

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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NRC STAFF BRIEF IN OPPOSITION TO  
FRIENDS OF THE EARTH APPEAL OF LBP-15-27

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this brief in opposition to Friends of the Earth's (FOE) October 23, 2015, "Notice of Appeal" (Notice) and "Brief of [FOE] in Support of Appeal of LBP-15-27" (Appeal).<sup>1</sup> In LBP-15-27, the Atomic Safety and Licensing Board (Board) concluded that FOE had not identified a *de facto* license amendment proceeding involving the operating licenses held by Pacific Gas & Electric Company (PG&E) for Diablo Canyon Power Plants, Units 1 and 2 (Diablo Canyon).<sup>2</sup> Therefore, the Board denied FOE's Petition to Intervene.<sup>3</sup> FOE appeals the Board's order,

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<sup>1</sup> Friends of the Earth's Notice of Appeal of LBP-15-27 (Oct. 23, 2015) (Notice); Brief of Friends of the Earth In Support of Appeal of LBP-15-27 (Oct. 23, 2015) (Appeal). Both the Notice and Appeal are available at Agencywide Documents Access & Management System (ADAMS) Accession No. ML15296A550).

<sup>2</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-27, 82 NRC \_\_ (slip op. at 10) (Sept. 28, 2015) (LBP-15-27). *Id.* at 10-18 (discussing why each communication or event cited in FOE's Petition or supplemental briefs was not a *de facto* license amendment).

<sup>3</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 19).

claiming the Board “erred when it failed to find that the Staff has engaged in a *de facto* license proceeding to amend Diablo Canyon’s licenses.”<sup>4</sup>

FOE’s Appeal should be denied because it does not identify an error of law or abuse of discretion in LBP-15-27. The Board appropriately applied the relevant law and appropriately used its discretion in ruling that FOE did not identify a licensing action which established a right to request a hearing under section 189a. of the Atomic Energy Act of 1954, as amended (AEA). Therefore, the Commission should deny the appeal and affirm the decision below.

### STATEMENT OF THE CASE

#### I. Procedural History

The Commission established the scope of this proceeding in CLI-15-14.<sup>5</sup> In that order, the Commission directed the Board to determine whether FOE’s August 2014 Petition to Intervene (Petition)<sup>6</sup> and October 2014 Reply (Reply)<sup>7</sup> identified an NRC activity that constituted a *de facto* license amendment<sup>8</sup> of PG&E’s existing licenses to operate Diablo Canyon such that

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<sup>4</sup> Appeal at 1.

<sup>5</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant, Units 1 &2), CLI-15-14, 81 NRC \_\_\_ (slip op. at 2, 7) (May 21, 2015) (referring a limited portion of FOE’s Petition to the Board). Thus, the Commission’s referral established the Board’s limited jurisdiction. See *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 339 (1983) (stating that a Board has only limited jurisdiction and may admit a party’s issues for hearing only insofar as those issues are within the scope of matters outlined in the notice of hearing on the licensing action).

<sup>6</sup> Petition to Intervene and Request for Hearing by Friends of the Earth (Aug. 26, 2014) (ADAMS Package Accession No. ML14254A223).

<sup>7</sup> See 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) (ADAMS Accession No. ML14287A788).

<sup>8</sup> A *de facto* license amendment occurs when a completed agency action grants a licensee greater authority than that provided by its existing licenses or otherwise alters the terms of an existing license. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326-28 (1996). The Staff’s June 15, 2015 pleading provided a detailed discussion of the *de facto* license amendment case law. See NRC Staff Answer to [FOE’s] *De Facto* License Amendment Claims Related to PG&E’s [UFSAR Rev. 21] (June 15, 2015) (ADAMS Accession No. ML15166A504) (Staff’s June 15, 2015 Brief).

FOE should have an opportunity to request a hearing pursuant to section 189a. of the AEA.<sup>9</sup>

The NRC activities identified in FOE's Petition and Reply that allegedly constituted *de facto* license amendments were:

- (1) the NRC Staff's March 2012 request for information to all power plant licensees pursuant to 10 C.F.R. § 50.54(f) (March 2012 § 50.54(f) Letter);
- (2) the NRC Staff's September 2012 Research Information Letter 12-01 (RIL 12-01), which documented the Staff's assessment of the new Shoreline Fault information;
- (3) the NRC Staff's October 2012 letter to PG&E that summarized the results of RIL 12-01 and placed the Staff's further review of new information in the context of the NRC's section 50.54(f) letter requesting seismic reevaluations by all power reactor licensees; (October 2012 Letter)<sup>10</sup> and
- (4) the NRC Staff's supposed "approval" of PG&E's Updated Final Safety Analysis Report, Rev. 21 (UFSAR Rev. 21).<sup>11</sup>

In considering these claims, the Commission directed the Board to provide an opportunity for the Staff and PG&E to respond to the UFSAR Rev. 21 *de facto* claims raised in FOE's Reply, and rule on FOE's Petition within 140 days of May 21, 2015.<sup>12</sup> On June 2, 2015, the Board issued an order scheduling oral argument and allowing PG&E and the Staff to file

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<sup>9</sup> See *Diablo Canyon*, CLI-15-14, 81 NRC at \_\_\_ (slip op. at 2, 7). See *id.* at 7 (citing *Perry* and directing the Board to consider whether an NRC action identified in FOE's Petition or Reply constituted a *de facto* amendment of PG&E's existing licenses to operate Diablo Canyon). If so, the Board was directed to consider the threshold issue of whether FOE met the 10 C.F.R. § 2.309 requirements. *Id.* at 8.

<sup>10</sup> *Id.* at 6-7 (citing FOE's Petition at 14-18, 21-22, 32-33, 42). These documents are available at ADAMS Accession Nos. ML12053A340, ML121230035, and ML120730106, respectively.

