

June 26, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO THE FRIENDS OF
THE EARTH'S SUPPLEMENTAL BRIEF

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (Board's) June 12, 2015 order,¹ the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this response to the Friends of the Earth's (FOE) Supplemental Brief in this proceeding.² The Board directed the Staff and Pacific Gas & Electric Company (PG&E) to address whether any of the "intervening events"³ in FOE's Supplemental Brief are relevant to the question referred to the Board in CLI-15-14.⁴

For the reasons outlined below, the Staff respectfully submits that none of the "intervening events" in FOE's Supplemental Brief are within the scope of this proceeding or

¹ See Order (Allowing Supplemental Briefing) (June 12, 2015) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15163A075) (June 12, 2015 Order). The Staff opposed FOE's Motion to Allow Supplemental Briefing. See NRC Staff Answer Opposing the Friends of the Earth Motion to Allow Supplemental Briefing (June 11, 2015) (ADAMS Accession No. ML15162A977).

² See Petitioner Friends of the Earth's Supplemental Brief (June 19, 2015) (ADAMS Accession No. ML15170A451) (FOE's Supplemental Brief).

³ These "intervening events" are (1) claims made before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), (2) an NRC inspection report, (3) an NRC letter, and (4) testimony at a Congressional hearing. Petitioner [FOE's] Motion to Allow Supplemental Briefing at 4-5 (June 5, 2015) (ADAMS Accession No. ML15156B521) (FOE's Motion to Allow Supplemental Briefing).

⁴ June 12, 2015 Order at 1. *Id.* at 2 (stating that supplemental briefs "shall address only events after August 26, 2014 that allegedly pertain to the issues referred by the Commission" in CLI-15-14).

pertain to the issues referred by the Commission in CLI-15-14.⁵ Therefore, the Board should not consider these actions in analyzing the question before it. In any event, none of the subsequent Staff actions discussed in FOE's Supplemental Brief constitute or confirm a *de facto* license amendment. Thus, the Board should deny FOE's Petition.

DISCUSSION

I. The Scope of the Referral in CLI-15-14 Was Limited to Particular Arguments and Filings

The Commission established the scope of this proceeding in CLI-15-14.⁶ In that order, the Commission directed the Board to determine whether FOE's August 2014 Petition to Intervene (Petition)⁷ and October 2014 Reply (Reply)⁸ identified an NRC activity that constituted a *de facto* license amendment⁹ of PG&E's existing licenses to operate Diablo Canyon Nuclear Power Plant (Diablo Canyon) such that FOE should have an opportunity to request a hearing pursuant to section 189a. of the Atomic Energy Act of 1954, as amended (AEA).¹⁰ The NRC activities identified in FOE's Petition and Reply that allegedly constituted *de facto* license amendments were:

⁵ *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-15-14, 81 NRC ___, __ (May 21, 2015) (slip op. at 7) (ADAMS Accession No. ML15141A084).

⁶ In license amendment proceedings, the scope of the proceeding is established in the *Federal Register* Notice associated with the license amendment request. See *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 339 (1983) (stating that a Board has only limited jurisdiction and may admit a party's issues for hearing only insofar as those issues are within the scope of matters outlined in the notice of hearing on the licensing action).

⁷ FOE's Petition is available at ADAMS Package Accession No. ML14254A223.

⁸ See Friends of the Earth's Reply to NRC Staff's and Pacific Gas & Electric Company's Answers and Proposed *Amicus Curiae* Nuclear Energy Institute's Brief In Response to Petition to Intervene and Request for Hearing (Oct. 14, 2014) (Reply) (ADAMS Accession No. ML14287A788).

⁹ A *de facto* license amendment occurs when a completed agency action grants a licensee greater authority than that provided by its existing licenses or otherwise alters the terms of an existing license. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326-28 (1996) (*Perry*).

¹⁰ See *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 2, 7) (citing *Perry* and directing the Board to consider whether an NRC action identified in FOE's Petition or Reply constituted a *de facto* amendment of PG&E's existing licenses to operate Diablo Canyon). If so, the Board was directed to consider the threshold issue of whether FOE met the 10 C.F.R. § 2.309 requirements. *Id.* at 8.

