ORAL ARGUMENT NOT YET SCHEDULED

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

No. 14-1213

FRIENDS OF THE EARTH,
Petitioner,
v.

U.S. NUCLEAR REGULATORY COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

and
PACIFIC GAS & ELECTRIC COMPANY,
Intervenor.

_____

RESPONDENTS' REPLY TO PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DEFER BRIEFING SCHEDULE

JOHN C. CRUDEN
Assistant Attorney General

THEKLA HANSEN-YOUNG
Attorney
Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
PO Box 7415, Ben Franklin Station
Washington, D.C. 20044
(202) 307-2710
thekla.hansen-young@usdoj.gov

ANDREW P. AVERBACH
Solicitor

CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 2085
(301) 415-1618
charles.mullins@nrc.gov

March 23, 2015

INTRODUCTION

In this petition for review, Petitioner, Friends of the Earth ("FOE") claims that the U.S. Nuclear Regulatory Commission ("NRC" or "Commission")[1] has taken an action that effectively amends the license of the Diablo Canyon Nuclear Power Plant without providing an opportunity for the requisite administrative hearing. Respondents (NRC and the United States of America) originally moved this Court to dismiss this case, arguing that the Court lacked jurisdiction. A motions panel of this Court referred the motion to dismiss to the merits panel and directed that the case be scheduled for merits briefing.

Respondents do not challenge the panel's decision that this Court should review the merits of the case alongside our jurisdictional arguments. Instead, we simply ask this Court to defer merits briefing while the Commission resolves issues that are now pending in adjudication before the Commission and that are also before this Court as part of the Petition for Review. FOE opposes the motion but its arguments are inconsistent with both the record and basic administrative practice. As we explain below, deferring briefing until the agency has issued a final decision is both reasonable and appropriate. Once such a decision has been issued, both Respondents and this Court will be better able to address the merits of FOE's Petition for Review.

[1] This motion will use "NRC" for the agency as a whole and "Commission" for the 5-member body that manages the agency.

ARGUMENT

I. Respondents Are Not Re-Arguing the Motion to Dismiss.

1. FOE claims that this motion represents "a second bite at the apple" because it asks this Court to "reconsider[] its ruling to refer Respondents' arguments to the merits panel." Response at 2. But that claim is incorrect. In our Motion to Dismiss, we argued that this Court lacked jurisdiction (including that the case was not justiciable) based on arguments of finality and ripeness. The motions panel did not rule on those arguments, and we do not challenge that decision. This motion (unlike the previous one) does not ask the Court to dismiss the case; instead, it simply asks the Court to defer merits briefing until the Commission has adopted a merits position. Once the Commission has adopted a merits position, we will be able to defend that position meaningfully.

2. In its Response, FOE claims that the issue raised in the Motion to Defer "has already been fully briefed for the motions panel of this Court, which refused to reach the conclusion urged by Respondents and instead directed the parties to re-brief the issue for the merits panel." Response at 3. But that claim misstates the motions panel's order. The motions panel referred Respondents' *jurisdictional* (and justiciability) arguments, *i.e.*, those arguments based on finality and ripeness, to the merits panel. But the motions panel made no other ruling and did not address whether it would be appropriate to defer briefing.

It is true, as FOE notes, that in support of our Motion to Defer we cite some of the same facts that we cited in our Motion to Dismiss, and that we have cited these facts to demonstrate that FOE raises the same claims before this Court that it raises before the Commission. But the motions panel did not rule that the claims were not the same. Nor did it rule on the merits of the Motion to Dismiss. Instead, the motions panel merely referred the issue of *jurisdiction* (and justiciability) to the merits panel without making any findings. Thus, nothing prevents Respondents from citing the same facts in support of a *different* motion seeking *different* relief.

II. Deferring Briefing Will Enable the Commission's Attorneys to Defend the Commission's Decision on the Merits.

1. As we pointed out in our Motion to Defer, a Commission decision on the merits will provide the Commission's attorneys with a merits position to defend. *See* Motion at 5-7. The Commission's attorneys can only defend a Commission decision on those grounds adopted by the Commission in reaching a final decision based on the administrative record. They cannot create a Commission position.

