UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket Nos. 50-237-EA 50-249-EA
EXELON GENERATION COMPANY, LLC	)	
(Dresden Nuclear Power Station, Units 2 and 3)	)	January 24, 2014

EXELON'S ANSWER OPPOSING THE PETITION TO INTERVENE AND HEARING REQUEST FILED BY LOCAL UNION NO. 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Timothy P. Matthews
Raphael P. Kuyler
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: (202) 739-5527
Fax: (202) 739-3001
E-mail: tmatthews@morganlewis.com
E-mail: rkuyler@morganlewis.com

Tamra S. Domeyer
Associate General Counsel
Exelon Generation Company, LLC
4300 Winfield Road, 5th Floor
Warrenville, IL 60555
Phone: (630) 657-3753
Fax: (630) 657-4323
E-mail: tamra.domeyer@exeloncorp.com

Counsel for Exelon Generation Company, LLC

TABLE OF CONTENTS

Page

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket Nos. 50-237-EA 50-249-EA
EXELON GENERATION COMPANY, LLC	)	
(Dresden Nuclear Power Station, Units 2 and 3)	)	January 24, 2014

EXELON'S ANSWER OPPOSING THE PETITION TO INTERVENE AND HEARING REQUEST FILED BY LOCAL UNION NO. 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

I. INTRODUCTION AND SUMMARY

In accordance with 10 C.F.R. § 2.309(i)(1), Exelon Generation Company, LLC ("Exelon") submits this timely Answer Opposing the Petition to Intervene and Hearing Request ("Petition"), filed by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO ("Local 15" or "the Local") on December 12, 2013 in the above-captioned proceeding.[1] The Petition proffers three contentions challenging the Confirmatory Order issued by the U.S. Nuclear Regulatory Commission ("NRC") Staff to Exelon following a successful Alternative Dispute Resolution ("ADR") session and settlement of apparent violations of access authorization requirements in 10 C.F.R. §§ 73.56(a)(2), 73.56(f)(1) and 73.56(f)(3), related to

[1] Under 10 C.F.R. § 2.309(i)(1), this Answer was originally due 25 days after service of Local 15's Petition, or by January 6, 2014. On December 20, 2014, the Board granted an unopposed extension of time until January 24, 2014 for Exelon and the NRC Staff to answer the Petition. *See Exelon Generation Company, LLC* (Dresden Nuclear Power Station, Units 2 & 3), Order (Granting Joint Unopposed Motion for Extension of Time) (unpublished) (Dec. 20, 2013). Accordingly, this Answer is timely filed.

off-site criminal activity by a Senior Reactor Operator ("SRO") and the failure of certain Dresden Nuclear Power Station ("Dresden Station") personnel to report aberrant behavior.[2]

To be granted a hearing in this proceeding, Local 15 must demonstrate standing and submit at least one admissible contention.[3] The Board must deny Local 15's Petition because it meets neither of these requirements.[4] Most significantly, the Local has not articulated an injury caused by the Confirmatory Order, because the Order does not expand the scope of its members' longstanding reporting obligations established in the NRC's access authorization rules. Moreover, although the NRC's requirements may affect the existence of a duty to bargain under the National Labor Relations Act ("NLRA"), the NRC is not the appropriate forum for the Local to raise its claim that Exelon failed to bargain with it over changes to Exelon's procedures because such relief falls well beyond the scope of the statutory authority of the NRC or the agency's particular expertise. Finally, the Board lacks authority to grant Local 15's request for discretionary intervention, because no other petitioner has established standing and an admissible contention warranting a hearing in this matter—a precondition for discretionary intervention. Thus, Local 15's Petition must be denied in its entirety.

II. BACKGROUND

On May 9, 2012, an off-duty Dresden Station SRO hijacked a car at gunpoint, in an off-site Illinois parking lot.[5] Illinois authorities charged the SRO with aggravated vehicular

---

2 *See* Letter from C. Pederson, NRC Region III Administrator, to M. Pacilio, Exelon, "Confirmatory Order; NRC Report Nos. 05000237/2013407(DRS); 05000249/2013407(DRS) and Investigation Report No. 3-2012-020; Dresden Nuclear Power Station, Units 2 and 3" at 1 (Oct. 28, 2013), *available at* ADAMS Accession No. ML13298A144 ("Confirmatory Order"), published in the Federal Register as *In the Matter of Exelon Generation Company, LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License*, 78 Fed. Reg. 66,965 (Nov. 7, 2013) ("Notice").

3 *See* 10 C.F.R. § 2.309(a).

4 *See id.* § 2.309(f)(1).

5 *See* IA-13-025, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) at 1 (Oct. 28, 2013), *available at* ADAMS Accession No. ML13298A363.

hijacking.[6] After fleeing the country while on bail, he was convicted in absentia and sentenced to 40 years in prison.[7]

Shortly after the SRO's arrest, Local 15 employees informed Exelon management that a Dresden Station Equipment Operator ("EO"), a member of Local 15, had been discussing his knowledge of the SRO's plans to rob an armored vehicle—with the complicity of another Dresden Station SRO.[8] Exelon investigated, and concluded that all three individuals were not trustworthy and reliable under 10 C.F.R. § 73.56, revoked their unescorted access to Exelon's nuclear facilities, and terminated the employment of all three. The EO's termination is not the subject of any ongoing challenge by the Local.

The NRC Office of Investigations ("OI") also initiated an investigation to determine whether the accomplice SRO, the EO, or other Dresden Station personnel knew that the first SRO planned to commit a crime and failed to report that aberrant behavior to Exelon, contrary to NRC regulations.[9] Based on the OI investigation, the NRC identified apparent violations of the NRC's access authorization requirements contained in 10 C.F.R. § 73.56: specifically, the requirement that "individuals who are subject to an access authorization program . . . shall at a

---

6 *See id*.

7 *See id*.

8 The accomplice is currently serving a three-year jail sentence at an Illinois correctional center. *See* Enformable Nuclear News, "Ex-fugitive reactor operator accepts plea deal" (Dec. 27, 2013) (accessible at http://enformable.com/2013/12/ex-fugitive-reactor-operator-accepts-plea-deal/), last accessed Jan. 22, 2014; *see also* IA-13-024, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Oct. 28, 2013), *available at* ADAMS Accession No. ML13298A386.

9 *See* Confirmatory Order, encl. 1 at 1. "Aberrant behavior" is a regulatory term of art used routinely in NRC reviews of licensee access authorization programs. *See*, *e.g.*, NRC Inspection Manual, Chapter 1240 § 04.03 (Dec. 1, 2004), *available at* ADAMS Accession No. ML043560128 ("10 CFR 73.56 requires behavioral observation, conducted by supervisors and management personnel, designed to detect individual behavioral changes which, if left unattended, could lead to acts detrimental to public health and safety. If the licensee observes any such aberrant behavior, the licensee should follow the same procedures for NRC and contractor inspectors.").

minimum, report any concerns arising from behavioral observation, including, but not limited to, concerns related to *any questionable behavior patterns or activities* of others . . . ."[10]

Exelon accepted the NRC's invitation for ADR.[11] The ADR led to a preliminary settlement agreement between Exelon and the NRC on September 18, 2013.[12] On October 28, 2013, the NRC issued the agreed-upon Confirmatory Order.[13]

The Confirmatory Order first reiterated the NRC's investigation findings of apparent violations of 10 C.F.R. §§ 73.56(a)(2), 73.56(f)(1), and 73.56(f)(3), stemming from the failure of individuals with unescorted access to Dresden Station to report to a supervisor their knowledge that other individuals with unescorted access intended to commit a violent crime, off-site, during their non-working hours.[14] Second, the Order recited actions that Exelon already had completed related to the apparent violations. Specifically, Exelon:

- Revised Exelon procedure SY-AA-103-513, "Behavioral Observation Program" to indicate that the behavioral observation program includes an expectation to report offsite illegal activity;
- Conducted an Exelon-wide briefing of the issue and the expectation to report unusual behavior observed either on or offsite;
- Trained Dresden Station personnel of the changes to the procedure and the expectations for reporting aberrant offsite activities;
- Verified that Dresden Station personnel understood the procedural requirements and guidance; and
- Revised the general employee training program, used at Exelon and at other reactor utilities, to include guidance on reporting offsite aberrant activities.[15]

---

[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" at 2 (Jul. 3, 2013) (emphasis added), *available at* ADAMS Accession No. ML13184A232 ("July 3 Letter").

[11] *See* Confirmatory Order at 1.

[12] *See id*.

[13] *Id.* at 6.

[14] *See id*. at 2.

