UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-361-CAL
	)	& 50-362-CAL
SOUTHERN CALIFORNIA EDISON CO.	)	
	)	
(San Onofre Nuclear Generating Station,	)	
Units 2 and 3)	)	June 24, 2013
	)	

JOINT ANSWER BY FRIENDS OF THE EARTH AND THE NATURAL RESOURCES DEFENSE COUNCIL TO STAFF'S MOTION TO VACATE LBP-13-07

I. INTRODUCTION

Friends of the Earth (FoE) and the Natural Resources Defense Council (NRDC) file this answer in opposition to the Nuclear Regulatory Commission (NRC) Staff's "Motion to Vacate the Licensing Board's Full Initial Decision, LBP-13-07," filed June 14, 2013 ("motion"). The answer is timely filed under 10 C.F.R. § 2.323(c).

The Atomic Safety and Licensing Board ("Board" or "ASLB") issued LBP-13-07[1] in response to Commission Order CLI-12-20.[2] The Commission's Order directed the Board to determine whether the process engaged in by the NRC Staff and the licensee, Southern California Edison Company (SCE), following from a March 27, 2012 confirmatory action letter (CAL) constituted a *de facto* licensing proceeding giving rise to public hearing rights under Section 189(a) of the Atomic Energy Act (AEA). The Board answered the Commission's referred question with a unanimous "yes," detailing three, fully independent ways in which

[1] Memorandum and Order (Resolving Issues Referred by the Commission in CLI-12-20), LBP-13-07, 77 NRC __, (May 13, 2013) (slip op.) [hereinafter "LBP-13-07"].
[2] *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-12-20, 76 NRC __, slip op. at 5 (Nov. 8, 2012) [hereinafter "CLI-12-20"].

SCE's actions pursuant to the CAL process require a license amendment with attendant public hearing rights before the plant could be restarted. LBP-13-07 discusses the application of Commission precedent on *de facto* license amendment actions and the proper application of the standards under 10 C.F.R. § 50.59.[3]

Rather than petitioning for review of LBP-13-07, Staff's motion requests that the Commission vacate the Board's Order in light of SCE's decision not to pursue the necessary license amendments to allow restarting the San Onofre Nuclear Generating Station ("San Onofre") Units 2 and 3.

Vacatur is not appropriate in this instance because: (1) LBP-13-07, a decision about the conditions under which public hearing rights are triggered, is not moot; (2) Staff's motion is improper where, as here, the moving party has failed to appeal the underlying decision, thus depriving the Commission of the opportunity to adjudge for itself whether the appeal is moot; (3) even if the Commission were to determine that a petition to review was moot, the Commission is not precluded from reviewing such a petition; and (4) the Staff's motion is an impermissible collateral attack attempting to challenge the merits of LBP-13-07 without demonstrating that the Staff meets the Commission's criteria for a petition for review, as required by 10 C.F.R § 2.341.

FoE and NRDC[4] thus respectfully submit that the Commission should deny Staff's motion.

[3] LBP-13-07 at 21–22, 30–37.

[4] In its June 3, 2013 *Answer To FoE & NRDC's Motion To Convene A Board And Consolidate License Amendment Proceedings*, Staff claimed that NRDC attempted to shift its participation from "amicus" to that of a party. Staff is wrong and misunderstands the nature of the May 23, 2013 motion and, to the extent it intends to raise any similar claims to this Answer, it is likewise incorrect. Filing duplicative pleadings—either in moving to consolidate and notice an existing *de facto* license amendment process or in response to Staff's present motion—would waste the Commission's time and adjudicatory resources. To the extent the Commissioners agree with Staff's position that NRDC can only file a response here as amicus curiae, then this response could be treated as a Joint Answer by FoE and Amicus Curiae NRDC.