Here, FOE claims both before this Court and before the Commission that the licensee's Revision 21 to the Diablo Canyon Updated Final Safety Analysis Report ("Safety Report") constitutes a *de facto* license amendment. But because that issue is now pending before the Commission, its attorneys do not have a final decision on whether Revision 21 constitutes a *de facto* license amendment to defend. Instead, the Commission is still considering whether Revision 21 and any

associated NRC Staff decision to "accept" or "approve" that document constitutes a *de facto* license amendment. Thus, because the Commission's attorneys can only defend a Commission decision based on the rationale contained in that particular decision (and on the administrative record), the Commission's attorneys do not yet have a Commission decision to defend on the question under review in this case, *i.e.*, whether the alleged approval of Revision 21 constitutes a *de facto* amendment.

2. In response to our assertion that Respondents have no agency position to defend, FOE claims, Response at 3-4, that "nothing prevents counsel for Respondents from simply requesting the Commission's position in this matter and arguing before this Court accordingly, just as counsel for private parties regularly do." But such an endeavor could greatly undermine the agency's adjudicatory decisionmaking process.

In essence, FOE suggests that the Commission's attorneys go door-to-door to the individual Commissioners and determine their views while they are considering a FOE's request for an administrative adjudicatory hearing. But, in this case, that process would require the attorneys to determine and articulate the Commission's position before the Commission itself has reached a final decision on the issue. That result, in turn, could prevent Commissioners from changing their minds after advising their attorneys – or could result in the attorneys having to change their position if the Commission changes its position.

Moreover, relying on a preliminary opinion, as FOE suggests, would disrupt the process of the Commission issuing a formal decision based on an administrative record, which this Court could then review. This process is a basic requirement of administrative law that is designed to ensure accurate, efficient, and fair agency decisionmaking. And a deviation from this process could potentially jeopardize the rights of the parties (including FOE and the licensee) litigating the issues before the Commission. Indeed, it is no small irony that FOE, having invoked the Commission's procedures to seek a hearing before the agency (and claiming that failure to grant the hearing could result in serious harm), now seeks to bypass the Commission's consideration of the very issues it has raised.

3. FOE also alleges that the Commission's attorneys are not "in danger of running afoul of [the rule enunciated in *Philadelphia Gas Works*] because NRC has already taken a position that Revision 21 is lawful." *See* Response at 4 (citing the agency document that FOE claims "approved" Revision 21). But again, FOE's argument ignores the Commission's role as final arbiter of agency adjudicatory matters. The June 23, 2014 memorandum that FOE claims "approved" Revision 21 was issued by the NRC Staff, not the Commission.[2] The NRC Staff is a separate and independent party in the administrative proceeding before the

[2] As we noted in our motion to dismiss (*see* p. 15, n.10), the legal consequences of this document are limited to the NRC Staff's conclusion that Revision 21 satisfied the administrative reporting requirements of 10 C.F.R. § 50.71(e).

Commission and does not – and in fact, cannot – speak for the Commission on contested adjudicatory issues.

Here, FOE claims that the NRC Staff has "approved" Revision 21 to the Diablo Canyon Safety Report. But FOE has also challenged that "approval" before the Commission as a *de facto* amendment requiring the opportunity for a hearing. Indeed, FOE's agency petition asks the Commission to overrule this alleged approval and to provide an opportunity an administrative hearing on the changes to the Diablo Canyon Safety Report. The Commission, sitting in its adjudicatory capacity, is the ultimate authority within the agency of whether the "approval" of Revision 21 constitutes a *de facto* license amendment. The Commission's attorneys can hardly ask this Court to endorse the position expressed by the Staff in the challenged document when the Commission may, at FOE's request, ultimately overrule any decision made in that document.

III. FOE's Claims that the Issues in the Petition for Review and the Agency Petition Are Different Because They Have Been Raised in Different Proceedings Are Both Incorrect and Irrelevant.

FOE argues that the Petition for Review is "separate and distinct from the agency petition" and that, as a result, the *issues* pending in both fora are different. Response at 4. But no such distinction exists, and, even if it did, the mere fact that the proceedings are different is irrelevant.

1. FOE never explains how its agency petition, which it does not attach to its response or even cite anywhere in its submission, is meaningfully different from its Petition for Review before this court. While FOE filed the two pleadings in separate fora, they both raise the same issues and seek the same result: an administrative hearing on the impact of Revision 21.

