

February 13, 2023

Mr. Daniel H. Dorman
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Submitted via electronic submission

Subject: NEI's Support for PG&E's Exemption from 10 C.F.R. § 2.109(b)

Dear Mr. Dorman:

On behalf of the Nuclear Energy Institute (NEI),¹ I write to express NEI's strong support for the request by Pacific Gas & Electric (PG&E) for an exemption from the requirements of 10 C.F.R. § 2.109(b) concerning a timely license renewal application for Diablo Canyon Units 1 and 2.² The Nuclear Regulatory Commission (NRC) is currently evaluating PG&E's request for an exemption from the five-year timely renewal period provided in Section 2.109(b) as PG&E intends to resubmit a license renewal application for both Diablo Canyon Units no later than the end of December 2023.

As detailed in this letter, PG&E's exemption request is supported by multiple, compelling considerations. First, longstanding and well-settled judicial authority holds that the Commission possesses broad legal authority to implement its obligations under the Atomic Energy Act (AEA), including granting exemptions, where appropriate, from regulations duly promulgated by the Commission. Second, the Commission's broad legal authority to grant such exemptions is at its zenith when, as here, the requested exemption is from an administrative, scheduling requirement that was in the Commission's sole discretion to establish in the first instance. Third, PG&E's exemption request presents no undue risk to the public health and safety or common defense and security. Finally, special circumstances, including significant public interest considerations, support granting the exemption request.

¹ NEI's mission is to promote the use and growth of clean nuclear energy through efficient operations and effective policy. NEI has more than 300 members, including companies that own or operate nuclear power plants, reactor designers and advanced technology companies, architect and engineering firms, fuel suppliers and service companies, consulting services and manufacturing companies, companies involved in nuclear medicine and nuclear industrial applications, radionuclide and radiopharmaceutical companies, universities and research laboratories, labor unions, and international electric utilities.

² PG&E Letter (DCL-22-085) to NRC, Request to Resume Review of the Diablo Canyon Power Plant License Renewal Application or, Alternatively, for an Exemption from 10 CFR 2.109(b), Concerning a Timely Renewal Application (Oct. 31, 2022) (ML22304A691) ("PG&E Request").

I. The Commission Has Broad Legal Authority to Grant the Exemption Request

As detailed in its request, PG&E seeks an exemption from the Commission's timely renewal regulation in 10 C.F.R. § 2.109(b), which provides that an existing power reactor license "will not be deemed to have expired until the [license renewal] application has been finally determined" if the applicant submits the license renewal application "at least five years before the expiration of the existing license."³ Longstanding and well-settled judicial precedent establishes that the Commission possesses the legal authority to grant the exemption request.

For decades, since the days when the first nuclear power plants were being licensed, the U.S. Supreme Court and other courts have recognized the Commission's broad legal authority to implement the AEA.⁴ As succinctly described by the U.S. Court of Appeals for the D.C. Circuit in 1969, Congress enacted in the AEA "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."⁵ In 1978, the U.S. Court of Appeals for the First Circuit further summarized the Commission's broad authority and discretion:

Both the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 confer *broad regulatory functions* on the Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts, 42 U.S.C. § 2201(p). In a regulatory scheme where *substantial discretion* is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress. The Atomic Energy Act of 1954 is *hallmarked by the amount of discretion granted the Commission* in working to achieve the statute's ends.⁶

³ 10 C.F.R. § 2.109(b).

⁴ See, e.g., *Vt. Yankee Power Corp. v. NRDC*, 435 U.S. 519, 525-26 (1978) (observing the Commission "was given broad regulatory authority" under the AEA); *Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO*, 367 U.S. 396, 408 (1961) ("We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision.").

⁵ *Siegel v. Atomic Energy Comm'n (AEC)*, 400 F.2d 778, 783 (D.C. Cir. 1968). See also *Ohio ex rel. Celebrezze v. NRC*, 868 F.2d 810, 813 (6th Cir. 1989) (reiterating the court's statements in *Siegel* regarding the Commission's uniquely broad statutory authority). The Commission, too, has appropriately recognized its own "broad legal authority" under the AEA. See *Exelon Generation Co., LLC* (Early Site Permit Proceeding for the Clinton ESP Site), CLI-07-12, 65 NRC 203, 208 (2007) ("[T]he NRC has broad legal authority under the Atomic Energy Act.").

