

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

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

Docket No. 50-275

Docket No. 50-323

ASLBP No. 15-941-05-LA-BD01

September 28, 2015

MEMORANDUM AND ORDER

(Denying Petition to Intervene and Request for Hearing)

Before the Board, on referral by the Commission,¹ is a limited portion of a petition for intervention and request for hearing by Friends of the Earth (FOE) in what FOE characterizes as a de facto license amendment proceeding involving the operating licenses held by Pacific Gas & Electric Company (PG&E) for Diablo Canyon Power Plant Units 1 and 2.² Specifically, the Commission has referred the question of whether FOE has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act of 1954, as amended (AEA).³ Because we conclude that the NRC has

¹ See CLI-15-14, 81 NRC ___, ___ (slip op. at 2) (May 21, 2015).

² Petition to Intervene and Request for Hearing by Friends of the Earth (Aug. 26, 2014) (Petition).

³ CLI-15-14, 81 NRC at ___ (slip op. at 2).

neither granted PG&E greater authority than that provided by its existing licenses nor otherwise altered the terms of those licenses, we determine that FOE is not entitled to an opportunity to request a hearing pursuant to AEA section 189a.

I. BACKGROUND

As has been observed, “[s]eismology is an evolving science.”⁴ The history of the Diablo Canyon plant bears this out. In the nearly fifty years since construction began,⁵ two faults in close proximity to the plant have been discovered. The Hosgri Fault was identified during construction, and spurred extensive reanalysis and modifications of the plant’s design.⁶ The seismic safety of the plant was reviewed in a contested evidentiary hearing. The Licensing Board in that matter ruled, and the Atomic Safety and Licensing Appeal Board affirmed,⁷ that the Hosgri Fault had been adequately evaluated, and the plant’s safety reasonably assured, as the plant would conservatively withstand the potential effects of earthquakes associated with the Hosgri Fault.⁸

More recently, in 2008, the Shoreline Fault—which allegedly runs within a mere 300 meters of the plant’s intake structure⁹—was identified. A preliminary assessment by the NRC

⁴ Pac. Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 913 (1981).

⁵ The construction permit for Unit 1 was issued in 1968 and for Unit 2 in 1970. See Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit No. 2), LBP-74-60, 8 AEC 277, 277-78 (1974). Operating licenses for Units 1 and 2 respectively were issued in 1984 and 1985. CLI-15-14, 81 NRC at ___ (slip op. at 2-3).

⁶ See Pac. Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453, 470, 501-05 (1979).

⁷ Diablo Canyon, ALAB-644, 13 NRC at 996. A small portion of the opinion, concerning an unrelated matter, i.e., security plan issues, was not affirmed. Id.

⁸ See Diablo Canyon, LBP-79-26, 10 NRC at 478, 499.

⁹ Petition at 1.

Staff in 2009 found the plant safe,¹⁰ and a more detailed assessment in 2012 determined that “[t]he NRC’s conservative estimates for the potential ground motions from the Shoreline fault are at or below the ground motions for which the [Diablo Canyon plant] has been evaluated previously and demonstrated to have reasonable assurance of safety.”¹¹ Diablo Canyon’s seismic safety, like that of all nuclear power plants in the United States, is also being reviewed under the NRC’s post-Fukushima lessons learned and information-gathering process pursuant to 10 C.F.R. § 50.54(f), which authorizes the NRC to collect information from licensees “to determine whether or not the license should be modified, suspended, or revoked.”¹²

This is the context within which, on August 26, 2014, FOE filed its petition to intervene and request for hearing before the Commission. FOE alleges, inter alia, that the NRC Staff has permitted the Diablo Canyon reactors to operate outside their licensing basis, as FOE alleges the plant’s seismic design basis does not encompass the seismic risk associated with the Shoreline Fault, and that this alleged permission amends the license de facto.¹³ On October 6,

¹⁰ NRC, Research Information Letter 09-001, Preliminary Deterministic Analysis of Seismic Hazard at Diablo Canyon Nuclear Power Plant from Newly Identified “Shoreline Fault” (Apr. 2009) (ADAMS Accession No. ML090330523).

¹¹ NRC, Research Information Letter 12-01, Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone at xii (Sept. 2012) (ADAMS Accession No. ML121230035) (2012 Assessment).

