

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company)	
(U 39 E) for Approval of Ratepayer Funding to)	A.10-01-014
Perform Additional Seismic Studies)	(Filed January 15, 2010)
Recommended by the California Energy)	
Commission.)	

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) REPLY BRIEF

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Pursuant to Rule 13.11 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure,¹ Southern California Edison Company (SCE) respectfully submits this reply brief in connection with Pacific Gas & Electric Company's (PG&E) Application (A.) 10-01-014, which requests additional funding for seismic studies for PG&E's Diablo Canyon Nuclear Power Plant (Diablo Canyon or DCNPP).

1. INTRODUCTION

This reply brief responds to the opening brief submitted by the Alliance for Nuclear Responsibility (A4NR) regarding Dr. Douglas Hamilton's recommendations for the scope of the Diablo Canyon seismic studies. As explained below, the Commission should not adopt any recommendations that concern seismic-safety issues, as these issues are within the exclusive jurisdiction of the Nuclear Regulatory Commission (NRC).

¹ The reply brief also complies with the briefing schedule set by the Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo) dated March 6, 2012, and Administrative Law Judge (ALJ) Barnett's instruction provided at the conclusion of the April 20, 2012 evidentiary hearing for the above-captioned proceeding.

2. DISCUSSION

2.1 Scope of the Seismic and Tsunami Studies

2.1.1 SCE's Recommendations

SCE has argued in this proceeding that the Commission should reject recommendations that concern seismic-safety, such as Dr. Hamilton's recommendations for recalculating seismic design margins, determining the controlling seismic hazards for seismic-safety, and providing oversight of these activities independent of PG&E and the NRC, because these type of issues are within the exclusive jurisdiction of the Nuclear Regulatory Commission (NRC). A4NR trivializes SCE's jurisdictional concerns as unnecessary "legal hyperventilating"² and "arm-waving."³ A4NR misses the point.

SCE is not objecting to the state's authority to direct the state's investor-owned utilities to perform seismic activities for San Onofre Nuclear Generating Station (SONGS) and Diablo Canyon in the context of assessing the reliability of these facilities. Indeed, SCE and PG&E have already submitted applications for funding to perform such seismic activities for SONGS and Diablo Canyon, as recommended by the California Energy Commission's AB1632 Report and directed by Commission President Peevey. For its part in this proceeding, PG&E has indicated that the seismic surveys proposed by PG&E, will produce information enabling PG&E to address the concerns raised by Dr. Hamilton.⁴

Rather, the jurisdictional concerns raised by SCE pertain to matters regarding the potential use of the seismic activities to assess and evaluate seismic-safety issues. As explained below, a central purpose of Congress in passing the Atomic Energy Act of 1954 (AEA) as amended was to ensure consistent and informed actions with regard to civilian nuclear activities,⁵

² A4NR Opening Brief, p. 4.

³ A4NR Opening Brief, p. 9.

⁴ PG&E/Nishenko, Tr., p. 96, lines 3-11.

⁵ *Silkwold v. Kerr-McGee Corp*, 464 U.S. 238, 250-51 (1984); Exhibit SCE-01, SCE Rebuttal Testimony, p. 9.

and avoid potential regulatory conflicts.⁶ To the extent the Commission takes action that pertains to nuclear-safety, even if incidental and even if based on a non-safety-related, economic rationale, such action is incompatible to the AEA's central purpose.

Accordingly, the Commission should expressly adopt and affirm the following in its decision on PG&E's application:

Proposed Conclusion of Law or Ordering Paragraph: “By its orders in this proceeding, the Commission does not intend to interfere with the NRC’s jurisdiction over seismic-safety matters, including the NRC’s requirements set forth in the NRC’s March 12, 2012 50.54(f) letter. To the extent that information developed by the investigations is ultimately used to reach a nuclear-safety finding, that finding and the means by which it is reached, will be exclusively within the jurisdiction of the NRC.”⁷

2.1.2 A4NR’s Apparent Withdrawal Of Dr. Hamilton’s Recommendations For Reviewing And Recalculating Seismic Design Margins Is Appropriate.

