

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP-15-6

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman  
Nicholas G. Trikouras  
Dr. Gary S. Arnold

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

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

Docket No. 50-275-LR  
Docket No. 50-323-LR

ASLBP No. 10-900-01-LR-BD01

February 11, 2015

MEMORANDUM AND ORDER

(Denying Petition to Intervene and Petition for Waiver)

This proceeding concerns an application by Pacific Gas & Electric Company (PG&E) to renew its operating licenses for two nuclear power reactors at the Diablo Canyon Nuclear Power Plant located near San Luis Obispo, California.<sup>1</sup> PG&E's licenses expire on November 2, 2024 and August 26, 2025, respectively.<sup>2</sup>

Before the Board are two petitions submitted by Friends of the Earth (FoE): (1) for a hearing and to intervene;<sup>3</sup> and (2) for a waiver of certain NRC regulations.<sup>4</sup> Because each of

<sup>1</sup> The background of this proceeding is set forth in prior decisions of the Board and of the Commission. See LBP-10-15, 72 NRC 257, 273-75 (2010); CLI-11-11, 74 NRC 427, 429-31 (2011).

<sup>2</sup> 75 Fed. Reg. 3,493, 3,493 (Jan. 21, 2010).

<sup>3</sup> FoE's Request for a Hearing and Petition to Intervene (Oct. 10, 2014) (Petition).

<sup>4</sup> FoE's Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding (Oct. 10, 2014) (Waiver Petition).

FoE's three proffered contentions raises issues that are outside the scope of a license renewal proceeding, as established by the Commission's regulations, and because FoE has not satisfied the requirements for a waiver of those regulations, we deny both petitions.

### I. BACKGROUND

On January 21, 2010, the NRC published a Federal Register notice of an opportunity for a hearing on PG&E's license renewal application.<sup>5</sup> The period for filing a petition for intervention or request for hearing closed on March 22, 2010. The San Luis Obispo Mothers for Peace (SLOMFP) filed a timely petition to intervene,<sup>6</sup> which the Board granted.<sup>7</sup>

On August 26, 2014, FoE filed a hearing request with the Commission concerning seismic issues at the Diablo Canyon facility.<sup>8</sup> That petition, addressing FoE's claim that ongoing operation of the facility under its existing licenses might be unsafe in light of the risks of earthquakes, remains pending before the Commission.

On October 10, 2014, FoE filed the petition to intervene and waiver petition that are before the Board in this license renewal proceeding. FoE asserted that its petition to intervene is based on new and materially different information that was first made available in a Seismic Report<sup>9</sup> that PG&E submitted to the NRC on September 10, 2014.<sup>10</sup> FoE proffered three contentions that purport to address license renewal, but also reiterated its continuing claim—as previously set forth in its pending petition before the Commission—that, because of the ongoing

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<sup>5</sup> 75 Fed. Reg. at 3,493.

<sup>6</sup> Request for Hearing and Petition to Intervene by SLOMFP (Mar. 22, 2010).

<sup>7</sup> LBP-10-15, 72 NRC at 345. The Board did not, however, admit all of SLOMFP's proffered contentions, *id.* at 317, and subsequently the Commission limited the admissible contentions further. CLI-11-11, 74 NRC at 437, 452, 458.

<sup>8</sup> Petition to Intervene and Request for Hearing by FoE (Aug. 26, 2014).

<sup>9</sup> PG&E, Central Coastal California Seismic Imaging Project (Sept. 10, 2014) (ADAMS Accession No. ML14260A106).

<sup>10</sup> See Petition at 4-7, 33-35.

risks posed by potential earthquakes, “PG&E has not demonstrated that the plant can be safely operated under its existing operating license.”<sup>11</sup> FoE claims that PG&E’s September 10, 2014 Seismic Report on Diablo Canyon demonstrates that nearby faults “are capable of producing an earthquake with ground acceleration that far exceeds the limits in the plant’s current licensing basis, posing a serious safety risk to the public and environment near the plant.”<sup>12</sup> PG&E’s analyses, FoE contends, do “not instill confidence in the utility’s conclusions that the plant remains safe.”<sup>13</sup>

