ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, Petitioner, v. U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, and PACIFIC GAS & ELECTRIC COMPANY, Intervenor.	)	No. 14-1213

RESPONDENTS' REPLY TO PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTION

Petitioner Friends of the Earth ("FOE") and Intervenor Pacific Gas & Electric Company ("PG&E") have now responded to the Motion to Dismiss filed by Respondents United States of America and the U.S. Nuclear Regulatory Commission.[1] Respondents established in their motion that (1) this Court lacks jurisdiction over the Petition for Review because the Petition does not challenge final agency action, and (2) the case is not ripe for review because FOE has filed identical claims now pending before the Commission. As set forth below, the responses confirm each of our arguments. Thus, this Court should dismiss the Petition for Review and allow the Commission to decide the issues that FOE has raised. FOE may file a new petition for review pursuant to the Hobbs Act if it is dissatisfied with the Commission's decision.

FACTUAL BACKGROUND

As noted in our Motion to Dismiss, PG&E built the Diablo Canyon Nuclear Power Plant in an area that was later discovered to contain several earthquake faults. Motion to Dismiss at 5-7. In the 1970's, PG&E analyzed the Hosgri Fault, which had been discovered just offshore from the facility, and the maximum ground motion for a hypothetical earthquake on the Hosgri Fault was explicitly considered and applied in the licensing of the facility. *Id*. at 5-6. In 2008, PG&E

[1] This Reply uses "NRC" to refer to the agency as a whole and "Commission" to refer to the 5-member body that manages the agency.

discovered the Shoreline Fault, also lying near the facility. PG&E analyzed the Shoreline Fault and concluded that an earthquake on the fault would not impact safe operation of the plant. *Id*. at 6-7. PG&E has now filed Revision 21 to the Final Safety Analysis Report ("Safety Report") for the plant stating that the ground motion resulting from the more recently-discovered Shoreline Fault is bounded by any ground motion resulting from the previously-analyzed Hosgri Fault. *Id*. at 8-9.

FOE asserts that the NRC's "approval" of Revision 21 has amended the Diablo Canyon licenses and that the amendments required a hearing in accordance with the Atomic Energy Act. Briefly, FOE argues before both this Court and the Commission that the Hosgri Fault was not incorporated into the plant's seismic design bases and, therefore, cannot be used as a "bounding" condition without an amendment to the facility's license. *Compare* FOE Response at 3-4 *with* Exhibit 1, Motion to Dismiss, at 18-27 and Exhibit 2, Motion to Dismiss, at 8-9.

ARGUMENT

I. The NRC Memo of June 23, 2014 Is Not Final Agency Action.

1. FOE claims the NRC internal memo dated June 23, 2014, *see* Exhibit 3 to Respondents' Motion to Dismiss, constitutes final agency action. FOE Response at 10-12. But the June 23 memo does not address the "bounding" issue raised by FOE, and NRC regulations do not require NRC approval of statements made in Revisions to a Safety Report. Instead, the memo merely reflects the internal NRC

staff determination that Revision 21 addressed the actions that it was expected to address and was filed in a timely fashion. The memo makes no statement whether PG&E correctly incorporated the additional seismic analysis. *See* Motion to Dismiss at 14-15 and Exhibit 3. Thus, it is not the "'consummation' of the agency's decisionmaking process," and no "rights or obligations have been determined." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

2. Even if the June 23 memo represented final agency action, as FOE claims (FOE Response at 8-12), we have demonstrated that FOE has appealed that action to the Commission and that this appeal renders the action non-final. *See* Motion to Dismiss at 15-16. FOE never addresses this argument in its Response.

FOE has challenged what it characterizes as the NRC's "acceptance" or "approval" of Revision 21, *i.e.*, the action allegedly reflected in the June 23 memo, in its filings before the Commission. *See* Exhibit 3, Motion to Dismiss, at 12-19. While the June 23 memo was not made public before FOE's filings with both the Commission and this Court (*see* FOE Response at 12), FOE has challenged the alleged decision it claims is reflected in that document in both fora. To the extent the June 23 memo constitutes an "approval" of Revision 21 by the NRC Staff, the Commission has the power to reverse that decision, and instead to require PG&E to seek a license amendment in order to incorporate the seismic information in Revision 21 into its Safety Report. Thus, even if the June 23 memo reflected final

agency action when written, FOE's hearing request constitutes an appeal of that action that destroys any finality it may have originally possessed. *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994).

II. FOE's Claim Is Not Ripe for Judicial Review.

We demonstrated in our motion that FOE has filed a request before the Commission raising the same issues raised in this lawsuit. *See* Motion to Dismiss at 17-20. In response, FOE claims the proceeding before the agency is somehow "different" from the proceeding before this Court. *E.g.*, FOE Response at 4-7; 12-13. But FOE ignores the fact that its claims before the Commission and this Court are materially identical. Moreover, FOE's Response makes additional claims identical to its claims pending before the Commission.