¹² Letter from Joseph M. Sebrosky, Senior Project Manager, NRC, to Edward D. Halpin, Senior Vice President, PG&E, Diablo Canyon Power Plant, Unit Nos. 1 and 2—NRC Review of Shoreline Fault at 1 (Oct. 12, 2012) (ADAMS Accession No. ML120730106); see also Letter from Eric J. Leeds and Michael R. Johnson, NRC, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, Request for Information Pursuant to Title 10 of the Code of Federal Regulations 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident (Mar. 12, 2012) (ADAMS Accession No. ML12053A340) (March 2012 Letter).

¹³ Petition at 29-70.

2014, PG&E, the NRC Staff,¹⁴ and the Nuclear Energy Institute (NEI), as an amicus curiae,¹⁵ filed briefs in opposition. FOE filed its reply on October 14, 2014.¹⁶

On May 21, 2015, the Commission referred a limited portion of FOE's hearing request to the Atomic Safety and Licensing Board Panel.¹⁷ The scope of the referral is "limited to whether the NRC granted PG&E greater authority than that provided by its existing licenses or otherwise altered the terms of PG&E's existing licenses, thereby entitling Friends of the Earth to an opportunity to request a hearing pursuant to AEA section 189a."¹⁸

Supplemental briefs are also before the Board. In accordance with the Commission's directive,¹⁹ the Board allowed²⁰ briefs by PG&E and the NRC Staff in response to an argument initially raised in FOE's reply concerning PG&E's Updated Final Safety Analysis Report

¹⁴ Pacific Gas and Electric Company's Answer to Friends of the Earth Hearing Request (Oct. 6, 2014); NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth (Oct. 6, 2014) (NRC Staff Answer).

¹⁵ Nuclear Energy Institute Motion for Leave to File Amicus Curiae Brief (Oct. 6, 2014); Amicus Curiae Brief of the Nuclear Energy Institute in Response to Friends of the Earth Hearing Request (Oct. 6, 2014).

¹⁶ 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) (Reply); see also Licensing Board Notice and Order (Scheduling Oral Argument) (June 2, 2015) at 3 (unpublished) (granting NEI's Motion for Leave to File Amicus Curiae) (Scheduling Order).

¹⁷ CLI-15-14, 81 NRC at __ , __ (slip op. at 2, 12). Some portions of the request were denied. Others, such as FOE's underlying safety concerns, were referred to the Executive Director for Operations for consideration pursuant to 10 C.F.R. § 2.206. Id. at __ , __ (slip op. at 2, 11). In response to the Commission's referral, this Board was established on the same day by order of the Chief Administrative Judge. Licensing Board Order (Establishment of Atomic Safety and Licensing Board) (May 21, 2015) (unpublished).

¹⁸ CLI-15-14, 81 NRC at __ (slip op. at 7).

¹⁹ Id. at __ (slip op. at 8).

²⁰ Scheduling Order at 2.

(UFSAR) Revision 21.²¹ Also, in response to FOE's motion to allow briefing concerning events that had taken place since its initial Petition to the Commission,²² the Board permitted short supplemental briefs, without ruling on "which (if any) intervening events might be relevant."²³ Accordingly, FOE filed its supplemental brief on June 19, 2015,²⁴ and, on June 26, 2015, PG&E and the NRC Staff filed responses.²⁵ Oral argument was held in Rockville, Maryland on July 9, 2015.²⁶

II. ANALYSIS

A. Standing

FOE alleges that it is a national non-profit environmental organization.²⁷ It bases its claim to standing on the interests of five individual members, who allege that the operation of Diablo Canyon, without proper seismic analysis, risks harm to their personal health, safety, economic, aesthetic, and environmental interests.²⁸

²¹ Pacific Gas and Electric Company's Supplemental Brief Regarding UFSAR Revision 21 (June 15, 2015). NRC Staff Answer to Friends of the Earth's De Facto License Amendment Claims Related to PG&E's Updated Final Safety Analy[s]is Report, Revision 21 (June 15, 2015).

²² Petitioner Friends of the Earth's Motion to Allow Supplemental Briefing (June 5, 2015).

²³ Licensing Board Order (Allowing Supplemental Briefing) (June 12, 2015) (unpublished).

²⁴ Petitioner Friends of the Earth's Supplemental Brief (June 19, 2015) (Supplemental Brief).

²⁵ Pacific Gas and Electric Company's Response to FOE's Supplemental Brief (June 26, 2015); NRC Staff Response to the Friends of the Earth's Supplemental Brief (June 26, 2015) (NRC Staff Supplemental Response).

