

April 7, 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Independent
Spent Fuel Storage Installation)

Docket No. 72-26-MLR

**NRC STAFF ANSWER TO SAN LUIS OBISPO MOTHERS FOR PEACE
HEARING REQUEST AND PETITION TO INTERVENE**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), the U.S. Nuclear Regulatory Commission (NRC or Commission) staff (Staff) hereby answers the hearing request and petition to intervene submitted by the San Luis Obispo Mothers for Peace (SLOMFP or Petitioner). As discussed below, SLOMFP has standing to bring its request and submitted an admissible contention. Therefore, SLOMFP's Petition should be granted.

BACKGROUND

SLOMFP's Petition relates to Pacific Gas and Electric Company's (PG&E or Applicant) license renewal application for the Independent Spent Fuel Storage Installation (ISFSI) located at PG&E's Diablo Canyon Nuclear Power Plant (DCNPP) site. The NRC issued the initial license for this ISFSI, materials license no. SNM-2511, on March 22, 2004. The license authorizes PG&E to "provide interim storage in a dry cask storage system for up to 2100 metric tons of uranium contained in intact and damaged fuel assemblies and associated radioactive

materials resulting from the operation of the Diablo Canyon Power Plant”¹ for a 20-year period. On March 9, 2022, PG&E submitted an application to renew this ISFSI license for an additional 40 years (Application).²

On January 10, 2023, the NRC published a notice of opportunity to request a hearing and petition for leave to intervene on the Application.³ On March 13, 2023,⁴ SLOMFP submitted its Petition with two contentions that concern the adequacy of technical (Contention A) and environmental (Contention B) information in the Application given recent developments concerning the potential extension of the operating life of the DCNPP.

DISCUSSION

I. Standing to Intervene

A. Applicable Legal Requirements

Under the Commission’s Rules of Practice, any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene. The petition must include the contentions that the petitioner

¹ “Notice of Issuance of Materials License SNM–2511; Diablo Canyon Independent Spent Fuel Storage Installation,” 69 FR 15910 (Mar. 26, 2004).

² Available at ADAMS Accession No. ML22068A189. In 2011, NRC regulations were revised to allow ISFSI renewal terms up to 40 years. See Title 10, *Code of Federal Regulations* (10 C.F.R.) § 72.42; “License and Certificate of Compliance Terms; Final Rule,” 76 FR 8890 (Feb. 16, 2011).

³ “License renewal application; receipt; notice of opportunity to request a hearing and to petition for leave to intervene; Pacific Gas and Electric Company; Diablo Canyon Independent Spent Fuel Storage Installation,” 88 FR 1431 (Jan. 10, 2023).

⁴ See “San Luis Obispo Mothers for Peace’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Diablo Canyon Spent Fuel Storage Installation,” (Mar. 13, 2023) (Agencywide Documents Access and Management System (ADAMS) Accession no. ML23074A110) (Petition). SLOMFP initially submitted the Petition via e-mail and later filed on the NRC’s Electronic Information Exchange (EIE). See “Re-filed San Luis Obispo Mothers for Peace’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Diablo Canyon Spent Fuel Storage Installation,” (Mar. 14, 2023) (ADAMS Accession no. ML23073A382). The Atomic Safety and Licensing Board stated that it accepts SLOMFP’s March 13, 2023, e-mail filing as timely, notwithstanding that the Petition was not timely filed via the EIE. See Memorandum and Order (Initial Prehearing Order),” (Mar. 29, 2023) (ADAMS Accession No. ML23088A151) at 1-2 and n. 2.

seeks to litigate in the hearing.⁵ The presiding officer will grant the petition if it determines that the petitioner has standing under 10 C.F.R. § 2.309(d) and has proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).⁶

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a petition must contain:

- (i) The name, address, and telephone number of the petitioner;
- (ii) The nature of the petitioner's right under the Atomic Energy Act of 1954 to be made a party to the proceeding;
- (iii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.⁷

In ruling on a petition, the presiding officer "must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in" § 2.309(d)(1).⁸ The Commission requires that "an intervenor have some direct interest in the outcome of a proceeding,"⁹ not merely an intellectual or academic interest.¹⁰ To this end, "the petitioner bears the burden to provide facts sufficient to establish standing,"¹¹ and

⁵ 10 C.F.R. § 2.309(a). As defined in 10 C.F.R. § 2.4, "*Person* means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission . . . , any State or any political subdivision of, or any political entity within a State, any foreign government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing."