<sup>11</sup> *Diablo Canyon*, CLI-15-14, 81 NRC at \_\_\_ (slip op. at 8) (summarizing FOE's claims that the Staff approved UFSAR Rev. 21 and that this constituted a *de facto* license amendment and was a "confirmation" of a *de facto* license amendment proceeding). UFSAR Rev. 21 is available at Diablo Canyon Power Plant Units 1 and 2 Final Safety Analysis Report Update Revision 21 (Sept. 2013) (ADAMS Accession No. ML15098A461).

<sup>12</sup> See *id.* at 8-9.



briefs responding to FOE's UFSAR Rev. 21 claims.<sup>13</sup> The Staff and PG&E filed responsive briefs on June 15, 2015.<sup>14</sup>

On June 5, 2015, FOE filed a motion to allow supplemental briefing on whether subsequent NRC actions that occurred after submission of its Petition were *de facto* license amendments.<sup>15</sup> The actions FOE identified were as follows: (1) the NRC sent a letter dated May 13, 2015 to PG&E concerning PG&E's seismic hazard report; (2) on December 15, 2014 the NRC published an inspection report (Staff's December 2014 Inspection Report); and (3) on December 3, 2014, Dr. Sam Blakeslee, a former California state senator, testified before the U.S. Senate Environment and Public Works Committee to describe Staff oversight actions at Diablo Canyon.<sup>16</sup> The Board permitted FOE to submit a supplemental brief, without ruling on "which (if any) intervening events might be relevant."<sup>17</sup> The Staff and PG&E filed responses to

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<sup>13</sup> See Board Notice and Order (Scheduling Oral Argument) at 2 (unpublished) (June 2, 2015) (ADAMS Accession No. ML15153A192).

<sup>14</sup> See Staff's June 15, 2015 Brief; [PG&E's] Supplemental Brief Regarding [UFSAR Rev. 21] (June 15, 2015) (ADAMS Accession No. ML15166A463).

<sup>15</sup> See FOE's Motion to Allow Supplemental Briefing (June 5, 2015) (ADAMS Accession No. ML15156B521). See FOE's Supplemental Brief at 1 (ADAMS Accession No. ML15170A451) (arguing that these events "bear on the question" before the Board and "demonstrate that the Staff has taken action that grants greater operating authority"). See *also id.* at 6 (claiming that the NRC's May 13, 2015 Letter "enlarged the terms of Diablo Canyon's licenses"). Both the Staff and PG&E opposed FOE's motion to allow supplemental briefing. NRC Staff Answer Opposing the [FOE] Motion to Allow Supplemental Briefing (June 11, 2015) (ADAMS Accession No. ML15162A977); [PG&E] Opposition to Motion for Expanded Briefing (June 11, 2015) (ADAMS Accession No. ML15162A901).

<sup>16</sup> See FOE's Supplemental Brief at 5-6, 16-17, 18-20.

<sup>17</sup> Licensing Board Order (Allowing Supplemental Briefing) (June 12, 2015) (unpublished) (ADAMS Accession No. ML15163A075).

FOE's Supplemental Brief on June 26, 2015.<sup>18</sup> The Board held an oral argument on July 9, 2015.<sup>19</sup>

## II. LBP-15-27

On September 28, 2015, the Board issued LBP-15-27. In LBP-15-27, the Board considered whether any of the Staff actions identified in FOE's Petition, Reply, and Supplemental Brief constituted *de facto* license amendments under *Perry*.<sup>20</sup> The Board ruled that FOE did not identify an NRC activity that constituted a *de facto* license amendment and that therefore, FOE was not entitled to an opportunity to request a hearing pursuant to AEA section 189a.<sup>21</sup> As a result, the Board denied FOE's Petition.<sup>22</sup>

In considering FOE's claims, the Board applied the applicable Commission case law on *de facto* license amendments.<sup>23</sup> As the Board stated, this case law recognizes that hearing

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<sup>18</sup> Pacific Gas and Electric Company's Response to FOE's Supplemental Brief (June 26, 2015) (ADAMS Accession No. ML15177A385) (PG&E Response to FOE Supplemental Brief); NRC Staff Response to the Friends of the Earth's Supplemental Brief (June 26, 2015) (ADAMS Accession No. ML15177A114).

<sup>19</sup> See Prehearing Conference Transcript for [PG&E], Diablo Canyon Nuclear Power Plant (July 9, 2015), pages 1-130 (ADAMS Accession No. ML15195A411) (Prehearing Conference Transcript).

<sup>20</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 10-18 and n. 76). In applying *Perry*, the Board followed the Commission's direction in looking to other recent *de facto* holdings (e.g., *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167 (2014); *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC \_\_ (Mar. 9, 2015) (slip op.)). As discussed in its June 15, 2015 Brief, the Staff believes the Board should only have considered whether the actions identified in FOE's Petition and Reply constituted *de facto* amendments, as directed in CLI-15-14.

<sup>21</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 1-2). FOE raised two contentions in its Petition. The Board found that FOE's Contention 1 raised the issue of whether an NRC activity constituted a *de facto* amendment that would have entitled FOE to hearing opportunity. *Id.* at 7-8. Because the Board decided that FOE was not entitled to a hearing opportunity, it concluded that it did not need to reach the admissibility of FOE's Contention 2. *Id.* at 8. Moreover, because the Board held that FOE did not establish a right to request a hearing under section 189a., the Board did not rule on standing or timeliness. See *id.* at 6-7.

<sup>22</sup> *Id.* at 19. See also *id.* ("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.").

