

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

In the matter of  
Pacific Gas and Electric Company  
Diablo Canyon Nuclear Power Plant  
Units 1 and 2

Docket Nos. 50-275-LR  
50-323-LR

**SAN LUIS OBISPO MOTHERS FOR PEACE'S  
PETITION FOR REVIEW OF MEMORANDUM AND ORDER  
(DENYING MOTIONS TO FILE NEW CONTENTIONS)**

Diane Curran  
Harmon, Curran, Spielberg & Eisenberg, L.L.P.  
1726 M Street N.W. Suite 600  
Washington, D.C. 20036  
202-328-3500  
Fax: 202-328-6918  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Counsel to SLOMFP

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**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.341 and the Order of the Secretary dated August 28, 2015, San Luis Obispo Mothers for Peace (“SLOMFP”) hereby petitions the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) for partial review of the Atomic Safety and Licensing Board’s (“ASLB’s”) Memorandum and Order (Denying Motions to File New Contentions) (Aug. 6, 2015) (“Memorandum and Order”). SLOMFP seeks review of the Memorandum and Order to the extent that it concludes the following contentions are inadmissible: Contention A (Inadequate Consideration of Energy Alternatives), Contention B (Failure to Conduct Cost-Benefit Analysis of Energy Alternatives), and Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis).<sup>1</sup> The Commission should take review because the Memorandum and Order is inconsistent with and contrary to established law and raises important questions of law and policy. *See* 10 C.F.R. §§ 2.341(b)(4)(ii) and 2.341(b)(4)(iii).

**II. FACTUAL AND PROCEDURAL BACKGROUND**

This petition for review concerns three contentions submitted by SLOMFP under the National Environmental Policy Act (“NEPA”), challenging the adequacy of Amendment 2 to PG&E’s Environmental Report (Feb. 25, 2015) or information PG&E asserted would be

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<sup>1</sup> SLOMFP does not seek review of the ASLB’s decision with respect to Contentions B and D.

considered in the Amended Environmental Report. On April 6, 2015, SLOMFP submitted Contention A, which challenges the adequacy of PG&E’s consideration of energy alternatives in its Amended Environmental Report. San Luis Obispo Mothers for Peace’s Motion to File New Contentions Regarding Adequacy of Environmental Report for Diablo Canyon License Renewal Application”) (“4/6/15 SLOMFP Motion”). On April 15, 2015, SLOMFP submitted Contention C, which challenged the adequacy of seismic inputs and analyses whose results PG&E assertedly intended to consider in its Severe Accident Mitigation Analysis (“SAMA Analysis”) in the future. San Luis Obispo Mothers for Peace’s Motion to File New Contentions Regarding Adequacy of Severe Accident Mitigation Alternatives Analysis for Diablo Canyon License Renewal Application (“4/15/15 SLOMFP Motion”). Both Motions were opposed by PG&E and the NRC Staff, and the ASLB ruled the contentions were inadmissible in the Memorandum and Order.

### **III. ARGUMENT**

#### **A. The ASLB Commission Should Take Review of the Memorandum and Order With Respect to Contention A.**

The ASLB’s decision regarding Contention A raises significant question of law and policy regarding the effect of the most recent revision to the License Renewal Generic Environmental Impact Statement (“GEIS”)<sup>2</sup> on previous Commission decisions. In addition, SLOMFP respectfully submits that the ASLB erred by ruling that NRC precedents pre-dating the 2013 License Renewal GEIS allowed PG&E to confine its alternative energy analysis to alternative sources of baseload power rather than considering combinations of non-baseload

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<sup>2</sup> Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437, June 2013).

renewable energy sources, energy efficiency and demand-side management.<sup>3</sup> The ASLB relied on precedents that referenced the original 1996 License Renewal GEIS, which has now been superseded by a markedly different analysis in the revised 2013 License Renewal GEIS.

Contention A asserts that PG&E's Amended Environmental Report is inadequate to satisfy NEPA and 10 C.F.R. § 51.53(c)(2) because it does not evaluate a reasonable array of alternatives that either currently are commercially viable or will become so in the near term (*i.e.*, within the next ten years). SLOMFP disputes PG&E's reliance on the outdated concept that "any alternative that could not replace the baseload capacity generation of DCPD [is] an unreasonable alternative." Amended Environmental Report at 7.1-1. Contention A also challenges PG&E's refusal to give serious consideration to the alternative of combined renewable energy sources, efficiency and demand side management. Instead, the only combined-energy-sources alternative considered by PG&E relied heavily on natural gas, which has the significant adverse environmental impact of carbon emissions. Amended Environmental Report at 7.2-3 and 7.2-4 – 7.2-5. With support from SLOMFP's expert, Mark Cooper, SLOMFP raised a genuine dispute with PG&E regarding the reasonableness of its refusal to consider a combined-energy-source alternative that did *not* include natural gas.

