UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

KRISTINE L. SVINICKI, WILLIAM D. MAGWOOD, IV, GEORGE APOSTOLAKIS, WILLIAM C. OSTENDORFF, AND CHAIRMAN ALLISON M. MACFARLANE

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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) June 24, 2013

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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

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

Office of the Attorney General
for the State of Vermont
109 State Street
Montpelier, Vermont 05609

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PRELIMINARY STATEMENT

The State of New York and the State of Vermont ("the States") submit this brief *amici curiae* in this matter in support of intervenors and in opposition to NRC Staff's motion to vacate the Atomic Safety and Licensing Board's full initial decision, LBP-13-07. In that decision, the Licensing Board determined that the Confirmatory Action Letter process between the Staff and the applicant constituted a *de facto* license amendment proceeding subject to a public hearing. *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3) Memorandum and Order (Resolving Issues Referred by the Commission in CLI-12-20), LBP-13-07, 77 N.R.C. ___ (May 13, 2013) (ML13133A323). This ruling, which mandated that a public hearing be held as required in a licensing action, *de facto* or otherwise, is consistent with the Atomic Energy Act's ("AEA's") provision for public involvement in NRC decisionmaking.

The AEA, the Administrative Procedure Act, and NRC's regulations require NRC to provide the public an opportunity to participate in agency proceedings that amend a nuclear power plant operating license, or modify a regulation governing the operations of a plant. *See, e.g.*, Atomic Energy Act, § 189, 42 U.S.C. § 2239; 10 C.F.R. § 2.309. As recounted in the States' motion for leave, the States of New York and Vermont take very seriously the public participation provisions laid out by the United States Congress and the Commission, and submit that the Commission's granting of vacatur in this proceeding would run counter to those provisions and Congressional intent, frustrate informed public participation in other proceedings, and improperly skew the development of Commission administrative case law.

Congress enacted AEA § 189 to ensure that the public had a right to participate in federal administrative proceedings concerning the licensing of atomic energy facilities. Senator

Anderson, one of the drafters of the AEA, made the following statement in support of public participation:

> We should establish procedures which are open to all, with a maximum or information disseminated as to the hazards and safety of each proposed design of a reactor, and as to the administrative considerations and actions taken on each application. The public has a substantial investment in the atomic-energy program and has a right to know and analyze the steps being followed by administrative officials.
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> …because I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I want to be sure that the Commission has to do its business out of doors, so to speak, where everyone can see it.

Statement of Senator Anderson, 1957 Congressional Record 4093-94 (Mar. 21, 1957). Decisions issued by Atomic Safety and Licensing Boards are an integral part of such open and transparent processes.

NRC's Transparency Mandate

Public transparency has been a stated core value of the NRC for many years, and Commissioners have expressed their dedication to public involvement in NRC decisionmaking in statements made around the world. NRC's efforts to engage the public have been a priority for Chairman Macfarlane since taking office and "enhancing the NRC's engagement with the public is a high priority." Allison M. Macfarlane, Chairman, Nuclear Regulatory Comm'n, Remarks at the 2013 Fuel Cycle Information Exchange, Rockville, MD (June 11, 2013), transcript available at http://pbadupws.nrc.gov/docs/ML1316/ML13162A517 .pdf (last visited June 23, 2013). As Chairman Macfarlane stated recently, "[i]n order for our regulatory process to be successful, we must take a broad range of viewpoints into account. Congress, industry, state, local, and tribal governments, non-governmental organizations, and the public should feel confident that we are not only hearing their views, but actively considering them." *See* Allison

Macfarlane, Chairman, Nuclear Regulatory Comm'n, Remarks at the 2013 NRC Regulatory Information Conference (RIC): The Next 25 Years (Mar. 12, 2013), transcript available at http://pbadupws.nrc.gov/docs/ML1307/ML13071A260.pdf (last visited June 23, 2013). Former Chairmen and Commissioners have echoed these sentiments as well. Chairman Klein has stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders" and that "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible." Dale E. Klein, Chairman, Nuclear Regulatory Comm'n, Remarks at the Report to the Convention on Nuclear Safety, Vienna, Austria (Apr. 15, 2008), transcript available at http://pbadupws.nrc.gov/docs/ML0810/ ML081070367.pdf (last visited June 23, 2013); *see also* Jeffrey S. Merrifield, former Commissioner, Nuclear Regulatory Comm'n, Speech at the NRC 2001 Regulatory Innovation Conference: A Vision of Tomorrow, A Plan for Today (Mar. 14, 2001 NRC News # S-O1- 005) ("The Commission has a significant responsibility to provide fair and meaningful opportunities for public involvement in our licensing proceedings"); Peter B. Lyons, Commissioner, Nuclear Regulatory Comm'n, Remarks at the Trombay Colloquium: Perspectives on Nuclear Regulation and the Global Interest in Nuclear Energy (Mar. 27, 2006, NRC News # S-06-011) (in speaking about the "opportunity for public hearings," stressing how very seriously the agency takes its "responsibility for public participation" because "when the public has an opportunity to . . . participate in our decisionmaking process, nuclear safety is enhanced and public confidence in the NRC as a fair, stable and strong nuclear regulator is strengthened"), *quoted in Shaw Areva MOXServices* (Mixed Oxide Fuel Fabrication Facility), 66 N.R.C. 169, 2007 WL 4976933, n.81 (Oct. 31, 2007).

