

**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 26, 2015
)	

EXELON’S BRIEF IN RESPONSE TO CLI-15-16

In accordance with the Commission’s direction in CLI-15-16, Exelon Generation Company, LLC (“Exelon”) hereby provides this brief addressing the question of whether the appeal of Local Union No. 15, International Brotherhood of Electrical Workers (“Local 15”) of the Atomic Safety and Licensing Board’s (“Board”) decision in LBP-14-04¹ should be dismissed as moot and this proceeding terminated.²

As demonstrated below, the NRC Staff’s recent temporary relaxation³ of the Confirmatory Order which is the subject of this proceeding⁴ effectively provides Local 15 with the specific relief it desired at the outset. The focus of Local 15’s original Petition

¹ 79 NRC 319 (2014).

² Following the issuance of CLI-15-16, Exelon consulted with counsel for Local 15 and the NRC Staff regarding whether the parties could jointly stipulate that Local 15’s appeal could be dismissed as moot. Counsel for the NRC Staff was amenable to such a stipulation. Counsel for Local 15 stated that Local 15 did not believe its appeal was moot.

³ Letter from C. Pederson, Regional Administrator, NRC, to B. Hanson, Senior Vice President, Exelon Generation Company, LLC, and President and Chief Nuclear Officer, Exelon Nuclear, “Dresden Nuclear Power Station—Request for Relaxation of Confirmatory Order” (May 4, 2015), *available at* ADAMS Accession No. ML15125A103 (“Relaxation Letter”).

⁴ Letter from C. Pederson, NRC Region III Administrator, to M. Pacilio, Senior Vice President, Exelon Generation Company, LLC, and President and Chief Nuclear Officer, Exelon Nuclear, “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”).

was squarely on the alleged injuries caused by the Confirmatory Order to Local 15's economic rights under the National Labor Relations Act.⁵ The Relaxation Letter now allows Exelon and Local 15 to bargain over the effects of Exelon's decision to make changes to Revision 9 of its Behavioral Observation Program ("BOP") to comply with the Confirmatory Order.⁶ Local 15's appeal is therefore moot, and this proceeding should be terminated. In the alternative, if the Commission does not find Local 15's appeal to be moot, then the Commission should deny Local 15's appeal and uphold the Board's decision in LBP-14-04, for all of the reasons set forth in LBP-14-04 itself and in Exelon's and the NRC Staff's responses to Local 15's appeal.⁷

I. BACKGROUND

The regulatory background and procedural history of this case are summarized in LBP-14-04 and in Exelon's Brief on Appeal and are not repeated in detail here. Briefly and most pertinently, following an investigation that identified 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) related to the knowing failure to disclose planned criminal activity by workers at Dresden Nuclear Power Station ("Dresden"), the NRC Staff issued a Confirmatory Order to Exelon. The Confirmatory Order recited certain actions that Exelon had already taken, and required Exelon to take certain additional actions, related to the apparent violations regarding the

⁵ See Petition to Intervene and Request for Hearing at 2, 6-9, 13 (Dec. 12, 2013) ("Petition").

⁶ See Relaxation Letter at 2; see also Letter from S. Marik, Site Vice President – Dresden Nuclear Power Station, Exelon Generation Company, LLC, to C. 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, available at ADAMS Accession No. ML15030A079 ("Relaxation Request").

⁷ See generally Exelon's Answer Opposing Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO's Appeal of LBP-14-04 (June 6, 2014) ("Exelon's Brief on Appeal"); NRC Staff's Brief in Opposition to Appeal of LBP-14-04 by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO (June 6, 2014) ("NRC Staff's Brief on Appeal").

access authorization program requirements, including specific additional revisions to the BOP procedure, training, and the conduct of an effectiveness assessment.⁸

Local 15 filed its Petition challenging the Confirmatory Order, purporting to show standing, and proposing three contentions, which alleged that the Confirmatory Order: (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 National Labor Relations Act ("NLRA").⁹ Exelon and the NRC Staff opposed the Petition on multiple grounds, including that all three proposed contentions were inadmissible.¹⁰ Ultimately, the Board denied the Petition both because Local 15 did not demonstrate standing and separately because none of its proffered contentions was admissible. Local 15's appeal raises several claims, including that the Board erred in finding Proposed Contentions (1) and (2) inadmissible.¹¹

The parties completed the briefing of the appeal over one year ago. In parallel with this proceeding before the NRC, Local 15 filed an unfair labor practice charge before the National Labor Relations Board ("NLRB") related to the Confirmatory Order. In connection with this charge, Local 15 argued that Exelon was obligated to bargain with Local 15 over the Confirmatory Order and over the additional guidance in the BOP. But, while the appeal of LBP-14-04 remained pending before the Commission, the NLRB

⁸ See Confirmatory Order at 3-6.

⁹ See Petition at 2.