⁶ 10 C.F.R. § 2.309(a).

⁷ 10 C.F.R. § 2.309(d)(1).

⁸ 10 C.F.R. § 2.309(d)(2). The presiding officer may also consider a request for discretionary intervention when a petitioner is determined to lack standing to intervene as a matter of right, where a sufficient showing is made with respect to the factors enumerated in 10 C.F.R. § 2.309(e).

⁹ *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579 (2005).

¹⁰ *Id.* at 580 (citations omitted).

¹¹ *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

for the purpose of a standing determination, the Commission is to “construe the petition in favor of the petitioner.”¹²

In cases involving reactor facilities, the Commission will apply a standing presumption based on proximity to the site.¹³ No such presumption exists for nuclear materials proceedings.¹⁴ In such cases, to obtain standing based on geographic proximity to a facility, a petitioner must demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”¹⁵ This “proximity-plus” standard is applied on a “case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”¹⁶ If “there is no ‘obvious’ potential for radiological harm at a particular distance frequented by the petitioner, it becomes the petitioner’s burden to show a specific and plausible means of how the challenged action may harm him or her.”¹⁷ “[C]onclusory allegations about potential radiological harm” are insufficient for this showing.¹⁸ Where a petitioner is unable to demonstrate “proximity-plus” standing to intervene, traditional standing principles will apply.¹⁹

The NRC has “long applied contemporaneous ‘judicial concepts of standing,’” which require “an actual or threatened injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and arguably falls within the ‘zone of interest’” protected

¹² *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015); *Ga. Inst. Of Tech* (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 115 (1995).

¹³ *See Fla. Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

¹⁴ *See Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

¹⁵ *Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 116.

¹⁶ *Id.* at 116–17.

¹⁷ *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311–12 (2005) (quoting *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248 (internal quotations omitted)).

¹⁸ *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248.

¹⁹ *See U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 189 (2010).

by the Atomic Energy Act of 1954, as amended (AEA).²⁰ The “injury ‘must be both concrete and particularized, not conjectural, or hypothetical.’”²¹ “[T]he heart of the standing inquiry is whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.”²²

When an organization requests a hearing, it must demonstrate either organizational or representational standing. To demonstrate organizational standing, the organization petitioner must show an “injury-in-fact” to the interests of the organization itself.²³ Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify any such members by name and address. Also, the organization must show that the identified members would have standing to intervene in their own right, and that these members have authorized the organization to request a hearing on their behalf.²⁴ In addition, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted

²⁰ *El Paso Elec. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-20-07, 92 NRC 225, 230 (2020) (quoting *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009)).

²¹ *Palo Verde*, CLI-20-7, 92 NRC at 230 (quoting *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)).

²² *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71 (quoting *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978)).

²³ See *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011).

²⁴ See *Detroit Edison Company* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 71 NRC 49, 51–52 (2010); see also *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 72 (citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389–400 (1979)) (“An organization seeking representational standing on behalf of its members may meet the ‘injury-in-fact’ requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding.”).

claim nor the required relief must require an individual member to participate in the organization's legal action.²⁵

Lastly, under the Commission's rules, a petitioner can request that the Board consider granting discretionary standing when the petitioner cannot establish its standing as of right under one of the standards above. However, the Board may only entertain this request if another petitioner "has established standing and at least one admissible contention has been admitted so that a hearing will be held."²⁶

B. Petitioner's Standing to Intervene

1. Petitioner's Argument

SLOMFP claims representational standing on behalf of its members, stating that "it is a non-profit membership organization concerned with the dangers posed by Diablo Canyon and other nuclear reactors, nuclear weapons and radioactive waste."²⁷ SLOMFP's Petition included affidavits from four of its members who live six to eighteen miles from the Diablo Canyon site expressing concerns related to the continued operation of the Diablo Canyon ISFSI and authorizing SLOMFP to proceed on their behalf.²⁸

2. Staff Position on Standing

SLOMFP has established representational standing. SLOMFP's organizational interests are within the zone of interests recognized by the AEA. SLOMFP provided affidavits from its members establishing the criteria for representational standing. Consistent with the proximity-plus standard, this proceeding relates to an action, namely the renewal of the ISFSI license to store up to 2100 metric tons²⁹ of spent nuclear fuel, that has a source of radioactivity

²⁵ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007).

