

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,
50-249-EA

CLI-16-06

MEMORANDUM AND ORDER

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 hearing request in this enforcement matter.¹ The Staff and the licensee, Exelon Generation Company, LLC, request that we uphold the Board's decision.² As discussed below, we find that intervening events in this matter have resolved the controversy that gave rise to Local 15's hearing request in the first instance. In the absence of a live controversy, we dismiss Local 15's appeal as moot.

¹ *Notice of Appeal of LBP-14-04 by Local 15, International Brotherhood of Electrical Workers, AFL-CIO* (May 12, 2014) (Local 15 Notice of Appeal); *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 *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); *Exelon's Answer Opposing Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO's Appeal of LBP-14-04* (June 6, 2014).

I. BACKGROUND AND PROCEDURAL HISTORY

This case concerns an unusual enforcement matter associated with the Dresden Nuclear Power Station. In May 2012, an off-duty Dresden senior reactor operator (SRO) hijacked a car at gunpoint; he was later arrested and convicted of aggravated vehicular hijacking.³ Shortly after the arrest of the SRO, an equipment operator with unescorted plant access told several individuals (including Exelon and NRC personnel) that he was asked approximately a year earlier by the SRO and another individual to participate in a violent crime.⁴

NRC regulations require a licensee's access authorization program to include a behavioral observation program designed to detect activities or behaviors that may present an unreasonable risk to public health and safety.⁵ The NRC Staff conducted an investigation to determine whether

³ The NRC terminated the individual's senior reactor operator license at the request of the licensee and subsequently issued an order prohibiting his involvement in licensed activities; the licensee terminated his employment at the plant. See *In the Matter of Michael J. Buhrman*; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 78 Fed. Reg. 66,970 (Nov. 7, 2013).

⁴ Letter from Gary L. Shear, NRC, to Michael J. Pacilio, Exelon Generation Company, LLC and Exelon Nuclear, "Dresden Nuclear Power Station, Units 2 and 3; Report Nos. 05000237/2013407; 05000249/2013407 (DRS) and Results of Investigation Report No. 3-2012-020" (July 3, 2013) (Investigation Summary Letter) & Enclosure, "Factual Summary of NRC Investigation" (ADAMS accession no. ML13184A232) (Investigation Summary). The NRC prohibited the other individual, also an SRO, from licensed activities, but took no enforcement action against the equipment operator. See *generally* *In the Matter of Landon E. Brittain*; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 78 Fed. Reg. 66,968 (Nov. 7, 2013). Exelon terminated the employment of the second SRO and the equipment operator. See *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), at 2-3; *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).

⁵ Investigation Summary Letter at 1-2. Section 73.56(a)(2) requires that a licensee establish, implement, and maintain an access authorization program. Section 73.56(f)(1) requires access authorization programs to "include a behavioral observation program that is designed to detect behaviors or activities that may constitute an unreasonable risk" to the public health and safety and common defense and security. Section 73.56(f)(3) requires (in part) that individuals subject to an access authorization program "shall, at a minimum report any concerns arising from behavioral observation, including, but not limited to, concerns related to any questionable behavior patterns or activities of others to a reviewing official, his or her supervisor, or other management personnel" as designated in site procedures. The recipient of the report (if not the reviewing official) must convey

personnel at Dresden knew that the former SRO planned to commit an offsite crime and willfully failed to report him to plant management for “aberrant behavior.”⁶ Based upon the results of this investigation, the NRC staff identified several examples of an apparent violation of 10 C.F.R. § 73.56(a)(2), (f)(1), and (f)(3).

The Staff notified Exelon of the apparent violation, and, among other things, offered Exelon an opportunity to request alternative dispute resolution, which Exelon accepted.⁷ During the alternate dispute resolution session, a preliminary settlement was reached.⁸ The resulting Confirmatory Order memorialized a number of actions Exelon had already completed, and Exelon agreed to a number of additional actions. As relevant here, the order acknowledged that Exelon had already revised its Behavioral Observation Program “to indicate that the . . . program includes an expectation to report offsite illegal activity.”⁹ Exelon also volunteered to further revise its Behavioral Observation Program within ninety days to provide additional guidance on the type of credible information or offsite activities (if observed) that employees should report to their management.¹⁰ In consideration of this and Exelon’s other commitments, the Staff agreed that it

the report to the reviewing official, who in turn will re-assess the reported individual’s unescorted access or unescorted access authorization status.

⁶ See Investigation Summary at 1.

⁷ See Letter from Steven K. Orth, Region III, NRC, to Michael J. Pacilio, Exelon Generation Company, LLC and Exelon Nuclear, “Alternative Dispute Resolution Session on September 18, 2013” (Sept. 9, 2013) (ML13253A196).

⁸ Confirmatory Order, 78 Fed. Reg. at 66,965.

⁹ *Id.*

¹⁰ *Id.* Revision 10 to Exelon’s Behavioral Observation Program includes the changes memorialized by the Confirmatory Order. See SY-AA-103-513 (Rev. 10) (2014) (attached as Ex. 3 to *Reply of Local Union 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).

