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# Congress of the United States
## House of Representatives
### Washington, DC 20515-3001

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July 8, 2013

The Honorable Allison M. Macfarlane
Chairwoman
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, D.C. 20555-0001

Dear Chairwoman Macfarlane,

The Nuclear Regulatory Commission is currently considering a petition for rulemaking requesting the Commission limit the scope of third party review of employer decisions, revoking employee unescorted access [NRC-2013-0024]. In light of the recent Seventh Circuit Court of Appeals ruling, I urge the commission to deny this petition for rulemaking as an unnecessary curtailment of due process for nuclear workers.

For more than two decades, nuclear power plant licensees and their employees have effectively engaged in third party review of unescorted access decisions, as permitted by NRC rules. Unescorted access is a requirement for most employees at nuclear power plants, and that access may be revoked when the employer deems the employee untrustworthy or unreliable. In 1991, the NRC implemented a minimum level of due process review for these access denials. A nuclear generating licensee was henceforth required to provide "an opportunity for an objective review of the information upon which the [unescorted access] denial… was based." Union represented employees at numerous plants were able to review the denial or revocation of unescorted access as part of their grievance procedure as settled upon in collective bargaining agreements. These labor contract grievance procedures could ultimately lead to arbitration, where an objective third party would have the power to reinstate a wrongful denial of access.

Despite a functioning third party review process, the licensees represented by the Nuclear Energy Institute (NEI) have repeatedly fought to limit independent review. When the NRC undertook a comprehensive review of its regulations, NEI argued unsuccessfully that changes prohibited arbitral review. A unanimous ruling by a panel of the Seventh Circuit Court of Appeals held that NRC's 2009 amendments were not a reversal of its prior allowance of third party review. Exelon v. Local 15, 676 f.3d 566 (7th Cir. 2012). The Court found:

"[The Licensee's] reading of [10 C.F.R. §] 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 change in the 2009 from "may be" to

heard, and to have an objective decision-maker…The change in the 2009 from "may be" to "must provide" clarified that the internal management review is a required procedural floor of protection for employees. I 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." Id. At 571-72

Nothing in the Commission's record so much as hinted at an intent to modify the long-established allowance of objective, third party review. NEI has responded to its court loss by seeking to rewrite the rules for its own benefit and the workers' detriment. I consider this to be a solution for a problem that does not exist. The decision to revoke or deny unescorted access is tantamount to termination of an employee, and that employee would face dim prospects in the pursuit of another job in the nuclear energy sector. Recognizing the gravity of that determination, the NRC has maintained a floor of employee protection and due process over the past few decades. During the same amount of time, employee grievances have been subject to possible arbitral review where the collective bargaining agreement affords the employee greater procedural protections. If Judge Richard Posner of the Seventh Circuit Court of Appeals had his way, no employer would have carte blanche authority to remove security clearances and every employee, not just those belonging to unions, would benefit from third party review of judicial decisions. Exelon v. Local 15, 682 F.3d 620 (7th Cir. 2012). I find this history convincing and urge the NRC not to advance this petition for rulemaking. This petition seeks to limit the rights of workers. Creating a ceiling where due process has long existed is not the proper course of action.

Sincerely,

Robert E. Andrews

Robert E. Andrews
Member of Congress

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515–3001

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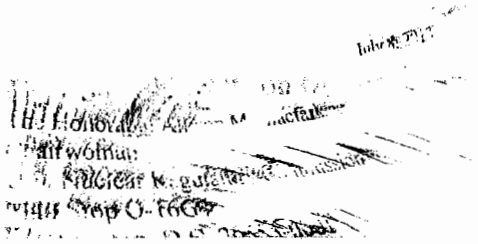

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