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SUBJECT: Responds to 900614 notice of violation & 900614 director's decision under 10 CFR 2.206.

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President

September 28, 1990

PG&E Letter No. DCL-90-235

Dr. Thomas E. Murley, Director
Office of Nuclear Reactor Regulation
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Re: In the Matter of Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant, Units 1 and 2,
Docket Nos. 50-275A and 50-323A.

Subject: Reply of Pacific Gas and Electric Company to Notice of Violation for Diablo Canyon Nuclear Power Plant, Units 1 and 2, dated June 14, 1990, and Director's Decision Under 10 C.F.R. 2.206 dated June 14, 1990.

Dear Dr. Murley:

This Reply is the response of Pacific Gas and Electric Company ("PG&E") to the above captioned Notice of Violation ("NOV") and Director's Decision, regarding alleged violations of certain conditions of PG&E's operating licenses for Diablo Canyon. This Reply also responds to the request of your Office of General Counsel that PG&E explain its position regarding the alleged violations prior to any discussion regarding possible clarification of the NOV. Finally, this Reply responds to the direction of the Director of the Office of Nuclear Reactor Regulation ("Director") that PG&E provide a written statement of steps it has taken and intends to take (1) to comply with the decision of the federal district judge in U.S. v. Pacific Gas and Electric Company, 714 F. Supp. 1039 (N.D. Cal. 1989)(the "June 8th Order") and (2) to eliminate certain language from its wholesale electric tariffs and schedules on file with the Federal Energy Regulatory Commission ("FERC").

With respect to the alleged violation of license condition (7) of the Diablo Canyon licenses, PG&E reaffirms that it will abide by any final decision no longer subject to appeal in the litigation referred to above. PG&E also affirms that it will take appropriate steps to comply with the final outcome of that litigation in subsequent transactions.

As you may be aware, the federal court litigation is far from over. PG&E intends to appeal from the federal district court judgment after it is entered, because in PG&E's opinion the June 8th Order contains significant errors which could adversely impact our ratepayers. For this reason, it would be premature to rely on the findings in the June 8th Order. Accordingly, in order to protect its right to appeal and preserve the status quo pending appeal, PG&E renews its previous request that the Director either vacate or stay the Decision and related NOV concerning license condition (7) (See DCL-90-163).

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With respect to the alleged violation of license condition (6), the Director's finding is contrary to the court decision upon which it appears to be based. License condition (6) does not permit full requirements customers to unilaterally rewrite the terms and conditions of their contracts on demand. Accordingly, PG&E requests that the Director find that PG&E has not violated license condition (6).

Finally, PG&E contests the finding that it has violated license condition (9)a. The provision found in PG&E's wholesale contracts which is in issue does not restrict the ability of PG&E's customers and interested parties to contest the terms and conditions of tariffs and schedules filed by PG&E. To the contrary, it has been described as a "standard" provision by FERC, consistent with the requirements of the Federal Power Act. Nor does license condition (9)a require PG&E to make unilateral filings at FERC.

Accordingly, PG&E denies that it has violated license conditions (6), (7) or (9)a, as alleged in the NOV. As your Office of General Counsel is aware, PG&E concurrently is filing a petition in the United States Court of Appeals for the District of Columbia Circuit for review of the Director's Decision. We consider this petition to be protective of PG&E's right to seek review of the Director's Decision. However, we have expressed to your Office of General Counsel our willingness to postpone the review by mutual consent of the Commission and PG&E pending the appeal from the federal district court judgment.

I. OVERVIEW

A. The Commitments.

In 1976, PG&E entered into the so-called Stanislaus Commitments (the "Commitments") with the U.S. Department of Justice as a settlement of an antitrust review occasioned by PG&E's application for a construction permit for its proposed Stanislaus Nuclear Project. After it withdrew its application for that Project, PG&E agreed to have the Commitments incorporated into its operating licenses for the Diablo Canyon Nuclear Power Plant.

