

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

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

Docket No. 50-275-LR

Docket No. 50-323-LR

ASLBP No. 10-900-01-LR-BD01

October 21, 2015

MEMORANDUM AND ORDER

(Denying Motion to File Amended Contention, Granting Summary Disposition, and
Terminating Proceeding)

This proceeding concerns an application by Pacific Gas & Electric Company (PG&E) to renew its operating licenses for two nuclear power reactors at the Diablo Canyon Nuclear Power Plant located near San Luis Obispo, California.¹

Before the Board are motions (1) by intervenor San Luis Obispo Mothers for Peace (SLOMFP) to file an Amended Contention C,² and (2) by PG&E for summary disposition on

¹ The background of this proceeding is set forth in prior decisions of the Board and of the Commission. See, e.g., LBP-10-15, 72 NRC 257, 273-75 (2010); CLI-11-11, 74 NRC 427, 429-31 (2011); LBP-15-6, 81 NRC 314, 316 (2015); Licensing Board Memorandum and Order (Denying Motions to File New Contentions) (Aug. 6, 2015) at 2-4 (unpublished) (August Order).

² San Luis Obispo Mothers for Peace's Motion to File Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation) (July 31, 2015) (SLOMFP Motion).

Contention EC-1.³ For the reasons set forth below, we deny the first motion, grant the second, and—in the absence of any contention—terminate the proceeding.

I. BACKGROUND

On January 21, 2010, the NRC published a Federal Register notice of an opportunity for a hearing on PG&E's license renewal application.⁴ SLOMFP filed a timely petition to intervene, which the Board granted.⁵ After review by the Commission, one admitted contention—Contention EC-1—remained.⁶ Contention EC-1 is a contention of omission that alleges PG&E failed, in the severe accident mitigation alternatives (SAMA) analysis required by 10 C.F.R. § 51.53(c)(3)(ii)(L), to discuss a recently-discovered fault (the Shoreline Fault) located near the plant.⁷

Subsequently, both SLOMFP and another petitioner moved to admit additional contentions,⁸ which the Board rejected.⁹ Of especial relevance is SLOMFP's motion, filed April 15, 2015, to admit Contention C. Contention C alleged that—although PG&E's SAMA

³ Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1 (July 31, 2015).

⁴ 75 Fed. Reg. 3493, 3493 (Jan. 21, 2010).

⁵ LBP-10-15, 72 NRC at 345.

⁶ CLI-11-11, 74 NRC at 437, 444, 452, 458.

⁷ Id. at 444; see also Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) at 8-20.

⁸ Friends of the Earth's Request for a Hearing and Petition to Intervene (Oct. 10, 2014); San Luis Obispo Mothers for Peace's Motion to File New Contentions Regarding Adequacy of Environmental Report for Diablo Canyon License Renewal Application (Apr. 6, 2015); San Luis Obispo Mothers for Peace's Motion to File New Contentions Regarding Adequacy of Severe Accident Mitigation Alternatives Analysis for Diablo Canyon License Renewal Application (Apr. 15, 2015) (Motion on Proposed Contentions C and D).

⁹ LBP-15-06, 81 NRC at 315; August Order at 1.

analysis now addressed the Shoreline Fault—its analysis still failed to adequately account for seismic hazards at the facility.¹⁰

On July 31, 2015, shortly before the Board ruled the original Contention C inadmissible,¹¹ SLOMFP moved to amend Contention C in response to PG&E's further updating its SAMA analysis.¹² On the same day, PG&E moved for summary disposition on the only admitted contention (Contention EC-1).

On August 13, 2015, the NRC Staff submitted a response supporting PG&E's summary disposition motion.¹³ On August 25, 2015, PG&E and the Staff submitted oppositions to SLOMFP's motion to amend Contention C.¹⁴ With the parties' consent, the Board allowed SLOMFP until September 14, 2015 to respond to PG&E's summary disposition motion and to reply in support of its motion to amend.¹⁵

¹⁰ Motion on Proposed Contentions C and D at 2-15.

