

ORAL ARGUMENT NOT YET SCHEDULED

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

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

FEDERAL RESPONDENTS’ STATUS REPORT

Pursuant to the Court’s order dated April 13, 2015, the U.S. Nuclear Regulatory Commission (“NRC”) and the United States (collectively, “Federal Respondents”) report that the NRC has today issued the memorandum and order attached to this report as Exhibit A.

In its Petition for Review to this Court, Petitioner Friends of the Earth has asserted that the NRC’s issued a *de facto* license amendment without a hearing, based on the alleged approval by the agency of the Final Safety Analysis Report Update, Revision 21, for the Diablo Canyon Power Plant, in violation of the

Atomic Energy Act. On February 26, 2015, Federal Respondents moved to defer briefing pending final resolution by the agency of a hearing request, filed by Friends of Earth before the Commission, also based upon an asserted *de facto* license amendment at the same plant. The Court's order of April 13, 2015, ordered that the case be held in abeyance in light of the proceeding before the agency.

The memorandum and order issued by the Commission today refers Friends of the Earth's hearing request, insofar as Friends of the Earth asserts that the NRC improperly granted a *de facto* license amendment, to the Commission's Atomic Safety and Licensing Board Panel "to determine whether Friends of the Earth has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a. of the Atomic Energy Act of 1954, as amended." Exh. A at 2. This referral specifically contemplates consideration by the Board of the issue raised by the Petition for Review – whether the alleged approval by the NRC of the Final Safety Analysis Report Update, Revision 21, constitutes a *de facto* license amendment requiring the opportunity for a hearing. *See id.* at 8.

The memorandum also denies a portion of the hearing request (based on the Diablo Canyon Power Plant's ability to shut down safely, an issue separate from the *de facto* license amendment issue raised in the Petition for Review) and refers the concerns underlying this portion of the hearing request, as well as Friends of the Earth's request for a suspension of plant operations, to the agency's Executive

Director for Operations for consideration pursuant to 10 C.F.R. § 2.206. *Id.* at 9-11.

The memorandum and order directs the Atomic Safety and Licensing Board Panel to rule on Friends of the Earth's hearing request based upon a *de facto* license amendment within 140 days, i.e., before October 8, 2015. *See id.* at 8-9 & n.8. Federal Respondents will provide status reports at the 60-day intervals contemplated by the Court's April 15 order.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

___s/Andrew P. Averbach___
ANDREW P. AVERBACH
Solicitor

___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

May 21, 2015

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on May 21, 2015, I filed *Federal Respondents' Status Report* 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/Andrew P. Averbach___
ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(301) 415-1956
andrew.averbach@nrc.gov

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of)

PACIFIC GAS & ELECTRIC COMPANY)

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

) Docket Nos. 50-275, 50-323
)
)
)
)

CLI-15-14

MEMORANDUM AND ORDER

We rule today on Friends of the Earth's petition for intervention and request for hearing in what Friends of the Earth characterizes as a *de facto* license amendment proceeding involving the operating licenses held by Pacific Gas & Electric Company for Diablo Canyon Power Plant Units 1 and 2.¹ Friends of the Earth asserts, *inter alia*, that the NRC is allowing PG&E to operate Diablo Canyon outside of the plant's licensing basis with respect to the analysis of new seismic data following discovery of the Shoreline Fault in 2008. Friends of the

¹ *Petition to Intervene and Request for Hearing by Friends of the Earth* (Aug. 26, 2014) (Hearing Request). Friends of the Earth also filed a petition to intervene in the *Diablo Canyon* license renewal proceeding, which also raised contentions associated with new seismic data; the Board denied the petition to intervene. *Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, LBP-15-6, 81 NRC __ (Feb. 11, 2015) (slip op.); *Friends of the Earth's Request for a Hearing and Petition to Intervene* (Oct. 10, 2014). In addition, Friends of the Earth has a petition for review before the United States Court of Appeals for the District of Columbia Circuit in which Friends of the Earth challenges an asserted NRC final order relating to seismic analysis in connection with the Final Safety Analysis Report as Updated, Revision 21, for Diablo Canyon. *Friends of the Earth v. NRC*, No. 14-1213 (D.C. Cir. filed Oct. 28, 2014).

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Earth also contends that the NRC's assessment of this new information is insufficient to assure that the plant can safely shut down in the event of an earthquake caused by nearby faults.

We refer a limited portion of the hearing request to the Atomic Safety and Licensing Board Panel to determine whether Friends of the Earth has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a. of the Atomic Energy Act of 1954, as amended (AEA). In addition, we deny portions of the hearing request but refer Friends of the Earth's underlying concerns to the Executive Director for Operations (EDO) for consideration pursuant to 10 C.F.R. § 2.206. Finally, we deny, without prejudice, Friends of the Earth's alternative request that we exercise our inherent supervisory authority to order a discretionary hearing.

I. BACKGROUND

The seismic design basis of Diablo Canyon is complex.² A new fault, the Hosgri Fault, was identified during plant construction and the review of the operating license application for Diablo Canyon. That discovery led to an evaluation of certain aspects of the plant's design and to plant modifications to address the potential effects of earthquakes associated with the Hosgri Fault.³ In addition, a condition was added to the Unit 1 operating license which required that PG&E develop and implement a program to reevaluate the seismic design bases used for the plant.⁴ The operating licenses for Units 1 and 2 were issued in 1984 and 1985, respectively,

² See, e.g., *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453 (1979); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plants, Units 1 and 2), CLI-84-13, 20 NRC 267 (1984); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177 (1985).

³ See *Diablo Canyon*, ALAB-644, 13 NRC at 909-14; *Diablo Canyon*, LBP-79-26, 10 NRC at 490.

⁴ See *Diablo Canyon*, CLI-85-14, 22 NRC at 179 (this condition provides assurance "that the seismic design of Diablo Canyon will be subject to continuing scrutiny"). In this decision, we (continued . . .)

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and in the early 1990s the NRC Staff concluded that PG&E had satisfied the license condition.⁵

As relevant here, a fault close to Diablo Canyon, called the Shoreline Fault, was identified in 2008. The NRC Staff documented a preliminary assessment of the new information in 2009 and a further assessment in 2012.⁶ In its letter to PG&E summarizing the results of the NRC's 2012 Assessment,⁷ the Staff explained that it had concluded that ground motions from the Shoreline Fault are at or below those for which Diablo Canyon was evaluated previously and that the Staff was placing its evaluation of the Shoreline Fault into the context of the reevaluation of seismic hazards that was under way for all operating nuclear power reactors in connection with post-Fukushima lessons learned.⁸

(. . . continued)

consider Friends of the Earth's assertions as relating to the plant as a whole—that is, as assertions relating to both operating licenses, even though the seismic license condition resides in the Unit 1 operating license.

⁵ Boger, Bruce A., NRC, letter to J.D. Shiffer, PG&E (June 6, 1991) (ADAMS accession no. ML14279A124 (package)); Rood, Harry, NRC, letter to Gregory M. Rueger, PG&E (Apr. 17, 1992) (ML14279A132); *see also NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth* (Oct. 6, 2014), at 4-5 (Staff Answer).

