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
	)	50-323
(Diablo Canyon Power Plant,	)	
Units 1 and 2)	)	

NRC STAFF ANSWER TO FRIENDS OF THE EARTH'S *DE FACTO* LICENSE AMENDMENT CLAIMS RELATED TO PG&E'S UPDATED FINAL SAFETY ANALYIS REPORT, REVISION 21

I. INTRODUCTION

Pursuant to the Commission's direction and the Atomic Safety and Licensing Board's (Board) Order,[1] the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer in opposition to the Friends of the Earth (FOE) claim, made in its Reply,[2] "that the Staff has 'approved' [Pacific Gas & Electric Co.'s (PG&E's)] Final Safety Analysis Report Update, Revision 21[3] [(UFSAR, Rev. 21)], and this action, standing alone, grants PG&E greater operating authority and alters the terms of the operating licenses"[4] at Diablo Canyon Power Plant, Units 1 and 2 (Diablo Canyon or DCPP).

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[1] *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plants, Units 1 and 2), CLI-15-14, 81 NRC at __ (May 21, 2015) (slip op. at 8) (stating that the Board should provide an opportunity for the Staff and PG&E to respond to FOE's assertions); Notice and Order (Scheduling Oral Argument), (June 2, 2015) (unpublished) (Agencywide Documents Access & Management System (ADAMS) Accession No. ML15153A192).

[2] 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) (FOE's Reply) (ADAMS Accession No. ML14287A788).

[3] Diablo Canyon Power Plant Units 1 and 2 Final Safety Analysis Report Update (Sept. 2013) (ADAMS Accession No. ML15098A461) (UFSAR, Rev. 21).

[4] *Diablo Canyon*, CLI-15-4, 81 NRC at __ (May 21, 2015) (slip op. at 8) (citing FOE's Reply at 11-19). FOE's Petition to Intervene is available at ADAMS Package Accession No. ML14254A223. FOE also submitted a Motion Requesting Supplemental Briefing (ADAMS Accession No. ML15156B521). The Staff opposed FOE's Motion. *See* NRC Staff Answer Opposing the Friends of the Earth Motion to Allow

The Commission also directed the Board to provide an opportunity for the Staff and PG&E to respond to FOE's assertion that "the asserted approval of [UFSAR, Rev. 21]" is "a 'confirmation' of the *de facto* license amendment proceeding that is referenced in [FOE's] hearing request."[5] The Staff hereby provides its response in opposition to this claim for the Board's consideration in the matter referred by the Commission.[6]

In short, FOE claims that there is a *de facto* license amendment proceeding triggering an Atomic Energy Act (AEA) section 189a. hearing opportunity because the Staff supposedly approved changes PG&E made to its UFSAR, Rev. 21, and thereby effectively amended Diablo Canyon's seismic licensing basis outside of the section 50.90 license amendment process.[7] For the reasons stated below, FOE has not shown that the Staff approved PG&E's UFSAR, Rev. 21 or shown that any NRC action related to UFSAR, Rev. 21 constituted a *de facto* license amendment. Therefore, the Board should deny FOE's request for a hearing.

II. BACKGROUND ON FSAR SUBMITTALS AND PG&E's UFSAR, REV. 21

FOE's Reply includes two *de facto* claims related to PG&E's UFSAR, Rev. 21. In considering these claims, it is critical to first understand the NRC's regulations related to FSARs and FSAR updates as well as PG&E's UFSAR, Rev. 21.

(footnote continued …)
Supplemental Briefing (June 11, 2015). On June 12, 2015, the Board granted FOE's request for supplemental briefing.

[5] *Diablo Canyon*, CLI-15-14, 81 NRC __ (May 21, 2015) (slip op. at 8) (citing FOE's Reply at 4).

[6] *Id.* (noting that PG&E and Staff should have opportunity to respond to both assertions). *See id*. at 7 (providing that the Board is to consider "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" with respect to activities associated with certain Staff correspondence). *See id*. at 6-7 (listing the NRC correspondence at issue).

[7] FOE's Reply at 3-4. FOE appears to argue that NRC approved the UFSAR, Rev. 21 and that the NRC "surreptitiously" made changes to the license. *Id*. at 3.

A. FSAR Requirements and Purpose of FSAR Updates

An application for a Part 50 operating license must include an FSAR, which describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole.[8] Additionally, pursuant to 10 C.F.R. § 50.71(e), each holder of a Part 50 operating license must periodically update its FSAR to keep it current, and submit those revisions to the Commission.[9] Under 10. C.F.R. § 50.71(e), power reactor licensees must submit FSAR updates either annually or six months after each refueling outage.[10] These updates must include changes made pursuant to 10 C.F.R. § 50.90 and 10 C.F.R. § 50.59.[11] Further, nuclear power plant licensees subject to Part 50's Appendix B quality assurance requirements must also submit certain changes to the quality assurance program description pursuant to § 50.71(e).[12]

The purpose of 10 C.F.R. § 50.71(e) is to provide an updated reference document to be used in recurring safety analyses performed by the licensee, the Commission, and other

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[8] 10 C.F.R. § 50.34(b). *See also* 10 C.F.R. § 50.4 (providing requirements for written communications from a licensee or applicant to the NRC); *id*. at (b)(6) (providing requirements for updated FSAR submittals).

[9] *Georgia Power Co*.(Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-5, 37 NRC 96, 99 n.3 (1993), *aff'd* CLI-93-16, 38 NRC 25 (1993).

[10] 10 C.F.R. § 50.71(e)(4).

[11] 10 C.F.R. § 50.71(e)(2) ("The submittal shall include the effects[] of all changes made in the facility or procedures as described in the FSAR; all safety analyses and evaluations performed by the applicant or licensee either in support of approved license amendments or in support of conclusions that changes did not require a license amendment in accordance with § 50.59(c)(2)…; and all analyses of new safety issues performed by or on behalf of the applicant or licensee at Commission request;" "Effects of changes includes appropriate revisions of descriptions in the FSAR such that the FSAR (as updated) is complete and accurate."). *See also* 10 C.F.R. § 50.59(a)(4) (defining FSAR, as updated, as "the Final Safety Analysis Report (or Final Hazards Summary Report) submitted in accordance with Sec. 50.34, as amended and supplemented, and as updated per the requirements of Sec. 50.71(e)….").

