July 6, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
EXELON GENERATION COMPANY, LLC	)	Docket Nos. 50-237-EA and 50-249-EA
	)	
(Dresden Nuclear Power Station)	)	

NRC STAFF'S REPLY TO LOCAL 15
AND EXELON'S BRIEFS IN RESPONSE TO CLI-15-16

I. Introduction

The staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its reply to the briefs filed by Local 15, International Brotherhood of Electrical Workers, AFL-CIO ("Local 15") and Exelon Generation Company, LLC ("Exelon") in response to the Commission's Memorandum and Order issued on June 11, 2015.[1] The Commission directed the parties to provide "briefing on the question whether Local 15's appeal should be dismissed as moot and this proceeding terminated" in the event the parties could not agree to jointly stipulate to withdraw Local 15's appeal.[2] In the absence of such agreement, the Staff filed its brief on June 26 requesting the Commission to dismiss the appeal as moot.[3] Exelon's brief requested the same.[4] Conversely, Local 15 opposed dismissal and provided three arguments as to why the Commission should not terminate the proceeding. The Staff responds to these arguments, in turn, below.

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[1] *See Exelon's Brief in Response to CLI-15-16* (June 26, 2015) (ADAMS Accession No. ML15177A364) ("Exelon Brief"); *Local 15's Brief in Response to the Commission's June 11, 2015 Memorandum and Order* (June 26, 2015) (ADAMS Accession No. ML15177A355) ("Local 15 Brief").

[2] *Exelon Generation Co.* (Dresden Nuclear Power Station), CLI-15-16, 81 NRC __, __ (June 11, 2015) (slip op. at 4).

[3] *NRC Staff's Brief on Mootness in Response to CLI-15-16* (June 26, 2015) (ADAMS Accession No. ML15177A384) ("Staff Brief").

[4] *See* Exelon Brief at 1.

II. Discussion

a. Local 15's Argument That More Substantive Relief Is Available Is Unpersuasive Because the Underlying Controversy Remains Moot

In its brief, Local 15 argues that the temporary relaxation of a portion of the Confirmatory Order does not afford the "substantive relief it sought in its initial Petition and continues to seek in the pending appeal."[5] Specifically, Local 15 claims only a "small portion of the relief it originally sought" has been obtained because the settlement of Local 15's unfair labor practice charge "touches only on Contention 3, leaving Contentions 1 and 2 unresolved."[6] At the outset, the Staff notes that Local 15's petition requests redress in the form of "*either* revocation . . . or modification" of the Confirmatory Order to allow it and its members to "have a voice" in any Behavioral Observation Program changes.[7] As stated in the Staff's brief, Local 15's petition for a hearing and all three of its contentions—not solely Contention 3—have a lack of bargaining as the foundational alleged injury.[8] Because the underlying controversy precipitating this NRC proceeding has been resolved in another forum, and rights associated with that controversy have been accommodated by the NRC Staff, the issues underlying Local 15's appeal are moot and the Commission should dismiss the appeal.

Local 15's arguments that this controversy is not moot rely on its desire to obtain additional relief not afforded by the National Labor Relations Board ("NLRB"), and further exemplify the recasting of its labor dispute as a safety issue.[9] Local 15 argues that because the NLRB settlement concerns only bargaining over the *effects* of the order's imposition of

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[5] Local 15 Brief at 2.

[6] *Id.* at 2-3.

[7] *See Petition to Intervene and Request for Hearing* at 8 (Dec. 12, 2013) (ADAMS Accession No. ML13346B030) (emphasis added).

[8] Staff Brief at 4-5.

[9] *See id.* at 6, n. 25 (quoting passage from LBP-14-04 striking Local 15's new arguments regarding the safety implications of the Confirmatory Order, noting that Local 15's initial concerns "clearly resided elsewhere").

