

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL OF LBP-14-04 BY LOCAL UNION NO. 15,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

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June 6, 2014

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the NRC Staff (“Staff”) hereby files its brief opposing the “Corrected Brief In Support of Appeal of LBP-14-04” (“Appeal”) filed by Local 15, International Brotherhood of Electrical Workers, AFL-CIO (“Local 15”) on May 13, 2014.¹ Local 15 asserts that the Commission should reverse the Atomic Safety and Licensing Board’s (“Board”) April 17, 2014, “Memorandum and Order (Denying Petition to Intervene and Request for Hearing)” (“LBP-14-04”). For the reasons discussed below, the Staff opposes the Appeal and believes the Board correctly denied Local 15’s request for hearing.

BACKGROUND

Exelon Generation Company, LLC (“Exelon”) is the holder of two licenses authorizing the operation of Dresden Nuclear Power Station (“Dresden Station”) in Morris, Illinois. On June 6, 2012, the NRC’s Office of Investigations Region III field office initiated an investigation to determine if any personnel at the Dresden Station were aware that a former Senior Reactor Operator (“SRO”) had planned to commit a violent crime and willfully failed to report that SRO

¹ Local 15 timely filed its Notice of Appeal and supporting brief with the Commission on May 12, 2014. See Notice of Appeal of LBP-14-04 by Local 15 (May 12, 2014) (ADAMS Accession No. ML14132A399); Brief in Support of Appeal of LBP-14-04 (May 12, 2014) (ADAMS Accession No. ML14132A400). However, due to a formatting error within the brief, and after consulting with all parties, Local 15 filed a Corrected Notice of Appeal and its Corrected Brief in Support of Appeal of LBP-14-04 on May 13, 2014. See Corrected Notice of Appeal of LBP-14-04 by Local 15 (May 13, 2014) (ADAMS Accession No. ML14133A634); Corrected Brief in Support of Appeal of LBP-14-04 (May 13, 2014) (ADAMS Accession No. ML14133A638) (“Appeal”).

for aberrant behavior.² Based on the results of the investigation, the Staff substantiated that several individuals had failed to fulfill the requirements of Exelon's Behavioral Observation Program ("BOP"), as required by 10 C.F.R. § 73.56, but provided Exelon the opportunity to request Alternative Dispute Resolution ("ADR") before the Staff made its final enforcement decision.³ Exelon agreed to attend an ADR session, which took place on September 18, 2013, and reached a settlement agreement with the Staff that was memorialized in a Confirmatory Order issued on October 28, 2013.⁴

The Confirmatory Order acknowledged several actions Exelon had already completed in response to the incident that precipitated the investigation, which included, among others, a revision to its BOP to indicate the expectation to report offsite illegal activity.⁵ Additionally, the Confirmatory Order committed Exelon to further revise its BOP within 90 days to (1) provide additional guidance and training on the types of observed offsite activities or credible information that should be reported; and (2) clearly communicate the procedural requirements to assure such information is properly forwarded without delay.⁶ Exelon also committed to (1) conduct an effectiveness assessment of these revised procedures within 18 months; (2) present

² EA-13-068, *Dresden Nuclear Power Station, Units 2 and 3; Report Nos. 05000237/2013407; 05000249/2013407(DRS) and Results of Investigation Report No. 3-2012-020* (July 3, 2013) (ADAMS Accession No. ML13184A232).

³ *Id.* at 2. ADR is a voluntary and informal process, arranged through Cornell University's Institute on Conflict Resolution, in which a trained neutral mediator with no decision-making authority assists the parties in reaching a mutually agreeable resolution. See *id.* at 3; see also NRC Enforcement Policy at 28-29 (July 9, 2013) (ADAMS Accession No. ML13228A199).

⁴ EA-13-068, *Confirmatory Order Modifying License, Dresden Nuclear Power Station, Units 2 and 3* (Oct. 28, 2013) (ADAMS Accession No. ML13298A144) ("Confirmatory Order"). The terms of the Confirmatory Order applied to Exelon's entire fleet of operating reactors.

⁵ *Id.* at 3. Specifically, Exelon stated that it had already (1) revised its BOP to indicate that the program includes an expectation to report offsite illegal activity; (2) conducted a fleet-wide briefing of the issue and the expectation to report unusual behavior observed either on or offsite; (3) trained Dresden Station personnel of the changes to the procedure and the expectations for reporting aberrant offsite activities; (4) verified that Dresden Station personnel understood these requirements and guidance; and (5) revised its general employee training program used at other Exelon reactor facilities to include guidance on reporting offsite aberrant activities.

