

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE
TO FRIENDS OF THE EARTH'S APPEAL OF LBP-15-27

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May 13, 2015 (ADAMS Accession No. ML15113B344)5

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I. INTRODUCTION

Pacific Gas and Electric Company (“PG&E”) herein responds to and opposes the appeal filed by Friends of the Earth (“FOE”) on October 23, 2015.¹ FOE seeks a reversal of the Atomic Safety and Licensing Board (“Licensing Board”) decision, LBP-15-27,² denying FOE’s Petition to Intervene and Request for Hearing on an alleged *de facto* license amendment related to seismic issues for the Diablo Canyon Power Plant (“Diablo Canyon”). FOE’s appeal should be rejected. There has been no operating license amendment as alleged by FOE, and therefore there is no license amendment proceeding. There has been no NRC approval or any other action that increases PG&E’s operating authority for Diablo Canyon or entitles FOE to a hearing under the Atomic Energy Act (“AEA”). Diablo Canyon operates safely and in accordance with the terms of the current licenses. The NRC’s ongoing post-Fukushima reevaluation of seismic issues is part of the NRC’s ongoing oversight process and is not a licensing activity that creates hearing

¹ “Friends of the Earth’s Notice of Appeal of LBP-15-27” and “Brief of Friends of the Earth in Support of Appeal of LBP-15-27” (“Appeal Brief”), dated October 23, 2015.

² Memorandum and Order (Denying Petition to Intervene and Request for Hearing), LBP-15-27, dated September 28, 2015.

rights at this time. FOE’s request for hearing is not consistent with the facts, the NRC regulatory framework, or Commission precedent — and was correctly denied by the Licensing Board.

II. BACKGROUND

A. Diablo Canyon Seismic Safety Studies

In November 2008, PG&E advised the NRC that, through its ongoing Long Term Seismic Program (“LTSP”) for Diablo Canyon, it had identified a new zone of seismicity offshore from Diablo Canyon. This is referred to as the “Shoreline Fault zone” or simply the “Shoreline Fault.” Since that time, PG&E has completed several comprehensive reports on the Shoreline Fault and other seismic hazards in the region of Diablo Canyon. These reports have consistently confirmed the seismic safety of continued operation of Diablo Canyon, based on ground motion comparisons with the current licensing basis and design of the plant.

First, in January 2011, PG&E submitted to the NRC its first comprehensive analysis of the Shoreline Fault.³ The Shoreline Fault Report concluded, utilizing a deterministic methodology, that the updated ground motions for the four faults in the region of Diablo Canyon (the Shoreline, Los Osos, San Luis Bay, and Hosgri faults) are bounded by the current licensing basis 1977 Hosgri Earthquake (“HE”) response spectrum. Plant equipment qualified for the 1977 HE earthquake is therefore qualified for updated ground motions for all four regional faults. The new information did not change additional seismic qualification margin provided by more conservative loads calculated based on the earlier Double Design Earthquake (“DDE”) (and related inputs) developed for the construction permit.

³ “Report on the Analysis of the Shoreline Fault Zone, Central Coastal California: Report to the U.S. Nuclear Regulatory Commission” (January 2011) (ADAMS Accession No. ML110140431) (“Shoreline Fault Report”).

The NRC Staff conducted its own review of the Shoreline Fault Report and in September 2012 issued RIL 12-01 documenting the results.⁴ The NRC Staff concluded that its deterministic approach confirmed that seismic loading levels predicted for the earthquake scenarios on the Shoreline Fault would not exceed HE ground motions for which necessary plant equipment is already qualified. The Staff's evaluation was also summarized in a letter to PG&E dated October 12, 2012.⁵

Second, in September 2014, PG&E issued a report on the results of its unprecedented and comprehensive Central Coastal California Seismic Imaging Project completed at the request of the California Energy Commission in response to state legislation.⁶ Based on advanced imaging, updated seismic information, and a deterministic methodology, PG&E's CCCSIP Report again concluded that the ground motions from the updated Shoreline Fault and other regional faults remain bounded by the 1977 HE design ground motions for which the plant was previously evaluated.

The CCCSIP Report was not completed at the NRC's request, but was submitted to the agency for information. For purposes of assessing PG&E's basis for current operation given new (post-licensing) seismic information, the NRC Staff completed an evaluation of the

⁴ Research Information Letter 12-01 "Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone" (September 2012) (ADAMS Accession No. ML121230035) ("RIL 12-01").

⁵ NRC Letter to E.D. Halpin, "Diablo Canyon Power Plant, Unit Nos. 1 and 2 – NRC Review of Shoreline Fault (TAC Nos. ME5306 and ME5307)," dated October 12, 2012 ("October 2012 NRC Letter"). The NRC Staff concluded that "the existing design basis for the plant already is sufficient to withstand those ground motions."

⁶ PG&E Letter DCL-14-081, "Central Coastal California Seismic Imaging Project, Shoreline Fault Commitment," dated September 10, 2014 (ADAMS Accession No. ML14260A106) ("CCCSIP Report").

report as part of a baseline inspection in December 2014.⁷ The Staff utilized its own “more conservative” approach and concluded that the past evaluations for the Hosgri Earthquake provide “considerable design margin” to assure that safety related structures, systems, and components (“SSCs”) will function properly in the new earthquake scenarios.⁸

Most recently, in March 2015, PG&E submitted its probabilistic Seismic Hazards Report responding to the NRC’s request under 10 C.F.R. § 50.54(f) for a seismic reevaluation and screening.⁹ Following the Fukushima accident, the NRC’s Japan Lessons-Learned Near-Term Task Force recognized that NRC regulations do not require periodic seismic re-evaluations after initial licensing. The Near-Term Task Force therefore recommended that the NRC require all operating plant licensees to reevaluate the seismic design bases for structures, systems, and components. To address this recommendation, the NRC Staff requested that licensees reevaluate seismic hazards using present day probabilistic methods (and a peer review process) to identify vulnerabilities.¹⁰

As requested by NRC Staff, PG&E considered all relevant data, models, and methods in evaluating seismic sources and ground motions. The Seismic Hazards Report

⁷ Inspection Report 050000275/2014008 and 05000323/2014008, December 15, 2014 (ADAMS Accession No. ML14349A485) (“December 2014 Inspection Report”).

⁸ *Id.*, Enclosure at 5

⁹ PG&E Letter DCL-15-035, “Response to NRC Request for Information Pursuant to 10 CFR 50.5(f) Regarding the Seismic Aspects of Recommendation 2.1 of the Near-Term Task Force Review of Insights From the Fukushima Dai-Ichi Accident: Seismic Hazard and Screening Report,” dated March 11, 2015 (ADAMS Accession No. ML15071A046) (“Seismic Hazards Report”).