All three existing parties—PG&E, the NRC Staff and SLOMFP—responded to FoE’s filings on November 4, 2014.<sup>14</sup> Although neither PG&E nor the Staff challenged FoE’s standing, each opposed FoE’s petition to intervene on the same three grounds. First, they asserted it was not timely.<sup>15</sup> Second, they asserted, because each of FoE’s three proffered contentions raises issues outside the scope of a license renewal proceeding, each is inadmissible for failure to comply with various related subparts of 10 C.F.R. § 2.309(f)(1).<sup>16</sup> Third, they asserted that FoE has failed to satisfy the rigorous requirements for seeking a waiver of the NRC’s regulations, as set forth in 10 C.F.R. § 2.335 and in pertinent Commission decisions.<sup>17</sup> For its part, SLOMFP supported FoE’s petition, essentially for the reasons given by FoE.

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<sup>11</sup> Id. at 3 (emphasis added).

<sup>12</sup> Id. at 4.

<sup>13</sup> Id. at 16 (emphasis added).

<sup>14</sup> PG&E’s Answer Opposing the FoE Hearing Request and Petition for Waiver (Nov. 4, 2014) (PG&E Answer); NRC Staff’s Answer to FoE’s Request for a Hearing and Petition to Intervene and Waiver Petition (Nov. 4, 2014) (Staff Answer); SLOMFP’s Response to FoE’s Request for a Hearing and Petition to Intervene and Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding (Nov. 4, 2014).

<sup>15</sup> PG&E Answer at 23-25; Staff Answer at 13-22.

<sup>16</sup> PG&E Answer at 13-22; Staff Answer at 22-38.

<sup>17</sup> PG&E Answer at 25-28; Staff Answer at 38-50.

FoE submitted a reply on November 12, 2014,<sup>18</sup> and the Board heard oral argument from FoE and the parties on January 21, 2015.<sup>19</sup>

## II. ANALYSIS

To participate as a party in an NRC adjudicatory proceeding concerning a proposed licensing action, a petitioner must (1) demonstrate standing;<sup>20</sup> and (2) proffer at least one admissible contention.<sup>21</sup>

### A. Standing

No party challenges FoE's standing and, upon its independent examination, the Board determines that FoE has demonstrated standing to petition to intervene.<sup>22</sup>

### B. Timeliness

Although FoE submitted its petition to intervene almost four years after the original deadline, and both PG&E and the NRC Staff raise objections to its timeliness that are not frivolous,<sup>23</sup> on balance we decline to reject FoE's petition as untimely. Arguably, FoE's petition

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<sup>18</sup> FoE's Reply to NRC Staff's and PG&E's Answers to Petition to Intervene and Request for Hearing (Nov. 12, 2014) (Reply).

<sup>19</sup> Transcript of Diablo Canyon Nuclear Power Plant Units 1 and 2 (Jan. 21, 2015) (Tr.). In citing to the transcript, we reference the transcript as modified by the transcript corrections adopted by the Board. See Licensing Board Order (Ruling on Joint Proposed Transcript Corrections) (Feb. 4, 2015) (unpublished).

<sup>20</sup> 10 C.F.R. § 2.309(d).

<sup>21</sup> Id. § 2.309(f).

<sup>22</sup> FoE alleges it is a national non-profit environmental organization that, among other things, seeks to minimize the risks that nuclear facilities might pose to its members or to the general public. Petition at 36. FoE seeks to intervene on behalf of its members, and has submitted sworn declarations from five of its members, each of whom resides between approximately six to eleven miles from the Diablo Canyon facility. Declaration of Sandra L. Brazil, Petition Attachment 3; Declaration of Thomas Danfield, Petition Attachment 4; Declaration of Michael R. Jencks, Petition Attachment 5; Declaration of Jeffrey Pienack, Petition Attachment 6; Declaration of Susan Sunderland, Petition Attachment 7.

<sup>23</sup> PG&E Answer at 23-25; Staff Answer at 13-22. As the NRC Staff points out, FoE had earlier opportunities to participate in this proceeding with regard to the risks of earthquakes in general. PG&E's original license renewal application addressed seismic issues, including the then-

to intervene is based on new and materially different information about the risks of earthquakes near the Diablo Canyon facility that was not available to FoE before PG&E submitted its Seismic Report to the NRC on September 10, 2014—just 30 days before FoE submitted its petition.