¹⁰ See generally 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) ("Exelon Answer"); NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) ("NRC Staff Answer").

¹¹ See generally [Corrected] Brief in Support of Appeal of LBP-14-04 (May 13, 2014) ("Appeal"). As noted in CLI-15-16, Local 15 did not appeal the Board's decision on proposed Contention (3).

concluded that Exelon had an obligation to bargain only over the *effects* of the Confirmatory Order.¹² Without admitting that it violated the NLRA, Exelon decided to settle the NLRB matter and to agree, subject to NRC approval, to bargain with Local 15 over the effects; *e.g.*, the additional guidance to be provided in Revision 10 to the BOP procedure to comply with the Confirmatory Order.¹³ Accordingly, Exelon requested that the NRC temporarily relax the Confirmatory Order to permit Exelon to bargain with Local 15 over this issue for 90 days.¹⁴ On May 4, 2015, the NRC Staff approved this request, and temporarily relaxed the Confirmatory Order in part, allowing Exelon to revert to a previous revision of its BOP until Exelon and Local 15 can bargain on a new revision that also complies with the Confirmatory Order.¹⁵ Those discussions are ongoing.

The NRC Staff notified the Commission of its decision to temporarily relax the Confirmatory Order.¹⁶ On June 11, 2015, the Commission issued CLI-15-16, directing the litigants to provide either: (1) a joint stipulation that Local 15's appeal should be dismissed; or (2) briefing on the question of whether Local 15's appeal should be dismissed as moot and this proceeding terminated.¹⁷ Local 15 did not agree to stipulate that its appeal should be dismissed.

¹² See Relaxation Request at 5. Bargaining over the effects of the action is distinct from any requirement to bargain over the action itself.

¹³ See *id.* (citing U.S. Government National Labor Relations Board Settlement Agreement In the Matter of Exelon Generation Company, LLC, Case 13-CA-118294, effective December 29, 2014).

¹⁴ See *id.*

¹⁵ See Memorandum from C. Hair, Counsel for NRC Staff, to the Commissioners at 1 (May 6, 2015) (“Staff Notification”).

¹⁶ See *id.*

¹⁷ See CLI-15-16, slip op. at 4.

II. THE COMMISSION SHOULD DENY LOCAL 15'S APPEAL AS MOOT

As the Commission outlined in CLI-15-16, the fundamental issues Local 15 raised in Contentions 1 and 2 are now moot. Thus, Local 15's appeal should be denied as moot.

Under NRC practice, "a case will be moot when the issues are no longer live or the parties lack a cognizable interest in the outcome. Unless there is a substantial controversy admitting of a specific relief through a decree of a conclusive character, a case is moot."¹⁸

As previously noted, Proposed Contention 1 alleges that the Confirmatory Order imposes new obligations on employees to report off-site, off-duty conduct, beyond those set forth in 10 C.F.R. §§ 73.56(f)(1)-(3), without justification.¹⁹ Since the original Petition, Local 15 has conceded that the NRC access authorization regulations do reach off-site, off-duty conduct.²⁰ Thus, the Confirmatory Order does not impose new obligations on Local 15's members, and this contention was effectively moot even before the Relaxation Letter. The Relaxation Letter further provides an opportunity to negotiate that would otherwise have been foreclosed. Accordingly, there is no live controversy regarding Local 15's concerns about new obligations on its members as a result of the Confirmatory Order.²¹

Proposed Contention 2 alleged that the Confirmatory Order was vague and over-broad, and improperly delegated to Exelon the discretion to interpret and implement NRC standards without input from Local 15, the public or the NRC.²² By temporarily relaxing the Confirmatory Order to allow Exelon to bargain with Local 15 over the additional

¹⁸ *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993) (citations and internal quotations omitted).

¹⁹ *See* Petition at 15-16.

²⁰ *See* Exelon's Brief on Appeal at 10.

²¹ *See Comanche Peak*, CLI-93-10, 37 NRC at 200.

²² *See* Petition at 18.

guidance to be provided in the BOP procedure regarding the types of off-site activities to be reported under Exelon's BOP, the Staff provided Local 15 with precisely the remedy it sought. Local 15 will now have the opportunity to remedy any alleged vagueness in the Confirmatory Order through its bargaining with Exelon over the specific additional guidance to employees in Revision 10 to Exelon's BOP. Since Local 15 has obtained the relief it requested, Contention 2 is also moot.

