UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

June 6, 2016

COMMISSION VOTING RECORD

DECISION ITEM: SECY-15-0149

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

The Commission acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of June 6, 2016.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Rochelle C. Bavol

Rochelle C. Bavol
Acting Secretary of the Commission

Enclosures:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Burns
Commissioner Svinicki
Commissioner Ostendorff
Commissioner Baran
OGC
EDO
PDR

VOTING SUMMARY – SECY-15-0149

RECORDED VOTES

	APPROVED	DISAPPROVED	ABSTAIN	NOT PARTICIPATING	COMMENTS	DATE
Chrm. Burns	X	X			X	05/20/16
Cmr. Svinicki	X				X	02/17/16
Cmr. Ostendorff	X				X	02/26/16
Cmr. Baran		X			X	02/05/16

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

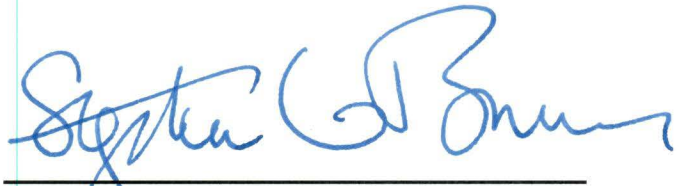
FROM: Chairman Burns

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

Approved __X__ Disapproved __X__ Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached __X__ None _____

I approve in part and disapprove in part the staff's proposal as discussed in the attached comments.



SIGNATURE

Entered in STARS
Yes __x__
No _____

20 May 2016
DATE

Chairman Burns's Comments on SECY-15-0149
Role of Third-Party Arbitrators in Licensee Access Authorization and Fitness-For-Duty Determinations at Nuclear Power Plants

I approve the staff's Option 1A to proceed with the "normal" rulemaking process to further explore the issues raised in the staff's paper and in the divergent comments offered by unions and licensees on the topic. My approval of rulemaking initiation does not come without reservations. I have yet to be convinced on the merits that a change to our regulations is warranted.

The safety and security of nuclear facilities must remain our paramount concern. This agency has always taken very seriously potential security threats, including insider threats, against nuclear facilities. But before making a decision on amending our regulations, I would need further demonstration that a compelling issue of common defense and security is presented by the alleged "gap" or interpretive conundrum in the NRC's regulations with respect to the role played by arbitration where allowed under some labor-management contracts, or that some means other than rulemaking is inadequate to address the concern.[1] However, in light of the NRC staff's stated security concerns, and the fact that proceeding with rulemaking does not guarantee any particular outcome -- let alone any outcome at all -- I am willing to let the rulemaking process proceed. In my view, this is a case where it is prudent to hear from all potentially affected parties in a public process before taking any alternatives off the table and making a final decision on how to proceed.

The rulemaking process affords the staff an opportunity to further complete its analysis of this issue through the invaluable inclusion of views from the public, labor unions, industry, and other interested stakeholders. Indeed, the history of this issue seems to reflect a circumstance in which the interested parties are often talking past one another. For example, in meeting with interested stakeholders prior to voting on this matter, I've heard from either side in this debate that they have offered approaches that would accommodate the mutual interests of those involved but, for one reason or another, those solutions have fallen by the wayside. From my standpoint, a facilitated engagement among interested stakeholders would be valuable and, indeed, approaching the issues through the techniques of a negotiated rulemaking (*see* 5 USC §§ 561-570) might be worth pursuing.

In proceeding with rulemaking, the staff should endeavor to ensure that any proposed revisions to our regulations are as narrowed in scope as is necessary to ensure the public safety and security. To the extent possible, the staff should not unnecessarily preclude arbitration outright but should consider whether the NRC's goals can be achieved while still allowing some degree of redressability with respect to a licensee's access determinations. Consequently, I agree with Commissioner Svinicki that the staff should make specific outreach to potentially affected labor organizations regarding the proposed content and timeframe for the proposed rule, in addition to its normal outreach efforts.

Finally, I note that Judge Posner's views in agreeing with the court's denial of rehearing *en banc* in *Exelon Generation Co. v. Local 15, IBEW*, 682 F.3d 620 (7th Cir. 2012), have been invoked to

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[1] I note that the staff has issued "non-cited" violations in a few instances based on its current interpretive approach to the regulations at issue where licensees have followed arbitrators' decisions. Although I have questions about the purpose and basis for such actions, I acknowledge that this awkward situation warrants at least further exploration through the rulemaking process.

support arguments regarding the inappropriateness of private arbitration in the circumstances involving access authorization. Whether or not one subscribes to those views on private arbitration or holds a particular view on the interpretation of the Commission's adoption of its rule in 1991, it is worth noting that Judge Posner argues for public administrative review (i.e, the NRC would be directly involved in review of licensee determinations of trustworthiness and reliability), which is not provided under current regulations. The NRC has resisted such an approach for a variety of reasons. Are those prepared to eliminate arbitration prepared to adopt this alternative and create a more enhanced role for the NRC in reviewing contested licensee access decisions? Such a step would appear unwarranted given the experience with the system that has largely worked well since its inception, but any further rule on this matter should ensure that there is a reasonable and balanced accommodation of interests in access determinations.