Exelon also agreed to provide its employees training on the new revision within ninety days of its completion and to conduct an effectiveness assessment of the revised procedures and of the employee training within eighteen months of the Confirmatory Order’s effective date. All activities save the effectiveness assessment were completed. Letter from Patrick R. Simpson, Exelon Generation Company, LLC, to Kenneth O’Brien, Region III, NRC, “Response to Confirmatory Order

would issue no finding, notice of violation, or civil penalty, and that it would take no other enforcement action with respect to this matter.¹¹ The Confirmatory Order applied not only to Dresden, but also to Exelon's entire fleet of operating reactors.¹²

The notice of issuance of the Confirmatory Order included an opportunity to request a hearing.¹³ In response, Local 15 sought a hearing and submitted three contentions.¹⁴ In Contention 1, Local 15 asserted that the Confirmatory Order should not be sustained because it imposed obligations on off-duty Exelon employees without justification.¹⁵ In Contention 2, the Local asserted that the Confirmatory Order should not be sustained because it imposed on Exelon employees behavioral observation and reporting requirements that were "vague, over-broad and not carefully tailored . . . and improperly delegates to Exelon the discretion to interpret and implement NRC standards" for behavioral observation.¹⁶ Local 15's Contention 3 raised concerns about possible violations of the National Labor Relations Act.¹⁷ Related to its Contention 3, but as a matter separate from this adjudication, Local 15 pursued unfair labor practice charges before the

EA-13-068" (Sept. 30, 2014) (ML14273A482); Letter from Richard A. Skokowski, Region III, NRC, to Michael J. Pacilio, Exelon Generation Company, LLC and Exelon Nuclear, "[Acknowledgment] of Exelon Generation Company Response to NRC Request for a Written Response to Confirmatory Order EA-13-068" (Nov. 17, 2014) (ML14322A472). Because the procedure has since been further revised, new dates to complete the associated training and effectiveness assessment have been established. See *infra* note 24.

¹¹ Confirmatory Order, 78 Fed. Reg. at 66,966.

¹² *Id.* at 66,965.

¹³ *Id.* at 66,966.

¹⁴ See *Petition to Intervene and Request for Hearing* (Dec. 12, 2013) (Local 15 Petition).

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 19.

National Labor Relations Board (NLRB).¹⁸ In LBP-14-4, the Board denied Local 15's request for hearing on the grounds that the Local had neither demonstrated standing nor submitted an admissible contention.¹⁹ Local 15's appeal followed.

Local 15 challenged the Board's standing determination as well as its rejection of Contentions 1 and 2. Local 15 also argued that the Board erred when it concluded that our regulations do not entitle the union to a hearing as of right.²⁰ The Local did not appeal the Board's rejection of Contention 3.

During the pendency of the Local's appeal, Exelon informed the Staff that it had entered into a settlement agreement regarding the NLRB case, and it requested a temporary relaxation of the Confirmatory Order to implement the NLRB settlement agreement.²¹ In particular, Exelon requested that the Staff relax the Confirmatory Order to "permit a temporary rescission of the additional guidance to employees concerning their reporting obligations" provided in Revision 10; the relaxation would allow Exelon and Local 15 additional time to bargain "over the effects of [Exelon's] decisions to make revisions to its [Behavioral Observation Program] to comply with the Confirmatory Order."²²

¹⁸ See, e.g., 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 (providing the status of the NLRB matter).

¹⁹ LBP-14-4, 79 NRC at 334. Judge Karlin filed a dissenting opinion. *Id.* at 339-76.

²⁰ See Local 15 Notice of Appeal; Local 15 Appeal Brief.

²¹ See Letter from Shane Marik, Exelon Generation Company, LLC, to Cynthia D. Pederson, 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 (ML15030A079) (Relaxation Request).

²² *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, related to the timing of completion of training and the completion of the effectiveness assessment, likewise be relaxed. Letter from Tamra Domeyer,

The Staff approved Exelon's relaxation request.²³ The approval permitted Exelon to "revert to [Revision 9 of the Behavioral Observation Program] until Exelon and Local 15 can bargain on a new revision that complies with the Confirmatory Order."²⁴ Exelon has informed us that it has completed bargaining with Local 15 "over the effects of Exelon's decision to implement changes to [Revision 10 of the Behavioral Observation Program]."²⁵ And Exelon has implemented a revised Behavioral Observation Program, incorporating revisions to the Program resulting from the negotiations with Local 15.²⁶

Upon learning of the Staff's approval of the Relaxation Request and the actions to be taken in furtherance of the NLRB settlement, we sought briefing from the litigants as to the impact of the

Exelon Generation Company, LLC, to Jared Heck and Steven Orth, Region III, NRC, "Supplemental Information for Request for Relaxation of Condition V(A)(A.1(1)) of Confirmatory Order EA-13-068" (Apr. 13, 2015) (ML15106A427).

²³ Memorandum from Christopher C. Hair, Counsel for the Staff, to the Commissioners (May 6, 2015) (Staff Notification), attaching Letter from Cynthia D. Pederson, Region III, NRC, to Bryan C. Hanson, Exelon Generation Company, LLC, and Exelon Nuclear, "Dresden Nuclear Power Station—Request for Relaxation of Confirmatory Order" (May 4, 2015) (ML15125A103) (Relaxation Approval).

²⁴ Staff Notification at 1. The Staff's approval extended the dates for compliance with the Confirmatory Order to allow for the actions discussed above. The relaxation revised the Order to provide (1) for revision of Exelon procedure SY-AA-103-513 until November 30, 2015, (2) for Exelon to provide training to its staff on this revision by January 15, 2016, and (3) for Exelon's development and conduct of an effectiveness assessment of the revised procedure and associated training by May 31, 2016. Relaxation Approval at 2.

²⁵ *Commission Notice* (Sept. 25, 2015). The notice attaches a letter from Exelon to Local 15 providing Exelon's representation to the Local that the bargaining required by the settlement had been completed. See Letter from Philip Brzozowski, Exelon Generation, to Dave Sergenti and Bill Phillips, IBEW Local 15 (Sept. 23, 2015) (Brzozowski Letter).

