

UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

KRISTINE L. SVINICKI, WILLIAM D. MAGWOOD, IV,
GEORGE APOSTOLAKIS, AND 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
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

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The State of New York and the State of Vermont (or “the States”), through their undersigned counsel, submit this motion for leave to file a brief *amici curiae* in this matter in opposition to Staff’s motion to vacate the Licensing Board’s full initial decision, LBP-13-07. The States’ brief *amici curiae* accompanies this motion. The States respectfully request that the Commission grant the motion and accept the brief pursuant to 10 C.F.R. § 2.315(d) or the Commission’s inherent authority. This motion is timely under 10 C.F.R. §§ 2.315(d) and 2.323(a) since it is being filed within the 10 days allocated to the petitioner to file its opposition to the Staff’s motion.

Statement of Interest

Although neither the State of New York nor the State of Vermont is a party to this proceeding, the two States have fundamental and longstanding concerns about the development of fair and transparent decisionmaking and adjudicatory processes within the Nuclear Regulatory Commission.

The State of New York has expressed serious concerns about the safety and environmental impacts of Indian Point Units 1, 2, and 3 in Buchanan, New York, and has set out these concerns in the State’s Petition to Intervene in the Nuclear Regulatory Commission’s proceeding to consider whether or not to renew the operating licenses for these plants, NRC ASLBP No. 07-858-03-LR-BD01. The Commission convened an Atomic Safety Licensing Board to review the contentions submitted by the State and other parties, and a number of those contentions were admitted for adjudication. Many of the admitted contentions went through an adjudicatory evidentiary hearing process in 2012; a hearing on the second set of these contentions will take place at a future date.

The State of New York, an Agreement State, has a strong interest in ensuring the safety of the nuclear power plants within its borders. In this role, the State of New York takes very seriously the public participation provisions laid out by the United States Congress in the Atomic Energy Act, the National Environmental Policy Act, and the Administrative Procedure Act. For these reasons, the State appeared as *amicus curiae* in the matter of *Brodsky v. Nuclear Regulatory Commission*, 578 F.3d 175 (2d Cir. 2009), in which the State argued for “meaningful public participation by a diverse and appropriately concerned public” in a case not dissimilar to the instant matter, where the interpretation of NRC regulations either includes or excludes the public and limits the ability of the public to seek an adjudicatory hearing. *See Brodsky v. Nuclear Regulatory Commission*, 08-1454AG, Brief For *Amicus Curiae* New York State at 35 ML090410135 (Feb. 3, 2009). The State has also actively participated in other AEC and NRC adjudicatory proceedings (initial construction permits and operating licenses for Shoreham Nuclear Power Station and Indian Point Nuclear Generating Unit 2 and Unit 3) and nuclear waste issues. *New York v. United States*, 505 U.S. 144 (1992) (concerning “take title” provisions of the Low-Level Radioactive Waste Amendments Act of 1985); *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (concerning NRC waste confidence rule).

The State of Vermont has similarly participated in AEC and NRC adjudicatory proceedings and nuclear waste issues, including the waste confidence rule proceedings that led to *New York v. NRC*. Recently, Vermont has participated in the follow-up proceedings required by the remand ordered in *New York v. NRC*, including the submission of formal comments and the submission of a multi-state petition to the NRC.

As recognized by the U.S. Supreme Court, States have important sovereign interests in the regulation of atomic energy matters. *New York v. United States*, 505 U.S. at 188; *see*

generally, *Massachusetts v. U.S. Env'tl Protection Agency*, 549 U.S. 497, 520 (2007)

(Commonwealth of Massachusetts and other States “entitled to special solicitude” in standing analysis).

Both New York and Vermont have an interest in ensuring the full accessibility and transparency of licensing proceedings around the country and in the development of a fair and balanced body of administrative adjudicatory decisions which may impact public participation and other issues of concern to the States.

Consideration of the States’ *Amici* Brief is Desirable

The States’ accompanying *amici curiae* brief supplies a perspective that will aid the Commission in determining whether to grant Staff’s motion to vacate LBP-13-07. *See Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 N.R.C. 144, 150-51 (1987) (allowing a non-party to participate as *amicus curie* where he could “supply a perspective that would materially aid the Licensing Board’s deliberations.”). The States—having actively participated as intervenors in NRC adjudicatory proceedings—are in a unique position to address the adverse effects that an order to vacate would have on transparency and public participation in NRC proceedings. In particular, the States can provide insights on how such a practice negatively affects intervenors in NRC proceedings. The States’ brief neither “injects new issues into [the] proceeding nor alter[s] the content of the record developed by the parties;”¹ instead, it provides a useful perspective concerning the broader implications of granting Staff’s motion. *See NRC, Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule*, at 19 (Dec. 17, 2003) (ADAMS Accession No. ML033510327) (“The primary value of an *amicus* brief is to provide

¹ *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-4, 45 N.R.C. 95, 96 (1997).

the independent perspective and analysis of the non-party.”). Thus, the attached *amici* brief is desirable and should be considered in the Commission’s evaluation of Staff’s motion to vacate.

CONCLUSION

For the reasons set forth in this motion and the accompanying *amici curiae* brief, the undersigned respectfully request that the Commission grant the State of New York and the State of Vermont’s motion and accept the proffered brief.

Respectfully submitted,

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10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b), I certify that I have made a sincere effort to contact counsel for parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues. My efforts have not been successful with respect to NRC Staff and the applicant whose counsel has informed me that the Staff and applicant take no position on the motion for leave. Staff reserves the right to respond to the States' motion. Friends of the Earth and Natural Resources Defense Council do not oppose this motion.

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