



POLICY ISSUE **(Notation Vote)**

April 4, 2019

SECY-19-0033

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: DISCONTINUATION OF RULEMAKING—ACCESS AUTHORIZATION
AND FITNESS-FOR-DUTY DETERMINATIONS

PURPOSE:

In this paper, the U.S. Nuclear Regulatory Commission (NRC) staff requests Commission approval to discontinue the rulemaking activity, "Access Authorization and Fitness-for-Duty Determinations." Based on information learned during the development of the draft regulatory basis, the staff has determined that there is not a safety or security need for a rulemaking to clarify the role of third parties in such determinations.

BACKGROUND:

Process for Discontinuing Rulemaking Activities

In SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated October 19, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. [ML15267A759](#)), the staff described an approach that would require Commission approval to discontinue rulemakings previously authorized by the Commission. The Commission approved the staff's recommendation in a staff requirements memorandum (SRM) to SECY-15-0129, "Staff Requirements – SECY-15-0129 – Commission Involvement in Early Stages of Rulemaking," dated February 3, 2016 (ADAMS Accession No. [ML16034A441](#)).

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Consistent with Commission direction in the SRM to explore ways to minimize the resources necessary to discontinue rulemaking, the staff is suspending work on the Access Authorization and Fitness for Duty draft regulatory basis pending the Commission's response to this request to discontinue rulemaking. The staff has also developed the enclosed draft *Federal Register* notice that would inform the public should the Commission decide to discontinue the rulemaking.

DISCUSSION:

The central issue staff was exploring in this rulemaking was whether a third party's reversal of a licensee reviewing official's access authorization determination under Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, "Physical Protection of Plants and Materials," or a fitness-for-duty determination under 10 CFR Part 26, "Fitness-for-Duty Programs," would adversely impact public health and safety or the common defense and security.

On November 15, 2015, the staff submitted a notation vote paper to the Commission designated as SECY-15-0149, "Role of Third-Party Arbitrators in Licensee Access Authorization and Fitness-for-Duty Determinations at Nuclear Power Plants" (ADAMS Accession No. [ML16063A268](#)). In this paper, the staff provided options to address and clarify the proper role of third parties in licensee access authorization and fitness-for-duty determinations. These options included: 1) rulemaking to clarify that only licensees can make final access authorization or fitness-for-duty decisions; 2) development of a Commission policy statement that would clarify that only licensees can make final access authorization or fitness-for-duty decisions; or 3) maintaining the status quo. The staff recommended that the Commission authorize an expedited rulemaking.

In SRM-SECY-15-0149, "Staff Requirements – SECY-15-0149 – Role of Third Party Arbitrators in Licensee Access Authorization and Fitness-for-Duty Determinations at Nuclear Power Plants," dated June 6, 2016 (ADAMS Accession No. [ML16158A286](#)), the Commission directed the staff to proceed with the normal rulemaking process, including the development of a regulatory basis. In addition to the staff's normal outreach efforts, the Commission directed the staff to make specific outreach to potentially affected labor organizations on the content and timeframe for the proposed rule. The Commission further directed the staff to include in the proposed rule a robust appeals process for workers whose access authorization is denied or revoked and to address in the proposed rule third-party review of fitness-for-duty determinations.

Consistent with the direction in SRM-SECY-15-0149, the staff held two public meetings to discuss this rulemaking activity. During these meetings, the staff obtained input from interested stakeholders, including union and industry representatives, on the use of third-party arbitration within the commercial nuclear power industry. Summaries of these public meetings are available in ADAMS at Accession Nos. [ML16336A034](#) and [ML17067A171](#). The staff also held a closed meeting with the International Brotherhood of Electrical Workers on December 12, 2016, to discuss several specific cases referenced in SECY-15-0149 and other cases relevant to this rulemaking activity. A summary of the closed meeting is available in ADAMS at Accession No. [ML16355A092](#). After the closed meeting, the International Brotherhood of Electrical Workers voluntarily provided the staff with specific data on arbitration cases involving certain union members and the outcome of these cases. The data provided by the International Brotherhood of Electrical Workers is available in ADAMS at Accession Nos. [ML17034A087](#) (not publicly available) and [ML17037D201](#) (not publicly available).

The data from the International Brotherhood of Electrical Workers showed that, over a span of 32 years, 371 individuals had their access authorizations terminated and were therefore removed from employment with licensees. Of those 371 individuals, 46 elected to arbitrate their termination, and 14 of those individuals ultimately returned to work. To date, none of these reinstatements have resulted in an adverse impact on public health and safety or the common defense and security. The data provided by the International Brotherhood of Electrical Workers was limited only to information provided by local union organizations and does not necessarily offer a complete list of all International Brotherhood of Electrical Workers arbitration cases, arbitrations involving other unions, or arbitrations brought by individuals independent of any union involvement.

In February and March 2017, Exelon Generation gave the NRC information on four arbitration cases that had reversed access authorization terminations that had been made by Exelon reviewing officials (ADAMS Accession No. ML17080A471 (not publicly available and limited NRC viewers)). The staff is not aware of any safety or security issues associated with the reinstatement of unescorted access for the individuals involved in these cases. One of these cases, however, did result in the NRC issuing a noncited violation to Exelon. In this specific case, pursuant to an arbitrator's ruling, the licensee removed disqualifying information from an industry shared database. The disqualifying information was related to an individual to whom the licensee had previously denied unescorted access. Removal of this disqualifying information constituted a violation of the NRC's regulations, which require the licensee to ensure that any disqualifying information about an individual who applied for unescorted access authorization be retained in the shared database. This individual did not return to work, therefore, there is no additional information regarding the performance of this individual.

