UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
SOUTHERN CALIFORNIA EDISON COMPANY	)	Docket Nos. 50-361-CAL & 50-362-CAL
(San Onofre Nuclear Generating Station, Units 2 and 3)	)	

CLI-13-09

MEMORANDUM AND ORDER

The NRC Staff requests that we vacate the Atomic Safety and Licensing Board's order, LBP-13-7, which resolved issues we referred to the Panel for consideration in this matter late last year.[1] As discussed more fully below, this proceeding became moot while LBP-13-7 was still subject to a potential appeal. Therefore, in keeping with our established and customary practice, we grant the Staff's motion and vacate LBP-13-7.

I. BACKGROUND

A. Events at San Onofre

San Onofre Nuclear Generating Station Units 2 and 3 have been offline since a steam generator tube leak led to the rapid shutdown of Unit 3 in January 2012. The licensee,

[1] LBP-13-7, 77 NRC 307 (2013). *See* CLI-12-20, 76 NRC 437 (2012).

Southern California Edison Company, provided to the NRC in March of that year a description of the actions it committed to take with respect to the steam generator tube issues.[2] In response, the Staff issued a "Confirmatory Action Letter" (CAL) to Southern California Edison; the CAL confirmed Edison's commitments, and identified several actions to be taken prior to restarting the reactors.[3] As relevant here, Southern California Edison, as part of its proposal for the restart of Unit 2, submitted in April 2013 a request to revise the Unit 2 license and the associated technical specification requirements for steam generator tube integrity, in order to restrict temporarily Unit 2 operation to no more than 70% of rated thermal power.[4]

On June 7, 2013, Southern California Edison informed the Staff of its determination not to seek restart of San Onofre Units 2 and 3,[5] and shortly thereafter certified to the NRC that it has permanently ceased power operation of both units.[6] Southern California Edison also

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[2] *See* Dietrich, Peter T., Southern California Edison, letter to Elmo E. Collins, NRC, *Steam Generator Return-to-Service Action Plan, San Onofre Nuclear Generating Station* (Mar. 23, 2012) (ADAMS accession no. ML12086A182) (Unit 2 Return to Service Plan).

[3] *See* Collins, Elmo E., Regional Administrator, Region IV, US NRC, letter to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, Southern California Edison, *Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation* (Mar. 27, 2012) (ML12087A323).

[4] *See* Dietrich, Peter T., Southern California Edison, letter to NRC Document Control Desk, *Amendment Application Number 263* (Apr. 5, 2013) (ML13098A043); Bauder, Douglas R., Southern California Edison, letter to NRC Document Control Desk, *Supplement 1 to Amendment Application Number 263* (Apr. 9, 2013) (ML13100A021); Application and Amendment to Facility Operating License Involving Proposed No Significant Hazards Consideration Determination; San Onofre Nuclear Generating Station, Unit 2, 78 Fed. Reg. 22,576, 22,576 (Apr. 16, 2013).

[5] *See* Affidavit of Mr. Michael R. Johnson Concerning [Southern California Edison]'s Decision to Retire SONGS Units 2 and 3 (June 14, 2013), appended to *NRC Staff's Motion to Vacate the Atomic Safety and Licensing Board's Full Initial Decision, LBP-13-07* (June 14, 2013) (Staff Motion to Vacate).

[6] Dietrich, Peter T., Southern California Edison, letter to NRC Document Control Desk, *Certification of Permanent Cessation of Power Operations* (June 12, 2013) (ML131640201).

withdrew its April 2013 license amendment request.[7] Edison has since permanently defueled the reactors, and the Staff has closed out the CAL.[8]

B. Procedural History

This adjudication has unfolded in parallel with the activities discussed above. Shortly after the Staff issued the CAL, Friends of the Earth submitted a petition to intervene, in which it sought a hearing on the restart of both units, and a stay of any decision to authorize restart pending the conclusion of the requested hearing.[9] Friends of the Earth maintained, among other things, that Southern California Edison's replacement of its steam generators in 2010 and 2011 pursuant to 10 C.F.R. § 50.59, without first obtaining NRC approval via a license amendment, was unlawful, and that the CAL and the process for resolving the CAL constituted a *de facto* license amendment.[10]

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[7] Application and Amendment to Facility Operating License Involving Proposed No Significant Hazards Consideration Determination; San Onofre Nuclear Generating Station, Unit 2, 78 Fed. Reg. 37,594, 37,595 (June 21, 2013).

