UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )
EXELON GENERATION COMPANY, LLC )
(Dresden Nuclear Power Station )
Confirmatory Order Modifying License)
)

) Docket Nos. 50-237-EA 50-249-EA
)

ASLBP No. 14-930-01-EA-BD01
)

BRIEF IN SUPPORT OF APPEAL OF LBP-14-04

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INTRODUCTION

Pursuant to 10 CFR § 2.311, Local 15, International Brotherhood of Electrical Workers, AFL-CIO (Local 15) appeals the Memorandum and Order Denying Petition to Intervene and Request for Hearing, issued by the Atomic Safety and Licensing Board (Board) on April 17, 2014. This appeal presents important questions of first impression for the NRC. Chief among them is this:

- Where the NRC, prompted by the alleged violations of individual workers, issues an enforcement order that directly and adversely affects all of a licensee’s individual workers, are those workers, represented by their union, entitled to a hearing under section 189(a)(1)(A) of the Atomic Energy Act even though the licensee itself (but not the workers or their union) has consented to the order?

Additional issues which have never been squarely addressed by any Commission decision and should be resolved in this appeal concern:

- How, if at all, to reconcile hearing rights conferred by 10 CFR § 2.202(a)(3) with standing and contention requirements established by 10 CFR § 2.309(d) and (f); and

- Whether the NRC exceeds its authority under 10 CFR § 73.56(f) when it issues a confirmatory order that imposes on workers reporting obligations neither enumerated in existing regulations nor tied to the health and safety concerns that animate those regulations.

The Board erroneously reached the wrong conclusions on these important issues and several subsidiary questions, committing numerous legal errors in the process.

BACKGROUND AND PROCEDURAL HISTORY

Exelon Corporation is an electric utility with subsidiaries that generate, transmit, and distribute electric power and provide related services to approximately 3 million residential, commercial, and industrial customers within its Illinois service area - the northern one-third of Illinois. Exelon Corporation currently has three wholly owned subsidiaries that include

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1 Exelon Generation Co., LLC (Dresden Nuclear Power Station, Units 1 & 2), LBP-14-04 (April 17, 2014).
2 42 USC § 2239(a)(1)(A).

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

On June 6, 2012, the U.S. Nuclear Regulatory Commission's Office of Investigations, Region III Field Office, initiated an investigation of an incident in which a Senior Reactor Operator (SRO) from the Dresden Station allegedly planned to rob an armored car and attempted to enlist the assistance of another Dresden SRO. The investigation examined whether other Dresden personnel, including a bargaining unit Equipment Operator (EO), knew of the planned crime but failed to report it. Based on its investigation, the NRC identified an apparent violation of 10 CFR §§ 73.56(a)(2), 73.56(f)(1) and 73.56(f)(3) and informed Exelon of this conclusion on July 3, 2013. All of the apparent violation examples involved the actions of individual employees. The NRC also informed Exelon that the apparent violation was being considered for enforcement action in accordance with the NRC's Enforcement Policy and

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3 Local 15 represents employees at the first five of these; employees at the Clinton Station are represented by IBEW Local 51.
4 Dresden SROs are not members of the bargaining unit represented by Local 15 but EOs are.
5 Dresden Nuclear Power Station, Units 2 and 3; Results of Investigation Report No. 3-2012-020 (ADAMS Accession No. ML13184A232) (“Choice Letter”).
6 Id. at 2.
provided Exelon with the option of: (1) providing a written response to the violation; (2) attending a Predecisional Enforcement Conference; or (3) requesting ADR with the NRC.\textsuperscript{7}

On June 11, 2013, NRC Senior Enforcement Coordinator, V. Patricia Lougheed entered a statement of non-concurrence expressing disagreement and discomfort with the enforcement actions. That statement provided:

I also recognize that the NRC normally holds the licensee responsible for acts of its employees. . . . [However] there were no facts to indicate that the licensee, other than the three individuals mentioned, had any way to know of the planned crime without one of the three individuals coming forward. . . . 

10 CFR 73.56(f) is written as an individual responsibility and not a licensee responsibility. The licensee had a program in place and trained on that program. However, no program can stop people from planning or committing crimes. Furthermore, people planning on committing a crime are not likely to tell their employers they are about to commit a crime. Therefore, no matter what the licensee does, it cannot prevent someone such as the wrongdoer or his alleged accomplice. . . .

Since the NRC is departing from its normal precedent, I feel that the NRC is proposing to issue an escalated violation to the licensee only so that it can say that it is “doing something” and that’s not the reason to issue violations. It appears the NRC is deviating from standard only because of the publicity of the case. That is not a good precedent.\textsuperscript{8}

Exelon chose to request ADR to resolve its differences with the NRC and a mediation session took place on September 18, 2013. During the ADR session, which was conducted by a neutral mediator with no decision-making authority, a preliminary settlement agreement was reached. The October 28, 2013 Confirmatory Order that is the subject of this proceeding was

\textsuperscript{7} Id.

\textsuperscript{8} NRC Form 757, Non-Concurrence by V. Patricia Lougheed, NRC Senior Enforcement Coordinator (June 11, 2013) (ADAMS Accession No. ML13184A232) (“Lougheed Non-Concurrence”).
issued pursuant to that agreement.\textsuperscript{9} Local 15 was not notified in advance of the ADR and did not participate in it. Nor was Local 15 a party to any agreement that resulted.

Section II of the Confirmatory Order recites findings of the NRC investigation concerning the conduct of the two SROs who planned the robbery of an armored car and the EO who allegedly learned of their plan and yet did not report it to Exelon.\textsuperscript{10} Section III of the Confirmatory Order outlines the elements of the preliminary settlement agreement reached through ADR.\textsuperscript{11} As recited by the Confirmatory Order, that agreement acknowledged actions Exelon had already taken to:

- Revise its Procedure SY-AA-103-513 (“Behavioral Observation Program”) to indicate an “expectation to report offsite illegal activity”;
- Conduct an Exelon-wide briefing concerning the “expectation to report unusual behavior observed either on or offsite”;
- Train personnel on changes to the Procedure and “expectations for reporting aberrant offsite activities”; and
- Verify that personnel “understood the procedural requirements and guidance”.\textsuperscript{12}

The Confirmatory Order also addressed actions Exelon had not yet taken but agreed to take in order to resolve its differences with the NRC. Those actions include, \textit{inter alia}, further revisions of Procedure SY-AA-103-513 “to provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials,” and training on the revisions within 90 days of the effective date of the order.\textsuperscript{13} In exchange for Exelon’s commitments, the NRC agreed “to not issue a finding, a Notice of Violation, a civil penalty, or to

\textsuperscript{9} Exelon Generation Co. (Dresden Nuclear Power Station), 78 Fed. Reg. 66,965 (Nov. 7, 2013) (“Confirmatory Order” or “CO” herein).
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 66,966.
\textsuperscript{13} Id. at 66,965.
take any further enforcement action in the matter of EA-13-068 discussed in the NRC’s letter to Exelon dated July 3, 2013.”