In arguing that reliance on baseload generation is now outdated, Contention A cites the 2013 revision to the License Renewal GEIS, which effectively abandoned the NRC's previous determination that alternative energy sources must provide baseload power. Instead, the new GEIS recognized that the energy sector is changing so rapidly it is no longer possible to reach generic conclusions:

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<sup>3</sup> These precedents, cited in the Memorandum and Order at 8 n.37, include *NextEra Energy Seabrook LL* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301 (2012) and *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC 393 (2012).

**Recent advances in (replacement power alternatives.** Several commenters asserted that much of the information describing replacement power alternatives did not reflect the state-of-the-science. In some cases, commenters noted facts and events that occurred after the publication date of the draft GEIS.

The NRC has updated the final GEIS to incorporate the latest information on replacement power alternatives, but it is inevitable that rapidly evolving technologies will outpace information presented in the GEIS. Incorporation of this information is more appropriately made in the context of plant-specific license renewal reviews, rather than in the GEIS. As with renewable energy technologies, energy policies are evolving rapidly. While the NRC acknowledges that legislation, technological advancements, and public policy can underlie a fundamental paradigm shift in energy portfolios, the NRC cannot make decisions based on anticipated or speculative changes. Instead, the NRC considers the status of alternatives and energy policies when conducting plant-specific environmental reviews.

*Id.* at 1-30 – 1-31.

Although the License Renewal GEIS clearly allows the ASLB to make a case-specific evaluation that does not presume the necessity of reliance on baseload power, the ASLB concluded that it was bound by earlier decisions. Memorandum and Order at 8-9 (citing *Seabrook*, CLI-12-05; and *Davis-Besse*, CLI-12-08). Those decisions require a contention to demonstrate the availability of energy sources to substitute fully for the baseload power generated by the reactor. The ASLB erred by rejecting out of hand SLOMFP's assertion that efficiency and demand-side-management could reduce the demand for baseload power during the license renewal term. Memorandum and Order at 9.

In addition to the ASLB's legal error, its decision raises the question of whether the 2013 License Renewal GEIS is actually an effective document, or whether the Commission intends to allow the Staff and ASLB to rely on decisions that interpret the 1996 License Renewal GEIS. SLOMFP respectfully requests the Commission to clarify that the 2013 License Renewal GEIS, which recognizes the fast-changing nature of the energy sector and the increasing role of

renewable energy and demand-side-management, governs NEPA reviews of alternative energy analyses.

The ASLB also erred by concluding that PG&E could be excused from considering an all-renewables/efficiency/demand-side-management alternative because that alternative is not PG&E's "preference." Memorandum and Order, slip op. at 9. PG&E itself does not express any business preference for an alternative that includes natural gas, but instead states that any other alternative is not possible. Amended Environmental Report at 7.2-4 – 7.2-5. SLOMFP raised a genuine dispute with PG&E, relying on PG&E's own data, regarding the reasonableness of PG&E's conclusion. While the ASLB claimed that SLOMFP and Mr. Cooper provided no "evidence" that a combination of renewables, efficiency and demand-side-management could replace Diablo Canyon within ten years, in fact Contention C provides substantial evidence of the viability and rapid growth of these technologies, and is also supported by Mr. Cooper's substantial and expertise. The Board effectively reached the merits by weighing Mr. Cooper's supported opinions against the statements in the Amended Environmental Report, and by failing to credit Mr. Cooper's expert opinion.

