

January 24, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC.)	Docket Nos. 50-237-EA and 50-249-EA
)	
(Dresden Nuclear Power Station)	ASLBP No. 14-930-01-EA-BD01
Confirmatory Order Modifying License))	

NRC STAFF ANSWER TO PETITION
TO INTERVENE AND REQUEST FOR HEARING

I. Introduction

Pursuant to 10 C.F.R. § 2.309(i)(1), the Staff of the U.S. Nuclear Regulatory Commission (NRC Staff or Staff) responds to the Petition to Intervene and Request for Hearing filed by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (Local 15 or Petitioner) on December 12, 2013.¹ For the reasons discussed below, the Staff asserts that Local 15 has failed to establish standing in this proceeding or propose an admissible contention. Accordingly, the Staff respectfully requests the Board to deny Local 15's Petition.

II. Background

Exelon Generation Company, LLC (Exelon or Licensee) is the holder of two Reactor Operating Licenses, which authorize the operation of the Dresden Nuclear Power Station (Dresden Station) in Morris, Illinois. On June 6, 2012, the NRC initiated an investigation to determine if a Senior Reactor Operator (SRO), an Equipment Operator (EO), or any other personnel at the Dresden Station knew that a SRO planned to commit a violent crime and failed to report that SRO for questionable behavior.² Based on the results of its investigation, the Staff

¹ Petition to Intervene and Request for Hearing (Dec. 12, 2013) (Petition).

² EA-13-068, *Dresden Nuclear Power Station, Units 2 and 3; Report Nos. 05000237/2013407; 05000249/2013407(DRS) and Results of Investigation Report No. 3-2012-020* (July 3, 2013) (ADAMS Accession No. ML13184A232) (Results of Investigation Report).

substantiated that several individuals failed to fulfill the requirements of Exelon's behavioral observation program, as required by NRC requirements at 10 C.F.R. § 73.56.³ Accordingly, the Staff notified Exelon of the apparent violation on July 3, 2013.⁴

Before making a final enforcement decision, the Staff provided Exelon the opportunity to request Alternative Dispute Resolution (ADR), a voluntary and informal process in which a trained neutral mediator assists both parties in reaching a mutually agreeable resolution.⁵ Exelon agreed to attend an ADR session, which took place on September 18, 2013.⁶ Subsequently, the NRC reached a settlement agreement with Exelon and memorialized the terms in a Confirmatory Order (Order) that Exelon agreed would apply to its entire fleet of operating reactors.⁷ As part of the settlement agreement, NRC credited Exelon for the actions it took following the incident with respect to its behavioral observation program.⁸ Additionally, the Order committed Exelon to further revise its behavioral observation program within 90 days to provide additional guidance and training on what types of offsite activities or information should

³ *Id.*

⁴ *Id.*

⁵ *Id.*; see also NRC Enforcement Policy (July 9, 2013) (ADAMS Accession No. ML13228A199) (Enforcement Policy) at 28-29.

⁶ EA-13-068, *Dresden, NRC Letter Re Alternative Dispute Resolution Session on September 18, 2013* (Sep. 9, 2013) (ADAMS Accession No. ML13253A196); EA-13-068, *Confirmatory Order Modifying License, Dresden Nuclear Power Station, Units 2 and 3*, at 3 (Oct. 28, 2013) (ADAMS Accession No. ML13298A144) (Confirmatory Order).

⁷ See Confirmatory Order at 4.

⁸ As acknowledged in the Confirmatory Order, Exelon stated it had already (1) revised its "Behavioral Observation Program" procedure to indicate that the program includes an expectation to report offsite illegal activity; (2) conducted a fleet-wide briefing of the issue and the expectation to report unusual behavior observed either on or offsite; (3) trained Dresden Station personnel of the changes to the procedure and the expectations for reporting aberrant offsite activities; (4) verified that Dresden Station personnel understood these requirements and guidance; and (5) revised its general employee training program used at other Exelon reactor facilities, to include guidance on reporting offsite aberrant activities. Confirmatory Order at 3-4.

