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Office of Administration  
Mail Stop: TWFN-7-A60M,  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
ATTN: Program Management  
Announcements and Editing Staff

Re: Request for Comment on Draft RIS, "Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants" (Docket ID NRC-2020-0073)

Florida Power & Light Company on behalf of itself and of its affiliates, NextEra Energy Seabrook, LLC, NextEra Energy Duane Arnold, LLC, and NextEra Energy Point Beach, LLC (collectively, "NextEra") provides the following comments on Draft RIS, "Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants." The NRC published the Draft RIS for comment in the *Federal Register* on March 31, 2020 (85 Fed. Reg. 17771). NextEra appreciates the opportunity to provide these comments. However, as expressed in the attached comments, we believe that the Draft RIS inappropriately imposes new staff positions interpreting the Commission's regulations. These new positions should either be withdrawn or imposed through a notice-and-comment rulemaking process.

We look forward to continued dialogue with the NRC Staff regarding the Draft RIS.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "W. L. Parks".

William L. Parks  
General Manager, Safety Assurance and Learning  
Florida Power & Light Company

Enclosure: 1. NextEra Comments

**NextEra Comments on Draft RIS 2020-XX**  
**“Clarification of Personnel Access Authorization Requirements for Nonimmigrant Foreign Nationals Working at Nuclear Power Plants”**

This document reflects the comments of Florida Power & Light Company and its affiliates, NextEra Energy Seabrook, LLC, NextEra Energy Duane Arnold, LLC, and NextEra Energy Point Beach, LLC (collectively, “NextEra”) on the NRC’s Draft RIS, “Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants.”

The Draft RIS relays the NRC’s expectation that “the licensee is ultimately responsible for verifying the true identity and validating the non-immigrant foreign national’s eligibility to work with the correct visa category when granting UA or certifying UAA” (emphasis added). As is explained in more detail below, this is not required by current NRC regulations and would impose an onerous and unnecessary burden on licensees. New requirements should be introduced in regulations following a notice-and-comment rulemaking process. NextEra respectfully requests that the NRC should withdraw the Draft RIS and, if the NRC determines that licensees’ Access Authorization reviews should ensure that its employees and its contractors’ and vendors’ employees are authorized to work in the United States, institute a rulemaking proceeding to that effect.

***I. Practical Considerations***

At the outset, it should be noted that NextEra and its contractors/vendors comply with immigration laws and NextEra does not knowingly allow work to be performed on its sites by non-authorized individuals. However, NextEra’s Human Resources professionals can only directly validate this for its own employees. In the case of the workers provided by contractors/vendors, NextEra contractually relies on the contractor/vendor that employs these workers to ensure that its workers are authorized to work in the United States. Nuclear Access Authorization staff members are not trained in the application of immigration laws and should not be expected to add this burden to their existing responsibilities. The Draft RIS implies that this is a relatively simple analysis, but that is not the case. As the Draft RIS itself notes, relying on SAVE to validate employment authorization can involve leafing through guidance documents and immigration manuals and tables and codes to determine visa categories. And that does not get into the various exceptions and extensions that may be applicable in individual cases.

NextEra has encountered numerous work authorization questions that cannot be resolved by Access Authorization staff based on a simple review of visa documents. For instance, certain workers on an H-1B visa may be authorized to work beyond the date stated on their visa if a timely extension request has been filed and remains pending. An individual’s visa or passport may be expired on its face while his or her employment authorization document remains valid. Individuals in the US on a student visa may be authorized to work following completion of their coursework under certain circumstances. And certain business travelers on B1 visas may perform work such as installation, service, or repair of commercial/industrial equipment purchased from outside the US or training of US workers to perform such services. None of these situations can be simply evaluated by Access Authorization staff.

Finally, in the past, NextEra has encountered challenges with the accuracy of the information provided by SAVE. This concern does not affect the use of SAVE to validate the authenticity of an individual’s documentation, but if the NRC wants to rely on SAVE as an I-9 workaround for licensees to check the employment authorization of a contractor’s employees, the NRC should ensure that SAVE provides accurate and reliable information regarding employment authorization.



## ***II. Regulatory Analysis***

In addition to these practical considerations, the interpretation set forth in the Draft RIS has no basis in the NRC's current regulations. The NRC's mission is radiological safety, not enforcing the nation's immigration laws. The NRC's regulations do require licensees to verify the true identity of individuals seeking unescorted access authorization. And the NRC's regulations do require, in the case of foreign nationals, licensees to "**validate** the claimed non-immigration status that the individual has provided **is correct**." 10 CFR 73.56(d)(3). But that validation of non-immigration status does not require licensees to further the analysis by evaluating the authority of the individual in question to perform the work being performed at the licensee's site.