¹⁰ NRC Letter 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 for the Fukushima Dai-Ichi Accident,” dated March 12, 2012 (ADAMS Accession No. ML12053A340) (“Section 50.54(f) Letter”).

includes a comparison of updated ground motion response spectra to the current licensing basis spectra for Diablo Canyon, including the original DDE and the 1977 HE. PG&E concluded that the updated ground motion response spectra exceed the DDE in a specified high frequency range, and therefore Diablo Canyon screens in for further evaluation under the 10 C.F.R. § 50.54(f) process. Nonetheless, the Seismic Hazards Report concluded that the new ground motion response spectra compare favorably to the ground motions for the 1977 HE design/licensing basis spectra and the post-licensing LTSP seismic margins assessment. Because safety related equipment is qualified to the 1977 HE spectrum (which involves greater ground motions than the DDE), there is reasonable assurance that necessary SSCs will perform their functions in the event of an earthquake at the levels of the new spectra.

The NRC Staff issued its summary of the screening and prioritization results for the seismic reevaluations for Western plants in a letter dated May 13, 2015.¹¹ The letter concludes that, based on interim evaluations and actions, Diablo Canyon is “safe for continued operations.” The May 2015 NRC Letter did not make any final decisions about the need for licensing basis changes, but set an initial schedule for the next phase of PG&E’s seismic hazard reevaluation for Diablo Canyon.

At bottom, every report on the seismic safety of Diablo Canyon that has been completed to date, since identification of the Shoreline Fault, has concluded that Diablo Canyon is operating safely within the design capabilities of the plant as mandated by the current licenses and licensing basis. The NRC will consider the need for any further actions, including any

¹¹ “Screening and Prioritization Results for the Western United States Sites Regarding Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Seismic Hazards Re-Evaluations for Recommendation 2.1 of the Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident,” dated May 13, 2015 (ADAMS Accession No. ML15113B344) (“May 2015 NRC Letter”).

changes to the current licensing basis, at the completion of the next phase of the Section 50.54(f) process.¹²

B. FOE's Request for Hearing

On August 26, 2014, FOE filed a petition seeking a hearing on seismic issues related to Diablo Canyon.¹³ The hearing request was based on the information developed by PG&E beginning in 2008 related to the Shoreline Fault; subsequent PG&E reports on, and NRC Staff reviews of, that information; and a Differing Professional Opinion (“DPO”) being pursued internally at the NRC by a former senior resident inspector at Diablo Canyon regarding the NRC’s oversight of seismic issues. FOE argued that the NRC is conducting a *de facto* license amendment proceeding without offering a hearing.

PG&E filed an answer opposing the hearing request.¹⁴ PG&E carefully explained the seismic licensing history and the current licensing basis for Diablo Canyon, and included a detailed expert declaration to clarify FOE’s mischaracterizations and misunderstandings of the licensing basis. Like PG&E, the NRC Staff also opposed the hearing request.¹⁵ The Staff concluded that there was no actual or *de facto* license amendment under AEA Section 189.a.

In CLI-15-14, the Commission referred to the Licensing Board the limited issue of “whether the NRC granted PG&E greater authority than that provided by its existing licenses

¹² As of October 27, 2015, the next phase of the Diablo Canyon probabilistic seismic hazards evaluation is due September 30, 2017.

¹³ “Petition to Intervene and Request for Hearing by Friends of the Earth,” dated August 26, 2014.

¹⁴ “Pacific Gas and Electric Company’s Answer to Friends of the Earth Hearing Request,” dated October 6, 2014 (“PG&E Answer”). The PG&E Answer included a detailed technical declaration from William Hortsman (“Hortsman Declaration”).

¹⁵ “NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth,” dated October 6, 2014.

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."¹⁶ Subsequently, in accordance with the Commission's direction in CLI-15-14, the Licensing Board allowed PG&E and NRC Staff to respond to FOE's later assertion that the NRC Staff "approved" Diablo Canyon Updated Final Safety Analysis Report ("UFSAR") Revision 21, and that "this action, standing alone, grants PG&E greater operating authority and alters the terms of the operating licenses."¹⁷ PG&E filed a supplemental brief addressing that question on June 15, 2015.¹⁸ As discussed there, the NRC Staff did not approve Revision 21 nor did it amend the licenses or grant greater operating authority. The NRC Staff agreed.¹⁹

Finally, in accordance with a Licensing Board Order of June 12, 2015, PG&E responded to a supplemental FOE brief²⁰ addressing other "new" information and alleged NRC Staff "approvals" arising since the hearing request was filed.²¹ PG&E explained that allowing continued operation of Diablo Canyon in light of new seismic information being developed — whether PG&E's January 2011 Shoreline Fault Report, its September 2014 CCCSIP Report, or

¹⁶ *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC ___, slip op. at 7 (May 21, 2015).

¹⁷ Notice and Order (Scheduling Oral Argument), June 2, 2015, at 2, quoting CLI-15-14.

¹⁸ "Pacific Gas and Electric Company's Supplemental Brief Regarding UFSAR Revision 21," dated June 15 ("PG&E Revision 21 Brief").

¹⁹ "NRC Staff Answer to Friends of the Earth's De Facto License Amendment Claims Related to PG&E's Updated Final safety Analysis Report, Revision 21," dated June 15, 2015.

²⁰ "Petitioner Friends of the Earth's Supplemental Brief," dated June 19, 2015 ("FOE Brief").

²¹ "Pacific Gas and Electric Company's Response to FOE's Supplemental Brief," dated June 26, 2015 ("PG&E Supplemental Brief").

the most recent Seismic Hazards Report submitted in accordance with 10 C.F.R. § 50.54(f) — did not amend the plant’s licenses or expand PG&E’s operating authority.²²

C. Licensing Board Memorandum and Order, LBP-15-17

In LBP-15-17 the Licensing Board denied FOE’s request for hearing and petition to intervene. The Licensing Board recognized the possibility that hearing rights might exist “when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing.”²³ However, based on Commission precedent, for such a *de facto* license amendment to exist, there must be an NRC action that grants “a licensee ‘greater operating authority’ or otherwise alter[s] ‘the terms of the license’ or permit[s] the licensee to go beyond its existing authority.”²⁴ Where “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.”²⁵ “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 hearing under AEA Section 189a.”²⁶

²² The NRC Staff also responded on this issue. “NRC Staff Response to the Friends of the Earth’s Supplemental Brief,” dated June 26, 2015.

²³ LBP-15-17, slip op. at 8.

²⁴ *Id.*, citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 328 (1996). Note that in *Perry* the Commission determined that the NRC action at issue (an explicit approval required under the regulations) did not constitute an amendment.

²⁵ *Id.* at 9, citing *Perry*, CLI-96-13, 44 NRC at 328 (emphasis in LBP-15-17).

²⁶ *Id.*, citing *Southern California Co Edison*. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n.10 (2012) (emphasis in LBP-15-17).