be reported.⁹ Also, Exelon committed to (1) conduct an effectiveness assessment of these revised procedures within 18 months; (2) present the facts and lessons learned from the underlying events of the violation at an industry forum within 90 days; and (3) notify the NRC as actions are completed.¹⁰ In exchange for these commitments, the NRC agreed to not issue a Notice of Violation, civil penalty, or take any further enforcement action in the matter.¹¹

On November 7, 2013, the NRC published in the *Federal Register* a notice of the issuance of the Confirmatory Order modifying Exelon's license, informing any person adversely affected by the Order of their right to request a hearing within 30 days.¹² On November 22, 2013, the NRC granted Local 15 a 15-day extension of time to file a petition to intervene.¹³ Local 15 timely filed its Petition on December 12, 2013, submitting three contentions and requesting the NRC to rescind the Confirmatory Order.¹⁴ On December 19, 2013, this Atomic Safety and Licensing Board was established to consider the Petition.¹⁵

III. Standing

A. Petitioner's Standing to Intervene

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *In the Matter of Exelon Generation Company, LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License*, 78 Fed. Reg. 66,965, 66,966 (Nov. 7, 2013).

¹³ See Referral Memo of the Secretary to the ASLB Regarding Request for Hearing in the Matter of Exelon Generation Company, LLC, Dresden Nuclear Power Station (Dec. 13, 2013) (ADAMS Accession No. ML13347B340). Local 15 had sought a 90-day extension. See Letter from Rochelle G. Skolnick to Roy Zimmerman (Nov. 22, 2013).

¹⁴ Petition at 2, 8. On December 19, 2013, Exelon and the Staff filed a Joint Unopposed Motion for Extension of Time to File Answer to Petition to Intervene. The Board granted the motion. See Order (Granting Joint Unopposed Extension Motion) (unpublished) (Dec. 20, 2013).

¹⁵ Establishment of Atomic Safety and Licensing Board (Dec. 19, 2013) (ADAMS Accession No. ML13353A605).

Local 15's Petition asserts both representational and organizational standing to intervene in this proceeding. In addition, Local 15 argues that its members' physical proximity to Dresden Station establishes standing to intervene. While hearing requests are construed in favor of the petitioner on issues of standing,¹⁶ the petitioner ultimately bears the burden of providing facts sufficient to establish standing.¹⁷ As discussed more fully below, the Staff contends that Local 15 has not met its burden.

a. Applicable Legal Standards

A petitioner requesting a hearing must demonstrate standing and set forth at least one admissible contention.¹⁸ To satisfy these requirements, the petitioner must state (1) the nature of its right under the Atomic Energy Act (AEA)¹⁹ to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.²⁰ When assessing whether a petitioner has satisfied these requirements, licensing boards apply contemporaneous judicial concepts of standing,²¹ requiring the petitioner to establish (1) a distinct and palpable injury-in-fact that falls within the "zones of interest" arguably protected by the statutes governing the proceeding (e.g., the AEA or National Environmental Policy Act

¹⁶ See *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 395-96 (2009) (citing *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

¹⁷ See *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 139 (2010).

¹⁸ 10 C.F.R. § 2.309(a). A petitioner's right to participate in a hearing derives from Section 189a of the Atomic Energy Act of 1954, as amended (AEA). 42 U.S.C. § 2239(a)(1)(A) ("In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.").

¹⁹ 42 U.S.C. § 2201 et seq.

²⁰ 10 C.F.R. §§ 2.309(d)(1)(ii)-(iv).

²¹ See *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-03, 73 NRC 613, 621 (2011).

(NEPA)²²; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.²³ The injury-in-fact must be concrete and particularized, not conjectural or hypothetical.²⁴

An organization, such as Local 15, can establish standing by demonstrating either representational standing or organizational standing. To establish representational standing, the petitioner must demonstrate that (1) its members, using the enumerated criteria set forth above, would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit; and (4) at least one of the organization's members has authorized it to represent the member's interests.²⁵ To establish organizational standing, the petitioner must, in its own right as an organization, satisfy the same requirements for standing as an individual: injury, causation, and redressability.²⁶ The alleged injury-in-fact must impact either the organization's interests or the interests of its members, and the injury-in-fact must be within the "zone of interests" protected by the AEA or NEPA.²⁷

Lastly, the NRC recognizes a "proximity presumption" for standing, which allows a petitioner who resides within 50 miles of a reactor to establish standing without sufficiently

²² 42 U.S.C. § 4321 et seq.

