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NUCLEAR REGULATORY COMMISSION

Title: Exelon Generation Company
Dresden Nuclear Power Station
Units 2 & 3

Docket Number: 50-237-EA and 50-249-EA

ASLPB Number: 14-930-01-EA-BD01

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UNITED STATES OF AMERICA

U.S. NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: : Docket No.

EXELON GENERATION CO., LLC : 50-237-EA

(Dresden Nuclear Power : 50-249-EA

Station, Units 2 & 3) : ASLBP No.

_____ : 14-930-01-EA-BD01

Thursday,

March 6, 2014

Morris, Illinois

BEFORE:

PAUL S. RYERSON, Chairman

ALEX S. KARLIN, Administrative Judge

JEFFREY D.E. JEFFRIES, Administrative Judge

1 APPEARANCES:

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On Behalf of the Petitioner, Local Union No. 15:

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P R O C E E D I N G S

9:28 a.m.

CHAIRMAN RYERSON: Please be seated.

Welcome, everyone. We're here in the matter of Exelon Generation Company's Dresden Nuclear Power Station. Specifically this proceeding concerns a request for a hearing by Local Union No. 15 of the International Brotherhood of Electrical Workers regarding an October 18, 2013 confirmatory order that was issued to Exelon by the United States Nuclear Regulatory Commission.

I'm Judge Ryerson. I'm trained as a lawyer. I chair this particular Atomic Safety and Licensing Board that the NRC has assigned to this proceeding.

On my right is Judge Karlin who is also trained as a lawyer and on my left is Judge Jeffries who, Dr. Jeffries is a nuclear engineer.

First of all, we'd very much like to thank the staff of the Grundy County Courthouse and Judge Marsaglia in particular for making this beautiful facility available to us. This is very nice that we have the opportunity to use this facility.

The courthouse has some rules that apply to all proceedings here. First, unless you are a lawyer you should not have a cell phone on you. If

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1 you are a lawyer and you have a cell phone it should
2 be on vibrate and you should not speak into it in the
3 courtroom. Please go outside if you do have an
4 emergency that does require you to use your cell
5 phone.

6 Before we take the appearances of counsel
7 for the various parties I'd like to summarize how we
8 intend to proceed today.

9 Our purpose is to hear argument on
10 standing, standing of the union in this proceeding and
11 on the adequacy of its hearing request.

12 We've read the parties' legal memoranda
13 and we've read your very helpful responses to our
14 written questions. We therefore intend to begin with
15 brief -- and I emphasize brief, no more than 10
16 minutes -- presentations from each of the parties.

17 And then we intend to primarily use our
18 time today to ask questions. I think generally when
19 a member of the Board asks a question we will indicate
20 which party we would like an answer from. Sometimes
21 a Board member may want an answer from all three
22 parties, sometimes only from one party. We're fairly
23 informal here. If you haven't been asked to answer a
24 question and you feel you must say something about it
25 raise your hand and we'll probably allow you to do

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1 that.

2 Logistically we hope, at least I hope, my
3 colleagues are not necessarily as optimistic, that we
4 will finish before 1 o'clock in which case we'll go
5 that late without lunch. We'll certainly take a few
6 breaks.

7 If it's apparent that we cannot finish by
8 1 o'clock we'll break significantly earlier for lunch
9 at an appropriate time and probably take an hour for
10 lunch. I think there are several places around here
11 that people can get lunch and get back in time.

12 Before we take the appearances of counsel
13 any other comments? Judge Karlin?

14 JUDGE KARLIN: None.

15 CHAIRMAN RYERSON: Judge Jeffries? All
16 right. Let's begin with the petitioner, please.

17 MS. SKOLNICK: Thank you, Your Honor.
18 Here on behalf of the International Brotherhood of
19 Electrical Workers Local 15 IBEW myself, Rochelle
20 Skolnick, and Marilyn Teitelbaum.

21 CHAIRMAN RYERSON: Welcome.

22 MS. SKOLNICK: Thank you.

23 CHAIRMAN RYERSON: And for Exelon.

24 MR. KUYLER: On behalf of Exelon, Ray
25 Kuyler, Morgan Lewis. My colleague, Tim Matthews and

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1 Tammy Domeyer.

2 CHAIRMAN RYERSON: Thank you. Welcome.
3 And for the NRC staff?

4 MR. MICHEL: Yes, good morning, Your
5 Honors. On behalf of the NRC staff my name is
6 Christopher Hair and my co-counsel is Eric Michel.

7 CHAIRMAN RYERSON: Thank you. Welcome.
8 And I didn't have an opportunity to ask did any
9 counsel have questions at this point about the
10 logistics or the way in which we intend to proceed?

11 Then let's begin with -- Ms. Skolnick,
12 will you be speaking?

13 MS. SKOLNICK: Yes, I will. Thank you.
14 I'm here today on behalf of more than 1,600 men and
15 women employed by Exelon Generation and represented by
16 Local 15.

17 These bargaining unit employees are
18 integral to the continued safe and efficient operation
19 of Exelon's fleet of nuclear plants in Illinois. They
20 take their work seriously and they understand its
21 great importance.

22 As you know, the actions of the Nuclear
23 Regulatory Commission and indeed this Board have a
24 direct and substantial impact on their lives and their
25 livelihoods. We therefore appreciate very much the

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1 opportunity to speak with you today on their behalf.

2 I'm going to use my allotted 10 minutes to
3 do essentially three things. First, I would like to
4 touch on a brief factual recap because I think it's
5 important to keep in mind with what we do here today
6 the events that brought us to this point.

7 From there I will move to an overview of
8 the three significant ways in which we believe the
9 confirmatory order is problematic and why it should
10 not be sustained.

11 And then finally I'll touch on the issues,
12 especially those raised by the questions the Board has
13 posed concerning Local 15's hearing rights.

14 So, to start with the facts, on June 6 of
15 2012 the Office of Investigation's Region 3 Field
16 Office initiated an investigation into the activities
17 of three Exelon Dresden Station employees.

18 The investigation concluded, among other
19 things, that two licensed senior reactor operators
20 planned and conspired to commit a serious violent
21 crime, hijacking an armored car.

22 The two attempted to recruit an equipment
23 operator who then possessed unescorted access to the
24 Dresden Station to join them in their criminal
25 activities.

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1 Now, before the planned crime could take
2 place one of those senior reactor operators was
3 arrested for hijacking a car at gunpoint. After being
4 released on bail he fled the country, was tried in
5 absentia, convicted and sentenced to a 40-year prison
6 term.

7 Both senior reactor operators were
8 subsequently prohibited from further involvement in
9 licensed activities and the equipment operator lost
10 his access, and all three were of course terminated.

11 At the conclusion of its investigation NRC
12 staff issued a choice letter to Exelon spelling out
13 the apparent violations, all of which were allegedly
14 committed by individual employees and none of which
15 were committed by Exelon itself.

16 In fact, I think it's important to note
17 that in her June 11, 2013 non-concurrence statement
18 Senior Enforcement Coordinator Patricia Loughheed
19 expressly found that, and I quote, "The licensee met
20 its obligation by having a program in place and
21 training on that program." That being a reference to
22 the behavioral observation program.

23 As Ms. Loughheed sensibly noted,
24 individuals planning on committing a crime are
25 unlikely to report those plans to their employers and

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1 no program is going to stop people from planning or
2 committing crimes.

3 As she said, no matter what a licensee
4 does it cannot prevent someone such as the wrongdoer
5 or his alleged accomplice.

6 Now, importantly as part of the conclusion
7 of the investigation there was no finding that there
8 was a systemic problem with Exelon's behavioral
9 observation program and no finding that there was an
10 institutional culture of not reporting events or
11 conduct bearing on nuclear safety.

12 This was clearly an isolated incident
13 perpetrated by some very bad apples.

14 Now, in response to the choice letter
15 Exelon elected to engage in ADR which produced a
16 settlement that was subsequently memorialized in the
17 confirmatory order.

18 Local 15 which is the legal bargaining
19 representative for more than 1,600 Exelon employees
20 was neither notified of the ADR process nor invited to
21 participate.

22 Now, the confirmatory order memorialized
23 certain changes Exelon had made to its behavioral
24 observation program between the issuance of the choice
25 letter and the September 18 mediation. And the order

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1 also ordered Exelon to make certain other changes to
2 its program.

3 It did these things, the order, despite
4 the fact that there was no finding that Exelon's
5 behavioral observation program was in any way
6 deficient or that a different program could have
7 prevented the events that led to the investigation.

8 That disconnect between the serious
9 violent and isolated criminal evnets that precipitated
10 the investigation on the one hand and the ordered
11 remedy on the other is just one way in which the
12 confirmatory order is in our belief problematic and
13 part of why we believe it should not be sustained.

14 The second problem with the order is the
15 fact that with respect to the changes in Exelon's
16 program both memorialized in the order and ordered the
17 order's scope is both broader than that of 10 C.F.R.
18 Part 73 and untethered to the nuclear safety concerns
19 that anchor those regulations.

20 Accordingly, it imposes obligations on
21 Exelon employees that have not heretofore existed.

22 Now, I'd like to give you sort of a
23 concrete example of how this might play out as a
24 practical matter.

25 So, the order endorses Exelon's revision

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1 of its program to include an expectation for employees
2 to report offsite illegal activity.

3 Now, the reporting of offsite illegal
4 activity is not limited in any way by the order either
5 in terms of the severity of the illegal activity or
6 its connection with nuclear safety concerns. And as
7 a result the order leaves unanswered some very
8 significant questions.

9 Now, staff has suggested that things like
10 jaywalking and minor traffic infractions may not be
11 reportable. But if so, where is the line between
12 reportable and non-reportable illegal activity.

13 So for example, is an employee obligated
14 to report, for example, when the colleague he carools
15 to work with drives several miles over the speed limit
16 on the way to work? Or what about if he drives 25
17 miles over the speed limit?

18 The order also refers to unusual and
19 aberrant behavior but doesn't define these terms or
20 limit them in any way, nor does it connect them to
21 nuclear safety or the risk of radiological sabotage.

22 So for example, I may think it very
23 unusual when my otherwise mild-mannered colleague
24 takes up skydiving and invites me to join her, but if
25 I'm an Exelon employee do I have an obligation to

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1 report that conduct?

2 So, as you can see, one problem with
3 directives as broad and undefined as those contained
4 in the order is that when employees are confronted
5 with such a directive they're reduced to guessing at
6 where the line between reportable and non-reportable
7 conduct actually falls.

8 And given the chain of events and
9 consequences that may follow for a colleague in the
10 event I report something that turns out not to have
11 been significant enough to be reported I may be
12 reluctant to report anything unless I'm perfectly
13 confident that it should be reported.

14 And in any event, my line for what is
15 clearly reportable may be in a different place from
16 that of my colleagues, my supervisors, or the NRC.

17 So as a result, some things that arguably
18 ought to be reported may not be. And that would
19 clearly defeat the purpose of the order which
20 presumably intended to increase safety at Exelon's
21 facilities and not decrease.

22 Now, yes, the order does direct Exelon to
23 provide additional guidance on these points. But the
24 order itself does not limit Exelon's discretion or
25 require that Exelon tie its behavioral observation

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1 program's reporting obligations to the statutory and
2 regulatory framework.

3 Which leads me to the third part of our
4 concerns with the order. So, by entering the
5 confirmatory order the NRC has effectively allowed
6 Exelon to place parameters on its own bargaining
7 obligations that are not otherwise present either in
8 the Atomic Energy Act or the NRC regulations.

9 A little framework here on the bargaining
10 obligation. So, pursuant to the National Labor
11 Relations Act Exelon has a legal duty to bargain with
12 the union as its employees' designated representative.

13 That duty extends to all the employees'
14 terms and conditions of employment including perhaps
15 especially discipline.

16 But both parties' duty is circumscribed by
17 law in various ways. So for example, they could not
18 agree to a contract that violated the Americans with
19 Disabilities Act or its implementing regulations, nor
20 obviously can they agree to a contract that violates
21 the AEA or the NRC regs.

22 But while these laws provide overall
23 parameters, everything within those parameters is fair
24 game and must be bargained about if it relates to
25 terms and conditions of employment.

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1 As the Supreme Court has taught in cases
2 like W.R. Grace and the Firefighters cases cited in
3 our pleadings it is well settled that an employer
4 cannot further narrow those parameters by unilaterally
5 entering into an agreement with a third party or a
6 government entity.

7 Nor may an employer bind its employees
8 bargaining representative through a consent decree the
9 union has not consented to.

10 But that is precisely the situation we
11 have here. Exelon voluntarily entered into agreement
12 that in the confirmatory order was converted into what
13 amounts to a consent decree.

14 The union had no part in it and did not
15 consent and yet it and its members are now not only
16 required to abide by the terms of the order but we're
17 also being told that the order limits Exelon's duty to
18 bargain with the union about the employees' terms and
19 conditions of employment, including things that Exelon
20 asserts can form the basis for discipline.

21 Now, if the order is sustained we believe
22 the Nuclear Regulatory Commission will have permitted
23 Exelon to unilaterally circumscribe its own bargaining
24 obligations in ways they were not circumscribed by
25 statute or regulation.

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1 Turning finally to the questions the Board
2 has posed concerning Local 15's right to a hearing.
3 As you review our pleadings in this matter you will
4 see that our position as to the basis for our right to
5 hearing has evolved somewhat as we've gone along.
6 That of course is one of the benefits of responsive
7 pleadings and of having specific questions from the
8 tribunal like those you issued to us last month.

9 And given that our law firm is brand new
10 to practice before this Commission we appreciate the
11 Commission's policy of lenience with such new
12 attorneys in this regard.

13 We initially took at face value the
14 order's directive that in order to be granted a
15 hearing we would have to establish standing and
16 proffer at least one admissible contention pursuant to
17 Rule 2.309.

18 And we continue to believe that even if
19 the Board chooses to evaluate our petition pursuant to
20 those standards we should be granted a hearing because
21 we have indeed met them.

22 However, your February 5 questions caused
23 us to reevaluate the regulations and the NRC's
24 jurisprudence in this area and as a result of that
25 review we now believe as we explained in our February

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1 28 memorandum that we have a right to demand a hearing
2 because pursuant to Section 2.202 we have been
3 adversely affected by the confirmatory order.

4 Consistent with that status we do not
5 believe that we are required to meet the standing and
6 contention standards set forth in Section 2.309.

7 Now, both Exelon and staff argue against
8 applying anything other than the 2.309 standards for
9 standing and contentions to evaluate our right to a
10 hearing. They advance their arguments in slightly
11 different ways but both rely essentially on the notion
12 that Local 15 should be treated not as a person
13 adversely affected by the order but instead as a third
14 party somehow with lesser rights.

15 Now, I think it's a creative argument
16 given that there simply is no class of persons
17 identified by the regulations and specifically 2.202
18 as third parties with discrete rights.

19 I think it's also important to note here
20 that aside from the 1981-82 Consumers Power Palisades
21 case which of course predated the 1991 regulatory
22 amendments that among other things made significant
23 changes to 2.202 no party has cited a single case that
24 deals with the rights of a licensee's employees to be
25 heard concerning an order issued to the licensee.

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1 Rather, all the cases cited concern
2 entities that truly were strangers to the operation of
3 the licensee.

4 CHAIRMAN RYERSON: Ms. Skolnick,
5 consistent with our earlier order if I could ask you
6 to wrap up in the next --

7 MS. SKOLNICK: Okay. I would just like to
8 point out that the language of Section 2.202 and the
9 language of Section 2.309 clearly create different
10 classes of entities.

11 So, 2.202 identifies a licensee, other
12 persons subject to the jurisdiction of the Commission,
13 and any other person affected adversely by the order.

14 By contrast, Section 2.309 applies to a
15 different class of person which is any person whose
16 interest may be affected by a proceeding.

17 As the 1994 Sequoyah Fuels Licensing Board
18 observed about this very language different language
19 is not only presumed to mean different things but as
20 between 2.202 and 2.309 actually does mean different
21 things and accords different rights.

22 So clearly Local 15 doesn't stand in a
23 position where there is only a possible effect on our
24 interest. And this is not a case where our interest
25 only may be affected by the proceeding.

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1 So, consistent with 2.202(a)(3) we believe
2 that we are entitled to demand a hearing on the
3 sustainability of the order and should not be required
4 to establish other bases for standing or to proffer
5 contentions. And with that I'll conclude my opening
6 statement and I'll be happy to take whatever questions
7 you may have.

8 CHAIRMAN RYERSON: Thank you, Ms.
9 Skolnick. I think we'll get all three statements and
10 then we'll proceed to questions at that point.

11 For Exelon is it Mr. Kuyler?

12 MR. KUYLER: Yes, Your Honor. Thank you.
13 Good morning Judges Ryerson, Karlin and Jeffries and
14 may it please the Board. On behalf of Exelon I
15 appreciate the opportunity to speak to you this
16 morning.

17 This NRC proceeding presents a few
18 relatively simple and straightforward issues of law
19 that are fully contemplated in the Commission's
20 regulations and that the Board can and should resolve
21 at the standing and contention admissibility stage.

22 For the reasons thoroughly explained in
23 Exelon and the NRC staff's filings we urge you to deny
24 the Local's petition in its entirety.

25 The NRC offers the opportunity for third

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1 parties to challenge confirmatory orders, that is,
2 settlement agreements over violations of NRC
3 regulations, but this opportunity is a limited one.
4 It is a safety valve for extraordinary situations
5 where the third party can show that the confirmatory
6 order has somehow created a public health and safety
7 problem.

8 This principle is established by a long
9 line of cases running from Palisades in 1981 to the
10 Alaska Department of Transportation case in 2004,
11 Davis Besse case in 2004 and other Licensing Board
12 decisions as well.

13 This case is not an extraordinary
14 situation. There's no real dispute in the facts of
15 this case or the significance of those facts. The
16 Local does not dispute that the individuals who took
17 part in or knew about the armed robbery plot that led
18 to the confirmatory order all violated NRC regulations
19 and violated Exelon's behavioral observation program.

20 No participant disputes that the
21 underlying facts raise questions about the
22 trustworthiness and reliability of the individuals
23 involved in a criminal conspiracy.

24 And no participant disputes that these
25 individuals should not be trusted with the special

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1 responsibility for the public health and safety and
2 the common defense and security that comes with the
3 privilege of operating a commercial nuclear plant.

4 The Local's petition raises a handful of
5 straightforward issues of law. And those are, one, do
6 the NRC's access authorization rules require reporting
7 of offsite and off-duty conduct that may have
8 implications for nuclear safety and security,
9 including the trustworthiness and reliability of
10 individuals with unescorted access.

11 Second, whether the alleged injuries are
12 within the scope of interest protected by the Atomic
13 Energy Act.

14 Third, whether discretionary standing is
15 available to the Local.

16 And fourth, whether alleged violations of
17 the National Labor Relations Act are cognizable in
18 this proceeding.

19 And on the first question the answer is
20 yes. The NRC's access authorization rules in 73.56
21 require Exelon to establish a behavioral observation
22 program. And every person subject to the BOP must
23 report any questionable behavior patterns or
24 activities so long as the behavior could have
25 implications for nuclear safety and security including

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1 the trustworthiness and reliability of individuals
2 with unescorted access. Any questionable behavior.

3 There is no exclusion of behavior that is
4 outside the fence or off the clock. And in reply, the
5 Local acknowledges that the regulations are not so
6 limited.

7 The confirmatory order did not change or
8 expand those rules. It mandated clarifications to
9 Exelon's program, additional training on reporting
10 requirements, an effectiveness assessment and specific
11 deadlines by which Exelon must demonstrate conformance
12 with that confirmatory order.

13 So, the first legal issue raised by the
14 petitioners relating to the scope of those access
15 authorization rules speaks directly to their standing.

16 When the Local argues that the
17 confirmatory order imposed reporting requirements for
18 offsite and off-duty behavior for the first time it is
19 incorrect as a matter of law. And in reply the Local
20 admits as much. Therefore it has not been injured by
21 the confirmatory order.

22 And there is nothing the Board can do to
23 remedy those injuries. Even if the confirmatory order
24 were vacated the regulations and the BOP would remain
25 in place and would still require the reporting of any

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1 questionable behavior that could reflect on
2 trustworthiness and reliability of individuals who
3 have unescorted access.

4 And second, even if the Board finds that
5 the Local somehow has been injured by the confirmatory
6 order there's another question. Whether the claimed
7 injuries involving potential future disciplinary
8 action or infringement of bargaining rights are within
9 the scope of the Atomic Energy Act.

10 The Local has not shown that its members
11 would be less safe than they would have been without
12 the confirmatory order, or that they have otherwise
13 been injured from a radiological health and safety
14 perspective. And therefore the Local doesn't have
15 standing.

16 Recently the Local has raised a theory
17 that it is somehow entitled to a hearing in this
18 matter as of right, as if it were the subject of NRC's
19 enforcement action.

20 There is no question that the Local is
21 required to show standing and an admissible contention
22 to intervene in this proceeding because it was not the
23 person to whom the order was issued.

24 And furthermore, Section 2.309(d)(3)
25 grants standing as of right to the subject of an

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1 enforcement proceeding, but does not grant standing to
2 others. They must show standing.

3 The Local's recent filing misconstrues the
4 purpose of the 1991 regulations, the rulemaking and
5 the legal theories it presents run contrary to various
6 cases since 1991.

7 In particular, I would note when the Local
8 says that no party has cited a case regarding
9 licensing employees where they challenged a
10 confirmatory order issued to a licensee there is such
11 a case. That's the Alaska Department of
12 Transportation case in 2004, CLI-04-26, Your Honors.

13 The third legal issue before the Board is
14 simpler than the first two. Under certain unusual
15 circumstances the NRC allows a party to intervene in
16 a proceeding even though it does not have standing.

17 This is a discretionary intervention, but
18 since 2004 this has only been allowed when another
19 party has a valid hearing request. So the
20 discretionary intervention rule does not apply here.

21 Under the current rules of practice the Board cannot
22 grant the Local discretionary standing.

23 And even if the Board were to find that
24 the Local has standing or that it should have
25 discretionary intervention somehow the petition still

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1 should be denied because there are no admissible
2 contentions.

3 This is primarily because the contentions
4 raise the same issues that the Board must resolve in
5 determining the Local's standing. The Local's
6 contentions challenge the access authorization rules.
7 They're therefore barred by the principle that the NRC
8 rules cannot be attacked in adjudicatory proceedings.

9 With respect to the contentions I should
10 also mention here that the reference to the differing
11 professional opinion of Ms. Loughheed in the course of
12 issuing the notice of violation, that's not in the
13 pleadings so there's no basis for the Board to make
14 any decisions based on that document.

15 Finally, the Local's contentions raise a
16 final legal issue that is quite straightforward,
17 whether the confirmatory order should have
18 acknowledged Exelon's bargaining rights under the
19 NLRA. And the NRC has thereby allegedly endorsed
20 violations of the NLRA.

21 The NRC makes decisions based on public
22 health and safety, common defense and security. It
23 has no statutory mandate to enforce labor laws nor
24 does it have any special expertise in labor matters.
25 And those matters for the National Labor Relations

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1 Board or other tribunals to resolve.

2 So for all these reasons the Board should
3 deny the petition.

4 Before moving on, the Board had noted that
5 it would entertain oral motions to strike during
6 today's argument. Exelon is moving to strike one item
7 in the Local's reply brief. And I'm happy to make
8 that motion now or later in the proceeding if the
9 Board sees fit.

10 CHAIRMAN RYERSON: This would be a fine
11 time. The reason we put that in our order is that
12 I've never seen a proceeding thus far where someone
13 has not moved to strike a pleading which seems almost
14 unique to our proceedings. But please, go ahead.

15 MR. KUYLER: Thank you, Your Honor. The
16 Board should strike one new argument that the Local
17 presents for the first time in its reply.

18 On page 9 the Local states that it
19 believes that the confirmatory order has the
20 cumulative effect of rendering Exelon's operations
21 less safe than they were before.

22 New bases cannot be introduced for the
23 first itme in a reply. A reply cannot expand the
24 scope of arguments set forth in an original petition
25 and cannot cure an otherwise deficient contention.

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1 The Local did not make this claim in its
2 original petition. It did not claim that the
3 confirmatory order made the plant less safe. So while
4 the Local may respond to new legal arguments that the
5 other parties set forth, it cannot set forth entirely
6 new claims for which the other parties have no
7 opportunity for a written response.

8 And furthermore, there's no support for
9 this bare allegation nor is it clear what contention
10 this claim falls under. And Exelon therefore moves to
11 strike this new argument. Thank you, Your Honor.

12 JUDGE KARLIN: May we ask what page again?

13 MR. KUYLER: Page 9, Your Honor.

14 JUDGE KARLIN: I'm on page 9.

15 CHAIRMAN RYERSON: I actually, I think the
16 most efficient way to proceed will probably be -- I
17 already had some questions for Ms. Skolnick about that
18 argument so we'll give her an opportunity to respond
19 to the motion when I ask her questions about the
20 union's position on safety.

21 MS. SKOLNICK: Thank you.

22 JUDGE KARLIN: Can I ask exactly where on
23 page 9 and what pages are you talking about?

24 MR. KUYLER: At the bottom just before the
25 footnote.

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1 JUDGE KARLIN: Yes.

2 MR. KUYLER: Under roman III second
3 sentence. Because of the order's defects it has the
4 cumulative effect of rendering Exelon's operations
5 less safe than they were before the order.

6 JUDGE KARLIN: Okay, thank you.

7 MR. KUYLER: Yes, Your Honor. Exelon
8 stands ready to proceed.

9 CHAIRMAN RYERSON: Thank you. And Mr.
10 Hair.

11 MR. HAIR: Thank you, Your Honor. May it
12 please the Board my name is Christopher Hair, counsel
13 for the NRC staff. My co-counsel today as I mentioned
14 previously is Eric Michel.

15 First, the staff would like to thank the
16 Board for the opportunity today to address the issues
17 raised in the petition. Also, the staff would like to
18 thank counsel for the interveners and licensee for
19 participating in today's hearing. And finally, the
20 staff would like to thank any members of the public
21 here today for attending the oral argument.

22 The staff's confirmatory order is the end
23 result of a settlement conference made possible by the
24 staff's alternative dispute resolution, or ADR
25 program.

1 The ADR program began in 2004 as part of
2 NRC's enforcement program with the goal of achieving
3 more timely and economical resolution of enforcement
4 issues, more effective outcomes and improved
5 relationships between the NRC and the regulated
6 community.

7 In this case, through the ADR program the
8 NRC engaged the licensee in a non-binding mediation
9 session regarding several apparent violations at
10 Dresden. These apparent violations were identified by
11 an NRC investigation related primarily to the
12 licensee's behavioral observation program.

13 The events that triggered the NRC
14 investigation are very unusual and involve the senior
15 reactor operator, SRO, engaging in the planning and
16 execution of an armed car-jacking.

17 To briefly explain behavioral observation
18 requirements, NRC regulations require the licensee to
19 have an access authorization program to ensure that
20 employees with unescorted access to the plant are
21 trustworthy and reliable.

22 The program must also include a behavioral
23 observation program which requires employees to notify
24 the licensee of any observed behaviors that might
25 impact safety or security at the plant and the public.

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1 In this case the SRO I previously
2 mentioned engaged other employees at Dresden with his
3 plans to commit a violent crime. Such activity not
4 only placed this individual's trustworthiness and
5 reliability into question but also potentially
6 threatened the safety and security of the facility and
7 public.

8 Accordingly, the SRO's behaviors fell
9 squarely within the purview of NRC's behavioral
10 observation requirements. To the extent that other
11 employees observed the SRO's behaviors they had an
12 affirmative obligation to report.

13 Importantly, since their introduction in
14 1991 these requirements are neutral with respect to
15 where the behavior occurs. In other words, if an
16 individual is engaged in some sort of behavior that
17 may adversely impact safety or security at the plant
18 where that behavior takes place does not change its
19 potential impact. The staff maintains that the duty
20 to report extends beyond the boundaries of the
21 facility.

22 The confirmatory order states that if a
23 hearing is to be held in this matter the only issue to
24 be considered is whether the order should be
25 sustained.

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1 Typically, where an enforcement order
2 improves safety the Commission has decided that no
3 hearing is appropriate.

4 The petition in this case differs somewhat
5 from previous challenges to the staff's enforcement
6 orders. The petition does not argue for a more
7 stringent confirmatory order or propose additional
8 safety measures. Rather, the petition alleges that
9 for several reasons the interveners are harmed by the
10 conditions of the order. Therefore, the central
11 question that this Board must decide is whether the
12 alleged harm is properly within the scope of this
13 proceeding.

14 As the staff argued in its brief the
15 petition raises issues that inappropriately attempt to
16 broaden the scope of this proceeding. The NRC is not
17 in a position to decide who represents the licensee
18 during a settlement discussion at an ADR session. The
19 NRC has no duty under the Collective Bargaining
20 Agreement between the licensee and interveners or the
21 National Labor Relations Act.

22 Moreover, the NRC cannot rescind its
23 confirmatory order for reasons that extend beyond the
24 purposes of the Atomic Energy Act. The petition stems
25 from a private dispute between the licensee and

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1 interveners and does not involve issues related to the
2 Atomic Energy Act.

3 In this proceeding the staff is primarily
4 concerned with effectively addressing the apparent
5 violations at Dresden related to its behavioral
6 observation program.

