

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
PACIFIC GAS AND ELECTRIC) Docket No. 50-275-LR
COMPANY) Docket No. 50-323-LR
)
(Diablo Canyon Power Plant, Units 1 and 2))

APPLICANT'S ANSWER IN SUPPORT OF THE
NRC STAFF PETITION FOR INTERLOCUTORY REVIEW OF LBP-10-15

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August 30, 2010

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the Pacific Gas and Electric Company (“PG&E”) hereby answers the NRC Staff’s petition for interlocutory review of LBP-10-15.¹ PG&E agrees with the NRC Staff that the Board’s decision warrants interlocutory review because it affects the structure of this limited proceeding in a pervasive and unusual manner. *See* 10 C.F.R. § 2.341(f)(2)(ii). As discussed in PG&E’s appeal of LBP-10-15, PG&E also agrees with the NRC Staff that the Board erred in admitting Contention TC-1 and Contention EC-1.²

The Board’s decision to admit Contention TC-1, which involves a current operating issue, undermines the Commission’s longstanding and frequently expressed intent to

¹ *See* “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 (“NRC Pet.”); *see also* Memorandum and Order (Rulings on Standing, Contention Admissibility, Waiver Petition, and Selection of Hearing Procedures), LBP-10-15 (slip op. August 4, 2010).

² *See* “Applicant’s Brief in Support of Appeal from LBP-10-15,” dated August 16, 2010 (“PG&E Appeal”). PG&E did not address (and was not required to address) the standard for interlocutory review under 10 C.F.R. § 2.341(f)(2) in its appeal. PG&E had an appeal as of right under 10 C.F.R. § 2.311(d).

focus license renewal proceedings on issues related to plant aging. The contention as framed by the Board would require PG&E to support a predictive finding that is not required by the regulations related to future implementation of aging management programs. The Board decision to admit environmental Contention EC-1 based on a Council on Environmental Quality (“CEQ”) regulation blurs the distinction between executive branch agencies and independent regulatory agencies and weakens the NRC’s authority to exercise independent judgment on technical and environmental matters. For these reasons, PG&E supports the NRC Staff’s petition for interlocutory review.

II. DISCUSSION

A. Contention TC-1 requires litigation of issues that are not addressed in 10 C.F.R. Part 54 and for which there are no applicable legal standards.

As PG&E explained in its appeal of LBP-10-15, Contention TC-1, whether as originally proposed or as recast by the Board, should not have been admitted for two reasons: (1) the contention raises a *current operational issue* that is beyond the scope of an NRC license renewal review, and (2) the contention, in any event, lacks a basis to demonstrate that the current adverse operational trend referenced as a basis for the contention gives rise to a genuine dispute regarding *aging management*. PG&E Appeal at 2-14. PG&E therefore agrees with the NRC Staff that Contention TC-1 raises issues outside the scope of the limited license renewal proceeding and is contrary to Commission regulations and precedent. *See* NRC Pet. at 8-18.

PG&E has already appealed this contention as of right under 10 C.F.R. § 2.311(d). Accordingly, there should be no need for a Commission finding that the standards for interlocutory review have been met. Nonetheless, PG&E agrees with the NRC Staff that litigating Contention TC-1 would have an unusual and pervasive effect on this proceeding (and potentially other license renewal proceedings). The Board decision expands the scope of the

issues involved far beyond the confines of the limited inquiry set forth in 10 C.F.R. Part 54. The Board's probe into PG&E's current performance and trends — to make a predictive finding regarding how PG&E will implement programs in the future — duplicates ongoing NRC Staff oversight efforts (now and in the future) and intrudes into the NRC Staff's independent oversight responsibilities. *See, e.g., Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980). Under the Board's formulation of the scope of license renewal, any current compliance issue (*e.g.*, quality assurance, technical qualifications, or human performance) could be raised, ultimately bringing into the scope of the license renewal review the nature, extent, and corrective actions for that present-day issue. The Board, however, has no basis under Part 54 to supervise ongoing NRC inspection and enforcement activities. The Board's decision therefore affects the basic structure of the NRC's license renewal review and this proceeding.

