

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of:	)		)	Docket Nos.	50-237-EA
	)		)		50-249-EA
EXELON GENERATION COMPANY, LLC	)		)		
(Dresden Nuclear Power Station, Units 2 and 3)	)		)		
	)		)	June 6, 2014	
	)		)		

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**EXELON'S ANSWER OPPOSING LOCAL UNION NO. 15, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO'S APPEAL OF LBP-14-04**

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(Dresden Nuclear Power Station, Units 2 and 3)	)	
	)	June 6, 2014
	)	

**EXELON’S ANSWER OPPOSING LOCAL UNION NO. 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO’S APPEAL OF LBP-14-04**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.311(b) and 2.341(c)(3), Exelon Generation Company, LLC (“Exelon”) hereby opposes the May 12, 2014 appeal<sup>1</sup> filed by Local Union No. 15, International Brotherhood of Electrical Workers (“Local 15”) in the above-captioned proceeding. Local 15 seeks to reverse the Atomic Safety and Licensing Board’s (“Board”) Order<sup>2</sup> denying Local 15’s Petition to Intervene and Request for Hearing.<sup>3</sup> The Commission should deny the Appeal because, although Local 15 claims to raise “important questions of first impression,” the Appeal raises no questions of first impression, distorts the facts and the law, and seeks to overturn decades of well-settled precedent interpreting the Rules of Practice in 10 C.F.R. Part 2.

At the outset of the Appeal, Local 15’s statement of the issues fundamentally distorts both the facts and the law. As shown below, the NRC’s enforcement action was not prompted

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<sup>1</sup> [Corrected] Brief in Support of Appeal of LBP-14-04 (May 13, 2014) (“Appeal”); *see also* [Corrected] Notice of Appeal of LBP-14-04 by Local 15, International Brotherhood of Electrical Workers, AFL-CIO (May 13, 2014). Reply briefs are not permitted in support of appeals under 10 C.F.R. § 2.311.

<sup>2</sup> *Exelon Generation Co., LLC* (Dresden Nuclear Power Station, Units 2 & 3), LBP-14-04, 77 NRC \_\_\_, slip op. (Apr. 17, 2014) (“LBP-14-04”).

<sup>3</sup> Petition to Intervene and Request for Hearing (Dec. 12, 2013) (“Petition”).



solely by alleged reporting “violations of individual workers,” as the Local claims,<sup>4</sup> but also by Exelon’s alleged violations of the programmatic requirements for the Behavioral Observation Program (“BOP”) under 10 C.F.R. §§ 73.56(a)(2) and 73.56(f)(1). The requirements in Sections 73.56(a)(2) and 73.56(f)(1) apply to “licensees,” not to individuals. Moreover, the Confirmatory Order<sup>5</sup> does not directly require Local 15 or its members to do anything—nor can the NRC cite Local 15 members for violations of the Confirmatory Order.<sup>6</sup> Thus, the order has no direct effect on Local 15 or its members. There is also no indirect or adverse effect on workers subject to the BOP, because, again contrary to the assumptions in Local 15’s issue statements, the Confirmatory Order imposes no new “reporting obligations” beyond those already set forth in Section 73.56. Finally, the NRC Staff did specifically “tie” the action specified in the Confirmatory Order to its “health and safety concerns.”<sup>7</sup>

The centerpiece of Local 15’s Appeal is a novel theory raised not in its Petition, but by the Board during this proceeding and in the dissent in LBP-14-04: that under 10 C.F.R. § 2.202(a)(3), Local 15 is not a petitioner, but rather should be entitled to a hearing as a matter of right in this proceeding, and therefore need show neither standing nor an admissible contention under 10 C.F.R. § 2.309.<sup>8</sup> Alternatively, Local 15 seeks to overturn the Board’s conclusions that it: (1) did not demonstrate standing, and (2) failed to proffer an admissible contention.<sup>9</sup>

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<sup>4</sup> Appeal at 1.

<sup>5</sup> Letter from C. Pederson, NRC Region III Administrator, to M. Pacilio, Exelon, “Confirmatory Order; NRC Report Nos. 05000237/2013407(DRS); 05000249/2013407(DRS) and Investigation Report No. 3-2012- 020; Dresden Nuclear Power Station, Units 2 and 3” at 1 (Oct. 28, 2013), *available at* ADAMS Accession No. ML13298A144 (“Confirmatory Order”).

<sup>6</sup> *See Local No. 93, Int’l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 529-30 (1986) (“[T]he consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms.”).

<sup>7</sup> Appeal at 1.

<sup>8</sup> *See id.* at 8.

<sup>9</sup> *See id.* at 19-30.

The Commission should deny Local 15's Appeal for several reasons. First, as demonstrated in Section IV.A, below, the Board applied well-established precedent when it declined to grant Local 15's hearing request as a matter of right, because the language of Part 2 and the uniform Commission interpretation of its regulations over decades make clear that only the party to whom an order is issued—the party who is charged with misconduct or a violation under the order—may demand a hearing as of right. Local 15 improperly ignores this precedent when it incorrectly asserts that its claim to a hearing as of right is a question of “first impression.”<sup>10</sup> Because the Confirmatory Order at issue in this proceeding does not charge Local 15 or its members with any misconduct, Local 15 has no right to demand a hearing.<sup>11</sup> Rather, Local 15 must *show* some adverse effect as a petitioner and otherwise establish standing and proffer an admissible contention to intervene and obtain a hearing.

Second, as shown in Section IV.B below, the Board correctly found that Local 15 lacks standing, because there has been no injury to Local 15 or its members within the zone of interest covered by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* (“AEA”). Indeed, the Confirmatory Order does not adversely impact Local 15 or its members, either directly or indirectly. Local 15 also fails the long-standing Commission-established tests for causation and redressability which are prerequisites for standing and a hearing.

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<sup>10</sup> *Id.* at 1.

<sup>11</sup> The NRC considered enforcement action against three individuals, including a former Equipment Operator and Local 15 member whom the NRC preliminarily determined engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5. Local 15 took no action to participate in the NRC's consideration of enforcement action against its member. The NRC issued Orders prohibiting the two other individuals from engaging in licensed activities. *See* IA-13-025, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) at 1 (Oct. 28, 2013) (“IA-13-025”), *available at* ADAMS Accession No. ML13298A363; IA-13-024, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Oct. 28, 2013) (“IA-13-024”), *available at* ADAMS Accession No. ML13298A386. These two individuals are the only individuals charged with a violation who potentially could have demanded a hearing as of right—with respect to the enforcement actions taken against them.

Finally, the Board properly found Contentions 1 and 2 inadmissible.<sup>12</sup> These contentions impermissibly challenge both the regulations in 10 C.F.R. § 73.56 and the agency’s discretion in exercising its enforcement authority, and also are insufficiently supported and fail to raise a genuine dispute suitable for hearing, all contrary to 10 C.F.R. § 2.309(f)(1).

## **II. STATEMENT OF THE CASE**

### **A. Background and Procedural History**

The procedural history of this case is summarized in LBP-14-04.<sup>13</sup> By way of background, 10 C.F.R. § 73.56 requires licensees to establish and maintain an unescorted access program, including a Behavioral Observation Program (“BOP”), to provide assurance that individuals to whom a licensee grants unescorted access to the protected and vital areas of a nuclear power plant are trustworthy and reliable.<sup>14</sup> As part of the BOP, all individuals who are subject to an access authorization program must report “*any* behavior of individuals that may adversely affect the safety or security of the licensee’s facility . . . .”<sup>15</sup> Likewise, such individuals must “report any concerns arising from behavioral observation, including, but not limited to, concerns related to *any questionable behavior patterns or activities* of others to the reviewing official, his or her supervisor, or other management personnel designated in their site

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<sup>12</sup> Local 15 has abandoned its third proposed contention. *See* Petition at 19-20. The Commission deems waived any arguments made before that Board that are abandoned on appeal. *See, e.g., Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 257 (2010).

<sup>13</sup> *See* LBP-14-04, slip op. at 3-7.

<sup>14</sup> 10 C.F.R. §§ 73.56(a)(2), (c), (f)(1).