<sup>23</sup> *Id.* at 8 (citing to *Perry* and quoting the standard for what constitutes a *de facto* license amendment). *Perry*, in turn, cites to circuit court case law discussing *de facto* license amendments. See *Perry*, CLI-96-13, 44 NRC at 315 ("Again, the key consideration should be: Did the agency action

rights may be triggered “when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing.”<sup>24</sup> The Board did not consider FOE’s claims related to the safe operation of Diablo Canyon because the Commission referred these claims to the Executive Director for Operations as a request for enforcement action pursuant to 10 C.F.R. § 2.206.<sup>25</sup>

### STANDARD OF REVIEW

An order denying a petition to intervene and/or request for hearing is appealable pursuant to 10 C.F.R. § 2.311. Pursuant to § 2.311(c), a ruling on a request for hearing or a petition to intervene is only appealable on the question as to whether the request/petition should have been granted. The Commission gives substantial deference to a Board’s determinations on threshold issues and will affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion.<sup>26</sup>

A petitioner appealing a Board’s denial of intervention “bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims.”<sup>27</sup> “A mere recitation of an appellant’s prior

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“supplement” the existing operating authority prescribed in the license? See [*Citizens Awareness Network v. United States Nuclear Regulatory Comm’n*, 59 F.3d 284, 295 (1st Cir. 1995) (CAN)].”

<sup>24</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 8). See CAN, 59 F.3d at 295 (noting same). In ruling on FOE’s claims, the Board also had all of the Staff’s briefs, which discussed the proposition that it is the effect of the Staff’s action, not the label given, that matters for purposes of a *de facto* claim. See, e.g., Staff’s June 15, 2015 Brief at 6.

<sup>25</sup> See LBP-15-27, 82 NRC \_\_ (slip op. at 17 n.76). See *Diablo Canyon*, CLI-15-14, 81 NRC at \_\_ (slip op. at 9).

<sup>26</sup> See *AmerGen Energy Co., LLC*, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111,121 (2006) (citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006)).

<sup>27</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'"<sup>28</sup>

When considering an appeal under 10 C.F.R. § 2.311, the Commission may affirm a Board decision on any ground finding support in the record, whether or not relied on by the Board.<sup>29</sup>

### ARGUMENT

FOE's Appeal should be denied because FOE has not shown that the Board committed an error of law or abused its discretion in denying FOE's Petition in LBP-15-27. Instead, FOE's Appeal simply repeats arguments made in its previous filings. As explained below and in previous Staff filings, FOE's arguments lack merit in light of the relevant *de facto* case law, Diablo Canyon's seismic design, and the NRC's regulatory processes.

FOE's Appeal argues that the Board erred in two ways. First, FOE argues that the Board erred by evaluating each individual Staff action or communication to determine whether there was a *de facto* license amendment, when it should have instead looked at the actions as a continuing process.<sup>30</sup> Second, FOE maintains that the Board erred in accepting the Staff's label for each action or communication, thereby disregarding the principle that it is the substance of the action, not its label, which matters in determining whether there was a *de facto* amendment.<sup>31</sup>

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<sup>28</sup> *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993) (quoting *Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-91-5, 33 NRC 238, 240-41 (1991)).

<sup>29</sup> See, e.g., *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

<sup>30</sup> Appeal at 1-2, 10.

<sup>31</sup> *Id.* at 3, 9, 11-12.

However, as more fully addressed below, FOE is incorrect on both points. First, the Commission's *de facto* license amendment framework does not recognize "ongoing" *de facto* license amendment proceedings.<sup>32</sup> Thus, the Board correctly considered each Staff action identified by FOE on its face to determine if the action effected an amendment. Second, the Board did not merely accept the Staff's label without analyzing the substance of each action. Rather, the Board carefully considered pleadings filed by the Staff and PG&E that amply documented why each Staff action or communication did not grant greater operating authority to Diablo Canyon.<sup>33</sup> Moreover, the Board addressed and rejected the substance of FOE's *de facto* license amendment claim—that the Hosgri Earthquake evaluation (HE) was not part of Diablo Canyon's design basis until it was implicitly added by one of several Staff actions or by UFSAR Rev. 21.<sup>34</sup> Thus, the Board did not rule merely based on the label assigned to actions and communications by the Staff. Further, the Board did not err in determining that FOE had not identified a *de facto* license amendment. Therefore, FOE's Appeal should be denied.

I. The Board Appropriately Considered Each Individual Staff Action in Finding that FOE Did Not Identify a *De Facto* License Amendment

FOE's Appeal claims that the Board erred in applying the Commission's *de facto* case law in LBP-15-27 because the Board analyzed discrete Staff actions instead of the "series of events" FOE identified in its Petition, Reply, and Supplemental Briefs.<sup>35</sup> FOE asserts that the Board failed to focus on whether the process engaged in by the Staff, considering all actions in

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<sup>32</sup> See *Perry*, CLI-93-13, 44 NRC at 327; See Staff's June 15, 2015 Brief at 6-8, 13.

<sup>33</sup> See, e.g., NRC Staff Answer to Petition to Intervene and Request for a Hearing by Friends of the Earth, at 23-38 (Oct. 6, 2014) (ADAMS Accession No. ML14279A573) (Staff's Answer to FOE's Petition to Intervene); Staff's June 15, 2015 Brief at 14-21; PG&E's Answer to Friends of the Earth Hearing Request (Oct. 6, 2014) (ADAMS Accession No. ML14279A617); PG&E's Supplemental Brief Regarding UFSAR Revision 21 (June 15, 2015) (ML15166A463); PG&E's Response to FOE Supplemental Brief.

<sup>34</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 12-13).

<sup>35</sup> Appeal at 10.

totality, amounted to a *de facto* amendment proceeding.<sup>36</sup> However, the Board's analysis of each finite and completed Staff action is consistent with relevant *de facto* license amendment cases.

As the Staff has explained before the Board, the *Perry de facto* license amendment framework does not recognize "ongoing" *de facto* license amendment proceedings.<sup>37</sup> Instead, *Perry* directs the presiding officer to analyze a completed Staff action and determine whether that completed action augmented the licensee's operating authority or otherwise altered the terms of its license.<sup>38</sup> Thus, the *Perry* analysis *looks back* at a finite and completed agency action; it does not involve *looking forward* or looking at a continuing series of interactions between the Staff and the licensee as the Staff conducts its oversight to "confirm" some ongoing license amendment process. In LBP-15-27, the Board conducted an analysis of each Staff action, consistent with the Commission's direction in CLI-15-14.<sup>39</sup> In doing so, the Board correctly applied the Commission's *de facto* case law. Thus, FOE's Appeal does not identify an error of law with respect to the Board's *de facto* analysis and should be denied.