II. THE ASLB'S DECISION PROVIDES A GENERALLY APPLICABLE INTERPRETATION OF NRC REGULATIONS, APPLICABLE BEYOND SAN ONOFRE, REGARDING WHEN A LICENSE AMENDMENT IS REQUIRED

A. LBP-13-07 Clarifies the Proper Application of the Legal Standards Governing Public Participation When a Licensee Proposes a Change Inconsistent with Its License

The Board's decision is about two things, each consistent with the other. In one respect, LBP-13-07 speaks to the specific question certified to the Board regarding the CAL process for a specific facility. More fundamentally, LBP-13-07 speaks to the process owed to the public when a licensee proposes an action or actions that do not conform to its existing license. Every case stands alone for the specific facts presented to a tribunal, and every case has an application of law to specific facts that elucidates fundamental tenets of law.[5]

As applied to the facts in this case, LBP-13-07 enunciates a rule of law that when a licensee proposes an action that does not conform to its existing license, the Atomic Energy Act (AEA)[6] and NRC regulations[7] and precedent[8] require the licensee to apply for an amendment to its license, which triggers a right to request an adjudicatory hearing by "any person whose interests may be affected" by the proceeding.[9] LBP-13-07 explicates the legal standards for determining what kind of interactions between a licensee and the NRC Staff constitute a license amendment *de facto*, regardless of how characterized by the Staff,[10] and it confirms the public's right to an adjudicatory hearing under certain circumstances.

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[5] "[A] court's resolution [of a dispute] will define the specific requirements…in the circumstances presented by the case and thus create…a specific rule of legal obligation applicable to like circumstances." Richard A. Posner & William M. Landes, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 249 (1976). "It is only from a series of judicial decisions, each determining the legal significance of a slightly different set of facts, that a rule applicable to a situation…can be inferred." *Id.* at 250.

[6] 42 U.S.C. § 2131 (establishing that it is unlawful for any person to use a [nuclear power] utilization facility "except under and in accordance with a license issued by the Commission").

[7] 10 C.F.R. §§ 50.90–92; *and* 10 C.F.R. § 50.59.

[8] *See, e.g.*, *Cleveland Elec. Illum. Co.* (Perry Nuclear Power Plant), 44 N.R.C. 315, 326–27 (1996).

[9] 42 U.S.C. § 2239(a)(1)(A).

[10] LBP-13-07 at 20.

The requirement that a licensee obtain a license amendment when it seeks to make any change not "in accordance with"[11] the terms of its operating license—whether this be a change to the facility's technical specifications or a proposal that would result in permitting the licensee to operate "in any greater capacity"[12] than its original license prescribes—flows directly from the safety objectives of the Atomic Energy Act because it ensures there will be a thorough regulatory review of any proposed changes that have potentially significant safety effects. Moreover, the public participation rights provided for under the Atomic Energy Act and NRC's implementing regulations, specifically the attendant right of any person to request a public adjudicatory hearing in a license amendment proceeding,[13] are critical to the integrity of the NRC's licensing process and to public safety, since they ensure that any proposed changes by a licensee with significant safety implications will be required to maintain the appropriate margin of safety provided for in the original operating license.

Along with the application of law to specific facts that resulted in a finding from a duly impaneled Board, LBP-13-07 is concerned with the proper application of the legal standards[14] that govern when a license amendment proceeding is required. While the Board's factual analysis is necessarily applied to San Onofre, its legal interpretations are applicable beyond the specific facts in this case. Thus, Staff errs when it assumes that the Board's decision is moot because SCE no longer seeks to amend the license to allow restart of San Onofre Units 2 and 3.[15]

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[11] 42 U.S.C. § 2131.
[12] *Cleveland Elec. Illum. Co*, 44 N.R.C at 326–27 (internal citations omitted).
[13] *See* 42 U.S.C. § 2239; *and* 10 C.F.R. § 2.309.
[14] Applicable legal standards include: NRC regulations governing license amendments, 10 C.F.R. §§ 50.90-50.92; the application of 10 C.F.R. § 50.59 providing standards for a licensee for the purpose of determining whether it is required to seek a license amendment for proposed changes; and NRC precedent concerning when a *de facto* license amendment is found, as discussed in LBP-13-07 at 21−22. *See* LBP-13-07 at 17–24.
[15] Staff asserts that FoE's letter of June 11, 2013 to Chairman Macfarlane stating that SCE's License Amendment Request 263 is moot is evidence that *LBP-13-07* is moot. Staff takes an unwarranted leap of logic to make this conclusion. While SCE's request to amend an operating license for a plant that will no longer operate may be moot, LBP-13-07, which describes the application of legal standards discerning what actions rise to the level of *de facto*