⁶ *Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978) (emphasis added) (citing *Siegel*, 400 F.2d at 783).

This broad legal authority applies to all agency regulations that the Commission has deemed necessary to fulfill its responsibilities. The Commission acts within its broad legal authority not only when it promulgates substantive regulations prescribing protections for the public health and safety and for the common defense and security, but also when it promulgates a regulation that allows for specific exemptions from those requirements when specified conditions are met.

Relevant here, 10 C.F.R. § 54.15 allows for exemptions from the Commission's requirements for the renewal of nuclear power plant operating licenses contained in 10 C.F.R. Part 54, so long as such exemption is in accordance with the provisions 10 C.F.R. § 50.12.⁷ Section 50.12, in turn, provides that the Commission may grant exemptions from its requirements when such exemption is "authorized by law, will not present an undue risk to the public health and safety, and [is] consistent with the common defense and security," and where "special circumstances are present."⁸ Section 50.12 then spells out when such special circumstances are present.⁹

Suffice it to say that the Commission would not have promulgated a rule permitting exemptions from its own requirements if it lacked such authority. NEI is aware of no statutory command, or judicial precedent, that would remove from the Commission's broad legal authority the ability to exercise its ample discretion and permit exemptions from its regulatory requirements. In other words, Congress deliberately chose to confer broad regulatory responsibility on the Commission without express or implied qualification or limitation on the Commission's ability to allow for exemptions from its requirements where the Commission found such exemption appropriate.

II. The Same Discretion the Commission Exercised When Establishing the Five-Year Timely Renewal Period May Be Exercised to Grant an Exemption from that Period

The Administrative Procedure Act of 1946 (APA) establishes the statutory authority for the Commission's timely renewal regulation in 10 C.F.R. § 2.109(b). But the APA does not specify or direct that a license renewal application must be submitted five years prior to the expiration of an existing license. The Commission established that five-year period, acting within its broad discretion. Because that determination was confined to the Commission's broad discretion, it is free to grant an exemption for a shorter period, consistent with the judicial precedent summarized above.

APA Section 9(b) states in relevant part that "[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a

⁷ 10 C.F.R. § 54.15 ("Exemptions from the requirements of this part may be granted by the Commission in accordance with 10 CFR 50.12").

⁸ 10 C.F.R. § 50.12(a)(1) and (2).

⁹ 10 C.F.R. § 50.12(a)(2)(i)-(vi).

license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.”¹⁰

APA Section 9(b) did not define what it meant by “timely.” Such definition was left to the Commission’s broad discretion. Indeed, nothing in APA Section 9(b) suggests or requires that the Commission prescribe a definition of “timely” at all. Notwithstanding the absence of such a statutory command, in 1962, the AEC exercised its discretion and established 30 days as the timely renewal period in 10 C.F.R. § 2.109.¹¹

Over two decades later, when it became clear that numerous nuclear power reactor licensees would seek to operate their reactors beyond their initial operating license period, the Commission opted to revise the Section 2.109 timely renewal period for power reactors. The NRC staff initially proposed that a license renewal application be received no later than three years prior to the expiration of the operating license.¹² The advanced notice of proposed rulemaking explaining this initial determination explicitly “[r]ecogniz[ed] that there is not a strong basis for selecting a particular cutoff time.”¹³ Nonetheless, the Commission exercised its discretion to propose three years as the new cut off time for timely renewal.¹⁴ In 1991, when promulgating the final rule, the Commission ultimately settled on five years as the timely renewal period and this timeframe remains in effect.¹⁵

This three-decade history behind the establishment of the present day, five-year timely renewal period shows the Commission’s broad legal authority and discretion to establish what “timely” means under Section 2.109(b). This history shows that the Commission could have established a shorter (or longer) timely renewal period than the one it ultimately adopted.