PG&E has long treated the Commitments as a significant and serious obligation. Among other things, the Commitments obligate PG&E to provide transmission services pursuant to interconnection agreements with a defined group of utilities, and PG&E does so. According to a federal task force, PG&E apparently now engages in more transmission for other utilities than any other utility in the country. See The Transmission Task Force's Report To The Federal Energy Regulatory Commission, October 1989, p. 45. Indeed, the municipal electric utilities in PG&E's control area all receive transmission services through their interconnection agreements with PG&E. The Northern California Power Agency ("NCPA"), which initiated the 10 CFR 2.206 proceeding on which this NOV is based, currently buys only a small fraction of its energy from PG&E, using instead PG&E transmission services to access its own remote generation and to purchase power from others.

The Commitments, however, are not themselves a transmission tariff. They contemplate, instead, that PG&E and the requesting entity will negotiate in

good faith to establish specific terms and conditions that are suited to the requested services. Thus, the Commitments provide that PG&E "shall transmit power pursuant to interconnection agreements, with provisions which are appropriate to the requested transaction" (license condition (7)a).

Nothing in the Commitments obligates PG&E to transmit power in the absence of such an interconnection agreement. Nor do the Commitments require PG&E to enter into such an agreement when the proposed seller does not have the lawful ability to sell such power, when the proposed purchaser does not have the lawful or contractual authority to buy it, or when the request is for services to be provided on dates that have already passed. It is PG&E's position that the events that gave rise to the matter now before the NRC involve all of those circumstances.

B. The 1982 WAPA-Cities Dispute.

In 1982, six cities in PG&E's control area asked PG&E to provide short-term transmission services for power they, through their joint powers agency, the Northern California Power Agency ("NCPA"), wanted to purchase from the Western Area Power Administration ("WAPA"). In response, PG&E pointed out that it would have little difficulty reaching sensible transmission arrangements for proposed transactions that were otherwise valid. However, PG&E declined to accommodate the requested wheeling because it reasonably and in good faith believed that the proposed transaction was outside of WAPA's statutory authority, and would violate WAPA's system integration contract with PG&E. PG&E also believed that its full requirements contracts with the six cities did not permit the proposed transactions, since those contracts obligated the Cities to buy all their power from PG&E (three of the cities had provisions in their contracts that allowed them to search for other power sources.)

Finally, PG&E believed that the request was not warranted for a portion of the period involved, since the Cities wanted wheeling beginning in early May 1982, even though they did not enter into a contract with WAPA until May 28th, and a contract could not have been negotiated and made effective by FERC until some time later. In fact, the final agreement between WAPA, NCPA and the six cities was not signed until November 3, more than a month after the proposed transactions would have been over.

PG&E offered to discuss the matter with the Cities. When the matter could not be resolved amicably, the Cities and WAPA simply "declared" the power sold and wheeled.

C. The Federal District Court Proceedings.

WAPA sued PG&E and the Cities in federal district court (the "federal action"). The Cities through NCPA also petitioned the NRC to declare that PG&E had violated the Commitments, although they apparently asked the NRC to withhold decision pending the outcome of the federal action (Director's Decision p. 1).

The June 8th Order affirmed PG&E's position in certain critical respects. The Order found that the wheeling request was at odds with the "full requirements" provisions of the power sales contracts that three of the cities had freely

negotiated with PG&E (Lodi, Alameda, and Ukiah). The Order further found that the Commitments did not relieve those three cities of their contractual obligations. Consequently, the Order found that PG&E had breached neither the power sales contract nor the Commitments with respect to those cities.

The June 8th Order interpreted the specific provisions of PG&E's power sales contracts with the other three cities (Healdsburg, Lompoc, and Santa Clara) in conjunction with Article 7 of the Commitments, to require PG&E to accommodate the proposed transaction. Final judgment has not yet been entered in the federal district court litigation; when it is, PG&E plans to appeal, challenging a variety of factual findings unsupported by the record, and legal findings contrary to established law, including the finding that PG&E violated Article (7) of the Commitments.

II. DISCUSSION

The NOV and Director's Decision found that PG&E had violated license conditions (6), (7), and (9)a. This Reply contests each of those findings, and the following sections address those findings in sequence.