[12] *See* 10 C.F.R. § 50.54(a)(3) (changes to the quality assurance program description that do not reduce the commitments). Also, holders of renewed licenses are required to include in their FSAR updates of any systems, structures, and components newly identified that would have been subject to an aging management review or evaluations of time-limited aging analyses in accordance with 10 C.F.R. § 54.21, and must describe how the effects of aging will be managed such that the intended function(s) in § 54.4(b) will be effectively maintained during the period of extended operation. 10 C.F.R. § 54.37(b).

interested parties.[13] Thus, 10 C.F.R. § 50.71 "is only a reporting requirement to [e]nsure that an updated FSAR will be available."[14] The NRC's process for approving license amendments and technical specifications changes is independent of the FSAR updating process.[15] Further, the NRC does not formally approve the material licensees submit pursuant to 10 C.F.R. § 50.71(e). Instead, the Staff only reviews such submittals as part of its oversight to ensure compliance with existing requirements.[16]

B. PG&E's UFSAR, Rev. 21

On September 16, 2013, PG&E submitted the DCPP UFSAR, Rev. 21 to the NRC.[17] Importantly, UFSAR, Rev. 21 was submitted pursuant to 10 C.F.R §§ 50.71(e), 50.54(a)(3) and 50.4(b)(6), not 10 C.F.R. § 50.90.[18] UFSAR, Rev. 21 represents the status of DCPP Units 1 and 2 through March 23, 2013.[19] As required by 10 C.F.R. § 50.71(e), UFSAR, Rev. 21 provided changes made under the provisions of 10 C.F.R. § 50.59[20] and changes made as a result of section 50.90 license amendments.[21]

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[13] Periodic Updating of Final Safety Analysis Reports, 45 Fed. Reg. 30,614, (May 9, 1980) (Final rule) (adding 10 C.F.R. § 50.71(e)).

[14] *Id*. at 30,615.

[15] *Id*. (stating that "approvals of license amendments and technical specification changes are independent of the FSAR updating process.").

[16] *Id*. (stating that the material submitted under 10 C.F.R. § 50.71(e) "may be reviewed by the NRC staff but will not be formally approved.").

[17] PG&E Letter DCL-13-091, at 1 (Sept. 16, 2013) (ADAMS Accession No. ML13280A391).

[18] *Id*.

[19] *Id*.

[20] These unilateral licensee changes are identified in PG&E Letter DCL-13-091, Enclosure 1, "Changes Incorporated into the Diablo Canyon Power Plant Final Safety Analysis Report Update, Revision 21 Resulting from 10 CFR 50.59 Evaluations."

[21] These changes, which triggered an opportunity to request a section 189a hearing when PG&E submitted a § 50.90 license amendment request, are identified in PG&E Letter DCL-13-091, Enclosure 2, "Changes Incorporated into the Diablo Canyon Power Plant Final Safety Analysis Report Update, Revision 21 Resulting From License Amendments."

As relevant to FOE's claims,[22] in DCPP UFSAR, Rev. 21, PG&E noted in several places that the Shoreline Fault Zone is considered to be a lesser included case under the Hosgri evaluation.[23] FOE argues that it is entitled to a section 189a hearing based on an alleged *de facto* license amendment related to UFSAR, Rev. 21. For the reasons discussed below, FOE's request for a hearing should be denied.

III. DISCUSSION

A. LEGAL STANDARDS FOR *DE FACTO* HEARING REQUESTS

To obtain a hearing, a person must raise a matter that triggers a hearing opportunity under section 189a. of the AEA,[24] such as a license amendment proceeding.[25] The Commission has also recognized that agency actions not formally labelled as license amendments nevertheless can constitute *de facto* license amendments and accordingly trigger section 189 hearing rights.[26] The Commission applies the standard outlined in *Perry*[27] when considering *de facto* license amendment claims.[28]

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[22] *See e.g.*, FOE's Reply at 11 ("For the reasons described herein and in FoE's Petition to Intervene, incorporating the seismic risk presented by the Shoreline fault into the license requires a license amendment. The Staff has improperly issued a *de facto* license amendment by approving FSARU Revision 21 and continues to conduct an ongoing *de facto* licensing proceeding with respect to any other license revisions, such as to the ground motion potential equations, required as a result of the additional information contained in the PG&E Seismic Report.").

[23] *See e.g.*, DCPP UFSAR, Rev. 21, at 2.5-66, Sec. 2.4.3.10.3 "Hosgri Earthquake" (citing NRC letter to PG&E, Diablo Canyon Power Plant, Unit Nos. 1 and 2 – NRC Review of Shoreline Fault (TAC Nos. ME5306 and ME5307), (Oct. 12, 2012) (ADAMS Accession No. ML120730106)).

[24] *Omaha Pub. Power Dist.* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 6). *See* Atomic Energy Act of 1954, as amended, § 189a, 42 U.S.C. § 2239 (2006) (listing NRC actions that trigger hearing opportunities). If a hearing opportunity was triggered, FOE would then have to meet the requirements in 10 C.F.R. § 2.309. *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 440-41 (noting that if Board found *de facto* amendment, then Board should consider if 10 C.F.R. § 2.309 requirements met).

[25] *See* AEA; *See* 10 C.F.R. § 50.90 (when a licensee desires to amend its license, it submits a license amendment request under section 50.90 and a notice of opportunity for hearing is published in the *Federal Register*).

[26] *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 327 (1996) (Perry); *Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 6); *Florida Power & Light Co.* (St. Lucie Power Plant, Unit 2), CLI-14-11, 80 NRC 167 (2014).

Under *Perry*, a *de facto* license amendment can occur when an agency action (1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.[29] Thus, not every NRC action or approval outside of the section 50.90 process constitutes a *de facto* license amendment.[30] Instead, "it is the *substance* of the NRC action that determines entitlement to a section 189(a) hearing, *not* the particular label the NRC chooses to assign."[31] Given this, a *de facto* analysis is a highly fact-specific inquiry into whether an agency action altered the terms of a license or provided the licensee with greater operating authority.[32]

In applying *Perry*, the Commission has specified that NRC oversight activities,[33] which are conducted to ensure that licensees comply with existing requirements, do not constitute *de facto* licensing actions because they do not alter the terms of the license or otherwise authorize additional operating activities.[34] Further, the Commission has specified that completed agency

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(footnote continued …)

[27] *Perry*, CLI-96-13, 44 NRC at 327.

