

June 15, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
PACIFIC GAS AND ELECTRIC) Docket No. 50-275
COMPANY) Docket No. 50-323
(Diablo Canyon Power Plant, Units 1 and 2))

PACIFIC GAS AND ELECTRIC COMPANY'S
SUPPLEMENTAL BRIEF REGARDING UFSAR REVISION 21

INTRODUCTION

In accordance with the Commission's direction in CLI-15-14,¹ the Licensing Board in its Notice and Order of June 2, 2015, invited Pacific Gas and Electric Company ("PG&E") and the NRC Staff to respond to the assertion by Friends of the Earth ("FOE") 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."² As discussed below, the NRC Staff does not approve revisions to the Updated Final Safety Analysis Report ("UFSAR"), nor has it issued such an approval for Revision 21. The NRC Staff has not taken any action with respect to new seismic information relevant to the Diablo Canyon Power Plant ("Diablo Canyon") that grants PG&E greater operating authority or that alters the terms or conditions of the Diablo Canyon operating licenses. FOE's request for a hearing should be denied.

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

² Notice and Order (Scheduling Oral Argument), June 2, 2015, at 2, quoting CLI-15-14.

BACKGROUND

On August 26, 2014, FOE filed a petition seeking a hearing on seismic issues related to Diablo Canyon.³ The Hearing Request was derived from seismic information developed by PG&E beginning in 2008 related to the so-called Shoreline Fault and from subsequent PG&E reports on, and NRC Staff reviews of, that information. FOE argued that: (1) the NRC is conducting a *de facto* license amendment proceeding; and (2) the NRC Staff's determination that the Shoreline Fault is a lesser-included case under the prior Hosgri Earthquake evaluation for Diablo Canyon is insufficient to ensure that the plant is operating safely.⁴

PG&E answered FOE's Hearing Request on October 6, 2014. PG&E provided detailed information to correct the public record regarding Diablo Canyon's licensing history, the current seismic licensing basis, and PG&E's various seismic studies and evaluations completed and ongoing at the time related to the Central Coast of California and Diablo Canyon.⁵ As a safety matter, PG&E has consistently concluded, based upon thorough seismic studies and up-to-date evaluations, that the plant is operating safely within its seismic design capabilities.⁶

³ "Petition to Intervene and Request for Hearing by Friends of the Earth," dated August 26, 2014 ("Hearing Request").

⁴ Hearing Request at 29, 47.

⁵ See generally "Pacific Gas and Electric Company's Answer to Friends of the Earth Hearing Request," dated October 6, 2014 ("PG&E Answer").

⁶ The PG&E Answer addressed (at 8-10) PG&E's initial evaluation of new seismic information and the comprehensive report on the Shoreline Fault submitted in January 2011. See PG&E Letter No. DCL-11-005, "Report on the Analysis of the Shoreline Fault Zone, Central Coastal California," dated January 7, 2011 ("Shoreline Fault Report") (ADAMS Accession No. ML110140431). In addition to the Shoreline Fault Report, the PG&E Answer addressed (at 11-12) the company's September 2014 report on advanced seismic studies based on a California Energy Commission recommendation. See PG&E Letter DCL-14-081, "Central Coastal California Seismic Imaging Project, Shoreline Fault Commitment," dated September 10, 2014 (ADAMS Accession No. ML14260A106) ("Seismic Imaging Project Report"). Subsequent to the PG&E Answer, PG&E has

The PG&E Answer specifically addressed FOE’s *de facto* license amendment argument, demonstrating that the Hearing Request should be dismissed as a matter of law. There is no license amendment involved, *de facto* or otherwise, in the continuing operation of Diablo Canyon under its current operating licenses.⁷ Moreover, even if there were a non-conformance with the seismic licensing basis, there still would not be a *de facto* license amendment with accompanying hearing rights. As PG&E previously wrote, “[t]here is no right to a hearing on NRC enforcement actions or on exercises of discretion to allow continued operation notwithstanding a non-conformance.”⁸ The NRC Staff also filed an answer to the Hearing Request, opposing FOE’s request.⁹

In CLI-15-14 the Commission referred to the Licensing Board the limited issue of “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.”¹⁰ As summarized by the Commission in CLI-

completed a probabilistic seismic hazard evaluation and prioritization screening report for Diablo Canyon in response to the NRC’s post-Fukushima Section 50.54(f) letter requesting seismic risk evaluations. *See* PG&E Letter DCL-15-035, “Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding the Seismic Aspects of Recommendation 2.1 of the Near-Term Task Force Review of Insights From the Fukushima Dai-Ichi Accident: Seismic Hazard and Screening Report,” dated March 11, 2015 (ADAMS Accession No. ML15071A046) (“Seismic Hazard Report”).

