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ELLEN C. GINSBERG
Vice President, General Counsel & Secretary

1201 F Street, NW, Suite 1100
Washington, DC 20004
P: 202.739.8140
ecg@nei.org
nei.org

NUCLEAR ENERGY INSTITUTE

January 25, 2013

Ms. Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001

Email: rulemaking.comments@nrc.gov

Subject: Petition for Rulemaking to Amend 10 C.F.R. § 73.56, "Personnel access authorization requirements for nuclear power plants"

Dear Ms. Vietti-Cook:

In accordance with 10 C.F.R. § 2.802, the Nuclear Energy Institute (NEI)[1] on behalf of its members, submits this Petition for Rulemaking requesting that the U.S. Nuclear Regulatory Commission (NRC) amend its regulations at 10 C.F.R. §§ 73.56(a) and (*l*). NEI is petitioning the NRC for regulatory action because of a decision earlier this year in the United States Court of Appeals for the 7th Circuit holding that the NRC's access authorization regulations do not prohibit the use of third-party arbitrators. At bottom, the effect of this decision is that a person who has been determined not to be trustworthy and reliable by a licensee as part of a comprehensive evaluation required by NRC regulations could nevertheless be granted unescorted access to a nuclear power plant. This possibility obviously raises serious security and regulatory compliance issues for nuclear power plant licensees. Beyond the problems that this decision creates for NRC reactor licensees, the predicament that the court's decision creates also should be of significant concern to the Commission in view of its statutory mandate to ensure adequate protection of the public health and safety and the common defense and security.

In light of these concerns, NEI is requesting that the NRC modify its access authorization regulations to impose a limited scope of third-party review of denials or revocations of licensee unescorted access decisions to ensure that such decisions cannot be overturned by any third-party. These revisions would also clarify that unescorted access decisions are solely the responsibility of reactor licensees, subject to oversight by the NRC.

These revisions are supported by a number of strong policy and security considerations that are detailed in the attached petition. In sum, the revisions would re-establish the licensee's exclusive responsibility for the safety and security of its site. An interpretation of the NRC's regulations that permits a division of this responsibility between the licensee and an unaccountable third party is simply unacceptable and entirely inconsistent with the core principles underlying

[1] The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

the NRC's safety and security regulations. Further, licensee access authorization decisions are made by licensee personnel who have the requisite training and experience to make predictive decisions regarding a person's trustworthiness and reliability with an ultimate focus on the security of the site and the safety of the public. NEI's proposed revisions would ensure that, much like national security clearance decisions, the merits of unescorted access decisions are not subjected to second-guessing, especially by persons without the necessary training and qualifications, and for whom safety and security is not the principal concern. Finally, it should be noted that these proposed changes would not alter the effectiveness of the current review process. Thorough reviews of access denials and revocations would continue to be available to persons whose access has been revoked or denied, and the NRC would retain its authority to provide oversight of these decisions through its existing inspection and enforcement programs.

NEI requests that the NRC consider this petition on an expedited basis in light of the potential for near-term adverse consequences that may result from the lack of clarity in the current rule.

Thank you for your consideration of our request. Please contact me or Jason Zorn of my staff at 202-739-8144 (jcz@nei.org) if you need additional information.

Sincerely,

Ellen C. Ginsberg

Ellen C. Ginsberg

Attachment

c: The Honorable Allison M. Macfarlane, Chairman, NRC
The Honorable Kristine L. Svinicki, Commissioner, NRC
The Honorable George Apostolakis, Commissioner, NRC
The Honorable William D. Magwood, IV, Commissioner, NRC
The Honorable William C. Ostendorff, Commissioner, NRC
Mr. R. William Borchardt, Executive Director for Operations, NRC
Ms. Margaret Doane, General Counsel, NRC
Mr. James T. Wiggins, Office of Nuclear Security and Incident Response, NRC

Nuclear Energy Institute
Petition for Rulemaking to Amend 10 C.F.R. § 73.56

In accordance with 10 C.F.R. § 2.802, the Nuclear Energy Institute (NEI) on behalf of its members, hereby submits this Petition for Rulemaking requesting that the U.S. Nuclear Regulatory Commission (NRC) amend its regulations at 10 C.F.R. §§ 73.56(a) and (*l*).

