

Petitioner's central complaint in this matter is that the Nuclear Regulatory Commission ("NRC") has "approved" Revision 21 to PG&E's Updated Final Safety Analysis Report ("UFSAR") for the Diablo Canyon Power Plant ("Diablo Canyon"), and in doing so improperly granted a license amendment without offering a hearing opportunity. In the current Motion, Petitioner seeks to supplement the administrative "record" related to this "approval" with a document prepared by PG&E and recently released to the Petitioner by the NRC under the Freedom of Information Act. In fact, the document at issue was an internal PG&E document that was not part of the record of any NRC administrative proceeding. There was no NRC approval and none was required. The Motion to add the document to the agency's certified index of the record should be denied.

BACKGROUND

PG&E provided a concise summary of the seismic design and NRC licensing requirements for Diablo Canyon in its December 29, 2014, Response to Respondents' Motion to Dismiss in this matter.¹ PG&E also discussed the NRC's requirements for licensees to report to the NRC revisions to the UFSAR. These regulations are codified in 10 C.F.R. § 50.71(e).² Under the regulations, UFSAR revisions must be submitted every two years, to include changes to the report to

¹ "Intervenor's Response to Respondents' Motion to Dismiss" (Dec. 29, 2014) at 3-7.

² *Id.* at 3-4.

address new information and analyses developed during the reporting period, license amendments approved by the NRC during the reporting period, and plant or procedure changes made without NRC approval in accordance with the regulations during the period. The NRC does not approve UFSAR revisions; the requirement to update the licensee-controlled document is a licensee's reporting obligation, not a license amendment.³

As described in the Declaration of Thomas R. Baldwin, Exhibit 1 to this response ("Declaration"), PG&E notified the NRC of Revision 21 by correspondence on the NRC licensing docket for Diablo Canyon on September 16, 2013. In accordance with prior correspondence from the NRC, PG&E incorporated new information into Revision 21 related to potential earthquakes in the region of Diablo Canyon, including the so-called "Shoreline Fault" earthquake scenario.⁴ While there was no administrative "proceeding" on Revision 21, the NRC has included the docketed correspondence (including Revision 21) in its index of the record in this matter.

In its Motion, Petitioner seeks to add to the index of the record a PG&E "Change Request" document associated with Revision 21 (Exhibit 1 to Petitioner's Motion). As also described in the Declaration, the internal "Change Request" was

³ *Id.* at 4, 13-14.

⁴ Declaration at ¶ 10.

prepared by PG&E prior to submitting Revision 21 to the NRC.⁵ PG&E reviews proposed changes to the UFSAR internally — to, among other things, determine whether NRC approval is required (by applying NRC regulations in 10 C.F.R. § 50.59). In this case, the PG&E reviewers concluded that NRC approval was not required for the changes related to the Shoreline Fault evaluation.⁶ Accordingly, only a notification to the NRC and a copy of the revised report (with vertical change indications in the margins) were submitted to the NRC. PG&E did not submit the “Change Request” with the “redline” revision on the licensing docket.⁷ PG&E maintained the internal documentation related to the revision, including the “Change Request,” as a plant record.⁸ PG&E’s records, and the conclusions therein, are subject to ongoing NRC inspection and enforcement.

An NRC reviewer documented his review of PG&E’s Revision 21 on June 23, 2014.⁹ As discussed in PG&E’s December 29, 2014, Response to Respondents’ Motion to Dismiss, this so-called “Bamford memo” was

⁵ Declaration at ¶¶ 7, 9.

⁶ *Id.* at ¶ 10.

⁷ *Id.* at ¶ 8.

⁸ *Id.* at ¶¶ 7, 9.

