

RAS#JJ-02

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: In the Matter of David B. Kuhl, II  
Denial of Senior Reactor Operator License

Docket Number: 55-62335-SP

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USNRC

July 23, 2009 11:00am

Location: (telephone conference)

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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IN THE MATTER OF :

DAVID B. KUHL, II : Docket No.  
(Denial of Senior : 55-62335-SP  
Senior Reactor :  
Operator License) :

\_\_\_\_\_  
:

Monday,

July 20, 2009

Via Teleconference

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

PAUL S. RYERSON, Chair

ALAN S. ROSENTHAL, Administrative Judge

MICHAEL F. KENNEDY, Administrative Judge

## 1 APPEARANCES:

2 On Behalf of Mr. Kuhl:

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## P R O C E E D I N G S

(10:05 a.m.)

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JUDGE RYERSON: Good morning, everyone.

MR. KUHL: Good morning.

MR. SMITH: Good morning.

JUDGE RYERSON: I'm Administrative Judge Paul Ryerson, and I'm Chair of the Licensing Board that's been established to address Mr. Kuhl's hearing request concerning a Senior Reactor Operator License. And with me is Judge Alan Rosenthal, who, like me, is trained as a lawyer, and also a third judge on our panel is Dr. Michael Kennedy, who is trained as a nuclear engineer.

We have a reporter on the line, I believe, and I would just remind everyone, first, that whatever you say on the call will be transcribed, and I would ask that you identify yourselves, which will make life much easier for the reporter. And, secondly, we have a public line that is open to the public for listening, but not speaking, so be aware, as well, that there is potentially any number of people out there, public.

So, could we go through who is here, first, for the NRC Staff.

MR. SMITH: Good morning, Your Honors.

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1 This is Maxwell Smith, representing the NRC Staff  
2 today. And I am joined by Ed Williamson and Jeremy  
3 Suttenger from the Office of General Counsel, as well  
4 John Munro from the Office of Nuclear Reactor  
5 Regulation Division of Inspection and Regional  
6 Support. Also on the line calling separately from  
7 Region I is Sam Hansell.

8 JUDGE RYERSON: Okay. Thank you, Mr.  
9 Smith. And do we have Mr. Kuhl?

10 MR. KUHL: Good morning. Yes, sir, I'm on  
11 the line.

12 JUDGE RYERSON: And am I pronouncing your  
13 name properly? Is it Kuhl not Kuhl?

14 MR. KUHL: Yes, Your Honor, you are.

15 JUDGE RYERSON: Good. All right. Well,  
16 you've all, I assume, seen our July 1 order that  
17 convened this call.

18 (Off record operator comment.)

19 JUDGE RYERSON: All right. We'll  
20 continue. Now, apparently, we have members of the  
21 public listening, as well. We will not repeat what we  
22 just went through.

23 You have before you the July 1 order that  
24 established this call. And, in a nutshell, the Board  
25 is concerned that regardless of the merit of Mr.

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1 Kuhl's claim, there may, at this point, be no remedy  
2 that the Board can award, that we're simply unable,  
3 even if we were to find that his claim has merit to,  
4 as a practical matter, award any remedy. And I'd like  
5 to start with two questions to the Staff concerning  
6 this.

7 Mr. Smith, the first question is this,  
8 really. Are there any facts that are in dispute?  
9 And, specifically, but for Mr. Kuhl's voluntary  
10 resignation from employment, is there any question but  
11 that he would have satisfied the requirements for a  
12 Senior Operator License? In other words, he passed  
13 the exam, and there was a certification subsequently  
14 withdrawn, but for his voluntary withdrawal from  
15 employment, would he have satisfied the requirements?

16 MR. SMITH: Your Honor, my understanding  
17 is that the essential facts are not in dispute, and  
18 had he not resigned from Beaver Valley, I think Mr.  
19 Kuhl did pass the written and operating test, and  
20 would have, but for leaving, would have been issued  
21 the Senior Reactor Operator's License.

22 JUDGE RYERSON: Okay. Thank you. Then,  
23 the second question is this, you raised in your filing  
24 the Commission's decision in the Morabito case, and  
25 you did not use that decision to make the argument

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1 that Mr. Kuhl's claim is now moot. And I'd be -- I'm  
2 curious, I think the Board is curious as what your  
3 position is on mootness, in light of the Morabito  
4 case?