- (1) the NRC Staff's March 2012 request for information to all power plant licensees pursuant to 10 C.F.R. § 50.54(f) (March 2012 § 50.54(f) Letter);
- (2) the NRC Staff's September 2012 Research Information Letter 12-01 (2012 RIL), which documented the Staff's assessment of the new Shoreline Fault information;
- (3) the NRC Staff's October 2012 letter to PG&E that summarized the results of the 2012 assessment and placed the Staff's further review of new information in the context of the NRC's section 50.54(f) letter requesting seismic reevaluations by all power reactor licensees; (October 2012 Letter)¹¹ and
- (4) the NRC Staff's supposed "approval" of PG&E's Updated Final Safety Analysis Report, Rev. 21 (UFSAR Rev. 21).¹²

Importantly, the Commission was aware when it made its referral that almost nine months had passed since FOE submitted its Petition. Likewise, the Commission was aware that Staff oversight activities had occurred between August 2014 and May 2015 and that further oversight activities were ongoing or planned for the future.¹³ Moreover, the Commission was aware that FOE filed a petition in the D.C. Circuit based on its UFSAR Rev. 21 *de facto* claims and that the D.C. Circuit ordered that proceeding held in abeyance on procedural grounds.¹⁴

With this knowledge, the Commission directed the Board to consider only the *de facto* claims in the pleadings already submitted,¹⁵ consider briefs from the Staff and PG&E

¹¹ *Id.* at 6-7 (citing FOE's Petition at 14-18, 21-22, 32-33, 42). These documents are available at ADAMS Accession Nos. ML12053A340, ML121230035, and ML120730106, respectively.

¹² *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 8) (summarizing FOE's claims that the Staff approved UFSAR Rev. 21 and that this constituted a *de facto* license amendment and was a "confirmation" of a *de facto* license amendment proceeding). UFSAR Rev. 21 is available at ADAMS Accession No. ML15098A461.

¹³ For example, the Commission was aware that the Staff's oversight related to the March 2012 § 50.54(f) letters continued and that licensee submittals in response to the letter were being reviewed by Staff. See, e.g., SECY-15-0059, *Seventh 6-Month Status Update on Response to Lessons Learned from Japan's March 11, 2011, Great Tohoku Earthquake and Subsequent Tsunami* (Apr. 9, 2015) (ADAMS Accession No. ML15069A540).

¹⁴ In fact, the NRC filed the motion seeking deferral. "Respondent's Motion to Defer Briefing Schedule," No. 14-12-13 (Feb. 26, 2015). See In the Matter of Pacific Gas & Electric Co., Docket Nos. 50-275, 50-323, Order No. 14-1213 (Apr. 13, 2015) (deferring consideration of the merits of FOE's UFSAR Rev. 21 claims pending the outcome of the administrative process at the NRC on FOE's Petition).

¹⁵ These pleadings included FOE's Petition, the Staff's and PG&E's answers to the Petition, the Nuclear Energy Institute's (NEI) *amicus* brief, and FOE's Reply. *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 7-8). Notably, the Commission did not refer any of the arguments or issues raised in the filings in the D.C. Circuit to the Board.

responding to the UFSAR Rev. 21 *de facto* claims raised in FOE's Reply, and rule on FOE's Petition within 140 days of May 21, 2015.¹⁶ The Board's June 2, 2015 Order scheduling oral argument repeated the limited scope of the matter referred and likewise noted that no additional briefing was contemplated.¹⁷ Importantly, the Commission did not refer to the Board any Staff actions taken after FOE's Petition and Reply were submitted or provide an opportunity for FOE to submit an additional brief on its UFSAR Rev. 21 claims. Such a limited referral is in line with past precedent¹⁸ and 10 C.F.R. § 2.309.¹⁹

II. FOE's Supplemental Brief Makes Arguments Beyond the Scope of This Proceeding

Given the limited scope of the Commission's referral, FOE's Supplemental Brief effectively asks the Board to contravene the directive in CLI-15-14. Specifically, FOE's Supplemental Brief requests that the Board consider whether subsequent NRC actions that have occurred since its Petition was submitted are *de facto* license amendments.²⁰ These subsequent actions are: (1) a May 13, 2015 NRC Letter to PG&E; (2) a December 2014 NRC Inspection Report; and (3) December 2014 testimony from Dr. Sam Blakeslee describing Staff oversight actions at Diablo Canyon.²¹ But the Commission did not refer these subsequent

¹⁶ See *id.* at 8-9.

