

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC COMPANY)	Docket Nos. 50-275-LR
)	50-323-LR
(Diablo Canyon Nuclear Power Plant,)	
Units 1 and 2))	

NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF
ATOMIC SAFETY AND LICENSING BOARD DECISION (LBP-10-15)
ADMITTING AN OUT OF SCOPE SAFETY CONTENTION
AND IMPROPERLY RECASTING AN ENVIRONMENTAL CONTENTION

Maxwell C. Smith
Catherine E. Kanatas
Susan Uttal
Lloyd B. Subin
Counsel for NRC Staff

August 19, 2010

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ISSUES PRESENTED	3
PROCEDURAL HISTORY	3
DISCUSSION.....	5
I. Legal Standard for Interlocutory Review	5
II. The Commission Should Reverse the Board’s Admission of TC-1, an Out of Scope Contention.....	6
A. The Board Incorrectly Held that TC-1 Was Within the Scope of this License Renewal Proceeding.....	8
1. Admission of TC-1 Rests on an Interpretation of 10 C.F.R. § 54.29 That is Contrary to Commission Precedent.....	8
2. Admission of TC-1 Undermines the Limited Scope of Part 54 License Renewal Proceedings.....	11
3. Admission of TC-1 Contravenes 10 C.F.R. § 54.30(b).....	16
B. The Board’s Error Will Have a Pervasive and Unusual Effect on This Proceeding	18
III. The Commission Should Reverse the Board’s Admission of EC-1 as Recast by the Board.....	21
A. The Board Improperly Imposed a Requirement that an Applicant’s SAMA and the Staff Meet CEQ Regulation 40 C.F.R. § 1502.22 to Satisfy NEPA	22
B. The Board’s Error Will Have a Pervasive and Unusual Effect on This Proceeding	24
CONCLUSION	25

TABLE OF AUTHORITIES

Page

ADMINISTRATIVE DECISIONS

Commission

AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461 (2008)..... 8, 9

Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC 331 (2009)..... 1

Dominion Nuclear North Anna, LLC (ESP for North Anna Early Site Permit Site), CLI-07-27, 66 NRC 215 (2007)..... 23

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205 (2002)..... 24

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002) 23

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), CLI-09-06, 69 NRC 128 (2009)..... 6

Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __ (Jul. 8, 2010)(slip op.)..... 8, 9

Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461 (2004)..... 6, 24

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001).....*passim*

Georgia Institute of Technology (Georgia tech Research Reactor), CLI-95-12, 42 NRC 111 (1995)..... 10

Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727 (2006)..... 10

Shaw Areva MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC 55 (2009)..... 18, 25

Atomic Safety and Licensing Board

Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC __, (Aug. 4, 2010)(slip op.)*passim*

REGULATIONS

10 C.F.R. § 2.309(f)(1)(iv).....	23
10 C.F.R. § 2.309(f)(2).....	24
10 C.F.R. § 2.311.....	1
10 C.F.R. § 2.311(b).....	1
10 C.F.R. § 2.311(d)(1).....	3
10 C.F.R. § 2.319.....	25
10 C.F.R. § 2.321.....	25
10 C.F.R. § 2.323(f)(1).....	3
10 C.F.R. § 2.332.....	25
10 C.F.R. § 2.333.....	25
10 C.F.R. § 2.335.....	3
10 C.F.R. § 2.341(f)(2).....	1, 7
10 C.F.R. § 2.341(f)(2)(ii).....	<i>passim</i>
10 C.F.R. Part 50.....	10, 11
10 C.F.R. § 50.2.....	11
10 C.F.R. § 50.36.....	11
10 C.F.R. § 50.51.....	11
10 C.F.R. § 50.59.....	17
10 C.F.R. § 50.70(e).....	11
10 C.F.R. Part 51.....	<i>passim</i>
10 C.F.R. § 51.10.....	23
10 C.F.R. § 51.41.....	23
10 C.F.R. § 51.45(c).....	25
10 C.F.R. § 51.53(c)(2).....	22
10 C.F.R. § 51.53(c)(3)(ii)(L).....	22, 24, 25

10 C.F.R. § 51.53(c)(3)(iv)	25
10 C.F.R. Part 54	<i>passim</i>
10 C.F.R. § 54.1	10
10 C.F.R. § 54.3	20
10 C.F.R. § 54.29(a)	<i>passim</i>
10 C.F.R. § 54.29(a)(1)	17
10 C.F.R. § 54.30	16, 17
10 C.F.R. § 54.30(a)	16
10 C.F.R. § 54.30(b)	16
10 C.F.R. § 54.33(b)	12, 16
40 C.F.R. § 1502.22	22, 23, 24
40 C.F.R. § 1502.22(b)	22

STATUTES

42 USC § 4321 (NEPA – Section 102(2))	24
---	----

MISCELLANEOUS

Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) (ADAMS Accession No. ML100810441)	<i>passim</i>
Applicant’s Notice of Appeal of LBP-10-15 (Aug. 16, 2010) (ADAMS Accession No. ML102280603)	3
NRC Staff’s Answer to the San Luis Obispo Mothers for Peace Request for Hearing and Petition to Intervene, at 14-26 (Apr. 16, 2010) (ADAMS Accession No. ML101060667)	<i>passim</i>
Applicant’s Answer to Petition to Intervene and Response to Requests for Waivers (Apr. 16, 2010) (ADAMS Accession No. ML101060671)	4
Transcript of Diablo Canyon Nuclear Plant Oral Arguments (May 26, 2010) (ADAMS Accession No. ML101590109)	6, 16
NRC Staff’s Unopposed Motion to Correct the Transcript of the Oral Argument Held on May 26, 2010 (Jun. 18, 2010)(ADAMS Accession No. ML101690408)	6
Video Recording of May 26, 2010 Diablo Canyon Oral Argument (http://www.slocounty.ca.gov/bos/BOSagenda.htm)	7

NUREG-1801, “Generic Aging Lessons Learned Report,” Rev. 1, Vol. 1 (Sep. 2005).....	8, 9, 15
NUREG-1537, “Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors: Format and Content” (Feb. 1996).....	11
Nuclear Power Plant License Renewal, Revisions, 60 Fed. Reg. 22,461 (May 8, 1995)	11, 12
Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991)	<i>passim</i>
NRC Inspection Manual, Manual Chapter 2515, Light-Water Reactor Inspection Program - Operations Phase, 4 (Jan. 24, 2003)(ADAMS Accession No. ML003766127).....	14
NRC Inspection Manual, Manual Chapter 0612, Power Reactor Inspection Reports, 12 (Sep. 20, 2007)(ADAMS Accession No. ML0707201910)	14
NRC Inspection Manual, Manual Chapter 0310, Components Within the Cross-Cutting Areas (Feb. 23, 2010) (ADAMS Accession No. ML 1002909930).....	14
NRC Inspection Manual, Manual Chapter 0305, Operating Reactor Assessment Program, 40-43 (Dec. 24, 2009)(ADAMS Accession No. ML0934213000).....	14
NUREG-1800, Rev. 1 “Standard Review Plan for Review of License Renewal Applications For Nuclear Power Plants” (Sept. 2005)(ADAMS Accession No. ML052770566).....	15
Webster’s II, New College Dictionary (3d. Ed.), 1293 (Houghton Mifflin Co., 2005).....	17
Diablo Canyon Power Plant - NRC Integrated Inspection Report 05000275/2008005, 05000323/2008005 and 07200026/2008001, Enclosure 1 at 24-25 (Feb. 6, 2009) (ADAMS Accession No. ML090370406).....	19
Diablo Canyon Power Plant – NRC Integrated Inspection Report 05000275/2009003 and 05000323/2009003, Enclosure 1 at 21-24 (Aug. 5, 2009) (ADAMS Accession No. ML092170781).....	19
Diablo Canyon Power Plant – NRC Integrated Inspection Report 05000275/2009005 and 05000323/2009005, Enclosure 1 at 35-37 (Feb. 3, 2010) (ADAMS Accession No. ML100341199).....	19
IMC 2515, Appendix A, Risk-Informed Baseline Inspection Program (Jan. 26, 2007) (ADAMS Accession No. ML061580537).....	20
NRC Staff’s Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention (Feb. 12, 2010) (ADAMS Accession No. ML100431768).....	21
Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments; Final Rule, 49 Fed. Reg. 9352 (Mar. 12, 1984).....	23, 24