I. Statement of Petitioner's Interests

NEI has a clear interest in the issues underlying this rulemaking petition and can provide a unique and useful perspective on their resolution. NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. As such, NEI seeks to promote the continuing availability of nuclear energy in the United States, the safe operation of existing nuclear facilities, and the development of new ones. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States. These entities have primary responsibility for ensuring that the use of special nuclear materials adequately protects the public health and safety and is not inimical to the common defense and security. Additionally, NEI believes that NRC licensees must be able to rely on a predictable federal regulatory scheme administered by the NRC. NEI therefore endeavors to bring matters to the NRC's attention that might frustrate the agency's statutory and regulatory objectives. The regulatory issue identified in this petition is a generic matter, and has the potential to affect the ability of NRC reactor licensees to control access to the protected and vital areas of their sites.

II. Background

Nuclear power plants are required to have programs to evaluate employees for suitability to have unescorted access to the protected and vital areas of the plants. These programs – known as access authorization programs – are required by NRC regulations at 10 C.F.R. § 73.56, "Personnel access authorization requirements for nuclear power plants." The access authorization rule was originally codified in 1991[1] and most recently revised in the 2009 Power Reactor Security Requirements rulemaking.[2]

Subsection 73.56(c) sets a general performance objective requiring each licensee to have an access authorization program that "provide[s] high assurance that the individuals [who have unescorted access to the facility] are 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." The central element of Section 73.56 is Subsection (d), which requires licensees to perform background investigations on employees seeking unescorted access to collect information regarding criminal, credit, employment, and educational history, as well as other information relevant to determining whether a person is trustworthy and reliable.[3] In addition, licensees are required by § 73.56(*l*) to implement a review procedure to notify persons that they have been denied unescorted access, and to provide, at the request of the affected individual, a procedure for the review of "a denial or unfavorable termination of unescorted access or unescorted access authorization that may adversely affect

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[1] Final Rule, Access Authorization Program for Nuclear Power Plants, 56 Fed. Reg. 18,997 (April 25, 1991).

[2] Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009).

[3] Fingerprint-based Criminal History Records checks are required by 10 C.F.R. § 73.57 as a prerequisite for unescorted access to nuclear power plants. Section 73.57 implements Section 149 of the Atomic Energy Act of 1954. *See* 42 U.S.C. § 2169.

employment." The rule requires that the review procedure "must provide for an impartial and independent internal management review."

It is in this regulatory context that, earlier this year, the 7th Circuit Court of Appeals decided *Exelon Generation Company v. Local 15, International Brotherhood of Electrical Workers.*[4] At bottom, the court was asked to consider whether the NRC's access authorization regulations at 10 C.F.R. § 73.56, as amended in 2009, preclude review of denials or revocations of unescorted access by a third-party arbitrator if such a review is permitted (or, at least, not prohibited) by an applicable collective bargaining agreement. The court held that neither 10 C.F.R. § 73.56(a)(4) nor § 73.56(*l*) prohibited third-party review of a denial or revocation of unescorted access, and that the NRC's 2009 rulemaking to amend Section 73.56 did not change the policy that was originally established in the 1991 rulemaking. Thus, under the terms of Exelon's collective bargaining agreement with Local 15,[5] the court held that Exelon was required to allow a labor arbitrator to review the denial of unescorted access of an employee covered by the collective bargaining agreement. The broader implications of this decision are that licensees in the 7th Circuit[6] who have collective bargaining agreements containing a standard provision allowing for the arbitration of disputes regarding wages, hours, and terms and conditions of employment may be required to abide by the determination of the arbitrator even if that results in the restoration of unescorted access of a person who has been determined not to be trustworthy and reliable through a comprehensive evaluation by the responsible licensee.

This troubling outcome ultimately rests on the 7th Circuit's conclusion that NRC regulations do not explicitly prohibit arbitration of disputes of unescorted access denials or revocations. It also relies on the existing rule's lack of clarity regarding the proper scope of the review process and the ultimate responsibility of the licensee for plant safety and security. Had NRC regulations been clearer, it is likely that the court would not have reached its conclusion, regardless of the language in the applicable collective bargaining agreement.

The consequences of the court's decision are not merely theoretical. Although the arbitrators assigned to review the grievances at issue in Exelon's lawsuit ultimately upheld the employment terminations of the

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[4] 676 F.3d 566 (7th Cir. 2012). The procedural history of this decision is lengthy and complex, and a complete recitation is not necessary for purposes of this petition. In brief, the case came to the 7th Circuit on appeal by Local 15 of the IBEW from a district court decision granting Exelon's request for a declaratory judgment that the NRC's 2009 amendment of the access authorization regulations "clearly precluded outside review of unescorted access decisions." *Exelon Generation Company v. Local 15, International Brotherhood of Electrical Workers*, 2011 WL 2149624 at *3 (N.D. Ill. 2011). It should also be noted that a previous district court decision prior to the 2009 amendment of the rule held, however, that the earlier NRC regulations "do not preclude disputes involving decisions to deny unescorted site access from being arbitrated pursuant to a collective bargaining agreement..." and that Exelon's grievance and arbitration procedure in its collective bargaining agreement with Local 15 was broad enough to permit arbitration of unescorted access disputes. *Exelon Generation Company, LLC v. Local 15, International Brotherhood of Electrical Workers*, 2008 WL 4442608 at *6 (N.D. Ill. 2008).

