

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of)

EXELON GENERATION COMPANY, LLC)

(Dresden Nuclear Power Station))

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

CLI-15-16

MEMORANDUM AND ORDER

Pending before us is the appeal of Local 15, International Brotherhood of Electrical Workers, AFL-CIO, of the Atomic Safety and Licensing Board's decision in LBP-14-4 denying Local 15's petition to intervene and request for hearing.¹ Local 15's challenge centers on the NRC Staff's issuance of a Confirmatory Order under which the licensee, Exelon Generation Company, LLC, among other things, issued Revision 10 of its procedure implementing the Behavioral Observation Program.²

¹ *Notice of Appeal of LBP-14-04 by Local 15, International Brotherhood of Electrical Workers, AFL-CIO* (May 12, 2014); *Brief in Support of Appeal of LBP-14-04* (May 12, 2014, corrected May 13, 2014) (Local 15 Appeal Brief); see LBP-14-4, 79 NRC 319 (2014).

² See *In the Matter of Exelon Generation Company, LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License*, 78 Fed. Reg. 66,965, 66,965 (Nov. 7, 2013) (Confirmatory Order). Prior to the settlement that resulted in the Confirmatory Order, Exelon had revised its Behavioral Observation Program (as Revision 9); Exelon further revised the program pursuant to the Confirmatory Order (as Revision 10). Compare SY-AA-103-513, "Behavioral Observation Program" (Rev. 10) (2014) (attached as Ex. 3 to *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)), with SY-AA-103-513, "Behavioral Observation Program" (Rev. 9) (2013) (attached as Ex. 2 to

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Before the Board, Local 15 proffered three contentions. In Contention 1, Local 15 asserted that the Confirmatory Order should not be sustained because it imposes obligations on off-duty Exelon employees without justification.³ In Contention 2, the Local asserted that the Confirmatory Order should not be sustained because it imposes on Exelon employees behavioral observation and reporting requirements “that are vague, over-broad and not carefully tailored . . . and improperly delegates to Exelon the discretion to interpret and implement NRC standards” for behavioral observation.⁴ The Local’s Contention 3 raised concerns about possible violations of the National Labor Relations Act; the Board excluded Contention 3, and the Local did not appeal that ruling.⁵ Related to its Contention 3, but as a matter separate from this adjudication, Local 15 pursued unfair labor practice charges before the National Labor Relations Board (NLRB).⁶

During the pendency of the Local’s appeal, Exelon informed the Staff that it had entered into a settlement agreement with the NLRB and requested a temporary relaxation of the Confirmatory Order to effectuate actions pursuant to that agreement.⁷ In particular, Exelon

Local 15 Reply); SY-AA-103-513, “Behavioral Observation Program” (Rev. 8) (2010) (enclosed as Attachment 4 to *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). Revision 10 of the Behavioral Observation Program currently is in place.

³ *Petition to Intervene and Request for Hearing* (Dec. 12, 2013), at 15.

⁴ *Id.* at 18.

⁵ See LBP-14-4, 79 NRC at 331 (holding that concerns about possible labor disputes do not establish standing); *id.* at 337 (rejecting Contention 3, which asserted that the Confirmatory Order should not be sustained because it “improperly endorses and confirms” Exelon’s asserted failure to bargain with Local 15).

⁶ See LBP-14-4, 79 NRC at 337; *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), at 9-10 (providing the status of the NLRB matter).

⁷ Exelon indicated that the NLRB ultimately agreed that Exelon was not obliged to bargain over either the decision to enter the settlement agreement with the Staff and consent to the

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stated that “it is in its best interest to settle the unfair labor practice charges with the NLRB and to agree, subject to NRC approval, to bargain with Local 15 over the content of the additional guidance to be provided regarding ‘the types of offsite activities, if observed, or credible information that should be reported to reviewing officials’” that was adopted in Revision 10 of Exelon’s Behavioral Observation Program procedure. Of particular note, Exelon requested that the Staff relax section V(A)(A.1(1)) of the Confirmatory Order to “permit a temporary rescission of the additional guidance to employees concerning their reporting obligations” provided in Revision 10, to allow Exelon and Local 15 to bargain “over the effects of [Exelon’s] decisions to make revisions to its [Behavioral Observation Program] to comply with the Confirmatory Order.”⁸

The Staff recently informed us that it has approved Exelon’s request.⁹ The Staff explains that the approval of Exelon’s relaxation request permits Exelon to “revert to [Revision 9 of the

Confirmatory Order or the decision to retain the changes confirmed in Revision 9 of the Behavioral Observation Program (which Exelon implemented prior to issuance of the Confirmatory Order). But the NLRB concluded that Exelon was obliged to give Local 15 notice and an opportunity to bargain “over the effects of [Exelon’s] decision to implement changes in the terms and conditions of [the employees’] employment that [Exelon] made pursuant to the [Confirmatory Order].” See Marik, Shane, Exelon Generation Company, LLC, letter to Cynthia D. Pederson, Regional Administrator, Region III, NRC, “Request for Relaxation of Condition V(A)(A.1(1)) of Confirmatory Order EA-13-068” (Jan. 26, 2015), at 4-5 (ADAMS accession no. ML15030A079) (Relaxation Request).

