

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-16-11

MEMORANDUM AND ORDER

On October 21, 2015, the Atomic Safety and Licensing Board granted summary disposition of the sole admitted contention in this license renewal proceeding in favor of the applicant, Pacific Gas and Electric Company (PG&E).¹ The Board also dismissed a proposed contention filed by the intervenor, San Luis Obispo Mothers for Peace, and terminated the

¹ LBP-15-29, 82 NRC 246, 254 (2015); see *Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1* (July 31, 2015) (PG&E Motion for Summary Disposition); *Statement of Material Facts on Which no Genuine Dispute Exists* (July 31, 2015); *Affidavit of L. Jearl Strickland in Support of Summary Disposition of Contention EC-1* (July 31, 2015).

proceeding.² Mothers for Peace has petitioned for review of that decision.³ In addition, Mothers for Peace seeks review of the Board's dismissal of two proposed contentions in an earlier Board decision.⁴ For the reasons set forth below, we deny the petitions for review.

I. BACKGROUND

In November 2009, PG&E applied to renew the operating licenses for Diablo Canyon Units 1 and 2 for an additional twenty years.⁵ The NRC Staff provided an opportunity for interested persons to request an adjudicatory hearing.⁶ Mothers for Peace filed a request for hearing with proposed contentions challenging the application.⁷ One of its contentions, Contention EC-1, was admitted for hearing.⁸ In that contention, Mothers for Peace asserted that PG&E's Environmental Report, specifically the severe accident mitigation alternatives (SAMA)

² LBP-15-29, 82 NRC at 254-55.

³ *San Luis Obispo Mothers for Peace's Petition for Review of LBP-15-29* (Nov. 16, 2015) (November 2015 Petition for Review).

⁴ *San Luis Obispo Mothers for Peace's Petition for Review of Memorandum and Order (Denying Motions to File New Contentions)* (Sept. 14, 2015) (September 2015 Petition for Review); see *Memorandum and Order (Denying Motions to File New Contentions)* (Aug. 6, 2015) (unpublished) (August 2015 Board Decision).

⁵ 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 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).

⁶ *Id.*

⁷ *Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace* (Mar. 22, 2010).

⁸ LBP-10-15, 72 NRC 257, 345 (2010), *aff'd in part and rev'd in part*, CLI-11-11, 74 NRC 427, 444, 459 (2011).

analysis, failed to consider the Shoreline Fault, which was discovered near the Diablo Canyon site.⁹

Today we consider Mothers for Peace's petitions for review of the Board's dismissal of Contention EC-1 as moot and the Board's dismissal of three proposed contentions: Contention A, which challenges PG&E's consideration of energy alternatives;¹⁰ Contention C, a SAMA contention that challenges PG&E's consideration of seismic hazards;¹¹ and amended Contention C, which repeats the arguments in Contention C and provides additional challenges to PG&E's consideration of seismic hazards.¹² Mothers for Peace filed these contentions in response to PG&E's February 2015 and July 2015 revisions to its Environmental Report, as well as PG&E's March 2015 response to the NRC's request for seismic hazard information under 10 C.F.R. § 50.54(f) (part of the agency's lessons-learned activities from the Fukushima Dai-ichi

⁹ CLI-11-11, 74 NRC at 438, 444.

¹⁰ *San Luis Obispo Mothers for Peace's Motion to File New Contentions Regarding Adequacy of Environmental Report for Diablo Canyon License Renewal Application* (Apr. 6, 2015), at 2-7 (New Contentions A and B).

¹¹ *San Luis Obispo Mothers for Peace's Motion to File New Contentions Regarding Adequacy of Severe Accident Mitigation Alternatives Analysis for Diablo Canyon License Renewal Application* (Apr. 15, 2015), at 2-15 (New Contentions C and D). Mothers for Peace also moved to file proposed Contentions B and D, which, respectively, challenged PG&E's conclusions regarding the impacts of license renewal in comparison to the impacts of energy alternatives and the consideration of flooding risk from local intense precipitation events as part of the SAMA analysis. New Contentions A and B at 8-13; New Contentions C and D at 16-18. The Board found these contentions inadmissible, and Mothers for Peace did not seek review of their dismissal. August 2015 Board Decision at 1; September 2015 Petition for Review at 1 n.1.

¹² *San Luis Obispo Mothers for Peace's Motion to File Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation)* (July 31, 2015), at 3-25 (Amended Contention C).

accident and continuing oversight of all plants, outside of license renewal).¹³ Mothers for Peace argues that we should take review of, and reverse, the Board's rulings.¹⁴ PG&E and the Staff oppose Mothers for Peace's petitions for review.¹⁵

II. DISCUSSION

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to one or more of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

¹³ New Contentions A and B at 1; New Contentions C and D at 1-3; Amended Contention C at 1-2; see Letter from Barry S. Allen, PG&E, to NRC Document Control Desk (Feb. 25, 2015) (ADAMS accession no. ML15057A102 (package)) (February 2015 Revised License Renewal Application); Letter from Barry S. Allen, PG&E, to NRC Document Control Desk (Mar. 11, 2015) (ML15071A046 (package)) (March 2015 Seismic Hazard Report); Letter from Barry S. Allen, PG&E, to NRC Document Control Desk (July 1, 2015) (ML15182A452) (July 2015 SAMA Analysis Update). 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) (Section 50.54(f) Request); 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).