**B. The ASLB Commission Should Take Review of the Memorandum and Order With Respect to Contention C.**

Contention C asserts that PG&E's analysis of severe accident mitigation alternatives ("SAMA Analysis") is inadequate to satisfy the National Environmental Policy Act ("NEPA") or NRC implementing regulation 10 C.F.R. § 51.53(c)(ii)(L) because PG&E proposes to rely on the results of PG&E's recently-submitted and seriously deficient post-Fukushima seismic risk analysis for its evaluation of the cost-effectiveness of measures to mitigate earthquake impacts.<sup>4</sup>

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<sup>4</sup> PG&E's 2015 seismic hazards analysis consists of two documents: Pacific Gas and Electric Co., Seismic Hazard and Screening Report, Diablo Canyon Power Plant Units 1 and 2 ("SHS

Contention C is supported by the attached Declaration of Dr. David D. Jackson, Professor of Geophysics Emeritus at the University of California at Los Angeles.

In dismissing Contention C, the ASLB committed clear factual and legal errors by ignoring and mischaracterizing the claims of the contention, and by applying erroneous legal standards by which it impermissibly judged the merits of the contention and shifted the burden of proof from PG&E to SLOMFP. Therefore the decision warrants Commission review. 10 C.F.R. § 2.341(b)(4)(i), (ii).<sup>5</sup>

First, the ASLB impermissibly restricted the scope of NEPA by ruling that:

PG&E's 2015 seismic reevaluation, which was submitted in response to the NRC Staff's request pursuant to section 50.54(f), is being reviewed by the NRC in a Part 50 process specifically designed to consider the adequacy of the Diablo Canyon plant's current licensing basis. *Insofar as Contention C alleges deficiencies in that seismic reevaluation per se, this Part 54 license renewal proceeding is not a proper forum for litigation of section 50.54(f) licensing basis issues with no connection to any SAMA.*

Memorandum and Order, slip op. at 16 (emphasis added).

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Report”), submitted by letter from Barry S. Allen, PG&E to NRC, re: 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 (Mar. 11, 2015) (“SHS Report”); and PG&E’s Seismic Source Characterization for the Diablo Canyon Power Plant, San Luis Obispo County, California; report on the results of a SSHAC level 3 study (Rev. A, March 2015) (“SSC Report”).

<sup>5</sup> In a footnote, the ASLB ruled that Contention C was premature. Memorandum and Order at 17 n.75. Nevertheless, the ASLB ruled on the admissibility of the contention. SLOMFP notes that it exercised an abundance of caution in filing Contention C when PG&E submitted the SHS and SSC Reports to the NRC rather than waiting for supplementation of the SAMA Analysis. In light of the Commission’s rule that contentions must be raised as soon as information becomes available, and in light of the fact that PG&E had said only that it would incorporate the “results” of the SHS and SSC into its SAMA Analysis rather than committing to also incorporate the underlying data and methods, SLOMFP submitted the contention within 30 days of obtaining the SHS and SSC Reports (in April 2015). Since then, PG&E has submitted a supplement to its SAMA Analysis and SLOMFP has submitted an Amended Contention C, which is now pending before the ASLB.

The ASLB's holding violates NEPA by restricting, without a statutory basis, the scope of NEPA to exclude consideration of relevant information about environmental risk. NEPA must be complied with "to the fullest extent possible." *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1977); *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1034-35 (9th Cir. 2006). To fulfill this mandate, information that is relevant to the environmental analysis for a proposed licensing decision must be considered unless the NRC is excused by another statute. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1034-35. The fact that the information was gathered under the Atomic Energy Act does not preclude its consideration under NEPA because, as the Commission has recognized, the Atomic Energy Act "does not limit NEPA." *Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, CLI-01-17, 54 NRC 3, 13 (2001).<sup>6</sup>

Here, the information presented in the SSC and SHS is, by its own terms, relevant to the SAMA Analysis because it concerns the reliability of inputs to the SAMA Analysis concerning the characteristics and severity of the earthquake risk posed by Diablo Canyon.<sup>7</sup> In fact, PG&E effectively conceded the relevance of the SHS and SSC Reports to its SAMA Analysis by proposing to supplement its SAMA Analysis with the "results" of the studies. *See* 4/15/15

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<sup>6</sup> *See also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 9-10 (2002). In *Duke Energy Corp.*, the Commission affirmed the admission of a contention that a SAMA analysis for renewal of a reactor should have considered the results of an NRC-sponsored safety study prepared by Sandia National Laboratories for completely different purposes. 56 NRC at 9-10.

<sup>7</sup> The information was prepared and submitted by PG&E in response to a post-Fukushima request for information designed by the NRC to help it determine "whether further regulatory action [is] needed in the areas of seismic and flooding design" and to "decide upon the most appropriate regulatory action focusing on the most beneficial safety enhancements." Memorandum to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status re: 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 at 2 (Mar. 12, 2012).