[8] *See* Dietrich, Peter T., Southern California Edison, letter to NRC Document Control Desk, *Permanent Removal of Fuel from the Reactor Vessel* (July 22, 2013) (ML13204A304) (Unit 2); Dietrich, Peter T., Southern California Edison, letter to NRC Document Control Desk, *Permanent Removal of Fuel from the Reactor Vessel* (June 28, 2013) (ML13183A391) (Unit 3); Howell, Arthur T., III, NRC, letter to Peter Dietrich, *Closure of Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation* (Aug. 1, 2013) (ML13213A238).

[9] *Petition to Intervene and Request for Hearing by Friends of the Earth* (June 18, 2012) (Friends of the Earth Petition); *Application to Stay Any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station Pending Conclusion of the Proceedings Regarding Consideration of the Safety of the Replacement Steam Generators* (June 18, 2012). The Natural Resources Defense Council (NRDC) supported Friends of the Earth's hearing request. *Natural Resources Defense Council's (NRDC) Response in Support of Friends of the Earth Petition to Intervene and NRDC's Notice of Intent to Participate* (June 27, 2012).

[10] Friends of the Earth Petition at 2, 16-18. *See also* Dietrich, Peter T., Southern California Edison, letter to Elmo E. Collins, NRC, *Confirmatory Action Letter - Actions to Address Steam Generator Tube Degradation, San Onofre Nuclear Generating Station, Unit 2* (Oct. 3, 2012), (continued . . .)

In CLI-12-20, we referred Friends of the Earth's § 50.59 claim regarding the replacement of the Unit 2 and 3 steam generators to the Executive Director for Operations for appropriate action under 10 C.F.R. § 2.206, and referred Friends of the Earth's *de facto* license amendment claim to the Atomic Safety and Licensing Board Panel. The referral directed the Panel to consider "whether: (1) the Confirmatory Action Letter issued to [Southern California Edison] constitutes a *de facto* license amendment that would be subject to a hearing opportunity under Section 189a [of the Atomic Energy Act]; and, if so, (2) whether the petition meets the standing and contention admissibility requirements of 10 C.F.R. § 2.309."[11]

The Board issued its final initial decision on the matter, LBP-13-7, on May 13, 2013. Among other things, the Board held that the CAL process between the Staff and Southern California Edison—in particular Edison's Unit 2 Return to Service Plan and the Staff's potential future authorization of that plan—constituted a *de facto* license amendment proceeding.[12] Thereafter, Friends of the Earth submitted a motion to convene a licensing board and to consolidate the April 5 license amendment matter with this one.[13]

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Enclosure 2 at 10 (ML12285A263) (stating that new steam generators were placed into service at Units 2 and 3 in 2010 and 2011, respectively).

[11] CLI-12-20, 76 NRC at 440-41. We also denied Friends of the Earth's request to initiate a discretionary hearing. *Id.* at 441.

[12] *See, e.g.*, LBP-13-7, 77 NRC at 326-28, 334, 338. Because the Board granted Friends of the Earth's requested relief (that is, a ruling that a license amendment and hearing opportunity were required), it also terminated the proceeding. *Id.* at 316.

[13] *Motion by Friends of the Earth and the Natural Resources Defense Council Requesting the Nuclear Regulatory Commission to Convene an Atomic Safety and Licensing Board and Consolidate the License Amendment Proceedings for the San Onofre Nuclear Generating Station* (May 23, 2013) (Motion to Consolidate). Because Southern California Edison has withdrawn its license amendment request, we dismiss the Motion to Consolidate as moot.

On a related note, after Southern California Edison's announcement that it would permanently cease operation of San Onofre, Friends of the Earth requested that the NRC either "withdraw its (continued . . .)

As noted above, on June 7, the day petitions for review of LBP-13-7 were due, Southern California Edison notified the Staff that it would not seek to restart the plant.[14] In response, the Staff sought, and was granted, an extension of time to file a petition for review of LBP-13-7 to determine an appropriate course of action in light of Edison's decision to retire the plant.[15] The Staff did not file a petition for review; however, it did file the instant motion to vacate the Board's decision. Friends of the Earth and NRDC oppose the Staff's motion.[16] And the States of New York and Vermont jointly seek leave to file an *amici curiae* brief in opposition to the Staff's motion.[17]

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proposed approval" of the license amendment request, or toll indefinitely the deadline for submitting hearing requests in that matter. *See* Ayres, Richard, Counsel for Friends of the Earth, letter to Chairman Macfarlane (June 11, 2013), at 1 (ML13164A327). In response, the Secretary tolled the running of the time for the filing of such requests. Order (Tolling the Running of the Time to File an Intervention Petition) (June 14, 2013) (unpublished). At that time, Southern California Edison had sought withdrawal of its license amendment request, but the Staff had not yet acted on the withdrawal. Now that the license amendment application is officially withdrawn, we clarify that no hearing request associated with that application will be accepted by the NRC.

