential to the Intertie. It was necessary to get British Columbia's concurrence to ratify the Treaty, and to that end it was sought to find a market for Canadian power in the United States so British Columbia could proceed with development of the Columbia River power resources. The Northwest states did not have a market for all of Canada's share of Treaty power. It was clear a market had to be found outside the Northwest "so it was necessary for us to get transmission lines down to California to sell this power." CH-38,581. The private utilities in California "started out being opposed to our project, really." CH-38,581.

> ... the State of California was our particular political problem. They had a big water project that they wanted to build and did build in fact to move water from northern California to southern California. In order to move that water it had to go through the Tehachapi Mountains, and that took a lot of electricity to run the pumps to get it over

the mountains, so with the Canadian power that didn't belong to the Pacific Northwest and therefore Northwesterners were not asserting preference to it, we had a block of power that we could offer to California customers who insisted on firm power Now, the way we went about this was first of all to market the Canadian power into the Northwest customers on our agreement that we would find them a purchaser for the power for the period they didn't need in California.

We then took those contracts with the Northwest utilities, private utilities, public agencies and so forth and we used them as security for a big bond issue of $300 or $400 million and we paid that $300 or $400 million to Premier Bennett as prepayment for his downstream benefits for a period of 30 years, and then as it ultimately worked out we laid that power off in California for varying terms . . .

So as you see, these two great projects came together. We could not get the treaty without being able to market the British Columbia share of the power. We would have had great difficulty getting the State of California to agree to our whole Intertie project without the benefit of that Canadian power.

So the two projects that seemed to be floundering came together and went through.

CH-38,582-3.

Asked if the primary purpose of the Intertie was to allow transfer of Canadian power to California, Mr. Luce said:

No. I would say it had both purposes, but the inception and the primary purpose of the proposed Intertie lines was to market in California, Nevada and Arizona surplus Northwest power, that was otherwise just spilling over the spillways and going into the Pacific Ocean, to California and Arizona The first Intertie proposal long preceded the Canadian treaty. The first one I believe was in 1936 and there was another one in the late 1940's and another one in the 1950's, so all of which really were independent of the treaty. But the Treaty came along it just happened that it made it possible to consummate the political approvals that we had to have for this Intertie program.

CH-38,583-4.

The exclusion of non-generating utilities (which included the Intervenor municipalities) originated not with PG&E, Edison or San Diego but with the Bonneville Power Administration. Mr Luce testified:

It was our policy throughout the framing of the legislation that would define a regional preference for the Pacific Northwest, the design of Intertie lines that would dispose of surplus capacity and surplus energy from the Northwest and the negotiation of contracts to utilize those lines that we wanted contracts with entities *that would have their own generation.*

CH-38,572 (emphasis added).

The policy

originated from for the purpose of the legislation which had to be passed first before any Intertie lines could be built. That legislation defining a preference for all customers in the Pacific Northwest against any customers outside the Pacific Northwest was intended to authorize only the sale of surplus energy and surplus capacity outside of the Pacific Northwest. A utility that had no generation in the first place could not use interruptible energy and could not use capacity without energy. If it had no generation it had no energy So the very nature of the basic legislation that finally was adopted by Congress was such that the natural customers outside of the Northwest were those that would not be dependent on the capacity and energy from the Northwest that was withdrawable and that,if they bought surplus capacity would have the energy to go with it.

There was the further consideration that we felt, Bonneville, that if a utility that was only a distribution system somehow became dependent on power from the Pacific Northwest it would be very difficult regardless of what the preference legislation said to withdraw that power. If a shortage developed in the Pacific Northwest so that it was necessary to withdraw the power to serve a load in the Northwest the political argument between California municipalities or Arizona municipalities and aluminum companies in the Pacific Northwest that constituted about a third of our load, as I recall, would be a very difficult political argument no matter what the legislation said. We didn't want to create that kind of inherent conflict.

CH-38,573-4.

Whether Mr. Luce was right or wrong in all his reasoning is beside the point. The exclusion of non-generators came from BPA in the first instance and not from the private utilities. The exclusion policy was thought out in BPA between Mr. Luce and two BPA employees CH-38,575-6.

Certainly there was never any doubt in Bonneville Power that was our policy. Our job when I became Administrator in February 1961 as regards the sale of surplus power outside of the region was first of all to get the concurrence of the various Bonneville customers and the political officeholders in the Northwest, to a bill that they thought would adequately protect them.

It took us almost a year to do that. No bill as I recall was introduced in Congress until we had taken it up with the public agencies in the Northwest, private utilities in the Northwest and the industrial companies in the Northwest. We had many, many conferences about what would constitute adequate protection for the Pacific Northwest that could not be broken by some political power play in later years.

I am sure in those discussions and conferences and negotiations that this basic marketing policy was articulated and certainly was assumed.

CH-38,574-5.

Asked whether this exclusion policy was suggested to BPA by private utilities, Mr. Luce said.

I do not believe that is correct. They may have favored that policy, but the Pacific Northwest power users had their own reasons which were sufficient and which I would suppose preceded any discussions with the California utilities.

CH-38,575.

The non-generating utilities in northern California were not forgotten, Mr. Luce testified:

... the preference customers that didn't have their own generation in northern California for the most part were served by the Bureau of Reclamation that had generation on the Sacramento River. The Bureau of Reclamation out of the Intertie lines got an allocation of surplus power which they were able to bank, as the expression was, with the private utilities and I think that was altogether Pacific Gas and Electric that served the Sacramento Valley and were able to convert this surplus undependable power, if you will, from the Northwest through this banking arrangement into firm power, so the preference customers were taken care of through that arrangement.

In other words, in our marketing scheme in California, we didn't overlook these northern California preference customers but our way of providing benefit for them was through the Bureau of Reclamation, which had its own generation and which had contracts with PG&E and which used PG&E lines to a large extent to deliver Federally generated power that was produced by the Bureau of Reclamation dams in California.

This policy of our dealing through the Bureau of Reclamation was well known to the Congressional delegation who watched these negotiations very, very carefully. Biz Johnson, for example, was from a little town called Roseville which itself was one of these muncipals that had no generation of its own but was a customer of the Bureau of Reclamation. Biz was on the House Interior Committee and a key Congressman to getting Congressional approval for the ultimate Intertie plan.

There were other Congressmen likewise from northern California who watched very carefully what we were doing and were looking out for their constituents, as they should, and looking out particularly for the northern California municipals.

CH-38,584-5.

The arrangement for supplying northern California municipal preference customers through the Bureau of Reclamation's CVP did not make provision for all wishing to share in Northwest power, however. No provision was made for Southern Cities. Even in northern California not all municipal preference customers could obtain power from CVP. Not only did CVP have more requests for power than it could accommodate, but entities were not taken care of beyond the limited area encompassed by CVP's own distribution system plus wheeling by PG&E within an irregular area of an estimated 100-mile radius.

Mr. Luce's testimony made clear that DWR and SMUD were allowed participation because their political power made that necessary. The same was true of LADWP with its so-called satellite cities, Burbank, Glendale and Pasadena, but this group was also necessary to the entire Intertie arrangement, since LADWP was the prime builder of the dc line that the BPA group wanted, and a major potential purchaser of Northwest Power. LADWP, Glendale, Burbank and Pasadena each had its own generation, so were not subject to the objection to non-generators. The impression from all the testimony is that Edison and PG&E were not sure of the reliability of dc transmission, and participated in the dc line only because their contribution to its cost was necessary if the whole Intertie arrangement was not to fall.

Intervenors say that the three private California companies usually spoke with one voice in arguing for a privately built rather than a Federal Intertie. They also opposed a private Intertie which would act as a common

carrier This is generally correct Mr Gerdes, President of PG&E, was often the spokesman for the three companies

Intervenors correctly say the three private companies were opposed to a Federal or competing private common carrier. There is no question the three companies opposed a Federal line. So did some Senators, Congressmen and executives and BPA officials, among others. Private utilities may express their views to Congress and to government officials, and advocate publicly and privately that private transmission lines are preferable to public lines, and offer competing plans in an effort to build a private line themselves, without violating anti-trust laws or principles Speaking in concert under these conditions is not forbidden, and may be desirable in the interest of practicality.

Intervenors argue, however, that PG&E did more—that PG&E President Gerdes threatened to disconnect the PG&E system from a proposed Federal Intertie consisting of one ac and one dc line, which would have rendered that Federal system economically infeasible by loss of the PG&E market. Mr. Gerdes, however, explained that the system of one ac and one dc line was not electrically stable in his opinion, and that it might result in blackouts on the PG&E system. His threat to disconnect, in other words, was because of this particular unstable configuration of one ac and one dc line, and did not amount to a threat to use PG&E's market power to prevent any Federal transmission, even one of proper configuration. There is insufficient evidence to show that this particular incident was improperly motivated. The question is not whether Mr. Gerdes was right, but whether his belief was sincere. It has not been shown that it was not.

The proposed private line also was opposed by the CPP companies. It has not been shown, however, that any of them acted improperly against the prospective competitor. The competitor has not been shown to have been defeated by the companies' actions. Its viability has not been established, and is extremely doubtful. That line would have been in opposition to the established policy of BPA not to sell to non-generators, and the BPA policy seems to have been endorsed by Northwest companies and the powerful Senators whose constituents they were. The financial soundness of the proposed line has not been satisfactorily established. It is dubious whether all the conflicting interests could have been dealt with to make the line possible. A principal push for the Intertie lines that were finally built came from the government, and the Intertie would not have been built without it The would-be competitor common carrier private line did not have this push behind it, nor has any comparable push been shown Finally, the engineering details of the private line are not shown to have been worked out and agreeable to those who would have had to endorse it. When the differences of opinion as to the engineering in the history of the Intertie are considered, it does not appear the potential private common carrier had advanced to the point of viability.

Having dealt with the allegations of improper action outside the contracts themselves, we turn now to the contracts relating to the Pacific Intertie. These are summarized in Staff's Initial Brief, pp. 14-19

The California Companies Pacific Intertie Agreement

The Pacific Intertie Agreement (PIA) dated August 25, 1966, is an agreement among PG&E, Edison and [San Diego] setting forth their respective rights and obligations relating to the Pacific Northwest Intertie transmission facility (IR R-1).

The three CPP Companies share their capacity on a 50/43/7 basis· these percentages represent the relative magnitude of the Companies' daily energy peak load demands at the time the Pacific Intertie Agreement was consummated (Lane, 1174). The allocations of the CPP Companies include their proportionate shares of ... capacity which SMUD was initially allocated (Lane, 1175; Moody, 1594). In addition, the PIA provides that the CPP Companies have the right to any unused share of the Bureau's or DWR's allocation. (IR R-1, Paragraph 7.01(f); Moody, 1594-5.)

LADWP-Edison Pacific Intertie, D-C Transmission Facilities Agreement

The LA-Edison DC Intertie Agreement, dated March 31, 1966 (Ex. 2230), and continuing in effect for a term of 75 years, provides for the construction of the DC line by LADWP. Under the terms of the agreement, Edison was to pay LADWP one half of the costs associated with the construction and maintenance of the facility (Arts. 5,9); in return Edison is entitled to an undivided half interest in the line and its capacity (Art. 4). The agreement further provides that LADWP may sell up to thirty percent of its interest to the Cities of Burbank, Glendale, and Pasadena, and that Edison may share its capacity with PG&E and San Diego. (Art. 19). At present, the three cities collectively have an interest in 10% of the DC line's capacity, and Edison has assigned its share to the other CPP Companies in accordance with the 50-43-7

ratio set forth in the Pacific Intertie Agreement (Lane, 1182)

In connection with the LA:Edison DC Intertie Agreement, the parties also executed in March 1966, an agreement known as the "City-Edison Sylmar Interconnection Agreement," providing for the construction of a new inter-connection by the parties at LADWP's Sylmar Switching Station (Ex 2231.)

Use of Facilities Agreement

This agreement, dated August 1, 1967, provides that the CPP Companies shall be entitled to the use of the segment of the AC Intertie system owned by PP&L between the Malin Substation and Indian Spring Tower in exchange for an annual payment of $475,000 for a period of 40 years (IR B-2.)

CVP-EHV Agreement (Contract 2947A)

This agreement (IR Y-1) between the Bureau and the CPP Companies provides that they will coordinate construction of their respective shares of the Intertie; that the CPP Companies will transport up to 200 MW through December 1970, and 400 MW thereafter, on behalf of the Bureau between Round Mountain Substation and the Bureau's Tracy Switchyard; and the Bureau will provide transmission on behalf of the CPP Companies over its Intertie segment between Malin and Round Mountain Substations for amounts in excess of the Bureau's 200 or 400 MW allocation.

SMUD-EHV Agreement

Executed August 1, 1967, the Agreement provides for transmission service over the Intertie by the CPP Companies of up to 200 MW of capacity on SMUD's behalf; for the period April 1, 1971-March 31, 1976, SMUD's allocation rose to 400 MW. In addition, the agreement provides for interruptible transmission service for 225 million kWh per year. (IR W-1, Art. 9.) If SMUD decreases its use of the line, it may not thereafter increase it, except as to changes in the amount of Canadian Entitlement Power ("CEP") purchased by SMUD from utilities in the Northwest. (*Ibid*, Art. 10(d).) The EHV contract also provides for transmission service of Northwest power over PG&E's 230 kV network from the Tesla substation (ibid, Art. 14), the purchase of CEP by SMUD (ibid, Art. 17), and the interim sale of CEP and Northwest firm power to the CPP Companies. (Ibid, Art. 15.)

DWR-EHV Agreement

The DWR-EHV Agreement (IR X-1), executed August 1, 1967, provides DWR with up to 25 MW of capacity over the Intertie through March 1969, and 300 MW thereafter (Art. 10) The Agreement also provides for the sale by DWR of CEP or Northwest firm power to the CPP Companies (Art 15), the sale of power to DWR for project power uses (Art. 18), and transmission service with respect to exchange energy over the Intertie facility (Art. 24.)

PG&E-SMUD Integration Agreement

The PG&E-SMUD Agreement was executed June 4, 1970 and amended on September 11, 1975 (IR S-1, T-1). It provides for the integrated operation of the SMUD and PG&E systems and for the sale and exchange of electric power and energy (Walbridge, 2231).

The integrated operation of the systems includes cooperation in the planning for facilities by the exchange of information. Information exchanged includes addition or changes in future generation and forecasts of system loads. Further integrated operation and reliability is maintained through the following provisions: certain generation design and performance characteristics are specified. SMUD declares the amount of energy from its hydro facilities which it will make available to PG&E for scheduling over certain periods of time. Criteria are specified for the hydro operation to assure future availability. Scheduling procedures for generation are given. Interconnection points between the transmission systems of the parties with associated metering requirements are specified. (IR S-1; T-1.)

In general, SMUD uses its resources to supply its load and sells any surplus to PG&E. If these resources are insufficient to meet load, PG&E supplies the deficiency which is later returned in kind. Power is sold at SMUD's cost to PG&E except for certain defined excess energy. The SMUD-PG&E agreement remains in effect until January 1, 1993 unless cancelled by either party upon six years notice. (*Ibid.*)

Contract 2948A (Reclamation Agreement)

Contract 2948A between WAPA (CVP) and PG&E (IR U-1), was executed July 31, 1967, and remains in effect until January 1, 2005. The agreement integrates the power supply facilities of CVP and PG&E. It provides for 1) firming support for CVP hydroelectric generating plants, 2) load support for the CVP preference customer load level, and 3) transmission service to various CVP loads—both project and preference customers. PG&E obtains the right to purchase all power in excess of CVP's obligations to other entities or its pumping load and the right to various

coordination and transmission services (Anderson, 2194-5, IR U-1)

At times, CVP generates more power than it needs to meet its own pumping loads and its obligations to its customers and at other times generates insufficient energy to meet its needs In order to fully utilize its generating resources CVP has, in Contract 2948A, worked out an exchange agreement with PG&E wherein CVP deposits its excess energy into "bank accounts" when its generation exceeds load and withdraws energy from those accounts during times when load exceeds generation. In all, there are three energy accounts (Arts. 20(b), 20(c) and 20(d)) and one capacity account (Art. 29(a)) (Anderson, 2195-8.)

Energy Account No. 1 (Art. 20(b)) contains energy deposited during CVP operations going back years prior to the current growth of CVP customers. This energy, which amounted to about 15 billion kWh when Contract 2948A was signed in 1967, was closed to any additional deposits in 1967 PG&E paid an average rate of 2.444 mills/ kWh for energy in Account No. 1, and CVP buys that power back at the rate of 2.8105 mills/kWh. Withdrawals from this account are made at any time energy supplies available to CVP from generation or other purchases are inadequate to meet CVP preference customer energy requirements. Energy can only be withdrawn from Account No. 1 to meet preference customer load requirements. All withdrawals must come from Account No. 1 before withdrawals can be made from Account No. 2. It is anticipated that the account will be depleted by 1986. (Anderson, 2197-8.)

Energy Account No. 2 (Art. 20(c)) was established at the time Contract 2948A was signed Deposits to that account consist of any energy supplies available to CVP that are in excess of the needs of CVP customers. These excess energy supplies may originate from CVP generation or other purchased supplies such as Northwest power. As noted above, deposits in Energy Account No. 2 cannot be withdrawn until Account No. 1 is depleted (Anderson, 2197-9.)

The Annual Energy Exchange Account is an account that allows the CVP either to deposit or borrow energy for off-peak pumping purposes any month during the year. Contract 2948A requires that every attempt must be made to zero out this account each year. (Anderson, 2197.) The rate paid by CVP for a deficit in this account is 3 mills and the rate paid by PG&E for surplus is 2 mills. For the years 1973-78, 1,565 million kWh have been deposited, and 1,327 million kWh have been withdrawn, so PG&E has purchased about 238 million kWh. (Ex. 1060, 1061, Anderson, 2199)

The capacity account (Art 29(a)) began in January 1965 and was established to credit the United States for firm capacity available to PG&E over and above the capacity required to meet CVP preference customer loads. When the capacity account was started in 1965 the CVP's preference customer load level was less than CVP's contractual firm capacity so a surplus of firm capacity was available to the area. It was anticipated that CVP's pumping loads would increase in the future, and at some point in time, when pumping loads were large, there would be little capacity to meet customer demands. To dispose of this excess capacity and arrange for its return when needed in the future, this capacity was sold to PG&E and credited to an account for repurchase later by CVP. When Contract 2948A was signed in 1967, and provisions for the Northwest imports were made a part of the Contract, the deposits to the capacity account were changed to the amount of capacity available from CVP generation plus Northwest imports that were surplus to CVP preference customer requirements (Anderson, 2200-1.)

The DWR-Suppliers Contract

The suppliers contract (IR R-10) is an agreement entered into in November, 1966, between DWR and PG&E, Edison, San Diego, and LADWP. It provides for the sale, exchange, and transmission of power by the four suppliers to DWR for the operation of the State Water Project. Deliveries under the Suppliers Agreement will terminate March 31, 1983. (Harvego, 2211-2.)

The Oroville-Thermalito Power Sale Contract

The Oroville-Thermalito Power Sale contract (IR S-10) was executed November 29, 1967, between the DWR and PG&E Edison, and San Diego. The agreement requires DWR to sell the entire output of the Hyatt-Thermolito hydroelectric facilities to the California Companies. The Companies obtain the entire output which includes 760 MW of capacity and average annual generation of 2.1 billion kWh for a fixed annual payment. The output of the power produced at the Oroville and Thermalito facilities are sold to the three CPP Companies as follows: PG&E, 56.3%, SCE, 37.6%; SDG&E, 6.1%. Deliveries under the Oroville-Thermalito contract will also terminate March 31, 1983 (Harvego, 2212, IR T-10 pp. 3-4, S-10).

Another contract providing for transmission on the Intertie is the contract between Edison (SCE) and DWR. This is set forth at page 120 of Southern Cities' Initial Brief

The SCE-DWR Contract (Exh 1137) was entered into on October 11, 1979 The contract, which terminates in 2004, provides for sale of capacity and energy between DWR and SCE on the expiration of the Suppliers and the Oroville-Thermalito contracts.

Under the SCE-DWR Contract, SCE is obligated to provide DWR with 300 MW of capacity (¶ 8.1) and associated energy (¶ 9.1.2). SCE is to receive up to 135 MW of three-hour peaking capacity from DWR's Devil's Canyon and Cottonwood recovery plants (¶ 10.1) and 350 MW from the Oroville Division (¶ 13.1.1) plus the net energy made available from energy SCE provides for pumped storage operations (¶ 13.1.10.)

In addition, ¶ 6 of the contract provides DWR with firm and nonfirm transmission service, if Edison determines that transmission is available, for DWR to deal with third parties. The transmission service specified includes service on portions of the Intertie system, such as the Midway-Vincent 500 kv line, the Vincent-Sylmar line, interconnecting with LADWP, and the Vincent-San Onofre line, interconnecting with [San Diego].

In connection with the PIA, the Commission is also asked to consider the Seven Party Agreement, the CPPA, the Stanislaus Commitments, the recent Interconnection Agreement between PG&E and NCPA and ten of its members (not including Redding or Santa Clara), the similar agreement between PG&E and Santa Clara, and the "Matrix Interruptible Transmission Service Agreements" between Edison and the Southern Cities.

The Seven Party Agreement was the subject of Docket No. E-7796-007. Both docket and agreement were terminated by Opinion No. 175, *supra*. I have ruled that the Seven Party Agreement, while not itself a subject of investigation in the present docket, might be considered in so far as it might indicate illegal activities with respect to the PIA. It is contended that purchase of surplus energy from the Northwest to California and sales of excess energy to the Northwest from California were to be divided among PG&E, Edison, and San Diego in the 50-43-7 percent ratio that reflects their allotments of Intertie capacity, and that this is contrary to anti-trust law, and indicates the California companies' intention to monopolize the sales from and purchases for California while excluding others from such sales and purchases

It also has been argued that these allocations would result in the Northwest sellers receiving less for their power because competition between the California buyers was eliminated. This is inaccurate. The price of surplus power for sale from the Northwest pursuant to the Seven Party Agreement was at a price fixed by BPA, so the lack of buyers' competition would not affect it. Sales of excess power from California to the Northwest were to be at each seller's incremental price, so the total price to the Northwest buyer would have been higher when sales were divided among the three California companies rather than made by the seller with the lowest cost None of this had anything to do with excluding other entities from the Intertie, or with the allocations made by the PIA of Intertie capacity. The division of sales and purchases applied only to PG&E. Edison and San Diego Other California entities, namely LADWP and its satellite cities, which had access to the Northwest over the dc line, could and did buy from and sell power to the Northwest, they were not affected by the Seven Party Agreement. The analysis and remedy applied here are not affected by the Seven Party Agreement

The same is true of the CPPA, which has been dealt with earlier. The argument appears to be that the CPPA as well as the Seven Party Agreement demonstrates anti-competitive intent to exclude the Intervenors and others from the Intertie. I find nothing in the CPPA referring to the Intertie, or that would call for a remedy different from or additional to what is imposed here on the basis of the discussion that follows.

The Stanislaus Commitments

Sections I and VII of the Pacific Gas and Electric Company Statement of Commitment (the Stanislaus Commitments) were ordered filed in Docket No. E-7777-000 as part of Rate Schedule No. 38, Pacific Intertie Agreement Commission Order on Motion to Compel Filing of Certain Documents, issued June 2, 1980, 11 FERC ¶ 61,246, *aff'd*, *Pacific Gas and Electric v. F.E.R.C.*, D.C. Cir 679 F.2d 262 (1982).

Essentially, the Commitments embody an agreement entered into on April 30, 1976 between PG&E and the U.S. Department of Justice (DOJ), and they are the culmination of a DOJ investigation into certain PG&E activities allegedly in violation of the antitrust laws. They have been included by the Nuclear Regulatory Commission as conditions of the license of PG&E's Diablo

Canyon Nuclear Power Plant Unit No. 1. They generally describe conditions under which PG&E is bound to provide services such as interconnection, transmission, access to nuclear generation, capacity and energy exchange, and reserve coordination to other utilities requesting such service

11 FERC ¶ 61,246, at page 61,484 (footnote omitted).

This Commission was not a party to the agreement with DOJ or to the proceedings before the NRC. It is not bound by agreement or by equitable estoppel from considering and imposing any modifications it may require in the Commitments It is limited here, however, by the scope of this proceeding.

So far as Docket No. E-7777-000 is concerned, the Commission ordered the Stanislaus Commitments filed only in connection with the Pacific Intertie Agreement (PIA). The Commission *order* previously quoted said:

> The Commission is not persuaded that the Commitments in their entirety affect or relate to the PIA As noted previously, the Commitments govern provision by PG&E of various services in the future. Parts of the Commitments concern services other than transmission, such as capacity and energy exchange and access to nuclear generation. Section VII is designated "Transmission Services" and is the only part of the Commitments to refer to the Pacific Intertie itself. It provides that PG&E shall not be required to use the Intertie for transmission pursuant to the Commitments if such use would impair PG&E's "own use of this facility consistent with the Bonneville Project Act (50 Stat. 731, August 20, 1937), Pacific Northwest Power Marketing Act (78 Stat. 756, August 31, 1964) and the Public Works Appropriations Act, 1965 (78 Stat. 682, August 30, 1964)." This section also governs construction of additional transmission capacity, the filing of rate schedules and agreements for transmission, and the transmission of power and energy generally insofar as these services are consistent with "good utility practice," as defined in Section I of the Commitments.
>
> We will order PG&E to file Section I ("Definitions") and Section VII ("Transmission") of the Stanislaus Commitments, because they affect or relate to the PIA. We do not order the filing of the remainder of the Commitments. Our order today does not expand the scope of this proceeding.

11 FERC ¶ 61,246, at page 61,486.

This makes clear that only Sections I and VII of the Stanislaus Commitments are to be considered in Docket No E-7777-000, and then only in so far as they affect or relate to the Pacific Intertie Agreement The Commitments are not to be considered or revised in their entirety in Docket No. E-7777-000, although they are within the Commission's jurisdiction and might be the subject of Commission investigation and general modification if the Commission so directed.

1. Neighboring Utilities

Section VII, Paragraph A of the Commitments provides:

> A. Applicant shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction and which are consistent with these license conditions. Except as listed below, such service shall be provided (1) between two or among more than two Neighboring Entities or sections of a Neighboring Entity's system which are geographically separated, with which, now or in the future, Applicant is interconnected, (2) between a Neighboring Entity with which, now or in the future, it is interconnected and one or more Neighboring Distribution Systems with which, now or in the future, it is connected and (3) between any Neighboring Entity or Neighboring Distribution System(s) and the Applicant's point of direct interconnection with any other electric system engaging in bulk power supply outside the area then electrically served at retail by Applicant.

This is all the transmission the Commitments provide; transmission is available only to or from "Neighboring Entities" or "Neighboring Distribution Systems". These are defined in Section I, Paragraphs C and D:

> C. "Neighboring Entity" means a financially responsible private or public entity or lawful association thereof owning, contractually controlling or operating, or in good faith proposing to own, to contractually control or to operate facilities for the generation, or transmission at 60 kilovolts or above, of electric power which meets each of the following criteria: (1) its existing or proposed facilities are or will be technically feasible of direct interconnection with those of Applicant; (2) all or part of its existing or proposed facilities are or will be located within the Service Area; (3) its primary purpose for owning, contractually controlling, or operating generation facilities is to sell in the Service Area the power generated; and (4) it is, or upon

commencement of operations will be, a public utility regulated under applicable state law or the Federal Power Act, or exempted from regulation by virtue of the fact that it is federal state, municipal or other public entity

D. "Neighboring Distribution System" means a financially responsible private or public entity which engages, or in good faith proposed to engage, in the distribution of electric power at retail and which meets each of the criteria numbered (1), (2), and (4) in subparagraph C above.

"Service Area" means areas PG&E serves at retail, and adjacent areas in Northern and Central California (Section I, Paragraph B) PG&E has agreed to treat DWR, CVP and SMUD as Neighboring Entities (Exh. 2354, CH-37513). For purposes of this discussion, "Neighboring Utility" will be used to include both Neighboring Entities and Neighboring Distribution Systems. "Non-Neighboring Entities" will refer to those which are neither.

In the *Initial Decision on License Conditions, supra*, I said.

> This provision would not allow an entity from outside PG&E's area, which obtained a licensed project within that area, to have project power transmitted over PG&E's lines to a point of connection with other systems operating outside PG&E's area. I find the Commitments in this respect are unduly discriminatory against such entities as Edison, Los Angeles, San Diego, the four major Northwest utilities and Southern Cities, who might wish to obtain licenses and use the power in their own areas.

Transmission over the Pacific Intertie as well as over PG&E's general transmission grid is restricted by the limitation of service to Neighboring Utilities. The Stanislaus Commitments apply to transmission over the Intertie but, as originally drafted, the Commitments provide transmission only to or from a Neighboring Utility. Not only project power transmission but all power transmission is so restricted. Not only would power from a project owned by someone other than PG&E or a Neighboring Utility not receive Intertie transmission under the Commitments as written, but any power generated within or without the area by a non-Neighboring Utility would not receive such transmission unless destined from outside the area for a Neighboring Utility. This I find to be undue discrimination against non-Neighboring Entities. No valid reason has been advanced to support such discrimination, and it is therefore unjust and unreasonable. It must be eliminated to provide for Intertie transmission for those entities which are not Neighboring Utilities on equal terms with those that are. In so far as the use of PG&E's general transmission grid is necessary to transmit power to and from the Intertie so that Intertie transmission may take place, the Intertie is affected by the exclusions from transmission over the general grid. Accordingly, the Stanislaus Commitments must be amended to eliminate such unduly discriminatory, unjust and unreasonable exclusions where they apply to general grid transmission affecting Intertie transmission. General grid transmission between two non-Neighboring Entities in PG&E's area does not affect the Intertie Agreement or transmission and is thus outside the scope of this proceeding as established in the Commission order of December 28, 1979, and the denial of rehearing.

2. Involuntarily Alienated Projects

Two exceptions to the Commitments are provided. The first is a provision in Section VII, Paragraph A, that PG&E is not required to transmit power from a project involuntarily transferred from it.

In the Initial Decision on License Conditions issued July 1, 1983 in *Pacific Gas and Electric Company*, Project No. 2735-001 *et al.*, I said:

> PG&E contends that it has not refused transmission from an involuntarily transferred project but has merely not undertaken to supply transmission from such a project. I am unable to accept PG&E's attempt to walk this narrow line between refusal and noncommitment. At best this provision leaves PG&E's competitors at a disadvantage; only PG&E is assured of transmission from a transferred project. Anyone else competing for such a project must be uncertain as to whether transmission will be available, and many responsible executives would be unwilling to commit the necessary investment and plan their generation resources with this additional uncertainty. The existence of this *in terrorem* provision raises the uncertainty to a higher level than if no Commitments for transmission had ever existed.
>
> I find that the exception for transmission from an involuntarily transferred project is unjust and unreasonable, and that it is an improper use of PG&E's transmission monopoly that restrains competition for project licenses for hydro generation.

I make the same finding here. The elimination of this provision is ordered, in so far as it applies to power to be transmitted on the Intertie, in connection with its consideration in Docket No. E-7777-000. The

retention of this provision would mean that any entity wishing to compete with PG&E for a project in PG&E's area would not be sure it could transmit its project power to the Pacific Intertie and thence over it out of the PG&E area. This might well keep it from applying for the project. This is an improper use of PG&E's transmission power which restrains competition for project licenses for hydrogeneration. It also directly affects the transmission to be offered by PG&E over the Pacific Intertie. It is, then, within the scope of the Commission order of June 2, 1980, 11 FERC ¶ 61,246. The limitations placed by that order on the scope of the proceedings in Docket No. E-7777-000 do not apply.

3. Area Option

The second exception to the Stanislaus Commitments is the so-called "area option" or "exit veto." This provision in Section VII, Paragraph A, provides:

> Applicant shall not be required by this Section to transmit power . . .
>
> (2) from a Neighboring Entity for sale to any electric system located outside the exterior geographic boundaries of the several areas then electrically served at retail by Applicant if any other Neighboring Entity, Neighboring Distribution System, or Applicant wishes to purchase such power at an equivalent price for use within said areas.
>
> "Applicant" means PG&E. (Section I, Paragraph A.)

Intervenors call this an "exit veto." It is not, however, a right to forbid the exportation of energy from the area; it merely gives entities within the PG&E area a right of first refusal so that they may have the energy if they are willing to pay what the owner would receive from an outside purchaser. (The testimony established that it is what the owner would receive, not what the buyer would pay, that governs.)

There was considerable discussion as to how this would work, and whether a seller would have to go back and forth between an outside purchaser and the entities within the area to allow the latter to match changing offers. Mr. Kaprielian, a forthright and impressive witness for PG&E, made it clear that this problem exists only in the minds of lawyers. In practice, the dispatchers would know the prices each entity would pay and the needs of each entity, and match-ups would be made quickly at the dispatcher level without resort to negotiation or to management executives.

PG&E defends this provision on the ground that it is necessary to keep power generated within the area available for use in the area. If this is not done, power needed within the area may be taken away. PG&E is the supplier of last resort within its area and is undertaking the ultimate responsibility for providing necessary supplies of power if other suppliers fall short. It has not fulfilled its own plans for new generation for several years, and its reserves (and, accordingly, the area reserves) have fallen below what PG&E considers a safe margin, therefore, it wishes to be able to keep further generation within the area if it is needed there. Under the provision, the generating entity will not lose money by keeping its energy in the area.

While PG&E's motives are understandable and even praiseworthy, this particular exception to the wheeling commitments is an unduly discriminatory restraint on interstate commerce insofar as it applies to power which might be sold outside California, and also discriminates against all potential purchasers outside the PG&E service area. I find that it is unjust and unreasonable, unduly discriminatory and anticompetitive. The elimination of this exception was made a condition of the Helms and Pit licenses insofar as it may affect power from those licensed projects in the event of their future transfer to others. Initial Decision on License Conditions, *supra*. Elimination of this exception is also ordered in Docket No. E-7777-000 as a modification of the Commitments which were made part of Rate Schedule 38, in so far as transmission over the Intertie is concerned. This will apply to all power, whether from a licensed project or not.

4. Impairment of Intertie Use

PG&E has sought to have the last sentence of Section VII, Paragraph A of the Stanislaus Commitments interpreted to mean that PG&E may foreclose a competing bidder for Northwest power from transmission over the Intertie to the extent PG&E wishes to use the Intertie to transmit the same power. Specifically, if PG&E wished to buy a particular block of power from a Northwest Company, and PG&E planned to transmit it over the Intertie if PG&E obtained the power, the Intertie capacity to be assigned to such transmission would not be available to someone who outbid PG&E for the power, even though PG&E had not obtained the power and so would have no need of the Intertie capacity to transmit that particular power for itself. This would preclude anyone else, who needed PG&E Intertie transmission for the power it wished to buy, from competing with PG&E for power.

The language upon which PG&E relies in Section VII is that "with respect to the Pacific Northwest-Southwest Intertie, Applicant shall

not be required by this section to provide the requested transmission service if it would impair Applicant's own use of this facility . . ." PG&E contends that its interpretation is embodied in and established by correspondence with the Department of Justice. It is questionable whether the language supports PG&E's interpretation, or whether a policy filed with this Commission may be altered by an interpretation established by external and unfiled documents. These questions need not be resolved. If it is assumed that PG&E's interpretation is correct, the provision cannot be permitted to stand in the face of its impermissible restriction upon competition. It would be a use of PG&E's control of transmission to exclude competition in bidding for power. I find this to be unjust, unreasonable, and contrary to the public interest. The Commitments must be amended to explicitly prohibit any such restraint.

5. Reserve Requirements and Number of Connection Points

The Intervenors have argued that other provisions of the Stanislaus Commitments are improper: specifically, the provisions as to reserves and the provision that interconnection shall be at one point unless otherwise agreed (Commitments, page 3, Paragraph B.). The Commission ordered the filing, in the E-7777-000 proceeding, of Sections I and VII of the Commitments "because they affect or relate to the PIA. We do not order the filing of the remainder of the Commitments." 11 FERC ¶ 61,246 at p. 61,486. This language does not bring the other provisions of the Commitments within the scope of Docket No. E-7777-000 and Intervenors' arguments as to reserve provisions and interconnection will not be considered here.

6. Implementation Provisions

Under the Commitments, PG&E is required to transmit power "pursuant to interconnection agreements, with provisions which are appropriate to the requested transactions and which are consistent with these license conditions." No transmission would occur until agreements for interconnection have been entered into. Physical interconnection with PG&E, direct or indirect, would be necessary before an entity could receive the wheeling services. Even as to interconnected entities, PG&E has maintained that agreements for transmission service should be negotiated before that service begins.

It has been alleged that PG&E has stalled on putting transmission arrangements into effect by stretching out negotiations for a contract. I do not find that this has occurred, but the Commitments as written would allow this sort of abuse to occur. I find that the absence of a provision to get service started within a reasonable time is unjust and unreasonable and contrary to the public interest.

I agree with PG&E that there should be an opportunity for negotiation prior to the institution of transmission service pursuant to the Stanislaus Commitments. The parties may be able to devise arrangements more suitable to their circumstances than would result from adversary proceedings and regulatory rulings. They know their own requirements best, and will often be able to work out agreements that will take into account the workings of the industry and the parties' particular situation. Should negotiation fail, however, there should be a means of resolving differences and getting service started within a reasonable time.

The Stanislaus Commitments should be modified, so far as Intertie transmission and transmission to and from it over the PG&E transmission grid is concerned, to provide that any entity entitled to such transmission pursuant to the Stanislaus Commitments may serve a written request therefor on PG&E. The requesting party shall publish the request in the newspapers having respectively the greatest circulation in (1) San Francisco (the largest city in PG&E's area), (2) Sacramento (the state capital), and (3) either the nearest city to the origin or the nearest city to the destination of the transmission requested. The publication shall contain a notice that objections to the requested transmission may be filed within sixty days with this Commission. This will give any competitor for what may be limited transmission capacity the opportunity to be heard, as well as allowing PG&E the chance to object that the request is improper or impossible to comply with. If within four months from the date of the request PG&E has not agreed with the requesting entity upon a rate schedule providing for the transmission requested, the requesting entity may file with this Commission and serve upon PG&E a demand that the requested service commence within six months or such longer period as the demand may provide. PG&E then shall within six months (or such longer period as the demand may provide) of the demand file, with this Commission, a rate schedule covering the services requested and make the services available unless stay is granted or a contrary decision is reached by this Commission. A stay shall be effective to delay the date service shall begin even though exceptions or appeal may be pending. The rate schedules for the services shall be subject to review by this Commission which may order them revised. If suspended, the rates will be collected subject to refund of

amounts found to be excessive. This is necessary as part of the remedy here ordered, as well as pursuant to the powers of the Commission to suspend initial rates as set forth in *Middle South Energy, Inc.*, Order Granting Rehearing, etc., May 24, 1983, 23 FERC ¶ 61,277, *Trans-Alaska Pipeline Rate Cases* 436 U.S. 631 (1977). Otherwise, the imposition of excessive rates might be a means of preventing the service from being used.

Requests and demands pursuant to these implementation provisions must be for specific service, and not requests for general transmission. The requests and demands should specify the transmission service, but not the terms on which it is to be rendered. In the first instance, and subject to review, the terms of rate schedules not agreed upon are to be promulgated by PG&E. This Commission customarily has allowed utilities to design their own rate schedules so long as the design is not unjust and unreasonable. There may be many just and reasonable rate schedule designs which will produce the proper revenues for the utility, and are thus permissible for it to use. NCPA's request for a postage stamp rate for all transmission service is denied. Nothing prevents the use of postage stamp rates if they are just and reasonable, but PG&E is not required to use that particular rate design if it prefers another design that is not unjust and unreasonable It has not been shown that all other rate designs are unjust and unreasonable.

All rates and terms of service, of course, are to be not unduly discriminatory, and otherwise just and reasonable.

All filings shall be made in this proceeding The proceeding shall remain open to avoid the delays attendant upon a new proceeding. Any stay referred to in this Initial Decision may be issued by the then Presiding Judge in this proceeding, by the Chief Judge in the absence of a Presiding Judge, or by the Commission.

One aspect that must be considered is that of construction of new facilities or increases in transmission capacity, both of which are to be included in PG&E's planning and construction programs pursuant to Section VII, Paragraph B of the Stanislaus Commitments. That such new construction or increases in transmission capacity are to be put into effect, and not merely planned, is apparent from the inclusion of such construction or capacity increases in the construction program as well as the planning program. No time is set here for construction or increased transmission. It would be almost impossible to do so, since it is not now known just what construction or increases in capacity may be called for. Under the circumstances, a reasonable time will apply. What a reasonable time may be will depend upon the construction or transmission increases involved and the circumstances under which they are undertaken. If the parties cannot agree, the reasonable time may be determined in the implementation procedure previously set forth, and the time for putting service into effect extended to allow for the necessary construction or expansion. PG&E may raise these issues by alleging impossibility to perform by the time service is requested or would go into effect under the implementation procedure. Where construction or expansion is necessary, it is suggested the parties attempt to reach agreement on the time service is to begin, and if no agreement is reached, the demand for service should not fail to allow a reasonable time for compliance. If it does not allow a reasonable time, the legal expenses of extending the time, by stay or otherwise, may at the discretion of the Commission be included in the costs of increased capacity or additional facilities payable by the PG&E customer under Paragraph B of Section VII of the Commitments. Any increases in construction or expansion costs caused by delay resulting from unwarranted objections or requests for stay by PG&E with respect to all or part of a demand for service may be excluded in the discretion of the Commission from the costs to be recovered by PG&E under Paragraph B.

Unless otherwise agreed, the party requesting service requiring construction or expansion must commit itself to payment of the cost. PG&E may require either advance payment or a commmitment to use the transmission service sufficiently for PG&E to recoup its costs from the rates charged, so long as the requirement is not unjust and unreasonable or unduly discriminatory.

The PG&E-NCPA Interconnection Agreement

After the conclusion of the hearing, PG&E and NCPA signed a contract for interruptible transmission over the Intertie. NCPA later complained that little transmission was made available, and the contract has expired It is not an issue in this proceeding. It was followed by an Interconnection Agreement between PG&E and NCPA, including all NCPA members except Santa Clara and Redding. This agreement provided for interruptible Intertie transmission and certain firm transmission elsewhere than on the Intertie. On July 18, 1983, PG&E moved to lodge the then unsigned Interconnection Agreement in this proceeding. It was later executed and was filed with the Commission on August 16, 1983, and accepted for filing September 14, 1983, 24 FERC ¶ 61,286, without approval or decision on the merits, in Docket No. ER83-683-000 While the agreement was not a subject of the hearing in this proceeding, official notice may

be taken of it and it may be considered in so far as its existence may affect the remedies here. The justness and reasonableness of the Agreement is subject to Commission determination in Docket No. ER83-683-000.

PG&E argues that the Interconnection Agreement indicates that PG&E has negotiated in good faith with NCPA and has implemented the Stanislaus Commitments as pertinent to NCPA. (PG&E's Reply to NCPA's Response to Motion to Lodge, p. 1, filed August 10, 1983.) PG&E might argue that the Interconnection Agreement shows PG&E is not excluding NCPA from the Intertie or denying access to transmission facilities. PG&E also might argue that in view of the Interconnection Agreement, the implementation provision here ordered with respect to the Stanislaus Commitments and the Intertie is unnecessary. These arguments do not affect the result reached here. First, PG&E's intent to exclude or failure to negotiate in good faith is not the basis of the relief ordered with respect to the Intertie and the Stanislaus Commitments. Second, the Interconnection Agreement does not apply to all entities in PG&E's area, or to all entities outside that area which may wish to use the Intertie lines or PG&E's transmission to and from the Intertie in PG&E's area. These entities are entitled to the services ordered in this proceeding.

Bottleneck

Intervenors have alleged that the CPP companies' ability to deny Cities access to the Intertie gives the Companies monopoly power over relevant markets for wholesale power, impairing Intervenors' ability to obtain coordination services and their ability to provide retail services competitively. Edison Witness Johnson stated:

> [T]he Intertie makes it possible for California utilities to purchase "surplus" hydroelectric energy from the Pacific Northwest. During flush periods of the year, the generating capacity of Pacific Northwest hydroelectric systems is in excess of the amounts demanded by Pacific Northwest customers. In the absence of the opportunity to sell this surplus energy to California companies via the Intertie, Pacific Northwest producers would spill water over their dams and lose significant amounts of potential energy for all time. Hence, the sale of low cost surplus energy from Northwest hydro sources to California lowers the energy costs of the California utilities . . .

CH-1677. (See *also* Lane, CH-1161.) While cheap Northwest power has been reduced, and will be further reduced, it is not yet eliminated. The advantages of exchange of peak power between the Northwest and California will remain.

Intervenors and Staff have each alleged that the Intertie is a "bottleneck" facility, and that, accordingly, antitrust principles require that direct access to it be granted to competitors.

The essential facility, or bottleneck facility, doctrine is well established in law. In *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912), a group of railroads had control over all railroad switching facilities in St. Louis. The Court said:

> [W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates the first and second sections of the [Sherman] act.

Id. at 409. To remedy the situation, the Court ordered ownership of or access to the terminals for any existing or future railroad. *Id.* at 411. As later developed, the doctrine states that

> where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.

A.D. Neale, the Antitrust Laws of the United States 67 (2d., 1970) *quoted in Hecht v. Pro-Football, Inc.* 570 F. 2d 902 (D.C. Cir. 1977).

As stated in *Hecht*:

> To be "essential" a facility need not be indispensible, it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.

Id. at 992.

In this case, the Intertie facilities meet these criteria. *Accord, Cities of Anaheim, Riverside et al. v. Southern California Edison Co.*, Order Specifying Certain Facts To Be Without Substantial Controversy, No. CV-78-810-MML (C.D. Calif., May 19, 1981). ("The transmission facilities known as the Pacific Intertie cannot practicably be duplicated by plaintiffs. Consequently the Intertie is essential to . . . transmission." *Id.* at 3.)

It is clear that the Intertie was built at great expense. It consists of two 500kV ac lines extending over a distance of 945 miles, and one 800kV dc line over a distance of 846 miles in length. (Lane, CH-1158.) The total capital investment when the facility was built was $700 million (Id., CH-1167), and to duplicate the facility would no doubt require an even

greater expense (Guth, CH-29,516.) The emergence of the current Intertie required approximately 50 years, beginning with a suggestion of a West Coast Intertie in 1919, surfacing again in the mid-1930's, with planning in earnest beginning in the late 1950's and early 1960's. (Lane, CH-1162-64.) The Intertie ac lines were not energized until 1969 and the dc lines not until 1970. (Lane, CH-1159.)

In view of the tremendous resources required to duplicate these facilities, and the handicap placed upon those who are not given access to them, I find the Pacific Intertie lines are "bottleneck" facilities.

The argument has been presented that although a bottleneck situation admittedly exists (See Edison Witness Johnson, CH-1684), other bottlenecks exist elsewhere. Johnson cited as an example that Anaheim now owns the distribution network in the Disneyland area, and thus possesses a bottleneck monopoly of distribution, foreclosing direct access on the part of Edison to service Disneyland. CH-1685.

This argument is not persuasive. First, these other bottleneck situations are not in controversy in this case, and they also may or may not be found to be anticompetitive. Secondly, all bottlenecks are not, *per se*, illegal. For an illegal bottleneck to exist, it must be infeasible for the excluded competitors to duplicate the facilities, and the denial of use must inflict a severe handicap on potential entrants. *Hecht v. Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977). It is clear that not all structural bottlenecks would necessarily meet these criteria.

PG&E Witness Guth testified as follows:

> [Q:] The question is whether it would not be more expensive if NCPA were compelled to drop its use of the PG&E system and construct its own system interconnecting the Cities together and to the PG&E area borders?
>
> Would not it be more expensive for NCPA to build and operate this than it would to utilize the PG&E system?
>
> THE WITNESS: The answer is probably yes. It would be more expensive in total to society in terms of the resources it consumed . . .

CH-29,518.

He continued at a later point:

> Q: Are the Cities prevented or inhibited in building their own alternative transmission networks by a transmission network being a natural monopoly? . . .
>
> A: My answer is that they are probably, they are certainly prevented by regulators from doing that since transmission within the area would be a natural monopoly inhibited by cost factors and prevented by regulation because of those cost factors reflecting a useful waste of resources

CH-29,654-55 Guth expressed the opinion that if the transmission line were built, it would have to be integrated into the transmission network that is the natural monopoly. CH-655. It is questionable whether this would be feasible.

PG&E has cited evidence (Reply Brief, p. 112, *citing* Daines, CH-26,346) that the Intertie can be duplicated. The evidence is not persuasive. Daines' study was based only on the economic feasibility for PG&E, not NCPA or others. As he stated:

> Our company made studies of [a third AC line] on a preliminary basis for our *own evaluation* . . The economic feasibility is not certain . . . Economic feasibility of the third line must address [the] question of preference and some reasonably fair division of the power so that if the *utilities* were to build the line, they would not lose the power supply,and make it uneconomical for them

CH-26,346-47, emphasis added.

PG&E's citation of Southern Cities Witness Russell is also not persuasive. Russell states that if DWR, CVP and NCPA in concert were to construct additional 500 kV facilities, the project would be economically feasible. CH-16,458. First, while this has been studied, there is no evidence of serious consideration or negotiation. Secondly, the Commission does not have jurisdiction over DWR or CVP to order any such partnership, and even if it did, there is nothing in the antitrust cases which states that a project becomes "economically feasible" for bottleneck facility analysis if competitors are able to combine to duplicate the facility. The purpose of the bottleneck doctrine is to enhance competition. This purpose would not be furthered if, as here, participation by a competitor was possible only if it combined with others.

Nor would it be in the public interest to require an additional Intertie line to be built. As Witness Johnson testified:

> As voltage increases, the relative energy loss falls; the transmission of large amounts of energy can be achieved at falling costs with high voltage lines even though large capital expenditures and significant operating costs are involved. Consequently, a single transmission line with a given voltage will be more efficient than a number of lower voltage lines delivering the same amount of energy in a specified time period.

CH-1655

San Diego has argued (Brief II, p. 34) that the bottleneck doctrine must be rejected on grounds that the Supreme Court, in *Terminal Railroad*, stated that access must be granted "upon nearly an equal plane as may be as that occupied [by defendants]" (224 U.S. at 411) and that because the proprietary risks are not shared, the Intervenors cannot obtain the benefits This argument is easily rejected. The cited case goes on to state:

> Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such . . . terms . . . as will . . . place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the [owners].

Also, the case does not require absolute parity In *United States v. American Telephone and Telegraph Co.*, CCH Trade Cases ¶64,276 (D.D.C 1981), the government had argued that AT&T was required to afford interconnection to the new Bell carriers on terms of parity with those enjoyed by its own subsidiary. The court rejected this position, stating that *Terminal Railroad* did not contain a requirement of absolute parity.

> [P]roblems of feasibility and practicability may be taken into account in determining the sufficiency under the law of the access to essential facilities . . To put it another way, parity is not required.

Id. at 74,238.

San Diego's remaining argument as to parity is also not persuasive. (Brief II, p. 34.) San Diego states that because the preference laws grant government owned utilities priority in the purchase of cheap Northwest power, Intertie access would give Intervenors a *greater* advantage. The preference laws are statutory and a matter of legislative design. The Companies cannot use a bottleneck facility to deny benefits the legislature has decided to give.

San Diego has argued that the Supreme Court has required collective action by competitors in connection with an essential facility to justify equal access. (Brief I, p. 21.) This is inaccurate. First, as in *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971), the bottleneck theory has been applied to single firms. Second, the focus is on the nature of the facility, not the owners. *See Associated Press v. United States*, 326 U.S. 1 (1945). Intent also is not relevant. For the bottleneck theory to apply, it does not have to be proven that either a "conspiracy to monopolize" exists or that the exclusion is for the specific purpose of extending a monopoly. Rather, denial of access to a bottleneck facility is itself a restraint of trade. *Venture Technology Inc. v. National Fuel Gas Co et al.*, 1980-81 CCH Trade Cases ¶63,780 at 78,169 (W.D.N.Y. 1981) If Edison is correct (Comments p 14) that for relief to be granted the denial of access must be part of a contract combination or conspiracy, there is both contract and combination here. Edison also contends the denial of access must be unreasonable. I find that the denial of access to unused Intertie capacity is unduly anticompetitive, unduly discriminatory, unjust and unreasonable, and contrary to the public interest. It is a waste of a portion of a major economic asset of this country.

As San Diego (Brief II, p. 33) correctly points out:

> [t]he antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.

Hecht v. Pro Football, 570 F. 2d 982, 992-993 As stated in *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*, 194 F 2d 484 (1st Cir 1952)·

> [a]dmittedly, the finite limitations of the building itself thrust monopoly power upon the defendants, and they are not required to do the impossible in accepting indiscriminately all who would apply. Reasonable criteria of selection, therefore, such as lack of available space, financial unsoundness, or possibly low business or ethical standards, would not violate the standards of the Sherman Antitrust Act.

See also Venture Technology, Inc. v. National Fuel Gas Co., supra

> . . . the refusal to allow Venture to connect to a [bottleneck] pipeline would not be a violation if [it were] found that the capacity of the line in question had been exceeded so that other producers would be forced to reduce their sales if Venture had been connected to the pipeline.

Id. at 78,169.

It is clear that excess capacity is not always available on the Intertie. Access can be given without interfering with the owners' use or previous commitments by providing for interruptible access. For this reason, it is found that (1) the bottleneck doctrine applies in this case and (2) as a result, access to the Intertie should be awarded, on an interruptible basis, to those not now using it who may wish to do so All unused Intertie capacity, whether available for long periods or short, for long distances or short, for interstate or intrastate transmission, should be available to those who wish to use it where such use would not interfere with the

owner's use or prior commitments and where it would not impair system reliability or be inconsistent with prudent operation. This will yield the greatest economic use of the lines, and is therefore in the public interest. To the extent the Intertie may not constitute a bottleneck for some intrastate transmission because other transmission paths may be available, in the case of PG&E and Edison the other paths will be through their transmission grids. It is permissible, of course, for such paths to be substituted for Intertie transmission. San Diego has no such paths, so we need consider only its share in the Intertie.

Nothing in this Initial Decision prevents furnishing firm Intertie capacity, to an entity wishing it, in place of or in addition to providing interruptible transmission access to the Intertie.

This Commission has no authority over governmental entities such as CVP, LADWP, Glendale, Burbank and Pasadena, who are among those now with access to the Intertie. This order is directed only to PG&E, Edison, and San Diego. The fact that others cannot be reached is not a reason to refrain from issuing an order to those over whom we do have authority. Nor does their ownership of shares in the Intertie operate as an alternative to the PG&E, Edison and San Diego Intertie transmission. The government entities' shares are part of the bottleneck, not an alternative to it.

We do not now decide how available capacity on the Intertie is to be allocated. It must, of course, be on a non-discriminatory basis, at rates that are just and reasonable. Access to Intertie transmission shall not be limited to the present Intervenors, but must be accorded without regard to whether those who desire access are parties to this proceeding or not.

This order applies to both the ac and dc Intertie lines; any unused capacity on either or both must be available for use by others. To the extent use of the dc line might be restricted by the LADWP-Edison Pacific Intertie, DC Transmission Agreement, measures must be taken to offset or avoid the restrictions through use of ac lines or other arrangements which will be discussed later. Not only the Intertie lines are affected; necessary transmission capacity to and from the Intertie lines must be made available to the extent it exists and is available for use. Such transmission is part of the bottleneck, as it would limit access to the Intertie. Both PG&E and Edison have a monopoly, each in its own area, of a transmission grid which would provide or limit access to and from the Intertie. To the extent any provisions of the PIA or other agreements may conflict with this order, they shall be abrogated, and the provisions of this order shall prevail.

This proceeding will be left open for the purpose of dealing with any problems which may arise in connection with the relief provided here.

Intervenors' Witness Russell said that the Intertie's physical capacity could be increased, and that the Intervenors could share in the increase. He suggested that the Intervenors be allowed to increase the capacity if the PIA companies did not wish to do so. If the PIA companies did not wish to share the cost of the capacity increases suggested by Intervenors, Mr. Russell would allow Intervenors to make the changes, and have the full amount of the increased capacity allocated to them.

It has also been suggested that the existing Intertie ac lines, usually operated at 2500 MW capacity, could be operated at 2700 MW, thus making 200 MW available for allotment to Intervenors. While transmission has reached 2700 MW on a short-term emergency or test basis, 2500 MW has been the normal usage, and to go higher would reduce the safety margin. Increasing the amount of current transmitted will also increase the temperature of the line and result in increased line losses. Increases in operating costs, notably in maintenance and rate of depreciation, would be expected to follow.

There is no showing that any of the PIA companies or committees have made any determinations as to increasing or not increasing the physical capacity of the line in bad faith in order to hold down the available capacity, or hold down the transmission over the existing facilities for the purpose of not having transmission available for Intervenors or others not party to the PIA. The evidence appears to show that PG&E, at least, would have liked more transmission available for itself. This is indicated from the consideration given to the building of an additional Intertie line. (I do not include the controversy over DWR's transmission rights, as that might be thought to arise from a desire to exclude Intervenors, rather than to obtain transmission for PG&E.)

This Commission has no power to order changes in operating policies or practices which are not unjust or unreasonable and where no bad faith has been shown. It has not been contended that the failure to make changes in the Intertie facilities, or to operate them at no more than 2500 MW, was unjust, unreasonable, or the result of bad faith. The contention was that the capacity of the facilities could be increased, and that even without change the present ac facilities could

be operated at 2700 MW. Even if the Commission had the power to substitute its judgment for that of the operators in matters of efficiency, economy, and safety, I would decline to do so. This Commission is not in the business of making operating decisions. The utilities should run their own businesses, so long as their decisions are not unreasonable and are not made in bad faith.

Paragraph 7.02 of the PIA provides, in part:

> Each [PIA] company shall have the right to purchase its share, based on Relative Size Percentages, of any Northwest Power acquired by one or more of the [PIA] Companies, on the same terms and conditions as the acquiring Company.
>
> Paragraph 7.02 also provides that if a Company rejects part or all of its share in the Northwest Power, the other Companies may take it in the same Relative Size Percentages, and before a Company may transfer any of its Northwest Power to a non-PIA entity, the other PIA Companies have a first refusal on it.

I find Paragraph 7.02 is anti-competitive, unjust and unreasonable. It must be deleted in its entirety.

Paragraph 6.02(h) gives the other PIA Companies a right of first refusal if Edison wishes to sell all or part of its share of the transmission on the dc line. So far as this applies to a portion shared by Edison with PG&E or San Diego, this provision may be necessary to protect their rights. (Under the agreement with LADWP, Edison obtained the right to use half of the dc line's capacity; Edison then gave the right to use 50 percent of that half to PG&E, and the right to use 7 percent of the half to San Diego.) This right of first refusal has never been exercised (Mitchell, CH-1858, 1860; Daines, CH-1340), and at the outset of this proceeding, Edison acknowledged its waiver of the provision. (Edison Opening Brief at pages 31, 33.) Paragraph 6.02(h) must be revised to eliminate the right of first refusal as to transmission service except that San Diego and PG&E may each protect its portion of dc line allocation assigned it by Edison by retaining a right of first refusal as to its own allocation, but such right shall extend no further than is necessary for such protection. Beyond that, I find the first refusal to be anticompetitive, unjust and unreasonable.

Paragraph 7.01(e) provides that, with certain exceptions, no PIA Company shall transfer or make available Intertie capacity to another entity, whether a PIA Company or not, without the consent of the PIA Company owning the facilities in which capacity is available. This would mean, for example, that San Diego could not make part or all of its ac Intertie allotment available to one of the Southern Cities for transmission to or from the Northwest without the consent of both Edison and PG&E, since some of the ac transmission facilities to and from the Northwest lie in Edison's area and are owned by it, while part of the ac transmission route lies in PG&E's territory and is owned by it. This provision is not only in restraint of trade, but might be invoked to frustrate the relief here provided. The only circumstances under which the PIA Company owning the facilities might properly object to their use, by a financially responsible entity deriving its right to use from an arrangement with another PIA Company having the legal right to such transmission, would be if for some reason the transmission system would be adversely affected by the use sought. The adverse effect would have to be substantially greater than would result from use by the PIA Company which sought to transfer it before transmission for the transferee could be challenged. Paragraph 7.01(e) must be modified to reflect this ruling.

Paragraph 7.01(e) also provides that no PIA Company shall transfer or make available any of its Assured Intertie Capacity without according the other PIA Companies a right of first refusal. Again, Edison has waived its first refusal rights, but the other PIA companies have not. This portion of Paragraph 7.01(e) is found to be in restraint of trade, and unjust, and unreasonable. For the reasons discussed above, it must be eliminated.

Staff requests that all rulings of the Intertie Coordination Committee be filed with the Commission because the rulings affect or relate to the Intertie agreements. I agree. All such rulings shall be filed in this proceeding, which will remain open for any action which may be required on such rulings.

The LADWP-Edison DC Intertie Agreement

With certain exceptions, Article 19(c)(1) of the LADWP-Edison DC Intertie Agreement provides for a right of first refusal to all other participants in that Agreement:

> if any Participant desires to sell, lease or otherwise dispose of all or any portion of its interest, or of its right to use capacity, in the DC Transmission Facilities and additions and betterments thereto . . .

This gives LADWP, Glendale, Burbank and Pasadena a first refusal as to any use of dc line capacity now allocated to PG&E, Edison or San Diego. This Commission does not have the authority to abrogate the rights of LADWP, Glendale, Burbank, or Pasadena. The first refusal might seem to interfere with the transmission remedy here ordered, that is, that

all unused dc line as well as ac lines capacity of Edison, PG&E and San Diego should be available on an interruptible basis to entities not party to the PIA. That interference, however, can and must be kept at a minimal level.

The first refusal provision, being restrictive, is to be strictly construed, and any arrangement not specifically covered should be considered outside the scope of the provision. For example, an agreement by Edison to purchase energy in the Northwest and sell the energy to Anaheim at cost plus cost of transportation would not be within the provision, since all transmission would be Edison's. If Anaheim buys Northwest energy, assigns it to Edison in the Northwest and then repurchases it at Anaheim, the transmission of the energy would be Edison's, and that would be outside the scope of the provision. Another possibility would be for Anaheim to buy Northwest energy and assign it to Edison in return for other energy delivered by Edison at Anaheim, with suitable adjustments in the price of the delivered energy to compensate for transmission expense and line losses incurred by Edison in bringing down the Northwest energy for general use in its area. No doubt many other arrangements can be made which would avoid the application of the first refusal provision. The particular form of the transaction should be left to the entity providing access to the Intertie transmission so long as the costs to other parties are not increased above what just and reasonable transmission charges would be and the obligation to provide access to transmission is not frustrated.

In the event, however, that the first refusal clause would prevent or impair the furnishing of access to dc line transmission as required by this Initial Decision, the entity required to provide Intertie access will be able to provide a full remedy by providing access to ac lines transmission out of its own capacity which it would otherwise be using on the ac lines, and making up for its loss of ac lines capacity by using the dc line itself. Its own use of the dc line would not fall within the ambit of the first refusal provision, and that provision does not affect ac lines transmission for anyone. Under such an arrangement the entity providing Intertie access may ordinarily recover the reasonable rate that would have been applicable had dc line transmission been available and utilized.

In general, the entity providing access should use the least expensive transmission route available after the entity's own and its already committed transmission needs are taken care of. This is subject to the normal operating procedures on the lines, including normal emergency procedures. No one is required to exceed the usual transmission capacity of a line to reduce cost, except in circumstances, emergency or otherwise, where higher capacity would be utilized if the energy transmitted were the entity's own.

While the Commission cannot invalidate the first refusal rights of LADWP, Glendale, Burbank and Pasadena, it has authority to order PG&E, Edison and San Diego not to sell or otherwise transfer any transmission rights on the dc line that would fall within the scope of the first refusal. If LADWP, Glendale, Burbank or Pasadena should acquire such rights, it would remove a portion of the dc line capacity from our authority to require its use for others than PG&E, Edison, San Diego, LADWP, Glendale, Burbank and Pasadena, or, in the alternative, to provide substitute transmission for PG&E, Edison and San Diego that will free ac lines capacity for use by those others. PG&E, Edison and San Diego are ordered not to transfer any dc line capacity subject to the first refusal provision without prior approval by the Commission in this proceeding.

This proceeding will be held open to permit the resolution of any questions that arise from the orders with respect to dc line arrangements.

PG&E, Edison and San Diego will also be ordered to renounce their first refusal rights under the DC Intertie Agreement so that any entity may bid if any other participants in the dc lines wish to transfer their entitlements, and the renunciation shall be made an amendment to the Agreement. Edison has already waived its first refusal rights except as to ownership.

The SMUD and DWR EHV Agreements

No one has complained of the amounts of intertie capacity made available to SMUD or DWR. The evidence indicates that SMUD extracted from PG&E a larger allocation than PG&E originally wished to give. This was done by SMUD refusing to enter into the contract and to support the Intertie package of agreements unless its demands were met.

With respect to SMUD, the Intervenors have complained that it should be permitted to sell some of its power not only to Intervenors (a point which will be dealt with later) but also to Edison. To effect this, SMUD would need transmission, the Intervenors contend transmission on the Intertie should be available for that purpose. Whether Edison wishes to purchase SMUD power or SMUD wishes to sell to Edison has not been established, but the remedies previously

provided would apply here under both the Stanislaus Commitments and the bottleneck theory. PG&E should provide available unused capacity on a non-discriminatory basis to SMUD as well as others for whom transmission is requested. This remedy is more limited than Intervenors would like, in that PG&E need make available only unused capacity and need not give up capacity that is already being utilized. To the extent that any capacity is or will be available, PG&E is obligated to allow it to be used.

As to DWR, Intervenors complain that the capacity committed to transmission of power for operating DWR's pumps should be available for DWR to assign to others for other purposes. This contention is rejected. The contract with DWR provides for power transmission up to 300,000 kW to operate the pumps. It is not an outright allocation of 300,000 kW capacity but merely an agreement to transmit power for the pumps, not for any other use. While the California companies might have contracted with DWR to provide 300,000 kW capacity to be used for any purpose, they did not do so, and the arrangement made was not unjust and unreasonable so far as appears from this record. A contract to provide power only for a particular purpose is not unjust and unreasonable *per se*. DWR asked for transmission for its pumps and that is what it got.

A subsequent contract between DWR and PG&E, while not considered in this proceeding because it was filed after the close of the record, is contended to have made this controversy moot in this case, although this is disputed.

Other Contracts Affecting the PIA

The CVP arrangements and the SMUD-PG&E Integration Agreement will be considered later. The remaining contracts affecting the Pacific Intertie need not be discussed here as they have no effect upon the remedies which have been ordered.

III. PG&E-SMUD Integration Agreement

This agreement provides for SMUD to sell to PG&E all of its hydro and nuclear power in excess of that needed for its own use, and for PG&E to provide back-up service for SMUD. When SMUD desired to construct a nuclear plant, it found that a plant large enough to provide the desired economies of scale would give it more capacity than its own system could utilize. The logical purchaser of SMUD's excess generation was PG&E, which is the major adjacent electric utility. Only a good sized utility could utilize all SMUD's excess, and only a major utility could provide the back-up that SMUD would require in the event of down time on the nuclear facility. NCPA members had no generation at the time this contract was entered into, and could have utilized only a very small fraction of what SMUD had available for sale. They complain, nevertheless, that PG&E has monopolized the SMUD power, making it unavailable to others.

Since the close of the record, PG&E has filed a notice of termination of its contract with SMUD, to take effect in 1987. No notice of termination of PG&E's services to SMUD has been filed with this Commission, and those services must continue until the Commission approves the discontinuance.

During the hearing, considerable evidence was devoted to showing that SMUD's power could be more advantageously used by Edison than by PG&E. There is no evidence that Edison was interested in the power.

SMUD is not a party to this proceeding, and the Commission has no jurisdiction over it.

NCPA has previously sought to obtain a modification of the PG&E-SMUD agreement as being in violation of the antitrust laws. NCPA sought to obtain a share of SMUD's nuclear power. The Commission summarily disposed of NCPA's contentions and declined to order a hearing. This was affirmed by the D.C. Court of Appeals, 514 F.2d 184 (1974), *cert. denied*, 423 U.S. 863 (1975). That case indicates that Commission has no authority to revise any contract of SMUD to compel it to deliver power to NCPA or anyone else, or even to cease to deliver power to PG&E.

The Commission would have authority, however, if PG&E violated the antitrust laws in entering into the SMUD contract, to order PG&E to release SMUD from some or all of its commitment to sell power to PG&E, so that SMUD could make such arrangements as it wished for the power freed from the contract commitment. What SMUD might do then would be its own determination, free from the contract constraints, but free also from any compulsion by this Commission.

It has not been shown that PG&E entered into the contract with the intention of excluding other purchasers from the market rather than for the purpose of acquiring power needed for its own use. PG&E is short of the reserves it believes adequate for its own operations. PG&E has not met its own planning goals for several years prior to the hearing. Any time anyone contracts to buy anything it excludes others who might wish to buy the same thing. This is not a violation of the antitrust laws, nor is it unreasonable provided the purchase is made because it is needed and not because the purchaser wishes

to keep a competitor from getting it. The classic example is a manufacturer who purchases a competitor's factory. If he does so in order to prevent competition, it is wrongful. If he does so not for that purpose but because he wishes to utilize the factory for his own production, it is not wrongful exclusion of a competitor. Here, I cannot find upon the evidence presented that PG&E's purpose was the exclusion of competitors rather than buying power it needed to supply its customers.

While I find that no remedy should be ordered, any remedy awarded would be of little value. Any remedy must be prospective only, and PG&E's notice of termination means that SMUD is now free to negotiate for sales elsewhere, if it so desires, with sales to begin on the date of termination. Unless there is a settlement, history indicates that those proceedings will take a substantial time in this Commission and in the appellate courts, so that any remedy would be in effect very little time (if at all) before the notice of termination takes effect.

No argument is made that the sales of power to SMUD by PG&E are wrongful. These sales are under this Commission's jurisdiction, and are made pursuant to filed rate schedules which have been the subject of other Commission proceedings and are not involved in this case.

In order to make any sale of SMUD power to Southern California or an NCPA member, there must be transmission over PG&E-controlled lines. The Stanislaus Commitments make such transmission available, either for SMUD, which PG&E has agreed to treat as a Neighboring Entity, or for the purchaser who may take delivery at the SMUD system. Purchasers within the PG&E area will be Neighboring Entities; a purchaser in Southern California will be entitled to transmission over the Intertie in accordance with the previous section of this Initial Decision. The Stanislaus Commitments provide for the construction by PG&E of additional facilities if presently existing transmission is inadequate. That provision should assure firm rather than interruptible transmission if that is necessary and economically feasible.

No revision of the Stanislaus Commitments will be ordered beyond those previously indicated in connection with the PIA. I have found no wrongdoing by PG&E in connection with the SMUD agreement. The Commission has not placed the Stanislaus Commitments within the scope of this proceeding except as they affect the PIA. If there is further complaint that the Stanislaus Commitments are not implemented, or that the exceptions ordered deleted in connection with the PIA may still be applied where the PIA is not concerned, the Commission may deal with the matter in a later proceeding. In view of the time which will elapse before the effective date of the notice of termination, arrangements by the parties concerned may make any Commission decision unnecessary.

IV. Contract 2948A

Wheeling

Perhaps the strongest attack on Contract 2948A is that Article 24 placed undue limitations on the transmission to be provided to CVP by PG&E. PG&E is not required to wheel power for CVP to any customer who:

(1) is located outside the specified geographic area ("wheeling area"); (2) was not a PG&E customer on April 2, 1951, (3) has had a monthly demand of under 500kW for three months prior to the request for service, or (4) is located inside the boundaries of a municipality served by PG&E at retail. (I.R. U-1 pp.48-9.)

The Stanislaus Commitments, however, contain none of these limitations. Under the Commitments, PG&E agrees to wheel anywhere within its area, and over the Pacific Intertie, between any Neighboring Entity and (1) another Neighboring Entity, (2) a Neighboring Distribution System, or (3) another bulk power supplier connected to PG&E. PG&E has agreed to treat CVP as a Neighboring Entity.

The so-called limitations on wheeling in Contract 2948A are not prohibitions against PG&E wheeling. The limitations merely limit what PG&E undertakes to do under Contract 2948A. The Stanislaus Commitments are a different undertaking, and the 2948A limitations do not apply to the wheeling PG&E undertakes to provide under the Stanislaus Commitments. In any case, no clause of Contract 2948A relating to wheeling may be invoked by PG&E to prevent the carrying out of the terms of the Stanislaus Commitments. If the clauses conflict, the limitations must give way.

Under the bottleneck theory previously discussed, PG&E could not refuse to provide transmission over its facilities if transmission capacity was available between CVP and potential customers. PG&E had a monopoly of transmission over much of its grid. PG&E had declined to furnish wheeling between CVP and potential customers on numerous occasions, and did not claim that transmission was not then available. The Stanislaus Commitments, and the agreement to treat CVP as a Neighboring Entity, are a suitable remedy if undue discrimination in the Commitments is

eliminated and if implementation of the Commitments is assured

The Stanislaus Commitments, as drafted, have been held in this Initial Decision to be unduly discriminatory in connection with the Pacific Intertie in that (1) the "area option" exception is unduly discriminatory against commerce and against any purchaser located outside the PG&E area, and (2) no means are provided to implement the services called for by the Commitments in the event agreement on the terms of transmission are not reached within a reasonable time. The Commitments, as drafted, I find to be insufficient as a remedy in view of Contract 2948A's failure to include general non-discriminatory wheeling provisions. As part of the remedy here, I direct that Contract 2948A be amended (1) to include an agreement by PG&E that the "area option" exception to the Stanislaus Commitments will not be invoked by PG&E in connection with wheeling from CVP, and (2) to provide that the implementation procedure previously required for the Stanislaus Commitments in connection with the Pacific Intertie may be invoked by CVP to implement any wheeling to which it may be entitled from PG&E (whether or not the wheeling involves the Pacific Intertie).

I further direct as part of the remedy here that Contract 2948A be amended to require that transmission by PG&E for CVP to and from other entities must be provided on the same basis as transmission to and from Neighboring Entities. PG&E shall not be required to provide transmission beyond its service area, however, or to provide transmission lines in addition to those now in existence except to the extent required by the Stanislaus Commitments for Neighboring Entities save that PG&E must treat other entities similarly situated the same as Neighboring Entities with respect to construction for transmission to and from CVP.

While this Commission has no jurisdiction over CVP to change its obligations under Contract 2948A (with the exception of certain rate review not here relevant), the Commission does have the authority to order PG&E to forego rights or increase its commitments under Contract 2948A, so long as no new requirements are laid upon CVP. The remedies here provided require nothing of CVP, although certain additional rights are given it, but PG&E is required to assume additional obligations. This is within the Commission's authority. Nothing herein obligates PG&E to render any service unless CVP agrees to pay for it at just and reasonable rates.

Contract 2948A, prior to this Initial Decision, provided for wheeling only within a limited area. Payment for this wheeling was provided by Article 25. Wheeling required by this Initial Decision and/or the Stanislaus Commitments beyond the area covered by Contract 2948A is not covered by Article 25. Just and reasonable rates for such wheeling may be established by the procedures set forth in the Stanislaus Commitments. Rates for the new wheeling required will not be discriminatory merely because they are different from the rates provided by Article 25. This is for two reasons. First, the new wheeling to be provided is for different (and likely more distant) locations than that governed by Article 25. Second, even if the new wheeling were comparable to that governed by Article 25, PG&E is entitled to charge a just and reasonable rate for the new wheeling. The rates provided by Article 25 may limit what PG&E is entitled to receive for wheeling covered by Article 25, even if the Article 25 rates are lower than just and reasonable rates. This is pursuant to the Sierra Mobil doctrine. Wheeling which is otherwise similar but not subject to Article 25 is not so limited.

One remaining question is whether delivery may be required to more than one delivery point per customer. I find that it is discriminatory to refuse delivery to any and all delivery points so long as just and reasonable compensation is paid. So far as connection facilities are concerned, the customer or CVP may construct them, or PG&E may be compensated for the cost of construction either by initial payment or by an increment in the wheeling rate with a guarantee of sufficient usage to cover the construction cost, or there may be a combination of methods.

The remedy in this respect follows the general principle stated earlier. Higher cost of providing service to a utility does not justify denial of service, but the utility should pay compensatory rates for the service it receives. If the just and reasonable cost becomes too high the utility itself will not take the service.

The same reasoning applies to any new transmission facilities constructed by PG&E as provided in the Stanislaus Commitments. If such facilities are built by PG&E for transmission to or from CVP, PG&E is entitled to be reimbursed for the construction cost. If the transmission is within the wheeling area, this reimbursement shall be in addition to rates provided by Article 25.

PG&E contends (First Post-Hearing Brief, pp. 118-9) that there is no need to alter the wheeling provisions of Contract 2948A because (1) CVP can sell all the power it has available for sale inside the wheeling area as limited by the contract provisions, and (2) the Stanislaus

Commitments give CVP a right to transmission service within PG&E's area

CVP not only can sell what it has available, it has a waiting list of customers it is unable to supply because it does not have power available to sell them. This does not change the fact that CVP is not able to sell to customers outside the wheeling area without wheeling provisions to provide for transmission to additional places. How CVP allocates its available power is not within this Commission's jurisdiction. To allow it to make its allocation choices without undue constraint on its ability to obtain wheeling from PG&E is our legitimate concern. It may be that CVP will not wish to use the additional wheeling made available by this Decision. It should have the chance to make that determination.

It is true that the Stanislaus Commitments give CVP a broader scope for wheeling, and for that reason the Commitments are accepted as providing a part of the remedy required. Because the Commitments do not provide a complete remedy, and because they are unduly discriminatory in some of their provisions, an additional remedy must be imposed. That is what has been done.

PG&E has argued that the Commission has no power to order wheeling. The Commission did not order PG&E to enter upon the wheeling called for by Contract 2948A, or upon the wheeling required by the Stanislaus Commitments. PG&E having undertaken to wheel, it is obligated to do so without undue discrimination, and upon just and reasonable terms and conditions. That is all that is required here.

Termination

Staff recommends that the present provision for termination by either party on four years notice be changed to allow CVP to terminate on three years notice, while PG&E should be enjoined from giving notice of termination for five years from a Commission decision in this proceeding (Initial Brief, p. 222). Staff further recommends that provision be made for withdrawal of outstanding balances in CVP's energy and capacity bank accounts with PG&E at CVP's option, and that the wheeling portions of Contract 2948A be made severable to remain in effect after termination of other parts of the contract (*Id.*, p. 222.)

I am unable to make a finding on the evidence presented that four years would be an unreasonable period for notice of termination by CVP but that three would be reasonable. These notice periods are for the purpose of allowing the other party time to make such adjustments in supplies, sales, and transmission, both in facilities and in other contracts, as may be needed because of the termination of the arrangements between the parties. Here, if CVP terminates, and other contracts are not negotiated between CVP and PG&E, PG&E may have to find other major sources of supplies, other customers for a major amount of capacity and energy, other avenues of transmission, and users for some of the transmission capacity now provided by PG&E to CVP. New facilities, both for transmission and generation, might have to be built. In practice, it is unlikely these parties would sever all links; notice of termination would be merely a prelude to negotiation of other contracts governing the relations between them. I am unable to say that four years would be an unreasonable notice time given the size and complexity of the relations between the parties, and in the absence of specific evidence as to why four years is too long. In at least one case, where far less difficult adjustments would be required, the Commission has approved a much longer period. *Arizona Public Service Company*, 18 FERC ¶ 61,196, pp. 61,395-6 (1982).

Nor am I able to find that PG&E should be restrained for five years from giving notice. There is little evidence directed to this specific point. PG&E, even if the contract were terminated, is required to continue to render all services it is presently rendering under Contract 2948A until PG&E has applied to the Commission and been authorized by it to discontinue any service. It is, therefore, unnecessary for CVP to have the initial period requested by Staff to allow CVP to adjust its operations. Should PG&E apply to discontinue services, any adjustment period which may appear necessary may be provided by the Commission order on the application, if PG&E is allowed to discontinue essential services. Unless CVP has other alternatives, PG&E may not be allowed to discontinue.

Because of the necessity for PG&E to obtain permission before discontinuing services, there appears no reason why the wheeling portions of Contract 2948A need be made severable. Whether or not the contract is terminated, the wheeling services (like all other PG&E services to CVP) will remain in effect until the Commission permits their termination after application for such termination by PG&E.

Also to be continued until a PG&E application for termination is granted by the Commission are the provisions for CVP energy or capacity bank accounts with PG&E. While CVP has been credited with payment by PG&E for the amounts in the accounts, these

amounts were subject to repurchase by CVP at a higher rate It would seem that CVP could withdraw what it has in these accounts during the four-year notice period, but if it does not, the Commission may make suitable provision in any order permitting PG&E to terminate the service There has been little evidence submitted on this point, and the situation may never arise, or may be negotiated between the parties. It is unnecessary and undesirable to provide for it at this time.

In connection with any such later order the Commission may consider the possible need to regulate the withdrawals from the bank accounts to prevent too much being taken at once or at inconvenient times, which might either strain PG&E's resources or require excessive generation by high-cost plants.

Staff has also requested that in future contracts PG&E not be allowed to require CVP, (1) to commit its entire excess capacity to PG&E or (2) with certain exceptions, to limit its sources of supply to meet obligations to PG&E Any further contract replacing Contract 2948A to the extent it is jurisdictional, will have to be filed with this Commission, which can then pass upon its justness and reasonableness. To the extent the contract is non-jurisdictional, the Commission will have no more authority now than then to amend its terms or reject it. The future conditions under which the contract is entered into and the specific terms of the contract may determine what the ultimate decision should be. I see no reason to go into it here. Accordingly, I decline to accept Staff's recommendation in this respect.

Banking Accounts

CVP is part of the Bureau of Reclamation, now under the Department of Energy. CVP is primarily an irrigation and flood control operation; power generation is secondary to the other purposes. The water flow is regulated to meet irrigation and flood control needs, with electric generation a by-product. CH-2193. CVP power is dedicated first to CVP pumping requirements. CH-2193. Only the power left after CVP pumping demands is now available for commercial sale.

CVP generating plants are all hydro. It has no thermal plants. Many of the hydro plants are run-of-the river plants, so the power must be generated as the water flows, and not by impounding water in reservoirs and using it as power is needed. This results in great differences in CVP generation in different years, depending on whether the year is wet or dry, and also in great differences in the same year between one season and another.

CVP does import Northwest power over the Pacific Intertie to serve its customers CVP's preference customer load is supplied basically from the surplus of its own hydro generation above irrigation needs, plus what is brought in from the Northwest. PG&E has undertaken to provide a limited amount of power to back up CVP's fluctuating power supplies. CVP sells firm power to various municipal utilities, and other preference entities, and its additional available energy to PG&E pursuant to the banking arrangements

The sale of firm power is made possible largely by the "banking" arrangements with PG&E, under which CVP makes deliveries to PG&E in times of surplus and withdraws the deposited power in times of shortage Without this arrangement, CVP would have large supplies to sell at some periods and little or nothing to sell at other times The banking arrangements allow CVP to contract to sell a steady flow of energy on a year-round basis.

This arrangement has worked for many years, and has enabled CVP to be a more reliable supplier and utilize its energy more efficiently. In ordering any alteration of this arrangement, we should be careful not to damage the established benefits or interfere with the working of an arrangement that has proven itself. CVP does not seek here any relief from the established system, nor does CVP defend it. We have not been given the benefit of CVP's views.

Staff contends the restrictions on the use of power drawn from Energy Accounts Nos. 1 and 2, and the annual energy exchange account, must be deleted as anti-competitive and *per se* illegal under *Gulf States Utilities Company*, 5 FERC ¶ 61,066 (1976). Staff's Initial Brief states (pp. 126-7)

> Article 20(d) provides that power that the United States draws out of the annual energy exchange account can be used only to supply power to the bureau's pumps off peak. (Anderson 2200). Thus, PG&E has placed a resale restriction on the power it sells to the U.S. out of the annual energy exchange account which limits the use that the U.S. can make of power it purchases. If not for this limitation CVP could have used the large amount of excess energy in this account to meet its preference customer load or to transfer to Energy Account No. 2 (Anderson, 2200.)
>
> Similarly, energy that CVP purchases from PG&E under Energy Account No. 1 and 2 can only be used to meet preference customer loads and for no other purpose. (IR U-1, Article 21 (b), Anderson, 2197-8).

Gulf States involved an ordinary sale. The transactions here were more complicated. They

might be considered services by PG&E in receiving and returning particular categories of energy. The transactions were cast in the form of sales to PG&E and return sales, but they could have been treated as services for which a fee was charged, and cast in that form, rather than reaching the result by providing for sales to and from PG&E. An argument could be made that the power coming out should return to the category from which it was drawn, and that only. This argument is not convincing, since there was no limit on how the power could have been used had it not been deposited with PG&E under the banking arrangements.

An argument could also be made that to allow withdrawn power to be used in any manner whatsoever might result in excessive withdrawals at inconvenient times, which could result in excessive generating costs to PG&E. This is because generating costs tend to increase as demand increases and less efficient sources of generation are brought on line. Particular conditions may offset this tendency, of course.

I find the provisions are unduly restrictive and should be eliminated to allow energy withdrawn from the banking accounts to be used in any manner CVP wishes. Provision should be made to limit the time and amount of withdrawals, and/or to increase PG&E's compensation for withdrawals not permitted under the present contract restrictions, so that there will be no uncompensated costs to PG&E resulting from the deletion of the limitations. Suitable provisions for limitations on withdrawals, or for increased compensation for PG&E for withdrawals in excess of present limitations, cannot be framed upon the basis of this record. In any event, it is preferable to allow the parties concerned to attempt to reach agreement upon those things, before review by the Commission to determine the justness and reasonableness of the limitation and compensation provisions, rather than to have the Commission attempt to frame the provisions in the first instance. A further hearing would be required in either case.

The provision that bank account withdrawals should be made during off-peak hours is not affected by this Initial Decision. This is not a limitation on the use which CVP may make of the withdrawal power. It provides that the energy may be taken only at times which are less of a strain on PG&E's resources than withdrawals at peak periods might be and also reduces the tendency toward increased generation costs that would occur during peak periods.

We do not yet know whether CVP may wish to make withdrawals of power in addition to those which would be permitted under Contract 2948A as originally written. If it does, or if it may wish to do in the future, I find that PG&E should be accorded reasonable notice that CVP wishes the applicable contract limitation on withdrawals abrogated so that PG&E may make arrangements to minimize possible disruptions, as well as to allow PG&E and CVP to negotiate any limitations on withdrawals reasonably necessary to protect PG&E and/or to provide PG&E with just and reasonable compensation for the additional cost incurred or to be incurred by it as a result of the elimination of the withdrawal restrictions. Exactly how this cost should be computed must await a record with evidence addressed to this.

Within six months of the date that the Commission determination in this proceeding becomes final, CVP may file a notice with PG&E and this Commission that it desires to have the right to withdraw power, in addition to that permitted by the limitations here found improper. Within six months after such notice PG&E may file with this Commission in this proceeding a proposed rate schedule containing proposed restrictions reasonably necessary for PG&E's protection and/or any new rates to be applicable to any withdrawals to be made in addition to those which would be permitted under the limitations here eliminated. This filing shall include any and all material required for rate filings with this Commission. The filing may incorporate whatever agreement has been reached between CVP and PG&E. If there is no such an agreement PG&E may nevertheless file. The proposed terms and conditions will be subject to review by the Commission in this proceeding and the proposed rate schedule shall be subject to suspension. Withdrawals in excess of those permitted by the limitations here eliminated may commence thirty-one days after the filing by PG&E, or the last day for such filing if no filing is made. Should PG&E not file a rate schedule as here provided, the rates applicable to other withdrawals from a particular account will apply to withdrawals which would have been prohibited by the provisions here eliminated. This proceeding will remain open for any determinations which may be necessary pursuant to this paragraph.

Limits on Use of Project Power

Article 19(a) and (b) require CVP to furnish all capacity and energy for project loads (with one exception) from project plants. Staff and NCPA argue that the restriction is an illegal restraint on CVP's use of its own power. Without the restriction CVP might be able to sell some of this power as peaking power, while buying off-peak power to run its pumps. Whether any such arrangement could

be made by CVP that would be economically feasible is questionable, but it may be a possibility if conditions should be right. The restriction constitutes a restraint on possible competition by CVP with PG&E, and it should be eliminated.

No additional service obligations of PG&E shall result from this elimination. Nothing shall prevent CVP and PG&E from negotiating for additional service by PG&E, for which PG&E is entitled to compensation.

Limitation on Importation of Northwest Energy

NCPA states (Second Brief, p. 152):

> It is unclear why CVP must be limited to importing Northwest Dump or Exchange energy over its Intertie Entitlement "for use or sale in Contractor's Service Area," and can only import such resources if they can be "used beneficially" in PG&E's service area (Article 19(e)).

Article 19(e) also provides that PG&E will accept all such energy. The importation of energy only if it can be "used benefically" in PG&E's area is clearly meant to limit the amount PG&E must take to what it can beneficially use. There is nothing wrong with this.

This article does not limit what CVP may import. It provides for the importation, and sale to PG&E, of Northwest energy that PG&E can beneficially use in its area. This is not unduly anti-competitive.

Nothing in Contract 2948A should be allowed to restrain CVP from importing and using or selling elsewhere energy not sold to PG&E.

Limits on Sources of Power

CVP is limited by Contract 2948A to obtaining power only from PG&E or Northwest sources. Staff cites in this connection Articles 5, 12(a)(7), 19(d)(e) and (g). Articles 19(d)(e) and (g) also limited CVP to acquiring Northwest power only in amounts not exceeding that which could be imported over CVP's share of the Intertie transmission (IR-UI). Staff argues that these restrictions are discriminatory since these restrictions do not appear in PG&E's arrangement with San Diego or Edison.

It is questionable whether these provisions are unduly discriminatory since both CVP's operation and its relationship with PG&E are very different from those of either San Diego or Edison. CVP's operations are integrated with PG&E; this is not true of San Diego or Edison. PG&E must transmit much of the CVP power sold to its customers; this is not true of Edison or San Diego. The "banking" arrangements between PG&E and CVP are unique: PG&E schedules much of CVP's power, but not that of Edison or San Diego. The hydro power generation of CVP is quite different from the generation mix of San Diego or Edison. CVP's dams are devoted primarily to flood control and irrigation while Edison and San Diego are concerned primarily with the sale of electric power. CVP is governed by laws that do not apply to Edison and San Diego in so far as operations are concerned. PG&E provides a large percentage of backup power for CVP and under different arrangements than is the case with San Diego and Edison, which provide their own reserves to a much greater degree, although they can rely on PG&E under the Power Pool arrangements. The puts and takes in the "banking" arrangements could be affected by different CVP purchases, as might the scheduling by PG&E and the use of PG&E transmission lines by CVP or even the use of the CVP transmission lines by PG&E. None of this applies to Edison or San Diego. The systems and their relationship with PG&E are so completely different that I am unable to find that the restrictions on purchasing from other than PG&E or the Northwest and the limitation of purchases from the Northwest to CVP's Intertie transmission (even if CVP built or obtained other transmission routes to the Northwest) is unduly discriminatory.

I find, however, that the restrictions on power sources unduly restrain competition and are therefore unjust and unreasonable. No good and sufficient non-competitive reason for the imposition of such complete restraints has been shown. The absolute prohibition on other purchases goes beyond what is needed for the protection of PG&E's operations. To the extent that PG&E's operations might be adversely affected by the removal of these restraints, limitations on PG&E's responsibility may be negotiated provided they are not unduly anticompetitive.

The three cardinal points applicable to removal of the limitations on banking account withdrawals are also applicable here—notice, negotiation and compensation. After the final Commission decision in this proceeding, CVP may give PG&E notice of any purchases it wishes to make in addition to those it might bring in over its Intertie transmission share. The notice shall be filed with this Commission. Within six months from the date of notice PG&E shall file with the Commission in this proceeding a rate schedule covering whatever additional services PG&E has agreed to render CVP in connection with the additional purchases, the compensation agreed upon or proposed by PG&E without agreement, and any limitations upon the additional purchases

either agreed upon or proposed by PG&E as reasonably required to protect its operations PG&E shall not be required to render any back-up or banking services as a result of the additional purchases unless it has agreed to do so or has been ordered to do so by the Commission Any rate schedule filed by PG&E shall be subject to suspension. This proceeding shall remain open for any determination which may be necessary pursuant to this paragraph.

The purchasing of power from other sources than the Northwest by CVP may involve interconnection with these other sources. That would affect the PG&E system because of its many CVP connections and the integrated operation. This will be dealt with in the next section

Interconnections

Staff states (Initial Brief, p. 137):

> Article 19(g) requires that CVP obtain PG&E's consent before it transmits for or interconnects with any system that may directly or indirectly interconnect with PG&E (IR U-1). PG&E counsel has correctly stated that it is hard to think of any situation where CVP could interconnect with another system that would not, at the very least, indirectly affect PG&E as defined in Article 19(g). (*See* Golub, 20,805.)
>
> The staff agrees with PG&E that it is possible that certain CVP interconnections to unreliable systems could adversely affect PG&E and cause operating problems (Kaprielian, 22,515-6; 20,808; 20,812-3). PG&E does need assurance that the third party to whom CVP interconnects follows prudent utility standards (Kaprielian, 20,814-16) but Article 19(g) gives PG&E the right to veto a CVP interconnection with or transmission for any system, whether or not that system follows prudent utility standards. This provision is inconsistent with good system planning and operations unless it were appropriately qualified by technical criteria. (Russell, 2856; Holmes, 18,423.)

At page 138 Staff continues:

> The problem with 19(g) is simply that it does not set any objective standard for PG&E refusing to allow NCPA to interconnect with others. PG&E can block such interconnections for no reason at all, for an anticompetitive reason or for any other reason that is totally divorced from engineering concerns.