<sup>15</sup> *Id.* § 73.56(f)(2) (emphasis added).

procedures.”<sup>16</sup> These rules do not distinguish between whether the reportable behavior occurs on-site or off, or relates to conduct on-site, or off.<sup>17</sup>

In this proceeding, the NRC Staff issued a Confirmatory Order to Exelon as a licensee following an investigation that identified licensee apparent violations of the access authorization rules in 10 C.F.R. §§ 73.56(a)(2), 73.56(f)(1), and 73.56(f)(3). Specifically, the Staff concluded that Exelon failed to maintain its BOP in compliance with Sections 73.56(a)(2) and 73.56(f)(1), and also found that certain individual Exelon employees had failed to report questionable behavior patterns or activities as required by Exelon’s BOP, contrary to the requirements of Section 73.56(f)(3).<sup>18</sup> Separately, the NRC determined that one individual (an Equipment Operator and Local 15 member) deliberately violated the regulatory requirements in Section 73.56(f)(3) and issued enforcement orders to the two individuals involved in the underlying criminal conspiracy, prohibiting their involvement in NRC-licensed activities.<sup>19</sup>

The Confirmatory Order found Exelon’s commitments to address the licensee apparent violations were “acceptable and *necessary*” and “determined that public health and safety require that Exelon’s commitments be confirmed. . . .”<sup>20</sup> The Confirmatory Order “conclude[d] that with these commitments the public health and safety are reasonably assured.”<sup>21</sup>

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<sup>16</sup> *Id.* § 73.56(f)(3) (emphasis added). Local 15 complains that the Confirmatory Order does not specify what types of credible information should be reported. *See* Appeal at 5. But the Confirmatory Order is quite clear in this regard. Credible information refers not to a new category of information, but rather to the quantity or source of information supporting a concern to trigger the reporting requirement.

<sup>17</sup> *See* 10 C.F.R. § 73.56; Exelon’s Answer Opposing the Petition to Intervene and Hearing Request Filed By Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO at 10-15 (Jan. 24, 2014) (“Exelon Answer”); NRC Staff Answer to Petition to Intervene and Request for Hearing at 8 (Jan. 24, 2014) (“NRC Staff Answer”) (“The reporting of off-site, off-duty conduct has always been within NRC’s regulatory purview so long as the observed conduct has a nexus to public health and safety or the common defense and security.”).

<sup>18</sup> *See* Confirmatory Order at 1.

<sup>19</sup> *See* IA-13-025 at 1; IA-13-024 at 1.

<sup>20</sup> Confirmatory Order, encl. at 6 (emphasis added).

<sup>21</sup> *Id.*

Importantly, the Confirmatory Order addresses only apparent violations of a licensee’s regulatory obligations and was directed only at Exelon as a licensee, so it binds only Exelon to take actions—not anyone else.<sup>22</sup> It required Exelon to clarify its BOP procedures and imposed additional training requirements for Exelon to fulfill.<sup>23</sup> No individuals are named in the Confirmatory Order and it “does not bind Local [15] to do or not to do anything. It imposes no legal duties or obligations [directly or indirectly] on the Union [or its members] at all.”<sup>24</sup> While it requires Exelon to clarify the reporting obligations under the BOP, the clarification is well within the scope of the existing regulatory requirements.. The Confirmatory Order and Exelon’s revised procedures provide more clarity and specificity than the standards in the regulations, but they do not expand those standards.<sup>25</sup> They make clear what was previously obvious—“all” means off-site and on-site, off-duty as well as on-duty.

Following the NRC’s publication of the Notice in the *Federal Register*,<sup>26</sup> Local 15 filed its Petition. The Petition focused solely on Local 15’s alleged economic injuries under the National Labor Relations Act (“NLRA”), openly acknowledging that its “economic interest *may not fall within the ‘zone of interest’ protected by the AEA . . .*”<sup>27</sup> Thus, although Local 15 asserted that it had standing, it also sought, in the alternative, discretionary intervention under 10 C.F.R. § 2.309(e).<sup>28</sup> Local 15 proposed three contentions, arguing that the Confirmatory Order

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<sup>22</sup> See *Local No. 93, Int’l Assoc. of Firefighters*, 478 U.S. at 529-30.

<sup>23</sup> The regulations require licensees to provide initial and requalification BOP training. 10 C.F.R. § 73.56(f)(2)(i).

<sup>24</sup> *Local 93, Int’l Assoc. of Firefighters*, 478 U.S. at 529-30.

<sup>25</sup> See LBP-14-04, slip op. at 21-22. Nor does the Confirmatory Order impose any obligations directly upon anyone, other than Exelon.

<sup>26</sup> See *In the Matter of Exelon Generation Company, LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License*, 78 Fed. Reg. 66,965, 66,966-67 (Nov. 7, 2013) (“Notice”). The Notice specifically stated that persons other than Exelon who might be adversely affected by the Confirmatory Order had the opportunity to request a hearing, subject to 10 C.F.R. §§ 2.309(d) and (f). *Id.* at 66,967.

<sup>27</sup> Petition at 13 (emphasis added); see also *id.* at 6-9 (asserting only economic injuries).

<sup>28</sup> See *id.* at 6-15.

allegedly: (1) imposed obligations not required by the regulations, without sufficient justification; (2) is vague, over-broad, and not carefully tailored to address the NRC's health and safety concerns; and (3) improperly endorsed Exelon's refusal to bargain with Local 15 over the Confirmatory Order, in alleged violation of the NLRA.<sup>29</sup> Exelon and the NRC Staff opposed the Petition on multiple grounds.<sup>30</sup> Local 15 filed its Reply on February 14, 2014.<sup>31</sup>

The Board's pre-hearing order posed nine questions, raising for the first time the novel question of whether Local 15 could *demand a hearing as of right*, without showing standing or an admissible contention under 10 C.F.R. §§ 2.309(d) and (f).<sup>32</sup> The parties responded,<sup>33</sup> and the Board heard a full day of oral argument.<sup>34</sup> In accordance with the Board's Instructions,<sup>35</sup> at oral argument Exelon moved to strike one phrase in the Reply, because it proffered for the first time a new basis for Local 15's contentions—the claim that the Confirmatory Order rendered the operation of the Dresden Station in some unspecified way less safe—without satisfying the late-filing requirements.<sup>36</sup> Thereafter, again in accordance with the Board's direction at oral argument, Exelon submitted the Motion to Strike in writing.<sup>37</sup>

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<sup>29</sup> See *id.* at 2.

<sup>30</sup> See generally Exelon Answer; NRC Staff Answer.

<sup>31</sup> 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 at 9 (Feb. 14, 2014) ("Reply").

<sup>32</sup> Licensing Board Order (Concerning Instructions for Oral Argument) at 1-3 (Feb. 5, 2014) ("Instructions") (unpublished).

<sup>33</sup> 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); Exelon's Memorandum Responding to the Questions in the Board's February 5, 2014 Order (Feb. 28, 2014); NRC Staff Memorandum in Response to Board Order Concerning Instructions For Oral Argument (Feb. 28, 2014).

<sup>34</sup> See LBP-14-04, slip op. at 6 n.27.

<sup>35</sup> See Instructions at 1.

<sup>36</sup> See Official Transcript of Proceedings, Dresden Nuclear Power Station, Units 2 & 3 at 26:15–27:11 (Mar. 6, 2014) ("Tr.").

<sup>37</sup> Exelon's Motion for Strike at 1-2, n.2 (Mar. 13, 2014) ("Motion to Strike"). The Staff did not object to the Motion to Strike. Local 15 opposed. See Local 15, International Brotherhood of Electrical Workers, AFL-CIO's Response in Opposition to Exelon's Motion to Strike (Mar. 20, 2014).

**B. Summary of Board Decision (LBP-14-04)**

The Board denied the Petition both because Local 15 did not demonstrate standing and separately because none of its proffered contentions was admissible.<sup>38</sup> The Board rejected Local 15's belated attempt to claim that it was entitled to obtain a hearing as a matter of right, as the Commission has for decades treated third party hearing requests challenging enforcement actions under the ordinary requirements for standing and an admissible contention.<sup>39</sup> The Board found Local 15 lacked standing because none of its "concerns gives rise to an interest that is arguably within the zone of interests protected by the [AEA]."<sup>40</sup> In so doing, the Board held that Local 15 did not timely allege and nor could it credibly claim that the Confirmatory Order actually reduces safety at Exelon's facilities.<sup>41</sup> The Board emphasized that the NRC's policy favoring settlement agreements as well as the availability of other avenues for Local 15 to pursue its NLRA concerns (*i.e.*, the National Labor Relations Board to whom it has already petitioned) both provide additional reasons to reject Local 15's attempt to relax the NRC's standards for intervention.<sup>42</sup> The Board also rejected Local 15's discretionary intervention claim as contrary to the rule.<sup>43</sup> Finally, the Board rejected all three of Local 15's contentions, finding that their inadmissibility "constitute[d] a separate and independent ground for denying its petition."<sup>44</sup> In

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<sup>38</sup> LBP-14-04, slip op. at 3.

