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Title: In the matter of Charlissa C. Smith

Docket Number: 55-23694-SP

ASLBP Number: 13-925-01-SP-BD01

Location: Rockville, Maryland

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UNITED STATES OF AMERICA

U.S. NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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: Docket No.

In the Matter of: : 55-23694-SP

CHARLISSA C. SMITH : ASLBP No.

: 13-925-01-SP-BD01

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Wednesday,

January 23, 2013

Rockville, Maryland

BEFORE:

ALAN S. ROSENTHAL, Chairman

BRIAN K. HAJEK, Administrative Judge

RONALD M. SPRITZER, Administrative Judge

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APPEARANCES :

On Behalf of the U.S. Nuclear Regulatory

Commission:

DAVID CYLKOWSKI, ESQ.

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P R O C E E D I N G S

10:00 a.m.

CHAIRMAN ROSENTHAL: Good morning, ladies and gentlemen.

Ms. Smith, I assume you're on the line.

MS. SMITH: Yes sir. I am.

CHAIRMAN ROSENTHAL: Okay. Very good.

This Licensing Board is hearing oral argument this morning on the December 5, 2012 timely demand of Charlissa Smith for a hearing on the denial by the NRC Staff of her application for a senior reactor operator's license.

The denial was set forth in a November 15, 2012 letter in which Ms. Smith was advised that she could demand such a hearing within 20 days under the provisions of 10 CFR 2.103(b)(2). The grant of the hearing demand is opposed by the NRC Staff.

I am Alan S. Rosenthal, the Board Chair. The other members of the Board are Judges Ronald M. Spritzer on my left and Brian K. Hajek on my right.

This argument is governed by the terms of the Board's January 9 Order as supplemented in a January 15 Order. As stated therein, the Board has read with care the written submissions. Accordingly, the sole purpose of today's proceeding is to enable

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1 its members to seek answers to that questions that
2 have arisen based upon the content of those
3 submissions. Most but not necessarily all of those
4 questions was set forth broadly in the January 15
5 Order.

6 To that end, the Board has not established
7 time limits. Instead when its members conclude that
8 further questioning likely will not prove fruitful,
9 the proceeding with be forthwith terminated.

10 Ms. Smith has accepted the Board's
11 invitation to participate by telephone. I will now
12 call upon the counsel representing the NRC Staff at
13 this argument to identify himself for the record.

14 MR. CYLKOWSKI: Good morning, Your Honor.
15 My name is David Cylkowski. With me at counsel's
16 table is Susan Uttal as well.

17 CHAIRMAN ROSENTHAL: All right. Before we
18 get to the questions, Mr. Cylkowski, I have a few
19 questions to ask of you with respect to the Staff's
20 insistence and its response to Ms. Smith's hearing
21 demand that the demand be summarily denied as
22 untimely. That insistence is based upon the claim
23 later withdrawn that Ms. Smith had erroneously invoked
24 Federal Express as a means for transmitting her
25 hearing demand to the Commission.

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1 Now the denial letter specifically
2 authorized Ms. Smith to utilize Federal Express as a
3 means for submitting the hearing demand. In that
4 circumstance, I find it incredible that the Staff
5 would advance the position that it did. And I would
6 like even though it's now been withdrawn an
7 explanation as to how that happened.

8 Because quite frankly, Mr. Cylkowski, this
9 Board expects more from the Staff. It expects that
10 when there are filings by the Staff before the Board
11 those filings are accurate factually and legally. And
12 quite frankly I fail to understand how in light of the
13 fact that on the first page of the denial letter Ms.
14 Smith again is authorized specifically to utilize
15 Federal Express. That Staff could have advanced that
16 absolutely absurd argument in its papers.

17 I think we were entitled to something more
18 from the Staff. And I want an explanation as to how
19 that happened.

20 MR. CYLKOWSKI: Yes, Your Honor. Your
21 Honor is correct that this was an error, an oversight,
22 by the Staff. And as Your Honor noted, this is the
23 reason why on the Staff's subsequent filing it was
24 withdrawn.

25 CHAIRMAN ROSENTHAL: I don't find your

1 statement that it was an oversight sufficient. Did
2 you read the denial letter before you filed your
3 response?

4 MR. CYLKOWSKI: Yes, Your Honor. Counsel
5 had read the denial letter.

6 CHAIRMAN ROSENTHAL: And did you read the
7 first page?

8 MR. CYLKOWSKI: Yes, Your Honor.

9 CHAIRMAN ROSENTHAL: And did it appear on
10 the first page that Ms. Smith was authorized to use
11 Federal Express?

12 MR. CYLKOWSKI: Yes, Your Honor.

13 CHAIRMAN ROSENTHAL: Well, then how do you
14 justify this is an oversight? It seems to me it was
15 simply the last word in carelessness.