¹⁷ See June 2, 2015 Order at 2-3. See also *id.* at 2 (providing Staff and PG&E an opportunity to submit a response to FOE's UFSAR Rev. 21 claims by June 15, 2015). The Staff and PG&E timely submitted these responses. See NRC Staff Answer to [FOE]'s *De Facto* License Amendment Claims Related to PG&E's [UFSAR Rev. 21] (June 15, 2015) (ADAMS Accession No. ML15166A504) (Staff's June 15, 2015 Brief); Pacific Gas and Electric Company's Supplemental Brief Regarding UFSAR Revision 21 (June 15, 2015) (ADAMS Accession No. ML15166A463).

¹⁸ See, e.g., *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 276-77 (1989). In *Seabrook*, petitioners claimed that a Staff Confirmatory Action Letter (CAL) constituted a *de facto* suspension triggering a sec. 189a hearing opportunity. *Id.* at 275-6. In considering this claim, the Board only considered whether the CAL *itself* constituted a *de facto* suspension and not licensee submittals in response to a CAL or Staff inspection activities, or future hypothetical Staff approval). *Id.* at 276. See *Seabrook*, ALAB-940, 32 NRC 225 (1990) (affirming LBP-89-28).

¹⁹ See 10 C.F.R. § 2.309 (providing for a petition to intervene, answers to the petitions, and an opportunity to reply but no additional filings).

²⁰ See FOE's Supplemental Brief at 1 (arguing that these events "bear on the question" before the Board and "demonstrate that the Staff has taken action that grants greater operating authority"). See also *id.* at 6 (claiming that the NRC's May 13, 2015 Letter "enlarged the terms of Diablo Canyon's licenses").

²¹ See FOE's Supplemental Brief at 5-6, 16-17, 18-20.

actions to the Board for its consideration or direct briefing on any of these subsequent Staff activities. Thus, if the Board were to consider whether these actions constituted *de facto* license amendments, the Board would impermissibly expand the scope of this proceeding.

Notably, FOE does not dispute this point.²² Instead, FOE argues that given the passage of time between the submission of its Petition and the Commission's referral, the Board must consider these actions to answer the question before it.²³ But FOE is mistaken on both points. The passage of time does not permit the Board to expand the scope of the Commission's referral.²⁴ Moreover, the Board does not need to consider the subsequent actions or additional arguments about an alleged Staff approval of UFSAR Rev. 21²⁵ to answer the question referred by the Commission.²⁶

In fact, the Board should not consider these subsequent actions or additional UFSAR Rev. 21 arguments in ruling on FOE's Petition. Instead, the Board should consider the filings specified in CLI-15-14²⁷ to determine whether the NRC's March 2012 § 50.54(f) Letter, the 2012 RIL, the October 2012 Letter, or the alleged Staff approval of UFSAR Rev. 21 constituted a *de*

²² In fact, FOE emphasizes that these subsequent actions have occurred in the time since it filed its Petition. See, e.g., FOE's Supplemental Brief at 1.

²³ See FOE's Motion to Allow Supplemental Briefing at 4-5.

²⁴ *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 171 (1976) (stating that a Board cannot enlarge the jurisdiction conferred by the Commission).

²⁵ Much of FOE's Supplemental Brief focuses on claims that the Staff allegedly approved UFSAR Rev. 21 and that this constitutes a *de facto* license amendment. These are claims that FOE has also raised in a Petition for Review before the D.C. Circuit. However, such supplemental briefing on this point is contrary to both the Commission's directive in CLI-15-14 and the Board's June 2, 2015 Order which only allowed PG&E and the Staff to submit a single brief responding to the UFSAR Rev. 21 claims raised in FOE's Reply. See *supra* at n. 15, 17.

²⁶ See FOE's Motion to Allow Supplemental Briefing at 5 (arguing that such briefing is necessary).