LBP-13-07 stands as a unanimous, well-thought-out explication of the appropriate process and legal rights due under the Atomic Energy Act and the NRC's own implementing regulations in this and other similar cases.[16]

In this context, it must be remembered that *the Commission* referred this matter *precisely to seek the Board's guidance* on whether the substantive questions and extended process that occurred with San Onofre constituted a *de facto* license amendment under the NRC's regulations, as well as what process is due in such situations. Having received a unanimous and carefully considered decision from the Board in response to the Commission's referral, it would appear difficult indeed for the Commission to explain expunging the decision it sought.

Further, notwithstanding the Staff's note that "[u]nreviewed Board decisions do not constitute precedent or binding law,"[17] it is widely acknowledged that licensing board decisions assist in clarifying the application of statutory law and regulations for the public. Staff itself recognizes this, as it states that "participants in other cases can cite to unreviewed Board decisions to support their positions in NRC licensing litigation"[18] and "[s]imilarly, Boards have relied on decisions of other Boards for guidance."[19] Indeed, this is precisely the Staff's objection to letting the decision stand—that it will be used to interpret the NRC's regulations in ways the Staff disagrees with in *future* cases.

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licensing amendments, is not moot and provides clear illustration of how the Agency can interpret adjudicatory hearing rights.

[16] LBP-13-07 at 17–24.

[17] Staff Motion at 5 (internal citations omitted).

[18] *Id.* at 5.

[19] *Id.* Further, as any adjudicatory body, any ASLB panel is free to take note of previous rulings on similar or analogous matters and, with the specific facts of the case in mind, arrive at a decision. See, as one recent example, "[i]n this circumstance, we conclude that the Dewey-Burdock board's resolution of the legal question of the interpretation of 'construction' under section 40.32(e) was correct and that the subsequent rulemaking revision did not change this result. In this regard, contrary to the assertions of SEI and the staff, we are unable to conclude that the September 2011 rulemaking has the definitive effect they claim." *In the Matter of Strata Energy, Inc.*, (Ross In Situ Recovery Uranium Project), LBP-12-3, Feb. 10, 2012, at 30.

Thus, SCE's decision not to pursue the license amendment process required by the ASLB confirms, rather than moots, the rulings of LBP-13-07 regarding the proper characterization of a request by a licensee to make changes at a plant that do not conform to the existing license.[20] The fact that the Staff disagrees with the ruling is to be expected, since the Staff failed to persuade the ASLB. But that fact is an insufficient basis for vacating the ASLB's well-considered, unanimous decision. Nor does the Staff's disagreement with the ASLB render the Board's decision "confusing"[21] or "controversial"[22] as a clear statement of the law. Staff's real argument about the precedential liability of this decision is not that the public or, internally, the NRC will be confused by it, but rather that Staff contests the decision on its merits. Whether LBP-13-07 should stand on its merits is properly considered through the appeals process that Staff has declined to engage, as discussed further in Section V.

B. The Board's Interpretations of Law Are Not Mooted by SCE's Decision Not to Restart the Plant

Contrary to Staff's view,[23] LBP-13-07 is not mooted simply because SCE has chosen not to seek the license amendments required to restart San Onofre Unit 2 or 3 under the ASLB's decision. Staff's position that SCE's decision not to seek the license amendments moots the ASLB decision is untenably narrow; it ignores entirely the broader legal propositions clarified by the Board that apply beyond this particular case. Specifically, the decision serves as important guidance for the Commission on a due process issue on which the Commission sought clarification.