⁹ Memorandum, P. Bamford to M. Markley, “Diablo Canyon Power Plant, Units 1 and 2 – Review of Final Safety Analysis Report Update, Revision 21 (TAC NOS. MF2945 and MF2946” (June 23, 2014) (“Bamford Memo”) The Bamford Memo is Exhibit 3 to Respondents’ Motion to Dismiss (Dec. 10, 2014).

documentation of an NRC oversight function and was not an “approval” of Revision 21 or a final determination that no license amendment was required.¹⁰

ARGUMENT

Petitioner acknowledges that the record in connection with a petition for review of agency action consists of the “order involved,” any “findings or report on which [the order], is based,” and “pleadings, evidence, and other parts of the proceedings before the agency.”¹¹ The premise for Petitioner’s Motion is that the “NRC was asked to review Revision 21,” that the document in question (PG&E’s “Change Request”) provides the “context” or support for the changes in Revision 21, and that the document “played an important role in the agency’s decision making process.”¹² Similarly, Petitioner asserts that the Change Request is part of the “record that was before the agency at the time it made its decision to approve Revision 21”¹³ and that “[t]he agency clearly had the Change Request, and any similar such document explaining the changes proposed for the [UFSAR], before it

¹⁰ “Intervenor’s Response to Respondents’ Motion to Dismiss” (Dec. 29, 2014) at 15.

¹¹ Motion at 5-6, *citing* Fed. R. App. P. 16(a).

¹² *Id.* at 7.

¹³ *Id.* at 5.

at the time of the agency's decision making process.”¹⁴ Petitioner therefore claims that the Change Request should be part of the record.¹⁵

The Petitioner's characterizations of the document at issue and the NRC process are inaccurate. The Petitioner is simply presuming a key element of its merits argument. The document at issue was not submitted to the NRC in connection with Revision 21; PG&E did not request NRC approval of Revision 21; there was no NRC approval of Revision 21; and there was no administrative proceeding on Revision 21. The Change Request document is not part of any administrative record on any final agency decision.

As discussed above and in the Declaration, the “Change Request” document is not a request to the NRC for approval of Revision 21. Rather, it is a document prepared by PG&E, in accordance with PG&E's procedures, documenting PG&E's internal review of proposed revisions. The “Change Request” was not submitted to the NRC in connection with Revision 21.¹⁶

¹⁴ *Id.* The Change Request at issue relates to Section 2.5 of the safety report (related to Geology and Seismology). Petitioner also claims that it requested from the NRC under the Freedom of Information Act a similar “Change Request” document for Section 3.7 of the UFSAR (related to Seismic Design), but received no such document from the agency. The fact that the NRC did not produce any such document for Section 3.7 is not surprising, given that the document is not required to be submitted to the NRC.

¹⁵ *Id.* at 6, citing *Maritel, Inc. v. Collins*, 422 F. Supp. 28 188 (D.D.C. 2006).

¹⁶ Declaration at ¶¶ 8, 9.

Petitioner offers no support for its claim that the “Change Request” document was “submitted in order to discharge PG&E’s duties under § 50.71(e).”¹⁷ In fact, 10 C.F.R. § 50.71(e) does not require licensees to submit a “Change Request” document with UFSAR revisions. In accordance with the regulation, PG&E submitted Revision 21 to the NRC on the Diablo Canyon license docket. The submittal included the complete revision in electronic format (on a compact disc), with a list of changes and revision indications.¹⁸ The submittal on the docket did not include the “Change Request” document.

Submitting a safety report revision under 10 C.F.R. § 50.71(e) also does not initiate an NRC approval of the substance of the revision. As the NRC has explained in adopting the regulation, a revision under Section 50.71(e) “does not constitute a licensing action but is only intended to provide information.”¹⁹ Further, “[t]he material submitted [under Section 50.71(e)] may be reviewed by the NRC staff but will not be formally approved.”²⁰ Petitioner’s assertion that the

¹⁷ Motion at 5.

¹⁸ See 10 C.F.R. § 50.71(e)(1) and (5). The docketed correspondence, dated September 16, 2013, without the attached Revision 21, is Exhibit 1 to Respondents’ Response to Petitioner’s Motion to Supplement the Record (Apr. 7, 2015).

¹⁹ See “Intervenor’s Response to Respondents’ Motion to Dismiss” (Dec. 29, 2014) at 14, citing “Periodic Updating of Final Safety Analysis Reports,” Final Rule, 45 Fed. Reg. 30,614, 30,615 (May 9, 1980).

