UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 August 23, 2024

PACIFIC GAS AND ELECTRIC COMPANY'S ANSWER OPPOSING THE APPEAL OF LBP-24-6 FILED BY SAN LUIS OBISPO MOTHERS FOR PEACE, FRIENDS OF THE EARTH, AND ENVIRONMENTAL WORKING GROUP

RYAN K. LIGHTY, ESQ.
TIMOTHY P. MATTHEWS, ESQ.
PAUL M. BESSETTE, ESQ.
MORGAN, LEWIS & BOCKIUS LLP

Counsel for Pacific Gas and Electric Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

NRC Cases

Acts of Congress

Regulations

Other Authorities

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), Pacific Gas and Electric Company ("PG&E") submits this Brief in Opposition to the Appeal of LBP-24-6 ("Appeal"), filed by San Luis Obispo Mothers for Peace, Friends of the Earth, and the Environmental Working Group (collectively, "Petitioners").[1] In LBP-24-6,[2] the Atomic Safety and Licensing Board ("Board") denied Petitioners' March 5, 2024 hearing request and petition to intervene in this proceeding ("Petition").[3] The Board denied the Petition after unanimously concluding that none of Petitioners' three proposed contentions were admissible. On appeal, Petitioners purport to challenge all three of the Board's contention admissibility rulings. As explained below, the Commission should AFFIRM the Board's contention admissibility rulings in LBP-24-6.

This proceeding pertains to the License Renewal Application ("LRA") filed by PG&E to seek extensions of the U.S. Nuclear Regulatory Commission ("NRC") operating licenses for Diablo Canyon Power Plant, Units 1 and 2 ("DCPP"). The NRC's license renewal process includes both safety and environmental reviews; but the safety review focuses on one thing: *aging management*. In Contentions 1 and 2, Petitioners sought an evidentiary hearing on certain *ongoing operational matters* (related to seismic topics and the Unit 1 reactor pressure vessel ("RPV")) that are *not* related to aging management. Such matters have long been governed by *other* regulatory processes with separate avenues for public participation. Thus, as the Board correctly held, these challenges are inadmissible because they we brought in the wrong forum.

---

1 Notice of Appeal of LBP-24-6 by [Petitioners] (July 29, 2024) (ML24211A2887); Brief by [Petitioners] on Appeal of LBP-24-6 (July 29, 2024) (ML24211A288) ("Appeal").

2 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-24-6, 100 NRC __ (July 3, 2024) (slip op.) (ML24185A197).

3 Re-filed Hearing Request by [Petitioners] for Hearing on [PG&E's] License Renewal Application for the Diablo Canyon Nuclear Plant (Mar. 5, 2024) (ML24067A079) ("Petition").

To be clear, that does not mean that Petitioners' safety concerns in Contentions 1 and 2 have been ignored.[4] In fact, those same concerns already have been and are being given due consideration in an appropriate forum.[5] So, beyond the legally required outcome here (as correctly determined by the Board), there also is no practical reason that a *duplicative* hearing must be held on these topics in this limited-scope license renewal proceeding.

Petitioners also proffered two environmental claims. In Contention 1, Petitioners brought a challenge regarding the analysis of potential environmental impacts from a hypothetical accident. However, that topic was analyzed in the NRC's Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants ("GEIS").[6] And the corresponding conclusions from the GEIS have been codified in NRC regulations following notice and comment rulemaking.[7] Thus, Contention 1 purported to challenge to NRC environmental *regulations*, not the LRA. As a matter of law, challenges to regulations cannot be brought in individual licensing proceedings such as this, absent a special "waiver" from the Commission. Petitioners neither requested nor received one here. So, as the Board again correctly held, that portion of Contention 1 also was inadmissible as a matter of law. Finally, in Contention 3, Petitioners essentially asked the Board to admit a "placeholder" contention on a baseless theory that the NRC might decide in the future to willfully violate the Coastal Zone Management Act

---

4 *See, e.g.*, *Diablo Canyon,* LBP-24-6, 100 NRC at __ (slip op. at 30 n.130).

5 *Id.* at __ (slip op. at 4–5).

6 *See* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (Rev. 0, May 1996, ML040690705 (Vol. 1)) ("1996 GEIS")); (Rev. 1, June 2013, ML13106A241 (Vol. 1)) ("2013 GEIS"); (Rev. 2, Aug. 2024, ML24086A526 (Vol. 1)) ("2024 GEIS").

7 *See* 10 C.F.R. Part 51, Subpart A, app. B, tbl. B-1 ("Design Basis Accidents" and "Severe Accidents").

("CZMA").[8] Based on the longstanding doctrine that agencies are entitled to a "presumption of administrative regularity," the Board correctly rejected that demand.

The Appeal provides no basis to overturn any of the well-reasoned bases for rejecting Contentions 1, 2, and 3. As an overarching matter, the applicable standard of review on appeal places an affirmative burden on the appellant to identify an "error of law" or "abuse of discretion" in the challenged ruling.[9] Oddly, the Appeal fails even to *mention* this appellate standard. Petitioners do not acknowledge it; engage with it; or marshal fact and law toward any argument that LBP-24-6 is affected by an error of law or abuse of discretion. By disregarding the applicable standard, Petitioners have failed to meet their affirmative burden. The Appeal should be rejected on its face for that reason alone.

Furthermore, the Appeal largely repeats arguments that were presented to (and rejected by) the Board, without disputing the Board's analysis. But Commission precedent is clear that merely disputing the outcome—and hoping for a different result from the Commission without identifying reversible error—is categorically insufficient for an appeal.[10]

Ultimately, Petitioners have not identified any error of law or abuse of discretion in LBP-24-6. Thus, for the many reasons detailed below, the Commission should AFFIRM the Board's well-reasoned admissibility rulings on each of the three contentions.

---

[8] Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. ch. 33 § 1451 *et seq.*).

[9] *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 386 (2012) (citing *Progress Energy Fla., Inc*. (Levy Cty. Nuclear Power Plant, Units 1 & 2), CLI-10-2, 71 NRC 27, 29 (2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-11-9, 74 NRC 233, 237 (2011)).

[10] *See, e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 6 & 7), CLI-17-12, 86 NRC 215, 219 (2017).

II. BACKGROUND & LEGAL STANDARDS

A. NRC Processes and Public Participation

In their original Petition, and again on Appeal, Petitioners seek to conflate and blur the line between two distinct NRC regulatory processes and their corollary opportunities for public participation. Thus, a brief summary of those processes and opportunities is instructive to the discussion on appeal, namely: the NRC's ongoing operational oversight and associated citizen *enforcement* petition opportunity; and the NRC's power reactor license renewal proceeding and associated *licensing* hearing opportunity.