The Licensing Board also recognized the distinction between licensing matters that involve hearing rights and regulatory oversight matters that do not:

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 an 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 to the extent consistent with applicable NRC rules and precedent.²⁷

The Licensing Board specifically considered FOE's oft-repeated argument that the 1977 HE response spectrum is not part of the Diablo Canyon licensing basis and that it was a "one-time exception." The Licensing Board rejected that argument based on the well-documented Diablo Canyon licensing history establishing that the plant was augmented, qualified, and ultimately licensed to the Hosgri earthquake spectrum.²⁸

The Licensing Board also specifically considered each of FOE's arguments related to NRC Staff "actions" alleged to be *de facto* amendment approvals. These were: (a) the NRC Staff's March 12, 2012 request for information under 10 C.F.R. § 50.54(f);²⁹ (b) NRC Staff RIL 12-01, addressing the Shoreline Fault;³⁰ (c) the NRC Staff's letter on October 12, 2012,

²⁷ *Id.* at 10 (emphasis in original). The Board also observed that the DPO cited by FOE specifically addressed a compliance issue (an oversight matter) and had been addressed by NRC Staff management. *Id.* at 9-10.

²⁸ *Id.* at 12-13, 18.

²⁹ *Id.* at 10-11.

³⁰ *Id.* at 12-13.

based on RIL 12-01, concluding that new seismic analyses would be considered in the Section 50.54(f) process;³¹ (d) the NRC's acceptance and alleged "approval" of PG&E's Revision 21 to the Diablo Canyon UFSAR in September 2013;³² (e) the NRC Staff's December 2014 Inspection Report;³³ (f) PG&E's March 2015 Seismic Hazards Report, responding to the NRC's request for information under 10 C.F.R. § 50.54(f); and (g) the May 2015 NRC Letter, responding to the Seismic Hazard Report and reporting screening and prioritization results. All of the alleged NRC "actions" were thoroughly addressed by the parties in the briefs and oral argument before the Licensing Board. The Licensing Board concluded that none of them are NRC actions that constitute an approval that amends the Diablo Canyon operating licenses or that grants PG&E greater operating authority under those licenses. Therefore, there is no *de facto* license amendment creating hearing rights, and the Licensing Board denied the hearing request.

III. ARGUMENT

A. The Licensing Board Correctly Addressed the Issue Delegated by the Commission

The issue before the Licensing Board was a specific one: whether the NRC has issued an approval that granted PG&E greater authority than the authority provided in the existing Diablo Canyon licenses or that otherwise altered the terms of the licenses. The issue was not whether the "licensing basis" has changed or whether there is increased risk or reduced seismic "safety margin" due to new seismic information, as FOE seems to believe. The

³¹ October 2012 NRC Letter at 4. The October 2012 NRC Letter also stated (at 2) that in light of the deterministic evaluations that had been completed, the Shoreline Fault scenario should be considered a "lesser included case" under the HE, and that PG&E should update the Diablo Canyon UFSAR as necessary in accordance with the requirements of 10 C.F.R. § 50.71(e).

³² LBP-15-17, slip op. at 14-16.

³³ *Id.* at 16-17.

Licensing Board correctly concluded, based on an ample record, that the NRC has not issued any approval to PG&E on seismic issues that amends the licenses, *de facto* or otherwise. The NRC has not taken any action that grants PG&E any greater operating authority than provided in the current licenses, nor has it altered the terms or conditions of the current operating licenses. The Diablo Canyon units operate today in accordance with the same licenses and Technical Specifications as applied prior to the “actions” identified by FOE. Safety-related structures, systems, and components remain qualified for the seismic loads defined by the current licensing basis. There has been no NRC action entitling FOE to a hearing under AEA Section 189.a.

In addressing an appeal under 10 C.F.R. § 2.311(c), the Commission will defer to a licensing board ruling “absent an error of law or an abuse of discretion.”³⁴ In this case FOE has not identified any basis for reversing the Licensing Board’s decision.

First, FOE persists in its claim that PG&E has modified the license and licensing basis (for example, in UFSAR Revision 21) with respect to the role of the 1977 Hosgri Earthquake evaluation. For example, FOE claims that the 1977 HE was “not part of the plant’s seismic design bases,”³⁵ and played some kind of “lesser role.”³⁶ But the Licensing Board considered these characterizations and rejected them. The licensing record, including NRC safety evaluation reports and the hearing record from the initial licensing process, confirm that the Hosgri earthquake ground motions are part of the Diablo Canyon seismic design and licensing bases and that the plant has been appropriately analyzed for loads associated with those

³⁴ *Entergy Operations Inc.* (Palisades Nuclear Plant), CLI-15-22, slip op. at 7 (November 9, 2015), citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

³⁵ FOE Appeal Br. at 18.

³⁶ *Id.*

ground motions.³⁷ PG&E addressed this issue at length in its answer to the hearing request.³⁸ And the issue was discussed at length at the oral argument.³⁹ FOE provides no basis to disturb the Licensing Board's finding.⁴⁰ Rather, FOE seems only to believe that persistence in making erroneous assertions will somehow make them true. But no amount of repetition can change the fact that the Hosgri earthquake has been part of the Diablo Canyon licensing basis since prior to the start of operations. There has been no change to the licensing basis for the plant, let alone the operating licenses.

Second, the underlying legal and regulatory principles relied upon by the Licensing Board are consistent with Commission precedent and are indisputable. The Licensing Board, like the Commission in its *St. Lucie* and *Fort Calhoun* decisions, emphasized the distinction between licensing actions that involve hearings and NRC oversight activities that do not.⁴¹ The Licensing Board correctly concluded that FOE cannot create a hearing opportunity merely by claiming that Diablo Canyon is operating outside its licensing basis or is operating unsafely ("reduced margin"). Such claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206.⁴² FOE asserts that "the Board erroneously

³⁷ LBP-15-27, slip op. at 12-13.

³⁸ PG&E Answer at 2-8; Horstman Declaration at ¶¶ 7-21.

³⁹ Tr. 63-73, 89-126.

⁴⁰ The Commission generally affords its boards substantial deference on threshold issues, such as the admissibility of contentions. *Oyster Creek*, CLI-06-24, 64 NRC at 121. The Licensing Board's findings on this issue are entitled to similar deference.

⁴¹ *Omaha Public Power Dist.* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC ____, slip op. at 7-8 (March 9, 2015), citing *Fla. Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC ____, slip op. at 8-9 (Dec. 19, 2014).

⁴² LBP-15-27, slip op. at 9, citing *San Onofre*, CLI-12-20, 76 NRC 437, 439

accepted the bald assertion that, because the Staff classified an action as ‘oversight’ rather than licensing, that action *ipso facto* cannot affect the authority granted by the licenses.”⁴³ But this is a completely false characterization of what the Licensing Board did. The Licensing Board did not accept any Staff classification, “pronouncement,” or label. The Licensing Board made its own determination that the matters identified by FOE were oversight activities and did not change the licenses or current licensing basis or grant greater operating authority.

