

ENCLOSURE

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Proposed Director's Decision

Notice of Request for Issuance of an Order for Compliance

ADAMS Accession No. ML100970310

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 OFFICE OF NUCLEAR REACTOR REGULATION

Eric J. Leeds, Director

In the Matter of)	Docket Nos. 50-282 and 50-306
)	
NORTHERN STATES POWER COMPANY)	License Nos. DPR-42 and DPR-60
)	
Prairie Island Nuclear Generating Plant, Units 1 and 2)	

PROPOSED DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. Introduction

By letter to Mr. Bill Borchardt, Executive Director for Operations for the U.S. Nuclear Regulatory Commission (NRC), dated September 4, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML093380574), Mr. David Sebastian (the Petitioner) filed a petition pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 2.206, "Requests for Action under this Subpart."

Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the NRC Web site <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the reference staff in the NRC Public Document Room by telephone at 1-800-397-4209, or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

II. Action Requested

The Petitioner requested that the NRC take the following actions:

- (1) Order Xcel Energy Inc. (Xcel) to cease and desist from its current arbitrary and capricious practice of using the Access Authorization and Fitness-for-Duty (AA/FFD)

Programs for purposes other than their original intent, as they are being applied against him.

- (2) Order compliance with the following:
 - (A) the NRC's regulations at 10 CFR 73.56, "Personnel Access Authorization Requirements for Nuclear Power Plants;"
 - (B) the rationale described in the final rule "Access Authorization Program for Nuclear Power Plants" (RIN 3150-AA90), published in the *Federal Register* on April 16, 1991 (56 FR 18997); and
 - (C) the Nuclear Energy Institute's (NEI) implementation guidance in NEI 03-01, "Nuclear Power Plant Access Authorization Program," Revision 2, dated October 2008.
- (3) Grant the Petitioner access authorization without further delay to perform his accepted job tasks, with all record of said denial removed from any and all records, wherever found.
- (4) Issue any other order, or grant any other relief, to which the Petitioner may have shown himself entitled.

Petitioner's Bases for the Requested Action

The Petitioner stated that Xcel is in violation of 10 CFR 73.56 in denying him access to the Prairie Island Nuclear Generating Plant using the AA/FFD Programs by basing the decision solely upon an existing tax lien. The Petitioner stated that Xcel failed to base the decision to grant or deny unescorted access authorization on a review and evaluation of all pertinent information. The Petitioner stated that Xcel failed to incorporate all three elements (i.e., background investigation, psychological assessment, and behavioral observation) of the unescorted access authorization program when making the decision to deny unescorted access and that this is contrary to the rationale for rulemaking, as discussed in 56 FR 18997.

Determination for NRC Review under 10 CFR 2.206

The NRC Petition Review Board (PRB) met on October 26 and December 2, 2009, to discuss the petition under consideration and determine whether it met the criteria for further review under the 10 CFR 2.206 process. The PRB included NRC technical and enforcement

staff, legal counsel, and an NRC senior-level manager as its chairperson. The PRB determined that the petition under consideration did, in part, meet the criteria established in NRC Management Directive (MD) 8.11, "Review Process for 10 CFR 2.206 Petitions," dated October 25, 2000, for acceptance into the 10 CFR 2.206 process. The PRB made the following initial recommendations:

- Item 1 met the criteria established in MD 8.11 for acceptance into the 10 CFR 2.206 process for the petition under consideration.
- Item 2 met the criteria established in MD 8.11 for acceptance into the 10 CFR 2.206 process for the petition under consideration.
- Item 3 did not meet the MD 8.11 criteria for further review under the 10 CFR 2.206 process, in that the request did not specifically address an enforcement-related action.
- Item 4 did not meet the MD 8.11 criteria for further review under the 10 CFR 2.206 process, in that the petition provided insufficient facts to support the request. However, the results of any investigation into the circumstances of the petition could result in enforcement actions beyond those specifically requested in items 1 and 2.

The NRC discussed the initial recommendation with the Petitioner during a telephone conversation on December 16, 2009. During this conversation, the Petitioner stated that he would not request another opportunity to address the PRB. In a letter dated January 15, 2010 (ADAMS Accession No. ML093410050), the NRC informed the Petitioner that the PRB had approved the petition request, in part, and that it was referring the issues in the petition to the Office of Nuclear Reactor Regulation for appropriate action.

