

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1004

FRIENDS OF THE EARTH,
Petitioner,

v.

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

**FEDERAL RESPONDENTS' RESPONSE IN OPPOSITION
TO PETITIONER'S MOTION TO HOLD THE CASE IN ABEYANCE**

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Friends of the Earth (“FOE”), which filed this case, has now moved to hold the case in abeyance “pending a decision by [Pacific Gas & Electric Company] to move forward with its license renewal application.” Motion at 4-5. But as we note below, the company has consistently acted to “move forward” with the NRC administrative hearing process on the application and it has not sought to withdraw the application. Thus, this Court should deny the motion and allow the case to proceed.

1. In 2009, Pacific Gas & Electric Company (“PG&E”) filed an application for renewal of the facility operating licenses of the Diablo Canyon Nuclear Power Plant for an additional twenty-year term. Diablo Canyon is a 2-unit nuclear power plant owned and operated by PG&E located near San Luis Obispo, California. The plant’s two licenses currently expire in 2024 and 2025, respectively.

In 2014, FOE filed a request for hearing and petition for leave to intervene in the ongoing administrative proceeding. FOE also filed a request that the agency waive several NRC regulations governing intervention in a license renewal proceeding. In early 2015, the Licensing Board denied the requests, finding that the claims FOE sought to raise did not meet the agency’s admissibility requirements and that FOE had not made a *prima facie* case that the agency should waive the applicable regulations.

FOE timely appealed to the Commission, which issued a decision affirming the Licensing Board on November 9, 2015. *In re Pacific Gas & Electric Company* (Diablo Canyon Nuclear Power Plant), CLI-15-21, 82 NRC ____ (2015). On January 8, 2016, FOE filed the instant petition for review, asking this Court to order the agency to grant its hearing request and petition to intervene in the proceeding as well as its request that the Commission waive several applicable NRC regulations. FOE now seeks to hold this case in abeyance.

2. FOE claims that PG&E is not actively pursuing the application for renewal of the Diablo Canyon licenses. *See* Motion at pp. 3-4, ¶ 6. But that claim is demonstrably wrong. In fact, PG&E has not sought to withdraw its application for license renewal, which it (presumably) would have done if it were, indeed, not pursuing the application. Instead, as we show below, it has actively pursued approval of its application before the agency.

3. The NRC's administrative proceeding has two components: the NRC staff's review of the application and an opportunity for interested parties to challenge the application before the NRC's Atomic Safety and Licensing Board, or a "contested" proceeding. A party challenging the application may file contentions (*i.e.*, challenges) to specific portions of the application that are then heard by the Licensing Board. After initial resolution of these issues by the Licensing Board, the losing party may appeal to the Commission.

Meanwhile, the NRC staff will review the application and make any necessary findings. For example, the NRC staff will require PG&E to make certain filings on a host of issues, both technical and environmental, to support the staff's review of the license renewal application. After the staff has completed its review the agency will either approve or deny the requested license renewal. In this case, review of PG&E's application is ongoing; PG&E has been actively engaged in the review and has filed information as requested by the NRC staff in a timely fashion.

4. In late 2014 PG&E filed a document reviewing newly available seismic information related to the Diablo Canyon site. As noted above, FOE filed claims relating to that filing and asked that the agency waive its regulations governing license renewal to allow litigation of those claims. PG&E actively opposed those claims. And as also noted above, the agency has now issued a final decision, CLI-15-21, dismissing FOE's claims and denying its waiver request.

5. The Licensing Board has now terminated the "contested" portion of the proceeding. Another party, the San Luis Obispo Mothers for Peace, had previously been admitted to the proceeding in 2010 with one admitted contention. Mothers for Peace filed additional contentions in 2015 in response to another of PG&E's submissions. PG&E filed an answer challenging the new contentions and a motion for summary judgment challenging the previously admitted contention. The

Licensing Board issued two separate decisions denying the newly proposed contentions and dismissing the previously-admitted contention. The Board then terminated the contested portion of the proceeding.

Mothers for Peace has appealed both decisions to the Commission, and PG&E has opposed both appeals. Both appeals have now been briefed and the Commission is expected to issue a decision in the near term. If the Commission denies the appeal, and this Court neither reinstates FOE's hearing request nor reverses the decision to terminate the proceeding, the contested portion of the proceeding will be over. Meanwhile, the NRC staff will be free to issue the renewed licenses when the staff completes its review of the application.

6. There is no reason to delay a decision in this case. This matter is ripe for review, and there is no reason for the case not to proceed, if for no other reason than for regulatory certainty. The NRC is actively processing PG&E's application for renewal of each of the Diablo Canyon licenses and PG&E has actively participated in the proceeding and has not sought to withdraw the application. As we have described above, the NRC's Licensing Board has terminated the "contested" portion of the proceeding, and that decision is now on appeal to the Commission. If the Commission upholds that decision, the contested portion of the proceeding will have been completed. The agency will then be ready to

approve the application and issue the requested renewal of both licenses when the NRC staff completes its review of the application.

Leaving this case dangling without any reason creates uncertainty for the NRC as well as for all other parties to the proceeding. A remand of the Commission's decision by this Court would impact the entire proceeding and require changes to the agency's review of the application. Resolving these issues now promotes the NRC's administrative process by identifying any deficiencies and by allowing the agency to address them in a timely fashion.

While individual PG&E officials may have made statements that FOE interprets as expressing some alternative view, the company has continued to participate in the license renewal administrative process before the agency. It may be that at some future point, PG&E will choose not to exercise the twenty-year renewal of the license, if granted, much like a person who obtains a driver's license but then decides not to use it. But that decision need not be made – as FOE itself notes – until 2024, some 8 years in the future. In sum, in the absence of any firm indication that PG&E does not seek the renewal of the Diablo Canyon licenses and in the absence of any attempt by PG&E to withdraw its license renewal application, this Court should allow this case to proceed and deny the motion to hold the case in abeyance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on February 25, 2016, I filed "*Federal Respondents' Response in Opposition to Petitioner's Motion to Hold the Case in Abeyance*" in Case No. 16-1004 with the U.S. Court of Appeals for the District of Columbia Circuit by filing it with the Court's CM/ECF system. That method is calculated to serve:

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