

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

Jeremy A. Mercer, Chair
Nicholas G. Trikouros
Dr. Gary S. Arnold

In the Matter of:

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant, Units 1
and 2)

Docket Nos. 50-275 LR-2 and 50-323 LR-2

ASLBP No. 24-983-02-LR-BD01

March 13, 2024

MEMORANDUM AND ORDER
(Initial Prehearing Order)

This proceeding concerns a hearing request on behalf of San Luis Obispo Mothers for Peace, Friends of the Earth, and Environmental Working Group (collectively, “Petitioners”) on the license renewal application submitted by Pacific Gas and Electric Company (“PGE”) for Diablo Canyon Nuclear Power Plant, Units 1 and 2. On March 7, 2024, this Licensing Board (“Board”) was established to rule on standing and contention admissibility matters and to preside at any hearing. See Establishment of Atomic Safety and Licensing Board (March 7, 2024).

I. PROCEDURAL HISTORY AND FILINGS

PGE submitted its license renewal application on November 7, 2023, seeking to extend its licenses for Diablo Canyon Units 1 and 2 by an additional 20 years beyond November 2, 2024, and August 26, 2025, respectively. See ADAMS Accession No. ML23311A157, p.1. The Nuclear Regulatory Commission (“Agency”) had a Notice published in the Federal Register on December 19, 2023, announcing the opportunity to request a hearing. See 88 Fed. Reg. 87817 (Dec. 19, 2023). That Notice required that “Petitions [requesting a hearing] must be filed no later than 75 days from the date of publication of this notice *in accordance with the filing*

instructions in the ‘Electronic Submissions (E-Filing)’ section of this document.” Id. at 87818

(emphasis added). The “Electronic Submissions (E-Filing)” section of the Notice states, among other things, that

[a]ll documents filed in NRC adjudicatory proceedings ... *must* be filed in accordance with 10 CFR 2.302. The E-Filing process *requires* participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, *unless* an exemption permitting an alternative filing method, as further discussed, is granted.

Id. (emphasis added). Section 2.302(a) of the cited regulation provides that “[d]ocuments filed in Commission adjudicatory proceedings subject to this part *shall* be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption permitting an alternative filing method or unless the filing falls within the scope of paragraph (g)(1) of this section.” 10 C.F.R. § 2.302(a) (emphasis added).

The California Energy Commission (“CEC”) timely filed a March 4, 2024, Request to Participate as a non-party in this proceeding, pursuant to 10 C.F.R. § 2.315(c).

Petitioners did not file an exemption request in this case; nor did they seek an extension of the deadline to file a petition. Thus, pursuant to the Notice, any petition seeking a hearing was required to be filed via the Agency’s E-Filing system not later than March 4, 2024. See 10 C.F.R. § 2.306(a) (extending March 3, 2024, deadline to March 4, 2024, given March 3rd was a Sunday). Petitioners emailed their hearing request to the Agency’s Hearing Docket email address and to counsel for PGE and counsel for the Nuclear Regulatory Staff (“Staff”) at 9:50 p.m. Eastern on March 4, 2024, but did not file the petition via the E-Filing system until March 5, 2024. See Petition, Certificate of Service page (ADAMS Accession No. ML24065A433).

Petitioners did not explain in their Certificate of Service why they did not file the petition via the E-Filing system on time. Id. But in Petitioners’ counsel’s March 4, 2024 email, posted to the Electronic Hearing Docket, counsel stated that she was forced to submit the Petition via email because she “was not able to request access to the electronic docket in time for this filing.” See

ADAMS Accession No. ML24067A088. Petitioners' counsel did not explain in the email, though, when she first requested access to the electronic docket. See id. As Petitioners' counsel is experienced in Agency practice, see, e.g., Pacific Gas & Electric Co. (Diablo Canyon Independent Spent Fuel Storage Facility), LBP-23-07, 98 NRC 1, at 6 n.8 (2023), and as the Notice provides explicit direction on how to obtain timely filing rights, including noting that requests for docket access should be made at least 10 days in advance of the filing deadline, see 88 Fed. Reg. 87818, Petitioners' failure to file timely via the E-Filing system is concerning.

"Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations." Statement of Policy of Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 454 (1981). Petitioners were obligated to file their Petition via the E-Filing system timely. See 88 Fed. Reg. at 87818.

