



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W. Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

EXELON GENERATING CORP.,
LASALLE COUNTY STATION,

Respondent.

IBEW LOCAL 15,
Authorized Employee
Representative.

OSHRC Docket No. 00-1198

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

This case involves a dispute over the interpretation and application of the hazardous energy control (lockout/tagout) procedures of the electric power generation, transmission, and distribution standard, 29 C.F.R. § 1910.269(d), under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78. Before the Commission is Chief Administrative Law Judge Irving Sommer's decision affirming a single citation issued to Exelon Generating Corp. (Exelon). That citation alleges a violation of the group lockout/tagout (LOTO) provision of the standard, 29 C.F.R. § 1910.269(d)(8)(ii)(D), for Exelon's failure to require that each employee on the cited job affix a personal lock or tag to a group lockout/tagout device or sign on/off a master tag. We affirm the judge's decision.

2005 OSHRC No. 17

I. BACKGROUND

OSHA promulgated the final electric power generation standard on January 31, 1994, pursuant to a negotiated rulemaking in which the electric utility industry trade associations and unions representing affected workers participated. Edison Electric Institute (EEI), an association of investor-owned electric utilities, and the International Brotherhood of Electrical Workers (IBEW) jointly proposed provisions to the draft standard that the Utility Workers Union of America (UWUA), which represents approximately one third of the unionized electric utility work force, did not endorse. The Secretary, in agreement with some of the concerns the UWUA raised, rejected a number of provisions contained in the EEI/IBEW draft. Following promulgation of the standard, EEI and IBEW conferred with OSHA over the issuance of a compliance directive to clarify some disputed issues. A series of meetings and exchanges of proposals ensued, and OSHA issued a compliance directive on October 20, 1997, covering numerous provisions of the standard, including group tagging. On June 2, 1999, EEI sent a letter to OSHA's Directorate of Compliance Programs summarizing its interpretation of some items addressed by the compliance directive. In response, on October 14, 1999, OSHA issued a Standards Interpretation and Compliance Letter in which it advised EEI, *inter alia*, that its interpretation of the group tagging provision was incorrect, and explained OSHA's position on the requirements of group tagging under the standard.

Subsequently, OSHA inspected Exelon's LaSalle County Station located in Marseilles, Illinois, from December 16, 1999 through May 31, 2000. There is no dispute that Exelon's LOTO program did not include a requirement that each maintenance employee sign on and off a master tag when utilizing a group tagout procedure for out of service equipment. Nor is there any dispute that each maintenance employee on the cited heater repair job did not individually sign on/off the master tag. Exelon's procedure, which reflects industry practice and the EEI/IBEW proposal, includes the use of a worker tagout tracking list (WTTL) that identifies all covered employees but permits a supervisor or lead worker to verbally notify the individual workers of the application and removal of LOTO

protection. The central issue in this case is whether the cited standard permits Exelon's use of this type of procedure or requires that the individual workers performing service and maintenance personally manifest by a verifiable means their acknowledgment of the application and removal of LOTO protection, such as by signing on and off of a group tag.

Exelon contends that the cited standard is confusing, that OSHA had agreed to the group tagging procedure advocated by EEI and IBEW in the discussions leading up to the issuance of the compliance directive and by the terms of the directive itself, and that the citation must be vacated. It further argues that it is exempt from the requirements of the cited standard because the "system operator" provision of the standard applies to its facility instead.

II. REGULATORY FRAMEWORK

OSHA stated in the preamble to the final electric power generation standard that the fundamental premise of "[l]ockout or tagout is personal protection." 59 Fed. Reg. 4319, 4360 (January 31, 1994). Indeed, the standard requires that "[l]ockout and tagout device application and removal may only be performed by the authorized employees who are performing the servicing or maintenance." 29 C.F.R. § 1910.269(d)(4). Explaining this requirement, OSHA made clear that "[i]t cannot be overemphasized that employees performing tasks on deenergized equipment may be exposed to hazards involving serious injury or death if the status of the lockout or tagout control can be changed without their knowledge." *Id.* OSHA specifically addressed its rejection of EEI's position concerning personal control, as follows:

OSHA does not agree that the removal of a tagout device by a person other than the one who [is] under its protection is not related to safety. . . . The entire energy control program in this standard depends upon each employee recognizing and respecting another employee's lockout or tagout device. The servicing employee relies upon the fact that he or she applied the device and assumes that it will remain on the equipment while he or she is exposed to the hazards of the servicing operation. *OSHA believes that the only way to ensure that the employee is aware of whether or not the lockout or tagout device is in place is to permit only that employee to remove the device himself or herself.*

59 Fed. Reg. at 4360 (citations omitted) (emphasis added). *See also* 59 Fed. Reg. at 4349-52.

OSHA agreed, however, that some “modification of the general rule” was warranted under specific circumstances including, to a limited extent, in group lockout or tagout situations. 59 Fed. Reg. at 4360. Accordingly, OSHA promulgated section 1910.269(d)(8)(ii), which includes the provision cited here:

(8) *Additional requirements.*

...

(ii) When servicing or maintenance is performed by a crew, craft, department, or other group, they shall use a procedure which affords the employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device. Group lockout or tagout devices shall be used in accordance with the procedures required by paragraphs (d)(2)(iii) and (d)(2)(iv) of this section including, but not limited to, the following specific requirements:

...

(D) Each authorized employee shall affix a personal lockout or tagout device to the group lockout device, group lockbox, or comparable mechanism when he or she begins work and shall remove those devices when he or she stops working on the machine or equipment being serviced or maintained.

29 C.F.R. § 1910.269(d)(8)(ii)(D).

The group LOTO provision incorporated the “outcome and rationale” of the general industry standard, which requires that “each employee in the group needs to be able to affix his/her personal lockout or tagout system device as part of the group lockout.” 59 Fed. Reg. at 4361. OSHA explicitly rejected a system that did not specify the use of individual locks or tags by the individual employees of a group, which would have accorded responsibility for all employees in the group to a single authorized employee. *Id.* Noting the difficulty of addressing LOTO where complex equipment is serviced and maintained by numerous employees extending across multiple workshifts, OSHA reiterated the “basic approach” of the standard concerning individual responsibility for application and removal of lockout or

tagout devices, and emphasized that, consistent with the OSHA instruction pertaining to the general industry standard:

- (1) . . . Irrespective of the situation, the requirements of the final rule specify that each employee performing maintenance or servicing activities be in control of hazardous energy during his or her period of exposure.
- (2) The procedures must ensure that each authorized employee is protected from the unexpected release of hazardous energy by personal lockout or tagout devices. No employee may affix the personal lockout or tagout device of another employee.
- (3) The use of such devices as master lock and tags are permitted and can serve to simplify group lockout/tagout procedures. . . . In a tagging system, a master tag may be used, *as long as each employee personally signs on and signs off on it and as long as the tag clearly identifies each authorized employee who is being protected by it.*

Id. at 4361-62 (emphasis added).

III. DISCUSSION

The plain wording of the cited standard, § 1910.269(d)(8)(ii)(D), clearly and explicitly mandates use of a personal tagout device in a group tagging situation. This unambiguous requirement is consistent with the terms and structure of the standard as a whole and the explanatory material provided in its preamble. *See Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141, 1145 (7th Cir. 2001) (stating principle that unambiguous regulations are applied according to their plain meaning, *citing Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655 (2000)). Accordingly, we reject Exelon's contention that the group tagging requirements of the standard are confusing or unclear.

We also reject Exelon's contention that the standard does not specifically require use of a personal tagout device for group tagout because the standard is performance oriented. Beginning with the general industry standard and carried forward into the power generation standard, the core concept of lockout/tagout is *personal* protection, that each individual worker controls his/her own lock or tag. This fundamental requirement does not convert the standard from performance oriented to a specification standard. Rather, individual control over the lockout/tagout device constitutes a core performance requirement of the standard.

Moreover, we agree with the judge that the addition of personal sign on/off of the WTTL “would reduce the risk of a crew member being exposed to the hazard of electrocution.” Indeed, the record shows that Exelon supervisors had prematurely sent employees to work on deenergized equipment, that employees had been disciplined for failure to follow Exelon’s out of service procedure, that no system existed to verify that tracking lists were properly used, and that some employees expressed concerns about the procedure. Accordingly, we affirm the judge’s finding that Exelon’s procedure “does not afford ‘protection equivalent to that provided by the implementation of a personal lockout or tagout device.’”

