

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)	)	

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NRC STAFF'S ANSWER TO PETITION FOR REVIEW OF LBP-11-32

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December 15, 2011

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION .....	1
PROCEDURAL HISTORY .....	2
DISCUSSION.....	5
I. Legal Standards for Interlocutory Review .....	5
II. SLOMPF Does Not Meet the Standards for Interlocutory Review .....	6
A. SLOMPF Does Not Show That the Board’s Decision Will Affect the Basic Structure Of the Proceeding in a Pervasive or Unusual Manner.....	8
1. The Petition Misapplies the Regulatory Standard.....	8
2. SLOMPF Does Not Show That the Board’s Application of CLI-11-05 Affects the “Basic Structure” of the Proceeding in a Pervasive and Unusual Manner .....	9
B. SLOMPF Does Not Show It Is Threatened With an Immediate and Serious Irreparable Impact .....	14
1. The Petition Mistakes the Board’s Holding in LBP-11-32 .....	14
2. The Board’s Decision Does Not Otherwise Create an Immediate and Serious Irreparable Impact That Cannot Be Alleviated.....	15
III. SLOMPF Has Not Shown That Interlocutory Review is Otherwise Warranted .....	17
A. SLOMPF’s Petition Is Not Justified Under 10 CFR § 2.341(f)(1).....	17
B. SLOMPF’s Petition Is Not Supported by the Commission’s Statement Of Policy on Conduct of Adjudicatory Proceedings .....	19
C. SLOMPF’s Petition Is Not Justified by CLI-11-05.....	19
CONCLUSION .....	20

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby files its answer in opposition to the San Luis Obispo Mothers for Peace (“SLOMFP”) Petition for Partial Interlocutory Review of LBP-11-32 (“Petition”).<sup>1</sup> The Petition seeks review of the Atomic Safety and Licensing Board’s (“Board”) November 18, 2011, Memorandum and Order and Referral (Denying Motion to Admit New Contention and Referring Ruling to the Commission).<sup>2</sup> SLOMFP requests review of the portion of the Board’s decision that SLOMFP alleges held its contention to be “premature.”<sup>3</sup> However, the Board decided the new contention was inadmissible on other grounds.<sup>4</sup> The Staff submits that the Petition should be denied because the Petition misconstrues the Board’s holding and does not meet the standards for interlocutory review, as the Petition demonstrates neither an “immediate

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<sup>1</sup> San Luis Obispo Mothers for Peace’s Petition for Partial Interlocutory Review of LBP-11-32 (Dec. 5, 2011) (ADAMS Accession No. ML11339A149).

<sup>2</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC \_\_ (Nov. 18, 2011) (slip op.) (“LBP-11-32”).

<sup>3</sup> Petition at 2.

<sup>4</sup> LBP-11-32 at 16, 18-19.

or serious irreparable impact” that cannot be alleviated by a petition for review nor that the decision will “affect the basic structure of the proceeding in a pervasive and unusual manner.”<sup>5</sup>

### PROCEDURAL HISTORY

On November 23, 2009, Pacific Gas & Electric (“Applicant” or “PG&E”) filed an application to renew its operating licenses for Diablo Canyon Nuclear Power Plant (“DCNPP”), Units 1 and 2.<sup>6</sup> On March 22, 2010, SLOMFP submitted a Request for Hearing and Petition to Intervene that contained five contentions.<sup>7</sup> Because two of the contentions in the Petition to Intervene challenged NRC regulations, SLOMFP filed a petition to waive application of the regulations in this proceeding.<sup>8</sup> The Applicant filed an answer opposing all five contentions and the waiver request.<sup>9</sup> The Staff filed a response opposing the waiver request<sup>10</sup> as well as an answer opposing admission of four of the five contentions.<sup>11</sup>

Of the proffered contentions, the Board admitted four contentions (Technical Contention 1 (“TC-1”), Environmental Contention 1 (“EC-1”), Environmental Contention 2 (“EC-2”) and Environmental Contention 4 (“EC-4”)), referred EC-2 to the Commission for a ruling on waiver of a rule of general applicability under 10 C.F.R. § 2.335, denied admission of EC-3, and referred

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<sup>5</sup> 10 C.F.R. § 2.341(f)(2).

<sup>6</sup> Letter from James R. Becker, Senior Vice President, dated November 23, 2009, transmitting application for license renewal for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (ADAMS Accession No. ML093350335). Pursuant to 10 C.F.R. § 51.53(c), Appendix E to the application was the Applicant’s environmental report. Appendix E, Applicant’s Environmental Report – Operating License Renewal Stage (Nov. 23, 2009) (ADAMS Accession No. ML093340123).

<sup>7</sup> Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (March 22, 2010) (ADAMS Accession No. ML1008104410) (“Petition to Intervene”).

<sup>8</sup> Petition to Intervene at 19, 21.

<sup>9</sup> Applicant’s Answer to Petition to Intervene and Response to Requests for Waivers, at 2-3 (Apr. 16, 2010) (ADAMS Accession No. ML101060671).

