

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Baran

SUBJECT: SECY-15-0149: ROLE OF THIRD-PARTY ARBITRATORS IN  
LICENSEE ACCESS AUTHORIZATION AND FITNESS-FOR-  
DUTY DETERMINATIONS AT NUCLEAR POWER PLANTS

Approved \_\_\_\_\_ Disapproved X Abstain \_\_\_\_\_ Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached X None \_\_\_\_\_

Entered in STARS

Yes XX  
No \_\_\_\_\_

  
\_\_\_\_\_  
Signature

2/5/16  
\_\_\_\_\_  
Date

**Commissioner Baran's Comments on SECY-15-0149,  
"Role of Third-Party Arbitrators in Licensee Access Authorization and Fitness-for-Duty  
Determinations at Nuclear Power Plants"**

In this paper, the NRC staff seeks a Commission decision that only licensees can make final access authorization and fitness-for-duty determinations for power plant employees. Specifically, the staff recommends an expedited rulemaking "that would make clear that only licensees can make final access authorization determinations." The staff also presents the option of issuing a policy statement to this effect. I disapprove both the staff's recommended rulemaking option (Option 1) and the alternative policy statement option (Option 2).

**History of Arbitration of Access Authorization Determinations**

In 1991, the Commission established a requirement for licensees to have access authorization programs for individuals with unescorted access to protected and vital areas of nuclear power plants. An access authorization program has three elements: background investigation, psychological assessment, and behavioral observation. The "general performance objective" set by the Commission is to provide "high assurance that only trustworthy and reliable personnel are granted unescorted access."

The Commission required licensees to put in place procedures to allow an individual who is denied unescorted access or has unescorted access revoked to have that decision reviewed. In its Statement of Considerations for the 1991 rule, the Commission explained the need for a review procedure:

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 of the licensee's employees that the program is a fair one worthy of their cooperation. The review procedures mandated by the rule ... provide a necessary additional assurance that where access is denied there is a sound basis for the decision and that mistaken access denials, which would undermine the quality of a licensee's work force and thereby counter the interests of safety, will not stand uncorrected.<sup>1</sup>

In response to concerns that workers' rights could be eroded, the Commission stated: "the Commission never intended that any review procedure that already exists in a bargaining agreement be abandoned." The Commission also explicitly stated that "the rule would allow the use of a grievance procedure for review of denials or revocations of access authorizations." The Commission went on to explain: "It 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." These are unambiguous statements that third-party arbitration of grievances provided for in a collective bargaining agreement between a licensee and the union representing its employees is allowed under the rule. In response to public comments that "[a] third party (i.e., an independent adjudicator) should not be deciding disputes over access authorization," the Commission expressed confidence in the efficacy of the review procedure, stating that "if 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." In short, the Commission was very clear that third-party arbitration of

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<sup>1</sup> *Final Rule: Access Authorization Program for Nuclear Power Plants*, 56 Fed. Reg. 18997, 19002 (April 25, 1991).

access authorization denials and revocations is permitted by and consistent with NRC regulations.

Third-party arbitration of access authorization determinations was common practice for the next two decades. As the Seventh Circuit Court of Appeals explained in a 2012 decision, “From 1991 to 2009, the Commission took the unequivocal position that labor arbitrators have the power [to review access denial decisions and order unescorted access as a remedy for a wrongful denial], and courts agreed.”<sup>2</sup> The Seventh Circuit held that the 2009 amendments to NRC’s access authorization regulations did not prohibit arbitration of unescorted access denials and revocations. The court persuasively concluded that nothing in the 2009 rulemaking record indicated any Commission intent to change the clear policy of allowing arbitrators to review denials and revocations of unescorted access. The court found that the changes to the review procedure provision merely “established a procedural floor that could be exceeded by providing for arbitral review of access decisions.”

In January 2013, the Nuclear Energy Institute filed a petition for rulemaking requesting that NRC amend its regulations to prohibit third-party arbitrators from overturning a licensee’s decision to deny or revoke unescorted access. After NRC published the petition for public comment, a significant number of stakeholders and Members of Congress expressed strong opposition to the petition. The petition was later withdrawn.

Now, the NRC staff proposes to reverse the Commission’s long-standing position of allowing third-party arbitration of access authorization decisions through a rulemaking “to clarify that only licensees can make final decisions on access authorization.”