We also reject Exelon’s contention that during post-promulgation discussions and by the terms of the ensuing October 19, 1997 compliance directive, OSHA agreed to the EEI/IBEW group tagging proposal. Exelon contends that OSHA’s withdrawal of certain proposed language indicates that OSHA agreed to substitute verbal notification of the application and removal of LOTO protection for the requirement of individual worker sign on/off. The forty-three page compliance directive, which pertains to group tagging in only one paragraph, makes clear that OSHA did no such thing. The 1997 compliance directive addresses group tagging, as follows:

- Employees placing lockout or tagout devices, group lockout/tagout, and master tagging programs: §1910.269(d)(4), (d)(6), (d)(7), and (d)(8)(ii)

With the exception of paragraph (d)(8)(v), §1910.269(d) was taken directly from the generic standard for the control of hazardous energy sources, §1910.147. The program directive on §1910.147 [footnote: OSHA Instruction STD 1-7.3], the generic lockout/tagout standard, contains guidance for the use of group lockout/tagout and master tagging programs. Appendix C of that directive presents example group lockout/tagout procedures [footnote: These are intended as examples only. Other means of meeting the standard may also be used.] that can be used to comply with §1910.269(d).

CPL 2-1.18A – Enforcement of the Electrical Power Generation, Transmission, and Distribution Standard, Appendix B, Clarification of Major Issues, October 29, 1997.

The generic LOTO standard program directive, made applicable to the power generation standard in the October 29, 1997 compliance directive, states that group lockout/tagout procedures shall provide, “at a minimum,” that no employee may affix a personal lockout/tagout device for another employee. OSHA Directives STD 1-7.3, §1910.147, the Control of Hazardous Energy (Lockout/Tagout) – Inspection Procedures and Interpretive Guidance, September 11, 1990, paragraph I.8.d. It also provides that:

During all group lockout/tagout operations where the release of hazardous energy is possible, each authorized employee performing servicing or maintenance shall be protected by his/her personal lockout or tagout device and by the company procedure. As described at Appendix C, B.1.g., *a master tag is a personal tagout device if each employee personally signs on and signs off on it and if the tag clearly identifies each authorized employee who is being protected by it.*

OSHA Directives STD 1-7.3, paragraph I.8.h (emphasis added).

Appendix C, in turn, provides that group LOTO procedures generally require personal control of hazardous energy, noting that on a single shift involving only a small number of workers, “the installation of each individual’s lockout/tagout device upon each energy isolating device would not be a burdensome procedure.” It recognizes, however, that where servicing and maintenance extends over multiple shifts and/or involves many workers, “consideration must be given to the implementation of a lockout/tagout procedure that will ensure the safety of the employees involved and will provide for *each individual’s control* of the energy hazards.” Appendix C, B (emphasis added). A list of examples of such procedures follows to “illustrate several alternatives for having authorized employees affix personal lockout/tagout devices in a group lockout/tagout setting.” A review of the directive shows that common to each of the examples listed as alternatives is a requirement that each covered employee must be responsible for attaching and removing his/her own lockout/tagout device, and that where a work permit or master tag is used, that requirement is satisfied by each employee taking the physical step of personally signing on and off the job. Appendix C, B.3. Although the directive might permit other means by which each

covered employee can physically and personally manifest acknowledgement of application and removal of LOTO protection, we can find no support for Exelon's contention that the non-exclusivity clause would permit relinquishment of personal control altogether.¹

We also agree with the judge's finding that OSHA's October 14, 1999 compliance letter should have dispelled any industry misperceptions. In the letter, OSHA explicitly rejected EEI's interpretation of the group LOTO provision, explaining that a master tag is a "personal tagout device only if (1) each employee personally signs on and signs off on the master tag and (2) the master tag clearly identifies each employee who is thereby protected." By the terms of the standards, relevant portions of the preambles, and subsequent statements, OSHA has consistently maintained that the group tagging provisions of both the generic and electric power generation LOTO standards require personal control over the application and release of hazardous energy. The October 1999 letter, which predates the OSHA inspection here, simply states again OSHA's long-standing position in response to EEI's specific question. It does not provide any basis for Exelon, a longtime EEI member, to now claim that it lacked notice of OSHA's intent to enforce the standard by requiring personal sign on/off of a group tag.²

¹We also reject Exelon's claim that OSHA official David Wallis provided testimony in another case inconsistent with OSHA's position here. When Wallis stated that a system *identifying* each authorized employee would satisfy the requirements of the standard, he was referring to a separate requirement to identify covered workers that is different from the discrete requirement to affix personal lockout or tagout devices.

²Similarly, we find that OSHA's acceptance of Pennsylvania Power & Light's (PP&L) application for Voluntary Protection Program (VPP) status for one of its facilities, despite the absence in PP&L's LOTO program of an individual sign on/off requirement for group tagging, did not undermine OSHA's otherwise consistent requirement of individual sign on/off. PP&L's group tagging procedure was expressly deemed "interim" pending further OSHA review, and other PP&L VPP applications were stayed during this time. In these circumstances, we agree with the judge's finding that "the granting of one VPP application is an insufficient basis upon which to find . . . that [Exelon] had a reasonable belief that it was in compliance with the standard."

Finally, we find that the system operator provision of the standard, 29 C.F.R. § 1910.269(d)(8)(v),³ does not operate as an exemption from the group tagging provision.⁴ OSHA incorporated the system operator provision, which “allow[s] for the placement and removal of lockout or tagout devices by the system operator[,]” to “provide[] employers with the flexibility to protect employees by central control of energy isolating devices, but provide[] employees with protection equivalent to that provided by personal lockout or tagout devices.” 59 Fed. Reg. at 4364. OSHA officials testified here that the system operator provision was meant to permit application and removal of energy isolation devices by operations rather than maintenance personnel, and that the provision applies whether the work is performed by a single employee or a group of employees. According to the

³That provision states as follows:

(8) *Additional requirements.*

...

(v) If energy isolating devices are installed in a central location and are under the exclusive control of a system operator, the following requirements apply:

(A) The employer shall use a procedure that affords employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device.

(B) The system operator shall place and remove lockout and tagout devices in place of the authorized employee under paragraphs (d)(4), (d)(6)(iv), and (d)(7)(iv) of this section.

(C) Provisions shall be made to identify the authorized employee who is responsible for (that is, being protected by) the lockout or tagout device, to transfer responsibility for lockout and tagout devices, and to ensure that an authorized employee requesting removal or transfer of a lockout or tagout device is the one responsible for it before the device is removed or transferred.

⁴Chairman Railton believes it unnecessary to decide here whether section 1910.269(d)(8)(v) operates as an exemption to section 1910.269(d)(8)(ii)(D). In his view, Exelon did not meet its burden to show entitlement to any exemption. *Stanbest, Inc.*, 11 BNA OSHC 1222, 1226, 1983-84 CCH OSHD ¶ 26,455, p. 33,619 (No. 76-4355, 1983) (the party claiming an exception has the burden to prove it comes within the exception). Accordingly, the Chairman would affirm the citation on the basis that section 1910.269(d)(8)(ii)(D) does not permit the tagout system this employer used at its generating station.

officials, where a group of employees is exposed, the group LOTO provision would still apply. During the discussions regarding the compliance directive, EEI submitted a proposal that stated, in part:

The standard [1910.269(d)(8)(ii)] is not intended to apply group lockout/tagout (Master Tagging) procedures to Central Control Programs that allow for placement and removal of tagout devices by a central control system. Central Control Programs that strictly regulate the operation of energy control devices by a system operator who is the only person with authority to operate energy control devices under his/her jurisdiction and to place or remove tags on these devices provide protection equivalent to personal tagout devices.

EEI's proposal was not incorporated into the compliance directive, which ultimately did not address the system operator provision of the standard at all.

Nothing in either the group tagging provision or system operator provision indicates that the two are mutually exclusive. Based on the language and structure of the standard, core principles of LOTO, and the legislative history of the standard, we find that Exelon failed to establish that the system operator provision operates as an exemption to the group tagging requirements of the standard.⁵

IV. PENALTY

The judge assessed the stipulated penalty of \$2,400, taking into consideration the employer's size (600 to 800 employees), good faith, and gravity of the violation. Section 17(j), 29 C.F.R. § 666(j). The penalty amount was not contested on review, and we find that it is appropriate in light of the statutory factors.

⁵Having found that the system operator provision of the standard does not operate as an exemption from the group tagging provision we, like the judge, need not decide whether the system operator provision applies here.

V. ORDER

We affirm a violation of 29 C.F.R. § 1910.269(d)(8)(ii)(D), Serious Citation 1, Item 1, for Exelon's failure to require that each maintenance employee on the cited job affix a personal lock or tag to a group lockout/tagout device, such as by signing on and off the master tag worker tagout tracking list. We also hereby assess the stipulated penalty of \$2,400.

/s/ _____

W. Scott Railton
Chairman

/s/ _____

James M. Stephens
Commissioner

/s/ _____

Thomasina V. Rogers
Commissioner

Dated: April 26, 2005

SECRETARY OF LABOR, :
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 Complainant, :
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 v. :
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 EXELON GENERATING CORP., :
 LASALLE COUNTY STATION, :
 :
 Respondent. :
----- :
 IBEW LOCAL 15, :
 :
 Authorized Employee :
 Representative. :

OSHRC DOCKET NO. 00-1198

Appearances:

Kevin Koplin, Esquire
Ruben R. Chapa, Esquire
Chicago, Illinois
For the Complainant.