The Board's Revised Scheduling Order, dated November 19, 2012, specifies that persons not currently a party may file timely petitions to intervene “provided that they satisfy the ‘good cause’ criteria of 10 C.F.R. § 2.309(c)(1)(i)-(iii) . . .”<sup>24</sup> Section 2.309(c)(1) states:

Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline . . . will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The Revised Scheduling Order further clarifies that “[b]ecause such filings are subject to additional requirements, the determination as to whether such requests or petitions are filed in a ‘timely manner’ as required by 10 C.F.R. § 2.309(c)(1)(iii) shall be subject to a reasonableness standard and is not subject to the thirty (30) day deadline” applicable to motions by existing parties to add or amend contentions.<sup>25</sup>

Invoking these standards, FoE claims that its proffered contentions are all based on new information contained in PG&E’s September 10, 2014 Seismic Report (and that, indeed, its October 10, 2014 petition was timely filed within 30 days of public availability of that report even

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<sup>24</sup> Recently discovered Shoreline Fault. SLOMP submitted a timely, admissible contention pertaining to the Shoreline Fault in March 2010. NRC Answer at 4.

<sup>25</sup> Id. at 9-10.

though it did not necessarily have to be under a “reasonableness standard”).<sup>26</sup> According to FoE, the Seismic Report added “significant new and material information to the body of scientific knowledge regarding the seismicity of the area surrounding Diablo Canyon.”<sup>27</sup>

Specifically, FoE contends that the Seismic Report revises upward previous estimates of the seismic potential of a number of faults near the Diablo Canyon facility.<sup>28</sup> For example, FoE points out that the Seismic Report found that one fault that is very close to the plant—the Shoreline fault—is nearly double the previously assumed length and that this revised estimate increases the potential magnitude of an associated earthquake from a Richter scale 6.5 to 6.7.<sup>29</sup> For the first time, the Seismic Report concluded that the “step-over” between two other nearby faults—the Hosgri fault and the San Simeon fault—is small enough that the two faults must be assumed to rupture together rather than separately (in turn, increasing the potential magnitude of a Hosgri earthquake from 7.1 to 7.3).<sup>30</sup> Likewise, the Seismic Report concluded for the first time that the Hosgri and Shoreline faults intersect such that a linked rupture involving the full Hosgri fault and the full Shoreline fault must be assumed to be possible (posing the risk of a magnitude 7.3 earthquake occurring within 600 meters of the Diablo Canyon facility).<sup>31</sup>

Neither PG&E nor the NRC Staff disputes that the Seismic Report disclosed these new facts.<sup>32</sup> Rather, they claim these facts are not material or are not materially different from information that was previously available.

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<sup>26</sup> Petition at 35.

<sup>27</sup> Id. at 33.

<sup>28</sup> See generally id. at 34-35.

<sup>29</sup> Id. at 34.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> See Tr. at 694 (“Yes, the length of the Shoreline fault is different in the 2014 [Seismic Report] data than in the 2011 data.”) (PG&E counsel); see also Tr. at 695 (stating that the assumption

The NRC Staff argues, for example, that “[w]hile these three conclusions might be new information,” PG&E nonetheless ultimately concluded “that the ground motions from updated shoreline fault and other regional faults remain less than the 1977 Hosgri Design ground motions, for which the plant was evaluated and demonstrated to have reasonable assurance of safety.”<sup>33</sup> To conclude that these admittedly new facts are not material, however, one must accept at face value PG&E’s own “interim” conclusion that the updated ground motion potential based on this new seismic information is necessarily “bounded” by previous ground motion response spectra.<sup>34</sup> As FoE points out, this is the very issue on which it seeks a hearing, and on which FoE has set forth evidence that is at least plausible.<sup>35</sup>

We therefore decline to reject FoE’s petition as untimely.

#### C. Contentions

Each of FoE’s proffered contentions, however, either raises issues that are outside the scope of a license renewal proceeding, or fails to satisfy one or more requirements of 10 C.F.R § 2.309(f)(1).<sup>36</sup>

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that the Hosgri and the San Simeon fault will rupture together rather than separately “was new”) (PG&E counsel); Tr. at 696 (acknowledging that “there was a further sensitivity done in the 2014 report” suggesting that the Hosgri and the Shoreline fault may rupture jointly) (PG&E counsel); Tr. at 699 (acknowledging on behalf of NRC Staff that those three facts were new and timely acted upon) (NRC Staff counsel).