⁶ Research Information Letter 09-001, Preliminary Deterministic Analysis of Seismic Hazard at Diablo Canyon Nuclear Power Plant from Newly Identified "Shoreline Fault" (Apr. 2009) (ML090330523); Research Information Letter 12-01, Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone (Sept. 2012) (ML121230035) (2012 Assessment).

⁷ Sebrosky, Joseph M., NRC, letter to Edward D. Halpin, PG&E, "Diablo Canyon Power Plant, Unit Nos. 1 and 2--NRC Review of Shoreline Fault" (Oct. 12, 2012), at 1 (ML120730106).

⁸ *See generally* NRC Letter to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, Request for Information Pursuant to Title 10 of the Code of Federal Regulations 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident (Mar. 12, 2012) (ML12053A340) (Section 50.54(f) Request). After receiving the NRC's letter, PG&E withdrew an earlier License Amendment Request (LAR), LAR-11-05, "Evaluation Process for New Seismic Information and Clarifying the Diablo Canyon Power Plant Safe Shutdown Earthquake" (Oct. 20, 2011) (ML11312A166), with the justification that it had been mooted by the 50.54(f) request and the guidance in the October 2012 NRC letter to PG&E. *See* Allen, Barry S., PG&E, letter to U.S. NRC Document Control Desk, "Withdrawal of License Amendment Request 11-05, Evaluation (continued . . .)

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Friends of the Earth challenges NRC's activities related to the analysis of the Shoreline Fault. First, Friends of the Earth contends that it is entitled to a public hearing under AEA section 189a. because the NRC is in effect granting a license amendment that has significant safety implications. As supporting evidence, Friends of the Earth states that the NRC is permitting PG&E to use methodologies and assumptions not prescribed in the operating licenses, thereby sidestepping an opportunity for hearing.⁹ It also asserts that PG&E and the NRC Staff have admitted that a license amendment is necessary in connection with the submission of PG&E's License Amendment Request 11-05, which was subsequently withdrawn.¹⁰ Second, Friends of the Earth contends that the Staff's "determination that the new seismic information, including the Shoreline Fault earthquake and its effect on the San Luis Bay and Los Osos Faults, is a lesser-included case within the Hosgri Earthquake[,] is insufficient to [e]nsure that Diablo Canyon is operating . . . with an adequate margin of safety."¹¹

(. . . continued)

Process for New Seismic Information and Clarifying the Diablo Canyon Power Plant Safe Shutdown Earthquake" (Oct. 25, 2012), at 2 (ML12300A105); *see also Pacific Gas and Electric Company's Answer to Friends of the Earth Hearing Request* (Oct. 6, 2014), at 16 (PG&E Answer); *Declaration of Mr. William R. Horstman in Support of Pacific Gas & Electric Company's Answer Opposing Friends of the Earth's Request for Hearing* (Oct. 6, 2014), at 13.

⁹ Hearing Request at 33.

¹⁰ *Id.* at 34-38, 41-43; *see supra* note 8.

¹¹ Hearing Request at 47. The Petition relies extensively on a 2013 Differing Professional Opinion (DPO) by Dr. Michael Peck who previously served as a Senior Resident Inspector at Diablo Canyon. *See, e.g.*, Hearing Request at 2-3, 23-25, 61-63. Dr. Peck, in his DPO, had recommended enforcement action and asserted, among other things, that a license amendment is required to revise the "double design earthquake" evaluation to higher ground motions associated with new seismic information. *See* DPO Case File for DPO-2013-002, Document 8, DPO Appeal Decision (Sept. 9, 2014), at 3-4 (ML14252A743) (DPO Case File). The DPO Case file is a single ADAMS file with eight separate documents. An Ad Hoc Review Panel, convened to review the DPO, concluded that PG&E used an acceptable method in its evaluation of the Shoreline Fault Zone, found no significant or immediate concerns relating to the NRC's understanding of the new seismic information, and identified no potential violation of 10 C.F.R. § 50.59. (Section 50.59 sets forth the types of changes, tests, or experiments that may be (continued . . .)

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The Staff and PG&E oppose the request for hearing.¹² The Staff argues that Friends of the Earth has not identified a 10 C.F.R. § 50.90 license amendment application or a completed NRC action that effectively amends the Diablo Canyon operating licenses to allow PG&E to operate the plant in a greater capacity than prescribed in the licenses.¹³ The Staff also argues that the expressed concerns about safety, the licensee's compliance with regulatory requirements, and the adequacy of NRC oversight are appropriately addressed as requests for enforcement action pursuant to 10 C.F.R. § 2.206.¹⁴ In addition, the Staff asserts that Friends of the Earth has not demonstrated standing to intervene, has not demonstrated that its intervention petition is timely, and has not shown that a discretionary hearing is warranted.¹⁵

PG&E argues, among other things, that Friends of the Earth mischaracterizes the Diablo Canyon seismic licensing basis and that there is no pending licensing amendment proceeding, *de facto* or otherwise.¹⁶ PG&E also responds that it has established that Diablo Canyon can be

(. . . continued)

undertaken without prior NRC approval as well as those that would require a license amendment. See 10 C.F.R. § 50.59(c).) The Director of the Office of Nuclear Reactor Regulation agreed with these technical findings, and the Executive Director for Operations determined on appeal by Dr. Peck that he was unable to arrive at the same conclusion as Dr. Peck with regard to the exclusion of the Hosgri evaluation and associated methodologies from the licensing basis. DPO Case File, Document 8, DPO Appeal Decision at 4-5.

¹² Staff Answer at 2-3; PG&E Answer at 1, 31; see also *Nuclear Energy Institute Motion for Leave to File Amicus Curiae Brief* (Oct. 6, 2014) (NEI Motion). NEI represents that PG&E supports its motion, Friends of the Earth does not oppose it, and the NRC Staff did not object to the filing but reserved the right to respond. NEI Motion at 1 n.2. Our referral to the Atomic Safety and Licensing Board Panel includes NEI's request.

¹³ Staff Answer at 2-3.

¹⁴ *Id.* See generally 10 C.F.R. § 2.206(a) ("Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license."). The Commission on its own motion may review that decision. *Id.* § 2.206(c).

¹⁵ Staff Answer at 2-3.

¹⁶ PG&E Answer at 1-2, 16-17.

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shut down safely following an earthquake on the Shoreline, San Luis Bay, and Los Osos faults.¹⁷ In addition, PG&E asserts that the petition is inconsistent with the ongoing NRC process for reevaluation of seismic hazards and seismic licensing bases and that any plant or licensing basis changes found to be necessary, or any required license amendments (together with associated hearing opportunities), will be identified in due course in accordance with NRC processes and regulations.¹⁸

II. DISCUSSION

Friends of the Earth requests that we take three actions: (1) that we grant Friends of the Earth's intervention in the asserted *de facto* license amendment proceeding; (2) that we empanel an Atomic Safety and Licensing Board to conduct a public adjudicatory hearing to determine whether Diablo Canyon can shut down safely in light of the effect of potential earthquakes that could affect the plant; and (3) that we order PG&E to suspend operations pending a determination, following a public hearing, that Diablo Canyon can be safely operated in accordance with any necessary amendments.¹⁹ We address these requests in turn.