## **The Role of NRC**

NRC’s requirement that licensees provide “high assurance that only trustworthy and reliable personnel are granted unescorted access to protected and vital areas of nuclear power plants” is a classic performance-based standard. Licensees are legally responsible for complying with the requirement, but there are different ways to do so. The fact that licensees are responsible for complying with the regulatory requirements does not prevent a licensee from establishing a program in which the validity of a licensee’s access authorization determination is subject to review by a disinterested arbitrator from outside the company.

And that is what many licensees have opted to do. They entered into collective bargaining agreements with employee unions that provide for third-party arbitration of access authorization decisions. As the NRC staff acknowledges in the paper, “A majority of licensees have generic provisions in their collective bargaining agreements that do not preclude the arbitration of licensee access authorization determinations.” In its June 2013 comments on the NEI petition for rulemaking, the International Brotherhood of Electrical Workers explained:

Parties must submit to arbitration only those disputes that they have agreed should be resolved through arbitration. A licensee is obligated to submit a dispute over access to arbitration only because it has agreed in collective bargaining to do so. If a licensee believes that certain types of disputes should be excluded from arbitration or that

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<sup>2</sup> *Exelon Generating Co. v. Local 15, Intern. Broth. of Elec. Workers, AFL-CIO*, 676 F.3d. 566, 568 (7<sup>th</sup> Cir. 2012).

arbitration over some issues should be limited in scope, that licensee would be free to negotiate a contract provision so stating.<sup>3</sup>

Pursuant to labor contracts, arbitration of these issues has been routine for decades. There is no reason to believe that every licensee determination that an employee is not trustworthy and reliable will always be correct. There is also no reason to believe that a union will arbitrate non-meritorious claims on behalf of an employee who would pose a threat to a nuclear plant or that a neutral, third-party arbitrator would find in favor of such an employee. On the contrary, providing an impartial, third-party review of these management decisions and a forum for challenging a licensee determination should increase the reliability of those determinations and facilitate compliance with NRC's requirements.

However, if a licensee is concerned that it has agreed to a review process that could result in noncompliance with NRC's access authorization requirements, that licensee can seek to address the issue through collective bargaining. It is not appropriate for NRC to interfere with the collective bargaining process by re-writing the agreements reached by licensees and unions. NRC should not dictate the terms of labor contracts; that's for licensees and unions to negotiate. There is no indication that a licensee has attempted to address an access authorization arbitration concern in negotiations and failed to reach an agreement acceptable to both parties.

In fact, just the opposite occurred at Arkansas Nuclear One. There, Entergy and IBEW Local 647 agreed on a specific provision relating to arbitration of access authorization decisions. The clause provides for a grievance procedure tailored to access authorization issues that includes the use of "a permanent panel of five neutral arbitrators who have a demonstrated record of experience and expertise in fitness for duty and unescorted access authorization issues." If management and labor can resolve the issue to their mutual satisfaction at this plant, why should NRC start dictating contract terms at other plants?

The NRC staff argues that "allowing third-party arbitrators to overturn a licensee's access authorization determination presents both a safety concern and a security vulnerability" because "[a]rbitrators' decisions could result in people that the licensee has already determined are not trustworthy and reliable having unescorted access to nuclear equipment and materials." But in the rare case in which NRC believes an untrustworthy person with unescorted access poses a genuine danger to a plant, the agency can issue an order to ensure safety and security. This is unlikely to be burdensome for the agency as there are only a few arbitrations of access authorization denials and revocations each year (and not all of those arbitrations result in unescorted access being restored or granted).

To support its recommendation for a rulemaking, the NRC staff points to the 2009 staff endorsement of NEI guidance that "clearly states that the access authorization determinations of the licensee are final and may not be overturned by any third party." But regulatory guidance provides only one acceptable approach to meeting NRC's performance-based access authorization requirements. And more importantly, non-binding guidance endorsed by the NRC staff cannot displace unambiguous rulemaking language approved by the Commission. When the Commission voted to adopt the access authorization requirements and accompanying Statement of Considerations in 1991, the Commission was clear that arbitration of access decisions was allowed. The staff lacks authority to reverse that determination by endorsing a guidance document.

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<sup>3</sup> International Brotherhood of Electrical Workers comment (June 5, 2013).

## **Conclusion**

For the reasons discussed above, I approve Option 3 to take no action at this time. If the staff determines it is necessary, the staff should develop a process to maintain awareness of ongoing arbitration of access authorization determinations so that orders can be prepared in any case in which Commission intervention is necessary to ensure the safety and security of a nuclear power plant.