

POLICY ISSUE
(Notation Vote)

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FOR: The Commissioners

FROM: Victor M. McCree
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SUBJECT: ROLE OF THIRD-PARTY ARBITRATORS IN LICENSEE ACCESS
AUTHORIZATION AND FITNESS-FOR-DUTY DETERMINATIONS AT
NUCLEAR POWER PLANTS

PURPOSE:

The purpose of this paper is to provide options for the Commission to clarify that only licensees can make final decisions on access authorization and fitness-for-duty (FFD) determinations. This paper provides the recent history of litigation regarding the use of third parties to arbitrate licensee determinations and discusses the merits of options presented to the Commission.

SUMMARY:

The role of third-party arbitrators to review, and potentially overturn, licensee unescorted access authorization and FFD determinations presents a policy issue that warrants Commission attention. As discussed more fully below, this issue was brought into focus by a 2012 decision by the U.S. Court of Appeals for the Seventh Circuit ("the Court") holding that NRC security requirements do not prohibit arbitration of licensee unescorted access denials and revocations.

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The Court's decision is contrary to the staff's longstanding view that U.S. Nuclear Regulatory Commission (NRC) regulations require licensees to be accountable for the safety and security of their facilities and, therefore, only licensees can make final decisions on access authorization determinations. In the aftermath of the Court's decision, at least one arbitrator has overturned a licensee's access authorization revocation and required the reinstatement of an individual that the licensee had determined is not trustworthy and reliable. Additionally, the NRC staff has recently become aware that Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26 FFD determinations are being arbitrated under some licensees' collective bargaining agreements. The staff recognizes that the Court's decision does not address FFD determinations. However, as discussed more fully below, the arbitration of FFD determinations is conceptually identical to the issue of arbitration of licensee access authorization determinations.

BACKGROUND:

The general performance objective of a licensee's access authorization program is to provide high assurance that only trustworthy and reliable personnel are granted unescorted access to protected and vital areas of nuclear power plants. NRC regulations require that licensees ensure that only individuals determined to be trustworthy and reliable are given unescorted access. Granting unescorted access to individuals that a licensee has determined are not trustworthy and reliable would be a violation of regulatory requirements that could subject a licensee to enforcement action. The history of the NRC's access authorization requirements is set forth below.

On April 25, 1991, the NRC published in the *Federal Register* a final rule entitled, "Access Authorization Program for Nuclear Power Plants" (56 FR 18997). For the first time, agency regulations required licensees to develop and maintain an access authorization program for individuals requiring unescorted access to protected and vital areas at nuclear power plants. The rule set forth the required elements for licensee access authorization programs, codifying in regulations what had long been practiced to varying degrees by most licensees as part of the physical security program for their facilities.

The rule stated in 10 CFR 73.56(a)(4) that "[o]nly a licensee shall grant an individual unescorted access." The rule further required that each licensee's access authorization program "include a procedure for the review, at the request of the affected employee, of a denial or revocation by the licensee of unescorted access authorization of an employee...which adversely affects employment" (10 CFR 73.56(e)). The rule went on to state that the "procedure *may* be an impartial and independent internal management review" (10 CFR 73.56(e)) (emphasis added). In responding to public comments on the review procedure, the Commission stated in the Statement of Considerations to the rule that it "never intended that any review procedure that already exists in a bargaining agreement be abandoned" (56 FR 19002). Responding to comments from labor unions, the Commission further stated that "[i]t is not the intent of the Commission to exclude from consideration or to require consideration of access authorization issues in the collective bargaining process as long as the resolution of these issues is within the limits set by this rulemaking" (56 FR 19006).

On March 27, 2009, the NRC published in the *Federal Register* a final rule entitled “Power Reactor Security Requirements” (74 FR 13926). Of particular relevance to the issues addressed in this paper, the 2009 rulemaking moved the 1991 “Review procedures” provision in 10 CFR 73.56(e) to its current position at 10 CFR 73.56(l). Of particular relevance to the access authorization requirements, the language of the provision was revised to state that the licensee’s review procedure “*must* provide for an impartial and independent internal management review” (emphasis added). Under the 2009 rule, the requirement for an internal management review is no longer discretionary, as it had been in the 1991 rulemaking language. The 2009 rulemaking did not change the language in 10 CFR 73.56(a)(4). Additionally, although the 2009 rule mandated a role for internal management review of access authorization determination, both the 2009 rule language and the associated 2009 Statement of Considerations were silent on the role of third-party arbitrators and the collective bargaining process in licensee access authorization determinations.