I agree with Staff that PG&E should not be able arbitrarily to prevent CVP from interconnecting with another system. Unless it appears that the interconnection will threaten the reliability of PG&E's system, or cause PG&E engineering problems, or result in increased and uncompensated costs to PG&E's operations (not resulting from a loss of sales or other non-engineering effect), for PG&E to prevent CVP from interconnecting would be unjust and unreasonable If the system to be interconnected is already interconnected with PG&E, directly or indirectly, so that the exposure of PG&E's system will not be substantially increased, even interconnection by CVP with a system of lesser reliability will not increase the risk to PG&E's reliability. It may also be possible to provide safeguards so that even a system of lesser reliability may be interconnected without substantial risk to PG&E's system. Additional expense to PG&E resulting from the interconnection, such as possible line losses (*see* PG&E Initial brief, p. 123, citing Witness Kaprielian, CH-22,514/12 to CH-22,518/8), should be compensated for.

Hereafter, PG&E shall not unreasonably withhold its consent to a requested interconnection, nor impose unreasonable terms and conditions in connection with its consent. If there is a difference of opinion as to whether consent is unreasonably withheld or whether unreasonable terms and conditions are imposed, this proceeding will remain open for resolution of the matter.

Staff also recommends (Initial Brief, p. 225) that PG&E be required to seek CVP's consent for a PG&E interconnection with a third party. While this, at first blush, appears to be only equal treatment, I decline to accept the recommendation. PG&E is interconnected not only with CVP, but with SMUD, Edison, and others. There seems no more reason to require CVP's consent than some of the others PG&E is one of the more careful and conservative electric utility operators; it makes a point of its reliability and safety. Its record in this respect is superior. It is the dominating utility in its area. It has accepted the overriding responsibility of supporting the other utilities in its area. It is the dispatcher and coordinator of the entire area. CVP has not sought any right to veto PG&E's connections. For it to do so would be akin to the tail wagging the dog. Its agreement to Contract 2948A and lack of trying to change it might be considered consent to any interconnection PG&E wishes to make. It may well be, in the light of PG&E's operating history with respect to reliability and conservation, that CVP will be content to rely on PG&E's judgment in this respect.

Limitation of Sales to Hydro

Articles 19(f) of Contract 2948A allows CVP to make available to PG&E capacity or energy from hydro electric plants only. Staff contends that this is unduly discriminatory

because CVP can only sell capacity and energy from a certain type of facility and no other PG&E supplier is so limited CVP has indicated interest in a thermal plant Staff-Witness Holmes (CH-18425-6) suggests that if PG&E wishes to limit the amount to be purchased, a specific amount should have been provided.

PG&E's other power suppliers are not like CVP. CVP's generation is entirely hydro. Other suppliers' generation is a mixture of hydro and thermal. PG&E's purchases from the Northwest are on a completely different basis than those of other suppliers, including CVP.

It is not unknown in the industry for a utility to purchase the entire output of a hydro electric plant or other sort of generation I can see no reason why a utility should not be allowed to purchase CVP's present hydro electric generation without being required also to take additional generation of another character

Load Support Level

Article 14, as amended, limits the CVP load PG&E will back up to 1152 MW (IR U-1). Staff asks Contract 2948A "be modified to require PG&E to grant CVP requests for increases in support for customer load levels unless PG&E can demonstrate that it cannot feasibly support such levels." (Staff Initial Brief, pp 135-6, 223.)

There has been no showing that PG&E imposed or sought the limitation on load support for the purpose of limiting CVP's sales or for any anti-competitive purpose. I find nothing improper, by itself, in a utility putting a limit on the back-up support it will provide. Staff's proposal that support must be unlimited unless shown to be unfeasible takes no account of the possible increase in costs resulting from increased support, with the increase supplied by more expensive generation. In addition, the proposal would require a compelled allocation of PG&E's resources to support of CVP's increased load, even though PG&E might prefer them allocated elsewhere. Unless the restriction is shown to be unduly anti-competitive, as it has not, I do not consider it improper.

It is true that CVP may be limited in the load it can serve if it cannot obtain necessary back-up power. Any customer of PG&E will be limited in what it can sell by the amount it can buy, either of direct supplies or of back-up. It does not follow that the supplier can place no limit on the supplies it will furnish.

Staff recommends also that CVP should be allowed to serve customer load above the present ceiling of 1152 MW (Initial Brief, p. 223). So long as CVP can do so without increasing PG&E's obligations, CVP should not be limited in its sales by a contract with a competitor Contract 2948A, then, shall not limit CVP's sales, but PG&E shall not be required (unless it agrees) to furnish support for any CVP sales beyond the support presently required. To the extent back up is necessary to the sales to be made, if CVP is able to arrange for back up by other reliable suppliers, it may make the sales.

400 MW Reserves

CVP receives 400 MW over the Intertie from Centralia. Article 18(b) requires CVP to provide an equitable share of reserves up to 400 MW Staff argues CVP should not be required to provide 400 MW of spinning reserve to guard against an Intertie outage Staff makes a number of arguments at pages 136-7 of its Initial Brief, saying that the Intertie is more reliable than most generating units, that there are two parallel ac lines available for Intertie transmission power so only 200 MW would be lost in an outage, that BPA backs up Centralia, and that it was the intention of the parties to Contract 2948A that Article 18(b) require the same reserve obligation of CVP as PG&E would have if obtaining the same power over the same line (citing PG&E Witness Keating, CH 27,309).

The contract does not call for a particular number; it calls for "an equitable share of reserve capacity in an amount up to 400,000 KW." This does not require 400 MW; 400 MW is the upper limit, but the amount required is an equitable share. Article 18(b) need not be revised, but I agree with Staff, in view of Mr. Keating's testimony, that "an equitable share" would be no more than PG&E would provide if using the Intertie to import the same power. The specific amounts may change with circumstances, but that is the principle to be applied.

Article 14(c)(3)

This article provides that:

> ... unless PG&E agrees otherwise any CVP customer that elects to take supplemental power from a supplier other than PG&E must take such power only from suppliers who are able to supply the entire supplemental load of that customer, other than that supplied by PG&E and the U.S., without receiving support or standby from PG&E or the U.S. and without imposing any additional burden on PG&E or the U.S.

Staff Initial Brief p. 133.

Staff says this provision is unduly discriminatory in that it restricts potential suppliers of supplemental power to CVP customers to those who can supply all the

supplemental power, and limits the customers' right to choose freely among suppliers who could supply reliable service.

PG&E contends that the provision merely insures that purchases are not made from unreliable sources. PG&E Witness Keating said the only requirement is that a reliable source of back up shall be maintained. CH-1242

PG&E is the power supplier of last resort in its area, the ultimate source of power to which all others in the area turn if they are caught short. It has an obvious interest in making sure that CVP customers do not create situations in which CVP—and thus, indirectly, possibly PG&E—may have to come to the rescue of customers who have made imprudent arrangements, either (1) not considering the possible dangers or (2) perhaps feeling they can think of cost without regard to reliability because PG&E will ultimately bail them out. PG&E may have to provide CVP with the power for the bail out unless Contract 2948A has some limitation on what CVP's customers may do. Even if there is no contract whereby PG&E, directly or through CVP, must provide the bailout, PG&E would in practice assist any utility in its area that had nowhere else to turn. It is not discriminatory to differentiate between, on the one hand, small utilities without proven reliability and with possibly questionable practices, and on the other hand, Edison and San Diego, whose reliability and low-risk practices are well established and acceptable to PG&E.

PG&E says it is entitled to reasonable protection from exposure to demands it never authorized or controlled. Nevertheless, I feel Article 14(c)(3) goes too far, and another approach should be taken.

It is not a practicable solution to provide that the customers may do as they please, but PG&E will not be compelled to back them up if they go beyond what is permitted by Article 14(c)(3). PG&E is going to help them in an emergency if they have no place else to turn and if PG&E has the resources.

The first point is that the customers should not be limited in the number of suppliers they may wish to deal with. The key is the reliability of the customers' suppliers, and not the number. That reliability could be established in several ways—by PG&E's approval of a supplier's reliability, by back up of the unapproved supplier by an approved utility other than PG&E, or by PG&E providing the back up. The necessary approval by PG&E may not be unreasonably withheld, and resort may be had to the Commission in this proceeding if it is.

At the present time, comparatively little power is necessary to back up CVP's customers' suppliers other than CVP or PG&E. The present limitation to 1152 MW for back up of CVP's load would operate to hold down PG&E's exposure. It is at least possible however, that in the future customers may reduce their takes from CVP, voluntarily or otherwise, and increase their takes from other suppliers. This could multiply the back up exposure of PG&E, especially with the possibilities opened up by the expanded wheeling the Stanislaus Commitments make available. I cannot find, therefore, that protection for PG&E from unreliable suppliers is unnecessary because of the small amount of exposure that may result.

In the event a customer wishes to purchase from an unreliable supplier, it can contract for back up with PG&E or another reliable supplier. Otherwise, it has no right to expect back up from PG&E, either directly or by way of CVP. Despite this, if the homes in a customer's area are going dark, someone will provide it with power, and that someone is likely to be PG&E.

It is not likely, in the next few years, that PG&E will be unable to provide back up power to CVP customers whose suppliers fail them. The arrangement which seems most in the public interest is for PG&E to supply the back up power needed, but to receive fully compensatory rates for doing so. PG&E may make such arrangements for doing so as can be negotiated. In the absence of particular agreements, PG&E may also provide a general rate schedule with rates for such back up. These rates need not be fixed, but may be based upon a just and reasonable formula. All such rates are of course subject to review by this Commission after they are filed. In the event circumstances may change so that PG&E may be unable to supply back up power for all CVP customers, or if for any other reason not now apparent PG&E should not be called upon to do so, PG&E may move this Commission for whatever relief may be suitable. For the present, the scheduling of fully compensatory rates to back up unreliable suppliers, which rates may greatly exceed the rates to reliable suppliers, appears to offer sufficient protection to PG&E.

Rates

The rates at which CVP sells power are not within the jurisdiction of this Commission, except for review to assure that CVP's full costs are recovered. It would be improper, and subject to correction in this proceeding, for PG&E to use monopoly power to impose inadequate rates, but it has not been shown

that this has occurred There has been some argument, not pressed in the post-hearing briefs, that PG&E's monopoly of transmission and its predominant position in the area carries the implication that the terms of Contract 2948A were imposed illegally The factors mentioned, by themselves, are not enough. CVP is an arm of the United States Government, not devoid of funds or legal counsel, and presumably aware of its rights, which could make its situation known to the Department of Justice and this Commission, and the Bureau of Reclamation (of which CVP is a part) has made its views prevail despite PG&E opposition in substantial matters regarding the Pacific Intertie. Without evidence that particular CVP rates in the contract resulted from anti-competitive action by PG&E, I cannot find that the rates were improperly imposed.

The fact that some services are not specifically charged for is not improper unless the rate structure does not provide for a full cost recovery. The arrangement is analagous to the inclusion of a free premium with the sale of merchandise—the total price covers the "gift" of the "free" item.

The rates at which PG&E provides services to CVP are subject to review by this Commission in rate proceedings. Their level is not within the scope of Phase II of Docket No. E-7777 unless the rates resulted from anti-competitive action. Again, PG&E's monopoly of transmission and its predominant position in the area are not enough, by themselves, to establish anti-competitive actions in this respect.

V. Contract 2947A

This contract was not one of those specifically named by the Commission for investigation. It does, however, affect and relate to the Pacific Intertie, and must be considered for that reason.

Under the Stanislaus Commitments and the bottleneck theories previously discussed, CVP must be treated, like anyone else, in a non-discriminatory manner in being accorded the use of any available transmission allocated to Edison or San Diego on the ac or dc Intertie lines. This treatment would not be altered by the provisions of Contract 2947A, as the required treatment is independent of that contract and despite anything in the contract to the contrary. Only one change need be made. Article 32, dealing with alienation, should be revised as suggested in Staff's Initial Brief (p. 238) to read:

> Neither the contract nor any part thereof shall be assigned without prior notice to all other parties.

A PIA Company shall have the opportunity to object if it would be subjected to possible financial loss by assignment to a financially irresponsible entity.

VI. Other Territorial Customer Allocations

Staff and its initial brief (pp. 127-8) states that "the CPP companies have maintained or enhanced the monopoly power . . . by means of numerous other territorial and customer allocation agreements . . . " Cited are June 1971 agreements between San Diego and Imperial Irrigation District which provide that neither will sell in the other's territory for 25 years (IR X-10), resale restrictions in wholesale contracts with the City of Colton (IR Y-2, Z-2, H-3, I-3 and K-3), restrictions limiting use of wholesale power to the customers service area for Vernon, Anaheim, Riverside, Banning, Deseret Electric Cooperative, Azusa, Anza Electric Cooperative, Citizens Utilities Company and LADWP (IR A-3, B-3, D-3, E-3, F-3, G-3, J-3, L-3, P-3, R-3, Exhibit 6227), restrictions from reselling Nevada Power to Northwest entities (Exhibits 2014, 2015, 6012, 6013), and PG&E resale restrictions on California Pacific Utility Co. (IR X-2, SMUD Ex. 1214, IR K-2, R-2) Palo Alto, Santa Clara and Redding (IR-Q-2, S-2, Z-2 and W-2, Exhibit 7224).

While the foregoing arrangements are alleged to be evidence of anticompetitive schemes by CPP companies, these arrangements themselves are not within the scope of this proceeding. They are not among the contracts named for investigation in the Commission orders, nor do they relate to the Pacific Intertie or the PIA. I do not find that modifications of any of these agreements are necessary to remedy anticompetitive or unduly discriminatory provisions in the contracts that are subject to this investigation, nor do I find that they are part of an anticompetitive scheme directed towards any of the contracts here under investigation. Accordingly, no modification of any of these arrangements is ordered, nor are any other remedies provided with respect to them.

VII. Representation of Intervenors

NCPA has been represented in this proceeding by attorneys from the office of Spiegel & McDiarmid. The Southern Cities have been represented by different attorneys from the office of Spiegel & McDiarmid. When a question was raised as to the reason for this, Mr. McDiarmid of Spiegel & McDiarmid stated that the two groups of intervenors were represented by different attorneys in his firm because of the existence of possible conflict of interest between the two groups. It was

indicated that a strict division between the different groups of attorneys would be maintained at all times so far as this proceeding was concerned.

Mr. McDiarmid stated that both groups of clients had been fully informed of the possible conflict of interest, that both NCPA and Southern Cities had been represented by the firm for some time and are dependent upon it not only for legal advice in connection with these proceedings but for advice in a broad spectrum of matters, and it was felt that in the light of these relationships that both groups could be better represented by Spiegel & McDiarmid attorneys than by others.

While Mr. McDiarmid did not specify the particular nature of the conflicts of interest, at least some of these became apparent during the proceeding. Both NCPA, whose members are entities in north and central California, and the four Southern Cities who are located in Edison's service area in southern California, sought firm access to the Pacific Intertie. If firm allotments of capacity had been made it would have been necessary to determine who would receive the allotments and the size of the allotments. The basis for making such allotments might well have been a subject of controversy between Southern Cities and NCPA or its individual members. For instance, NCPA was unwilling to invest capital to purchase a portion of the Intertie entitlements; Southern Cities was willing to make that investment. If purchase of Intertie shares were made a condition of participation, Southern Cities would receive participation while NCPA would not.

A number of NCPA members are customers of CVP and so have received indirectly the benefits of purchases of Northwest power by CVP, as CVP's rates to them have been lowered by CVP's receipt of the cheaper Northwest power. Some of the other NCPA members, and all the Southern Cities, have received no such benefits. In allocating equitable participation in the Intertie, one possible contention might be that we should reduce the participation of those who have already received these indirect benefits of the Intertie, leaving a larger share for the others who have not received such benefits. If it were argued that NCPA should receive the sum of Intertie shares due its members, it would follow that NCPA and Southern Cities would be on opposite sides on this question.

It is also apparent that varying methods of allotment of Intertie shares would yield differing results. Allotments on the basis of peak loads would yield one result, allotment on the basis of total load another and other variations might be considered on the basis of alternative supply resources, types of loads served, differing rates charged, and other factors. It might well have been held that NCPA or its members should have access only to the ac lines while Southern Cities should have access only to the dc line. Historically LADWP, Glendale, Burbank and Pasadena have had all their access on the dc line, and this might well have been what Southern Cities would have received if they had participated originally. Similarly CVP, DWR and SMUD obtained access only to the ac line, and this might well have been what NCPA and some or all its members would have received had they participated in the original Intertie arrangements. While both groups of Intervenors sought access to both ac and dc lines, a larger allotment on the dc lines might well have been preferred by Southern Cities to a lesser access to both ac and dc lines if this question had ever been presented. NCPA or its members might have preferred a larger access to the ac lines to a smaller share in both ac and dc lines. The possibility of conflict in these respects would emerge most sharply in settlement negotiations, where one group might adhere to its attempt to obtain transmission over both ac and dc lines while the other might seek to concentrate on one line only to obtain a larger share there. Certainly the possibility for conflicts of interest was extensive at the start of hearing.

If I had handled this case and the interventions from the beginning, I would have gone into this matter in more detail. I was, however, the fourth Administrative Law Judge in this proceeding, which had continued for years and had involved many orders by both the judges and the Commission. The Commission had granted interventions to NCPA and to Southern Cities as represented by attorneys from this one law office although there is some question as to whether the Commission was aware that both groups of attorneys were from the same firm. In these circumstances I felt that I should not for the first time, while pressing the participants to get to hearing, inquire into the matter further, especially as it would entail additional delay if new counsel were required to come into the case.

VIII. Matters Raised by Comments

Due to the complexity of this case and the volumes of record and exhibits, a draft of the first six sections of this opinion with ordering clauses was made available to the participants for comments. Comments were filed by PG&E, Edison, San Diego, NCPA, Southern Cities, Santa Clara and Staff. There was also an *amicus* communication from SMUD, a non-

participant Reply comments were filed by PG&E, Edison, San Diego, NCPA, Southern Cities, Santa Clara and Staff The Initial Decision in its present form has incorporated changes suggested by the comments or resulting from further consideration in the light of the comments. Most of them are self-explanatory. To the extent they are typographical corrections, factual corrections that do not affect the reasoning or result, or language clarification, nothing need be said here. In some instances, however, matters raised by the comments will be addressed here.

PG&E, Edison and San Diego all state that the Commission has no power to order wheeling. They contend that the remedy of access to the Intertie lines and to PG&E and Edison's grids for the purpose of access to the Intertie constitutes a wheeling order and, therefore, is an inpermissible remedy.

While it is my view that in fashioning a remedy for anticompetitive or unduly discriminatory acts the Commission may order wheeling, this Initial Decision need not rest upon that ground. Insofar as PG&E is concerned, it has undertaken by the Stanislaus Commitments to provide wheeling. This Initial Decision requires modification of the Stanislaus Commitments, which is unquestionably within the Commission's jurisdiction, to cure certain provisions which I have found to be unduly discriminatory, anticompetitive, unjust and unreasonable.

It is also my view that the relief provided under the bottleneck theory as to access to transmission over the Intertie lines requires no wheeling order. Wheeling is the transmission by the operator of one system, over that system's facilities, of the power of another entity. San Diego operates no part of the Intertie lines, either ac or dc. The ac lines are operated by Edison and PG&E and the dc line by LADWP. San Diego does not provide the wheeling service; that is provided by the operators. San Diego merely has a right to have a share in the capacity of both ac and dc lines. What it is directed to do here is to make any unused portion of its Intertie capacity share available to others at all times when it is not being fully used. If LAWDP poses an obstacle to San Diego making available some of its dc line capacity (in accordance with our previous discussion), San Diego is required to cut back on its actual use of the ac lines sufficiently to be able to provide on the ac line what this order calls for it to do, if it cannot do so on the dc line. San Diego has a contractual right to receive wheeling from PG&E and Edison on the ac lines. It is required by this order only to make a portion of its rights available to others. The wheeling obligation of PG&E and Edison arises not from the order of this Commission but from the contract with San Diego. San Diego is not being ordered to wheel but merely to transfer its existing rights to receive wheeling.

Edison, similarly, has a right to transmission by PG&E on the ac lines of power from the Northwest through northern and central California to Edison's area. This wheeling is accomplished by PG&E, not Edison. This would assure the NCPA members and other northern and central California entities that, even in the absence of the Stanislaus Commitments, Edison could transfer to them a portion of its rights to wheeling by PG&E on the ac lines. If LADWP should prevent transferring a part of Edison's rights on the dc line this could be made up by cutting back Edison's ac lines usage and shifting its own demands to the dc line The Matrix agreements between Edison and Southern Cities would take care of the transmission within Edison's own territory including access to and from the Intertie line over Edison's general grid. As to other southern California entities, although they have not yet come into this case, if they should seek transmission it would be unduly discriminatory for Edison to refuse service to similar entities on terms similar to what it has provided in the Matrix agreements.

As far as PG&E is concerned, it is committed by the Stanislaus Commitments to provide transmission without undue discrimination both on the Intertie and on its own general grid. This includes both interstate and intrastate transmission on the Intertie Again, to the extent LADWP may frustrate use of PG&E's capacity on the dc line, this can be offset by PG&E cutting back on its own ac lines transmission. Intrastate transmission by PG&E to the southern California area would take place pursuant to the Stanislaus Commitments. This obligation arises not from the Commission order but from PG&E's obligation under the Stanislaus Commitments Any agreement for transmission under the Stanislaus Commitments will, of course, be subject to filing with this Commission. San Diego, Edison and PG&E will be directed to file with this Commission, in this proceeding, any contracts entered into to provide access to the Intertie, or to PG&E's or Edison's general grid for purpose of access to and from the Intertie.

If it were necessary to order wheeling to carry out the remedies provided by this Initial Decision, and if, contrary to my opinion, the Commission lacked authority in this situation to order wheeling, it would be necessary to consider the possibility of other remedies. One

course would be to make the necessary factual findings and suggest that any aggrieved parties apply for relief in a District Court which could order the necessary relief, as was done in the Otter Tail case. The Commission might also consider ordering the admission of smaller utilities to the PIA or to participatory ownership in the Intertie lines with additional ownership in the ac lines to offset any inability to obtain rights in the dc line. I could possibly order sale of power by the PIA companies, to entities damaged by exclusion from the Intertie, at rates which would give them the equivalent of what they could obtain by importation of Northwest power if the Intertie were available to them. The remedy here provided will be less disruptive to the operations of electrical systems in California than the other remedies which might be considered.

PG&E has suggested that the material at page 17 should be omitted or that the Initial Decision should indicate that there was no improper action on the part of PG&E counsel. There was no intention to express approval or disapproval of any action of counsel for any party. In considering what arrangements should be ordered among the parties to the California Power Pool, including potential members, it seemed relevant to consider whether they would be able to work together and the extent to which cooperation might be impeded by poor personal relationships. The relationship between some NCPA counsel and some PG&E counsel was unfriendly. It seemed relevant therefore, both to this Initial Decision and to possible changes which the Commission might consider, that this lack of friendliness did not extend to relationships between PG&E executives and the executives of NCPA members. The CPPA operating relationships will be between executives, not counsel. At the time of hearing NCPA did not have executives. Nevertheless, the fact that its members' executives and the PG&E executives had amicable relations seems to indicate that we need not expect hostility between NCPA's executives and those of PG&E. I do not find that the language on page 17 should be eliminated. In the light of counsel's concern, however, I will emphasize at this point that no criticism of counsel was intended or implied by the language on page 17.

PG&E has suggested (Comments, p. 28) that, in considering reserve requirements in connection with firm power, one requirement should be that the source of firm power be not more than one control area away from a California Power Pool member. This might be a reasonable requirement if the question were purchases of spinning reserves necessary to back up power generated by the purchaser. Such spinning reserves should be capable of being promptly available and are completely independent of the power which they back up PG&E's recommendation, however, was made in connection with reserves for purchased firm power. The seller of the firm power will have provided reserves, including spinning reserve, to back up its own generation and these reserves will be immediately available to the seller whether it is one or several control areas removed from the Power Pool. In practice, PG&E's suggested requirement would have very limited application, in all probability, since the purchase of firm supplies becomes more expensive with the distance they must be transmitted.

PG&E (Comments p 32) states that the requirement on page 22 of the Initial Decision that NCPA must be allowed to buy spinning reserves from CPP members should be modified to provide that NCPA should also be required to sell spinning reserve to other pool members. The language in the Initial Decision was directed to eliminating possible discrimination against a small utility The present CPPA parties, in making the required amendment to the CPPA, may draft a broader provision so long as its terms are just and reasonable. It seems unlikely that some of the smaller utilities will have reserves to sell in any significant amount, but if they do, it may be provided for.

PG&E also questions whether Pool members may always have reserves available to sell, and suggests that in the instance compensation might be inadequate. No Pool member or anyone else is required to sell what it does not have or what is needed for the operation of its own system. I fail to see, however, why inadequate compensation need result if reserves, emergency power or any other forms of back up are provided for a Pool member. The supplying entity is entitled to just and reasonable compensation and the CCPA or other filed rate schedule may so provide.

PG&E has urged, in connection with the second criteria for seller's reserves set forth in the discussion of reserves for purchased power under Paragraph 5.01 of the CPPA (p. 25), that not only the level of reserves should be considered, but also the quality. This Initial Decision has attempted to deal with the requirements of the CPPA and with the specific testimony of Mr. Whyte, quoted at page 24. Neither refers to quality of reserves. If the reserves on that system were unreliable for some reason, and a reasonable means were specified for determining this, we would have a different question. At present, I have no provision in this regard upon which to pass.

PG&E has raised the question whether transmission for non-utility entities is required. So far as access to and from the Intertie is concerned, and access to transmission on the Intertie itself, interruptible access is to be given on a non-discriminatory basis to all, both utilities and non-utilities. Since the Intertie cannot accommodate everyone to the full extent they desire, the PIA companies will have to work out how to allot what is available. Their arrangements must be not unduly discriminatory and otherwise just and reasonable, and this Commission may review them, but in the first instance the PIA companies will determine how access will be allotted.

PG&E states it does not interpret the Initial Decision to require it to transmit preference power over the Intertie that PG&E would have bought but for the preference (Response to Comments, p. 18). Intervenors urge that if they can purchase power in the Northwest which PG&E tried to obtain, they should have the right to Intertie transmission PG&E would have used for the power. I cannot accept either view as presented. If a PIA company has Intertie transmission open, it must not deny its use to someone else that has bought power the PIA company wanted. It does not have to reserve capacity to take the power, or hold existing open capacity available until all the particular power has been transmitted. It is suggested PG&E might rush out to buy substitute power to fill the opening on the Intertie and so prevent the original power it lost to another from being transmitted. If it is shown that PG&E bought power for the purpose of excluding another's power from the line, this will be anti-competitive and improper. If it purchases power not in order to exclude someone else but because it has use for the power itself, this is permissible, and transmission may be provided for PG&E's power, if necessary, even if this requires interruption of someone else's transmission. The line is sometimes hard to draw between permissible and impermissible action, but the legal theory is clear.

The reaching of a particular result in this proceeding does not mean that all arguments made in support of that result are accepted. I have attempted to state the extent of remedies here provided, and conclusions that additional remedies must be implied from or must follow on the remedies ordered are usually unwarranted.

It is ordered:

(A) The Stanislaus Commitments, and the contracts referred to in this Initial Decision, shall be modified, interpreted and applied as provided in this Initial Decision

(B) To the extent any provision of any such contract is herein declared to be unduly anti-competitive, unduly discriminatory or unjust and unreasonable, it shall have no force or effect

(C) In all instances in which revisions of contract provisions are required, if revision of other provisions of the contract would effect the same results here required, such revision of other provisions may be substituted for or may be coordinated with the required revision. Any revisions to other contract provisions needed to avoid ambiguity, or conflict with the revised provisions or the requirements of this Initial Decision, should also be made. If any such conflict remains after the revisions are incorporated in any contract, the provisions of the revisions, and of this Initial Decision, shall prevail.

(D) Edison, PG&E, San Diego shall give access to the ac and dc lines of the Pacific Intertie, and to their transmission lines necessary for transmission to and from the Intertie, on a non-discriminatory basis in accordance with this Initial Decision, and for rates no more than just and reasonable.

(E) Membership in the California Power Pool shall be available in accordance with this Initial Decision and to the extent provided in the membership clause to be submitted.

(F) Changes in any contract, and the Stanislaus Commitments, required by this initial decision, and all filings required by this Initial Decision, shall be submitted in this proceeding for approval within three months of the date this Initial Decision or any modification thereof becomes final and not subject to review. Such submissions may include modifications or additions permitted but not required by this Initial Decision.

(G) This proceeding shall remain open for the purposes provided by this Initial Decision, including consideration of any modifications to any contract or the Stanislaus Commitments to be submitted for approval.

(H) Except as provided in Ordering Paragraph (F), this proceeding is terminated.

— Footnotes —

[1] "Commission," "the Commission," or "this Commission" refers to the Federal Energy Regulatory Commission or its predecessor, the Federal Power Commission.

[2] NCPA is a public agency of the State of California created by a joint powers agreement pursuant to Chapter 5, Division 7, Title 1 of the California Government Code. Each member of NCPA owns and operates an electric distribution system for the supply of electric power and energy within its boundaries. Five of the member cities—Alameda, Healdsburg, Lodi, Lompoc and Ukiah—have been served for many years exclusively by Pacific Gas and

Electric Company ("PG&E") Five member Cities—Biggs, Gridley, Palo Alto, Redding and Roseville—together with NCPA associate member Plumas-Sierra Rural Electric Cooperative purchase their entire supply from the U S Bureau of Reclamation Central Valley Project ("USBR", "CVP"), marketed by the Western Area Power Administration ("WAPA"). One member city, Santa Clara, purchases from both PG&E and WAPA NCPA initial Brief p. 2

3 . *Notice of Compliance Filing*

(July 16, 1979)

Take notice that on July 5, 1979, the Southern California Edison Company tendered for filing in compliance with the Commission's order of June 14, 1979

I, Agreements between Edison and the Department of Water and Power of the City of Los Angeles

A City—Edison Pacific Intertie DC Transmission Facilities Agreement (Executed March 31, 1966).

B City—Edison Sylmar Interconnection Agreement (Executed March 31, 1966)

C Amendment No. 1 to City—Edison Sylmar Interconnection Agreement (Executed February 11, 1971).

II Other Documents

A. Amendment No 2 to the Pacific Intertie Agreement dated March 1, 1970.

B Midway Interconnection Agreement between Pacific Gas and Electric Company (PG&E) and Edison dated March 12, 1970

C. Pacific Power & Light Company—California Companies Agreement for Use of Transmission Capacity dated August 1, 1967.

D. California Power & Light Company—California Companies Agreement for Use of Transmission Capacity dated August 1, 1967.

E California Companies Pacific Intertie Agreement Coordination Committee Rulings 1-41.

Also, pursuant to the Commission's order of June 14, 1979, Pacific Gas and Electric Company and San Diego Gas & Electric Company on July 5, 1979, jointly filed:

(1) United States Department of the Interior, Bureau of Reclamation, Central Valley Project, California: Contract with Pacific Gas and Electric Company for installation, operation and maintenance of facilities at Round Mountain, and for the operation and maintenance of Bureau EHV Line, dated July 31, 1967.

(2) United States Department of the Interior, Bureau of Reclamation, Central Valley Project, California: Contract with Pacific Gas and Electric Company for installation, operation and maintenance of facilities at Cottonwood Substation, dated July 31, 1967.

(3) Amendment Number Two to California Pacific Intertie Agreement, dated March 1, 1970.

(4) Midway Interconnection Agreement between Pacific Gas and Electric Company and Southern California Edison Company, dated March 12, 1970.

(5) Letter Agreement dated May 29, 1968 between Pacific Gas and Electric Company and Bureau of Reclamation

(6) Letter Agreement dated July 9, 1969, between Pacific Gas and Electric Company and Bureau of Reclamation

(7) Letter Agreement dated November 20, 1967 between Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company

(8) Letter Agreement dated March 1, 1970 between Pacific Gas & Electric Company, San Diego Gas & Electric Company and Southern Edison Company.

(9) The presently effective rulings of the Coordination Committee of the California Companies Pacific Intertie Agreement (Ruling Nos 1, 6, 7, 10, 16, 17, 18, 19, 20, 22, 23, 24, 25, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, and 42)

(10) Ruling Nos. 4 and 7 of the Board of Control of the California Power Pool Agreement

Supplemental Notice of Compliance Filing

(August 1, 1979)

In addition to the filing of the contracts listed on the notice issued in this docket on July 16, 1979, Pacific Gas & Electric Company and San Diego Gas & Electric Company jointly listed the following contracts which are within the scope of the Commission's order but which have already been filed:

Contract—FERC Rate Schedule No

(1) Letter Agreement dated August 25, 1966—Supplement No. 3 to PG&E Rate Schedule FPC No. 38

(2) Letter of Agreement to Supplement The California Companies Pacific Intertie Agreement For the Two-Year Period April 1, 1968 to March 31, 1970, dated August 25, 1966—Supplement No. 2 to PG&E Rate Schedule FPC No. 38

(3) Illustration of Costs and Revenues Allocation, dated August 25, 1966—Part of PG&E Rate Schedule FPC No. 38, relates to Section 5 of CCPIA and Exhibit C

(4) Amendment Number One to California Companies Pacific Intertie Agreement dated January 10, 1968—Supplement No 1 to PG&E Rate Schedule FPC No. 38

(5) Agreement For Use of Transmission Capacity Pacific Power & Light Company, Pacific Gas & Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, dated August 1, 1967–PP&L Rate Schedule FPC No. 86

(6) United States Department of the Interior, Bureau of Reclamation, Central Valley Project, California: Contract with California Companies for Extra High Voltage Transmission and Exchange Service, dated July 31, 1967—PG&E Rate Schedule No. 35

(7) Contract Between California Companies and Sacramento Municipal Utility District for Extra

High Voltage Transmission and Exchange Service, dated August 1, 1967—PG&E Rate Schedule FPC No 37

(8) Contract Between State of California and California Companies for the Sale, Interchange and Extra High Voltage Transmission of Electric Capacity And Energy, dated August 1, 1967—PG&E Rate Schedule FPC No. 36

(9) Early Service Agreement, dated August 29, 1967—PG&E Rate Schedule FPC No. 39

(10) Assignment and Agreement Relating to Canadian Entitlement Exchange Agreement, dated March 10, 1966—Exhibit A to PG&E Rate Schedule FPC No 40

(11) California Entities Canadian Entitlement Power Reassignment Agreement for Years 1968-1970, dated August 29, 1967—PG&E Rate Schedule FPC No. 40

(12) Power Sales Contract executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Pacific Gas and Electric Company, dated July 31, 1967—PG&E Rate Schedule FPC No. 32

(13) Power Sales Contract executed by the United States of America, Department of the Interior acting by and through Bonneville Power Administrator and San Diego Gas & Electric Company, dated December 29, 1967—SCE Rate Schedule FPC No. 35

(14) Power Sales Contract executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Southern California Edison Company, dated July 31, 1967—SCE Rate Schedule FPC No. 33

(15) Exchange Agreement executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Pacific Gas and Electric Company, dated July 31, 1967—FPC Rate Schedule FPC No. 33

(16) Exchange Agreement executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and San Diego Gas & Electric Company, dated December 29, 1967—SDG&E Rate Schedule FPC No. 16

(17) Exchange Agreement executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Southern California Edison Company, dated July 31, 1967—SCE Rate Schedule FPC No. 36

In addition to filing the contracts listed on the previous notice issued July 16, 1979 in this docket, Southern California Edison Company listed the following contracts which are within the scope of the Commission's order but which have already been filed·

1. Pacific Intertie Agreement, SCE FPC Rate Schedule No. 40.

2. Illustration of Costs and Revenues Allocation, dated 8/25/66. SCE FPC Rate Schedule No. 40.

3 Letter Agreement between the California Companies, dated 8/25/66 to the Pacific Intertie Agreement. SCE FPC Rate Schedule No 40

4. Letter Agreement to Supplement the California Companies-Pacific Intertie Agreement dated 8/25/66 SCE FPC Rate Schedule No 40.

5. Amendment 1 to the Pacific Intertie Agreement. SCE FPC Rate Schedule No. 40.

6. Amendment 2 to the Pacific Intertie Agreement. Submitted herewith.

7. PP&L-Calif. Companies-Transmission Agreement. Submitted herewith.

8. USBR-California Companies EHV Transmission and Exchange Service. SCE FPC Rate Schedule No. 37.

9. SMUD-California Companies EHV Transmission and Exchange Service Contract SCE FPC Rate Schedule No 39.

10. State-California Companies Sale, Interchange, and EHV Transmission Contract. SCE FPC Rate Schedule No 38

11. LADWP-dison Pacific Intertie DC Transmission Facilities Agreement Submitted herewith.

12. LADWP-SCE Sylmar Interconnections Agreement. Submitted herewith.

13. Assignment and Agreement Relating to Canadian Entitlement Exchange Agreement SCE FPC Rate Schedule No. 42.

14. BPA-SCE Exchange Agreement BPA No. 14-03-54126. SCE FPC Rate Schedule No 36.

15. BPA-SCE Power Sales Contract, BPA No 14-03-54125. SCE FPC Rate Schedule No. 35.

16. Early Transmission Service Agreement with LADWP, dated 8/29/67, SCE Rate Schedule No. 41 Terminated March 31, 1970.

17. 1970 Service Agreement (Extension of Early Service Agreement with LADWP) dated 4/1/70 Terminated May 31, 1970.

18. Midway Interconnection Agreement between PG&E and SCE. Submitted herewith.

19. California Power Pool Board of Control Rulings 4 and 7. Submitted herewith.

20. California Companies Pacific Intertie Agreement Coordination Committee Rulings 1-41. Submitted herewith.

21. Settlement Agreement between Edison and the Cities of Anaheim, Banning and Riverside. See SCE FPC Rate Schedule No. 15.4 (Anaheim), 21.3 (Banning), and 17.4 (Riverside).

22. Settlement Agreement between Edison and the Anza Electric Cooperative, Inc. See SCE FPC Rate Schedule No. 19.2.

23. Settlement Agreement Between Edison and the City of Colton. See SCE FPC Rate Schedule No. 31.5.

24. Settlement Agreement between Edison and the Southern California Water Company See SCE FPC Rate Schedule No.33.3.

25. Settlement Agreement between Edison and the City of Vernon. See SCE FPC Rate Schedule No. 13.5.

26 Settlement Agreement between Edison and the City of Azusa See SCE FPC Rate Schedule No 164

27 Integrated Operations Agreement between the City of Anaheim and Edison See SCE FPC Rate Schedule No 95

28 Integrated Operations Agreement between the City of Riverside and Edison See SCE FPC Rate Schedule No 94

[4] These were

(1) USBR-SCE Interconnection Contract

(2) Agreement of Parties to the California Power Pool Agreement Concerning City-Edison Pacific Intertie D-C Transmission Facilities Agreement and City-Edison Smylar Interconnection Agreement, Dated March 25, 1966.

(3) Agreement of Parties to the California Power Pool Agreement Concerning City-Edison Pacific Intertie D-C Transmission Facilities Agreement and City-Edison Smylar Interconnection Agreement Dated April 1, 1966

(4) Letter of Understanding Regarding Seven Party Agreement Dated January 14, 1969

(5) Intersuppliers Contract

(6) Oroville-Thermolito Power Sale Contract Dated November 29, 1967

(7) Contract Among the California Companies with respect to purchase of power generated at Oroville Thermolito Power Plant

In addition, the following documents were ordered to be cross-referenced to Docket No. E-7777 (II)

(1) PP&L-PG&E Sales and Energy Exchange Contract

(2) The document superseding the PP&L-PG&E memorandum (Payment for use of PP&L Kv line)

(3) State (California)—Suppliers Contract (including supplements)

[5] The deficient Party shall be excused from making the aforesaid payments to the extent that the Spinning Reserve Deficiency on which they are based was caused by (a) an Emergency on the Area System of any Party, (b) a Capacity Resources Deficiency for which payments are being made in accordance with paragraph 5.03, (c) furnishing Emergency Service or Capacity Resources Standby Service, or (d) forces or conditions which were unpredictable in the sole judgment of the Board of Control

[¶ 63,049]

Pacific Gas Transmission Company, Docket No. RP83-113-000, et al.; Pacific Interstate Transmission Company, Docket No. RP83-135-000; Pacific Offshore Pipeline Company, Docket No. RP83-136-000; El Paso Natural Gas Company, Docket No. RP83-139-000; Transwestern Pipeline Company, Docket No. RP81-130-007, et al.

Order of Chief Judge Denying Requests for Reconsideration

(Issued February 8, 1984)

Curtis L. Wagner, Jr., Chief Administrative Law Judge.

On December 9, 1983, Pacific Gas Transmission Company and Pacific Gas and Electric Company filed a joint request that the Chief Administrative Law Judge reconsider and reverse his order of December 6, 1983, severing issue and consolidating proceedings in the above-captioned dockets [25 FERC ¶ 63,062]. On December 15, 1983, El Paso Natural Gas Company filed a motion for reconsideration of the above described order of the Chief Judge requesting that the order be modified to permit the minimum bill/minimum take and rate design issues, which have already been heard and briefed in Docket No. RP81-130-000, *et al.*, to be decided without delay or, in the alternative, that the Chief Judge's order be modified to permit the issue in the *Transwestern* case which is unique to that pipeline—whether Transwestern Pipeline Company, through the operation of its minimum bill/minimum take provisions, should be permitted to require Southern California Gas Company, through its affiliate Pacific Lighting Gas Supply Company to purchase and receive from Transwestern quantities of gas which Transwestern itself is purchasing on a "best-efforts" basis from intrastate and interstate sources—to proceed to an early decision. On December 16, 1983, the Gas Service Company filed a motion for reconsideration of the portion of the Chief Judge's order which severs the minimum bill issue and related rate design matters from Docket No. RP81-130-000, *et al.*, and consolidates those issues with the proceeding in Docket No. RP83-113-000, *et al.* Answers were filed on December 23, 1983, by Transwestern Pipeline Company opposing Pacific Gas Transmission Company's and Pacific Gas and Electric Company's motion, and on December 30, 1983, by Arizona Public Service Company, Gas Company of New Mexico, Southern Union Gas Company and Southwest Gas Corporation opposing Pacific Gas Transmission Company's and Pacific Gas and Electric Company's motions, but supporting El Paso Natural Gas

ALJ Decisions and Reports

[¶ 63,001]

Pacific Gas and Electric Company, Project Nos. 2735-001, 1988-003, and 233-006

Initial Decision on License Conditions

(Issued July 1, 1983)

Thomas L. Howe, Presiding Administrative Law Judge.

Appearances

Morris M. Doyle, Terry J. Houlihan, Charles A. Ferguson, Gregory P. Landis, Robert Ohlbach, Howard V. Golub, J. Michael Reidenbach, Glen West, Jr., Malcomb H. Furbush, William B. Kuder, Sanford M. Skaggs and *Daniel E. Gibson* for Pacific Gas and Electric Company

George Spiegel, Robert C. McDiarmid, Daniel I. Davidson, Thomas C. Trauger, John Michael Adragna, Robert A. Jablon, James C. Pollock and *Samuel Karp* for Northern California Power Agency (filing on behalf of itself and its members, the Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara and Ukiah, California, and the Plumas-Sierra Rural Electric Cooperative) and the Cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara and Ukiah, California; *James N. Horwood* for the Cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara and Ukiah, California; *Martin McDonough* for Northern California Power Agency; *Fredrick D. Palmer* and *James D. Pembroke* for the City of Santa Clara, California

Sandra J. Strebel, Peter K. Matt, Bonnie S. Blair, Cynthia S. Bogorad and *Stephen C. Nichols* for the Cities of Anaheim, Riverside, Colton and Azusa, California

Richard V. Mattingly, Jr., Daniel Behuniak, Glen Ortman, Gloria Sodaro, Rhodell G. Fields, G. Kimball Williams, James V. McGettrick, Barbara K. Kagan, Jane C. Murphy, Charles F. Reusch, Daniel Lamke, Melvin G. Berger, Joseph Karger, John J. Bartus, Harvey L. Reiter, Patrick Mahoney, Jonathan Paff, Donald Garber, Joseph Vasapoli and *A. Hays Butler* for the Staff of the Federal Energy Regulatory Commission

Summary

The Helms and Pit projects have been licensed to PG&E. NCPA has not made an affirmative case why a beneficial interest should be allotted to it and why that should go to NCPA rather than to someone else.

PG&E has a monopoly of transmission in certain sub-areas, and power from the projects can be transmitted only over PG&E's lines. The Stanislaus Commitments provide for transmission for others by PG&E, with certain exceptions. Each license shall be conditioned to provide, so far as it would apply to the licensed project, (1) elimination of the Commitments provision that transmission need not be provided for power from a project involuntarily alienated from PG&E; (2) elimination of the "area option" giving in effect first refusal on power sought to be sold outside PG&E's area; (3) transmission for non-Neighboring Entities as well as Neighboring Utilities, and (4) in the event of transfer of the project license, interconnection with PG&E's transmission system shall continue, and PG&E shall provide such transmission of project power as the Commission shall determine in transferring the project license. Provisions as to reserves and number of points of connection are not now determined, but shall be determined by the Commission in connection with the determination of transmission on transfer of the project license.

There is no conflict between the conditions imposed by this initial decision and the Nuclear Regulatory Commission's condition.

Certain additional remedies may be ordered in Docket No. E-7777-000, heard together with this proceeding. They are not appropriate conditions of the licenses.

Procedural Background

An application for a license for the Helms Creek Pumped Storage Project (Project Nos. 2735, 1988) (Helms) [1] was filed by Pacific Gas and Electric Company (PG&E) on September 24, 1973. Northern California Power Agency (NCPA) [2] petitioned to intervene in the Helms proceeding on January 28, 1974. NCPA's petition centered around the allegations that PG&E has engaged in various acts or activities which, together with PG&E's control over generation and transmission in its service area, amount to a violation of antitrust law. Specifically, NCPA alleged four areas of violation: (1) that PG&E's refusal to wheel power to or from sources of bulk power other than PG&E has prevented member cities from obtaining lower cost power and has discouraged the entry of potential competitors into the electric power market; (2) that PG&E's contract with the Bureau of Reclamation unduly confines the geographic area within which PG&E is required to wheel Central Valley Project (CVP) power to preference customers; unduly limits the amount of CVP power marketable as firm to 1050 MW, thus intensifying NCPA cities' dependence upon PG&E; and unduly limits the sources of electric power to be wheeled by PG&E for the Bureau and also prohibits interconnection by the Bureau with PG&E systems unless agreed to by PG&E, both of which preclude the Bureau, NCPA and others from competing with PG&E in the Northern California power market; (3) that PG&E's execution of contracts, including the Seven Party Agreement, which provides for the sale of surplus power at a uniform price among various California/Pacific Northwest utilities; the PG&E contracts with State hydroelectric facilities for surplus power; and the PG&E contracts with the Sacramento Municipal Utility District (SMUD) providing for PG&E's right to purchase all power generated by SMUD in excess of its load, discourage planning and development of independent power sources by NCPA and others; and (4) that PG&E has discouraged NCPA attempts to develop or obtain alternative power supplies for its members by rejecting NCPA's request to participate in the California Power Pool (CPP), and by discouraging attempts to develop independent sources of supply, such as the steam reserves in the Geysers, California field. NCPA concluded that PG&E had violated antitrust law, and that the Commission has the obligation to scrutinize Project No. 2735 to determine its consistency with antitrust policy. NCPA requested that PG&E be denied the application, or alternatively, that the license be issued only upon condition that PG&E's restraints on trade be eliminated, *e.g.*, that PG&E provide wheeling and back-up, and that NCPA be allowed to join regional planning to share in the development of new power sources.

PG&E responded, arguing that NCPA had not established a reasonable nexus between its asserted antitrust allegations and Helms project, and thus that the issues raised by NCPA are not relevant to the license proceeding. PG&E requested that NCPA's petition be denied in its entirety.

The Commission granted NCPA's petition to intervene and set the matter for hearing, 55 FPC 1543, 1557, *reh. den.* at 2598 (1976). On May 18, 1976, the Commission granted the license for the Helm's project, reserving, in Article 62 of the license, the authority to impose such further conditions as may be appropriate as a result of the hearing. The Commission stated:

> In wording Article 62 as we do, we imply nothing about the possible scope of such conditions; the issues of whether further conditions are appropriate, what they shall require, and the Commission's authority to impose specific conditions must await hearing. Our finding with respect to Article 62 is merely that the license for Project No. 2735 meets the Section 10(a) standard only upon the condition, *inter alia*, that we reserve authority to impose such further requirements as may be found appropriate at and after hearing.

55 FPC 2237, 2260 *(Helms Hearing Order)*.

PG&E also filed an application for the continued operation of the Pit 3-4-5 Project No. 233, located on the Pit River in Shasta County, California. Santa Clara and NCPA petitioned to intervene, with allegations essentially similar to those in Project No. 2735. The Commission granted the license noting that NCPA presented no compelling reason why its allegations could not be investigated in the same manner as in Project No. 2735, and consolidated the issues with the ongoing proceeding in Helms. 14 FERC ¶ 61,179 *(Pit Hearing Order*, February 26, 1981). *Inter alia*, Article 62 of the Helms license, and Article 41 of the Pit license state:

> The Commission reserves the right, after notice and opportunity for hearing, to prescribe such further conditions pursuant to the Federal Power Act as may be found appropriate to remedy Licensee's

anticompetitive or monopolistic practices, if any.

Helms Hearing Order at 2270; *Pit Hearing Order* at 61,332.

Hearing

Since the license proceedings involved a general investigation of all PG&E's alleged anticompetitive actions, any investigation into particular anticompetitive actions of PG&E with respect to the contracts that are the subject of investigation in Docket No. E-7777-000 were also properly the subject of the license investigations. When it became apparent that the background information and many issues in these license proceedings and Docket No. E-7777-000 would overlap, Chief Judge Wagner assigned both proceedings to me. This allowed joint hearings to be held before a single judge and enabled a single record to be made on the common issues. A joint hearing transcript comprised over 45,000 pages, with both volumes and pages numbered with the prefix "CH" for "Consolidated-Helms". Additionally, matters relevant to the license proceedings alone were dealt with in a separate transcript. The exhibits in the joint hearings by agreement and request of the participants were numbered as follows:

Staff, beginning with 1,000, NCPA 2,000, Southern Cities 3,000, PG&E 4,000, San Diego 5,000, Edison 6,000, NCPA-Southern Cities jointly 7,000.

The exhibits introduced in the license proceedings only were designated with the prefix "H" for "Helms", Staff exhibits began with H-8,000, PG&E H-9,000 and Intervenors H-10,000. By reason of the consolidation of Docket No. E-7796-007 and Docket No. E-7777-000, the transcript of the limited hearing became available as part of the record in the latter docket as well, and the exhibits in the limited hearing (designated with the prefix "L" for "limited") are also part of the record in Docket No. E-7777-000, and are available here.

The record in these proceedings is over 53,000 pages, over 3,000 exhibits, and over 250 items by reference, many of which are lengthy. The hearing took over two and a half years. Even this was a condensation. According to one staff memorandum, more than one million pages of documents were produced in discovery. In an effort to hold the hearing within bounds, cross-examination after the first year of hearing was limited and a great deal of the proferred evidence was limited.

The rule set forth by the Commission is that evidence may be excluded where it is not of a kind which would affect fairminded persons in the conduct of their daily affairs. This is not the rule, however, which has been applied customarily in proceedings before this Commission. Administrative Law Judges (including this one) have inclined to the view expressed by some courts of appeal, that admission of evidence should be liberally allowed. In general the practice has been to let the evidence in and then disregard it. A judge will not be reversed for admitting evidence. Courts have pointed out that admitted evidence may be disregarded, whereas the exclusion of evidence may result in a remand and additional hearing. In the majority of hearings where questionable evidence is allowed to come in, it is evidence that would add comparatively little time to hearing and deciding the case. In these proceedings, however, there was a considerable volume of evidence that would be subject to exclusion under the test set forth in the Commission regulations. If this evidence were to be admitted, essential fairness would necessitate reasonable cross-examination and rebuttal of it. While a judge might be tempted to admit such evidence and then disregard it after hearing, Counsel could not be sure which evidence would be disregarded. Counsel in an important case could hardly permit such admitted evidence to stand without probing cross-examination and attack by any available rebuttal which in turn would be subject to cross-examination and surrebuttal. As nearly as I could estimate, the excluded testimony would have resulted in adding at least six months to the hearing which, even without such testimony, became one of the longest in the history of administrative law.

The Licenses

The Commission has ruled that no matter what develops in the present proceedings, the licenses are issued to PG&E. PG&E was the only applicant, and the Commission has established that, even if the most extreme anti-competitive actions should be proven, PG&E should still receive the licenses.

It is not enough for NCPA to show that PG&E was guilty of anticompetitive conduct. It would also have been necessary for NCPA to show in each case that the license should be issued to it. The Federal Power Act and the Commission have provided what applications should contain to enable an applicant to receive a license. NCPA has not made the showings which would be required for licenses to be issued to it. This is not merely a procedural defect. The substantive showing required of an applicant before a license can issue to it is absent. It is not enough to allege that PG&E is unworthy to receive a license or that these particular licenses should be denied because of PG&E's actions. It must also be

shown that a particular applicant should be granted the licenses. Here, there is no such showing and no competing applicant.

NCPA has argued that it was prevented from filing competing license applications by having no transmission provided. The Commission rejected this argument on the ground that NCPA was not prevented from filing applications, as shown by NCPA's applying in other license proceedings. I am bound by this determination.

Beneficial Interest

In lieu of a legal license, NCPA and Staff argue that a beneficial interest should be granted to NCPA. This amounts to a bookkeeping transaction merely, since PG&E would own the license and operate the project. In effect, PG&E would be required to provide NCPA with a certain amount of hydroelectric power at the cost of the power, rather than at the rates applicable to PG&E sales to NCPA members, which rates reflect the rolled-in costs of all PG&E's hydroelectric power as well as all other sources of PG&E's power. NCPA would then sell the power or allocate it to its members as it saw fit. In the case of Helms, which is a pumped-storage project, in theory there might be some added benefit in having the project capacity used to provide service at peak hours. In practice, the cost of the Helms project has risen so high that any savings are questionable, and the proportionate share NCPA would receive in the Helms project would be too small to matter much if any attempt were made to use it in coordination with operations in California as a whole, as has been suggested. The power from the Pit projects is cheaper, and would reduce the overall electric bill of any entity allocated all or part of it. There is no pumped storage on the Pit project.

The only evidence as to the size of the claimed allocation to NCPA was that it should have five percent of PG&E's total hydro generation in the area. (To accord with the percentage of area load claimed by NCPA, the percentage would be much smaller.) The goal of five percent of total hydro generation for NCPA, if indeed it is to be a goal, could be realized by awards of other projects (or generation from them) on a case by case basis as the licensing of other projects comes before the Commission.

It is at least questionable whether an allocation, if made, should be made to NCPA rather than to some or all of its constituent members. NCPA has no service area and could not itself use the power. It has no distribution organization comparable to those of its individual members, who do serve specified areas. Some of its members now have the benefit of more hydro power than do others, as some are served by low-cost Bureau of Reclamation Power and others are not. Whether this should result in differing shares of hydro electric power to the various members has not been addressed by the participants. If it should, allocation to particular members rather than to NCPA should probably result.

I find no reason why a beneficial share in the license should go to NCPA rather than to one or several others - SMUD, California Department of Water Resources (DWR), Anza, San Francisco, Los Angeles, Glendale, Burbank, Pasadena, San Diego, Edison, one or several or all of the Southern Cities, one or several or all of the individual members of NCPA, or other entities not here considered, perhaps even outside California. NCPA may argue that it is the only one in these proceedings expressing interest but it has not expressed interest in the form required by the FERC - filing an application and making the requisite showing. The Commission has held that it was not prevented from doing so merely by PG&E's provision in the Stanislaus Commitments that no wheeling is required from projects involuntarily transferred from PG&E, as evidenced by NCPA's applying in other proceedings. There was no evidence here of anything else by which PG&E improperly prevented filings by NCPA or anyone else. It is conceivable that some other entity was intimidated from filing by the non-wheeling clause; the Commission reasoning with respect to NCPA not being intimidated would not apply to entities which did not file in other proceedings. Under NCPA's reasoning that an intimidated party should be given a license or allocation, such an entity would have a better claim to an allotment than would NCPA.

In brief, NCPA has sought to support only one side of its necessary case. It has tried to show why the licenses should not be granted to PG&E, but it has not produced the affirmative evidence to show why licenses should be granted NCPA. The requirements of the Federal Power Act and the Commission of a specific affirmative showing by an applicant before a license issues to it should not be bypassed by awarding a beneficial interest rather than a legal license. Even if it had been shown that PG&E had prevented someone from filing a license application, I would reopen the proceeding to permit such a filing, rather than bypass the requirement that an affirmative showing be made by an applicant before a license is granted.

Investigation Looking to Conditions

In the Helms Hearing Order, 55 FPC 1543 (1976) the Commission said that NCPA's central assertion was "that PG&E's control over generation and transmission in its service area amounts to a violation of the Sherman Act ... " 55 FPC at 1554. The Commission continued:

> We have concluded on the basis of the pleadings that NCPA's allegations are relevant to the instant license proceeding ... hearing on the claims set forth by NCPA shall be for the purpose of determining the broad issues of whether PG&E maintains such control over generation and transmission of electric power in northern and central California as to create a situation or situations inconsistent with the antitrust laws or the policies clearly underlying these laws. If the record in this proceeding shows that such a situation or situations do exist, then the question will be what relief can appropriately be granted in the form of conditions to the Project No. 2735 license.

55 FPC at 1555.

The market shares of net capability of all forms of power in the PG&E area are set forth in the following table: [3]

Owner	Type of Power	Net Capability -MW Summer	Net Capability -MW Winter	Company Percent Share Summer	Company Percent Share Winter
PG&E	Hydro	2436	2421	68	68.9
	Cogeneration	150	150		
	Geothermal	908	908		
	Steam	7242	7249		
	Gas Turbine	354	405		
	Total	11090	11125		
SMUD	Hydro	653	649	9.4	9.7
	Nuclear	875	903		
Turlock Irrigation District	Hydro	148	148	.91	.92
Hetch-Hetchy (San Francisco)	Hydro	313	302	1.9	1.9
CVP	Hydro	1260	1237	7.7	7.7
Yuba County Water Agency	Hydro	324	322	2.0	2.0
DWR	Hydro	434	424	6.4	5.4
	Pumped Storage	606	450		
Placer County Water Agency	Hydro	242	239	1.5	1.5
Oroville-Wyandotte Irrigation District	Hydro	85	85	.52	.53
Oakdale-San Joaquin Irrigation District	Hydro	94	83	.58	.52
Nevada Irrigation District	Hydro	68	68	.42	.42
Merced Irrigation District	Hydro	95	88	.58	.54
East Bay M.U.D.	Hydro	19	19	.12	.12
	Total	16306	16150	99.83	100.15

The market shares of net capability of hydroelectric and pumped storage projects in the PG&E area may be considered even more important in a licensing proceeding. These are set forth in the following table: [4]

Owner	Net Capability -MW Summer	Net Capability -MW Winter	Percent Share of Total Summer	Percent Share of Total Winter
PG&E	2436	2421	36	37
SMUD	653	649	9.6	9.9
Turlock Irrigation District	148	148	2.2	2.3
Hetch-Hetchy (San Francisco)	313	302	4.9	4.6
CVP	1260	1237	18.5	18.9
Yuba County Water Agency	324	322	4.8	4.9
DWR	1040	874	15.3	13.4
Placer County Water Agency	242	239	3.6	3.7
Oroville-Wyandotte Irrigation District	85	85	1.2	1.3
Oakdale-San Joaquin Irrigation District	94	83	1.4	1.3
Nevada Irrigation District	68	68	1.0	1.0
Merced Irrigation District	95	88	1.4	1.3
East Bay M.U.D.	19	19	.3	.3
	6797	6535	100.2%	99.9

The foregoing statistics do not include PG&E's purchase of power generated by others within the area, which could be argued to increase the percentage of generation controlled by PG&E. Contrariwise, no account is taken of power sold by PG&E pursuant to contracts, which could be argued to decrease PG&E's control over the power generated. The statistics on generation take no account of power imported from outside the PG&E area, which is part of the total power supply to the area. Substantial imports have been made by SMUD, DWR and CVP as well as PG&E. PG&E receives substantial amounts of power from both the Northwest and from the south, and also dispatches power in both directions at other times and under other conditions. No meaningful compilation is available.

I find that neither these statistics nor the other evidence presented as to PG&E's control of generation establish a monopoly of power generation either (1) from all generation sources or (2) from hydro-generation.

Transmission is an exclusive monopoly of PG&E in much of its area. The percentage of transmission in the entire area is not a proper measure. In a part of the area that has no other transmission, it makes little difference that CVP may have transmission in some other part. Duplication of transmission facilities is usually economically wasteful. Transmission is traditionally a monopoly in most instances, and regulation has been substituted for competition. This is one of the situations where regulatory agencies "can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance." *Northern Natural Gas Co. v. F.P.C.*, 399 F.2d 953, 961 (CADC, 1968). Many municipalities are completely dependent upon PG&E's transmission lines. It controls all access in its area to the Pacific Intertie, and thus all transmission to or from the Pacific Northwest except for specific entitlements allotted to SMUD, DWR and CVP. (Since the close of the record, PG&E has had one contract to provide NCPA with interruptible Intertie transmission, and is negotiating a further contract.) It has monopoly power over transmission to or from its area to or from the south. Power from the Helms and Pit projects can be transmitted only over PG&E's lines.

The Stanislaus Commitments

These PG&E Commitments will be considered at this point in connection with the conditions to be imposed on the Helms and Pit licenses.

> Essentially, the Commitments embody an agreement entered into on April 30, 1976 between PG&E and the U.S. Department of Justice (DOJ), and they are the culmination of a DOJ investigation into certain PG&E activities allegedly in violation of the antitrust laws. They have been included by the Nuclear Regulatory Commission as conditions of the license of PG&E's Diablo Canyon Nuclear Power Plant Unit No. 1. They generally describe conditions under which PG&E is bound to provide services such as interconnection, transmission, access to nuclear generation, capacity and energy exchange, and reserve coordination to other utilities requesting such service.

Commission order on Motion to Compel Filing of Certain Documents, June 2, 1980, 11 FERC ¶ 61,246, at page 61,484 (footnote omitted), aff'd *Pacific Gas and Electric v. F.E.R.C.*, CADC Nos. 79-1881 and 80-2129 (May 17, 1982).

This Commission was not a party to the agreement with DOJ or to the proceedings before the NRC. It is not bound by agreement or by equitable estoppel from considering and imposing any modifications it may require in the Commitments. The Commitments may be modified in any respect if this is an appropriate condition to one or more of the licenses issued in the Helms and Pit proceedings.

Involuntarily Alienated Projects

Two exceptions to the Commitments are provided. The first is a provision in Section VII, Paragraph A, that PG&E is not required to transmit power from a project involuntarily transferred from it.

This provision would have applied to transmission from the Pit project if a renewal license had been issued to someone other than PG&E, because the Pit project was previously licensed to PG&E and a renewal license to someone else would have resulted in an involuntary transfer of the project facilities from PG&E. The provision would not have applied to transmission from the Helms project, if the original license had been awarded to someone other than PG&E, because there would have been no transfer from PG&E in the grant of an original license to someone else. In the case of each license, however, the provision would apply in the future if that

license should be transferred to someone else at the expiration of the present license, or if the Commission should abrogate one or both of the present licenses.

NCPA contended that the presence of this exception prevented it from applying for licenses, but the Commission has rejected this argument as has been said. Although NCPA was not intimidated, there is no way of knowing whether other possible applicants may or may not have been intimidated. PG&E contends that it has not refused transmission from an involuntarily transferred project but has merely not undertaken to supply transmission from such a project. I am unable to accept PG&E's attempt to walk this narrow line between refusal and noncommitment. At best this provision leaves PG&E's competitors at a disadvantage; only PG&E is assured of transmission from a transferred project. Anyone else competing for such a project must be uncertain as to whether transmission will be available, and many responsible executives would be unwilling to commit the necessary investment and plan their generation resources with this additional uncertainty. The existence of this *in terrorem* provision raises the uncertainty to a higher level than if no Commitments for transmission had ever existed.

I find that the exception for transmission from an involuntarily transferred project is unjust and unreasonable, and that it is an improper use of PG&E's transmission monopoly that restrains competition for project licenses for hydro generation. The removal of this provision, in so far as it would apply to the Helms and Pit projects power in case of future alienation, is ordered as a condition of the licenses issued for the Helms and Pit projects.

Area Option

The second exception to the Stanislaus Commitments is the so-called "area option" or "exit veto." This provision in Section VII, Paragraph A, provides:

> Applicant shall not be required by this Section to transmit power . . .
>
> (2) from a Neighboring Entity for sale to any electric system located outside the exterior geographic boundaries of the several areas then electrically served at retail by Applicant if any other Neighboring Entity, Neighboring Distribution System, or Applicant wishes to purchase such power at an equivalent price for use within said areas.
>
> "Applicant" means PG&E (Section I, Paragraph A).

Intervenors call this an "exit veto." It is not, however, a right to forbid the exportation of energy from the area; it merely gives entities within the PG&E area a right of first refusal so that they may have the energy if they are willing to pay what the owner would receive from an outside purchaser. (The testimony established that it is what the owner would receive, not what the buyer would pay, that governs.)

There was considerable discussion as to how this would work, and whether a seller would have to go back and forth between an outside purchaser and the entities within the area to allow the latter to match changing offers. Mr. Kaprelian, a forthright and impressive witness for PG&E, made it clear that this problem exists only in the minds of lawyers. In practice, the dispatchers would know the prices each entity would pay and the needs of each entity, and match-ups would be made quickly at the dispatcher level without resort to negotiation or to management executives.

PG&E defends this provision on the ground that it is necessary to keep power generated within the area available for use in the area. If this is not done, power needed within the area may be taken away. PG&E is the supplier of last resort within its area and is undertaking the ultimate responsibility for providing necessary supplies of power if other suppliers fall short. It has not fulfilled its own plans for new generation for several years, and its reserves (and, accordingly, the area reserves) have fallen below what PG&E considers a safe margin; therefore, it wishes to be able to keep further generation within the area if it is needed there. Under the provision, the generating entity will not lose money by keeping its energy in the area.

While PG&E's motives are understandable and even praiseworthy, this particular exception to the wheeling commitments is a discriminatory restraint on interstate commerce insofar as it applies to power which might be sold outside California, and also discriminates against all potential purchasers outside the PG&E service area. I find that it is unjust and unreasonable, unduly discriminatory and anticompetitive. Insofar as it affects power from licensed projects, it places a restraint upon competition for power from such projects, as only power from PG&E projects could be sold outside the PG&E area without being subject to the first refusal accorded those in the area. This, in turn, constitutes a restraint on competition for the projects themselves. Anyone wishing to send project power outside the area would be discouraged from acquiring the project. The elimination of this exception is made a condition of the Helms and Pit licenses in so far as it may affect power from these licensed

projects in the event of their future transfer to others.

3. Neighboring Utilities

Section VII, Paragraph A of the Commitments provides:

> A. Applicant shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction and which are consistent with these license conditions. Except as listed below, such service shall be provided (1) between two or among more than two Neighboring Entities or sections of a Neighboring Entity's system which are geographically separated, with which, now or in the future, Applicant is interconnected, (2) between a Neighboring Entity with which, now or in the future, it is interconnected and one or more Neighboring Distribution Systems with which, now or in the future, it is connected and (3) between any Neighboring Entity or Neighboring Distribution System(s) and the Applicant's point of direct interconnection with any other electric system engaging in bulk power supply outside the area then electrically served at retail by Applicant.

This is all the transmission the Commitments provide; transmission is available only to or from "Neighboring Entities" or "Neighboring Distribution Systems." These are defined in Section I, Paragraphs C and D:

> C. "Neighboring Entity" means a financially responsible private or public entity or lawful association thereof owning, contractually controlling or operating, or in good faith proposing to own, to contractually control or to operate facilities for the generation, or transmission at 60 Kilovolts or above, of electric power which meets each of the following criteria: (1) its existing or proposed facilities are or will be technically feasible of direct interconnection with those of Applicant; (2) all or part of its existing or proposed facilities are or will be located within the Service Area; (3) its primary purpose for owning, contractually controlling, or operating generation facilities is to sell in the Service Area the power generated; and (4) it is, or upon commencement of operations will be, a public utility regulated under applicable state law or the Federal Power Act, or exempted from regulation by virtue of the fact that it is a federal, state, municipal or other public entity.
>
> D. "Neighboring Distribution System" means a financially responsible private or public entity which engages, or in good faith proposes to engage, in the distribution of electric power at retail and which meets each of the criteria numbered (1), (2), and (4) in subparagraph C above.

"Service Area" means areas PG&E serves at retail, and adjacent areas in Northern and Central California (Section I, Paragraph B). PG&E has agreed to treat DWR, CVP and SMUD as Neighboring Entities (Exh. 235-4, CH-37513). For purposes of this discussion, "Neighboring Utility" will be used to include both Neighboring Entities and Neighboring Distribution Systems. "Non-Neighboring Entities" will refer to those which are neither.

This provision would not allow an entity from outside PG&E's area, which obtained a licensed project within that area, to have project power transmitted over PG&E's lines to a point of connection with other systems operating outside PG&E's area. I find the Commitments in this respect are unduly discriminatory against such entities as Edison, Los Angeles, San Diego, the four major Northwest utilities and Southern Cities, who might wish to obtain licenses and use the power in their own areas. The Commitments do not provide for non-Neighboring Entities' project power to be transmitted to other non-Neighboring Entities whether within or without the PG&E area. I find they are unduly discriminatory, unjust and unreasonable in this respect. So far as they may apply to the Helms and Pit project power in the event of future alienation, the Commitments must be revised to provide (1) that entities from outside the PG&E area may use PG&E's available transmission service for their own generation so that they may compete for project licenses, (2) for transmission of power generated from projects within the area to entities outside the area even though the generating entity may not meet the definition of Neighboring Entity and so would not be entitled under the Commitments as originally framed to transmit the generated power over PG&E's transmission network to reach a purchaser outside the area, and (3) to allow project power generated by non-Neighboring Entities to be transmitted to purchasers within the area whether or not the purchasers are Neighboring Utilities. This revision is made a condition of the project licenses.

4. *Implementation Provisions*

Under the Commitments, PG&E is required to transmit power "pursuant to interconnection agreements, with provisions which are appropriate to the requested transactions and which are consistent with these license conditions." No transmission would occur until agreements for

interconnection have been entered into. It is apparent that someone not interconnected with PG&E could not receive the wheeling services. Even as to interconnected entities, PG&E has maintained that agreements for transmission service should be negotiated before that service begins.

It has been alleged that PG&E has stalled on putting transmission arrangements into effect by stretching out negotiations for a contract. I do not find that this has occurred, but the Commitments as written would allow this sort of abuse to occur. I find that the absence of a provision to get service started within a reasonable time is unjust and unreasonable and contrary to the public interest.

So far as the Helms and Pit projects are concerned, if one is transferred from PG&E in the future, the flow of power from that project should not be interrupted, and provision for this should be made in the Commitments. If PG&E wishes to allege that the particular service should not or cannot be provided, it can make this contention in connection with the proceeding to determine whether the project should be transferred. The competing applications, or other relevant pleadings, will then be available, and the proposed recipient of transmission service will be known. The Commission will be able to take into account the necessary transmission in connection with its determination as to the license, and may make suitable determination as to transmission provisions. All that is necessary here is that the licenses be conditioned to require that if a license is transferred, PG&E shall continue the interconnection of the project with its general transmission grid and shall immediately provide such transmission for project power as the Commission shall order in issuing the new license, at such rates as PG&E shall file within thirty days of the Commission order becoming final and no longer subject to review, and that these rates shall be subject to regulatory review and to refund. The Commission at that time may modify or add to the terms and conditions of service, including such matters as reserve requirements and number of interconnection points. The details of the proposed service will then be known and can be dealt with more easily than we could now frame specific requirements. These conditions shall be incorporated in the Stanislaus Commitments and the amended Commitments filed with this Commission. The Commitments shall be subject to any further amendment by the Commission ordered in subsequent proceedings, as is the case with any filed Rate Schedule or policy statement.

6. Reserve Requirements and Number of Connection Points

The Intervenors have argued that other provisions of the Stanislaus Commitments are improper, specifically the provisions as to reserves and the provision that interconnection shall be at one point unless otherwise agreed (Commitments, page 3, Paragraph B.)

Insofar as such questions might relate to transmission from licensed project, they are within the scope of the license proceedings. I find, however, they are more appropriately addressed in the proceedings which may be had in connection with later licensing the projects to others, should that ever occur, as has been stated earlier.

The NRC Condition

There may be concern as to this Commission imposing obligations upon PG&E in connection with Commitments which have been made a condition of a license subject to the jurisdiction of the Nuclear Regulatory Commission. The changes required in the Stanislaus Commitments do not involve any conflict with the NRC. These changes are not contrary in any respect to what is required by the NRC's condition; they require transmission in addition to that which would be required by the NRC condition, but leave what the NRC does require still in full force. We are not faced with a situation where the NRC required action which this Commission forbade, or the NRC forbade action which this Commission required. The orders of the two Commissions need no reconciliation, and both may be given full force and effect. There is no need to consider whether our order should be modified to prevent a conflict with the NRC's determination, or to relieve PG&E from having to decide which agency to obey.

It has been determined by the Commission that NCPA was not deterred from applying for a license by the provision that the Stanislaus Commitments would not require transmission of power from an involuntarily alienated project. It has not been shown that anyone else was deterred. No other allegations of past restraint have been made with respect to any of these projects. There has been no showing that any other restraint of competition with respect to either of these licenses has occurred. I find that the potential use of PG&E's monopoly of transmission to restrain competition with respect to these projects will be effectively prevented by the conditions here imposed.

Other allegations of anti-competitive conduct here made are considered in

connection with Docket No. E-7777-000, heard jointly with the license proceedings. I have concluded that the additional remedies which may be imposed by order in Docket No. E-7777-000 are not appropriate conditions of the licenses here. Alleged anti-competitive actions or arrangements that do not affect a project, its licensing or its operation are not appropriately remedied by conditions upon that license, unless the license itself contributes to the anti-competitive actions or arrangements in a manner that may be remedied by conditions relating to the license, the project, or to its operation. The only allegation as to how these licenses contribute to an anti-competitive arrangement is that the projects increase PG&E's monopoly of generation. The remedy sought was to deny PG&E the license, or to award to NCPA a beneficial interest in the licensed project, to avoid increasing the amount of power controlled by PG&E. While I do not find a monopoly of generation is shown by the evidence, even if it were, the remedies sought must be rejected for the reasons previously given.

I conclude that no other conditions than those already specified are appropriate to be imposed on the licenses in these proceedings.

Ordered:

(A) The Helms and Pit licenses are each conditioned as provided herein.

(B) The changes in the Stanislaus Commitments required by the conditions provided herein shall be incorporated in the Commitments and the amended Commitments filed with this Commission within thirty days from the time this order becomes final.

(C) These dockets are terminated.

— Footnotes —

1 Project No. 2735 (Helms) will utilize the Courtright and Wishon reservoirs of the existing North Fork Kings River Project No. 1988 as the upper and lower reservoirs of the proposed Helms pumped storage project. Applicant for Helms therefore also seeks to amend its license for Project No. 1988 to reflect the construction of the Helms project. 55 FPC 2237 (May 18, 1976)

2 "NCPA is a public agency of the State of California created by a joint powers agreement pursuant to Chapter 5, Division 7, Title 1 of the California Government Code. Each member of NCPA owns and operates an electric distribution system for the supply of electric power and energy within its boundaries. Five of the member cities—Alameda, Healdsburg, Lodi, Lompoc and Ukiah—have been served for many years exclusively by Pacific Gas and Electric Company ("PG&E"). Five member cities—Biggs, Gridley, Palo Alto, Redding and Roseville—together with NCPA associate member Plumas-Sierra Rural Electric Cooperative purchase their entire supply from the U.S. Bureau of Reclamation Central Valley Project ("URBR", "CVP"), marketed by the Western Area Power Administration ("WAPA"). One member city, Santa Clara, purchases from both PG&E and WAPA." NCPA's initial brief, p. 2.

3 From Western Systems Coordinating Council's "Existing Generation and Significant Additions and Changes to System Facilities 1891-1991" issued April 1982.

4 From Western Systems Coordinating Council's "Existing Generation and Significant Additions and Changes to System Facilities 1891-1991" issued April 1982.

[¶ 63,002]

Kansas-Nebraska Natural Gas Company, Inc., Docket No. TC82-43-000

Order Partially Granting Motion to Compel Documents Claimed as Privileged

(Issued July 1, 1983)

Bruce L. Birchman, Special Administrative Law Judge.

Pursuant to the procedures set forth in my orders of May 24, 1983, 23 FERC ¶ 63,080, and June 6, 1983, Kansas-Nebraska ("KN") filed a supplemental index which lists more specifically the 40 documents in controversy, an affadavit of Buddy J. Becker, Esq., in-house counsel for KN which provides information with regard to those documents, and a legal memorandum. The legal memorandum does not express disagreement with the legal analysis set forth in my order in another case reported at 17 FERC ¶ 63,048 which, I stated, would govern disposition of those claims of privilege absent good and sufficient reason to the contrary.

Great Western also filed a legal memorandum for my consideration. It makes two points: (1) that per *Hickman v. Taylor*, 329 U.S. 495 (1947), the attorney-client privilege does not extend to communications from an attorney to someone other than the client—in this instance, to communications with KN's expert witnesses such as Chaney, Ransom, and others who were retained by KN in prior judicial or FPC/FERC adjudicatory

CASE TITLE: PG&E v. City of Healdsburg, et al.

COURT/CASE NO: Sonoma County Superior Court, No. 127234

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814; I am over the age of eighteen years and not a party to the foregoing action.

On June 18, 1984, I served the document(s) named below on the parties in said action by placing a true copy thereof in a sealed envelope, addressed as indicated below, with delivery charges thereon fully prepaid, then delivering said envelope to a representative of Federal Express in Sacramento, California.

Document(s) Served

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Parties Served

ROBERT OHLBACH, ESQ.
HOWARD V. GOLUB, ESQ.
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
P. O. Box 7442
San Francisco, CA 94120

Federal Express
Airbill No. 774-907-490

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 18, 1984, at Sacramento, California.

Barbara Gordon

Barbara Gordon

McDONOUGH, HOLLAND & ALLEN
PROFESSIONAL CORPORATION

ROBERT OHLBACH
SHIRLEY A. SANDERSON
STUART K. GARDINER
RANDALL J. LITTENEKER
P.O. Box 7442
San Francisco, CA 94120
Telephone: (415) 972-6669

Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, vs. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. 127234 PACIFIC GAS AND ELECTRIC COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CITY'S DEMURRER Date: September 13, 1984 Time: 10:30 a.m. Dept: 6

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES (continued)

Page(s)

Cases (continued)

TABLE OF AUTHORITIES (continued)

Page(s)

Cases (continued)

TABLE OF AUTHORITIES (continued)

Page(s)

Cases (continued)

TABLE OF AUTHORITIES (continued)

Page(s)

Cases (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

I

INTRODUCTION

Plaintiff Pacific Gas and Electric Company (PGandE) brought this action against defendant City of Healdsburg (City) in Sonoma County Superior Court seeking damages for City's breach of its agreement to buy from PGandE all of the electric power needed for its own use and for resale. The City refused to pay PGandE nearly $400,000 for electricity supplied to it between May 1982 and September 1982, contending that it had purchased the power from another supplier, despite its agreement with PGandE.

City removed the case on the basis that the federal court had exclusive jurisdiction. The Court held that the complaint presented no federal question and remanded it to Superior Court. (The Order is attached hereto as Exhibit 1.)

City has filed a general demurrer seeking dismissal, contending that although the complaint is valid on its face, with the aid of judicial notice it can prove that in fact it purchased the power from someone other than PGandE. In the alternative City requests the Court to refer this case to the Federal Energy Regulatory Commission

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(FERC), 1/ on the theory that this breach of contract case is beyond the competence of the Court to determine.

City's procedural maneuvers should be seen for what they are -- an attempt to avoid the lawful consequences of City's breach of contract by avoiding the jurisdiction of the California Superior Court, the only court with jurisdiction capable of granting the relief sought by PGandE.

This Memorandum of Points and Authorities will discuss, in order, why City's demurrer must be overruled, why no issue in this case should be referred to FERC, and why City's documents are not subject to judicial notice, are irrelevant, and are hearsay.

II

CITY'S DEMURRER SHOULD BE OVERRULED.

A. City Improperly Attempts To Contradict Facts Stated In The Complaint.

Half of City's Memorandum of Points and Authorities in support of its Demurrer (Demurrer) asserts a "factual background." (Demurrer, pp. 3-11.) In the Argument portion of its Memorandum, City also presents assertions intended to be treated as facts which it claims contradicts PGandE's complaint. However, the alleged facts

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1/ FERC is the successor to the Federal Power Commission (FPC).

are irrelevant because a demurrer lies only for defects appearing on the face of a complaint or matters subject to judicial notice. Cal. Civ. Proc. Code § 430.30; Ramsden v. Western Union, 71 Cal. App. 3d 873, 879 (1977). Allegations of a complaint are assumed to be true for the purpose of a demurrer, and thus a demurrer is not the appropriate procedure for determining the truth of disputed facts. Id. For these reasons, City may not properly argue alleged facts on demurrer. Cravens v. Coghlan, 154 Cal. App. 2d 215, 217 (1957). As shown below, even City's alleged "facts," do not support its demurrer.

Only City's assertions properly based on judicial notice may be considered in ruling on the demurrer. As noted below, the documents judicially noticeable for the purpose of this demurrer are far more limited in number and purpose than City claims. (See Section IV, p. 43.) Moreover, while the court may take judicial notice of the existence of certain relevant public records, it may not take notice of the truth of factual matters stated in such records. (Section IV C, p. 48.) Ramsden at 879; People v. Long, 7 Cal. App. 3d 586, 591 (1970); Love v. Wolf, 226 Cal. App. 2d 378, 403 (1964).

B. PGandE's Complaint States Facts Constituting A Cause Of Action For Breach Of Contract.

City's general demurrer attempts to contradict the facts stated in PGandE's complaint. City argues that it

purchased its power from someone other than PGandE. It bases this argument (a) on an implausible interpretation of the contract between City and PGandE, and (b) on certain commitments agreed to by PGandE unrelated to this contract.

City's contract argument is most remarkable. In City's view, because the contract provides for "good faith" negotiations, City may amend it at will without even consulting PGandE, enabling City to escape the consequences of its breach by unilaterally altering the terms and conditions. This "fail safe" view of the law, which would render the contract at issue wholly illusory, finds no support in the contract or in the one case City cites in support.

City's other argument is that the Stanislaus Commitments 2/ compel PGandE to substitute electric power from other sources for the power PGandE is otherwise required to supply to City, and to transmit such other power to City, without PGandE's agreement and at City's whim. However, as will be shown below, the Stanislaus Commitments are irrelevant to this case. 3/

2/ Throughout most of its Demurrer, City refers to the Stanislaus Commitments as the Diablo Canyon license conditions. (But see Demurrer at 5, n. 3.)

3/ Although City's assertions regarding the Stanislaus Commitments are largely incorrect, we will not correct them here because such factual assertions are inappropriate and unnecessary on demurrer.

1. PGandE Has Pleaded All Required Elements Of A Cause Of Action For Breach Of Contract.

The complaint in this action contains simple, standard breach of contract language similar to that regularly filed with this court. Indeed, by spending a few seconds with the complaint, the court will be able to determine that the complaint is adequate on its face. To prevail against a general demurrer, plaintiff need only demonstrate that its complaint contains facts entitling it to some judicial relief. M.G. Chamberlain & Co. v. Simpson, 173 Cal. App. 2d 263, 267 (1959). In a breach of contract action, there are four factual elements which must be pleaded: the making of a contract and its terms, plaintiff's performance, defendant's breach, and consequential damage to the plaintiff from this breach. Id. at 274; 3 B. Witkin, California Procedure, Pleading, § 390 (2d ed. 1971); accord, Reichert v. General Ins. Co., 68 Cal.2d 822, 830 (1968); Smith v. Royal Mfg. Co., 185 Cal. App. 2d 315, 325 (1960). PGandE's complaint contains all four of these elements: the making of a contract and its terms (Complaint, Paragraphs 8 and 9); plaintiff's performance (Complaint, Paragraphs 10, 11 and 13); defendant's breach (Complaint, Paragraph 12); and consequential damage to plaintiff (Complaint, Paragraph 14). PGandE has therefore pleaded a complete and sufficient cause of action for breach of contract by City.

However, City's principal arguments on demurrer are factual. It argues that the power in question came not from PGandE, but from the Western Area Power Administration (WAPA). As shown below, however, where City bought its power is irrelevant. City was obligated to pay PGandE for its full requirements of power pursuant to the contract. City's two attempted defenses, its absurd interpretation of the contract and its misapplication of the Stanislaus Commitments, do not defeat the complaint.

2. The Contract Presents No Bar To This Action.

The complaint is clear that City was required to purchase all the power it required from PGandE. The contract provides that:

> PGandE shall sell and deliver to Healdsburg, and Healdsburg shall purchase and receive from PGandE all Power required by Healdsburg except for such Northwest Energy as may from time to time be delivered by PGandE to Healdsburg under the provisions of the NCPA-PGandE Temporary Transmission Contract. Contract, Article 1.(a) (emphasis added).

City argues that in fact it purchased the power from WAPA and that it was able to do so because, in its view the quoted contract language does not mean what it says. City notes that Articles 1.(b) and 1.(c) allow City to seek power from other sources and that PGandE has an obligation to negotiate in good faith to accommodate such other sources of supply. (Demurrer, pp. 11-12.) City takes this to mean

that it had the right to unilaterally amend the contract at will to buy other power whenever it wished. City does not allege that PGandE actually agreed to amend the contract to accommodate its alleged other purchase.

However, City has no right on demurrer to argue for such an interpretation contradicting the plain words of this contract. In Martinez v. Socoma Companies, Inc., 11 Cal.3d 394 (1974), the California Supreme Court reiterated the established rule that:

> When a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. [citation omitted.] Martinez v. Sonoma 11 Cal.3d, 394, 400 (1974). (emphasis added)

In the present case, the contract was expressly incorporated into the complaint by reference as though fully set forth. (Complaint, Paragraph 8.) Consequently, the Martinez rule applies; the power to be purchased under the contract was "all Power required by Healdsburg." This precludes City from arguing here that any lesser amount of power unilaterally determined by City was the contract amount instead.

City argues that when an exhibit to a complaint "flatly contradicts" the complaint, a demurrer may be granted, relying on Scudder Food Products, Inc. v. Ginsberg, 21 Cal.2d 596 (1943). (Demurrer at 12) Scudder and other

cases indicate that unless there is a flat contradiction between the exhibit and the complaint, pleaded words are controlling.

Scudder does not help City. The contract not only fails to "flatly contradict" the complaint, it is entirely consistent with the complaint. City relies on Articles 1.(b) and 1.(c) of the contract which provide:

> 1.(b) Nothing in this Agreement shall be interpreted in such a way as to prevent Healdsburg from seeking to obtain Power from sources other than PGandE or developing its own sources.
>
> 1.(c) In the event Healdsburg is able to obtain or develop Power from sources other than PGandE and still wishes to continue purchasing some Power from PGandE, at Healdsburg's request the Parties shall endeavor in good faith to amend, supplement or supersede this Agreement in order to accommodate Healdsburg's purchase and use of such other sources of Power on terms and conditions which are just and reasonable. (emphasis added.)

Thus the language relied on by City is permissive only, as to City's option to seek alternate sources of power. And it imposes no requirement on PGandE other than upon request, to endeavor in good faith with City to alter the contractual relationship on reasonable terms to accommodate other sources of power. Nothing in the contract forced PGandE to substitute power from another source. Remarkably, City fails to allege that (a) it made any request to amend the contract, (b) that PGandE failed to negotiate in good faith,

or (c) that PGandE rejected an offer of "just and reasonable" terms and conditions. Obviously, however, a full trial on the merits is the only way to resolve such issues, not a demurrer.

The plain words of the contract as to the conditions under which it could have been amended are thus clear, and they are wholly inconsistent with the interpretation City attempts to assign to the language of the contract. Even if the language of the contract could be said to be ambiguous, which it manifestly cannot, PGandE's pleaded meaning must be accepted on demurrer:

> [W]here "a pleaded instrument is ... susceptible of more than one construction as to its nature or as to the purpose intended by the parties to be attained by it, [emphasis in original] the construction of the party pleading it should be accepted, if such construction be reasonable" in considering a pleading attacked by general demurrer. [citation omitted]. Connell v. Zaid, 268 Cal. App. 2d 788, 795 (1969). (emphasis added.)

City was obligated to purchase all of its power from PGandE unless the contract was amended. City admits that the contract was not amended to permit the alleged purchases from WAPA. Thus, whether City purchased its power from WAPA or any other third party or from PGandE is irrelevant. Under the contract it was required to pay PGandE for that power in any event. City's contract

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argument does not change the fact that the complaint adequately states a claim for breach of contract.

3. The Stanislaus Commitments Present No Bar To This Action.

The other factual theory upon which City's general demurrer rests is that the Stanislaus Commitments operate to preclude an action for breach of the contract. City claims that the Stanislaus Commitments (1) forbade PGandE from insisting upon an exclusive contract, (presumably meaning a contract in which PGandE undertakes to supply all the electric power needs of City) (Demurrer, at p. 12), and (2) required PGandE to transmit power from WAPA to City. (Demurrer, pp. 12-13.)

City's first assertion is both unsupported and unsupportable. City's several quotations from the Stanislaus Commitments all refer to an obligation on the part of PGandE to transmit power. None of those references, or the Commitments, indicate that full requirements contracts are prohibited.

No more relevant is City's second claim, that the Stanislaus Commitments required PGandE, under any and all circumstances, to transmit any power sold by WAPA to City which City desired to receive. City contracted to buy all its power from PGandE. Since the contract was not amended in any way relevant to this case, City thus had disabled itself by the terms of its own agreement from purchasing

power from any source other than PGandE. (Complaint, Paragraph 10.) Therefore, whether PGandE would have agreed to transmit such power, and the terms and conditions under which a transmission contract could have been reached pursuant to the Stanislaus Commitments is totally irrelevant. Even if PGandE had transmitted power from WAPA to City, City would still have been obligated under the terms of its own contract to pay PGandE for all power received or to pay damages for its breach.

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, 4/ 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

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4/ City characterizes PGandE's complaint as asserting that PGandE is entitled to be paid for power received by City because the contract with City is exclusive. (Demurrer at 11.) City claims that this statement is a conclusion of law and need not be taken as true. Id. However, the relevant language of paragraph 8 of the Complaint merely paraphrases Article 1.(a) of the contract.

The Complaint sets forth this language as part of the terms and conditions of the contract relevant to PGandE's cause of action for breach. City has not shown, nor can it show, how this language from the contract itself, and its paraphrase in the Complaint as a material term of the contract, constitutes a conclusion of law.

are irrelevant and inapplicable. Accordingly, the general demurrer should be overruled.

4. The Complaint Is Not Uncertain.

City makes only one challenge to the face of the complaint. Although stated only in its Memorandum of Points and Authorities and not in its Demurrer, City pleads a special demurrer for uncertainty pursuant to Cal. Civ. Proc. Code § 430.10(f) as an alternative to its general demurrer. (Demurrer, p. 12, n. 7.) However, the special demurrer is totally without merit for several reasons. First, a special demurrer must distinctly specify the grounds upon which it is made with reference to the precise items in the complaint which are uncertain. Cal. Civ. Proc. Code § 430.60; Rupley v. Huntsman, 159 Cal. App. 2d 307, 312 (1958). City has utterly failed to do this. It only states that the complaint fails "to disclose exactly what obligations of the contract [PGandE] claims to have 'fully performed.'" (Demurrer, p. 12, n. 7.) The complaint indicates, however, as complaints always do, that the plaintiff fully performed all of its obligations. Thus, City presents no serious claim that the face of the complaint is defective due to uncertainty.

Second, this requested relief is directly contrary to Cal. Civ. Proc. Code § 457, which allows a party to plead generally that it has performed all required conditions precedent and which expressly relieves the party of the need

to plead all the evidentiary facts showing performance of conditions precedent. 5/ Third, a special demurrer for uncertainty cannot be sustained where the allegations of the complaint are clear enough to give the defendant notice of the issues in the case. People v. Lim, 18 Cal.2d 872, 882 (1941). The detailed arguments in City's Demurrer, although unpersuasive, are vivid evidence that City appreciates all too well the issues to which it must respond in this lawsuit.

Finally,

> A special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made. People v. Lim at 883; accord, People v. Taliaferro, 149 Cal. App. 2d 822, 824 (1957).

Since PGandE has pleaded all the requisite elements of a breach of contract action, in conformity to the provisions of Cal. Civ. Proc. Code § 457, there is no uncertainty in the allegations made in PGandE's complaint and the special demurrer should also be overruled.

5/ "Conditions Precedent, How To Be Pleaded. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party must establish, on the trial, the facts showing such performance." Cal. Civ. Proc. Code § 457.

III

THIS ACTION SHOULD NOT BE REFERRED TO FERC.

A. Jurisdictional Background

City has brought this motion in order to convince the Court to refer the case to FERC for an advisory opinion. This maneuver is merely one of many recent attempts to avoid this Court's jurisdiction over the case. After the complaint was served in November 1983, City removed the case to the United States District Court for the Northern District of California by filing a petition alleging that the complaint stated a federal question. Although its removal pleadings claimed that only the federal court had jurisdiction because the only possible cause of action was a federal one based on the Federal Power Act (FPA), 16 U.S.C. § 791 et. seq. City then filed a motion to dismiss claiming that no federal cause of action was stated. The Honorable William H. Orrick, United States District Judge, found no federal question and granted PGandE's motion to remand, noting that "it appears to me that this complaint states a single cause of action for breach of contract" and that "the PGandE has pleaded a state law contract." (Transcript of proceedings of April 13, 1984 attached as exhibit 2, pp. 23-24; emphasis added.) Because the case was remanded, Healdsburg's motion to dismiss was never heard.

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Despite having argued to the federal court that it had exclusive jurisdiction over PGandE's cause of action, City now seeks to convince this Court that only the FERC, created by Congress pursuant to the FPA, is competent to hear and decide the case.