2. FOE attempts to distinguish the two proceedings when it claims that the Petition for Review challenges a "completed" license amendment, while the agency petition seeks intervention in an "ongoing" proceeding. Response at 5. Both of these arguments are disingenuous at best. First, the Petition for Review does not challenge a "completed" license amendment because the agency has not issued a formal amendment to the Diablo Canyon licenses reflecting Revision 21 – and FOE's Petition for Review makes no such claim. Instead, the Petition for Review appears to claim that by "accepting" Revision 21 the agency effectively changed the facility's operating authority, *i.e.*, the agency has *de facto* amended the license, and accordingly the agency *should* have held a hearing. But FOE cannot point to any "completed" amendment because none exists. To suggest otherwise is nothing short of fanciful.

Second, FOE's agency petition (before the Commission) does not seek intervention in an "ongoing" proceeding. Agency proceedings are initiated by a Federal Register Notice, *see* 42 U.S.C. §§ 2239a(2)(A) and (B), which will be

referenced in any petition to intervene. But FOE's agency petition (Exhibit 1) does not cite any NRC-issued Federal Register Notice as authority for its request to be admitted as a party to the proceeding. Instead, the agency petition claims that the agency's course of action constituted a *de facto* amendment of the Diablo Canyon license. Exhibit 1 at 6. Subsequently, FOE filed a Reply that claimed "approval" of Revision 21 constituted a *de facto* amendment and that the Commission should provide an opportunity for an adjudicatory hearing on that action. *See* Motion to Defer Briefing, Exhibit 5, at 12-19. But, as we noted above, that is precisely what FOE argues in its Petition for Review. Thus, contrary to its assertions before this Court, FOE's agency petition is an attempt to convince the Commission to initiate a new proceeding, not an attempt to intervene in an ongoing proceeding. Simply put, the distinction FOE attempts to draw is non-existent.

3. The purported distinction that FOE raises is also irrelevant. FOE attaches great import to the so-called "context" of the two proceedings, arguing that merely because the two pleadings (the "agency petition" and the Petition for Review) are filed in separate proceedings, they must therefore raise different issues. But that is demonstrably illogical. A party can file pleadings in two separate fora and seek the same relief.

Here, while the two proceedings are separate, they address the same issue and seek the same relief. A Commission decision granting the hearing request in

FOE's agency petition would be an order finding that Revision 21 constitutes a license amendment and offering an opportunity for a hearing. That result would be identical to the result of a decision by this Court's granting FOE's Petition for Review: a finding that Revision 21 constituted a license amendment and offering an opportunity for a hearing. The "context" of the two proceedings is irrelevant.

IV. Deferring the Briefing Schedule Allows the Commission to Contribute Its Expertise to the Proceeding.

FOE's response fails to address our argument that deferring briefing will allow the Commission to bring its technical and regulatory expertise to bear on FOE's claims. *See* Motion to Defer Briefing at 7-9. Those claims center on the relationship between the earthquake faults in the Diablo Canyon region and that facility's licensing basis, and they raise complex issues at the intersection of physics, geology, and nuclear plant engineering and licensing. For example, resolving these claims will require assessing the ground acceleration associated with a possible earthquake on one (or more) of the faults in the region and the potential resulting impact on the facility itself.

This Court is not as well-positioned to take evidence and make findings of fact as is the Commission with regard to whether FOE or the NRC Staff has the superior technical arguments. Yet making technical decisions in these areas could well be necessary to determine whether the changes to the Diablo Canyon Safety Report contained in Revision 21 provided the facility with additional operating

authority that would constitute an amendment to the facility license, as claimed in both FOE's Petition for Review and its agency petition. If this Court attempts to resolve these complex technical issues on its own, it will do so without the benefit of the Commission's application of its technical and regulatory expertise in these disciplines to FOE's claims.

V. Deferring the Briefing Schedule Does Not Harm FOE or the Public.

FOE belatedly claims that "there is extreme urgency" in closing the Diablo Canyon facility and that briefing should proceed "without delay." Response at 6. But FOE's response does not claim any specific technical deficiency or present any expert opinion that continued operation of the plant is unsafe, which might prevent this Court from deferring briefing. And FOE has not filed an emergency motion to stay operation of the facility with either the Commission or this Court, indicating that its claim of "extreme urgency" should be taken with a sizable dose of salt. The Commission is now addressing FOE's claims related to Revision 21 of the Diablo Canyon Safety Report, and it is the proper body to resolve such claims in the first instance, with this Court providing judicial review of its decision.