The Nuclear Energy Institute (NEI) initially published NEI 03-01, “Nuclear Power Plant Authorization Program,” in February 2003. NEI 03-01 provided standardized industry guidance on implementing the NRC’s access authorization requirements with the goal of establishing consistency in access authorization programs throughout the nuclear industry. The NRC endorsed NEI 03-01, Revision 3 (May 2009), in Regulatory Guide (RG) 5.66, Revision 2, “Access Authorization Program for Nuclear Power Plants,” as an acceptable means of meeting the NRC’s access authorization requirements in 10 CFR 73.56. All power reactor licensees have incorporated NEI 03-01, Revision 3, into their security plans. Security plans are reviewed and approved by the NRC and incorporated into the licensee’s licensing basis. This NRC-endorsed guidance clearly states that the access authorization determinations of the licensee are final and may not be overturned by any third-party.

On August 2, 2010, Exelon Generation Company (“Exelon”) filed a complaint seeking declaratory relief against the defendant, Local 15, International Brotherhood of Electrical Workers, AFL-CIO (“IBEW”), in the U.S. District Court for the Northern District of Illinois (the “District Court”). Exelon argued that the language of 10 CFR 73.56(a)(4) read in conjunction with the NRC’s 2009 revisions to its access authorization regulations, prohibits outside review, including arbitration, of a licensee’s unescorted access determinations. Reading the plain meaning of the regulatory language in 10 CFR 73.56(a)(4), the District Court granted summary judgment for Exelon. IBEW appealed the decision to the Court.

On March 29, 2012, the Court of Appeals reversed the judgment of the District Court and remanded the case with instructions to enter summary judgment for IBEW. The Court stated that, from 1991 to 2009, the Commission took the unequivocal position that labor arbitrators deciding grievances under collective bargaining agreements can review access authorization determinations and order the granting or restoration of unescorted access as a remedy for a wrongful denial. Specifically, the Court interpreted the Commission’s response to public comments in the Statement of Considerations to the 1991 access authorization rulemaking as establishing an acceptable appeal process for the revocation or denial of access authorization determinations.

In examining the 2009 power reactor security rulemaking, the Court determined that nothing in the text of the amended regulation or in the rulemaking history suggested that the Commission intended to overturn what the Court viewed as the Commission's established policy on the role of arbitrators. In reaching this conclusion, the Court noted:

...the utter silence in the rulemaking record on the issue of arbitral review of access denials. There is simply nothing from the entire process – from the notice of proposed rulemaking to the public comments to the Commission's own response and final rulemaking analysis – that suggests that the Commission intended to change its established policy permitting arbitrators to review access decisions.

The Court acknowledged that NEI 03-01, Revision 3, was "crystal-clear" in asserting that third parties were prohibited from reviewing licensee access authorization decisions. However, the Court found the NRC staff's endorsement of NEI 03-01, Revision 3, too vague to serve as the Commission's own authoritative interpretation of the role of third-party arbitrators in licensee access authorization determinations.

On April 13, 2012, Exelon filed a petition for rehearing *en banc*. The Court denied the petition. Judge Richard Posner filed a concurring opinion. While agreeing that the criteria for rehearing had not been satisfied and that the decision to deny was sound, he was disturbed by the "mysterious absence of government review of decisions involving [access authorization determinations] for employees of nuclear facilities...." Judge Posner further noted, "...while there is nothing judges can do without exceeding the proper bounds of our office, Congress and the Nuclear Regulatory Commission can do something and one or both of them should."

On January 25, 2013, NEI filed "*Petition for Rulemaking to Amend 10 CFR 73.56, 'Personnel access authorization requirements for nuclear power plants'*" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13035A186). The petition requested that the NRC amend its regulations to limit the 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. The NRC docketed the petition as PRM-73-16, and published a notice of receipt and request for public comment in the *Federal Register* on April 22, 2013 (78 FR 23684). The public comment period closed on June 6, 2013.

