

July 2, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO MOTION TO SUBMIT BRIEF *AMICI CURIAE*

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby answers the “State of New York and State of Vermont [(the States)] Motion for Leave to File Brief *Amici Curiae* In Support of Petitioner [Friends of the Earth (FOE)] and In Opposition to NRC Staff’s Motion to Vacate the Atomic Safety and Licensing Board’s Full Initial Decision, LBP-13-07” (States’ Motion).¹ For the reasons set forth below, the Staff respectfully submits that the Commission should not admit the States’ *Amici* Brief under 10 C.F.R. § 2.315(d) because it does not add value to the Commission’s decision-making on the Staff’s Motion to Vacate LBP-13-07 (Staff’s Motion to Vacate).² Accordingly, the Commission should deny the States’ Motion and not accept the States’ *Amici* Brief.

¹ The States’ Motion is available at Agencywide Documents Access and Management System (ADAMS) Accession No. ML13176A210. Attached to the States’ Motion is the “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) (ADAMS Accession No. ML13176A295) (States’ *Amici* Brief).

² NRC Staff’s Motion to Vacate the Licensing Board’s Full Initial Decision, LBP-13-07 (June 14, 2013) (ADAMS Accession No. ML13165A329) (Staff’s Motion to Vacate).

DISCUSSION

I. The States' Motion and Amici Brief Do Not Add Value to the Commission's Decision-Making On the Staff's Motion to Vacate

Under certain circumstances, the Commission's regulations permit the filing of an *amicus curiae* brief, at the Commission's discretion. Specifically, section 2.315(d) provides that:

(d) If a matter is taken up by the Commission under § 2.341 or *sua sponte*, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief "*amicus curiae*." Such a person shall submit the amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before the Commission will be granted at the discretion of the Commission.

Typically, the Commission only accepts *amicus* briefs after the Commission grants a petition for review and does not provide for *amicus* briefs supporting or opposing petitions for review.³ In determining whether to exercise its discretion to admit *amicus* briefs, the Commission's decision "ultimately depend[s] upon the value afforded to the decision-making process by consideration of the amicus briefs."⁴ The "primary value of an amicus brief is to provide the independent perspective and analysis of the non-party."⁵

³ *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-39 (1997). In CLI-10-17, the Commission accepted *amicus* briefs supporting and opposing the Staff's petition for review when granting Staff's petition for review and considering arguments in the Staff's petition. *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 4 n.16 (2010).

⁴ See Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule (Dec. 17, 2003) at 19 (ADAMS Accession No. ML033510327). This "value" is "balanced against the potential delay attributable to consideration and ultimate resolution of matters raised in the *amicus* briefs." *Id.* The Commission may also consider whether there are extraordinary circumstances making acceptance of an *amicus* brief imperative as a matter of fairness or sound decision-making. *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-22, 68 NRC 355, 359 (2008).

⁵ Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule (Dec. 17, 2003) at 19 (ADAMS Accession No. ML033510327). See *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 642 n.138 (2010) (noting that *amicus curiae* participation does not provide the same rights of participation as party status and cannot be considered a substitute means to protect a petitioner's interest or to preserve a petitioner's appellate rights).

In this case, there is no petition for review, as no party or interested state or government filed a petition for review of LBP-13-07. Instead, the States' Motion and *Amici* Brief oppose the Staff's Motion to Vacate LBP-13-07.⁶ The States argue that their *Amici* Brief should be accepted because it provides the States' independent viewpoint on how the Commission's *vacatur* practice "negatively affects intervenors in NRC proceedings"⁷ and will assist the Commission in its decision-making on the Staff's Motion to Vacate.⁸ However, the States' Motion and *Amici* Brief will not add value to the Commission's decision-making on the Staff's Motion to Vacate because, as outlined below, they contain incorrect information regarding Commission case law on *vacatur* and the Staff's Motion to Vacate. Therefore, the States' Motion should be denied and the States' *Amici* Brief should not be accepted.⁹

