LBP-14-04

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Alex S. Karlin
Dr. Jeffrey D.E. Jeffries

In the Matter of	Docket Nos. 50-237-EA and 50-249-EA
EXELON GENERATION COMPANY, LLC	ASLBP No. 14-930-01-EA-BD01
(Dresden Nuclear Power Station, Units 2 & 3)	April 17, 2014

MEMORANDUM AND ORDER
(Denying Petition to Intervene and Request for Hearing)

Before the Board is a petition to intervene and request for hearing submitted by Local Union 15, International Brotherhood of Electrical Workers, AFL-CIO (Local 15).[1] The petition requires that we address this question: When may a non-participant challenge the settlement of an NRC enforcement action before an Atomic Safety and Licensing Board?

Our dissenting colleague reads the right to a hearing under section 189(a)(1)(A) of the Atomic Energy Act[2] broadly. Consistent with the Commission's guidance and regulations, a majority of the Board reads the Act more narrowly.

Generally, a non-party petitioner may not challenge a confirmatory order embodying a settlement if the order "improves the safety situation over what it was in the absence of the order."[3] Nonetheless, as the Commission has recognized, the NRC's notice of opportunity for

[1] See Petition to Intervene and Request for Hearing (Dec. 12, 2013) [hereinafter Petition].

[2] 42 U.S.C. § 2239(a)(1)(A).

[3] In the Matter of State of Alaska Dept. of Transp. & Pub. Facilities (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 406 (2004).

hearing on a confirmatory order provides the public a "safety valve" because "conceivably" the order might "remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation."[4] As the Commission has also recognized, however, such situations should be rare, as the intended purpose of all confirmatory orders is to enhance, rather than diminish, public safety. Therefore, the Commission has stated, "[i]n practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders."[5] Indeed, in half a century of proceedings before Atomic Safety and Licensing Boards, it appears no union has ever established standing to challenge a confirmatory order, and only one other has tried.[6]

Against this backdrop, Local 15 asks the Board to set aside an October 28, 2013 Confirmatory Order (Confirmatory Order) that arose from the settlement of an enforcement dispute between the owner of the Dresden Nuclear Power Station (Exelon Generation Company (Exelon)) and the NRC Staff. Local 15 represents certain of Exelon's employees but was not a party to the settlement. Asserting that "those employees have been entirely excluded from the process of developing the settlement agreement between Exelon and the NRC,"[7] Local 15 claims that the Confirmatory Order (1) imposes new obligations on Exelon employees without sufficient justification; (2) imposes obligations that are "intrusive and ill-defined;" and (3) "improperly endorses and confirms" Exelon's failure to bargain with Local 15 concerning these

[4] Id. at 406 n.28 (emphasis added).

[5] Id.

[6] The licensing board in that case rejected the union's claim to standing, but the appeal board (under the rules then in effect) permitted discretionary intervention. See Consumers Power Co. (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247 (1981), rev'd on other grounds, ALAB-670, 15 NRC 493 (1982). Subsequently, the Commission vacated both decisions, ruling that they should not be cited as precedent. CLI-82-18, 16 NRC 50 (1982).

[7] Reply of Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO to NRC Staff and Exelon Answers Opposing Local 15's Petition to Intervene and Request for Hearing (Feb. 14, 2014) at 4 [hereinafter Local 15 Reply].

new obligations, allegedly in violation of the National Labor Relations Act.[8] If the Confirmatory Order is rescinded, it contends, settlement discussions should commence anew, this time with the "essential" participation of Local 15.[9]

Local 15 did not timely allege—nor, in the Board's opinion, can Local 15 credibly claim—that the Confirmatory Order renders operation of Exelon's Dresden Nuclear Power Station less safe. Nor does Local 15 claim that, in any other way, the Confirmatory Order adversely affects compliance with the laws the NRC is charged with enforcing. In such circumstances, the Commission's decisions and sound public policy indicate that a non-party such as Local 15 is not entitled to a hearing before an Atomic Safety and Licensing Board. Because Local 15 has not established standing to intervene, and also because it has failed to proffer a contention that is suitable for an evidentiary hearing before this Board, we deny its petition.

Many commitments by corporations have consequences for their employees. To clarify: The Board does not rule that, by reason of being employed by Exelon, any individual loses the right to request an NRC hearing on a safety or environmental issue. Rather, we conclude that, not having adequately pled any such concern, an employee cannot seek a hearing on other consequences that flow from Exelon's decision to settle an NRC enforcement action. If they do not assert a plausible adverse effect on safety or the environment, dissatisfied employees may not initiate an NRC adjudicatory proceeding to void the decisions of their company's management.

I. Background

The underlying facts are not in dispute.

On June 6, 2012, the NRC's Office of Investigations Region III field office initiated an investigation to determine whether a senior reactor operator at the Dresden facility planned to

[8] Petition at 7, 15, 19.

[9] Local 15 Reply at 10.

commit a violent crime (robbing an armored car) and whether other employees knew of the plan but failed to report it.[10] Based on its investigation, the NRC Staff concluded that several employees failed to fulfill the requirements of Exelon's behavioral observation program, as required by 10 C.F.R. § 73.56(f).[11]

Accordingly, on July 3, 2013, the Staff notified Exelon of the apparent violation.[12] Before making a final enforcement decision, however, the Staff provided Exelon the opportunity to request alternative dispute resolution.[13] This is a voluntary and informal process, arranged through Cornell University's Institute on Conflict Resolution, in which a trained neutral mediator with no decision-making authority assists the parties in reaching a mutually agreeable resolution.[14] Exelon agreed to attend such a session, which took place on September 18, 2013.[15] Thereafter, the NRC Staff reached a settlement agreement with Exelon and memorialized the terms in the Confirmatory Order, which Exelon agreed would apply to its entire fleet of operating reactors.[16]

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[10] Letter from G. Shear, Director, Division of Reactor Safety, to M. Pacilio, Exelon, 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) at 5 (ADAMS Accession No. ML13184A232).

[11] Id. at 2.

[12] See id.

[13] Id.

[14] Id. at 3.

[15] See Letter from S. Orth, Enforcement/Investigations Office, NRC, to M. Pacilio, Exelon, Alternative Dispute Resolution Session on September 18, 2013 (Sep. 9, 2013) (ADAMS Accession No. ML13253A196).

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

As part of the settlement agreement, the NRC credited Exelon for actions it took unilaterally following the incident with respect to its behavioral observation program.[17] Additionally, Exelon volunteered 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 be reported.[18] Exelon also volunteered to (1) conduct an effectiveness assessment of these revised procedures within 18 months; (2) present the facts and lessons learned from the underlying events at an industry forum within 90 days; and (3) notify the NRC as actions are completed.[19] In exchange, the NRC agreed not to issue a notice of violation or civil penalty and not to take any further enforcement action in the matter.[20]

In proposing the changes to its behavioral observation program that were incorporated in the Confirmatory Order, Exelon took the initiative. As Local 15 states: "It is important to note that the changes to Exelon's behavioral observation program recited by the Order were not imposed upon Exelon by the NRC."[21] Rather, as Local 15 notes, many of the changes had already been implemented by Exelon independently. Moreover, it is "likely," the union suggests, that the rest were proposed by Exelon itself in what Local 15 calls "a gambit on Exelon's part to placate the NRC and avoid fines or other sanctions."[22] Local 15 charges that Exelon "could

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[17] 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 facility personnel on the changes to the procedure and the expectations for reporting aberrant offsite activities; (4) verified that Dresden facility 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. Id. at 66,965.

[18] Id.

[19] Id. at 66,965–66.

[20] Id. at 66,966.

[21] Petition at 20.

[22] Id.

have involved the Union in the process of developing a response to the NRC investigation but chose not to do so."[23] Although it acknowledges that the Confirmatory Order "is nominally directed to the licensee," and that Exelon "bears the burden of revising its Behavioral Observation Program . . . consistent with the terms of the order," Local 15 asserts that it is actually Exelon's employees "who are directly and adversely affected."[24]

On December 4, 2013, Local 15 filed an ongoing unfair labor practice charge with Region 13 of the National Labor Relations Board, alleging that Exelon's failure to involve the union was a violation of its and its members' statutorily and contractually protected bargaining rights.[25] On December 12, 2013—after the NRC denied its request for a 90-day extension of the time in which to respond to the NRC's notice of opportunity for hearing[26]—Local 15 also filed the instant hearing request with the NRC. It submits three contentions and asks the NRC to rescind the Confirmatory Order. Exelon and the NRC Staff oppose.[27]

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[23] Id.

[24] Local 15 Reply at 3.

[25] See Exelon Generation Co., L.L.C., NLRB Case No. 13-CA-118294. On March 5, 2014, Local 15 filed a new and related charge that has been docketed by Region 13 as Case 13-CA-123795.

[26] See Confirmatory Order, 78 Fed. Reg. at 66,965; Letter from R. Skolnick to R. Zimmerman (Nov. 22, 2013); Memorandum from A. Vietti-Cook, Secretary, Nuclear Regulatory Commission, to E. R. Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Request for Hearing in the Matter of Exelon Generation Company, LLC, Dresden Nuclear Power Station, Docket Nos. 50-237-EA and 50-249-EA, Confirmatory Order Modifying License (Dec. 13, 2013) (ADAMS Accession No. ML13347B340).

[27] Exelon's Answer Opposing the Petition to Intervene and Hearing Request Filed By Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (Jan. 24, 2014); NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014). Local 15 filed a timely reply on February 14, 2014, and all parties submitted responses to the Board's written questions on February 28, 2014. See Local 15 Reply; see also Memorandum of Local 15, International Brotherhood of Electrical Workers, AFL-CIO Responding to Atomic Safety and Licensing Board Questions for Oral Argument (Feb. 28, 2014); Exelon's Memorandum Responding to the Questions in the Board's February 5, 2014 Order (Feb. 28, 2014); NRC Staff Memorandum in Response to Board Order Concerning Instructions For Oral Argument (Feb. 28, 2014). The Board heard oral argument in Morris, Illinois on March 6, 2014.

Exelon has moved to strike part of Local 15's reply, in which, for the first time, Local 15 attempts to argue that the Confirmatory Order could actually have an adverse effect on safety at the Dresden Nuclear Power Plant.[28] For the reasons set forth below, the Board grants Exelon's motion to strike.

II. Analysis

To intervene as a party, Local 15 must (1) establish it has standing; and (2) proffer at least one admissible contention.[29] Somewhat belatedly, Local 15 contends that, under 10 C.F.R. § 2.202(a)(3), it may demand a hearing without complying with these requirements.[30] It is incorrect.

Although on its face the language of 10 C.F.R. § 2.202(a)(3)[31] might be ambiguous, its regulatory history makes clear that the Commission did not intend to relieve third-party individuals who are not the subject of an enforcement order (but who nonetheless seek a hearing on the order) from satisfying the requirements for a petition for intervention set forth in 10 C.F.R. § 2.309. These requirements include satisfying both the standing criteria in section 2.309(d) and the contention admissibility criteria in section 2.309(f). Unlike demands for a hearing by the subject of an enforcement order, which are automatic without regard to satisfying

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[28] Exelon's Motion for Strike (Mar. 13, 2014); Local 15, International Brotherhood of Electrical Workers, AFL-CIO's Response in Opposition to Exelon's Motion to Strike (Mar. 20, 2014).

[29] 10 C.F.R. § 2.309(a).

[30] Memorandum of Local 15, International Brotherhood of Electrical Workers, AFL-CIO Responding to Atomic Safety and Licensing Board Questions for Oral Argument (Feb. 28, 2014) at 1–2.

[31] 10 C.F.R. § 2.202(a)(3) provides that, upon issuance of an enforcement order, the NRC must:

> [i]nform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order . . . .

10 C.F.R. § 2.309,[32] both the Commission and other licensing boards have consistently required third parties seeking intervention with respect to an enforcement order to meet the 10 C.F.R. § 2.309 criteria, and have not considered such requests to be automatic.

Prior to 1991,[33] the 10 C.F.R. Part 2 regulations limited the NRC's ability to issue orders to unlicensed persons.[34] The purpose of the 1991 amendments was, in relevant part, to revise these regulations "to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction" and to identify which types of Commission orders include hearing rights.[35] Nearly all of the discussion in the Statement of Considerations for the 1991 amendments concerns the NRC's new procedures to issue orders upon unlicensed persons subject to the Commission's jurisdiction. It does not inform the question relevant to Consumers Power and to the instant proceeding—namely, what hearing rights are afforded under section 2.202(a)(3) to "other person[s] adversely affected by the order" but who are not the subject of the order.

There is, however, one passage in the Statement of Considerations where such third-party hearing rights are discussed in the context of the availability of third-party hearing rights when the subject of the order consents to its issuance:

> Section 2.202 provides that if the licensee or other person to whom an order is issued consents to its issuance, or the order confirms actions agreed to by the licensee or such other person, that consent or agreement constitutes a waiver by the licensee or such other person of a right to a hearing and any associated rights. . . . Whether or not the licensee or other person consents to an order,

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[32] See In the Matter of Andrew Siemaszko, CLI-06-16, 63 NRC 708, 714 n.3 (2006) (stating that 10 C.F.R. § 2.202 provides for an "automatic grant of such hearing requests").

[33] See Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664 (Aug. 15, 1991).

[34] See 10 C.F.R. §§ 2.202, 2.204 (1990) (providing Commission procedure for issuing an "Order to show cause" and "Order for modification of license," respectively, but only upon a "licensee").

[35] 56 Fed. Reg. at 40,664. These 1991 amendments also served to put licensed and unlicensed persons on notice that they may be subject to an enforcement action for deliberate misconduct or deliberately providing incomplete or inaccurate information to the agency. Id. at 40,665.

> *other persons adversely affected by an order* issued under § 2.202 to modify, suspend or revoke a license will be offered an *opportunity for a hearing consistent with current practice and the authority of the Commission to define the scope of the proceeding on an enforcement order*.[36]

As reflected in the Consumers Power decisions, the "current practice" of the Commission at the time of the 1991 amendments was to treat third-party requests for a hearing on an enforcement order as a petition for intervention under the Commission's generally applicable rules.[37] The Commission continued this practice after the more extensive1991 amendments.[38] Additionally, after the 2004 amendments to Part 2,[39] which created Subpart C and codified the current 2.309(d) standing criteria and 2.309(f) contention admissibility criteria, both the Commission and other licensing boards have continued to treat third-party requests for a hearing on an enforcement order as traditional petitions for intervention under Subpart C.[40]

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[36] Id. at 40,678 (emphasis added) (citing Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983)).

[37] See Consumers Power Co., LBP-81-26, 14 NRC at 249 (subjecting a third-party union's request for a hearing to the requirements of 10 C.F.R. § 2.714, the then-equivalent to the current 10 C.F.R. § 2.309)); see also Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980) (examining a third-party request for hearing on an enforcement order under the generally applicable rules governing intervention, *i.e.,* standing and discretionary intervention standards).

[38] See, e.g., Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994) (affirming LBP-94-05 and LBP-94-08, which granted "intervention" to a third party seeking a hearing on an enforcement order on the basis of generally applicable standing and contention admissibility requirements).