Northern California Power Agency (NCPA), a joint powers agency of which City is a member, has recently attempted to convince the Nuclear Regulatory Commission to become involved in this lawsuit and FERC to construe the Complaint in this action, 6/ claiming that City has a defense based on the license conditions for the Diablo Canyon Nuclear Power Plant. Neither federal agency has responded yet. In the unlikely event that either agency agrees with NCPA's contention and attempts to adjudicate City's possible defense, that will not oust this Court of jurisdiction. As we will discuss in Sections III D3 p. 25 and III F p. 38, the ultimate question of liability is one for the courts.

B. City's Contentions

City contends that under the doctrine of primary jurisdiction, "this Court is obligated to refer the issue raised by the complaint to FERC." (Demurrer, p. 2, lines 22-23, emphasis added.) This misstates the law; primary

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6/ NCPA Motion to Lodge dated July 20, 1984 addressed to the FERC, and Petition for Enforcement of License Conditions addressed to the NRC, dated August 1, 1984.

jurisdiction is at most discretionary with the Court. (Section III E, p. 33.) City urges the court to seek an advisory opinion from the FERC for the following reasons:

1. The Sonoma County Superior Court is not competent to the task:

> ". . . full consideration of the merits of this proceeding will involve moderately complex and interrelated questions of law and fact, and will require the construction of various contracts and agreements. . . . In these circumstances, the Court should not attempt to construe the rights and responsibilities of the parties. . . ." (Demurrer, p. 14, lines 11-20; emphasis added.)

2. State courts cannot construe the FPA (Demurrer, p. 1 line 27-p. 2 line 2);

3. Unless the Court refers the case to FERC, there will be conflict with FERC's regulatory powers (Demurrer p. 2, lines 2-3).

These contentions are totally unsound. As discussed below, the Superior Court has jurisdiction and is fully competent to construe any relevant contracts or statutes. (Section III C, p. 17) Primary jurisdiction is inapplicable to this case (Section III D, p. 19); even if it were applicable, referral to FERC would be inappropriate under the standards developed by the cases discussed in Section III E, p. 33. For these reasons, the court should decline to refer the case or any issue in the case to FERC.

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C. The Superior Court Has Jurisdiction And Is Competent To Decide All Of The Issues In The Case.

City contends that this court lacks both the power and the competence to construe federal statutes and to interpret contracts. (Contentions 1 and 2 above.) This is pure nonsense and should be disposed of at the outset. The California courts routinely construe statutes and contracts. City ought to know that the state trial courts are the courts of general jurisdiction in this country, while federal courts and agencies are tribunals of limited jurisdiction. City appears to be unaware that the California Constitution establishes the Superior Courts as the principal trial courts of the state, "with unlimited monetary and subject matter jurisdiction. . . ." 1 B. Witkin, California Procedure, Courts § 132, p. 403 (2 ed. 1970). Clearly the Superior Court has subject matter jurisdiction over this complaint for breach of a state law contract.

City now suggests that only FERC can interpret the FPA (Demurrer, p. 2, l. 1-2), although it apparently would have been willing to permit the federal court to do so, if it had had jurisdiction. This is incorrect. State courts can and do interpret federal statutes when they are

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relevant 7/ to issues before such courts. Pan American Petroleum v. Superior Court of Delaware, 366 U.S. 656 (1961); Pan American Petroleum v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561 (8th Cir.), cert. denied 370 U.S. 937 (1962); Northwest Central Pipeline Corp. v. Mesa Petroleum Co. 576 F.Supp. 1496 (D.C. Del. 1983); Great Western Sugar Co. v. Northern Natural Gas, 661 P.2d 684, 690 (Colo. Ct. App. 1982); Estate of Mabury v. Christian Science Board, 54 Cal. App. 3d 969 (1976).

Nor does City's absurd contention that the Superior Court is incompetent to interpret complicated contracts have any greater merit. 8/ City cites no supporting authorities for this assertion, perhaps because none exist. The California Constitution, article VI § 10 grants the Superior Court "original jurisdiction in all causes" at law and in equity, except those given by statute to other courts (emphasis added). The California courts are not limited to simple cases. The California Constitution's broad grant of jurisdiction to the Superior Court negates

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7/ PGandE does not and cannot sue for breach of contract under the FPA; PGandE does not presently anticipate an issue in this case that would require the court's interpretation of the FPA.

8/ In fact, it should not be very complicated at all to determine that City breached its contract and owes PGandE damages; the only complication is in City's strained attempts to concoct a plausible sounding defense.

City's assertion that the Court should not involve itself in "moderately complex . . . questions of law and fact" or in the "construction of various contracts and agreeements."

D. The Doctrine Of Primary Jurisdiction Is Inapplicable Because FERC Does Not Have Jurisdiction Over This Dispute.

City claims that unless the Court refers this case to FERC, there will be conflict with FERC's regulatory powers. (Contention 3) This is not the case. FERC has no jurisdiction over this breach of contract claim; thus, there is no risk that the Court's action in this case will conflict with FERC's regulatory powers.

The doctrine of primary jurisdiction assumes that the court and the administrative agency have concurrent jurisdiction over a case or issue. See, e.g., R. M. Travis, Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act, 63 Calif. L. Rev. 926 (1975). When there is concurrent jurisdiction, the question to be resolved by application of the doctrine is who should deal with the matter first -- the court or the agency. If either court or agency lacks jurisdiction, then the inquiry is instead one of determining judicial jurisdiction. In other words, if the agency lacks jurisdiction, there is no reason for the court to consider referring anything to the agency. (See generally 4 K. C. Davis, Administrative Law Treatise, § 22 et. seq. (2d ed. 1983).)

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It follows that when the jurisdiction of the agency is limited by statute, there will be a correspondingly limited area of concurrent jurisdiction with the courts, and occasions for referral to an agency will be rare. The following discussion will show that FERC has no jurisdiction over the issues raised by this lawsuit; hence, primary jurisdiction does not apply. Even if it did apply, FERC's expressly limited regulatory jurisdiction indicates few occasions for a court to refer issues to FERC. This is not one of them.

1. The Regulatory System Created By The FPA Is Limited And Well-Defined.

In order to analyze City's claim that primary jurisdiction requires the court to refer this matter to FERC, it is necessary to understand that the regulatory system set up by the FPA over interstate power sales is limited and does not diminish state jurisdiction over actions for breach of contract. A more detailed description of the FPA regulatory system is in PGandE's Reply Memorandum in Support of Its Motion To Remand, attached hereto as exhibit 4. (Exhibit 4, p. 6-12.) Briefly, the FPA 9/

9/ The relevant provisions of the FPA and the Natural Gas Act (NGA), 15 U.S.C. § 717 et. seq., "are in all material respects substantially identical," have been interpreted in pari materia, and cases interpreting them are cited interchangeably. (Federal Power Commission v. Sierra Pacific Co., 350 U.S. 348 (1956); Permian Basin Area Rate Cases, 390 U.S. 747 reh'g denied sub nom. Bass v. Federal Power Commission, 392 U.S. 917 (1968).)

regulatory scheme does not permit FERC to impose rates; rather, it reviews rates established voluntarily by contracting parties for lawfulness and changes them only when they are found to be unjust and unreasonable. (Permian Basin Area Rate Cases, 390 U.S. 747, reh'g denied sub nom. Bass v. Federal Power Commission, 392 U.S. 917 (1968); United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332, 343 (1956).)

Several courts have examined the legislative history of the Natural Gas Act (NGA) 15 U.S.C. § 717 et. seq. and the FPA and have concluded that

> The legislation was thus carefully fashioned to exert federal control only in a limited and well-defined area. It would distort that pattern beyond recognition to find inherent in this plan a proscription of state legislation allowing parties to contract to sell natural gas in interstate commerce, or of state law prescribing liability for the breach of such a contract. The FPC may regulate many aspects of the gas-supply contract . . . but not even that agency has attempted to imply that the contractual relationship is itself a creature of federal law. City of New Orleans v. United States Gas Pipe Line Co., 390 F.Supp. 861, 865 (E.D. La. 1974).

See, e.g., Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949).

> Unlike the Federal Communications Act, in which Ivy [Ivy Broadcasting Co. v. AT&T 391 F.2d 486 2d. Cir. 1968] found federal common law governed contractual disputes involving interstate telephone service, the NGA and NGPA are not so

> pervasive a scheme of federal regulation as to indicate a congressonal objective that cannot be obtained without the application of federal common law. Pennzoil v. FERC, 645 F.2d 360, 384, 385 (5th Cir. 1981) cert. denied 454 U.S. 1142 (1982); emphasis added.

Mobile clearly distinguishes between the NGA and the FPA on the one hand and the Interstate Commerce Act (ICA), 49 U.S.C. § 1 et. seq. on the other.

> "In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements. . . . the Natural Gas Act permits the relations between the parties to be established initially by contract. . . . United Gas Pipe Line Co. v. Mobile Gas Corp. 350 U.S. 332, 338-339 (1956); emphasis added.

We emphasize this difference because the vast bulk of the cases cited by City in support of referral to FERC are cases arising under the ICA, a pervasive regulatory scheme which totally preempts state law. These cases are distinguishable and offer no guidance on primary jurisdiction under the FPA, a non-pervasive regulatory system which does not preempt state law.

Nor does the mere fact that the Healdsburg-PGandE contract was filed with FERC mean that FERC has jurisdiction over PGandE's breach of contract claim. (See PGandE's Motion to Remand, attached as exhibit 3, pp. 8-10.) The United States Supreme Court made that very clear in discussing common law contract rights embodied in FPC-filed contracts under the NGA:

> "The rights as asserted by Cities Service are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. Pan American Petroleum v. Superior Court of Delaware 366 U.S. 656, 663 (1961).

Thus, we have seen that FERC's regulatory jurisdiction over power sale contracts has been interpreted by the courts to be limited, with no intention to preempt state contract law.

2. FERC's Jurisdiction Is A Prerequisite To A Decision Under The Primary Jurisdiction Theory.

The question whether an issue should be referred to an agency does not arise unless the agency has concurrent jurisdiction with the court over that issue.

In Montana-Dakota Utilities Co. v. Northwestern Public Service Company, 341 U.S. 246 (1951), the United States Supreme Court held that a utility's complaint that the FPC-filed rates it was charged were unreasonably high failed to state a cause of action maintainable in federal court. The utility claimed that it had been defrauded into accepting and paying an unreasonable rate because it was controlled by the selling utility through interlocking directorships and joint officers. It sought damages measured by the difference between the FPC-filed rates, and those to be determined by the court as reasonable rates. The Court unanimously held that only the FPC, not the

courts, had jurisdiction to determine just and reasonable rates. The court's majority held that the case must therefore be dismissed; the minority wanted the fraud issues in the complaint referred to FPC.

The majority held that because FPC had no jurisdiction to award reparations for past unreasonable rates, the issue could not be referred.

> "But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission a power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly." (Montana-Dakota v. Northwestern Public Service Company 341 U.S. 246, 254 (1951); emphasis added)

Even the dissenting justices agreed that

> "If the Commission can neither fix rates retrospectively nor award damages, it clearly can afford no adequate remedy to Montana-Dakota . . . the Court of Appeals was in error in thinking that an adequate administrative remedy existed . . ." (Montana-Dakota v. Northwestern, 341 U.S. 246, 261 (1951).)

The issue determined by the Montana-Dakota court is identical to the issue here: should the court refer an issue to FERC when FERC has no jurisdiction over it? The answer is clearly no. The Supreme Court's refusal to refer issues to FPC when it had no jurisdiction is directly on

point and governs this case. Similarly, other cases hold that an administrative agency can only act on matters over which it has regulatory jurisdiction. (See e.g., Central Illinois Public Service Company v. Federal Power Commission, 338 F.2d 682, 687 (7th Cir. 1964); County of Alpine v. County of Tuolumne, 49 Cal.2d 787, 797 (1958).)

3. FERC Has No Jurisdiction Over City's Breach Of Contract.

FERC lacks jurisdiction over the lawsuit for five reasons. Thus, only the California state courts have jurisdiction.

(a) Courts Have Refused To Find FERC Jurisdiction Over Liability For Breach Of Contract.

The unanimous decision of the United States Supreme Court in Pan American Petroleum Co. v. Superior Court of Delaware, 366 U.S. 656 (1961) established that a common law claim for breach of a natural gas contract regulated by the FPC is within the state court jurisdiction. In Pan American, Cities Service bought natural gas from producers but was required to pay more than the contract price because of a Kansas state agency minimum price order. Cities Service made the overpayments under written protest and conditioned upon repayment in the event the Kansas order was determined to be invalid. The gas purchase contracts, the Kansas order, and the written protest were filed with FPC as required by the NGA. When the Supreme Court

invalidated the Kansas order, Cities Service sued in the Delaware state court for breach of the refund contract created by its reservation of rights and by defendants' acceptance of conditional payments. Defendants challenged the state court's jurisdiction, arguing that the Cities Service contract claim must either be to enforce or to challenge a rate filed with the FPC and that the case therefore arose under the NGA. The Supreme Court held that the Delaware courts had subject matter jurisdiction and rejected defendants' contentions saying:

> The answers depend on the particular claims a suitor makes in a state court - on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' [citation omitted] . . . the complaints in the [state] court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts . . . No right is asserted under the Natural Gas Act.
>
> The suits are thus based upon claims arising under state, not federal law. (Pan American 366 U.S. at pp. 662-663.)

In Pan American the issue before the court was whether the state or the federal courts had jurisdiction over the breach of contract claim. While it did not have the precise issue here before it, the Pan American decision is clearly inconsistent with any notion that the FERC has jurisdiction over breach of contract cases. Given the lack of any federal regulatory issue here, as in Pan American,

FERC can bring nothing more to bear on the case than could a federal court. Yet the federal court has no jurisdiction.

In two cases arising out of the same facts as those in Pan American, the United States Court of Appeals for the 8th and 10th Circuits each held that the trial of a breach of contract lawsuit in federal court under the court's diversity jurisdiction did not invade the FPC's primary jurisdiction. (Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Company 297 F.2d 561 (8th Cir.), cert. denied 370 U.S. 937 (1962).) (Landon v. Northern Natural Gas Co., 338 F.2d 17 (10th Cir. 1964) cert. denied 381 U.S. 914 (1965).) In each case, the court held that the pleadings did not invoke the FPC's jurisdiction to review the lawfulness of rates. It pointed out that the court had not been asked to adjudicate a violation of the NGA or to enforce any liability created by it. In so holding each court specifically distinguished primary jurisdiction cases arising out of the ICA and found them unpersuasive in

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construing the primary jurisdiction doctrine under the NGA. 10/

In a case construing the FPA, an Ohio court followed Pan American, holding that it, not the federal court, had jurisdiction over a breach of an FPC-filed contract and that FPC had no primary jurisdiction. Cleveland Electric Illum. Co. v. City of Cleveland, 363 N.E.2d 759 (1976) cert denied 434 U.S. 856 (1977).

(b) FERC Cannot Award The Damages Requested By PGandE.

FERC has no power to award damages.

> "The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages. . . ."

10/ United States v. Western Pacific R.R. Co., 352 U.S. 59 (1956), is an ICA case and thus is unpersuasive in construing primary jurisdiction under the FPA. It has been criticized as showing

> "too uncritical a deference to 'administrative expertise'. . . . The courts have for years been deciding cases of this sort without any sense of strain."

L. L. Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1036, 1045-1046 (1964). As a final note, Professor Jaffe said,

> "The final chapter of Western Pacific adds a note of irony to the whole elaborate performance . . . The Commission ultimately came to the same conclusions as the Court of Claims and by almost the same method of applying the linguistic and customary meaning." Id. at 1047.

(Montana-Dakota v. Northwestern Public Service Co., 341 U.S. 246, 260, 261 (1951); Town of Massena New York v. Niagara Mohawk Power Corp., 18 FERC ¶ 61,068, (1982).)

(c) FERC Cannot Take Action On This Contract Because It Has Been Terminated.

Even where FERC undoubtedly has jurisdiction to review whether a given rate is unlawful or unreasonable, it can only act prospectively. (Federal Power Commission v. Sierra Pacific Power Co. 350 U.S. 348, 353 (1956); Montana-Dakota v. Northwestern Public Service Co. 341 U.S. 246, 254, 258 (1951).) Before City could be excused from its contract obligations (the result towards which all of City's defenses are directed) FERC would have to alter City's contract obligations retroactively. But this is something the FPA and the United States Supreme Court cases interpreting it do not permit. In fact, the contract was terminated on September 14, 1983 (Exhibit 5), leaving FERC with no regulatory responsibilities involving the contract.

(d) FERC Has No Jurisdiction Over Municipalities.

Even if FERC could award damages and could act retroactively, it has no jurisdiction over a municipality like Healdsburg. (See, Exhibit 3, pp. 15-16.) Section 201(f) of the FPA, 16 U.S.C. § 824(f) provides that:

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> No provision in this subchapter shall apply to . . . any political subdivision of a state . . . unless such provision makes specific reference thereto.

In Northern California Power Agency v. Federal Power Commission, 514 F.2d 184 (D.C. Cir.), cert. denied 423 U.S. 863 (1975), NCPA sought an FPC order increasing the capacity of a municipality's power plants for the use of NCPA, but recognized that under FPA § 201(f) FPC had no jurisdiction to order the municipality to do anything. However, it argued that FPC should exercise its jurisdiction over PGandE to find contracts between PGandE and the municipality unlawful until they were amended to provide NCPA with some capacity. The FPC and the Court rejected this argument, holding that FPC would not be permitted to do indirectly what it was not authorized to do directly. Thus, without personal jurisdiction over City, FERC cannot hold City liable for breach of contract, or order it to pay damages and therefore cannot have jurisdiction over the lawsuit.

(e) There Are No Private Damage Actions Provided By The FPA.

City states:

> "We note at the outset that PGandE has the right to seek from FERC the relief which it requests from this Court." (Demurrer, p. 15, l. 1-2)

This assertion is both false and irrelevant. In fact, the FPA creates no express or implied private rights of action

on behalf of a public utility to enforce contract rights based on FERC-filed contracts (See, Exhibit 3, pp. 11-16; Exhibit 2, pp. 17-18).

City suggests that a case involving the City of Cleveland and Cleveland Electric Illuminating Co. supports its assertion that a damage action is available to PGandE at FERC. (Demurrer, p. 15, l. 10-15) This is incorrect. That unique case involved FPC's authority to order interconnections between utilities and to establish terms and conditions under which the interconnection would proceed, under FPA § 202(b), 16 U.S.C. § 824a(b). As a part of those terms and conditions and in order to permit the City of Cleveland to obtain the desired interconnection, FPC ordered the City to pay its power bills, noting that it had refused to pay or had paid late in the past. (Cleveland Electric Illuminating Co. v. City of Cleveland, 363 N.E.2d 759 (1976) cert. denied 434 U.S. 856 (1977); City of Cleveland v. Federal Power Commission, 525 F.2d 845 (D.C. Cir. 1976).) The critical distinction between the Cleveland situation and PGandE's breach of contract lawsuit is that in Cleveland, FPC's authority to issue the payment order was based on its authority to order conditional interconnection, not on a general power to order payment of amounts due under a power purchase contract. Thus, the Cleveland cases do not support City's assertion that establish that a private cause of action is available at FERC.

In City of Gainesville v. Florida Power and Light Co., 488 F.Supp. 1258 (S.D. Fla. 1980) the court held that there were no implied private rights of action created by the FPA or the NGA. The court noted that when Congress intended to create a private right of action, (as it did in other sections of the FPA) it was explicit in doing so. Similarly, the United States Courts of Appeals for the 5th Circuit and the 3rd Circuit have determined that the NGA does not provide an implied private right of action for damages. (Pennzoil v. FERC 645 F.2d 360, 384 (5th Cir. 1981); Clark v. Gulf Oil Corp. 570 F.2d 1138 (3rd Cir. 1977) cert. denied, sub nom. Philadelphia Gas Works v. Gulf Oil Corp. 435 U.S. 970 (1978).)

Although the cases cited above stand for the proposition that the FPA created no private right of action in favor of a utility for breach of a FERC-filed contract, it should also be noted that failure to create such a private right of action to be adjudicated by an agency may also indicate that Congress did not intend the agency to have primary jurisdiction. See Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 302 (1976).

In summary, since FERC has no jurisdiction over breach of contract cases, no jurisdiction to award damages, to act retroactively, or to entertain private rights of action under the FPA, it clearly does not have jurisdiction over the issues in this case. Nor does it have personal

jurisdiction over City. Since FERC has no jurisdiction, this Court and FERC do not have concurrent jurisdiction and the doctrine of primary jurisdiction cannot be applied.

E. Even If The State Court And FERC Had Concurrent Jurisdiction, It Would Be Inappropriate For The Court To Exercise Its Discretion To Refer The Case.

Even if FERC had concurrent jurisdiction over the lawsuit with this court, there are several reasons why it would be inappropriate for the court to refer the case or any of its issues to FERC.

City misstates the allegedly relevant doctrine:

> this Court is obligated to refer the issue raised by the complaint to FERC. . . . The doctrine of primary jurisdiction requires the court to defer in the first instance to the FERC. . . . [Demurrer, p. 2, l. 22-27.]

In fact, primary jurisdiction is discretionary. 4 K. C. Davis, Administrative Law Treatise, § 22:1 (2d ed. 1983); Great Western Sugar Company v. Northern Natural Gas Co., 661 P.2d 684, 690, (Colo. Ct. App.) reh'g. denied (1982) cert. granted, Colorado Supreme Court (1983). If the court and FERC have concurrent jurisdiction, then the court must exercise its discretion to determine whether anything should be referred to FERC. It is not mandatory, contrary to City's statement that the case be sent to FERC.

Correctly stated, the doctrine gives the Court discretion to allow an agency, when appropriate, an

opportunity to "pass in the first instance on technical questions of fact uniquely within its expertise and experience or in cases which referral is necessary to secure uniformity and consistency in the regulation of business. . . ." Great Western Sugar Company v. Northern Natural Gas Corp. 661 P.2d 684, 690 (1982). Great Western sought damages in state court for breach of contract and fraud in connection with defendant's interruption of natural gas service to Great Western. Defendant was subject to regulation by FERC. Due to a nationwide gas shortage in the late 1960's, defendant changed its rules on interruption of service, making interruptions more frequent than before. Defendants asserted that FERC had primary jurisdiction over Great Western's claims. The trial court denied the motion to refer to FERC. The Colorado Court of Appeals, using the above analysis, held that common law contract claims were the basis of the litigation, that these claims were within the conventional competence of the state courts and that the trial court did not err in refusing to refer issues to FERC.

In this case, as in Great Western, City's liability does not turn on technical questions of fact uniquely within FERC's expertise and experience; instead, determination of liability depends upon interpretation of a California contract which is a question of California

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law, 11/ and a matter which this court is far more qualified than FERC to decide:

> "Referral of issues to an agency is not required when the issue is strictly a legal one and the issues involved are within the conventional competence of the courts." (Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976))

Neither is referral to FERC necessary to secure regulatory uniformity. As we have noted, the contract has been terminated and no proceedings are pending at FERC on the contract.

> "Deference [to an agency] is particularly inappropriate where the litigation deals with a single event which requires no continuing supervision by the regulatory agency." (Mississippi Power and Light Co. v. United Gas Pipe Line, 532 F.2d 412, 419 (5th Cir. 1976).)

Great Western Sugar Company v. Northern Natural Gas Corp. 661 P.2d 684, 690 (Colo. Ct. App. 1982.)

Cities' cases which discusses FPC or FERC primary jurisdiction are distinguishable from the case before the

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11/ City agrees that liability depends upon a question of law. In its Motion to Dismiss, filed with the District Court, City admits, "It is our belief that the matters raised in the Complaint are particularly susceptible to rapid disposition as a matter of law, that there are no significant questions of fact to be determined. . . ." Motion to Dismiss, p. 1, l. 24-28, emphasis added. Contract interpretation is, of course, a question of law. (Cincinnati Gas and Electric Company v. FERC, 724 F.2d 550, 554 (6th Cir. 1984); Great Northern Railway v. Merchants Elevator Company, 259 U.S. 285 (1922).)

court on their facts. (Demurrer, p. 18, l. 17-p. 19, l. 2.) Huber involved natural gas royalties which, if they were within the FPC's jurisdiction, would have created rates exceeding a FPC rate ceiling. The District Court referred the issue to FPC, which had filed an amicus brief claiming that it arguably had jurisdiction over royalties. The potential impact of the Huber royalty issue on FPC's rate jurisdiction is readily apparent; no rate issues are involved in this case.

Texas Oil & Gas involved withdrawal of natural gas from interstate commerce, under FERC's jurisdiction, to intrastate commerce without obtaining the statutorily required approval from FERC. It seems to be more an exhaustion of administrative remedies case than a primary jurisdiction case. In any event, such issues are not present here.

Mississippi Power & Light arose out of the same natural gas curtailments discussed in section III F, p. 38. The fifth circuit said

> The courts should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate . . . there are a few general situations in which referral is often unwarranted. . . . Deference is particularly inappropriate where the litigation deals with a single event which requires no continuing supervision by the regulatory agency. . . . The

> nature of relief sought, moreover, is also a relevant consideration . . . when the agency's position is sufficiently clear or nontechnical or when the issue is peripheral to the main litigation, courts should be very reluctant to refer. Finally, the court must always balance the benefits of seeking the agency's aid with a need to resolve disputes fairly yet as expeditiously as possible. Mississippi Power & Light Company, v. United Gas Pipe Line, 532 F.2d 412, 419 (5th Cir. 1976), cert. denied 429 U.S. 1094 (1977)

The court then held that referral there was particularly appropriate because there were very technical curtailment proceedings pending before FPC dealing with the nationwide energy shortage, FPC was involved in some necessary fact finding on the curtailments and was considering methods to exempt the curtailing pipelines from the civil liability. In contrast, here there is no action pending at FERC dealing with Healdsburg's contract. 12/ Nor does the contract have implications for national energy policy. It deals with a single event (the 1982 breach) and does not involve technical matters within FERC's expertise. Application of the factors listed in the Mississippi decision leads to the conclusion that no referral should be made to FERC.

In Eastern Shore, the Delaware Supreme Court opinion cited by City did not discuss the trial court's

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12/ Cities' assertion that this contract is before FERC (Demurrer, page 18, lines 4 through 5) is false. The contract was terminated on September 14, 1983.

reasons for referring the case to FPC. The Delaware Chancery Court opinion reveals that the complaint alleged that defendant's acts exposed plaintiff to possible criminal penalties for violation of the NGA. (Eastern Shore Natural Gas Company v. Stauffer Chemical, 285 A.2d 826, 829 (Del. Ch. 1971).) Thus, the pleading in that case is totally distinguishable from this breach of contract pleading. There the issue in the complaint was violation of the NGA. PGandE's pleading does not allege any violation of the FPA.

Examination of all of the cases and factors discussed above indicate that even if concurrent jurisdiction existed, the court should refuse to refer the case to FERC.

F. FERC Has Agreed That It Cannot Determine Liability For Breach Of Contract Under State Law.

In several cases, FERC or FPC has declined to determine liability for breach of contract, finding that it had neither the power nor the desire under the circumstances, to adjudicate the necessary issues of state law. In one case, the Presiding Administrative Law Judge said:

> It is also well established, and is best disposed of ab initio, that the Commission has limited authority, if any, to interpret ordinary questions of breach of contract . . . [citations omitted] . . .
>
> None of the contract issues, as the court found, deals with an area

> peculiarly within the Commission's expertise, and the ultimate resolution of these contract issues, therefore, will be decided by the courts. United Gas Pipe Line Co., 54 FPC 1109, 1151, 1152 (1975)

In one of many cases arising out of natural gas curtailment due to the national energy shortage of the early 1970's, FERC said:

> This Commission and the courts reviewing its orders have recognized the Commission is without jurisdiction ultimately to determine United's liability for curtailment damages. Any such liability is for the courts to determine. (United Gas Pipeline Co. 4 FERC ¶ 61,151, p. 61,349, 61, 352 (1978).)

In that case, several questions had been referred to FERC by the courts under the doctrine of primary jurisdiction. FERC determined that it had discretion to decide whether to accept those questions. The first group of questions raised the issue whether defendants had deliberately or negligently created a gas shortage. FERC held that when negligence, bad faith, or other wrongful conduct was alleged, the Commission had

> neither the power nor the desire to adjudicate United's contract liability, for as recognized in International Paper, that is within the province of the appropriate court. . . . Furthermore, it has been the FPC's policy in the past not to consider questions referred by a court where the issues referred are already pending before the court for its decision. (United Gas Pipeline Company 4 FERC ¶ 61,151,

p. 61,349, 61,353-354 (1978) emphasis added.)

A second group of referred questions requested FPC to determine whether the contract barred or limited defendant's liability for curtailments. FPC held that those liabilty issues were not within its primary jurisdiction. FPC stated that its primary jurisdiction limits had been established by State of Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974) which held that FPC could not adjudicate contract liability and reversed an earlier FPC opinion on defendant's liability.

In Arkansas Louisiana Gas Company v. Hall, ("Arkla") 453 U.S. 571 (1981) the issues were whether a favored nations clause in an FPC-filed gas purchase contract had been triggered and whether a state court could award damages for the difference between the contract rate and the favored nations rate, which would have the effect of creating a retroactive rate increase. The court affirmed the judgment of the Louisiana courts that under Louisiana law the favored nations clause was triggered.

> "We see no reason to disagree with the Commission's judgment that interpretation of the favored nations clause raises only questions of state law. The state court found that the contract had been breached. We will not overturn the construction of Louisiana law by the highest court of that state." (Arkansas-Louisiana v. Hall, 453, U.S. 571, 579 at fn. 9, (1981).)

Arkla argued to the court that FPC had primary jurisdiction and also sought a ruling at FPC that the favored nations clause had not been triggered. The United States Supreme Court denied Arkla's petition for certiorari on the primary jurisdiction question. Arkansas Louisiana Gas Company v. Hall, 444 U.S. 878 (1979). FERC then declined to exercise primary jurisdiction, holding that the interpretation of the favored nations clause raised no matters on which the Commission had particular expertise. Arkansas-Louisiana Gas Company v. Hall 7 FERC ¶ 61,175, p. 61,321; Arkansas-Louisiana Gas Company v. Hall, 453 U.S. 571, 575 (1980).

Finally, in Town of Massena v. Niagara Power Mohawk Power Corp., 18 FERC ¶ 61,068, p. 61,116, 61,117 (1982), Massena brought an action at FERC against Niagara Mohawk, alleging violations of the FPA. It also brought a damage action for breach of contract in the New York state courts. FERC decided not to dismiss the complaint but deferred its proceedings, saying:

> The case before us is not the usual type of rate case we decide. The important questions presented largely involved the interpretation of two contracts. New York law provides the rules for deciding those questions. We are not experts on New York contract law. The New York court is. . . . a decision by the New York court on the complex questions of New York contract law will simplify our decision. . . . This case is essentially a private lawsuit between Massena and Niagara Mohawk. . . . 18 FERC ¶ 61,068, p. 61,116, 61,117.

The FERC noted that Massena's claim for damages would have to be heard by the state court whatever the outcome of a FERC proceeding. In making these remarks FERC not only expressed a reluctance to act as a civil court and to determine liability for breach of contract; it also recognized that it would be obligated to follow Erie and apply state contract law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981) and cases cited therein. Thus, FERC itself has recognized that in many instances it would simply be inappropriate for FERC to sit as a state court, applying state law to breach of contract claims.

In summary, none of the factors discussed by the primary jurisdiction cases indicate that the Court should exercise its discretion to refer the case, or any part of it to FERC. The issues here are legal ones. Liability depends upon a single event, and requires no regulatory supervision. There are no issues which depend upon any special technical expertise of FERC. Finally, FERC itself recognizes that it is not an expert on state contract law, and has frequently declined to adjudicate state law questions. Clearly, if it is even necessary to consider the primary jurisdiction doctrine, the cases suggest that it would be more appropriate for FERC to defer to this Court's primary jurisdiction then for the Court to defer to FERC's.

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IV

THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF MANY OF THE DOCUMENTS ATTACHED TO DEFENDANT'S DEMURRER.

City largely concedes that the complaint, taken by itself, is free from demurrable defects. However, to support its demurrer, defendant asks the court to take judicial notice of a large stack of materials not included in the complaint. The thirty-one exhibits to City's memorandum are an inch thick, and seem designed to give the appearance of complexity 13/ rather than show defects in the complaint. City apparently believes that every piece of correspondence sent by or to a public agency is appropriate for judicial notice. However, that is not the law. The documents attached to City's memorandum have three flaws. First, most of the documents are not the kinds of documents which can be judicially noticed. Second, many of the documents are irrelevant to the issues raised by the demurrer. Third, even if the court could take judicial notice of these documents, it could not take judicial notice of their contents.

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13/ As noted earlier, City argues that this action is too complex for a California Superior Court to handle.

A. Many Of The Documents Are Not Subject To Judicial Notice.

City states that these documents are proper subjects of judicial notice pursuant to subdivisions (c) and (h) of Cal. Evid. Code §452. (Request for Judicial Notice, p. 2) These subdivisions allow the court to take judicial notice of:

> (c) Offical acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
>
> * * *
>
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Subdivision (h) of section 452 does not apply to any of City's attachments. This section was not intended to cover all documents which might be relevant in an action. Instead, subdivision (h) applies to indisputable facts such as:

> facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world."

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Comment of Assembly Committee on Judiciary, Cal. Evid. Code (Deering's 1966) §452, p. 531. Subdivision (h) of §452 does not apply to public agency documents. (Marino v. City of Los Angeles, 34 Cal. App. 3d 461 (1973); Edna Valley Ass'n v. San Luis Obispo Coordinating Council, 67 Cal. App. 3d 444 (1977); Ruddock v. Ohls, 91 Cal. App. 3d 271, 275 n. 1 (1979).)

Similarly, many of defendant's attachments do not fall under §452(c). In particular, the court cannot take judicial notice of (1) letters sent by NCPA or Healdsburg (Attachments 11, 14, 16, 21, 27, 29); (2) letters sent by WAPA (Attachments 15, 18, 22, 26 and 30); (3) letters sent by PGandE (Attachments 12, 17, 23, 24, 25, 28).

1. Letters Sent By NCPA Or Healdsburg

Section 452(c) is inapplicable to letters sent by NCPA or Healdsburg. It applies only to official acts of a federal department or of a "state." A city, such as Healdsburg, is not a "state" within the meaning of this subdivision. (Marino v. City of Los Angeles, 34 Cal. App. 3d 461, 465 (1973).) Similarly, joint powers agencies formed by cities (such as NCPA) are not covered. (Edna Valley Ass'n v. San Luis Obispo Coordinating Council, 67 Cal. App. 3d 444, 449-50 (1977).)

2. Letters Sent By WAPA

Section 452(c) does apply to "official acts" of federal agencies such as WAPA. However, not every document

prepared by a federal agency is an "official act." See Childs v. State of California, 144 Cal. App. 3d 155, 162-63. (1983) ("official acts" applies to things such as resolutions and reports; it does not apply to an individual's description of agency actions not governed by specific agency rules); (2 Jefferson, California Evidence Benchbook, §47.2, p. 1756 (1982) (this subdivision was intended to apply to reports and findings of legislative and administrative committees.)) It makes no sense to take judicial notice of the letters of one party to a commercial transaction merely because that party is a federal agency. Letters sent by WAPA are not entitled to judicial notice.

3. Letters Sent By PGandE

PGandE is not a "state" under §452(c). The fact that NCPA and WAPA received these letters does not entitle them to judicial notice. Section 452(c) applies only to "official acts of" a state. This section does not apply to documents sent to a state entity by private individuals or corporations. Citizens Utilities Co. v. Superior Court, 56 Cal. App. 3d 399, 410-411 (1976) (letters filed with the CPUC which are not part of the decision of the commission cannot be judicially noticed).

B. None Of The Documents Are Relevant.

Even if a document falls into one of the categories in Evidence Code §452, it should not be judicially noticed unless relevant. (Mozzetti v. Brisbane,

67 Cal. App. 3d 565, 578 (1977); Ca. Evidence Code § 350.) City's Attachments 1-8 are submitted solely for the proposition that PGandE is obligated to obey the Stanislaus Commitments. (Demurrer, p. 4) As shown in Section III·B4, p. 12, above, this assertion is irrelevant. Whether or not PGandE was obligated to transfer the power at issue from WAPA to City, the City breached its contract by failing to pay for its full requirements of power.

Similarly, Attachments 9-13 are submitted for the purpose of showing that the contract between City and PGandE has been modified twice in the past. (Demurrer, pp. 6-8). As shown above, these documents do not establish, or even discuss whether PGandE was obligated to modify the contract here. Attachments 14-30 are submitted for the purpose of showing that City purchased its power from WAPA rather than PGandE. (Demurrer, pp. 2, 4, 11.) As shown in Section II B3, p. 7, above, no matter who else supplied the other power, City breached its contract. City does no more than produce evidence proving its breach by offering these documents. Finally, City does not even suggest that Attachment 31 proves any proposition relevant to the demurrer.

Additionally, many of these documents are irrelevant even to the issues for which they are cited and contain extensive unrelated information. Attachment 3, for example, is twelve pages long, has a long discussion of

physical security and emergency planning at Diablo Canyon, but contains not one word about the Stanislaus Commitments. Attachment 4 contains information about "environmental qualifications" at Diablo and other issues not relevant here. Most courts require counsel to state, with "specificity, the exact document or portion of a document...when requesting the court to take judicial notice..." (2 Jefferson, California Evidence Benchbook, §47.2, p. 1757 (1982).) City has made no effort to comply with this requirement. City's material is irrelevant and accordingly should not be judicially noticed.

C. Judicial Notice Cannot Be Taken Of The Truth Of The Matters At Issue Here.

Even if the court could take judicial notice of the documents attached to City's memorandum, it could not take judicial notice of the contents of those documents unless they are orders, findings of fact and conclusions of law, or judgments. Other information is hearsay and cannot be used to establish the truth of the matter asserted through judicial notice. Childs v. State of California, 144 Cal. App. 3d 155, 162-63 (1983) (the "court cannot take judicial notice of self-serving hearsay allegations" of a public official); Ramsden v. Western Union Board, 71 Cal.

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App. 3d 873, 879 (1977); Day v. Sharp, 50 Cal. App. 3d 904, 914 (1975). 14/

Many of City's documents fall under this rule. For example, City asks the court to rule, on a demurrer and as a matter of law, that PGandE was required to transmit the power at issue in this action from WAPA to Healdsburg. (Demurrer, p. 13). It asks the court to take judicial notice of a document where NCPA argues this position. (Attachment 21.) Similarly, defendant asks the court to rule, as a matter of law, that the power at issue did not belong to PGandE. (Demurrer, p. 2). It asks the court to take judicial notice of a document where NCPA makes this assertion. (Attachment 27.) The court cannot take judicial notice of these and other "self-serving hearsay allegations." (Childs v. State, 144 Cal. App. 3d 155, (1983).) City's materials cannot be judicially noticed, and do not support the grant of the demurrer.

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14/ In addition, courts hold that to

> "go beyond notice of the existence of a document to an interpretation of its meaning constitutes improper consideration of evidentiary matters." (Middlebrook Anderson Co. v. Southwest Savings & Loan Ass'n., 18 Cal. App. 3d 1023, 1038 (1971).)

V

CONCLUSION

Breach of contract actions between California parties belong in the California courts. This simple action belongs in this court. City's motion should be denied in its entirety.

Dated: August 20, 1984.

Respectfully submitted,

ROBERT OHLBACH
SHIRLEY A. SANDERSON
STUART K. GARDINER
RANDALL J. LITTENEKER

By Shirley A. Sanderson
SHIRLEY A. SANDERSON
Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

EXHIBIT

EXHIBIT 1

ORIGINAL
FILED
APR 16 1984
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT OHLBACH
HOWARD V. GOLUB
SHIRLEY A. SANDERSON
STUART K. GARDINER
P.O. Box 7442
San Francisco, CA 94120
Telephone: (415) 541-6669

Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

RECEIVED
MAR 16 1984
WILLIAM L. WHITTAKER
CLERK, U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, vs. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. C-83-6189-WHO ~~[PROPOSED]~~ ORDER REMANDING CASE TO SONOMA COUNTY SUPERIOR COURT

The motion of plaintiff Pacific Gas and Electric Company to remand this action to Sonoma County Superior Court pursuant to 28 U.S.C. § 1447(c) was regularly heard on April 13, 1984 before the Honorable William H. Orrick, United States District Judge. The Court having been fully

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apprised in the matter, on proof being made to the satisfaction of the Court and for good cause appearing,

IT IS HEREBY ORDERED that plaintiff's motion to remand be granted. It appears to the Court that the case was improvidently removed and without jurisdiction. ~~and it is further ordered that plaintiff shall recover costs, including attorneys fees in the amount of $2,500.~~ WHD

Dated: 4/13/84

WM H Orrick

THE HONORABLE WILLIAM H. ORRICK,
United States District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY, PLAINTIFF, V. CITY OF HEALDSBURG, ETC., ET AL., DEFENDANTS.	NO. C-83-6189-WHO SAN FRANCISCO, CALIFORNIA APRIL 13, 1984

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM H. ORRICK, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
LAW DEPARTMENT
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET
SAN FRANCISCO, CALIFORNIA 94106

FOR THE DEFENDANTS:
MC DONOUGH, HOLLAND & ALLEN
BY: RICHARD W. NICHOLS, ESQ.
555 CAPITOL MALL, SUITE 950
SACRAMENTO, CALIFORNIA 95814

SPIEGEL & MC DIARMID
BY: ROBERT C. MC DIARMID, ESQ.
WATERGATE OFFICE BUILDING
2600 VIRGINIA AVENUE, N.W.
WASHINGTON, D. C. 20037

COURT REPORTER:
CARL R. PLINE
OFFICIAL COURT REPORTER
POST OFFICE BOX 36052
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

FRIDAY, APRIL 13, 1984 AFTERNOON SESSION

THE CLERK: CASE NO. 83-6189, PACIFIC GAS AND ELECTRIC COMPANY VERSUS THE CITY OF HEALDSBURG.

COUNSEL?

MS. SANDERSON: GOOD AFTERNOON, YOUR HONOR.

SHIRLEY SANDERSON AND STUART GARDINER APPEARING ON BEHALF OF THE MOVING PARTY PACIFIC GAS AND ELECTRIC COMPANY.

MR. NICHOLS: RICHARD W. NICHOLS OF MC DONOUGH, HOLLAND & ALLEN IN SACRAMENTO FOR THE CITY OF HEALDSBURG.

AND I WOULD LIKE TO INTRODUCE TO THE COURT MR. ROBERT C. MC DIARMID OF SPIEGEL & MC DIARMID OF WASHINGTON, D.C.

MR. MC DIARMID EARLIER TODAY HAS PAID HIS MONEY IN THE CLERK'S OFFICE ON THE 18TH FLOOR AND TURNED HIS PAPERS IN. BUT I TAKE IT -- HE HAS NOT YET BEEN SWORN IN, SO I WOULD MOVE HIS ADMISSION PRO HAC VICE FOR THIS HEARING.

THE COURT: ALL RIGHT. I'LL.... I WELCOME YOU, PRO HAC VICE, FOR THIS HEARING --

MR. MC DIARMID: THANK YOU, YOUR HONOR.

THE COURT: -- MR. MC DIARMID; AND CONGRATULATE YOU ON COMING TO SUCH A PLEASANT PLACE AS SAN FRANCISCO.

MR. MC DIARMID: IT'S A LOVELY DAY TODAY.

THE COURT: ALL RIGHT. I'LL HEAR FROM THE PLAINTIFF.

YOU MAY SIT DOWN.

MS. SANDERSON: YOUR HONOR, WE BROUGHT THIS ACTION IN

THE STATE COURT IN THE COUNTY OF SONOMA AS A SIMPLE BREACH OF CONTRACT CAUSE OF ACTION.

THE QUESTION HERE TODAY BEFORE YOUR HONOR IS WHETHER THE CASE PRESENTS A FEDERAL QUESTION SO THAT FEDERAL JURISDICTION IS APPROPRIATE. WE UNDERSTAND THAT DEFENDANT CITY IN ITS OPPOSITION PAPERS HAS ESSENTIALLY CHANGED THE NATURE OF ITS ARGUMENT TO CLAIM THAT THE FEDERAL POWER ACT HAS COMPLETELY PREEMPTED STATE LAW IN THIS AREA SO THAT THE ONLY CAUSE OF ACTION THAT P G AND E CAN STATE IN THIS MATTER IS A FEDERAL CAUSE OF ACTION.

THE COURT: WHAT'S THE PURPOSE OF HAVING THE P G AND E FILE ITS TARIFF WITH THE FEDERAL POWER COMMISSION?

MS. SANDERSON: WELL, YOUR HONOR --

THE COURT: OR IT FILES THE CONTRACT, I GUESS.

MS. SANDERSON: IT FILES A CONTRACT. WE DO NOT BELIEVE THAT IT IS THE SAME AS A TARIFF, BECAUSE A TARIFF IS A GENERAL OFFER TO PROVIDE SERVICES TO ALL ELIGIBLE APPLICANTS. AND WE HAVE INSTEAD HERE A SPECIFIC CONTRACT THAT IS ON FILE WITH THE FEDERAL ENERGY REGULATORY COMMISSION.

THE COURT: WELL, WHAT ARE THE FEDERAL POWER COMMISSION'S DUTIES WITH RESPECT TO THAT CONTRACT, ONCE IT'S BEEN FILED?

MS. SANDERSON: YOUR HONOR --

THE COURT: IN OTHER WORDS, WHY DO THEY --

MS. SANDERSON: WHAT ARE THEY SUPPOSED TO DO?

THE COURT: -- REQUIRE IT?

YES.

MS. SANDERSON: YES.

WELL, THE PARTIES ARE FREE TO SET RATES AND TERMS AND CONDITIONS OF SERVICE BY CONTRACT. WHEN THE CONTRACT IS THEN FILED WITH THE FEDERAL ENERGY REGULATORY COMMISSION, THE COMMISSION'S DUTIES ARE TO DETERMINE WHETHER THE RATES AND TERMS AND CONDITIONS OF SERVICE ARE WITHIN THE ZONE OF REASONABLENESS. AND... THIS IS NOT THE KIND OF PERVASIVE FEDERAL REGULATION THAT WE SEE IN THE INTERSTATE COMMERCE ACT. AND IT IS RATHER DELIMITED --

THE COURT: WELL, DOES IT MAKE A SPECIFIC DETERMINATION OF THAT?

MS. SANDERSON: IT MAKES -- NO, IT DOES NOT MAKE A SPECIFIC DETERMINATION OF THAT, UNLESS THE ISSUE IS RAISED EITHER BY THE COMMISSION ON ITS OWN MOTION, OR BY ONE OF THE PARTIES, OR AN INTERVENOR.

INSTEAD, THE CONTRACT IS PRESENTED FOR FILING; AND, IF THERE IS NO OPPOSITION TO IT, IT IS FILED. AND THE SPECIFIC ORDER IN THIS CASE ACCEPTING THE CONTRACT FOR FILING SAID THAT THE FILING DID NOT CONSTITUTE COMMISSION APPROVAL OF THE CONTRACT, NOR DID IT IMPLY THAT THE COMMISSION WAS APPROVING ANY OF THE CONTRACT OBLIGATIONS SET FORTH IN THE CONTRACT.

THE COURT: DOES THE CALIFORNIA PUBLIC UTILITIES COMMISSION HAVE TO APPROVE THE CONTRACT?

MS. SANDERSON: NO, YOUR HONOR. MANY YEARS IN THE PAST THE CALIFORNIA COMMISSION DID REGULATE CONTRACTS OF THIS KIND, BUT IT NO LONGER DOES. THIS IS WITHIN THE AMBIT OF THE FEDERAL ENERGY REGULATORY --

THE COURT: WELL, WHO -- TAKING THE WORST CASE FOR THE P G AND E, WHO WOULD BE LIKELY TO COME FORWARD, AFTER THE CONTRACT HAS BEEN FILED WITH THE FEDERAL POWER COMMISSION, AND ASSERT THAT IT'S NOT WITHIN THE -- WHATEVER THOSE WORDS OF ART -- WHICH I TAKE IT THEY ARE -- ZONE OF REASONABLENESS?

MS. SANDERSON: WELL, THE OTHER PARTY COULD CERTAINLY FILE A MOTION TO INTERVENE IN THE PROCEEDING AND CLAIM THAT THE -- THAT THE RATES SET FORTH IN THE CONTRACT --

THE COURT: WELL, THE OTHER PARTY WOULD HAVE ALREADY SIGNED THE CONTRACT.

MS. SANDERSON: YES, I KNOW. IT -- IT DOES HAPPEN, YOUR HONOR.

THE COURT: HAVE YOU -- DOES IT HAPPEN?

MS. SANDERSON: YES, IT DOES.

THE COURT: WHEN IS THE LAST TIME IT HAPPENED?

MS. SANDERSON: WELL, THE LAST TIME I'M AWARE OF IS JUST LAST WEEK, IN WHICH WE HAVE AN INTERCONNECTION AGREEMENT WITH THE CITY OF SANTA CLARA, AND A RATE SETTLEMENT. WE UNDERSTAND -- I'M NOT FULLY FAMILIAR WITH THE CIRCUMSTANCES, BUT WE UNDERSTAND THAT THE CITY OF SANTA CLARA FILED A MOTION TO INTERVENE, AND ASKED THE COMMISSION TO SUSPEND THE RATES FOR...

I BELIEVE A ONE-DAY PERIOD.

THE COURT: BUT THIS WAS ANOTHER CONTRACT WITH -- WAS IT WITH --

MS. SANDERSON: THIS IS A DIFFERENT -- THIS IS A DIFFERENT CONTRACT, YOUR HONOR.

THE COURT: YES.

MS. SANDERSON: BUT IT IS THE KIND OF PROCEDURE THAT DOES OCCUR BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION.

THE COURT: WELL, IN THIS CASE COULDN'T THE CITY OF HEALDSBURG, EVEN THOUGH IT SIGNED THE CONTRACT, GO BEFORE THE COMMISSION AND SAY: THIS IS WITHOUT THE ZONE OF REASONABLENESS?

MS. SANDERSON: AT THE TIME THE CONTRACT WAS FILED, OR DURING THE TIME IT WAS EFFECTIVE, YES. THE CITY OF HEALDSBURG COULD HAVE DONE THAT.

BUT THE CONTRACT HAS BEEN TERMINATED. AND SINCE THE FEDERAL ENERGY REGULATORY COMMISSION DOES NOT HAVE THE AUTHORITY TO... SET RATES IN A RETROACTIVE FASHION, OR TO AWARD REPARATIONS, WE FEEL THAT THE COMMISSION NO LONGER HAS JURISDICTION OVER THOSE MATTERS, SIMPLY BECAUSE THE CONTRACT HAS BEEN TERMINATED.

THE COURT: WELL, THE COMMISSION COULDN'T -- DOES THE COMMISSION HAVE POWER TO ENFORCE THE PAYMENT? YOU'RE HERE TO GET YOUR MONEY.

MS. SANDERSON: THAT'S -- THAT'S CURRECT, YOUR HONOR. AND --

THE COURT: NOW, CAN THE COMMISSION -- HAS IT GOT THAT POWER TO COMPEL THE CITY OF HEALDSBURG TO PAY UP?

MS. SANDERSON: WE DO NOT THINK THAT THE COMMISSION HAS THAT POWER. IT DOES NOT HAVE THE POWER TO AWARD DAMAGES, NUMBER ONE. NUMBER TWO, A READING OF THE.... OF SUBCHAPTER 2 OF THE FEDERAL POWER ACT SHOWS THAT IT'S DESIGNED TO REGULATE WHOLESALE SELLERS OF ELECTRICITY IN INTERSTATE COMMERCE, AND NOT TO REGULATE THE OBLIGATIONS OF THE PURCHASER.

AND IN THAT RESPECT THE ACT IS QUITE DIFFERENT FROM THE INTERSTATE COMMERCE ACT, IN WHICH THE STATUTE THERE CREATES AN EXPLICIT OBLIGATION ON THE PART OF THE COMMON CARRIER IN THAT CASE TO ENFORCE ITS TARIFFS AS AGAINST ANY SHIPPER, OR -- OR CUSTOMER. AND IT ALSO EXPLICITLY CREATES AN OBLIGATION ON THE PART OF THE SHIPPER TO PAY THOSE RATES.

AND WE FEEL THAT THAT IS ONE OF THE THINGS THAT DISTINGUISHES THE FEDERAL POWER ACT FROM A MORE PERVASIVE REGULATORY SCHEME LIKE THE INTERSTATE COMMERCE ACT.

THE COURT: WELL, THERE ARE APPARENTLY NO CASES UNDER THE FEDERAL POWER... COMMISSION; AND YOU RELY ON CASES... STEMMING FROM THE NATURAL GAS ACT.

MS. SANDERSON: WELL, WE RELY ON BOTH CASES STEMMING FROM THE NATURAL GAS ACT, AND WE DO RELY ON CERTAIN CASES UNDER THE FEDERAL POWER ACT.

WE BELIEVE THAT THE PAN AMERICAN DECISION, UNDER THE NATURAL GAS ACT, IS A CONTROLLING DECISION ON THIS MATTER.

THE COURT: WELL, THE -- THE DEFENDANTS DISTINGUISH THOSE CASES JUST ON THAT GROUND; THAT IT'S UNDER THE NATURAL GAS ACT AND NOT UNDER THE FEDERAL POWER ACT.

MS. SANDERSON: THE UNITED STATES SUPREME COURT IN THE PERMIAN BASIN AREA RATE CASES, AND IN THE UNITED GAS PIPELINE VERSUS MOBILE CASE, EXPLICITLY SAID THAT THE RELEVANT PROVISIONS OF THE FEDERAL POWER ACT AND THE NATURAL GAS ACT ARE IN ALL RESPECTS -- ALL MATERIAL RESPECTS IDENTICAL; AND THAT THE -- THEY, THEMSELVES, CITE AUTHORITIES UNDER ONE ACT AS BEING RELEVANT TO THE OTHER ACT.

SO I -- I THINK THAT IT'S QUITE CLEAR, YOUR HONOR, THAT THE AUTHORITIES UNDER THE NATURAL GAS ACT, SUCH AS PAN AMERICAN, DO IN FACT APPLY TO THE FEDERAL POWER ACT.

IN ADDITION, THE CITY OF CLEVELAND CASE THAT WE HAVE CITED IN OUR MOVING PAPERS, AND THAT WE ALSO DISCUSS IN OUR REPLY MEMORANDUM, IS A CASE THAT EXPLICITLY FOLLOWS PAN AMERICAN IN THE CONTEXT OF THE FEDERAL POWER ACT, NOT THE NATURAL GAS ACT. AND THAT COURT SAID THAT THE -- THAT PAN AMERICAN WAS ESSENTIALLY IDENTICAL.

SO WE FEEL THAT THE NATURAL GAS ACT CASES DO IN FACT APPLY; AND THAT THERE HAVE BEEN COURT HOLDINGS THAT THE FEDERAL POWER ACT IS TO BE CONSTRUED THE SAME WAY. THE COURTS HAVE DONE SO.

THE COURT: ALL RIGHT.

I'LL HEAR FROM THE DEFENDANTS.

MR. MC DIARMID: THANK YOU, YOUR HONOR.

THE COURT: WHAT MAKES THE NATURAL GAS ACT... SO DIFFERENT FROM THE FEDERAL POWER ACT THAT YOU CAN DISTINGUISH THESE CASES ON IT?

MR. MC DIARMID: THAT'S NOT THE ONLY BASIS ON WHICH WE DISTINGUISH, YOUR HONOR; BUT THE... FACT OF THE MATTER IS THAT THIS WHOLE AREA, BOTH UNDER THE NATURAL -- PARTICULARLY UNDER THE NATURAL GAS ACT; I THINK NOT UNDER THE FEDERAL POWER ACT -- IS A... VERY CONFUSED ONE. YOU CANNOT JUST LOOK AT SEPARATED PIECES AND QUOTATIONS FROM CASES. YOU REALLY HAVE TO PLOW THROUGH THEM ALL. AND IT'S A MESS.

THE PROBLEM -- THE REASON WHY IT'S AS MUCH OF A MESS AS IT IS HAS TO DO WITH HISTORY. BECAUSE... IN 1954, AS YOU WILL RECALL... PROBABLY, THERE -- THERE WAS A SUPREME COURT DECISION WHICH HELD THAT THE THOUSANDS AND THOUSANDS AND THOUSANDS OF CONTRACTS OF NATURAL GAS PRODUCERS WITH PIPELINES WERE JURISDICTIONAL WITH THE OLD FEDERAL POWER COMMISSION.

AND IT'S FROM THAT DECISION, AND THE MESS THAT STEMMED FROM THAT, THAT THE PAN AM CASE, ON WHICH P G AND E RELIES, STEMS.

THE COURT: WELL --

MR. MC DIARMID: NOW --

THE COURT: -- IS THAT THE WAY YOU DISTINGUISH THE PAN AM CASE? IS THAT --

MR. MC DIARMID: NO.

THE COURT: -- ITS FOREFATHERS WERE IN A MESS?

MR. MC DIARMID: NO. WE DISTINGUISH THE PAN AM CASE IN PRECISELY THE SAME WAY THAT THE SUPREME COURT DID A YEAR AGO IN ARKANSAS LOUISIANA AGAINST HALL. THAT THE PAN AM CASE IS A DECISION WHICH... RESULTED FROM THE MESS I WAS REFERRING TO EARLIER; BUT WHAT WAS LEFT AT THAT TIME WAS A CONTRACT, THE COURT SAID IN THE ARKANSAS LOUISIANA CASE, TO PAY BACK AMOUNTS OVER AND ABOVE THOSE WHICH WERE PERMISSIBLE AND LEGAL AS FILED TARIFF AMOUNTS UNDER THE NATURAL GAS ACT.

NOW, THE.... THE COURT AND THE FER -- THE OLD FPC HAD BY THAT TIME DECIDED WHAT WAS PERMISSIBLE AND LEGAL AS A FILED TARIFF UNDER THE NATURAL GAS ACT. AND THE ONLY QUESTION THAT WAS LEFT AT THAT POINT WAS WHETHER OR NOT THE PAN AMERICAN COMPANY COULD OBTAIN BACK THE AMOUNTS IT HAD PAID, AS IT TURNED OUT ILLEGALLY, OVER AND ABOVE THE AMOUNTS FOUND TO BE LEGAL UNDER THE NATURAL GAS ACT.

I COMMENT AS WELL THAT THE.... IT'S RATHER INTERESTING THAT THE DISSENT OF TWO JUSTICES, STEVENS AND REHNQUIST, IN THE ARKANSAS LOUISIANA CASE BASICALLY FOLLOWS THE LINE OF ARGUMENT WHICH IS MADE BY P G AND E TODAY. A RATHER BITTER DECISION ON BOTH SIDES; AND I THINK IT'S WELL WORTH READING.

NOW, THE REAL QUESTION I THINK HERE IS PERHAPS DISTINGUISHABLE. WE THINK THE SUIT IS BASED ON A TARIFF, OR A RATE SCHEDULE.

THE COURT: WELL, HOW DO YOU DIFFERENTIATE BETWEEN

THAT AND A CONTRACT?

MR. MC DIARMID: YOU CAN'T. UNDER THE COMMISSION'S REGULATIONS ANY CONTRACT WHICH IS PERMITTED TO BE INFORCED IS A PART -- MUST BE FILED AND IS PART OF THE RATE SCHEDULE. SO IS EVERYTHING ELSE THE COMMISSION DIRECTS TO BE FILED.

IN THIS CASE THE HEALDSBURG/P G AND E CONTRACT -- AND WE DON'T --

THE COURT: CAN THE COMMISSION ORDER THE PAYMENT OF DAMAGES FOR BREACH OF CONTRACT?

MR. MC DIARMID: THE TYPICAL WAY OF APPROACHING A CASE OF THIS SORT, YOUR HONOR, IS FOR THE UTILITY TO FILE AT THE COMMISSION FOR AN ORDER STATING THAT IT'S OWED MONEY. NOW, THIS IS THE CITY OF CLEVELAND -- THIS IS THE CITY OF CLEVELAND CASE, THE PART WE CITE.

THE COURT: WELL, WILL YOU ANSWER MY QUESTION, PLEASE.

MR. MC DIARMID: YES.

THE COURT: IF YOU KNOW THE ANSWER.

MR. MC DIARMID: YES.

THE COURT: DOES THE FEDERAL POWER COMMISSION HAVE AUTHORITY TO AWARD DAMAGES IN THE EVENT OF A BREACH OF CONTRACT?

MR. MC DIARMID: YES, YOUR HONOR. BUT IT'S A TWO PART STATE -- IT'S A TWO-STAGE PROCESS.

THE -- THE UTILITY FILES AT THE FERC TO SAY: HEALDSBURG OWES ME MONEY. HEALDSBURG, WHICH IS IN THIS CASE, WOULD SAY PRECISELY THE SAME THING WE'RE SAYING HERE: NO, WE

DON'T. UNDER THE RATE SCHEDULE WE DON'T OWE YOU ANY MONEY.

THE COMMISSION WILL DECIDE. EITHER WE DO, OR WE DON'T.

THEN, ORDINARILY -- WHAT ALMOST ALWAYS HAPPENS IN THESE CASES IS THE PARTY FOUND AGAINST WILL PAY.

THE COURT: ALL RIGHT. NOW, SUPPOSE THEY DON'T WANT TO PAY. THAT'S --

MR. MC DIARMID: SUPPOSE THEY DON'T WANT TO PAY --

THE COURT: YES.

MR. MC DIARMID: -- WHAT THEN HAPPENS IS THE COMMISSION.... THIS HAS ONLY HAPPENED, I THINK, IN ONE CASE IN THE LAST TWENTY YEARS -- THE COMMISSION WILL THEN FILE UNDER SECTION 317, OR THE UTILITY WILL FILE UNDER SECTION 317, IN DISTRICT COURT TO MAKE... THE PARTY FOUND AGAINST BY THE FERC PAY. IN COMPLIANCE WITH THE ORDER.

THE COURT: IS IT THE POSITION OF THE DEFENDANT THAT THE FEDERAL POWER ACT PREEMPTS ANY STATE CONTRACTS DEALING WITH ELECTRIC POWER?

MR. MC DIARMID: NOT QUITE. OUR POSITION IS THAT THE COLLECTION OF CONTRACTS AND ORDERS WHICH ARE FILED AS RATE SCHEDULES APPLICABLE TO THIS SERVICE, AS A WHOLE... MUST, AS A MATTER OF FEDERAL LAW, BE THE ONLY GOVERNING CRITERIA AS TO SERVICE AND AMOUNTS DUE. BUT THAT IS THE WHOLE THING.

THE COURT: WHAT DO YOU MEAN "THE WHOLE" -- WHAT IS "THE WHOLE THING?"

I DON'T UNDERSTAND.

MR. MC DIARMID: WELL, YOUR HONOR, YOU ASKED -- YOU ASKED MS. SANDERSON WHETHER OR NOT HEALDSBURG HAD OBJECTED WHEN THE CONTRACT IN QUESTION WAS FILED. NO, WE DIDN'T.

AND ONE OF THE REASONS WHY WE DIDN'T WAS THE COMMISSION HAD... EITHER AT THAT TIME, OR MOMENTARILY THEREAFTER... CERTAINLY IN EFFECT FOR THIS PERIOD, DIRECTED THAT CERTAIN ADDITIONAL COMMITMENTS, OBLIGATIONS OF P G AND E, BE FILED AS THIS -- AS PART OF THIS RATE SCHEDULE.

THE COURT: IN THIS PARTICULAR CONTRACT?

MC. MC DIARMID: WITH THIS PARTICULAR CONTRACT, IN THIS RATE SCHEDULE, YES.

THE COURT: WELL, YOU'RE REFERRING, I TAKE IT, TO THE STANISLAUS COMMITMENTS.

MR. MC DIARMID: I AM.

THE COURT: AND WERE THEY EVEN REFERRED TO IN THE CONTRACT?

MR. MC DIARMID: NO, YOUR HONOR. THE CONTRACT CAME FIRST. THE COMMISSION -- THAT WAS FILED AS PART OF THE RATE SCHEDULE. THE COMMISSION SAID: FILE THIS PART OF THE STANISLAUS COMMITMENTS AS PART OF YOUR RATE SCHEDULE.

HEALDSBURG AT THAT TIME HAD THE OBLIGATION BETWEEN IT AND P G AND E DEFINED BY THE RATE SCHEDULE, WHICH WAS THE CONTRACT.... THERE'S A QUESTION AS TO WHETHER IT'S THIS ONE, INCIDENTALLY, OR A SUPERSEDING ONE, OR -- AND... THOSE PORTIONS

OF THE STANISLAUS COMMITMENTS WHICH THE COMMISSION HAD DIRECTED P G AND E TO FILE. THAT'S THE RATE SCHEDULE. THAT'S THE OBLIGATION.

THE COURT: SO YOU'RE TELLING ME... IF I UNDERSTAND IT CORRECTLY, THAT THE P G AND E CAN'T MAKE A CONTRACT WITH ANY MUNICIPALITY... WITHOUT FILING IT AND HAVING IT ENFORCED BY THE FEDERAL POWER COMMISSION. IN OTHER WORDS, THE FEDERAL POWER COMMISSION PREEMPTS THE FIELD.

MR. MC DIARMID: THE STATUTE SAYS YOU MAY NOT MAKE EFFECTIVE ANY -- YOU MAY NOT EFFECTUATE ANY CONTRACT WHICH IS NOT FILED WITH THE FEDERAL POWER COMMISSION -- OR IT'S NOW THE FEDERAL ENERGY REGULATORY COMMISSION. I TEND TO THINK OF IT AS THE FEDERAL POWER COMMISSION ALSO. WHEN I SAY ONE, I MEAN... INTERCHANGEABLY.

YES. THAT'S CORRECT. YOU MAY NOT, P G AND E MAY NOT, MAKE EFFECTIVE ANY CONTRACT WHICH IS NOT FILED WITH THE FERC.

NOW, THERE'S A QUALIFICATION TO THAT, WHICH IS QUITE TYPICALLY.... WHERE THERE IS NO DISAGREEMENT BETWEEN THE PARTIES, FREQUENTLY THINGS ARE FILED TO BE EFFECTIVE RETROACTIVELY. THAT'S --

THE COURT: AND -- AND IF IT'S.... IF ANOTHER CITY, OR THE CITY OF HEALDSBURG, SAYS: WELL, WE'RE -- WE MADE THE CONTRACT, BUT WE'RE NOT GOING TO PAY YOU FOR PART OF IT, THE ONLY RECOURSE OF THE P G AND E IS NOT IN THE CALIFORNIA COURTS, BUT IS BEFORE THE FEDERAL POWER COMMISSION.

DOES THAT FOLLOW FROM WHAT YOU'VE SAID?

MR. MC DIARMID: YOUR HONOR, IT PROBABLY DOES. BUT THE REASON I SAY "PROBABLY"... IS THAT THERE IS A PLETHORA OF CASES IN THIS GENERAL AREA. I THINK THAT'S WHAT THE SUPREME COURT WOULD ULTIMATELY HOLD. AND YOU MAY LOOK AT THE ARKANSAS LOUISIANA CASE FOR THAT, WHICH I THINK SUPPORTS IT.

THE COURT: WELL, THAT'S --

MR. MC DIARMID: THAT'S -- THAT'S NOT -- THAT'S NOT SOMETHING WHICH IS UNIFORMLY SO.

HOWEVER, WHAT IS -- WHAT I CAN SAY IS THERE IS NO CASE UNDER THE FEDERAL POWER ACT, WITH THE EXCEPTION OF... THE STATE OF OHIO... CLEVELAND CASE, CITED BY P G AND E -- WHICH I THINK HAS BEEN OVERTAKEN BY THE ARKANSAS LOUISIANA CASE -- WHICH SUGGESTS, THAT EVEN SUGGESTS, THAT A STATE COURT MAY INTERPRET A RATE SCHEDULE WHERE THERE IS A QUESTION AS TO WHAT THAT RATE SCHEDULE MEANS --

THE COURT: WELL, THIS IS --

MR. MC DIARMID: -- AND ENFORCE IT.

THE COURT: -- NOTHING.... THE P G AND E'S CASE HERE IS NOT -- AS I UNDERSTAND IT FROM THE PAPERS, IS NOT WHETHER OR NOT THE RATE IS UNJUST OR UNREASONABLE.

MR. MC DIARMID: NO.

THE COURT: ITS SUIT IS TO ENFORCE A SALES CONTRACT --

MR. MC DIARMID: THAT'S CORRECT, YOUR HONOR.

AND THE QUESTION --

THE COURT: -- AND THE PAYMENT OF THAT RATE. AND IT GOES TO A CALIFORNIA COURT. AND YOU COME IN AND SAY: WELL, WE'RE SORRY; WE'VE.... FEDERAL -- FERC, WHATEVER THE ACRONYM IS --

MR. MC DIARMID: RIGHT.

THE COURT: -- HAS PREEMPTED THE FIELD.

THAT'S YOUR ARGUMENT, IS IT?

MR. MC DIARMID: WE'RE NOT PREPARED TO SAY, YOUR HONOR, THAT THERE IS NO BASIS FOR HOLDING THAT ANY COURT HAS JURISDICTION. HOWEVER, IF THERE IS JURISDICTION ON ANY COURT, EITHER -- EITHER AS A MATTER OF A FEDERAL QUESTION, WHICH COULD OF COURSE BE BROUGHT IN A STATE COURT AND BE REMOVED; OR ON THE BASIS OF 28 U.S.C. 1337, DEALING WITH ENFORCING TARIFFS REQUIRED TO BE FILED, WHICH IS ALSO A FEDERAL QUESTION AND CAN BE REMOVED; AND IN EITHER EVENT CAN BE REMOVED TO THIS COURT. WE ARE NOT SAYING THAT THIS COURT DOES NOT HAVE THE AUTHORITY TO DETERMINE WHETHER... UNDER THE RATE SCHEDULE HEALDSBURG OWES MONEY TO P G AND E.

WHAT WE ARE SAYING IS THAT THAT.... THAT SUIT IS ON THE BASIS OF A RATE SCHEDULE WHICH MUST PROVIDE A FEDERAL QUESTION.

NOW, P G AND E'S ARGUMENT IS, AS I UNDERSTAND IT, THAT THERE IS A COMPLETELY SEPARATE AND DISTINCT STATE CAUSE OF ACTION --

THE COURT: YES.

MR. MC DIARMID: -- WHICH HAS --

THE COURT: WELL, THEY FOLLOWED JUSTICE FRANKFURTER'S OPINION IN THE PAN AM CASE.

MR. MC DIARMID: WELL --

THE COURT: AND YOU RATHER CAVALIERLY DUST THAT ASIDE BY SAYING THAT CAME FROM A BIG MESS.

MR. MC DIARMID: NO, YOUR --

THE COURT: WHICH I DON'T KNOW, ONE WAY OR ANOTHER. BUT THAT'S NOT A VERY PERSUASIVE LEGAL ARGUMENT.

MR. MC DIARMID: YOUR HONOR, THE PAN AM CASE -- I BEG YOUR PARDON; I WASN'T -- I WASN'T TRYING TO MAKE THAT LEGAL ARGUMENT. I WAS TRYING TO LAY A LITTLE BIT OF THE BACKGROUND OF WHERE THAT CAME FROM.

THE PAN AM CASE HAS BEEN, WE THINK, CLARIFIED, IF THERE WAS ANY QUESTION ABOUT IT, BY THE ARKANSAS LOUISIANA CASE.

THE COURT: HOW ABOUT THE PERMIAN BASIN CASE?

MR. MC DIARMID: NO, YOUR HONOR. THE PERMIAN BASIN CASE HAS NOTHING TO DO WITH THIS. THE PERMIAN BASIN CASE IS A QUESTION AS TO WHETHER THE COMMISSION HAD THE AUTHORITY TO SET AN AREA-WIDE RATE FOR NATURAL GAS. AND THEY -- I SUGGEST, YOUR HONOR, THAT IF YOU READ THE ENTIRE CASE -- WHICH... I HAVE DONE, BUT WHICH IS OVER A HUNDRED PAGES -- YOU WILL NOT FIND IT TO BE DISPOSITIVE AT ALL.

THE COURT: BUT YOU WILL FIND, HOWEVER, THAT THEY HELD THAT THE NATURAL GAS ACT AND THE POWER ACT SHOULD HAVE BEEN

INTERPRETED IN PARI MATERIA.

MR. MC DIARMID: YOUR HONOR, THERE ARE ALL SORTS OF CASES WHICH SAY THAT THE NATURAL GAS ACT AND -- OR CERTAIN PORTIONS OF THE NATURAL GAS ACT AND OF THE... FEDERAL POWER ACT SHOULD BE DETERMINED IN PARI MATERIA.

THE COURT: THAT'S RIGHT. AND SOME OF THEM ARE RIGHT HERE --

MR. MC DIARMID: SURE.

THE COURT: -- THAT ARE BEING RELIED ON.

MR. MC DIARMID: AND THERE ARE OTHER CASES THAT STATE THAT THE FEDERAL POWER ACT SHOULD BE DETERMINED -- SHOULD BE... DETERMINED IN LIGHT OF THE HISTORY WHICH SHOWS THAT THEY WERE FOLLOWING THE ICC ACT.

THE PROBLEM I THINK IS THIS -- AND LET ME GIVE YOU A HYPOTHESIS. IF P G AND E IS RIGHT THAT THEY CAN SEPARATELY PICK AND CHOOSE AMONG THE CONTRACTS WHICH IN TOTO DEFINE THE RELATIONSHIP BETWEEN P G AND E AND HEALDSBURG, THEN IF THEY HAD A CONTRACT WHICH HAD A PROVISION IN IT THAT SAID THAT HEALDSBURG WOULD PAY A THOUSAND DOLLARS A DAY FOR SOME EXTRANEOUS LOSSES SOMEWHERE, AND IF THE FERC HAD SAID THAT: YOU MAY NOT ENFORCE THAT PROVISION UNTIL YOU COME BACK TO THE FERC, THAT THEY COULD JUST GO AHEAD, TRUNDLE INTO STATE COURT, AND MAKE -- AND BRING THAT SUIT.

AND THE FACT OF THE MATTER IS, AS WE VIEW IT... THAT EVERYTHING IN THAT RATE SCHEDULE, EVERYTHING WHICH IS FILED IN

THAT RATE SCHEDULE TO DEFINE THE RELATIONSHIP BETWEEN P G AND E AND HEALDSBURG, IS PART OF ONE PACKAGE. IT IS A FEDERAL PACKAGE.

NOW, THE FEDERAL PACKAGE -- I'M NOT GOING TO SAY THAT THE FEDERAL PACKAGE CAN'T PERHAPS BE ENFORCED IN A STATE COURT. I DON'T THINK -- THERE IS NO CASE THAT DOES THAT, WITHOUT A REFERENCE -- AND I'M NOT SURE THERE'S ANY CASE THAT DOES THAT AT ALL. I.... WITH A POSSIBLE EXCEPTION OF THE CLEVELAND CASE. THE OHIO STATE CASE. WHICH, AS I EXPLAINED BEFORE, I THINK HAS BEEN SUPERSEDED BY THE ARKANSAS LOUISIANA CASE.

BUT... EVEN IF IT CAN BE BROUGHT IN STATE COURT, IT CAN BE REMOVED HERE. BECAUSE THAT TOTAL DEFINITION OF RIGHTS AND REMEDIES IS A MATTER OF FEDERAL LAW.

THE COURT: I DON'T UNDERSTAND THAT.

DO YOU WANT.... THERE HAS TO BE A QUESTION ARISING UNDER THE CONSTITUTION, OR A FEDERAL QUESTION, TO GET HERE.

MR. MC DIARMID: THAT'S CORRECT.

THE COURT: AND WHAT IS IT?

MR. MC DIARMID: THE ENFORCEMENT OF A... RATE SCHEDULE WHICH ONLY HAS EFFECTIVENESS BY STATUTE, TO THE EXTENT THAT IT IS FILED AND ENFORCEABLE UNDER THE FERC -- BY THE FERC, IS A FEDERAL QUESTION.

THE COURT: WELL, ALL RIGHT.

I'LL HEAR THE OTHER SIDE AGAIN.

MS. SANDERSON: THANK YOU, YOUR HONOR.

THE COURT: NOW, I'M MOST INTERESTED IN COUNSEL'S STATEMENT THAT THE FEDERAL POWER COMMISSION HAS PREEMPTED THE FIELD; AND THAT IT HAS THE AUTHORITY TO DO JUST WHAT YOU SAY IT CAN'T DO; NAMELY, TO ENFORCE A STATE CONTRACT AND ORDER DAMAGES PAID.

MS. SANDERSON: OKAY, YOUR HONOR. I -- I HAVE A NUMBER OF OTHER COMMENTS ABOUT COUNSEL'S ARGUMENT; BUT TO ADDRESS THE QUESTION THAT'S ON YOUR HONOR'S MIND --

THE COURT: YES.

MS. SANDERSON: -- I THINK IT'S CLEAR FROM LOOKING AT THE TERMS OF THE FEDERAL POWER ACT THAT IT DOES NOT CREATE ANY CAUSES OF ACTION IN FAVOR OF A UTILITY SUCH AS P G AND E IN A CASE LIKE THIS TO ENFORCE... ITS CONTRACT RIGHTS TO PAYMENT.

IN THE FIRST PLACE, THE -- SUBCHAPTER 2 OF THE FEDERAL POWER ACT ONLY PURPORTS TO REGULATE THE SELLER; IT DOESN'T CREATE ANY EXPLICIT OBLIGATION ON THE PART OF THE PURCHASER TO PAY.

SECONDLY, THERE'S THE GAINESVILLE CASE, THE FLORIDA CASE, IN WHICH COUNSEL'S LAW FIRM REPRESENTED SOME CITIES, IN WHICH THE COURT THERE HELD THAT THE FEDERAL POWER ACT DOES NOT CREATE ANY PRIVATE RIGHTS OF ACTION... IMPLICITLY. AND HERE THERE ARE NO EXPLICIT PRIVATE RIGHTS OF ACTION CREATED BY THE ACT EITHER.

SO THERE IS AT LEAST ONE COURT HOLDING THAT THERE ARE NO PRIVATE RIGHTS OF ACTION UNDER THE FEDERAL POWER ACT AND

UNDER THE NATURAL GAS ACT. THAT'S THE GAINESVILLE CASE. AND THERE ARE CASES, SUCH AS THE PENNZOIL CASE, CITED IN OUR REPLY MEMORANDUM, WHICH INDICATE THAT UNDER THE NATURAL GAS ACT THERE IS SIMILIARLY NO PRIVATE RIGHT OF ACTION.

SO WE THINK THAT.... THAT THE ASSERTION THAT P G AND E COULD PROCEED UNDER THE FEDERAL POWER ACT, OR BEFORE THE FERC, IS -- IS SIMPLY INCORRECT.

THE COURT: COUNSEL SAYS THAT THE ARKANSAS CASE OVERTURNED, AS I UNDERSTOOD HIM TO SAY, THE CLEVELAND CASE.

MS. SANDERSON: YES. WE DISAGREE WITH THAT CONTENTION, YOUR HONOR.

THE ARKANSAS LOUISIANA CASE WAS A CASE IN WHICH A... PRODUCER BROUGHT AN ACTION IN STATE COURT IN ORDER TO ESSENTIALLY TRY TO RAISE THE RATES, COMPARED TO WHAT WAS ON FILE WITH THE FEDERAL ENERGY REGULATORY COMMISSION. WE'RE NOT SEEKING TO RAISE RATES HERE. WE DON'T THINK THAT THAT CASE APPLIES TO THIS SITUATION.

THAT CASE ALSO DID NOT TURN ON A QUESTION OF FEDERAL JURISDICTION. IT WAS NOT A REMAND CASE. AND REALLY DIDN'T APPLY TO THE KIND OF SITUATION AND THE KIND OF ISSUE THAT WE HAVE BEFORE THIS COURT.

FINALLY, IN THAT CASE THERE IS A STATEMENT BY THE COURT THAT THE FERC HAD EXPLICITLY DECLINED TO DECIDE A QUESTION OF STATE LAW; NAMELY, WHETHER THE FAVORED NATIONS CLAUSE IN THE CONTRACT HAD BEEN TRIGGERED. SO I -- I BELIEVE THAT THAT CASE

IS JUST TOTALLY INAPPLICABLE TO THE ISSUE BEFORE THIS COURT.

I THINK I HAVE TO MENTION SOMETHING ABOUT THE CLEVELAND CASE THAT'S RELIED UPON BY THE CITY. THAT CASE CAME UP UNDER PECULIAR CIRCUMSTANCES, AND IT IS ONE OF THE CASES IN WHICH THE FEDERAL POWER COMMISSION, UNDER SECTION 202(B) OF THE FEDERAL POWER ACT, ORDERED THE UTILITY TO CONSTRUCT AN INTERCONNECTION WITH THE CITY IN THAT CASE. AND UNDER 202(B) THE COMMISSION MAY ORDER SUCH AN INTERCONNECTION AND SET THE TERMS AND CONDITIONS UNDER WHICH THE INTERCONNECTION WILL TAKE PLACE.

AND THAT IS EXACTLY WHAT THE COMMISSION DID IN THAT INSTANCE. IT IS NOT A CASE IN WHICH... THERE IS A VOLUNTARY CONTRACT ENTERED BY THE PARTIES WHICH IS THEN FILED WITH THE COMMISSION. IT IS, INSTEAD, ONE OF THESE INSTANCES WHERE A PLAINTIFF GOES IN TO THE COMMISSION TO REQUEST AN INTERCONNECTION, AND THE COMMISSION ITSELF WILL THEN SET THE TERMS AND CONDITIONS UNDER WHICH THE INTERCONNECTION CAN TAKE PLACE.

AND IN THAT CASE THE COMMISSION EXPLICITLY DETERMINED, AS IT CAN UNDER THAT STATUTE, WHAT PAYMENT WOULD BE MADE; AND EXPLICITLY ENTERED AN ORDER RESPECTING PAYMENT. THAT'S DISTINGUISHABLE FROM THE CASE BEFORE THIS COURT.. BECAUSE WHEN THERE IS AN EXPLICIT ORDER OF THE COMMISSION REGARDING PAYMENT, THEN THE FEDERAL COURTS DO HAVE JURISDICTION.

BUT IN THE ORDINARY POWER SALES CONTRACT CASE, SUCH AS

WE HAVE HERE, THERE IS NO SUCH COMMISSION ORDER. AND I THINK THAT IS WHAT DISTINGUISHES THE CLEVELAND CASE.

THE COURT: ALL RIGHT. THE MATTER IS SUBMITTED.

YOU CAN SIT DOWN NOW.

AND I'M GOING TO RULE. I'VE LISTENED CLOSELY TO THE ARGUMENT, AND I'VE READ THE BRIEFS CAREFULLY. AND I AM UNHAPPY TO THE EXTENT THAT THERE ISN'T WHAT WE WOULD CALL A HORSE CASE HERE, ONE INVOLVING THE FEDERAL POWER ACT. BUT THE NATURAL GAS ACT HAS BEEN INTERPRETED AS BEING IN PARI MATERIA WITH THE FEDERAL POWER ACT. AND FOR THE FOLLOWING REASONS I REMAND THE ACTION TO THE STATE COURT.

IT APPEARS TO ME THAT THIS COMPLAINT STATES A SINGLE CAUSE OF ACTION FOR A BREACH OF CONTRACT. THERE'S NO DIVERSITY, NOR DOES THE COMPLAINT RAISE, ON ITS FACE CERTAINLY, ANY FEDERAL QUESTION. AND IT'S FOR THOSE REASONS THAT I HOLD THIS COURT DOESN'T HAVE JURISDICTION.

NOW, THE CITY OF HEALDSBURG ASSERTS THAT THE JURISDICTION EXISTS ON THREE SEPARATE THEORIES. FIRST, THAT THE CONTRACT IS REGULATED AS A TARIFF UNDER THE FEDERAL POWER ACT; SECOND, THAT THE P G AND E ATTEMPTED TO DISGUISE ITS FEDERAL CLAIM BY ARTFULLY PLEADING IT AS A STATE LAW CLAIM; AND, THIRD, EVEN IF THE COMPLAINT STATES A CLAIM FOR BREACH OF CONTRACT, FEDERAL JURISDICTON LIES IF PLAINTIFF'S RIGHT TO RELIEF UNDER THE STATE LAW REQUIRES RESOLUTION OF SUBSTANTITAL QUESTIONS OF FEDERAL LAW.

NONE OF THOSE ARGUMENTS ARE VALID SO FAR AS I CAN SEE.

IT IS TRUE AND OBVIOUS THAT THE CONTRACT BETWEEN THE CITY OF HEALDSBURG AND THE P G AND E MUST BE FILED WITH THE FEDERAL POWER COMMISSION.. BUT THAT HAS, AS NEAR AS I CAN SEE FROM THE CASES TO WHICH I'VE BEEN REFERRED, LITTLE OR NO APPLICATION TO THIS CASE.

THE MAIN REASON BEING THAT THE P G AND E'S CLAIM DOES NOT INVOLVE ANY CHARGES THAT THE RATES ARE UNJUST OR UNREASONABLE. THE P G AND E'S ACTION IS FOR THE ENFORCEMENT OF A SALES CONTRACT BY PAYMENT OF THE RATE SET FORTH IN THE CONTRACT. AND THERE'S NOTHING IN THE ACT THAT ESTABLISHES OR DENIES A FEDERAL CAUSE OF ACTION FOR THE BREACH OF A POWER SALE CONTRACT.

AS I EARLIER QUOTED JUSTICE FRANKFURTER FROM WHAT... MIGHT WELL BE A SEMINAL CASE IN THE AREA, HE SAID, AND I QUOTE IT: WE ARE NOT CALLED ON TO DECIDE THE EXTENT TO WHICH THE NGA REINFORCES OR ABROGATES THE PRIVATE CONTRACT RIGHTS HERE IN CONTROVERSY. THE FACT THAT CITIES SERVICE SUES IN CONTRACT OR QUASI CONTRACT, AND NOT THE ULTIMATE VALIDITY OF ITS ARGUMENTS, IS DECISIVE.

AND ALTHOUGH COUNSEL WARNS THE COURT TO BEWARE; AND HE'S READ ALL THE CASES DECIDED SINCE THEN -- AND I HAVEN'T HAD TIME TO DO THAT -- I THINK THAT THE PRINCIPLE IN THAT CASE IS QUITE OBVIOUS HERE.. BECAUSE THE P G AND E HAS PLEADED A STATE LAW CONTRACT.

THE COMPARISON WITH THE INTERSTATE COMMERCE ACT I DON'T THINK IS APROPOS. IN CONSTRUING THE NATURAL GAS ACT, THE SUPREME COURT HELD, WHEN IT WAS COMPARED TO THE INTERSTATE COMMERCE ACT, THAT: WE SHOULD BEAR IN MIND THAT IT EVINCES NO PURPOSE TO ABROGATE PRIVATE CONTRACT RATES AS SUCH. AND, TO THE CONTRARY, BY REQUIRING CONTRACTS TO BE FILED WITH THE COMMISSION, THE ACT EXPRESSLY RECOGNIZES THAT RATES TO PARTICULAR CUSTOMERS MAY BE SET BY INDIVIDUAL CONTRACTS. AND IN THIS RESPECT, THE ACT IS IN MARKED CONTRAST TO THE INTERSTATE COMMERCE ACT, WHICH IN EFFECT PRECLUDES PRIVATE RATE AGREEMENTS BY ITS REQUIREMENT THAT ALL RATES TO CUSTOMERS BE UNIFORM.

I DON'T THINK APPLYING THE ARTFUL PLEADING DEFENSE IS APROPOS HERE, ALTHOUGH COUNSEL FOR THE DEFENDANT DOES STATE THAT HE THINKS THE FEDERAL POWER COMMISSION HAS PREEMPTED THE FIELD. AS I SAY, THE CASES -- I'M NOT PERSUADED OF THAT. AND UNLESS THAT IS THE FACT, THE ARTFUL PLEADING ARGUMENT, OF COURSE, CAN'T BE -- ISN'T USED.

SO, IN SUMMARY, I CONCLUDE THAT THE CITY HAS NOT ESTABLISHED THAT THE COMPLAINT STATES A CLAIM THAT ARISES UNDER THE CONSTITUTION OR LAWS OF THE FEDERAL GOVERNMENT. AND THE... REMOVING DEFENDANT, OF COURSE, HAS THE BURDEN OF PROVING FEDERAL JURISDICTION -- WHICH I DON'T THINK IT HAS -- AND THE REASON THAT IT DOES HAVE IS BECAUSE FEDERAL COURTS ARE COURTS OF LIMITED JURISDICTION, AND BECAUSE OF PRINCIPLES OF FEDERAL-STATE COMITY.

SO I ORDER THE CASE REMANDED. I DENY THE PLAINTIFF'S MOTION FOR ATTORNEYS' FEES.

AND YOU PREPARE THE ORDER.

MS. SANDERSON: THANK YOU, YOUR HONOR.

MR. GARDINER: THANK YOU, YOUR HONOR.

(WHEREUPON THESE PROCEEDINGS WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, WE, THE UNDERSIGNED OFFICIAL REPORTERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 25-A INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY, OUR, SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER TO THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED TO TRANSCRIPTION TO THE BEST OF MY, OUR, ABILITY.

Carl R Pline

CARL R. PLINE

EXHIBIT 3

ROBERT OHLBACH
HOWARD V. GOLUB
SHIRLEY A. SANDERSON
STUART K. GARDINER
P.O. Box 7442
San Francisco, CA 94120
Telephone: (415) 541-6669

Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, vs. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. C-83-6189-WHO REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO REMAND Hearing Date: April 13, 1984 Hearing Time: 1:30 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Table of Authorities (continued)

Table of Authorities (continued)

I

INTRODUCTION

Originally City stated in its Petition for Removal at p. 5 that PGandE could have brought its breach of contract action under the Federal Power Act, (FPA) 16 USC § 791 et seq. 1/ City's new theory is that PGandE's only cause of action is a federal one.

> PGandE has no right to maintain suit based on its contract rather than the tariff. City's Opposition, p. 14, lines 3 and 4.

The reason for the switch is obvious. PGandE's motion at p. 18 established that the mere fact that PGandE may have an unpleaded federal claim will not prevent remand. Salveson v. Western States Bankcard Association 525 F.Supp. 566, 571 (N.D. Cal. 1981). Now City tries to convince the court that its hoped for defenses should be part of PGandE's complaint.

City's motive in opposing remand is clear -- it claims on the one hand that PGandE must bring its suit in federal court to enforce a "tariff" (City's Opposition p. 14, l. 10-11), while it simultaneously asks the court to dismiss PGandE's complaint for failure to state a cause of action (City's Motion to Dismiss). The federal courts in this circuit have refused to

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1/ The Federal Power Act (FPA) and the Natural Gas Act (NGA) 15 U.S.C. § 717 et. seq. are in all material respects substantially identical and have been cited interchangeably. See, PGandE's motion, p. 6, fn. 1.

construe valid state claims as arising under federal law simply in order to dismiss them because federal law does not provide plaintiff with a cause of action. In re Sugar Antitrust Litigation, 588 F.2d 1270 (9th Cir. 1978), cert. den. sub nom California & Hawaiian Sugar v. California 441 US 932, 99 S.Ct. 2052, 60 L.Ed.2d 660 (1979).

Furthermore, City fails to cite even a single case holding that PGandE cannot sue a wholesale purchaser in state court to recover for services rendered, and fails to distinguish Pan American Petroleum v. Superior Court of Delaware, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961) which is directly on point in every material way. City's arguments opposing remand are dealt with below. However, since City's strategy appears to be to confuse 2/ rather than to clarify the issues, we will briefly recap the law on removal here.

II

THE LAW REGARDING FEDERAL QUESTION JURISDICTION ON MOTION TO REMAND.

1) In the absence of diversity the propriety of removal depends upon whether the case "arises under" the

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2/ City's claim that the contract has been amended is correct (City's Opposition, p. 2, fn. 2 and p. 6, l. 23-26) but the only amendments of which we are aware relate to other transactions, do not diminish City's obligation to pay for services provided by PGandE, and are irrelevant to PGandE's claim for payment.

Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. A case arises under federal law if

> a right or immunity created by the Constitution or laws of the United States [must be] [is] an element, and an essential one, of the plaintiff's cause of action. ... The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Gully v. First National Bank 299 U.S. 109, 112, 113; 57 S.Ct. 96, 81 L.Ed. 70 (1936).

2) Plaintiff's allegations on the face of the well-pleaded complaint determine whether the case is removable. Great Northern Railway v. Alexander 246 U.S. 276, 282, 38 S.Ct. 237, 62 L.Ed. 713 (1918).

3) Where plaintiff's claim involves both federal and state grounds, plaintiff is free to ignore the federal ground and pitch his claim on the state ground. 1a Moore's Federal Practice ¶ 0.160, at 185 (2d. edition 1979); Salveson v. Western States Bankcard Association 525 F.Supp. 566, 571 (N.D. Cal. 1981).

4) A federal defense or counterclaim will not provide federal question jurisdiction. Pan American Petroleum v. Superior Court of Delaware, 366 U.S. 656, 633.

5) Federal preemption is ordinarily a defense. Guinasso v. Pacific First Federal Savings and Loan Association 656 F.2d 1364, 1366 (9th Cir. 1981) cert. den. 455 US 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982) See quote at p. 14. Usually federal preemption is the same as any other federal defense or

counterclaim - it will not support removal. "[W]hen the claim presents a prima-facie basis for relief entirely under state law, the preemption defense does not support federal jurisdiction." Id. at 1367.

6) Preemption may support removal only when "federal law not only displaces state law but also confers a federal remedy on the plaintiffs or compels them to rely, explicitly or implicitly, on federal propositions." Id. at 1367. In such a situation, the plaintiff may not fraudulently conceal the fact that his only claim is federal by resorting to "artful pleading" of a state claim. Salveson v. Western States Bankcard Association 525 F.Supp. 566, 572 (N.D. Cal. 1981). Thus, the artful pleading doctrine relied on by City at pp. 3-5 of its Opposition applies only to situations in which federal law has completely preempted any possible state law claim. See, In re Sugar Antitrust Litigation 588 F.2d 1270, fn. 5 at p. 1272 (9th Cir. 1978).