Because the Commission has broad legal authority to grant exemptions from its requirements, and because the definition of “timely” under Section 2.109(b) is within the Commission’s discretion, the Commission thus possesses the authority to grant an

¹⁰ 5 U.S.C. § 558(c). Congress explicitly made the APA—including Section 9(b)—applicable to NRC licensing actions. 42 U.S.C. § 2231. In other words, timely renewal was an applicable legal background rule since the AEA was first enacted.

¹¹ AEC, Rules of Practice, Revision of Rules, 27 Fed. Reg. 377, 379 (Jan. 13, 1962).

¹² Advance Notice of Proposed Rulemaking; Notice of Workshop: Nuclear Power Plant License Renewal; Public Workshop on Technical and Policy Consideration, 54 Fed. Reg. 41,980, 41,984-85 (Oct. 13, 1989) (“License Renewal ANPR”); Nuclear Power Plant License Renewal; Proposed Rule, 55 Fed. Reg. 29,043, 29,051, 29,058 (July 17, 1990).

¹³ License Renewal ANPR, 54 Fed. Reg. at 41,984.

¹⁴ Nuclear Power Plant License Renewal; Proposed Rule, 55 Fed. Reg. 29,043, 29,051, 29,058 (July 17, 1990) (“Proposed License Renewal Rule”).

¹⁵ Nuclear Power Plant License Renewal; Final Rule, 56 Fed. Reg. 64,943, 64,962 (Dec. 13, 1991).

exemption from the five-year timely renewal period, particularly given that it has recognized that “there is not a strong basis for selecting a particular cutoff time.”¹⁶

Despite suggestions to the contrary,¹⁷ neither the AEA nor the National Environmental Policy Act (NEPA) limited or proscribed application of the APA’s timely renewal provision to NRC licenses. Had Congress wanted to limit or proscribe application of the APA’s timely renewal provision to NRC licenses, Congress could have done so in either statute. It did not. Indeed, the AEA explicitly makes the APA applicable to NRC licensing actions.¹⁸ And nothing else in the AEA (or NEPA) prohibits the NRC from implementing the APA’s statutory command to provide for the continuation of existing, unexpired licenses while the agency reviews a request to extend that license. Thus, the NRC is well within its authority to “protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded.”¹⁹

III. The Exemption Request Will Not Present an Undue Risk to the Public Health and Safety or Common Defense and Security

PG&E’s exemption request succinctly and more than adequately explains why the exemption request will not present an undue risk to the public health and safety or the common defense and security, in accordance with 10 C.F.R. § 50.12(a)(1).²⁰ NEI writes to emphasize three points.

First, the NRC may take action, at any time, within its broad legal authority, to protect public health and safety, and ensure the common defense and security. If the NRC grants an exemption from its requirements, it does not abandon these other authorities it possesses under the AEA. Should circumstances warrant, the NRC retains the broad

¹⁶ License Renewal ANPR, 54 Fed. Reg. at 41,984. Since the Commission first established a default regulatory definition of a “timely” application, it has also maintained the broad discretion to deviate from that definition by exemption when necessary. See AEC, Rules and Regulations, Licensing of Production and Utilization Facilities, 21 Fed. Reg. 355, 356 (Jan. 19, 1956) (promulgating 10 C.F.R. § 50.12 to prescribe the process for specific exemptions from agency regulations). Just as timely renewal operated as background legal rule when the AEA was enacted, the agency’s exemption provisions operated as a background legal rule when the timely renewal requirements were adopted. In other words, the “agency rules” for determining whether an application is “timely” under Section 9(b) are the NRC’s timely renewal rules read in conjunction with its exemption rules.

¹⁷ See Petition by San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group to Deny Pacific Gas & Electric Company’s Request to Review Undocketed license Renewal Application for the Diablo Canyon Unit 1 and Unit 2 Reactors and Petition to Deny Pacific Gas & Electric Company’s Request to Extend the Diablo Canyon Reactors’ License Terms Without Renewing the Licenses (Jan. 10, 2023).

¹⁸ 42 U.S.C. § 2231.