1. Ongoing Operational Oversight

Every nuclear power plant, including DCPP, is subject to rigorous NRC operational oversight throughout the entire life of the licensed facility. Licensees are required to comply with stringent requirements associated with the full range of radiological safety, security, and environmental matters, including those related to seismic matters and RPV integrity, among many others. These obligations are collectively referred to as the plant's Current Licensing Basis ("CLB").[11] The CLB is established at the time of initial plant licensing; it evolves throughout the life of the facility; and it carries forward into any renewal term. The NRC maintains a robust inspection and oversight program to ensure that CLB requirements are met throughout the plant's lifecycle. Key features include the NRC's Reactor Oversight Process, which provides a comprehensive framework for continuous assessment and inspection of licensee facilities, and the NRC's Process for the Ongoing Assessment of Natural Hazards Information ("POANHI"), which is staffed by technical experts on external hazards.[12]

---

[11] *See* 10 C.F.R. § 54.3(a) (defining the CLB).

[12] *See Reactor Oversight Process (ROP)*, NRC.GOV, https://www.nrc.gov/reactors/operating/oversight.html (last visited Aug. 20, 2024).*Process for the Ongoing Assessment of Natural Hazard Information (POANHI)*, NRC.GOV, https://www.nrc.gov/reactors/operating/ops-experience/poanhi.html (last visited Aug. 20, 2024).

The NRC employs a diverse toolkit for addressing safety issues throughout the life of the plant, including authority to issue orders to modify, suspend, or revoke a license.[13] For example, the NRC may take enforcement action to address licensee noncompliance with safety regulations or may invoke its "backfit"[14] process to modify a plant's CLB if needed to address new safety information (including new seismic information).

Although enforcement and backfit actions are most often initiated by the NRC staff, any member of the public may raise potential health, safety, or other compliance issues related to a plant's CLB via a citizen enforcement petition. This process is described in 10 C.F.R. § 2.206 (and such petitions are often referred to as "2.206 petitions"). The NRC can institute an action to modify, suspend, or revoke a license, or take other appropriate action to resolve the issue, as appropriate. This is the well-established process through which members of the public can challenge a plant's CLB or seek enforcement of its requirements.

2. License Renewal Proceedings

Pursuant to the Atomic Energy Act ("AEA"),[15] power reactor licensees can seek, and the NRC can issue, a renewed operating license to permit continued operation beyond the expiration of the plant's initial operating license. A renewed license carries forward the plant's CLB. And the NRC's ongoing operational oversight process covers the full range of safety, security, and environmental matters for plant operation regardless of the operating term, initial or renewal. Thus, in promulgating 10 C.F.R. Part 54, the NRC reasonably chose to define its safety review framework as including only a limited scope of issues that are particularly germane to extended operation—namely, those focused on aging management. The purpose of the license renewal

[13] *See generally* 10 C.F.R. Part 2, Subpart B.

[14] *See* 10 C.F.R. § 50.109.

[15] Atomic Energy Act of 1954, Pub. L. 83-703, 69 Stat. 919 (codified as amended at 42 U.S.C. ch. 14).

proceeding "is to ensure that the licensee can successfully manage the detrimental effects of aging," during extended operations,[16] "on certain long-lived, passive components that are important to safety."[17] By design, license renewal proceedings are "not intended to duplicate the NRC's ongoing oversight of operating reactors."[18] The key components of a license renewal application include its aging management programs ("AMPs") and time-limited aging analyses ("TLAAs"). Notably, the NRC has published guidance (known as the "GALL Report") containing AMPs generically determined to satisfy Part 54, which applicants may adopt.[19] If adopted, and otherwise consistent with the GALL Report, those AMPs are entitled to a rebuttable presumption of regulatory sufficiency.[20]

Through notice and comment rulemaking, the Commission purposefully chose to exclude operational oversight and CLB matters from the scope of its license renewal proceedings. As the Commission explained:

> In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's [CLB] to re-analysis during the license renewal review. The [CLB] represents an 'evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.' … It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement. Just as these oversight programs help ensure compliance with the [CLB] during the original license term, they likewise can reasonably be expected to fulfill this function during the renewal term.[21]

---

16 *Entergy Nuclear Operations, Inc*. (Indian Point, Units 2 & 3), CLI-15-6, 81 NRC 340, 347 (2015).

17 *Id*.; *see also* 10 C.F.R. §§ 54.21, 54.29(a).

18 *Indian Point*, CLI-15-6, 81 NRC at 347.

19 *See* NUREG-1801, Rev. 2, Generic Aging Lessons Learned (GALL) Report (Dec. 2010) (ML103490041).

20 *See generally Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 45–47).

21 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 9 (2001) (citation omitted).

Furthermore, the NRC also conducts a separate environmental review as part of any license renewal proceeding. The objective of that review is to analyze the "potential [environmental] impacts of an additional 20 years of nuclear power plant operation[s]."[22] This review is required to satisfy the National Environmental Policy Act ("NEPA").[23] The NRC's NEPA regulations are codified in 10 C.F.R. Part 51.

For license renewal, Part 51 is based in part on the GEIS, which summarizes the findings of a systematic inquiry into the potential environmental consequences of license renewal.[24] Based on these analyses, the GEIS outlines two types of environmental issues:

- Generic "Category 1" issues, for which the NRC made "generic conclusions applicable to all existing nuclear power plants;"[25] and
- Plant-Specific "Category 2" issues, for which site-specific analyses are required for each individual license renewal proceeding.[26]

Applicants must submit an environmental report ("ER") that analyzes all Category 2 issues on a plant-specific basis.[27] But, for Category 1 issues, impact conclusions are codified (via notice and comment rulemaking) in 10 C.F.R. Part 51, Subpart A, Appendix B and are not required to be re-analyzed in each individual license renewal application.[28] Ultimately, the NRC Staff draws upon the applicant's ER, the GEIS, and other sources to produce a plant-specific Supplemental Environmental Impact Statement ("SEIS").[29]

---

22 *Id.*

23 National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 *et seq*.).

24 *See* 1996 GEIS at xxxiv; *see* 2013 GEIS at S-4; *see also* 2024 GEIS at xxxiv.

25 *Turkey Point*, CLI-01-17, 54 NRC at 11.

26 *See id.* at 11–12 (discussing Category 2 issues).

27 *See* 10 C.F.R. §§ 51.41, 51.45, 51.53(c)(3)(ii).

28 *Id.* § 51.53(c)(3)(i). Licensees may incorporate by reference those analyses and the codified impact findings from Appendix B. *See id.* § 51.53(a).

29 *See* 2013 GEIS at 1-16 to 1-18.