Stephen C. Yohay, Esquire
James F. Laboe, Esquire
Washington, D.C.
For the Respondent.

Charles A. Werner, Esquire
St. Louis, Missouri
For the Authorized Employee Representative.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent Exelon Generating Corporation’s LaSalle County Station, in Marseilles, Illinois, from December 16, 1999 through May 31, 2000. As a result of the inspection, OSHA issued a two-item serious citation alleging that Respondent (“Exelon”) had violated OSHA’s lockout/tagout requirements. Exelon contested the citation, a complaint and answer were filed, and this matter was

scheduled for a hearing set to begin on April 16, 2001.¹ On March 29, 2001, the Secretary of Labor (“the Secretary”) filed a motion to amend her citation and complaint to allege a sole violation, and her motion was granted.² As amended, the citation and complaint set out a single item, Item 1, which alleges a serious violation of 29 C.F.R. 1910.269(d)(8)(ii)(D) as follows:

[I]n the Tank Farm Area, Cycled Condensate Tank 1CY01T (Heater 3A), authorized electrical maintenance employees were exposed to the potential for unexpected re-energization of a 480-volt heater while performing servicing and/or maintenance activities. The employees did not affix personal locks or tags to a group lockout or tagout device at the energy isolation device.

The hearing in this case was held on April 16, 17 and 18, 2001. The Secretary and Exelon filed post-hearing briefs on July 13, 2001, and this matter is now ready for disposition.

Background

Exelon’s LaSalle County Station is an electricity-generating nuclear power plant. The facility has four departments (operations, maintenance, administration and training), and, at the time of the inspection, it had 700 to 800 employees. The plant employs electricians to service and maintain equipment, and, to protect its electricians from the release of hazardous energy during servicing work, it uses what it calls its “Out of Service” (“OOS”) procedure. Exelon’s OOS procedure is a kind of master tagging system characteristic of what is utilized throughout the electric power generation industry. Exelon has used a master tagging system at the LaSalle facility and its other facilities for over 20 years. (Tr. 7; 84-85; 89-91; 139; 191-92; 433-34; 536-37; 553-54; 558; 594; J-1).

When equipment requires servicing at the LaSalle facility, both the maintenance and the operations departments implement the OOS procedure. A maintenance employee develops a “work

¹Respondent’s name at the time the citation was issued was “Commonwealth Edison Company, LaSalle County Station.” On February 20, 2001, Respondent filed a motion to amend the case name to the one reflected above due to Commonwealth Edison’s merger with other companies to form Exelon. Respondent’s motion was granted on March 2, 2001.

²As issued, Items 1 and 2 of Citation 1 alleged violations of 29 C.F.R. 1910.333(b)(2)(iii)(A) and 29 C.F.R. 1910.269(d)(8)(ii)(D), respectively. At the Secretary’s request, Item 1 was amended to allege the original violation, or, in the alternative, a violation of either 29 C.F.R. 1910.269(d)(8)(ii)(D) (Item 1a) or 29 C.F.R. 1910.269(d)(6)(iv) (Item 1b); the citation was also amended to add “abatement notes” to Items 1a, 1b and 2. The Secretary then filed a notice of dismissal of Items 1b and 2, after which she filed the motion to amend noted *supra*.

package” that includes the instructions and the work procedures that apply to the job. The employee enters the job into the plant’s computer tracking system and, if the job requires energy isolation, prepares an OOS request. The request designates the maintenance supervisor who will be the “holder” of the OOS. The request then goes to the operations department, where an operator uses the computer to make a list of isolation points for the job. A second operator checks the list, after which the list is printed and provided to a third operator, who performs equipment isolation and hangs OOS cards on the isolation points to verify that energy has been isolated.³ A fourth operator verifies that the third operator correctly isolated and tagged the equipment. The third and fourth operators then initial the proper document in the work package, and the third operator places the master OOS card (“master card”) on the master OOS board (“master board”), which is located outside the facility’s work execution center. The third operator then records in the computer the tasks that have been performed. (Tr. 89-96; 102-04; 110-11; 123-25; 435-36; R-105).

After entering an “acceptance” of the OOS into the computer, the maintenance supervisor holds a job briefing with the maintenance crew that will do the work. The supervisor designates a lead worker, who is the crew member responsible for the OOS actions to be taken and for interacting with the maintenance supervisor and operations personnel. The lead worker puts the names of the crew members on a worker tagout tracking list (“tracking list”) and places a personnel protection card (“protection card”) on top of the master card that is on the master board.⁴ The lead worker then inspects the isolation points to confirm that they are isolated and tagged, informs the crew they are protected by the OOS, and puts a check by each name on the tracking list; any crew members who want to may also inspect the isolation points. After the job is finished, the lead worker informs the crew that the OOS protection will be lifted and that the equipment may be re-energized. The lead worker indicates the crew was so informed by putting his initials by each name on the tracking list, and he then signs the list, takes his protection card from its location on top of the master card, and advises the maintenance supervisor that the job is finished and that the protection card has been

³The OOS cards state as follows: “Danger. Do Not Operate. Out of Service.” (Tr. 96).

⁴The lead worker keeps the work package during his shift and gives it to his supervisor at the end of the shift; the tracking list is kept with the work package. (Tr. 35; 46; 59; 191).

removed. The supervisor confirms that the work has been done and reviews the work package for completeness; he also records in the computer that the job is finished and releases the OOS on the computer. An operator confirms that the maintenance supervisor has released the OOS and properly entered the status of the job into the computer. The operator prints a “final clear checklist,” which the operations supervisor signs, and operators then remove the master card from the master board and the OOS cards from the isolation points. The operations supervisor documents these actions on the computer, reviews the work package for completeness, and enters into the computer the status of the OOS as “closed.” (Tr. 33-34; 119-20; 126-32; 136; 185-87; 210; 436; R-105).

Exelon’s current OOS procedure has been in effect since early 2000. Its prior procedures have been similar, with the computer tracking system being put into place in 1997 and the worker tagout tracking list being put into place in 2000.⁵ Employees received training in the new OOS procedure involving the worker tagout tracking list from January through April of 2000, which was during the time that OSHA was conducting its inspection. Employees also receive annual training in the company’s OOS procedure. (Tr. 61-62; 71-72; 97-101; 127-28; 147-48; 182; R-98).

The Cited Work

Exelon was cited because OSHA determined that maintenance workers who were servicing a 480-volt heater were exposed to the hazard of the equipment re-energizing unexpectedly. The servicing work involved a heater on a “C.Y.” tank that was tripping a breaker when it was turned on, and electricians were assigned to work on the heater’s junction box on March 15, 16, 20, 22 and 23, 2000. Danny Crouse, the lead worker for the job, identified C-1 as a general map of the LaSalle site and C-25-26 as photos of the tank and junction box; he marked on C-1 the location of the tank, the motor control center (“MCC”) where the breakers (the energy isolating devices) for the heater were located, and the master board where the master card and his protection card were hung during the servicing work. Crouse also identified C-18, C-20 and C-21 as photos of the breakers in the “off” position with OOS cards on them, C-14-15 as photos showing the master board with the master card and his protection card in place, and C-11-12 and C-17 as copies of the OOS cards, the master card

⁵Before the current procedure, the lead worker was responsible for telling the members of his crew when the OOS protection went into effect and when it ended, but there was no method for tracking the names of the individual crew members. (Tr. 58-59; 127-28).

and his protection card. Finally, Crouse identified C-7A as a copy of the tracking list he filled out on March 22, 2000, and C-31 as a record of the work performed. Crouse's testimony indicates the OOS procedure set out above was followed during the work on the junction box. (Tr. 24-57).

The Cited Standard

The standard cited in this case, 29 C.F.R. 1910.269(d)(8)(ii)(D), is a provision of the electric power generation, transmission and distribution standard, and there is no dispute that section 1910.269(d) applies to the condition set out in the citation. *See* J-1. Section 1910.269(d)(8)(ii) provides as follows, with the specifically-cited provision underlined for emphasis:

(ii) When servicing or maintenance is performed by a crew, craft, department, or other group, they shall use a procedure which affords the employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device. Group lockout or tagout shall be used in accordance with the procedures required by paragraphs (d)(2)(iii) and (d)(2)(iv) of this section including, but not limited to, the following specific requirements:

(A) Primary responsibility shall be vested in an authorized employee for a set number of employees working under the protection of a group lockout or tagout device (such as an operations lock);

(B) Provision shall be made for the authorized employee to ascertain the exposure status of all individual group members with regard to the lockout or tagout of the machine or equipment;

(C) When more than one crew, craft, department, or other group is involved, assignment of overall job-associated lockout or tagout control responsibility shall be given to an authorized employee designated to coordinate affected work forces and ensure continuity of protection; and

(D) Each authorized employee shall affix a personal lockout or tagout device to the group lockout device, group lockbox, or comparable mechanism when he or she begins work and shall remove those devices when he or she stops working on the machine or equipment being serviced or maintained.