¹⁴ November 2015 Petition for Review at 1-2; September 2015 Petition for Review at 1. Mothers for Peace filed its September 2015 petition before the Board issued its decision in LBP-15-29 and terminated the proceeding. At that time, the September 2015 petition was interlocutory, and Mothers for Peace would have had to demonstrate a basis for review under 10 C.F.R. § 2.341(f)(2). Now that the Board has terminated the proceeding, however, the issue whether interlocutory review is appropriate is moot.

¹⁵ *Pacific Gas and Electric Company's Opposition to San Luis Obispo Mothers for Peace's Petition for Review of LBP-15-29* (Dec. 11, 2015); *NRC Staff Answer Opposing San Luis Obispo Mothers for Peace's Petition for Review of LBP-15-29 and Review of the Board's August 6, 2015 Memorandum and Order* (Dec. 11, 2015); *Applicant's Response to Petition for Review* (Oct. 9, 2015), at 1; *NRC Staff's Answer Opposing Commission Review of Atomic Safety and Licensing Board Memorandum and Order Denying Motion to File New Contentions A and C* (Oct. 9, 2015).

- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration that we may deem to be in the public interest.¹⁶

A. The Board’s Contention Admissibility Rulings

1. Contention A

In Contention A, Mothers for Peace argued that PG&E’s amended Environmental Report fails to satisfy the requirements of the National Environmental Policy Act (NEPA) because it relies on what Mothers for Peace claimed to be an outdated concept: that alternative energy technologies capable of baseload generation would be the only viable candidates for replacement power for Diablo Canyon.¹⁷ Mothers for Peace also challenged PG&E’s selection of a combination of concentrated solar power, wind, solar photovoltaics, geothermal, demand-side management, and natural-gas-fired generation, as a “technically feasible and practicable technology combination alternative to continuing the operation of [Diablo Canyon].”¹⁸ Mothers for Peace asserted that this combination alternative “ignores the dramatic developments in . . .

¹⁶ 10 C.F.R. § 2.341(b)(4).

¹⁷ New Contentions A and B at 2-3 (“Chapter 7 of PG&E’s Amended Environmental Report is inadequate to satisfy NEPA and 10 CFR § 51.53(c)(2) because it does not evaluate a reasonable array of energy alternatives that either currently are commercially viable or will become so in the near term (i.e., within the next ten years). PG&E’s energy alternatives analysis is based on arbitrary and unreasonable assumptions about the necessary characteristics of replacement energy, the viability and availability of alternative energy sources, and what constitute[s] reasonable combinations of energy sources.”).

¹⁸ February 2015 Revised License Renewal Application, Enclosure 2, Attach. 1, at 7.2-4; see New Contentions A and B at 4.

the individual technologies,” and therefore overly relies on natural gas, “which distorts the environmental impact assessment.”¹⁹ In a similar vein, Mothers for Peace argued that these recent developments in renewable technologies, including their reduction in cost, demonstrate that they will be available as alternatives “to replace Diablo Canyon capacity upon the termination of its current license[s]” in November 2024 and August 2025, and that PG&E was wrong to question their availability during that timeframe.²⁰ In support of its contention, Mothers for Peace attached a declaration from Mark Cooper, a Senior Fellow for Economic Analysis at the Institute for Energy and the Environment at Vermont Law School.²¹

The Board found that Mothers for Peace’s claims “either r[an] afoul of binding Commission precedents” or otherwise failed to meet the contention admissibility standards in 10 C.F.R. § 2.309(f)(1).²² In *Seabrook*, we clarified the scope of the energy alternatives analysis for license renewal, and we explained that an energy alternatives contention in a license renewal proceeding must provide facts or expert opinion sufficient to raise a genuine dispute as to whether the proposed alternative technology (or combination of technologies) “is

¹⁹ New Contentions A and B at 4-5.

²⁰ *Id.* at 6; *see also id.* at 3-4.

²¹ *Declaration of Mark Cooper in Support of San Luis Obispo Mothers for Peace’s Motion to File New Contentions Regarding Adequacy of Environmental Report for Diablo Canyon License Renewal Application* (Apr. 6, 2015), ¶ 1.

²² August 2015 Board Decision at 8 (citing *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 339 n.223, 342 (2012); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 397 (2012)). Although PG&E had argued that some of Mothers for Peace’s claims in Contention A were not timely under 10 C.F.R. § 2.309(c), the Board did not rule on the timeliness of the contentions because it found them inadmissible under section 2.309(f)(1). *Id.* at 5; *Pacific Gas and Electric Company’s Answer Opposing Proposed Energy Alternatives Contentions* (May 1, 2015), at 7, 10.

currently commercially viable, or will become so in the near term” to supply baseload power.²³ We reiterated this standard in the *Davis-Besse* license renewal proceeding shortly after our decision in *Seabrook*.²⁴ Based on our decisions in those cases, the Board found that Mothers for Peace had not presented a “plausible, adequately supported argument” that its preferred technologies “could supply sufficient baseload power to replace Diablo Canyon’s generating capacity at the time its operating licenses expire.”²⁵

Mothers for Peace argues that the Board mistakenly relied on *Seabrook* and *Davis-Besse* because the decisions predated the NRC’s 2013 revision to the Generic Environmental Impact Statement for License Renewal (GEIS).²⁶ According to Mothers for Peace, the rationale from those cases for whether a given energy alternative is capable of supplying “baseload” power is a relic of the 1996 License Renewal GEIS, “which has now been superseded by a markedly different analysis” in the 2013 revision.²⁷ Mothers for Peace asserts that the Board’s

²³ *Seabrook*, CLI-12-5, 75 NRC at 342.