[39] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

[40] See, e.g., In the Matter of Andrew Siemaszko, CLI-06-16, 63 NRC at 724 (reversing the Board's grant of discretionary intervention to a third-party petitioner challenging an enforcement order, directing the Board on remand to consider whether the petitioner satisfied contention admissibility requirements); FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157–58 (2004) (citing sections 2.309(d) and (f) as the relevant legal standards when evaluating a third-party petition for hearing on a confirmatory order); Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 290–92 (2008) (denying a third-party request for a hearing on a confirmatory order, in part, because the petitioner failed to establish standing or raise an admissible contention under section 2.309(f)); Nuclear Fuel Servs., Inc. (Special Nuclear Facility), LBP-07-16, 66 NRC 277, 284–85 (2007) (citing to section 2.309 standing and contention admissibility criteria as the relevant legal standards for evaluating third-party requests for hearing on a confirmatory order); In the Matter of State of Alaska Dep't of Transp. & Pub. Facilities (Confirmatory Order Modifying

A. Standing

An organization such as Local 15 may seek to establish standing in its own right or representational standing on behalf of one or more members. Local 15 claims both. In the alternative, it asks to be granted discretionary intervention.

1. Representational Standing

To establish representational standing, Local 15 must (1) show that the interests it seeks to protect are germane to its own purposes; (2) identify, by name and address, at least one member who qualifies for standing in his or her own right; (3) show that it is authorized by that member to request a hearing on his or her behalf; and (4) show that neither the claim asserted nor the relief requested requires that member's participation in the proceeding in an individual capacity.[41] As to whether the individual member qualifies for standing, that member must have suffered or might suffer a concrete and particularized injury that is (1) fairly traceable to the challenged action; (2) likely redressable by a favorable decision;[42] and (3) arguably within the zone of interests protected by the governing statute—here, the Atomic Energy Act.[43] Moreover, the zone of interests requirement is applied more rigorously when the petitioner is not the direct subject of the challenged regulatory action.[44]

License), LBP-04-16, 60 NRC 99 (2004) (applying section 2.309 criteria when evaluating a third-party request for hearing on a confirmatory order), rev'd on other grounds, CLI-04-26, 60 NRC 399.

[41] Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007) (citations omitted).

[42] Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[43] Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); see also 10 C.F.R. § 2.309(d).

[44] Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 12 (1998) ("Where the plaintiff itself is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that

Local 15's principal factual support for its claim to representational standing (as well as for all its contentions) is the affidavit of a union member and Exelon employee, Dennis Specha, who duly authorizes Local 15 to represent his interests.[45] Mr. Specha asserts three claims. First, he is concerned that the terms of the Confirmatory Order impose very broad and insufficiently specific reporting obligations.[46] He therefore fears that, "[i]n light of this vagueness," he might "inadvertently violate Exelon's procedure and be subjected to discipline and/or revocation of access."[47] He does not allege, however, that the imposition of new reporting obligations somehow makes the Dresden facility less safe or that he fears being disciplined by the NRC directly. Second, Mr. Specha believes that his rights as a bargaining unit member and Chief Steward have been violated by reason of Exelon's failure to bargain with Local 15 concerning terms and conditions of his employment and by the NRC's having "approved of that conduct and affirmed it in the Confirmatory Order."[48] Third, Mr. Specha asserts that, "[a]s an individual living approximately 28 miles from the Dresden Station," he has "a particular interest in the continued safe operations of the plant."[49] He asserts that the changes resulting from the Confirmatory Order "are not reasonably related to the safe

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Congress intended to permit the suit.") (quoting Clarke v. Sec. Ind. Ass'n, 479 U.S. 388, 399 (1987)).

[45] See Petition, Attach. 1, Aff. of Dennis Specha.

[46] Id. ¶ 10.

[47] Id. Our dissenting colleague suggests that, for failing to report the behavior of another Exelon employee, Mr. Specha might also be banished by the NRC from working anywhere in the nuclear industry; fined up to $100,000; and prosecuted criminally. Dissent at 32. Regardless of whether those concerns are realistic, Mr. Specha does not allege them.

[48] Petition, Attach. 1, Aff. of Dennis Specha ¶ 11.

[49] Id. ¶ 12.

operations of the plant," but, again, he does not claim that those changes actually make the plant less safe.[50]

None of Mr. Specha's three concerns gives rise to an interest that is arguably within the zone of interests protected by the Atomic Energy Act.[51] Therefore, he lacks standing, and his concerns cannot support Local 15's claim to representational standing.

a. Vagueness Claim

In the circumstances of this case, concerns that have nothing to do with safety do not give rise to standing. Indeed, the Commission instructs us that even a concern that does involve safety will not support standing if the petitioner seeks merely a "better" settlement: that is, one that promises greater improvements to safety than the settlement that was actually negotiated.[52] Standing to challenge a confirmatory order exists only when a petitioner credibly alleges that a settlement somehow actually reduces safety.[53] Not surprisingly, the Commission expects that such cases will be rare.[54]

The critical inquiry in a proceeding involving any confirmatory order, therefore, is whether the order somehow diminishes the licensee's health and safety conditions. If it does not, no hearing is appropriate. Thus, Mr. Specha's concern that new requirements imposed by the Confirmatory Order might be more clearly drafted—absent a proper allegation of an adverse effect on safety—do not give rise to standing in this proceeding.

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[50] Id.

[51] Indeed, somewhat defensively, Local 15 emphasizes in its alternative request for discretionary intervention that, for discretionary intervention, "[i]t is irrelevant that the Union's economic interest may not fall within the 'zone of interests' protected by the AEA." Petition at 13.

[52] Alaska Dept. of Transp., CLI-04-26, 60 NRC at 406.

[53] Id. at 406 n.28.

[54] Id.

It is in this context that we must address Exelon's motion to strike one argument from Local 15's reply. In its reply, Local 15 claims, for the first time, that the Confirmatory Order "has the cumulative effect of rendering Exelon's operations less safe than they were before."[55] Local 15 did not make this claim in its initial petition.

In its petition, Local 15 asserted that it has a generalized interest in the safety of the Dresden facility,[56] challenged whether the Confirmatory Order is necessary for safety,[57] and contended that the Confirmatory Order must be "carefully tailored to address the legitimate concerns for public health and safety."[58] But it did not claim, implicitly or explicitly—much less with specificity—that the Confirmatory Order made the Dresden Nuclear Power Plant less safe.

The purpose of a reply is narrow. It is to give a petitioner an opportunity to address arguments in the opposing parties' answers.[59] A reply may not be used to introduce new arguments. As the Commission has stated: "It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request."[60]

We therefore grant Exelon's motion to strike. Moreover, even if we were to consider Local 15's belated assertion that the Confirmatory Order might actually reduce safety at the Dresden facility, we would find its argument neither plausible nor credible.

Initially, Local 15's concerns clearly resided elsewhere. Its petition claimed only that the changes to Exelon's behavioral observation program required by the Confirmatory Order were not necessary for safety (not that they detracted from it); that the changes allegedly put

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[55] Local 15 Reply at 9.

[56] Petition at 8, 17.

[57] Id. at 15.

[58] Id. at 18.

[59] Nuclear Mgmt. Co., L.L.C. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[60] Id. (citation omitted).

employees at risk of being disciplined for failing to report behavior they might not understand they were required to report; and that the Confirmatory Order "condoned" the very same alleged violations of the National Labor Relations Act that Local 15 is litigating before the National Labor Relations Board.

Neither Mr. Specha's affidavit nor any other facts submitted by Local 15 support a claim of an adverse impact on plant safety. Apart from Local 15's having been alerted by the answers to its petition that the absence of a safety claim might be fatal to its standing case,[61] there is no explanation for the union's 180-degree change in course. While Local 15 claims in its reply that the Confirmatory Order creates an adverse effect on safety, its initial petition asserted essentially the opposite: that the Confirmatory Order contains new additional safety-related requirements "without genuine basis or need."[62] Initially Local 15 argued that the Confirmatory Order reflected regulatory overkill—namely, that Exelon and the NRC should not "use a bulldozer to kill an ant"[63]—not that the Confirmatory Order detracted from safety.

We find unpersuasive Local 15's counsel's speculation—articulated for the first time at oral argument[64]—that the required changes to Exelon's behavioral observation program, which were intended to clarify when reporting is necessary under section 73.56(f), might somehow have just the opposite effect: that is, to discourage employees from reporting incidents that bear upon another employee's trustworthiness and reliability. Yet counsel's speculation at oral

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[61] 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 (Jan. 24, 2014) at 16; NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) at 12; see also Tr. at 37 (Local 15's counsel acknowledged that, in responding to Exelon's and the NRC Staff's answers, "we realized we needed to sharpen" a safety argument because "[w]e did not do a very good job of connecting the dots . . . in the initial petition").

[62] Petition at 18.

[63] Id.

[64] Tr. at 13; see also id. at 37 (Local 15's counsel acknowledged that, even when the union first asserted an explicit safety claim in its reply, "we didn't go into detail on that point").

argument is the only "support" for the otherwise unexplained claim in Local 15's reply of a lessening in facility safety. Therefore, we would decline to credit Local 15's belated safety claim even if we did not strike it. In the absence of a plausible dispute as to whether the alleged vagueness in the requirements imposed by the Confirmatory Order adversely affects nuclear safety, Mr. Specha's vagueness allegations do not support standing to request a hearing before an Atomic Safety and Licensing Board.

b. National Labor Relations Act Claim

Even more clearly, Mr. Specha's concerns about possible violations of the National Labor Relations Act do not establish standing here, as those concerns are more appropriately addressed in the proceeding that Local 15 has already initiated before the National Labor Relations Board. Any right that Local 15 might have to bargain over the terms of employment is not governed by the Atomic Energy Act or otherwise within the scope of the NRC's authority. Indeed, as the Supreme Court has held, such labor-related disputes are within "the exclusive competence of the NLRB."[65]

c. Proximity Presumption Claim

Finally, although the NRC employs a proximity presumption to establish standing in certain types of cases, the presumption has no application in an enforcement proceeding such as this. The 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."[66] Thus, the presumption is limited to reactor licensing proceedings and

[65] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959); see also Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988) (holding that NLRB is the agency equipped to handle alleged violations of the National Labor Relations Act, including collective bargaining disputes).

[66] Calvert Cliffs 3 Nuclear Project, L.L.C. (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009).

to other cases where there is "an obvious potential of offsite [radiological] consequences."[67] Otherwise, "[a]bsent an 'obvious' potential for harm, it is a petitioner's burden to show how harm will or may occur."[68] Mr. Specha makes no such attempt.

2. Organizational Standing

Local 15's claim to organizational standing is no more persuasive. Local 15's own organizational interests—independent of its role in representing Mr. Specha's interests—appear, if anything, to be even less focused on concerns that might fall within the zone of interests protected by the Atomic Energy Act. Insofar as Local 15 is concerned about alleged unfair labor practices (of which it has already complained to the National Labor Relations Board), as explained above such matters do not fall within the jurisdiction of the NRC. And even insofar as Local 15 might also be concerned about the dilemma in which its members find themselves in attempting to comply with allegedly vague standards of conduct, its concerns seem less direct than those of the affected members themselves, such as Mr. Specha, who might personally face discipline or termination. Local 15's interests surely are no stronger than those of Mr. Specha, whose concerns we have already determined to be insufficient to confer standing under the Atomic Energy Act in the circumstances presented.[69]

B. Discretionary Intervention

If it does not qualify for standing under 10 C.F.R. § 2.309(a), Local 15 asks to be permitted discretionary intervention pursuant to 10 C.F.R. § 2.309(e). But Local 15 clearly cannot be granted discretionary intervention, which may be considered only "when at least one

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[67] N. 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. Dep't of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 364–65 (2004)).

[68] Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 (2008).

[69] See, e.g., id. at 266 (rejecting union's organizational standing argument in an indirect license transfer proceeding initiated before the Commission because it was "merely the Local's 'representational standing' argument dressed up in different clothes.").

requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held."[70] As there is no other petitioner or intervenor in this proceeding, discretionary intervention is not possible.

C. Settlements

In addition to these established reasons for denying Local 15 standing or discretionary intervention, sound public policy directs the same result. This case arises from the settlement of an earlier dispute concerning the Dresden facility. With the assistance of a trained mediator, Exelon and the NRC Staff negotiated the terms of the Confirmatory Order that resolved their differences and avoided the need for a contested evidentiary hearing.

Such settlements are, of course, favored: "It is axiomatic that the Commission, like other adjudicatory bodies, looks with favor upon settlements."[71] The NRC has long preferred concentrating its resources "on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings."[72]

Accordingly, the Commission has recognized that too freely allowing third parties to contest enforcement settlements at hearings would undercut the NRC's policy favoring enforcement settlements.[73] Such settlements may become illusory if licensees consent to

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[70] 10 C.F.R. § 2.309(e); see also 69 Fed. Reg. at 2189 ("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.").

[71] In the Matter of Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 42 NRC 195, 205 (1997) (citing Rockwell Int'l Corp. (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990)); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981). See also 10 C.F.R. § 2.338.

[72] Pub. Serv. Co. of Ind., CLI-80-10, 11 NRC at 441.

[73] See Alaska Dep't of Transp., CLI-04-26, 60 NRC at 408.

confirmatory orders and are nonetheless subjected to formal proceedings, possibly leading to different or more severe enforcement actions.[74]

When the subject of an enforcement action, such as Exelon, negotiates with the NRC, the Agency reasonably expects that it can deliver on its promises. To be sure, others may also be impacted in various ways by the settlement of an enforcement proceeding. A stone thrown in the ocean may cause ripples that extend very far. But "[t]he general tendency of the law," when deciding which consequences give rise to actionable rights, "is not to go beyond the first step."[75]

If the NRC were to allow third parties with no demonstrated interest in its core concerns—nuclear safety and the environment—to routinely initiate evidentiary hearings to contest settlements, as a practical matter the Agency would have to invite all such parties to the negotiating table. Otherwise, any one of such indirectly affected entities and individuals—various unions, union and non-union employees, contractors, and perhaps even suppliers and others[76]—might defeat the goal of avoiding a full evidentiary hearing by demanding such a hearing to assert its own parochial interests following a settlement between the NRC and the named party. Indeed, Local 15 claims its participation to be "essential" to further negotiations if this Board were to rescind the Confirmatory Order.[77] Such complicated multi-party negotiations would no doubt hinder, not enhance, the prospects for promptly and efficiently concluding enforcement actions when the subject is willing to settle on terms that protect the public's interest in nuclear safety and the environment.

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[74] See id. (citing Pub. Serv. Co. of Ind., CLI-80-10, 11 NRC at 441).

[75] S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918) (Holmes, J.).

[76] At oral argument, counsel for Local 15 acknowledged that, consistent with the union's claim to standing, in some circumstances a company that supplied guard services to a nuclear facility might also be entitled to a hearing before an Atomic Safety and Licensing Board. See Tr. at 42.

[77] Petition at 10.