When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

Statement of Policy of Conduct of Licensing Proceedings, 13 N.R.C. at 454. The Board will deem the Petition to be filed timely,¹ but it believes the conduct warrants a sanction. The most

¹ The Notice expressly defines the E-Filing system requirement as "procedural." 88 Fed. Reg. at 87818; see also 10 C.F.R. § 2.307(a); see also ADAMS Accession No. ML24067A090

appropriate sanction here is an admonition that any similar conduct will not be tolerated in this proceeding. While this is Petitioners' counsel's second recent such failing, given counsel did provide the Agency, counsel for PGE, and counsel for the Staff with the Petition prior to the filing deadline, there is no prejudice.² See Diablo Canyon Independent Spent Fuel Storage Facility, 98 NRC at 6 n.8; cf. Nelroy Drugs, Inc. v. Rochester Drug Co-Operative, Inc., Case # 20-CV-06946-FPG, 2021 WL 1534730, at *4-5 (W.D.N.Y. April 19, 2021) (dismissing as untimely a motion not filed via the courts' electronic filing system because, among other things, filer did not email the motion to the court or opposing counsel before the filing deadline).

Petitioners' counsel also is admonished that, as this is at least her second time failing to file a Petition via the E-Filing system timely, a "third strike" may be viewed by a future board or the Commission as grounds to deny the Petition as untimely or subject counsel or her client(s) to other sanction. Petitioners' counsel is aware that a request for filing rights should be made no later than 10 days prior to the filing deadline. See 88 Fed. Reg. at 87818; see also Licensing Board Order (Initial Prehearing Order), Pacific Gas & Electric Co. (Diablo Canyon Independent Spent Fuel Storage Facility), No. 72-26-ISFSI-MLR at 2 (Mar. 29, 2023) (unpublished). Petitioners' counsel also is aware that Petitions are to be filed via the E-Filing system. See 88 Fed. Reg. at 87818; see also Licensing Board Order (Initial Prehearing Order), Pacific Gas & Electric Co. (Diablo Canyon Independent Spent Fuel Storage Facility), No. 72-26-ISFSI-MLR at 2 (Mar. 29, 2023) (unpublished); see also 10 C.F.R. § 2.302(a). The existence of "personal or other obligations ... does not relieve that party of its hearing obligations." Statement of Policy of Conduct of Licensing Proceedings, 13 N.R.C. at 454.

(email from Agency's Assistant for Rulemakings and Adjudications providing docket access as of approximately 7:00 a.m. March 5, 2024, and asking "[w]hen can we expect to see your EIE filing?").

² The Board recognizes that CEC did not receive a copy of the Petition on March 4, 2024.

II. BRIEFING SCHEDULE

Pursuant to 10 C.F.R. § 2.309(i), Answers to the Petition are due by Friday, March 29, 2024. Should Petitioners choose to file any Reply, that Reply must be E-Filed by Friday, April 5, 2024. *Any failure to E-File by that date, or to seek and receive a timely extension (see below), will result in the Board not considering the Reply.* The foregoing Reply due date shall apply even if an Answer is filed prior to the above-noted date for those Answers.

III. ADMINISTRATIVE MATTERS

The Board requires that all counsel for PGE, the Staff, CEC, and the Petitioners read and comply with this Initial Prehearing Order. If any participant files a motion seeking to modify or excuse compliance with any part of this Initial Prehearing Order, that motion shall include a demonstration of good cause for the requested modification/excused compliance and a certification that the movant's counsel read this Initial Prehearing Order in its entirety upon issuance by the Board. Cf. Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 21 (1998).

A. NOTICE OF APPEARANCE

If not already filed, each counsel shall file a Notice of Appearance, in compliance with 10 C.F.R. § 2.314(b), via the Agency's E-Filing system within seven (7) calendar days of the date of this Initial Prehearing Order.³

B. SUBMISSIONS

All submissions shall be double spaced and use a font no smaller than 11-point, including for footnotes. The Board encourages all participants to keep their use of footnotes to a minimum. String citations are not encouraged; all authorities cited should be necessary. All

³ For assistance with the Agency's E-Filing system, please contact the Electronic Filing Help Desk via its webpage (<https://www.nrc.gov/site-help/e-submittals/contact-us-eie.html>). Alternatively, one may contact the Help Desk by telephone (toll free) at 866-672-7640. The Help Desk's hours of operation are 9:00 am to 6:00 pm Eastern time, Monday through Friday (excluding Government holidays).

submissions shall include the date of the submission in the caption, in a location similar to that of the date in the caption of this Initial Prehearing Order. Include page numbers in the top margin; no other text, except privacy/confidentiality markings for documents submitted on the non-public docket, may appear within a margin. Any submission of more than 15 pages in length, excluding Attachments (see Subsection G., below), should include a Table of Contents. Headings are useful navigation tools and help break up long arguments/analysis; but be sure to format heading levels consistently throughout the submission.

