

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	
)	Docket Nos. 50-237; 50-249
Exelon Generation Company, LLC)	License Nos. DPR-19; DPR-25
Dresden Nuclear Power Station)	EA-13-068

PETITION TO INTERVENE AND REQUEST FOR HEARING

Pursuant to 10 C.F.R. §§ 2.309 and 2.714 and the October 28, 2013 Confirmatory Order in this Docket, Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (“Local 15” or “Union”), petitions the Nuclear Regulatory Commission (“NRC” or the “Commission”) to intervene and requests a hearing in the above-captioned proceeding.

I. Introduction

Local 15, whose main office is located in Downers Grove, Illinois, is a labor union and the collective bargaining representative of individuals employed by the licensee in this matter, Exelon Generation Company (“Exelon”, “Licensee” or the “Company”) at its Dresden Nuclear Power Station and four other facilities. Local 15 has current Collective Bargaining Agreements with Exelon covering the wages, fringe benefits, and terms and conditions of employment of the bargaining unit employees represented by Local 15, IBEW. As the duly authorized collective bargaining representative of this workforce, Local 15 satisfies requirements of both organizational and representational standing to intervene in this proceeding. Even if the Commission were to determine that Local 15 does not satisfy either organizational or representational standing requirements, the Commission should find that Local 15 has satisfied requirements for discretionary intervention pursuant to 10 CFR § 2.309(e). The bases for a grant of intervention are discussed more fully in Sections III and IV of this Petition.

In support of its Request for Hearing, Local 15 raises the following contentions, discussed in greater detail in Section V below:

1. The Confirmatory Order should not be sustained because, without sufficient justification in the record, it imposes obligations on the off-duty employees of Exelon not otherwise required by the NRC in Title 10 of the Code of Federal Regulations, Part 73, Sections 56(f)(1)-(3) to observe and report the offsite, off-duty conduct of fellow employees.
2. The Confirmatory Order should not be sustained because it imposes on the employees of Exelon Generation behavioral observation and reporting obligations that are vague, over-broad and not carefully tailored to address the NRC's stated health and safety concerns and improperly delegates to Exelon the discretion to interpret and implement NRC standards concerning behavioral observation without the input of Local 15, the public or the NRC.
3. The Confirmatory Order should not be sustained because it improperly endorses and confirms unlawful actions undertaken by Exelon Generation in derogation of its duty to bargain with Local 15 about the employees' terms and conditions of employment and in violation of the legally protected rights of Local 15 and its members.

II. Background Facts

Exelon Corporation is an electric utility with subsidiaries that generate, transmit, and distribute electric power and provide related services to approximately 3 million residential, commercial, and industrial customers within its Illinois service area - the northern one-third of Illinois. Exelon Corporation is the result of a merger of Unicom Corporation, a holding corporation which included Commonwealth Edison Company, and PECO Energy Company, in October, 2000. Exelon Corporation currently has three wholly owned subsidiaries that include bargaining unit employees represented by Local 15, IBEW: Exelon Generation Company, LLC ("Exelon"), Commonwealth Edison Company ("ComEd"), and Exelon Business Services

Company (“BSC”). Exelon Generation operates six nuclear power plants in Illinois: Braidwood, Byron, Dresden, LaSalle, Quad Cities and Clinton Stations.¹

Exelon Corporation has approximately 5,000 Local 15 bargaining unit employees in Illinois; of these, approximately 1,645 are employed by Exelon Generation. Local 15 was formed in 1994 and is an amalgamation of seventeen local unions that had comprised the former System Council U-25, a negotiating entity. These former local unions represented the Company’s employees in the various geographic areas and departments of ComEd (as the Company was then called prior to the 2000 merger) for over 50 years.

On June 6, 2012, the U.S. Nuclear Regulatory Commission's Office of Investigations, Region III Field Office, initiated an investigation of an incident in which a Senior Reactor Operator (SRO)² from the Dresden Station allegedly planned to rob an armored car and attempted to enlist the assistance of another Dresden SRO. The investigation examined whether other Dresden personnel, including a bargaining unit Equipment Operator (EO), knew of the planned crime but failed to report it. Based on its investigation, the NRC identified an apparent violation of 10 CFR §§ 73.56(a)(2), 73.56(f)(1) and 73.56(f)(3) and informed Exelon of this conclusion on July 3, 2013. The NRC also informed Exelon that the apparent violation was being considered for enforcement action in accordance with the NRC's Enforcement Policy and provided Exelon with the option of: (1) providing a written response to the violation; (2) attending a Predecisional Enforcement Conference; or (3) requesting ADR with the NRC. Exelon chose to request ADR to resolve its differences with the NRC and a mediation session took place on September 18, 2013. During the ADR session, which was conducted by a neutral

¹ Local 15 represents employees at the first five of these; employees at the Clinton Station are represented by IBEW Local 51.

