

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FRIENDS OF THE EARTH,

*Petitioner,*

V.

U.S. NUCLEAR REGULATORY  
COMMISSION and UNITED STATES  
OF AMERICA,

*Respondents.*

**No. 16-1004**

### UNDERLYING DECISION FROM WHICH APPEAL ARISES

Pursuant to the Court's Order of January 12, 2016, Friends of the Earth, petitioner in this matter, attaches hereto as Exhibit A the Memorandum and Order of the U.S. Nuclear Regulatory Commission, CLI-15-21, affirming an order of the Atomic Safety and Licensing Board denying Friends of the Earth's Request for a Hearing and Petition to Intervene (Oct. 10, 2014) and Friends of the Earth's Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) As Applied to the Diablo Canyon License Renewal Proceeding (Oct. 10, 2014).

Dated: February 11, 2016

Respectfully submitted,

/s/ Richard E. Ayres

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# EXHIBIT A

Friends of the Earth v. NRC  
No. 16-1004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman  
Kristine L. Svinicki  
William C. Ostendorff  
Jeff Baran

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

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

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

**CLI-15-21**

**MEMORANDUM AND ORDER**

Friends of the Earth has appealed the Atomic Safety and Licensing Board's ruling in LBP-15-6, in which the Board denied Friends of the Earth's petition to intervene and its related request to waive certain regulations that govern the scope of this license renewal proceeding.<sup>1</sup> For the reasons set forth below, we affirm the Board's ruling.

**I. BACKGROUND**

In November 2009, Pacific Gas and Electric Company (PG&E) applied to renew the operating licenses for Diablo Canyon Units 1 and 2 for an additional twenty years.<sup>2</sup> The NRC

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<sup>1</sup> *Friends of the Earth's Notice of Appeal of LBP-15-6* (Mar. 9, 2015); *Brief of Friends of the Earth in Support of Appeal of LBP-15-6* (Mar. 9, 2015) (Appeal); LBP-15-6, 81 NRC 314, 327 (2015).

<sup>2</sup> Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License Nos. DPR-80 and DPR-82 for an Additional 20-Year Period; Pacific

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Staff docketed the application and provided an opportunity for interested persons to request an adjudicatory hearing.<sup>3</sup> At that time, one petitioner, the San Luis Obispo Mothers for Peace, filed a request for hearing and proposed five contentions challenging the application.<sup>4</sup> The Board admitted three of them.<sup>5</sup> We reversed in part and affirmed in part the Board's ruling, leaving one admitted contention pending in the proceeding.<sup>6</sup> In that contention, Mothers for Peace asserted that PG&E's Environmental Report, specifically PG&E's severe accident mitigation alternatives analysis, failed to consider the Shoreline Fault, a recently discovered fault near the Diablo Canyon facility.<sup>7</sup>

Since the discovery of the Shoreline Fault, PG&E has undertaken a series of studies to gain a better understanding of the seismic landscape near Diablo Canyon.<sup>8</sup> Among these efforts, at the request of the State of California, PG&E launched a major seismic imaging

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Gas & Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2; and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation, 75 Fed. Reg. 3493, 3493 (Jan. 21, 2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace* (Mar. 22, 2010).

<sup>5</sup> LBP-10-15, 72 NRC 257, 345-46 (2010). The Board also found that Mothers for Peace had demonstrated a *prima facie* case for waiver to support the admission of a fourth contention; the Board conditionally admitted that contention and certified the waiver petition to us for review. *Id.* at 345. We denied the waiver request and thus found the contention inadmissible. CLI-11-11, 74 NRC 427, 452 (2011).

<sup>6</sup> CLI-11-11, 74 NRC at 444.

<sup>7</sup> *Id.* at 438; *see infra* note 10.

<sup>8</sup> *See, e.g.,* Report on the Analysis of the Shoreline Fault Zone, Central Coastal California: Report to the U.S. Nuclear Regulatory Commission (Jan. 2011), at ES-1 (ADAMS accession no. ML110140425).