²⁶ See Brzozowski Letter at 2 (unnumbered) ("[Exelon] intends to implement Rev. 10 [of the Behavioral Observation Program] incorporating the parties' agreed-upon revisions regarding the matters over which we were obliged to bargain."). In a status report to the NRC, Exelon indicated that minor changes to Revision 10 of Exelon procedure SY-AA-103-513 were negotiated; Exelon implemented the revised procedure by November 30, 2015. See Letter from David M. Gullott, Exelon Generation Company, LLC, to Kenneth O'Brien, Region III, NRC, "Annual Response to Confirmatory Order EA-13-068 (Oct. 28, 2015) (ML15302A183); see also Letter from Steven K. Orth, Region III, NRC, to Bryan C. Hanson, Exelon Generation Company, LLC and Exelon Nuclear, "Acknowledgment of Annual Response to Confirmatory Order EA-13-068" (Nov. 6, 2015) (ML15313A207).

actions undertaken by Local 15 and Exelon on this adjudication.²⁷ Specifically, we directed 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.”²⁸ The litigants did not agree to a joint stipulation.²⁹ Consistent with our direction in CLI-15-16, the litigants provided their views as to whether Local 15’s appeal should be dismissed as moot. Local 15, Exelon, and the Staff filed initial and reply briefs.³⁰ Local 15 argues that its appeal is not moot. Exelon and the Staff argue that it is. We consider the mootness question below.

II. DISCUSSION

We will consider a case or controversy to be “moot when the issues are no longer ‘live,’ or the parties lack a cognizable interest in the outcome.”³¹ In determining mootness, we look to “whether the relief sought would, if granted, make a difference to the legal interests of the

²⁷ CLI-15-16, 81 NRC 810 (2015).

²⁸ *Id.* at 813.

²⁹ *NRC Staff’s Brief on Mootness in Response to CLI-15-16* (June 26, 2015), at 1 (Staff Initial Brief); *Local 15’s Brief in Response to the Commission’s June 11, 2015 Memorandum and Order* (June 26, 2015), at 1 (Local 15 Initial Brief).

³⁰ See *Local 15 Initial Brief*; *Exelon’s Brief in Response to CLI-15-16* (June 26, 2015); *Staff Initial Brief*; *Local 15’s Reply to NRC Staff and Exelon Briefs in Response to CLI-15-16* (July 6, 2015) (Local 15 Reply Brief); *Exelon’s Brief in Reply Regarding CLI-15-16* (July 6, 2015); *NRC Staff’s Reply to Local 15 and Exelon’s Briefs in Response to CLI-15-16* (July 6, 2015) (Staff Reply Brief).

³¹ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 557 (2013) (quoting *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993)). We are not strictly bound by the “case or controversy” requirement, but we generally follow it “absent the most compelling reasons.” *Comanche Peak*, CLI-93-10, 37 NRC at 200 n.28 (citations omitted).

parties.”³² And when subsequent events outrun the controversy, we will ordinarily dismiss a case as moot.³³

A. Mootness of Local 15’s Appeal

The fundamental dispute here is whether the controversy has been resolved by the temporary relaxation of the Confirmatory Order—specifically the rescission of Revision 10 of the Behavioral Observation Program procedure—and the Local’s opportunity to negotiate with Exelon on revised language concerning the types of obligations to be imposed on Exelon employees under the program. As discussed below, we find that it has.

Local 15 contends that the settlement of its unfair labor practice charge in the parallel case before the NLRB, provides it with “only a small portion of the relief it originally sought.”³⁴ Specifically, Local 15 argues that the resolution of the unfair labor practice charge relates only to Contention 3, leaving Contentions 1 and 2 unresolved.³⁵ The Local takes the position that, as described in those two contentions, the Confirmatory Order itself imposes improper obligations on Exelon employees that may only be remedied by rescission of the order.³⁶ Local 15 asserts that the settlement of the NLRB complaint addressed only the *effects* of the Confirmatory Order, rather than the “contents of or obligations imposed by the Order itself.”³⁷ But it is the effects of the

³² *Comanche Peak*, CLI-93-10, 37 NRC at 200 (quoting *Air Line Pilots Ass’n Int’l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990)).

³³ *Id.*; *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980) (holding that a tribunal may “dismiss those matters placed before them which have been mooted by supervening developments”); see *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 55 (D.C. Cir. 2001).

³⁴ Local 15 Initial Brief at 2.

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ *Id.* at 4. The record reflects that the NLRB concluded that Exelon was not required to bargain over (among other things) the decision to settle the enforcement matter with the NRC and consent to the Confirmatory Order, but was obliged to bargain over the effects of those decisions and over

Confirmatory Order (and, specifically, the provisions of Revision 10 to which the Local objects) that directly impacted Exelon employees, including members of Local 15. In our view the NLRB settlement provided Local 15 with the fundamental relief requested in this proceeding—the opportunity to address with Exelon the Local’s concerns regarding Exelon’s Behavioral Observation Program procedure.

As noted above, in Contention 1, the Local challenged the obligations placed on off-duty employees to report certain conduct of other employees. And in Contention 2, the Local opposed the imposition of observation and reporting obligations that are “vague, over-broad, and not carefully tailored” and argued that the Confirmatory Order delegates to Exelon the discretion to implement and interpret NRC standards. Both contentions are premised upon Local 15’s objection that the revisions to the Behavioral Observation Program were made without the involvement of the union.³⁸ And both of these contentions challenge the Behavioral Observation Program procedure itself.³⁹

the guidance to employees contained in Revision 10 of the Behavioral Observation Program. Relaxation Request at 4-5.

³⁸ Local 15 Petition at 18 (regarding Contention 1, stating that “the Union strenuously objects to sweeping changes that detrimentally affect the rights and interests of every single Exelon Generation bargaining unit member being made without genuine basis or need and without the important input of the Union and the bargaining unit members”); *id.* at 19 (regarding Contention 2, stating that, although the Order instructs Exelon “to provide additional guidance on the types of offsite activities, if observed, or credible information that should be reported to reviewing officials, this instruction neither cabins Exelon’s discretion in developing that guidance nor acknowledges Exelon’s duty, pursuant to federal labor law, to engage in bargaining over its employees’ terms and conditions of employment with their duly authorized bargaining representative.” (internal quotations omitted)).