²⁷ These filings are: FOE's Petition, the Staff and PG&E's Answer to the Petition, NEI's *amicus* brief, FOE's Reply, and the Staff and PG&E's June 15, 2015 briefs responding to FOE's UFSAR Rev. 21 *de facto* claims. See *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 7-8).

facto license amendment under *Perry*.²⁸ As indicated in CLI-15-14, the specified pleadings fully brief the issues raised in FOE's Petition and Reply and referred to the Board.²⁹

III. FOE's *De Facto* Arguments Are Also Contrary to *Perry* and 10 C.F.R. § 2.309

At bottom, FOE argues that the Board must consider the subsequent actions newly identified in its Supplemental Brief and its additional arguments related to UFSAR Rev. 21 because they provide "updated information" that the Staff is conducting an "ongoing" *de facto* license amendment proceeding.³⁰ However, this line of argument is contrary to both *Perry* and 10 C.F.R. § 2.309.

As the Staff has explained, the *Perry de facto* license amendment framework does not recognize "ongoing" *de facto* license amendment proceedings.³¹ Instead, *Perry* directs the presiding officer to analyze a completed Staff action and determine whether that completed action augmented the licensee's operating authority or otherwise altered the terms of its license.³² Thus, the *Perry* analysis *looks back* at a finite and completed agency action; it does not involve *looking forward* or looking at a continuing series of interactions between the Staff and the licensee as the Staff conducts its oversight to "confirm" some ongoing license amendment process. For this reason, none of the subsequent Staff actions discussed in FOE's Supplemental Brief pertain to the issue before the Board (i.e., whether the already completed Staff actions raised in FOE's Petition and Reply constituted *de facto* license amendments).

²⁸ If the Board questions the scope of the Commission's referral, it could certify the question to the Commission. 10 C.F.R. §§ 2.319(l), 2.323(f); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-83-28, 17 NRC 987, 989 (1983).

²⁹ Contrary to FOE's claim, the D.C. Circuit's order did not "effectively refer" the issues and arguments raised in FOE's Petition for Review before the D. C. Circuit to the Board. See FOE's Motion to Allow Supplemental Briefing at 5-6. As noted, the Commission was aware of the D.C. Circuit litigation when it made its referral but did not refer those pleadings or arguments to this Board. Instead, the Commission directed the Board to rule on FOE's Petition based only on the briefs discussed in CLI-15-14.

³⁰ See FOE's Motion to Allow Supplemental Briefing at 1 (arguing that additional briefing "would aid the Board by including updated information necessary to determine whether the NRC Staff has *de facto* amended and continues to *de facto* amend the operating licenses for Diablo Canyon.").

³¹ See Staff's June 15, 2015 Brief at 6-8, 13. See Staff Answer to FOE's Petition at 25, 46.

³² *Perry*, CLI-93-13, 44 NRC at 327.

The only support FOE has offered for its assertion of an “ongoing” *de facto* license amendment proceeding is a citation to a vacated Board decision in a San Onofre Nuclear Generating Station (SONGS) proceeding.³³ But as discussed in the Staff’s June 15, 2015 Brief, the Commission explicitly held in CLI-15-14 that *Perry* provides the applicable *de facto* analysis and declined to adopt the reasoning in the Board’s SONGS decision. Thus, the Board should not consider FOE’s *de facto* claims under the SONGS’ “ongoing *de facto* license amendment” framework as doing so would be contrary to CLI-15-14 and *Perry*.

Further, the arguments contained in FOE’s Supplemental Brief are contrary to 10 C.F.R. § 2.309. Section 2.309 provides strict by design contention admissibility requirements that apply to every AEA section 189a hearing request, including hearing requests based on *de facto* claims.³⁴ Section 2.309 provides that a petitioner cannot amend its contentions at will. Instead, a petitioner must file a new or amended contention or a separate petition to allow for the consideration of additional claims.³⁵

As discussed above, FOE’s Petition requested a hearing based on claims that certain completed Staff actions constituted *de facto* license amendments; the Staff and PG&E answered these claims and FOE replied. The Commission then specified that the Board rule on FOE’s Petition based on a limited set of filings that did not include FOE’s Supplemental Brief. Thus, FOE cannot use its Supplemental Brief to add new contentions or amend its existing

³³ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307 (2013). In SONGS, the Board applied a different *de facto* analysis than the one applied in *Perry* because, among other things, instead of looking backward at a past completed agency action, it looked forward to possible future agency action. See *id.* at 333. While FOE’s Supplemental Brief does not cite to the SONGS decision, FOE’s Petition and Reply cited to this decision as support for its “ongoing” *de facto* claims. See Petition at 32; Reply at 25. These “ongoing” *de facto* claims are likewise made in FOE’s Supplemental Brief. See FOE’s Supplemental Brief at 1-2 (arguing that the subsequent events show that the Staff “is continuing to” *de facto* amend PG&E’s licenses).