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project, which culminated in a final report that PG&E provided to the NRC in September 2014.<sup>9</sup> PG&E also incorporated the information it obtained from the seismic imaging project into its March 2015 response to the Staff's request for updated seismic hazard information from all licensees as part of the agency's response to the March 2011 nuclear accident at the Fukushima Dai-ichi Nuclear Power Plant in Japan.<sup>10</sup> Over the course of this ongoing process, the Staff will review PG&E's updated seismic hazard information to determine what impacts, if any, it will have on current operations at Diablo Canyon, including whether any changes to Diablo Canyon's current licensing basis are necessary.<sup>11</sup>

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<sup>9</sup> See Central Coastal California Seismic Imaging Project (Sept. 10, 2014) (ML14260A106 (package)).

<sup>10</sup> See Allen, Barry S., PG&E, letter to U.S. NRC Document Control Desk (Mar. 11, 2015), at 1-2, Enclosure 1 (ML15071A046 (package)); see also Tr. at 770-71. See generally Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Mar. 12, 2012) (ML12053A340) (50.54(f) Letter); Final Determination of Licensee Seismic Probabilistic Risk Assessments Under the Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendation 2.1 "Seismic" of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Oct. 27, 2015) (ML15194A015). PG&E's updated seismic hazard analysis also will be considered in certain limited respects to inform the Staff's environmental review of PG&E's license renewal application, specifically with regard to the severe accident mitigation alternatives analysis and Mothers for Peace's admitted contention. See Lindell, Joseph A., counsel for NRC Staff, letter to Licensing Board (July 16, 2015), at 1 (ML15197A195); Tr. at 784. Relatedly, PG&E sought summary disposition of Mothers for Peace's admitted contention, arguing that because PG&E has now considered the Shoreline Fault in its severe accident mitigation alternatives analysis, the contention should be dismissed. See *Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1* (July 31, 2015), at 1-2. The Board recently granted summary disposition and has terminated the proceeding. LBP-15-29, 82 NRC \_\_ (Oct. 21, 2015) (slip op.).

<sup>11</sup> See Tr. at 764-65, 791-93; see also 50.54(f) Letter at 1 ("The review will enable the staff to determine whether the nuclear plant licenses . . . should be modified, suspended, or revoked.").

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One month after PG&E submitted the seismic imaging project report to the NRC, Friends of the Earth filed a petition to intervene with three proposed contentions.<sup>12</sup> In general, Friends of the Earth asserted that the operating licenses for Diablo Canyon Units 1 and 2 may not be renewed until the agency explores, in an evidentiary hearing, the impact of the new seismic information on the safe operation of the plant.<sup>13</sup> Although Friends of the Earth argued that its contentions were within the scope of the Diablo Canyon license renewal proceeding, as a precaution it also requested a waiver of three regulations in 10 C.F.R. Part 54 that pertain to the scope of the agency's license renewal review:<sup>14</sup> 10 C.F.R. § 54.4, which defines the scope of

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<sup>12</sup> *Friends of the Earth's Request for a Hearing and Petition to Intervene* (Oct. 10, 2014), at 1 (Petition); *Affidavit and Curriculum Vitae of Dr. Gerhard Jentzsch* (Oct. 8, 2014); *Gundersen Affidavit Supporting Friends of the Earth's Petition to Intervene* (Oct. 10, 2014). Friends of the Earth filed a separate hearing request, a portion of which we referred to the Atomic Safety and Licensing Board to determine whether, as Friends of the Earth asserts, there is an ongoing de facto license amendment proceeding involving PG&E's updated seismic hazard evaluation, for which the NRC is required to provide an opportunity to request a hearing under the Atomic Energy Act of 1954, as amended (AEA). See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-14, 81 NRC 729, 730, 734-35 (2015); *Petition to Intervene and Request for Hearing by Friends of the Earth* (Aug. 26, 2014) (Hearing Request) (ML14254A223 (package)); see also *infra* note 69 (discussing the referral of a portion of this hearing request to the Staff for resolution under section 2.206). The Board recently denied Friends of the Earth's request for hearing on the ground that "the NRC has neither granted PG&E greater authority than that provided by its license nor otherwise altered the terms of those licenses," and therefore, Friends of the Earth had not demonstrated the existence of a licensing action subject to hearing rights under Section 189a. of the Atomic Energy Act. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-27, 82 NRC \_\_\_, \_\_ (Sept. 28, 2015) (slip op. at 1-2). Friends of the Earth has appealed the Board's decision. *Friends of the Earth's Notice of Appeal of LBP-15-27* (Oct. 23, 2015); *Brief of Friends of the Earth in Support of Appeal of LBP-15-27* (Oct. 23, 2015) (ML15296A550).