August 19, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC COMPANY)	Docket Nos. 50-275-LR
)	50-323-LR
(Diablo Canyon Nuclear Power Plant,)	
Units 1 and 2))	

NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF
ATOMIC SAFETY AND LICENSING BOARD DECISION (LBP-10-15)
ADMITTING AN OUT OF SCOPE SAFETY CONTENTION AND
IMPROPERLY RECASTING AN ENVIRONMENTAL CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2)(ii), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby requests that the Commission grant interlocutory review of the portion of the Atomic Safety and Licensing Board's ("Board") August 4, 2010, Order¹ in the above-captioned matter that admits Technical Contention 1 ("TC-1").² The Staff also asks the Commission to grant interlocutory review of the portion of the Order that recasts Environmental Contention 1 ("EC-1"). The San Luis Obispo Mothers for Peace ("SLOMFP") filed both contentions on March 22, 2010.³

¹ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC __ (Aug. 4, 2010)(slip op.) ("Order").

² The Staff notes that 10 C.F.R. § 2.311(b) describes appeals from rulings on petitions to intervene and requests for hearing and states, "No other appeals from rulings on requests for hearing are allowed." The NRC Staff interprets this limitation to only apply to appeals seeking review under the standard provided by 10 C.F.R. § 2.311. Indeed, the Commission routinely considers appeals under § 2.341(f)(2) that challenge aspects of a board's ruling on a request for hearing. *E.g.*, *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC 331, 365 (2009).

³ Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) (Agency Document Access & Management System ("ADAMS") Accession No. ML100810441) ("Petition").

As set forth below, the Board majority erred in recasting and admitting TC-1 because it is unrelated to the subject matter of this proceeding, license renewal.⁴ Instead, it focuses on current operating issues that are already subject to the Staff's regulatory oversight. As a result of the Board's ruling, this once-limited renewal proceeding will become a broad review of the applicant's history of compliance with its current licensing basis in order to predict whether the applicant is likely to comply with its licensing basis in distant years.⁵ Such inquiries are contrary to the normal subject matter of license renewal process and proceedings. Thus, the Order adversely affects the basic structure of this proceeding in a pervasive and unusual manner. The Staff requests that the Commission grant interlocutory review of the Board's admission of TC-1.

Additionally, the Board also erred in admitting EC-1, as recast, because it requires the applicant and the Staff to meet a Council on Environmental Quality ("CEQ") regulation the Commission has not adopted. As a result of the Board's ruling, the applicant may demonstrate compliance with the NRC's regulations implementing the National Environmental Policy Act ("NEPA") by meeting a CEQ regulation that the Commission has not adopted and is potentially inconsistent with the NRC's environmental regulations. This result adversely affects the basic structure of the proceeding in a pervasive and unusual manner because the Board does not have the authority to evaluate license renewal applications against a different, and potentially inconsistent, regulatory standard than those the Commission has adopted. Consequently, the Staff requests that the Commission grant interlocutory review of the Board's Order admitting EC-1 as a contention of omission and limit the contention to whether the application complies with NRC regulations.

⁴ Judge Abramson dissented from the portion of the majority's decision that admitted TC-1. Order (separate opinion of J. Abramson) at 11-12. The dissent provides a detailed rebuttal to the majority's improper admission of TC-1.

⁵ Such an inquiry also incorrectly assumes that an applicant with a strong record of compliance will not one day experience compliance issues. As discussed below, rather than speculate, the NRC relies on its ongoing oversight process to evaluate compliance issues as they arise.

ISSUES PRESENTED

- A. Whether the Board committed an error in admitting a contention that shifts the focus of a license renewal proceeding from the adequacy of an application's proposed aging management programs ("AMP") to a broad review of the applicant's prior operating and compliance history?
- B. Did the Board commit an error in recasting a contention to require a license renewal applicant and the Staff to meet a non-binding CEQ regulation that the Commission has not adopted?

PROCEDURAL HISTORY

SLOMFP filed five contentions related to Pacific Gas & Electric Co.'s ("PG&E" or "Applicant") application to renew the operating licenses for the Diablo Canyon Nuclear Power Plant ("DCNPP") Units 1 and 2.⁶ The Board admitted four contentions, referred one of those contentions to the Commission for a ruling on waiver of rule of general applicability under 10 C.F.R. § 2.335, denied one contention, and referred several "novel" legal and policy questions to the Commission with regard to one of the admitted contentions under 10 C.F.R. 2.323 (f)(1).⁷ On August 16, 2010, PG&E appealed the admission of all four contentions under 10 C.F.R. § 2.311(d)(1).⁸ The Staff's appeal, however, challenges only the Board's admission of TC-1 and the admission of EC-1 as recast by the Board.⁹

TC-1

As initially submitted by SLOMFP, TC-1 read:

The applicant, Pacific Gas & Electric Company (PG&E), has failed to satisfy 10 C.F.R. § 54.29's requirement to demonstrate a reasonable assurance that it can and will "manag[e] the effects of aging" on equipment that is subject to the

⁶ *Id.*

⁷ Order at 96.

⁸ Applicant's Notice of Appeal of LBP-10-15 (August 16, 2010) (ADAMS Accession No. ML102280603).

⁹ The Staff does not address, in this appeal, the Board's admission of the other two contentions. The Staff awaits Commission direction on whether it wishes briefs on the questions certified by the Board.

license renewal rule, i.e., safety equipment without moving parts. In particular, PG&E has failed to show how it will address and rectify an ongoing pattern of management failures with respect to the operation and maintenance of safety equipment.¹⁰

The Staff opposed this contention on the grounds that:

1. TC-1 rests on an interpretation of 10 C.F.R. § 54.29 that is contrary to Commission precedent;
2. Admission of TC-1 would undermine the limited scope of license renewal proceedings;
3. TC-1 is outside the scope of this proceeding pursuant to 10 C.F.R. § 54.30(b); and
4. TC-1 lacks an adequate factual basis.¹¹

On August 4, 2010, the Board rephrased and admitted TC-1 as follows:

The applicant, Pacific Gas & Electric Company (PG&E), has failed to satisfy 10 C.F.R. § 54.29's requirement to demonstrate a reasonable assurance that it can and will "manage the effects of aging" in accordance with the current licensing basis. PG&E has failed to show how it will address and rectify an ongoing adverse trend with respect to recognition, understanding, and management of the Diablo Canyon Nuclear Power Plant's design/licensing basis which undermines PG&E's ability to demonstrate that it will adequately manage aging in accordance with this same licensing basis as required by 10 C.F.R. § 54.29.¹²

EC-1

As initially submitted by SLOMFP, EC-1 read:

Failure of SAMA Analysis to Include Complete Information about Potential Environmental Impacts of Earthquakes and Related SAMAs. PG&E's Severe Accident Mitigation Alternatives ("SAMA") analysis fails to satisfy 40 C.F.R. § 1502.22 because it is not based on complete information that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant and because PG&E has failed to acknowledge the absence of the information or demonstrated that the information is too costly to obtain. As a result of PG&E's failure to use complete information, the SAMA analysis does not satisfy the requirements of the National Environmental Policy Act ("NEPA") for consideration of alternatives (see *Idaho Conservation League v. Mumma*,

¹⁰ Petition at 2.