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

Third, the Confirmatory Order required that Exelon take the following additional actions:

> B. Responsibility to Report Offsite Aberrant Behavior or Credible Information:
>
> B.1. Within 90 days of the effective date of the Confirmatory Order, revise Exelon procedure SY-AA-103-513, "Behavioral Observation Program": (1) to provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials, and (2) to ensure that procedural requirements to pass information forward without delay are clearly communicated.
>
> B.2. Within 90 days of the revision to the procedure described in B.1., provide training to Exelon staff of the revision.
>
> B.3. Within 18 months of the effective date of the Confirmatory Order, develop and conduct an effectiveness assessment of its revised procedure and of the general employee training to determine if Exelon personnel remain aware of the need to report observed offsite aberrant behavior or credible information.
>
> B.4. These terms and conditions apply to the current Exelon fleet of operating reactors existing as of the date of the Confirmatory Order.[16]
>
> C. Recognition within Reactor Community:
>
> Within 90 days of the effective date of the Confirmatory Order, Exelon will develop and make a presentation based on the facts and lessons learned from the events that gave rise to the Confirmatory Order. Exelon agrees to make this presentation at an appropriate industry forum and to submit an operating experience summary to an industry-wide organization. Exelon will make the presentation materials available to the onsite NRC resident inspectors at the Dresden Station.[17]

[16] *Id.* at 4.

[17] *Id.* at 5.

D. Informing NRC when Actions Are Complete:

> Unless otherwise specified, Exelon will submit written notification to the U.S. NRC Region III Director of Reactor Safety at one year from the date of the Confirmatory Order, and annually thereafter, as actions are completed until total completion.[18]

The Order modified Exelon license numbers DPR-19 and DPR-25 to reflect these orders.[19]

Significantly, the NRC found that Exelon's commitments, as set forth in the Confirmatory Order, "are acceptable and *necessary* and conclude[d] that with these commitments the public health and safety are reasonably assured."[20] Further, the NRC "determined that public health and safety *require* that Exelon's commitments be confirmed by this Confirmatory Order."[21]

On November 7, 2013, the NRC published a Notice in the Federal Register stating that any person adversely affected by the Confirmatory Order may request a hearing within thirty days.[22] After an extension of this deadline was granted,[23] Local 15 filed its Petition on December 12, 2013. The Petition was referred to the Board.[24]

---

18 *Id*.

19 *Id.* at 6.

20 *Id.* (emphasis added).

21 *Id.* (emphasis added).

22 Notice, 78 Fed. Reg. at 66,966.

23 *See* Memorandum from Annette L. Vietti-Cook, Secretary, Nuclear Regulatory Commission, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, re: 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 (EA-13-068) (Dec. 13, 2013), *available at* ADAMS Accession No. ML13347B340 ("Referral Memo").

24 *See* Referral Memo.

III. LOCAL 15 LACKS STANDING

A. Governing Legal Standards for Standing

To obtain a hearing, a petitioner must address and meet the criteria for standing set forth in 10 C.F.R. § 2.309(d).[25] In an enforcement proceeding, a petitioner must show: (1) an injury-in-fact; (2) that is fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision.[26] These three criteria are commonly referred to as injury-in-fact, causation, and redressability, respectively. In an enforcement proceeding, the threshold question for both standing and contention admissibility is whether the hearing request is within the scope of the proceeding as outlined in the enforcement order.[27] In other words, the question of standing is directly related to the scope of the proceeding.[28]

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to an organizational interest within the scope of NRC jurisdiction), or in a representative capacity (by demonstrating jurisdictional harm to the interests of one of its members).[29]

Local 15 claims that it has standing because the Confirmatory Order allegedly will have an adverse effect on it and its members.[30] Fundamentally, the injuries Local 15 asserts are that under the Confirmatory Order: (1) its members are "subjected for the first time to observation and reporting obligations concerning observed off-duty and off-site conduct that are both

---

25 *See* EA-13-068 at 12.

26 *See, e.g.*, *Alaska Dep't of Transp.*, CLI-04-26, 60 NRC 399, 405 (2004) ("Alaska DOT"); *Sequoyah Fuels Corp. and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

27 *See Alaska DOT*, CLI-04-26, 60 NRC at 405.

28 *See Nuclear Fuel Services, Inc.* (Special Nuclear Facility), LBP-07-16, 66 NRC 277, 293-94 (2007).

29 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (*citing Ga. Inst. of Tech*. (Georgia Tech Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

30 *See* Petition at 7.

intrusive and ill-defined";[31] and (2) that the alleged changes to the terms and conditions of its members' employment, as endorsed or specified in the Confirmatory Order, were undertaken "without affording [its members] their statutorily-protected right to engage in bargaining over such changes."[32] In addition, the Local asserts that the physical proximity of workers to Dresden Station "further supports" its standing.[33] In support of this theory, the Local submits a declaration from one of its members who works at Dresden Station and lives approximately 28 miles from the plant.[34] As explained in detail below, these asserted injuries are insufficient to confer standing upon Local 15.

B. Local 15 Fails to Show Organizational or Representational Standing

1. *There is No Injury-in-Fact*

To show standing, an organization must show that the NRC's action will cause either it or one of its members to suffer a distinct and palpable injury[35] that is not "conjectural" or "hypothetical."[36] The alleged injury must be attributable to the confirmatory order itself[37] and must also lie within "the zone of interests" protected by the statutes governing the proceeding—for most proceedings, either the AEA or the National Environmental Policy Act of 1969, as

---

31 *Id*.

32 *Id*. at 8.

33 *Id*.

34 *See id*. (*citing* Petition, Exhibit 1, Affidavit of Dennis Specha (Dec. 11, 2013)). Although Mr. Specha's affidavit asserts that he lives within 28 miles of Dresden Station and therefore has "a particular interest in the continued safe operations of the plant," such vague claims are insufficient to show harm under the Atomic Energy Act ("AEA"). And while Mr. Specha further asserts that the changes to the Behavioral Observation Program ("BOP") described in the Confirmatory Order "are not reasonably related to the safe operation of the plant," he does not assert that the changes to the BOP make the plant *less* safe. These claims are addressed in Section III.B.1 and V.B, below.

35 *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 353 (1999).

36 *Gore*, CLI-94-12, 40 NRC at 72 (citations omitted).

37 *See Alaska DOT*, CLI-04-26, 60 NRC at 406 (*citing Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16).

amended ("NEPA").[38] The injury-in-fact, therefore, must generally involve potential public health and safety concerns such as radiological or environmental harm.[39] Contrary to this requirement, Local 15 has not articulated a distinct and palpable injury. Further, even if had articulated a legitimate injury to a statutory interest in negotiation, that interest is not within the NRC's statutory zone of interests.[40]

a. There Is No Injury

As a threshold matter, the Local cannot rely on the proximity of any of its members to Dresden Station as a short-hand for injury-in-fact to show standing in this proceeding. Under very limited circumstances such as reactor initial licensing or license renewal, standing may be presumed based on the petitioner's geographical proximity to the nuclear power plant.[41] For example, in proceedings involving an initial or renewed operating license for power reactors, "proximity" standing has been granted for petitioners who reside within 50 miles of the facility in question because of the potential for an off-site radiological release associated with the licensing action (*i.e*, new or continued operation of a nuclear power plant or modification of an operating license).[42] The proximity presumption does not, however, apply in enforcement

---

38 *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5 (1998).

39 *See, e.g., Nuclear Fuel Services, Inc.,* LBP-07-16, 66 NRC at 305 (holding that the petitioner failed to show injury under a Confirmatory Order, as his request for hearing failed to address how "the measures instituted by the NRC are contrary to the public health and safety…the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.") (*citing Alaska DOT*, CLI-04-26, 60 NRC at 405).

40 Local 15 seeks standing to intervene in both an organizational and representational capacity on behalf of its members. *See* Petition at 1. Past board decisions have not significantly distinguished between the claims of labor unions for organizational and representational standing, so this Section analyzes both issues together. *See*, *e.g.*, *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 266 (2008) (rejecting petitioner union's organizational standing argument because it was "merely the Local's 'representational standing' argument dressed up in different clothes.").

41 *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001).

42 *See, e.g.*, *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009).

proceedings, such as this one, because the Confirmatory Order does not authorize new or continued power plant operations or modification to those operations.[43] Local 15's attempt to use the proximity of one of its members to Dresden Station is insufficient to demonstrate standing and must be rejected.

Second, there is no actual injury to the interests of Local 15 or its members attributable to the Confirmatory Order. As previously noted, Local 15's fundamental allegation is that because of the Confirmatory Order, its members "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 . . . ."[44] That the Local cites no authority for this assertion is not surprising, as there is none. As a factual matter, this claim is incorrect, because the actions endorsed in the Confirmatory Order do not represent any material change to NRC requirements for the scope of Exelon's BOP. Aberrant behavior reflecting on the trustworthiness and reliability of personnel with unescorted access has long been the subject of required reporting—whether it occurs on-site or off, or relates to conduct on-site, or off.