In particular, the Licensing Board correctly concluded that the ongoing Section 50.54(f) seismic reevaluation process is an oversight process, and does not create present hearing rights.⁴⁴ The Section 50.54(f) Letter is a request for information to determine whether additional action will be necessary. As discussed above, PG&E and the NRC Staff have established and documented the safety basis for continued operation while that evaluation is ongoing.⁴⁵ Continued operation under the present licenses, however, is not an increase in operating authority.⁴⁶ FOE’s insinuations of safety issues and its claims that the licensing basis has already been changed for the reevaluation are also not consistent with the regulatory process or the facts. PG&E’s March 2015 Seismic Hazards Report, summarizing the results of the seismic hazards screening evaluation, does not change the Diablo Canyon licenses (or even the licensing basis).

⁴³ FOE Appeal Br. at 9-10, citing LBP-15-27, slip op. at 14-17.

⁴⁴ *Id.* at 10.

⁴⁵ The NRC Staff again recently emphasized that the seismic hazards reevaluations are “beyond” the current design and licensing bases of operating plants and that the reevaluations requested by the Section 50.54(f) Letter “do not revise the design basis of the plant even if such hazard information is expected to exceed the plant’s current design basis.” See Memorandum, William M. Dean, Director, Office of Nuclear Reactor Regulation, to Regional Administrators, “Treatment of Seismic and Flooding Hazard Reevaluations in the Design and Licensing Basis of Operating Power Reactors,” dated September 29, 2015 (ML15127A401), at 1 (emphasis added).

⁴⁶ See PG&E Supplemental Brief at 4-5.

It is based on an updated, non-licensing basis probabilistic methodology to address new seismic information to determine whether design and licensing basis changes will be required. The use of a new methodology in this way is not an increase in operating authority.

Third, the Licensing Board analyzed each of the actions or events relied upon by FOE to determine whether there was an affirmative approval that was somehow mislabeled (as alleged by FOE) and that in fact was a license amendment (*i.e.*, an approval that changed the terms or conditions of the license or granted greater operating authority). The Licensing Board found no such approval or amendment, only matters of ongoing oversight that do not confer hearing rights. Again, FOE's assertions of safety issues, increased risk, reduced margin, or noncompliance with the license or with the licensing basis are matters for a Section 2.206 petition. Even if there were increases in risk, reduced margins, or non-compliances, these would not be "increases in operating authority." They would be matters to be addressed through ongoing regulatory oversight processes to restore compliance or increase operational safety margin. Moreover, changes in the licensing basis (if they existed) are not equivalent to changes in the license itself. Any argument that PG&E has made an inappropriate change to the licensing basis under 10 C.F.R. § 50.59 is a matter for a petition for enforcement action, not a hearing request.⁴⁷

In particular, the NRC Staff's RIL 12-01 and the October 2012 NRC Letter, evaluating PG&E's interim report on the Shoreline Fault were not NRC licensing approvals.⁴⁸ These documents reflect ongoing NRC Staff oversight, addressing — and confirming — PG&E's assessments of the safety of current operations in accordance with the current design

⁴⁷ PG&E Revision 21 Brief at 11.

⁴⁸ LBP-15-27, slip op. at 12-14.

and licensing bases. The NRC concluded that the Shoreline Fault could be addressed in the UFSAR as “a lesser included case” under the prior Hosgri earthquake evaluation. This conclusion did not change the license — or even the licensing basis. The licensing basis remained the original DDE evaluation (including related structural analyses) plus the HE evaluation (including related structural analyses). The updated ground motions (response spectra) and resulting loads are bounded by the current design and licensing bases.

FOE continues to claim that the NRC has “approved” UFSAR Revision 21 and therefore amended the license. But the Licensing Board correctly found that under the regulations in 10 C.F.R. § 50.71(e) the NRC does not approve UFSAR revisions.⁴⁹ A UFSAR revision is a licensee report. It is not an amendment to the license. There is simply no NRC approval that confers hearing rights. As recognized by the Commission, a licensee cannot unilaterally amend a license.⁵⁰ UFSAR revisions are subject to NRC oversight and enforcement. The nature of the UFSAR revision is defined by the regulations, not by a “label” as FOE claims. PG&E’s internal “change request” related to UFSAR Revision 21 is also not an NRC approval (or a request for an NRC approval). Nor is the NRC’s internal (and preliminary) review document (the “Bamford memo”).⁵¹ If FOE believes that the UFSAR revision did not comply with 10 C.F.R. § 50.71(e) or with 10 C.F.R. § 50.59, that concern must be pursued through a request for enforcement action under 10 C.F.R. § 2.206.

Finally, FOE in its appeal relies upon two cases to support its argument that there has been a *de facto* license amendment: the Commission’s decision in *Perry*, and the First

⁴⁹ *Id.* at 14-16.

⁵⁰ *St. Lucie*, CLI-14-11, slip op. at 8.

⁵¹ PG&E Supplemental Brief at 9-10; PG&E Revision 21 Brief at 8-9.

Circuit decision in *Citizens Awareness Network*.⁵² But in both of these cases there were clear NRC actions granting approvals: an approval of a revised reactor vessel specimen withdrawal schedule in *Perry* and a Commission decision to allow a licensee to proceed with major decommissioning work in *Citizens Awareness Network*. The issue in each case was therefore whether those approvals should have been treated as license amendments subject to hearing rights. In *Perry* the Commission found no increase in authority; in *Citizens Awareness Network* there was clearly an increase in authority because the activities at issue were precluded by regulation at the time.

In the present case, there is no NRC approval (under any “label”) that could be a *de facto* amendment. The NRC has exercised its oversight authority and is evaluating new seismic information as an ongoing matter using new methodologies — on a schedule consistent with PG&E’s and the NRC Staff’s conclusions that the Diablo Canyon units are operating safely in accordance with the limits and conditions set by the current license (and in accordance with the current seismic design and licensing bases). The NRC has not increased operating authority or granted any new authority. There is no “approval” of new activities even remotely analogous to the specific approval in *Citizens Awareness Network*. The Licensing Board appropriately denied the hearing request because there is no present right to a hearing under the AEA.

B. FOE Has Not Demonstrated Any Error in the Licensing Board’s Decision

FOE raises a number of specific arguments, rehashing arguments previously made and offering new twists to prior arguments.⁵³ None of FOE’s repetitive arguments establishes a

⁵² *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 288 (1st Cir. 1995).

⁵³ An appeal that does not point to an error of law or abuse of discretion by the board but simply restates the contention with additional support will not meet the requirements for a valid appeal. *Shieldalloy Metallurgical Corp.* (Amendment Request for

legal error in the Licensing Board decision. None justifies reversal of a decision made on the basis of full briefing, oral argument, and a substantial record. This is an area where the Commission is routinely most deferential to its boards.