⁷ PG&E Answer at 16-22.

⁸ *Id.* at 22.

⁹ “NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth,” dated October 6, 2014 (“NRC Staff Answer”). NRC Staff pointed out that FOE’s request to suspend plant operations should be referred to the Executive Director for Operations as a request for enforcement action under 10 C.F.R. § 2.206. The Commission did exactly that in CLI-15-14.

¹⁰ *Id.* at 7.

15-14, FOE’s Hearing Request relied on regulatory 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); and (3) the NRC Staff’s October 2012 letter to PG&E that summarized the results of the 2012 assessment and placed 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.¹¹

These matters were all addressed in PG&E’s Answer.¹²

But, as observed by the Commission in CLI-15-14, in FOE’s reply¹³ to the PG&E and NRC Staff answers to the Hearing Request, FOE asserted an additional basis for its claim that there should be a hearing opportunity — 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.”¹⁴ The Commission directed that PG&E and the NRC Staff be given the opportunity to address FOE’s assertions related to UFSAR Revision 21. The issue is therefore addressed below.

DISCUSSION

Section 189.a of the Atomic Energy Act requires a hearing opportunity only for certain specified actions — *i.e.*, “the granting, suspending, revoking or amending of any license.”¹⁵ As stated by the Commission in its recent *Fort Calhoun* decision, “[a] licensee cannot amend the

¹¹ CLI-15-14, 81 NRC at __, slip op. at 6-7 (citations to the Hearing Request omitted).

¹² PG&E Answer at 10-16.

¹³ “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 fore Hearing,” dated October 14, 2014 (“FOE Reply”).

¹⁴ CLI-15-14, 81 NRC at __, slip op. at 8 (citations to the FOE Reply omitted).

¹⁵ 42 U.S.C. § 2339.a(1)(A).

terms of its license unilaterally; it must request and obtain agency approval.”¹⁶ The Commission has recognized that some agency actions “not formally labeled as license amendments nevertheless can constitute *de facto* license amendments and accordingly trigger hearing rights.”¹⁷ The specific issue addressed in this brief is whether the NRC Staff “approved” UFSAR Revision 21 and whether it has granted PG&E greater operating authority or altered the terms of the operating licenses. In short, the NRC Staff did not grant any approval with respect to UFSAR Revision 21 — under any label. Nor did it increase PG&E’s licensed authority or alter the plant’s operating licenses. UFSAR Revision 21 therefore does not create a hearing opportunity.

A. The NRC Staff Did Not Approve (and Did Not Need to Approve) UFSAR Revision 21

PG&E discussed the seismic licensing basis for Diablo Canyon in the PG&E Answer.¹⁸ As discussed there, the licensing basis is comprised of three separate seismic evaluations: the original Design Earthquake and Double Design Earthquake, and the later (1975) Hosgri Earthquake evaluation. Safety related (Design Class 1) equipment was structurally qualified for the seismic loads associated with the ground motions for each licensing basis earthquake, in accordance with acceptance criteria approved for each evaluation. The adequacy of the 1975 Hosgri design basis was confirmed after licensing through the Long Term Seismic Program.

As also discussed in the PG&E Answer, PG&E’s 2011 Shoreline Fault Report and its 2014 Seismic Imaging Project Report showed that deterministic ground motions for the

¹⁶ *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC __, __, slip op. at 7 (Mar. 9, 2015), citing *Florida Power & Light Co.* (St. Lucie Plant, Unit 2, CLI-14-11, 80 NRC __, __, slip op. at 8 (Dec. 19, 2014).

¹⁷ *Fort Calhoun*, CLI-15-5, 81 NRC at __, slip op. at 7-8, citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

¹⁸ PG&E Answer at 2-8.