²⁶ 10 C.F.R. § 2.309(e).

²⁷ Petition at 4.

²⁸ *Id.*, Attachments 1-4.

²⁹ Application at G-2.

and associated obvious potential for offsite consequences such that SLOMFP has met its burden to demonstrate its standing to request a hearing.

II. Legal Standards for Contention Admissibility

A. General Requirements

In addition to demonstrating standing, a petitioner must submit an admissible contention to be granted a hearing. The legal requirements governing the admissibility of contentions are set forth in 10 C.F.R. § 2.309(f)(1)-(2). Specifically, a petition must “set forth with particularity” the contentions that a petitioner seeks to raise, and, for each contention, the petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;³⁰
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;³¹
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;³²
- (v) Provide 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;³³ and

³⁰ Contentions cannot be based on speculation and must have “some reasonably specific factual or legal basis.” *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.*, (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015).

³¹ All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000). Consequently, any contention that falls outside the specified scope of the proceeding must be rejected. *See PG&E* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 435-36 (2011).

³² “A dispute at issue is material if its resolution would make a difference in the outcome of the licensing proceeding.” *Holtec Int’l* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 190 (2020) (internal quotations omitted).

³³ The petitioner is obliged to present the facts and expert opinions necessary to support its contention. *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (it is the petitioner’s responsibility to satisfy the basic contention admissibility requirements; Boards should not have to search

- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. This information must include 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 identification of each failure and the supporting reasons for the petitioner's belief.³⁴

Further, "contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner."³⁵ "On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report."³⁶

The Commission's regulations governing contention admissibility are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."³⁷ The Commission has explained that the contention admissibility rules are "strict by design."³⁸ Failure

through a petition to "uncover" arguments and support for a contention, and "may not simply 'infer' unarticulated bases of contentions"). See *also* *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991).

³⁴ To show that a genuine dispute exists the contention "must include references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute" and if the petitioner believes that the application fails to contain information on a relevant matter, "the contention must identify each failure and the supporting reasons for the petitioner's belief." *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-20-11, 92 NRC 335, 342 (2020).

³⁵ 10 C.F.R. § 2.309(f)(2).

³⁶ *Id.*

³⁷ See, e.g., *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Unit 3), LBP-20-8, 92 NRC 23, 46 (2020) (quoting "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)); *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, NE), LBP-15-15, 81 NRC 598, 601 (2015).

³⁸ *Indian Point*, CLI-16-5, 83 NRC at 136 (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) and *S. Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010)). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

to satisfy any of the six pleading requirements renders a contention inadmissible.³⁹ The rules require “a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention.”⁴⁰ Although a petitioner does not have to prove its contention at the admissibility stage,⁴¹ the contention admissibility standards are meant to only afford hearings to those who “proffer at least some minimal factual and legal foundation in support of their contentions.”⁴² The petitioner must provide some support for the contention, either in the form of facts or expert testimony, and failure to do so requires that the contention be rejected.⁴³ The Commission has long held that the “basis” requirements are intended to: (1) ensure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) put other parties sufficiently on notice of the issues to be litigated.⁴⁴

Under Commission caselaw, and absent a waiver, a proffered contention must be rejected if it challenges applicable statutory requirements, regulations, or the basic structure of

³⁹ *Indian Point*, CLI-16-5, 83 NRC at 136; see also *Duke Energy Corp.* (Oconee Nuclear Station), CLI-99-11, 49 NRC 328, 334-35 (1999) (the heightened contention admissibility rules are designed to preclude contentions “based on little more than speculation”). The requirements are intended, *inter alia*, to ensure that a petitioner reviews the application and supporting documents prior to filing contentions; that contentions are supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute before a contention is admitted for litigation, to avoid the practice of filing contentions which lack any factual support and seeking to flesh them out later through discovery. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991).

⁴⁰ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006) (quoting *Palo Verde*, CLI-91-12, 34 NRC at 155-56).