[14] *See NRC Staff Motion for Extension of Time to File Petition for Review* (June 7, 2013), at 1.

[15] *Id*.; Order (Granting Extension of Time) (June 7, 2013) (unpublished).

[16] *Joint Answer by Friends of the Earth and the Natural Resources Defense Council to Staff's Motion to Vacate LBP-13-07* (June 24, 2013) (Joint Answer). While the Board did not formally rule on NRDC's status in this case, NRDC participated before the Board as *amicus curiae*. *See, e.g.*, Order (Conference Call Summary and Directives Relating to Briefing) (Dec. 7, 2012), at 1 n.1, 4 n.7 (unpublished). We treat the filing as the answer of Friends of the Earth, supported by NRDC, as we did in CLI-12-20. Southern California Edison did not file an answer; the Staff represents that Edison does not object to its request. Staff Motion to Vacate at 4 n.20.

[17] *State of New York and State of Vermont Motion for Leave to File Brief* Amici Curiae *in Support of Petitioner and in Opposition to NRC Staff's Motion to Vacate the Atomic Safety and Licensing Board's Full Initial Decision, LBP-13-07* (June 24, 2013) (States' Motion); *State of New York and State of Vermont Brief* Amici Curiae *in Support of Petitioner and in Opposition to NRC Staff's Motion to Vacate the Atomic Safety and Licensing Board's Full Initial Decision, LBP-13-07* (June 24, 2013) (States' Brief). The States request that we accept the brief pursuant to 10 C.F.R. § 2.315(d) or, alternatively, as an exercise of our inherent supervisory authority over adjudications. States' Motion at 1. The Staff opposes the States' motion. *See NRC Staff's*
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As discussed further below, we grant the Staff's request, and vacate the Board's decision, in line with our usual practice.

II. DISCUSSION

The Board's decision pertained, as a general matter, to the San Onofre Unit 2 restart, including the Staff's potential future authorization of the Unit 2 Return to Service Plan. In view of Southern California Edison's decision to permanently retire Units 2 and 3, the Staff has ceased review of Edison's Unit 2 Return to Service Plan.[18] These developments have led to the end of this adjudication. The issue before us today is whether, given the circumstances presented, vacatur of the Board's decision is appropriate. We discuss in turn Friends of the Earth's "mootness" argument and the reasons for our prudential decision to vacate LBP-13-7.

Friends of the Earth frames the dispute as a question of mootness, arguing that the Board's decision is not moot because it contains "broader legal propositions clarified by the Board that apply beyond this particular case" and "serves as important guidance for the Commission," and that, as a result, vacatur is not appropriate.[19] In particular, Friends of the

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Answer to Motion to Submit Brief Amici Curiae (July 2, 2013). Section 2.315(d) provides for the filing of *amicus curiae* briefs when we have taken up a matter pursuant to § 2.341 or *sua sponte*, neither of which is the case here. While our rules do not provide for the filing of *amicus curiae* briefs on motions filed pursuant to 10 C.F.R. § 2.323, as a matter of discretion, we have reviewed both the States' brief and the Staff's opposition.

The States did not file their motion and brief via the agency's E-filing system, as required by 10 C.F.R. § 2.302, nor did they seek an exemption from that rule. We remind adjudicatory participants that electronic filing is required, unless the presiding officer grants an exemption permitting an alternative filing method for good cause shown, or unless the filing falls within the scope of the exception identified in 10 C.F.R. § 2.302(g)(1).

[18] Staff Motion to Vacate at 1.

[19] Joint Answer at 6.

Earth contends that, because a similar legal issue may occur in a future proceeding involving different litigants, the underlying issues in the case are not moot.[20]

"Generally, a case will be moot when the issues are no longer 'live,' or the parties lack a cognizable interest in the outcome."[21] The fundamental dispute in this case revolved around the circumstances under which Unit 2 would be permitted to restart. Because San Onofre is now permanently shut down—and will not restart—no live controversy remains between the litigants in this case.[22]

Friends of the Earth's arguments regarding mootness are unavailing. Although Friends of the Earth cites *Davis-Besse* and *Advanced Medical Systems* for the general proposition that an appeal is not moot if there is a possibility of similar acts recurring in the future, these cases refer to instances where the same litigants likely will be subject to similar future action.[23] We do

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[20] *Id.* at 9-10.