A. The States' *Amici* Brief Contains Incorrect Information on the Commission's *Vacatur* Case Law and the Contents of the Staff's Motion to Vacate

First, the States' *Amici* Brief contains incorrect statements about Commission case law on *vacatur* and the contents of the Staff's Motion to Vacate. For example, the Brief claims that "controversy" is not an appropriate ground for *vacatur* and that "...no caselaw Staff cites [in its Motion to Vacate LBP-13-07] uses the term 'controversial.'"¹⁰ These assertions are unfounded. Commission case law cited by the Staff in its Motion to Vacate explicitly provides that

⁶ States' Motion; States' *Amici* Brief at 1. During consultation on the States' Motion, Staff counsel relayed to counsel for New York that the Commission's regulations do not contemplate *amicus* briefs on motions to vacate. See *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-22, 68 NRC 355, 359 (2008) (noting that § 2.315(d) does not apply to appeals filed under 10 C.F.R. § 2.1015, but only to petitions for review under § 2.341 or matters taken up *sua sponte* by the Commission).

⁷ See States' Motion at 3.

⁸ *Id.* at 3 (claiming that consideration of the *Amici* Brief is desirable because it "supplies a perspective that will aid the Commission in determining whether to grant Staff's motion to vacate LBP-13-07"). *Id.* at 4 (stating that *Amici* Brief should be considered in the Commission's evaluation of the Staff's Motion to Vacate LBP-13-07).

⁹ See States' Motion at 1 (requesting that the *Amici* Brief be accepted under 10 C.F.R. § 2.315(d) or under the Commission's inherent authority).

¹⁰ States' *Amici* Brief at 5.

controversial Board decisions should be vacated if appellate review is no longer available.¹¹

And this cited case law does indeed use the term “controversial.”¹² Specifically, *Kerr-McGee* states, in relevant part, that:

because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will permit any similar questions that may come up to be considered anew, without the binding influence of an apparently *controversial* Appeal Board decision that the Commission has not had the occasion to review.

CLI-92-02, 43 NRC at 14 (emphasis added). Therefore, the apparent controversial nature of an unreviewed Board decision is applicable to the Commission’s consideration of a motion to vacate. It is also appropriate for the Commission to consider the possible confusion or future effects stemming from unreviewed Board decisions.¹³ The States’ instant Motion and *Amici* Brief is another example of the confusion and future effects stemming from LBP-13-07.¹⁴ Given these incorrect assertions, the States’ *Amici* Brief will not add value to the Commission’s decision-making on the Staff’s Motion to Vacate LBP-13-07.

B. The States’ *Amici* Motion and Brief Misstate the Effect of Staff’s Motion to Vacate and the Commission’s *Vacatur* Practice

The States’ *Amici* Brief will also not add value to the Commission’s decision-making on the Staff’s Motion to Vacate because it misstates the effect of the Staff’s Motion to Vacate and

¹¹ See *Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility)*, CLI-92-02, 43 NRC 13 (1996); Staff’s Motion to Vacate at 5 n.22, n.24-25 (citing *Kerr-McGee*), 6 n.29, 7 n.35.

¹² *Kerr-McGee*, CLI-92-02, 43 NRC at 14.

¹³ See *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 543 (2005) (stating that it is the Commission’s customary course of action to vacate unreviewed Board orders when their appellate review becomes unavailable because of mootness to eliminate any confusion or future effects stemming from these decisions); Staff’s Motion to Vacate at 5.