Staff relies heavily on a Commission case, *Private Fuel Storage, L.L.C.* (*PFS*), to argue that filing an appeal is unnecessary because any possible appeal of LBP-13-07 would be devoid

[20] *See* LBP-13-07 at 17–24.
[21] Staff Motion at 6−7.
[22] *Id.* at 3, 4 n. 15.
[23] *Id.* at 7.

of outstanding controversy.[24] The present case, however, is distinguishable from *PFS* because it expounds upon legal standards more broadly applicable to the regulated community. In *PFS*, an ASLB issued a Redaction Order, which instructed the Staff to submit a redacted version of a document containing sensitive material.[25] The Staff appealed the Redaction Order, but the Commission found the appeal moot because the Staff had already fully complied with the Order. The Commission therefore vacated the underlying Redaction Order on the grounds that there existed no outstanding controversy.

The facts in LBP-13-07 differ significantly from those in *PFS*, which involved a narrow procedural order directing the Staff to redact a document, and which was mooted because the Staff had already performed the ordered redaction. In contrast, LBP-13-07 provides more broadly applicable guidance for public participation in future licensing proceedings and is therefore not moot despite the licensee's decision to retire San Onofre Units 2 and 3.

C. The Legal Issues Underlying LBP-13-07 Are Likely to Recur

At its core, and beyond the application of law to a set of specific facts, the Board's decision concerns what public process is owed under the Atomic Energy Act and the NRC's own regulations when a licensee takes certain kinds of actions. More specifically, LBP-13-07 places certain limitations on an enforcement device such as a CAL: under the Board's decision, the Staff may not utilize an enforcement action in lieu of a licensing review when the licensee proposes changes that are outside the terms of its operating license.[26] Under LBP-13-07, such changes require a license amendment proceeding and opportunity for a public adjudicatory hearing.

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[24] *In the Matter of Private Fuel Storage, L.L.C (Indep. Spent Fuel Storage Installation)*, 62 N.R.C. 542, 542 (2005) [hereinafter "*PFS*"].
[25] *Id.*
[26] *See* 42 U.S.C. § 2131 (prohibiting any activity by a licensee not "in accordance with" its existing operating license).

LBP-13-07 speaks clearly to this point. In its decision, the Board notes that while each inquiry concerning a *de facto* license amendment is highly fact specific, existing case law "provides a straight-forward analytic framework for assessing the relevant facts."[27] The Board then goes on to lay out the factors that must be considered in a *de facto* license amendment inquiry, specifically, whether the licensee's proposed actions, if granted, would permit it to "operate (1) in a manner that deviates from a technical specification in its existing license; (2) beyond the ambit, or outside the restrictions, of its existing license; or (3) in a manner that is neither delineated nor reasonably encompassed within the prescriptive terms of its existing license."[28]

It is the application of these factors, taken together with the body of law and NRC precedent so carefully considered by the Board in reaching its decision, which delineates when a license amendment is required or exists *de facto*. The likelihood is great that another case will require the application of these standards and the guidance the Board has provided through its detailed analysis. That does not mean, importantly, that a different Board with a different set of factual predicates will come to the same result as the Board that decided LBP-07-13. As Staff itself notes, empirically this iterative process is already underway, as intervenors in an ongoing case have cited to LBP-13-07 to clarify the application of 10 C.F.R. § 50.59's standards for when a license amendment is required.[29] Notably, the Board in that case has not ruled on the matter and, while certainly sound precedent from FoE's and NRDC's perspective, the decision in LBP-13-07 does not necessarily bind future Boards considering different facts. Those Boards are capable of applying the law to the specific facts before them, mindful of precedent.

[27] LBP-13-07 at 21.
[28] *Id.* at 23.
[29] Petition to Intervene, *FirstEnergy Nuclear Operating Co*. (Davis-Besse Nuclear Power Station, Unit 1), at 12–16, Docket No. 50-346-LA (May 20, 2013); Staff Motion at 5 n. 26.