II. The Board Considered the Pleadings Below and the Substance of the Staff's Actions in Finding That FOE Did Not Identify a *De Facto* License Amendment

FOE also argues that the Board erred in accepting the Staff's label for each action or communication, instead of looking at the substance of the action to determine whether there

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<sup>36</sup> *Id.* at 1-2.

<sup>37</sup> See Staff's June 15, 2015 Brief at 6-8, 13. See Prehearing Conference Transcript at 30-31.

<sup>38</sup> *Perry*, CLI-93-13, 44 NRC at 327. This type of analysis also applies when considering other types of *de facto* licensing actions. See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 276-77 (examining a Staff's Confirmatory Action Letter (CAL) on its face to determine if the CAL constituted a *de facto* suspension triggering Sec. 189a. hearing rights). See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-940, 32 NRC 225 (1990) (affirming LBP-89-28).

<sup>39</sup> The Commission explicitly held in CLI-15-14 that *Perry* provides the applicable *de facto* analysis. *Diablo Canyon*, CLI-15-14, 81 NRC \_\_ (slip op. at 7).

was a *de facto* amendment.<sup>40</sup> As noted, FOE's Petition, Reply, and Supplemental Brief identified several actions it claimed constituted a *de facto* license amendment or were part of a *de facto* license amendment "process." On appeal, FOE focuses on its prior arguments that PG&E's submission of UFSAR Rev. 21 and the Staff's supposed approval of the UFSAR constituted a *de facto* license amendment, and also restates its claim that the Staff's December 2014 Inspection Report constituted a *de facto* license amendment.

In particular, FOE's Appeal restates its arguments that: (1) the HE was not part of Diablo Canyon's design basis before UFSAR Rev. 21; (2) UFSAR Rev. 21's discussion of the HE, Shoreline Fault, and Long Term Seismic Program (LTSP) expanded the operating authority of Diablo Canyon; (3) UFSAR Rev. 21 accomplished what PG&E's LAR-11-05 sought to do; and (4) the Staff's December 2014 inspection report constituted a *de facto* license amendment.<sup>41</sup>

However, as discussed below, FOE's arguments do not demonstrate that the Board erred or abused its discretion. Instead, FOE's claims are not correct in light of the Staff's regulatory process, the Diablo Canyon seismic design basis, and *de facto* case law. Moreover, the Board considered the information and pleadings before it and determined that the substance of each action identified in FOE's Petition, Reply, and Supplemental Briefs, including the Staff's actions with respect to UFSAR Rev. 21, did not constitute a *de facto* amendment. Therefore, FOE's Appeal should be denied.

A. The Board Correctly Held That the Staff's Review of UFSAR Rev. 21 Did Not Constitute a *De Facto* License Amendment

Before addressing FOE's specific arguments on appeal, a discussion of the nature of UFSAR Rev. 21 and the Board's ruling on UFSAR Rev. 21 is instructive.

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<sup>40</sup> Appeal at 3, 9, 11-12.

<sup>41</sup> See *id.* at 15-29. FOE's Appeal does not appear to challenge the Board's rulings on other actions it claims constituted *de facto* license amendments, aside from the December 2014 inspection report. See *id.* at 29.

PG&E submitted UFSAR Rev. 21 to the NRC on September 16, 2013.<sup>42</sup> UFSAR Rev. 21 represents the status of Diablo Canyon Units 1 and 2 through March 23, 2013.<sup>43</sup> The Staff, following its normal process, performed a sampling review of PG&E's UFSAR Rev. 21 to determine whether the submittal met the requirements of 10 C.F.R. § 50.71(e), which included determining whether it reflected changes to the FSAR that PG&E made either through a license amendment request or through the 50.59 process.<sup>44</sup> Based on its review, the Staff concluded that UFSAR Rev. 21 "was submitted consistent with the requirements in 10 CFR 50.71(e)."<sup>45</sup>

In LBP-15-27, the Board ruled that UFSAR Rev. 21 and the accompanying Staff review was not a *de facto* amendment because the Staff does not review FSAR submittals "for accuracy; nor does it approve the analyses therein."<sup>46</sup> Rather, the Board noted that 10 C.F.R. § 50.71(e) is only a reporting requirement.<sup>47</sup> The Board concluded that because the Staff does not "approve" substantive changes made by the licensee, such as changes to the seismic analysis, any unauthorized changes made by PG&E "would be a matter for NRC oversight, not for adjudication."<sup>48</sup>

FOE's Appeal argues that the Board erred because it only considered how the Staff generally reviews FSAR submissions, but did not consider the effect of the Staff's review of

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<sup>42</sup> PG&E Letter DCL-13-091, at 1 (Sept. 16, 2013) (ADAMS Accession No. ML13280A391).

<sup>43</sup> *Id.*

<sup>44</sup> See Memorandum from Peter J. Bamford, NRC, to Michael T. Markley, NRC, "Diablo Canyon Power Plant, Units 1 and 2 – Review of Final Safety Analysis Report Update, Revision 21 (TAC Nos. MF2945 and MF2946)," (June 23, 2014) at 3 (ADAMS Accession No. ML14022A120) (describing sampling review of PG&E's UFSAR Rev. 21) (Bamford Memorandum).

<sup>45</sup> See *id.* at 3.

<sup>46</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 14).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 15.



UFSAR Rev. 21 in particular.<sup>49</sup> However, the Board's analysis reflects the legal principle that the effect, and not the label, of a Staff action is what counts for purposes of determining a *de facto* license amendment. As further discussed below, the information and pleadings before the Board support the Board's finding that the Staff's review of UFSAR Rev. 21, as documented in the Bamford Memorandum, did not amend the Diablo Canyon licenses.

