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(Fax: 301-415-1101)
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Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudications Staff
Washington, DC 20555-0001

Re: Comments on Petition for Rulemaking,
Docket ID NRC-2013-0024

Dear Secretary:

This letter contains my comments in opposition to the Nuclear Energy Institute's (NEI) Petition for Rulemaking, dated January 25, 2013 (Docket No. PRM-73-16). NEI is seeking to have the NRC amend its personnel access authorization regulations to limit the scope of third-party review of licensee decisions denying or revoking an employee's unescorted access at their facility, and is seeking to ensure that such decisions denying access cannot be overturned by any third party. I hereby request that the NRC deny NEI's Petition for Rulemaking for all of the reasons stated below. I make this request on behalf of the many employees who have already been significantly adversely impacted by the current process, and those who will be adversely impacted in the future by the process that NEI proposes.

As an attorney who has spent more than 25 years representing numerous employees, primarily in the nuclear industry, both whistleblowers and others who have been subjected to unfair treatment, discrimination and/or retaliation in the workplace, I have seen firsthand the devastating impact that occurs when someone is wrongfully terminated. In the past few years I have represented a number of nuclear industry employees, both contractors and direct licensee employees, who have lost their jobs as a result of being denied unescorted access authorization at the nuclear power plant at which they worked. In most cases those denials of access have been based on shoddy, or non-existent, investigations by the security or human resources departments of the licensees. There have been no standards or requirements for these investigations, and in most cases, no independent assessment by competent legal departments or critical executive management reviews. The regulator's role in assuring the competency or accuracy of these investigations has been non-existent. This Catch-22 then leads to the employees' terminations because they no longer have access to the plants. In other cases, the denials have resulted from incompetent investigations that rely on false statements and/or the personal biases of individuals

in either licensee management or the security departments, who had the power to, and abused that power, using it to ruin the careers and reputations of many good employees.

In all the cases on which I have worked, my clients were supported by their colleagues and often their supervisors, as good, honest, reliable and trustworthy individuals. However, that character evidence was often ignored or not even collected by the investigation, and other evidence was ignored, not included, or not analyzed, with the outcome being a denial of access. The result has been that these hard-working, loyal employees are determined by the licensee to be "untrustworthy", not based on any direct or objective evidence, but solely on false statements made by biased individuals, assumptions, or circumstantial, subjective evidence, stitched together in incompetent and shoddy investigations.[1]

Although the regulations provide an opportunity for an internal appeal, those appeals are heard by panels that are hardly independent and, based on my experience, have never overturned the initial denial of access decision made by the site. In most cases, the employees are not provided the opportunity to have their cases heard or reviewed by "independent" parties who question or probe the validity of the initial investigation. The result is that these employees are denied future employment anywhere in the nuclear industry. This process is already fundamentally unfair and lacks any form of due process for those employees who seek to challenge unfounded and inaccurate allegations made against them.

I do believe that the current access regulations require changes in order to ensure both strong nuclear security and fundamental fairness to employees, but the proposal by NEI does neither. It is my recommendation that the NRC undertake a study of how the current system is actually working, including polling the licensees to find out: 1) the quality or standards that licensees use in conducting denial of access investigations; 2) whether any internal licensee management committee or review board has **ever** overturned an initial denial of access determination; and 3) in how many instances did outside third parties (such as in litigation or grievance hearings), hear the evidence presented and overturn the initial denial of access decision. In those cases what, if anything, was done to or as a result of the initial, flawed, security/HR investigation? This insight would provide the NRC a much better perspective on the quality of the work being done at the initial determination level, and what changes should be considered to enhance the overall quality of the program to ensure fairness to employees. Likewise, for those nuclear security incidents that have occurred, a review of what factors were involved that should have been identified during the security process would be useful.