Staff presents reliance on LBP-13-07 by intervenors in other cases as problematical; however, this is again a reflection of the Staff's dislike of the decision and not indicative of the decision's relevance or legal merit. To the contrary, the fact that LBP-13-07 is already being cited suggests its utility and undermines the Staff's position that the decision must be moot because the issues cannot recur.[30] To be precise, the underlying legal issues, which concern the legal standards for when a license amendment is required, are capable of recurring and may reasonably be anticipated to do so. Even though the licensee decided not to seek the required license amendments for the San Onofre plant, the issue will recur in a different context.

The Commission recognized this principle of recurrence in *Toledo Edison*, where it found that an issue before it on appeal was not moot because there was "some possibility of similar future acts from which the public should be protected."[31] Certainly there is a high possibility that "similar future acts," i.e., 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, will occur.

Thus, there is more than a "reasonable expectation"[32] that LBP-13-07 will inform the Commission in the future, despite the fact that the San Onofre plant will be retired. The Staff will undoubtedly encounter the question of what is properly handled as a licensing proceeding as opposed to an enforcement process in the future[33]; as such, the underlying legal issues in this

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[30] Staff Motion at 5 (stating that a case is "moot when there is no reasonable expectation that the matter will recur").
[31] *The Toledo Edison Co. & The Cleveland Elec. Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3)*, 10 N.R.C. 265, 400 (1979) (quoting *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1172−73 (6th Cir. 1978) (declining to "find that the likelihood of similar conduct in the future is so remote that the present case is moot")).
[32] *See Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041)*, 37 N.R.C. 181, 185 (1993) ("A case is moot when there is no reasonable expectation that the matter will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.") (citing *Cty. Of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).
[33] As the Board emphasized, its decision in LBP-13-07 will not unduly open the floodgates to *de facto* license amendment challenges, as the decision responds to a "highly fact-specific question" in an "exceptionally unusual case." LBP-13-07 at 16. Nevertheless, LBP-13-07 explicates important general legal propositions that do apply in certain circumstances, even if, as an unreviewed Board ruling, it is not binding law.

case are not mooted by SCE's voluntary and unilateral decision to shut down the plant rather than pursue the required license amendments. The issues at stake in a decision by the licensee to retire the San Onofre units were not under adjudication in the LPB-13-07 proceeding.

Were this the appropriate standard by which to gauge mootness, it would produce the absurd result that *any* case subsequently resolved by actions of the licensee would be potentially subject to vacatur. Such a standard would offend the most basic tenet of a legal system based on common law: the doctrine of *stare decisis*, which stands for the notion that past decisions should not be lightly overruled. The Supreme Court of the United States has stated at least three compelling reasons for this important doctrine:

> [1] [T]he desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.[34]

Staff's request for vacatur in the present instance should be denied not only because it flies in the face of *stare decisis*, but also because it intimates distrust of future Boards' abilities to properly apply relevant past decisions to new sets of facts.[35]

III. STAFF'S FAILURE TO APPEAL THE UNDERLYING DECISION MAKES THE MOTION TO VACATE IMPROPER

Staff's motion to vacate should be denied because Staff failed to appeal LBP-13-07. Applicable legal principles mandate that vacatur is appropriate only where review of a decision

[34] *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 403 (1970).
[35] *Stare decisis* enhances institutional reputation and fosters the appearance of fairness. *See* Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89, 107 (1998) ("Stare decisis allows [decision-makers] to strengthen their reputation by promoting the perception that decisions are consistent over time.").

that has already been appealed by the losing party becomes unavailable.[36] Staff's contention that it was precluded from petitioning for review of LBP-13-07[37] is premised on the incorrect assumption that the Commission would of necessity be required to find the petition moot.

The vacatur remedy serves the purpose of protecting "the losing party from the binding effect of a judgment that may have been overturned on appeal."[38] It would defy logic to provide such a remedy without an examination of the questions to be raised on appeal and a determination by the appellate body that those questions are now moot. In fact, Staff cite to only one case (*Yankee Atomic*), inapposite here, where the Commission vacated an ASLB order that had not been appealed, as explained below.

