

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman  
Nicholas G. Trikouros  
Dr. Paul B. Abramson

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant, Units 1  
and 2)

Docket Nos. 50-275-LR and 50-323-LR

ASLBP No. 10-890-01-LR-BD01

September 15, 2010

INITIAL SCHEDULING ORDER

This proceeding concerns an application by Pacific Gas & Electric Co. (PG&E) for renewal of licenses to operate its two nuclear power reactors at the Diablo Canyon Nuclear Power Plant near San Luis Obispo, California. Under the NRC regulations, this Board has the “duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.” 10 C.F.R. § 2.319. This initial scheduling order is designed to ensure proper case management of this proceeding, including “[e]xpediting the disposition of the proceeding; [e]stablishing early and continuing control so that the proceeding will not be protracted because of lack of management; [d]iscouraging wasteful prehearing activities; [i]mproving the quality of the hearing . . . ; and facilitating . . . settlement.” 10 C.F.R. § 2.332(c)(1)-(5). The initial scheduling order must be issued “as soon as practicable” after the request for hearing is granted. 10 C.F.R. § 2.332(a).<sup>1</sup>

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<sup>1</sup> See also 10 C.F.R. Part 2, Appendix B, II, Model Milestones for Hearing Conducted Under 10 C.F.R. Part 2, Subpart L (initial scheduling order to be issued within 55 days of Board decision granting intervention and admitting contentions).

## I. Background

On November 23, 2009, PG&E submitted an application to the NRC to renew PG&E's licenses (DPR-80 and DPR-82) to operate Diablo Canyon Nuclear Plant Units 1 and 2, near San Luis Obispo, California. On January 21, 2010, the NRC published a "Notice of Opportunity for Hearing" in the Diablo Canyon proceeding. 75 Fed. Reg. 3493 (Jan. 21, 2010). On March 22, 2010, the San Luis Obispo Mothers for Peace (SLOMFP) filed a petition requesting intervention herein. On August 4, 2010, the Board ruled, inter alia, that SLOMFP had standing to challenge PG&E's license renewal application and had presented at least one contention that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1). LBP-10-15, 72 NRC \_\_ (slip op.) (Aug. 4, 2010). The Board granted SLOMFP's hearing request and found four of its contentions to be admissible.<sup>2</sup> The Board also ruled, based on the information available at that time, that the 10 C.F.R. Part 2, Subpart L hearing procedures were appropriate for each of the four contentions. LBP-10-15, 72 NRC at \_\_ (slip op. at 95).

On August 5, 2010, the Board scheduled an initial conference, pursuant to 10 C.F.R. §§ 2.329 and 2.332, for the purpose of developing a scheduling order to govern the conduct of this proceeding.<sup>3</sup> The Order stated that the scheduling conference would cover, inter alia, nineteen enumerated items related to the schedule and management of the case and directed the parties to confer concerning these items. In addition, the Order instructed the NRC Staff to submit a written estimate of its projected schedule for completion of its safety and environmental

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<sup>2</sup> The Board found contention EC-2 to be admissible provided that the Commission grants SLOMFP a waiver from certain regulations. See LBP-10-15, 72 NRC at \_\_ (slip op. at 51). We ruled that contention EC-4 is admissible and referred this decision to the Commission. See id. at \_\_ (slip op. at 69). Meanwhile, PG&E and the NRC Staff have appealed the Board's ruling with regard to the two other admitted contentions (TC-1 and EC-1). Applicant's Brief in Support of Appeal from LBP-10-15 (Aug. 16, 2010); NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board's Decision (LBP-10-15) Admitting an Out of Scope Safety Contention and Improperly Recasting an Environmental Contention (Aug. 19, 2010).

<sup>3</sup> Licensing Board Order (Scheduling Initial Scheduling Conference) (Aug. 5, 2010) (unpublished) (Order).

evaluation reports. On August 10, 2010, counsel for PG&E submitted a letter reflecting the agreement of the parties<sup>4</sup> regarding some of the enumerated items. Letter from David A. Repka, Counsel for PG&E (Aug. 10, 2010) (Repka Letter-1). On August 18, 2010, the NRC Staff filed its estimate that the Staff would issue its final safety evaluation report (FSER) on the proposed license renewal on May 23, 2011, and its final supplemental environmental impact statement (FEIS) on August 12, 2011. Letter from Lloyd B. Subin, Counsel for NRC Staff (Aug. 18, 2010).

On August 24, 2010, the Board conducted the initial scheduling conference. The parties stated their views regarding the nineteen items listed in the Order, and various other case management strategies were discussed. During the conference, the Board asked the parties to submit a clarification of their intent with regard to the disclosure of privilege logs. On August 31, 2010, counsel for PG&E submitted a letter clarifying the parties' intent on that issue. Letter from David A. Repka, Counsel for PG&E (Aug. 31, 2010) (Repka Letter-2).