<sup>13</sup> See *Petition* at 1-2, 6, 10.

<sup>14</sup> See *id.* at 20-21, 30; *Friends of the Earth's Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding* (Oct. 10, 2014) (Waiver Request); *Declaration of Richard Ayres, Counsel for Friends of the Earth, Regarding Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding* (Oct. 10, 2014).

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license renewal; 10 C.F.R. § 54.21, which sets forth the contents of a license renewal application; and 10 C.F.R. § 54.29, which sets forth the findings that the agency must make for the issuance of a renewed license.<sup>15</sup> In response to questioning from the Board at oral argument, Friends of the Earth requested waiver of 10 C.F.R. § 54.30 to the extent it also precluded the litigation of Friends of the Earth's proposed contentions.<sup>16</sup> That section states that matters relating to reasonable assurance of safety during the current license term are to be addressed under the current license and are outside the scope of a license renewal review.<sup>17</sup> Mothers for Peace filed an answer in support of Friends of the Earth's petition to intervene and waiver request.<sup>18</sup>

PG&E and the Staff opposed Friends of the Earth's intervention on several grounds. Both PG&E and the Staff asserted that Friends of the Earth's proposed contentions were not timely filed because, in PG&E's view, Friends of the Earth could have filed them in 2011, when PG&E submitted an earlier report on the Shoreline Fault to the agency, or, in the Staff's view, no later than 2012, when the Staff completed a confirmatory analysis of that report.<sup>19</sup> In addition,

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<sup>15</sup> 10 C.F.R. §§ 54.4, 54.21, 54.29.

<sup>16</sup> Appeal at 1-2 n.3; Tr. at 740-41. Because we find that Friends of the Earth has not met the standard for a waiver of our rules, we need not address the timeliness of this additional request.

<sup>17</sup> 10 C.F.R. § 54.30.

<sup>18</sup> *San Luis Obispo Mothers for Peace's Response to Friends of the Earth's Request for a Hearing and Petition to Intervene and Petition for Waiver of 10 C.F.R. §§ 54.4, 54.21, and 54.29(a) as Applied to the Diablo Canyon License Renewal Proceeding* (Nov. 4, 2014), at 1.

<sup>19</sup> See *Pacific Gas and Electric Company's Answer Opposing the Friends of the Earth Hearing Request and Petition for Waiver* (Nov. 4, 2014), at 23-25 (PG&E Answer); *NRC Staff's Answer to Friends of the Earth's Request for a Hearing and Petition to Intervene and Waiver Petition* (Nov. 4, 2014), at 20 (Staff Answer). See generally Report on the Analysis of the Shoreline Fault Zone, Central Coastal California (Jan. 7, 2011) (ML110140431 (package)); Research Information Letter 12-01, Confirmatory Analysis of Seismic Hazard at Diablo Canyon Power



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PG&E and the Staff argued that the proposed contentions were outside the scope of the proceeding because they raised current operating issues rather than the safety issues designated for review in a license renewal proceeding—specifically, those relating to the aging management of certain structures, systems, and components during the period of extended operation.<sup>20</sup> PG&E and the Staff also asserted that Friends of the Earth's waiver request should not be granted because Friends of the Earth had not demonstrated special circumstances that would prevent the challenged license renewal regulations from serving their intended purpose.<sup>21</sup>

The Board "decline[d] to reject [Friends of the Earth's] petition as untimely," but ultimately found that Friends of the Earth's contentions did not meet our admissibility requirements and that its waiver request did not demonstrate a *prima facie* case for waiver.<sup>22</sup> The Board therefore denied both the petition to intervene and the waiver request, and Friends of the Earth filed the instant appeal.<sup>23</sup> Friends of the Earth's appeal qualifies as an appeal as of right under 10 C.F.R. § 2.311(c).<sup>24</sup> Our standard of review is highly deferential; we will not

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Plant from the Shoreline Fault Zone (Sept. 2012) (ML121230035). Friends of the Earth filed a reply to PG&E's and the Staff's answers. *Friends of the Earth's Reply to NRC Staff's and Pacific Gas & Electric Company's Answers to Petition to Intervene and Request for Hearing* (Nov. 12, 2014).

<sup>20</sup> See PG&E Answer at 13-15; Staff Answer at 25-26, 30, 37.

<sup>21</sup> See PG&E Answer at 25-28; Staff Answer at 41-50.

