

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO FRIENDS OF THE EARTH'S APPEAL OF MEMORANDUM AND
ORDER LBP-15-6 (DENYING PETITION TO INTERVENE AND PETITION FOR WAIVER)

Joseph A. Lindell
Counsel for NRC Staff

April 02, 2015

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
BACKGROUND.....	2
I. Diablo Canyon Licensing Basis and Seismic Studies.....	2
II. License Renewal Procedural History.....	5
LEGAL STANDARDS.....	8
I. Standard for Commission Review.....	8
II. Contention Admissibility Criteria.....	8
III. Standards for a Petition for Waiver.....	9
ARGUMENT.....	10
I. FOE’s Petition for Waiver Does Not Meet Any of the <i>Millstone</i> Factors.....	11
A. <i>Millstone</i> Factor 1: The Board Correctly Determined That FOE does not Demonstrate that Application of 10 C.F.R. Part 54 Would Not Serve the Purposes for Which it was Adopted.....	12
B. <i>Millstone</i> Factor 2: FOE Has Not Shown That Special Circumstances Exist.....	15
C. <i>Millstone</i> Factor 3: FOE Has Not Shown That There Are Special Circumstances Unique to Diablo Canyon.....	17
D. <i>Millstone</i> Factor 4: The Board Correctly Determined that A Waiver is Not Necessary to Reach a Significant Safety Issue.....	18
II. FOE’s Contentions 1 and 3 Are Inadmissible Because They Do Not Raise a Genuine Dispute with the LRA.....	20
CONCLUSION.....	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission:</u>	
<i>AmerGen Energy Co., LLC</i> (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006)	9
<i>Crow Butte Res., Inc.</i> (Marsland Expansion Area), CLI-14-2, 79 NRC 11 (2014).....	8
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Station, Units 1 and 2), CLI-05-24, 62 NRC 551 (2005)	<i>passim</i>
<i>Exelon Generation Co., LLC</i> (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199 (2013) (slip op.).....	18
<i>Fansteel, Inc.</i> (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195 (2003)	21
<i>Florida Power & Light Co.</i> (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001)	10, 17
<i>Pac. Gas & Elec. Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427 (2011)	6
<i>Pub. Serv. Co. of New Hampshire</i> (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573 (1988)	16
<i>South Carolina Elec. & Gas Co.</i> (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1 (2010)	9
<u>Atomic Safety and Licensing Appeal Board:</u>	
<i>Pac. Gas & Elec. Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903 (1981)	2
<u>Atomic Safety and Licensing Board:</u>	
<i>N. States Power Co.</i> (Prairie Island Nuclear Generating Plant Independent Spent Fuel Installation), LBP-12-24, 76 NRC 503 (2012).....	9
<i>Pac. Gas & Elec. Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453 (1979)	2
<i>Pac. Gas & Elec. Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257 (2010)	6
<i>Pac. Gas & Elec. Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-15-6, __ NRC __ (Feb. 11, 2015) (slip op.)	<i>passim</i>

PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2),
LBP-07-4, 65 NRC 281 (2007)21

Director's Decisions:

Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2),
DD-86-4, 23 NRC 211 (1986)..... 19

General Elec. Co. (Vallecitos Nuclear Center, License No. SNM-960),
DD-79-9, 9 NRC 744 (1979).....19-20

Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia),
DD-95-15, 42 NRC 20 (1995)..... 19

Petition Requesting Seismic Reanalysis (All Power Reactors),
DD-80-01, 11 NRC 153 (1980)..... 19

Philadelphia Elec. Co. (Limerick Nuclear Generating Station, Units 1 and 2),
DD-79-16, 10 NRC 609 (1979)..... 19

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3),
DD-97-23, 46 NRC 168 (1997)..... 19

Southern California Edison Co. (San Onofre Nuclear Generating Station, Unit 1),
DD-81-20, 14 NRC 1052 (1981)..... 19

REGULATIONS

10 C.F.R. § 2.206(a)..... 18

10 C.F.R. § 2.309(f)(1)8-9

10 C.F.R. § 2.309(f)(1)(vi)21

10 C.F.R. § 2.335(a).....9

10 C.F.R. § 2.335(b).....9

10 C.F.R. § 2.335(c).....9-10

10 C.F.R. § 2.341(b)(4).....8

10 C.F.R. § 54.3(a).....5

10 C.F.R. § 54.21(c)(1).....5

10 C.F.R. § 54.30(b)..... 16-17

MISCELLANEOUS

Notice of Acceptance for Docketing of the Application, Notice of Opportunity for
Hearing for Facility Operating License Nos. DPR-80 and DPR-82 for an Additional 20-Year
Period; Pacific Gas & Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2;
and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards
Information (SUNSI) for Contention Preparation,
75 Fed. Reg. 3493 (Jan. 21, 2010).....5

Nuclear Power Plant License Renewal,
56 Fed. Reg. 64,943 (Dec. 13, 1991) (Final rule).....16-17

Nuclear Power Plant License Renewal; Revisions,
60 Fed. Reg. 22,461 (May 8, 1995) (Final rule) 14, 16

NUREG-0675, Sup. No. 34, *Safety Evaluation Report*
(June 1991) (ADAMS Accession No. ML14279A130).....2

April 2, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO FRIENDS OF THE EARTH'S APPEAL OF MEMORANDUM AND ORDER LBP-15-6 (DENYING PETITION TO INTERVENE AND PETITION FOR WAIVER)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the U.S. Nuclear Regulatory Commission ("Staff" or "NRC Staff") hereby files this brief in opposition to Friends of the Earth's ("FOE") appeal ("FOE Appeal")¹ of the Memorandum and Order of the Atomic Safety and Licensing Board ("Board") denying its petition to intervene and petition for waiver ("LBP-15-6").² LBP-15-6 denied three proposed contentions and a petition for waiver of the Commission's regulations filed by FOE in the license renewal proceeding for Diablo Canyon Nuclear Power Plant, Units 1 and 2 ("Diablo Canyon" or "DCPP").³ FOE's proposed contentions and waiver request concerned the September 10, 2014, Central Coastal California Seismic Imaging Project Report ("Seismic Report") prepared by the holder of the Diablo Canyon operating licenses,

¹ Brief of Friends of the Earth in Support of Appeal of LBP-15-6 (Mar. 9, 2015) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML15068A357).