Based on the NRC Staff's best current estimate of its schedule, the requirements of the NRC regulations, the nature and circumstances of the admitted contentions, and the statements and representations of the parties, the Board now issues this initial scheduling order.

## II. Schedule

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the following case management procedures and schedule shall govern this adjudicatory proceeding:

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<sup>4</sup> Pursuant to 10 C.F.R. § 2.1202(b)(2), the NRC Staff notified the Board that it will participate as a party on all admitted contentions. NRC Staff's Notice of Intent to Participate as a Party (Aug. 10, 2010). Thus, unless otherwise expressly indicated, the term "party" in this order includes the NRC Staff.

A. Mandatory Disclosures and Production of Hearing File.<sup>5</sup>

1. Initial Mandatory Disclosures and Production of Hearing File. The regulations specify that, unless otherwise ordered by the Board, the parties must automatically make certain mandatory disclosures to each other within thirty (30) days of the Board's ruling admitting contentions. 10 C.F.R. § 2.336(a). Likewise, within thirty (30) days, the NRC Staff must make certain mandatory disclosures, 10 C.F.R. § 2.336(b), and must produce a hearing file and make it available to all parties. 10 C.F.R. § 2.1203(a). Those deadlines are modified, as follows:

- i. Contention EC-1: The parties and the NRC Staff shall make mandatory disclosures, and the Staff shall produce the hearing file relevant to Contention EC-1, commencing on October 15, 2010.<sup>6</sup>
- ii. Contention EC-2: The parties and the NRC Staff shall make mandatory disclosures, and the Staff shall produce the hearing file, relevant to Contention EC-2 commencing thirty (30) days after the Commission rules on the waiver request regarding this contention.<sup>7</sup>
- iii. Contention EC-4: The parties and the NRC Staff shall make mandatory disclosures, and the Staff shall produce the hearing file relevant to Contention EC-4, commencing on the earlier of (a) March 15, 2011, or (b) thirty (30) days after the Commission rules on the referral of this contention.<sup>8</sup>

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<sup>5</sup> Except where otherwise specified herein, the term "mandatory disclosures" includes the witness lists and privilege logs required under 10 C.F.R. § 2.336(a) and (b).

<sup>6</sup> The parties proposed this deferral, see Repka Letter-1 at 1-2, and the Board finds that it will not interfere with the critical path schedule for this adjudicatory proceeding.

<sup>7</sup> Pursuant to 10 C.F.R. § 2.335 the Commission must determine whether to grant the waiver requested by SLOMFP. Accordingly, the Board temporarily suspended the mandatory disclosure requirements applicable to EC-2. LBP-10-15, 72 NRC at \_\_\_ (slip op. at 96). An indefinite deferral is appropriate, because EC-2 requires, as a pre-requisite, a decision by the Commission on the waiver request.

<sup>8</sup> Pursuant to 10 C.F.R. § 2.323(f)(1) the Board referred contention EC-4 to the Commission and temporarily deferred the mandatory disclosure requirements applicable to EC-4. Id. at \_\_\_ (slip op. at 96). Originally, this deferral was for an indefinite period. Upon further consideration however, the Board believes that an indefinite deferral is inappropriate and may significantly

iv. Contention TC-1: The parties and the NRC Staff shall make mandatory disclosures, and the Staff shall produce the hearing file, relevant to Contention TC-1 commencing on the earlier of (i) March 15, 2011, or (ii) thirty (30) days after the Commission rules on the interlocutory appeal of this contention.<sup>9</sup>

2. Updating of Disclosures. The regulations specify that the parties have a “continuing” duty to update their mandatory disclosures, 10 C.F.R. § 2.336(d), and that the NRC Staff has a “continuing” duty to update the hearing file. 10 C.F.R. § 2.1203(c). But the regulations are not clear as to the frequency of such updates. Based on Repka Letter-1 and discussions during the August 24, 2010 conference, the parties and the NRC Staff shall update their disclosures, and the hearing file, on the fifteenth day (15th) of each month following their initial disclosures. Each monthly update shall cover all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party or the NRC Staff (or their agents) as of the last day of the preceding month.

3. Privilege Logs. The regulations require that the parties provide a “list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status

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delay the conduct of the evidentiary hearing. This issue may be reconsidered at our next case management conference.