Pursuant to the terms of the Confirmatory Order, employees will be required for the first time to observe and report any off duty “unusual,” “illegal” or “aberrant” activity of co-workers, without limitation. None of these terms appear in the regulations and none of them are defined in the order. The Order further requires the reporting of “credible information” about co-workers, although it does not specify the type of credible information. Nothing in the regulations concerning behavioral observation requires such reporting. Nothing in the Order ties these reporting requirements to public health or safety and there is no nexus between the Order and the health, safety and radiological sabotage concerns that animate 10 CFR § 73.56.

The Order provided that “[a]ny person adversely affected by this Confirmatory Order, other than Exelon may request a hearing within 30 days of the date of this Order.” In addition to extensive instructions concerning e-filing of documents with the Commission, the Order provides that “[i]f a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).” Finally, the Order notes that:

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

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14 *Id.* at 66,966.
16 *Id.* at 66,967.
17 *Id.*
The Order did not inform “any other person adversely affected by the order of his or her right…to demand a hearing on all or part of the order.”

On December 12, 2013, Local 15 timely filed a Petition to Intervene and Request for Hearing. On December 19, 2013, the Commission established an Atomic Safety and Licensing Board to preside over the proceeding. On January 24, 2014, NRC Staff and Exelon each filed an Answer opposing Local 15’s Petition. On February 14, 2014, Local 15 filed its Reply. On February 5, 2014, the Board issued an order setting Oral Argument for March 6, 2014 and posing nine questions to which it asked the parties to submit written answers by February 28, 2014. All parties complied with that request. Oral argument took place on March 6. Exelon moved to strike a portion of Local 15’s Reply, first orally on March 6, and then in writing on March 13, 2014. Local 15 filed its written opposition to that motion on March 20, 2014.

18 10 CFR § 2.202(a)(3).
19 Petition to Intervene and Request for Hearing (Dec. 12, 2013) (ADAMS Accession No. ML13184A232) (“Petition to Intervene”). It did so after requesting a 90-day extension of time for filing and being granted a 15-day extension.
21 NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) (ADAMS Accession No. ML14024A670) (“NRC Staff Answer”); Exelon’s Answer Opposing the Petition to Intervene and Hearing Request Filed by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (Jan. 24, 2014) (ADAMS Accession No. ML14024A691) (“Exelon Answer”).
22 Reply of Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO to NRC Staff and Exelon Answers Opposing Local 15’s Petition to Intervene and Request for Hearing (Feb. 14, 2014) (ADAMS Accession No. ML14045A331) (“Local 15 Reply”).
26 Exelon’s Motion to Strike (March 13, 2014) (ADAMS Accession No. ML14073A001)
2014, the Board issued its Memorandum and Order denying Local 15’s Petition and Request for Hearing.28 Administrative Law Judge Karlin filed a lengthy and thorough dissent.29

STANDARD OF REVIEW

Pursuant to 10 CFR § 2.311, a party may appeal as of right a licensing board’s order denying a petition to intervene and/or request for hearing on the question of whether the petition/request should have been granted.30 The Commission “will defer to the Board's rulings on standing absent an error of law or abuse of discretion.”31

ARGUMENT

I. The Board majority erred as a matter of law when it concluded that 10 CFR § 2.202(a)(3) does not entitle Local 15 to demand a hearing without also satisfying standing and contention admissibility criteria set forth in 10 CFR § 2.309(d) and (f).

The Board majority, in contravention of well-established principles of statutory and regulatory construction, disregarded the plain meaning of 10 CFR § 2.202(a)(3) and instead, relying on a misinterpretation of a small piece of regulatory history, reached an absurd result that is contrary to the unambiguous terms of the regulation. It is axiomatic and the United States Supreme Court has repeatedly acknowledged that “when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.”32 As the Commission has also acknowledged, that principle

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27 Local 15, International Brotherhood of Electrical Worker, AFL-CIO’s Response in Opposition to Exelon’s Motion to Strike (March 20, 2014) (ADAMS Accession No. ML14079A346)
28 LBP-14-04.
29 LBP-14-04 at 25-71.
30 10 CFR § 2.311(c); FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC 393, 396-397 (2012).
31 Strata Energy, Inc. (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608 (2012).
applies with no less force in the regulatory context. Where, as here, the plain language is not ambiguous, “recourse to regulatory history is not necessary” and that history may not be used to reach a result in conflict with the plain meaning of the regulation’s wording. While the Board majority here opines that the language of § 2.202(a)(3) “might be ambiguous” it stops short of making a finding that the regulatory language is in fact ambiguous, as it must before resorting to administrative history. Its reliance on that history is therefore in error.

A. The plain language of 10 CFR § 2.202(a)(3) requires that Local 15, as a “person adversely affected” by the Confirmatory Order, be allowed to demand a hearing as of right.

Section 159(a)(1)(A) of the Atomic Energy Act provides that the “Commission shall grant a hearing upon the request of any person whose interest may be affected.” Pursuant to 10 CFR § 2.202(a)(3), an enforcement order must “[i]nform the licensee or any other person adversely affected by the order of his or her right…to demand a hearing on all or part of the order.” The Board majority and NRC Staff agree that those to whom § 2.202(a)(3) applies need not comply with the standing or contention requirements of § 2.309 and that a grant of hearing sought by the “subject” of an enforcement order should be automatic. The plain language of § 2.202(a)(3) requires no less, at least as concerns the licensee or “any other person adversely affected” by such an order.

33 AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 483 (2008) (“[a]s with statutes, the plain meaning of a regulation controls its interpretation”) (citing Tesoro Hawaii Corp. v. United States, 405 F.3d 1339, 1346 (Fed. Cir. 2005); Time Warner Entertainment Co. L.P. v. Everest Midwest Licensee, L.L.C., 381 F.3d 1039, 1043 (10th Cir. 2004); U.S. Dept. of Energy (High-Level Waste Repository), CLI-06-05, 63 NRC 143 (2006)).

34 U.S. Dept. of Energy (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 391 (2008). See also U.S. Dept. of Energy (High-Level Waste Repository), CLI-06-05, 63 NRC 143 at 154 (“Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.”).

35 LBP-14-04 at 7 (emphasis supplied).

36 42 USC §2239(a)(1)(A).