³⁹ Indeed, the Confirmatory Order itself imposed few additional requirements beyond those already found in Revision 10: it required Exelon to provide additional guidance on what activities should be reported and required Exelon to clearly communicate that such reporting should occur immediately. 78 Fed. Reg. at 66,965. Local 15 did not raise a substantial challenge to the additional requirements in the order; instead the Local focused on the infirmities in Revision 10 to the Behavioral Observation Program. Local 15 Petition at 15-21 (objecting to the language in the Confirmatory Order requiring Exelon to develop additional guidance primarily on the ground that the language was not sufficient to remedy the alleged defects in Revision 10); see *Comanche Peak*, CLI-93-10, 37 NRC at 200 (noting that when a case no longer raises a “substantial” controversy, it is moot).

Revision 10 of Exelon's Behavioral Observation Program—the revision to which Local 15 objected—has been superseded. As discussed above, Exelon obtained from the Staff a temporary relaxation of the Confirmatory Order, and Exelon and Local 15 thereafter bargained over a new revision to the Behavioral Observation Program, which has now been put in place. Thus, the specific conditions about which the Local complains, as well as its concern that these conditions were implemented without being subjected to the negotiation process, have been addressed.

To be sure, Local 15 was not guaranteed a particular outcome through the collective bargaining process, and we recognize that the Local may not have obtained all of the changes to the Behavioral Observation Program that it sought. The newly revised program procedure is not part of the record of this proceeding, and we did not review it. The precise revisions to the procedure, however, are not material to our determination. Local 15 has now had a seat at the table with Exelon, in the context of collective bargaining, to negotiate its concerns about the Behavioral Observation Program identified in its Contentions 1 and 2, including the obligations of off-duty employees, Local 15's concerns regarding the asserted vagueness or breadth of those obligations, and Exelon's implementation of the program. Put another way, Exelon and Local 15 squarely addressed the revisions to the Behavioral Observation Program that Local 15 challenged in its Contentions 1 and 2. Further, as noted above, Revision 10 has been rescinded and a new revision put in place that reflects these negotiations. As facilitated by the Staff's temporary relaxation of the Confirmatory Order, implementation of the NLRB settlement has resolved the underlying controversy in this case and rendered it moot.⁴⁰

We have recognized an exception to the mootness doctrine when “a case is capable of repetition, yet evading review.”⁴¹ Local 15 invokes that exception and asserts that, because Exelon

⁴⁰ We have reviewed Commissioner Baran's dissent, and it does not change our opinion that this case is moot. See, e.g., *supra* note 39 and text. Moreover, we decline to permit Local 15 to re-litigate here what it fairly negotiated with Exelon in its settlement agreement before the NLRB.

⁴¹ See, e.g., *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-10, 78 NRC 563, 568 n.35 (2013) (citations omitted). Similarly, we have found an

continues to operate nuclear plants and Local 15 continues to represent bargaining unit employees at those plants, “it is entirely likely that there will be future enforcement actions involving Exelon that have an adverse effect on its employees.”⁴² That exception, as discussed below, is not applicable here.

An injury “capable of repetition” requires “a reasonable expectation that the same complaining party would be subjected to the same action again.”⁴³ We find no reasonable expectation that the same parties will confront the same issues again. The events that led to the Confirmatory Order in this matter, set forth above, were highly unusual and are unlikely to recur.⁴⁴ And to evade review, a challenged action must be “too short to be fully litigated prior to its cessation or expiration.”⁴⁵ Local 15 argues that a future enforcement order could—like the Confirmatory Order here—require Exelon to make, within ninety days, changes to its Behavioral Observation Program that would have an adverse effect on employees. Local 15 states its concern that, within that time frame, it would be unable to obtain a Licensing Board ruling or Commission decision on a challenge to such an order.⁴⁶ On this point, we agree with the Staff that the underlying action must be inherently short-lived, which is not the case here: by its terms, the

exception “when the same litigants are likely to be subject to similar future action.” *Id.* at 568 (citing *San Onofre*, CLI-13-9, 78 NRC at 551, 557-58).

⁴² Local 15 Initial Brief at 7-8; see Local 15 Reply Brief at 3 (stating that “it is reasonably likely that the NRC will engage in enforcement actions with Exelon which have an effect on the terms and conditions of bargaining unit members’ employment”).

⁴³ *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009); see *Comanche Peak*, CLI-93-10, 37 NRC at 205 & n.53.

⁴⁴ To the extent that Local 15 asserts more generally that the possibility of future enforcement actions involving Exelon will have an effect on the bargaining unit members’ employment, the Local’s argument is speculative and likewise does not fall within this narrow exception. See *Munsell v. Dep’t of Agric.*, 509 F.3d 572, 583 (D.C. Cir. 2007) (“speculation [as to future events], without more, does not shield a case from a mootness determination”) (internal quotes omitted).

⁴⁵ *Del Monte*, 570 F.3d at 322; *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio, 44041), CLI-93-8, 37 NRC 181, 185 (1993).

⁴⁶ Local 15 Initial Brief at 8.

Confirmatory Order does not expire after the implementation period.⁴⁷ Standing alone, an implementation deadline in a future enforcement order of the same type would have no effect on Local 15's ability to seek and obtain relief on such an order. Local 15's appeal is not appropriate for consideration under an exception to the mootness doctrine.⁴⁸

B. Advisory Opinion on the Question of Local 15's Hearing Rights

One other matter merits mention. Local 15 asserts that dismissal of its appeal now would leave unanswered the collateral question whether Local 15 may demand a hearing as of right under 10 C.F.R. § 2.202(a)(3).⁴⁹ This issue was initially raised not by the Local, but by the Board itself. Prior to oral argument, the Board posed questions to the litigants; several of these related to the application of section 2.202(a)(3) to Local 15.⁵⁰ That provision requires the Staff to “[i]nform the licensee or any other person adversely affected by the order of his or her right . . . to demand a hearing . . . except in a case where the licensee or other person has consented in writing to the order.”⁵¹ As part of its response to the Board's questions, Local 15 requested that the Board apply section 2.202(a)(3) to the Local and find that, as an entity “adversely affected” by the Confirmatory

⁴⁷ See Staff Reply Brief at 4-5 & n.20.