SLOMFP Motion at 2 (citing Amended Environmental Report at F-34). Accordingly, the ASLB committed clear legal error by ruling that the information in the SSC and SHS is irrelevant to the SAMA Analysis.

Second, the ASLB committed clear legal and factual errors in judging the adequacy of Contention C to meet NRC admissibility standards for SAMA contentions. As the ASLB acknowledged, a contention challenging a SAMA analysis must set forth “a supported contention pointing to an apparent *error or deficiency* that may have significantly skewed the environmental conclusions [of the SAMA analysis].” Memorandum and Order at 16 (quoting *Davis-Besse*, CLI-12-08, 75 NRC at 407 (emphasis in original)). But the ASLB ignored SLOMFP’s specific and well-supported criticisms of the data and methods relied on by PG&E for its earthquake risk estimates, instead arbitrarily characterizing the contention as the mere expression of SLOMFP’s “desire” for an alternative approach that was no better than PG&E’s approach. Memorandum and Order at 17. According to the ASLB, Contention C merely offered “some alternate approach, some additional detail to include, some refinement.” *Id.* at 16 (quoting *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012)).

At the outset, in ruling that Dr. Jackson’s arguments were unpersuasive, the ASLB committed legal error by relying on the fact that Dr. Jackson’s views “were in fact considered and discussed during development of the 2015 seismic analysis.” Memorandum and Order, slip op. at 16. The fact that PG&E’s own consultants considered and rejected the criticisms expressed by Dr. Jackson in Contention C only serves to confirm the existence of a dispute between the parties warranting the admission of the contention. 10 C.F.R. § 2.309(f)(2). To credit PG&E’s rejection of Dr. Jackson’s views at this stage of the proceeding constitutes an impermissible

merits determination. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443 (2011); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 9-10 (2002). Furthermore, by giving weight to PG&E's rejection of Dr. Jackson's opinions in its dismissal of Contention C, the ASLB improperly shifted the burden of proof from PG&E to SLOMFP. 10 C.F.R. § 2.325.

The ASLB also devised and applied a new, additional standard for admissibility of Contention C that impermissibly reached the merits of the contention: whether or not the SAMA Analysis was "plausibly reasonable." According to the ASLB, it dismissed Contention C because SLOMFP "fail[ed] to show that the approach taken by PG&E is not plausibly reasonable." Memorandum and Order, slip op. at 16. This new standard constitutes a significant departure from the Commission's established standard, *i.e.*, whether a contention has identified "a deficiency that plausibly could alter the overall result of the [SAMA] analysis in a material way."). *Pilgrim*, CLI-12-15, 75 NRC at 714.<sup>8</sup> Rather than judging whether Contention C's criticisms were plausible for purposes of raising a material dispute with PG&E about the reasonableness or adequacy of the data and methods supporting PG&E's SAMA Analysis, the ASLB effectively resolved the dispute on the merits by judging the plausibility of SAMA Analysis against SLOMFP's criticisms. Such a merits determination must await the conclusion of a hearing.

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<sup>8</sup> See also *Seabrook*, CLI-12-05, 75 NRC 301, 323 (2012) (contention must show it is "genuinely plausible that inclusion of an additional factor or use of other assumptions and models may change the cost-benefit conclusions for the SAMA candidates evaluated."); *Davis-Besse*, CLI-12-08, 75 NRC at 407 (quoting *Seabrook*, CLI-12-05, 75 NRC at 323) (contention must provide "some factual or expert basis for why the proposed changes in the analysis are warranted (e.g., why the inputs or methodology used is unreasonable, and the proposed changes or methodology would be more appropriate.)").