<sup>39</sup> *See id.* at 7-9.

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.* at 3; *see also id.* at 13-14 ("Initially, Local 15's concerns clearly resided elsewhere . . . initially Local 15 argued that the Confirmatory Order reflected regulatory overkill—namely, that Exelon and the NRC should not 'use a bulldozer to kill an ant'—not that the Confirmatory Order detracted from safety") (citation omitted). The Board also held that (a) Local 15's NLRA claim was outside the scope of NRC's authority; (b) Local 15 could not rely upon a proximity presumption in this enforcement proceeding; and (c) Local 15's NLRA-based organizational standing claims were even further removed from the NRC's zone of interest. *See* LBP-14-04, slip op. at 15-16.

<sup>42</sup> *See id.* at 17-19.

<sup>43</sup> *See id.* at 16-17 ("As there is no other petitioner or intervenor in this proceeding, discretionary intervention is not possible.").

<sup>44</sup> *Id.* at 19.

so doing, the Board examined the record, and agreed with Exelon’s and the NRC Staff’s arguments that the Confirmatory Order did not expand the broad obligation in the regulations to report “any questionable behavior pattern or activities,” but instead, merely required Exelon to “clarify and make more explicit existing regulatory requirements.”<sup>45</sup>

A spirited dissent from the well-reasoned majority decision offers creative suggestions for modifications to the Commission’s adjudicatory framework,<sup>46</sup> some of which Local 15 now asks the Commission to adopt and apply retroactively to this case.

### **C. Summary of Local 15’s Appeal**

As its principal basis for appeal, Local 15 asserts its newly-adopted theory of its entitlement to a hearing as of right.<sup>47</sup> Local 15 then, without irony, characterizes this new entitlement as presenting “important questions of first impression for the NRC.”<sup>48</sup>

In the alternative, Local 15 claims that the Board erred in denying its Petition even when evaluated under well-established standards. It argues that the Board should have credited its belated reduction-in-safety contention amendment as its basis for standing, and argues that the Board applied the AEA zone of interest too rigorously.<sup>49</sup> Finally, Local 15 argues that Board improperly rejected Contentions 1 and 2.<sup>50</sup> Local 15 does not appeal either the denial of Contention 3, or the Board’s rejection of its discretionary intervention claim, nor does it request discretionary intervention from the Commission.<sup>51</sup>

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<sup>45</sup> *Id.* at 21 (quoting 10 C.F.R. § 73.56(f)(3)).

<sup>46</sup> *See id.* at 25-71 (Karlin, J. dissenting).

<sup>47</sup> Appeal at 9.

<sup>48</sup> *Id.* at 1; *see also id.* at 7-12.

<sup>49</sup> *See id.* at 19-24.

<sup>50</sup> *Id.* at 27-30.

<sup>51</sup> Local 15 has therefore waived such arguments. *See Shearon Harris*, CLI-10-9, 71 NRC at 257.



In so doing, Local 15 effectively abandons the NLRA claims that were the focus of its original Petition. In addition, as this proceeding has progressed, Local 15 has considerably modified its allegations regarding the injuries it asserts were caused by the Confirmatory Order. In the initial Petition, it claimed that the NRC’s regulations did not require the reporting of “off-site, off-duty conduct.”<sup>52</sup> Then, in Reply, it conceded that the regulations did reach “certain off-duty conduct, including criminal background checks and required self-reporting of legal actions.”<sup>53</sup> And finally, on Appeal, Local 15 appears to concede that the regulations require the reporting of certain illegal, unusual or aberrant behavior, even if it occurred off-duty, so long as there is a nexus to nuclear safety or security.<sup>54</sup> These repeated concessions and ever-shifting positions raise an obvious question: what, if any, injury does Local 15 still claim the Confirmatory Order has caused?

### III. STANDARD OF REVIEW

To intervene in any NRC proceeding, including an enforcement proceeding, a petitioner must demonstrate standing and propose at least one admissible contention.<sup>55</sup> When considering an appeal under 10 C.F.R. § 2.311 or a petition for review, the Commission may affirm a Board decision on any ground finding support in the record, whether or not relied on by the Board.<sup>56</sup> The Commission generally defers to Board decisions on threshold issues in rulings on hearing requests, including standing and contention admissibility, and on case management decisions

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<sup>52</sup> Petition at 5.

<sup>53</sup> Reply at 12 (emphasis in original).

<sup>54</sup> See Appeal at 25 n.100.

<sup>55</sup> See 10 C.F.R. § 2.309(a); see also *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157-58 (2004).

<sup>56</sup> *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

such as rulings on motions to strike, but it will reverse a decision only if there is clear “error of law or abuse of discretion.”<sup>57</sup>

#### **IV. THE COMMISSION SHOULD REJECT LOCAL 15’S APPEAL**

##### **A. Local 15 Is a Petitioner and Is Not Entitled to a Hearing as a Matter of Right**

###### **1. Local 15 Is Not Entitled to a Hearing as of Right**

Local 15 argues for the first time on appeal that its membership was the *de facto* target of the Confirmatory Order, and it should thus be entitled to a hearing as of right in this proceeding.<sup>58</sup> This belated argument is not only novel, but inaccurate.<sup>59</sup>

In an enforcement proceeding, the entity charged with a violation (*i.e.*, the subject of that proceeding) may be either a “licensee or [an]other person subject to the Commission’s jurisdiction.”<sup>60</sup> Under 10 C.F.R. §§ 2.202(a)(2) and (b), the person “to whom the Commission has issued an order” is required to respond to the violation, by filing a written answer under oath or affirmation. The licensee, or any other person adversely affected by the order, may demand a hearing.<sup>61</sup> If the *answer required under Sections 2.202(a)(2) and (b)* demands a hearing, then the Commission will schedule one.<sup>62</sup> Anyone other than the person to whom the order is issued may request a hearing as an intervenor, based on alleged adverse effects,<sup>63</sup> but this opportunity is

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<sup>57</sup> See, e.g., *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 322 (2010) (“We will defer to the Board’s rulings on threshold issues absent an error of law or abuse of discretion.”); *Int’l Uranium (USA) Co.* (White Mesa Uranium Mill), CLI-02-21, 56 NRC 161, 163-65 (2002) (applying the same standard to the review of a Presiding Officer’s decision to strike a filing).

<sup>58</sup> See Appeal at 9.

<sup>59</sup> Even if Local 15’s unprecedented and unsupported interpretation of Section 2.202(a)(3) were correct, it still would need to show that it or its members are, indeed, “adversely affected” by the Confirmatory Order. As demonstrated in Section IV.B.1, Local 15 did not make this showing, because the Confirmatory Order did not injure Local 15 or its members at all.

<sup>60</sup> 10 C.F.R. § 2.202(a)(1).

<sup>61</sup> *Id.* § 2.202(a)(3); *id.* § 2.202(b) (“[T]he answer may demand a hearing.”).

<sup>62</sup> *Id.* § 2.202(c) (“If the *answer* demands a hearing, the Commission will issue an order designating the time and place of hearing.”) (emphasis added).

<sup>63</sup> *Id.* § 2.309(a). In such a case, the applicant or licensee is deemed at party. *Id.*

subject to the requirement that adverse effects be demonstrated and that the petitioner show standing and an admissible contention.<sup>64</sup> Relatedly, in enforcement proceedings, “the licensee or other person against whom the action is taken shall have standing.”<sup>65</sup> Anyone else is a petitioner who must *demonstrate* standing.<sup>66</sup> This process governs nearly all NRC adjudications, including this one.<sup>67</sup> Thus, the regulatory scheme read as a whole shows that Local 15—an entity that is neither a licensee nor a “person to whom the Commission has issued an order”—does not have a right to demand a hearing.

