

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	Docket Nos. 50-237-EA
)	50-249-EA
)	
EXELON GENERATION COMPANY, LLC)	
)	
(Dresden Nuclear Power Station, Units 2 and 3))	
)	July 6, 2015
)	

EXELON’S BRIEF IN REPLY REGARDING CLI-15-16

In accordance with the Commission’s direction in CLI-15-16, Exelon Generation Company, LLC (“Exelon”) hereby provides this reply responding to the briefs filed by the NRC Staff¹ and Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (“Local 15”)² on the question of whether Local 15’s appeal of the Atomic Safety and Licensing Board’s (“Board”) decision in LBP-14-04³ should be dismissed as moot and this proceeding terminated.

The NRC Staff recently issued a temporary relaxation⁴ of the Confirmatory Order which is the subject of this proceeding⁵ in furtherance of Local 15’s demands. As

¹ NRC Staff’s Brief on Mootness in Response to CLI-15-16 (June 26, 2015) (“NRC Staff’s Brief”).

² Local 15’s Brief in Response to the Commission’s June 11, 2015 Memorandum and Order (June 26, 2015) (“Local 15’s Brief”).

³ 79 NRC 319 (2014).

⁴ Letter from C. Pederson, Regional Administrator, NRC, to B. Hanson, Senior Vice President, Exelon Generation Company, LLC, and President and Chief Nuclear Officer, Exelon Nuclear, “Dresden Nuclear Power Station—Request for Relaxation of Confirmatory Order” (May 4, 2015), *available at* ADAMS Accession No. ML15125A103 (“Relaxation Letter”).

⁵ Letter from C. Pederson, NRC Regional Administrator, to M. Pacilio, Senior Vice President, Exelon Generation Company, LLC, and President and Chief Nuclear Officer, Exelon Nuclear, “Confirmatory Order; NRC Report Nos. 05000237/2013407(DRS); 05000249/2013407(DRS) and Investigation Report No. 3-2012-020; Dresden Nuclear Power Station, Units 2 and 3” (Oct. 28, 2013), *available at* ADAMS Accession No. ML13298A144 (“Confirmatory Order”).

demonstrated in Exelon's Brief⁶ and the NRC Staff's Brief, and as further explained below, the temporary relaxation effectively provides Local 15 with the relief it specifically requested at the outset. Local 15's appeal is therefore moot, and this proceeding should be terminated. In the alternative, if the Commission elects to reconsider Local 15's appeal as a general policy question, notwithstanding its mootness,⁷ then the Commission should deny Local 15's appeal and uphold the Board's decision in LBP-14-04, for all of the reasons set forth in LBP-14-04 itself and in Exelon's and the NRC Staff's responses to Local 15's appeal.⁸

I. LOCAL 15'S BELATED ARGUMENTS RAISE NO IMPORTANT LEGAL OR POLICY ISSUES

Exelon agrees with the NRC Staff's principal arguments. In particular, the NRC Staff's Brief points out that Local 15 did not claim in its initial Petition either that the Confirmatory Order would cause a reduction in safety at Exelon's plants, or that it could demand a hearing as of right under Section 2.202(a)(3) without either demonstrating standing or proffering an admissible contention. Thus, there is no need for the Commission to resolve unpled factual or legal disputes here, particularly where no live controversy compels them to be reached.

Importantly, neither of these claims implicates any important legal or policy issues worthy of the Commission's extraordinary review. On the contrary, it is well-settled that new claims cannot be raised in a NRC adjudication without addressing the late-filed

⁶ Exelon's Brief in Response to CLI-15-16 (June 26, 2015) ("Exelon's Brief").

⁷ Cf. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Plant, Unit 3), CLI-13-04, 77 NRC 101, 104-05 (2013) (declining to provide general direction or revised guidance in an adjudicatory decision when the appeal did not seek direct reversal of the underlying Board decision).

⁸ See generally Exelon's Answer Opposing Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO's Appeal of LBP-14-04 (June 6, 2014) ("Exelon's Brief on Appeal"); NRC Staff's Brief in Opposition to Appeal of LBP-14-04 by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (June 6, 2014) ("NRC Staff's Brief on Appeal").

contention pleading standards.⁹ It is also well-settled that third parties who allege adverse effects from an NRC enforcement order must demonstrate both standing and an admissible contention to obtain a hearing.¹⁰ Local 15 having failed to do either, there is no need for the Commission to consider the merits of these issues in order to resolve any important legal or policy questions.

In any event, despite their suggestion to the contrary,¹¹ Local 15 cites no judicially recognized “important legal question” exception to the concept of mootness. On the contrary, the mootness doctrine is intended to ensure that important legal or policy questions are resolved in the context of live cases or controversies, not merely theoretical disputes.¹²

II. LOCAL 15’S CLAIM THAT ITS APPEAL IS NOT MOOT LACKS MERIT

Local 15’s Petition to Intervene and Request for Hearing,¹³ including Contentions 1 and 2, and its appeal of LBP-14-04,¹⁴ are moot for all of the reasons set forth in Exelon’s Brief and the NRC Staff’s Brief. Most significantly, Local 15’s Brief fails to refute the following critical facts.