However, as described in Section II, above, the legal principles underlying LBP-13-07 are not moot and thus appellate review has been available. The Board's decision concerns legal propositions undisturbed by SCE's decision not to pursue the required license amendments for San Onofre, including, for example: (1) an explication of Commission precedent on *de facto* licensing actions as it applies to the Staff's conduct of the enforcement process; and (2) the correct application of 10 C.F.R. § 50.59 standards to major changes made by a licensee, such as with steam generator replacements of a different design. Because Staff failed to challenge these propositions in an appeal or demonstrate how such a challenge is moot in light of SCE's subsequent actions, vacatur is inappropriate in this instance.

The Staff's attempt to leapfrog the appeal process and move instead directly into vacatur also deprives the Commission of the opportunity to decide whether there remain non-moot issues

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[36] *See United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988) ("The *Munsingwear* procedure is inapplicable to cases in which 'the controversy ended when the losing party…*declined to pursue its appeal*.'") (emphasis supplied).

[37] Staff Motion at 8–9.

[38] Kipp D. Snider, *The Vacatur Remedy for Cases Becoming Moot Upon Appeal: In Search of A Workable Solution for the Federal Courts*, 60 GEO. WASH. L. REV. 1642, 1666 (1992); *see also PFS*, 62 N.R.C. at 542 (holding "it is prudent to vacate [Board decisions] when Commission *appellate review is cut short by mootness*") (emphasis supplied).

to be considered on appeal. The request to vacate LBP-13-07 rests on the Staff's erroneous presumption that review by appeal was unavailable, and Commission precedent cited by the Staff provides no basis for this request. The Staff cites *PFS* for the proposition that the Commission, as a matter of course, vacates underlying ASLB decisions "when Commission appellate review is cut short by mootness."[39] *PFS*, however, explicitly requires that the mootness must occur within an *appellate* review before vacatur may be considered. At this time, however, the Commission does not have before it any appeal from the Staff on the merits of the underlying ASLB decision. Therefore, *PFS* does not support the Staff's request for the Commission to vacate the ASLB's order.

The Staff also errantly relies on the Commission's *Yankee Atomic* case as a basis for its position that an appeal is not necessary.[40] However, invoking *Yankee Atomic* in this way is disingenuous; contrary to Staff's assertions, *Yankee Atomic* merely reinforces the *PFS* principle that the Commission may vacate underlying decisions only when an *appeal* is rendered moot.[41]

Citing *Yankee Atomic*, Staff states that the Commission has previously vacated an un-appealed ASLB decision on mootness grounds. *Yankee Atomic*, however, does not support this position. *Yankee Atomic* involved an original ASLB order and a second ASLB order denying reconsideration of the original. Although only one of the orders in *Yankee Atomic* was appealed, both orders involved the same issue, thus explaining why the Commission vacated both orders when the appeal became moot.

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[39] *PFS*, 62 N.R.C. at 542.

[40] Staff Motion at 4 n. 19 (citing *In the Matter of Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, 50 N.R.C. 219, 221 (1999) [hereinafter "*Yankee Atomic*"]).

[41] In *Yankee Atomic*, intervenors submitted Contentions in a challenge to a license amendment application. The ASLB issued an order, LBP-99-14, to admit four Contentions. Subsequently, the licensee filed a motion with the ASLB to reconsider its decision to admit the fourth Contention, but the ASLB denied the licensee's motion for reconsideration in a second order, LBP-99-17. The licensee thereafter filed with the Commission an appeal to contest the Board's decisions regarding the Contentions. While that appeal was pending, however, intervening events rendered the appeal moot, so the Commission vacated both LBP-99-14 and LBP-99-17. *Yankee Atomic*, 50 N.R.C. at 221–22.

Unlike the situation in *Yankee Atomic*, the Staff here has moved to vacate a stand-alone decision by the Board without first appealing the order. Although Staff promotes the view that the Commission has discretion to vacate ASLB orders that have not been appealed, the Staff misreads *Yankee Atomic* and cites no other case law for support. *Yankee Atomic* supports the position that Staff may not in isolation move to vacate an unfavorable decision by an ASLB without first mounting an appeal on the merits. In sum, Commission practice and precedent preclude an attempt to have an ASLB decision vacated outside of a pending appeal; and since no appeal has been filed here, the Commission may not vacate the ASLB's decision.

