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

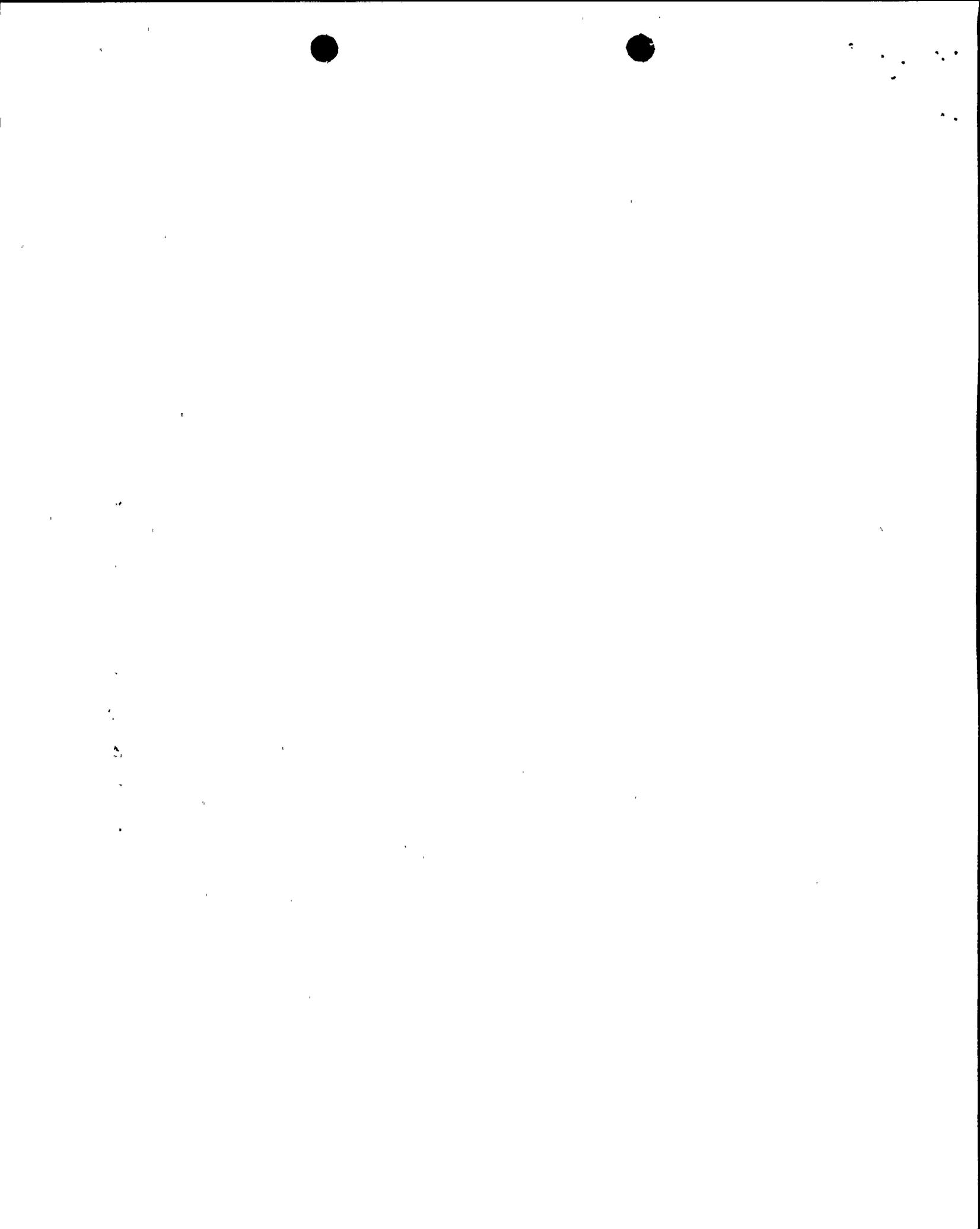
However, in light of the conclusions reached by the District Court regarding PG&E's non-compliance with the Diablo Canyon license conditions\*, I am specifically requiring PG&E to report to me in writing within 30 days of its receipt of this order regarding the steps it has taken and plans to take in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

## II. BACKGROUND

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

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

\*\*An additional violation not dealt with in the District Court's decision concerns license condition 9(a). For this violation, I am requiring PG&E to report whether the practices have been discontinued and the steps PG&E has taken or will take to cure the problem.



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

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

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

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

#### A. NCPA's Petitions

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



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

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



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

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

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



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

- (2)f--Interconnection agreements,
- (7)a--Providing transmission services,
- (7)d--Filing rate schedules and agreements for transmission services,
- (9)a--Implementing rates, charges and practices subject to the appropriate regulatory body.

#### B. District Court Proceeding

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



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

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

(b) Nothing in this Agreement shall be interpreted in such a way as to prevent [the City] from seeking to obtain Power from sources other than PG&E . . . .

(c) In the event [that the City] is able to obtain . . . Power from sources other than PG&E and still wishes to continue purchasing some Power from PG&E, at [the City's] request the Parties shall endeavor in good faith to amend, supplement or supersede this Agreement in order to accommodate [the City's] purchase and use of such other sources of Power on terms and conditions which are just and reasonable. [United States of America v. Pacific Gas and Electric Company, supra, at 1052-1053.]



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

### III. DISCUSSION

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

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



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

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

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



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

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

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

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



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

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

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



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

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

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

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

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



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

IV. CONCLUSION

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

Original signed by,  
Thomas E. Murley

Thomas E. Murley, Director  
Office of Nuclear Reactor Regulation

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

Distribution [DIABLO]

Docket Files 50-275A, 50-323A  
PTSB Rdg            NRC PDR            HRood  
WLambe            PMAS Rdg.           LPDR  
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\*SEE PREVIOUS CONCURRENCE

PTSB:PMAS\*  
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D: NRR  
T Murley  
6/14/90



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