² *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-15-6, 81 NRC ___ (Feb. 11, 2015) (slip op.) (ADAMS Accession No. ML15042A326).

³ See Letter from James R. Becker, Site Vice President, to NRC, Information to Support NRC Review of DCPD License Renewal Application ("LRA") (Nov. 23, 2009) (ADAMS Accession No. ML093350335) (transmitting application for license renewal for Diablo Canyon). The Diablo Canyon LRA (2009), is available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/diablo-canyon.html>.

Pacific Gas and Electric Company (“PG&E” or “licensee”), for the State of California and also submitted to the NRC.⁴ Because FOE has not shown that the Board committed an error of law or abused its discretion in finding that the petition to intervene did not meet the admissibility standards in 10 C.F.R. § 2.309(f)(1) and that the petition for waiver did not satisfy the requirements for waiver in 10 C.F.R. § 2.335(b)-(c), the Commission should deny the appeal.

BACKGROUND

I. Diablo Canyon Licensing Basis and Seismic Studies

Diablo Canyon has a unique and complex seismic design and licensing basis. In the late 1970’s, after the issuance of Diablo Canyon’s construction permits but before the completion of evidentiary hearings on seismic issues related to the issuance of Diablo Canyon’s operating licenses, some aspects of the plant’s design were reanalyzed to address the Hosgri Fault, which was discovered after plant construction was authorized and underway, and is located 5 km (3 mi) from Diablo Canyon. PG&E reanalyzed and upgraded the plant design to withstand an earthquake with a ground acceleration of 0.75g, which accommodates the higher estimates of ground acceleration caused by the Hosgri Fault.⁵

Additionally, the Diablo Canyon Unit 1 full-power license DPR-80 has a license condition (2.C.(7)) that required a reevaluation of the seismic design basis of the plant.⁶ To meet this

⁴ See Letter from E. Halpin, Senior Vice President, PG&E, to NRC, Central Coastal California Seismic Imaging Project, Shoreline Fault Commitment (Sept. 10, 2014) (“PG&E Letter DCL-14-081”) (ADAMS Accession No. ML14260A387) (transmitting the enclosed Seismic Report (ADAMS Package Accession No. ML14260A106)).

⁵ See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 909-10 (1981), *affg* LBP-79-26, 10 NRC 453, 463-507 (1979); *Diablo Canyon*, LBP-79-26, 10 NRC at 490 (PG&E “was required to modify the plant, where necessary, to withstand an SSE with a maximum vibratory acceleration of 0.75g.”).

⁶ Diablo Canyon Nuclear Power Plant, Unit 1, Docket No. 50-275, Facility Operating License, License No. DPR-80, at 7 (Nov. 2, 1984) (ADAMS Accession No. ML053140349).

requirement, PG&E developed the Long-Term Seismic Program (“LTSP”). As part of the LTSP, PG&E performed a full seismic reevaluation of Diablo Canyon between 1985 and 1988.⁷

A new fault near Diablo Canyon, the Shoreline Fault, was discovered by the United States Geological Survey (“USGS”) in 2008. PG&E and the NRC have assessed the capability of the Shoreline Fault in several studies, such as those documented in Research Information Letter (“RIL”) 09-001, “Preliminary Deterministic Analysis of Seismic Hazard at Diablo Canyon Nuclear Power Plant from Newly Identified ‘Shoreline Fault,’”⁸ and in RIL 12-01, “Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone.”⁹ The studies concluded that the ground motions from the Shoreline Fault are at or below those for which Diablo Canyon was evaluated previously and demonstrated to have a reasonable assurance of safety.¹⁰

On April 10, 2011, PG&E submitted a letter to the NRC stating that it would complete certain seismic studies at Diablo Canyon before the State of California issued its coastal consistency certification required for license renewal.¹¹ These seismic studies are those “approved and funded by the California Public Utilities Commission (CPUC).”¹² PG&E stated

⁷ The results of the program are detailed in the Final Report of the Diablo Canyon LTSP and summarized in NUREG-0675, Sup. No. 34, *Safety Evaluation Report* (June 1991) (ADAMS Accession No. ML14279A130). See Letter from Bruce Boger, Director, NRC, to J.D. Shiffer, Senior Vice President, PG&E, Issuance of Supplement No. 34 to NUREG-0675, Safety Evaluation Report for [DCPP], and Finding of Compliance with Condition 2.C.(7) of Unit 1 Operating License DPR-80 Related to The LTSP (TAC Nos. 55305 and 68049) (June 6, 1991) (ADAMS Legacy Accession No. 9106120065) (on microfiche) (“SSER 34”). Also available at ADAMS Package No. ML14279A124. In SSER 34, the Staff found that the LTSP license condition was met and that the seismic design basis for Diablo Canyon remained the same as a result of the re-evaluation. See SSER 34 at section 1.4, page 1-7.

⁸ RIL 09-001, Preliminary Deterministic Analysis of Seismic Hazard at [DCPP] from Newly Identified “Shoreline Fault” (Apr. 8, 2009) (ADAMS Accession No. ML090330523) (“RIL 09-001”).

⁹ RIL 12-01, Confirmatory Analysis of Seismic Hazard at [DCPP] from the Shoreline Fault Zone (Sept. 2012) (ADAMS Accession No. ML121230035) (“RIL 12-01”).

¹⁰ See, e.g., RIL-12-01 at xii.

¹¹ See Letter from John T. Conway, Senior Vice President-Energy Supply & Chief Nuclear Officer, PG&E, to NRC, Request for Deferral of Issuance of [DCPP] Renewed Operating Licenses, at 1 (Apr. 10, 2011) (ADAMS Accession No. ML111010592) (“PG&E Letter DCL-11-047”).