The Parties' Contentions

The Secretary contends that Exelon violated the standard because its OOS procedure did not provide for each crew member on the cited job to control the means of protection by affixing and then removing a personal lockout or tagout device. She asserts that a master tagging system utilizing a work permit or tracking list such as Exelon's is permissible, as long as each crew member signs onto the list to acknowledge the OOS protection and then signs off of the list to acknowledge the lifting of the protection, but that the lead worker's signing on and off the list for the entire crew does

not comply with the standard.⁶ (Tr. 474-75). She also asserts that her interpretation of the standard is supported by the language of the standard itself, by the preambles to 29 C.F.R. 1910.269 and 29 C.F.R. 1910.147, the general industry lockout/tagout standard issued in 1989, and by OSHA's compliance directives relating to 29 C.F.R. 1910.147 and 29 C.F.R. 1910.269.

Exelon contends that the standard as written is confusing and unclear with respect to group tagging requirements and that after the standard was issued, electric utility interests were given to understand in meetings with OSHA that the master tagging procedures they used were acceptable without the necessity of each crew member signing on and off of a master tag or work permit. Exelon further contends that it was in compliance with the standard, based upon statements in OSHA's compliance directives, testimony an OSHA official gave in a deposition in an earlier case, and the fact that OSHA granted the Voluntary Protection Program application of an electric utility facility that had a tagging procedure that did not require individual crew members to sign on and off a master tag or similar device. Exelon concludes that it did not have fair notice in this matter, due to OSHA's change in position, and that, in any case, its OOS procedure gives employees protection equivalent to that afforded by the implementation of a personal lockout or tagout device.

History of the Standard

The standard cited in this case is part of 29 C.F.R. 1910.269, the standard regulating electric power generation, transmission and distribution. However, as the Secretary notes, a comment following section 1910.269(d)(1) states as follows:

NOTE 2: Lockout and tagging procedures that comply with paragraphs (c) through (f) of §1910.147 of this part will also be deemed to comply with paragraph (d) of this section if the procedures address the hazards covered by paragraph (d) of this section.

As the Secretary also notes, except for 1910.269(d)(8)(v), the group lockout/tagout provisions set out in 29 C.F.R. 1910.269(d)(8) mirror those set out in 29 C.F.R. 1910.147(f)(3) of the general industry lockout/tagout standard. The Secretary points out that representatives of the Edison Electric

⁶The record shows that Exelon's policy does not require individual crew members to sign on and off of the tracking list. The record also shows that the tracking list is the only document that identifies all of the crew members on a particular job and that while the OOS actions are entered into the computer, the computer does not identify the individual crew members. Finally, the record shows that the protection card placed on top of the master card lists only the lead worker and his supervisor and that the OOS cards do not list anyone. (Tr. 39; 42; 171; 185-86; C-7A; C-11-12; C-17; R-105).

Institute (“EEI”), a trade association of electric utilities that includes Exelon, participated in the rule making process for both 29 C.F.R. 1910.147 and 29 C.F.R. 1910.269.⁷

The record shows that OSHA began addressing the issue of lockout/tagout in the late 1970’s and that it developed a draft lockout/tagout standard in 1983 that was distributed to associations, companies, and unions with an interest in the standard. OSHA received numerous comments, and, in 1985, EEI and the IBEW gave the agency several proposals with respect to the regulation of operations and maintenance in the electric utility industry.⁸ OSHA published its proposed standard in April 1988, and, after public hearings that fall and receipt of comments until May 1989, the agency published its final rule regarding general industry lockout/tagout, that is, section 1910.147, on September 1, 1989.⁹ (Tr. 385-86; C-50 at 36,644-46).

One proposal in the preamble to 1910.147 for group lockout/tagout would have allowed the lead employee to affix and remove a primary lock (rather than each individual employee affixing his own lock or tag), thus making the lead employee “responsible for the safety of all the employees in the group, if that program provided the same degree of safety as personal lockout or tagout.” OSHA rejected the proposal, stating that “an additional element is necessary for the safety of the servicing employees: each employee in the group needs to be able to affix his/her personal lockout or tagout system device as part of the group lockout.” According to OSHA, this was necessary because the use of a personal lockout or tagout device gives the individual employee a degree of control over his own protection, such that “no single employee has control of the means to remove the group lockout or tagout devices while employees are still servicing ... the equipment.” Thus, “the authorized employee in charge of the group lockout or tagout does not remove the group lockout device until each

⁷EEI provides regular reports on OSHA matters to its members, and Exelon, previously Commonwealth Edison, has been a member of EEI for over 50 years. (Tr. 379-80; 383; 422-23).

⁸EEI and other electric utility industry trade associations had specifically asked OSHA to adopt rules relating to their operations. *See* C-48 at 4320.

⁹The rule explicitly stated that section 1910.147 did not apply to the generation, transmission and distribution of electrical power by utilities and that that subject would be addressed in separate rule making efforts. *See* C-50 at 36,644.

employee in the group has removed his/her personal device, indicating that employees are no longer exposed to the hazards from the servicing operation.” *See* C-50 at 36,681-82.

During the rule making, EEI brought up the issue of complex servicing operations that involve many isolation points and extend over different shifts. (C-50 at 36,683). OSHA agreed that removing and replacing lockout or tagout devices for each shift could be burdensome, stating that:

In these situations, the use of the work permit, with each employee signing on and off the equipment, combined with the employees walking down the equipment to ensure continued deenergization prior to beginning work, would be an acceptable approach to compliance with group lockout/tagout and shift transfer provisions of the standard. (C-50 at 36,683).

On the same page, OSHA also stated, as to procedures EEI, API and OCAW had submitted:

To the extent that the procedures ... provide for individual verification that the equipment has been properly deenergized, and to the extent that the procedures allow for the servicing employee to attest to that verification in accordance with the standard, OSHA believes that such procedures would comply with the Final Rule.

On September 11, 1990, OSHA issued STD 1-7.3, a compliance directive regarding 1910.147. *See* C-49. Appendix C to the directive contains illustrations of compliant procedures for group operations, although, as the appendix notes, “[t]hese examples are not intended to present the only acceptable procedures for conducting group operations.” *See* C-49 at 27. On page 28, Appendix C defines the terms “master tag” and “work permit” as follows:

MASTER TAG is a document used as an administrative control and accountability device. This device is normally controlled by the operations department personnel and is a personal tagout device if each employee personally signs on and signs off on it and if the tag clearly identifies each authorized employee who is being protected by it.

WORK PERMIT is a control document which authorizes specific tasks and procedures to be accomplished.

On pages 31-36, Appendix C describes a procedure that could be used for the servicing and maintenance of complex equipment. That procedure provides, in relevant part, as follows:

Throughout the maintenance and/or servicing activity, operations personnel normally maintain control of the equipment. The use of the work permit or “master tag” system (with each employee personally signing on and signing off the job to ensure continual employee accountability and control), combined with verification of hazardous energy control, work procedures, and walk-through, is an acceptable approach to

compliance with the group lockout/tagout and shift transfer provisions of the standard. (C-49 at 32).

The procedure also provides that:

Upon completion of the tasks required by the work permit, the authorized employees' names can be signed off the Master Tag by their supervisor once all employees have signed off the work permit. The work permit is then attached to the Master Tag. (Accountability of exposed workers is maintained.) (C-49 at 35).

The record further shows that on January 31, 1989, OSHA published its proposed standard on electric power generation, transmission and distribution. The proposed standard was based in part on drafts that EEI and the IBEW had submitted, and OSHA met with EEI and the IBEW several times to obtain their advice. The agency received numerous comments on the proposed standard, public hearings were held in late 1989, and further comments were received until March 1991. The final rule, section 1910.269, was published on January 1, 1994. (Tr. 385-87; C-48 at 4320-23).

As to the group lockout/tagout provisions of 1910.269, OSHA again rejected a proposal that would have allowed the lead worker to be responsible for the safety of the group rather than requiring the use of individual locks or tags by each individual crew member. In so doing, the agency stated that it was adopting the "outcome and rationale with respect to final § 1910.147(f)(3)" and quoted extensively from the record regarding that standard. (C-48 at 4361-62). OSHA also rejected the position of EEI and the IBEW that the tagging procedures used by the electric utility industry are unique and work well to protect employees and that OSHA should therefore accept them. (C-48 at 4350-51, 4363-64). OSHA noted that it had determined that electric utility employees at high risk were exposed to a significant risk of injury under existing practices, based upon Eastern Research Group's review of IBEW fatality reports. (C-48 at 4363 n.33). OSHA further noted that the only concept in the industry that was unique, based on statements of an EEI representative at the hearings and his video presentation of a typical tagout procedure, was the use of central control facilities and a system operator who initiated and controlled switching and tagging procedures. The agency thus concluded that the appropriate action was to incorporate 1910.147(f)(3) into 1910.269(d)(8) and to add a new "system operator" provision at 1910.269(d)(8)(v). (C-48 at 4364).