⁶ *Id.* at 4.

the facts and lessons learned from the underlying events at an industry forum within 90 days; and (3) notify the NRC as these actions were completed.⁷ Local 15 did not participate in the ADR session which lead to the settlement agreement.

On November 7, 2013, the Staff published in the *Federal Register* a notice of the issuance of the Confirmatory Order modifying Exelon's license.⁸ The notice stated that any person "adversely affected by this Confirmatory Order . . . may request a hearing within 30 days" and directed such persons to "set forth with particularity the manner in which his interest is adversely affected . . . address[ing] the criteria set forth in 10 CFR 2.309(d) and (f)."⁹ After receiving an extension, Local 15 filed a petition to intervene on December 12, 2013, submitting three contentions and requesting that the Staff rescind the Confirmatory Order.¹⁰ On January 24, 2014, both Exelon and the Staff filed an answer opposing Local 15's petition to intervene,¹¹ after which Local 15 filed its reply.¹² In advance of oral argument, which took place in Morris, Illinois, on March 6, 2014, the Board issued an order requiring each party to provide written responses to several questions, which included questions concerning the Confirmatory Order's conformance with 10 C.F.R. § 2.202(a)(3) and the regulatory history of that specific provision.¹³

⁷ *Id.* In exchange for these commitments, the Staff agreed not to issue a Notice of Violation, civil penalty, or take any further enforcement action in the matter.

⁸ *In the Matter of Exelon Generation Company, LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License*, 78 Fed. Reg. 66,965 (Nov. 7, 2013).

⁹ *Id.* at 66,966, 66,967.

¹⁰ Petition to Intervene and Request for Hearing (Dec. 12, 2013) (ADAMS Accession No. ML13346B030) ("Petition").

¹¹ NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) (ADAMS Accession No. ML14024A670) ("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).

¹² 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").

¹³ Order Concerning Instructions for Oral Argument (Feb. 5, 2014) (ADAMS Accession No. ML14036A108). All parties complied with the request. See NRC Staff Memorandum in Response to

On April 17, 2014, the Board issued LBP-14-04, which denied Local 15's request for hearing on the basis that it had not demonstrated standing or submitted an admissible contention.¹⁴ Local 15 now appeals that decision.

STANDARD OF REVIEW

A licensing board order wholly denying a petition to intervene and/or request for hearing is appealable under 10 C.F.R. § 2.311.¹⁵ Absent an error of law or abuse of discretion, the Commission defers to the Board's rulings on both standing¹⁶ and contention admissibility.¹⁷

DISCUSSION

Local 15 asserts that the Board erred as a matter of law by (1) requiring Local 15 to satisfy the 10 C.F.R. § 2.309(d) and (f) standing and contention admissibility criteria, rather than allowing Local 15 to "demand" a hearing as of right; (2) finding Local 15 lacked standing; and (3) refusing to admit two of its contentions.¹⁸ For the reasons discussed below, the Commission should affirm the Board's decision.

Board Order Concerning Instructions for Oral Argument (Feb. 28, 2014) (ADAMS Accession No. ML14059A309); Memorandum of Local 15, International Brotherhood of Electrical Workers, AFL-CIO Responding to Atomic Safety and Licensing Board Questions for Oral Argument (Feb. 28, 2014) (ADAMS Accession No. ML14059A555); Exelon's Memorandum Responding to the Questions in the Board's February 5, 2014 Order (Feb. 28, 2014) (ADAMS Accession No. ML14059A554).

¹⁴ *Exelon Generation Co., LLC* (Dresden Power Station, Units 2 & 3), LBP-14-04, 79 NRC ___, ___ (Apr. 17, 2014) (slip op. at 3) ("LBP-14-04"). Judge Karlin filed a dissent. *See id.* at 25-71.

¹⁵ *All Operating Boiling Water Reactor Licensees With Mark I and Mark II Containments* (Order Modifying Licenses with Regard to Reliable Hardened Containment Vents), CLI-13-02, 77 NRC 39, 44 (2013) (citing 10 C.F.R. § 2.311(c)).

¹⁶ *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608 (2012).

¹⁷ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 379-80 (2012).

¹⁸ Local 15 does not appeal the Board's refusal to admit Contention 3, which claimed the Staff had "improperly endorse[d] and confirm[ed]" Exelon's alleged improper failure to bargain with Local 15 pursuant to collective bargaining obligations. LBP-14-04 at 22-23.

I. The Board Correctly Determined That Local 15 Must Establish Standing and Submit At Least One Admissible Contention and May Not Demand a Hearing as of Right Pursuant to 10 C.F.R. § 2.202(a)(3).