¹² *Id.*

that it would “issue a report addressing the results prior to issuance of a consistency certification and/or renewed operating licenses, if approved.”¹³ In 2012, PG&E committed to the NRC that if it discovered new faults during its collection of data or uncovered information suggesting that the Shoreline Fault is more capable than currently believed, it would provide the NRC with an interim evaluation.¹⁴

PG&E’s Seismic Report was submitted to the NRC on September 10, 2014.¹⁵ PG&E stated that its additional seismic studies revealed that “the Shoreline fault is longer . . . and therefore, more capable.”¹⁶ However, PG&E’s interim evaluation 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.”¹⁷ PG&E also performed an operability assessment as a result of this new information and determined that Diablo Canyon remained operable.¹⁸ The Staff performed an inspection of this operability determination, and determined that the conclusion of the licensee’s operability assessment was appropriate.¹⁹

¹³ *Id.*

¹⁴ See Letter from Barry Allen, Site Vice President, PG&E, to NRC, Withdrawal of License Amendment Request [(“LAR”)] 11-05, “Evaluation Process for New Seismic Information and Clarifying the [DCCP] Safe Shutdown Earthquake” at 4 (Oct. 25, 2012) (ADAMS Accession No. ML12300A105) (“PG&E Letter DCL-12-108”).

¹⁵ See PG&E Letter DCL-14-081.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ See Letter from Wayne Walker, Chief, NRC, to Edward Halpin, Senior Vice President and Chief Nuclear Officer, PG&E, Diablo Canyon Power Plant – NRC Focused Baseline Inspection Report 05000275/2014008 And 05000323/2014008, at Enclosure, 3-4 (Dec. 15, 2014) (ADAMS Accession No. ML14349A485).

¹⁹ *Id.* at 5.

II. License Renewal Procedural History

On November 23, 2009, PG&E submitted a license renewal application (“LRA”) for Diablo Canyon.²⁰ The LRA included, among other things, an integrated plant assessment (“IPA”), which identified those structures, systems, and components (“SSCs”) subject to an aging management review,²¹ a description of the time-limited aging analyses (“TLAAs”)²² for Diablo Canyon,²³ and a description of aging management programs (“AMPs”).²⁴ The LRA discussed both the Hosgri and Shoreline Faults.²⁵

The NRC accepted the LRA for review, and on January 21, 2010, published a *Federal Register* Notice providing a Notice of Opportunity for Hearing.²⁶ The period for filing a petition for intervention or request for hearing closed on March 22, 2010.²⁷ The San Luis Obispo Mothers for Peace (“SLOMFP”) timely filed a petition to intervene and a waiver petition on March 22, 2010.²⁸ As relevant here, one of SLOMFP’s contentions related to the Shoreline

²⁰ LRA at Section 1.0, 1.1-1.

²¹ See LRA Chapter 2 (describing and justifying the methods used in the integrated plant assessment to identify those structures and components subject to an aging management review in accordance with the requirements of 10 C.F.R. § 54.21(a)(2)).

²² See 10 C.F.R. § 54.3(a); 10 C.F.R. § 54.21(c)(1).

²³ See LRA Chapter 4. See *id.* at 4.3-51, 4.7-11 – 4.7-12.

²⁴ See LRA at Appendix B.

²⁵ See, e.g., LRA at Appendix E at 5-4 – 5-5 (discussing the Shoreline fault as part of PG&E’s environmental report (“ER”)), LRA at A-36 and 2.1-9 (discussing the Hosgri earthquake).

²⁶ Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License Nos. DPR-80 and DPR-82 for an Additional 20-Year Period; Pacific Gas & Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2; and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation, 75 Fed. Reg. 3493, 3493 (Jan. 21, 2010).

²⁷ See *id.*

²⁸ Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) (ADAMS Accession No. ML100810441); San Luis Obispo Mothers for Peace’s Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2) (Mar. 22, 2010) (ADAMS Accession No. ML100810442) (“SLOMFP Waiver Petition”). SLOMFP supported its petition with a declaration from its counsel. See Declaration by Diane Curran in Support of Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2) (Mar. 22, 2010). SLOMFP’s waiver

Fault.²⁹ A Board was established and granted SLOMFP's hearing request and admitted SLOMFP's Shoreline Fault contention.³⁰

Almost four years later, FOE submitted its October 10, 2014 Petition to Intervene and Petition for Waiver.³¹ FOE's Petition to Intervene was based on information contained in PG&E's September 10, 2014 Seismic Report that FOE claimed to be new and materially different, specifically, information related to the Shoreline Fault and the Hosgri Fault.³² FOE proffered three contentions claiming (1) that the Seismic Report demonstrated that SSCs within the scope of license renewal could not be safely shut down in the event of an earthquake,³³ (2) that the TLAAs for relay switches and snubbers were missing or inadequate;³⁴ and (3) that PG&E's AMPs were inadequate in light of the Seismic Report.³⁵ FOE's Petition for Waiver requested a waiver of several provisions in 10 C.F.R. Part 54 concerning the limited scope of

petition concerned generic determinations of environmental risk made by the NRC in its Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437). See SLOMFP Waiver Petition at 1.

²⁹ See Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace at 8-16. SLOMFP claimed that the severe accident mitigation alternatives ("SAMA") analysis required by 10 C.F.R. 51.53(c)(3)(ii)(L) was inadequate because it did not account for the Shoreline Fault. The Staff opposed the contention in part, but did not object to its admission to the extent that PG&E's SAMA analysis did not include a discussion of the Shoreline Fault.

³⁰ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 345-46 (2010). On appeal, the Commission affirmed the Board's ruling on admissibility but restated the contention. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 429, 438 (2011).

³¹ Friends of the Earth's Request for a Hearing and Petition to Intervene (Oct. 10, 2014) (ADAMS Accession No. ML14283A591) ("Petition to Intervene"); Friends of the Earth'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) (ADAMS Accession No. ML14283A603) ("Petition for Waiver").