⁸ *Id.* at 5-6. Section V(A)(A.1(1)) of the Confirmatory Order provided that, within ninety days of the effective date of the Confirmatory Order, Exelon would revise its Behavioral Observation Program “(1) to provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials, and (2) to ensure that procedural requirements to pass information forward without delay are clearly communicated.” Confirmatory Order, 78 Fed. Reg. at 66,966. In a supplement to its Relaxation Request, Exelon requested that two other sections of the Confirmatory Order likewise be relaxed—section V(A)(A.2)), related to training, and section V(A)(A.3)), related to the effectiveness assessment. Domeyer, Tamra, Exelon Generation Company, LLC, letter to Jared Heck, Regional Counsel, NRC, “Supplemental Information for Request for Relaxation of Condition V(A)(A.1(1)) of Confirmatory Order EA-13-068” (Apr. 13, 2015) (ML15106A427).

⁹ Hair, Christopher C., Counsel for the Staff, Memorandum to the Commissioners (May 6, 2015) (Staff Notification), attaching Pederson, Cynthia D., Regional Administrator, NRC, letter to Bryan C. Hanson, Exelon Generation Company, LLC, and Exelon Nuclear, “Dresden Nuclear Power

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Behavioral Observation Program] until Exelon and Local 15 can bargain on a new revision that complies with the Confirmatory Order.”¹⁰

The actions to be taken in furtherance of the settlement of Local 15’s NLRB claim appear to address the concerns raised by Local 15 in its Contentions 1 and 2.¹¹ At bottom, it appears that Local 15 has achieved the outcome it desired—rescission of Revision 10 of the Behavioral Observation Program procedure and the opportunity to negotiate with Exelon revised language concerning the types of obligations to be imposed on Exelon employees under the program. Upon consideration of these developments, therefore, we *direct* the litigants to provide either (1) a joint stipulation that Local 15’s appeal should be dismissed or (2) briefing on the question whether Local 15’s appeal should be dismissed as moot and this proceeding terminated. A joint stipulation, if filed, will be due within 15 calendar days of the date of this order. Likewise, if briefs are filed, Local 15, Exelon, and the Staff may file initial briefs within 15 calendar days of the date of this order. Reply briefs may be filed within 7 calendar days of the

Station—Request for Relaxation of Confirmatory Order” (May 4, 2015) (ML15125A103) (Relaxation Letter).

¹⁰ Staff Notification at 1. The Staff’s approval extends the dates for compliance with the Confirmatory Order to allow for the actions discussed above. The relaxation revises section V(A)(A.1(1)) to provide for revision of Exelon procedure SY-AA-103-513 until November 30, 2015, section V(A)(A.2) to provide that Exelon shall provide training to its staff on this revision by January 15, 2016, and section V(A)(A.3) to provide for Exelon’s development and conduct of an effectiveness assessment of the revised procedure and associated training by May 31, 2016. Relaxation Letter at 2.

¹¹ We observe that the litigants did not promptly notify us of the Relaxation Request, which has been before the Staff since January of this year. Litigants are reminded that the duty to report material significant developments in a matter under adjudication arises immediately upon discovery of that information. The obligation extends to all parties; the Staff in particular is not to delay in reporting until it has completed its own evaluation of the matter. While it is true that the *grant* of the relaxation is the action of most significance here, a notification of such a request’s pendency tends to inform us as to whether—and when—to act on an affected appeal. See *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491 n.11 (1976); *Georgia Power Co.* (Alvin W. Vogtle Nuclear Plant, Units 1 & 2, ALAB-291, 2 NRC 404, 408 (1975).

initial briefs' filing. If the litigants anticipate that they may agree to a joint stipulation dismissing the case but need more than 15 days to make that determination, the litigants should file a joint motion for extension of time.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Rochelle C. Baval
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of June, 2015.

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)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-15-16** have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

Paul S. Ryerson, Chair
Administrative Judge
E-mail: paul.ryerson@nrc.gov

Alex S. Karlin
Administrative Judge
E-mail: alex.karlin@nrc.gov

Dr. Jeffrey D.E. Jeffries
Administrative Judge
E-mail: jeffrey.jeffries@nrc.gov

Nicholas Sciretta
Law Clerk
E-mail: nicholas.sciretta@nrc.gov

Carter Thurman, Law Clerk
E-mail: carter.thurman@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
OCA Mail Center
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

Catherine Scott, Esq.
E-mail: catherine.scott@nrc.gov

Mauri Lemoncelli, Esq.
E-mail: mauri.lemoncelli@nrc.gov

Christopher Hair, Esq.
E-mail: christopher.hair@nrc.gov

Eric Michel, Esq.
E-mail: eric.michel@nrc.gov

Sabrina Allen, Paralegal
E-mail: sabrina.allen@nrc.gov

OGC Mail Center
E-mail: OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the
Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

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Counsel for Local Union No. 15
Schuchat, Cook & Werner
1221 Locust Street
2nd Floor
St. Louis, MO 63103

Marilyn S. Teitelbaum, Esq.
E-mail: mst@schuchatcw.com

Rochelle G. Skolnick, Esq.
E-mail: rgs@schuchatcw.com

Sandra Perry, Paralegal
E-mail: sp@schuchatcw.com

Counsel for Exelon Generation
Power Company
200 Exelon Way, KSA-3N
Kennett Square, PA 19348

Donald P. Ferraro, Esq.
E-mail: Donald.Ferraro@exeloncorp.com

6500 N. Dresden Road
Morris, IL 60450
Dean Walker, Esq.
E-mail: dean.walker@exeloncorp.com

Counsel for Exelon Generation
Power Company
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004

Timothy P. Matthews, Esq.
E-mail: tmatthews@morganlewis.com

Raphael P. Kuyler, Esq.
E-mail: rkuyler@morganlewis.com

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of June, 2015