<sup>9</sup> The parties proposed that the mandatory disclosures for TC-1 be postponed indefinitely due to the fact that PG&E and the NRC Staff appealed this contention and the ostensible burdens associated with disclosures relating to TC-1. See Repka Letter-1 at 1-2; Tr. at 438-41. However, an indefinite deferral could significantly delay this proceeding. The Staff currently estimates that its safety and environmental reviews of this application will proceed quite expeditiously. Given that the mandatory disclosures and production of the hearing file are the only discovery available in a Subpart L proceeding and are essential to the ability of the parties to prepare their testimony and exhibits for the evidentiary hearing, the Board is not inclined to grant an indefinite deferral. If mandatory disclosures commence after March 15, 2011, and if, as commonly occurs, disputes arise as to the scope of the disclosure and/or the legitimacy of various claims of privilege, then such activities may impinge upon the Trigger Date (as hereinafter defined) and delay the evidentiary hearing. We note that, if the Commission decides the interlocutory appeal of TC-1 within six months (as is common), the issue will be moot. If not, the Board expects to hold another prehearing conference in January or February 2011, and the deferral can be revisited at that time.

of the documents.” 10 C.F.R. § 2.336(a)(3); see also 10 C.F.R. § 2.336(b)(5). These are referred to as “privilege logs.”<sup>10</sup> Pursuant to their agreement, the parties shall not be required to produce privilege logs for documents claimed to qualify for the attorney-client, attorney work product, or deliberative process privileges. Repka Letter-2 at 2. Also pursuant to the agreement of the parties, they shall produce, as part of their mandatory disclosures, privilege logs covering any documents claimed to qualify for protected status as security related information and/or as proprietary information under 10 C.F.R. § 2.390(a)(1), (3), and (4) and (d)(1). Id. Each privilege log shall identify the statute or regulation that provides the legal basis for the claimed privilege, and shall provide, for each document listed, sufficient information for the other parties, and the Board, to assess the validity of the claim of privilege or protected status.

4. Scope of Disclosures and Hearing File<sup>11</sup>

i. If a party (or its agents) generates the document in question, then it may limit mandatory disclosures to its final document and need not include its internal drafts, including comments on drafts, resolution of comments, draft transmittals, or other similar documents. However, if a party has legal possession, custody, or control of a “draft” document developed by another party, and which is otherwise subject to mandatory disclosure (e.g., relevant to a contention), then the party possessing the “draft” must produce it unless that party knows that the other party has already disclosed that document herein.<sup>12</sup>

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<sup>10</sup> 10 C.F.R. § 2.336(a)(3) and (b)(5) cover documents claimed to be privileged and documents claimed to be protected. In both cases, the party or the NRC Staff must identify and list the document “together with sufficient information for assessing the claim of privilege or protected status . . . .” Id.

<sup>11</sup> A number of the provisions of this sub-section are based on the agreements reflected in Repka Letter-1.

<sup>12</sup> The reason for this rule is simple. If the person who developed a document considered it sufficiently final to share it with an external third party (e.g., a party or the NRC Staff) who is a litigant herein, then we do not deem that document, even if it is still labeled “draft,” exempt from the mandatory disclosure requirements.

- ii. Notes or comments (handwritten or electronic) on a final document constitute a separate document and must be produced as well as the original document.
- ii. A party need not identify or produce a document that has been served on the other parties to this proceeding.
- iii. If a document exists in both hard copy and electronic formats, then the party need only produce the electronic copy.
- iv. The parties need not identify or produce press clippings, including web clippings.
- v. If the same relevant e-mail exists in multiple locations, each party may produce only one copy of that e-mail.
- vi. The parties need not produce publicly available documents. Each party, however, will produce as part of its disclosures a log identifying publicly available documents upon which the party may rely and indicating the general location of such documents.
- vii. All documents that are required to be disclosed pursuant to 10 C.F.R. § 2.336(b) and that are available via the NRC's website or the NRC's Agencywide Documents Access and Management System (ADAMS) shall be specifically identified by the NRC Staff as required under 10 C.F.R. §§ 2.336(b) and 2.1203. Documents so disclosed and so identified do not need to be identified or produced by any other party.<sup>13</sup>

5. Electronically Stored Information.

- i. Reasonable Search. Mandatory disclosures and the production of the hearing file shall include electronically stored information and documents (ESI). In implementing their responsibilities, the parties and the NRC Staff shall conduct a reasonable good faith search for all documents or information, including ESI, subject to the mandatory disclosure and hearing file requirements. Each production or disclosure shall include a signed affidavit attesting that the

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<sup>13</sup> At the evidentiary hearing stage, however, the Board may require the NRC Staff or the parties to produce separate electronic or paper copies of certain important documents such as the FEIS, FSER, and COLA.

party or the NRC Staff has conducted such a search, and that the disclosure or production excludes only (a) documents or information exempted from disclosure pursuant to the law, including NRC regulations or this order, and (b) information that is not reasonably accessible because of undue burden or cost.<sup>14</sup>

ii. Format of Production. The parties shall produce each document electronically in PDF format to the extent practical. If a document is produced in PDF format, the party will use best efforts to produce the document in word searchable format.