⁴⁸ In its initial brief, Local 15, anticipating a possible argument from Exelon, asserts that the matter is not mooted by the actions taken by Exelon in furtherance of the NLRB settlement. Local 15 Initial Brief at 9 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (“a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice”) (citation omitted). This “voluntary cessation” exception is intended to prevent a party from evading review by taking temporary action to preclude a possible adverse decision. *Laidlaw*, 528 U.S. at 189. Local 15 does not argue, nor do we otherwise find, that Exelon is likely to fail to abide by the terms of the NLRB settlement agreement should we dismiss this case as moot.

⁴⁹ Local 15 Initial Brief at 6.

⁵⁰ Order (Concerning Instructions for Oral Argument) (Feb. 5, 2014) (unpublished); see *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) (Local 15 Memorandum); *NRC Staff Memorandum in Response to Board Order Concerning Instructions for Oral Argument* (Feb. 28, 2014) (Staff Memorandum); *Exelon's Memorandum Responding to the Questions in the Board's February 5, 2014 Order* (Feb. 28, 2014).

⁵¹ 10 C.F.R. § 2.202(a)(3).

Order, the Local was entitled to a hearing and need not satisfy the standing and contention admissibility requirements.⁵² The Board declined to do so, concluding that the regulatory history of the provision makes clear that we “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.”⁵³

In view of our determination that Local 15’s appeal is moot, we decline to reach the question of the applicability of section 2.202(a)(3) to the union in this instance, as such an opinion would be advisory in nature. We disfavor the issuance of advisory opinions and prefer instead to address issues in the context of a concrete dispute.⁵⁴

⁵² Local 15 Memorandum at 2.

⁵³ LBP-14-4, 79 NRC at 325. Judge Karlin disagreed; he took the view that members of Local 15 qualify as individuals “adversely affected by the order” within the meaning of section 2.202(a)(3). LBP-14-4, 79 NRC at 341-49 (Karlin, J., dissenting).

⁵⁴ *San Onofre*, CLI-13-10, 78 NRC at 568-69; see *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008).

III. CONCLUSION

For the reasons discussed above, we *dismiss* Local 15's appeal as moot and *terminate* this proceeding.⁵⁵

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
This 5th day of April, 2016

⁵⁵ No inference should be drawn with respect to our view of the correctness of the Licensing Board's decision in LBP-14-4; we express neither approval nor disapproval of that decision. Similarly, we have reviewed Commissioner Baran's dissent, which provides his views on the merits of Local 15's appeal. Because that appeal is moot, we do not comment on the views he has expressed.

Additional Views of Commissioner Svinicki

I fully join my colleagues in the majority opinion. Although I need not do so, I elect to write separately to draw into sharp relief the juxtaposition between the majority's holding and Judge Karlin's critique of our hearing process in his dissenting opinion. Judge Karlin argued that our procedural regulations for adjudicatory hearings, while not contrary to law, cumulatively impose a barrier to public participation that is unnecessarily stringent.¹ Having now served a number of years in an adjudicatory capacity on this Commission, I do not agree with Judge Karlin's characterizations of specific aspects of our hearing process.² More fundamentally, I do not share his observation that our regulations are needlessly strict. As the Commission has often stated, our contention admissibility requirements are "strict by design" to ensure that NRC hearings "serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues."³ Consequently, when petitioners bring claims that are not susceptible to such adjudications, we frequently direct them toward other processes or government agencies.⁴ In the instant case, Local 15's ability to find relief in another venue that moots the underlying contention shows the inherent benefit of adherence to this principle and reveals Judge Karlin's concerns as, at best, significantly overstated. Rather than frustrate the public interest, the Board's application of

¹ LBP-14-4, 79 NRC at 372-76 (Karlin, J., dissenting).

² *E.g., compare id.* at 374 (alleging that in NRC adjudications the Staff "*always opposes the request for a hearing*") (citing *U.S. Dep't of Energy* (High-Level Waste Repository), CAB-02, Tr. at 352-55 (Apr. 1, 2009) (ML090910293)) *with Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 276, 285 (2010) (noting that the Staff agreed that the intervenor had shown standing and provided at least one admissible contention (thereby satisfying the requirements for a hearing request)).

³ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station Unit 2), CLI-03-14, 58 NRC 207, 213 (2003).

⁴ *E.g., Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 230 (2015); *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 NRC __, __ (Nov. 9, 2015) (slip op. at 17 & n.69).

our procedural regulations allowed the underlying dispute to be resolved in a suitable venue.

Therefore, instead of creating what Judge Karlin describes as “an exclusionary fortress against the conduct of adjudicatory hearings,”⁵ our procedures ensure that NRC adjudications are narrowly focused and that the agency refrains from attempting to adjudicate claims that are more readily or effectively resolved through a different NRC process or by a different entity altogether.

⁵ LBP-14-4, 79 NRC at 375.

Commissioner Baran, Dissenting

I respectfully dissent from the majority's decision. A contention seeking rescission of the NRC Confirmatory Order cannot be moot if the order remains in place. Rather than dismissing the appeal as moot, the Commission should rule on Local 15's appeal of the Licensing Board's decision and find that Local 15 has established standing and submitted an admissible contention on which a hearing should be held.

I. Mootness

The mootness finding in the majority decision relies on two underlying premises: first, that the fundamental relief sought by Local 15 was the opportunity to collectively bargain with Exelon on changes to the company's Behavioral Observation Program procedure, and second, that Local 15's challenge to the NRC Confirmatory Order is really just a challenge to this Exelon procedure. In my view, neither of these premises is consistent with or supported by the actual arguments made by Local 15.

