

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 50-237-EA
EXELON GENERATION COMPANY, LLC)	50-249-EA
)	
(Dresden Nuclear Power Station)	ASLBP No. 14-930-01-EA-BD01
Confirmatory Order Modifying License))	

**MEMORANDUM OF LOCAL 15, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO RESPONDING TO ATOMIC SAFETY AND
LICENSING BOARD QUESTIONS FOR ORAL ARGUMENT**

Pursuant to the February 5, 2014 Order of the Atomic Safety and Licensing Board concerning instructions for oral argument, Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (“Local 15” or “Union”), submits this memorandum responding to the ASLB’s questions concerning “standing and the sufficiency of the hearing request.”

1. Does 10 C.F.R. § 2.202(a)(3) apply to the October 28, 2013 Confirmatory Order?

Local 15’s position is that 10 C.F.R. § 2.202(a)(3) applies to the October 28, 2013, Confirmatory Order (“CO” or “Order”).¹ The basis for this position is the CO itself, which states (at 6) that it is being issued pursuant to, *inter alia*, “the Commission’s regulations in 10 C.F.R. § 2.202.”

2. If section 2.202(a)(3) applies, did the Confirmatory Order adequately inform “any other person affected by the order” of the right to “demand” a hearing pursuant to section 2.202(a)(3)?

While the publication of the October 28, 2013 CO in the Federal Register on November 7, 2013 arguably fulfilled the Commission’s obligation to provide timely notice with regard to

¹ *In the Matter of Exelon Generation Co., LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License*, 78 Fed. Reg. 66965 (Nov. 7, 2013).

the *existence* of the Order,² the wording of the CO failed to provide notice to Local 15 (and any other person adversely affected by the order) of its right to demand a hearing pursuant to section 2.202(a)(3). The CO neither cites to nor quotes from 10 C.F.R. § 2.202(a)(3). Instead, it refers generally to having been issued pursuant to 10 C.F.R. § 2.202, along with other statutory and regulatory authorities, and states that “[a]ny person adversely affected by this Confirmatory Order, other than Exelon may request a hearing within 30 days of this Order.” CO at 8. The CO does not reference the right of any adversely affected person to *demand* a hearing, and refers instead to the circumstance where “a hearing is *requested* by a person whose interest is adversely affected[.]” *Id.* at 12 (emphasis added).

The CO refers explicitly to 10 C.F.R. §§ 2.309(d) and 2.309(f) and states: “If a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).” CO at 12.³ Consistent with this directive, Local 15 has requested a hearing and petitioned for leave to intervene in this matter, demonstrating its standing and setting forth its contentions (and the bases for them) with respect to the CO. Local 15 urges the Board to apply Section 2.202(a)(3) and find that, as an entity adversely affected by the CO, Local 15 is entitled to demand a hearing and need not satisfy either the standing or contention requirements of Section 2.309(d) and (f). However, to the extent this Board concludes that sections 2.309(d) and 2.309(f) are applicable, Local 15 has satisfied those requirements.

² See, e.g., *Detroit Edison Co., Fermi Power Plant (Independent Spent Fuel Storage Installation)*, LBP-09-20, 70 N.R.C. 565, 570 (2009) (discussing the legal sufficiency of late-published Federal Register notice).

³ The right to request a hearing appears in the CO at page 8; several pages later (at page 12), and following an extended discussion of the Commission’s e-filing protocols, the Order refers to the need for any hearing request to comply with sections 2.309(d) and 2.309(f).

The Atomic Safety and Licensing Board has explained that the purpose of notice “is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.” *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.*, LBP-04-33, 60 N.R.C. 749, 752-53 (2004) (quotation marks and citation omitted). The Board has expressed concern about the language of hearing notices, suggesting that “perhaps serious consideration should be given to revising the language of hearing notices in these cases to go beyond the somewhat euphemistic reference to the scope of the proceeding as being ‘whether this Confirmatory Order should be sustained.’” *Nuclear Fuel Services, Inc.*, 66 N.R.C. 277, 325 n.339 (2007) (citation omitted). The Board’s conclusion was that clarifying the notice routinely provided in enforcement orders with respect to the specific requirements attendant to the hearing process would result in “submitted petitions that are more directly focused on the applicable standard.” *Id.* Applying this logic here, Local 15 submits that the purposes of providing notice would have been well served by including more detailed language in the notice about the right to demand a hearing under section 2.202(a)(3).

3. If section 2.202(a)(3) applies, must a “licensee or any other person adversely affected” also demonstrate standing under 10 C.F.R. § 2.309(d)?