OSHA also stated in the preamble to 1910.269 that in STD 1-7.3, the compliance directive it had issued as to 1910.147 (C-49), it had previously answered many questions about group lockout/tagout. (C-48 at 4362). In summarizing those guidelines, the agency explained as follows:

In a tagging system, a master tag may be used, as long as each employee personally signs on and signs off on it and as long as the tag clearly identifies each authorized employee who is being protected by it. (C-48 at 4362).

The agency further explained that “the use of the work permit or comparable means, with each employee signing in and out as he or she begins or stops working on the equipment ... would be an acceptable approach to compliance with group lockout or tagout and shift change provisions of the standard.” (C-48 at 4362). In regard to shift changes, the agency noted that:

When tagout devices are used, it would be possible to use a tag with spaces for the off-going employee to sign off, giving the date and time, and for the on-coming employee to sign on, also giving the date and time. Each employee would verify the deenergizing and energy isolation for his or her own protection before signing onto the tag. (C-48 at 4362-63).

After the final rule for 1910.269 was issued, EEI filed a petition for review with OSHA challenging the validity of the standard. EEI withdrew the petition after the agency agreed it would address EEI and union concerns and issue a compliance directive clarifying the standard; during this negotiation period, OSHA’s National Office reviewed all of the citations that were to be issued under the new standard.¹⁰ OSHA, union and EEI representatives met various times to discuss the proposed compliance directive and to exchange draft language. On October 20, 1997, OSHA issued CPL 2-1.18A (*see* C-52), a compliance directive pertaining to 1910.269. The directive was the result of the negotiations of OSHA, EEI and union representatives, and Appendix B to the directive, entitled “Clarification of Major Issues,” addresses lockout/tagout in general, group lockout/tagout and master tagging systems. (Tr. 389-415; 455-57; 489-90; 513-19; 546-47; 551-53; C-52 at 29-32). In this regard, Appendix B states as follows:

Employees placing lockout or tagout devices, group lockout/tagout, and master tagging programs: § 1910.269(d)(4), (d)(6), (d)(7), and (d)(8)(ii)

¹⁰The primary concern of EEI and the industry was whether OSHA would accept the established master tagging practices as being in compliance with the standard. (Tr. 390-91; 579).

With the exception of paragraph (d)(8)(v), § 1910.269(d) was taken directly from the generic standard for the control of hazardous energy sources, § 1910.147. The program directive on § 1910.147, the generic lockout/tagout standard, contains guidance for the use of group lockout/tagout and master tagging programs. Appendix C of that directive presents example group lockout/tagout procedures that can be used to comply with 1910.269(d).¹¹ (C-52 at 32).

Whether Exelon had Adequate Notice of the Standard's Requirements

Exelon contends it did not have fair notice in this matter for a number of reasons, the first of which is that the standard as written is confusing and unclear as to group tagging requirements. The parties agree the cited standard is a “performance standard,” that is, one that gives the employer some latitude regarding the means of compliance used. Exelon notes that if a standard’s language is not explicit on a matter in issue, the standard’s preamble is the “most authoritative evidence of the meaning of the standard.” See *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000), and cases cited therein. Exelon further notes that if the preamble does not clarify the standard’s meaning, other sources may be considered, including “administrative interpretations which clarify obscurities or resolve ambiguities.” *Miami Indus., Inc.*, 15 BNA OSHC 1258, 1265 (No. 88-671, 1991), quoting *Diebold v. Marshall*, 585 F.2d 1327, 1336-38 (6th Cir. 1978).

In view of the fact that the standard is a performance standard, and after reviewing the language of the standard, set out *supra*, together with the above-noted provisions of the preambles and compliance directives as to 1910.147 and 1910.269, I conclude that OSHA has clearly and consistently articulated its position with respect to group tagging requirements. In particular, OSHA has invariably rejected the notion that a lead worker may sign on and off of a master tag or work permit for the entire crew and has instead required each individual crew member to sign on and off of the master tag or work permit. However, in support of its contention that the standard’s group tagging requirements are confusing and unclear, Exelon points to the “system operator” provisions set out at 29 C.F.R. 1910.269(d)(8)(v). Those provisions are as follows:

(v) If energy isolating devices are installed in a central location and are under the exclusive control of a system operator, the following requirements apply:

¹¹This excerpt contains two footnotes, the text of which is set out on page 42 of C-52. Footnote 4 references the number of the directive for 1910.147, while footnote 5 states that “[t]hese are intended as examples only. Other means of meeting the standard may also be used.”

(A) The employer shall use a procedure that affords employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device.

(B) The system operator shall place and remove lockout and tagout devices in place of the authorized employee under paragraphs (d)(4), (d)(6)(iv), and (d)(7)(iv) of this section.

(C) Provisions shall be made to identify the authorized employee who is responsible for (that is, being protected by) the lockout or tagout device, to transfer responsibility for lockout and tagout devices, and to ensure that an authorized employee requesting removal or transfer of a lockout or tagout device is the one responsible for it before the device is removed or transferred.

Exelon notes that OSHA stated in the preamble to the final rule that (d)(8)(v) was inserted specifically to “recognize lockout and tagout practices that are common in the electric utility industry and that have been successful in protecting employees from hazards associated with the control of hazardous energy sources.” (C-48 at 4364). Exelon asserts that EEI and the IBEW concluded that (d)(8)(v) was intended to be an exception to the requirement under (d)(8)(ii)(D) for “individual sign on and sign off.” Exelon further asserts, however, that EEI and the IBEW were unsure this was the case and concerned that OSHA had misunderstood EEI’s statements and video at the hearings. Exelon states that due to confusion about what the standard meant, as well as concern that the standard would not permit the industry to continue using its established tagging procedures, EEI filed its petition for review with OSHA. (R. Brief at 13-17).¹²

Exelon’s assertion that the industry was confused about group tagging requirements, due to a belief that (d)(8)(v) was an exception to (d)(8)(ii), is not persuasive. First, as noted above, OSHA has consistently stated what it requires in group tagging procedures. Second, (d)(8)(v)(A) specifically requires the employer to use a procedure that “affords employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device.” This is the same language used in the group lockout/tagout provisions of 1910.147(f)(3)(i) and 1910.269(d)(8)(ii), and, after OSHA’s many pronouncements that each individual crew member must sign on and off of a device such as a master tag or work permit, it is unreasonable to conclude the agency would

¹²In support of its assertions, and as set out in its brief, Exelon presented the testimony of James Tomaseski, an official of IBEW, Charles Kelly, an official of EEI, and Forrest Carr, a former official of Boston Edison and a former member of EEI’s OSHA task force.

abandon this requirement without an explicit statement it was doing so. Third, David Wallis, an OSHA official who was involved in writing 1910.269 and who represented OSHA at the negotiation meetings with EEI and union officials, testified that (d)(8)(v) was not an exception to (d)(8)(ii).¹³ He said that when (d)(8)(v) applies, its purpose is to allow the system operator to affix locks or tags, rather than the authorized maintenance employee who is being protected by them, but that the employer must nonetheless ensure that the person requesting the removal of a lock or tag is the same one who requested its application. He also said that even when (d)(8)(v) does apply, (d)(8)(ii) also applies in a group lockout/tagout situation, such that each member of the maintenance crew must sign on and off of a device or list. (Tr. 441-45; 455-57; 482-86; 492-94; 497-500). Fourth, Walter Siegfried, an OSHA official who is an agency spokesperson regarding 1910.269 and who discussed the subject citation with Wallis and the inspecting compliance officers, also testified about the standard.¹⁴ His testimony was consistent with that of Wallis. (Tr. 329-55).

I have considered OSHA's statement in the preamble that 1910.269(d)(8)(v) was included to "recognize lockout and tagout practices that are common in the electric utility industry and that have been successful in protecting employees from hazards associated with the control of hazardous energy sources." *See* C-48 at 4364. However, OSHA also stated that, while it had viewed the EEI video and found certain utility company tagout procedures to be unique, it had concluded that the evidence and accident data in the record demonstrated that "even under these procedures, employees can be exposed to hazards." (C-48 at 4364). OSHA further stated:

Therefore, rather than adopt the EEI/IBEW draft provisions on the control of hazardous energy sources, OSHA is incorporating additional provisions under § 1910.269(d)(8)(v) to allow for the placement and removal of lockout or tagout devices by the system operator. This provides employers with the flexibility to protect employees by central control of energy isolating devices, but provides employees with protection equivalent to that provided by personal lockout or tagout devices. (C-48 at 4364).

In regard to paragraph (d)(8)(v)(C), OSHA provided a detailed explanation, as follows:

¹³David Wallis has been an electrical engineer in OSHA's Office of Electrical, Electronic and Mechanical Engineering Safety Standards since 1973. (Tr. 441-43).

¹⁴Walter Siegfried has been a safety and health specialist in OSHA's National Office since 1997 and has been with the agency since 1982. (Tr. 320-27).