²⁴ *Davis-Besse*, CLI-12-8, 75 NRC at 397.

²⁵ August 2015 Board Decision at 9. Additionally, to the extent Dr. Cooper asserted that energy efficiency measures could replace baseload power, the Board found that this argument failed to raise a genuine dispute because PG&E considered demand-side management and energy efficiency programs, and although they do not generate baseload power, PG&E deemed them a reasonable alternative. *Id.* at 9-10. And to the extent Mothers for Peace and Dr. Cooper referenced the costs of energy alternatives to argue that PG&E should have considered the economic viability of continuing operation of Diablo Canyon in its alternatives analysis, the Board found that such a determination is within the purview of state regulatory and utility officials and therefore outside the limited scope of the NRC’s license renewal proceeding. *Id.* at 11 (citing Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,471 (June 5, 1996)).

²⁶ September 2015 Petition for Review at 2-4.

²⁷ *Id.* at 3.

ruling “raises the question of whether the [revised] GEIS is actually an effective document” and asks us “to clarify” that the revised GEIS “governs NEPA reviews of alternative energy analyses.”²⁸ Mothers for Peace also argues that it adequately supported its contention, noting in particular its challenge to PG&E’s combination alternative, and asserts that the Board improperly reached the merits of the contention by “weighing [Dr.] Cooper’s supported opinions against the statements in the Amended Environmental Report, and by failing to credit [Dr.] Cooper’s expert opinion.”²⁹

Mothers for Peace, however, reads the 2013 GEIS out of context and mischaracterizes the Board’s treatment of its contention. Mothers for Peace references a discussion in the revised GEIS regarding advancements in replacement power alternatives that explained that the generic analysis considers the latest information on energy alternatives but does not incorporate anticipated or speculative changes on the future state of technology.³⁰ In this discussion, the NRC acknowledged that “it is inevitable that rapidly evolving technologies will outpace information presented in the GEIS” and left the consideration of the status of energy alternatives and energy policies to individual license renewal reviews.³¹

In the 2013 GEIS, the NRC did not, however, revise the agency’s long-standing position that energy alternatives, to be considered reasonable, must be “capable of meeting the purpose

²⁸ *Id.* at 4-5.

²⁹ *Id.* at 5.

³⁰ *Id.* at 4 (citing “Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Main Report” (Final Report), NUREG-1437, Rev. 1, Vol. 1 (June 2013), at 1-30 to 1-31 (ML13106A241) (GEIS Rev. 1)).

³¹ GEIS Rev. 1, at 1-31.

and need of the proposed action (license renewal) or replacing the power generated by a nuclear power plant.”³² In fact, consistent with our holdings in *Seabrook* and *Davis-Besse*, the revised GEIS expressly states that “[a] reasonable alternative must be commercially viable on a utility scale and operational prior to the expiration of the reactor’s operating license, or expected to become commercially viable on a utility scale and operational prior to the expiration of the reactor’s operating license.”³³ Mothers for Peace’s misapprehension that the revised GEIS reflects a change in the agency’s assessment of how best to address energy alternatives is not a valid basis for review of the Board’s decision.

Further, although Mothers for Peace argues that the Board improperly weighed its arguments, we see nothing to indicate that the Board misapplied our case law or the contention admissibility standards set forth in our rules of practice.³⁴ The Board reviewed Mothers for Peace’s supporting documentation, including Dr. Cooper’s declaration, to determine whether Mothers for Peace had advanced a genuine, material dispute with PG&E’s license renewal application.³⁵ The Board found that although Dr. Cooper’s statement showed an increase in generation from renewable technologies and declining costs and increased use of battery

³² Compare *id.* at 2-18, with “Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Main Report” (Final Report), NUREG-1437, Vol. 1 (May 1996), 8-15 (ML040690705) (evaluating alternatives identified . . . as capable of satisfying the purpose and need of the proposed action”).

³³ GEIS Rev. 1, at 2-18. We “need only discuss those alternatives that are reasonable and ‘will bring about the ends’ of the proposed action.” *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)).

³⁴ See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

³⁵ See, e.g., August 2015 Board Decision at 11.

technology, it did not show that these technologies would be commercially available and practicable to satisfy baseload demand in the relevant timeframe for license renewal.³⁶ Without a showing of a substantial question as to whether the Board erred, Mothers for Peace has not made a case for our review of the Board's ruling on Contention A. Therefore, we decline to review the Board's ruling on this contention.

2. Contention C and Amended Contention C

PG&E submitted an update to its Environmental Report in February 2015 that revised the SAMA analysis by addressing, among other things, updated seismic information that considered the Shoreline Fault and other regional faults.³⁷ In its Contention C, Mothers for Peace argued that the revised SAMA analysis "is not based on a sufficiently rigorous or up-to-date analysis of seismic risks."³⁸ First, Mothers for Peace asserted that the revised SAMA analysis is inadequate because it relies on an "interim" seismic analysis and does not

³⁶ *Id.*

³⁷ See February 2015 Revised License Renewal Application, Enclosure 2, Attach. 2, at 4.20-3.