Local 15 understands section 2.202(a)(3) to require that a hearing demand be accompanied by a showing that the “person [is] adversely affected.” The requirement to make an “adversely affected” showing may be similar to the standing requirement in section 2.309(d). However, section 2.202(a)(3) provides a right to “demand a hearing,” which is plainly distinct from section 2.309(d)’s general requirements for the submission of a “request for hearing or petition for leave to intervene.” Previous Licensing Board decisions have explicitly viewed demands for hearing pursuant to Section 2.202(a)(3) as residing on a different track from

intervention petitions and requests for hearing pursuant to Section 2.309 and its predecessor regulation, Section 2.714.⁴

In *Sequoyah Fuels Corp. (Gore, OK Site Decontamination and Decommissioning Funding)*, LBP-94-5, 1994 NRC LEXIS 10 (Feb. 24, 1994), the ASLB issued a pre-hearing memorandum requesting the participants' guidance as to how it could or could not reconcile the differences between sections 2.202 and 2.714.⁵ In considering the timeliness of a citizen group's petition to intervene in support of an enforcement order, the Board resolved at least part of its own question by focusing on the fact that section 2.202(a)(3) concerns those adversely affected by the *order*, while section 2.714 (like its successor regulation, section 2.309) concerned those whose interest may be affected by the *proceeding*.⁶ Applying a similar analysis in the instant case, Local 15's injuries clearly fall within the scope of section 2.202(a)(3) as it is the *Order* that has directly and adversely affected the Union. While the proceeding will further affect Local 15's interests, the initial trigger for Local 15's involvement lies within the order itself.

The *Sequoyah Fuels* Board further noted that the then-recently adopted Section 2.202 was intended to "make clear the agency's authority over both licensees and nonlicensees who are

⁴ See *Nuclear Mgmt. Co., LLC, (Palisades Nuclear Plant)*, LBP-06-10, 63 N.R.C. 314, 384 n.17 (2006) (distinguishing, with regard to contention pleading, Section 2.202(a)(3) and 2.309(f)); *Sequoyah Fuels Corp. (Gore, OK Site Decontamination and Decommissioning Funding)*, LBP-94-5, 1994 NRC LEXIS 10 (Feb. 24, 1994) (distinguishing between Section 2.202(a)(3) and Section 2.714). Section 2.714 ("Intervention") was eliminated and its substance moved to Section 2.309 in the 2004 regulatory amendments. 69 Fed. Reg. 2182 (Jan. 14, 2004).

⁵ See *Sequoyah Fuels Corp. (Gore, OK Site Decontamination and Decommissioning Funding)*, 1994 NRC LEXIS 137 (Jan. 13, 1994) (Memorandum Posing Matters for Consideration at Prehearing Conference).

⁶ The ASLB rejected the possibility that "the 'adversely affected by the order' language of section 2.202(a)(3) and the language of section 2.714(a)(1) providing an intervention opportunity to persons 'whose interest may be affected by the proceeding'" were coextensive. *Sequoyah Fuels Corp. (Gore, OK Site Decontamination and Decommissioning Funding)*, LBP-94-5, 1994 NRC LEXIS 10 slip op. at 29 (citing *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984)). In doing so, the Board noted that such an interpretation "runs contrary to the usual inference that different language is intended to mean different things" and found there was no purpose or regulatory history behind the language to suggest otherwise. *Id.* at 29-30 and n.19.

the targets of the enforcement action taken in the order” and that “[t]hese are the persons to whom the ‘adversely affected by the order’ language in section 2.202(a)(3) obviously was directed.”⁷ In contrast to the citizen group that the *Sequoyah Fuels* Board treated as an intervenor because its interest was *potentially* affected by the outcome of the proceeding, Local 15 has already suffered an injury flowing from the Order itself and is within the class of “persons” section 2.202(a)(3) was intended to reach.

Regardless of whether the requirements of section 2.309(d) are applicable to a hearing demand pursuant to section 2.202(a)(3), the Union has established standing by demonstrating that it is adversely affected by the CO. As presented by the Union in its filings in this proceeding, the imposition upon individual employees of the obligation to comply with the changes mandated by the CO is an adverse impact upon the employees represented by Local 15. These adverse effects are compounded by the lack of clarity in the CO with respect to the obligations to be imposed upon the employees, through Exelon, and the procedural and substantive harm associated with requiring Exelon to implement a program beyond the requirements of NRC regulations. Local 15’s harm is redressable by the Nuclear Regulatory Commission, in that the Union is asking the Commission to revoke the Order and return to the status quo ante. Local 15’s members are, therefore, harmed by the Confirmatory Order, and would be better off if the Order were vacated. *See Detroit Edison Co.*, CLI-10-03, 71 N.R.C. 49, 50 (2010); *Maine Yankee Atomic Power Co.*, CLI-04-05, 59 N.R.C. 52, 60 (2004). The Union’s position is that the Order is unwarranted and unsupported by the record. As such, Local 15 has demonstrated that it has standing under 10 CFR § 2.309(d).