In license renewal proceedings, public participation opportunities include various public meetings, the opportunity to submit written comments on environmental scoping and the draft SEIS, and the opportunity to request a hearing to challenge the application. Pursuant to 10 C.F.R. § 2.309(a)(1), a hearing request may be granted only if the presiding officer determines that the petitioner has demonstrated standing and has proposed at least one admissible contention that meets the admissibility criteria in 10 C.F.R. § 2.309(f)(1).[30] Failure to satisfy any one of these six admissibility criteria requires that a proposed contention be rejected.[31] These criteria are "strict by design."[32] The petitioner alone bears the affirmative burden to satisfy these criteria.[33]

As particularly relevant here, to be admissible, contentions must fall within the scope of the proceeding, and must demonstrate a genuine dispute with the application on a material issue of fact or law. Contentions challenging ongoing agency oversight and a plant's CLB, or codified impact conclusions from the GEIS, are inadmissible as beyond the limited scope of the license

---

30 To be admissible, a proposed contention 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; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to the specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)

31 *See* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004); *see also Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

32 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

33 *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325, 329 (2015) ("[t]he proponent of a contention is responsible for formulating the contention and providing the necessary support to satisfy the contention admissibility requirements" and "it is Petitioners' responsibility, not the Board's, to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for admission") (citation omitted).

renewal hearing opportunity.[34] The Commission long ago determined that it would be "unnecessary and wasteful" to permit such challenges—because these issues are addressed through different regulatory pathways.[35]

B. Standard of Review on Appeal

NRC regulations at 10 C.F.R. § 2.311(c) permit petitioners to appeal orders denying hearing requests and petitions to intervene, as of right, on the sole question of "whether the request and/or petition should have been granted."[36] The Commission generally provides "substantial deference"[37] to Board decisions on contention admissibility, but will reverse a Board's ruling "if there has been an error of law or an abuse of discretion."[38] Thus, the Commission generally is disinclined to upset licensing board findings, particularly on matters involving fact-specific issues or consideration of expert affidavits or submissions.[39] The Commission reviews questions of law *de novo*, and will "reverse a licensing board's legal rulings if they are 'a departure from[,] or contrary to[,] established law.'"[40] To prevail on an abuse of discretion claim, the appellant must persuade the Commission "that a reasonable mind could reach no other result."[41] An appeal that simply restates the petitioner's arguments, is not a valid

---

34 *Turkey Point*, CLI-01-17, 54 NRC at 7–9; *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17–18 (2007) ("Because the generic environmental analysis was incorporated into a regulation, the conclusions of that analysis may not be challenged in litigation.").

35 *Turkey Point*, CLI-01-17, 54 NRC at 7.

36 10 C.F.R. § 2.311(c).

37 *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 26 (2014).

38 *Comanche Peak*, CLI-12-7, 75 NRC at 386 (citing *Levy Cty.,* CLI-10-2, 71 NRC at 29; *Oyster Creek*, CLI-09-7, 69 NRC at 259; *Comanche Peak*, CLI-11-9, 74 NRC at 237).

39 *Hydro Res., Inc.* (Crownpoint, NM), CLI-06-1, 63 NRC 1, 2 (2006).

40 *Oyster Creek*, CLI-09-7, 69 NRC at 259 (citation omitted).

41 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 532 (1991), *aff'd*, CLI-91-13, 34 NRC 185 (1991) (internal citation omitted).

appeal.[42] As the Commission has made clear, it will not consider new arguments raised for the first time on appeal and that the licensing board never had a chance to consider.[43]

III. PETITIONERS FAIL TO IDENTIFY ANY ERROR OF LAW OR ABUSE OF DISCRETION IN THE BOARD'S CONTENTION ADMISSIBILITY RULINGS

On appeal, Petitioners assert that the Board erred in its admissibility rulings as to all three proposed contentions. But, as explained further below, Petitioners identify no error of law or abuse of discretion by the Board. Indeed, the Appeal is *conspicuously* devoid of any meaningful engagement with the relevant legal standards for proposed contentions, much less the Board's application of law and fact in the context of those standards. Instead, Petitioners recycle arguments from their Petition alongside conclusory assertions that the Board "erroneously and arbitrarily denie[d] the public a hearing on crucial safety and environmental issues."[44] This approach, however, is insufficient to satisfy the standard of review on appeal, and wholly fails to justify abandoning the "substantial deference" the Commission typically affords such decisions.

A. Petitioners Identify No Error of Law or Abuse of Discretion on Contention 1

In Contention 1, Petitioners raised both safety and environmental claims on seismic matters. Petitioners' safety claims purported to challenge seismic information related to the plant's CLB. And their environmental claims purported to challenge the NRC's codified Category 1 analyses regarding potential environmental impacts of hypothetical accidents caused by earthquakes. The Board held that: Petitioners' safety claims failed to dispute any information

---

[42] *Shieldalloy Metallurgical Corp.* (Newfield, N.J. Facility), CLI-07-20, 65 NRC 499, 503-05 (2007); *Turkey Point*, CLI-17-12, 86 NRC at 219 ("[r]ecitation of an appellant's prior positions in a proceeding or statement of general disagreement with a decision's result is not sufficient; the appellant must point out the errors in the Board's decision.") (citations omitted).

[43] *USEC Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (quotations and citation omitted). The purpose of an appeal "is to point out errors made in the Board's decision," not to present "arguments and evidence never provided to the Board." *Id.* (quotations and citation omitted).

[44] Appeal at 1.

in the LRA; their environmental claims improperly challenged NRC regulations without the necessary waiver; and both claims were beyond the scope of this license renewal proceeding.

On appeal, Petitioners present their disagreement with the Board's ruling, but wholly disregard the appellate standard of review. Because they present no argument or assertion aimed at that standard, they have not met their affirmative burden to demonstrate its satisfaction here. Moreover, as detailed below, Petitioners' arguments do not otherwise amount to identification of any error of law or abuse of discretion in LBP-24-6. Accordingly, the Commission should AFFIRM the Board's ruling on Contention 1.

1. Petitioners Identify No Error of Law or Abuse of Discretion in the Board's Scope Determination

In the proceedings before the Board, Petitioners squarely acknowledged that their safety and environmental claims in Contention 1 were beyond the limited scope of license renewal proceedings as defined in the plain text of NRC regulations.[45] As to safety, Contention 1 sought to challenge seismic issues within the plant's CLB, which is addressed through separate processes and is outside the scope of license renewal. As to environmental matters, Contention 1 sought to challenge, without the required waiver, the NRC's codified analysis of the environmental impacts of hypothetical accidents caused by earthquakes during a license renewal term. Notably, certain seismic safety or environmental issues do, in fact, fall within the scope of license renewal, such as those related to aging management (*i.e.*, AMPs or TLAAs) or severe accident mitigation alternatives ("SAMAs").[46] But Petitioners raised no such challenges in

[45] *See, e.g.*, Appeal at 5 (admitting 10 C.F.R. Parts 51 and 54 do not require what Petitioners demand in Contention 1); Transcript of Diablo Canyon Nuclear Power Plant, Units 1 & 2, License Renewal Hearing, May 22, 2024 (revised) at 47–48 (June 22, 2024) (ML24179A075) ("Tr.") (admitting that Contention 1 does not "fit under the standard rules [for license renewal] that have been in effect since 1991" and that agreeing that apart from words from Commissioner Hanson, seismic issues do not belong in a license renewal proceeding).