¹¹ NRC Staff's Answer to the San Luis Obispo Mothers for Peace Request for Hearing and Petition to Intervene, at 14-26 (Apr. 16, 2010) (ADAMS Accession No. ML101060667) ("NRC Staff's Answer"). PG&E also opposed the contention because it does not raise a genuine dispute with the application and raises current operational issues. Applicant's Answer to Petition to Intervene and Response to Requests for Waivers, at 9-13 (Apr. 16, 2010) (ADAMS Accession No. ML101060671).

¹² Order at 92.

956 F.2d 1508, 1519-20 (9th Cir. 1992)) or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L).¹³

The Staff supported this contention in part and opposed it in part on the grounds that:

1. EC-1 is a contention of omission because the SAMA evaluation contained in the ER (Attachment F to Appendix E of the ER) omits a discussion of the “Shoreline Fault.”¹⁴
2. The remainder of EC-1 is inadmissible for lack of sufficient basis,¹⁵
3. The NRC is not bound by substantive CEQ regulations.¹⁶

The Staff proposed admitting EC-1 as a contention of omission with the following language:

The SAMA evaluation contained in the Environmental Report, at Attachment F to Appendix [E] omits a discussion of the impact, if any, the “Shoreline Fault” might have on the SAMA evaluation.¹⁷

However, the Board rephrased and admitted EC-1 as follows:

PG&E’s Severe Accident Mitigation Alternatives (“SAMA”) analysis fails to satisfy 40 C.F.R. § 1502.22 because it fails to consider information regarding the Shoreline fault that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant. Further, that omission is not justified by PG&E because it has failed to demonstrate that the information is too costly to obtain. As a result of the foregoing failures, PG&E’s SAMA analysis does not satisfy the requirements of the National Environmental Policy Act (“NEPA”) for consideration of alternatives or NRC implementing regulation 10 C.F.R. 51.53(c)(3)(ii)(L).¹⁸

The Staff now petitions for interlocutory review of the portion of the Board’s Order that admitted TC-1 and incorrectly recast EC-1.

DISCUSSION

I. Legal Standard for Interlocutory Review

The Commission’s regulation at 10 C.F.R. § 2.341(f)(2)(ii) provides that the Commission may grant interlocutory review at the request of a party if the issue for which the party seeks

¹³ *Id.*

¹⁴ NRC Staff’s Answer at 28-29.

¹⁵ *Id.* at 28, 30-33.

¹⁶ *Id.* at 26 n.22.

¹⁷ *Id.* at 29.

¹⁸ Order at 25-26 (emphasis added).

review “affects the basic structure of the proceeding in a pervasive or unusual manner.” As a general matter, disputes over board rulings on contention admissibility are not the types of errors that affect the basic structure of a proceeding in a pervasive or unusual manner.¹⁹ The Commission has noted, if parties could “successfully invoke interlocutory review based merely on an assertion that the licensing board erred in admitting (or excluding) a contention, [the Commission would open] the floodgates to a potential deluge of interlocutory appeals from any number of participants who lose admissibility rulings.”²⁰ Rather, the Commission has clarified that the “ ‘basic structure’ standard is meant to address disputes over the very nature of the hearing in a particular proceeding - for example, whether a licensing hearing should proceed in one step or in two - not to routine arguments over admitting particular contentions.”²¹

II. The Commission Should Reverse the Board’s Admission of TC-1, an Out of Scope Contention

In its opinion, the Board rejected the Staff’s argument that TC-1 raised issues outside the scope of this proceeding. The Staff argued that the Commission has previously focused the scope of Part 54 on the narrow question of whether an applicant’s plan to manage the effects of aging during the period of extended operation (“PEO”) is adequate.²² Thus, the Staff concluded

¹⁹ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-06, 69 NRC 128, 136-37 (2009); *Exelon Generating Company, LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 468 (2004).

²⁰ *Indian Point*, CLI-09-06, 69 NRC at 137.

²¹ *Clinton*, CLI-04-31, 60 NRC at 467.

²² The Board asserts that the Staff inconsistently supported this position during oral argument. “Strangely, at another point, the Staff contradicted itself: ‘The *Staff focuses* on what’s in the license application and the program itself and *whether or not that program will get implemented adequately* and ensure the safe operation of the plant.’ ” Order at 79 (*quoting* Transcript of Diablo Canyon Nuclear Plant Oral Arguments, at 108-109 (May 26, 2010) (ADAMS Accession No. ML101590109) (“Tr”)) (emphasis added in Order). The Statement quoted by the Board does not correctly reflect the Staff’s position. On June 18, 2010, the Staff filed an unopposed motion to correct this portion of the transcript. NRC Staff’s Unopposed Motion to Correct the Transcript of the Oral Argument Held on May 26, 2010 (June 18, 2010) (ADAMS Accession No. ML101690408) (“Motion to Correct the Transcript”). As corrected, the sentence quoted by the Board should have read: “The Staff focuses on what’s in the license application and the program itself and whether or not that program will *if* implemented adequately ensure the safe operation of the plant.” As correct, the sentence is consistent with the Staff’s view that license renewal proceedings focus on the adequacy of the applicant’s plan to manage aging. As stated in the Motion to Correct the

that TC-1, which challenges the applicant's ability to implement its plan to manage aging in light of ongoing operating performance and compliance issues, was outside the scope of hearing. The Board held that "under narrowly limited circumstances, the 10 C.F.R. § 54.29(a) determination can be informed by the applicant's past performance if it is an ongoing pattern of difficulty in managing activities and compliance that have a direct link to the applicant's ability to implement the AMP in accordance with the [current licensing basis ("CLB")]."²³ The Board claims that its holding is supported by the plain text of 10 C.F.R. § 54.29(a), a previous Commission decision regarding license renewal outside the Part 54 context, and a footnote from the 1991 Statement of Considerations for Part 54.²⁴ But, as discussed in greater detail below, none of these sources supports the Board's ruling. Rather, admission of TC-1 is contrary to recent Commission precedent, the carefully-structured scope of license renewal, and the Commission's regulations. Moreover, the Board's conclusion will result in a dramatic expansion of the scope and nature of the license renewal process. As a result, this error will have a pervasive and unusual effect on this proceeding.²⁵

Transcript, the Staff based its corrections on a review of the video file available on the San Luis Obispo County Board of Supervisors' website. *Id.* The hyper link for the website is http://www.slocounty.ca.gov/bos/BOS_agenda.htm. The file is under the heading 2010 Board of Supervisors Meetings and is titled Special Meeting – Outside Agencies. The sentence in question occurs at the two hour, fourteen minute, and thirty three second mark in the video file. The Board did not rule on the Unopposed Motion to Correct the Transcript and quoted that incorrect sentence in the Order. Order at 79.

²³ Order at 80.

²⁴ *Id.*

²⁵ 10 C.F.R. § 2.341(f)(2).

