



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

August 6, 2019

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM:           SECY-19-0033

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

The Commission acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of August 6, 2019.

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

A handwritten signature in blue ink, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook  
Secretary of the Commission

Enclosures:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Svinicki  
Commissioner Baran  
Commissioner Caputo  
Commissioner Wright  
OGC  
EDO  
PDR

VOTING SUMMARY – SECY-19-0033

RECORDED VOTES

	<u>APPROVED</u>	<u>DISAPPROVED</u>	<u>ABSTAIN</u>	<u>NOT PARTICIPATING</u>	<u>COMMENTS</u>	<u>DATE</u>
Chrm. Svinicki	X				X	06/27/19
Cmr. Baran	X				X	06/28/19
Cmr. Caputo		X			X	07/15/19
Cmr. Wright	X				X	06/28/19

**POLICY ISSUE**  
**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** CHAIRMAN SVINICKI  
**SUBJECT:** SECY-19-0033: Discontinuation of Rulemaking -  
Access Authorization and Fitness-for-Duty  
Determinations

Approved XX Disapproved     Abstain     Not Participating    

Comments: Below XX Attached XX None    

I approve the staff's proposal to discontinue the rulemaking on access authorization and fitness-for-duty determinations. I approve publication of the Federal Register notice informing the public of this action (enclosure to SECY-19-0033), subject to the attached edits.

I appreciate the staff's thoroughness in carrying out the assessment of this issue, as previously directed by the Commission. As the staff notes in the paper, "[l]icensees 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." In light of the potential for severe security consequences regarding any programmatic gaps or errors in this regard, I am confident that the NRC staff will continue their persistent monitoring of trends and data related to human behavioral monitoring and fitness-for-duty programs at licensee facilities and promptly notify the Commission, should the staff's conclusions change in the future. The staff should consider whether routine reporting to the Commission on this topic via the Annual Threat Review paper would be appropriate.

  
\_\_\_\_\_  
SIGNATURE

06/27/19  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No

KLS Edits

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 26, 37, 50, 70, and 73**

**[NRC-2016-0145]**

**RIN 3150-AJ79**

**Access Authorization and Fitness-for-Duty Determinations**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Discontinuation of rulemaking activity.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is discontinuing the rulemaking activity, "Access Authorization and Fitness-for-Duty Determinations." The purposes of this document are to inform members of the public of the discontinuation of the rulemaking activity and to provide a brief explanation for this decision. The rulemaking activity will no longer be reported in the NRC's portion of the Unified Agenda of Regulatory and Deregulatory Actions (the Unified Agenda).

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the rulemaking activity discussed in this document is discontinued.

**ADDRESSES:** Please refer to Docket ID NRC-2016-0145 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- **Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0145. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, at 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Ilka Berrios, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2404; e-mail: [Ilka.Berrios@nrc.gov](mailto:Ilka.Berrios@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On November 15, 2015, the staff submitted to the Commission a notation vote paper 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 the following: 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 the staff requirements memorandum (SRM) for 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.

## **II. Process for Discontinuing Rulemaking Activities**

When the staff identifies a rulemaking activity that can be discontinued, the staff submits to the Commission a request for approval to discontinue the rulemaking. The Commission provides its decision in a Staff Requirements Memorandum. If the Commission approves discontinuing the rulemaking activity, the staff informs the public of the Commission's decision through the publication of a *Federal Register* notice.

A rulemaking activity may be discontinued at any stage in the rulemaking process. For a rulemaking activity that the public has commented on, the NRC will consider those comments before discontinuing the rulemaking activity; however, the NRC will not provide individual comment responses. For rulemaking activities that have generated significant public interest, the NRC conducts a public meeting or other form of public engagement to communicate its intent before discontinuing the rulemaking.

After Commission approval to discontinue a rulemaking activity, the staff updates the next edition of the Unified Agenda to indicate that the rulemaking is discontinued. The rulemaking activity will appear in the completed section of that edition of the Unified Agenda but will not appear in future editions.