1. *There Is No De Facto Amendment, Whether The Events And Actions Cited By FOE Are Viewed Individually Or Collectively*

FOE's first argument is that there is no one approval that grants PG&E greater operating authority, but rather a "'proceeding' made up of a series of events to amend Diablo Canyon's licenses."⁵⁴ FOE accuses the Licensing Board of "reviewing each Staff action without context" and taking a "piecemeal approach."⁵⁵ FOE's argument is pure sophistry. The Licensing Board looked at all of FOE's asserted actions and events. FOE is not clear what further "context" could be considered. But, more importantly, regardless of whether the events are viewed individually or collectively, at the end of the "series" there is still no change to the current licenses or operating authority for Diablo Canyon. The units operate safely, within the limits of the existing licensing basis and consistent with the terms of the un-amended licenses. Safety-related equipment remains qualified to the current licensing bases. FOE perceives that the Licensing Board's approach allows a "regulatory loophole."⁵⁶ In fact, there is no such thing. Instead, FOE is seeking to expand AEA Section 189.a hearing rights to matters where the statute provides no such rights.

Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

⁵⁴ FOE Appeal Br. at 10.

⁵⁵ *Id.*

⁵⁶ *Id.*

2. *The NRC Did Not Approve UFSAR Revision 21, Nor Was It Required To Do So*

As discussed above, the Licensing Board addressed this issue and rejected FOE's argument.⁵⁷ The UFSAR update process is established by regulation, 10 C.F.R. § 50.71(e), and the nature of the notification process was specifically explained by the Commission in adopting the rule. Submitting a UFSAR revision under Section 50.71(e):

. . . does not constitute a licensing action but is only intended to provide information. . . . Thus, for example, approvals of license amendments and technical specification changes are independent of the FSAR updating process. . . . The material submitted may be reviewed by the NRC staff but will not be formally approved.⁵⁸

This explanation is clear and applies to all UFSAR revisions. FOE claims that this case is different; that a "typical" "label" for a Staff action should not apply.⁵⁹ The only support for FOE's claim is a vague reference to the Court's mandate to focus on effects, not labels, in *Citizens Awareness Network*. But the effects of UFSAR Revision 21 are no different from the effects of any other revision. Revision 21 was not approved by the NRC, and by virtue of the regulation itself was not a licensing action that could alter the license, licensing basis, or operating authorities.⁶⁰ The revision remains subject to NRC oversight.

FOE suggests that this case is different because the "effect of the Bamford memo in this particular case is unequivocally to endorse PG&E's changes to the FSARU for Diablo

⁵⁷ LBP-15-27, slip op. at 14-16.

⁵⁸ "Periodic Updating of Final Safety Analysis Reports, Final Rule," 45 Fed. Reg. 30614, 30615 (May 9, 1980).

⁵⁹ FOE Appeal Br. at 11.

⁶⁰ Revision 21 and PG&E's bases for making the change remain subject to NRC oversight. If the NRC Staff were to conclude that the change to the document also involved a change to the plant and procedures subject to an evaluation under 10 C.F.R. § 50.59, the revision and the Section 50.59 evaluation would be subject to NRC review and enforcement.

Canyon.”⁶¹ But, as a matter of fact, that is not what the Bamford memo did. The Bamford memo is an internal NRC memorandum (not issued to PG&E) that merely documented the NRC’s receipt and administrative review of Revision 21.⁶² It did not substantively endorse particular changes, let alone modify the licenses. And, as a matter of law, the Bamford memo could not have done any more than what the regulation provides for under Section 50.71(e). If the regulation does not require or involve an approval for a UFSAR revision (or even a request for such approval), then, with all due respect, Mr. Bamford surely could not have singlehandedly “approved” such a revision. Nor could he have reviewed a required notification in a way that had the effect of amending the Diablo Canyon licenses. As in *Kelley v. Selin*, under the NRC’s regulations defining the process for UFSAR updates “[t]here is no licensing decision being made.”⁶³ Hence, there can be no license amendment. The effect of the UFSAR revision that FOE seeks follows from the regulations themselves, not from the Bamford memo.⁶⁴

FOE again raises the issue of PG&E’s internal “UFSAR Change Request” document. As PG&E explained in the briefs below, the Change Request form was prepared in accordance with PG&E’s own procedures for controlling UFSAR revisions.⁶⁵ It was not submitted to NRC and PG&E did not request NRC approval. It documented PG&E’s

⁶¹ *Id.* at 12.

⁶² *See* PG&E Revision 21 Brief at 8-9.

⁶³ *Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995). The Court in *Kelley* considered whether a site-specific decision was being made to approve use of a certified spent fuel storage cask at the site involved, that would confer hearing rights. Under the NRC’s regulatory structure, providing general licenses for storage using a certified cask, there is no site-specific approval.

⁶⁴ FOE Appeal Br. at 13.

⁶⁵ PG&E Supplemental Brief at 9-10.

conclusion, subject to NRC oversight, that the revision did not involve a change to the plant or procedures and that no approval was necessary. FOE attaches significance to the notations in the Change Request referring to NRC correspondence on the subject.⁶⁶ But the references to NRC correspondence (no doubt references to RIL 12-01 and the October 2012 NRC Letter) do not turn the revision into a request for an approval, nor do they turn the NRC Staff documents (or NRC Staff inaction) into an NRC approval. Absent a request for approval, as in *Fort Calhoun*, “[a] licensee cannot amend the terms of a license unilaterally.”⁶⁷ And if, as FOE asserts,⁶⁸ the Staff is guilty of “willful blindness to the licensee’s unlawful action,” FOE’s remedy is to seek action through 10 C.F.R. § 2.206. Notwithstanding FOE’s unfounded hyperbole, AEA Section 189.a provides no hearing rights under the circumstances.⁶⁹

3. *UFSAR Revision 21 Did Not Add The Hosgri Evaluation To The Licensing Basis (It Was Already There), Nor Did It Change The “Safe Shutdown Earthquake”*

FOE next asserts that prior to UFSAR Revision 21, the 1977 Hosgri evaluation “was not the plant’s safe shutdown earthquake and, therefore, was not part of its seismic design basis.”⁷⁰ As discussed above, the Licensing Board considered this issue. FOE’s premise is patently incorrect. The 1977 HE evaluation has been part of the licensing and design bases of

⁶⁶ FOE Appeal Br. at 13.

⁶⁷ *Fort Calhoun*, CLI-15-5, 81 NRC at ___, slip op. at 7.

⁶⁸ FOE Appeal Br. at 14.

⁶⁹ There also is simply no basis for FOE’s assertion that the NRC Staff is “keeping itself ignorant of whether a UFSAR revision crosses the line from a permissible amendment to an impermissible *de facto* license amendment.” *Id.* While FOE might think this to be a great sound bite, it crosses the line from fair advocacy to scurrilous insult. The record is quite clear that the NRC Staff has consistently and independently reviewed information on the Shoreline Fault, documented the bases for its safety conclusions, and on several occasions explained why no license amendment (actual or *de facto*) is presently involved.