The relief sought by Local 15 is not limited to its ability "to negotiate with Exelon on revised language concerning the types of obligations to be imposed on Exelon employees under the program."¹ Nor do Local 15's pleadings merely challenge Revision 10 of Exelon's Behavioral Observation Program procedure. Although the concern with collective bargaining is one element of Local 15's initial petition, Local 15 also seeks rescission of the Confirmatory Order on the grounds that its members will be directly harmed by the order and that the order will negatively impact public health and safety. For example, Local 15 contends that the Confirmatory Order will adversely impact safety because it "will likely have introduced into the reporting requirements numerous ambiguities and inconsistencies and rendered employee compliance far more

¹ Majority Decision at 9.

uncertain.”² Collective bargaining over Revision 10 of Exelon’s procedures does not and cannot address these concerns. As Local 15 stated in its brief regarding mootness, while the NRC Staff temporarily relaxed the Confirmatory Order to allow for collective bargaining, “that bargaining will remain fully circumscribed by the entirety of the Confirmatory Order itself.”³ According to Local 15, “[t]he obligations imposed by the Confirmatory Order—as a separate matter from those imposed by Exelon—remain every bit as objectionable as they were when Local 15 first filed its Petition to Intervene.”⁴

As long as the Confirmatory Order remains in place, Local 15’s contention seeking its rescission is not moot. The fact that “Local 15 has now had a seat at the table with Exelon, in the context of collective bargaining”⁵ does nothing to change that. As the Staff and Exelon acknowledge in their briefs, the Staff provided a temporary relaxation of a permanent order to allow Local 15 and Exelon to collectively bargain regarding Exelon’s procedure. The relaxation period expired on November 30, 2015, so the Confirmatory Order is again in effect and Local 15’s concerns with the terms of the Confirmatory Order itself are not resolved.⁶ Therefore, issues raised in Local 15’s initial petition remain live.

Because this case is not moot, the Commission should rule on Local 15’s appeal of the Licensing Board’s decision in LBP-14-4 denying Local 15’s petition to intervene and request for

² *Petition to Intervene and Request for Hearing* (Dec. 12, 2013), at 5 (Local 15 Petition); *Brief in Support of Appeal of LBP-14-04* (May 12, 2014), at 24-25 (Local 15 Appeal Brief).

³ *Local 15 Brief in Response to the Commission’s June 11, 2015 Memorandum and Order* (June 26, 2015), at 5.

⁴ *Id.*

⁵ Majority Decision at 12.

⁶ See Memorandum from Christopher C. Hair, Counsel for the Staff, to the Commissioners (May 6, 2015), attaching Letter from Cynthia D. Pederson, Region III, NRC, to Bryan C. Hanson, Exelon Generation Company, LLC, and Exelon Nuclear, “Dresden Nuclear Power Station—Request for Relaxation of Confirmatory Order” (May 4, 2015) (ML15125A103).

hearing.⁷ I would affirm in part and reverse in part the Board's decision to deny Local 15's petition and remand this matter to the Board for a hearing on Local 15's Contention 2.

II. Standing

In this enforcement proceeding, the threshold question that must be resolved relates both to standing and contention admissibility—whether the hearing request is within the scope of the proceeding as outlined in the Confirmatory Order.⁸ The controlling precedent on requests to intervene in enforcement proceedings is *Bellotti v. NRC*, which affirmed the Commission's authority under section 189a. of the Atomic Energy Act to define the scope of an enforcement proceeding and to limit that scope to whether to sustain the order.⁹ As the Commission has stated, "The rationale underlying *Bellotti* is that, when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation."¹⁰ The Commission also has explained, "The upshot of the post-*Bellotti* cases is that a petitioner may obtain a hearing only if the measures to be taken under the order would in themselves harm the petitioner."¹¹

This case presents different factual circumstances than those analyzed in the Commission's post-*Bellotti* cases to date, each of which found that the party that was not the direct subject of the order lacked standing. In each of those cases, the petitioners sought stronger enforcement orders or different penalties against the licensee. Here, Local 15 seeks to overturn

⁷ LBP-14-4, 79 NRC 319 (2014).

⁸ *Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 405, *reconsideration denied*, CLI-04-38, 60 NRC 652 (2004).

⁹ *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

¹⁰ *Alaska DOT*, CLI-04-26, 60 NRC at 405.

¹¹ *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)*, CLI-13-2, 77 NRC 39, 45 (2013).

the Confirmatory Order on the grounds that its members will be directly harmed by the order and that the order will negatively impact public health and safety.

In this case, the Board found that Local 15 did not demonstrate standing. As a general matter, the Commission looks to “contemporaneous judicial concepts of standing” in assessing whether a petitioner has standing to intervene.¹² To establish standing, a petitioner must demonstrate a “concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision,’ where the injury is ‘to an interest arguably within the zone of interests protected by the governing statute.’”¹³

The Board focused its inquiry on whether Local 15 has demonstrated that its asserted injury falls within the zone of interests arguably protected under the statute at issue and found that it did not. Given its holding on the zone of interests test, the Board did not focus on the core standing requirements. I would find that Local 15 has met the basic standing requirements of injury in fact, causation, and redressability and that Local 15 meets the zone of interests test.

Local 15 argues that its individual members will be directly harmed by this Confirmatory Order, which it asserts subjects its members “for the first time to observation and reporting obligations concerning observed off-duty and off-site conduct that are both intrusive and ill-defined and violations of which can form the basis for discipline and/or the denial of security access,” including possible termination of employment.¹⁴ Local 15 also contends that the Confirmatory Order will adversely impact safety because it “will likely have introduced into the reporting requirements numerous ambiguities and inconsistencies and rendered employee compliance far

¹² *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

¹³ *Id.* at 915 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)).