37 See LBP-14-04 at 7-8 and n.32 and NRC Staff Memorandum at 3. Both Staff and the Board Majority cite In re Andrew Siemaszko, CLI-06-16, 63 NRC 708, 714 n.3 (2006) in support of their conclusions.
Although it questions the severity of the CO’s impact on them, the Board majority does not assert that the workers represented by Local 15 are unaffected by the CO. As Judge Karlin spells out in his dissent, the CO clearly targets individual workers and imposes on them new duties and liabilities: the CO was prompted by the conduct of individual workers; is issued pursuant to a regulation that itself imposes duties and liabilities on individual workers; and individual workers who do not comply with the reporting obligations set forth in the order face discipline at the hands of the licensee or enforcement action (civil and criminal) by the NRC. NRC Staff admits the order was “tailored…to address the individual failures of Exelon employees” and, in her Non-Concurrence, Senior Enforcement Coordinator Patricia Lougheed sharply questioned the propriety of issuing a violation to the licensee when the conduct at issue was perpetrated by individual workers and unlikely to be prevented “no matter what the licensee does.”

Despite these facts and in contravention of the plain language of the regulation, the Board majority adopted a fiction that deemed these workers, who are clearly the de facto target of the order, to be members of a newly created class of “third parties.” The Board majority assigns certain lesser rights to such “third parties” as distinguished from those who are “the subject of an enforcement order” (another newly-created and, as discussed at length in the dissent, ill-defined, class). The Board majority’s conclusions in this regard are clearly erroneous as a matter of law.

38 LBP-14-04 at 31-32 (Karlin, J., dissenting).
39 10 CFR § 73.56(f).
40 See 10 CFR § 73.80 and 73.81.
41 NRC Staff Answer at 14.
42 Lougheed Non-Concurrence.
43 LBP-14-04 at 35-36 (Karlin, J., dissenting).
Section 2.202(a) describes three classes of persons and accords each with certain rights. Those classes are:

- “Licensee”
- “other person subject to the jurisdiction of the Commission” (see § 2.202(a)(1))
- “any other person adversely affected by the order” (see § 2.202(a)(3))

Sections 2.202 (a) and (a)(1) describe a “Licensee” or “other person subject to the jurisdiction of the Commission” as the classes of entities to whom an order may be issued and on whom an order must be served. Section 2.202 (a)(3) provides that a “Licensee” or “any other person adversely affected by the order” are the classes of entities who are entitled to be informed by the order of their right to demand a hearing on all or part of the order. It is this class—any other person adversely affected by the order—to which Local 15 and its members belong. Section 2.202(b) creates yet another class: an “other person to whom the Commission has issued an order under [Section 2.202]”; pursuant to § 2.202(b), a licensee or “other person to whom the Commission has issued” an enforcement order must file an answer to the order. Those same two classes are entitled to move the presiding officer to set aside the immediate effectiveness of an enforcement order.44

By contrast, 10 CFR § 2.309 applies on its face to a different class of person, i.e., “any person whose interest may be affected by a proceeding and who desires to participate as a party.”45 Such a person is afforded different rights: he or she may file a written request for hearing and a “specification of the contentions which the person seeks to have litigated in the

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44 10 CFR § 2.202(c)(2)(i).
45 10 CFR § 2.309(a).
hearing.”46 Such a person is also required to meet standing requirements, including a statement of the “possible effect of any decision or order that may be issued in the proceeding on the petitioner’s hearing request.”47 The quoted language highlights the absurdity of applying the § 2.309(d) and (f) requirements, which on their face apply to someone whose interest may, in the future, be affected by a proceeding, to someone who has already been adversely affected by an enforcement order. Why require someone who has already been adversely affected by an enforcement order to speculate on the “possible effect of any decision or order that may be issued in the proceeding” when that person can articulate quite clearly how he or she has already been burdened by an order that is not just a chimerical possibility but actually exists? Why, when the Order (consistent with the practice of the NRC) has defined the sole issue for hearing as “whether the order should be sustained” would the NRC ask someone who seeks a hearing on that order to specify “what he or she seeks to have litigated” (i.e., contentions)?48 This is one absurdity that results from the Board majority’s engrafting of the § 2.309(d) and (f) requirements on to a demand for hearing by a person adversely affected by an enforcement order.

46 Id. That a hearing request made pursuant to § 2.309 is different from a hearing demand made pursuant to § 2.202(a)(3) is further supported by the timelines set for each in the regulations. In most cases, the time to request a hearing pursuant to § 2.309 is 60 days, unless otherwise specified in the notice of agency action. 10 CFR § 2.309(b)(3) and (4). By contrast, a person demanding a hearing pursuant to § 2.202(a)(3) must do so within a much shorter time frame: 20 days from the date of the order, unless the order specifies otherwise. This distinction is sensible if the pleading requirements pursuant to § 2.202(a)(3) are less demanding than those of § 2.309. As another licensing board recently observed, the Commission “evidently concluded” that where a person was entitled to demand a hearing rather than merely requesting one, “no more than 20 days would be required to prepare a document that would satisfy the conditions precedent to obtaining the hearing.” In re Charlissa C. Smith (Denial of Reactor Operator License) LBP-13-03 at 8 (slip op.) (February 19, 2013) (rejecting Staff’s insistence that one demanding a hearing pursuant to 10 CFR § 2.103(b)(2) must also satisfy the requirements of § 2.309 and noting parallel between § 2.103(b)(2) and § 2.202(a)(3)).

47 10 CFR § 2.309(d)(iv).

48 See also In re Andrew Siemaszko, CLI-06-16, 63 NRC 708, 725 (2006) (Jaczkó, Comm., dissenting) (questioning the wisdom of requiring a petitioner for discretionary intervention on an enforcement order to also submit an admissible contentation noting that with the already-limited scope of proceedings on enforcement orders “it seems a meaningless request to require those seeking discretionary intervention to restate” the issues).
The Board majority’s separate classes of “third parties” or those who are “the subject of an order” are nowhere to be found in either § 2.202 or § 2.309. As Judge Karlin pointed out in his dissenting opinion, there is no support either in the regulations or in any Commission decision for the creation of a new class of those who are “the subject of an order.” Further, to the extent the Board majority would equate being named in the order with being the subject of the order (and therefore, according to the majority, entitled to demand a hearing) such a conclusion would be inconsistent with the Commission’s actual practice, as acknowledged by Staff at oral argument. In practice, the NRC often issues enforcement orders that impose obligations on an entire class without naming each individual member; despite not being named in the order each individual class member would be entitled to demand a hearing as of right pursuant to § 2.202(a)(3). Similarly here, the CO imposes obligations on an entire class of individuals (i.e., Exelon employees) who are not named individually in the order. Just as all boiling water reactor licensees are entitled to demand a hearing on an order that adversely affects but does not actually name them, so too should the employees who are adversely affected but not named in the CO at issue here be entitled to demand a hearing as of right pursuant to § 2.202(a)(3).

B. The majority’s reliance on regulatory history is misplaced and mistaken.

The foregoing analysis of the regulatory language reveals that the Commission has been quite precise in describing which types of entities are entitled to which rights. As Judge Karlin observed in his dissent, the Commission knew how to distinguish among classes of people and

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49 LBP-14-04 at 35-36 (Karlin, J., dissenting).