A. FOE Raises the Same Claims Before the Commission and this Court.

1. FOE never responds to our recitation of the identical claims made in both the Petition for Review and in its Reply filing with the agency. *See*, *e.g.*, Motion to Dismiss at 15-16, 17-19. FOE claims before both this Court and the Commission that the agency has amended the Diablo Canyon licenses without the hearing required by the Atomic Energy Act. And in both proceedings FOE challenges the "approval" of Revision 21 to the Diablo Canyon Safety Report, which it claims was the NRC action amending the Diablo Canyon licenses. Yet FOE's Response never explains how these identical claims are somehow "different."

2. In a revisionist effort to distinguish the two proceedings, FOE claims that the litigation before the Commission constitutes a separate proceeding that was initiated by the NRC when the agency requested licensees to review their current earthquake analyses as part of the NRC's Fukushima earthquake study. FOE Response at 5 & n. 3 (citing NRC "Request for Information," dated March 12, 2012 (ML12053A340)).[2] But that argument approaches the frivolous. In order to have initiated a proceeding with the March 12, 2012 letter, the NRC would have had to issue a Federal Register notice announcing the opportunity for a hearing and provide notice in the March 12 letter. *See generally* 10 C.F.R. § 2.309(b). But the NRC did not issue any such notice, and the letter itself does not mention any hearing opportunity. Thus, the March 12 letter did not "initiate" the proceeding.

That the March 12 letter did not initiate the Commission proceeding is further supported by the fact that FOE did not claim the March 12 letter as a basis for its hearing request before the Commission. Instead, FOE's only reference to the March 12 letter before the Commission is its assertion that the letter provides no authority for PG&E to submit the additional seismic information. *See* Exhibit 1, Motion to Dismiss, at 20-21; Exhibit 2, Motion to Dismiss, at 11. Thus, FOE can hardly claim now that the March 12, 2012 letter is the basis for the proceeding

[2] "ML" citations reflect the accession number for documents that are available in ADAMS, the NRC's public database, www.nrc.gov/reading-rm/adams/html .

before the Commission. Instead, FOE's hearing request explains that the basis for its filing is that "the NRC has violated § 189a(1)(A) of the Atomic Energy Act [42 U.S.C. § 2239(a)(1)(A)] with respect to [] Revision 21." Exhibit 3, Motion to Dismiss, at 5. And that is exactly what FOE claims to be the issue before this Court. *See* Petition for Review at 1-3.

Similarly, FOE mischaracterizes its hearing request as "a petition to intervene in an *ongoing* licensing proceeding to determine the appropriate method of analysis for new seismic information." FOE Response at 12 (emphasis in original). But there was no "ongoing proceeding" claiming a *de facto* license amendment before FOE filed its hearing request. That proceeding simply did not exist before it was initiated by FOE's filing.

3. As part of its effort to distinguish its Petition for Review from the hearing request pending before the Commission, FOE elaborates on the arguments it intends to raise before this Court. For example, FOE argues that Revision 21 changed the "Safe Shutdown Earthquake" and established a "less conservative analysis used for that earthquake as the benchmark against which all plant equipment must be certified." Response at 4. FOE argues that Revision 21

> changed the Safe Shutdown Earthquake from one that could produce no more than 0.4 g at the plant to one that could produce up to 0.75 g at the plant, while requiring no changes to the plant itself to maintain the safety margin. This erosion of safety margin enlarges the licensee's operating authority.

Id. at 5 (emphasis omitted).

But FOE makes the identical argument before the Commission. FOE filed two contentions (comparable to a "count" in a civil action) in its NRC hearing request. FOE's Contention 2 claims that

> NRC Staff's determination that the new seismic information, including the Shoreline Earthquake . . . is a lesser-included case within the Hosgri Earthquake is insufficient to insure that Diablo Canyon is operating safely with an adequate margin of safety.

Exhibit 1, Motion to Dismiss, at 47. In support, FOE argues that "the postulated Safe Shutdown Earthquake has a much lower ground acceleration than the postulated Hosgri Earthquake – 0.4 g compared to 0.75 g respectively" *id*. at 50, ¶ 8, and that "[w]ithout a license amendment, a comparison of the new seismic data to the Hosgri Fault cannot be used to comply with the regulatory duty to insure that [the safety-related equipment at Diablo Canyon] can withstand the maximum vibratory ground motion that can occur at the plant," *id*. at 51, ¶ 11.

In short, FOE has raised highly complex claims regarding the Diablo Canyon licensing history and the application of complex engineering principles regarding earthquake analyses to the safety of nuclear power plants. These issues are clearly within the primary jurisdiction of the agency designated by Congress to resolve such claims: the U.S. Nuclear Regulatory Commission.