16 MR. CYLKOWSKI: Your Honor, let me be
17 clear. I am not trying to justify the Staff's
18 oversight. And the Staff apologizes to the Board and
19 to Ms. Smith for the oversight. And that's why the
20 argument was withdrawn in the Staff's very next
21 filing.

22 CHAIRMAN ROSENTHAL: How long may I ask
23 have you been employed by this agency?

24 MR. CYLKOWSKI: Around four or five months
25 now, Your Honor.

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1 CHAIRMAN ROSENTHAL: All right. Well, I
2 hope that you'll take this instance to heart and that
3 there isn't a repetition of it. Because I can tell
4 you that there's nothing that will bring you and your
5 office into greater disrepute than instances like
6 this.

7 Now I might add that the Staff's motion to
8 reply to one of Ms. Smith's submission is granted.
9 And the Board will take it into consideration for
10 whatever the Board might think its worth. It was in
11 that reply that we granted it. The Board believes the
12 file that the Staff conceded that their assertion that
13 Ms. Smith's submission was untimely was unwarranted.

14 Now we're going to get to the questions.
15 And it appears to the Board that most of these
16 questions are appropriately directed in the first
17 instance to Staff counsel.

18 Ms. Smith, after we have finished with
19 Staff counsel you will be given an opportunity to
20 respond.

21 I would like to start out, Mr. Cylkowski,
22 with the basis for your assumption that this
23 proceeding is governed by the provisions of 10 CFR
24 2.309(f)(1). In that connection, I would like to ask
25 you first of all whether you attached any significance

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1 and if not why not to the fact that under the section
2 that governs this proceeding what Ms. Smith filed was
3 not a hearing request but it was a hearing demand.

4 What significance attaches to that fact,
5 if any. And also are you aware of the history of the
6 section involved? In other words, the history of
7 section 2.103.

8 MR. CYLKOWSKI: Yes, Your Honor. And to
9 answer your first question regarding the use of demand
10 and 10 CFR Section 2.103(b)(2), the Staff understands
11 demand in this context to mean that Ms. Smith is
12 entitled to a hearing as of right provided that she
13 meets the filing requirements beforehand. Demand does
14 not mean that a requester gets a hearing no matter
15 what. There are still prior legal requirements.

16 CHAIRMAN ROSENTHAL: Now what is the
17 difference then between a request and a demand? I
18 mean if she met, assuming that this were a hearing
19 request, the requirements that you refer to she would
20 get a hearing as a matter of right. And now you say
21 she has to meet these requirements. I take it you're
22 talking about the 2.309(f)(1) requirements.

23 MR. CYLKOWSKI: Yes, Your Honor.

24 CHAIRMAN ROSENTHAL: You say she has to
25 meet those even though what she's filing is a demand

1 and not a request. In that circumstance what is the
2 difference between request and demand?

3 MR. CYLKOWSKI: Your Honor, as it regards
4 the requirements in 2.309, there is not a difference
5 between --

6 CHAIRMAN ROSENTHAL: What is the
7 difference between -- You're not answering my
8 question. This is a hearing demand. It is not a
9 hearing request. The fact is that in its original
10 form Section 2.103 used the term "hearing request."
11 A year later, it was changed to hearing demand.

12 Now there has to be some significance and
13 you haven't told me what it is. And what you're
14 telling me doesn't make any difference whether it's
15 demand or request. In either event, they have to meet
16 the requirements of the 2.309(f)(1).

17 Now if they have to meet the requirements
18 in either event, what is the difference between
19 hearing demand and hearing request?

20 MR. CYLKOWSKI: Your Honor, as pertains to
21 this argument and these requirements, there is not a
22 difference between demand and request.

23 CHAIRMAN ROSENTHAL: Not a difference.
24 What do you back that up with? On what basis do you
25 have for telling this Board that when the Commission

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1 changed the language from request to demand it was
2 engaging in an idle exercise? But either way the
3 hearing demander had to meet the same requirements.
4 I mean I want to know what is your authority for that
5 proposition.