CONCLUSION

For the foregoing reasons, this Court should defer issuance of a briefing schedule and hold this case in abeyance pending final resolution of FOE's Petition to Intervene and Request for Hearing now pending before the Commission.

Respectfully submitted,

__s/Andrew P. Averbach___
ANDREW P. AVERBACH
Solicitor

JOHN C. CRUDEN
Assistant Attorney General

__s/Thekla Hansen-Young__
THEKLA HANSEN-YOUNG
Attorney
Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
PO Box 7415, Ben Franklin Station
Washington, D.C. 20044
(202) 307-2710
thekla.hansen-young@usdoj.gov

__s/Charles E. Mullins__
CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 2085
(301) 415-1618
charles.mullins@nrc.gov

March 23, 2015

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on March 23, 2015, I filed Respondents' *Reply to Petitioner's Response to Respondents' Motion to Defer Briefing Schedule* 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:

Richard E. Ayers
Jessica L. Olson
John H. Bernetich
Ayers Law Group
1707 L Street, N.W. Suite 850
Washington, D.C. 20036

David A. Repka
Darani M. Reddick
Winston & Strawn, LLP
1700 K Street, N.W.
Washington, D.C. 20006

Thekla Hansen-Young
Attorney, Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
P.O. Box 7415, Ben Franklin Station
Washington, D.C. 20044

Respectfully submitted,

__s/Charles E. Mullins__
CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(301) 415-1618
charles.mullins@nrc.gov

EXHIBIT 1

Respondents' Reply to Petitioner's Response
to Respondents' Motion to Defer Briefing Schedule

No. 14-1213 (D.C. Cir.)

Petition to Intervene and Request for Hearing,
filed by Friends of the Earth before the Commission
(Aug. 26, 2014)

Pages 1-7

(Entire document available at ML14254A231
at www.nrc.gov/reading-rm/adams.html)

BEFORE THE UNITED STATES

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS & ELECTRIC COMPANY	)	Docket Nos. 50-275, 50-323
	)	
(Diablo Canyon Power Plant)	)	August 26, 2014

PETITION TO INTERVENE AND REQUEST FOR HEARING BY FRIENDS OF THE EARTH

In 2008, a U.S. Geological Survey geophysicist discovered a previously unknown fault just offshore from Diablo Canyon Power Plant (Diablo Canyon) near San Luis Obispo, California. Despite its being located just 300 meters from Diablo Canyon's intake structure, Nuclear Regulatory Commission (NRC or Commission) and Pacific Gas & Electric (PG&E) scientists had failed to discover the fault during the approximately 30 years since Diablo Canyon began operations or in the approximately 45 years since the plant's construction permits were issued. Six years after the discovery of this fault, later named the Shoreline Fault, PG&E has not demonstrated that the plant can be safely operated under its existing operating license; to the contrary, studies done so far indicate that the Shoreline Fault and the nearby Los Osos and San Luis Bay 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.

Despite both the NRC's and PG&E's acknowledgement of this startling information, the NRC has not required PG&E to propose a license amendment and make a public demonstration that the plant remains safe to operate. Meanwhile the Staff has allowed the reactors to continue to operate outside their licensing basis, effectively amending the license *de facto*. In fact, the NRC appears to have suppressed a report by NRC's Chief Resident Inspector for Diablo Canyon, Dr. Michael Peck, stating flatly that the plant is no longer operating within its licensing basis. On August 25, 2014, the Associated Press (AP) issued a major article disclosing that Dr. Peck had filed a Dissenting Profession Opinion (DPO) with the NRC.[1] In his DPO, Dr. Peck concluded that "that [these] three local earthquake faults [the Shoreline, San Luis Bay, and Los Osos faults] are capable of generating significantly greater vibratory ground motion than was used to establish the facility safe shut down earthquake (SSE) design basis."[2] Since Diablo is not operating within its licensing basis, Dr. Peck asserted, the plant must suspend operations while the NRC considers a license amendment. Dr. Peck further noted that NRC's actions "[i]n response to this issue . . . have been inconsistent with existing regulatory requirements and the facility design bases and Operating License."[3] Despite Dr. Peck's explicit request that his DPO be made public, the existence of the report itself was not publically known until the AP's report.