¹⁴ Local 15 Petition at 7.

more uncertain.”¹⁵ The Staff and Exelon disagree, arguing that the Confirmatory Order provided more clarity than the regulation and therefore that it cannot cause an injury in fact.¹⁶ But the question of whether the Confirmatory Order provided more specificity and clarity (as claimed by the Staff and Exelon) or caused confusion and reduced safety (as claimed by Local 15) is a dispute of fact. For standing purposes, we do not rule on disputes of fact but read the petition in the light most favorable to the petitioner.¹⁷ It is undisputed that members of Local 15 will be affected by the order, and here, their representative has claimed with a supporting affidavit that these changes will harm those members and reduce safety. Consequently, Local 15 has pled a sufficient injury in fact to meet our standing requirements. Local 15 has met the causation requirement because the asserted injury is “fairly traceable” to the issuance of the Confirmatory Order. Similarly, the asserted harm can be redressed in this proceeding by a favorable decision—that is, the revocation of the Confirmatory Order. Therefore, Local 15 meets the basic standing requirements.

The next question is whether the asserted harm arguably falls within the zone of interests of the Atomic Energy Act.¹⁸ To evaluate Local 15’s zone-of-interests claim, “we first discern the interests ‘arguably . . . to be protected’ by the statutory provision at issue; we then inquire whether the plaintiff’s interests affected by the agency action in question are among them.”¹⁹ The Atomic

¹⁵ *Id.* at 5; Local 15 Appeal Brief at 5, 19-20.

¹⁶ *Exelon’s Answer Opposing Local Union No. 15, International Brotherhood of Electrical Workers, AFL-CIO’s Appeal of LBP-14-04* (June 6, 2014), at 19-20, 23-24 (Exelon Answer); *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), at 9-13 (Staff Answer).

¹⁷ See, e.g., *Georgia Institute of Technology (Georgia Tech Research Reactor)*, CLI-95-12, 42 NRC 111, 115 (1995).

¹⁸ See *Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico)*, CLI-98-11, 48 NRC 1, 8 (1998), *petition for review denied, Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999); *U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant)*, CLI-01-23, 54 NRC 267, 272-73 (2001).

¹⁹ *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (omission in original); see also *USEC*, CLI-01-23, 54 NRC at 272-73; *Ambrosia Lake*, CLI-98-11, 48 NRC at 11.

Energy Act “concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security.”²⁰ In the enforcement context, one way in which an injury can fall within the zone of interests protected by the Atomic Energy Act is where it “is based on the premise that [the Order’s] terms, if carried out, would be affirmatively contrary to the public health and safety.”²¹

Local 15 asserts that its members’ conduct falls within the zone of interests protected by the Atomic Energy Act.²² The Supreme Court has traditionally construed the zone-of-interests test liberally, stating that it “is not meant to be especially demanding.”²³ The Court looks for “‘some indication’ that the petitioner’s interest is arguably among those interests protected by the relevant statute.”²⁴

I would find that Local 15’s claims fall within the zone of interests of the AEA because Local 15 directly challenges the effectiveness of the order and asserts that the order will adversely impact public health and safety. Citing the Commission’s decision in *Alaska DOT*, the Board stated that the only way in which standing can be established in an enforcement proceeding is by demonstrating that issuance of the order will be contrary to the public health and safety.²⁵

In *Alaska DOT*, the Commission found that the petitioner lacked standing because he was seeking to strengthen the order and add new requirements.²⁶ Unlike the petitioner in *Alaska DOT*,

²⁰ *Ambrosia Lake*, CLI-98-11, 48 NRC at 14; *accord Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1445 (1982).

²¹ *Alaska DOT*, CLI-04-26, 60 NRC at 406 n.28 (quoting *Alaska Department of Transportation and Public Facilities*, LBP-04-16, 60 NRC 99, 122 n.4 (2004) (Bollwerk, J., dissenting in part)).

²² Local 15 Appeal Brief at 23.

²³ LBP-14-4, 79 NRC at 355 (Karin, J., dissenting) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)).

²⁴ *Ambrosia Lake*, CLI-08-11, 48 NRC at 8 (citing *Nat’l Credit Union Admin.*, 522 U.S. at 494 n.7).

²⁵ LBP-14-4, 79 NRC at 329 (majority opinion).

²⁶ *Alaska DOT*, CLI-04-26, 60 NRC at 405. In *Alaska DOT*, the dispute centered on a confirmatory order and companion notice of violation that listed discriminatory actions the State of Alaska

Local 15 does not seek to strengthen the Confirmatory Order or add new requirements. The Board relies on the following passage in *Alaska DOT*: “The critical inquiry under *Bellotti* in a proceeding on a confirmatory order is whether the order improves the licensee’s health and safety conditions. If it does not, no hearing is appropriate.”²⁷ But that statement was essentially *dicta* in *Alaska DOT* and must be read in context with the facts of that case.²⁸ The Board also cites *Alaska DOT* for the proposition that “a petitioner like Mr. Farmer is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order.” But this language does not support the conclusion that Local 15 lacks standing.

First, as Judge Karlin pointed out, Local 15 is not “a petitioner like Mr. Farmer” because it is seeking to overturn the order and is directly affected by it. Moreover, *Alaska DOT* cited the dissent in the underlying Board decision. The dissent observed that a challenge asserting that an order, “if carried out, would be affirmatively contrary to the public health and safety . . . would be one that seemingly would fall within the scope of a proceeding as envisioned under *Bellotti*.”²⁹ This passage applies *Bellotti* to the facts of the case in *Alaska DOT* and provides one example of the type of claim that could be admissible, as opposed to an exhaustive list of such claims. While an

Department of Transportation and Public Facilities allegedly took against an individual, Mr. Farmer, who had been the Statewide Radiation Safety Officer, in retaliation for raising safety concerns about radiation exposures to Alaska DOT employees. The confirmatory order modified Alaska DOT’s materials license and required the agency to take a number of planning and training actions to ensure a safety-conscious work environment. Mr. Farmer sought rescission of the confirmatory order and requested that it be replaced or supplemented with civil penalties and enforcement actions against certain individuals. The Commission reversed the board’s decision granting Mr. Farmer a hearing.