A. Request for Hearing on the Asserted *De Facto* License Amendment

Friends of the Earth's hearing request points to several events and ongoing activities that it cites as evidence of an ongoing *de facto* license amendment proceeding. These include the activities associated with the following NRC correspondence: (1) the NRC Staff's March 2012 request for information to all power plant licensees pursuant to 10 C.F.R. § 50.54(f); (2) Research Information Letter 12-01 (Sept. 2012), which documented the staff's assessment of the new Shoreline Fault information; and (3) the NRC Staff's October 2012 letter to PG&E that

¹⁷ *Id.* at 24-31.

¹⁸ PG&E Answer at 2.

¹⁹ Hearing Request at 7.

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summarized the results of the 2012 assessment and placed the Staff's further review of new information in the context of the NRC's section 50.54(f) letter requesting seismic reevaluations by all power reactor licensees.²⁰

We refer a portion of the hearing request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. The scope of the referral is limited to whether the NRC granted PG&E greater authority than that provided by its existing licenses or otherwise altered the terms of PG&E's existing licenses, thereby entitling Friends of the Earth to an opportunity to request a hearing pursuant to AEA section 189a.²¹

PG&E and the Staff argue that Friends of the Earth is challenging only NRC oversight and enforcement of Diablo Canyon's licenses and related requirements rather than an actual *de facto* amendment of those licenses.²² We emphasize that claims regarding inadequacies in a licensee's technical evaluations or non-compliance with its license, standing alone, do not suffice to identify an activity that may constitute a license amendment.²³ Such concerns are appropriately addressed by the NRC Staff in the enforcement context. As we have recently

²⁰ *Id.* at 14-18, 21-22, 32-33, 42.

²¹ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326-28 (1996) (comparing *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 295 (1st Cir. 1995) (the agency had expressly altered the policy and application of 10 C.F.R. § 50.59 as it related to decommissioning activities, permitting the licensee to dismantle major structural components without prior NRC approval of a final decommissioning plan), with *Massachusetts v. NRC*, 878 F.2d 1516 (1st Cir. 1989), and *In re Three Mile Island Alert, Inc.*, 771 F.2d 720 (3d Cir. 1985) (NRC approvals of plant restart and lifting suspension did not trigger AEA section 189a. hearing rights)). And we have recently issued two decisions providing additional direction in this area. *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167 (2014); *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op.).

²² See, e.g., Staff Answer at 2-3; PG&E Answer at 18-20.

²³ See *St. Lucie*, CLI-14-11, 80 NRC at 173 ("A licensee cannot amend the terms of its license unilaterally. Agency approval or authorization is a necessary component of Commission action that affords a hearing opportunity under section 189a., but not all agency approvals granted to licensees constitute *de facto* licensee amendments.") (citations omitted).

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held, licensee action without an NRC approval of an increase in authority or alteration of the terms of the license does not constitute a *de facto* amendment.²⁴

We note that, in its reply to the PG&E and Staff answers, Friends of the Earth asserts that the Staff has “approved” PG&E’s Final Safety Analysis Report Update, Revision 21, and this action, standing alone, grants PG&E greater operating authority and alters the terms of the operating licenses.²⁵ Elsewhere, Friends of the Earth refers to the asserted approval of Revision 21 as a “confirmation” of the *de facto* license amendment proceeding that is referenced in the hearing request.²⁶ The Board, as part of its consideration of this matter (including the timeliness of the arguments raised in the reply), should provide an opportunity for the Staff and PG&E to respond to these assertions.

In addition, this referral includes such threshold issues as standing, timeliness, and satisfaction of contention admissibility standards in accordance with 10 C.F.R. § 2.309.²⁷

Finally, we direct the Board to rule on whether Friends of the Earth’s hearing request should be

²⁴ *Id.* (rejecting the petitioners’ premise that a series of Staff communications relating to plant oversight should be considered as an element of a single, overarching *de facto* license amendment “since only certain activities trigger the opportunity for a hearing”).

²⁵ *Friends of the Earth’s Reply to NRC Staff’s and Pacific Gas & Electric Company’s Answers and Proposed Amicus Curiae Nuclear Energy Institute’s Brief in Response to Petition to Intervene and Request for Hearing* (Oct. 14, 2014), at 11-19 (Friends of the Earth Reply).

²⁶ *Id.* at 4.

²⁷ The participants and the Board should assign no significance to the fact that we are not ruling on Friends of the Earth’s hearing request ourselves. We note that we have ruled recently on other hearing requests related to asserted *de facto* license amendments and in so doing have broadened our line of cases on what does—and does not—constitute a *de facto* license amendment. See *St. Lucie*, CLI-14-11, 80 NRC 167; *Fort Calhoun*, CLI-15-5, 81 NRC ___. But ordinarily threshold hearing issues are decided by our Boards in the first instance. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 560 & n.36 (2013) (“Licensing boards are the appropriate finders of fact in most circumstances; referral of a matter for a fact-specific dispute occurs in the ordinary course of business.”).

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granted within 140 days of the date of this decision.²⁸

B. Adjudicatory Hearing on Ability to Shut Down Safely

Throughout its petition, Friends of the Earth raises questions about the operational safety of Diablo Canyon in connection with the potential effects of earthquakes that could occur along nearby faults. As noted above, Friends of the Earth specifically challenges the NRC's confirmatory assessment in 2012 that the Shoreline Fault scenario should be considered as a lesser included case under the Hosgri evaluation. In this vein, Friends of the Earth requests that we empanel a Licensing Board to conduct a public adjudicatory hearing on whether Diablo Canyon can shut down safely in the event of nearby earthquakes that would affect the plant.²⁹

We deny the request for a hearing on operational safety and safe-shutdown but refer Friends of the Earth's concerns to the Executive Director for Operations to address as a request for enforcement action pursuant to 10 C.F.R. § 2.206.³⁰ Friends of the Earth objects in advance to any such referral,³¹ but a request for a hearing on safety concerns and for a safe operation

²⁸ This timeline is informed by our model milestones. See 10 C.F.R. pt. 2, app. B, II. "Model Milestones for Hearings Conducted Under 10 CFR Part 2, Subpart L" (providing for a decision by the presiding officer on intervention petitions and admission of contentions within 140 days of publication of the notice of opportunity for hearing in the *Federal Register*).

²⁹ Hearing Request at 7.

³⁰ We recognize that the Executive Director for Operations has considered at length and rejected the Differing Professional Opinion (DPO) from which Friends of the Earth draws support. See DPO Case File, Document 8, DPO Appeal Decision (Sept. 9, 2014). But the hearing request and the DPO are not identical, and seismic reevaluation is ongoing.

³¹ See, e.g., Friends of the Earth Reply at 24-26. Friends of the Earth acknowledges that the section 2.206 process is designed to initiate a proceeding to amend, revoke, or suspend a license but asserts that the process is not sufficient to respond to a challenge to a *de facto* license amendment proceeding that has already been initiated. *Id.* Yet, Friends of the Earth infuses its hearing request with assertions that challenge whether Diablo Canyon can be shut down safely in light of seismic issues and whether continued operation should be allowed. Moreover, we are referring the asserted *de facto* license amendment, as limited above, for (continued . . .)