<sup>10</sup> NRC Staff’s Response to the Petition for Wavier of Commission Regulations Filed by San Luis Obispo Mothers for Peace, at 1 (Apr. 16, 2010) (ADAMS Accession No. ML101060657).

<sup>11</sup> NRC Staff’s Answer to the San Luis Obispo Mothers for Peace Request for Hearing and Petition to Intervene, at 1 (Apr. 16, 2010) (ADAMS Accession No. ML101060667).

several legal and policy questions to the Commission with regard to EC-4, pursuant to 10 C.F.R. § 2.323(f)(1).<sup>12</sup> On August 16, 2010, PG&E appealed the admission of all four contentions under 10 C.F.R. § 2.311(d)(1).<sup>13</sup> On August 19, 2010, the Staff filed an appeal of the Board's decision as to the admission of TC-1 and EC-1, pursuant to 10 C.F.R. § 2.341(f)(2).<sup>14</sup> In response, the Commission issued CLI-11-11 on October 12, 2011, affirming the Board's decision in part and reversing in part, resulting in the admission of one of the Intervenor's contentions.<sup>15</sup>

On March 11, 2011, the Fukushima Dai-ichi facility in Japan experienced an earthquake followed by a tsunami, which damaged some of the reactors located on site.<sup>16</sup> Following that event, the Commission established a near-term Task Force to conduct a systematic and methodical review of the NRC's processes and regulations and to make recommendations on additional improvements to the Commission for its policy direction. On July 12, 2011, the near-term Task Force issued its report: "Recommendations for Enhancing Reactor Safety in the 21<sup>st</sup> Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" ("TFR").<sup>17</sup>

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<sup>12</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 74 NRC \_\_ (Aug. 4, 2010) (slip op. at 96) (ADAMS Accession No. ML102160435).

<sup>13</sup> Applicant's Notice of Appeal of LBP-10-15 (Aug. 16, 2010) at 1 (ADAMS Accession No. ML102280603).

<sup>14</sup> 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 (August 19, 2010) (ADAMS Accession No. ML102310565)

<sup>15</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, \_\_ NRC \_\_ (October 12, 2011) (slip op).

<sup>16</sup> The NRC Staff recognizes the importance of the accident at Fukushima Dai-ichi and the resulting tragic loss of life and damage. The NRC Staff takes seriously its responsibility to analyze and implement any lessons learned from that accident.

<sup>17</sup> Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) (ADAMS Accession No. ML111861807).

In response to the release of the TFR, SLOMFP filed a contention on August 11, 2011, alleging that the Environmental Report for the DCONPP license renewal failed to satisfy NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the TFR.<sup>18</sup> The Board held oral arguments regarding the contention on October 13, 2011, and on November 18, 2011, the Board denied admission of the new contention in LBP-11-32.<sup>19</sup> The Board rejected the contention because it found that there was no requirement for an Applicant to update an environmentally compliant ER to reflect new and significant information, a holding which a majority of the Board certified to the Commission under 10 C.F.R. § 2.323(f).<sup>20</sup> However, the Board then held that even if there were a duty to update the ER, the new contention would still not be admissible under the contention admissibility standards because SLOMFP's contention did not demonstrate a material dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(vi).<sup>21</sup> The Board noted that "since SLOMFP offers nothing to link the outcome of the Fukushima events to either the DCONPP plant or to its LRA, there is no information provided to show any dispute with the application."<sup>22</sup> The Board found that "SLOMFP has not provided even a potentially plausible case that the Task Force 'findings and recommendations' will 'paint a seriously different picture' of the environmental impacts of the DCONPP."<sup>23</sup>

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<sup>18</sup> Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011).

<sup>19</sup> LBP-11-32 at 2, 16, 18-19.

<sup>20</sup> *Id.* at 16-18, 21. Judge Abramson wrote a separate concurrence agreeing with the Board's holding but not joining in the referral of the ruling to the Commission. LBP-11-32 (Concurring Opinion of Judge Abramson).

<sup>21</sup> *Id.* at 18.

<sup>22</sup> *Id.* at 19.

<sup>23</sup> *Id.*

On December 5, 2011, SLOMPF filed the instant Petition before the Commission requesting interlocutory review of the portion of the Board's decision that it did not certify to the Commission under 10 C.F.R. § 2.341(f)(2).<sup>24</sup> SLOMPF alleges that the Board denied admission of the contention because it was "premature" and that the Board erred in so holding.<sup>25</sup> The Petition contends the Commission should take interlocutory review of LBP-11-32 because the Board's decision will have a "pervasive and unusual effect on the proceeding."<sup>26</sup>

## DISCUSSION

### I. Legal Standards for Interlocutory Review

Pursuant to 10 C.F.R. § 2.341(f)(2), the Commission may, at their discretion, grant a party's request for interlocutory review of a Board decision.<sup>27</sup> However, "the Commission generally disfavor[s] interlocutory, piecemeal appeals" of licensing board decisions.<sup>28</sup> Accordingly, the Commission's "rules set a high bar for interlocutory review petitions"<sup>29</sup> and review is granted only in "extraordinary circumstances."<sup>30</sup> The party seeking review must demonstrate that the issue for which it seeks review:

- i) Threatens the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

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<sup>24</sup> Petition at 1.