⁷⁰ FOE Appeal Br. at 15.

the plant since initial licensing. Revision 21 only clarified the original licensing basis by adding to the existing discussion of the Hosgri ground motions and explaining how those were considered in licensing the plant. The licensing basis has been, since Diablo Canyon operations began, the DDE and the Hosgri evaluation ground motions.⁷¹ Where, as here, the Licensing Board has reviewed the record in detail, in accord with the Commission's delegation, the Commission should be disinclined to upset the Board's findings and conclusions.⁷²

FOE's argument is also based on a fundamental mischaracterization of UFSAR Revision 21. Not only was the Hosgri evaluation a part of the Diablo Canyon licensing basis since the operating licenses were issued, the Hosgri evaluation was included in the UFSAR prior to Revision 21. For example, the Hosgri earthquake and evaluation were addressed in detail in Section 2.5 on Geology and Seismology. (UFSAR Section 2.5.2.10 described the ground accelerations and response spectra, including the development of the Hosgri ground motion response spectrum, and referenced a related NRC Staff supplemental safety evaluation report ("SSER" No. 5).) Also contrary to FOE's assertions,⁷³ Revision 21 did not add anything that states that the Hosgri is the "safe shutdown earthquake," nor does it state that the Hosgri evaluation would "function" as the safe shutdown earthquake. UFSAR Revision 21 is clear that both the DDE and Hosgri seismic qualification bases remain part of the design and licensing bases for safety related equipment. PG&E added clarifying detail to the UFSAR, but did not and could not unilaterally change the licensing basis. Any inaccuracy that FOE (or the NRC Staff) may perceive in the revision would be a matter for regulatory oversight rather than a hearing.

⁷¹ PG&E Answer at 2-8; *see, e.g.*, Tr. 118, 127.

⁷² *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 45-46 (2001).

⁷³ FOE Appeal Br. at 18-19.

The term “safe shutdown earthquake” also does not have the licensing basis significance for Diablo Canyon that FOE attaches to it. The term derives from 10 C.F.R. Part 100, Appendix A, which was still under development when the plant was licensed for construction. Diablo Canyon was licensed based on several different earthquake evaluations, including the DDE completed for the construction permit and the Hosgri evaluation completed prior to issuance of the operating license.⁷⁴ By focusing on the words of the current, generic regulation, FOE misses the actual plant-specific licensing basis for Diablo Canyon. That licensing basis undeniably includes the Hosgri evaluation ground motions as a benchmark for qualification of equipment.

The Diablo Canyon seismic licensing history and licensing basis are documented in the contemporaneous docketed correspondence, including the NRC Staff supplemental safety evaluation report cited by the Licensing Board.⁷⁵ Contrary to FOE’s claim, PG&E’s 1977 Hosgri evaluation falls explicitly within the definition of “current licensing basis” in 10 C.F.R. § 54.3 because: (1) it is part of the design basis of the plant as defined in 10 C.F.R. § 50.2 and documented in the UFSAR; (2) it involves licensee commitments and analyses documented in supplemental safety evaluation reports; and (3) it is reflected in docketed licensing correspondence submitted during the NRC licensing review and hearing process. Any one of these three would be sufficient to meet the regulatory definition that FOE cites. FOE also makes a ridiculous argument that the Staff’s supplemental safety evaluation report is not part of the licensing basis because it “was issued in 1978, well before the licensee received its operating

⁷⁴ PG&E Answer at 2-4; Horstman Declaration at ¶¶ 7-15.

⁷⁵ LBP-15-27, slip op. at 13, n. 56, citing SSER No. 7.

licenses.”⁷⁶ Safety evaluation reports and supplements document the licensing review and must be issued before the licenses are issued. They are therefore an important record in establishing the licensing basis of a plant.⁷⁷

As noted by the Licensing Board, the issue of the seismic design for the Hosgri Earthquake was also extensively litigated in the operating license hearing.⁷⁸ The Appeal Board summarized that history, noting that the Licensing Board had equated the Hosgri response spectrum to the “maximum vibratory ground motion” — essentially equivalent to the safe shutdown earthquake under Appendix A.⁷⁹ FOE simply ignores this history. The hearing record is clearly fundamental to defining the licensing basis of the plant — indeed more so than the UFSAR itself (which must be drafted to reflect the licensing history and licensing basis).

There is also no factual basis for FOE’s claim that the Hosgri evaluation was assigned some undefined “lesser role.”⁸⁰ FOE cites the NRC Staff supplemental safety evaluation report (SSER No. 34) addressing PG&E’s *post-licensing* LTSP and vaguely refers to different methodologies utilized for qualifying plant structures and equipment during the Hosgri

⁷⁶ FOE Appeal Br. at 19.

⁷⁷ FOE also suggests that the supplemental safety evaluation is not relevant because it was issued before the plant’s “original Final Safety Analysis Report.” But the “original” Final Safety Analysis Report is part of the license application, first submitted in September 1973. The first Updated FSAR is not required until after licensing. See 10 C.F.R. § 50.71(e)(3)(i).

⁷⁸ LBP-15-27, slip op. at 12-13.

⁷⁹ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 910-11 (1981), addressing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453 (1979).

⁸⁰ FOE Appeal Br. at 18.

evaluation relative to the DDE evaluation.⁸¹ This issue was addressed in PG&E’s Answer to the hearing request.⁸² Each evaluation had its own methodology, accepted by the NRC at the time. This argument is a challenge to the initial licensing review, not to any change made in UFSAR Revision 21. FOE also claims that the Hosgri evaluation encompassed “a more limited scope” of equipment than the “approved list in Regulatory Guide 1.29.”⁸³ This argument (citing a 2007 non-licensing basis revision to the Reg. Guide) is not based on anything in the record. In fact, Diablo Canyon safety-related SSCs were and remain qualified for the Hosgri ground motions.⁸⁴

4. *Neither UFSAR Revision 21 Nor The October 2012 NRC Letter Changed The Design Basis Or Granted Greater Authority*

In another variation on the recurring argument, FOE argues that UFSAR Revision 21 and its antecedent, the October 2012 NRC Letter, “changed the design basis of the plant by modifying the description of the maximum earthquake from (1) the DDE to (2) the DDE, Hosgri Evaluation, or the LTSP spectrum for purposes of establishing the parameters for meeting

⁸¹ *Id.* at 21.

⁸² PG&E Answer at 4-6; Horstman Declaration at ¶ 14.

⁸³ FOE Appeal Br. at 18-19.

⁸⁴ In connection with the initial licensing review, the structural evaluations for the HE ground motions were documented in the “Hosgri Report” that was submitted to the NRC in phases as amendments to the operating license application. (The Hosgri amendments to the application were submitted between June 3, 1977, and June 6, 1980.) The seismic structural evaluations in the complete Hosgri Report encompassed the full scope of safety-related equipment under Safety Guide 29, which was the predecessor to Reg. Guide 1.29 applicable to Diablo Canyon. The first phase of the Hosgri structural evaluation was submitted on the docket (operating license application Amendment 50 in June 1977) and encompassed the seismic evaluation of equipment required to shut down and maintain the plant in a safe condition. This is the scope of equipment that has been previously described as the “Hosgri Earthquake Dedicated Shutdown Path.” The second phase of the Hosgri evaluation was completed and submitted to the NRC in November 1977 (operating license application Amendment 56). This phase encompassed all safety-related Design Class 1 equipment.