## **III. Access Authorization and Fitness for Duty Determinations**

Consistent with Commission direction provided in SRM-SECY-15-0149, the staff initiated a rulemaking to determine whether a third party's reversal of a licensee reviewing official's access authorization determination or fitness-for-duty determination would adversely impact public health and safety or the common defense and security.

The NRC held two public meetings to discuss this rulemaking activity. During these meetings, the NRC obtained input from interested stakeholders, including union and industry representatives, concerning the use of third-party arbitration within the commercial nuclear power industry. The NRC posted summaries of these public meetings in ADAMS at Accession Nos. [ML16336A034](#) and [ML17067A171](#). The NRC 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 that were relevant to this rulemaking activity. After the closed meeting, the International Brotherhood of Electrical Workers voluntarily provided the NRC with specific data on arbitration cases involving certain International Brotherhood of Electrical Workers members and the outcome of these cases. The NRC posted a summary of the closed meeting in ADAMS at Accession No. [ML16355A092](#).

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 the 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 decisions made by Exelon reviewing officials. The NRC 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. Additionally, the NRC will continue to maintain awareness of access authorization issues and take necessary actions should the need arise.

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. The staff used this external feedback and other information obtained during development of the draft regulatory basis to evaluate whether the issue of 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 determined that third-party reversals of licensee access authorization and fitness-for-duty decisions do not present a significant safety or security concern that warranted engaging in rulemaking.

As part of the rulemaking process, the staff performed a preliminary cost analysis, which concluded that the rulemaking option would not be justified, based on a mean net cost of \$ 4.5 million. Further, the staff identified no significant qualitative or quantitative benefits that would offset the cost to conduct the rulemaking.

Consistent with NRC procedures for discontinuing a rulemaking and because the staff's recommended approach was different from the recommended approach in SECY-15-0149, the staff conducted a public meeting 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 in this document. 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. Based on stakeholder input, the NRC determined its regulations provide adequate appeals processes, and the NRC does not plan to issue NRC guidance.

The staff presented its recommendation to the Commission in SECY-19-XXXX, dated [INSERT date of SECY-19-XXXX]. On [INSERT date of SRM-SECY-19-XXXX], the Commission issued SRM-SECY-19-XXXX, which approved the staff's recommendation to discontinue this rulemaking activity.

#### **IV. Conclusion**

The NRC is no longer pursuing the "Access Authorization and Fitness-for-Duty Determinations" rulemaking for the reasons discussed in this document. In the next edition of the Unified Agenda, the NRC will update the entry for the rulemaking activity and reference this document to indicate that the rulemaking is no longer being pursued. The rulemaking activity will appear in the completed actions section of that edition of the Unified Agenda but will not appear in future editions. If the NRC decides to pursue a similar or related rulemaking activity in the future, it will inform the public through a new rulemaking entry in the Unified Agenda.

Dated at Rockville, Maryland, this        day of        2019.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,  
Secretary of the Commission.

**POLICY ISSUE**  
**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: Commissioner Baran  
SUBJECT: SECY-19-0033: Discontinuation of Rulemaking -  
Access Authorization and Fitness-for-Duty  
Determinations

Approved  Disapproved  Abstain  Not Participating

COMMENTS: Below  Attached  None

Entered in "STARS"

Yes

No

  
\_\_\_\_\_  
SIGNATURE

6/28/19  
\_\_\_\_\_  
DATE

**Commissioner Baran's Comments on SECY-19-0033,  
"Discontinuation of Rulemaking—Access Authorization and Fitness-for-Duty  
Determinations"**

Over my objection, the Commission voted in 2016 to initiate a rulemaking to provide that only licensees can make final access authorization and fitness-for-duty determinations for power plant employees. In this paper, the NRC staff recommends discontinuing this rulemaking based on the staff's determination that "there is not a safety or security need for a rulemaking to clarify the role of third parties in such 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. As I explained in my 2016 vote, the Commission was very clear in its Statement of Considerations for the 1991 rule that third-party arbitration of access authorization denials and revocations is permitted by and consistent with NRC regulations.