Local 15 argues that the Board erred as a matter of law by “disregard[ing] the plain meaning of 10 C.F.R. § 2.202(a)(3)” and not allowing Local 15 to demand a hearing as a matter of right.¹⁹ To the contrary, the Board found that both regulatory history and Commission practice reveal that § 2.202(a)(3) does not relieve third parties challenging an enforcement order from satisfying the generally applicable intervention criteria of 10 C.F.R. § 2.309.²⁰ Local 15 argues instead that § 2.202 unambiguously entitles Local 15 with the right to “demand” a hearing without reference to § 2.309, asserting that the Board’s reliance on regulatory history to determine otherwise constitutes legal error.²¹

However, the Board noted that, on its face, the regulation is potentially ambiguous.²² In fact, a plain language reading of 10 C.F.R. § 2.202(a)(3) utilizing the Local 15’s interpretation exposes this ambiguity. The regulation states that Commission orders 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, except in a case where the licensee *or other person* has consented in writing to the order” (emphasis added). Local 15 believes the phrase “any other person” truly means *any person who can demonstrate he or she is “adversely affected” by the order, a class to which it belongs.*²³ But the regulation also contemplates that the “other person”

¹⁹ Appeal at 7. 10 C.F.R. § 2.202(a)(3) states, in relevant part, that Commission orders that modify, suspend, or revoke a license, 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, except in a case where the licensee or other person has consented in writing to the order[.]”

²⁰ LBP-14-04 at 7-9. The Board and the Staff characterize Local 15 as a “third party” with respect to the Confirmatory Order, which was a two-party settlement agreement between NRC and Exelon. It is not meant to imply Local 15 has achieved “party” status in this proceeding, as Local 15 has not demonstrated standing or submitted an admissible contention.

²¹ Appeal at 8.

²² LBP-14-04 at 7 (stating the language of 10 C.F.R. § 2.202(a)(3) “might be ambiguous”).

²³ Appeal at 10.

to which it refers may consent in writing to the order; Local 15's literal interpretation would provide any person the ability to "consent" to an order issued to a licensee. The more plausible interpretation, as accepted by the Board, is that the "other person" referenced in § 2.202(a)(3) refers to a person who receives an enforcement order but is not a licensee.²⁴ This is precisely what the 1991 amendments to 10 C.F.R. Part 2—which first inserted the "other person" language at issue—authorized for the first time.²⁵

Local 15's interpretation of 10 C.F.R. § 2.202 would create a substantial discrepancy within Commission regulations that has no basis in law or practice. If persons "adversely affected" by an enforcement order need not satisfy the § 2.309 standing and contention admissibility criteria, such persons would have a significantly different path to intervention than those seeking intervention in a licensing proceeding. Third party intervenors in an enforcement proceeding could initiate a hearing as of right by merely notice pleading that the party is "adversely affected," which the Commission has repeatedly stated is not acceptable in NRC proceedings.²⁶ The 2004 amendments to Part 2, which codified the current § 2.309 criteria, state the Commission's desire to ensure the adjudicatory process is used to address "real, concrete, specific issues" that are appropriate for litigation and resolution "with respect to an

²⁴ The Board majority used the phrase "subject of the enforcement order" to describe this class of persons, which Local 15 criticizes as a "newly-created" and "ill-defined" class. See LBP-14-04 at 7; Appeal at 9, 12 (citing LBP-14-04 at 35-36 (Karlin, J., dissenting)). The Staff used this phrase, which the Board majority adopted in its decision, in its answer to the Board's questions preceding oral argument. NRC Staff Memorandum in Response to Board Order Concerning Instructions for Oral Argument, at 3 (Feb. 28, 2014) (ADAMS Accession No. ML14059A309). At oral argument, the Staff clarified that this phrase referred to persons "named" in the order, *i.e.*, the recipient of the order. See Transcript of Meeting with Exelon Generation Company on 03/06/2014 in Morris, Illinois (Mar. 6, 2014) (ADAMS Accession No. ML14070A558) at 125-29 (*as corrected by* Joint Motion Containing Proposed Transcript Corrections (Mar. 24, 2014) (ADAMS Accession No. ML14083A660)).

²⁵ See LBP-14-04 at 8-9 (citing *Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons*, 56 Fed. Reg. 40,664 (Aug. 15, 1991)); see also NRC Staff Memorandum in Response to Board Order Concerning Instructions for Oral Argument, at 4 (Feb. 28, 2014) (ADAMS Accession No. ML14059A309).

²⁶ See, *e.g.*, *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-15, 71 NRC 479, 482 (2010) (citing *Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)*, CLI-03-17, 58 NRC 419, 428 (2003)).