- A. The Board Incorrectly Held that TC-1 Was Within the Scope of this License Renewal Proceeding
1. Admission of TC-1 Rests on an Interpretation of 10 C.F.R. § 54.29 that is Contrary to Commission Precedent

In the recent *Vermont Yankee* license renewal proceeding decision, CLI-10-17,²⁶ the Commission provided a thorough overview of the scope of its Part 54 license renewal process for commercial power reactors. To start, the Commission noted that the aging management review, required by Part 54, “is the process that the Staff and the license renewal applicants use in determining whether a reactor’s structures, systems, and components will require additional activities in order to effectively manage aging in the period of extended operation, and if so, what those activities would be.”²⁷

The Commission noted that 10 C.F.R. § 54.29(a) provides the standard for granting license renewal and requires the NRC to find that actions “*‘have been or will be taken with respect to managing the effects of aging . . . and . . .time limited aging analyses.’*”²⁸ The Commission then reiterated its previous interpretation of this language: “an applicant’s use of an aging management program identified in the GALL Report constitutes reasonable assurance that it *will* manage the targeted effect of aging during the renewal period.”²⁹ The GALL Report is a staff document that contains approved methods for managing the effects of aging during the PEO.³⁰ Thus, the Commission concluded that the application’s “commitment to implement an AMP that the NRC finds is consistent with the GALL Report constitutes one acceptable method

²⁶ *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC ___, (Jul. 8, 2010)(slip op.).

²⁷ *Id.*, slip. op. at 17.

²⁸ *Id.* at 44 (quoting 10 C.F.R. § 54.29(a)) (emphasis and alteration in original).

²⁹ *Id.* (quoting *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2008)) (emphasis in original).

³⁰ NUREG-1801, “Generic Aging Lessons Learned Report,” Rev. 1, Vol. 1 (Sep. 2005) (“GALL Report”) (emphasis added).

for compliance.”³¹ Consequently, the Commission’s discussion plainly indicates that the question of whether an applicant is likely to implement its AMPs is outside the scope of Part 54 license renewal. The NRC makes that determination through its ongoing oversight process. The Commission’s description illustrates that an applicant may satisfy the requirements of Part 54 by adopting an AMP, such as one in the GALL report, that the NRC finds acceptable.

The Board suggests that such an approach to license renewal amounts to compliance “via a Xerox machine.” Order at 90. But, the Commission’s recent ruling in *Vermont Yankee* rebuts this mistaken characterization.

An applicant may commit to implement an AMP that is consistent with the GALL Report and that *will* adequately manage aging. But such a commitment does not absolve the applicant from demonstrating, *prior* to issuance of a renewed license, that its AMP is indeed consistent with the GALL Report. We do not simply take the applicant at its word. When an applicant makes such a statement, the Staff will draw its own independent conclusion as to whether the applicant’s programs are in fact consistent with the GALL Report.³²

Accordingly, the proper focus in considering a license renewal application is whether the AMP itself is sufficient. Actual implementation of the plan is a separate matter, beyond the scope of the license renewal process and subject to the NRC’s ongoing regulatory oversight.³³

These statements are consistent with prior Commission descriptions regarding the scope of Part 54 license renewal. In *Oyster Creek*, the Commission stated:

[T]he license renewal applicant's use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period. If the applicant uses a different method for managing the effects of aging for particular SSCs at its plant, then the applicant should demonstrate to the Staff reviewers that its program includes the ten elements cited in the GALL Report and will likewise be effective. In addition, many plants will have plant specific aging management programs for which there is no corresponding program in the GALL Report. For each aging management program, the application gives a brief description of the licensee’s operating experience in implementing that program.³⁴

³¹ *Vermont Yankee*, CLI-10-17, 72 NRC ___, slip op. at 44.

³² *Id.* at 47-48.

³³ See *infra* n.52.

³⁴ *Oyster Creek*, CLI-08-23, 68 NRC at 468 (*quoting* GALL Report at 3) (emphasis added).

Moreover, on other occasions, the Commission has stated that “ ‘Part 54 requires renewal applicants to demonstrate *how* their programs will be effective in managing the effects of aging during the proposed period of extended operation.’ ”³⁵ The Commission’s previous descriptions of the license renewal process indicate that to meet the requirements of Part 54, an applicant need only show that its plans are adequate to manage the effects of aging; an applicant does not need to demonstrate that its prior operating history suggests it will be successful in implementing those plans.

Instead of relying on prior Commission cases on point regarding the scope of license renewal for power reactors under Part 54, the Board relied on a Commission decision regarding the scope of license renewal for research and test reactors under Part 50.³⁶ The Board cited *Georgia Tech* for the proposition that

In determining whether . . . to renew a license[], the Commission makes what is in effect predictive findings about the qualifications of an applicant. The *past performance of management may help indicate* whether a licensee will comply with agency standards. . . . Of course, the *past performance must bear on the licensing action [renewal] currently under review.*³⁷

But, *Georgia Tech* involved an application to renew the license for a research reactor.³⁸ Part 54 is not applicable to applications to renew the license for research and test reactors (“RTR”).³⁹ Since the NRC’s ongoing operating oversight and inspection is less rigorous with respect to RTRs than power reactors, and RTR licensees need not update their final safety analysis reports every two years, an application for license renewal for a RTR must meet the more

³⁵ *Nuclear Management Company, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 733-34 (2006) (*quoting Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001)) (emphasis added).

³⁶ *Id.* at 82 (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995)).

³⁷ *Id.* (citing *Georgia Tech*, CLI-95-12, 42 NRC at 120).

³⁸ *Georgia Tech*, CLI-95-12, 42 NRC at 113.

³⁹ 10 C.F.R. § 54.1.

expansive requirements of 10 C.F.R. Part 50.⁴⁰ Thus, a license renewal review under Part 50, unlike one under Part 54, is not limited to a demonstration that the applicant will manage the effects of aging on in-scope passive systems, structures, and components during the PEO. Consequently, previous Commission statements delineating the scope of Part 50 license renewal for RTR licenses are of limited value in interpreting the narrower scope of Part 54 power reactor license renewal. Instead, the Commission's extensive discussions of the scope of Part 54 license renewal, discussed above, are directly relevant and illustrate that TC-1 is outside the scope of license renewal.

2. Admission of TC-1 Undermines the Limited Scope of Part 54 License Renewal Proceedings

The Board ruling, admitting TC-1, undermines the Commission's carefully structured rulemaking and scope for license renewal proceedings. The Commission based its regulations governing license renewal on two fundamental principles. First, the Commission stated that "with the possible exception of the detrimental effects of aging. . . the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable level of safety."⁴¹ Second, the Commission determined that "each plant's current licensing basis must be maintained during the renewal term, in part through a program of age-related degradation management for systems, structures, and components that are important to license renewal."⁴²

Thus, the Commission concluded, "the decision to issue a renewed operating license

⁴⁰ See e.g., 10 C.F.R. §§ 50.2 (indicating that a license under Part 50 includes a renewed license under Part 50), 50.51 (indicating that Part 54 governs renewal for power plants), and 50.36 (specifying the requirements an application for a Part 50 license must meet); 50.70(e)(requiring power reactor licensees to update their final safety analysis reports every two years). For a complete discussion of the requirements that must be met in a license renewal application for a RTR see NUREG-1537, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors: Format and Content (Feb. 1996) (available on public website).

⁴¹ Nuclear Power Plant License Renewal, Revisions, 60 Fed. Reg. 22,461, 22, 464 (May 8, 1995).

⁴² Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64946 (Dec. 13, 1991).

need not involve a [review of the current operating performance] or compliance with a plant's licensing basis."⁴³ Instead, the Commission has found that "aging management of certain important systems, structures, and components during this period of extended operation should be the focus of a renewal proceeding and that issues concerning operation during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review."⁴⁴ The Commission similarly limited hearings on license renewals to reflect the narrow scope of NRC review on such applications.⁴⁵ As the Commission later explained, "In establishing its license renewal process, the Commission did not find it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review."⁴⁶

The Commission's rules on license renewal are based on the assumption that the NRC's ongoing regulatory activities are sufficient to ensure licensee compliance with the plant's current licensing basis during the initial period of operation and the extended period of operation.⁴⁷ Elements of an AMP are incorporated into a plant's licensing basis during the period of extended operation.⁴⁸ Thus, the extent to which a plant implements and complies with the elements of its AMPs during the period of extended operation is subject to the NRC's continuing oversight activities, including, if necessary, increased oversight and enforcement actions.⁴⁹

⁴³ *Id.* at 64,960.