III

CITY'S ARGUMENT

City apparently 3/ contends that PGandE's breach of contract action is completely preempted by the FPA and thus it is impossible for PGandE ever to plead a state cause of action for

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3/ City avoids clearly stating its contention, perhaps because of the difficulty of supporting it. However, any lesser assertions fail to provide a basis for denying remand. See ¶¶ 5 and 6 of Section II.

City's breach of contract. City's opposition pp. 1-9. City's contention is plainly incorrect as will be demonstrated below.

IV

THE REGULATORY SCHEME UNDER THE FPA CONTEMPLATES VOLUNTARY INDIVIDUAL CONTRACTS; IT IS NOT A PERVASIVE SCHEME OF FEDERAL REGULATION.

City's Opposition mischaracterizes the PGandE-Healdsburg contract as a "tariff" and suggests that regulation of interstate wholesale power sales is identical to regulation of common carriers in which tariffs of general applicability are filed with the appropriate federal regulatory agency. City's opposition, pp. 7-8. This is not true and the record should be set straight immediately.

In describing the NGA, the United States Supreme Court has said

> The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity. Permian Basin Area Rate Cases 390 U.S. 747, 822, 88 S.Ct. 1344 20 L.Ed.2d 312 (1968). reh den. sub nom Bass v. Federal Power Commission 392 U.S. 917, 88 S.Ct. 2050, 20 L.Ed.2d 1379 (1968).

FERC has no authority to impose rates.

> . . .the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates. The initial rate-making and rate-changing powers of

> natural gas companies remain undefined and unaffected by the Act. United Gas Company v. Mobile Gas Corp. 350 U.S. 332, 343 76 S.Ct. 373, 100 L.Ed. 373 (1956). (Emphasis in original)

By statute, FERC's regulatory authority over a contract within its jurisdiction is confined to a determination of the justness and reasonableness of the rates and charges. FPA § 205, 206; 16 U.S.C. § 824d, 824e.

> The basic power of the Commission is that given it [by § 5(a) [NGA] to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'. This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. United Gas Co. v. Mobile Gas Corp. 350 U.S. 332, 341.

The Court has contrasted regulation under the Interstate Commerce Act (ICA) 49 U.S.C. § 1 et. seq. with regulation under the FPA and NGA and has emphasized the importance of private contracts under the FPA and NGA. 4/

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act

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4/ City claims that the FPA is modelled on the ICA. City's opposition p. 8, l.11-15. The case on which City relies held that under the FPA and the ICA, the regulatory agency has exclusive jurisdiction in determining the reasonableness of rates. The case did not hold that the regulatory schemes of the two Acts were equally pervasive.

> expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. . . . The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. [i.e. tariffs] On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act . . . the Natural Gas Act permits the relations between the parties to be established initially by contract, . . . United Gas Co. v. Mobile Gas Corp. 350 U.S. 332, 338-339. (emphasis added)

Thus, we see that the FPA and the NGA, in contrast to federal regulation of trucks, railroads and ships were designed to exert federal control only in a limited area. The FPA does not purport to displace the right of parties to contract under state contract law.

V

THE FPA DOES NOT PREEMPT STATE CONTRACT LAW.

City's basic position is that:

> PG&E has no right to maintain suit based on its contract rather than the tariff. City's opposition, p. 14, lines 3 and 4.

City claims that PGandE has stated a federal question on the face of the complaint. City's opposition, pp. 2 and 3. Since the

complaint does not mention the FPA, City apparently bases this statement on its preemption theory. City accuses PGandE of "artful pleading" to conceal the federal nature of the complaint. 5/ City's opposition, pp. 3-7. Citing irrelevant common carrier cases as authority, City asserts that the PGandE-Healdsburg contract is a "tariff" merely because it is filed with a federal agency and that federal jurisdiction is available for recovery of tariff charges. All of these assertions rest upon the notion of complete FPA preemption of state contract law so that any contract claim necessarily arises under the FPA. City's theory implies the existence of a valid federal cause of action before state law will be displaced. See Section VI.

City's theory is not supported by the cases. City's precise argument was raised and rejected in the controlling case of Pan American Petroleum v. Superior Court of Delaware, 366 U.S. 656. The facts and holding of Pan American were discussed in PGandE's first memorandum at pp. 6-10.

The holding of Pan American is wholly inconsistent with City's preemption theory. If the NGA had completely preempted state law breach of contract actions as contended by the Pan American defendants and by City here, the Court would have been

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5/ ". . . PGandE here composed its complaint in an effort to avoid the appearance of a federal claim or cause of action." City's opposition, p. 4, line 16-18.

required to hold that the federal courts had jurisdiction over the case.

City tries to distinguish Pan American by its incorrect assertion that the refund contracts there were not filed with the FPC. In fact, defendant Texaco had filed the refund contract while defendant Pan American had not. Nevertheless, in both cases the holding was the same -- the state courts had jurisdiction. (The Texaco and Pan American case were both resolved by the Court's decision in Pan American.)

The same result was reached in Landon v. Northern Natural Gas 338 F.2d 17 (10th Cir. 1964) cert. den. 381 US 914, 85 S.Ct. 1529 14 L.Ed.2d 435 (1965) in which the court dealt with a virtually identical set of facts as those in Pan American. The court rejected the argument that the FPC had exclusive jurisdiction over the contract claims and held that those contract claims were Kansas state law claims. Thus, Pan American and Landon are inconsistent with any theory that the FPA so completely preempts state contract law as to justify removal. See ¶¶ 5 and 6, Section II.

Moreover at least two courts have expressly held that the NGA (and therefore, the FPA) does not preempt state contract law:

> Neither the NGPA nor the NGA expressly preempt the appliction of state contract law to the interpretation of gas purchase contracts. The NGA was carefully fashioned to exert federal control only in a limited and well-defined area. It is well-established that contractual

> claims between parties to a natural gas contract do not arise under the NGA for purposes of federal question jurisdiction of federal courts. . . . The Mobile-Sierra doctrine holds that the NGA did not abrogate the ability of parties to privately contract within the regulatory confines of that Act. . . . Unlike the Federal Communications Act, in which Ivy [Ivy Broadcasting Co. v. AT&T 391 F.2d 486 2d. Cir. 1968] found federal common law governed contractual disputes involving interstate telephone service, the NGA and NGPA are not so pervasive a scheme of federal regulation as to indicate a congressional objective that cannot be obtained without the application of federal common law. Pennzoil v. FERC 645 F.2d 360, 384, 385 (5th Cir. 1981) cert. den. 454 US 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982)

The Pennzoil court said that the NGA did not provide an implied private cause of action for damages (Id. at 384, fn 49), further negating the idea that federal law had completely displaced state contract law in this area. See also, City of New Orleans v. United Gas Pipeline Co. 390 F.Supp. 861 (E.D. La. 1974).

City attempts to distinguish New Orleans by asserting incorrectly that the transactions there were never within the FPC's jurisdiction at all. City's opposition, p. 12. The court there noted that the FPC had jurisdiction over all transportation of natural gas in interstate commerce (Id at 862, fn 2) and that defendants' claim that the complaint arose under the NGA was based upon that FPC jurisdiction over transportation. (Id. at 863, fn 6.) Thus, City is simply incorrect when it asserts that

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the New Orleans case is distinguishable because there was no FPC jurisdiction over the transactions in question. 6/

The cases discussed above also explain why the artful pleading doctrine does not apply to this case. The cases show that Congress clearly did not intend the FPA to preempt state law in the interpretation of wholesale electric contracts. City's cases cited at pages 5 through 8 are all distinguishable because they are not FPA or NGA cases; they are ICA or other common carrier cases in which the congressional intent was to preempt state law by creating a much more pervasive regulatory scheme than that created by the FPA.

VI

A COMPLAINT FOR BREACH OF A WHOLESALE CONTRACT DOES NOT REQUIRE RESOLUTION OF IMPORTANT ISSUES OF FEDERAL LAW.

City contends that questions of federal law so pervade PGandE's complaint that its right to relief necessarily requires resolution of substantial questions of federal law. City's opposition, pp. 5-7.

A. The Stanislaus Commitments Are Not Part Of PGandE's Complaint But Rather Are A Possible City Defense.

City denies that the Stanislaus Commitments (SC) 7/ are a defense and asserts that they form part of PGandE's breach of

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6/ Both the New Orleans and the Pennzoil courts distinguished Ivy relied on by City at pages 6 and 7 of its Opposition.

7/ The Stanislaus Commitments are Nuclear Regulatory Commission license conditions designed to moot any question of anticompetitive conduct by PGandE.

contract claim. City's opposition, pp. 18-20. This is patently incorrect. PGandE's complaint does not assert that it has any rights against the City pursuant to the SC, nor does City explain how the SC could constitute a cause of action against it. PGandE's complaint is based on the contract.

City also asserts that the SC amend "tariffs" on file with the FERC. It neglects to state that the SC provisions governing sales of electricity, the only provisions that could be pertinent here, are not filed with FERC; rather, only the Definition and the Transmission sections were ordered filed. Pacific Gas and Electric Company 11 FERC ¶ 61,246, 61,486 (1980) aff'd without opinion 679 F.2d 262 (D.C. Cir. 1982) (Decision attached as Exhibit A.) City doesn't mention that the FERC Staff requested not only that the SC be filed but that PGandE be ordered to file implementing tariffs. Id. at 61,484. Clearly, FERC staff did not view the SC themselves as self-executing tariffs. The FERC did not order implementing tariffs to be filed. Id. at 61,486. Thus, in view of the limited portion of the SC which were filed and the limited purpose for which they were filed it is extremely difficult to see how the SC could form an element of PGandE's breach of contract case against the City. The most that can be said for the SC is that the City hopes that they may provide it with a defense. As noted above, such a defense is not sufficient to confer removal jurisdiction on this court. See, p.4.

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B. City's Authorities Do Not Support Its Contention That This Case Requires Resolution Of A Substantial Question Of Federal Law.

City cites Franchise Tax Board of California v. Construction Laborers Vacation Trust, 103 S.Ct. 2841, 77 L.Ed.2d 420, 51 U.S.L.W. 4945 (1983) as holding that a case might arise under federal law when a plaintiff's right to relief under state law requires resolution of a substantial question of federal law. The case before the Court was not such a case, and thus the language cited by City is dictum. The opinion is instructive, however. The Court reaffirms that

> [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. 103 S.Ct. 2841, at 2848. (emphasis added).

In actuality, the case's holding contradicts City's proposition. 8/ The parties agreed that the only issue was the

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8/ City contends that by pleading compliance with conditions precedent to City's obligation to pay PGandE for services rendered, PGandE has inserted some federal "quasi-statutory" obligations into its case. City's Opposition p. 2. Whatever a "quasi-statute" might be, PGandE does not rely upon a "quasi-statute" as an element of its case. PGandE does know that it supplied power to City for which City has not paid, and that under these circumstances PGandE has a valid state claim against City. City's reference to "quasi-statutory obligations" will not accomplish its objective to prevent remand.

trustees' defense that ERISA preempted state law and rendered them powerless to honor the state's tax levies. Despite the importance of the case to thousands of federally regulated trusts, and the fact that the only question was one of federal preemption, the Court held that the case was not properly removed, noting that

> The issue is an important one, which affects thousands of federally regulated trusts and all non-federal tax collection systems, and it must eventually receive a definitive, uniform resolution. Nevertheless, for reasons involving perhaps more history than logic, we hold that the lower federal courts had no jurisdiction to decide the question in the case before us. . . . 103 S.Ct. 2841, 2843. (emphasis added)

By that standard, it is clear that the instant case does not require resolution of a substantial question of federal law.

The other cases cited by City similarly do not support City's theory. In Stone v. Stone 632 F.2d 740 (9th Cir. 1980) cert. den. sub nom Seafarers International Union v. Stone 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 the question was whether the federal courts had original jurisdiction over an action brought by a participant in an ERISA regulated plan pursuant to an express cause of action created by ERISA to enforce rights under such plans. The court determined that federal jurisdiction was proper. Here, there is no express cause of action created by the FPA in favor of PGandE. See, PGandE's motion at pp. 11-16. In Smith v. Kansas Title and Trust Company 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), plaintiff sued

for an injunction claiming that a federal statute was unconstitutional, the quintessential federal question. In Graf v. Elgin, Joliet and Eastern Railway 697 F.2d 771 (7th Cir. 1983) plaintiff's claim was held to be one under the Railway Labor Act or alternatively one under federal common law, either of which preempted state contract remedies for breach of railroad collective bargaining contracts. In American Invs-Co. Countryside v. Riverdale Bank 596 F.2d 211 (7th Cir. 1979) where plaintiff's complaint to remove a cloud on his title required him to plead and prove that a federal defense arising under a Federal Housing Authority regulatory agreement did not invalidate his claim, the case was not within the federal court's subject matter jurisdiction.

Finally, Ivy Broadcasting v. AT&T 391 F.2d 486 (2d Cir. 1968) is distinguishable because the Federal Communications Act preempts state law in the area of interstate communications service. Congress did not choose to emulate the preemptive regulatory schemes described in Ivy when it enacted the FPA. See, Sections IV and V. None of these cases supports City's assertion that PGandE's state contract claim is so permeated by federal law that federal jurisdiction is appropriate.

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VI

THE FPA DOES NOT PREEMPT STATE CONTRACT LAW SINCE IT PROVIDES NEITHER THE RIGHT NOR REMEDY SOUGHT BY PGandE.

Using a faulty analogy with common carrier cases, City asserts that PGandE could sue in federal court to enforce its "tariff." The scope of federal regulation over wholesale power contracts is limited and well defined. See, Section IV Pennzoil v. FERC 645 F.2d 360, 384 (5th Cir. 1981).

City's argument is analogous to one raised in In re Sugar Antitrust Litigation 588 F.2d 1270 (9th Cir. 1978). There, the State of California, on behalf of a consumer class, commenced state antitrust actions in state court which were then removed. Defendants contended that the facts alleged in the state court complaints stated claims under the federal antitrust laws and thus arose under federal law. In rejecting this argument our circuit court noted that defendants were attempting to transform the state claims into federal claims by citing cases in which federal law completely preempted state law. Id. at 1272, fn 5. City is trying to do the same here. The state antitrust complaints, however, did not constitute any valid federal cause of action on behalf of the consumer class.

> While the process of removal of state actions looks to trial of the removed cause in a more appropriate forum, here removal will assure that the cause will never be tried at all. It would be incongruous for us to construe these state law consumer class claims as arising under federal law when, under federal law as announced Illinois Brick,

> it would appear that they never arose at all. On the other hand under California state law they may not be foreclosed. . . . To deny remand under these extraordinary circumstances amounts to federal pre-emption of the antitrust laws by judicial act where it is conceded that there is no congressional preemption. Id. at 1273. (emphasis added)

The court refused to affirm removal simply so that the state claims pleaded could be dismissed for failing to state a federal cause of action. The court held that there was no federal preemption of state law claims when federal law did not provide plaintiffs with either a right or a remedy. The result should be the same here.

Although City vigorously argues that the FPA is of such preemptive force that it justifies removal, its argument is undercut by the fact that the FPA does not appear to provide PGandE with either the right to bring a cause of action against a delinquent municipal customer or the remedy of damages. See, Montana-Dakota Utilities v. Northwestern Public Service Co. 341 US 246, 260 71 S.Ct. 692, 95 L.Ed. 912 (1951), and PGandE's moving papers, pp. 11-15.

City's cases at pp. 14-16 of its Opposition in support of its novel theory simply hold that when an action is bought to enforce FERC orders, then FPA § 317 prescribes exclusive federal

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jurisdiction. But, here, there is no order to enforce. 9/ The FPA does not explicitly place obligations on municipal purchasers of wholesale power and there is no explicit FPA rule, regulation or order requiring City to honor its contracts.

VII

PGandE SHOULD BE AWARDED ITS ATTORNEYS' FEES.

PGandE has requested an award of attorneys' fees because it is not fair that PGandE's ratepayers should have to bear the expense of City's unwarranted removal of PGandE's claim, just as they should not have to bear the expense of City's use of energy for which it refuses to pay. City's attorneys participated in two key cases which hold that the FPA does not provide an implied private right of action for damages and that municipal entities are exempt from regulation under the FPA. (City of Gainesville v. Florida Power and Light 488 F.Supp. 1258 (S.D. Fla. 1980) and NCPA v. FPC 514 F.2d 184 (D.C. Cir. 1975) cert den. 423 US 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1975). Despite the holdings of these cases, City represented to the Court, and still maintains, that PGandE has a cause of action for breach of contract under the FPA.

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9/ The FERC order accepting the PGandE-Healdsburg contract for filing explicitly states that acceptance for filing does not constitute FERC approval of the contract nor FERC recognition of any claimed contractual right or obligation. See Exhibit B, attached.

In its opposition, City asserts that there must be statutory authorization for an award of fees and that City must be found guilty of bad faith. 10/ Once again, City misstates the law. Federal Rule of Civil Procedure 7(b)(3) requires that all motions be signed in accordance with Rule 11, which requires that pleadings and motions be signed by an attorney of record.

> . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. FRCP 11 (emphasis added).

Rule 11 does not require that bad faith be found before attorneys' fees may be awarded.

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10/ As we point out below, it is not necessary for PGandE to take a position on City's bad faith or lack thereof, although we will be prepared to do so if requested by the Court.

An award of attorneys' fees to PGandE can be justified under Rule 11 on the basis that City either failed to make reasonable inquiry or made contentions contrary to what it knew to be existing law.

City did not simply fail to deal with Gainesville's holding that there was no implied private right of action for damages under the FPA. In addition, City has advanced a preemption theory supported only by cases readily distinguishable from those interpreting the FPA or NGA and has failed to deal with cases contrary to its position under the FPA or NGA. City has tried to cover the gross inadequacy of its position by citing an overabundance of inapplicable cases dealing with the Federal Housing Administration, the Interstate Commerce Act, the Labor Management Relations Act, the Railway Labor Act, the Federal Communications Act, the Shipping Act, and the Intercoastal Shipping Act. Even a cursory examination of cases under the NGA and the FPA cited in PGandE's motion would have revealed that the federal statutes and, indeed, some of the very cases relied on by City, are distinguishable. For example, the Mobile case distinguishes the regulatory scheme of the NGA from that of the ICA, as does Montana-Dakota. The New Orleans case cited by PGandE in its motion expressly distinguishes the Ivy case cited and relied upon by City. Shepardizing either New Orleans or Ivy would have revealed the Pennzoil case which distinguishes the regulatory scheme set forth by the NGA from that of the Federal Communications Act. City's citation of this mass of inapplicable

authority not only destroys its federal preemption argument, but also illustrates the fact that upon reasonable inquiry, City should have concluded that the cases cited by it in its opposition memorandum were totally inapplicable. For these reasons, under the authority of Rule 11 of the Federal Rules of Civil Procedure, Grinnell Brothers v. Touche Ross 655 F.2d 725 (6th Cir. 1981) and PGandE's moving papers at pp. 19-21, PGandE supplements its original request for attorneys' fees and requests an additional nine hours of attorneys' fees at the rate of $125 per hour which represents only the time involved to read and distinguish City's common carrier cases.

Dated: April 6, 1984.

Respectfully submitted,

ROBERT OHLBACH
HOWARD V. GOLUB
SHIRLEY A. SANDERSON
STUART K. GARDINER

By Shirley A. Sanderson
SHIRLEY A. SANDERSON
Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

Quello, James	Kandiyohi County, Minnesota	26.0	1,950	Crop Dryer
Robinson, William	Cherokee County, Iowa	2.0	190	Residential
Ruvelson, James J.	Washington County, Minnesota	1.6	200	Residential
Sanders, Leonard C.	Hemphill County, Texas	1.2	158	Residential
Schmidt, Carroll	Cass County, Nebraska	1.5	131	Residential
Skinner, Farms	Hansford County, Texas	31.2	3,000	Irrigation
Stenn, H. Emmert	Shelby County, Iowa	1.7	330	Residential
Thomas, A. Asher	Dickinson County, Iowa	24.0	740	Crop Dryer
Turrittin, Muriel	Le Sueur County, Minnesota	2.0	240	Residential
Vogel, Harvey	Minnehaha County, South Dakota	2.0	190	Residential
Wenthold, James	Winneshiek County, Iowa	2.0	180	Residential
Wilson, A. J.	Barton County, Kansas	1.5	191	Residential
Lex, Charles	Webster County, Iowa	15.0	390	Crop Dryer
Total Peoples Division		1,146.0	106,428	
TOTALS, ALL PROJECTS		1,198.2	112,348	

[¶ 61,245]

Discontinuance of Form RO211, Docket No. RM80-63

Order No. 89; Final Rule

(Issued June 2, 1980)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

[This rule was published in 45 F.R. 38354 on 6/9/80 effective 9/1/80, and appears at *FERC Statutes and Regulations ¶ 30,165.*]

[¶ 61,246]

Pacific Gas and Electric Company, Docket No. E-7777(II) and Pacific Power & Light Company, E-7796

Order on Motion to Compel Filing of Certain Documents

(Issued June 2, 1980)

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr. and George R. Hall.

On August 14, 1979, the staff of the Commission filed a "Motion to Compel Filing" with the Commission. The staff requests that we direct the California Companies[1] to file certain documents as part of PG&E Rate Schedule No. 38.[2] The documents are the "Pacific Gas and Electric Company Statement of Commitments," referred to as the "Stanislaus Commitments" and included in the staff's motion as Appendix B,[3] and twenty-four other documents, listed in Appendix A to the staff's motion.

PG&E and Edison filed responses in opposition on September 17, 1979, and the Cities[4] filed their response in support of the staff's motion on the same day. On September 13, 1979, the Commission issued a "Notice of Intent to Act" so that the staff's motion would not be deemed denied by operation of law under the Commission's Rules of Practice and Procedure.[5]

In its motion, the staff relies upon two previous Commission orders in this proceeding. On December 28, 1978, we affirmed the Administrative Law Judge's ruling on the scope of this proceeding, consolidated Docket Nos. E-7796 and E-7777, and directed the companies to file "all classifications, practices, rules, regulations or contracts that in any manner affect or relate to the Pacific Intertie Agreement . . ."[6] On June 14, 1979, we denied rehearing of the December 28, 1978 order and directed the companies to comply with its filing provisions within twenty days.[7] Also in the June 14, 1979 order, we denied the staff's motion to perfect compliance but stated that Cities or the staff were free to file a motion to compel filing if they believed additional documents should have been filed by the companies.[8] On July 5, 1979, the companies filed several contracts not previously filed and described numerous other contracts which were

EXHIBIT A
PAGE 1 OF 7

already on file with the Commission but which the companies stated were within the scope of the June 14, 1979 order.

The question, then, is whether the documents listed in the staff's motion to compel filing are within the purview of the directive contained in our December 28, 1978 order, which is set forth in full as follows:

> Within 30 days of the issuance of this order, all signatories of the Pacific Intertie Agreement, who are public utilities, shall file, jointly or individually, all classifications, practices, rules, regulations or contracts that in any manner affect or relate to the Pacific Intertie agreement with the Commission in Docket No. E-7777.

This order was made under our authority pursuant to Section 205(c) of the Federal Power Act.[9] Ordering paragraph (6) substantially repeats, in pertinent part, the language of Section 205(c) and of Sections 35.1(a) and 35.2(b) of the Commission's Regulations, which implement it. We explained that contracts filed pursuant to our order would be filed as subject matter in this proceeding and not merely as evidentiary background.[10] We also stated that such contracts would be subject to modification to the extent FERC authority permits.[11]

In the December 28, 1978 and June 14, 1979 orders we agreed with Edison's assertion that determination of which agreements "affect or relate to" electric service within the purview of Section 35.2(b) of the Regulations must be made by application of a "rule of reason."[12] Edison repeats its argument that the Commission must rely upon a "rule of reason" in ruling upon the instant motion and warns that literal application of the "in any manner affect or relate to" test would require the filing of "thousands or millions of documents" never contemplated by the Commission.[13]

Obviously, lines always have to drawn somewhere, and it is important to remember the context in which the staff's motion to compel filing has been made. This proceeding involves, among other things, the question whether the California Companies have unlawfully restricted access by public power authorities to transmission service over the Pacific Intertie, thereby depriving them of the opportunity to exploit alternative (and cheaper) sources of generation. As we stated in our June 14, 1979 order, at 11, no compelling reason has been presented for this Commission to adopt a limited or overly restrictive interpretation of Section 205(c) of the Federal Power Act and its underlying Regulations. At the same time, the staff must show good reason for this Commission to add to the complexity of an already difficult and protracted proceeding.

The staff alleges that the contracts it seeks to have filed involve the use of Intertie facilities by one or more of the California companies or the Los Angeles Department of Water Power (LADWP), provide for exchange of power between the Northwest and the California Companies over the Intertie, govern the transmission of Power to the State of California over the Intertie,[14] or, in the case of the Stanislaus Commitments, govern the provision of certain services by PG&E to other electric companies.[15]

The Stanislaus Commitments

The staff requests that we order PG&E to file as part of Rate Schedule No. 38 the "Pacific Gas and Electric Company Statement of Commitment" (the Stanislaus Commitments). Staff states that the Commitments are directly related to the PIA and that "their broad scope has an impact upon the other contracts under investigation as well."[16]

Essentially, the Commitments embody an agreement entered into on April 30, 1976 between PG&E and the U.S. Department of Justice (DOJ), and they are the culmination of a DOJ investigation into certain PG&E activities allegedly in violation of the antitrust laws. They have been included by the Nuclear Regulatory Commission as conditions of the license of PG&E's Diablo Canyon Nuclear Power Plant Unit No. 1.[17] They generally describe conditions under which PG&E is bound to provide services such as interconnection, transmission, access to nuclear generation, capacity and energy exchange, and reserve coordination to other utilities requesting such service.

The staff requests not only that the Commitments be filed immediately but also asserts that it is essential "that appropriate rates and tariffs be filed as soon thereafter as reasonably possible."[18] Although service has been available pursuant to the Commitments since April 30, 1976 (Tr. 348), no contracts for service have been executed.[19] PG&E acknowledges that the "commitments are presently binding . . ."[20]

PG&E concedes the relevance of the Commitments as evidence on the issue of its allegedly anticompetitive practices, and it has filed them for evidentiary purposes. The company contends, however, that the Commitments should not be filed as rate schedules or contracts affecting rate schedules, arguing that they are only the "framework for the negotiation of contracts" for possible

EXHIBIT A
PAGE 2 OF 7

service *in futuro*, and that in any event the Commitments lie outside the jurisdiction of the FERC.[21] Moreover, PG&E argues, filing the Commitments more than ninety days prior to commencement of electric service would violate Commission Regulations, 18 CFR § 35.3(a).[22] PG&E argues that the Commitments do not "affect or relate to" the PIA, within the meaning of Section 205(c), in that they do not alter its terms and were in fact developed several years after its execution.[23]

Regarding the staff's suggestion that PG&E be required to file appropriate rates and tariffs as soon as possible after filing the Commitments, PG&E counters that such a filing would violate "the basic policy of the Federal Power Act which favors the negotiation of contracts between parties before review by the Commission."[24] Further, the company states that to develop and file the rates—which of necessity would be rates of general application—would be extraordinarily burdensome.

Both the staff and PG&E cite *Michigan Wisconsin Pipe Line Company*, 34 FPC 621 (1965), to support their respective positions. In that case, the FPC ruled that Mich Wis' policy regarding construction of lateral lines constituted "practices" under the Natural Gas Act, and the Commission ordered the pipeline company to include its lateral line formula as part of its tariff. The FPC held that a "practice" included company policy statements.[25] PG&E also relies upon *Transcontinental Gas Pipe Line Corporation*, 36 FPC 1058 (1966), where the FPC ordered Transco to file the formula relating to the company's lateral line policy as part of its tariff. PG&E argues that these opinions stand for the principle that the Commission only requires filing of specific "financial terms and conditions affecting customer service."[26] The Stanislaus Commitments are said not to satisfy such a principle because they do not provide specific financial terms or include mathematical formulae. In our June 14, 1979 order in this proceeding, wherein we ordered Southern California Edison to file certain contracts as part of the PIA, Rate Schedule No. 38, we rejected the argument that PG&E reiterates now, and we quoted with approval the FPC's conclusion in *Michigan Wisconsin:*

> A consistent and predictable course of conduct of the supplier that affects its financial relationship with the consumer in our opinion is a "practice" subject to the filing requirements. The filing of such a procedure as part of the pipeline tariff is not only consistent with but furthers the purpose underlying the filing and posting requirements of rate schedules. A pipeline tariff announces not only what the pipeline has done in the past but the terms and conditions upon which it would, as a matter of policy, provide service to new customers meeting the tariff's eligibility requirements. Even if the tariff were viewed as merely an informational description of existing service obligations, this description of the pipeline's actual practice would be of real benefit to both existing and potential customers, for it would show them, as well as the Commission, the terms by which gas would be sold upon completion of Section 7 proceedings.[27]

We stated that neither *Michigan Wisconsin* nor *Transco* could rationally be construed as an effort by the FPC to limit the applicability of Section 205(c) of the Federal Power Act and its pertinent Regulations.[28] There is no reason to hold that Section 205(c) applies only to financial terms and mathematical formulae.

This Commission has recently reaffirmed its policy of broadly interpreting Section 205(c) in a case involving the allegedly anticompetitive practices of an electric utility.[29] Pursuant to a discussion of the *Michigan Wisconsin* opinion, we directed the Florida Power & Light Company to file the four criteria upon which it would condition the availability of transmission service, as contained in the testimony of a company witness.

In the December 21, 1979 order in *Florida Power & Light Company*, we stated that although we did not "believe that rate schedules need contain every statement made by a utility," the circumstances required that the transmission availability criteria be included.[30] Similarly, given the context in which the question arises in this present proceeding, that is, as part of an investigation into practices allegedly restricting competition, the Stanislaus Commitments should be filed with the Commission, absent a strong reason to the contrary.

PG&E relies upon *Municipalities of Groton, et al. v. F.E.R.C.*, 587 F.2d 1296 (D.C. Cir. 1978), arguing that it supports a limited reading of Section 205(c).[31] PG&E notes that the court grounded its holding that the Commission had jurisdiction over a certain practice "affecting" a jurisdictional rate or charge because the practice directly affected the price of the jurisdictional service.[32] While PG&E's description of the court's analysis is correct, it infers too much. The holding does not suggest that a direct effect on price is the only nexus by which the Commission could justify requiring the filing of the

EXHIBIT A
PAGE 3 OF 7

Commitments. A practice may affect or relate to the PIA in ways other than merely prescribing the price for service. We think this is shown clearly by a statement made to the presiding administrative law judge by counsel for PG&E:

> I think, your Honor, just to make our position perhaps clearer with respect to the so-called limited number of utilities who can have access to the Intertie in California that limited number is not limited to those who have existing—not necessarily limited to those who have existing contractual rights and PG&E points out in the evidence that under the Stanislaus commitments it agreed to provide access to the Intertie to neighboring entities and district systems such as NCPA members whenever the company has no use of the line for its own—of its own—so the scope of the access in California in terms of number of utilities who have access may not be materially different than that in the Northwest. The terms and conditions of access are somewhat different. (Tr. CH2630)

PG&E also contends that the Commission has a policy against requiring the filing of nuclear plant license conditions, relying on the FPC's October 15, 1975 order in *Virginia Electric and Power Company*, Docket No. E-9147. The VEPCO case involved a request by the staff that VEPCO be required to file certain plant license antitrust conditions, as imposed by the AEC, which conditions the staff alleged would moot several complaints made by intervenor customers in the proceeding. The intervenors themselves opposed the staff motion and argued that the conditions (in the intervenors' view) would not satisfy the complaints. Whether the licensing conditions would "affect or relate to" the electric tariffs which were the subject of the proceeding was not the issue. Clearly, the VEPCO order does not establish a Commission policy against requiring conditions such as the Stanislaus Commitments to be filed.

The Commission is not persuaded that the Commitments in their entirety affect or relate to the PIA. As noted previously, the Commitments govern provision by PG&E of various services in the future. Parts of the Commitments concern services other than transmission, such as capacity and energy exchange, and access to nuclear generation. Section VII is designated "Transmission Services", and is the only part of the Commitments to refer to the Pacific Intertie itself. It provides that PG&E shall not be required to use the Intertie for transmission pursuant to the Commitments if such use would impair PG&E's "own use of this facility consistent with the Bonneville Project Act (50 Stat. 731, August 20, 1937), Pacific Northwest Power Marketing Act (78 Stat. 756, August 31, 1964), and the Public Works Appropriations Act, 1965 (78 Stat. 682, August 30, 1964)."[33] This section also governs construction of additional transmission capacity, the filing of rate schedules and agreements for transmission, and the transmission of power and energy generally, insofar as these services are consistent with "good utility practice," as defined in Section I of the Commitments.[34]

We will order PG&E to file Section I ("Definitions") and Section VII ("Transmission") of the Stanislaus Commitments, because they affect or relate to the PIA. We do not order the filing of the remainder of the Commitments. Our order today does not expand the scope of this proceeding.

The Other Contracts:

Attached as Appendix A to the staff's motion is a list of twenty-four other contracts which the staff alleges "affect or relate to" the PIA under Section 205(c) and our earlier orders in this proceeding.[36] The California Companies oppose the filing of most of these contracts.[36]

We are met at the outset with Edison's broad objection to the staff motion as it pertains to these contracts, to wit, that the staff fails to comply with Section 1.12(a) of the Commission's Rules and Regulations, which requires that a person filing a motion must state the grounds on which a ruling or relief is sought.[37] Edison contends that the staff's motion "omits any real mention of grounds."[38]

For purposes of its response, Edison defines grounds as "facts and discussion showing how, in this case, the particular documents sought fall within the Commission's prior orders."[39] Edison also argues that the staff has failed to carry its burden of proof that relief should be granted, in that the staff does not describe the documents or show how they affect or relate to the PIA.[40] Edison also offers a group of criteria which it suggests the Commission use in determining whether the contracts in question affect or relate to the PIA.[41] Edison concludes that none of the contested documents meets these criteria for filing.

There is considerable merit to Edison's argument that the staff has not provided detailed explanation of its grounds for filing of many of these documents,[42] and we think that in most cases the staff has not properly met its burden. As we noted previously, the staff has described the contracts in Appendix A at page 4 of its motion. There the staff alleges that the

EXHIBIT A
PAGE 4 OF 7

contracts fall into three categories: those involving use of Intertie facilities by the California Companies or the LADWP, those providing for power exchange between the Northwest and the California Companies over the Intertie, and those governing transmission of power to the State of California over the Intertie. The Commission finds that although the contracts are, in most cases, within the purview of Section 205(c), as developed in our earlier order in this proceeding, other factors militate against filing. There are a few exceptions which we will address presently. Despite the staff's having shown that the contracts for the most part may affect or relate to the PIA, Edison has shown good reason why the Commission should not require that all of them be filed. Edison notes that several of the contracts are terminated or were previously filed as rate schedules which are now terminated. Documents A-5 and A-8 were filed as Rate Schedule Nos. 59 and 85, respectively, and have both been terminated.[42] The contracts designated A-12, A-13a, and A-13b were filed as Rate Schedule Nos. 79, 87 and 87.1, respectively and have all been terminated.[44] Similarly, Contracts A-14A and A-14b were Rate Schedule Nos. 89 and 89.1 and were terminated December 31, 1978.[45] Contract A-16 is a letter agreement dated January 12, 1970 and involves terms under which Emergency Service was provided between LADWP and the Bonneville Power Administration on four dates between December 30, 1968 and January 30, 1969. We see no reason to order Edison to file this contract as part of Rate Schedule No. 38. Edison also includes under its general heading of terminated documents or rate schedules Document B-2, a January 14, 1969 letter of understanding regarding the Seven Party Agreement. Edison states that this document is Exhibit L-46-15 in Docket No. E-7796. Edison does not demonstrate that this document is terminated and we find that it should be filed as part of Rate Schedule No. 38.

Edison contends that it should not be ordered to file Document A-6, the "Victorville-Lugo Interconnection Agreement," or Document A-7, the "Edison Pasadena Interruptible Transmission Service Agreement," because these contracts have already been filed as Rate Schedules Nos. 51 and 88, respectively. We see no valid reason for requiring the company to file in these dockets contracts already properly filed as rate schedules in other dockets. Further, the staff has not shown that these documents affect or relate to the PIA.

Edison has agreed to file Documents A-9 and A-10, which pertain to the DC Transmission Facilities Agreement and the Sylmar Agreement, both of which are already filed in these dockets.

Edison states that Document A-11 is a construction contract relating to the construction and ownership of a third Midway-Vincent 500 kV transmission line, which line is not part of the Pacific Intertie facilities. We will not order the company to file this document.

Edison states that Document A-1, which the staff and the Cities call the "USBR-California Companies Cost of Malin Facilities Letter," dated October 12, 1971, does not exist. Accordingly, we could not direct the company to file it.

Document A-2 is the "USBRSCE Interconnection Contract" dated July 31, 1961 and also known as the Mead Inter connection Agreement. It provides for an interconnection between Edison and the U.S. Bureau of Reclamation at the Mead Substation. Edison states that the Mead Substation is "not part of the facilities covered in the (PIA)."[46] The staff argues that it involves the use of Intertie facilities.[47] For this reason, we find that this document, based upon our review of the pleadings, should be filed as a contract which affects or relates to the PIA.

The staff offers nothing but a title for Document A-3, an "Agreement for Cooperative Use of Pacific Intertie Radio-communication Facilities (PG&E SCE SDG&E LADWP — BPA)," dated October 30, 1967. Edison counters that because the agreement was never executed it is "therefore not properly a subject for filing since it is not a contract or otherwise an operative document."[48] We agree, and we will not order the filing of this document.

Edison objects to the staff's request pertaining to the contracts governing transmission of power to the State of California over the Pacific Intertie (C-1 through C-4). Document C-1 is described as a contract between the State and certain suppliers (LADWP, SDG&E, Edison and PG&E) for sale of power for operation of the Department of Water Resources pumping operations. Edison states that this contract and its supplements have been filed as Rate Schedules 43, 43.1, 43.2 and 43.3. We will not require Edison to file them in the instant docket, but we will order them cross-referenced and made subject matter in this proceeding. We will, however, require the filing of Document C-2, which the staff calls the "Intersuppliers Contract," as it assigns rights and responsibilities among the various suppliers of power to the State over the Intertie.

Staff provides no detailed description of Documents C-3 and C-4, which concern the purchase of power from the Oroville-

EXHIBIT A
PAGE 5 OF 7

Thermalito generation facilities. However, the contracts require transmission *via* the Intertie and therefore affect or relate to the PIA, and we will order that they be filed in Rate Schedule No. 38.

In addition to the contracts described so far, the staff seeks an order directing the filing of two other contracts which involve PG&E but not Edison. Document A-15 is a memorandum between PG&E and Pacific Power & Light Company providing for use of PP&L's 500 kV lines. In its Reply, PG&E states that this memorandum was superseded by the "Agreement For Use of Transmission Capacity" between PP&L and the California Companies, dated August 1, 1967, and this later contract has been filed as PP&L Rate Schedule No. 86.[19] Document B-1 is an agreement between PP&L and PG&E concerning interconnection of the two companies' systems *via* the Intertie. The staff requests an order to file this agreement, but PG&E states that it has been filed as PG&E Rate Schedule No. 29.[20] We see no valid reason for ordering PG&E to refile either of these agreements. We will, however, order that Rate Schedule No. 86 and document B-1 be cross-referenced and made the subject matter of this proceeding.[21]

As we noted previously, today's order does not expand the scope of this proceeding. Modification of the contracts ordered to be filed may be made only to the extent that the contracts affect or relate to the PIA. This is also true in the case of contracts already on file, in other dockets, which we are ordering to be cross-referenced and included as subject matter in this proceeding. Our order should not be construed as a reopening of other dockets.

Although we are directing the filing of only eight of the twenty-four contracts listed in the staff's motion, we wish to note that our order today should not be construed as limiting the use of the remaining contracts as evidence. Nothing herein prevents their introduction as evidence on any matter with which this proceeding is concerned, and we note that the relevance of most of these documents to the issues of this proceeding appears to be conceded by the parties. The decision whether to admit them as evidence is of course for the Administrative Law Judge.

The Commission orders:

(A) Pacific Gas and Electric Company, shall file Section I and Section VII of the "Stanislaus Commitments" in these dockets as part of Rate Schedule No. 38 within fifteen (15) days of the issuance of this order.

(B) Southern California Edison Company shall file in these dockets as part of Rate Schedule No. 38, within fifteen (15) days of the issuance of this order the following seven documents, as described in the FERC staff's August 14, 1979 Motion To Compel Filing: A-2, A-9, A-10, B-2, C-2, C-3 and C-4.

(C) Other documents described in the staff's motion and already on file and currently in effect as rate schedules in another docket shall be cross-referenced to Rate Schedule No. 38 and given the docket number *E-7777*(II). These are documents B-1, C-1, and the contract which supersedes document A-15.

(D) As to all documents described in the staff's motion which are not ordered to be filed in ordering paragraphs (A) and (B) above, the staff's motion is denied.

—Footnotes—

[1] Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company, all of which are parties to this proceeding.

[2] The Pacific Intertie Agreement ("PIA").

[3] The Commitments also appear at 41 Fed. Reg. 20,255 (1976).

[4] The Northern California Power Agency (NCPA) and the Cities of Anaheim, Riverside, Colton and Azusa, California.

[5] 18 CFR 1.12(e).

[6] *Pacific Gas and Electric Co.*, Docket Nos. E-7796 and *E-7777*(II), order issued December 28, 1978, 5 FERC ¶ —, mimeo. at 23 (ordering paragraph (6)).

[7] *Pacific Gas & Electric Co.*, Docket Nos. E-7796 and *E-7777*(II), order issued 6/14/79, 7 FERC ¶ —, mimeo at 14. By orders issued January 29, and February 23, 1979, 6 FERC ¶ —, ¶ —, the Commission denied requests by Edison and PG&E for a stay of the December 28, 1978 order.

[8] *Id.* at 13. We invited filing "with the Commission" in order to "remove the burden of the Presiding Judge to rule on a motion to compel filing of documents that may or may not be forthcoming." The staff notes that the presiding Administrative Law Judge denied two previous staff motions to compel filing of the Stanislaus Commitments, ruling that the Commission should decide the question of PG&E's duty to file, pursuant to Sections 35.1 and 35.2 of the Regulations. Staff Motion to Compel Filing, p. 4, n. 4.

[9] 16 U.S.C. 824(d)(e).

[10] June 14, 1979 order, mimeo. at 9.

[11] *Id.*

[12] December 28, 1978 order, mimeo. at 22; June 14, 1979 order, mimeo. at 11.

[13] "Response of Southern California Edison Company In Opposition to the 'Motion To Compel Filing' of the FERC Staff Dated August 20, 1979" (Edison Response), at 3. Edison offers as examples contracts related to the purchase and use of materials and labor.

EXHIBIT A
PAGE 6 OF 7

[24] Staff Motion at 4.

[25] *Id.* at 5.

[26] *Id.* at 4.

[27] "Cities Response In Support of Staff's Motion to Compel Filing" at 6.

[28] Staff Motion at 6.

[29] "Reply of Pacific Gas and Electric Company to Staff Motion To Compel Filing" at 2.

[30] Tr. 340.

[31] PG&E Reply at 2.

[32] PG&E also states that filing the Commitments before specification of parties who would receive service violates 18 CFR § 35.10(a).

[33] PG&E Reply at 2.

[34] *Id.* at 4.

[35] The FPC defined "practice" as it is found in Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c). Provisions of that Act are read in *pari materia* with analogous provisions of the Federal Power Act. *F.P.C. v. Sierra Pacific Power Company*, 350 U.S. 348, 353 (1956).

[36] PG&E Reply at 4.

[37] 34 FPC at 626, quoted in *Pacific Gas & Electric Co.*, Docket Nos. E-7796 and E-7777 (II), order issued June 14, 1979, at mimeo. 10-11.

[38] *PG&E*, June 14, 1979 order at mimeo. 11.

[39] "Order Directing The Submission of a Transmission Tariff In Substitution for Individual Rate Schedules", *Florida Power & Light Company*, Docket Nos. ER78-19, *et al.*, issued December 21, 1979, 9 FERC ¶ —, *rehearing denied* February 6, 1980, 10 FERC ¶ 61,108.

[40] *Id.* at mimeo. 5.

[41] PG&E Reply at 3, n. 3.

[42] The "practice" was a deficiency charge incurred by the participants of NEPOOL for insufficient system capability. The Executive Committee of the pool argued (without success) that the charge "does not represent a charge for a service or transmission." 587 F.2d at 1301.

[43] Staff Motion, Appendix B at 9.

[44] *Id.* at 2.

[45] For convenience of reference, we adopt the numbering and classification schemes used in the staff's motion.

[46] Edison states that it has already filed Document A-4 in its July 5, 1979 compliance filing. Exhibit 1 to Edison's Response is a tabular summary of the company's arguments in opposition to filing.

[47] 18 CFR § 1.12(a).

[48] Edison Response at 5.

[49] *Id.*

[50] *Id.*

[51] Id. at 3-4.

[52] See, for example, pages 3-4 of Appendix A to the Staff Motion, where fourteen contracts are catalogued merely by title and date.

[53] Edison Response at 6, 8.

[54] *Id.* at 9.

[55] *Id.* at 10.

[56] Edison Response at 6.

[57] Staff Motion at 4.

[58] Edison Response at 6.

[59] PG&E Reply at 7.

[60] *Id.*

[61] In the case of contracts on file in other dockets, the staff requests that we "place the docket No. E-7777(II) on those contracts and cross-reference them to Rate Schedule No. 38." (Staff Motion at 2. n. 2.). The request is not unreasonable and will be granted. We will not order the cross-referencing of the several superseded rate schedules, and cross-referencing is limited to those contracts which affect or relate to the PIA.

[¶ 61,247]

Panhandle Eastern Pipe Line Company, Docket No. CP80-261

Findings and Order After Statutory Hearing Issuing Certificate of Public Convenience and Necessity and Granting Petition to Intervene

(Issued June 2, 1980)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

On February 29, 1980, Panhandle Eastern Pipe Line Company (Panhandle)[1] filed in Docket No. CP80-261 an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the construction and operation of taps and related facilities in order to render, directly or through local distribution companies, natural gas service to 45 of Panhandle's right-of-way grantors and to establish seven new delivery points to existing distributor customers therefor, all as more fully set forth in the application.

As partial consideration for granting the rights-of-way, all of the proposed customers have requested gas service pursuant to the terms of rights-of-way agreements. In order to render gas service to the 45 right-of-way grantors, Panhandle proposes the following:

EXHIBIT A
PAGE 7 OF 7

WASHINGTON 20426

AUG 5 1981

Docket No. ER81-582-000 and ~~ER81-583-000~~

Pacific Gas and Electric Company
Attention: W. M. Gallavan
Vice President, Rates
77 Beale Street
San Francisco, California 94106

Dear Mr. Gallavan:

By letters dated June 30, 1981, you submitted for filing with the Commission a proposed contract and revised service agreements providing for interruptible transmission service to Northern California Power Agency member cities.

Pursuant to Section 375.308(1) of the Commission's Regulations, your submittal is accepted for filing and designated as shown on the Enclosure.

Notice of your filing was issued on July 13, 1981, with comments, protests, or interventions due on or before July 31, 1981. No comments, protests, or interventions were filed.

Good cause is shown for granting waiver of the notice requirements pursuant to Section 205(d) of the Federal Power Act and Section 35.11 of the Commission's Regulations thereunder; therefore, the rate schedule shall become effective July 1, 1981.

This acceptance for filing does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

This action is final unless a petition appealing it to the Commission is filed within 30 days from the date of this letter, as provided in Section 1.7(d) of the Commission's Regulations, 18 C.F.R. 1.7(d) [as amended in Docket No. RM78-19 (August 11, 1978), Docket No. RM79-59 (July 23, 1979), and Docket No.

FEDERAL ENERGY REGULATORY COMMISSION
DOCKETED
AUG 5 1981
DOCKET SECTION

EXHIBIT B
PAGE 1 OF 4

Pacific Gas and Electric Company

RM81-20 (May 22, 1981)]. The filing of a petition appealing this action to the Commission or an application for rehearing as provided in Section 313(a) of the Act does not operate as a stay of any date specified in this letter except as specifically ordered by the Commission.

This acceptance for filing terminates Docket Nos. ER81-582-000 and ER81-583-000.

Sincerely,

William W. Lindsay

William W. Lindsay, Director
Office of Electric Power Regulation

cc: See Attached List of Addressees

EXHIBIT B
PAGE 2 OF 4

Enclosure

Pacific Gas and Electric Company
Rate Schedule Designations

Filed: July 1, 1981
Effective: July 1, 1981

Docket No. ER81-583-000

	Designation	Other Party	Description
1)	Pacific Gas and Electric Co. Rate Schedule FERC No. 66	Northern California Power Agency	Interruptible transmission service

Docket No. ER81-582-000

2)	Supplement to Service Agreement under FPC Electric Tariff Original Vol. No. 2	City of Alameda	provision for metering and billing
3)	Supplement to Service Agreement under FPC Electric Tariff Original Vol. No. 2	City of Lodi	provision for metering and billing
4)	Supplement to Service Agreement under FPC Electric Tariff Original Vol. No. 2	City of Lompoc	provision for metering and billing
5)	Supplement to Service Agreement under FPC Electric Tariff Original Vol. No. 2	City of Santa Clara	provision for metering and billing
6)	Supplement to Service Agreement under FPC Electric Tariff Original Vol. No. 2	City of Ukiah	provision for metering and billing
7)	Service Agreement under FPC Electric Tariff Original Vol. No. 2 (supersedes service agreement as amended dated 10/24/55)	City of Healdsburg	provision for metering and billing

EXHIBIT B
PAGE 3 OF 4

List of Addressees

1.) Northern California Power Agency
Attention: Robert E. Grimshaw
General Manager
770 Kiely Boulevard
Santa Clara, California 95051

2.) Mr. J. R. Shepard
General Manager and Chief Engineer
Bureau of Electricity
Department of Public Utilities
P. O. Drawer H
Alameda, California 94501

3.) City Manager, City of Healdsburg
City Hall
Healdsburg, California 95448

4.) Mayor
City of Lodi
P. O. Box 320
Lodi, California 95241

5.) Director of Electric Utility
City of Santa Clara
1500 Warburton Avenue
Santa Clara, California 94102

6.) E. C. Stevens, Mayor
City of Lompoc
Lompoc, California 93438

7.) City of Ukiah
Municipal Electric System
203 South School Street
Ukiah, California 95482

EXHIBIT B
PAGE 4 OF 4

PROOF OF SERVICE BY MAIL

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; that my business address is 77 Beale Street, San Francisco, California 94106; and that on the date set out below I deposited a true copy of the attached:

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO REMAND

sealed in envelope(s) with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States in the said City and County, addressed as follows:

Robert C. McDiarmid, Esq.
Spiegel & McDiarmid
2600 Virginia Avenue, NW
Washington, D. C. 20037

Richard W. Nichols, Esq.
McDonough, Holland & Allen
555 Capitol Mall, Suite 950
Sacramento, CA 95814

Robert Crawford, Esq.
141 North Street
Healdsburg, CA 95448

I declare under penalty of perjury that the foregoing is true and correct. Executed at 77 Beale Street, San Francisco, California, on April 6, 1984.

WANDA M. LOW

EXHIBIT 4

ROBERT OHLBACH
HOWARD V. GOLUB
SHIRLEY A. SANDERSON
STUART K. GARDINER
P.O. Box 7442
San Francisco, CA 94120
Telephone: (415) 541-6669

Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, vs. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. C-83-6189-WHO MOTION TO REMAND MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date: April 13, 1984 Hearing Time: 1:30 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases (continued)

Statutes

I.

INTRODUCTION

Plaintiff Pacific Gas and Electric Company (PGandE) brought this action against defendant City of Healdsburg (City) in Sonoma County Superior Court seeking damages for City's breach of an agreement obligating the City to buy from PGandE all of the electric power needed for its own use and for resale. The City refused to pay PGandE nearly $400,000 for electricity supplied to it between May 1982 and December 1982, contending that it had purchased the power elsewhere, despite its agreement with PGandE.

On December 28, 1983, the City removed the action from Sonoma County Superior Court to this Court. The petition for removal contains many inaccurate and irrelevant statements to which it is not necessary to respond in this memorandum. However, on page 5 of the petition the City suggests that the complaint states a federal question as that is the reason for removal:

> In short, PG&E's asserted contract right rests on a tariff subject to pervasive federal regulation through the Federal Power Act as administered by the FERC, and subject to other obligations imposed by federal law. In fact, PG&E could have chosen to bring this suit directly in federal court, pursuant to section 317 of the Federal Power Act, 16 U.S.C., § 825p. and to 28 U.S.C. §§ 1331 and 1337.
>
> Petition for Removal (hereinafter, Petition) P. 5, ¶ 10

Plaintiff respectfully suggests that an examination of its complaint and the cases cited in this memorandum of points and authorities will demonstrate that the action is not a federal question case but rather a common law claim for breach of a California contract raising questions of state law only. The Supreme Court decision in Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961) [hereinafter cited as Pan American] is of particular importance; it discusses all of the arguments raised by City in support of its claim that this is a federal question case, and rejects them.

Contrary to City's claim, this action is not founded on the Federal Power Act which only creates a regulatory scheme for setting just and reasonable rates and terms of service; the Act does not provide remedies for the breach of contract at issue here. Because of an obvious lack of subject matter jurisdiction plaintiff now brings this motion to remand the action to state court pursuant to 28 U.S.C. § 1447(c) which states in pertinent part:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. . . .

///

II

CITY'S CONTENTIONS

The City appears to contend that federal jurisdiction exists because (1) there is a federal regulatory system over sales of electricity in interstate commerce, (2) PGandE could have pleaded a federal cause of action for breach of contract and (3) City's federal defenses somehow confer jurisdiction on this Court. None of these contentions is supportable; Pan American rejects each of them as a basis for federal jurisdiction.

III

DEFENDANT CITY BEARS THE BURDEN OF PROVING FEDERAL JURISDICTION.

Because the City does not claim that there is diversity of citizenship (and in fact there is none), this case may remain in the district court only if it arises under the Constitution or the laws of the United States. The removing defendant has the burden of proving federal jurisdiction e.g., Wilson v. Republic Iron etc. Co., 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921). Because the removing defendant bears this burden of proof and because of the waste and inefficiency in obtaining a judgment that later proves to be void for lack of subject matter jurisdiction, remand is the preferred procedure if federal jurisdiction is doubtful. Shamrock Oil and Gas v. Sheets,

313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); Hill v. United Fruit, 149 F.Supp. 470 (S.D. Ca. 1957).

IV

NO FEDERAL QUESTION IS RAISED BY THE COMPLAINT.

Plaintiff's allegations in the complaint determine whether or not a case is removable. Great Northern Railway v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918). The federal question must appear on the face of the complaint. Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961); Gully v. First National Bank, 299 U.S. 109, 575 S.Ct. 96, 81 L.Ed. 70 (1936).

In its complaint, PGandE states only a claim for breach of a California contract; PGandE does not allege there that City has violated the Federal Power Act or any other federal law. The gravamen of PGandE's complaint is its contract right to be paid for service it has rendered. Those are rights established by state law, not federal law. Thus, no federal question appears on the face of the complaint.

In fact, the complaint is a cut and dried breach of contract complaint: it recites the making of the contract, its breach by the City, resulting damages suffered by PGandE, and the full performance of PGandE's own contract

obligations. Complaint, Paragraphs 8-14. Nowhere in the complaint does PGandE assert a claim or right arising under the Federal Power Act or under any other federal law. The City has admitted this in City's recently filed Motion to Dismiss. There is not a single reference to a claim by PGandE against the City pursuant to the Federal Power Act in City's motion. Instead, the City characterizes the issue between the parties as one of classic contract interpretation.

The City states:

> The theory of Pacific Gas and Electric Company's complaint is straightforward. PG&E alleges that PG&E and Healdsburg "[o]n or about May 5, 1981, . . . entered into a written contract in which [PGandE] agreed to sell and deliver to the City, and the City agreed to purchase and receive from [PGandE] all of the electric capacity and energy required by the City . . ." [Complaint, ¶ 8.] PG&E further alleges that, pursuant to that contract it supplied all the City's electric requirements and that the City 'has breached the contract by refusing and failing to pay' the bills rendered to it by PGandE. [Complaint, ¶ 12.]
>
> The issue between the parties is simple; was Healdsburg required to purchase 'all of the electric capacity and energy required by the City' from PGandE? The period at issue is May-September 1982 [Complaint, ¶ 11]. The issue has been delineated in part by an escrow arrangement proposed by PG&E and entered into by Healdsburg and the other entities associated with the arrangement, together with PG&E. Thus, the only question which appears relevant to this matter is whether Healdsburg was

> required to purchase all of its electric energy from PGandE.
>
> Motion to Dismiss, p. 2, lines 4-23, emphasis added.

It is the contract which determines City's duty to purchase power from PGandE. The contract rights PGandE seeks to enforce are derived from state law, not federal law. Thus, the City itself must concede that there is no federal question on the face of the complaint.

V

THERE IS NO EXCLUSIVE FEDERAL JURISDICTION OVER A CLAIM FOR BREACH OF A POWER SALE CONTRACT.

The United States Supreme Court decided in Pan American, 366 U.S. 656, that common law claims for breach of contract are within the jurisdiction of the state courts, not the federal courts. 1/ In Pan American, Cities Service Gas Company purchased natural gas from Texaco and Pan American. Cities Service was required to pay more than the

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1/ While Pan American was a case involving the Natural Gas Act instead of the Federal Power Act, the relevant provisions of the two statutes "are in all material respects substantially identical" and have been interpreted in pari materia. FPC v. Sierra Pacific Power Co., 350 U.S. 348, 765 S.Ct. 368, 100 L.Ed. 388 (1956); Permian Basin Area Rate Cases, 390 U.S. 747 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968), reh. den sub nom Bass v. Federal Power Commission, 392 U.S. 917, 88 S.Ct. 2050, 20 L.Ed.2d 1379 (1968).

contract price because of a minimum price order of the Kansas Gas Commission. Cities Service made the overpayments under written protest and conditioned upon repayment in the event the Kansas order was determined to have been invalid. The contracts, the Kansas order, and the written protest were filed with the Federal Power Commission as required by the Natural Gas Act. When the order was invalidated by the United States Supreme Court, Cities Service sued in Delaware State Court on the contract for refunds created by the reservation of rights and defendants' acceptance of conditional payments. Defendants challenged the jurisdiction of the Delaware state court, claiming that the Natural Gas Act granted exclusive jurisdiction over the contract claim to the federal courts, thereby depriving state courts of subject matter jurisdiction. The United States Supreme Court granted certiorari, stating that the question whether the state courts had jurisdiction was an important one.

In holding that the Delaware courts had subject matter jurisdiction over Cities Services' contract claims, the Court said:

> ". . . questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court -- on how he casts his action. Since "the party who brings a

> suit is master to decide what law he will rely upon," . . . the complaints in the [state] court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum-rate order was invalid, or for restitution of the overpayments by which petitioners have allegedly been unjustly enriched under the compulsion of the invalid Kansas order. No right is asserted under the Natural Gas Act.
>
> The suits are thus based upon claims of right arising under state, not federal law.

Pan American, 366 U.S. at pp. 662, 663. Emphasis added.

Here, as in Pan American, no federal question is raised by the simple contract claims stated by PGandE which seek only to enforce state-created contract rights, and which do not assert any rights under the Federal Power Act.

VI

THE EXISTENCE OF A FEDERAL REGULATORY SCHEME DOES NOT CONVERT A COMMON LAW CONTRACT CLAIM INTO A FEDERAL QUESTION.

City claims that because the Federal Power Act sets up a pervasive system of regulation over contracts for interstate sales of electricity for resale, federal courts therefore have jurisdiction of claims for breach of those contracts. Petition, p. 3, ¶¶ 5-7. This is not true. Contract claims between parties to a wholesale electric

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contract filed with the FERC 2/ do not arise under the Federal Power Act as a result of such filing or regulation. See, Pan American, 366 U.S. at p. 662.

In Pan American, the court rejected defendant's argument that Cities Service's contract claim must necessarily be to enforce or to challenge a rate contained in the contract filed with the Federal Power Commission, and that the case therefore arose under the Natural Gas Act. This court should likewise reject the City's identical theory based upon the Federal Power Act.

City's petition for removal stresses the fact that the contract between the parties was required to be filed and was filed with the FERC. Petition, p. 3, ¶¶ 5-7. This is not controverted by PGandE; in fact, paragraph 9 of the complaint states that the contract was accepted for filing by the FERC. As in Pan American, City's unarticulated theory appears to be that because the contract was filed with the FERC and because there is a scheme of federal regulation over rates contained in power sales contracts, there must necessarily be a federal question in any action for breach of that filed contract.

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2/ The Federal Energy Regulatory Commission (FERC) is the regulatory successor to the Federal Power Commission (FPC).

In Pan American, the Supreme Court discussed the fact that there was federal regulation of interstate sales of natural gas and said:

> The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.
>
> Pan American, 366 U.S. at p. 663; emphasis added.

Accord, Landon v. Northern Natural Gas Company, 338 F.2d 17 (10th Cir. 1964) cert. den. 381 U.S. 914, 85 S.Ct. 1529, 14 L.Ed.2d 435 (1965).

In City of New Orleans v. United Gas Pipeline Co., 390 F.Supp. 861 (E.D. La. 1974), the Court concluded that the federal scheme of regulation created by the Natural Gas Act did not turn contracts for the interstate sales of gas into creatures of federal law:

> The legislation was thus carefully fashioned to exert federal control only in a limited and well-defined area. It would distort that pattern beyond recognition to find inherent in this plan a proscription of state legislation allowing parties to contract to sell natural gas in interstate commerce, or of state law prescribing liability for the breach of such a contract. The FPC may regulate many aspects of the gas-supply contract . . . but not even that agency has attempted to imply that the contractual relationship is itself a creature of federal law.
>
> City of New Orleans, 390 F.Supp. at p. 865.

VII

PGandE COULD NOT HAVE BROUGHT A FEDERAL CLAIM FOR BREACH OF ITS CONTRACT WITH THE CITY.

City claims that "PGandE could have chosen to bring this suit directly in federal court pursuant to section 317 of the Federal Power Act, 16 U.S.C., § 825p, . . ." (Petition, p. 5, ¶ 10, lines 4-7.) This contention is simply incorrect. It is is also irrelevant even if true, since PGandE may choose to rely on its state claim and need not rely on an alternative federal cause of action. Pan American, 366 U.S. at p. 663, quoted on p. 18 herein.

A. Section 317 Of The Federal Power Act Does Not Create A Federal Cause Of Action.

It is well established that the "exclusive jurisdiction" grant to the federal courts in section 317 of the Federal Power Act does not create a federal claim arising under the Act. Pan American, 366 U.S. at p. 644.

Section 317 of the Federal Power Act does not create a federal cause of action. Section 317 of the Federal Power Act provides in pertinent part as follows:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law are brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or

> any rule, regulation, or order thereunder. . . .
>
> § 317 Federal Power Act; 16 U.S.C. § 825p.

On its face, section 317 grants jurisdiction to the District Courts if, and only if another section of the Federal Power Act or a rule, regulation or order thereunder creates a cause of action. Inasmuch as the City is exempt from the relevant provisions of the Federal Power Act § 201(f) Federal Power Act, 16 U.S.C. § 8245 (see discussion at C., p. 15) it is difficult to see how § 317 could be applicable to the instant action. In any event, the United States Supreme Court in Pan American, held that the Natural Gas Act's identical exclusive jurisdiction grant 3/ did not bar a state court action of this sort. In discussing the reasons why state court remedies were not barred, the Court said:

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3/ Section 22 of the Natural Gas Act provides in pertinent part as follows:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder."
>
> 15 USC § 717u.

> "But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court - on how he casts his action. . . .
>
> Nor does section 22 of the Natural Gas Act help petitioners. "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. This was settled long ago in Pratt v. Paris Gas Light & Coke Co. . . .
>
> Pan American 366 U.S. at p. 662, 664, emphasis added.

In 1976 in a case raising many of the same legal issues as Pan American, the question whether state courts had jurisdiction over a breach of contract case brought by an electric utility to recover unpaid bills against a defaulting wholesale purchaser of electricity was considered by the Ohio Court of Appeals. Cleveland Electric Illuminating Company v. City of Cleveland 363 N.E. 2d 759 (1956) cert. den. 434 U.S. 856, 985 S.Ct. 175, 54 L.Ed.2d 127 (1977). The wholesale electric contract had been filed with the FPC pursuant to the Federal Power Act. In Cleveland Electric, the delinquent City argued that the exclusive jurisdiction grant in the Federal Power Act barred any state court action on plaintiff's breach of contract

claim. The court held that Pan American controlled and concluded that section 317 of the Federal Power Act must be construed the same way section 22 of the Natural Gas Act had been construed in Pan American. (See also City of New Orleans v. United Gas Pipeline Company, quoted at p. 10, 390 F.Supp. 861 at pp. 863, 864 (E.D. La. 1974). It held that section 317 did not bar a plaintiff from pursuing its contract claim in state court. Thus, neither section 317 of the Federal Power Act nor section 22 of the Natural Gas Act create federal causes of action, nor do they prohibit the state courts from determining rights and obligations under a contract filed with the FERC.

B. The Federal Power Act Does Not Create Either An Explicit Or An Implied Private Right Of Action Enabling A Utility To Sue For Enforcement Of Its FERC-Filed Contract Rights.

Nowhere in the Federal Power Act is there language creating an explicit private civil cause of action on behalf of a public utility to enforce contract rights based upon contracts required to be filed with the FERC.

Similarly, there is no private right of action that would allow PGandE to sue City in federal court in this case. City's argument that PGandE could have brought this suit pursuant to section 317 of the Federal Power Act is undercut by the fact that the Federal Power Act has been construed to create no implied private rights of action. In City of Gainesville v. Florida Power and Light Co., 488

F.Supp. 1258 (S.D. Fla. 1980) Gainesville and certain other cities filed an action claiming that Florida Power and Light violated federal antitrust laws, the Federal Power Act, the Natural Gas Act, and various state antitrust statutes. The Court held that there were no implied private rights of action created by the Federal Power Act or the Natural Gas Act. In discussing section 317 of the Federal Power Act the Court said: "The Cities confuse grants of jurisdiction with provisions for causes of action." Gainesville, 488 F.Supp. at p. 1273, emphasis added. The Court stated that section 317 was a jurisdictional grant complementing section 314(a) which creates an explicit federal cause of action in favor of the FERC and section 10(c) which creates an explicit private cause of action against federal licensees in favor of those whose property is damaged by a federally licensed project. Thus, when explicit federal causes of action are created by other sections of the Federal Power Act, section 317 provides that the district courts have exclusive jurisdiction over those causes of action. It does not in and of itself create any implied federal causes of action.

C. No Relevant Provision Of The Federal Power Act Applies To City.

Even if the Federal Power Act did grant PGandE a private right of action for breach of a wholesale power contract by a customer, it would not be available to PGandE here because the defaulting City is a municipality. As the

City should know, the pertinent provisions of the Federal Power Act do not apply to governmental entities. § 201(f) Federal Power Act, 16 U.S.C. § 824(f). The statute provides as follows:

> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing as such in the course of his official duty, unless such provision makes specific reference thereto.
>
> § 201(f) Federal Power Act, 16 U.S.C. 824(f), emphasis added.

Therefore it is clear that City should never have removed this case to federal court. See also, Northern California Power Agency v. Federal Power Commission, 514 F.2d 184 (D.C. Cir. 1975), cert den. 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1975) (Sacramento Municipal Utility District, a public agency of the State of California was held not to be subject to regulation by virtue of the provisions of § 201(f) of the Federal Power Act).

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VIII

FEDERAL DEFENSES DO NOT CONFER REMOVAL JURISDICTION ON THE FEDERAL COURTS.

We understand City to claim that PGandE's Stanislaus Commitments somehow alter the terms of the PGandE-City contract. City states:

> The FERC has also required PG&E to file with it, as part of PG&E's general obligations applicable to all jurisdictional sales for resale, the transmission provisions of the so-called "Stanislaus Commitments" . . . [which] will substantially affect any interpretation of the right to collect from Healdsburg under PG&E's filed tariff alleged in the complaint. . . .
>
> Although requested to provide transmission to Healdsburg . . . as it is required to pursuant to [the Stanislaus Commitments] PG&E refused to do so. . . . If PG&E is bound by its [Stanislaus Commitments], which are filed with the FERC, and which affect all its contractual relationships subject to regulation under the Federal Power Act, then Healdsburg owes PG&E nothing, because PG&E's essential contract right has been amended pro tanto by such filings.
>
> Petition, pp. 3, 4, ¶¶ 8, 9, emphasis added.

City's allegations are false and inaccurate in many important respects. Even taken at face value, however, the most that can be said for City's argument is that City may have a federal defense to PGandE's contract action. While PGandE does not believe that City has any valid defense, the question here is whether a federal defense

confers jurisdiction on this Court. It is well established that the existence of a federal defense is not sufficient to give the federal court subject matter jurisdiction when the complaint does not raise a federal question. Nor will allegations in the petition for removal suffice.

The Pan American court recognized that only the complaint, not defendant's answer or the petition for removal can supply the federal question necessary to sustain the federal court's subject matter jurisdiction.

> It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. . . . Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .'
>
> For this requirement it is no substitute that the defendant is almost certain to raise a federal defense. . . . Equally immaterial is it that the plaintiff could have elected to proceed on a federal ground. . . . If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.
>
> Pan American, 366 U.S. at p. 663. Emphasis added.

The court in Pan American concluded that even if the Natural Gas Act provided defendants with a valid federal

defense, that would not confer federal jurisdiction over a common law contract complaint.

> We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.
>
> Pan American, 366 U.S. at p. 664, emphasis added.

IX

ATTORNEYS FEES SHOULD BE AWARDED TO PGandE

In addition to the costs authorized by 28 U.S.C. § 1447(c), PGandE requests that this court to award attorneys fees to PGandE to compensate PGandE for the time and expense required to make this motion to remand.

Removal occurs automatically upon the filing of a petition for removal. See, 28 U.S.C. § 1441 et seq. When a case is removed improperly, without jurisdiction as this case was, the plaintiff must move to remand. In this case counsel for the removing defendant knew or should have known that there was no federal contract claim that PGandE could have brought at the time the removal petition was filed, based upon their participation in the Gainesville and NCPA cases. 4/ Despite their knowledge that no federal contract claim existed, in the Petition for Removal filed with this

Court, they attempted to persuade the Court that such a claim did exist by stating: "In fact PG&E could have chosen to bring this suit directly in federal court. . . ." Petition, p. 5, ¶ 10. That statement is false as shown above at pp. 11-16.

Under such circumstances it would be only just for City or its counsel to compensate PGandE for its efforts to remand this case to the proper court. Although such attorneys fees awards are exceptional, they may be made under the district court's equitable powers, in the interests of justice, and it is not necessary to find that defendant acted in bad faith in order to make such an award. Grinnell Brothers v. Touche Ross, 655 F.2d 725 (6th Cir. 1981).

Grinnell involved the removal of a Michigan state court case to United States District Court. Plaintiffs removed to remand based upon the federal court's lack of subject matter jurisdiction, and requested attorney's fees because of the improper removal. After briefs on the motion

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4/ PGandE requests that the court take judicial notice of the appearance of Spiegel and McDiarmid as counsel of record in Gainesville from the pages of the official reporter attached as Exhibit A to this memorandum, and the appearance of McDonough, Holland, Schwartz & Allen as counsel of record in NCPA v. FPC from the pages of the official reporter and the cover sheet of NCPA's Petition for Certiorari to the United States Supreme Court, attached as Exhibits B1 and B2 respectively. Federal Rules of Evidence § 201.

to remand were filed, defendants acquiesced in the request for remand. After oral arguments on the issue of fees, the court awarded plaintiffs $500. On appeal, the Court of Appeals for the 6th Circuit sustained the fee award noting that a finding of bad faith, vexatious action, or flagrant disregard for the propriety of an action was not required, and further noting that the motion to remand would have been granted by the court if defendants had not consented to remand. PGandE submits that the circumstances here, as in Grinnell, justify an award of attorney's fees.

X

CONCLUSION

For all the reasons stated above, plaintiff PGandE contends that the District Court does not have jurisdiction over this breach of contract action and that the Court

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should grant plaintiffs' motion to remand, request for costs and attorneys fees.

Dated: March 16, 1984.

Respectfully submitted,

ROBERT OHLBACH
HOWARD V. GOLUB
SHIRLEY A. SANDERSON
STUART K. GARDINER

By Shirley A. Sanderson
SHIRLEY A. SANDERSON
Attorneys for Plaintiff
PACIFIC GAS AND ELECTRIC COMPANY

EXHIBIT 5

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OCT 17 1983

Docket Nos. ER83-683-000
and ER83-684-000

Pacific Gas and Electric Company
Attention: Mr. Harry W. Long, Jr.
P.O. Box 7442
San Francisco, California 94120

Dear Mr. Long:

By order issued September 14, 1983, in Docket No. ER83-683-000, the Commission accepted for filing an Interconnection Agreement between Pacific Gas and Electric Company and the Northern California Power Agency. The Commission's order, however, did not include rate schedule designations. The attached Enclosure contains the applicable rate schedule designations for Docket No. ER83-683-000.

By letter dated August 15, 1983, you submitted for filing with the Commission a Notice of Cancellation of your Rate Schedule R-1 with regard to sales to the California Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Roseville and Ukiah since these cities will be served by the Northern California Power Agency. Authority to act on this matter is delegated to the Director, Division of Electric Rate Regulation under Section 375.308 of the Commission's Regulations; pursuant to Section 375.308(l), your submittal is accepted for filing and designated as follows:

Pacific Gas and Electric Company
Supplement to Service Agreements
under FPC Electric Tariff,
Original Volume No. 2
(Cancels service agreements with
above customers)

Notice of your filing was published in the Federal Register with comments, protests, or interventions due on or before August 29, 1983. On August 29, 1983, the Northern California Power Agency and those of its members affected by the proposed termination filed a motion to intervene. Under Rule 214(c)(1) of the Commission's Rules of Practice and Procedure (18 CFR 385.214) the unopposed motion to intervene filed by the Northern California Power Agency and its members serves to make them parties to this proceeding.

Pacific Gas and Electric Company

Good cause is shown for granting waiver of the notice requirements pursuant to Section 205(d) of the Federal Power Act and Section 35.11 of the Commission's Regulations thereunder; therefore, the rate schedule supplement shall become effective September 14, 1983.

This acceptance for filing does not constitute approval of any claimed contractual right or obligation associated with the above rate schedule or its cancellation, and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Pacific Gas and Electric Company.

This action is final unless a petition appealing it to the Commission is filed within 30 days from the date of this letter, as provided in Rule 1902 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.1902. The filing of a petition appealing this action to the Commission or an application for rehearing as provided in Section 313(a) of the Act does not operate as a stay of any date specified in this letter except as specifically ordered by the Commission.

This acceptance for filing terminates Docket No. ER83-684-000.

Sincerely,

Gordon E. Murdock

Gordon E. Murdock, Director
Division of Electric Rate Regulation

Enclosure

cc: Spiegel & McDiarmid
Northern California Power Agency

Enclosure

Pacific Gas & Electric Company
Rate Schedule Designations
Docket No. ER83-683-000

Filed : August 16, 1983
Other Party: Northern California Power Agency

Designation	Description
Rate Schedule FERC No. 84	Interconnection Agreement
Supplement No. 1 to Rate Schedule FERC No. 84	Service Schedule A Partial Requirements Service
Supplement No. 2 to Rate Schedule No. 84	Service Schedule B Emergency Power
Supplement No. 3 to Rate Schedule No. 84	Service Schedule C Maintenance Power
Supplement No. 4 to Rate Schedule No. 84	Service Schedule D Short-Term Firm Power
Supplement No. 5 to Rate Schedule No. 84	Service Schedule E Geysers Curtailment Power
Supplement No. 6 to Rate Schedule No. 84	Service Schedule F Curtailment Power
Supplement No. 7 to Rate Schedule No. 84	Service Schedule G Firm Transmission Service
Supplement No. 8 to Rate Schedule No. 84	Service Schedule H Interruptible Transmission Service
Supplement No. 9 to Rate Schedule No. 84	Service Schedule I Reserves Service
Supplement No. 10 to Rate Schedule No. 84	Service Schedule J Station Use Power
Supplement No. 11 to Rate Schedule No. 84	Service Schedule K Power Factor Correction Service

PROOF OF SERVICE BY MAIL
(C.C.P. Secs. 1013a(1) and 2015.5)

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; that my business address is 77 Beale Street, San Francisco, California 94106; and that on the date set out below I deposited a true copy of the attached

PACIFIC GAS AND ELECTRIC COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CITY'S DEMURRER

sealed in envelope(s) with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States in the said City and County, addressed as follows:

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
555 Capitol Mall, Suite 950
Sacramento, California 95814

ROBERT C. McDIARMID, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448

I declare under penalty of perjury that the foregoing is true and correct. Executed at 77 Beale Street, San Francisco, California, on August 20, 1984.

WANDA M. LOW

PROOF OF SERVICE BY MAIL
(C.C.P. Secs. 1013a(1) and 2015.5)

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; that my business address is 77 Beale Street, San Francisco, California 94106; and that on the date set out below I deposited a true copy of the attached

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555 Capitol Mall, Suite 950
Sacramento, California 95814

ROBERT C. McDIARMID, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448

I declare under penalty of perjury that the foregoing is true and correct. Executed at 77 Beale Street, San Francisco, California, on August 20, 1984.

WANDA M. LOW

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, NW
Washington, DC 20037
Telephone: (202) 333-4500

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448
Telephone: (707) 433-4842

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Defendant
City of Healdsburg, California

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

v.

CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40,

Defendants.

No. 127234

REPLY MEMORANDUM OF THE CITY OF HEALDSBURG IN SUPPORT OF DEMURRER

Date: September 13, 1984
Time: 10:30 a.m.
Dept: 6

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

Cases

Statutes

Administrative Decisions

Miscellaneous

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, NW
Washington, DC 20037
Telephone: (202) 333-4500

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448
Telephone: (707) 433-4842

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Defendant
City of Healdsburg, California

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, v. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. 127234 REPLY MEMORANDUM OF THE CITY OF HEALDSBURG IN SUPPORT OF DEMURRER Date: September 13, 1984 Time: 10:30 a.m. Dept: 6

The City of Healdsburg[1/] herewith responds to the rather voluminous Memorandum of Points and Authorities in Opposition to City's Demurrer,[2/] filed by Pacific Gas and Electric Company ("PG&E") and dated August 20, 1984. Healdsburg regrets that it

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1/ Sometimes referred to herein as "City" or "Healdsburg."

2/ Referred to herein as "Memorandum."

apparently has not made its position clear to PG&E. The Memorandum of August 20 is not responsive to most of the points we believed we had raised, and, to the extent it seeks to avoid rather than to respond to those points, we believe it is in error as a matter of law. We will respond to each of PG&E's points separately, but we believe it important to focus on several things which PG&E does not say, as well as on the things which it does say.[3/]

There should be no question about the facts necessary for a quick resolution of the primary issue in this case; PG&E raises none, although PG&E asserts that it is somehow improper for this Court to take judicial notice of PG&E's own public representations sworn to before other agencies, and that this Court must treat those representations as if they did not exist. Healdsburg believes that the threshold issue raised is one of law: Whether PG&E may, with impunity, refuse to perform its obligations under its Diablo Canyon Nuclear Power Plant License and its own contract. In our view, on the uncontested facts, PG&E was bound to permit Healdsburg to purchase, and to transmit to Healdsburg, power from the United States.[4/] PG&E appears to assert that

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3/ Some of the things which PG&E says appear simply to be misstatements of Healdsburg's position, but are stated in ways which are internally inconsistent throughout the body of the document. Compare, for example, the concession at page 15 that the Federal Energy Regulatory Commission had been asked to "construe the Complaint in this action" (itself not quite a correct characterization) with the flatly erroneous statement at page 37 that "Cities' [sic] assertion that this contract is before FERC . . . is false."

4/ The Western Area Power Administration, Central Valley Project, sometimes referred to as "WAPA" or "CVP."

under its rate schedule with Healdsburg it was entitled to ignore its obligations under its Nuclear Regulatory Commission ("NRC") license, and to ignore and refuse to negotiate with Healdsburg to permit such transactions.

The basic issue, as we see it, is whether PG&E is or is not bound by its NRC license conditions. A subsidiary issue is whether PG&E would have the right it claims -- even absent its license obligations -- under its rate schedules for service to Healdsburg, filed with the Federal Energy Regulatory Commission ("FERC") and as amended by that agency.

Healdsburg believes that these issues -- even recognizing what appears to be PG&E's somewhat shifting position on what its claim really is -- are basically interpretations of federal rate schedules and licenses -- matters of law. As such, since there are no matters of fact which need be resolved to rule in City's favor, this case is an appropriate one for resolution on demurrer, as we show below. As to the basic issue -- the enforceability vel non of NRC's license conditions -- Healdsburg, through the Joint Powers Agency of which it is a member, NCPA,[5/] has sought a ruling from NRC, but no ruling has yet issued. PG&E's interpretation of its license conditions as stated in its Memorandum is extraordinary and will have to be resolved either by this Court, by the NRC itself, or by the FERC.

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5/ The Northern California Power Agency.

Preliminarily, PG&E starts off by recasting both Healdsburg's legal argument and the uncontested facts. Thus, at page 4, PG&E asserts that:

> "City's contract argument is most remarkable. In City's view, because the contract provides for 'good faith' negotiations, City may amend it at will without even consulting PGandE, enabling City to escape the consequences of its breach by unilaterally altering the terms and conditions."

This, of course, is not at all what Healdsburg asserted and now asserts. PG&E's argument, however, ties in with its assertion, at pages 8-9, that:

> "City fails to allege that (a) it made any request to amend the contract, (b) that PGandE failed to negotiate in good faith, or (c) that PGandE rejected an offer of 'just and reasonable' terms and conditions."

Of course, at pages 8-11 of its Memorandum of Points and Authorities, City demonstrated precisely that it had requested that PG&E permit the transaction, thus amending the contract as it had undertaken to do before pursuant to the Stanislaus Commitments, and noted that PG&E had failed to negotiate at all and indeed had consistently refused to do so. Further, PG&E's stated reasons for refusing to negotiate relied upon legal contentions which had absolutely nothing to do with its contention in this proceeding and which it has apparently decided to abandon in light of its contrary representations to FERC. See Attachments 16, 17, 21, 22, 23, 24, 25, 26, 27 and 28. Moreover, since Healdsburg proposed precisely the terms and conditions insisted upon by PG&E only a few weeks earlier for a similar transaction (Attachment 16), we find it difficult to understand how PG&E can assert, as it does at page 9, that Healdsburg has

not alleged "that PGandE rejected an offer of 'just and reasonable' terms and conditions." PG&E represented to FERC that the terms and conditions for the similar purchase of energy from the Turlock Irrigation District ("TID") were just and reasonable when it filed them, thus it ill becomes PG&E to make a contention of this sort here. These documents make it clear, of course, that PG&E refused to negotiate on terms and conditions, or anything else.

The key elements of PG&E's present contention appear to be reflected in pages 9-11 of its Memorandum. Thus, it asserts that "City was obligated to purchase all of its power from PGandE unless the contract was amended." (Page 9.) It then asserts (pages 10-11) that "[s]ince the contract was not amended in any way relevant to this case, City thus had disabled itself by the terms of its own agreement from purchasing power from any source other than PGandE." Thus, PG&E's contention apparently is that it had the unrestricted right to refuse to permit Healdsburg to purchase any portion of its energy or capacity requirements from others. We believe that contention is in error, both under the terms of the contract itself and under the terms of its Diablo Canyon license conditions, which require PG&E to permit Healdsburg to make such purchases from others.

I. PG&E WAS OBLIGATED TO PERMIT THE TRANSACTION REQUESTED BY HEALDSBURG.

A. The Contract Itself.

Article 1 of the contract between Healdsburg and PG&E attached to the complaint provides:

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"(a) PGandE shall sell and deliver to Healdsburg, and Healdsburg shall purchase and receive from PGandE all Power required by Healdsburg except for such Northwest Energy as may from time to time be delivered by PGandE to Healdsburg under the provisions of the NCPA-PGandE Temporary Transmission Contract.

"(b) Nothing in this Agreement shall be interpreted in such a way as to prevent Healdsburg from seeking to obtain Power from sources other than PGandE or developing its own sources.

"(c) In the event Healdsburg is able to obtain or develop Power from sources other than PGandE and still wishes to continue purchasing some Power from PGandE, at Healdsburg's request the Parties shall endeavor in good faith to amend, supplement or supersede this Agreement in order to accommodate Healdsburg's purchase and use of such other sources of Power on terms and conditions which are just and reasonable."

PG&E relies entirely upon Article 1(a) in its Memorandum, and asserts that Articles 1(b) and 1(c) are "permissive only" and that the language:

"imposes no requirement on PGandE other than upon request, to endeavor in good faith with City to alter the contractual relationship on reasonable terms to accommodate other sources of power. Nothing in the contract forced PGandE to substitute power from another source."

Memorandum, page 8, emphasis in original.

It is abundantly clear that City did obtain commitments of power from other sources and did request PG&E to amend or supplement the agreement[6/] to permit it to utilize that power. (Attachment 11, as to power from TID; Attachment 16 as to power from the Western Area Power Administration ("WAPA").) It is equally clear that PG&E agreed "[p]ursuant to our Stanislaus

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6/ We need not here reach the fact that City had been seeking a more comprehensive agreement, through NCPA, for over a decade at that time.

Commitments" to permit the transaction involving power from TID (Attachment 12). As to the transaction from WAPA, however, it is clear that PG&E flatly refused, for reasons which have absolutely nothing to do with the contract upon which PG&E here relies[7/] (Attachment 17). Indeed, the only reasons cited by PG&E on the several occasions on which it refused to negotiate are both irrelevant to its contract with City and not so much as mentioned by PG&E in this lawsuit[8/] (Attachment 23, in response to Attachment 22; Attachments 24 and 25, in partial response to Attachment 21; Attachment 28, in response to Attachment 27).

Preliminarily, it may be noted that the California Commercial Code, section 1203, imposes an obligation of good faith in the performance or enforcement of every contract or duty within that Code, and that section 1102(3) of that Code makes it clear that the obligation of good faith, diligence, reasonableness and care proscribed by the Code may not be disclaimed by agreement. This obligation, of course, is the same obligation of a party to a contract to perform in good faith which has long been extant in California at common law. As stated in Jacobs v. Freeman (1980) 104 Cal.App.3d 177, 188-189:

> "'[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' [Citations.]

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7/ The reasons relied upon by PG&E in its refusal to negotiate are, City believes, erroneous, but the legal merit of those arguments is not at issue here.

8/ Indeed, we understand PG&E to have stated that it relies entirely upon its contract with City for its claim in this proceeding.

> The implied covenant imposes upon the parties an obligation to do everything that the contract presupposes they will do to accomplish its purpose."

Relying upon this basic principle, the Fifth District Court of Appeal there rejected a mechanistic interpretation of a contract much like PG&E's here, where a seller, a party to an escrow agreement which by its terms was subject to approval by the seller's board of directors, asserted that since board approval was never obtained (because no information concerning the sale was ever submitted to the board), there was no contract. As the court held, id. at 187, "the seller's agents were required to act in good faith by seeking board approval for the transaction, and the board was required to consider the proposal honestly."

In McWilliams v. Holton (1967) 248 Cal.App.2d 447, the court rejected an argument that a lessor, relying upon a lease provision providing for occupancy when the present tenant vacated, could decline to deliver the property by failing to give notice to quit to the existing tenant. The court noted the proposition, 248 Cal.App.2d at 452, that "'"A party to a contract cannot take advantage of his own act or omission, to escape liability thereon."'" Citing Ray Thomas, Inc. v. Cowan (1929) 99 Cal.App. 140, 145. The court held that action of this sort violated the implied covenant of good faith and fair dealing and the implied covenant which:

> "'not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.'"

McWilliams v. Holton, supra, 248 Cal.App.2d at 451.

Finally, in Vale v. Union Bank (1979) 88 Cal.App.3d 330, a bank utilized its right to resign as trustee under a trust agreement if it was unwilling to comply with the instructions of a committee set up to direct the investment for a pension and profit sharing plan. In a situation analogous to that here, where PG&E claims the right to refuse to negotiate if refusal means that it obtains the economic benefit for which City had contracted, the bank argued that it was entitled to resign, thus causing a requirement of sale of certain stocks and consequent loss, if the committee were unwilling to invest in certain funds profitable to the bank. That argument was rejected by the First District Court of Appeal, which noted, 88 Cal.App.3d at 336, that:

> "a covenant of good faith and fair dealing is implied in every contract. It requires 'each party not to do anything which will deprive the other parties thereto of the benefits of the contract . . . [and] to do everything that the contract presupposes that he will do to accomplish its purpose.'"

The court concluded that the bank's exercise of its right to resign under the terms of the contract "clearly shows that the bank failed to act in good faith." Id. Consequently, damages were assessed.

Thus, it seems clear that under California law alone, PG&E, when faced with a request to permit City to utilize the other sources of power it had developed, was required to do so, and on just and reasonable terms and conditions. Since the terms and conditions which City proposed were precisely those insisted upon by PG&E for a functionally identical transaction only weeks

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before, PG&E's refusal even to negotiate was clearly not consistent with the implied covenant of good faith and fair dealing imposed under California law.

Moreover, were there any question as to PG&E's obligation, it should have been dispelled by the course of conduct prior to the May 1982 refusal of PG&E to negotiate, when requested to do so by City, with respect to its purchase of energy from the United States. As the Commercial Code, section 2208, makes clear, where a contract involves repeated occasions for performance by either party, with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced to without objection shall be relevant to determine the meaning of the agreement. As is clear from Attachments 11 and 12, when previously requested to provide transmission service and partial requirements service to Healdsburg, inter alia, PG&E undertook to provide such service on its terms and conditions, "[p]ursuant to our Stanislaus Commitments." See Attachment 12, page 1. As noted by the Court of Appeal, Fifth District, in Davies Machinery Co. v. Pine Mountain Club, Inc. (1974) 39 Cal.App.3d 18:

> "The conduct of the parties subsequent to the execution of a contract and before any controversy had arisen as to its effect, is persuasive evidence in determining the meaning of the agreement. 'This rule of practical construction is predicated on the common sense concept that "actions speak louder than words."'"

Id. at 26.

B. The License Conditions.

PG&E asserts that it is not precluded by its license conditions from insisting upon a full requirement contract (page 10)

which would preclude City from purchasing capacity or energy from others, including the United States.[9/] PG&E also alleges, rather strangely, that City has nowhere cited an obligation under PG&E's license conditions dealing with anything other than transmission obligations. It asserts that "[n]one of those references, or the Commitments, indicate that full requirements contracts are prohibited."[10/] PG&E does not seem to deny its obligation to transmit power purchased by City, but asserts that this Court need not reach the issue of whether PG&E "would have agreed to transmit such power" since the issue is "totally irrelevant." Memorandum at 11. PG&E's rationale for this latter argument is that:

> "Even if PGandE had transmitted power from WAPA to City, City would still have been obligated under the terms of its own contract to pay PGandE for all power received or to pay damages for its breach."

Id.

We believe that PG&E is simply wrong in its crabbed and limited view of the scope of the license conditions, which it seems not to wish to follow. Preliminarily, there should be no question that the license conditions have been in effect since prior to the time of the contract attached to PG&E's complaint. While PG&E has elsewhere asserted that the license conditions

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9/ It may be noted that there is no controversy here as to purchases of capacity. City paid PG&E for all capacity taken, and the only question is as to the source of the energy.

10/ Strangely, PG&E seems to have overlooked entirely City's quotation, at page 5 of its Memorandum of Points and Authorities, of Section 2F.(6) of the Diablo Canyon license conditions, which is directly on point.

have been in effect since 1976, the conditions here relevant were first added formally to the Diablo Canyon Nuclear Plant License on December 6, 1978 (Attachment 1). Thus, regardless of whether the license conditions modified rights under pre-existing contracts, as PG&E has elsewhere asserted,[11/] it is clear that the contract at issue between Healdsburg and PG&E was an interconnection agreement negotiated "pursuant to these license conditions" within the meaning of Section F.(2) of the license conditions. One may note that Section F.(2)f. provides that "[a]n interconnection agreement shall not prohibit any party from entering into other interconnection agreements, but may provide that (1) Applicant receive adequate notice" together with other provisions not apparently relevant here. For this reason alone, PG&E's argument that it may force City to contract not to take power from other sources would fail, but there are several even more specific requirements as well.

Section F.(6) provides, in directory form, that:

> "Upon request, Applicant shall offer to sell firm . . . partial requirements power for a specified period to an interconnected Neighboring Entity or Neighboring Distribution System under a contract with reasonable terms and conditions . . . ."

Paragraph F.(7), dealing with PG&E's obligation to transmit power, again in directory terms, apparently need not be further discussed, since PG&E does not rely on any lack of obligation to transmit, but only on its failure to believe in the obligatory terms requiring it to offer partial requirements power when requested. Both provisions, it may be noted, require PG&E to

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11/ Before the FERC.

offer the terms and conditions of service when requested, and do not allow it to sit back and await a "satisfactory" offer of terms and conditions by City.

In light of the very clear nature of its license conditions, we think that PG&E's contention that the license conditions are irrelevant may be dismissed with little concern. The argument that PG&E has no obligation under its license conditions has even less merit than its argument that it has no obligation to negotiate in good faith to permit Healdsburg to purchase power or energy from other sources.[12/] We believe it to be clear as a matter of law that PG&E refused to permit City to obtain power which it had purchased from the United States, refused to negotiate on terms and conditions, refused to accept terms and conditions favorable to it which it had previously forced City to accept, refused to offer to provide partial requirements service to City and refused to offer to provide transmission service to City. Thus it is clear that it has violated its license obligations, and, indeed, that it seeks to profit in this Court by having so violated its obligations. PG&E was obligated, upon request, to offer City the modification to its contract, if any were needed, and to permit City to obtain the partial requirements service from PG&E necessary to allow City to utilize the power purchased from the United States.