6. Termination. The duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing.

B. Protective Order and Non-Disclosure Agreement.<sup>15</sup>

1. Confer. On or before October 15, 2010, the parties shall confer with one another for the purpose of discussing and developing a joint proposed protective order and nondisclosure agreement dealing with the handling (and redaction) of documents that are listed on the privilege logs.<sup>16</sup>

2. Submission. On or before November 15, 2010, the parties shall submit to the Board either (i) a unanimously agreed upon proposed protective order and nondisclosure agreement; or (ii) individually or jointly proposed protective orders and nondisclosure agreements. In either

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<sup>14</sup> Cf. Fed. R. Civ. P. 16(b)(5) (scheduling order to include “provisions for disclosure of electronically stored information”); 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”).

<sup>15</sup> Documents covered by a protective order are nevertheless required to be included in a privilege log. Indeed, the only way that an opposing party can learn of the existence of such a document, and thus to request access to that document, is for it to be included in the privilege log.

<sup>16</sup> See Licensing Board Order (Protective Order Governing Non-Disclosure of Certain Documents Claimed to be Proprietary) (Jan. 12, 2007) (unpublished) (ADAMS Accession No. ML0701203270) in Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR, ASLBP No. 06-849-03-LR, for a good example of a protective order and non-disclosure agreement in a Subpart L proceeding.

event, the proposals may be accompanied by a short brief, not to exceed five (5) pages, explaining the proposal and submission. The proposed protective order and nondisclosure agreement should, at a minimum, cover documents claimed to be privileged pursuant to 10 C.F.R. § 2.390(a)(4).

3. Response Brief. If, but only if, the parties are unable to submit a unanimously agreed upon proposed protective order and nondisclosure agreement, then, on or before November 22, 2010, each party may file a brief (not to exceed five (5) pages) responding to any points previously raised by the other parties.

C. Disclosure Disputes and Motions to Compel. The Board intends to identify, manage and resolve any discovery or disclosure disputes promptly, fairly, and as early in the adjudicatory proceeding as practicable. We expect the parties to pursue this objective as well, so as to minimize or avoid such disputes once the initial disclosures (leading to the evidentiary hearing) begin. However, the regulations require that, unless otherwise specified by the Board, a motion, such as a motion to compel, shall be filed within ten (10) days after the occurrence or circumstance from which the motion arises. 10 C.F.R. § 2.323(a). Likewise a motion must be accompanied by a certification that the movant made a sincere effort to contact the other parties and to resolve the issues raised in the motion.<sup>17</sup> 10 C.F.R. § 2.323(b). Experience indicates that some of the mandatory disclosures, particularly the initial mandatory disclosures (and initial production of the hearing file) with regard to a particular contention, can be quite large. This can make it difficult, if not impossible, to comply with both the consultation and ten (10) day

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<sup>17</sup> The consultation effort required by 10 C.F.R. § 2.323(a) does not extend the ten-day promptness deadline process required by 10 C.F.R. § 2.323(b). For example, the listing of a document on a privilege log is the “occurrence or circumstance” when the claim of privilege first arises, and a motion challenging that claim should, absent good cause, generally be filed within ten days under 10 C.F.R. § 2.323(a). Negotiations between the parties concerning the validity of the privilege claim, while important and valuable, do not automatically extend the ten-day deadline and the commencement of the ten-day countdown does not wait until (perhaps many months later) one of the parties finally declares a negotiating impasse. However, the parties may request a reasonable extension of the deadline if they show that they are actively engaged in good faith negotiations to resolve the disclosure dispute.

requirement of 10 C.F.R. § 2.323(a) and (b). The parties discussed this issue and agreed, at least with regard to initial disclosures, that some adjustment in the deadlines for motions to compel would be appropriate. Tr. at 414-15 (Curran), 415-16 (Repka), 416-17 (Uttal).

Accordingly, the following rules shall apply to disputes regarding the timing, nature, scope, and completeness of mandatory disclosures, production of hearing files, and privilege logs, including but not limited to disputes regarding whether a document qualifies for a claimed privilege or protection, disputes whether a document should be produced notwithstanding that it qualifies for a privilege, disputes regarding redaction, disputes regarding the adequacy of a privilege log, and disputes regarding the scope and application of any protective order or non-disclosure agreement (hereinafter “disclosure disputes”):

1. Burden of Proof: Regardless of whether the disclosure dispute arises in the context of a motion to compel or a motion for a protective order, the party asserting the privilege or protection bears the burden of proof. See 10 C.F.R. § 2.325.
2. Promptness: General Deadline: Motions raising disclosure disputes shall be filed within twenty (20) days of the occurrence or circumstance from which the motion arises. For example, such motions should generally be filed within twenty (20) days of the monthly update of the mandatory disclosures. Absent prior approval by the Board, negotiations between the parties concerning a discovery dispute do not extend the twenty (20) day deadline. Absent good cause shown, motions raising discovery disputes will not be considered after the twenty (20) day deadline.
3. Promptness Exception: Initial Disclosures and Initial Production of Hearing File: Motions raising disclosure disputes arising from the initial disclosures and initial production of hearing file (including the associated privilege logs) for a particular contention shall be filed within sixty (60) days of the initial disclosures and initial production.