²⁶ Tr. at 1-130. Two days before the oral argument the Board received an unsolicited limited appearance statement from a former NRC Commissioner, Dr. Victor Gilinsky. The statement was accepted without opposition, but, in accordance with 10 C.F.R. § 2.315(a), Dr. Gilinsky's statement is not "considered evidence in the proceeding." See Licensing Board Order (Allowing Limited Appearance Statement of Dr. Gilinsky) (July 15, 2015) (unpublished).

²⁷ Petition at 71.

²⁸ Id. at 72-73.

The NRC Staff challenges FOE's standing; PG&E does not. The Staff argues that, even if there were a de facto license amendment proceeding to trigger the opportunity for a hearing under section 189a of the AEA, the alleged harm to FOE's members is too attenuated to establish standing.²⁹

Because we conclude that FOE fails to demonstrate the existence of a licensing action subject to AEA hearing rights, we need not address the issue of standing.³⁰

B. Timeliness & Scope

For similar reasons, the Board need not rule on whether FOE's petition is timely.³¹ The Board has concerns as to the timeliness of matters that were raised for the first time in FOE's Supplemental Brief—all of which took place before the Commission's referral and most of which could have been brought to the Commission's attention earlier.³²

²⁹ NRC Staff Answer at 43-47; see also Petition at 71-87.

³⁰ See Omaha Pub. Power Dist. (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 333 (2015) (Commission did not reach standing question because it denied de facto license amendment petition on the merits).

³¹ See id. Again, the NRC Staff—but not PG&E—challenges the timeliness of FOE's original petition to the Commission. See Petition at 87-92 (arguing that the timeliness requirement of § 2.309(b) does not apply because no formal proceeding has been commenced, but that if the requirement does apply, that FOE has demonstrated "good cause" for the Commission to entertain an untimely petition); NRC Staff Answer at 47-48 (arguing that the Petition does not satisfy timeliness requirements as it is based on actions taken in 2012 and that the Petition is not based on new information).

³² At oral argument, FOE's counsel acknowledged that FOE had no real excuse for not bringing new developments to the Commission's attention during the almost nine-month period in which its Petition remained pending before the Commission. Tr. at 37-40. The NRC Staff appears to suggest that a petitioner is powerless to update its petition without going through the formality of filing "a new or amended contention or a separate petition to allow for the consideration of additional claims"—and satisfying both the late-filed criteria in 10 C.F.R. § 2.309(c) and the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). NRC Staff Supplemental Response at 7-8. The Board does not agree. There is a difference between asserting genuinely new arguments and alerting the tribunal to new, additional support for an existing argument. Cf. Fed. R. App. P. 28(j).

Moreover, it is questionable whether—regardless of their timeliness—these subsequent events are within the scope of the Commission’s limited referral.³³

Ultimately, however, it makes no difference. The Board concludes that none of the events on which FOE relies—in its Petition, in its Reply or in its Supplemental Brief—establishes that the NRC has granted a de facto license amendment in connection with the Diablo Canyon facility.

C. Contentions

In its Petition, FOE proffered two contentions.

Contention 1 states:

Because NRC is conducting a de facto license amendment proceeding that has significant safety implications, petitioner is entitled to a public hearing under section 189a of the Atomic Energy Act.³⁴

Contention 2 states:

NRC Staff’s determination that the new seismic information, including the Shoreline Earthquake and its effect on the San Luis Bay and Los Osos Faults, is a lesser-included case within the Hosgri Earthquake is insuffic[i]ent to insure that Diablo Canyon is operating safely with an adequate margin of safety.³⁵

Contention 1 presents the same issue that the Commission has most clearly referred to the Board: that is, “whether Friends of the Earth has identified an NRC activity that requires an

³³ See, e.g., NRC Staff Supplemental Response at 2-6. Ironically, only Commissioner Svinicki—who dissented from referring FOE’s petition to a Licensing Board—suggested that the Board’s role would necessarily require expanding the record, rather than ruling solely on the grounds that FOE previously presented to the Commission. CLI-15-14, 81 NRC at ___ n.2 (slip op. at 1 n.2) (Svinicki, Comm’r, concurring in part and dissenting in part) (“While I find that Friends of the Earth’s hearing request lacks sufficient information to show a de facto license amendment, I recognize that the majority’s referral will provide Friends of the Earth with a chance to develop its position further. Thus, should the Commission be called upon to provide another ruling in this proceeding, the issue we consider then will be different than the one before us today. At that time, I will consider, afresh, the record as it exists, including the additional arguments and potential factual positions that will be developed as a result of this referral.”).

³⁴ Petition at 29.