In addition, the ASLB grossly mischaracterized the claims of Contention C as mere suggestions of possible alternatives that would have no demonstrable effect on the SAMA Analysis. Contrary to the ASLB's characterization, Contention C clearly and specifically identifies deficiencies in PG&E's data and methods, explains in detail why these omissions could have a significant effect on the results of the analysis, and discusses how they can and should be cured. *See* 4/15/15 SLOMFP Motion at 5-12. For instance, Contention C challenges PG&E's failure to locate nearby earthquakes by collecting offshore earthquake data or by analytically accounting for the significant uncertainty caused by the failure to collect that data. The contention explicitly asserts that PG&E's failure to either collect the data or compensate for the uncertainty caused by the lack of data prevents PG&E from "reasonably rely[ing] on the SSC Report's results in its SAMA Analysis." 4/15/15 SLOMFP Motion at 7. The contention also explains in detail the technical reasons for the assertion, including PG&E's failure to follow "the well-established method for California earthquake mapping." *Id.* Similarly, SLOMFP asserts that PG&E understates the magnitude of potential large earthquakes by using a method that "has been demonstrated to be unsupportable." *Id.* at 8. Furthermore, the contention criticizes assumptions by PG&E that are "purely subjective" because they are not supported by data, and in fact are contradicted by experience. *Id.* at 8-9. And, contrary to the ASLB's conclusion (Memorandum and Order at 17), Contention C proposes methodologies that PG&E should use to correct the inadequacies of its analysis, and explains why they are necessary. *See* 4/15/15 SLOMFP Motion at 6-7 and n.6 (proposing methods for correction of PG&E's errors with respect to location of earthquakes and explaining that these corrections could show earthquakes "much closer to DCP than the assumed fault geometry under any of the options considered by PG&E), *id.* at 11-12 (proposing measures for correction of PG&E's failure to account for potential large earthquakes

and discussing the potential effect of these corrections on PG&E’s analysis). All of the technical assertions in Contention C are based on the knowledge and expert opinion of Dr. Jackson, a highly qualified seismologist. Thus, Contention C more than satisfies the requirement to provide “some factual or expert basis for why the proposed changes in the analysis are warranted (e.g., why the inputs or methodology used is unreasonable, and the proposed changes or methodology would be more appropriate.)” *Davis-Besse*, CLI-12-08, 75 NRC at 407; *Seabrook*, CLI-12-05, 75 NRC at 323.<sup>9</sup>

Finally, the ASLB legally erred by holding that SLOMFP must show the effect of deficiencies in PG&E’s underlying seismic risk analysis on the question of “whether any particular safety enhancement would ‘be cost-effective to implement.’” Memorandum and Order at 17. As the Commission has held, criticisms of the details of a SAMA analysis are not required where a contention asserts that significant information or inputs have been omitted from the analysis as a whole. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 442-43 (2011); *Duke Energy Corp.*, CLI-02-17, 56 NRC at 9-10. *See also Davis-Besse*, CLI-12-08 (judging a contention that questioned the reasonableness of meteorological inputs to a SAMA Analysis without also requiring a demonstration of whether the inputs affected a particular SAMA).

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<sup>9</sup> To the extent that the ASLB may have reached its conclusion based on the fact that SLOMFP asserted that correction of the deficiencies *could* have a material effect on the results of the SAMA Analysis rather than that they *would* have a material effect, the ASLB legally erred: SLOMFP is only required to show that “inclusion of an additional factor or use of other assumptions and models *may* change the cost-benefit conclusions for the SAMA candidates evaluated.” *NextEra Energy Seabrook, L.L.C.* (Seabrook, CLI-12-05, 75 NRC 301, 323 (2012) (emphasis added). *See also Davis-Besse*, CLI-12-08, 75 NRC at 406 (requiring a showing of an “error or deficiency that *may* have significantly skewed the environmental conclusions. . .”) (emphasis added).

#### IV. CONCLUSION

For the foregoing reasons, the Commission should take review of the Memorandum and Order and reverse it.

Respectfully submitted,

*[Electronically signed by]*

Diane Curran

Harmon, Curran, Spielberg & Eisenberg, L.L.P.

1726 M Street N.W. Suite 600

Washington, D.C. 20036

202-328-3500

Fax: 202-328-6918

E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Counsel to SLOMFP

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CERTIFICATE OF SERVICE**

I certify that on September 14, 2015, I posted on the NRC's Electronic Information Exchange SAN LUIS OBISPO MOTHERS FOR PEACE'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER(DENYING MOTIONS TO FILE NEW CONTENTIONS). It is my understanding that as a result, the NRC Commissioners, Atomic Safety and Licensing Board, and parties to this proceeding were served.

Respectfully submitted,

*Electronically signed by*

Diane Curran

Harmon, Curran, Spielberg & Eisenberg, L.L.P.

1726 M Street N.W. Suite 600

Washington, D.C. 20036

202-328-3500

Fax: 202-328-6918

E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)