The Atomic Energy Act (AEA or Act) requires a plant to have a valid license and operate within its licensing basis. The scope of the licensing basis, as described by the NRC, is

---

[1] The Associated Press, *AP Exclusive: Expert Calls for Nuke Plant Closure*, N.Y. Times, Aug. 25, 2014, http://www.nytimes.com/aponline/2014/08/25/us/ap-us-nuclear-reactor-dispute.html?hp&action=click&pgtype=Homepage&version=WireFeed&module=pocket-region&region=pocket-region&WT.nav=pocket-region.

[2] NRC, Dr. Michael Peck, Differing Professional Opinion (*hereinafter* "DPO"), at 2. The DPO is provided as Attachment A to this Petition..

[3] DPO, at 2.

comprised of the requirements imposed on the plant by its design basis, facility-specific technical specifications, NRC regulations, and other requirements. When a plant cannot operate within the specific parameters described in the current licensing basis, the AEA requires the licensee to seek a license amendment, triggering a public process with an adjudicatory hearing in which other interested parties may participate. Thus NRC regulations, and public safety, require that the plant suspend operations, as requested by Dr. Peck, the NRC official at the site most directly responsible for public safety, until PG&E can show, with evidence reviewed in a public hearing on a license amendment, that the plant can be operated safely.

Diablo Canyon's licensing basis requires that the plant's integral systems and parts be qualified to withstand stress caused by the strongest potential earthquake that can occur at the plant. Currently, Diablo Canyon's licensing basis provides that the plant is qualified to withstand an earthquake with ground acceleration of 0.4 g.[4] The Shoreline Fault has the potential to cause an earthquake with ground acceleration of up to 0.62 g—much higher than what the licensing basis allows.[5] The Los Osos and San Luis Bay faults have peak ground acceleration of 0.60 g and 0.70 g, respectively—also well above what Diablo Canyon's licensing basis allows.[6] Yet the NRC Staff (herein sometimes referred to as the Staff or the Commission Staff) continues to allow the plant to operate without a public review of whatever evidence the

[4] "g" is a measure of acceleration due to Earth's gravity. 1.0 g equals 9.81 m/s^2. *See* NRC, Fact Sheet on Seismic Issues for Nuclear Power Plants, http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-seismic-issues.html.

[5] DPO, at 22. Peak ground acceleration is at 100 Hz. *Id.* *See also* PG&E Report to NRC, "Report on the Analysis of the Shoreline Fault Zone, Central Coast California," (Jan. 2011), ADAMS Accession No. ML110140400, at 6-51.

[6] PG&E Report to NRC, "Report on the Analysis of the Shoreline Fault Zone, Central Coast California," ADAMS Accession No. ML110140400, at ES-5.

NRC and the licensee can produce that it can safely withstand this far greater force, or without even PG&E's making changes to its licensing basis.

Following discovery of the Shoreline Fault, PG&E consulted with NRC Staff regarding how to evaluate the seismic risk posed by the three faults. Acting upon NRC Staff's advice, PG&E concluded that a change to its licensing basis was necessary and that the Staff would have to approve any new method used to evaluate the Shoreline Fault. Accordingly, PG&E filed a License Amendment Request.

Initially, NRC Staff determined internally to deny PG&E's request on grounds that amending Diablo Canyon's license as PG&E requested would lessen the plant's safety requirements below acceptable standards.[7] After reviewing the License Amendment Request, NRC Staff found that the method proposed by PG&E was "unacceptable from technical and regulatory perspectives."[8] NRC Staff thus recognized that it could not lawfully grant PG&E's amendment request.

Rather than deny the License Amendment Request, however, PG&E—with NRC's assistance—managed to achieve effectively the same result as requested in the License Amendment Request. Approximately one year after the License Amendment Request was submitted, NRC Staff permitted PG&E to withdraw its request, and began a private process to amend Diablo Canyon's license through closed-door negotiations with PG&E, in violation of the AEA, which requires the NRC to provide an opportunity for a public adjudicatory hearing on any

[7] NRC draft document, "Basis for DE Denial of Diablo Canyon 1&2 LAR 11-05," at 3, ADAMS Accession No. ML13354B992. This document, which was attached from an NRC email, was obtained through the Freedom of Information Act, NRC Request No. FOIA/PA-2014-0065.

[8] *Id.*

amendment to a nuclear reactor operating license. NRC Staff took this striking position notwithstanding, and in direct contradiction to, its own prior determinations (1) that a formal license amendment was required to make the changes PG&E wanted to make; (2) that the License Amendment Request submitted by PG&E was insufficient to ensure that the plant would remain safe; and (3) that the NRC Staff could not lawfully grant the License Amendment Request.