Paragraph (d)(8)(v)(C) requires the employer to make provisions to identify the authorized employee being protected by the lockout or tagout device, to transfer responsibility for lockout and tagout devices, and to ensure that an employee requesting the removal or transfer of a lockout or tagout device is the authorized employee responsible for it. It is important for any lockout or tagging system to protect every employee servicing or maintaining machinery or equipment. To achieve this goal, the lockout or tagging procedure must ensure that no lock or tag protecting an employee is removed without the knowledge and participation of the employee it is protecting. Even though the energy control devices are under the exclusive control of the system operator, the locked out or tagged out devices must not be operated until the employee they are protecting personally authorizes it. When a lockout or tagout device is to be removed or when responsibility for the device is to be transferred to another employee, the lockout or tagout procedures must take steps to identify the employee requesting removal or transfer. Signed orders, for example, could be used, and the signatures on the orders could be checked against the original lockout or tagout request. Password systems, master lock systems, and receipt systems could also be used to identify the authorized employee responsible for the lockout or tagout device. The procedures must also make provision for transferring lockout or tagout from one employee to another, such as may be needed during shift changes. The procedures must also ensure that the system operator does not remove any lockout or tagout device without the specific authorization of the employee it is protecting (except as permitted in paragraph (d)(7)(iv) for emergencies). Paragraph (d)(8)(v)(C) prohibits supervisors (or other employees) from releasing lockout or tagout devices while they are protecting authorized employees, and it recognizes only central control systems that provide protection equivalent to that provided by personal lockout or tagout devices. The use of signed orders, passwords, master locks or tags, or receipts can facilitate compliance with this provision.

Based upon the foregoing, I find, as David Wallis and Walter Siegfried both testified, that 1910.269(d)(8)(v) is not an exception to 1910.269(d)(8)(ii), that even when 1910.269(d)(8)(v) does apply the provisions of 1910.269(d)(8)(ii) also apply in a group lockout/tagout situation, and that in a group lockout/tagout situation falling under 1910.269(d)(8)(v), each individual crew member protected by the lockout or tagout must sign on and off of a device such as a master tag, work permit or list. Exelon's first contention is accordingly rejected.¹⁵

¹⁵Siegfried indicated the cited instance fell within (d)(8)(v). (Tr. 333; 354-55). The Secretary, however, states in her brief that she "does not concede that [Exelon] meets the threshold requirements to qualify for the 'system operator' provision." The issue here is whether there was a violation of the cited standard. Having rejected Exelon's assertion that (d)(8)(v) is an exception to (d)(8)(ii), I need not decide whether the cited instance falls under the "system operator" provision.

Exelon next contends that electric utility interests were given to understand in meetings with OSHA that the master tagging procedures they used were acceptable without the necessity of each crew member signing on and off of a master tag or work permit. Exelon refers mainly to a meeting held in February 1996 to continue negotiating the terms of the compliance directive that OSHA was to issue for 1910.269. A number of individuals attended the meeting, including David Wallis of OSHA, James Tomaseski of the IBEW, Charles Kelly of EEI and Forrest Carr of Boston Edison. Among the topics addressed were the industry's master tagging procedures and, prior to the meeting, OSHA and EEI had exchanged proposed language in this regard to be included in the directive; however, the proposed language was not included in C-52, the directive issued in October 1997. (Tr. 397-99; 409; 488-90; 517; 580; R-12; R-19-20).

Exelon asserts that at the meeting, when industry officials "pressed their point" about being able to continue using their master tagging procedures, David Wallis stated that the industry was allowed to rely on the examples of procedures given in Appendix C to the compliance directive for 1910.147. In particular, Exelon notes the testimony of Forrest Carr, as follows:

Mr. Wallis stated that what we were looking for, the flexibility, was ... in [Appendix C] because the things that were listed as specifics were only examples and that you did have the flexibility to do other things within the language of [the directive]. And [he] basically said that [the directive] gives you what you want. (Tr. 584).

Exelon also notes the testimony of James Tomaseski that OSHA had stated at the meeting that if the industry followed the provisions of 1910.147 it would be in compliance with 1910.269; his understanding of this statement was that OSHA had agreed that the industry's established master tagging procedures were acceptable as they were. (Tr. 518-19). Finally, Exelon notes the further testimony of Forrest Carr that, based on what David Wallis had said, there was an agreement to take out a provision OSHA had proposed. (Tr. 584-85). That provision was to follow immediately after the last sentence in Appendix B to the 1910.269 directive, set out *supra*, which stated that Appendix C to the 1910.147 directive presented example group lockout/tagout procedures that could be used to comply with 1910.269(d). *See* C-52 at 32. The proposed provision was as follows:

When many energy sources or many persons are involved or when a lockout/tagout procedure is to extend over more than one shift, the alternative procedures outlined in this appendix may be used to comply with paragraph (d) of §1910.269. These alternative procedures must assure personal protection for each employee being

protected by ensuring that each individual is uniquely accounted for and that each individual is the only person that can release his or her lockout device, tagout device, or equivalent means of controlling hazardous energy.¹⁶ (R-20 at 2).

Exelon asserts that the foregoing establishes that OSHA led the industry to believe its master tagging procedures complied with the standard. I disagree. First, the testimony of Forrest Carr did not specify what questions were put to David Wallis; as Carr put it, “we wanted to have [the industry’s tagging procedures] better clarified as being an acceptable practice.” (Tr. 584). Second, James Tomaseski testified he did not remember any discussion about individual employees signing on and off of a master tag or other device in group tagging procedures; as he recalled, the question to OSHA was if anything had changed, to which OSHA replied that compliance with 1910.147 would constitute compliance with 1910.269. (Tr. 519). Third, David Wallis explained that the reason OSHA had agreed to omit the proposed provision was because EEI had stated at the meeting that “the first part of the answer to number three (*see* R-20 at 2) answered the issue for them.” Wallis also explained that the deletion of the material did not mean it was incorrect, but that it was simply not part of OSHA’s official interpretation. (Tr. 466). Fourth, as Wallis noted, a provision EEI had proposed that was not included in the 1910.269 directive referenced (d)(8)(ii) and was captioned “Central Control (Master Tagging) Programs.” (Tr. 488-89). The provision stated:

The standard is not intended to apply group lockout/tagout (Master Tagging) procedures to Central Control Programs that allow for placement and removal of tagout devices by a central control system. Central Control Programs that strictly regulate the operation of energy control devices by a system operator who is the only person with authority to operate energy control devices under his/her jurisdiction and to place or remove tags on these devices provide protection equivalent to personal tagout devices. Paragraph (d)(8)(v) ... provides for Central Control Programs in electric power generation installations with central control. (R-12 at p. 2).

In view of the above, I find unpersuasive Exelon’s assertion that the industry was led to believe its master tagging procedures complied with the standard. I further find that the statements

¹⁶Footnote 4 (set out after the term “equivalent means”) stated: “Appendix C identifies work permits, on which employees sign in and sign out, as being equivalent means of controlling hazardous energy sources. Procedures that rely solely on visual or audible means of accounting for employees (for example, visually determining whether employees are present) are not acceptable. Each individual employee being protected must have a verifiable means of releasing his or her ‘lockout device, tagout device, or equivalent means.’” This language was also not included in C-52.

of Wallis at the February 1996 meeting were substantially the same as what OSHA had told the industry previously. The record shows that in June 1994, OSHA held a seminar on 1910.269. OSHA, industry and union officials were present, and attendees included Wallis and his supervisor, Joseph Pipkin, as well as Forrest Carr and IBEW representatives; at the meeting, Joseph Pipkin stated that if industry complied with 1910.147 it would be in compliance with 1910.269. (Tr. 449-50; 579-80; R-9). The record also shows, as noted *supra*, that OSHA had consistently stated what it required in group tagging procedures during the promulgation of 1910.147 and 1910.269. Moreover, while Charles Kelly, an EEI official, indicated his belief that the statements of Wallis at the February 1996 meeting “allowed us to do what we wanted to do,” he conceded the sum total of the agreement reached with OSHA was to follow Appendix C.¹⁷ (Tr. 414-15). Finally, although Wallis agreed there are means other than those set out in Appendix C that may be used, as the Appendix itself notes, he testified, and OSHA has made clear, that each individual crew member in a group tagging situation must sign on and off of a master tag, work permit or other device. (Tr. 462-63; 493-94; 499-500).

Even assuming *arguendo* that the industry had concluded, albeit mistakenly, that OSHA had approved its master tagging procedures at the 1996 meeting, a May 1999 meeting and a subsequent communication from OSHA should have dispelled any misperceptions the industry had. On May 21, 1999, OSHA, EEI and IBEW representatives met to discuss the industry’s tagging procedures under 1910.269, and the issue of signing tags was specifically addressed. On June 2, 1999, EEI’s Charles Kelly wrote a letter to OSHA requesting a moratorium on the issuance of citations or a review of proposed citations by OSHA’s National Office; Kelly also requested verification of what EEI had understood the agency’s position to be at the meeting. *See* C-53. On October 14, 1999, the Director of OSHA’s Directorate of Compliance Programs wrote a letter that, after declining to impose a moratorium, responded to EEI’s questions and concerns. *See* C-54.