12/ Indeed, PG&E offers no plausible reading of its license conditions which would even arguably excuse its behavior here. It relies instead upon averments that the conditions are irrelevant. City fervently hopes, for the sake of the people of California, that PG&E is more careful in following the health and safety requirements of its license, than it is in following the antitrust requirements.

II. THE MATTERS OF LAW AND JUDICIALLY NOTICEABLE FACT ASSERTED BY HEALDSBURG ARE PROPERLY BEFORE THIS COURT ON DEMURRER.

The complaint alone does not control the scope of the Court's review on demurrer, as PG&E contends (Memorandum at 3). The scope of consideration on demurrer was more accurately stated by the First District Court of Appeal as follows:

> "While allegations of the complaint are deemed to be true in ruling on the demurrers, where an allegation is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity (National Automobile & Cas. Ins. Co. v. Payne, 261 Cal.App.2d 403, 408 [67 Cal.Rptr. 784]). While a demurrer admits all material and issuable facts, properly pleaded, it does not admit contentions, deductions or conclusions of law (Daar v. Yellow Cab Co., [1967] 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732])."

Dale v. City of Mountain View (1976) 55 Cal.App.3d 101, 105. Thus, the complaint does not control as to judicially noticeable facts, nor as to the conclusions of fact or law.13/

These principles are easily understood. The purpose of a demurrer is to eliminate quickly from the court system actions in which the plaintiffs cannot prevail. Where either judicially noticeable facts or conclusions of fact or law will prevent plaintiff's recovery, there is no point in allowing a suit to go forward simply because the plaintiff has not alleged those facts or laws in its complaint. 3 Witkin, California Procedure, Pleading §328 (2d ed. 1971).

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13/ Daar v. Yellow Cab Co., supra, cited in the above quotation, holds that a demurrer does not admit "contentions, deductions or conclusions of fact or law." Serrano v. Priest (1971) 5 Cal.3d 584, 591 (emphasis supplied).

These principles were recognized long ago by the California Supreme Court:

> "Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result?"

People v. Oakland Water Front Co. (1897) 118 Cal. 234, 245, quoted in Witkin, supra, Pleading §328. As to judicially noticeable facts:

> "[i]n the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary."

Chavez v. Times-Mirror Co. (1921) 185 Cal. 20, 23, quoted in Witkin, supra, Pleading §328.

Section 430 of the California Code of Civil Procedure ("CCP") was amended to allow demurrer on a ground appearing "'from any matter of which the court must or may take judicial notice'" precisely to include these principles. Witkin, supra, Pleading §328; see also cases discussed id. at §329. The amended sections, CCP §§430.10 and 430.70, are, of course, the provisions under which Healdsburg has demurred.

Healdsburg asserts that PG&E's interpretation of its contract is contrary to law. The Diablo Canyon license

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conditions[14/] eliminate, as a matter of law, an essential precondition of the suit: PG&E's right to refuse to transmit United States power to Healdsburg, and PG&E's right to refuse to permit Healdsburg to accept that power on a partial requirements basis. PG&E's complaint in fact explicitly acknowledged that the contract under which it sues was filed with FERC; but PG&E failed to disclose in its complaint the further conditions imposed on the transaction by FERC. Healdsburg is entitled on demurrer to refer to sources of law outside the pleadings which bar the complaint. E.g., Talley v. Northern San Diego County Hospital District (1953) 41 Cal.2d 33 (judicial notice of (1) fact that defendant was a local hospital unit, and (2) the legal principle that a hospital performing a governmental function is immune from suit); Scott v. McDonnell Douglas Corp. (1974) 37 Cal.App.3d 277 (affirming dismissal, upon demurrer to libel suit, because of judicially noticed statutory immunity for publications made in the course of legislative proceedings).

Moreover, the contract itself may be interpreted by the Court, and PG&E's conclusory allegations of its meaning are not effective to bar a contrary interpretation required by the contract itself or by judicially noticeable facts. Here, the Diablo Canyon license conditions, as well as a judicially noticeable prior course of conduct, compel an interpretation of PG&E's

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14/ The license conditions, as such and as part of a FERC tariff, have the binding force of law. They are therefore judicially noticeable. Dollar-A-Day Rent-A-Car Systems, Inc. v. Pacific Telephone and Telegraph Co. (1972) 26 Cal.App.3d 454, 457. Cf. Carter v. American Telephone & Telegraph Co. (5th Cir. 1966) 365 F.2d 486, 491 & n.7. In fact, PG&E has admitted that FERC-filed tariffs have the force of law (Attachment 28).

conduct that bars the complaint. See, e.g., Byrne v. Harvey (1962) 211 Cal.App.2d 92, relying heavily on judicial notice of other court proceedings and of the contents of the agreement attached to the complaint in sustaining a dismissal, based on demurrer, of an action for breach of the agreement.

In fact, even though "a demurrer does not admit facts judicially known to be false," Everett v. Everett (1976) 57 Cal.App.3d 65, 68 n.3, and a factual allegation of a complaint may on demurrer be treated as a nullity if contradicted by a judicially noticeable fact, e.g., Dale v. City of Mountain View, supra, 55 Cal.App.3d at 105 & n.2, the Court may not be squarely faced with the issue of conflicting facts on demurrer here. What PG&E has done, rather, is to pick and choose the facts and legal principles it has included in its complaint, obscuring the real nature of the transactions complained of and the laws governing the conduct of the parties. As in Byrne v. Harvey, supra, 211 Cal.App.2d at 118:

> "This is a case where judicial notice invoked and applied as an instrument for testing the pleading shows that it is defective and that allegations essential to correct its defects cannot be made."

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III. THE COURT MUST TAKE JUDICIAL NOTICE OF HEALDSBURG'S ATTACHMENTS.

California Evidence Code §453[15/] requires the court to take judicial notice "of any matter specified in Section 452 if a party requests it" and gives the court and opposing parties adequate notice of its request. Healdsburg has given such notice, and all of the documents attached to its Memorandum of Points and Authorities in Support of Demurrer are both judicially noticeable under California Evidence Code §452 and relevant to the issues raised by Healdsburg's demurrer. Therefore its request for judicial notice must be granted.

A. All of Healdsburg's Documents Are Judicially Noticeable.

PG&E does not deny (page 45) that Attachments 1-10, 13, 19, 20 and 31 are proper subjects of judicial notice. Its argument that the remaining documents are not noticeable under

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15/ "§453. Compulsory judicial notice upon request

"The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

"(a) Gives each adverse party sufficient notice of the requests, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

"(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter."

sections 452(c) and (h)[16] is untenable. Contrary to the way in which PG&E formulates the issue (page 45), the California courts look to the ownership or location of documents to determine their official nature. Thus, the noticeability of the documents at issue under section 452(c) must be analyzed in terms of whose official records they are, rather than who originally drafted the documents being maintained as official records.

1. The Documents Contained in WAPA's Records.

Five of these documents (Attachments 15, 18, 22, 26 and 30) are letters written by the Area Manager of WAPA in his official capacity. Because such letters constitute an integral part of WAPA's business of selling electricity, they are clearly "official acts" of a federal agency noticeable under section 452(c). In Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal.App.3d 730, 740, the court took judicial notice of the City's letter rejecting the plaintiff's claim because the letter was deemed an official act of the City. Similarly, in Post v. Prati (1979) 90 Cal.App.3d 626, 634, the court took judicial notice of, inter alia, letters from a state agency, a legislative analyst and an individual legislator, to the governor, urging him to sign a certain bill. Thus, letters of a federal power

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16/ Section 452(c) provides that judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States."

Section 452(h) allows judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

agency that make up official transactions are undoubtedly subject to judicial notice.

The five letters (Attachments 14, 23, 24, 27 and 29) sent to WAPA by NCPA, PG&E and Healdsburg are also noticeable as part of a federal agency's records. In Greenberg v. Hollywood Turf Club (1970) 7 Cal.App.3d 968, the court took judicial notice of a private party's request for a hearing before the California Horse Racing Board, on the grounds that it was "on file with the Board, and as such [was] an official record of the Board." Id. at 980 n.8. And in Chas. L. Harney, Inc. v. State (1963) 217 Cal.App.2d 77, the court found that a private plaintiff's claims filed with the State Board of Control were subject to judicial notice along with the Board's letters denying the claims. Id. at 85, n.6. Even letters between private parties relating to a wholly private contract have been found to be proper subjects of judicial notice where they are part of an official record. Dryden v. Tri-Valley Growers (1977) 65 Cal.App.3d 990, 997. Here, where federal and state agencies were parties to the contracts at issue, letters relating to the contracts are even more clearly noticeable.[17/]

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17/ Citizens Utilities Company v. Superior Court (1976) 56 Cal.App.3d 399, cited by PG&E, is inapplicable because there the court found that the letters requested to be noticed were neither relevant to the case at hand, nor part of the California Public Utilities Commission's decision in the proceeding wherein the letters were received as evidence. In contrast, the five letters sent to WAPA are relevant to PG&E's rights under the contract and constitute an integral part of WAPA's official act of selling its surplus electricity to Healdsburg and other NCPA members.

2. The Documents Contained in NCPA's Records.

Contrary to PG&E's blanket assertion, page 45, there is ample precedent for California courts to judicially notice the official acts and records of municipalities. In E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, the California Supreme Court noted that the trial court had properly taken judicial notice of certain documents attached to the City's demurrer, including the contract between White and the City and related bidding documents. By the same reasoning, correspondence between Healdsburg, NCPA and PG&E relating to the Healdsburg-PG&E contract and the attempted modification thereof must be a proper subject of judicial notice. See also Commercial Union Assurance Co. v. City of San Jose, supra; Chambers v. Ashley (1939) 33 Cal.App.2d 390; 31 Cal.Jur.3d, Evidence §35 (1976).

However, the Court need not rely on such precedent to take notice of the remaining documents (Attachments 11, 12, 16, 17, 21, 25 and 28). The First District has deemed appropriate a trial court's judicial notice of the contents of agreements between private parties and a joint powers entity formed by the City of Santa Cruz and the County of Santa Cruz. Teachers Management and Investment Corporation v. City of Santa Cruz (1976) 64 Cal.App.3d 438, 443-444. NCPA is a joint powers agency created pursuant to Chapter 5, Division 7, Title I of the California Government Code,[18/] and it performs important regulatory functions delegated by the state. Functionally,

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18/ See People v. Shepherd (1977) 74 Cal.App.3d 334, 337 (court took judicial notice of the joint powers agreement of an entity formed under the same provision).

therefore, NCPA must be treated as a state agency for purposes of section 452(c). As the First District recognized in Agostini v. Strycula (1965) 231 Cal.App.2d 804, the mere fact that a municipality constitutes part of an agency (there, the Civil Service Commission for the City and County of San Francisco) does not deprive the agency of its state status for purposes of judicial notice of agency records. In fact, to adopt such a formalistic distinction between municipalities and county and state agencies would contravene the predominant judicial policy of California courts favoring the use of judicial notice where such use facilitates truth-seeking and eliminates unnecessary litigation.[19/] Because PG&E does not deny the authenticity of the documents offered by Healdsburg, the Court should take them into consideration now rather than waiting for their eventual introduction into evidence at trial.

3. The Documents Are Noticeable Under Section 452(h).

Alternatively, most of these documents and their contents may be noticed under section 452(h) since they are "[f]acts and propositions" not actually disputed by PG&E and are "capable of immediate and accurate determination by resort to sources of

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19/ See, e.g., Chas. L. Harney, Inc. v. State, supra, (1963) 217 Cal.App.2d 77 (quoting 2 Witkin, California Procedure [1st ed.], Pleading §208, p. 1185) ("'[T]he pleader should not be allowed to by-pass a demurrer by suppressing facts'" which the court could otherwise notice judicially); Watson v. Los Altos School District (1957) 149 Cal.App.2d 768, 772 (quoting City of Los Angeles v. Abbott (1932) 217 Cal. 184, 192) ("to refuse to take judicial notice . . . when justice requires it 'would be to blink the perceptive sense of courts to a degree not consistent with the increasing need for a more practical and efficient method in the administration of the law.'").

reasonably indisputable accuracy." PG&E's argument that section 452(h) is inapplicable to the documents at issue is at best disingenuous, particularly with respect to PG&E's own letters to WAPA and NCPA (Attachments 12, 17, 23, 24, 25 and 28), in light of its recent reliance on that provision in obtaining judicial notice of a letter from its Chairman of the Board to a state legislator in Public Utilities Commission v. Energy Resources Conservation and Development Commission (1984) 150 Cal.App.3d 437, 450.

B. All of the Documents Are Relevant.

PG&E's allegations that the documents should not be judicially noticed because they are irrelevant requires little response. As argued above and in Healdsburg's first memorandum, the Diablo Canyon license conditions -- the Stanislaus Commitments -- provide the background behind the PG&E-Healdsburg contract, especially Articles 1(b) and 1(c). The Justice Department's and NRC's conclusion that the antitrust protections embodied in the Stanislaus Commitments needed to be made a condition of PG&E's license is extremely relevant to indicate the circumstances under which the contract was formed. Thus, Attachments 1-8, relating to the issuance of the license by the NRC and the filing of the license conditions with the FERC, are an aid to determining the intent of the parties.

Attachments 9-13, which pertain to PG&E's prior agreements to allow Healdsburg to purchase power from WAPA and the Turlock Irrigation District, are relevant to show the course of performance of the PG&E-Healdsburg contract.

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"The conduct of the parties subsequent to the execution of a contract and before any controversy had arisen as to its effect, is persuasive evidence in determining the meaning of the agreement. 'This rule of practical construction is predicated on the common sense concept that "actions speak louder than words." Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they know what they were talking about, the courts should enforce that intent.' (Italics added.) (Crestview Cemetery Assn. v. Dieden, 54 Cal.2d 744, 754; [8 Cal.Rptr. 427, [433], 356 P.2d 171[, 177]; 1 Witkin, Summary of Cal. Law (8th ed. 1973), Contracts, § 527, pp. 449-450.)"

Davies Machinery Co. v. Pine Mountain Club, Inc., supra, 39 Cal.App.3d at 26-27.

Similarly, Attachments 14-30, consisting of correspondence regarding Healdsburg's proposed purchase of power from WAPA, are relevant to the issue of PG&E's refusal to negotiate in good faith upon Healdsburg's request to modify the contract in the same manner as previous modifications. Finally, Attachment 31, which is a segment of PG&E's brief before FERC in Docket No. E-7777(II), is relevant to the issue of FERC's interest in the case, which the Court must consider in its ruling on primary jurisdiction.

PG&E also argues (at page 48) that the Court should deny the request for judicial notice because it was not specific enough.[20/] Healdsburg respectfully submits that the original request was adequately specific and that it fully complied with

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20/ In this respect, PG&E's reliance on Jefferson's California Evidence Benchbook is misleading. It is clear from the words omitted from the section quoted by PG&E that the requirement of specificity pertains only to judicial notice of court records.

the requirements of California Evidence Code §453.[21] PG&E cannot be arguing that the request was deficient as to the requirement of notice to adverse parties under section 453(a), because PG&E clearly understood the points sought to be established and had ample opportunity to challenge Healdsburg's request. The requirement in section 453(b) that a party "[f]urnish[] the court with sufficient information to enable it to take judicial notice of the matter" has also been met. The provision was designed simply to obviate the need for the court "to resort to any sources of information not provided by the parties." Comment of the Law Revision Commission following section 453. Because Healdsburg has provided the Court with copies of all documents it wishes the Court to notice, there is no need for the Court to engage in additional research.

However, should there be any question regarding which portions of certain documents Healdsburg requests to be noticed, we further specify that: (1) Attachment 3 is noticeable to show that PG&E received an operating license for its Diablo Canyon Nuclear Plant Unit I on September 21, 1981, and was bound by its conditions, and (2) pages 8-17 of Attachment 4 (Section 2.F.) set out, as a condition of that license, the Stanislaus Commitments, several subsections of which (pages 9-10, 13-15) relate to PG&E's duties regarding transmission and partial requirements services, as explained above.

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[21] Even if Healdsburg had failed to meet the notice requirements of section 453 the Court could and should still exercise its discretionary power to notice the documents under section 452.

C. PG&E's Argument that the Court May Not Take Judicial Notice of the Truth of the Matters Contained in the Documents Is Misleading and Erroneous.

PG&E's last-ditch attempt to dissuade the Court from noticing the documents attached to Healdsburg's memorandum improperly assumes that we are urging the Court to accept as true every assertion embodied in the documents. Such is not the case. The existence of the documents themselves, the dates on which and by whom they were written, and the fact of certain statements made in correspondence may all be verified by judicial notice.[22/] This sort of information is sufficient to back up our contentions that Healdsburg acted in conformity with the understanding of the parties as manifested by their earlier dealings under the contract, that PG&E did not so conform its behavior, and that PG&E also violated the terms of its NRC license.

However, should the Court feel the need to take judicial notice of the truth of statements made in any of the documents[23/] in addition to the existence of those statements, it is free to do so. The cases relied upon by PG&E (at pages 48-49) are inapposite. They correctly recognize the danger of assuming the truth of "hearsay allegations" that are judicially noticeable

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22/ See, e.g., Public Utilities Commission v. Energy Resources Conservation and Development Commission, supra; Hogen v. Valley Hospital (1983) 147 Cal.App.3d 119; Commercial Union Assurance Co., supra; Greenberg, supra; and Chas L. Harney, supra.

23/ We do not, for example, request that judicial notice be taken of the truth of the conclusory assertions or rationale in PG&E's letters refusing to negotiate, but rather the fact of PG&E's refusal. PG&E does not repeat the assertions of law here, nor could it do so while purporting to maintain this case in this Court.

solely because they are part of documents offered in evidence in a judicial or quasi-adjudicative administrative proceeding. However, Healdsburg's argument for judicial notice does not hang on such a slender thread. Because they themselves constitute official acts of the agencies concerned, most of the documents offered by Healdsburg are equivalent to "orders, findings of fact and conclusions of law, or judgments" of courts, the truth of the contents of which PG&E admits may be noticed. The City is not requesting notice of the truth of statements made in documents drafted by PG&E. Furthermore, none of NCPA's or WAPA's documents were prepared specifically for the purposes of the instant litigation; rather they were written to deal with matters arising in the course of official business.[24/] Therefore, the Court may take notice of the contents of the documents offered by Healdsburg. "The fact that [a] document's contents are used in support of a demurrer does not alter the propriety of taking judicial notice" of the document. Greenberg v. Hollywood Turf Club, supra, 7 Cal.App.3d at 980 n.8. Moreover, the Court may interpret the contract in light of the contents of these documents in deciding whether to sustain Healdsburg's demurrer. In Dryden v. Tri-Valley Growers, supra, 65 Cal.App.3d 990, for example, the court relied on the contents of letters

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24/ Thus, Healdsburg's documents are unlike those offered by the state in Childs v. State (1983) 144 Cal.App.3d 155, 162-163, a case PG&E relies upon. In Childs, the court properly rejected as "self-serving hearsay" an individual state official's description of the State Board of Control's mailing practices, which appears to have been prepared for the sole purpose of proving that the plaintiff had missed the deadline for filing suit against the state after rejection of his claim by the Board of Control.

judicially noticed to sustain a demurrer to a claim of interference with contractual relationships. The court held that the letters established that the defendant's predecessors, parties to the original contract, had abandoned performance of the contract months before transferring their interest to defendant. Therefore, because the breach of performance was not caused by defendant, plaintiff could not state a valid claim of intentional interference. In the instant case, the documents subject to judicial notice similarly point up a fatal flaw in PG&E's complaint; PG&E cannot properly allege, in light of Healdsburg's attachments, that it has fully performed its obligations under law and under its contract with Healdsburg.

IV. PG&E'S ARGUMENTS THAT THIS COURT MAY NOT OR NEED NOT REFER QUESTIONS RAISED IN THIS LITIGATION TO THE FEDERAL ENERGY REGULATORY COMMISSION ARE WIDE OF THE MARK.

PG&E broadly attacks Healdsburg's contention in Section II of its demurrer that, if PG&E's complaint is not simply dismissed, this Court must, and in any event should, refer certain contract questions raised herein to the Federal Energy Regulatory Commission ("FERC"). These attacks are without merit, and indeed, investigation of the materials cited by PG&E yields further support for Healdsburg's position.

Several preliminary points must be made. First, PG&E claims that Healdsburg "misstates the law" by claiming that a court may in some circumstances be obligated to defer to an agency's primary jurisdiction. PG&E Memorandum at 15-16, 33-34. The sources PG&E cites to support this bold assertion, however, are to the contrary. Davis clearly states that primary jurisdiction

sometimes "prevents a court from initially deciding a particular question" or "'requires judicial abstention.'"[25/] Great Western Sugar terms primary jurisdiction "discretionary," but by discussing why referral is not "required" under the specific facts before it the Colorado Court of Appeals implicitly acknowledges that referral sometimes is "required".[26/] In light of the fact that so many of the cases cited by Healdsburg and discussed by PG&E involve reversals of trial court decisions for failure to refer questions to competent administrative bodies, it is hard to see how PG&E can take the position that Healdsburg has misstated the law in this regard. It is not improper to call the primary jurisdiction doctrine "discretionary," but because under some facts failure to refer is an abuse of discretion it is also unquestionably correct to say that the doctrine is sometimes mandatory.

PG&E characterizes Healdsburg as asking this Court to seek "an advisory opinion" from FERC. Memorandum at 14, 15. PG&E offers no explanation for this characterization; it is in fact a mischaracterization. The exclusive means of review of any decision of the FERC is through the filing of a petition with a United States Court of Appeals pursuant to Section 313 of the Federal Power Act, 16 U.S.C. §825l; the Superior Court may construe a FERC order but may not review it. See Pennsylvania Railroad Co. v. United States (1960) 363 U.S. 202, holding that

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25/ 4 K. Davis, Administrative Law Treatise §22:1 at 82, 83 (2d ed. 1983).

26/ Great Western Sugar Co. v. Northern Natural Gas Co. (Colo. Ct. App. 1982) 661 P.2d 684, 690.

the Court of Claims, having referred a question within the primary jurisdiction of the Interstate Commerce Commission ("ICC"), was obliged to await full judicial review of the ensuing ICC order before resuming its proceedings. Davis, supra, at §22:4, says of Pennsylvania Railroad that it "appears to have put the main questions to rest, for they have not been adjudicated later." But cf. Mississippi Power & Light Co. v. United Gas Pipe Line Co. (5th Cir. 1976) 532 F.2d 412, 422 (whether and to what extent Federal Power Commission ("FPC") decisions on referral will bind referring court is unclear).

PG&E would have this Court hold that it may not refer questions relating to this litigation to FERC. Memorandum at 19-33. PG&E is very wide of the mark here. It should hardly require citation of authority to establish that FERC possesses jurisdiction to construe tariffs on file with it pursuant to its regulatory powers under the Federal Power and Natural Gas Acts. However, several cases cited by PG&E serve to make the point. Thus, in Town of Massena v. Niagara Mohawk Power Corp. (1982) 18 F.E.R.C. ¶61,068, FERC stated that it plainly had jurisdiction over, and could not dismiss, allegations that Niagara Mohawk had failed to render service as required by its filed tariff. In Arkansas Louisiana Gas Co. v. Hall (1979) 7 F.E.R.C. ¶61,175, at 61,322, FERC adopted an earlier FPC conclusion that the Commission had concurrent jurisdiction with a Louisiana state court to construe a clause in a jurisdictional gas sale contract, and that it therefore could consider a petition from the seller for a declaratory order to construe the contract. And, in United Gas Pipe Line Co. (1978) 4 F.E.R.C. ¶61,151, at 61,354-55, FERC

held that it possessed primary jurisdiction over questions relating to the impact of gas tariff provisions on a pipeline's contract liability in non-jurisdictional contracts.

Healdsburg would add to this list two cases not cited by PG&E. In MIGC, Inc. (1983) 25 F.E.R.C. ¶61,309, modified (1984) 26 F.E.R.C. ¶61,094, a customer who was being sued by MIGC for breach of contract sought from FERC an interpretation of its obligations under the contract, a filed gas sale tariff. FERC declared that it had concurrent jurisdiction to interpret the tariff provisions, if not "exclusive and primary jurisdiction," and set the question for hearing. 25 F.E.R.C. at 61,699. In Kansas-Nebraska Natural Gas Co. (1982) 21 F.E.R.C. ¶61,285, reh'g denied (1983) 22 F.E.R.C. ¶61,085, petition for review dismissed sub nom. Great Western Sugar Co. v. FERC (D.C. Cir. 1984) 733 F.2d 966, supplemented (1983) 23 F.E.R.C. ¶61,220, a gas pipeline company which was being sued in state court for breach of contract for failure to take certain actions requested a FERC ruling on whether the taking of such actions would have violated its filed tariffs. FERC determined that the applicant was entitled to a declaratory order and set the question for hearing, notwithstanding the fact that the state court in question had held that FERC did not have primary jurisdiction over the contract question.

PG&E's arguments that FERC cannot have primary jurisdiction over the construction of filed rate schedules involved in the instant suit are misguided. Thus, for instance, PG&E argues that FERC has no jurisdiction to determine liability for breach of contract, Memorandum at 25-29; that FERC cannot order

Healdsburg to pay PG&E, id. at 29-30; and that FERC cannot award damages, id. at 30-33. To the extent that any of this is accurate, none of it is germane. FERC can construe filed rate tariffs, which is all Healdsburg would suggest that the Court request FERC to do. The Commission explained the distinction between what Healdsburg seeks and what PG&E argues against in Kansas-Nebraska Natural Gas Co., supra, 21 F.E.R.C. at 61,780:

> "The Commission is not herein seeking to adjudicate specific claims of contract liability. That is a matter for the Courts. However, in the circumstances, the Commission believes that, in order to preserve the integrity of its regulation over terms and conditions of service by interstate [gas] pipelines under its jurisdiction, including interruptions, it must make the initial determination with respect to a pipeline's privileges and obligations under its certificates and filed tariffs."

Or, as the Supreme Court stated in Aircraft & Diesel Equipment Corp. v. Hirsch (1947) 331 U.S. 752, 767, quoted in Davis, supra, §22:1, "[t]he very purpose of providing . . . an initial and preliminary administrative determination is to secure the administrative judgment . . . as foundation for or perchance to make unnecessary later judicial proceedings." As for PG&E's claim that FERC cannot exercise jurisdiction over a terminated rate, Memorandum at 29, such a position is absurd. Just as FERC continues investigating the justness and reasonableness of once-suspended tariffs long after such tariffs expire,[27/] FERC can construe a superseded rate in order to determine whether a regulated entity has or had performed its obligations thereunder.

27/ See, e.g., Willmut Gas & Oil Co. v. FPC (D.C. Cir. 1961) 294 F.2d 245, 249, cert. denied (1962) 368 U.S. 975.

Finally, in its Memorandum at 33-42, PG&E takes up the real issue before the Court respecting primary jurisdiction: Whether, under the facts of this case, reference to FERC is appropriate. Again, however, PG&E's arguments are off-base. PG&E sets out to distinguish various cases cited by Healdsburg, but its efforts reveal the weakness of its position.

Thus, for example, PG&E seeks to distinguish J. M. Huber Corp. v. Denman (5th Cir. 1966) 367 F.2d 104, on the basis that this case, unlike Huber, does not involve "rate issues." Memorandum at 35-36. This case turns on the construction of a contract between PG&E and Healdsburg that is part of a rate schedule filed with FERC,[28/] plus certain nuclear plant license conditions that are FERC-jurisdictional rate schedules, some of which are and some of which are not on file with FERC.[29/] As PG&E put it in Attachment 28, "such contracts between the cities and PGandE are also tariffs filed with the Federal Energy Regulatory Commission, and have the force of law. . . . Both the cities and PGandE must abide by those tariffs . . . ." The only real question presented here is that of defining PG&E's obligations and privileges under its filed rate schedules and its license

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28/ The rate schedule includes not only the contract itself, as supplemented, but also filed portions of the Diablo Canyon license conditions.

29/ The fact that some of these license conditions have not been filed is of no import. When a FERC-jurisdictional public utility such as PG&E is bound, by contract, license or otherwise, to obligations relating to FERC-jurisdictional services, it may not escape such obligations by relying on its failure to file them with FERC. See, e.g., Sam Rayburn Dam Electric Cooperative v. FPC (D.C. Cir. 1975) 515 F.2d 998, 1008, cert. denied (1976) 426 U.S. 907.

conditions.[30] Hence, "rate issues" are at the very heart of this case.

In straining to distinguish Mississippi Power & Light Co. v. United Gas Pipe Line Co., supra, (5th Cir. 1976) 532 F.2d 412, cert. denied (1977) 429 U.S. 1094, PG&E notes that "there is no action pending at FERC dealing with Healdsburg's contract," stating in a footnote that Healdsburg had falsely claimed otherwise in its demurrer. Memorandum at 37. What Healdsburg in fact correctly stated, however, was that contracts implicated in the dispute, such as the PG&E-WAPA agreement known as Contract 2948A, were under investigation by FERC. Demurrer at 18. PG&E's misstatement of Healdsburg's position is a microcosm of its complaint -- an attempt to convert what was originally a dispute over its contract with WAPA into a contract action against Healdsburg.[31]

Finally, in what is in some ways an ultimate distortion, PG&E quotes, Memorandum at 39, the following statement from United Gas Pipe Line Co., supra, (1978) 4 F.E.R.C. ¶61,151, at 61,354:

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[30] When PG&E originally refused to negotiate to allow the power purchase at issue here, its stated reason dealt with WAPA's ability to sell power to others under its contracts with PG&E. Attachment 17. PG&E has not incorporated this issue in its pleadings herein, presumably because inclusion of a claim against WAPA, i.e., the United States, would deprive this Court of jurisdiction.

[31] Moreover, as we note at page 2, n.3, supra, PG&E has recognized that the City has requested FERC to construe, in connection with its decision in a proceeding dealing largely with antitrust issues, PG&E's position in this proceeding.

> "Furthermore, it has been the FPC's policy in the past not to consider questions referred by a court where the issues referred are already pending before the court for its decision."

This statement could be taken to mean that FERC simply would not accept a referral from this Court on questions relating to the construction of contract rate schedules. Whatever the meaning, however, FERC definitively rejected that FPC policy in 1979, adopting instead a flexible approach comparable if not identical to that applied by courts in determining whether to refer questions to FERC:

> "Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous."

Arkansas Louisiana Gas Co. v. Hall, supra, (1979) 7 F.E.R.C. ¶61,175, at 61,322 (emphasis added). In short, there are no bright lines regarding primary jurisdiction; contrary to what

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PG&E would argue,[32/] this Court must make a reasoned judgment, based upon the specific characteristics of this case, whether referral to FERC of questions within its concurrent jurisdiction would be appropriate or desirable.

We may conclude this section by reviewing the reasons why this Court, if it does not dismiss PG&E's complaint, should stay its proceedings and refer questions of tariff interpretation to FERC.

1. While the PG&E-Healdsburg Agreement may not be an overly technical contract whose interpretation would benefit greatly from FERC's special expertise, the contract between PG&E and WAPA, Contract 2948A, which was the sole stated basis for PG&E's refusal to transmit the power at issue in this suit, is such a technical contract.

32/ PG&E cites Pan American Petroleum Corp. v. Superior Court (1961) 366 U.S. 656, and cases following it, in support of this Court's jurisdiction. Memorandum at 25-29. However, these cases cannot and do not establish that under the facts presented herein FERC does not have primary jurisdiction. To the extent that PG&E relies on Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co. (8th Cir.) 297 F.2d 561, cert. denied (1962) 370 U.S. 937, and Landon v. Northern Natural Gas Co. (10th Cir. 1964) 338 F.2d 17, cert. denied (1965) 381 U.S. 914, to support a distinction between Federal Power Act/Natural Gas Act primary jurisdiction cases and Interstate Commerce Act primary jurisdiction cases, such reliance is unfounded. Any intimation that the Federal Power Act, unlike the Interstate Commerce Act, allows a court to reach behind and collaterally revise a filed rate, Pan American v. Kansas-Nebraska, supra, 297 F.2d at 569, was definitively rejected by the Supreme Court in Arkansas Louisiana Gas Co. v. Hall (1981) 453 U.S. 571. As the Court stated therein, 453 U.S. at 582 n.12, "Pan American Petroleum Corp. v Superior Court, 366 US 656 [Citation] (1961), stated only that a state rather than a federal court was the proper forum in which a buyer should bring a breach-of-contract action to obtain a refund of charges in excess of the filed rate." (Emphasis added.) PG&E would have this Court repeat the mistakes of others in reading too much into Pan American, but that decision in no way adverts to questions of primary jurisdiction.

2. The Commission has been investigating Contract 2948A and the Stanislaus Commitments for several years in connection with a broader antitrust investigation, and has on record voluminous testimony and exhibits regarding the contract and the Commitments.[33/] Because positions which PG&E has previously taken and positions which PG&E may again take in its dispute with Healdsburg conflict with other positions taken by PG&E in the antitrust proceeding, the Commission will be considering the activities which this suit concerns as an integral part of its antitrust investigation. Because of this background, FERC is especially qualified to construe the rate schedules at issue. Conversely, failure to refer questions to FERC could result in divergent administrative and judicial construction of PG&E's obligations and privileges under the Stanislaus Commitments and Contract 2948A.

3. PG&E's claim that Healdsburg must pay PG&E for all power received by Healdsburg regardless of whether the power was obtained from PG&E or elsewhere, Memorandum at 11, is a strained construction of the tariff yielding what on its face seems to be an unreasonable result. This clearly invokes the rule enunciated by the Supreme Court in United States v. Western Pacific Railroad Co. (1956) 352 U.S. 59, 68, that where there is no genuine "distinction between the issues of tariff construction and of the reasonableness of the tariff as applied," reference to the

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33/ There are over 45,000 pages of transcript alone in that proceeding, now before the Commission on exceptions taken by all parties to the initial decision of the Administrative Law Judge. See Pacific Power & Light Co. (1984) 26 F.E.R.C. ¶63,048, at 65,181.

agency responsible for regulating the tariff is especially appropriate.[34/]

V. CONCLUSION

For all of the above reasons, PG&E's opposition to Healdsburg's demurrer is unfounded. Accordingly, PG&E's complaint should be dismissed for failure to state a cause of action. Alternatively, this Court should suspend this proceeding and refer questions of construction of rate schedules to the Federal Energy Regulatory Commission, whose action thereupon will in all likelihood resolve any and all disputes between PG&E and Healdsburg.

DATED: September 4, 1984.

Respectfully submitted,

ROBERT C. McDIARMID
DANIEL I. DAVIDSON
MARC R. POIRIER
SPIEGEL & McDIARMID

ROBERT CRAWFORD

RICHARD W. NICHOLS
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation

By Richard W. Nichols
Richard W. Nichols

Attorneys for Defendant
City of Healdsburg, California

34/ Cf. Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., supra, 297 F.2d at 565, wherein the trial court found that interpretation of the tariffs at issue would "'not require this Court to determine the reasonableness of the rates on file with the FPC nor to determine what constitutes reasonable rates'." While PG&E relies on this case to argue that trial of breach of contract actions does not invade FERC's primary jurisdiction, Memorandum at 27-28, in fact the decision bears witness to the fact that the primary jurisdiction question must be approached on a case-by-case basis.

CASE TITLE: PG&E v. City of Healdsburg, et al.

COURT/CASE NO: Sonoma County Superior Court, No. 127234

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814; I am over the age of eighteen years and am not a party to the foregoing action.

On September 4, 1984, I served the document named below on plaintiff by placing a true copy thereof in an envelope addressed to plaintiff's counsel as follows:

ROBERT OHLBACH, ESQ.
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
RANDALL J. LITTENEKER, ESQ.
77 Beale Street, Room 101
San Francisco, CA 94106

Federal Express Airbill No. 774-908-643

which envelope, with delivery charges thereon to be billed to my employer's Federal Express account, was then sealed and delivered to a representative of Federal Express in Sacramento, California.

In addition, I served the document named below on plaintiff by placing a true copy thereof in an envelope addressed to plaintiff's counsel as follows:

ROBERT OHLBACH, ESQ.
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
RANDALL J. LITTENEKER, ESQ.
P. O. Box 7442
San Francisco, CA 94120

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mail box regularly maintained by the United States Postal Service in Sacramento, California.

DOCUMENT SERVED: REPLY MEMORANDUM OF THE CITY OF HEALDSBURG IN SUPPORT OF DEMURRER

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 1984, at Sacramento, California.

Barbara Gordon
Barbara Gordon

McDONOUGH, HOLLAND & ALLEN
A PROFESSIONAL CORPORATION

ROBERT C. McDIARMID, ESQ.
DANIEL I. DAVIDSON, ESQ.
MARC R. POIRIER, ESQ.
SPIEGEL & McDIARMID
2600 Virginia Avenue, NW
Washington, DC 20037
Telephone: (202) 333-4500

ROBERT CRAWFORD, ESQ.
141 North Street
Healdsburg, California 95448
Telephone: (707) 433-4842

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Defendant
City of Healdsburg, California

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff, v. CITY OF HEALDSBURG, a municipal corporation; and ROES 1-40, RED COMPANIES 1-40, Defendants.	No. 127234 APPENDICES TO DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEMURRER Date: September 13, 1984 Time: 10:30 a.m. Dept: 6

Various citations to authority are set forth in defendant's reply memorandum in support of its demurrer to plaintiff's complaint, which are not officially reported. Those authorities are attached hereto as appendices, for the convenience of the Court.

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APPENDIX A: Town of Massena, New York v. Niagara Mohawk Power Corporation and Power Authority of the State of New York (1982) 18 F.E.R.C. ¶61,068

APPENDIX B: Arkansas Louisiana Gas Company v. Frank F. Hall, et al. (1979) 7 F.E.R.C. ¶61,175

APPENDIX C: United Gas Pipe Line Company (1978) 4 F.E.R.C. ¶61,151

APPENDIX D: MIGC, Inc. (1983) 25 F.E.R.C. ¶61,309

APPENDIX E: MIGC, Inc. (1984) 26 F.E.R.C. ¶61,094

APPENDIX F: Kansas-Nebraska Natural Gas Company, Inc. (1982) 21 F.E.R.C. ¶61,285

APPENDIX G: Kansas-Nebraska Natural Gas Company, Inc. (1983) 22 F.E.R.C. ¶61,085

APPENDIX H: Kansas-Nebraska Natural Gas Company, Inc. (1983) 23 F.E.R.C. ¶61,220

APPENDIX I: Pacific Power & Light Company, and Pacific Gas and Electric Company (1984) 26 F.E.R.C. ¶63,048 (1984)

DATED: September 4, 1984.

ROBERT C. McDIARMID
DANIEL I. DAVIDSON
MARC R. POIRIER
SPIEGEL & McDIARMID

ROBERT CRAWFORD

RICHARD W. NICHOLS
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation

By Richard W. Nichols
Richard W. Nichols

Attorneys for Defendant
City of Healdsburg, California

[2] The Commission made this statement without the benefit of an evidentiary record. We agree with the judge's subsequent finding that Hamilton is a customer entitled to receive service from a cooperative within the meaning of the Agreement.

[3] *Gulf States Utilities Co.*, 5 FERC ¶ —, Docket No. ER76-816 (October 20, 1978).

[4] I.D. pg. 13. In fact, CG&E's witness testified that it was not the fact that BMCI was making the sale that it found objectionable.

Q: I think, again, Counsel had asked you questions both on the question of offpeak and what you just said, the series of corporations. Is it the offpeak that bothers you?

A: It is the offpeak.

Q: It is not the series of corporations then?

A: No, just the offpeak nature of the service. [Tr. 499]

[¶ 61,068]

Town of Massena, New York v. Niagara Mohawk Power Corporation and Power Authority of the State of New York, Docket Nos. EL82-6 and E-9565

Order Instituting Investigation and Staying Proceedings

(Issued January 25, 1982)

Before Commissioners: C.M. Butler III, Chairman; Georgiana Sheldon, J. David Hughes and A.G. Sousa.

The Town of Massena, New York moves for an order directing Niagara Mohawk Power Corporation to comply with a filed tariff and a settlement agreement. Massena alleges that by refusing to provide service as required by the tariff and the settlement agreement, Niagara Mohawk has violated Sections 205 and 206 of the Federal Power Act. Because of the nature of the allegations and the relief sought, we deem this motion a complaint.[1]

The facts are these. The tariff at issue is a contract, designated NS-1, between the Power Authority of the State of New York (PASNY) and Niagara Mohawk. The contract requires Niagara Mohawk to transmit, or wheel, power to certain of PASNY's municipal customers. The contract provides the rate Niagara Mohawk can charge for wheeling and the terms under which it will wheel.

The settlement agreement is a contract between Massena and Niagara Mohawk. The agreement resolves litigation, both here and in the federal district court, between Massena and Niagara Mohawk over Niagara Mohawk's obligation under the NS-1 contract to wheel PASNY power to Massena.[2] The portion of the settlement agreement in dispute provides:

> Niagara Mohawk agrees that, with the consummation and closing of this agreement, it will provide transmission services pursuant to contract NS-1 between Niagara Mohawk and PASNY or under any succeeding transmission tariff filed with and approved by the Federal Energy Regulatory Commission, provided further, that, pursuant to such tariff or transmission contract, Niagara Mohawk will deliver PASNY power to the Town of Massena at both the Browning and Andrews substations.

When it came time to begin service, Niagara Mohawk refused to deliver power to the Browning substation unless Massena agreed to pay a charge for wheeling to that substation in excess of the rate provided for in the NS-1 contract. When Massena refused to pay, Niagara Mohawk shut down, or de-energized, the Browning substation. Massena then filed the instant complaint.

Massena alleges that the NS-1 contract provides the only rate for wheeling service to Massena and that that rate does not vary according to the number of substations at which power is delivered. Massena therefore contends that Niagara Mohawk has violated Sections 205 and 206 of the Act because the demand for an extra charge is an attempt to impose a rate without authority in any filed rate schedule. PASNY, which supports Massena, alleges that Niagara Mohawk has violated the Act by failing to provide the service at the Browning substation required by the NS-1 contract and the settlement agreement.

Massena also alleges that Niagara Mohawk's conduct is unlawful in that it is an unreasonable exercise of monopoly power in violation of Sections 205 and 206 of the Act and a breach of the NS-1 contract and the settlement agreement.[3]

In its answers Niagara Mohawk argues that the rate in NS-1 is applicable to service at only one substation and that during the settlement negotiations Massena agreed to pay

APPENDIX A

an extra charge for service at the second substation. Niagara Mohawk also argues that the complaint should be denied because the case is moot, we lack jurisdiction, and collateral estoppel precludes Massena from litigating the issue of whether the rate in NS-1 provides compensation for service at a second substation.

Massena's allegations raise a serious question of whether Niagara Mohawk has violated the Power Act. The complaint cannot be dismissed. But neither can Massena's allegations be resolved on the basis of the papers now before us. Niagara Mohawk's answers put into dispute material issues of fact. A hearing is needed to resolve these disputes.

But the hearing need not be convened immediately. We have discretion to defer proceedings on our docket for reasons of "'[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"[4] Those reasons are present here:

(1) A few days after it filed its complaint here, Massena initiated a breach of contract action against Niagara Mohawk in the Supreme Court of New York for St. Lawrence County. In this action Massena alleges that Niagara Mohawk has breached the settlement agreement by failing to provide service at the second substation. Massena seeks damages, specific performance, and declaratory relief. The Supreme Court has issued a preliminary injunction directing Niagara Mohawk to provide service at both substations at the rate in the NS-1 contract.[5] The trial will be held in June, 1982.

(2) The case before us is not the usual type of rate case we decide. The important questions presented largely involve the interpretation of two contracts. New York law provides the rules for deciding those questions.[6] We are not experts on New York contract law. The New York court is.

(3) Allowing the New York litigation to proceed while deferring our own proceeding will promote the comprehensive disposition of Massena's claims and decrease the possiblity of a multiplicity of suits. Massena seeks an order from us directing Niagara Mohawk to provide service at two substations at the rate in the NS-1 contract. Massena seeks essentially the same relief from the New York court. A complete victory for Massena in the New York court will likely obviate the need for further proceedings here.[7] But if we were to go forward now and find for Massena, further proceedings in New York would still be necessary. Massena's claim for damages would still have to be heard.

(4) Even if further proceedings are necessary here after the New York court finishes, a decision by the New York court on the complex questions of New York contract law will simplify our decision.

(5) This case is essentially a private lawsuit between Massena and Niagara Mohawk. The terms of the settlement agreement apply only to those parties. And the terms of the NS-1 contract at issue are not common in the industry.

No one of these factors would in itself be controlling. Taken in their totality, however, they suggest to us that it would be unwise to go forward with this case until Massena's action in the state court ends.

Accordingly, the proceeding we now initiate will be stayed pending the outcome of the litigation between Massena and Niagara Mohawk in the New York courts. Should, however, that litigation be unreasonably delayed or should circumstances change so that it would be inequitable to continue the stay, we will consider a motion by Massena to vacate or modify the stay. When there is a final and non-appealable judgment in the New York action, we will consider what else we should do.

The Commission orders:

(A) The Town of Massena's motion for an order directing compliance with filed tariff shall be treated as a complaint under Section 206 of the Commission's Rules of Practice and Procedure. The complaint is assigned Docket No. EL82-6-000.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Section 306 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Part 1), a proceeding is hereby instituted to investigate the issues raised by the complaint in Docket No. EL82-6-000 and, if necessary, to prescribe such relief as is appropriate.

(C) The proceeding initiated hereby shall be stayed pending a final and non-appealable judgment in the action entitled *Town of Massena v. Niagara Mohawk Power Corporation* in the Supreme Court of the State of New York for St. Lawrence County, without prejudice, however, to the right of Massena to apply to vacate or modify the stay in the event the above action is unreasonably delayed or there is a change in circumstances in, or affecting, the above action which would make it inequitable to continue the stay.

(D) Within 90 days after there is a final and non-appealable judgment in the above action, Massena shall file a copy of the judgment with us, together with a brief setting forth its views as to what else should be done. Failure to file will be deemed a consent to dismissal of the complaint without prejudice.

(E) Within 30 days after Massena files pursuant to Paragraph (D) other parties may file a brief in response.

— Footnotes —

[1] The issues raised in the complaint are essentially different from the issues raised by the complaint in Docket No. E-9565. Accordingly, we will assign a new docket number to this complaint.

[2] PASNY argues that we have no jurisdiction over this contract except as it may relate to a settlement of one of our proceedings. We disagree. Our jurisdiction is not so limited. Section 201(b) of the Act gives us jurisdiction. See our order in *Village of Penn Yan, New York*, Docket No. EL78-29 (March 28, 1979), *aff'd in relevant part New York State Electric and Gas Corp. v. FERC*, 638 F.2d 388 (2d Cir. 1980).

[3] Niagara Mohawk contends that we have no jurisdiction over Massena's breach of contract claims. The company, relying on *Airco, Inc. v. Niagara Mohawk Power Corp.*, 65 A.D. 378, 411 N.Y.S. 2d 460 (App. Div. 1978), thinks those claims belong in the New York courts. The problem with this argument is that the contracts provide for the transmission of electrical energy at wholesale in interstate commerce. In these circumstances a breach of contract may also constitute a violation of the Act. We have exclusive jurisdiction over that issue. The case relied on by Niagara Mohawk is not to the contrary. That case deals only with the jurisdiction of the New York courts over breach of contract claims when no violation of the Act is alleged. See *New York State Electric & Gas Corp. v. FERC*, 638 F.2d at 395-96.

[4] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). See also *Kansas Power & Light Co. v. FPC*, 554 F.2d 1178, 1186 n. 12 (D.C. Cir. 1977); *City of Lafayette v. F.P.C.*, 454 F.2d 941, 952-53 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).

[5] The Supreme Court denied Massena's motion for partial summary judgment on November 29, 1981.

[6] *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Pennzoil Co. v. FERC*, 645 F.2d 360, 383-87 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3547 (January 11, 1982) (No. 81-340).

[7] Niagara Mohawk contends that because the New York court can grant the same relief we can, there is nothing "remaining within FERC's jurisdiction." We disagree. The existence of parallel proceedings over a question of personal liability, as we have here, deprives neither forum of jurisdiction. *Kline v. Burke Const. Co.*, 260 U.S. 226, 230 (1922). Nor does the existence of a parallel proceeding even compel us to defer our proceedings. *Ashland Oil & Refining Co. v. FPC*, 421 F.2d 17 (6th Cir. 1970); *Kansas Power & Light Co. v. FPC*, 554 F.2d 1178.

[¶ 61,069]

Northern Natural Gas Company, Division of InterNorth, Inc., Docket No. CP81-293-000

Findings and Order After Statutory Hearing Issuing Certificate of Public Convenience and Necessity

(Issued January 25, 1982)

Before Commissioners: C.M. Butler III, Chairman; Georgiana Sheldon, J. David Hughes, and A.G. Sousa.

I. Introduction

On April 21, 1981, Northern Natural Gas Company, Division of InterNorth, Inc. (Northern),[1] filed in Docket No. CP81-293-000 an application, as supplemented on May 20, 1981, pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing the transportation and delivery of natural gas to Marathon Oil Company (Marathon) and the construction and operation of facilities therefor, all as more fully set forth in the application.

Northern proposes to transport and deliver for sale to Marathon up to 5,000 Mcf per day of natural gas for a period not to exceed 45 days and terminating not later than July 1, 1982. Northern states that the gas to be sold will be surplus to its general system needs during the term of the sale. The sale will be on a best-efforts basis, subject to Northern's ability to meet fully the needs of its existing general system requirements. Northern also states that where the demands of its on-system customers prevent it from providing the total requested deliveries to its off-system customers, any surplus available to its off-system customers will be divided in a *pro rata* manner, subject to pipeline operational considerations.

ble Commission Regulations under the Natural Gas Act and particularly the general terms and conditions set forth in paragraphs (a) and (e) of Section 157.20 and in Part 154 of such Regulations.

(C) Transco's transportation rates and disposition of revenues derived therefrom shall be subject to the determination in the rate proceeding in Docket No. RP77-108.

—Footnotes—

[1] This is the settlement rate approved by order issued June 27, 1978, in Docket Nos. RP76-136 and RP77-26.

[2] Date of first delivery under the June 21, 1978 authorization was November 1, 1978.

[¶61,174]

Amendments to Subpart A of Part 157 of the Regulations Implementing the Natural Gas Act, Docket No. RM79-43

Order Issuing Interim Rule

(Issued May 18, 1979)

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith and George R. Hall.

[Note: This rule was published in 44 Fed. Reg. 30331, on May 25, 1979, effective May 18, 1979, and appears at *FERC Statutes and Regulations* ¶ 30,055.]

[¶61,175]

Arkansas Louisiana Gas Company v. Frank F. Hall, et al., Docket No. RI76-28

Order Declining Jurisdiction After Reconsideration of the Issue on Remand

(Issued May 18, 1979)

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr. and George R. Hall.

[Note: Order denying rehearing issued July 16, 1979, 8 FERC ¶ 61,031.]

I

A QUESTION OF JURISDICTION

In this case this Commission[1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to determine whether a royalty agreement between a gas utility and the United States is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the "most favored nation clause" in a gas supply contract between the utility and certain independent producers of gas?[2]

II

HISTORY OF PROCEEDINGS

A. The Parties

Frank J. Hall, *et al.*, are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas Louisiana Gas Company ("Arkla"), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractual provision, known as a most favored nation clause, provides:

> If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. The State Court Proceedings

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court[3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement

with the government had triggered the most favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana, Second Circuit,[3] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the United States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a "purchase from another party-seller."[4] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition.[5] Arkla has petitioned the Supreme Court of the United States for certiorari.

C. Action Before the FPC

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC held:

> There is no question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.
>
> * * * * * * *
>
> However, there is a threshhold question as to the contractual basis of [the] rates. It has been Commission policy, to defer action on contract questions presented to it involving jurisdictional sales which are pending in court. * * *. This case presents a question of concurrent jurisdiction. * * *. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled[6] that even if the state court held that the Hall group was entitled to a higher rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the Commission's Regulations. The FPC also noted that since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. Actions By The FERC

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remanding the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978,[7] the Commission asked for briefs directed towards the question of:

> "whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here."

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a "[c]omission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court:"

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

In examining whether this Commission has a special expertise which makes it the appropriate forum to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contact questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has "purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Sligo gas field at a higher price than is provided to be paid for gas

delivered under this agreement." While there are circumstances where the interpretation of a favored nation clause may involve this Commission's technical expertise,[11] we have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a "purchase from another party-seller" which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need for uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.[12] While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests,"[13] and to this end in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted; we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the favored nation clause. In the circumstances of this case whether a "purchase" occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended "purchase" to include.[14] What "purchase from another party-seller" means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to trigger the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all favored nation clauses. Indeed, uniform interpretation would seem to be impossible.

It has been argued that the interpretation of this contract may have involved a state court in determining whether a "sale" had occurred. And the interpretation of the word "sale," it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas.[15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case. This case involves contract interpretation. And it is clear that the word "sale" may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. "The same words, in different settings, may not mean the same thing."[16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group were entered into long before this Commission became actively concerned with the indefinite price escalation clauses, and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses.[17] Indeed, in contracts executed after April 3, 1961, most favored nation clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract,[18] is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

On the facts of this case, the damages do not exceed applicable area ceiling rates.[19] The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group.[20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.[21] The Supreme Court of Louisiana further stated:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.[22]

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

—Footnotes—

[1] These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transferred to the FERC. The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, to the FERC.

[2] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*; Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978, 4 FERC ¶ 61,133. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976, 55 FPC 1018. The FPC's previous actions in this case are discussed more fully in Section II, *infra*, pp. 4–5.

[3] *Hall* v. *Arkansas Louisiana Gas Company*, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

[4] *Hall* v. *Arkansas Louisiana Gas Company*, 359 So.2d 255 (May 1, 1978).

[5] The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

> in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Melancon* v. *Texas Company*, 230 La. 593, 89 So.2d 135 (1956). *Mobil Oil Corporation* v. *Federal Power Commission*, 149 U.S.App.D.C. 310, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413, 32 L.Ed.2d. 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activation of the favored nation clause only to situations where there was a technical "purchase," "seller," or "price." The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

[6] A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of considering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

[7] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Petition (March 8, 1976).

[8] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Application for Rehearing (issued June 4, 1976, 55 FPC 2660). In these proceedings, the FPC issued other orders which are not relevant at this time.

[9] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief.

[10] Order Denying Petition (March 8, 1976) at 1020.

[11] See *Pure Oil Company* v. *F.P.C.*, 299 F.2d 370 (7th Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

[12] See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 343–344 (1956); *United Gas Pipe Line Co.* v. *Memphis Gas Dist.*, 358 U.S. 103, 109–110, 112–114 (1958).

[13] *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

[14] The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. See n. 2, p. 3.

[15] This Commission's jurisdiction extends to "the *sale* of natural gas in interstate commerce for resale." Section 1(b) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717(b).

[16] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

[17] 18 CFR 154.93.

[18] The Hall group holds small producer certificates which exempt it from certain rate filing requirements. See 18 CFR 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored nation clause. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. *Id.* However, because a small producer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, up to applicable limits provided by the Commission for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the "Order Denying Application for Rehearing" issued June 4, 1976, the FPC stated on p. 2660, n. 1:

> Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See *Somedan Oil Corp., et al.*, 37 FPC 267, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall

group has not filed for a rate increase prior to 1972. The Louisiana Court therefore deemed that the Hall group had fullfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of *certiorari* has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. *Arkla v. Hall*, Sup. Ct. No. 78-986, filed December 18, 1978.

On April 25, 1979, 7 FERC ¶ 61,088, we issued an "Order Requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

Frank J. Hall v. Arkansas Louisiana Gas Company, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its *Order Denying Application For Rehearing* (June 4, 1976); and *Order Clarifying And Amplifying Commission Order Denying Application For Rehearing* (November 8, 1976, 56 FPC 2905).

Supreme Court of Louisiana, slip op. p. 12, n. 7.

[¶61,176]

Cities Service Gas Company, Docket Nos. RP72-142, RP76-135, RP78-76 (PGA79-2 and AP79-2)

Order Accepting, Subject to Condition, and Suspending Rate Increase, Granting Waiver, and Establishing Hearing Procedures

(Issued May 18, 1979)

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

[Note: Order issued August 3, 1979, on rehearing, modifying prior order, dismissing request for suspension of ordering paragraphs and deferring action on request for clarification, 8 FERC ¶ 61,119.]

On March 22, 1979, Cities Service Gas Company (Cities Service) filed Second Revised Third Revised Sheet No. 6 to its FERC Gas Tariff, Original Volume No. 1, in which it proposed to increase its rates charged through its purchased gas adjustment clause by 34.8 million dollars. The proposed rate increase would, if approved, result in a unit increase of 11.11 cents per Mcf above current levels.[1] In particular, the proposed increased rates reflect:

(1) an increase of 9.73 cents per Mcf in current purchased gas costs, including certain costs attributable to the Natural Gas Policy Act of 1978 (NGPA);

(2) an increase of 1.19 cents per Mcf in the PGA surcharge adjustment, intended to recoup 15.6 million dollars in unrecovered purchase costs; and

(3) an increase of .19 cents per Mcf in the advance payment adjustment, due to the elimination of a negative adjustment of .29 cents per Mcf, and a reduction of .10 cents per Mcf to reflect a reduction in the advance payment balance.

Cities Service proposes that its increased rates be made effective on April 23, 1979.

Notice of Cities Service's PGA filing was issued on April 4, 1979, and comments were required to be filed on or before April 17, 1979.

The Commission notes that Cities Service's proposed increase in purchased gas costs includes increases in costs of gas supplied by producers as well as pipeline suppliers, and is in part attributable to increases occasioned by the implementation of

delivered to Fruehauf exceed its contract demand with its supplier.

(3) Fruehauf shall reduce the volumes it would receive under the curtailment plan of its existing natural gas supplier for Priority 2 or Priority 3 use as defined above to the extent that the volumes of gas transported under the transportation certificates exceed the volumes of curtailment experienced by Fruehauf in the eligible Priority 2 or 3 categories.

(4) Texas Gas shall submit a monthly report consisting of an original and four copies to the Commission indicating the name of the producer, the volumes received and transported, the volumes delivered, and the name of the distributor. Such report shall be filed under oath within 20 days after the end of each month included in the terms of the transportation certificate. Texas Gas shall file reports for any month during which gas is not transported. In addition, the first monthly report shall also state the date of initial delivery.

(5) Fruehauf shall provide Texas Gas with monthly reports which shall be transmitted to the Commission as an attachment to the reports required by (4) above. Such reports shall contain the amount of natural gas consumed at the plant during the month covered by the report, the end use of such consumption according to the end-use priorities contained in 18 CFR 2.78, the amount of natural gas consumed from other sources and the end use of the gas from such other sources.

(6) Columbia's transportation rates authorized herein, based upon rate schedules which are presently in effect subject to refund, are conditioned upon any change in rates authorized in Docket No. RP76-95 or final Commission orders on future rate filings by Columbia.

(7) In the event gas is diverted by Columbia, Columbia shall comply with all applicable Commission Regulations and reporting requirements under the Natural Gas Act.

(8) Texas Gas shall credit any excess revenues generated over and above the incremental costs incurred in performing the subject transportation service to Account 191 of the Uniform System of Accounts for Natural Gas Companies.

Commissioner Holden voted present.

[¶61,150]

TOSCO Corporation Office of Hearings and Appeals Case No. DXE-0494, Docket No. RA78-3

Order Dismissing a Request for Review Pursuant to Section 504 of the Department of Energy Organization Act

(Issued August 9, 1978)

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

[This Order is cited 4 FERC ¶ 61,150. The text appears at *FERC Appeals Decisions August 1978—June 1981* ¶ 46,001.]

[¶61,151]

United Gas Pipe Line Company, Docket Nos. RP71-29, et al. (Phase III)

Order Affirming Ruling of Presiding Judge, Granting in Part and Denying in Part Motions to Lodge, Denying Motion for Initiation of Rulemaking Proceeding, and Clarifying Scope of Proceeding

(Issued August 9, 1978)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

On December 16, 1975, the Presiding Administrative Law Judge, acting pursuant to Section 1.28(a) of the Commission's Rules of Practice and Procedure, referred to the Commission (1) certain questions concerning the intended scope of the hearing previously ordered by the Commission to be held in the above-captioned proceeding and (2) the Presiding Judge's rulings on the admissibility of

APPENDIX C

evidence dated November 11 and December 9, 1975. On June 10, 1976, March 25, 1977, May 10, 1977, and June 22, 1977, respectively, United Gas Pipe Line Company (United) filed with the Commission four separate motions seeking to lodge with the Commission certain opinions and orders issued by the U.S. Court of Appeals for the Fifth Circuit and three Federal district courts within its jurisdiction. Relying on these decisions United requests the Commission to affirm the November 11, 1975 ruling of the Presiding Judge and to expand the scope of this hearing to include the numerous legal and factual issues referred to this Commission by the several orders of the district courts. Reversal of the Presiding Judge's evidentiary ruling is sought by a number of United's customers who are intervenors in the proceeding and by the Commission staff. United's motions to lodge and for declaratory relief are likewise vigorously opposed.

The Commission finds reasonable and therefore approves the evidentiary ruling of the Presiding Judge. The motions to lodge numerous questions referred by the courts to the Commission are for the most part denied for the reason that such questions pertain primarily to the issue of United's possible contract liability to its customers for curtailment damages rather than to issues related to the establishment of United's curtailment plan. The Commission finds that the contract liability issues are beyond the scope of its jurisdiction and authority and therefore declines to include the contract liability issues and related questions as matters to be decided in this proceeding. Certain of the referred questions, however, are well within the ambit of Commission jurisdiction, and these questions are accepted for Commission consideration and disposition.

Procedural History

That part of this proceeding now designated as Phase III arose out of United's curtailment proceedings and involves United's potential liability to its customers for breach of contract resulting from curtailment of deliveries, United's attempts to modify its tariffs for the purpose of avoiding such liability, and the extent of the Commission's jurisdiction in the matter. United states that it is a defendant in seven lawsuits brought by direct industrial customers to recover over $1 billion in curtailment damages. Pennzoil Company, United's former parent, is a codefendant in several of the suits.

On March 31, 1971 United filed a petition requesting the Commission to issue a declaratory order determining and limiting United's obligations under the substitute fuel clauses contained in its contracts with several large utility and industrial customers. Those clauses provide that when United cannot deliver the full contract quantity of gas, it must pay the difference between the cost of gas and the customers' cost of alternate fuels. On May 17, 1971, in response to Commission Order No. 431 (45 FPC 570), United proposed a new section 12.3 of its curtailment tariff purporting to absolve it from liabity under the substitute fuel clauses.[3] These proposals were considered by the Commission along with other curtailment issues, following hearing, in Opinion No. 606, which was issued on October 5, 1971. While Opinion No. 606 dealt primarily with the Commission's jurisdiction over the curtailment of sales to United's direct customers, the Commission also denied United's request for a declaratory order interpreting and limiting its liability under the substitute fuel clauses and refused to approve the exculpatory tariff provision, stating that (46 FPC 805):

> Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the courts. No additional tariff language like that proposed in Section 12.3 . . . is necessary to limit liability under contracts when agencies' orders, rules, or regulations authorize actions contrary to those contracts.

In Opinion 606-A the Commission further clarified its view of the contract liability question as follows (46 FPC 1292-1293):

> In clarification, this Commission has the responsibility and the authority to protect all consumers from efforts by pipelines to grant preferences in service to particular customers or classes of customers in times when gas shortage precludes fulfillment of all contracts for delivery of gas. A claim of preference in service directly, or, in the case of substitute fuel clauses, indirectly, cannot operate to deprive this Commission of authority to assure fair and equitable curtailment plans. The pipeline companies cannot be faced with the dilemma of providing non-discriminatory service as ordered by the Commission and at the same time incur liability for breach of contracts which grant discriminatory preferences, directly or indirectly. Thus, the Commission's authority to preclude undue preferences and discriminations in service operates to preempt any contract provisions inconsistent with the exercise of that authority as not being in the public interest.

Opinions 606 and 606-A were reviewed by the Court of Appeals for the Fifth Circuit in *International Paper Co.* v. *F.P.C.*, 476 F. 2d 121 (5th Cir. 1973) (hereinafter *International Paper*). In referring to the above-quoted language of the Commission's opinions, the Court stated (476 F. 2d 125):

> After due study, we have determined that this language is mere dicta and has no force other

than to reflect a position taken by the FPC which lacks support in the record before it.

The Commission in Opinion No. 606, upon finding that it had jurisdiction over United's curtailment plan, had referred the case to the Presiding Examiner for an initial decision on the merits of United's proposed plan. The Presiding Examiner issued his initial decision on July 3, 1972. Upon review of the initial decision the Commission, on January 12, 1973, issued its Opinion No. 647 (49 FPC 179). Insofar as it is pertinent to the phase III issues, the Commission in Opinion 647 restated its view that United could not be held liable for breach of contract and that accordingly the proposed exculpatory tariff provision was unnecessary.

Shortly after Opinion No. 647 was issued the Court issued its decision in *International Paper*. The Commission responded to that decision in Opinion 647-A (49 FPC 1211). In accordance with Chief Judge Brown's concurring opinion in *International Paper* stating that while the issue of contract liability must ultimately be resolved by the Courts, the Commission nevertheless has a positive duty under the doctrine of primary jurisdiction to determine the legal and practical ramification of its orders, the Commission proceeded to consider the issues involving United's potential contract liability and the effect of the Commission's orders thereon. (49 FPC 1219-1224). The Commission concluded that in the absence of negligence, bad faith or other wrongful conduct a pipeline acting pursuant to an approved curtailment plan must be exonerated of all liability as a matter of law, citing *F.P.C. v. Louisiana & Light Co.*, 406 U.S. 621 (1972). The Commission further found that in cases involving negligence, bad faith or wrongful conduct on the part of a pipeline, the Commission has no power to adjudicate contract liability, and that such liability must be determined by the courts. However, the Commission reaffirmed its conclusion in Opinion No. 647 that United was not guilty of any improvidence or willful misconduct. The Commission further found that the substitute fuel clauses were not unduly preferential or inconsistent with the public interest *per se*. This finding was expressly conditioned, however, upon the Commission's interpretation that under those clauses United was exposed to potential liability for a maximum of seven days. The Commission concluded that the proposed tariff section 12.3 remained unnecessary because United was not subject to any contract liability resulting from its allocation of gas in accordance with a Commission approved curtailment plan.

Opinion Nos. 647 and 647-A were reviewed in the Fifth Circuit and, once again, the Court vacated in their entirety and remanded the Commission's findings and conclusions with respect to the contract liability and related tariff issues.

The Court found that the Commission should not have attempted to determine what United's potential contract liability would be in the absence of proposed tariff section 12.3, since this was a matter to be decided by the courts; rather the Commission should have determined what the effect of section 12.3 would be, if approved, upon United's potential contract liability. The court propounded several specific questions to be considered by the Commission (503 F. 2d 867, 5th Cir. 1974):

> Can a tariff provision remove general contractual liability? If the provision would remove liability, would the unavailability of damages subject United's curtailed customers to any undue prejudice or disadvantage?

Referring to the question of whether the substitute fuel clauses themselves might constitute an undue preference in favor of the direct customers, the Court asked (503 F. 2d 868 (5th Cir. 1974)):

> Would section 12.3 have prevented such an undue preference by effectively abrogating the substitute fuel clauses? If it did abrogate them, would that subject International Paper and the others to any undue prejudice or disadvantage?

Evolution of Phase III

On March 7, 1975, the Commission issued its order on remand of Opinions 647 and 647-A, in which it divided United's curtailment proceedings into two phases (53 FPC 742). The determination of an interim curtailment plan to be effective pending the Commission's decision on a permanent plan was designated as phase I, while the ongoing proceedings involving development of a permanent plan were designated as phase II. The contract liability and related issues pertaining to United's proposed exculpatory tariff provision were included in phase II. A further order was issued on April 2, 1975, in which the Commission acted upon United's resubmission of the proposed tariff section 12.3. United's request for a retroactive effective date of November 14, 1971 was denied pending the outcome of the phase II hearings. The Commission also noted the objections of Mississippi Power & Light Company to the resubmission of section 12.3. MP&L argued that since the Commission is without jurisdiction over United's direct sales, or the rates at which those sales are made, it was therefore without jurisdiction to relieve United from obligations created by the direct sales contracts. The Commission ruled that this jurisdictional issue should be included among those to be decided in phase II. The next order was issued on May 2, 1975 (53 FPC 1496). In this order, issued on rehearing of the order of March 7th, the Commission granted United's request that the contract liability issues be severed from phase II and that a new phase III be created for the purpose of rendering an expedited decision on these issues. Finally, on August 20, 1975 (54 FPC 796), the Commission issued an order partially granting United's request for a declaratory order enlarging the issues to be considered in phase III. United had requested the Commission to in-

clude in phase III the issues of (1) whether the payment of damages or compensation to some of its customers would create undue preferences and discriminations, (2) whether section 12.1 of United's tariff precludes damage claims, (3) whether United was guilty of negligence or willful misconduct, and (4) whether the rights of United's previously intrastate customers are fixed by its curtailment tariff, and whether the payment of damages to such customers would create undue preferences and discriminations. The order of August 20 granted United's request only as to item (2). The above-described orders of March 7, April 2, May 2, and August 20, 1975, delineate the scope of phase III as it existed prior to this order.

The parties involved in the phase III hearings quickly became embroiled in controversy over the scope of the proceedings. This controversy is reflected in the pleadings and arguments of the parties in connection with the efforts of United's adversaries to strike substantial portions of United's phase III evidence on the ground such evidence is addressed to matters beyond the scope of the proceeding. On November 11, and December 9, 1975, the Presiding Judge issued orders granting in part but for the most part denying the motions to strike, and on December 16, 1975, he referred his rulings to the Commission for review. These rulings are discussed at a later point in this order. In the meantime, the damage suits against United were proceeding apace. One of these actions was filed against United and Pennzoil by MP&L in the U.S. District Court for the Southern District of Mississippi seeking $160 million in curtailment damages. At United's request, the District Court stayed the proceeding until this Commission had an opportunity to exercise its jurisdiction over the still pending curtailment controversies.

The District Court's stay order was reviewed and approved by the Fifth Circuit in *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F. 2d 412 (5th Cir. 1976) (hereinafter *MP&L*). The court upheld the District Court's stay order but stated that the District Court should prepare an order specifying the issues upon which the Commission's opinion was being sought. On June 10, 1976, United moved to lodge the *MP&L* decision with the Commission. On April 22, 1977, the District Court issued an order in response to *MP&L* propounding a number of specific questions which were referred to the Commission for "a full and adequate determination, articulating its rationale and supporting it with relevant finding of fact . . ." On May 10, 1977, United moved to lodge the District Court's order with the Commission.[1] On June 22, 1977, United moved to lodge a similar referral order issued by the District Court for the Southern District of Mississippi in an action for curtailment damages filed against United and Pennzoil by Mississippi Power Company.

In determining the issues pending herein for decision, the Commission shall consider first those issues associated with the motions to lodge.

Primary Jurisdiction

This Commission and the courts reviewing its orders have recognized the Commission is without jurisdiction ultimately to determine United's liability for curtailment damages. Any such liability is for the courts to determine. *International Paper, State of Louisiana, MP&L, supra.* Nevertheless, in the course of litigation associated with United's curtailment proceedings, the courts have suggested that the Commission should and in some instances might be required to consider questions involving United's possible contract liability pursuant to the doctrine of primary jurisdiction.

The question of primary jurisdiction was discussed extensively by the Court in *MP&L*, with particular reference to its applicability to the facts of this case. The Court, in approving a stay of the district court damage suit and referral of issues to the Commission, found the doctrine of primary jurisdiction "particularly appropriate" to curtailment damage suits (532 F. 2d 419, 5th Cir. 1976):

> In this litigation, referral is particularly appropriate. While the Federal Power Commission's jurisdiction is somewhat limited, the Natural Gas Act, as interpreted by the courts, has provided the Commission with the statutory basis for pervasive regulation of the curtailment question.

The court identified five specific areas in which the Commission's opinion would be of "material aid" to the District Court in resolving the damage action. These were (1) a determination on the facts and circumstances that resulted in United's gas shortage, (2) determination of the scope and impact of exculpatory tariff provisions, (3) interpretation of provisions of United's contracts which might limit its liability, (4) consideration of compensation to curtailed customers, and (5) determination of whether the presence or absence of damages significantly affects the curtailment decision.

As previously noted, United moved on June 10, 1976 to lodge the *MP&L* decision with the Commission. This request was denied by the Commission on July 19, 1976 as premature, since no referrals had yet been issued by the district courts in response to the *MP&L* decision. These referrals have now been issued, and United has moved to lodge them as indicated *supra*.

United's several motions to lodge and the answers which have been filed in opposition thereto raise the threshold issue of whether the Commission has any discretion in deciding whether to accept the questions referred by the district courts. If not, the inquiry is at an end, and the Commission would have no alternative but to accept the referred questions and attempt to determine them. United strenously argues that under the circumstances of this case action is mandatory rather than discretion-

ary, and that the Commission is therefore obligated to set the referral issues for hearing and decision. In support of its contention United relies upon the concurring opinion in *International Paper, MP&L,* and *Int'l. Ass'n., Heat and Frost Insulators and Asbestos Workers* v. *United Contractors Ass'n.*, 483 F. 2d 384 (3d Cir. 1973). In discussing the referral issue in the latter case the Court stated (483 F. 2d 404):

> As to the first reason—no guarantee of Board action—we believe it gives too narrow an interpretation to the doctrine of primary jurisdiction. Under the doctrine, the District Court would certify the labor issues to the Board for findings of fact concerning each alleged act and conclusions of law. *The Board is expected to honor this certification* . . . (emphasis added).

The Commission cannot agree that its consideration and determination of each of the referred questions is, as a matter of law, mandatory. The authorities presented by United do not persuade the Commission otherwise. The Commission is obligated to determine issues as to which it has paramount or even exclusive jurisdiction under the Natural Gas Act. *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); also *Texas and P.R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Thus the court in *MP&L* states that (532 F. 2d 420 (5th Cir. 1976)):

> Certainly, the interpretation and implementation of a tariff is a question properly passed in the first instance by the Commission and reference by a court to a regulatory agency may not even be discretionary on such an issue.

The *Asbestos Workers case, supra,* appears to have involved such an issue. *Thompson Newspapers, Inc.* v. *Toledo Typographical Union*, 387 F. Supp. 351 (E.D. Mich. S.D. 1974). Not all issues fall into this category, however, particularly those as to which the Commission lacks jurisdiction, and where its decision may not be binding on the courts. In such cases the Commission believes it should and does have discretion in deciding whether it will rule on questions referred to it by the courts under the doctrine of primary jurisdiction.[4] Thus, the Court in *MP&L*, referring to the *International Paper* and *State of Louisiana* decisions stated that (532 F. 2d 421, 5th Cir. 1976):

> Nothing we said in either case, however, implied that although a court will make the final determination, that court could not and should not *seek the Commission's assistance* pursuant to the doctrine of primary jurisdiction. (Emphasis added).

The Supreme Court case of *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) appears especially pertinent. In this case, Ricci filed an antitrust complaint in U.S. District Court charging the Chicago Mercantile Exchange and others with conspiring to restrain his business. The District Court dismissed the complaint. The Court of Appeals reversed but held that the court action should be stayed until the Commodity Exchange Commission could pass on the validity of the allegations pursuant to the Commodity Exchange Act. In affirming the Court of Appeals' decision, the Supreme Court's five member majority stated (409 U.S. 304):

> We need not finally decide the jurisdictional issue for present purposes, but there is sufficient statutory support for administrative authority in this area *that the agency should at least be requested to institute proceedings.* (Footnote omitted, emphasis added).

This language of the Court clearly implies that the Commodity Exchange Commission had discretion in deciding whether or not to institute proceedings. See also *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

No case has been shown by United in which a trial court directed or compelled an agency to accept and decide referred issues. The Commission firmly believes that its consideration of the referred questions is discretionary rather than mandatory, and accordingly proceeds to consider the questions propounded by the district courts.

The District Court Referrals

There are two referral orders pending before the Commission. Both were issued by Federal District Court Judges of the Southern District of Mississippi. The order issued in the Mississippi Power & Light Co. action will be referred to as the MPL referral order; that issued in the Mississippi Power Company action will be referred to as the MPC referral order. The orders are essentially similar but not identical. For convenience the referred questions will be discussed by reference to the MPL referral order.

The questions referred fall generally into the five categories specified by the court in *MP&L*. Part A of the MPL referral order sets forth six questions which bear upon the issue of whether United was guilty of negligence, bad faith, or wrongful conduct. These questions seek to ascertain, for example whether United or Pennzoil deliberately or negligently created United's gas shortage by releasing gas reserves or surrendering gas purchase contracts, or whether United or Pennzoil was negligent in failing to make reasonable efforts to acquire new reserves.

The Commission has previously considered the subject of United's possible negligence or wrongful conduct in Opinion 647-A. In discussing a potential curtailment damage action based upon United's negligence, bad faith or other wrongful conduct, the Commission stated (49 FPC 1220-21):

> With regard to the second category of cases, we have neither the power nor desire to adjudicate

United's contract liability, for, as recognized in *International Paper*, that is within the province of the appropriate court.

Moreover, in its order issued on August 20, 1975, in this proceeding, the Commission specifically denied United's request to expand the scope of phase III proceeding to include the issue of whether the shortage resulting in United's curtailments was caused by United's "negligent or willful misconduct." Furthermore, it has been the FPC's policy in the past not to consider questions referred by a court where the issues referred are already pending before the court for its decision. *Merle M. Rowan, et al. v. Allied Chemical Corp.*, 39 FPC 64 (1968).

Inclusion of the questions of part A of the referral order as additional issues in phase III would substantially expand the scope of the proceeding, at great public and private expense and at the expense of further delay, all with no assurance that the Commission's final decision would be binding. Of greatest concern to the Commission, however, is the fact that the issues included in the part A questions, which presumably would be governed by the law of the State of Mississippi, appear essentially unrelated to the establishment of United's curtailment plan, which, in the final analysis, is what is involved in these proceedings, whether phase I, II or III. It appears to the Commission that its primary responsibility and function should be to establish United's curtailment plan and, in keeping with the court's decision in *State of Louisiana*, to assess the impact of that plan upon United's potential contract liability. This the Commission shall endeavor to do. However, it is the Commission's judgment that the issues in part A of the MPL referral order are not within the Commission's primary jurisdiction as thus defined.

The *Ricci* case appears relevant also to the Commission's decision on this issue. In approving referral of the controversy in that case preliminarily to the Commodity Exchange Commission, the majority in *Ricci* specifically noted the conclusion of the Court of Appeals that (409 U.S. 299):

> [T]he specific Exchange rules allegedly violated were within the bounds of adjudicative and remedial jurisdiction of the Commodity Exchange Commission. . . . (Footnote omitted.)

The majority in *Ricci* did not decide the jurisdictional issue, but it is clear that its approval of the referral was based, at least in part, upon the possibility of Commission jurisdiction. By contrast, it is admitted by all concerned in the instant case that this Commission lacks jurisdiction to adjudicate United's possible contract liability. As a result, the Commission finds itself, on the facts of this case, in agreement with the statement of Justice Marshall in his dissenting opinion in *Ricci* that (409 U.S. 310):

> An agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place.

Based on the foregoing considerations the Commission must respectfully decline to include the part A questions as matters to be decided in phase III.

Part B of the MPL referring order requests the Commission to determine whether any of the provisions of United's tariff or any Commission orders provide United with a defense to the damage suits. The possible effects of section 12.1 and 12.3 of the tariff on United's liability are already issues in this proceeding. The referral order also makes specific reference to section 11, which is the *force majeure* section of United's tariff.

The Commission finds these issues involve matters which are within the scope of its primary jurisdiction. Questions as to the impact of other portions of United's tariff upon its contract liability are relevant to the phase III proceeding for the same reasons the proceeding was expanded on August 20, 1975, to include the possible effect of tariff section 12.1 in addition to proposed section 12.3. A claimed defense based upon any Commission order should also be considered since, as stated in the concurring opinion in *International Paper*, the Commission has a positive duty to determine the legal and practical ramifications of its valid orders (476 F. 2d 130). The scope of phase III shall accordingly be expanded to include the issues contained in part B of the referral order.

Part C of the referral order contains five separate questions requesting the Commission to interpret the United-MP&L contract and state whether in its opinion the contract bars or limits the imposition of liability upon United for its curtailments.

The Commission finds the issues in part C do not come within its primary jurisdiction. *Rowan v. Allied Chemical Corp. supra*. The Commission previously expressed its opinion on United's liability under the substitute fuel clauses in Opinion No. 647-A (49 FPC 1222) only to be reversed in *State of Louisiana*. In that decision the Court informed the Commission it had made the wrong inquiry, stating (503 F. 2d 867):

> In deciding whether to adopt United's proposed section 12.3 the Commission used a test of redundancy. It asked whether the new section was necessary to United's avoidance of contract liability and implicitly assigned itself the task of determining United's contract liability. Once FPC concluded United was well nigh invulnerable anyway, it decided that section 12.3 should not be adopted. An unfortunate by-product of that approach is an arguably premature determination of United's contract liability via the doctrine of collateral estoppal.

The Commission must again state that in its judgment it has primary jurisdiction in this proceeding to determine a curtailment plan governing

the allocation of gas supplies on United's system and to assess the impact of that plan on United's contract liability. The Commission shall also consider the possible effect of other provisions of United's tariff and of the Commission's orders upon the liability issue. The questions in part C, however, go well beyond these limits and appear to be inconsistent with the *State of Louisiana* decision. Interpretation of the MP&L and MPC non-jurisdictional contracts under the laws of Mississippi should be left to the courts. The Commission therefore respectfully declines to include the part C issues in phase III.

Part D of the MPL referral order is comprised of two questions pertaining to curtailment compensation. The court asks (1) whether MP&L may be compensated by higher priority customers for curtailment and (2) if it is compensated, would that bar or limit the awarding of damages to MP&L.

The compensation issue is clearly within the Commission's exclusive jurisdiction. *Mississippi Public Service Commission* v. *F.P.C.*, 522 F. 2d 1345 (5th Cir., 1975). However, the Commission has not approved a compensation plan for United or any other pipeline. The compensation issue as to United has never been part of the phase III proceedings and it would, in the Commission's judgment, be futile now to attempt to consider compensation issues in this limited proceeding. However, the compensation issue is being considered by the Commission in a pending rulemaking proceeding of general applicability in Docket No. RM78-4. Because compensation is a matter within the Commission's exclusive jurisdiction, the Commission shall accept the part D questions, with the response thereto subject to Commission action in the rulemaking proceeding in Docket No. RM78-4.

Part E of the MPL referral order contains three questions asking whether the awarding of damages to MP&L would (1) grant MP&L an undue preference or advantage in contravention of the Natural Gas Act, (2) impair United's ability to render service, or (3) frustrate or hamper the Commission's ability to allocate United's gas supplies fairly and in accordance with the public interest.

The legal issue presented by the first question contained in part E is within the Commission's jurisdiction under the Natural Gas Act and shall therefore be accepted. The remaining two questions in part E, however, cannot be answered without speculating as to United's ultimate liability. If United is found to have no liability, these questions become moot. If United's liability is found to be limited by the terms of its contracts, the answer to these questions could be "no." If United is found to have "open-ended" liability, the answer to these questions could be "yes." The Commission concludes that no useful purpose would be served by trying to answer these two questions prior to a determination of United's contract liability, if any.

Scope of Proceedings

Consistent with the foregoing discussion the Commission accepts referral of parts B, D and E(a) of the MPL referral order and questions 10, 12, 13 and 14(a) of the MPC referral order. The Commission respectfully declines to accept referral of all other questions. In accordance with the terms of the *State of Louisiana* decision and of this order, the scope of the proceeding in phase III shall include and shall be limited to the following issues:

1. Is it within the Commission's jurisdiction and authority under the Natural Gas Act to approve proposed section 12.3 as a part of United's curtailment tariff?

2. If the answer to question 1 is "yes," should section 12.3 be approved?

3. If so, what should be the effective date of such provision?

4. What would be the effect of section 12.3 upon United's potential contract liability? Specifically, would approval of section 12.3 effectively abrogate the substitute fuel clauses contained in the contract between United and certain of its customers?

5. If so, would this serve to grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage within the meaning of Section 4(b)(1) of the Natural Gas Act?

6. Do any other of United's tariff provisions or any general or specific orders of the Commission remove or limit United's potential contract liability?

7. Would the awarding of damages for United's curtailments grant the recipients thereof an undue preference or advantage in contravention of the Natural Gas Act?

Admissibility of Evidence

Pursuant to the Commission's orders setting the phase III issues for hearing, United submitted extensive evidence and related exhibits. United describes its evidence in the following terms:

> This evidence, which is intended to support the Commission's jurisdiction generally to effectuate exculpatory tariffs and the justness and reasonableness of specific exculpatory provisions in United's tariffs, describes the circumstances leading to the shortage of gas on United's system and United's resulting need to curtail service to its customers. The evidence shows that an unforeseen growth in gas demand and reduction in gas supply resulted from a variety of factors beyond the control of United or any other pipeline, many of which are also in curtailment. Lastly, United's evidence explains its gas acquisition, inventory and sales policies and activities for all periods of time relative to its curtailments and demonstrates that such policies and activities were consistent with industry practice and Commission policies.

The parties, including the Commission staff

argue that substantial portions of United's evidence should be stricken on grounds that the evidence pertains to the issue of whether the gas shortage on its system was caused by United's negligence, bad faith or misconduct, and that these issues have been excluded by the Commission as issues in this proceeding. They also argue that if hearings are required to be held on United's evidence, these proceedings will be unduly prolonged and that burdensome matters of proof would be created.

In an order issued November 11, 1975, the Presiding Judge partially granted motions to strike portions of United's evidence, but for the most part he denied the motions. In his order of December 9, 1975, the Presiding Judge denied all motions for reconsideration of his prior ruling, and refused to refer the matter to the Commission. However, on December 16, 1975, upon further consideration of a request by the Commission staff the ruling was referred by the Presiding Judge to the Commission for its review pursuant to Section 1.28(a) of the Rules. Because this appeal involves important questions concerning the proper scope of the phase III proceeding, the Commission finds that special circumstances have been shown warranting the Commission's consideration of the Presiding Judge's rulings.

As discussed above, the issue of United's possible negligence, bad faith, or willful misconduct in causing the gas shortage on its system was excluded as an issue in this proceeding by virtue of the FPC's prior orders, notably the order of August 20, 1975. That policy is reaffirmed in this order. The Presiding Judge recognized this fact in his ruling of November 11th. He determined however, that this fact was not sufficient to justify the motions seeking to strike United's testimony. While finding that certain limited portions of the evidence pertained solely to issues beyond the scope of the proceeding he declined to strike the remainder. The Presiding Judge explained the basis for his ruling as follows:

> The August 20 order has indeed, as Movants contend, created a framework for phase III. Certain issues were excluded therein and are not to be determined in this aspect of the proceeding. Therefore, proposed evidence going exclusively to those issues clearly must be stricken.
>
> However most of the material Movants seek to strike is not so easily compartmentalized. The order of August 20 sets out certain lines of inquiry to be pursued: the effect of section 12.3 on United's possible contractual liability; whether section 12.1 limits general liability; whether a tariff provision can remove general contractual liability; if the provision removes liability, would the unavailability of damages subject United's curtailment customers to undue prejudice or disadvantage. If consideration of such issues requires the submission of evidence that also may relate to precluded matters, it cannot be stricken.

Moreover, the orders of March 7, April 2, and May 2, 1975, under which phase III was established, following the remand in *State of Louisiana v. F.P.C.*, 503 F. 2d 844 (5th Cir. 1974), have not been superseded by the August 20 order. They created phase III in order to consider questions of the Commission's jurisdiction, the justness and reasonableness of section 12.3, and, if approved, whether effectiveness of the provision should be made retroactive to November 14, 1971. Such an inquiry is considerably broader in scope than Movants and Staff Counsel suggest. For example, on the question of the Commission's jurisdiction to place an exculpatory tariff in the nature of section 12.3 into effect, United is not precluded from attempting to establish the circumstances behind its gas shortage.

Unless proposed evidence is clearly inadmissible, the more appropriate approach is to challenge its weight rather than its admissibility. See, e.g., *American Louisiana Pipe Line Company, et al.*, 18 FPC 632, 635 (1975). Movants will have ample opportunity to do so here.

Upon review the Commission finds that the ruling of the Presiding Judge is reasonable and should be affirmed. The Commission believes the Presiding Judge was correct in his analysis of the issues presented and that his ruling was proper for the reasons stated in his order.

Rulemaking

In a pleading filed on April 25, 1977, the Commission staff argues that the phase III issues are "susceptible of general resolution" and therefore suggests that the Commission initiate a rulemaking proceeding for the purpose of determining the effect of exculpatory tariff provisions on the contract liability of pipelines. It further suggests that the phase III proceedings be stayed pending completion of the rulemaking. The staff states that its objective is not to exhaustively list the policy considerations to be addressed in the suggested rulemaking, but rather to demonstrate "that the fundamental issue in phase III is properly and necessarily resolvable through the weighing of policy considerations." None of the parties has expressed support for the staff's proposal.

The Commission finds that good cause has not been shown to undertake a general rulemaking proceeding as requested, and the staff's motion shall accordingly be denied.

The Commission finds:

The issues presented by the Presiding Judge's referral of December 16, 1975, constitute extraordinary circumstances, and a decision thereon by the Commission is necessary to prevent detriment to the public interest.

The Commission orders:

(A) Except to the extent granted by this order the motions to lodge and for declaratory relief filed herein by United are denied.

(B) The Presiding Judge's order of November 11, 1975 is affirmed.

(C) The staff's motion for initiation of a rulemaking proceeding is denied.

(D) The scope of the phase III hearing is clarified in accordance with the terms of this order.

Commissioner Holden voted present.

—Footnotes—

[1] This proceeding began before the former Federal Power Commission (FPC). Pursuant to the Department of Energy Organization Act, it is now before this Commission, effective as of October 1, 1977. The term "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

[2] "Whenever Seller prorates its gas supply or interrupts its service in accordance with this Section 12 of its tariff so that customers of Seller do not receive the volumes of natural gas they desire up to their Maximum Daily Quantities, Seller shall not be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such period of proration or interruption."

[3] Section 12.3 was redesignated in this order as Section 12.4. However to avoid confusion the section will be referred to throughout this order as Section 12.3.

[4] "Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then Seller may, without liability to its customers, prorate Seller's supplies of natural gas."

United had earlier, on March 25, 1977, moved to lodge a referral order issued by the District Court for the Southern District of Alabama. This referral order related to an action for curtailment damages filed against United and Pennzoil by Allied Paper, Inc. However this case was subsequently settled, and on September 27, 1977, United withdrew its March 25th motion to lodge.

[5] In its order issued in this proceeding on July 19, 1976 (56 FPC 336), denying as premature United's motion to lodge the *MP&L* decision, the Commission stated:

> Without expressing any opinion at this time as to the nature of the assistance this Commission might *in its discretion* render to the District Court, we anticipate that any new factual inquiry which might proceed from a referral from the District Court would be assigned to Phase III. (Emphasis added).

[6] These issues do not include those dealing with compensation. Further Commission action with respect to the compensation-related questions is deferred pending Commission action in Docket No. RM78-4.

[¶61,152]

Western Massachusetts Electric Company, Connecticut Light and Power Company and Hartford Electric Light Company; Project Nos. 1889 and 2485

Order Authorizing Changes in Land Rights

(Issued August 9, 1978)

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

On February 14, 1978, Western Massachusetts Electric Company (WMECO), Licensee for the Turners Falls Project No. 1889, and Connecticut Light and Power Company and the Hartford Electric Light Company, joint Licensees with WMECO for the Northfield Mountain Pumped Storage Project No. 2485, filed an application for changes in land rights. The Applicants request Commission approval to grant easements over 5 parcels of project land and to convey one parcel of project land in fee to the Town of Gill, Massachusetts. The Applicants have also filed prints of Exhibit K drawings for Project No. 2485 showing the locations of the proposed easements and of the land to be sold in fee. The application conforms to our Regulations.

Public notice of the application was given on April 17, 1978, with May 25, 1978 as the last date for filing protests or petitions to intervene. None was received.

The Proposal

The Applicants propose to grant Gill a 30-foot wide easement to construct a sanitary sewer to collect and transport an estimated 10,400 gallons of waste water a day from the Village of Riverside to Turners Falls. There the sewage would enter the Turners Falls gravity sewer and then flow to the Town of Montague treatment plant.[1] The proposed sewer facilities would consist of about 12,000 feet of eight-inch pipe and a pumping station in Riverside, and about 3,000 feet of six-inch force main leading to Turners Falls.

The plan submitted by Applicants shows that the facilities would be located along or across Oak and Fairview Streets in Gill and First and L streets in Montague. The sewer lines would be buried both on land and within the bed of the Connecticut River. The river crossing would be approximately 1,400 feet southeast of the Turners Falls Dam.[2] The proposed grant in fee covers the land to be used for

[¶ 61,308]

Delmarva Power & Light Company, Docket No. ER78-414-009

Order Denying Rehearing

(Issued November 28, 1983)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes and Oliver G. Richard III.

On September 29, 1983, the Commission issued Opinion No. 185-A which, among other things, amended Opinion No. 185 [24 FERC ¶ 61,199] on the cash working capital issue to permit the use of the 45-day rule without the Opinion No. 19-A modifications [6 FERC ¶ 61,154], and further explained the Commission's decision not to allocate demand charges to the interruptible customers. The Municipal Intervenors seek rehearing on both these issues. The Intervenors do not raise any arguments which would warrant changing our decision on rehearing.