² Dresden SROs are not members of the bargaining unit represented by Local 15 but EOs are.

mediator with no decision-making authority, a preliminary settlement agreement was reached; the Confirmatory Order was issued pursuant to that agreement. Exelon did not notify Local 15 about the NRC's findings or the ADR session and it has not shared the preliminary settlement agreement with Local 15.

Section II of the Confirmatory Order recites findings of the NRC investigation concerning the conduct of the two SROs who planned the robbery of an armored car and the EO who allegedly learned of their plan and yet did not report it to Exelon. Section III of the Confirmatory Order outlines the elements of the preliminary settlement agreement reached through ADR. As recited by the Confirmatory Order, that agreement acknowledged actions Exelon had already taken to:

- Revise its Procedure SY-AA-103-513 (“Behavioral Observation Program”) to indicate an “expectation to report offsite illegal activity”;
- Conduct an Exelon-wide briefing concerning the “expectation to report unusual behavior observed either on or offsite”;
- Train personnel on changes to the Procedure and “expectations for reporting aberrant offsite activities”; and
- Verify that personnel “understood the procedural requirements and guidance”.

The Confirmatory Order also addresses actions Exelon had not yet taken but agreed to take in order to resolve its differences with the NRC. Those actions include (*inter alia*) further revisions of Procedure SY-AA-103-513 and training on the revisions within 90 days of the effective date of the order. In exchange for Exelon's commitments, the NRC agreed “to not issue a finding, a Notice of Violation, a civil penalty, or to take any further enforcement action in the matter of EA-13-068 discussed in the NRC's letter to Exelon dated July 3, 2013.”

The version of Procedure SY-AA-103-513 that was in effect prior to the events described in the confirmatory order imposed observation and reporting obligations on supervisory and managerial employees as well as those not in supervisory or managerial roles who have

unescorted access authorization. This procedure did not address off-duty, offsite conduct and tied reporting obligations to behavior “that may adversely affect the safety or security of a licensee facility, or that may constitute an unreasonable risk to the health and safety of the public or the common defense and security, including a potential threat to commit radiological sabotage.”³ The revised procedure, which Exelon appears to have put into place in July of 2013 but which the Union only received on December 11, explicitly requires, for the first time, employee reporting of off-site, off-duty conduct, thereby imposing increased reporting obligations on bargaining unit employees. The Union has not been privy to either the briefing or training Exelon told the NRC had already been provided to its employees concerning the “expectation to report unusual behavior observed either on or offsite” or “expectations for reporting aberrant offsite activities” (as recited in Section III.A of the Confirmatory Order) nor has it been provided with any information about the specifics of how Exelon intends to comply with its obligations pursuant to Section III.B of the Confirmatory Order. However, assuming these additional documents track the language of the Confirmatory Order, they will likely have introduced into the reporting requirements numerous ambiguities and inconsistencies and rendered employee compliance far more uncertain. Off-duty employees will be required for the first time to observe and report any off duty unusual, illegal or aberrant activity of others, without apparent limitation, suggesting that such things as jaywalking and minor traffic infractions are reportable offenses. “Unusual behavior” observed either on or offsite and “aberrant offsite activities” will be required to be reported, with Exelon given total discretion “to provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials.”

³ The policy did require self-reporting concerning “any arrests, criminal charges, convictions or proceedings.”

Local 15 received a copy of the Confirmatory Order on November 1, 2013 and met with Exelon concerning it on November 21, 2013. At that meeting, the Union requested to bargain with Exelon over changes to Exelon's behavioral observation program and the details of how the Confirmatory Order would affect the bargaining unit employees' terms and conditions of employment. Exelon refused that request and stated that it does not intend to bargain with the Union on this subject. In response to Exelon's refusal to bargain, Local 15 filed an unfair labor practice ("ULP") charge with Region 13 of the National Labor Relations Board on December 4, 2013.⁴

III. Standing

The Commission has previously held that to establish standing in the context of enforcement proceedings, "a Petitioner must show (1) an injury in fact; (2) fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision." *In re Nuclear Fuel Servs., Inc., Special Nuclear Facility* (Confirmatory Order), 66 N.R.C. 277, 284-285 (N.R.C. 2007). Distinct from other NRC proceedings, to establish standing as a matter of right to challenge a Confirmatory Order, "an individual or organization requesting a hearing must show that he, she, or it would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement." *Id.* Thus, the question of standing is "directly related" to the scope of the proceeding. *Id.*

⁴ The Union's ULP charge is currently being processed by the Region but even if the Union obtains relief on that charge, it will not be able to obtain complete relief absent NRC action.