Focusing myopically on one phrase in one regulation in isolation—and ignoring the impact of that interpretation on the entire regulatory framework—Local 15 claims that the Board “disregarded the plain meaning of 10 CFR § 2.202(a)(3)” and instead relied upon “a small piece of regulatory history” when it concluded that Local 15 was not entitled to a hearing as a matter of right.<sup>68</sup> Without considering the violence worked on the remaining provisions in Sections 2.202 and 2.309 or any precedent interpreting those rules, Local 15 concludes that it is entitled to demand a hearing without showing either standing or an admissible contention,<sup>69</sup> just as if it were the person “against whom the [NRC’s] action is taken.”<sup>70</sup>

Local 15 ignores the principle that the Commission construes its regulations to give import and significance to every term and phrase and holds that in the “interpretation of any regulation . . . the entirety of the provision must be given effect,” so as to not “render any part

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<sup>64</sup> See, e.g., *Davis-Besse*, CLI-04-23, 60 NRC at 157.

<sup>65</sup> 10 C.F.R. § 2.309(d)(3).

<sup>66</sup> *Id.* § 2.309(d)(2).

<sup>67</sup> *Id.* § 2.1; see also *id.* § 2.300 (“The provisions of this subpart [C] apply to all adjudications conducted under . . . 10 CFR Part 2, unless specifically stated otherwise in this subpart.”).

<sup>68</sup> Appeal at 7.

<sup>69</sup> See *id.* at 10-11.

<sup>70</sup> 10 C.F.R. § 2.309(d)(3); see also *id.* § 2.202(c) (“If the answer [required to be submitted by the person *to whom the Commission has given an order* under Section 2.202(b)] demands a hearing, the Commission will issue an order designating the time and place of the hearing.”).

inoperative.”<sup>71</sup> More generally, the text of any statute or regulation cannot be evaluated by simply looking at single provision in isolation.<sup>72</sup>

Reviewing Section 2.202 as a whole (as the Board did), along with its place within the overall Rules of Practice, it is clear that the term “demand,” as used in Section 2.202(a)(3), does not confer upon a third party the authority to demand a hearing as of right to challenge an NRC enforcement order. Only the person to whom the order is issued is compelled to respond to the order “by filing a written answer” and, importantly, it is only that person who may in its answer demand a hearing that must be granted.<sup>73</sup> No filing from any other person triggers the automatic hearing specified in Section 2.202(c). Local 15’s interpretation of Section 2.202(a) would render Section 2.202(c) meaningless.

All requests to intervene in NRC proceedings are evaluated under the standing and contention admissibility rules in Section 2.309. A petitioner, like the licensee or other person to whom the order is issued under Section 2.202(a)(3), must show adverse effect, but this showing is sufficient for only one element of the standing requirement under 10 C.F.R. § 2.309(d)—the demonstration of injury-in-fact.<sup>74</sup> To successfully obtain a hearing, an intervening petitioner

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<sup>71</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (citations omitted), *review declined*, CLI-88-1, 28 NRC 603 (1988); *Kerr-McGee Chem. Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 133 (1991) (citing *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985)).

<sup>72</sup> *See United Savings Ass’n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”) (citations omitted).

<sup>73</sup> *See* 10 C.F.R. § 2.202(b), (c).

<sup>74</sup> *Compare id.* § 2.309(d)(2) (requiring a petitioner to demonstrate “an interest affected by the proceeding”) *with id.* § 2.202(a)(3) (stating that “any other person adversely affected by the order” may also demand a hearing).

must demonstrate standing through a showing of the remaining standing elements and submit at least one admissible contention.<sup>75</sup>

Thus, Local 15's creative interpretation of the "plain language" of one phrase in Section 2.202(a)(3) cannot stand. The Board majority quite logically, and consistent with the text and structure of the regulation as well as Commission precedent, concluded that "the Commission did not intend to relieve third-party individuals who are not the subject of an enforcement order (but who nonetheless seek a hearing on the order) from satisfying the requirements for a petition for intervention set forth in 10 C.F.R. § 2.309."<sup>76</sup>

## **2. Commission Precedent and the Statements of Consideration Do Not Support Local 15's Interpretation of Section 2.202**

The Commission's own explanation of its rules refutes Local 15's interpretation. The Commission and Boards over decades have uniformly held that third parties seeking to challenge NRC enforcement orders must meet the general requirements governing intervention (*i.e.*, standing and an admissible contention).<sup>77</sup> As the Board notes, this was the case when Part 2 first was promulgated in 1991, and has continued to be the case through numerous revisions.<sup>78</sup>

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<sup>75</sup> *Id.* § 2.309(a); *see also* *Davis-Besse*, CLI-04-23, 60 NRC at 157 ("To obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention."); *Alaska Dep't of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 405 (2004) ("Alaska DOT") ("To obtain a hearing, a petitioner must demonstrate 'an interest affected by the proceeding'— *i.e.*, standing.") (citation omitted).

<sup>76</sup> LBP-14-04, slip op. at 7.

<sup>77</sup> *See, e.g.*, *Alaska DOT*, CLI-04-26, 60 NRC at 405 (requiring an entity not subject to the order to demonstrate standing and an admissible contention); *Davis-Besse*, CLI-04-23, 60 NRC at 157 (imposing the same requirements on party not subject to the enforcement order); *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247, 249 (1981) (concluding that a union representing plant workers lacked standing in a challenge to a confirmatory order), *rev'd on other grounds*, ALAB-670, 15 NRC 493 (1982), *vacated as moot*, CLI-82-18, 16 NRC 50 (1982); *Pub. Serv. Co. of Ind.* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438 (1980) (examining a third-party request for hearing on an enforcement order under the generally applicable rules governing intervention, *i.e.*, standing and discretionary intervention standards); *Sequoyah Fuels Corp. & Gen. Atomic* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994) (affirming LBP-94-05 and LBP-94-08, which granted "intervention" to a third party seeking a hearing on an enforcement order on the basis of generally applicable standing and contention admissibility requirements); *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 724 (2006) (reversing the Board's grant of discretionary intervention to a third-party petitioner challenging an enforcement order, directing the Board on

Local 15 attempts to distinguish this mountain of precedent by labeling these cases as “*Bellotti*” cases, and summarily claiming that Local 15 has “cleared the *Bellotti* hurdle.”<sup>79</sup> *Bellotti* is beside the point.<sup>80</sup> The cases cited by Exelon, the NRC Staff, and the Board uniformly stand for the fundamental principle that the standing and contention admissibility rules apply to third-party petitioners who seek to challenge enforcement orders.<sup>81</sup> The 2004 *Davis-Besse* decision, for example, is demonstrative: “[t]o obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention.”<sup>82</sup>

In its Appeal, Local 15 relies (for the first time in this proceeding) upon two unpublished 1987 orders, claiming that the Commission reversed a Staff order in response to a hearing request from certain control room operators and their union, without applying the standing and contention rules.<sup>83</sup> Local 15’s reliance on these unpublished orders is misplaced. First, the record in the unpublished orders is so vague that it is impossible to draw conclusions about the circumstances of or basis for the Commission majority’s decision. In fact, the record established by the two dissenting Commissioners suggests that what Local 15 seeks is “extraordinary.”<sup>84</sup>

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remand to consider whether the petitioner satisfied contention admissibility requirements); *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 & 2), LBP-08-14, 68 NRC 279, 290–92 (2008) (denying a third-party request for a hearing on a confirmatory order because the petitioner failed to establish standing or raise an admissible contention under section 2.309(f)); *Nuclear Fuel Servs., Inc.* (Special Nuclear Facility), LBP-07-16, 66 NRC 277, 284–85 (2007) (citing to section 2.309 standing and contention admissibility criteria as the relevant legal standards for evaluating third-party requests for hearing on a confirmatory order).

<sup>78</sup> LBP-14-04, slip op. at 9.

<sup>79</sup> Appeal at 14 n.54 (quoting LBP-14-04, slip op. at 48 (Karlin, J. dissenting); *see also id.* at 16, 19.

<sup>80</sup> *See Bellotti v. NRC*, 725 F.2d 1380, 1382-83 (D.C. Cir. 1983). The “*Bellotti*” issue relates to what relief a petitioner may seek in an enforcement proceeding, not to the question of whether a third party has a right to demand a hearing without demonstrating standing or meeting contention admissibility requirements.