[5] The district court previously had held in 2008 that, although the collective bargaining agreement did not specifically identify unescorted access disputes as an action subject to arbitration, the broad language of the grievance and arbitration provision permitted such review. *Exelon Generation Company, LLC v. Local 15, International Brotherhood of Electrical Workers*, 2008 WL 4442608 at *8 (N.D. Ill. 2008).

[6] The 7th Circuit covers Wisconsin, Illinois, and Indiana. There are 8 operating nuclear power plants with a total of 14 reactor units in these states. Exelon accounts for 6 operating plants with a total of 11 reactor units in Illinois. Employees at all 6 plants are covered by a collective bargaining agreement with Local 15 or another local that contains a standard grievance and arbitration provision.

two former employees,[7] thereby rendering the access issue moot, Exelon is currently involved in three other cases scheduled or in the process of being scheduled for arbitration. Both are being scheduled for arbitration. The sole issue for the arbitrator in each of these cases is whether the revocation of unescorted access of the two former employees involved in the incident should be overturned. Two grievances arise from the same incident involving two former employees who were responsible for a glycol spill that could have damaged the nuclear reactor. It is undisputed that both former employees went to great lengths to cover up the spill and lied during Exelon's investigation. The arbitrators assigned to each case agreed to hear and rule on the employment termination first and to delay consideration of the access grievances until after the 7th Circuit's ruling. After hearing evidence on whether the terminations of these two employees were for just cause, the arbitrators in both cases found that, although the former employees clearly attempted to cover up the glycol spill and lied to Exelon, no cause for discharge existed because the two employees might have been induced to disclose their actions by ambiguous statements by the plant management potentially offering leniency in exchange for honesty. In both cases, the two employees lost their access because of their dishonesty in covering up the spill and then lying during the company investigation. Both arbitrators are now scheduling hearings to review Exelon's decision to deny these two former employees unescorted access to Exelon's facilities. The third matter is scheduled for arbitration, and in that case, the arbitrator will be asked by the union to overturn the denial of unescorted access to an individual whom Exelon, as the licensee, determined stole company property and was not forthright in the company investigation.

Other reactor licensees are faced with similar challenges. The provision of Exelon's collective bargaining agreement that has been interpreted to permit arbitral review of unescorted access determinations is similar to provisions in other NRC licensee collective bargaining agreements. As such, several other NRC licensees in the 7th Circuit may ultimately be required to restore unescorted access to individuals previously determined not to be trustworthy and reliable. One utility, for instance, has four separate cases in which employees have either sought arbitration of an unescorted access revocation, or have expressed their intent to do so. All of these employees previously had been denied unescorted access by the utility for failing to demonstrate trustworthiness and reliability under various circumstances, including: being arrested for driving under the influence, and for being a repeat offender regarding alcohol-related criminal offenses; violating the terms of a conditional access agreement requiring abstention from drugs and alcohol; attempting to falsify a random drug test; and lying to investigators regarding accusations of theft.

The decisions to revoke the unescorted access of these employees were based on a sound record and the expert judgment of the utility's access authorization staff whose primary duty it is to protect the public from the risk of radiological sabotage by ensuring that only trustworthy and reliable individuals have access to nuclear power plants. Whether those decisions will ultimately stand will depend largely on prompt and decisive regulatory action by the NRC. In this vein, it is worth noting that, in the 7th Circuit's denial of *en banc* review sought by Exelon, Judge Richard Posner took the unusual step of issuing a written concurrence expressing his great concern about the insufficiency of the NRC's regulations. Regarding a solution, in no uncertain terms he urged that "Congress and the Nuclear Regulatory Commission can do something and one or both of them should."[8] NEI strongly agrees with Judge Posner's call for agency action.

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[7] One individual had been discharged for failing a drug and alcohol test and lying about his substance abuse and the other individual had been discharged for lying about his alcohol abuse.

[8] *Exelon Generation Company v. Local 15, International Brotherhood of Electrical Workers*, 682 F.3d 620 (7th Cir. 2012) (denial of petition for rehearing *en banc*) (Posner, J. concurring).