The 1991 rule 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, 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.

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

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

<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).

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.”

The purpose of the 2016 rulemaking was to explore reversal of the Commission’s long-standing position of allowing third-party arbitration of access authorization decisions. I strongly opposed this effort because it is not appropriate for NRC to interfere with the collective bargaining process by effectively re-writing the agreements reached by licensees and unions. NRC should not dictate the terms of labor contracts; that is for licensees and unions to negotiate.

In meeting the performance-based 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,” licensees have wisely been permitted to establish 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. 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.

Data provided by the International Brotherhood of Electrical Workers during the rulemaking process bears this out. The data convinced the NRC staff that only a small portion of access authorization terminations have been challenged through arbitration over the years and an even smaller number of individuals ultimately returned to work at a nuclear plant as a result of arbitration. According to the staff, “none of these reinstatements have resulted in an adverse impact on public health and safety or the common defense and security.”

I appreciate that the NRC staff has changed its position, and I agree that the rulemaking should be discontinued. I approve publishing the draft *Federal Register* notice announcing this decision, subject to the attached edits.

Going forward, it is important that the regulatory guidance on access authorization is consistent with the Commission’s unambiguous determination in 1991 that third-party arbitration of access decisions is permitted. The staff lacks authority to reverse that Commission determination by endorsing any guidance document that purports to prohibit third-party review of an access authorization denial or termination.

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 26, 37, 50, 70, and 73**

**[NRC-2016-0145]**

**RIN 3150-AJ79**

**Access Authorization and Fitness-for-Duty Determinations**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Discontinuation of rulemaking activity.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is discontinuing the rulemaking activity, "Access Authorization and Fitness-for-Duty Determinations." The purposes of this document are to inform members of the public of the discontinuation of the rulemaking activity and to provide a brief explanation for this decision. The rulemaking activity will no longer be reported in the NRC's portion of the Unified Agenda of Regulatory and Deregulatory Actions (the Unified Agenda).

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**FOR FURTHER INFORMATION CONTACT:** Ilka Berrios, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2404; e-mail: [Ilka.Berrios@nrc.gov](mailto:Ilka.Berrios@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**



On November 15, 2015, the staff submitted to the Commission a notation vote paper 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 the staff requirements memorandum (SRM) for 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.

## ~~II. Process for Discontinuing Rulemaking Activities~~

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~~After Commission approval to discontinue a rulemaking activity, the staff updates the next edition of the Unified Agenda to indicate that the rulemaking is discontinued. The rulemaking activity will appear in the completed section of that edition of the Unified Agenda but will not appear in future editions.~~

## III. II. Access Authorization and Fitness for Duty Determinations

Consistent with Commission direction provided in SRM-SECY-15-0149, the staff initiated a rulemaking to determine whether a third party's reversal of a licensee reviewing official's access authorization determination or fitness-for-duty determination would adversely impact public health and safety or the common defense and security.

The NRC held two public meetings to discuss this rulemaking activity. During these meetings, the NRC obtained input from interested stakeholders, including union and industry representatives, concerning the use of third-party arbitration within the commercial nuclear power industry. The NRC posted summaries of these public meetings in ADAMS at Accession Nos. [ML16336A034](#) and [ML17067A171](#). The NRC 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 that were relevant to this rulemaking activity. After the closed meeting, the International Brotherhood of Electrical Workers voluntarily provided the NRC with specific data on arbitration cases involving certain International Brotherhood of Electrical Workers members and the outcome of these cases. The NRC posted a summary of the closed meeting in ADAMS at Accession No. [ML16355A092](#).

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 the 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 decisions made by Exelon reviewing officials. The NRC 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, and therefore, there is no additional information regarding the performance of this individual.

The NRC has concluded that ~~Although allowing a third party, for example, an independent~~ 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 risk ~~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. The staff used this external

feedback and other information obtained during development of the draft regulatory basis to evaluate whether the issue of 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 determined that third-party reversals of licensee access authorization and fitness-for-duty decisions do not present a significant safety or security concern that warranted engaging in rulemaking.

