

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
	)	Docket Nos. 50-237-EA
	)	50-249-EA
EXELON GENERATION COMPANY, LLC	)	
	)	
(Dresden Nuclear Power Station, Units 2 and 3)	)	
	)	March 13, 2014
	)	

**EXELON’S MOTION TO STRIKE**

In accordance with 10 C.F.R. § 2.323(a), and the Atomic Safety and Licensing Board’s (“Board’s”) directions at the March 6, 2014 oral argument, Exelon Generation Company, LLC (“Exelon”) hereby timely moves to strike one portion of the “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” filed on February 14, 2014 (“Reply”).

As Exelon noted at oral argument, and as explained in detail below, Local 15’s Reply impermissibly includes a new basis for its contentions without satisfying the standards governing new or amended contentions. Specifically, Local 15 claims that the Confirmatory Order “has the cumulative effect of rendering Exelon’s operations less safe than they were before . . . .”<sup>1</sup> Because Local 15’s Reply proffered this new claim, the Board should strike it.<sup>2</sup>

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<sup>1</sup> Reply at 9.

<sup>2</sup> In accordance with 10 C.F.R. § 2.323(b), counsel for Exelon certifies that they made a sincere effort to contact the other parties in this proceeding on March 4, 2014, to explain to them the factual and legal issues raised in this motion, and to resolve those issues to the extent practicable, and certifies that these efforts to avoid the need for this motion have been unsuccessful. Counsel for the Staff

## I. BACKGROUND

On November 7, 2013, the Nuclear Regulatory Commission (“NRC” or “Commission”) published a notice of opportunity for hearing and confirmatory order in the above-captioned matter.<sup>3</sup> On December 12, Local 15 filed a Petition to Intervene and Hearing Request (“Petition”), proffering three overlapping and interrelated contentions in support of the claim that the Confirmatory Order should not be sustained.<sup>4</sup> The first alleged that the Confirmatory Order was insufficiently justified by the record in this matter.<sup>5</sup> The second alleged that the Confirmatory Order imposed new, vague and overbroad reporting obligations on Exelon’s employees who are members of Local 15, and improperly delegated the interpretation and implementation of behavioral observation standards to Exelon.<sup>6</sup> And the third asserted that the Confirmatory Order improperly endorsed Exelon’s actions in purported violation of the National Labor Relations Act.<sup>7</sup>

On January 24, 2014, Exelon and the NRC Staff filed timely answers to the Petition, objecting to Local 15’s standing and the admissibility of its contentions.<sup>8</sup> Exelon objected to the Petition because, among other reasons, the Local did not allege

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stated that the Staff does not object to Exelon’s motion. Counsel for the Local did not agree to the relief requested in this motion.

<sup>3</sup> See In the Matter of Exelon Generation Company, LLC; Dresden Nuclear Power Station Confirmatory Order Modifying License, 78 Fed. Reg. 66,965 (Nov. 7, 2013).

<sup>4</sup> See generally Petition.

<sup>5</sup> See Petition at 15-18.

<sup>6</sup> See *id.* at 18-19.

<sup>7</sup> See *id.* at 19-20.

<sup>8</sup> 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’s Answer”); NRC Staff Answer to Petition to Intervene and Request for Hearing (Jan. 24, 2014) (“NRC Staff Answer”).

that the Confirmatory Order made the Dresden Nuclear Power Station (“Dresden”) less safe.<sup>9</sup>

On February 14, 2014, the Local filed its Reply to Exelon’s and the NRC Staff’s Answers. In the Reply, the Local did not limit itself to defending the adequacy of its standing and contentions as pled in its Petition. Instead, on page 9 of its Reply, the Local stated for the first time that “[b]ecause of the [Confirmatory O]rder’s defects, it has the cumulative effect of rendering Exelon’s operations less safe than they were before the order . . . .”

## **II. THE BOARD SHOULD STRIKE LOCAL 15’S NEW ARGUMENT**

Local 15 did not make this claim in its initial Petition. In the Petition, it asserted its general interest in the safety of Dresden,<sup>10</sup> that it is challenging the safety-related basis for the Confirmatory Order,<sup>11</sup> and that the order must allegedly be “carefully tailored to address the legitimate concerns for public health and safety.”<sup>12</sup> But it did not claim, implicitly or explicitly—much less with any specificity in its contentions—that the Confirmatory Order made Dresden less safe.

The purpose and scope of a reply brief is specific and narrow. It is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers.<sup>13</sup> A reply cannot be used as a vehicle to introduce new arguments or support,

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<sup>9</sup> See Exelon’s Answer at 9 & n.39, 19.

<sup>10</sup> See, e.g., Petition at 8, 17.

<sup>11</sup> See *id.* at 15 (“[A] challenge to the safety-related basis for modification of terms and conditions of employment at a nuclear plant by a confirmatory order *bears directly upon the safe operation of the plant*”) (emphasis in original); see also *id.*, Exhibit 1, Affidavit of Dennis Specha ¶ 12 (Dec. 11, 2013) (asserting “a particular interest in the continued safe operations of the plant. I am concerned that the changes to Exelon’s behavioral observation program described by the Confirmatory Order are not reasonably related to the safe operations of the plant.”).

<sup>12</sup> Petition at 18.