IV. EVEN *IF* THE BOARD'S DECISION WERE FOUND TO BE MOOT, APPEAL IS STILL AVAILABLE UNDER NRC PRECEDENT AND STAFF WAS THEREFORE REQUIRED TO SEEK REVIEW PRIOR TO MOVING TO VACATE

The Staff was not foreclosed from filing a petition for review with the Commission, and indeed was required to do so before vacatur could be considered, even if the Commission ultimately were to determine that an appeal of LBP-13-07 was made moot by SCE's decision to abandon the necessary license amendments to restart San Onofre. Although the federal courts lack jurisdiction to consider the merits of a moot case under Article III of the Constitution,[42] the NRC is not similarly constrained.[43] As a result, there was "no insuperable barrier to [the Commission's review of] issues which have been indisputably mooted."[44]

The Commission has stated that it "will not [review moot cases] in the absence of the most compelling cause."[45] This case presented such a cause: an opportunity for the Commission

[42] *Spirit of the Sage Council v. Norton*, 411 F.3d 225, 230 (D. C. Cir. 2005).
[43] *N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2),* 7 N.R.C. 41, 54 (1978), remanded on other grounds *sub nom. Minn. v. N.R.C.*, 602 F.2d 412 (D.C.Cir. 1979) ("[The Commission is] not subject to the jurisdictional limitations placed on the Federal courts by…Article III.") [hereinafter "*Prairie Island*"]; *and see In the Matter of Tex. Utils. Elec. Co., et al. (Comanche Peak Steam Elec. Station, Unit 2)*, 37 N.R.C. 192, 200 n. 28 (1993) (noting that the Commission is not strictly bound by Article III's "case or controversy" requirement).
[44] *Prairie Island*, 7 N.R.C. at 54.
[45] *Id.*

to demonstrate its stated commitment to transparency and public participation, the two issues at the core of LBP-13-07. Rejecting an attempt by the Staff to "wipe"[46] a decision from the books simply because the Staff disagrees with the holding would affirm forcefully the Commission's commitment to these values.

In LBP-13-07, the ASLB held that the rights of the public provided by the Atomic Energy Act to participate in licensing decisions were triggered by actions that, while carried out under the Staff's "enforcement" authority, were in fact licensing actions. Commission review of the merits of such an important decision would have served to clarify the agency's position on public participation as required by the AEA and endorsed by the unanimous ASLB decision. Thus, even if the Staff believed that the Commission would have determined the appeal to be moot, the Staff should have filed a petition for review because there is compelling cause for the Commission to hear the appeal and assess its merits. The Staff's failure to file such a petition is fatal error.

In addition, the Commission should reject out of hand the Staff's complaints that the decision is "confusing" or "controversial." The Commission referred to the Board the question of whether the CAL process constitutes a *de facto* license amendment proceeding. In a unanimous and well-considered decision, the ASLB found three independent ways in which the answer to the Commission's referred question is a resounding "yes."[47] The Staff's claims that LBP-13-07 is "confusing" or "controversial" should be seen for what they are—the complaint of a party whose position has been duly heard, carefully considered, and rejected. If the Staff wished to contest the merits of the decision, the proper course of action, as discussed in Section III, above, was for the Staff to file a petition for review. Staff's current motion, as discussed

[46] Staff Motion at 9.
[47] LBP-13-07 at 24–25.

below, is nothing more than an improper collateral attack on the substance of the ASLB decision in the guise of a procedural motion.