The Board prefers the use of an introduction laying out your argument in a succinct fashion, roadmap paragraphs within each section of your pleading/submission, and strong topic sentences in each paragraph. Try to use short sentences, with plain language, that use active voice. Strive to eliminate adjectives and adverbs, unless necessary, and keep rhetoric to a minimum. Avoid repetition. Do not stretch arguments beyond what they and the legal/factual support can bear. See, e.g., 10 C.F.R. § 2.323(d).

Considering the above, the Board currently is not imposing a page or word limitation on submissions but retains discretion to impose such limitations in the future.

C. USE OF GENERATIVE ARTIFICIAL INTELLIGENCE

The Board is aware of the development of and use of generative Artificial Intelligence in the legal community. At this time, the Board is not making a judgment about whether such use is appropriate, nor will it require any separate filing/attestation as to whether generative AI was used or, if used, whether the results were checked by humans. But the Board will consider the signature on any submission to be a certification that the signer has made an independent determination that the submission is “supported by appropriate and accurate references to legal authority and factual basis.” 10 C.F.R. § 2.323(d); cf 10 C.F.R. § 2.304(d); see also Policy on Conduct of Adjudicatory Proceedings, 48 N.R.C. at 22. The Board also has discretion to impose

sanctions if necessary and appropriate, e.g., should a submission include reference to non-existent legal authority. See, e.g., 10 C.F.R. § 2.323(d).⁴

D. MOTIONS

Unless some other time is specified in the Agency's rules or by the Board (e.g., see below), motions are due not later than 10 calendar days after the occurrence or circumstances from which the motion arises. See 10 C.F.R. §§ 2.306(a), 2.323(a)(2). All motions shall be accompanied by a proposed order that grants the specific relief requested, e.g., not simply "The motion is granted." See 10 C.F.R. § 2.323(b). All motions also must include a separate, signed certification that (i) details the good faith efforts undertaken by the movant to resolve the issue raised in the motion or to seek concurrence in the motion from the other participants⁵ and (ii) states whether each of the other participants opposes or does not oppose the motion. See 10 C.F.R. § 2.323(b). The Board will deny any motion that lacks such a certification. See id.

Motions to file new/amended contention(s), and the accompanying new/amended contention(s), will be considered timely under 10 C.F.R. § 2.309(c)(1)(iii) if filed not later than 30 days after the date upon which the information that is the basis of the motion becomes available.

Motions for extension of time are due not later than three (3) *business* days before the due date seeking to be extended. See 10 C.F.R. § 2.307(b).

⁴ See also Statement of Policy of Conduct of Licensing Proceedings, 13 N.R.C. at 454 (outlining some of the sanctions the Atomic Safety and Licensing Board Panel has available when a participant fails to meet its obligations and urging that "[a]t an early stage in the proceeding, a board should make all parties aware of the Commission's policies in this regard").

⁵ A certification that includes something akin to the statement that "good faith efforts were undertaken to resolve the issue raised in this motion, without success" is insufficient. Rather, the description should include what efforts were undertaken (i.e., email, in-person, or telephone/video) and when. Communication that does not provide the recipient(s) with the reason(s) for the motion or sufficient time to consider the request and respond is not demonstrative of good faith efforts to resolve an issue or seek concurrence.

E. ANSWERS/OPPOSITIONS TO MOTIONS

Except for the motions noted below, answers/oppositions to any motion are due no later than 10 calendar days after service of the motion to which the answer/opposition is being filed.

See 10 C.F.R. §§ 2.306(a), 2.323(c).

Answers/oppositions to motions to file new/amended contention(s) are due 25 calendar days after service of the motion. See 10 C.F.R. §§ 2.306(a), 2.309(i)(1).

Answers/oppositions to a motion for extension of time or for leave to file a reply (see below) are due no later than the end of the first business day after service of the motion being opposed.