<sup>25</sup> *Id.* at 1-2.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> 10 C.F.R. § 2.341(f)(2).

<sup>28</sup> See, e.g., *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-02, 65 NRC 10, 12 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

<sup>29</sup> *Entergy Nuclear Vermont Yankee & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1, 3 (2007).

<sup>30</sup> See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-30, 72 NRC \_\_, \_\_ (Nov. 30, 2010) (slip. op at 5); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 & n. 44 (2006).

- ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.<sup>31</sup>

But as the Commission has held, “[t]he possibility that an interlocutory ruling may be wrong does not in itself justify interlocutory review”<sup>32</sup> even if “aspects of the Licensing Board’s decision appear highly questionable.”<sup>33</sup>

Moreover, “absent highly unusual circumstances,” the Commission has “declined to conduct interlocutory review of contention admissibility decisions.”<sup>34</sup> Particularly “where the intervenor’s other contentions remain in litigation,” refusal to admit a contention “does not constitute a pervasive effect on the litigation calling for interlocutory review.”<sup>35</sup> Nor does a denial of the admissibility of a contention “affect a proceeding’s basic structure,” which “comprehends disputes over the very nature of the hearing in a particular proceeding,” not “routine arguments over admitting particular contentions.”<sup>36</sup>

## II. SLOMPF Does Not Demonstrate That Its Petition Meets the Standards for Interlocutory Review

SLOMPF petitions for “partial” interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii) of the Board’s decision in LBP-11-32, alleging that the Board denied its new Contention on the grounds that the Contention was “premature.”<sup>37</sup> SLOMPF further claims that the Board “applied

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<sup>31</sup> 10 C.F.R. § 2.341(f)(2).

<sup>32</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-01, 53 NRC 1, 5 (2001) citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

<sup>33</sup> *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004) (internal cites omitted).

<sup>34</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-06, 69 NRC 128, 133 (2009) (internal cites omitted).

<sup>35</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-01, 53 NRC 1, 5 (2001).

<sup>36</sup> *Clinton*, CLI-04-31, 60 NRC at 467 (internal cites omitted).

<sup>37</sup> SLOMPF states that it is not petitioning for review of the question of whether the Applicant is required to supplement its ER, but rather “the ASLB’s other ground for denying admission of the contention: that it is premature.” Petition at 1-2.

an erroneous legal standard” to the question of whether SLOMPF presented new and significant information.<sup>38</sup> SLOMPF contends that, therefore, “interlocutory review is warranted under 10 C.F.R. § 2.341(f)(2)(ii) because the decision will have a pervasive and unusual effect on the proceeding” and because it “meets the NRC’s standard for referral or directed certification of ALSB decisions in 10 C.F.R. § 2.341(f)(1).”<sup>39</sup> SLOMPF also maintains that “[r]eview is appropriate because LBP-11-32 presents the type of ‘novel’ legal question that the Commission has encouraged licensing Boards to certify on an interlocutory basis if they arise during litigation of contentions related to the Fukushima Daiichi accident” and further that interlocutory review is justified by 10 C.F.R. § 2.341(f)(1) and the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) (“Statement of Policy”).<sup>40</sup>

SLOMPF’s Petition does not meet the standard for interlocutory review under 10 C.F.R. § 2.341(f)(2) because SLOMPF fails to show either that there will be an “immediate and serious irreparable impact” that cannot be alleviated through appeal of the final decision or that the Board’s decision will “affect the basic structure of the proceeding in a pervasive or unusual manner.”<sup>41</sup> Nor are the Commission’s decision in CLI-11-05,<sup>42</sup> the *Statement of Policy*, or 10 C.F.R. § 2.341(f)(1) applicable to satisfying the standard for interlocutory review requested by a party. Moreover, SLOMPF mistakes the Board’s holding regarding its new contention by alleging that the Board rejected its contention as premature.<sup>43</sup> Because the Board did not deny

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<sup>38</sup> Petition at 6.

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* .

<sup>41</sup> See 10 C.F.R. § 2.341(f)(2).

<sup>42</sup> *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC \_\_, \_\_ (Sep. 9, 2011)(slip op.) (ADAMS Accession No. ML11252A958).

<sup>43</sup> In LBP-11-32, the Board devoted a lengthy footnote to the issue of timing when setting the schedule for filing contentions based on Fukushima while not deciding the case on that issue. LBP-11-32 at 17, n. 34. But the Board dismissed SLOMPF’s contention not on grounds of prematurity but because the Board found no legal duty to supplement a compliant environmental report with new and significant

admission of the new contention on grounds of prematurity, there is no basis for granting review of the Board's decision.<sup>44</sup> Consequently, SLOMPF's petition alleging legal error by the Board for denying admission of its new contention does not meet the standard for interlocutory review and the petition should be denied.

