

June 11, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER OPPOSING THE FRIENDS OF
THE EARTH MOTION TO ALLOW SUPPLEMENTAL BRIEFING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the Atomic Safety and Licensing Board (Board) order scheduling responses,¹ the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer opposing the Friends of the Earth (FOE) Motion to allow supplemental briefing in this proceeding.² The basis for this proceeding is a Commission referral in CLI-15-14 of the question of whether the NRC granted the Pacific Gas and Electric Company (PG&E) greater authority than that provided by its existing operating licenses for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (DCPP), or otherwise altered the terms of these licenses, thereby *de facto* amending these licenses and providing an opportunity for FOE to request a hearing.³ With its Motion, FOE seeks permission to brief the Board on four matters that were not briefed before the Commission and states that such a briefing is necessary because these matters “bear

¹ See Order (Scheduling Responses) (June 8, 2015) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15159A678).

² See Petitioner Friends of the Earth’s Motion to Allow Supplemental Briefing (June 5, 2015) (ADAMS Accession No. ML15156B521) (Motion).

³ *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-15-14, 81 NRC ___, ___ (May 21, 2015) (slip op. at 7).

directly on,” and must be addressed for the Board to “respond fully” to, the *de facto* amendment question referred to the Board.⁴

The Board should deny FOE’s Motion for further briefing and disregard the additional matters raised therein because this request is contrary to the Commission’s expressly-limited delegation of authority to the Board in this proceeding. Specifically, in CLI-15-14, the Commission indicated that the Board was to decide FOE’s *de facto* amendment argument based on the pleadings that were before the Commission and on a single opportunity for the Staff and PG&E to respond to additional arguments that FOE had newly-raised in its reply brief before the Commission.⁵ The Commission’s referral did not provide for any further briefings such as the briefing that FOE is now requesting; therefore, FOE’s Motion should be denied.⁶

BACKGROUND

In its hearing request before the Commission,⁷ FOE argued, in part, that it had a right to a hearing on an alleged ongoing *de facto* license amendment proceeding involving activities associated with the following 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 [S]taff’s assessment of the new Shoreline Fault information; and (3) the NRC Staff’s October 2012 letter to PG&E that summarized the results of the 2012 assessment and placed

⁴ Motion at 1, 10. The four matters raised by FOE are (1) a FOE claim before the U.S. Court of Appeals for the District of Columbia Circuit, (2) an NRC inspection report, (3) an NRC letter, and (4) a U.S. Senate Committee on Environment and Public Works hearing. *Id.* at 4-5.

⁵ See *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 8). The Staff intends to timely file its response to the new arguments in FOE’s reply brief on or before June 15, 2015, consistent with the Board’s direction. See Notice and Order (Scheduling Oral Argument), at 2 (June 2, 2015) (unpublished) (ADAMS Accession No ML15153A192).

⁶ The Board should also deny FOE’s Motion because it is functionally a 10 C.F.R. § 2.309(c) motion for leave to file new or amended contentions after the deadline, but it does not address any of that regulation’s “good cause” requirements or the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), let alone all of these requirements. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999) (stating that a failure to comply with any of these requirements is grounds for dismissing a contention).

⁷ See Petition to Intervene and Request for Hearing by Friends of the Earth (Aug. 26, 2014) (ADAMS Accession No. ML14254A231) (*De Facto* Hearing Request).

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.^{8]}

In its answer to FOE's hearing request, the Staff opposed this argument for failing to identify a completed NRC action that effectively amended the DCPD operating licenses to allow PG&E to operate the plant in a greater capacity than prescribed in the licenses.⁹ PG&E also opposed this argument for not demonstrating the existence of a pending license amendment proceeding *de facto* or otherwise.¹⁰ The Nuclear Energy Institute (NEI) filed an *amicus curiae* brief opposing the FOE hearing request.¹¹ FOE filed a reply to the Staff's and PG&E's answers and to NEI's *amicus curiae* brief.¹² In this reply, as explained by the Commission, FOE newly argued that the Staff had "approved" PG&E's Final Safety Analysis Report Update (FSARU), Revision 21, and that this action, standing alone, constituted a *de facto* license amendment.¹³

In CLI-15-14, the Commission declined to rule on the *de facto* amendment arguments raised in FOE's hearing request and, instead, referred the matter to the Board.¹⁴ The Commission instructed that, "[t]he 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 [FOE] to an opportunity to request a hearing pursuant to [the Atomic Energy Act of 1954, as amended (AEA)] section 189a."¹⁵ The

⁸ *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 6-7).