³² See Petition to Intervene at 4-7.

³³ *Id.* at 8-21.

³⁴ *Id.* at 21-30.

³⁵ *Id.* at 30-32.

license renewals in the event that the Board ruled that FOE's proposed contentions were outside the scope of the Diablo Canyon license renewal proceeding.³⁶

In LBP-15-6, the Board denied FOE's Petition to Intervene as well as its Petition for Waiver. The Board ruled that FOE's proposed contentions were inadmissible because they were outside the scope of and not material to the findings the NRC must make in the license renewal proceeding, which is focused on the effects of aging and not on current operating issues.³⁷ The Board also found that FOE failed to challenge any portion of PG&E's IPA, TLAAs, or AMPs.³⁸ Finally, the Board denied FOE's request for a waiver because FOE had not made a *prima facie* showing that the regulations in 10 C.F.R. Part 54 limiting the scope of license renewal proceedings would not serve the purposes for which they were adopted.³⁹ To the contrary, the Board stated that in this case, the regulations from which FOE sought relief would serve the exact purpose that the Commission had intended: to prevent the litigation of current operating issues in a license renewal proceeding that is instead concerned with the management of aging effects during the period of extended operations.⁴⁰

Subsequently, FOE filed the instant timely appeal. In its appeal, FOE concedes that its proposed Contention 2 is inadmissible.⁴¹ FOE also appears to concede that its remaining contentions are inadmissible absent a waiver of 10 C.F.R. §§ 54.4, 54.21, 54.29(a), and 54.30.⁴² FOE argues, however, that the Board erred in denying its Petition for Waiver, and asks the Commission to grant the Petition for Waiver and the Petition to Intervene, or, in the alternative,

³⁶ See *generally* Petition for Waiver.

³⁷ LBP-15-6, at __ (slip op. at 9-13).

³⁸ *Id.*

³⁹ *Id.* at __ (slip op. at 15).

⁴⁰ *Id.* at __ (slip op. at 15-16).

⁴¹ FOE Appeal at 2 n.6.

⁴² *Id.* at 1-2.

to grant the Petition for Waiver and direct the Board to reconsider the admissibility of proposed Contentions 1 and 3.⁴³

The Commission should deny FOE's request to reverse LBP-15-6. As discussed more fully below, FOE has failed to demonstrate that waiver of several provisions in 10 C.F.R. Part 54 is warranted; to the contrary, the regulations FOE seeks to waive in this case serve precisely the purpose for which they were adopted. Furthermore, FOE has failed to demonstrate—or even argue—that if the regulations were waived, its contentions raise a genuine dispute with the LRA.

LEGAL STANDARDS

I. Standard for Commission Review

10 C.F.R. § 2.311(c) provides that an order denying a petition to intervene and/or request for hearing is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted. However, on appeal, the Commission defers to a Board's contention admissibility rulings unless the appeal points to an "error of law or abuse of discretion" on the part of the Board.⁴⁴

II. Contention Admissibility Criteria

In order to be admitted, a contention must meet all of the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Under § 2.309(f)(1), an admissible contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted. . .
- (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;

⁴³ *Id.*

⁴⁴ See, e.g., *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014) (citations omitted).

(iv) 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 on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) . . . [P]rovide 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 (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief[.]⁴⁵

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.⁴⁶ As the Commission and Atomic Safety and Licensing Boards have repeatedly held, "[a] failure to meet any of these criteria renders the contention inadmissible."⁴⁷

III. Standards for a Petition for Waiver

Pursuant to 10 C.F.R. § 2.335(a), "[e]xcept as provided in [§ 2.335(b), (c), and (d)], no rule or regulation of the Commission, or any provision thereof, concerning the licensing of 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." Subsection (b) of § 2.335 further provides that,

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular

⁴⁵ 10 C.F.R. § 2.309(f)(1). A further provision, § 2.309(f)(1)(vii), applies only to COL applications submitted under 10 C.F.R. Part 52.

⁴⁶ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006).

⁴⁷ *South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 & n.33 (2010), *quoting* *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006) ("requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements."); *N. States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Installation), LBP-12-24, 76 NRC 503, 509 (2012).

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.

Subsection (c) directs the presiding officer to dismiss the petition and related claims if the petitioner does not produce a “*prima facie* showing” that the requirements are met.

In applying these provisions, the Commission has emphasized that a waiver of one or more of its license renewal rules may be granted only upon a showing that the following four factors set out in *Millstone*⁴⁸ have 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.⁴⁹

Thus, unless *all* of these requirements are satisfied, any matters deemed to be outside the scope of the license renewal safety review cannot be challenged in individual license renewal proceedings.⁵⁰

ARGUMENT

The Board did not commit an error of law or abuse its discretion in denying FOE’s Petition to Intervene and Petition for Waiver; instead, its decision in LBP-15-6 is predicated on sound principles supported by Commission regulations and precedent. In ruling against FOE’s Petition to Intervene and Petition for Waiver, the Board explained that (1) a license renewal proceeding is future oriented, concerned with the effects of aging during the period of extended

⁴⁸ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 1 and 2), CLI-05-24, 62 NRC 551 (2005).

⁴⁹ *Id.* at 559-60 (emphasis in original; footnotes omitted).

⁵⁰ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10-12 (2001).

operations, and (2) that a contention must challenge the contents of the license renewal application.⁵¹ FOE's appeal should be denied because its arguments in support of its appeal are inconsistent with these two principles. First, the Commission should not grant FOE's request for waiver of several provisions in 10 C.F.R. Part 54 because FOE's arguments concern the safety of Diablo Canyon's *current operation* in light of the information in the Seismic Report. As such, in this case, the rules serve precisely the purpose for which they were adopted, *i.e.*, to distinguish between current operating issues and future oriented concerns related to the effects of aging. Second, even if the Commission finds merit in FOE's waiver request, the Commission should not grant FOE's Petition to Intervene because FOE fails to demonstrate, and in fact did not argue, that its proposed contentions raise a genuine dispute with the LRA.