I. Background to the current issue

A. Personnel Access Authorization Regulations

The regulatory framework surrounding site access, at 10 CFR 73.56, requires each licensee to implement an access authorization program that provides a high degree of assurance that

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[1] It has been my experience that individuals who are actually guilty of some offense that results in denial of access understand that is the consequence of their behavior, and do not waste their time or resources fighting an appeal.

individuals granted access are deemed "trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage." 10 CFR 73.56(c).

Employees who apply for unescorted access to a nuclear plant must go through a comprehensive background investigation which includes, at a minimum, an FBI criminal history records check (including verification of identity based on fingerprinting), employment history, education, credit history, personal references, and in some cases a psychological evaluation. A background check must be sufficient to support the trustworthiness and reliability determination. (See definition for *Background check* at 10 CFR 73.2(a).

Trustworthiness and reliability are characteristics of an individual considered dependable in judgment, character, and performance, such that disclosure of Safeguards Information ... to that individual does not constitute an unreasonable risk to the public health and safety or common defense and security. "A determination of trustworthiness and reliability for this purpose is based upon a background check." 10 CFR 73.2(a).

Radiological sabotage is defined as "A determined violent external assault, attack by stealth, or deceptive actions, including diversionary actions, by an adversary force capable of operating in each of the following modes: A single group attacking through one entry point, multiple groups attacking through multiple entry points, a combination of one or more groups and one or more individuals attacking through multiple entry points, or individuals attaching through separate entry points...." 10 CFR 73.1(a)(1). *Radiological sabotage* means any deliberate act directed against a plant or transport in which an activity licensed pursuant to the regulations in this chapter is conducted, or against a component of such a plant or transport which could directly or indirectly endanger the public health and safety by exposure to radiation." 10 CFR73.2(a).

According to the NRC's Access regulations, a determination whether to grant or deny unescorted access is to be based on an evaluation of all of the information collected on an individual. 10 CFR 73.56(h)(1).

The Access regulations are not supposed to function as a substitute for normal personnel processes, but rather as a process security barrier. There is a tremendous impact on the livelihood of those persons who have been denied access to the nuclear plant in which they have developed their career. Denial of access effectively voids their ability to work at any nuclear plant. 10 CFR 73.56(h)(3). In recognition of this reality, the NRC mandated a series of due process type protections that were allegedly designed to ensure that employees have a fair opportunity to protect themselves against inaccurate information or the biases or abuse of authority with which licensee security and management officials are empowered. This process, set forth in 10 CFR 73.56(l), requires the following procedural safeguards:

- Provision shall include a procedure for notice of denial of unescorted access;
- Procedures must include provisions for the review, at the request of the affected individual, of denial of unescorted access that may adversely affect employment;

- Procedure must include provision to ensure the individual is informed of the grounds for the denial and allow the individual an opportunity to provide additional relevant information and an opportunity for an objective review of the information upon which the denial was based;

- Procedure must provide for an impartial and independent internal management review.

B. The Current Law

Nuclear licensees have been arguing these issues in the courts, unsuccessfully, for years. In an earlier federal lawsuit between a licensee and the relevant union, District Judge Lefkow ruled that access denials were grievable under the collective bargaining agreement and that the 1991 access regulations then in force did not preclude arbitral review. *Exelon Generation Company, LLC v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO*, No. 06 CV 6961, 2008 WL 4442608 (N.D.Ill. Sept. 29, 2008).

The licensee never appealed that decision; instead the licensee filed a new action in district court seeking a declaratory judgment that the 2009 amendments to the access regulations changed the NRC's policy to prohibit third party review of a licensee's denial of access decision. The district court ruled in the licensee's favor and the matter was appealed to the 7th Circuit Court of Appeals and involved a question of federal law – whether the 2009 amendments to section 73.56 prohibit arbitration of unescorted access denials. In *Exelon Generation Company, LLC v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO*, 676 F.3d 566 (7th Cir. 2012), appellate Judge Hamilton, held for the Union, and stated:

> "Exelon's reading of section 73.56 mistakenly assumes that the Commission wrote the 2009 revision to roll back workers' rights. The text of the amended subsection (l) reveals the opposite purpose – to enhance rather than erode procedural protections. Subsection (l) provides baseline rights to employees challenging adverse access determinations: to receive notice, to be heard, and to have an objective decision-maker. The 1991 version permitted licensees to provide for management-level review but did not explicitly require it. Nothing in the 1991 text prevented a licensee from, for example, giving review authority to the same person who issued the initial denial or to a non-managerial employee who was supervised by the initial decision-maker. The change in 2009 from "may be" to "must provide" clarified that the internal management review is a required procedural floor of protection for employees. We see no basis for inferring that the internal review was also a procedural ceiling. Subsection (l) does not bar arbitral review of unescorted access denials."

In requesting these proposed changes to 10 C.F.R. 73.56, NEI is merely attempting an end-run around the latest legal loss for the licensees. For all the reasons identified herein, I oppose this attempt at an "end run" around the process established in the regulations to provide some means of protection for employees in these circumstances.

II. Actual implementation of the regulatory denial of access process.

My experience, unfortunately, is that employees are not fully aware of their rights as they relate to the denial of access regulations in the first place. The employees generally are provided notice of the denial by the licensee and of their right to appeal the denial decision within 10 days. They are usually provided with a basic reason for the denial, but it is never enough to allow them to adequately appeal the denial decision. Only when the employee is provided with all the information on which the denial decision was based -- the security/human resources investigation report, applicable procedures, witness statements, etc. -- does he/she have the type of information necessary to prepare an adequate appeal. Employees generally do not even know they are allowed to ask for the full investigation, much less that they should be provided such information in the first place. Without seeking counsel, most workers never even see the investigation or other documents on which their denial of access was based.

I am usually disappointed, and sometimes appalled, at the poor quality of the investigation reports that I receive from the licensees. They generally are based on inconsistent information, include numerous discrepancies, false statements made by biased individuals, circumstantial evidence, opinions without any basis in fact, or completely inaccurate information not supported by any direct or objective evidence. They do not take into account the fact that the employee previously passed a thorough background security clearance investigation, the length and quality of the employee's service and years of loyalty to the licensee, or the support they are given by their colleagues and supervisors. However, my experience has been that no matter how may discrepancies I point out about the facts or statements or the lack of evidence, no appeal has ever been overturned by the "independent" internal management review board. That fact alone leads me to believe that there is no way that an "internal" management review will or can ever be objective or independent. That is contrary to the intent of the NRC's regulations.

I have included here a number of examples of cases in which, but for third-party intervention -- usually litigation -- all these employees would be out of work in their chosen field.

My work in representing clients who were wrongfully denied unescorted access has primarily involved licensees in NRC Regions 2 and 3 and has involved both union and non-union employees and contractors. I have set out below the factual situations involving some of my clients as examples of the types of situations I have encountered.

Region 2

Clients 1, 2, and 3

I currently represent three non-union employees and contractors (one an employee of more than 30 years) who were denied unescorted access by a Region 2 licensee and terminated. The denial of access was based on an investigation by the licensee of an allegation received by a former contractor employee who previously had been terminated for misconduct.[2] The alleger was part

[2] The alleger was believed to have been terminated for making threats against the lead

of a team of workers who had been tasked to fabricate a main steam instrument rack extension panel ("panel") for installation during an upcoming outage. The panel was not a quality component but did require QC inspection of the panel welds. The alleger claimed that because the panel appeared to be warped, the team was directed (by the lead technician) to cut out the pipe and replace it without obtaining QC approval. A technical investigation revealed that the wrong pipe had been used in the fabrication of the panel, but no determination could be made as to whether the wrong pipe was installed initially or whether or when a re-fabrication of the panel occurred.