²³ *Union Elec. Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 NRC 14, 23 (2012) (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)).

²⁴ *Westinghouse Elec. Co., LLC* (Hematite Decommissioning Project), LBP-09-28, 70 NRC 1019, 1024 (2009) (citing *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)).

²⁵ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

²⁶ *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411 (2007).

²⁷ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994).

pleading injury, causation, and redressability.²⁸ This proximity presumption is based on the finding “that persons living within the roughly 50-mile radius of the facility face a realistic threat of harm if a release from the facility of radioactive material were to occur.”²⁹ However, the proximity presumption is generally limited to reactor licensing proceedings or in cases where there is an “obvious potential for offsite [radiological] consequences.”³⁰

b. Petitioner Does Not Demonstrate Standing

In support of its standing to intervene, Local 15 alleges multiple injuries and claims that the Order will adversely affect its individual members.³¹ First, Local 15 states that the Order unilaterally modifies the terms and conditions of employment at Exelon facilities without union participation, thereby violating Local 15’s rights pursuant to the National Labor Relations Act (NLRA).³² Second, Local 15 alleges that its members now “face a very real threat” of future economic and property loss (*i.e.*, disciplinary suspension, loss of security access, termination of employment) because the Order subjects employees “for the first time” to observation and reporting obligations concerning behaviors observed off-duty and off-site.³³ In addition, Local 15 claims that its members’ physical proximity to the regulated facility bolsters its standing argument, stating that persons who work within a power plant should have a similarly

²⁸ See *Bell Bend*, CLI-10-07, 71 NRC at 138; *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009).

²⁹ *Calvert Cliffs*, CLI-09-20, 70 NRC at 917.

³⁰ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503, 507-08 (2012) (citing *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364-65 (2004)).

³¹ Petition at 7.

³² *Id.*

³³ *Id.*

recognized protected interest as persons who live near power plants via the proximity presumption.³⁴

The Staff respectfully asserts that Local 15's arguments fail to demonstrate standing. As discussed below, Local 15 has not sufficiently established either representational or organizational standing to intervene because its alleged injuries are (1) outside the "zone of interests" protected by the Atomic Energy Act; (2) not concrete or particularized; and (3) not fairly traceable to the action in question.

Both of Local 15's asserted injuries — loss of procedural NLRA rights and prospective economic/property loss — are outside of the relevant "zones of interest" in this proceeding. As previously stated, standing requires that a petitioner suffer a distinct and palpable injury-in-fact falling within the zones of interest protected by the governing statute. If a petitioner's interests are only tangentially related to, or inconsistent with, the implicit purposes of the governing statute — particularly when the petitioner is challenging a regulatory action but is not itself the subject of the action — the "zone of interests" test is not met.³⁵

In this case, the AEA bounds both the Confirmatory Order and the hearing rights of those affected.³⁶ The AEA authorizes the NRC to license the development, use, and control of civilian nuclear materials in such a way that provides adequate protection for the health and safety of life and property, and promotes the common defense and security.³⁷ Local 15's concerns, in contrast, arise from labor law issues (*i.e.*, collective bargaining obligations) with Exelon that are separate and independent from the NRC's health and safety or common defense and security obligations. Indeed, if the NRC were required to consider the tangential,

³⁴ *Id.* at 8.

³⁵ See *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

³⁶ See AEA §§ 161, 189. 42 U.S.C. §§ 2201, 2239.

³⁷ See, *generally*, 42 U.S.C. § 2013.

non-health and safety or security effects of enforcement orders on third parties, the agency's ability to carry out its enforcement responsibilities would be significantly hampered. Local 15's labor issues, if actionable, require an appropriate forum for their resolution, potentially including the proceeding Local 15 has already initiated with the National Labor Relations Board (NLRB).³⁸