I. FOE's Petition for Waiver Does Not Meet Any of the *Millstone* Factors

In its initial Petition for Waiver and now on appeal, FOE asks for a limited waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) to the extent that these regulations preclude FOE from raising challenges to Diablo Canyon's ability to shut down safely following a potential earthquake.⁵² At oral argument before the Board, FOE asserted that it also sought a waiver of 10 C.F.R. § 54.30 to the extent that § 54.30 conflicted with its arguments.⁵³ These provisions cited by FOE do not relate to one specific issue, but broadly address the components within the scope of license renewal (§ 54.4), the contents of a license renewal application (§ 54.21), the findings the NRC must make to grant a renewed license (§ 54.29(a)), and that matters related to the current licensing basis are outside the scope of license renewal (§ 54.30). The Board

⁵¹ See LBP-15-6 at ___ (slip op. at 8-16).

⁵² See, *e.g.*, Petition for Waiver at 1-2.

⁵³ *Id.* See *also* Transcript of Oral Argument at 740-41 (Jan. 21, 2015) (ADAMS Accession No. ML15026A130).

addressed FOE's Petition for Waiver with respect to two of the four *Millstone* factors, and found that FOE had failed to make a *prima facie* case that waiver was warranted.⁵⁴

The Board's ruling was correct. Although FOE asserts that its waiver request is limited,⁵⁵ it is actually very broad. FOE seeks to waive the entire scope of license renewal and litigate a current operating issue in this license renewal proceeding. Granting FOE's waiver request would undermine the structure of the Commission's license renewal regulations, which at their core distinguish between the management of aging related effects during the period of extended operations, and operating issues relating to a plant's current licensing basis. FOE is essentially seeking to significantly change the rule without going through the rulemaking process.

A. *Millstone* Factor 1: The Board Correctly Determined That FOE Does Not Demonstrate that Application of 10 C.F.R. Part 54 Would Not Serve the Purposes for Which it was Adopted

The Board determined that FOE did not meet the first *Millstone* factor because FOE failed to show that applying the regulations would not serve the purposes for which they were adopted.⁵⁶ To the contrary, the Board held that the "regulations from which [FOE] seeks relief serve exactly the purpose the Commission intended[.]"⁵⁷ The Board found that, in raising concerns about the present-day risk of an earthquake at Diablo Canyon, FOE sought waiver of the regulations which limit the scope of license renewal proceedings to issues that are unique to the period of extended operations, which, for Diablo Canyon, will not begin until 2024. The Board, quoting *Millstone*, explained that the regulations FOE sought to waive were adopted

⁵⁴ LBP-15-6 at __ (slip op. at 15-16).

⁵⁵ See, e.g., FOE Appeal at 17.

⁵⁶ LBP-15-6 at __ (slip op. at 15-16).

⁵⁷ *Id.* at 16.

precisely to bar the litigation of “allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging.”⁵⁸

On appeal, FOE does not dispute the Board’s finding that FOE’s concerns are not limited to the period of extended operation.⁵⁹ FOE’s proposed Contention 1, which asserts that in light of new information in the Seismic Report, PG&E has not demonstrated that Diablo Canyon will be able to shut down safely following a potential earthquake, raises an issue that is, on its face, not limited to future operations. In fact, as the Board noted,⁶⁰ FOE stated in its Petition to Intervene that “PG&E has not demonstrated that the plant can be safely operated under its existing operating license.”⁶¹

FOE instead argues that the Board misunderstood the primary purpose of the license renewal rules in 10 C.F.R. Part 54, which FOE asserts are not to promote efficiency by limiting the scope of license renewal proceedings, but to ensure safety during the period of extended operations.⁶² FOE maintains that because it raises a significant safety concern regarding earthquakes relevant to the renewal period, waiver is warranted.⁶³ However, a very similar argument was previously rejected by the Commission in *Millstone*. There, a petitioner requested a waiver of 10 C.F.R. § 50.47(a), which provides that challenges to the adequacy of an emergency plan are not within the scope of license renewal.⁶⁴ The petitioner argued that one of the purposes of 10 C.F.R. § 50.47 is to ensure the protection of public health and safety,

⁵⁸ *Id.*, quoting *Millstone*, CLI-05-24, 62 NRC at 561 (emphasis in original).

⁵⁹ *Id.* at 15 (“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.”).

⁶⁰ *Id.* at 15.

⁶¹ Petition to Intervene at 3. See also *id.* at 5 (“[T]he PG&E Seismic Report establishes that the earthquake caused by the Hosgri fault, as identified and analyzed in the Hosgri part of the original licensing proceeding, is no longer the largest or most powerful threat to the Diablo plant.”).

⁶² FOE Appeal at 8-9.

⁶³ *Id.*

⁶⁴ *Millstone*, CLI-05-24, 62 NRC at 559.

and, therefore, if the emergency plan does not provide that protection, waiver would be consistent with the purpose of the rule.⁶⁵ In response, the Commission ruled that not all safety concerns are suitable for litigation in a license renewal proceeding, which is limited in scope to the effects of aging.⁶⁶ The Commission explained as follows:

Of course, *all* our Part 50 regulations are aimed, directly or indirectly, at protecting public health and safety. But that does not mean that they are all suitable subjects for litigation in a license renewal proceeding. They are not. In fact, the primary reason we excluded emergency-planning issues from license renewal proceedings was to limit the scope of those proceedings to ‘age-related degradation unique to license renewal.’ Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the Millstone license renewal application. Consequently, 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. . . . NRC regulations provide two other procedural mechanisms (10 C.F.R. §§ 2.206 and 2.802) by which [the petitioner] may pursue its concerns about Millstone’s current emergency plan.⁶⁷

FOE maintains that there is a current deficiency in addition to a future one and, as such, FOE’s arguments fundamentally conflict with a stated purpose of the license renewal rule, which is to separate current operating issues from future-oriented concerns.⁶⁸ As the Commission held in *Millstone*, the fact that FOE claims that it has safety-significant concerns is not sufficient to waive the limited scope of 10 C.F.R. Part 54.