General Design Criterion 2.”⁸⁵ FOE asserts that the clarifying information on the Hosgri and LTSP evaluations (which were in fact completed many years ago) added to the UFSAR in Revision 21 “alter[ed] the foundation for the seismic design basis” and that the DDE was no longer the only “maximum earthquake” in the UFSAR.⁸⁶ FOE argues that the NRC Staff “directed and approved” the change to the design basis through the October 2012 NRC Letter and the Bamford memo.⁸⁷

As previously discussed, the Licensing Board made no mistake in concluding that neither Revision 21, the October 2012 NRC Letter, nor the Bamford memo directed or approved a change to the seismic design of the plant. The HE evaluation was part of the plant design and licensing bases since the operating license review and hearings. The plant was evaluated for both the HE and DDE; both earthquake evaluations were therefore considered (at differing times) to establish the maximum earthquake ground motions in the region; and both were considered in structural evaluations to establish maximum seismic loads on safety related equipment (each with their own inputs). Even FOE recognizes here that Revision 20 of the UFSAR included a reference to the Hosgri evaluation.⁸⁸ More importantly, FOE again fails to acknowledge the substantial additional record, including docketed licensing correspondence, the NRC Staff safety evaluation reports, and the hearing decisions, that document and confirm the significant role of the Hosgri evaluation (both seismic and structural) in the initial licensing of the plant. These documents define the licensing basis as much, if not more than, any revision of

⁸⁵ FOE Appeal Br. at 21.

⁸⁶ *Id.* at 22.

⁸⁷ *Id.* at 23.

⁸⁸ *Id.* at 22.

the UFSAR. The point of Revision 21 (prepared as part of a Diablo Canyon Licensing Basis Verification Project) was to more clearly conform the UFSAR to the actual licensing basis, not to change the licensing and design bases of the plant.⁸⁹

5. *PG&E's Analysis of New Seismic Information Does Not Alter The Terms Of The License Or Involve Greater Operating Authority*

FOE next argues that PG&E's evaluations of the Shoreline Fault scenarios and other "reanalyzed faults (Shoreline, Los Osos, and San Luis Bay) create additional and unacceptable risk."⁹⁰ However, this argument by its terms addresses new seismic analyses and implications for current operational safety. FOE is not identifying here any specific NRC approval that could be a license amendment. Nor is FOE identifying any change to the licenses or any increase in operating authority that should be properly treated as a license amendment. An increase in risk (even if it existed) is not an increase in operating authority. It may be a reason for the licensee to take additional action or for the regulator to require additional action, but any stakeholder concerns regarding the adequacy of current oversight or operational safety must be addressed by 10 C.F.R. § 2.206.

FOE also persists in its view that "the safe shutdown scenario for Diablo Canyon remains the DDE" and that new seismic information "must therefore be compared against the

⁸⁹ The NRC Staff's suggestion in the October 2012 NRC Letter that PG&E consider the Shoreline Fault a "lesser included" fault under the Hosgri evaluation, and that PG&E update the UFSAR "as appropriate," is also a far cry from an "approval." It is illogical to argue that a statement by the NRC Staff that PG&E could follow an UFSAR update process that requires no NRC approval is itself an approval. FOE's formulation of an "approval" would mean that a Staff statement that a plant modification could be made without NRC approval under Section 50.59 would itself be an approval of the modification triggering hearing rights.

⁹⁰ FOE Appeal Br. at 23.

DDE scenario, not the Hosgri evaluation.”⁹¹ FOE argues that the Staff alters the license and grants greater authority in allowing PG&E to use the Hosgri response spectrum as the “sole benchmark.”⁹² FOE’s argument fails on many levels. First, the DDE is not the only licensing basis “safe shutdown” analysis for Diablo Canyon, as already discussed. Likewise, the HE is not and has not ever been the “sole benchmark.” Second, in accord with the October 2012 NRC Letter, PG&E’s Seismic Hazards Report compares the updated ground motion response spectrum to both the DDE and Hosgri. The fact that the spectrum exceeds the DDE in a certain frequency range is the reason Diablo Canyon screens in for further evaluation under 10 C.F.R. 50.54(f) Letter. Third, PG&E’s comparisons of updated ground motion response spectra to the Hosgri response spectrum, along with the LTSP seismic margins assessment, establish the basis for current safe operations. This is not a license amendment, *de facto* or otherwise. The Licensing Board correctly found that the Section 50.54(f) Letter is an oversight matter and did not revise the licensing basis of the plant (or, more importantly, the licenses).⁹³ Likewise, PG&E’s evaluations confirming the functionality of equipment for the updated seismic hazards are not constrained by historic licensing basis methodologies and do not amend the license.⁹⁴

⁹¹ *Id.* at 23-24.

⁹² *Id.* at 24.

⁹³ LBP-15-27, slip op. at 11. As discussed below, no nuclear plant license or licensing basis (other than the Diablo Canyon LTSP) included a method for analyzing new seismic information. This was the reason there was a Section 50.54(f) Letter.

⁹⁴ *See* PG&E Answer at 21-22.

6. *The Voluntary Filing And Voluntary Withdrawal Of LAR 11-05 Do Not Constitute A De Facto Amendment And Are Not “Probative” Of The Matter*

FOE next touts PG&E’s withdrawn license amendment request (LAR 11-05) as evidence of a *de facto* amendment.⁹⁵ That voluntary request would have modified the licensing basis by explicitly defining a “safe shutdown earthquake” (a term not explicitly adopted in the current licensing basis) and establishing a specific approach for evaluating new seismic information (something lacking in the current regulations and licenses). The LAR was withdrawn after the Fukushima accident. The license, the license terms and conditions, and the licensing bases therefore remained unmodified. Instead of adopting specific provisions (including new Technical Specifications) by which Diablo Canyon would address new seismic information going forward (in effect, adopting the LTSP margins assessment as an ongoing program and methodology), Diablo Canyon is now subject to the generic Section 50.54(f) process to reassess the adequacy of the current licensing basis. Meanwhile, safety-related equipment is qualified (and functional) for the current licensing basis seismic criteria.

FOE claims that juxtaposing PG&E’s operating authority before LAR 11-05 to its authority after withdrawing LAR 11-05 “lays bare” the expansion of authority.⁹⁶ But, the supposed example of a change in authority cited by FOE — identifying the Hosgri as the safe shutdown earthquake — never occurred, as already discussed. The licensing basis both before submittal of LAR 11-05 and after withdrawal of LAR 11-5 remains the original DDE evaluation

⁹⁵ FOE Appeal Br. at 24-26.

⁹⁶ *Id.* at 25.

(including related structural analyses) and the HE evaluation (including related structural analyses).⁹⁷

Having failed to identify an actual change in operating authority, FOE decides that PG&E must have elected to file LAR 11-05 because it “was required by law” (or at least because “counsel for PG&E” must have believed that to be so).⁹⁸ However, FOE identifies no requirement that would have obligated PG&E to file LAR 11-05, nor does it highlight a non-compliance that resulted from withdrawing LAR 11-05. FOE’s argument amounts to baseless speculation about PG&E’s intent and beliefs. In fact, as the Licensing Board correctly concluded, the withdrawn LAR has “little if any significance” in the context of FOE’s *de facto* amendment argument.