<sup>22</sup> LBP-15-6, 81 NRC at 320, 325.

<sup>23</sup> *Id.* at 327. PG&E and the Staff oppose Friends of the Earth's Appeal. See *Pacific Gas and Electric Company's Opposition to Friends of the Earth Appeal from LBP-15-6* (Apr. 3, 2015), at 1; NRC Staff's Answer to Friends of the Earth's Appeal of Memorandum and Order LBP-15-6 (Denying Petition to Intervene and Petition for Waiver) (Apr. 2, 2015), at 2.

<sup>24</sup> See 10 C.F.R. § 2.311(c) (providing an appeal as of right on the question whether a request for hearing or petition to intervene should have been granted).

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overturn a licensing board's ruling on threshold issues like intervention absent error of law or abuse of discretion.<sup>25</sup>

## II. DISCUSSION

For a successful intervention petition or request for hearing, a petitioner must, in addition to demonstrating standing, propose at least one contention that:

- (1) provides a specific statement of the issue of law or fact to be raised or controverted;
- (2) provides a brief explanation of its basis;
- (3) demonstrates that the issue raised is within the scope of the proceeding;
- (4) demonstrates that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (5) provides a concise statement of the alleged facts or expert opinions that support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue; and
- (6) provides sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the contention must identify each failure and the supporting reasons for the petitioner's belief.<sup>26</sup>

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<sup>25</sup> See, e.g., CLI-11-11, 74 NRC at 431.

<sup>26</sup> 10 C.F.R. § 2.309(a), (f)(1)(i)-(vi). The Board found that Friends of the Earth had demonstrated standing through the authorized representation of members who live within fifty miles of the Diablo Canyon Nuclear Power Plant site. See LBP-15-6, 81 NRC at 317-18 & n. 22. The Board's ruling on Friends of the Earth's standing is not before us on appeal.

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Our contention admissibility requirements are strict by design; only focused, well supported issues will be admitted for hearing.<sup>27</sup>

Our rules of practice also place limits on the types of issues a petitioner may raise. As relevant here, 10 C.F.R. § 2.335(a) prohibits challenges to an agency rule or regulation in an adjudicatory proceeding without a waiver of that rule or regulation. And because our rules were promulgated with the expectation that they will apply generically, rather than on a case-by-case basis, we set a high bar for waivers: a waiver request must demonstrate that “special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which . . . [it] was adopted.”<sup>28</sup> To determine whether this standard has been met, we apply a four-factor test.<sup>29</sup> The petitioner must demonstrate that:

- (i) the rule’s strict application would not serve the purposes for which it was adopted;
- (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;
- (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and

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<sup>27</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

<sup>28</sup> 10 C.F.R. § 2.335(b); *see also Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 206-07 (2013).

<sup>29</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

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- (iv) waiver of the regulation is necessary to reach a significant safety or environmental problem.<sup>30</sup>

Contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited by 10 C.F.R. § 2.335(a), are outside the scope of the proceeding.<sup>31</sup>

On appeal, Friends of the Earth asks us to reverse the Board's ruling in LBP-15-6, grant its waiver request, and admit Contentions 1 and 3 for hearing.<sup>32</sup> In the alternative, Friends of the Earth asks us to grant the waiver request and remand the proceeding to the Board "to consider anew the admissibility of Contentions 1 and 3."<sup>33</sup> We find that the Board appropriately denied Friends of the Earth's petition to intervene and waiver request. Therefore, we decline to remand the contention admissibility issue for the Board to address a second time.

**A. Friends of the Earth's Contentions 1 and 3**

In Contention 1, Friends of the Earth argued that the information in the seismic imaging report demonstrates that the potential energy from seismic activity near Diablo Canyon "is far greater than previously known."<sup>34</sup> Friends of the Earth asserted that PG&E's imaging study revealed that the Shoreline Fault is longer than previously known, that it may rupture with the Hosgri Fault (a nearby fault that was used in the calculation of the seismic design and licensing basis for Diablo Canyon during the initial operating license proceeding), and that the Hosgri and

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<sup>30</sup> *Id.*; *Limerick*, CLI-13-7, 78 NRC 199, 207-09 (2013).

<sup>31</sup> See 10 C.F.R. § 2.309(f)(1)(iii). We also discussed the relationship between sections 2.335(a) and 2.309(f)(iii) earlier in this proceeding. See CLI-11-11, 74 NRC at 452.