Personnel Access Data System

During the December 16, 2009, telephone conversation, the Petitioner noted that item 3 was an important aspect of his request and clarified its intent. The Petitioner stated that

information retained and on record that related to access denial at the Prairie Island Nuclear Generating Plant was inhibiting his access to other nuclear facilities. The Petitioner was concerned about what information pertaining to him was being shared within the nuclear industry. He was specifically concerned that the information resulting in his being denied access authorization at Prairie Island Nuclear Generating Plant was being disseminated throughout the nuclear industry through the Personnel Access Data System (PADS). The Petitioner requested additional information regarding the PADS, including (1) what information it contains, (2) how it is used in the nuclear industry, and (3) the ability to access personal information entered in the system.

On January 7, 2003, the NRC issued an Order for Compensatory Measures Related to Access Authorization (ADAMS Accession No. ML030060360). The order required the nuclear industry to develop, implement and maintain an industry database (e.g., PADS) accessible by NRC-licensed facilities, with the intent of sharing information, including the determination of whether an individual is denied access at any other NRC-licensed facility. The order stated that any person who has been denied access at a licensee facility based on NRC requirements (e.g., falsification of information, trustworthiness or reliability issues, issues related to fitness for duty) shall be placed in the industry information-sharing mechanism and flagged accordingly to advise other licensees of the individual's status.

Each licensee is required to review and evaluate these access decisions before granting a request for unescorted access. The order further states that unescorted access can only be granted under the following conditions if a person is in a denial status: (1) the denying licensee reviews the access decision and determines, after further review, that unescorted access authorization is appropriate, or (2) another licensee reviews the conditions under which the denying licensee made the denial decision and determines the individual is now trustworthy, reliable, and fit for duty, and that unescorted access would be appropriate at the current

licensee site. Thus, each licensee must evaluate the denial status on a case-by-case basis and make a determination of trustworthiness and reliability.

Only demographic data information, such as name, date of birth, and social security number, is contained in PADS. The current status of unescorted access and denial of access is also contained in PADS. A licensee must ensure that it has the individual's consent before entering information into the PADS database and allowing subsequent retrieval by other authorized operators. It is essential that each licensee ensure that its authorized operators observe this requirement before entering new data.

The PADS database contains no criminal history information, based on the U.S. Department of Justice requirements on the dissemination of criminal history information of third-party entities. Although PADS indicates when a licensee has additional information that should be reviewed in making future access determinations, the database does not include such information. When additional information exists, the licensee's reviewing official must obtain and review the specifics to make a determination on unescorted access to the protected area. The licensee may only obtain such information from another licensee after a newly executed consent is signed by the individual. Since the additional information may or may not be negative, subsequent denial of access cannot be made based only on PADS data. Thus, the licensee must contact the previous facility regarding its denial of access. Then the current licensee must independently evaluate all the information.

An individual or member of the public does not have access to PADS. An individual requiring clarification or resolution of an access authorization concern must resolve the issue with the licensee where unescorted access was last held or otherwise denied.

III. Discussion

Regulatory Evaluation

The regulations in 10 CFR 73.56(d)(5) state, in part: “Licensees, applicants, contractors and vendors shall ensure that the full credit history of any individual who is applying for unescorted access or unescorted access authorization is evaluated.” A credit history check provides information to be used with other background investigation information in the reviewing official’s evaluation of an individual’s reliability and trustworthiness. Poor repayment data alone would typically not be disqualifying. However, when considered in context or with the other information, if there are indications of a potential lack of integrity such that trustworthiness and reliability cannot be assured, then the reviewing official should evaluate the individual’s application as discussed below.

The industry standard for nuclear power plant access authorization program, as described in NEI 03-01, meets the intent and substance of the rule. NEI-03-01 defines potentially disqualifying information as any derogatory information (e.g., unfavorable information from an employer; developed or disclosed criminal history; credit history such as, but not limited to, collection accounts, bankruptcies, tax liens; judgments; unfavorable reference information; evidence of drug or alcohol abuse; discrepancies between information disclosed and developed) that must be evaluated against the adjudication criteria of a licensee or contractor/vendor.

The implementing guidance (Section B.1.2.a (1 and 2)) for the NRC order of January 7, 2003, requires licensees to review derogatory information in accordance with safeguards criteria to ensure that individuals are trustworthy and reliable before granting unescorted access.