A. SLOMPF Does Not Show That the Board's Decision Will Affect the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

1. The Petition Misapplies the Regulatory Standard

SLOMPF maintains that the basis for its petition for interlocutory review is 10 C.F.R. § 2.341(f)(2)(ii), claiming that interlocutory review is warranted "because the decision will have a pervasive and unusual effect on the proceeding."<sup>45</sup> But SLOMPF misapplies the regulatory standard for interlocutory review. The "pervasive and unusual" standard in 10 C.F.R. § 2.341(f)(2)(ii) that SLOMPF cites applies only where the decision "affects the *basic structure* of the proceeding in a pervasive and unusual manner."<sup>46</sup> The standard for granting interlocutory review, therefore, depends on whether the Board's decision "affects the basic structure of the proceeding," not just whether it will have a "pervasive and unusual effect on the proceeding,"<sup>47</sup> as SLOMPF alleges. Because the Commission considers the "basic structure" of the proceeding to comprehend "disputes over the very nature of the hearing in a particular proceeding — for example, whether a licensing hearing should proceed in one step or two,"<sup>48</sup> SLOMPF's Petition regarding the Board's decision on contention admissibility does not fulfill this standard.

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information. LBP-11-32 at 16. Alternatively, the Board found that the contention would be inadmissible regardless because SLOMPF failed to establish a material dispute with the application. LBP-11-32 at 18-19.

<sup>44</sup> LBP-11-32 at 16, 18-19 (deciding on other grounds).

<sup>45</sup> Petition at 2.

<sup>46</sup> 10 C.F.R. § 2.341(f)(2)(ii) (emphasis added).

<sup>47</sup> See 10 C.F.R. § 2.341(f)(2)(ii).

<sup>48</sup> *Clinton*, CLI-04-31, 60 NRC at 467.

2 SLOMPF Does Not Show That the Board’s Application of CLI-11-05 Affects the “Basic Structure” of the Proceeding in a Pervasive and Unusual Manner

SLOMPF unpersuasively argues that the Board’s interpretation of CLI-11-05 inappropriately rendered their contention to be “premature”<sup>49</sup> and “affects this proceeding . . . in a pervasive and unusual manner by creating great uncertainty regarding the appropriate timing of a contention challenging the failure of an environmental decision-making document to address the implications of the Fukushima accident.”<sup>50</sup> SLOMPF additionally cites several other licensing board holdings on a similar contention filed in other proceedings as supporting this claim and affecting the proceeding.<sup>51</sup> Therefore, SLOMPF appears to argue, it is now uncertain as to the correct time to file its contention as a result of this decision and seeks Commission guidance.<sup>52</sup>

But this Board did not hold that SLOMPF’s new contention was premature.<sup>53</sup> Although other licensing boards may have held that a similarly filed contention was premature, SLOMPF conflates those holdings with the decision of this Board, which made no such holding.<sup>54</sup> SLOMPF’s basis for alleging that the Board found its new contention to be premature is its claim that the Board “concluded that the contention was premature because the ultimate outcome of

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<sup>49</sup> Petition at 2.

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 2, 10, and 11.

<sup>53</sup> *See* LBP-11-32 at 16-20. The Board held that the Intervenor failed to establish a material dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(vi). LBP-11-32 at 21.

<sup>54</sup> The Intervenor cites other licensing board decisions, but these decisions are not precedent and are not binding either on this Board or on the Intervenor. Petition at 6, 10-11. The standard for interlocutory review applies to a specific decision of a particular licensing board. *See* 10 C.F.R. § 2.341(f)(2). Therefore, licensing board holdings in those proceedings are inapplicable to determining whether the decision in LBP-11-32 merits additional Commission review under the standard in 10 C.F.R. § 2.341(f)(2).

the Task Force Report is uncertain.”<sup>55</sup> But as even SLOMPF notes in its Petition, the Board found that the “logic of the contention is that *implementation* of the Task Force recommendations will greatly increase the reactor costs, necessarily resulting in changes to the SAMA analysis and alternatives analysis.”<sup>56</sup> Because SLOMPF plainly conditioned the dispute of its new contention on the implementation of Task Force Report recommendations as mandatory,<sup>57</sup> the Board held that because the Task Force recommendations to which SLOMPF referred have not yet been made mandatory, SLOMPF’s new contention does not establish a material dispute with the application.<sup>58</sup> The Board correctly recognized that the costs that SLOMPF alleged arise from non-existent “mandatory measures” do not currently exist and thus do not establish a material dispute with the application.<sup>59</sup> As the Board put it, “[a]bsent better knowledge of those regulatory changes, it is impossible to predict what additional costs, if any, such changes may impose on DNCPP.”<sup>60</sup>

The Board also found that SLOMPF did not show that the recommendations were “new

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<sup>55</sup> Petition at 5, citing LBP-11-32 at 18-19.

<sup>56</sup> *Id.* at 5, citing LBP-11-32 at 18-19 (emphasis added). SLOMPF, in its Petition, does not appear to raise issue with the Board’s treatment of SRM/SECY-11-0124 in the decision. See LBP-11-32 at 19.