[46] *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 28, 35).

Contention 1. Instead, Petitioners opted to challenge only out-of-scope issues, based on an unsupported theory that their challenges were nevertheless admissible due to a brief exchange at a Congressional hearing.

Specifically, at that hearing,[47] Senator Padilla asked Chair Hanson for "[a]ny comments" on safety standards with "specific concern about seismic risk" at Diablo Canyon.[48] Chair Hanson answered by saying:

> We are going to be looking at updated safety information as part of that license renewal process. We did require all plants to take a look at the enhanced, relook at their risks after Fukushima. Diablo, of course, did look at their seismic risk and we will take another look at that as part of the license renewal process.[49]

Petitioners' theory was two-fold. First, as a factual matter, Petitioners argued that the Chair's unscripted remark should be *interpreted* as contradicting the license renewal scope limitations in NRC regulations. Petitioners read that statement as a "commitment" to conduct a "broad[er] review" of seismic matters than required by NRC license renewal regulations and to "examine seismic risk with new eyes and in a comprehensive manner, and that it will be conducted as part of the license renewal process."[50]

Second, as a legal matter, Petitioners *speculated* (without citation to any supporting legal authority) that the statement of a single witness at a Congressional hearing creates binding legal obligations capable of repealing regulations promulgated through notice and comment rulemaking. According to Petitioners, the codified license renewal scope limitations long-embedded in 10 C.F.R. Parts 51 and 54 were effectively *repealed* (albeit solely for DCPP, and

---

47 The complete question and answer on which Petitioners rely is provided in the Board's decision. *Id*. at __ (slip op. at 28–29).

48 *Id.*

49 *Id.* at __ (slip op. at 29).

50 Appeal at 13; *see also* Tr. at 65–67.

solely on seismic issues) by virtue of Chair Hanson's remark without further action by Congress or the Commission.

After duly considering Petitioners' arguments, the Board was "not persuaded that anything in Chair Hanson's testimony expressly, or even by implication, operates to expand the codified scope of review on license renewal."[51] Notably, the Board reached this conclusion on solely *factual* grounds, rejecting Petitioners' *interpretation* of Chair Hanson's statement; it did not reach (and did not need to reach) a definitive conclusion regarding Petitioners' dubious speculation on the *legal* effect of Congressional testimony. Ultimately, the Board unanimously concluded that Contention 1 was inadmissible as beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). The Appeal does not expose any error of law or abuse of discretion in that conclusion.

a. Petitioners Identify No Abuse of Discretion in the Board's Factual Conclusion Regarding the Meaning of Chair Hanson's Remark

As noted above, the Board found nothing in the text of Chair Hanson's testimony that clearly expressed a plan to depart from the NRC's codified license renewal process. As the Board noted, "even if" Petitioners' claims regarding the *legal* effect of that testimony were correct, "there is nothing in that testimony indicating," and Chair Hanson "did not expressly state," any plan to broaden the license renewal seismic review to include CLB issues or previously codified environmental analyses.[52] Given that the Chair's remark "can be read in harmony"[53] with the existing codified scope provisions (*e.g.*, consideration of seismic issues in

[51] *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 35).

[52] *Id*. at __ (slip op. at 30).

[53] *Id.*

the context of AMPs or SAMAs), the Board found Petitioners' interpretation of the testimony to be unavailing.

The Appeal largely glosses-over that portion of the Board's ruling, focusing instead on the legal issue. Petitioners' only acknowledgement of the Board's testimony *interpretation*, and their sole attempt to dispute it, appears in a single footnote. Therein, they disparage the Board's view as a "crabbed alternative interpretation."[54] Assuming that criticism could be viewed as a claim that the Board abused its discretion, it falls far short of the required demonstration. To prevail on an abuse of discretion claim, the appellant has an affirmative burden to show "that a reasonable mind could reach no other result."[55] They have neither attempted nor done so here.

According to Petitioners, the entire Commission expressly, purposefully, and unanimously intended to enact a sweeping and unprecedented repeal of its longstanding license renewal regulations—contrary to the notice and comment requirements of the Administrative Procedure Act ("APA");[56] devoid of any policy vote required by the AEA; and without announcing any legal authority or precedent for such a maneuver—via a single, unscripted remark presented in the "broadest" (*i.e.*, vaguest) possible terms at a Congressional hearing. Petitioners would have the Commission believe that this extraordinary reading is the *only* reasonable interpretation of the subject testimony for one single reason: because the question and answer at the Congressional hearing were presented "in the broadest possible terms."[57] But they fail to explain why a "broad" discussion mandates the extraordinary result they seek here. And they offer no reason why the Board's logical reading, in which the question-and-answer

---

54 Appeal at 13 n.35.

55 *Turkey Point*, ALAB-952, 33 NRC at 532, *aff'd*, CLI-91-13, 34 NRC 185 (1991) (internal citation omitted).

56 Administrative Procedure Act of 1946, Pub. L. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. ch. 5, subch. I § 500 *et seq*.).

57 Appeal at 13 n.35.

exchange can be read in harmony with existing regulations, is not one that a "reasonable mind could reach." Indeed, the Board's interpretation is factually substantiated and imminently reasonable.[58] And it is entitled to "substantial deference" here. Thus, Petitioners have not demonstrated an abuse of discretion by the Board.

b. Petitioners' Arguments Regarding the Legal Effect of Congressional Testimony Provide No Grounds for Reversal Because They Are Irrelevant to the Outcome of LBP-24-6, Were Not Timely Raised, and Otherwise Fail to Demonstrate Any Error of Law

As noted above, Petitioners argued in their Petition, and re-argue in their Appeal, that Contention 1 falls within the scope of this license renewal proceeding only because Chair Hanson's statement in a Congressional hearing "overrode" the APA and the NRC's scope limitations as codified in Parts 51 and 54.[59] But, in the proceedings before the Board, "Petitioners did not cite [any] authority for the proposition that such testimony is binding."[60] Thus, the Board conducted its own legal research. The Board identified a U.S. Supreme Court case and a 9th Circuit case holding that statements to Congress can neither create "legally binding obligations" nor "expand and contract" agency jurisdiction.[61] The Board also reviewed two non-binding district court cases noting that Congressional testimony could be viewed as "helpful and persuasive" or otherwise clarify how existing regulations operate.[62]

---

[58] Chair Hanson's statement regarding NRC plans to look at seismic issues in the license renewal proceeding can be read in harmony with existing regulations requiring consideration of in-scope seismic topics. As noted above, seismic issues are within the scope of license renewal to the extent they are related to aging management (*i.e.*, AMPs or TLAAs) or mitigation alternatives (*i.e.*, SAMAs).