50 For example, the Commission issues orders to the entire class of Mark 1 and Mark 2 Boiling Water Reactor operators and despite the fact that each of those reactors is not named in the order, each licensee who actually operated that type of reactor would be entitled to demand a hearing as of right pursuant to Section 2.202(a)(3). Oral Argument Transcript at 126-27; see also LBP-14-04 at 36 and n.21 (Karlin, J., dissenting).
assign different rights and responsibilities to each. Where, as here, the language of the regulations is clear and unequivocal, that language must be given effect. The Board majority’s reach into regulatory history in an attempt to support a conclusion contrary to the plain language of the rule is improper and clearly erroneous, especially where it has not even made a finding that the regulation is ambiguous. Moreover, the Board majority misreads that history.

The Board majority relies on “one passage in the Statement of Considerations” for the 1991 regulatory amendments to support its position that, in essence, the Commission could not have meant what it said when it codified the right of “any other person adversely affected” by an enforcement order to demand a hearing without also fulfilling standing and contention requirements.

Unfortunately, the passage cited by the majority is itself ambiguous:

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

The majority, in response to this isolated statement, makes a massive inferential leap (again invoking the class of “third parties”), assuming that “consistent with current practice” modifies the “opportunity” for hearing afforded a “third party.” It does so despite the far more obvious conclusion, supported by the Statement’s citation to Bellotti, that “consistent with current practice,” actually modifies only the word “hearing” (i.e., “a hearing consistent with current practice” and not “an opportunity…consistent with current practice”). Read in that manner, the

51 LBP-14-04 at 36-37 (Karlin, J., dissenting).
52 LBP-14-04 at 8.
last 22 words of the sentence, just prior to the *Bellotti* citation, are clearly a reference to the central holding of *Bellotti*, which was of course that (1) the NRC had the authority to define the scope of its proceedings and (2) its practice of limiting hearings on enforcement orders to the question of whether the order should be sustained, not whether it should be strengthened or otherwise altered, was not arbitrary. Even if it were appropriate to rely upon regulatory history, that history supports the plain language reading of § 2.202(a)(3) urged by Local 15 and not, as the majority would have it, an interpretation directly contrary to and inconsistent with that plain language. In summary, the majority erred in using an ambiguous legislative history to change the plain language of an unambiguous regulation.

C. The cases the majority cites in support of its “third party” treatment of Local 15 are all readily distinguishable.

The Board majority asserts that the Commission and other licensing boards have “consistently required third parties seeking intervention with respect to an enforcement order to meet the 10 CFR 2.309 criteria, and have not considered such requests to be automatic.” What it fails to note, however, is that it also appears that the Commission has never been called upon squarely to confront the question posed by this appeal. This gap in jurisprudence may be at least partly explained by the fact that the NRC has apparently routinely violated (as it did in this case) the § 2.202(a)(3) requirement to inform “any other person adversely affected by the order of his or her…right to demand a hearing” on an order issued pursuant to § 2.202. In any event, all of the cases the Board majority asserts show that “third parties” must meet the standing and

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54 *Bellotti*, 725 F.2d at 1381-82. NRC Staff acknowledges that Local 15 has “cleared the *Bellotti* hurdle.” See LBP-14-04 at 48 (Karlin, J., dissenting) (citing Oral Argument Tr. at 112).

55 See LBP-14-04 at 66 (Karlin, J., dissenting) (noting that in the last ten years only one enforcement order out of hundreds published in the Federal Register contained the language required by § 2.202(a)(3) and that the NRC Enforcement Policy and Enforcement Manual also omit any reference to the “legal requirement that NRC orders must inform the adversely affected persons of their right to demand a hearing”). As Local 15 noted in its February 28, 2014 Memorandum (at 2) and at the March 6 oral arguments (Tr. at 16-17), the CO’s failure to inform Local 15 of its right to demand a hearing pursuant to § 2.202(a)(3) initially misled Local 15 regarding its hearing rights.
contention requirements of §§ 2.309(d) and (f)\textsuperscript{56} and are not entitled to demand a hearing pursuant to § 2.202(a)(3) even if (like Local\textsubscript{15}) they have been adversely affected by an enforcement order, are all distinguishable from this one.

The majority philosophically observes that others “may also be impacted in various ways by the settlement of an enforcement proceeding” and that “a stone thrown in the ocean may cause ripples that extend very far.”\textsuperscript{57} But the effect of the CO on the workers in this case is more in the nature of a boulder placed upon their shoulders than a stone thrown in the ocean. Indeed, its effect on the workers occurs at “the first step” and is immediate, not remote. The workers’ concerns are much more than theoretical. Because of that, granting a hearing to Local 15 in this case will not open the door to a great volume of hearing demands by “indirectly affected entities and individuals”\textsuperscript{58} to assert their own “parochial interests.” Utilizing the plain language of the regulation to permit a hearing as of right only to those who have actually demonstrated an adverse effect flowing from the order itself rather than some speculative harm that could result from the proceeding will naturally limit those who can seek such a hearing.

In each of the cases cited by the Board majority, the entity seeking hearing would not be entitled to one even applying the plain language of 10 CFR § 2.202(a)(3) as Local 15 urges. In Andrew Siemaszko, an enforcement order prohibited Mr. Siemaszko from involvement in NRC-Licensed activities based upon his deliberate misconduct.\textsuperscript{59} Mr. Siemaszko requested and was automatically granted a hearing pursuant to 10 CFR § 2.202.\textsuperscript{60} The Union of Concerned

\textsuperscript{56} LBP-14-04 at 9 and n.40.
\textsuperscript{57} LBP-14-04 at 18.
\textsuperscript{58} The majority’s statement of this concern seems to concede that Local 15 has been at least indirectly adversely affected. LBP-14-04 at 18.
\textsuperscript{59} Andrew Siemaszko, CLI-06-16, 63 NRC at 714.
\textsuperscript{60} Id.
Scientists and Ohio Citizen Action petitioned to intervene and were granted discretionary intervention. On appeal by NRC Staff, the Commission vacated that grant and remanded for reconsideration by the Board. It was undisputed that neither intervenor alleged it had actually been adversely affected by the enforcement order; rather, intervenors alleged that there was the “potential for undermining worker and public confidence in the NRC’s oversight capability.”61 The Commission made no holding with regard to the applicability of standing and contention requirements to a demand for hearing pursuant to § 2.202(a)(3) but only considered the propriety of the board’s grant of discretionary intervention.62

Similarly, in *FirstEnergy Nuclear Operating*,63 petitioners were individuals and the Nuclear Information and Resource Service. There was no evidence they were adversely affected by the order in that case and they did not argue, nor did the Commission consider an argument that they were entitled to demand a hearing pursuant to § 2.202(a)(3). In fact, the licensing board noted that petitioners had “made no effort in the context of the confirmatory order to establish how the order's corrective measures cause them any harm whatsoever.”64 Likewise, the petitioners in *Florida Power and Light*,65 and *Nuclear Fuel Services*,66 both licensing board