Behavioral Observation Program requirements and not the order's contents, full redress is not afforded by the NLRB settlement.[10] Local 15 alleges a live controversy in this proceeding by focusing on the distinction between obligations imposed by Exelon (to be addressed by "effects" bargaining) and obligations imposed by the NRC's Confirmatory Order, stating that the latter are unlawful and can only be redressed by the Commission rescinding the order.[11] However, what Local 15 casts as a limitation in the NLRB settlement appears to be all that which Local 15 is entitled under federal labor law,[12] an assertion which Local 15 does not deny in its brief.[13] The fact that Local 15's "effects" bargaining "will remain fully circumscribed by the entirety of the Confirmatory Order itself"[14] does not lend weight to its argument that a live controversy remains in this NRC proceeding, but simply summarizes the resolution of the ancillary labor dispute—the NLRB settlement has provided Local 15 the right to bargain over the effects of a licensee's decision to enter into a settlement agreement arising out of an enforcement action, a right the NRC Staff has facilitated by approving a partial relaxation of the relevant provisions of the Confirmatory Order.

b. Exceptions to the Mootness Doctrine Are Inapplicable

[10] Local 15 Brief at 4.

[11] *Id.* at 3-4.

[12] *See* Exelon Generation Company, LLC, Request for Relaxation of Condition V(A)(A.1(1)) of Confirmatory Order EA-13-068 (Jan. 26, 2015) at 4-5 (ADAMS Accession No. ML15030A079) (stating "[t]he NLRB concluded that [Exelon] was not obligated to bargain over the decision to enter the Settlement Agreement and consent to the Confirmatory Order or the decision to retain the changes confirmed in Revision 9 of the BOP and was not required to rescind Revision 9 of the BOP."); *see also* Exelon Brief at 3-4 ("In connection with this charge, Local 15 argued that Exelon was obligated to bargain with Local 15 over the Confirmatory Order and over the additional guidance in the BOP. But, while the appeal of LBP-14-04 remained pending before the Commission, the NLRB concluded that Exelon had an obligation to bargain only over the *effects* of the Confirmatory Order.").

[13] *See* Local 15 Brief at 3-4 (acknowledging the NLRB's complaint concerning the Union's charge was over the "effects" of Exelon's decision to implement changes pursuant to the NRC's Confirmatory Order).

[14] *Id.* at 5.

Local 15 argues that even if the Commission determines that the case is moot, the Commission should apply an exception to the mootness doctrine because "it is entirely likely that there will be future enforcement actions involving Exelon that have an adverse effect on its employees."[15] Further, Local 15 argues that a future order would likely contain a similar 90-day implementation deadline imposed by the Confirmatory Order in this case, which would make it "procedurally impossible" for Local 15 to litigate the enforcement order in that period.[16]

The federal courts and the Commission recognize the "'capable of repetition, yet evading review'" exception to the mootness doctrine.[17] This exception typically applies when "a short-term action expires by its own force before the underlying basis for the action can be adjudicated."[18] The Commission customarily applies this exception narrowly, thus reserving it for the infrequent circumstance when the challenged action "was too short in duration to be litigated and there is a reasonable expectation that the same party will be subjected to the same action again."[19]

This exception is clearly inapplicable in this instance because the exception requires an injury that is *inherently* short-lived, and thus incapable of adjudication before the injury naturally

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[15] *Id.* at 7.

[16] *Id.* at 8.

[17] *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-08, 37 NRC 181, 185 (1993) (citing *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); *Sec. & Exch. Comm'n v. Sloan*, 436 U.S. 103, 109 (1978); *Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1170 (D.C. Cir. 1984)).

[18] *Id.* at 187 (citing *Sec. & Exch. Comm'n v. Sloan*, 436 U.S. 103, 109-10 (1978)).