It seems especially unwise to expand standing to initiate an NRC adjudicatory proceeding when, as here, the petitioner has other ways to assert its claims. Local 15 has already invoked the jurisdiction of the National Labor Relations Board by filing an unfair labor practice charge. Should its charge be upheld, or should other new circumstances warrant changes in the Confirmatory Order, the Order itself contains a procedure for seeking modification for good cause.[78] Moreover, if an individual employee such as Mr. Specha were in fact threatened with discipline or termination on the basis of the standards he contends are too vague, he would be entitled to a hearing in accordance with Local 15's collective bargaining agreement.[79] Although Local 15 contends that these other approaches might be less effective than voiding the Confirmatory Order, it is not without alternative avenues of redress.

For all of these reasons, Local 15 has failed to establish standing to intervene in this proceeding, and its petition must therefore be denied.

D. Contentions

Although we conclude that Local 15's petition must be denied for failure to establish standing, we also determine that Local 15 has failed to submit an admissible contention. While the defects in Local 15's three proffered contentions echo many of the difficulties with its attempts to establish standing, they constitute a separate and independent ground for denying its petition. We address each briefly.

Contention 1 states:

> 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.[80]

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[78] Confirmatory Order, 78 Fed. Reg. at 66,967.

[79] Tr. at 49.

[80] Petition at 2.

In any enforcement action—and especially in one that has been settled to the NRC's satisfaction without creating a formal record—the NRC's choice of sanctions is "quintessentially a matter of the Commission's sound discretion."[81] It is well within the NRC's discretion to impose specific requirements that clarify or go beyond those already established by regulations, such as 10 C.F.R. § 73.56.[82]

Other than its own subjective opinion, Local 15 proffers no legal or factual basis on which the Board could conclude that the terms of the Confirmatory Order exceed the broad scope of the NRC's discretion under the Atomic Energy Act. Whether Local 15 considers the terms of the Confirmatory Order warranted or unwarranted is irrelevant if they fall within the Agency's authority to impose. Contention 1 is not admissible because it fails to provide sufficient information to show that a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Contention 2 states:

> 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.[83]

Local 15 cites no statute or regulation that is violated by reason of the NRC's alleged failure to "narrowly tailor" its efforts to enhance reporting of criminal activity or other indications

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[81] Advanced Med. Sys. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312–13 (1994), aff'd, 61 F.3d 903 (6th Cir. 1995).

[82] See 10 C.F.R. § 2.202(a) ("The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper . . . .").

[83] Petition at 2.

of untrustworthy behavior by individuals who have been allowed unescorted access into nuclear facilities. On the contrary, the sanction to impose is within the Agency's discretion.[84]

Moreover, without the need for an evidentiary hearing, this Board is quite capable of concluding—and so finds—that, if anything, the terms endorsed in the Confirmatory Order provide more specificity than the applicable NRC regulation itself—which rather broadly requires reporting of "any questionable behavior patterns or activities."[85] The parties disagree on the nature of the requirements imposed by the Confirmatory Order. Local 15 calls them "sweeping changes" that "expand greatly" the reporting obligations of Exelon employees.[86] Exelon and the NRC Staff maintain that the changes are not material and, essentially, merely clarify and make more explicit existing regulatory requirements.[87] Exelon and the Staff are closer to the mark.

Specifically, Mr. Specha asserts that "it is unclear exactly what type and scope of 'unusual', 'aberrant', and/or 'illegal' conduct I will be expected to report."[88] But, unlike the NRC's own regulation, which does not more specifically describe the "questionable" behavior Mr. Specha must report, Exelon's most recent behavioral observation program contains an explicit definition of "aberrant behavior"[89] and lists more than twenty representative examples of the kinds of behavior that would be reportable as questionable, unusual, aberrant, or criminal.[90] Local 15 proffers no facts upon which this Board could reasonably conclude other than that the

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[84] Alaska Dep't of Transp., CLI-04-26, 60 NRC at 407; Advanced Med. Sys., CLI-94-6, 39 NRC at 312–13.

[85] 10 C.F.R. § 73.56(f)(3).

[86] Petition at 16.

[87] 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 (Jan. 24, 2014) at 2; NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) at 18.

[88] Petition, Attach. 1, Aff. of Dennis Specha ¶ 10.

[89] See Local 15 Reply, Exh. 3 at 1.

[90] See id. at 7–9.

Confirmatory Order has resulted in clarification—not obfuscation—of the kinds of behaviors that Exelon employees must report.

Finally, contrary to the charge of improper delegation to Exelon, in fact the NRC's regulations permit licensees to develop their own individual access authorization programs, provided they satisfy 10 C.F.R. § 73.56.[91] The access authorization rule therefore leaves individual decision-making authority related to unescorted access to each licensee's discretion.[92]

In the absence of any demonstration by Local 15 that either the NRC or Exelon has abused or exceeded its lawful discretion with respect to nuclear safety programs, Contention 2 is not admissible because it fails to provide sufficient information to show that a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Contention 3 states:

> 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.[93]

Whether the Confirmatory Order "improperly endorses and confirms" Exelon's alleged failure to bargain with Local 15 is outside the scope of this proceeding. The NRC's authorizing statute is the Atomic Energy Act. As Local 15 candidly admits, "Exelon's actions in this regard may not conflict with its obligations pursuant to the AEA and NRC regulations."[94]

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[91] See Final Rule, Access Authorization Program for Nuclear Power Plants, 56 Fed. Reg. 18,997, 18,998 (Apr. 25, 1991) (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).

[92] See 10 C.F.R. § 73.56(a)(4).

[93] Petition at 2.

[94] Id. at 19–20.

That Contention 3 fails to implicate a statute or regulation that pertains to the NRC is dispositive of Local 15's request for a hearing before an Atomic Safety and Licensing Board. The NRC does not initiate evidentiary hearings to address labor disputes between its licensees and their employees. Rather, the appropriate forum for such disputes is the National Labor Relations Board—before which Local 15 has already submitted a claim.

Contention 3 is not admissible because it raises an issue that (1) is not within the scope of this proceeding (in contravention of 10 C.F.R. § 2.309(f)(1)(iii)); (2) is not material to the findings the NRC must make to support the action that is involved in this proceeding (in contravention of 10 C.F.R. § 2.309(f)(1)(iv)); and (3) does not raise a genuine dispute on a material issue of law or fact (in violation of 10 C.F.R. § 2.309(f)(1)(vi)).

III. ORDER

For the foregoing reasons:

A. Exelon's motion to strike part of Local 15's reply is granted.

B. Local 15's petition to intervene and request for hearing is denied.

The proceeding before this Board is therefore terminated. In accordance with 10

C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after it is served.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Jeffrey D.E. Jeffries
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 17, 2014

Dissent by Judge Karlin

I dissent.

The following questions are presented in this case:

1. If NRC issues an order that is based on alleged violations by individual workers, that de facto targets individual workers and their behavior, and that imposes new burdens and liabilities on individual workers, then do those workers (as represented by their union) have a right to a hearing under Section 189(a)(1)(A) of the Atomic Energy Act (AEA)?
2. If a Licensee consents to such an order, does that extinguish the workers' right to a hearing?
3. If NRC violates 10 C.F.R. § 2.202(a)(3) by failing to inform "any other person adversely affected by the order of his or her . . . right to demand a hearing" is a petitioner allowed to remedy such issues in its reply?
4. If NRC issues an order that requires workers to report any "unusual," "illegal," or "aberrant" observed behavior or "credible information" concerning their co-workers, regardless of whether they are on-site or off-site, on-duty or off-duty, then does the order exceed NRC's authority under 10 C.F.R. § 73.56(f), which uses none of those terms and which only requires the reporting of behaviors that have a nexus to the nuclear related health and safety of the public and common defense and security?

The Confirmatory Order (Order) that NRC issued in this case, and the request for hearing filed by 1,500 workers at Exelon, raise all of these issues. It is clear to me that these workers, represented herein by Local Union No. 15, International Brotherhood of Electrical Workers (Local 15), have a right to a hearing.

Introduction

This bizarre saga starts with a crime spree by two Exelon employees—Messrs Buhrman and Brittain. NRC trusted these two individuals by licensing them to be Senior Reactor Operators (SROs). Exelon entrusted them with the operation of a major nuclear power reactor, the Dresden Nuclear Power Station. Meanwhile, these gentlemen conspired to rob an armored truck, hijacked an automobile, and were caught, convicted, and imprisoned.

Much bad publicity resulted from these shenanigans and NRC knew it had to "do something."[1] NRC took enforcement action and ordered that these individuals should never work in the nuclear industry again.[2] So far so good.[3]

In addition, NRC issued an enforcement order against Exelon—the Order which is the subject of this case. In the Order, NRC and Exelon agreed that the easiest way to "do something" was to blame and burden someone else—the thousands of people working throughout Exelon's entire fleet of 10 plants and 17 nuclear reactors. Tr. at 73.

In response, 1,500 of these workers, represented by Mr. Specha and Local 15, challenged the Order and requested a hearing. The Majority denies these workers their right to obtain a hearing under 10 C.F.R. § 2.202(a)(3), and rejects their hearing request under 10 C.F.R. § 2.309, despite the fact that the Order directly affects them.

The Majority's primary rationale is that the workers are "non-participants" who are out to spoil the deal between NRC and Exelon. According to the Majority, these workers are "third

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[1] NRC Form 757, Non-Concurrence by V. Patricia Lougheed, NRC Senior Enforcement Coordinator (June 11, 2013) (ADAMS Accession No. ML13239A225) ("I feel that the NRC is proposing to issue an escalated violation to the licensee only so that it can say that it is "doing something" and that's not the reason to issue violations. It appears the NRC is deviating from standard only because of the publicity of the case.").

[2] Michael J. Buhrman Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Oct. 28, 2013); Landon E. Brittain Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Oct. 28, 2013).

[3] In issuing these orders, however, NRC admits that it never informed Messrs Buhrman and Brittain of their right to demand a hearing, as is required by 10 C.F.R. § 2.202(a)(3). Tr. at 116–19. This point is discussed in Section VIII below.

parties" who have no standing because they have only "economic" interests, e.g., they are merely concerned about losing their jobs, being blacklisted from working in the nuclear industry, and/or being the subject of NRC civil or criminal enforcement action if they fail to comply with the Order. The Majority asserts that such interests are not within the "zone of interests" of the AEA, and thus that we are powerless to grant these workers a hearing.

The Majority's secondary rationale is that the safety concerns raised by Local 15 (e.g., that the Order may lessen safety by confusing employees as to what is reportable, and thus causing under-reporting of genuine issues or over-reporting of irrelevant matters),[4] cannot be considered because (a) these concerns are not credible, and (b) they were raised too late.

I disagree.

My analysis is divided into several sections:

- Section I reviews 10 C.F.R. § 2.202(a)(3) and concludes that Local 15 has the right to a hearing under that regulation. (See page 28).
- Section II reviews 10 C.F.R. § 2.309(d) and concludes that Local 15 satisfies NRC's standing requirements. This includes standing based on the workers' "economic," due process, and safety interests. (See page 38).
- Section III reviews the Bellotti Doctrine and concludes that Local 15 clears the Bellotti hurdle.[5] (See page 48).
- Section IV reviews the issue of "safety" and concludes that it has been fairly raised and should be considered. (See page 50).
- Section V reviews 10 C.F.R. § 2.309(f)(1) and concludes that Contentions 1 and 2 meet NRC's contention admissibility requirements. (See page 55).
- Section VI rejects the notion that allowing Local 15 its day in court would violate NRC's policy of encouraging settlements. (See page 61).

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[4] Reply of Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO to NRC Staff and Exelon Answers Opposing Local 15's Petition to Intervene and Request for Hearing (Feb. 14, 2014) at 2, 9 [Reply].

[5] Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982) (restricting the limits of a hearing to solely "whether, on the basis of matters set forth in the Order, the Order should be sustained"). Bellotti v. N.R.C., 725 F.2d 1380, 1381 (D.C. Cir. 1983) affirmed the Commission's authority to set the scope of its own hearings.

- Section VII discusses why the pending National Labor Relations Board (NLRB) proceeding cannot give Local 15 the relief it seeks here, i.e., rescission of the NRC order. (See page 63).

- Section VIII reviews the Order and concludes that it violated 10 C.F.R. § 2.202(a)(3) and was misleading. (See page 65).

My conclusion (see page 67) summarizes the numerous barriers to public participation in NRC's adjudicatory process, and finds that the Exelon workers, as represented by Local 15, have met them all.

I. Local 15 Has a Right to a Hearing Under 10 C.F.R. § 2.202(a)(3).

A. A "Person Adversely Affected" By an Enforcement Order has a Legal Right to Demand a Hearing Under 10 C.F.R. § 2.202(a)(3) and Need Not Comply with 10 C.F.R. § 2.309.

The AEA states that the "Commission shall grant a hearing upon the request of any person whose interest may be affected." 42 U.S.C. § 2239(a)(1)(A). With regard to enforcement orders, NRC regulations state that the order must "inform the licensee or any other person adversely affected by the order of his or her right . . . to demand a hearing." 10 C.F.R. § 2.202(a)(3) (emphasis added).

The NRC Staff concedes that 10 C.F.R. § 2.202(a)(3) provides for an automatic grant of a hearing request, and that a person covered by 10 C.F.R. § 2.202(a)(3) does not need to show standing under 10 C.F.R. § 2.309(d), and does not need to comply with the criteria of 10 C.F.R. § 2.309(f)(1).[6]

The Staff has acknowledged this point before.[7] The Staff bases this concession on Andrew Siemaszko CLI-06-16, 63 NRC 708, 714 n.3 (2006), where the Commission stated that

[6] NRC Staff Memorandum in Response to Board Order Concerning Instructions for Oral Argument (Feb. 28, 2014) at 3 [Staff Response] ("[D]emands for a hearing by the subject of an enforcement order . . . are automatic without regard to satisfaction of 10 C.F.R. § 2.309.").

[7] "Staff counsel expressly conceded at oral argument, [that] one demanding a hearing on a challenge to an enforcement order need not comply with the section 2.309(f)(1) requirements." Charlissa C. Smith (Denial of Senior Reactor Operating License), LBP-13-3, 77 NRC 82, 91 (2013).

when a hearing is demanded by a person covered under 10 C.F.R. § 2.202, the grant of the hearing is "automatic." Staff Response at 3 n.8.

Just last week the NRC Staff agreed to, and the Commission implicitly blessed, the automatic right of a non-licensee, with a purely economic interest, to demand a hearing under 10 C.F.R. § 2.202(a)(3) without showing standing or proffering an admissible contention. In Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor), CLI-14-05, 79 NRC __ (Apr. 10, 2014) the NRC Staff issued an order prohibiting Aerotest, the licensee, from operating its research reactor.[8] Nuclear Labyrinth, a company hoping to purchase and operate Aerotest's reactor, together with Aerotest, filed a demand for a hearing under 10 C.F.R. § 2.202.[9] The demand did not attempt to show how Nuclear Labyrinth had standing. The demand contained no discussion of Nuclear Labyrinth's injury-in-fact, causation, redressibility, zone of interests, safety interests, or economic interests. Nuclear Labyrinth did not "request" a hearing under 10 C.F.R. § 2.309. It demanded one. Nuclear Labyrinth made no attempt to articulate admissible contentions.