All three of my clients fully cooperated with multiple investigations, and consistently denied involvement or that a re-fabrication occurred; and, there is no direct evidence that they were involved if a re-fabrication did occur. There was no logical reason that they would have risked their careers for a project that was not under a deadline to complete, and for which there would not have been any consequences to them if they correctly performed a re-fabrication and had the welds QC inspected. Yet, the licensee determined they all must have lied during the investigation and, therefore, were untrustworthy. After obtaining the licensee's investigation report, I appealed the denial of access decisions for all three individuals and all three denials were upheld by a management review panel. Because these three employees were not union members and did not have the grievance procedure available to them, I filed a Department of Labor complaint which was also provided to the NRC's Region 2 Allegations Office, and the matter is currently pending before the DOL and NRC. In addition, the NRC Allegations office has an open investigation in abeyance pending resolution of the DOL claim.

It is beyond a reasonable belief that the licensee could seriously believe that an employee of 30+ years who lived and raised a family near the plant, as well as the other contractor employees whose jobs were their sole means of support for their families, posed a threat to public health or safety or were capable of nuclear sabotage. Yet all three employees' careers are forever ruined by a fabricated story and a defective investigation.

Region 3

Client 1

In 2003, I represented an employee who had a few beers, and one drink, with dinner while watching the US invasion of Iraq on TV. The next morning at work he was told he had been selected for random drug/alcohol testing. He blew into a breathalyzer and it registered positive. He was then tested on a second breathalyzer which displayed an error message and was later determined to be defective. Against procedure, he was re-tested using the first breathalyzer which again showed a positive result. (Two corrective action reports were written regarding the faulty equipment that stated the test was invalid because collection procedures were not followed.) Yet, the employee was denied access, was escorted from the building and despite making several requests, was never provided with his appeal rights. Instead the employee was

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technician and the company after he was verbally reprimanded by the lead technician about his blatant disregard of directions provided to him and the rest of the team during a job pre-brief on another project.

told by the licensee's security/FFD supervisor that, in his opinion there must be an "alcohol problem," the employee would have to participate in a chemical dependency assessment and would be reinstated if the findings of the assessment were favorable. The employee participated in the assessment and was told by the independent chemical dependency counselor that she had not identified any dependency issues. The licensee's security/FFD supervisor still refused to accept the counselor's assessment and was hostile towards the employee. The counselor later reported to the employee that the licensee's security/FFD supervisor was exceptionally insistent that she require the employee to attend a substance abuse program, against her professional judgment.

The employee agreed to the requirements thinking it would be the fastest way for him to be returned to work. He attended four classes and the counselor signed off that he had completed the program. Still the licensee security/FFD supervisor insisted that the employee sign a form agreeing to participate in an extended FFD program for one year. The client questioned the form because it stated that his participation was a "condition of employment." The employee was required to jump through all the security/FFD supervisor's hoops and still ended up with a PADS record that showed he had been denied access for 20 days, implying that he was denied access for cause. This employee tried for years to get the licensee to change these records and it wasn't until I filed a defamation lawsuit regarding the damage to his professional reputation caused by the unjustified PADS entry that the matter was resolved favorably for the client.

Clients 2 and 3

I represented two site employees, related by blood, who were employed by a Region 3 licensee. One had been employed for 19 years; the other for 13 years, in different areas of the plant. They were both denied access for being untrustworthy (and then terminated because they had no site access), when a management investigation, based on obvious false statements from a biased individual which then perpetuated into false statements by a management official, determined they had schemed to defraud the Company of $825.00 in equipment repairs on a surplussed Cushman utility cart that was going to be given to one of the employees for a "donation." There was no evidence that they did anything wrong. In essence, the licensee's security/FFD supervisor "felt" that they must be lying because they were related. After obtaining the investigation report, I filed an appeal of the denial of access on behalf of both employees, pointing out the false statements, the discrepancies, and the obvious retaliatory bias of one of the supervisors who made false statements. (One of the employees had previously written two Corrective Action Reports about that individual's actions, including one that the individual had retaliated against the employee after they wrote the first Corrective Action Report.) Again, I was convinced there was no way that any objective person could look at the facts and uphold the denial of access decisions. Again, the management review board upheld the denial of access decisions for both individuals, without explanation. Both employees were represented by a Union and filed grievances. I filed a DOL retaliation complaint, copied to the NRC. Finally, the employees were both reinstated after a year of fighting to get their jobs back. However, the damage to their reputations and economic stability remained unresolved.