Here there can be no question that the Confirmatory Order “as it exists” will have an adverse affect on both Local 15 and its individual members who are employed by Exelon.⁵ The Confirmatory Order gives the NRC’s stamp of approval to unilateral modifications already made by Exelon to bargaining unit employees’ terms and conditions of employment as well as those to be made under Section III.B of the Order. Because these modifications were and are being made without bargaining with the Union, the Union’s and its members’ rights pursuant to the NLRA have been violated first by the Company and then again by the NRC itself in its affirmance of the Company’s actions. Individual employees who are subjected for the first time to observation and reporting obligations concerning observed off-duty and off-site conduct that are both intrusive and ill-defined and violations of which can form the basis for discipline and/or denial of security access face a very real threat of both economic (in the event of disciplinary suspension and a loss of security access) and property (in the event of termination of employment, since bargaining unit employees have a due process protected property interest in continued employment) loss as a result of the Confirmatory Order. While the Dresden employees’ indisputable interest in maintenance of contractually and statutorily protected employment rights is in part (but not wholly) economic, that economic interest is specific and particularized. As such it is clearly distinct from the generalized or diffuse economic interest claimed by power company ratepayers, which have been previously held to be insufficient to support intervention. *See, e.g., In re Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), 5 N.R.C. 1418, 1977 NRC LEXIS 97 at *3 (1977). Further, there is far more at stake here than a “pocketbook injury”; both

⁵ In support of the instant Petition, Local 15 submits an affidavit (marked as Exhibit 1) from David Specha, Reactor Operator and Chief Steward at the Dresden Station. Mr. Specha’s affidavit explains the Confirmatory Order’s adverse effect on his employment and affirms that he has authorized Local 15 to act on his behalf in this proceeding.

the Union's and its members' due process rights have been violated by the NRC's order, which has summarily changed the employees' terms and conditions of employment without affording them their statutorily-protected right to engage in bargaining over such changes.⁶

The physical proximity of the workers to the regulated facility further supports the Union's standing in this matter. Dennis Specha, a Reactor Operator at the Dresden Station and a member of the Union who has authorized the Union to act on his behalf in this matter, lives approximately 28 miles from the plant. *See* Exhibit 1. In other proceedings, residence-based proximity of within 50 miles has been found sufficient to support standing and should likewise do so here. *Id.* at *8-9. Moreover, employees who work within the plant itself have at least as much of a protected interest springing from proximity as an individual who lives "within the shadow" of a nuclear plant. The Union, as their exclusive representative, has a particular interest in insisting upon participation in matters which vitally concern the safety of its members. Whenever a licensee or the NRC develops program changes which modify bargained for and agreed upon terms and conditions of employment allegedly in the interest of safety, the workers and their exclusive representative should have a voice.

The only way in which these ills can be redressed is through NRC action, specifically, either revocation (the Union's preferred remedy) or modification of the Order. As discussed

⁶ This interest, in the due process of statutorily-required bargaining prior to changes in terms and conditions of employment, is distinct from the right the employees also have in the continuance of existing terms and conditions themselves. In this regard the Union here asserts a claim slightly different from the one the Licensing Board rejected in the *Consumers Power* case discussed further herein. There, the Licensing Board concluded that neither the union nor the employees it represented had a due process protected interest in "the right to work overtime" because that right was not guaranteed to workers by any constitutional or statutory provision. *In re Consumers Power Co.* (Palisades Nuclear Power Facility), 14 NRC 247, 1981 NRC LEXIS 85 at *18-20 (1981) *rev'd on other grounds* at 15 NRC 493, 1982 NRC LEXIS 197 (1982). Here, however, there can be no dispute that both the Union and its members have a statutorily protected interest in the maintenance of bargained-for terms and conditions of employment absent notice to, bargaining with and agreement of the Union.

more thoroughly below, the NRC is the only entity that can provide full relief to Local 15 and absent NRC action, any relief Local 15 might obtain in another forum would be incomplete. Taken together, these facts demonstrate that Local 15, both on its own behalf as an organization with distinct legal rights vis-à-vis the Licensee, and as the representative of individuals employed by the Licensee, has suffered and will continue to suffer an injury in fact, fairly traceable to the Confirmatory Order, which can only be redressed through NRC action. Accordingly, Local 15 should be granted standing to intervene in this proceeding as a matter of right.

IV. Discretionary Intervention

Local 15 believes that the Commission should grant it intervention as a matter of right as discussed above. Even if the Commission were to decide that Local 15 does not have standing to intervene as a matter of right, however, the Commission is empowered to grant discretionary intervention to Local 15 pursuant to 10 CFR § 2.309(e) and should do so in this case.