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61 Andrew Siemaszko, ASLBP No. 05-839-02-EA, 2005 NRC LEXIS 129 at *3 (August 2, 2005).
62 While Local 15 originally asserted the licensing board in this case could grant it discretionary intervention, the union recognizes that in the absence of a grant of hearing to any other party, discretionary intervention is not permitted.
63 *FirstEnergy Nuclear Operating* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154 (2004).
64 *FirstEnergy Nuclear Operating* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379 at *11 (2004).
65 *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279 (2008). The order at issue in FPL addressed apparent violations by FPL supervisory and/or managerial personnel to promptly contact the site security manager when they learned of “credible objective evidence” that called into question the trustworthiness and reliability of contract workers. 73 Fed. Reg. 36,131 (June 25, 2008). There was no claim the order imposed obligations on anyone other than FPL management or had already caused harm to the intervenor. The contractor who was denied intervention claimed only that a radiological release “could forever compromise the environment” where the petitioner resides and does business. 68 NRC at 288. Intervention was denied on *Bellotti* grounds, i.e., that the petitioner failed to show it would be adversely affected by the terms of the existing order and was instead seeking additional enforcement action against FPL, and because the petitioner’s challenge to the NRC’s authority to engage in ADR was not within the scope of the enforcement proceeding. *Id.* at 290-92.
decisions, never alleged that they had been adversely affected by the order in each case and
neither argued it was entitled to demand a hearing pursuant to 2.202(a)(3) (nor did the licensing
board consider such an argument *sua sponte*).

*Alaska DOT*,67 which, aside from the *Consumers Power* cases,68 is the only case any
party has thus far cited in which a licensee’s employee has attempted to obtain a hearing on a
confirmatory order issued to his employer, is similarly inapposite although it merits some
discussion. In that case the petitioner (Mr. Farmer) was a licensee employee who was subjected
to retaliation during a 3-year period for raising safety concerns about radiation exposures of
ADOT employees.69 The confirmatory order required the licensee to implement a Safety
Conscious Work Environment that was intended to prevent similar injuries in the future. **It did
not impose any obligations on Farmer, nor did Farmer claim it did.**70 In fact, Farmer, unlike
Petitioner here, did not claim that he had been adversely affected by the order itself; rather, he
sought additional measures beyond those included in the order. Nor did Farmer argue he was
entitled to demand a hearing pursuant to § 2.202(a)(3).

Further, the practice has not been exclusively as the majority describes. For example, in
*Northern States Power Co.*, the Director of the Office of Inspection and Enforcement issued an
order to the licensee to show cause why its operating license should not be modified to prohibit
the use of “radios, tapes, television sets or other audible entertainment devices” in the control

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67 *Alaska Dept. of Transp.* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399 (2004).
68 *Consumers Power Co.* (Palisades Nuclear Power Facility), ALAB-670, 15 NRC 493 (1982); *Consumers Power
69 *Alaska Dept. of Transp.*, 60 NRC at 402.
70 “The Confirmatory Order at issue in this proceeding mandates numerous actions for ADOT to take to ensure a
Safety Conscious Work Environment. These actions, including independent policy review, training, and a plan for
assuring compliance with Section 30.7, cannot conceivably cause Farmer to suffer any injury. And without any
injury *attributable to the Confirmatory Order*, Farmer does not have standing in this proceeding.” *Id.* at 406
(emphasis original).
rooms of the licensee’s nuclear plants.71 A group of control room operators (who, presumably, would have been forced to relinquish their radios) and their union requested a hearing on the order.72 In response to the hearing request, the Commission ordered NRC Staff to file a “detailed explanation of the health and safety basis” for the show cause order.73 The Commission announced that based upon the filing, it would either withdraw the order or rule on the request for hearing.74 The Commission did not announce or apply any of the standing or contention rules that the majority insists must be applied here to evaluate the union’s and employees’ request for hearing.75 After receiving the staff response, the Commission rescinded the order prohibiting the use of audible entertainment devices, etc. in the licensee’s control rooms and dismissed the proceeding, presumably providing to the union and its members the relief they sought.76 The Commission in Northern States allowed licensee employees who were adversely affected by an enforcement order to challenge that order without meeting standing and contention pleading requirements. Their injury was the loss of the ability to listen to music while on duty. Here, the workers’ injury is far more profound, implicating job security, blacklisting and civil and criminal penalties.77 These workers should be afforded the right to a hearing.

II. The Board majority erred as a matter of law when it found Local 15 lacked standing to challenge the CO.

72 Id.
73 Id. It did so over the objection of a dissenting Commissioner who urged assignment of the matter to a Board or ALJ to evaluate the hearing request. The Commission’s decision to ignore the position of the dissent speaks for itself.
74 Id.
75 This was true despite the fact that 10 CFR §2.714 as it then existed included a standing inquiry for intervention that today’s § 2.309(d) absorbed in the 2004 regulatory amendments and closely tracks. See 10 CFR § 2.714 (1987); 69 Fed. Reg. 2182, 2218 and Table 2 (Jan. 14, 2004) (cross-referencing pre- and post-amendment CFR provisions). A copy of the archived version of the regulation is attached for the convenience of the Commission.
77 See LBP-14-04 at 32 (Karlin, J., dissenting).
Although Local 15 believes it need not allege or establish standing in order to demand a hearing, it has nonetheless, as Judge Karlin found in his dissent, satisfied NRC standing requirements and the Board’s conclusion to the contrary was clearly erroneous. Although the majority recites established standards for demonstrating standing, it does not apply them, instead foreclosing that inquiry by adopting a rule that the only claim that will support standing to challenge a confirmatory order is one that the order reduces safety. In doing so, the majority erects a barrier to entry that is unsupported by any statutory or regulatory provision and unsupported by any holding of a Commission of judicial decision.\textsuperscript{78} The majority’s interposition of this requirement is legally erroneous.

A. The Board Majority erred when it concluded that Local 15 must “credibly allege” the CO made conditions less safe in order to be permitted intervention.

The Board’s over-arching error with regard to standing is its insistence that “[s]tanding to challenge a confirmatory order exists only when a petitioner credibly alleges that a settlement somehow actually reduces safety.”\textsuperscript{79} The majority makes this sweeping assertion in reliance not on any actual holding of a Commission or court decision but rather on a piece of dicta in the Alaska DOT decision, i.e., a gratuitous statement that did not concern an issue that was required to be resolved in that case.\textsuperscript{80} In reality, the petitioner in Alaska DOT was found to be without standing not because he had failed to allege that the order reduced safety but rather because the order (which undisputedly imposed no new obligations on him) could not conceivably have any adverse effect on him personally and what he sought—a strengthening of the order—was, by practice of the Commission as upheld by Bellotti—outside the scope of the proceeding. In both

\textsuperscript{78} Further, as discussed in Section III, infra, the Board majority has precluded Local 15 from meeting this artificially constructed standard by improperly striking Local 15’s allegations that the CO reduced safety.