<sup>81</sup> *See* LBP-14-04, slip op. at 9. Nor are all of the pertinent cases even arguably “*Bellotti*” cases. *See, e.g., Palisades*, LBP-81-26, 14 NRC at 247.

<sup>82</sup> *Davis-Besse*, CLI-04-23, 60 NRC at 157.

<sup>83</sup> *See* Appeal at 17-18 (citing *Northern States Power Co.* (Monticello Nuclear Generating Co.), 1987 NRC LEXIS 320 (Feb. 13, 1987); *Northern States Power Co.* (Monticello Nuclear Generating Co.), 1987 NRC LEXIS 282 (May 1, 1987)).

<sup>84</sup> *Monticello*, 1987 NRC LEXIS 282 at \*2 (Chairman Zech and Commissioner Carr, dissenting).

Moreover, unpublished Commission decisions are not binding.<sup>85</sup> Given the abundant, clear, and more recent precedent, these orders provide no guidance on the current case.<sup>86</sup>

As the Board notes, the rulemaking history for Section 2.202(c) confirms the settled interpretation of the rules.<sup>87</sup> A 1991 rulemaking codified the Commission's then-longstanding practices regarding third-party participation in an enforcement proceeding, explaining:

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.*<sup>88</sup>

Local 15 posits that the phrase “consistent with current practice” modifies only the word “hearing,” and not the word “opportunity.”<sup>89</sup> This interpretation defies logic. Even if the word “opportunity” were removed from the sentence, the meaning would not change. Other persons adversely affected by an order would be “offered a hearing, consistent with current practice.” The rules and practice have never allowed third parties to demand a hearing as of right on an enforcement order. Grant of a hearing to a third party always has been contingent upon a showing of standing and an admissible contention.<sup>90</sup> Had the Commission, in 1991, intended such a substantial change from its prior practice, then it would have been required to propose such a rule change and presumably attracted numerous comments on such a proposal.

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<sup>85</sup> See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-592, 11 NRC 744, 745 (1980).

<sup>86</sup> The Appeal does not seek or argue that discretionary intervention is appropriate either. See *generally* Appeal.

<sup>87</sup> LBP-14-04, slip op. at 8-9 (citing Final Rule, Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,664 (Aug. 15, 1991)). In 1991, the Commission amended Section 2.202 and other regulations to accomplish three main purposes: (1) to revise procedures for issuing orders to unlicensed individuals who are otherwise subject to the Commission's jurisdiction; (2) to identify the types of orders to which hearing rights attach; and (3) to put licensed and unlicensed persons on notice that they may be subject to enforcement for certain types of deliberate misconduct. See *id.*

<sup>88</sup> LBP-14-04, slip op. at 8-9 (quoting Final Rule, Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. at 40,678) (emphasis added in LBP-14-04).

<sup>89</sup> Appeal at 13.

<sup>90</sup> LBP-14-04, slip op. at 9 (citing *Palisades*, LBP-81-26, 14 NRC at 249).

### 3. Strong Policy Considerations Support the Commission’s Longstanding Precedent

There are good reasons for the sharp distinction between the rights of the licensee or other person to whom the Commission has issued an enforcement order and those of others who may be potentially affected. The Commission has clearly held that “it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders.”<sup>91</sup> Furthermore, lowering the intervention standards here “would undercut the NRC’s policy of favoring enforcement settlements.”<sup>92</sup>

Moreover, the person to whom an order is issued is clearly subject to a *direct* adverse effect. Anyone other than that subject—the addressee—must somehow demonstrate that he or she has suffered some *indirect* adverse effect.<sup>93</sup> The regulations, as long interpreted, sensibly treat those who may be indirectly affected differently from those who are directly affected.<sup>94</sup>

In summary, as a matter of law and fact Local 15 is not entitled to a hearing as a matter of right and must meet the requirements of Section 2.309 to obtain a hearing on the Confirmatory Order. The plain text of the Rules of Practice, longstanding precedent and practice interpreting those rules, regulatory history, and practicality all support the principle that the licensee or other person to whom an enforcement order is issued will necessarily be directly affected and is treated differently from an only potentially (and indirectly) affected third party, such as Local 15. To do otherwise would “hinder, not enhance, the prospects for promptly and efficiently concluding

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<sup>91</sup> *Id.* at 2 (citing *Alaska DOT*, CLI-04-26, 60 NRC at 406 n.28).

<sup>92</sup> *Id.* at 17.

<sup>93</sup> *Alaska DOT*, CLI-04-26, 60 NRC at 405; *see also Sequoyah Fuels*, CLI-94-12, 40 NRC at 71 (stating, in the context of an enforcement proceeding, “[i]n order for NACE to be admitted as a party in this enforcement proceeding it must first demonstrate that it has an interest that may be affected by the proceeding; *i.e.*, it has standing to participate”).

<sup>94</sup> *See* LBP-14-04, slip op. at 18 (citing *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)); *see also Local No. 93, Int’l Assoc. of Firefighters*, 478 U.S. at 529).



enforcement actions” by opening the door to hearings on “parochial interests” far beyond nuclear or environmental safety.<sup>95</sup>

## **B. Local 15 Lacks Standing to Intervene**

To obtain a hearing in an NRC proceeding, a petitioner must address and meet the criteria for standing set forth in 10 C.F.R. § 2.309(d).<sup>96</sup> A petitioner must show: (1) an injury-in-fact within the zone of interests protected by the governing statute; (2) that is fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision.<sup>97</sup> These hornbook criteria are commonly referred to as injury-in-fact, causation, and redressability.

In an enforcement proceeding, the threshold question for both standing and contention admissibility is whether the hearing request falls within the scope of the proceeding as outlined in the enforcement order.<sup>98</sup> This means that the injury must be within the zone of interests protected by the governing statute, in this instance the AEA.<sup>99</sup> In an enforcement proceeding, the question of standing is directly related to the scope and purpose of the proceeding.<sup>100</sup> The zone of interests requirement is not so expansive as to include marginal or tangential injuries where the petitioner is not the direct subject of the challenged regulatory action.<sup>101</sup>

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<sup>95</sup> LBP-14-04, slip op. at 18.

<sup>96</sup> See Confirmatory Order, encl. at 12.

<sup>97</sup> See, e.g., *Alaska DOT*, CLI-04-26, 60 NRC at 405; *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989); *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72.

<sup>98</sup> See *Alaska DOT*, CLI-04-26, 60 NRC at 405.

<sup>99</sup> *St. Lucie*, CLI-89-21, 30 NRC at 329; see also *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998) (“[T]he Commission also has required the petitioner’s interest to fall, arguably, within the ‘zone of interests’ protected or regulated by the governing statute(s)—here, the AEA and NEPA.”); *Palisades*, LBP-81-26, 14 NRC at 250-59 (“[I]n enforcement cases, as in licensing cases, . . . [o]ne must, *in addition*, allege an interest arguably within the zone of interests protected by the Act.”) (emphasis added) (citing *Marble Hill*, CLI-80-10, 11 NRC 438; *Wis. Elec. Power Co.* (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980); *Portland Gen. Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613 (1976)).

<sup>100</sup> See *Nuclear Fuel Servs., Inc.*, LBP-07-16, 66 NRC at 293-94.

<sup>101</sup> *Ambrosia Lake*, CLI-98-11, 48 NRC at 12 (“[W]here the plaintiff itself is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff’s interests are so marginally

## 1. There Is No Injury

Local 15's fundamental allegation is that the Confirmatory Order injures it and its members by requiring its members "for the first time to observe and report any off-duty 'unusual,' 'illegal' or 'aberrant' activity of co-workers, without limitation."<sup>102</sup> This claim is false. As the Board majority recognized, the actions endorsed and required in the Confirmatory Order do not change the behavioral observation requirements already mandated by NRC regulations.<sup>103</sup> The regulations at 10 C.F.R. § 73.56 have long required reporting of "any questionable behavior" reflecting on the trustworthiness and reliability of personnel with unescorted access—whether the observation occurs on-site or off, or relates to conduct on-site, or off.<sup>104</sup> Local 15 cites no authority for its effort to limit the obligation to report "any questionable behavior" to on-site observations of on-site conduct—because there is no such limit and no such authority. The Confirmatory Order merely requires Exelon to ensure its BOP accurately reflects the scope of the reporting obligation created by 10 C.F.R. § 73.56 and requires Exelon to take other actions, such as enhanced communication and training to ensure compliance in the future by Exelon, its employees, and the industry generally. It also requires that Exelon report its progress on those actions to the NRC by specified dates.<sup>105</sup> It in no way expands the regulations' reporting obligations.