6 MR. CYLKOWSKI: Yes, Your Honor. The 2004
7 rule changes to, amendments to, Part 2, the Commission
8 was clear that it was bringing challenges to SRO and
9 RO license denials --

10 CHAIRMAN ROSENTHAL: It did?

11 MR. CYLKOWSKI: -- within the requirements
12 of Subpart L and Subpart C.

13 CHAIRMAN ROSENTHAL: Where did it say that
14 specifically?

15 MR. CYLKOWSKI: Yes, Your Honor. The
16 Court's brief indulgence. This is in the 2004 rule
17 change and this is Volume 69 of the Federal Register
18 beginning at page 2182. At page 2206, the Commission
19 states "Under this provision Subpart L procedures
20 would be used as a general matter for hearings on
21 power reactor construction permit and operating
22 license applications, power reactor license renewal
23 applications." And the Commission specifically states
24 "reactor operator licensing under Part 55."

25 Elsewhere in that amendment, the

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1 Commission discusses applying the requirements of
2 Section 2.309(a)(2) to these new and former
3 proceedings. For example, at page 2188, the
4 Commission states "In the final rule, well supported,
5 specific intentions will be required in all
6 proceedings just as they are now required under the
7 Commission's formal hearing procedures." And the
8 Commission specifically cites "Section 2.309(a)."

9 CHAIRMAN ROSENTHAL: All right. Now why
10 in that circumstance -- You're right about that -- did
11 the denial notice or letter of denial rather call Ms.
12 Smith's attention to her obligation to comply with
13 those provisions? Was she supposed to be a mind
14 reader?

15 MR. CYLKOWSKI: No, Your Honor. But the
16 letter is not legally required to include --

17 CHAIRMAN ROSENTHAL: Not legally required.

18 MR. CYLKOWSKI: Yes, Your Honor.

19 CHAIRMAN ROSENTHAL: She is bound when she
20 files a request for or demand for a hearing on a
21 matter that affects her career. She's required to go
22 to the Commission's regulations. Her intention isn't
23 going to the regulations.

24 And isn't it the case that when there's a
25 notice of opportunity given to the public that's

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1 published in the Federal Register that that notice of
2 opportunity for hearing will set forth the provisions
3 of 2.309 that the hearing requester acting on that
4 notice must observe?

5 Here there is none of this. She's told
6 nothing. She's just told that within 20 days she can
7 demand a hearing.

8 MR. CYLKOWSKI: Yes, Your Honor.

9 CHAIRMAN ROSENTHAL: Now isn't it a little
10 difficult for me to assume that there was no
11 obligation at all that the Staff had these steps that
12 she had to take in order to obtain a hearing that the
13 Staff wasn't obligated to provide her with them?

14 MR. CYLKOWSKI: No, Your Honor. And I
15 could point you to the regulation, 10 CFR Section
16 2.103(b) sets forth the requirements for the denial
17 letter. It requires the Staff to in the case of a
18 proposed denial "inform the applicant in writing of
19 the nature of any deficiencies or the reason for a
20 proposed denial and the right of the applicant to
21 demand a hearing within 20 days." All further
22 requirements Ms. Smith is deemed to have constructive
23 notice of.

24 CHAIRMAN ROSENTHAL: Constructive notice.

25 MR. CYLKOWSKI: Yes, Your Honor, under --

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1 Sorry. Was Your Honor finished with the question?

2 CHAIRMAN ROSENTHAL: It does not satisfy
3 me. I don't know about my brethren. She has
4 constructive notice that the regulations require her
5 to do more than she's specifically told in the denial
6 letter. That seems to me to be a -- I think there
7 might even be constitutional implications to that.

8 MR. CYLKOWSKI: Your Honor, under the
9 Federal Register Act and specifically 44 USC Section
10 1507 "unless otherwise specifically provided by
11 statute, publication in the Federal Register" --

12 CHAIRMAN ROSENTHAL: No.

13 MR. CYLKOWSKI: -- "is legally sufficient
14 to give notice of the contents of a document..."

15 CHAIRMAN ROSENTHAL: I'm fully aware of
16 that and I'm fully aware of Federal Crop Insurance v.
17 Merrill which took note of that fact. But does the
18 Staff regard this as reasonable to issue a denial
19 notice or letter when they say "You can appeal this in
20 20 days"? They don't say anything beyond that. But
21 you've got 20 days in which to make a hearing demand.

22 And now they come in and say, "Oh,
23 incidentally, what you should have been doing even
24 though we didn't call it to your attention is you
25 should have been turning to the Code of Federal

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1 Regulations to see if there were things specifically
2 that you had to do." Is the Staff really telling this
3 Board that that's a reasonable position for it to
4 take?