However, one argument made by the Municipal Intervenors deserves comment. The Intervenors claim that the Commission's refusal to allocate demand costs to the Q rate customers was partly based on the erroneous finding that Delmarva credited the demand charges included in the Q rate tariff against the full requirements customers' cost of service in order to compensate the full requirements customers for the use of the system. The Intervenors request that the Commission either require this crediting or include the rate customers in allocating demand costs. The Intervenors have misinterpreted Opinion No. 185-A. The Commission did not make a finding that this crediting occurred, it simply set forth, as its policy on the treatment of interruptible rates, that this crediting should occur. In Opinion No. 185-A we stated that, "while demand charges are not *allocated* to the (interruptible) customers because no capacity has been planned to meet their needs, a demand charge is included in the rate for the energy as a contribution toward the already recovered capacity costs. This demand charge is credited against the cost of service to compensate the full requirements customers for the use of capacity. The Commission stated that the treatment of Q rate customers is consistent with this policy. Therefore, if Delmarva has not credited these charges against the cost of service for the full requirements customers, it is hereby directed to follow the policy set forth in Opinion No. 185-A, and do so.

The Commission orders:

The application for rehearing, to the extent not granted, is denied.

—Footnote—

1 24 FERC ¶ 61,380 (1983).

[¶ 61,309]

MIGC, Inc., Docket No. RP84-15-000; Colorado Interstate Gas Company, Docket No. RP84-7-000

Order Accepting for Filing and Suspending Tariff Sheets, Subject to Refund and Conditions, Consolidating Dockets, Initiating Hearing, Deferring Resolution of Certain Issues and Establishing Procedures

(Issued November 29, 1983)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes and Oliver G. Richard III.

On October 11, 1983, Colorado Interstate Gas Company (CIG) filed in Docket No. RP84-7 a petition requesting the Commission to institute a proceeding and, after hearing, to determine the extent of CIG's minimum bill obligation, if any, due to MIGC, Inc. (MIGC) under MIGC's FERC Gas Tariff Original Volume No. 1, Rate Schedule PL-1. On October 27, 1983, MIGC filed in Docket No. RP84-15, an increase in its jurisdictional rates pursuant to Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, and Section 154.63 of the regulations of the Federal Energy Regulatory Commission, 18 C.F.R. § 154.63. Because the minimum bill issue can best be addressed in conjunction with MIGC's general rate increase,

APPENDIX D

the Commission shall set both dockets for hearing and consolidate Docket Nos. RP84-15 and RP84-7 for purposes of hearing and decision.

Background.

1. Docket No. RP84-15 (Rate Increase)

On October 27, 1983, MIGC filed revised tariff sheets[1] to its FERC Gas Tariff Original Volume No. 1 reflecting an increase in annual revenues from jurisdictional sales and transportation services of approximately $3.8 million or 14.08% over the rates currently effective. This is an increase of 128.09% in jurisdictional revenues excluding revenues to recover purchased gas costs. The proposed effective date is December 1, 1983. The increase is based on actual data for the twelve-month period ending June 30, 1983, as adjusted for known and measurable changes in costs which are expected to be incurred by the end of the nine-month adjustment period ending March 31, 1984.

MIGC states that the principal reasons for the rate increase are as follows: (1) increases in operation and maintenance expenses; (2) increases in working capital requirements; (3) a reduction in proposed sales and transportation; and, (4) an increase in the overall rate of return to 15.50%, which yields a return on common equity of 18.50%.

On October 31, 1983, public notice of MIGC's petition was issued. The Commission provided, until November 16, 1983, an opportunity for filing comments, protests or responses. Timely motions and notices to intervene were filed by those parties listed in Appendix A. Pursuant to Rule 214 (18 C.F.R. §385.214), any timely motion to intervene is granted unless an answer is filed within 15 days of the date such motion is filed.

CIG, in its motion to intervene, requests that the Commission suspend MIGC's filing for the full statutory five-month period and promptly institute a hearing on the lawfulness of the proposed rates. CIG further requests that MIGC's minimum bill, which is an integral part of the subject rate increase, be suspended and made subject to refund in this case. Furthermore, CIG states that if the tariff sheets are suspended, MIGC should be required to restate its rates to establish a new Base Tariff Rate as of December 1, 1983. These matters are addressed below.

2. Docket No. RP84-7 (Petition)

CIG, in its Petition For Order Declaring Minimum Bill Obligation Due, argues that it has no minimum bill payment obligation to MIGC for this contract year. CIG contends that the dispute regarding the minimum bill involves interpretation of tariff provisions and determination of the effect of those provisions and thus is within the Commission's primary and exclusive jurisdiction. Accordingly, CIG requests the Commission to hold a prompt hearing in this matter. If the Commission orders CIG to make a minimum bill payment to MIGC, however, CIG requests that the Commission further order that (1) MIGC credit to its Account No. 191, the gas cost component of any minimum bill payments received, and (2) the minimum bill payments by CIG to MIGC are properly included in CIG's Account No. 803, Natural Gas Transmission Line Purchases, and recoverable through CIG's purchased gas adjustment (PGA) clause.

CIG advances a number of different arguments in support of its position that no minimum bill payment is due. Specifically, CIG claims that it has no minimum bill obligation for any gas that can be described by the following categories: gas that MIGC purchased from MDU, that has been shut-in by producers, that has not been shown by MIGC to have been of contract quality, or that MIGC may have flared. CIG further contends that it has no minimum bill obligation for damages MIGC may incur to its gas suppliers under take-or-pay contracts or for costs and damages MIGC might have to pay for gas flared by its suppliers. Furthermore, CIG contends that any minimum bill obligation to MIGC is subject to the outcome of the proceedings in Docket No. RM83-71.[2]

On October 17, 1983, public notice of CIG's petition was issued. The Commission provided, until November 4, 1983, an opportunity for filing comments, protests, or responses. Timely motions and notices to intervene were filed by those parties listed in Appendix B. Pursuant to Rule 214 (18 C.F.R. §385.214), any timely motion to intervene is granted unless an answer is filed within 15 days of the date such motion is filed.

A Motion To Intervene Out Of Time On Behalf of Public Service Company of Colorado, Western Slope Gas Company, and Cheyenne Light, Fuel and Power Company (Public Service) was filed two days late. Public Service alleges that its late filing resulted from late receipt of the Commission notice. In determining whether good cause exists to permit a late intervention, the Commission will consider, in accordance with its regulations, four factors: (a) the nature of the interest alleged by the late intervenor and whether that interest is adequately represented by other parties in the proceeding; (2) whether permitting the late intervention will prejudice other parties in the proceeding; (3) whether permitting the late intervention will delay

resolution of the proceeding; and (4) the reasons offered by the late intervenor for not having filed on time.

Public Service, a group of customers of CIG, has an interest in this proceeding. Public Service has shown good cause for its late filing. We find that granting late intervention will not unduly delay the schedule of the proceeding described below. For the reasons stated above, Public Service is granted intervention.

In its motion to intervene and answer, MIGC states that the issues raised in CIG's Petition are, for the most part, also issues pending in a federal court proceeding instituted on July 26, 1983, by MIGC against CIG and several of its affiliates in the United States District Court for the District of Wyoming. [3] MIGC argues that the Commission does not have exclusive jurisdiction over the matters raised in CIG's petition and that the entire controversy between MIGC and CIG, including the issues raised in the Petition, should be resolved in federal court. Accordingly, MIGC requests that the Commission not initiate proceedings in this docket. In the alternative, if the Commission initiates a proceeding on this petition, MIGC requests that the Commission determine that CIG is obligated to purchase gas from MIGC, under and in accordance with Rate Schedule PL-1, from any sources inside or outside the Powder River Basin, to the extent MIGC has the certificate authority necessary to acquire gas from such source.

MIGC's motion and answer further responds to the major assertions and allegations in CIG's petition. In summary, MIGC states that, to the extent that gas purchased from MDU is casinghead gas, CIG must take or pay for all such gas tendered by MIGC, up to 155,000 Mcf per day, and to the extent such gas is residual gas or gas well gas, CIG must take or pay for the quantities set forth in the contract and tariff. The fact that gas is ultimately not produced or is flared does not negate the fact that it has been "tendered" to CIG. MIGC states that the gas tendered by it did not exceed relevant contract quality specifications. MIGC also makes the following allegations. CIG's take-or-pay obligation to MIGC for the July through October 1983 period is not subject to the outcome of the proceedings in Docket No. RM83-71, which can only have prospective effect. CIG's assertion that MIGC has been overcollecting fixed costs is irrelevant, misleading, and incorrect. MIGC argues that CIG is responsible for gas that was flared because it unlawfully shut the valve with the full knowledge that its action would require flaring which the Wyoming Oil and Gas Conservation Commission (OGCC) determined was necessary to prevent waste. MIGC's gas purchasing practices were not imprudent since CIG guaranteed MIGC a market for its gas.

Regarding CIG's other requests for relief, MIGC submits the following responses: (1) the issue of whether CIG can recover its minimum bill payments in its PGA filings is of no interest to MIGC and should be considered in CIG's purchased gas adjustment (PGA) docket; and (2) the issue of whether MIGC be required to credit its Account No. 191 with the gas cost component of any minimum bill payment must be considered in a proceeding pursuant to Section 5 of the Natural Gas Act with relief prospective only.

MIGC further requests that if the Commission initiates a proceeding in this docket, it should clarify that CIG is obligated to purchase from MIGC, in accordance with the terms of the Gas Purchase Agreement as reflected in Rate Schedule PL-1, all gas that MIGC acquires through certificated purchase or transportation arrangements.

(5) Big Horn Fractionation Company (BHF) also protests "the allegations and mischaracterizations" made by CIG in its Petition. BHF contends that CIG directly caused any waste resulting from flaring. BHF further contends that CIG failed to act in a prudent manner, in not attempting to find additional markets on its own system.

Discussion

MIGC Rate Filing (Docket No. RP84-15).

Based upon a review of this filing, the Commission finds that MIGC's proposed tariff sheets have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Moreover, Alternative Twenty-Eighth Revised Sheet No. 32 is inconsistent with the order issued in Docket No. TA84-1-47-000. [4] Accordingly, the Commission shall reject Alternative Twenty-Eighth Revised Sheet No. 32 and accept for filing the remaining tariff sheets and suspend their effectiveness for the period set forth below and subject them to the conditions set forth in this order.

In a number of suspension orders, [5] the Commission has addressed the considerations underlying the Commission's policy regarding rate suspensions. For the reasons given there, we have concluded that rate filings should generally be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it

may be inconsistent with other statutory standards. It has been acknowledged, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. No such circumstances exist here.

The Commission's Regulations under Section 154.38(d)(4)(vi) (a) require a company with a PGA clause to file at least every 36 months, a cost and revenue study supporting a restatement of its Base Tariff Rate. MIGC's last restatement of its Base Tariff Rate became effective December 1, 1980, pursuant to letter order of the Director, Office of Pipeline and Producer Regulation, dated November 28, 1980. Since the rates filed in this docket will not take effect until May 1, 1984, MIGC shall restate its Base Tariff Rate to become effective December 1, 1983, subject to refund. The restatement must be supported by a cost and revenue study meeting the requirements of Section 154.38(d)(4)(vi)(a) and justifying the restated rates. [6] Should MIGC not restate its Base Tariff Rate as of December 1, 1983, MIGC shall refund all amounts collected under its PGA clause above the old restated Base Tariff Rate which became effective as of December 1, 1980, for sales for the period beginning December 1, 1983.

Minimum Bill Petition (Docket No. RP84-7)

CIG's petition raises a number of questions regarding MIGC's minimum bill. The Commission has determined, in Docket No. RP83-116, [7] that the original certificate between MIGC and CIG was modified to permit gas deliveries from sources outside the Powder River Basin and that CIG is obligated to pay for volumes shut-in or not delivered and to take or pay for "all gas produced from oil wells which is tendered to Buyer [CIG]." [8] There is no need to re-address these issues in this docket.

In the instant docket, however, CIG raises additional questions regarding MIGC's minimum bill. CIG stated that a controversy still exists over the amount of the payment due and challenges the justness and reasonableness of MIGC's minimum bill. Accordingly, the Commission shall institute a hearing to resolve these disputes. However, we shall defer resolution of the question of whether MIGC should be required to credit to its Account No. 191 the gas cost component of any minimum bill payments received pending further order of the Commission.

We find MIGC's argument that we should not institute proceedings at the Commission concerning the correct calculation of the minimum bill not to be persuasive. As we noted in our October 4, 1983 order in Docket No. RP83-116, involving other related aspects of the disagreements between CIG and MIGC:

> The interpretation and effect of MIGC's and CIG's gas tariff provisions and the Commission's approval thereof are matters appropriately entrusted to the Commission pursuant to its regulatory authority under the Natural Gas Act. It is well established that the interpretation and effect of tariff provisions approved by a Federal regulatory agency are ordinarily unique within the agency's primary and exclusive jurisdiction. [21]

[21] *United States v. Western Pacific Railroad Co.*, 325 U.S. 59 (1956); *Southwestern Sugar and Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959).

Even assuming, for purposes of argument, that the Commission does not have exclusive and primary jurisdiction to decide this issue, the Commission certainly has, as MIGC admits, concurrent jurisdiction to decide this issue. Accordingly, there is no reason to defer our proceedings on this matter.

Finally, the Commission shall address CIG's assertion that its minimum bill payment obligation to MIGC is subject to the outcome of the proceedings in Docket No. RM83-71. It is true that the minimum bill provision is subject to possible modification in light of an order that may be issued in response to the Notice of Proposed Rulemaking in Docket No. RM83-71. First, the Commission has not determined whether or not it will adopt the rule proposed in Docket No. RM83-71, or if so, whether it will be modified from the proposal presented in the Notice. Further, even if it is assumed that an order modifying all minimum bills will be issued in Docket No. RM83-71, the Commission has not decided what the effective date of such an order would be. It is also not clear that such an order, if adopted by the Commission, would resolve all of the issues surrounding the dispute over the MIGC minimum bill. Accordingly, a hearing to resolve this matter is appropriate.

Purchasing Practices

The issue of MIGC's purchasing practices was raised by CIG in Docket No. TA83-2-47. In the Commission's first order in that docket, [9] the Commission deferred action on that issue. Accordingly, that issue will be resolved in that docket pursuant to further Commission action in that docket.

Contract Quality

CIG has submitted affidavits purporting to show that ". . . gas delivered to CIG by MIGC immediately prior to the July 28th shutoff period exceeded relevant contract quality levels for oxygen and Btu content." Specifically, the affidavit states that samples of gas tested on July 27, 1983 contained oxygen levels of 150 parts per million (p.p.m.) and 47 p.p.m. for two respective tests. The affidavit states that the oxygen discovered during the tests could not have been produced with natural gas because oxygen is generally not found with natural gas in the ground in its natural state. Therefore, CIG states that to the extent that oxygen is present, it must have become commingled with the natural gas after the gas left the ground. The affidavit further states the gross heating value of one sample of gas was 1131.5 Btu per cubic foot. In conclusion CIG states:

> "It must be assumed absent a sufficient showing by MIGC to the contrary, that gas produced and tendered in the July through October [1983] period would not have met contract quality standards and, therefore, cannot be charged to CIG under the minimum bill."

MIGC responds that the original contract provision required that gas "not contain more than a total of 4 percent carbon dioxide and/or oxygen by volume," and that four percent by volume is equal to 40,000 p.p.m. Nevertheless, MIGC states that the contract was amended before it became effective to eliminate the four percent limitation on oxygen content and insert in its place a statement that "Seller shall not inject or allow to be injected any air or oxygen in the gas delivered hereunder without prior consent of Buyer." MIGC argues that CIG has not asserted that MIGC was out of compliance with this provision during the period CIG incurred take-or-pay liability. Moreover, MIGC contends that the affidavit "drastically and incorrectly overstates" the oxygen level of MIGC's gas on the date tested.

With respect to the Btu content, MIGC states that the currently effective contract and tariff provision requires that gas have a heating value of not less than 963 nor more than 1200 Btu per cubic foot. Furthermore, MIGC has commenced operation of its inert gas generation facility, at CIG's insistence, to reduce the heating content of its gas.

The Commission has reviewed the contract and relevant tariff language and finds that CIG's allegations, even if proved correct, fail to present a *prima facie* case that MIGC has breached its contract by tendering gas in excess of the relevant contract quality standards. Regarding the oxygen levels, CIG's evidence is insufficient to prove that MIGC has "injected or allowed to be injected any air or oxygen in the gas" tendered. Regarding the Btu level, this is clearly within the range specified in the contract. Moreover, it has not been shown by CIG that the results of the tests (150 p.p.m. and 47 p.p.m. of oxygen) were representative of gas tendered to it from MIGC during the cutoff period. Further, even assuming it was representative, CIG has not alleged that MIGC "injected or allowed to be injected any air or oxygen in the gas." Finally, in any event, even assuming the gas tendered by MIGC contained either 150 p.p.m. or 47 p.p.m. of oxygen during the cutoff period, CIG has not alleged that the amount of oxygen in the gas was in excess of a *de minimus* amount such that the oxygen materially affected the quality of the gas being tendered to CIG by MIGC.

CIG's Treatment of Minimum Bill Payments

Minimum bill payments made by CIG to MIGC which are appropriately calculated and otherwise just and reasonable may be included in CIG's Account No. 803 and tracked by CIG through its PGA clause. [10] However, any refunds or prospective rate adjustments affecting MIGC's rates to CIG, including the minimum bill component of such rates, shall be passed through by CIG to its customers through the normal operation of CIG's PGA clause.

The Commission orders:

(A) Pursuant to the authority of the Natural Gas Act, particularly Sections 4, 5, 8 and 15 thereof, and the Commission's rules and regulations, a public hearing shall be held concerning the lawfulness of the rate increase proposed by MIGC.

(B) Pending hearing and decision, and subject to the conditions of the ordering paragraphs below and those described in the body of this order, MIGC's tendered tariff sheets listed in footnote one, with the exception of Alternative Twenty-Eighth Revised Sheet No. 32, shall be accepted for filing and suspended for the full statutory period of five months until May 1, 1984, when they shall be permitted to become effective, subject to refund and subject to the conditions set forth in the body of this order and below. Alternative Twenty-Eighth Revised Sheet No. 32 is rejected.

(C) Prior to December 1, 1983, MIGC shall file revised tariff sheets restating its Base Tariff Rate to become effective December 1, 1983, subject to the provisions of 18 C.F.R. § 154.38(d)(4)(vi).

(D) The relief requested by CIG in its Petition For Order Declaring Minimum Bill Obligation Due is denied except for the issues of the amount of CIG's minimum bill obligation and of whether MIGC's minimum bill should be modified as discussed in the body of the order. Those issues shall be set for hearing pursuant to the Natural Gas Act. ...

(E) Docket Nos. RP84-7 and RP84-15 are consolidated for purposes of hearing and decision. ...

(F) The Commission Staff shall prepare and serve top sheets on all parties on or before March 1, 1984. ...

(G) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose (18 C.F.R. § 375.304), shall convene a prehearing conference in this consolidated proceeding to be held within 10 days after the service of top sheets by the Staff, in a hearing or conference room of the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. The Presiding Administrative Law Judge is authorized to establish such further procedural dates as may be necessary and to rule upon all motions (except motions to consolidate, sever, or dismiss), as provided for in the Rules of Practice and Procedure.

—Footnotes—

[1] Twenty-Eighth Revised Sheet No. 32, Alternative Twenty-Eighth Revised Sheet No. 32, First Revised Sheet No. 102, and First Revised Sheet No. 140.

[2] 24 FERC ¶ 61,254 (1983)(citing to Notice of Proposed Rulemaking, 48 Fed. Reg. 39238, and *FERC Statutes and Regulations* ¶ 32,334).

[3] *MIGC, Inc., et al. v. Colorado Interstate Gas Co., et al.*, No. C83-0299, involves the allegations that CIG's actions constitute violations of federal and state antitrust laws, breach of fiduciary duty, fraudulent concealment, and several breaches of contract claims. While the complaint filed in the instant docket involves the same factual circumstances, it involves a narrower question, *i.e.*, the proper interpretation of MIGC's tariff and contract with CIG. ...

[4] 25 FERC ¶ 61,153 (1983).

[5] *E.g., Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one day suspension); *Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980)(five month suspension). ...

[6] Pursuant to that section, MIGC may use the cost and revenue study in the instant filing (Docket No. RP84-15) to support its restated Base Tariff Rate.

[7] *Colorado Interstate Gas Co. v. MIGC, Inc.*, 25 FERC ¶ 61,006 (1983).

[8] 25 FERC ¶ 61,006, at p. 61,038 (1983).

[9] *MIGC, Inc.*, 23 FERC ¶ 61,156 (1983).

[10] *Mississippi River Transmission Corporation*, 18 FERC ¶ 61,304 (1983).

Appendix A

Big Horn Fractionation Company
Colorado Interstate Gas Company

Appendix B

Big Horn Fractionation Company
Champlin Petroleum Company
K-N Energy, Inc.
MIGC, Inc.
Montana Dakota Utilities Co.
Public Service Commission of Wyoming
Public Service Company of Colorado, Western Slope Gas Company, and Cheyenne Light, Fuel and Power Company

[¶ 61,310]

K-N Energy, Inc., Docket No. TA84-1-53-000 (PGA84-1)

Order Accepting for Filing and Suspending Proposed Tariff Sheets, Subject to Refund and Conditions, and Ordering Consolidation

(Issued November 29, 1983)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes and Oliver G. Richard III.

On September 30, 1983, K-N Energy, Inc. (K-N) filed its regularly scheduled purchased gas adjustment (PGA)[1] to take effect on December 1, 1983, reflecting an increase of $4,731,073 annually, consisting of (1) an 8.7¢ per Mcf increase in the projected base cost of gas; and (2) a net 10.48¢ per Mcf increase in the unrecovered gas cost surcharge.

The 10.48¢ per Mcf increase consists of a negative 22.79¢ per Mcf charge to amortize the over-recovery of $5,695,331 in gas costs accumulated for the period August 1, 1982 through July 31, 1983, and a positive 23.83¢ per Mcf surcharge to recover $15,722,969 which represents the difference between cost-of-service pricing of K-N production previously charged and NGPA prices for such gas to which K-N may be entitled during a prior period commencing May 1, 1980, pursuant to the Supreme Court's decision in *Public Service*

In the event Shipper receives transportation service and pays the Facility Charge under this rate schedule for at least fifteen years and all or a portion of the additional facilities are specifically required by Transporter for use beyond the fifteen-year period, Transporter shall make a refund to Shipper consisting of the difference between the depreciation payments made by Shipper to Transporter during the fifteen-year period through payment of Transporter's effective depreciation rate or rates for its transmission plant together with the related income tax consequence. In the event a refund is made to Shipper, Transporter's books of account shall be adjusted correspondingly, including the corresponding reduction of Transporter's reserve for accumulated amortization and depreciation. Transporter and Shipper will cooperate to determine the utilization of the facilities in the event Shipper does not desire to use the facilities beyond the fifteen-year period.

In the event the facilities are authorized to be abandoned after the fifteen-year period, Transporter shall not be obligated to make a refund of depreciation to Shipper. To the extent Transporter has prepaid income taxes in excess of those recovered by Transporter in the Facility Charge, Shipper shall reimburse Transporter for the prepaid income taxes at the time the facilities are abandoned.

First Revised Sheet No. 74 Superseding
Original Sheet No. 74

15. *Contingent Refunds by Transporter to Shipper*

15.2 *Refund Procedure.* The Transporter will file with FERC and furnish to Shipper a refund report and after approval by FERC, Transporter shall refund to Shipper the depreciation described in Section 15.1, net of any income taxes prepaid by Transporter in excess of those recovered by Transporter in the Facility Charge, effective upon the expiration of the fifteen-year period; provided Transporter is able to specifically use the facilities. Transporter shall refund to Shipper the prepaid income taxes netted in the refund of depreciation at the time, or over the period of time, Transporter is able to recover the prepaid income taxes through tax deductions.

16. *Revision of Service Life*

The Facility Charge described in Section 3(a) and the Contingent Refunds described in Section 15 are based on a fifteen-year service life for the facilities added by Transporter to render the transportation service for Shipper. In the event it is determined, either before service commenced or at any time during the fifteen-year term, that a different service life is appropriate, Transporter and Shipper shall agree upon the required revisions to reflect the change in service life and Transporter shall thereafter be obligated to initiate and expedite such proceedings as may be necessary to effectuate any such agreed upon revisions.

Issued by: J.S. Charles, Vice President
Effective: October 1, 1983

[¶ 61,094]

MIGC, Inc., Docket Nos. RP84-15-002 and RP84-15-003; Colorado Interstate Gas Company, Docket Nos. RP84-7-001 and RP84-7-002

Order on Rehearing Modifying Prior Order

(Issued January 27, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

On December 29, 1983, MIGC, Inc. (MIGC) filed a request for rehearing of the Order Accepting for Filing and Suspending Tariff Sheets, Subject to Refund and Conditions, Consolidating Dockets, Initiating Hearing, Deferring Resolution of Certain Issues and Establishing Procedures, 25 FERC ¶ 61,309 (1983) (Suspension Order).[1] On December 28, 1983, the Public Service Company of Colorado, Western Slope Gas Company and Cheyenne Light, Fuel and Power Company (Public Service, *et al.*) filed a request for rehearing of the Suspension Order.[2]

The MIGC Request

MIGC requests rehearing of the following four issues: (1) the consolidation of Docket Nos. RP84-15-000 and RP84-7-000 for purposes of hearing and decision; (2) the requirement that MIGC make refunds or reduce its rates if it fails to restate its Base

APPENDIX E

Tariff Rate as of December 1, 1983; (3) the scope of the hearing concerning Colorado Interstate Gas' (CIG) minimum bill [3] obligation to MIGC; (4) the question of whether the contract quantity provisions of MIGC's Rate Schedule PL-1 constitutes a "minimum bill" as that term is used in Docket No. RM83-71 and is generally understood in the industry.

1. Consolidation of Dockets

The Suspension Order consolidated, for purposes of hearing and decision, MIGC's general rate increase and CIG's request to determine the extent of its minimum bill obligation to MIGC. MIGC, in its request for rehearing, argues that consolidation of these two dockets will result in unnecessary delay of the resolution of the issue of CIG's minimum bill liability to MIGC. MIGC contends that the resolution of CIG's minimum bill obligation involves a relatively mechanical calculation and that no issue to be resolved in MIGC's general rate case will affect this calculation. MIGC requests that the Commission not consolidate these issues and that it promptly resolve the issue of CIG's minimum bill liability. [4]

The Commission is not convinced that the issue of CIG's minimum bill liability should be severed from MIGC's general rate increase proceeding or set for expedited hearing. We shall leave to the discretion of the presiding judge, the question of whether separate procedures should be established. Further, this decision is without prejudice to the parties' right to enter into a settlement agreement resolving some or all of the issues in these consolidated proceedings.

2. Restatement of Base Tariff Rate

The Suspension Order requires that MIGC restate its Base Tariff Rate in accordance with § 154.38(d)(4)(vi)(a) of the Commission's Regulations [5] before December 1, 1983. The Suspension Order further provides that if MIGC fails to restate its base tariff rate as of December 1, 1983, "MIGC shall refund all amounts collected under its PGA clause above the old restated Base Tariff Rate which became effective as of December 1, 1980, for sales for the period beginning December 1, 1983." MIGC states that it filed to restate its Base Tariff Rate on November 30, 1983. MIGC requests that if the Commission should reject the restatement filed by MIGC on November 30, 1983, the Commission should reconsider imposition of the refund requirement. On December 13, 1983, CIG filed an answer in opposition to MIGC's request.

The Commission has not yet acted on this filing and will defer decision on MIGC's request pending Commission action on that filing.

3. Scope of Hearing

MIGC, in its request for rehearing, expressed confusion over the scope of the hearing concerning the minimum bill charged to CIG which was instituted by the Suspension Order. The Commission finds clarification of this issue to be in order.

The questions to be addressed in the hearing instituted in these dockets are, among others, (1) whether MIGC's minimum bill is just and reasonable or whether it should be modified, and (2) the proper calculation of CIG's minimum bill obligation to MIGC for the period July through October 1983. As discussed below, the hearing does not include the issue of whether CIG's obligation to MIGC is subject to the outcome of Docket No. RM83-71.

4. Whether the Contract Quantity Provisions of MIGC's Rate Schedule Constitute a Minimum Bill

MIGC contends that the take-or-pay provisions of its Rate Schedule PL-1 are not a "minimum bill" as that term is used in Docket No. RM83-71. MIGC argues that the distinguishing factor is that minimum bill provisions guarantee the pipeline recovery of a portion of its fixed costs by guaranteeing a specific volume of sales whereas take-or-pay provisions guarantee a market for a percentage of the gas which is produced or available for sales. MIGC, therefore, requests that the Commission grant rehearing of the Suspension Order to the extent necessary to clarify that the applicable provisions in MIGC's Rate Schedule PL-1 are take-or-pay provisions and not minimum bill provisions, or in the very least, that the Commission has made no determination as to the applicability of the proposed rule in Docket No. RM83-71 to these provisions.

The Commission does not accept MIGC's argument that the take-or-pay provision of its tariff does not constitute a minimum bill as that term is used in Docket No. RM83-71. First, minimum bills do not necessarily recover only fixed costs. As our notice of proposed rulemaking in Docket No. RM83-71 indicates, a minimum bill can also recover variable costs. Further, MIGC's "take-or-pay provision" is a provision in a pipeline's jurisdictional sales tariff which provides for minimum level of costs to be recovered from a customer, in this

case CIG, regardless of the amount of gas taken by that customer. In the broadest sense, that is what a minimum bill in a pipeline's sales tariff does. The fact that the relevant provision guarantees a market for a percentage of the gas which is produced and available for sale rather than guaranteeing a specific volume of sales is not, in itself, a distinguishing feature which would set it apart from the minimum bill provisions covered by the proposed rulemaking. However, a final rule in Docket No. RM83-71 has not issued. Accordingly, it is unclear at this point what changes, if any, would be required in MIGC's tariff as a result of the final rule. Accordingly, we shall continue to make the subject provision in MIGC's tariff subject to the order to be issued in Docket No. RM83-71, but shall not decide at this point what specific changes in MIGC's tariff, if any, would be required by that order. The Commission therefore denies rehearing on this issue.

The Public Service Request

Public Service requests clarification or rehearing of the following observation concerning CIG's treatment of minimum bill payments:

> Minimum bill payments made by CIG to MIGC which were appropriately calculated and otherwise just and reasonable may be included in CIG's Account No. 803 and tracked by CIG through its PGA clause.

Public Service states that if it was the Commission's intention to rule that any such obligation may automatically be passed through to CIG's customers, then Public Service objects and requests rehearing.

The Commission permits minimum bill payments which are appropriately entered into Account No. 803 to be passed through the PGA. [6] The justness and reasonableness of the rates charged by MIGC to CIG, including the minimum bill charges, is the subject of the instant proceeding. The issue of whether CIG's minimum bill payments made to MIGC should, in turn, be subject to a review in one of its own rate proceedings shall be considered at the time the Commission determines how to treat the broader issue of CIG's overall purchasing practices. This matter shall thus be subject of a further order in a CIG general Section 4, Section 5 or PGA rate proceeding.

The Commission orders:

(A) The Commission modifies its prior order in this docket as discussed in the body of this order.

(B) Rehearing for purposes of further consideration of MIGC's arguments regarding its requirement to restate its Base Tariff Rate is granted pending Commission action on MIGC's restated Base Tariff Rate filing.

(C) Resolution of the purchasing practice issue raised by Public Service, *et al.*, is deferred as discussed in the body of this order.

(D) To the extent not granted above, the requests for rehearing are denied.

— Footnotes —

[1] MIGC's request for rehearing is docketed as Docket No. RP84-15-003 and Docket No. RP84-7-002.

[2] Public Service's request for rehearing is docketed as Docket No. RP84-15-002 and Docket No. RP84-7-001.

[3] MIGC contends that this is a "take-or-pay" obligation as opposed to a "minimum bill" obligation. For purposes of consistency, this order refers to the obligation as a "minimum bill." This issue is discussed further in the body of this order.

[4] MIGC states that Big Horn Fractionation Company (Big Horn) fully supports MIGC's request in this regard.

[5] 18 C.F.R. § 154.38(d)(4)(vi)(a).

[6] *Mississippi River Transmission Corp.*, 18 FERC ¶ 61,304 (1982).

[¶ 61,095]

KN Energy, Inc., Docket Nos. TA84-1-53-003, TA84-1-53-004 and TA84-1-53-006—TA84-1-53-008

Order Denying Requests for Reconsideration

(Issued January 27, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

[¶ 61,285]

Kansas-Nebraska Natural Gas Company, Inc., Docket No. TC82-43-000

Order Establishing Procedures and Denying Petition to Intervene

(Issued December 7, 1982)

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon and Oliver G. Richard III.

On August 5, 1982, Kansas-Nebraska Natural Gas Company, Inc. (Kansas-Nebraska) filed a petition pursuant to Rule 207 (18 C.F.R. § 385.207) of the Commission's Rules of Practice and Procedure for the issuance of a declaratory order relative to certain matters that it contends fall within the purview of this Commission's jurisdiction and which have arisen as a result of judgments rendered against Kansas-Nebraska in a law suit for breach of contract brought by the Great Western Sugar Company (Great Western) against Kansas-Nebraska in the Colorado District County Court in and for the County of Logan. [1]

I. Background of Judicial Proceeding

The suit instituted by Great Western against Kansas-Nebraska for breach of contract was premised, *inter alia*, upon the fact that Kansas-Nebraska at intervals during the heating seasons from 1973-1974 through 1978-1979 interrupted service to four Great Western sugar beet plants served by Kansas-Nebraska. Two of these plants are served directly by Kansas-Nebraska pursuant to certificates issued by the Commission. [2] Great Western's plant at Scottsbluff, Nebraska, is served from the local distribution system which Kansas-Nebraska acquired from North Central Gas Company with Commission approval. [3]

The fourth plant is located at Goodland, Kansas, and is served on an interruptible basis from a local distribution system of the Peoples Natural Gas Division of Northern Natural Gas Company (Northern Natural) which obtains its gas supply for that part of its system from Kansas-Nebraska under wholesale rate schedules regulated by the Commission. [4] Great Western sought approximately $3.7 million dollars in damages for the interruption of service by Kansas-Nebraska to the aforementioned plants between November 1, 1973 and March 1, 1979.

On January 31, 1979, the Colorado District Court rendered a partial determination in the lawsuit instituted by Great Western and found that Kansas-Nebraska had breached its interruptible contracts for service to the Ovid, Sterling and Scottsbluff plants. On May 29, 1979, the court further held that Kansas-Nebraska was in breach of its wholesale service agreement with Northern Natural under which the Goodland plant is served. [5] In connection with the wholesale service for the Goodland plant, the court referred to the jury the question as to whether Kansas-Nebraska and Northern Natural intended to confer third-party benefits on Great Western under their service agreement. The jury found for Northern Natural on Great Western's claim against that company, but found that Kansas-Nebraska and Northern Natural intended to confer benefits on Great Western under their service agreement.

On July 12, 1979, the jury awarded Great Western $1,000,000 on the breach of contract claim against Kansas-Nebraska but refused to find that the actions of that company were tantamount to a participation of fraud upon Great Western.

The District Court's decision was appealed by both Kansas-Nebraska and Great Western. On June 17, 1982 the Colorado Court of Appeal upheld the District Court's summary judgments as to Kansas-Nebraska's liability for breach of contract. [6] Kansas-Nebraska filed a petition for a writ of certiorari to the decision rendered against it by the Colorado Court of Appeals with the Supreme Court of Colorado and the Commission requested, and was granted permission to intervene as an *amicus curiae*. (*Kansas-Nebraska Natural Gas Co., Inc. v. The Great Western Sugar Company*, Supreme Court of Colorado No. 82 SC 322.)

In its petition for a declaratory order Kansas-Nebraska requested that the Commission expeditiously resolve the following questions related to this matter:

1. Had Kansas-Nebraska acceded, during the heating seasons 1973-74 through 1978-79, to the demands of The Great Western Sugar Company that it meet all of the interruptible requirements of Great Western's sugar beet factories on days when it was withdrawing gas from storage to supply the requirements of high priority customers, would Kansas-Nebraska have violated its obligations under:

(a) the certificates of public convenience and necessity authorizing service to Great Western's plants;

(b) the certificates of public convenience and necessity authorizing Kansas-Nebraska to develop and operate its storage fields;

(c) Federal Power Commission Order Nos. 431, 467-B, and/or 498; and

(d) Kansas-Nebraska's FPC/FERC Gas Tariff?

2. In the absence of fraud, negligence, imprudence, bad faith, or misconduct on the part of Kansas-Nebraska; would the award of damages to Great Western for failure of Kansas-Nebraska to supply Great Western's interruptible requirements during the heating seasons 1973-74 through 1978-1979 constitute an undue preference or advantage under Section 4(b) of the Natural Gas Act or a violation of the filed rate doctrine where Kansas-Nebraska interrupted service to other interruptible customers during the same heating seasons and did not pay them damages?

The Colorado Court of Appeals in its opinion issued on June 17, 1982 noted that Great Western's and Kansas-Nebraska's contracts for natural gas service date back to 1955 and were renewed periodically. The specific provision of the contract dealing with interruption that that court ruled Kansas-Nebraska had breached was set forth on pages 2 and 3 of its slip opinion.

"It is specifically agreed as a condition precedent to provision of the rate herein and to the making of this agreement by KN that notwithstanding any other provision of this agreement delivery of gas to [GW] shall be subject to interruption and that KN, irrespective of the happening of any of the occurrences herein before mentioned or referred to, but in its absolute discretion and without liability to [GW] for damages or otherwise, shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of gas to [GW] hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service.

[GW] further represents and agrees that it will maintain standby fuel installations wherever necessary to avoid irreparable or serious loss or damage to person or property in the event of interruption of gas supply."

Notwithstanding this contractual provision, the Colorado state courts found Kansas-Nebraska to be in breach of its contract with Great Western due to interruptions made between November 1, 1973 and March 1, 1979.

II. Proceedings Before the Commission.

On August 29, 1975, Kansas-Nebraska filed in Docket No. RP76-8 a general rate increase which also contained tariff sheets proposing certain changes in the General Terms and Conditions of Kansas-Nebraska's FERC Gas Tariff. This filing revised Kansas-Nebraska's FERC Gas Tariff Volume No. 1 *inter alia*, by incorporating into Section 13 b(4)(Limitations on Obligations) of the General Terms and Conditions the following provision relating to removal of gas from storage to serve the needs of its interruptible customers:

Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff.

This tariff filing, applicable to direct sales as well as wholesale interruptible service, was suspended for a period of five months and became effective on March 14, 1976. Because of the curtailment implications inherent in these sheets, they were severed from the general rate increase proceeding in Docket No. RP76-8 and redocketed as a new proceeding in Docket No. RP76-90.

On December 27, 1976, Kansas-Nebraska filed in Docket No. RP76-90 a revision to the then effective Section 13 of the General Terms and Conditions of its FERC Gas Tariff Volume No. 1, which included a complete curtailment plan. These new provisions became effective, after suspension, on July 1, 1977. In this revised filing the provision on withdrawals from storage was renumbered as Section 13.b(5). This revised provision was as follows:

(5) Storage withdrawal - Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers in Step 1 through Step 5 of subparagraph (3)(1) above served by Seller or Buyer.

The proceedings in Docket No. RP76-90 were ultimately resolved as a result of a settlement entered into between the parties after considerable time had been expended in the conduct of formal hearings. The Commission in its order issued on November 2, 1981, adopting and approving the settlement did not pass upon the justness and reasonableness of the tariff sheets filed by Kansas-Nebraska on August 29, 1975 and December 27, 1976:

* * * The Stipulation and Agreement resolves by compromise all issues in Docket Nos. RP76-90, *et al.*, and the tariff sheets

attached thereto will become effective as indicated therein following the issuance by the Commission of a final order approving the settlement. Hence, there is no need or reason for the Commission to rule on the justness or reasonableness of the tariff sheets filed on August 29, 1975 and December 27, 1976 by KNNG in Docket No. RP76-90 . . . (See 17 FERC ¶ 61,102, pp. 208-9)

The Commission did adopt and confer its approval on the following Section 13.b(5) which was part of the stipulation and agreement:

(5) *Storage Withdrawals.* Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers in Priority 5 served by Seller or Buyer, but may utilize gas in storage to make such deliveries when, by reason of storage inventories and prospective withdrawals the withdrawals of gas from storage will not, in the sole judgment of Seller, impair its ability to supply the requirements of consumers, classified in Priority 1, Priority 2, Priority 3, and Priority 4, during the succeeding 12-month period.

Large interruptible industrial customers of Kansas-Nebraska like Great Western are classified as Priority 5 customers under the curtailment plan approved by the Commission in its November 2, 1981 order.[10]

III. Discussion

The Commission derives its jurisdiction over the transportation of natural gas in interstate commerce and certain matters associated with such transportation that relate to the rendition of natural gas service from Section 1(b) of the Natural Gas Act (15 USC 717b). As stated by the Supreme Court of the United States, the Congress under Section 1(b) of that Act conferred upon the Commission jurisdiction over the transportation of natural gas in interstate commerce:[11]

> . . . Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. . . .

It has also been recognized that the interruption of natural gas service by interstate pipelines is a matter that properly falls within the purview of this Commission's jurisdiction over the transportation of natural gas in interstate commerce, whether such natural gas is sold directly or at wholesale.[12]

Thus the questions propounded by Kansas-Nebraska in its petition for a declaratory order are directed to matters that relate to this Commission's jurisdiction. In order to answer the questions posed by Kansas-Nebraska, it is necessary to develop a record, *inter alia*, on three basic questions:

(1) What were the applicable Commission orders, certificates, and tariff provisions during the relevant time periods?

(2) What requirements and limitations did those Commission orders, certificates, and tariff provisions place on Kansas-Nebraska during the relevant time periods?

(3) What did Kansas-Nebraska do in response to those requirements and limitations, and what were the facts and circumstances that caused Kansas-Nebraska to take the actions that it did?

It is the position of the Commission that the question of whether interruption of service by interstate pipelines is to be sanctioned is a matter for it to determine in the first instance. The existence of different determinations by the Colorado courts and this Commission relating to the propriety of Kansas-Nebraska's rendition of service could place Kansas-Nebraska in an untenable position. By interrupting its interruptible industrial customers, Kansas-Nebraska could find itself in the paradoxical situation of being in breach of its contracts under state law when acting in conformity with the terms of its certificates and the provisions of its tariff on file with the Commission.

The Commission is not herein seeking to adjudicate specific claims of contract liability. That is a matter for the Courts. However, in the circumstances, the Commission believes that, in order to preserve the integrity of its regulation over terms and conditions of service by interstate pipelines under its jurisdiction, including interruptions, it must make the initial determination with respect to a pipeline's privileges and obligations under its certificates and filed tariffs. The Commission will therefore institute a formal hearing for the purpose of making such a determination.

Providing adequate responses to the aforementioned three questions may require the development of an extensive record. As a preliminary matter, it would appear that in making any determination as to whether interruptions were proper in any time-frame, there is a need to include in the record certain facts that existed on the occasion a specific interruption occurred. It is evident that Kansas-Nebraska's gas supply situation on the occasion of each interruption is a relevant

factor that warrants consideration and could be a justification for interruption in any time-frame. However, the development of an adequate record in this proceeding is not necessarily predicated upon gas supply *per se*. On a given occasion, Kansas-Nebraska while possessing a sufficient gas supply may not have had the physical capacity to provide for the needs of all of its customers. It could urge that this was a justifiable reason for interruption. Hence, this raises the question of whether Kansas-Nebraska was precluded on specific occasions from rendering service to one or more of Great Western's four sugar beet plants because of the existence of capacity restrictions on its system. This will necessitate the introduction into the record of capacity data to demonstrate whether Kansas-Nebraska was precluded because of the existence of capacity constraints from rendering service to each of Great Western's sugar beet plants. However, even absent a supply deficiency or capacity constraints, it still might be urged that within a particular time-frame there was justification for interruption by Kansas-Nebraska. This could be predicated upon a projected supply deficiency or for other reasons. Hence, there may also be a need for this type of information in order to fully develop the record in this proceeding. In addition, it would be useful to determine whether Kansas-Nebraska's firm customers in the time-frame in question were allocated all or a substantial part of its costs associated with its storage operations in their rates. In any event, the Commission will leave to the Presiding Law Judge designated to preside over this proceeding the issue of the factual evidence necessary for the Commission to make the findings required.

In view of the complex nature of the problem and the extensive array of data required for this purpose, the Commission will provide herein for a prehearing conference to precede the formal hearing in which determinations relative to the evidence necessary to satisfy the record can be discussed.

In spite of the considerable evidence that may be required for the purpose of making the necessary findings in the instant proceeding, the Commission is not unmindful of the fact that the matter currently before it has been in litigation for a considerable period of time. The Commission, therefore, expects that the Presiding Administrative Law Judge will use his full authority to expedite this matter, and to this end, he is provided with flexibility in the conduct of this proceeding including the authority to establish all procedural dates.

After due notice by publication in the Federal Register on August 26, 1982 (47 Fed. Reg. 37617), Great Western and Producers Gas Equities, Inc. (Producers) filed timely petitions to intervene. Great Western also filed a protest in which it contended that the Commission should decline to entertain Kansas-Nebraska's petition for a declaratory order in the above-styled proceeding.[12]

United Gas Pipe Line Company (United) also filed a timely petition to intervene in the instant proceeding which was opposed by Kansas-Nebraska. United indicates that six of its industrial customers are suing it in state and federal courts for nearly $2 billion in damages alleged to have been incurred as a result of curtailments on its system. United also notes that the Commission instituted a separate proceeding in *United Gas Pipe Line Co.*, Docket No. RP71-29, *et al.* (Phase III), to consider the extent to which United, under the Natural Gas Act, can be liable to such customers for curtailments of service. United contends that any action that the Commission takes in the instant proceeding might affect aspects of *United* (Phase III). Kansas-Nebraska opposes United's request for intervention on the basis that its petition for a declaratory order arises from a specific lawsuit for breach of contract by Great Western against Kansas-Nebraska in the Colorado state courts relating to the interruption of natural gas service to specific plants served directly and indirectly by Kansas-Nebraska. It contends that the issues it has raised in its petition for a declaratory order are exclusively questions of law predicated upon the assumption of the facts set forth in the summary judgment order of the state courts. It contends that United is not a supplier of gas to Kansas-Nebraska and that it does not serve, either directly or indirectly, any of the sugar beet plants involved. It further asserts that United is not a competitor of Kansas-Nebraska nor does it have privy to or is it a beneficiary in any way to the contracts in question. Kansas-Nebraska therefore requests that the Commission deny United's petition to intervene without prejudice to United's participation as an amicus in briefing questions of law.

The Commission is of the opinion that the interest alleged by United is too speculative to serve as a basis of intervention. A petitioner seeking the right to intervene must have a direct interest in a proceeding and not merely the desire to shape precedent. This Commission has ruled that a general allegation by a petitioner that it may be bound by any determination that it may make is not a present and direct interest warranting its

intervention.[24] Accordingly, the Commission will deny United's motion to intervene without prejudice to its participation as an *amicus* in briefing questions of law.

The Commission finds and orders:

(A) That on the basis of the information currently available to it, the Commission is unable to render a determination of whether or to what extent Kansas-Nebraska properly interrupted service to Great Western over the period of time between November 1, 1973 and March 1, 1979.

(B) That in the circumstances the determination of when interruption of service by Kansas-Nebraska to Great Western was proper and the interpretation of the provisions relating to interruption as incorporated in Kansas-Nebraska's effective tariffs on file with the Commission between the years 1973 through 1979 are matters that fall within the purview of this Commission's jurisdiction and it will provide for a formal hearing to be preceded by a prehearing conference for the reasons set forth in the text of the order to enable the Commission to render a determination as to whether or to what extent, during the period November 1, 1973 through March 1, 1979 when interruption of service to Great Western by Kansas-Nebraska was warranted.

(C) An Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose (18 C.F.R. § 375.304); shall convene a prehearing conference in this proceeding on December 21, 1982 in a hearing room of the Federal Energy Regulatory Commission; 825 North Capitol Street, N.E., Washington, D.C. 20426, for the reasons indicated in this order. The Presiding Administrative Law Judge is authorized to establish such further procedural dates as may be necessary and to conduct further proceedings in accordance with this order and the Rules of Practice and Procedure.

(D) United's petition to intervene has not been shown to be required by the public interest and is denied.

— Footnotes —

[1] The *Great Western Sugar Company v. Northern Natural Gas Co.* and *Kansas-Nebraska Natural Gas Company, Inc.*, Civil Action No. 13503, filed on January 6, 1978.

[2] These plants are located at Ovid and Sterling, Colorado and service by Kansas-Nebraska was specifically authorized by the Commission. (*Kansas-Nebraska Natural Gas Co., Inc.*, 12 FPC 510 (1953) and 41 FPC 449 (1969).) The principal use of gas at these plants is boiler fuel.

[3] Service by Kansas-Nebraska to this plant was also authorized by the Commission (See *Kansas-Nebraska Natural Gas Company, Inc.*, 28 FPC 1074 (1969)).

[4] *Kansas-Nebraska Natural Gas Co., Inc., et al.*, 44 FPC 218 (1970).

[5] On May 29, 1979, the Commission filed a brief *amicus curiae* before the Colorado District Court in which it contended: "There is a substantial possibility, absent reference to the Commission, of a conflict between the decisions of the District Court and the Commission. Such a conflict could affect the Commission's ability to regulate reductions in natural gas service in a uniform manner" (Amicus Br. p. 27). The District Court by its order of June 8, 1979 declined to refer any of these matters to the Commission. On August 9, 1978, it had denied a previous request for referral to the Commission made solely by Kansas-Nebraska and on March 26, 1979, it denied Kansas-Nebraska's motion for reconsideration of its action. Kansas-Nebraska in a further attempt to prevent the trial in the District Court from going forward, sought a writ of prohibition and an injunction in the Colorado Supreme Court and the United States District Court for the District of Nebraska, respectively. These requests made by Kansas-Nebraska were denied on June 21, 1979 and June 28, 1979. Kansas-Nebraska thereafter took an appeal to the Colorado Court of Appeals of the decision of the District Court. The Commission for the second time filed a brief *amicus curiae*.

[6] *The Great Western Sugar Company v. Kansas-Nebraska Natural Gas Co., Inc.*, Colorado Court of Appeals, Nos. 80 CA0081 and 80 CA0236.

[7] The appellate court overturned the lower court for not granting Great Western's motion for a directed verdict with instructions to the jury to award damages for every day Kansas-Nebraska breached its contract and interrupted service without an excuse for nonperformance. That portion of the judgment was therefore reversed and remanded for a new trial in order to access the damages on each day that Kansas-Nebraska interrupted service on this basis throughout the 1973-1979 period involved.

[8] See footnote 6, *supra*.

[9] See "Order Adopting And Approving Settlement, and Terminating Proceedings" in the proceeding, entitled *Kansas-Nebraska Natural Gas Company, Inc.*, in Docket No. RP76-90, *et al.*, issued on November 2, 1981 (17 FERC ¶ 61,102).

[10] Priority 5 basically is comprised of Kansas-Nebraska's large interruptible customers.

[11] *Panhandle Eastern Pipe Line Company v. Public Service Commission*, 332 U.S. 507, 516 (1947).

[12] *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 636-638, 641 (1971).

[13] The petition for a declaratory order will not be dismissed at this time. In view of the fact that no opposition was voiced to Great Western's and Producers' timely petition to intervene, they are granted by operation of Rule 214.

[14] *Area Rate Proceeding*, Docket No. AR11-1, 26 FPC 193, 194; *Texas Eastern Transmission Corporation*, 35 FPC 282.

(B) WLAC shall file within 30 days of the date of this order:

(1) revised rates to reflect the elimination of any costs and volumes associated with purchases which are not on line and flowing as of February 1, 1983;

(2) supporting information on its projected purchase from Tenneco and its sales volume estimate;

(C) This filing is accepted subject to any orders issued in Docket No. TA82-2-61.

— Footnotes —

[1] Fourth Revised Sheet No. 4A to FERC Gas Tariff, Original Volume No. 1.

[2] *E.g., Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (one day suspension); *Great Lakes Gas Transmission Company*, 12 FERC ¶ 61,293 (five month suspension).

[¶ 61,085]

Kansas-Nebraska Natural Gas Company, Inc., Docket No. TC82-43-000

Order Denying Application for Rehearing and Request for Stay of Further Proceedings

(Issued January 31, 1983)

Before Commissioners: C. M. Butler III, Chairman; J. David Hughes, A. G. Sousa and Oliver G. Richard III.

On December 30, 1982, the Great Western Sugar Company (Great Western) pursuant to Section 19(a) of the Natural Gas Act (15 USC 717, *et. seq.*) and Rule 713 (18 C.F.R. § 385.713) of the Commission's Rules of Practice and Procedure filed an application for rehearing of the order issued by the Commission in the above-styled proceeding on December 7, 1982 [21 FERC ¶ 61,285], and a motion pursuant to Section 19(c) of the Natural Gas Act and Rule 713(c) requesting that the Commission stay all further proceedings herein pending the resolution of the questions raised in its application for rehearing.

Great Western argues that the Commission can take no action in this proceeding without a referral to it by a court. The Commission does not dispute Great Western's contention that the Colorado courts have jurisdiction to decide breach of contract claims. In addition, the Commission does not dispute that, under the doctrine of primary jurisdiction, the courts must determine in the first instance whether any questions in breach of contract litigation pending before them call for reference to the agency. Great Western correctly states that the Commission sought referral of the breach of contract matters pending before the Colorado courts relative to Kansas-Nebraska Natural Gas Company, Inc. (Kansas-Nebraska) and that such requests for referral were denied. However, it must be understood that the Commission sought referral of matters relating to litigation that was primarily predicated upon questions of contract law. Referral was appropriate in those instances because under the primary jurisdiction doctrine contract claims are normally matters properly decided by the courts. Great Western contends that the Commission cannot do anything more than provide its views on this matter by filing an *amicus* brief with the appropriate court. [1] Great Western misapprehends the nature of the instant proceeding and the fact that the Commission possesses the requisite authority to institute such proceedings on its own initiative. The instant proceeding is not predicated upon contract law and does not require the referral from a court or a delegation of authority from any other entity.

The basis for the issuance of the December 7, 1982, order was a req[illegible] for a declaratory order filed by Kansas-Nebraska pursuant to Rule 207 (18 C.F.R. § 385.207) of the Commission's Rules of Practice and Procedure. Kansas-Nebraska's petition for a declaratory order, among other things, requested that the Commission make certain determinations under certain factual predicates and within a certain time frame. These determinations relate to whether that company would have been in violation of certain certificates issued to it by the Commission, the tariffs that it had on file with the Commission and other specific orders and policy pronouncements issued by the Commission if it did not interrupt service to Great Western on certain occasions. The Commission, upon reviewing Kansas-Nebraska's petition, concluded that it could not resolve the matters raised therein without additional facts, and therefore convened a formal hearing for the purpose of ascertaining the information it required to make the

APPENDIX G

determinations requested in Kansas-Nebraska's petition.

However, it is abundantly clear that the matters presently pending before the Commission in the instant proceeding differ from the breach of contract litigation presently pending before the Colorado courts. The issue in the instant proceeding relates to the interruption of natural gas service. This subject is a matter that falls within the Commission's exclusive jurisdiction.

As early as 1947, the Supreme Court recognized the Federal Power Commission's authority to act on the subject of curtailments:

> [T]he matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interest among various states. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 523 (1947).

The Supreme Court later held that the Federal Power Commission's authority over interruption of service derived from two sources: The transportation provision of Section 1(b) of the Natural Gas Act, and Section 16 of that Act:

> Since curtailment programs fall within the FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities . . . Section 16 of the Act assures the FPC the necessary degree of flexibility . . . : *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 642 (1972).

The Commission has jurisdiction over interruption of service even in the face of conflicting contractual provisions. *Louisiana Power & Light*, 406 U.S. at 646-647; *American Smelting and Refining Co.*, 494 F.2d 925, 934 (D.C. Cir. 1974).

Because this matter falls within the Commission's exclusive jurisdiction, Great Western's application for rehearing will be denied. The Commission further notes that it has a continuing responsibility and obligation under the Natural Gas Act to make determinations relative to the conditions under which natural gas service by the interstate gas pipelines to their customers in the various states may be interrupted.

In support of its motion requesting a stay of further proceedings, Great Western relies upon the standards for the granting of stays as enumerated in the *Virginia Petroleum Jobbers* case. [2] Contrary to Great Western's argument in favor of its requested stay, the standard for granting a stay by an administrative agency is whether justice requires the grant of the stay under the Administrative Procedure Act (APA), 5 U.S.C. §705. Recently, we applied the standard of the APA to deny a request for stay in *United Gas Pipe Line Company*, Docket No. TA82-2-11, issued August 25, 1982 (20 FERC ¶61,208), and *Mid-Louisiana Gas Company*, Docket No. RP82-51-000, issued November 23, 1982 (21 FERC ¶61,205). In applying the APA standard, we must balance the interests of Great Western with those of Kansas-Nebraska as well as the overall public interest. We must also determine whether the company will sustain any irreparable harm in the absence of a stay.

The Commission is of the view that the public interest requires that it diligently pursue and render determinations relative to the request for a declaratory order. The interruption of service by interstate pipeline companies is a matter exclusively within the Commission's jurisdiction and unless it expeditiously undertakes to act in such situations, it might convey the wrong impression with respect to the role it intends to play in this area. While the proceeding we have instituted may entail additional expense on the part of Great Western and Kansas-Nebraska; the Commission could not make a determination on Kansas-Nebraska's request for a declaratory order without the development of the record called for in the December 7, 1982, order. We do not believe that the additional expense claimed by Great Western, standing alone, constitutes sufficient ground to stay the expedited proceeding that we have ordered.

The application for rehearing filed by Great Western on December 30, 1982, therefore presents no new substantive issue of law or material issues of fact which were not considered by the Commission in its order of December 7, 1982, or which having now been considered warrant reconsideration of that order.

The Commission orders:

Great Western's application for rehearing and motion for stay of the Commission's December 7, 1982 order, in the above-styled proceedings, filed on December 30, 1982, are denied.

— Footnotes —

[1] See page 10 of Great Western's application for rehearing. See also page 16 of Great Western's application for rehearing contending that the Commission cannot undertake the proceedings provided for in its December 7, 1982 order in the above styled proceeding without a reference by the courts.

[2] *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

17 Days

Cash Working Capital

$$= 1/8\,[642,652,000] + \frac{37}{365}\,[717,331,000] + \frac{15}{365}\,[109,111,000]$$
$$= 80,332,000 + 72,716,000 + 4,484,000$$
$$= \$157,532,000$$

[13] 18 C.F.R. Part 101, Definition No. 11 states, in pertinent part, that " 'Depreciation,' as applied to depreciable electric plant, means the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of electric plant in the course of service . . . " Definition No. 31 defines service life as "the time between the date electric plant is includible service, or electric plant leased to others, and the date of its retirement."

[14] *Boston Edison Company*, Opinion No. 156, 21 FERC ¶ 61,327 (1982). *See also Carolina Power & Light Company*, 18 FERC ¶ 61,234 at p. 61,470 (1982) (concurring Opinion).

[15] 18 C.F.R. Part 101, Operating Expense Instructions, No. 2.

[16] 18 C.F.R. Part 101, Definition 11. We are convinced by the record that chemical cleaning does not extend the life of a generating facility beyond what would otherwise be its useful life, but rather allows that life to be realized or restored.

[17] Winnetka also contributed $120,000 in aid of constructing certain distribution equipment. These facilities are used to serve only Winnetka and are therefore assigned directly to the village rather than through allocation of Winnetka's proportional share of Commonwealth's total distribution plant. The law judge found, and there is no dispute, that this contribution should be credited directly to Winnetka's rate base.

[18] The Commission requires that contributions given in aid of construction be deducted from rate base. This is done in order to prevent a utility from earning a return on the contribution since they do not represent company investment. *See Alabama Power Company*, Project No. 82, Opinion No. 596, 45 FPC 1068, 1089 (1971), *reh.*, 46 FPC 248 (1971), *remanded on other grounds, Alabama Power Co. v. F.P.C.*, 482 F.2d 1208 (5th Cir. 1973), *aff'd in pertinent part*, Opinion No. 596-A, 56 FPC 1249, 1252 (1976).

[19] The law judge approved a 4 CP method of demand cost allocation. We affirm and adopt this decision for the reasons stated in the initial decision.

[20] *See, e.g., Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608, 620-22 (2nd Cir. 1965).

[21] *New Orleans Public Service, Inc. v. F.E.R.C.*, 659 F.2d 509, 516-17 (5th Cir. 1981).

[22] 12 FERC ¶ 63,042 (1980), *aff'd*, Opinion No. 114, 14 FERC ¶ 61,139 (1981).

[23] *Cf. Central Illinois Light Company*, Opinion No. 81, 10 FERC ¶ 61,248 at p. 61,475 (1980).

[24] *See Commonwealth Edison Co.*, Docket No. EL80-25-001, 21 FERC ¶ 61,096 (1982). Provided that it has sufficient capacity, the company will usually not refuse to sell emergency and maintenance energy if the customer is unable to meet its load. Tr. 199.

[25] Through the tilt, Commonwealth includes some capacity costs in the energy charge. The judge found this practice not to be cost justified and disapproved it on a prospective basis. We agree for the reasons stated in the initial decision.

[26] Commonwealth found the judge's decision reasonable but notes its support for a split-savings method pricing method for economy power.

[27] We are not here announcing a general rule approving a particular form of split-savings. We find this type of split-savings appropriate in this case because of administrative convenience.

[28] This decision shall not be applied retroactively. Retrospective application would require that each transaction which occurred during the locked-in period be examined to determine the applicable price and then be repriced accordingly. There may be situations where a past transaction would not have taken place had the new price been applicable at that time. Since those sales cannot now be "undone," the new price to be applied could result in uneconomical economy sales. Given these administrative problems and possible inequities, the only reasonable solution is to apply the new pricing scheme prospectively. The initial decision is modified consistent with this decision.

[¶ 61,220]

Kansas-Nebraska Natural Gas Company, Inc., Docket Nos. TC82-43-000 and TC82-43-002

Order Denying Motion to Terminate Proceeding

(Issued May 12, 1983)

Before Commissioners: Georgiana Sheldon, Acting Chairman; J. David Hughes, A. G. Sousa and Oliver G. Richard III.

APPENDIX H

The Great Western Sugar Company (Great Western) on April 12, 1983, filed a motion to terminate the proceeding in Docket No. TC82-43-000. The motion is prompted by a decision of the Colorado Supreme Court on March 21, 1983, granting and denying certiorari on certain issues related to a state court damage award to Great Western arising out of interruptions of service by Kansas-Nebraska Natural Gas Company, Inc. (K-N) in the 1970's.

One issue on which certiorari was not granted was whether the trial court erred in failing to refer to this Commission under the doctrine of primary jurisdiction questions relevant to K-N's service interruptions involving the interpretation of certificates of public convenience and necessity issued by the Federal Power Commission (FPC), tariffs filed with the FPC and FERC, and orders of the FPC. Great Western concludes that the court's decision renders useless any future Commission decision on these matters in the present proceeding.

This conclusion appears premature. Great Western also may be reading more into the court's decision than it should since the court's reasoning is not displayed. In any event, the decision has no direct effect upon our authority to carry out our own responsibilities under the Natural Gas Act to investigate interruptions of service by entities subject to the Commission's jurisdiction. We see nothing in the court's decision or Great Western's motion which indicates that we should change the course of this proceeding set in the order establishing it which was issued December 7, 1982 [21 FERC ¶ 61,285].

Accordingly, Great Western's motion to terminate the proceeding is denied.

[¶ 61,221]

Producer-Suppliers of Transcontinental Gas Pipe Line Corporation, Docket No. CP83-279-000

Findings and Order After Statutory Hearing Issuing Certificates of Public Convenience and Necessity and Permitting and Approving Limited-Term Abandonment

(Issued May 13, 1983)

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

I. Background

On April 15, 1983, Transcontinenal Gas Pipe Line Corporation (Transco) filed an application in the above-captioned docket on behalf of certain producers pursuant to Sections 7(b) and 7(c) of the Natural Gas Act to grant a certificate of public convenience and abandonment authorization, all as more fully set forth in the application.

By order issued on April 28, 1983 [23 FERC ¶ 63,044], the Commission approved an uncontested settlement in Transco's general Section 4 rate proceedings in Docket Nos. RP83-11 and RP83-30. That settlement established a voluntary Industrial Sales Program (ISP) on the Transco system. Under the ISP, Transco will arrange, as agent for its customers, sales between producer-suppliers and its customers. The ISP is an experimental program designed to keep natural gas competitive with the prices of alternative fuels and to maintain historical throughput levels on Transco's system.

To the extent that Transco's producers-suppliers have not been removed from Commission jurisdiction under the Natural Gas Act by operation of Sections 601(a)(1)(A) and (B) of the Natural Gas Policy Act of 1978 (NGPA), their participation in the ISP requires both certificate and abandonment authority. For the reasons discussed below, we grant the requested authorization.

To the extent that Transco will transport gas under the ISP to its distributor customers, such transportation is authorized on a self-implementing basis under Sections 311(a)(1) of the NGPA and Section 284.102(a) of the Commission's Regulations. However, Transco also has a direct industrial customer who is eligible to purchase gas in the ISP. Accordingly, in a separate application, Transco will seek certificate authorization pursuant to Section 7(c) of the Natural Gas Act to transport gas under the ISP to Owens-Corning Fiberglas Corporation (Owens).

Transco also seeks waiver of Sections 157.24, 157.25 and 157.30 of the Commission's Regulations. In support of its request, Transco notes that comparative information will be submitted by Transco in monthly reports pursuant to Article II(B), Section 11, of the Settlement Agreement, all as more fully set

[¶ 63,048]

Pacific Power & Light Company, Docket No. E-7796-007;
Pacific Gas and Electric Company, Docket No. E-7777-000

Initial Decision on Investigation of the California Power Pool, the Pacific Intertie Agreement and Related Contracts

(Issued February 10, 1984)

Thomas L. Howe, Presiding Administrative Law Judge.

Appearances

Malcolm H. Furbush, Robert Ohlbach, Howard V. Golub, J. Michael Reidenbach, Morris M. Doyle, Terry J. Houlihan, Charles A. Ferguson and *Gregory P. Landis* for Pacific Gas and Electric Company

Irwin F. Woodland, Paul G. Bower, Arthur L. Sherwood, Joseph B. Schubert, Steven H. Nesenblatt, B. Glenn George, John R. Bury, David N. Barry, III, William E. Marx, Thomas E. Taber, Joseph A. Vallecorsa, Jr., Ann P. Cohn, Allen Hyman, Herbert G. Gleitz, Richard M. Merriman, Brian J. McManus, Michael K. Hammaker, Rollin E. Woodbury and *Harry A. Poth, Jr.*, for Southern California Edison Company

Gordon Pearce, C. Edward Gibson, J. A. Bouknight, Jr., E. Gregory Barnes, Charles Daly, Albert V. Carr, Jr., Wayne Jefferies, Sherman Chickering, Barton M. Meyerson, C. Hayden Ames and *Shand Green* for San Diego Gas & Electric Company

George Spiegel, Robert C. McDiarmid, Daniel I. Davidson, Thomas C. Trauger, John Michael Adragna, Robert A. Jablon, James C. Pollock and *Samuel Karp* for Northern California Power Agency (filing on behalf of itself and its members, the Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara and Ukiah, California, and the Plumas-Sierra Rural Electric Cooperative) and the Cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara and Ukiah, California; *James N. Horwood* for the Cities of Alameda, Healdsburg, Lodi, Lompoc, Santa Clara and Ukiah, California; *Martin McDonough* for Northern California Power Agency; *Fredrick D. Palmer* and *James D. Pembroke* for the City of Santa Clara, California

Sandra J. Strebel, Peter K. Matt, Bonnie S. Blair, Cynthia S. Bogorad and *Stephen C. Nichols* for the Cities of Anaheim, Riverside, Colton and Azusa, California

Richard K. Pelz for Department of the Interior

Harvey L. Reiter, Melvin G. Berger, Charles F. Reusch, John J. Bartus, Joseph Karger, A. Hays Butler, Barbara K. Kagan, Jane C. Murphy, James V. McGettrick, Rhodell G. Fields, Jonathan Paff, Daniel Lamke, G. Kimball Williams, Richard V. Mattingly, Jr., Daniel Behuniak, Glen Ortman and *Gloria Sodaro* for the Staff of the Federal Energy Regulatory Commission

Procedural Background

Docket No. E-7796-007

Termination of the proceeding in Docket No. E-7796-007 (formerly E-7796) was ordered by the Commission, [1] Opinion No. 175, 23 FERC ¶ 61,402, June 22, 1983. The present Initial Decision deals with the other dockets. The terminated docket is retained in the title, however, to avoid any confusion that might arise from its omission, as it is the lead docket in the consolidation with Docket No. E-7777-000 (formerly E-7777 (Phase II)) and has appeared on the orders, pleadings and hearing dealing with Docket No. E-7777-000 since the consolidation.

APPENDIX I

Docket Nos. E-7777-000 and ER76-296

Docket No. E-7777 commenced on September 29, 1972 when Pacific Gas and Electric Company (PG&E) filed a wholesale rate increase. Northern California Power Agency (NCPA) [2] intervening, alleged that PG&E had engaged in anticompetitive behavior, and requested rejection of the filing, or alternatively, acceptance upon condition that PG&E's anticompetitive behavior be eliminated. By order issued November 27, 1972 [48 FPC 1153], the Commission accepted the filing without condition, suspended the rate increase for five months, and set the matter for hearing.

Staff moved on September 25, 1973 to dismiss and remove all matters relating to the issue of anticompetitive conduct from Docket No. E-7777. The motion was granted by the then presiding administrative law judge. On November 7, 1973, NCPA moved for extraordinary relief. Cities and NCPA alleged:

> that PG&E has entered into various contracts which, through their restrictive and anticompetitive nature, have strengthened a purported monopoly over generation and transmission facilities in northern and central California to the detriment of Cities and NCPA.

51 FPC 1030, 1031. The Commission said, Id.:

> The relief either requested or implied by the various allegations would entail: (1) the adjustment of PG&E's rates to Cities and NCPA to account for the alleged anticompetitive activities; (2) the direction by this Commission to PG&E to wheel power; and (3) the review and possible amendment of the ... contracts to remove anticompetitive provisions.

The contracts in question were PG&E's contracts with: (1) San Diego Gas and Electric Company (San Diego) and Southern California Edison Company (Edison) known as the California Power Pool (FPC Rate Schedule No. 27); (2) the United States Bureau of Reclamation (FPC Electric Tariff Original Volume No. 4), usually called Contract No. 2948A; (3) Sacramento Municipal Utility District (SMUD) (FPC Rate Schedule No. 45) hereafter called the SMUD Contract; and (4) the Seven Party Agreement (FPC Rate Schedule No. 105). 51 FPC 1030, 1032, fn. 1. The Commission said it lacks authority to order proposed rate adjustments or wheeling but it does have the authority, in proper circumstances, to amend certain provisions of contracts on file with the Commission. 51 FPC 1030, 1033. The Commission instituted a second phase of the proceeding and set it for hearing, saying:

> We view with deep seriousness and concern the charges made by Cities against PG&E and believe they warrant a full and complete investigation. The Section 206 proceeding herein ordered will allow for such investigation and provide the appropriate forum for the presentation and development of a complete evidentiary record concerning the alleged anticompetitive activity and conduct of PG&E. If, for example, after hearing and decision PG&E is found, by virtue of contract provisions subject to FPC jurisdiction, to have restricted the ability of its customers to develop their own generation, or limited customers' access to alternate supply sources, this Commission will not hestitate to order contract reform or other measures as are necessary to eliminate such practices.

51 FPC 1030, 1033 (March 14, 1974), *reh. den.*, 51 FPC 1543 (May 15, 1974).

On June 24, 1974, the Cities of Anaheim, Riverside, Colton, and Azusa, California (Southern Cities) petitioned to intervene in Docket No. E-7777. Southern Cities alleged that the California Power Pool operated in such a manner as to restrict the ability of Southern Cities to plan and develop power supply resources. By order dated May 12, 1975, the Commission granted the petition, designating Edison a party respondent.

The Commission g ıted Staff's June 5, 1974 motion to remove from Docket No. E-7777 (Phase II) those issues relating to the justness and reasonableness of the Seven Party Agreement and to consolidate such severed issues with those in Docket No. E-7796. The Commission noted, however:

> As Northern Cities point out, some of the issues in Docket No. E-7777 (Phase II), after severance, may continue to overlap issues in Docket No. E-7796, after consolidation. For example, The Seven Party Agreement would seem to be relevant in Docket No. E-7777 (Phase II) to the question of whether the four contracts under investigation therein are part of a plan or pattern of anticompetitive conduct of Pacific Gas and Electric Company, as the Northern Cities claim ...

52 FPC 58, 60 (July 8, 1974).

On November 26, 1975, PG&E filed in Docket No. ER76-296 an amendment to the SMUD contract. The Commission instituted a Section 206 investigation of the amendment concerning its anticompetitive aspects, permitted NCPA to intervene, and consolidated Docket No. ER76-296 with Docket No. E-7777 (Phase II). 55 FPC 1307. The Commission noted that sales by SMUD to

PG&E are beyond its jurisdiction, and the amendment "is jurisdictional only insofar as SMUD's proposed new capacity affects the amount of standby capacity and energy [PG&E] must furnish to SMUD." (P. 1308)

On August 9, 1978, Staff moved for clarification as to the scope of Docket No. E-7777 (Phase II). I ruled that the allegations of anticompetitive transmission practices by the members of the California Power Pool, with respect to the Pacific Intertie, were within the scope of this proceeding, and that measures other than revision of the contracts under review may be appropriate if anticompetitive conduct is found to exist. On December 28, 1978, the Commission affirmed, stating:

> Although prior Commission orders do refer to four contracts as the subject of inquiry, the Commission's March 14, 1974 order makes clear that transmission access was found to be a relevant issue . . . Thus, the terms of the Pacific Intertie Agreement, which concerns access to a transmission system which could be used to transmit power from "alternative supply sources" to NCPA, Southern Cities, and other customers, are an appropriate subject of inquiry for this proceeding . . . The Pacific Intertie Agreement has been filed with this Commission. Because the Pacific Intertie Agreement is a subject of this proceeding, so must those contracts that affect or relate to that agreement be subject to this proceeding.

5 FERC ¶ 61,305 at p. 61,655.

The Commission also consolidated Docket Nos. E-7796-007 and E-7777-000, and ordered that in Docket No. E-7777-000 (1) Edison file the D. C. Intertie and Sylmar agreements with the Commission, and (2) that Edison, PG&E and San Diego file with this Commission "all classifications practices, rules, regulations, or contracts that in any manner affect or relate to the Pacific Intertie Agreement." 5 FERC at pp. 61,651, 61,658, *reh. den.* 7 FERC ¶ 61,267, June 14, 1979. [3] In denying rehearing the Commission made clear at pp. 61,564-5 that practices as well as contracts affecting or relating to the Pacific Intertie were to be the subject matter of Docket No. E-7777-000 and "subject to modification to the extent of the Commission's authority."

The United States Court of Appeals for the District of Columbia Circuit affirmed without opinion. *Southern California Edison Co. v. F.E.R.C.* (D.C. Cir. Nos. 79-1893 and 80-2195 (May 17, 1982)). Inter alia, the Court also affirmed the Commission's order, 11 FERC ¶ 61,246 at p. 61,488, that PG&E file portions of its nuclear license condition (the Stanislaus Commitments), as a "practice" under Section 205(c) of the Federal Power Act. *See Pacific Gas and Electric Co. v. F.E.R.C.*, D.C. Nos. 79-1881 and 80-2129 (May 17, 1982). These Commission orders of June 2, 1980, 11 FERC ¶ 61,246, required the filing of additional contracts affecting the Pacific Intertie Agreement. [4]

After Staff moved for partial summary adjudication of certain issues against Edison in accordance with Commission Opinion No. 62 in *Southern California Edison Company*, Docket No. ER76-205, 8 FERC ¶ 61,198 (1979), on January 2, 1980, I granted the motion in part, finding that the Commission's determination that Edison engages in head-to-head competition and fringe competition with Southern Cities summarily disposes of those competition issues in these proceedings.

In response to argument that wheeling of power might be ordered pursuant to the Commission's powers under Federal Power Act § 211 (PURPA), I ruled that this was not proper in this proceeding because PURPA proceedings were not within the scope of this proceeding, and the necessary formal requirements of a PURPA proceeding had not been followed. Order As To Scope of Proceedings, July 20, 1982. That order noted that to attempt to give relief under PURPA without notice would deny the parties their due process rights to present evidence on the PURPA requirements, and any relief granted in this proceeding must be on other grounds. The order was issued to forestall motions to reopen the record and other possible motions in connection with possible PURPA relief.

What Docket No. E-7777-000 Is and Is Not

Docket No. E-7777-000 originated as a complaint against PG&E in a rate case and was expanded by the Commission into an investigation of certain specified contracts to determine whether they are anticompetitive individually or as a group. These contracts are the Pacific Intertie Agreement, the California Power Pool, the PG&E-SMUD agreement and Contract 2948A. The Commission has ruled that additional contracts and practices affecting Pacific Intertie Agreement are also within the scope of the proceeding. Edison and San Diego are parties to the Pacific Intertie Agreement and the California Power Pool and are parties to or may be affected by other contracts which affect the Intertie Agreement. PG&E, San Diego and Edison have filed such contracts and practices, the most important of the practices being those set forth in PG&E's Stanislaus Commitments. This proceeding is not a general investigation of anticompetitive practices of PG&E or any other companies, although other arrangements and practices of the various companies would properly be considered in so far as they might throw light

upon allegedly anticompetitive aspects of the contracts and practices being investigated.

Hearing

A limited hearing in Docket No. E-7796-007 was held prior to the consolidation of that docket with Docket No. E-7777-000, the present proceeding. Originally the Helms and Pit license proceeding, Project No. 2735-001, et al. and Docket No. E-7777-000 were assigned to different judges. Since the license proceedings involved a general investigation of all PG&E's alleged anticompetitive actions, any investigation into particular anticompetitive actions of PG&E with respect to the contracts that are the subject of Docket No. E-7777-000 were also properly the subject of the license investigations. When it became apparent that the background information and many issues in this proceeding would overlap with those in the Helms license proceeding, Chief Judge Wagner assigned both proceedings to me. This allowed joint hearings to be held before a single judge and enabled a single record to be made on the common issues. A joint hearing transcript comprised over 45,000 pages, with both volumes and pages numbered with the prefix "CH" for "Consolidated-Helms." (Matters relevant to the license proceedings alone were dealt with in a separate transcript.) By agreement and request of the participants, the exhibits in the joint hearings were numbered as follows:

> Staff, beginning with 1,000, NCPA 2000, Southern Cities 3,000, PG&E 4,000, San Diego 5,000, Edison 6,000, NCPA Southern Cities 7,000.

By reason of the consolidation of Docket No. E-7796-007 and Docket No. E-7777-000, the transcript of the limited hearing in the former case became available as part of the record in the latter docket as well, and the exhibits in the limited hearing (designated with the prefix "L" for "limited") are also part of the record in Docket No. E-7777-000.

The record is over 48,000 pages, over 3,000 exhibits, and over 250 items by reference, many of which are lengthy. The hearing in these proceedings took over two and a half years. According to one staff memorandum, more than one million pages of documents were produced in discovery. In an effort to hold the hearing within bounds, cross-examination after the first year of hearing was limited and a great deal of the proffered evidence was limited.

The rule set forth by the Commission is that evidence may be excluded where it is not of a kind which would affect fairminded persons in the conduct of their daily affairs. This is not the rule, however, which has been applied customarily in proceedings before this Commission. Administrative Law Judges (including this one) have inclined to the view expressed by some courts of appeal, that admission of evidence should be liberally allowed. In general, the rule has been to let questionable evidence in and then disregard it. A judge will generally not be reversed for admitting evidence. Courts have pointed out that admitted evidence may be disregarded, whereas the exclusion of evidence may result in a remand and additional hearing. In the majority of hearings where questionable evidence is allowed to come in, it is evidence that would add comparatively little time to hearing and deciding the case. In these proceedings, however, there was a considerable volume of evidence that would be subject to exclusion under the test set forth in the Commission regulations. If this evidence were to be admitted, essential fairness would necessitate reasonable cross examination and rebuttal of it. While a judge might be tempted to admit such evidence and then disregard it after hearing, Counsel could not be sure which evidence would be disregarded. Counsel in an important case could hardly permit such admitted evidence to stand without probing cross examination and attack by any available rebuttal which in turn would be subject to cross examination and surrebuttal. As nearly as I could estimate, the excluded testimony would have resulted in adding at least six months to the hearing which even without such testimony became one of the longest in the history of administrative law.

Events Subsequent to Hearing

After the close of the record there were numerous additional developments including new contracts. Orders as to admission of evidence issued. There were extensive motions and the rulings thereon, including motions to reopen the record and to consider additional evidence. Some of these matters were troublesome in view of the further development of the situation. In any developing situation, however, there must come a time when new events, new situations and new evidence should no longer prolong the hearing. For reasons appearing later in this Initial Decision, this proceeding will be kept open, which will permit further action, in certain respects, as new circumstances may require.

I. The California Power Pool Agreement (CPPA)

The original California Power Pool Agreement was signed December 14, 1961, by San Diego, Edison, California Electric Power Company, and PG&E. The present amended pool agreement between the same parties,

except California Electric Power Company, which was merged with Edison (CPPA, Exh. 6097, Item by Ref. Q-1), became effective July 20, 1964.

The pool also actively involves the largest municipally owned utility in the United States—the Los Angeles Department of Water and Power (LDWP)—in its meetings, deliberations, and operating practices, although LDWP is not a formal member. In turn, LDWP serves as liaison for the three smaller municipally owned utilities in Burbank, Glendale, and Pasadena. SCE also serves as liaison with its resale customers, including the Cities of Anaheim and Riverside. The end result is that the California Power Pool is the coordination vehicle for major generating entities in most of California, an area of about 140,000 square miles.

The agreement sets forth the contractual terms and conditions governing the interconnected operation of the Area Systems of the three utilities. It provides for each party to operate its system continuously and in parallel with each system of a party with which it shares an interconnection, and for the maintenance of interconnections in good operating condition. The agreement requires each party to provide minimum margins of capacity resources, energy resources, and spinning reserve, and makes provision for the pooling and sharing of the reserve margins possessed by the parties.

The definition of Area System according to the terms of the agreement is the following:

> Area System of a Party is its System together with (a) each other system of a Third Party with which it normally operates in parallel by means of facilities and under agreements which result in effectively integrating their loads and resources from an operating standpoint, and (b) generating plants in California, not included above, substantially all the output of which is sold to the Party and integrated into the Party's System. Through this provision the loads and resources of an integrated Third Party are included with those of the Party and will affect the obligations of the Party to the Pool. These Third Party systems, through their integration contracts with a Party, indirectly receive the reliability benefits of the pool backing up the supply of the Party with whom they are integrated.
>
> The Area System of PG&E includes: (1) its System, (2) the Systems of Central Valley Project (excluding Project pumping), Sacramento Municipal Utility District, City and County of San Francisco, those generating plants of East Bay Municipal Utility District, Merced Irrigation District, Oroville-Wyandotte Irrigation District, Tri-Dam Project of Oakdale and South Joaquin Irrigation Districts, Placer County Water Agency, and Yuba County Water Agency. The Southern California Edison Company Area System includes its System plus the System of the Metropolitan Water District. The San Diego Gas and Electric Company Area System includes only its System.

* * *

A key point of the agreement is the concept that each party plans and constructs resources on a basis that provides at least certain minimum reserve margins. As a result, each party not only is able to fulfill its obligations, but may also rely upon the availability of such reserve margins from the other members if necessary. Each party is obligated (1) to operate its system in such a manner as to minimize disturbances that might impair service to the customers of other parties, (2) to maintain frequency at approximately 60 cycles within limits to be set by the Board of Control, and (3) to take care of its own reactive [kilovolt]-ampere requirements.

The services provided for in the agreement are all subject to certain specified conditions. A party can be required to furnish a service only out of its available capacity resources and then only to the extent that it can do so (1) without jeopardizing service to its own customers and other parties to which it is furnishing service of a higher priority, and (2) without interfering with obligations to third parties if such obligations existed at the time the pool was formed or created thereafter in accordance with the agreement.

The services provided for in the agreement are the following:

1. Short-Term Firm Service—By mutual agreement, a party may make capacity available and furnish energy to another party for up to 45 days, subject to renewal by mutual agreement. The effect of such service is to require the committed capacity to be excluded from the capacity resources of the supplier and, subject to some limitation to permit its inclusion in the capacity resources of the receiver. The purchase, sale, or exchange of firm capacity and energy for longer periods may be the subject of separate agreements.

2. Emergency Service—In the event of an emergency on the system of a party, that party has the right, if it is using all of its own spinning reserve, to receive service from the spinning reserves of the other parties for 2 hours. The amount of spinning reserve that

may be demanded under this provision depends on the amount of spinning reserve the receiving party is obligated to maintain under the agreement. There is no charge for emergency service as long as the receiver does not require energy in excess of 2 hours, and does not exceed its spinning reserve entitlement at any time after the first ½ hour. However, the energy must be returned.

If the emergency continues for more than 2 hours and if the party in trouble is using diligence to utilize its available resources, it is entitled to receive capacity and energy from the other parties for up to 60 days to replace its lost or interrupted capacity. The rate for emergency service that continues for more than 2 hours, or where the receiver exceeds its spinning reserve entitlement at any time after the first ½ hour of service is contained in a rate schedule.

3. Economy Capacity Service—By mutual agreement, a party may make capacity available and furnish energy to another party subject to notice of discontinuance sufficient for the receiver to place alternative capacity in service. The receiver is not, however, entitled to more than 24 hours notice. The effect of such service is to require the committed capacity to be excluded from the supplier's spinning reserve and subject to some limitation, to permit its inclusion in the resources of the receiver. The rate for such service is contained in a rate schedule.

4. Economy Energy Service—By mutual agreement, a party may sell economy energy to another party. Such service is interruptible without notice. The rate for such service is contained in a rate schedule.

5. Capacity Resources Standby Service—In the event of a capacity resource deficiency on the system of a party, that party may, if its own resources are fully loaded, call upon the other parties for capacity and energy for up to 7 days for the purpose of supplying firm customer loads. After the 7 days, the service can be renewed. The rate for such service is contained in a rate schedule.

6. Energy Interchange Service—Under this service, the intermediate system, which initially is that of the Southern California Edison Company, receives energy for the account of the receiver from the supplier of one of the aforesaid services (plus energy necessary to offset estimated energy losses) and delivers to the receiver an equivalent amount of energy so received for its account. The rate for such service is contained in a rate schedule.

The agreement requires each member to provide minimum margins of capacity resources, energy resources, and spinning reserve. These requirements, which are not intended to serve as standards of sound operating practice, merely establish the absolute minimum amount of resources believed necessary to preserve the reliability of the pool and to permit the furnishing of services provided for in Section 8 of the agreement.

The electric customers in the service areas of all three of the parties receive the following benefits:

1. Dependability of Service—In the event of an emergency loss of power supply sources on its own system, each party is able to provide more dependable service because of access to the spinning reserves of the other parties.

2. Reduction of Capital Expenditures—Each party has been able to reduce its capital expenditures below what they otherwise would have been because of (1) the resources credit that each of the companies takes through the sharing of installed reserves, and (2) the availability of the reserve resources of the other parties in the event of an emergency or scheduled outage.

3. Reduction in Operating Expenses—Each party has been able to reduce its operating expenses below what they otherwise would have been because they are able (1) to rely upon the spinning reserves of the other parties and (2) to draw upon the least expensive available source of power in the pool.

The pool provides valuable benefits to the public. Pool operations, which make available additional emergency assistance from the other pool members, benefits the public served by such a party by improving the reliability of service. In fact, although not specifically designed to do so, the pool may incidentally benefit interconnected third parties in cases of necessity. Those pool operations that reduce operating costs below what they otherwise would have been are passed on to retail and wholesale customers in the form of a lower cost of service.

Power Pooling in the Western Region, February, 1981, FERC-0054, pp. 139-44.

A Board of Control is established by Paragraphs 10.01 and 10.02, of one representative (plus an alternate) from each Pool member, with salaries and expenses borne by the member represented. Except for calling meetings, election of Chairman and Vice Chairman, and appointing committees

(Paragraphs 10.4 and 10.05), actions and recommendations of the Board of Control require unanimous consent (Paragraph 10.03). The Board is to

(a)(1) review and coordinate planning

(2) recommend construction or improvement of resources, interconnections and other facilities

(b) establish procedures for exchange of information

(c) determine the load each interconnection can transmit under normal conditions

(d) to prescribe metering, recording and billing procedures and other procedures necessary to implement terms of the CPPA

(e) to prescribe operating procedures, and criteria for providing services under the CPPA, including rules as to scope of authority of dispatchers to implement rights and duties under the CPPA

(f) to recommend establishment of certain administrative positions

(g) to recommend to each member establishment and procedures of centralized dispatching and billing to aid in administering the CPPA and for sharing costs thereof.

Power Pooling in the Western Region, *supra*, continues, pp. 145-9:

Both the PG&E and SCE systems of and by themselves are as large as some power pools. For that reason, each of these areas can presently justify constructing the largest size units currently available from manufacturers. Therefore, the principal area of coordination is a result of the strong transmission interconnection that exists between the SCE and PG&E systems—three 500KV a-c lines.

Under the pool agreement, there is an obligation for each of the parties to submit the latest forecast of loads and resources to the Board of Control at 6-month intervals (paragraphs 9.01 and 10.06(b)). Through these reports and other data each of the parties is familiar with the plans and expectations of the other parties.

A capacity resources deficiency occurs when the available capacity resources to a party are less than the capacity resources requirements under the pool agreement, that is, 110 percent of its peakload or 10-percent margin. There are other variations. The deficiency could be 110 percent of the peakload for that day, or it could be the sum of 105 percent of its peakload plus its capacity resources out of service because of scheduled maintenance for that same day.

An energy resources deficiency occurs when a party's energy resources during a month are less than its energy resources requirement. The energy resources requirement is defined as the actual energy requirements for that month plus the energy capability of the generating units out of service for scheduled maintenance, plus 50 percent of the energy capability of the largest generating unit included in the capacity resources and not out of service during that month. . . . In simple terms, the units have to serve the energy load, and, in addition, there must be provision for some amount of reserve energy. In the pool agreement, this provision is 50 percent of the energy capability of the largest generating unit not out of service during the month for each party. Finally, the agreement does not impose a penalty for an energy resources deficiency, it simply requires any party having a deficiency to use due diligence to correct the situation as soon as possible.

Each party is presently required to maintain a spinning reserve equal to at least 7 percent of its peak demand on that day. However, a party does not incur a spinning reserve deficiency unless it goes below 5 percent. If a spinning reserve deficiency is incurred for two successive half-hourly determinations, the payment is $0.10 per kW-day. Several provisions excuse the deficient party from making any payment for such a deficiency for a specified time. The most commonly used provision for excusing payment is an emergency on a party's system.

If a party has an emergency and incurs a spinning reserve deficiency, it is entitled to draw on the spinning reserve of the other parties. There is no payment for emergency service as long as the deficient party neither receives energy longer than 2 hours after the emergency, nor exceeds its spinning reserve entitlement after the first ½ hour. The spinning reserve entitlement is equal to the spinning reserve requirement, which is 7 percent of peak demand for the day. If either of the two specified limits is exceeded, then the party will be considered as receiving emergency service at the rate provided in the appropriate schedule. If the emergency lasts for less than 2 hours, any energy received shall be returned to the supplier as soon as practicable at a mutually satisfactory time . . .

To achieve the anticipated benefits of a pool requires that each party bring to the pool a minimum level of reliability in its system. For example, the California Power Pool Agreement prescribes that the

minimum level of installed reserve is 10 percent. If there were no enforcement provisions, one of the incentives to maintain the 10 percent would be lost. Those members that were maintaining 10 percent or greater would be supporting the deficient member, who would be achieving the benefits of not having installed capacity of its own by relying on that of the other members. That is, the benefits of the pooling would not be distributed on an equitable basis. Also, any party that lets its installed reserves drop to 10 percent would be doing so with the understanding that other members of the pool were maintaining at least 10 percent. Otherwise, they would need to have a larger reserve margin if they wished to maintain the same level of reliability.

In the area of maintenance planning, the scheduled outage of any major component of the bulk transmission system would be taken only after consultation with other systems that might be affected. The normal requirement for such an outage request is 72 hours, so that each of the parties can have adequate time to assess what the impact of that outage will be on its system. Typically, it is a practice of the parties to avoid scheduled outage of transmission facilities during periods of high customer requirements. By providing 72-hours notice, it is often possible for a system that has held up on some needed maintenance work to coordinate it with the outage request of another party. The pool companies regularly update their schedules for major generating unit maintenance. These schedules are currently updated as often as once a month, and the information is exchanged to identify periods in which shifts in these maintenance programs are called. This practice prevents too many very large units from being out of service at the same time. This coordinating function has been extremely important in times of drought and at times when there was an interruption in the normal supply of fuel.

... Good communications at both the dispatcher and scheduling levels, as well as higher levels of operating management, are paramount to the success of operations under the California Power Pool Agreement. The companies have provided the dispatch organization with a highly sophisticated and redundant communication network for voice communication as well as channels of communication for indicating the status of the backbone EHV system that interconnects them. At those times of the year when loads are highest, the dispatchers communicate with one another by 9:00 a.m. each morning to provide a forecast of that day's anticipated load and the resources available to meet that load. Similarly, at midnight of each day, there is an exchange of information regarding the actual peak and the level of spinning reserve at the time of the peak for each of the major California electric utilities. As the day progresses, dispatchers quote incremental and decremental costs at delivery points, and indicate whether power is available for sale or would be purchased if the price were right. Whenever there is a significant loss of resources on any of the pool systems, this fact is communicated to the other dispatching organizations. Should loss of a major resource represent a threat to the reliability of one of the parties or to the pool, the overall reliability of the pool is almost immediately assessed to see if any other actions are required. In the event of sudden emergencies, the design features of each of the systems are automatically brought into play and the status of events made known to the dispatchers through modern data collection and display facilities.