In point 2 of its letter, EEI set out its position regarding group tagout as follows:

2. § 1910.269(d)(8) does not require group tagout. Rather, once equipment has been de-energized and tags properly placed, the supervisor or other leader of the crew that is to perform the work is to personally inspect the tags to assure that the system has been properly de-energized, and that it is safe to begin work. To assure

¹⁷Kelly is EEI’s Director of Industry Human Resource Issues, and his primary responsibility is to serve as a liaison with OSHA on all matters impacting the industry. (Tr. 379-81).

accountability, the name of the supervisor or leader must be entered in some form of record, such as a master tag or computer-generated tagging list, so that it is clear who is responsible for the crew's safe work under the tags. The supervisor or lead person will account for all crewmembers prior to the system being re-energized. (C-53 at 2).

OSHA's response to the foregoing stated:

The procedure described in your summary point is unacceptable as written because it places each crew member's personal safety with the supervisor/crew leader. With respect to § 1910.269(d)(8)(ii)(D) requirements, verbal accountability steps are **not** equivalent to each employee placing a personal device on a group LOTO mechanism. (C-54 at 2).

EEI's points 3 and 4 stated that:

3. Under 1910.269(d)(8)(g), individual members of the crew are to be given the opportunity to inspect the tags and to have his/her name recorded on the record, *i.e.*, sign the master tag or tagging list. This is not a required element of a compliant tagging program, however. (C-53 at 2).

4. Those whose names have been recorded as responsible must "sign off" the accountability document before the tags are removed and the equipment re-energized. (C-53 at 2).

OSHA replied to the above as follows:

Issues 3 and 4 both address a tagout procedure. A master tag, as defined by OSHA Instruction STD 1-7.3, is a document used as an administrative control and accountability device; it is normally controlled by the operations department personnel. It is a personal tagout device only if (1) each employee personally signs on and signs off on the master tag and (2) the master tag clearly identifies each employee who is thereby protected. (C-54 at 2).

In addition to the foregoing, OSHA's letter pointed out that it had rejected a proposal during the 1910.269 rule making that individual locks or tags were not required in group lockout/tagout. OSHA's response further pointed out that EEI's position, that the crew leader or supervisor may advise crew members that it is safe to work or that the equipment is about to be re-energized, did not comply with the standard; instead, each crew member must affix and remove his own lock or tag or sign on and off of a master tag or permit. (C-54 at 2-3).

On the basis of C-53 and C-54, as well as the other evidence set out *supra*, I find that the record does not support Exelon's contention that OSHA led the industry to believe that its group tagging practices complied with the standard. Exelon's second contention is therefore rejected.

Exelon further contends it complied with the standard, based on (1) statements in Appendices B and C, (2) statements that David Wallis made in a deposition in an earlier case, and (3) the fact that OSHA granted the Voluntary Protection Program (“VPP”) application of a facility with a similar procedure. As to (1), the relevant text of Appendices B and C is given above. In sum, however, Appendix C (to the 1910.147 directive) gives examples of compliant operations, while Appendix B (to the 1910.269 directive) states that 1910.147 has guidance for the use of group procedures and that Appendix C has “example group lockout/tagout procedures that can be used to comply with 1910.269(d).” *See* C-49 at 26-36; C-52 at 32. Appendix C notes that “[t]hese examples are not intended to present the only acceptable procedures for conducting group operations,” and Appendix B notes that “[t]hese are intended as examples only. Other means of meeting the standard may also be used.” (C-49 at 27; C-52 at 42 n.4). Similar to its argument set out above, Exelon points to this language in the appendices and to the testimony of David Wallis that means other than those set out in Appendix C may be used to comply with the standard; Exelon also points to the testimony of Wallis that OSHA has never told the industry what all the acceptable methods are. (Tr. 462-63). Regardless, it is clear from Appendix C and the record in general that OSHA requires personal accountability of each and every crew member in a group tagging situation and that each such crew member must sign on and off of a master tag, work permit or similar device. Moreover, as the Secretary indicates in her brief, the procedure Exelon has chosen to use is substantially the same as those described in the preambles to 1910.147 and 1910.269 and Appendix C, which specifically require each individual crew member to sign on and off of a master tag or work permit. *See* C-48 at 4362; C-49 at 31-36; C-50 at 36,683. Exelon’s contention is accordingly rejected.

With respect to (2), Exelon notes the testimony of David Wallis in a deposition in 1998 in another Commission case in which Wallis gave OSHA’s interpretation of 1910.269 and Appendix C regarding compliant group tagging procedures. Wallis agreed that he was so deposed (Tr. 454-55), and he read into the record the following from the deposition:

Q: What exactly is the kind of procedure that the Agency had in mind when it says provide a system which identifies each authorized employee involved in a maintenance operation in the group lockout context....

A: You have to have a procedure for identifying which employees are in the crew doing work.

Q: Describe one that is in compliance.

A: It is -- the procedure says that you have to have either a list of people working on the equipment or you have to have their names on the group lockout device where you can find out who is working on it. Those are examples of compliant procedures.

Q: So under group lockout procedures you can have the people who are working on the project identified on the list in the control room, right?

A: You could have it there. (Tr. 468-69).

Exelon points to the foregoing in support of its contention that it complied with the standard and to the testimony of Wallis at the hearing that his position was still the same. (Tr. 469-70). However, Wallis then went on to testify that his position was in regard to the obligation to identify employees on the crew. (Tr. 469-70). It is clear that the obligation to identify employees on the crew is different from the obligation that each crew member sign on and off of a master tag, work permit or other device. It is equally clear that both are required in a group tagging or master tagging procedure. *See, e.g.*, Appendix C (C-49) at 28.¹⁸ Exelon's contention is rejected.

In regard to (3), Exelon notes the evidence in the record that another electric utility facility, with a group tagging procedure similar to that of Exelon and the industry in general, was accepted into OSHA's Voluntary Protection Program ("VPP"). The record shows that Pennsylvania Power and Light ("PP&L") applied for VPP status in 1996, that the compliance program PP&L submitted included a group tagging procedure that did not require individual crew members to sign on and off of a master tag or other device, and that in 1999 OSHA granted the application of one of PP&L's facilities. (Tr. 362-78). However, the record further shows that PP&L had also applied for VPP status for a number of its other facilities and that the applications for those were stayed pending the resolution of lockout/tagout issues between PP&L and OSHA. (Tr. 373-78). The record does not establish why OSHA granted the application for VPP status of one of PP&L's facilities, when all of the facilities presumably had the same or similar group tagging procedures. Regardless, under the facts of this case, the granting of one VPP application is an insufficient basis upon which to find either that Exelon complied with the standard or that it had a reasonable belief that it was in compliance with the standard. Exelon's contention is rejected, and, for all the reasons set out above, I conclude that Exelon had adequate notice of the standard's requirements.

¹⁸As set out *supra*, Appendix C (C-49) defines the term "master tag" on page 28 and states that it "is a personal tagout device if each employee personally signs on and signs off on it and if the tag clearly identifies each authorized employee who is being protected by it."

Whether Exelon's OOS Procedure Provides Equivalent Protection

Exelon's final contention is that it did not violate the standard because its OOS procedure affords "protection equivalent to that provided by the implementation of a personal lockout or tagout device." In support of this contention, Exelon points to its "carefully crafted and implemented" OOS procedure, the fact that employees receive extensive training in the procedure, and the fact that no injuries have ever occurred at the facility because of a failure to follow the OOS procedure. Exelon also points to the testimony of witnesses to the effect that no one in the industry uses personal tags, or requires individual crew members to sign on and off of a master tag or other device, and that doing so would add nothing to employee safety and would be a "nightmare" to enforce. Exelon concludes that OSHA's interpretation of the standard is not entitled to deference in this case.

In general, the Secretary's interpretation of an ambiguous OSHA standard is entitled to deference as long as her interpretation is reasonable and consistent with the regulatory language. *See Martin v. OSHRC*, 499 U.S. 144 (1991), and cases cited therein. As a preliminary matter, I tend to agree with the Secretary that the standard is not ambiguous, especially when read in conjunction with the relevant provisions of the preambles to 1910.147 and 1910.269. However, even if it were, I would still find that the Secretary is entitled to deference in this matter. As Exelon itself notes, the Supreme Court has recently articulated the factors to be considered in determining whether an administrative agency's interpretation of a regulation should be given deference, as follows:

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.