Despite all of these points, and in stark contrast to the instant case, the Staff did not oppose Nuclear Labyrinth's demand for a hearing.[10] Although Nuclear Labyrinth was neither the licensee nor the target of the enforcement order, the Staff took the position that Nuclear Labyrinth's "interest in owning and operating" Aerotest's research reactor was sufficient to give it a right to demand a hearing under 10 C.F.R. § 2.202(a)(3). Id. at 2. The Staff never suggested

[8] Order Prohibiting Operation of Aerotest Radiography and Research Reactor, 78 Fed. Reg. 46,618, 46,619–20 (Aug. 1, 2013).

[9] Joint Answer to and Demand for Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2013) (ADAMS Accession No. ML13226A412) at 14.

[10] NRC Staff Response to Joint Answer to and Demand for Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 27, 2013) (ADAMS Accession No. ML13239A225) at 2.

that Nuclear Labyrinth needed to show the elements of standing under 10 C.F.R. § 2.309(d) or to file contentions that met the criteria of 10 C.F.R. § 2.309(f).

More importantly, the Commission implicitly agreed. The Commission specifically noted that "the Staff d[id] not oppose . . . Nuclear Labyrinth's demand for a hearing on . . . the Order." Aerotest, CLI-14-05, 79 NRC at __ (slip op. at 5–6). And although the Commission questioned Nuclear Labyrinth's standing to challenge the denial of Aerotest's license transfer, the Commission did not question Nuclear Labyrinth's right to demand a hearing on the enforcement order.[11]

The Commission reached the correct result in Aerotest. The 1,500 workers who seek to challenge NRC's order in Dresden deserve the same.

B. Exelon Workers, as Represented by Local 15, Have a Right to Demand a Hearing Because They Are "Persons Adversely Affected by the Order" Within the Meaning of 10 C.F.R. § 2.202(a)(3).

Given that 10 C.F.R. § 2.202(a)(3) grants a covered person the "automatic" right to a hearing (without the need to comply with 10 C.F.R. § 2.309(d) or (f)), a key question is whether the Exelon workers qualify for this status, i.e., whether they are "adversely affected by the order" within the meaning of 10 C.F.R. § 2.202(a)(3). Clearly, they are.

1. The Exelon Workers Are, In Fact, "Adversely Affected by the Order."

The Order in this case is based on alleged violations by individual workers and NRC admits that the Order is "tailored . . . to address the individual failures of Exelon employees."[12] The Order de facto targets the workers, and its purpose is to change the behavior of the individual workers. Although Exelon is the only person named in the Order, its primary effect is

[11] "Because we defer our consideration of the license renewal and enforcement proceedings until we have issue a final decision in the license transfer proceeding, we likewise defer our consideration of related issues, including . . . the question of Nuclear Labyrinth"s party status in the license renewal matter." Id. at __ (slip op. at 12 n.43) (emphasis added).

[12] NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) at 14 (emphasis added) [Staff Answer].

to impose new and more stringent responsibilities and liabilities on individual workers. Under the new regime imposed by the Order, the individual employees of Exelon must change their behavior and will bear the brunt of the Order. This reality is demonstrated by several factors.

First, as NRC acknowledges, the Order is based on alleged violations by individuals (not by Exelon). Tr. at 55. The Order recites four (and only four) "apparent violations" and each of them entail the failure of a specific individual to file a report.[13] NRC acknowledges that the Order contains no allegation that Exelon committed any violation. Tr. at 66.

Second, the Non-Concurrence by NRC Senior Enforcement Coordinator, Ms. V. Patricia Lougheed, eloquently reveals that the behavior of individual Exelon workers, not Exelon, was the cause and de facto target of enforcement action:

> I also recognize that the NRC normally holds the licensee responsible for acts of its employees. . . . [However] there were no facts to indicate that the licensee, other than the three individuals mentioned, had any way to know of the planned crime without one of the three individuals coming forward. . . . .
>
> 10 CFR 73.56(f) is written as an individual responsibility and not a licensee responsibility. The licensee had a program in place and trained on that program. However, no program can stop people from planning or committing crimes. Furthermore, people planning on committing a crime are not likely to tell their employers they are about to commit a crime. Therefore, no matter what the licensee does, it cannot prevent someone such as the wrongdoer or his alleged accomplice. . . . .
>
> Since the NRC is departing from its normal precedent, I feel that the NRC is proposing to issue an escalated violation to the licensee only so that it can say that it is "doing something" and that's not the reason to issue violations. It appears the NRC is deviating from standard only because of the publicity of the case. That is not a good precedent.[14]

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[13] Examples of the violations alleged in the Order include (1) "an EO, who had unescorted access to the Dresden Station, failed to report concerns to a supervisor regarding an observed change in behavior of two individuals," and (2) "A SRO, who had unescorted access to the Dresden Station, failed to report." Dresden Nuclear Power Station Confirmatory Order Modifying License, 78 Fed. Reg. 66,965, 66,965 (Nov. 7, 2013).

[14] NRC Form 757, Non-Concurrence by V. Patricia Lougheed, NRC Senior Enforcement Coordinator (June 11, 2013) (ADAMS Accession No. ML13329A531).

Third, the Order is founded on a regulation that imposes duties and liabilities on individuals. The regulation states: "Individuals who are subject to an access authorization program under this section shall at a minimum, report any concerns arising from behavioral observation." 10 C.F.R. § 73.56(f)(3). Under the law, individuals must report, and they are individually liable if they fail to do so. The regulation focuses on the individual.

Fourth, if an individual worker fails to comply with additional reporting obligations imposed by the Order, then Exelon can discipline or terminate that individual. Every worker is at risk. Every worker's job is on the line if he or she fails to understand and comply with the enhanced behavioral observation and reporting program mandated by the Order.

Fifth, if an individual worker fails to comply with the additional reporting obligations imposed by the Order, then NRC can take enforcement action against that individual. Again, individuals, not Exelon, are at risk. NRC can issue an order suspending the individual from working anywhere in the nuclear industry. 10 C.F.R. § 73.80. NRC can order the individual to pay civil penalties of up to $100,000. Id. NRC can take criminal enforcement action against the individual. 10 C.F.R. § 73.81.

Sixth, the NRC Staff admits that the Order was based on violations by individuals and that changing the behavior of individual workers was the primary purpose of the Order:

> [T]he 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. . . . [T]he apparent violation alleged that Exelon employees failed to report behaviors of an SRO that involved the planning of a violent crime.[15]

The Staff acknowledges that the Order addresses the behavior of individual workers. "[T]he Confirmatory Order memorializes a settlement agreement reached with Exelon to address individual failures to report." Staff Answer at 15.

[15] NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) at 14 (emphasis added) [Staff Answer].

The Order in this case is not like the typical enforcement order, wherein NRC orders a corporation to modify and improve a corporate program, or to conduct additional analysis or testing of a system, structure or component. In contrast, this Order is based on, and specifically targets, the behavior of individual workers, and puts them in direct, personal jeopardy if they fail to comply.

In sum, Mr. Specha and his co-workers in Local 15 are the de facto targets of the Order[16] and are "other person[s] adversely affected by the order" within the meaning of 10 C.F.R. § 2.202(a)(3).

2. "No Change Therefore No Adverse Impact" Argument Is Unavailing.

Exelon and the Staff argue that the Order changes nothing and therefore cannot adversely affect anyone.[17] Meanwhile, Local 15 argues that the Order contains new reporting obligations (e.g., the duty to report any "unusual" or "illegal" behavior of a co-worker, whether or not the behavior has any nexus to nuclear safety) that adversely affect Exelon workers. Petition to Intervene and Request for Hearing (Dec. 12, 2013) at 5 [Petition].

I reject the "no change" argument for three reasons. First, if the Order changed nothing, then it is a vacuous exercise. There was no need to issue it, and there should be no objection to revoking it.

Second, at this preliminary stage of the proceeding it appears plausible that the Order indeed imposes new or additional legal requirements (on the workers) that seem to be a "change" from the pre-existing legal requirements. For example, under the Order, NRC now requires that workers report any observed "illegal," "unusual," or "aberrant" behavior by their co-workers. These seem to be new legal requirements, because none of these words appear in 10

[16] As the de facto targets of the enforcement order, they also have automatic standing under 10 C.F.R. § 2.309(d)(3).

[17] Exelon's Answer Opposing the Petition to Intervene and Hearing Request Filed by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (Jan. 24, 2014) at 10 [Exelon Answer]; Staff Answer at 8.

C.F.R. § 73.56(f). In addition, NRC's Order does not state that any such illegal, unusual, or aberrant behavior must have a nexus to "public health and safety or the common defense and security" in order to be reportable.[18] The Order is not even limited to the reporting of "observed" behavior (ostensibly the core concept of the 10 C.F.R. § 73.56(f) "behavioral observation program"), but mandates that workers also must report any other "credible information" they may have concerning their co-workers. 78 Fed. Reg. 66,965, 66,965 (Nov. 7, 2013). There appears to be no duty to report "credible information" in 10 C.F.R. § 73.56(f).[19]

Third, whether the Order actually changes the legal obligations imposed on the workers (and whether the changes are legally supportable and valid) constitutes the "merits" of this case. The merits are to be decided later. At this juncture we can only decide whether the request for hearing should be granted.

3. Adverse Economic Impacts Qualify as Adverse Effects Within the Meaning of 10 C.F.R. § 2.202(a)(3).

The NRC Staff and Exelon assert that Local 15 is raising purely economic concerns (e.g., workers are worried about losing their jobs) and that such economic interests do not qualify as adverse effects within the meaning of 10 C.F.R. § 2.202(a)(3). They assert that a person must raise a safety concern in order to be entitled to demand a hearing under this regulation.

This argument flies in the face of the fact that licensees and other targets of NRC enforcement orders regularly challenge enforcement orders on purely economic grounds. For example, licensees regularly challenge enforcement orders on the ground that the proposed

[18] 10 C.F.R. § 73.56(f)(2). The Staff acknowledges that, in order to be reportable under 10 C.F.R. § 73.56(f)(3), "the observed conduct [must have] a nexus to public health and safety or the common defense and security." Staff Answer at 8. The Order, however, does not say that. It seems to require individuals to report any observed behavior that is deemed illegal, unusual or aberrant, with no requirement of a nexus to public health, safety, common defense, or security.

[19] Staff acknowledges that the "credible information" language is not contained in any regulation. Tr. at 89.

penalty is too high. A purely economic interest. Likewise, a licensee has a right to challenge an enforcement order on the ground that its requirements are too burdensome (e.g., too expensive). Indeed, the NRC Staff acknowledges that if NRC had issued the instant Order to Exelon unilaterally, then Exelon would have a right to a hearing on the same contention (Contention 2) raised by Local 15. Tr. at 100–01.

In addition, if an order blacklists a worker by name, he has the right to demand a hearing under 10 C.F.R. § 2.202(a)(3), even though he may motivated by purely economic concerns (e.g., staying employed).[20]

If a licensee or blacklisted worker can use "economic" reasons to demand a hearing under 10 C.F.R. § 2.202(a)(3), then so can the unnamed workers represented by Local 15. The regulation grants equal rights to the "licensee" and to "any other person adversely affected by the order." Both have a right to demand a hearing.

C. The Phrase "Person Adversely Affected by the Order" in 10 C.F.R. § 2.202(a)(3) Does Not Mean "Person Who is the Subject of the Order" or "Person Named in the Order."

The NRC Staff takes the position that the phrase "other person adversely affected by the order" in 10 C.F.R. § 2.202(a)(3) does not mean what it says. First, the Staff argues that "other person adversely affected by the order" means the "subject of the order." Staff Response at 3 (emphasis added). The Staff says that the "subject" of the order is entitled to demand a hearing, but that a "third party" has no such right and instead must satisfy the standing and contention admissibility criteria of 10 C.F.R. § 2.309(d) and (f). Id.

But the Staff's new phrase—"subject of the order"—does not appear anywhere in 10 C.F.R. § 2.202. Nor can the Staff cite any Commission decision which holds, or even states, that the phrase "other person adversely affected by the order" means "person who is subject to the order." There is no such case.

[20] See David Geisen LBP-09-24, 70 NRC 676 (2009); Andrew Siemaszko LBP-09-11, 70 NRC 151 (2009).

Nor does the Staff even know what the phrase "subject of the order" means. The Staff contradicts itself. At one point, the Staff argues that the right to demand a hearing under 10 C.F.R. § 2.202(a)(3) only applies to persons actually named in the order. Tr. at 128–29. At another point the Staff acknowledges the opposite—that a person does not need to be named in an enforcement action in order to have a right to demand a hearing under 10 C.F.R. § 2.202(a)(3).[21]

More importantly, the Staff's interpretation does not comport with the plain language of the regulation. "The plain language of the enacted text is the best indicator of intent."[22] Here, 10 C.F.R. § 2.202(a)(3) plainly states that any person "adversely affected" has a right to a hearing. It does not limit that right only to a person "subject to the order."

The structure of 10 C.F.R. § 2.202 confirms this interpretation. The regulation expressly distinguishes between the "person to whom the Commission has issued an order" and "any other person adversely affected by the order." The former must file an answer to the Order,[23] and may move to set aside the immediate effectiveness of an order.[24]

In contrast, 10 C.F.R. § 2.202(a)(3), states that a "licensee or any other person adversely affected," has the right to demand a hearing. A demand for hearing is different than

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[21] Tr. at 126–27 ("that actually is something that the NRC does regularly, traditional enforcement such as through our post-Fukushima Orders that applies to all licensees" while adding that such persons, even though not named in the orders have a right to demand a hearing).

[22] Nixon v. United States, 506 U.S. 224, 232 (1993); see also U.S. Dep't of Energy (High-Level Waste Repository), CLI-06-5, 63 NRC 143, 154 (2006) ("The interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself.") (internal quotation omitted).

[23] See 10 C.F.R. § 2.202(a)(2), (b) ("A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answer.")

[24] See 10 C.F.R. § 2.202(c) ("The licensee or other person to whom the Commission has issued an immediately effective order may . . . move the presiding officer to set aside the immediate effectiveness of the order.").

an answer. The person named in the Order must file an answer. The right to demand a hearing is broader. This is what the regulation says, and it is entirely logical.

The point is clear: NRC knew how to say "person to whom the order is issued" because it used that exact phrase in 10 C.F.R. § 2.202(b) and (c)(2). But NRC, quite obviously, did NOT use that phrase in 10 C.F.R. § 2.202(a)(3).[25]

The importance of the phrase "any other person adversely affected" is underscored by the fact that it was intentionally added in 1991. Until that time, the regulation only stated that the licensee had the right to demand a hearing on an enforcement order. 10 C.F.R. § 2.202(a)(3) (1991). In 1991, NRC amended the regulation to state that the "licensee or any other person adversely affected" have a right to demand a hearing.[26] This was a purposeful and significant expansion of the universe of persons entitled to demand a right to a hearing.

The Staff and Exelon point to the 1991 statement of consideration concerning "waivers," in an attempt to equate the phrase "other person adversely affected by the order" with the phrase "person named in the order." Staff Response at 4. This is unconvincing. The statement of consideration specifies:

> Section 2.202 provides that if the licensee or other person to whom an order is issued consents to its issuance . . . that consent or agreement constitutes a waiver by the licensee or such other person of a right to a hearing. . . . Whether or not the licensee or other person consents to an order, other persons adversely affected by an order issued under § 2.202 . . . will be offered an opportunity for a hearing consistent with current practice and the authority of the Commission to define the scope of the proceeding on an enforcement order. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

56 Fed. Reg. at 40678 (emphasis added).

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[25] The Staff's suggestion that the 10 C.F.R. § 2.202(a)(3) phrase "person adversely affected by the order" should be construed to mean "person who is the subject of the order" or "person named in the order" fails for the same reason.