Additionally, Local 15's asserted injury of prospective economic and property loss is not sufficiently concrete and particularized. Local 15 argues that the Order mandates "for the first time" the reporting of unusual, illegal, or aberrant off-site, off-duty conduct, and the uncertainty surrounding this obligation increases the risk of discipline or termination.³⁹ However, the Staff disagrees with Local 15's characterization that this is a "new" requirement. NRC requirements at 10 C.F.R. § 73.56 provide that individuals are to report "*any* concerns arising from behavioral observation," including "*any* questionable behavior patterns or activities of others[.]"⁴⁰ The reporting of off-site, off-duty conduct has always been within NRC's regulatory purview so long as the observed conduct has a nexus to public health and safety or the common defense and security.⁴¹ The amendments to Exelon's access authorization procedures memorialized in the Order are simply meant to clarify these off-site, off-duty requirements, and are not new obligations. To be clear, the examples provided by Local 15 of new activities that arguably must now be reported (*e.g.*, jaywalking and minor traffic infractions) are speculative, and may not have the requisite nexus to health and safety or common defense and security issues.⁴² It is an

³⁸ See Petition at 6.

³⁹ *Id.* at 5, 7.

⁴⁰ 10 C.F.R. § 73.56(f)(3) (emphases added).

⁴¹ *Id.*

⁴² Any access authorization determinations that are based on observed behaviors with no nexus to radiological health and safety are the sole responsibility of the licensee. Such determinations go beyond NRC's requirements in 10 C.F.R. § 73.56 and are not endorsed by the agency.

axiom that no injury-in-fact can result where no new activity is proposed.⁴³ Any hypothetical action taken by the Licensee based on an employee's failure to report observed off-duty and off-site behavior does not rise to the level of a "realistic threat of direct injury"⁴⁴ required for purposes of standing.

Also, Local 15 lacks standing because the injury is not fairly traceable to the action in question. In essence, the injuries asserted in the Petition arise from Exelon's alleged refusal to bargain with the union before implementing changes to its access authorization program. The NRC has not "affirmed" any alleged violations of Local 15's NLRA rights through the Confirmatory Order, nor does it expect its licensees to violate any legal obligations it may have when agreeing to an ADR settlement. Rather, the NRC reasonably expects that its licensees have the authority to enter into any settlements reached in the ADR process and will comply with any relevant laws.⁴⁵ If a licensee cannot fulfill the requirements of a confirmatory order, it may submit a written request to the NRC to relax or rescind its order.⁴⁶

As a final matter, Local 15's reliance on the "proximity presumption" of standing is misplaced. In NRC jurisprudence, such a presumption is applicable in nuclear power reactor licensing cases where the action contemplated is the issuance of a license or amendment to a license that would enable the applicant to engage in NRC licensed regulatory activities, which necessarily carry some measure of risk.⁴⁷ This premise is not applicable in this enforcement

⁴³ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-01, 59 NRC 1, 4 (2004); *see also Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001) (stating that, in the context of a license amendment proceeding, to establish standing a petitioner must show the amendment will cause a "distinct new harm or threat apart from the activities already licensed.") (internal quotations omitted).

⁴⁴ *See White Mesa*, CLI-01-21, 54 NRC at 253.

⁴⁵ *See* NRC Enforcement Manual, Rev. 9 (Sept. 9, 2013) (ADAMS Accession No. ML102630150) at Section 1.2.4.C (p. 278).

⁴⁶ *See* Confirmatory Order at 8. Such a request must be based on a demonstration of "good cause." *Id.*

⁴⁷ *See Calvert Cliffs*, CLI-09-20, 70 NRC at 917.

proceeding.⁴⁸ Local 15 does not argue that the Order makes the plant less safe or increases the risk of off-site radiological consequences, but rather that the Order tangentially harms the union and its members in a labor and employment context. For this reason, along with the reasons stated above, the Petition should be denied because Local 15 has not satisfied the requirements for standing under 10 C.F.R. § 2.309.

B. Discretionary Intervention

As an alternative to intervention under 10 C.F.R. § 2.309(a), Local 15 argues that the Board should grant discretionary intervention pursuant to 10 C.F.R. § 2.309(e). However, that regulation specifically states that discretionary intervention is only considered “when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held.”⁴⁹ Thus, discretionary intervention is inappropriate under the present circumstances because there are no other petitioners in this proceeding.