\textsuperscript{79} LBP-14-04 at 12 (emphasis original).

\textsuperscript{80} See Judge Karlin’s extensive exploration of the significance (or its lack) of dicta. LBP-14-04 at 50-51 and n.39 (Karlin, J., dissenting).
respects, Local 15 is distinguishable: the CO has imposed new burdens on its members and it seeks only to have the order rescinded, not strengthened.

Again, the majority has interposed a requirement that is not only unsupported by the plain language of the regulations but flatly contradicts that language. 10 CFR § 2.309(d) requires a requestor/petitioner merely to state “the nature and extent of…[its] property, financial or other interest in the proceeding.” Local 15 has stated that its members face (among other things) loss of property and financial losses if the order is sustained and they fail to comply with its terms. The majority has dismissed bases for standing articulated in the regulation and instead imposed a single new basis: reduction in safety. Because this approach is clearly in conflict with the regulations it is an error of law that requires reversal by the Commission.

B. The majority misapplied concepts of judicial/constitutional standing and the jurisprudential “zone of interests” test.

The majority’s adoption of the Alaska DOT dicta to require that a petitioner allege a reduction in safety as the threshold determinant of standing resulted in its misapplication of the contemporaneous concepts of judicial standing which the Commission has held should be used in evaluating a petitioner’s standing to intervene in licensing proceedings. 81 The majority further misapplied the jurisprudential “zone of interests” test which the Commission has also applied, where appropriate. These are additional errors supporting a reversal of the majority’s decision.

The elements of the Article III “case or controversy” Constitutional standing test require a petitioner to allege (1) concrete and particularized injury; (2) causally connected to the action complained of; and (3) likely to be redressed by a favorable decision. 82 The Board majority does not appear to doubt that Local 15 has satisfied the three elements although it does not actually


analyze their application to the facts as alleged by Local 15. In fact, as discussed by the dissent, Local 15 has satisfied all three elements of constitutional standing. It has alleged that the CO imposes new obligations and liabilities on the workers it represents (injuries in fact that have already occurred) and that the order further increases the risk that those workers will be subjected to adverse consequences flowing from the imposition of those obligations and liabilities.83 Both of these forms of injury—that which has already occurred and that which increases risk of harm—have been found to satisfy the “injury-in-fact” element.84 These injuries are directly traceable to the CO, establishing the causal connection. And there can be no question that revocation of the Order will redress these injuries.

In addition to these elements, the majority recites that the petitioner’s injury must be “arguably within the zone of interests protected by the governing statute” (conveniently omitting the words “or regulated” which are actually included in the test) and further (incorrectly) asserts that the “zone of interests requirement is applied more rigorously when the petitioner is not the direct subject of the challenged regulatory action.”85 Both of these recitations misstate the law in subtle but important ways that tend to tilt the field against Local 15. The zone of interests test which the Commission in past applications has taken directly from the United States Supreme Court’s decision in Clarke v. Securities Indus. Ass’n, actually requires that in addition to alleging injury in fact, the petitioner’s interest must fall “arguably within the zone of interests to be

83 Those consequences include, but are not limited to, termination of employment, blacklisting, and criminal prosecution.

84 See, e.g., Mass. v. EPA, 549 U.S. 497, 520-23 (2007); Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) (“Injury may be actual or threatened”) (citing cases).

85 LBP-14-04 at *10. Although the majority cites Quivira Mining as support for the second assertion, as discussed below, that case contains no such statement.
protected or regulated by the statute or constitutional guarantee in question.”

Pursuant to the Administrative Procedure Act, a petitioner is entitled to judicial review of agency action (the context in which the zone of interests test arose) when it is “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” The zone of interests tests applies only to determine whether the alleged aggrievement or adverse effect falls within the zone of interest regulated or protected by the governing statute (the second prong of 5 USC §702); it does not apply to a petitioner who has suffered a legal wrong because of agency action (the first prong). Here, Local 15 has suffered a legal wrong inasmuch as the NRC has imposed unlawful requirements upon its members through the confirmatory order. Thus, if the majority were to have properly applied the zone of interests test consistent with the context in which it arose, it would never have reached or applied that test at all. Its application here was erroneous.

Nor has the majority correctly invoked Quivira Mining. Neither that case nor any other cited by the majority requires a “more rigorous” application of the zone of interests test when the petitioner is not the “direct subject” of the regulatory action at issue. In fact, as noted by the dissent, the Commission in Quivira Mining merely recites the test as articulated in Clarke, which itself notes that “the test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.” And as the United States

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87 5 USC §702 (emphasis added).


89 The exact language of Quivira Mining does not include the word “direct” to modify “subject of the contested regulatory action.” The majority’s insertion of the modifier appears to be a semantic effort to further thin the ranks of those who may escape its “more rigorous” application of the zone of interests tests. For the majority it is not enough, apparently, to be the subject of such regulation; one must be the direct subject.

90 Clarke, 479 US at 399.
Court of Appeals for the District of Columbia Circuit has recently observed, “t]he zone of interests requirement poses a low bar” and a plaintiff “satisfies the requirement unless his ‘interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” 91

Assuming, arguendo, that the zone of interests test should apply here, the majority erred in finding that the injury suffered by the Exelon workers is not “arguably within the zone of interests” protected or regulated by the relevant statute. There is no question that the conduct of individual workers, whether themselves licensed by the NRC or employees of licensees, is regulated by the NRC pursuant to its authority under the AEA. 92 Therefore, there should be no question that these individual workers’ conduct falls within the “zone of interests regulated…by” the NRC pursuant to its authorizing statutes. An enforcement order that imposes obligations on individual workers represents an exercise of the NRC’s authority to regulate the conduct of individual workers. Therefore, an individual employee’s challenge to an order that regulates his or her conduct clearly (not just “arguably”) falls within the zone of interests regulated by the NRC.

Further, to the extent the majority reads “regulated or protected by” the AEA as requiring that the interests at stake be consistent with the AEA’s “overarching purpose,” that reading is erroneous. In Bennett v. Spear, the Supreme Court expressly rejected the Ninth Circuit’s conclusion that a petitioner did not meet the zone of interests test because its economic interest was “neither directly regulated by the [Endangered Species Act] nor [sought] to vindicate its overarching purpose of species preservation.” 93 The Bennett Court found within a provision of

92 See, e.g., 10 CFR § 52.4(a)(6).
the ESA requiring the EPA to “use the best scientific and commercial data available” an intent to “ensure that the ESA will not be implemented haphazardly, on the basis of speculation or surmise” such that its actions do not result in “economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”94 Similarly here, the AEA not only authorizes the Commission to regulate the operation of nuclear plants (which necessarily includes the conduct of workers within those plants) but also to “make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper [to] assist it” in exercising its authority under the Act.95 This statutory language demonstrates an expectation that the Commission will take action not on the basis of “speculation or surmise” but will instead base its regulation of the industry, including the workers at issue here, on an evidentiary record that actually supports such regulation, thereby balancing safety and health concerns with the rights of those adversely affected by its regulatory actions. Further, as the dissent observes, while the regulations promulgated by the Commission protect public health and safety, they also “protect against the imposition of requirements that are in excess of those necessary to achieve that objective.”96 Accordingly, as in Bennett, the interests of Local 15 and its members do fall within the zone of interests regulated or protected by the AEA.