[26] Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,684 (Aug. 15, 1991).

First, contrary to what the statement of consideration says, section 2.202(a)(3) does NOT use the phrase "other person to whom an order is issued." Thus, to the extent it is referring to 10 C.F.R. § 2.202(a)(3), the statement of consideration is incorrect. Second, the statement of consideration is focusing on the distinction between persons who consent to the order (whether it is the licensee or the "other person adversely affected by the order") and other persons, who may have the opportunity to request a hearing. Here, as shown above, the workers represented by Local 15 are the de facto targets of the order who are directly and adversely impacted. They are not mere strangers or "third parties" who have wandered in from left field. Third, the statement of consideration cites and focuses on Bellotti. I discuss the Bellotti decision below. For the moment, I merely note that even the NRC Staff acknowledges that Local 15 "cleared the Bellotti hurdle." Tr. at 112.

In summary, the 1,500 Exelon workers represented by Local 15 are "adversely affected" by the Order within the meaning of 10 C.F.R. § 2.202(a)(3) and thus have an automatic right to demand a hearing and need not comply with 10 C.F.R. § 2.309(d) and (f).

II. Local 15 Meets NRC's Normal Standing Requirements.

Assuming arguendo that Local 15 and the Exelon workers do not have a right to demand a hearing under 10 C.F.R. § 2.202(a)(3), their request for a hearing also satisfies the requirements of 10 C.F.R. § 2.309. In this section, I analyze the "normal" standing requirements of 10 C.F.R.§ 2.309(d). In Section V, I analyze the contention admissibility requirements of 10 C.F.R. § 2.309(f).

A. The Interests of Local 15 Satisfy the Plain Language of 10 C.F.R. § 2.309(d).

As relevant here, 10 C.F.R. § 2.309(d)(1) requires that the request for hearing state (i) the name and identity of the requestor; (ii) the nature of the requestor's right to be a party to the proceeding; and (iii) "the nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding." 10 C.F.R. § 2.309(d)(1)(i)–(iii) (emphasis added). The petition by Local 15 complies with this regulation because the workers are concerned about

potential job losses, blacklisting, and monetary penalties that they could suffer if they fail to comply with the Order, i.e., "property" and "financial" interests.

B. Local 15 Satisfies Judicial/Constitutional Standing.[27]

Another barrier to the NRC adjudicatory process was added in 1976. In addition to the standing requirements of 10 C.F.R. § 2.309(d) [then 10 C.F.R. § 2.714(d)], the Commission ruled that "in determining whether a petitioner for intervention in NRC domestic licensing proceedings has alleged an "interest [which] may be affected by the proceeding" within the meaning of Section 189a of the Atomic Energy Act . . . contemporaneous judicial concepts of standing should be used." Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613–14 (1976).

The "judicial concepts of standing" derive from Article III of the U.S. Constitution which limits the jurisdiction and power of the federal courts to "cases and controversies." U.S. Const. Art. III. "The doctrine of standing . . . reflect[s] this fundamental [constitutional] limitation." Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009). Article III does not apply to NRC.

The constitutional "judicial concept" of standing requires that a petitioner allege three things: (1) injury-in-fact; (2) a causal connection; and (3) redressability.

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant . . . Third, it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal cites omitted).

[27] "It is a commonplace that standing encompasses two components: constitutional and prudential. For constitutional standing, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. For prudential standing, a plaintiff usually must show, in addition, that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 281–82 (D.C. Cir 1988) (internal cites omitted).

Local 15's petition meets these requirements. First, it alleges that the Order imposes new burdens, risks, and potential liabilities directly on individual workers, thus meeting the injury-in-fact test. In addition, increased risk, e.g., the increased risk of termination, blacklisting, and/or prosecution resulting from the Order, by itself, constitutes an injury-in-fact.[28] Second, the alleged increased burdens, risks, and potential liabilities are a direct result of, and thus "fairly traceable" to the Order. Third, the alleged increased burdens, risks, and potential liabilities imposed on the individual workers are likely to be redressed by a favorable decision, i.e., the revocation of the Order.[29]

C. Local 15 Meets the Prudential "Zone of Interests" Test.

In addition to the standing requirements of 10 C.F.R. § 2.309(d) and the constitutional standing requirements of Article III of the Constitution, the Commissioners sometimes also impose the prudential "zone of interests" test to persons requesting a hearing.

Exelon and the Staff argue that Local 15 possesses no interests in this case which fall within the "zone of interests" of the AEA. Exelon Answer at 9, 16–21; Staff Answer at 7–8. Both claim that Local 15 asserts economic/property injuries, and that such injuries fall outside the zone of interests protected by the AEA. Exelon Answer at 18; Staff Answer at 7.

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[28] Massachusetts v. EPA, 549 U.S. 497, 520–23 (2007) (finding that the risk of future harm as an injury is both "actual" and "imminent"); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183–85 (2000) (concluding that an injury-in-fact can result when the risk of encountering environmental harms prevents a plaintiff from taking an action); Natural Res. Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006) ("[W]e have recognized that increases in risk can at times be 'injuries in fact' sufficient to confer standing.").

[29] Local 15 informed us that it filed an unfair labor practice complaint with the NLRB alleging that Exelon failed to bargain with Local 15 regarding the changes to Exelon's behavioral observation program. Petition at 6. Exelon argues that the changes to the behavioral observation program are mandated by NRC and thus that Exelon is not required to bargain over them under the NLRA. Exelon Answer at 22. Even if the NLRB finds Exelon guilty of an unfair labor practice, so long as NRC's Order remains in place, the behavioral observation program will remain mandatory and the NLRB cannot redress the problem. Local 15's complaint can only be redressed if the Order is revoked by NRC. See Section VII herein.

It is true that the Commission often finds that an economic interest "generally is not sufficient to afford standing in Commission licensing proceedings regarding health and safety."[30] But the reality of NRC's cases is more complicated than that, because petitioners with "economic" interests are sometimes allowed to be heard.

In two recent cases, intervenors were granted standing based on purely economic interests. In 2009 the Nuclear Energy Institute (NEI) was granted standing in a case "based on its members' economic interest."[31] The Board acknowledged that "economic interests are sometimes insufficient to establish standing," but found that in this case NEI's members had a "claim to be the real parties in interest" in the controversy being litigated. Id. at 431–32. Similarly, Local 15's members are the real parties in interest here, where Exelon and NRC reached an agreement concerning the behavioral and reporting duties of Exelon's employees. In 2010 the National Association of Regulatory Utility Commissioners (NARUC) sought intervention based on injuries which would "increase the costs to regulated utilities."[32] The Board granted NARUC standing, finding that "these economic harms constitute its members' injury-in-fact." Id. The Board neither imposed nor discussed an artificially narrow zone of interests barrier.

Since Boards and the Commission do grant intervenors standing based on their economic interests, something more must be going on when intervenors with only economic interests are denied standing. One type of litigant found repeatedly to present economic

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[30] Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 249 n.61 (1991); see also Pub. Serv. Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6 19 NRC 975, 978 (1984).

[31] U.S. Dep't of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 431 (2009) modified, CLI-09-14, 69 NRC 580 (2009) (reversing some contention rulings, standing rulings unaffected).

[32] U.S. Dep't of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 637 (2010).

interests "not cognizable in an NRC license transfer proceeding" is a utility ratepayer.[33] Looking beyond the term "economic" in the ratepayer cases reveals the reason they are denied standing—injuries suffered by ratepayers are not particularized or distinct to the extent required to support standing, but are instead generalized and shared by a large class.[34] Taxpayer standing is commonly seen in a similar light by the federal courts.[35] A denial of standing based on ratepayer status thus more appropriately falls under the injury-in-fact prong of judicial standing, and not the zone of interests prong.

The Majority finds that Local 15 lacks standing to challenge the Order because it fails to allege an injury to its members that falls within the zone of interests protected by the AEA, which the Majority believes to be limited to plant safety. The Majority states that "[s]tanding to challenge a confirmatory order exists only when a petitioner credibly alleges that a settlement somehow actually reduces safety." Majority at 12. The Majority claims that its resolution of the standing issue is supported by Supreme Court decisions that it interprets to require the zone of interests test to be "applied more rigorously when the petitioner is not the direct subject of the challenged regulatory action," and by dicta in the Commission's Alaska DOT decision. Majority at 10.

Alaska DOT is readily distinguishable from this case, in which the claim is not that NRC has insufficiently regulated someone else, but that the petitioner's members will be subjected to unlawful agency regulation as the result of the challenged Order. Contrary to the Majority's

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[33] Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16 55 NRC 317, 345 (2002).

[34] Envirocare of Utah, Inc. (Byproduct Waste Disposal), LBP-92-8, 35 NRC 167, 174 (1992). See also Virginia Elec. and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976) ("Whether the 'zone of interests' test has been satisfied does not depend, however, upon how concrete or speculative the threat of injury may be.") (superceded by statute).

[35] Hein v. Freedom from Religion Found., 551 U.S. 587, 599 (2007) ("We have consistently held that [taxpayer] interest is too generalized and attenuated to support Article III standing.").

assertions, the zone of interests test as applied in federal court does not bar the petitioner's claims.

The Commission is not necessarily required to decide standing issues in the same manner as federal courts. But, in applying standing requirements, which include the zone of interests test, the Commission has instructed licensing boards that they should be guided by decisions of the Supreme Court and other federal courts. "In assessing whether a petitioner has standing, we have long applied contemporaneous 'judicial concepts of standing.' This is true with respect to the requirement for a 'concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision,' where the injury is 'to an interest arguably within the zone of interests protected by the governing statute.'" Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Servs., LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009). Moreover, the Commission's summary of the zone of interests test in Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 12 (1998) (quoted by the Majority at 10 n.44) is taken directly from the Supreme Court's decision in Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399 (1987). This is a further indication that the Commission intends that we look to federal law in applying the zone of interests test. If, contrary to the general rule that boards are to apply judicially recognized concepts of standing, the Commission intends boards to apply a version of the zone of interests test that is more demanding than the requirements imposed by the Supreme Court, the Commission would have made that clear in its rulings. I see no indication that the Commission has done so.

Had the Majority correctly applied contemporaneous judicial concepts of standing, it would have found that Local 15's claims are not barred by the zone of interests test. In fact, the zone of interests test would not even apply to Local 15's claims had they been filed in federal court. The Administrative Procedure Act (APA) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the

meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). Thus, there are two routes to judicial review under the APA: the petitioner may either allege that it will suffer legal wrong because of the agency action; or, alternatively, that it is adversely affected or aggrieved by agency action within the meaning of a relevant statute. The zone of interests test applies only to the latter type of claim. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990) ("to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.") (quoting Clarke, 479 U.S. at 396–397). Local 15, however, alleges agency conduct that amounts to a legal wrong: that NRC is allegedly imposing unlawful requirements upon Local 15's members through the Order. Because such a claim is sufficient to establish Local 15's right to judicial review under the APA, Local 15 would not need to show that its members "are adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Were the law otherwise, an agency could freely impose unlawful requirements upon anyone who could not satisfy the zone of interests test, an obviously absurd result.

The Commission's summary of the zone of interests test in Quivira Mining, CLI-98-11, 48 NRC at 12 (quoting Clarke, 479 U.S. at 399) (emphasis added), states that "[w]here the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit." This formulation is entirely consistent with that in the preceding paragraph. When the petitioner is the subject of the disputed agency action and challenges the legality of that action, as Local 15 does here, the zone of interests test does not apply.

I do not see how it can be seriously disputed that Local 15's members are the subject of the contested regulatory action. The Staff's regulatory action was in response to actions of

some of Local 15's members, it was intended to impose additional requirements on the members, the members must comply with those requirements once they are imposed by Exelon, and NRC itself may enforce the requirements through civil and criminal enforcement action against the members. That is sufficient to demonstrate that the members are the subject of the contested regulatory action. It should make no difference that the Staff's means of imposing the requirements on Local 15's members is through the Order issued to Exelon. To rule otherwise is to exalt the form of the agency's action over its substance.

Furthermore, even assuming arguendo that the zone of interests test does apply to Local 15's workers' claims, the claims satisfy the test. The Majority states that under Commission and Supreme Court rulings the test "is applied more rigorously when the petitioner is not the direct subject of the challenged regulatory action." Majority at 10. The Commission's decision in Quivira Mining Co., which the Majority cites for this claim, contains no such statement. Rather, as previously noted, the Commission merely quoted the Supreme Court's summary of the zone of interests test from Clarke, 479 U.S. at 399. And the decision in Clarke goes on, in the very next sentence, to state that "the test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." Id. (emphasis added). See also Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emp. of Library of Cong., Inc. v. Billington, 737 F.3d 767, 771 (D.C. Cir. 2013) ("The zone of interests requirement poses a low bar."). The Supreme Court only finds potential litigants outside the zone of interests of a statute when Congress' intent to actually exclude that litigant is clear.[36]

The Majority commits the even more fundamental error of focusing on the overall purpose of the AEA rather than on the correct question: whether the plaintiff's grievance

[36] In Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 489 (1998) the Court found that prior cases "establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." Instead, standing is refused only when Congressional intent specifically precludes the party or issue from obtaining judicial review. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 348 (1984).

"arguably fall[s] within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." Bennett v. Spear, 520 U.S. 154, 162 (1997) (emphasis added). Bennett was a challenge to a biological opinion issued by the Fish and Wildlife Service under the Endangered Species Act of 1973 (ESA). The question was whether the petitioners, who had competing economic and other interests in a project, had standing to seek judicial review of the biological opinion under the citizen-suit provision of the ESA and the APA. The Ninth Circuit concluded that the zone of interests test was not satisfied because the petitioners were neither directly regulated by the ESA nor sought to vindicate its overarching purpose of species preservation. That conclusion, the Supreme Court held, was error.

> Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies. It is difficult to understand how the Ninth Circuit could have failed to see this from our cases.

Bennett, 520 U.S. at 175–76 (emphasis added).

The Court then examined the specific statutory requirement at issue, concluding that, although it did not expressly provide for protection of economic interests, the zone of interests test was easily satisfied:

> The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives . . . . Petitioners' claim that they are victims of such a mistake is plainly within the zone of interests that the provision protects.

Id. at 176–77.

Similarly, Local 15's first contention alleges errors by the Staff in the implementation of 10 C.F.R. § 73.56(f)(1)–(3) that fall within the zone of interests protected or regulated by those

provisions. According to Local 15, the Order requires Exelon to impose obligations on Local 15's members in excess of those authorized by 10 C.F.R. § 73.56(f)(1)–(3). To be sure, the most obvious objective of those regulations is to provide for the protection of public health and safety. But they also protect the interests of nuclear power plant employees by specifying the requirements that are necessary to achieve those objectives and by implying that further restrictions on employees are not necessary. Thus, like the multiple interests protected by the ESA provision at issue in Bennett, NRC regulations both protect public health and safety and protect employees against the imposition of requirements that are in excess of those necessary to achieve that objective. If, as Local 15 alleges, the Order imposes requirements beyond those authorized in the regulations, the agency has acted contrary to provisions of 10 C.F.R. § 73.56(f)(1)–(3) that protect employees against unnecessary or excessive restrictions on their conduct. That is sufficient to show that Local 15's first contention falls within the zone of interests protected or regulated by subsections 10 C.F.R. § 73.56(f)(1)–(3), even assuming the zone of interests test applies.