The California Power Pool companies have not established a centralized dispatch. The board has examined this situation as they observed centralization and regional control being adopted in other regions of the country. The board's conclusions are that the sought after benefits of centralization can be achieved now with existing agreements. In some regions of the country the utilities involved in a pooling arrangement believed it was in their best interest to relinquish some of their prerogatives and assign them to another level of hierarchy. However, in view of the fact that within the PG&E control area there are a number of irrigation districts, a State project, a Federal project, and municipal and district projects that are integrated into the operation, it should be apparent that the PG&E power control group performs not only the function of centralized control for a large electric utility, but also many of the functions that typically get assigned to a pool dispatching office. By way of comparison, the PG&E control area geographically and in terms of load is approximately equal to that of New England. Much the same could be said of the SCE system and its dispatch organization. PG&E, SCE, and SDGE are evaluating the potential benefits of increased pooling. In 1980, PG&E, SCE and the Los Angeles Department of Water and Power will participate in a modified Florida-type brokering scheme along with many other WSCC utilities.

The California Power Pool has no formal independent planning organization.

NCPA, Southern Cities and Staff maintain that the CPP serves to maintain dominant control by the parties to it over transmission, reserve sharing, emergency power and coordination services within California. It is also claimed that the CPPA prevents small utilities from entering into transactions on an efficient and economical basis with other utilities by provisions which allegedly penalize a small system on the basis of size, or through provisions which permit arbitrary veto of transactions by existing members of the CPP.

Cities and Staff complain of the lack of a membership provision. It is claimed that this gives each CPP member the unfettered discretion to exclude a potential member such as NCPA from the benefits of pooled operations in California. These benefits are stated to be reserve and emergency services, and economies of scale.

PG&E and Edison state that there is no membership provision because the CPPA was designed only for interconnection and coordination of the original members' systems. PG&E also states that specific criteria are impossible to spell out, and that consideration of new members is best accomplished on a case-by-case basis, such as when membership was offered to SMUD and LADWP. (PG&E Initial Brief, pp. 130-31.) Finally, the companies maintain that there has been no adverse effect in NCPA and Southern Cities not being members, since the Southern Cities and NCPA's member cities currently receive service from Edison and PG&E, and that totally open membership would diminish the reliability of the Pool. Edison states the CPPA is "open to any utility qualified to assume and perform the obligations imposed upon each member of the agreement." (Edison Initial Brief, p. 87.) Edison argues the only type of entity capable of being added to the CPPA as it is structured and operates would be a utility which is fully resourced and maintains its own control area.

During the course of this proceeding, unusual animosity was demonstrated between counsel for NCPA and counsel for PG&E. In an effort to eliminate unpleasant exchanges, they were finally ordered not to address each other directly, but only to address the bench. One PG&E counsel complained that an NCPA attorney had pushed him and physically taken papers from him during a recess. All this raised some questions as to whether the parties should be ordered to enter into relations where cooperation and coordination are necessary, and mutual trust and good will are important if not essential. I was pleased, therefore, to find that the personal relations between the NCPA members' executives who were here to testify and the PG&E executives whom they encountered in my presence were not only courteous, but also cordial and friendly. While it might be difficult for the lawyers involved to work together, no difficulty in cooperation between the executives of NCPA members and PG&E executives has appeared. I did not observe all the NCPA members' executives, and the present executives of the central organization have come into office since the hearing. What I saw, however, indicates that relationships between PG&E and NCPA members' executives and technical personnel will not impede cooperation and coordination in their operations or in those of a common pool.

Animosity was not observed between attorneys for Southern Cities and those for Edison, PG&E and San Diego, or between attorneys for NCPA and those for Edison and San Diego.

A power pool arrangement is a voluntary arrangement, *Central Iowa Power Cooperative v. F.E.R.C.*, 606 F. 2d 1156 (D.C. Cir. 1979) (MAPP); Federal Power Act, § 202(a), and the voluntary nature is to be encouraged.

> The Commission had authority, however, under section 206 of the Act, 16 U.S.C. § 824e (1976), to order changes in the limited scope of the Agreement, including the addition of pool services, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract [that was] unjust, unreasonable, unduly discriminatory or preferential" *See Municipalities of Groton v. F.E.R.C.*, 190 U.S. App. D. C. at 404-06, 587 F. 2d at 1801-03 . . . the Commission should consider the policies of the Federal Power Act in making a determination under this section. This does not mean, however, that a pooling plan is unlawful under section 206 merely because a more comprehensive arrangement might better achieve the purposes of section 202(a). To so conclude would undermine Congress's determination that coordination under section 202(a) be voluntary.

Id. at 1168.

It has been argued that it will deter power pooling if utilities which agree to a pool among themselves are required to extend the benefits of the pool to small entities which cannot contribute proportionately in exchange for the benefits they receive. It is further argued that it is reasonable discrimination, and not undue discrimination, to extend membership only to those who will benefit the other members in return for the benefits the other members confer on them. In the CPPA, for instance,

emergency power is furnished for two hours in some circumstances (Section 8.06), with no provision for payment, although the power must be returned later. Each of the present members of the CPP can furnish emergency power to the others, and thus reciprocate for the power that may be supplied it. Smaller entities, if admitted to the Pool, could not reciprocate in any meaningful amount, and would be more likely to take than to give.

Nothing, however, requires that the CPPA parties preserve the present provision for emergency power as it now is. The CPPA may be amended to provide a reasonable charge for such emergency service, which charge may cover the full cost. To require the present Pool members to render service without just compensation would be illegal. Any charge would have to be filed with this Commission, and may not be more than just and reasonable.

It is established that entities receiving service may be divided into categories if the differences between them result in significant differences in the services rendered, or in the cost of such services. Lower rates for higher volumes, or for interruptible service, or for off-peak service are not unreasonable in themselves (although a particular differential may be found unreasonable). There may not be discrimination between entities that is not justified by differences in the services rendered or in the costs of rendering such services. An electric utility which has undertaken to provide a particular service to some may not refuse to provide such service to others in similar position where it has the facilities and capacity to serve them. Whether the others are in a similar position is a question of fact. The others are not in sufficiently different position to justify denial of service if the differences can be compensated for by higher rates or reasonable adjustments to services. A power pool agreement may be amended to provide reasonable compensation for services, and different charges may be provided for different categories so long as the categories and charges are just and reasonable. Again, the charges will be subject to review by this Commission.

Where it is feasible to provide an applicant with the same services given Pool members at reasonable rates that compensate fully for the cost of the services rendered, I conclude that the proper course is not to exclude the applicant, but to include it while providing for compensatory rates. It is preferable to adjust the rates for all members rather than to provide a new separate schedule for new members, but this does not prevent separate categories and charges where this is reasonable and not unduly discriminatory.

In MAPP, the Court of Appeals affirmed the Commission, which held smaller generating systems should be included in the pool "so long as they provide compensation for the true value of transmission services whether in kind or in money," and directed participants and the Commission staff to develop a formula for fair compensation to be paid by those participants unable to reciprocate for transmission in kind. Id., at 1172. While the ruling was with respect to transmission, the same principle should be applied to other services. For what is provided them, members should reciprocate or pay reasonable charges.

NCPA and Southern Cities had no generation as of the conclusion of the hearing in these proceedings. Future generation was planned, however, and some was under construction.

The benefits of the CPPA are (1) reserve sharing, (2) emergency service, (3) economies of scale, and (4) joint planning. Some of these benefits overlap.

As of the close of the record, only the planning function was of use to NCPA and Southern Cities, since the other three were benefits in connection with generation which the Intervenors had not established. Future generation is being planned, however, and other generating alternatives are being examined. I conclude that access to the planning aspects of the CPPA should be granted to any area entities seeking membership and affirmatively engaged in building or designing significant generating facilities. To open participation in the CPPA planning to any who may be merely considering the possibility of future generation may be too burdensome; we are not presented with that question here. Neither do we need to decide where the line must be drawn between those who are sufficiently entered upon a course leading to future generation to render their inclusion in planning necessary to avoid undue discrimination, and those who are not. It is proper for those admitted to the planning function to bear their just and reasonable share of the costs of the planning operation. What that share may be is not now before us.

Under the CPPA, each member controls its own building of generating plants. Planning and development are not controlled by the decisions of the Pool members as a group, but by the decisions of the individual member with respect to its own needs. Members may cooperate and coordinate, they may alter their individual investments and plans for generation in the light of what others are doing, but they cannot be compelled or prevented by the other members. There are

reserve requirements, but how these reserve requirements are to be met is in the hands of the member obligated, and not of a central planning body.

It is unnecessary in connection with planning to consider the question of how control is to be exercised, and the weight of votes to be cast. In these planning provisions, we have neither the problem of the small system that may have little or no voting power, nor that of the large system that does not want its future controlled by the votes of lessor entities. All that new members of the CPPA are to be given is an ear and a voice in connection with planning, not a vote. They must be allowed to participate in the planning sessions, and must be furnished with the knowledge there available to others, and allowed to express their views on the potential plans for the members' areas. Conversely, they must furnish information and hear others' views.

In MAPP, *supra*, the Court of Appeals affirmed "the Commission's decision that the failure to include non-generating distribution systems in MAPP is not anti-competitive and does not render the Agreement inconsistent with the public interest." *Id.*, at 1165. In MAPP, however, there were differences from the CPPA.

> ". . . . non-generating distribution systems that desire to enter the generating business may submit construction plans to MAPP for consideration and may attend MAPP meetings at which long-range plans are discussed."

Id., at 1165. I conclude that non-generating California distribution systems should be accorded here what was accorded them by MAPP, and that NCPA should be permitted to represent its member utilities if they so desire.

The Commission modified MAPP so any distribution company interconnected with a MAPP participant that wishes to construct generation facilities "is assured of eligibility for pool membership, and the consequent benefits of reserve sharing, when the facilities are operational." *Id.*, at 1165. The CPP should be similarly modified here. NCPA should be treated as a distribution company for this purpose.

In *MAPP*, there was a pre-existing membership provision that was altered. Here there is no membership provision. The present members are directed to draft an appropriate membership provision and submit it for approval.

I do not construe *MAPP* to require admission to full membership of entities with only insignificant generating facilities, or tiny shares in larger generating facilities. (See page 19, which requires participation in the planning function only for those building or planning *significant* generating facilities.) The membership provision may provide reasonable standards.

Paragraph 1.29 of the CPPA should be redrafted to exclude the assumption that there are only three parties to the agreement.

Paragraphs 3.02 and 8.01 have had similar allegations leveled against them. Paragraph 3.02 states:

> Each Party reserves the right to continue or renew existing agreements and enter into additional agreements with any Third Party for the purchase, sale, exchange, and/or transmission of capacity and/or energy; provided, however, that unless the Parties mutually agree otherwise in writing, no Party shall enter into any such additional agreement with a Third Party whose System is not included in the Party's Area System if the effect of such additional agreement would be either
>
> (a) to obligate the Party to stand by or protect any supply of power for such Third Party unless the Party is providing Spinning Reserve equal to its obligations for such service in addition to that otherwise required under this Agreement.
>
> (b) to obligate any other rty to furnish directly or indirectly to any such Third Party capacity, energy, and/ or transmission service, or
>
> (c) to result in a Capacity Resources Deficiency, and Energy Resources Deficiency or a Spinning Reserve Deficiency or a conflict with any obligation under this Agreement.

NCPA claims this provision restricts the ability of a pool member to contract with a third party through a potentially arbitrary veto.

First, with regard to Paragraph 3.02(b), PG&E Witness Kapriclian has interpreted this language to mean that it does not prevent a member from offering some of its own transmission to a third party, but only prohibits a party from obligating one of the other parties without approval. CH-1481. Edison interprets this provision similarly. CH-1625-1626; CH-1862-1867. NCPA states the language as presently worded is not in accordance with the interpretation. (NCPA Initial Brief, p. 172.) PG&E states in response that there is no unequivocal public necessity to rewrite the paragraph, since the members of the Pool already know what it means. They may, but possible future applicants may not.

The clause should be redrafted to reflect Mr. Kaprielian's interpretation.

Second, there is also a question as to whether Paragraph 3.02 applies to the situation in which a third party located within the control area of a Pool member deals with other Pool members. Kaprielian states it does not. CH-1868; CH-20,985-86. Edison agrees with this interpretation. NCPA has no problem with the desirability of this interpretation, but cannot reconcile the interpretation with the language. PG&E again responded that no necessity exists for revision. The provision should be redrafted to reflect Mr. Kaprielian's interpretation.

The third problem with Paragraph 3.02 concerns its effects upon sales by a third party located outside the service area of any Pool member. Under the provisions of 3.02(a), a member cannot obligate itself to stand by or protect any supply of power unless (1) it is providing spinning reserves equal to its obligations or (2) the other members agree in writing. Again, there is a problem of interpretation. Witness Mitchell states the provision, rather than requiring the party to spin 100% of the contemplated transaction, only requires a party to spin 7% of the entire transaction (pursuant to Paragraph 7.01 as modified). CH-1867-68. Edison states that NCPA's incorrect interpretation is based on early Pool documents, and has never been interpreted to require spinning of 100% of the entire transaction. (Edison Answering Brief, pp. 248-49.) The ambiguous spinning requirement should be redrafted with specificity.

NCPA also argues that the provision gives the other members unfettered discretion to veto transactions where the Party does not have the spinning reserves to back up the transaction. NCPA argues that in the past Edison has forced every major contract it has to be exempted from this provision. Edison states that Intervenors and Staff can point to no instance where the provision has been utilized to forestall any proper transactions. (Edison Answering Brief, p. 250.) PG&E argues that the provisions need to remain to protect the pool's reliability.

This provision was drafted to ensure a Pool member, unless it agrees, does not become responsible for another member's folly in guaranteeing standby for a third party's supply of power if that supply is questionable. The purpose of this provision cannot be applied in a discriminatory manner, however. If NCPA acquires generation and becomes a member of the CPPA, it must be treated like anyone else so long as the circumstances are similar. It must also be allowed to buy spinning reserve from other members at just and reasonable rates. The fact that as a member it can refuse to waive the provision in question for other members if it is not treated fairly may discourage discrimination against it. It is hoped that the various members will be able to work together and not carry into their Pool dealings the animosity that has partly risen from and also been one of the causes of so much litigation. If not, the Commission may entertain a petition to deal with the situation by amendment of the CPPA or otherwise.

The elimination of the provision has not been shown to be required. It has not yet been used to discriminate, or to obstruct. If it is, the doors of this Commission are open. Since it appears to have a valid purpose, it will not be deleted at this time.

Similar attacks have been made upon Paragraph 8.01(b) of the CPPA. The section states:

> (b) In order to protect the Parties from unknown and unreasonable risks and to avoid inequities, no Party shall take service hereunder to stand by or protect any supply of power for its Area System or the System of a Third Party if such supply of power is obtained from a generating source not included in the Area System of a Party; provided, that there shall be excepted from this paragraph any source under contract to a Party on the date hereof and any other source which the Parties mutually agree in writing to except herefrom.

As described by NCPA Witness Westfall

> ... if NCPA were to purchase a block of power from the Northwest it ... would be precluded from receiving any standby or reserve service from SCE or SDG&E without approval of all parties to the Agreement ...

CH-753. The provision is present to protect the reliability of purchases of power from outside sources. Kaprielian agrees with the interpretation, but stated, "I do not believe there would be any problem" because he is convinced the CPP companies would apply the standard to a resource imported by NCPA. CH-1483. NCPA claims this provision has been applied in a very lax manner in the past, with permission sometimes never given in writing, or projects sometimes interpreted to be within a system to avoid the provision. NCPA claims this, coupled with the fact that no transaction has ever been delayed or cancelled as a result of Paragraph 8.01, shows that the provision is unnecessary.

As with Paragraph 3.02, the provision was drafted with the intent to promote reliability of the pool. It must not be used, however, to discriminate against small potential members.

For this reason, the provision will be allowed to stand, but it must be applied in a non-discriminatory manner. It shall also be revised to include Staff's recommended revision (Initial Brief, p. 246) that the purchase be allowed as long as it is as reliable as other resources owned, purchased or controlled by any other Party as of the date of the Commission's final order in this proceeding.

Paragraph 5.01 of the CPPA provides two standards for the Capacity Resources Requirement, which shall be the greater of the two. The first standard is 110% of a member's Peak Demand for that day. The second is the sum of 105% of the Peak Demand for that day plus the amount of Capacity Resources out of service for scheduled maintenance at the time. Witness Westfall argues this discriminates against a entity such as NCPA which meets a portion of its peak load through firm purchases from another party. NCPA claims that since by definition a firm purchase is backed by the reserves of the seller, the buyer should not also have to maintain reserves to guarantee it.

In answer to NCPA's contention is the testimony of Edison Witness Whyte, CH-29,854:

Q. Mr. Westfall (at Tr CH-8443) criticizes CPPA Paragraph 5.01 by suggesting that the Capacity Resource Requirement should be reduced for any member which is purchasing "firm power" since the seller of that "firm power" must provide reserves. In your opinion can a purchaser of "firm power" prudently avoid providing reserves for that "firm power"?

A. No. The extent to which purchased "firm power" can be relied upon to carry load on the purchaser's system is a function of many variables, among which are the conditions on the system where the power is generated, the contract terms and conditions, and the transmission arrangements. For example, Edison has an arrangement with Portland General Electric where Edison exchanges firm power. Portland has the right, however, to curtail service to Edison if necessary to avoid curtailing service to its own customers. Also, the connecting transmission lines must be available. At Edison, as I have said, we use loss of load probability techniques to recognize these factors. I should also note that reserves are necessary to provide for regulating margin and for load forecast uncertainty whether or not power is being supplied under "firm" contracts.

There appear four objections to NCPA's argument. First, the contract: Mr. Whyte has pointed out that a "firm" sale is not necessarily an unequivocal commitment to deliver power. Second, conditions on the seller's system: Mr. Whyte did not specify these, but at least two are readily apparent. The level of the seller's reserves may or may not be equal to the reserves required of CPP companies; if it is not, the reserve levels for the firm purchase would not provide the same margin of safety as would the purchaser's own reserves. There may also be other conditions on the seller's system which would render its power supply less reliable than generation by CPP members. What these conditions may be is not specified, nor does the CPPA provide standards. Third, if there is a transmission line between the seller and the buyer, that transmission line may be subject to interruption; no matter how much power Portland General may have available, it cannot be gotten to California if the Intertie lines are out of service. Fourth, Mr. Whyte states reserves are necessary to provide for regulating margin and load forecast uncertainty.

I conclude that the criteria which should be met are these: (1) the purchased power must not only bear the label of firm power, but the contractual obligation to furnish it must be part of seller's first priority load, not interruptible where the seller's retail customer needs require it; (2) the reserves on the seller's system must be as high as those required of CPP members; (3) aside from reserves, the reliability of seller's system should not be jeopardized by conditions on it; and (4) the transmission link between seller and buyer must not be susceptible to interruption to any appreciable extent unless there are sufficient alternate transmission routes, not susceptible to interruption to any appreciable extent, to transmit the seller's power to the CPP at some point or points so there is no loss of power to the Pool through the failure of transmission to the buyer. All these standards are for the protection of the Pool, not of the buyers, and should be so construed.

For a small utility in the PG&E or Edison area, a PG&E or Edison guarantee of delivery of power will be as good as its own reserves. If the linkage with PG&E or Edison fails, there will be no burden upon the Pool. For the small utility in PG&E's area, guaranteed power from PG&E should require no other reserves than PG&E's. The same is true for Edison's area.

A slightly different problem arises when a small utility in Edison's area buys firm power from a member of the CPP other than Edison. If one of the Southern Cities buys firm power from PG&E, there should be no problem. PG&E's rate to the small utility would include the cost of reserves for such power, and those reserves would be available to the Pool as a whole even if they could not reach the small utility because of some transmission problem

outside PG&E's area. There would be no burden on the Pool as a whole affecting reliability, because PG&E's reserves would take care of it. The same is true if a utility in PG&E's area buys from Edison or San Diego.

If the small utility buys from another small utility Pool member which does not itself have adequate reserves, and must resort to the Pool to make good its deficiencies, a burden will be placed upon the Pool. Either the selling small utility or the buying utility must compensate the Pool for the deficiency, or must make good the deficiency by buying reserves from a member of the Pool that does have them available.

When there is a deficiency in the reserves of the seller, and seller purchases reserves to make up the deficiency, seller needs only to purchase what is lacking, not the entire amount of reserves needed to back up the firm power sold. For example, if seller has sufficient reserves to back up one half the firm power sold, seller need arrange only for additional reserves sufficient to back up one half the amount of the firm power sale, not the entire sale. Under the same circumstances, if the buyer purchases the necessary reserves to make up seller's deficiency, buyer need purchase only the reserves necessary to back up one half the amount of the firm power purchase.

PG&E has raised the question of a seller's reserves being less reliable than those of Pool members. There is no provision in the CPPA for measuring the quality of reserves. If this is thought to be a problem, an amendment to the CPPA may be submitted in this proceeding to provide for it. We do not now have the record necessary for drafting such an amendment.

As to conditions on a seller's system, other than reserves, which might render power purchased from it less reliable than a purchase from PG&E or Edison, the conditions cannot be spelled out here on the basis of this record. While such conditions may be imagined, including reckless management, inadequate maintenance on the system, and threatening environmental conditions such as possible interruption of service by avalanches or forest fires, neither the record nor the CPPA make any attempt to enumerate them or to provide standards or methods for determining whether conditions exist endangering seller's reliability. The CPPA may be amended to provide a means for determining if such conditions exist. Until this is done, firm power which meets the other standards here set forth should not require reserves provided by the buyer because of conditions on the seller's system.

Such entities as LADWP, SMUD, and CVP are so interconnected with CPPA members that the transmission standard is satisfied. Deliveries from the Northwest, on the other hand, may be subject to transmission interruptions. The burden of such interruptions falls upon the Pool as a whole, if a purchase does not have the necessary reserves. A small utility without such reserves may not be excluded from the Pool, but must be permitted to arrange in advance for reserves at just and reasonable rates. The small utility must pay for any such service, and not demand revision of the Pool requirements so that it would receive service for nothing. To hold otherwise would require the larger utilities to render service without compensation.

The reserves for load forecast uncertainty on seller's system will be covered by the seller's reserves. The reserves for load forecast uncertainty on the buyer's system will not be covered by seller's reserves unless specific arrangements are made between seller and buyer. If no such arrangements are made, these reserves will have to be provided by buyer, purchased from someone else, or provided by the Pool. The general statement that firm purchases are supported by the reserves of the seller is not entirely true, since that portion of the reserves necessary for load forecast uncertainty on the buyer's system is not provided by the purchase of a specific amount of firm power. Of course, if the firm power purchase is an arrangement for all the buyer's requirements, the reserves for load forecast uncertainty will be included in seller's obligation, and if seller's reserves, and transmission for them, meet the criteria previously set forth, no other reserves for load forecast uncertainty should be required. If, however, the firm purchase is limited to a fixed amount, then reserves for load forecast uncertainty on buyer's system must be provided in some other manner.

The reserves for load forecast uncertainty are but a part of the necessary total reserves. Reserves to take care of generating outages, for example, should be encompassed in the seller's system. It is not proper for the CPPA to provide, then, for no credit for the reserves available along with the firm power, and the clause in paragraph 5.01 is improper in this respect. It must be modified.

If the buyer's reserves in a particular category, which are available to support the firm power sold, fall short of that required by CPPA of its members, there still must be a credit for the reserves that are available. For example, if reserves of 2 MW are required for 20 MW, and seller has only 1 MW of reserves for each 20 MW of its load, a credit of 1 MW must be allowed buyer toward its total reserves

requirements, assuming the transmission and other criteria are satisfied.

In other words, the amount of reserves in any category which a buyer of firm power must furnish shall not be computed as a percentage of peak load minus firm power purchased. It should be computed as total reserves required (a percentage of peak load) minus the seller's reserves available to buyer. If the reserve percentage is required to be 5 percent, the peak load 40 MW, the firm purchase is 10 MW and the seller's reserves available to buyer are 3 MW, the algebraic computation of the required reserves is five percent of 40 MW, or 2 MW. It is *not* five percent of (40-10) MW, or 1.5 MW. The reserves that buyer must purchase equals (2-3) MW, or 1.7, not 2 MW, as it would be if no credit were given for seller's reserves. This method of computation may be applied to all categories of reserves. In view of this determination, regulating margin need not be separately considered.

The Pool members shall submit a revision of Paragraph 5.01 drafted in the light of this Initial Decision and the proceeding shall remain open for the purpose of approving, modifying or redrafting the Pool members' revised provision that is required to be submitted.

NCPA also claims Paragraph 5.01 discriminates against small systems by requiring them to carry more installed reserves in relation to their system peak than large pool systems. This is because NCPA speculates that it will possibly rely on one very large generating unit, and it would be obligated to maintain reserves in an amount equal to the greater of (a) 110% of its peak demand for a given day or (b) the sum of 105% of its peak demand *plus* its capacity resources out of service because of scheduled maintenance. When the large plant is out of service for maintenance, NCPA would be required to carry large reserves in relation to its load. In contrast, an entity such as PG&E does not rely on a single large unit. Any PG&E unit will generate a small part of PG&E's load, and when the unit is out of service it will not greatly affect the reserves required.

Assuming an entity with a Peak Demand of 100MW, which has one 70MW plant down for scheduled maintenance, the Capacity Resources Requirement would be 175MW. Without the provision requiring 105% of Peak Demand plus the 70MW plant out of service, the Capacity Resources Requirement would be 110MW, of which 70MW would be out of service. This would leave only 40MW to service a 100 Peak Demand. With the provision requiring 105% of Peak Demand plus the 70MW plant out of service, there would be 105MW to service the 100MW Peak Demand. This does not seem an unreasonable requirement. Paragraph 5.01 exists to promote reliability. NCPA can purchase reserves. It can continue to enjoy the economies of scale through joint ownership. CH-33,359; CH-23,235-37. It can also reduce, although not eliminate, the effect of maintenance through careful scheduling (Edison Initial Brief p. 63). To some extent this is not possible, but a power pool is not required to eliminate all the handicaps under which a small utility must operate because of its size. A pool cannot, of course, create additional handicaps by undue discrimination.

Paragraph 5.03 establishes a payment for capacity resources deficiencies:

> Any Party incurring a Capacity Resources Deficiency shall thereupon become obligated to pay as liquidated damages to the Parties entitled thereto under paragraph 5.04, two dollars ($2.00) for each kilowatt of such Capacity Resources Deficiency for each calendar month and any fraction thereof until such Capacity Resources Deficiency is completely removed and for each of the next twelve (12) calendar months thereafter.

It is clear that some deficiency charge under Section 5.03 is justified. *New England Power Pool Agreement* (NEPOOL), Opinion No. 775, 56 FPC 1562, 1581 (1976). While, as in NEPOOL, smaller systems will have more difficulty avoiding the charge, it appears the charge is necessary. NEPOOL stated the deficiency charge should be based upon actual kilowatt shortfall. The charge in NEPOOL was $22 per kilowatt year, plus an additional percentage of that charge; here the charge is $2 per month, or $24 per year. Here, however, the charge continues for twelve calendar months after the capacity deficiency is removed. In NEPOOL, the $22 approximated costs as estimated by the Working Committee, here the basis for the charge has not been shown. In NEPOOL, the Commission said that the $22 had not been shown to be unjust or unreasonable. The $2 per month ($24 per year) has not been shown to be unjust and unreasonable here. The number is so close to that approved in NEPOOL that it is not suspect. The additional twelve-month charge, however, has not been shown to have any basis. It will be ordered eliminated. The CPPA members may, however, submit a proposed provision providing for any charge which they can establish as just and reasonable. Such charges may differ from past charges in rate design as well as amount.

Paragraph 6.01 of the CPPA requires any member to have energy resources equal to the sum of (1) its Energy Requirements for a

month, (2) the Energy Capability of the generating units included in its Capacity Resources out of service on scheduled maintenance during that month, and (3) 50% of the Energy capability of the largest generating unit included in its Capacity Resources not out of service on scheduled maintenance that month. As with Paragraph 5.01, Intervenors and Staff claim this prevents small utilities who wish to rely on large generating units from participating in the Pool, and thus it discriminates against them.

Initially, NCPA claimed that the provision was ambiguous, in that PG&E witness Kaprielian stated that the apparent discriminatory effect of the provision is lessened by the fact that a "credit" is given for the emergency capability for units out of service. NCPA initially said that the provision did not appear to be in harmony with that statement. (NCPA Initial Brief, p. 195.) NCPA apparently backed off upon hearing Mr. Kaprielian's explanation of how the provision has been read:

> A member's "Energy Requirements" are defined by paragraph 1.23 as its "total energy demand, expressed in kilowatt hours, on all power sources of its Area System" during the month. The kinds of energy sources a member can count toward fulfilling its paragraph 6.01 obligation are described in paragraph 1.24 as "the aggregate dependable load carrying ability, expressed in kilowatt hours, of its Capacity Resource" during the month. Par. 1.24. The "Capability Resources" of a member include the sum of the capabilities of all electric generating units, whether in or out of service during the month, and all purchased firm power, less the amount of firm power made available to other Pool members. Par. 1.08. Since the requirement of Paragraph 6.01(b) to maintain energy resources equivalent to the capability of units out of service for scheduled maintenance can be discharged simply by counting the energy capability of the same units under paragraph 1.24, the net requirement is that a Pool member maintain resources capable of producing energy sufficient to cover the energy demand on its system for that month plus energy reserves equivalent to 50% of the capability of its largest generating unit in service for that month. (Kapriellian, CH-1490/2-5.) When each Pool member maintains resources capable of producing at least this quantity of energy,the reliability of the Pool is assured. (Kapriellian, CH-1463/7-9.)

Relying upon this testimony, I find no redrafting is necessary.

NCPA also quotes certain member dissatisfaction with the provision as reason to have it removed. This is not enough. Differing opinions on how to achieve reliability are not grounds for requiring a change. That current members disagree is some evidence, however, that future members may successfully campaign within the Pool itself to delete or amend the provision. This voluntariness is at the core of power pool arrangements. The provision was designed to ensure reliability, and not to promote discrimination. While small systems may be affected in ways not experienced by larger entities, in the absence of undue discrimination this is permissible.

Paragraph 7.01 is the CPPA's spinning reserve requirement. This is determined on the basis of a Party's peak demand on a given day. NCPA objects that, like Paragraph 5.01, it requires an entity to keep reserves for that part of its load that is met through firm purchases, and NCPA argues this in essence requires that the firm purchase be backed by reserves twice: once by the seller and once by the buyer.

The seller's reserves are included in any firm purchase. As stated in regard to Paragraph 5.01, power purchased from a distant utility may be more of a risk than power owned outright. If purchased power is PG&E's or Edison's guaranteed power, it is virtually as reliable as the customer's own power, and if it cannot be delivered it will place no burden on the Pool. The same reasoning and standards previously set forth in connection with Paragraph 5.01 apply here. Paragraph 7.01 should be amended so a buyer need not provide spinning reserve for guaranteed power sold by a CPPA member with adequate spinning reserves under the standards previously provided, or from any other supplier if the purchase meets those standards previously established in connection with Paragraph 5.01: (1) unequivocally guaranteed power, (2) backed by reserves at least equal to CPPA standards, (3) from a seller with transmission to the CPPA not subject to appreciable chance of interruption. The CPPA may also incorporate standards or means for determining if conditions exist on seller's system that endanger a seller's reliability, and making reasonable provision for reserves to offset such conditions.

Staff alone objects to Paragraph 7.03, which sets up a spinning reserve deficiency penalty charge, claiming the charge bears no relationship to the costs incurred by the other members.

A deficiency charge of some sort seems reasonable to provide incentive to the members to maintain the proper reserves. As required in

the NEPOOL opinion, *supra*, regarding capacity charges, the charge is based on an actual kilowatt shortfall, and there has been no showing the amount charged is clearly excessive.

That amount is 10 cents per kW of the largest spinning reserve deficiency incurred by a Pool member in a day. It is stated to be liquidated damages. A Pool member may be excused from payment under certain specified circumstances, and the charge may be changed from time to time by the Board of Control. If so changed, it is a rate change which must be filed with this Commission. While the circumstances excusing payment seem sufficiently explicit so they should not lend themselves to abuse, [8] they must be applied without discrimination.

Paragraph 8.02 deals with priority of service. NCPA fears that the provision would require that service to a non-party would come behind service to any of the CPPA parties, constituting a bar to dealing with entities within another party's control area. Edison and PG&E say that this section specifically deals only with transactions between CPPA parties. This has been confirmed by testimony. Mitchell CH-1878-79; Kaprielian CH-1492 and CH-22,177. The language refers to transactions "between a Party and another Party." No revision is necessary.

NCPA and Staff contend Paragraph 8.06, like Paragraphs 5.01 and 6.01, imposes a penalty on small systems which are relying on large generating units.

Paragraph 8.06 states that in the event of an emergency, a Party uses its own spinning reserves first, and to the extent that is insufficient, it can draw upon the spinning reserves of other parties, without charge, for two hours as long as it does not draw more than 7% of its daily peak load (the amount of its spinning reserve requirement). NCPA concludes that since PG&E's peak load provides a larger reservoir for emergency service than would NCPA's peak load, if NCPA relied on a single large unit it would incur a penalty, while large operators such as PG&E rarely would incur charges for excess. (NCPA Initial Brief, p. 199.) NCPA asks the provision be revised.

It appears that NCPA and Staff are in effect arguing that small operators are not getting enough free service. NCPA need not necessarily rely on large units. The provision does not appear to have been drafted with discriminatory intent. Staff Witness Newton testified that charges for emergency service are not uncommon. CH-17,276-77, 17,290. The provision may stand.

NCPA argues for the removal of Paragraph 8.06(f), claiming that it effectively precludes a party from providing standby service to the system of any other entity not included in its area system.

A reading of the provision makes it clear that this is merely a clause preventing a Pool member in an emergency situation from obligating the spinning reserves of another Pool member (which it is receiving due to the emergency conditions) to provide standby service to third parties, without the other Pool member's consent. I find this provision not unreasonable.

The Intervenors attack Paragraph 8.09, saying the provision operates to penalize a utility that operates a single large unit. The provision allows a Pool member, upon request, to supply capacity for a period of seven days to another Pool member with a Capacity Deficiency. Such a request may be renewed. NCPA claims the provision is ambiguous, in that it is not clear whether the availability of capacity resource standby service is limited to seven days, or whether the limitation is eliminated by the fact the service may be renewed. Kapriellian stated the seven days is to only give a review period to determine whether the conditions for continued service are met (CH-1494) and is not meant as a limitation.

The provision appears to be ambiguous. The seven-day period is not a limitation on the service which may be rendered.

Intervenors and Staff contend Paragraph 11.03 provides for a division of markets. That paragraph states:

> Nothing in this Agreement shall be construed as providing, directly or indirectly, for any cooperative furnishing of electric utility service by any party within the system of any other party.

This provision is not a division of markets. It does not prohibit or require anything; it merely states what the CPPA does *not* do. There is no evidence it has been interpreted or applied to justify or require an improper practice. In the absence of such evidence, no revision will be required.

It has been urged that rulings of the Board of Control should be filed with this Commission as supplements to the CPPA. Paragraph 10.06 of the CPPA defines the authority of the Board. Except for Paragraphs 10.06(c), (d) and (e), and the catch-all (h), the Board's power is only to review, recommend, and establish information procedures. Under (c), the Board determines the load capacity of each Interconnection; under (d) the Board determines metering, recording and billing

procedures, and any other procedure the Board "may determine to be necessary" to implement the CPPA terms; under (e) the Board prescribes operating procedures and criteria for providing services; under (h) the Board may take all other actions authorized or required of it by the CPPA. Paragraph 7.03 provides the Board may change the charges for Spinning Reserve Deficiency, or in some instances forgive the charges. A change in charges would have to be filed with the Commission even if this Initial Decision said nothing about it. It is apparent that rulings of the Board of Control may affect substantive rights of parties to the CPPA, although most rulings would not do so. Accordingly, I direct that Paragraph 10 be amended to provide that all rulings of the Board be filed with this Commission in this proceeding, as supplements to the CPPA, and that such filings be made. The proceeding will remain open for the purpose of receiving any such Board rulings and considering objections to them.

At present, each CPPA member is represented on the Board of Control. This may be altered if the parties wish to submit a suitable amendment to the CPPA in this proceeding. Admission to the planning function need not mean representation on the Board. It may not be necessary to give every generating member direct representation on the Board where such membership is greatly expanded. The provision for unanimous decision may be impractical with a larger membership. These questions were not argued, and need not now be decided. So long as a proposed revision of the CPPA is on these points is just and reasonable, the parties are entitled to frame it as they wish.

It has also been urged that the Pool minutes interpreting the Pool provisions and Board rulings be filed as supplements to the CPPA. I decline to order this. The Pool minutes are available to all present and future Pool members, and are subject to production as evidence in any proceeding in which they are relevant. In my view, they are not properly considered as supplements to a filed rate schedule. The Board of Control rulings go beyond interpretation and establish new rules, and may therefor be considered as establishing additional terms of the rate schedule. This Commission has not, however, required interpretations of rate schedule provisions by a utility, or the minutes of a utility's Board of Directors dealing with interpretations, to be filed as rate schedule supplements.

II. The Pacific Intertie

The Pacific Intertie is considered to be the greatest electrical transmission achievement in this country in this century. It established high voltage, high volume, long distance transmission between northern Oregon and its terminal near Los Angeles, the greatest distance over which commercial electrical transmission had ever been accomplished in this country, and in the greatest volume that long distance transmission had ever reached anywhere in the world. One component, a direct current line, was the first major dc transmission line in this country, and was completed through difficult terrain in the face of skepticism on the part of some engineers as to whether the proposed technology would work. After an initial period in which some "bugs" were dealt with, the dc line proved to be successful beyond the expectations of most of its proponents in providing low-cost long distance transmission.

The engineering feat of design and construction was complemented by the difficult political maneuvering and compromising necessary to work out the details among the conflicting interests and demands of the Northwestern states, California, Canada, municipal utilities, private utilities, the Bureau of Reclamation and other state and federal agencies. Senators, Congressmen, governors, cabinet officers and President Johnson became involved.

Basically, the Intertie system consists of two 500 kV lines from Oregon into California, and one 800 kV line to the east from Oregon through Nevada and southern California. The system is described in more detail in Southern Cities' initial brief at page 13:

> The two 500 KV ac lines begin at the John Day Dam on the Columbia River. The first leg of each line, from John Day 89 miles to Grizzly Substation in Oregon, is owned by the Bonneville Power Administration ("BPA"). From Grizzly 178 miles to Malin Substation near the California Oregon border ("COB"), one line is owned by BPA and the other by Portland General Electric Company ("PortGE"). From Malin 94 miles to PG&E's Round Mountain Substation, one line is owned by the United States Bureau of Reclamation ("USBR"). The second line is owned by Pacific Power & Light Company ("PP&L") as far as the Indian Spring Tower and by PG&E from the Indian Spring Tower to Round Mountain. Both lines then proceed southward through PG&E's service area 425 miles, through the Table Mountain, Vaca dixon (one line only goes to this substation), Tesla and Los Banos Substations to Midway Substation. From Midway the lines are owned by Edison and continue south into Edison's service area to Edison's Vincent Substation, a distance of 113 miles. [1] From

Vincent the two lines, also owned by Edison, extend an additional 47 miles to Edison's Lugo Substation. The AC Intertie traverses a total distance of 946 miles. (Moody: 7/1587-88). A 230 KV line owned by USBR from Round Mountain to Cottonwood is also officially a part of the Intertie. It does not, however, connect directly to the USBR Intertie line which runs from Malin to Round Mountain.

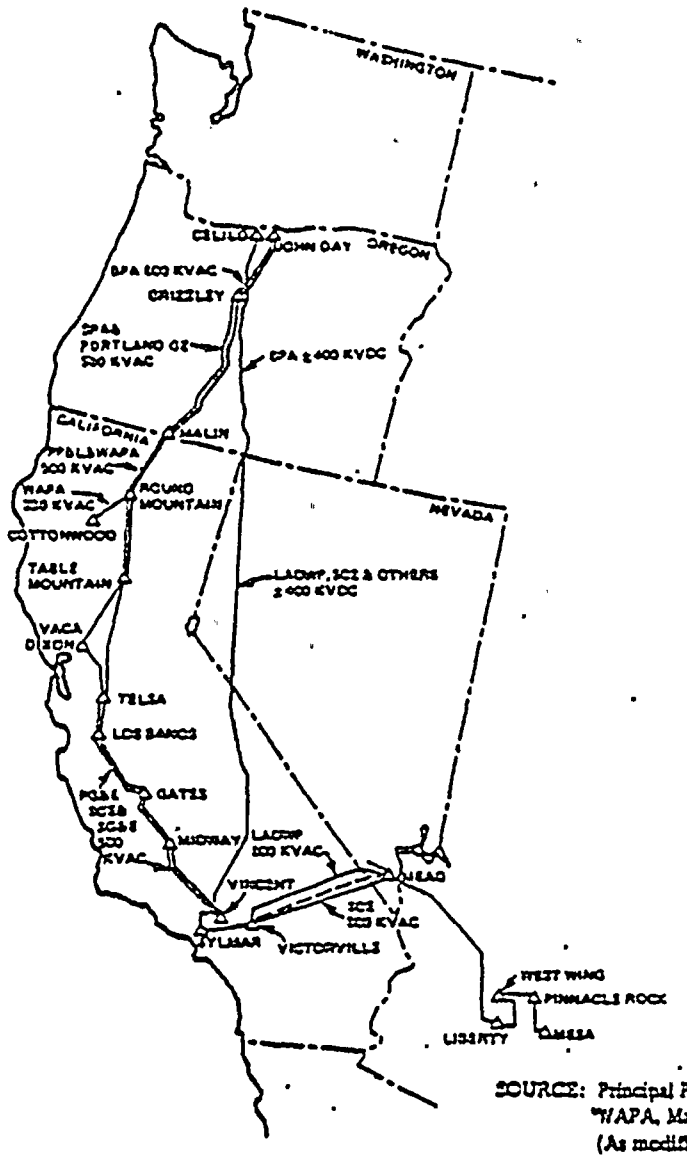
The dc Intertie line runs 846 miles from the Celilo Converter Station near The Dalles in northern Oregon, through Nevada and California to the Sylmar Converter Terminal near Los Angeles. BPA owns the line in the Northwest as far as the Nevada-Oregon border (NOB). From the NOB to and including the Sylmar Station, the line is owned 50% by the Los Angeles Department of Water and Power (LADWP) together with the Cities of Glendale, Burbank and Pasadena, and 50% by Edison. Edison owns and operates 230 KV transmission lines which interconnect Sylmar with Vincent (Moody: 7/1588).

[1] There is a third 500 KV AC line from Midway to Vincent, owned one-half by PG&E and one-half by SCE, which is not considered part of the Intertie (Moody. 263/31855-56)

The Intertie is shown on the map on page 65,197. The 500 kV ac Intertie lines in the PG&E area are owned by PG&E.

The two 500-kV a-c lines were constructed and went into operation 1968 and 1969, respectively, following the original proposal for interconnection of the Pacific Northwest and Southwest Regions. As a part of the synchronized loop or doughnut network, the a-c interties are subject to unscheduled power or circulating flow. The rated capacity of the a-c intertie is 2,500 MW, assuming no loop flow. The d-c intertie, for which, the loop flow is not a factor, was constructed and placed in operation in May 1970. With transmission losses, the delivery capacity of that line is about 1,400 MW. The line has recently been uprated by about 20 percent by increasing the current rating of the converters from 1,800 to 2,000 amperes. Plans exist to increase the voltage rating from ±400 to ±500 kV, which will increase the capacity to about 2,000 MW. Current uses of both the a-c and d-c interties include capacity sales and firm and nonfirm energy sales.

Power Pooling in the United States, FERC-0049, pp. 139-41.



SOURCE: Principal Power Facilities Western U.S., WAPA, Map No. A-2, December 1979. (As modified).

FIGURE 4—Pacific Northwest-Southwest Intertie, from Power Pooling in the Western Region. FERC-0054, page 30

The Intertie at the close of the record had 10 users. CVP and DWR use 28% of the ac Intertie capacity. CH-1680. SMUD was allotted capacity, which varied over the years. Burbank, Glendale, LADWP and Pasadena together are allocated 50% of capacity of the dc Intertie line. The rest of the Intertie capacity, both ac and dc, is allocated 50% to PG&E, 43% to Edison and 7% to San Diego. CH-1680. These final three percentages reflect the relationship between the three companies' daily energy peak load demands at the time the Intertie Agreement was consummated. CH-1174. These companies have used the ac capacity not utilized by any of the others. PG&E provided some limited interruptible transmission to NCPA since the close of the record, and since at least early 1978, Edison has offered interruptible transmission service on the Pacific Intertie to the Southern Cities. (Mitchell, CH 1806, 1812-1813; Ex. 6039.) Edison's offer to provide such interruptible transmission service was accepted by the Southern Cities of Anaheim and Riverside, and "Matrix interruptible transmission service Agreements" were executed and filed with the Commission in January 1981. Edison FERC Rate Schedule Nos. 129 and 130. The Cities of Colton and Azusa subsequently filed similar "Matrix Agreements." Edison FERC Rate Schedules 160 and 162.

Intertie usage at the California/Oregon or Nevada/Oregon borders as of the close of the record was as follows:

	500 kV ac lines	*800 kV (±400kV) dc line*	*Total*
LADWP	0	560	560
Pasadena	0	32	32
Burbank	0	54	54
Glendale	0	54	54
CVP	400	0	400
DWR	300	0	300
SMUD	0	0	0
PG&E	900	350	1250
Edison	774	301	1075
San Diego	126	49	175
Total	2500MW	1400MW	3900MW

Moody. CH-1595. SMUD's usage was zero because it had not used its allotted transmission and the companies contended it had thereby lost it. By Commission decision after the close of the record, SMUD was found entitled to receive up to 200 MW of transmission service over the Intertie.

Different parts of the Intertie were built by different entities. Owners of different segments or shares therein were agencies of the United States (BPA and CVP), municipal utilities (LADWP, Glendale, Burbank and Pasadena), Edison, PG&E, Portland General Electric Company, and Pacific Power & Light Company (PP&L). PP&L turned over operation of its segment to PG&E. San Diego contributes to the operation and maintenance costs proportionate to its allotted use of the line. SMUD and DWR contributed nothing to the construction cost, but pay at a set rate for their transmission service. All others with firm arrangements to use the Intertie contributed capital.

NCPA and Southern Cities contend PG&E, Edison and San Diego controlled the Intertie arrangements and wrongly excluded them and other municipals from any allotment of Intertie capacity.

The Intertie when planned and first built was sought as an outlet for the quantity of unused hydro power from the Northwest caused by the surplus water accumulated in the mountain snows which on melting fills the Northwest reservoirs to the point where the water must be run through the turbines or wasted by spilling. The Intertie looked to transmission of this hydro electric power from the Northwest, and possibly Canada, to areas in California, where power was more expensive. It also provided the means for the sale of Canadian Entitlement Treaty power to the California utilities. It made possible the exchange of power between California and the Northwest so that each of these regions could obtain power from the other during its own peak periods and return it at the other region's peak periods, which are different both in time of day and time of year. Not only do the daily peak periods in the Northwest occur at different hours than they do in California, but the Northwest peaks occur in the winter when power is needed for heating, and much of the California peaks occur in the summer when power is needed for air conditioning. With the sharp escalation in the cost of thermal generation, starting with the oil embargo of 1973, Northwest hydroelectric energy became an increasingly inexpensive source of energy in relation to the alternatives. The Intervenors' desire for this cheap Northwest power has

occasioned much of the litigation here, in other agencies and in the courts. This cheap power would be available to California entities only if transmission were available, and transmission requires access to the Pacific Intertie.

In the last few years, however, this Northwest hydro electric power is no longer as cheap as it was and prices within the next year are expected to rise sharply. The Northwest has increased its own need for power and has undertaken to build thermal (including nuclear) plants to meet anticipated needs, as well as increasing the Northwest area's demand for available hydro electric power. In short, not as much hydro electric power is available from the Northwest for sale in California, and what there is is no longer as cheap. Access to the Intertie will be less advantageous now to the Intervenors than it might have been earlier, but increases in other generating costs still leave access to the Intertie desirable. The ability to exchange power between the Northwest and California to serve their different peaking times is still important, but this is of less value to the Intervenors so long as their own generation facilities are limited. They had none at the close of the record, but some were planned, and we are informed the first are now on line.

The Intervenors (except Redding, which is served by CVP exclusively) are all served by PG&E or Edison, with some NCPA members also getting power from CVP and some of the Southern Cities purchasing energy elsewhere. There is no question of their not receiving sufficient electricity. Essentially what is at stake here is the cost of power. PG&E and Edison make the point that cheap power from the Northwest and the economic advantages of power exchanges reduce PG&E's and Edison's cost and rates to everyone they serve (including resale customers), and the Intervenors who are resale customers share in the benefits of Intertie use in this respect.

The costs to and rates charged by the various municipalities may be reduced if access to the Intertie is given them, but there will be a corresponding increase in the cost to PG&E and Edison and an increase in their rates to cover the cost increase assuming full retail rate recovery of costs. The stockholders of PG&E and Edison will not lose money, nor will the executives of PG&E and Edison have their salaries reduced. Essentially what we deal with here is the question of whether the consumers supplied by the municipalities will have their rates reduced while other customers of PG&E and Edison find their rates increased. The rates charged by many of the municipalities appear to be below those charged by PG&E and Edison, although direct comparison is difficult because the methods of charging rates differ.

The first contention we must deal with is that PG&E, Edison and San Diego operated in concert (1) to prevent the building of a Federal Intertie line or a privately owned Intertie line which would have accorded transmission to all, and (2) to exclude the municipalities from access to the Pacific Intertie line.

As to how the Intertie came about, I rely on the testimony of Witness Charles F. Luce, Chairman and Chief Executive Officer of Consolidated Edison Company of New York. Before he became Under Secretary of the Interior, he was Administrator of Bonneville Power Administration from February 1961 to September 1966. CH-38,571. Mr. Luce was called as a witness by me after it became apparent that he had more knowledge of the origin of the Intertie arrangements than any other living man. In his testimony he impressed me as being truthful and forthright in the extreme and I accept his version of the facts, as set forth in Volume CH-313 of the record, as the best available to us and superior to the version some have sought to piece together from documents.

Mr. Luce's testimony indicates that the main impetus for the creation of the Intertie in the form that eventually materialized came from within the United States Government. Mr. Luce was one of those at the center of the efforts that culminated in the Intertie. He was one of the three United States negotiators of the treaty between the United States and Canada relating to the cooperative development of water resources of the Columbia River Basin. CH-38,578. This treaty was essential to the Intertie. It was necessary to get British Columbia's concurrence to ratify the Treaty, and to that end it was sought to find a market for Canadian power in the United States so British Columbia could proceed with development of the Columbia River power resources. The Northwest states did not have a market for all of Canada's share of Treaty power. It was clear a market had to be found outside the Northwest "so it was necessary for us to get transmission lines down to California to sell this power." CH-38,581. The private utilities in California "started out being opposed to our project, really." CH-38,581.

> ... the State of California was our particular political problem. They had a big water project that they wanted to build and did build in fact to move water from northern California to southern California. In order to move that water it had to go through the Tehachapi Mountains, and that took a lot of electricity to run the pumps to get it over

the mountains, so with the Canadian power that didn't belong to the Pacific Northwest and therefore Northwesterners were not asserting preference to it, we had a block of power that we could offer to California customers who insisted on firm power. Now, the way we went about this was first of all to market the Canadian power into the Northwest customers on our agreement that we would find them a purchaser for the power for the period they didn't need in California.

We then took those contracts with the Northwest utilities, private utilities, public agencies and so forth and we used them as security for a big bond issue of $300 or $400 million and we paid that $300 or $400 million to Premier Bennett as prepayment for his downstream benefits for a period of 30 years, and then as it ultimately worked out we laid that power off in California for varying terms . . .

So as you see, these two great projects came together. We could not get the treaty without being able to market the British Columbia share of the power. We would have had great difficulty getting the State of California to agree to our whole Intertie project without the benefit of that Canadian power.

So the two projects that seemed to be floundering came together and went through.

CH-38,582-3.

Asked if the primary purpose of the Intertie was to allow transfer of Canadian power to California, Mr. Luce said:

No. I would say it had both purposes, but the inception and the primary purpose of the proposed Intertie lines was to market in California, Nevada and Arizona surplus Northwest power, that was otherwise just spilling over the spillways and going into the Pacific Ocean, to California and Arizona. The first Intertie proposal long preceded the Canadian treaty. The first one I believe was in 1936 and there was another one in the late 1940's and another one in the 1950's, so all of which really were independent of the treaty. But the Treaty came along it just happened that it made it possible to consummate the political approvals that we had to have for this Intertie program.

CH-38,583-4.

The exclusion of non-generating utilities (which included the Intervenor municipalities) originated not with PC&E, Edison or San Diego but with the Bonneville Power Administration. Mr. Luce testified:

It was our policy throughout the framing of the legislation that would define a regional preference for the Pacific Northwest, the design of Intertie lines that would dispose of surplus capacity and surplus energy from the Northwest and the negotiation of contracts to utilize those lines that we wanted contracts with entities *that would have their own generation.*

CH-38,572 (emphasis added).

The policy

originated from for the purpose of the legislation which had to be passed first before any Intertie lines could be built. That legislation defining a preference for all customers in the Pacific Northwest against any customers outside the Pacific Northwest was intended to authorize only the sale of surplus energy and surplus capacity outside of the Pacific Northwest. A utility that had no generation in the first place could not use interruptible energy and could not use capacity without energy. If it had no generation it had no energy. So the very nature of the basic legislation that finally was adopted by Congress was such that the natural customers outside of the Northwest were those that would not be dependent on the capacity and energy from the Northwest that was withdrawable and that,if they bought surplus capacity would have the energy to go with it.

There was the further consideration that we felt, Bonneville, that if a utility that was only a distribution system somehow became dependent on power from the Pacific Northwest it would be very difficult regardless of what the preference legislation said to withdraw that power. If a shortage developed in the Pacific Northwest so that it was necessary to withdraw the power to serve a load in the Northwest the political argument between California municipalities or Arizona municipalities and aluminum companies in the Pacific Northwest that constituted about a third of our load, as I recall, would be a very difficult political argument no matter what the legislation said. We didn't want to create that kind of inherent conflict.

CH-38,573-4.

Whether Mr. Luce was right or wrong in all his reasoning is beside the point. The exclusion of non-generators came from BPA in the first instance and not from the private utilities. The exclusion policy was thought out in BPA between Mr. Luce and two BPA employees. CH-38,575-6.

> Certainly there was never any doubt in Bonneville Power that was our policy. Our job when I became Administrator in February 1961 as regards the sale of surplus power outside of the region was first of all to get the concurrence of the various Bonneville customers and the political officeholders in the Northwest, to a bill that they thought would adequately protect them.
>
> It took us almost a year to do that. No bill as I recall was introduced in Congress until we had taken it up with the public agencies in the Northwest, private utilities in the Northwest and the industrial companies in the Northwest. We had many, many conferences about what would constitute adequate protection for the Pacific Northwest that could not be broken by some political power play in later years.
>
> I am sure in those discussions and conferences and negotiations that this basic marketing policy was articulated and certainly was assumed.

CH-38,574-5.

Asked whether this exclusion policy was suggested to BPA by private utilities, Mr. Luce said:

> I do not believe that is correct. They may have favored that policy, but the Pacific Northwest power users had their own reasons which were sufficient and which I would suppose preceded any discussions with the California utilities.

CH-38,575.

The non-generating utilities in northern California were not forgotten. Mr. Luce testified:

> ... the preference customers that didn't have their own generation in northern California for the most part were served by the Bureau of Reclamation that had generation on the Sacramento River. The Bureau of Reclamation out of the Intertie lines got an allocation of surplus power which they were able to bank, as the expression was, with the private utilities and I think that was altogether Pacific Gas and Electric that served the Sacramento Valley and were able to convert this surplus undependable power, if you will, from the Northwest through this banking arrangement into firm power, so the preference customers were taken care of through that arrangement.
>
> In other words, in our marketing scheme in California, we didn't overlook these northern California preference customers but our way of providing benefit for them was through the Bureau of Reclamation, which had its own generation and which had contracts with PG&E and which used PG&E lines to a large extent to deliver Federally generated power that was produced by the Bureau of Reclamation dams in California.
>
> This policy of our dealing through the Bureau of Reclamation was well known to the Congressional delegation who watched these negotiations very, very carefully. Biz Johnson, for example, was from a little town called Roseville which itself was one of these muncipals that had no generation of its own but was a customer of the Bureau of Reclamation. Biz was on the House Interior Committee and a key Congressman to getting Congressional approval for the ultimate Intertie plan.
>
> There were other Congressmen likewise from northern California who watched very carefully what we were doing and were looking out for their constituents, as they should, and looking out particularly for the northern California municipals.

CH-38,584-5.

The arrangement for supplying northern California municipal preference customers through the Bureau of Reclamation's CVP did not make provision for all wishing to share in Northwest power, however. No provision was made for Southern Cities. Even in northern California not all municipal preference customers could obtain power from CVP. Not only did CVP have more requests for power than it could accommodate, but entities were not taken care of beyond the limited area encompassed by CVP's own distribution system plus wheeling by PG&E within an irregular area of an estimated 100-mile radius.

Mr. Luce's testimony made clear that DWR and SMUD were allowed participation because their political power made that necessary. The same was true of LADWP with its so-called satellite cities, Burbank, Glendale and Pasadena, but this group was also necessary to the entire Intertie arrangement, since LADWP was the prime builder of the dc line that the BPA group wanted, and a major potential purchaser of Northwest Power. LADWP, Glendale, Burbank and Pasadena each had its own generation, so were not subject to the objection to non-generators. The impression from all the testimony is that Edison and PG&E were not sure of the reliability of dc transmission, and participated in the dc line only because their contribution to its cost was necessary if the whole Intertie arrangement was not to fall.

Intervenors say that the three private California companies usually spoke with one voice in arguing for a privately built rather than a Federal Intertie. They also opposed a private Intertie which would act as a common

carrier. This is generally correct. Mr. Gerdes, President of PG&E, was often the spokesman for the three companies.

Intervenors correctly say the three private companies were opposed to a Federal or competing private common carrier. There is no question the three companies opposed a Federal line. So did some Senators, Congressmen and executives and BPA officials, among others. Private utilities may express their views to Congress and to government officials, and advocate publicly and privately that private transmission lines are preferable to public lines, and offer competing plans in an effort to build a private line themselves, without violating anti-trust laws or principles. Speaking in concert under these conditions is not forbidden, and may be desirable in the interest of practicality.

Intervenors argue, however, that PG&E did more—that PG&E President Gerdes threatened to disconnect the PG&E system from a proposed Federal Intertie consisting of one ac and one dc line, which would have rendered that Federal system economically infeasible by loss of the PG&E market. Mr. Gerdes, however, explained that the system of one ac and one dc line was not electrically stable in his opinion, and that it might result in blackouts on the PG&E system. His threat to disconnect, in other words, was because of this particular unstable configuration of one ac and one dc line, and did not amount to a threat to use PG&E's market power to prevent any Federal transmission, even one of proper configuration. There is insufficient evidence to show that this particular incident was improperly motivated. The question is not whether Mr. Gerdes was right, but whether his belief was sincere. It has not been shown that it was not.

The proposed private line also was opposed by the CPP companies. It has not been shown, however, that any of them acted improperly against the prospective competitor. The competitor has not been shown to have been defeated by the companies' actions. Its viability has not been established, and is extremely doubtful. That line would have been in opposition to the established policy of BPA not to sell to non-generators, and the BPA policy seems to have been endorsed by Northwest companies and the powerful Senators whose constituents they were. The financial soundness of the proposed line has not been satisfactorily established. It is dubious whether all the conflicting interests could have been dealt with to make the line possible. A principal push for the Intertie lines that were finally built came from the government, and the Intertie would not have been built without it. The would-be competitor common carrier private line did not have this push behind it, nor has any comparable push been shown. Finally, the engineering details of the private line are not shown to have been worked out and agreeable to those who would have had to endorse it. When the differences of opinion as to the engineering in the history of the Intertie are considered, it does not appear the potential private common carrier had advanced to the point of viability.

Having dealt with the allegations of improper action outside the contracts themselves, we turn now to the contracts relating to the Pacific Intertie. These are summarized in Staff's Initial Brief, pp. 14-19:

The California Companies Pacific Intertie Agreement

The Pacific Intertie Agreement (PIA) dated August 25, 1966, is an agreement among PG&E, Edison and [San Diego] setting forth their respective rights and obligations relating to the Pacific Northwest Intertie transmission facility (IR R-1).

The three CPP Companies share their capacity on a 50/43/7 basis: these percentages represent the relative magnitude of the Companies' daily energy peak load demands at the time the Pacific Intertie Agreement was consummated. (Lane, 1174). The allocations of the CPP Companies include their proportionate shares of ... capacity which SMUD was initially allocated (Lane, 1175; Moody, 1594). In addition, the PIA provides that the CPP Companies have the right to any unused share of the Bureau's or DWR's allocation. (IR R-1, Paragraph 7.01(f); Moody, 1594-5.)

LADWP-Edison Pacific Intertie, D-C Transmission Facilities Agreement

The LA-Edison DC Intertie Agreement, dated March 31, 1966 (Ex. 2230), and continuing in effect for a term of 75 years, provides for the construction of the DC line by LADWP. Under the terms of the agreement, Edison was to pay LADWP one half of the costs associated with the construction and maintenance of the facility (Arts. 5,9); in return Edison is entitled to an undivided half interest in the line and its capacity (Art. 4). The agreement further provides that LADWP may sell up to thirty percent of its interest to the Cities of Burbank, Glendale, and Pasadena, and that Edison may share its capacity with PG&E and San Diego. (Art. 19). At present, the three cities collectively have an interest in 10% of the DC line's capacity, and Edison has assigned its share to the other CPP Companies in accordance with the 50-43-7

ratio set forth in the Pacific Intertie Agreement (Lane, 1182).

In connection with the LA-Edison DC Intertie Agreement, the parties also executed in March 1966, an agreement known as the "City-Edison Sylmar Interconnection Agreement," providing for the construction of a new inter-connection by the parties at LADWP's Sylmar Switching Station. (Ex. 2231.)

Use of Facilities Agreement

This agreement, dated August 1, 1967, provides that the CPP Companies shall be entitled to the use of the segment of the AC Intertie system owned by PP&L between the Malin Substation and Indian Spring Tower in exchange for an annual payment of $475,000 for a period of 40 years. (IR B-2.)

CVP-EHV Agreement (Contract 2947A)

This agreement (IR Y-1) between the Bureau and the CPP Companies provides that they will coordinate construction of their respective shares of the Intertie; that the CPP Companies will transport up to 200 MW through December 1970, and 400 MW thereafter, on behalf of the Bureau between Round Mountain Substation and the Bureau's Tracy Switchyard; and the Bureau will provide transmission on behalf of the CPP Companies over its Intertie segment between Malin and Round Mountain Substations for amounts in excess of the Bureau's 200 or 400 MW allocation.

SMUD-EHV Agreement

Executed August 1, 1967, the Agreement provides for transmission service over the Intertie by the CPP Companies of up to 200 MW of capacity on SMUD's behalf; for the period April 1, 1971-March 31, 1976, SMUD's allocation rose to 400 MW. In addition, the agreement provides for interruptible transmission service for 225 million kWh per year. (IR W-1, Art. 9.) If SMUD decreases its use of the line, it may not thereafter increase it, except as to changes in the amount of Canadian Entitlement Power ("CEP") purchased by SMUD from utilities in the Northwest. (*Ibid*, Art. 10(d).) The EHV contract also provides for transmission service of Northwest power over PG&E's 230 kV network from the Tesla substation (ibid, Art. 14), the purchase of CEP by SMUD (ibid, Art. 17), and the interim sale of CEP and Northwest firm power to the CPP Companies. (Ibid, Art. 15.)

DWR-EHV Agreement

The DWR-EHV Agreement (IR X-1), executed August 1, 1967, provides DWR with up to 25 MW of capacity over the Intertie through March 1969, and 300 MW thereafter (Art. 10). The Agreement also provides for the sale by DWR of CEP or Northwest firm power to the CPP Companies (Art. 15); the sale of power to DWR for project power uses (Art. 18); and transmission service with respect to exchange energy over the Intertie facility. (Art. 24.)

PG&E-SMUD Integration Agreement

The PG&E-SMUD Agreement was executed June 4, 1970 and amended on September 11, 1975 (IR S-1, T-1). It provides for the integrated operation of the SMUD and PG&E systems and for the sale and exchange of electric power and energy (Walbridge, 2231).

The integrated operation of the systems includes cooperation in the planning for facilities by the exchange of information. Information exchanged includes addition or changes in future generation and forecasts of system loads. Further integrated operation and reliability is maintained through the following provisions: certain generation design and performance characteristics are specified. SMUD declares the amount of energy from its hydro facilities which it will make available to PG&E for scheduling over certain periods of time. Criteria are specified for the hydro operation to assure future availability. Scheduling procedures for generation are given. Interconnection points between the transmission systems of the parties with associated metering requirements are specified. (IR S-1; T-1.)

In general, SMUD uses its resources to supply its load and sells any surplus to PG&E. If these resources are insufficient to meet load, PG&E supplies the deficiency which is later returned in kind. Power is sold at SMUD's cost to PG&E except for certain defined excess energy. The SMUD-PG&E agreement remains in effect until January 1, 1993 unless cancelled by either party upon six years notice. (*Ibid.*)

Contract 2948A (Reclamation Agreement)

Contract 2948A between WAPA (CVP) and PG&E (IR U-1), was executed July 31, 1967, and remains in effect until January 1, 2005. The agreement integrates the power supply facilities of CVP and PG&E. It provides for 1) firming support for CVP hydroelectric generating plants, 2) load support for the CVP preference customer load level, and 3) transmission service to various CVP loads—both project and preference customers. PG&E obtains the right to purchase all power in excess of CVP's obligations to other entities or its pumping load and the right to various

coordination and transmission services. (Anderson, 2194-5; IR U-1.)

At times, CVP generates more power than it needs to meet its own pumping loads and its obligations to its customers and at other times generates insufficient energy to meet its needs. In order to fully utilize its generating resources CVP has, in Contract 2948A, worked out an exchange agreement with PG&E wherein CVP deposits its excess energy into "bank accounts" when its generation exceeds load and withdraws energy from those accounts during times when load exceeds generation. In all, there are three energy accounts (Arts. 20(b), 20(c) and 20(d)) and one capacity account (Art. 29(a)). (Anderson, 2195-8.)

Energy Account No. 1 (Art. 20(b)) contains energy deposited during CVP operations going back years prior to the current growth of CVP customers. This energy, which amounted to about 15 billion kWh when Contract 2948A was signed in 1967, was closed to any additional deposits in 1967. PG&E paid an average rate of 2.444 mills/ kWh for energy in Account No. 1, and CVP buys that power back at the rate of 2.8105 mills/kWh. Withdrawals from this account are made at any time energy supplies available to CVP from generation or other purchases are inadequate to meet CVP preference customer energy requirements. Energy can only be withdrawn from Account No. 1 to meet preference customer load requirements. All withdrawals must come from Account No. 1 before withdrawals can be made from Account No. 2. It is anticipated that the account will be depleted by 1986. (Anderson, 2197-8.)

Energy Account No. 2 (Art. 20(c)) was established at the time Contract 2948A was signed. Deposits to that account consist of any energy supplies available to CVP that are in excess of the needs of CVP customers. These excess energy supplies may originate from CVP generation or other purchased supplies such as Northwest power. As noted above, deposits in Energy Account No. 2 cannot be withdrawn until Account No. 1 is depleted. (Anderson, 2197-9.)

The Annual Energy Exchange Account is an account that allows the CVP either to deposit or borrow energy for off-peak pumping purposes any month during the year. Contract 2948A requires that every attempt must be made to zero out this account each year. (Anderson, 2197.) The rate paid by CVP for a deficit in this account is 3 mills and the rate paid by PG&E for surplus is 2 mills. For the years 1973-78, 1,565 million kWh have been deposited, and 1,327 million kWh have been withdrawn, so PG&E has purchased about 238 million kWh. (Ex. 1060, 1061; Anderson, 2199.)

The capacity account (Art. 29(a)) began in January 1965 and was established to credit the United States for firm capacity available to PG&E over and above the capacity required to meet CVP preference customer loads. When the capacity account was started in 1965 the CVP's preference customer load level was less than CVP's contractual firm capacity so a surplus of firm capacity was available to the area. It was anticipated that CVP's pumping loads would increase in the future, and at some point in time, when pumping loads were large, there would be little capacity to meet customer demands. To dispose of this excess capacity and arrange for its return when needed in the future, this capacity was sold to PG&E and credited to an account for repurchase later by CVP. When Contract 2948A was signed in 1967, and provisions for the Northwest imports were made a part of the Contract, the deposits to the capacity account were changed to the amount of capacity available from CVP generation plus Northwest imports that were surplus to CVP preference customer requirements. (Anderson, 2200-1.)

The DWR-Suppliers Contract

The suppliers contract (J" R-10) is an agreement entered into in November, 1966, between DWR and PG&E, Edison, San Diego, and LADWP. It provides for the sale, exchange, and transmission of power by the four suppliers to DWR for the operation of the State Water Project. Deliveries under the Suppliers Agreement will terminate March 31, 1983. (Harvego, 2211-2.)

The Oroville-Thermalito Power Sale Contract

The Oroville-Thermalito Power Sale contract (IR S-10) was executed November 29, 1967, between the DWR and PG&E, Edison, and San Diego. The agreement requires DWR to sell the entire output of the Hyatt-Thermolito hydroelectric facilities to the California Companies. The Companies obtain the entire output which includes 760 MW of capacity and average annual generation of 2.1 billion kWh for a fixed annual payment. The output of the power produced at the Oroville and Thermalito facilities are sold to the three CPP Companies as follows: PG&E, 56.3%; SCE, 37.6%; SDG&E, 6.1%. Deliveries under the Oroville-Thermalito contract will also terminate March 31, 1983 (Harvego, 2212; IR T-10 pp. 3-4, S-10).

Another contract providing for transmission on the Intertie is the contract between Edison (SCE) and DWR. This is set forth at page 120 of Southern Cities' Initial Brief:

> The SCE-DWR Contract (Exh. 1137) was entered into on October 11, 1979. The contract, which terminates in 2004, provides for sale of capacity and energy between DWR and SCE on the expiration of the Suppliers and the Oroville-Thermalito contracts.
>
> Under the SCE-DWR Contract, SCE is obligated to provide DWR with 300 MW of capacity (¶ 8.1) and associated energy (¶ 9.1.2). SCE is to receive up to 135 MW of three-hour peaking capacity from DWR's Devil's Canyon and Cottonwood recovery plants (¶ 10.1) and 350 MW from the Oroville Division (¶ 13.1.1) plus the net energy made available from energy SCE provides for pumped storage operations (¶ 13.1.10.)
>
> In addition, ¶ 6 of the contract provides DWR with firm and nonfirm transmission service, if Edison determines that transmission is available, for DWR to deal with third parties. The transmission service specified includes service on portions of the Intertie system, such as the Midway-Vincent 500 kv line, the Vincent-Sylmar line, interconnecting with LADWP, and the Vincent-San Onofre line, interconnecting with [San Diego].

In connection with the PIA, the Commission is also asked to consider the Seven Party Agreement, the CPPA, the Stanislaus Commitments, the recent Interconnection Agreement between PG&E and NCPA and ten of its members (not including Redding or Santa Clara), the similar agreement between PG&E and Santa Clara, and the "Matrix Interruptible Transmission Service Agreements" between Edison and the Southern Cities.

The Seven Party Agreement was the subject of Docket No. E-7796-007. Both docket and agreement were terminated by Opinion No. 175, *supra*. I have ruled that the Seven Party Agreement, while not itself a subject of investigation in the present docket, might be considered in so far as it might indicate illegal activities with respect to the PIA. It is contended that purchase of surplus energy from the Northwest to California and sales of excess energy to the Northwest from California were to be divided among PG&E, Edison, and San Diego in the 50-43-7 percent ratio that reflects their allotments of Intertie capacity, and that this is contrary to anti-trust law, and indicates the California companies' intention to monopolize the sales from and purchases for California while excluding others from such sales and purchases.

It also has been argued that these allocations would result in the Northwest sellers receiving less for their power because competition between the California buyers was eliminated. This is inaccurate. The price of surplus power for sale from the Northwest pursuant to the Seven Party Agreement was at a price fixed by BPA, so the lack of buyers' competition would not affect it. Sales of excess power from California to the Northwest were to be at each seller's incremental price, so the total price to the Northwest buyer would have been higher when sales were divided among the three California companies rather than made by the seller with the lowest cost. None of this had anything to do with excluding other entities from the Intertie, or with the allocations made by the PIA of Intertie capacity. The division of sales and purchases applied only to PG&E, Edison and San Diego. Other California entities, namely LADWP and its satellite cities, which had access to the Northwest over the dc line, could and did buy from and sell power to the Northwest; they were not affected by the Seven Party Agreement. The analysis and remedy applied here are not affected by the Seven Party Agreement.

The same is true of the CPPA, which has been dealt with earlier. The argument appears to be that the CPPA as well as the Seven Party Agreement demonstrates anti-competitive intent to exclude the Intervenors and others from the Intertie. I find nothing in the CPPA referring to the Intertie, or that would call for a remedy different from or additional to what is imposed here on the basis of the discussion that follows.

The Stanislaus Commitments

Sections I and VII of the Pacific Gas and Electric Company Statement of Commitment (the Stanislaus Commitments) were ordered filed in Docket No. E-7777-000 as part of Rate Schedule No. 38, Pacific Intertie Agreement. Commission Order on Motion to Compel Filing of Certain Documents, issued June 2, 1980, 11 FERC ¶ 61,246, *aff'd., Pacific Gas and Electric v. F.E.R.C.*, D.C. Cir. 679 F.2d 262 (1982).

Essentially, the Commitments embody an agreement entered into on April 30, 1976 between PG&E and the U.S. Department of Justice (DOJ), and they are the culmination of a DOJ investigation into certain PG&E activities allegedly in violation of the antitrust laws. They have been included by the Nuclear Regulatory Commission as conditions of the license of PG&E's Diablo

Canyon Nuclear Power Plant Unit No. 1. They generally describe conditions under which PG&E is bound to provide services such as interconnection, transmission, access to nuclear generation, capacity and energy exchange, and reserve coordination to other utilities requesting such service.

11 FERC ¶ 61,246, at page 61,484 (footnote omitted).

This Commission was not a party to the agreement with DOJ or to the proceedings before the NRC. It is not bound by agreement or by equitable estoppel from considering and imposing any modifications it may require in the Commitments. It is limited here, however, by the scope of this proceeding.

So far as Docket No. E-7777-000 is concerned, the Commission ordered the Stanislaus Commitments filed only in connection with the Pacific Intertie Agreement (PIA). The Commission order previously quoted said:

The Commission is not persuaded that the Commitments in their entirety affect or relate to the PIA. As noted previously, the Commitments govern provision by PG&E of various services in the future. Parts of the Commitments concern services other than transmission, such as capacity and energy exchange and access to nuclear generation. Section VII is designated "Transmission Services" and is the only part of the Commitments to refer to the Pacific Intertie itself. It provides that PG&E shall not be required to use the Intertie for transmission pursuant to the Commitments if such use would impair PG&E's "own use of this facility consistent with the Bonneville Project Act (50 Stat. 731, August 20, 1937), Pacific Northwest Power Marketing Act (78 Stat. 756, August 31, 1964) and the Public Works Appropriations Act, 1965 (78 Stat. 682, August 30, 1964)." This section also governs construction of additional transmission capacity, the filing of rate schedules and agreements for transmission, and the transmission of power and energy generally insofar as these services are consistent with "good utility practice," as defined in Section I of the Commitments.

We will order PG&E to file Section I ("Definitions") and Section VII ("Transmission") of the Stanislaus Commitments, because they affect or relate to the PIA. We do not order the filing of the remainder of the Commitments. Our order today does not expand the scope of this proceeding.

11 FERC ¶ 61,246, at page 61,486.

This makes clear tha t only Sections I and VII of the Stanislaus Commitments are to be considered in Docket No. E-7777-000, and then only in so far as they affect or relate to the Pacific Intertie Agreement. The Commitments are not to be considered or revised in their entirety in Docket No. E-7777-000, although they are within the Commission's jurisdiction and might be the subject of Commission investigation and general modification if the Commission so directed.

1. Neighboring Utilities

Section VII, Paragraph A of the Commitments provides:

A. Applicant shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction and which are consistent with these license conditions. Except as listed below, such service shall be provided (1) between two or among more than two Neighboring Entities or sections of a Neighboring Entity's system which are geographically separated, with which, now or in the future, Applicant is interconnected, (2) between a Neighboring Entity with which, now or in the future, it is interconnected and one or more Neighboring Distribution Systems with which, now or in the future, it is connected and (3) between any Neighboring Entity or Neighboring Distribution System(s) and the Applicant's point of direct interconnection with any other electric system engaging in bulk power supply outside the area then electrically served at retail by Applicant.

This is all the transmission the Commitments provide; transmission is available only to or from "Neighboring Entities" or "Neighboring Distribution Systems". These are defined in Section I, Paragraphs C and D:

C. "Neighboring Entity" means a financially responsible private or public entity or lawful association thereof owning, contractually controlling or operating, or in good faith proposing to own, to contractually control or to operate facilities for the generation, or transmission at 60 kilovolts or above, of electric power which meets each of the following criteria: (1) its existing or proposed facilities are or will be technically feasible of direct interconnection with those of Applicant; (2) all or part of its existing or proposed facilities are or will be located within the Service Area; (3) its primary purpose for owning, contractually controlling, or operating generation facilities is to sell in the Service Area the power generated; and (4) it is, or upon

commencement of operations will be, a public utility regulated under applicable state law or the Federal Power Act, or exempted from regulation by virtue of the fact that it is federal, state, municipal or other public entity.

D. "Neighboring Distribution System" means a financially responsible private or public entity which engages, or in good faith proposed to engage, in the distribution of electric power at retail and which meets each of the criteria numbered (1), (2), and (4) in subparagraph C above.

"Service Area" means areas PG&E serves at retail, and adjacent areas in Northern and Central California (Section I, Paragraph B). PG&E has agreed to treat DWR, CVP and SMUD as Neighboring Entities (Exh. 2354, CH-37513). For purposes of this discussion, "Neighboring Utility" will be used to include both Neighboring Entities and Neighboring Distribution Systems. "Non-Neighboring Entities" will refer to those which are neither.

In the *Initial Decision on License Conditions, supra*, I said:

> This provision would not allow an entity from outside PG&E's area, which obtained a licensed project within that area, to have project power transmitted over PG&E's lines to a point of connection with other systems operating outside PG&E's area. I find the Commitments in this respect are unduly discriminatory against such entities as Edison, Los Angeles, San Diego, the four major Northwest utilities and Southern Cities, who might wish to obtain licenses and use the power in their own areas.

Transmission over the Pacific Intertie as well as over PG&E's general transmission grid is restricted by the limitation of service to Neighboring Utilities. The Stanislaus Commitments apply to transmission over the Intertie but, as originally drafted, the Commitments provide transmission only to or from a Neighboring Utility. Not only project power transmission but all power transmission is so restricted. Not only would power from a project owned by someone other than PG&E or a Neighboring Utility not receive Intertie transmission under the Commitments as written, but any power generated within or without the area by a non-Neighboring Utility would not receive such transmission unless destined from outside the area for a Neighboring Utility. This I find to be undue discrimination against non-Neighboring Entities. No valid reason has been advanced to support such discrimination, and it is therefore unjust and unreasonable. It must be eliminated to provide for Intertie transmission for those entities which are not Neighboring Utilities on equal terms with those that are. In so far as the use of PG&E's general transmission grid is necessary to transmit power to and from the Intertie so that Intertie transmission may take place, the Intertie is affected by the exclusions from transmission over the general grid. Accordingly, the Stanislaus Commitments must be amended to eliminate such unduly discriminatory, unjust and unreasonable exclusions where they apply to general grid transmission affecting Intertie transmission. General grid transmission between two non-Neighboring Entities in PG&E's area does not affect the Intertie Agreement or transmission, and is thus outside the scope of this proceeding as established in the Commission order of December 28, 1979, and the denial of rehearing.

2. Involuntarily Alienated Projects

Two exceptions to the Commitments are provided. The first is a provision in Section VII, Paragraph A, that PG&E is not required to transmit power from a project involuntarily transferred from it.

In the Initial Decision on License Conditions issued July 1, 1983 in *Pacific Gas and Electric Company*, Project No. 2735-001, *et al.*, I said:

> PG&E contends that it has not refused transmission from an involuntarily transferred project but has merely not undertaken to supply transmission from such a project. I am unable to accept PG&E's attempt to walk this narrow line between refusal and noncommitment. At best this provision leaves PG&E's competitors at a disadvantage; only PG&E is assured of transmission from a transferred project. Anyone else competing for such a project must be uncertain as to whether transmission will be available, and many responsible executives would be unwilling to commit the necessary investment and plan their generation resources with this additional uncertainty. The existence of this *in terrorem* provision raises the uncertainty to a higher level than if no Commitments for transmission had ever existed.
>
> I find that the exception for transmission from an involuntarily transferred project is unjust and unreasonable, and that it is an improper use of PG&E's transmission monopoly that restrains competition for project licenses for hydro generation.

I make the same finding here. The elimination of this provision is ordered, in so far as it applies to power to be transmitted on the Intertie, in connection with its consideration in Docket No. E-7777-000. The

retention of this provision would mean that any entity wishing to compete with PG&E for a project in PG&E's area would not be sure it could transmit its project power to the Pacific Intertie and thence over it out of the PG&E area. This might well keep it from applying for the project. This is an improper use of PG&E's transmission power which restrains competition for project licenses for hydrogeneration. It also directly affects the transmission to be offered by PG&E over the Pacific Intertie. It is, then, within the scope of the Commission order of June 2, 1980, 11 FERC ¶ 61,246. The limitations placed by that order on the scope of the proceedings in Docket No. E-7777-000 do not apply.

3. Area Option

The second exception to the Stanislaus Commitments is the so-called "area option" or "exit veto." This provision in Section VII, Paragraph A, provides:

> Applicant shall not be required by this Section to transmit power . . .
>
> (2) from a Neighboring Entity for sale to any electric system located outside the exterior geographic boundaries of the several areas then electrically served at retail by Applicant if any other Neighboring Entity, Neighboring Distribution System, or Applicant wishes to purchase such power at an equivalent price for use within said areas.
>
> "Applicant" means PG&E. (Section I, Paragraph A.)

Intervenors call this an "exit veto." It is not, however, a right to forbid the exportation of energy from the area; it merely gives entities within the PG&E area a right of first refusal so that they may have the energy if they are willing to pay what the owner would receive from an outside purchaser. (The testimony established that it is what the owner would receive, not what the buyer would pay, that governs.)

There was considerable discussion as to how this would work, and whether a seller would have to go back and forth between an outside purchaser and the entities within the area to allow the latter to match changing offers. Mr. Kaprielian, a forthright and impressive witness for PG&E, made it clear that this problem exists only in the minds of lawyers. In practice, the dispatchers would know the prices each entity would pay and the needs of each entity, and match-ups would be made quickly at the dispatcher level without resort to negotiation or to management executives.

PG&E defends this provision on the ground that it is necessary to keep power generated within the area available for use in the area. If this is not done, power needed within the area may be taken away. PG&E is the supplier of last resort within its area and is undertaking the ultimate responsibility for providing necessary supplies of power if other suppliers fall short. It has not fulfilled its own plans for new generation for several years, and its reserves (and, accordingly, the area reserves) have fallen below what PG&E considers a safe margin; therefore, it wishes to be able to keep further generation within the area if it is needed there. Under the provision, the generating entity will not lose money by keeping its energy in the area.

While PG&E's motives are understandable and even praiseworthy, this particular exception to the wheeling commitments is an unduly discriminatory restraint on interstate commerce insofar as it applies to power which might be sold outside California, and also discriminates against all potential purchasers outside the PG&E service area. I find that it is unjust and unreasonable, unduly discriminatory and anticompetitive. The elimination of this exception was made a condition of the Helms and Pit licenses insofar as it may affect power from those licensed projects in the event of their future transfer to others. Initial Decision on License Conditions, *supra*. Elimination of this exception is also ordered in Docket No. E-7777-000 as a modification of the Commitments which were made part of Rate Schedule 38, in so far as transmission over the Intertie is concerned. This will apply to all power, whether from a licensed project or not.

4. Impairment of Intertie Use

PG&E has sought to have the last sentence of Section VII, Paragraph A of the Stanislaus Commitments interpreted to mean that PG&E may foreclose a competing bidder for Northwest power from transmission over the Intertie to the extent PG&E wishes to use the Intertie to transmit the same power. Specifically, if PG&E wished to buy a particular block of power from a Northwest Company, and PG&E planned to transmit it over the Intertie if PG&E obtained the power, the Intertie capacity to be assigned to such transmission would not be available to someone who outbid PG&E for the power, even though PG&E had not obtained the power and so would have no need of the Intertie capacity to transmit that particular power for itself. This would preclude anyone else, who needed PG&E Intertie transmission for the power it wished to buy, from competing with PG&E for power.

The language upon which PG&E relies in Section VII is that "with respect to the Pacific Northwest-Southwest Intertie, Applicant shall

not be required by this section to provide the requested transmission service if it would impair Applicant's own use of this facility..." PG&E contends that its interpretation is embodied in and established by correspondence with the Department of Justice. It is questionable whether the language supports PG&E's interpretation, or whether a policy filed with this Commission may be altered by an interpretation established by external and unfiled documents. These questions need not be resolved. If it is assumed that PG&E's interpretation is correct, the provision cannot be permitted to stand in the face of its impermissible restriction upon competition. It would be a use of PG&E's control of transmission to exclude competition in bidding for power. I find this to be unjust, unreasonable, and contrary to the public interest. The Commitments must be amended to explicitly prohibit any such restraint.

5. Reserve Requirements and Number of Connection Points

The Intervenors have argued that other provisions of the Stanislaus Commitments are improper: specifically, the provisions as to reserves and the provision that interconnection shall be at one point unless otherwise agreed (Commitments, page 3, Paragraph B.). The Commission ordered the filing, in the E-7777-000 proceeding, of Sections I and VII of the Commitments "because they affect or relate to the PIA. We do not order the filing of the remainder of the Commitments." 11 FERC ¶61,246 at p. 61,486. This language does not bring the other provisions of the Commitments within the scope of Docket No. E-7777-000 and Intervenors' arguments as to reserve provisions and interconnection will not be considered here.

6. Implementation Provisions

Under the Commitments, PG&E is required to transmit power "pursuant to interconnection agreements, with provisions which are appropriate to the requested transactions and which are consistent with these license conditions." No transmission would occur until agreements for interconnection have been entered into. Physical interconnection with PG&E, direct or indirect, would be necessary before an entity could receive the wheeling services. Even as to interconnected entities, PG&E has maintained that agreements for transmission service should be negotiated before that service begins.

It has been alleged that PG&E has stalled on putting transmission arrangements into effect by stretching out negotiations for a contract. I do not find that this has occurred, but the Commitments as written would allow this sort of abuse to occur. I find that the absence of a provision to get service started within a reasonable time is unjust and unreasonable and contrary to the public interest.

I agree with PG&E that there should be an opportunity for negotiation prior to the institution of transmission service pursuant to the Stanislaus Commitments. The parties may be able to devise arrangements more suitable to their circumstances than would result from adversary proceedings and regulatory rulings. They know their own requirements best, and will often be able to work out agreements that will take into account the workings of the industry and the parties' particular situation. Should negotiation fail, however, there should be a means of resolving differences and getting service started within a reasonable time.

The Stanislaus Commitments should be modified, so far as Intertie transmission and transmission to and from it over the PG&E transmission grid is concerned, to provide that any entity entitled to such transmission pursuant to the Stanislaus Commitments may serve a written request therefor on PG&E. The requesting party shall publish the request in the newspapers having respectively the greatest circulation in (1) San Francisco (the largest city in PG&E's area), (2) Sacramento (the state capital), and (3) either the nearest city to the origin or the nearest city to the destination of the transmission requested. The publication shall contain a notice that objections to the requested transmission may be filed within sixty days with this Commission. This will give any competitor for what may be limited transmission capacity the opportunity to be heard, as well as allowing PG&E the chance to object that the request is improper or impossible to comply with. If within four months from the date of the request PG&E has not agreed with the requesting entity upon a rate schedule providing for the transmission requested, the requesting entity may file with this Commission and serve upon PG&E a demand that the requested service commence within six months or such longer period as the demand may provide. PG&E then shall within six months (or such longer period as the demand may provide) of the demand file, with this Commission, a rate schedule covering the services requested and make the services available unless stay is granted or a contrary decision is reached by this Commission. A stay shall be effective to delay the date service shall begin even though exceptions or appeal may be pending. The rate schedules for the services shall be subject to review by this Commission which may order them revised. If suspended, the rates will be collected subject to refund of

amounts found to be excessive. This is necessary as part of the remedy here ordered, as well as pursuant to the powers of the Commission to suspend initial rates as set forth in *Middle South Energy, Inc.*, Order Granting Rehearing, etc., May 24, 1983, 23 FERC ¶ 61,277; *Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631 (1977). Otherwise, the imposition of excessive rates might be a means of preventing the service from being used.

Requests and demands pursuant to these implementation provisions must be for specific service, and not requests for general transmission. The requests and demands should specify the transmission service, but not the terms on which it is to be rendered. In the first instance, and subject to review, the terms of rate schedules not agreed upon are to be promulgated by PG&E. This Commission customarily has allowed utilities to design their own rate schedules so long as the design is not unjust and unreasonable. There may be many just and reasonable rate schedule designs which will produce the proper revenues for the utility, and are thus permissible for it to use. NCPA's request for a postage stamp rate for all transmission service is denied. Nothing prevents the use of postage stamp rates if they are just and reasonable, but PG&E is not required to use that particular rate design if it prefers another design that is not unjust and unreasonable. It has not been shown that all other rate designs are unjust and unreasonable.

All rates and terms of service, of course, are to be not unduly discriminatory, and otherwise just and reasonable.

All filings shall be made in this proceeding. The proceeding shall remain open to avoid the delays attendant upon a new proceeding. Any stay referred to in this Initial Decision may be issued by the then Presiding Judge in this proceeding, by the Chief Judge in the absence of a Presiding Judge, or by the Commission.

One aspect that must be considered is that of construction of new facilities or increases in transmission capacity, both of which are to be included in PG&E's planning and construction programs pursuant to Section VII, Paragraph B of the Stanislaus Commitments. That such new construction or increases in transmission capacity are to be put into effect, and not merely planned, is apparent from the inclusion of such construction or capacity increases in the construction program as well as the planning program. No time is set here for construction or increased transmission. It would be almost impossible to do so, since it is not now known just what construction or increases in capacity may be called for. Under the circumstances, a reasonable time will apply. What a reasonable time may be will depend upon the construction or transmission increases involved and the circumstances under which they are undertaken. If the parties cannot agree, the reasonable time may be determined in the implementation procedure previously set forth, and the time for putting service into effect extended to allow for the necessary construction or expansion. PG&E may raise these issues by alleging impossibility to perform by the time service is requested or would go into effect under the implementation procedure. Where construction or expansion is necessary, it is suggested the parties attempt to reach agreement on the time service is to begin, and if no agreement is reached, the demand for service should not fail to allow a reasonable time for compliance. If it does not allow a reasonable time, the legal expenses of extending the time, by stay or otherwise, may at the discretion of the Commission be included in the costs of increased capacity or additional facilities payable by the PG&E customer under Paragraph B of Section VII of the Commitments. Any increases in construction or expansion costs caused by delay resulting from unwarranted objections or requests for stay by PG&E with respect to all or part of a demand for service may be excluded in the discretion of the Commission from the costs to be recovered by PG&E under Paragraph B.

Unless otherwise agreed, the party requesting service requiring construction or expansion must commit itself to payment of the cost. PG&E may require either advance payment or a commmitment to use the transmission service sufficiently for PG&E to recoup its costs from the rates charged, so long as the requirement is not unjust and unreasonable or unduly discriminatory.

The PG&E-NCPA Interconnection Agreement

After the conclusion of the hearing, PG&E and NCPA signed a contract for interruptible transmission over the Intertie. NCPA later complained that little transmission was made available, and the contract has expired. It is not an issue in this proceeding. It was followed by an Interconnection Agreement between PG&E and NCPA, including all NCPA members except Santa Clara and Redding. This agreement provided for interruptible Intertie transmission and certain firm transmission elsewhere than on the Intertie. On July 18, 1983, PG&E moved to lodge the then unsigned Interconnection Agreement in this proceeding. It was later executed and was filed with the Commission on August 16, 1983, and accepted for filing September 14, 1983, 24 FERC ¶ 61,286, without approval or decision on the merits, in Docket No. ER83-683-000. While the agreement was not a subject of the hearing in this proceeding, official notice may

be taken of it and it may be considered in so far as its existence may affect the remedies here. The justness and reasonableness of the Agreement is subject to Commission determination in Docket No. ER83-683-000.

PG&E argues that the Interconnection Agreement indicates that PG&E has negotiated in good faith with NCPA and has implemented the Stanislaus Commitments as pertinent to NCPA. (PG&E's Reply to NCPA's Response to Motion to Lodge, p. 1, filed August 10, 1983.) PG&E might argue that the Interconnection Agreement shows PG&E is not excluding NCPA from the Intertie or denying access to transmission facilities. PG&E also might argue that in view of the Interconnection Agreement, the implementation provision here ordered with respect to the Stanislaus Commitments and the Intertie is unnecessary. These arguments do not affect the result reached here. First, PG&E's intent to exclude or failure to negotiate in good faith is not the basis of the relief ordered with respect to the Intertie and the Stanislaus Commitments. Second, the Interconnection Agreement does not apply to all entities in PG&E's area, or to all entities outside that area which may wish to use the Intertie lines or PG&E's transmission to and from the Intertie in PG&E's area. These entities are entitled to the services ordered in this proceeding.