III. The majority erred in granting Exelon’s motion to strike and refusing to consider or credit Local 15’s allegations concerning the order’s adverse effect on safety.

Contrary to the assertions of the majority that Local 15 failed to assert safety concerns until its Reply, Local 15’s Petition was based, in part, on safety concerns. In it, Local 15 argued that the Order’s “ambiguities and inconsistencies rendered employee compliance [with reporting

94 Id. at 176.
95 42 USC § 2201(c).
96 LBP-14-04 at 47 (Karlin, J., dissenting).
obligations] far more uncertain.”97 Local 15 affirmed that it was “deeply concerned with the safety of Dresden Station and other nuclear plant personnel as well as the general public.”98 It argued that “the breadth, vagueness and ambiguity of the observation and reporting obligations [contained in the Order] casts a wide and indiscriminate net that simply is not carefully tailored to address . . . legitimate concerns for public health and safety.”99 In Contention 2, Local 15 asserted that the Order imposes reporting obligations that are vague, overbroad, and not limited or cabined by 10 C.F.R. § 73.56(f) and that these flaws will confuse the people who are trying to comply with the Order.100 These statements, taken together, must be read as articulating the concern that the confirmatory order renders conditions at Exelon less safe. As the dissent observes, “it requires no leap of logic to recognize that, if, as Local 15 asserts, an Order is so vague and ambiguous that people do not know how to comply with it, then it will undermine compliance and thereby undermine safety and security.”101 The fact that the dissent finds these assertions “quite plausible” reinforces the impropriety of disposing of Local 15’s assertions concerning safety at the pleading stage of this proceeding.

Even if Local 15’s concerns regarding safety were not clearly and unequivocally stated until its Reply, that should not be fatal as intervenors are undisputedly permitted by the Commission to cure in a reply deficiencies with regard to standing.102 Because Local 15’s

97 Petition at 5.
98 Id. at 17.
99 Id. at 18.
100 Specifically, the Order goes beyond the provisions of 10 C.F.R. § 73.56(f) imposing reporting requirements on any “illegal,” “unusual,” or “aberrant” behavior and requiring the reporting of other “credible information.” The Order does not define these terms, none of which are even contained in 10 C.F.R. § 73.56(f). Nor does the Order require that the illegal, unusual or aberrant behavior or credible information have any nexus to nuclear safety or security.
101 LBP-14-04 at 53 (Karlin, J., dissenting).
102 See, e.g., S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC 1, 7 (2010) (reversing licensing board decision refusing to allow intervenor to cure standing deficiency in reply).
clarification of its concern that the order renders conditions less safe provides another plank to support Local 15’s “injury in fact” and the order’s adverse effect on the workers, it clearly bolsters standing. To the extent Local 15’s standing has been found deficient, it is error for the majority to disallow statements that correct such alleged deficiencies when they are contained in a Reply. Further, nothing in Local 15’s Reply, including its clarified statements regarding safety, alters its contentions. Accordingly, those statements do not run afoul of the requirements for the timely submission of contentions contained in 10 CFR § 2.309(f).

The majority erred further in construing Local 15’s safety-related claims against it, asserting that that Local 15 cannot “credibly claim” that the Order could render Exelon’s operations less safe. It is well-settled that hearing requests are to be construed in favor of the petitioner on issues of standing. The majority’s “credibility” determinations are misplaced at the pleading stage and in the absence of an evidentiary hearing. Further, the fact that the dissent repeatedly confirms the plausibility of Local 15’s claims suggests that a trier of fact may conclude likewise and contrary to the conclusory determinations of the majority.

IV. The Board majority erred when it found Contentions 1 and 2 to be inadmissible.

Local 15 maintains that, as discussed above, it was error for the Board majority to require submission of an admissible contention. Local 15 is entitled to demand a hearing as of right because it has been adversely affected by the CO; having alleged the CO’s adverse effect, Local

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103 Even if Local 15’s safety-related claims were to be viewed as support for Contentions 1 and 2 rather than additional support for standing, it would have been permissible for the Board to accept and consider this rationale. So long as the litigants are given the opportunity to present arguments on such a new theory, a Board is free to decide contention admissibility on a theory different from those argued by the litigants. See Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 69 NRC 68, 73 n.24. Here, there was such an opportunity and neither Staff nor Exelon was prejudiced or subjected to unfair surprise.

104 LBP-14-04 at 3.

105 See, e.g., Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

106 As discussed below, it is error for the Board to make a merits determination, which necessarily include determinations of credibility, at the pleading stage.
15 need not meet separate standing and contention requirements. Even if Local 15 were required to establish standing, it is duplicative and a waste of resources to require the submission of contentions that meet the requirements of 10 CFR § 2.309(f) where the scope of the proceeding and the sole issue for determination has already been limited to whether the order should be sustained. Nonetheless, Local 15 has proffered contentions that meet those requirements and are therefore admissible. The Board majority’s conclusion to the contrary constituted error.

A. Contention 1

Contention 1, which has at its heart the allegation that the CO imposes obligations on Exelon’s employees without sufficient justification in the record, satisfies all six requirements for contention pleading.107 The legal basis for this contention is the CO’s failure to comply with the requirement, set forth in 10 CFR § 2.202(a)(1) that an enforcement order “allege the violations with which the licensee…is charged…or other facts deemed to be sufficient ground for the proposed action…” This regulation evinces the Commission’s expectation that enforcement orders will not be issued absent “sufficient ground” or justification for the action. Local 15 asserts there is not sufficient justification in the record to support the Order, satisfying the requirement to provide a specific statement of the issue (§ 2.309(f)(1)(i)). Because

107 Pursuant to 10 CFR §2.309(f), each contention must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;
(ii) Provide a brief explanation of the basis for the contention;
(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.
compliance with § 2.202(a)(1) is essential to the order’s sustainability, this contention satisfies materiality requirements and is clearly within the scope of the proceeding (§ 2.309(f)(1)(iii) and (iv)) (i.e., should the order be sustained?). Local 15 has provided a brief explanation of the basis for its contention (§ 2.309(f)(1)(ii)): the lack of evidence to support a conclusion that the actions of the individual employees could be attributed in any manner to the licensee, including deficiencies in its Behavioral Observation Program, or to support the imposition of additional reporting obligations on Exelon employees. While Contention 1 is arguably a legal contention and therefore exempt from the requirement to allege “facts” to support the petitioner’s position, Local 15 has laid out the facts of which it has knowledge that suggest the CO is not supported by sufficient grounds. Having satisfied all of the foregoing requirements, it is clear that Local 15 has provided “sufficient information to show that a genuine dispute exists…on a material issue of law or fact.” (§ 2.309(f)(1)(vi)). The Board majority’s finding that Contention 1 was inadmissible was therefore erroneous.