[28] *Id.* at 326-27. *See Diablo Canyon*, CLI-15-14, 81 NRC __ (May 21, 2015) (slip op. at 7 n.21) (noting that *Perry* is standard). The *Perry* decision is consistent with federal case law, which likewise recognizes that agency actions can constitute *de facto* license amendments. *See, e.g.*, *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 295 (1st Cir. 1995) (*CAN*) (finding that a Commission policy change was equivalent to a license amendment because it "undeniably *supplemented* the operating authority of extant licenses…which might henceforth engage in major forms of component disassembly beyond the ambit of their original licenses.") (emphasis in original).

[29] *See Perry*, CLI-96-13, 44 NRC at 326.

[30] For example, NRC oversight activities gathering information about and evaluating plant performance, regardless of the findings it makes, do not alter the conditions of a license and, therefore, cannot form the basis for the right to request a hearing. *St. Lucie*, CLI-14-11, 80 NRC at 174.

[31] *CAN*, 59 F.3d at 295 (emphasis in original). *See* FOE's Reply at 17 (citing to *CAN* for same proposition).

[32] *See, e.g.*, *Sholly v. NRC*, 651 F.2d 780, 791 (D.C. Cir. 1980) (per curiam), *vacated on other grounds*, 459 U.S. 1194 (1983) (holding that Commission order permitting venting of radioactive gas from TMI-2 "granted the licensee authority to do something that it otherwise could not have done under the existing license authority" and so was license amendment under section 189 of AEA).

[33] These oversight activities include inspections, performance assessments, and enforcement. *St. Lucie*, CLI-14-11, 80 NRC at 174.

[34] *See Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 7) (noting that Staff inspections and Confirmatory Action Letters are oversight activities normally conducted for the purpose of

action, as opposed to future hypothetical agency action, is the proper subject of a *de facto* inquiry. Thus, in considering *de facto* license amendment hearing requests, the Commission only analyzes, or refers to a Board to analyze, whether Staff actions that occurred before the petition was submitted constitute *de facto* license amendments.[35]

Moreover, the Commission has repeatedly held that licensee action is insufficient to trigger a *de facto* license amendment proceeding.[36] "A licensee cannot amend the terms of its license unilaterally"; it must request and obtain agency approval.[37] Thus, licensee activities undertaken pursuant to 10 C.F.R. § 50.59[38] without prior NRC approval[39] do not constitute *de facto* license amendments.[40] To the extent that a previous Board held otherwise, the

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(footnote continued …)
ensuring the licensees comply with existing NRC requirements and license conditions while licensing actions alter the terms of the license or otherwise authorize additional operating activities); *St. Lucie*, CLI-14-11, 80 NRC at 173 (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"). *See also Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 234-38 (1990) (discussing distinction with respect to hearing rights).

[35] *See San Onofre*, CLI-12-20, 76 NRC at 440-41 (referring to Board the question of whether Staff's March 2012 Confirmatory Action Letter (CAL) constituted a *de facto* license amendment); *See also St. Lucie*, CLI-14-11, 80 NRC at 175 (Commission only evaluated NRC Staff actions that occurred within 60 days of the petition, not actions taken years earlier).

[36] *St. Lucie*, CLI-14-11, 80 NRC at 173 & n. 31; *Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 8).

[37] *St Lucie*, CLI-14-11, 80 NRC at 173; *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….").

[38] Section 50.59 sets forth the circumstances under which a licensee may make changes to the facility as described in its UFSAR, make changes in the procedures described in the UFSAR, and conduct tests or experiments not otherwise described in the UFSAR without obtaining a license amendment under 10 C.F.R. § 50.90. *See* 10 C.F.R. § 50.59(c)(1).

[39] "Agency approval or authorization is a necessary component of Commission action that affords a hearing opportunity under section 189a." *St. Lucie*, CLI-14-11, 80 NRC at 173. *Id.* at 174 (stating that Staff review and oversight of a licensee's submittals do not constitute *de facto* license amendments because the Staff is only reviewing or overseeing unilateral licensee activities).

[40] Y*ankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n. 7 (1994). *See also St. Lucie*, CLI-14-11, 80 NRC at 175 (stating that hearing opportunities do not attach to licensee changes made under section 50.59 because they do not require NRC approval).

Commission declined to adopt that Board's reasoning.[41] A licensee's section 50.59 analysis is properly challenged through a 10 C.F.R. § 2.206 petition rather than via an AEA section 189 hearing request.[42] Further, the Commission has 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."[43]

B. FOE's Hearing Request Should Be Denied Because FOE Has Not Shown A *De Facto* License Amendment Triggering An AEA Section 189a Hearing Opportunity

FOE claims that the NRC approved PG&E's UFSAR, Rev. 21 and that this action, on its own, constitutes a *de facto* license amendment.[44] FOE also claims that UFSAR, Rev. 21 "confirms" that there is a "*de facto* license amendment process" because it shows the "NRC Staff surreptitiously" changed the license.[45] The crux of both of FOE's arguments appears to be that the NRC approved the addition of new seismic information into PG&E's UFSAR, Rev. 21[46] and that in doing so, the NRC granted PG&E greater operating authority and altered the terms of the Diablo Canyon operating licenses without providing the public an opportunity to participate in the process.[47]

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[41] *St. Lucie*, CLI-14-11, 80 NRC at 174, n.33 ("Thus, to the extent [LBP-13-7] found that unilateral licensee activities can constitute *de facto* license amendments…, we decline to adopt that Board's reasoning here.").

[42] *Diablo Canyon*, CLI-15-14, 81 NRC at 5 n. 14.

[43] *Fort Calhoun*, CLI-15-5, 81 NRC __ (slip op. at 13).

[44] FOE's Reply at 11-19. *See also id*. at 19 (claiming that UFSAR, Rev. 21 "is evidence that the NRC has issued at least one *de facto* license amendment in the ongoing *de facto* amendment proceeding to address new seismic information about the area around Diablo Canyon.").

[45] *Id*. at 3.