<sup>32</sup> Appeal at 2. Friends of the Earth does not challenge the Board's ruling on Contention 2, which pertained to aging management of certain switches and snubbers. *Id.* at 2 n.6; Petition at 21.

<sup>33</sup> Appeal at 2.

<sup>34</sup> Petition at 10.

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San Simeon faults are assumed to be connected.<sup>35</sup> Friends of the Earth asserts that this new information demonstrates “that previous seismic studies by PG&E significantly underestimated the potential seismic energy that could be released near Diablo Canyon.”<sup>36</sup>

Based on its interpretation of the new information, Friends of the Earth questioned PG&E’s conclusion that the updated ground motion calculations are bounded by Diablo Canyon’s existing seismic design and licensing bases.<sup>37</sup> Friends of the Earth also questioned PG&E’s calculation methodology, arguing that the equations used in the seismic imaging report were not peer-reviewed and have not been approved by the NRC.<sup>38</sup> Ultimately, Friends of the Earth argued that the Board should not renew the operating licenses for Diablo Canyon until PG&E can demonstrate that “the plant can be safely shut down following an earthquake on one or more of [the nearby] faults.”<sup>39</sup>

The Board rejected Friends of the Earth’s Contention 1 because it did not meet three of the requirements for an admissible contention.<sup>40</sup> The Board noted that Friends of the Earth did not dispute that safe shutdown of the plant “is a current operating issue” that is not dependent

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<sup>35</sup> *Id.* at 11-12.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> *See id.* at 15.

<sup>38</sup> *See id.* at 13-15.

<sup>39</sup> *Id.* at 10; *see also id.* at 8 (Contention 1: “PG&E’s operating license for Diablo Canyon should not be renewed unless and until PG&E establishes that the plant can withstand and be safely shut down following an earthquake on the Hosgri-San Simeon, Shoreline, Los Osos, or San Luis Bay Faults.”).

<sup>40</sup> LBP-15-6, 81 NRC at 321-22. All six requirements must be met for a contention to be admitted. 10 C.F.R. § 2.309(f)(1).

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upon “whether PG&E’s licenses . . . should be renewed.”<sup>41</sup> The Board found this concern to be outside the narrow scope of the license renewal proceeding, which, for safety-related issues, “is limited to ‘plant structures and components that will require an aging management review for the period of extended operation [under the renewed license] and the plant’s systems, structures, and components that are subject to an evaluation of time-limited aging analyses.’”<sup>42</sup> Similarly, the Board found that Friends of the Earth did not raise an issue material to the findings the NRC must make to support the licensing action, which, as noted above, is narrowly focused.<sup>43</sup> Finally, the Board found that Friends of the Earth had not raised a genuine dispute with PG&E because its concerns “do not actually challenge any specific part” of PG&E’s license renewal application.<sup>44</sup>

We agree with the Board’s finding that Contention 1 is outside the scope of this license renewal proceeding. Contention 1 asserts that, to obtain a renewed license, PG&E must adequately demonstrate that Diablo Canyon “can withstand and be safely shut down following an earthquake on the Hosgri-San Simeon, Shoreline, Los Osos, or San Luis Bay faults.”<sup>45</sup> As the Board properly recognized, this contention raises “a current operating issue” that “is not unique to whether PG&E’s licenses—which do not expire until nearly a decade from now—

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<sup>41</sup> LBP-15-6, 81 NRC at 320-21.

<sup>42</sup> *Id.* at 321 (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212 (2001)).

<sup>43</sup> *Id.* at 321-22.

<sup>44</sup> *Id.* at 322.

<sup>45</sup> Petition at 8.

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should be renewed.”<sup>46</sup> A central principle of our license renewal regulations is that such issues must be addressed as they arise.<sup>47</sup> Accordingly, our regulations rely on the regulatory processes applicable to all currently operating reactors to address most safety and security issues, limiting license renewal proceedings to consideration of only certain issues related specifically to plant aging.<sup>48</sup> Contention 1 does not address the particular aging-related matters within the scope of license renewal proceedings under our 10 C.F.R. Part 54 regulations. Thus, the contention is outside the scope of this license renewal proceeding.