7 Dresden employees must be aware of their
8 important obligation to report behaviors that could
9 adversely impact plant safety or security of the plant
10 and the public.

11 The confirmatory order is tailored to
12 address these issues and is fully supported by the
13 record created by the NRC Office of Investigations.

14 For these reasons as well as the reasons
15 stated in the staff's brief the staff's position is
16 that the issues raised in the petition are
17 inappropriate for an evidentiary hearing. The staff
18 respectfully requests that this Board deny the
19 petition. Thank you.

20 CHAIRMAN RYERSON: Thank you, Mr. Hair.
21 Let's begin, Ms. Skolnick, with -- I have a few
22 questions about the union's position on safety, what
23 its claims are concerning safety. And I'd like to ask
24 you those. And if after we're finished with those
25 questions there's anything else you would like to say

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1 in response to the motion feel free.

2 MS. SKOLNICK: okay, thank you.

3 CHAIRMAN RYERSON: But let's begin with
4 some questions about it. And my first question is
5 does Local 15 claim that the confirmatory order has an
6 adverse impact on safety. I know that your position
7 is that that is not necessary, to have an adverse
8 impact on safety.

9 MS. SKOLNICK: You're right, Your Honor,
10 yes.

11 CHAIRMAN RYERSON: But do you make that
12 claim?

13 MS. SKOLNICK: We believe that because of
14 its breadth and its vagueness, yes, that the
15 confirmatory order does have an adverse impact on
16 safety. And I think I touched on that in my opening
17 statement with regard to the confusion that employees
18 could reasonably have in the face of an order that is
19 not -- that doesn't link, for example, illegal
20 activity to nuclear safety concerns, and doesn't
21 expressly define the kinds of illegal activity that
22 are to be reported.

23 I think the result of that is a natural
24 tendency for employees to wonder about what exactly is
25 reportable. So, and I think that a natural

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1 consequence of that is that there's the possibility
2 that some conduct that should be reported and that
3 might bear on nuclear safety will go unreported
4 because there's a lack of clarity about that.

5 CHAIRMAN RYERSON: So, your position is
6 that the confirmatory order has made less clear than
7 the regulation itself what must be reported?

8 MS. SKOLNICK: Well, I think that the
9 problem is that you have to read the confirmatory
10 order as a discrete document. I don't think that --
11 I mean, as long as you read the confirmatory order as
12 a discrete document you're looking at what's on the
13 face of that document. And it's not cabined in the
14 same way that the regulations are.

15 I mean, I think the regulations, you know,
16 looking at what 73.56 requires, and even looking at
17 what my distinguished counsel over here said, every
18 time they refer to those kinds of reporting
19 obligations they are clearly and distinctly tied to
20 those nuclear safety concerns. The order doesn't do
21 that. So I think in that regard it muddies the waters
22 with regard to what's reportable.

23 CHAIRMAN RYERSON: And what's your
24 response to the argument that at least implicitly any
25 of these requirements are tied to nuclear safety? I

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1 mean, why else would they exist? Why else would we
2 have them?

3 MS. SKOLNICK: Well, that may be the case
4 implicitly. I haven't seen anything in the law that
5 makes that clear. And the fact remains that the order
6 which is what's out there for the employees to look at
7 doesn't say that on its face.

8 CHAIRMAN RYERSON: Okay. When in your
9 pleadings did Local 15 first make this claim, that
10 there is an adverse effect on safety?

11 MS. SKOLNICK: Thank you for that
12 question. And I think that goes into our response to
13 the motion to strike. Because I think the law is very
14 clear that while we cannot raise brand new contentions
15 in our reply we are absolutely entitled to respond to
16 and focus on, and this is from a 2006 case, any legal,
17 logical, or factual arguments presented in the answers
18 and the amplification of statements that we provided
19 in our initial petition is legitimate and permissible.

20 In our petition, in our original petition
21 at 18 and at 17 and 18 we made a couple of assertions
22 concerning the breadth, vagueness and ambiguity of the
23 confirmatory order's observation and reporting
24 requirements.

25 And we observed there that they were not

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1 carefully tailored to address legitimate concerns for
2 health and safety.

3 We also said in our initial petition that
4 we did not believe that it would be unsafe for Dresden
5 and other -- the rest of Exelon's fleet to operate in
6 the absence of the changes that the confirmatory order
7 requires with the implication being that the
8 confirmatory order did not make things more safe.

9 And so --

10 CHAIRMAN RYERSON: If I may stop you
11 there.

12 MS. SKOLNICK: Sure.

13 CHAIRMAN RYERSON: The question of whether
14 it may make things more safe is different from whether
15 it actually makes things less safe.

16 MS. SKOLNICK: Sure.

17 CHAIRMAN RYERSON: And in your initial
18 petition did you make the argument that you do make in
19 your reply that somehow the confirmatory order makes
20 things less safe? In other words, we do not -- I
21 think you understand, we do not have the ability to
22 try to write a better confirmatory order. Perhaps we
23 could. Perhaps it could be more clear.

24 But the question is does the order as it
25 exists make things less safe. And that is your

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1 position in your reply as I take it. Did you make
2 that argument in your petition?

3 MS. SKOLNICK: Your Honor, I think we did
4 not do a very good job of connecting the dots between
5 our assertion in the initial petition that the order
6 was over-broad and vague and the natural implications
7 of that position. It was in response to certain
8 arguments made by both Exelon and staff in their
9 answers that we realized we needed to sharpen that
10 point.

11 So I think you're right that we did not do
12 a particularly good job in our initial pleading of
13 connecting those dots between the deficiencies in the
14 order and the natural safety implications.

15 CHAIRMAN RYERSON: And in your reply you
16 reach the conclusion, you assert that the confirmatory
17 order could make things less safe. But do you explain
18 that? You've explained that this morning, but do you
19 really explain that in your reply?

20 MS. SKOLNICK: In the reply we didn't go
21 into detail on that point, no.

22 CHAIRMAN RYERSON: Let me ask you this.
23 You submitted with your petition an affidavit from Mr.
24 Specha. Am I pronouncing his name properly?

25 MS. SKOLNICK: I think so, yes.

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1 CHAIRMAN RYERSON: And does his affidavit
2 address the question of whether the confirmatory order
3 makes things less safe at the reactor?

4 MS. SKOLNICK: Your Honor, I do not
5 believe that that affidavit does address directly that
6 question.

7 CHAIRMAN RYERSON: Okay. I think those
8 are my questions that pertain to the --

9 MS. SKOLNICK: Actually, I'm sorry, Your
10 Honor. I just had a chance to look at Mr. Specha's
11 affidavit. He does say that the changes announced in
12 the confirmatory order result in very broad
13 observation and reporting obligations. Further, it is
14 unclear exactly what type and scope of unusual,
15 aberrant and/or illegal conduct I will be expected to
16 report.

17 CHAIRMAN RYERSON: So he expresses what he
18 sees as a problem with the uncertainty of the
19 standard.

20 MS. SKOLNICK: Right.

21 CHAIRMAN RYERSON: He doesn't take the
22 next step and say that that makes things less safe.

23 MS. SKOLNICK: Yes, you're right.

24 CHAIRMAN RYERSON: He will avoid a
25 reporting because of the uncertainty. He doesn't say

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1 that explicitly.

2 MS. SKOLNICK: You're right, Your Honor.

3 CHAIRMAN RYERSON: All right. Is there
4 anything else that you would like to say in response
5 to the motion? I think we may have covered the point.

6 MS. SKOLNICK: Well, I think I just want
7 to make it clear that we believe that what we put in
8 our reply was clearly both an amplification, a
9 sharpening of what we had in our original petition,
10 and directly responsive to various arguments raised by
11 Exelon and staff in their answers.

12 I can point you to particular passages
13 within their answers that we feel our reply was
14 responsive to if you feel that would be helpful.

15 CHAIRMAN RYERSON: I think -- we'll spot
16 those most likely.

17 MS. SKOLNICK: Okay.

18 CHAIRMAN RYERSON: Judge Karlin, do you
19 have a question?

20 JUDGE KARLIN: Well, I have a question
21 with regard to the motion to strike.

22 CHAIRMAN RYERSON: What I was going to
23 suggest was I don't have that many questions on
24 standing. And when I finish if it's all right then if
25 either of you have questions that relate to the motion

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1 to strike we'll follow up with that.

2 So, for the moment then we'll put aside
3 the motion but there will be maybe further questions
4 addressed to that. Perhaps we'll give Mr. Kuyler a
5 final shot to say something about it.

6 I do have a few other questions, Ms.
7 Skolnick, for you, I think most of which probably
8 relate primarily to standing although I think one of
9 the parties has observed that some of the issues on
10 standing also seem somewhat embedded in some of the
11 issues with regard to the contentions themselves.

12 But let me ask you this question. When a
13 company such as Exelon comes to the settlement table
14 and tries to settle a dispute with the NRC doesn't the
15 company in effect warrant that it has the authority to
16 deliver on whatever its promises may be? I mean,
17 can't the agency reasonably assume that in negotiating
18 a settlement with a company?

19 MS. SKOLNICK: Well, I think that's
20 certainly a reasonable position for the agency to
21 take. And it's unfortunate that in a situation like
22 the one that occurred that Exelon did not divulge to
23 the agency that it had certain other obligations that
24 may conflict with those it might be entering into.

25 I think it would be something to consider.

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1 Certainly many of the facilities that are regulated by
2 the Commission do not have those kinds of collective
3 bargaining obligations. But where they exist I think
4 it would behoove the Commission to be aware of those
5 obligations and perhaps to consult with the licensee
6 as to whether those obligations might need to be taken
7 into consideration when they enter into ADR.

8 CHAIRMAN RYERSON: Let me give you a
9 hypothetical. Suppose there's some sort of security
10 breach, physical security breach at a reactor. And
11 the company comes in to settle a possible enforcement
12 action. And it says we'll double the number of guards
13 at the facility. It's got a contract with a security
14 firm of some kind. And the agency says that sounds
15 nice, let's do that. Let's double the number of
16 guards at the facility.

17 But the contract that the company has with
18 the guard company doesn't provide for that number of
19 guards. Probably as a practical matter the company
20 will be very happy because they will get more
21 business, but their contract doesn't provide for it.

22 Would they in theory in your view have the
23 ability to demand a hearing in front of a licensing
24 board, the NRC? Because they are being affected, are
25 they not? The company is being affected, now has to

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1 produce twice as many guards.

2 MS. SKOLNICK: Well, I guess the question
3 would be whether the company was adversely affected.
4 And it would not seem to me that they would be able to
5 make that claim.

6 I think you could posit a hypothetical
7 where the company might be adversely affected truly by
8 the order and then in that case I think they would
9 stand in the same shoes that we do.

10 CHAIRMAN RYERSON: Let's talk a little bit
11 about the NLRB proceeding that you also have under
12 way. The status of that is -- do you still have a
13 hearing scheduled for April on that claim?

14 MS. SKOLNICK: As we said in our response
15 to your questions the Board, the region has issued a
16 complaint which is right now set for April.

17 There have been some developments in that.
18 Yesterday we actually filed a new charge to cover
19 specifically Exelon's conduct in the month of January
20 with regard to its revision to the behavioral
21 observation program.

22 I think that it's likely that that hearing
23 in April will not take place as scheduled. The Board
24 will most likely investigate the new charge. And as
25 is often the case where there are closely related

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1 charges if the Board were to find merit in the new
2 charge they may choose to amend the complaint that's
3 out there and then that would result in a new hearing
4 date.

5 CHAIRMAN RYERSON: And again, why is the
6 simultaneous NLRB proceeding not adequate in your
7 view? There is a provision in the confirmatory order
8 that the regional administrator for Region 3 of the
9 NRC can relax or rescind the order for good cause.

10 So I guess the question that occurred to
11 me is if you obtain, if the union obtains an order
12 from the NLRB giving some remedy can't -- and I may
13 ask this question of Mr. Hair as well. Can't the
14 union then come -- or rather, oh I see. Wouldn't
15 Exelon -- maybe I have this question for everybody.
16 Wouldn't Exelon be able to come to the NRC and say
17 look what they've done to us. We need to try to
18 change this order in some way in light of what the
19 NLRB has done.

20 But first starting with you, why is that
21 not a satisfactory remedy?

22 MS. SKOLNICK: A couple of reasons. I
23 mean, first I think you answered part of your own
24 question by acknowledging that it would have to be
25 Exelon that would have to come. We would not have the

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1 power to do that, at least under the way that order is
2 drafted.

3 Second of all, I think we were clear in
4 our answers to your questions the complaint that has
5 been issued by the Labor Board does not actually
6 address the confirmatory order. And I think you can
7 understand that reluctance on the part of a sister
8 agency to tread on the purview of the Nuclear
9 Regulatory Commission.

10 So, at least as things stand that
11 complaint will not address the actual confirmatory
12 order. So, the only venue where we can address the
13 confirmatory order is here.

14 MS. TEITELBAUM: Your Honor, may I?

15 CHAIRMAN RYERSON: Yes.

16 MS. TEITELBAUM: I'm dealing with the NLRB
17 charge. And in fact the NLRB, the regional director,
18 not the NLRB because we're at that stage of the
19 regional director has made it very clear that they do
20 not believe they have any power to change the
21 confirmatory order. And that they ask the same
22 questions you're asking here, when is the NRC going to
23 rule and are waiting around to see that. So, these
24 are two different things. Only you in the Board's
25 decision have the power to change the confirmatory

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1 order in this case.

2 MS. SKOLNICK: Although to be clear we're
3 not --

4 CHAIRMAN RYERSON: We can't change it. We
5 can dissolve it.

6 MS. SKOLNICK: Right.

7 MS. TEITELBAUM: Correct. And Exelon is
8 arguing to the regional director that the regional
9 director doesn't have any power to do anything with
10 respect of our charge because they are required to do
11 what they're doing by the NRC. So, you see the catch-
12 22 we're in.

13 CHAIRMAN RYERSON: Let me get first
14 Exelon's view on that issue. Mr. Kuyler, let me put
15 essentially the same hypothetical to you. If there
16 were an order in the NLRB proceeding would that not
17 give you an opening to make a good cause showing in
18 your view under the confirmatory order before the NRC?

19 MR. KUYLER: Yes, Your Honor, if there
20 were such an order in the NLRB proceeding and Exelon
21 was required by the NLRB to make changes to its BOP
22 then it certainly could come to the NRC and seek a
23 relaxation of the confirmatory order.

24 But I think it's important to keep in mind
25 the distinctions here. The confirmatory order that

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1 Exelon has entered into binds Exelon. So, if there is
2 a violation of the confirmatory order the NRC can take
3 enforcement action against Exelon. Exelon's
4 behavioral observation program had to be revised to
5 meet the confirmatory order.

6 If one of the Local's members violates
7 Exelon's behavioral observation program that is an
8 issue between Exelon and the Local, potentially before
9 the NLRB, but that's not an issue for the Nuclear
10 Regulatory Commission.

11 CHAIRMAN RYERSON: Mr. Hair, did you want
12 to comment on behalf of the administrator for Region
13 3?

14 MR. HAIR: Given that she's in the room,
15 Your Honor, I don't want to speak for her.

16 However, I think we would certainly prefer
17 that such issues be resolved prior to the issuance of
18 the confirmatory order. However, we would entertain
19 that.

20 An order from the NLRB as a showing of
21 good cause, we would consider that seriously. And I
22 think that's all the staff's in a position to talk
23 about.

24 CHAIRMAN RYERSON: Okay, thank you.

25 JUDGE KARLIN: Can I ask on that one? I

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1 just have to ask this question. You posit, I believe,
2 Mr. Hair and Mr. Kuyler, that if the NLRB was to issue
3 an order ordering the company not to implement the
4 behavioral observation program that has been imposed
5 by the NRC that the company could go back to the NRC
6 and ask to rescind it.

7 The chances of the NLRB issuing such an
8 order are about 1 million to 1 so it seems like a
9 strange situation. Because the NLRB is not going to
10 order the behavioral observation program be changed.
11 They may say it's an unfair labor practice, but is
12 there any possibility you think that the NLRB will
13 order the behavioral observation be restored to
14 whatever it was before? Mr. Kuyler?

15 MR. KUYLER: If we may have just a second.

16 JUDGE KARLIN: It's an easy question. It
17 isn't going to happen.

18 MR. KUYLER: Your Honor, I would observe
19 that the NLRB Region 13 has already in issuing its
20 charge they allege a potential violation of effects
21 bargaining, but not decisional bargaining.

22 JUDGE KARLIN: I'm not sure what that
23 means but I don't think it means that the NLRB is
24 going to order you to restore your BOP to something
25 that the NRC has ordered you to do.

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1 MR. KUYLER: Yes, Your Honor.

2 JUDGE KARLIN: Thank you. So it's a false
3 hypothetical. It isn't going to happen.

4 MR. MATTHEWS: Judge Karlin, my colleague
5 Ray Kuyler was pointing out that the union has already
6 asked the NLRB that specific question. And the region
7 didn't conclude that the confirmatory order was a
8 violation. The region did not --

9 JUDGE KARLIN: A violation of the NLRB's
10 unfair labor practice issues.

11 MR. MATTHEWS: Of the NLRN.

12 JUDGE KARLIN: That's the point. Whether
13 it's an unfair labor practice, they have jurisdiction.
14 Whether this confirmatory order is legitimate under
15 the regs is our jurisdiction.

16 MR. MATTHEWS: Exactly, Judge Karlin.

17 CHAIRMAN RYERSON: Back to Ms. Skolnick.
18 Another hypothetical for you. Mr. Specha is concerned
19 that the vagueness or ambiguities in the confirmatory
20 order put him in a quandary. He asserts he doesn't
21 know what sorts of things he must report and what
22 sorts of things he does not have to report.

23 If Mr. Specha were disciplined by Exelon
24 for failure to report, two questions for you. Would
25 he have under the union agreement or otherwise a right

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1 to a hearing before discipline were imposed? And if
2 so, could he raise the ambiguity or vagueness of the
3 confirmatory order as a defense in a case like that?

4 MS. SKOLNICK: That's a complicated
5 question. In the labor law context typically an
6 employee can be disciplined only for just cause.

7 Part of the just cause inquiry is whether
8 there was an investigation into the event that caused
9 the discipline. So, at least theoretically pursuant
10 to that sort of just cause standard Mr. Specha would
11 have been entitled to some kind of a meeting, some
12 kind of an opportunity to respond to the allegations
13 of the employer.

14 In terms of raising the ambiguity, first
15 of all, I think that he probably would have been
16 disciplined under your hypothetical pursuant to the
17 behavioral observation program. And that is not what
18 we're here about today. What we're here about today
19 is the confirmatory order.

20 And I'm not sure that in the context of
21 discipline by Exelon pursuant to the behavioral
22 observation program that Mr. Specha would be able to
23 raise the vagueness and ambiguity of the confirmatory
24 order. Those are two separate documents.

25 CHAIRMAN RYERSON: Mr. Kuyler, do you have

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1 a view on that? Whether the employee would be able to
2 raise alleged vagueness in the confirmatory order. Who
3 were being disciplined by Exelon.

4 MR. KUYLER: Your Honor, if he was being
5 disciplined by Exelon for violation of the Behavioral
6 Observation Program, there -- and a charge of
7 vagueness were raised, I think the first place one
8 would look is to Revision 10 to the Behavioral
9 Observation Program.

10 The one that's in place right now, which
11 Exelon was required to institute because of the
12 Confirmatory Order and if you look there, the cause of
13 the Confirmatory Order's requirements, Exelon put in
14 additional specificity.

15 Examples of those types of behaviors that
16 are off-site, off duty and clearly -- and reportable.
17 And other examples of behaviors that, in Exelon's
18 view, are not reportable. And minor traffic
19 violations are in those -- is identified in Rev 10 as
20 something that is not reportable. Whereas, engagement
21 with an organization that advocates the violent
22 overthrow of the government is.

23 So I think there is greater specificity
24 than there was before and certainly more specificity
25 within what's in the regulations which require the

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1 reporting of any questionable behavior.

2 MS. SKOLNICK: May I respond to that --

3 CHAIRMAN RYERSON: Yes, you may.

4 MS. SKOLNICK: -- Your Honor?

5 With all due respect to Mr. Kuyler, I
6 think what's in the BOP is irrelevant to the question
7 that's before this Board. The question that's before
8 the Board concerns the Confirmatory Order and I
9 appreciate, you know, Mr. Kuyler's observations about
10 the BOP, but I don't that's particularly relevant to
11 this question.

12 CHAIRMAN RYERSON: Yes, I mean the
13 question that I had was the allegation is that well,
14 there are types of conduct. He sees somebody running
15 over the speed limit by three miles per hour, does he
16 have to report it? My guess is that he doesn't;
17 nobody's going to discipline him because of that.

18 And so I sort of wonder whether, you know,
19 we're trying to define things in a way that may not be
20 necessary in part because they aren't really going to
21 happen. No one's going to discipline him for failing
22 to report a colleague's going three miles per hour
23 over the speed limit.

24 And also, if they did, is here some due
25 process opportunity for the employee to assert, you

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1 know, I couldn't possibly have known that I was
2 supposed to report speeding at three miles per hour
3 over the speed limit. And that, I guess that's my
4 question and you're saying to me, as I understand it,
5 it is not clear you would have that opportunity?

6 MS. SKOLNICK: I think that's speculative,
7 and you know, yes, I think that's part of our concern.

8 JUDGE KARLIN: Following on that, I think
9 that the confirmatory Order does require the reporting
10 of illegal activity. And your suggesting to Mr.
11 Kuyler that, well, the BOP in Rev 10 says minor
12 illegal activity you don't have to report.

13 But if Mr. Specha was driving to work one
14 day with his colleague and he observed his colleague
15 going 57 miles per hour in a 55 zone, under the terms
16 of that Order, that would be an illegal activity and
17 he would by duty bound to report it, it would seem.
18 And if you chose to prosecute him for that, he
19 couldn't say, well, the thing is not clear.

20 It is clear, any illegal activity. And so
21 I guess what you're saying is sort of trust us. We
22 won't prosecute people, just trust us. Minor illegal
23 activity is okay with us. NRC may not like it, but
24 it's okay with us. We'll let it slide. Isn't that
25 sort of a trust us argument?

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1 Mr. Specha would be nailed for doing an
2 illegal activity whether you were going to be
3 indulgent on him or not.

4 MR. KUYLER: Yes, Your Honor, I believe
5 you're referring to Page 3 of the Confirmatory Section
6 3(a) where it says that it confirms that Exelon
7 revised the BOP to indicate that it includes an
8 expectation to report off-site illegal activity.

9 JUDGE KARLIN: Yes.

10 MR. KUYLER: I think the best way out of
11 that hypothetical situation is that when Exelon
12 identifies those minor violations, minor traffic
13 violations, parking tickets, that's not within the
14 scope of the illegal activity that's been contemplated
15 here in this.

16 KARLIN: How do we know that? That's not
17 what I see. It just says illegal, it doesn't say
18 minor. It doesn't say except minor.

19 The Confirmatory Order mandates the
20 reporting of any illegal activity. The fact that you
21 may decide to let him off one day and you decide not
22 to let him off another day. Trust us doesn't change
23 what the words in the Order are.

24 MR. KUYLER: I believe, Your Honor, that
25 there is more definition given to these issues in the

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1 Behavioral Observation Program.

2 JUDGE KARLIN: And how about the Regs?
3 How about the law? I can't speak for your Behavioral
4 Observation Program. You can change your Behavioral
5 Observation Program tomorrow and eliminate that minor,
6 you know. You've changed it a bunch of times, you can
7 change it again. It's a trust us argument, isn't it?

8 MR. KUYLER: No, Your Honor, because when
9 this text was written, the Rev 9 of the Behavioral
10 Observation Program was already in place. So Exelon
11 had already identified and made specific changes that
12 the NRC was endorsing. So one would have to look to
13 the --

14 JUDGE KARLIN: Well, I'm not asking what
15 your BOP looked like in Rev 8, 7, 9 and 10. I'm
16 saying what this Confirmatory Order mandates.

17 MR. KUYLER: Yes. A couple of points on
18 that, Your Honor.

19 First, this is just recognizing what
20 Exelon has already done. But also the individual
21 who's sitting in the passenger seat of the car isn't
22 actually bound by this Confirmatory Order. He or she
23 would be bound by the Exelon Behavioral Observation
24 Program, but also the Regulations.

25 JUDGE KARLIN: So NRC is powerless to

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1 enforce the violation of this Confirmatory Order by an
2 individual employee?

3 MR. KUYLER: Exelon has entered into this
4 Confirmatory Order, Your Honor.

5 JUDGE KARLIN: NRC is powerless to enforce
6 a violation of this Confirmatory Order by an
7 individual employee?

8 MR. KUYLER: Yes, it can take action
9 against Exelon but not against the individual.

10 JUDGE KARLIN: Okay. Do you agree with
11 that Mr. Hair?

12 MR. MICHEL: I agree practically speaking,
13 Your Honor. I think the provisions in the
14 Confirmatory Order apply to changes that the licensee
15 must make to its programs. They're not direct
16 affirmative requirements for individuals so I'm not
17 saying that there's no possible way for an individual
18 to violate this. This is inspectible, it's
19 incorporated into the Order. It's a requirement.

20 JUDGE KARLIN: Isn't the Order based
21 entirely on violations or alleged violations by
22 individuals?

23 MR. MICHEL: That's correct. They're
24 based on individual actions of which the licensee is
25 responsible for. So this is, although the NRC did

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1 take individual enforcement actions and issued orders
2 as was mentioned earlier today, this Order really has
3 to do with the licensee's portion of the -- the
4 responsibility for those violations as the individual
5 employees --

6 JUDGE KARLIN: All right, I'll get that
7 that later.

8 CHAIRMAN RYERSON: Yes, I have I think
9 just two or three questions and then maybe we can take
10 a break.

11 Ms. Skolnick?

12 MS. SKOLNICK: I'm beginning to feel like
13 I'm in law school --

14 CHAIRMAN RYERSON: I have too many
15 questions for you.

16 MS. SKOLNICK: -- again with all these
17 hypotheticals.

18 CHAIRMAN RYERSON: This is not a
19 hypothetical. It's simply, I'm trying to understand
20 a point you made that seemed to cut the other way
21 against it.

22 You say on your original Petition on Page
23 20, you say it is important to note that the changes
24 to Exelon's Behavioral Observation Program recited by
25 the Order were not imposed upon Exelon by the NRC.

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1 In other words, you're saying the NRC
2 didn't require any of this and I'm a little confused
3 as to how that cuts in terms of your standing
4 argument.

5 MS. SKOLNICK: Right and I think that may
6 not have been well articulated. The point that I
7 think we were trying to make there was that Exelon
8 voluntarily entered into the ADR. Exelon voluntarily
9 entered into the Settlement Agreement.

10 The Confirmatory Order really just
11 memorializes a Settlement Agreement that Exelon
12 voluntarily entered into. And therefore, the terms
13 that are embodied in the Confirmatory Order were
14 voluntarily agreed to by Exelon.

15 Now that doesn't mean that the
16 Confirmatory Order adds an entry of the commission,
17 doesn't have the force of law. But just that Exelon
18 had choices when it agreed to the conditions that are
19 set forth in the Order.

20 CHAIRMAN RYERSON: Yes, I mean to me,
21 maybe that pertains more to your third contention in
22 front of us and --

23 MS. SKOLNICK: Right.

24 CHAIRMAN RYERSON: -- to the proceeding
25 before the NRB that the company was acting in ways

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1 that, well, the company was acting without the Union
2 and without being required to do so.

3 But then your point is that once there's
4 an Order then you have a right to Petition to have a
5 hearing on that Order. Okay.

6 Mr. Hair, what is your response to the
7 point that's made by the Union here that you have
8 asserted, I think Exelon has asserted as well, that
9 Exelon and the NRC had these extensive negotiations
10 and ended up with a Confirmatory Order that changed
11 not one iota the requirements and responsibilities
12 that Exelon already had. I mean, am I
13 misunderstanding your position? Let me start with
14 you. Is that the NRC staff's position?

15 MR. MICHEL: In a way, Your Honor, it is.
16 The Confirmatory Order did not broaden the reach of
17 the regulations under Part 73. What they did was, you
18 know, and as part of the ADR process, this is sort of
19 the expectation of the agency.

20 The agency seeks to gain a bit more
21 creativity, for lack of a better term, and ways to
22 address apparent violations. And because of that, the
23 licensees that engage the NRC with ADR typically come
24 to the table with proactive items that they've already
25 taken as corrective actions to address the apparent

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1 violations.

2 So the NRC takes notice of those as ways
3 to improve the implementation of those regulations at
4 the facility. So while the Order in and of itself is
5 not intended to be a broadening of the NRC's
6 regulatory scope in this in this way or change the way
7 we regulate access authorization of behavioral
8 observation. It was simply a way to bolster the
9 implementation of this program at this specific
10 facility and fleet wide at Exelon.

11 CHAIRMAN RYERSON: Thank you.

12 And Mr. Kuyler, do you agree with that?
13 Did Exelon see the Order as expanding its obligations
14 in some way or I think you also took the position it
15 really did not expand them, it may have clarified
16 them, I guess?

17 MR. KUYLER: That's correct, Your Honor.

18 CHAIRMAN RYERSON: Okay.

19 MR. KUYLER: But the Confirmatory Order is
20 not vacuous as the Local has suggested simply because
21 it didn't expand the scope of reporting requirements.