5 MR. SMITH: Your Honor, the NRC Staff does  
6 believe that at this point, whether the proceedings  
7 before you are moot, we didn't oppose the hearing  
8 request because under the regulations, Section 2.103,  
9 it appears to state that all a person wishing to  
10 appeal the denial of an Operator's License need do is  
11 file in a timely manner. And it doesn't seem that the  
12 requirements of 2.309 necessarily apply to that kind  
13 of request.

14 We believe that the case should be  
15 dismissed as moot, because the Morabito case makes  
16 clear when the Applicant can't utilize the applied for  
17 license, then the underlying case is moot, and should  
18 be dismissed. As the Board noted in its July 1<sup>st</sup>  
19 order, under 10 CFR 55.52(b) and (e), Mr. Kuhl will  
20 not be able to use the license at this point. And  
21 we'd also like to note that under 10 CFR 55.55(a), an  
22 Operator's License terminates when the employee leaves  
23 the facility. And the applied for license, at this  
24 point, would have terminated at the point that Mr.  
25 Kuhl left Beaver Valley.

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1 JUDGE ROSENTHAL: Mr. Smith, this is Judge  
2 Rosenthal. In that circumstance, does the Staff  
3 believe that the Board should do anything further in  
4 this proceeding other than to dismiss the proceeding,  
5 perhaps on its own initiative as moot? I mean, what  
6 useful purpose, as you see it, would be served by any  
7 further filings, or further consideration on the part  
8 of the Board, given your belief that this proceeding  
9 is moot in light of the fact that Mr. Kuhl is no  
10 longer employed by the utility?

11 MR. SMITH: The NRC Staff believes that  
12 the Board could dismiss this case sua sponte as moot,  
13 but the Staff could move -- could file a motion to  
14 dismiss.

15 JUDGE ROSENTHAL: Well, could or should?

16 MR. SMITH: Should.

17 JUDGE ROSENTHAL: You said we could do  
18 that. Is the Staff now taking the position that this  
19 is what should be done?

20 MR. SMITH: Yes. That's correct, Your  
21 Honor.

22 JUDGE RYERSON: All right. Mr. Kuhl, what  
23 are your observations on this?

24 MR. KUHL: Good morning, Your Honor. I  
25 have some thoughts on this. I did read your July 1<sup>st</sup>

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1 order, and I understand your concerns, and I hope to  
2 address them this morning.

3 First of all, the SRO license is limited  
4 to the facility for which it was issued. You do  
5 reference the Code of Federal Regulations for that  
6 statement. You do make the statement that I no longer  
7 work at Beaver Valley Power Station. That made me  
8 think about what's going on there. I talked to some  
9 SOs there to see what exactly is happening. There  
10 continues to be a need, in my opinion, for Senior  
11 Reactor Operator Licenses. I have found out that the  
12 person that I resigned to has, in fact, left the  
13 company.

14 Right now, I guess I would ask you, is  
15 there anything that would prevent me from returning to  
16 Beaver Valley? Is there any law or requirement that  
17 would stop me?

18 JUDGE RYERSON: Generally, we don't give  
19 legal advice from this end.

20 MR. KUHL: Okay. Well, I'll put it this  
21 way. Right now, there is nothing that would prevent  
22 me from going back there if they found that I would be  
23 a suitable candidate for employment there. Right now,  
24 the thing that would make me most suitable for  
25 employment at Beaver Valley Power Station would be a

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1 Senior Reactor Operator License for that station, a  
2 license that I completed the requirements for, and, in  
3 my opinion, have earned.

4 JUDGE RYERSON: Let me ask the Staff -  
5 (Simultaneous speech.)

6 MR. KUHL: -- there is the license.

7 JUDGE RYERSON: Let me ask the Staff what  
8 their view is. Mr. Smith, if, hypothetically, and we  
9 don't know, obviously, what the company's view is on  
10 any of this; but if, hypothetically, Mr. Kuhl were to  
11 return to the company's employment tomorrow, what  
12 would his status be vis a vis the license, having  
13 passed the exam, as you say, and as you acknowledge  
14 having otherwise satisfied all the requirements? What  
15 would the status be today? Would he have to start  
16 over from scratch, or what would be his situation?