⁴⁴ 60 Fed. Reg. at 22,481.

⁴⁵ 56 Fed. Reg. at 64,961.

⁴⁶ *Turkey Point*, CLI-01-17, 54 NRC at 9.

⁴⁷ See 56 Fed. Reg. at 64,946.

⁴⁸ See 10 C.F.R. § 54.33(b) (stating that each renewed license will contain conditions and limitations to ensure that systems, structures, and components subject to review under Part 54 "will continue to perform their intended functions for the period of extended operation").

⁴⁹ See 56 Fed. Reg. at 64,946 (noting that the Staff will continue to ensure a plant's compliance with its licensing basis during the period of extended operation).

Consequently, the speculative pre-licensing review required by TC-1 would be precisely the type of duplicative inquiry the Commission sought to avoid in license renewal proceedings.

Indeed, when it promulgated the license renewal rules, the Commission discussed the possibility that some applicants for license renewal might not be fully operating in compliance with all NRC requirements. The Commission found:

Issues . . . which already are the focus of ongoing regulatory processes . . . do not come within the NRC's safety review at the license renewal stage:

The Commission cannot conclude that its regulation of operating reactors is "perfect" and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements. However, based upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently broad and rigorous to establish that the added discipline of a formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety.⁵⁰

Therefore, the Commission foresaw that plants might not operate in "perfect compliance with all NRC requirements" when it promulgated the license renewal rule. *Id.* But, the Commission did not conclude that such non-compliance warranted a review to determine whether or not it could find reasonable assurance that an applicant would implement the terms of its AMPs during the PEO. Rather, the Commission determined that its ongoing oversight process is sufficiently rigorous to address such operating issues and ensure compliance with the CLB during the PEO.

⁵⁰ *Turkey Point*, CLI-01-17, 54 NRC at 10 (quoting 56 Fed. Reg. at 64, 945).

The issues raised by the inspection findings supporting TC-1 are plainly the type of issues that the Commission believed would be addressed by the ongoing regulatory oversight process.⁵¹

The 1991 statement of considerations clearly indicates that the Commission did not envision license renewal as a forum for a duplicative review with the oversight process.⁵²

Nonetheless, the Board incorrectly relies on an isolated footnote from the 1991 statement of considerations to support its finding that TC-1 is within the scope of license renewal.⁵³ But, that footnote, when read in its entirety and within the context of Commission precedent, actually supports the Staff's position:

However, allegations that the *implementation* of a licensee's *proposed* actions to address age-related degradation unique to license renewal has or will cause noncompliance with the plant's current licensing basis during the period of extended operation, or that the failure of the licensee to address age-related degradation unique to license renewal in a particular area has or will cause such noncompliance during the period of extended operation would be valid subjects for contention, since the claim essentially questions the *adequacy* of the licensee's *program* to address age-related degradation unique to license renewal.⁵⁴

⁵¹ Petition at 2-5. The NRC's ongoing oversight process is sufficiently robust to address the concerns raised by TC-1. The NRC's reactor oversight process ("ROP") is a risk-based inspection process that relies on the level of performance plants exhibit to determine the level of NRC oversight at each plant. NRC Inspection Manual, Manual Chapter 2515, Light-Water Reactor Inspection Program – Operations Phase, 4 (Jan. 24, 2003) (ADAMS Accession No. ML003766127) (IMC 2515). Consequently, as plant-performance degrades, the NRC increases the frequency and type of inspections it conducts at the plant. In this manner, the NRC preserves its finding of reasonable assurance that a given plant will operate safely. In addition to covering instances of non-compliance with plants' licensing bases, the ROP analyzes the predominant causes of such non-compliance and evaluates trends in those areas, termed cross-cutting areas. NRC Inspection Manual, Manual Chapter 0612, Power Reactor Inspection Reports, 12 (Sep. 20, 2007) (ADAMS Accession No. ML0707201910). The NRC tracks three types of cross-cutting areas, all related to safety culture: human performance, problem identification and resolution, and safety conscious work environment. NRC Inspection Manual, Manual Chapter 0310, Components Within the Cross-Cutting Areas (Feb. 23, 2010) (ADAMS Accession No. ML1002909930). A sufficient quantity of cross-cutting issues may result in a licensee developing corrective actions to improve in an area of weakness or in a safety-culture assessment of the plant. NRC Inspection Manual, Manual Chapter 0305, Operating Reactor Assessment Program, 40-43 (Dec. 24, 2009) (ADAMS Accession No. ML0934213000). In sum, the ROP will continue to ensure that PG&E complies with the DCNPP licensing basis during the PEO and will also monitor attributes of PG&E's safety culture and take appropriate actions to redress any adverse trends that may emerge.

⁵² 56 Fed. Reg. at 64, 945.

⁵³ Order at 84, 91.

⁵⁴ 56 Fed. Reg. at 64,952 n. 1 (emphasis added).

The footnote acknowledges that non-compliance with the CLB may be an adequate basis for a contention, but only in limited circumstances. Specifically, when the “implementation” of a “proposed” action or failure to address an aspect of age-related degradation relating to a passive system structure or component would result in an inadequate AMP, an intervenor may file a valid contention. Clearly, these situations contemplate a deficient plan rather than a failure to implement an otherwise acceptable proposed action.⁵⁵ Indeed, the Commission says as much at the end of the sentence, when it explains that such a claim would challenge the adequacy of the program to address age-related degradation. Consequently, the provision on which the Board relies establishes that the proper focus of license renewal is the adequacy of an applicant’s proposed program to manage the effects of aging, not a wide ranging inquiry into prior noncompliances with an applicant’s licensing basis.⁵⁶

⁵⁵ Judge Abramson notes this point in his separate opinion. Order (separate opinion of J. Abramson), at 11-12.

⁵⁶ In addition, the Board relies on a quotation from the Staff’s GALL Report to support its conclusion that the NRC should consider past performance when determining whether an “applicant has demonstrated that it will adequately manage aging in the future.” Order at 89. The Board notes that the GALL Report indicates that the tenth element of an AMP should address operating experience. According to the GALL Report, “[o]perating experience involving the aging management program, including *past corrective actions* resulting in program enhancements or additional programs should *provide objective evidence to support a determination* that the effects of aging *will be adequately managed.*” *Id.* (quoting GALL Report at 3) (emphasis in Order). But, this quotation indicates that the focus of the Staff review, with respect to operating experience, is on the adequacy of the AMP, not the licensee’s future performance. Thus, the Staff considers whether past corrective actions resulted in program enhancements or additional programs. The Staff’s statements in the companion document to the GALL Report, the Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants (“SRP”), confirm that the Staff considers operating experience to judge the effectiveness of an AMP, not a licensee’s ability to comply with its CLB. “A past failure would not necessarily invalidate an aging management program because the feedback from operating experience should have resulted in appropriate program enhancements or new programs. This information can show where an existing program has succeeded and where it has failed (if at all) in intercepting aging degradation in a timely manner.” NUREG-1800, Rev. 1, Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants, at A.1-7 (September 2005) (ADAMS Accession No. ML052770566). The SRP also notes, “An applicant may have to commit to providing operating experience in the future for new programs to confirm their effectiveness.” *Id.*

Thus, contrary to the Board’s finding, the GALL Report’s consideration of operating experience does not “implicitly reject” the carefully structured scope of license renewal crafted by the Commission. Rather, as the above quotations make clear, it relies on operating experience to confirm the effectiveness of the applicant’s proposed AMPs. These quotations illustrate that the proper focus of license renewal is on the adequacy of the applicant’s plan for managing aging, not on whether the applicant’s prior history of conformance with NRC regulations suggests that the applicant will comply with its CLB during the PEO.