NRC regulatory/licensing action,” an objective that applies in equal force to both enforcement and licensing adjudications.²⁷ The Board recognized that, consistent with Commission direction, “too freely allowing” third parties to contest enforcement actions could potentially open the door to a myriad of challengers.²⁸ Local 15’s attempt to allay these fears—proposing that only those who have “*actually* demonstrated an adverse effect flowing from the order” are able demand a hearing as of right²⁹—is the precise purpose of and rationale for the § 2.309 criteria that Local 15 argues it does not have to satisfy.

The Board found additional support for its interpretation of § 2.202(a)(3) in the Statements of Consideration for the 1991 amendments to 10 C.F.R. Part 2, which first established the language providing “any other person adversely affected by the order of his or her right . . . to demand a hearing.”³⁰ Local 15 argues this examination of regulatory history was incorrect as a matter of law.³¹ However, recourse to regulatory history is acceptable where, as previously discussed, “the language and structure of the regulation reveal an ambiguity[.]”³² As such, the Board properly examined this 1991 rulemaking, which provided further evidence of the Commission’s intent that third party requests for hearings on enforcement orders issued under § 2.202 be treated as traditional petitions under the generally applicable rules governing intervention.³³

²⁷ See *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). The provisions of 10 C.F.R. Part 2, Subpart C (which contains § 2.309) “apply to *all adjudications . . . unless specifically stated otherwise in [Subpart C].*” 10 C.F.R. § 2.300 (emphasis added).

²⁸ LBP-14-04 at 17-18 (citing *Alaska Dep’t of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 408 (2004) (“ADOT”)).

²⁹ Appeal at 15 (emphasis in original).

³⁰ LBP-14-04 at 8-9.

³¹ Appeal at 8, 14.

³² *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 391 (2008).

³³ LBP-14-04 at 8-9. The relevant language identified by the Board states that “other persons adversely affected by an order issued under § 2.202 . . . will be offered an opportunity for a hearing

Lastly, Local 15 discusses at length the cases cited by the Board as demonstrating the Commission's consistent treatment of third parties in enforcement proceedings as intervenors subject to standing and contention admissibility criteria.³⁴ In order to rectify this established Commission practice with its conflicting position, Local 15 claims that it is factually distinct from all the prospective intervenors in these cited cases, who were unable to demonstrate they were "adversely affected" by an enforcement order.³⁵ Local 15 argues that these intervenors "would not be entitled [to demand a hearing as of right] even applying the plain language of 10 C.F.R. § 2.202(a)(3) as Local 15 urges."³⁶ In essence, Local 15 argues that these intervenors were unqualified to demand a hearing as of right under § 2.202 and thus could only rely on § 2.309. However, none of the Commission or Board cases cited indicate that such a dual path to intervention is possible; in fact, such a path is unrecognized in Commission practice.³⁷

consistent with current practice and the authority of the Commission to define the scope of the proceeding on an enforcement order." 56 Fed. Reg. at 40,678. The Board interpreted this passage to reflect the Commission's intention to offer third parties in enforcement proceedings an "opportunity for a hearing consistent with current practice" (*i.e.*, a request for hearing/petition for intervention). Local 15 construes the same passage to mean only that the Commission intended to provide *hearings* "consistent with current practice" (*i.e.*, narrowed in scope pursuant to *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)) and to say nothing with regards to the opportunity for hearing. Appeal at 13-14. Not only is the Board's interpretation more plausible (Local 15's interpretation makes the phrase "an opportunity for" meaningless), it is also supported by decades of post-1991 Commission practice, in which such third party requests for hearing are treated as petitions for intervention under the Commission's generally applicable rules. See LBP-14-04 at 9, nn.38, 40 (collecting cases).

³⁴ Appeal at 14-18.

³⁵ *Id.* at 14-15.

³⁶ *Id.* at 15.

³⁷ Indeed, 10 C.F.R. § 2.309(d)(3) specifically grants standing in enforcement proceedings to "the licensee or other person against whom the action is taken," but says nothing of third parties, further confirming that such parties in enforcement proceedings must address the criteria in § 2.309(d)(1). Local 15's sole example of a case (offered for the first time in its appeal) in which a third party was allowed to "challenge" an order without satisfying standing and contention pleading requirements is *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2; Monticello Nuclear Generating Co.), 1987 WL 109550 (May 1, 1987) (unpublished). In that unusual case, the Staff had issued a "show cause" order to a licensee, which was challenged by a group of control room operators and their union. Without considering the merits of the challenge, the Commission *sua sponte* directed the Staff to provide a detailed justification for the order, and thereafter rescinded the order without articulating the basis for doing so. Two dissenting Commissioners observed that this "extraordinary Commission involvement" was an unwarranted deviation from the "normal course" of the enforcement process.