<sup>33</sup> Staff Answer at 19 (quoting Letter from E. Halpin, Senior Vice President, PG&E, to NRC, Central Coastal California Seismic Imaging Project, Shoreline Fault Commitment at 2 (Sept. 10, 2014) (ADAMS Accession No. ML14260A387); see also PG&E Answer at 23-25; Tr. at 694 (“The conclusions remain the same.”) (PG&E counsel).

<sup>34</sup> See Reply at 11.

<sup>35</sup> See Petition at 15-16; Petition, Attachment 1, Affidavit and Curriculum Vitae (CV) of Dr. Gerhard Jentzsch at ¶ 19; Reply at 5-8.

<sup>36</sup> Insofar as relevant, 10 C.F.R. § 2.309(f)(1) requires that, for each proffered contention, a petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised . . . ; (ii) Provide a brief explanation of the basis for the contention; (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv)

Contention One states:

PG&E's operating license for Diablo Canyon should not be renewed unless and until PG&E establishes that the plant can withstand and be safely shut down following an earthquake on the Hosgri-San Simeon, Shoreline, Los Osos, or San Luis Bay faults.<sup>37</sup>

FoE's concern with the ability of the Diablo Canyon facility to shut down safely following a potential earthquake is a current operating issue, and is not unique to whether PG&E's licenses—which do not expire until nearly a decade from now—should be renewed. The participants essentially do not dispute this.<sup>38</sup>

The scope of a license renewal safety review, however, is narrow. It is limited to “plant structures and components that will require an aging management review for the period of extended operation and the plant’s systems, structures, and components that are subject to an evaluation of time-limited aging analyses.”<sup>39</sup> As PG&E succinctly observes, “[e]arthquakes are not an aging mechanism.”<sup>40</sup>

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Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position . . . ; (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . .

<sup>37</sup> Petition at 8.

<sup>38</sup> See Tr. at 688-89 (“If [FoE] is correct, however, the Diablo Canyon [facility] has a problem, and it must be corrected now. That’s a current operating issue. It cannot await the expiration of the current licenses in 2024 and 2025 and the beginning of the extended operating period.”) (NRC Staff counsel); see also Tr. at 720 (responding that PG&E’s duty to show the ability for a safe shutdown during a seismic event is “an ongoing operational matter”) (PG&E counsel); Tr. at 724 (responding to the question that if the new seismic data had become available 20 years ago whether PG&E could have waited and addressed the data at relicensing, “I think they would have been required to address it 20 years ago.”) (FoE counsel).

<sup>39</sup> Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC 211, 212 (2001) (citing 10 C.F.R. §§ 54.21(a), (c), 54.4).

<sup>40</sup> PG&E Answer at 22.

A fundamental principle that underlies the Commission's license renewal regulations is that "with the possible exception of the detrimental effects of aging on the functionality of certain plant systems, structures, and components in the period of extended operation . . . the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable level of safety . . . ."<sup>41</sup> Indeed, in this very proceeding, the Commission reversed the Board's earlier decision to admit a contention that the Commission found to raise current operating issues.<sup>42</sup>

As the Commission reemphasized in its prior ruling in this case, "license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity."<sup>43</sup> Thus, the NRC's regulations contemplate that concerns such as those raised by Contention One will be addressed when, as part of the NRC's ongoing oversight, the Staff inspects the plant and evaluates any potential impacts to safety. Specifically, the regulations assume that the NRC's ongoing oversight of Diablo Canyon will address any safety-significant issue associated with PG&E's Seismic Report.

Because Contention One raises issues that are not part of a license renewal proceeding, as established by the Commission's regulations, it is not within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Nor, for the same reason, does Contention One raise an issue that is material to findings the NRC must make to support the proposed licensing action, as required by 10 C.F.R. § 2.309(f)(1)(iv). Likewise, because FoE's broad allegations do not actually challenge any specific part of PG&E's integrated plant assessment or time-limited aging analyses (TLAAs), Contention One fails to demonstrate the existence of a "genuine dispute with

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<sup>41</sup> 60 Fed. Reg. 22,461, 22,464 (May 8, 1995).

<sup>42</sup> CLI-11-11, 74 NRC at 435-37.