FOE further argues that the Board “strayed” from the *Millstone* test by finding that its claims raise current operating issues not limited to the period of extended operations.⁶⁹ FOE maintains that the Board found that because FOE’s proposed contentions are not within the

⁶⁵ *Id.* at 560.

⁶⁶ *Id.* at 560-61.

⁶⁷ *Id.* (emphasis in original) (footnotes omitted).

⁶⁸ *Id.* See also Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,481 (May 8, 1995) (Final rule).

⁶⁹ FOE Appeal at 10.

scope of license renewal, FOE is also not entitled to waiver of the regulations determining the scope of license renewal.⁷⁰ According to FOE, the “Board’s reasoning on this point is entirely circular[.]”⁷¹ However, the Board’s reasoning is sound. A waiver may be granted only when strict application of a regulation does not serve the regulation’s purpose.⁷² Since one of the purposes of the license renewal rule is to exclude current operating issues, FOE cannot seek to litigate current operating issues and claim that the rule’s purpose is not met if such litigation is not allowed. Simply put, one may be entitled to a waiver when one can demonstrate that a rule is not doing what it is designed to do, but one cannot obtain a waiver when the rule is functioning as designed.

B. Millstone Factor 2: FOE Has Not Shown that Special Circumstances Exist

The Board did not address whether FOE had shown special circumstances that were “not considered . . . in the rulemaking proceeding leading to the rule sought to be waived”⁷³ because it found FOE’s Petition for Waiver insufficient on the other *Millstone* factors.⁷⁴ On appeal, FOE argues that it has demonstrated special circumstances for waiver.⁷⁵ However, FOE has not shown special circumstances. Rather, its arguments on appeal demonstrate that its waiver request is misplaced.

In support of the special circumstances *Millstone* factor, FOE recounts the complex licensing basis of Diablo Canyon, and asserts that “Diablo Canyon’s unique seismic history constitutes special circumstances that warrant an analysis at the license renewal stage of whether the plant’s SSCs, in their aged condition, can continue to function properly under the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Millstone*, CLI-05-24, 62 NRC at 559-560.

⁷³ *Id.* at 560, quoting *Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, 30 NRC 231, 235 (1989).

⁷⁴ LBP-15-6 at __ (slip op. at 16 n.69).

⁷⁵ FOE Appeal at 10-15.

potential seismic circumstances during the extended period of operation.”⁷⁶ FOE documents the discovery of the Hosgri Fault, the creation of the LTSP, and the Seismic Report’s findings regarding the increased capabilities of the faults surrounding the plant.⁷⁷ FOE argues that these changed circumstances cast doubt on Diablo Canyon’s ability to shut down safely during the period of extended operation, and that “the rule’s purpose of continued safety is not furthered” by limiting the scope of license renewal review.⁷⁸

FOE’s arguments, however, do not demonstrate special circumstances that warrant waiver. In asserting that the Seismic Report shows that “the seismic risk to the plant was far greater than previously thought,”⁷⁹ and claiming that PG&E erroneously concluded in the report that the 1977 Hosgri Evaluation was still bounding,⁸⁰ FOE merely reiterates why it believes the plant is unsafe to operate right now. The circumstances alleged by FOE—the discovery of a current licensing basis concern during a license renewal proceeding—are not special, but were explicitly considered by the Commission in its license renewal rulemaking. The Commission stated throughout its Statements of Consideration (“SOC”) for the license renewal rule that the rule was designed to consider issues unique to the license renewal term, and not those issues related to a plant’s current licensing basis.⁸¹ In other words, the Commission addressed FOE’s circumstances by limiting the scope of license renewal to exclude current operating issues.⁸²

⁷⁶ *Id.* at 10-11.

⁷⁷ *Id.* at 11-14.

⁷⁸ *Id.* at 14-15.

⁷⁹ *Id.* at 13.

⁸⁰ *Id.* at 14.

⁸¹ See, e.g., 60 Fed. Reg. at 22,481 (stating that “aging management of certain important systems, structures, and components during this period of extended operation should be the focus of a renewal proceeding and [] issues concerning operation during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review.”); Nuclear Power Plant License Renewal 56 Fed. Reg. 64,943, 64,960 (Dec. 13, 1991) (Final rule) (stating that “the decision to issue a renewed operating license need not involve a licensing review of the adequacy of or compliance with a plant’s licensing basis.”); *id.* at 64,961 (“Issues that have relevance and could be completely resolved during the term of operation under the existing operating license as well as license

In a similar vein, the Commission has explained that “special circumstances must be such as to undercut the rationale for the rule sought to be waived.”⁸³ In this instance, the special circumstances that FOE cites—the discovery of a current operating issue—*support* the rationale in *Millstone* for the limited scope of license renewal, that “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.”⁸⁴ As the Commission held in *Turkey Point*, its ongoing regulatory oversight ensures the adequacy of a plant’s current licensing basis, and there is no reason to reanalyze this current licensing basis in a license renewal proceeding.⁸⁵ Thus, FOE has not made the necessary showing on the second *Millstone* factor.

C. *Millstone* Factor 3: FOE Has Not Shown That There Are Special Circumstances Unique to Diablo Canyon

As discussed directly above, FOE has not shown that there are special circumstances in this license renewal proceeding that were not considered during the 10 C.F.R. Part 54 rulemaking. Since FOE has not shown special circumstances that warrant waiver, it also cannot satisfy the third *Millstone* factor, which is that the identified special circumstances must be “unique” to the facility rather than “common to a large class of facilities.”⁸⁶

renewal would not be admissible under the new provision of § 2.758 because there is no unique relevance of the issue to the renewal term.”).