Pursuant to NRC regulations, all commercial nuclear power plant licensees, including Exelon, must have an approved physical security plan that provides protection against radiological sabotage and unreasonable risk to the public health and safety.[45] In 1991, the NRC

---

43 *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 290 (2008) ("Although Licensing Boards have used a proximity presumption when resolving issues of standing for cases involving reactor licensing, in a case involving an enforcement order, such as this one, the standing requirement is based on the . . . Order itself, and the petitioner must show that he will be adversely affected by the terms of the . . . Order.") (citations omitted) (*citing Alaska DOT*, CLI-04-26, 60 NRC at 406).

44 Petition at 7.

45 *See* 10 C.F.R. §§ 73.55, 73.56.

implemented 10 C.F.R. § 73.56, which requires that, as part of their physical security plans, licensees establish and implement an "access authorization program."[46]

The access authorization program must apply to "[a]ny individual to whom a licensee intends to grant unescorted access to nuclear power plant protected or vital areas or any individual for whom a licensee or an applicant intends to certify unescorted access authorization."[47] The program "must provide high assurance" that covered individuals "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."[48]

Access authorization programs must include "a [BOP] that is designed 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," and that applies to all covered individuals.[49] Every person subject to the BOP must communicate to the licensee "*any* behavior of individuals that may adversely affect the safety or security of the licensee's facility . . . ."[50] The BOP must provide that:

> [i]ndividuals who are subject to an access authorization program under this section shall at a minimum, report any concerns arising from behavioral observation, including, but not limited to, concerns related to *any questionable behavior patterns or activities* of others to the reviewing official, his or her supervisor, or other management personnel designated in their site procedures.[51]

---

46 10 C.F.R. § 73.56(a)(1); *see also* Final Rule, Access Authorization Program for Nuclear Power Plants, 56 Fed. Reg. 18,997 (Apr. 25, 1991).

47 10 C.F.R. § 73.56(b)(1)(i).

48 *Id*. § 73.56(c).

49 *Id*. § 73.56(f)(1).

50 *Id*. § 73.56(f)(2) (emphasis added).

51 *Id.* § 73.56(f)(3) (emphasis added).

Further, the regulations require that individuals with unescorted access "promptly report to the reviewing official, his or her supervisor, or other management personnel designated in site procedures any legal action(s)" in which they are involved, as specifically defined in the regulations.[52]

These rules, by their plain language, contain no limit to on-site or on-duty conduct—they require reporting of "any behavior of individuals that may adversely affect the safety or security of the licensee's facility" and "any questionable behavior patterns or activities."[53] Beyond the plain language of the regulations, moreover, the regulatory history of Section 73.56 does not support any limitation of the reporting obligation to on-site or on-duty conduct, or suggest that off-site or off-duty conduct was somehow exempt.[54] That the Local desires such a limitation does not make it so. The context of the reporting obligation in a regulation that includes off-site conduct throughout cannot support the Local's baseless interpretation.

The relevance of off-site and off-duty conduct to the trustworthiness and reliability of an individual is demonstrated throughout the access authorization rule. An individual's initial grant of unescorted access authorization for a nuclear facility regulated by the NRC is obviously based on an evaluation of that individual's *off-site, off-duty* conduct. For this reason, a background investigation is required for initial access authorization.[55] The background investigation includes, among other things, a personal history disclosure, an employment history evaluation (including educational history), a credit history evaluation, a character and reputation evaluation,

---

52 *Id*. § 73.56(g).

53 *Id*. § 73.56(f)(2) & (3).

54 *See*, *e.g.*, Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,963 (Mar. 27, 2009); Final Rule, Access Authorization Program for Nuclear Power Plants, 56 Fed. Reg. at 18,997.

55 *See* 10 C.F.R. § 73.56(d).

and a criminal history review.[56] In addition, individuals who maintain unescorted access must submit to updated investigations every three or five years, which includes a criminal history update and credit history re-evaluation.[57] These inquiries cannot be limited to on-site and on-duty activities.

Likewise, the behavioral observation provisions of the fitness for duty ("FFD") rule, 10 C.F.R. § 26.33, which Exelon's BOP is also intended to address, do not limit FFD reporting concerns to on-site or on-duty conduct. On the contrary, Section 26.33 specifies that "[i]ndividuals who are subject to this subpart shall report *any* FFD concerns about other individuals to the personnel designated in the FFD policy."[58] Off-site use of illegal drugs, for example, is explicitly subject to the FFD rules.[59]

Consistent with this facially obvious and reasonable reading of the regulation, the Commission recently explained that the purpose of the BOP is to:

> increase the likelihood that potentially adverse behavior patterns and actions are detected, communicated, and evaluated before there is an opportunity for . . . detrimental consequences. The rule requires individuals under this program to be trained to identify and report questionable patterns or activities . . . .[60]

The matters relating to Exelon's BOP that are endorsed or specified in the Confirmatory Order simply affirm the pre-existing scope of questionable behaviors subject to reporting and specify additional training for covered personnel.

Consistent with this logical reading of scope of its regulations, the NRC has taken action against individuals based on information about off-site and off-duty conduct that was reported to

---

56 *See id*. § 73.56(d)(2), (4), (5), (6), & (7).

57 *See id*. § 73.56(i)(v)(A), (B).

58 *Id.* § 26.33 (emphasis added).

59 *See id*. § 26.75(e).

60 Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. at 13,963.

the licensees under their BOP. For example, in 2010, a Director's Decision held that it was reasonable under 10 C.F.R. § 73.56 for a licensee to deny unescorted access to an individual based on information about a failure to resolve a tax lien.[61] The licensee found that the individual's actions reflected potential trustworthiness and reliability concerns,[62] and the Director found this determination sound and justified.[63] Although the individual self-reported the tax lien issue in accordance with regulatory requirements, the decision confirms that both off-site and off-duty conduct are material to an evaluation of trustworthiness and reliability, and fall within the scope of the NRC's access authorization rule, and, therefore its licensees' implementing procedures.

Finally, Exelon's BOP (and prior versions/related policies) have been in place for more than twenty years. Under the BOP, Exelon has long covered unusual or aberrant behavior without limitation to on-site and on-duty conduct. For example:

- Personnel with unescorted access to Dresden Station are explicitly responsible "for the continual behavior observation of all individuals."[64]
- The specific requirement to report "unusual" or "aberrant" behavior by others—without regard to whether such behavior was on or off-duty—has been in place for over a decade, since 2003.[65]
- In 2009, Exelon further revised the BOP to add specific examples of unusual or aberrant behavior that must be reported. These examples were not limited to conduct occurring in

---

61 *See N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), DD-10-2, 72 NRC 163, 170 (2010).

62 *See id*. at 169.

63 *See id*. at 170.

64 *See* ComEd, "Continual Behavior Observation Program," Policy No. SY-AA-103-512, Rev. 1 § 3.1 (2000) (Attachment 1 to this Answer). ComEd, an Exelon affiliate, is the prior owner and operator of Dresden Station. In 2001, Exelon acquired Dresden Station as the successor in interest to ComEd.

65 *See* Exelon Nuclear, "Behavior Observation Program," Policy No. SY-AA-103-512, Rev. 4 § 3.1.1 (2003) (requiring individuals covered by the program to "[r]eport to their supervisor when an individual is exhibiting unusual or aberrant behavior that may constitute an unreasonable risk to the health and safety of the public, including a potential threat to commit radiological sabotage") (Attachment 2 to this Answer).

the workplace: one of the examples of unusual or aberrant behavior listed was "[u]nusual views or opinions that might be directly or indirectly threatening to a nuclear facility."[66]

- Another revision to the BOP in 2010 substantially expanded the obligation to report legal actions by adding to the list of such reportable actions "serious civil charges" such as a summons to appear in court, filing for bankruptcy, claims of negligence, wrongful death, discrimination or harassment, any claim involving intentional or willful conduct, or any claim in which a party seeks a judgment against an individual of at least $40,000.[67]

Thus, Local 15's complaint that the Confirmatory Order endorses changes to the BOP that subject its members to "intrusive and ill-defined" observation and reporting requirements concerning observed off-duty and off-site conduct[68] is entirely without support and, therefore, fails to show that the Local or its members have been injured by the Confirmatory Order, as required to establish standing.[69] Consistent with the language of the NRC rule it implements, individuals subject to Exelon's BOP have long been required to report *any* unusual or aberrant behavior of others subject to the BOP—even if those behaviors occurred off-site and off-duty. Put another way, the Local has failed to show how it or its members "will be worse off by reason of the Confirmatory Order's provisions."[70]

In sum, the actions related to reporting procedures and training Exelon agreed to in the Confirmatory Order do not represent a material change to the scope of Exelon's BOP, and are fully consistent with long-standing NRC regulatory requirements. The changes specified in the Confirmatory Order clarify the existing scope of behaviors subject to reporting and require additional specific training for covered personnel to clarify the existing requirements. Therefore,

---

66 *See* Exelon Nuclear, "Behavior Observation Program," Policy No. SY-AA-103-513, Rev. 7 § 3.2.2.6 (2009) (Attachment 3 to this Answer).