<sup>13</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

cannot expand the scope of arguments set forth in the original petition, and cannot be used to cure an otherwise deficient contention.<sup>14</sup> As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria . . . .<sup>15</sup>

The prohibition against making new arguments in replies is rooted in the Commission’s interest in conducting adjudicatory hearings efficiently.<sup>16</sup> Accordingly, a petitioner must include all of its arguments and claims in its *initial* filing. “Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later.”<sup>17</sup>

Allowing a petitioner to freely amend or supplement its contentions in reply would also prejudice the licensee (and the NRC Staff) because the regulations do not allow responses to replies.<sup>18</sup> “Allowing new claims in a reply not only would defeat the

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<sup>14</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, 74 NRC 801, 808-811 (2011) (granting in part a motion to strike on the ground that new arguments not raised in the petition for interlocutory review are “outside the appropriate scope of a reply”).

<sup>15</sup> *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

<sup>16</sup> See *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (“LES”), *recons. denied*, CLI-04-35, 60 NRC 619, 622-23 (2004) (“[T]he need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.”); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

<sup>17</sup> *LES*, CLI-04-35, 60 NRC at 622-23 (internal quotes and citation omitted).

<sup>18</sup> See 10 C.F.R. § 2.309(i)(3).

contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.”<sup>19</sup>

Thus, Local 15 may not set forth entirely new claims or amend its contentions in reply. A licensing board has the authority to strike individual arguments and exhibits, including new bases for a contention that are introduced for the first time in reply.<sup>20</sup>

For example, in the *Palisades* license renewal proceeding, the petitioner filed a thinly-supported contention in its initial petition, and then sought to bolster it with new arguments that were “not even suggested” in the original contention as pled.<sup>21</sup> The Board refused to consider the new claims in the reply, and the Commission affirmed that decision.<sup>22</sup> Similarly, the Board should exercise its authority here and strike Local 15’s

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<sup>19</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>20</sup> *See, e.g.*, 10 C.F.R. § 2.319 (giving the presiding officer all the powers necessary “to take appropriate action to control the prehearing . . . process”); *see also Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 399-400, 407, 429 (2008).

<sup>21</sup> *See Palisades*, CLI-06-17, 63 NRC at 731. Local 15 may argue that it was merely responding to the legal arguments of the other parties, but this is incorrect. Local 15 was not clarifying or amplifying its prior arguments by, for example, citing new legal authority in support of its position or critiquing authorities presented by Exelon or the NRC Staff. In its Answer, Exelon identified the absence of any claim that the Confirmatory Order made Dresden less safe. *See Exelon’s Answer* at 9 & n.39, 19. In reply, Local 15 baldly asserted that the Confirmatory Order made Dresden less safe and, in so doing, introduced an entirely new factual allegation and basis for its contentions in reply—an allegation that it did not raise at all in the initial Petition. Allowing a petitioner to introduce an entirely new basis or contention simply because the opposing party noted in its answer that the petitioner had failed to raise that claim in the petition would defeat the contention pleading requirements. *See LES*, CLI-04-35, 60 NRC at 621-23 (affirming a Board decision to allow reply arguments that “legitimately amplified” prior arguments, while rejecting additional bases for contentions).

<sup>22</sup> *See Palisades*, CLI-06-17, 63 NRC at 729. At oral argument, the Board noted certain situations where Boards and/or the Commission have granted standing based on supplemental materials filed with a reply, thereby curing what would otherwise have been a deficient showing of standing in an initial petition. *See, e.g., S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC 1, 6-7 (2010) (finding standing based, in part, on supplemental clarifying declarations filed in reply, and reversing a Board’s denial of standing); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 396-97 (2009) (granting standing to a *pro se* petitioner based on a supplemental declaration filed with a reply, but still denying petition to intervene because no contentions were admissible), *aff’d on other grounds*, CLI-10-07, 71 NRC 133 (2010). These cases are inapposite. In those cases, the petitioners merely sought to clarify the foundation for the claims of standing in their petitions. Here, however, Local 15 does not seek merely to clarify the foundation for its standing or clarify an earlier argument. Rather, it seeks to introduce an entirely new basis for its

new argument. The Local cannot now try to salvage its deficient initial Petition with what is effectively an amended contention presented for the first time in reply, and to which Exelon and the NRC Staff have no opportunity to respond.<sup>23</sup>

### III. CONCLUSION

For the reasons set forth above, the Board should strike the new claim presented by Local 15 for the first time in its Reply.

Respectfully submitted,

*Signed (electronically) by Raphael P. Kuyler*

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*Counsel for Exelon Generation Company,  
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Dated in Washington, DC  
this 13th day of March 2014

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contention in its reply. These cases do not allow that tactic; indeed, clear Commission precedent prohibits it.

<sup>23</sup> See 10 C.F.R. § 2.309(c)(1) (specifying requirements for late-filed new or amended contentions). If the Board decides to consider the new claim in the Local's Reply, then Exelon respectfully requests an opportunity to fully and substantively respond to the timeliness and admissibility of the new claim in writing. Although admissibility of the new claim was discussed briefly at oral argument, neither Exelon nor the Staff was afforded opportunity to respond to it on the merits.

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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 Motion to Strike” 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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