³⁴ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsid. denied*, CLI-02-01, 55 NRC 1 (2002) (“Our contention rule is strict by design.”). See *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 8) (providing that the threshold issues of meeting 10 C.F.R. § 2.309 apply).

³⁵ 10 C.F.R. § 2.309.

contentions unless it meets the late-filed criteria in 10 C.F.R. § 2.309(c). FOE's Supplemental Brief does not address much less meet these requirements.³⁶ Therefore, FOE's Supplemental Brief is contrary to 10 C.F.R. § 2.309(c) to the extent that it identifies new Staff actions it claims are *de facto* license amendments and augments arguments made in its Petition or Reply.³⁷

As noted in the Staff's Answer Opposing FOE's Motion to Allow Supplemental Briefing, if FOE wants to submit a new contention or amend its existing contentions, it can do so.³⁸ However, FOE cannot modify its contentions in this or any other proceeding without meeting the 10 C.F.R. § 2.309 requirements.³⁹

IV. FOE's Supplemental Brief Does Not Identify a *De Facto* License Amendment

Even if the Board determines that the subsequent actions and additional UFSAR Rev. 21 arguments in FOE's Supplemental Brief are part of the CLI-15-14 referral, the Board should still deny FOE's Petition. As discussed briefly below,⁴⁰ FOE's Supplemental Brief does not identify a *de facto* license amendment based on any subsequent Staff action. Instead, FOE's claims relate to FOE's concern that Diablo Canyon is not safe to operate given new seismic information.⁴¹ But these concerns do not pertain to the relevant question of whether there is a *de facto* license amendment. Further, these safety concerns are not properly before this Board.

³⁶ See *Florida Power & Light Co.*(Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-06-21, 64 NRC 30, 33-34 (2006) (noting that a petitioner's failure to address the late filed factors in 10 C.F.R. § 2.309 is reason enough to reject the contention).

³⁷ In particular, FOE uses its Supplemental Brief to augment its UFSAR Rev. 21 arguments. See, e.g., FOE's Supplemental Brief at 10-18 and Exhibit 2 (Letter from Dr. Michael Peck to Sen. Barbara Boxer (Jan. 22, 2015) (ADAMS Accession No. ML15170A453)) (making UFSAR Rev. 21 *de facto* claims).

³⁸ See Staff Answer Opposing [FOE's] Motion to Allow Supplemental Briefing. FOE could also submit a new petition to intervene based on the separate Staff actions discussed in its Supplemental Brief.

³⁹ See *Calvert Cliffs*, CLI-06-21, 64 NRC at 33-34.

⁴⁰ The Staff's position is that briefing on these subsequent Staff actions is not relevant to the issue before the Board and therefore the Staff is not submitting extensive briefing on these matters.

⁴¹ See, e.g., FOE's Supplemental Brief at 8.

Instead, the Commission separately referred these concerns to the Executive Director for Operations (EDO) to be considered under 10 C.F.R. § 2.206.⁴²

First, FOE has not shown that the Staff's May 13, 2015 letter constitutes a *de facto* license amendment. FOE claims that the Staff's May 13, 2015 letter "had the effect of augmenting the plain terms of the licenses' seismic design basis to include an extra-design basis [ground motion] response spectrum."⁴³ In support of this argument, FOE claims that PG&E's March 2015 report shows that "PG&E is unable to comply with important conditions in the plant's operating licenses."⁴⁴ FOE argues that the Staff's May 13, 2015 letter "endorses" PG&E's plan to address this supposed non-compliance and that this granted PG&E additional operating authority.⁴⁵

Contrary to FOE's claim, the Staff's May 13, 2015 letter is not a *de facto* license amendment.⁴⁶ Instead, the Staff's May 13, 2015 letter simply confirms that PG&E is following the established 10 C.F.R. § 50.54(f) process that was outlined in the Staff's March 2012 § 50.54(f) Letter.⁴⁷ In response to the Staff's March 2012 § 50.54(f) Letter, PG&E submitted its March 2015 report. That report indicated that PG&E screened in to Category 1.⁴⁸ The Staff's

⁴² See *Diablo Canyon*, CLI-15-14, 81 NRC at ___ (slip op. at 12) (referring FOE's claims to EDO).