17 MR. SMITH: My understanding is that if he  
18 were to reapply to Beaver Valley and would be selected  
19 for employment, which would obviously be the  
20 Licensee's decision, he could file a waiver of the  
21 examination requirements under 55.47, with a new  
22 application, though, for the Senior Reactor Operator  
23 License.

24 JUDGE ROSENTHAL: This is Judge Rosenthal,  
25 again. So, if I understand you correctly, the fact

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1 that he has passed the examination, would have gotten  
2 the license had he remained in the employ of the  
3 utility, does not mean that he would be automatically  
4 entitled to receive that license based upon his having  
5 passed the exam, if tomorrow morning the company were  
6 to indicate a willingness to employ him. He'd have to  
7 go through an additional bureaucratic procedure, if I  
8 may put it that way, that might or might not give him  
9 the license without having to take the examination  
10 anew, even though he's apparently just recently  
11 passed. Is that the way it operates?

12 MR. SMITH: That's essentially correct,  
13 Your Honor. He would have to reapply, and then he  
14 could go through the discretionary waiver process to  
15 avoid taking the test again. But he would need to go  
16 through that process.

17 JUDGE ROSENTHAL: And how long would that  
18 process take? I mean, what I'm getting at is, Mr.  
19 Kuhl suggests that there's a need at the facility  
20 currently for Senior Reactor Operators. We don't know  
21 whether that's the case or not, we don't know whether  
22 he would be employed, in any event. But, let's assume  
23 for the sake of discussion that they have a need for  
24 additional SROs, and they would be prepared to take  
25 him on. Do you have any idea then how long this

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1 process would take to determine whether to give him a  
2 waiver, and allow him to be employed?

3 MR. SMITH: Your Honor, the Staff  
4 understands that would largely be up to the facility  
5 in how long to get him requalified and get the  
6 application submitted to the NRC.

7 JUDGE ROSENTHAL: Well, assuming the  
8 application is filed, then how long would it take for  
9 the NRC to determine whether to give him a waiver?

10 MR. SMITH: I think the NRC Staff could do  
11 it in a relatively short time, perhaps a matter of  
12 days.

13 JUDGE ROSENTHAL: Okay.

14 JUDGE RYERSON: So, I mean, if -- Judge  
15 Ryerson, again. If I understand the facts correctly,  
16 Mr. Smith, what you're saying is that if Mr. Kuhl were  
17 to be re-employed by the company, the fact that he  
18 passed the exam would, in all likelihood, be useful in  
19 the process of securing the Senior Operator's License.  
20 But, frankly, unless I'm missing something, nothing  
21 that we, as a Board, would do today would really  
22 affect that one way or the other. Is that your view,  
23 Mr. Smith, first? And then I'll ask Mr. Kuhl.

24 MR. SMITH: That's the Staff's  
25 understanding, Your Honor.

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1 JUDGE RYERSON: And, Mr. Kuhl, do you have  
2 a different view?

3 MR. KUHL: Yes, Your Honor, I do. In  
4 fact, I think I can work through the process and the  
5 discussions on the regulations while addressing the  
6 second concern in your order on July 1<sup>st</sup>. The  
7 statement was, "No SRO license for Beaver Valley Power  
8 Station that Mr. Kuhl might be awarded could be active  
9 as not having been at the facility for six months,  
10 seven months. Mr. Kuhl could not have performed the  
11 functions of an operator or senior operator for the  
12 necessary minimum number of hours during each calendar  
13 quarter."

14 That's an excellent point, but I do have  
15 some experience as an instructor at nuclear power  
16 plants, and the process we follow working with the  
17 law. For starters, 10 CFR 55.53, the Conditions of  
18 Licenses, Subsection Foxtrot 2 says basically if you  
19 haven't met Subsection Bravo where you've been  
20 actively performing functions of an operator, and it  
21 gives a minimum number of hours that you would work  
22 per calendar quarter, which is before you do that  
23 again, you effectively need to make your license  
24 active again. Foxtrot 1 states that your  
25 qualification status has to be current and valid, and

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1 that that's really the re-qualification program, the  
2 continuing training that the facility licensee  
3 provides for its licensed operators.