<sup>43</sup> Id. at 435 (quoting 56 Fed. Reg. 64,943, 64,952 (Dec. 13, 1991)).

the applicant," as required by 10 C.F.R. § 2.309(f)(1)(vi). Absent a waiver of the NRC's regulations, therefore, Contention One is not admissible.

Contention Two states:

PG&E has failed to establish in its license renewal application that the effects of aging on Diablo Canyon's relay switches and snubbers will be adequately managed for the period of extended operation, in violation of 10 C.F.R. § 54.21(c).<sup>44</sup>

Relay switches and snubbers are not subject to an aging management review. Both are excluded by 10 C.F.R. § 54.21(a)(1)(i), which requires an aging management review only for equipment that performs its intended function without moving parts or without a change in configuration or property. As FoE's own expert recognizes, both relay switches and snubbers have mechanical moving parts.<sup>45</sup>

FoE asserts, however, that snubbers and relay switches are within the scope of license renewal pursuant to § 54.4(a)(2)<sup>46</sup> and that § 54.21(a)(3) therefore imposes a duty on PG&E to demonstrate in some manner—by a TLAA or otherwise<sup>47</sup>—that “the effects of aging will be

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<sup>44</sup> Petition at 21.

<sup>45</sup> See Petition, Attachment 2, Affidavit and CV of Arnold Gundersen, MSNE, RO at 24-25 (describing relays as “mechanical switching devices” that control the flow of electricity through the use of electromagnets and springs); *id.* at 37 (explaining that snubbers are “specialized springs and devices” that are “similar to the shock absorbers on cars”).

<sup>46</sup> “Plant systems, structures, and components within the scope of this part are— . . . (2) All non-safety related systems, structures, and components whose failure could prevent satisfactory accomplishment of [*inter alia*, the capability to shut down the reactor and maintain it in a safe shut-down condition].” 10 C.F.R. § 54.4(a)(2).

<sup>47</sup> Compare Tr. at 753 (“There are no time-limited aging analyses for switches and snubbers. And that is inadequate given that the new material on the seismic risk.”) (FoE counsel); with Tr. at 755 (“What we are saying is that some demonstration that they will continue to be operative and will assure that the plant can be shut down should be a part of this license extension request. It doesn’t necessarily have to be a TLAA but there needs to be some demonstration because the regulations require it.”) (FoE counsel).

adequately managed so that [their] intended function(s) will be maintained consistent with the [current licensing basis] for the period of extended operation.”<sup>48</sup> We do not agree.<sup>49</sup>

First, although FoE initially contended in its petition that “PG&E has failed to show that its [TLAAs] for relay switches and snubbers [are] adequate,”<sup>50</sup> a TLAA is not expressly required for snubbers and relay switches. Those components are not qualified on the basis of “time-limited assumptions defined by the current operating term . . .”<sup>51</sup> Such a time-limited assumption exists, for example, “where you had inaccessible cable and you can’t perform routine surveillance on that equipment, so you analyze it for the current operating license term.”<sup>52</sup> In that situation, a TLAA is necessary to demonstrate the cable’s functionality throughout the extended period of operation.

Diablo Canyon’s relay switches and snubbers, however, do not rely on time-limited assumptions based on the plant’s operating term, but rather are subject to ongoing maintenance programs pursuant to 10 C.F.R. § 50.65.<sup>53</sup> At oral argument, counsel for FoE conceded that

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<sup>48</sup> 10 C.F.R § 54.21(a)(3). See also Tr. at 751-52 (contending that § 54.21(a)(3) references not § 54.21(a)(1)(i), which excludes snubbers and relays, but rather the initial portion of § 54.21(a)(1) and § 54.4, which includes § 54.4(a)(2) non-safety-related systems (such as snubbers and relays) necessary for safe shut down) (FoE counsel).

<sup>49</sup> We also question whether, improperly, FoE introduced new arguments at oral argument. Because we reject these arguments, we need not resolve this issue.

<sup>50</sup> Petition at 24.

<sup>51</sup> 10 C.F.R. § 54.3(a)(3) (emphasis added).

<sup>52</sup> Tr. at 753-54 (PG&E counsel).