4. Promptness Exception: Post Trigger Date: After the Trigger Date (as defined in II.J herein) motions raising disclosure disputes shall be filed within five (5) working days of the occurrence or circumstance from which the motion arises.

5. Scope and Timing: Disclosure disputes shall be resolved by this Board pursuant to the normal procedures set forth in 10 C.F.R. Part 2 and in this initial scheduling order. The “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation” set forth in the original notice issued herein, see 75 Fed. Reg. at 3495-97, no longer governs because it applies to “potential parties” who are seeking access to information in order to prepare contentions, whereas here SLOMFP is a party and contentions have already been prepared and admitted.<sup>18</sup> Thus, while consultation between the disputants (including the Staff) is still required under 10 C.F.R. § 2.323(b) and while the Staff is free to engage in whatever internal deliberations it chooses when it decides whether to withhold a document, the procedures in the initial order now “give way to the normal process for litigating disputes concerning access to information” under 10 C.F.R. Part 2, see 75 Fed. Reg. at 3496, and do not extend the disclosure dispute deadlines (e.g., for filing motions to compel) set forth above.

D. Monthly Status Report. Commencing on September 16, 2010, the NRC Staff shall submit a short report specifying its best estimate of the dates it expects to issue the draft and final version of the Supplemental Environmental Impact Statement (DEIS and FEIS), the Advanced Final Safety Evaluation Report (AFSER) and the Final Safety Evaluation Report (FSER), and the dates when it understands that the Advisory Committee on Reactor Safety (ACRS) and its relevant subcommittees plan to issue any reports concerning PG&E’s proposed

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<sup>18</sup> The “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation” was issued pursuant to 10 C.F.R. § 2.307(c), which only authorizes SECY to establish procedures for potential parties to obtain access to safeguards or sensitive information when they are seeking that information in order to meet Commission requirements for intervention. That situation does not apply here.

license renewal. Thereafter, the Staff shall update this status report on the third Thursday of each month.

E. Requests For Subpart G Proceeding Based on Disclosures of Eyewitness. A request that a contention or other contested matter be handled pursuant to Subpart G procedures based on 10 C.F.R. § 2.310(d) (which focuses, inter alia, on issues “where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness . . .”) may be based on the mandatory disclosure of the identity of an opposing party’s witnesses pursuant to 10 C.F.R. § 2.336(a)(1). Such requests shall be filed within the same promptness deadlines specified in II.C. for disclosure disputes.

F. Additional Contentions.

1. Consolidated Briefing. If a party seeks to file a motion or request for leave to file a new or amended contention (timely or untimely), then it shall file such motion and the substantive proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1).

Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention. Within seven (7) days of service of the answer, the movant may file a reply.<sup>19</sup>

2. Timeliness. A motion and proposed new contention referred to in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes

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<sup>19</sup> This procedure resolves difficulties that have arisen in several proceedings concerning the interplay of the sequence and timing for motions under 10 C.F.R. §§ 2.309(f)(2) and 2.323 (motion, answer), and the sequence and timing for contentions under 10 C.F.R. § 2.309(h) (contention, answer, reply). This procedure clarifies and expedites the process by consolidating and shortening the multiple steps specified in those regulations.

available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both provisions, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).

3. Selection of Hearing Procedures. A motion and proposed new contention specified in paragraph II.F.1 above may address the selection of the appropriate hearing procedure for the proposed new contention. See 10 C.F.R. §§ 2.309(g) and 2.310(d).

G. Pleadings and Motions – Generally.

1. Pleadings – Page Limitation. Motions and answers to motions shall not exceed fifteen (15) pages in length (excluding attachments, see II.K.5, infra) absent preapproval of the Board. A motion for preapproval to exceed this page limitation shall be submitted in writing no less than three (3) business days prior to the time the motion or answer is due to be filed. A motion to exceed this page limitation must (i) indicate whether the request is opposed or supported by the other participants to the proceeding; (ii) provide a good faith estimate of the number of additional pages that will be filed; and (iii) demonstrate good cause for being permitted to exceed the page limitation.