³⁸ New Contentions C and D at 2-3 ("PG&E's SAMA Analysis . . . is inadequate to satisfy [NEPA] or NRC implementing regulation 10 C.F.R. § [51.53(c)(3)(ii)(L)] because PG&E's evaluation of potential mitigation measures is not based on a sufficiently rigorous or up-to-date analysis of seismic risks. As a result, PG&E's evaluation of the comparative costs and benefits of measures to prevent or mitigate the effects of a severe earthquake does not sufficiently credit the cost-effectiveness of mitigation measures. While PG&E claims that the 'results and insights' of its 2014 'interim' probabilistic risk analysis [PRA] . . . are 'reasonable for the purposes of a SAMA analysis' . . . by PG&E's own admission, [it] is only an 'interim' PRA. . . . In addition, it is not sufficiently rigorous or updated to support the SAMA analysis. Nor does PG&E's promise to 'update' the [PRA] with the 'results' of its 2015 seismic hazards analysis cure the inadequacy of [the PRA] to support PG&E's SAMA Analysis, because PG&E's seismic hazards analysis is also insufficiently rigorous and relies on outdated or unjustified methods and assumptions. Given the inadequacies of PG&E's seismic hazards analysis, to merely cite its 'results' in a revised SAMA Analysis would not be sufficient to ensure the adequacy of the SAMA Analysis to evaluate potential mitigation measures for severe seismic accidents. Instead, PG&E must cure the significant defects in the underlying data and analyses." (internal citations omitted)).

incorporate information from the updated seismic hazard evaluation that PG&E submitted in March 2015 in response to the Staff's Section 50.54(f) Request.³⁹ PG&E committed to update its SAMA analysis with this information, but it had not yet done so at the time Mothers for Peace submitted Contention C.⁴⁰ Second, Mothers for Peace argued that even if PG&E were to have incorporated this information, the SAMA analysis would still be inadequate due to purported deficiencies in PG&E's updated seismic hazard evaluation.⁴¹ Mothers for Peace filed Amended Contention C after PG&E again revised the SAMA analysis in July 2015 to incorporate the information from its updated seismic hazard evaluation. Mothers for Peace echoed the arguments in Contention C and added new claims relating to the adequacy of PG&E's seismic hazard analysis.⁴² Dr. David Jackson, Professor of Geophysics, Emeritus, at UCLA, provided expert opinion in support of Contention C and Amended Contention C.⁴³

³⁹ *Id.* at 4-5.

⁴⁰ See February 2015 Revised License Renewal Application at 2.

⁴¹ See New Contentions C and D at 6-12 (arguing, among other things, that PG&E may have incorrectly mapped the location of the Shoreline Fault and other nearby faults, thereby underestimating "the shaking that may be caused by nearby earthquakes" and that even assuming a correct mapping, PG&E failed "to account for recent data and models showing that earthquakes on given faults may be much larger than previously assumed"). The Board found these claims speculative because they were based on a filing that PG&E had not yet submitted. August 2015 Board Decision at 17 n.75.

⁴² Amended Contention C at 3-4, 13 (arguing that PG&E's July 2015 SAMA Analysis Update fails to consider "the effects of spectral acceleration" and fails to consider "surface fault rupture, ground displacement, ground velocity, and duration of shaking"—"other measures of ground motion that could cause reasonably foreseeable adverse environmental impacts on Diablo Canyon that are more extreme than or different from the impacts of spectral acceleration").

⁴³ New Contentions C and D at 13; *Declaration of Dr. David D. Jackson in Support of San Luis Obispo Mothers for Peace's Motion to File New Contention Regarding Adequacy of Severe Accident Mitigation Alternatives Analysis for Diablo Canyon License Renewal Application* (Apr.

Our case law sets forth the standard for determining whether a SAMA-related contention raises a genuine, material dispute for an admissible contention under 10 C.F.R. § 2.309(f)(1). Because for any SAMA analysis “[i]t will always be possible to envision and propose some alternate approach, some additional detail to include, [or] some refinement,”⁴⁴ we have instructed our licensing boards that “the proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA.”⁴⁵ We have made clear that “[u]nless a petitioner sets forth a supported contention pointing to an apparent error or deficiency that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing.”⁴⁶

The Board applied this standard to both the original and amended versions of Contention C.⁴⁷ The Board found that, “most importantly,”⁴⁸ Mothers for Peace “never addressed the potential impact of any particular seismic model change on the cost-benefit

15, 2015); Amended Contention C at 19; *Declaration of Dr. David D. Jackson in Support of San Luis Obispo Mothers for Peace’s Amended Contention C* (July 31, 2015).

⁴⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

⁴⁵ *Seabrook*, CLI-12-5, 75 NRC at 323. This stems from NEPA’s “rule of reason.” See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010); see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (observing that “while there ‘will always be more data that could be gathered,’ agencies ‘must have some discretion to draw the line and move forward with decisionmaking’” (quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 11 (1st Cir. 2008))); *Seabrook*, CLI-12-8, 75 NRC at 323 (“SAMA adjudications would prove endless if hearings were triggered merely by suggested alternative inputs and methodologies that conceivably could alter the cost-benefit conclusions.”).

⁴⁶ *Davis-Besse*, CLI-12-8, 75 NRC at 407 (emphasis omitted).

⁴⁷ See LBP-15-29, 82 NRC at 250-52; August 2015 Board Decision at 15-17.