[46] *See, e.g., id*. (claiming that the Staff "surreptitiously slipp[ed] into the license changes" and that the Staff "negotiated" with PG&E).

[47] *See id*.at 12-14 (alleging that UFSAR, Rev. 21 moves the Hosgri Earthquake into the plant's established seismic design basis); *Id.* at 3-4 (noting that changes to UFSAR, Rev. 21 were done "surreptitiously" and that UFSAR, Rev. 21 "was subjected to no public review.").

As discussed in detail below, FOE has not shown that the NRC approved PG&E's UFSAR, Rev. 21 or that the NRC took any action with respect to PG&E's UFSAR, Rev. 21 that constitutes a *de facto* license amendment. Instead, FOE's arguments demonstrate a misunderstanding of the NRC's regulatory process, PG&E's UFSAR, Rev. 21, Diablo Canyon's design and licensing basis, and the Commission's case law on what constitutes a *de facto* license amendment. Thus, FOE has not shown[48] that there is a *de facto* license amendment and the Board should deny FOE's hearing request.

1. FOE Has Not Shown That the Staff Approved UFSAR, Rev. 21

As discussed above, a *de facto* license amendment occurs when an agency action, like an approval, effectively amends the license or grants the licensee additional authority.[49] FOE claims that the NRC "approved" PG&E's UFSAR, Rev. 21 and that this approval was a *de facto* license amendment because UFSAR, Rev. 21 granted PG&E greater operating authority and altered the terms of the Diablo Canyon licenses.[50]

As an initial matter, FOE's claim is incorrect and demonstrates a misunderstanding of the NRC's regulatory framework. As discussed above, PG&E was required to submit an FSAR when it applied for a Part 50 operating license.[51] The NRC's regulations require an FSAR to include information that describes the facility, presents the design bases and the limits on its

[48] Because this is a *de facto* hearing request, FOE is the "proponent of an order" under 10 C.F.R. § 2.325 (i.e., an order from the Board that there is a *de facto* license amendment proceeding based on UFSAR, Rev. 21). Thus, FOE has the burden of persuasion on the issue. *See* 5 U.S.C. § 556(d).

[49] *Supra* at 5-8.

[50] FOE's Reply at 16, 17. *See, e.g., id*. at 13 (claiming UFSAR, Rev. 21 "(1) adds the Hosgri Evaluation to the seismic design basis, (2) makes it a Safe Shutdown Earthquake, and (3) adds the Shoreline fault zone as a 'lesser included case under the Hosgri evaluation,' without making any of these required demonstrations."). *Id.* at 17-18 (claiming UFSAR, Rev. 21 allows PG&E to operate Diablo Canyon with a reduced margin of safety by changing the seismic design basis for the plant and effectively exempting the Shoreline Fault from meeting General Design Criteria 2 and Part 100, Appendix A requirements to which the plant was licensed).

[51] *See* 10 C.F.R. § 50.34.

operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole.[52]

As a holder of a license to operate a nuclear power reactor, PG&E must then subsequently submit an update to its original FSAR and must periodically submit revisions to its FSAR pursuant to 10 C.F.R. § 50.71(e).[53] These revisions must include changes to the FSAR that PG&E has made through a section 50.90 license amendment request[54] and changes made through the section 50.59 process.[55] Revisions or updates that a licensee makes to its own document cannot be *de facto* amendments, because there is no agency action.[56] Thus, PG&E's revisions and updates to its FSAR, on their own, cannot constitute a *de facto* amendment. Rather, licensees revise and update their FSARs in accordance with NRC regulatory provisions, which FOE is not challenging and cannot challenge in an adjudicatory proceeding.[57]

Importantly, the NRC has made clear that 10 C.F.R. § 50.71(e) is only a reporting requirement.[58] A licensee's "[s]ubmittal of updated FSAR pages does not constitute a licensing action but is only intended to provide information."[59] In fact, the Statements of Consideration for

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[52] 10 C.F.R. § 50.34(b).

[53] *See* 10 C.F.R. § 50.71(e)(4) ("Subsequent revisions must be filed annually or 6 months after each refueling outage provided the interval between successive updates does not exceed 24 months. The revisions must reflect all changes up to a maximum of 6 months prior to the date of [filing].").

[54] Such changes would have triggered an opportunity for a section 189a hearing when PG&E submitted the request and would have already been approved by the NRC. *See* 10 C.F.R. § 50.90.

[55] 10 C.F.R. § 50.71(e). PG&E must also submit certain changes it makes to the quality assurance program description pursuant to § 50.71(e). *See* 10 C.F.R. § 50.54(a)(3) (changes to the quality assurance program description that do not reduce the commitments).

[56] *St. Lucie*, CLI-14-11, 80 NRC at 173 n. 31; *Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 10-11).

[57] *See* 10 C.F.R. § 2.335(a) (NRC rules not subject to challenge in an adjudicatory proceeding absent a waiver).

[58] *See* Periodic Updating of Final Safety Analysis Reports, 45 Fed. Reg. 30,614, 30,615 (May 9, 1980) (Final rule).

[59] *Id.* at 30,615.

§ 50.71(e) explicitly state that "approvals of license amendments and technical specification changes are independent of the FSAR updating process."[60] Thus, it is not part of the NRC's process to "approve" changes made by the licensee under 10 C.F.R. § 50.71(e) or 10 C.F.R. § 50.59.[61]

Instead, the NRC, as part of its oversight process, does a sampling review of an FSAR update to determine if the FSAR was submitted consistent with the requirements of 10 C.F.R. § 50.71(e). This is exactly what occurred with PG&E's UFSAR, Rev. 21. The NRC Staff performed a sampling review of PG&E's UFSAR, Rev. 21 to determine if the submittal met the requirements of 10 C.F.R. § 50.71(e), which included determining if it reflected changes to the FSAR that PG&E made either through a license amendment request or through the 50.59 process.[62] Based on its review, the Staff concluded that PG&E's UFSAR, Rev. 21 "was submitted consistent with the requirements in 10 CFR 50.71(e)."[63] Nothing in the Staff's review constituted an "approval."[64] The Staff did not approve PG&E's revisions or take any action that altered the license or PG&E's operating authority. Instead, the Staff's review was part of its

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[60] *Id*.