2. Response to New Facts or Arguments in Answer Supporting a Motion. Except for a motion to file a new or amended contention as set forth in paragraph II.F. supra or where there are compelling circumstances, the moving party has no right to reply to an answer or response to a motion. See 10 C.F.R. § 2.323(c). However, if any party files an answer that supports a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a response to any new facts or arguments presented in that answer. Except as otherwise specified herein, no further supporting statements or responses thereto will be entertained.<sup>20</sup>

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<sup>20</sup> This provision avoids unnecessary confusion and litigation that has arisen on this point and is modeled on 10 C.F.R. § 2.710(a).

3. Motion for Leave to File Reply. A party seeking to file a reply must first obtain leave of the Board. A motion for leave to file a reply shall be submitted no less than three (3) business days prior to the time the reply would need to be filed.<sup>21</sup> In addition to all other requirements, a motion to file a reply must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate good cause for permitting the reply to be filed.

4. Motion for Extension of Time. A motion for extension of time shall be submitted in writing at least three (3) business days before the due date for the pleading or other submission for which an extension is sought. In addition to all other requirements, a motion for extension of time must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate appropriate cause that supports permitting the extension.

5. Answer Opposing a Motion to Exceed the Page Limitation, to File a Reply, or to Extend the Time for Filing a Pleading. An answer to a motion to exceed the page limit, to file a reply, or to extend the time for filing a pleading shall be filed and served on the next business day after the filing of the request.

6. Motion Certification. In accordance with 10 C.F.R. § 2.323(b), a motion will be rejected if it does not include the following certification by the attorney or representative of the moving party:

“I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion,

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<sup>21</sup> Although the agency’s rules of practice regarding motions do not provide for reply pleadings, the Board will presume that for a reply to be timely it would have to be filed within seven (7) days of the date of service of the response it is intended to address. See 10 C.F.R. § 2.309(h)(2).

and to resolve those issues, and I certify that my efforts have been unsuccessful.”<sup>22</sup>

7. Answer Certification. If the attorney or representative of a party is contacted pursuant to the consultation requirement of 10 C.F.R. § 2.323(b), then that person (or his or her alternate) must make a sincere effort to make himself or herself available to listen and to respond to the moving party’s explanation, and to resolve the factual and legal issues raised in the motion. If the answering party is unaware of any attempt by the moving party to contact it, then the answer shall so certify. Otherwise, an answer will be rejected if it does not include the following certification by the contacted attorney or representative (or his or her alternate) of the answering party:

“I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.”

It is inconsistent with the dispute avoidance/resolution purposes of 10 C.F.R. § 2.323(b), and thus insufficient, for the contacted attorney or representative to fail or refuse to consider the substance of the consultation attempt, or for the party to respond that “it takes no position on the motion (or issues) and that it reserves the right to file a response to the motion when it is filed.”

8. Supplemental Information. The certifications specified in the foregoing two subsections may be supplemented with any additional information that the representative or attorney deems necessary to ensure the accuracy of the certification or to explain the situation.

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<sup>22</sup> Although in general the movant has only ten (10) days within which to file its motion under 10 C.F.R. § 2.323(a), a sincere effort at consultation should be timely, i.e., not initiated at the last minute. It should be initiated sufficiently in advance of the ten-day deadline to provide enough time for the possible resolution of the matter or issues in question. See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 128 (2006). If the initial consultation is initiated at a reasonable time and the parties believe that all or part of the matter may be resolved amicably if additional time for filing the motion were provided, the parties are encouraged to file a joint motion requesting an extension of time.

H. Dispositive Motions. Dispositive motions, such as motions for summary disposition under 10 C.F.R. § 2.1205 and motions to dismiss a matter as moot, ask for a resolution of a contention on the basis of written pleadings, testimony, and exhibits and are, in this respect, quite similar to Subpart L proceedings, which are primarily written proceedings (with the opportunity for the Board to ask questions). In light of this situation, the Board finds that dispositive motions, especially if filed late in the proceeding when the parties are heavily engaged in other important tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serving to narrow or expedite the resolution of the adjudicatory proceeding. Therefore, motions for summary disposition and other dispositive motions, while permissible, will be managed in this proceeding as follows:<sup>23</sup>

1. Certification. A dispositive motion (e.g., motion for summary disposition or a motion to dismiss) will be rejected unless, in addition to the signature requirements of 10 C.F.R. § 2.304(d) and the certifications required by 10 C.F.R. § 2.323(b) and this order, the motion includes the following certification by the attorney or representative of the moving party:

“I certify that this motion is not interposed for delay, prohibited discovery, or any other improper purpose, that I believe in good faith that there is no genuine issue as to any material fact relating to this motion, and that the moving party is entitled