⁴⁸ August 2015 Board Decision at 17.

evaluations of the [severe accident mitigation measures] that PG&E considered.”⁴⁹ That is, in the Board’s assessment, both versions of the contention lacked the necessary link between Mothers for Peace’s claimed deficiencies in the underlying seismic hazard evaluations and the environmental conclusions in PG&E’s SAMA analysis.⁵⁰ To the extent that Mothers for Peace challenged the adequacy of PG&E’s updated seismic hazard evaluation *per se*—that is, independent of the SAMA analysis—the Board found such a challenge outside the scope of the license renewal proceeding because the seismic hazard evaluation was submitted in connection with the agency’s continuing oversight of the plant.⁵¹ At bottom, the Board found that Mothers for Peace had not demonstrated that PG&E’s analysis was unreasonable under NEPA.⁵²

Mothers for Peace argues that our review of the Board’s ruling on both original and Amended Contention C is warranted because the Board committed factual and legal errors by mischaracterizing the contentions and judging them on their merits.⁵³ Mothers for Peace faults the Board for what it claims was an improper weighing and crediting of PG&E’s views over those of Dr. Jackson.⁵⁴ But the record reflects that the Board adhered to our case law and the contention admissibility standards in our rules of practice. The Board did not weigh Dr. Jackson’s declaration, but rather looked to whether Mothers for Peace had demonstrated a

⁴⁹ LBP-15-29, 82 NRC at 250; *see also* August 2015 Board Decision at 17.

⁵⁰ *See* LBP-15-29, 82 NRC at 250-52; August 2015 Board Decision at 17.

⁵¹ LBP-15-29, 82 NRC at 250, 252; August 2015 Board Decision at 16.

⁵² LBP-15-29, 82 NRC at 252; August 2015 Board Decision at 16-17.

⁵³ November 2015 Petition for Review at 4; *see also* September 2015 Petition for Review at 6.

⁵⁴ September 2015 Petition for Review at 8-9; *see also* November 2015 Petition for Review at 5-6.

connection between the claimed deficiencies in PG&E's updated seismic evaluation and the results of the SAMA analysis. The Board found that Mothers for Peace did not make that connection.⁵⁵

According to Mothers for Peace, the original and amended contentions asserted that information had been "omitted" from the SAMA analysis—rendering them contentions of "omission" rather than contentions of "adequacy"—and therefore Mothers for Peace was not required to describe how its criticisms of PG&E's updated seismic hazard evaluation would materially affect the SAMA analysis' conclusions.⁵⁶ Mothers for Peace likens its arguments to those in Contention EC-1 and our decision upholding the Board's admission of that contention on appeal.⁵⁷ In that decision, we cited our reasoning in *McGuire/Catawba* for admitting a portion of a contention that asserted that the applicant failed to consider the results of a particular study in its SAMA analysis, finding it analogous to Contention EC-1, which claimed that PG&E's SAMA analysis failed to consider the Shoreline Fault.⁵⁸ We also observed that not

⁵⁵ See LBP-15-29, 82 NRC at 252; August 2015 Board Decision at 17. Mothers for Peace also contends that the Board improperly restricted the scope of NEPA by finding its challenge to PG&E's updated seismic hazard evaluation outside the scope of the proceeding. September 2015 Petition for Review at 6-7. But the Board merely observed that to the extent Mothers for Peace sought to challenge the updated seismic hazard evaluation itself—a review ongoing as part of the Staff's oversight activities for Diablo Canyon—without any connection to the SAMA analysis, it was outside the scope. See LBP-15-29, 82 NRC at 250; August 2015 Board Decision at 16.

⁵⁶ See November 2015 Petition for Review at 4; September 2015 Petition for Review at 11. Mothers for Peace nevertheless asserts that it met the standard for an admissible contention by challenging the methodology and conclusions in PG&E's seismic hazard analyses. See November 2015 Petition for Review at 5-6; September 2015 Petition for Review at 10-11.

⁵⁷ See November 2015 Petition for Review at 4-5; September 2015 Petition for Review at 11.

⁵⁸ CLI-11-11, 74 NRC at 442-43 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 8-11 (2002)).

every SAMA contention must be supported in the same way, and that “[t]he support required for a contention necessarily will depend on the issue sought to be litigated.”⁵⁹

Whether a contention is characterized as one of “omission” or “adequacy” is a matter of degree.⁶⁰ Contentions that claim a failure to include an entire subject matter or study might be considered contentions of omission.⁶¹ Contentions that argue for alternative analyses or refinements to a SAMA analysis might be characterized as contentions of “adequacy.” But as we explained in our decision upholding Contention EC-1, the label is not the deciding factor at the contention admissibility stage.⁶² It is the arguments made and the support provided for those arguments, and ultimately, the demonstration of a genuine dispute as to whether the SAMA analysis is reasonable under NEPA, that determines whether or not a SAMA contention is admissible.⁶³ This theme runs throughout our SAMA case law.⁶⁴

Here, the Board found that Mothers for Peace had not attempted to connect its claims with the SAMA analysis. This is insufficient support for the contentions regardless of how they

⁵⁹ *Id.* at 442.

⁶⁰ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002) (discussing the “difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application”).

⁶¹ See *id.*; *McGuire/Catawba*, CLI-02-17, 56 NRC at 9-11.

⁶² See CLI-11-11, 74 NRC at 442. The importance of this distinction increases, however, in the face of an argument that the contention has become moot. See *McGuire/Catawba*, CLI-02-28, 56 NRC at 382-83; *infra* Part II.B.

⁶³ See CLI-11-11, 74 NRC at 442-43.

⁶⁴ See *id.* at 443; *Davis-Besse*, CLI-12-8, 75 NRC at 406-07; *Seabrook*, CLI-12-5, 75 NRC at 323-24; *McGuire/Catawba*, CLI-02-17, 56 NRC at 8.

are labeled. Therefore, we find that Mothers for Peace has not raised a substantial question regarding the Board's ruling on either original or Amended Contention C.