3. Admission of TC-1 Contravenes 10 C.F.R. § 54.30(b)

The Commission embodied its carefully structured dichotomy between operating issues and aging management issues in 10 C.F.R. § 54.30. Pursuant to 10 C.F.R. § 54.30(a), if the license renewal review of a plant demonstrates that the plant will not comply with its CLB during the current licensing term, the licensee must take actions to address the noncompliance. The licensee's compliance with this requirement is "not within the scope of the license renewal review." 10 C.F.R. § 54.30(b).

The Board relies on several inspection findings regarding PG&E's understanding and management of its licensing basis to support TC-1.⁵⁷ According to TC-1, these inspection findings undermine PG&E's ability to demonstrate that it will be able to adequately manage the effects of aging during the PEO.⁵⁸ But, this conclusion goes too far. If the NRC renews the license, effectively managing the effects of aging during the PEO will be part of the DCNPP licensing basis.⁵⁹ Therefore, TC-1 essentially alleges that the management at DCNPP is incapable of complying with the licensing basis.⁶⁰ But, such an incapability would not suddenly appear at the start of the PEO. Rather, assuming TC-1 is correct, that incapability exists now, and PG&E would need to take steps to redress that incapability now. Such steps are plainly outside of the scope of license renewal, under 10 C.F.R. § 54.30(b). Rather, they are appropriately addressed by the ROP.

The Board found that TC-1 "is focused squarely on PG&E's *future performance during the PEO*, not current conduct."⁶¹ Consequently, the Board claims that TC-1 "does not run afoul

⁵⁷ Order at 91.

⁵⁸ *Id.* at 87.

⁵⁹ 10 C.F.R. § 54.33(b).

⁶⁰ At argument, counsel for SLOMFP stated that the gravamen of TC-1 is that "there is something wrong that has to be addressed," and suggested that "[o]ne of the answers might be you lack an adequate safety culture." Tr. at 120. But, the ROP continuously monitors safety culture. *Supra* n. 51.

⁶¹ Order at 88. This is a distinction without a difference since the basis for TC-1 is prior conduct.

of 10 C.F.R. § 54.30(b).⁶² But, this conclusion misstates the scope of TC-1. As discussed above, TC-1 purports to challenge PG&E's future compliance with its CLB, yet TC-1, of necessity, calls into question PG&E's current compliance with its CLB. To the extent PG&E is actually unable to comply with its licensing basis now, including 10 C.F.R. § 50.59 or any other provision, PG&E must take steps to address that inability under 10 C.F.R. § 54.30. Logically, those steps, fixing any compliance problems in the present day, would ameliorate any concerns regarding PG&E's ability to comply with its licensing basis in the future.

Finally, the Board held that the plain text of 10 C.F.R. § 54.29(a) supported admission of TC-1.⁶³ Specifically, that regulation states that the NRC will issue a renewed license if it finds that "[a]ctions have been identified and have been or will be taken with respect to [managing the effects of aging], such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB." The Board found that the words "will" and "will continue to be conducted" show that the regulation requires the NRC to make "predictive findings about what the NRC thinks the applicant will *actually do* in the future."⁶⁴ But, the Board's conclusion is based on the assumption that 10 C.F.R. § 54.29(a) uses the term "will" to denote what will actually occur in the future. While this is a common usage of the word, "will" may also be used to express intention.⁶⁵ When read with the understanding that "will" expresses intent, 10 C.F.R. § 54.29(a)(1) would only require the NRC to determine that the applicant had sufficient plans to manage the effects of aging during the

⁶² *Id.*

⁶³ Order at 81.

⁶⁴ *Id.*

⁶⁵ Webster's II, New College Dictionary (3d Ed.), 1293 (Houghton Mifflin Co. 2005). Arguably, the use of the word "will" to express intent is far more common than use of the word to express future occurrences. For example, the statement "John will meet Mary at three" is most frequently understood as a statement of intent. Any number of unplanned events could prevent the planned meeting from actually occurring such as an auto accident, a health emergency, or a higher-priority issue occurring. Thus, a statement with "will" frequently denotes a plan as opposed to a description of a future occurrence certain to take place.

PEO. Such a reading better comports with the prior Commission discussions regarding the scope of license renewal cited above. Those discussions indicate that an applicant need only demonstrate how it will manage the effects of aging during the PEO. Moreover, this reading avoids the odd result of 10 C.F.R. § 54.29(a) requiring the NRC to guess what changes in operating performance will likely occur in the future. Rather, when read naturally, the regulation should only require the NRC to determine if the applicant's plan is adequate to manage the effects of aging during the PEO. Implementation of the proposed plan is wisely left to the NRC's normal regulatory oversight process.

B. The Board's Error Will Have a Pervasive and Unusual Effect on This Proceeding

As discussed above, the Commission may grant interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii) when it finds that the appealed error "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." Thus, the Commission recently granted interlocutory review when a Board's ruling threatened to indefinitely extend a proceeding and amounted to unauthorized oversight of the NRC Staff's non-adjudicatory activities.⁶⁶ In that case the Staff argued that a board's ruling had a pervasive effect on the proceedings when the decision required the Staff to notify intervenors thirty days before the end of the Staff's review of certain construction activities scheduled to be completed in four to eight years.⁶⁷ The Staff argued that it would indefinitely extend the proceedings and lead to unauthorized Board control of non-adjudicatory activities.⁶⁸ The Commission granted interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii).⁶⁹ The Commission acknowledged the unique nature of the proceedings, and ultimately determined that the Board's ruling resulted in uncertain status for the contention and

⁶⁶ *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC 55, 61-63 (2009).

⁶⁷ *Id.* at 61-62.

⁶⁸ *Id.* at 62.

⁶⁹ *Id.* at 62.

amounted to unauthorized Board oversight of the Staff's non-adjudicatory activities.⁷⁰ As discussed further below, the Board's decision in this proceeding will have a similar effect on this proceeding.

The Commission based its regulations governing license renewal on a carefully constructed dichotomy between current performance issues and aging issues unique to license renewal.⁷¹ To avoid a duplicative review with the NRC's ongoing oversight activities, the Commission limited the scope of license renewal to aging-related issues.⁷² The Board's decision eviscerates that distinction.

As reframed, TC-1 requires the Board and parties to undertake a wide-ranging investigation into several inspection findings related to PG&E's maintenance of the DCNPP licensing basis.⁷³ Such a review will, of necessity, consider current compliance issues and will be duplicative of the NRC Staff's ongoing oversight of DCNPP. Indeed, the NRC first documented all of the findings that underlie TC-1 in its inspection reports and evaluated them under the ROP.⁷⁴ Moreover, TC-1 will then force the parties to use that information to speculate on whether PG&E will comply with the licensing basis during a PEO that will start in over a decade.

⁷⁰ *Id.* at 63.

⁷¹ 56 Fed. Reg. at 64,946.

⁷² *Turkey Point*, CLI-01-17, 54 NRC at 9.