A. PG&E Has Not Violated License Condition (6).

License condition (6) provides that PG&E "shall offer to sell firm, full or partial requirements power for a specified period to an interconnected Neighboring Entity or Neighboring Distribution System..." The Director's Decision states that "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." (Decision at 9). The NOV states that "[c]ontrary to [license condition (6)], in 1982 [NCPA], a Neighboring Entity, and the City of Healdsburg, a Neighboring Distribution System, requested partial requirements power from PG&E, as part of an attempt by them to purchase part of their bulk power supply from [WAPA]. PG&E refused to sell partial requirements power as requested." These findings are contrary to the law and the facts, and PG&E denies that it has violated license condition (6) in any respect.

The finding as to license condition (6) appears to be premised on the June 8th Order, but is not in fact supported by that Order. The June 8th Order did not find that PG&E had refused to sell full or partial requirements power, nor did it conclude that PG&E had violated license condition (6). Nor is such a finding supported by the facts. NCPA and the Cities did not ask for additional requirements power services from PG&E in the 1982 transaction -- instead they wanted to purchase power from WAPA. In fact, license condition (6) became an issue in the federal district court litigation solely because NCPA argued that this provision allowed the Cities to disregard their existing full requirements contracts with PG&E. In concluding that PG&E has violated license condition (6), the Director appears to agree with NCPA's longstanding contention that the Commitments permit wholesale customers to disregard existing contracts merely by requesting a new contract. This assertion was expressly rejected by the federal district court, and should be rejected by the Director as well.

In the June 8th Order, the Court noted that the contracts of Lodi, Ukiah, and Alameda were full requirements contracts, under which those cities were committed to purchase all their power from PG&E. The Order rejected the Cities' argument that "the Stanislaus Commitments allow the Cities unilaterally to terminate or modify full requirements contracts with PG&E made after the Commitments took effect." 714 F. Supp. at 1051. The Order stated:

> "[t]hough NCPA and Cities claim the right to do so under the Commitments, they have come forward with no supporting evidence or argument.... Had they wanted to, the Cities [in 1981] could have entered into contracts for partial requirements service. They did not do so.... The Commitments specifically contemplate that sales would be 'under a contract,' implying an exchange of obligations. To the extent that the Cities obligated themselves to take their full requirements from PG&E in exchange for PG&E's obligation to supply them, they cannot look to the Stanislaus Commitments for an escape clause." 714 F. Supp. at 1051-52 (footnotes omitted).1/

The Director's Decision and NOV expressly state that PG&E violated license condition (6) by denying NCPA's request in 1982, apparently finding that PG&E should have allowed all six cities to modify their contracts upon demand. That is directly at odds with the June 8th Order, is unsupported by the facts, and would make the negotiation of long term power contracts an idle act. Since the finding that PG&E has violated license condition (6) appears to have been based solely on the June 8th Order, and since it is contrary to that decision, it should be vacated.

B. PG&E Has Not Violated License Condition (7).

1. If The Findings As To License Condition (7) Are Based On The Federal Court Litigation, They Are Premature Until That Litigation Has Been Concluded.

Both the Director's Decision and NOV expressly state that they are based upon the federal district court findings. For these reasons, the Director should vacate or stay this proceeding until there is a final decision in the federal litigation. If PG&E prevails on appeal, then the Director's Decision and NOV would have no foundation and would require reversal. See Massie v. Hennessey,

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1/ The June 8th Order found that the three other cities had "alternate power clauses" in their contracts with PG&E which permitted them to seek to obtain power from sources other than PG&E. The Order found that these clauses allowed these cities to purchase from WAPA, notwithstanding PG&E's good faith belief that the transaction was unlawful. (PG&E believes that this decision was erroneous and intends to appeal it.) However, the Order's finding was based on the terms of those contracts, and was not based on a finding that PG&E had violated license condition (6). Therefore, this portion of the June 8th Order also cannot provide a basis for the NOV and Director's Decision.