In its opening brief, A4NR apparently withdraws Dr. Hamilton’s recommendations for (1) reviewing and recalculating the seismic design margins of safety-related Diablo Canyon components, and (2) providing oversight of these activities independent of PG&E and the Nuclear Regulatory Commission (NRC).⁸ To the extent A4NR is withdrawing these recommendations, it is an appropriate step. Doing so correctly acknowledges that the recommendations impermissibly interfere with the NRC’s jurisdiction over seismic-safety issues for Diablo Canyon. As explained in SCE’s rebuttal testimony, a necessary step for reviewing and recalculating design margins for a nuclear plant involves determining the underlying design

⁶ *Pac. Gas & Electric Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 v.s. 190, 219 (1983).

⁷ Such an affirmance is consistent with Decision (D.) 12-05-004, Conclusion of Law No. 10.

⁸ A4NR’s Opening Brief p. 1 (A4NR does not offer Dr. Hamilton’s recommendations contained in Exhibit A4NR-04, Hamilton Testimony, pp. 53-54).

basis event for which the margins are to be determined, which is central to the “adequate protection” determination made exclusively by the NRC under authority of the AEA.⁹

The AEA specifically authorizes the NRC to regulate the construction and operation of nuclear reactor facilities in order to protect the public health and safety from radiological risks, and provides that the NRC may not cede this authority.¹⁰ The U.S. Supreme Court held in *Pacific Gas* that the AEA provides the federal government with “exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials,” and regarding these subjects, “no role was left for the states.”¹¹

In keeping with its broad statutory mandate under the AEA, the NRC has established a correspondingly comprehensive and pervasive regulatory framework for addressing the seismic design of nuclear power reactors for the adequate protection of the public’s radiological health and safety.¹² Demonstrating that its regulation of seismic-safety issues is active, current, and ongoing, the NRC recently issued a letter on March 12, 2012, pursuant to 10 C.F.R. § 50.54(f), requiring all reactor licensees to identify and provide information regarding the seismic and other external hazards (e.g. flooding) impacting the licensees’ respective plants.

Given this regulatory framework under the AEA, the Commission need not and should not engage in seismic-safety determinations.

⁹ Exhibit SCE-01, SCE Rebuttal Testimony, p. 2. The purpose of the NRC’s “adequate protection” determination is to protect the radiological health and safety of the public, through acceptable design, construction, operation, maintenance, modification, and quality assurance requirements for licensed nuclear power plants . See 42 U.S.C. §§ 2133, 2232.

¹⁰ See 42 U.S.C. § 2021(c)(1); Exhibit SCE-01, SCE Rebuttal Testimony, p. 3.

¹¹ *Pacific Gas*, 461 U.S. at 207 (citing 42 U.S.C. §§ 2014(e), (z), (aa), 2061-64, 2071-78, 2091-99, 2111-14).; Exhibit SCE-01, SCE Rebuttal Testimony, p. 3.

A. *Pacific Gas Compels The Commission To Reject Any Recommendation Involving Nuclear-Safety Issues, Because These Issues Are Within The NRC’s Exclusive Jurisdiction.*

Although apparently withdrawing Dr. Hamilton’s specific recommendations for reviewing and recalculating Diablo Canyon seismic design margins and providing oversight of these activities independent of PG&E and the NRC, A4NR nonetheless broadly asserts that the Commission has the authority to implement virtually any seismic recommendation, including those involving seismic-safety issues, so long as the state articulates a non-safety, economic rationale.¹³ In support, A4NR selectively quotes from *Pacific Gas*, which acknowledges the states’ traditional role in regulating the economic aspects of nuclear power generation within a state, including determining “the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.”¹⁴

A4NR’s discussion of *Pacific Gas* is incomplete. It is worthwhile to review the decision in its totality in order to demonstrate and emphasize the point that *Pacific Gas* actually holds that the NRC has the exclusive jurisdiction to regulate nuclear-safety issues, and that a state cannot implement regulations (e.g. a utility commission decision)¹⁵ that interfere with that jurisdiction, even if incidental, and even if based on a non-safety-related, economic rationale.