⁷³ Diablo Canyon Power Plant - NRC Integrated Inspection Report 05000275/2008005, 05000323/2008005 and 07200026/2008001, Enclosure 1 at 24-25 (Feb. 6, 2009) (ADAMS Accession No. ML090370406) ("IIR 08-05"); Diablo Canyon Power Plant – NRC Integrated Inspection Report 05000275/2009003 and 05000323/2009003, Enclosure 1 at 21-24 (Aug. 5, 2009) (ADAMS Accession No. ML092170781) ("IIR 09-03"); Diablo Canyon Power Plant – NRC Integrated Inspection Report 05000275/2009005 and 05000323/2009005, Enclosure 1 at 35-37 (Feb. 3, 2010) (ADAMS Accession No. ML100341199) ("IIR 09-05").

⁷⁴ IIR 08-05, IIR 09-03, IIR 09-05.

The Board asserts that, in light of its efforts to narrow the scope of TC-1, “TC-1 will not open the floodgates to an endless stream of contentions.”⁷⁵ However, limiting TC-1 to issues related to PG&E’s “recognition, understanding, and management” of the DCNPP licensing basis provides no meaningful restriction on the extended reach of this hearing.⁷⁶ The licensing basis of DCNPP contains the requirements with which PG&E must comply while operating DCNPP.⁷⁷ Consequently, all instances of non-compliance relate to PG&E’s licensing basis in some sense, and many of those issues may well reflect adversely on PG&E’s “recognition, understanding, and management” of that design basis. Therefore, almost any future operating issue could prove germane to the Board’s intended review of DCNPP’s operating history.

As a result, this licensing proceeding has become a wide-ranging inquiry into PG&E’s conformance with its licensing basis in order to predict PG&E’s future performance.⁷⁸ The terms of this inquiry are ever-malleable because new operating issues at DCNPP could widen and augment the scope of the issues before the Board. Moreover, once the Board completes its hearing on TC-1, any new operating issues could form the bases to reopen these proceedings for subsequent contentions. Given the frequency with which the NRC inspects DCNPP, the Board’s holding could result in a continuing stream of contentions and, as a practical matter, result in the litigation of current performance issues under the guise of license renewal.⁷⁹ This is precisely the unfocused and duplicative review the Commission sought to avoid in promulgating its license renewal regulations.⁸⁰

⁷⁵ Order at 92 (quotations omitted).

⁷⁶ *Id.* at 92.

⁷⁷ See 10 C.F.R. § 54.3 (defining licensing basis as the totality of NRC requirements applicable to a plant).

⁷⁸ The Commission determined that a finding of compliance with the CLB is not required for license renewal. 56 Fed. Reg. at 64,951.

⁷⁹ IMC 2515, Appendix A, Risk-Informed Baseline Inspection Program (Jan, 26, 2007) (ADAMS Accession No. ML061580537).

⁸⁰ *Turkey Point*, CLI-01-17, 54 NRC at 9.

Therefore, the Board's error threatens to have a pervasive and unusual effect in this and other license renewal proceedings.⁸¹ The impact of the Board's decision on this proceeding goes far beyond simply admitting a new contention. Rather, the Board's decision contravenes the Commission's carefully designed scope of license renewal proceedings by admitting a contention that focuses on the applicant's past and present compliance with its current licensing basis. The Board's holding results in a proceeding with no apparent end, as any emerging performance, compliance, or inspection issue could potentially supplement TC-1 or create a new contention. Moreover, this review of operating, performance, or compliance issues could result in the Board's oversight of the Staff's non-adjudicatory activities. Consequently, the Board's ruling will have a pervasive and unusual effect on this proceeding and the Commission should grant interlocutory review.

III. The Commission Should Reverse the Board's Admission of EC-1 as Recast by the Board

The Staff argued that EC-1 was an admissible contention of omission because PG&E's SAMA analysis should have addressed the Shoreline Fault, but the Staff contended that the remainder of EC-1 lacked a sufficient basis.⁸² In its opinion, the Board agreed with the Staff's argument that EC-1 is an admissible contention of omission with respect to the Shoreline

⁸¹ The Staff appealed a similar ruling in the Prairie Island Nuclear Generating Plant license renewal proceeding. In that appeal, the Staff predicted that the appealed error could be copied by other boards and result in a dramatic expansion of the scope of issues reviewed in the Commission's license renewal proceedings. NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention, at 6, 14 (Feb. 12, 2010) (ADAMS Accession No. ML100431768). SLOMFP's submission of TC-1 and the Board's ruling in this proceeding bears out the Staff's prediction. In litigating the one contention in the Prairie Island proceeding, focused on operating issues, the parties have filed over three hundred pages of testimony from thirteen experts and filed thousands of pages of exhibits. These documents primarily discuss issues already addressed by the NRC under the ROP. Absent Commission intervention, a similar wide-ranging inquiry into current operating issues is certainly foreseeable in this proceeding. Moreover, in light of the Board's expansive construction of 54.29(a), future intervenors will almost certainly file similar contentions in license renewal cases. Such contentions, which will lead to expansive and costly proceedings that are duplicative of the Staff's ongoing oversight activities, will likely become a regular feature of license renewal.

⁸² NRC Staff Answer at 28-33.

Fault.⁸³ The Board did not, however, accept the Staff's rephrasing of EC-1.⁸⁴ Instead, the Board stated that SLOMPF alleged numerous facts to support its position that PG&E's SAMA analysis fails to satisfy 40 C.F.R. § 1502.22.⁸⁵ That CEQ regulation permits NEPA analyses to omit relevant information when the cost of obtaining it is exorbitant.⁸⁶ The Board also held that a determination of whether the costs of obtaining the probabilistic evaluation of the Shoreline Fault are "exorbitant" is a material issue under 10 C.F.R. § 51.53(c)(3)(ii)(L) and NEPA.⁸⁷ The Board then admitted a rephrased version of EC-1 that required the applicant to meet 40 C.F.R. § 1502.22 to satisfy NEPA.⁸⁸ Specifically, the Board held that "[a]s a result of the foregoing failures [to meet 40 C.F.R. §1502.22], PG&E's SAMA analysis does not satisfy the requirements of [NEPA]."⁸⁹ As discussed below, the Board overstepped its authority by requiring an applicant to meet a CEQ regulation that is not binding on the NRC or its licensees. This error will have a pervasive and unusual effect on this proceeding.⁹⁰

A. The Board Improperly Imposed a Requirement that an Applicant's SAMA and the Staff Meet CEQ Regulation 40 C.F.R. § 1502.22 to Satisfy NEPA

Commission precedent clearly states that CEQ regulations, while serving as guidance

⁸³ Order at 22-25 & 20 n. 31; and NRC Staff's Answer at 28.

⁸⁴ SLOMPF's proposed EC-1 contained the requirement to meet 40 C.F.R. § 1502.22. See Petition at 8. Staff's proposed EC-1 removed this requirement, but rephrased EC-1 in terms of Part 51 requirements for satisfying NEPA. NRC Staff's Answer at 29.

⁸⁵ Order at 22 and 23.

⁸⁶ 40 C.F.R. § 1502.22(b).

⁸⁷ Order at 21. Notably, the Board cited 10 C.F.R. § 51.53(c)(2)(ii)(L). *Id.* (emphasis added). This was likely a typographical error and the Board meant to cite 10 C.F.R. § 51.53(c)(3)(ii)(L). Even if, however, the Board meant to state that exorbitant costs was a material issue under 10 C.F.R. § 51.53(c)(2), the Staff disagrees with this proposition. Neither regulation mentions the word "exorbitant," in contrast with 40 C.F.R. § 1502.22. Further, neither regulation deals with incomplete or unavailable information, in contrast with 40 C.F.R. § 1502.22.

⁸⁸ Order at 25-6.