III. Petitioner's Grounds for the Requested Action

There are a number of clear public policy reasons supporting immediate action by the NRC to amend 10 C.F.R. § 73.56.

A. Control of Site Access Determinations by Third Parties Will Challenge a Licensee's Ability to Demonstrate High Assurance of Adequate Protection

Subsection 73.56(c) requires licensees to have an access authorization program that "provide[s] high assurance that the individuals [who have unescorted access to the facility] are 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." The obligation to demonstrate "high assurance" necessarily requires licensees to be responsible for all decisions related to the operation and security of its site. The importance of vesting ultimate responsibility for site access with the licensee is fundamental to the access authorization regulations. This policy is reflected in the rule's provisions regarding contractor-managed access authorization programs at Subsection 73.56(a)(4), which states that "[o]nly a licensee shall grant an individual unescorted access. Licensees and applicants shall certify individuals' unescorted access authorization and are responsible to maintain, deny, terminate, or withdraw unescorted access authorization."[9] In addition, the Commission made clear in the statements of consideration to the 1991 final rule that "the ultimate responsibility of denying or granting access authorization to an individual resides with the licensee."[10] The principle of ultimate licensee responsibility also underlies the NRC's safety regulations. For instance, the Commission has stated clearly that "[w]ithin [the framework of the Atomic Energy Act of 1954], the regulated industry (i.e., the licensees and their suppliers and consultants) bears the primary responsibility for the proper construction and safe operation of licensed nuclear facilities."[11]

In stark contrast, application of the 7th Circuit's decision permitting an unaccountable third party to decide ultimately who has access to a nuclear power plant completely undermines the principle of licensee ultimate responsibility and seriously challenges a licensee's ability to achieve the goal of demonstrating "high assurance" of the effectiveness of its access authorization program. If left uncorrected, a licensee could be forced to make a difficult decision of choosing either to comply with an arbitrator's decision that an employee's unescorted access must be restored, or risking regulatory enforcement action for failing to meet the NRC's requirement to maintain "high assurance." The 7th Circuit's decision, if left unaddressed, could - in extreme situations - result in licensees being unable to demonstrate compliance with NRC's regulations.[12] The splintering of responsibility between the licensee and an unaccountable third party is entirely inconsistent with fundamental concepts in the Atomic Energy Act and NRC regulations, and

[9] The 7th Circuit rejected Exelon's arguments that 10 C.F.R. § 73.56(a)(4) was applicable to all access authorization-related decisions, including those being reviewed by an arbitrator. Notwithstanding the court's opinion, the concern underlying Section 73.56(a)(4) - that the licensee must maintain ultimate responsibility over who has access to the site - has equal if not greater weight when a third-party reviewer (as opposed to a qualified contractor overseeing the licensee's access program) is evaluating a licensee's unescorted access determination.

[10] Final Rule, 56 Fed. Reg. at 19,004 (1991).

[11] *In the Matter of Federal Tort Claim of General Public Utilities Corp.*, CLI-81-10, 13, N.R.C. 773, 775 (1981). *See also* Statement of Policy, Freedom of Employees in the Nuclear Industry to Raise Concerns Without Fear of Retaliation, 61 Fed. Reg. 24, 336 (May 14, 1996) ("NRC licensees have the primary responsibility to ensure the safety of nuclear operations.").

[12] As a practical matter, one result could be the unnecessary exposure of NRC licensees to regulatory enforcement action.

unnecessarily subjects licensees to regulatory risk. At worst, the safety of the public is threatened by permitting untrustworthy persons unfettered access to the site.

B. Amending the Rule Will Align it with the Commission's Original Intent

The 7th Circuit's decision rests largely on its conclusion regarding the Commission's underlying intent of the 1991 rulemaking, since the provision of § 73.56(*l*) at issue has remained largely unchanged since its promulgation. The 7th Circuit concluded that there was "no doubt that [the NRC's] 1991 version permitted arbitral review of access denials."[13] NEI does not dispute the court's conclusion in this respect. But what the court did not consider in reaching this conclusion was the fact that the Commission also explained that "consideration of access authorization in the collective bargaining process" was bounded, "*within the limits set by this rulemaking.*"[14]

Those limits were clearly articulated by the Commission in that rulemaking. In the statements of consideration to the final rule, the Commission emphasized that it:

> sees the review procedures required by the rule as *necessary to assure effective access monitoring* by licensees....The effectiveness of the 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.[15]

The Commission also stated that:

> the required review procedure applies only to employees denied access authorization on the basis of the program elements in the rule itself.... [I]f the evidence indicates a *proper application of relevant criteria* in excluding an employee, the review procedure, if utilized, should result in a decision vindicating the management action.[16]

In other words, the purpose of the review process required by § 73.56(*l*) was to ensure that the licensee followed its access authorization process and that that process resulted in a decision that was based on accurate facts and that protected the plant from security vulnerabilities. Thus, *the review should be focused on the integrity of the process, not on the merits of the decision.* 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 conclusion. Reading the rulemaking history in its totality, it seems clear that it was never the NRC's intent to allow a third-party reviewer to substitute his own subjective judgment for the licensee's with respect to the weight given particular facts or the application of the applicable criteria. The review process contemplated by Subsection 73.56(*l*) certainly was not intended to result in unaccountable third parties making final decisions about the suitability of individuals for unescorted access.

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[13] *Exelon*, 676 F.3d at 574.

[14] Final Rule, 56 Fed. Reg. at 19,006 (1991) (emphasis added).

[15] *Id.* at 19,002 (emphasis added).

[16] *Id.* at 19,003 (emphasis added).

In not accounting for the NRC's clearly-stated rationale, the 7th Circuit's decision has created a troubling precedent - inconsistent with the Commission's original intent - by expanding the scope of a third-party reviewer's review to an examination of the individual's suitability for unescorted access. The correct reading of the rulemaking record makes inescapable the conclusion that the Commission intended that the review procedures ensure that the licensee's evaluation was based on the "proper application of relevant criteria" and accurate information. If the review finds that the criteria were not properly applied or that the facts upon which the decision was based were inaccurate, then the regulations contemplate that *the licensee* – not the reviewer – will reconsider the access decision. The 7th Circuit's decision disturbs the rule's clearly-established intent.

C. The NRC's Ability to Demonstrate Assurance of Adequate Protection of Public Health and Safety and Common Defense and Security is Compromised

The NRC is obligated under the Atomic Energy Act of 1954 "to ensure, through its licensing and regulatory functions, that the generation and transmission of nuclear power does not unreasonably threaten the public welfare."[17] "Section 182(a) of the Act commands the NRC to ensure that any use or production of nuclear materials 'provide[s] adequate protection to the health or safety of the public.'"[18] Furthermore, courts have suggested that "[i]f the NRC had indisputable proof before it that nuclear power plants are not adequately secure from terrorist attack and nonetheless decided that it would do nothing to address the situation," that the NRC might be found to have "'abdicated' its statutory responsibility."[19] Such an abdication could occur, for instance, if NRC regulations were found to contain a clear vulnerability and the NRC did not act to correct it. The situation created by the 7th Circuit's decision undermines the NRC's ability to demonstrate that adequate protection is assured if licensees are impeded in their ability to comply with NRC requirements to maintain "high assurance." As observed by Judge Posner in his concurrence on the petition for rehearing *en banc*, this issue rests squarely in the lack of clarity in the NRC's access authorization regulations; a deficiency only the NRC is capable of addressing.

D. Trustworthiness and Reliability of Employees Should be Determined by Trained and Qualified Persons with a Vested Interest in Protecting the Site and the Public

The 7th Circuit's decision effectively empowers unaccountable third parties to decide who is suitable for access to nuclear power plants despite the fact that those third parties may have little or no training, qualifications, or experience in making such decisions. In the similar context of granting national security clearances, the U.S. Supreme Court has succinctly articulated the problem with such a situation:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information.... For 'reasons ... too obvious to call for enlarged discussion' ... the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body

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[17] *County of Rockland v U.S. Nuclear Regulatory Commission*, 709 F.2d 766, 769 (2d Cir. 1983).

[18] *Union of Concerned Scientists v. NRC* (UCS I), 824 F.2d 108 (D.C. Cir. 1987).

[19] *Riverkeeper v. Collins*, 359 F.3d 156 (2d Cir. 2004).

> determine what constitutes an acceptable margin of error in assessing the potential risk.[20]

As with the granting of national security clearances, access authorization decisions for nuclear power plants are made by persons with training, expertise, and experience in making predictive judgments about the suitability of persons to have unescorted access to nuclear facilities. Third party reviewers, such as labor arbitrators, on the other hand, are not likely to have the requisite training or experience to make such predictive judgments. Furthermore, whereas a licensee's reviewing official is primarily focused on the protection of the site and the public radiological sabotage, a labor arbitrator does not have as his primary goal to ensure that the public is ultimately protected as a result of his decisions. As such, an arbitrator is not likely to approach his task with the same sensitivity to conservative decision-making that is part of a nuclear safety culture. In this sense, unconstrained third-party reviews of the merits of access decision effectively reduce the margin of safety.