67 *See* Exelon Nuclear, "Behavior Observation Program," Policy No. SY-AA-103-513, Rev. 8 § 2.6.3.C (2010) (Attachment 4 to this Answer).

68 Petition at 7.

69 *See Alaska DOT*, CLI-04-26, 60 NRC at 406 (*citing Maine Yankee*, CLI-04-5, 59 NRC at 57 n.16).

70 *Nuclear Fuel Services, Inc.,* LBP-07-16, 66 NRC at 324.

Local 15 has not suffered any distinct and palpable injury by virtue of the Confirmatory Order.[71] As a result, Local 15 lacks standing under Section 2.309(d), and its Petition should be dismissed.

b. The Alleged Injury Is Not Within the Zone of Interests Cognizable in NRC Proceedings

Second, even if the scope of NRC's access authorization requirements were not so clear, the alleged injury to Local 15 and its members falls outside the zone of interests protected by the statutes governing NRC proceedings. To show standing in an NRC proceeding, a petitioner's alleged injury must lie within "the zone of interests" protected or regulated by the statutes governing the proceeding—for most proceedings, either the AEA or NEPA.[72] Further, as noted by the Commission and the U.S. Supreme Court, the zone of interests examination may require heightened scrutiny when, as here, the plaintiff is not the direct subject of the challenged regulatory action.[73] As shown in this section, Local 15 fails to carry its burden to show that its purported economic and property injuries fall within the zone of interests protected by the AEA.[74]

The zone of interests protected by the AEA is limited to questions about the public health and safety in the regulation of nuclear materials, such as potential radiological harm. The AEA's

---

71 *See Shieldalloy*, CLI-99-12, 49 NRC at 353.

72 *Ambrosia Lake*, CLI-98-11, 48 NRC at 5; *see also Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247, 250-59 (1981) ("in enforcement cases, as in licensing cases, …[o]ne must, *in addition*, allege an interest arguably within the zone of interests protected by the Act.") (emphasis added) (*citing Pub. Serv. Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438 (1980); *Wisconsin Electric Power Co.* (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2, CLI-76-27, 4 NRC 610, 613 (1976)), *rev'd on other grounds*, CLI-82-18, 16 NRC 50.

73 *Ambrosia Lake*, CLI-98-11, 48 NRC at 12 ("[w]here 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 Congress intended to permit the suit.") (*citing Clarke v. Securities Ind. Ass'n,* 479 U.S. 388, 399 (1987)).

74 Local 15 fails to claim any environmental injuries protected by NEPA, so NEPA cannot serve as a basis for standing to establish injury. In any event, NEPA's purpose is to protect the environment—"not the economic interests of those adversely affected by agency decisions." *Ambrosia Lake*, CLI-98-11, 48 NRC at 8.

purpose is to protect the "public health and safety, and the common defense and security," through licensing and regulation of nuclear materials.[75] As such, claims of economic injury, unlinked to a claim of radiological injury (*e.g.*, radiological clean up), are not among those interests arguably protected or regulated under the AEA."[76]

Local 15 claims that the Confirmatory Order injures its members' economic and property rights, all derived from either contracts or statutory labor employment interests.[77] It claims that the Confirmatory Order harms members' economic and property rights by subjecting them to "disciplinary suspension and a loss of security access,"[78] and jeopardizes their "due process protected property interest in continued employment"[79] and "statutorily-protected right to engage in bargaining" prior to changes in terms and conditions of employment.[80] It does not claim that the alleged injuries from the Confirmatory Order were in any way linked to radiological harm, to public health or safety, or to the common defense or security. In fact it cannot. The Local seeks to exempt its members from their obligation to help ensure site workers are trustworthy and reliable. Local 15 concedes this point when it states that its "economic interest *may not fall within the 'zone of interest' protected by the AEA* . . . ."[81] Although Local 15 repeatedly ties its claimed injuries to its asserted rights under the NLRA,[82] it makes no attempt to tie its alleged injuries to any public health and safety concern protected by the AEA.

---

75 *Id.* at 14.

76 *Id*. at 10.

77 *See* Petition at 7.

78 *Id*.

79 *Id*.; *see also id*. at 8.

80 *Id*. at 8; *see also id*., n.6 (referring to the Local's and its members' interest in "maintenance of bargained-for terms and conditions of employment.").

81 Petition at 13 (emphasis added).

82 *See id*. at 7, 11 n.7, 13, 17, 20 (*citing* NLRA, 29 U.S.C. § 151–169 and associated case law).

The Commission "historically has rejected bare economic injury – unlinked to any radiological harm – as a basis for standing."[83] Likewise, Local 15's claimed property and due process injuries, if they exist, also fail to support standing.[84] Local 15's alleged injuries fall well beyond the zone of interests protected by the AEA, and for this reason alone, the Petition must be rejected.

In what appears to be the only reported NRC case evaluating a similar claim, the Licensing Board in *Palisades* (LBP-81-26) reached the same logical conclusion. It held that a labor union's "economic interest in maintaining contractually protected employment rights" is outside the zone of interests protected by the AEA and "therefore can not [sic] serve as a basis to request a hearing as a matter of right."[85] In *Palisades*, the Licensing Board denied a union's petition challenging certain overtime restrictions in a Confirmatory Order, in part because the claimed due process injury to "contractually protected employment rights" failed to fall within the zone of interests protected by the AEA.[86]

While the *Palisades* Licensing Board decision is not binding precedent and parts of it were reversed on appeal, the standing analysis described above was not reversed and is instructive to this proceeding, particularly as the *Palisades* Licensing Board decision appears to be the only reported instance where a Board analyzed traditional standing of a petitioner under

---

83 *Ambrosia Lake*, CLI-98-11, 48 NRC at 10.

84 Local 15 claims, without support, that it has property and due process interests in maintaining the right to bargain for its members' terms of employment. *See*, *e.g.*, *id*. at 7-8. But, as shown in Section III.B.1.a, above, Exelon's BOP and its predecessors have been in place for over 20 years. Exelon has never previously bargained with the Local over the terms of the BOP. *See Exelon Generation Company, LLC v. Local 15, IBEW,* No. 06 CV 6961, slip. op. at 10 (N.D. Ill. Sept. 29, 2008) (stating that Exelon's access authorization program "was developed and implemented *unilaterally* by Exelon's Nuclear Security Department and has *never* been negotiated with Local 15") (emphasis added). The Union has also not previously objected to earlier changes to the BOP by filing a grievance with the National Labor Relations Board ("NLRB") or otherwise.

85 *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247, 251 (1981), *rev'd on other grounds*, ALAB-670, 15 NRC 493 (1982), *vacated as moot*, CLI-82-18, 16 NRC 50 (1982).

86 *See Palisades*, LBP-81-28, 14 NRC at 251.

closely analogous facts.[87] The *Palisades* Atomic Licensing and Appeal Board ("ALAB") decision, which the Local relies upon extensively in its Petition, reversed the *Palisades* Licensing Board decision (LBP-81-26) on other grounds without evaluating the question of traditional standing, because the ALAB granted the petitioner discretionary intervention (under different rules for discretionary intervention than apply today).[88] The Commission later vacated both the Licensing Board (LBP-81-26) and the ALAB decisions as moot, so neither is binding on this Board.[89]

In evaluating the union's claim of standing in the *Palisades* case, the Licensing Board explained that the union failed to allege that the employment restriction resulting from the Confirmatory Order "made the facility less safe," and thereby failed to implicate the AEA.[90] The *Palisades* Licensing Board also rejected the union's due process claims, for similar reasons.[91] The Licensing Board further stated that any "understanding" that may exist between the union workers and the NRC is that the workers "will not be able to undertake any activities . . . to the

---

87 *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-09, 77 NRC __, slip op. at 10 (Dec. 5, 2013) ("[r]egardless of vacatur, the decision is an agency record, and will not be excised from the public view . . . . Future litigants can cite the decision as support for an argument; we or a licensing board then may consider whether such an argument is persuasive"); *see also id*. at 11 n.34 (stating, in specific reference to the *Palisades* cases, that "NRC litigants are not prohibited from referencing a vacated decision"). Indeed, Local 15 relies extensively on the *Palisades* Appeal Board decision for its own arguments. *See* Petition at 9-15 (arguing discretionary intervention based on the analysis in ALAB-670).