<sup>57</sup> SLOMPF states: “*Were SAMAs imposed as mandatory measures*, the outcome of the ER and subsequently the EIS for Diablo Canyon could be affected significantly in two major respects. First, severe accident mitigative measures now rejected as too costly may be required, thus substantially improving the safety of the Diablo Canyon operation if it is licensed. Second, consideration of the costs of mandatory mitigative measures could affect the overall cost-benefit analysis for the reactor.” Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) at 14 (emphasis added).

<sup>58</sup> LBP-11-32 at 18-19.

<sup>59</sup> See *id.* at 18-19. SLOMPF attempts to argue now that the Board erred in its logic when it “overlooked the environmental impact of a decision *not* to adopt the Task Force recommendations.” Petition at 9. But SLOMPF made no such argument in its new contention or at oral argument. Because SLOMPF premised its new contention on the imposition of SAMAs “as mandatory measures,” the Board correctly held that since such mandatory measures had not been taken, the new contention failed to establish a material dispute because the costs that SLOMPF alleged would arise from mandatory measures do not exist and therefore cannot change the cost-benefit analysis for the reactor. LBP-11-32 at 8, 16-20.

<sup>60</sup> *Id.* at 18.

and significant” information. In part, the Board noted, “[b]ut we fail to see, and SLOMPF has not shown, how these recommendations in-and-of themselves (even from such an august body as the Task Force), constitute ‘new and significant information’ that ‘presents a seriously different picture of the environmental impact of the project from what was previously envisioned.’”<sup>61</sup> The Board noted that the “impacts of the Task Force recommendations remain uncertain and unpredictable,” and that therefore “assessing any changes that might need to be made in the DCNPP SAMA analysis or NEPA alternatives analysis similarly impossible.”<sup>62</sup> Accordingly, SLOMPF established no dispute based on the recommendations. As the Board recognized, because this proceeding regards an individual license renewal, any “new and significant” information must raise a dispute with the specific application. Because the Board found that “SLOMPF offers nothing to link the outcome of the Fukushima events to either the DNCPP plant or to its LRA,” the Board held SLOMPF did not provide the requisite information to show a dispute with the application.<sup>63</sup> Accordingly, the Board found that “SLOMPF has not provided even a potentially plausible case that the Task Force ‘findings and recommendations’ will ‘paint a seriously different picture’ of the environmental impacts of the DCNPP.”<sup>64</sup>

SLOMPF also errs in claiming that the Board found its new contention to be premature by “interpret[ing] CLI-11-05 too broadly.”<sup>65</sup> SLOMPF argues that “CLI-05 does not hold that *any* contentions regarding the Fukushima accident are premature, only contentions that seek

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 19. These statements may have confused the Intervenor as to the Board’s holding. But as the Board pointed out, the new contention as put forth by the Intervenor simply did not establish a material dispute with the application and did not meet the “new and significant” standard put forth by the Commission in CLI-11-05. *Id.* at 18-19. Although new and significant information may arise from Fukushima, and the intervenor may put forth new contentions based on such information, the Board simply held that this contention did not meet the standard. *Id.* at 17, n.35 and 18-19.

<sup>63</sup> *Id.* at 19.

<sup>64</sup> *Id.*

<sup>65</sup> Petition at 9.

'generic' relief."<sup>66</sup> SLOMPF appears to suggest that the Board simply applied CLI-11-05 and ignored the Commission's holding that Fukushima related claims could be raised in individual proceedings.<sup>67</sup> But the Board did not reject SLOMPF's new contention because the Commission found a generic NEPA analysis to be premature. The Board denied SLOMPF's contention in this individual proceeding because SLOMPF did not establish that a requirement existed for an applicant to update its ER and because SLOMPF's new contention failed to establish a genuine dispute with the individual license application.<sup>68</sup> Moreover, as the Board observed, SLOMPF's new contention, which was a generic contention filed in multiple proceedings, failed to "link the outcome of the Fukushima events to either the DNCPP plant or to its LRA"<sup>69</sup> in this individual licensing proceeding.

To the extent that SLOMPF appears to argue that it is now uncertain as to the correct time to file its contention as a result of the Board's holding, this argument is unfounded. The Board specifically laid out the schedule for filing environmental contentions based on Fukushima. The Board stated that "[i]f the DSEIS fails to capture and address any information that SLOMPF believes to be 'new and significant,' then SLOMPF may file a NEPA contention at that time."<sup>70</sup> The Board stated that if a contention "is filed within 30 days of the DSEIS, the contention will be deemed timely."<sup>71</sup> The Board further maintained that "if PG&E voluntarily supplements its ER, either in response to an RAI or sua sponte, to address the impact of the Fukushima Accident or the Task Force Report, then a new contention, relating to those events,

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<sup>66</sup> Petition at 9.

<sup>67</sup> See *id.* at 9.

<sup>68</sup> LBP-11-32 at 16, 18-20.

<sup>69</sup> *Id.* at 19.

<sup>70</sup> *Id.* at 17.