The NRC received 81 comment submissions with over 380 individual comments from 212 commenters and co-signers. Commenters included nuclear industry representatives, organized labor unions, nuclear workers, and members of the U.S. Congress. The majority of the comments received opposed the petition. Union commenters generally stated that adopting the petition would be unfair to workers and that arbitration is the only forum where employees can challenge the employer's justification for its access authorization determination. Numerous Congressional commenters stated that revoking or denying unescorted access is tantamount to terminating an employee. They further noted that the management review required by 10 CFR 73.56(l) provides a procedural floor for the protection of employees. It is not a procedural ceiling that bars arbitral review of unescorted access denials. Congressional commenters further stated that granting the petition would limit the existing rights of workers. Some commenters were in favor of granting the petition. For example, one commenter wrote that the Atomic Energy Act of 1954, as amended, and the NRC's security regulations are intended to protect the public health and safety which is dependent on a stringent approach to

site security, including limiting the persons who have access to the nuclear facility to those who have been appropriately screened and whose behavior continues to justify site access. Other comments in favor of adopting the petition expressed similar opinions.

On July 18, 2014, NEI submitted NEI 03-01, Revision 4, for NRC review and endorsement. The primary change in the NEI 03-01 revision was to include an independent review process for licensee access authorization denials or revocations. The review process would consist, in part, of a three-person panel comprised of a licensee-designated representative, an employee-designated representative, and an independent third-party appeal reviewer. The proposed guidance states that the decision of the panel would be binding on the licensee as long as the decision does not violate NRC regulatory requirements. The industry guidance does not specify what those requirements are. On January 22, 2015, NEI informed the NRC via letter of NEI's withdrawal of PRM-73-16 (ADAMS Accession No. ML15023A338), asserting that the revised guidance document, if endorsed by the agency, would sufficiently address the issue of the role of third-party arbitration and negate the need for rulemaking. The staff was not involved in this revision to NEI 03-01 and has no plans to initiate formal review of the guidance, absent Commission direction to do so.

The NRC staff learned earlier this year that unions are also using arbitration to challenge licensees' 10 CFR Part 26 FFD determinations. Part 26 requires, in part, that licensees have an FFD program that specifically applies to all persons who are granted unescorted access to nuclear power reactor protected areas. Consistent with 10 CFR 26.23(b), FFD programs must, in part, "[p]rovide reasonable assurance that individuals are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties."

Licensees rely on substance abuse experts (SAE) and medical review officers (MRO) to assist in implementing their FFD programs. An SAE is required to be a licensed physician or other relevant certified professional with basic knowledge of, and clinical experience in, the diagnosis and treatment of alcohol and controlled-substance abuse disorders. Consistent with 10 CFR 26.187(g), the SAE is required to evaluate individuals who have violated a licensee's substance abuse policy and make a recommendation concerning, among other things, the individual's return to duty. The SAE is not an advocate of the licensee or the individual. Rather, as stated in 10 CFR 26.187(g), the SAE's function is to protect the public health and safety and the common defense and security by professionally evaluating licensee personnel. The MRO is required to be a licensed physician and additionally have passed an examination administered by a nationally-recognized MRO certification board. Generally, the MRO's role is to review licensee personnel drug test results and identify any evidence of subversion of the testing process.

With respect to a determination of FFD, the NRC's regulations at 10 CFR 26.189(d) specifically state that "[n]either the individual nor licensees and other entities may seek a second determination of fitness if a determination of fitness under this part has already been performed by a qualified professional employed by or under contract to the licensee or other entity." An arbitrator's overturning of a licensee's revocation or denial of unescorted access based on an SAE or MRO determination would constitute a second determination of FFD, in violation of the NRC's regulatory requirements. More importantly, such decisions could potentially undermine the public health and safety and the common defense and security by requiring that individuals

that the licensee has determined are not trustworthy and reliable, or who cannot perform their duties safely and securely, be returned to duty.