A contention outside the scope of a proceeding is not admissible for hearing in that proceeding.<sup>49</sup> To remedy that deficiency, Friends of the Earth must persuade us to grant its waiver petition, in which it asks us to set aside, for purposes of this specific proceeding, the foundational regulations in 10 C.F.R. Part 54 that define the scope of our license renewal proceedings. As discussed in Part II.B., *infra*, Friends of the Earth has not demonstrated that a

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<sup>46</sup> LBP-15-6, 81 NRC at 320-21.

<sup>47</sup> Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,463-64 (May 8, 1995) (License Renewal Rule) (reaffirming the regulatory philosophy that, “[g]iven the Commission’s ongoing obligation to oversee the safety and security of operating reactors, issues that are relevant to current plant operation will be addressed by the existing regulatory process within the present license term rather than deferred until the time of license renewal”); *see also Millstone*, CLI-05-24, 62 NRC at 560-61 (“[I]t makes no sense to spend the parties’ and our own valuable resources litigating allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging.” (emphasis in original)). This concept is the first principle of license renewal, which is that the “regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable level of safety so that operation will not be inimical to public health and safety or common defense and security.” License Renewal Rule, 60 Fed. Reg. at 22,464.

<sup>48</sup> *See* 10 C.F.R. §§ 54.4 (defining the scope of our license renewal regulations), 54.21 (specifying license renewal application requirements), 54.29(a) (indicating the safety findings we must make before issuing renewed licenses).

<sup>49</sup> 10 C.F.R. § 2.309(f)(1)(iii); *see also* 10 C.F.R. § 2.335(a).

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waiver of our basic rules governing license renewal proceedings is warranted here. Therefore, we uphold the Board's ruling that Contention 1 is inadmissible because it is outside the scope of the proceeding.<sup>50</sup>

In Contention 3, Friends of the Earth asserted that PG&E's integrated plant assessment, under which PG&E must identify the structures, systems, and components subject to an aging management review, is faulty because it "rests on seismic data that has been shown to be obsolete and inaccurate."<sup>51</sup> Friends of the Earth argued that PG&E must demonstrate that the structures, systems, and components identified in the integrated plant assessment can continue to perform their intended functions during the period of extended operation in light of the "newly understood seismic circumstances of the plant."<sup>52</sup>

The Board likewise found this contention inadmissible, observing that Friends of the Earth "d[id] not explain how its claims . . . would affect the Staff's ability to make the findings required for license renewal."<sup>53</sup> The Board noted that Friends of the Earth did not cite any specific portion of the license renewal application that it found deficient, nor did Friends of the Earth explain how its generalized concerns about aging components relate to the updated

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<sup>50</sup> Because Contention 1 is outside the scope of this license renewal proceeding and inadmissible on that basis alone, we need not reach the Board's findings regarding other contention admissibility requirements.

<sup>51</sup> Petition at 30-31 (Contention 3: "PG&E has failed to establish in its aging management plan that the effects of aging on Diablo Canyon will be adequately managed for the period of extended operation, in violation of 10 C.F.R. § 54.21(a)(3).").

<sup>52</sup> *Id.* at 31.

<sup>53</sup> LBP-15-6, 81 NRC at 324.



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seismic information in the seismic imaging report.<sup>54</sup> The Board thus dismissed the contention for failure to raise an issue that is material to the findings the NRC must make to support the proposed licensing action.<sup>55</sup> The Board also found that because Friends of the Earth did not provide any specific references to the license renewal application, Friends of the Earth had failed to demonstrate the existence of a genuine dispute with PG&E on a material issue of fact or law.<sup>56</sup> We agree that Friends of the Earth's intervention petition does not identify any specific portion of the application that it seeks to challenge and therefore lacks the specificity that our contention admissibility rules require. The Board properly found Contention 3 inadmissible.<sup>57</sup>

#### **B. Friends of the Earth's Waiver Request**

On appeal, Friends of the Earth reasserts that it is entitled to a waiver to litigate Contentions 1 and 3.<sup>58</sup> The Board denied Friends of the Earth's waiver request for failure to meet two of the four waiver factors.<sup>59</sup> First, the Board found that Friends of the Earth had not shown that application of the regulations in this proceeding would not serve the purposes for which they were adopted. The Board found that our license renewal regulations would serve

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<sup>54</sup> *Id.* at 324-25; *see also* 10 C.F.R. § 2.309(f)(1)(vi).

<sup>55</sup> *Id.* (citing 10 C.F.R. § 2.309(f)(1)(iv)).