[59] Appeal at 11–12; *see* Petition at 13–15 (discussing Chair Hanson's statement as requiring the NRC to an extra safety review).

[60] *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 29 n.127).

[61] *Id.* (discussing *Lincoln v. Virgil*, 508 U.S. 182, 194 (1993) and *Ruiz v. Morton*, 462 F.2d 818, 822 (9th Cir. 1972)).

[62] *Id.* (discussing *Texas v. United States*, 86 F. Supp. 3d 591, 654 n.64 (S.D. Tex. 2015) and *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953)).

The Board expressed "grave doubts" that "a statement during a congressional hearing, even by the Commission's Chair, can otherwise expand the scope of a licensing proceeding beyond that defined by the Commission's adjudicatory precedent or hearing opportunity notice."[63] However, the Board stopped short of reaching a definitive conclusion regarding the legal effect of Congressional testimony. Instead, the Board simply characterized the case law as "unclear" and resolved the question on factual grounds alone.[64] On appeal, Petitioners argue that the Board's decision on Contention 1 should be reversed because the two district court cases cited by the Board "support[]" their theory that Chair Hanson's statement is legally binding.[65] But these arguments provide no grounds for reversal for at least three reasons.

First, assuming *arguendo* that Petitioners are correct regarding the legal effect of Congressional testimony (they are not), that circumstance would have no impact on the admissibility ruling for Contention 1. The Board correctly rejected the contention on the factual issue alone, mooting the corresponding legal question. As noted above, the Board concluded that Chair Hanson's statement was consistent with existing regulations that require consideration of *in-scope* seismic issues in license renewal proceedings. Accordingly, the Board's determination that the case law on the legal effect of Congressional testimony is "unclear," even if erroneous, would constitute nothing more than harmless error, which provides no grounds for reversal.[66]

Second, the Appeal presents entirely new arguments seeking to equate the factual circumstances of the two district court cases with the instant proceeding. But those arguments

---

63 *Id.* at __ (slip op. at 29).

64 *Id.* at __ (slip op. at 29 n.127).

65 Appeal at 12.

66 *In the Matter of David Geisen*, CLI-10-23, 72 NRC 210, 247 (2010) (error without prejudice is harmless and provides no grounds for reversal on appeal).

were never presented to the Board. In fact, the Board identified those cases in the first instance. Petitioners presented zero arguments about those cases—or any other authority allegedly supporting their novel and speculative legal theory—to the Board. As the Commission has made clear, it simply will not consider new arguments raised for the first time on appeal.[67] The Board cannot be faulted for not considering unpresented arguments.

And third, the district court cases cited by Petitioners, *United States v. Morgan*,[68] and *Texas v. United States*,[69] do not demonstrate any legal error by the Board. As explained below, those cases do not *support* Petitioners' theory that Congressional testimony can conjure new binding legal obligations and "override" codified regulations. And those cases certainly do not evidence any "departure" from established law.[70]

In *Morgan*, the government brought an action to restrain several defendants from continuing alleged violations of the Sherman Anti-Trust Act.[71] In determining whether the defendants' actions violated anti-trust law, the district court found "persuasive and helpful" an advisory opinion from the U.S. Securities and Exchange Commission ("SEC"). That opinion, consisting of a majority opinion (joined by three commissioners) and a concurring opinion (authored by a fourth commissioner), provided the agency's "views on the application of [existing] antitrust laws to the securities field."[72] Notably, the district court disavowed any "binding" legal effect of the opinion, expressly stating that the agency's "views are not binding

---

67 *USEC*, CLI-06-10, 63 NRC at 458 (quotations and citation omitted). The purpose of an appeal "is to point out errors made in the Board's decision," not to present "arguments and evidence never provided to the Board." *Id*. (quotations and citation omitted).

68 118 F. Supp. 621 (S.D.N.Y. 1953).

69 86 F. Supp. 3d 591 (S.D. Tex. 2015).

70 *Oyster Creek*, CLI-09-7, 69 NRC at 259 (citation omitted).

71 Sherman Antitrust Act of 1890, Pub. L. 51-647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7).

72 *Morgan*, 118 F. Supp. 621, 698–99 (S.D.N.Y. 1953).

on me, or upon any other court or judge."[73] Thus, *Morgan* stands for the unremarkable proposition that an agency advisory opinion, much like an *amicus* brief, can be "helpful" to a court. To be clear, *Morgan* did not involve Congressional testimony; it said nothing about the legal effect of Congressional testimony or the constraints Congress placed on agency action in the APA; it did not conclude that any agency statements were "binding" on anyone; and it provides no support for a theory that an agency can be bound or required to act contrary to its own regulations. At bottom, that case provides no obvious support for Petitioners' claims and certainly does not demonstrate that the Board's ruling is a departure from settled law—and the Appeal offers no explanation otherwise.

Texas also contradicts Petitioner's position. In that case, a group of states sought injunctive relief in district court to prevent the federal government from implementing a program intended to provide legal status to individuals in the country illegally.[74] The program was not promulgated via rulemaking or executive order, but rather was instituted via an agency memorandum. A central question in the case was whether the program was properly characterized as an exercise of prosecutorial discretion (*i.e.*, not removing people from the country under immigration laws), which is presumptively unreviewable.[75] Although part of the program arguably involved enforcement matters, the court considered whether the program also affirmatively conferred certain benefits.[76] It was in this context that the district court discussed, in a footnote, the Congressional testimony of an IRS commissioner. The Commissioner explained how the new program interacted with existing tax rules and confirmed that it would

---

[73] *Id.* at 699.

[74] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[75] *Id.* at 652–56 (discussing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

[76] *Id.* at 654-55.

effectively bestow a new tax benefit on certain individuals.[77] In the court's view, this supported a conclusion that the program went beyond a mere exercise of enforcement discretion, and thus the government had improperly "legislated a substantive rule without complying with the procedural requirements of the [APA]."[78]

In summary, the court simply relied on the Commissioner's explanation of how *existing* tax rules operate; it did not find that the testimony imposed some new, binding obligation, or otherwise authorized a departure from existing rules. Quite the opposite—the court found that conferring new tax benefits without engaging in notice and comment rulemaking would violate the APA. So too here. Applying the *Texas* decision to this proceeding, requiring the NRC to take an action outside its codified regulatory process without engaging in notice and comment rulemaking also would violate the APA.[79] Thus, *Texas* also does not support any claim that LBP-24-6 is affected by legal error.

* * *

Ultimately, the Appeal fails to demonstrate any error of law or abuse of discretion in the Board's scope conclusion as to Contention 1.