88 *See Palisades*, ALAB-670, 15 NRC at 495 ("eschew[ing] the opportunity to resolve the standing question . . . because we hold considerable doubt that, as presented, this issue is likely to arise again in Commission proceedings").

89 *See Palisades*, CLI-82-18, 16 NRC at 51-52.

90 *Palisades*, LBP-81-26, 14 NRC at 253. The Licensing Board in *Palisades* also noted that the Confirmatory Order in no way inhibited the ability of employees to consult with the licensee. Thus, the Local's interest in having a voice in safety-related decisions had not "been 'injured-in-fact' by the Director's Order." *Id*. at 252. The Licensing Board's analysis in *Palisades* also is consistent with Exelon's arguments in Section III.B.1, above.

91 *See id.* at 255-56 ("[d]enying a hearing to the Union does not in any way conflict with any of [the] tenets of due process").

extent that such activities adversely impact on safety,"[92] and that to the extent a hearing is required under the AEA, the Union has been afforded all process that is constitutionally due.[93]

Similar to the union in *Palisades*, Local 15 asserts injury to its alleged due process interest in "contractually and statutorily protected employment rights."[94] Like the Palisades workers who could not challenge the NRC's safety-based overtime restrictions based on Constitutional or other legal rights to work overtime, the Local's members cannot challenge the NRC's safety-based requirements to report off-site conduct that could reflect on the trustworthiness of an individual with unescorted access authorization, based on an alleged legal right to be free of such requirements.

Local 15 attempts to distinguish its claim from the failed claim of the *Palisades* petitioner by asserting that it is merely seeking to protect existing "bargained-for terms and conditions of employment" under the NLRA.[95] This salvage attempt fails for two reasons. First, any right to bargain over the terms of employment—if one exists—may be affected by the requirements of the AEA or NRC regulations, but is not itself governed by the AEA or within the scope of the NRC's authority.[96] As the Supreme Court has held, labor-related disputes are "the exclusive competence of the NLRB."[97] There is certainly no basis for the NRC to evaluate such claims.

---

92 *Id.* at 257.

93 *See id.* at 256 ("Indeed, section 189a. of the Atomic Energy Act and the hearing rights it affords to individuals who have been adversely affected by Commission action are the very embodiment of due process. Thus, to the extent that a hearing is not required by section 189a. of the Atomic Energy Act, the Union has been afforded all the process that it is constitutionally due.") (citation omitted).

94 Petition at 7.

95 *See* Petition at 8 n.6. Section 8 of the NLRA (29 U.S.C. § 158) sets out the duty to bargain for covered entities.

96 *See Palisades*, ALAB-670, 15 NRC at 495 n.3 ("[r]ather than assert an interest within the penumbra of the statutes ordinarily administered by the Commission, the union alleges an interest [contractually protected employment rights] arguably within the zone of interest of the federal labor statutes.").

97 *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *see also Laborers Health & Welfare Trust Fund*, 484 U.S. 539 (1988) (holding that NLRB is the agency equipped to handle alleged violations of the NLRA, including collective bargaining disputes).

And second, as explained in note 84 above, Exelon has unilaterally implemented and has unilaterally changed its BOP for more than 20 years, without bargaining over its terms. Accordingly, the limits on that program are not "bargained-for terms of employment" and are indistinguishable from the injuries the *Palisades* workers alleged.

In summary, Local 15 has failed to show that any of its claimed injuries are within the zone of interests protected or regulated by the statutes governing this proceeding. Thus, Local 15 does not have standing to challenge the Confirmatory Order.

2. Local 15 Fails to Establish Causation

In addition to showing injury-in-fact, a petitioner must also establish causation by showing that the injuries alleged are "fairly traceable to the proposed action,"[98] in this case, the imposition of the Confirmatory Order.[99] The relevant inquiry is whether a cognizable interest of the petitioner might be adversely affected by one of the possible outcomes of the proceeding.[100]

Causation is lacking because Local 15's alleged injuries are not fairly traceable to the NRC's actions. Local 15 essentially claims that it has been and will be injured because Exelon failed to bargain with it before implementing the actions listed in the Confirmatory Order as already taken, and because the NRC failed to require Exelon to bargain over additional actions to be taken in the future.[101] Any claimed injury due to an alleged failure to bargain, however, is not fairly traceable to the Confirmatory Order itself.

---

98 *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75; *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 34-35 (2006) (standing rejected based on failure to show causal nexus between alleged injury and the proposed license transfer).

99 *See St. Lucie*, LBP-08-14, 68 NRC at 291 (standing in proceeding on a Confirmatory Order rejected in part based on failure to show link between alleged injury and the Confirmatory Order: "something more than proximity to the facility (*i.e.*, a link between the Confirmatory Order and the alleged harm to the individual) is necessary to establish standing") (*citing Alaska DOT*, CLI-04-26, 60 NRC at 406).

100 *Nuclear Eng'g Co., Inc.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

101 *See* Petition at 19-20.

As a threshold matter, as shown above in Section III.B.1.a, it is the access authorization regulations, and not the Confirmatory Order, that "caused" the alleged injury asserted by Local 15. Furthermore, the "injury" is not caused by an alleged failure to bargain by Exelon. Exelon has no duty or authority to bargain with the Union over the scope of the NRC's regulatory requirements. As the Commission has stated, it is "loath to step into the middle of a labor dispute," as it has "neither the expertise nor the legislative charter of a National Labor Relations Board or labor mediator."[102] The Supreme Court has repeatedly held that the NLRB must be mindful of conflicts between the terms or policies of the NLRA and those of other federal statutes, and when there is such a conflict, the NLRB must undertake a "careful accommodation" of the two statutes.[103] Thus, it is well settled that an employer is excused from the duty to bargain over that which it is legally compelled to do.[104] Because the NRC's regulations, and not the Confirmatory Order, are the cause of the injury alleged, and Exelon has no duty to bargain over matters required by the regulations, no causation is shown.

The application of the BOP to off-site or off-duty conduct was not caused by the Confirmatory Order. Instead, as explained in Section III.B.1.a, above, the regulations governing the BOP always have applied to off-site/off-duty conduct. Under 10 C.F.R. § 73.56, *any* conduct that may reflect upon the trustworthiness and reliability of individuals with access authorization, such that there may be an unreasonable risk to the public health and safety, is properly subject to Exelon's BOP. The Confirmatory Order does not introduce these requirements—the regulations

---

102 *See Power Auth. of the State of New York* (James A. FitzPatrick Nuclear Power Plant and Indian Point, Unit 3) CLI-00-22, 52 NRC 266, 314 (2000).

103 *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

104 As a result, the Supreme Court has repeatedly set aside NLRB orders that fail to accommodate the policies of or "trench upon" other federal statutes or regulations. *See, e.g., NLRB* v. *Bildisco* & *Bildisco,* 465 U. S. 513, 527-534 (1984) (precluding the NLRB from enforcing orders found in conflict with the Bankruptcy Code); *Connell Constr. Co.* v. *Plumbers,* 421 U. S. 616, 626 (1975) (rejecting claims that federal antitrust policy should defer to the NLRA).

already did so. The Confirmatory Order supports Exelon's efforts to reaffirm and clarify that point to all of its employees, including members of Local 15. For this additional reason, Local 15 has failed to show standing.

3. Local 15 Fails to Establish Redressability

Finally, Local 15 must show that "its actual or threatened injuries can be cured by some action of the [NRC]."[105] In other words, each petitioner must demonstrate that the injury is "redressable" by a favorable decision in this proceeding. If a petitioner requests a remedy that is beyond the scope of a hearing, "then the hearing request must be denied…"[106]

There is nothing this Board can do to redress Local 15's alleged injury. Again, although the NRC's regulatory requirements may certainly impact the scope of any duty to bargain, this Board cannot order Exelon to bargain or otherwise redress Local 15's claim that Exelon failed to bargain with Local 15. And likewise, the NRC lacks the authority to direct Exelon to bargain with the Local over future actions to meet the Confirmatory Order.[107]

Furthermore, Local 15's dissatisfaction with the NRC's requirements for the scope of its licensees' BOPs cannot be redressed by a Board decision to relax or rescind the Confirmatory Order. Once again, as previously shown, it is the Commission's regulations that establish reporting requirements for off-site or off-duty conduct that may constitute an unreasonable risk to the public health and safety—not the Confirmatory Order. If the NRC were to rescind the Confirmatory Order, the Local's alleged injuries would not be remedied, because the reporting of

---

105 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

106 *Nuclear Fuel Services, Inc.* (Special Nuclear Facility), LBP-07-16, 66 NRC 277, 285 (2007).