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determination falls squarely within the purposes of a request for enforcement action.³²

C. Suspension of Operations Pending Hearing and Safety Determination

We turn now to Friends of the Earth's request that the NRC order PG&E to suspend operations pending a determination, following a public hearing, that Diablo Canyon can be safely operated under its amended licenses.³³ Although the agency has on occasion suspended final licensing decisions,³⁴ these and other cases establish that a decision to do so is highly dependent upon the facts and requires a judgment that the significance of the matter raised is so substantial as to warrant suspension.³⁵ In the instant case, Friends of the Earth has made no showing of an imminent health and safety threat.³⁶ Moreover, the seismic design issues at Diablo Canyon have been the subject of extensive licensee and Staff review, as illustrated by the evaluations already completed, the close consideration given to the DPO by NRC Staff, and the ongoing analysis and review pursuant to the Section 50.54(f) Request, the purpose of which is "to enable the Commission to determine whether or not the license should

(. . . continued)
consideration by a Licensing Board.

³² We have previously rejected an assertion by Friends of the Earth that the section 2.206 process does not provide a viable forum for relief. *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012); *accord St. Lucie*, CLI-14-11, 80 NRC at 179.

³³ Hearing Request at 26-27.

³⁴ *See Calvert Cliffs 3 Nuclear Project LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 & n.7 (2012).

³⁵ *See, e.g., Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71 (2014); *Union Electric Co. d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 152-57, 161-65 (2011).

³⁶ Indeed, in the DPO upon which Friends of the Earth relies, Dr. Peck agreed that the "issues raised in the DPO did not result in a significant or immediate safety concern." DPO Case File, Document 5, DPO Appeal Submission at 7.

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be modified, suspended, or revoked.”³⁷

For these reasons, we also deny the suspension request but refer Friends of the Earth’s underlying concerns to the Executive Director for Operations for consideration under section 2.206 as a request to institute a proceeding to “modify, suspend or revoke a license.”³⁸

D. Friends of the Earth’s Request for a Discretionary Hearing

Friends of the Earth argues that, should we determine that a hearing is not required in this matter, we should nonetheless grant a discretionary hearing to “insure that the seismic analysis of the Shoreline Fault complies with the Atomic Energy Act,” to “assure the public that the plant is safe to operate,” and to effectuate “the Commission’s policy of transparency.”³⁹ The Staff argues that Friends of the Earth has not shown that a discretionary hearing is warranted.⁴⁰

We find no reason to bypass our normal process by ordering a discretionary adjudicatory hearing when it has not been determined that one is required under Section 189a. of the Atomic Energy Act. If the Licensing Board determines that a hearing in this matter should be granted, then there will be no need to consider whether to grant a discretionary hearing. Alternatively, commencing an adjudicatory hearing now when one is not otherwise required could disrupt the ongoing seismic analysis and review for Diablo Canyon and could undermine the established process for challenges to Staff oversight and requests for amendment or revocation of a license.

³⁷ 10 C.F.R. § 50.54(f).

³⁸ *Id.* § 2.206. Although we refer to the Executive Director for Operations the safety-related and oversight-related assertions that most clearly fall within the scope of the Staff’s ongoing oversight and enforcement responsibilities, we do not prejudge whether the portions of the Hearing Request referred to the Panel warrant a licensing hearing apart from the Staff’s ongoing oversight and consideration of any need for related licensing or enforcement action. Our three-judge Licensing Boards have the necessary tools to more fully address these portions of the Hearing Request.

³⁹ Hearing Request at 70.

⁴⁰ NRC Staff Answer at 53-54.

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For these reasons, we deny the request for a discretionary hearing, but this denial is without prejudice to the renewal of such a request.⁴¹

III. CONCLUSION

For the reasons discussed above, we (1) *refer* the request for hearing on the asserted *de facto* amendment to the Panel for consideration under AEA section 189a. (42 U.S.C. § 2239(a)) and 10 C.F.R. § 2.309, (2) *deny* the request for an adjudicatory hearing on operational safety and safe-shutdown but *refer* the concerns underlying that request, including asserted violations of the plant's licensing basis and asserted lack of demonstrated capability for safe shutdown to the Executive Director for Operations for consideration under 10 C.F.R. § 2.206, and (3) *deny* the request to suspend plant operations but *refer* the concerns underlying that request to the Executive Director for Operations, also for consideration under 10 C.F.R. § 2.206. We *deny* without prejudice Friends of the Earth's request for a discretionary hearing.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of May, 2015.

⁴¹ We note, however, that to the extent that Friends of the Earth seeks discretionary intervention under 10 C.F.R. § 2.309(e), intervention as a matter of discretion is permitted only where at least one petitioner has established standing and at least one admissible contention has been admitted, and a petitioner is required to address six factors in its initial petition. See *St. Lucie*, CLI-14-11, 80 NRC at 179 n.60.

Additional Views of Chairman Burns

With regard to the issues raised in Commissioner Svinicki's dissent, I have confidence in the Atomic Safety and Licensing Board's ability to effectively and efficiently adjudicate this case. While it is necessary and prudent for the Commission to provide clarity and direction to the Board where needed, the Commission has done just that in the recent *St. Lucie* and *Fort Calhoun* decisions. Judicial economy is served by referring this matter in the first instance to the Board for resolution.

Additional Views of Commissioner Ostendorff

While I share Commissioner Svinicki's concerns about the scope of the review undertaken by the Board in the *San Onofre* case, the Board's decision in *San Onofre* has not affected the Commission's standard for analyzing *de facto* license amendment hearing requests. Rather, the majority opinion and the recent *St. Lucie* and *Fort Calhoun* Commission decisions affirm that the Commission's standard has not been relaxed. I expect that these recent Commission decisions remove any uncertainty as to the standard that the Board should use when it reviews *de facto* license amendment hearing requests. With that in mind, the majority opinion places this hearing request where it can most efficiently be handled—with the Board.

Commissioner Svinicki, Concurring in Part and Dissenting in Part

I respectfully dissent with regard to the majority's decision to refer the Friends of the Earth's hearing request to a Licensing Board for a determination of whether Staff activities have effected a *de facto* license amendment with respect to Diablo Canyon's seismic licensing basis.¹ In my view, there is no need to do so because the Commission already has sufficient information to rule on the request as stated.² Moreover, similar referrals have led to Board rulings that created considerable regulatory uncertainty. Referring this question to the Board has the potential to yield a similar result. Last, I find that the scope of the referral needlessly invites further challenges in other proceedings.

A. Friends of the Earth Has Not Identified Any *De Facto* License Amendment

As the majority notes, in some cases, the Commission has observed that agency actions not formally labelled as license amendments nevertheless can constitute *de facto* license amendments and accordingly trigger hearing rights for the public under section 189a. of the AEA.³ We have articulated two key factors to consider when determining whether agency action constitutes a *de facto* license amendment: whether the agency action (1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.⁴ "A

¹ Although a majority of Commissioners has not subscribed to my position, the majority has emphasized that it takes no position on the underlying dispute between the litigants at this point in the proceeding. See *supra* p. 14, note 38.