First, Local 15’s fundamental problem with the Confirmatory Order was that it allegedly gave:

⁹ See, e.g., *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010); *Nuclear Mgmt. Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

¹⁰ See Exelon’s Brief on Appeal at 14 n.77 (citing cases).

¹¹ See Local 15’s Brief at 6-7.

¹² See *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-13-09, 78 NRC ___, slip op. at 8 (Dec. 5, 2013) (Although a “legal question might indeed come up in a future adjudication involving different litigants, it is too general—and too speculative—for resolution here. Such a future case is appropriately decided in the context of a concrete dispute, with self-interested parties vigorously advocating opposing positions.”) (citations and internal quotations omitted).

¹³ See Petition to Intervene and Request for Hearing (Dec. 12, 2013) (“Petition”).

¹⁴ [Corrected] Brief in Support of Appeal of LBP-14-04 (May 13, 2014) (“Appeal”).

the NRC's stamp of approval to unilateral modifications already made by Exelon to bargaining unit employees' terms and conditions of employment as well as those to be made under Section III.B of the Order. *Because these modifications were and are being made without bargaining with the Union*, the Union's and its members' rights pursuant to the [National Labor Relations Act] have been violated first by the Company and then again by the NRC itself in its affirmance of the Company's actions.¹⁵

With the temporary rescission of the Confirmatory Order, this demand to allow Local 15 to bargain with Exelon over the terms and conditions of its members' employment has now been satisfied.

Second, Contention 1 is moot because of Local 15's own concessions (that the NRC access authorization regulations do in fact reach off-site, off-duty conduct such that the Confirmatory Order does not impose new requirements) as its arguments have evolved over time, and because the temporary rescission allows Local 15 the opportunity to negotiate over the specific obligations to be imposed on its members following the Confirmatory Order.¹⁶

Third, Contention 2 is moot because Local 15 will have the opportunity to remedy any alleged vagueness in the Confirmatory Order through its bargaining with Exelon over the specific additional guidance to employees in Revision 10 to Exelon's BOP procedure.¹⁷

Finally, the question of whether the terms of the Confirmatory Order itself are objectionable because they impose obligations on Local 15's members by requiring Exelon

¹⁵ Petition at 7 (emphasis added).

¹⁶ Compare Petition at 5 (arguing that Exelon's revised Behavioral Observation Program ("BOP") procedure "explicitly requires, for the first time, employee reporting of off-site, off-duty conduct") with Appeal at 25 n.100 (arguing that the Confirmatory Order "goes beyond the provisions of 10 CFR § 73.56(f) imposing reporting requirements on any 'illegal,' 'unusual,' or 'aberrant' behavior and requiring the reporting of other 'credible information.'").

¹⁷ See Exelon's Brief at 5-6.

to implement changes to the BOP “in anticipation of and pursuant to the Confirmatory Order”¹⁸ is irrelevant. Exelon has the right to revise its own BOP regardless of the terms of or even the existence of the Confirmatory Order. It has done so at least nine times before, without objection from Local 15, much less any claim of a right to negotiate over the BOP¹⁹—before the current dispute stemming from the failure to report a planned carjacking and additional criminal activities. The critical point for the Commission’s mootness analysis is that, consistent with Local 15’s request, the NRC Staff has modified the Confirmatory Order specifically to afford Local 15 the opportunity it sought to negotiate over the additional guidance to be provided in the BOP procedure. Thus, Local 15 is currently in active negotiations over the obligations to be imposed on its members through the BOP revisions, exactly the issue about which it sought to negotiate.²⁰ Local 15’s argument that it has not been allowed to negotiate, presumably with the NRC Staff, over the Confirmatory Order itself presents a distinction without a practical difference and, in any case, is now moot.

III. LOCAL 15’S BRIEF MISINTERPRETS THE MOOTNESS EXCEPTIONS

Local 15 misinterprets the established exceptions to the mootness doctrine when it argues that because Exelon continues to operate nuclear power plants and because Local 15 continues to represent some of Exelon’s employees, it is “entirely foreseeable” that a similar dispute “could” arise.²¹ That connection is far too tenuous. The standard to be met is not whether it is theoretically possible that a similar claim could somehow arise again at

¹⁸ See Local 15’s Brief at 3.

¹⁹ See Exelon’s Answer Opposing the Petition to Intervene and Hearing Request Filed By Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO at 18 n.84 (Jan. 24, 2014).

²⁰ It is the BOP, not the Confirmatory Order, which imposes binding obligations on Local 15’s members. See Exelon’s Brief on Appeal at 4-5.