B. The Board's Summary Disposition of Contention EC-1

We reach the same conclusion with regard to the Board's ruling on Contention EC-1. Contention EC-1 states that PG&E's SAMA analysis did not satisfy the requirements of NEPA or 10 C.F.R. § 51.53(c)(3)(ii)(L) because it "fail[ed] to consider information regarding the Shoreline [Fault] that is necessary for an understanding of seismic risks to the Diablo Canyon power plant."⁶⁵ PG&E incorporated information regarding the Shoreline Fault into its SAMA analysis and then filed a motion for summary disposition on the ground that the contention had become moot, which the Board granted.⁶⁶ The sole argument that Mothers for Peace makes for our discretionary review is that it did not expect to have to defend against a dispositive motion on Contention EC-1 until after the Staff issued the Draft Supplemental Environmental Impact Statement (Draft SEIS), which the Staff currently plans to issue in August 2016.⁶⁷ Mothers for Peace argues that it had relied on the Board's most recent scheduling order and that the Board's granting of PG&E's motion before issuance of the Draft SEIS was "inconsistent with the

⁶⁵ CLI-11-11, 74 NRC at 444 ("PG&E's Severe Accident Mitigation Alternatives [(SAMA)] analysis fails to consider information regarding the Shoreline [Fault] that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant. As a result, PG&E's SAMA analysis does not satisfy the requirements of the National Environmental Policy Act [(NEPA)] for consideration of alternatives or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L)." (first and third alterations in original)).

⁶⁶ PG&E Motion for Summary Disposition at 4-5; LBP-15-29, 82 NRC at 254.

⁶⁷ See November 2015 Petition for Review at 10-12; Letter from Joseph A. Lindell, counsel for NRC Staff, to the Administrative Judges (Oct. 15, 2015) (Staff Schedule Update).

Commission's legal and policy precedents protecting the fairness of NRC adjudications."⁶⁸

Mothers for Peace takes issue with the Board's case management, suggesting that the Board sacrificed fairness to expediency.⁶⁹ The history of this proceeding, however, reflects otherwise.

After it admitted Contention EC-1, the Board issued its initial scheduling order in September 2010,⁷⁰ and since that time, it has kept us apprised of changes to the hearing schedule. In June 2011, the Board notified us of an over four-year delay in the adjudicatory proceeding resulting from PG&E's request for the Staff to "delay the final processing"⁷¹ of PG&E's license renewal application until PG&E completed seismic imaging studies that had been requested by the State of California.⁷² The Board directed PG&E to issue monthly updates on the status of its seismic imaging project to inform the Board's schedule for the adjudicatory proceeding.⁷³

⁶⁸ November 2015 Petition for Review at 10-11.

⁶⁹ *Id.* at 11.

⁷⁰ Initial Scheduling Order (Sept. 15, 2010).

⁷¹ Letter from David A. Repka, counsel for PG&E, to the Administrative Judges (Apr. 12, 2011), at 1 (quoting attached Letter from John T. Conway, PG&E, to NRC Document Control Desk (Apr. 10, 2011), at 2) (April 2011 PG&E Letter).

⁷² Notice of 52-Month Delay and Order Requiring Status Reports (June 7, 2011), at 2-3 (unpublished) (Notice of Delay). PG&E recognized that the results of the studies could inform the state's reviews under the Coastal Zone Management Act and the California Coastal Act, and it noted that the NRC could not issue renewed licenses for Diablo Canyon without concluding that license issuance would be consistent with the Coastal Zone Management Act. See April 2011 PG&E Letter at 1-2. PG&E stated that "in light of the [Fukushima Dai-ichi accident] and the interest in California on the issue of seismic safety at [Diablo Canyon], PG&E believe[d] it prudent to complete these studies and issue a report addressing the results prior to issuance of a state [Coastal Zone Management Act] consistency certification and a renewed NRC operating license." *Id.* at 1.

⁷³ Notice of Delay at 4-5.

In its most recent iteration of the scheduling order, issued in March 2014, the Board amended the deadlines for new or amended environmental contentions and dispositive motions, including the deadline for dispositive motions on Contention EC-1.⁷⁴ The Board extended the deadline for filing a dispositive motion from ten to thirty days after the event on which the motion was based, with the additional instruction that dispositive motions based on the final seismic imaging report should not be filed before, but would be deemed timely if filed within thirty days after, issuance of the Draft SEIS.⁷⁵ And the Board instructed that dispositive motions with regard to Contention EC-1 would be due thirty days after issuance of the Draft SEIS.⁷⁶ The Board explained that this “ultimate deadline” was “in addition to, not in lieu of” the general thirty-day deadline for dispositive motions.⁷⁷

At the time the Board set this schedule, PG&E had expected to issue the final seismic imaging report in June 2014, and the Staff had expected to issue the Draft SEIS in September 2014.⁷⁸ To avoid duplication of effort on the part of the parties and the Board if contentions or dispositive motions were filed based on the seismic imaging report, only to be superseded by the issuance of the Draft SEIS a few months later, the Board based the deadlines on the Staff’s issuance of the Draft SEIS.⁷⁹

⁷⁴ Second Revised Scheduling Order (Mar. 26, 2014), at 1-2 (unpublished) (Second Revised Scheduling Order).