875 F.2d 1386, 1390 (9th Cir. 1989) (a reversed judgment cannot serve as a basis for disposition on the ground of res judicata or collateral estoppel); Ornellas v. Oakley, 618 F.2d 1351, 1356 (9th Cir. 1980) (same). Thus, the Director should either vacate or stay the Director's Decision and NOV in order to permit the course of litigation to proceed properly and to postpone (if not obviate) the briefing and arguing of the protective petition for review of the Director's Decision. 18 Wright, Miller & Cooper, Federal Practice & Procedure, section 4433, p. 312-13 (1981).

This approach has long been recognized. As Wright, Miller & Cooper recommend, "[t]hese difficulties suggest that ordinarily it is better to avoid the res judicata question by dismissing the second action or staying [it]." Federal Practice & Procedure, supra, p. 313. See also, In re Professional Air Traffic Controllers Organization, 699 F.2d 539, 544 n. 18 (D.C. Cir. 1983), citing Restatement (Second) of Judgments §16 comment b (1982) ("court asked to accord a judgment preclusive effect may be well advised to stay its own proceedings to await the ultimate disposition of the judgment on appeal").

Such a resolution is especially appropriate where, as here, no nuclear safety issue is involved and the only remedy sought by the Director is notification of the steps PG&E has taken or intends to take to comply with the district court's order. Plainly, PG&E will comply with the orders of the district court in the event those orders are sustained on appeal. And, pending the outcome of any such appeal, the interests of NCPA and the Cities will not be harmed by a stay, as the Cities admitted by their earlier request that the Director withhold decision in this docket pending the outcome of the federal court action. See Director's Decision at 1.

Thus, fairness and equity dictate, and prudential expenditure of agency and judicial resources compel, that this enforcement action should be stayed.

2. If The Director's Decision Is Based On Its Own Evaluation, It Is Contrary To The Facts And To The Law, Is Arbitrary In The Absence Of An Adjudicated Record, And Is Not Supported By An Adequate Statement Of Decision.

The Director's findings as to license condition (7) appear to be based solely on the June 8th Order. However, in letters dated July 5, 1990 and August 3, 1990, NCPA argued that the Director's Decision was based on an analysis independent of that of the federal court. If this is accurate and PG&E is incorrect in its reading of the Decision, then the Decision, among other things, is not supported by an adequate record and fails to provide litigants with an adequate statement of the basis for the decision.

Moreover, even if the Decision were based on an analysis independent of the June 8th Order, the facts and applicable law would continue to be in dispute. On the merits, as PG&E will explain in its appeal from the federal court litigation, PG&E in fact fully complied with the Commitments in 1982. PG&E contends that it was not obligated to wheel WAPA power because WAPA could not sell it and the Cities could not buy it, and WAPA had no statutory authority to broker surplus power, as it attempted to do in this case. Moreover, the

Cities were bound by the full requirements provisions of their Power Sale Contracts with PG&E, in the absence of an amendment to those agreements, negotiated in good faith. Moreover, the request for wheeling, to be provided retroactively and during a period in which no FERC-approved interconnection agreement was in place, was contrary to the Federal Power Act.

Equally significant, even if PG&E were wrong as to these matters, it believed in good faith that they were correct, and will adhere to that belief until the matters have been finally adjudicated. It is PG&E's position that the Commitments cannot be read to impose an obligation to wheel power that the regulated utility believes in good faith cannot be sold or purchased.

Finally, the finding that PG&E violated license condition (7) creates bad public policy. If a utility is obligated to wheel pursuant to the Commitments, even though it believes in good faith that the transaction is illegal, it is put to an impossible choice. Either PG&E provides the wheeling service, which may result in injury to its customers and third parties, or it refuses and runs the risk that it will be found to have violated its NRC license obligations. Forcing a responsible utility to make this choice is neither prudent nor required by the Commitments. The findings as to license condition (7) should be reversed, or stayed pending the outcome of the appeal of the June 8th Order.

C. PG&E Has Not Violated License Condition (9)a.

License condition (9)a 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.