⁸² See *Millstone*, CLI-05-24, 62 NRC at 561-62 (rejecting the petitioner’s argument for special circumstances because in the SOCs, the Commission had already considered what to do with current operating issues raised in license renewal). See also 10 C.F.R. § 54.30(b) (“The licensee’s compliance with the obligation . . . to take measures under its current license is not within the scope of the license renewal review.”).

⁸³ *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988).

⁸⁴ *Millstone*, CLI-05-24, 62 NRC at 561 (emphasis in original). Instead, 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.*

⁸⁵ *Turkey Point*, CLI-01-17, 54 NRC at 8-9.

⁸⁶ *Millstone*, CLI-05-24, 62 NRC at 559-60, quoting *Seabrook*, CLI-88-10, 28 NRC at 597.

Nonetheless, FOE argues that the “byzantine seismic and regulatory history surrounding Diablo Canyon’s design basis plainly satisfies the ‘uniqueness’ factor.”⁸⁷ FOE asserts that Diablo Canyon is the only operating plant on the West Coast, where earthquakes are more frequent, and that no other plant has a seismic design basis as uncertain and complex.⁸⁸ However, these arguments do not demonstrate uniqueness for the purposes of a waiver. The Commission has explained that to meet *Millstone*’s uniqueness factor, a challenge to a regulation should rest on “issues that are legitimately unique to the proceeding and do not imply broader concerns about the rule’s general viability or appropriateness.”⁸⁹ As discussed at length above, FOE challenges the distinction in 10 C.F.R. Part 54 between current operating issues and the effects of aging during the license renewal term, which necessarily implies a broader concern about the viability or appropriateness of 10 C.F.R. Part 54 in its entirety. Thus, FOE does not satisfy the third *Millstone* factor.

D. *Millstone* Factor 4: The Board Correctly Determined that A Waiver is Not Necessary to Reach a Significant Safety Issue

With regard to the final *Millstone* factor—whether waiver is necessary to reach a significant safety issue—the Board determined that although potential seismic risks are safety significant, FOE raises current operating issues that are inadmissible in this license renewal proceeding.⁹⁰ The Board explained that FOE could have raised its concerns of “present and ongoing risk” by petitioning the Commission under 10 C.F.R. § 2.206 or by asking the Commission under 10 C.F.R. § 2.802 to expand the scope of license renewal proceedings.⁹¹

⁸⁷ FOE Appeal at 15.

⁸⁸ *Id.* at 16.

⁸⁹ See *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 208 (Oct. 31, 2013) (slip op.). *Id.* (“To be sure, if an issue were ‘common to a large class of facilities,’ then it would be appropriate for [the Commission] to address the issue through rulemaking.”).

⁹⁰ LBP-15-6 at __ (slip op. at 16).

⁹¹ *Id.*

The Board concluded that because FOE had other avenues to resolve its issues, including another petition currently pending before the Commission, waiver was not necessary.⁹²

On appeal, FOE argues that it has no alternative avenues to pursue its concerns.⁹³ FOE's primary argument concerns 10 C.F.R. § 2.206, which allows a person to petition the Commission "to institute a proceeding . . . to modify, suspend, or revoke a license."⁹⁴ FOE claims that it cannot avail itself of 10 C.F.R. § 2.206 because it does not seek enforcement action, but instead raises health and safety concerns pertaining to the license renewal period.⁹⁵ FOE states that NRC guidance provides that 10 C.F.R. § 2.206 petitions must ask for enforcement relief, and therefore, since FOE does not seek an enforcement action, its claims can only be brought in the license renewal proceeding.⁹⁶

FOE's argument lacks merit. As discussed at length above, FOE's concerns based on the Seismic Report pertain to Diablo Canyon's compliance with its current license, and do not raise aging management issues pertinent to the license renewal period. A petition under 10 C.F.R. § 2.206 is the proper means for the public to ensure that nuclear power plant licensees comply with their licenses, including with regard to seismic matters.⁹⁷ FOE may not desire or elect to ask the NRC to initiate enforcement review (*i.e.*, whether there is a need to modify the

⁹² *Id.*

⁹³ FOE Appeal at 16.

⁹⁴ 10 C.F.R. § 2.206(a).

⁹⁵ FOE appeal at 18-19.

⁹⁶ *Id.*

⁹⁷ Petitioners have raised seismic concerns via 10 C.F.R. § 2.206 on many occasions. See, e.g., *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), DD-97-23, 46 NRC 168 (1997); *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), DD-95-15, 42 NRC 20 (1995); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), DD-86-4, 23 NRC 211 (1986); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Unit 1), DD-81-20, 14 NRC 1052 (1981); *Petition Requesting Seismic Reanalysis* (All Power Reactors), DD-80-01, 11 NRC 153 (1980); *Philadelphia Elec. Co.* (Limerick Nuclear Generating Station, Units 1 and 2), DD-79-16, 10 NRC 609 (1979) (granting part of the petition by requesting the U.S. Geological Survey to evaluate (1) whether the present seismic design bases (ground motions) are adequate to account for the effects of the nearby blasting and (2) the likelihood that the nearby blasting will reactivate old faults at the site); *General Elec. Co.* (Vallecitos Nuclear Center, License No. SNM-960), DD-79-9, 9 NRC 744 (1979) (FOE was among the requestors).

license or to issue a notice of violation), but what FOE raises is still fundamentally a compliance or enforcement issue.⁹⁸ FOE's concerns do not relate to aging management issues during the license renewal period, which, for Diablo Canyon, does not begin until 2024. Rather, FOE's claims are relevant right now. Therefore, the Commission should not address FOE's claims in this license renewal proceeding. Since 10 C.F.R. § 2.206 offers a viable avenue for FOE to pursue, the Board correctly determined that waiver of the 10 C.F.R. Part 54 regulations is not necessary to reach FOE's concerns regarding the Seismic Report.⁹⁹

Because FOE has not demonstrated that it satisfies any of the four *Millstone* waiver factors, the Board's decision should be upheld, and FOE's appeal should be denied.