[61] As noted above, if a licensee makes a change under 10 C.F.R. § 50.59 that triggers the need for a license amendment under 10 C.F.R. § 50.90, then the licensee must submit a license amendment request and this would trigger a section 189a. hearing opportunity. Licensee actions under 10 C.F.R. § 50.59 do not trigger hearing rights under the AEA. *See, e.g.*, *Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (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"). Instead, failure to comply with 10 C.F.R. § 50.59 is an enforcement matter. Likewise, licensee revisions submitted to the NRC under 10 C.F.R. § 50.71(e) are not *de facto* license amendments.

[62] *See* Memorandum from Peter J. Bamford, NRC, to Michael T. Markley, NRC, "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) at 3 (ADAMS Accession No. ML14022A120) (describing sampling review of PG&E's UFSAR Rev. 21).

[63] *See id*. at 3. This internal NRC memorandum is cited as evidence of a *de facto* license amendment in a Petition for Review FOE filed in the D.C. Circuit on October 28, 2014.

[64] *St. Lucie*, CLI-14-11, 80 NRC at 173-74 (staff approval or authorization needed to constitute *de facto* amendment).

normal oversight activities to ensure that PG&E's submittal complied with existing regulatory requirements.[65] Thus, FOE has not shown that the Staff approved PG&E's UFSAR, Rev. 21 and that such approval constituted a *de facto* license amendment.

2. FOE Has Not Shown That the NRC Has Taken Any Other Action That Constituted a *De Facto* License Amendment

Further, FOE has not shown how any other Staff action related to UFSAR, Rev. 21 constitutes a *de facto* license amendment. FOE claims that UFSAR, Rev. 21 is a "confirmation" that there is a "*de facto* license amendment process"[66] because it shows that the Staff has made[67] or allowed[68] changes that effectively accomplish the same results as PG&E sought in its LAR-11-05.[69] FOE appears to argue that because the NRC improperly made or allowed these changes to be made outside of the license amendment process, there is a *de facto* licensing "process."[70]

While FOE correctly notes that it is the substance or effect of an agency's action, not the title given to the action, that matters for purposes of a *de facto* analysis,[71] FOE has not shown

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[65] *See Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 7, 8) (noting that staff oversight activities ensuring compliance with existing requirements do not constitute *de facto* license amendments).

[66] *See* FOE's Reply at 4. *See Diablo Canyon*, CLI-15-14, 81 NRC __ (May 21, 2015) (slip op. at 8).

[67] *See* FOE's Reply at 3 (suggesting that the NRC made changes by stating that the Staff "surreptitiously slipp[ed] into the license changes").

[68] *Id*. at 3 (suggesting that the NRC authorized changes by stating that the NRC Staff have negotiated these results).

[69] *Id*. at 2-3, 12. Letter from James Becker, PG&E to NRC, License Amendment Request [LAR] 11-05, "Evaluation Process for New Seismic Information and Clarifying the [DCPP] Safe Shutdown Earthquake" (Oct. 20, 2011) (PG&E Letter DCL-11-097) (ADAMS Accession No. ML11312A166) at Enclosure to PG&E Letter DCL-11-097 (LAR-11-05).

[70] *See* FOE's Reply at 3 (claiming the NRC Staff "negotiated" with PG&E such that PG&E was able to make changes in its UFSAR that accomplished what it sought to do in LAR-11-05).

[71] *Id.* at 17 (quoting *CAN*). Thus, the fact that the NRC Staff did not approve the UFSAR is not dispositive of the issue before the Board. What is dispositive is that FOE has not shown how any Staff action related to UFSAR, Rev. 21, including supposed back door "negotiations" with PG&E, constitutes a *de facto* license amendment.

that *any* NRC action related to UFSAR, Rev. 21, regardless of the name given to the action, has expanded PG&E's operating authority or otherwise altered the terms of the licenses.[72] Instead, FOE's claims inappropriately focus on unapproved licensee actions under 10 C.F.R. § 50.59 and demonstrate a misunderstanding of Diablo Canyon's current design and licensing basis.

a.) No Staff Action

To constitute a *de facto* license amendment, there must be a completed Staff action.[73] FOE claims that the Staff "surreptitiously slipp[ed] changes into the license" through UFSAR, Rev. 21.[74] In support of this claim, FOE notes that UFSAR, Rev. 21 was not publicly available or subject to public review before Dr. Michael Peck's differing professional opinion (DPO) was made public.[75] However, FOE does not indicate how the public or non-public status of a document suggests the NRC made covert changes to UFSAR, Rev. 21 that amended the license or gave PG&E additional authority.[76] Furthermore, the purpose of 10 C.F.R. § 50.71(e) is not to make licensees' FSAR updates subject to an adjudicatory proceeding.[77] Likewise, FOE provides no support for its allegations that the Staff took part in back door "negotiations" with

[72] *See, e.g., id*. at 3 (claiming the NRC Staff negotiated with PG&E on changes made to UFSAR, Rev. 21 and that these negotiated changes effectively amended the license).

[73] *See Perry*, CLI-96-13, 44 NRC at 327. As discussed above and in the Staff's Answer to FOE's Petition to Intervene, the idea of an "ongoing license amendment process" is at odds with Commission and binding federal case law that analyzes a finite completed agency action, not hypothetical future action.

[74] FOE's Reply at 3.

[75] *Id*. at 4.

[76] Under 10 C.F.R. § 50.39, applications and documents submitted to the Commission in connection with applications may be made available for public inspection in accordance with the provisions of the regulations contained in 10 C.F.R. part 2.

[77] Instead, the purpose of the regulation is to ensure that the information included in the FSAR contains the latest information developed. *See* 10 C.F.R. § 50.71(e)(4); 45 Fed. Reg. at 30,615.