107 *See supra* § III.B.1.b; *see also FitzPatrick*, CLI-00-22, 52 NRC at 314 (stating that the NRC has "neither the expertise nor the legislative charter of a National Labor Relations Board or labor mediator").

off-site and off-duty conduct still would be required under the regulations.[108] Adjudicatory proceedings are simply not a forum for challenging generic determinations established by rulemaking.[109]

Thus, Local 15 fails to show that its injuries are redressable by a decision in this proceeding, and for this additional reason Local 15 cannot show standing.

IV. LOCAL 15 MAY NOT BE GRANTED DISCRETIONARY INTERVENTION

A. Governing Legal Standards for Discretionary Intervention

Under 10 C.F.R. § 2.309(e), a presiding officer may consider a request for discretionary intervention where a party lacks standing to intervene as a matter of right under 10 C.F.R. § 2.309(d)(1). Section 2.309(e), however, clearly states that discretionary intervention may only be granted when at least one petitioner has established standing and at least one contention has been admitted in the proceeding.[110]

A petitioner who seeks discretionary intervention must address the following factors set forth in 10 C.F.R. § 2.309(e), which the Board will consider and balance:

(1) Factors weighing in favor of allowing intervention —
   (i) the extent to which its participation would assist in developing a sound record;
   (ii) the nature of petitioner's property, financial or other interests in the proceeding;
   (iii) the possible effect of any decision or order that may be issued in the proceeding.
(2) Factors weighing against allowing intervention —
   (i) the availability of other means whereby the petitioner's interest might be protected;

---

[108] *See Alaska DOT*, CLI-04-26, 60 NRC at 406 (finding no standing because the petitioner's "position immediately after the requested rescission of the Confirmatory Order would *not* be improved, for the situation would revert to what it was before the order") (emphasis in original).

[109] *See Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-09, 76 NRC __, slip op. at 14 (Oct. 23, 2012). This matter is further discussed in Section V, below.

[110] *See also PPL Susquehanna LLC*, (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 n.14 (2007) ("[D]iscretionary standing [is] only appropriate when one petitioner has been shown to have standing as of right and admissible contention so that a hearing will be conducted.").

(ii) the extent to which petitioner's interest will be represented by existing parties; and

(iii) the extent to which petitioner's participation will inappropriately broaden the issues or delay the proceeding.

Of these criteria, the foremost factor in favor of discretionary intervention is the first factor—assistance in developing a sound record, and the most important factor weighing against discretionary intervention is the last—potential to broaden or delay the proceeding.[111] The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention.[112]

B. Local 15 Cannot Be Granted Discretionary Intervention

The deadline for seeking a hearing in this proceeding has expired.[113] No other entity has petitioned to intervene and requested a hearing in this proceeding, so no party (other than Local 15) currently can possibly be granted a hearing. Because there is no other party with standing and an admissible contention, under Section 2.309(e), discretionary intervention is simply not available to Local 15, and the Board must deny this request.

The Local relies on the vacated 1982 ALAB decision in *Palisades* as the basis for its discretionary intervention argument.[114] The *Palisades* decision, in turn, relied upon the standards in the Commission's *Pebble Springs* decision as the basis for evaluating discretionary intervention.[115] These standards were later codified in the current 10 C.F.R. § 2.309(e).[116] When it codified these standards, however, the Commission explicitly limited their application. The

---

111 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004) (*citing Portland Gen. Elec. Co.* (Pebble Springs Nuclear Power Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1979)).

112 *See Sheffield*, ALAB-473, 7 NRC at 745 (requiring potential discretionary intervenor to show "that it is both willing and able to make a credible contribution to the full airing of the issues . . . in this proceeding").

113 *See* Referral Memo (establishing a December 12, 2013 deadline for hearing requests).

114 *See* Petition at 9 (*citing Palisades*, ALAB-670, 15 NRC at 493).

115 *See Palisades*, ALAB-670, 15 NRC at 494-95 (*citing Pebble Springs*, CLI-76-27, 4 NRC at 616).

116 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2201.

Commission unambiguously explained that it "has decided to incorporate the Pebble Springs standard for discretionary intervention into the final rule to allow consideration of discretionary intervention *when at least one other requestor/petitioner has established standing and at least one admissible contention so that a hearing will be held*."[117] Thus, any analysis in the *Palisades* ALAB decision regarding discretionary intervention is inapposite to the Local's request, because the plain text of Section 2.309(e) precludes Local 15 from seeking discretionary intervention in this proceeding.

Even if the Board could ignore the plain text of Section 2.309(e) and the Commission's explicit limitation of the *Pebble Springs* standards—or if there were another party with standing and an admissible contention—then Local 15's request for discretionary intervention would still be subject to denial under the standards in Section 2.309(e). The first and most important factor is whether the Local's participation in this proceeding would assist in developing a sound record.[118] But that sound record must relate to material issues. Whether Exelon must bargain with the Local over Exelon's changes to the BOP to meet the Confirmatory Order is not a material question in this proceeding; the issue in this proceeding concerns Exelon's obligations under the access authorization regulations.[119]

As to the remaining factors, briefly, Local 15's interest in the proceeding, which is to assert its bargaining rights under the NLRA to minimize the scope of its members' obligations under NRC regulations, is not within the zone of interests protected by the AEA, and therefore

---

117 *Id*. (emphasis added).

118 *See Pebble Springs*, CLI-76-27, 4 NRC at 616.

119 *Cf. Palisades*, LBP-81-26, 14 NRC at 260 (finding a union did not meet the first factor, because "any 'contribution' the Union would make to the record would be to non-safety related issues"). In reversing the Licensing Board's analysis of this issue, the ALAB in Palisades focused on the union's factual challenges to the need for the confirmatory order. *See Palisades*, ALAB-670, 15 NRC at 504. But this reasoning is undercut by later case law holding that challenges by intervenors to facts established in a confirmatory order are inadmissible. *See Alaska DOT*, CLI-04-26, 60 NRC at 408.

not cognizable in this proceeding.[120] And although the regulations this Board [or the NRC] enforces may impact the scope of Exelon's bargaining obligations before the NLRB, this Board is not the appropriate forum to resolve the Local's concerns—which are "essentially labor disputes between a licensee and its employees."[121] The factors against discretionary intervention weigh heavily against Local 15's participation: (i) the Local may pursue its claims before other tribunals[122] (and, in fact, the Local has filed an unfair labor practice charge before the NLRB related to this same set of facts);[123] (ii) the question of whether Local 15's interest is represented by an existing party is not relevant because its interests are not within the zone of interests protected by the AEA;[124] and (iii) most importantly, Local 15's participation in a hearing on this matter would inappropriately broaden and delay this proceeding because the requested hearing would be on matters outside NRC jurisdiction and because, absent Local 15's request, there would be no hearing.[125]

In summary, discretionary intervention is not available to Local 15. Even if it were, the Union has failed to demonstrate any justification for exercise of the discretion.

V. LOCAL 15'S CONTENTIONS ARE INADMISSIBLE

A. Standards for Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Further, each contention must:

---

120 *Cf. Palisades*, LBP-81-26, 14 NRC at 260 ("the Union's interest is economic . . . this interest is not arguably within the 'zone of interests' protected by the Atomic Energy Act.").

121 *Id*.

122 *Cf. id*. at 261 ("this agency simply is not one of those tribunals").

123 *See Exelon Generation Company, LLC*, NLRB Case No. 13-CA-118294.

124 *See Palisades*, LBP-81-26, 14 NRC at 262.

125 *Cf. id*. (finding, under similar circumstances, that a petitioner's request would inappropriately broaden the proceeding because it would "lead to a hearing that otherwise probably would not be held").

(1) provide a specific statement of the legal or factual issue sought to be raised;

(2) provide a brief explanation of the basis for the contention;

(3) demonstrate that the issue raised is within the scope of the proceeding;

(4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;

(5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and

(6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[126]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[127] The NRC's contention admissibility rules are "strict by design."[128] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[129] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[130] As the Commission has recently held, an admitted contention is defined by its stated bases, and licensing boards must "specify each basis relied upon for admitting a contention."[131] The Commission has stated that it "should not have to

---

126 S*ee* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—is only applicable in proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the admissibility of the proposed contentions in this proceeding.

127 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

128 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002).