22 The NRC obtained a specific set of
23 benefits by imposing the Confirmatory Order. It got
24 additional clarifications in Exelon's program,
25 additional training and effective assessment,

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1 presentation on Exelon's dime to the industry to
2 expand awareness of this issue and specific deadlines
3 by which all those things had to be completed.

4 So the NRC obtained benefits out of this.
5 Exelon, for its part, was able to avoid potential
6 escalated enforcement action, fines and credit under
7 the RRP for not having that sort of that escalated
8 enforcement action. So it's not vacuous, Your Honor.

9 CHAIRMAN RYERSON: All right, I have one
10 more question and I think we'll take a short break.
11 This is for you, Mr. Hair.

12 In your written answers to our questions,
13 Footnote 9 on Page 3, I just wanted to clarify that I
14 understand your position. It's the second sentence in
15 that Footnote says, this does not mean that Exelon
16 employees are unaffected by the Confirmatory Order and
17 as such, Exelon employees have the right to request a
18 hearing in this proceeding.

19 I take it what you're saying, consistent
20 with everything else that you're argued, is that the
21 employees are affected and, therefore, they have an
22 opportunity to request a hearing but you're not
23 conceding either that they have standing under
24 2.309(d) or that they are necessarily affected within
25 the meaning of 202.

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1 Do I correctly understand your position?
2 You're not conceding that they're properly in front of
3 us and we're past standing as far as the Union is
4 concerned?

5 MR. MICHEL: Yes, Your Honor, I think
6 you've correctly stated our position on that. They
7 have the opportunity to request the hearing and this
8 gets back to the idea that this exercise, the staff
9 permitting third parties to request a hearing is a
10 safety valve for the agency in case there are
11 unintended consequences with safety consequences of
12 its Enforcement Orders.

13 CHAIRMAN RYERSON: Okay. All right,
14 before we take a break, I should state that if anyone
15 picks up refreshments in the ten minutes or so, the
16 only refreshments allowed in the Courtroom are water,
17 in addition to the cell phone rules that apply in this
18 Courtroom.

19 I think we'll take an eight minute break
20 and resume at -- that's even - definitely a ten minute
21 break. We'll resume at 10:50.

22 MARSHALL: All rise.

23 (Whereupon the foregoing matter went off
24 the record at 10:42 a.m. and went back on the record
25 at 10:53 a.m.)

1 CHAIRMAN RYERSON: Very well. I think
2 Judge Karlin has some questions at this point.

3 JUDGE KARLIN: Yes. Thank you.

4 I'd like to address some questions to Mr.
5 Hair and focus on the Order itself that appears in the
6 Federal Register so I can understand it a little
7 better. I'm going to refer to the Federal Register
8 version which I have marked up in seven different
9 colors, as you can see. And I have some questions
10 about it.

11 On the Federal Register November 7, 2013,
12 78 Fed. Reg. 66965 the Confirmatory Order is published
13 and I'm going to refer to that Page 66965 from the
14 beginning.

15 I read the Confirmatory Order, Mr. Hair,
16 and I've tried to discern whether the violations that
17 were of concern to the NRC and I see an essential
18 problem with that Order for violations listed. And
19 I'm going to ask you about each of them.

20 On violation number one, an EO, and I'm
21 going to synopsise here, an EO failed to report
22 concerns regarding the behavior changes. Is that
23 right?

24 MR. MICHEL: That's correct, Your Honor.

25 JUDGE KARLIN: So that's an individual

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1 failed to report something that he was supposed to
2 report.

3 MR. MICHEL: Yes, Your Honor.

4 JUDGE KARLIN: Is that a violation by
5 Exelon?

6 MR. MICHEL: Yes, Your Honor. Exelon is
7 responsible for the conduct of its employees.

8 JUDGE KARLIN: So Exelon is automatically
9 responsible when any employee goes off on a detour and
10 frolic and fails to report it?

11 MR. MICHEL: To be --

12 JUDGE KARLIN: Exelon's automatically
13 responsible every time an employee doesn't report?

14 MR. MICHEL: To the extent that an
15 employee violates the affirmative requirements and
16 access authorization regulations, then yes, Exelon is
17 automatically.

18 JUDGE KARLIN: Let's go through the next
19 one, number two.

20 An SRO with unescorted access failed to
21 report. So again, we're dealing with an individual
22 who failed to report something.

23 MR. MICHEL: Yes, sir. An individual who
24 is also an NRC licensee by virtue of their Senior
25 Reactor Operations.

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1 JUDGE KARLIN: Is that relevant to whether
2 they have to report or not?

3 MR. MICHEL: No, Your Honor.

4 JUDGE KARLIN: Okay, so we don't need to
5 talk about that.

6 Violation number three, an SRO failed to
7 report. So again we're talking about an individual's
8 behavior or someone who failed to report.

9 MR. MICHEL: Yes.

10 JUDGE KARLIN: All right.

11 And then number four, were there four
12 people in this conspiracy an SRO failed to report?

13 MR. MICHEL: Yes, sir, there was a fourth
14 individual identified by the NRC investigation.

15 JUDGE KARLIN: So all these were
16 violations by individual employees?

17 MR. MICHEL: All these were --

18 JUDGE KARLIN: Allegedly violations.

19 MR. MICHEL: Allegedly violations of both
20 the individuals and a licensee, as I said previously,
21 by virtue of the licensee being responsible for the
22 conduct of its employees.

23 JUDGE KARLIN: Does the Confirmatory Order
24 say anywhere that there's an alleged violation by the
25 company?

1 MR. MICHEL: That I'm not sure of, Your
2 Honor, if we spell that out specifically.

3 JUDGE KARLIN: Does the -- yes, that's
4 what I want to know. I don't find anything in the
5 Confirmatory Order that alleges the corporation,
6 Exelon, violated anything. And it sounds like the
7 issue Ms. Laufer raised in her nonconcurrency, which
8 I think is very important and I'd like find more about
9 before we rule on this.

10 But my point being, there's nothing in the
11 Confirmatory Order that alleges any violation by
12 Exelon.

13 MR. MICHEL: Your Honor, the way the NRC
14 and the Confirmatory Order put the public on notice
15 that it was a licensee violation is the regulations
16 cited by the NRC in that second column here have to do
17 with -- the first one is 10 CFR Part 73, Section 56.

18 JUDGE KARLIN: Yes, okay, let me go to the
19 Regulations, 10 CFR Part 56 F(3). I want to focus on
20 that one for the moment. I've read them all. I know
21 what they say. But I'd like to focus on the
22 Regulation 10 CFR 56 F(3) says, "individuals who are
23 subject to an access program shall report." So it's
24 a violation by individuals, isn't it?

25 MR. MICHEL: That's correct.

1 JUDGE KARLIN: That that Reg deals with.

2 MR. MICHEL: That's correct, Your Honor.

3 JUDGE KARLIN: And the only violation
4 cited in the Confirmatory Order are violations by
5 individuals.

6 There's no allegation anywhere in that
7 Order that Exelon violated anything. Did they violate
8 the training obligations? Did you allege that?

9 MR. MICHEL: No, Your Honor, that wasn't
10 alleged.

11 JUDGE KARLIN: Did you allege that they
12 failed to implement the training -- the BOP in some
13 way?

14 MR. MICHEL: No, Your Honor.

15 JUDGE KARLIN: Did you allege that the BOP
16 was worded wrong?

17 MR. MICHEL: No, Your Honor.

18 JUDGE KARLIN: I don't see any violations.
19 So the violations were all by individuals and the
20 Regulation 10 CFR 56 F(3) imposes an obligation by
21 individuals, right?

22 MR. MICHEL: That's correct.

23 JUDGE KARLIN: And if individuals don't
24 follow the obligation of the Regs, can the NRC take
25 enforcement action against them?

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1 MR. MICHEL: Yes, it can, Your Honor.

2 JUDGE KARLIN: And that's under 10 CFR
3 Section 7380, you can take civil penalties against
4 those individual workers?

5 MR. MICHEL: Yes, Your Honor, we can take
6 impose a civil penalty upon individuals under certain
7 circumstances.

8 JUDGE KARLIN: Can you issue injunctions
9 against individuals for violating the NRC Regs? Like
10 they can't work in the nuclear industry for ten years?

11 MR. MICHEL: Yes, Your Honor. The NRC
12 does issue Orders every now and then to individuals
13 prohibiting them for certain periods of time.

14 JUDGE KARLIN: Right, Mr. Siemaszko who
15 is cited and Mr. Geisen?

16 MR. MICHEL: That's correct.

17 JUDGE KARLIN: The individuals had been
18 cited for civil penalties. They can be barred from
19 working in the nuclear industry by NRC?

20 MR. MICHEL: That's correct.

21 JUDGE KARLIN: And the NRC can take
22 criminal sanctions against individuals who violate the
23 NRC Regs under 10 CRF Section 7381?

24 MR. MICHEL: I'm not familiar with that
25 section right now, Your Honor. If you'll allow me to

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1 --

2 JUDGE KARLIN: Sure.

3 MR. MICHEL: Your Honor, yes there are
4 criminal penalties associated with certain violations
5 of the Atomic Energy Act. Whether or not it would be
6 NRC imposing criminal sanctions --

7 JUDGE KARLIN: Or going to federal court
8 to have criminal sanctions?

9 MR. MICHEL: That's correct, Your Honor.

10 JUDGE KARLIN: And the NRC can pursue
11 criminal sanctions against an individual worker who
12 failed to comply with this Reg regarding reporting or
13 on the -- and this Order regarding reporting.

14 MR. MICHEL: Yes, Your Honor. Criminal
15 sanctions could result in the violation of NRC
16 requirements.

17 JUDGE KARLIN: And in addition to all of
18 the above, the NRC can also put the individual's name
19 on a blacklist informing other companies in the
20 industry that they shouldn't be hiring that person.

21 MR. MICHEL: Yes, sir. I believe you're
22 referring to a system called PADS, which the acronym
23 evades me at this moment, but yes, that's what the
24 industry uses to identify individuals that may have
25 negative employment history at certain facilities.

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1 The NRC does not require that database,
2 however, it does understand it's use and has taken
3 notice of that in the past.

4 JUDGE KARLIN: So it seems to me that the
5 Confirmatory Order was generated because of what you
6 deemed to be inappropriate behavior by individual
7 workers and the remedy was to change the behavior of
8 individual workers by, shall we posit for the moment,
9 changing the requirements and changing the BOP.

10 I know there's argument whether there's a
11 change or not, let's put that aside for the moment.
12 But it was focused on violations by the individual
13 employees and making sure that in the future,
14 individual employees, workers, behavior would change
15 and they would report more appropriately and more in
16 line with what you thought they should report.

17 MR. MICHEL: I think that's a fair
18 statement, Your Honor.

19 The Confirmatory Order seeks to more than
20 just requiring changes to these programs, require more
21 training and guidance to these employees which is
22 within the purview of the licensees at administration
23 of their access authorization program as they've been
24 given pursuant to our regulations.

25 JUDGE KARLIN: I'd like to refer you to

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1 your Answer, not the answers to the questions, but
2 your Answer on Page 14, please. Are you there?

3 MR. MICHEL: Yes, sir.

4 JUDGE KARLIN: On Page 14 of the staff's
5 Answer, at the top it says, "In this case, the staff
6 tailored the Confirmatory Order to address the
7 individual failures of Exelon employees to report
8 questionable behavior patterns or activities as
9 required.

10 Although the Confirmatory Order led to
11 changes in Exelon's program, the apparent violations
12 in this case did not claim that Exelon's program was
13 entirely deficient, rather the apparent violation
14 alleges Exelon's employees failed to report behaviors
15 of an SRO that involved planning of a criminal
16 nature."

17 So the NRC specifically tailored this
18 enforcement Order to deal with the behavior of
19 individual employees?

20 MR. MICHEL: Yes, Your Honor. The
21 individual employees, their conduct is what resulted
22 in the apparent violations. We've established that.

23 JUDGE KARLIN: Well, aren't the individual
24 employees de facto subject of this Enforcement Order
25 even though they're not named?

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1 MR. MICHEL: The subject of this
2 particular Enforcement Order, and this kind of gets to
3 what we were just discussing a minute ago where the
4 NRC cites both the licensee and the individuals
5 subject to its enforcement policy and guidance in the
6 enforcement manual and that --

7 JUDGE KARLIN: Well let me say -- wait a
8 second. Wait a second. I'll get to the enforcement
9 manual in a minute. Okay? Go ahead. Maybe you were
10 done, I'm sorry.

11 MR. MICHEL: No, what I wanted to
12 communicate, Your Honor, is that the NRC worked with
13 what it could in the Confirmatory Order to make the --
14 the industry doesn't normally regulate to the level of
15 the specific wording of the licensee's access
16 authorization program.

17 So when they come to the table with
18 revisions to the program and ways that we can make it
19 more clear, and the evidence that it may not have been
20 that clear, or all that clear, to the employees was
21 that there were these four apparent violations cited
22 by the NRC Office of Investigations.

23 To the NRC, that was evidence that the
24 program was not as clear as it could be and employees
25 might have the misconception that off-site reporting

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1 requirements were not part of the Behavioral
2 Observation Program.

3 So what the Confirmatory Order did was
4 offer those clarifications in training based on those
5 clarifications to facilitate, in the future, a better
6 result.

7 JUDGE KARLIN: And referring you to Page
8 15 of your Answer, the staff's Answer, the same theme
9 comes through, "In this case the Confirmatory Order
10 memorializes the Settlement Agreement reached with
11 Exelon to address individual failures to report
12 observed behaviors." And you then go on to talk about
13 the failure of several individuals failed to fulfill
14 their requirements in the Behavior Observation
15 Program.

16 So I put it to you, it wasn't the whole
17 thrust of the Confirmatory Order to alter the
18 reporting of individual employees and make it clearer
19 what their duties were?

20 MR. MICHEL: The goal of the Confirmatory
21 Order was to make that clearer for the entirety of the
22 organization.

23 JUDGE KARLIN: Right, okay, let's just get
24 to that in a minute.

25 Now the changes you -- this Order doesn't

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1 just apply to just that one, does it?

2 MR. MICHEL: No, Your Honor. It applies
3 fleet wide.

4 JUDGE KARLIN: It applies to all of
5 Exelon's nuclear power plants? How many do they have?

6 MR. MICHEL: I'm not sure off hand, Your
7 Honor, maybe the --

8 JUDGE KARLIN: Mr. Kuyler?

9 MR. KUYLER: Ten sites, I believe.

10 JUDGE KARLIN: Ten sites? And how many
11 reactors?

12 Mr. KUYLER: Seventeen reactors, Your
13 Honor.

14 JUDGE KARLIN: Okay. And how many
15 employees are covered by that, Mr. Kuyler?

16 MR. KUYLER: That I do not know, Your
17 Honor.

18 JUDGE KARLIN: How many thousands of
19 employees are covered by this Confirmatory Order? Mr.
20 Hair, do you know?

21 MR. MICHEL: I don't know the exact
22 number, Your Honor. I would suspect it's in the
23 thousands.

24 JUDGE KARLIN: Do you know --

25 MS. SKOLNICK: I'm sorry, Your Honor, we

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1 don't know because at some of those plants we do not
2 represent those employees.

3 JUDGE KARLIN: Right, you represent, as I
4 understand, five of the plants in Illinois
5 representing about 5,000 people?

6 MS. SKOLNICK: That's correct.

7 JUDGE KARLIN: Are the reporting
8 obligations of the regulations imposed only on those
9 people who have unescorted access or even if you don't
10 have unescorted access, if you see somebody that does
11 something you think is wrong, you need to report it,
12 you're obliged to report?

13 MR. MICHEL: The Access Authorization
14 Regulations only apply to certain employees and it --

15 JUDGE KARLIN: Right.

16 MR. MICHEL: -- deals with those who have
17 unescorted access or unescorted access authorization
18 and that, I believe it can point us to the scope of
19 the regulation at the beginning of Section 73.56. But
20 that encompasses by and large the --

21 JUDGE KARLIN: And in addition to imposing
22 it on all 17 nuclear power plants operated by Exelon,
23 you ask Exelon, you told Exelon, you Ordered Exelon to
24 go give a presentation to basically NEI and NPO and
25 they've done that. Right?

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1 MR. MICHEL: Yes, Your Honor.

2 JUDGE KARLIN: And is it your
3 contemplation that this new regime will apply
4 throughout the nuclear industry?

5 MR. MICHEL: Well, Your Honor --

6 JUDGE KARLIN: Or is it just going to be
7 Exelon that has to do this?

8 MR. MICHEL: No, Your Honor, the NRC does
9 not anticipate any new regime, as it were, with
10 respect to Behavioral Observation requirements. This
11 is simply the Confirmatory Order addresses an apparent
12 problem at this specific site, the Dresden site, that
13 may apply elsewhere.

14 And you know, at this time, the NRC is not
15 seeing a systemic problem across all of its licensees
16 regarding this issue. However, as the provision of
17 the Order that you just addressed regarding the
18 presentation to NEI and NPO, that provision is
19 designed to ensure that there's awareness within the
20 regulated community about this errant issue and that
21 if clarifications to a licensee's Behavioral
22 Observation Program are, to the extent that they would
23 be a good thing and make sure that the regulations are
24 carried out and they don't have these types of issues
25 where clearly illegal and violent criminal activity

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1 goes unreported, if it addresses those issues then
2 that --

3 JUDGE KARLIN: Wait a second, wait a
4 second. It doesn't say clearly illegal or, you know,
5 it says illegal. Right? Fifty-seven miles per hour
6 is illegal. Right?

7 MR. MICHEL: The prevailing --

8 JUDGE KARLIN: It doesn't say that. This
9 Order doesn't say that. It doesn't say clearly
10 illegal or terrible or going to rob banks. It says
11 illegal.

12 MR. MICHEL: The only place where the
13 Confirmatory Order says illegal is in the provision
14 mentioned earlier today acknowledging an action that
15 Exelon --

16 JUDGE KARLIN: You're blessing that and
17 basically making it an imprimatur that cannot be
18 changed without the NRC approval. Correct?

19 MR. MICHEL: The staff's position is that
20 that particular requirement cannot be read in a
21 vacuum. When read with the entirety of the Order, it
22 gives context to the type of activity we're talking
23 about.

24 JUDGE KARLIN: So is that a trust us
25 argument? Trust us, but we can go out and nail

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1 anybody we're going to go to the ones we want to?

2 MR. MICHEL: The employees with unescorted
3 access that the licensee trusts as trustworthy and
4 responsible is really up to their determination.

5 The NRC does regulate up to a floor that
6 states that their requirement or their program needs
7 to meet certain requirements.

8 JUDGE KARLIN: And that's illegal.

9 MR. MICHEL: The NRC --

10 JUDGE KARLIN: Any illegal activity must
11 be reported. You just blessed that and required it
12 and so now that's the law of the land as far as you're
13 concerned and if somebody doesn't comply with that,
14 you can go after them, can't you?

15 MR. MICHEL: The law of the land -- the
16 NRC's position is that the regulation encompasses that
17 the only word that we used in the regulation is
18 unusual behavior.

19 JUDGE KARLIN: Right, the word -- no, wait
20 a second. Is that in the Reg? Unusual? Show me
21 where that's in the Reg.

22 MR. MICHEL: Yes, Your Honor. In 73.56
23 F(3) the first sentence of that section states that
24 individuals who are subject to an access authorization
25 program under the statute shall, at a minimum, report

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1 any concerns arising from behavior, including, but not
2 limited to concerns related to any questionable
3 behavior patterns.

4 And I apologize, Your Honor, it's
5 questionable behavior patterns, it's not unusual.

6 JUDGE KARLIN: Right.

7 MR. MICHEL: It's my mistake.

8 JUDGE KARLIN: So the Order doesn't use
9 that phrase. The Order doesn't say behavior
10 observation, questionable behavior patterns. It says
11 anything that's illegal, it doesn't even have to be a
12 pattern. Anything that's unusual, it doesn't have to
13 be a pattern. Anything that's aberrant. None of
14 those words appear in the Reg as far as I can find.
15 Correct me if I'm wrong.

16 MR. MICHEL: You are correct.

17 JUDGE KARLIN: Mr. Kuyler, you indicated
18 that the word aberrant behavior in the brief, and it
19 was Footnote 9, is a regulatory term. Where is that
20 in the behavior observation Regs?

21 MR. KUYLER: Aberrant behavior is not
22 defined in the Regulations.

23 JUDGE KARLIN: So it's not a regulatory
24 term? It's maybe a guidance term, but it's not -- and
25 that's not law.

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1 MR KUYLER: It is used in NRC guidance and
2 it's also very specifically defined for the benefit of
3 the Exelon --

4 JUDGE KARLIN: Right, and --

5 MR. KUYLER: -- employees and the
6 Behavioral Observation Program.

7 JUDGE KARLIN: -- and aren't they
8 regulations to be binding on this Board and on NRC and
9 on the parties and I take guidance not to be. So when
10 you say regulatory term, I think it must be law and
11 apparently, it isn't.

12 So the terms, Mr. Hair, aberrant, unusual,
13 illegal do not appear in -- what is it -- 56.73 F(3),
14 do they?

15 MR. MICHEL: No, they do not, Your Honor.

16 JUDGE KARLIN: Why didn't you use that
17 term? Why didn't you use the term questionable
18 behavior patterns? Now pattern is something you're
19 able to get your hands on, it's a repeated thing that
20 happens presumably. And it says activities, now I'm
21 not sure whether that's a pattern of activity or just
22 an activity. Patterns or activities.

23 Okay, so I guess my concern is that the
24 Order seems to be focused on violations by individual
25 employees and it seems to be focused on changing the

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1 behavior of individual employees. Are they not then
2 the de facto subject in some serious sense of the
3 Order?

4 MR. MICHEL: In as much as they are
5 represented by the licensee --

6 JUDGE KARLIN: No, no, no, no, they're not
7 represented by the licensee. NRC and the licensee got
8 in a room and cut a deal and imposed burdens on
9 workers. Is that supposed to mean that they're
10 representing the workers?

11 MR. MICHEL: Absolutely, Your Honor.

12 JUDGE KARLIN: No, they don't represent
13 the workers. The workers own butts are on the line
14 under this Reg. You think when the workers got nailed
15 under that Reg that the company's going to say, oh
16 yes, yes, we're going to defend you. Maybe they will,
17 maybe they won't.

18 MR. MICHEL: That question --

19 JUDGE KARLIN: Do you seriously suggest
20 that the company represents the employees in this
21 matter? They've got different counsel here. Do they
22 think the company represents them?

23 MR. MICHEL: No, Your Honor, I think the
24 Union represents the employees in a different
25 capacity. All the staff is pointing out here is that

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1 when it engaged with the licensee, it views the
2 licensee as a whole in the ADR process, including all
3 of the employees.

4 And while there may be separate interests
5 that result from that --

6 JUDGE KARLIN: Yes?

7 MR. MICHEL: -- I believe those need to
8 take place in the proper channels.

9 JUDGE KARLIN: I was an ADR provider for
10 a year. I did environmental law for 25 years before
11 I got here ten years ago and we did a lot of super
12 fund cases and we did ADR and it was a commonplace
13 situation where the EPA and the PRP's, the people who
14 sent waste to the site, settled a deal whereby the
15 imposed liability on some third party. I was with
16 Shell Oil Company. EPA and Shell would agree, oh yes,
17 Shell will pay ten percent, Exxon will pay 90 percent.
18 Exxon wasn't in the room.

19 Now is this that kind of situation where
20 the staff and the company cut a deal whereby the
21 burdens are imposed on somebody who wasn't in the
22 room?

23 MR. MICHEL: That is certainly not the
24 intention of the process, Your Honor, and having some
25 small familiarity with super fund cases, I can

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1 appreciate that reference. However, no, the
2 provisions of the Order, you know, do put the onus on
3 the licensee to make changes that do impact employees
4 --

5 JUDGE KARLIN: But didn't you just say
6 they specifically tailored to the behavior of
7 individual employees? That's what your brief says
8 repeatedly.

9 MR. MICHEL: That's correct, Your Honor.
10 And what we mean by that is really that --

11 JUDGE KARLIN: And those employees have no
12 opportunity to demand a hearing?

13 MR. MICHEL: Not to demand one.

14 JUDGE KARLIN: They have no opportunity to
15 request a hearing because their interests are merely
16 economic? They don't want to lose their jobs and lose
17 their homes?

18 MR. MICHEL: The staff's position is that
19 the opportunity for a hearing is sort of adequate for
20 the staff to figure out whether or not they are -- the
21 employees here are harmed by the Order.

22 The second question that the staff, you
23 know, it's considered and spoken to in its brief is
24 that harm is really outside of the scope of NRC's
25 purview and under the Atomic Energy Act.

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1 JUDGE KARLIN: Why?

2 MR. MICHEL: The basis for the dispute in
3 the staff's opinion is regarding the Labor Law issue
4 between --

5 JUDGE KARLIN: No, no, no, no, let's
6 forget about contention three, let's just talk about
7 that these people now are going to have to do more
8 reporting, illegal, unusual, aberrant, etc. and if
9 they don't do it, they can be fired, they can go to
10 jail, they can get penalized, they can get
11 blacklisted. And they don't have -- there's an impact
12 there. Let us consider the possibility that there's
13 an impact on these people.

14 But you're saying the impact is merely
15 economic and therefore, they don't have a right to a
16 hearing opportunity, even to request a hearing?

17 MR. MICHEL: No, Your Honor. What the
18 staff was suggesting is that there is no safety -- the
19 safety --

20 JUDGE KARLIN: The safety, now let's talk
21 about safety for a minute.

22 Let's say that the Order was issued to
23 Exelon and Exelon didn't like it. It was not a
24 Confirmatory Order, it was an Order imposing a
25 \$100,000.00 penalty on Exelon. And Exelon wanted to

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1 fight that Order, it's not a Confirmatory Order, and
2 they wanted -- and they said wait a second, that
3 penalty's too high, \$100,000.00 is too high.

4 And you say, well you don't have any
5 standing, Exelon, because you're concern is just
6 monetary. It's not related to safety. Can the
7 licensee raise issues that are not related to safety,
8 but the workers not?

9 MR. MICHEL: In that particular instance,
10 Your Honor, I would agree that the scope of that
11 proceeding would likely not include a challenge to
12 whether or not the civil penalty was too high. I
13 would suspect that there would be safety --

14 JUDGE KARLIN: And the company can't
15 challenge the penalty for being too high?

16 MR. MICHEL: You would --

17 JUDGE KARLIN: Do they do that all the
18 time?

19 MR. MICHEL: Yes, Your Honor. The
20 challenge would be based, however, that the safety
21 consequences either are not there or unwarranted, that
22 the Order is unwarranted by some safety issue.

23 JUDGE KARLIN: No, no, no, no, that's --
24 I don't understand that at all. I mean they can say,
25 A, we're not liable, we didn't violate the Regs so we

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1 shouldn't pay anything. Or B, you're imposing a
2 penalty which is far greater than appropriate for this
3 situation and we want to mitigate and show you all the
4 nice things we've done.

5 They're not raising a safety issue.
6 They're raising an economic issue. The penalty's too
7 high. We don't want to pay it. They have standing,
8 don't they?

9 MR. MICHEL: Well, if we issued the
10 licensee an Order with a civil penalty, they would
11 have standing.

12 JUDGE KARLIN: Okay. All right.

13 Let me just also suggest, and then to Mr.
14 Kuyler and Ms. Skolnick from the Motion to Strike.

15 One of the things you've raised, this is
16 a different topic, certainly a different topic, is
17 whether, was it the Union, the Local 15 raised issues
18 regarding adverse effect on safety and to the extent
19 that the Union, there's an argument that the Union,
20 there's no adverse effect on the Union, to the extent
21 that it involves issues related to the standing of the
22 Union was part --

23 Isn't it true that the Commission's case
24 law specifically allows interveners to cure standing
25 issues in their replies? The Sumner case and the

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1 Belven case both hold by the Commission, in fact,
2 Boards have reversed for not allowing somebody correct
3 in the reply issues related to standing.

4 To the extent safety issues are related to
5 standing, and I'm not sure they are, they can be
6 related to either one, they can cure on the reply. Do
7 you not know that, Mr. Kuyler?

8 MR. KUYLER: I have not read those cases
9 in preparation for this oral argument, but I am
10 familiar with instances where the Commission has
11 allowed parties to cure their representational
12 standing by filing a Declaration that shows that one
13 of their members actually authorizes them to speak on
14 their behalf.

15 Here we have entirely --

16 JUDGE KARLIN: In their reply, in the
17 Sumner case, the Commission reversed the Board for not
18 allowing them, in their reply which is what they did,
19 add an Affidavit and add additional information as to
20 why they claimed to have standing. And the Board was
21 reversed and told to go back and have a hearing on it.

22 MR. KUYLER: Yes, but --

23 JUDGE KARLIN: I just think we ought to
24 put that into the pot when we think about, you know,
25 whether or not they can raise the adverse affect on

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1 standing on the safety in their reply.

2 MR. KUYLER: I would observe, Your Honor,
3 that the new allegation that the Confirmatory Order
4 somehow makes the plant less safe comes up in the
5 context of contentions not standing. So the Local
6 hasn't articulated how this new allegation somehow
7 brings them standing in the other --

8 JUDGE KARLIN: And are you harmed in any
9 way by that one sentence you want stricken? You've
10 had an opportunity to respond to and argue about it,
11 haven't you? Are we to deny a hearing on something
12 that might be very important because there was one
13 sentence that was in there? I mean you have had an
14 opportunity to respond to that issue by raising this
15 issue now.