DISCUSSION:

The staff's longstanding view is that NRC regulations require that licensees only grant unescorted access to individuals determined to be trustworthy and reliable. An arbitrator's decision requiring the reinstatement of an individual that the licensee has previously determined is not trustworthy and reliable presents a safety concern and a security vulnerability and puts the licensee in violation of NRC regulatory requirements and potentially subject to enforcement action. In the aftermath of the Court's decision, there has been at least one instance where an arbitrator in the Seventh Circuit has required the reinstatement of an individual that the licensee had previously determined was not trustworthy and reliable. The licensee did, in fact, reinstate that individual and removed all derogatory information from the Personnel Access Database System (PADS), although the individual did not elect to return to employment at the licensee's facility. There has been at least one instance in the Eighth Circuit where an arbitrator has overturned a licensee's revocation of an employee's access authorization and ordered that the employee be reinstated and granted unescorted access. However, the staff is not aware of any Federal Court litigation associated with this particular arbitration decision. [REDACTED]

[REDACTED] Additionally, a recent unpublished decision from the Eleventh Circuit affirmed a lower court's finding that the collective bargaining agreement between Florida Power & Light and union employees permitted arbitration of access authorization determinations. The court found the collective bargaining agreement ambiguous as to whether access determinations were covered by the agreement and applied a presumption of arbitrability. The court did not address whether NRC regulations or policies barred arbitration.

The staff is also aware that unions are now seeking to arbitrate SAE recommendations and MRO determinations required under 10 CFR Part 26. Consistent with 10 CFR 26.69(b)(6), a licensee is required to implement an SAE's recommendation regarding an employee's FFD. The staff is aware of one SAE decision that was grieved under the licensee's collective bargaining agreement. In that instance, the arbitrator overturned the licensee's access decision implementing the SAE's recommendation. The licensee filed a complaint seeking declaratory judgement in a Federal District Court in the Seventh Circuit. The staff is also aware of another SAE decision that is being grieved in the Eighth Circuit although there is no pending litigation in Federal District Court. The staff is of the opinion that a rulemaking is needed to also clarify that third-party arbitrators may not overturn a licensee's access authorization determination implementing an SAE or MRO determination and recommendation.

These decisions illuminate the need for the NRC to address the role of arbitrators in licensee access authorization and FFD determinations in the near-term. The NRC places upon licensees the responsibility and the burden of determining the trustworthiness and reliability of individuals having unescorted access at their facilities whether it be from background investigations, performance observations, or FFD tests. The NRC holds licensees responsible for these determinations because they have the most comprehensive information and expertise to make and support such determinations.

Labor arbitrators generally do not have expertise in the NRC's security regulations, the conduct of the access authorization review process, or appropriate training in predictive human behavior, to make informed access authorization determinations. Similarly, arbitrators are not licensed or certified medical experts with expertise in substance abuse issues and licensee FFD programs. More importantly, arbitrators are not licensed by the NRC and are not subject to the NRC's regulatory authority. Accordingly, the staff is of the opinion that allowing third-party arbitrators to overturn a licensee's access authorization determination presents both a safety concern and a security vulnerability. Arbitrators' decisions could result in people that the licensee has already determined are not trustworthy and reliable having unescorted access to nuclear equipment and materials. The theft, misuse, or sabotage of such equipment and material could result in harm to the public health and safety or the common defense and security. Although this paper focuses primarily on unescorted access determinations, similar concerns exist with respect to arbitration decisions overturning SAE and MRO recommendations and determinations.

Additionally, requiring a licensee to reinstate unescorted access to an individual that the licensee has previously determined is not trustworthy and reliable could place the licensee in violation of NRC regulations and, therefore, potentially subject the licensee to enforcement action by the NRC. Furthermore, every power reactor licensee has incorporated NEI 03-01, Revision 3, into its physical security plan. These physical security plans are incorporated into the license, thereby making compliance with NEI 03-01, Revision 3, an enforceable condition of the license. Specifically, Section 12.6 of NEI 03-01, Revision 3, states that the unescorted access authorization "decision of the licensee's initial reviewer or, if applicable, the decision from the licensee internal management review process is final, shall be the exclusive means by which [unescorted access authorization/unescorted access] decisions may be reviewed, and may not be reviewed or overturned by any third party." Accordingly, [REDACTED] licensees are in the difficult position of either complying with the terms of their license, and thereby violating the two Circuit's position that licensee access authorization determinations may be subject to arbitration, or complying with the Seventh Circuit's direction and thereby violating the terms of their license. As noted above, the NRC holds licensees responsible for access authorization decisions. In the case of the licensee in the Seventh Circuit that reinstated an individual pursuant to an arbitrator's decision, the NRC found the licensee in violation of its license because it removed derogatory information concerning that individual from PADS in compliance with an arbitrator's decision, contrary to NRC requirements. However, staff chose to exercise its enforcement discretion in this particular instance.