PG&E that effectively amended the license.[78] Instead, FOE points to Staff oversight activities, including previous analyses related to the Shoreline Fault,[79] and also claims that PG&E updated its FSAR in a way that requires a license amendment under 10 C.F.R. § 50.59(c)(2).[80]

As the Commission has recently emphasized, Staff oversight activities meant to ensure compliance and unapproved licensee actions under 10 C.F.R. § 50.59 do not constitute *de facto* license amendments.[81] Thus, FOE's *de facto* license amendment claims related to UFSAR, Rev. 21 must fail.

b.) No Change in License or Greater Operating Authority

FOE's UFSAR, Rev. 21 *de facto* claims also fail because FOE does not show any alteration of the license or grant to PG&E of greater operating authority than in its existing licenses.[82] FOE claims that UFSAR, Rev. 21 granted PG&E greater operating authority and altered the license because it accomplished what PG&E's LAR-11-05 sought to do. Specifically, FOE claims UFSAR, Rev. 21: 1) made the Hosgri Earthquake part of Diablo Canyon's design basis; 2) designated the Hosgri Earthquake as the Safe Shutdown Earthquake (SSE); 3) made the Hosgri Earthquake the bounding evaluation by which the predicted ground motion from the

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[78] *See* FOE's Reply at 3 (claiming that there is a *de facto* license amendment "process" because the NRC Staff, through back door negotiations, allowed PG&E to make changes to UFSAR, Rev. 21 that should have required a license amendment).

[79] *Id*. at 16 (citing Letter from Joseph M. Sebrosky, Senior Project Manager, NRC, to Mr. Edward Halpin, Senior Vice President, PG&E, Diablo Canyon Power Plant, Units Nos. 1 and 2 – NRC Review of Shoreline Fault (TAC Nos. ME5306 and ME5307) (Oct. 12, 2012) (ADAMS Accession No. ML120730106)). *See also* i*d*. at 10-11 (citing 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) (ADAMS Accession No. ML12053A340) (10 C.F.R. § 50.54(f) Fukushima Accident Lessons Learned Letter).

[80] *See, e.g., id*. at 16 (citing 10 C.F.R. § 50.59(c)(2)(viii)).

[81] *Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 7, 8). *See also St. Lucie*, CLI-14-11, 80 NRC at 175 (observing that "[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.").

[82] *See Perry,* CLI-96-13, 44 NRC at 327 (must show a staff action and that the action altered the license or granted the licensee additional authority).

Shoreline Fault would be measured; and 4) allowed PG&E to use the methodologies and assumptions of the Long Term Seismic Program (LTSP)[83] in evaluating the Shoreline Fault.[84]

As an initial matter, FOE's claims about what LAR-11-05 sought to do are not entirely correct. In LAR-11-05, PG&E sought to amend the licenses to make the Hosgri Earthquake the Safe Shutdown Earthquake (SSE) for the plant, and to "clearly define an evaluation process for newly identified seismic information and incorporate ongoing commitments associated with the Long Term Seismic Program (LTSP) into the FSARU."[85] Significantly, PG&E did not request to newly incorporate the Hosgri Earthquake into the plant's seismic design basis, and did not ask for a license change to demonstrate that the Shoreline Fault was bounded by the Hosgri Earthquake and the LTSP.

Further, FOE has not shown that any of the changes it claims occurred through UFSAR, Rev. 21 actually did occur, much less that the asserted changes altered the license or granted PG&E greater operating authority. This is not surprising, because UFSAR, Rev. 21 only added text that further described the existing design basis earthquakes in Diablo Canyon's licenses, and referenced oversight activities regarding the Shoreline Fault documented elsewhere. FOE confuses Staff oversight with licensing activities and demonstrates a misunderstanding of the Diablo Canyon design and licensing basis.

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[83] The LTSP was developed based on a license condition in the Diablo Canyon Unit 1 operating license requiring PG&E to continue to evaluate the plant's seismic hazard. Although the Staff concluded in 1991 that the license condition had been fulfilled, PG&E committed to continue to use the LTSP in its evaluation of new seismic information. *See* Staff Answer at 4-5; UFSAR Rev. 21 at 2.5-80 – 81.

[84] *See, e.g.*, FOE's Reply at 3, 9, 12, 13, 17-18.

[85] PG&E Letter DCL-11-097 at 1.

i. The Hosgri Earthquake Has Long Been Part of Diablo Canyon's Design and Licensing Basis

First, FOE claims that UFSAR, Rev. 21 incorporated the Hosgri Earthquake into the Diablo Canyon's design basis.[86] However, as explained in the Staff's Answer to FOE's Petition to Intervene, the Hosgri Earthquake has been part of Diablo Canyon's design and licensing basis since the plant received its operating licenses.[87] Simply put, the Hosgri Earthquake is part of Diablo Canyon's design basis because PG&E conducted evaluations and appropriate plant modifications to demonstrate that the plant's design could withstand the seismic load of an earthquake occurring on the Hosgri Fault. In the operating license proceeding, the Atomic Safety and Licensing Appeal Board acknowledged that Diablo Canyon was appropriately constructed to withstand an earthquake with a ground acceleration of 0.75g from the Hosgri Fault, and affirmed the Licensing Board's decision to use that "figure as the anchor point for determining the basic response spectrum used to evaluate the Diablo Canyon plant's ability to withstand an SSE."[88]

Moreover, in Supplemental Safety Evaluation Report (SSER) 7, the Staff explained that a Hosgri Earthquake of 0.75g "is the basis that we have approved for use in the seismic reevaluation."[89] Indeed, 10 C.F.R. § 50.2 defines "design bases" in part as "the specific values or ranges of values chosen for controlling parameters as reference bounds for design," and

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[86] FOE's Reply at 9. 10 C.F.R. § 54.3(a) states that "plant-specific design-basis information defined in 10 CFR 50.2" is a subset of the "current licensing basis." FOE argues that even if the Hosgri Earthquake was part of Diablo Canyon's current licensing basis prior to UFSAR Rev. 21, it was not part of the plant's design basis. FOE's Reply at 8-9.

[87] *See* NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth at 30-32 (Oct. 6, 2014) (ADAMS Accession No. ML14279A573) (Staff Answer to FOE's Petition to Intervene). *See also* Pacific Gas and Electric Company's Answer to Friends of the Earth Hearing Request at 3-7 (Oct. 6, 2014) (ADAMS Accession No. ML14279A617).

[88] *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 910-11 (1981),*aff'g* in part, LBP-79-26, 10 NRC 453, 490 (1979) (emphasis omitted).

[89] Supplement No. 7 to the Safety Evaluation of the [Diablo Canyon], at 2-4 (May 26, 1978) (ADAMS Accession No. ML14279A129).