B. The Board Correctly Noted That the Hosgri Earthquake Evaluation Has Long Been Part of Diablo Canyon's Design Basis

FOE maintains that the Board erred by concluding that the HE "has been an established part of the Diablo Canyon design basis since the facility began operation."<sup>50</sup> FOE argues that UFSAR Rev. 21 altered the seismic design basis of the plant by incorporating the HE, which before had only been part of the licensing basis, but not part of the design basis or the plant's SSE.<sup>51</sup>

However, the Board was correct. The HE is part of Diablo Canyon's design basis, not just the licensing basis. 10 C.F.R. § 50.2 defines "design bases" in part as "the specific values or ranges of values chosen for controlling parameters as reference bounds for design," and "requirements derived from analysis (based on calculation and/or experiments) of the effects of a postulated accident for which a structure, system, or component must meet its functional goals." If a plant is modified and qualified to withstand the higher ground acceleration produced by a larger earthquake, such analyses and modifications are by definition part of the plant's design basis. Thus, the HE is part of the Diablo Canyon seismic design basis because PG&E

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<sup>49</sup> Appeal at 11-12.

<sup>50</sup> *Id.* at 15, *citing* LBP-15-27, 82 NRC \_\_ (slip op. at 12-13).

<sup>51</sup> Appeal at 15.

conducted evaluations and appropriate plant modifications to demonstrate that the plant's design could withstand the seismic load of an earthquake occurring on the Hosgri Fault.<sup>52</sup>

Moreover, the Board correctly pointed out the plant's capacity to withstand an earthquake along the Hosgri Fault was extensively litigated and resolved at the time of initial licensing.<sup>53</sup> The Atomic Safety and Licensing Appeal Board acknowledged, in 1981, during Diablo Canyon's operating license proceeding, that the plant was appropriately constructed to withstand an earthquake with a ground acceleration of 0.75g from the Hosgri Fault.<sup>54</sup> This is further documented in at least two safety evaluation reports, where the Staff acknowledged that the HE is part of the seismic design for Diablo Canyon.<sup>55</sup> In Supplemental Safety Evaluation Report (SSER) 7, the Staff explained that a Hosgri Earthquake of 0.75g "is the basis that we have approved for use in the seismic reevaluation . . . [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."<sup>56</sup> And in SSER 34, the Staff wrote "that the seismic qualification basis for Diablo Canyon will continue to be the *original design basis plus the Hosgri evaluation basis*["]."<sup>57</sup> Although FOE correctly notes that SSER 7 was published "before the licensee received its operating licenses" or submitted the original FSAR,<sup>58</sup> SSER 7 is still probative of what the Staff intended the design basis to be.

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<sup>52</sup> See *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-79-26, 10 NRC 453, 492-507 (1979) (discussing the modifications and reanalysis performed after discovery of the Hosgri Fault).

<sup>53</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 12).

<sup>54</sup> *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 910-11 (1981), *aff'g* in part, LBP-79-26, 10 NRC at 490.

<sup>55</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 13 n.56).

<sup>56</sup> Supplement No. 7 to the Safety Evaluation Report [for Diablo Canyon], at 2-4 (May 26, 1978) (ADAMS Accession No. ML14279A129) (emphasis added).

<sup>57</sup> NUREG-0675, Supplement No. 34, Safety Evaluation Report [for Diablo Canyon], at 1-7 (June 1991) (ADAMS Accession No. ML14279A130) (emphasis added).

<sup>58</sup> Appeal at 19.

FOE argues that while the HE may have been part of the Diablo Canyon licensing basis, it could not have been part of the design basis because it was never identified as the SSE until UFSAR Rev. 21.<sup>59</sup> FOE maintains that the “seismic design basis for nuclear power plants is made up of an operating basis earthquake (OBE) and a safe shutdown earthquake (SSE)[,]” and since the HE was neither before UFSAR Rev. 21, it was not part of the design basis of the plant.<sup>60</sup>

But FOE’s claims are incorrect. First, UFSAR Rev. 21 does not identify the HE as the SSE for Diablo Canyon. UFSAR Rev. 21 states that the Hosgri Earthquake, the Design Earthquake (DE), and the Double Design Earthquake (DDE) are all design basis earthquakes, but does not designate the Hosgri Earthquake as the SSE.<sup>61</sup> Rather, UFSAR, Rev. 21, like previous versions of the FSAR, states that the DDE is the equivalent of Diablo Canyon’s SSE.<sup>62</sup>

Second, FOE’s assertion that the HE cannot be part of the design basis for the plant without being designated as the SSE is unfounded. As explained above, Diablo Canyon was evaluated and modified to withstand the seismic load of an earthquake occurring on the Hosgri Fault, which meets the definition of “design basis” in 10 C.F.R. § 50.2. The fact that 10 C.F.R. Part 100 Appendix A only discusses the OBE and SSE does not exclude other earthquake evaluations from being part of a plant’s design basis.<sup>63</sup>

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<sup>59</sup> *Id.* at 18.

<sup>60</sup> See *id.* (citing 10 C.F.R. Part 100 App’x A); see also *id.* at 20 (assuming that SSER 7 could not have considered the HE part of the design basis because it identified the DDE as the SSE).

<sup>61</sup> UFSAR Rev. 21 at 2.5-59.

<sup>62</sup> *Id.* at 3.2-1. The statement that the DDE is equivalent to the SSE has not been modified at least since UFSAR Rev. 15 in September 2003. See *id.* (date on bottom right of the page). FOE itself notes that UFSAR Rev. 21 states that the SSE continues to be the DDE, but argues that other changes made in UFSAR Rev. 21 demonstrate that the HE has effectively become the SSE. Appeal at 23 n.72. However, FOE’s position is based on its incorrect assumption that any bounding earthquake at the site must be identified as the SSE.