129 *Id. (quoting Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

130 Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

131 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 310 n.50 (2012).

expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[132]

Of particular relevance to Local 15's Petition is the longstanding principle that a contention that challenges an NRC rule is outside the scope of the proceeding under 10 C.F.R. § 2.309(f)(1)(iii) and, therefore, inadmissible. This is because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[133] This includes contentions that seek to litigate a generic determination established by a Commission rulemaking.[134]

In enforcement proceedings, the scope of the proceeding is particularly narrow, and is closely tied to standing. The Commission has stated that "[f]or 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," and that the Commission's authority to define the scope of a proceeding "includes limiting the hearing to the question whether the order should be sustained."[135]

As explained below, under these standards, all of Local 15's proposed contentions are deficient on multiple grounds.

B. Contention 1, Regarding The Alleged Imposition of Obligations Beyond NRC Regulations, Is Inadmissible

In Contention 1, Local 15 claims that the Confirmatory Order should not be sustained because it imposes obligations not otherwise required by NRC regulations, specifically 10 C.F.R. § 73.56(f)(1)-(3). Local 15 claims, without support, that the changes Exelon has made to its

---

132 Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

133 10 C.F.R. § 2.335(a).

134 *See Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-09, 76 NRC __, slip op. at 14 (Oct. 23, 2012).

135 *Alaska DOT*, CLI-04-26, 60 NRC at 405.

BOP, to allegedly require for the first time that employees report "unusual," "illegal," or "aberrant" behavior of fellow employees while off-site or off-duty, are "sweeping" and unwarranted changes that greatly expand the obligations of employees, beyond the requirements of the regulations.[136] Local 15 also claims as part of this contention that there "is no evidence" that the car robbery plot "was anything other than an isolated incident," or that the individual's conduct was attributable to any deficiency in the BOP.[137]

As demonstrated below, Contention 1 is inadmissible under 10 C.F.R. § 2.309(f)(1)(ii), (iii), (iv), and (vi). Specifically, the contention is a collateral attack on the Commission's regulations and fails to raise a genuine dispute on a material issue of law or fact for several reasons.

1. The Contention Lacks Basis and Is a Collateral Attack on the Commission's Rules Because the Confirmatory Order Imposes No New Reporting Requirements Beyond Existing Regulations

As previously noted, under 10 C.F.R. § 73.56(f)(2), every person subject to the BOP must communicate to the licensee "*any* behavior of individuals that may adversely affect the safety or security of the licensee's facility . . ."[138] And under Section 73.56(f)(3), "*any questionable* behavior patterns or activities" must be reported.[139]

These standards are intentionally broad. And the Confirmatory Order does not expand their broad scope. Rather, the Confirmatory Order acknowledges Exelon's articulation of the existing scope of its BOP—and directs further clarifications—to further specify what the regulations already plainly require: that "illegal," unusual," and "aberrant" off-site behavior or

136 *See* Petition at 16.

137 Petition at 17.

138 Emphasis added.

139 Emphasis added.

activities are material to continuing trustworthiness and reliability, and thus are reportable.[140] It also directs additional training for Exelon personnel to correct any flawed understanding of the existing BOP rules such as that articulated by Local 15 in its Petition.[141] The matters required by the Confirmatory Order clarify existing requirements, and do not in any way expand the scope of reportable behavior beyond what the regulations already require.

Indeed, as demonstrated above in Section III.B.1.a, the NRC's regulatory reporting requirements do not distinguish between on-site/on-duty and off-site/off-duty conduct. Thus, Local 15's claim that the Confirmatory Order imposes such requirements "for the first time"[142] lacks any basis whatsoever in fact or law. Understandably, the Local cites none.

For the same reasons, Local 15's claims are effectively a collateral attack on the Commission's rule in Section 73.56. A contention that attacks an NRC rule is outside the scope of the proceeding and inadmissible.[143] A petitioner "may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies."[144] Here, Local 15 is seeking to challenge the requirements in 10 C.F.R. § 73.56(f), under which its members must report any questionable off-site behavior patterns that may adversely affect the safety or security of Dresden Station. The narrowing of the scope of the BOP advocated by the Local would reduce the safety and security of nuclear power plants such as Dresden Station and the other Exelon stations covered by Exelon's BOP by allowing members of the Local to turn a blind eye to conduct obviously relevant to trustworthiness or reliability of

---

140 *See* Confirmatory Order, encl. 1 at 3.

141 *See id*. at 3-4.

142 Petition at 5.

143 *See Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-09, 76 NRC __, slip op. at 14 (Oct. 23, 2012); *Exelon Generation Company, LLC* (Braidwood Nuclear Station, Units 1 & 2 and Byron Nuclear Station, Units 1 & 2), LBP-13-12, 77 NRC __, slip op. at 4, 7 (Nov. 19, 2013).

144 *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

site personnel, such as cavorting with suspected terrorists or planning an armed robbery. This position is not only contrary to the plain text of the regulation, but also to the very purpose of the access authorization rule.[145] Such an attack on NRC policy and regulation is outside of the scope of this proceeding and is inadmissible.

Local 15 essentially concedes that the NRC's access authorization rules do not distinguish between on-site/on-duty and off-site/off-duty conduct, thereby confirming that this contention is outside the scope of this proceeding. For example, Local 15 admits that Exelon's BOP has long required self-reporting of off-duty arrests, criminal charges, convictions, or proceedings.[146] Although the Local seeks to distinguish the self-reporting requirement in Exelon's BOP from behavioral observation in Exelon's BOP, it cannot escape the fact that off-duty and off-site conduct could reflect upon an individual's trustworthiness. Furthermore, Local 15 also acknowledges that the robbery plot at issue here would "naturally" raise questions "concerning the trustworthiness of the individuals involved . . . ."[147] Given that the very purpose of the BOP is to "provide high assurance" that individuals granted unescorted access continue to be "trustworthy and reliable,"[148] Local 15 acknowledges the relevance of off-site and off-duty conduct to the BOP. As such, the Local's Petition confirms that Contention 1 lacks basis in law or fact and is a collateral attack on the access authorization rules.

For the foregoing reasons, Contention 1 lacks basis in fact or law and is outside the scope of this proceeding. It is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(ii) and (iii).

---

145 *See* Final Rule, Power Reactor Security Requirements, 58 Fed. Reg. at 13,926-27.

146 Petition at 5.

147 *Id*. at 17.

148 10 C.F.R. § 73.56(c).

2. Even if the Confirmatory Order Were to have Imposed Additional Requirements, such an Action Is Well Within NRC's Discretion

As previously shown, the Confirmatory Order does not impose any new reporting requirements on Exelon or its employees to cover off-site or off-duty conduct. Instead, it acknowledges existing requirements established by the regulations and Exelon's BOP, and directs additional clarification and training for Exelon employees. Nevertheless, even if the Confirmatory Order did somehow expand the scope of longstanding reporting obligations under the BOP for "unwarranted" reasons, Contention 1 would still be inadmissible, because the NRC has the authority and discretion to impose new requirements through enforcement orders. NRC's reasons for its order are not subject to challenge in a hearing; it is the provisions of the order that may be challenged. Whether the Local considers NRC's actions warranted or unwarranted is irrelevant if they fall within the agency's authority to decide. The Local's claims, therefore, fail to a raise a material issue a genuine dispute, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

In an enforcement action, the NRC's choice of sanctions is "quintessentially a matter of the Commission's sound discretion."[149] In general, the NRC has the authority to issue orders that have the effect of amending the licenses and/or imposing requirements in excess of what is generally required under the regulations.[150] In other words, even if the terms of the Confirmatory Order arguably impose specific requirements in excess of what is strictly required under Section 73.56, the NRC is well within its discretion to impose such requirements. Thus, Local 15's purported dispute over whether the measures specified in the Confirmatory Order

---

149 *Advanced Med. Sys.*, CLI-94-6, 39 NRC 285, 312-13 (1994), *aff'd* 61 F.3d 903 (6th Cir. 1995).

150 *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 . . . .").

"are likely to reduce the likelihood" of similar instances in the future is irrelevant.[151] The Local is impermissibly seeking to substitute its subjective judgment for that of the NRC, and thereby fails to raise a material issue or a genuine dispute on a material issue of law or fact. In sum, the NRC can require Dresden Station employees to report off-site criminal conduct, and the Local cannot challenge that requirement in this proceeding.