Stephen G. Burns
20 May 2016

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER SVINICKI

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

Approved XX Disapproved _____ Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached XX None _____

SIGNATURE

02/17/16
DATE

Entered on "STARS" Yes ✓ No ___

Commissioner Svinicki's Comments on SECY-15-0149
Role of Third-Party Arbitrators in Licensee Access Authorization and Fitness-for-Duty Determinations at Nuclear Power Plant

I approve the staff's recommendation that the agency proceed to rulemaking, which may take the form of an expedited rulemaking, for the purpose of developing a proposed rule containing a clear requirement that only nuclear power plant licensees may make final access authorization (e.g., unescorted access and fitness-for-duty) determinations. Although the staff may proceed under "expedited" rulemaking timeframes, the staff should make specific outreach to potentially impacted labor organizations regarding the proposed content and timeframe for the proposed rule, including opportunities for public comment, in order to facilitate the input from such entities.

I have monitored the issues at play here since they were initially litigated in 2009, including the subsequent petition for rehearing, filed and denied in 2012. I have considered also the thoughtful vote filed by my colleague, Commissioner Baran. Although the issues can be framed through many different prisms, I root my consideration of this matter in the Commission's obligation, under law, to provide for the common defense and security of the United States in matters of nuclear security related to the operation of commercial nuclear power plants. In this light, I do not seek to re-litigate whether the questions underlying *Exelon v. Local 15, International Brotherhood of Electrical Workers* were correctly decided by the Court. I accept that they were. Rather, the question occurs whether, in light of the circumstances as we now understand them, coupled with the growing numbers of arbitrated and reversed access authorizations of which we are aware, and with the specific and contemporary knowledge members of this Commission have regarding the capability and intent of the adversaries of this Nation, can we – as individuals and as a collective body burdened with this obligation – tolerate these trends. I suggest that we cannot.

As noted by Judge Posner, in his views appended to the denial of the petition for rehearing en banc, "I am persuaded that the panel decision is sound and that the criteria for granting rehearing en banc have not been satisfied. But the result is disturbing, and 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."

Posner goes on: "The safety of nuclear energy facilities cannot be taken for granted. . . . An errant employee of a nuclear power plant, including a substance abuser who is also a liar, could do catastrophic damage. . . . 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."[1]

Our regulations place the burden for protection and defense of a nuclear power plant site on the licensee. If that licensee does not have the authority – the ultimate backstop authority – to deny unescorted access to individuals the licensee determines to be untrustworthy of that access, every aspect of defensive strategy is a chimera. I do not propose that we change the accountability residing with licensees. Instead, I suggest that we take action to remedy the potential for third-party arbitrators to erect obstacles to this accountability through the

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[1] *Exelon Generation Co., LLC, v. Local 15, Intern. Broth. of Elec. Workers, AFL-CIO,* 682 F.3d 620, 621-623 (7th Cir. 2012) (Posner, J., concurring).

development of a rule that will make licensee accountability clear and unambiguous under our regulations going forward.

Kristine L. Svinicki 17 February 2016

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Ostendorff

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

Approved XX Disapproved _____ Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached XX None _____

Entered in STARS
Yes _____
No _____

WO Ostendorff
Signature

2/20/16
Date

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

I approve the staff's recommendation to pursue an expedited rulemaking to clearly articulate that licensees must make final access authorization determinations to ensure the safety of their plants and the public. I further approve the staff's recommendation to include in the revised rule a robust appeal process for workers whose access authorization is denied or revoked.

Commissioner Baran has thoughtfully summarized the history of our access authorization regulations, which have up to this point allowed for unrestricted arbitration of licensees' access authorization determinations. Shortly after we issued a revision to 10 C.F.R. Part 73 in 2009, the staff endorsed NEI 03-01, Revision 3, which prohibits arbitrators from overturning licensees' access authorization determinations. And in 2012, the Seventh Circuit Court of Appeals held that Exelon is required to arbitrate access authorization determinations with its unionized workers. I see rulemaking as the best way to resolve this conflict.

The Atomic Energy Act vests the NRC with the responsibility for licensing the use of nuclear materials in such a way that the public health and safety and common defense and security are ensured. We do that by holding our licensees responsible for compliance with our regulations. When a third party overturns a licensees' decision, our ability to carry out our responsibility is challenged.

I recognize that there is a tension between protecting the public and protecting employees' rights. A nuclear worker's future livelihood can be permanently damaged by an adverse access authorization decision. I do not take that lightly and therefore do not advocate for entirely removing third parties from negotiations. Due process must be maintained. But knowing what we know about today's threat environment and the potential impacts of an insider's malicious acts within the protected area of a nuclear power plant, safety and security must be paramount.

The NRC, licensees, unions, and employees all share the same goal of safety and security, but licensees are ultimately responsible for the safety of their facilities and compliance with NRC regulations. I agree that rulemaking, which will provide an opportunity for comment on the rule and draft guidance, is the best method to ensure that potential security vulnerabilities are addressed while at the same time ensuring workers' rights are protected. For the same reasons, I approve the staff's recommendation to address third-party review of fitness-for-duty determinations in the same rulemaking.

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.[1]

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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[1] *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."[2] 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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[2] *Exelon Generating Co.* v. *Local 15, Intern. Broth. of Elec. Workers, AFL-CIO*, 676 F.3d. 566, 568 (7th Cir. 2012).

arbitration over some issues should be limited in scope, that licensee would be free to negotiate a contract provision so stating.[3]

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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[3] 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.