<sup>63</sup> As explained in the Staff’s June 15, 2015 Brief, Diablo Canyon’s construction permit predates 10 C.F.R. Part 100, Appendix A. Thus, the terminology of Appendix A does not neatly apply to Diablo Canyon. Diablo Canyon was originally designed to a DE of 0.2g and a DDE of 0.4g, which were later

For all of these reasons, the Board did not err when it concluded that the HE had been part of Diablo Canyon's seismic design basis long before UFSAR Rev. 21 or any of the Staff actions and communications identified by FOE as *de facto* license amendments.

C. The Discussion of the HE, LTSP, and Shoreline Fault in UFSAR Rev. 21 Does Not Suggest that a *De Facto* License Amendment Has Occurred

FOE argues that UFSAR Rev. 21 modified the design basis for Diablo Canyon by “designating the DDE, and the Hosgri Evaluation and LTSP earthquakes as the ‘maximum earthquakes’ for the plant, and designating the Shoreline Fault Zone as a lesser-included scenario under the Hosgri Evaluation.”<sup>64</sup> FOE states that the Staff's October 12, 2012 Letter and the Bamford Memorandum “directed and approved this change to the design basis,” thus effecting a *de facto* license amendment.<sup>65</sup>

However, the Board ruled that FOE had not identified a *de facto* license amendment.<sup>66</sup> Importantly, this holding was based on pleadings documenting that UFSAR Rev. 21 did not make any of the changes to the design basis as asserted by FOE. The Staff explained in its June 15, 2015 Brief that although UFSAR Rev. 21 is the first version of the FSAR to refer to the HE as a design basis earthquake *in Chapter 2 of the FSAR*, other parts of the FSAR have long stated that the HE is part of the Diablo Canyon design basis. For example, UFSAR Rev. 20,<sup>67</sup> when describing the seismic classification of the plant in Chapter 3, stated, “Plant features that correspond to Seismic Category I, as identified in SG [Safety Guide] 29, are designed to remain

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viewed as being equivalent to a Part 100, Appendix A OBE and SSE, respectively. The HE was added after the plant was evaluated and modified to withstand the seismic loads of an earthquake occurring on the Hosgri Fault. See Staff's June 15, 2015 brief at 18 n.94.

<sup>64</sup> Appeal at 22.

<sup>65</sup> *Id.* at 23.

<sup>66</sup> LBP-15-27, 82 NRC \_\_\_ (slip op. at 14-16).

<sup>67</sup> Diablo Canyon Power Plant Units 1 and 2 Final Safety Analysis Report Update Revision 20 (Nov. 2011) (ADAMS Accession No. ML15097A229) (UFSAR Rev. 20).

functional during the *design basis earthquakes* that they are required to withstand: the DE (equivalent to the OBE of SG 29), the DDE (equivalent to the SSE of SG 29), and/or the postulated Hosgri Earthquake (HE).<sup>68</sup> This language was in the FSAR long before the Staff actions that FOE claims are *de facto* amendments.<sup>69</sup>

Furthermore, the Staff explained in its June 15, 2015 Brief that the LTSP, although part of Diablo Canyon's licensing basis, did not alter the seismic design basis.<sup>70</sup> Rather, the initial LTSP study *confirmed* the adequacy of Diablo Canyon's seismic design basis by determining that equipment qualified to the three design basis earthquakes remained qualified. UFSAR Rev. 21 continues to refer to the LTSP as a licensing basis earthquake scenario, and did not make any statements suggesting that the LTSP modified the seismic design basis.<sup>71</sup>

Similarly, UFSAR Rev. 21's statements regarding the Shoreline Fault did not modify Diablo Canyon's seismic design basis. As the Staff explained in its June 15, 2015 Brief, since the HE is part of the plant's design basis, stating that potential ground motions from the Shoreline Fault are bounded by the HE simply means that the plant can safely operate within its existing design and licensing basis.<sup>72</sup> When the Shoreline Fault was discovered, both PG&E and the NRC analyzed the new fault to determine whether the predicted ground motions were

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<sup>68</sup> *Id.* at 3.2-2 (emphasis added).

<sup>69</sup> The language has not been modified at least since UFSAR Rev. 15 in September 2003. See *id.* (date on bottom right of the page).

<sup>70</sup> Staff's June 15, 2015 brief at 20 n.105. The LTSP, which began as a license condition, is part of Diablo Canyon's licensing basis. See 10 C.F.R. § 54.3(a) (stating that license conditions are part of the licensing basis). Although the condition has been fulfilled, it has not been removed from the license. See Diablo Canyon Nuclear Power Plant, Unit 1, Docket No. 50-275, Facility Operating License, License No. DPR-80, at 7 (revised Feb. 27, 2014) (ADAMS Accession No. ML053140349) (DCPP License) (Condition 2.C.(7) describes the "Seismic Design Bases Reevaluation Program," which is the LTSP).

<sup>71</sup> See UFSAR, Rev. 21 at 2.5-59 ("The DE, DDE, and HE are design bases earthquakes and the LTSP is a licensing bases earthquake."); *id.* at 2.5-81 ("the LTSP material does not address or alter the current *design* licensing basis for the plant") (emphasis added).

<sup>72</sup> Staff's June 15, 2015 brief at 19. See *also* LBP-15-27, 82 NRC \_\_ (slip op. at 12).

bounded by those for which the plant had been previously evaluated. PG&E and the NRC concluded that ground motions calculated for the Hosgri Earthquake bound potential ground motions from the Shoreline Fault, and therefore Diablo Canyon could safely continue to operate within its existing license and with appropriate safety margins.<sup>73</sup>

FOE also argues that the potential ground motions from the Shoreline Fault must be evaluated against the DDE (Diablo Canyon's SSE), and that PG&E's and the NRC's evaluation of the Shoreline Fault instead against the HE is an expansion of Diablo Canyon's operating authority and a *de facto* amendment.<sup>74</sup> Elsewhere, FOE contends that PG&E and the Staff employed "relaxed" assumptions and analytical methods that differ from those in the design basis to demonstrate that the HE bounds the Shoreline Fault, and that this improperly grants greater operating authority to the licensee.<sup>75</sup>

However, both of these claims conflate oversight and licensing. When discussing RIL 12-01, the Board correctly found that the Staff's comparison of the risk posed by the Shoreline Fault to that of the Hosgri Fault concerned safe operation, and was not a licensing action.<sup>76</sup> As the Staff explained in its June 15, 2015 Brief, consideration of whether the plant is operating within safe margins is an oversight function.<sup>77</sup> As such, the seismic hazard posed by a potential

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<sup>73</sup> See, e.g., RIL 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).