⁴¹ *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

⁴² *Oconee*, CLI-99-11, 49 NRC at 334.

⁴³ *Palo Verde*, CLI-91-12, 34 NRC at 155; accord, *Indian Point*, CLI-16-5, 83 NRC at 136. See “Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process,” 54 Fed. Reg. at 33170 (“This requirement does not call upon the intervener to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.”).

⁴⁴ *Oconee*, CLI-99-11, 49 NRC at 328; see also *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

the Commission's regulatory process.⁴⁵ Attempts by a petitioner to advocate for requirements stricter than those imposed by regulation constitute collateral attacks on the Commission's rules and are therefore inadmissible.⁴⁶

III. Contention Admissibility

A. Proposed Contentions

1. Contention A

Information Provided in [the ISFSI] License Renewal Application is Incorrect and Insufficient to Satisfy NRC Safety Regulations.⁴⁷

a. Contention Bases

SLOMFP asserts in Contention A that the Application does not meet NRC requirements in 10 C.F.R. §§ 72.22, 72.30(a) and (b) and "the General Design Criteria in 10 C.F.R. Part 72, Subpart F" because it is based on the "incorrect assumption that PG&E will retire the Diablo Canyon reactors in 2024 and 2025."⁴⁸ SLOMFP refers to an October 31, 2022, letter from PG&E to the NRC where PG&E asked the NRC to resume its review of PG&E's license renewal application for the DCNPP consistent with PG&E plans to operate the DCNPP beyond 2025.⁴⁹ SLOMFP argues that this is relevant to the ISFSI license renewal proceeding because extended DCNPP operations will generate significant additional spent fuel that must be managed at the Diablo Canyon ISFSI, and that the application does not address the safety (including design and

⁴⁵ As set forth in 10 C.F.R. § 2.335(a), "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding," in the absence of a waiver petition granted by the Commission. *See also Dominion Nuclear Conn.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). Further, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected. *Id.*

⁴⁶ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012) (citations omitted); *See Peach Bottom*, ALAB-216, 8 AEC at 20-21 (explaining that a contention that seeks to raise an issue that is not proper for adjudication in the proceeding or that does not apply to the facility in question, or seeks to raise an issue that is not concrete or litigable must also be rejected).

⁴⁷ Petition at 5-8.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 7 and n. 12 (referencing "Request to Resume Review of the Diablo Canyon Power Plant License Renewal Application or, Alternatively, for an Exemption from 10 C.F.R. 2.109(b), Concerning a Timely Renewal Application." ADAMS Accession No. ML22304A691 (Gerfen Letter)).

financial assurance) implications of continued operations, including the additional spent fuel inventory.⁵⁰

b. Staff Position on Admissibility of Contention A

Contention A is admissible, limited to the claim that the Application does not appear to reflect recent updates concerning the operations and date of expected retirement of the DCNPP. As discussed further below, while operations at one facility would not ordinarily bear upon the licensing of another, here operations at the DCNPP are connected to operations at the Diablo Canyon ISFSI by the Application. And the Application does not appear to address a potential change to the planned retirement date of the DCNPP.

In November 2009, PG&E submitted a license renewal application for DCNPP, Units 1 and 2.⁵¹ This license renewal application had timely renewal protection under 10 C.F.R. § 2.109(b) because it was submitted more than 5 years before the expiration dates of the operating licenses for the units, meaning that the DCNPP could continue operating under its current licenses until the NRC made a licensing decision on the license renewal request. In April 2011, PG&E requested that the NRC delay its decision on the DCPN Units 1 and 2 license renewal application.⁵² Ultimately, PG&E withdrew the application with the expectation that it would retire the DCNPP at the end of the current license terms.⁵³

On September 2, 2022, the State of California enacted Senate Bill No. 846, which invalidated and reversed a 2018 California Public Utilities Commission decision to withdraw PG&E's license renewal application and retire the DCNPP.⁵⁴ Subsequently, PG&E submitted

⁵⁰ Petition at 5-7.

⁵¹ ADAMS Accession No. ML093340086.

⁵² ADAMS Accession No. ML111010592.

⁵³ "Pacific Gas and Electric Co., Withdrawal of License Renewal Application," 83 FR 17688 (Apr. 23, 2018).