¹⁴ See also Staff’s Motion to Vacate (citing FOE’s Motion to Convene and Consolidate and the Davis-Besse petition citing LBP-13-07 as examples of the confusion stemming from LBP-13-07). The States’ Motion and *Amici* Brief add confusion because they are not authorized by § 2.315(d). The Staff intended to file a petition for review of LBP13-07. However, SCE’s intervening decision to permanently retire SONGS, announced on the morning petitions for review of LBP-13-07 were due, mooted the underlying controversy.

the Commission's *vacatur* practice.¹⁵ For example, the States' *Amici* Brief argues that the Staff's Motion to Vacate interferes with the Commission's practice of referring matters to the Board, as provided for in the AEA.¹⁶ But the Staff's Motion to Vacate has no such effect on the Commission's ability to refer issues to a Board. Instead, the Staff's Motion to Vacate only asks the Commission to follow its practice of vacating unreviewed Board decisions where appellate review became unavailable because of mootness.¹⁷ Doing so ensures that when similar questions arise in other proceedings, they may "be considered anew, without the binding influence of an apparently controversial [Board]¹⁸ decision that the Commission has not had the occasion to review."¹⁹ The States' desire to have LBP-13-07 stand so that the public may examine and rely upon its reasoning²⁰ is therefore contrary to Commission policy and precedent.

Moreover, despite the States' claims, the Staff's Motion to Vacate and the Commission's *vacatur* practice do not interfere with the Commission's commitment to transparency and meaningful public participation in decision-making and adjudicatory proceedings.²¹ The SONGS CAL process illustrates the Commission's commitment to transparency by providing a variety of opportunities for interested members of the public and stakeholders to observe or

¹⁵ States' *Amici* Brief at 1. The States' *Amici* Brief broadly claims that if the Commission granted *vacatur* in this case, it would: "run counter" to the AEA, the Administrative Procedure Act, Congressional intent, and the Commission's regulations; frustrate informed public participation in other proceedings; and skew the development of Commission administrative law. *Id.*

¹⁶ *Id.* at 6 (arguing that the Staff's Motion to Vacate "interferes with the incremental development of administrative common law before [the] Commission.").

¹⁷ Staff's Motion to Vacate at 1-2, 9. As the Staff noted in its Motion to Vacate, the Commission's decision to vacate an unreviewed Board decision does not reflect on the soundness of the Board's decision. *Id.* at 5 n.24.

¹⁸ See *id.* at 3-4 and 4 n.15 (explaining why LBP-13-07 is controversial).

¹⁹ *Kerr-McGee*, CLI-92-02, 43 NRC at 14.

²⁰ See States' *Amici* Brief at 4.

²¹ See *id.* at 1-3, 5. *Id.* at 6 (stating that the Commission must be mindful of not harming public participation in NRC decision-making). See also States' Motion at 3 ("In particular, the States can provide insights on how [the Commission's *vacatur*] practice negatively affects intervenors in NRC proceedings.").

comment on the NRC's review of the SONGS steam generator tube degradation issue. This provided a broad range of viewpoints, which were considered by the Staff during its review.

Among other things, during the SONGS CAL process, the Commission or the Staff (1) established a public website and blog dedicated to SONGS steam generator issues; (2) provided eight public meetings, a Commission meeting, and multiple Congressional briefings, (3) established an electronic hearing docket with publicly available filings; (4) issued multiple press releases; (5) responded to numerous letters and questions from interested entities and stakeholders;²² and (6) published an individual *Federal Register* notice providing for an opportunity to comment on the Staff's proposed determination on no significant hazards consideration and an opportunity for hearing on Southern California Edison's (SCE) April 5, 2013 license amendment request (LAR).²³ The public and interested stakeholders were also afforded the opportunity to petition for enforcement actions under the Commission's 10 C.F.R. § 2.206 process.²⁴ Nothing in the Staff's Motion to Vacate or the Commission's *vacatur* practice affects this transparency or the Commission's commitment to transparency and meaningful public involvement in the future. Nor does the Staff's Motion to Vacate or the Commission's *vacatur* practice eliminate any of the many opportunities to consider and address public health and safety concerns.

²² These stakeholders included Congress, state and local officials, the public, and the industry.