ARGUMENT

The Commission's Vacatur Practice is Based on Outdated and Inapplicable Law

The Commission has stated that it is not bound by judicial practice, including that of the United States Supreme Court. *See Kerr-McGee Chem. Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 N.R.C. 13, 15 (1996). Yet, the Commission began the practice of granting vacatur in reliance on dicta in the 1950 case *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)[1] despite the Supreme Court's clear statements in that decision that its ruling addressed only civil cases from a court in the federal system; it did not address administrative decisions. *Munsingwear*, 340 U.S. at 39-40. Insofar as the Commission relies on *Munsingwear* as the foundation for its vacatur decisions, and subsequently declines to revisit the issue in light of over six decades of updated federal court decisions, the States submit that the Commission's "practice" is in fact unsupported absent an analysis of *Munsingwear*'s progeny, including *U.S. Bancorp Corp. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).

Vacatur of the Board's Ruling is Not in the Public Interest

The States assert that no vacatur of this ruling is warranted, and that Staff has not met its burden for showing why removing this decision from public access is in the public interest. The States submit that the public interest would be not be served by a vacatur. Judicial and administrative precedents and persuasive authorities are valuable and important to the public. Granting Staff's motion would run counter to the public interest by preventing the public from examining and relying upon the reasoning in the Board's decision, rendered after full briefing by interested parties, as persuasive authority. In support of its motion, Staff argues that

[1] *See N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 N.R.C. 41, 55 (1978), *remanded on other grounds, sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979)); *see also U.S. Bancorp Corp. v. Bonner Mall P'ship*, 513 U.S. 18, 26-27 (1994) (observing that "the portion of Justice Douglas' opinion in *Munsingwear* describing the "established practice" for vacatur was "dictum").

"participants in other cases can cite to unreviewed Board decisions to support their positions in NRC licensing litigation" and that "Boards have relied on decisions of other Boards for guidance." NRC Staff's Motion To Vacate The Licensing Board's Full Initial Decision, LBP-13-07 (June 14, 2013) ("Staff Motion") at 5. Such citation and reliance is entirely appropriate and consistent with American legal practice; Licensing Boards and parties in other proceedings are capable of distinguishing binding from non-binding precedent, and indeed have been doing so since the inception of the NRC's adjudicatory proceeding regulations. As LBP-13-07 is an unreviewed Board decision, it is not binding precedent, and therefore, not harmful to Staff, which "will have an opportunity to seek judicial review when and if rulings issued in this proceeding are used against it in a future case." *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 N.R.C. 113 (1998).

"Controversy" Is Not An Appropriate Ground for Vacatur

The States are particularly concerned about Staff's position that because the ruling is "controversial" it must be vacated. Staff Motion at 5. As an initial matter, no caselaw Staff cites uses the term "controversial." The States submit that such a content-based standard is inconsistent with the Commission's commitment to meaningful public participation in fair, open, and transparent adjudicatory proceedings. The Staff's motion cites to *Kerr-McGee Chem. Corp.* 43 N.R.C. at 15 (holding that under the circumstances in that case, wherein the Board's ruling "involve(d) complex questions and vigorously disputed interpretations of agency provisions," the Commission chose as a policy matter to vacate the decision and thereby eliminate the decision as precedent). However, the States submit that decisions on issues that "involve complex questions and vigorously disputed interpretations of agency provisions" are not the same as

"controversial," and the public, NRC Staff, and applicants can benefit from examining the well-considered, fully-briefed exploration of these issues by duly qualified Licensing Board panels.

Staff's motion interferes with the incremental development of administrative common law before this Commission. In 1962, Congress amended the AEA to provide for the Commissioners' referral of matters to Atomic Safety and Licensing Boards and for such boards to issue "intermediate or final decisions." AEA § 191, 42 U.S.C. § 2241; Pub. L. 87-615, § 1 (approved Aug. 29, 1962). In the San Onofre Confirmatory Action Proceeding, the three administrative judges – all impartial judges employed by the federal government for just this purpose – issued a decision following a formal referral from the Commissioners and briefing by the parties. In short, the preparation and issuance of LBP-13-07 used federal financial resources and followed a regular administrative process initiated by the Commissioners and authorized by the AEA. 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. Indeed, Congress' creation of Atomic Safety and Licensing Boards means that the Staff sometimes does not prevail, and those decisions have important value as persuasive authority, as do decisions when Staff's position does prevail.

In applying the "complex questions and vigorous dispute" standard, the Commission must be mindful of not harming public participation in NRC decisionmaking, since intervention is one manner in which matters can and may appropriately be "vigorously disputed." *See, e.g.*, *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 N.R.C. 219 (1999); *La. Energy Servs., L.P.*, 47 N.R.C. 113, and the instant matter. Surely, neither Staff nor the Commission believes that the only time an issue is complex is when a Board agrees with an intervenor position that conflicts with Staff's approach. To the contrary, it is the value of public

involvement – and the ability of the public to raise valid issues resulting in positive changes towards public safety and environmental protection – that underlie the Commission's public participation policies and regulations to begin with.

CONCLUSION

The State of New York and the State of Vermont respectfully request that the Commission deny Staff's motion and let the Licensing Board's order stand for what it is – a persuasive, but not binding, administrative decision entitled to no more or less weight than any other Licensing Board decision rendered in any proceeding on any issue. The public has the right to access this Licensing Board decision in the future.

Respectfully submitted,

Signed (electronically) by
Janice A. Dean
Kathryn Liberatore
Laura Heslin
Assistant Attorneys General
Office of the Attorney General
for the State of New York
120 Broadway
New York, New York 10271
(212) 416-8446

Signed (electronically) by
John J. Sipos
Assistant Attorney General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224
(518) 402-2251

Lisa Covert, Legal Intern

Signed (electronically) by
Kyle H. Landis-Marinello
Assistant Attorney General
Office of the Attorney General
for the State of Vermont
109 State Street
Montpelier, Vermont 05609
(802) 828-3171

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