<sup>53</sup> See Tr. at 754 (PG&E counsel); see also PG&E Answer at 20 n. 57 (“Safety-related snubbers are maintained by periodic visual inspections and functional testing performed by qualified personnel in accordance with Diablo Canyon procedures, Technical Specifications, and the NRC’s maintenance rule. The testing and inspections ensure that all required snubbers are operable so that the structural integrity of the reactor coolant system and all other safety-related systems is maintained during and following a seismic or other event initiating dynamic loads. Relays are ‘shake table’ tested prior to installation and, once installed, are periodically tested in accordance with Technical Specifications. Testing consists of energizing all relays in the channel required for channel operability, verifying the operability of each required relay, and performing a continuity check.”).

"[t]hese two items [snubbers and relay switches] are excluded from those that are required to have TLAs."<sup>54</sup>

Second, the Board cannot accept FoE's invitation to broadly interpret § 54.21(a)(3) as imposing an additional duty on PG&E (beyond an aging management plan or a TLAA) that would require "some demonstration"<sup>55</sup> of the continued functionality of snubbers and relay switches during the period of extended operation. The Commission has expressly limited license renewal proceedings to avoid such duplicative reviews of matters that are already covered by ongoing maintenance programs.<sup>56</sup> Again, as the Commission stated in connection with this very proceeding, "license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity."<sup>57</sup>

Because Contention Two raises issues that are not part of a license renewal proceeding, as established by the Commission's regulations, it is not within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Nor, for the same reason, does Contention Two raise an issue that is material to findings the NRC must make to support the proposed licensing action, as required by 10 C.F.R. § 2.309(f)(1)(iv). Likewise, Contention Two fails to demonstrate the existence of a "genuine dispute with the applicant," as required by 10 C.F.R. § 2.309(f)(1)(vi). Absent a waiver of the NRC's regulations, therefore, Contention Two is not admissible.

Contention Three states:

PG&E has failed to establish in its aging management plan that the effects of aging on Diablo Canyon will be adequately managed for the period of extended operation, in violation of 10 C.F.R. § 54.21(a)(3).<sup>58</sup>

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<sup>54</sup> See Tr. at 742 (FoE counsel).

<sup>55</sup> Tr. at 755 (FoE counsel).

<sup>56</sup> See supra at 9.

<sup>57</sup> CLI-11-11, 74 NRC at 435 (quoting 56 Fed. Reg. at 64,952).

<sup>58</sup> Petition at 30.

The standard for granting a reactor license renewal is set forth in 10 C.F.R. § 54.29. To grant renewal, the NRC Staff must find that there is reasonable assurance that the effects of aging on relevant systems, structures, and components will be managed during the period of extended operation, that time-limited aging analyses have been identified for review, and that applicable environmental requirements have been met.

FoE does not explain how its claims in Contention Three would affect the Staff's ability to make the findings required for license renewal. FoE makes only broad assertions that, in light of the findings in the Seismic Report, PG&E has failed to ensure that the effects of aging will be adequately managed for an additional 20 years.<sup>59</sup> But FoE does not explain how its seismic claims relate to aging. FoE asserts merely that the "aged components" will not be able to perform their intended function. Moreover, FoE does not challenge a specific portion of the license renewal application. Instead, FoE merely claims that the entire aging management review is inadequate.<sup>60</sup>

Contention Three does not raise an issue that is material to findings the NRC must make to support the proposed licensing action, as required by 10 C.F.R. § 2.309(f)(1)(iv). Likewise, because FoE's broad allegation that PG&E's aging management plan is "inadequate" in light of new information does not actually reference any specific portion of PG&E's application that it disputes, FoE fails to demonstrate the existence of a "genuine dispute with the applicant," as required by 10 C.F.R. § 2.309(f)(1)(vi). Absent a waiver of the NRC's regulations, therefore, Contention Three is not admissible.

#### D. Waiver

Pursuant to 10 C.F.R. § 2.335(a), except as provided in 10 C.F.R. § 2.335(b)-(d), "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of

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<sup>59</sup> See, e.g., Tr. at 703 (FoE counsel).

<sup>60</sup> Tr. at 755-56 (FoE counsel).

production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.”<sup>61</sup> FoE’s petition for waiver of the regulations that otherwise bar each of its proffered contentions fails to satisfy 10 C.F.R. § 2.335.