⁴³ FOE's Supplemental Brief at 2, 6-7. *Id.* at 4 (claiming the ground motion response spectrum "adds a 35% design margin onto the Hosgri evaluation"). FOE also repeats claims already made in its Petition. See, e.g., *id.* at 8 (arguing that the "post-Fukushima process under 10 C.F.R. § 50.54(f) is not a substitute for the statutory requirement to comply with license terms and follow statutorily mandated procedures in order to amend a license."). The Staff already responded to these claims in its answer to FOE's Petition. See Staff's Answer to FOE's Petition at 24-26 (ADAMS Accession No. ML14279A573).

⁴⁴ FOE's Supplemental Brief at 2.

⁴⁵ *Id.*

⁴⁶ The May 13, 2015 letter is also not a "retreat" from a previous Staff position that a license amendment was required. See FOE's Supplemental Brief at 3. Further, the Staff did not "direct[] [PG&E] to request a *de facto* amendment." *Id.* at 7.

⁴⁷ As the Staff explained in its Answer to FOE's Petition, the section 50.54(f) process is an ongoing oversight matter for all operating plants. The process began with the issuance of the Staff's March 2012 § 50.54 Letter. See Staff's Answer to FOE's Petition at 24-26 (discussing why the March 2012 § 50.54(f) Letter does not constitute a *de facto* license amendment).

⁴⁸ Diablo Canyon was not unique in this regard. Other plants screened in to this same category. See NRC letter regarding Seismic Screening and Prioritization Results for WUS Licensees (May 13, 2015) (ADAMS Accession No. ML15113B344).

May 13, 2015 letter confirmed next steps (i.e., PG&E will submit further analysis to the NRC in 2017). Nothing in the Staff's May 13, 2015 letter amends PG&E's license or grants PG&E greater authority. While future license amendments are always possible as part of the § 50.54(f) process,⁴⁹ the possibility of a future license amendment does not trigger a hearing right now.⁵⁰

Second, FOE has not shown that the Staff's December 2014 Inspection Report is a *de facto* license amendment. FOE claims that this inspection report approved PG&E's determination of operability and accepted PG&E's assumptions, methodologies, and conclusions used in PG&E's California Seismic Imaging Project Report.⁵¹ Given this, FOE argues that the Staff's December 2014 Inspection Report granted PG&E additional authority than is authorized by the plant's licenses.⁵² But as the Commission has explained, the NRC's inspection process is separate from its licensing process.⁵³ Staff oversight activities that ensure compliance with existing requirements do not constitute *de facto* license amendments. Thus, NRC inspection reports, even inspection reports documenting violations, are not *de facto* license amendments.⁵⁴

Third, FOE has not shown that Dr. Blakeslee's testimony from the December 2014 Senate Committee hearing constitutes a *de facto* license amendment. FOE claims that Dr. Blakeslee's testimony describes the "significance of the Staff's willingness to allow PG&E free

⁴⁹ The Staff will review the 2017 analysis and determine if any licensing basis changes are needed.

⁵⁰ *Omaha Pub. Power Dist.* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC at __ (slip op. at 10) (ADMAS Accession No. ML15068A396) ("the prospect of a possible future license amendment does not trigger hearing rights now").

⁵¹ FOE's Supplemental Brief at 19. See *id.* at 20.

⁵² *Id.*

⁵³ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 NRC 167, 174 (2014).