Discretionary intervention is an “extraordinary procedure” and has been granted very rarely. *See In re Siemaszko*, 63 N.R.C. 708, 716-17 (2006) (detailing the history of grants of discretionary intervention and noting its rarity). The Union’s research has revealed only one case in the history of the NRC where a union sought discretionary intervention in the context of a challenge to a confirmatory order. That decision granting discretionary intervention, which was subsequently vacated as moot based on a settlement reached between the union and the NRC, presented facts very closely analogous to the instant case and unique in NRC jurisprudence. *See In re Consumers Power Company* (Palisades Nuclear Power Facility), 15 NRC 493, 1982 NRC LEXIS 197 (1982). The order there was vacated after the NRC Staff and the UWUA resolved their differences and filed a Joint Motion to Terminate Proceeding. That motion came on the heels of the NRC Administrator of Region III issuing a Partial Rescission of Order modifying the

overtime restrictions to comply with the normal Commission policy on overtime, thus removing the changes in overtime to which the UWUA had objected. *See In re Consumers Power Company* (Palisades Nuclear Power Facility), 16 NRC 50 (1982).

Although the order vacating the *Consumers Power* Appeal Board decision provides that neither it nor the Licensing Board decision it reversed are to be used as guidance and therefore cannot be used as precedent to decide this case, Petitioner believes that the Appeal Board's application of the factors for standing to a union is relevant to the analysis the NRC should undertake in this case to decide whether Local 15 should be granted discretionary intervention. Therefore, this section of the Petition will in large part track the analysis applied by the *Consumers Power* Appeal Board, but without citation to that case.

For the convenience of the Commission and solely to highlight the process of applying discretionary intervention standards to the unique union setting, the Union will summarize briefly the facts and history of the *Consumer Power* case. In *Consumers Power*, as in this case, the NRC entered a Confirmatory Order memorializing an agreement whose terms had been proposed by the licensee to resolve differences it had with the NRC. In the years preceding the confirmatory order in that case, the Palisades facility had been cited "for numerous infractions" of NRC regulations and had been subject to two enforcement actions. *Id.* at *4. A January, 1981 infraction led the Director of the NRC to find that "major changes in the licensee's management controls are necessary to assure that the licensee can operate the Palisades facility without undue risk to the health and safety of the public." *Id.* at *4-5. In response, Consumers Power made certain commitments to satisfy the NRC's concerns, including new limitations on overtime for bargaining unit employees, which were confirmed in the Order. *Id.* at *5. The union alleged that these limitations were more restrictive than the NRC's generally applicable standards, that they

“lack[ed] any factual basis” and were “unsupported by any reasonable safety considerations” and further that they had been proposed to the NRC by the licensee “without notice or consultation with the union.” *Id.* at *1, 7.

The Appeal Board reversed the lower tribunal’s denial of the union’s petition to intervene and request for hearing. The Appeal Board declined to resolve the question of the union’s standing, asserting that it had “considerable doubt that, as presented, this issue is likely to arise again in Commission proceedings” and that there was “no present necessity to decide the matter when our opinion would provide little practical guidance for future cases.” *Id.* at *3.⁷ Instead, the Appeal Board found the Licensing Board had improperly withheld discretionary intervention.⁸ To reach this conclusion, the Appeal Board considered each of the Section 2.309(e) factors in turn.⁹

⁷ In doing so, the Appeal Board noted that the union, in order to meet the “injury in fact” requirement for standing had alleged the confirmatory order “caused a garden variety pocketbook injury to the employment opportunities of the Palisades’ operators” and that this injury would appear to be more within the “zone of interest” of federal labor statutes rather than those ordinarily administered by the NRC. *Id.* at *3 n.3. The Appeal Board observed that while this fact “seemingly would present no barrier to meeting the zone test” for standing in federal court, “[i]n the setting of an NRC administrative proceeding...it raises questions not easily amenable to resolution.” *Id.* Here, as discussed above, the Union and its members allege both economic and due process (the violation of their statutorily protected rights under the NLRA) injuries in fact, i.e.,. The Union’s research has revealed no subsequent case where either the Licensing Board or the Appeal Board has answered the precise standing question raised by the instant petition or the related standing question raised by the UWUA in its petition.

⁸ In reaching this conclusion, the Appeal Board invoked the Commission’s decisions in *Portland General Electric Co.* (Pebble Springs Nuclear Plant, units 1 and 2), 4 NRC 610 (1976), and *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station Units 1 and 2), 11 NRC 438 (1980), where the agency held it “could best fulfill its regulatory responsibilities in licensing proceedings by permitting broader public participation than is mandated by section 189a” of the AEA (i.e., where intervention is not available as of right) and set forth guidelines for the “exercise of broad discretion in ruling on intervention requests” *Id.* at *11-12 citing cases..