⁷ *Sequoyah Fuels Corp. (Gore, OK Site Decontamination and Decommissioning Funding)*, LBP-94-5, 1994 NRC LEXIS 10 slip op. at 30 n.19.

4. If section 2.202(a)(3) applies, must a “licensee or any other person adversely affected” also satisfy the requirements of 10 C.F.R. § 2.309(f)(1)?

While Local 15’s hearing demand has been presented in full compliance with the requirements of 10 C.F.R. § 2.309(f), it does not now appear that these requirements apply to the demand. Section 2.309(f)(1) requires that a “request for hearing or petition for leave to intervene” set forth the contentions to be raised in the form set forth in the regulation. Local 15, as a person adversely affected by the Confirmatory Order, has a right to demand a hearing and need not request a hearing or leave to intervene as contemplated in Section 2.309(f)(1).⁸ Under Section 2.202(a)(3), the only prerequisite to Local 15 demanding a hearing is a showing that it is adversely affected by the Order.

That said, Local 15 notes that requiring a person demanding a hearing to show how they are adversely affected by the challenged action fulfills the goals of the Commission’s section 2.309(f) contention regulation, which include: (1) focusing the hearing process on real disputes rather than on generic attacks on NRC requirements, regulations or policies; (2) putting other parties on notice of the specific grievances at issue in the hearing; and (3) ensuring that full adjudicatory hearings result only when the person seeking a hearing proffers “at least some minimal factual and legal foundation.” *Nuclear Management Co., LLC (Palisades Nuclear Plant)*, LBO-06-10, 63 N.R.C. 314, 337 (2006) (citation and quotation marks omitted).

Even if a party demanding a hearing pursuant to section 2.202(a)(3) must also satisfy the requirements of section 2.309(f)(1), Local 15 has done so. Local 15 stated that it is seeking to raise multiple contentions and set forth their bases in its December 12, 2013, “Petition to

⁸ See *Nuclear Mgmt. Co., LLC, (Palisades Nuclear Plant)*, LBP-06-10, 63 N.R.C. 314, 384 n.17 (2006) (distinguishing, with regard to contention pleading, Section 2.202(a)(3) and 2.309(f)).

Intervene and Request for Hearing” at pages 15, 18, and 19. Local 15 explained each contention in detail and met the requirements of section 2.309(f)(1).

5. Both Petitioner and Exelon extensively discuss decisions in the Consumers Power Co. (Palisades Nuclear Power Facility) case from 1981 and 1982. Of what significance, if any, are the subsequent 1991 regulatory amendments, which established for the first time the duty of the NRC to inform “any other person adversely affected by the order of his or her right . . . to demand a hearing” under 10 C.F.R. § 2.202(a)(3)?

In the *Consumers Power Co.* decision the Atomic Safety and Licensing Appeal Board focused on “discretionary intervention” under 10 C.F.R. § 2.309(g), and expressly did not decide the issue of the union’s standing under Section 2.309(d). *Consumers Power Co.*, 15 N.R.C. 493, 495 (1982) (declining to resolve the question of the union’s standing). However, the analysis applied by the *Consumers Power Appeals Board* (and the outcome of that analysis) in many ways presages the 1991 regulatory amendments’ acknowledgment that the NRC, in the exercise of its jurisdiction over licensees, had the potential to affect the employees of licensees and further that licensees and their employees sometimes have a shared interest in notice and hearing opportunities. The 1991 regulatory amendments were intended to “put on notice all persons whose actions relate to a licensee’s activities subject to NRC regulation, that they may be subject to enforcement action...” thereby clarifying what the Commission then asserted was its existing jurisdiction over “any person...who engages in conduct affecting activities within the Commission’s subject-matter jurisdiction.”⁹ The 1991 regulatory amendments emphasized the particular importance of providing adequate notice of the right to demand a hearing to “any other person adversely affected by the order” under section 2.202(a)(3) by including an express obligation to provide notice to affected persons beyond the licensee—even when, as here, the licensee has consented to the order. Thus, the Commission observed that:

⁹ 56 Fed. Reg. 40,664, 40,665-66 (Aug. 15, 1991).