2. Petitioners Identify No Error of Law or Abuse of Discretion in the Board's Genuine Dispute Ruling

In LBP-24-6, the Board also concluded that the safety claims in Contention 1 are inadmissible because Petitioners failed to satisfy the "genuine dispute" requirement in 10 C.F.R. § 2.309(f)(1)(vi). Specifically, the Board held that Petitioners' safety claims failed to dispute the

---

77 *Id.* at 654 n.64.

78 *Id.* at 677.

79 The Board squarely invited Petitioners to address APA requirements in the proceedings below, but Petitioners sidestepped the issue. Specifically, in response to a question from Judge Arnold on how "comments of one Commissioner in response to a senator's question toss [the "fairly rigorous rule making process"] out the window," Petitioners offered no discussion of the APA and instead merely demurred that they "should be able to rely on the statement." Tr. at 57–58.

sufficiency of any specific safety content in the LRA and failed to identify the omission of any content required by 10 C.F.R. Part 54.[80] In their Appeal, Petitioners express disagreement with that conclusion, but again fail to explain how the Board's decision was affected by any error of law or abuse of discretion.

First, Petitioners decry the Board's conclusion as "tautological" "because the NRC's Part 54 regulations do not require PG&E to address seismic risk in the safety portion of its application."[81] But Petitioners' characterization of the regulations is not entirely inaccurate. To be clear, seismic matters *are* required to be addressed in the LRA to the extent they are within the scope of Part 54's aging management requirements. The Board was demonstrably correct in its observation that, although they could have, Petitioners did not challenge the sufficiency or omission of any such *aging management* content in the LRA. Petitioners do not claim otherwise.

Second, Contention 1 was directed at seismic safety matters that are unrelated to aging management—*i.e.*, those encompassed by the plant's CLB and subject to ongoing operational oversight. In that regard, Petitioners are spot-on that *those* matters (which have been or are being reviewed under the appropriate 2.206 petition process) are not required by Part 54 to be addressed (redundantly) in the LRA.[82] And Petitioners' acknowledgement of that fact simply serves to validate the Board's objectively correct conclusion that Contention 1 failed to dispute the sufficiency or omission of any information required to be presented in the LRA.

Here, Petitioners again fall back to arguing that if Chair Hanson's statement is given binding effect (as shown above, it should not be), then the NRC will need to review in this license renewal proceeding all seismic matters, including those encompassed by the plant's

---

80 *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 32–33).

81 Appeal at 14.

82 10 C.F.R. § 54.30(b).

CLB.[83] But even if Petitioners were correct, and the NRC unilaterally committed itself to conduct some extra-procedural review, that circumstance would not retroactively render PG&E's application materially defective. Safety contentions claiming the NRC "failed" in its review are *per se* inadmissible because it is the application, not the review, that must be challenged.[84] Here, PG&E fully complied with all application-content requirements and submitted an LRA consistent with applicable guidance. Petitioners identify no portion of the exchange between Senator Padilla and Chair Hanson prescriptively defining additional information that must be included in an LRA. PG&E cannot be faulted for not including in its LRA information that is not required to be presented therein. Ultimately, the Appeal identifies no error of law or abuse of discretion in the Board's plainly correct ruling that Petitioners failed to dispute the LRA.

3. Petitioners Make No Attempt to Identify Any Error of Law or Abuse of Discretion in the Board's Waiver Determination, Which Is Objectively Correct

Lastly, the Board found that the environmental aspect of Contention 1 was inadmissible for the additional reason that it impermissibly seeks to challenge NRC regulations. That conclusion is indisputably correct as a matter of law.

Petitioners sought a hearing in this individual licensing proceeding to litigate the potential environmental impacts of hypothetical accidents initiated by seismic events. That issue, however, was comprehensively analyzed by the NRC in the GEIS, and the conclusions of that analysis were codified as Category 1 issues in 10 C.F.R. Part 51 via notice and comment rulemaking.[85] The NRC's rules of practice and procedure funnel challenges to its regulations

---

[83] Appeal at 14.

[84] For safety contentions, the Commission has long held that "the applicant's license application is in issue, not the adequacy of the Staff's review of the application. An intervenor . . . may not proceed on the basis of allegations that the Staff has somehow failed in its performance." *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), *review denied*, CLI-83-32, 18 NRC 1309 (1983).

[85] *See* 10 C.F.R. Pt. 51, App. B. Tbl. B-1.

into the *rulemaking* process and generally prohibit such challenges in individual *licensing* proceedings.[86] However, litigants can seek a waiver of that general prohibition. Petitioners neither requested nor received such a waiver here. Thus, in the absence of the required waiver, the Board had no choice but to conclude that Petitioners' challenge was impermissible. The Appeal offers no specific rebuttal to that conclusion, and therefore fails to demonstrate any error of law or abuse of discretion.

* * *

In sum, the Appeal fails to demonstrate any error of law or abuse of discretion in any of the Board's reasons for concluding that Contention 1 was inadmissible. Accordingly, the Commission should AFFIRM the Board's ruling on Contention 1.

B. Petitioners Identify No Error of Law or Abuse of Discretion on Contention 2

Contention 2 alleged that PG&E's LRA "does not include an adequate plan to monitor and manage the effects of aging due to embrittlement of the Unit 1 [RPV] or an adequate [TLAA] as required by 10 C.F.R. 54.21."[87] After due consideration, the Board found Contention 2 inadmissible for two main reasons: because Petitioners' claims were out-of-scope and because they failed to demonstrate a genuine dispute with the LRA.[88] On appeal, Petitioners merely repeat selected statements from their declarant, Dr. Macdonald. As a matter of law, repetition of earlier claims is an insufficient basis to overturn a decision on appeal.

In fact, Petitioners offer one—*and only one*—criticism of the Board's ruling: that it "failed to consider the detail and specificity with which Dr. Macdonald demonstrated that in

---

86 *See* 10 C.F.R. § 2.335.

87 Petition at 16.

88 *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 38–47).

Shakespeare's words, 'What's past is prologue.'"[89] Otherwise, the Appeal does not meaningfully engage with LBP-24-6; fails to distinguish between the Board's two primary bases for rejecting the contention; and offers no analysis of the admissibility criteria. As further explained below, Petitioners' appeal—if it can even be characterized as such—wholly fails to demonstrate any error of law or abuse of discretion in the Board's ruling on Contention 2.