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<sup>23</sup> The Commission has stated that “[t]here may be times in the proceeding where motions for summary disposition should not be entertained because consideration of the motion would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues or distracting other parties and the presiding officer from their preparation for a scheduled hearing. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The presiding officer . . . is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide presiding officers the flexibility to make that determination in most proceedings.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2186 (Jan. 14, 2004).

to a decision as a matter of law, as required by 10 C.F.R. §§ 2.1205 and 2.710(d).<sup>24</sup>

2. Promptness Deadline: Additional Time for Dispositive Motions. In light of the gravity and importance of dispositive motions, and in order to accommodate careful consultation as specified above, dispositive motions may be filed twenty (20) days after the occurrence or circumstance from which the motion arises (rather than the ten (10) day time frame established by 10 C.F.R. § 2.323(a)), provided that the moving party commences sincere efforts to contact and consult all other parties within ten (10) days of the occurrence or circumstance, and the accompanying certification so states.

3. Answers. In accordance with 10 C.F.R. § 2.1205(b), an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within twenty (20) days after service of the motion.

4. Continuance. If it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the Board may refuse the application for summary disposition, order a continuance to permit affidavits to be obtained, or make and order as is appropriate. See 10 C.F.R. § 2.710(c); cf. Fed. R. Civ. P. 56(f).

5. Ultimate Deadlines. With regard to any contention based on 10 C.F.R. Part 51 or the National Environmental Policy Act, no motion for summary disposition or other dispositive motion may be filed after June 1, 2011.<sup>25</sup> With regard to any other contention or issue, no

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<sup>24</sup> See 10 C.F.R. § 2.304(d) (Representations of a Signatory to a Pleading); cf. Fed. R. Civ. P. 11(b).

<sup>25</sup> June 1, 2011 is slightly more than 60 days prior to August 12, 2011, the date when the Staff estimates it will issue the Final Supplemental EIS. Staff Projected Schedule (August, 18, 2010).

motion for summary disposition or other dispositive motion may be filed after May 1, 2011.<sup>26</sup>

These deadlines are in addition to, not in lieu of, the promptness deadlines specified above.

I. Clarification, Simplification, and Amendment of the Pleadings. During the initial scheduling conference, the parties and the NRC Staff stated that it was their consensus that it is premature to address the following issues:

1. The clarification, simplification, or specification of the issues;
2. The necessity or desirability of amending the pleadings;
3. Opportunities to develop stipulations or admissions of fact; and
4. Opportunities for the settlement of issues or contentions.

Tr. at 407-08.

Nevertheless, the Board encourages the parties and NRC Staff to continue to consider and pursue such measures, as specified in 10 C.F.R. §§ 2.329(c)(1)-(3) and 2.338. We will revisit these issues throughout this proceeding. For example, if it appears that stipulations or admissions of fact can narrow or eliminate factual or legal disputes, the parties and the NRC Staff are encouraged to consult with each other and/or file motions to pursue the same.

J. Evidentiary Hearing Filings. The Board currently contemplates a single evidentiary hearing herein, which will cover both the three environmental contentions and the single safety contention. Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing. The Board has determined that the appropriate trigger date for the initiation of such filings is the later of (a) the date when the NRC Staff issues the Final Supplemental EIS (FSEIS) to the public, or (b) the date when the full ACRS meets to discuss the PG&E application.<sup>27</sup> This shall be deemed the "Trigger Date."

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<sup>26</sup> May 1, 2011 is slightly more than 60 days prior to July, 7, 2011, the date when the Staff estimates that the full ACRS will meet to consider PG&E's application. Staff Projected Schedule (August, 18, 2010).

<sup>27</sup> The Staff currently estimates that it will issue the FSEIS on August 12, 2011 and that the full ACRS will meet to consider PG&E's application on July 7, 2011. Staff Projected Schedule

1. Initial Statements of Position, Testimony, Affidavits, and Exhibits. Forty-Five (45) days after the Trigger Date, all parties and the NRC Staff shall file their initial written statement of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for their statements or position.

2. Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits. No later than twenty (20) days after service of the materials submitted under paragraph J.1, the parties and the NRC Staff shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for their statements or position. Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal

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(August, 18, 2010). We note also that 10 C.F.R. § 2.332(d) prohibits the commencement of evidentiary hearings on environmental issues until after the FEIS. It also prohibits commencement of evidentiary hearings on safety issues until after the FSER, unless the Board affirmatively finds that the safety hearing can be held earlier and still expedite the ultimate resolution of the case.

exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.

3. Motions In Limine or to Strike. No later than ten (10) days after service of the materials submitted under paragraph J.2, the parties and the NRC Staff shall file their motions in limine or motions to strike regarding the materials submitted under paragraphs J.1 and J.2. Answers shall be filed no later than seven (7) days after service of such motions.