¹⁹ *Pan-Atl. Steamship Corp. v. Atl. Coast Line R.R. Co.*, 353 U.S. 436, 439 (1958).

²⁰ PG&E Request, Enclosure 2 at pp. 4-5 of 11.

legal authority to take action notwithstanding that it previously granted a scheduling-related exemption.

Second, the NRC also possesses regulatory tools to further ensure public health and safety and the common defense and security. For example, the NRC maintains the ability—and indeed the obligation—to inspect and assess plant performance by applying its well-established, risk-informed Reactor Oversight Process. Notably, the Commission has made clear that general operational issues “are effectively addressed and maintained by ongoing agency oversight, review, and enforcement.”²¹ The NRC also has ability to craft temporary inspections procedures to assess a licensee’s progress in implementing its key or risk-significant aging management programs and commitments during the pendency of the license renewal approval process.²² Adopting such inspection procedures to fit the specific circumstances at hand, and coordinating with the affected licensee to achieve common understanding of the goals of such inspections, will provide additional assurance that there are no undue risks to the public health and safety or the common defense and security from continued operation.

Third, the existence of robust NRC legal authority and regulatory tools to ensure continued safe operation should not imply that the review of PG&E’s license renewal application must be protracted. In accordance with Section 102(c) of the Nuclear Energy Innovation and Modernization Act, the NRC milestone for completing its review of a power reactor license renewal application is 18 months.²³ As it acknowledges, “[t]he NRC staff will work with each licensee or applicant to establish a specific schedule for each request, *which may be shorter* or longer than the generic milestone schedule based on the specific needs of the licensee or applicant and the staff’s resources.”²⁴ PG&E’s application screams out as one for which the NRC staff should establish a streamlined review schedule. The NRC staff already issued a safety evaluation report and completed multiple rounds of environmental reviews, audits, and public meetings on the original application. Properly leveraging these previous reviews not only gives the NRC staff a tremendous head start on its review of PG&E’s application, but also should allow it to efficiently develop inspection procedures to verify the safety of continued operation.

²¹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004) (citation omitted).

²² See, e.g., NRC Inspection Manual, Temporary Instruction 2516/001, Review of License Renewal Activities (Mar. 30, 2011; expired Dec. 13, 2013) (ML110620255) (applicable only to Indian Point Nuclear Generating Unit 2 and Pilgrim Nuclear Power Station).

²³ NRC, Generic Milestone Schedules of Requested Activities of the Commission (last updated Sept. 10, 2021), available at <https://www.nrc.gov/about-nrc/generic-schedules.html> (citing 42 U.S.C. § 2215(c)).

²⁴ *Id.* (emphasis added).

IV. Significant Policy Considerations Support PG&E's Exemption Request

As explained above, granting PG&E's exemption request is well within the Commission's broad legal authority and discretion, is consistent with Section 2.109(b), and would not present any undue risk to the public health and safety and common defense and security. Granting the exemption request is also supported by significant policy considerations.

As an initial matter, the continued need for reliable electric power in California supports granting the extension request. As detailed in PG&E's exemption request, the California state legislature passed, and Governor signed into law, a statute expressing California's strong interest in keeping Diablo Canyon operating beyond its existing licenses.²⁵ As explained in the statute, continued operation of the Diablo Canyon plant may be necessary for state-wide energy reliability and to reduce greenhouse gas emissions, all while renewable and other zero-carbon resources are developed.²⁶

Federal and state officials have expressed support for extending the Diablo Canyon operating licenses for these reasons. In November 2022, the U.S. Department of Energy (DOE) conditionally awarded \$1.1 billion from the Civil Nuclear Credit Program to support extension of the Diablo Canyon operating licenses—itsself an expression of the widespread public support for extending the operating licenses. At that time, California Governor Newsom (who represents California's over 39 million people) reiterated his support for license extension, stating that the DOE "investment creates a path forward for a limited-term extension of the Diablo Canyon Power Plant to support reliability statewide and provide an onramp for more clean energy projects to come online."²⁷ Senator Feinstein similarly stated that Diablo Canyon license extension "is necessary if California is going to meet its ambitious clean-energy goals while continuing to deliver reliable power. This is especially critical as California's electric grid has faced increasing challenges from climate-fueled extreme weather events."²⁸ These clear expressions of support by California's elected representatives weigh strongly in favor of granting the exemption request. They demonstrate compliance with the default five-year deadline would result in undue hardship and other costs far in excess of those contemplated when Section 2.109(b) was adopted, and also constitute material circumstances not considered when the regulation was adopted and for which it would be in the public interest to grant the exemption.