²¹ Local 15’s Brief at 7-8.

some point in the future. Rather, the standard is whether the controversy between the parties is live (which, as Exelon and the NRC Staff have shown, it is not), or whether the deliberately narrow exception applies for controversies that are “capable of repetition, yet evading review.”²² Again, as Exelon has explained, this exception is for controversies for which there is a “*reasonable expectation* that the same complaining party will be subject to the same action again,” not simply that it is “foreseeable” or theoretically possible for such a dispute to recur.²³

Furthermore, this exception requires a showing that future disputes are *likely to continue to evade review* because “the challenged action was in its duration too short to be litigated.”²⁴ Local 15 would not be foreclosed from raising future challenges under similar circumstances, nor would such challenges be rendered untimely. Contrary to Local 15’s arguments,²⁵ its Petition and Appeal have not been rendered moot by any 90-day deadline imposed in the Confirmatory Order on Exelon. It is the Local’s own entry into a voluntary settlement agreement before the NLRB which required Exelon to seek relaxation of the Confirmatory Order and the Staff’s subsequent grant of that request that have rendered these claims moot.

²² *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-10, 37 NRC 192, 205 (1993) (emphasis added).

²³ *Id.* at 205; *see also San Onofre*, 78 NRC ___, slip op. at 7-8 (acknowledging an exception to the mootness doctrine “where the same litigants *likely* will be subject to similar future action”) (emphasis added). In an apparent attempt to meet this formulation, Local 15 speculates that it is “entirely likely that there will be future enforcement actions involving Exelon that have an adverse affect on its employees.” Local 15’s Brief at 7-8. Exelon does not agree that it is likely that it and Local 15 will again be involved in a dispute over an NRC Confirmatory Order, as all parties agree that the events leading to the Confirmatory Order were an isolated incident and there has only been one other example of a generally similar dispute in the past half-century of NRC adjudications. *See* Exelon’s Brief at 7.

²⁴ *Comanche Peak*, CLI-93-10, 37 NRC at 205.

²⁵ *See* Local 15’s Brief at 8.

Local 15's arguments that voluntary cessation of an activity due to a settlement does not moot this case²⁶ also is unavailing because it is the NLRB settlement and the NRC Staff's decision that moots Local 15's appeal, not any unilateral, voluntary action by Exelon. The voluntary cessation exception to the mootness rule is based on "the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."²⁷ However, when the government's actions are at issue, courts are reluctant to apply the voluntary cessation exception.²⁸ This is because "courts are justified in treating a voluntary governmental cessation of a possibly wrongful conduct with solicitude" as "government[al] actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested parties."²⁹ Local 15 has put forth no evidence to suggest that the NLRB's actions or the NRC Staff's actions were not in good faith—indeed the NRC's Staff's actions are exactly what both Local 15 and Exelon sought.

This proceeding does not fall within the voluntary cessation exception to the mootness doctrine for two additional reasons. First, as explained above and in Exelon's Brief, there is no reasonable expectation either that this fact pattern will recur or would

²⁶ See Local 15's Brief at 8-9 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) and *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-560, 10 NRC 265, 399-400 (1979)).

²⁷ *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001); see also *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006) (voluntary cessation exception does not apply when action is not a "unilateral action taken for the deliberate purpose of evading a possible adverse decision").

²⁸ See *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 & 1116 nn. 15-17 (10th Cir. 2010) (citing cases); see also *id.* at 1116 ("*Laidlaw's* heavy burden frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case.").

²⁹ *Id.* at 1116 n.15 (quoting *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009)).

evade judicial review in the unlikely event it did.³⁰ Second, unlike in the *Laidlaw* and *Davis-Besse* decisions cited by Local 15, the appeal in this proceeding has not been mooted through unilateral action by any party.³¹ Indeed, the Staff's temporary relaxation was issued at Exelon's request in order to allow Exelon to bargain *under its settlement agreement with Local 15* before the NLRB. Thus, Local 15's reliance on the voluntary cessation exception to the mootness doctrine is misplaced at best.

³⁰ See *Laidlaw*, 528 U.S. at 189; *L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1978); see also *City of Waukesha*, 531 U.S. at 285 (“a live controversy is not maintained by speculation”)

³¹ Cf. *Laidlaw*, 528 U.S. at 193 (holding the case not moot when business owner voluntarily closed chemical plant during pendency of appeal of Clean Water Act claim); *Davis-Besse*, 10 NRC at 399-400 (holding an appeal of ASLB decision regarding wholesale sales requirement not moot because utility had refused to sell to power to intervenors in the past so there was “very real possibility” utility would refuse to sell to intervenors in the future).

IV. CONCLUSION

For the reasons set forth in Exelon's and the Staff's Briefs, and for the additional reasons set forth above, the Commission should deny Local 15's appeal of LBP-14-04 as moot. In the alternative, the Commission should deny the appeal on the merits for the reasons set forth in Exelon and the NRC Staff's responses to Local 15's appeal.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

July 6, 2015

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