"requirements derived from analysis (based on calculation and/or experiments) of the effects of a postulated accident for which a structure, system, or component must meet its functional goals." If a plant is modified and qualified to withstand the higher ground acceleration produced by a larger earthquake, such analyses and modifications are by definition part of the plant's design basis.

Although UFSAR, Rev. 21 is the first version of the FSAR to refer to the Hosgri Earthquake as a design basis earthquake in Chapter 2 of the FSAR, which discusses site characteristics,[90] this does not mean that UFSAR, Rev. 21 has now newly incorporated the Hosgri Earthquake into Diablo Canyon's design and licensing basis. In fact, when the prior UFSAR, Rev. 20[91] described the seismic classification of the plant in Chapter 3, it stated, "Plant features that correspond to Seismic Category I, as identified in SG [Safety Guide] 29, are designed to remain functional during the *design basis earthquakes* that they are required to withstand: the DE (equivalent to the OBE of SG 29), the DDE (equivalent to the SSE of SG 29), and/or the postulated Hosgri Earthquake (HE)."[92] Thus, UFSAR, Rev. 21 merely clarified what has long been the case—that the Hosgri Earthquake is part of Diablo Canyon's existing design and licensing basis because the plant was qualified, through modification and testing, to withstand the calculated seismic load from an earthquake on the Hosgri Fault.

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[90] *See* FOE's Reply at 13-14 (noting the difference between UFSAR, Rev. 20 and Rev. 21 on this point).

[91] Diablo Canyon Power Plant Units 1 and 2 Final Safety Analysis Report Update Revision 20 (Nov. 2011) (ADAMS Accession No.ML15097A229) (UFSAR, Rev. 20).

[92] *Id*. at 3.2-2 (emphasis added). This language has not been modified at least since UFSAR, Rev. 15 in September 2003. *See id.* (date on bottom right of the page).

ii. UFSAR, Rev. 21 Did Not Designate the Hosgri Earthquake as the Safe Shutdown Earthquake

Second, FOE argues that UFSAR, Rev. 21 designated the Hosgri Earthquake as the plant's SSE.[93] But this is incorrect; UFSAR, Rev. 21 states that the Hosgri Earthquake, the Design Earthquake (DE), and the Double Design Earthquake (DDE)[94] are all design basis earthquakes, but does not designate the Hosgri Earthquake as the SSE.[95] Rather, UFSAR, Rev. 21, like previous versions of the FSAR, states that the DDE is the equivalent of Diablo Canyon's SSE.[96] Thus, FOE is incorrect that UFSAR, Rev. 21 accomplishes what PG&E sought to do in LAR-11-05.[97]

iii. UFSAR, Rev. 21's Discussion of the Shoreline Fault Being Bounded By Hosgri Does Not Amend the Licenses

Third, FOE claims that UFSAR, Rev. 21 amended Diablo Canyon's licenses because it stated that a potential earthquake on the Shoreline Fault is bounded by the Hosgri Earthquake.[98] However, UFSAR, Rev. 21 only restates the conclusions of prior analyses such as PG&E's 2011 seismic report and the NRC's Research Information Letter (RIL) 12-01.[99] As

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[93] FOE's Reply at 12.

[94] Because Diablo Canyon's construction permit predates Part 100, Appendix A, Diablo Canyon was originally designed to a DE of 0.2g and a DDE of 0.4g, which were later viewed as being equivalent to a Part 100, Appendix A Operating Basis Earthquake (OBE) and SSE, respectively.

[95] UFSAR, Rev. 21 at 2.5-59.

[96] *Id*. at 3.2-1. The statement that the DDE is equivalent to the SSE has not been modified at least since UFSAR, Rev. 15 in September 2003. *See id.* (date on bottom right of the page).

[97] In LAR-11-05, PG&E asked the NRC for approval to designate the Hosgri Earthquake as the SSE. *See* LAR-11-05 at 2. Further, even assuming FOE was correct that this was the result of the UFSAR change, this does not constitute a *de facto* license amendment because it would be a unilateral, unapproved licensee change to the FSAR.

[98] FOE's Reply at 3, 18.

[99] [PG&E] Report on the Analysis of the Shoreline Fault Zone, Central Coastal California (Jan. 2011) (The documents are available at ADAMS Package Accession No. ML110140431); RIL 12-01, *Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone* (Sept. 2012) (ADAMS Accession No. ML121230035) (RIL 12-01).

explained in the Staff's Answer to FOE's Petition to Intervene, these restatements do not amend the license or grant PG&E greater authority.[100]

When the Shoreline Fault was discovered, both PG&E and the NRC analyzed the new fault to determine whether the predicted ground motions were bound by those for which the plant had been previously evaluated. In several studies, PG&E and the NRC concluded that ground motions calculated for the Hosgri Earthquake bound potential ground motions from the Shoreline Fault, and therefore Diablo Canyon could safely continue to operate within its existing license and with appropriate safety margins.[101] Therefore, neither those studies, nor UFSAR, Rev. 21, changed Diablo Canyon's license.

Moreover, the fact that UFSAR, Rev. 21 states that Shoreline Fault ground motions are bounded by Hosgri Earthquake ground motions does not make the Hosgri Earthquake the SSE, as was requested in LAR-11-05. FOE confuses oversight and enforcement with a licensing action. The Hosgri Earthquake is an established part of Diablo Canyon's design and licensing basis. If potential ground motions from the Shoreline Fault are bounded by the Hosgri Earthquake, it simply means that the plant is safe to operate within its existing design and licensing basis. The Hosgri Earthquake does not need to be designated as the SSE for the Staff or licensee to draw conclusions about the plant's operability.[102]

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[100] *See* Staff Answer to FOE's Petition to Intervene at 26-29.

[101] *See, e.g.*, RIL-12-01 at xii.