The Draft RIS discusses several sources of regulatory authority for its interpretation but none of these sources support its interpretation. First, the Draft RIS cites 10 CFR 73.56(d)(3), "Verification of true identity," which requires that "at a minimum, licensees, applicants, and contractors or vendors shall validate that the social security number that the individual has provided is his or hers, and, in the case of foreign nationals, validate that the claimed non-immigration status that the individual has provided is correct." Second, the Draft RIS explains that licensees should follow Supplement 1 to NEI 03-01, Revision 3, dated May 2009, which "states at B.1.3.c, '...Licensees should confirm eligibility for employment through U.S. Citizenship and Immigration Service (CIS) [USCIS] and thereby verify and ensure to the extent possible, the accuracy of a social security number of [or] alien registration number....'" Third, the Draft RIS cites the "the general performance objective of 10 CFR 73.56(c), which states that access authorization program must provide high assurance that individuals are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security. As explained below, none of these three sources provide a regulatory basis for the interpretation in the Draft RIS that licensees should ensure individuals granted unescorted access are authorized to work in the United States.

### **A. 73.56(d)(3)**

Section 73.56(d)(3) states:

Verification of true identity. Licensees, applicants, and contractors or vendors shall verify the true identity of an individual who is applying for unescorted access or unescorted access authorization in order to ensure that the applicant is the person that he or she has claimed to be. At a minimum, licensees, applicants, and contractors or vendors shall validate that the social security number that the individual has provided is his or hers, and, in the case of foreign nationals, validate the claimed non-immigration status that the individual has provided is correct. In addition, licensees and applicants shall also determine whether the results of the fingerprinting required under § 73.57 confirm the individual's claimed identity, if such results are available.

Read in context,<sup>1</sup> it is clear that the purpose of the Section 73.56(d)(3) requirement to validate that the claimed non-immigration status is correct is to validate the true identity of the individual. The question is not, is this person authorized to work in the United States? But instead the question is, do these identification documents match the individual who presented them and are they valid? Therefore, under 10 CFR 73.56(d)(3), the NRC can require licensees to validate that the individual is the person that he or she has claimed to be and that the non-immigration status reflected on his or her identification matches that listed in SAVE. But it cannot require licensees to perform a full legal analysis of work authorization in order to determine true identity.

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<sup>1</sup> The regulation is captioned "Verification of true identity."

This interpretation is supported by the regulatory history of the 2009 security rulemaking. At the outset, the proposed rule explained:

The proposed paragraph would require the entities who are subject to this section, at a minimum, to validate the social security number, or in the case of foreign nationals, the alien registration number, that the individual has provided to the licensee, applicant or C/V. The term, “*validation*,” would be used in the proposed paragraph to indicate that licensees, applicants and C/Vs would be required to take steps to access information in addition to that provided by the individual from other reliable sources *to ensure that the personal identifying information the individual has provided to the licensee is authentic.*

Proposed Rule, Power Reactor Security Requirements, 71 Fed. Reg. 62664 (Oct. 26, 2006) (emphases added). Thus, the purpose of this regulation, as proposed, was to ensure that the paper documentation provided by an individual is authentic “in order to ensure that the applicant is the person that he or she has claimed to be.” 10 CFR 73.56(d)(3).

That limited purpose did not change when the rule was finalized. In the final rule, the language was expanded from requiring validation of an “alien registration number” to requiring validation of “non-immigrant status” in order to accommodate individuals from NAFTA countries who may not have an alien registration number. Regardless, the Commission explained that this revision was made “to allow licensees and applicants to use an alien registration or an I-94 Form *to verify the identity of a foreign national.*” Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13926, 13947 (Mar. 27, 2009) (emphasis added).

Thus, both the plain language of the regulation as well as the regulatory history make clear that Section 73.56(d)(3) does not require licensees to wade into the intricacies of immigration law, but instead merely calls for a check “to ensure the applicant is the person that he or she has claimed to be.”