Local 15 therefore satisfies all of the requirements imposed by contemporaneous judicial concepts of standing. It has shown (1) an injury to its members resulting from the allegedly unlawful Order and redressable by a favorable order of the Board; and (2) that, even assuming the zone of interests test applies, the 1,500 workers represented by Local 15 are "regulated" by the Order and their interest in preventing excessive restrictions on their conduct falls within the zone of interests protected or regulated by 10 C.F.R. § 73.56(f). I fail to see where the Majority has demonstrated that for cases such as this the Commission intends a Board to ignore contemporaneous judicial concepts of standing and instead impose an alternative and more restrictive concept of standing. Instead, the Majority relies on the Alaska DOT/Bellotti line of cases, which concern the redressability aspect of standing and the scope of the proceeding, not the zone of interests test. The inapplicability of Bellotti is discussed in Section III.

III. The Request for Hearing Satisfies Bellotti.

Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983) is an important case which addresses both standing (redressability) and contention admissibility (scope) in the context of an NRC enforcement order. As even the NRC Staff acknowledges, the petition by Local 15 satisfies Bellotti. Tr. at 112 (Local 15 has "cleared the Bellotti hurdle").

In Bellotti, the Attorney General of the Commonwealth of Massachusetts, Mr. Francis X. Bellotti, challenged an enforcement order that NRC had issued to the licensee of the Pilgrim Nuclear Power Station located in Plymouth, Massachusetts. Mr. Bellotti did not oppose the issuance of the enforcement order. Bellotti, 725 F.2d at 1382. Instead, he wanted the order to be strengthened and to be harsher. Pilgrim, CLI-82-16, 16 NRC at 46. NRC denied Mr. Bellotti's petition for a hearing, and the United States Court of Appeals for the District of Columbia affirmed.

The rationale of the Court of Appeals in Bellotti was as follows. When NRC issued the enforcement order against the Pilgrim Plant, the order stated that if someone wanted to challenge it, the scope of the "proceeding" would be limited to whether "the Order should be sustained." Pilgrim, CLI-82-16, 16 NRC at 45–46. The Commission denied Bellotti's hearing request because he was not asserting that the enforcement order should not be sustained, but instead wanted it to be toughened and enhanced. Id. Thus, the hearing request was not within the "scope" of the proceeding. Id. Likewise, the Commission ruled that Mr. Bellotti was not an "affected person" and did not have standing, because his injury could not be redressed by the Board. Id. The Court of Appeals for the District of Columbia affirmed the Commission's decision, holding that NRC has the authority to define the scope of its proceedings, and that "the Attorney General would be an affected person only if he opposed issuance of the Order, which he does not." Bellotti, 725 F.2d at 1382.

Subsequently, the Commission summarized its Bellotti doctrine as follows:

> For the third time this year we address the question whether petitioners may obtain licensing board hearing to challenge NRC Staff enforcement orders as too weak or otherwise insufficient. The answer, under a longstanding Commission policy upheld in Bellotti v. NRC, is no. The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening.

State of Alaska Dep't of Transp. and Pub. Facilities (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 404 (2004) (emphasis added) (Alaska DOT).[37]

The Commission has consistently used Bellotti to deny any challenge to an enforcement order that argues that an enforcement order is too weak or needs strengthening.

The Bellotti doctrine involves both standing and contention admissibility. "For an enforcement order, the threshold question—related to both standing and admissibility of contentions—is whether the hearing request is within the scope of the proceeding as outlined in the order." Alaska DOT at 405. If the petitioner files a contention that requests a remedy that is beyond the scope of the proceeding, then the contention is not admissible because it violates 10 C.F.R. § 2.309(f)(1)(iii). Likewise, if the remedy sought by the petitioner is that the Board should mandate that the enforcement order be strengthened, then the petitioner lacks judicial standing, because, given the limited scope of the proceeding, the Board has no power to grant such relief, i.e., redress the petitioner's complaint. Alaska DOT at 404.

Turning to the instant case, there is no doubt that Local 15 passes the Bellotti test because it is asking that the Order be revoked. Petition at 8. The Order states that if a hearing is requested "the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained." 78 Fed. Reg. at 66,967. Each of the three contentions meet this criterion because they each assert that "[t]he Confirmatory Order should not be sustained." Petition at 2 (emphasis added). Local 15 does not ask for the Order to be strengthened. It asks

[37] In Alaska DOT, the Commission denied a petition from a Mr. Farmer, because he sought to strengthen the order, i.e., "sought to replace or supplement the order with civil penalties and enforcement actions against individual managers." Alaska DOT at 403.

for the Order to be revoked, thus satisfying the "scope" requirement of 10 C.F.R. § 2.309(f)(1)(iii). Likewise, Local 15 satisfies the redressability element of judicial standing.

No holding in any of the Commission's subsequent decisions under the Bellotti doctrine undermine the validity of Local 15's standing or the within-scope nature of its contentions.

To the contrary, Local 15 and the Exelon workers it represents will bear the brunt of the new behavioral observation measures and individual liabilities imposed by the terms of the Order and they are asking that the Order be revoked entirely.

IV. The Issue of Safety Has Been Fairly Raised and Should Be Considered.

The Majority seizes on a morsel of dicta in Alaska DOT to rule that no one can challenge an enforcement order so long as the order, in any way, "improves the safety situation over what it was in the absence of the order." Majority at 1 (quoting Alaska DOT at 406). In addition, the Majority rules that Local 15's safety arguments—that the flaws in the Order have "the cumulative effect of rendering Exelon's operations less safe than they were before" the order (Reply at 9)—are not credible and are too late. Majority at 13.

I disagree.

A. The Majority's Reliance on Alaska DOT Dicta is Misplaced.

The Majority seizes on one brief passage in Alaska DOT to deny Local 15's hearing request. "A petitioner like Farmer is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order." Alaska DOT at 408.

That passage is not a legitimate basis for denying a hearing to Local 15.

First, Local 15 is not "a petitioner like Farmer." Local 15 opposes the corrective measures in the Order and is petitioning to have it revoked. In contrast, Mr. Farmer approved of the corrective measures imposed in the order and petitioned to have it strengthened.[38] Mr.

[38] "This is really a request to impose either different or additional enforcement measures—in contravention of Commission doctrine in enforcement actions, as approved in Bellotti." Alaska DOT at 405.

Farmer was not adversely affected by the order, because he agreed that its remedial actions were warranted. Local 15 and the workers are adversely affected, because they disagree with the remedial actions in the Order and want it revoked.

Second, since the 1,500 individual workers represented by Local 15 are the de facto targets (albeit unnamed) of the enforcement order they are not "like Farmer." The target of an order is not limited to safety challenges and can challenge it on any ground (e.g., the penalty is too large).

Third, the Alaska DOT statement is not binding on this Board because it was dicta, i.e., it addresses an ancillary matter which was not necessary to the Alaska DOT decision. In Alaska DOT, the Commission never contemplated the situation presented in this case.[39]

Fourth, the Majority's position would insulate all confirmatory orders from any challenge. All enforcement orders "improve the safety situation" at least to some degree. But according to the Majority, so long as the Order contains one scintilla of safety improvement, it is immune from any challenge. The Majority acknowledges that, under its interpretation, challenges to confirmatory orders will be "rare." The Majority is too modest. Under its interpretation, such

[39] As the Commissioners undoubtedly realize, one of the most fundamental precepts of law is that the "holding" of a higher tribunal is binding on a lower tribunal, but "dicta" is not. "Dicta" is defined as a "court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." Black's Law Dictionary 454 (6th ed. 1990). Holdings are binding, because they address the central issues of a case—issues that must be decided and that were the direct focus of thorough briefing by the litigants. Meanwhile, dicta deals with ancillary matters, which probably were not tightly litigated or briefed (and thus where the tribunal did not get the benefit of such focused briefing). As Chief Justice Marshall explained, dicta "ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens v. State of Virginia, 19 U.S. 264, 399–400 (1821).

challenges will be impossible.[40] This is because every enforcement order will, in at least some small way, improve safety or security.

Finally, if the Majority's position is correct, then the Order in this case, and all NRC confirmatory orders, mislead the public. They all state that a "person adversely affected by the order may request a hearing," whereas, in fact, no one could ever meet the Majority's "safety" criterion and thus no such hearing request could ever be granted.

B. Local 15 Has Raised Legitimate Safety Concerns Which Should be Heard.

Assuming arguendo that Local 15's challenge to the Order must be based on safety concerns, Local 15 meets this standard.

As an initial matter, Local 15's Petition is based, in part, on safety concerns. Local 15 argues that "ambiguities and inconsistencies [in the Order] rendered employee compliance far more uncertain." Petition at 5. Local 15 states that it is "deeply concerned with the safety of Dresden Station and other nuclear plant personnel as well as the general public." Petition at 17. It argues that "the breadth, vagueness and ambiguity of the observation and reporting obligations [in the Order] casts a wide and indiscriminate net that simply is not carefully tailored to address . . . legitimate concerns for public health and safety." Petition at 18.

Contention 2 asserts that the Order imposes reporting obligations that are vague, overbroad, and not limited or cabined by 10 C.F.R. § 73.56(f) and that these flaws will confuse the people who are trying to comply with the Order. These allegations are quite plausible and could be addressed in an evidentiary hearing. The Order goes beyond the provisions of 10 C.F.R. § 73.56(f), putting NRC on record (for the first time) as imposing reporting requirements on any "illegal," "unusual," or "aberrant" behavior, as well as requiring the reporting of other "credible information." None of these terms are contained in 10 C.F.R. § 73.56(f), and none of

[40] See e.g., Bellotti, 725 F.2d at 1386 (Wright, dissenting) ("Under the Commission's reasoning, where a licensed and operating plant has been found unsafe, where the Commission has ordered some remedial amendment, and where the licensee has accepted that amendment, there is no public interest in the proceeding.").

them are defined in the Order. The Order does not even require that illegal, unusual or aberrant behavior or credible information have any nexus to nuclear safety or security.

It requires no leap of logic to recognize that, if, as Local 15 asserts, an Order is so vague and ambiguous that people do not know how to comply with it, then it will undermine compliance and thereby undermine safety and security.

The Majority points to the fact that the first place where Local 15 expressly asserted that the Order makes Exelon's operations "less safe" was in its Reply. Reply at 9. The Majority believes this was a fatal mistake.

I disagree.

First, the Commission has held that an intervenor is entitled to cure deficiencies with regard to standing when it files its reply.[41] Even if Local 15's petition regarding safety was not clear, Local 15 responded to the arguments in the Staff's answer, and clarified its safety concerns in its reply. The "less safe" argument underpins Local 15's standing because it helps explain why Local 15 and the workers at the Exelon facilities will be "adversely affected" by the Order. Local 15 was entitled to cure this (supposed defect) in its reply.

Second, hearing requests are to be construed in favor of the petitioner on issues of standing. "To evaluate a petitioner's standing, we construe the petition in favor of the petitioner."[42] In contrast, the Majority discounts Local 15's safety concern, asserting that Local 15 cannot "credibly claim" that the Order could render Exelon's operations less safe. Majority at 3. I strongly disagree. As I have discussed above, the Order contains many undefined terms

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[41] South Carolina Elec. & Gas Co. and South Carolina Pub. Serv. Auth. (also referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (reversing a Board for refusing to allow an intervenor to cure its standing in its reply); PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139–40 ("Mr. Epstein had the opportunity to cure on reply the defects in his initial petition.").

[42] Georgia Institute of Tech. (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

that are not found in 10 C.F.R. § 73.56(f) and that could plausibly lead to confusion and to a lowering of safety and security.[43]

Third, Local 15's "less safe" argument articulated in the Reply does not modify or change any of the contentions. 10 C.F.R. § 2.309(f) concerns the admissibility of contentions, not the admissibility of bases. Where the focus of the contention is unchanged, there is no problem. In this case the contentions are unchanged and the focus of what would be litigated in the evidentiary hearing remains exactly as before.

Fourth, even with regard to contention admissibility (rather than standing) it would be permissible for the Board to accept and consider the "less safe" rationale to support Contentions 1 and 2. The Commission has specifically stated that a Board is "free to decide this issue [contention admissibility] on a theory different from those argued by the litigants, but only if it explained the specific basis of its ruling and gave the litigants a chance to present arguments (and, where appropriate, evidence) regarding the Board's new theory."[44] This makes sense. The reason for generally refusing to allow an intervenor to raise entirely new contentions in its reply is that it might unfairly surprise the Applicant and the NRC staff who generally do not have a right to "reply to the reply." This problem is obviated if—as here—the applicant and NRC Staff were given the "chance to present arguments" concerning the Intervenor's "less safe" concerns.

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[43] The key issue is what is required by law, not what is specified in Exelon's ever-changing behavioral observation program. If it is required by law, then NRC may legally enforce it. The legal requirements are 10 C.F.R. § 73.56(f) and now, NRC's Order. Therefore it is crucial to know what the Order (i.e., NRC) requires, and whether it exceeds the ambit of 10 C.F.R. § 73.56(f). The contents of Exelon's behavioral observation program (at any given moment) cannot substitute for the duty of the NRC Staff, when it issued the instant Order, to be reasonably clear as to what is required of workers who are trying to comply with their legal obligation to report on their co-workers under 10 C.F.R. § 73.56(f).

[44] Tennessee Valley Auth. (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 73 n.24 (emphasis omitted).

In sum, there is no valid reason to deny a hearing to Local 15 and the Exelon workers it represents. They have raised legitimate and serious safety concerns and fairness dictates that they should at least have an opportunity to be heard on the merits of their concerns.[45]

V. Contentions 1 and 2 Satisfy the Admissibility Requirements of 10 C.F.R. § 2.309(f).

Assuming arguendo that Local 15 does not have an "automatic" right to a hearing under 10 C.F.R. § 2.202(a)(3), and must file contentions that meet the admissibility criteria of 10 C.F.R. § 2.309(f)(1), I conclude that Contentions 1 and 2 are admissible.

A. Contention 1.

Contention 1 asserts, in pertinent part, that 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 [10 C.F.R. §] 56(f)(1)–(3)." Petition at 15.

A quick review demonstrates that Contention 1 satisfies each of the six admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)–(vi), as follows. Contention 1 complies with 10 C.F.R. § 2.309(f)(1)(i) because it provides a "specific statement of the issue of law or fact to be raised or controverted." The issue is straightforward—does the Order contain sufficient justification in the record to justify the Order and the remedial actions it imposes on Exelon and the Exelon workers?