The Director found that the following provision (the "as-filed" provision) in PG&E's tariffs with the City of Healdsburg and with NCPA violates license condition (9)a:

> 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. [Emphasis added by NRC.]

The NOV contains this explanation:

> The underlined language above 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 stalling any agreement or resolution of differences 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. Examples of these provisions are contained in PG&E's tariffs with the City of Healdsburg dated April 20, 1981 and with NCPA dated July 29, 1983. 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, which has jurisdiction over the transmission or sale of energy required under the license conditions. PG&E has failed to file the required service schedules or has included provisions in service schedules that restrict the FERC from ruling upon rates, terms, and practices as is the customary practice for such filings before the FERC. [NOV at 3.]

The rationale offered in the Director's Decision uses virtually identical language, with the substitution of the following for the last sentence: "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." Director's Decision at 11.

The Director's Decision on these issues contravenes settled FERC precedent recognizing the legitimacy of as-filed conditions. It is also premised on a fundamental misreading of condition (9)a. Before addressing the specific provision included in PG&E's contracts, and why it belongs in a negotiated contract, it is appropriate to provide some background on FERC ratemaking and contracts.

1. Contracts v. Unilateral Filings At FERC.

Unlike some industries where rates are set on a uniform "common carrier" basis, the terms and conditions of wholesale electric service are usually set by negotiated contract. As the U.S. Supreme Court observed, "only a relatively few wholesale transactions are governed by the [Federal Power Act] and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements ... the Federal Power Act permits the relations between the parties to be established initially by contract ..." United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338-39 (1956) (decided under the Natural Gas Act). See also Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956) (interpretation of the Federal Power Act is the same). Consequently, under the Federal Power Act, FERC is required to give "substantial weight" to contracts between utilities and their wholesale customers. See Union Electric Co. v. Federal Energy Regulatory Commission, 890 F.2d 1193 (D.C. Cir. 1989).

This does not mean that electric utilities are precluded from making unilateral filings at FERC. But, there are important differences between negotiated bilateral contracts and unilateral filings. Almost by its nature, a unilateral filing contemplates protracted litigation before FERC. The utility will often file for rates at the upper end of a "zone of reasonableness." Federal Power Commission v. Conway Corp., 426 U.S. 271, 278 (1976). It is allowed to do so since "statutory reasonableness ... allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951). The customer will try to persuade FERC to set the lowest possible rate. By reaching a negotiated agreement, on the other hand, the parties seek to avoid the uncertainties of the regulatory process by resolving contested matters between themselves. Both the utility and the customer often make significant concessions in order to reach a balance that is acceptable to both sides.

PG&E does not include the "as-filed" provision when it makes a unilateral filing, but only when it files a bilateral, negotiated agreement. However, even in the case of a negotiated agreement which contains an "as-filed" condition, FERC has the final say. Only those terms and conditions found just and reasonable by FERC are allowed to govern the relations between the parties.[2/] The fact that the parties have agreed to those terms and conditions, however, is a factor that FERC is obligated to give significant weight. See, e.g., Tennessee Gas Pipeline Co. v. FERC, 824 F.2d 78, 82 (D.C. Cir. 1987); ANR Pipeline Co. v. FERC, 771 F.2d 507, 519 (D.C. Cir. 1985).

2. FERC Approval Of "As-Filed" Conditions.

The Director's Decision states that "as-filed" conditions preclude parties from contesting terms of the "service schedule" and deprive FERC of jurisdiction to rule on rates, terms and conditions. This is simply not so. As FERC has consistently held, the "as-filed" condition merely ensures that the legitimate expectations of the parties to a negotiated service agreement -- which is in the nature of a settlement -- will not be defeated by the regulatory process.

There is nothing unusual about "as-filed" conditions. Their use at FERC is so commonplace that FERC has referred to them as a "standard reservation." Florida Gas Transmission Co., 51 F.E.R.C. ¶ 61,309, 62,000 (1990) ("Article XXII sets forth standard reservations that the Stipulation and Agreement is . . . of no effect unless approved in its entirety without modification. . . .").