⁹ Section 2.309(e) requires the adjudicator to consider and balance the following:

- (1) Factors weighing in favor of allowing intervention –

With regard to the first factor, the extent to which the petitioner's participation, in this case, could be reasonably expected to assist in developing a sound record, the first consideration is the scope of the hearing and what issue(s) may be heard. Within the context of a confirmatory order, as discussed above, the sole issue is whether, on the basis of the record and operating history recited within the order, the order should be sustained."¹⁰ Here, there can be little dispute that the representative of the licensed operators at Dresden is ideally suited to present evidence and otherwise assist in developing the record on the question of the role Exelon's behavioral observation program may or may not have played in the events recited in Section II of the Confirmatory Order and whether the modifications to that program described by the Order are supported by the facts and safety considerations and are likely to result in the outcome sought by the NRC. Further, Local 15 is uniquely qualified to assist in developing the standards which

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- (i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;
 - (ii) The nature and extent of the requestor's/petitioner's property, financial, or other interests in the proceeding; and
 - (iii) The possible effect of any order that may be issued in the proceeding on the requestor's/petitioner's interest;
- (2) Factors weighing against allowing intervention –
- (i) The availability of other means whereby requestor's/petitioner's interest will be protected;
 - (ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and
 - (iii) The extent to which requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

10 CFR §2.309(e).

¹⁰ Although this parameter was explicitly mandated by the Director of Enforcement in the Consumers Power case, it would seem to be a parameter that is coextensive with any challenge to a confirmatory order (including the instant one) which is, by definition, simply confirming an agreement between the NRC and a given licensee. As discussed in *Nuclear Fuel Services*, the issue in such a case is not the wisdom of any hypothetical alternative order but rather the propriety of the order itself as it stands. See *Nuclear Fuel Services*, 66 NRC at 285.

Exelon, without either the Union's or the NRC's assistance, will develop under Section III.B of the Confirmatory Order—a prospect not the most conducive to insuring the public safety.

The second factor, the nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding, also weighs in favor of the Union's intervention. The economic and due process interests the Union seeks here to protect are squarely within the range of interests deserving favorable consideration in a discretionary intervention request. It is irrelevant that the Union's economic interest may not fall within the "zone of interest" protected by the AEA because the "zone of interest" inquiry is relevant only to standing and not to discretionary intervention. In addition to the economic harm that could befall the Union's members as a result of the Confirmatory Order, also at stake are those members' property interests in continued employment. Further, both the Union and its members have due process and NLRA rights that have been trampled by both the Confirmatory Order itself and the licensee's conduct that is affirmed by the Confirmatory Order.

The third factor, the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest, also weighs in favor of Union intervention. The Union's interest here is not in the nature of a labor dispute to which the NRC is simply a bystander; rather, it is the Director of Enforcement who can modify the commitments Exelon has made to alter its behavioral observation program without bargaining with the Union. The modifications to the bargaining unit members' terms and conditions of employment that have been both endorsed and mandated by the Confirmatory Order in this case can only be rescinded or altered by the Director and are not susceptible to a full remedy in any other forum. While Local 15 may also have a labor dispute with Exelon concerning its conduct in violation of the NLRA, it could not possibly obtain complete relief in any action to enforce its rights under that statute so long as this

Confirmatory Order remains to shield Exelon's misconduct. Thus, all three of the factors to weigh in favor of intervention swing the balance heavily in favor of granting Local 15's Petition.

Nor do the factors to be considered against allowing intervention tip the balance in the other direction. With regard to the fourth factor, the availability of other means whereby the requestor's/petitioner's interest will be protected, as discussed above, the NLRB is not the appropriate tribunal to hear and fully remedy the Union's complaint. Only the NRC is suited to adjudge a challenge to the factual support and safety significance of changes to Exelon's behavioral observation program. No other agency may undermine the Director's order; nor does any other agency have the appropriate expertise to review any alleged safety significance of changes in reporting requirements. Unless and until the Director's order is modified by the NRC, the Union cannot obtain complete relief. This factor does not weigh against Local 15 intervention.

The fifth factor, the extent to which the requestor's/petitioner's interest will be represented by existing parties, also does not weigh against intervention by Local 15. It appears very clear that the modifications challenged by the Union were agreed upon by the licensee and the NRC—the only other parties to this action. Thus, there is no other party who can represent the interests of Local 15 and its members.

