

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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FRIENDS OF THE EARTH	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
UNITED STATES NUCLEAR	)	
REGULATORY COMMISSION	)	
and the UNITED STATES OF AMERICA,	)	No. 14-1213
	)	
Respondents,	)	
	)	
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	)	
PACIFIC GAS AND ELECTRIC COMPANY,	)	
	)	
Intervenor	)	
_____	)	

**INTERVENOR’S RESPONSE TO MOTIONS  
TO GOVERN PROCEEDINGS**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Intervenor Pacific Gas and Electric Company (“PG&E”) hereby responds to: (1) the Petitioner’s Motion to Set Briefing Schedule and Order Oral Argument, dated September 15, 2015 (“Petitioner’s Motion”); and (2) Federal Respondents’ Motion

to Continue this Case in Abeyance, dated that same day (“Respondents’ Motion”). PG&E opposes the Petitioner’s Motion and supports the Respondents’ Motion.

### **ARGUMENT**

1. By Order of April 13, 2015, the Court held this case in abeyance and directed the parties to file motions to govern future proceedings on September 15, 2015. In their motion, the Federal Respondents seek to continue to hold the case in abeyance pending completion of the administrative proceedings at the Nuclear Regulatory Commission (“NRC” or “Commission”) encompassing the same issues as presented in this matter. PG&E concurs.

Petitioner asserts in this Court that the NRC has “approved” PG&E’s Revision 21 of its Updated Final Safety Analysis Report for the Diablo Canyon Power Plant (“Revision 21”), and that this approval was a license amendment for which Petitioner was entitled to a hearing. This very issue — Petitioner’s “de facto license amendment argument” — was made by Petitioner in connection with a request for hearing at the agency. That request for hearing remains pending before an NRC administrative board as described in the Respondents’ Motion (at 3).<sup>1</sup> The Commission’s ultimate action on the Petitioner’s administrative hearing request

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<sup>1</sup> This fact is also central to the Respondents’ motion to dismiss dated December 10, 2014. PG&E supported that motion on December 28, 2014. The motion to dismiss and response provide further detail regarding Revision 21, the NRC’s regulations that apply to such revisions, and the Petitioner’s hearing request still before the NRC. The motion to dismiss has been referred to the merits panel.

will moot this matter either because the agency grants a hearing or because the Commission issues a reviewable final order denying a hearing.

As the Respondents explain, if the Petitioner is disappointed by the outcome of the administrative proceeding, any subsequent review in this Court will be based on the administrative record, including adjudicatory decisions by the NRC's administrative board and the Commission itself on any appeal. Respondents' Motion at 4-5. Continuing to hold this case in abeyance will promote judicial economy and efficiency as well as sound judicial decision-making without any prejudice to Petitioner.

2. In its motion, Petitioner seeks an order to move forward by setting a briefing schedule and oral argument, and to "commence consideration" of its pending motion to supplement the record.<sup>2</sup> Its bases for moving forward are deeply flawed.

First, Petitioner suggests that Respondents "erroneously contend" that the hearing request pending at the NRC raises similar issues to those raised by the petition for review in this Court. Petitioner's Motion at 3. Without elaboration, Petitioner sees NRC's "approval" of Revision 21 as "a separate, independent, and final agency action that is ripe for review." *Id.* at n. 3. But these assertions are

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<sup>2</sup> The Petitioner's motion to supplement the certified index of record was filed on March 25, 2014. PG&E opposed that motion on April 9, 2014. In its Order the Court deferred consideration of the motion pending further order of the Court.

simply not true. Petitioner's hearing request before the agency argues that the NRC staff, by a number of different actions or omissions, "amended" the operating license (and licensing basis) for the Diablo Canyon Power Plant and therefore that Petitioner is entitled under the Atomic Energy Act to a hearing on the changes. NRC staff's purported "approval" of Revision 21 is certainly one basis for the hearing request that the Petitioner has asserted below. The agency's final decision on that request will necessarily address Petitioner's argument. Whether or not there was an "approval" associated with Revision 21, whether one was required, and whether Revision 21 amended the license are therefore issues still before the agency. Even if the eventual Commission decision on the Petitioner's hearing request is perceived as separate from the purported "approval" of Revision 21 that has already occurred, the arguments that are before the Court are still before the agency at this time.