7. *No Technical Specification Changes Are Presently Required, And Therefore No Hearing Is Required*

Flailing to find a basis for a *de facto* amendment, FOE next claims that “[I]eaving Diablo Canyon’s Technical Specifications unaltered in this case violates regulations requiring certain information, including an evaluation method for new seismic data, to be incorporated into the plant’s Technical Specifications.”⁹⁹ But FOE’s argument again rests on multiple misstatements of facts and mistaken assumptions. LAR 11-05 included proposed changes to the Technical Specifications to incorporate a process, previously absent, for the evaluation of new

⁹⁷ FOE again repeats its mantra that the Hosgri evaluation has “effectively become” the safe shutdown earthquake, and that this change “reduces the safety margin of the plant’s seismic design basis.” *Id.* None of this, however, is true. And, even if it was, reduced safety margin with respect to new seismic information cannot be equated to an increase in operating authority.

⁹⁸ *Id.* at 26.

⁹⁹ *Id.* at 26.

seismic information.¹⁰⁰ The changes would have been associated with Technical Specification “Administrative Controls.” But, because the amendment was never made, there was no change to the Technical Specifications. Instead, PG&E is following the process set by the NRC in the Section 50.54(f) Letter — a process that did not change the licensing basis of any nuclear plant (including Diablo Canyon) such that technical specification changes would be necessary.

Regardless, technical specifications are reserved for those matters where the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.¹⁰¹ It goes without saying that virtually all requirements involving seismic qualification of SSCs at nuclear power facilities have some connection to safety, but these safety requirements can be followed and enforced adequately by means of licensee-controlled documents. What FOE’s claim lacks, therefore, is a minimal factual or legal basis for believing that PG&E’s failure to seek a Technical Specification change for including the Shoreline Fault as a lesser included case significantly increases the public health and safety risk. Simply because a set of administrative items could be inserted into technical specifications does not mean that they must be there. There is “no statutory or regulatory requirement that every operational detail ... be subject to a technical specification.”¹⁰² To the extent FOE here is

¹⁰⁰ 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 license, PG&E sought to “clearly define the evaluation to be performed upon discovery of new seismic information.”

¹⁰¹ *Portland General Electric Co. (Trojan Nuclear Plant)*, ALAB-531, 9 NRC 263, 273 (1979).

¹⁰² *Perry*, CLI-96-13, 44 NRC at 328.

actually challenging current compliance with 10 C.F.R. § 50.36, its remedy again is through the Section 2.206 process.

FOE also reiterates its flawed argument that that the NRC Staff, “through the approval of Revision 21,” permitted PG&E to insert new methodologies into the licenses for Diablo Canyon. FOE again ignores the intent of the NRC’s different regulatory processes. The purpose of the UFSAR update requirement in 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 interested parties. As discussed above, Section 50.71(e) is a reporting requirement. According to the Statements of Consideration for Section 50.71(e), “approvals of license amendments and technical specification changes are independent of the FSAR updating process.”¹⁰³ The existence of a UFSAR revision therefore has no bearing on whether a Technical Specification change is necessary.

8. *The December 2014 Inspection Report Is An Oversight Matter And Not Part Of A “Proceeding” To Amend The Licenses*

FOE finally asserts that the Licensing Board erred in finding that the NRC Staff’s December 2014 Inspection Report “was not part of a proceeding that effected a *de facto* license amendment.”¹⁰⁴ Again, FOE claims that the Licensing Board has “ignored” *Citizens Awareness Network* and its general admonition about “effects of a Staff action” rather than “labels.”¹⁰⁵ However, the Licensing Board correctly concluded that the inspection report was part of the inspection or oversight process, and that “NRC inspection reports, even inspection reports

¹⁰³ 45 Fed. Reg. at 30615.

¹⁰⁴ FOE Appeal Br. at 29.

¹⁰⁵ *Id.*

documenting violations, are not *de facto* license amendments.”¹⁰⁶ The Licensing Board did not ignore the effect of the inspection report or rely on a label. The Licensing Board simply characterized the inspection report correctly, based on its nature and effect.

PG&E addressed this issue in a brief before the Licensing Board.¹⁰⁷ The NRC Staff’s December 2014 Inspection Report documented an assessment of PG&E’s seismic operability determination after the issuance of the September 2014 CCCSIP Report. On its face, the Staff document is a “baseline inspection report.” It is not a license amendment or a specific approval. The report addresses PG&E’s basis for continued safe operation given new seismic information and summarizes the NRC Staff’s evaluation of potential ground motions utilizing a “more conservative” approach. The Staff concludes that “past evaluations of the Hosgri spectrum indicate considerable design margin for functionality of SSCs, and satisfy the provisions for operability as described in NRC Inspection Manual Chapter 0326.”¹⁰⁸ The December 2014 Inspection Report does not excuse non-compliance with the license, endorse a change in licensing bases methodology, or grant greater operating authority. The inspection report in this case did not even identify any findings or violations. At bottom, an inspection report documents an oversight function.¹⁰⁹ Contrary to FOE’s incantation of *Citizens Awareness Network*, it is precisely the effect of the inspection report, not its label, that is relevant.

Under FOE’s approach every inspection report issued by the NRC “approving” a plant condition or analysis (by not finding a violation), would initiate a “proceeding” to amend

¹⁰⁶ LBP-15-27, slip op. at 16-17, citing *Fort Calhoun*, CLI-15-5, 81 NRC at 336-37.

¹⁰⁷ See PG&E Supplemental Brief at 11-12.

¹⁰⁸ December 2015 Inspection Report, Enclosure at 5.

¹⁰⁹ See *Fort Calhoun*, CLI-15-5, 81 NRC at ___, slip op. at 7-9 (recognizing the “distinction between [the] agency’s hearing and oversight processes”).

the license. Presumably any finding of a non-compliance would also initiate a “proceeding” to amend a license or grant greater authority. FOE’s approach would therefore create a hearing opportunity for every inspection report. FOE, however, cites no support in the statute or NRC regulations for such a sweeping conclusion — and certainly none can be found in *Citizens Awareness Network*. FOE’s argument is inconsistent with the plain language of AEA Section 189.a, the regulatory framework established by 10 C.F.R. § 2.206, and ample Commission precedent that Section 2.206 provides the process for stakeholders to address the adequacy of NRC oversight.

IV. CONCLUSION

The Licensing Board correctly denied FOE’s request for hearing and petition to intervene. FOE’s appeal should be rejected.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 17th day of November 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of “PACIFIC GAS AND ELECTRIC COMPANY’S RESPONSE TO FRIENDS OF THE EARTH’S APPEAL OF LBP-15-27” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 17th day of November 2015, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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