<sup>71</sup> *Id.* at 16-17.

would need to be filed within 30 days of the filing of the supplemental ER in order to be timely.”<sup>72</sup> These instructions from the Board are quite explicit as to when to file an environmental contention. Therefore, no “uncertainty” exists as to the timing to file a contention and the decision does not on that basis “affect the basic structure of the proceeding in a pervasive or unusual manner.”<sup>73</sup>

Although SLOMPF does not challenge an actual holding of the Board and its Petition fails for that reason, the Petition would still be inadmissible under the standard for interlocutory review. Contention admissibility decisions, such as the one on which SLOMPF’s Petition rests, do not affect the “basic structure” of a proceeding for the purposes of the interlocutory review standard.<sup>74</sup> “Claims that a board has wrongly rejected a contention, or portions of a contention, are commonplace; such claims cannot be said to affect a proceeding’s ‘basic structure’ within the meaning of 2.341(f).”<sup>75</sup> Rather, the “‘basic structure’ standard comprehends disputes over the very nature of the hearing in a particular proceeding — for example, whether a licensing hearing should proceed in one step or two — not to routine arguments over admitting particular contentions.”<sup>76</sup> Because SLOMPF’s Petition seeks review of a contention admissibility decision, the decision does not affect the “basic structure” of the proceeding as the Commission has defined it and the Petition should be denied.

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<sup>72</sup> *Id.* at 17. But as the Board noted, “[w]e do not address whether, at the time of the issuance of the DSEIS (or voluntary supplement to the ER), there will actually be any ‘new and significant’ information relating to Fukushima. *Id.* at 17, n. 35. Any contention submitted must still meet the contention admissibility standards under 10 C.F.R. § 2.309(f)(1).

<sup>73</sup> See 10 C.F.R. § 2.341(f)(2)(ii).

<sup>74</sup> *Clinton*, CLI-04-31, 60 NRC at 467.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

B. SLOMPF Does Not Show It Is Threatened With An Immediate and Serious Irreparable Impact

Under 10 C.F.R. § 2.341(f)(2)(i), a party may assert that interlocutory review is warranted where a licensing board's decision "threatens the party with immediate and serious irreparable impact" which cannot be alleviated through later petitioning for review of the final decision.<sup>77</sup> While SLOMPF does not directly contend that interlocutory review is warranted under this standard, SLOMPF does allege that the Board committed "legal error" in its decision,<sup>78</sup> which is normally reviewed under this standard rather than under the "affects the basic structure of the proceeding" standard found in 10 C.F.R. § 2.341(f)(2)(ii).<sup>79</sup> Regardless, SLOMPF's petition is deficient because SLOMPF's petition does not establish an "immediate and serious irreparable impact" that cannot be later rectified by a petition for review of the Board's final decision.

1. The Petition Mistakes the Board's Holding in LBP-11-32

As discussed above, the Petition is mistaken regarding the Board's holding in LBP-11-32, and therefore the Petition has not shown any "serious or irreparable impact" that cannot be alleviated. Regardless, if the Commission were to grant review, it could not resolve SLOMPF's claim by reversing the Board's decision because the Board did not hold what SLOMPF claims it did, i.e., that the contention was denied admission because it was premature. Even if the Board had held that SLOMPF's claim was premature, the SLOMPF's petition would not meet the standard for interlocutory review that requires showing an "immediate and serious irreparable impact." Such a decision would mean only that SLOMPF must file a Fukushima contention when it has new information that establishes a genuine dispute with the application, meets the

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<sup>77</sup> See 10 C.F.R. § 2.341(f)(2)(i).

<sup>78</sup> Petition at 6.

<sup>79</sup> See, e.g., *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 71 (2004); See *Clinton*, CLI-04-31, 60 NRC at 467; *Indian Point*, CLI-10-30, 72 NRC \_\_ (slip op at 6).

contention admissibility standards, and complies with the clear schedule for filing that the Board put forth for this proceeding.<sup>80</sup> No “immediate and serious irreparable impact” would result even if SLOMPF’s claim were correct because SLOMPF will have the opportunity to file timely contentions based on new and significant information if such information arises.<sup>81</sup>

2. The Board’s Decision Does Not Otherwise Create an Immediate and Serious Irreparable Impact That Cannot Be Alleviated

SLOMPF also argues that the Board erred in two other respects that do not appear to be related to the Petition’s grounds of prematurity.<sup>82</sup> Neither of these grounds provides sufficient support to show that there is an “immediate or serious irreparable impact” that cannot be alleviated by a petition for review.<sup>83</sup> First, SLOMPF argues that the Board “erroneously assumed that the Task Force recommendations would only be significant and therefore only need to be addressed if they were adopted.”<sup>84</sup> Second, SLOMPF argues that the Board “erroneously assumed that the only significant effect of the Task Force Report was that the cost of the facility would rise if the Task Force Recommendations were adopted.”<sup>85</sup> These two claims are similar and rest on the fact that the Board understood the Intervenor’s contention to be that the costs for DNCP would change only if the Task Force report recommendations were made to be mandatory requirements by the NRC.<sup>86</sup> Because SLOMPF premised its contention on the implementation of the Task Force Report recommendations as mandatory,<sup>87</sup> the Board correctly

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<sup>80</sup> See LBP-11-32 at 16-19, 17, n. 34.