Petitioner argues that recognizing the congruence of issues will disrupt normal appellate procedure because issues of exhaustion and finality are to be addressed at the merits phase. Petitioner's Motion at 3-4. But the Respondents are not asking, in the current motion, that this case be dismissed for failure to exhaust or lack of finality.<sup>3</sup> Respondents are only asking the Court to continue to hold the

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<sup>3</sup> Those matters are pending in the motion to dismiss that has been referred to the merits panel.

case in abeyance as a matter of judicial economy and efficiency. This is a matter of case management that need not and cannot be deferred to the merits phase. Petitioner's reliance on *Far East Conference v. United States*, 342 U.S. 570 (1952), is not only misplaced, it is misleading. The Supreme Court in that case recognized the importance of allowing the agency with "administrative expertise" to address a matter first. *Id.* at 576. Then, in the passage relied upon by Petitioner, the Court in fact held that the case be dismissed rather than that it be held in abeyance. *Id.* at 577. The Supreme Court certainly did not order that briefing and consideration of the issues in the case move forward.

Second, Petitioner argues that "[f]urther abeyance would also prevent Petitioner from advancing its merits arguments in a timely fashion," and that "[e]xpedition is particularly important in a case such as this, which involves the safety of an operating nuclear plant." Petitioner's Motion at 5. However, there is no factual predicate for this assertion, no motion for stay of any agency action, and no reference to any specific assertions of current or imminent safety implications in the administrative process below. In fact, Diablo Canyon Power Plant remains under active safety oversight by the NRC, and every assessment to date of seismic safety by PG&E and the NRC staff relevant to Petitioner's issue has concluded that the plant is operating safely. And this Court is not even being asked by Petitioner to review a substantive safety finding; Petitioner is instead raising a legal issue of

procedure in seeking a hearing. It is again misleading for the Petitioner to suggest that resumption of this case is necessary for safety reasons.

Third, Petitioner takes issue with Respondents' argument that the administrative process must be completed in order for the agency to take a position on the merits of Petitioner's argument that Revision 21 required a hearing opportunity. Petitioner argues that the "Respondents attorneys *have already* adopted a litigation position" on the issue. Petitioner's Motion at 7 (emphasis in original). Petitioner provides as an exhibit the *NRC staff* brief filed with the administrative board. This NRC staff brief, of course, is not a Commission position. The Commission has not yet acted in its administrative capacity to take final agency action on the issues raised by the Petitioner. Therefore, contrary to Petitioner's assertion (*id.* at 8) that the agency in the present forum can take whatever position they deem appropriate, Respondents are in fact in a position where — quite reasonably — they do not want to pre-judge the outcome of the agency's own administrative process. Holding this matter in abeyance resolves that issue.<sup>4</sup>

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<sup>4</sup> Petitioner also suggests Commission impropriety in "attempting to hold off the Court's review by sending the matter on a detour" through an administrative board. *Id.* at 9. This charge is baseless. Petitioner chose to file a hearing request at the Commission (as opposed, for example, to seeking NRC enforcement action under 10 C.F.R. § 2.206). The Commission could have addressed the hearing request, but acted well within its discretion, and consistent with normal procedure for hearing requests, in referring the matter to a board for an initial decision. While the process has taken some time, perhaps owing to the novelty and complexity of the Petitioner's issues, it is a straightforward

## **CONCLUSION**

The Federal Respondents' Motion should be granted and the case should continue to be held in abeyance pending final agency action. Petitioner's Motion should be denied.

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/s/ signed electronically by  
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Dated: September 25, 2015

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administrative referral — hardly the “bureaucratic maze” described by Petitioner (*id.* at 10).

I hereby certify that on this 25<sup>th</sup> day of September 2015, copies of “Intervenor’s Response to Motions to Govern Proceedings” in the captioned proceeding have been served by Electronic Case Filing (“ECF”).



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