² While I find that Friends of the Earth's hearing request lacks sufficient information to show a *de facto* license amendment, I recognize that the majority's referral will provide Friends of the Earth with a chance to develop its position further. Thus, should the Commission be called upon to provide another ruling in this proceeding, the issue we consider then will be different than the one before us today. At that time, I will consider, afresh, the record as it exists, including the additional arguments and potential factual positions that will be developed as a result of this referral.

³ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

⁴ *Id.*

licensee cannot amend the terms of its license unilaterally”; it must request and obtain agency approval.⁵ Thus licensee action, as opposed to agency action, is insufficient to trigger a *de facto* license amendment proceeding.⁶ Moreover, we have declined “to interpret the AEA to require hearings based on the possibility that a licensee may request an amendment to make unspecified modifications at some uncertain time in the future.”⁷

The majority refers a number of agency communications to the board for consideration, including: (1) the NRC Staff’s March 2012 request for information to all power plant licensees pursuant to 10 C.F.R. § 50.54(f); (2) Research Information Letter 12-01, which documented the staff’s assessment of the new Shoreline Fault information; (3) the NRC Staff’s October 2012 letter to PG&E that summarized the results of the 2012 assessment and placed the Staff’s further review of new information in the context of the NRC’s section 50.54(f) request for seismic reevaluations by all power reactor licensees; and (4) the NRC Staff’s acceptance of PG&E’s updated final safety analysis report (UFSAR) revision 21.⁸ I have considered each in turn, in light of the foregoing precedent, and find that Friends of the Earth has not shown how any of

⁵ *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, 173 (2014); see 10 C.F.R. § 50.90 (“Whenever a holder of a license . . . desires to amend the license . . . application for an amendment must be filed with the Commission . . .”).

⁶ *St. Lucie*, CLI-14-11, 80 NRC at 173 & n.31.

⁷ *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC ___ (Mar. 9, 2015) (slip op. at 13).

⁸ Hearing Request at 14-18, 21-22, 32-33, 48-49; Friends of the Earth Reply at 9, 12-19. “The application for an operating license includes the final safety analysis report (FSAR) which is to contain: a description of the facility; the design bases and limits on operation; and the safety analysis for the structures, systems, and components (SSC) and of the facility as a whole.” Changes, Tests, and Experiments: Proposed Rule, 63 Fed. Reg. 56,098, 56,099 (Oct. 21, 1998). A licensee must operate its facility “in accordance with the license and as described in its final safety analysis report.” NUREG-1650, Rev. 3, *The United States of America Fifth National Report for the Convention on Nuclear Safety*, Rev. 3, at 112 (Sept. 2010) (ML102810031). Thus, if a licensee wishes to change a component of the FSAR, it must follow the process in 10 C.F.R. § 50.59 or obtain a license amendment pursuant to 10 C.F.R. § 50.90. Additionally, licensees must periodically provide updated FSARs under 10 C.F.R. § 50.71(e).

these regulatory instruments expands PG&E's operating authority or otherwise alters the terms of the Diablo Canyon operating licenses.⁹

1. The March 12, 2012, Section 50.54(f) Request

First, Friends of the Earth argues that because the March 12, 2012, § 50.54(f) Request directs PG&E to use “*specific* methodologies and assumptions to analyze new seismic data,” it effectively amends the terms of the Diablo Canyon licenses.¹⁰ But this argument fundamentally misapprehends the purpose of the Section 50.54(f) Request. Friends of the Earth suggests that because the 50.54(f) Request will effectively amend the analyses relied on to demonstrate plant safety in the FSAR and the license, a license amendment is required.¹¹ On its face, however, the Section 50.54(f) Request does not propose to change the analysis in any operating plant's existing licensing basis. Rather, it asks licensees, in light of the Fukushima accident, to evaluate plant seismic and flooding design bases using updated analytical methods and to provide information to determine whether any changes to the plants' design bases are warranted.¹² Indeed, the letter explicitly notes that the “evaluations associated with the requested information in this letter do not revise the design basis of the plant.”¹³ The letter acknowledges that the contents of the licensees' responses may lead to additional regulatory actions to update plants' licensing bases, such as orders, license amendments, or rulemakings,

⁹ The majority also notes that the hearing request extensively relies on a Differing Professional Opinion from Dr. Michael Peck, the former Senior Resident Inspector at the plant. *See supra* p. 5, note 11. Because a differing professional opinion does not constitute an agency action, it cannot constitute a *de facto* license amendment in and of itself. Nevertheless, I have considered its contents as support for Friends of the Earth's claims that other agency actions constituted *de facto* license amendments.

¹⁰ Hearing Request at 34.

¹¹ *Id.* at 35-47.

¹² Section 50.54(f) Request at 4.

¹³ *Id.*

for which the public would have participation rights.¹⁴ Therefore, with respect to the March 12, 2012, 50.54(f) Request, Friends of the Earth appears to make the same error as the petitioner in *Fort Calhoun*—seeking a hearing on speculative changes to a plant’s licensing basis that may or may not occur.¹⁵ Having previously rejected such claims, the Commission can cite to that finding and reach a similar holding here that the March 12, 2012, 50.54(f) Request does not constitute a *de facto* license amendment.

2. Research Information Letter 12-01

With regard to Research Information Letter 12-01, Friends of the Earth contends that the Staff’s analysis, which concludes that Diablo Canyon can operate safely despite the Shoreline Fault, effectively amends the Diablo Canyon licensing basis to include the prior evaluation of the Hosgri Earthquake as part of the plant’s seismic licensing basis.¹⁶ A careful reading of Research Information Letter 12-01, however, does not reveal any instance where the Staff altered the terms of the Diablo Canyon operating licenses or provided PG&E with greater operating authority. Indeed, Research Information Letter 12-01 does not reach any conclusions regarding the Diablo Canyon operating licenses.¹⁷ Rather, it is focused on determining whether the plant can operate safely in light of the risk posed by the Shoreline Fault.¹⁸ The focus here on overall plant safety is not unique in the NRC’s regulatory process, and Friends of the Earth has not demonstrated that the Staff’s comparison of the Shoreline Fault to the Hosgri Fault, to determine whether Diablo Canyon was operating safely, amounted to a tacit, or *de facto*, amendment to the operating licenses.

¹⁴ *Id.* at 1; *see, e.g.*, 10 C.F.R. §§ 2.309, 2.805.

¹⁵ *Fort Calhoun*, CLI-15-5, 81 NRC at ___ (slip op. at 13).

¹⁶ Hearing Request at 47-70.

¹⁷ 2012 Assessment at 95.