IV. Contentions

A. Legal Standards for Contention Admissibility

The legal standards governing admissibility of contentions are set forth in the NRC’s Rules of Practice at 10 C.F.R. § 2.309(f)(1). In order to be admissible, a contention must:

- (i) Provide a specific statement of the legal or factual issue sought to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;

⁴⁸ See *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 290 (2008) (citing *Alaska Dep’t. of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 406 (2004)) (“Although Licensing Boards have used a proximity presumption when resolving issues of standing for cases involving reactor licensing, in a case involving an enforcement order . . . the standing requirement is based on the Confirmatory Order itself[.]”).

⁴⁹ 10 C.F.R. § 2.309(e); see also *Changes to Adjudicatory Process (Part II)* (final rule), 69 Fed. Reg. 2182, 2189 (Jan. 14, 2004) (“The Commission is codifying the six criteria for discretionary intervention which were first articulated in *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976) . . . Discretionary intervention, however, will not be allowed unless at least one other petitioner has established standing and at least one admissible contention.”).

- (iii) Demonstrate that the issue raised is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents, which the petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute with the applicant/licensee exists on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The purpose of the Commission's contention pleading requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."⁵⁰ The Commission "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."⁵¹ The "contention admissibility requirements are deliberately strict, and [the Commission] will reject any contention that does not satisfy the requirements."⁵² Mere "notice pleading" does not suffice.⁵³

Where an enforcement order is at issue, the threshold question — related to both standing and admissibility of contentions — is whether the hearing request is within the scope of

⁵⁰ *Changes to Adjudicatory Process (Part II)* (final rule), 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁵¹ *Id.*

⁵² *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC 245, 253 (2010) (quoting *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)).

⁵³ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (citing *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007)).

the proceeding as outlined in the order.⁵⁴ The Commission has the authority to define the scope of the hearing pursuant to 10 C.F.R. § 2.202(a)(4), and this authority includes limiting the hearing to the question of whether the order should be sustained.⁵⁵ The critical inquiry in a proceeding involving a confirmatory order is whether the order improves the licensee's health and safety conditions.⁵⁶ If it does, or if the order has no impact on the *status quo ante*, no hearing is appropriate.

B. Discussion

a. Contention 1

The Confirmatory Order should not be sustained because, without sufficient justification in the record, it imposes obligations on the off-duty employees of Exelon not otherwise required by the NRC in Title 10 of the Code of Federal Regulations, Part 73, Sections 56(f)(1)-(3) to observe and report the offsite, off-duty conduct of fellow employees.⁵⁷

Local 15's first contention contains two central challenges: (1) the Confirmatory Order imposes requirements beyond the scope of 10 C.F.R. § 73.56, and (2) the Order lacks an adequate basis or justification. Local 15 asserts that the record suggests the Order was not drawn in such a way as to remedy the NRC's regulatory concerns.⁵⁸ Local 15 also opines that

⁵⁴ *State of Alaska Dep't of Transp.*, CLI-04-26, 60 NRC at 405.

⁵⁵ See *Bellotti v. N.R.C.*, 725 F. 2d 1380, 1381 (D.C. Cir. 1983) *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); see also *State of Alaska Dep't of Transp.*, CLI-04-26, 60 NRC at 405; *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157-58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004).

⁵⁶ See *State of Alaska Dep't of Transp.*, CLI-04-26, 60 NRC at 408; *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments* (Order Modifying Licenses With Regard to Reliable Hardened Containment Vents), CLI-13-02, 77 NRC at ___ (Jan. 31, 2013) (slip op.) at 4. The Commission has stated that the practice of allowing third parties to contest enforcement settlements at hearings would undercut the NRC's policy favoring enforcement settlements. See *State of Alaska Dep't of Transp.*, CLI-04-26, 60 NRC at 408. Such settlements may become illusive if licensees consent to confirmatory orders and are nonetheless subjected to formal proceedings, possibly leading to different or more severe enforcement actions. See *id.* (citing *Public Service Company of Indiana* (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (March 13, 1980)).

⁵⁷ Petition at 2.

⁵⁸ Petition at 16.

the apparent violations related to the SRO's planning of violent behavior were based on an isolated incident and not attributable to any deficiency in Exelon's behavioral observation program. The Staff will address each of the Local 15's arguments, in turn, below.