4 Subsection 2 says that the licensee has  
5 completed a minimum of 40 hours of shift functions  
6 under the direction of an operator or senior operator  
7 in the position which he's been assigned. So,  
8 basically, you stay in 40 hours under instruction  
9 watch to reactivate your license, if it goes inactive.

10 What the utility -- the industry do to  
11 insure we are complying with that is that when an  
12 operator receives their initial license, we also  
13 require the 40 hours of under instruction time. The  
14 reason being is that, it may seem like the day that an  
15 operator receives his license he immediately goes on  
16 shift and starts performing those functions. That's  
17 not actually true.

18 The qualification process is very focused  
19 on insuring personnel passing the NRC exam. Some  
20 topics that aren't directly related to the exam aren't  
21 normally covered. To give an example, I'll give you  
22 the company that I'm temporarily working at, they have  
23 a whole procedure on how to do that. There's a whole  
24 attachment listing a bunch of topics. It says, "The  
25 transition training", which is what they call the

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1 training after the NRC exam is completed, "should be  
2 returned prior to -- completed prior to returning to  
3 the plant for assignment." It says, "License  
4 candidates passing the license exam shall complete 40  
5 hours of under instruction watches", and that complies  
6 with the Code of Federal Regulations.

7 JUDGE ROSENTHAL: I don't wish to  
8 interrupt, Mr. Kuhl. This is Judge Rosenthal, again.  
9 But I don't see how any of that goes to the question  
10 as to what relief this Board could give you that would  
11 be significant, and on what basis that relief could be  
12 afforded. Because, again, as I understand it, at  
13 least, so long as you're not in the employ of the  
14 utility, under the Commission's regulations, you  
15 simply are not entitled to a license. And the fact  
16 is, at this point, you're not in the employ of the  
17 company. And, therefore, I don't see offhand --  
18 everything that you may have just told us might be  
19 true, but it doesn't seem to me to go to the matter of  
20 what kind of relief we could afford you, given the  
21 fact that you're not in the employ of the company at  
22 this point, and under the Commission's regulations  
23 such employment is a condition to your being issued a  
24 license.

25 Aren't we just bound by the fact that we

1 have to comply with the Commission's regulations, and  
2 the Commission's regulations specifically state, in  
3 effect, that you're not, at this point, entitled to a  
4 license, because you're not in the employ of the  
5 company.

6 MR. KUHL: Your Honor, I understand what  
7 you're saying, but what I don't understand, and what  
8 I have been unable to determine is what Commission  
9 regulation makes that requirement. I have yet to find  
10 anything substantial that says if a person no longer  
11 works at the facility, that their license is removed,  
12 or that working at the facility is the requirement for  
13 having the license. 10 CFR 55.31 is the applicable  
14 regulation, and it clearly says that there's a  
15 facility licensee's need for an operator, or a senior  
16 operator to perform assigned duties. It says nothing  
17 about my employment status.

18 JUDGE ROSENTHAL: This is Judge Rosenthal,  
19 again. Mr. Smith, is the Board correct in its belief  
20 that employment by the company is a condition  
21 precedent to the issuance of an SRO license?

22 MR. SMITH: Your Honor, that's the NRC  
23 Staff's understanding. We'd refer you and Mr. Kuhl to  
24 10 CFR 55.55, Part A, which states that, "Each  
25 operator license and senior operator license expires,

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1 which is at the date of issuance, or upon termination  
2 of employment with the facility licensee."

3 JUDGE RYERSON: Okay. This is Judge  
4 Ryerson, again, Mr. Kuhl. I have one further question  
5 for you. And, again, I mention that we are -- of  
6 course, everything that's being said is being  
7 transcribed. So with that reminder, let me ask you a  
8 question.

9 The facts concerning your resignation are,  
10 at least in the record that I've seen, not really set  
11 forth in any detail. And they may not be relevant,  
12 they're most likely not directly relevant, but I'd  
13 like to give you the opportunity, if you want to, to  
14 tell us a little more about that. The Board might  
15 find it helpful to know a little bit more about the  
16 circumstances of your departure. But, again, there is  
17 absolutely no requirement that you do so. That's  
18 entirely simply an opportunity for you to speak to  
19 that, if you'd like to.