The NRC's regulatory framework for license renewal in Part 54 also does not contain any legal standards for assessing the implications of a licensee's compliance with its current operating license or adverse operating trends. The Standard Review Plan does not indicate that a discussion of current operational performance matters is necessary. *See* NUREG-1800, "Standard Review Plan for Review of License Renewal Applications for Nuclear Plants," Revision 1 (September 2005). Accordingly, neither PG&E in its application nor the NRC Staff in its review documents addresses current compliance. The parties would need to "guess" as to what standards are to be applied and how they might augment their application or review documents to address Contention TC-1. The Board's decision therefore fundamentally alters the shape of the ongoing adjudication by requiring the parties to craft new standards and to speculate as to how those standards should be applied in the proceeding.

Accordingly, the Commission should grant the NRC Staff's petition for interlocutory review of Contention TC-1.

B. Contention EC-1 requires compliance with a standard not adopted in NRC regulations and therefore fundamentally alters the nature and scope of the NRC's review.

The NRC Staff's petition for interlocutory review focuses on the Board's purported legal basis for Contention EC-1: the CEQ regulation at 40 C.F.R. § 1502.22. NRC Pet. at 22-23. Among other reasons stated in PG&E's appeal, PG&E agrees with the NRC Staff that the Board improperly based Contention EC-1 on 40 C.F.R. § 1502.22.³ PG&E Appeal at 18.

As with Contention TC-1, PG&E has already appealed this contention as of right under 10 C.F.R. § 2.311(d). Accordingly, there should be no need for a Commission finding that the standards for interlocutory review have been met. Nonetheless, PG&E agrees with the NRC Staff that litigating Contention EC-1 would have an unusual and pervasive effect on the proceeding. The Board found that 40 C.F.R. § 1502.22 provides a legal basis for the contention. LBP-10-14 at 19-25. However, as an independent regulatory agency, the NRC is not legally bound by CEQ regulations. *See, e.g., Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002). And, as PG&E noted in its appeal, there is no NRC regulation in 10 C.F.R. Part 51 that corresponds to 40 C.F.R. § 1502.22. By requiring the parties to litigate PG&E's compliance with CEQ regulations and related case law, the Board has effectively bypassed the Commission's considered decision to not adopt 40 C.F.R. § 1502.22. *See* 49 Fed. Reg. 9352, 9353-54 (March 12, 1984) (reserving the right to resolve

³ As PG&E explained in its appeal of LBP-10-15, Contention EC-1 should not have been admitted for additional, independent reasons. For example, SLOMFP did not demonstrate any omission from the SAMA analysis. PG&E Appeal at 14-18. And, even assuming that 40 C.F.R. § 1502.22 were applicable to NRC proceedings, SLOMFP also failed to show that explicit consideration of the Shoreline Fault is essential to PG&E's SAMA analysis. *Id.* at 18-20.

whether additional information is essential to a reasoned choice among alternatives in a manner consistent with the Commission's responsibilities as an independent regulatory agency). It is beyond unusual for a Licensing Board to apply regulatory requirements of other agencies in NRC licensing proceedings without the Commission's express direction.

In addition, one of the fundamental attributes of an independent regulatory agency is the authority to make its own technical and environmental determinations free from the influence of executive agencies. By selectively incorporating executive agency regulations into the NRC licensing process, the Board has eliminated an essential separation between the NRC and CEQ. It is NRC regulations — not CEQ regulations — that establish the standards to govern whether an applicant has provided sufficient information in its SAMA analysis.

At bottom, the Board's decision to cherry-pick CEQ regulations for application in NRC proceedings is unusual and will have a pervasive effect on the proceeding by requiring the parties to litigate compliance with non-NRC regulations. The Commission should therefore grant the NRC Staff's petition for interlocutory review of Contention EC-1.

III. CONCLUSION

For the above reasons, PG&E supports the NRC Staff's petition for interlocutory review. The Commission should reverse the Board's decision regarding the admissibility of Contention TC-1 and Contention EC-1.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 30th day of August 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
PACIFIC GAS AND ELECTRIC) Docket No. 50-275-LR
COMPANY) Docket No. 50-323-LR
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(Diablo Canyon Power Plant, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S ANSWER IN SUPPORT OF THE NRC STAFF PETITION FOR INTERLOCUTORY REVIEW OF LBP-10-15” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 30th day of August 2010, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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