Further, the staff does not believe that the proposed revisions to NEI-03-01 adequately address the role of third parties in licensee access authorization determinations. [REDACTED] decisions of the proposed review panel are likely to be binding upon licensees, since the Court has already determined that an arbitrator's overturning of a licensee denial or revocation of an employee's unescorted access does not violate the NRC's regulatory requirements. The revision to the guidance simply replaces a third-party arbitrator with a third-party review panel in which the licensee does not have the controlling vote. This could result in third parties making access authorization determinations even though the NRC holds licensees responsible for those determinations.

Options


The staff considered a number of approaches that could be used to clarify that only licensees can make final decisions on access authorization and FFD determinations. These options include rulemaking, the development and issuance of a Commission policy statement to clearly and unambiguously address the role of third parties in these determinations, and maintaining the status quo.

Option 1: Development of a Proposed Rule

The rulemaking option would clarify the regulatory language in 10 CFR 73.56(a)(4) and ensure consistency with regulatory language contained elsewhere within this section and in other parts of the NRC's regulations. As noted above, the 1991 access authorization rulemaking contained language in 10 CFR 73.56(a)(4) stating that "[o]nly a licensee shall grant an individual unescorted access." Similar language in 10 CFR 73.57(g) provides that "[n]o person shall be permitted unescorted access to a non-power reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable...." Finally, the language in 10 CFR 37.23(b) states that "[r]eviewing officials are the only individuals who may make trustworthiness and reliability determinations that allow individuals to have unescorted access to category 1 or category 2 quantities of radioactive materials possessed by the licensee."

A plain reading of the regulatory language in these three sections would result in the conclusion that only an NRC licensee can make access authorization determinations. However, in reaching its 2012 decision, the Seventh Circuit Court looked at the context of the regulatory language in 10 CFR 73.56(a)(4). The Court found that the 10 CFR 73.56(a)(4) regulatory language appears in an introductory paragraph describing the respective roles of the licensee and its contractors in the access authorization process. In analyzing this paragraph, the Court construed the regulatory language in 10 CFR 73.56(a)(4) – "Only a licensee shall grant an individual unescorted access" – as allocating responsibility for elements of the access authorization process between licensees and their contractors. The Court concluded that the language was, at best, ambiguous on the availability of arbitral review of licensee access authorization determinations given what the Court saw as the Commission's previous clearly articulated policy on this issue. Accordingly, the Court found that the language in 10 CFR 73.56(a)(4) did not prohibit the arbitration of licensee access authorization determinations.

There is no similar contextual ambiguity in the regulatory language found in 10 CFR 73.57(g) or 10 CFR 37.23(b).



It is difficult to predict whether issuance of a revised rule would place additional burdens on licensees. On the one hand, the rule would codify in NRC regulations security provisions already present in licenses. Therefore, there should be minimal to no costs associated with complying with the new rule. On the other hand, the rule could result in the need for many

licensees to modify their collective bargaining agreements with their unions; this could be a contentious action requiring expenditure of licensee resources.

Initiating a rulemaking proceeding will have several benefits. First, it would address the safety concern/security vulnerability and enforcement issues raised by ensuring that access authorization and FFD determinations made by the licensee are not overturned by third-party arbitrators. Depending on the outcome of the rulemaking, this will ensure that an individual determined not to be trustworthy or reliable by the licensee does not get unescorted access to a nuclear power plant. Second, it would clarify regulatory uncertainty by addressing potential conflicts between language in various sections of the NRC's regulations and associated guidance. Third, a rulemaking would engage the public and various other stakeholders in a transparent process for addressing the role of third parties in licensee access authorization determinations. Fourth, a rulemaking would provide a suitable vehicle for addressing the various viewpoints contained in the public comments received in response to the now withdrawn PRM-73-16.

There are two sub-options to the rulemaking option.

Option 1A - Normal Rulemaking Process: This option would require the staff to engage in the normal rulemaking process, beginning with the development of a regulatory basis. The purpose of the rulemaking would be to further evaluate the options available to clarify regulatory language and address the proper role of third-party arbitrators in licensee access authorization and FFD determinations. The regulatory basis would provide an analysis of whether to proceed with a proposed rule.