¹¹ August Order at 16-17.

¹² SLOMFP Motion at 1-2.

¹³ NRC Staff Answer to Pacific Gas and Electric Company's Motion for Summary Disposition on Contention EC-1 (Aug. 13, 2015) (NRC Staff Answer to PG&E's Motion).

¹⁴ Pacific Gas and Electric Company's Answer Opposing Proposed Amended Contention C (Aug. 25, 2015) (PG&E Answer to SLOMFP's Motion); NRC Staff Answer to San Luis Obispo Mothers for Peace's Motion to File Amended Contention C (Aug. 25, 2015) (NRC Staff Answer to SLOMFP's Motion).

¹⁵ Licensing Board Order (Granting Unopposed Motion for Extension of Time) (Aug. 3, 2015) (unpublished) (Order Granting Extension of Time); Licensing Board Order (Granting Unopposed Motion for Extension of Time) (Aug. 25, 2015) (unpublished).

II. ANALYSIS

A. Motion to File Amended Contention C

As SLOMFP acknowledges, “Amended Contention C is based to a significant extent on SLOMFP’s original Contention C,”¹⁶ which the Board previously rejected as inadmissible.¹⁷ As first proffered, Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis) stated:

PG&E’s SAMA Analysis (Appendix F of PG&E’s Amended ER) is inadequate to satisfy the National Environmental Policy Act or NRC implementing regulation 10 C.F.R. § 51.53(c)(ii)(L) because PG&E’s evaluation of potential mitigation measures is not based on a sufficiently rigorous or up-to-date analysis of seismic risks. As a result, PG&E’s evaluation of the comparative costs and benefits of measures to prevent or mitigate the effects of a severe earthquake does not sufficiently credit the cost-effectiveness of mitigation measures.

While PG&E claims that the “results and insights” of its 2014 “interim” probabilistic risk analysis (“PRA”) (labeled “DCO3”) are “reasonable for the purposes of a SAMA analysis,” by PG&E’s own admission, DCO3 is only an “interim” PRA. In addition, it is not sufficiently rigorous or updated to support the SAMA analysis.

Nor does PG&E’s promise to “update” the DCO3 with the “results” of its 2015 seismic hazards analysis cure the inadequacy of DCO3 to support PG&E’s SAMA Analysis, because PG&E’s 2015 seismic hazards analysis is also insufficiently rigorous and relies on outdated or unjustified methods and assumptions. Given the inadequacies of PG&E’s seismic hazards analysis, to merely cite its “results” in a revised SAMA Analysis would not be sufficient to ensure the adequacy of the SAMA Analysis to evaluate potential mitigation measures for severe seismic accidents. Instead, PG&E must cure the significant defects in the underlying data and analyses.¹⁸

As more fully explained in our August 6, 2015 Memorandum and Order, the Board determined that, for three separate and independent reasons, Contention C failed to satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

¹⁶ San Luis Obispo Mothers for Peace’s Reply to Oppositions to File Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation) (Sept. 14, 2015) at 1 (Reply).

¹⁷ August Order at 16-17.

¹⁸ Motion on Proposed Contentions C and D at 2-3 (internal citations omitted).

First, insofar as Contention C alleged deficiencies per se in the seismic reevaluation that PG&E submitted in a Part 50 process designed to consider the adequacy of the Diablo Canyon plant's current licensing basis, the Board ruled that a Part 54 license renewal proceeding is not a proper forum for litigation of section 50.54(f) licensing basis issues with no connection to any SAMA.¹⁹

Second, SLOMFP failed to make a plausible showing that PG&E's approach to SAMAs was not reasonable.²⁰ As the Commission has recognized, "[i]t will always be possible to envision and propose some alternate approach, some additional detail to include, some refinement."²¹ But that, without more, does not demonstrate a genuine dispute suitable for an evidentiary hearing, as required by 10 C.F.R. § 2.309(f)(1)(vi). The proper question, the Commission has stated, "is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA."²² "Unless a petitioner sets forth a supported contention pointing to an apparent error or deficiency that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing."²³

¹⁹ August Order at 16.