³⁵ Id. at 47.

opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act of 1954, as amended.”³⁶ There may be some question as to whether—if the Board were to rule in FOE’s favor on this issue—the Commission intended for the Board to then address the admissibility of Contention 2.³⁷ Because we conclude that FOE has not established an opportunity to request a hearing, however, we need go no further, and do not reach the admissibility of Contention 2.

Section 189a of the AEA requires the NRC to provide an opportunity for hearing “[i]n any proceeding under this [Act], for the granting, suspending, revoking, or amending of any license.”³⁸ Therefore, AEA section 189a hearing rights are triggered when a licensee submits a license amendment request to the NRC.

Additionally, the Commission has recognized—although it appears never to have actually confronted—other circumstances that might be tantamount to a license amendment. Hearing rights may also be triggered when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing. As the Commission has explained, a de facto license amendment would exist, and hearing rights would be triggered, if the NRC were to grant a licensee “greater operating authority” or otherwise alter “the terms of the license” or permit the licensee to go beyond its existing license authority.³⁹

³⁶ CLI-15-14, 81 NRC at ___ (slip op. at 2).

³⁷ Compare id. (“We refer a limited portion of the hearing request to the Atomic Safety and Licensing Board Panel to determine whether Friends of the Earth has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act of 1954, as amended (AEA).”), with id. at ___ (slip op. at 8-9) (“[T]his referral includes such threshold issues as standing, timeliness, and satisfaction of contention admissibility standards in accordance with 10 C.F.R. § 2.309. [W]e direct the Board to rule on whether Friends of the Earth’s hearing request should be granted” (emphasis added)).

³⁸ 42 U.S.C. § 2239(a)(1)(A).

³⁹ Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996). In applying this standard, as directed by the Commission, the Board attaches little if any significance to the fact that, after discovery of the Shoreline Fault, PG&E initially elected to seek a license amendment, but then withdrew that request. See Letter from James

Where, on the other hand, NRC approval does not permit a licensee to operate in any greater capacity than originally authorized and all relevant safety regulations and license terms remain applicable, NRC approval does not amend the license.⁴⁰ A de facto license amendment proceeding is not initiated merely because a licensee takes an action that requires some type of NRC approval,⁴¹ or because a licensee makes a change to its facility that is allowed under 10 C.F.R. § 50.59 without prior NRC approval.⁴²

Nor may a petitioner create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis. Such claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA section 189a.⁴³ For example, when a former NRC senior resident inspector at Diablo Canyon issued a Differing Professional Opinion (DPO) regarding PG&E's

Becker, Site Vice President, PG&E, to NRC, License Amendment Request 11-05, "Evaluation Process for New Seismic Information and Clarifying the Safe Shutdown Earthquake" (Oct. 20, 2011) (ADAMS Accession No. ML11312A166); see also Letter from Barry Allen, Site Vice President, PG&E to NRC, Withdrawal of License Amendment Request 11-05, "Evaluation Process for New Seismic Information and Clarifying the Safe Shutdown Earthquake" (Oct. 25, 2012) (ADAMS Accession No. ML12300A105). We are not persuaded by FOE's argument that PG&E's actions in this regard are probative of whether the NRC Staff eventually granted PG&E greater authority or otherwise altered the terms of PG&E's licenses. See Petition at 34-38.

⁴⁰ Perry, CLI-96-13, 44 NRC at 328.

⁴¹ See id. at 321. Judicial case law provides several examples of NRC approvals that did not trigger section 189a hearing rights. See, e.g., Massachusetts v. NRC, 878 F.2d 1516, 1521 (1st Cir. 1989) (NRC authorization to restart plant, following NRC Staff's review of forty-seven ordered modifications, not a license amendment); In re Three Mile Island Alert, Inc., 771 F.2d 720, 729-30 (3d Cir. 1985) (decision lifting license suspension and authorizing restart under stipulated conditions not a license amendment); San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984) (lifting of a license suspension not a license amendment), reh'g en banc on other grounds, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986).

⁴² Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101-02 (1994); see infra text accompanying notes 62-70.

⁴³ See S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n.10 (2012) ("A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206." (citing Yankee Nuclear, CLI-94-3, 39 NRC at 101 n.7)).

compliance with the plant's technical specifications, he recommended that the NRC initiate an "enforcement action" to address the alleged noncompliance.⁴⁴

The distinction between adjudicatory matters and regulatory oversight is especially important in the current environment. Following the Fukushima accident in Japan, the NRC Staff has asked for a seismic hazard reevaluation of all nuclear power reactors pursuant to 10 C.F.R. § 50.54(f). These reevaluations are not de facto license amendment proceedings because they do not amend any facility's license. Rather, they are requests for information to allow the NRC to determine whether, as to each facility, it should or should not require additional action. Imposing any such new requirements would involve separate regulatory action. As to any individual facility, the Commission might then determine that an order, license amendment or rulemaking is necessary. At such time, the public would have an opportunity to participate in any such processes to the extent consistent with applicable NRC rules and precedent.