F. REPLIES

Any permitted reply must be filed within seven (7) calendar days of the service of the answer/opposition to which it replies. See 10 C.F.R. §§ 2.306(a), 2.307(b), 2.309(i)(2). Replies should be brief and targeted to the new argument(s) or fact(s) in the answer/opposition.

Participants who file a motion for leave to file new/amended contention(s) are permitted to file a reply as-of-right. See 10 C.F.R. § 2.309(i)(2).

Participants who desire to file a reply in support of any other submission must seek and obtain permission from the Board to file that reply. See 10 C.F.R. § 2.323(c). By rule, no reply will be permitted absent “compelling circumstances,” which the movant must demonstrate in the motion. Id. Examples of compelling circumstances encompass the inclusion in the answer of (i) an argument that the movant reasonably could not have anticipated, or (ii) new facts.

The movant must file its motion for leave to file a reply not later than four (4) calendar days after service of the answer to which the reply is sought. If the Board grants the motion, unless (i) the proposed Reply was attached to the motion or (ii) the motion also seeks and supports a different due date and the Board agrees, the reply will be due not later than seven (7) calendar days after the service of the motion to which the reply is directed. See 10 C.F.R. §§ 2.307(b), 2.323(c).

G. ATTACHMENTS TO FUTURE SUBMISSIONS

If a participant chooses to append document(s) to any future submission, those document(s) should be identified as Attachments, not as Exhibits,⁶ with a unique numeric or alpha designation on each Attachment (e.g., Attachment 1 or Attachment A) in the upper-right corner of the first page (which may be in the margin, under the page number) or centered on a cover page immediately preceding the document. For submissions with more than three Attachments, the Board prefers for the submission to include a Table of Attachments behind the signature page of the submission and before the first Attachment. The Table of Attachments should identify each Attachment with an appropriate and non-argumentative title and provide the number of pages in each Attachment (excluding the cover page, if cover pages are used).

Attachments shall be included, in order, as part of the single portable document format (PDF) file (i.e., submission, attachments, certificate of service) when the file is uploaded to the Agency's E-Filing system. The filer should use multiple PDF files for a filing only if the filing exceeds the size limit of the E-Filing system (currently 1,000 MB). See Guidance for Electronic Submissions to the NRC (Rev. 10), § 2.3, p. 6 (May 30, 2023) (available at <https://www.nrc.gov/site-help/electronic-sub-ref-mat.html>). If the filing exceeds the size limit, the filer should break down the filing into the fewest multiple PDF files that comply with the limit.

H. Unavailability of E-Filing System

Per the Commission's direction, see 72 Fed. Reg. 49139, 49145 (Aug. 28, 2007), participants should employ the following backup method for filing if the E-Filing system is unavailable. The participant should submit the filing (in appropriate PDF files—see Subsection G., above) via email to the Board's law clerk, Ms. Newman at emily.newman@nrc.gov, (copying all other counsel) with the ASLBP Docket Number and "technical failure" in the subject line. The

⁶ The use of "Exhibit" is reserved for documents/items submitted prior to or at a hearing (should one occur) for inclusion in the evidentiary record of the proceeding.

participant also must include in the email, as a separate PDF file, a signed and sworn affidavit detailing the unsuccessful attempts (see next paragraph) to file via the E-Filing system.

This backup method is not available for use unless the participant has attempted to file using the E-Filing system at least two times, more than one hour apart, after noon Eastern time and was not able to file due to a technical failure on the part of the Agency's E-Filing system. Problems on the participant's end, such as internet connections or hardware/software issues, do not constitute a technical failure on the part of the Agency's E-Filing system.

IV. INITIAL PREHEARING CONFERENCE

The Board has not determined yet whether it will hold an initial prehearing conference to hear argument regarding standing and contention admissibility but will make that determination later. If the Board determines that oral argument is warranted, it will be held on one of the following dates: April 23, 24, 25, 30 or May 1, 2. The Board also is unsure, as of now, whether oral argument would be held in-person in the Board's Hearing Room, with the argument also webcast, or at a location near the Diablo Canyon Nuclear Power Plant. If participants have a preference as to format, location, or date of such oral argument, they should E-File that preference, and their reasons therefore, within 5 calendar days of the issuance of this Order.