<sup>56</sup> *Id.* at 325 (citing 10 C.F.R. § 2.309(f)(1)(vi)).

<sup>57</sup> The Board also found that Friends of the Earth would have needed to obtain a rule waiver in order to obtain a hearing on Contention 3. *Id.* Because we find that Contention 3 is inadmissible due to lack of specificity, we need not reach the question of whether Contention 3 is an out-of-scope contention requiring a rule waiver.

<sup>58</sup> Appeal at 7-8.

<sup>59</sup> LBP-15-6, 81 NRC at 326-27.

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exactly their intended purpose by focusing the proceeding on future-oriented aging issues.<sup>60</sup>

Second, the Board found that Friends of the Earth had not shown that a waiver is necessary to reach a significant safety issue.<sup>61</sup> Although the Board observed that “potential seismic risks to the Diablo Canyon facility are important issues—most certainly ‘significant’ ones,” the Board concluded that Friends of the Earth could raise its concerns through other, more appropriate avenues.<sup>62</sup>

Having agreed with the Board’s finding that Contention 1 is outside the scope of this license renewal proceeding and, therefore, may not be litigated absent a rule waiver,<sup>63</sup> we turn to the Board’s denial of Friends of the Earth’s waiver petition.<sup>64</sup> We agree with the Board that Friends of the Earth has not met the standards for a waiver of our rules, but we reach this conclusion on different grounds. We find that Friends of the Earth has not shown that special

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<sup>60</sup> *Id.* at 326 (citing *Millstone*, CLI-05-24, 62 NRC at 561). In its waiver request, Friends of the Earth pointed broadly to the safety-related purpose of our license renewal regulations. See Waiver Request at 6-7. Although it is true that our license renewal regulations are designed with safety as their goal, they were drawn specifically to ensure that current safety issues are prioritized (and are addressed as part of the NRC’s ongoing oversight activities) over those that are unique to the period of extended operation—that is, to ensure that safety issues are addressed at their appropriate time. See License Renewal Rule, 60 Fed. Reg. at 22,463-64; *Millstone*, CLI-05-24, 62 NRC at 560-61 (rejecting a similarly broad interpretation of the purpose of the license renewal regulations).

<sup>61</sup> LBP-15-6, 81 NRC at 327.

<sup>62</sup> *Id.*

<sup>63</sup> See *supra* Section II.A.

<sup>64</sup> As already discussed, we do not reach the question here of whether a waiver would be necessary to permit litigation of Contention 3. See *supra* note 57. Accordingly, although both Friends of the Earth’s waiver petition and the Board’s decision contemplate that a waiver would be necessary for both Contention 1 and Contention 3, our waiver analysis here assumes, without deciding, that Contention 1 is the only contention requiring a waiver.

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circumstances exist that were not considered, either explicitly or by necessary implication, when we adopted our license renewal regulations—the second factor in our waiver test.<sup>65</sup> At bottom, Friends of the Earth argues that a safety issue relating to the current operation of Diablo Canyon requires attention as part of this license renewal proceeding. But we contemplated precisely this type of circumstance when we devised the licensing structure of Part 54. We were aware, when adopting the rule, that issues “relevant to current plant operation” could arise while a license renewal application was under review, and, based on our confidence in the NRC’s regulatory process, we reaffirmed our view that those issues are best addressed as part of our regular oversight activities, outside of license renewal.<sup>66</sup> We see no reason to revisit that rationale in this case.

As the Board correctly observed, our rules provide other mechanisms for Friends of the Earth to raise its concerns that would not require us to redefine the scope of this proceeding.<sup>67</sup> In particular, Friends of the Earth “may file a request to institute a proceeding . . . to modify, suspend, or revoke a license, or for any other action that may be proper,” if it believes that

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<sup>65</sup> See *Millstone*, CLI-05-24, 62 NRC at 560.

<sup>66</sup> License Renewal Rule, 60 Fed. Reg. at 22,463-64. Friends of the Earth does argue, when addressing this second waiver-test factor, that “[t]he license renewal rule was based on the implicit assumption that a plant’s seismic design basis would be static, so that there was no need to revisit the seismic assumptions to determine whether alterations to the plant’s current licensing basis were necessary when considering a license renewal.” Appeal at 10; see also *id.* at 14-15. Yet, when issuing our license renewal regulations, we explained plant licensing bases as follows: “The [current licensing basis] represents the *evolving* set of requirements and commitments for a specific plant *that are modified as necessary over the life of a plant* to ensure continuation of an adequate level of safety.” License Renewal Rule, 60 Fed. Reg. at 22,473 (emphasis added). Modifications to a plant’s licensing basis made outside of license renewal could include, for instance, changes addressing newly discovered seismic risks.