<sup>81</sup> *Id.* at 17, n. 35 (noting that such information may not arise and that the Board makes no holding on whether such contentions will meet the contention admissibility standards).

<sup>82</sup> See Petition at 2, 7-8.

<sup>83</sup> See 10 C.F.R. § 2.341(f)(2)(i).

<sup>84</sup> Petition at 7.

<sup>85</sup> *Id.* at 8.

<sup>86</sup> See LBP-11-32 at 8-9, 18-19.

<sup>87</sup> Motion to Admit New Contention Regarding the Safety and Environmental Implications of the

held that SLOMPF did not establish a genuine dispute because the Task Force report recommendations to which SLOMPF referred have not been made mandatory.<sup>88</sup>

Although SLOMPF fails on the merits of these claims, such allegations of legal error alone are insufficient to satisfy the standard for interlocutory review. The Commission will only grant a petition for interlocutory review based on legal error by a licensing board where it has found that any error by a Licensing Board truly cannot be rectified by a later petition for review.<sup>89</sup> Otherwise, where a “bell [can] be unrung,” and a rejection of a contention may be later appealed to the Commission, such as is the case here, a petition for interlocutory review will not be granted.<sup>90</sup> Even where the Commission might find a board’s decision “problematic” or “highly questionable,” such a finding does not satisfy the standard for interlocutory review.<sup>91</sup> Rather, the appropriate venue for such arguments is to file a petition for review upon the final decision of the presiding officer. To present such arguments “piecemeal,” before a final decision has been rendered by the licensing board, is contrary to the Commission’s “general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings.’”<sup>92</sup> SLOMPF may still file contentions based on information from the events at Fukushima provided it meets the contention admissibility standards,<sup>93</sup> and may still petition for review of the Board’s decision under the regulations.

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Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) at 14.

<sup>88</sup> LBP-11-32 at 18-19.

<sup>89</sup> See *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 71 (2004).

<sup>90</sup> *Id.*

<sup>91</sup> See *Clinton*, CLI-04-31, 60 NRC at 467; *Indian Point*, CLI-10-30, 72 NRC \_\_ (slip op. at 6) (rejecting interlocutory review where it was observed that “[p]ortions of the Board’s decision appear[ed] problematic, and may warrant our review later in the proceeding”).

<sup>92</sup> See *Clinton*, CLI-04-31, 60 NRC at 467 (internal cites omitted).

<sup>93</sup> See LBP-11-32 at 16-18.

Accordingly, SLOMPF's allegation of legal error fails to establish that the Board's decision will have a "serious or immediate irreparable impact" that cannot be reasonably alleviated by an appropriate petition for review as required by 10 C.F.R. § 2.341(f)(2)(i). Consequently, SLOMPF's petition should be denied because it does not meet the standards for interlocutory review.

III. SLOMPF Has Not Shown That Interlocutory Review is Otherwise Warranted

SLOMPF also alleges that its petition for interlocutory review is warranted under 10 C.F.R. § 2.341(f)(1), the *Statement of Policy*, CLI-98-12, 48 NRC at 23, and the Commission's direction in CLI-11-05.<sup>94</sup> SLOMPF's reliance on these three references is misplaced. None of these provide alternative standards for petitions for interlocutory review by parties to a proceeding and SLOMPF's efforts to justify its petition on these grounds should be denied.

A. SLOMPF's Petition Is Not Justified Under 10 CFR § 2.341(f)(1)

SLOMPF contends that its petition is justified because "the ruling meets the NRC's standard for referral or directed certification of ALSB decisions in 10 C.F.R. § 2.341(f)(1)."<sup>95</sup> Section 2.341(f)(1) allows licensing boards to seek interlocutory review for questions certified or for rulings or issues referred to the Commission under § 2.319(l) or § 2.323(f) "if the certification or referral raises significant and novel legal policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding."<sup>96</sup> By SLOMPF's own admission, this standard does not apply to parties to a proceeding but to the licensing boards.<sup>97</sup>

The Commission has rejected attempts by parties to use the standard in § 2.341(f)(1) independently of Board certification. "Section 2.341(f)(1) does not say that the significance or

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<sup>94</sup> Petition at 2.

<sup>95</sup> *Id.* at 2, 10.

<sup>96</sup> See 10 C.F.R. § 2.341(f)(1).

<sup>97</sup> See Petition at 2 ("the ruling meets the NRC's standard for referral or directed certification of ALSB decisions").

novelty of issues independently justifies discretionary interlocutory Commission review.”<sup>98</sup>

“Rather, the provision says that the Commission will consider such issues where the *Board* refers one of its rulings, or certifies an issue, as warranting immediate Commission attention.”<sup>99</sup>

It is the purview of a Board, and not a party, to consider whether an issue raises “significant and novel legal or policy issues.”<sup>100</sup>