Option 1B - Expedited Rulemaking: This option would require the staff to assemble a team to complete the rulemaking process in accordance with an expedited schedule. The Office of the General Counsel would take the lead in this effort. The rationale for rulemaking set forth in this SECY paper would serve as the regulatory basis for the rulemaking, and the follow-on rulemaking schedule would proceed immediately upon direction from the Commission, beginning with the development of a proposed rule for Commission review.

The following pros and cons are applicable to both rulemaking approaches:

Pros:

- Provides the advantages of an open, deliberative rulemaking process, permitting the staff to develop an effective, long-term policy with respect to the proper role of third-party arbitrators in licensee access authorization and FFD determinations.
- Allows the staff to clarify regulatory language and ensure consistency between the requirements in various sections of NRC regulations to reflect a consistent Commission policy on the role of a third party in licensee access authorization and FFD determinations.
- Maximizes stakeholder involvement in developing potential solutions to the issues identified.
- Provides a vehicle for addressing the viewpoints contained in the public comments submitted in response to PRM-73-16.

- Provides an avenue to address safety concerns/security vulnerabilities relevant to the necessary changes in guidance documents, with time in the rulemaking schedule to interact with the public and other stakeholders.
- Provides regulatory certainty.
- Provides the surest approach to make clear the NRC's intent regarding licensee authority to make access authorization and FFD determinations.

Cons:

- The primary disadvantage of this option is the time required for the NRC to promulgate the revised requirements and have licensees implement a final rule providing a solution to the proper role of third parties in licensee access authorization and FFD determinations.
 - The expedited rulemaking option would be faster than normal rulemaking; however, both would involve staff time and resources as estimated in the resource enclosure to this paper.
- This option would not provide quick resolution of a staff-identified safety concern and security vulnerability given the time it takes to complete a rulemaking.
- Depending on the outcome of the rulemaking process, this option could be perceived by some stakeholders as the NRC interfering in the licensee management-labor relationship.

The staff does not believe that it is necessary to develop a separate regulatory basis to support the recommended proposed rule. The issue being addressed by the proposed rule was first raised in PRM-73-16. In responding to the PRM, staff analyzed the issues raised by the petitioner, analyzed the NRC's current and historical regulations governing the NRC's access authorization requirements, and reviewed the Commission's past statements on the role of third parties in licensee access authorization decisions. Additionally, the staff has considerable public input on the issue from a diversity of stakeholders through the public comments received on PRM-73-16. Finally, the staff has taken into consideration recent judicial developments. Based on this review and analysis, the staff believes that it has an understanding of the issues raised by allowing third parties to overturn licensee access authorization determinations and the steps necessary to address the safety concern/security vulnerability and enforcement issues raised by this practice.

The staff recognizes that PRM-73-16 did not address issues related to SAE and MRO determinations required by 10 CFR Part 26. Therefore, there was no discussion of these issues in the public comments received on the PRM. However, the issues raised with respect to arbitration of SAE and MRO determinations are conceptually identical to the issue of arbitration of licensee access authorization determinations. Accordingly, the staff anticipates that if there were an opportunity to comment on a regulatory basis related to addressing the role of third parties in licensee's FFD decisions, the responses received from commenters would be similar, if not identical, to the responses received on PRM-73-16. Therefore, the staff does not believe it is necessary to develop a separate regulatory basis to address the Part 26 issues. Furthermore, staff believes that it would be most efficient to address these related issues in one expedited rulemaking in which all interested persons would have the opportunity to provide their views for the NRC's consideration through the public comment process.

Option 2: Issuance of Policy Statement

The staff considered the option of the Commission issuing a policy statement affirming the staff's longstanding view that NRC regulations require licensees to be accountable for the safety and security of their facilities and, therefore, only licensees can make final decisions on access authorization determinations. The Court interpreted the Commission's responses to public comments in the Statement of Considerations supporting the 1991 access authorization rulemaking to be a clear and unambiguous articulation of Commission policy permitting the arbitration of licensee access authorization determinations. As noted above, the Court in its 2012 decision reviewed the 2009 power reactor security rulemaking. In its review, the Court noted the "utter silence in the rulemaking record on the issue of arbitral review of access denials." Based partly on this silence, the Court concluded that the Commission had not changed its longstanding policy of allowing arbitration of licensee access authorization determinations. A Commission policy statement would address that silence. A policy statement would constitute a clear and unambiguous statement of the Commission's position on the role of third-party arbitrators in licensee access authorization and FFD determinations. As a matter of fairness, a policy statement could provide stakeholders with the Commission's view on the proper role of third parties in licensee's access authorization and FFD determinations.