Again, it is ridiculous that anyone at the licensee could seriously believe that these two long-term employees would risk their careers over a surplussed piece of equipment, or that they actually posed a threat to public health and safety or were capable of nuclear sabotage.

Client 4

I represent another former employee of a Region 3 licensee who was denied access after a security/access department investigation determined that he was "untrustworthy" because he had not reported an alleged incident that had occurred almost two years previously when he was still a fairly new employee. The event occurred when the employee and about 6 others in his group were tasked with hanging an American flag on top of the turbine deck by the control room. While the supervisors were trying to determine how best to do the job safely, the employee became curious about an unmarked black box with a keypad lock that he had been leaning against. He punched some random numbers into the keypad and then noticed the lock was unlocked; he was unsure if he had unlocked the lock with his random numbers or whether it was unlocked before he touched it. He noticed red duct tape that was holding the door shut. He pushed the door shut, without opening it, and the door locked. The group hung the flag and he left the area. He never mentioned the incident to anyone and did not feel he was required to.

Two years later, an individual saw a security guard changing the code on another lock box. That employee told security that the locks weren't very secure and proceeded to tell him what he had witnessed two years earlier. That resulted in an investigation by the Security department in which my client cooperated fully and told the truth about what had happened two years earlier. The Security/FFD supervisor became defensive when my client commented that the safe was unmarked and did not contain a sign stating the required access level or that the lock box was for security use only; it was unlike every other lock he had seen throughout the plant. The client learned during the investigation that the black box was a gun safe. Almost immediately my client was denied access and terminated.

The client filed his own appeal of the denial of access prior to retaining me and the denial was upheld by an internal management review board. After I was retained, I requested the investigation report and asked for the opportunity to file a meaningful appeal based on the report and the materials involved in the denial decision. The licensee declined my request. It is clear to us that this incident was more the fault of an inept security department with ineffective policies and procedures, and the embarrassment that our client caused them. They could not possibly have been concerned two years after the incident occurred, that he posed a risk to the public health and safety or that he was capable of committing radiological sabotage. His union filed a grievance on his behalf which is still pending. My efforts will be based on the outcome of the grievance.

These are just a few examples of the complaints our office frequently receives, and most often need to turn down because there is no process to work with. Employees are bewildered and overwhelmed that here, in this country, there could be such an imbalanced process. Employees have often spent their entire career at a plant, ensuring its safe operations, and being loyal

members of a workforce.[3] They should be entitled to some degree of fair and equitable process before being stripped of the right to provide for their families. NEI's proposal would just authorize this travesty and should be rejected.

III. Nuclear Employees Must Be Provided The Right To An Objective Review of Denial of Access Decisions by a Truly Independent Third Party.

The NRC recognized that denial of site access is an adverse action with significant, if not permanent, career limiting consequences. The NRC regulations regarding denial of access require an impartial and independent review of a denial of access decision. We do not believe that the internal licensee management review boards (by whatever name) are functioning to provide that role. Thus, employees must be able to have some alternative avenue to have their denial of access decisions reviewed fairly, by competent people, qualified to provide the role of the skeptical critic and ensure that the denial of access process is not abused by the site as an easy way to get rid of employees outside of any fair or formal process.