Shoreline Fault and the other regional faults near Diablo Canyon remain bounded by the 1975 Hosgri ground motions.¹⁹ Safety related equipment qualified to the Hosgri ground motions therefore remains qualified. The NRC Staff exercised its oversight responsibilities and independently confirmed the conclusions in the Shoreline Fault Report. The NRC Staff's evaluation was documented in a comprehensive report²⁰ and summarized in the letter to PG&E dated October 12, 2012.²¹ The NRC Staff concluded that "the existing design basis for the plant already is sufficient to withstand those ground motions."²² It further concluded that "the Shoreline scenario should be considered as a lesser included case under the Hosgri evaluation and the licensee should update the final safety analysis report (FSAR), as necessary, to include the Shoreline scenario in accordance with the requirements of 10 C.F.R. § 50.71(e)."²³

PG&E submitted UFSAR Revision 21 to the NRC in September 2013, in accordance with 10 C.F.R. § 50.71(e). The UFSAR updates on geoscience and seismic design issues were intended to accomplish two goals: (1) clarify the licensing history with respect to seismic issues and the basis for NRC license issuance; and (2) summarize Shoreline Fault evaluations consistent with the NRC's independent conclusion in 2012 that the Shoreline Fault should be considered "a lesser included case" under the licensing basis Hosgri Earthquake evaluation. The UFSAR seismic clarification and update did not involve any actual change to the

¹⁹ *Id.* at 8-12.

²⁰ Research Information Letter 12-01, "Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone" (September 2012).

²¹ NRC Letter to E.D. Halpin, "Diablo Canyon Power Plant, Unit Nos. 1 and 2 – NRC Review of Shoreline Fault (TAC Nos. ME5306 and ME5307)" (October 12, 2012).

²² *Id.* at 4.

²³ *Id.*

plant or procedures as described in the safety analysis report (implemented under 10 C.F.R. § 50.59 or otherwise).

Under the regulations, a UFSAR update submitted in accordance with Section 50.71(e) is not a license amendment and does not involve an NRC approval. The NRC requires licensees, after the plant has been licensed, to periodically update the UFSAR to “assure that the information included in the [UFSAR] contains the latest information developed.”²⁴ There is no administrative approval for the revisions. As explained by the Commission in adopting its regulations, submitting a UFSAR revision under Section 50.71(e):

. . . does not constitute a licensing action but is only intended to provide information. . . . Thus, for example, approvals of license amendments and technical specification changes are independent of the FSAR updating process. . . . The material submitted may be reviewed by the NRC staff but will not be formally approved.²⁵

Accordingly, the UFSAR update submittal is a notification to the NRC; it does not involve the “granting, suspending, revoking or amending of any license” that would trigger a hearing opportunity under Section 189.a. Contrary to FOE’s argument that “Revision 21 requires a license amendment,”²⁶ a UFSAR revision does not require an amendment. It does not even require an NRC approval, under any other label, that could be considered to be a *de facto* amendment.²⁷

²⁴ 10 C.F.R. § 50.71(e).

²⁵ “Periodic Updating of Final Safety Analysis Reports, Final Rule,” 45 Fed. Reg. 30614, 30615 (May 9, 1980).

²⁶ FOE Reply at 14.

²⁷ See 10 C.F.R. § 50.71(e) (explaining that the update should include safety analyses and evaluations performed by the licensee “either in support of approved license amendments or in support of conclusions that changes did not require a license amendment”). PG&E in this regard agrees fully with the separate opinion of Commissioner Svinicki in connection with CLI-15-14 (slip op. at 8-10).

The periodic UFSAR update presents a very different situation from that considered by the Commission in *Perry*. In that case the Commission found that the regulations require an approval (under 10 C.F.R. Part 50, Appendix H) for a change in a withdrawal schedule for reactor material specimens.²⁸ The Commission therefore evaluated whether the approval was a license amendment. (The Commission found that it was not, because the approval process associated with withdrawal schedules merely enforces license requirements.²⁹) For a UFSAR update submittal there is no approval under the regulations, and further evaluation of a possible *de facto* amendment is not necessary. As in *Kelley v. Selin*, under the NRC's regulations defining the process for UFSAR updates, “[t]here is no licensing decision being made.”³⁰ Hence, there can be no license amendment (of any kind).

In its pending federal court case (now being held in abeyance by the Court of Appeals), FOE has invoked the so-called “Bamford Memo”³¹ as an “approval” of UFSAR Revision 21. The Bamford Memo is an internal NRC memorandum (not issued to PG&E) documenting the NRC’s receipt and administrative review of Revision 21. NRC’s review of a UFSAR update is conducted as part of the agency’s routine inspection and enforcement (*i.e.*, oversight) functions, separate from the licensing and hearing process. The Staff reviewer found no

²⁸ *Perry*, CLI-96-13, 44 NRC at 321-26.

²⁹ *Id.* at 328.