Contention 1 also satisfies 10 C.F.R. § 2.309(f)(1)(ii) because it "provide[s] a brief explanation of the basis [i.e., rationale] for the contention." The regulations require that an order "allege the violations with which the licensee . . . is charged . . . or other facts deemed to be sufficient ground for the proposed action." 10 C.F.R. § 2.202(a)(1) (emphasis added). Does the Order allege any violations by Exelon? Does the Order allege "facts deemed to be sufficient

[45] And since the Order has already gone into effect, granting Local 15 a hearing would not delay or obstruct any activities by Exelon or the NRC Staff.

ground for the proposed action?" The "basis" of Contention 1 is that the Order is defective because it fails to provide "sufficient justification in the record" for the burdens it imposes.[46]

As to the third criterion, Contention 1 alleges that the Order "should not be sustained," and is thus clearly within the "scope of the proceeding" as required by 10 C.F.R. § 2.309(f)(1)(iii). NRC Staff admits this point (Local 15 has "cleared the Bellotti hurdle." Tr. at 112).

For the same reason, the issue presented in Contention 1 (whether the Order contains sufficient justification under 10 C.F.R. § 2.202(a)(1)) raises a "material" issue, and thus satisfies 10 C.F.R. § 2.309(f)(1)(iv).

The fifth regulatory criterion states that a petition must "provide a concise statement of the alleged facts . . . which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely." 10 C.F.R. § 2.309(f)(1)(v).

As an initial matter, to the extent that Contention 1 raises an issue of law, it is exempt from 10 C.F.R. § 2.309(f)(1)(v). In the matter of U.S. Dep't of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, the Commission held:

> [O]ur rules permit contentions that raise issues of law as well as contentions that raise issues of fact. . . . [R]equiring a petitioner to allege 'facts' under 10 C.F.R. § 2.309(f)(1)(v) or to provide an affidavit that sets out the 'factual and/or technical bases' . . . in support of a legal contention—as opposed to a factual contention—is not necessary.

Id. at 590.

Contention 1 is a legal contention, at least in part, because it asserts that the Order does not contain sufficient justification to warrant the actions that NRC has mandated.

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[46] Petition at 15. Where an enforcement order directly targets two entities, the fact that one of them (Exelon) consents to the order does not relieve NRC of the duty to comply with 10 C.F.R. § 2.202(a)(1) vis-a-vis the other (i.e., the workers).

To the extent that Contention 1 may raise factual issues, it satisfies 10 C.F.R. § 2.309(f)(1)(v) because the Petition states the underlying facts (e.g., the crime spree by the two SROs), attaches Exelon's behavioral observation program, and alleges:

> Local 15 is aware of no evidence that the SROs' and EO's failure to report these events was caused by any insufficiency in Exelon's existing access authorization program or its behavioral observation component, as embodied in Exelon Procedure SY-AA-103-513, nor does any such statement appear in the Confirmatory Order. Local 15 is aware of no evidence that any other Exelon employees have failed to report "behaviors or activities that may constitute an unreasonable risk to the health and safety of the public and common defense and security, including a potential threat to commit radiological sabotage" or concerns arising from behavioral observation. There simply is no evidence in the record to support a conclusion that the three employees' failure to report the plot to rob an armored car was anything other than an isolated incident and no evidence to support a conclusion that their conduct was attributable to any deficiency in Exelon's behavioral observation program. Nor is there any evidence that the measures Exelon has reportedly already taken, or has agreed to take in the future—measures which are affirmed by the Confirmatory Order—are likely to reduce the likelihood of occurrence of similar events in the future.

Petition at 17.

Sixth, Contention 1 satisfies 10 C.F.R. § 2.309(f)(1)(vi) because it provides "sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact." The "genuine issues" include whether the Order was justified at all, i.e., was there any violation by Exelon at all (do violations by criminal conspirator employees automatically constitute a violation by the employer?) and whether the record contains sufficient information to justify the remedial actions imposed on the workers by the Order.

While I need not, and do not, address, the "merits" of Contention 1, I conclude that it satisfies the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)–(vi).

B. Contention 2.

Contention 2 asserts, in pertinent part:

> The Confirmatory Order should not be sustained because it imposes on the employees of Exelon behavioral observation and reporting requirements 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.

Petition at 18.

Contention 2 provides a "specific statement of the issue of law or fact to be raised or controverted," as required by 10 C.F.R. § 2.309(f)(1)(i). It raises several issues, including whether the Order imposes reporting obligations on the workers that are "over-broad," e.g., that exceed NRC's authority under 10 C.F.R. § 73.56(f)(3). The Order requires the reporting of any "illegal," "unusual," or "aberrant" conduct, but none of these terms are defined. Petition at 18. Nor are they found in 10 C.F.R. § 73.56(f). Local 15 complains the order requires the reporting of behavior without regard to whether it has any nexus to public health and safety or the common defense and security.[47] Petition at 18; Tr. at 12. Another example is that the Order is not limited to "observed behavior," but also requires workers to report about any "credible information" concerning their co-workers. Petition at 5. The Petition satisfies 10 C.F.R. § 2.309(f)(1)(i).

The "basis" for Contention 2 is explained in its "because" clause. Local 15 asserts that the Order should be revoked "because it imposes on the employees . . . 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." Petition at 18. Without addressing the merits of the claims, Local 15 certainly has provided the "basis" (i.e., legal rationale) for Contention 2 and has satisfied 10 C.F.R. § 2.309(f)(1)(ii).

The Order specifies that the scope of any challenge to the Order "shall be whether this Confirmatory Order should be sustained." 78 Fed. Reg. at 66,967. Contention 2 asserts that

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[47] NRC Staff acknowledges that 10 C.F.R. § 73.56(f) only requires the reporting of "observed conduct [with] a nexus to public health and safety or the common defense and security." NRC Answer at 8.

the Order "should not be sustained" and thus is within the scope of this proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii).

Likewise, Contention 2 raises "material" issues—whether the Order exceeds NRC's authority, whether it is so vague that it will undermine compliance and leave workers exposed to inappropriate liabilities and burdened—and satisfies 10 C.F.R.§ 2.309(f)(1)(iv).

Turning to 10 C.F.R. § 2.309(f)(1)(v), Contention 2 clearly qualifies as a "legal contention." Local 15 is asserting, inter alia, that the Order exceeds NRC's authority and that NRC has improperly delegated to Exelon the ability to determine what constitutes compliance with the law (i.e., what must be reported under the Order). As a legal contention, Contention 2 does not need to comply with 10 C.F.R. § 2.309(f)(1)(v). U.S. Dep't of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

In any event, Contention 2 is supported by a "concise statement of the alleged facts" that is sufficient to support Local 15's request for a hearing. The affidavit of Mr. Dennis Specha states, in pertinent part:

> I am very concerned about the adverse impact of the NRC's Confirmatory Order on my own employment. The changes announced in the Confirmatory Order result in very broad observation and reporting obligations. Further, it is unclear exactly what type and scope of "unusual," "aberrant," and/or "illegal" conduct I will be expected to report. In light of this vagueness I am concerned that I could inadvertently violate Exelon's Procedure and be subjected to discipline and/or revocation of access.

Petition, Exh. 1, Aff. of Dennis Specha (Dec. 11, 2013) ¶ 10.

The Petition argues that the Order "will likely have introduced into the reporting requirements numerous ambiguities and inconsistencies and rendered employee compliance far more uncertain." Petition at 5. Contention 2 satisfies 10 C.F.R. § 2.309(f)(1)(v).

Contention 2 provides "sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact" and satisfies 10 C.F.R. § 2.309(f)(1)(vi). There is a genuine dispute on various material issues, e.g., whether the Order is over-broad and exceeds NRC's

legal authority (legal issue), whether it is too vague and thereby undermines compliance (factual issue), and whether it unnecessarily exposes workers to new burdens and liabilities (factual issue).

In sum, Contention 2 meets the admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)–(vi).

C. Contention 3.

Contention 3 asserts:

> 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.

Petition at 2.

In contrast to Contentions 1 and 2, which raise issues as to whether the Order violates the AEA or NRC regulations such as 10 C.F.R. § 2.202(a)(1) [Contention 1] or 10 C.F.R. § 73.56(f) [Contention 2], Contention 3 raises issues that are outside of our expertise or jurisdiction. It is for the NLRB, not the ASLBP, to decide whether the changes to the behavioral observation program constituted "terms and conditions of employment" under the National Labor Relations Act (NLRA). It is for the NLRB, not the ASLBP, to decide whether Exelon has a "duty to bargain with Local 15" about these changes. It is for the NLRB to decide whether the fact that these changes have now been incorporated and legally imposed by an Order from NRC exonerates Exelon from any unfair labor practice charge under the NLRA. See Section VII below.

Contention 3 is not admissible under 10 C.F.R. § 2.309(f)(1)(iii) and (iv) because it raises issues that are outside of the scope of NRC expertise and jurisdiction. On this issue, I agree with the Majority.

VI. When A Settlement Directly Imposes Adverse Impacts On A Third Person, That Person Has a Right to Be Heard.

The Majority argues that if we grant a hearing to Local 15 and the Exelon workers, this will undermine NRC's ability to settle enforcement actions and violate NRC's policy of encouraging settlements. The Majority refers to a statement by the Commission in Alaska DOT:

> [T]o allow third parties to contest enforcement settlements at hearings would undercut our salutary policy favoring enforcement settlements. Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subjected to formal proceedings, possibly leading to more severe or different enforcement actions.

Alaska DOT at 408–09 (internal quote omitted).

Certainly NRC has a policy of encouraging settlements, see 10 C.F.R. §§ 2.203, 2.338(a). The policy is salutary. But when a settlement between NRC and a licensee directly imposes significant burdens and liabilities on individual workers, they have a right to be heard.

First, the above quoted statement from Alaska DOT is dicta. See Alaska DOT at 408 ("Our holding that Farmer does not have standing is dispositive of this case."); id. at 409 ("[W]e need not decide this issue.").

Second, Alaska DOT is inapposite because it was a pure Bellotti case and even the Staff agrees that Local 15 "clears the Bellotti hurdle." Tr. at 112.

Third, the dire consequences contemplated in the above-quoted passage in Alaska DOT (the specter that intervention might lead to "more severe or different enforcement actions [against the licensee]," Alaska DOT at 409) cannot arise in this case. This is because Local 15 is asking that the enforcement order be revoked. If Local 15 is successful, Exelon will be released from complying with NRC's enforcement order.

Fourth, as discussed above, although Exelon is the only party expressly named in the Order, individual Exelon workers are also, de facto, the targets of this enforcement order. NRC acknowledges that the Order was specifically "tailored" to modify the behavior of individual employees. Staff Answer at 14. Individual workers will be personally liable to NRC if they fail to

comply with the reporting obligations established in the Order. These workers have a due process right to protect their liberty and property, as they are affected by this Order.

It is axiomatic that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement." Local No. 93, Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 529 (1986).

Fifth, NRC's policy of encouraging settlements specifically recognizes that settlements are not inviolate. "The presiding officer or Commission may order the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding." 10 C.F.R. § 2.338(i). Likewise "the presiding officer . . . may order such adjudication of the issues as he may deem to be required in the public interest." 10 C.F.R. § 2.203. The fact that NRC has settled an enforcement action with a licensee does not mean that other persons directly and adversely affected by it cannot be heard.

Finally, the Majority reasons that, if we grant Local 15 a hearing on its challenges to the Order, then it is tantamount to ordering NRC and Exelon to allow Local 15 to participate in the settlement negotiations.[48] The Majority implies that such a ruling would open the flood-gates by allowing strangers, bystanders, and other interlopers to enter the ADR room and to kibitz about the settlement of every enforcement action.

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[48] During oral argument, counsel for Local 15 was pushed to acknowledge that the union would also like to be included in the discussions concerning Exelon's modifications to its behavioral observation program. See Tr. at 216–17. After extracting this point, the Majority raises the specter that, if Local 15 is allowed to challenge this Order, then NRC would never be able to settle an enforcement case because every Tom, Dick, or Harry would now be entitled to second guess NRC, and settlement negotiations would entail "complicated multi-party negotiations [that] would no doubt hinder, not enhance, the prospects for promptly and efficiently concluding enforcement actions when the subject is willing to settle." Majority at 18 (emphasis added). Baloney. First, although Local 15 might "like" to be included in the negotiations, the Petition does not ask for such relief. The petition merely asks that the Order be revoked. That is relief that this Board, and only this Board, can grant. Second, the workers represented by Local 15 are the de facto target of the Order. The sanctity of settlements notwithstanding, when two persons settle a "dispute" by foisting substantial new burdens and liabilities on another person, that person has a due process right to be heard.

I disagree. The only relief that Local 15 is seeking is that the Order "not be sustained." Petition at 3. Local 15 might "like" to be consulted and involved in the negotiation of a confirmatory order concerning revisions to Exelon's behavioral observation program, Tr. at 216–17, but Local 15 is not asking us to issue such an order. Perhaps the NLRA even says that Exelon must bargain with Local 15 on such matters—but this is not our issue.[49] Even if Local 15 asked us to order the Staff to bring them into the settlement negotiations (which they do not), we could not grant it.[50] Local 15 has merely asked that the Order be revoked. Petition at 8. This we could do.

VII. NLRB Cannot Grant The Requested Relief—Revocation of the Order.

The Majority dismisses Local 15's request for a hearing, telling the workers to look, instead, to the NLRB for the relief they request. With regard to Contention 3—which asserts that Exelon's actions constituted an "unfair labor practice" in violation of the NLRA—I agree. This Board has no NLRA expertise or jurisdiction. With regard to the other two contentions, however, I disagree.

Contentions 1 and 2 raise issues (e.g., whether the Order fails to adhere to 10 C.F.R. § 73.56(f)) and seek relief (that NRC's Order be revoked) that can only be granted by NRC.

The Majority puts Local 15 in a Catch-22, thereby denying the workers any effective relief. On the one hand, the Majority says—go away—we are powerless to help you. Take your complaints to the NLRB. On the other hand, Exelon says the NLRB is powerless to modify the Order because it is a legally binding edict of the NRC.[51] Voila! NRC and Exelon negotiate a

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[49] Exelon clearly does NOT represent the workers on this issue, and NRC cannot assume that it does.

[50] Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004).

[51] Exelon argues that the Order "establishes what the NRC determined was acceptable and necessary to ensure that the public health and safety are reasonably assured. The NRC determined that public health and safety require that Exelon's commitments be confirmed by this Confirmatory Order." Exelon Answer at 38 (internal quotes and cites omitted). Exelon

private deal that imposes significant new burdens and liabilities on individual workers, but the workers have no right to even be heard.[52]

Finally, the Majority suggests that a worker such as Mr. Specha should wait until NRC files charges against him for violating the new reporting obligations imposed by the Order or until Exelon terminates him and then, at that point "he would be entitled to a hearing in accordance with Local 15's collective bargaining agreement." Majority at 19. I disagree. A person does not need to wait until he is charged with a crime and "in the dock" before he can challenge an Order that imposes new burdens and liabilities on him.[53] Here, it appears that the workers are immediately and adversely impacted—they must immediately increase their surveillance of, and reporting on, their co-workers. Failure to report under the Order, i.e., failure to report something that Exelon or NRC later decide was "unusual," or "illegal," subjects the workers to being blacklisted, fined and/or imprisoned by the NRC. NRC and Exelon say—"Trust Us." We will be reasonable. We do not really mean (as the Order flatly says) that you must report all "unusual" or "illegal" behavior of your co-workers. Tr. at 53 (Exelon), 77–79 (NRC Staff). Just report the ones we want you to report.[54]

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concludes that "[A]n employer is excused from the duty to bargain over that which it is legally compelled to do." Id. Catch-22: NRC should defer to NLRB and NLRB must defer to NRC.