The federal courts and the NRC recognize an exception to the mootness doctrine for disputes which are "capable of repetition, yet evading review."²³ This exception applies when: (a) "the challenged action was in its duration too short to be litigated"; and (b) "there is a reasonable expectation that the same complaining party will be subject to the same action again."²⁴ Neither of these prerequisites is met here. First, the Confirmatory Order is permanent, not short-lived. The adjudicatory proceeding on this issue has been lengthy and not been limited by lifespan of the underlying action. Local 15's contentions are not mooted by a short-duration Confirmatory Order, but rather by specific actions requested by Local 15 and taken by Exelon and the NRC Staff to give Local 15 the opportunity to negotiate that it sought. Second, there is no reasonable expectation that Local 15 will be subject to the same action again. As Local 15 itself argued in its original Petition, the

²³ *Comanche Peak*, CLI-93-10, 37 NRC at 205 (citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

²⁴ *Comanche Peak*, CLI-93-10, 37 NRC at 205; see also *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-13-09, 78 NRC ___, slip op. at 7-8 (Dec. 5, 2013) (acknowledging an exception to the mootness doctrine "where the same litigants likely will be subject to similar future action"); *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-13-10, 78 NRC ___, slip op. at 7 (Dec. 5, 2013).

events that led to the Confirmatory Order were an “isolated incident.”²⁵ There is simply no dispute that the events which led to the Confirmatory Order were extraordinary.

To the extent Local 15 is concerned about vindicating its alleged right theorized in the Board’s dissent, as a third-party labor union whose members may be indirectly affected by a Confirmatory Order, to demand a hearing as of right before the NRC, such concerns also do not fall within the exception to the mootness doctrine. Exelon does not anticipate that either silent tolerance of criminal behavior, or planning by union members to commit serious crimes, is widespread or likely to be repeated. Moreover, no such advisory opinion is appropriate here.²⁶ In over half a century of NRC adjudications, there appears to be only a single other reported case involving a challenge by a labor union to a confirmatory order.²⁷ That case was also ultimately vacated as moot due to a settlement between the union and the NRC Staff.²⁸ Clearly there is no reasonable expectation that Local 15 is likely to face a similar situation again.²⁹

²⁵ Petition at 17. For this reason, Local 15’s appeal is also not subject to any exception to the mootness doctrine to address a situation where “the same basic dispute is likely to recur in the future.” *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Plant, Unit 3), LBP-09-15, 70 NRC 198, 210 (2009) (citing *In re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980) (holding that the mootness doctrine did not apply given the “certainty that the identical issue was likely to recur”)).

²⁶ See *San Onofre*, CLI-13-10, 78 NRC ___, slip op. at 8 (declining to issue an advisory opinion, “a practice we disfavor”).

²⁷ See LBP-14-04, 79 NRC at 321-22 (citing *Consumers Power Co. (Palisades Nuclear Power Facility)*, LBP-81-26, 14 NRC 247 (1981), *rev’d on other grounds*, ALAB-670, 15 NRC 493 (1982), *vacated as moot*, CLI-82-18, 16 NRC 50 (1982)).

²⁸ See *Palisades*, CLI-82-18, 16 NRC at 51.

²⁹ Cf. *Roe v. Wade*, 410 U.S. at 125 (“Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be ‘capable of repetition, yet evading review.’”).

III. IN THE ALTERNATIVE THE COMMISSION SHOULD DENY LOCAL 15'S APPEAL FOR ALL OF THE REASONS PREVIOUSLY BRIEFED

In the alternative, even if the Commission does not determine that Local 15's appeal is moot, it should deny Local 15's appeal for all of the additional reasons set forth in Exelon's Brief on Appeal and the NRC Staff's Brief on Appeal.

First, the Relaxation Letter does not affect Exelon's showing and the Board's conclusion that Local 15 was not the *de facto* target of the Confirmatory Order, such that it should be entitled to a hearing as of right without either showing standing or an admissible contention. Local 15's unprecedented and unsupported theory remains unsustainable as a matter of law.³⁰

Second, Local 15's lack of standing in this proceeding is unaffected by the Relaxation Letter. Local 15 still has suffered no injury-in-fact that is within the zone of interest protected by the Atomic Energy Act, is fairly traceable to the Confirmatory Order, and is likely to be redressed by a favorable decision in this proceeding.³¹

Third, the Board acted well within its discretion when it granted Exelon's Motion to Strike Local 15's belated, unsupported, and speculative argument that the Confirmatory Order has the effect of rendering Exelon's operations less safe.³²

And finally, proposed Contentions 1 and 2 remain inadmissible, for all of the reasons set forth in LBP-14-04 and in the briefings on appeal.³³

³⁰ See Exelon's Brief on Appeal at 11-18.

³¹ See *id.* at 18-24.

³² See *id.* at 24-26.

³³ See *id.* at 26-30.

IV. CONCLUSION

For the reasons set forth above, the Commission should deny Local 15's appeal of LBP-14-04 as moot because the NRC Staff's relaxation of the Confirmatory Order provides Local 15 with the relief it originally requested. In the alternative, the Commission should deny the appeal for the reasons set forth in Exelon and the NRC Staff's responses to Local 15's appeal.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

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Dated in Washington, DC
this 26th day of June 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that on this date, copies of “Exelon’s Brief in Response to CLI-15-16” 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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