[21] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

[22] *See, e.g.*, *Comanche Peak*, CLI-93-10, 37 NRC at 200; *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) ("The Constitution permits this Court to decide legal questions only in the context of actual "Cases" or "Controversies.") While we are not strictly bound by the "case or controversy" requirement, the same analysis the federal courts use to determine whether a case is moot can be applied to our cases.

[23] Joint Answer at 9 (citing *Toledo Edison Co. and Cleveland Electric Illuminating Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3) and *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-560, 10 NRC 265, 400 (1979); *Advanced Medical Systems, Inc.* (Geneva, Ohio), CLI-93-8, 37 NRC 181, 185 (1993) (citing *County of Los Angeles v. Davis*, 440 U.S. at 631).

Davis-Besse was an antitrust proceeding, in which the Licensing Board conditioned the licenses for Davis-Besse and Perry upon finding that the license applicants had violated the antitrust laws in dealing with their competitors. The Appeal Board, in modifying and affirming that decision, noted "that the extensive past misconduct of the applicants suggests a real possibility that they may again try to force small electric systems in their area out of business once the heat of this litigation has passed." *Davis-Besse*, ALAB-560, 10 NRC at 400. And in *Advanced*

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not expect the litigants here—Friends of the Earth, Southern California Edison, and the NRC Staff—to be subject to similar circumstances in the future, since Southern California Edison has permanently ceased operation of the subject facility. Friends of the Earth contends that future similar "situations in which a determination must be made on whether the process engaged in between the Staff and a licensee is a *de facto* license amendment proceeding" may arise, thus bringing the case within *Davis-Besse* and *Advanced Medical Systems.*[24] While this legal question might indeed come up in a future adjudication involving different litigants, it is too general—and too speculative—for resolution here. Such a future case is appropriately decided in the context of a concrete dispute, with "self-interested parties vigorously advocating opposing positions."[25] Indeed, were Friends of the Earth's argument to carry the day, no Board decision ever would be vacated.[26]

In our view, then, the motion turns not on the question whether the case is moot, but rather on the question whether vacatur is appropriate. As an initial matter, Friends of the Earth

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Medical Systems, the licensee challenged the Staff's use of immediately effective orders after fulfilling the underlying requirements of those orders. CLI-93-8, 37 NRC at 182. We held that, to show that the case is not moot, the movant must show a reasonable expectation that it will be subjected to the same action again. *Id.* at 187.

[24] Joint Answer at 9.

[25] *Cf. U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) (citations omitted). *See also Alvarez*, 558 U.S. at 92.

[26] We have recognized an exception to the mootness doctrine, where "a case may not be moot if it is 'capable of repetition, yet evading review': i.e., if the challenged action were too short in duration to be litigated and there is a reasonable expectation that the same party will be subjected to the same action again." *Advanced Medical Systems*, CLI-93-8, 37 NRC at 185 (citing *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); *Securities & Exchange Comm'n v. Sloan*, 436 U.S. 103, 109 (1978); *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1170 (D.C. Cir. 1984)). Friends of the Earth does not make this argument, but in any event, given the permanent shutdown of the plant and the fact that the same parties will not confront the same issues again, this case would not fall within that exception.

argues that vacatur is improper where the Staff has not petitioned for review of the Board's decision.[27] This case does differ in timing from previous cases involving vacatur—oftentimes, the controversy has ended during the pendency of appeals before the Commission or the Appeal Board.[28] In contrast, the instant controversy ended during the brief period in which petitions for review could have been filed. This difference in timing should not determine the outcome here. Because Southern California Edison has permanently ceased power operation at San Onofre, requiring the Staff to file a petition for review of LBP-13-7 would elevate process over substance. Given that this adjudication will go no further, the issue before us is not the propriety of an appeal, but the propriety of vacatur.

Unreviewed Board decisions do not create binding legal precedent.[29] Nonetheless, as a prudential matter, we will vacate such decisions when appellate review is cut short by mootness.[30] The Commission has long done so as a routine matter. Denying vacatur here

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[27] Joint Answer at 10-11.

[28] *See, e.g.*, *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113 (1998); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996); *Comanche Peak*, CLI-93-10, 37 NRC at 192.