In sum, the crux of Local 15's position that it may "demand" a hearing is its disagreement with being characterized in this proceeding as a "third party" subject to § 2.309, rather than being recognized as the "*de facto* target of the order" with the same hearing rights as the recipient.³⁸ The Staff reiterates that it does not believe that the employees represented by Local 15 are unaffected by this Confirmatory Order.³⁹ As the Board acknowledged, "[m]any commitments by corporations have consequences for their employees."⁴⁰ Whether Exelon had a duty to bargain with or otherwise include Local 15 in the settlement process that resulted in these commitments is an ancillary labor dispute that cannot appropriately be addressed in this forum.⁴¹ Consistent with Commission practice, the Staff respectfully considers Local 15 to be a third party concerning this Confirmatory Order which has been executed by and issued upon Exelon.

Thus, for the reasons stated above, the Board was correct in its determination that Local 15 must comply with § 2.309(d) and (f) in order to obtain a hearing, and is not entitled to "demand" a hearing as of right under § 2.202.

II. The Board Correctly Determined That Local 15 Failed to Establish Standing.

The Board correctly concluded that Local 15 failed to establish standing.⁴² The Board found that the concerns raised in the affidavit filed by Mr. Dennis Specha⁴³ were not "arguably

³⁸ Appeal at 9.

³⁹ NRC Staff Memorandum in Response to Board Order Concerning Instructions for Oral Argument at 3, n.9 (Feb. 28, 2014) (ADAMS Accession No. ML14059A309). As such, Local 15 has the right to request a hearing, as it has done.

⁴⁰ LBP-14-04 at 3.

⁴¹ See LBP-14-04 at 19, 23 (acknowledging Local 15's ongoing unfair labor practice charge filed with Region 13 of the National Labor Relations Board).

⁴² *Id.* at 10-17. The Board first found that Local 15 had failed to establish representational standing. *Id.* at 10-12; see *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999). In addition, the Board found that Local 15 failed to establish organizational standing. LBP-14-04 at 16; see *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 411 (2007). The Board also rejected Local 15's arguments for "proximity" standing and discretionary intervention. LBP-14-04 at 15-17.

within the zone of interests protected by the Atomic Energy Act.”⁴⁴ Further, in response to Mr. Specha’s assertion that the Confirmatory Order is overly vague, the Board stated that “[s]tanding to challenge a confirmatory order exists only when a petitioner credibly alleges that a settlement somehow actually reduces safety.”⁴⁵ The Board’s decision to deny standing is consistent with prior Commission precedent, and further supported by Commission policy supporting enforcement settlements. Accordingly, the Commission should affirm the Board’s ruling.

A petitioner requesting a hearing must demonstrate standing and set forth at least one admissible contention.⁴⁶ To satisfy the Commission’s standing requirements, a petitioner must state (1) the nature of its right under the Atomic Energy Act (“AEA”)⁴⁷ to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.⁴⁸ Licensing boards apply contemporaneous judicial concepts of standing,⁴⁹ requiring the petitioner to establish (1) a distinct and palpable injury-in-fact that falls within the “zones of interest” arguably protected by the statutes governing the proceeding (e.g., the AEA or National Environmental Policy Act;⁵⁰ (2) the injury is fairly traceable to the

⁴³ See Petition, Attach.1, Aff. Of Dennis Specha.

⁴⁴ LBP-14-04 at 12. The Board also rejected Local 15’s claim of organizational standing because its “interests surely are no stronger than those of Mr. Specha.” *Id.* at 16.

⁴⁵ *Id.* at 12 (emphasis in original).

⁴⁶ 10 C.F.R. § 2.309(a). A petitioner’s right to participate in a hearing derives from Section 189a of the Atomic Energy Act of 1954, as amended. 42 U.S.C. § 2239(a)(1)(A) (“In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.”).

⁴⁷ 42 U.S.C. § 2011, *et seq.*

⁴⁸ 10 C.F.R. §§ 2.309(d)(1)(ii)-(iv).

⁴⁹ See *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-03, 73 NRC 613, 621 (2011).

challenged action; and (3) the injury is likely to be redressed by a favorable decision.⁵¹ The injury-in-fact must be concrete and particularized, not conjectural or hypothetical.⁵²

Consistent with previous Commission standing determinations regarding cases involving challenges to enforcement orders, the Board ruled that non-safety concerns in this proceeding do not support standing.⁵³ In keeping with the Commission's instruction, the Board stated that "[g]enerally, a non-party petitioner may not challenge a confirmatory order embodying a settlement if the order 'improves the safety situation over what it was in the absence of the order.'"⁵⁴ In addition, the Board noted that the notice of opportunity for hearing on a confirmatory order provides the public a "safety valve" because the order might actually decrease safety.⁵⁵ The Board found that Local 15's initial petition "did not claim, implicitly or explicitly—much less with specificity—that the Confirmatory Order made the Dresden Nuclear

⁵⁰ 42 U.S.C. § 4321 *et seq.*

⁵¹ *Union Elec. Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 NRC 14, 23 (2012) (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)).