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related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit.").

<sup>102</sup> Appeal at 5, 28.

<sup>103</sup> See LBP-14-04, slip op. at 21-22.

<sup>104</sup> 10 C.F.R. § 73.56(f)(2), (3) (requiring reporting of "*any questionable behavior patterns or activities*" or "*any behavior of individuals that may adversely affect the safety or security of the licensee's facility*") (emphasis added).

<sup>105</sup> See LBP-14-04, slip op. at 21-22.

Local 15's complaints that the Confirmatory Order did not define terms and might lead to confusion<sup>106</sup> are without basis. Section 73.56 requires licensees to implement the broad general requirements through their site procedures. As the Board recognized, the Confirmatory Order actually clarifies and defines the regulations' broad reporting requirements, covering "any questionable behavior or activities;"<sup>107</sup> it is difficult to see how the Confirmatory Order could possibly be viewed to have made things less clear. In any event, because the Confirmatory Order imposes no requirements on Local 15 or on its members,<sup>108</sup> any alleged confusion on their part is irrelevant.<sup>109</sup> Accordingly, there is no injury to Local 15 or its members.

## **2. The Board Properly Applied the Zone of Interests Test**

As noted above, a petitioner's alleged injury must lie within "the zone of interests" protected or regulated by the statutes governing the proceeding.<sup>110</sup> This means that the petitioner must show that the specific injuries it alleges were caused by the NRC's action are within the zone of interests protected or regulated under the AEA (or, in some cases, the National Environmental Policy Act ("NEPA")).<sup>111</sup> Further, the zone of interests examination does not extend to peripheral, marginal or tangential harms when, as here, the petitioner is not the direct subject of the challenged regulatory action.<sup>112</sup> In an enforcement proceeding, the petitioner must demonstrate that the order results in a reduction in safety.<sup>113</sup>

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<sup>106</sup> Appeal at 25 n.100.

<sup>107</sup> See LBP-14-04, slip op. at 21.

<sup>108</sup> See *Local No. 93, Int'l Assoc. of Firefighters*, 478 U.S. at 529-30.

<sup>109</sup> As the Board notes, "Exelon's most recent behavioral observation program contains an explicit definition of 'aberrant behavior' and lists more than twenty representative examples of the kinds of behavior that would be reportable as questionable, unusual, aberrant, or criminal." LBP-14-04, slip op. at 21.

<sup>110</sup> *Alaska DOT*, CLI-04-26, 60 NRC at 405.

<sup>111</sup> See *Ambrosia Lake*, CLI-98-11, 48 NRC at 5 (upholding a Board decision that petitioner's alleged economic injury did not fall within the zone of interests of either the AEA or NEPA).

<sup>112</sup> See *id.* at 12.

<sup>113</sup> See LBP-14-04, slip op. at 12 (citing *Alaska DOT*, CLI-04-26, 60 NRC at 406 n.28).

Local 15 attempts to circumvent these principles by advancing unsupported arguments that: (1) it need not credibly allege a reduction in safety; (2) in the alternative, the Board erred in concluding that there was no such credible allegation; (3) the Commission should dispense with the zone of interest test; and (4) the Commission should find that Local 15 has satisfied the zone of interest test. None of these arguments merit a different conclusion.

First, Local 15 claims that the Board’s conclusion that standing “exists only when a petitioner credibly alleges that a settlement somehow actually reduces safety” is based on mere dicta in the *Alaska DOT* decision.<sup>114</sup> Local 15 misreads the law. In *Alaska DOT*, the petitioner lacked standing because, among other things, he did not claim that the “corrective measures outlined in the Confirmatory Order are themselves detrimental to safety.”<sup>115</sup> This requirement, therefore, is an integral part of the Commission’s holding in *Alaska DOT*.<sup>116</sup>

Local 15’s second claim, that the Board erred in finding its reduction-in-safety claims both belated and insufficiently supported,<sup>117</sup> is addressed in Section IV.C, below.

Next, Local 15 asks the Commission to reverse decades of precedent and adopt what it describes as “the Article III ‘case or controversy’ Constitutional standing test,” which, as formulated by Local 15, omits any reference to the zone of interests requirement imposed in NRC proceedings.<sup>118</sup> But Local 15 acknowledges that both the Commission and the courts require a petitioner’s alleged injuries to fall within the “zone of interests to be protected or

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<sup>114</sup> Appeal at 19 (quoting LBP-14-04, slip op. at 12).

<sup>115</sup> *Alaska DOT*, CLI-04-26, 60 NRC at 406.

<sup>116</sup> Local 15 also argues that the *Alaska DOT* case is distinguishable because this Confirmatory Order “has imposed new burdens and its members and it seeks only to have the order rescinded not strengthened.” Appeal at 20. As explained above, however, the Confirmatory Order has imposed no new “burdens” on Local 15 or its members. Moreover, the requirement to allege a potential reduction in safety is not tied solely to the *Bellotti* principle, but instead derives from the requirement that a petitioner’s injury be within the zone of interests protected by the AEA. See LBP-14-04, slip op. at 10-15.

<sup>117</sup> See Appeal at 24-26.

<sup>118</sup> *Id.* at 20-21.

regulated by the statute or constitutional guarantee in question.”<sup>119</sup> Under Commission precedent, a petitioner’s alleged injuries must “fall within the ‘zone of interests’” protected by the statutes governing the proceeding<sup>120</sup>—in this case, the AEA. The Commission applies this test because its “administrative process benefits from the concrete adverseness brought to a proceeding,”<sup>121</sup> and because the NRC necessarily must limit its proceedings to controversies under statutes it administers.<sup>122</sup>

Local 15 further claims that it should prevail under the now “low bar” set by its zone of interests test, provided it shows that its interests are at best “marginally related to or [not] inconsistent with the purposes implicit in the statute . . . .”<sup>123</sup> Local 15 cites no Commission precedent endorsing a “low bar” for the zone of interest test—nor is there any. As noted above, marginal or tangential injuries do not satisfy the zone of interests test for NRC proceedings under the AEA.<sup>124</sup>

Even using this alternative standard, Local 15 falls short. To meet its lowered zone of interests test, Local 15 claims that its members are either NRC licensees or employees of licensees, and therefore, it alleges that its members’ “conduct” falls within the zone of interests regulated by the NRC.<sup>125</sup> But this is not the test. The question is whether the specific *injuries* Local 15 alleges were caused by the Confirmatory Order are within the zone of interests

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<sup>119</sup> *Id.* at 21-22 (quoting *Clarke*, 479 U.S. at 396).

<sup>120</sup> *See Ambrosia Lake*, CLI-98-11, 48 NRC at 5.

<sup>121</sup> *Pebble Springs*, CLI-76-27, 4 NRC at 613.

<sup>122</sup> *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985); *Power Auth. of the State of New York* (James A. FitzPatrick Nuclear Power Plant and Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 314 (2000) (stating that the NRC has “neither the expertise nor the legislative charter of a National Labor Relations Board or labor mediator”).

<sup>123</sup> Appeal at 23 (citing *Cook v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013)).

<sup>124</sup> *See Ambrosia Lake*, CLI-98-11, 48 NRC at 12.

<sup>125</sup> *See* Appeal at 23.

protected or regulated under the AEA,<sup>126</sup> not whether it or its members' *conduct* is generally regulated by the NRC under the AEA—or even regulated by the Confirmatory Order.<sup>127</sup>

Local 15 acknowledged from the outset of this proceeding that its interests were statutory (NLRA) and economic, and that its “economic interest *may not fall within the ‘zone of interest’ protected by the AEA . . . .*”<sup>128</sup> Although Local 15’s Petition repeatedly tied its claimed injuries to its asserted rights under the NLRA,<sup>129</sup> it made no timely and credible attempt to tie its alleged injuries to any public health and safety concern protected by the AEA.