Rather than requiring PG&E to provide a deterministic evaluation of the ability of the plant's structures, systems, and components (SSCs) to withstand the destructive forces of the worst-case earthquake caused by the Shoreline fault system, the Staff indicated that performance of the probabilistic analysis called for under the Commission's Fukushima review would provide sufficient assurance that the plant was safe to operate. But NRC policy requires a deterministic analysis of the plant's ability to survive a worst-case earthquake, and prohibits use of a probabilistic analysis of the chances such an earthquake will occur to demonstrate a plant's safety. PG&E cannot show, through its Fukushima analysis, that the plant's SSCs would survive a worst-case earthquake caused by the Shoreline fault system, and it has not made such a showing through other means.

In allowing PG&E to avoid a license amendment proceeding, NRC Staff relied upon a claim by PG&E that, although the potential ground motion from the Shoreline, Los Osos, and San Luis Bay faults exceeded that contained in Diablo Canyon's licensing basis, the seismic risk posed by the faults was less than the risk posed by another fault, the Hosgri Fault, near the plant. But the Hosgri analysis is not part of the licensing basis for Diablo Canyon, as the Commission made clear decades ago when it licensed the plant. Since it is not part of the licensing basis of

the plant, the Hosgri analysis therefore cannot be used to authorize continued operation under the current license.

Moreover, it has not been shown that Diablo Canyon is capable of being safely shut down following an earthquake. Although the Hosgri Fault is indeed a large fault that poses a significant risk to Diablo Canyon, the methodologies and assumptions used to evaluate the Hosgri Fault's risk to the plant are materially weaker than the assumptions that NRC regulations provide for use in determining whether a plant can safely withstand earthquakes. Indeed, PG&E has admitted that the projected ground motion at the plant site caused by an earthquake on one of the three faults is equal to or greater than potential ground motion caused by a Hosgri earthquake.[9] As a result, the Hosgri Event is not a valid basis for comparison to new seismic data.

By permitting PG&E to amend its license through back channels and informal discussions, rather than through the license amendment process required by the Atomic Energy Act, NRC is conducting a *de facto* license amendment proceeding, in violation of the AEA and NRC decisions. Rather than holding a public hearing process as required by the AEA, where the public could challenge the NRC Staff's and PG&E's unsubstantiated assertions that the plant is safe, the Staff has used a closed-door process between itself and the licensee to work a *de facto* license amendment. Using PG&E's self-serving assumptions as its basis for evaluating the new ground motion data relating to the Shoreline, Los Osos, and San Luis Bay faults, the Staff continues to grant PG&E operating authority not set forth in the current operating license for Diablo Canyon. Thus, the Staff is currently permitting Diablo Canyon to continue operating in

[9] *Id.* at ES-2.

the face of a serious seismic threat that has not undergone comprehensive and transparent study, posing a serious safety risk to the public near Diablo Canyon.

Petitioner Friends of the Earth (Petitioner or FoE) therefore requests (1) that it be permitted to intervene in the *de facto* license amendment proceeding; (2) that the Commission empanel an Atomic Safety and Licensing Board to conduct a public adjudicatory hearing regarding Diablo Canyon's ability to be safely shut down in the event of the peak ground motion that can be expected given today's understanding of the potential earthquakes that could affect the plant, as required by the section 189a(a)(1)(A) of Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A); and (3) in accordance with past NRC practice, that the NRC order PG&E to suspend operations at Diablo Canyon pending a determination, following a public hearing, that it can be safely operated under its license as amended.

I. FACTUAL BACKGROUND

1. Seismic Evaluations At Diablo Canyon In The 1970s

Diablo Canyon Unit 1 received its construction permit in April 1968, some 46 years ago. The construction permit for Unit 2 followed in December 1970.[10] Construction of Diablo Canyon took place throughout the 1970s amid continuing controversy during the hearings before the Atomic Energy Commission on the operating license. The then-recently created Nuclear Regulation Commission did not approve full power operating licenses for Units 1 and 2 until November 1984 and August 1985, respectively, some 15 years after construction began.

[10] *See* NRC, "Extension of Construction Permit Completion Dates," ADAMS Accession No. ML022320331 (Feb. 2, 1980), encl. at 1.