First, the Board held that Contention 2 was beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), because it improperly challenged the plant's CLB rather than aging management issues. Notwithstanding token citations to Part 54 in the Petition, and a few block quotes from the LRA in Dr. Macdonald's declaration, the Board found that Petitioners' and Dr. Macdonald's claims were almost entirely "devoted to actions taken by (or not taken by) PG&E and/or the Commission *prior to* PG&E's submission of the LRA."[90] As the Board noted, this backwards-looking gaze is problematic because it challenges a plant's CLB, which is outside the scope of the proceeding.[91] In reaching its scope conclusion, the Board relied, in part, on controlling precedent from the *Point Beach* proceeding, in which the Commission recently upheld a licensing board's rejection of a similar contention proffering backwards-looking criticisms of RPV embrittlement analyses.[92] And at oral argument, the Board invited Petitioners to distinguish their claims, but received a response confirming that Petitioners were, in fact, seeking to challenge the plant's CLB.[93] Thus, despite Petitioners' thin attempts to cloak the contention with cursory references to Part 54, the Board determined as a factual matter that Contention 2 sought to challenge the CLB, and therefore was out of scope.

---

89 Appeal at 15.

90 *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 39).

91 *Id.* at __ (slip op. at 39–40).

92 *Id.*

93 *Id.* at __ (slip op. at 40).

Second, the Board held that Contention 2 failed to demonstrate a genuine dispute with the LRA, as required by 10 C.F.R. § 2.309(f)(1)(vi). Among other things, that criterion requires references to "specific portions" of the application being challenged—something Petitioners failed to supply in the Petition itself. The Board acknowledged that a background discussion in Dr. Macdonald's declaration included block quotes from a few pages of the LRA.[94] But it found that only two were accompanied by any discussion or criticism, neither of which identified a genuine dispute.[95] The Board also reviewed the analytical section of the declaration and found that it was singularly focused on CLB matters, save two sentences providing conclusory assertions about "license renewal" with no link to any particular discussion in the LRA.[96] At oral argument, Petitioners finally revealed that they were attempting to challenge the RPV AMP.[97] But they still did not specify any particular AMP content being challenged. Nevertheless, the Board acknowledged the LRA's statement that the RPV AMP was consistent with the GALL Report, which essentially entitles that AMP to a rebuttable presumption of regulatory sufficiency.[98] However, Petitioners failed to acknowledge, grapple with, or otherwise dispute that relevant information, *i.e.*, made no attempt to "rebut" that rebuttable presumption.

---

94 The Board noted that Petitioners failed to identify a single LRA provision in their Petition, as required by 10 C.F.R. § 2.309(f)(1)(vi), and correctly pointed out that their wholesale "incorporation by reference" of Dr. Macdonald's declaration "contravenes Commission precedent." However, the Board's ruling did not rest on that finding. Thus, Petitioners' citation to a licensing board case (which is not controlling here and does not supersede "Commission precedent") for the proposition that mere "notice" pleading suffices in NRC adjudicatory proceedings (it does not), does not demonstrate any error of law or abuse of discretion. *See* Appeal at 15 n.41 (citing *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 408 (2006)).

95 Of those two, one simply overlooked supposedly missing information and the other failed to explain why missing information was required to be included in an LRA. *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 41–43).

96 *Id.* at __ (slip op. at 43–44).

97 Tr. at 96–97.

98 *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 44).

Accordingly, the Board properly concluded that Petitioners had not carried their burden to demonstrate a genuine dispute on a material issue of fact or law.

On appeal, Petitioners point to no error of law or abuse of discretion in the Board's ruling. In fact, it is not entirely clear which (if any) arguments in the Appeal may be directed at which admissibility criterion or which aspect of the Board's ruling. As to the Board's scope conclusion, Petitioners neither dispute the Board's characterization of their statements at oral argument nor rebut the Board's application of the *Point Beach* precedent. And as to the Board's genuine dispute conclusion, Petitioners say nothing about the GALL Report and (Shakespearian maxims aside) *still* do not tell us which portion of the RPV AMP they were purporting to dispute. Overall, the Appeal does little more than quote or reference certain statements from Dr. Macdonald's declaration, claiming they are "specific and well-supported." But this vague assertion identifies no error of law or abuse of discretion; and simply restating earlier arguments is not a valid appeal.[99]

Lastly, Petitioners appear to equate Contention 2 with an embrittlement contention that was admitted in the *Indian Point* proceeding.[100] But they offer no analysis or discussion to support the suggested equivalence and fail to explain how—or even assert that—it somehow contradicts any portion of LBP-24-6. In any event, a brief review of that decision makes clear that the specific claims in the *Indian Point* contention are easily distinguishable from the vague allegations offered by Petitioners here.[101] Simply put, Petitioners' unexplained reference to this

---

[99] *Shieldalloy*, CLI-07-20, 65 NRC at 503–05.

[100] Appeal at 17 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 131 (2008)).

[101] *Compare, e.g.*, *Indian Point*, LBP-08-13, 68 NRC at 131 (noting that the operative challenge in that proceeding was "whether" an AMP was necessary) *with Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 44) (noting that the LRA included an AMP entitled to a presumption of regulatory sufficiency, which Petitioners neither acknowledged nor challenged).

non-controlling licensing board decision does not remotely evidence any error of law or abuse of discretion in the Board's ruling here.

* * *

In sum, the Board fully considered Petitioners' arguments and appropriately applied controlling law. On appeal, Petitioners do not claim or show otherwise. Instead, the Appeal merely recycles Petitioners' original arguments and hopes for a different result from the Commission. This does not satisfy the appellate standard of review. Accordingly, the Commission should AFFIRM the Board's ruling on Contention 2.

C. Petitioners Identify No Error of Law or Abuse of Discretion on Contention 3

Among many other environmental laws, federal license applicants (including applicants for NRC license renewals such as PG&E) and federal agencies (including the NRC) must comply with the CZMA. As relevant here, there are two main steps in the CZMA process: the "certification," which an applicant must submit to the cognizant state agency (here, the California Coastal Commission ("CCC")) with a copy thereof included in its application to the federal agency; and the subsequent "concurrence" from that state agency, which must be obtained before the license can be issued.[102] In Contention 3, Petitioners alleged that the NRC cannot approve the LRA because PG&E has not yet obtained a CZMA "concurrence." The Board held that this contention was inadmissible for failing to demonstrate a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). As explained below, the Board's ruling is manifestly correct, and the Appeal identifies no error of law or abuse of discretion in the Board's reasoning.

[102] A federal agency can also issue a license without a state concurrence if: (1) the state fails to act, or (2) if the state rejects the certification and the applicant prevails on an appeal to the Secretary of Commerce. CZMA, 16 U.S.C. § 1456(c)(3)(A).

Based on two key conclusions, the Board essentially found that Contention 3 was unripe. First, as a matter of settled law that no party disputed, the CZMA "concurrence" is not required at the application stage. Thus, as the Board correctly held, its absence from the LRA is not a cognizable deficiency (and PG&E fully complied with its obligation to provide the "certification" in the LRA). Second, as another matter of settled law that no party disputed, the NRC cannot approve the LRA unless and until that CZMA "concurrence" is issued. As the Board again correctly held, in the absence of some indication that the NRC intends to violate the statute by approving the LRA without that "concurrence" (which no party alleged), no genuine dispute *currently* exists on the matter of CZMA compliance. On appeal, Petitioners do not contest any of these fundamental aspects of the Board's ruling. Instead, Petitioners raise two tertiary claims that provide no grounds for reversal of the Board's ruling.