As the Commission explained in the Millstone decision,<sup>62</sup> a waiver may be granted only upon a showing that each of four factors has been satisfied:

(i) the rule’s strict application “would not serve the purposes for which [it] was adopted”; (ii) the movant has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived”; (iii) those circumstances are “unique” to the facility rather than “common to a large class of facilities”; and (iv) a waiver of the regulation is necessary to reach a “significant safety problem.” The use of “and” in this list of requirements is both intentional and significant. For a waiver request to be granted, all four factors must be met.<sup>63</sup>

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<sup>61</sup> 10 C.F.R. § 2.335(a). Subsections (b), (c) and (d) of Section 2.335 further provide as follows:

(b) A participant to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation . . . be waived or an exception be made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that . . . state[s] with particularity the special circumstances alleged to justify the waiver or exception requested.

(c) If, on the basis of the petition . . . the presiding officer determines that the petitioning participant has not made a prima facie showing that the application of the specific Commission rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross examination, or argument directed to the matter will be permitted . . .

(d) If . . . the presiding officer determines that the prima facie showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission . . . for a determination in the matter of whether the application of the Commission rule or regulation . . . should be waived or an exception made.

<sup>62</sup> Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005).

<sup>63</sup> Id. at 559-60 (emphasis in original) (footnotes omitted).

FoE fails to establish a prima facie case that its waiver petition meets at least two of these four factors.

First, FoE has not made a prima facie showing that application of 10 C.F.R. §§ 54.4, 54.21 and 54.29(a) would not serve the purposes for which they were adopted. These regulations limit license renewal proceedings to issues that are unique to the period of extended operation. As the Commission has clarified, its license renewal process does not “require submission of information relating to the adequacy of, or compliance with, the current licensing basis” and does not “require a finding regarding the adequacy of, or compliance with, the plant’s licensing basis.”<sup>64</sup>

As FoE acknowledges, the Commission revised its license renewal rules specifically “to identify and eliminate from license renewal proceedings certain analysis that would be duplicative of the licensee’s ongoing obligations to comply with Commission regulations and the plant’s current licensing basis.”<sup>65</sup> As the Commission explained in Millstone, “it makes no sense to spend the parties’ and our own valuable resources litigating allegations of current deficiencies in a proceeding that is directed to future-oriented issues of aging.”<sup>66</sup>

FoE’s concerns about the risk of an earthquake near the Diablo Canyon facility are not limited to the proposed period of extended operation, which would not even begin before the year 2024. On the contrary, FoE charges that “PG&E has not demonstrated that the plant can be safely operated under its existing operating license.”<sup>67</sup> In these circumstances, the

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<sup>64</sup> 56 Fed. Reg. at 64,961.

<sup>65</sup> Waiver Petition at 6 (citing 60 Fed. Reg. at 22,462-63).

<sup>66</sup> Millstone, CLI-05-24, 62 NRC at 561 (emphasis in original). Rather, the “NRC regulations provide two other procedural mechanisms (10 C.F.R. §§ 2.206 and 2.802) by which [a petitioner] may pursue its concerns about” current deficiencies. Id.

<sup>67</sup> Petition at 3.

regulations from which FoE seeks relief serve exactly the purpose the Commission intended: that is, to bar litigation of “allegations of current deficiencies in a proceeding that is directed to future-oriented issues of aging.”<sup>68</sup> This alone is fatal to FoE’s waiver request.<sup>69</sup>

Second, FoE has also not made a prima facie showing that a waiver is necessary to reach a significant safety issue. To be sure, potential seismic risks to the Diablo Canyon facility are important issues—most certainly “significant” ones. But they are current operating issues, not issues that pertain uniquely to a potential period of extended operation.

There are other ways in which FoE might raise its concerns about the present and ongoing risk of earthquakes at the Diablo Canyon facility. These include a possible petition to modify the plant’s operating licenses under 10 C.F.R. § 2.206; a possible 10 C.F.R. § 2.802 petition for rulemaking to expand the scope of license renewal proceedings; and perhaps the very petition that FoE has presently pending before the Commission.<sup>70</sup> But this license renewal proceeding—which addresses only issues that are unique to a period of extended operation that would not begin until a decade from now—is not such an opportunity. FoE’s fundamental claim—that “PG&E has not demonstrated that the plant can be safely operated under its existing operating license”<sup>71</sup>—must be adjudicated elsewhere.

### III. ORDER

For the foregoing reasons, FoE’s petition to intervene is denied, and FoE’s petition for a waiver is denied.