Those employees who are represented by unions, are usually able to have their union file a grievance of their termination (which results from the denial of access decision) on their behalf. We have found at least one licensee who has made it a practice to deny an employee access and base the termination on the fact that the employee no longer has access to the plant. We believe this is a Catch-22 ploy by the licensee to keep the employee from being able to grieve their termination, as it is their position (and NEI is requesting the NRC to provide support to that position) that the denial of access cannot be grieved. In one instance, a Region 3 licensee attorney made a statement that we believe proves this intent. He said: "Because [your client's] termination of employment was simply the result of his inability to access the [plant] following the denial of his unescorted access, and **not as the result of any disciplinary action**, there are no records responsive to your request to which [your client] is entitled under this statute." In addition, we have also found that a licensee in has been delaying an employee's grievance hearing process, we believe, while it waits for the NRC to rule on NEI's Petition for Rulemaking. This would again deny the employee his rights under the grievance process to a third-party, impartial review of the facts.

Over the years, for several of my clients, I have found a valid state cause of action to challenge the licensee's denial of access decision. In my experience, it is only when I file suit on behalf of the employee, and the poor quality of the licensee's "investigation" is brought to the attention of

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[3] Because a negative "trustworthiness and reliability" determination will adversely affect an employee and virtually void his ability to work in the future, it is critical that the NRC **mandate** that such a determination be based on a complete picture of the employee, and not on a single incident. The Access regulations stress the importance of a comprehensive background check in making a determination on trustworthiness and reliability, including employment history, criminal history, credit history, personal references, etc. Trustworthiness and reliability really is a characteristic that is best determined by the people who work with an employee on a day-to-day basis, not a "wanna-be cop" who has no knowledge of an individual or contact with them until they are tasked with investigating an alleged incident.

an independent third party -- i.e., a judge, a jury, an Administrative tribunal, etc. -- that the case is finally actually reviewed by an "independent" third party and resolved. That process can be lengthy and expensive and is difficult for an employee who is unemployed and not able to work in the nuclear industry based on the licensee's denial of access to pursue. However, in the long run, having a healthy independent review process, sometimes by a third-party, is the only way to ensure that the nuclear safety and security process is both strong and fair.

Finally, in the event that we can find no legitimate basis to file a Department of Labor or state claim, we have filed complaints/allegations with the NRC regarding the specific access denials by some licensees, asking the NRC to review the investigation, the appeal process and the fairness of the denial decision. Unfortunately, to date none of those allegations have been investigated by the NRC, which simply relied upon the existence of the licensee's process and never assessed the quality or accuracy of the information on which a denial decision is based.

The NRC, as regulator of the licensees, must uphold the rights of employees to have their denial of access decisions reviewed by independent and impartial third parties and must deny NEI's Petition for Rulemaking in this circumstance in which it seeks to empower the licensees even more than it has in the past – stripping employees of any hope of fairness or accuracy.

Conclusion

We agree that a strong and healthy safety and security culture depends on the processes employed by the licensees and the NRC to ensure that only trustworthy and reliable employees work at our nation's commercial nuclear plants. However, the unbridled power given to the security department, without a truly independent review process, is not achieving the goal of the program. There are currently no standards for quality work done by the security or HR departments and the stories and examples are legion where that has been the case.

NEI's own Petition for Rulemaking makes the best arguments for why its Petition should be denied. First, in quoting the Commission's statements in consideration to the final rule:

> "... The effectiveness of the [access monitoring] program will depend on the *accuracy of the information* that forms the basis for access authorization decisions and on the perception that the program is a fair one worthy of their cooperation."
> Final Rule, 56 Fed. Reg. at 19,002 (emphasis added).

Second, NEI argues "the purpose of the review process ... was to ensure that the [licensee's access authorization process] was based on *accurate facts*.... A review that is focused on the integrity of the process includes **ensuring that the licensee reviewing official used the correct facts and applied the licensee's review criteria consistently in reaching his conclusions."** Clearly, if these criteria were being followed by the licensees, they would not have to worry about an independent third-party reviewer overturning the decisions. That process does not currently exist, and we urge the NRC to reject NEI's proposed rule in its entirety.

As a final matter I would like to note my formal objection to the decision to shorten the comment period on this extremely important issue.

Thank you for the opportunity to provide comments.

Sincerely,

Billie P. Garde

Billie Pirner Garde