In both its initial Petition and in subsequent submissions, FOE points to several communications and events that allegedly support its claim that the NRC is conducting a de facto license amendment proceeding that entitles it to request a hearing now, rather than potentially at some future point. Because none involves the NRC's granting to PG&E greater authority than that provided by its existing licenses or otherwise altering their terms, none gives rise to hearing rights under AEA section 189a.

We consider each of FOE's arguments below.

First, FOE focuses on a March 12, 2012 request for information from the NRC Staff, pursuant to 10 C.F.R. § 50.54(f), that went to all nuclear power plant licensees, including PG&E. FOE argues that, because that request allegedly directed PG&E to use "specific methodologies

⁴⁴ NRC, DPO Case File-DPO-2013-002, Doc. 1, DPO Submittal at 1-2 (July 19, 2013) (ADAMS Accession No. ML14252A743). An independent review panel subsequently reviewed the DPO and determined that enforcement action was unwarranted. Id., Doc. 8, DPO Appeal Decision at 4-5 (Sept. 9, 2014); see also id., Doc. 4, DPO Decision at 1-2 (May 29, 2014).

and assumptions to analyze new seismic data,” it effectively amended the terms of the Diablo Canyon licenses.⁴⁵ On the contrary, the Staff’s letter merely asked all nuclear power plant licensees (1) to evaluate, in light of the Fukushima accident in Japan, their plants’ seismic and flood design bases using updated analytical methods, and (2) to provide additional information to enable the NRC to determine whether future changes to any of the plants’ design bases might be warranted.⁴⁶

The Staff’s March 12, 2012 request expressly stated that the “evaluations associated with the requested information in this letter do not revise the design basis of the plant.”⁴⁷ Rather, the request contemplated that, for various plants, the licensees’ responses might (or might not) lead to further regulatory actions, such as orders, license amendments or rulemaking that might (or might not) trigger various forms of public participation at the appropriate time.⁴⁸ As the Commission recently instructed, speculative changes to a plant’s licensing basis that may or may not occur do not constitute a proper ground on which to seek an adjudicatory hearing.⁴⁹ The NRC Staff’s March 12, 2012 request for information does not constitute a de facto license amendment.⁵⁰

⁴⁵ Petition at 34. In fact, the Staff’s request showed some flexibility, stating that “[a]lternate approaches with appropriate justification will be considered.” March 2012 Letter at 3.

⁴⁶ Id. at 4-5.

⁴⁷ Id. at 4.

⁴⁸ Id. at 1.

⁴⁹ Fort Calhoun, CLI-15-5, 81 NRC at 338.

⁵⁰ In a different context, another Licensing Board also concluded that the Staff’s March 12, 2012 request for information did not constitute an “approval.” See Union Electric Co. (Callaway Plant, Unit 1), LBP-12-15, 76 NRC 14, 34 (2012) (ruling that March 12, 2012 information request was not an “approval” that needed to be listed in applicant’s environmental report under 10 C.F.R. § 51.45(d)).

Second, FOE seeks to rely on Research Information Letter 12-01, which, in September 2012, documented the NRC Staff's assessment of information concerning the newly discovered Shoreline Fault. FOE contends that the Staff's analysis, which concluded that Diablo Canyon can operate safely despite the Shoreline Fault (by comparing the Shoreline Fault to the Hosgri Fault), in effect amended the Diablo Canyon licensing basis.⁵¹

Research Information Letter 12-01, however, did not alter the terms of the Diablo Canyon operating licenses or provide PG&E with greater operating authority. It reached no conclusions whatsoever regarding the Diablo Canyon operating licenses. Rather, it focused on determining whether the plant can operate safely in light of the risk posed by the Shoreline Fault.⁵² Neither the Staff's comparison of the Shoreline Fault to the Hosgri Fault nor the Staff's alleged understatement of the risk posed by the Shoreline Fault⁵³ amounted to a de facto license amendment. As the Commission recently observed, "if a hearing could be invoked each time the NRC engaged in oversight or inquiry into plant conditions, the NRC's administrative process could be brought to a virtual standstill."⁵⁴

Moreover, Research Information Letter 12-01 could not have added the prior evaluation of the Hosgri Earthquake to the plant's seismic design basis because the Hosgri Earthquake has been an established part of the Diablo Canyon design basis since the facility began operation. The plant's capacity to withstand the Hosgri Earthquake was extensively litigated and resolved at the time of initial licensing.⁵⁵ Supplemental NRC safety evaluation reports

⁵¹ Petition at 42-43, 48-51.