⁵⁴ Additional information about these events can be found in the NRC's recent timely renewal exemption evaluation, available at ADAMS Accession No. ML23026A109 (Exemption Evaluation).

the “Gerfen Letter” to which the Petitioner refers where PG&E requested that the NRC resume its review of the previously withdrawn DCNPP license renewal application;⁵⁵ PG&E also requested that the NRC confirm that PG&E is in timely renewal under 10 C.F.R. § 2.109(b). In the alternative, PG&E requested an exemption from 10 C.F.R. § 2.109(b) and requested timely renewal protection upon submittal of a license renewal application for the DCNPP by the end of 2023. In that letter, PG&E stated that the NRC should approve the exemption, otherwise the DCNPP would be required to shut down before the current licenses expire.⁵⁶

On January 24, 2023, the NRC staff determined that it would not initiate or resume review of PG&E’s withdrawn application.⁵⁷ On March 2, 2023, the NRC issued an exemption to PG&E that would allow the DCNPP to continue operating while the agency considers a license renewal application, contingent upon PG&E submitting a sufficient application to the NRC by December 31, 2023.⁵⁸

In summary, based upon a change in California law, a submittal to the NRC by PG&E based upon that change, and the recently issued NRC exemption that could ultimately result in DCNPP operations beyond the current licenses, SLOMFP is correct that the expected retirement date of the DCNPP is at least in flux. And as SLOMFP notes in its Petition, the Application specifically refers to, and appears to in some cases rely on, the 2024 and 2025 retirement dates of DCNPP Units 1 and 2 to satisfy NRC requirements.⁵⁹ For example, beginning on page 1-3 of the Application, PG&E states, with respect to financial qualifications under 10 C.F.R. § 72.22(e), that NRC requirements will be satisfied with the decommissioning trust funds that will be available to the ISFSI following DCNPP Unit 1 retirement in 2024:

⁵⁵ See Petition at 7 and n. 12 (referencing Gerfen Letter).

⁵⁶ Gerfen Letter at 6.

⁵⁷ ADAMS Accession no. ML22343A179.

⁵⁸ ADAMS Accession no. ML23026A115.

⁵⁹ See, e.g., Petition at 5-6.

PG&E will remain financially qualified to carry out the operation and decommissioning of the ISFSI during the period of the renewed material license as required by 10 C.F.R. 72.22(e). The source of funds to operate the DC ISFSI until the DCP Unit 1 permanent shutdown in November 2024 is the General Rate Case process The source of funds to operate and decommission the DC ISFSI starting in November 2024 of the renewed license period will include the PG&E Decommissioning Trust Fund, which is regulated by the CPUC and Nuclear Regulatory Commission (NRC). . . .⁶⁰

If DCNPP, Unit 1 is still operating beyond November, 2024, those funds will not be available, and this statement in the Application would not be accurate.⁶¹ SLOMFP also claims that PG&E's decommissioning funding plan does not comply with 10 C.F.R. § 72.30 given representations in the Application about the retirement date of the DCNPP.⁶² While the Gerfen Letter as well as the NRC's exemption evaluation note the contingency associated with PG&E's requests and the *potential* for the DCNPP to operate beyond the dates in its current reactor licenses, given the specific representations in the Gerfen Letter contrasted with discussions in the Application, SLOMFP has shown that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact" per 10 C.F.R. § 2.309(f)(1)(vi) as to the impact of these developments for the Application's satisfaction of NRC requirements. Therefore, this portion of Contention A is admissible.

SLOMFP also makes claims in Contention A concerning the need to redesign the Diablo Canyon ISFSI based upon a potential increase in inventory based on a 20-year extension in reactor operations and the failure of the Application to therefore meet 10 C.F.R. Part 72, Subpart

⁶⁰ Application at pp. 1-3, 4. See Petition at 5 and n. 8 (citing Application at pp. 1-4).

⁶¹ This is not to suggest that the Staff has substantive concerns with PG&E's financial qualification to operate the ISFSI, but only that the Petitioner has met the pleading requirements of 10 C.F.R. § 2.309(f)(1). See *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004) ("While we do not expect a petitioner to prove its contention at the pleading stage, we do require that it show a genuine dispute warranting a hearing."). The Staff is also aware of the Commission's general approach to financial assurance for regulated entities (i.e., the premise "that reasonable and prudent costs of safely operating a nuclear power plant will be recovered through the ratemaking process"). See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 13, *rev'd on other grounds*, CLI-88-10, 28 NRC 573 (1988).