Judge Posner poignantly observed in his concurrence in the *en banc* decision that it is the "tendency of arbitrators to split the difference in their awards – that is, to give each side a partial victory...." Judge Posner highlighted the problem with this compromise-based arbitral approach when applied to considering access to nuclear power plants:

> There are enough indications of split-the-difference behavior in labor arbitration to make one worry about the possible tendency of an arbitrator reviewing a nuclear facility's revocation of an employee's security clearance to impose a sanction that would enable him to retain a right of unescorted access to the facility even if he were a drug addict, a drunkard, and a congenital liar all rolled up into one.[21]

Notwithstanding Judge Posner's very legitimate concerns, the 7th Circuit decision creates exactly the kind of "disturbing" result in which persons without any relevant qualifications or the motivation to ensure that the public is protected will be in a position to make such a decision, even if the decision directly contradicts a carefully-considered determination made by an experienced and safety-focused licensee reviewing official. This result is completely at odds with the objective of minimizing the possibility that untrustworthy and unreliable individuals will have unfettered access to nuclear power plants and undermines a licensee's ability to protect its facility against radiological sabotage.

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[20] *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

[21] *Exelon*, 682 F.3d at 621 (Posner, J., concurring). To be clear, NEI does not agree with Judge Posner's suggestion that the NRC institute a process through which the NRC or any other government agency reviews access decisions made by licensees. Such an approach has been rejected by the NRC and the nuclear industry since access requirements have been part of NRC regulatory requirements. Congress has also considered and rejected government review of access determinations when it codified fingerprinting and criminal history records check requirements in Section 149 of the Atomic Energy Act. As explained by the NRC in the proposed rule that ultimately codified those requirements, the legislative history to Section 149 states Congress's intent that "the Nuclear Regulatory Commission (NRC) would serve as a challenging agency, in order to collect fingerprint cards from licensees and applicants....The NRC will not screen the results." Proposed Rule, Requirements for Criminal History Checks, 51 Fed. Reg. 40,438, 40,438-439 (Nov. 7, 1986).

E. Taking Action to Address the 7th Circuit Decision Will Maintain the Fundamental Fairness of the Access Authorization Review Process

NEI's proposed rule revisions largely maintain the existing language of Subsection 73.56(*l*), specifying that licensee procedures must include an "impartial and independent internal management review." The existing review procedures prescribed by Subsection 73.56(*l*) and implemented by all NRC reactor licensees would continue to provide the necessary employee protections under NEI's proposed revisions. Persons who have been denied unescorted access or whose unescorted access has been revoked would continue to have a process available through which the bases for that decision could be reexamined by an objective and independent reviewer.

As is the case today, licensee access authorization programs would also be subject to NRC oversight through inspection and enforcement. Thus, the NRC would maintain its current ability to inspect the licensee's access authorization process and review procedures to ensure compliance with NRC requirements. As part of its responsibilities, the NRC has proven that it can effectively ensure that licensees are implementing adequate access authorization programs, following their respective processes, using accurate facts, and applying their review criteria consistently. The NRC's ability to demonstrate effective oversight applies not only to the granting of unescorted access, but also with equal force to denials of unescorted access. Nevertheless, it is important to keep in mind that when the NRC exercises oversight over a licensee's access authorization program, it does not substitute its own judgment for the licensee's decisions, just as it does not substitute its judgment for licensee management with respect to operational matters in the absence of a violation. If the NRC were to substitute its judgment for the licensee's and restore unescorted access to a person found by the licensee to be untrustworthy and unreliable, an untenable regulatory situation would be created in which the NRC would become at least partially responsible for the security of the site.[22]

NEI's proposed rule changes do not preclude the possibility that the review function could be performed by a third-party arbitrator. At bottom, the fundamental issue created by the 7th Circuit decision is not with the existence of the review process or even necessarily with the qualifications of a third-party reviewer. *Rather, the issue goes to the scope of the review and the third-party reviewer's authority.* Permitting a review process where a third-party reviewer can substitute his own judgment for the licensee reviewing official's judgment is simply not consistent with the intent of the rule, and makes little sense from a policy perspective. A more focused third-party review, on the other hand, would adequately address the concerns created by the possibility of an untrained, unaccountable third party being placed in a position to make access decisions.