¹⁸ *Id.*

Regardless, even assuming the Staff's analysis in Research Information Letter 12-01 has some linkage to the plant's licensing basis, Friends of the Earth still has not shown that the letter expands the licensee's authority or alters the terms of the licenses. Friends of the Earth concedes that the Diablo Canyon UFSAR specifically addressed whether the plant was seismically qualified for the Hosgri Earthquake.¹⁹ Moreover, as PG&E and the Staff noted, the plant's capacity to withstand the Hosgri Earthquake was extensively litigated at the time of initial licensing.²⁰ As a result of that litigation, the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board (whose opinions constitute binding precedent at the NRC), both acting on authority delegated from the Commission, found the plant seismically qualified to withstand that earthquake.²¹ Of note in the Appeal Board's order are repeated references to the Hosgri Earthquake as the plant's "Safe Shutdown Earthquake," a term that Friends of the Earth acknowledges is normally associated with a plant's seismic licensing basis.²² Friends of the Earth further agrees that these orders are also part of the plant's licensing basis.²³ Thus, Friends of the Earth has not shown that the Staff's conclusion in Research Information Letter 12-01 expanded PG&E's operating authority or otherwise altered the terms of the licenses. Because Friends of the Earth concedes that the plant's licensing basis already permits the plant to operate in light of the seismic hazard posed by the Hosgri Fault and the Staff found that the seismic hazard from the Shoreline Fault is bounded by that from the Hosgri Fault, the hearing

¹⁹ Friends of the Earth Reply at 6, 9 (citing 10 C.F.R. § 54.3(a) (defining the scope of a reactor's licensing basis) and PG&E, Diablo Canyon Power Plant, Units 1 and 2, Final Safety Analysis Report Update, Rev. 12 (Sept. 1998), at 2.5-58 (discussing the Hosgri Earthquake)).

²⁰ Staff Answer at 3-4, 30-31 (citing *Diablo Canyon*, LBP-79-26, 10 NRC at 453; *Diablo Canyon*, ALAB-644, 13 NRC at 903); PG&E Answer at 6-7 (same).

²¹ *Id.*

²² *Diablo Canyon*, ALAB-644, 13 NRC at 910-11, 913, 923, 941, 990; Hearing Request at 47.

²³ Friends of the Earth Reply at 6.

request fails to demonstrate that either the licensee's authority to operate the plant or the terms of the licenses have changed.

Friends of the Earth also asserts that the “the Hosgri Evaluation and the [Long Term Seismic Program] were . . . intended to be a one-time exception” from the plant's licensing basis,²⁴ contending that the analysis of the Hosgri Earthquake “did not change the seismic design basis” but was rather a “response to a request by NRC to conduct certain additional analysis.”²⁵ However, Friends of the Earth has not substantiated this claim. The statement Friends of the Earth relies on to support this inference pertains to the Long-Term Seismic Program, not the evaluation of the Hosgri Earthquake.²⁶ Friends of the Earth also generally cites to the initial Licensing Board decision on the Hosgri Evaluation to support this claim.²⁷ But this general reference, lacking more, is insufficient to support Friends of the Earth's position. If anything, the extensive record pertaining to the Hosgri Evaluation described in the cited opinion tends to support the opposite inference—that the Hosgri Evaluation is a part of the Diablo Canyon seismic licensing basis.²⁸

²⁴ Hearing Request at 20.

²⁵ Friends of the Earth Reply at 9 (emphasis removed). Friends of the Earth consistently conflates the Hosgri Earthquake Evaluation and the Long Term Seismic Program. *E.g.*, Hearing Request at 48 (“The methodologies and assumptions that PG&E employed in the [Long Term Seismic Program] and the associated Hosgri Evaluation were not as conservative as those required by the [safe shutdown earthquake.]”). But as explained in Research Information Letter 12-01, the two are distinct. 2012 Assessment at 5. Moreover, Research Information Letter 12-01 concluded that the seismic hazard posed by the Shoreline Fault was bounded by or equal to the hazard analyzed in both the Long Term Seismic Program and the Hosgri Evaluation. *Id.* at 58.

²⁶ Hearing Request at 20 n. 51 (claiming that the Diablo Canyon UFSAR states that the Long Term Seismic Program “does not alter the design bases for” Diablo Canyon).

²⁷ *Id.* at 49-50 (citing *Diablo Canyon*, LBP-79-26, 10 NRC at 453).

²⁸ *Diablo Canyon*, ALAB-644, 13 NRC at 903.

In support of its petition, Friends of the Earth critiques the adequacy of the agency's approval of the plant's seismic qualification to the Hosgri Earthquake in the Diablo Canyon licenses.²⁹ Friends of the Earth claims "the LTSP/Hosgri Evaluation is a drastically less comprehensive method and less conservative analytical method than the Standard Method approved by the Commission."³⁰ But the Hosgri Earthquake has been an established part of the Diablo Canyon licensing basis since the facility began operation. Consequently, the opportunity to challenge the adequacy of the Hosgri Earthquake evaluation as an original matter occurred decades ago.³¹ Indeed, the agency extensively considered challenges to the evaluation at that time and concluded that the Hosgri Earthquake evaluation was adequate.³²

Likewise, Friends of the Earth argues that the NRC's evaluations have understated the risk posed by the Shoreline Fault.³³ But again, rather than indicating some alteration to the licenses, these claims go to the accuracy of the Staff's analyses in its ongoing oversight of Diablo Canyon, which is not an appropriate issue for NRC adjudicatory hearings. As the Commission recently observed, "[I]f a hearing could be invoked each time the NRC engaged in oversight over or inquiry into plant conditions, the NRC's administrative process could be brought to a virtual standstill."³⁴

²⁹ Hearing Request at 54-59.

³⁰ *Id.* at 58.

³¹ 10 C.F.R. § 2.309(c).

³² *Diablo Canyon*, ALAB-644, 13 NRC at 910-11, 996.

³³ Hearing Request at 59-64.

³⁴ *St. Lucie*, CLI-14-11, 80 NRC at 175.

3. The October 2012 Letter to PG&E

Friends of the Earth points to the October 2012 letter as another instance where Staff action has amounted to a *de facto* license amendment.³⁵ This letter simply summarized the conclusions of the Research Information Letter and requested that PG&E use the process in the 50.54(f) Request to evaluate seismic risk at the site going forward.³⁶ As discussed previously, Friends of the Earth has not shown that either of these two letters constituted *de facto* amendments. For those same reasons, therefore, the hearing request does not demonstrate that the October 2012 letter grants or constitutes expansion of PG&E's operating authority or otherwise alters the terms of the Diablo Canyon operating licenses.³⁷

4. PG&E's UFSAR Update 21

In its reply brief, Friends of the Earth claims that the NRC Staff's acceptance of PG&E's UFSAR update 21 constitutes a *de facto* license amendment to the plant's seismic licensing basis. Specifically, Friends of the Earth contends that UFSAR update 21 inappropriately moves the Hosgri Earthquake into the plant's established seismic design basis.³⁸ Again, these arguments appear to misconstrue our regulatory process. Under 10 C.F.R. § 50.71(e), licensees must periodically submit an updated FSAR to the agency. However, the agency does

³⁵ Hearing Request at 34.

³⁶ October 12, 2012 Letter at 1.

³⁷ The letter notes that PG&E should update the UFSAR "as necessary, to include the Shoreline scenario in accordance with the requirements of 10 C.F.R. §50.71(e)." *Id.* at 2. As discussed in the next section, updates to the UFSAR under § 50.71 are controlled by the requirements of 10 C.F.R. §§ 50.90 and 50.59. 10 C.F.R. § 50.71(e). Updates under § 50.90 require a license amendment, with a corresponding opportunity for a public hearing. The Commission has repeatedly held that changes to a UFSAR under § 50.59 do not trigger opportunities for a public hearing. Interpreted within this framework, the phrase "as necessary" within the letter would suggest simply that PG&E should update the UFSAR within the confines of the existing regulatory structure and would not, as Friends of the Earth would have it, constitute a request to circumvent the process for updating the UFSAR.