[29] *See, e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998)). Friends of the Earth argues that vacating the Board decision would violate the *stare decisis* principle. Joint Answer at 10. Under this principle, a tribunal should abide by precedent and decline to disturb settled matters. But *stare decisis* is not implicated here—the Board decision is not binding on future tribunals.

[30] *See, e.g.*, *PFS*, CLI-05-22, 62 NRC at 544; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999); *LES*, CLI-98-5, 47 NRC at 114; *North Atlantic Energy Service Corp.* (Seabrook Station Unit No. 1), CLI-98-24, 48 NRC 267, 269 (1998); *Oncology Services Corp.* (Byproduct Material License), CLI-93-17, 38 NRC 44, 49 (1993); *Comanche Peak*, CLI-93-10, 37 NRC at 205; *Fewell Geotechnical Engineering, Ltd.* (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83, 84 (1992); *Consumers Power Co.* (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982); *Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407, 408 (1980); *Commonwealth Edison Co.* (Braidwood Station, Unit Nos. 1 and 2), ALAB-874, 26 NRC 156, (continued . . .)

would thus represent a marked departure from established Commission precedent. Moreover, this matter has been sharply contested and, following the Board's rigorous review of the issues, culminated in a lengthy and complex decision. We find vacatur particularly appropriate here, where the litigants vigorously disputed (among other things) the proper scope of the Board's review and whether the CAL constituted a *de facto* license amendment. When vacating for mootness, we neither approve nor disapprove the underlying Board ruling; therefore, we take no position on the Board's decision.[31]

New York and Vermont express concern that vacatur will "remov[e] this decision from public access."[32] But this is not the case. Regardless of vacatur, the decision is an agency record, and will not be excised from the public view. Like other NRC decisions that have been vacated, LBP-13-7 is, and will be, available to the public via the ADAMS system, and we expect this decision to be published as part of NUREG-0750, a compilation of Commission and Board

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158 (1987); *US Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897, 898 (1987); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-842, 24 NRC 197, 198-99 (1986); *U.S. Department of Energy* (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-39 (1983); *Rochester Gas and Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867, 869 (1980).

[31] Put another way, our decision to vacate LBP-13-7 "does not intimate any opinion on [its] soundness." *Yankee Rowe*, CLI-99-24, 50 NRC at 222 (quoting *Kerr-McGee*, CLI-96-2, 43 NRC at 15); *LES*, CLI-98-5, 47 NRC at 114 (quoting *Kerr-McGee*, CLI-96-2, 43 NRC at 15). Because we do not address the merits, we need not address Friends of the Earth's argument that the Staff impermissibly raises objections to the merits of the Board's decision without filing a petition for review under 10 C.F.R. § 2.341. Joint Answer at 15-17.

[32] States' Brief at 4.

decisions.[33] Future litigants can cite the decision as support for an argument; we or a licensing board then may consider whether such an argument is persuasive.[34]

One other matter merits brief mention. Friends of the Earth argues that vacatur is particularly inadvisable here, where we specifically referred the CAL issue to the Board to receive the Board's guidance on whether the CAL process constituted a *de facto* license amendment and on the process due to the public in such situations.[35] But we referred the matter to the Board in the context of a live dispute with specific facts. Licensing boards are the appropriate finders of fact in most circumstances; referral of a matter for a fact-specific dispute occurs in the ordinary course of business.[36] That the Board decision here resulted from a referral does not, therefore, suggest that this is a special case meriting departure from our usual practice regarding vacatur for mootness.

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[33] *See generally* Internal Commission Procedures, Appendix 9, "Nuclear Regulatory Commission Issuances" (July 5, 2011).

[34] It bears noting that a prior Commission has touched on this point. In vacating three decisions of the Licensing and Appeal Boards in a 1982 *Palisades* matter, the Commission observed, "These decisions also should not be used for guidance." *Palisades*, CLI-82-18, 16 NRC at 52. We note, however, that NRC litigants are not prohibited from referencing a vacated decision.

[35] Joint Answer at 5.

[36] *See* 10 C.F.R. § 2.308 ("Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under § 2.313(a) to rule on the matter."). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005) ("[W]e expect our licensing boards to review testimony, exhibits, and other evidence carefully and to resolve factual disputes. That is the boards' chief function in our adjudicatory system.").

III. CONCLUSION

For the reasons set forth above, we *grant* the Staff's motion, *vacate* the Board's ruling in LBP-13-7, and *terminate* this proceeding.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of December, 2013.