⁶² See, e.g., Petition at 6. The Application contains a spent fuel management strategy on pp. G-3 – G4.

F.⁶³ But SLOMFP has not supported these claims with facts or expert opinion as required by 10 C.F.R. § 2.309(f)(1)(v); thus, such claims are inadmissible. Extended reactor operations would result in the generation of additional spent fuel, but SLOMFP has not demonstrated how such potential operations render the Application insufficient.

2. Contention B

Inadequate Statement of Purpose and Need in Environmental Assessment.⁶⁴

a. Contention Bases

In Contention B, SLOMFP argues that the “Purpose and Need” statement in PG&E’s Environmental Report⁶⁵ (ER) is inadequate because “it is based on the assumption that the [Diablo Canyon] reactors will close when their operating licenses expire in 2024 and 2025,” and that therefore the ER “does not address the spent fuel storage needs created by PG&E’s recent reversal of its previous decision to close” the DCNPP.⁶⁶ SLOMFP argues that this inadequate purpose and need statement leads to a correspondingly insufficient consideration of alternatives in the ER.⁶⁷ SLOMFP also claims that the ER is insufficient because it “does not address how the re-licensing of the ISFSI will be consistent with two significant State [of California] policies regarding the creation and storage of spent fuel.”⁶⁸ Additionally, SLOMFP argues that the ER fails to consider cumulative impacts, and concludes that for these reasons

⁶³ See, e.g., Petition at 7.

⁶⁴ *Id.* at 9-17.

⁶⁵ Application, Appendix F.

⁶⁶ Petition at 9.

⁶⁷ See, e.g., *id.* at 10-11.

⁶⁸ *Id.* at 10.

the Application fails to satisfy NRC requirements at 10 C.F.R. §§ 51.23, 51.30(a)(1)(i)-(iii),⁶⁹ 51.45(b), and 51.45(b)(3).⁷⁰

c. Staff Position on Admissibility of Contention B

Contention B is inadmissible. Unlike the circumstance in Contention A, the Applicant's ER does not explicitly refer to the retirement date for the DCNPP as the basis for meeting NRC regulatory requirements; indeed, even the specific discussion with which the Petition takes issue, the ER's purpose and need statement, appears entirely applicable to either the DCNPP retiring per the terms of its current licenses or some potential future extension. SLOMFP's claims concerning California laws and important California state policies are outside the scope of this proceeding and are inadmissible. SLOMFP's claim that the ER's alternatives evaluation is faulty because of a deficient purpose and need statement ignores the explicit discussion of alternatives in the Application. Lastly, SLOMFP's claim that the ER does not evaluate cumulative impacts lacks basis, as the ER discusses cumulative impacts to the only resource areas where it finds impacts.

The purpose and need statement in the ER provides that "the purpose and the need for the proposed action is to provide for continued temporary dry storage of spent nuclear fuel generated from operation of DCPD at the DC ISFSI until facilities are available for interim or permanent disposal."⁷¹ This purpose and need statement makes no reference to the timing of the retirement of the DCNPP. In fact, while the ER notes the planned retirement dates in a few places,⁷² SLOMFP'S claim that the analysis in the ER depends upon the retirement of the

⁶⁹ The Petition refers separately to 10 C.F.R. §§ 52.30(a)(1)(i), (ii), and (iii). There are no such sections. We presume that SLOMFP was referring to 10 C.F.R. §§ 51.30(a)(1)(i)-(iii), which concern the contents of environmental reviews.

⁷⁰ Petition at 10-11.

⁷¹ Application ER at F-2.

⁷² See *id.* at F-1, F-10.

