

February 3, 2023

Andrea Veil  
Director, Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Subject: The Breakthrough Institute's Comment on Pacific Gas and Electric's October 31, 2022, Letter Requesting an Exemption from 10 CFR 2.109(b).

Dear Ms. Andrea Veil,

The Nuclear Regulatory Commission (NRC) is currently reviewing an exemption request submitted by Pacific Gas and Electric Company's (PG&E) with respect to the license renewal application of the Diablo Canyon Power Plant (DCPP). BTI writes today to express our support for PG&E's request for an exemption from 10 CFR 2.109(b) to allow DCPP to continue to operate while its application is under review.

BTI is an independent 501(c)(3) global research center that advocates for appropriate regulation and oversight of nuclear reactors to enable the new and continued use of safe and clean nuclear energy. BTI acts in the public interest and does not receive funding from industry.

### Background

Originally, PG&E filed their license renewal application (LRA) in November of 2009. In 2018, PG&E withdrew that LRA. Last year, after reevaluating projected future energy demand and in light of new State legislative developments, PG&E decided to continue operating DCPP. To this end, PG&E requested that the NRC resume its review of their 2009 LRA or to grant an exemption to the 5 year requirement of 10 CFR 2.109(b), allowing DCPP to use the protections afforded by the timely renewal provision of § 2.109(b) to continue operating while the application is under review.<sup>1</sup> With the NRC's recent decision<sup>2</sup> to not resume review of the original 2009 LRA, PG&E intends to file a new LRA later this year. Admittedly, this does not meet the minimum of 5 years required to gain the protection of § 2.109(b). However, an exemption from that 5 year requirement would allow the DCPP to continue its safe and secure operation while providing clean and reliable electricity to

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<sup>1</sup> See [ML22304A691](#).

<sup>2</sup> See [ML22343A179](#).

the public. Such an exemption is not only legally permissible, it is consistent with prior Commission decisions and the NRC's Principles of Good Regulation.

### Justification for Exemption

10 CFR 54.17(a) requires that an LRA comply with, among other provisions, subpart A of 10 CFR Part 2, which includes 10 CFR 2.109. Exemptions from the requirements in Part 54 are governed by 10 CFR 50.12.<sup>3</sup> Under § 50.12(a), exemptions may be granted if they are: "(1) Authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security" and there are "special circumstances" as defined in § 50.12(a)(2).

#### *Authorized by law*

§ 2.109(b) is derived from Section 9(b) of the Administrative Procedure Act (APA):<sup>4</sup>

*When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.*

This provides no specific timeframe. The Atomic Energy Act (AEA) limits the duration of licenses and permits their renewal, but does not specify procedures on how to do so. The 5 year timeframe was put in place by the Commission as part of a discretionary agency rulemaking. Since there is no statutorily mandated time frame, the NRC may shorten the period at its discretion either through a change to, or exemption from, the existing regulation. As stated above, 10 CFR 54.15 allows the NRC to grant exemptions from the requirements of part 54. If the NRC determines that the requirements of that section are met, then they are legally authorized to grant the exemption should they find it appropriate.

#### *No undue risk to the public health and safety/ Consistent with common defense and security*

This exemption does not affect any operations, systems, or components that are required to maintain safe and secure operations, nor will it affect PG&E's ability to physically secure the site or protect special nuclear material. The NRC has, and will continue to maintain, a presence onsite at the DCPP to ensure the adequate protection of public health and safety.

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<sup>3</sup> 10 CFR 54.15.

<sup>4</sup> 5 USC § 558.

### *Special Circumstances*

§ 50.12(a)(2) defines the “special circumstances” that must be in existence to justify the exemption. Several of the enumerated circumstances are present here. One applicable situation is:<sup>5</sup>

*Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.*

PG&E did not intentionally postpone the decision to seek license renewal: the decisions to apply, withdraw, and then reapply were based on significant factors such as changes in projected energy demand and unanticipated changes in State policy. If the exemption is denied, DCPD will have to shut down once the licenses expire, which will place an undue burden on the residents of California, who will suffer from the lack of clean, reliable electricity that the plant provides.

Another applicable situation is:<sup>6</sup>

*The exemption would result in benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption*

As stated above, DCPD would likely shut down if the exemption is denied. The State of California and the California Independent System Operator (CAISO) expressly stated that DCPD is necessary to maintain reliability of the electricity grid. Loss of electricity detrimentally contributes to both health and safety of the public. Further, at this time, the only electricity source that can fill that hole is fossil fuels, which emit not only carbon dioxide, but also particulate matter and air pollutants that significantly degrade the air quality of the surrounding environment. The public would greatly benefit from not having to endure lower-quality air.

### Previous exemptions

The Commission has granted exemptions to § 2.109(b) in the past. The prior exemptions concur that such an exemption is authorized by law, meets the criteria of a special circumstance, and did not impose undue risk on the public. One such instance involves the R. E. Ginna Nuclear Power

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<sup>5</sup> 10 CFR 50.12(a)(2)(ii).

<sup>6</sup> 10 CFR 50.12(a)(2)(iv).

Plant. Exelon requested<sup>7</sup> in 2020 to be allowed to file for an LRA 3 years in advance instead of 5 years. This request was granted<sup>8</sup> by the NRC in 2021. The Commission granted<sup>9</sup> the same exemption of 3 years as opposed to 5 for the Clinton Power Station in 2019. Additionally, in 2004 the Commission also approved<sup>10</sup> an exemption to allow the Oyster Creek Generating Station to submit a little over 3.5 years in advance instead of 5.

### Conclusions

While the aforementioned exemptions are all for at least three years - and DCPD only has a little under 2 years and 2.5 years left on their licenses for Units 1 and 2 respectively - we believe that this request still has merit. Denial of this request would likely result in DCPD having to shut down due not to a safety, economic, or need-based reason, but due to procedure alone. This procedure was intended to provide regulatory efficiency and predictability, and has served that purpose on many occasions. However, strict adherence to the procedure in this case would not provide that function and would negatively impact the public.

The denial would serve no safety benefit through regulation of DCPD, as the plant is still subject to its license and other regulatory requirements pending the final outcome. It would impose further health and safety risks on the public. If DCPD is removed from the grid, due to the current construction of the energy system in California, it will be replaced with fossil fuels, which are demonstrably worse for the health and safety of the public. The reliability of the grid will also be reduced, placing the population at risk.

For these reasons we respectfully request that the NRC grant PG&E's exemption request.

Sincerely,

Ted Nordhaus  
Founder and Executive Director

Dr. Adam Stein  
Director of Nuclear Energy Innovation

Leigh Anne Lloveras  
Nuclear Energy Analyst

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<sup>7</sup> See [ML20255A001](#).

<sup>8</sup> See [86 FR 20523](#).

<sup>9</sup> See [ML19092A262](#).

<sup>10</sup> See [ML042960164](#).

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