1. Scope of Behavioral Observation Requirements

The Confirmatory Order falls squarely within the scope of NRC's behavioral observation requirements in 10 C.F.R. § 73.56. As briefly discussed with respect to standing, NRC regulations require each nuclear power reactor licensee to implement and maintain an access authorization program that must provide "high assurance" that individuals subject to access authorization requirements are "trustworthy and reliable."⁵⁹ Each licensee's access authorization program must include a behavioral observation program,⁶⁰ which requires individuals to report any observed behaviors that may "adversely affect the safety or security of the licensee's facility or that may constitute an unreasonable risk to the public health and safety or the common defense and security, including a potential threat to commit radiological sabotage."⁶¹ Reports of questionable behavior must be promptly provided to a reviewing official, who reassesses the reported individual's unescorted access or unescorted access authorization.⁶² If the reviewing official has reason to question an individual's trustworthiness or reliability, the licensee must administratively withdraw or terminate the individual's unescorted access or unescorted access authorization and investigate the individual.⁶³ However, the ultimate decision-making authority regarding individual access authorization determinations lies with the licensee.⁶⁴

⁵⁹ 10 C.F.R. §§ 73.56(a), (c).

⁶⁰ *See id.* § 73.56(f).

⁶¹ *Id.* § 73.56(f)(2).

⁶² *See id.* § 73.56(f)(3).

⁶³ *See id.*

⁶⁴ *See id.* § 73.56(4).

In this case, the Staff tailored the Confirmatory Order to address the individual failures of Exelon employees to report questionable behavior patterns or activities as required by NRC regulations and Exelon's behavioral observation program. Although the Confirmatory Order ultimately led to changes (both current and pending) to Exelon's program, the apparent violation in this case did not claim that Exelon's program was entirely deficient. Rather, the apparent violation alleged that Exelon employees failed to report behaviors of an SRO that involved the planning of a violent crime.⁶⁵ Without a doubt, the SRO's behavior placed his trustworthiness and reliability into question and could have directly impacted the safety and security of individuals at the Dresden Station. Therefore, the SRO's behavior was within the purview of the behavioral observation program, and the Exelon employees should have reported this behavior.

NRC regulations regarding behavioral observation requirements are neutral with respect to the location and duty-status of individuals. So long as the questionable behavior has a nexus to the safety and security of its licensees, the NRC imposes an affirmative obligation to report.⁶⁶ Although the conditions of the Confirmatory Order seek to make Exelon's procedures more clear in this regard, they do not depart from established regulatory policy with respect to behavioral observation requirements. Therefore, Local 15 has failed to raise a genuine dispute with respect to a material issue of law or fact.

2. Adequate Basis of the Confirmatory Order

The Staff has fulfilled its responsibility to provide a sound basis for the Confirmatory Order. The NRC has broad statutory authority to issue enforcement orders that are "necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property."⁶⁷ Consequently, in crafting an enforcement order to address a

⁶⁵ See Results of Investigation Report, *supra* note 2, at 2.

⁶⁶ See 10 C.F.R. §§ 73.56(f)(1)-(2).

⁶⁷ See AEA § 161(b). 42 U.S.C. § 2201.

regulatory concern, the Staff has an obligation to ensure that its order directly and promptly addresses the problem.⁶⁸ In issuing an order, the Staff must “[a]llege the violations . . . or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action.”⁶⁹ A licensee to whom the Commission has issued an order can challenge the order.⁷⁰ Alternatively, the licensee may consent to a confirmatory order and waive its hearing rights.⁷¹

In this case, the Confirmatory Order memorializes a settlement agreement reached with Exelon to address individual failures to report observed behaviors within the scope of the Exelon’s behavioral observation program. The Staff based its Confirmatory Order solely on the evidence gathered as a result of its investigation.⁷² Specifically, the Staff substantiated that several individuals failed to fulfill the requirements of NRC’s behavioral observation requirements and Exelon’s behavioral observation program.⁷³ Accordingly, the Staff drafted the Confirmatory Order to make clear that questionable behavior should be reported regardless of time, place, or duty-status. Therefore, the Confirmatory Order represents an improvement to safety at Dresden Station, and the Petition’s contention arguing that the Order lacks a basis or justification cannot stand.