³⁰ *Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995). The Court in *Kelley* considered whether a site-specific decision was being made to approve use of a certified spent fuel storage cask at the site involved, that would confer hearing rights. Under the NRC’s regulatory structure, providing general licenses for storage using a certified cask, there is no site-specific approval.

³¹ 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).

compliance issues. But the Bamford Memo does not “approve” PG&E’s UFSAR Revision 21. At most, it documents an administrative review of the UFSAR revision. The memorandum does not curtail further NRC inspection of PG&E’s documentation or evaluation of the bases for the revisions. NRC inspectors remain free to audit underlying information within their discretion, including compliance with 10 C.F.R. § 50.59 with respect to changes. Oversight functions are distinct from licensing actions.³² If a licensee fails to update its UFSAR appropriately, or does not properly implement plant or procedure changes associated with a UFSAR revision, the licensee is subject to NRC enforcement action. If a petitioner is unhappy with the lack of NRC enforcement action, the appropriate remedy is through 10 C.F.R. § 2.206.³³

At bottom, there is no approval or license amendment associated with the submission of a required periodic update to the UFSAR. Unlike *Perry*, in which the NRC granted an approval of a revised withdrawal schedule for reactor material specimens, the NRC did not “grant” PG&E anything in connection with UFSAR Revision 21. As in *Fort Calhoun*, “[a] licensee cannot amend the terms of a license unilaterally.”³⁴ Given that there was no approval and none was requested or required, there can be no *de facto* license amendment. NRC review of a

³² *St. Lucie*, CLI-14-11, 80 NRC at __, slip op. at 9 (“[N]either licensee activities nor NRC inspection of (or inquiry about) those activities provides the opportunity for a hearing under [the] Atomic Energy Act] because those activities only concern compliance with the terms of the existing license.”).

³³ *Fort Calhoun*, CLI-15-5, 81 NRC at __, slip op. at 11. This specifically includes a challenge to a Section 50.59 evaluation. *See also First Energy Nuclear Operating Co.*(Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 78 NRC __ (Aug. 12, 2013). This avenue for a remedy specifically applies to any FOE claim that the Shoreline Fault is not a “lesser included case” under the 1975 Hosgri evaluation or that 10 C.F.R. § 50.59 was not satisfied.

³⁴ *Fort Calhoun*, CLI-15-5, 81 NRC at __, slip op. at 7.

UFSAR revision is part of the agency's routine inspection and enforcement (*i.e.*, oversight) functions, separate from the licensing and hearing process.³⁵

B. UFSAR Revision 21 Did Not Grant Increased Operating Authority or Amend the License

As discussed above, UFSAR Revision 21 clarified the seismic licensing history of Diablo Canyon and incorporated information on the Shoreline Fault consistent with the NRC Staff's independent findings in 2012. Even assuming that some NRC "approval" or "grant" was involved (which they were not), UFSAR Revision 21 did not increase PG&E's operating authority for Diablo Canyon or alter license terms or conditions.

The Diablo Canyon operating licenses authorize full power operation of the units. UFSAR Revision 21 did not increase that operating authority, as the units are authorized to operate at the same capacity as before. The operating licenses also include various license conditions. Those conditions were unchanged by UFSAR Revision 21. The Diablo Canyon Technical Specifications (incorporated in the license under 10 C.F.R. § 50.36) set limiting conditions on operation of plant equipment. UFSAR Revision 21 did not change any of those Technical Specifications. As stated by the Commission in *Perry*, "[o]nly those actions falling 'beyond the ambit of the prescriptive authority granted under the license' necessitate a license amendment."³⁶ UFSAR Revision 21 did not increase operating authority beyond the ambit of existing authority or

³⁵ The NRC only "reviews" the UFSAR update to inform future oversight activities; it does not "review and approve" the UFSAR update to give PG&E greater operating authority.

³⁶ *Perry*, CLI-96-13, 44 NRC at 327, citing *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 295 (1st Cir. 1995). The present situation differs from the situation in *Citizens Awareness Network*. There, the Court found that due to a change in policy, the NRC was allowing the licensee to conduct major decommissioning activities prior to an approval of a decommissioning plan required under the regulations. The Court found that the NRC's change in policy supplemented the licensee's operating authority. In the present case, no supplemental authority is involved.

relax any operating restrictions. The units operate in accordance with the same licenses and same limitations as existed prior to UFSAR Revision 21.