<sup>74</sup> Appeal at 23-24. Interestingly, FOE acknowledges that the SSE remained the DDE in UFSAR Rev. 21, but asserts elsewhere that UFSAR Rev. 21 "effectively" made the HE the SSE. *Compare id.* at 23 n.72 *with id.* at 25 and *see supra* at n.62.

<sup>75</sup> *Id.* at 15, 20-21. Although FOE claims that PG&E and the Staff relied on more "relaxed" analytical methods and assumptions than those in Diablo Canyon's design basis when looking at the risk posed by the Shoreline Fault, FOE fails to explain what methods and assumptions were relaxed.

<sup>76</sup> See LBP-15-27, 82 NRC \_\_ (slip op. at 12). The Board quoted the Commission's recent decision in *St. Lucie* stating that "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." *Id.* (quoting *St. Lucie*, CLI-14-11, 80 NRC at 175).

<sup>77</sup> Staff's June 15, 2015 brief at 19.

earthquake scenario can be measured against the HE, which is part of Diablo Canyon's design basis, or against the LTSP, which is not part of the design basis but is a more up-to-date analysis of existing safety margins, or by other methods.<sup>78</sup> Contrary to FOE's assertions, PG&E and the Staff need not compare the Shoreline Fault to the DDE in order to make an operability decision, nor must they use the same methods and assumptions as those in the DDE or in the HE.<sup>79</sup> Rather, PG&E and the NRC continue to use up-to-date and state of the art methods for determining Diablo Canyon's seismic hazard.<sup>80</sup> For these reasons, the Board appropriately concluded that neither the NRC's studies of the Shoreline Fault nor UFSAR Rev. 21 changed Diablo Canyon's licenses.

D. The Board Appropriately Found That PG&E's Filing and Withdrawal of LAR 11-05 Does Not Suggest That a *De Facto* License Amendment Has Occurred

Next, FOE claims that the Board acted arbitrarily, capriciously, and contrary to law when it ignored the significance of PG&E filing and withdrawing LAR 11-05.<sup>81</sup> FOE claims that these actions are probative of whether there is a *de facto* license amendment related to Diablo Canyon.<sup>82</sup> In particular, FOE argues that before LAR 11-05 was filed, the DDE was clearly Diablo Canyon's safe shutdown earthquake but that after PG&E withdrew the LAR and submitted UFSAR Rev. 21, the HE "had effectively become the equivalent of the plant's safe shutdown earthquake," exactly as LAR-11-05 had proposed.<sup>83</sup> FOE also asserts that the Staff's

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<sup>78</sup> See *id.* at 19-21.

<sup>79</sup> Diablo Canyon's technical specifications define a component as "operable" in part "when it is capable of performing its specified safety function(s)." DCCP License, Technical Specifications, at 1.1-4. Thus, operability is about safety. FOE has not pointed to any requirement or NRC guidance suggesting that everything relied on in making an operability determination must be part of a plant's design or licensing basis.

<sup>80</sup> See, e.g., March 2012 § 50.54(f) Letter, at 4 (asking Diablo Canyon, among other plants, to reevaluate its seismic hazard "using present-day NRC requirements and guidance").

<sup>81</sup> Appeal at 25.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

actions related to the withdrawal and the submission of UFSAR Rev. 21 “lays bare the expansion of authority granted by the Staff.”<sup>84</sup>

Similarly, FOE argues that the changes to Diablo Canyon’s technical specifications (TS) proposed by LAR-11-05, specifically with regard to designating the LTSP as the plant’s methodology for evaluating new seismic information, were accomplished by UFSAR Rev. 21.<sup>85</sup> FOE asserts that contrary to NRC regulations, which require TS changes to be approved by license amendment, the Staff “directed PG&E to use these changes and then approved its use of those methodologies, effecting a *de facto* license amendment.”<sup>86</sup>

However, the Board appropriately found that PG&E’s withdrawal of LAR-11-05 was not “probative of whether the NRC Staff eventually granted PG&E greater authority or otherwise altered the terms of PG&E’s licenses.”<sup>87</sup> Simply put, the information and pleadings before the Board demonstrated that nothing proposed by LAR-11-05 has been implemented, in UFSAR Rev. 21 or otherwise. In LAR-11-05, PG&E sought to amend the licenses to make the HE the SSE for the plant, and to “clearly define an evaluation process for newly identified seismic information and incorporate ongoing commitments associated with the [LTSP] into the [UFSAR].”<sup>88</sup> But neither UFSAR Rev. 21 nor any Staff action made the HE Diablo Canyon’s SSE or designated the LTSP as the method for evaluating new seismic information.

As explained above, UFSAR Rev. 21, like previous versions of the FSAR, states that the DDE is the equivalent of Diablo Canyon’s SSE.<sup>89</sup> It does not state that the HE is the SSE.

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 27-28.

<sup>86</sup> *Id.* at 28.

<sup>87</sup> LBP-15-27, 82 NRC \_\_\_ (slip op. at 9 n.39).

<sup>88</sup> Letter from James Becker, PG&E to NRC, License Amendment Request [LAR] 11-05, “Evaluation Process for New Seismic Information and Clarifying the [Diablo Canyon] Safe Shutdown Earthquake,” at 1 (Oct. 20, 2011) (ADAMS Accession No. ML11312A166) (LAR-11-05).

<sup>89</sup> UFSAR Rev. 21 at 3.2-1.