2/ As the Supreme Court has explained in interpreting parallel provisions of the Natural Gas Act, the Act "permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts which to that end must be filed with the Commission and made public." United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338-39 (1956).

Moreover, the fact that parties have agreed to an "as-filed" condition in no way limits the ability of parties to challenge, or FERC's authority to review, the reasonableness of the underlying contract. FERC has specifically recognized that, notwithstanding an "as-filed" condition, it remains "obligated to review each aspect of the [agreement]. . . ." Id. at 62,021. See also Transcontinental Gas Pipeline Co., 48 F.E.R.C. ¶ 61,399, at 62,626 (1989) (modifying settlement that had been presented to FERC as a "nonseverable package").

In fact, FERC has expressly found acceptable an "as-filed" condition in a PG&E interconnection agreement with the Modesto Irrigation District (MID), a neighboring entity entitled to Commitments service.[3]/ Responding to an intervenor's argument that the condition deprived the FERC of jurisdiction to review the agreement's compliance with regulatory standards, the FERC said:

> We also believe that the provision by which PG&E can terminate the Agreement if the Commission changes it is acceptable. . . . We do not believe the termination provision eliminates any of their rights or protection, nor does it eliminate our regulatory prerogative to review the Agreement in light of public interest considerations. [Pacific Gas and Electric Company, 44 F.E.R.C. ¶ 61,010 at 61,053 (1989).]

Indeed, FERC entered this holding even though it modified certain provisions of the PG&E/MID contract.

Nor does the "as-filed" condition preclude PG&E or other parties from accepting FERC's modification. The parties are free to waive the "as-filed" condition, or, as was the case with PG&E and MID, to renegotiate the agreement to deal with FERC's concerns.

Thus, contrary to the Director's Decision and the NOV, an "as-filed" condition does not "provide[] PG&E with an unfair advantage in its dealings with other power systems in the Northern California bulk power services market." It merely protects the expectations of all parties to an agreement, freely negotiated, against an unanticipated regulatory change -- a purpose that the FERC itself has recognized as legitimate. See Gulf States Utilities Co., 55 F.P.C. 1784, 1801 (1976) ("We cannot say that a requirement in a contract that it is not effective until finally approved by this Commission without conditions unacceptable to the parties is a per se violation of the Act or not in the public interest.").

3/ The provision reads:

> This agreement is expressly conditioned upon FERC's acceptance of the entire Agreement, without material change or condition unacceptable to either party; and shall not become effective unless so accepted.

Elimination of the "as-filed" condition will have no salutary effects. If anything, it will discourage negotiated agreements and increase the likelihood of litigation on unilaterally filed rate schedules. Neither party will have any assurance that a negotiated agreement will stand as a final statement of their rights and obligations. With such exposure, the service provider may well conclude that its interests are better protected with a unilateral filing. It is that result, not the inclusion of an "as-filed" condition, which would be inconsistent with the intent and letter of the Commitments that they are to be implemented by negotiated agreements.

License condition (9)a plainly does not preclude the incorporation of an "as-filed" condition in an implementing interconnection agreement. FERC has approved such conditions and understands their purpose and effect. Their elimination will frustrate negotiations and increase litigation at FERC, contrary to the intended means of implementing the Commitments and to the underlying premise of the Federal Power Act.

3. Unilateral Filings.

The Director also found that 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." NOV at 3; Director's Decision at 10. Although not expressly alleged as a violation, the statement is in the NOV and to prevent future regulatory disputes, PG&E feels compelled to address this finding as well.

The Director's Decision finds no support in the language of license condition 9(a). Indeed, by its terms, condition 9(a) does not impose any affirmative obligations on PG&E. It simply provides that: "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." The same or similar provisions are found in the antitrust license conditions for virtually all nuclear power plants, and the meaning of those provisions is equally common -- to assure that private agreements implementing bulk power transactions are not insulated from otherwise applicable state and federal regulation.4/ Nothing in license condition 9(a) suggests an intention to

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4/ Indeed, condition (9)a parallels two provisions of the Atomic Energy Act which preserve the jurisdiction of state and federal regulators over power generated at commercial nuclear power plants and over transactions involving such power. Section 271 provides, in pertinent part:

> Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State, or Local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission . . . . [42 U.S.C. § 2018 (1988).]