Staff Evaluation

Staff from the NRC Office of Nuclear Security and Incident Response evaluated the

Petitioner's requests based upon the governing regulations and a review of (1) the information provided by the Petitioner to the NRC, (2) the access authorization regulatory guidance and industry standards, (3) the interviews conducted by staff from the NRC Region III Office of Investigations, and (4) Xcel's access authorization implementing procedure.

On February 23, 2010, NRC Region III Office of Investigations staff interviewed Xcel personnel who were familiar with the access authorization program at the Prairie Island Nuclear Generating Plant. The Xcel staff included those directly involved in the site access authorization process related to the Petitioner. As discussed below, the NRC staff reviewed the details derived from the interviews to better understand the specific circumstances involved in denying the Petitioner site access.

As recently as October 2009, NRC Region III inspectors conducted a security baseline inspection of Xcel's access authorization program. The inspection found that Xcel effectively implemented the NRC access authorization program requirements under 10 CFR 73.56, "Personnel Access Authorization Requirements for Nuclear Power Plants," in addition to the applicable regulatory guidance that describes a method the staff considers acceptable to meet the requirements of 10 CFR 73.56. The industry standard for a nuclear power plant access authorization program, as described in NEI 03-01, meets the intent and substance of the rule. An Appendix to NRC Regulatory Guide 5.66, "Access Authorization Program for Nuclear Power Plants," issued June 1991, provides the standards, except for a Safeguards Information supplement to the standards that is protected against unauthorized disclosure and controlled in accordance with 10 CFR 73.21, "Protection of Safeguards Information: Performance Requirements."

The NRC staff also reviewed Xcel's internal procedure, FP-S-AA-01, "Xcel Energy Nuclear Department Fleet Procedure Access Authorization Program." Section 5.11.2.1g identifies tax liens as derogatory information if there are no signs of repayment or actions taken

to address the issue before the decision to grant unescorted access. The Petitioner's case was reviewed against FP-S-AA-01, Section 5.11.4.4. (b)(2), which requires evaluation of any derogatory information in accordance with Attachment 5 of the safeguards provisions, to determine if the lack of action by the Petitioner indicates a lack of trustworthiness and reliability warranting denial of access.

The licensee evaluated the Petitioner's tax lien and status against Attachment 5, Item C.9, and the implementing guidance B.1.2.a.2.viii and 1.3.b.1.ii, Clause 2, in the January 7, 2003, order and determined that it indicated a lack of trustworthiness and reliability warranting denial. Poor repayment data alone would typically not be disqualifying. However, when considered in context or with the other information, if there are indications of a potential lack of integrity such that trustworthiness and reliability cannot be assured, then the reviewing official should evaluate the individual's application against the safeguards supplement. Xcel applied this criterion to the Petitioner's case.

The Petitioner disclosed the tax lien to Xcel in the personal history questionnaire. However, for approximately 7 years (early 2001 to 2008), there was no evidence of the Petitioner repaying the debt to the Internal Revenue Service or planning to do so. While the Petitioner provided a document indicating that he sought legal counsel to resolve the tax lien, he did nothing to execute it or establish a payment plan to resolve the matter due to, as he claimed, a lack of monetary funds.

This case was reviewed against Xcel procedure FP-S-AA-01, Section 511.4.4 (b)(2), requiring evaluation of any derogatory information in accordance with Attachment 5 of the safeguards provisions. The process determination indicated a lack of trustworthiness and reliability warranting denial, based on the Petitioner's failure to execute repayment of the debt. As previously discussed, poor repayment data alone would typically not be disqualifying. However, Xcel reviewed the Petitioner's application against the safeguards supplement in

conjunction with other pertinent information and identified a potential lack of integrity, and ultimately determined that trustworthiness or reliability could not be assured.

IV. Conclusion

The NRC staff concludes that Xcel effectively implemented the AA/FFD Programs in accordance with established NRC regulations and NRC-endorsed standards in the case of Mr. Sebastian. Xcel's decision to deny the Petitioner unescorted access to the Prairie Island Nuclear Generating Plant appears sound and justified. Therefore, the NRC denies the Petitioner's request. No further action is required.

As provided in 10 CFR 2.206(c), a copy of this director's decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the decision will constitute the final action of the Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this day of 2010.

FOR THE NUCLEAR REGULATORY COMMISSION

Eric J. Leeds, Director
Office of Nuclear Reactor Regulation