[52] The Majority suggests that, if the NLRB rules that Exelon violated the NLRA, then Local 15 can always come back and ask NRC to modify the Order. "Should [Local 15's unfair labor practice] charge be upheld . . . the Order itself contains a procedure for seeking modification for good cause." Majority at 19. Another Catch 22. First, only Exelon is entitled to seek a modification of the Order. Local 15 has no such power. Second, even if Local 15 filed such a request, the Majority would be confronted with the identical question — do the workers and Local 15 have standing to seek modification of the Order? Presumably the Majority would be consistent and, again, deny Local 15's request on the ground that the workers are mere "non-participants" to the Order.

[53] See Sackett v. EPA, 132 S.Ct. 1367 (2012).

[54] For example, in its Order, NRC stated that workers must report any "illegal" activity by their co-workers. The Order is legally enforceable, and the NRC sets the minimum or "floor" requirements. Tr. at 77, 92. Meanwhile, Exelon's behavioral observation program says that workers do not need to report minor illegal activities. Obviously Exelon does not have the authority to change the Order or to exonerate workers from complying with its requirements.

"Trust Us" will not do. When the police power of the Federal Government is deployed to order a person to perform certain actions, under pain of losing his or her livelihood, liberty, and/or property, then that person has a right to challenge the order, and have a hearing to determine what the order means and whether it comports with the law.[55]

VIII. The Order Violated 10 C.F.R. § 2.202(a)(3) and Misled Local 15.[56]

NRC's Order in this case violated 10 C.F.R. § 2.202(a)(3). Nothing in the Order or the Federal Register notice informed anyone of their "right to demand a hearing" as required by 10 C.F.R. § 2.202(a)(3) (the order "will . . . [i]nform the licensee or any other person adversely affected by the order of his or her right . . . to demand a hearing").

The right to "demand a hearing" under 10 C.F.R. § 2.202 is manifestly different from the opportunity to "request a hearing" under 10 C.F.R. § 2.309. The Staff's attempt to equate these two phrases was demolished in a recent case involving identical language:

> For the Staff's argument to apply, the Board would have to conclude that a hearing 'demand' filed as of right under section 2.103(b)(2) is a 'hearing request" under section 2.309(f)(1).
>
> The Board declines to adopt such an interpretation because it would conflict with the ordinary meaning of the English language: manifestly 'demand' and 'request' are not synonyms and therefore cannot be given, as the Staff would have it, the same meaning and effect. A person authorized to make a 'demand' is generally understood to have a right to the matter that is the subject of the demand. Thus, 10 C.F.R. § 2.202(a)(3) and (c), which, like section 2.103(b)(2), authorize a 'demand' for a hearing, are understood to confer a right to a hearing. One authorized to make a 'request,' by contrast, is merely given permission to ask for something, not to demand it. The usual rule of regulatory interpretation is that 'different language is intended to mean different things,' and thus a demand for a hearing is not to be treated as a mere request for a hearing."

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[55] See Sackett v. EPA, 132 S.Ct. 1367 (2012).

[56] See Fort Stewart Schs. v. Fed. Labor Relations Auth., 495 U.S. 641, 654 ("It is a familiar rule of administrative law that an agency must abide by its own regulations.").

Charlissa C. Smith (Denial of Senior Reactor Operator License), LBP-13-3, 77 NRC 82, 90 (2013) (citations omitted).

Orders issued by the NRC Enforcement Office consistently fail to "inform . . . any other person adversely affected by the order of his or her . . . right to demand a hearing" and thus fail to comply with 10 C.F.R. § 2.202(a)(3). For example, my search of the Federal Register reveals that none of the hundreds of enforcement orders that NRC has published during the last ten years even mention the "right to demand a hearing," except one.[57] The NRC Enforcement Policy and Enforcement Manual (over 400 pages) conveniently omit any reference to the legal requirement that NRC orders must inform the adversely affected persons of their "right to demand a hearing." The Order to Exelon did not contain this phrase. Even NRC's enforcement orders to Mr. Buhrman and Mr. Brittain never mentioned their "right to demand a hearing." The Staff's practice of ignoring 10 C.F.R. § 2.202(a)(3) has continued until recently.[58]

The failure of the instant Order to inform the licensee or "other person adversely affected" of their right to demand a hearing confused and misled Local 15.[59]

[57] In the Matter of MC Squared, Inc., Tampa, FL; Order Imposing Civil Monetary Penalty, 72 Fed. Reg. 69,714 (Dec. 10, 2007).

[58] See In the Matter of South Carolina Electric & Gas Company, Virgil C. Summer; Nuclear Station Independent Spent Fuel Storage Installation Order Modifying License (Effective Immediately), 79 Fed. Reg. 6,652 (Feb. 4, 2014).

[59] "We initially took at face value the order's directive that in order to be granted a hearing we would have to establish standing and proffer at least one admissible contention pursuant to Rule 2.309." Tr. at 16–17.

Conclusion—Cumulative Effects

Over the years the NRC has created numerous barriers to entry into the adjudicatory process. Many of them are evident in this case. None of them are legally necessary.[60] These barriers include:

1. Administrative Standing: Imposing the legally unnecessary requirements of 10 C.F.R. § 2.309(d).

2. Judicial Concepts of Standing: The addition of the Constitutional tests of injury-in-fact, causation, and redressability.[61]

3. Additional Prudential Tests: The imposition of the (prudential) "zone of interests" test.[62]

4. Eliminating Discretionary Intervention: The elimination of discretionary intervention unless some other person has established standing (and, even in such cases, only allowing discretionary intervention in very "extraordinary" situations).[63]

5. Bellotti Doctrine: Establishing the Bellotti doctrine, whereby the scope of an enforcement proceeding is defined so narrowly that virtually no one (except the target of the order) can be granted a hearing.[64]

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[60] In fact, the Purpose section of the AEA, § 3(d), specifically provides for creating "a program to encourage widespread participation" in order to achieve the policies set forth in the AEA. How the various barriers have affected the public's ability to participate in NRC proceedings was outlined last year by a frequent counsel for intervenors before boards. See Letter from Diane Curran to NRC Commissioners (Feb. 26, 2013) (ADAMS Accession No. ML13057A987).

[61] Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Servs., LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) ("[W]e are not strictly bound by judicial standing doctrines . . . [but] we have long applied contemporaneous 'judicial concepts of standing.'").

[62] The Commission, in determining standing, asks whether "an interest arguably within the zone of interests protected by the governing statute" has been injured. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

[63] Andrew Siemaszko (Vacating Discretionary Intervention), CLI-06-16, 63 NRC 708, 716 (2006). See also 69 Fed. Reg. 2,182, 2,201 (Jan. 14, 2004).

[64] Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982) (restricting the limits of a hearing to solely "whether, on the basis of matters set forth in the Order, the Order should be sustained"). Bellotti v. N.R.C., 725 F.2d 1380, 1381 (D.C. Cir. 1983) reaffirmed the Commission's authority to set the scope of its own hearings.

6. Misleading Notices to the Public: Allowing the Staff to issue orders that consistently fail to inform adversely affected persons of their right to demand a hearing and that violate 10 C.F.R. § 2.202(a)(3).[65]

7. Premature Adjudication: Requiring petitions to be filed 60 days after the application is docketed. At this point the licensing process has barely started, making it much more difficult for a public interest group to formulate an admissible challenge.[66]

8. Get it Right the First Time or Be Forever Barred: Prohibiting an intervenor from curing technical defects in its Reply, for fear that 27 extra days would excessively "delay" the licensing proceeding (which usually takes an additional three to five years).[67]

9. Imposing "Reopener" Requirements Even Though the Evidentiary Record Has Never Been "Opened": If a petition is rejected or dismissed at the docketing stage (before the evidentiary record has ever been "opened"), then subsequent petitions, in addition to meeting all of the other requirements, must also show that the evidentiary record should be 'reopened" under 10 C.F.R. § 2.326.[68]

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[65] See Section VIII supra.

[66] "The early commencement of licensing hearings . . . wastes the time and resources of all parties on premature and unproductive litigation." Letter from Diane Curran to NRC Commissioners at 9 (Feb. 26, 2013) (ADAMS Accession No. ML13057A987); cf. 40 C.F.R. § 124.19 (administrative challenges to EPA permits are to be filed 30 days after EPA's final permit decision).

[67] The Commission has "stressed" that because of NRC's "increasing adjudicatory docket" it is "paramount" that Petitioners satisfy the contention admissibility requirements in the petition ("at the outset") and not 27 days later in their reply.

> As the Commission has stressed, our contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer. . . . As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements.

Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004) (internal quotes and cites omitted) (emphasis added).

[68] The "rule governing motions to reopen sets a high standard." Virginia Elec. and Power Co. (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 700 (2012).

10. Asymmetrical Interlocutory Appeals: Allowing the Staff and Licensee to file interlocutory appeals on the admission of a contention, while prohibiting Intervenors from filing such appeals on the denial of a contention (unless ALL contentions have been denied).[69]

11. Strictly Construed: Mandating that the six contention admissibility requirements of 10 C.F.R. § 2.309(f) be strictly construed against the intervenors.[70]

12. NRC Staff Participation Opposing All Requests for Evidentiary Hearings: When a "person whose interest may be affected" under AEA § 189(a)(1)(A) requests a hearing, the NRC Director handing the licensing process always opposes the request for a hearing. This is usually unnecessary and unproductive, because the well-represented Applicant always opposes the hearing request.[71]

None of the forgoing barriers are required by law. These are self-imposed limitations. Even when they are subject to judicial review, the courts do not pass judgment on the wisdom of these barriers. At most, a court will examine a specific barrier, in isolation, and generally conclude that it is not illegal.[72]

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[69] "The right to interlocutory appeal . . . is fundamentally asymmetrical." Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 147 n.89 (2009). The current appeal procedure was established by 37 Fed. Reg. 28,710, 28,711 (Dec. 29, 1972). In 2013 NRC issued an advance notice of proposed rulemaking to change these interlocutory appeal rules which it later withdrew because it "believe[d] that there is not significant public interest in a rule change at this time." Potential Changes to Interlocutory Appeals Process for Adjudicatory Decisions 78 Fed. Reg. 66,660, 66,660 (Nov. 6, 2013).

[70] The Commission describes the contention admissibility rules as "strict by design." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008); Amergen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006); Exelon Generation Co. (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

[71] U.S. Dep't of Energy (High Level Waste Repository), CAB-02, Tr. at 352–55 (Apr. 1, 2009).

[72] See Bellotti v. N.R.C., 725 F.2d 1380, 1381 (D.C. Cir. 1983).

As Chevron teaches—the Commissioners have the legal authority to modify, remove, or adjust any of these barriers.[73] Indeed, the entire point of Chevron was to allow administrative agencies to change their mind.

Over the decades, brick by brick, the cumulative effect has been to create an exclusionary fortress against the conduct of adjudicatory hearings. NRC imposes standing requirements more stringent than ANY other administrative agency in the Federal Government.[74] Indeed, NRC sometimes imposes standing requirements MORE stringent than those imposed in federal court.[75] The NRC case law on standing comprises many thousands of pages. Tens of millions of dollars of litigation costs that have been devoted to standing—an issue that most federal agencies ignore or take for granted. Meanwhile, an evidentiary hearing on the merits of a contention usually takes a single day.

During the last ten years there have only been thirteen cases in which an intervenor actually obtained a Subpart L adjudicatory hearing.[76] Barely one hearing per year. Rather than

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[73] "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron v. NRDC, 467 U.S. 837, 863–64 (1984).

[74] One commenter has cited NRC's "50-mile proximity presumption" as an example of NRC's great liberality in the arena of standing. David A. Repka & Tyson R. Smith, Proximity, Presumptions, and Public Participation: Reforming Standing at the Nuclear Regulatory Commission, 62 Admin. L. Rev. 583, 590 (2010). I disagree. Given that NRC's safety regulations cover a 50 mile planning area, 10 C.F.R. § 50.47(c)(2), it would be contradictory for NRC to deny standing to persons within that area.

[75] Envirocare of Utah v. NRC, 194 F.3d 72, 74 (D.C. Cir. 1999) (wherein NRC raised the bizarre argument that it would be legally permissible for NRC to "refuse to grant a hearing to persons who would satisfy the criteria for judicial standing and refuse to allow them to intervene in administrative proceedings").

[76] The NRC webpage states that the agency conducts over 1,000 public meetings annually. 2013–14 Information Digest, http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/v25/facts-at-a-glance.pdf (last visited Apr. 14, 2014). But most of these were merely public "comment" sessions. Except for the three Subpart L evidentiary hearings held in 2013, few (if any) of NRC's 1000 meeting afforded members of the public the opportunity to have an impartial adjudicator force the NRC Staff or a Licensee/Applicant to do something that they did not want to do.

increasing, as was predicted in 2004,[77] the NRC's adjudicatory docket has substantially decreased.

In this regard, I note that the NRC has recently initiated a "Cumulative Effects of Regulation" (CER) program that requires the NRC Staff "to develop and implement outreach tools that will allow NRC to consider more completely the overall impacts of multiple rules, orders, generic communications, advisories, and other regulatory actions on licensees."[78] Excellent.

Perhaps the CER program should also consider the cumulative effects of the NRC regulations and CLI decisions on members of the public, seeking to have their objections heard in an adjudicatory hearing under AEA § 189(a).

As a judge on the ASLBP it is my duty to apply the law, the regulations, and the holdings of the decisions of the Commission to the facts of the case before me. I do my best to discharge this duty.

In this case, my duty requires me to say that the request for hearing by the 1,500 workers at Exelon represented by Local 15 should be granted. The Majority's decision is not required by any law, regulation, or holding of the Commission.

The Exelon workers have raised legitimate contentions (1) that they will be adversely affected by the Staff's Confirmatory Order and (2) that the Order is legally deficient. These workers deserve a hearing on those issues.

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[77] See Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004).

[78] See 79 Fed. Reg. 13,685, 13,686 (Mar. 11, 2014) (citing SECY-11-0032 (Oct. 11, 2011) (ADAMS Accession No. ML112840466)) ("Consideration of the Cumulative Effects of Regulation in the Rulemaking Process"); SECY-12-0137 (Oct. 5, 2012) (ADAMS Accession No. ML12223A162) ("Implementation of the Cumulative Effects of Regulation Process Changes") and the Staff Requirements Memorandum to SECY-12-0137 (ADAMS Accession No. ML13071A635).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
EXELON GENERATION COMPANY, LLC	)	Docket Nos. 50-237-EA and 50-249-EA
	)	
(Dresden Nuclear Power Station)	)	ASLBP No. 13-930-01-EA-BD01
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **LBP-14-04 MEMORANDUM AND ORDER (Denying Petition to Intervene and Request for Hearing)** have been served upon the following persons by the Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of April 2014