²⁰ Id.

²¹ Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc., (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

²² FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC 393, 406 (2012) (citing NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 323 (2012)). Although a SAMA analysis considers safety issues, it is in actuality an environmental review that must be judged under NEPA's "rule of reason" and not under the safety requirements of the Atomic Energy Act. See Pilgrim, CLI-12-15, 75 NRC at 706-07.

²³ Davis-Besse, CLI-12-08, 75 NRC at 407.

Third, although the purpose of SAMA analyses is to identify safety enhancements that would be cost beneficial to adopt,²⁴ Contention C never addressed the potential impact of any particular seismic model change on the cost-benefit evaluations of the SAMAs that PG&E considered.²⁵ As the Commission has emphasized, the relevant issue “is whether any additional SAMA should have been identified as potentially cost beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis.”²⁶

Amended Contention C states:

PG&E’s SAMA Analysis (Appendix F of PG&E’s Amended Environmental Report), as supplemented by the SHU-SAMA Evaluation, is inadequate to satisfy NEPA or NRC implementing regulation 10 C.F.R. § 51.53(c)(ii)(L) because PG&E’s evaluation of potential mitigation measures is not based on a sufficiently rigorous or up-to-date analysis of seismic risks. In addition, PG&E fails to take into account all relevant earthquake characteristics that could affect the SAMA analysis, even though PG&E’s seismic hazards analysis provides information about these characteristics. As a result of these deficiencies, PG&E’s evaluation of the comparative costs and benefits of measures to prevent or mitigate the effects of a severe earthquake does not sufficiently credit the cost-effectiveness of mitigation measures.

While PG&E claims that the “results and insights” of its 2014 “interim” probabilistic risk analysis (“PRA”) (labeled “DCO3”) are “reasonable for the purposes of a SAMA analysis[,]” by PG&E’s own admission, DCO3 is only an “interim” PRA. In addition, it is not sufficiently rigorous or updated to support the SAMA analysis.

Nor does PG&E’s recent “update” of the DCO3 with the “results” of its 2015 seismic hazards analysis cure the inadequacy of DCO3 to support PG&E’s SAMA Analysis, because PG&E’s 2015 seismic hazards analysis is also insufficiently rigorous and relies on outdated or unjustified methods and assumptions. Given the inadequacies of PG&E’s seismic hazards analysis, to merely cite its “results” in the SHU-SAMA Evaluation is not sufficient to ensure the adequacy of the SAMA Analysis to evaluate potential mitigation measures for severe seismic accidents. Instead, PG&E must cure the significant defects in the underlying data and analyses.

²⁴ See Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 290-91 (2010), pet. for reconsideration denied, CLI-10-15, 71 NRC 479 (2010).

²⁵ See August Order at 17.

²⁶ Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009).

Finally, the SHU-SAMA Evaluation is unreasonably restricted to the consideration of the effects of spectral acceleration on the Diablo Canyon Nuclear Power Plant. The only information from the SSC or SHS Report that is presented in the SHU-SAMA Evaluation is a table showing seismic initiating event frequencies. The SHU-SAMA Evaluation fails to consider other measures of ground motion that could cause reasonably foreseeable adverse environmental impacts on Diablo Canyon that are more extreme than or different from the impacts of spectral acceleration. These factors include surface fault rupture, ground displacement, ground velocity, and duration of shaking.²⁷

Beyond recognizing that PG&E most recently updated its SAMA analysis on July 1, 2015, Amended Contention C differs from the original contention in one significant way. SLOMFP now alleges that PG&E unreasonably restricted its analysis to considering the effects of spectral acceleration. It contends that PG&E should also have analyzed other measures of ground motion, including surface fault rupture, ground displacement, ground velocity, and duration of shaking.