As part of the rulemaking process, the staff performed a preliminary cost analysis, which concluded that the rulemaking option would not be justified, based on a mean net cost of \$ 4.5 million. Further, the staff identified no significant qualitative or quantitative benefits that would offset the cost to conduct the rulemaking.

Consistent with NRC procedures for discontinuing a rulemaking and because the staff's recommended approach was different from the recommended approach in SECY-15-0149, the staff conducted a public meeting 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 in this document. 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. Based on stakeholder input, the NRC determined its regulations provide adequate appeals processes, and the NRC does not plan to issue NRC guidance.

~~The staff presented its recommendation to the Commission in SECY-19-XXXX, dated [INSERT date of SECY-19-XXXX]. On [INSERT date of SRM-SECY-19-XXXX], the Commission issued SRM-SECY-19-XXXX, which approved the staff's recommendation to discontinue this rulemaking activity.~~

#### **IV.III. Conclusion**

The NRC is no longer pursuing the "Access Authorization and Fitness-for-Duty Determinations" rulemaking for the reasons discussed in this document. In the next edition of the Unified Agenda, the NRC will update the entry for the rulemaking activity and reference this document to indicate that the rulemaking is no longer being pursued. The rulemaking activity will appear in the completed actions section of that edition of the Unified Agenda but will not appear in future editions. ~~If the NRC decides to pursue a similar or related rulemaking activity in the future, it will inform the public through a new rulemaking entry in the Unified Agenda.~~

Dated at Rockville, Maryland, this        day of                    2019.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,  
Secretary of the Commission.

**POLICY ISSUE**  
**NOTATION VOTE**

**RESPONSE SHEET**


**TO:** Annette Vietti-Cook, Secretary  
**FROM:** Commissioner Caputo  
**SUBJECT:** SECY-19-0033: Discontinuation of Rulemaking –  
Access Authorization and Fitness-for-Duty  
Determinations

Approved \_\_\_ Disapproved XX Abstain \_\_\_ Not Participating \_\_\_

Comments: Below \_\_\_ Attached XX None \_\_\_

**Entered in STARS**

Yes X  
No \_\_\_\_\_

  
\_\_\_\_\_  
**SIGNATURE**  
7-15-19  
\_\_\_\_\_  
**DATE**

Commissioner Caputo's Comments on  
SECY-19-0033, Discontinuation of Rulemaking  
Access Authorization and Fitness-for-Duty Determinations

I would like to thank the Staff for their hard work and dedication to this very important and complex issue. I acknowledge my fellow Commissioners' views, but I firmly disagree with the current approach supported by the majority. I believe that an open concern remains with the role of third-party arbitrators in licensee access authorization and fitness-for-duty determinations at nuclear power plants. I therefore disapprove the Staff's recommendation to discontinue the rulemaking on access authorization and fitness-for-duty determinations and to publish the Federal Register notice informing the public that the NRC is discontinuing the rulemaking.

This issue arose due to a 7th Circuit Court decision that upheld the use of third-party arbitrators in the final determination of a licensee's access authorization determinations under 10 C.F.R. Part 73 or Fitness-for-Duty determinations under 10 C.F.R. § Part 26. In *Exelon Generating Co. v. Local 15, IBEW*, 676 F.3d 566 (7<sup>th</sup> Cir. 2012), the Court held that the NRC's regulatory requirements do not prohibit arbitration of licensee unescorted access denials and revocations, even though 10 C.F.R. § 73.56(a)(4) states that "Only a licensee shall grant an individual unescorted access." The Court determined that in its 1991 rulemaking NRC had allowed for third-party arbitration of these determinations and nothing in the 2009 amendments to Part 73 altered that permission.