⁵² 2012 Assessment at 95. As explained infra, the NRC Staff continues to study the seismic risks at Diablo Canyon—an undertaking that may—or may not—eventually require PG&E to seek a license amendment, which would trigger AEA section 189a hearing rights at that time.

⁵³ Petition at 59-64.

⁵⁴ Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 175 (2014).

⁵⁵ Diablo Canyon, LBP-79-26, 10 NRC at 499; Diablo Canyon, ALAB-644, 13 NRC at 923.

further confirm that the Hosgri Earthquake is part of the plant's seismic design basis.⁵⁶ Because FOE concedes that the plant's licensing basis already permits the plant to operate in light of the seismic hazard posed by the Hosgri Fault—and the Staff found that the seismic hazard from the Shoreline Fault is bounded by that from the Hosgri Fault—FOE's hearing request fails to show that either PG&E's authority to operate the plant or the terms of its licenses have changed.⁵⁷

Third, as another instance where NRC Staff action allegedly amounted to a de facto license amendment, FOE points to an October 12, 2012 letter that summarized the conclusions of Research Information Letter 12-01 and requested that, for certain further seismic analysis, PG&E use the process identified in the Staff's March 12, 2012 request for information pursuant to 10 C.F.R. § 50.54(f).⁵⁸ As discussed, FOE has failed to show that either of these earlier two communications constituted de facto license amendments. For the same reasons, FOE fails to demonstrate that the Staff's October 12, 2012 letter, summarizing and elaborating on its earlier

⁵⁶ See, e.g., Office of Nuclear Reactor Regulation (NRR), NRC, Safety Evaluation of the Diablo Canyon Nuclear Power Station Units 1 and 2, at 2-4 (Supp. 7 May 1978) (ADAMS Accession No. ML14279A129) ("Hosgri event (0.75g) [t]his is the basis that we have approved for use in the seismic reevaluation. . . [W]e require that the plant design be shown to be adequate for the Hosgri event and the applicant is proceeding with the work necessary to demonstrate this."); NRR, NRC, Safety Evaluation Report, NUREG-0675, at 1-7 (Supp. 34 June 1991) (ADAMS Accession No. ML14279A130) ("The Staff notes that the seismic qualification basis for Diablo Canyon will continue to be the original design basis plus the Hosgri evaluation basis, along with the associated analytical methods, initial conditions, etc."). See also PG&E, Diablo Canyon Power Plant, Units 1 and 2, Final Safety Analysis Report Update at 2.5-58 (Rev. 12 Sept. 1998) (ADAMS Accession No. ML9810080139).

⁵⁷ FOE also claims that "the Hosgri Evaluation and the [Long Term Seismic Program] were . . . intended to be a one-time exception" from the plant's licensing basis, and did not change the seismic design basis. Petition at 20; Reply at 9. The statement on which FOE relies, however, pertains solely to the Long-Term Seismic Program, not the evaluation of the Hosgri Earthquake. See Petition at 20 n.51. Moreover, Research Information Letter 12-01 concluded that the seismic hazard by the Shoreline Fault was bounded by or equal to the hazard analyzed in both the Long Term Seismic Program and the Hosgri Evaluation. 2012 Assessment at 58.

⁵⁸ Petition at 34.

communications, expanded PG&E's operating authority or otherwise altered the terms of the Diablo Canyon operating licenses in any way.

Fourth, in its Reply, FOE claims that the NRC Staff's acceptance of PG&E's UFSAR Revision 21, in September 2013 (shortly after FOE's initial Petition had been filed with the Commission), also constituted a de facto license amendment because, allegedly, it too inappropriately moved the Hosgri Earthquake into the Diablo Canyon plant's existing seismic design basis.⁵⁹ FOE also argues that UFSAR Revision 21 amends the license in that it: (1) removes the Double Design Earthquake from the seismic design basis;⁶⁰ and (2) provides authorization to use new methods of analysis to demonstrate satisfaction of the seismic design basis, including probabilistic methods rather than deterministic methods.⁶¹

FOE's argument, however, misconstrues the significance of the Staff's "approval" of a UFSAR revision. Pursuant to 10 C.F.R. § 50.71(e), licensees must periodically submit an updated FSAR to the NRC to report "information and analyses submitted to the Commission by the . . . licensee or prepared by the . . . licensee pursuant to Commission requirement" since the previous update. But the agency does not review such submittals for accuracy; nor does it approve the analyses therein. Rather, as stated when section 50.71(e) was promulgated, the regulation "is only a reporting requirement."⁶² "[A]pprovals of license amendments and technical specification changes are independent of the FSAR updating process."⁶³ As the Commission explained when it promulgated the section 50.71(e) reporting requirement, "[s]ubmittal of

⁵⁹ Reply at 12-14.