Amended Contention C fails to satisfy the admissibility criteria of 10 C.F.R. § 2.309(f)(1)²⁸ for essentially the same reasons as the original version.

²⁷ SLOMFP Motion at 3-4 (internal citations and footnote omitted).

²⁸ Insofar as relevant, 10 C.F.R. § 2.309(f)(1) requires that, for each proffered contention, a petition must:

(i) Provide a specific statement of the issue of law or fact to be raised . . . ; (ii) Provide a brief explanation of the basis for the contention; (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position . . . ; (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application

First, insofar as “Amended Contention C is based to a significant extent on SLOMFP’s original Contention C,”²⁹ as SLOMFP itself recognizes, it suffers from identical deficiencies, which are addressed in the Board’s Memorandum and Order of August 6, 2015.³⁰

Second, insofar as Amended Contention C sets forth new allegations, it suffers from similar deficiencies. It is not enough to suggest a preferred method for performing a SAMA analysis. SLOMFP must come forward with a plausible demonstration that PG&E’s existing analysis is unreasonable. SLOMFP fails to allege that considering ground displacement, ground velocity or shaking duration would materially change any conclusions regarding the cost-effectiveness of particular SAMAs.

Likewise, SLOMFP does not explain how incorporation of surface fault rupture into the SAMA analysis would make a material difference or how the analysis is unreasonable because PG&E did not consider it. On the contrary, SLOMFP fails to address PG&E studies that considered the potential for surface fault rupture and determined that “the ground at and near the [Diablo Canyon] site has not been displaced by faulting for at least 80,000 to 120,000 years.”³¹ Nor has SLOMFP shown how consideration of surface fault rupture would make a material difference in any SAMA analysis conclusions.

Amended Contention C is not admitted.³²

²⁹ Reply at 1.

³⁰ August Order at 16-17.

³¹ PG&E, Diablo Canyon Power Plant Units 1 and 2, Final Safety Analysis Report Update, at 2.5-2 & 2.5-67 (Rev. 21 Sept. 2013) (ADAMS Accession No. ML15098A461).

³² PG&E and the NRC Staff also contend that Amended Contention C is not timely. PG&E Answer to SLOMFP’s Motion at 10-12; NRC Staff Answer to SLOMFP’s Motion at 14. Although submitted within 30 days of PG&E’s updated SAMA analysis, consistent with the definition of “timely” in the Second Revised Scheduling Order issued on March 26, 2014, PG&E and the Staff nonetheless assert that the new arguments in Amended Contention C could have and should have been asserted earlier. Specifically, SLOMFP’s claims concerning PG&E’s alleged failure to consider additional measures of ground motion are not based on information that differed materially from information that was available before PG&E’s most recent SAMA update. See 10 C.F.R. § 2.309(c)(1)(i)-(iii). Because the Board concludes that Amended

B. Motion for Summary Disposition on Contention EC-1

Pursuant to 10 C.F.R. § 2.1205, PG&E moves for summary disposition on Contention EC-1. Contention EC-1 is a contention of omission alleging PG&E failed to address the Shoreline Fault in the SAMA analysis submitted as part of the initial renewal application for Diablo Canyon. Quite apart from the adequacy of PG&E's treatment of the Shoreline Fault in its updated SAMA analysis (discussed above), it is undisputed that PG&E's analysis no longer omits the Shoreline Fault. PG&E therefore asserts that Contention EC-1 is now moot.

The NRC Staff agrees.³³ In its decision concerning PG&E's appeal of the Board's initial contention admissibility ruling, it appears the Commission anticipated this very situation, and would agree as well: "If SLOMFP intends to challenge the adequacy of any information that PG&E provides in a revision or supplement to its license renewal application regarding the Shoreline Fault, it must submit a new or amended contention."³⁴ Plainly, Contention EC-1, as originally submitted, is now moot.