16 MR. KUYLER: Your Honor, we have had an
17 opportunity to respond orally but not in writing and
18 if that had been part of their original contentions,
19 Your Honor, I believe Exelon would have objected on
20 the basis of --

21 JUDGE KARLIN: How about if we cured it?
22 How about if we gave a short Order giving you ten days
23 to file a little brief on that issues in five pages or
24 less? Could you then -- would that cure your problem?

25 MR. KUYLER: Your Honor, we would still

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1 stand on the objection, although we would take that
2 opportunity if it was granted.

3 JUDGE KARLIN: Okay. Back to Mr. Hair,
4 please.

5 Now let me ask you something, you were the
6 enforcement attorney on this matter, weren't you?

7 MR. MICHEL: Yes, Your Honor.

8 JUDGE KARLIN: Okay. On the Confirmatory
9 Order itself, on Page 66965, again on the Federal
10 Register, you imposed in Section 3(b), the NRC imposes
11 this in Section 3(b) for them to do some additional
12 changes or guidance, you say, in their behavior
13 Observation Program.

14 B(1) says, within 90 days, provide
15 additional guidance on the types of off-site
16 behaviors, and here's what I want to ask about, off-
17 site behaviors, and I'm not worried about the off-
18 site, on-site, that's not an issue and the Union has
19 agreed that's not the issue -- all types of off-site
20 behavior, if observed or credible information that
21 should be reported.

22 Now I understand we're talking about
23 Behavior Observation Program to the point, what is it,
24 10 CRF 73.56(f) of the Behavior Observation Program.

25 Is there anywhere in that Reg that talks

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1 about something on this? Credible information is not
2 observed. Behavior observed or credible information.
3 What is the legal basis for the NRC to impose a
4 requirement that beyond simply observed behavior on
5 credible information? Is there a Reg that talks about
6 that?

7 MR. MICHEL: No, Your Honor, there's not
8 regulation that talks about that and --

9 JUDGE KARLIN: So when the Union says
10 there may be a problem here because you're going
11 beyond the Reg imposing things that are not proper, is
12 this one of the things? Where does credible
13 information come from?

14 MR. MICHEL: Credible information, Your
15 Honor, comes from the guidance and procedures that
16 implement the regulation. The regulation is not --

17 JUDGE KARLIN: Guidance? Guidance? What
18 guidance? Your guidance or their guidance?

19 MR. MICHEL: That's their guidance, Your
20 Honor. Their procedures.

21 JUDGE KARLIN: Their guidance. So, but
22 now you're imposing as a Confirmatory Order, Ordering
23 a company to require workers to report any credible
24 information that should be reported, whatever that
25 means.

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1 MR. MICHEL: The licensee, Your Honor, is
2 directed to consider what additional information
3 related to behavioral observation, as it is kind of
4 cabined by access authorization would need to be in
5 their guidance document to prevent this problem from
6 occurring again.

7 JUDGE KARLIN: And again, you repeat the
8 phrase, or aberrant -- the end of Section B(1),
9 Section 3(b)(1) in the last sentence contains again
10 the phrase it has to report not just behavior,
11 behavior or credible information. And again, the Regs
12 don't have that in them, do they?

13 MR. MICHEL: No, Your Honor, the Regs as
14 we've already noted, are pretty thin with respect to
15 what is actually required in these programs to --

16 JUDGE KARLIN: And that phrase appears
17 several times in the Order and I have to say it
18 troubles me when you say this doesn't reflect a change
19 in any requirement. You know, isn't that change?

20 MR. MICHEL: I --

21 JUDGE KARLIN: It's all totally new as far
22 as I can tell.

23 MR. MICHEL: It's a change to the
24 licensee's procedures and guidance. It does not
25 represent a broadening of the already very broad

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1 behavior observation requirement.

2 JUDGE KARLIN: No, no, no, no, once again,
3 it does represent a broadening. I mean I can
4 understand observed behavior, I observed something and
5 I report it. But if something else, if somebody comes
6 to me in a bar and says, hey, you know what Joe is
7 doing? And maybe I think the guy is credible. So I
8 have to report that?

9 MR. MICHEL: I think I see what you mean,
10 Your Honor. There is a difference between actually
11 observing behavior or hearing about it from a third
12 party.

13 JUDGE KARLIN: Credible information.

14 MR. MICHEL: Right, receiving that
15 information and the line is admittedly a bit unclear
16 with when that rises to the level of an observed
17 behavior.

18 JUDGE KARLIN: All right.

19 MR. MICHEL: And licensees have dealt
20 with this, so Exelon, I can speak to, has dealt with
21 this by inserting language that gives guidance to when
22 you observe that type of information, it -- to the
23 extent that it impacts an individual's trustworthiness
24 and responsibility, it should be reported on.

25 JUDGE KARLIN: Well maybe you should put

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1 that in the Reg then. If that's what you're going to
2 legally require, don't you want people to know what's
3 legally required or are you just going to leave it to
4 Exelon to change its BOP whenever it feels like it?

5 MR. MICHEL: The Regulation is open ended
6 and I believe that was on purpose to make sure that we
7 have a floor that the licensee must build upon --

8 JUDGE KARLIN: Okay, but here in the
9 Confirmatory Order, which is NRC's imprimatur on it
10 requiring a reporting of something which is not
11 required in the Regs. Do you agree with that? Is
12 there anything in the Reg that says that?

13 MR. MICHEL: No, I do agree there's
14 nothing in the Regulation that contains this language
15 or anything that we can point to that says this is
16 exactly where it came from. However, you know, I just
17 want to note for the Board's benefit that Confirmatory
18 Orders tend to get into the level of detail that we
19 would not normally in a traditional Enforcement Order,
20 because we're working together with the licensee to
21 evaluate ways that the licensee can and the NRC will
22 inspect against, improve their implementation of
23 existing Regulations.

24 JUDGE KARLIN: Why do you inspect against
25 something that's not required legally by NRC?

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1 MR. MICHEL: Well, Your Honor, the only
2 thing that the NRC would inspect with this action item
3 in the Confirmatory Order is whether or not they've
4 made those revisions and those revisions have
5 encompassed the types of information that --

6 JUDGE KARLIN: But it would be under --
7 until they make the change, they had this new phrase
8 in there, but it's utterly unenforceable by NRC?

9 MR. MICHEL: The --

10 JUDGE KARLIN: Not to the company but to
11 an employee who says, I'm not going to report any
12 credible -- I'm not going to do that. And you say, oh
13 you have to.

14 MR. MICHEL: I think that question gets to
15 the nature of how these access authorization programs
16 work. The determination of whether or not to grant an
17 individual access authorization or to revoke it, lies
18 with the licensee by design. So the NRC would not go
19 in an inspect, Your Honor, an individual decision and
20 question that decision.

21 We would only do so in evaluating the
22 program as a whole or, as in this case, if we were
23 made aware through investigation or otherwise of
24 individual failure --

25 JUDGE KARLIN: Yes, you have --

1 MR. MICHEL: -- from the Regulation --

2 JUDGE KARLIN: The Reg gives you the right
3 to enforce against individuals.

4 MR. MICHEL: That's correct.

5 JUDGE KARLIN: We've already established
6 that.

7 MR. MICHEL: That's correct. And that's
8 what we've done in this case, Your Honor. And to the
9 extent that --

10 JUDGE KARLIN: No, no, no, no, you're
11 messing up your argument. In this case, you're going
12 in as a company not against individuals in this Order.
13 Right?

14 MR. MICHEL: Yes, Your Honor. That's sort
15 of the nuance of NRC enforcement policy where we do
16 cite the licensee as responsible for the individuals.
17 But you are entirely correct that the actions here
18 were based on affirmative obligations of the
19 individuals.

20 JUDGE KARLIN: Right. Okay. Now, and it
21 is correct - let me redo the Behavior Observation
22 Program Regulation as it existed five years ago in 29
23 words. It appears in 73.56(b)(2)(ii), "Behavior
24 observation conducted by supervisors and management
25 personnel designed to detect individual behavior

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1 changes which, if left unattended, could lead to acts
2 detrimental to the public health and safety."

3 So until five years ago, Behavior
4 Observation Program Reg didn't even apply to workers,
5 did it?

6 MR. MICHEL: I would have to look at the
7 -- unfortunately, I don't have that version of the
8 Regulation in front of me, but based on your reading,
9 I assume --

10 JUDGE KARLIN: Yes, I suggest you look at
11 March 27, 2009 Federal Register 74, Fed Reg 13927 and
12 this is on Page 13982, I think, where the Behavior
13 Observation Program now consists of several thousand
14 words as opposed to the 29. And it did not apply to
15 workers until nine years ago.

16 Let me switch questions, I have some
17 questions about Section 202. Give me a minute here.
18 All right.

19 CHAIRMAN RYERSON: Yes, I think it does
20 look like we will probably not finish by 1:00. So
21 let's, at a convenient breakpoint, I think around
22 noon, we'll take an hour for lunch and we'll see
23 exactly what the time is to come back then. But let's
24 -- people plan accordingly so we won't take a break
25 then until around noon and we'll take a lunch break.

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1 JUDGE KARLIN: Mr. Hair, some questions on
2 Section 202 and 202(a)(3), when we wrote some
3 questions on to you and you answered and those answers
4 were helpful.

5 So I'm looking at the 1980 Federal CFR and
6 it is the Section 202(a)(3) and I will quote it, the
7 Order by NRC will "inform the licensee of his right
8 within 20 days to demand a hearing."

9 Now on August 15, 1991, as you know, that
10 Regulation was changed and it now reads, the NRC will
11 "inform the licensee or any other person adversely
12 affected by the Order of his or her right to demand a
13 hearing."

14 So in '91, there was a fundamental, in my
15 mind, change to the Reg expanding the universe of
16 people who have the right to demand a hearing and the
17 phrase is licensee or any other person adversely
18 affected by the Order.

19 Now in your answers, I'm sorry, answers to
20 the questions, Page 3, you make the statement, "the
21 staff asserts that third party individuals or entities
22 who are not the subject of" and that's your key word
23 you used, "third party who are not the subject of
24 Enforcement Order, but nonetheless seek an Order, must
25 satisfy the requirements for a Petition for

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1 intervention in Section 2.309 which includes the
2 standing criteria in 2.309(d) in contention
3 admissibility criteria in 2.309(f)."

4 Next sentence, "unlike demands for a
5 hearing by the subject of an Enforcement Order, which
6 are automatic without regard to satisfaction of
7 2.309."

8 Okay, so it's your position that the
9 subject or an Enforcement Order doesn't have to show
10 standing, does he or she?

11 MR. HAIR: Your Honor, is it all right if
12 I answer your question?

13 JUDGE KARLIN: Yes.

14 MR. HAIR: Our position, as we have stated
15 in our Memorandum answering your questions, is based
16 on both NRC Commission practice before and after these
17 revisions in 1991 --

18 JUDGE KARLIN: No, no, no, I just want
19 your position right here. You say, unlike demands for
20 a hearing by the subject of an Enforcement Order which
21 are automatic with regard to satisfaction of 2.309 and
22 then you cite Siemaszko which the Commission said
23 provides for an automatic grant to hearing requests.

24 So that person who is the subject of an
25 Enforcement Order doesn't have to show standing, do

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1 they under 2.309(d)?

2 MR. HAIR: The Commission in Siemaszko
3 used the word automatic --

4 JUDGE KARLIN: And what did you say here?

5 MR. HAIR: -- and so we articulated the
6 word automatic used by the Commission.

7 JUDGE KARLIN: And they don't have to show
8 contention admissibility, do they?

9 MR. HAIR: They don't have to show
10 standing in contention admissibility because as a
11 matter of practice, Your Honor, the subject of an
12 Enforcement Order, the person the Enforcement Order
13 issued --

14 JUDGE KARLIN: Right. Okay, so now the
15 question becomes who's the subject of the Enforcement
16 Order?

17 MR. HAIR: The subject of the Enforcement
18 Order is the entity --

19 JUDGE KARLIN: No, no, no, I'm asking what
20 -- but that's what the question becomes, it seems to
21 me.

22 MR. HAIR: Yes.

23 JUDGE KARLIN: You posit that the subject
24 of an Enforcement Order doesn't have to show standing,
25 doesn't have to show contention admissibility.

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1 So now we have to argue about, A, whether
2 that's right or a correct interpretation, and B, who
3 is the subject of an Enforcement Order? So I want to
4 focus on that a little bit.

5 Now if the Order was issued to Exelon,
6 would they be the subject of an Enforcement Order?

7 MR. HAIR: Yes.

8 JUDGE KARLIN: They wouldn't have to show
9 standing?

10 MR. HAIR: As a matter of practice, it's
11 unnecessary to go through --

12 JUDGE KARLIN: No, no, I'm talking about
13 law.

14 MR. HAIR: Well, the Commission used the
15 term automatic in the Siemaszko case --

16 JUDGE KARLIN: Yes, I'm familiar with the
17 law.

18 MR. HAIR: -- when referring to this
19 situation, so by Commission practice, there's no need
20 to show standing.

21 JUDGE KARLIN: By Commission holding?

22 MR. HAIR: Excuse me, yes, by Commission
23 holding in the Siemaszko --

24 JUDGE KARLIN: I just distinguished
25 between holdings and practice and they don't have to

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1 show contention admissibility?

2 MR. HAIR: No, there's no --

3 JUDGE KARLIN: So let's say Exelon wanted
4 to raise contention too here, the contention is Exelon
5 says, wait a second, you're ordering us to do all
6 these things and it's vague, it's over board. I don't
7 understand it. I don't know how we're going to be
8 able to implement it. They'd get a hearing on that,
9 wouldn't they?

10 MR. HAIR: They would, Your Honor, in that
11 when if Exelon were making those similar arguments in
12 the context of Confirmatory Order, the Confirmatory
13 Order, as we've discussed --

14 JUDGE KARLIN: Yes --

15 MR. HAIR: -- defines Exelon.

16 JUDGE KARLIN: The hypothetical is not a
17 Confirmatory Order.

18 MR. HAIR: Understood, Your Honor, but
19 the, pardon my misuse of the term, the Order in your
20 hypothetical is placed upon Exelon, the licensee, and
21 if they do not comply with that Order because of
22 problems that they see with the Order, they are the
23 ones who are going to be cited for violation of the
24 Order.

25 So their standing, their contentions in

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1 that case, as a matter of practice, are clear. They
2 disagree with the Order --

3 JUDGE KARLIN: So they have a right to
4 have a hearing, demand a hearing in fact, and they
5 don't have to have a contention that meets the six
6 criteria of 309(f)?

7 MR. HAIR: They are not required to make
8 that showing.

9 JUDGE KARLIN: They are not required to
10 make a showing of standing.

11 MR. HAIR: No, Your Honor.

12 JUDGE KARLIN: And Mr. Siemaszko, who's an
13 individual who was issued an Enforcement order, he
14 doesn't have to show standing either, does he?

15 MR. HAIR: No, in that case, Your Honor,
16 he was the subject of the Enforcement Order. It was
17 --

18 JUDGE KARLIN: And he doesn't have to show
19 compensable contention?

20 MR. HAIR: He was not required to, no.

21 JUDGE KARLIN: And he has the right to
22 demand a hearing?

23 MR. HAIR: Yes.

24 JUDGE KARLIN: And he gets a hearing?

25 MR. HAIR: Yes, by Commission only.

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1 JUDGE KARLIN: Okay, now, let's talk about
2 the subject of it. Let's talk about 2.202 of the Reg,
3 2.202(a)(3) it says inform a licensee or any other
4 person adversely affected have the right to demand.

5 Now it doesn't say subject of, so where do
6 you get that? Is there any case, can you cite me any
7 case which grapples with that phrase and says it's
8 limited to the people who are the subject of an Order?
9 It says that, upholds that?

10 MR. HAIR: Using that specific term
11 subject, Your Honor?

12 JUDGE KARLIN: I want to know a case that
13 grapples with 2.202(a)(3) and says it means the
14 subject of.

15 MR. HAIR: Well, I think if one looks at
16 how procedurally the Siemaszko Commission decision was
17 handled, we can see that by Commission holding there
18 is -- that the parties are treated differently.

19 In the Siemaszko hearing, Mr. Siemaszko,
20 who was the licensee, or excuse me, he was the subject
21 of the Order, he was the person who was barred from
22 NRC practice in that case.

23 JUDGE KARLIN: All right.

24 MR. HAIR: The Commission said, in its
25 Footnote, he receives a hearing without respect to

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1 2.309(d) and 2.309(f).

2 JUDGE KARLIN: Right.

3 MR. HAIR: In that same case, Your Honor,
4 there were third parties who were not subjects of the
5 Order but were trying to intervene on behalf of Mr.
6 Siemaszko and they were required --

7 JUDGE KARLIN: They were the Union of
8 Concerned Scientists attempted to intervene in that
9 proceeding and the Board granted discretionary
10 intervention in that proceeding and the Commission
11 reversed on them saying the discretionary intervention
12 would not be granted, because A, this is not a
13 discretionary intervention case so much as far as I'm
14 concerned at the moment, and B, the Union of Concerned
15 Scientists didn't have any compliance duties under the
16 Order in question. They weren't the subject of the
17 Order, were they? They were just an interested public
18 citizen group who wanted to participate.

19 MR. HAIR: That's correct, Your Honor.

20 JUDGE KARLIN: Quite distinct from
21 situation where the workers who had individual
22 exposures, as in this case.

23 MR. HAIR: Well, it's distinct in that
24 respect, Your Honor, but again, I would point to that
25 the person in Siemaszko upon whom the Order was issued

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1 --

2 JUDGE KARLIN: Right.

3 MR. HAIR: -- was dealt differently than
4 a third party trying to intervene in the proceeding
5 who was not a subject --

6 JUDGE KARLIN: Right, okay, let's go with
7 that phrase.

8 Look at 2.202(b), now I suggest to you
9 that language in (b) contrasts very sharply with the
10 language in (a)(3). The language in (b) says, a
11 licensee or other person to whom the Commission has
12 issued an Order under this section, blah, blah, blah.

13 And so that's not what (a)(3) says; (a)(3)
14 says something quite different, very different. It
15 says, it doesn't say inform the licensee or the person
16 who is the subject of the Order, it says any other
17 person adversely affected.

18 MR. HAIR: Yes, Your Honor.

19 JUDGE KARLIN: So please explain to me why
20 in one section -- why those sections are utterly
21 different?

22 MR. HAIR: Well, Your Honor, all the
23 sections, well I don't want to say all, but many
24 sections in 2.202 use this different phrase for when
25 we're dealing with non-licensees. 2.202(a) talks

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1 about a person subject to the jurisdiction of the
2 Commission, 2.202(b), as you referred to, uses the
3 different language to discuss a non-licensee and other
4 person just as 2.202(a)(3) uses different language.

5 So the Regulation uses different language
6 to discuss these non-licensees upon whom Orders may be
7 issued. But as we --

8 JUDGE KARLIN: Are you suggesting we
9 should use the same -- all these different language
10 all means the same thing?

11 MR. HAIR: As we raised in our answers to
12 the questions, Your Honor, the regulatory history and
13 the Statements of Consideration that are in the
14 background of the 1991 amendments interject this
15 language we believe show that no --

16 JUDGE KARLIN: Okay, let's go to that Page
17 4 of answers.

18 MR. HAIR: Yes.

19 JUDGE KARLIN: You have quote, from the
20 Reg change and it says, if I've got this right, quote,
21 and then you're quoting from the Statement of
22 Consideration for the changes to the Regs and it says,
23 "Section 202 provides that if the licensee or other
24 person to whom an Order is issued consents."

25 Where does it say that? Where does 2.202

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1 say that the licensee or other persons to whom an
2 Order is issued? Where does it say that? Find me a
3 part of that Reg that says that.

4 MR. HAIR: Again, Your Honor, it's ---

5 JUDGE KARLIN: No, no --

6 MR. HAIR: -- that specific phrase is not
7 in 2.202.

8 JUDGE KARLIN: So it doesn't say that? So
9 that Statement of Consideration statement is wrong.
10 It doesn't say that?

11 MR. HAIR: It doesn't use that specific
12 phrase to refer to third parties.

13 JUDGE KARLIN: Right. What phrases does
14 it use?

15 MR. HAIR: It uses multiple phrases --

16 JUDGE KARLIN: Right.

17 MR. HAIR: -- Your Honor.

18 JUDGE KARLIN: And when they use multiple
19 phrases, don't they mean different things? The
20 fundamental is, you know, proposition of the statutory
21 construction is when somebody writes two different
22 phrases, they mean two different things.

23 MR. HAIR: I agree to that in principle,
24 Your Honor, unless there is evidence in the regulatory
25 background that shows that no difference was intended,

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1 which reading through the whole block quote that we
2 provided in the Memorandum, we -- it's staff's
3 position that that paragraph there indicates that
4 third parties attempting to intervene in enforcement
5 proceedings that are not the persons to whom the Order
6 has been issued, are treated differently.

7 And that's true by reading this paragraph
8 from the Statement of Considerations and then in
9 various NRC case law, after these amendments, the
10 Commission has dealt with third party non-licensee
11 persons trying to intervene in Enforcement Orders.

12 JUDGE KARLIN: All right, there's -- but
13 you're positive there's not case -- no case law, you
14 don't see a line that deals with interpretation
15 specifically deals with the language in this Reg,
16 2.202(a)(3) that says that what this means is anyone
17 who's the subject of the Regulation?

18 MR. HAIR: That specific holding, I'm not
19 aware of, Your Honor, but it's by inference in looking
20 at Commission of these.

21 JUDGE KARLIN: Okay, tell me the other
22 cases. And tell me you don't the Alaska DOT?

23 MR. HAIR: Alaska DOT --

24 JUDGE KARLIN: Alaska DOT was challenged
25 by Mr. Farmer who was seeking for the Order to be more

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1 stringent and the Commission held that Mr. Farmer did
2 not have standing because he was not within the scope
3 of the proceeding. He was not asking that the Order
4 not be sustained. He was asking that it be beefed up
5 and made tougher.

6 MR. HAIR: The Commission in that case
7 overturned the Board decision on the basis of Bellotti
8 and that he was --

9 JUDGE KARLIN: Right.

10 MR. HAIR: -- seeking for -- but if, and
11 what we cited in Footnote 17 on Page 5, the Board
12 decision in Alaska DOT that was reversed for Bellotti
13 reasons, that Board required Mr. Farmer to address
14 2.309 standing and contention admissibility
15 requirements.

16 JUDGE KARLIN: I remember the decision and
17 I have the Commission's decision on Alaska DOT here
18 and the Board's decision and Judge Bork descended and
19 it was a pure Bellotti case, right?

20 What does Bellotti hold? Bellotti holds
21 that the Attorney General of the State of
22 Massachusetts, Mr. Bellotti, was trying to challenge
23 the Confirmatory Order that he said was a sweetheart
24 deal and was cutting the company too much slack and he
25 wanted it to be tougher. And the NRC or the D.C.

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1 Circuit, Judge Bork, ruled that the NRC has the right
2 to define the scope of its proceedings and the scope
3 of the proceeding was whether the Confirmatory Order
4 should be sustained or not. Right?

5 MR. HAIR: Yes.

6 JUDGE KARLIN: And the D.C. Circuit Judge
7 Bork ruled that was not what the Attorney General was
8 arguing. They were not arguing it should not be
9 sustained, they wanted it tougher. Right?

10 MR. HAIR: Yes, Your Honor, that was --
11 the Commission reversed the Board decision on that
12 grounds, the reason that's cited --

13 JUDGE KARLIN: The Bellotti case.

14 MR. HAIR: The Commission decision was
15 decided on Bellotti but the lower Board decision, and
16 we cited this for procedural reasons, the lower Board
17 decision in the Alaska DOT case required Mr. Farmer to
18 address 2.309 in order to be admitted.

19 And then the Commission then overturned
20 that on Bellotti which, obviously, reversed the lower
21 decision.

22 JUDGE KARLIN: Right.

23 MR. HAIR: But from a procedural
24 standpoint, that is how the Board in Alaska DOT
25 handled a third party petitioner on an Enforcement

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1 Order.

2 JUDGE KARLIN: Right. And Bellotti, let
3 me see here, when was Bellotti issued?

4 MR. HAIR: Was it 1983, Your Honor?

5 JUDGE KARLIN: 1983, that was before the
6 Reg was changed in 1991 --

7 MR. HAIR: Yes.

8 JUDGE KARLIN: -- to add the phrase or
9 other adversely affected persons. Right?

10 MR. HAIR: That's correct.

11 JUDGE KARLIN: So the Reg was
12 fundamentally changed after Bellotti and in any event,
13 the Board's ruling in the lower -- in the Bellotti
14 certainly aren't binding on this Board, is it?

15 MR. HAIR: Well, we don't cite it as
16 authority, Your Honor, just to notice that that is
17 procedurally how the Board in Alaska DOT handled a
18 third party petitioner.

19 JUDGE KARLIN: Well, it makes sense
20 because the Reg didn't allow for -- it said the
21 licensee has the right to demand a hearing. The Reg
22 didn't say that in those days.

23 So you can understand why the Board didn't
24 grapple with 2.202(a)(3) because it didn't say what it
25 says now. What I'm trying to --

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1 MR. HAIR: In Alaska Department of
2 Transportation, that was a 2004 case.

3 JUDGE KARLIN: Oh, I'm talking about
4 Bellotti. I'm talking -- okay, Alaska.

5 MR. HAIR: No, I was talking --

6 JUDGE KARLIN: But the Board did not
7 grapple with 2.202(a)(3) even in the Alaska case.
8 They didn't deal with that. They didn't cite it all.

9 MR. HAIR: That's right, Your Honor. And
10 that goes to our point that a third party intervention
11 Petition was treated under 2.309 in the lower court
12 Alaska decision, the lower Board decision.

13 JUDGE KARLIN: Okay. Now, in this Order,
14 let's just focus on the Order at Page 66967, just so
15 we can dispense with the Bellotti argument, if a
16 hearing is requested by a person who -- and this is
17 what you said, and you're the NRC staff and you put
18 this Order out.

19 This is what you wrote, the hearings
20 requested, blah, blah, blah, if a hearing is held,
21 "the issue to be considered at such a hearing shall be
22 whether the Confirmatory Order should be sustained."

23 And in this case, isn't that what the
24 contentions all start with the proposition there
25 because this Union is saying that the Order should not

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1 be sustained?

2 MR. HAIR: Yes, Your Honor, the staff
3 acknowledges that this case doesn't fall squarely
4 within the Bellotti framework.

5 The Petitioners here aren't asking for a
6 better Order, the arguments that they're making are
7 that they want the Order rescinded.

8 JUDGE KARLIN: So the holdings of Bellotti
9 and Alaska DOT are in opposite because they are
10 denying the interveners request because they're not
11 asking -- they're not challenging the scope of the
12 thing.

13 If the scope of the proceeding is whether
14 it should be sustained, and seems to me the Union is
15 clearly within that scope.

16 MR. HAIR: It's the staff's position is
17 that they've -- if I could be colloquial, they've
18 cleared the Bellotti hurdle, Your Honor, and that
19 they've sought the proper relief to even clear -- to
20 not be kicked out the door because of the holding of
21 Bellotti.

22 We've narrowed the -- the staff has
23 narrowed the issue for hearing as to whether it will
24 be sustained.

25 JUDGE KARLIN: So this is not a Bellotti

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1 problem? We can dispense with citing the holding of
2 Bellotti?

3 MR. HAIR: Well again, Your Honor, when I
4 speak to Alaska DOT, I'm not speaking to Alaska DOT as
5 a precedential value because you're correct in that.
6 That was a Bellotti case and the Petitioners were
7 ultimately denied because of --

8 JUDGE KARLIN: Well the Commission's
9 decision was certainly binding on us and that decision
10 was based upon Bellotti and it just said, well look,
11 they're not asking for the reverse Order to be
12 revoked, they're asking for it to be -- Mr. Farmer was
13 asking for it to be tough. And they said that's not
14 within the scope. So, yes.

15 MR. HAIR: The staff agrees, Your Honor,
16 that this is not a square Bellotti case where the
17 holding of Bellotti can be utilized to deny access to
18 a hearing at that first hurdle.

19 CHAIRMAN RYERSON: We'll take a break in
20 just a minute. I do have one follow-up question on
21 Alaska DOT.

22 The Commission did speak in a Footnote, I
23 think, in that case to the situation where, and this
24 was not before the Commission as a holding, but the
25 Commission did speak in a Footnote to the situation

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1 where a Petitioner might actually allege diminished
2 safety as a result of the Confirmatory Order.

3 And did the Commission not say, again not
4 as a holding, but didn't the Commission say in a
5 Footnote that that would be an appropriate situation
6 for a hearing? And that it didn't expect there would
7 be many such situations. Am I misremembering Alaska
8 DOT?

9 MR. HAIR: You are correct, Judge, and
10 just for the benefit of all the parties, it's Footnote
11 28 in that decision.

12 And this also, I just wanted call back to
13 the safety valve argument that we were referring to
14 in our Opening Statement or after our Opening
15 Statement that the opportunity for a hearing is really
16 to provide that safety valve if there are safety
17 concerns with the actual provisions of the Order. We
18 took that language directly from this Footnote.