II. FOE's Proposed Contentions 1 and 3 Are Inadmissible Because They Do Not Raise a Genuine Dispute with the LRA

In its appeal, FOE requests that the Commission grant both its Petition for Waiver and Petition to Intervene.¹⁰⁰ However, even if the Commission were to find merit in FOE's waiver request, it should still deny FOE's Petition to Intervene because FOE has failed to demonstrate that it has submitted an otherwise admissible contention. The Board found that FOE failed to raise a genuine dispute with the LRA pursuant to 10 C.F.R. § 2.309(f)(1)(vi).¹⁰¹ FOE's arguments on appeal pertain solely to the Board's denial of its waiver petition. FOE does not demonstrate that its two remaining proposed contentions—Contentions 1 and 3—raise a

⁹⁸ FOE also argues that it does not wish to pursue a petition for rulemaking under 10 C.F.R. § 2.802 because it only wants a one-time exception from the license renewal regulations. FOE Appeal at 17. However, this does not mean that FOE is barred from filing such a petition, or that such a petition could not provide it relief.

⁹⁹ FOE also maintains that the instant petition is not the same as the *de facto* license amendment petition before the Commission. FOE Appeal at 19-20; see *generally* Petition to Intervene and Request for Hearing by Friends of the Earth (Aug. 26, 2014) (ADAMS Accession No. ML14254A231) ("*de facto* Petition"). Although it is true that the two petitions are not identical, they are similar in that they both raise current operating issues that would be better addressed by 10 C.F.R. § 2.206 petitions.

¹⁰⁰ FOE Appeal at 2. FOE requests in the alternative that the Commission grant its Petition for Waiver and remand the question of the admissibility of its proposed Contentions 1 and 3 to the Board. *Id.*

¹⁰¹ LBP-15-6 at __ (slip op. at 9, 13).

genuine dispute with the LRA as is required by 10 C.F.R. § 2.309(f)(1)(vi). Thus, even if the Commission finds merit in FOE's waiver request, it should deny FOE's Petition to Intervene.

FOE's arguments on appeal pertain solely to waiver. Specifically, FOE attempts to explain how its out-of-scope claims raise significant safety issues that can only be addressed in this license renewal proceeding. However, while a waiver allows a petitioner to challenge matters otherwise excluded from the proceeding by regulation, it does not cure other deficiencies in a petition.¹⁰² 10 C.F.R. § 2.309(f)(1)(vi), for example, requires a petitioner to "include references to specific portions of the application . . . that the petitioner disputes[.]"¹⁰³ FOE has never explained, either in its initial Petition to Intervene or on appeal, how its proposed Contentions 1 and 3 raise specific disputes with the LRA. In fact, as the Board pointed out, FOE's contentions do not address PG&E's LRA in a meaningful manner. Regarding proposed Contention 1, the Board explained that, "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 the applicant' as required by 10 C.F.R. § 2.309(f)(1)(vi)."¹⁰⁴ Indeed, in its Petition to Intervene, FOE only asserted that in-scope SSCs "in their aged state" will fail to perform their intended functions such that the plant will not be able to be safely shut down in the event of an earthquake.¹⁰⁵ FOE did not explain which SSCs will fail or how the analysis in the LRA is

¹⁰² See, e.g., *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 304-06 (2007) (explaining that when a contention challenges a regulation and is outside the scope of the proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a waiver can be requested; and noting that a contention must also meet 10 C.F.R. § 2.309(f)(1)(vi) by raising a genuine dispute with the application).

¹⁰³ See also, e.g., *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (holding that mere notice pleading is insufficient); *Susquehanna*, LBP-07-4 at 306 (explaining, "A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.").

¹⁰⁴ LBP-15-6 at __ (slip op. at 9-10).

¹⁰⁵ See Petition to Intervene at 19-20.

incorrect. This is a fundamental deficiency in FOE's petition that FOE does not attempt to address on appeal, nor can it be cured for the first time in its appeal.

Proposed Contention 3 suffers from the same deficiency. In its Petition to Intervene, FOE stated only that PG&E's aging management review is inadequate in light of new information in the Seismic Report and that the aging management review relies on invalid assumptions.¹⁰⁶ But FOE did not reference any specific portion of the aging management review that it disputes, and did not specify which assumptions in the LRA are invalid or which AMPs are deficient. The Board found that in proposed Contention 3, "[FOE] does not challenge a specific portion of the license renewal application. Instead, [FOE] merely claims that the entire aging management review is inadequate."¹⁰⁷ The Board explained that for this reason 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)."¹⁰⁸

In sum, FOE proffers insufficient contentions that do not reference specific parts of the LRA, and thus do not raise a genuine dispute with the application. For this reason, as well as the reasons discussed above, the Commission should deny FOE's appeal.

CONCLUSION

For the reasons set forth above, the Board's decision in LBP-15-6 correctly held that FOE has not demonstrated that it should be granted a waiver from 10 C.F.R. Part 54. The license renewal rule at 10 C.F.R. Part 54 is functioning as designed in excluding FOE's proposed contentions, which raise current operating issues, not license renewal issues. Additionally, the Board correctly ruled that FOE's contentions are inadmissible because they identify no specific deficiencies in PG&E's license renewal application. Therefore, the Commission should affirm LBP-15-6 and deny FOE's appeal.

¹⁰⁶ *Id.* at 30-32.

¹⁰⁷ LBP-15-6 at __ (slip op. at 13).

¹⁰⁸ *Id.*

Respectfully submitted,

/Signed (electronically) by/

Joseph A. Lindell
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1474
E-mail: joseph.lindell@nrc.gov
Date of signature: April 2, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO FRIENDS OF THE EARTH'S APPEAL OF MEMORANDUM AND ORDER LBP-15-6 (DENYING PETITION TO INTERVENE AND PETITION FOR WAIVER)," dated April 02, 2015, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 2nd day of April, 2015.

/Signed (electronically) by/

Joseph A. Lindell
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1474
E-mail: joseph.lindell@nrc.gov
Date of signature: April 2, 2015