#### **B. NEI 03-01, Rev. 3, Supplement 1**

Next, the Draft RIS mentions NEI 03-01, Rev. 3, Supplement 1. The Draft RIS explains that this document “states at B.1.3.c,” that “Licensees should confirm eligibility for employment through U.S. Citizenship and Immigration Service (CIS) [USCIS] and thereby verify and ensure to the extent possible, the accuracy of a social security number of [or] alien registration number....” In the Draft RIS, the NRC Staff implies that because this language is in NEI 03-01, licensees are already committed to follow confirm eligibility for employment. But that is not the case. Contrary to the language used in the Draft RIS, this language does not come from section B.1.3.c of the NEI 03-01 Supplement. Instead, the Supplement is quoting from section B.1.3.c of the NRC’s 2002 Access Authorizations Compensatory Measures Order (AA CM). EA-02-261, “Order for Compensatory Measures Related to Access Authorization,” dated January 7, 2003.<sup>2</sup> Thus, NEI 03-01, Rev. 3, which was published in 2009 was simply stating a then-current legal requirement and providing a method to comply with that requirement.

However, the 2002 AA CM was rescinded by the NRC in 2011 because “the generically applicable security requirements set forth in the orders are adequately captured in the applicable NRC regulations.” Rescission or Partial Rescission of Certain Power Reactor Security Orders Applicable to Nuclear Power Plants (Nov. 28, 2011) ADAMS Accession No. ML111220447. Moreover, NEI 03-01 was not providing a new requirement, it was simply quoting the applicable regulatory standard at that time. The only additional language in NEI 03-01 was the bare statement that SAVE is a verification of employment eligibility.

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<sup>2</sup> The Safeguards designation from Attachment 2 to EA-02-261 was removed in 2013 following promulgation of the 2009 Access Authorization Rulemaking. U.S. NRC Regulatory Issue Summary 2013-19, Removal of Safeguards Information Designation from Attachment 2 to Order EA-02-261, “Order for Compensatory Measures Related to Access Authorization” (Dec. 13, 2013) (ADAMS Accession No. ML13150A135).



It is inappropriate for the NRC to rely on an industry guidance document from 2009 that quotes language from a since-rescinded order, in order to justify a new legal requirement.

Moreover, even when the 2002 AA CM was in effect, the NRC did not require licensees to validate that contractor/vendor employees were authorized to work in the United States. *See* Letter from J.A. Stall, Senior Vice President and Chief Nuclear Officer, FPL to NRC “Response to Order for Compensatory Measures Related to Access Authorization,” dated January 24, 2003, Attachment 1, footnote (“FPL and FPLE Seabrook will confirm eligibility for employment for new employees who are expected to seek unescorted access. This will be completed within the timeframes allowed and while observing restrictions of the responsible Federal agency. Contractors/Vendors will be directed to comply with employment checks required by INS”). This implementation was approved by the NRC. *See* Letter from Richard Laufer, Chief, Section 1, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation to J.A. Stall, Senior Vice President, Nuclear and Chief Nuclear Officer, Florida Power and Light Company, “Response to Order for Compensatory Measures Related to Access Authorization,” dated September 5, 2003.

### **C. General Performance Objective**

Finally, the Draft RIS argues that “10 CFR 73.56(d)(3) supports the general performance objective of 10 CFR 73.56(c), ‘General performance objective,’ which states, in part, that the licensee’s or applicant’s access authorization program must provide high assurance that individuals are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage.” NextEra agrees with this statement. The requirement to ensure that an applicant is the person that he or she has claimed to be is certainly consistent with this performance objective. But the NRC has not explained how validating that an individual is authorized to work in the United States is relevant to that performance objective.

### **III. Backfitting Discussion**

Finally, the Draft RIS explains that it does not represent a backfit because it does not require any action or written response on the part of any licensee. This is inconsistent with the NRC’s stated position regarding guidance documents with which the NRC expects licensees to comply, as set forth in a letter from the General Counsel. *See* Letter from Stephen Burns, General Counsel, NRC to Ellen Ginsberg, General Counsel NEI, dated July 14, 2010.<sup>3</sup> In that letter, the agency explained that staff guidance must be subject to the backfit rule if the staff intends the positions presented to be legally binding through further action, such as enforcement action. In such situations, the NRC recognizes the “implicit coercive effect” of the guidance. Here, presumably, the NRC plans to impose this position against licensees through inspections and enforcement actions. This supposition is supported by the NRC’s concurrent issuance of an Enforcement Guidance Memorandum, which, by its terms, allows for enforcement for violations of this interpretation after finalization of the Draft RIS. As a result, the backfit rule applies and a formal backfit analysis must be performed.

As noted above, this Draft RIS represents a change in NRC position, especially in light of the NRC’s acceptance of NextEra’s response to the 2002 AA CM. As a result, the NRC must perform a backfit analysis and identify a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from this guidance.

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<sup>3</sup> *See also* Management Directive 8.4, “Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,” (2019), which references the Burns letter and acknowledges that “[a] new or changed staff position may arise in several regulatory contexts, including facility inspections, license amendment reviews, or issuance of guidance documents.”