⁵² *Westinghouse Elec. Co., LLC* (Hematite Decommissioning Project), LBP-09-28, 70 NRC 1019, 1024 (2009) (citing *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)).

⁵³ LBP-14-04 at 12 (citing *ADOT*, CLI-04-26, 60 NRC at 406). The Staff notes, however, that a petitioner such as Local 15 is not barred from challenging an enforcement order. The Commission has consistently declined to entertain challenges to enforcement orders that seek to supplement or strengthen those orders. See *Bellotti vs. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983) *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *ADOT*, CLI-04-26, 60 NRC at 405; *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52, 56 (2004). Accordingly, because Local 15 seeks rescission of the order rather than strengthening, the Board did not dismiss Local 15's case out of hand. Rather, the Board properly focused its standing analysis on whether Local 15 had properly raised safety concerns in its petition, consistent with the Commission's treatment of petitioners in prior cases.

⁵⁴ LBP-14-04 at 1 (quoting *ADOT*, CLI-04-26, 60 NRC at 406).

⁵⁵ *Id.* at 2 (citing *ADOT*, CLI-04-26, 60 NRC at 406 n.28). The Commission recently cited this dicta from *ADOT* when stating what cognizable "harm" would support standing for a third-party petitioner in a 10 C.F.R. § 2.202 proceeding (*i.e.*, a worsening of safety conditions). See *All Operating Boiling Water Reactor Licensees With Mark I and Mark II Containments* (Order Modifying Licenses with Regard to Reliable Hardened Containment Vents), CLI-13-02, 77 NRC 39, 46 n.28 (2013). The Commission has previously noted it is unlikely that petitioners will obtain hearing on confirmatory enforcement orders. *ADOT*, CLI-04-26, 60 NRC at 406 n.28.

Power Plant less safe.”⁵⁶ Accordingly, these arguments did not support Local 15’s standing argument and were properly dismissed by the Board.

In addition, the Board correctly applied the “zone of interests” test regarding standing.⁵⁷ First, Local 15 argues that the zone of interests test “does not apply to a petitioner who has suffered a legal wrong because of agency action,”⁵⁸ which is incorrect.⁵⁹ Second, Local 15 argues that even if the test applies it has been satisfied because “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.”⁶⁰ However, the correct inquiry is whether the injury-in-fact (not merely the employees’ conduct) falls within the zone of interests of the AEA.⁶¹ As the Board properly concluded, Local 15’s concerns (as evidenced by Mr. Specha’s affidavit) “have nothing to do with safety” and relate to a labor dispute with the licensee.⁶² Therefore, the Board found that these concerns are not “arguably within the zone of interests protected by the [AEA].”⁶³ Indeed, the Board had difficulty squaring Local 15’s later claims of a safety concern with the concerns voiced in Local 15’s initial petition, which seemed to imply that the

⁵⁶ *Id.* at 13. The Board acknowledged that Local 15, in its reply brief and during oral argument, belatedly argued that the vagueness of the Confirmatory Order made the plant less safe. *Id.*; see Local 15 Reply at 9. The Board granted Exelon’s motion to strike those portions of the reply brief on the grounds that it improperly expanded Local 15’s initial claims. Further, the Board concluded that, even if it considered such safety arguments, it would find them “neither plausible nor credible.” LBP-14-04 at 13.

⁵⁷ See Appeal at 20.

⁵⁸ Appeal at 22 (citing 5 U.S.C. § 702).

⁵⁹ See *Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico)*, CLI-98-11, 48 NRC 1, 11 (1998) (“Merely because one may be injured by a particular agency action . . . does not necessarily mean one is within the zone of interest to be protected by a given statute. The zone-of-interests test would prove meaningless if it encompassed any party affected by an agency’s decision.”) (citing *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 524 (1991)).

⁶⁰ Appeal at 23 (internal quotations and punctuation omitted).

⁶¹ See *U.S. Enrichment Corp. (Paducah, Kentucky)*, CLI-01-23, 54 NRC 267, 272 (2001); *Quivira Mining Co.*, CLI-98-11, 48 NRC at 11 (quoting *Air Courier*, 498 U.S. at 523-524 (1991)).

⁶² LBP-14-04 at 12.