Finally, the sixth factor, the extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding, does not weigh against Union intervention. It does not appear that any other party has filed a petition challenging the Order and that granting the Union's Petition and giving its members the opportunity to be heard on this matter of deep concern may slow the proceeding. However, the uniqueness of the Union's position is not surprising given the Order's relatively narrow scope of application (i.e., only to

Exelon employees) as compared with other types of NRC proceedings. It is difficult to identify other parties that have the kind of direct interest in the issues raised by this Confirmatory Order—if not the Union to raise concerns about the effect of changes in the employees’ terms and conditions of employment, then who? And it would be patently unfair if the Union’s ability to advocate on behalf of its members’ rights was defeated simply because they are the only party with an interest in those rights. In *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), 5 NRC 1418 (1977), the Appeal Board noted that “if the petitioner is unequipped to offer anything of importance bearing on plant operation, it is hard to see what public interest conceivably might be furthered by nonetheless commencing a discretionary hearing at his or her behest.” Here, it could not be clearer that the Union meets that test inasmuch as a challenge to the safety-related basis for modification of terms and conditions of employment at a nuclear plant by a confirmatory order *bears directly upon the safe operation of the plant*, even if the Union’s challenge does not conform to more traditional types of claims that agency action does not go far enough to assure safe operation of a plant.

Based on the application of all six factors of the discretionary intervention test, Local 15’s request for a hearing should be granted pursuant to 10 CFR § 2.309(e) even if the NRC fails to find that Local 15 has standing as of right pursuant to 10 CFR § 2.309(d).

V. Contentions

In the event the Union’s Petition is granted, it seeks to raise the following contentions:

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

NRC regulations require each licensee to establish a behavioral observation program as a component of its access authorization program with the overarching aim of providing “high assurance” that individuals with unescorted access (among others) are “trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage.” 10 CFR §73.56(c). Behavioral observation programs are intended to “detect 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.” 10 CFR §73.56(f)(1). The regulations include an obligation to report such behaviors and any concerns that arise from behavioral observation. 10 CFR §73.56(f)(2)-(3). Consistent with these regulatory requirements, Exelon maintains an access authorization program that includes behavioral observation and reporting obligations. The Confirmatory Order in this case recites certain changes to its behavioral observation program that Exelon has allegedly already made in reaction to the incidents that gave rise to the NRC’s threatened enforcement action and certain other changes which it has obligated itself to make in the future pursuant to the settlement agreement memorialized in the Confirmatory Order. These changes expand greatly the obligations of Exelon employees, including those represented by Local 15, to observe and report offsite, off-duty “unusual,” “illegal” and “aberrant” conduct of their fellow offsite, off-duty employees. The Union does not believe these sweeping changes are supported by the record in this matter or that the record suggests the changes are drawn in such a way as to remedy the ills that led to the Confirmatory Order.

The Confirmatory Order recites that the NRC’s investigation revealed “an apparent violation of NRC requirements” in 10 CFR §§ 73.56(a)(2), (f)(1) and (f)(3), all in connection

with a single incident in which two SROs allegedly plotted an off-site crime and attempted to recruit an EO to assist them in unlawful activities. 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.¹¹ 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.

The Union, naturally, is deeply concerned with the safety of Dresden Station and other nuclear plant personnel as well as the general public. Obviously, if it would be unsafe for the Dresden Station to continue to operate in the absence of the changes contemplated by the Confirmatory Order, then such changes should be made albeit in a manner that is in compliance with the Licensee's obligations under the NLRA. However, the Union does not believe that is the

¹¹ The Union is further constrained to observe that aside from the obvious threat to public safety that an attempted robbery would itself pose and the questions such a plot would naturally raise concerning the general trustworthiness of the individuals involved, there appear to be no allegations that the actions of the SROs and EO in this matter *otherwise* constituted an unreasonable risk to the health and safety of the public and common defense and security, including a potential threat to commit radiological sabotage.

case here. The Union strenuously objects to sweeping changes that detrimentally affect the rights and interests of every single Exelon Generation bargaining unit member being made without genuine basis or need and without the important input of the Union and the bargaining unit members. Neither the NRC nor Exelon should use a bulldozer to kill an ant.

2. The Confirmatory Order should not be sustained because it imposes on the employees of Exelon 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.

The plain language of the Confirmatory Order illustrates the ambiguity and breadth of the new obligations that are to be imposed upon Exelon employees, including those represented by Local 15. Although the Order suggests that Exelon should provide "additional guidance" to employees concerning the types of activities they are required to report, there is nothing in the Order itself that adequately defines the types of "illegal", "unusual" and/or "aberrant" off-site and off-duty conduct that must be reported to Exelon. The breadth, vagueness and ambiguity of the observation and reporting obligations casts a wide and indiscriminate net that simply is not carefully tailored to address the legitimate concerns for public health and safety expressed in both the NRC regulations and the Confirmatory Order itself. The order recites that Exelon has already revised its Procedure SY-AA-103-513. Although the Order instructs Exelon "to provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials," this instruction neither cabins Exelon's discretion in developing that guidance nor acknowledges Exelon's duty, pursuant to federal labor law, to engage in bargaining over its employees' terms and conditions of employment with their duly authorized bargaining representative. As a result, this instruction provides no assurance that the

“guidance” Exelon issues will be reasonable and consistent with either the Act’s purposes or existing regulatory guidance or with its obligations pursuant to other federal statutes.