Accordingly, NEI's proposed rule revisions would ensure that the scope of the third-party review is limited and may not result in reassigning the licensee reviewing official's responsibility for the access decision to a third-party reviewer. Rather, the rule should provide for a limited-scope third-party review using factors articulated in the rule text. Under this construct, the third-party review of the denial or revocation would be focused on four elements: (1) completeness and correctness of the facts used to make the decision; (2) adherence to the licensee's review criteria; (3) adherence to legal and regulatory requirements; and (4) consistency with the licensee's established procedures.

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[22] It should also be noted that the agency's allegations process also might provide an aggrieved employee the opportunity to seek the NRC's oversight over licensee access decisions if there is a concern that the employee's access was revoked as a result of raising safety concerns with the licensee.

Regarding the first element, the rule text or statements of consideration should make clear that a third-party reviewer is not to apply his own subjective judgment regarding which version of the facts is true, question the weight given by the licensee reviewing official to any particular fact, or independently apply the facts to the licensee's review criteria. Rather, the third-party reviewer should only examine, for example, whether the reviewing official mistakenly relied on an inaccurate or outdated criminal history record, or whether the revocation resulted from a case of mistaken identity. A focus on the completeness and correctness of the facts mirrors the review that is available for criminal history records under 10 C.F.R. § 73.57(e) and Section 149 of the Atomic Energy Act for fingerprinting for unescorted access. With respect to the remaining elements, the third-party reviewer's role would be to confirm that the reviewing official consistently adhered to the licensee's access authorization review criteria, and that there was no anomaly in the reviewing official's application of the criteria or in following the licensee's processes.

The fairness of a limited-scope review process is evidenced by its similarity to an appellate court's scope of review of final agency action under the Administrative Procedure Act.[23] Much like that review, the review process required by Subsection 73.56(*l*) should not be an opportunity for a third-party reviewer to second-guess decisions that inherently require the exercise of expert discretion by the reviewing official. As with judicial review of agency action under the Administrative Procedure Act, if the third-party review process determines that the revocation was based on incomplete or incorrect information or an error in the process, the appropriate remedy would be for the case to be remanded to the licensee reviewing official for reconsideration in light of the third-party reviewer's findings.

One final point should be kept in mind regarding the function of the review process prescribed by 10 C.F.R. § 73.56(*l*). In the 1991 rulemaking, the Commission stated that it "does not base the requirement for review procedures on a need to comply with constitutional due process requirements...."[24] Rather, the purpose of the review procedures was to "*further the safety interests* addressed by the access rule."[25] In other words, it was the Commission's primary objective to ensure the safety of the facility by ensuring that licensees had a review process that placed safety as the paramount consideration; not to exclusively safeguard the ability of individual employees to challenge adverse access determinations at the expense of safety. A review procedure that elevates non-safety-related concerns (such as the ability to have a grievance resolved through arbitration) over the safety of the plant cannot possibly meet the rule's intent and makes little sense when viewed against the statutory backdrop of the Atomic Energy Act.

Once again, the Supreme Court's *Egan* decision is instructive on this point. In addressing the Court of Appeal's statement that there is a "strong presumption in favor of appellate review" of security clearances, the Court explained that:

> the proposition is not without limits, and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary

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[23] *See* 5 U.S.C. § 706. *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-416 (1971) (explained that "Although this inquiry into the facts [under Section 706(2)(A) of the APA] is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.").

[24] Final Rule, 56 Fed. Reg. at 19,002.

[25] *Id.* (emphasis added).

> judgment call, is committed by law to the appropriate agency of the Executive Branch.[26]

Much like the commitment of national security clearances to experts in the Executive Branch, the granting of unescorted access to NRC-regulated facilities has been committed by regulation to the licensee who bears ultimate responsibility for safe operation of the plant and overall security of the site. As such, any presumption in favor of appellate review of those discretionary determinations must "run aground" if the security of the facility – and ultimately the common defense and security of the United States -- is at stake.

IV. Proposed Amendments to 10 C.F.R. § 73.56

For the above-stated reasons, the NRC should amend its regulations at 10 C.F.R. § 73.56 to expressly prohibit the restoration or grant of unescorted access by third parties (including arbitrators), to remove all doubt that the licensee is solely responsible for making final unescorted access decisions, and to prescribe a clearly-articulated scope of review for third-party reviewers. Consistent with the fundamental principle of nuclear regulation that a licensee bears ultimate responsibility for the safety and security of its site, and the licensee's regulatory responsibility to maintain "high assurance" of the effectiveness of its access authorization program, a licensee, and *only* a licensee, should be the final decision-maker with respect to who may be granted unescorted access to nuclear power plants. This includes instances where the licensee has implemented a review process that permits third-party reviews (such as arbitration). If the licensee's responsibility for safety and security is undermined by the possibility that a third party, who is neither accountable for the safety and security of the facility, nor possesses the expertise to make such decisions, there is a serious concern that the licensee may be out of compliance with NRC regulations and the NRC cannot meet its own statutory obligations. As such, NEI proposes that the NRC amend its regulations as follows:

A. Revise the "Introduction" paragraph at 10 C.F.R. § 73.56(a) by striking the current language referring to contractor or vendor-managed access authorization programs:

> *The licensee or applicant may accept, in part or whole, an access authorization program implemented by a contractor or vendor to satisfy appropriate elements of the licensee's access authorization program in accordance with the requirements of this section. ~~Only a licensee shall grant an individual unescorted access.~~ Licensees and applicants shall certify individuals' unescorted access authorization and are responsible to maintain, deny, terminate, or withdraw unescorted access authorization.*

The current placement of this provision in paragraph 73.56(a) and its contextual connection to contractor-management access programs creates confusion and inconsistency in the access authorization regulations. This proposed revision -- and its companion addition under Paragraph B below -- would ensure that the rule's vesting of ultimate responsibility for access decisions is clear and applied consistently to all situations involving access decisions.

[26] *Egan*, 484 U.S. at 527.

B. Add a new paragraph – 10 C.F.R. § 73.56(a)(5) – to ensure that the licensee's responsibility to make final access authorization determinations applies to all circumstances:

> *Only a licensee may grant an individual unescorted access, including, but not limited to, instances where a licensee's unescorted access determination is subject to review by a third party in accord with 10 C.F.R. § 73.56(l), or if the licensee's access authorization program is implemented by a contractor or vendor.*

With the companion revision to Subsection 73.56(a), this revision would ensure that the rule's vesting of ultimate responsibility for access decisions is clear and applied consistently to all situations involving access decisions.

C. Revise 73.56(l) to ensure that the scope of the review is limited and that the review may not overturn the reviewing official's decision

> *Each licensee and applicant shall include a procedure for the notification of individuals who are denied unescorted access, unescorted access authorization, or who are unfavorably terminated. Additionally, procedures must include provisions for the review, at the request of the affected individual, of a denial or unfavorable termination of unescorted access or unescorted access authorization that may adversely affect employment. The procedure must contain a provision to ensure the individual is informed of the grounds for the denial or unfavorable termination 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 or unfavorable termination of unescorted access or unescorted access authorization was based. The procedure must provide for an impartial and independent internal management review.* ***The procedure may also provide for a limited review by a third-party (non-licensee) reviewer. The scope of the review by a third party is limited to ensuring that the licensee reviewing official's decision was based on complete and correct information; adherence to the licensee's review criteria; adherence to legal and regulatory requirements; and consistency with the licensee's established access authorization procedures. If a deficiency within this scope is identified during the third-party review, the results must be remanded to the licensee's reviewing official for reconsideration in light of the identified deficiency. The third-party review shall not result in overturning of the licensee reviewing official's decision.*** *Licensees and applicants shall not grant unescorted access or certify unescorted access authorization, or permit the individual to maintain unescorted access or unescorted access authorization during the review process.*

The proposed revision to Subsection 73.56(*l*) would add additional clarifying language to the review process provision as it applies to third parties. Namely, it expressly imposes a limited scope on third-party review consistent with the original intent of the rule, focusing the third-party reviewer on four discrete areas. In all of these areas, the third-party reviewer should generally show deference toward the licensee reviewing official's decision and should resolve any doubts in favor of the licensee. The revision also provides clarity that any identified deficiencies must be remanded to the licensee reviewing official for reconsideration, but that the third-party review cannot result in the denial or revocation decision being overturned.

V. Expedited Consideration

As discussed above, several NRC licensees face impending arbitration decisions that could result in restoration of unescorted access for individuals who have been determined to be unsuitable for access. Therefore, prompt agency action is critical. NEI requests that the NRC treat this rulemaking on an expedited basis, narrowly focus the rulemaking on the concise issues raised by this petition, and limit the amendments to several relatively straight-forward revisions. The conduct of this rulemaking would not require the development of any significant technical bases, regulatory guidance, or environmental analyses, significantly minimizing the use or reallocation of agency resources. The NRC should provide a minimal public comment period of 30 to 45 days to allow all stakeholders the opportunity to show support or identify any issues of concern. Finally, the NRC should quickly resolve all significant comments and issue a final rule within 120 days from publication of a proposed rule.