

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
EXELON GENERATION COMPANY, LLC) Docket Nos. 50-237-EA and 50-249-EA
)
(Dresden Nuclear Power Station))

NRC STAFF'S BRIEF ON MOOTNESS IN RESPONSE TO CLI-15-16

I. Introduction

On June 11, 2015, the Commission issued a Memorandum and Order directing the parties in this proceeding 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.”¹ Accordingly, the NRC Staff (“Staff”) contacted counsel for Local 15, International Brotherhood of Electrical Workers, AFL-CIO (“Local 15”) and Exelon Generation Company, LLC (“Exelon”). Local 15 informed the Staff and Exelon that it did not support a joint stipulation withdrawing its appeal. Because the parties have not agreed to file a joint stipulation, the Staff hereby files its brief on the issue of mootness as directed by the Commission. For the reasons discussed below, the Staff requests the Commission to dismiss Local 15’s appeal of LBP-14-04 as moot.

II. Background²

Currently pending before the Commission is an appeal of Local 15 of the Atomic Safety and Licensing Board’s decision in LBP-14-04 denying Local 15’s petition to intervene and

¹ *Exelon Generation Co. (Dresden Nuclear Power Station), CLI-15-16*, 81 NRC __, __ (Jun. 11, 2015) (slip op. at 4). The Commission provided 15 calendar days for the litigants to file their joint stipulation or respective briefs. *See id.*

² A full summary of this case can be found in the Staff’s brief opposing Local 15’s appeal. *See NRC Staff’s Brief in Opposition to Appeal of LBP-14-04 by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO* (Jun. 6, 2014) at 1-4 (ADAMS Accession No. ML14157A296). For convenience, the Staff here highlights the most recent relevant procedural history of this proceeding.

request for hearing.³ Local 15's petition to intervene contained three contentions challenging the Staff's Confirmatory Order with Exelon,⁴ which required a revision to Exelon's "Behavioral Observation Program."⁵ Local 15's Contention 1 asserted that the Staff's Confirmatory Order with Exelon should not be sustained because it imposes obligations on off-duty Exelon employees without sufficient justification.⁶ In Contention 2, Local 15 claimed 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 concerning behavioral observation without the input of Local 15, the public or the NRC."⁷ Finally, Contention 3 raised concerns about possible violations of the National Labor Relations Act.⁸

While Local 15's appeal was pending before the Commission, Exelon entered into a settlement agreement with the National Labor Relations Board ("NLRB") related to Local 15's unfair labor practice claim. The settlement agreement required Exelon to request a temporary

³ *Corrected Notice of Appeal of LBP-14-04 by Local 15, International Brotherhood of Electrical Workers, AFL-CIO* (May 13, 2014) (ADAMS Accession No. ML14133A634); *Corrected Brief in Support of Appeal of LBP-14-04* (May 13, 2014) (ADAMS Accession No. ML14133A638) (Local 15 Appeal Brief); see *Exelon Generation Co.* (Dresden Nuclear Power Station), LBP-14-04, 79 NRC 319 (2014).

⁴ See *Petition to Intervene and Request for Hearing* (Dec. 12, 2013) (ADAMS Accession No. ML13346B030) (Petition to Intervene).

⁵ 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). The "Behavioral Observation Program" is also known as Exelon procedure SY-AA-103-513, and is required by 10 C.F.R. § 73.56(f) to be a part of the licensee's access authorization program. Prior to the issuance of the Confirmatory Order, Revision 9 of the procedure was in effect. The revised procedure constituted Revision 10. See *Exelon Generation Co.*, CLI-15-16, 81 NRC at ___ (slip op. at 1 n.2).

⁶ *Petition to Intervene* at 15.

⁷ *Id.* at 18.