⁶³ *Id.*

Confirmatory Order contains new additional safety-related requirements that were unnecessary.⁶⁴

The Board's standing analysis is further supported by the Commission's long-standing policy favoring enforcement settlements. The Commission has stated that the practice of allowing third parties to contest enforcement settlements at hearings would undercut the NRC's policy favoring enforcement settlements.⁶⁵ Such settlements may become illusive if licensees consent to confirmatory orders and are nonetheless subjected to formal proceedings, possibly leading to different or more severe enforcement actions.⁶⁶ As the Board pointed out, "[i]f the NRC were to allow third parties with no demonstrated interest in its core concerns—nuclear safety and the environment—to routinely initiate evidentiary hearings to contest settlements, as a practical matter the Agency would have to invite all such parties to the negotiating table."⁶⁷ As such a result is unwarranted in this proceeding, the Staff respectfully submits that the Commission should uphold the Board's decision.

III. The Board Correctly Determined That Local 15 Failed to Submit an Admissible Contention.

The Board also correctly determined that Local 15 failed to submit an admissible contention—constituting a separate and independent ground for denial of the hearing request—for reasons that “echo many of the difficulties with its attempts to establish standing[.]”⁶⁸ Local

⁶⁴ *Id.* at 14 (“While Local 15 claims in its reply that the Confirmatory Order creates an adverse effect on safety, its initial petition asserted essentially the opposite: that the Confirmatory Order contains new additional safety-related requirements without genuine basis or need. . . . Initially Local 15 argued that the Confirmatory Order reflected regulatory overkill . . . not that the Confirmatory Order detracted from safety.”) (emphasis in original) (internal quotations and citations omitted).

⁶⁵ See *ADOT*, CLI-04-26, 60 NRC at 408.

⁶⁶ See *id.* (citing *Public Service Company of Indiana* (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980)).

⁶⁷ LBP-14-04 at 18.

⁶⁸ *Id.* at 19.

15 appeals the Board's finding with respect to two of its contentions, Contentions 1 and 2. As discussed below, the Staff agrees with the Board's decision on these contentions.

With respect to Contention 1,⁶⁹ Local 15 argues that the Confirmatory Order "imposes obligations on Exelon's employees without sufficient justification in the record" in contravention of 10 C.F.R. § 2.202(a)(1).⁷⁰ Specifically, Local 15 alleges there is a "lack of evidence" to support the burdens the order imposes on Exelon employees.⁷¹ Additionally, with respect to Contention 2,⁷² Local 15 alleges the reporting requirements contained within the Confirmatory Order are "vague, over-broad and not tailored to address the health and safety concerns that animate 10 C.F.R. § 73.56."⁷³ Local 15 also asserts the Board erroneously "reached the merits" of Contention 2 when the Board determined that, "if anything, the terms endorsed in the Confirmatory Order provide more specificity than the applicable NRC regulation itself."⁷⁴

The Board correctly found that both Contentions were inadmissible for lack of a genuine dispute on a material issue of law or fact, given that the agency's choice of sanctions in an enforcement proceeding are "quintessentially a matter of the Commission's sound discretion" if they fall within the NRC's authority to impose.⁷⁵ The NRC has broad statutory authority to issue

⁶⁹ Contention 1 states "[t]he Confirmatory Order should not be sustained because, without sufficient justification in the record, it imposes obligations on the off-duty employees of Exelon not otherwise required by the NRC in [10 C.F.R. Part 73, Sections 56(f)(1)-(3)] to observe and report the offsite, off-duty conduct of fellow employees." Petition at 2.

⁷⁰ Appeal at 27.

⁷¹ *Id.* at 28. See also Petition at 17.

⁷² Contention 2 states "[t]he Confirmatory Order should not be sustained because it imposes on the employees of Exelon Generation behavioral observation and reporting obligations that are vague, over-broad and not carefully tailored to address the NRC's stated health and safety concerns and improperly delegates to Exelon the discretion to interpret and implement NRC standards concerning behavioral observation without the input of Local 15, the public or the NRC." Petition at 2.

⁷³ Appeal at 28.

⁷⁴ *Id.* at 29; LBP-14-04 at 21.

⁷⁵ LBP-14-04 at 20 (citing *Advanced Med. Sys.* (One Factory Row, Geneva, Ohio), CLI-94-06, 39 NRC 285, 312-13 (1994), *aff'd* 61 F.3d 903 (6th Cir. 1995)); *id.* at 22.

enforcement orders that are “necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property,”⁷⁶ and NRC regulations require that such orders “[a]llege the violations . . . or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action.”⁷⁷