In *Pacific Gas*, the Supreme Court addressed whether the AEA preempted California Pub. Res. Code Section 25524.2, which imposed a moratorium on the certification of new nuclear plants in California until the California Energy Commission determined there was a federally approved means for permanently disposing nuclear waste.¹⁶ Petitioners SCE and PG&E argued that the statute was preempted by the AEA because the statute was predicated on

¹³ A4NR-02, Becker Rebuttal Testimony, p. 9.

¹⁴ A4NR Opening Brief, p. 4.

¹⁵ The Commission’s decision on PG&E’s application will provide the Commission’s findings of fact, conclusions of law, and orders in this proceeding. That decision should not interfere with the NRC’s jurisdiction over seismic-safety issues.

¹⁶ *Pacific Gas*, 461 U.S. at 194-95, 197-98.

safety concerns and therefore intruded on a preempted field.¹⁷ The state of California argued as the respondent that the statute was not preempted because the statute was based on economic concerns regarding the long term availability of the permanent disposal of spent nuclear fuel.¹⁸ California reasoned that without a permanent means of disposal, the accumulation of nuclear waste could become a critical problem, leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors.¹⁹ The *Pacific Gas* Court ultimately accepted California's avowed economic purpose as the rationale for enacting the statute and held that the statute lay outside the occupied field of nuclear safety regulation.²⁰

What is dispositive here, however, is that in analyzing the jurisdiction issue, the *Pacific Gas* Court reached this holding only after determining that the California nuclear-moratorium statute did not interfere with the federal government's jurisdiction over nuclear safety issues (i.e. the safety of storage available at the time).²¹ The Court noted, in particular, that the AEA did not preempt the statute because California was not seeking "to impose its own standards on [safe] nuclear waste disposal."²² In addition, the Court noted that the California legislature, in crafting its statutory moratorium, explicitly sought to avoid any conflicts with SCE's and PG&E's compliance with the then-existing NRC regulations on the safe storage of spent fuel,²³ in part by the legislation's explicit exemption of SONGS and DCNPP from the reach of the legislation.

The *Pacific Gas* Court further emphasized that there were jurisdictional limits to a state's traditional regulatory role, and that state regulation could not interfere upon the federal government's exclusive jurisdiction over nuclear-safety matters.²⁴ Of note, the Court stated that

¹⁷ *Pacific Gas*, 461 U.S. at 204.

¹⁸ *Pacific Gas*, 461 U.S. at 213.

¹⁹ *Pacific Gas*, 461 U.S. at 213-14.

²⁰ *Pacific Gas*, 461 U.S. at 213-14.

²¹ *Pacific Gas*, 461 U.S. at 213-16, 219.

²² *Pacific Gas*, 461 U.S. at 219 (emphasis added).

²³ *Pacific Gas*, 461 U.S. at 219.

²⁴ *Pacific Gas*, 461 U.S. at 219 ("Nor has California sought through § 25524.2 to impose its own standards on nuclear waste disposal.")

it would be impermissible for California to regulate the construction and operation of a nuclear plant, even if the regulation was enacted out of non-safety concerns:

It would be clearly impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plants construction and operation.²⁵

In other words, if the state regulation touched upon a construction or operations matter (such as the seismic design of a nuclear plant), even with a non-safety-related rationale, the state regulation would be preempted.

The Court also determined that a state could not condition the construction (or operation) of a nuclear power plant on the state's safety concerns being satisfied by the federal government:

Respondents . . . broadly argue, however, that although safety regulation of nuclear plants by states is forbidden, a state may completely prohibit new construction until its safety concerns are satisfied by the federal government. We reject this line of reasoning. State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC. . . .²⁶

In sum, A4NR's broad reading of *Pacific Gas* to suggest that the state has authority to implement virtually any seismic recommendation so long as the state articulates a non-safety, economic rationale wholly ignores the salient holdings discussed above. As explained in the discussion above, *Pacific Gas* actually holds that if a state regulation (e.g. utility commission decision) is enacted with multiple purposes, some for permissible non-safety-related, economic purposes and others for impermissible nuclear-safety-related purposes, the impermissible nuclear-safety-related purposes will doom the regulation or decision, and it will be preempted. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, a recent district court decision that invalidated an

²⁵ *Pacific Gas*, 461 U.S. at 212.