⁵⁴ *Fort Calhoun*, CLI-15-5 81 NRC at __ (slip op. at 10). See also *Diablo Canyon*, CLI-15-14, 81 NRC __ (slip op. at 12) (referring FOE's claims related to asserted violations of the plant's licensing basis to the EDO for consideration under 10 C.F.R. § 2.206).

rein to substitute revised methods of analysis” in the Diablo Canyon UFSAR.⁵⁵ As an initial matter, this testimony is not a Staff action. Therefore, it cannot constitute a *de facto* license amendment.⁵⁶ Moreover, the testimony does not identify a Staff action that constituted a *de facto* license amendment. Instead, it describes “PG&E’s changes to its [ground motion prediction methodologies. . .].”⁵⁷ But PG&E’s unapproved changes to its UFSAR under 10 C.F.R. § 50.59 do not constitute *de facto* license amendments.⁵⁸ While Dr. Blakeslee’s testimony reveals that he shares FOE’s concern about the safe operation of Diablo Canyon, this concern is not before the Board.

Finally, FOE has not shown that an alleged NRC approval of UFSAR Rev. 21 constitutes a *de facto* license amendment. FOE claims that PG&E “at the Staff’s direction, has made changes to the seismic design basis through [UFSAR Rev. 21], which were then endorsed by the Staff.”⁵⁹ FOE claims that since its Petition was filed, this alleged change made by UFSAR Rev. 21 has been made public, and this “public disclosure” bears on the question of whether the Staff has “*de facto* amended” the Diablo Canyon licenses.⁶⁰

But FOE’s Supplemental Brief does not indicate how any NRC Staff approval or action related to UFSAR Rev. 21 constitutes a *de facto* license amendment. Instead, FOE repeats arguments made in its Reply.⁶¹ Thus, FOE’s UFSAR Rev. 21 arguments are already before the Board and fully briefed as directed in CLI-15-14. While FOE’s Supplemental Brief points to new

⁵⁵ FOE’s Supplemental Brief at 16. See *id.* at Exhibit 3 (Dec. 3, 2014) (ADAMS Accession No. ML15170A454) (providing Dr. Blakeslee’s testimony).

⁵⁶ See *St. Lucie*, CLI-14-11, 80 NRC at 173-75 (agency action can constitute *de facto* license amendment not unilateral licensee activity).

⁵⁷ FOE’s Supplemental Brief at 16 (emphasis added).

⁵⁸ See *St. Lucie*, CLI-14-11, 80 NRC at 175 (unapproved unilateral licensee actions are not *de facto* license amendments).

⁵⁹ FOE’s Supplemental Brief at 1. See *id.* at 2 (claiming Staff approved changes to the design basis made in UFSAR Rev. 21).

⁶⁰ *Id.* at 1.

⁶¹ See, e.g., FOE’s Reply at 17-19 (citing the Staff’s October 2012 Letter). See FOE’s Supplemental Brief at 9 (citing to the Staff’s October 2012 Letter and claiming that the letter directed PG&E to update its UFSAR to incorporate new seismic data).

documents to support its claims,⁶² FOE does not indicate how those documents constitute or confirm a *de facto* license amendment. As the Staff explained in detail in its June 15, 2015 Brief, FOE has not shown how any NRC Staff action related to UFSAR Rev. 21 constitutes a *de facto* license amendment.⁶³

CONCLUSION

For the reasons stated above, the subsequent Staff actions and additional UFSAR Rev. 21 arguments in FOE's Supplemental Brief are not issues referred to this Board. In any event, FOE's Supplemental Brief does not identify or confirm any *de facto* license amendment triggering sec. 189a. hearing rights. Therefore, the Board should deny FOE's Petition.

Respectfully submitted,

/Signed (electronically) by/

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Dated: June 26, 2015

⁶² See, e.g., FOE's Supplemental Brief at 13 n. 52 and Exhibit 2 (Letter from Dr. Michael Peck to Sen. Barbara Boxer (Jan. 22, 2015)).

⁶³ See Staff's June 15, 2015 Brief. Notably, the Staff's June 15, 2015 Brief explained why the NRC's June 23, 2014 Memorandum from Peter J. Bamford did not constitute an approval or a *de facto* license amendment. *Id.* at 9-12.

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Units 1 and 2))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO THE FRIENDS OF THE EARTH'S SUPPLEMENTAL BRIEF," dated June 26, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 26th day of June, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 26th day of June, 2015