In SECY-15-0149, the Staff determined that the 7<sup>th</sup> Circuit's decision was contrary to the longstanding view that only licensees can make final decisions on access authorization determinations. The Staff presented three options to clarify that position within the regulations:

Option 1: Development of a Proposed Rule  
Option 1A - Normal Rulemaking Process  
Option 1B - Expedited Rulemaking

Option 2: Issuance of Policy Statement

Option 3: Maintain the Status Quo

The Staff recommended Option 1B, the use of expedited rulemaking. In SRM-SECY-15-0149, the Commission approved Option 1A and directed the Staff to proceed with the normal rulemaking process. The majority's approach to discontinue rulemaking would, in effect, change the Commission's determination for SECY-15-0149 to Option 3: Maintain the Status Quo. But maintaining the status quo, then as now, fails to clarify that only licensees can make final decisions on access authorization and fitness-for-duty determinations, and that is the fundamental issue that needs to be resolved.

While I recognize and appreciate my colleagues' resolve to avoid actions that do not provide a substantial increase of safety and are not cost-justified, I view this question as one of adequate protection of public health and safety and the common defense and security. Access is fundamental to adequate protection. The Commission should not maintain a muddled status quo where our regulations are in conflict on such a fundamental issue.

I agree strongly with rigorous cost-benefit accountability but access authorization, and licensee accountability for that access, is the foundation for all licensee security programs. Outsourcing



this decision to a third party not accountable for nuclear safety and security undermines these programs. The licensee for each nuclear power plant is required to develop, implement, and maintain an access authorization program to protect against an insider threat. The purpose of these programs is to demonstrate that each person granted unescorted access is trustworthy and reliable, does not constitute an unreasonable risk to the health and safety of the public or the common defense and security, and does not pose a threat to interrupt the normal operations of the plant or to commit radiological sabotage.

To prevent the possible adverse consequences of an insider, the insider threat program is designed to leverage the elements within the access authorization, fitness-for-duty, cyber security protection and physical protection programs in a concerted manner. However, these programs are all predicated on valid and effective access authorization programs. Individuals granted unescorted access have more opportunities to access safety and security-significant structures, systems and components, select the most vulnerable target, read and become familiar with sensitive information, and determine the best time to execute a malicious act.

The access authorization programs must be implemented in accordance with an approved NRC security plan which requires licensees to perform employment history, military history, criminal history, credit history, and education history reviews; conduct interviews with provided references; conduct drug and alcohol screening; and conduct psychological screening. These comprehensive requirements are designed to protect the health and safety of the public and the common defense and security. They should not be negotiable, nor should their legitimacy be undermined by an unaccountable third party.

My approach on this issue is consistent with certain votes on SECY-15-0149. At that time, then-Commissioner Svinicki raised concerns with third-party arbitrators erecting obstacles for licensees' accountability for access authorization. Former Commissioner Ostendorff stated, "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 licensee's decision, our ability to carry out our responsibility is challenged."

In his opinion concurring with the denial of a petition for rehearing *en banc* in the above case, Judge Posner expressed some concerns with the use of third-party arbitrators. Arbitrators have incentives to present outcomes that "split the difference" or give each side a partial victory to maintain demand for their services.<sup>1</sup> Judge Posner stated:

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.<sup>2</sup>

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<sup>1</sup> *Exelon v. Local 15, IBEW*, 682 F.3d 620, 621 (7th Cir. 2012)

<sup>2</sup> *Id.* at 621-22.

While I do not advocate for the administrative remedy Judge Posner proposes, I agree with his sentiments regarding arbitrators. Third-party arbitrators bear no accountability for the safety or security of a nuclear power plant. Staff states in SECY-19-0033:

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 1 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.

But once again, these defense-in-depth programs hinge on effective access authorization and fitness-for-duty programs.

I believe Staff was correct in their original assessment of this issue in SECY-15-0149:

An arbitrator's decision requiring the reinstatement of an individual that the licensee has previously determined is not trustworthy and reliable presents a safety concern and a security vulnerability and puts the licensee in violation of NRC regulatory requirements and potentially subject to enforcement action.