²⁶ *Pacific Gas*, 461 U.S. at 212-13.

attempt by the state of Vermont to regulate the continued operation of the Vermont Yankee Nuclear Plant, discusses *Pacific Gas* at length to reach precisely the same conclusion regarding the *Pacific Gas* holding.²⁷

Dr. Hamilton's recommendations in this proceeding, for recalculating seismic design margins, determining the controlling seismic hazards for seismic-safety, and providing oversight of these activities independent of PG&E and the NRC, all essentially would require the Commission to render a judgment questioning the NRC's conclusions on PG&E's original seismic analyses and seismic design for Diablo Canyon. The wholly separate, non-safety-related, economic rationale that supported the California nuclear-moratorium statute at issue in *Pacific Gas* does not exist here to support actions by the Commission questioning the NRC's conclusions on Diablo Canyon. Further, adopting the recommendation would create potential regulatory conflicts, uncertainty, and instability.

As SCE's rebuttal testimony demonstrated, Dr. Hamilton's testimony is replete with statements that expressly acknowledge the seismic-safety issues that A4NR seeks to have the Commission render a judgment, all questioning PG&E's original seismic analyses provided to the NRC:²⁸

- Page 6 – “My testimony for this proceeding raises concerns regarding the seismic setting of the plant, ***both as it relates to public health and safety*** . . .”
- Page 6 – “My Testimony also questions relevance of much of PG&E's extremely costly program of geology, geophysics and seismology research, to resolving or even addressing the important ***seismic safety issues affecting DCNPP***.”

²⁷ *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 2012 WL 162400, at *35(D. Vt. Jan. 19, 2012) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992) (“if an allegedly preempted statute is enacted with multiple purposes, some permissible, others impermissible, the impermissible purposes will doom the statute and it will be preempted.”)).

²⁸ A4NR-04, Hamilton Testimony, pp. 6, 7 12, 14.

- Page 7 – “This [PG&E’s prior studies] has resulted in non-recognition or non-acknowledgement by PG&E of what may well be the controlling seismic hazard to the *seismic safety of DCNPP.*”
- Page 7 – “This has the likely consequence of putting the *safety of the plant,* the electricity it provides to the state power grid, and *potentially the health and property of the public at risk.*
- Page 42 – “The most important such fault relative to the *safety of the DCNPP* is the Diablo Cove fault . . .”
- Page 43 – “This has resulted in non-recognition or non-acknowledgement by PG&E of what may well be the controlling seismic hazard to the *seismic safety of DCNPP.*”
- Page 43 – “This has the likely consequence of putting the *safety of the plant,* the electricity it provides to the State power grid, and potentially the *health and safety of the public and its property at risk.*”
- Page 44 – “During the 43 years since PG&E submitted the PSAR for a Construction Permit for DCNPP Unit1 to the AEC, it has made a series of submittals [to the NRC] with representations regarding geologic and seismic conditions that concern the *seismic safety of the nuclear power plant.*”

The numerous express references to seismic safety that Dr. Hamilton makes in his testimony remove any doubt that A4NR’s recommendation that the Commission direct PG&E to consider Dr. Hamilton’s testimony is inconsistent with any purported economic or reliability concerns. To the extent the Commission would consider these references and adopt Dr. Hamilton’s recommendations on the merits, the Commission’s action – even if based upon a non-safety-related, economic rationale – could also be reasonably interpreted as addressing seismic-safety concerns, which is a matter solely within the responsibility and jurisdiction of the NRC. As held in *Pacific Gas*, the impermissible nuclear-safety-related purpose dooms the recommendations, and the Commission should not adopt them.

2.2 Cost of the Studies and Whether They Should Be Capped

N/A

2.3 Cost Sharing

N/A

2.4 Outside Experts and Costs

N/A

2.5 Structure of Independent Peer Review Panel Authorized in Decision 10-08-003

N/A

3. CONCLUSION

For the reasons explained above, the Commission should reject any recommendations that concern seismic-safety issues that are within the exclusive jurisdiction of the Nuclear Regulatory Commission (NRC).

Respectfully submitted,

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