U.S. v. Mead, U.S.L.W. 4488, 4490 (2001). As Exelon further notes, the Court then went on to quote from a previous decision as a "summing up" of this issue, as follows:

The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 4490, quoting from *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In regard to thoroughness, the foregoing discussion establishes, and I find, that OSHA has thoroughly considered the issue of requiring each individual crew member to sign on and off of a

master tag, work permit or other device; this finding is bolstered by the fact that the requirements of both 1910.147 and 1910.269, including the sign-on/sign-off requirement, were the result of extensive comments, hearings and other input by interested parties, and by the fact that Appendix B to the compliance directive for 1910.269 was issued after a lengthy period of negotiations among OSHA, industry and union representatives. As to consistency, I have already found, as set out *supra*, that the evidence of record demonstrates that OSHA's interpretation of the standard has been consistent. This conclusion is apparent from a review of the preambles to the standards, the appendices to the compliance directives for the standards, and the interpretational letter of October 14, 1999, issued by OSHA's Directorate of Compliance Programs.

With respect to the validity of OSHA's reasoning, the Secretary notes in her brief that the core principle of lockout is that each employee who is potentially exposed to hazardous energy will have his own lockout or tagout device attached to the energy isolating device during the servicing operation and that the equipment cannot be re-energized until each employee removes his own lock or tag. (C-48 at 4320, 4359). The Secretary also notes that the purpose of this requirement is to reduce the possibility that another individual might re-energize equipment under the mistaken impression that all authorized employees had finished their maintenance work and were removed from danger; in this regard, the preamble to 1910.269 states that "[i]t cannot be overemphasized that employees performing tasks on de-energized equipment may be exposed to hazards involving serious injury or death if the status of the lockout or tagout control can be changed without their knowledge." (C-48 at 4359-60). The Secretary points out that by requiring each authorized employee to place and remove his own lock or tag, the standard assures the employee will have effective, individual control over energy sources that could otherwise cause serious injury. (C-48 at 4360-61). The Secretary further points out that this requirement applies whether one employee or a group of employees is performing servicing work. *See* 1910.269(d)(6)(iv), (d)(7)(iv) and (d)(8)(ii)(D).

As set out above, the Secretary contends that Exelon's tracking list is not the equivalent of a personal lockout or tagout device because each individual crew member does not sign onto and off of the tracking list; rather, the lead worker (1) informs the crew members of the OOS and puts a check by each employee's name on the list, (2) informs the crew members of the lifting of the OOS

and puts his own initials by each employee's name on the list, and then (3) signs the list.¹⁹ *See* C-7. The Secretary's concern is that, with only a verbal notification requirement, the possibility exists that a crew member might not actually be informed of the lifting of the OOS protection, thus exposing that crew member to the hazard of electrocution; the Secretary indicates that this hazard was exacerbated in this particular case by the fact that the breakers, or energy isolating devices, for the subject heater were in a different area than the heater. *See* C-1.

Turning to Exelon's contention, I have considered all of the evidence of record as to its OOS procedure, including the evidence indicating that employees are trained in the procedure and receive annual retraining, that employees comply with the procedure and do not disturb tags on equipment, and that the procedure was followed in the cited work. (Tr. 24-62; 71-72; 96-99; 135; 139; 150-51; 160-62; 165-66; 188-90; 206-08; 222-23). I have also considered the evidence indicating there have been no injuries at the facility from a failure to follow the procedure and that no one in the industry uses personal tags or requires individual crew members to sign on and off of master tags or other devices. (Tr. 169-70; 216; 434-35; 536-37; 594). Finally, I have considered the testimony of two witnesses that such a requirement would not increase safety. Gene Stanley, a vice-president of operations with Exelon who is responsible for six plants, testified that maintenance employees would not be any safer if they signed on and off of the tracking list due to the system that is in place and all of its safeguards. (Tr. 435-37). James Tomaseski, the IBEW official noted above, testified that signing on and off of a piece of paper would not make working on equipment safer; he indicated the key to safety is to have the proper procedures and training in place and to verify that equipment has been properly isolated and de-energized. He also testified that a sign-on/sign-off requirement would be a nightmare to enforce and would result in more discipline for members. (Tr. 519-24; 536-38).

Despite the foregoing, I agree with the Secretary's position in this matter. As set out *supra*, the core principle of lockout/tagout is for each employee to place and remove his own lock or tag, thus ensuring each individual employee effective, individual control over hazardous energy sources. Moreover, as discussed in the "history" portion of this decision, OSHA considered and rejected the assertions of EEI and the IBEW during rule making that the tagging procedures the industry used

¹⁹The Secretary stipulated at the hearing that other than the failure of each crew member to sign on and off of the tracking list, Exelon's procedure complied with the standard. (Tr. 474-75).

worked well to protect employees; instead, OSHA specifically found that electric utility employees at high risk were exposed to a significant risk of injury under existing practices, based upon Eastern Research Group's review of IBEW fatality reports. (C-48 at 4363 n.33). In addition, the issue here is whether the requirement that each crew member sign on and off of the tracking list would reduce the risk of a crew member being exposed to the hazard of electrocution. I find that it would, for the reasons that follow.

First, notwithstanding the evidence that employees followed the OOS procedure, James Hedenschoug, the OOS coordinator at the LaSalle facility, conceded he knew of instances in which maintenance supervisors had sent employees to work before electronically "accepting" the OOS, and Terry Ziakis, a senior human resource representative at the facility, acknowledged there had been a number of occasions where employees had been disciplined for failing to follow OOS procedures. (Tr. 82; 184; 225; 228; 235-38). Second, although Hedenschoug and Brian Schmitt, a first-line supervisor in the electrical maintenance department, both indicated that they attempted to verify that the tracking lists were being used and completed properly, their testimony establishes there was no system in place to ensure this was the case. (Tr. 187-90; 200-01; 221-23). Third, while Schmitt was emphatic that each crew member on the tracking list had to be located and notified about the lifting of the OOS, Danny Crouse, the lead worker during the cited job, testified that he told two members of his crew that the OOS was being lifted when he "bump[ed] into them" in the shop, indicating, in my view, a somewhat casual approach to the notification requirement. (Tr. 49-50; 211-16). Fourth, Crouse also testified that he had discussed the tracking list with Schmitt, his supervisor, the first time he used it because he had questions about filling it out and about why he would sign off for the crew instead of their signing off; according to Crouse, this was the same as the old procedure, with the crew relying on the lead worker, and Schmitt had no answer to his question.²⁰ (Tr. 57-59).

In light of the above, I conclude that the lead worker signing the tracking list for the crew does not afford "protection equivalent to that provided by the implementation of a personal lockout or tagout device." As I see it, without a specific sign-on/sign-off requirement for each crew member, there is a significant risk that a crew member might not actually be informed of the lifting of the

²⁰Schmitt agreed "a few guys" raised concerns with him about the new procedure. (Tr. 223).

OOS prior to its occurrence and thereby be exposed to an electrocution hazard. For example, I can envision a situation in which the lead worker signs off of the list prematurely, fully intending to advise the crew promptly but failing to do so for one reason or another. I can also envision a scenario in which the lead worker tells crew member “A” about the OOS protection ending and, because crew member “B” is not present and “A” expects to see “B” shortly, asks “A” to tell “B” about the OOS ending and then signs off of the list. Stated another way, the way to ensure that each crew member is protected from exposure to the hazard of electrocution is to require each crew member to personally sign off of the tracking list upon being advised of the lifting of the OOS.²¹

In concluding that the Secretary’s interpretation of the standard is entitled to deference, I am aware of the evidence indicating that no injuries have occurred at the facility from a failure to follow OOS procedures and that the industry does not require individual employees to sign on and off of master tags or other devices. I am also aware of Tomaseski’s testimony that enforcing such a requirement would be a “nightmare.” However, the purpose of the Act is to prevent the first accident, and the fact that the hazard the regulation protects against has not occurred is no defense to the violation. *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1059 (Nos. 89-2804 & 89-3097, 1993); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 588 (D.C. Cir. 1985). Further, that the industry in general has not complied with the standard is likewise no basis for vacating the citation. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1203 (No. 90-2304, 1993). Finally, I am simply not persuaded by Tomaseski’s testimony that enforcement of the sign-on/sign-off requirement would be a “nightmare.” Item 1 of Citation 1 is affirmed as a serious violation.

Penalty

The parties stipulated that, in the event the violation were to be affirmed as serious, the Secretary’s proposed penalty of \$2,400.00 would be appropriate. (Tr. 6-8; J-1). After giving due consideration to the parties’ stipulation, and to the employer’s size, history and good faith and the gravity of the violation, I conclude that the proposed penalty of \$2,400.00 is appropriate. The proposed penalty is accordingly assessed.

²¹The standard has provisions for occasions when an employee is not available to remove his lockout or tagout device. *See* 1910.269(d)(7)(iv).

Conclusions of Law

1. Respondent, Exelon Generating Corporation, LaSalle County Station, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. 1910.269(d)(8)(ii)(D).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Citation 1 is AFFIRMED as a serious violation, and a penalty of \$2,400.00 is assessed.

/s/
Irving Sommer
Chief Judge

Date: November 8, 2001
Washington, D.C.