DCNPP is not supported, and thus SLOMFP has not shown that a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Relatedly, SLOMFP claims that the purpose and need statement is inaccurate because it does not address the increased spent fuel inventory that extended operations at the Diablo Canyon reactors will produce.⁷³ But SLOMFP does not explain how this is the case, beyond the bare claim.⁷⁴ While the Staff has not completed its safety or environmental reviews of the Application and has no position on its sufficiency, the Petition does not support its claims with facts or expert opinion, as required by 10 C.F.R. § 2.309(f)(1)(v). Merely referring to the developments regarding the DCNPP and claiming that they are not considered in the ER does not suffice here without support as to why those developments specifically render the purpose and need statement problematic (in contrast to the specific discussion of why those developments are relevant to NRC requirements in Contention A), especially given that there is no reference to the retirement of the DCNPP in the purpose and need statement. Speculation, without more, cannot form the basis of an admissible contention. Therefore, SLOMFP has not shown how the purpose and need statement is inadequate under 10 C.F.R. §§ 51.30(a)(1)(i) and 51.45(b).

Next, with regard to the consideration of alternatives, the Petition includes extensive discussion of the initial licensing of the Diablo Canyon ISFSI and alternatives considered in that review.⁷⁵ SLOMFP claims that PG&E's consideration of alternatives in the Application for the purpose of renewal is overly narrow as a result of an inadequate purpose and need statement, illustrated by the broader consideration in initial licensing.⁷⁶ But SLOMFP does not appear to take issue with the actual discussion of alternatives in the Application, nor does SLOMFP

⁷³ Petition at 9-10.

⁷⁴ See e.g., *id.* at 9, 10.

⁷⁵ See *id.* at 12-14.

⁷⁶ *Id.* at 12.

explain what assertions in that discussion it disagrees with or why. Indeed, the ER contains a specific discussion as to why PG&E did not consider the particular alternatives that were considered during initial licensing but not in its license renewal ER.⁷⁷ As SLOMFP has only stated its general disagreement with the Applicant's approach and not presented a genuine dispute with the substance of that discussion, it has not shown that a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi), or why the discussion of alternatives does not satisfy 10 C.F.R. §§ 51.30(a)(1)(ii) or 51.45(b)(3).

Contention B also includes several claims concerning continued operations at the DCNPP and their incompatibility with California State law and policies.⁷⁸ But this proceeding concerns the Application's satisfaction of NRC requirements in 10 C.F.R. Parts 51 and 72, not the State law and policies discussed in the Petition. Therefore, these claims are outside the scope of the proceeding and inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

Lastly, SLOMFP claims that the ER is faulty because it does not consider a discussion of cumulative impacts.⁷⁹ SLOMFP is correct that the application does not include a separate section in its ER titled "cumulative impacts." But the ER's evaluation of effects finds potential impacts only in occupational and public dose.⁸⁰ In those discussions, the ER notes the cumulative contribution of ISFSI doses, with reference to the UFSAR discussion.⁸¹ As noted above, while the NRC staff has no position on the sufficiency of the ER, where, as here, the Application appears to have evaluated the impacts, including cumulative impacts, on those resource areas in which it found the proposed action to have any impacts at all, SLOMFP's bare claim that such discussion is absent is not sufficient to raise a genuine dispute of law or fact

⁷⁷ Application at F-7 to F-19.

⁷⁸ See, e.g., Petition at 10-11, 15-16.

⁷⁹ *Id.* at 10, 11, 14, 16.

⁸⁰ Application at F-40.

⁸¹ *Id.* at F-33 and F-34.

under 10 C.F.R. § 51.30(a)(1)(iii), as required by 10 C.F.R. § 2.309(f)(1)(vi). Therefore, Contention B is inadmissible.

CONCLUSION

SLOMFP's Petition is focused on the consequences a potential extension of operations at DCNPP may have on this ISFSI license renewal proceeding. At this phase in the proceeding, SLOMFP must demonstrate a litigable issue as required by 10 C.F.R. § 2.309. SLOMFP has done so with respect to the portion of Contention A that specifically contrasts statements in the Application with relevant factual developments at the DCNPP.

Therefore, for the reasons set forth above, the Staff respectfully submits that SLOMFP has demonstrated standing to intervene in this proceeding and has proffered one admissible contention. Accordingly, the petition should be granted, limited to the portion of Contention A described above.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 C.F.R. 2.304(d)

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Dated this 7th day of April 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Independent
Spent Fuel Storage Installation)

Docket No. 72-26-MLR

Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO SAN LUIS OBISPO MOTHERS FOR PEACE HEARING REQUEST AND PETITION TO INTERVENE," have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 7th day of April 2023.

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Dated this 7th day of April 2023