20 MR. KUHL: Certainly, Your Honor. I would  
21 appreciate that opportunity. I was initially hired at  
22 Beaver Valley Power Station to be a supervisor. I was  
23 hired to go directly to the class to serve them in  
24 that capacity.

25 Just so you know my background, I have

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1 been a previously SRO licensed unit supervisor at  
2 Oyster Creek, so I do know a little bit about the job.  
3 Based on my previous experience, I had a significant  
4 number of questions, because, as you can imagine,  
5 shift work has a certain impact on quality of life.  
6 I have a wife and two kids, and I really enjoy being  
7 with them, so I was concerned about what kind of  
8 rotation they follow.

9 I have worked at places before with five  
10 shift rotation, eight hour days, significantly reduced  
11 staffing that really makes life difficult for the  
12 licensed operators. So, that was a significant  
13 interest for me during the interview.

14 The person who hired me told me  
15 specifically that they were working on fixed shift  
16 rotations, and were going to 12-hour days. The  
17 difference between a 12-hour day and an 8-hour day is  
18 significant in any shift rotation, be it five or six.  
19 Once you go to a 12-hour day, obviously, your work day  
20 is longer, but you have significantly more time away  
21 from work.

22 That was very interesting to me. That was  
23 an important aspect of it. And when I discussed this  
24 with my wife, that was an important selling point,  
25 that we would be able to maintain a reasonable quality

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1 of life based on a 12-hour rotation. Six shifts would  
2 have been great.

3 I took the job. I went there, immediately  
4 found out that they weren't going to go to six shift,  
5 they were going to go to five shift. That was a bit  
6 of a disappointment, but not a show stopper. AS I  
7 proceeded to work through the program, and was working  
8 directly with licensed operators and folks on shift,  
9 what I found out was that the union had no desire to  
10 go to 12-hour shift rotations. Okay?

11 Then I found out that the management had  
12 no desire to go to 12-hour shift rotations. In fact,  
13 there was no way they were going to go to 12-hour  
14 shift rotations. This entire thing had been a ruse.  
15 Very frustrated with that.

16 The other aspect of it, I don't know how  
17 to describe this. Have you ever worked at a location  
18 where everyone you worked with suggested that you  
19 leave while you can? The morale at that site was so  
20 incredibly low, and the notion that the people were  
21 telling me to quit was really wearing. By the time  
22 the license came around, I thought that this probably  
23 might be the right thing to do for me, to leave the  
24 station.

25 When I found out that despite the fact

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1 that they have significant losses in my license class,  
2 they weren't going to be able to fill all the needs  
3 that they had. They still were not starting a license  
4 class for Unit 2. I thought at that point I really  
5 need to get out before I spent the rest of my life on  
6 shift there not seeing my family.

7 JUDGE RYERSON: Okay. Thank you.

8 MR. KUHL: That was my reasons.

9 JUDGE RYERSON: Thank you, Mr. Kuhl. As  
10 I said, that may not be directly relevant to anything  
11 we're charged with doing as a Board here, but we  
12 wanted to give you that opportunity. We appreciate  
13 your addressing it.

14 Let me ask, Mr. Smith, is there anything  
15 further that you would like to say?

16 MR. SMITH: Nothing further at this time,  
17 Your Honor.

18 JUDGE RYERSON: And, Mr. Kuhl, is there  
19 anything further that you have?

20 MR. KUHL: Yes, Your Honor. The last  
21 point that Mr. Smith made was, he was quoting 10 CFR,  
22 I believe 50.55 Alpha, the license would terminate  
23 when the employee leaves. Since my license was not  
24 issued at the time I left, it could not be terminated  
25 per that requirement. In fact, I can quote you the

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1 Commission's rule in ES 501 regarding issuing a  
2 license. And page 7 of 25, the last paragraph of  
3 Section Charlie, talks about before issuing a license,  
4 the Regional Office insures the applicant has been  
5 medically fit in 24 months, no permanent physical or  
6 mental conditions, is up-to-date in the requa  
7 training program. Moreover, shall advise the facility  
8 licensee to properly activate the individual's  
9 license", which would be the pre-described 40 hours  
10 under instruction, as well as any other training  
11 required. "If more than three months have passed  
12 since exam results issued." And, finally, it says,  
13 "If a licensing action is delayed for any reason, the  
14 effective date of the license will be the date on  
15 which it is issued. Licenses will not be back-dated."  
16 Now, I haven't had a license issued to me for Beaver  
17 Valley.