19 CHAIRMAN RYERSON: Now you agree that's
20 not binding on us, is that correct?

21 MR. HAIR: I would agree in the
22 characterization of this Footnote as dicta.

23 CHAIRMAN RYERSON: Yes.

24 What's your view on whether we should
25 listen to the Commission when it's not binding on us?

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1 Seriously, that's a serious issue because
2 arguably we're in a slightly different position from
3 the District Court and the Court of Appeals. I'm not
4 sure about that, but do you want to comment on that?

5 MR. HAIR: I would, Your Honor, and I
6 would agree that, well, the staff's brief is the, at
7 least the intent of the brief, was to illustrate the
8 situations where the Commission has, not necessarily
9 grappled with this 202(a)(3) issue, and, you know,
10 tried to make sense of the different language used in
11 those provisions. However, it does sort of
12 illustrate, at least intimate how the Commission
13 desires so-called third parties to be dealt with in
14 these types of intervention Petitions.

15 CHAIRMAN RYERSON: Thank you.

16 All right. Unless anyone has objections,
17 feels that an hour and five minutes is not enough for
18 lunch, I think people can deal with that in this area.
19 We will break until 1:00. We're adjourned until then.

20 MARSHALL: All rise.

21 (Whereupon the foregoing matter went off
22 the record at 11:55 a.m. and went back on the record
23 at 12:58 p.m.)

24 CHAIRMAN RYERSON: You may be seated.

25 Welcome back. We'll resume with some

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1 further questions from Judge Karlin.

2 JUDGE KARLIN: Give me a minute to
3 gathered some of the materials.

4 I have some questions that I'd like to
5 direct to Mr. Hair, at least initially. I think this
6 is primarily for the staff. And again, I'd like to
7 talk about the Enforcement Order.

8 In your answers, no, I think in your
9 pleadings in your reply, Mr. Hair, as we discussed
10 this morning, you acknowledge, I believe on Page 3, as
11 we discussed that the subject of the Enforcement Order
12 has a right to demand a hearing under 2.202(a)(3)
13 without regard to showing the standing or admissible
14 contention.

15 So, I'm concerned about some of your
16 Enforcement Orders related to this matter. For
17 example, in the pleadings, we are cited to the
18 Enforcement Order dated the same day as this
19 Enforcement Order to Mr. Buhrman.

20 And I read with interest the Enforcement
21 Order to Mr. Buhrman who is clearly the subject of the
22 Order. And it doesn't seem to comply with the Reg.
23 The Reg says the Order will inform the licensee of the
24 individuals of his right to demand a hearing.

25 Does your Order to Mr. Buhrman inform him

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1 of his rights to demand a hearing?

2 MR. MICHEL: Your Honor, I'd have to take
3 a look at that. I do have that Order in front of --
4 here.

5 JUDGE KARLIN: Okay, take a look at it.

6 MR. MICHEL: Sure.

7 JUDGE KARLIN: Does it contain the words
8 demand, right to demand? Does it contain the
9 provision 2.202(a)(3)?

10 MR. MICHEL: No, Your Honor, all it -- it
11 contains the similar language to the Confirmatory at
12 issue today that any adversely affected person or any
13 person adversely affected by this Order may submit a
14 written Answer to this Order and Mr. Buhrman and any
15 other person adversely affected may request a hearing.

16 JUDGE KARLIN: So, the Reg requires the
17 notice to inform him of his rights to demand a
18 hearing, doesn't it?

19 MR. MICHEL: We -- the Order by its terms
20 here uses the word --

21 JUDGE KARLIN: No, no, I'm sorry, the Reg.

22 MR. MICHEL: The Regulation --

23 JUDGE KARLIN: 2.202 says the Order shall
24 -- will inform him of his right to demanding.

25 MR. MICHEL: That's correct and --

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1 JUDGE KARLIN: And the Order doesn't do
2 that.

3 MR. MICHEL: It appears this Order does
4 not do that.

5 JUDGE KARLIN: All right, let's look at
6 the Order to Mr. Brittain. Does that do that?

7 MR. MICHEL: I believe they were
8 identical, Your Honor, I don't have Mr. Brittain's --

9 JUDGE KARLIN: And you were the author of
10 these Orders. You worked on them, right?

11 MR. MICHEL: I was involved in the
12 authoring of these Orders, correct.

13 JUDGE KARLIN: So NRC is noncompliant with
14 2.202(a)(3) because the Orders do not inform him of
15 his right to demand a hearing?

16 MR. MICHEL: I am not exactly sure what
17 other correspondence that we had between Mr. Buhrman
18 and Mr. Brittain. All I can say is that the
19 individuals were unresponsive to any correspondence
20 with the agency.

21 JUDGE KARLIN: Well, let's look at the
22 cover letter to Mr. Buhrman and Mr. Brittain have
23 seen.

24 But first off, the Reg says that the Order
25 shall inform him. So what other correspondence says

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1 is not relevant, but the cover letters don't tell him
2 he has a right to demand a hearing either. Do they?

3 MR. MICHEL: No, Your Honor, the Order
4 does not appear to do that and in as much as the Order
5 does not implement that Regulation, the staff concedes
6 that we would treat such a request for a hearing as a
7 demand as their right under 202(a)(3).

8 And to the extent that this language
9 intimates otherwise, it would be incorrect.

10 JUDGE KARLIN: And in the Opening
11 Statement, by Local 15, they indicated that they did
12 not realize 2.202(a)(3) was there and it was something
13 new to them that they then dealt with in the answers
14 to our questions.

15 Do you suspect that Mr. Brittain and Mr.
16 Buhrman didn't realize 2.202(a)(3) was there either or
17 do you expect them to read the Regs?

18 MR. MICHEL: I cannot speculate as to what
19 Mr. Buhrman or Brittain suspected as part of this. I
20 would say, however, that if they brought up that point
21 or if we were sitting here with Mr. Brittain or Mr.
22 Buhrman present, I think that would be an issue for
23 discussion whether or not that prejudiced those
24 individuals, the language of the Order not completely
25 --

1 JUDGE KARLIN: Don't you think that's
2 misleading and in addition to being noncompliant with
3 the Regulation requirement, the Order to inform them
4 of the right to demand a hearing is misleading to
5 these people?

6 MR. MICHEL: I do not think it's
7 misleading, Your Honor. I think that the context by
8 which we've issued the Orders, as well as Commission
9 precedent teaches otherwise.

10 JUDGE KARLIN: Oh, is there any Commission
11 precedence that says you don't have to put that in
12 the Order, that it violates the Reg? The Reg says it
13 has to be in the Order. Is there some law that you're
14 going to tell me that it doesn't have to be in the
15 Order?

16 MR. MICHEL: No, Your Honor, not at all.
17 The only thing I was referring to is the discussion we
18 had prior to our break regarding --

19 JUDGE KARLIN: Well they are the subject
20 of the Order.

21 MR. MICHEL: Right.

22 JUDGE KARLIN: There's no doubt about that
23 on that one.

24 MR. MICHEL: Right.

25 JUDGE KARLIN: Okay. And let's -- because

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1 I'm confused by sort of the disparity within the
2 Orders that are issued by the NRC.

3 On February 4, 2014 in the Federal
4 Register at 79 Fed. Reg. 6652 the NRC issued an
5 Enforcement Order to South Carolina relating to the
6 Sumner case and it was to South Carolina Electric and
7 Gas Company and it ordered them to do certain things.
8 And it was a Part 73 Enforcement Order, actually. Are
9 you familiar with that?

10 MR. MICHEL: I'm not familiar with this
11 specific Enforcement Order.

12 JUDGE KARLIN: And in that Order in the
13 Federal Register, there's no reference to right to
14 demand a hearing by South Carolina Electric and Gas.
15 And is this the policy of the NRC enforcement people
16 not to tell people about their right to demand a
17 hearing under 2.202(a)(3)?

18 MR. MICHEL: No, Your Honor, the agency
19 expects that individuals who are the subject of the
20 Order have the right to demand a hearing.

21 JUDGE KARLIN: But you're supposed to tell
22 them that in the Order. The law requires you to tell
23 them that in the Order. You don't do that.

24 MR. MICHEL: I agree, Your Honor. The
25 Regulation does require that the Order state that.

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1 And to the extent that it hasn't been done, I think
2 it's an issue outside of this proceeding. However, I
3 certainly would expect that to the extent that any
4 confusion resulting from that, that it would be sort
5 of cabined by the context of previous proceedings and
6 also the way we treat such Orders.

7 We would not, simply by virtue of the
8 Order not stating exactly the term demand, by virtue
9 of that, we would not oppose a request for hearing on
10 that basis. I think --

11 JUDGE KARLIN: Demand for a hearing.

12 MR. MICHEL: A demand for a hearing, even
13 though that we may have referred to it as a request,
14 perhaps by error, although I don't have knowledge of
15 those situations. There's other situations --

16 JUDGE KARLIN: Are you familiar with the
17 NRC's enforcement policies?

18 MR. MICHEL: Yes, Your Honor.

19 JUDGE KARLIN: Are you familiar with the
20 NRC's enforcement manual?

21 MR. MICHEL: Yes, Your Honor.

22 JUDGE KARLIN: Would it surprise you to
23 know that I did a word search in those two documents
24 exceeding 400 pages and the word demand for a hearing
25 never showed up?

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1 MR. MICHEL: I understand that that is the
2 case, Your Honor.

3 JUDGE KARLIN: So it wouldn't surprise
4 you?

5 MR. MICHEL: It wouldn't surprise me that
6 you did that, Your Honor, or that it's not in there?

7 JUDGE KARLIN: No would it surprise you
8 that the manual does not even mention the right to
9 demand a hearing under 2.202(a)(3)?

10 MR. MICHEL: No, Your Honor, it doesn't
11 surprise me from the standpoint of, you know --

12 JUDGE KARLIN: So, is this is consistent
13 policy by NRC to ignore 2.202(a)(3)?

14 MR. MICHEL: No, Your Honor. I think it's
15 the issue gets to be, you know, perhaps the agency can
16 be more exacting and certainly it would be my position
17 that we should be more exacting in some of the Orders
18 that we issue.

19 If, for instance, the demand versus a
20 request --

21 JUDGE KARLIN: Are you suggesting this is
22 just some sort of an aberrant or unusual behavior, do
23 I think occasionally you miss that word or --

24 MR. MICHEL: I can appreciate that
25 reference, Your Honor, and, you know, unfortunately,

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1 I really do not want to speculate as to why those
2 differences are there.

3 JUDGE KARLIN: And would it surprise you
4 to learn that I did a word search in the Federal
5 Register of all the Enforcement Orders ever issued by
6 NRC in the last ten years and out of hundreds of them
7 in there, only once did you ever utter the words right
8 to demand a hearing.

9 MR. MICHEL: I think, well, you know,
10 first of all, we have had rule changes where we've
11 introduced this new language of --

12 JUDGE KARLIN: No, that search only goes
13 back ten years --

14 MR. MICHEL: Ten years to --

15 JUDGE KARLIN: -- and then you back to
16 1991 when this was added.

17 MR. MICHEL: Got you.

18 JUDGE KARLIN: It was the MC Squared
19 decision actually. It's the only one I found
20 interesting.

21 MR. MICHEL: Well, Your Honor, the staff
22 is of the consistent position that if we issue an
23 Order to an individual or to an entity, that entity
24 has a right to demand a hearing and if they are not
25 the subject of the Order, then they have the right to

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1 request a hearing. We've --

2 JUDGE KARLIN: When you say subject to the
3 Order, do you mean named in the Order?

4 MR. MICHEL: That's correct, Your Honor,
5 it may --

6 JUDGE KARLIN: Or the subject to the
7 Order.

8 MR. MICHEL: That they are named in the
9 Order. That the Order is being issued to them.

10 JUDGE KARLIN: Now what if there was in
11 this case that you decided to issue an Order to Mr.
12 Matthews and Mr. Buhrman and to the company saying,
13 henceforth, all senior reactor operators shall have to
14 do X, Y, and Z. And there are how many senior reactor
15 operators are addressed in it? I'd like to ask Mr.
16 Kuyler.

17 KUYLER: I don't know.

18 JUDGE KARLIN: Ask your counsel. Ten, 15?

19 MS. DOMEYER: Twenty, maybe.

20 JUDGE KARLIN: Approximately.

21 MR. KUYLER: I'm told that there are about
22 89 licensed reactor operators.

23 JUDGE KARLIN: Senior operators.

24 MR. KUYLER: Not senior, but just
25 licensed.

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1 JUDGE KARLIN: At Dresden?

2 MR. KUYLER: Yes, Your Honor.

3 JUDGE KARLIN: All right, let's suppose
4 that there are 20 senior reactor operators.

5 If you issued, Mr. Hair, if you issued an
6 Order to Exelon saying, henceforth, the senior reactor
7 operators are the guys who went off and tried to rob
8 the armored car. Henceforth, all senior reactor
9 operators shall no longer rob armored cars and/or
10 shall report X, Y and Z.

11 Would one of those other 20 people have a
12 right to demand a hearing even though they weren't
13 named?

14 MR. MICHEL: Well, Your Honor, that
15 actually is something that the NRC does regularly,
16 traditional enforcement such as through our post-
17 Fukushima Orders that applies to all licensees even
18 though not every licensee may exhibit certain
19 conditions in those Orders.

20 JUDGE KARLIN: But those are not
21 Enforcement Orders are they? Aren't they --

22 MR. MICHEL: They are Orders issued under
23 10 CFR 2.202.

24 JUDGE KARLIN: Modifying the license?

25 MR. MICHEL: Order modifying the license.

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1 So we characterize them as Enforcement Orders, Your
2 Honor. However, it's a different juxtaposition.

3 JUDGE KARLIN: And in those cases, even
4 though you don't name all the licensees who are
5 subject, is there an appendix that usually names them
6 all?

7 MR. MICHEL: Sometimes there's an
8 appendix, Your Honor, other times, for instance the
9 Fukushima Orders I think were saying all of Mark I and
10 Mark II BWR reactors.

11 JUDGE KARLIN: Would they have a right to
12 a hearing?

13 MR. MICHEL: Yes.

14 JUDGE KARLIN: Demand a hearing?

15 MR. MICHEL: Each individual licensee, if
16 they were the subject of that Order in that they had
17 that type of reactor where they expressly named, yes.

18 JUDGE KARLIN: Well, I'm just trying to
19 figure out whether when you say subject to the Order,
20 you mean named, it's a euphemism for named?

21 JUDGE KARLIN: The staff means named, yes.

22 JUDGE KARLIN: And wasn't that sort of
23 form over substance if you -- some people are burdened
24 with obligations under the Order. They may be having
25 obligations, but you just don't name them then they

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1 don't have a right, only the named people have the
2 right?

3 MR. MICHEL: Yes, Your Honor, the NRC does
4 not consider it's Orders to operate in a vacuum. The
5 NRC fully understands that its Orders impact other
6 individuals and entities other than the licensee by
7 virtue of the relationships between the regulated
8 community.

9 However, whereas here, the licensee and,
10 I understand there's debate on this issue but the
11 licensee does represent, at least to the NRC, the
12 employees at that licensee's facility as well.

13 JUDGE KARLIN: Well the licensee controls
14 the employees to a certain extent. They hire the
15 employees, they fire the employees. But this is not
16 a situation, there's many Enforcement Orders where you
17 might say the licensee is Ordered to beef up its
18 mental fatigue program or the licensee is Ordered to
19 beef up some other technical.

20 This is a program that imposes duties,
21 liabilities, reporting liabilities on workers,
22 individual workers. And so I just wonder if the
23 subject to the Order position that you are taking is
24 really just what you mean is named, formally named, in
25 the Order.

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1 MR. MICHEL: We do mean named, Your Honor.
2 And just to clarify from the staff's position, the
3 Orders did not represent imposing new requirements on
4 the employees.

5 JUDGE KARLIN: Yes, I got that.

6 MR. MICHEL: We'll maintain that.

7 JUDGE KARLIN: But, and again, then we're
8 back to the 2.202(b) and actually (c), too, which use
9 the phrase, you know, person to whom an Order was
10 issued it is distinct from the person adversely
11 affected by the Order. So, we're back to that issue,
12 if you start going to naming in the Order.

13 That's all I've got for the moment.

14 CHAIRMAN RYERSON: Thank you, Judge
15 Karlin. Judge Jeffries, did you have some questions
16 at this point?

17 JUDGE JEFFRIES: Yes, sir, I do. They may
18 be very different than Judge Karlin's questions.

19 But I'd like to start off with Mr. Kuyler
20 --

21 MR. KUYLER: Yes, Your Honor.

22 JUDGE JEFFRIES: -- with Exelon.

23 Did Exelon ever consider Local 15 within
24 the ADR structure as a party that was adversely
25 affected by their actions and the subsequent CO?

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1 MR. KUYLER: No, Your Honor, Exelon did
2 not include Local 15 in the ADR.

3 JUDGE JEFFRIES: I know they didn't
4 include it in the ADR, but did they ever consider
5 including them as a party?

6 MR. KUYLER: I was not -- no, no, Your
7 Honor.

8 JUDGE JEFFRIES: Is that something that is
9 normally not done when you're going to a dispute that
10 is sidelined?

11 MR. KUYLER: Not to our knowledge, Your
12 Honor.

13 JUDGE JEFFRIES: Okay. It's never been
14 done.

15 MS. DOMEYER: By Exelon, to my knowledge.

16 JUDGE JEFFRIES: By Exelon, okay.

17 Has Exelon ever bargained with Local 15
18 about the Behavior Observation Program?

19 MR. KUYLER: No, Your Honor.

20 JUDGE JEFFRIES: Never? And we're talking
21 about the program all the way back from its inception
22 back in the early 2000s and Exelon was created in May
23 2000. Is that correct?

24 MY KUYLER: Yes, Your Honor, around that
25 time frame.

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1 JUDGE JEFFRIES: And during that time,
2 with all those revisions that we saw as your
3 attachment and the Answer and the conditions that were
4 shown in the Local 15 reply, I believe it was. In all
5 of that time, there's never been any bargaining
6 between Local 15 and Exelon about the Behavior
7 Observation Program. Is that correct?

8 MR. KUYLER: Yes, Your Honor, we stated
9 that in our brief.

10 JUDGE JEFFRIES: Okay. You did state that
11 but I just wanted to make sure that I understood it
12 correctly.

13 Let's say if a member of Local 15, an
14 employee at the plant, excuse me, who's a member of
15 Local 15 is under the unescorted access authorization
16 program and, therefore, under the Behavior Observation
17 Program, if they were wrongly implicated in a BOP
18 reporting event, what remedies do they have? What
19 process adequately protects them?

20 MR. KUYLER: For example, Your Honor, as
21 was done here, an individual who, for example, loses
22 his access authorization, could grieve that with the
23 NRB. I'm sorry. May I confer with my client?

24 JUDGE JEFFRIES: Sure.

25 MR. KUYLER: So, Exelon does undertake an

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1 investigation for deciding to retract someone's access
2 authorization and if that individual who loses access
3 authorization is represented by the Union, Local 15
4 for example, they could grieve that before the NRB.

5 JUDGE JEFFRIES: Okay. So is to mean that
6 the process, there's the investigation and then
7 there's a grievance process that would provide
8 adequate protection for the people who might be
9 wrongfully implicated in a Behavior Observation event.
10 Is that what I understand?

11 MY KUYLER: Yes, I believe that is
12 correct, Your Honor.

13 JUDGE JEFFRIES: So would the process that
14 they have now, the investigation, the grievance
15 process, substantially change with the change to the
16 process under the Confirmatory Order?

17 MR. KUYLER: The changes to the BOP were
18 made under the Confirmatory Order would not change
19 that process at all.

20 JUDGE JEFFRIES: It would not, okay.

21 Section (3)(a) of the Confirmatory Order
22 noted that an Exelon-like briefing of this issue and
23 the expectations report unusual behavior observed
24 either on or off-site was conducted?

25 A couple of questions with regard to that.

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1 Does that -- I think I heard you say earlier that the
2 application of the program went suite-wide which means
3 that it would include the Eastern region as well as
4 the Western regions here around Chicago, is that
5 correct?

6 MR. KUYLER: Yes, Your Honor.

7 JUDGE JEFFRIES: So that includes the
8 former PECO clients. How about the CENG plants? I
9 can't remember whether they had been incorporated at
10 the time when this Order was issued or not.

11 MR. KUYLER: Let me ask my client, Your
12 Honor.

13 JUDGE JEFFRIES: Okay.

14 MR. KUYLER: Yes, the former consolation
15 plants are not fully integrated into Exelon so they're
16 not covered under the BOP --

17 JUDGE JEFFRIES: Okay.

18 MR. KUYLER: -- under Exelon's BOP that
19 is on the record.

20 JUDGE JEFFRIES: Okay.

21 Was there some kind of attendance
22 documentation used in these briefings?

23 MR. KUYLER: We can find that out, Your
24 Honor, and answer that question if you'd like.

25 JUDGE JEFFRIES: What I'm getting at is

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1 that I heard the Union, or I read the Union say that
2 they were not privy, were not aware of, were not in
3 attendance, apparently did not have any knowledge of
4 these briefings and the training that had already
5 taken place according to the Section B of the
6 Confirmatory Order.

7 Now, I'm just trying to get an
8 understanding for the timing of all of this because
9 those things according to the Confirmatory Order had
10 already taken place. And I was looking for the number
11 of Union representatives that may have been there,
12 whether there were any stewards there and why there
13 was a disconnect and why the Local 15 felt as though
14 those things were not communicated in a way that they
15 should have been?

16 MS. DOMEYER: May I answer that question,
17 is that okay?

18 JUDGE JEFFRIES: Sure, please do.

19 MS. DOMEYER: So when this incident
20 occurred at the plant and when I say the incident, I'm
21 talking about the fact that the company found out that
22 the equipment operator had knowledge of these
23 activities that were planned off-site and that another
24 SRO was implicated in those activities.

25 The company began an exhaustive

1 investigation and a number of Local 15 bargaining
2 employees were interviewed during that investigation.
3 They were offered the right to representation. They
4 were offered representation during those interviews.
5 Some of the Local 15 employees had representation,
6 some of them chose to continue with the interview
7 without representation.

8 So the Union was aware as of the point we
9 started the investigation and when we put the
10 equipment operator on suspension that the company was
11 looking into this issue.

12 In addition, the company terminated the
13 equipment operator who failed to notify the company of
14 his knowledge of the off-site criminal activity
15 because he violated the BOP program and because he was
16 not honest during the company's investigation.

17 The Union filed a grievance in July of
18 2012 to grieve the fact that the company had
19 terminated the equipment operator for that and they
20 were representing him in that.

21 So they knew that the company had
22 terminated him for violating the BOP and the Union
23 chose not to take that grievance to arbitration even
24 though they had filed a grievance on his behalf.

25 In June before the equipment operator was

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1 terminated, at --

2 JUDGE KARLIN: June of what year?

3 MS. DOMEYER: -- June of 2012.

4 JUDGE KARLIN: Okay.

5 MS. DOMEYER: So within weeks of the
6 incident occurring and the company finding out about
7 the fact that the equipment operator had knowledge of
8 it and hadn't disclosed it to the company, the company
9 did a briefing at Dresden.

10 They typically do those in two ways. They
11 have what they call a supervisory briefing sheet which
12 is a written sheet that goes to all supervisors
13 advising them of the communication and then those
14 supervisors are responsible for communicating that
15 information to the bargaining unit employees.

16 I don't have documentation confirming that
17 was done, but it was a requirement of all the
18 supervisors.

19 In addition, at Dresden station itself, in
20 July of 2012, the company imposed a requirement that
21 every employee who held unescorted access to that
22 facility was required to complete updated Behavioral
23 Observation Training. It was a requirement for --

24 JUDGE KARLIN: So is this factual
25 testimony or legal argument?

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1 MS. DOMEYER: I'm just -- he asked a
2 question about whether the Union was aware of it and
3 I'm merely trying to respond to the question.

4 JUDGE KARLIN: I thought it was about the
5 Consent Order that was entered in 2013.

6 MS. DOMEYER: I thought, I'm sorry, I
7 thought the question was did the Union know about the
8 company's investigation and what was going on.

9 In July of 2013 when the violation letter
10 was issued, that letter was issued on the docket and
11 I don't know whether the Union was aware of that or
12 not. I do know there were communications from the
13 company at some point about the fact that a violation
14 had been identified by the NRC.

15 JUDGE KARLIN: Right, because in the
16 Union's Petition, I think they said they were not
17 aware of the briefing and you had said the Consent
18 Order dealt with in those briefings were ostensibly
19 done in 2013.

20 MS. DOMEYER: No, those briefings were
21 done in 2012 before we ever went to ADR and before any
22 violations were issued.

23 JUDGE KARLIN: When did Rev 9 come into
24 effect?

25 MS. DOMEYER: Revision 9 of the BOP was

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1 formally implemented at the plants beginning in May of
2 2013.

3 JUDGE KARLIN: Yes, 2013.

4 MS. DOMEYER: Right, but the briefings on
5 the requirements of the BOP were done in 2012 and the
6 training was also done in 2012 before we ever went to
7 ADR.

8 JUDGE KARLIN: Training first, revisions
9 later?

10 MS. DOMEYER: Well our position is is that
11 the revisions weren't a change to the BOP. In fact,
12 that's why we terminated the equipment operator was
13 because we found he had violated our BOP as the BOP
14 program was written.

15 JUDGE KARLIN: But the Order says, let's
16 go to the Order. It says that the licensee has
17 revised its BOP to include illegal and unusual and
18 aberrant.

19 Now today, you're saying it wasn't a
20 revision. Now --

21 MS. DOMEYER: I'm sorry --

22 JUDGE KARLIN: -- the Order says it did
23 revise it.

24 MS. DOMEYER: -- I'm not sure where you're
25 reading from.

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1 JUDGE KARLIN: Page 66965 of the Federal
2 Register of November 7, 2013. The Order reflects in
3 Section 3(a) that the licensee stated it has revised
4 the procedure to include illegal, unusual, aberrant.

5 Now you're saying well that's not a
6 revision at all. Did you misrepresent something to
7 the NRC?

8 MS. DOMEYER: We are not misrepresenting
9 anything, Your Honor. What we said -- what the Order
10 says is that we revised our BOP to indicate that the
11 Behavioral Observation Program includes an expectation
12 to report off-site illegal activity. By that --

13 JUDGE KARLIN: So the NRC thought that you
14 had revised it and you're saying to us that you didn't
15 revise it? You're saying that --

16 MR. MATTHEWS: Judge Karlin, I'm not sure
17 she finished her first answer.

18 JUDGE KARLIN: Beg your pardon?

19 MR. MATTHEWS: Pardon the interruption,
20 Your Honor.

21 JUDGE KARLIN: No, that's no problem.
22 What was your question?

23 MR. MATTHEWS: Ms. Domeyer I think was
24 still trying to answer the first question.

25 JUDGE KARLIN: I know, I got the answer

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1 that I wanted.

2 MR. MATTHEWS: Thank you.

3 MS. DOMEYER: So the BOP program applied
4 to the off-site behavior. It has always included an
5 obligation to report aberrant behavior with no
6 limitation on whether that behavior occurs in the
7 workplace or outside of the workplace.

8 What we did was we revised it to
9 specifically refer to including off-site illegal
10 behavior because that was the incident that arose with
11 the SROs and the equipment operator.

12 JUDGE KARLIN: So that was not the off-
13 site or on-site issue, the word illegal, is that new
14 or is illegal for somebody to report on somebody else.

15 I know that employees have to report on
16 their legal problems under 73.56(g) -- 73.56(f)
17 they're heretofore under no obligation to report on
18 other peoples illegal activities.

19 MS. DOMEYER: And our position is that the
20 BOP did require them to report that behavior.

21 JUDGE KARLIN: Did it say that?

22 MS. DOMEYER: Did the BOP program at that
23 point in time specifically say --

24 JUDGE KARLIN: Yes.

25 MS. DOMEYER: -- that an employee has an

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1 obligation to report their knowledge of off-site
2 illegal behavior? No it did not.

3 JUDGE KARLIN: All right, something else.
4 Okay, so that's changed.

5 MS. DOMEYER: Right. We revised the BOP
6 program to make it clear that the expectation to
7 report behavior that is aberrant behavior includes
8 off-site illegal behavior.

9 JUDGE KARLIN: But I'm not concerned about
10 the off-site, that's a red herring. I'm talking about
11 the illegal.

12 MS. DOMEYER: Right, and so all I'm saying
13 is that we revised the program to clarify that the
14 aberrant behavior that must be identified and reported
15 by employees includes illegal behavior.

16 JUDGE KARLIN: All right.

17 MS. DOMEYER: And as you know, illegal
18 behavior was already in the BOP program.

19 JUDGE KARLIN: It was not in the BOP
20 program with regard to the reporting on other persons
21 illegal behavior, was it?

22 MS. DOMEYER: It was not specifically
23 written in the BOP.

24 JUDGE KARLIN: No, it was with regard to
25 people reporting their own legal problems, right?

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1 MS. DOMEYER: Correct.

2 JUDGE KARLIN: So that's a change. When
3 you have to report on your brother as opposed to
4 report on yourself, that's a change.

5 MS. DOMEYER: That is not a change, Your
6 Honor. We terminated the equipment operator for
7 failing to report the off-site illegal behavior of his
8 coworkers. That is why he was terminated.