²⁷ LBP-14-4, 79 NRC at 329.

²⁸ See *Alaska DOT*, CLI-04-26, 60 NRC at 406 (“And without any injury *attributable to the Confirmatory Order*, Farmer does not have standing in this proceeding.”); *id.* at 408 (“Our holding that Farmer does not have standing is dispositive of this case.”) The statement cited by the Board appears after this holding and was not part of the reasoning of the holding.

²⁹ *Id.* at 408 n.28 (emphasis added) (quoting *Alaska DOT*, LBP-04-16, 60 NRC at 122 n.4 (Bollwerk, J., dissenting in part)).

assertion that an order is contrary to the public health and safety is the typical scenario in which one could show standing, it does not follow that a reduction in public health and safety is the *only* way in which a third party can demonstrate standing in an enforcement proceeding. This interpretation would not change the fact that it likely will be rare for a third party to establish standing in an enforcement proceeding. Indeed, as Exelon states, “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.”³⁰

In any event, I would find that Local 15 demonstrated standing even under the test spelled out by the Board. In its initial petition to intervene, Local 15 made several assertions that the order would diminish safety. For example, Local 15 argued that the “breadth, vagueness and ambiguity of the observation and reporting obligations casts a wide and indiscriminate net that simply is not carefully tailored to address legitimate concerns for public health and safety.”³¹ Local 15 also argued that the problems that it ascribes to the order will confuse people trying to comply with its terms.³² Local 15 further clarified these concerns in its reply brief, stating that the Confirmatory Order “has the cumulative effect of rendering Exelon’s operations less safe than they were before the order” because the revised Behavioral Observation Program could lead to uncertainty and confusion about behaviors to report that could “render[] the order ineffectual and the public less safe.”³³ Specifically, Local 15 argues that the order “is so broad and non-specific as to the types of conduct required to be reported and silent with regard to a nexus between such conduct and

³⁰ *Exelon Brief in Response to the Commission’s June 11, 2015, Memorandum and Order* (June 16, 2015), at 7.

³¹ Local 15 Petition at 18.

³² *Id.* at 5.

³³ *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), at 9, 11-12.

nuclear safety, it creates uncertainty and confusion with regard to precisely what conduct is required to be reported.”³⁴ Local 15 concludes that “these deficiencies result in decreased public safety.”³⁵

The Board did not find the Local’s safety concerns credible and as such did not find that they were sufficient to support standing. However, I would find that the Board in this instance strayed too far into the merits of the case and did not follow Commission precedent that hearing requests are to be construed in favor of the petitioner on issues of standing. At this stage of the proceeding, the concerns articulated by Local 15 were sufficient to demonstrate an injury in fact arguably within the zone of interests of the Atomic Energy Act. I would therefore reverse the Board’s standing decision.

III. Contention Admissibility

As a separate ground for denying Local 15’s hearing request, the Board concluded that it failed to submit an admissible contention. While I agree with the Board’s ruling on Contentions 1 and 3, I would find that the portion of Contention 2 that asserts that implementation of the Confirmatory Order will diminish public health and safety is admissible.

In Contention 2, Local 15 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.³⁶ The Board rejected Contention 2 as an inappropriate challenge to the NRC’s enforcement discretion, and for its failure to raise a genuine dispute with the Confirmatory Order.³⁷

³⁴ *Id.* at 12.

³⁵ *Id.* at 2.

³⁶ Local 15 Petition at 18.

³⁷ LBP-14-4, 79 NRC at 335-37. Judge Karlin would have admitted the contention. *Id.* at 365-66 (Karlin, J., dissenting).

In my view, a portion of Contention 2 is admissible. Local 15 is correct that the Board may not prejudge the merits of the contention. The Board reviewed the Confirmatory Order together with Exelon's revised Behavioral Observation Program to determine whether the documents on their face resulted in greater clarity as to the types of behaviors that Exelon employees must report. While the Commission has directed boards to review documents to ensure that they stand for the proposition for which they are cited, the Board delved too far into the merits here. Local 15 raised a question appropriate for hearing on whether the Confirmatory Order created confusion for the plant workers resulting in a reduction in safety. The Local specifically and repeatedly claimed that portions of the Confirmatory Order were "vague and over broad" and "will likely have introduced into the reporting requirements numerous ambiguities and inconsistencies and rendered employee compliance far more uncertain." Contention 2 is supported by Mr. Specha's affidavit. He asserts that the reporting requirements are unclear with respect to the scope of terms such as "unusual,' 'aberrant,' and/or 'illegal' conduct" that describe the types of conduct he and other Local 15 members will be responsible for reporting.³⁸ Whether the Confirmatory Order has the effect of decreasing safety is appropriately within the scope of this proceeding.

In conclusion, I would reverse the Board's decision regarding standing and the admissibility of Contention 2 and remand this matter to the Board for a hearing on Contention 2 on the question of whether the Confirmatory Order should not be sustained because it is improperly vague or over-broad, and thereby creates a potential risk to the public health and safety.

³⁸ *Affidavit of Dennis Specha* (Dec. 11, 2013), ¶ 10 (Exhibit 1 to Local 15 Petition).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
EXELON GENERATION COMPANY, LLC) Docket Nos. 50-237-EA and 50-249-EA
)
(Dresden Nuclear Power Station)) ASLBP No. 13-930-01-EA-BD01
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-16-06** have been served upon the following persons by the Electronic Information Exchange.

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Dresden Nuclear Power Station - Docket Nos. 50-237-EA and 50-249-EA

COMMISSION MEMORANDUM AND ORDER CLI-16-06

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[Original signed by Brian Newell _____]
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Dated at Rockville, Maryland
this 5th day of April 2015