⁸ *Id.* at 19. Local 15's appeal did not challenge the Board's ruling on this contention. See *Exelon Generation Co.*, LBP-14-04, 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).

relaxation of the Confirmatory Order in order to permit bargaining with Local 15 regarding the revision of its Behavioral Observation Program.⁹ After Exelon submitted its relaxation request, the Staff issued its approval on May 4, 2015.¹⁰ The Staff's approval permitted Exelon to revert to the previous revision (Revision 9) of the Behavioral Observation Program so Exelon and Local 15 can bargain on a new revision that complies with the Confirmatory Order. Under the revised Confirmatory Order, Exelon has until November 30, 2015 to revise its Behavioral Observation Program to "provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials" and "ensure that procedural requirements to pass information forward without delay are clearly communicated."¹¹ The Staff notified the Commission of the change to the Confirmatory Order, prompting the Commission's June 11, 2015 Memorandum and Order.¹²

III. Discussion

In deciding issues of mootness, the Commission looks to the mootness doctrine developed in federal courts.¹³ The mootness doctrine derives from the "case or controversy" requirements of Article III of the Constitution.¹⁴ The Commission generally considers a case or controversy as "moot when the issues are no longer 'live,' or the parties lack a cognizable

⁹ See Exelon Generation Company, LLC, Request for Relaxation of Condition V(A)(A.1(1)) of Confirmatory Order EA-13-068 (Jan. 26, 2015) (ADAMS Accession No. ML15030A079) (discussing NLRB settlement and attaching the settlement agreement).

¹⁰ See Hair, Christopher C., Counsel for the Staff, Memorandum to the Commissioners (May 6, 2015), attaching Pederson, Cynthia D., Regional Administrator, NRC, letter to Bryan C. Hanson, Exelon Generation Company, LLC, and Exelon Nuclear, "Dresden Nuclear PowerStation—Request for Relaxation of Confirmatory Order" (ADAMS Accession No. ML15126A571).

¹¹ *Id.*

¹² *Id.*

¹³ While the Commission is not strictly bound by the federal courts' mootness doctrine, it has traditionally used this doctrine in its adjudicatory proceedings. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-09, 78 NRC 551, 557 n.22 (2013); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993).

¹⁴ U.S. Const. art. III, § 2, cl. 1; see *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

interest in the outcome.”¹⁵ An actual and substantial controversy “admitting of specific relief” must exist at all stages of adjudicatory review, not merely at the time the initial pleading is filed.¹⁶ Consequently, the Commission may dismiss an appeal as moot when effective relief cannot be granted because of intervening events, or where the relief sought would, if granted, not make a difference to the legal interests of the parties.¹⁷

In its June 11, 2015 Memorandum and Order, the Commission noted that “[t]he 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.”¹⁸ Further, the Commission noted that “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.”¹⁹ The Staff agrees. The underlying controversy triggering Local 15’s intervention petition was its exclusion from bargaining over the revision of the Behavioral Observation Program. Local 15 argued in its petition to intervene that because the Behavioral Observation Program revisions were “made without bargaining with the Union, the Union’s and its members’ rights pursuant to the [National Labor Relations Act] have been violated first by the Company and then again by the NRC itself in its affirmance of the Company’s actions.”²⁰ Local 15 noted that “[t]he only way in which these ills can be redressed is through NRC action, specifically,

¹⁵ See *Southern California Edison Co.*, CLI-13-09, 78 NRC at 557 (quoting *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993)).

¹⁶ See *Texas Utilities Electric Co.*, CLI-93-10, 37 NRC at 200 (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

¹⁷ See *id.* (citing *Fair v. EPA*, 795 F.2d 851, 854–55 (9th Cir.1986), where the completion of a sewer project mooted a challenge to EPA’s approval of the project’s construction).

¹⁸ *Exelon Generation Co.*, CLI-15-16, 81 NRC at ___ (slip op. at 4).

¹⁹ *Id.*

²⁰ Petition to Intervene at 7.

either revocation (the Union's preferred remedy) or modification of the Order."²¹ Local 15 argued that it "could not possibly obtain complete relief in any action to enforce its rights under [the National Labor Relations Act] so long as [the] Confirmatory Order remains to shield Exelon's misconduct."²²

Even Local 15's contentions that do not explicitly allege a violation of federal labor law have a lack of bargaining at their foundation. Local 15's petition states, in support of Contention 1, that it "strenuously objects to sweeping changes that detrimentally affect the rights and interests of every single Exelon Generation bargaining unit member being made without genuine basis or need *and without the important input of the Union and the bargaining unit members.*"²³ Similarly, Local 15 argues in support of Contention 2 that the confirmatory order must "receive input from the employees who work subject to the procedures affected by the order and their collective bargaining representative," rather than providing Exelon sole discretion to "implement further changes without any input from its bargaining unit employees."²⁴

The Staff's relaxation of the Confirmatory Order, allowing time for Exelon and Local 15 to bargain on a new revision to the Behavioral Observation Plan, effectively ends the controversy that precipitated Local 15's petition to intervene. First, to the extent that the Confirmatory Order serves as a "shield" to Exelon's exclusion of Local 15 from collective bargaining, the NLRB addressed this issue via the settlement agreement between Exelon and the NLRB which required Exelon to request the NRC to relax the Confirmatory Order. Therefore, due to the Staff's action approving Exelon's relaxation request for "good cause," the NRC no longer can be said to impede Local 15's desired goals. Second, while the Staff's approval of Exelon's

²¹ *Id.* at 8.