²⁰ *Id.*

agency made a “decision to approve Revision 21”²¹ is contradicted by the NRC’s explanation of its own regulation.

The “Bamford memo” is cited by Petitioner as documenting an agency determination on the acceptability of Revision 21 — *i.e.*, the decision that the Change Request supposedly “supported.” But, on its face, the Bamford memo is only documentation of a review of whether the revision was timely submitted and included the information required by the regulation. The “Bamford memo” did not cite the Change Request, did not “approve” Revision 21, and did not evaluate whether any of the changes in Revision 21 necessitated a license amendment.

If the NRC had “approved” Revision 21, the NRC would have considered and relied only on information submitted on the official operating licensing docket.²² Stated another way, if the NRC makes a licensing decision based on information from the licensee, it must assure that the information is submitted on the docket. Here, the “Change Request” document was not submitted in connection with Revision 21 on the licensing docket. And it was never required by

²¹ Motion at 5.

²² *See, e.g.*, “NRC Office Instruction LIC-101, Rev. 4, License Amendment Review Procedures” (May 25, 2012); “Office of the Inspector General Semiannual Report to Congress (NUREG-1415, Vol. 17, No. 2)” (Apr. 2005) (“It is the responsibility of the NRC staff to ensure that all information provided by a licensee that is relied upon in making a license decision (*e.g.*, license amendment, safety evaluation) be docketed (recorded) in the official agency public records system”).

NRC to be submitted on the docket. It therefore was not part of any record of any decision (“approval” or otherwise) in connection with Revision 21.

This Court has stated that “judicial review of agency action is normally confined to the administrative record.”²³ Exceptions to this rule include situations where an agency considered evidence that it failed to include in the record.²⁴ But as explained above, the NRC had no occasion to consider the “Change Request” because it did not make any determinations regarding the acceptability of Revision 21 changes (including whether they were appropriately made without NRC approval pursuant to 10 C.F.R. § 50.59). Thus, this is not a case where the agency should have considered the document, and failed to include it in the record.

An NRC inspector apparently obtained the “Change Request” document through NRC’s inspection and oversight program and produced the document in response to a Freedom of Information Act request. Nonetheless, the facts belie Petitioner’s claims that the “Change Request” document “played an important role in the agency’s decision making process.”²⁵ Although PG&E’s update of the UFSAR is subject to NRC oversight, the agency’s exercise of oversight functions

²³ *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). PG&E does not concede that there is any agency “action” to review.

²⁴ *Id.*

²⁵ Motion at 5, 7. The fact that the agency produced the document in response to a Freedom of Information Act request also in no way demonstrates that the document played any role in a “decision.”

does not constitute a proceeding or involve an “approval” reviewable under the Hobbs Act.²⁶ The Change Request is therefore not a record in any proceeding.

CONCLUSION

The Petitioners’ Motion should be denied.

Respectfully submitted,

/s/ signed electronically by
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Dated: April 9, 2015

²⁶ “Intervenor’s Response to Respondents’ Motion to Dismiss” (Dec. 29, 2014) at 15-16.

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH)

Petitioner,)

v.)

UNITED STATES NUCLEAR)
REGULATORY COMMISSION)
and the UNITED STATES OF AMERICA,)

No. 14-1213

Respondents,)

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PACIFIC GAS AND ELECTRIC COMPANY,)

Intervenor)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2015, copies of “Intervenor’s Response to Petitioner’s Motion to Supplement the Certified Index of the Record” in the captioned proceeding have been served by Electronic Case Filing (“ECF”).

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Dated: April 9, 2015

EXHIBIT 1

Intervenor PG&E's Response to Petitioner's Motion to Supplement
the Certified Index of the Record
No. 14-1213 (D.C. Cir.)