This creates a situation where, by requiring licensees to restore access authorization and expunge records of derogatory employee information, arbitrators potentially place licensees – who are ultimately accountable for the safety and security of their facilities – in violation of regulatory requirements. Staff provided an example of this exact situation in SECY-15-0149, which highlights how complying with the Court's interpretation of one regulation leads to non-compliance with another. While Staff can manage these situations by employing enforcement discretion, that approach establishes a process that is subjective and neither transparent nor efficient, contrary to our Principles of Good Regulation.

A licensee's workforce is the first line of defense in ensuring that the facility is safe and secure. A situation as presented by Judge Posner where an untoward individual circumvents those safeguards resulting from the decisions of an arbitrator would clearly undermine the efficacy of access authorization and fitness-for-duty programs, which are vital for reasonable assurance of adequate protection.

While I share Commissioner Baran's concerns that workers' rights could be eroded, I must weigh that concern against our mission. There certainly are areas where third-party arbitration would be appropriate, but it is not in the access authorization or fitness-for-duty areas.

As I previously stated, access is fundamental to adequate protection. As such, the Staff should immediately reengage in the rulemaking process to develop a draft rule, clarifying that only licensees may grant unescorted access authorization. Staff should also provide the Commission with an imminent threat analysis to establish whether immediate action is required to address these concerns. I agree with Chairman Svinicki that the staff should monitor data and trends related to behavioral monitoring and fitness-for-duty programs and routinely inform the Commission of their findings. These notifications should include any trends indicating the increased use of enforcement discretion in these areas. Lastly, the staff should establish routine reporting to the Commission on this topic via the Annual Threat Review paper.

**POLICY ISSUE**  
**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** Commissioner Wright  
**SUBJECT:** SECY-19-0033: Discontinuation of Rulemaking -  
Access Authorization and Fitness-for-Duty  
Determinations

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

Comments: Below  X  Attached  X  None  \_\_\_

I appreciate the staff's thoughtful analysis and engagement with stakeholders on this matter. After further analysis and consideration of stakeholder feedback, the staff has concluded that third-party reversals of licensees' access authorization and fitness-for-duty determinations do not present a significant safety or security concern that warrants resolution by rulemaking. Therefore, I approve the staff's recommendation to discontinue this rulemaking. I also approve the staff's recommendation to issue the *Federal Register* notice informing the public of this decision, subject to the attached edits.

As the staff notes in this paper, power reactor and Category 1 fuel cycle facility licensees maintain and implement defense-in-depth security programs designed to ensure, in part, that individuals who maintain unescorted access to those facilities are trustworthy, reliable, and fit for duty. Additionally, the limited real-world examples of overturned determinations have not led to a safety or security issue. With that said, I agree with the Chairman that the staff should maintain awareness of access authorization issues going forward and notify the Commission if the staff's conclusions change. Finally, I agree with the staff that guidance on the appeal process is not needed.

**Entered in STARS**

Yes  ✓   
No  \_\_\_\_\_

  
\_\_\_\_\_  
SIGNATURE

6/28/19   
DATE

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 26, 37, 50, 70, and 73**

**[NRC-2016-0145]**

**RIN 3150-AJ79**

**Access Authorization and Fitness-for-Duty Determinations**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Discontinuation of rulemaking activity.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is discontinuing the rulemaking activity, "Access Authorization and Fitness-for-Duty Determinations." The purposes of this document are to inform members of the public of the discontinuation of the rulemaking activity and to provide a brief explanation for this decision. The rulemaking activity will no longer be reported in the NRC's portion of the Unified Agenda of Regulatory and Deregulatory Actions (the Unified Agenda).

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the rulemaking activity discussed in this document is discontinued.

**ADDRESSES:** Please refer to Docket ID NRC-2016-0145 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- **Federal Rulemaking Web Site:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2016-0145. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdresource@nrc.gov](mailto:pdresource@nrc.gov). The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Ilka Berrios, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2404; e-mail: [Ilka.Berrios@nrc.gov](mailto:Ilka.Berrios@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On November 15, 2015, the staff submitted to ~~the Commission a notation vote paper 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 the staff requirements memorandum (SRM) for 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~~ regarding the proposed 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.