9 JUDGE KARLIN: Right.

10 MS. DOMEYER: Our position is that the BOP
11 required that.

12 JUDGE KARLIN: And you also terminated him
13 for failure to being honest with you in your
14 investigation I think you said?

15 MS. DOMEYER: Yes.

16 JUDGE KARLIN: Are these factual issues
17 that are the merits of whether or not there's a change
18 here or not?

19 MS. DOMEYER: No, they are not factual
20 issues as to whether there's a change.

21 JUDGE KARLIN: Why not? That's what the
22 BOP said, what BOP said with BOP Rev 6 says, 7 says,
23 9 says, and 10 says. That's a factual issue.

24 MS. DOMEYER: Those changes were made --
25 to the extent you call them a change or a

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1 clarification, they were made before the Confirmatory
2 Order was entered. Those changes or revisions were
3 verifications were not the subject --

4 JUDGE KARLIN: Well the Confirmatory Order
5 calls them a revision, it called them a revision so it
6 was represented to the NRC that you revised your
7 procedures to include to report illegal off-site
8 illegal activity, you revised.

9 MS. DOMEYER: Any time our program is
10 updated, it is issued as a revision to the program
11 itself.

12 JUDGE KARLIN: Right.

13 MS. DOMEYER: Yes.

14 JUDGE KARLIN: But it's not a change. You
15 told the NRC it was a revision but you're telling us
16 it's not a change.

17 MS. DOMEYER: What I'm telling you is is
18 that it is a change to the facial words in the BOP
19 program? Yes, it is. Is it a change to the
20 expectation that employees report off-site aberrant
21 behavior? No, it is not a change. And in fact, that
22 is why the equipment operator was terminated.

23 CHAIRMAN RYERSON: Judge Jeffries, did you
24 want to continue?

25 JUDGE JEFFRIES: Thank you, Alex.

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1 Excuse me. So my understanding then is
2 that the investigation took place in 2012, and
3 subsequent to the investigation and this was before
4 the alternative dispute resolution, before that, you
5 actually had some briefings and some training because
6 of the events that took place with these illegal
7 actions of these SROs and equipment operator. Is that
8 correct?

9 MS. DOMEYER: Yes.

10 JUDGE JEFFRIES: Okay. So that was back
11 in 2012 and then in 2014 or whenever the -- no, 2013
12 when the Confirmatory Order came out then you talked
13 about those things in the past in Section 3.

14 MS. DOMEYER: Yes.

15 JUDGE JEFFRIES: Okay. Okay, I think I
16 understand now.

17 During that time that you had those
18 briefings, are you aware of any feedback that came
19 from any of the members of those supervisor briefings
20 I think you called them? Any feedback with regard to
21 the changes that were being implemented or the
22 revisions or just the general briefings themselves and
23 the training?

24 MS. DOMEYER: I am aware of no direct
25 feedback from the individuals with respect to the

1 training. I am aware that an assessment was done
2 shortly thereafter to assess understanding.

3 JUDGE JEFFRIES: And the results of that
4 assessment?

5 MS. DOMEYER: The results of that
6 assessment were that with the exception of two
7 individuals, everybody understood the obligation to
8 report off-site illegal behavior under the BOP
9 program.

10 JUDGE JEFFRIES: So you've made a point
11 about the fact of all along the expectation was that
12 off-site reporting was expected if people saw things
13 that would have an implication on trustworthiness and
14 reliability or impact on the facility, either its safe
15 operation or its security. Is that correct?

16 MS. DOMEYER: Yes.

17 JUDGE JEFFRIES: But when I look at the
18 procedures themselves, it specifically uses the words
19 that the observations became or others in the
20 workplace. It used that term over and over again. It
21 never says anything about any place other than the
22 workplace.

23 MS. DOMEYER: So, what it says is, and my
24 reading of it is there's only one reference to in the
25 workplace and that is in Section 2.3 where it says by

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1 observing the behavior of others in the workplace and
2 detecting and reporting aberrant behavior or changes
3 in behavior that might adversely impact an individuals
4 trustworthiness or reliability and undergo an annual
5 supervisory review.

6 That language is not cabined by a
7 detection of aberrant activity in the workplace. It's
8 only observation is in the workplace, but your
9 knowledge of aberrant activity is not cabined by being
10 limited to only that which occurs in the workplace.
11 And in fact, the BOP program, before we made any
12 updates or clarifications to the BOP program,
13 specifically refers to activities that generally,
14 typically, in the nuclear industry would only occur
15 off-site.

16 JUDGE JEFFRIES: Okay. Is Dresden similar
17 to most stations where they look at the 30-day
18 provision by keycard access?

19 MS. DOMEYER: You mean whether they've
20 been subject to the BOP program for the 30-day period?

21 JUDGE JEFFRIES: Yes.

22 MS. DOMEYER: I can't speak to how other
23 places handle that situation, so I do not know.

24 JUDGE JEFFRIES: Is that it's done at
25 Dresden?

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1 MS. DOMEYER: I'm not sure if we do it
2 based on keycard access, I believe it is, but, yes.

3 JUDGE JEFFRIES: I'm just referring to
4 that because that's just a further indicator that
5 these programs are very much focused on what happens,
6 not only on site, but really with inside the PA, the
7 protected area. Because that's how you used to
8 determine whether or not the 30-day provision has been
9 violated.

10 MS. DOMEYER: Well it depends on where
11 you're at. For example, at the plants, the
12 supervisors know whether the individuals have been at
13 work during that 30-day period.

14 JUDGE JEFFRIES: Right.

15 MS. DOMEYER: Outside the plants where
16 folks hold unescorted access but they are not at the
17 plants everyday, that observation and the reporting
18 requirement is not based on keycard access, it's based
19 on the supervisor's interaction with the individual.

20 But again, the focus of the program is
21 with respect to issues that occur in the workplace but
22 also issues impacting on trustworthiness and
23 reliability. And trustworthiness and reliability, by
24 definition in the Regulations, is not limited only to
25 things that occur in the workplace.

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1 JUDGE JEFFRIES: Okay. You said a little
2 bit in general about the industry presentation that
3 was conducted. Tell me more about that. Where was
4 that conducted and who was in attendance?

5 MS. DOMEYER: I do not know all of the
6 details of that. My understanding is it was conducted
7 at an NEI Task Force meeting that was attended by
8 representatives of other licensees across the industry
9 including an NPO representative. And the presentation
10 went through the incidents that resulted in the
11 apparent violations identified by the NRC as well as
12 the requirements of the Confirmatory Order.

13 JUDGE JEFFRIES: Okay, thank you.

14 Let me shift attention to Mr. Hair. Does
15 the NRC ever include Labor Union as affected party or
16 entity when an enforcement action is issued? Do you
17 know of any experiences where you've ever done that?

18 MR. MICHEL: Not to my knowledge, Your
19 Honor.

20 JUDGE JEFFRIES: Do you have any idea what
21 circumstances would have to occur before that might
22 come into play?

23 MR. MICHEL: Unfortunately, no, Your
24 Honor, I can't think of any.

25 JUDGE JEFFRIES: So when you look at

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1 something like the Behavior Observation Program, you
2 look at that as totally under the purview of the
3 licensee from the standpoint of making any changes or
4 doing anything with it and you look at that entity as
5 just a licensee and you don't take into account
6 anybody beyond that? Is that your position?

7 MR. MICHEL: Our position is simply that
8 the licensee -- we don't sort of look at the licensee
9 as separate parts making up one whole. We just see
10 the licensee as, you know, our licensee that
11 encompasses all of the operations at the facility and
12 all the employees engaged in those operations.

13 So I mean, you know, to be a fair
14 regulator, we have to take a look at -- just take, I
15 guess, a uniform look at the licensee as a whole,
16 understanding full well that it's made up of several
17 parts.

18 JUDGE JEFFRIES: So one of the things that
19 came out earlier today was the fact that there were
20 four individuals involved. There were three
21 individuals who were SROs, two of them were directly
22 involved in the events and the activities, one of them
23 heard about it later on and then there was an
24 equipment operator who was actually a member of Local
25 15. Right?

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1 So you were aware of this during the
2 investigation that here is this equipment operator who
3 belongs to the Union, but you then, in the same terms
4 as you view the licensee, when you put the
5 Confirmatory Order in place, because you only directed
6 it, or served it on the licensee. Is that correct?

7 MR. MICHEL: As a point of clarification,
8 Your Honor, we did contemplate enforcement action
9 against both the individual and the licensee. The
10 licensee -- the individual action is generally a non-
11 public enforcement action that's between the NRC and
12 the individual.

13 So the results of that are non-public but
14 it's not that the NRC did not take action against the
15 individual, it's that the NRC considered enforcement
16 action and ultimately did not take traditional
17 enforcement action against the licensee or the
18 individual in this case, otherwise it would have been
19 public.

20 JUDGE JEFFRIES: So it was different in
21 this particular individual's case than it would have
22 been for Buhrman or Brittain?

23 MR. MICHEL: Yes, using the enforcement
24 guidance, we take into consideration both the nature
25 of the individual's involvement, their level within

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1 the organization and those types of factors in
2 determining whether further escalated enforcement is
3 warranted.

4 JUDGE JEFFRIES: So from your perspective,
5 why was Exelon required to make the presentation to
6 the industry?

7 MR MICHEL: From our perspective, these
8 types of industry presentations, Your Honor, are
9 useful in that they provide some optics among the
10 industry for how at least one licensee or a group of
11 licensees has gone about addressing an issue. And in
12 this case, that issue was an apparent violation of
13 behavior observation reporting requirements.

14 However, no matter what the issue is, this
15 is, you know, an effective way we find to sort of put
16 the regulating community on notice with respect to not
17 only what's out there in terms of an issue, but how to
18 go about solving it. What's working? What may not be
19 working? And ways that we can get out more
20 clarification to our regulating community as a whole.

21 JUDGE JEFFRIES: Well, why would you use
22 something like this instead of what I consider to be
23 the more normal ways of communicating the exact thing
24 that you just talked about? Like for instance, a
25 Regulatory Issue Summary?

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1 MR. MICHEL: I understand, Your Honor.
2 Regulatory Issue Summaries generally require there to
3 be more of a systemic problem. I can't speak
4 intelligently to what that threshold is when the
5 agency decides that it's time to issue something like
6 Regulatory Issue Summary or a generic letter. But,
7 you know, I think it's more than just one incident at
8 one particular facility.

9 So if we wanted to make the industry as a
10 whole aware of this issue that is very likely present
11 at other facilities then we may go down that route.
12 Here, that wasn't necessarily the case. This just --
13 this is one of the many, you know, I've referred to it
14 before, creative problem solving outcomes that come
15 out of the and ADR session versus a traditional
16 enforcement follow-up with something like a RIS or a
17 generic letter.

18 JUDGE JEFFRIES: So, you didn't even
19 consider something other than putting it under the
20 umbrella of the confirmatory order?

21 MR. HAIR: Your Honor, I wouldn't say that
22 it wasn't considered. I think it's something that
23 we're keeping our finger on. It may be warranted in
24 the future. But it's something that the agency hasn't
25 made a decision on yet, the staff one way or the

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1 other.

2 JUDGE JEFFRIES: Well, here's something
3 that my 40 years in the industry has just honed my
4 interest when I look at this. Have you ever heard the
5 term a racket? *12:50

6 MR. HAIR: Yes, Your Honor.

7 JUDGE JEFFRIES: Okay. Well, then, what
8 I look at when I see a situation where clearly
9 individuals have done something that is way outside
10 the norms for this industry and the licensee is given
11 a corrective action which in all probability would not
12 solve the problem of those particular individuals.

13 And then they go out and make a
14 presentation because it looks as though there may have
15 been a gap in the program and that is that people may
16 not have understood fully that that program was
17 supposed to apply offsite as well as onsite.

18 And this isn't just Exelon. I mean, this
19 is industrywide. Most programs if you go and you do
20 the interpretation module you'll find out that they
21 focus on onsite. Which you would expect because
22 that's where the equipment is. That's where the
23 safety equipment is. That's where you have the most
24 opportunity to do mischief, right?

25 So, if it applies in this particular case

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1 and I'm putting words that aren't on the paper, but if
2 you're really wanting to sensitize and get people to
3 increase the probability that something like this or
4 something akin to this would never happen again you
5 would make it explicit that offsite reporting was
6 good.

7 So you make a presentation to NEI or to
8 INPO and it seems to me as though it's a natural next
9 step to ask the industry to make sure explicitly you
10 look offsite as well as onsite. Because I don't think
11 Exelon is all by itself. I think we're talking about
12 individuals here. But that -- be it what it may.

13 Okay, shifting over to Local 15.

14 MS. SKOLNICK: Yes, sir.

15 JUDGE JEFFRIES: Ms. Skolnick. I think we
16 agree that from a regulatory standpoint there isn't
17 anything in the regulation that says that the
18 behavioral observation program is not applicable
19 offsite too, is that correct?

20 MS. SKOLNICK: I think you're right about
21 that, that there are certain things that the
22 regulations -- with regard to offsite conduct that the
23 regulations do reach.

24 JUDGE JEFFRIES: Well, there's no place in
25 76.53 that you can point to that says that it is

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1 specifically an onsite program. Is that correct?

2 MS. SKOLNICK: You're right, there is no
3 explicit distinction between offsite and onsite
4 conduct. You're absolutely right.

5 JUDGE JEFFRIES: So the applicability --
6 implementation applicability goes beyond just onsite.

7 Do you believe the NRC was within its
8 authority to require them to explicitly state that
9 fact? In the most recent revision.

10 MS. SKOLNICK: I'm not sure I'm qualified
11 to answer that question, Your Honor. But what I would
12 say is if they were going to require that kind of
13 explicit requirement of Exelon that they should have
14 at a minimum connected it to -- explicitly to the
15 nuclear safety concerns that animate the regulations
16 and that they should have been much clearer about the
17 kind of conduct that was in fact reportable. I think
18 that's sort of the heart of our problem with it.

19 And you know, by raising those potential
20 ways in which they could have done things differently
21 I do not mean to suggest that we would ask that they
22 amend the order in that way.

23 I'm just saying that while they may have
24 been within their rights to require Exelon to say you
25 need to address this offsite illegal conduct, if they

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1 were then they also needed to be explicit about the
2 kind of conduct that needed to be reported, and to tie
3 that specifically to those nuclear safety concerns.

4 JUDGE JEFFRIES: I'm trying to understand
5 why I would expect that in the order rather than in
6 the implementing procedures that would come out of the
7 order. Given the fact that the NRC has the ability to
8 go in and to inspect what the implementing procedures
9 say to see if it conforms with what their intent was
10 in the order.

11 MS. SKOLNICK: And my answer to that, Your
12 Honor, would be because the order itself creates
13 independent obligations. And to the extent it does
14 that then it needs to have the complete obligation
15 laid out in the order.

16 And I don't think that it can correctly
17 rely on the BOP and the specifics of that and how
18 Exelon might implement the order to fulfill that
19 requirement of specificity and the connection to
20 nuclear safety.

21 JUDGE JEFFRIES: Even when they have the
22 ability in the checks and balances to do that.

23 MS. SKOLNICK: I think because the order
24 creates an independent obligation I think it needs to
25 be complete within itself.

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1 JUDGE JEFFRIES: Okay, thank you. You
2 heard my question with regard to the training.

3 MS. SKOLNICK: Yes.

4 JUDGE JEFFRIES: And the briefing that was
5 done earlier. Would you please respond to that from
6 the union side?

7 MS. SKOLNICK: Can you remind me what
8 specifically it was you wanted to know about the
9 training?

10 JUDGE JEFFRIES: Well, specifically when
11 I looked at your petition there was verbiage in there
12 that said that you were not privy to briefings and
13 training and things like that, that they were a
14 surprise to you.

15 MS. SKOLNICK: Yes.

16 JUDGE JEFFRIES: That all of a sudden you
17 got this. And now I find that back in 2012 these
18 supervisory briefings were given at the plant, and
19 there were people that were there, and I assume there
20 were some kind of attendance records, and there was
21 some feedback from them and things like that. So I'm
22 having a disconnect with regard to the communication.
23 I'd like your view on that.

24 MS. SKOLNICK: Sure. Maybe understanding
25 the union's structure would help. And I may ask for

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1 Ms. Teitelbaum to help supplement my answer here.

2 But I think what you heard from Ms.
3 Domeyer was that, yes, there were perhaps these
4 supervisory briefings where the supervisors were
5 instructed to inform the employees of certain things.

6 The union is not just the employees. And
7 generally in labor law we don't necessarily impute
8 whatever an individual member knows to what the union
9 as an entity also knows.

10 And so I don't think that there was
11 anything in what Ms. Domeyer said that was
12 inconsistent with the notion that the union
13 leadership, that the people who call the shots at the
14 union were not aware of these things.

15 Perhaps individual members were. I'm not
16 going to argue with her about this factual issue. But
17 to the extent that individual members were aware of
18 those briefings that's not the same thing as the union
19 being aware of it.

20 And as far as we know the union, I mean
21 what my understanding is from our client is the union
22 was not aware of those briefings or that guidance.

23 MS. TEITELBAUM: If I may.

24 JUDGE JEFFRIES: Please.

25 MS. TEITELBAUM: The union was not aware

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1 of those briefings and has in fact responded to some
2 questions like that from the NLRB. In fact, some of
3 the members were aware of the briefings in 2013. We
4 just recently heard about any briefings in 2012 and
5 we're not sure even how extensive those were.

6 And in fact, I think that at the heart of
7 this group of questions that you're asking, why would
8 this have to be in the CO instead of -- in the
9 confirmatory order rather than the BOPs, that the
10 obligation to bargain, talk to the union, work through
11 these is going to be circumscribed, or the term that
12 a lot of people have used here is cabined by this
13 confirmatory order.

14 If the confirmatory order as it's written
15 stands and says you have to make sure unusual,
16 aberrant and all illegal activity, that is the
17 obligation. And even if they go to arbitration
18 because somebody is discharged for it they're going to
19 argue to, as they've argued to the NLRB, that in fact
20 they can't do anything about it because it's an NRC
21 order. And I think that's the heart of why this is
22 very significant.

23 JUDGE JEFFRIES: But even if this Board
24 were to vacate the order as it stands today do you not
25 think the NRC has other ways to make sure that this

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1 particular behavioral observation program is in fact
2 implemented the way that it is envisioned under the
3 order?

4 MS. TEITELBAUM: Well, if in fact -- if
5 you're talking about amending the regulations it's a
6 whole procedure in which people will have input,
7 including the public, including the union to go
8 through that. First of all.

9 Second, I would assume that if it did go
10 through that procedure we're not going to have a
11 requirement in there. There's not now and I assume
12 they had chosen not to that says you have to report
13 all illegal activity, unusual activity, all aberrant
14 activity.

15 Instead it has this general statement
16 about observation programs so that you can ensure the
17 trustworthiness of employees.

18 Outside of that unless this confirmatory
19 order goes in the company has an obligation under the
20 NLRB to negotiate with the union about how to comply
21 with those regulations. So, yes, there's other ways
22 and there's ways that people can have input into that
23 too.

24 JUDGE JEFFRIES: You use the terms
25 "illegal, unusual and aberrant." Those terms have

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1 been around for quite awhile in the implementing
2 procedures, have they not?

3 MS. TEITELBAUM: I'm going to return this
4 back to Rochelle because she's the --

5 MS. SKOLNICK: And Your Honor again, to
6 the extent that they have been part of the behavioral
7 observation program, again I think that is not
8 strictly speaking relevant to the question that's
9 before this Board which is the validity of and the
10 sustainability of the confirmatory order.

11 JUDGE JEFFRIES: I'm having a hard time
12 dissecting that. Because it seems to me as though the
13 pleading that you have is one that binds them together
14 in some form. Because you continually say that this
15 is a new thing, this is something that is going to
16 bring uncertainty to the point of maybe making the
17 station less safe. Those kind of things make me
18 wonder whether or not you can just take the
19 confirmatory order and isolate it to the point where
20 you don't consider the other factors.

21 And when I hear that you have not
22 negotiated or bargained over any of the previous
23 revisions of the behavioral observation program, and
24 then all of a sudden when there's something that is
25 affected that all it does is bring into the explicit

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1 area the implementation applicability to take it
2 offsite and off-duty with the minor exception of the
3 illegal part.

4 Because the illegal part has been there
5 all along for self-reporting as my colleague Judge
6 Karlin has said. It's just that it hasn't been there
7 with regard to reporting on others of illegal
8 activity.

9 So when I try to put those things together
10 and the communication problem that I see with regard
11 to a series of briefings, a series of training where
12 I'm sure that union stewards have been in and it
13 didn't raise their level to the point where they came
14 running to the union leadership and saying we have a
15 real problem here. This is a departure from what
16 we're expected to do, something that's very different.
17 I have a hard time making that connection that that's
18 a real problem.

19 MS. SKOLNICK: Well, Your Honor, I think
20 you're touching on some of the very factual issues
21 that need to be resolved here. I mean, you raise some
22 interesting questions that touch on why we have
23 factual concerns.

24 JUDGE JEFFRIES: This Board isn't here to
25 either determine your labor relationship with Exelon.

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1 It isn't here to help your communication problems --

2 MS. SKOLNICK: And we're not asking --

3 JUDGE JEFFRIES: -- that you all have
4 internally.

5 MS. SKOLNICK: Right.

6 JUDGE JEFFRIES: So, I'm at a loss with
7 regard to, you know, just exactly what this Board is
8 supposed to do other than vacate an order which I see
9 as being something that -- not sustain an order which
10 I see as something that the NRC could very easily
11 circumvent even if it was not sustained.

12 MS. SKOLNICK: I'm not sure I understand
13 how you think it could be circumvented. And forgive
14 my unfamiliarity with the law in this regard. Aside
15 from traditional notice and comment rulemaking.

16 JUDGE JEFFRIES: I think all the NRC needs
17 to do, and you can correct me if I'm wrong, Mr. Hair,
18 is the NRC would look at it from the standpoint of
19 saying what is it that we feel that the industry is
20 not doing today in the behavioral observation area
21 that needs to be shored up. Given the fact that
22 something has happened. And the something that
23 happened was what happened in 2012 or 2011 with the
24 events that brought this case.

25 And all they need to do is send out an ID

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1 notice, a bulletin, an RIS. There are other
2 mechanisms that you can get that information out to
3 the public, is that not right?

4 MR. HAIR: Your Honor, we wouldn't be able
5 to extend beyond the regulations. And I'm sure that's
6 not what Your Honor is suggesting.

7 JUDGE JEFFRIES: No, I'm not suggesting
8 that.

9 MR. HAIR: However, to get to the same
10 effect, yes, there are other guidance documents, other
11 communications the NRC can engage in to send out the
12 message to the regulated community all the same.

13 JUDGE JEFFRIES: Enough on that. Let me
14 see if I have anything else. Did you agree with the
15 comments that were made by Ms. Domeyer with regard to
16 the recourse or the processes that are available to
17 anybody who might be wrongfully indicted under the
18 behavioral observation program?

19 MS. SKOLNICK: To the extent that someone,
20 for example, would have access denied there are
21 appeals processes in place for that. And there are
22 grievance processes culminating in arbitration.

23 JUDGE JEFFRIES: And they wouldn't change
24 based on this particular change of going offsite.

25 MS. SKOLNICK: Those are not affected by

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1 this. But I think Ms. Teitelbaum might have something
2 to add on that point.

3 MS. TEITELBAUM: Yes, right. It would be
4 affected by this confirmatory order because what has
5 happened in our past relationship and I'm sure will
6 continue to happen as it is happening right now before
7 the NLRB is that Exelon will argue it is an order of
8 the NRC. And we can't do anything about it, the
9 arbitrator can't do anything about it, the NLRB can't
10 do anything about it.

11 And so you add to and you give your stamp
12 of approval. And in fact foreclose, potentially
13 foreclose these other avenues when you make it an
14 order. And that is why the order should be narrowly
15 tailored to address the situation and be well within
16 the requirements of the regs.

17 Without that you do foreclose us from --
18 and the members that we represent from these avenues
19 of redress.

20 JUDGE JEFFRIES: Okay, thank you. That's
21 all I have.

22 JUDGE KARLIN: Let's just follow up on
23 that point that Ms. Teitelbaum raised. I'd like to
24 ask Mr. Kuyler. It does seem to me that there's sort
25 of a catch-22 going on here, that Exelon is playing

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1 both sides against the middle.

2 In front of the NLRB they are claiming
3 perhaps it's -- that there's some unfair labor
4 practice and you have to negotiate about this before
5 you can impose these requirements.

6 And you say this is involuntary. We're
7 being ordered to do this by the NRC. We have no
8 choice, Mr. NLRB. And so they're kind of powerless,
9 aren't they? They can say yes, it was an unfair labor
10 practice, but you can't change it because it's
11 mandated by the order of the NRC.

12 Is that what you're arguing to the NLRB,
13 that it is required by the NRC and therefore you don't
14 have to bargain about it? Aren't you arguing that?

15 MR. KUYLER: I can't speak directly, Your
16 Honor, to Exelon's arguments before the NLRB. If I
17 could confer with my client for one moment. Yes, I
18 think the heart of the matter here is that this all
19 starts from the assumption that the confirmatory order
20 imposes new --

21 JUDGE KARLIN: Let's forget about that.
22 I don't want to talk about the argument that there's
23 no change here. They argue that there is a change.

24 Now, under our rules we're supposed to
25 take the reasonably pled arguments regarding standing

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1 and adverse effect as accurate and true for purposes
2 of whether they should even get a hearing. I mean
3 they're just asking for a hearing at this point. This
4 is not a hearing, this is to decide whether they get
5 a hearing.

6 So, we're going to assume -- I'm going to
7 assume for the moment, and I think there's good
8 reason, let's say there is a change. And you go to
9 the NLRB. Aren't you arguing we have no choice here
10 because this is being ordered by the NRC?

11 MR. KUYLER: My understanding is that
12 Exelon's primary argument before the NLRB is that
13 these are matters that are required by NRC
14 regulations.

15 JUDGE KARLIN: Okay. That answers my
16 question. You're going to tell them you have no
17 choice. It's required.

18 And then you come to us and say well, you
19 shouldn't really look at this because it's really
20 something that should go before the NLRB. You argued
21 that to us. Contention 3 is not admissible. These
22 contentions are not admissible. They're just a labor
23 practice problem. You should defer to what the NLRB
24 does. You've argued that here in your briefs.

25 MR. KUYLER: Yes. Yes, Your Honor.

1 Again, another reason why there's no catch-22 here is
2 because the confirmatory order does not impose
3 anything directly upon the members of the Local. It
4 imposes obligations on Exelon.

5 JUDGE KARLIN: Yes, I've been through
6 that. I won't need to ask that question. Even if we
7 posit that only the people who were subject to the
8 order have a right to demand I think there's a
9 reasonable discussion. We need to think about whether
10 these workers are subject to the order.

11 They are -- the violation by individuals
12 is the basis of the order. There's no violation
13 alleged of the company. The compliance must be
14 imposed on the individual workers. They're
15 individually liable to go to jail, to be blacklisted,
16 to report.

17 And so I think I would like to refer to
18 Judge Rosenthal -- I'll let you talk in a minute --
19 Judge Rosenthal in the Appeal Board hearing in the
20 Palisades even before 1991 when they had a right, when
21 other affected parties had a right to demand a
22 hearing. And the union was asking for a hearing. And
23 they did not decide the issue of standing.

24 And Judge Rosenthal said I think there's
25 a good question to have standing. And I will quote

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1 you Rosenthal. "At bottom, the question here is
2 whether the affected individuals should be given the
3 opportunity to be heard on the warrant for the
4 confirmatory order. For me the mere statement of the
5 question suggests the answer. Even though formally
6 addressed to the licensee, the focus of the order is
7 of course upon the employment activities of the
8 operators and it is they who will likely bear the
9 brunt." It's 15 NRC 506 including note 1, footnote 1
10 of Rosenthal.

11 It seems to me that may be what is
12 happening here.

13 MR. KUYLER: If I may?

14 JUDGE KARLIN: Yes.

15 MR. KUYLER: A couple of responses, Your
16 Honor. First, in that Palisades case there was no
17 question that the confirmatory order in that case
18 imposed restrictions that were more stringent than
19 those set forth in the regulations. The hour, work
20 hour requirements were not -- and whether that imposed
21 additional requirements were not in dispute.

22 And secondly, with respect to the
23 confirmatory order we talked earlier about 73.56(f)(3)
24 which imposes obligations directly on individuals.
25 But the confirmatory order also calls out apparent

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1 violations of 56(a)(2) and (f)(1) which speak to the
2 program, Exelon's access authorization program and
3 Exelon's behavioral observation program with the
4 implicit meaning there that because of all these
5 individual violations the NRC came to the conclusion
6 that there was an apparent violation of programmatic
7 requirements.

8 JUDGE KARLIN: Well, let's just think
9 about this. I used to represent Shell Oil Company.
10 I've been in-house with them. If NRC comes to you as
11 counsel for Exelon and says you know, we've got a
12 problem here. We're going to take an enforcement
13 action against you. Why?

14 Well, senior reactor operator 1 and 2
15 formed a conspiracy to rob an armored car and they
16 didn't report. So you've got to amend your BOP
17 program. So next time they form a conspiracy to rob
18 an armored car they will report.