The Staff notes that its authority to issue enforcement orders is not without proper limitations. As discussed, NRC regulations only require the reporting of observed behaviors that have some nexus to NRC’s regulatory authority. In addition, the Administrative Procedure Act

⁶⁸ *State of Alaska Dep’t of Transp.*, CLI-04-26, 60 NRC at 411 (citing *State of Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License), LBP-04-16, 60 NRC 99, 122 (July 29, 2004) (Bollwerk, J. dissenting in part)).

⁶⁹ See 10 C.F.R. § 2.202(a)(1).

⁷⁰ See *id.* § 2.202(b).

⁷¹ See *id.* § 2.202(d).

⁷² Confirmatory Order at 1-2.

⁷³ *Id.*; see also Results of Investigation Report at 2.

(APA) provides that a reviewing court may set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁷⁴ The APA also provides that a “sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”⁷⁵ Local 15’s Petition raises contentions that fall outside of the NRC’s statutory authorization, and are therefore outside of the scope of this proceeding. To permit such a challenge by an intervenor who does not raise health and safety or common defense and security concerns is contrary to Commission jurisprudence and should be rejected.⁷⁶

b. Contention 2

The Confirmatory Order should not be sustained because it imposes on the employees of Exelon Generation behavioral observation and reporting obligations that are vague, over-broad and not carefully tailored to address the NRC’s stated health and safety concerns and improperly delegates to Exelon the discretion to interpret and implement NRC standards concerning behavioral observation without the input of Local 15, the public or the NRC.⁷⁷

Contention 2 asserts that the NRC has effectively delegated its rulemaking authority by providing Exelon the discretion to implement further changes without input from its bargaining unit employees. Also, similar to Contention 1, Contention 2 submits that the Confirmatory Order is legally insufficient. Local 15 elaborates on this argument by describing the Confirmatory Order as “vague, over-broad, and not carefully tailored” to address health and safety concerns.⁷⁸ For the reasons discussed below, the Staff asserts that Contention 2 is inadmissible.

⁷⁴ 5 U.S.C. § 706(2)(A).

⁷⁵ 5 U.S.C. § 558(b).

⁷⁶ See, e.g., *Bellotti*, 725 F. 2d at 1383 (D.C. Cir. 1983); *State of Alaska Dep’t of Transp.*, CLI-04-26, 60 NRC at 406 (2004).

⁷⁷ Petition at 2, 18.

⁷⁸ Petition at 18.

1. Delegation of Rulemaking Authority

The NRC has not delegated its rulemaking authority to Exelon or any other licensee. Further, the discretion afforded to Exelon in the Confirmatory Order to develop guidance related to access authorization⁷⁹ does not require the opportunity for public comment.⁸⁰ NRC's access authorization regulations permit licensees to develop their own individual access authorization programs as long as the requirements of 10 C.F.R. § 73.56 are met.⁸¹ The access authorization rule leaves individual decision-making authority related to unescorted access and unescorted access authorization to each licensee's discretion.⁸² Therefore, Local 15's contention appears to challenge the NRC's regulations as written. Subject to limited exceptions, "no rule or regulation of the Commission... is subject to attack ... in any adjudicatory proceeding."⁸³ Any contention that represents a challenge to the basic structure of the Commission's regulatory process must be rejected.⁸⁴ To the extent that Contention 2 challenges the NRC's access authorization regulations, the Staff respectfully contends that such a matter is inappropriate for adjudication before the Board and should be rejected.

⁷⁹ See Confirmatory Order at 7 (requiring Exelon to provide "additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials.").

⁸⁰ An order modifying a license, such as a confirmatory order, falls within the APA's definition of adjudication. See 5 U.S.C. § 551(7) (defining "adjudication" as an "agency process for the formulation of an order."); see also *Detroit Edison Company*, CLI-10-3, 71 NRC at 54, citing *All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel*, CLI-05-06, 61 NRC 37, 41 (2005). As such, enforcement orders do not trigger the notice-and-comment procedures applicable to rulemakings.

⁸¹ See 56 Fed. Reg. at 18998 (stating that the access authorization rule requires licensees to establish and maintain their own programs, which must include background investigations, psychological assessments, and behavioral observation).

⁸² See 10 C.F.R. § 73.56(4).