### **3. Local 15 Failed to Establish Causation of its Alleged Injuries**

Beyond injury-in-fact, Local 15 must establish causation by showing that the injuries it alleges are “fairly traceable to the proposed action,”<sup>130</sup> in this case, the Confirmatory Order.<sup>131</sup>

Local 15’s alleged injuries are not fairly traceable to the Confirmatory Order. Local 15 claims that because of the Confirmatory Order, its members will “for the first time” be required to observe and report any off-duty unusual, illegal, or aberrant activity of co-workers.<sup>132</sup> This argument fails for two reasons. First, the regulations governing the BOP always have applied to off-site/off-duty conduct, and required reporting of “any questionable behavior patterns or

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<sup>126</sup> See, e.g., *Ambrosia Lake*, CLI-98-11, 48 NRC at 5.

<sup>127</sup> Local 15 also relies on *Bennett v. Spear*, 520 U.S. 154, 175 (1997), to argue that the NRC must exercise its authority based on an “evidentiary record,” rather than “speculation or surmise.” Appeal at 24. As explained in Section II.A, above, however, the Confirmatory Order fully explains the evidentiary and safety justification for actions it endorses and requires. See Confirmatory Order, encl. at 6 (explaining that, in view of the foregoing (*i.e.*, the NRC’s investigative findings and Exelon’s commitments) the NRC determined that the public health and safety requires this Confirmatory Order).

<sup>128</sup> LBP-14-04, slip op. at 12 n.51 (quoting Petition at 13) (emphasis added).

<sup>129</sup> See Petition at 7, 11 n.7, 13, 17, 20 (citing NLRA, 29 U.S.C. § 151–169 and associated case law).

<sup>130</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75; *Fla. Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-06-21, 64 NRC 30, 34-35 (2006).

<sup>131</sup> See *St. Lucie*, LBP-08-14, 68 NRC at 291 (standing in proceeding on a Confirmatory Order rejected in part based on failure to show link between alleged injury and the Confirmatory Order: “something more than proximity to the facility (*i.e.*, a link between the Confirmatory Order and the alleged harm to the individual) is necessary to establish standing”) (citing *Alaska DOT*, CLI-04-26, 60 NRC at 406).

<sup>132</sup> See Appeal at 5, 28.

activities.”<sup>133</sup> Second, the Confirmatory Order has no impact on Local 15’s members.

Individuals cannot violate the Confirmatory Order; it applies only to Exelon.

#### **4. Local 15 Failed to Establish Redressability**

Finally, Local 15 must show that “its actual or threatened injuries can be cured by some action of the [NRC].”<sup>134</sup> In other words, the petitioner must demonstrate that the injury is “redressable” by a favorable decision in this proceeding. If a petitioner requests a remedy that is beyond the scope of a hearing, “then the hearing request must be denied...”<sup>135</sup>

Nothing can be done in this proceeding to redress Local 15’s alleged injury because, even absent the Confirmatory Order, the reporting requirements of 10 C.F.R. § 73.56 and Exelon’s procedures will remain in place. It is for the National Labor Relations Board, not the NRC, to decide to what matters bargaining rights attach.<sup>136</sup>

#### **C. The Board Was Well Within Its Discretion to Grant Exelon’s Motion to Strike**

Local 15 argues that the Board should have credited its belated claim that the Confirmatory Order somehow reduced safety at Exelon’s facilities.<sup>137</sup> Originally, Local 15 affirmatively claimed that the Confirmatory Order was *not* necessary for safety or that the NRC had not sufficiently justified the Confirmatory order.<sup>138</sup> As previously noted, Local 15’s claims were focused on alleged NLRA-based economic injuries, not any alleged radiological health or safety problem. In their answers to the Petition, both the Staff and Exelon pointed out the failure

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<sup>133</sup> 10 C.F.R. § 73.56(f)(3).

<sup>134</sup> *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

<sup>135</sup> *Nuclear Fuel Servs., Inc.*, LBP-07-16, 66 NRC at 285.

<sup>136</sup> LBP-14-04, slip op. at 15 (“Any right that Local 15 might have to bargain over the terms of employment is not governed by the [AEA].”).

<sup>137</sup> Appeal at 24-26.

<sup>138</sup> See LBP-14-04, slip op. at 13 (“Initially, Local 15’s concerns clearly resided elsewhere.”); *id.* at 13-14 (citing Petition at 18 (arguing that the Confirmatory Order reflected regulatory overkill and that Exelon and the NRC should not “use a bulldozer to kill an ant”).

of Local 15 to assert a safety nexus for the proffered contentions.<sup>139</sup> In Reply, for the first time, Local 15 claimed *in support of its contentions* that the Confirmatory Order “has the cumulative effect of rendering Exelon’s operations less safe.”<sup>140</sup> Significantly, Local 15 offered no further explanation or support for its general assertion.<sup>141</sup> Later, after prompting from the Board at oral argument, counsel for Local 15 effectively conceded the tardiness and lack of support for this argument.<sup>142</sup>

Ultimately, the Board correctly ruled that this amendment to the contentions was untimely.<sup>143</sup> Indeed, on Appeal Local 15 again admits that its “concerns regarding safety were not clearly and unequivocally stated until its Reply.”<sup>144</sup> Nevertheless, Local 15 asserts that the Board erred because a petitioner “undisputedly” has the right to use its reply to freely amend any claim related to standing.<sup>145</sup> This argument fails for two reasons. First, Local 15 raised this claim as an amendment to its contentions, not in support of any theory of standing.<sup>146</sup> It was only in response to Exelon’s Motion to Strike and supplemented on Appeal when Local 15—in yet another 180-degree course change<sup>147</sup>—connected its reduction-in-safety claim to standing.<sup>148</sup> Thus, this claim was nothing more than an untimely attempt to introduce a new basis and amend

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<sup>139</sup> See Exelon Answer at 16-17, 19-21; NRC Staff Answer at 8, 14.

<sup>140</sup> Reply at 9.

<sup>141</sup> See *id.* at 9-10.

<sup>142</sup> See LBP-14-04, slip op. at 13; Tr. at 37:11-14, 37:20-21 (“[W]e did not do a particularly good job in our initial pleading of connecting those dots between the deficiencies in the order and the natural safety implications. . . . In the reply we didn’t go into detail on that point, no.”).

<sup>143</sup> See LBP-14-04, slip op. at 13 (citing *Nuclear Mgmt. Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)).

<sup>144</sup> Appeal at 25.

<sup>145</sup> See *id.*

<sup>146</sup> See Reply at 9.

<sup>147</sup> See LBP-14-04, slip op. at 14.

<sup>148</sup> See Local 15, International Brotherhood of Electrical Workers, AFL-CIO Response in Opposition to Exelon’s Motion to Strike at 3 (March 20, 2014); Appeal at 25-26.



the proposed contentions.<sup>149</sup> Second, the decision Local 15 relies on is inapposite because there the Commission allowed the petitioner to submit supplemental clarifying declarations in support of a previously-asserted standing argument,<sup>150</sup> not to introduce an entirely new argument.<sup>151</sup> Thus, the Board was well within its discretion to grant Exelon’s Motion to Strike.<sup>152</sup>

Moreover, the Board rejected Local 15’s reduction-in-safety claim for the independent reason that it was supported only by speculation of counsel—*i.e.*, not supported in the affidavit of their representative—with the purported explanation articulated for the first time at oral argument.<sup>153</sup> The Board, therefore, acted well within its discretion.<sup>154</sup>

**D. The Board Properly Found Contentions 1 and 2 Inadmissible**

On appeal, Local 15 seeks to reverse the Board’s decision rejecting Contentions 1 and 2.<sup>155</sup> Local 15 does not seek review of Contention 3, which the Board also declined to admit—thereby abandoning the NLRA claims that were central to the initial Petition.<sup>156</sup> The Board correctly ruled both of those contentions inadmissible under 10 C.F.R. § 2.309(f)(1).

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<sup>149</sup> See generally Exelon’s Motion to Strike. Contrary to Local 15’s claims, see Appeal at 26 n.103, Exelon was not afforded the opportunity to make admissibility objections to the belated reduction-in-safety basis for Local 15’s contentions. See Tr. at 87:2-88:5.

<sup>150</sup> *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC 1, 6-7 (2010).

<sup>151</sup> See Reply at 9-10. As the Board notes, not only was this information not previously pled, in its Petition, Local 15 actually argued the opposite. LBP-14-04, slip op. at 13-14.

