

**ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 14-1213

FRIENDS OF THE EARTH,
Petitioner,
v.
U.S. NUCLEAR REGULATORY COMMISSION
and
UNITED STATES OF AMERICA,
Respondents, and
PACIFIC GAS and ELECTRIC COMPANY,
Intervenor.

**FEDERAL RESPONDENTS'
MOTION TO CONTINUE THIS CASE IN ABEYANCE**

On December 9, 2015, a Motions Panel of this Court (Kavanaugh, Pillard, and Wilkins, JJ.) issued an order (1) holding this case in abeyance; and (2) directing the parties “to file motions to govern future proceedings in this case by February 26, 2016.” Order at 1. As more fully explained below, Federal Respondents move to continue this case in abeyance. The U.S. Nuclear Regulatory Commission will, in the near future, issue a final decision in an administrative proceeding that is closely related to the subject matter of this case and that was filed by Friends of the Earth, petitioner in this case. Once that decision is issued, the parties will be better able to determine whether review of the petition for review in this case by this Court is necessary and, if so, what the scope of that review should be.

Friends of the Earth (“FOE”) filed this case challenging an action by respondent U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) that it alleges is a *de facto* amendment of the operating licenses of the Diablo Canyon Nuclear Power Plant. Diablo Canyon is a two-unit nuclear power plant located near San Luis Obispo, California and is owned and operated by the Pacific Gas and Electric Company (“PG&E”). Briefly, in 2013, PG&E filed Revision 21 to the plant’s Final Safety Analysis Report as Updated (“Safety Report”). Revision 21 included several changes to the Safety Report related to the plant’s seismic analysis. The petition for review filed by FOE in this case asserts that the NRC’s alleged acceptance of Revision 21 with these changes constituted an amendment to the Diablo Canyon operating licenses; thus, the lawsuit argues that section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), requires the NRC to offer the opportunity for a public hearing with regard to the changes in Revision 21.

Approximately two months before it filed this lawsuit, FOE also filed a request for hearing and petition to intervene with the Commission related to the changes in Revision 21. As in this case, FOE asserted that the NRC’s alleged acceptance of Revision 21 constituted an amendment of the Diablo Canyon operating licenses, and that section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), required the Commission to offer a hearing on the action. On May 21, 2015 the Commission referred the petition to intervene and request for

hearing to the Atomic Safety and Licensing Board (“Licensing Board”) for initial consideration. *In the Matter of Pacific Gas & Electric Co.* (Diablo Canyon Power Plant), CLI-15-14, 81 NRC 729, 734-35 (2015). Respondents filed the slip opinion of that decision with this Court on June 12, 2015.

On September 28, 2015, the Licensing Board issued a decision denying FOE’s hearing request. *In the Matter of Pacific Gas & Electric Co.* (Diablo Canyon Power Plant), LBP-15-27, 82 NRC 184 (2015). The Licensing Board decision addressed, *inter alia*, FOE’s claim that the NRC’s acceptance of Revision 21 to the Diablo Canyon Final Safety Analysis Report constituted a *de facto* amendment to the facilities’ operating licenses. *Id.* at 195-96. Respondents filed the slip opinion of that decision with this Court on October 1, 2015.

On October 23, 2015, FOE filed an appeal of the Licensing Board’s decision with the Commission. That appeal has been fully briefed, and the matter is now pending before the Commission. The Commission will issue a decision on FOE’s appeal within the next several months.

On April 13, 2015, while the Commission was considering FOE’s initial administrative filing, this Court concluded that it was appropriate to hold this case in abeyance. And as we have noted above, on December 9, 2015, after FOE’s appeal of the Licensing Board’s decision to the Commission, this Court determined that it was still appropriate to continue holding this case in abeyance. Given that

FOE's appeal is still pending before the Commission on an issue that wholly subsumes the issue in the instant lawsuit, this Court should continue to hold the instant case in abeyance until the Commission issues a decision on FOE's appeal. The parties may then file motions governing future proceedings in this case.

Respondents have consulted with the other parties to this case and Pacific Gas and Electric, the intervenor in this case, supports this motion. Friends of the Earth, the petitioner in this case, does not join in the motion or the characterization of the case or matters before the Commission expressed herein, but does not object to the relief requested in this motion.

Respectfully submitted,

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February 26, 2016

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on February 26, 2016, I filed "*Federal Respondents' Motion to Continue this Case in Abeyance*" in Case No. 14-1213 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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