19 Under any circumstances do you think the
20 changes that were wrought by this confirmatory order,
21 all the training that the company is going to go
22 through, would have meant that these SROs would have
23 reported their conspiracy to rob a bank?

24 MR. KUYLER: I can't --

25 JUDGE KARLIN: No, does it remedy that

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1 problem?

2 MR. KUYLER: It doesn't fix what happened,
3 no.

4 JUDGE KARLIN: Does it remedy -- would
5 those guys have reported? Does it fix the problem?

6 MR. KUYLER: It would be speculation.

7 JUDGE KARLIN: Oh, I didn't realize we had
8 to report offsite activities. So we're going to rob
9 the bank. So I guess we better report.

10 MR. KUYLER: It would be speculation, but
11 perhaps if others who were not the criminals involved
12 directly in the conspiracy had heard about this and
13 were more familiar with the requirements, perhaps they
14 would have reported. But that is speculation.

15 JUDGE KARLIN: So you're the attorney
16 representing Exelon in this ADR meeting and you say to
17 NRC what, are you crazy? The company didn't do
18 anything wrong. We didn't violate any reg. Maybe
19 those employees who went off on a detour and frolic
20 violated something but we didn't do anything wrong.
21 Isn't that what you would have said?

22 MR. KUYLER: Under other circumstances
23 that would be an option for the licensee to say that,
24 yes.

25 JUDGE KARLIN: And the licensee knows that

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1 it's regulated by the NRC on a regular basis so this
2 comes to let's cut a deal program. And who gets hit?
3 The people who are outside of the room. The workers
4 are the ones that have to comply with this.

5 MR. KUYLER: We disagree with that, Your
6 Honor.

7 JUDGE KARLIN: Do you agree that there are
8 settlements work to ADR -- I was an ADR provider for
9 a year. I took a year off from being a lawyer and
10 decided to be an ADR provider. I highly respect ADR
11 but it doesn't mean anything that comes out of it is
12 necessarily blessed with some sort of sacred deal.

13 And ADR can often result in an imposition
14 of duties on people who aren't in the room. Do you
15 posit that?

16 MR. KUYLER: Hypothetically?

17 JUDGE KARLIN: Have you ever seen it
18 involved in environmental cases where that happened?

19 MR. KUYLER: Hypothetically that is
20 possible.

21 JUDGE KARLIN: Okay. All right. So Mr.
22 Hair, now the NRC has a fitness for duty program,
23 right?

24 MR. HAIR: That's right.

25 JUDGE KARLIN: And that's 10 C.F.R. Part

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1 26?

2 MR. HAIR: Part 26, correct.

3 JUDGE KARLIN: And that's a very important
4 program, right?

5 MR. HAIR: That's right. It's very
6 related to the access authorization program. Or Part
7 73, yes.

8 JUDGE KARLIN: Yes, so Part 73, Part 26,
9 they're correlated. They're related in some way.

10 One of the things in studying, looking at
11 that is Section 10 C.F.R. 26.75 Sanctions. And it
12 talks about sanctions that management can impose,
13 company management can impose.

14 And those regulations, 10 C.F.R. 26.75(e),
15 (f), (h) impose significant limitations on sanctions
16 that an employer, the licensee can impose on workers
17 such as terminating them.

18 When I was in private practice termination
19 of a worker was called the death sentence of human
20 relations law. So before you can terminate somebody
21 under the fitness for duty program there are some
22 hoops that are required for a licensee to go through.
23 Right?

24 MR. HAIR: That's correct, Your Honor.

25 JUDGE KARLIN: Are any such hoops here for

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1 this program?

2 MR. HAIR: No, Your Honor. It is a
3 different design. It represents a different design
4 from --

5 JUDGE KARLIN: So it's just a free ride
6 for the employer. They can terminate anybody they
7 want. Whereas the fitness for duty program seems very
8 important. There are serious limitations on whether
9 they can do that.

10 MR. HAIR: Yes, there are, Your Honor.
11 And for good reason. I can shed a little bit of light
12 on that although I'm not an expert in 10 C.F.R. Part
13 26 by any stretch of the imagination.

14 However, when the NRC set up this Part 26
15 program we did have constitutional due process
16 problems when we were mandating a result.

17 For instance, in Part 73 we don't mandate
18 a result of any particular kind where the licensee
19 receives information based on the behavioral
20 observation program. We've said as much in our
21 briefs.

22 If they deem certain information that they
23 receive to undercut someone's trustworthiness and
24 reliability they make that determination. And as long
25 as their program meets the minimum requirements that

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1 we put forward they have a free ride as you might say.

2 Under Part 26 we mandate certain results
3 that must happen after a positive fitness for duty
4 test. However, we cannot mandate that result under
5 any circumstances. Those individuals need to be
6 afforded their constitutional due process rights. And
7 that program was designed with that in mind.

8 JUDGE KARLIN: And the interveners, the
9 Local 15 is raising due process rights here as well,
10 aren't they?

11 MR. HAIR: I would defer to them as to
12 what --

13 JUDGE KARLIN: But their briefs say that,
14 don't they?

15 MR. HAIR: I believe it does mention due
16 process concerns.

17 JUDGE KARLIN: Let me ask this. Now, NRC
18 is not the only agency that deals with nuclear
19 materials.

20 MR. HAIR: No, sir.

21 JUDGE KARLIN: Especially after 9/11. I
22 mean, these regs came in -- the behavioral observation
23 program was beefed up dramatically from 29 words to
24 several thousand in response to 9/11 in 2009.

25 What about DOE? Now, DOE deals with

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1 nuclear weapons, nuclear -- deadly nuclear materials.
2 Do they have a behavioral observation program?

3 MR. HAIR: Unfortunately I don't know the
4 answer to that question, Your Honor.

5 JUDGE KARLIN: And is theirs illegal and
6 unusual and aberrant? What words do they use?

7 MR. HAIR: Unfortunately like I said I'm
8 not familiar.

9 JUDGE KARLIN: How about Department of
10 Defense? They have nuclear weapons. They must be
11 very concerned about behavior. Do they have a
12 behavioral observation program for their people?

13 MR. HAIR: I do not --

14 JUDGE KARLIN: To report on other people
15 in their off-duty hours? How about CIA? The CIA used
16 to fire people because they were gay. Is that unusual
17 behavior in this day and age anymore that needs to be
18 reported? Let's say you're in Dubuque, Iowa. Do you
19 need to report that one of your coworkers is gay? Is
20 that unusual in that community?

21 MR. HAIR: The staff has no comment, Your
22 Honor.

23 JUDGE KARLIN: So, but there are other
24 agencies that maybe have a behavioral observation
25 program that might inform what we're trying to do

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1 here, or what you're trying to do here.

2 MR. HAIR: Yes, Your Honor, I think that's
3 a fair point. And to that point, and to the broader
4 point here that the order is tailored to address these
5 concerns I think at each agency's discretion is how to
6 prevent these things from happening again. It's never
7 an a surety. It's always something that you have to
8 work with the tools that are in front of you.

9 And as I hope the Board can appreciate the
10 tools used in the ADR process really lean heavily on
11 the implementation of regulations through licensee
12 procedure and licensee guidance, and they don't
13 necessarily carry with -- the decisions, I should say,
14 that are based on these revisions are not necessarily
15 underpinned by a regulatory requirement. Other than
16 that the order required those revisions to take place.

17 JUDGE KARLIN: Yes, I mean that's part of
18 contention number 2, isn't it, that part of their
19 concern is delegation, sort of unfettered delegation.
20 But that ends up to a "trust us" argument, right?
21 They say well, trust us, we won't ding you if you just
22 saw somebody going 56 miles an hour.

23 MR. HAIR: It's not trust the NRC, Your
24 Honor, it's trust the licensee.

25 JUDGE KARLIN: It's trust the licensee.

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1 And that's a delegation of whether you should put
2 people in jeopardy of being terminated by the company
3 because by the letter of the law I don't see how they
4 would lose an unfair labor practice argument.

5 You've terminated someone for going 56
6 miles an hour and his buddy didn't report him, and you
7 terminate the buddy. Unfair labor practice, I
8 shouldn't have been terminated. It's not a matter of
9 vagueness at that point. It's absolutely clear he was
10 violating the law and you simply say it's clear he was
11 violating the law. It's clear we have a right to
12 terminate him. We terminated him. There's nothing
13 unfair about that, Mr. NLRB, is there?

14 MR. KUYLER: In Revision 10 to the BOP,
15 Your Honor, the minor traffic violations are
16 specifically excluded from this.

17 JUDGE KARLIN: Right. But what about
18 Revision 11? Trust us, again. You can revise this
19 anytime you want. NRC doesn't give a -- as far as I
20 can tell.

21 MR. KUYLER: If a member of the Local has
22 a problem with Exelon's actions under the BOP in terms
23 of terminating someone's access authorization, that
24 person's access authorization, that is an issue
25 between Exelon and the Local and can be brought before

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1 the NLRB.

2 JUDGE KARLIN: What if Exelon wanted to be
3 a tough guy and just say illegal means illegal.
4 That's our BOP. Mr. Jones who doesn't report on his
5 buddy, fails to report 57 miles per hour by his buddy,
6 you terminate him. He files an unfair labor practice.
7 He's going to lose, isn't he? Hey, the reg is clear.
8 You've got to report -- the BOP is clear. You have to
9 report anything that's illegal, you didn't, you're
10 fired. What's unfair about that?

11 MR. KUYLER: Under that scenario, Your
12 Honor, there would probably be a reasonable argument
13 that any questionable behavior patterns that are
14 forbidden under -- or that are called out under 73.56,
15 that would fall under that. That would be a
16 reasonable argument.

17 JUDGE KARLIN: Now, you're going back to
18 the regs? I thought you were saying you could do --
19 you interpret it the way you want. Are you limited by
20 the regs to only what the regs can provide?

21 MR. KUYLER: If the challenge before the
22 NLRB is that Exelon's BOP is inadequate --

23 JUDGE KARLIN: No, no, that's not the
24 challenge before the NLRB. The challenge before the
25 NLRB is that was unfair labor practice. You

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1 terminated me unfairly. And you say what's unfair?
2 The BOP says illegal, you failed to report an illegal
3 activity, you're fired.

4 MR. KUYLER: Just to return -- one of our
5 primary arguments before the NLRB at this point is
6 that the BOP is consistent with the NRC regulations.

7 JUDGE KARLIN: It's required.

8 MR. KUYLER: Is required by the NRC
9 regulations.

10 JUDGE KARLIN: Yes, so that's the catch-
11 22.

12 MR. KUYLER: The way out of that catch-22,
13 Your Honor, for the Local is to petition for
14 rulemaking.

15 JUDGE KARLIN: Petition for the rulemaking
16 with the NRC?

17 MR. KUYLER: Before the NRC.

18 JUDGE KARLIN: They're not challenging the
19 rule. They're not challenging the rule. They're
20 challenging this order.

21 MR. KUYLER: I believe they are
22 challenging the rule, Your Honor.

23 JUDGE KARLIN: No -- okay. Well, I see
24 you've raised that argument. I see no challenge to
25 the regulation itself. They admit the regulation is

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1 valid. They're just saying this order is vague,
2 overly broad, extends beyond the order, et cetera, et
3 cetera. No challenge to the reg at all.

4 Let me refer you to page 7 of your
5 answers, Mr. Kuyler. I think I have concerns about
6 your characterization in several places actually of
7 the Davis Besse case.

8 Let's go to page 4 of your answers. It's
9 not these but the answers. And you say there, and I
10 quote, "As any question about the significance of the
11 phrase 'right to demand a hearing' as applied to third
12 parties who may seek to challenge NRC endorsement
13 action as further explained in response to the
14 following. The Commission has repeatedly held that
15 this right remains subject to the requirements for
16 standing and admissibility."

17 Can you cite me to any case in the annals
18 of the NRC where they construe the phrase "right to
19 demand a hearing" in 2.202(a)(3) and say that? Is
20 there any case that holds that? That deals with that
21 language.

22 MR. KUYLER: Yes, there are a number of
23 them, Your Honor. I would point first to the same
24 case that staff counsel pointed to before, the Alaska
25 Department of Transportation.

1 JUDGE KARLIN: That is utterly inapposite.
2 They do not confront that language and the holding in
3 that case is on pure Bellotti which is, as Judge
4 Ryerson indicated the scope of the hearing is whether
5 the order should be sustained. Mr. Farmer, you are
6 not asking that the order not be sustained, you're
7 asking the order be beefed up. Therefore you're not
8 allowed to challenge this.

9 It was outside of the scope. It wasn't a
10 question in construing 2.202(a)(3).

11 MR. KUYLER: Yes, Your Honor. That case
12 is on point and is controlling here because --

13 JUDGE KARLIN: If it's on point and it's
14 controlling how is it on point?

15 MR. KUYLER: Because in that case there
16 was a third party who alleged that they were adversely
17 affected by a confirmatory order and they were held to
18 the requirements, explicitly held to the requirements
19 of standing and contention admissibility.

20 And even though the reason they didn't
21 have standing and contention admissibility was because
22 of the principle of Bellotti the principle of
23 requiring them to show standing still applies. So, in
24 that respect this is a holding that is binding upon
25 this Board. Davis Besse, the same thing.

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1 JUDGE KARLIN: All right, let's go to
2 Davis Besse. I've got Davis Besse in front of me,
3 page 157. That is to my mind a pure Bellotti case.

4 The confirmatory order provided that
5 persons adversely affected could request a hearing
6 within 20 days. It didn't say demand a hearing. It
7 didn't confront -- demand a hearing. Significantly,
8 the confirmatory order set boundaries for the hearing.
9 "If a hearing is held the issue to be considered at
10 such a hearing shall be whether the confirmatory order
11 should be sustained." The exact same language appears
12 in this confirmatory order, does it not?

13 And the Commission says, in essence the
14 petitioner sought broad hearing in which to litigate
15 things that were outside the permissible scope of the
16 hearing. So it was an issue of whether -- Bellotti is
17 simply it's outside the scope.

18 Bellotti held, Judge Bork and this other
19 judge held that the NRC has a right to define the
20 scope of its hearings and it has defined the scope of
21 this hearing as whether this order should be
22 sustained.

23 And that's exactly what these people are
24 asking for, whether this order should be sustained.
25 This case doesn't deal with -- this case they're

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1 asking for, the NIRS, the Nuclear Information Research
2 Service is asking for the order to be beefed up. And
3 they said Bellotti, end of case.

4 MR. KUYLER: If I may just make two
5 observations, Your Honor.

6 JUDGE KARLIN: Yes.

7 MR. KUYLER: First, in this case as in the
8 other cases that we're talking about the fact that
9 standing and contention admissibility applied to the
10 petitioners was taken as a given. And it's a given
11 that applies here as well.

12 And I would also point you to 2.309(d)(3)
13 which again is the regulation that states specifically
14 that in an enforcement proceeding the licensee or the
15 individual who is -- to whom the enforcement order is
16 issued automatically has standing. Not a third party
17 who may be adversely affected, but if they claim that
18 they must show standing. And that's, I believe, what
19 was held in the Siemaszko case as well.

20 JUDGE KARLIN: Well, I think you've said
21 and Mr. Hair has certainly said that this person who
22 is a subject of the order is the one who has a right
23 to demand a hearing. And so there is a question
24 whether they're subject to the order.

25 The next question is assuming, even

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1 assuming 2.202(a)(3) doesn't apply and they have to
2 meet standing requirements. Let's look at 2.309(d)
3 which is the one you're talking about. A request for
4 hearing must state, and then it talks about the nature
5 and extent of the requester's property, financial, or
6 other interest. So, would you say that the union is
7 raising property or financial interests within the
8 scope of 2.309(d)?

9 MR. KUYLER: I think --

10 JUDGE KARLIN: It says financial interests
11 are legit. Property interests are legit.

12 MR. KUYLER: I think to understand that
13 phrase you need to look at the case law which holds
14 that to show standing you have to have a -- you have
15 to allege a violation of a right under the Atomic
16 Energy Act, perhaps the National Environmental Policy
17 Act.

18 Some of the examples where this language
19 would come up would be, for example, someone who
20 lives, who has a farm very close to a nuclear power
21 plant.

22 JUDGE KARLIN: Yes, the 50-mile radius.

23 MR. KUYLER: And so therefore they could
24 be injured from a radiological perspective but they
25 would be able to assert their property or financial

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1 interest.

2 JUDGE KARLIN: Why was the Nuclear Energy
3 Institute which alleged the economic interest of its
4 members allowed standing in the high-level waste case?
5 Why was the NARUC, national association of whatever
6 utility guys, granted standing based upon their
7 representing ratepayers in the high-level waste case?

8 MR. KUYLER: I would have -- I would be
9 happy to brief that.

10 JUDGE KARLIN: Confirmed by the
11 Commission.

12 MR. KUYLER: I would be happy to brief
13 that, Your Honor, if you'd like. I'm not familiar
14 with the specific arguments that were made at that
15 time. But I believe there were objections to those
16 standing -- to the standing of those organizations
17 that were not pursued on appeal to the Commission.

18 JUDGE KARLIN: No, the Commission affirmed
19 the standing of NARUC based upon its representation of
20 ratepayers.

21 MR. KUYLER: We'd be happy to brief that
22 if you'd like, Your Honor.

23 JUDGE KARLIN: Now, in contention
24 admissibility -- one more question then we'll be done,
25 Mr. Kuyler.

1 Again, I think maybe we've covered this
2 but I just want to be clear. If this was a unilateral
3 order as opposed to a confirmatory order and Exelon
4 got it and they have a right to demand a hearing let's
5 say. And they demanded a hearing. They said we want
6 a hearing because this is vague, it's over-broad, it's
7 overreaching, it's not within the proper scope of the
8 regs. You don't have the legal authority to do that.
9 Would you have a right to have a hearing on that?

10 MR. KUYLER: In an enforcement case where
11 the target of the enforcement order requests a hearing
12 they do not need to state contentions.

13 JUDGE KARLIN: So, you believe they have
14 a right to have a hearing on contention 2? As
15 presented here.

16 MR. KUYLER: The issues, the specific
17 issues that need to be raised don't need to be pled
18 because all the target would need to do is request the
19 hearing.

20 JUDGE KARLIN: Wouldn't you have to say
21 what you wanted in a hearing?

22 MR. KUYLER: On the question of whether
23 the confirmatory order should not be sustained.

24 JUDGE KARLIN: Right. And that's what
25 they're asking, the question of whether it should be

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1 sustained or not. And they give a reason. Because
2 it's over-broad.

3 MR. KUYLER: Well, I think that -- we have
4 a number of objections to their contentions that I
5 think are fully set forth in our answer brief.

6 JUDGE KARLIN: Right. We'll get to that
7 later.

8 CHAIRMAN RYERSON: Thank you, Judge
9 Karlin. We'll take another short break and resume at
10 2:35.

11 (Whereupon, the foregoing matter went
12 off the record at 2:27 p.m. and went back on the
13 record at 2:35 p.m.)

14 CHAIRMAN RYERSON: Welcome back. A couple
15 of points. I think when Mr. Kuyler kindly volunteered
16 to submit a brief on the standing aspects of some of
17 the Yucca Mountain high-level waste decisions. I have
18 persuaded Judge Karlin since I wrote those decisions
19 that he will listen to me.

20 (Laughter)

21 JUDGE KARLIN: I'll tell him what they
22 meant.

23 CHAIRMAN RYERSON: So, we'll discuss
24 those. I don't think we need a brief on that. At the
25 close of the session today there are a couple of

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1 housekeeping matters about additional briefing and the
2 like that we'll get to.

3 We very much hope we'll finish by about 4.
4 And we're really going to go through now I think the
5 three contentions that have been advanced by the
6 union.

7 As I think someone also noted earlier many
8 of the issues we've been talking about for some time
9 here are also related to those three specific
10 contentions. So I hope we can move through that
11 fairly quickly because we've already done some of
12 that.

13 With that let me begin on contention 1
14 which essentially challenges -- not to use my words
15 rather than yours, but I think it's an accurate
16 summary. You challenge the basis for the confirmatory
17 order. Is that a fair summary, Ms. Skolnick?

18 MS. SKOLNICK: I would say that we
19 challenge how well the underlying facts support the
20 confirmatory order that resulted.

21 CHAIRMAN RYERSON: Now, one thing we learn
22 as brand new lawyers, maybe not in law school but
23 immediately thereafter is that settlements are good
24 things. Everyone favors settlements. The judicial
25 system wouldn't work certainly in the criminal area if

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1 we didn't have compromise and settlements. Everybody
2 is in favor of settlements.

3 So that said, what is your position, what
4 kind of record must exist to support a settlement that
5 the parties are happy with? Where does that
6 requirement come from?

7 MS. SKOLNICK: Well, it's a complicated
8 question. I mean, I think that if the settlement did
9 not impose on anyone else any obligations than what
10 the parties agreed to in settlement it wouldn't matter
11 to anyone else whether the record supported that or
12 not.

13 Here, however, we have a situation where
14 there's a settlement that imposes obligations on
15 others who were not party to that settlement. And to
16 the extent that it does so we have to look at the
17 events that precipitated that settlement and ask
18 whether those events logically led to that particular
19 settlement.

20 And I think one of the flaws of the
21 settlement which was then of course stamped with the
22 Commission's, as Judge Karlin said, imprimatur is that
23 it is not connected with the events that took place
24 that actually led to the investigation.

25 CHAIRMAN RYERSON: Okay. Let me ask the

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1 question a little differently.

2 MS. SKOLNICK: Sure.

3 CHAIRMAN RYERSON: If your contention is
4 that there is not sufficient justification for the
5 settlement, for the confirmatory order that arose out
6 of the settlement, what -- exactly what regulation or
7 relevant statute are you contending is violated? Is
8 it due process? Or is it something more specific?

9 MS. SKOLNICK: Right. And I think -- and
10 actually, you know, as you were asking that second
11 question I was realizing that something I didn't
12 articulate in answer to your first question is this
13 isn't really just a settlement though. It is, in
14 fact, an order of the Commission.

15 And so to the extent that it is an order
16 of the Commission we believe that it needs to be tied
17 to the scope of the existing regulations.

18 The fact that the underlying events did
19 not support the order that was ultimately entered,
20 that may be sort of a side point. But I think that
21 one justification for entry of such an order would be
22 if it truly did address the underlying facts.

23 CHAIRMAN RYERSON: Okay. Is contention 1
24 possibly a legal issue contention? As you may or may
25 not be familiar, we are able -- Boards are able to

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1 admit something called the legal issue contention
2 where there really isn't a dispute as to material
3 facts. There's more of a dispute as to what those
4 facts mean, how they should be properly construed. Is
5 contention 1 possibly a legal issue?

6 MS. SKOLNICK: You know, I hesitate,
7 without being fully familiar with the Commission's
8 jurisprudence on this question I hesitate to give a
9 definitive answer.

10 It does seem to me though that there is
11 some question as to what the record did, in fact,
12 hold. And certainly from our standpoint because we
13 have not been privy I assume the Commission, the staff
14 is more familiar with what the record of the
15 investigation held. Obviously we haven't seen the
16 complete record there. So, to the extent that there
17 is some question as to what the record actually was
18 there may be fact issues.

19 I mean, I assume that if there was no
20 question, if there was no dispute about what the
21 record was then it may be properly a legal question.

22 CHAIRMAN RYERSON: What I was wondering is
23 if we were to order an evidentiary hearing what would
24 it look like. What witnesses -- you probably haven't
25 prepared your witness list yet, but what do you

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1 envision your hearing would look like? Who would the
2 witnesses be?

3 MS. SKOLNICK: Well, I mean there are
4 several issues that are we believe factual disputes.
5 I mean, aside from contention 1, I mean the question
6 of as we've discussed here whether the order imposes
7 obligations on employees that are beyond those that
8 were already imposed by the regulations. That is
9 presumably a mixed question of fact and law.

10 I think also, again, the underlying facts,
11 what the facts were that were uncovered in the
12 investigation. We have not seen all of those facts.
13 And I think that part of our discovery in preparation
14 for a hearing in this would be to get more information
15 about what those underlying facts were.

16 CHAIRMAN RYERSON: Okay. Judge Karlin?

17 JUDGE KARLIN: Okay. With regard to
18 settlements the agency does have a policy encouraging
19 settlements. That can be found in the regs at least
20 in two places, 10 C.F.R. 2.338, Settlement of Issues,
21 Ultimate Dispute Resolution. And it says the
22 Commission encourages settlements.

23 And I would point you to 2.338(I) I
24 believe it is which says boards can approve a
25 settlement but we may order the adjudication if we

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1 find that it's required in the public interest to
2 dispose of the proceeding. So, are you suggesting
3 that it is required in the public interest that before
4 we approve this settlement we ought to adjudicate some
5 of the issues?

6 MS. SKOLNICK: Well, Your Honor, I guess
7 I'm a little bit confused because my understanding is
8 that we aren't really approving a settlement. We're
9 approving -- you would be sustaining --

10 JUDGE KARLIN: You're challenging a
11 settlement and saying it shouldn't be approved.

12 MS. SKOLNICK: Well, but you would be
13 sustaining an order of the Commission, not just a
14 settlement agreement.

15 JUDGE KARLIN: Right.

16 MS. SKOLNICK: I mean, this is an actual
17 order of the Commission.

18 JUDGE KARLIN: Achieved through a
19 compromise. I agree, I see that point.

20 And the other way that might seem to be
21 relevant, 2.203 which talks about settlement in
22 compromise, enforcement orders. And it says the Board
23 can order adjudication of such issues as we deem
24 appropriate in the public interest even though the
25 Commission has issued into a settlement agreement or

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1 confirmatory order. So I suspect that would be
2 something you might be asserting here.

3 MS. SKOLNICK: Yes.

4 JUDGE KARLIN: All right. That's all I
5 have.

6 CHAIRMAN RYERSON: Judge Jeffries?

7 JUDGE JEFFRIES: I think I just have one
8 question although I know you want to separate the
9 confirmatory order from the implementing procedures.
10 I appreciate that. But if in fact the confirmatory
11 order would have included the guidance that's given in
12 the implementing procedure Rev 10 that you provided in
13 your reply. You understand what I'm talking about?

14 MS. SKOLNICK: I do. Yes.

15 JUDGE JEFFRIES: The behavioral
16 observation program rev 10. At Section 324 it has a
17 list of things that folks would be responsible for
18 from behavioral observation and illegal activities.
19 If the confirmatory order included that type of detail
20 would you have been satisfied with that as guidance?

21 MS. SKOLNICK: I think it would depend on
22 a number of things. First of all, to the extent that
23 the confirmatory order still extends beyond the scope
24 of the regulations I think we would still object to
25 it.

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1 I think to the extent the confirmatory
2 order had provided more detail and had tied, I'm not
3 sure that that particular passage of the BOP that you
4 cite would have tied the confirmatory order to the
5 regulatory requirements.

6 If there had been additional elaboration
7 in the order that in fact was tied directly to the NRC
8 regulations that may have satisfied our concern. But
9 I think you're asking a slightly different question
10 and I'm not sure that I could answer that one in the
11 affirmative.

12 MS. TEITELBAUM: May I respond?

13 JUDGE JEFFRIES: Yes.

14 MS. TEITELBAUM: I think that there is
15 still a challenge, a due process challenge and a
16 challenge to the order even if it included all those
17 things as being beyond the scope of the facts in this
18 case. And that the order should in fact be tied to
19 the facts in this case.

20 We, the union, our position is that the
21 union should have under the Firefighters case and the
22 W.R. Grace case been a party to any settlement that
23 was going to bind them.

24 And in effect, no matter what you call
25 this later it is a settlement. It's a consent

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1 settlement and that's how it got to be a confirmatory
2 order.

3 And for the NRC to affirm this
4 confirmatory order that is the result of a consent
5 decree I think violates those two Supreme Court cases.

6 JUDGE JEFFRIES: Okay.

7 CHAIRMAN RYERSON: Well, we may do much
8 better than 4 o'clock, we'll see. Let's move onto
9 contention 2.

10 Ms. Skolnick, I just want to clarify, your
11 contention, the union's contention is that the
12 confirmatory order makes matters less clear than the
13 regulation sitting there by itself. Is that fair?

14 MS. SKOLNICK: Yes.

15 CHAIRMAN RYERSON: Okay. And in
16 contention 2 you raise maybe two slightly different
17 arguments as I understand it. One is that the terms
18 of the order are not sufficiently specific.

19 And two, there's also a point in there I
20 think that the order improperly delegates to Exelon
21 authority to make decisions that it, I guess you
22 should say it shouldn't have discretion to make.

23 With respect to contention 2 what NRC rule
24 or what applicable statute do you contend is violated
25 by those deficiencies?

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1 MS. SKOLNICK: I would say 73.56 because
2 to the extent that the order goes beyond the
3 provisions of 73.56 and is not tied directly to those
4 provisions it is violative of those.

5 CHAIRMAN RYERSON: Okay. And I -- this is
6 the same question I asked you before so maybe your
7 answer is the same, but particularly I think on
8 contention 2, is this a legal issue contention? Is
9 this a subject on which you would be introducing
10 evidence at a hearing? What would it look like?

11 MS. SKOLNICK: Well, the question, one of
12 the questions that's raised by this contention is
13 whether in fact the effect of the order is to render
14 conditions less safe. And I think that is a fact
15 question.

16 CHAIRMAN RYERSON: And who -- well, a
17 question would be how, I suppose, a typical employee
18 covered by the program would view these requirements.
19 I mean, would you -- who would you be putting on as
20 witnesses? Not by name, but what types of witnesses
21 might you put on?