V. STAFF'S MOTION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE MERITS OF THE BOARD'S DECISION

Staff cannot circumvent the Commission's established appeals process simply by claiming that review is unavailable and filing a motion to vacate. Staff's motion is replete with attacks on the merits of the Board's decision,[48] which can only be appropriately considered in a petition for review. A motion to vacate without pursuing an accompanying appeal is particularly inappropriate where, as here, the questions at issue were referred to the Board by the Commission itself, and Staff, as one of the losing parties, has failed to appeal the decision. The Court's consideration of vacatur "must also take account of the public interest," because "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole" and "are not merely the property of private litigants."[49, 50] Parties who seek relief from unfavorable decisions must do so through the "orderly procedure" of appeal as of right and certiorari, and not through the use of "vacatur as a refined form of collateral attack on the judgment."[51]

NRC regulations require that petitions for review contain specified bases for challenging an ASLB decision. The relevant provision, 10 C.F.R. § 2.341, requires an appellant to show specifically why the decision or action is erroneous and why Commission review should be

[48] *See* LBP-13-07 at 4 n. 15, 6–7, 8 n. 40.
[49] *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) [hereinafter "*Bancorp*"].
[50] Judicial precedents are valuable because "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not only lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Gely, *supra* note 34, at 106−07 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).
[51] *Bancorp*, 513 U.S. at 27.

granted. In order to accept the petition, the Commission then must conclude that the Board's decision includes one or more of the following types of errors:

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (iii) A substantial and important question of law, policy, or discretion has been raised;
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
>
> (v) Any other consideration which the Commission may deem to be in the public interest.[52]

Staff has offered no petition for review citing any such bases for overturning the Board's decision. The Staff's present motion is a self-serving attempt to "wipe the slate clean"[53] without having to justify this outcome on the merits.

Staff's motion for vacatur thus impermissibly raises objections to the merits of the Board's decision without making the demonstration required by 10 C.F.R. § 2.341. For example, as discussed above, Staff cites the fact that LBP-13-07 is already being used by petitioners in other proceedings as rationale for vacating the decision—notably, however, Staff does not demonstrate that this usage is *incorrect*, which would require Staff to show that the decision is wrong on the merits.[54] Staff also contests, consistent with its position throughout, the Board's determination of the scope of the proceeding below.[55]

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[52] 10 C.F.R. § 2.341(b)(4).
[53] Staff Motion at 9.
[54] *Id.* at 5 n. 26.
[55] *Id.* at 8 n. 40 ("LBP-13-07 [held] that the Staff's CAL did not constitute a *de facto* license amendment"). The Board did indeed determine that the March 17, 2012 CAL was not a *de facto* license amendment, but that the relevant scope of the inquiry was the entire CAL process, including SCE's actions taken in response to the CAL. Those actions, the Board found, *did* constitute a *de facto* license amendment process. LBP-13-07 at 11−17.

Taken as a whole, the Staff's motion is a substantive attack on LBP-13-07, including its statement of the applicable law for determining what circumstances constitute a *de facto* licensing proceeding. And yet, Staff's failure to file a petition for review suggests an unwillingness and/or inability to demonstrate that it can meet the NRC's appropriately high standards for reversing an Atomic Safety and Licensing Board decision on appeal. The Staff's effort amounts to an improper collateral attack on the decision, which the Commission should reject as an attempt to circumvent the appellate process prescribed by the NRC's regulations.

Staff had ample opportunity to file an appeal from the Board's decision. With the concurrence of Friends of the Earth, Staff was even granted a seven-day extension of time in which to consider whether to file an appeal of the Board's decision. None was filed, and any attempt to do so now would be out of time.

VI. CONCLUSION

For the foregoing reasons, FoE and NRDC oppose Staff's motion to vacate LBP-13-07 and respectfully request that the Commission deny the motion.

Respectfully submitted,
/Signed (electronically) by Kristin Hines Gladd/

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Counsel for Natural Resources Defense Council

Dated in Washington, D.C.
this 24th day of June 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-361-CAL
	)	& 50-362-CAL
SOUTHERN CALIFORNIA EDISON CO.	)	
	)	
(San Onofre Nuclear Generating Station,	)	
Units 2 and 3)	)	June 24, 2013
	)	

CERTIFICATE OF SERVICE

I hereby certify that, on this date, "Joint Answer by Friends of the Earth and the Natural Resources Defense Council to Staff's Motion to Vacate LBP-13-07" was filed through the E-Filing system.

/Signed (electronically) by Kristin Hines Gladd/

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