Declaration of Thomas R. Baldwin

2. I received a BS in Mechanical Engineering from the University of Colorado, Boulder in 1984. I was granted a Senior Reactor Operator License for Diablo Canyon, Units 1 and 2, in 2000. (I have since retired my Senior Reactor Operator License.) I have over 29 years of experience in the commercial nuclear power industry and have been a registered Professional Engineer in California since 1988.
3. I have been employed by PG&E for Diablo Canyon duties since 1986. From November 1, 2009 to November 30, 2014, I was the Manager, Regulatory Services at Diablo Canyon, responsible for managing regulatory licensing and compliance issues arising under the regulations of the Nuclear Regulatory Commission (“NRC”).
4. As the Manager, Regulatory Services, one of my responsibilities was the overall implementation of the program for maintaining and revising the Diablo Canyon Updated Final Safety Analysis Report (“UFSAR”). The UFSAR is a document maintained by the licensee in accordance with NRC regulations, 10 C.F.R. § 50.71(e). The UFSAR is a summary of the current NRC licensing basis of the plant. The licensing basis encompasses a range of documents, including the NRC operating license and licensing correspondence, as defined in 10 C.F.R. § 54.3(a).

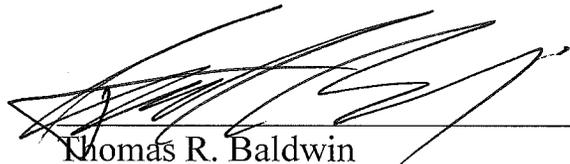
5. Under 10 C.F.R. § 50.71(e), licensees must report revisions to the UFSAR every two years. Revisions must address new information and analyses developed during the reporting period, license amendments approved by the NRC during the reporting period, and changes to the plant and procedures during that time that were within the scope of the UFSAR that were made without the need for NRC approval (in accordance with 10 C.F.R. § 50.59). In accordance with Section 50.71(e), a revision is submitted to the NRC but is not formally “approved” by the NRC.
6. PG&E controls the Diablo Canyon UFSAR under an Interdepartmental Administrative Procedure, XI3.ID2. Revision 15 of that procedure was in effect in September 2013, when Revision 21 of the UFSAR was submitted to the NRC. The procedure defines the internal reviews and approvals required from PG&E personnel for revisions to the UFSAR — including reviews of proposed revisions by a section owner, the Quality Verification director, and appropriate managers. The procedure also establishes the internal documentation required for the revisions and the internal review process.
7. The procedure includes a form (XI3.ID2, Attachment 4) for the “UFSAR Change Request.” The Change Request is used within PG&E to initiate and document the internal review and approval of all changes to the UFSAR, and to track incorporation of changes into the controlled document. A “Change

Request” is not submitted to the NRC with the revised UFSAR. The completed internal Change Request document is maintained with plant records and is available for NRC inspector review.

8. Revision 21 of the Diablo Canyon UFSAR was submitted on the NRC docket for the Diablo Canyon operating licenses on September 16, 2013. As described in the docketed correspondence, Revision 21 was submitted in electronic document format on a CD. The revised UFSAR included appropriate change indications in accordance with 10 C.F.R. § 50.71(e)(1) and (5), but was not a “redline” version of the report. The revision submitted to the NRC did not include PG&E’s internal review documents.
9. The document submitted to the Court by Friends of the Earth as Exhibit 1 to its Motion to Supplement the Certified Index of the Record is the PG&E Change Request for Section 2.5 of Revision 21 of the UFSAR, addressing Geology and Seismology issues. The Change Request is a completed form (XI3.ID2, Attachment 4) from the PG&E procedure, with a “redline” version of the sections being revised. The completed document is from PG&E’s internal records and was not submitted on the NRC licensing docket. It was available for NRC inspector review. PG&E did not “request” NRC approval of Revision 21.

10. Revision 21, Section 2.5, incorporated new information related to the Shoreline Fault that had been developed in the reporting period. In NRC correspondence to PG&E dated October 12, 2012, related to Shoreline Fault evaluations, NRC stated that that the Shoreline Fault should be considered a lesser included case under the previous Hosgri Fault earthquake evaluation, and PG&E should update the UFSAR as appropriate to include the Shoreline Fault scenario in accordance with the requirements of 10 C.F.R. § 50.71(e). In the internal Change Request documentation, PG&E concluded that the addition of that information to the UFSAR did not change the seismic design or licensing basis for Diablo Canyon and did not require NRC approval.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



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Date: April 8, 2015