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See id.* at 1 & nn.1-2.

⁷⁹ *See Tr.* at 642-46.

But fact-of-life changes occurred and the schedule slipped still further. In June 2014, the Board notified us of an additional eleven-month delay.⁸⁰ PG&E submitted its final seismic imaging project report in September 2014.⁸¹ As stated above, the Staff now expects to issue the Draft SEIS in August 2016.⁸²

In its February 2015 revision to its Environmental Report, PG&E updated its SAMA analysis with information from a 2014 probabilistic risk assessment that “incorporated seismic hazard curves that include the Shoreline Fault, as well as updated hazard curves for other regional faults,” using information that PG&E obtained as part of its development of a report on the Shoreline Fault that PG&E had provided to the Staff in 2011.⁸³ PG&E explained that the 2011 Shoreline Fault Report provided “the most recent probabilistic hazard analyses available at the time.”⁸⁴ Shortly thereafter, PG&E submitted its updated seismic hazard evaluation.⁸⁵

⁸⁰ See Notice of Additional Eleven-Month Delay in Adjudicatory Proceeding (June 23, 2014), at 2 (unpublished).

⁸¹ See Central Coastal California Seismic Imaging Project (Sept. 10, 2014) (ML14260A106 (package)).

⁸² Staff Schedule Update at 1. The Staff expects to issue the Final Supplemental Environmental Impact Statement in May 2017. *Id.* The Staff issued the Safety Evaluation Report in June 2011, and expects that any supplements to the Safety Evaluation Report would be issued in August 2016. *Id.*

⁸³ PG&E Motion for Summary Disposition at 4; see also February 2015 Amended License Renewal Application, Enclosure 2, Attach. 2, at 4.20-3. See generally “Report on the Analysis of the Shoreline Fault Zone, Central Coastal California: Report to the U.S. Nuclear Regulatory Commission” (Jan. 2011) (ML110140431).

⁸⁴ PG&E Motion for Summary Disposition at 4. When it submitted its amended Environmental Report, PG&E was in the process of preparing its updated seismic hazard evaluation as part of its response to the Staff’s Section 50.54(f) Request. *Id.*

⁸⁵ *Id.*; March 2015 Seismic Hazard Report.

PG&E then evaluated the effect of its updated seismic hazard evaluation on the SAMA analysis and submitted this evaluation in July 2015.⁸⁶

At oral argument with the parties on the admissibility of Mothers for Peace's new contentions, including Mothers for Peace's challenge to PG&E's updated SAMA analysis in Contention C, the Board asked PG&E whether it intended "to take any action" with respect to Contention EC-1 in light of the fact that PG&E had updated its SAMA analysis with information concerning the Shoreline Fault.⁸⁷ Counsel for PG&E responded, "I think it's fair to say that we do."⁸⁸ PG&E's motion for summary disposition followed.

PG&E argued that summary disposition was appropriate because the claimed omission from the SAMA analysis—consideration of the Shoreline Fault—had been cured and the contention had become moot.⁸⁹ Thus, it asserted that there remained no genuine issue of material fact and that it was entitled to a decision as a matter of law.⁹⁰ Mothers for Peace immediately moved for an unopposed extension of time to respond, which the Board granted.⁹¹

⁸⁶ PG&E Motion for Summary Disposition at 5; July 2015 SAMA Analysis Update.

⁸⁷ Tr. at 880-81.

⁸⁸ *Id.* at 881. PG&E explained that it had not filed a motion up to that point but that Contention EC-1 "is certainly addressed by the information" in PG&E's updated SAMA analysis. *Id.*

⁸⁹ See PG&E Motion for Summary Disposition at 3-5.

⁹⁰ *Id.* at 5.

⁹¹ *San Luis Obispo Mothers for Peace's Unopposed Motion for Extension of Time* (July 31, 2015); Order (Granting Unopposed Motion for Extension of Time) (Aug. 3, 2015) (unpublished) (Board Extension Order).

The Staff supported PG&E's motion, agreeing with PG&E that Contention EC-1 had become moot upon PG&E's update of its SAMA analysis.⁹²

In its answer, Mothers for Peace did not dispute that the claimed omission had been cured. Instead, Mothers for Peace focused solely on the timing of PG&E's motion, arguing that it was precluded by the Board's March 2014 scheduling order and therefore had been filed prematurely.⁹³ The Board agreed with PG&E and the Staff that summary disposition was appropriate and dismissed Contention EC-1 as moot.⁹⁴

In ruling on PG&E's motion, the Board observed that we had anticipated, in our decision upholding the Board's admission of Contention EC-1, the eventual mootness of the contention after a revision or supplement to the license renewal application.⁹⁵ We explained that a challenge to the adequacy of such a revision would need to be made in the form of a new or amended contention.⁹⁶ The Board rejected Mothers for Peace's reading of its March 2014 scheduling order to preclude PG&E's motion, finding that "[s]uch a construction . . . is inconsistent with [its] purpose and contrary to the Commission's direction that a Licensing Board's 'jurisdiction terminates when there are no longer any contested matters pending before

⁹² See *NRC Staff Answer to Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1* (Aug. 13, 2015), at 1, 4-5.

⁹³ *San Luis Obispo Mothers for Peace's Response to Pacific Gas & Electric Company's Motion for Summary Disposition of Contention EC-1* (Sept. 14, 2015), at 3-4.

⁹⁴ LBP-15-29, 82 NRC at 253-54.