## **II. Process for Discontinuing Rulemaking Activities**

When the staff identifies a rulemaking activity that can be discontinued, the staff submits to the Commission a request for approval to discontinue the rulemaking. The Commission provides its decision in a Staff Requirements Memorandum. If the Commission approves discontinuing the rulemaking activity, the staff informs the public of the Commission's decision through the publication of a *Federal Register* notice.

A rulemaking activity may be discontinued at any stage in the rulemaking process. For a rulemaking activity that the public has commented on, the NRC will consider those comments before discontinuing the rulemaking activity; however, the NRC will not provide individual comment responses. For rulemaking activities that have generated significant public interest, the NRC conducts a public meeting or other form of public engagement to communicate its intent before discontinuing the rulemaking.

After Commission approval to discontinue a rulemaking activity, the staff updates the next edition of the Unified Agenda to indicate that the rulemaking is discontinued. The rulemaking activity will appear in the completed section of that edition of the Unified Agenda but will not appear in future editions.

## **III. Access Authorization and Fitness for Duty Determinations**

Consistent with Commission direction provided in SRM-SECY-15-0149, the staff initiated a rulemaking to determine whether a third party's reversal of a licensee reviewing official's access authorization determination or fitness-for-duty determination would adversely impact public health and safety or the common defense and security.

The NRC held two public meetings to discuss this rulemaking activity. During these meetings, the NRC obtained input from interested stakeholders, including union and industry representatives, concerning the use of third-party arbitration within the commercial nuclear power industry. The NRC posted summaries of these public meetings in ADAMS at Accession Nos. [ML16336A034](#) and [ML17067A171](#). The NRC 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 that were relevant to this rulemaking activity. After the closed meeting, the International Brotherhood of Electrical Workers voluntarily provided the NRC with specific data on arbitration cases involving certain International Brotherhood of Electrical Workers members and the outcome of these cases. The NRC posted a summary of the closed meeting in ADAMS at Accession No. [ML16355A092](#).

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 the 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 decisions made by Exelon reviewing officials. The NRC 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. Additionally, the NRC will continue to maintain awareness of access authorization issues and take necessary actions should the need arise.

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. The staff used this external feedback and other information obtained during development of the draft regulatory basis to evaluate whether the issue of 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 determined that third-party reversals of licensee access authorization and fitness-for-duty decisions do not present a significant safety or security concern that warranted engaging in rulemaking.

As part of the rulemaking process, the staff performed a preliminary cost analysis, which concluded that the rulemaking option would not be justified, based on a mean net cost of \$ 4.5 million. Further, the staff identified no significant qualitative or quantitative benefits that would offset the cost to conduct the rulemaking.

Consistent with NRC procedures for discontinuing a rulemaking and because the staff's recommended approach was different from the recommended approach in SECY-15-0149, the staff conducted a public meeting 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 in this document. 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. Based on stakeholder input, the NRC determined its regulations provide adequate appeals processes, and the NRC does not plan to issue NRC guidance.

The staff presented its recommendation to the Commission in SECY-19-XXXX, dated [INSERT date of SECY-19-XXXX]. On [INSERT date of SRM-SECY-19-XXXX], the Commission issued SRM-SECY-19-XXXX, which approved the staff's recommendation to discontinue this rulemaking activity.

#### **IV. Conclusion**

The NRC is no longer pursuing the "Access Authorization and Fitness-for-Duty Determinations" rulemaking for the reasons discussed in this document. In the next edition of the Unified Agenda, the NRC will update the entry for the rulemaking activity and reference this document to indicate that the rulemaking is no longer being pursued. The rulemaking activity will appear in the completed actions section of that edition of the Unified Agenda but will not appear in future editions. If the NRC decides to pursue a similar or related rulemaking activity in the future, it will inform the public through a new rulemaking entry in the Unified Agenda.

Dated at Rockville, Maryland, this        day of        2019.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,  
Secretary of the Commission.