Although FOE claims that other changes to UFSAR Rev. 21 effectively demonstrate that the HE must have been designated as the SSE, its arguments lack support. As discussed in detail above, the HE has long been part of Diablo Canyon's design basis, and the FSAR has noted this fact for some time.<sup>90</sup> Thus, UFSAR Rev. 21 did not accomplish what PG&E sought to do in LAR-11-05, and the Board correctly held that the withdrawal of LAR-11-05 was not probative of whether there was a *de facto* license amendment.<sup>91</sup>

Similarly, UFSAR Rev. 21 did not designate the LTSP as the method for evaluating new seismic information. In LAR-11-05, PG&E explained that Diablo Canyon's licensing basis lacked a "a clear process for evaluating new seismic information," and that by adding technical specifications concerning the LTSP to the licensing basis, PG&E sought to "clearly define the evaluation to be performed upon discovery of new seismic information."<sup>92</sup> LAR-11-05 would have inserted new TSs for "ongoing review and evaluation of new seismic information and associated methodologies."<sup>93</sup> UFSAR Rev. 21, on the other hand, never designated the LTSP as the method and process for evaluating new seismic information. Rather, it merely added the history of the LTSP to Chapter 2 and restated the conclusions of prior studies that showed the Shoreline Fault is bounded by the LTSP.<sup>94</sup> FOE has not explained how UFSAR Rev. 21 does anything more.<sup>95</sup>

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<sup>90</sup> See *supra* at 12-15.

<sup>91</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 9 n.39).

<sup>92</sup> LAR-11-05, Enclosure at 2.

<sup>93</sup> *Id.*

<sup>94</sup> UFSAR, Rev. 21 at 2.5-80 – 82.

<sup>95</sup> As discussed in the Staff's Answer to FOE's Petition to Intervene at 6-7 & 38-39, PG&E withdrew LAR-11-05 in part because the Staff's letters pursuant to 10 C.F.R. § 50.54(f) explained the process for seismic reevaluations and considering new seismic information. PG&E considered the § 50.54(f) letter to obviate the need for any site specific clarification for Diablo Canyon. See Letter from Barry Allen, PG&E, to NRC, Withdrawal of 11-05 [LAR 11-05], "Evaluation Process for New Seismic Information and Clarifying the [Diablo Canyon] Safe Shutdown Earthquake," at 2 (Oct. 25, 2012) (ADAMS Accession No. ML12300A105). It is worth noting that although the Staff's March 2012 § 50.54(f) Letter

Further, FOE failed to demonstrate that such changes, even if they occurred, were directed or approved by the Staff. Even if UFSAR Rev. 21 changed Diablo Canyon's method for evaluating new seismic information, it would not constitute a *de facto* license amendment because unilateral licensee action cannot *de facto* amend a license.<sup>96</sup> Rather, if this were the case, PG&E's failure to seek and obtain a license amendment could be the subject of an enforcement action.

Nothing proposed by LAR-11-05 was accomplished by UFSAR Rev. 21 or by Staff direction or action. For this reason, the Board did not err when it concluded that PG&E's withdrawal of LAR-11-05 was not probative of whether there was a *de facto* license amendment.

E. The Board Correctly Found That the Staff's December 2014 Inspection Report Is Not a *De Facto* License Amendment

Finally, FOE contends that the "Board erred by holding that the Staff's December 2014 inspection report was not part of a proceeding that effected a *de facto* license amendment."<sup>97</sup> FOE claims that the Board's analysis with respect to the inspection report was contrary to *de facto* case law because the Board looked only to the label of the report as an oversight activity and not to the effect the report had on the license.<sup>98</sup>

However, nowhere in its briefs below or on appeal does FOE indicate how the Staff's December 2014 Inspection Report effected any change to the Diablo Canyon licenses.<sup>99</sup> This

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discussed a process for considering new seismic information, the Board properly held that the letter did not amend Diablo Canyon's licenses. See LBP-15-27, 82 NRC \_\_ (slip op. at 10-11).

<sup>96</sup> *St. Lucie*, CLI-14-11, 80 NRC at 174 (stating that Staff review and oversight of a licensee's submittals do not constitute *de facto* license amendments because the Staff is only reviewing or overseeing unilateral licensee activities).

<sup>97</sup> Appeal at 29 (*citing* LBP-15-27, 82 NRC \_\_ (slip op. at 16-17)).

<sup>98</sup> Appeal at 29.

<sup>99</sup> As the Staff explained in its June 15, 2015 Brief, it believes that the Staff's December 2014 Inspection Report, along with the other documents discussed in FOE's Supplemental Brief, were outside the scope of the Commission's referral in CLI-15-14. In any event, however, FOE has not shown that the Staff's December 2014 Inspection Report effected a *de facto* license amendment, or that the Board's decision was in error.

inspection report assessed PG&E's seismic operability determination after issuance of the September 2014 Seismic Imaging Report.<sup>100</sup> FOE has not shown how this particular report did anything more than ensure compliance with existing requirements. Thus, the Board's determination that this particular inspection report had the effect of a typical NRC inspection report (*i.e.*, an oversight activity that did not effect a *de facto* license amendment)<sup>101</sup> was not an error of law or abuse of discretion.

### CONCLUSION

For the reasons stated above, the Commission should deny FOE's Appeal and affirm the Board's ruling denying FOE's Petition.

Respectfully submitted,

**/Signed (electronically) by/**

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**Executed in Accord with 10 CFR 2.304(d)**

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<sup>100</sup> See LBP-15-27, 82 NRC \_\_ (slip op. at 16).

<sup>101</sup> LBP-15-27, 82 NRC \_\_ (slip op. at 16) (*citing St. Lucie*, CLI-14-11, 80 NRC at 174 and *Fort Calhoun*, CLI-15-5, 81 NRC at 336-37).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF BREIF IN OPPOSITION TO FRIENDS OF THE EARTH APPEAL OF LBP-15-27," dated November 17, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 17th day of November, 2015.

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 17th day of November, 2015