[102] The Staff recently considered this in its review of the DPO referenced in FOE's Reply. The Staff concluded that when it comes to operability, Diablo Canyon must demonstrate that it is operating within safe margins. Those seismic margins can be determined by the Hosgri Earthquake and the LTSP, or by other methods. Because the Hosgri Earthquake is part of the design and licensing basis of the plant and its ground motions bound the predicted ground motions of the Shoreline Fault, the Staff found that Diablo Canyon was operating safely within its design basis and did not need a margins assessment. *See generally* Case File for DPO-2013-002, (Case File ADAMS Accession No. ML14252A743), Document 8, DPO Appeal Decision, Memorandum to Michael Peck from Mark Satorius, EDO, Differing Professional Opinions Appeal Decision Involving Seismic Issues at Diablo Canyon (DPO-2013-002) (Sept. 9, 2014).

iv. UFSAR, Rev. 21 Did Not Amend the Licenses By Stating that the Shoreline Fault is Bounded by the LTSP

Fourth, FOE argues that because UFSAR, Rev. 21 states that the Shoreline Fault is bounded by the LTSP, the licenses have been amended to allow PG&E to use the methods and assumptions of the LTSP to analyze the Shoreline Fault.[103] However, UFSAR, Rev. 21 simply restates the conclusions of prior studies, such as RIL-12-01, that Diablo Canyon can continue to operate safely in part because the existing safety margins in the LTSP's ground motion analyses encompass the predicted ground motions from the Shoreline Fault.[104] FOE has not shown that UFSAR, Rev. 21 granted PG&E any greater operating authority or newly incorporated the methods and assumptions of the LTSP into the licenses.[105]

Further, FOE's claim again confuses oversight and licensing.[106] The LTSP's methods and assumptions need not necessarily be incorporated into Diablo Canyon's design and licensing basis to be a useful tool in determining whether Diablo Canyon is operating within existing safety margins.[107] PG&E and the NRC continue to use up-to-date and state of the art

[103] FOE's Reply at 3.

[104] *See, e.g.*, RIL-12-01 at xii.

[105] The LTSP, which began as a license condition, is part of Diablo Canyon's licensing basis. *See* 10 C.F.R. § 54.3(a) (stating that license conditions are part of the CLB). Although the condition has been fulfilled, it has not been removed from the license. *See* Diablo Canyon Nuclear Power Plant, Unit 1, Docket No. 50-275, Facility Operating License, License No. DPR-80, at 7 (revised Feb. 27, 2014) (ADAMS Accession No. ML053140349) (DCPP License) (Condition 2.C.(7) describes the "Seismic Design Bases Reevaluation Program," which is the LTSP). However, the LTSP is not part of Diablo Canyon's seismic design basis. Rather, the initial LTSP study *confirmed* the adequacy of Diablo Canyon's seismic design basis by determining that equipment qualified to the three design basis earthquakes remained qualified. Thus, the LTSP, although part of Diablo Canyon's licensing basis, did not alter the seismic design basis. *See* UFSAR, Rev. 21 at 2.5-59 ("The DE, DDE, and HE are design bases earthquakes and the LTSP is a licensing bases earthquake."); *id.* at 2.5-81 ("the LTSP material does not address or alter the current *design* licensing basis for the plant") (emphasis added).

[106] This confusion is common in *de facto* hearing requests. *See, e.g., Fort Calhoun*, CLI-15-5, 81 NRC __ (Mar. 9, 2015) (slip op. at 6-8) and *St. Lucie*, CLI-14-11, 80 NRC at 175 (noting that petitioners claiming that there were *de facto* license amendments confused oversight with licensing).

[107] Diablo Canyon's technical specifications define a component as "operable" in part "when it is capable of performing its specified safety function(s)." DCPP License, Technical Specifications, at 1.1-4.

methods for determining Diablo Canyon's seismic hazard.[108] FOE has not shown that using a study to support an operability determination amends a license.

Finally, UFSAR, Rev. 21 does not accomplish what PG&E sought to do in LAR-11-05 simply by adding language concerning the LTSP and referencing the conclusion that the Shoreline Fault is bounded by the LTSP.[109] In LAR-11-05, PG&E explained that Diablo Canyon's licensing basis lacked a "a clear process for evaluating new seismic information," and that by adding technical specifications concerning the LTSP to the licensing basis, PG&E sought to "clearly define the evaluation to be performed upon discovery of new seismic information."[110] UFSAR, Rev. 21, however, never states that the LTSP is the definitive method and process for evaluating new seismic information. Rather, it explains the history of the LTSP and restates the conclusions of prior studies demonstrating that the Shoreline Fault is bounded by the LTSP.[111] FOE has not explained how UFSAR, Rev. 21 does anything more.[112]

IV. CONCLUSION

FOE has not shown that the NRC approved PG&E's UFSAR, Rev. 21 or that any other NRC action related to PG&E's UFSAR, Rev. 21 altered the terms of the Diablo Canyon

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(footnote continued …)
Thus, operability is about safety. FOE has not pointed to any requirement or NRC guidance suggesting that everything relied on in making an operability determination must be part of a plant's licensing basis.

[108] *See, e.g.*, 10 C.F.R. § 50.54(f) Fukushima Accident Lessons Learned Letter (asking Diablo Canyon, among other plants, to reevaluate its seismic hazard "using present-day NRC requirements and guidance").

[109] *See* UFSAR, Rev. 21 at 2.5-80 – 82.

[110] LAR-11-05 at 2.

[111] UFSAR, Rev. 21 at 2.5-80 – 82.

[112] As discussed in the Staff's Answer to FOE's Petition to Intervene at 6-7 & 38-39, PG&E withdrew LAR-11-05 in part because the Staff's letters pursuant to 10 C.F.R. § 50.54(f) explained the process for seismic reevaluations and considering new seismic information. PG&E considered the § 50.54(f) letter to obviate the need for any site specific clarification for Diablo Canyon. *See* Letter from Barry Allen, PG&E, to NRC, Withdrawal of 11-05 [LAR 11-05], "Evaluation Process for New Seismic Information and Clarifying the [DCPP] Safe Shutdown Earthquake" , at 2 (Oct. 25, 2012) (ADAMS Accession No. ML12300A105).

operating licenses or granted PG&E greater authority than that provided by its existing licenses. Therefore, FOE has not shown that there is a *de facto* license amendment subject to an AEA hearing opportunity and the Board should deny FOE's request for a hearing.

Respectfully Submitted,

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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
	)	50-323
(Diablo Canyon Power Plant,	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO FRIENDS OF THE EARTH'S *DE FACTO* LICENSE AMENDMENT CLAIMS RELATED TO PG&E'S UPDATED FINAL SAFETY ANALYIS REPORT, REVISION 21" dated June 15, 2015, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 15th day of June, 2015.

/Signed (electronically) by/

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