⁶⁰ Tr. at 107.

⁶¹ Id. at 109.

⁶² Periodic Updating of Final Safety Analysis Reports, Final Rule, 45 Fed. Reg. 30,614, 30,615 (May 9, 1980).

⁶³ Id.

updated FSAR pages does not constitute a licensing action but is only intended to provide information.”⁶⁴

Such FSAR updates must reflect (1) changes a licensee has made through a license amendment request under 10 C.F.R. § 50.90 (which would have triggered an opportunity to request a hearing); and (2) certain changes that do not require a license amendment pursuant to 10 C.F.R. § 50.59. Actions taken by a licensee under the authority of section 50.59 do not give rise to hearing rights under the AEA,⁶⁵ but rather are monitored by the NRC Staff’s inspections and oversight, which may be challenged only by a petition for enforcement pursuant to 10 C.F.R. § 2.206.⁶⁶ Therefore, although the Staff reviews section 50.71(e) submissions for compliance with such administrative requirements as timeliness and content, the agency does not “approve” substantive changes, such as changes to a seismic analysis, as part of the section 50.71(e) process. Thus, UFSAR Revision 21 could not constitute a de facto amendment of the licenses for Diablo Canyon. If PG&E made any such reported changes without proper authorization or analysis, that would be a matter for NRC oversight, not for adjudication.⁶⁷

FOE’s interpretation of the NRC Staff’s “approval” of section 50.71(e) updates would lead to anomalous results. Under section 50.71(e), licensees must update their FSARs every two years.⁶⁸ If FOE were correct, then every two years the agency would “approve” all listed section 50.59 changes at a facility and the public would have an opportunity to request hearings

⁶⁴ Id.

⁶⁵ Fort Calhoun, CLI-15-5, 81 NRC at 337.

⁶⁶ See San Onofre, CLI-12-20, 76 NRC at 439 n.10 (citing Yankee Nuclear, CLI-94-3, 39 NRC at 101 n.7).

⁶⁷ Id.

⁶⁸ See 10 C.F.R. § 50.71(e)(4).

on those “approvals.” A fundamental purpose of section 50.59, however, is to permit licensees to make certain limited changes to their facilities without Commission approval.⁶⁹ Thus, FOE’s interpretation directly conflicts with the Commission’s clear admonition that a “member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.”⁷⁰ Moreover, because UFSARs that have been updated under section 50.71(e) must also list any license amendments that the agency has approved under section 50.90 within the preceding two years, FOE would apparently have the NRC “approve” all license amendments twice.

FOE has not demonstrated that the NRC Staff’s “acceptance” of UFSAR Revision 21 plausibly constituted a de facto license amendment.

Fifth, in its Supplemental Brief,⁷¹ FOE points to the NRC Staff’s December 2014 inspection report assessing PG&E’s seismic operability determination after issuance of the September 2014 Seismic Imaging Project Report. As the Commission has explained, however, the NRC’s inspection process is separate from its licensing process.⁷² Staff oversight activities that ensure compliance with existing requirements do not constitute de facto license amendments. Thus, NRC inspection reports, even inspection reports documenting violations, are not de facto license amendments.⁷³ The Commission has recognized this distinction in this

⁶⁹ Changes, Tests, and Experiments, 64 Fed. Reg. 53,582, 53,584 (Oct. 4, 1999).

⁷⁰ Yankee Nuclear, CLI-94-3, 39 NRC at 101 n.7.

⁷¹ As previously stated, there is substantial question whether any of the matters discussed in FOE’s Supplemental Brief were timely raised or are within the scope of the Commission’s referral. The Board need not decide these issues, however, because we conclude that none of the matters raised by FOE—in or after its initial Petition—constitute grounds for finding a de facto license amendment.

⁷² St. Lucie, CLI-14-11, 80 NRC at 174.