B. Contention 2

Like Contention 1, Contention 2 meets the pleading requirements of 10 CFR § 2.309(f). Contention 2 asserts the CO should not be sustained because it imposes reporting requirements on Exelon employees that are vague, over-broad and not tailored to address the health and safety concerns that animate 10 CFR § 73.56. Pursuant to the CO, Exelon employees will be required for the first time to observe and report any off duty “unusual,” “illegal” or “aberrant” activity of co-workers, without limitation. None of these terms appear in the regulations and none of them are defined in the order. The Order further requires the reporting of “credible information” about co-workers, although it does not specify the type of credible information. Nothing in the

109 See Petition at 17.
regulations concerning behavioral observation requires such reporting. Nothing in the Order ties these reporting requirements to public health or safety and there is no nexus between the Order and the health, safety and radiological sabotage concerns that animate 10 CFR § 73.56. Similar to Contention 1, these are, at least in part, legal issues for which no factual basis need be pled. Nonetheless, Local 15 has pled the fact of the confusion generated by the CO, through the affidavit of Dennis Specha. The issues raised by Local 15 in Contention 2 are material and clearly there is a dispute as to whether the Order is overbroad, vague and untethered to legitimate safety concerns. The Board majority erred when it concluded otherwise.

Even more troubling is that in its consideration of Contention 2, the Board majority erroneously failed to confine itself to the question of whether Local 15’s allegations satisfy the contention pleading requirements for admissibility. Instead, the majority reached the merits of the contention, announcing it has “no need for an evidentiary hearing” to conclude that Local 15’s allegations that the CO causes confusion about reporting requirements are without merit.110 Commission precedent dictates that it is plainly improper for a licensing board to reach the merits of a contention at the admissibility stage.111

110 LBP-14-04 at 21. In doing so, the majority further errs in relying on the terms of Exelon’s BOP to find that the CO has resulted in clarification rather than obfuscation of reporting requirements. At issue in this proceeding is the Confirmatory Order itself, not Exelon’s BOP and it is clearly erroneous to conflate the two. If the Order is vague or overbroad, as Local 15 alleges, those ills cannot be cured in a separate document (the BOP) which is admittedly within Exelon’s discretion to revise at any moment, but must be remedied through rescission of the order. Like an injunction or restraining order, the order itself should “state its terms specifically” and describe in reasonable detail the acts required “not by referring to the complaint or other document.” FED. R. CIV. P. 65(d). The Supreme Court has applied Rule 65(d) broadly not just to injunctions but to orders of various kinds including enforcement orders and affirmative decrees. See International Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n, 389 U.S. 64, 75 (1967) (citing cases). This specificity requirement is intended, inter alia, “to prevent uncertainty and confusion on the part of those faced with injunctive orders in order to avoid a possible contempt citation on a decree too vague to be understood.” See 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 65.60, 65-108 (3d ed. 2013); Schmidt v. Lessard, 414 U.S. 473, 475-76 (1974) (citing Moore’s).

111 See Luminant Generation Co. LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-11-09, 74 NRC 233 (2011) (noting that a Board finding that a licensee’s Mitigative Strategies Report met the requirements of 10 C.F.R. § 52.80(d) and 50.54(hh) would have been “an improper finding on the merits”) (citing Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2190 (Jan. 14, 2004) (“The contention standard does not contemplate a determination of the merits of a proffered contention.”)); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power
the nature of the requirements imposed by the order and proceeds to resolve that disagreement against Local 15 rather than taking the union’s assertions at face value, as is required at the admissibility stage.\textsuperscript{112} Although licensing board decisions regarding contention admissibility are given substantial deference, the majority has exceeded the bounds of its authority in reaching a merits determination regarding the effects of the CO. Accordingly, its conclusion with regard to the admissibility of Contention 2 should be reversed.

**CONCLUSION**

For all of the reasons articulated herein, the Commission should reverse the decision of the Board majority and grant Local 15’s request for hearing pursuant to 10 CFR § 2.202(a)(3) on the issue of whether the October 28, 2013 Confirmatory Order should be sustained. In the alternative, Local 15 requests that the Commission reverse the Board’s findings with regard to Local 15’s standing pursuant to 10 CFR § 2.309(d) and the admissibility of its Contentions 1 and 2 pursuant to 10 CFR § 2.309(f) and grant a hearing on those contentions.

\textsuperscript{112} See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29 (1989). The Appeals Board there noted that “boards should not make a judgment as to what weight should be given to a document on which a contention is based, as though it were a piece of evidence, but rather should take it at the face value its proponent urges.” To do otherwise would be “tantamount to a merits determination.”
Respectfully submitted,

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CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

Subpart G--Rules of General Applicability

§ 2.714 Intervention.

10 CFR 2.714

(a)(1) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105, any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, or as provided in § 2.102(d)(3). Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

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

(2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph...
(d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

(3) Any person who has filed a petition for leave to intervene or who has been admitted as a party pursuant to this section may amend his petition for leave to intervene. A petition may be amended without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the special prehearing conference pursuant to §2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference. After this time a petition may be amended only with approval of the presiding officer, based on a balancing of the factors specified in paragraph (a)(1) of this section. Such an amended petition for leave to intervene must satisfy the requirements of this paragraph (a) of this section pertaining to specificity.

(b) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to §2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity. A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

(c) Any party to a proceeding may file an answer to a petition for leave to intervene within ten (10) days after service of the petition, with particular reference to the factors set forth in paragraph (d) of this section. However, the staff may file such an answer within fifteen (15) days after service of the petition.

(d) The Commission, the presiding officer, or the atomic safety and licensing board designated to rule on petitions to intervene and/or requests for hearing shall permit intervention, in any hearing on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, by the State in which such area is located and by any affected Indian Tribe as defined in Part 60 of this chapter. In all other circumstances, such ruling body or officer shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

(1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(e) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, presiding officer or the designated atomic safety and licensing board may direct in the interests of:

(1) Restricting irrelevant, duplicative, or repetitive evidence and argument,
(2) Having common interests represented by a spokesman, and
(3) Retaining authority to determine priorities and control the compass of the hearing.

(f) In any case in which, after consideration of the factors set forth in paragraph (d) of this section, the Commission or the presiding officer finds that the petitioner's interest is limited to one or more of the issues involved in the proceeding, any order allowing intervention shall limit his participation accordingly.
(g) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (f) of this section.

(h) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that on this date, May 12, 2014, copies of the “Brief in Support of Appeal of LBP-14-04” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Rochelle G. Skolnick
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Dated in St. Louis, Missouri
this 12th day of May, 2014