[REDACTED]

However, policy statements do not have the same force of law as a regulation. Additionally, policy statements do not provide the consistent regulatory framework that the NRC customarily uses to regulate licensees; the NRC typically regulates through rulemaking and the development of related guidance. Finally, it is not clear how much time and resources would be saved in comparison to the development of an expedited rulemaking. Staff would have to develop a policy statement and present it to the Commission for approval. The Commission's practice has been to submit significant policy statements for public comment. The staff would have to address public comments and propose appropriate revisions in response to those comments for Commission review and approval prior to final approval and issuance of the policy statement. Therefore, the savings in time and resources may not be significant as compared to the recommended expedited rulemaking.

Pros:

- A policy statement would unambiguously articulate Commission policy on the role of third parties in licensee access authorization and FFD determinations.
- This option may be more expeditious and require fewer staff resources compared to the NRC's normal rulemaking process.
- Publication of the policy statement in the *Federal Register* would allow for public participation in the process for resolving this issue.
- A policy statement might clarify what the Court has found to be ambiguous language in 10 CFR 73.56(a)(4).

Cons:

- The NRC's preferred practice is to impose or clarify regulatory requirements through rulemaking rather than the issuance of policy statements.
- A policy statement may not provide significant resource savings when compared to an expedited rulemaking.
- A policy statement may be of limited use in enforcement matters as it does not have the same force and effect as a statute or regulation.
- This option could be perceived by some stakeholders as the NRC interfering in the licensee management-labor relationship.

Option 3: Maintain the Status Quo

The staff considered the option of maintaining the status quo. The NRC could require licensees to comply with their current licensing basis. All power reactor licensees have incorporated NEI 03-01 into their physical security plans. This NRC-endorsed guidance clearly states that only licensees may make final access authorization determinations. Licensee physical security plans are incorporated into their license and become a part of their licensing basis. Accordingly, consistent with the staff's interpretation of regulatory requirements, licensee physical security plans and NEI 03-01, licensees could decide not to implement an arbitrator's decision requiring the granting or reinstatement of unescorted access to an individual that the licensee has previously determined is not trustworthy or reliable. By taking this action, a licensee would maintain compliance with its license. However, this action would likely involve the licensee in litigation. A majority of licensees have generic provisions in their collective bargaining agreements that do not preclude the arbitration of licensee access authorization determinations.

Unions would likely argue, at least in the Seventh and Eleventh Circuits and possibly elsewhere, that the licensee is not following the Court's finding in its 2012 decision that such determinations are subject to arbitration. Alternatively, should the licensee, in order to avoid Federal court litigation, implement an arbitrator's decision to reinstate an individual it did not deem to be trustworthy and reliable, the licensee could face NRC enforcement action as was done in the Exelon case discussed above.

Addressing the proper role of third parties in licensee access authorization and FFD determinations through the enforcement process would not promote regulatory certainty. Although the NRC may elect to exercise enforcement discretion on an ad hoc case-by-case basis, the licensee would still have a violation of NRC requirements on its record. More importantly, it is not clear that the NRC would always elect to exercise enforcement discretion.

[REDACTED]

[REDACTED]

[REDACTED] Additionally, the ever present risk of enforcement action would likely result in the need for many licensees to modify their collective bargaining agreements with their unions to make clear that licensee access authorization and FFD determinations are not subject to arbitration. This would resolve the quandary that licensees currently find themselves in as a result of the judicial decisions, but is likely to be a contentious process affecting licensee-labor relations.

In the event that additional arbitration decisions to reinstate an employee to unescorted access status occur, the NRC could use orders on an as-needed basis. The staff would have to develop a process to ensure that it was aware of ongoing arbitration of access authorization and FFD determinations. The staff would have to evaluate each individual arbitrator's decision and craft an order in response. This order would then have to be presented for Commission approval prior to issuance. The staff has determined that using orders in this manner would be time consuming and resource intensive, as well as lacking in regulatory consistency and transparency.