Although allowing a third party, for example, an arbitrator, to overturn a licensee's access authorization and fitness-for-duty determination poses a potential risk, the staff does not consider this risk to present a significant safety or security threat. Licensees have maintained and implemented defense-in-depth security programs designed to ensure, in part, that individuals who maintain unescorted access to NRC-licensed commercial power reactors and Category I fuel cycle facilities are trustworthy and reliable and fit for duty. This is accomplished through the implementation of their insider mitigation, access authorization, fitness-for-duty, cyber protection, and physical protection programs.

During the development of the regulatory basis, the staff considered the feedback received from external stakeholders, including the information from the International Brotherhood of Electrical Workers and Exelon Generation. The staff used this external feedback and other information obtained during development of the draft regulatory basis to re-evaluate its prior position that third-party arbitrators overturning licensee access authorization and fitness-for-duty decisions posed a security vulnerability that needed to be addressed through rulemaking. After considering this new information, the staff changed its position that third-party reversals of licensee access authorization and fitness-for-duty decisions do not present a significant safety or security concern that warrants rulemaking.

As part of the rulemaking process, the staff performed a preliminary cost analysis, which concluded that the rulemaking option would not be cost-justified, based on a mean net cost (the average costs and benefits of all implementation and operational activities added together) of \$4.5 million. Further, the staff identified no significant qualitative or quantitative benefits that would offset the cost to conduct the rulemaking. If the Commission were to approve the staff's recommendation to discontinue this rulemaking, the NRC would avert approximately \$1.7 million in rulemaking-related costs.

Consistent with staff procedures for discontinuing a rulemaking, and because the staff's recommended approach is significantly different from its position in SECY-15-0149, the staff conducted a public meeting with interested stakeholders on November 1, 2018. During the public meeting, the staff presented the status of this rulemaking and indicated that it intended to recommend to the Commission the discontinuation of this rulemaking effort for the reasons stated above. The staff did not receive any negative feedback on this proposed recommendation.

In consideration of Commission direction in SRM-SECY-15-0149 to include a robust appeals process in the proposed rule, the staff analyzed whether standalone activities, such as issuing guidance on appeals processes, would be necessary if the NRC determined that rulemaking was not needed to address third-party reviews of licensee access authorization and fitness-for-duty determinations. At the November 1, 2018, public meeting, the staff sought stakeholder input on the need for a more robust appeals process. Based on the stakeholder input, and the staff's review of existing regulatory requirements, the staff has determined that the NRC's appeals processes are adequate and does not plan to issue revised guidance.

The staff recommends discontinuation of this rulemaking, including efforts to finalize a regulatory basis document, to avoid expending additional and unnecessary resources to complete the document. Should the Commission approve the staff's recommendation, the draft regulatory basis will be retained for staff knowledge management purposes but will not be made publicly available.

Proposed Industry Guidance on Access Authorization Determinations

On January 25, 2013, the Nuclear Energy Institute (NEI) submitted a petition for rulemaking (PRM) requesting that the NRC amend its regulations in 10 CFR Part 73. The petition, which the NRC docketed as PRM-73-16 (ADAMS Accession No. [ML13035A186](#)), requested that the NRC amend its access authorization regulations to limit the scope of third-party reviews of the denial or revocation of licensee unescorted access authorization determinations. Subsequently, on July 18, 2014, NEI submitted NEI 03-01, Revision 4, "Nuclear Power Plant Access Authorization Program" (ADAMS Accession No. [ML14199A643](#)), for NRC review and endorsement.

In a letter dated January 22, 2015 (ADAMS Accession No. [ML15023A338](#)), NEI informed the NRC of its withdrawal of PRM-73-16. NEI stated that, if the NRC endorsed Revision 4 of NEI 03-01, which includes an independent review process for licensee access authorization denials and revocations, the guidance would sufficiently address the issue of the role of third-party arbitration and avoid the need for rulemaking. To address NEI's pending request, the staff intends to engage with industry to obtain its views that will be used to inform the staff's determination on whether to initiate a formal review of NEI 03-01, Revision 4. This review could provide additional guidance on access authorization appeals, but is not necessary to maintain adequate protection, even if the rulemaking is discontinued.

RECOMMENDATION:

The staff recommends that the Commission approve the following staff actions:

- (1) Discontinue the rulemaking on access authorization and fitness-for-duty determinations.
- (2) Publish the enclosed *Federal Register* notice informing the public that the NRC is discontinuing the rulemaking on access authorization and fitness-for-duty determinations for the reasons set forth in this paper.

Upon Commission approval, the staff will inform the appropriate congressional committees of these actions and ensure orderly closure of the rulemaking activity in the NRC's portion of the Unified Agenda of Regulatory and Deregulatory Actions.

RESOURCES:

No additional resources are required to implement the recommendations.

If the Commission were to approve the staff's recommendation to discontinue this rulemaking, the resources already allocated to this rulemaking would be reallocated to other approved rulemaking projects through the Planning, Budgeting, and Performance Management Process.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection.


Margaret M. Doane
Executive Director
for Operations

Enclosure:
Draft *Federal Register* notice

SUBJECT: DISCONTINUATION OF RULEMAKING – ACCESS AUTHORIZATION AND FITNESS-FOR-DUTY DETERMINATIONS DATED: XXXXXXXX XX, 2019

Package: ML18360A169

Paper: ML18360A185

Federal Register notice: ML18360A189

*Via E-Mail

SECY Tickets: SRM-S15-0149-1 and SRM-S15-0149-2

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