If the Board determines that oral argument is warranted, counsel/representatives shall be prepared to discuss, among other things, the authorities and facts cited in the relevant submissions. Given the myriad technical issues raised in the Petition, the Board strongly encourages participants to have their expert(s) available during the oral argument should their input be necessary to respond to any of the questions posed by the Board.⁷

⁷ Additionally, should oral argument be held, the Board is amenable to including an appropriately prepared new/junior attorney in the argument, consistent with counsel's ethical obligations and client direction. If a new/junior attorney does participate, the Board will allow a more experienced lawyer to "back up" the new/junior attorney. The Board also will allow the new/junior attorney to handle a discrete part of the argument, e.g., one of multiple contentions, with the more experienced "back up" lawyer handling the balance of the argument, so that the new/junior attorney is not required to handle the entirety of the argument. The Board will

V. LIMITED APPEARANCE STATEMENTS

Since the beginning of the Agency's existence, the Commission has determined that public participation "is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to" the Agency. N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, 2 (1975). "One of the cornerstones of the NRC's regulatory approach has always been ensuring that its review processes and decision[-]making are open, understandable, and accessible to all interested parties." 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

At some point later in this proceeding, the Board will determine whether it intends to conduct an oral limited appearance statements session. But considering the foregoing public participation policy of the Agency, and in accord with 10 C.F.R. § 2.315(a), any person not a participant to this proceeding who wishes to make a statement regarding the issues in this proceeding may do so in writing by way of a limited appearance statement. Limited appearance statements, which are placed on the docket of this proceeding and, accordingly, are made available to the public, provide the public with an opportunity to make the Board and/or the participants aware of any concerns about matters at issue in this proceeding. By rule, though, limited appearance statements, whether written or oral, "shall not be considered evidence in the proceeding." 10 C.F.R. § 2.315(a).

Any person who desires to submit a written limited appearance statement, at any time in this proceeding, must identify clearly this proceeding and send the written statement to the Office of the Secretary using one of the methods below:

Mail: Office of the Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

regulate the argument to ensure that all sides receive fair treatment and to avoid any undue prolonging of the argument. See 10 C.F.R. §§ 2.319(e)&(k), 2.331.

Fax: (301) 415-1101 (verification (301) 415-1677))

Email: hearing.docket@nrc.gov

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

/RA/

Jeremy A. Mercer, Chair
Administrative Judge

Rockville, Maryland
March 13, 2024

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275-LR-2
) 50-323-LR-2
(Diablo Canyon Nuclear Power Plant,)
Units 1 and 2))
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Initial Prehearing Order)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: ocaamail.resource@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001
Jeremy A. Mercer, Chair, Administrative
Judge
Nicholas G. Trikouros, Administrative Judge
Dr. Gary S. Arnold, Administrative Judge
Noel M. Johnson, Law Clerk
Emily Newman, Law Clerk
E-mail: jeremy.mercer@nrc.gov
nicholas.trikouros@nrc.gov
gary.arnold@nrc.gov
noel.johnson@nrc.gov
emily.newman@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001
Ian Murphy
David Roth
Susan H. Vrahoretis
Jeremy L. Wachutka
Caitlin R. Byrd, Law Clerk
Georgiann E. Hampton, Law Clerk
E-mail: ian.murphy@nrc.gov
david.roth@nrc.gov
susan.vrahoretis@nrc.gov
jeremy.wachutka@nrc.gov
caitlin.byrd@nrc.gov
georgiann.hampton@nrc.gov

Counsel for Pacific Gas and Electric
Company
Morgan, Lewis & Bockius, LLC
1111 Pennsylvania Ave NW
Washington, DC 20004
Paul Bessette
Scott Clausen
Ryan K. Lighty
Timothy Matthews
E-mail: paul.bessette@morganlewis.com
scott.clausen@morganlewis.com
ryan.lighty@morganlewis.com
timothy.matthews@morganlewis.com

**Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2,
Docket Nos. 50-275-LR-2 and 50-323-LR-2)
MEMORANDUM AND ORDER (Initial Prehearing Order)**

Counsel for San Luis Obispo Mothers for Peace
Harmon, Curran, Spielberg, & Eisenberg, LLP
1725 DeSales Street, N.W.
Suite 500
Washington, DC 20036
Diane Curran
E-mail: dcurran@harmoncurran.com

California Energy Commission
Chief Counsel's Office
715 P Street
Sacramento, CA 95814
Devin Black
E-mail: devin.black@energy.ca.gov

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of March 2024.