The Confirmatory Order was based on evidence gathered during the course of the Staff’s investigation, which revealed multiple apparent violations of 10 C.F.R. Part 73.⁷⁸ Accordingly, the Staff drafted the Confirmatory Order in such a way to address the failures identified through the Staff’s investigation by increasing the clarity of Exelon’s BOP.⁷⁹ The terms of the Confirmatory Order are binding upon Exelon, which has consented to its issuance through a settlement agreement. Local 15’s contentions appear to voice general dissatisfaction with being left out of the settlement negotiation process.⁸⁰ But as the Board recognized, “[m]any commitments by corporations have consequences for their employees. . . . [D]issatisfied employees may not initiate an NRC adjudicatory proceeding to void the decisions of their company’s management [for reasons other than safety or environmental concerns].”⁸¹ As previously stated, *infra*, concerning 10 C.F.R. § 2.202, whether Exelon had a duty to include Local 15 in the settlement process is an ancillary labor dispute that cannot appropriately be

⁷⁶ AEA § 161b (42 U.S.C. § 2201).

⁷⁷ 10 C.F.R. § 2.202(a)(1).

⁷⁸ See Confirmatory Order at 1-2.

⁷⁹ See Staff Answer at 13-14.

⁸⁰ See Petition at 18 (“[Local 15] strenuously objects to sweeping changes that detrimentally affect the rights and interests of every single Exelon Generation bargaining unit member being made without genuine basis or need and without the important input of the Union and the bargaining unit members.”); *id.* at 19 (“[B]y committing Exelon itself the discretion to implement further changes without any input from its bargaining unit employees, the NRC is effectively delegating to Exelon . . . the kind of rule-making authority that should remain vested solely with the NRC . . . subject to the procedural safeguards inherent in notice and comment rule-making.”); *id.* at 20 (Local 15 has not been privy to the ADR process, but it appears likely that the remainder of the changes were . . . a gambit on Exelon’s part to placate the NRC[.]”).

⁸¹ LBP-14-04 at 3.

addressed in this forum. The relevant finding with respect to Contentions 1 and 2, as the Board correctly determined, is that Local 15 has not proffered a sufficient legal or factual basis to demonstrate the Staff has abused or exceeded its broad discretion to issue an order to a licensee under the Atomic Energy Act.⁸² As the Commission has stated, “Staff has considerable latitude in choosing enforcement weapons, and [a third party’s] disapproval of the remedy the Staff selected does not justify reopening an enforcement proceeding.”⁸³

Additionally, with respect to Contention 2, Local 15 is correct that licensing boards do not address the merits of contentions at the admissibility stage.⁸⁴ However, a licensing board must still determine whether there is “sufficient information to show a genuine dispute exists[.]”⁸⁵ Here, the Board observed that the terms used in the Confirmatory Order (*i.e.*, “unusual,” “aberrant,” “illegal” activity) expand upon the existing regulatory language of 10 C.F.R. § 73.56(f)(3), which requires the reporting of “any questionable behavior patterns or activities.”⁸⁶ While Local 15 alleges that these terms (“unusual,” “illegal,” and “aberrant”) are vague and over-broad, the Confirmatory Order requires that Exelon provide additional guidance and training on what type of behavior is expected to be reported in accordance with this change in behavioral observation procedure—precisely the clarification Local 15 seeks.⁸⁷ Thus, the Board was well within its authority to reject Local 15’s claim that the Confirmatory Order obfuscates reporting obligations, as this did not present a “genuine dispute” of fact or law. Nonetheless, even if this straightforward comparison of the text of the Confirmatory Order with the text of the regulation at

⁸² *Id.* at 20, 22.

⁸³ ADOT, CLI-04-26, 60 NRC 399, 409.

⁸⁴ See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3) LBP-12-18, 76 NRC 127, 166-67 (2012) (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-07, 43 NRC 235, 249 (1996)).

⁸⁵ *Id.*; see also 10 C.F.R. § 2.309(f)(1)(vi).

⁸⁶ LBP-14-01 at 21.

⁸⁷ Confirmatory Order at 7.

issue amounts to a “merits determination,” the Board did not exclusively rely on this determination in rejecting Contention 2. Rather, the Board also expressly found that the alleged “vague, over-broad and not carefully tailored” reporting obligations contained within the Confirmatory Order are well within the NRC’s discretion to impose.⁸⁸

For these reasons, the Board did not commit an error of law nor did it abuse its discretion in finding that Local 15 failed to submit an admissible contention.

CONCLUSION

Based on the discussion above, the Staff respectfully requests the Commission to affirm the Board’s ruling in LBP-14-04 and deny Local 15’s Appeal.

⁸⁸ LBP-14-01 at 20-21.

Respectfully submitted,

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Executed in accord with 10 C.F.R. § 2.304(d)

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Dated at Rockville, Maryland
this 6th day of June, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL OF LBP-14-04 BY LOCAL UNION NO. 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 6th day of June, 2014.

/Signed (electronically) by/

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