⁸³ 10 C.F.R. § 2.335(a); see *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

⁸⁴ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co., et. al.* (Peach Bottom Atomic Energy Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)).

Additionally, the NRC engaged in notice-and-comment rulemaking when it originally promulgated the access authorization rule.⁸⁵ That rulemaking permitted the public to address concerns regarding NRC's behavioral observation requirements. In fact, the NRC received several comments from labor unions during the rulemaking similar to Local 15's concerns.⁸⁶ In the Statements of Consideration for the final rule, the Commission stated that it "did not intend to include or exclude consideration of access authorization issues in collective bargaining, so long as any resolution is within the limits set by the NRC's regulations."⁸⁷

2. Legal Sufficiency of Confirmatory Order

Similar to Contention 1, Local 15 relies on vague assertions that the Confirmatory Order is legally insufficient. As the Staff discussed in its response to Contention 1, its Order was specifically tailored to address areas of regulatory concern identified in the Staff's apparent violation, and represents an improvement to safety issues within the scope of the NRC's regulatory authority. Therefore, Local 15 has failed to raise a genuine dispute on a material issue of law or fact.

c. Contention 3

The Confirmatory Order should not be sustained because it improperly endorses and confirms unlawful actions undertaken by Exelon Generation in derogation of its duty to bargain with Local 15 about the employees' terms and conditions of employment and in violation of the legally protected rights of Local 15 and its members.⁸⁸

⁸⁵ Access Authorization for Nuclear Power Plants (final rule), 56 Fed. Reg. 18997 (Apr. 25, 1991).

⁸⁶ Several labor unions, including the International Brotherhood of Electrical Workers (see, e.g., ADAMS Accession Nos. 8805240170, 8805230220 available in NRC's Public Legacy Library), expressed concern that industry guidelines for compliance with the access authorization rule were developed without input from the bargaining unit or any worker representatives. The unions believed that issues involved in granting access authorization were conditions of employment and as such should be subject to the collective bargaining process. See 56 Fed. Reg. at 19006.

⁸⁷ 56 Fed. Reg. at 19006. The Commission also noted that it had already provided a forum for the labor unions' concerns by publishing in the *Federal Register* a proposed policy statement endorsing the industry's guidelines for complying with the rule. See 53 Fed. Reg. 7534 (Mar. 9, 1988).

⁸⁸ Petition at 2.

The Staff asserts that Local 15's argument that NRC has endorsed an alleged NLRA violation is plainly outside of the scope of this proceeding. Local 15 argues that Exelon's actions related to the Confirmatory Order, although consistent with its obligations pursuant to the AEA and NRC regulations, conflict with the NLRA.⁸⁹ Therefore, Local 15 alleges that the NRC tacitly condoned Exelon's alleged violation of the NLRA by issuing the Confirmatory Order.

The NRC owes no duty to Exelon or its employees under the NLRA. The NRC's authorizing statute is the AEA, and the agency is ill suited to address labor disputes between its licensees and their employees. NRC lacks jurisdiction to provide declaratory or injunctive relief to Local 15 in its complaint of a violation of the NLRA. Here, Local 15's dispute rests solely with Exelon and, if actionable, should be properly adjudicated in the appropriate forum (e.g., the NLRB or U.S. Federal District Court). Although the Staff takes no position with respect to the labor dispute between Exelon and Local 15, the Staff does not condone any violation of federal or state law by NRC licensees.

V. Conclusion

As discussed above, the NRC Staff asserts that Local 15 has not sufficiently established standing. Further, Local 15 has failed to submit an admissible contention. Accordingly, the Staff respectfully requests the Board to deny the Petition.

Respectfully submitted,

Signed (electronically) by

Christopher C. Hair

Eric Michel

Counsel for NRC Staff

Dated at Rockville, Maryland
This 24th day of January, 2014.

⁸⁹ See Petition at 19-20.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC.)	Docket Nos. 50-237-EA and 50-249-EA
)	
(Dresden Nuclear Power Station)	ASLBP No. 14-930-01-EA-BD01
Confirmatory Order Modifying License))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that copies of the foregoing "NRC Staff Answer to Petition to Intervene and Request for Hearing" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 24th day of January, 2014.

/Signed (electronically) by/

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