²² *Id.* at 13-14.

²³ *Id.* at 18 (emphasis added).

²⁴ *Id.* at 19.

relaxation request did not provide Local 15 with their “preferred” remedy (*i.e.*, total rescission of the Confirmatory Order), it ultimately ensures that Local 15 will have the opportunity to bargain regarding the next revision of the Behavioral Observation Program. The settlement agreement—combined with the Staff’s action relaxing the Confirmatory Order—guarantees that Local 15 receives the relief it sought in this proceeding: the opportunity to bargain collectively.²⁵

Based on the above, there is no actual or substantial controversy in this proceeding. Local 15’s petition seeks revocation or modification of the Confirmatory Order on the basis that the order approves Exelon’s unilateral changes to the Behavioral Observation Program. The Staff has permitted a partial relaxation of the order to permit Local 15 and Exelon to bargain. Therefore, the Confirmatory Order can no longer be said to impede the resolution of Local 15’s labor dispute. In fact, notwithstanding that the Staff’s relaxation has mooted this controversy, the Staff has consistently taken the position in this proceeding that Local 15’s alleged injury (exclusion from the bargaining process) is beyond the scope of an NRC adjudication.²⁶ Given that the Staff believes it has assuaged an otherwise nonjusticiable controversy, it naturally follows that there is no actual or substantial controversy remaining in this proceeding

²⁵ The Staff notes that, subsequent to filing their intervention petition, Local 15’s claims have evolved to include questions regarding the safety implications of the Staff’s enforcement action and Local 15’s right to demand a hearing without demonstrating standing or filing an admissible contention. *See Exelon Generation Co.*, LBP-14-04, 79 NRC at 330 (noting that Local 15’s initial concerns “clearly resided elsewhere” in granting Exelon’s motion to strike new arguments made by Local 15 regarding the safety implications of the Confirmatory Order); *see also* Transcript of Meeting with Exelon Generation Company on 03/06/2014 in Morris, Illinois, at 16 (ADAMS Accession No. ML14070A558) (counsel for Local 15 stating during oral argument that “[a]s you review [Local 15’s] pleadings in this matter you will see that our position as to the basis for our right to hearing has evolved somewhat as we’ve gone along”). While Local 15’s claims made subsequent to its petition to intervene may implicate legal and policy issues for the Commission’s review, there is simply no need to litigate them in a proceeding where no controversy exists.

²⁶ *See NRC Staff Answer to Petition to Intervene and Request for Hearing*, at 7-9 (Jan. 24, 2014) (ADAMS Accession No. ML14024A672) (arguing that such an injury is outside the “zone of interests” protected by the Atomic Energy Act and not fairly traceable to the issuance of the confirmatory order); *NRC Staff’s Brief in Opposition to Appeal of LBP-14-04 by Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO*, at 9, 12-13 (June 6, 2014) (ADAMS Accession No. ML14157A296) (characterizing the controversy over the duty to bargain as an ancillary labor dispute not addressable in an NRC forum and agreeing with the Board’s determination that such concerns do not implicate safety).

necessitating redress from the Commission. Therefore, the Commission should dismiss Local 15's appeal as moot.

IV. Conclusion

For the reasons discussed above, the NRC Staff respectfully requests the Commission to dismiss Local 15's appeal of LBP-14-04 as moot and terminate this proceeding.

Respectfully submitted,

/Signed (electronically) by/

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

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Dated at Rockville, Maryland
this 26th day of June, 2015

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NOTICE OF APPEARANCE

Notice is given that the undersigned attorney enters an appearance in the above-captioned matter in accordance with 10 C.F.R. § 2.314(b).

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Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 26th day of June, 2015.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF ON MOOTNESS IN RESPONSE TO CLI-15-16" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 26th day of June, 2015.

/Signed (electronically) by/

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