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