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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 August 22, 2019, 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 Website:* 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; email: 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, at 301-415-4737, or by email to 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; email: Ilka.Berrios@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On November 15, 2015, the staff submitted 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 regarding the proposed content and timeframe for the proposed rule. The Commission further directed the staff to include in the proposed rule a robust appeal 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 SRM. 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, and 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.

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 16th day of August 2019.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

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