[19] *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-09, 78 NRC 551, 557-58, n. 26 (2013) (holding that while the same legal question may arise in a future proceeding with different litigants, it is prudent for the Commission to wait to decide the underlying legal question until it has before it a concrete dispute, with self-interested parties advocating opposing positions); *Advanced Med. Sys.,* CLI-93-08, 37 NRC at 187-88 (noting that although the licensee was "certainly subject to future orders, the legitimacy of such orders is highly fact-dependent, and a mere possibility of future action is not sufficient to eclipse a finding of mootness.").

expires (*i.e.* "evades" review).[20] While Local 15 cites the Confirmatory Order's 90-day implementation time period as relevant to this exception, the terms of the order (which comprise Local 15's alleged injury) are permanent, not short-lived. Indeed, neither the Staff nor Exelon sought to dismiss the case on mootness grounds after the expiration of the implementation period. This proceeding has become moot because of intervening Staff action (relaxation the terms of the Confirmatory Order to facilitate bargaining) that occurred over sixteen months after Local 15's petition for hearing was filed, not because of any inherent or natural expiration within the order itself. The implementation deadline within any speculative future enforcement order involving the same two parties would similarly have no effect on Local 15's ability to request a hearing on that hypothetical order. Thus, this exception is clearly inapplicable in this proceeding.[21]

c. An Advisory Opinion on Hearing Rights Is Unnecessary

Local 15 argues in its brief that "a dismissal of Local 15's appeal now would fail to resolve the important legal question of whether Local 15, as the union representing Exelon bargaining unit employees, may demand a hearing as of right pursuant to 10 C.F.R. § 2.202(a)(3). . . ."[22] In essence, Local 15 requests the Commission to issue an advisory opinion

[20] *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973) (challenge to state law prohibiting abortion not mooted by end of pregnancy because duration of pregnancy is inherently shorter than time required for litigation of issue); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976) (challenge to trial judge order restraining news media coverage of murder trial until jury was impaneled was not mooted by order's natural expiration because such orders were too "short-lived" and would always evade review); *Norman v. Reed*, 502 U.S. 279, 287-88 (1992) (challenge to state law allegedly creating obstacles for new political parties to be placed on election ballots not mooted by fact that particular election for which petitioner sought eligibility passed by time of appellate review).

[21] Local 15 also appears to argue that Exelon's voluntary actions taken pursuant to its settlement agreement with the NLRB should not support mootness because it would permit Exelon to continue its challenged conduct. *See* Local 15 Brief at 9. This longstanding exception to the mootness doctrine is reserved for situations where a defendant who voluntarily ceased the alleged wrongful conduct would be "free to return to his old ways" after having the case dismissed on mootness grounds. *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 189 (2000) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). Local 15 makes no argument that Exelon is likely to do so if this case is dismissed as moot (*i.e.*, not abide by the terms of the settlement agreement). Exelon's alleged wrongful behavior cannot reasonably be expected to recur and therefore the exception does not apply. *See id*.

[22] Local 15 Brief at 6.

to take the "opportunity to issue a ruling that will provide certainty regarding the rights of litigants."[23] The Commission has long stated that it disfavors issuing advisory opinions.[24] Local 15's basis for requesting an advisory opinion fails to demonstrate that the Commission should change its long-standing practice, reserved for "the most compelling considerations."[25] Where, as here, no live controversy exists and the risk of recurrence is exceedingly low, an advisory opinion is not warranted.

III. Conclusion

For the reasons discussed above and in its June 26th brief, the Staff respectfully requests the Commission to dismiss Local 15's appeal of LBP-14-04 as moot and terminate this proceeding.

Respectfully submitted,

/Signed (electronically) by/

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Executed in accord with 10 C.F.R. § 2.304(d)

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[23] *Id.* at 7.

[24] *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-10, 78 NRC 563, 568-69 (2013) (noting the Commission's preference to resolve an issue "in the context of a concrete dispute, where all of the parties have a stake in the outcome of the litigation"); *see also Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC 101, 105 (2013) (citing *Tennessee Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978)); *U.S. Dep't of Energy* (High Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008) (characterizing the Commission's disfavor of issuing advisory opinions as its "usual policy").

[25] *Hartsville Nuclear Plant*, ALAB-467, 7 NRC at 463 (1978).

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Dated at Rockville, Maryland
this 6th day of July, 2015

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S REPLY TO LOCAL 15 AND EXELON'S BRIEFS IN RESPONSE TO CLI-15-16" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 6th day of July, 2015.

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