Bottleneck

Intervenors have alleged that the CPP companies' ability to deny Cities access to the Intertie gives the Companies monopoly power over relevant markets for wholesale power, impairing Intervenors' ability to obtain coordination services and their ability to provide retail services competitively. Edison Witness Johnson stated:

> [T]he Intertie makes it possible for California utilities to purchase "surplus" hydroelectric energy from the Pacific Northwest. During flush periods of the year, the generating capacity of Pacific Northwest hydroelectric systems is in excess of the amounts demanded by Pacific Northwest customers. In the absence of the opportunity to sell this surplus energy to California companies via the Intertie, Pacific Northwest producers would spill water over their dams and lose significant amounts of potential energy for all time. Hence, the sale of low cost surplus energy from Northwest hydro sources to California lowers the energy costs of the California utilities . . .

CH-1677. (See *also* Lane, CH-1161.) While cheap Northwest power has been reduced, and will be further reduced, it is not yet eliminated. The advantages of exchange of peak power between the Northwest and California will remain.

Intervenors and Staff have each alleged that the Intertie is a "bottleneck" facility, and that, accordingly, antitrust principles require that direct access to it be granted to competitors.

The essential facility, or bottleneck facility, doctrine is well established in law. In *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912), a group of railroads had control over all railroad switching facilities in St. Louis. The Court said:

> [W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates the first and second sections of the [Sherman] act.

Id. at 409. To remedy the situation, the Court ordered ownership of or access to the terminals for any existing or future railroad. *Id.* at 411. As later developed, the doctrine states that:

> where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.

A.D. Neale, the Antitrust Laws of the United States 67 (2d., 1970) *quoted in Hecht v. Pro-Football, Inc.* 570 F. 2d 902 (D.C. Cir. 1977).

As stated in *Hecht*:

> To be "essential" a facility need not be indispensible, it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.

Id. at 992.

In this case, the Intertie facilities meet these criteria. *Accord, Cities of Anaheim, Riverside et al. v. Southern California Edison Co.*, Order Specifying Certain Facts To Be Without Substantial Controversy, No. CV-78-810-MML (C.D. Calif., May 19, 1981). ("The transmission facilities known as the Pacific Intertie cannot practicably be duplicated by plaintiffs. Consequently the Intertie is essential to . . . transmission." *Id.* at 3.)

It is clear that the Intertie was built at great expense. It consists of two 500kV ac lines extending over a distance of 945 miles, and one 800kV dc line over a distance of 846 miles in length. (Lane, CH-1158.) The total capital investment when the facility was built was $700 million (Id., CH-1167), and to duplicate the facility would no doubt require an even

greater expense. (Guth, CH-29,516.) The emergence of the current Intertie required approximately 50 years, beginning with a suggestion of a West Coast Intertie in 1919, surfacing again in the mid-1930's, with planning in earnest beginning in the late 1950's and early 1960's. (Lane, CH-1162-64.) The Intertie ac lines were not energized until 1969 and the dc lines not until 1970. (Lane, CH-1159.)

In view of the tremendous resources required to duplicate these facilities, and the handicap placed upon those who are not given access to them, I find the Pacific Intertie lines are "bottleneck" facilities.

The argument has been presented that although a bottleneck situation admittedly exists (See Edison Witness Johnson, CH-1684), other bottlenecks exist elsewhere. Johnson cited as an example that Anaheim now owns the distribution network in the Disneyland area, and thus possesses a bottleneck monopoly of distribution, foreclosing direct access on the part of Edison to service Disneyland. CH-1685.

This argument is not persuasive. First, these other bottleneck situations are not in controversy in this case, and they also may or may not be found to be anticompetitive. Secondly, all bottlenecks are not, *per se*, illegal. For an illegal bottleneck to exist, it must be infeasible for the excluded competitors to duplicate the facilities, and the denial of use must inflict a severe handicap on potential entrants. *Hecht v. Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977). It is clear that not all structural bottlenecks would necessarily meet these criteria.

PG&E Witness Guth testified as follows:

> [Q:] The question is whether it would not be more expensive if NCPA were compelled to drop its use of the PG&E system and construct its own system interconnecting the Cities together and to the PG&E area borders?
>
> Would not it be more expensive for NCPA to build and operate this than it would to utilize the PG&E system?
>
> THE WITNESS: The answer is probably yes. It would be more expensive in total to society in terms of the resources it consumed . . .

CH-29,518.

He continued at a later point:

> Q: Are the Cities prevented or inhibited in building their own alternative transmission networks by a transmission network being a natural monopoly? . . .
>
> A: My answer is that they are probably, they are certainly prevented by regulators from doing that since transmission within the area would be a natural monopoly inhibited by cost factors and prevented by regulation because of those cost factors reflecting a useful waste of resources.

CH-29,654-55. Guth expressed the opinion that if the transmission line were built, it would have to be integrated into the transmission network that is the natural monopoly. CH-655. It is questionable whether this would be feasible.

PG&E has cited evidence (Reply Brief, p. 112, *citing* Daines, CH-26,346) that the Intertie can be duplicated. The evidence is not persuasive. Daines' study was based only on the economic feasibility for PG&E, not NCPA or others. As he stated:

> Our company made studies of [a third AC line] on a preliminary basis for our *own evaluation* . . . The economic feasibility is not certain . . . Economic feasibility of the third line must address [the] question of preference and some reasonably fair division of the power so that if the *utilities* were to build the line, they would not lose the power supply and make it uneconomical for them.

CH-26,346-47, emphasis added.

PG&E's citation of Southern Cities Witness Russell is also not persuasive. Russell states that if DWR, CVP and NCPA in concert were to construct additional 500 kV facilities, the project would be economically feasible. CH-16,458. First, while this has been studied, there is no evidence of serious consideration or negotiation. Secondly, the Commission does not have jurisdiction over DWR or CVP to order any such partnership, and even if it did, there is nothing in the antitrust cases which states that a project becomes "economically feasible" for bottleneck facility analysis if competitors are able to combine to duplicate the facility. The purpose of the bottleneck doctrine is to enhance competition. This purpose would not be furthered if, as here, participation by a competitor was possible only if it combined with others.

Nor would it be in the public interest to require an additional Intertie line to be built. As Witness Johnson testified:

> As voltage increases, the relative energy loss falls; the transmission of large amounts of energy can be achieved at falling costs with high voltage lines even though large capital expenditures and significant operating costs are involved. Consequently, a single transmission line with a given voltage will be more efficient than a number of lower voltage lines delivering the same amount of energy in a specified time period.

CH-1655.

San Diego has argued (Brief II, p. 34) that the bottleneck doctrine must be rejected on grounds that the Supreme Court, in *Terminal Railroad*, stated that access must be granted "upon nearly an equal plane as may be ... as that occupied [by defendants]" (224 U.S. at 411) and that because the proprietary risks are not shared, the Intervenors cannot obtain the benefits. This argument is easily rejected. The cited case goes on to state:

> Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such ... terms ... as will ... place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the [owners].

Also, the case does not require absolute parity. In *United States v. American Telephone and Telegraph Co.*, CCH Trade Cases ¶ 64,276 (D.D.C. 1981), the government had argued that AT&T was required to afford interconnection to the new Bell carriers on terms of parity with those enjoyed by its own subsidiary. The court rejected this position, stating that *Terminal Railroad* did not contain a requirement of absolute parity.

> [P]roblems of feasibility and practicability may be taken into account in determining the sufficiency under the law of the access to essential facilities ... To put it another way, parity is not required.

Id. at 74,238.

San Diego's remaining argument as to parity is also not persuasive. (Brief II, p. 34.) San Diego states that because the preference laws grant government owned utilities priority in the purchase of cheap Northwest power, Intertie access would give Intervenors a *greater* advantage. The preference laws are statutory and a matter of legislative design. The Companies cannot use a bottleneck facility to deny benefits the legislature has decided to give.

San Diego has argued that the Supreme Court has required collective action by competitors in connection with an essential facility to justify equal access. (Brief I, p. 21.) This is inaccurate. First, as in *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971), the bottleneck theory has been applied to single firms. Second, the focus is on the nature of the facility, not the owners. *See Associated Press v. United States*, 326 U.S. 1 (1945). Intent also is not relevant. For the bottleneck theory to apply, it does not have to be proven that either a "conspiracy to monopolize" exists or that the exclusion is for the specific purpose of extending a monopoly. Rather, denial of access to a bottleneck facility is itself a restraint of trade. *Venture Technology Inc. v. National Fuel Gas Co. et al.*, 1980-81 CCH Trade Cases ¶ 63,780 at 78,169 (W.D.N.Y. 1981). If Edison is correct (Comments p. 14) that for relief to be granted, the denial of access must be part of a contract, combination or conspiracy, there is both contract and combination here. Edison also contends the denial of access must be unreasonable. I find that the denial of access to unused Intertie capacity is unduly anticompetitive, unduly discriminatory, unjust and unreasonable, and contrary to the public interest. It is a waste of a portion of a major economic asset of this country.

As San Diego (Brief II, p. 33) correctly points out:

> [t]he antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.

Hecht v. Pro Football, 570 F. 2d 982, 992-993. As stated in *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*, 194 F. 2d 484 (1st Cir. 1952):

> [a]dmittedly, the finite limitations of the building itself thrust monopoly power upon the defendants, and they are not required to do the impossible in accepting indiscriminately all who would apply. Reasonable criteria of selection, therefore, such as lack of available space, financial unsoundness, or possibly low business or ethical standards, would not violate the standards of the Sherman Antitrust Act.

See also Venture Technology, Inc. v. National Fuel Gas Co., supra

> ... the refusal to allow Venture to connect to a [bottleneck] pipeline would not be a violation if [it were] found that the capacity of the line in question had been exceeded so that other producers would be forced to reduce their sales if Venture had been connected to the pipeline.

Id. at 78,169.

It is clear that excess capacity is not always available on the Intertie. Access can be given without interfering with the owners' use or previous commitments by providing for interruptible access. For this reason, it is found that (1) the bottleneck doctrine applies in this case and (2) as a result, access to the Intertie should be awarded, on an interruptible basis, to those not now using it who may wish to do so. All unused Intertie capacity, whether available for long periods or short, for long distances or short, for interstate or intrastate transmission, should be available to those who wish to use it where such use would not interfere with the

owner's use or prior commitments and where it would not impair system reliability or be inconsistent with prudent operation. This will yield the greatest economic use of the lines, and is therefore in the public interest. To the extent the Intertie may not constitute a bottleneck for some intrastate transmission because other transmission paths may be available, in the case of PG&E and Edison the other paths will be through their transmission grids. It is permissible, of course, for such paths to be substituted for Intertie transmission. San Diego has no such paths, so we need consider only its share in the Intertie.

Nothing in this Initial Decision prevents furnishing firm Intertie capacity, to an entity wishing it, in place of or in addition to providing interruptible transmission access to the Intertie.

This Commission has no authority over governmental entities such as CVP, LADWP, Glendale, Burbank and Pasadena, who are among those now with access to the Intertie. This order is directed only to PG&E, Edison, and San Diego. The fact that others cannot be reached is not a reason to refrain from issuing an order to those over whom we do have authority. Nor does their ownership of shares in the Intertie operate as an alternative to the PG&E, Edison and San Diego Intertie transmission. The government entities' shares are part of the bottleneck, not an alternative to it.

We do not now decide how available capacity on the Intertie is to be allocated. It must, of course, be on a non-discriminatory basis, at rates that are just and reasonable. Access to Intertie transmission shall not be limited to the present Intervenors, but must be accorded without regard to whether those who desire access are parties to this proceeding or not.

This order applies to both the ac and dc Intertie lines; any unused capacity on either or both must be available for use by others. To the extent use of the dc line might be restricted by the LADWP-Edison Pacific Intertie, DC Transmission Agreement, measures must be taken to offset or avoid the restrictions through use of ac lines or other arrangements which will be discussed later. Not only the Intertie lines are affected; necessary transmission capacity to and from the Intertie lines must be made available to the extent it exists and is available for use. Such transmission is part of the bottleneck, as it would limit access to the Intertie. Both PG&E and Edison have a monopoly, each in its own area, of a transmission grid which would provide or limit access to and from the Intertie. To the extent any provisions of the PIA or other agreements may conflict with this order, they shall be abrogated, and the provisions of this order shall prevail.

This proceeding will be left open for the purpose of dealing with any problems which may arise in connection with the relief provided here.

Intervenors' Witness Russell said that the Intertie's physical capacity could be increased, and that the Intervenors could share in the increase. He suggested that the Intervenors be allowed to increase the capacity if the PIA companies did not wish to do so. If the PIA companies did not wish to share the cost of the capacity increases suggested by Intervenors, Mr. Russell would allow Intervenors to make the changes, and have the full amount of the increased capacity allocated to them.

It has also been suggested that the existing Intertie ac lines, usually operated at 2500 MW capacity, could be operated at 2700 MW, thus making 200 MW available for allotment to Intervenors. While transmission has reached 2700 MW on a short-term emergency or test basis, 2500 MW has been the normal usage, and to go higher would reduce the safety margin. Increasing the amount of current transmitted will also increase the temperature of the line and result in increased line losses. Increases in operating costs, notably in maintenance and rate of depreciation, would be expected to follow.

There is no showing that any of the PIA companies or committees have made any determinations as to increasing or not increasing the physical capacity of the line in bad faith in order to hold down the available capacity, or hold down the transmission over the existing facilities for the purpose of not having transmission available for Intervenors or others not party to the PIA. The evidence appears to show that PG&E, at least, would have liked more transmission available for itself. This is indicated from the consideration given to the building of an additional Intertie line. (I do not include the controversy over DWR's transmission rights, as that might be thought to arise from a desire to exclude Intervenors, rather than to obtain transmission for PG&E.)

This Commission has no power to order changes in operating policies or practices which are not unjust or unreasonable and where no bad faith has been shown. It has not been contended that the failure to make changes in the Intertie facilities, or to operate them at no more than 2500 MW, was unjust, unreasonable, or the result of bad faith. The contention was that the capacity of the facilities could be increased, and that even without change the present ac facilities could

be operated at 2700 MW. Even if the Commission had the power to substitute its judgment for that of the operators in matters of efficiency, economy, and safety, I would decline to do so. This Commission is not in the business of making operating decisions. The utilities should run their own businesses, so long as their decisions are not unreasonable and are not made in bad faith.

Paragraph 7.02 of the PIA provides, in part:

> Each [PIA] company shall have the right to purchase its share, based on Relative Size Percentages, of any Northwest Power acquired by one or more of the [PIA] Companies, on the same terms and conditions as the acquiring Company.
>
> Paragraph 7.02 also provides that if a Company rejects part or all of its share in the Northwest Power, the other Companies may take it in the same Relative Size Percentages, and before a Company may transfer any of its Northwest Power to a non-PIA entity, the other PIA Companies have a first refusal on it.

I find Paragraph 7.02 is anti-competitive, unjust and unreasonable. It must be deleted in its entirety.

Paragraph 6.02(h) gives the other PIA Companies a right of first refusal if Edison wishes to sell all or part of its share of the transmission on the dc line. So far as this applies to a portion shared by Edison with PG&E or San Diego, this provision may be necessary to protect their rights. (Under the agreement with LADWP, Edison obtained the right to use half of the dc line's capacity; Edison then gave the right to use 50 percent of that half to PG&E, and the right to use 7 percent of the half to San Diego.) This right of first refusal has never been exercised (Mitchell, CH-1858, 1860; Daines, CH-1340), and at the outset of this proceeding, Edison acknowledged its waiver of the provision. (Edison Opening Brief at pages 31, 33.) Paragraph 6.02(h) must be revised to eliminate the right of first refusal as to transmission service except that San Diego and PG&E may each protect its portion of dc line allocation assigned it by Edison by retaining a right of first refusal as to its own allocation, but such right shall extend no further than is necessary for such protection. Beyond that, I find the first refusal to be anticompetitive, unjust and unreasonable.

Paragraph 7.01(e) provides that, with certain exceptions, no PIA Company shall transfer or make available Intertie capacity to another entity, whether a PIA Company or not, without the consent of the PIA Company owning the facilities in which capacity is available. This would mean, for example, that San Diego could not make part or all of its ac Intertie allotment available to one of the Southern Cities for transmission to or from the Northwest without the consent of both Edison and PG&E, since some of the ac transmission facilities to and from the Northwest lie in Edison's area and are owned by it, while part of the ac transmission route lies in PG&E's territory and is owned by it. This provision is not only in restraint of trade, but might be invoked to frustrate the relief here provided. The only circumstances under which the PIA Company owning the facilities might properly object to their use, by a financially responsible entity deriving its right to use from an arrangement with another PIA Company having the legal right to such transmission, would be if for some reason the transmission system would be adversely affected by the use sought. The adverse effect would have to be substantially greater than would result from use by the PIA Company which sought to transfer it before transmission for the transferee could be challenged. Paragraph 7.01(e) must be modified to reflect this ruling.

Paragraph 7.01(e) also provides that no PIA Company shall transfer or make available any of its Assured Intertie Capacity without according the other PIA Companies a right of first refusal. Again, Edison has waived its first refusal rights, but the other PIA companies have not. This portion of Paragraph 7.01(e) is found to be in restraint of trade, and unjust, and unreasonable. For the reasons discussed above, it must be eliminated.

Staff requests that all rulings of the Intertie Coordination Committee be filed with the Commission because the rulings affect or relate to the Intertie agreements. I agree. All such rulings shall be filed in this proceeding, which will remain open for any action which may be required on such rulings.

The LADWP-Edison DC Intertie Agreement

With certain exceptions, Article 19(c)(f) of the LADWP-Edison DC Intertie Agreement provides for a right of first refusal to all other participants in that Agreement:

> if any Participant desires to sell, lease or otherwise dispose of all or any portion of its interest, or of its right to use capacity, in the DC Transmission Facilities and additions and betterments thereto . . .

This gives LADWP, Glendale, Burbank and Pasadena a first refusal as to any use of dc line capacity now allocated to PG&E, Edison or San Diego. This Commission does not have the authority to abrogate the rights of LADWP, Glendale, Burbank, or Pasadena. The first refusal might seem to interfere with the transmission remedy here ordered, that is, that

all unused dc line as well as ac lines capacity of Edison, PG&E and San Diego should be available on an interruptible basis to entities not party to the PIA. That interference, however, can and must be kept at a minimal level.

The first refusal provision, being restrictive, is to be strictly construed, and any arrangement not specifically covered should be considered outside the scope of the provision. For example, an agreement by Edison to purchase energy in the Northwest and sell the energy to Anaheim at cost plus cost of transportation would not be within the provision, since all transmission would be Edison's. If Anaheim buys Northwest energy, assigns it to Edison in the Northwest and then repurchases it at Anaheim, the transmission of the energy would be Edison's, and that would be outside the scope of the provision. Another possibility would be for Anaheim to buy Northwest energy and assign it to Edison in return for other energy delivered by Edison at Anaheim, with suitable adjustments in the price of the delivered energy to compensate for transmission expense and line losses incurred by Edison in bringing down the Northwest energy for general use in its area. No doubt many other arrangements can be made which would avoid the application of the first refusal provision. The particular form of the transaction should be left to the entity providing access to the Intertie transmission so long as the costs to other parties are not increased above what just and reasonable transmission charges would be and the obligation to provide access to transmission is not frustrated.

In the event, however, that the first refusal clause would prevent or impair the furnishing of access to dc line transmission as required by this Initial Decision, the entity required to provide Intertie access will be able to provide a full remedy by providing access to ac lines transmission out of its own capacity which it would otherwise be using on the ac lines, and making up for its loss of ac lines capacity by using the dc line itself. Its own use of the dc line would not fall within the ambit of the first refusal provision, and that provision does not affect ac lines transmission for anyone. Under such an arrangement the entity providing Intertie access may ordinarily recover the reasonable rate that would have been applicable had dc line transmission been available and utilized.

In general, the entity providing access should use the least expensive transmission route available after the entity's own and its already committed transmission needs are taken care of. This is subject to the normal operating procedures on the lines, including normal emergency procedures. No one is required to exceed the usual transmission capacity of a line to reduce cost, except in circumstances, emergency or otherwise, where higher capacity would be utilized if the energy transmitted were the entity's own.

While the Commission cannot invalidate the first refusal rights of LADWP, Glendale, Burbank and Pasadena, it has authority to order PG&E, Edison and San Diego not to sell or otherwise transfer any transmission rights on the dc line that would fall within the scope of the first refusal. If LADWP, Glendale, Burbank or Pasadena should acquire such rights, it would remove a portion of the dc line capacity from our authority to require its use for others than PG&E, Edison, San Diego, LADWP, Glendale, Burbank and Pasadena, or, in the alternative, to provide substitute transmission for PG&E, Edison and San Diego that will free ac lines capacity for use by those others. PG&E, Edison and San Diego are ordered not to transfer any dc line capacity subject to the first refusal provision without prior approval by the Commission in this proceeding.

This proceeding will be held open to permit the resolution of any questions that arise from the orders with respect to dc line arrangements.

PG&E, Edison and San [illegible]go will also be ordered to renounce their first refusal rights under the DC Intertie Agreement so that any entity may bid if any other participants in the dc lines wish to transfer their entitlements, and the renunciation shall be made an amendment to the Agreement. Edison has already waived its first refusal rights except as to ownership.

The SMUD and DWR EHV Agreements

No one has complained of the amounts of intertie capacity made available to SMUD or DWR. The evidence indicates that SMUD extracted from PG&E a larger allocation than PG&E originally wished to give. This was done by SMUD refusing to enter into the contract and to support the Intertie package of agreements unless its demands were met.

With respect to SMUD, the Intervenors have complained that it should be permitted to sell some of its power not only to Intervenors (a point which will be dealt with later) but also to Edison. To effect this, SMUD would need transmission; the Intervenors contend transmission on the Intertie should be available for that purpose. Whether Edison wishes to purchase SMUD power or SMUD wishes to sell to Edison has not been established, but the remedies previously

provided would apply here under both the Stanislaus Commitments and the bottleneck theory. PG&E should provide available unused capacity on a non-discriminatory basis to SMUD as well as others for whom transmission is requested. This remedy is more limited than Intervenors would like, in that PG&E need make available only unused capacity and need not give up capacity that is already being utilized. To the extent that any capacity is or will be available, PG&E is obligated to allow it to be used.

As to DWR, Intervenors complain that the capacity committed to transmission of power for operating DWR's pumps should be available for DWR to assign to others for other purposes. This contention is rejected. The contract with DWR provides for power transmission up to 300,000 kW to operate the pumps. It is not an outright allocation of 300,000 kW capacity but merely an agreement to transmit power for the pumps, not for any other use. While the California companies might have contracted with DWR to provide 300,000 kW capacity to be used for any purpose, they did not do so, and the arrangement made was not unjust and unreasonable so far as appears from this record. A contract to provide power only for a particular purpose is not unjust and unreasonable *per se*. DWR asked for transmission for its pumps and that is what it got.

A subsequent contract between DWR and PG&E, while not considered in this proceeding because it was filed after the close of the record, is contended to have made this controversy moot in this case, although this is disputed.

Other Contracts Affecting the PIA

The CVP arrangements and the SMUD-PG&E Integration Agreement will be considered later. The remaining contracts affecting the Pacific Intertie need not be discussed here as they have no effect upon the remedies which have been ordered.

III. PG&E-SMUD Integration Agreement

This agreement provides for SMUD to sell to PG&E all of its hydro and nuclear power in excess of that needed for its own use, and for PG&E to provide back-up service for SMUD. When SMUD desired to construct a nuclear plant, it found that a plant large enough to provide the desired economies of scale would give it more capacity than its own system could utilize. The logical purchaser of SMUD's excess generation was PG&E, which is the major adjacent electric utility. Only a good sized utility could utilize all SMUD's excess, and only a major utility could provide the back-up that SMUD would require in the event of down time on the nuclear facility. NCPA members had no generation at the time this contract was entered into, and could have utilized only a very small fraction of what SMUD had available for sale. They complain, nevertheless, that PG&E has monopolized the SMUD power, making it unavailable to others.

Since the close of the record, PG&E has filed a notice of termination of its contract with SMUD, to take effect in 1987. No notice of termination of PG&E's services to SMUD has been filed with this Commission, and those services must continue until the Commission approves the discontinuance.

During the hearing, considerable evidence was devoted to showing that SMUD's power could be more advantageously used by Edison than by PG&E. There is no evidence that Edison was interested in the power.

SMUD is not a party to this proceeding, and the Commission has no jurisdiction over it.

NCPA has previously sought to obtain a modification of the PG&E-SMUD agreement as being in violation of the antitrust laws. NCPA sought to obtain a share of SMUD's nuclear power. The Commission summarily disposed of NCPA's contentions and declined to order a hearing. This was affirmed by the D.C. Court of Appeals, 514 F.2d 184 (1974), *cert. denied*, 423 U.S. 863 (1975). That case indicates that Commission has no authority to revise any contract of SMUD to compel it to deliver power to NCPA or anyone else, or even to cease to deliver power to PG&E.

The Commission would have authority, however, if PG&E violated the antitrust laws in entering into the SMUD contract, to order PG&E to release SMUD from some or all of its commitment to sell power to PG&E, so that SMUD could make such arrangements as it wished for the power freed from the contract commitment. What SMUD might do then would be its own determination, free from the contract constraints, but free also from any compulsion by this Commission.

It has not been shown that PG&E entered into the contract with the intention of excluding other purchasers from the market rather than for the purpose of acquiring power needed for its own use. PG&E is short of the reserves it believes adequate for its own operations. PG&E has not met its own planning goals for several years prior to the hearing. Any time anyone contracts to buy anything it excludes others who might wish to buy the same thing. This is not a violation of the antitrust laws, nor is it unreasonable, provided the purchase is made because it is needed and not because the purchaser wishes

to keep a competitor from getting it. The classic example is a manufacturer who purchases a competitor's factory. If he does so in order to prevent competition, it is wrongful. If he does so not for that purpose but because he wishes to utilize the factory for his own production, it is not wrongful exclusion of a competitor. Here, I cannot find upon the evidence presented that PG&E's purpose was the exclusion of competitors rather than buying power it needed to supply its customers.

While I find that no remedy should be ordered, any remedy awarded would be of little value. Any remedy must be prospective only, and PG&E's notice of termination means that SMUD is now free to negotiate for sales elsewhere, if it so desires, with sales to begin on the date of termination. Unless there is a settlement, history indicates that those proceedings will take a substantial time in this Commission and in the appellate courts, so that any remedy would be in effect very little time (if at all) before the notice of termination takes effect.

No argument is made that the sales of power to SMUD by PG&E are wrongful. These sales are under this Commission's jurisdiction, and are made pursuant to filed rate schedules which have been the subject of other Commission proceedings and are not involved in this case.

In order to make any sale of SMUD power to Southern California or an NCPA member, there must be transmission over PG&E-controlled lines. The Stanislaus Commitments make such transmission available, either for SMUD, which PG&E has agreed to treat as a Neighboring Entity, or for the purchaser who may take delivery at the SMUD system. Purchasers within the PG&E area will be Neighboring Entities; a purchaser in Southern California will be entitled to transmission over the Intertie in accordance with the previous section of this Initial Decision. The Stanislaus Commitments provide for the construction by PG&E of additional facilities if presently existing transmission is inadequate. That provision should assure firm rather than interruptible transmission if that is necessary and economically feasible.

No revision of the Stanislaus Commitments will be ordered beyond those previously indicated in connection with the PIA. I have found no wrongdoing by PG&E in connection with the SMUD agreement. The Commission has not placed the Stanislaus Commitments within the scope of this proceeding except as they affect the PIA. If there is further complaint that the Stanislaus Commitments are not implemented, or that the exceptions ordered deleted in connection with the PIA may still be applied where the PIA is not concerned, the Commission may deal with the matter in a later proceeding. In view of the time which will elapse before the effective date of the notice of termination, arrangements by the parties concerned may make any Commission decision unnecessary.

IV. Contract 2948A

Wheeling

Perhaps the strongest attack on Contract 2948A is that Article 24 placed undue limitations on the transmission to be provided to CVP by PG&E. PG&E is not required to wheel power for CVP to any customer who:

(1) is located outside the specified geographic area ("wheeling area"); (2) was not a PG&E customer on April 2, 1951; (3) has had a monthly demand of under 500kW for three months prior to the request for service; or (4) is located inside the boundaries of a municipality served by PG&E at retail. (I.R. U-1 pp.48-9.)

The Stanislaus Commitments, however, contain none of these limitations. Under the Commitments, PG&E agrees to wheel anywhere within its area, and over the Pacific Intertie, between any Neighboring Entity and (1) another Neighboring Entity, (2) a Neighboring Distribution System, or (3) another bulk power supplier connected to PG&E. PG&E has agreed to treat CVP as a Neighboring Entity.

The so-called limitations on wheeling in Contract 2948A are not prohibitions against PG&E wheeling. The limitations merely limit what PG&E undertakes to do under Contract 2948A. The Stanislaus Commitments are a different undertaking, and the 2948A limitations do not apply to the wheeling PG&E undertakes to provide under the Stanislaus Commitments. In any case, no clause of Contract 2948A relating to wheeling may be invoked by PG&E to prevent the carrying out of the terms of the Stanislaus Commitments. If the clauses conflict, the limitations must give way.

Under the bottleneck theory previously discussed, PG&E could not refuse to provide transmission over its facilities if transmission capacity was available between CVP and potential customers. PG&E had a monopoly of transmission over much of its grid. PG&E had declined to furnish wheeling between CVP and potential customers on numerous occasions, and did not claim that transmission was not then available. The Stanislaus Commitments, and the agreement to treat CVP as a Neighboring Entity, are a suitable remedy if undue discrimination in the Commitments is

eliminated and if implementation of the Commitments is assured.

The Stanislaus Commitments, as drafted, have been held in this Initial Decision to be unduly discriminatory in connection with the Pacific Intertie in that (1) the "area option" exception is unduly discriminatory against commerce and against any purchaser located outside the PG&E area, and (2) no means are provided to implement the services called for by the Commitments in the event agreement on the terms of transmission are not reached within a reasonable time. The Commitments, as drafted, I find to be insufficient as a remedy in view of Contract 2948A's failure to include general non-discriminatory wheeling provisions. As part of the remedy here, I direct that Contract 2948A be amended (1) to include an agreement by PG&E that the "area option" exception to the Stanislaus Commitments will not be invoked by PG&E in connection with wheeling from CVP, and (2) to provide that the implementation procedure previously required for the Stanislaus Commitments in connection with the Pacific Intertie may be invoked by CVP to implement any wheeling to which it may be entitled from PG&E (whether or not the wheeling involves the Pacific Intertie).

I further direct as part of the remedy here that Contract 2948A be amended to require that transmission by PG&E for CVP to and from other entities must be provided on the same basis as transmission to and from Neighboring Entities. PG&E shall not be required to provide transmission beyond its service area, however, or to provide transmission lines in addition to those now in existence except to the extent required by the Stanislaus Commitments for Neighboring Entities save that PG&E must treat other entities similarly situated the same as Neighboring Entities with respect to construction for transmission to and from CVP.

While this Commission has no jurisdiction over CVP to change its obligations under Contract 2948A (with the exception of certain rate review not here relevant), the Commission does have the authority to order PG&E to forego rights or increase its commitments under Contract 2948A, so long as no new requirements are laid upon CVP. The remedies here provided require nothing of CVP, although certain additional rights are given it, but PG&E is required to assume additional obligations. This is within the Commission's authority. Nothing herein obligates PG&E to render any service unless CVP agrees to pay for it at just and reasonable rates.

Contract 2948A, prior to this Initial Decision, provided for wheeling only within a limited area. Payment for this wheeling was provided by Article 25. Wheeling required by this Initial Decision and/or the Stanislaus Commitments beyond the area covered by Contract 2948A is not covered by Article 25. Just and reasonable rates for such wheeling may be established by the procedures set forth in the Stanislaus Commitments. Rates for the new wheeling required will not be discriminatory merely because they are different from the rates provided by Article 25. This is for two reasons. First, the new wheeling to be provided is for different (and likely more distant) locations than that governed by Article 25. Second, even if the new wheeling were comparable to that governed by Article 25, PG&E is entitled to charge a just and reasonable rate for the new wheeling. The rates provided by Article 25 may limit what PG&E is entitled to receive for wheeling covered by Article 25, even if the Article 25 rates are lower than just and reasonable rates. This is pursuant to the Sierra Mobil doctrine. Wheeling which is otherwise similar but not subject to Article 25 is not so limited.

One remaining question is whether delivery may be required to more than one delivery point per customer. I find that it is discriminatory to refuse delivery to any and all delivery points so long as just and reasonable compensation is paid. So far as connection facilities are concerned, the customer or CVP may construct them, or PG&E may be compensated for the cost of construction either by initial payment or by an increment in the wheeling rate with a guarantee of sufficient usage to cover the construction cost, or there may be a combination of methods.

The remedy in this respect follows the general principle stated earlier. Higher cost of providing service to a utility does not justify denial of service, but the utility should pay compensatory rates for the service it receives. If the just and reasonable cost becomes too high the utility itself will not take the service.

The same reasoning applies to any new transmission facilities constructed by PG&E as provided in the Stanislaus Commitments. If such facilities are built by PG&E for transmission to or from CVP, PG&E is entitled to be reimbursed for the construction cost. If the transmission is within the wheeling area, this reimbursement shall be in addition to rates provided by Article 25.

PG&E contends (First Post-Hearing Brief, pp. 118-9) that there is no need to alter the wheeling provisions of Contract 2948A because (1) CVP can sell all the power it has available for sale inside the wheeling area as limited by the contract provisions, and (2) the Stanislaus

Commitments give CVP a right to transmission service within PG&E's area.

CVP not only can sell what it has available, it has a waiting list of customers it is unable to supply because it does not have power available to sell them. This does not change the fact that CVP is not able to sell to customers outside the wheeling area without wheeling provisions to provide for transmission to additional places. How CVP allocates its available power is not within this Commission's jurisdiction. To allow it to make its allocation choices without undue constraint on its ability to obtain wheeling from PG&E is our legitimate concern. It may be that CVP will not wish to use the additional wheeling made available by this Decision. It should have the chance to make that determination.

It is true that the Stanislaus Commitments give CVP a broader scope for wheeling, and for that reason the Commitments are accepted as providing a part of the remedy required. Because the Commitments do not provide a complete remedy, and because they are unduly discriminatory in some of their provisions, an additional remedy must be imposed. That is what has been done.

PG&E has argued that the Commission has no power to order wheeling. The Commission did not order PG&E to enter upon the wheeling called for by Contract 2948A, or upon the wheeling required by the Stanislaus Commitments. PG&E having undertaken to wheel, it is obligated to do so without undue discrimination, and upon just and reasonable terms and conditions. That is all that is required here.

Termination

Staff recommends that the present provision for termination by either party on four years notice be changed to allow CVP to terminate on three years notice, while PG&E should be enjoined from giving notice of termination for five years from a Commission decision in this proceeding (Initial Brief, p. 222). Staff further recommends that provision be made for withdrawal of outstanding balances in CVP's energy and capacity bank accounts with PG&E at CVP's option, and that the wheeling portions of Contract 2948A be made severable to remain in effect after termination of other parts of the contract *(Id.*, p. 222.)

I am unable to make a finding on the evidence presented that four years would be an unreasonable period for notice of termination by CVP but that three would be reasonable. These notice periods are for the purpose of allowing the other party time to make such adjustments in supplies, sales, and transmission, both in facilities and in other contracts, as may be needed because of the termination of the arrangements between the parties. Here, if CVP terminates, and other contracts are not negotiated between CVP and PG&E, PG&E may have to find other major sources of supplies, other customers for a major amount of capacity and energy, other avenues of transmission, and users for some of the transmission capacity now provided by PG&E to CVP. New facilities, both for transmission and generation, might have to be built. In practice, it is unlikely these parties would sever all links; notice of termination would be merely a prelude to negotiation of other contracts governing the relations between them. I am unable to say that four years would be an unreasonable notice time given the size and complexity of the relations between the parties, and in the absence of specific evidence as to why four years is too long. In at least one case, where far less difficult adjustments would be required, the Commission has approved a much longer period. *Arizona Public Service Company*, 18 FERC ¶ 61,196, pp. 61,395-6 (1982).

Nor am I able to find that PG&E should be restrained for five years from giving notice. There is little evidence directed to this specific point. PG&E, even if the contract were terminated, is required to continue to render all services it is presently rendering under Contract 2948A until PG&E has applied to the Commission and been authorized by it to discontinue any service. It is, therefore, unnecessary for CVP to have the initial period requested by Staff to allow CVP to adjust its operations. Should PG&E apply to discontinue services, any adjustment period which may appear necessary may be provided by the Commission order on the application, if PG&E is allowed to discontinue essential services. Unless CVP has other alternatives, PG&E may not be allowed to discontinue.

Because of the necessity for PG&E to obtain permission before discontinuing services, there appears no reason why the wheeling portions of Contract 2948A need be made severable. Whether or not the contract is terminated, the wheeling services (like all other PG&E services to CVP) will remain in effect until the Commission permits their termination after application for such termination by PG&E.

Also to be continued until a PG&E application for termination is granted by the Commission are the provisions for CVP energy or capacity bank accounts with PG&E. While CVP has been credited with payment by PG&E for the amounts in the accounts, these

amounts were subject to repurchase by CVP at a higher rate. It would seem that CVP could withdraw what it has in these accounts during the four-year notice period, but if it does not, the Commission may make suitable provision in any order permitting PG&E to terminate the service. There has been little evidence submitted on this point, and the situation may never arise, or may be negotiated between the parties. It is unnecessary and undesirable to provide for it at this time.

In connection with any such later order the Commission may consider the possible need to regulate the withdrawals from the bank accounts to prevent too much being taken at once or at inconvenient times, which might either strain PG&E's resources or require excessive generation by high-cost plants.

Staff has also requested that in future contracts PG&E not be allowed to require CVP, (1) to commit its entire excess capacity to PG&E or (2) with certain exceptions, to limit its sources of supply to meet obligations to PG&E. Any further contract replacing Contract 2948A to the extent it is jurisdictional, will have to be filed with this Commission, which can then pass upon its justness and reasonableness. To the extent the contract is non-jurisdictional, the Commission will have no more authority now than then to amend its terms or reject it. The future conditions under which the contract is entered into and the specific terms of the contract may determine what the ultimate decision should be. I see no reason to go into it here. Accordingly, I decline to accept Staff's recommendation in this respect.

Banking Accounts

CVP is part of the Bureau of Reclamation, now under the Department of Energy. CVP is primarily an irrigation and flood control operation; power generation is secondary to the other purposes. The water flow is regulated to meet irrigation and flood control needs, with electric generation a by-product. CH-2193. CVP power is dedicated first to CVP pumping requirements. CH-2193. Only the power left after CVP pumping demands is now available for commercial sale.

CVP generating plants are all hydro. It has no thermal plants. Many of the hydro plants are run-of-the river plants, so the power must be generated as the water flows, and not by impounding water in reservoirs and using it as power is needed. This results in great differences in CVP generation in different years, depending on whether the year is wet or dry, and also in great differences in the same year between one season and another.

CVP does import Northwest power over the Pacific Intertie to serve its customers. CVP's preference customer load is supplied basically from the surplus of its own hydro generation above irrigation needs, plus what is brought in from the Northwest. PG&E has undertaken to provide a limited amount of power to back up CVP's fluctuating power supplies. CVP sells firm power to various municipal utilities, and other preference entities, and its additional available energy to PG&E pursuant to the banking arrangements.

The sale of firm power is made possible largely by the "banking" arrangements with PG& E, under which CVP makes deliveries to PG&E in times of surplus and withdraws the deposited power in times of shortage. Without this arrangement, CVP would have large supplies to sell at some periods and little or nothing to sell at other times. The banking arrangements allow CVP to contract to sell a steady flow of energy on a year-round basis.

This arrangement has worked for many years, and has enabled CVP to be a more reliable supplier and utilize its energy more efficiently. In ordering any alteration of this arrangement, we should be careful not to damage the established benefits or interfere with the working of an arrangement that has proven itself. CVP does not seek here any relief from the established system, nor does CVP defend it. We have not been given the benefit of CVP's views.

Staff contends the restrictions on the use of power drawn from Energy Accounts Nos. 1 and 2, and the annual energy exchange account, must be deleted as anti-competitive and *per se* illegal under *Gulf States Utilities Company*, 5 FERC ¶ 61,066 (1976). Staff's Initial Brief states (pp. 126-7)

> Article 20(d) provides that power that the United States draws out of the annual energy exchange account can be used only to supply power to the bureau's pumps off peak. (Anderson 2200). Thus, PG&E has placed a resale restriction on the power it sells to the U.S. out of the annual energy exchange account which limits the use that the U.S. can make of power it purchases. If not for this limitation CVP could have used the large amount of excess energy in this account to meet its preference customer load or to transfer to Energy Account No. 2. (Anderson, 2200.)
>
> Similarly, energy that CVP purchases from PG&E under Energy Account No. 1 and 2 can only be used to meet preference customer loads and for no other purpose. (IR U-1, Article 21 (b); Anderson, 2197-8).

Gulf States involved an ordinary sale. The transactions here were more complicated. They

might be considered services by PG&E in receiving and returning particular categories of energy. The transactions were cast in the form of sales to PG&E and return sales, but they could have been treated as services for which a fee was charged, and cast in that form, rather than reaching the result by providing for sales to and from PG&E. An argument could be made that the power coming out should return to the category from which it was drawn, and that only. This argument is not convincing, since there was no limit on how the power could have been used had it not been deposited with PG&E under the banking arrangements.

An argument could also be made that to allow withdrawn power to be used in any manner whatsoever might result in excessive withdrawals at inconvenient times, which could result in excessive generating costs to PG&E. This is because generating costs tend to increase as demand increases and less efficient sources of generation are brought on line. Particular conditions may offset this tendency, of course.

I find the provisions are unduly restrictive and should be eliminated to allow energy withdrawn from the banking accounts to be used in any manner CVP wishes. Provision should be made to limit the time and amount of withdrawals, and/or to increase PG&E's compensation for withdrawals not permitted under the present contract restrictions, so that there will be no uncompensated costs to PG&E resulting from the deletion of the limitations. Suitable provisions for limitations on withdrawals, or for increased compensation for PG&E for withdrawals in excess of present limitations, cannot be framed upon the basis of this record. In any event, it is preferable to allow the parties concerned to attempt to reach agreement upon those things, before review by the Commission to determine the justness and reasonableness of the limitation and compensation provisions, rather than to have the Commission attempt to frame the provisions in the first instance. A further hearing would be required in either case.

The provision that bank account withdrawals should be made during off-peak hours is not affected by this Initial Decision. This is not a limitation on the use which CVP may make of the withdrawal power. It provides that the energy may be taken only at times which are less of a strain on PG&E's resources than withdrawals at peak periods might be and also reduces the tendency toward increased generation costs that would occur during peak periods.

We do not yet know whether CVP may wish to make withdrawals of power in addition to those which would be permitted under Contract 2948A as originally written. If it does, or it it may wish to do in the future, I find that PG&E should be accorded reasonable notice that CVP wishes the applicable contract limitation on withdrawals abrogated so that PG&E may make arrangements to minimize possible disruptions, as well as to allow PG&E and CVP to negotiate any limitations on withdrawals reasonably necessary to protect PG&E and/or to provide PG&E with just and reasonable compensation for the additional cost incurred or to be incurred by it as a result of the elimination of the withdrawal restrictions. Exactly how this cost should be computed must await a record with evidence addressed to this.

Within six months of the date that the Commission determination in this proceeding becomes final, CVP may file a notice with PG&E and this Commission that it desires to have the right to withdraw power, in addition to that permitted by the limitations here found improper. Within six months after such notice PG&E may file with this Commission in this proceeding a proposed rate schedule containing proposed restrictions reasonably necessary for PG&E's protection and/or any new rates to be applicable to any withdrawals to be made in addition to those which would be permitted under the limitations here eliminated. This filing shall include any and all material required for rate filings with this Commission. The filing may incorporate whatever agreement has been reached between CVP and PG&E. If there is no such an agreement PG&E may nevertheless file. The proposed terms and conditions will be subject to review by the Commission in this proceeding and the proposed rate schedule shall be subject to suspension. Withdrawals in excess of those permitted by the limitations here eliminated may commence thirty-one days after the filing by PG&E, or the last day for such filing if no filing is made. Should PG&E not file a rate schedule as here provided, the rates applicable to other withdrawals from a particular account will apply to withdrawals which would have been prohibited by the provisions here eliminated. This proceeding will remain open for any determinations which may be necessary pursuant to this paragraph.

Limits on Use of Project Power

Article 19(a) and (b) require CVP to furnish all capacity and energy for project loads (with one exception) from project plants. Staff and NCPA argue that the restriction is an illegal restraint on CVP's use of its own power. Without the restriction CVP might be able to sell some of this power as peaking power, while buying off-peak power to run its pumps. Whether any such arrangement could

be made by CVP that would be economically feasible is questionable, but it may be a possibility if conditions should be right. The restriction constitutes a restraint on possible competition by CVP with PG&E, and it should be eliminated.

No additional service obligations of PG&E shall result from this elimination. Nothing shall prevent CVP and PG&E from negotiating for additional service by PG&E, for which PG&E is entitled to compensation.

Limitation on Importation of Northwest Energy

NCPA states (Second Brief, p. 152):

> It is unclear why CVP must be limited to importing Northwest Dump or Exchange energy over its Intertie Entitlement "for use or sale in Contractor's Service Area," and can only import such resources if they can be "used beneficially" in PG&E's service area (Article 19(e)).

Article 19(e) also provides that PG&E will accept all such energy. The importation of energy only if it can be "used benefically" in PG&E's area is clearly meant to limit the amount PG&E must take to what it can beneficially use. There is nothing wrong with this.

This article does not limit what CVP may import. It provides for the importation, and sale to PG&E, of Northwest energy that PG&E can beneficially use in its area. This is not unduly anti-competitive.

Nothing in Contract 2948A should be allowed to restrain CVP from importing and using or selling elsewhere energy not sold to PG&E.

Limits on Sources of Power

CVP is limited by Contract 2948A to obtaining power only from PG&E or Northwest sources. Staff cites in this connection Articles 5, 12(a)(7), 19(d)(e) and (g). Articles 19(d)(e) and (g) also limited CVP to acquiring Northwest power only in amounts not exceeding that which could be imported over CVP's share of the Intertie transmission (IR-UI). Staff argues that these restrictions are discriminatory since these restrictions do not appear in PG&E's arrangement with San Diego or Edison.

It is questionable whether these provisions are unduly discriminatory since both CVP's operation and its relationship with PG&E are very different from those of either San Diego or Edison. CVP's operations are integrated with PG&E; this is not true of San Diego or Edison. PG&E must transmit much of the CVP power sold to its customers; this is not true of Edison or San Diego. The "banking" arrangements between PG&E and CVP are unique. PG&E schedules much of CVP's power, but not that of Edison or San Diego. The hydro power generation of CVP is quite different from the generation mix of San Diego or Edison. CVP's dams are devoted primarily to flood control and irrigation while Edison and San Diego are concerned primarily with the sale of electric power. CVP is governed by laws that do not apply to Edison and San Diego in so far as operations are concerned. PG&E provides a large percentage of backup power for CVP and under different arrangements than is the case with San Diego and Edison, which provide their own reserves to a much greater degree, although they can rely on PG&E under the Power Pool arrangements. The puts and takes in the "banking" arrangements could be affected by different CVP purchases, as might the scheduling by PG&E and the use of PG&E transmission lines by CVP or even the use of the CVP transmission lines by PG&E. None of this applies to Edison or San Diego. The systems and their relationship with PG&E are so completely different that I am unable to find that the restrictions on purchasing from other than PG&E or the Northwest and the limitation of purchases from the Northwest to CVP's Intertie transmission (even if CVP built or obtained other transmission routes to the Northwest) is unduly discriminatory.

I find, however, that the restrictions on power sources unduly restrain competition and are therefore unjust and unreasonable. No good and sufficient non-competitive reason for the imposition of such complete restraints has been shown. The absolute prohibition on other purchases goes beyond what is needed for the protection of PG&E's operations. To the extent that PG&E's operations might be adversely affected by the removal of these restraints, limitations on PG&E's responsibility may be negotiated provided they are not unduly anticompetitive.

The three cardinal points applicable to removal of the limitations on banking account withdrawals are also applicable here—notice, negotiation and compensation. After the final Commission decision in this proceeding, CVP may give PG&E notice of any purchases it wishes to make in addition to those it might bring in over its Intertie transmission share. The notice shall be filed with this Commission. Within six months from the date of notice PG&E shall file with the Commission in this proceeding a rate schedule covering whatever additional services PG&E has agreed to render CVP in connection with the additional purchases, the compensation agreed upon or proposed by PG&E without agreement, and any limitations upon the additional purchases

either agreed upon or proposed by PG&E as reasonably required to protect its operations. PG&E shall not be required to render any back-up or banking services as a result of the additional purchases unless it has agreed to do so or has been ordered to do so by the Commission. Any rate schedule filed by PG&E shall be subject to suspension. This proceeding shall remain open for any determination which may be necessary pursuant to this paragraph.

The purchasing of power from other sources than the Northwest by CVP may involve interconnection with these other sources. That would affect the PG&E system because of its many CVP connections and the integrated operation. This will be dealt with in the next section.

Interconnections

Staff states (Initial Brief, p. 137):

> Article 19(g) requires that CVP obtain PG&E's consent before it transmits for or interconnects with any system that may directly or indirectly interconnect with PG&E (IR U-1). PG&E counsel has correctly stated that it is hard to think of any situation where CVP could interconnect with another system that would not, at the very least, indirectly affect PG&E as defined in Article 19(g). (See Golub, 20,805.)
>
> The staff agrees with PG&E that it is possible that certain CVP interconnections to unreliable systems could adversely affect PG&E and cause operating problems (Kaprielian, 22,515-6; 20,808; 20,812-3). PG&E does need assurance that the third party to whom CVP interconnects follows prudent utility standards (Kaprielian, 20,814-16) but Article 19(g) gives PG&E the right to veto a CVP interconnection with or transmission for any system, whether or not that system follows prudent utility standards. This provision is inconsistent with good system planning and operations unless it were appropriately qualified by technical criteria. (Russell, 2856; Holmes, 18,423.)

At page 138 Staff continues:

> The problem with 19(g) is simply that it does not set any objective standard for PG&E refusing to allow NCPA to interconnect with others. PG&E can block such interconnections for no reason at all, for an anticompetitive reason or for any other reason that is totally divorced from engineering concerns.

I agree with Staff that PG&E should not be able arbitrarily to prevent CVP from interconnecting with another system. Unless it appears that the interconnection will threaten the reliability of PG&E's system, or cause PG&E engineering problems, or result in increased and uncompensated costs to PG&E's operations (not resulting from a loss of sales or other non-engineering effect), for PG&E to prevent CVP from interconnecting would be unjust and unreasonable. If the system to be interconnected is already interconnected with PG&E, directly or indirectly, so that the exposure of PG&E's system will not be substantially increased, even interconnection by CVP with a system of lesser reliability will not increase the risk to PG&E's reliability. It may also be possible to provide safeguards so that even a system of lesser reliability may be interconnected without substantial risk to PG&E's system. Additional expense to PG&E resulting from the interconnection, such as possible line losses (see PG&E Initial brief, p. 123, citing Witness Kaprielian, CH-22,514/12 to CH-22,518/8), should be compensated for.

Hereafter, PG&E shall not unreasonably withhold its consent to a requested interconnection, nor impose unreasonable terms and conditions in connection with its consent. If there is a difference of opinion as to whether consent is unreasonably withheld or whether unreasonable terms and conditions are imposed, this proceeding will remain open for resolution of the matter.

Staff also recommends (Initial Brief, p. 225) that PG&E be required to seek CVP's consent for a PG&E interconnection with a third party. While this, at first blush, appears to be only equal treatment, I decline to accept the recommendation. PG&E is interconnected not only with CVP, but with SMUD, Edison, and others. There seems no more reason to require CVP's consent than some of the others. PG&E is one of the more careful and conservative electric utility operators; it makes a point of its reliability and safety. Its record in this respect is superior. It is the dominating utility in its area. It has accepted the overriding responsibility of supporting the other utilities in its area. It is the dispatcher and coordinator of the entire area. CVP has not sought any right to veto PG&E's connections. For it to do so would be akin to the tail wagging the dog. Its agreement to Contract 2948A and lack of trying to change it might be considered consent to any interconnection PG&E wishes to make. It may well be, in the light of PG&E's operating history with respect to reliability and conservation, that CVP will be content to rely on PG&E's judgment in this respect.

Limitation of Sales to Hydro

Articles 19(f) of Contract 2948A allows CVP to make available to PG&E capacity or energy from hydro electric plants only. Staff contends that this is unduly discriminatory

because CVP can only sell capacity and energy from a certain type of facility and no other PG&E supplier is so limited. CVP has indicated interest in a thermal plant. Staff Witness Holmes (CH-18425-6) suggests that if PG&E wishes to limit the amount to be purchased, a specific amount should have been provided.

PG&E's other power suppliers are not like CVP. CVP's generation is entirely hydro. Other suppliers' generation is a mixture of hydro and thermal. PG&E's purchases from the Northwest are on a completely different basis than those of other suppliers, including CVP.

It is not unknown in the industry for a utility to purchase the entire output of a hydro electric plant or other sort of generation. I can see no reason why a utility should not be allowed to purchase CVP's present hydro electric generation without being required also to take additional generation of another character.

Load Support Level

Article 14, as amended, limits the CVP load PG&E will back up to 1152 MW (IR U-1). Staff asks Contract 2948A "be modified to require PG&E to grant CVP requests for increases in support for customer load levels unless PG&E can demonstrate that it cannot feasibly support such levels." (Staff Initial Brief, pp. 135-6, 223.)

There has been no showing that PG&E imposed or sought the limitation on load support for the purpose of limiting CVP's sales or for any anti-competitive purpose. I find nothing improper, by itself, in a utility putting a limit on the back-up support it will provide. Staff's proposal that support must be unlimited unless shown to be unfeasible takes no account of the possible increase in costs resulting from increased support, with the increase supplied by more expensive generation. In addition, the proposal would require a compelled allocation of PG&E's resources to support of CVP's increased load, even though PG&E might prefer them allocated elsewhere. Unless the restriction is shown to be unduly anti-competitive, as it has not, I do not consider it improper.

It is true that CVP may be limited in the load it can serve if it cannot obtain necessary back-up power. Any customer of PG&E will be limited in what it can sell by the amount it can buy, either of direct supplies or of back-up. It does not follow that the supplier can place no limit on the supplies it will furnish.

Staff recommends also that CVP should be allowed to serve customer load above the present ceiling of 1152 MW (Initial Brief, p. 223). So long as CVP can do so without increasing PG&E's obligations, CVP should not be limited in its sales by a contract with a competitor. Contract 2948A, then, shall not limit CVP's sales, but PG&E shall not be required (unless it agrees) to furnish support for any CVP sales beyond the support presently required. To the extent back up is necessary to the sales to be made, if CVP is able to arrange for back up by other reliable suppliers, it may make the sales.

400 MW Reserves

CVP receives 400 MW over the Intertie from Centralia. Article 18(b) requires CVP to provide an equitable share of reserves up to 400 MW. Staff argues CVP should not be required to provide 400 MW of spinning reserve to guard against an Intertie outage. Staff makes a number of arguments at pages 136-7 of its Initial Brief, saying that the Intertie is more reliable than most generating units, that there are two parallel ac lines available for Intertie transmission power so only 200 MW would be lost in an outage, that BPA backs up Centralia, and that it was the intention of the parties to Contract 2948A that Article 18(b) require the same reserve obligation of CVP as PG&E would have if obtaining the same power over the same line (citing PG&E Witness Keating, CH 27,309).

The contract does not call for a particular number; it calls for "an equitable share of reserve capacity in an amount up to 400,000 KW." This does not require 400 MW; 400 MW is the upper limit, but the amount required is an equitable share. Article 18(b) need not be revised, but I agree with Staff, in view of Mr. Keating's testimony, that "an equitable share" would be no more than PG&E would provide if using the Intertie to import the same power. The specific amounts may change with circumstances, but that is the principle to be applied.

Article 14(c)(3)

This article provides that:

> ... unless PG&E agrees otherwise any CVP customer that elects to take supplemental power from a supplier other than PG&E must take such power only from suppliers who are able to supply the entire supplemental load of that customer, other than that supplied by PG&E and the U.S., without receiving support or standby from PG&E or the U.S. and without imposing any additional burden on PG&E or the U.S.

Staff Initial Brief p. 133.

Staff says this provision is unduly discriminatory in that it restricts potential suppliers of supplemental power to CVP customers to those who can supply all the

supplemental power, and limits the customers' right to choose freely among suppliers who could supply reliable service.

PG&E contends that the provision merely insures that purchases are not made from unreliable sources. PG&E Witness Keating said the only requirement is that a reliable source of back up shall be maintained. CH-1242.

PG&E is the power supplier of last resort in its area, the ultimate source of power to which all others in the area turn if they are caught short. It has an obvious interest in making sure that CVP customers do not create situations in which CVP—and thus, indirectly, possibly PG&E—may have to come to the rescue of customers who have made imprudent arrangements, either (1) not considering the possible dangers or (2) perhaps feeling they can think of cost without regard to reliability because PG&E will ultimately bail them out. PG&E may have to provide CVP with the power for the bail out unless Contract 2948A has some limitation on what CVP's customers may do. Even if there is no contract whereby PG&E, directly or through CVP, must provide the bailout, PG&E would in practice assist any utility in its area that had nowhere else to turn. It is not discriminatory to differentiate between, on the one hand, small utilities without proven reliability and with possibly questionable practices, and on the other hand, Edison and San Diego, whose reliability and low-risk practices are well established and acceptable to PG&E.

PG&E says it is entitled to reasonable protection from exposure to demands it never authorized or controlled. Nevertheless, I feel Article 14(c)(3) goes too far, and another approach should be taken.

It is not a practicable solution to provide that the customers may do as they please, but PG&E will not be compelled to back them up if they go beyond what is permitted by Article 14(c)(3). PG&E is going to help them in an emergency if they have no place else to turn and if PG&E has the resources.

The first point is that the customers should not be limited in the number of suppliers they may wish to deal with. The key is the reliability of the customers' suppliers, and not the number. That reliability could be established in several ways—by PG&E's approval of a supplier's reliability, by back up of the unapproved supplier by an approved utility other than PG&E, or by PG&E providing the back up. The necessary approval by PG&E may not be unreasonably withheld, and resort may be had to the Commission in this proceeding if it is.

At the present time, comparatively little power is necessary to back up CVP's customers' suppliers other than CVP or PG&E. The present limitation to 1152 MW for back up of CVP's load would operate to hold down PG&E's exposure. It is at least possible however, that in the future customers may reduce their takes from CVP, voluntarily or otherwise, and increase their takes from other suppliers. This could multiply the back up exposure of PG&E, especially with the possibilities opened up by the expanded wheeling the Stanislaus Commitments make available. I cannot find, therefore, that protection for PG&E from unreliable suppliers is unnecessary because of the small amount of exposure that may result.

In the event a customer wishes to purchase from an unreliable supplier, it can contract for back up with PG&E or another reliable supplier. Otherwise, it has no right to expect back up from PG&E, either directly or by way of CVP. Despite this, if the homes in a customer's area are going dark, someone will provide it with power, and that someone is likely to be PG&E.

It is not likely, in the next few years, that PG&E will be unable to provide back up power to CVP customers whose suppliers fail them. The arrangement which seems most in the public interest is for PG&E to supply the back up power needed, but to receive fully compensatory rates for doing so. PG&E may make such arrangements for doing so as can be negotiated. In the absence of particular agreements, PG&E may also provide a general rate schedule with rates for such back up. These rates need not be fixed, but may be based upon a just and reasonable formula. All such rates are of course subject to review by this Commission after they are filed. In the event circumstances may change so that PG&E may be unable to supply back up power for all CVP customers, or if for any other reason not now apparent PG&E should not be called upon to do so, PG&E may move this Commission for whatever relief may be suitable. For the present, the scheduling of fully compensatory rates to back up unreliable suppliers, which rates may greatly exceed the rates to reliable suppliers, appears to offer sufficient protection to PG&E.

Rates

The rates at which CVP sells power are not within the jurisdiction of this Commission, except for review to assure that CVP's full costs are recovered. It would be improper, and subject to correction in this proceeding, for PG&E to use monopoly power to impose inadequate rates, but it has not been shown

that this has occurred. There has been some argument, not pressed in the post-hearing briefs, that PG&E's monopoly of transmission and its predominant position in the area carries the implication that the terms of Contract 2948A were imposed illegally. The factors mentioned, by themselves, are not enough. CVP is an arm of the United States Government, not devoid of funds or legal counsel, and presumably aware of its rights, which could make its situation known to the Department of Justice and this Commission, and the Bureau of Reclamation (of which CVP is a part) has made its views prevail despite PG&E opposition in substantial matters regarding the Pacific Intertie. Without evidence that particular CVP rates in the contract resulted from anti-competitive action by PG&E, I cannot find that the rates were improperly imposed.

The fact that some services are not specifically charged for is not improper unless the rate structure does not provide for a full cost recovery. The arrangement is analagous to the inclusion of a free premium with the sale of merchandise—the total price covers the "gift" of the "free" item.

The rates at which PG&E provides services to CVP are subject to review by this Commission in rate proceedings. Their level is not within the scope of Phase II of Docket No. E-7777 unless the rates resulted from anti-competitive action. Again, PG&E's monopoly of transmission and its predominant position in the area are not enough, by themselves, to establish anti-competitive actions in this respect.

V. Contract 2947A

This contract was not one of those specifically named by the Commission for investigation. It does, however, affect and relate to the Pacific Intertie, and must be considered for that reason.

Under the Stanislaus Commitments and the bottleneck theories previously discussed, CVP must be treated, like anyone else, in a non-discriminatory manner in being accorded the use of any available transmission allocated to Edison or San Diego on the ac or dc Intertie lines. This treatment would not be altered by the provisions of Contract 2947A, as the required treatment is independent of that contract and despite anything in the contract to the contrary. Only one change need be made. Article 32, dealing with alienation, should be revised as suggested in Staff's Initial Brief (p. 238) to read:

> Neither the contract nor any part thereof shall be assigned without prior notice to all other parties.

A PIA Company shall have the opportunity to object if it would be subjected to possible financial loss by assignment to a financially irresponsible entity.

VI. Other Territorial Customer Allocations

Staff and its initial brief (pp. 127-8) states that "the CPP companies have maintained or enhanced the monopoly power . . . by means of numerous other territorial and customer allocation agreements . . . " Cited are June 1971 agreements between San Diego and Imperial Irrigation District which provide that neither will sell in the other's territory for 25 years (IR X-10), resale restrictions in wholesale contracts with the City of Colton (IR Y-2, Z-2, H-3, I-3 and K-3), restrictions limiting use of wholesale power to the customers service area for Vernon, Anaheim, Riverside, Banning, Deseret Electric Cooperative, Azusa, Anza Electric Cooperative, Citizens Utilities Company and LADWP (IR A-3, B-3, D-3, E-3, F-3, G-3, J-3, L-3, P-3, R-3, Exhibit 6227), restrictions from reselling Nevada Power to Northwest entities (Exhibits 2014, 2015, 6012, 6013), and PG&E resale restrictions on California Pacific Utility Co. (IR X-2, SMUD Ex. 1214, IR K-2, R-2) Palo Alto, Santa Clara and Redding (IR-Q-2, S-2, Z-2 and W-2, Exhibit 7224).

While the foregoing arrangements are alleged to be evidence of anticompetitive schemes by CPP companies, these arrangements themselves are not within the scope of this proceeding. They are not among the contracts named for investigation in the Commission orders, nor do they relate to the Pacific Intertie or the PIA. I do not find that modifications of any of these agreements are necessary to remedy anticompetitive or unduly discriminatory provisions in the contracts that are subject to this investigation, nor do I find that they are part of an anticompetitive scheme directed towards any of the contracts here under investigation. Accordingly, no modification of any of these arrangements is ordered, nor are any other remedies provided with respect to them.

VII. Representation of Intervenors

NCPA has been represented in this proceeding by attorneys from the office of Spiegel & McDiarmid. The Southern Cities have been represented by different attorneys from the office of Spiegel & McDiarmid. When a question was raised as to the reason for this, Mr. McDiarmid of Spiegel & McDiarmid stated that the two groups of intervenors were represented by different attorneys in his firm because of the existence of possible conflict of interest between the two groups. It was

indicated that a strict division between the different groups of attorneys would be maintained at all times so far as this proceeding was concerned.

Mr. McDiarmid stated that both groups of clients had been fully informed of the possible conflict of interest, that both NCPA and Southern Cities had been represented by the firm for some time and are dependent upon it not only for legal advice in connection with these proceedings but for advice in a broad spectrum of matters, and it was felt that in the light of these relationships that both groups could be better represented by Spiegel & McDiarmid attorneys than by others.

While Mr. McDiarmid did not specify the particular nature of the conflicts of interest, at least some of these became apparent during the proceeding. Both NCPA, whose members are entities in north and central California, and the four Southern Cities who are located in Edison's service area in southern California, sought firm access to the Pacific Intertie. If firm allotments of capacity had been made it would have been necessary to determine who would receive the allotments and the size of the allotments. The basis for making such allotments might well have been a subject of controversy between Southern Cities and NCPA or its individual members. For instance, NCPA was unwilling to invest capital to purchase a portion of the Intertie entitlements; Southern Cities was willing to make that investment. If purchase of Intertie shares were made a condition of participation, Southern Cities would receive participation while NCPA would not.

A number of NCPA members are customers of CVP and so have received indirectly the benefits of purchases of Northwest power by CVP, as CVP's rates to them have been lowered by CVP's receipt of the cheaper Northwest power. Some of the other NCPA members, and all the Southern Cities, have received no such benefits. In allocating equitable participation in the Intertie, one possible contention might be that we should reduce the participation of those who have already received these indirect benefits of the Intertie, leaving a larger share for the others who have not received such benefits. If it were argued that NCPA should receive the sum of Intertie shares due its members, it would follow that NCPA and Southern Cities would be on opposite sides on this question.

It is also apparent that varying methods of allotment of Intertie shares would yield differing results. Allotments on the basis of peak loads would yield one result, allotment on the basis of total load another, and other variations might be considered on the basis of alternative supply resources, types of loads served, differing rates charged, and other factors. It might well have been held that NCPA or its members should have access only to the ac lines while Southern Cities should have access only to the dc line. Historically LADWP, Glendale, Burbank and Pasadena have had all their access on the dc line, and this might well have been what Southern Cities would have received if they had participated originally. Similarly CVP, DWR and SMUD obtained access only to the ac line, and this might well have been what NCPA and some or all its members would have received had they participated in the original Intertie arrangements. While both groups of Intervenors sought access to both ac and dc lines, a larger allotment on the dc lines might well have been preferred by Southern Cities to a lesser access to both ac and dc lines if this question had ever been presented. NCPA or its members might have preferred a larger access to the ac lines to a smaller share in both ac and dc lines. The possibility of conflict in these respects would emerge most sharply in settlement negotiations, where one group might adhere to its attempt to obtain transmission over both ac and dc lines while the other might seek to concentrate on one line only to obtain a larger share there. Certainly the possibility for conflicts of interest was extensive at the start of hearin

If I had handled this case and the interventions from the beginning, I would have gone into this matter in more detail. I was, however, the fourth Administrative Law Judge in this proceeding, which had continued for years and had involved many orders by both the judges and the Commission. The Commission had granted interventions to NCPA and to Southern Cities as represented by attorneys from this one law office although there is some question as to whether the Commission was aware that both groups of attorneys were from the same firm. In these circumstances I felt that I should not for the first time, while pressing the participants to get to hearing, inquire into the matter further, especially as it would entail additional delay if new counsel were required to come into the case.

VIII. Matters Raised by Comments

Due to the complexity of this case and the volumes of record and exhibits, a draft of the first six sections of this opinion with ordering clauses was made available to the participants for comments. Comments were filed by PG&E, Edison, San Diego, NCPA, Southern Cities, Santa Clara and Staff. There was also an *amicus* communication from SMUD, a non-

participant. Reply comments were filed by PG&E, Edison, San Diego, NCPA, Southern Cities, Santa Clara and Staff. The Initial Decision in its present form has incorporated changes suggested by the comments or resulting from further consideration in the light of the comments. Most of them are self-explanatory. To the extent they are typographical corrections, factual corrections that do not affect the reasoning or result, or language clarification, nothing need be said here. In some instances, however, matters raised by the comments will be addressed here.

PG&E, Edison and San Diego all state that the Commission has no power to order wheeling. They contend that the remedy of access to the Intertie lines and to PG&E and Edison's grids for the purpose of access to the Intertie constitutes a wheeling order and, therefore, is an inpermissible remedy.

While it is my view that in fashioning a remedy for anticompetitive or unduly discriminatory acts the Commission may order wheeling, this Initial Decision need not rest upon that ground. Insofar as PG&E is concerned, it has undertaken by the Stanislaus Commitments to provide wheeling. This Initial Decision requires modification of the Stanislaus Commitments, which is unquestionably within the Commission's jurisdiction, to cure certain provisions which I have found to be unduly discriminatory, anticompetitive, unjust and unreasonable.

It is also my view that the relief provided under the bottleneck theory as to access to transmission over the Intertie lines requires no wheeling order. Wheeling is the transmission by the operator of one system, over that system's facilities, of the power of another entity. San Diego operates no part of the Intertie lines, either ac or dc. The ac lines are operated by Edison and PG&E and the dc line by LADWP. San Diego does not provide the wheeling service; that is provided by the operators. San Diego merely has a right to have a share in the capacity of both ac and dc lines. What it is directed to do here is to make any unused portion of its Intertie capacity share available to others at all times when it is not being fully used. If LAWDP poses an obstacle to San Diego making available some of its dc line capacity (in accordance with our previous discussion), San Diego is required to cut back on its actual use of the ac lines sufficiently to be able to provide on the ac line what this order calls for it to do, if it cannot do so on the dc line. San Diego has a contractual right to receive wheeling from PG&E and Edison on the ac lines. It is required by this order only to make a portion of its rights available to others. The wheeling obligation of PG&E and Edison arises not from the order of this Commission but from the contract with San Diego. San Diego is not being ordered to wheel but merely to transfer its existing rights to receive wheeling.

Edison, similarly, has a right to transmission by PG&E on the ac lines of power from the Northwest through northern and central California to Edison's area. This wheeling is accomplished by PG&E, not Edison. This would assure the NCPA members and other northern and central California entities that, even in the absence of the Stanislaus Commitments, Edison could transfer to them a portion of its rights to wheeling by PG&E on the ac lines. If LADWP should prevent transferring a part of Edison's rights on the dc line this could be made up by cutting back Edison's ac lines usage and shifting its own demands to the dc line. The Matrix agreements between Edison and Southern Cities would take care of the transmission within Edison's own territory including access to and from the Intertie line over Edison's general grid. As to other southern California entities, although they have not yet come into this case, if they should seek transmission it would be unduly discriminatory for Edison to refuse service to similar entities on terms similar to what it has provided in the Matrix agreements.

As far as PG&E is concerned, it is committed by the Stanislaus Commitments to provide transmission without undue discrimination both on the Intertie and on its own general grid. This includes both interstate and intrastate transmission on the Intertie. Again, to the extent LADWP may frustrate use of PG&E's capacity on the dc line, this can be offset by PG&E cutting back on its own ac lines transmission. Intrastate transmission by PG&E to the southern California area would take place pursuant to the Stanislaus Commitments. This obligation arises not from the Commission order but from PG&E's obligation under the Stanislaus Commitments. Any agreement for transmission under the Stanislaus Commitments will, of course, be subject to filing with this Commission. San Diego, Edison and PG&E will be directed to file with this Commission, in this proceeding, any contracts entered into to provide access to the Intertie, or to PG&E's or Edison's general grid for purpose of access to and from the Intertie.

If it were necessary to order wheeling to carry out the remedies provided by this Initial Decision, and if, contrary to my opinion, the Commission lacked authority in this situation to order wheeling, it would be necessary to consider the possibility of other remedies. One

course would be to make the necessary factual findings and suggest that any aggrieved parties apply for relief in a District Court which could order the necessary relief, as was done in the Otter Tail case. The Commission might also consider ordering the admission of smaller utilities to the PIA or to participatory ownership in the Intertie lines with additional ownership in the ac lines to offset any inability to obtain rights in the dc line. I could possibly order sale of power by the PIA companies, to entities damaged by exclusion from the Intertie, at rates which would give them the equivalent of what they could obtain by importation of Northwest power if the Intertie were available to them. The remedy here provided will be less disruptive to the operations of electrical systems in California than the other remedies which might be considered.

PG&E has suggested that the material at page 17 should be omitted or that the Initial Decision should indicate that there was no improper action on the part of PG&E counsel. There was no intention to express approval or disapproval of any action of counsel for any party. In considering what arrangements should be ordered among the parties to the California Power Pool, including potential members, it seemed relevant to consider whether they would be able to work together and the extent to which cooperation might be impeded by poor personal relationships. The relationship between some NCPA counsel and some PG&E counsel was unfriendly. It seemed relevant therefore, both to this Initial Decision and to possible changes which the Commission might consider, that this lack of friendliness did not extend to relationships between PG&E executives and the executives of NCPA members. The CPPA operating relationships will be between executives, not counsel. At the time of hearing NCPA did not have executives. Nevertheless, the fact that its members' executives and the PG&E executives had amicable relations seems to indicate that we need not expect hostility between NCPA's executives and those of PG&E. I do not find that the language on page 17 should be eliminated. In the light of counsel's concern, however, I will emphasize at this point that no criticism of counsel was intended or implied by the language on page 17.

PG&E has suggested (Comments, p. 28) that, in considering reserve requirements in connection with firm power, one requirement should be that the source of firm power be not more than one control area away from a California Power Pool member. This might be a reasonable requirement if the question were purchases of spinning reserves necessary to back up power generated by the purchaser. Such spinning reserves should be capable of being promptly available and are completely independent of the power which they back up. PG&E's recommendation, however, was made in connection with reserves for purchased firm power. The seller of the firm power will have provided reserves, including spinning reserve, to back up its own generation and these reserves will be immediately available to the seller whether it is one or several control areas removed from the Power Pool. In practice, PG&E's suggested requirement would have very limited application, in all probability, since the purchase of firm supplies becomes more expensive with the distance they must be transmitted.

PG&E (Comments, p. 32) states that the requirement on page 22 of the Initial Decision that NCPA must be allowed to buy spinning reserves from CPP members should be modified to provide that NCPA should also be required to sell spinning reserve to other pool members. The language in the Initial Decision was directed to eliminating possible discrimination against a small utility. The present CPPA parties, in making the required amendment to the CPPA, may draft a broader provision so long as its terms are just and reasonable. It seems unlikely that some of the smaller utilities will have reserves to sell in any significant amount, but if they do, it may be provided for.

PG&E also questions whether Pool members may always have reserves available to sell, and suggests that in the instance compensation might be inadequate. No Pool member or anyone else is required to sell what it does not have or what is needed for the operation of its own system. I fail to see, however, why inadequate compensation need result if reserves, emergency power or any other forms of back up are provided for a Pool member. The supplying entity is entitled to just and reasonable compensation and the CCPA or other filed rate schedule may so provide.

PG&E has urged, in connection with the second criteria for seller's reserves set forth in the discussion of reserves for purchased power under Paragraph 5.01 of the CPPA (p. 25); that not only the level of reserves should be considered, but also the quality. This Initial Decision has attempted to deal with the requirements of the CPPA and with the specific testimony of Mr. Whyte, quoted at page 24. Neither refers to quality of reserves. If the reserves on that system were unreliable for some reason, and a reasonable means were specified for determining this, we would have a different question. At present, I have no provision in this regard upon which to pass.

PG&E has raised the question whether transmission for non-utility entities is required. So far as access to and from the Intertie is concerned, and access to transmission on the Intertie itself, interruptible access is to be given on a non-discriminatory basis to all, both utilities and non-utilities. Since the Intertie cannot accommodate everyone to the full extent they desire, the PIA companies will have to work out how to allot what is available. Their arrangements must be not unduly discriminatory and otherwise just and reasonable, and this Commission may review them, but in the first instance the PIA companies will determine how access will be allotted.

PG&E states it does not interpret the Initial Decision to require it to transmit preference power over the Intertie that PG&E would have bought but for the preference (Response to Comments, p. 18). Intervenors urge that if they can purchase power in the Northwest which PG&E tried to obtain, they should have the right to Intertie transmission PG&E would have used for the power. I cannot accept either view as presented. If a PIA company has Intertie transmission open, it must not deny its use to someone else that has bought power the PIA company wanted. It does not have to reserve capacity to take the power, or hold existing open capacity available until all the particular power has been transmitted. It is suggested PG&E might rush out to buy substitute power to fill the opening on the Intertie and so prevent the original power it lost to another from being transmitted. If it is shown that PG&E bought power for the purpose of excluding another's power from the line, this will be anti-competitive and improper. If it purchases power not in order to exclude someone else but because it has use for the power itself, this is permissible, and transmission may be provided for PG&E's power, if necessary, even if this requires interruption of someone else's transmission. The line is sometimes hard to draw between permissible and impermissible action, but the legal theory is clear.

The reaching of a particular result in this proceeding does not mean that all arguments made in support of that result are accepted. I have attempted to state the extent of remedies here provided, and conclusions that additional remedies must be implied from or must follow on the remedies ordered are usually unwarranted.

It is ordered:

(A) The Stanislaus Commitments, and the contracts referred to in this Initial Decision, shall be modified, interpreted and applied as provided in this Initial Decision.

(B) To the extent any provision of any such contract is herein declared to be unduly anti-competitive, unduly discriminatory or unjust and unreasonable, it shall have no force or effect.

(C) In all instances in which revisions of contract provisions are required, if revision of other provisions of the contract would effect the same results here required, such revision of other provisions may be substituted for or may be coordinated with the required revision. Any revisions to other contract provisions needed to avoid ambiguity, or conflict with the revised provisions or the requirements of this Initial Decision, should also be made. If any such conflict remains after the revisions are incorporated in any contract, the provisions of the revisions, and of this Initial Decision, shall prevail.

(D) Edison, PG&E, San Diego shall give access to the ac and dc lines of the Pacific Intertie, and to their transmission lines necessary for transmission to and from the Intertie, on a non-discriminatory basis in accordance with this Initial Decision, and for rates no more than just and reasonable.

(E) Membership in the California Power Pool shall be available in accordance with this Initial Decision and to the extent provided in the membership clause to be submitted.

(F) Changes in any contract, and the Stanislaus Commitments, required by this initial decision, and all filings required by this Initial Decision, shall be submitted in this proceeding for approval within three months of the date this Initial Decision or any modification thereof becomes final and not subject to review. Such submissions may include modifications or additions permitted but not required by this Initial Decision.

(G) This proceeding shall remain open for the purposes provided by this Initial Decision, including consideration of any modifications to any contract or the Stanislaus Commitments to be submitted for approval.

(H) Except as provided in Ordering Paragraph (F), this proceeding is terminated.

— Footnotes —

[1] "Commission," "the Commission," or "this Commission" refers to the Federal Energy Regulatory Commission or its predecessor, the Federal Power Commission.

[2] NCPA is a public agency of the State of California created by a joint powers agreement pursuant to Chapter 5, Division 7, Title 1 of the California Government Code. Each member of NCPA owns and operates an electric distribution system for the supply of electric power and energy within its boundaries. Five of the member cities—Alameda, Healdsburg, Lodi, Lompoc and Ukiah—have been served for many years exclusively by Pacific Gas and

Electric Company ("PG&E"). Five member Cities—Biggs, Gridley, Palo Alto, Redding and Roseville—together with NCPA associate member Plumas-Sierra Rural Electric Cooperative purchase their entire supply from the U.S. Bureau of Reclamation Central Valley Project ("USBR", "CVP"), marketed by the Western Area Power Administration ("WAPA"). One member city, Santa Clara, purchases from both PG&E and WAPA. NCPA initial Brief p. 2.

3 *Notice of Compliance Filing*

(July 16, 1979)

Take notice that on July 5, 1979, the Southern California Edison Company tendered for filing in compliance with the Commission's order of June 14, 1979:

I. Agreements between Edison and the Department of Water and Power of the City of Los Angeles

A. City—Edison Pacific Intertie DC Transmission Facilities Agreement (Executed March 31, 1966).

B. City—Edison Sylmar Interconnection Agreement (Executed March 31, 1966).

C. Amendment No. 1 to City—Edison Sylmar Interconnection Agreement (Executed February 11, 1971).

II. Other Documents

A. Amendment No. 2 to the Pacific Intertie Agreement dated March 1, 1970.

B. Midway Interconnection Agreement between Pacific Gas and Electric Company (PG&E) and Edison dated March 12, 1970.

C. Pacific Power & Light Company—California Companies Agreement for Use of Transmission Capacity dated August 1, 1967.

D. California Power & Light Company—California Companies Agreement for Use of Transmission Capacity dated August 1, 1967.

E. California Companies Pacific Intertie Agreement Coordination Committee Rulings 1-41.

Also, pursuant to the Commission's order of June 14, 1979, Pacific Gas and Electric Company and San Diego Gas & Electric Company on July 5, 1979, jointly filed:

(1) United States Department of the Interior, Bureau of Reclamation, Central Valley Project, California: Contract with Pacific Gas and Electric Company for installation, operation and maintenance of facilities at Round Mountain, and for the operation and maintenance of Bureau EHV Line, dated July 31, 1967.

(2) United States Department of the Interior, Bureau of Reclamation, Central Valley Project, California: Contract with Pacific Gas and Electric Company for installation, operation and maintenance of facilities at Cottonwood Substation, dated July 31, 1967.

(3) Amendment Number Two to California Pacific Intertie Agreement, dated March 1, 1970.

(4) Midway Interconnection Agreement between Pacific Gas and Electric Company and Southern California Edison Company, dated March 12, 1970.

(5) Letter Agreement dated May 29, 1968 between Pacific Gas and Electric Company and Bureau of Reclamation.

(6) Letter Agreement dated July 9, 1969, between Pacific Gas and Electric Company and Bureau of Reclamation.

(7) Letter Agreement dated November 20, 1967 between Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company.

(8) Letter Agreement dated March 1, 1970 between Pacific Gas & Electric Company, San Diego Gas & Electric Company and Southern Edison Company.

(9) The presently effective rulings of the Coordination Committee of the California Companies Pacific Intertie Agreement (Ruling Nos. 1, 6, 7, 10, 16, 17, 18, 19, 20, 22, 23, 24, 25, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, and 42).

(10) Ruling Nos. 4 and 7 of the Board of Control of the California Power Pool Agreement.

Supplemental Notice of Compliance Filing

(August 1, 1979)

In addition to the filing of the contracts listed on the notice issued in this docket on July 16, 1979, Pacific Gas & Electric Company and San Diego Gas & Electric Company jointly listed the following contracts which are within the scope of the Commission's order but which have already been filed:

Contract—FERC Rate Schedule No.

(1) Letter Agreement dated August 25, 1966—Supplement No. 3 to PG&E Rate Schedule FPC No. 38

(2) Letter of Agreement to Supplement The California Companies Pacific Intertie Agreement For the Two-Year Period April 1, 1968 to March 31, 1970, dated August 25, 1966—Supplement No. 2 to PG&E Rate Schedule FPC No. 38

(3) Illustration of Costs and Revenues Allocation, dated August 25, 1966—Part of PG&E Rate Schedule FPC No. 38, relates to Section 5 of CCPIA and Exhibit C

(4) Amendment Number One to California Companies Pacific Intertie Agreement dated January 10, 1968—Supplement No. 1 to PG&E Rate Schedule FPC No. 38

(5) Agreement For Use of Transmission Capacity Pacific Power & Light Company, Pacific Gas & Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, dated August 1, 1967–PP&L Rate Schedule FPC No. 86

(6) United States Department of the Interior, Bureau of Reclamation, Central Valley Project, California: Contract with California Companies for Extra High Voltage Transmission and Exchange Service, dated July 31, 1967—PG&E Rate Schedule No. 35

(7) Contract Between California Companies and Sacramento Municipal Utility District for Extra

High Voltage Transmission and Exchange Service, dated August 1, 1967—PG&E Rate Schedule FPC No. 37

(3) Contract Between State of California and California Companies for the Sale, Interchange and Extra High Voltage Transmission of Electric Capacity And Energy, dated August 1, 1967—PG&E Rate Schedule FPC No. 36

(9) Early Service Agreement, dated August 29, 1967—PG&E Rate Schedule FPC No. 39

(10) Assignment and Agreement Relating to Canadian Entitlement Exchange Agreement, dated March 10, 1966—Exhibit A to PG&E Rate Schedule FPC No. 40

(11) California Entities Canadian Entitlement Power Reassignment Agreement for Years 1968-1970, dated August 29, 1967—PG&E Rate Schedule FPC No. 40

(12) Power Sales Contract executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Pacific Gas and Electric Company, dated July 31, 1967—PG&E Rate Schedule FPC No. 32

(13) Power Sales Contract executed by the United States of America, Department of the Interior acting by and through Bonneville Power Administrator and San Diego Gas & Electric Company, dated December 29, 1967—SCE Rate Schedule FPC No. 35

(14) Power Sales Contract executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Southern California Edison Company, dated July 31, 1967—SCE Rate Schedule FPC No. 33

(15) Exchange Agreement executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Pacific Gas and Electric Company, dated July 31, 1967—FPC Rate Schedule FPC No. 33

(16) Exchange Agreement executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and San Diego Gas & Electric Company, dated December 29, 1967—SDG&E Rate Schedule FPC No. 16

(17) Exchange Agreement executed by the United States of America, Department of the Interior acting by and through the Bonneville Power Administrator and Southern California Edison Company, dated July 31, 1967—SCE Rate Schedule FPC No. 36

In addition to filing the contracts listed on the previous notice issued July 16, 1979 in this docket, Southern California Edison Company listed the following contracts which are within the scope of the Commission's order but which have already been filed:

1. Pacific Intertie Agreement. SCE FPC Rate Schedule No. 40.

2. Illustration of Costs and Revenues Allocation, dated 8/25/66. SCE FPC Rate Schedule No. 40.

3. Letter Agreement between the California Companies, dated 8/25/66 to the Pacific Intertie Agreement. SCE FPC Rate Schedule No. 40.

4. Letter Agreement to Supplement the California Companies-Pacific Intertie Agreement, dated 8/25/66. SCE FPC Rate Schedule No. 40.

5. Amendment 1 to the Pacific Intertie Agreement. SCE FPC Rate Schedule No. 40.

6. Amendment 2 to the Pacific Intertie Agreement. Submitted herewith.

7. PP&L-Calif. Companies-Transmission Agreement. Submitted herewith.

8. USBR-California Companies EHV Transmission and Exchange Service. SCE FPC Rate Schedule No. 37.

9. SMUD-California Companies EHV Transmission and Exchange Service Contract. SCE FPC Rate Schedule No. 39.

10. State-California Companies Sale, Interchange, and EHV Transmission Contract. SCE FPC Rate Schedule No. 38.

11. LADWP-dison Pacific Intertie DC Transmission Facilities Agreement. Submitted herewith.

12. LADWP-SCE Sylmar Interconnections Agreement. Submitted herewith.

13. Assignment and Agreement Relating to Canadian Entitlement Exchange Agreement. SCE FPC Rate Schedule No. 42.

14. BPA-SCE Exchange Agreement BPA No. 14-03-54126. SCE FPC Rate Schedule No. 36.

15. BPA-SCE Power Sales Contract, BPA No. 14-03-54125, SCE FPC Rate Schedule No. 35.

16. Early Transmission Service Agreement with LADWP, dated 8/29/67, SCE Rate Schedule No. 41. Terminated March 31, 1970.

17. 1970 Service Agreement (Extension of Early Service Agreement with LADWP) dated 4/1/70. Terminated May 31, 1970.

18. Midway Interconnection Agreement between PG&E and SCE. Submitted herewith.

19. California Power Pool Board of Control Rulings 4 and 7. Submitted herewith.

20. California Companies Pacific Intertie Agreement Coordination Committee Rulings 1-41. Submitted herewith.

21. Settlement Agreement between Edison and the Cities of Anaheim, Banning and Riverside. See SCE FPC Rate Schedule No. 15.4 (Anaheim), 21.3 (Banning), and 17.4 (Riverside).

22. Settlement Agreement between Edison and the Anza Electric Cooperative, Inc. See SCE FPC Rate Schedule No. 19.2.

23. Settlement Agreement Between Edison and the City of Colton. See SCE FPC Rate Schedule No. 31.5.

24. Settlement Agreement between Edison and the Southern California Water Company. See SCE FPC Rate Schedule No.33.3.

25. Settlement Agreement between Edison and the City of Vernon. See SCE FPC Rate Schedule No. 13.5.

26. Settlement Agreement between Edison and the City of Azusa. See SCE FPC Rate Schedule No. 16.4.

27. Integrated Operations Agreement between the City of Anaheim and Edison. See SCE FPC Rate Schedule No. 95.

28. Integrated Operations Agreement between the City of Riverside and Edison. See SCE FPC Rate Schedule No. 94.

[6] These were:

(1) USBR-SCE Interconnection Contract

(2) Agreement of Parties to the California Power Pool Agreement Concerning City-Edison Pacific Intertie D-C Transmission Facilities Agreement and City-Edison Smylar Interconnection Agreement. Dated March 25, 1966.

(3) Agreement of Parties to the California Power Pool Agreement Concerning City-Edison Pacific Intertie D-C Transmission Facilities Agreement and City-Edison Smylar Interconnection Agreement. Dated April 1, 1966.

(4) Letter of Understanding Regarding Seven Party Agreement Dated January 14, 1969

(5) Intersuppliers Contract

(6) Oroville-Thermolito Power Sale Contract Dated November 29, 1967

(7) Contract Among the California Companies with respect to purchase of power generated at Oroville-Thermolito Power Plant

In addition, the following documents were ordered to be cross-referenced to Docket No. E-7777 (II):

(1) PP&L-PG&E Sales and Energy Exchange Contract

(2) The document superseding the PP&L-PG&E memorandum (Payment for use of PP&L Kv line)

(3) State (California)—Suppliers Contract (including supplements)

[8] The deficient Party shall be excused from making the aforesaid payments to the extent that the Spinning Reserve Deficiency on which they are based was caused by (a) an Emergency on the Area System of any Party, (b) a Capacity Resources Deficiency for which payments are being made in accordance with paragraph 5.03, (c) furnishing Emergency Service or Capacity Resources Standby Service, or (d) forces or conditions which were unpredictable in the sole judgment of the Board of Control.

[¶ 63,049]

Pacific Gas Transmission Company, Docket No. RP83-113-000, et al.; Pacific Interstate Transmission Company, Docket No. RP83-135-000; Pacific Offshore Pipeline Company, Docket No. RP83-136-000; El Paso Natural Gas Company, Docket No. RP83-139-000; Transwestern Pipeline Company, Docket No. RP81-130-007, et al.

Order of Chief Judge Denying Requests for Reconsideration

(Issued February 8, 1984)

Curtis L. Wagner, Jr., Chief Administrative Law Judge.

On December 9, 1983, Pacific Gas Transmission Company and Pacific Gas and Electric Company filed a joint request that the Chief Administrative Law Judge reconsider and reverse his order of December 6, 1983, severing issue and consolidating proceedings in the above-captioned dockets [25 FERC ¶ 63,062]. On December 15, 1983, El Paso Natural Gas Company filed a motion for reconsideration of the above described order of the Chief Judge requesting that the order be modified to permit the minimum bill/minimum take and rate design issues, which have already been heard and briefed in Docket No. RP81-130-000, *et al.*, to be decided without delay or, in the alternative, that the Chief Judge's order be modified to permit the issue in the *Transwestern* case which is unique to that pipeline—whether Transwestern Pipeline Company, through the operation of its minimum bill/minimum take provisions, should be permitted to require Southern California Gas Company, through its affiliate Pacific Lighting Gas Supply Company to purchase and receive from Transwestern quantities of gas which Transwestern itself is purchasing on a "best-efforts" basis from intrastate and interstate sources—to proceed to an early decision. On December 16, 1983, the Gas Service Company filed a motion for reconsideration of the portion of the Chief Judge's order which severs the minimum bill issue and related rate design matters from Docket No. RP81-130-000, *et al.*, and consolidates those issues with the proceeding in Docket No. RP83-113-000, *et al.* Answers were filed on December 23, 1983, by Transwestern Pipeline Company opposing Pacific Gas Transmission Company's and Pacific Gas and Electric Company's motion, and on December 30, 1983, by Arizona Public Service Company, Gas Company of New Mexico, Southern Union Gas Company and Southwest Gas Corporation opposing Pacific Gas Transmission Company's and Pacific Gas and Electric Company's motions, but supporting El Paso Natural Gas

CASE TITLE: PG&E v. City of Healdsburg, et al.

COURT/CASE NO: Sonoma County Superior Court, No. 127234

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814; I am over the age of eighteen years and am not a party to the foregoing action.

On September 4, 1984, I served the document named below on plaintiff by placing a true copy thereof in an envelope addressed to plaintiff's counsel as follows:

ROBERT OHLBACH, ESQ.
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
RANDALL J. LITTENEKER, ESQ.
77 Beale Street, Room 101
San Francisco, CA 94106

Federal Express Airbill No. 774-908-643

which envelope, with delivery charges thereon to be billed to my employer's Federal Express account, was then sealed and delivered to a representative of Federal Express in Sacramento, California.

In addition, I served the document named below on plaintiff by placing a true copy thereof in an envelope addressed to plaintiff's counsel as follows:

ROBERT OHLBACH, ESQ.
SHIRLEY A. SANDERSON, ESQ.
STUART K. GARDINER, ESQ.
RANDALL J. LITTENEKER, ESQ.
P. O. Box 7442
San Francisco, CA 94120

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mail box regularly maintained by the United States Postal Service in Sacramento, California.

DOCUMENT SERVED: APPENDICES TO DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEMURRER

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 1984, at Sacramento, California.

Barbara Gordon

Barbara Gordon

McDONOUGH, HOLLAND & ALLEN
A PROFESSIONAL CORPORATION