Section 272 provides that:

overcome the fundamental premise of the Federal Power Act that parties would establish their relationships through negotiated agreements rather than have them defined and imposed by FERC in the first instance.

This reading is confirmed by other provisions of the Commitments as well. Thus, license condition 7(a) specifically provides that PG&E "shall transmit power pursuant to an interconnection agreement, with provisions which are appropriate to the requested transaction." And, license condition 9(e) explicitly states that the "conditions do not require PG&E to become a common carrier." This language clearly negates any suggestion that the Commitments require unilateral tariff filings by PG&E. To the contrary, it is only when PG&E and an individual neighboring entity have reached an agreement with "appropriate" provisions for a specific transaction that PG&E has an obligation to provide service.

The same is true of the Commitments provisions relating to Wholesale Power Sales, license condition (6). While those provisions state, in part, that "PG&E offer to sell firm, full or partial requirements power for a specified period to a neighboring entity," they do not purport in any way to define the terms of the proposed offer. Once again, private negotiations and, ultimately, agreement and FERC approval are required before the proposed transaction can be implemented.

Any doubt about this is easily resolved by reference to antitrust conditions in other NRC licenses that explicitly require unilateral filings at FERC. For instance, section X(b) of the license for Florida Power and Light Company's St. Lucie 2 provides that:

> In the event that the Company and a requesting entity are unable to agree regarding transmission services required to be provided under this Section X, Company shall, upon the request of such entity, immediately file a service agreement at the Federal Energy Regulatory Commission or its successor agency providing for such service. [Emphasis added.]

Similarly, condition (8) of the antitrust license conditions for Georgia Power Company's Vogtle 1 & 2 reactors specifically requires Georgia Power to file and maintain "an appropriate transmission tariff available to any entity." (Emphasis added.)

> Every licensee under this Act who holds a license from the Commission for a utilization or production facility for the generation of commercial electric energy under Section 103 and who transmits such energy in interstate commerce or sells it at wholesale shall be subject to the regulatory provisions of the Federal Power Act. [42 U.S.C. § 2019 (1982).]

PG&E to file service schedules with the FERC even if the parties do not agree to all of the proposed terms and conditions." Rather, condition (9)a serves only to clarify that whatever agreements ultimately are reached with neighboring entities under the license conditions remain subject to the Federal Power Act.

The obligation under the Commitments to negotiate in good faith is a serious one that obligates PG&E to be reasonable in its negotiations, or risk NRC sanctions if its negotiations are improper. However, the Commitments, and license condition 9(a) in particular, do not require PG&E to substitute FERC's regulatory mechanism for such negotiations. Thus, for the reasons stated above, the findings of the NOV and Decision are in error.

III. CONCLUSION

For the reasons stated above, PG&E denies that it has violated conditions 6, 7, and 9(a) of its Diablo Canyon licenses. Should you have any questions regarding the information provided in this response, or would like to discuss this matter further, please contact me or PG&E's attorneys, who are familiar with the related litigation:

Christopher J. Warner
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Subscribed to in San Francisco, California this 28th day of September 1990.

OFFICIAL SEAL
BIANCA E. ZELNIK
NOTARY PUBLIC - CALIFORNIA
San Francisco County
My Commission Expires July 30, 1991

Respectfully submitted,

Pacific Gas and Electric Company

By George A. Maneatis
George A. Maneatis
President

Howard V. Golub
Richard F. Locke
Attorneys for Pacific
Gas and Electric Company

By Richard F. Locke
Richard F. Locke

Subscribed and sworn to before me
this 28th day of September 1990

B. E. Zelnik
Bianca E. Zelnik, Notary Public
for the City and County of San Francisco
State of California

My commission expires July 30, 1991.

5023S/0085K

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