B. FOE Must Exhaust Its Administrative Remedies.

FOE claims that it is not required to exhaust its available remedies before the Commission, arguing that *Darby v. Cisneros*, 509 U.S. 137 (1993), mandates that exhaustion must be required by statute or agency regulation and that neither exists here. FOE Response at 13-15. FOE also "anticipates" that the NRC will argue that it must seek relief in the form of a petition filed under 10 C.F.R. § 2.206 ("a § 2.206 Petition")[3] before filing a petition for review, FOE Response at 15, and that that such a requirement is improper in this case. FOE Response at 15-18. But these arguments rest on inaccurate factual premises.

1. FOE misapplies *Darby v. Cisneros* to this situation. We are not arguing here that FOE must take an additional action before bringing suit. But having elected to file a hearing request with the Commission that includes the exact issue in the Petition for Review before this Court, FOE must exhaust the remedy it has elected before seeking judicial intervention. Regardless of whether framed as finality, exhaustion, or election of remedies, a party should not be permitted to file a hearing request with the Commission and then file a lawsuit that raises the same claim before this Court without waiting for the Commission to rule on its request.

[3] 10 C.F.R. § 2.206 provides that "[a]ny person may file a request to institute a proceeding . . . to modify, suspend, or revoke a license, or for any other action as may be proper." The NRC may take any number of actions in response to a § 2.206 Petition, including enforcement action or instituting a hearing pursuant to Section 189a of the Atomic Energy Act.

Here, FOE has filed a hearing request with the Commission, arguing that the NRC's approval of Revision 21 constitutes a *de facto* license amendment of the Diablo Canyon licenses. *See* Motion to Dismiss, Exhibit 2 at 3-4, 9, 12-19. FOE argues that the new seismic information in Revision 21 constitutes a change in the plant's licensing basis and requires a hearing. *Id*. Thus, contrary to FOE's claim (Response at 6), a Commission decision granting its hearing request will provide *exactly the same relief* that FOE seeks in its Petition for Review – a hearing on whether PG&E correctly incorporated the new seismic information into its Safety Report. A case is not ripe for review when a pending agency proceeding may render the case moot. *In re Aiken County*, 645 F.3d 428, 435 (D.C. Cir. 2011). And that is precisely the case given FOE's claim pending before the Commission.

2. Contrary to FOE's "anticipated" argument (FOE Repose at 15), we do not assert that FOE must file a § 2.206 Petition to exhaust its hearing claim. [4] Instead, we argue that because FOE has filed a hearing request with the Commission raising the identical issue it has raised before this Court, it must wait for the Commission to rule on that request before seeking relief from this Court.

[4] Because we do not claim that FOE must file a § 2.206 Petition to exhaust its remedies, FOE's argument that exhaustion is futile, *see* FOE Response at 16-18, is irrelevant. And even assuming *arguendo* that the internal NRC decision FOE cites as an indication of bias precludes the NRC Staff from fairly reviewing a § 2.206 Petition, that Staff decision in no way binds the Commission – the ultimate authority in the agency – from deciding the entirely separate hearing request now pending before it.

3. FOE makes a merits argument that it is not required to file a § 2.206 Petition in this situation. FOE Response at 15-18. P&E asserts that FOE is required to exhaust its remedies by filing a § 2.206 Petition. *See* PG&E Response at 16-19. But Respondents do not take any position on these merits arguments because they are pending before the Commission, which is the proper body to resolve them. *Compare* Exhibit 1, PG&E Response, at 22-23, 26, with Exhibit 2, Motion to Dismiss, at 24-26. That disagreement goes directly to the question of how the Commission orders its internal procedures and processes, and the agency should be allowed to rule on the issue in the first instance. Thus, the presence of this argument before the Commission is an additional reason for this Court to dismiss this Petition for Review and allow the Commission to decide the issue.[5]

CONCLUSION

For the foregoing reasons, and the reasons stated in our Motion to Dismiss, this Court should dismiss the Petition for Review.

[5] FOE claims that "[d]espite repeated requests . . . NRC has failed or refused to provide [FOE] with access to documents identified in the Certified Index, including Revision 21, the approval of which is the very basis of this Petition." Response at 8. But FOE had access to that portion of Revision 21 that addressed the seismic issues in this case when filing its pleadings before the Commission and also advised the undersigned that that access would be sufficient for this Motion. Security reviews of several documents are ongoing and will be completed promptly and, in any event, before any briefing of this case on the merits. In any event, those documents are relevant to the merits issues, not to the procedural dispute at issue in this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 8, 2015, I filed *Respondents' Reply to Petitioner's Response to Respondents' Motion to Dismiss* in Case No. 14-1213 with the U.S. Court of Appeals for the District of Columbia Circuit by filing it with the Court's CM/ECF system. That method is calculated to serve:

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