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<sup>68</sup> Millstone, CLI-05-24, 62 NRC at 561 (emphasis in original).

<sup>69</sup> We therefore need not decide whether FoE has demonstrated special circumstances that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived.” Id. at 560 (footnote omitted). Nor must we decide whether such special circumstances, if any, have been shown to be “unique” to the Diablo Canyon facility, rather than “common to a large class of facilities.” Id. (footnote omitted).

<sup>70</sup> See supra note 8.

<sup>71</sup> Petition at 3 (emphasis added).

In accordance with 10 C.F.R. § 2.311(b), any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after it is served.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
February 11, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
PACIFIC GAS & 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 **Memorandum and Order (Denying Petition to Intervene and Petition for Waiver)** have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
Washington, DC 20555-0001

Paul S. Ryerson, Chair  
Administrative Judge  
E-mail: [paul.ryerson@nrc.gov](mailto:paul.ryerson@nrc.gov)

Nicholas G. Trikouros  
Administrative Judge  
E-mail: [nicholas.trikouros@nrc.gov](mailto:nicholas.trikouros@nrc.gov)

Gary S. Arnold  
Administrative Judge  
E-mail: [gary.arnold@nrc.gov](mailto:gary.arnold@nrc.gov)

Alana Wase, Law Clerk  
E-mail: [alana.wase@nrc.gov](mailto:alana.wase@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of Commission Appellate Adjudication  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
OCAA Mail Center  
E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop: O-15D21  
Washington, DC 20555-0001

Edward L. Williamson, Esq.  
E-mail: [edward.williamson@nrc.gov](mailto:edward.williamson@nrc.gov)  
Beth Mizuno, Esq.  
E-mail: [beth.mizuno@nrc.gov](mailto:beth.mizuno@nrc.gov)

Susan Uttal, Esq.  
E-mail: [susan.uttal@nrc.gov](mailto:susan.uttal@nrc.gov)  
Catherine Kanatas, Esq.  
E-mail: [catherine.kanatas@nrc.gov](mailto:catherine.kanatas@nrc.gov)

Joseph Lindell, Esq.  
E-mail: [joseph.lindell@nrc.gov](mailto:joseph.lindell@nrc.gov)  
John Tibbetts, Paralegal  
E-mail: [john.tibbetts@nrc.gov](mailto:john.tibbetts@nrc.gov)

OGC Mail Center  
E-mail: [OGCMailCenter@nrc.gov](mailto:OGCMailCenter@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
Hearing Docket  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Diablo Canyon Nuclear Power Plant - Docket Nos. 50-275-LR and 50-323-LR  
**Memorandum and Order (Denying Petition to Intervene and Petition for Waiver)**

Counsel for Pacific Gas and  
Electric Company  
Winston & Strawn, LLP  
101 California Street  
San Francisco, CA 94111-5802  
David A. Repka, Esq.  
E-mail: [drepka@winston.com](mailto:drepka@winston.com)  
Tyson Smith, Esq.  
E-mail: [trsmitth@winston.com](mailto:trsmitth@winston.com)  
Carlos Sisco, Senior Paralegal  
E-mail: [csisco@winston.com](mailto:csisco@winston.com)

San Luis Obispo Mothers for Peace  
1123 Flora Road  
Arroyo Grande, CA 93420  
Jill ZamEk, Esq.  
[jzk@charter.net](mailto:jzk@charter.net)

Counsel for San Luis Obispo Mothers  
For Peace  
Harmon, Curran, Spielberg, and Eisenberg  
1726 M Street, N.W., Suite 600  
Washington, DC 20036  
Diane Curran, Esq.  
[dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Ayres Law Group, LLP  
1707 L Street NW, Suite 850  
Washington, DC 20036  
Richard E. Ayres, Esq.  
E-mail: [ayresr@ayreslawgroup.com](mailto:ayresr@ayreslawgroup.com)  
John Bernetich, Esq.  
E-mail: [bernetichj@ayreslawgroup.com](mailto:bernetichj@ayreslawgroup.com)  
Jessica L. Olson, Esq.  
E-mail: [olsonj@ayreslawgroup.com](mailto:olsonj@ayreslawgroup.com)

[Original signed by Clara Sola ]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 11<sup>th</sup> day of February, 2015