⁸⁹ *Id.* at 26.

⁹⁰ 10 C.F.R. 2.341(f)(2)(ii).

and given substantial deference, are not binding on the NRC unless expressly adopted.⁹¹ The NRC has not expressly adopted 40 C.F.R. § 1502.22.⁹² In fact, the statement of considerations for Part 51 states that the Commission reserved its right to not follow the substantive requirements in 40 C.F.R. § 1502.22, particularly the substantive requirement to determine whether the costs of obtaining incomplete or unavailable information are exorbitant.⁹³ Thus, applicants for license renewal and Staff are not required to meet 40 C.F.R. § 1502.22.⁹⁴ Consequently, an inquiry into whether obtaining missing information would be too costly is not material to this proceeding.⁹⁵ Moreover, prior Commission precedent holds that a contention of omission is moot if the omitted information on the issue is discussed by the applicant or considered by the Staff in a draft EIS.⁹⁶ The Board's rephrasing of EC-1 to allow an applicant to cure an omission by meeting the requirements of 40 C.F.R. § 1502.22, instead of supplying the missing information, is clearly contrary to the Commission's precedent on contentions of omission. Thus, the Board's conclusion that the Applicant and Staff could discharge their NEPA obligations through compliance with 40 C.F.R. § 1502.22 constitutes clear error.⁹⁷

⁹¹ See Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments; Final Rule, 49 Fed. Reg. 9352 (Mar. 12, 1984). See also *Dominion Nuclear North Anna, LLC* (ESP for North Anna Early Site Permit Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007); NRC Staff's Answer at 26 n.22.

⁹² See 49 Fed. Reg. at 9353-54.

⁹³ *Id.* ("Based upon its past experience, the Commission believes that it will seldom, if ever, be called upon to determine whether the cost of obtaining unknown information deemed relevant to adverse impacts and essential to a reasoned choice among alternatives is or is not exorbitant. In the unlikely event that the issue is presented, the Commission reserves the right to resolve the matter in a manner which is consistent with the Commission's re[s]ponsibilities as an independent regulatory agency").

⁹⁴ *North Anna*, CLI-07-27, 66 NRC at 222 n.21; NRC Staff's Answer at 26 n.22.

⁹⁵ See 10 C.F.R. § 2.309(f)(1)(iv) (limiting the hearing's scope to issues that are material to the findings the NRC must make to support the action under review).

⁹⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002); NRC Staff's Answer at 28-9.

⁹⁷ Although the NRC bears the ultimate responsibility to comply with NEPA, 10 C.F.R. § 51.10, under the Commission's regulations, applicants must submit environmental reports to assist the NRC prepare documents required by NEPA. 10 C.F.R. § 51.41. In adjudicatory proceedings, prospective

B. The Board's Error Will Have a Pervasive and Unusual Effect on This Proceeding

Under the legal standards governing interlocutory review, discussed above, the Board's ruling will have a pervasive and unusual effect on these proceedings. In a license renewal proceeding, the applicant and Staff must meet the requirements of the AEA, NEPA, and the NRC's regulations implementing both statutes. The Commission's Part 51 regulations implement section 102(2) of NEPA in a manner which is consistent with the NRC's domestic licensing and related regulatory authority.⁹⁸

As admitted, EC-1 would permit PG&E⁹⁹ to comply with 40 C.F.R. § 1502.22 to meet the requirements of NEPA without complying with the NRC's requirements under 10 C.F.R. 51.53(c)(3)(ii)(L), which requires a complete SAMA analysis.¹⁰⁰ Thus, if a finding was made under 40 C.F.R. § 1502.22 that the overall costs of obtaining the data on the Shoreline Fault were exorbitant, then PG&E would have discharged its Part 51 obligations under the Board's Order. This creates an inconsistency with the NRC's regulations which require a complete SAMA analysis.

The Staff supported admission of EC-1 because it believed that, under NRC regulations, SLOMFP had a right to question whether the Shoreline Fault impacted PG&E's SAMA analysis for DCNPP. The Board's reliance on the CEQ regulation frustrates the very purpose of that inquiry.¹⁰¹ Specifically, PG&E would not be required to address the omission in its SAMA analyses, and instead could rely on 40 C.F.R. §1502.22 to claim that such information is too

intervenors must file contentions on the environmental report, and may then amend those contentions when the Staff publishes its draft environmental documents. 10 C.F.R. § 2.309(f)(2).

⁹⁸ See 49 Fed. Reg. 9352 (Mar. 12, 1984). See also Part 54 (license renewal safety issues).

⁹⁹ In this case, the applicant is applying for license renewal. The Board's rationale, however, is not limited to the license renewal context and could be applied to other applications.

¹⁰⁰ Order at 25-26 (emphasis added).

¹⁰¹ See Clinton, CLI-04-31, 60 NRC at 467 (citing to *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205 (2002)).

costly to obtain.¹⁰² As a result, despite 10 C.F.R. § 51.53(c)(3)(ii)(L)'s clear requirement that PG&E, and ultimately the Staff, account for the Shoreline Fault in the SAMA analysis, this proceeding would instead become an inquiry into whether information on the Shoreline Fault is too costly to obtain. But, Part 51 contains no reference to incomplete or unavailable information, or a determination regarding exorbitant costs.¹⁰³ The Board does not have the authority to adopt CEQ regulations and ignore the Commission's own independent rules.¹⁰⁴ Therefore, the admission of EC-1, as rephrased by the Board could have a pervasive and unusual effect on the proceeding.¹⁰⁵ Thus, the Commission should grant interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii).

CONCLUSION

For the reasons set forth above, the Staff respectfully requests that the Commission grant interlocutory review and reverse the Atomic Safety and Licensing Board's August 4, 2010, Order that admitted TC-1 and rephrased EC-1.

/Signed (electronically) by/

Maxwell C. Smith
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
(301) 415-1246
maxwell.smith@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Catherine E. Kanatas
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
(301) 415-2321
catherine.kanatas@nrc.gov

¹⁰² See 10 C.F.R. § 51.53(c)(3)(ii)(L) and 10 C.F.R. § 51.53(c)(3)(iv).

¹⁰³ Instead, 10 C.F.R. § 51.53(c)(3)(iv) requires that the ER include discussion of new and significant information, while 10 § C.F.R. 51.45(c) requires that the ER include a cost-benefits analysis regarding alternatives in certain instances.

¹⁰⁴ See, e.g., 10 C.F.R. §§ 2.319, 2.321, 2.332, 2.333.

¹⁰⁵ *Shaw*, CLI-09-02, 69 NRC at 63.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275-LR/ 50-323-LR
)
(Diablo Canyon Nuclear Power Plant,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF ATOMIC SAFETY AND LICENSING BOARD DECISION (LBP-10-15) ADMITTING AN OUT OF SCOPE SAFETY CONTENTION AND IMPROPERLY RECASTING AN ENVIRONMENTAL CONTENTION," dated August 19, 2010, have been served upon the following by the Electronic Information Exchange, this 19th day of August, 2010:

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop – O-16G4
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ngt@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

David A. Repka, Esq.
Tyson Smith, Esq.
Carlos Sisco
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802
E-mail: drepka@winston.com
trsmith@winston.com
CSisco@winston.com

Jill ZamEk, Esq.
San Luis Obispo Mothers for Peace
1123 Flora Road
Arroyo Grande, CA 93420
E-mail: jzk@charter.net

Diane Curran, Esq.
Harmon, Curran, Spielberg, and Eisenberg
1726 M Street NW
Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Signed (electronically) by

Maxwell C. Smith
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1988
E-mail: maxwell.smith@nrc.gov
Date of signature: August 19, 2010