22 MS. SKOLNICK: I think that a witness, you
23 know, an employee who could testify as to how that
24 employee would read the order and how the employee
25 would understand the order to apply, that may be an

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1 appropriate kind of --

2 CHAIRMAN RYERSON: Yes. I mean, you have
3 an affidavit to that effect already with Mr. Specha.

4 MS. SKOLNICK: Right, right.

5 CHAIRMAN RYERSON: Is there a point beyond
6 really? I mean, his very simple statement is that he
7 doesn't understand exactly what's covered and what's
8 not covered and therefore he feels that he's
9 potentially subject to company discipline because he
10 doesn't know where the line is between required
11 reporting and not required reporting.

12 Is there more than that that you would be
13 trying to establish?

14 MS. SKOLNICK: I think perhaps the other
15 thing that it might be helpful for the Commission to
16 hear would be what the effect of that uncertainty
17 might be on the employee besides the lack of knowledge
18 as to where that line is between reportable and non-
19 reportable. So how does that affect the employee.
20 And what is the employee likely to do in response to
21 that uncertainty. I don't think we've had a statement
22 that addresses that directly yet.

23 CHAIRMAN RYERSON: You have a sworn
24 statement that that is of great concern to him because
25 --

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1 MS. SKOLNICK: Yes.

2 CHAIRMAN RYERSON: -- he doesn't want to
3 incur discipline up to the point of termination, but
4 he doesn't know, he says, what the line would be.
5 Again, beyond that can you clarify what you would show
6 in a hearing?

7 MS. SKOLNICK: Well, I mean, as I said in
8 my opening the effect with regard to that uncertainty.
9 So what does that mean to the employee? Does the
10 employee then feel confused about what to report? I
11 think that, like I said, I don't think that's
12 something we've heard directly.

13 We've heard that there is confusion about
14 that, but then the question is does that make the
15 employee less likely to report things. I think there
16 are some questions there about to go that next step
17 beyond yes, it's confusing, but what does that make me
18 do as an employee. How does that affect my behavior
19 as an employee.

20 CHAIRMAN RYERSON: Thank you. Judge
21 Karlin?

22 JUDGE KARLIN: Yes, maybe one for Mr.
23 Hair. On the legal contention at issue, that is to
24 say our case law and our regs actually, 2.309(f)(1)
25 acknowledges that there can be contentions that are

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1 purely legal contentions. Do you think that if this
2 was admitted it would be in the nature of a legal
3 contention? Contention number 2. Or would there be
4 factual issues also involved?

5 MR. HAIR: Your Honor, I don't see any
6 factual issues. Or at least I don't fully understand
7 the factual issues raised by the union. And I
8 understand that legal contention is a possibility.
9 However, the staff's position still is that there's
10 enough information now about the confines of this
11 dispute to disposition it as a matter of law. The
12 information at hand in the briefs.

13 JUDGE KARLIN: Well, our job today is to
14 decide whether the union should even get a hearing.
15 This is not a hearing. This is just to decide whether
16 they should get a hearing. And so we're here to focus
17 on whether they meet the conditions for admissibility
18 of a contention.

19 Some contentions are -- legal in nature,
20 like whether or not this order -- which, there it is,
21 you know, we can all see it, the facts are there --
22 prescribes certain things and whether that order
23 exceeds the authority of the agency under 10 C.F.R.
24 73.56(f). That might be a purely legal contention.
25 Do you agree?

1 MR. HAIR: Yes, I agree. I think there's
2 certainly a legal disagreement as to whether or not
3 the rules have been broadened, or at least that the
4 requirements of the confirmatory order represent
5 something more than the rules require fundamentally.

6 JUDGE KARLIN: They're arguing here in
7 this contention several things and I'll ask some
8 questions about that. It's vague, over-broad, not
9 carefully tailored to address NRC's concerns.

10 Now, the concern starts with I guess you
11 have to make sure people are trustworthy and reliable.
12 And as I was asking earlier it seems to me that many
13 other agencies as a factual matter have programs to do
14 the same thing. Maybe under exactly the same words or
15 something different. A behavioral observation
16 program. And it might be very interesting as a
17 factual matter to have some understanding.

18 Because I think one of the arguments is,
19 well, in every behavioral observation program there's
20 probably going to be some subjective element to
21 whether something needs to be reported or not, how
22 clear does it have to be. And you might turn to other
23 programs that other agencies have and say what are --
24 are they clear? Do they have a lesson that is
25 relevant here as to whether this one's over-broad or

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1 not? Because the answer is well, there always has to
2 be some subjectivity in it and the question is how
3 much subjectivity.

4 MR. HAIR: In this proceeding, Your Honor,
5 I don't think we can adjudicate whether or not the
6 rules themselves have that.

7 JUDGE KARLIN: No, no, not the rule.

8 MR. HAIR: Right. Because I mean the rule
9 just sets a fairly broad --

10 JUDGE KARLIN: Illegal --

11 MR. HAIR: As we discussed earlier today
12 the questionable behavior, I'm sure if the three
13 parties were given an opportunity to brief what that
14 meant we might come with three very different results.

15 However, you know, the agency's position
16 on what that is needs to remain constant. And we've
17 attempted to do that.

18 And the other language, we've used words
19 like "aberrant behavior" and "illegal behavior" all
20 those things we feel are encompassed in
21 "questionable." At least that's the staff's position,
22 that they don't represent anything more than that.
23 It's just another way of saying the same thing.

24 JUDGE KARLIN: Okay. Now, Ms. Skolnick,
25 on the contention number 2, it seems to break into

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1 several parts as Judge Ryerson indicated. Maybe it's
2 two and maybe it's more. But I want to try and
3 understand.

4 The confirmatory order should not be
5 sustained so you check that mark. Because it imposes
6 on employees behavioral observation reporting
7 obligations that are vague, over-broad, not carefully
8 tailored to address -- so there's vague, there's over-
9 broad, there's not carefully tailored, and then it
10 improperly delegates. Those are four things. Are
11 they four things? Are they two things? How many
12 contentions have we really got here?

13 MS. SKOLNICK: I would look at those two
14 things sort of in two baskets. In the first basket
15 you've got the vague, over-broad, not carefully
16 tailored to the NRC's health and safety concerns.
17 That's the way in which the confirmatory order goes
18 beyond the scope of 73.56 and is not tied to the
19 concerns of 73.56.

20 But then to the extent that the
21 confirmatory order leaves it to Exelon to provide the
22 degree of specificity that we would argue should be in
23 the confirmatory order, then that is an improper
24 delegation.

25 JUDGE KARLIN: Okay, so it's basically two

1 parts.

2 MS. SKOLNICK: I think so.

3 JUDGE KARLIN: All right. Okay. Now, one
4 of the things, maybe, Mr. Kuyler, you can help me with
5 this. The confirmatory order in terms of this over-
6 broad issue -- well, allegation, claim. Section
7 3(b)(1) I guess is uses -- demands from the NRC that
8 the reporting be covered for behaviors that are
9 observed or credible information that should be
10 reported. So, or credible information. Does the
11 credible information in the BOP -- which rev -- is
12 that in the BOP?

13 MR. KUYLER: I am not sure exactly whether
14 those words in the BOP, but I do understand that the
15 credible information phrase came from the specific
16 facts of this case where the NRC OI as part of its
17 investigation determined that there was a point where
18 the individual who failed to report knew enough about
19 the steps that these other individuals had taken where
20 they should have had credible information. He should
21 have interpreted that that it wasn't just a joke, Your
22 Honor.

23 JUDGE KARLIN: Okay. So, Mr. X who was
24 the equipment operator whose name is not to be uttered
25 here, he should have known even though he didn't

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1 observe anything.

2 MR. KUYLER: I believe that that was --

3 JUDGE KARLIN: Maybe observed him talking
4 to him or something. But, that isn't my problem. My
5 problem is in the over-broad area this seems to go
6 beyond the words of the reg clearly. Doesn't it? Mr.
7 Hair wants to talk.

8 MR. HAIR: Yes, I'm sorry.

9 JUDGE KARLIN: Go ahead.

10 MR. KUYLER: No, Your Honor. It defines
11 and narrows what it is that is observed behavior that
12 must be reported under the regulations.

13 JUDGE KARLIN: Well, it says observed or
14 credible information. It doesn't say -- that's a
15 dichotomy. There's no "or" in there.

16 MR. KUYLER: I don't believe that the
17 proper reading of that is to read anything more than
18 what's already in the regulations, that this is just
19 intended to provide further clarity.

20 JUDGE KARLIN: behavioral observation
21 program. You have to observe something. Someone's
22 drunk. Someone's driving over the speed limit.
23 Somebody is robbing a bank. But just because you hear
24 a rumor, credible, that just doesn't seem -- it's not
25 in the reg.

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1 MR. KUYLER: Well, again, it goes to the
2 specific facts of this case. And you could use the
3 example of somebody sitting at lunch and saying I want
4 to kill my boss. Is that credible information? It is
5 observed behavior, but is that credible? Probably
6 not. Depends on the circumstances. Maybe if that
7 person had -- there were other indicia of that person
8 --

9 JUDGE KARLIN: And you had to report
10 concerns, right? That's what the reg says, concerns.
11 Is that subjective? What if the guy said oh, I didn't
12 have any concern. So he gets off? If somebody else
13 is more of a worrywart, he had concerns and he does
14 have to report?

15 MR. KUYLER: The regs use the term "any
16 questionable behavior patterns."

17 JUDGE KARLIN: Right.

18 MR. KUYLER: So there is --

19 JUDGE KARLIN: Concerns about any
20 questionable behavior. Subjectively the guy is sort
21 of like the Dude, you know, he doesn't have any
22 concerns about anything. So, he's not concerned.
23 Does he have to report anyone?

24 MR. KUYLER: There is some subjectivity
25 here but part of the solution to that is training.

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1 And the training that was ordered in the confirmatory
2 order is intended to provide employees with examples
3 and information so they can make those judgments
4 better hopefully than what was done in the past.

5 JUDGE KARLIN: Okay. Mr. Hair, I'll give
6 you one last shot.

7 MR. HAIR: Yes, thank you. I just wanted
8 to make a clarification. It sort of jogged my memory.
9 The third SRO here, not the two individuals involved
10 with the planning, was an individual in a supervisory
11 position who was the recipient of these behavioral
12 observation reports. And the OI investigation
13 concluded that those reports weren't promptly
14 forwarded along.

15 And in Section 73.56(f)(3) there's a
16 provision somewhere down in the middle of the
17 paragraph that the recipient of a report -- now, we've
18 already gotten to the point where the individual
19 should have reported questionable behavior.

20 JUDGE KARLIN: So, somebody did file a
21 report.

22 MR. HAIR: Someone files a report. And
23 you know, a report doesn't have to be on a piece of
24 paper. Right, so you're in the control room. Someone
25 comes over to this individual and says this is what I

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1 saw.

2 That, the recipient of the report shall if
3 other than the reviewing official, and none of the
4 SROs there I don't believe were the reviewing
5 official, promptly convey the report to the reviewing
6 official. So that's where there's sort of a -- that
7 person hasn't observed anything, but they still have
8 an affirmative obligation to forward that along to the
9 reviewing individual.

10 JUDGE KARLIN: Well, that's different.
11 That's not, you know, that's if someone files a report
12 oral or written with someone and they don't pass it on
13 that's a violation of that reg. But we're talking
14 about people who are out there on the front line
15 workers and they have to not only -- they have to
16 observe their coworkers. If they observe something
17 they have to report it if it meets the qualifications.
18 And okay so far.

19 But now in addition to these front-line
20 people have to report any other credible information
21 they have. Well, that's an addition it seems to me to
22 them. Doesn't it?

23 MR. HAIR: I'm not sure, Your Honor. I
24 think the staff's position is that there's no
25 additional requirement of that information. It's

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1 simply just another way to discuss the types of
2 information that you're observing. If it's something
3 that gets to the trustworthiness and reliability of an
4 individual then it's credible.

5 JUDGE KARLIN: You're very casual with
6 regard to words. I mean, words mean something.
7 Reports of behavior. Other credible information. You
8 say well, that's the same thing. Well, it isn't the
9 same thing. Otherwise you wouldn't have had to say
10 it.

11 MR. HAIR: To the extent it's not, and we
12 have already established it's not in the regulations.

13 JUDGE KARLIN: Right.

14 MR. HAIR: The staff understands that. To
15 the extent it's not and it's in the behavioral
16 observation program it's one of those examples where
17 the licensee has gone beyond the baseline of the
18 requirements in the --

19 JUDGE KARLIN: No, this is in the order
20 that you ordered them to do.

21 MR. HAIR: Oh absolutely, yes. We're
22 ordering them to adjust their -- or to revise their
23 implementing procedures and guidance. The act of duty
24 to address certain issues in however way they see best
25 accomplishes that provision of the order the details

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1 of which the NRC will not have the authority just by
2 virtue of placing it into the order to go and issue
3 violations on behalf of.

4 JUDGE KARLIN: Well, you order somebody to
5 do something. They don't do it. Can't you do
6 anything about it?

7 MR. HAIR: Absolutely. And as I've said
8 before in this case we've ordered them to revise their
9 behavioral observation to include these examples. So
10 if they've done that the provision is then complied
11 with and we wouldn't issue a violation.

12 JUDGE KARLIN: Okay. That's all.

13 CHAIRMAN RYERSON: Thank you. Judge
14 Jeffries?

15 JUDGE JEFFRIES: I have nothing.

16 CHAIRMAN RYERSON: Excellent. Let's move
17 onto contention 3. And Ms. Skolnick, I don't have a
18 lot of questions about contention 3.

19 Let me pose a hypothetical to you again.
20 If we were to have a hearing and if the Board were to
21 rule against the union on contention 1, if we find
22 that there is an adequate basis for the order. We
23 rule against you on contention 2, we find that the
24 confirmatory order is sufficiently specific and that
25 whatever delegation it makes is entirely appropriate.

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Do you really have an independent contention in your view on the labor relations point? I mean, is contention 3 to be candid a contention you're really pursuing at this point?

MS. SKOLNICK: I think that's a fair question, but I think that to the extent that we -- that the confirmatory order stands as a way in which it circumscribes Exelon's bargaining obligation there is still a live contention 3.

I understand what you're saying as to if in every other respect the order is found to be legitimate would there be an independent basis for finding -- I mean, I think that's a hypothetical that I don't think is going to be the eventuality.

And I think that to the extent that there are these deficiencies with the confirmatory order, really what contention 3 does is to explain yet another effect of how the confirmatory order adversely affects us. And another basis in that it's the NRC's sort of trampling, intercepting the rights that are governed by the NLRB, that I think that's sort of the basis for that contention too is that intersecting jurisdiction of the two agencies there. But I understand your point, Judge.

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1 CHAIRMAN RYERSON: Thank you. Judge
2 Karlin?

3 MS. TEITELBAUM: May I add something to
4 that, do you mind?

5 CHAIRMAN RYERSON: Oh, yes.

6 MS. TEITELBAUM: I just want to just add
7 one thing, that in effect the NRC would be enabling a
8 violation of the Firefighters and W.R. Grace case.
9 Because this confirmatory order as we all know is
10 nothing more than an agreement -- it was nothing more
11 until it became a confirmatory order than an agreement
12 reached unilaterally between Exelon and the NRC to
13 keep Exelon from having to pay a fine.

14 And they were unconcerned with -- I
15 shouldn't say that. The primary thing was we get rid
16 of this and there's no monetary cost to us, and the
17 only cost is to the employees.

18 And we weren't a party to it. And yet if
19 you reduce it to a confirmatory order then we end up
20 bound by it under the NRC laws. And there's a whole
21 bunch of case including the Hanes case.

22 JUDGE KARLIN: NLRB you mean.

23 MS. TEITELBAUM: And National Labor
24 Relations Act. Yes. Under the Hanes case, et cetera.
25 Because if it becomes an order of the NRC then those

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1 rights are taken away from us.

2 So we think that the violation occurs in
3 the first place with the settlement agreement and then
4 it's enabled to -- you're enabling Exelon to take that
5 out of our rights under the NLRA by reducing it to a
6 confirmatory order which becomes an NRC agreement
7 which then will mean that the NLRB will feel they
8 cannot order any bargaining on it.

9 It will also -- and that's a position
10 they've taken before the NLRB. And it will also mean
11 that arbitrators, the same argument will be made to
12 arbitrators, that they cannot do anything about it
13 because they are taking this action because they were
14 ordered to do so by the NRC.

15 And so it's illegal action, unusual
16 action, whatever they decide, the company decides,
17 they'll have the right to do it with impunity if you
18 confirm this order.

19 CHAIRMAN RYERSON: Well, let me reverse
20 the hypothetical and put it to you, Ms. Teitelbaum.
21 Suppose we had a hearing and the Board concludes that
22 there isn't an adequate basis for the confirmatory
23 order. The Board concludes that the confirmatory
24 order is impermissibly vague and improperly delegates
25 to Exelon. And we strike down the confirmatory order.

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Would it be unlawful for the staff and Exelon to go back to the drawing board without the union and try again? Or must the union be there as a matter of law? Or are you just urging it should be there as a policy matter?

MS. TEITELBAUM: Well, I think -- I would conclude from W.R. Grace and the Firefighters case that we should be there as a matter of law if you want to use that to take away rights of our members. Yes.

JUDGE KARLIN: Well, let me jump in there. It seems to me that the issue is not whether the union should be in the room when the NRC and Exelon are working out the terms of a confirmatory order. The question is whether or not under 2.202(a)(3) or 2.309 the union should have a right to have a hearing before the confirmatory order is imposed upon their workers.

They're not asking to be in the room negotiating the confirmatory order. They're just asking for a right to have a hearing when that order comes down and it impacts them and their workers.

CHAIRMAN RYERSON: If I may interrupt, Judge Karlin, I believe the union has stated at a minimum that if the confirmatory order were struck down that it would be a good idea to have the union in

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1 the room. The union has said that, has it not?

2 MS. TEITELBAUM: Yes. I mean, I think
3 that having the union in the room, is that the legal
4 basis here? We should have the hearing and all these
5 things, factual differences, which I've heard a lot of
6 factual differences here today that we disagree with.

7 I thought your question was that should
8 they have had us in the room. I believe they should
9 have had us in the room if they want to bind us by it.
10 In other words, keep us from coming in and asking for
11 a hearing and going to a hearing. That we should be
12 party to it.

13 CHAIRMAN RYERSON: Right. I was trying to
14 clarify the position in your brief that I think
15 specifically -- your answers are in your reply brief.
16 I don't recall. But contrary to I think Judge
17 Karlin's recollection at least as I understand it you
18 have suggested that if the confirmatory order were
19 rescinded that it would then be possible and by
20 implication a good thing from your standpoint to
21 include the union in further negotiations.

22 MS. SKOLNICK: Can I just chime in on that
23 for a minute?

24 MS. TEITELBAUM: Sure.

25 MS. SKOLNICK: So, to the extent -- let's

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1 just take your hypothetical. Let's say that the
2 confirmatory order was rescinded and Exelon and staff
3 went back into the room together.

4 Now, to the extent that what came out of
5 that room imposed additional obligations on the
6 members of Local 15 that went beyond the scope of the
7 regulations then we would find ourselves right back
8 here in this very same spot again.

9 And one way to avoid that of course would
10 be to invite Local 15 into the room for that process.
11 So, I think that's sort of the thinking as a pragmatic
12 matter, that if we --

13 JUDGE KARLIN: But is that -- you haven't
14 asked for that relief.

15 MS. SKOLNICK: No, we have not. No.
16 Because we understand that's beyond the scope of what
17 this Board can do. But as a pragmatic matter it's
18 something worth considering.

19 CHAIRMAN RYERSON: You have suggested it
20 in the context of saying we should rescind the order.
21 You --

22 MS. SKOLNICK: Right.

23 CHAIRMAN RYERSON: -- recognize we don't
24 have the power to order you into the room.

25 MS. SKOLNICK: Right.

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1 CHAIRMAN RYERSON: But you suggest as a
2 practical matter if we were to rescind the order that
3 might be a good way to proceed.

4 MS. SKOLNICK: Yes.

5 MS. TEITELBAUM: Right. And if you recall
6 in the Palisades case, I know that was pre-amendment.
7 After there was a hearing ordered. They were allowed
8 intervention. There was a settlement. And I'm not
9 privy to how that occurred but, yes.

10 CHAIRMAN RYERSON: Thank you. Judge
11 Karlin, any more questions?

12 JUDGE KARLIN: On contention number 3, no.

13 CHAIRMAN RYERSON: Judge Jeffries?

14 JUDGE JEFFRIES: Nothing.

15 CHAIRMAN RYERSON: Give us just one
16 moment. Very well. We are close to finishing.

17 There are I think a few housekeeping
18 details for further briefing and some other matters.
19 First, despite my best efforts to have -- sorry, Mr.
20 Kuyler?

21 JUDGE KARLIN: Your Honor, if we may just
22 make a few remarks in response to some of the things
23 that have gone on today. Will the parties have a
24 chance to do that perhaps after?

25 CHAIRMAN RYERSON: We weren't really

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1 contemplating. I mean, if there's something
2 essential. I think we understand the parties'
3 positions pretty well at this point.

4 MR. KUYLER: If I could just make one
5 clarification as far as there was a settlement that
6 the PADS system is a blacklist. And I just wanted to
7 briefly address that.

8 JUDGE KARLIN: That was a question I
9 asked. I don't think we need that addressed.
10 Blacklist or whatever it is, it's a list of people the
11 NRC puts on its website that have had enforcement
12 actions against them. And other people consult it to
13 see who they should hire and who they shouldn't hire.

14 CHAIRMAN RYERSON: Very well.
15 Housekeeping details. Despite my best efforts to
16 avoid briefing a motion to strike portions of a reply
17 I think the easiest thing is to give you an
18 opportunity to brief that. You'd mentioned there were
19 a couple of cases.

20 If you wish, Mr. Kuyler, you have seven
21 days till next Thursday which would be the 13th I
22 think to file a very brief motion. We understand the
23 issues. You mentioned a couple of cases in particular
24 you wanted to bring to our attention I believe. So,
25 you have seven days to file a brief motion.

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1 Ms. Skolnick, you have seven days
2 thereafter which takes you to the 20th, I think next
3 Thursday, to field a response if you wish. So that
4 will take care of the motion. Excuse me.

5 Does the staff anticipate filing an answer
6 to that motion? Or you can't say yet? I'll tell you
7 what will happen. If you do then Ms. Skolnick will
8 get an extra seven days after that to respond to your
9 answer.

10 MR. HAIR: No objection to giving counsel
11 more time. But I'll reserve judgment and --

12 CHAIRMAN RYERSON: Reserve your right, all
13 right.

14 MR. HAIR: Thank you, Your Honor.

15 CHAIRMAN RYERSON: In other words if the
16 staff comes in and opposes your position simultaneous
17 with your initial response you get another seven days
18 to respond.

19 MS. SKOLNICK: To file a reply
20 essentially.

21 CHAIRMAN RYERSON: To reply to the staff.

22 MS. SKOLNICK: Okay.

23 CHAIRMAN RYERSON: So possibly we go out
24 21 days.

25 MS. SKOLNICK: Okay.

1 CHAIRMAN RYERSON: Okay. I believe it was
2 Ms. Skolnick who mentioned the non-concurrence
3 document.

4 MS. SKOLNICK: Yes.

5 CHAIRMAN RYERSON: Okay. We have not seen
6 that, the Board has not seen that. Unless there is
7 objection. I mean, I assume that's a public document
8 you got off of ADAMS?

9 MS. SKOLNICK: Yes, Your Honor.

10 CHAIRMAN RYERSON: So I suppose we could
11 take judicial notice of it since some of us are not as
12 adept at finding anything in ADAMS as apparently Ms.
13 Skolnick is. I would ask unless there's objection
14 that she simply file that document with -- on the
15 electronic hearing docket, file it and serve it.

16 MS. SKOLNICK: So that it's filed in this
17 docket.

18 CHAIRMAN RYERSON: So that it's filed in
19 the record.

20 MS. SKOLNICK: Okay.

21 CHAIRMAN RYERSON: And then we don't have
22 to take official notice. If anybody needs to comment
23 after you see it you can within a reasonable period do
24 that. But I assume that we'll see it and we'll make
25 whatever.

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1 JUDGE KARLIN: We might want to make clear
2 should that include the response to the -- there will
3 be a non-concurrence maybe, I guess there is one. And
4 then the staff usually responds to the non-concurrence
5 and files a document to that effect?

6 MR. HAIR: Well, the non-concurrence, it's
7 a package.

8 JUDGE KARLIN: Yes, a package. Several of
9 them.

10 MR. HAIR: Yes. So it does include a
11 staff response from the region.

12 JUDGE KARLIN: Okay. I would want to see
13 that.

14 CHAIRMAN RYERSON: If it's easier for the
15 staff to submit the package then that's --

16 MR. HAIR: That's fine. It's in ADAMS and
17 we will make sure that it's served on the Board and
18 parties for its admission.

19 CHAIRMAN RYERSON: Okay. So, Ms.
20 Skolnick, you are relieved of that responsibility.
21 The staff will promptly file the full package on the
22 non-concurrence. Mr. kuyler?

23 MR. KUYLER: If I may, Your Honor. Just
24 to note, it's not clear to Exelon what purpose this
25 document would serve. It's not tied to any contention

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1 or to standing or any of the arguments that the Local
2 has made or any of the other parties have made. So
3 it's not clear why this document would need to be
4 introduced.

5 CHAIRMAN RYERSON: That may well be. It
6 was mentioned and we haven't seen it. It's a public
7 document. We'd like to see it.

8 So, if -- obviously I'm not going to set
9 a briefing schedule with respect to this. If you see
10 it and you feel you need to tell us something about it
11 you can request the opportunity to do that and file
12 something with your request.

13 JUDGE KARLIN: Can I just add a sort of
14 procedural note? I mean, keep in mind we don't read
15 the documents that are in ADAMS. We don't have
16 mastery of it. All we have is what you put in the
17 file in this case.

18 And if you have some document you want to
19 reference us to my hope is that you would give it to
20 us as an attachment. Don't tell us to go find it in
21 ADAMS. Give it to us.

22 And we don't have judicial notice of
23 things that are in ADAMS. If you want something in
24 the record of this adjudication then you need to put
25 it on a silver platter and give it to us because we

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1 ain't going to go find it out in some law -- we've got
2 law books, we'll read those, but we're not going to
3 find any other documents unless you give them to us.

4 CHAIRMAN RYERSON: Anyway, to summarize,
5 the staff will file promptly the entire packet on non-
6 concurrence. And if any party feels that they need to
7 say something they can seek the opportunity to do that
8 in writing.

9 But frankly it's really as I see it a
10 matter of convenience that it's a document that was
11 referred to. It's in the public record. We could
12 look at it ourselves except some of us as I say are
13 less competent than others in finding any document in
14 the ADAMS system.

15 Final request. This is for Ms. Skolnick.
16 Would you undertake if there is a material development
17 in the NLRB proceeding of any kind, putting off the
18 hearing, having the hearing, although we may reach a
19 decision before that. But in the interim till our
20 next decision in any event in this proceeding if you
21 would undertake to make sure that we are informed
22 promptly of any developments on the NLRB front.

23 MS. SKOLNICK: And by material development
24 you mean essentially something that is an official
25 action of the Labor Board or the region?

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1 CHAIRMAN RYERSON: Something -- I leave it
2 to you to define what we would want to know about.

3 MS. SKOLNICK: Okay.

4 CHAIRMAN RYERSON: Material in that sense.
5 As we work through the issues we've talked about
6 today.

7 MS. SKOLNICK: Okay.

8 CHAIRMAN RYERSON: And as I said that will
9 be our next job. The Board's next job is to obviously
10 think about what's been said today, review your
11 answers, your written answers to the questions we've
12 had. And we will make a decision on the issues of
13 standing and the adequacy of the hearing petition. I
14 think we will most likely rule at the same time on the
15 motion to strike that I understand you are likely to
16 be filing.

17 The Commission has set milestones for
18 these activities which is 45 days from the day of
19 argument which I think is April 21. So we will have
20 a written decision issued by then, or alternatively we
21 will issue a notice saying we will not have a decision
22 by then and telling you when we expect to have it.
23 But I personally very much and I think this Board is
24 quite capable of issuing a decision by April 21.

25 That's largely it for me. I personally

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1 and on behalf of the Board I really do want to thank
2 all counsel for your arguments today. As you know,
3 we've dealt with a lot of issues that Licensing Boards
4 do not often deal with, union issues or whatever.

5 Ms. Skolnick, despite your protestations
6 that you don't understand our intricate and unusual
7 procedures at the NRC you've done a fine job of
8 representing your client. You've all done an
9 excellent job, a very competent and professional job
10 and it makes our task all that much easier. So we
11 thank you, thank you for that.

12 Finally, on behalf of again of the Board
13 I very much want to thank all the staff and Judge
14 Marsaglia in particular, the Grundy County Courthouse
15 for being such wonderful hosts. They have made
16 everything available to us we could possibly want and
17 we appreciate it very, very much.

18 Judge Karlin, anything else? Judge
19 Jeffries? And we stand adjourned. Thank you.

20 (Whereupon, the foregoing matter went
21 off the record at 3:26 p.m.)
22
23
24
25