³⁸ Friends of the Earth Reply at 12-14.

not review the submittals for accuracy or otherwise approve the analyses therein.³⁹ As clearly stated in its promulgation, this regulation “is only a reporting requirement”; “Submittal of updated FSAR pages does not constitute a licensing action but is only intended to provide information”; and “approvals of license amendments and technical specification changes are independent of the FSAR updating process.”⁴⁰

Indeed, the updates must reflect changes to the FSAR that the licensee has made, either through a license amendment request under 10 C.F.R. § 50.90, with a corresponding opportunity to request a hearing, or through the 10 C.F.R. § 50.59 process. As the Commission has consistently emphasized, licensee actions under 10 C.F.R. § 50.59 do not give rise to hearing rights under the AEA.⁴¹ Rather, such activities are appropriately monitored through staff inspection and oversight. Consequently, with regard to UFSAR update 21, our regulatory process does not call for agency action that would “approve” the changes to the seismic analysis as part of the section 50.71(e) update, and therefore under our established precedent, UFSAR update 21 cannot constitute a *de facto* license amendment with regard to the Diablo Canyon seismic licensing basis. If, as Friends of the Earth would have it, PG&E has inappropriately made changes to the UFSAR without seeking a license amendment or

³⁹ While the Staff did perform a review to determine if the submittal met the administrative requirements of section 50.71(e) for timeliness and content, the Staff did not review the technical adequacy of all of the changes in the update, particularly PG&E’s changes to the seismic analysis. 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) (ML14022A120).

⁴⁰ Periodic Updating of Final Safety Analysis Reports, Final Rule, 45 Fed. Reg. 30,614, 30, 615 (May 9, 1980).

⁴¹ *Fort Calhoun*, 81 NRC ___ (slip op. at 11) (noting that “hearing rights do not attach to licensee changes made under Section 50.59 because those changes do not require NRC approval but are instead subject to normal NRC oversight through the inspection process”).

performing a suitable section 50.59 analysis, then that is an issue appropriate for NRC inspection and oversight, not adjudication.⁴²

Furthermore, accepting the interpretation of § 50.71(e) advanced by Friends of the Earth would create absurd results within our regulatory process.⁴³ Under section 50.71(e), licensees must update their UFSARs every two years.⁴⁴ Thus, if Friends of the Earth's understanding of the regulation were correct, every two years the agency would effectively approve all section 50.59 changes at a facility and the public would have an opportunity to request hearings on those approvals. A central purpose of section 50.59, however, is to permit licensees to make certain limited changes to their facilities without Commission approval.⁴⁵ Thus, Friends of the Earth's interpretation would nullify our long-standing rule that a "member of the public may challenge an action taken under 10 C.F.R. §50.59 only by means of a petition under 10 C.F.R. § 2.206."⁴⁶ Additionally, since the UFSAR updated under § 50.71(e) also includes changes the agency approved by the license amendment process under § 50.90, this interpretation would have the agency effectively "approve" these changes for a second time, without apparent purpose or effect. These results counsel against adopting Friends of the Earth's proffered interpretation.⁴⁷ Consequently, Friends of the Earth has not made a sufficient showing to demonstrate that the agency's acceptance of UFSAR Update 21 constituted a *de facto* license amendment to the Diablo Canyon operating licenses.

⁴² *Id.*

⁴³ Friends of the Earth Reply at 12-14.

⁴⁴ 10 C.F.R. § 50.71(e)(4).

⁴⁵ Changes, Tests, and Experiments, 64 Fed. Reg. 53,582, 53,584 (Oct. 4, 1999).

⁴⁶ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

⁴⁷ *United States v. Turkette*, 452 U.S. 576, 580 (1981).

5. Conclusion

In light of the foregoing, and applying the Commission's precedents in *Perry*, *St. Lucie*, and *Fort Calhoun*, Friends of the Earth has not shown the existence of a *de facto* license amendment proceeding; it fails to call forth any present staff action that could plausibly be viewed as expanding PG&E's operating authority or otherwise altering the terms of the Diablo Canyon licenses.

Friends of the Earth also claims that the Staff and PG&E have engaged in back room negotiations to amend the Diablo Canyon operating licenses but does not cite to any evidence of this alleged improper behavior.⁴⁸ Rather, the record reflects actions by PG&E to monitor the seismic environment around Diablo Canyon and update its analyses accordingly and actions by the Staff to evaluate these analyses, as described in Regulatory Information Letter 12-01. Although these reviews did result, at one point in time, in plans to clarify the Diablo Canyon seismic licensing basis through a license amendment, these plans were subsequently overtaken by the NRC's generic regulatory response to the events at Fukushima. When the NRC requested that every operating plant, including Diablo Canyon, reevaluate its seismic licensing basis, the Staff and PG&E determined to encompass the review of the Diablo Canyon seismic licensing basis in that reevaluation instead of continuing with a separate process. Diablo Canyon was not unique in this regard. We also folded several ongoing seismic reevaluations of operating plants, being conducted under Generic Issue-199, Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern U.S. on Existing Plants, into our post-Fukushima activities.⁴⁹

⁴⁸ Hearing Request at 4-5.

⁴⁹ Generic Issue Management Control System Report for Fiscal Year 2015 1st Quarter (Dec. 23, 2014) (ML14351A014), at 13-16 ("The agency incorporated GI-199 into the work done by the Japan Lessons-Learned Project Directorate in response to the March 2011 Japan nuclear event. GI-199 activities in NRR are being addressed in the 50.54(f) letters on items 2.1 and 2.3 of the Japanese [Near-Term Task Force] recommendations.").

B. Referral to Board Needlessly Creates Regulatory Uncertainty

Over two years ago, the Commission considered another request to find that Staff oversight activities with regard to the San Onofre Nuclear Generating Station constituted a *de facto* license amendment proceeding.⁵⁰ The request asserted that a Confirmatory Action Letter from the Staff to the licensee, as well as “the process for resolving the issues raised in the Letter,” constituted a *de facto* license amendment.⁵¹ In response, we referred the request to the Atomic Safety and Licensing Board, specifically directing the Board to consider whether “the Confirmatory Action Letter issued to [Southern California Edison] constitutes a *de facto* license amendment.”⁵² In my view, we had referred a narrow question to the Board, regarding whether the letter itself constituted a *de facto* license amendment. The Board did not agree.

Despite the Commission’s plain direction to consider the “Confirmatory Action Letter,” the Board found that “common sense” could not support such a cramped interpretation of the referral because the Commission could have evaluated the letter on its own “without difficulty.”⁵³ Thus, the Board proceeded to examine whether any aspect of the larger Confirmatory Action Letter process, including hundreds of pages of unapproved restart proposals from the licensee, supported by thousands of pages of technical analyses, constituted a *de facto* license amendment.⁵⁴ As we noted in *St. Lucie*, in so doing the Board departed from decades of established *de facto* license amendment precedent, from both the Circuit Courts and the Commission, which had only considered whether agency action could constitute a *de facto*

⁵⁰ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 1 and 2), CLI-12-20, 76 NRC 437, 440 (2012).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 1 and 2), LBP-13-7, 77 NRC 307, 327, *vacated as moot*, CLI-13-9, 78 NRC 551 (2013).