⁹ *Id.* at 5 (citing NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth, at 2-3 (Oct. 6, 2014) (ADAMS Accession No. ML14279A573)).

¹⁰ *Id.* (citing Pacific Gas and Electric Company's Answer to Friends of the Earth Hearing Request, at 1-2, 16-17 (Oct. 6, 2014) (ADAMS Accession No. ML14279A617)).

¹¹ *Id.* at n.12 (citing Nuclear Energy Institute Motion for Leave to File *Amicus Curiae* Brief (Oct. 6, 2014) (ADAMS Accession No. ML14279A610)).

¹² See 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) (ADAMS Accession No. ML14287A788).

¹³ *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 8).

¹⁴ See *id.* at 8, n.27 ("The participants and the Board should assign no significance to the fact that we are not ruling on [FOE's] hearing request ourselves.").

¹⁵ *Id.* at 7.

Commission further indicated that this referral is limited to the pertinent portions of FOE's hearing request, the Staff's and PG&E's answers, NEI's *amicus curiae* brief, FOE's reply, and "an opportunity for the Staff and PG&E to respond to [the reply's] assertions."¹⁶

Consistent with the Commission's limited referral, this Board was established¹⁷ and stated in its initial scheduling order that it "will consider the pleadings previously submitted to the Commission" including NEI's *amicus curiae* brief.¹⁸ The Board directed that, in accordance with CLI-15-14, the Staff and PG&E may respond to FOE's FSARU, Revision 21, arguments.¹⁹ Other than these responses, the Board stated that it "contemplates no further written submissions."²⁰

In its Motion, FOE argues that further briefing is necessary because the scope of the issues referred to the Board is broader than just FOE's FSARU, Revision 21, arguments on which the Board granted the Staff and PG&E the opportunity to file additional briefing and because more expansive additional briefing would aid the Board in its determination of FOE's *de facto* license amendment argument by providing updated information.²¹

DISCUSSION

The scope of the Commission's referral in CLI-15-14 is expressly 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 FOE to an opportunity to request a hearing pursuant to AEA section 189a, and includes such threshold issues as FOE's standing, timeliness, and satisfaction of contention admissibility standards in accordance with 10 C.F.R.

¹⁶ *Id.* at 8. *See id.* at 5, n.12 ("Our referral to the Atomic Safety and Licensing Board Panel includes NEI's request.").

¹⁷ Establishment of Atomic Safety and Licensing Board (May 21, 2015) (ADAMS Accession No. ML15141A352).

¹⁸ Notice and Order (Scheduling Oral Argument), at 2-3.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

²¹ Motion at 1-2.

§ 2.309.²² It is also limited to the pertinent portions of FOE's hearing request, the Staff's and PG&E's answers, NEI's *amicus curiae* brief, FOE's reply, and any Staff and PG&E responses to the FSARU, Revision 21, arguments newly-raised in FOE's reply.²³

Despite the expressly-limited nature of this proceeding, FOE proposes to provide the Board with a supplemental brief regarding "events that have occurred in the more than nine months since" FOE's filing of its hearing request and the Commission's referral of FOE's *de facto* amendment argument to the Board.²⁴ As part of its referral, the Commission could have easily directed that the parties should file updated briefings, as FOE is essentially requesting. Instead, the Commission precisely and only directed the Board to take additional briefing from the Staff and PG&E in response to the new arguments raised in FOE's reply brief. The Commission apparently recognized that this limited additional briefing was necessary to complete the record before it and, subsequently, before the Board. Contrary to FOE's Motion, this finite direction is not properly construed as some sort of first step in a process of fully re-briefing FOE's *de facto* amendment argument. As such, FOE's request to now allow further briefing than that provided for by the Commission is outside the expressly-limited scope of the authority delegated to the Board and should, therefore, be denied.

²² *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 7-8).

²³ *See id.* at 8.

²⁴ Motion at 1.

CONCLUSION

For the reasons stated above, the Board should deny FOE's Motion to allow supplemental briefing and should disregard the additional arguments raised therein.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 11th day of June, 2015

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER OPPOSING THE FRIENDS OF THE EARTH MOTION TO ALLOW SUPPLEMENTAL BRIEFING," dated June 11, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 11th day of June, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 11th day of June, 2015