FOE suggests that UFSAR Revision 21 changed the licensing basis for Diablo Canyon, that 10 C.F.R. § 50.59 should have triggered a license amendment, and that this represents an increase in operating authority.³⁷ PG&E disagrees with the premise that UFSAR Revision 21 involves a change to the seismic licensing basis.³⁸ But, even if true, these complaints raise enforcement issues rather than licensing issues. If PG&E is not in compliance with the license, or inappropriately made a change to the licensing basis without NRC approval, operating authority has not been increased and the license has not been altered. The plant would be in *non-compliance* with its license. There would be no increase in operating authority precisely because PG&E would not have authority to remain in non-compliance indefinitely. PG&E would be obligated to restore compliance or consider a licensing basis change (whether through Section 50.59 or a license amendment). And NRC would retain authority to compel corrective action or change the license in accordance with appropriate processes (including any applicable hearing procedures).³⁹ If FOE is concerned with regulatory inaction, FOE's remedy is to seek enforcement action under 10 C.F.R. § 2.206.

After the Fukushima accident, the NRC initiated a process under 10 C.F.R. § 50.54(f) for all reactor licensees to reassess the adequacy of their seismic design and licensing

³⁷ FOE Reply at 14-18.

³⁸ See PG&E Answer at 2-8. Although the answer did not address UFSAR Revision 21, the discussion is applicable in that UFSAR Revision 21 contains information similar to that presented in the PG&E Answer and supporting Declaration of William Horstman.

³⁹ As previously discussed, PG&E's required UFSAR update provides NRC with information to facilitate the exercise of oversight, but cannot unilaterally increase operating authority or alter license terms or conditions.

bases in light of new seismic information relevant to their site.⁴⁰ FOE states that it does not contend that plants engaged in the Section 50.54(f) process are undergoing *de facto* amendments, but that “the NRC has *de facto* amended the license for Diablo Canyon through Revision 21.”⁴¹ But the NRC has done no such thing. PG&E’s UFSAR Revision 21, which documents the current seismic safety evaluations pending the outcome of the Section 50.54(f) process, does not amend the license (nor could it), as discussed above. Instead, as part of its responsibility to continuously assure safety, the NRC is utilizing a regulatory oversight process (Section 50.54(f)) to determine whether additional requirements should be imposed.⁴² The NRC Staff’s allowance of continued operation pending the Section 50.54(f) review — under the current license terms and conditions — is not a grant of expanded operating authority.⁴³

⁴⁰ PG&E Answer at 12-16.

⁴¹ FOE Reply at 11.

⁴² In the present case, in CLI-15-14, the Commission already determined that FOE’s concerns regarding the ability to shut the plant down safely and operate the plant pending the ongoing Section 50.54(f) review should be addressed under 10 C.F.R. § 2.206. CLI-15-14, 81 NRC at __, slip op. at 9-11.

⁴³ Even if the Staff does not insist on strict compliance with a particular Commission regulation, it is neither waiving the regulation at issue nor amending it, but is instead exercising enforcement discretion. *Compare Sequoyah Fuels Corp. and General Atomics* (Gore, OK, Site), CLI-97-13, 46 NRC 195, 221 n.28 (1997). An NRC decision to decline enforcement action is unreviewable as an action committed to agency discretion by law under *Heckler v. Chaney*, 470 U.S. 821 (1985). See *Safe Energy Coalition v. NRC*, 866 F.2d 1473, 1474, 1746-78 (D.C. Cir. 1989); *Massachusetts Public Interest Research Group v. NRC*, 852 F.2d 9, 14-18 (1st Cir. 1988); *Arnow v. NRC*, 868 F.2d 223, 230, 231, 234 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 61 (1989).

CONCLUSION

For the foregoing reasons, the NRC Staff did not “approve” UFSAR Revision 21 and did not take any action that increased PG&E’s operating authority or otherwise alter the terms or conditions of the Diablo Canyon operating licenses. Accordingly, UFSAR Revision 21 does not constitute a license amendment, *de facto* or otherwise.

Respectfully submitted,

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Executed in accord with 10 C.F.R. 2.304(d)

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Dated at Washington, District of Columbia
this 15th day of June 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
PACIFIC GAS AND ELECTRIC) Docket No. 50-275
COMPANY) Docket No. 50-323
)
(Diablo Canyon Power Plant, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S SUPPLEMENTAL BRIEF REGARDING UFSAR REVISION 21" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 15th day of June 2015, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

/s/ signed electronically by
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COUNSEL FOR THE PACIFIC GAS
AND ELECTRIC COMPANY

Dated at Washington, District of Columbia
this 15th day of June 2015