SLOMFP does not argue otherwise. Rather, it opposes summary disposition on Contention EC-1 solely on the ground that, as SLOMFP interprets the Second Revised Scheduling Order, PG&E's motion is allegedly premature. As SLOMFP would have it, the Board should defer dismissing EC-1 until after the Staff issues a draft supplemental environmental impact statement—presently expected in August 2016.³⁵ Despite the absence of any viable contention, SLOMFP would have the Board hold open this proceeding for nearly another year, at a minimum.

Contention C is not admissible because of its failure to satisfy 10 C.F.R. § 2.309(f)(1), we need not rule on its timeliness.

³³ NRC Staff Answer to PG&E's Motion at 4-5.

³⁴ CLI-11-11, 74 NRC at 443 n.92.

³⁵ San Luis Obispo Mothers for Peace's Response to Pacific Gas & Electric Company's Motion for Summary Disposition of Contention EC-1 (Sept. 14, 2015) at 2 n.1, 3-4.

Such a construction of our scheduling orders is inconsistent with their purpose and contrary to the Commission's direction that a Licensing Board's "jurisdiction terminates when there are no longer any contested matters pending before it."³⁶ As stated at the outset of our Initial Scheduling Order, the purpose of scheduling orders is to ensure proper case management, with the objective of "[e]xpediting the disposition of the proceeding; [e]stablishing early and continuing control so that the proceeding will not be protracted because of lack of management" and "[d]iscouraging wasteful prehearing activities."³⁷

The purpose of scheduling orders is not to vest in any party a right to invoke their provisions to achieve the opposite of the Board's intended objectives. Rather, unless a schedule is so onerous or unfair that it deprives a party of procedural due process, "scheduling is a matter of Licensing Board discretion."³⁸ A Licensing Board may modify or waive the provisions of its scheduling orders as it deems appropriate in the interest of sound case management.³⁹

The exercise of such discretion is especially appropriate here. SLOMFP's suggestion that this adjudication should continue, while it is clear that no genuinely contested matter remains pending before the Board, runs directly counter to the Commission's direction as to how its Licensing Boards should manage their cases.

³⁶ DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC 535, 564 n.46 (2015).

³⁷ Licensing Board Order (Initial Scheduling Order) (Sept. 15, 2010) at 1 (unpublished) (quoting 10 C.F.R. § 2.332(c)).

³⁸ Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

³⁹ See S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-212, 7 AEC 986, 991 (1974) ("Of necessity, licensing boards must be vested with considerable latitude in determining the course of the proceedings which they are called upon to conduct. . . . We will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause.").

Indeed, had PG&E not moved for summary disposition in these circumstances, in all likelihood the Board itself would have issued an order to show cause why Contention EC-1 should not now be dismissed as moot. SLOMFP requested and was allowed some 45 days in which to respond to PG&E's motion for summary disposition.⁴⁰ SLOMFP has not been prejudiced in any way by having to address the mootness of Contention EC-1 in responding to PG&E's motion, rather than in responding to the Board's order to show cause.

PG&E's motion for summary disposition on Contention EC-1 is granted.

⁴⁰ San Luis Obispo Mothers for Peace's Unopposed Motion for Extension of Time (July 31, 2015); Order Granting Extension of Time at 2.

III. ORDER

For the reasons stated:

1. SLOMFP's motion to file Amended Contention C is denied.
2. PG&E's motion for summary disposition on Contention EC-1 is granted.
3. In the absence of any admitted or proffered contention, this proceeding is terminated.

In accordance with 10 C.F.R. § 2.341(b), any petition for review of this Memorandum and Order must be filed within twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chair
ADMINISTRATIVE JUDGE

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Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

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Rockville, Maryland
October 21, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to File Amended Contention, Granting Summary Disposition, and Terminating Proceeding) (LBP-15-29)** have been served upon the following persons by the Electronic Information Exchange.

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Diablo Canyon Nuclear Power Plant - Docket Nos. 50-275-LR and 50-323-LR
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[Original signed by Herald M. Speiser]
 Office of the Secretary of the Commission

Dated at Rockville, Maryland
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