18 JUDGE RYERSON: Okay. Judge Rosenthal,  
19 did you have any further questions?

20 JUDGE ROSENTHAL: No, I think no.

21 JUDGE RYERSON: Judge Kennedy?

22 JUDGE KENNEDY: No, I do not.

23 JUDGE RYERSON: Okay. Well, these  
24 comments have been helpful. I think this concludes  
25 what we intended to cover today. The Board expects to

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1 rule on this issue, I believe, quite promptly. Is  
2 there anything else we need to address on this call?  
3 Judge Rosenthal?

4 JUDGE ROSENTHAL: Not that I can think of.

5 JUDGE RYERSON: Any of the parties believe  
6 there's anything else we should address while we have  
7 everyone? All right.

8 MR. KUHL: Yes, Your Honor. I do have  
9 another issue that I'm concerned about. That's the  
10 use of the Morabito case being used as precedent for  
11 my case.

12 JUDGE RYERSON: It's the same facility,  
13 isn't it?

14 MR. KUHL: Well, there is an interesting  
15 fact there, that it's the same facility. I mean,  
16 that's not something I can bring up in terms of a  
17 legal issue. My concern with the Morabito case is  
18 that the case, itself, was vacated by the Commission.  
19 And I'm certainly no lawyer, but I guess I don't  
20 understand how a vacated position could be used as  
21 precedent, other than to say that it's possible to  
22 vacate a position.

23 JUDGE RYERSON: Mr. Smith, do you know  
24 what Mr. Kuhl is referring to in terms of that  
25 decision being vacated? I don't think that's in the

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1 public record, but I could be wrong.

2 MR. SMITH: My understanding, Your Honor,  
3 is that the Commission's decision has not been  
4 vacated, that the Commission vacated the Atomic Safety  
5 and Licensing Board's decision below in that case.

6 JUDGE RYERSON: Correct.

7 MR. SMITH: NRC Staff is relying on the  
8 Commission's decision in Morabito.

9 JUDGE RYERSON: Right. That's my -

10 MR. SMITH: AS well as the Commission's  
11 decision denying a motion for reconsideration.

12 JUDGE RYERSON: Okay.

13 MR. KUHL: I apologize, I misspoke. The  
14 Commission vacated the position of the Atomic  
15 Licensing Board. Correct?

16 JUDGE RYERSON: Correct. And I believe  
17 the language that we were referring to was in the  
18 Commission decision, not in the Licensing Board  
19 decision.

20 MR. KUHL: Okay. So, the entire position  
21 has been vacated by the Commission. They said that it  
22 doesn't apply. To my understanding of what a vacated  
23 position is, it never happened legally.

24 JUDGE RYERSON: Well, but the point for  
25 which we are potentially invoking Morabito goes to the

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1 mootness question. In other words, what Mr. Morabito,  
2 as I recall the facts, suggested that notwithstanding  
3 the vacating of the Licensing Board decision, perhaps  
4 the Commission could consider, in effect, granting and  
5 revoking a license at the same time. And the  
6 Commission's reaction was no, we're not going to  
7 engage in that kind of activity. So, that's the point  
8 that we were citing it for, not the merits of the  
9 underlying decision; that it was, in fact, vacated by  
10 the Commission, that's all.

11 All right. Well, again, unless there's  
12 something else we need to talk about, we stand  
13 adjourned. I thank you very much.

14 MR. KUHL: Thank you, Your Honor.

15 MR. SMITH: Thank you, Your Honor.

16 (Whereupon, the proceedings went off the  
17 record at 10:34 a.m.)

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CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:           David B. Kuhl, II

Name of Proceeding: Denial of Senior Reactor  
Operator License

Docket Number:           55-62335-SP

Location:                 (teleconference)

were held as herein appears, and that this is the  
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