<sup>67</sup> See LBP-15-6, 81 NRC at 327.

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PG&E's seismic design and licensing basis is now invalid and that safe operation of the plant can no longer be assured.<sup>68</sup> Friends of the Earth also may file a petition for rulemaking to expand the scope of our license renewal regulations.<sup>69</sup> We decline to set aside our license renewal regulations to conduct what would be an entirely different proceeding when there are more appropriate avenues available for Friends of the Earth to seek relief.

That said, we consider seriously concerns regarding the safe operation of the current nuclear fleet. Today we conclude only that Friends of the Earth has not demonstrated that its seismic concerns are appropriately addressed as part of this license renewal adjudication, which, under our regulations, is limited in scope. Outside of this proceeding, the agency is

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<sup>68</sup> 10 C.F.R. § 2.206(a).

<sup>69</sup> See 10 C.F.R. § 2.802. We are not persuaded by Friends of the Earth's arguments that neither the section 2.206 process nor the opportunity to file a petition for rulemaking would address its claims. See Appeal at 17-19. First, contrary to Friends of the Earth's view, *see id.* at 18-19, the 2.206 process is designed for bringing just such a challenge regarding a licensee's current operation under its existing license. By its plain terms, section 2.206 provides an opportunity for the modification, suspension, or revocation of a license, any of which actions might be appropriate as a remedy for Friends of the Earth's concern that seismic considerations render operation of Diablo Canyon unsafe, if Friends of the Earth determines that its concerns differ from those already pending before the Staff. See *Diablo Canyon*, CLI-15-14, 81 NRC at 736 n.32 (referring a portion of a similar hearing request filed by Friends of the Earth to the Staff as a request for enforcement action under section 2.206, with instructions to the Staff to consider Friends of the Earth's concerns regarding the safe operation of Diablo Canyon). Second, although Friends of the Earth asserts that it does not wish to challenge our regulations in Part 54 as a general matter, *see* Appeal at 17, a petition for rulemaking to expand license renewal safety reviews, if successful, could be applied to this proceeding. See 10 C.F.R. § 2.802. Third, Friends of the Earth's insistence that its seismic concerns must be addressed "only in the course of a license renewal proceeding" because of their relation to safety *during the period of extended operation*," Appeal at 19, does not account for the fact that the current licensing basis (including any adjustments that may have been made to it to deal with emergent safety issues) carries forward from the initial license term into the period of extended operation. Friends of the Earth's concerns therefore appropriately could be addressed as part of the agency's continuing oversight of Diablo Canyon irrespective of when, during the plant's operating life, they may arise.

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conducting a comprehensive review of licensee seismic hazard reevaluations, including the information that PG&E provided in March of this year, which may lead to changes in the current licensing basis for Diablo Canyon, as well as for other operating plants.<sup>70</sup> Therefore, although we decline to permit Friends of the Earth to litigate its concerns in this proceeding, the seismic information that has given rise to these concerns is under close and active consideration by the agency.

### III. CONCLUSION

Friends of the Earth has not raised an admissible contention that is suitable for litigation in this license renewal proceeding, nor has it established that a waiver of our rules is warranted to address its concerns. We therefore *affirm* the Board's denial, in LBP-15-6, of Friends of the Earth's waiver petition and its petition to intervene.

IT IS SO ORDERED.

**NRC SEAL**

For the Commission

/RA/

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 9<sup>th</sup> day of November, 2015.

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<sup>70</sup> Any amendment to an existing license as a result of this process would be subject to a hearing opportunity under the AEA. See AEA § 189a., 42 U.S.C. § 2239(a).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-15-21** have been served upon the following persons by the Electronic Information Exchange.

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

**COMMISSION MEMORANDUM AND ORDER CLI-15-21**

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[Original signed by Brian Newell]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 9<sup>th</sup> day of November 2015

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed with the Clerk of Court using the CM/ECF system, thereby serving it on all parties of record, this 11th day of February, 2016.

Respectfully submitted,

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