If the NRC were to conclude that its own regulations concerning behavioral observation and reporting should be amended to expand the types of conduct that employees subject to the regulations are obligated to report, it could certainly undertake rulemaking on that issue. In that event, of course, the agency would be subject to the notice and comment requirements that apply to all federal rule-making and entities like Local 15 would be given the opportunity to provide input on this matter of great concern to their members. Similarly, where, as here, the NRC’s order confirming changes in Exelon’s behavioral observation program extends far beyond the three alleged bad actors whose conduct precipitated the NRC’s investigation, it is essential that the NRC receive input from the employees who work subject to the procedures affected by the order and their collective bargaining representative. Further, by committing to Exelon itself the discretion to implement further changes without any input from its bargaining unit employees, the NRC is effectively delegating to Exelon, a private entity, the kind of rule-making authority that should remain vested solely with the NRC and should be subject to the procedural safeguards inherent in notice and comment rule-making.

3. The Confirmatory Order should not be sustained because it improperly endorses and confirms unlawful actions undertaken by Exelon 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.

It is undisputed that Exelon did not bargain with Local 15 about changes it alleges it has already made to its Procedure SY-AA-103-513 and its behavioral observation program and that it has refused to bargain with Local 15 about changes it will make to both in the future—changes all endorsed and confirmed by the NRC in the instant Confirmatory Order. While Exelon’s actions in this regard may not conflict with its obligations pursuant to the AEA and NRC

regulations, they most certainly do conflict with its obligations pursuant to another federal law: the National Labor Relations Act. Section 8(d) of the NLRA requires employers and the representatives of their employees to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment” and requires employers to refrain from modifying a resulting collective bargaining agreement absent notice to and bargaining with their employees’ representatives. 29 USC § 158(d). An employer who unilaterally modifies its employees terms and conditions of employment without bargaining violates the NLRA. *See, e.g., NLRB v. Katz*, 369 US 736 (1962).

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. Some of these changes appear to have been independently undertaken by Exelon even before it engaged in mediation with the NRC. Local 15 has not been privy to the ADR process, but it appears likely that the remainder of the changes were proposed by the Licensee itself (not the NRC) in a gambit on Exelon’s part to placate the NRC and avoid fines or other sanctions on its operations at Dresden. Exelon could have involved the Union in the process of developing a response to the NRC investigation but chose not to do so. To the extent that response involved changes to the bargaining unit employees’ terms and conditions of employment, Exelon’s failure to involve the Union was a violation of the Union’s and its members’ statutorily and contractually protected rights. By adopting Exelon’s actions in this regard and incorporating them, unquestioned, into an order of the NRC, this Agency has tacitly condoned Exelon’s violation of the NLRA, a statute enforced by a sister agency, the NLRB.

CONCLUSION

Governmental officials, including the NRC, are constitutionally required “to minimize the risks of error and unfairness in the procedures by which one is deprived of life, liberty, or property.” *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976) *overruled on other grounds in Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 516 (5th Cir. 1980). The Union and its members have already been injured and will continued to be further injured by what amounts to a unilateral decision to impose duties on off-duty employees to observe and report the off-duty and offsite conduct of their fellow employees under imminent threat of discipline including possible discharge and/or loss of security access if they do not do so. This is an ill-advised and gratuitous action taken without adequate investigation, without record support and without giving voice to those most affected by the decision. The Union and its members plainly deserve and have a right to be heard.

For all of the foregoing reasons, Local 15 respectfully requests that its Petition to Intervene and Request for Hearing in this proceeding be granted and that the Commission grant such other relief as may be warranted by all the facts and circumstances.

Respectfully submitted,

/Signed (electronically by/

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Executed in Accord with 10 CFR 2.304(d)

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Dated at St. Louis, Missouri
this 12th day of December, 2013

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	
)	Docket Nos. 50-237; 50-249
Exelon Generation Company, LLC)	License Nos. DPR-19; DPR-25
Dresden Nuclear Power Station)	EA-13-068

AFFIDAVIT OF DENNIS SPECHA

I, Dennis Specha, being first duly sworn, declare under oath as follows:

1. I am over the age of 18 years and am fully competent to make this affidavit. I have personal knowledge of all the facts stated herein.
2. My physical residence address is: 880 Ruthenbeck Lane, New Lenox, IL 60451. I live approximately 28 miles from the Dresden Nuclear Power Station.
3. I make this affidavit in connection with a Petition to Intervene and Request for Hearing regarding the October 28, 2013 Confirmatory Order Modifying License in this proceeding.
4. I work as Reactor Operator in the secured area at the Dresden Nuclear Power Station. I have held that position since May of 2010. Prior to that time I worked as an Equipment Operator, also at Dresden. Both of these are bargaining unit positions and the terms and conditions of employment in both positions are governed by agreements negotiated between Exelon and Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO ("Local 15"). Pursuant to the collective bargaining agreement between Local 15 and Exelon, a non-probationary employee may be disciplined or discharged only for just cause.
5. I am a member of Local 15. From August 1, 2000 to April 1, 2008 and again from January 1 to September 1, 2012, I served as Union Steward. Since September 1, 2012, I have served as Chief Steward at Dresden. In my role as Steward and Chief Steward I am responsible for assisting Local 15 in negotiation and enforcement of its agreements with Exelon.
6. As a bargaining unit employee at the Dresden Nuclear Power Station I understand that if I violate one of Exelon Generation Company's policies or procedures, I may be subject to discipline up to discharge and/or revocation of my security access which I need for the position I hold. Among those policies is SY-AA-103-513 titled "Behavioral Observation Program", which is the subject of the October 28, 2013 Confirmatory Order.

7. The October 28, 2013 Confirmatory Order states that after investigation, the Nuclear Regulatory Commission (“NRC”) found violations of NRC requirements in Title 10 of the Code of Federal Regulations, Part 73, Sections 56(a)(2), 56(f)(1) and 56(f)(3). Exelon and NRC, without any Local 15 members or representatives being present, discussed the violations and reached a settlement.
8. The Confirmatory Order recites that Exelon has already revised its Behavioral Observation Program Procedure SY-AA-103-513 and the Order modifies Exelon’s operating licenses with respect to these actions and other actions Exelon is ordered to take. The changes will require off-site, off-duty bargaining unit employees, for the first time, to report off-site and off-duty conduct of other employees. Exelon has always taken the position that employees can be disciplined or discharged for violations of its policies and procedures including Procedure SY-AA-103-513.
9. I understand that Exelon did not bargain with the Union about these changes to Procedure SY-AA-103-513 and has refused to bargain with the Union about any further changes. I have not been involved in any bargaining concerning these changes.
10. 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.
11. I also believe that my rights as a bargaining unit member and Chief Steward have been violated because Exelon has failed to bargain with Local 15 about my terms and conditions of employment and the NRC has approved of that conduct and affirmed it in the Confirmatory Order, resulting in further violations of my rights.
12. As an individual living approximately 28 miles from the Dresden Station, I have a particular interest in the continued safe operations of the plant. I am concerned that the changes to Exelon’s behavioral observation program described by the Confirmatory Order are not reasonably related to the safe operations of the plant.
13. I have authorized Local 15 to intervene on my behalf and take such actions as are necessary to protect my rights in this matter.

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I declare under penalty of perjury that the foregoing is true and correct. Further affiant sayeth naught.

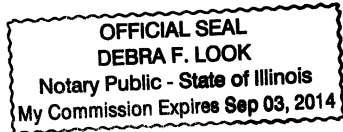
Executed on 12-11-13.

Dennis A. Specha
Dennis Specha

STATE OF ILLINOIS)
) ss.
COUNTY OF Will)

Sworn to and subscribed before me, a Notary Public, this 11 day of December, 2013.

Debra F. Look
Notary Public
My Commission Expires: 09/03/14



**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	
)	Docket Nos. 50-237; 50-249
Exelon Generation Company, LLC)	License Nos. DPR-19; DPR-25
Dresden Nuclear Power Station)	EA-13-068

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition to Intervene and Request for Hearing has been served upon the following persons by Electronic Information Exchange, this 12th day of December, 2013:

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
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Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
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Brian Newell
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Exelon Generation Company, LLC
Dresden Nuclear Power Station, Docket Nos. 50-237; 50-249
CONFIRMATORY ORDER MODIFYING LICENSE

U.S. Nuclear Regulatory Commission
Office of Enforcement
Washington, D.C. 20555-0001

Roy Zimmerman, Director
Email: Roy.Zimmerman@nrc.gov

Mr. Donald P. Ferraro
Associate General Counsel
Exelon Business Services Company, LLC
200 Exelon Way, KSA-3N
Kennett Square, PA 19348
Email: Donald.Ferraro@exeloncorp.com

Additionally, I hereby certify that a copy of the foregoing Petition to Intervene and Request for Hearing has been served upon the following individual via electronic mail on this 12th day of December, 2013:

Ms. Tamra Domeyer
Associate General Counsel
Exelon Business Services Company, LLC
4300 Winfield Road
Warrenville, IL 60555
Email: tamra.domeyer@exeloncorp.com

/Signed (electronically by/
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