First, Petitioners point to a CCC request for additional information ("RAI") to PG&E regarding its certification. Petitioners allege the RAI somehow exposes a genuine dispute because it constitutes "evidence" that PG&E could obtain a renewed license from the NRC without the required CZMA concurrence.[103] But that argument fails to demonstrate any error of law or abuse of discretion. The Board squarely considered—and properly rejected—that specious suggestion.[104] On appeal, Petitioners offer no rebuttal of the Board's reasoning. They simply repeat the same argument and demand a different result. As the Commission has explained, "[r]ecitation of an appellant's prior positions in a proceeding or statement of general

[103] *See* Appeal at 19 (citing Letter from T. Luster, CCC, to T. Jones, Senior Director Regulatory, Environmental and Repurposing, PG&E at 1 (Dec. 7, 2023)).

[104] *Diablo Canyon*, LBP-24-6, 100 NRC at __ (slip op. at 50–51).

disagreement with a decision's result is not sufficient; the appellant must point out the errors in the Board's decision."[105] They have not done so here.

Furthermore, the Board's conclusion is legally and factually sound. Regardless of whether the CCC was "satisfied" with the completeness of the original certification, an *extraordinary* logical gap exists between that unremarkable circumstance (*i.e.*, the issuance of an RAI) and the possibility that PG&E could obtain a renewed license without the required CZMA concurrence. Namely, that would require the NRC to purposefully elect to violate a federal statute. As a matter of settled law (which Petitioners do not dispute), the NRC is entitled to a presumption of administrative regularity.[106] In other words, baseless speculation of illegal conduct can never provide the basis for an admissible contention. Here, the Board specifically probed this issue at oral argument, asking whether Petitioners had any basis to dispute the NRC's presumption of regularity. Petitioners admitted, "[n]o, we have not presented evidence of irregularity by the staff."[107] Given that admission, the Board's conclusion is imminently reasonable and fully consistent with controlling law—and Petitioners offer nothing to conclude otherwise here.

Second, Petitioners (admitting that no genuine dispute currently exists) argue that the Commission should "hold the contention in abeyance pending further developments."[108] According to Petitioners, that is because the NRC cannot "reject [Contention 3] now and place extra burdens on Petitioners at whatever time in the future the NRC deems ripe for raising this

---

105 *Turkey Point*, CLI-17-12, 86 NRC at 219 (citations omitted).

106 *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-11, 67 NRC 379, 384 (2008) ("Absent clear evidence to the contrary, we presume that public officers will properly discharge their official duties." (cleaned up)).

107 Tr. at 143.

108 Appeal at 19.

material issue."[109] Yet again, the Board squarely considered—and properly rejected—that demand when Petitioners raised it in the initial proceedings. As the Board correctly explained, Commission precedent counsels that unripe placeholder contentions should be rejected—the opposite of what Petitioners demand.[110] On appeal, Petitioners neither acknowledge nor rebut the relevant Commission authority on that point. Petitioners simply recycle their arguments and demand a different result, which fails to constitute a valid appeal.

Next, Petitioners argue that a D.C. Circuit ruling from 1984, *Union of Concerned Scientists v. NRC* ("*UCS*"), compels the NRC to offer a hearing on CZMA issues.[111] As a preliminary matter, this argument is new and untimely. In the proceedings before the Board, Petitioners never invoked the *UCS* case as alleged support for Contention 3. However, the Commission will not consider new arguments raised for the first time on appeal that the Board never had an opportunity to consider.[112] Thus, the Commission should summarily reject these new arguments here.

Furthermore, *UCS* is inapt and provides no basis to disturb the Board's ruling. In *UCS*, the court held that the NRC cannot categorically exclude from the scope of a hearing opportunity any topic that is material to the underlying licensing decision. But the Board's ruling on Contention 3 in no way contradicts that holding. The Board did not conclude that CZMA issues are beyond the *scope of* (criterion (iii)) or are *immaterial to* (criterion (iv)) the proceeding. Rather, it concluded that Petitioners' wild speculation of illegal conduct was insufficient, as a

---

109 *Id.*

110 *See, e.g., Union Electric Co.* (Callaway Plant, Unit 1), CLI-15-11, 81 NRC 546, 548–50 (2015).

111 Appeal at 11, 13.

112 *USEC*, CLI-06-10, 63 NRC at 458 (quotations and citation omitted). The purpose of an appeal "is to point out errors made in the Board's decision," not to present "arguments and evidence never provided to the Board." *Id*. (quotations and citation omitted).

matter of law, to demonstrate a genuine dispute with the application (criterion (vi)). *UCS* has no bearing whatsoever on that fundamental defect in Contention 3, and certainly exposes no error of law or abuse of discretion in the Board's ruling.

In sum, the Board fully considered Petitioners arguments and appropriately applied controlling law. On appeal, Petitioners offer no contrary demonstration. Petitioners simply recycle their original arguments, hoping for a different result from the Commission, and improperly raise new arguments for the first time on appeal, none of which satisfy the appellate standard of review. Accordingly, the Commission should AFFIRM the Board's ruling on Contention 3.

IV. CONCLUSION

Petitioners have not met their affirmative burden to demonstrate that the licensing board misapplied controlling law or abused its discretion in ruling on any of Petitioners' three contentions. For the many reasons set forth above, the Commission should AFFIRM all three of the Board's contention admissibility rulings in LBP-24-6.

Respectfully submitted,

Signed (electronically) by Ryan K. Lighty
RYAN K. LIGHTY, ESQ.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
ryan.lighty@morganlewis.com

Executed in Accord with 10 C.F.R. § 2.304(d)
TIMOTHY P. MATTHEWS, ESQ.
PAUL M. BESSETTE, ESQ.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5527
(202) 739-5796
Timothy.Matthews@morganlewis.com
Paul.Bessette@morganlewis.com

Counsel for Pacific Gas and Electric Company

Dated in Washington, D.C.
This 23rd day of August 2024

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the matter of: PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	Docket No. 50-275-LR-2 and 50-323-LR-2 August 23, 2024

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "PACIFIC GAS AND ELECTRIC COMPANY'S ANSWER OPPOSING THE APPEAL OF LBP-24-6 FILED BY SAN LUIS OBISPO MOTHERS FOR PEACE, FRIENDS OF THE EARTH, AND ENVIRONMENTAL WORKING GROUP" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty
RYAN K. LIGHTY, ESQ.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
ryan.lighty@morganlewis.com

Counsel for Pacific Gas and Electric Company