⁵⁴ *Id.*

license amendment.⁵⁵ While common sense might suggest that the Commission would have clearly instructed the Board if it had intended to depart so dramatically from past practice, the Board was undeterred.

The Board's errant conclusion, that unapproved licensee proposals could also amount to *de facto* license amendments, led the Board to request hundreds of pages of briefings and evidence from the litigants. Moreover, the Board's legal error cascaded into a number of other faulty conclusions, such as its determination that licensing boards could review unilateral, unapproved, licensee actions under section 50.59(c)(2) to determine whether they also constituted *de facto* license amendments.⁵⁶ In the wake of the Board's ruling, the Commission received a number of similar requests for hearings on asserted *de facto* amendments that relied to various degrees on the Board's errors.⁵⁷ Thus, the Commission's simple referral—limited to a focused inquiry on its plain terms—interjected considerable and historic regulatory uncertainty into the agency's oversight of San Onofre.⁵⁸ Moreover, this uncertainty also spread to our oversight of other reactors through a series of similar petitions that seized on the Board's *San Onofre* order as a harbinger of a new, relaxed *de facto* license amendment jurisprudence at the Commission. In recent months, we have spent considerable time and effort dispelling these claims.⁵⁹

⁵⁵ *St. Lucie*, CLI-14-11, 80 NRC at 174 n.33.

⁵⁶ *San Onofre*, LBP-13-7, 77 NRC at 333-34.

⁵⁷ *St. Lucie*, CLI-14-11, 80 NRC at 174 n.33; *Fort Calhoun*, CLI-15-5, 81 NRC at ___ (slip op. at 8). Indeed, Friends of the Earth restates many of those errors in its own pleading. *E.g.*, Hearing Request at 32 & n.88.

⁵⁸ Of note, the plant closed shortly after the Board's decision. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 553 (2013).

⁵⁹ *St. Lucie*, CLI-14-11, 80 NRC at 174 n.33; *Fort Calhoun*, CLI-15-5, 81 NRC at ___ (slip op. at 8).

While I believe that the Commission can successfully resolve Friends of the Earth's request with the information before it, the majority correctly notes that the "seismic design basis of Diablo Canyon is complex."⁶⁰ In light of the lack of necessity to refer the matter, however, I fear, perhaps needlessly, that this complexity could provide ample thickets for a well-meaning licensing board to roam far-afield, in search of some hidden meaning behind the majority's referral of a matter so straightforward and of such limited-scope; a matter the Commission could have decided on its own, "without difficulty." History reveals that even plainly stated instructions, such as those provided by the majority here, provide no guarantee that the Board will hew to the Commission's narrow intent.⁶¹ Because the Commission can dispose of this question on its own, there is no need to entertain this peril or to invite such uncertainties into our oversight process once again.⁶²

C. The Scope of the Commission's Referral Creates Regulatory Uncertainty for Every Operating Reactor

The Commission's referral is also problematic in its scope, as it invites similar challenges related to every operating power reactor in the country. As mentioned above, the majority refers the March 2012, section 50.54(f) Request to the licensing board to consider whether it

⁶⁰ See *supra* p. 2, note 2 and accompanying text.

⁶¹ For this reason, I would strongly encourage the Board to refer any questions it has regarding the scope of this referral to the Commission under 10 C.F.R. § 2.341(f)(1) without hesitation and any party to this proceeding who believes that the Board has departed from the scope of the Commission's referral to file a petition for interlocutory review under 10 C.F.R. § 2.341(f)(2).

⁶² The majority reasons that referral is appropriate because "ordinarily threshold hearing issues are decided by our Boards in the first instance." See *supra* p. 10, note 27. But Friends of the Earth's claim asks us to find malfeasance or nonfeasance on the part of the Staff and convene a hearing where none existed before. Our rules of practice, which span almost 150 pages in the Code of Federal Regulations and provide for at least thirteen different hearing tracks, do not provide any guidance or standards for evaluating such requests. Therefore, I do not find the procedural posture of this proceeding to be ordinary. The majority further supports its reasoning by noting, "Licensing boards are the appropriate finders of fact in most instances." See *id.* (quoting *San Onofre*, CLI-13-9, 78 NRC at 560 & n.36). But again, if no additional fact finding is needed to rule on the hearing request, this argument is unavailing.

constitutes a *de facto* license amendment. As we have sent identical letters to every operating power reactor under our jurisdiction, however, the majority's decision would seem to solicit similar filings asserting *de facto* license amendments related to other operating reactors, with a reasonable expectation of similar referral to the licensing board for further proceedings. While we may ultimately have an opportunity to clarify this issue by ruling on an appeal from this case or another,⁶³ the far more efficient course would be to rule on this request today and avoid the possibility of expending limited agency and stakeholder resources on this question in redundant proceedings.

In light of these concerns and for the reasons provided, I dissent from the majority's proposed course of action in this proceeding. Although the majority has taken considerable steps to cabin the scope of its referral, we can decide the issues raised in Friends of the Earth's hearing request today and should do so, both to embrace judicial economy and to avoid injecting needless uncertainty into our process.

⁶³ Of course, the Commission may not have a chance to squarely provide such guidance as parties may decline to appeal licensing board decisions for any number of reasons. See, e.g., *San Onofre*, CLI-13-9, 78 NRC at 553.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-14)** have been served upon the following persons by the Electronic Information Exchange.

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

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

Roy Hawkens
Chief Administrative Judge
E-mail: Roy.Hawkens@nrc.gov

Edward L. Williamson, Esq.
E-mail: edward.williamson@nrc.gov
Beth Mizuno, Esq.
E-mail: beth.mizuno@nrc.gov
David Roth, Esq.
E-mail: david.roth@nrc.gov
Jeremy Wachutka, Esq.
E-mail: jeremy.wachutka@nrc.gov
Joseph Lindell, Esq.
E-mail: joseph.lindell@nrc.gov
Mitzi Young
E-mail: Mitzi.young@nr.gov
John Tibbetts, Paralegal
E-mail: john.tibbetts@nrc.gov

OGC Mail Center
E-mail: OGCMailCenter@nrc.gov

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

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

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Diablo Canyon Nuclear Power Plant - Docket Nos. 50-275 and 50-323

COMMISSION MEMORANDUM AND ORDER (CLI-15-14)

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

Counsel for Friends of the Earth
Ayers Law Group LLP
1707 L Street NW, Suite 850
Washington, DC 20036
Richard E. Ayres, Esq.
E-mail: ayresr@ayreslawgroup.com
Jessica Olson, Esq.
E-mail: olsonj@ayreslawgroup.com
John Bernetich, Esq.
E-mail: bernetichj@ayreslawgroup.com

[Original signed by Clara Sola]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of May, 2015