Whether or not the licensee or other person consents to an order, other persons adversely affected by an order issued under § 2.202 to modify, suspend or revoke a license will be offered an opportunity for a hearing consistent with current practice and the authority of the Commission to define the scope of the proceeding on an enforcement order.

Id. at 40,678. In doing so, the NRC recognized that although the licensee would not be able to demand a hearing after consenting to an order, there might be other persons adversely affected who must be offered an opportunity for a hearing on the order.

The 1991 amendments also explicitly recognized the possible effects of NRC orders on persons other than licensees and persons other than those directly mentioned in the order and the importance of providing them with notice and an opportunity for hearing. In response to comments on the proposed rulemaking expressing concern that an order could be issued to a licensee employee or contractor without notice to the licensee, the NRC acknowledged that there were situations in which it would be appropriate to afford the licensee notice and opportunity to be heard concerning orders issued to the licensee's employees or contractors.¹⁰ In the case of an order against a licensee's employee, NRC staff stated that it intended to serve the licensee with a copy of the order and consider the licensee's comments, even though the order did not directly address the licensee. *Id.* Just as a licensee has an interest in orders directed to its employees, the employees and their representative have an interest in orders directed to the licensee, particularly where, as here, those orders impose obligations on those employees' and impact their terms and conditions of employment. In such a situation, the NRC's reasoning in connection with the 1991 amendments suggests that the employees and their representative should be afforded the same notice and opportunity for hearing that would be afforded the licensee if the tables were turned.

¹⁰ 56 Fed. Reg. at 40,672.

6. The participants appear to disagree as to whether the Confirmatory Order imposes new obligations on individual employees beyond those already imposed by NRC regulations or otherwise. Is this a fact issue that warrants or requires the Board's consideration of evidence?

As the Board observes, there is disagreement as to the effects of the Confirmatory Order on individual employees. The record in this case does not support the Confirmatory Order's vague and expansive directives to Exelon and, by extension, the employees represented here by the Union. There are factual issues that warrant the Board's consideration of evidence as to the obligations on individual employees both prior to and following issuance of the Confirmatory Order. Local 15 seeks to introduce evidence to challenge the basis of the Confirmatory Order. The existence of these factual differences further strongly militates in favor of a hearing in this matter.

7. What is the status of the unfair labor practice charge that Petitioner filed with Region 13 of the National Labor Relations Board on December 4, 2013?

On February 14, 2014, Region 13 of the NLRB issued a complaint and notice of hearing based on the Union's December 4, 2013 ULP charge. The complaint alleges that Exelon has failed and refused to bargain with the Union about the effects of its decision to implement changes in the terms and conditions of employment pursuant to the October 28, 2013 Confirmatory Order. The complaint further alleges that Exelon's conduct in this regard violates Section 8(a)(1) and (5) of the National Labor Relations Act. The matter is set for hearing on April 9, 2014 although it is likely to be postponed. It is important to note that the NLRB complaint does not address Exelon's conduct in entering into ADR or in entering into the settlement agreement with the NRC, nor does it address the entry of or substance of the CO itself. Consequently, Local 15's only remedy on these issues is with this tribunal.

8. What is the status of Exelon’s implementation of the Confirmatory Order, including dates by which the various required actions were, or will be, performed?

Local 15 lacks sufficient information to fully answer this question. However, on information and belief, Exelon issued a revised BOP (Revision 10) on January 24, 2014 (previously supplied as Exhibit 3 to Local 15’s Reply Brief).

9. If the Board were to order a hearing, would such a hearing more appropriately be conducted under the formal procedures set forth in 10 C.F.R. Part 2 Subpart G or under the simplified procedures set forth in Subpart L?

Local 15’s position is that a hearing in this matter should be conducted under the procedures set forth in 10 C.F.R. Part 2 Subpart G. Pursuant to 10 C.F.R. § 2.310, proceedings on enforcement matters must be conducted under the procedures of subpart G “unless all parties agree and jointly request that the proceedings be conducted under the procedures of subpart L.” Local 15 at this time believes that certain aspects of the formal procedures of subpart G are important to preserve. For example, Local 15 anticipates seeking discovery that may extend beyond that provided in 10 CFR § 2.336. Local 15 also would like to preserve its right to cross-examine witnesses, which might not be permitted by 10 CFR § 2.1207(b)(6).

Respectfully submitted,

Signed (electronically) by Rochelle G. Skolnick

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that on this date, February 28, 2014, copies of “Memorandum of Local 15, International Brotherhood of Electrical Workers, AFL-CIO Responding to Atomic Safety and Licensing Board Questions for Oral Argument” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Rochelle G. Skolnick

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Dated in St. Louis, Missouri
this 28th day of February, 2014