The staff did consider the possibility of issuing a single pre-emptive, industry-wide order, in lieu of specific orders on a case-by-case basis. However, given the wide variation in the factual circumstances that may underlie individual arbitrator's decisions, the staff does not believe it is feasible to develop a generic order that would effectively address all adverse arbitration outcomes. Moreover, it is not clear what the order would compel each recipient to do, because the specific issues to be addressed will not have been identified yet.

Pros:

- This option would not require staff resources to undertake a rulemaking or issue a policy statement.
- Barring further arbitrations that overturn a licensee's unescorted access determination or FFD determination, this option would ensure that licensees remain in compliance with their licensing bases.
- If needed, any orders issued to address specific safety concerns and/or security vulnerabilities would have the regulatory authority of law that could be enforced if necessary.

Cons:

- This option would not ensure regulatory certainty.
- This option would likely result in the NRC taking enforcement action against licensees.
- This option would likely result in licensees facing a greater litigation threat as unions seek relief in Federal courts.
- This option may require licensees to renegotiate their collective bargaining agreements which could be interpreted as NRC interference in the licensee management-labor relationship.
- This option does not resolve the dilemma that licensees currently find themselves in as a result of the judicial decisions and the conflicting position in RG 5.66 which incorporates Section 12.6(b)(4) of NEI 03-01, Revision 3.
- This option would result in staff needing to devote resources to development of a process for the staff to stay abreast of and monitor arbitration decisions regarding denials or revocations of licensee access authorization and FFD determinations.
- If an order is used, the circumstances of the issuance of an order would need to be reviewed on a case-by-case basis, resulting in use of greater NRC resources.
- This option does not provide a vehicle for addressing all of the viewpoints contained in the public comments submitted in response to PRM-73-16.
- This option would not provide an opportunity to address the apparent ambiguity that the Court found in NRC regulatory language.

COMMITMENTS:

Should the Commission approve the NRC staff's recommendation to commence an expedited rulemaking, the staff would take immediate action to develop a proposed rule for Commission review that, while providing for a robust appeal process that could address the appropriate role for third parties, would clearly vest the final decision on access authorization and FFD determinations with the licensee.

Further, while developing the proposed and final rules, the NRC would continuously evaluate ongoing developments in arbitrations regarding access authorization and FFD determinations. The staff will return to the Commission should this evaluation identify situations where more immediate action may be required and would recommend appropriate regulatory options to mitigate these situations in an expeditious manner. Regulatory options may include use of orders and/or enforcement discretion on a case-by-case basis, based on the significance of the safety concern/security vulnerability.

RECOMMENDATION:

For the foregoing reasons, the staff recommends that the Commission approve development of a proposed rule that would make clear that only licensees can make final access authorization determinations and do so through an expedited rulemaking (as described under Option 1B). Should the Commission approve the staff's recommendation, the staff anticipates that the proposed rule would clarify the contextual ambiguity that the Court found in the language of 10 CFR 73.56(a)(4). The staff further recommends that the proposed rule revise language in 10 CFR 73.56(l) to include a robust appeal process that would set forth an appropriate role for third parties that could include making non-binding recommendations to licensee management. Finally, staff recommends that the proposed rule make corresponding changes to the 10 CFR Part 26 requirements to make clear that SAE determinations and MRO recommendations may not be overturned by a third party. In summary, rulemaking is the best means of setting agency security policies and establishing binding requirements to implement those policies.

RESOURCES:

If the staff's recommendation is approved by the Commission, the potential rulemaking would require resources in fiscal year (FY) 2016 to complete rulemaking activities. There are currently no resources budgeted in FY 2016 for this effort and a resource reallocation would be required. A more detailed breakdown of estimated resources for current and future years is provided in the enclosure entitled, "Resources and Level of Effort."

COORDINATION:

The Chief Financial Officer has reviewed this paper for resource implications and has no objections. The Office of the General Counsel has reviewed this package and has no legal objection.

/RA/

Victor M. McCree
Executive Director
for Operations

Enclosure:
Resources

COORDINATION:

The Chief Financial Officer has reviewed this paper for resource implications and has no objections. The Office of the General Counsel has reviewed this package and has no legal objection.

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***via email**

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