<sup>152</sup> See *Int’l Uranium*, CLI-02-21, 56 NRC at 163.

<sup>153</sup> See LBP-14-04, slip op. at 14.

<sup>154</sup> See *Alaska DOT*, CLI-04-26, 60 NRC at 405 (requiring petitioner to “demonstrate” standing at the admissibility stage); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996) (stating that the petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately).

<sup>155</sup> Appeal at 26.

<sup>156</sup> See, e.g., Petition at 7 (asserting standing based on alleged violations of NLRA-based rights); *id.* at 19 (connecting proposed Contention 2 to Local 15’s labor-related claims).

## 1. The Board Correctly Found Contention 1 Inadmissible

As previously noted, Contention 1 alleges that the Confirmatory Order imposes new obligations on off-duty employees to observe and report the offsite, off-duty conduct of fellow employees, without sufficient justification.<sup>157</sup> Contention 1 is an inadmissible attack on the NRC's enforcement discretion<sup>158</sup> and fails to raise a genuine dispute on a material issue of law or fact. It is also an impermissible collateral attack on the Commission's regulations.<sup>159</sup>

As previously noted, under 10 C.F.R. § 73.56(f)(2), every person subject to the BOP must communicate to the licensee “*any* behavior of individuals that may adversely affect the safety or security of the licensee's facility . . .”<sup>160</sup> And under Section 73.56(f)(3), “*any questionable* behavior patterns or activities” must be reported.<sup>161</sup> As explained in Section II.A, above, the Confirmatory Order does not expand or otherwise modify the scope of the regulations, and imposes no new reporting obligations on Local 15's members. Thus, Contention 1 lacks basis and is effectively an impermissible collateral attack on Section 73.56.<sup>162</sup>

On appeal, Local 15 argues that Contention 1 “is arguably a legal contention and therefore exempt from the requirements to allege ‘facts’ to support the petitioner's position.”<sup>163</sup> This is incorrect. The contention pleading standards 10 C.F.R. § 2.309(f)(1)(v) and (vi) require

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<sup>157</sup> LBP-14-04, slip op. at 19 (quoting Petition at 2).

<sup>158</sup> *See id.* at 20 (citing *Advanced Med. Sys.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312-13 (1994)).

<sup>159</sup> *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 76 NRC 377, 387 (2012); *Exelon Generation Co., LLC* (Braidwood Nuclear Station, Units 1 & 2 and Byron Nuclear Station, Units 1 & 2), LBP-13-12, 77 NRC \_\_\_, slip op. at 4, 7 (Nov. 19, 2013), *aff'd*, CLI-14-06, 77 NRC \_\_\_ slip op. (May 2, 2014).

<sup>160</sup> Emphasis added.

<sup>161</sup> Emphasis added.

<sup>162</sup> *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999) (“[A] petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies.”).

<sup>163</sup> Appeal at 28.

support for any contention, regardless of whether it raises legal or factual issues, or both.<sup>164</sup> The Board was well within its discretion to scrutinize the factual and legal basis for this contention at the admissibility stage.<sup>165</sup> Local 15 did not provide any legal authority for its conclusion that the Confirmatory Order imposed new requirements. In fact, it could not because the long history of Section 73.56 is clear. The NRC never intended to cabin the requirements to on-site observations of on-duty behaviors and expect nuclear workers to turn a blind eye to questionable conduct, merely because it occurred outside the fence.<sup>166</sup>

For the foregoing reasons, Contention 1 lacks any basis in fact or law, is outside the scope of this proceeding, and fails to raise a genuine dispute on a material issue of law or fact. It is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(ii), (iii), (iv), (v), and (vi).

## **2. The Board Correctly Found Contention 2 Inadmissible**

Contention 2 alleges that the Confirmatory Order should not be sustained because its terms are “vague, over-broad and not carefully tailored” 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.<sup>167</sup> The Board properly held Contention 2 inadmissible because, as with Contention 1, it is a collateral attack on the NRC’s access authorization rules and inappropriately challenges the NRC Staff’s exercise of its enforcement

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<sup>164</sup> See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006) (“The Commission requires supporting information and references to documents and sources that serve to establish the validity of the contention. Mere notice pleading does not suffice.”) (internal quotations and citations omitted); Policy on Conduct of Adjudicatory Proceedings, 63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998) (“Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis.”).

<sup>165</sup> See, e.g., *Oyster Creek*, CLI-06-24, 64 NRC at 118; *Davis-Besse*, CLI-12-08, 75 NRC at 397 (applying abuse of discretion standard to review of contention admissibility decisions).

<sup>166</sup> See, e.g., Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,963 (Mar. 27, 2009); Final Rule, Access Authorization Program for Nuclear Power Plants, 56 Fed. Reg. 18,997, 19,001-002 (Apr. 25, 1991).

<sup>167</sup> LBP-14-04, slip op. at 19 (quoting Petition at 2).

discretion. It also inappropriately seeks to subject the NRC to a claimed duty on Exelon's part to bargain with Local 15 over changes to the BOP. Contention 2 is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

The NRC has wide discretion to tailor its enforcement actions, and Local 15 failed to identify any statute or regulation violated by the Confirmatory Order.<sup>168</sup> As shown in Section IV.D.1, above, the ability to impose such sanctions is well within the agency's discretion.<sup>169</sup>

The Board also properly found that the contention was inadequately supported and inadmissible because the Confirmatory Order—together with the previous changes to Exelon's BOP recited therein—provides more clarity to the broad regulations, not less.<sup>170</sup> Local 15 again attempts to characterize its claims of vagueness as “legal issues for which no factual basis need be pled,”<sup>171</sup> but this claim is again inconsistent with the requirements that a contention be adequately supported, such that it raises a genuine dispute.<sup>172</sup>

Local 15 argues that the Board failed to confine itself to the question of whether this contention satisfied the contention admissibility requirements, and instead improperly reached the merits of the contention when it concluded that there is no “need for an evidentiary hearing” on whether the terms of the Confirmatory Order are vague.<sup>173</sup> But Boards are required to scrutinize the legal and factual support provided for a contention at the admissibility stage.<sup>174</sup>

The Board appropriately evaluated Local 15's claim that the language of the Confirmatory Order

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<sup>168</sup> *Id.* at 20 (“Local 15 cites no statute or regulation that is violated by reason of the NRC's alleged failure to ‘narrowly tailor’ its efforts.”).

<sup>169</sup> *See also id.* at 21 (citing *Alaska DOT.*, CLI-04-26, 60 NRC at 407; *Advanced Med. Sys.*, CLI-94-6, 39 NRC at 312–13).

<sup>170</sup> *Id.* at 21–22.

<sup>171</sup> Appeal at 29.

<sup>172</sup> *See supra* note 164.

<sup>173</sup> Appeal at 29 (quoting LBP-14-04, slip op. at 21).

<sup>174</sup> *USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596–97 (2005); *Limerick*, CLI-12-19, 76 NRC at 385–86 (evaluating and resolving key threshold legal issues at the admissibility stage).

was impermissibly vague, and found it speculative and lacking in foundation because “the terms endorsed in the Confirmatory Order [such as “illegal,” “unusual,” and “aberrant” conduct] provide more specificity than the applicable NRC regulation itself—which rather broadly requires reporting of ‘any questionable behavior patterns or activities.’”<sup>175</sup> This conclusion was well within the Board’s discretion.<sup>176</sup>

## V. CONCLUSION

For the foregoing reasons, the Commission should reject Local 15’s Appeal of LBP-14-04.

Respectfully submitted,

*Signed (electronically) by Raphael P. Kuyler*

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<sup>175</sup> See LBP-14-04, slip op. at 21 (quoting 10 C.F.R. § 73.56(f)(3)).

<sup>176</sup> USEC, LBP-05-28, 62 NRC at 596-97 (supporting material provided by a petitioner is subject to Board scrutiny); *Oyster Creek*, CLI-06-24, 64 NRC at 121 (noting that the Commission affords its Licensing Boards substantial deference on threshold issues, such as standing and the admissibility of contentions).

**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
(Dresden Nuclear Power Station, Units 2 and 3)	)	
	)	June 6, 2014

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of “Exelon’s Answer Opposing Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO’s 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 Raphael P. Kuyler*

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