Moreover, “in considering whether to take up issues in cases at an interlocutory stage,” the Commission “give[s] weight to the Board’s view” on whether a certification or referral was warranted.<sup>101</sup> Therefore, the fact that a board decided not to refer a particular ruling or certify a particular question to the Commission is important in considering whether the question is appropriate for interlocutory review. In this case, a majority of the Board chose to certify a portion of the ruling under 10 C.F.R. § 3.323(f) to the Commission but not the portion of the ruling for which SLOMPF petitions for review.<sup>102</sup> The Board majority’s choice to certify one part of the ruling but not the entire ruling suggests that there are good reasons that the refusal to admit a contention that does not establish a material dispute with the application is not a “novel” legal issue appropriate for Commission review at the interlocutory stage. Moreover, one judge did not join in certifying the question to the Commission because he did not believe that any of the issues in the case were “novel” and appropriate for interlocutory review.<sup>103</sup>

Because a party to the proceedings, such as SLOMPF, may not use the § 2.341(f)(1) standard to justify a petition for interlocutory review, SLOMPF’s attempt to justify its petition on

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<sup>98</sup> *Clinton*, CLI-04-31, 60 NRC at 467.

<sup>99</sup> *Id.* (emphasis in original).

<sup>100</sup> 10 C.F.R. § 2.341(f)(2).

<sup>101</sup> *Clinton*, CLI-04-31, 60 NRC at 467 citing *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).

<sup>102</sup> LBP-11-32 at 21.

<sup>103</sup> LBP-11-32 (Concurring Opinion of Judge Abramson).

these grounds should be denied.

B. SLOMPF's Petition Is Not Supported by the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings

SLOMPF further maintains that its petition for review is justified under the Commission's *Statement of Policy*, CLI-98-12, 48 NRC at 23.<sup>104</sup> SLOMPF's citation to the Statement of Policy, however, does not address the Commission's standards for granting interlocutory review. Rather, the portion of Statement of Policy to which SLOMPF refers addresses only the standards and policies for licensing boards to refer rulings or certify questions.<sup>105</sup> Specifically, it states only that "the Commission encourages licensing boards to refer rulings or certify questions."<sup>106</sup> Like SLOMPF's claim based on 10 C.F.R. § 2.341(f)(1), the Statement of Policy does not apply to parties to a proceeding and cannot be used to justify SLOMPF's petition for interlocutory review.

C. SLOMPF'S Petition Is Not Justified by CLI-11-05

SLOMPF additionally asserts that interlocutory review is "appropriate because LBP-11-32 presents the type of 'novel' legal question that the Commission has encouraged licensing Boards to certify on an interlocutory basis if they arise during the litigation of contentions related to the Fukushima Daiichi accident."<sup>107</sup> This claim also fails because the Commission specifically referred to licensing boards in that decision, and not parties to a proceeding.

In CLI-11-05, the Commission stated that "should a *licensing board* decision raise novel legal or policy questions, we encourage the boards to certify to us, in accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f), those questions that would benefit from our consideration."<sup>108</sup> The

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<sup>104</sup> Petition at 2.

<sup>105</sup> *Statement of Policy*, CLI-98-12, 48 NRC at 23.

<sup>106</sup> *Id.*

<sup>107</sup> Petition at 2.

<sup>108</sup> *Callaway*, CLI-11-05, 74 NRC \_\_ (slip. op at 35)(emphasis added).

Commission added that it would “monitor our ongoing adjudicatory proceedings and will reassess this determination if it becomes apparent that additional guidance would be appropriate. To this end, boards in particular proceedings are welcome to notify us if additional procedures would assist the board” in managing Fukushima related filings.<sup>109</sup>

As the Commission has emphasized, the 10 C.F.R. § 2.341(f)(1) standard, encompassing §§ 2.319(l) and 2.323(f) in terms of interlocutory review, applies only to licensing boards and cannot be used independently by parties to a proceeding.<sup>110</sup> Moreover, the Commission’s statement in CLI-11-05 upon which SLOMPF relies refers specifically to licensing boards, making it clear that it is for the boards, not the parties, to raise novel legal or policy questions or to notify the Commission if additional procedures would be necessary.<sup>111</sup> Therefore, SLOMPF’s attempt to justify its petition on this ground should be denied because the Commission’s statements do not apply to parties to a proceeding.

#### CONCLUSION

SLOMPF’s Petition should be denied because SLOMPF does not show that its Petition meets the Commission’s standards for petitioning for interlocutory review under 10 C.F.R. § 2.341(f)(2). SLOMPF does not demonstrate that the Board’s ruling results in either a “serious and irreparable impact” that cannot be alleviated by a petition for review after a final decision by the presiding officer nor does SLOMPF show that the ruling “affects the basic structure of the proceeding in a pervasive and unusual manner.” 10 C.F.R. § 2.341(f)(2). The alternative grounds under which SLOMPF attempts to justify its petition are inapplicable and equally unpersuasive.

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<sup>109</sup> *Id.* at 36.

<sup>110</sup> *Clinton*, CLI-04-31, 60 NRC at 467.

<sup>111</sup> *See Callaway*, CLI-11-05, 74 NRC \_\_ (slip. op at 35-36).

Respectfully submitted,

**/Signed (electronically) by/**

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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) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO PETITION FOR REVIEW OF LBP-11-32," dated December 15, 2011, have been served upon the following by the Electronic Information Exchange, this 15th day of December, 2011:

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