4. Proposed Questions for Board to Ask.<sup>28</sup> No later than thirty (30) days after service of the materials submitted under paragraph J.2, all parties and the NRC Staff shall file proposed questions for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The direct or rebuttal examination plans should contain a brief description of the issue or issues which the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. The proposed direct examination questions and plans should be filed in camera and not served on SECY, the NRC Staff, or any other party.

5. Motions for Cross-Examination.<sup>29</sup> No later than thirty (30) days after service of the materials submitted under paragraph J.2, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b). The motion for cross-

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<sup>28</sup> A party should cover all essential points in the direct and rebuttal testimony that it prefiles for each of its own witnesses. The prefiled proposed questions should not focus on a party's own witnesses, but should instead be directed to the witnesses of the other parties.

<sup>29</sup> "The standard for allowing the parties to conduct cross-examination is the same under Subparts G and L, to wit – the Administrative Procedure Act (APA) standard for cross-examination in formal administrative proceedings as set forth in 5 U.S.C. § 556(d) ("A party is entitled . . . to conduct such cross examination as may be required for a full and true disclosure of the facts."). See Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004); see also 69 Fed. Reg. at 2,195-96." LBP-10-15, 72 NRC at \_\_\_ (slip op. at 93-94).

examination shall be filed with all parties, but the cross-examination plan itself should be filed in camera and not be served on SECY, the NRC Staff, or any other party.

6. Evidentiary Hearing. Although the specific time and date for the evidentiary hearing will be determined later, the Board currently contemplates that it will commence between thirty (30) and eighty (80) days after the service of the material specified in paragraphs J.4 and J.5.

7. Witness with Written Testimony Must be Available in Person. Unless the Board expressly provides otherwise, each party (including the NRC Staff) must, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony attends the evidentiary hearing in person and is available to testify and to respond orally to questions.<sup>30</sup>

K. Attachments to Filings.

1. Documents Must be Attached. If a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), then a copy of that document, or the relevant portion thereof, shall be submitted with and attached to the pleading. The pleading must cite to the specific page or section of the document that is relevant.

2. Exception. If the following documents are publicly available on the NRC ADAMS system, then they do not need to be attached to a motion or pleading: PG&E's Application and Environmental Report, the DEIS, the FEIS, the FSER with open items, and the FSER. With regard to such documents, it is sufficient if the pleading clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the

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<sup>30</sup> If, after reading the prefiled testimony, the Board concludes that it has no questions for a particular witness, it will so advise the parties and that individual will not need to attend the evidentiary hearing. Likewise, if the Board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and propose that the contention be resolved pursuant to 10 C.F.R. § 2.1208.

specific page or section that is relevant. All other documents (or the relevant portions thereof), even if they can be found in ADAMS, should be attached to the pleading.<sup>31</sup>

3. Attached Documents are “Attachments.” All documents referred to in the pleadings (pursuant to the two preceding paragraphs) shall be labeled and referred to as “Attachments,” not exhibits.<sup>32</sup>

4. Designation and Marking of Attachments. A separate numeric designation shall be assigned to each Attachment (e.g., Attachment 3). With regard to Attachments covered by paragraph K.1, the numeric designation shall be prominently marked either on the first page of the appended document or on a cover/divider sheet in front of the appended document.

5. Page Limits/Method of Electronic Submission. Attachments are not subject to the page limitation set forth in section G.1 above. All Attachments associated with a pleading shall be submitted together via the E-Filing system as a single electronic file that consists of the pleading

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<sup>31</sup> The NRC’s E-Filing guidance document has guidance concerning the filing of copyrighted material. See <http://www.nrc.gov/site-help/e-submittals.html> (under Additional Information, follow link to Reference Materials for Electronic Submissions and then access link for Guidance for Electronic Submissions to the NRC, Revision 6).

<sup>32</sup> The term “exhibit” is reserved for use as a designation for those items that are submitted pursuant to paragraph II.J as proffered evidence for the evidentiary hearing.

or other submission, the certificate of service, and all the Attachments. If, however, the submission exceeds fifteen megabytes in size, then the pleading should be separated into two or more submissions, each less than fifteen megabytes.<sup>33</sup>

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
September 15, 2010

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<sup>33</sup> This accords with NRC's E-Filing guidance (at page 14-15). See <http://www.nrc.gov/site-help/e-submittals.html> (under Additional Information, follow link to Reference Materials for Electronic Submissions and then access link for Guidance for Electronic Submissions to the NRC, Revision 6).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing INITIAL SCHEDULING ORDER have been served upon the following persons by the Electronic Information Exchange.

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Docket Nos. 50-275-LR and 50-323-LR  
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[Original signed by Christine M. Pierpoint]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 15<sup>th</sup> day of September 2010.