Additional Views of Chairman Allison M. Macfarlane

The Staff has asked the Commission to follow its customary practice and vacate LBP-13-7 because, in view of Edison's decision to permanently retire San Onofre, no outstanding controversy remains, and this matter is now moot.[1] I concur that this matter is moot. Further, I understand that longstanding Commission case law and practice compels today's holding that vacatur of LBP-13-7 is warranted here, where the Commission's review has been cut short by mootness, and I do not advocate overturning longstanding Commission case law or practice. As discussed below, however, I question whether vacatur should be routinely granted as a matter of course.

One of the Commission's most important responsibilities is to ensure fairness in our adjudicatory proceedings. Our customary practice concerning vacatur, which is intended to achieve that goal, is designed to eliminate confusion and disagreement over what an unreviewed board decision may mean or what effect it may have in the resolution of safety or environmental issues in a future proceeding.[2] I am fully committed to ensuring fairness in our adjudicatory proceedings, but I am concerned that vacating LBP-13-7 in summary fashion may send the wrong message at a time when the NRC has not yet fully evaluated the issues that gave rise to the adjudicatory proceeding at San Onofre. Further, as discussed below, summarily vacating LBP-13-7 based on the motion before us does not, in my view, alleviate the Staff's concerns in any event.

Our case law on vacatur, while extensive, has been largely unchanged for many years. While the facts of the cases vary, as a general matter, the Commission will vacate as a matter of course a board decision "cut short by mootness" with little discussion, and with little apparent

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[1] Staff Motion to Vacate at 1-2.

[2] *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

regard for the circumstances surrounding the end of the case. The Staff argues that vacatur is appropriate here because the Board decision "has created confusion" and is "unclear."[3] The Staff fails to elaborate on this claim or discuss how the Staff or others will be harmed if this decision is not vacated, though this is perhaps understandable, considering that our case law on the topic provides little guidance on what is required, and we have never required anything more. Omitting a detailed discussion of the basis for its motion is one thing, but the Staff's criticism of the Board's decision, particularly where no merits review was requested or needed, is another. Even though today's opinion involves no review of, or comment on, the merits of LBP-13-7, and the Commission did not base its decision to vacate the Board order on the Staff's criticism of the order, I am concerned that the affirmative act of vacatur, based on the motion before us, gives the perception of rejecting the Board's decision, without the benefit of a robust merits review.

To be sure, the NRC Staff did not cause this proceeding to become moot—Edison did—and I do not find that the Staff stands in Edison's place in requesting vacatur.[4] But I am not persuaded by the Staff's arguments that denial of vacatur will negatively impact decision-making by the Staff and licensees concerning future confirmatory action letters, or otherwise result in confusion. Our boards understand that "whether a CAL process constitutes a *de facto* license amendment proceeding is a highly fact-specific question."[5] The Board's resolution of the fact-

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[3] Staff Motion to Vacate at 7. In support of its claim, the Staff cites a *Los Angeles Times* article, which acknowledges the issuance of the Board's decision, but does not discuss its contents; rather, the article appears to focus on the case going forward. *Id.* (citing Abby Sewell, *San Onofre Ruling Creates Confusion*, L.A. Times, May 13, 2013, http://www.latimes.com/local/lanow/la-me-ln-san-onofre-decision-20130513,0,3187177.story).

[4] *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("The denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'") (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)).

[5] LBP-13-7, 77 NRC at 328.

specific issues in this case has no bearing on licensees who may, in the future, consider voluntary action associated with a CAL. Nor, as today's decision observes, is LBP-13-7 binding on other boards that may be called upon to resolve similar issues.

Moreover, it is not clear that vacatur necessarily will eliminate "future confusion and dispute" over the "meaning or effect" of an unreviewed board decision. Unreviewed board decisions remain "on the books" in the sense that litigants in future cases are free to use the arguments therein to persuade us, or a licensing board. Disputes about the meaning and effect of the decision will be argued afresh in the context of that particular case. Any confusion today over the Board's reasoning or conclusions exists whether or not the decision is vacated.

I do not believe that we should necessarily continue our practice of routinely vacating moot board decisions. Rather, we should require any litigant seeking vacatur to provide a robust discussion for its argument that vacatur is warranted. We should then take into account the particular facts at hand in deciding whether to vacate.[6]

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[6] *See, e.g.*, *Bonner Mall*, 513 U.S. at 23-24 (discussing the post-*Munsingwear* practice of the federal courts, and observing that vacatur is not automatic, but will depend upon "the nature and character of the conditions which have caused the case to become moot.").