3. Local 15 Inappropriately Seeks to Dispute the NRC's Factual Basis for the Confirmatory Order

As previously noted, Local 15 claims that there "is no evidence" that the armored car robbery plot "was anything other than an isolated incident," or that the individual's conduct was attributable to any deficiency in the BOP.[152]

A hearing petitioner may not challenge an enforcement action by raising factual questions.[153] As a licensing board recently explained, "the Commission has held that claims by a *nonlicensee* to the effect that the root causes for facts underpinning a Confirmatory Order are inaccurate, are not valid claims in a proceeding concerning a Confirmatory Order."[154] This is because, in a Confirmatory Order proceeding such as this one, the licensee has already agreed to the enforcement order at the time the notice of hearing is published.[155] Moreover, while no one disputes that the armored car robbery plot developed by two nuclear power plant employees was an isolated incident, Local 15 fails to explain how the existence of an isolated incident warrants against modifying the BOP to provide additional clarification of the types of off-duty, off-site

---

151 Petition at 17.

152 *Id*.

153 *See Alaska DOT*, CLI-04-26, 60 NRC at 408-09, *reconsid. denied*, CLI-04-38, 60 NRC at 652.

154 *St. Lucie*, LBP-08-14, 68 NRC at 291-92 (*citing Alaska DOT*, CLI-04-26, 60 NRC at 408-09) (emphasis added).

155 *See Alaska DOT*, CLI-04-26, 60 NRC at 408. While this rationale is explained in a decision involving the principles of *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), the logic related to the timing of the licensee actions before the NRC issuance of the Notice of Hearing applies to any challenge by a non-licensee to a confirmatory order.

behavior that must be reported or otherwise forms the basis of a valid contention challenging the Confirmatory Order.

For this reason, too, the claims in Contention 1 regarding the evidence associated with the Confirmatory Order are outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), and inadmissible.

C. Contention 2, Regarding Alleged Vague and Overbroad Requirements in the Confirmatory Order and Alleged Improper Delegation of Discretion to Exelon, Is Inadmissible

In Contention 2, Local 15 claims that the Confirmatory Order does not adequately define the types of "illegal," "unusual," or "aberrant" off-site and off-duty conduct that must be reported, alleging that these standards are "vague, over-broad and not carefully tailored" to address the NRC's health and safety concerns.[156] Relatedly, Local 15 argues that the NRC's direction to Exelon to provide additional guidance to its employees on the types of activity covered fails to "cabin Exelon's discretion."[157] In addition, the Local complains that the Confirmatory Order fails to "acknowledge[] Exelon's duty" to bargain with Local 15 over the terms of employment of its members.[158]

Contention 2 is inadmissible because it is a collateral attack on the NRC's access authorization rules, inappropriately challenges the NRC Staff's exercise of its enforcement discretion, and inappropriately seeks to subject the NRC to a claimed duty on Exelon's part to bargain with the Local over changes to the BOP.

---

156 Petition at 18.

157 *Id*.

158 *Id*.

1. Contrary to Local 15's Claims, the Confirmatory Order Is More Specific than, and Well Within the Scope of, the Commission's Regulations

As demonstrated in Section III.B.1.a, above, contrary to Local 15's claims, the standards for reporting off-site conduct endorsed in the Confirmatory Order do not expand Exelon's BOP beyond the scope of the NRC's access authorization rules. The Local's complaints of over-breadth in the endorsement of these terms in the Confirmatory Order are belied by the regulations themselves, which cover *any questionable behavior patterns or activities*.[159] In comparison, the terms endorsed in the Confirmatory Order actually provide more specificity than the regulations.

Moreover, the descriptions of "illegal," "unusual," and "aberrant" conduct that Local 15 now claims to be vague and over-broad were not introduced into the BOP by the Confirmatory Order, but instead have been standards set forth in Exelon's BOP for many years, and have been placed there unilaterally by Exelon—to meet NRC regulatory requirements— without bargaining with the Local and without the Local's objection.

Thus, Contention 2 is a collateral attack on a regulation and, therefore is outside the scope of this proceeding, and inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

2. Contention 2 Inappropriately Challenges the NRC Staff's Enforcement Discretion

Contrary to Local 15's claims, the NRC has no obligation to "narrowly tailor" its actions to suit Local 15's apparent desire to allow its members to remain silent in the face of criminal activity or other indications of untrustworthy behavior by individuals who have been granted the privilege of unescorted access into nuclear facilities. To the contrary, the precise sanction to impose is within the Commission's discretion.[160] Put another way, in an enforcement action, the

---

159 10 C.F.R. § 73.56(f)(3).

160 *Alaska DOT*, CLI-04-26, 60 NRC at 407; *Advanced Med. Sys.*, CLI-94-6, 39 NRC at 312-13, *aff'd* 61 F.3d 903 (6th Cir. 1995).

NRC acts as a prosecutor. The adjudicatory process is not an appropriate forum for petitioners to second-guess decisions on resource allocation, policy priorities,[161] or the efficacy of those actions in deterring future misconduct. Disagreement with the particular remedy the Staff selected simply does not justify a hearing on an enforcement order.

For these reasons, Contention 2 fails to raise a material issue, and fails to raise a genuine dispute, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

3. The NRC Is Under No Obligation to Enforce Exelon's Alleged Duty To Bargain

As a general matter, the NRC is resistant to injecting itself into matters about which it has no special expertise or authority, such as labor disputes.[162] Although, as shown above, the Confirmatory Order may impact the scope or existence of Exelon's duty to bargain over the regulatory matters it addresses, the actual question of the scope or existence of a duty to bargain is ultimately one for the NLRB and falls well beyond the scope of NRC's jurisdiction or competence, and this enforcement proceeding.[163] The NRC's focus is on ensuring the public health and safety, not on enforcing collective bargaining rights. For this additional reason, Contention 2 is outside the scope of this proceeding, immaterial and inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

---

161 *See Alaska DOT*, CLI-04-26, 60 NRC at 407.

162 *See FitzPatric*k, CLI-00-22, 52 NRC at 314-15; *Calvert Cliffs*, CLI-06-21, 64 NRC at 34; *Millstone*, CLI-00-18, 52 NRC 129, 132 (2000).

163 *See supra* Section III.B.1.b.

D. Contention 3, Regarding The NRC's Alleged Endorsement of Exelon's Alleged Failure to Bargain, Is Outside the Scope of this Proceeding and Inadmissible

Finally, in Contention 3, Local 15 directly claims that the Confirmatory Order improperly endorses and confirms allegedly unlawful actions taken by Exelon "in derogation of its duty to bargain with Local 15."[164] Specifically, the Local states that it is undisputed that Exelon did not and will not bargain with the Local over the changes to the BOP addressed in the Confirmatory Order.[165] But Local 15 further admits that "Exelon's actions in this regard may not conflict with its obligations pursuant to the AEA and NRC regulations . . . ."[166] That should be the end of the matter. The NRC's authority and discretion are not subject to the NLRA. Moreover, the Confirmatory Order does not confirm or reject a duty to bargain. It establishes what the NRC determined was "acceptable and *necessary*" to ensure that "the public health and safety are reasonably assured."[167] The NRC "determined that public health and safety *require* that Exelon's commitments be confirmed by this Confirmatory Order."[168] As shown above, "employers' obligations under the NLRA must be harmonized with Federal regulations which mandate benefits or procedures which would otherwise be mandatory subjects of bargaining," and "an employer is excused from the duty to bargain over that which it is legally compelled to do."[169] Not only is the contention outside the scope of this proceeding, but the Local also seeks to have the NRC limit its existing rule and endorse a new bargaining obligation that has never existed and that the NLRB would not find under prevailing law.

---

164 Petition at 19.

165 *See id*.

166 *Id*. at 19-20.

167 *Id.* (emphasis added).

168 *Id.* (emphasis added).

169 Advice Mem., *United Telephone*, Case 16–CA–14505, 1991 WL 165136 (N.L.R.B.G.C.).

Stated simply, alleged violations of the NLRA are issues that are outside the scope of NRC's jurisdiction, outside the scope of this enforcement proceeding, and immaterial to it. Local 15 admits as much. Thus, Contention 3 is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

VI. CONCLUSION

For reasons discussed above, Local 15 has not satisfied the standing requirements in 10 C.F.R. § 2.309(d), and it proffers no contention satisfying the admissibility requirements in 10 C.F.R. § 2.309(f)(1). Discretionary intervention is not available to Local 15 in this proceeding. As a result, the Board must deny the Petition in its entirety.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

Timothy P. Matthews
Raphael P. Kuyler
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: (202) 739-5527
Fax: (202) 739-3001
E-mail: tmatthews@morganlewis.com
E-mail: rkuyler@morganlewis.com

Tamra S. Domeyer
Associate General Counsel
Exelon Generation Company, LLC
4300 Winfield Road, 5th Floor
Warrenville, IL 60555
Phone: (630) 657-3753
Fax: (630) 657-4323
E-mail: tamra.domeyer@exeloncorp.com

Counsel for Exelon Generation Company, LLC

Dated in Washington, DC
this 24th day of January 2014

DB1/ 77101570