²⁵ PG&E Request, Enclosure 2 at pp. 5-6 of 11.

²⁶ *Id.*

²⁷ Governor Newsom Statement on Federal Funding of Diablo Canyon Extension (Nov. 21, 2022), available at <https://www.gov.ca.gov/2022/11/21/governor-newsom-statement-on-federal-funding-for-diablo-canyon-extension>.

²⁸ Feinstein Applauds Energy Department Investment in Diablo Canyon (Nov. 21, 2022), available at <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=E3F8B369-86DD-4599-A990-05546C311A2A>.

Second, and relatedly, granting the exemption request is also consistent with the Commission's determination that the purpose and need for license renewal is "to provide an option to continue plant operations beyond the current licensing term to meet future system generating needs, as such needs may be determined by State, utility, system, and, where authorized, Federal (other than NRC) decision-makers."²⁹ The Commission has recognized that utility planners "need adequate time to develop alternative sources of power if the license is not renewed."³⁰ Here, if the exemption request is not granted and the Diablo Canyon operating licenses are allowed to expire, there likely will not be adequate time to develop alternative sources of clean, carbon-free power of the scale needed to replace the clean, carbon-free power generated by Diablo Canyon. In other words, the denial of the exemption would essentially abandon—rather than preserve—the option of license renewal for state, utility, and other federal decisionmakers, undermining the central purpose behind the NRC's license renewal framework.

Third, and finally, PG&E could not have reasonably anticipated that it would need to refile a license renewal application for Diablo Canyon. On Sept. 2, 2022, the State of California enacted a law reversing an earlier California Public Utilities Commission decision to retire the Diablo Canyon Units at the end of their existing operating licenses.³¹ As PG&E explained in its exemption request, it did not intentionally postpone the decision to seek license renewal.³² Indeed, in good faith, and well in advance of the five-year timely renewal period, PG&E previously submitted a license renewal application, which was subsequently withdrawn.³³ Since the withdrawal, "significant factors related to the energy needs in California have driven the State to direct PG&E to keep the option of continuing DCCP operations beyond the current license expirations," and such evolution in state policy was unanticipated.³⁴ That new direction is what necessitates the exemption request so the units can continue operating while the renewal application is under review.

Federal agencies and the licensees subject to federal regulations are not clairvoyant. Sometimes circumstances do not fit what is contemplated in a regulation. As a matter of law and policy, the existence of such unanticipated circumstances not contemplated by a regulation should weigh in favor of granting an exemption from that regulation. That is clearly the case here.

²⁹ NUREG-1437, Rev. 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Final Report at S-3 (June 2013).

³⁰ Proposed License Renewal Rule, 55 Fed. Reg. at 29,051.

³¹ PG&E Request, Enclosure 2 at p. 2 of 11.

³² *Id.*, Enclosure 2 at p. 5 of 11.

³³ *Id.*

³⁴ *Id.*

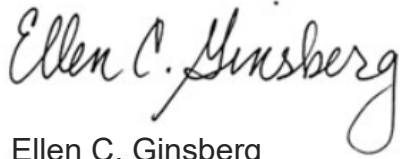
Mr. Daniel H. Dorman

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For all the foregoing reasons, NEI strongly supports granting PG&E's exemption request.

Sincerely,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive style with a large, looping "G" at the end.

Ellen C. Ginsberg

cc: Chair Christopher T. Hanson
Commissioner Jeff Baran
Commissioner David A. Wright
Commissioner Annie Caputo
Commissioner Bradley R. Crowell
Marian Zabler, NRC General Counsel
Andrea Veil, NRC Director NRR
Lauren Gibson, License Renewal Projects Branch Chief