⁹⁵ *Id.* at 253 (citing CLI-11-11, 74 NRC at 443 n.92).

⁹⁶ CLI-11-11, 74 NRC at 443 n.92.

it.”⁹⁷ The Board further explained that “[t]he purpose of scheduling orders is not to vest in any party a right to invoke their provisions to achieve the opposite of the Board’s intended objectives,” and that a licensing board “may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management.”⁹⁸ The Board reasoned, “unless a schedule is so onerous or unfair that it deprives a party of procedural due process, ‘scheduling is a matter of Licensing Board discretion.’”⁹⁹

Although Mothers for Peace now maintains that it was prejudiced when the Board granted PG&E’s motion for summary disposition, the record reflects that the Board managed the case fairly, as well as efficiently.¹⁰⁰ Licensing boards have considerable discretion in their management of adjudicatory proceedings.¹⁰¹ Given the procedural history outlined above, the

⁹⁷ LBP-15-29, 82 NRC at 253 (quoting *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC 535, 564 n.46 (2015)).

⁹⁸ *Id.* at 254 (citing *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 991 (1974)).

⁹⁹ *Id.* (quoting *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986)).

¹⁰⁰ See November 2015 Petition for Review at 11-12.

¹⁰¹ See 10 C.F.R. § 2.319; *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-28, 72 NRC 553, 554 (2010) (expecting the Board “to make full use of its broad authority under [the] rules to establish and maintain a fair and disciplined hearing process, avoiding extensions of time absent good cause, unnecessary multiple rounds of briefs, or other unnecessary delay”).

litigation of Contention EC-1 cannot be said to have been rushed.¹⁰² And when PG&E filed its motion, Mothers for Peace was provided with a full and fair opportunity to respond.¹⁰³

Ultimately, however, little remained for Mothers for Peace to do in response to the motion for summary disposition, aside from filing a new or amended contention that challenged the adequacy of PG&E's SAMA analysis revisions—which Mothers for Peace did with its proposed original and Amended Contention C.¹⁰⁴ In the *McGuire/Catawba* proceeding, after the applicant had supplied information from the study that the petitioner had claimed to have been omitted, we explained: “[i]f we did not require an amended or new contention in ‘omission’ situations, an original contention alleging simply a failure to address a subject could readily be transformed—without basis or support—into a broad series of disparate new claims,” which “effectively would circumvent NRC contention-pleading standards.”¹⁰⁵ Therefore, as the Board here noted, had PG&E not moved for summary disposition, the Board reasonably could have requested briefing on the question of Contention EC-1's mootness.¹⁰⁶ We find that Mothers for

¹⁰² Moreover, although the Board did not rely on this point, the March 2014 scheduling order fairly can be read to allow PG&E's motion because the Board's “ultimate deadline” for dispositive motions on Contention EC-1 expressly was provided “*in addition to, not in lieu of*” the general thirty-day deadline for dispositive motions. Second Revised Scheduling Order at 2 (emphasis added). PG&E filed its motion for summary disposition thirty days after submitting its July 2015 SAMA analysis update. See PG&E Motion for Summary Disposition at 1 n.1.

¹⁰³ See Board Extension Order at 2.

¹⁰⁴ See CLI-11-11, 74 NRC at 443 n.92; accord *McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

¹⁰⁵ See *McGuire/Catawba*, CLI-02-28, 56 NRC at 383.

¹⁰⁶ LBP-15-29, 82 NRC at 254. Moreover, as the Board recognized, if the Board were to have allowed the contention to remain pending for a year or more in anticipation of the Draft SEIS, when it was “clear that no genuinely contested matter” remained before it, the Board would have acted counter to our direction that a Board's jurisdiction terminates when the contested matters before it have been resolved. See *id.*; *Fermi*, CLI-15-10, 81 NRC at 564 n.46; *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-701 (2012); *cf.*

Peace has not raised a substantial question that it was prejudiced by the Board's ruling or that the Board erred in its dismissal of Contention EC-1.

III. CONCLUSION

Mothers for Peace has not raised a substantial question warranting review of the Board's dismissal of proposed Contention A, proposed original or Amended Contention C, or the Board's summary disposition of Contention EC-1. We therefore *deny* its petitions for review.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of June, 2016

Union Electric Co. (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC 546, 550 (2015) (rejecting the admission of "placeholder" contentions); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (noting that the regulations do not contemplate contentions that function as a "placeholder" for a further motion to be filed later).

Additional Views of Commissioner Baran

I concur with the Commission's memorandum and order but write separately to expand on the discussion of how the NRC Staff evaluates and defines reasonable energy alternatives when conducting a NEPA analysis. As the Commission has previously recognized, the electricity generation sector is a dynamic environment featuring rapidly evolving technologies. As a result, the particular generation resources qualifying as "baseload" will change over time. For example, as energy storage technologies mature, previously intermittent renewable energy generation paired with energy storage are functioning as baseload generation. Energy efficiency improvements and demand response strategies also need to be analyzed as plausible alternatives to baseload nuclear generation in the agency's NEPA reviews. Reflecting this evolution of what constitutes "baseload power" in our NEPA reviews will only enhance their utility for decisionmakers and the public.

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-16-11** have been served upon the following persons by the Electronic Information Exchange and e-mail.

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Diablo Canyon Nuclear Power Plant - Docket Nos. 50-275-LR and 50-323-LR
COMMISSION MEMORANDUM AND ORDER CLI-16-11

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

Dated at Rockville, Maryland
this 2nd day of June 2016