²³ 78 Fed. Reg. 22576 (Apr. 16, 2013). This LAR was submitted in response to Staff's identification of a Technical Specification compliance issue during the SONGS CAL review. The States' *Amici* Brief did not acknowledge or identify these as opportunities for public participation. But these were opportunities for public participation during the SONGS CAL process. Sec. 189 of the AEA and 10 C.F.R. Part 2 separately provided for adjudicatory hearing rights, which were triggered by SCE's April 5, 2013 LAR.

²⁴ Two separate § 2.206 petitions for review related to the SONGS CAL process were filed. See Letter from Richard E. Ayres to Commissioners, Request that NRC Open a Docket for the Ongoing Proceeding to Address Major Safety Issues with the Replacement Steam Generators at San Onofre Units 2 and 3 (June 18, 2012) (ADAMS Accession No. ML12171A409); 10 C.F.R. § 2.206 Request Letter from Tom Gurdziel (Apr. 5 2013) (ADAMS Accession No. ML13102A248). See also *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 327 n.50) (identifying the § 2.206 process as a means for petitioners to protect their interests).

C. The States' *Amici* Brief Incorrectly Describes the Commission's *Vacatur* Practice and the Basis of the Staff's Motion to Vacate

Finally, the States' *Amici* Brief will not add value to the Commission's decision-making on the Staff's Motion to Vacate because it incorrectly describes the Commission's *vacatur* practice and the basis of the Staff's Motion. The Staff's Motion to Vacate is based on the Commission's *vacatur* practice, as outlined in Commission and Federal Court case law.²⁵ The States' *Amici* Brief asserts that the Commission's *vacatur* practice is based on outdated and inapplicable law,²⁶ because the Commission has not revisited its *vacatur* practice in light of more recent Federal Court precedent.²⁷ But the Commission has revisited its *vacatur* practice in light of the *Munsingwear* line of cases, including *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*,²⁸ and the Staff's Motion to Vacate is consistent with this current Commission practice.

The States' *Amici* Brief also suggests that the Staff filed its Motion to Vacate because the Staff disagreed with the Board and did not "like" the ruling.²⁹ However, this suggestion is unsupported; the Staff filed its motion to vacate because appellate review of LBP-13-07 was unavailable because of mootness.³⁰ Moreover, the Commission's *vacatur* practice is not based on the merits of an unreviewed Board decision. As stated in the Staff's Motion to Vacate, *vacatur* does not reflect on the soundness of the Board's decision.³¹ Thus, the Commission

²⁵ See Staff's Motion to Vacate at 5-6.

²⁶ States' *Amici* Brief at 4.

²⁷ *Id.* at 4.

²⁸ 513 US 18 (1994). Specifically, in *Kerr-McGee*, the Commission considered and declined to follow *Bancorp*. CLI-92-02, 43 NRC at 14.

²⁹ States' *Amici* Brief at 6 ("The fact that the Staff's position was not accepted by the San Onofre Board or that the Staff may not like the Board's ruling is no reason to vacate and expunge the ruling.").

³⁰ See Staff's Motion to Vacate at 1-2 (describing the basis for the motion to vacate).

³¹ *Id.* at 5 n.24 (citing *Kerr-McGee*, CLI-92-2, 43 NRC 13 (1996)).

should not accept the States' *Amici* Brief or consider it in the Commission's evaluation of the Staff's Motion to Vacate.³²

CONCLUSION

For the reasons outlined above, the Staff respectfully requests that the Commission deny the States' Motion and not accept the States' *Amici* Brief.

Respectfully submitted,

/Signed (electronically) by/

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³² States' Motion at 4 (requesting such consideration).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO MOTION TO SUBMIT BRIEF *AMICI CURIAE*" dated July 2, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 2nd day of July, 2013. Additionally, I hereby certify that copies of the "NRC STAFF'S ANSWER TO MOTION TO SUBMIT BRIEF *AMICI CURIAE*" dated July 2, 2013 have been served on the below individuals this 2nd day of July, 2013 via electronic mail.

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