⁷³ Fort Calhoun, CLI-15-5, 81 NRC at 336-37.

very case, by referring FOE's safety claims to the Executive Director for Operations for consideration under 10 C.F.R. § 2.206.⁷⁴

Sixth, FOE focuses on a March 2015 seismic hazard report issued by PG&E in response to the NRC Staff's information request under section 50.54(f), which was part of the Commission's post-Fukushima review of all power reactors. The March seismic hazard report, by itself, cannot possibly grant a de facto license amendment for the simple reason that it was issued by PG&E. A licensee cannot grant itself a license amendment—de facto or otherwise.⁷⁵

Finally,⁷⁶ FOE points to the NRC Staff's May 13, 2015 letter responding to PG&E's March 2015 seismic hazard report, claiming that the letter "had the effect of augmenting the plain terms of the licenses' seismic design basis to include an extra-design basis [ground motion] response spectrum."⁷⁷ FOE claims that PG&E's March 2015 report shows that it cannot presently comply with conditions in the Diablo Canyon plant's operating licenses, and that the NRC Staff's May 13, 2015 letter granted PG&E additional operating authority because it "endorses" PG&E's plan to address this supposed noncompliance.⁷⁸

⁷⁴ CLI-15-14, 81 NRC at ___ (slip op. at 12).

⁷⁵ See St. Lucie, CLI-14-11, 80 NRC at 173 ("A licensee cannot amend the terms of its license unilaterally.").

⁷⁶ Although the Board does not take FOE to suggest that testimony before a Senate committee could somehow grant a license amendment, we have also considered FOE's argument that the testimony of Dr. Sam Blakeslee—a geophysicist and former California state senator who presented testimony in December 2014 to the United States Senate Committee on Environment and Public Works—describes the "significance of the Staff's willingness to allow PG&E free rein to substitute revised methods of analysis" in the Diablo Canyon UFSAR. Supplemental Brief at 16. Dr. Blakeslee's testimony demonstrates that he shares FOE's general concerns about the safe operation of Diablo Canyon; however, the Commission has not referred such concerns to this Board. It has referred FOE's concerns regarding operational safety to the NRC Executive Director for Operations to address as a request for enforcement action pursuant to 10 C.F.R. § 2.206. See CLI-15-14, 81 NRC at ___ (slip op. at 9).

⁷⁷ Supplemental Brief at 6-7.

⁷⁸ Id. at 2.

The Staff's May 13, 2015 letter was not a de facto license amendment. As previously explained, the Hosgri Earthquake is not an "extra-design basis" but is a part of the historic design basis. Furthermore, the letter merely confirmed that PG&E is following the 10 C.F.R. § 50.54(f) process that, as part of its ongoing oversight responsibilities, the Staff initiated with its request for information back in March 2012. Diablo Canyon's seismic hazard re-evaluation results, like those of certain other nuclear power plants, warranted additional analysis. The Staff's May 13, 2015 letter confirmed the next steps in the post-Fukushima process: that is, that PG&E will submit further evaluations in 2017 for the NRC's review. This ongoing process might—or might not—require PG&E to obtain a license amendment in the future. The mere possibility of a future license amendment, however, does not trigger a hearing opportunity today.⁷⁹

Ultimately, this Board must remain mindful of the "limited" scope of the Commission's referral, which is to determine whether FOE has established a right to request a hearing under section 189a of the AEA. There are various other ways in which the public may participate in NRC activities. The Commission has directed the Staff to investigate FOE's concerns regarding operational safety as though FOE had sought one such opportunity—a petition for enforcement pursuant to 10 C.F.R. § 2.206.⁸⁰ Additionally, the Commission has retained for itself the option of exercising its discretion to conduct an evidentiary hearing even though one is not required by the AEA.⁸¹

This Board is charged solely with determining whether, even though no license amendment has been formally approved by the NRC, FOE has nonetheless established a right

⁷⁹ Fort Calhoun, CLI-15-5, 81 NRC at 337.

⁸⁰ CLI-15-14, 81 NRC at ___ (slip op. at 9).

⁸¹ Id. at ___ (slip op. at 11-12).

to request an evidentiary hearing under section 189a of the AEA on the theory that a license amendment has been granted de facto. We conclude that FOE has established no such right.

III. ORDER

For the reasons stated, FOE's petition to intervene and request for hearing is denied. In accordance with 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD

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Rockville, Maryland
September 28, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Petition to Intervene and Request for Hearing)** have been served upon the following persons by the Electronic Information Exchange.

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

MEMORANDUM AND ORDER (Denying Petition to Intervene and Request for Hearing)

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[Original signed by Clara Sola _____]
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Dated at Rockville, Maryland
this 28th day of September, 2015