5 MR. CYLKOWSKI: Your Honor, the Staff's
6 position is that --

7 CHAIRMAN ROSENTHAL: I asked you whether
8 you think that's a reasonable position for the Staff
9 to be taking.

10 MR. CYLKOWSKI: Yes, that's a reasonable
11 position insofar as it fulfills the legal requirements
12 of Section 2.103(b)(2) and Ms. Smith has constructive
13 notice of the filing requirements.

14 ADMIN. JUDGE SPRITZER: Don't you think
15 from the standpoint of someone like Ms. Smith who is
16 not a lawyer when she receives a letter from the NRC
17 saying what you need to do is file a request by
18 Federal Express under 2.103, wouldn't that to an
19 average person who is not an attorney suggest to them
20 that that's sufficient and they don't need to do
21 anything beyond that? And in other words, I'll put it
22 slightly differently. Isn't it at least somewhat
23 misleading for the NRC to send a letter to someone?
24 Forget whether you think this is covered by the
25 Federal Register Act or not. Don't you just think in

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1 the common sense sort of way that this is rather
2 misleading to send a letter to someone that says all
3 you need to do is file a demand for hearing under
4 2.103 by Federal Express?

5 Then we get a response from the Staff that
6 says, "You should throw this out because she (a)
7 didn't use EIE" which is now withdrawn -- I understand
8 that -- and (b) "you didn't file the requirements of
9 2.309(f)(2)" I think it primarily in terms of setting
10 forth meeting the six contention admissibility
11 requirements. Don't you think from the standpoint of
12 an average member of the public that that's somewhat
13 misleading?

14 MR. CYLKOWSKI: Your Honor, I can say that
15 the Commission has addressed the question of pro se
16 litigants and how pro se litigants should --

17 ADMIN. JUDGE SPRITZER: I didn't ask
18 whether the Commission has addressed it. I'm just
19 asking you. Don't you think that's somewhat
20 misleading?

21 MR. CYLKOWSKI: I don't believe it's
22 misleading, Your Honor. And I would defer to the
23 Commission.

24 CHAIRMAN ROSENTHAL: Why isn't it
25 misleading? I mean what do you think that a non

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1 lawyer getting a notice, a letter, which says "If
2 you're dissatisfied with the denial of your
3 application you have a right to demand a hearing
4 within 20 days under the provisions of Section 2.103?"

5 It doesn't say anything else. Why in God's name would
6 a non lawyer, a licensed reactor operator, come to the
7 conclusion, "Gee, there must be some other
8 requirements that I have to meet and so I'd better go
9 and check the Federal Register or to check the Code of
10 Federal Regulations or check the Atomic Energy Act or
11 check God knows what to see whether there are some
12 other requirements"?

13 I think that that imposes a ridiculous
14 burden upon an individual and I certainly -- As Judge
15 Spritzer suggested, it's entirely misleading. Even as
16 a lawyer if I were to get that kind of letter, I would
17 think that the only thing that I have to do is to
18 within the 20 days provide the Commission by Federal
19 Express if I choose to with my grievance.

20 I mean, what alerted her to the fact that
21 there might be other requirements that mandated that
22 she go and check at least the Code of Federal
23 Regulations? And she wouldn't even know where to look
24 in the Code of Federal Regulations I would think. I
25 mean, she's not pointed to any particular section.

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1 So I just don't understand how you can
2 tell us that she was in the real world -- and that's
3 what we're talking about -- that she was under some
4 kind of notice, constructive notice, that she'd better
5 check the Federal Register or check the Code of
6 Federal Regulations from cover to cover to see whether
7 there's something that she had to do which she wasn't
8 told about in her letter.

9 MR. CYLKOWSKI: Yes, Your Honor. Well, I
10 would make two points in response to that. First, Ms.
11 Smith is not just an average member of the public.
12 She is a relatively sophisticated party. Ms. Smith is
13 educated. Ms. Smith is seeking to work as a senior
14 reactor operator at a facility.

15 And, second of all, Ms. Smith was directed
16 to parts of Part 2 in the November 15th letter.

17 CHAIRMAN ROSENTHAL: She was directed if
18 I recall correctly to Section 2.103. And where is it
19 in 2.103 that she is called upon to look at other
20 sections of the CFR in search of some other
21 requirements? There was no such requirement set forth
22 in 2.103, was there?

23 MR. CYLKOWSKI: No, Your Honor. Those
24 requirements are not in 2.103 itself. But after being
25 directed to Section 2.103, a reasonable reading of the

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1 surrounding requirements would reveal to the
2 sophisticated -- And furthermore, Your Honor, I would
3 emphasize that while we can discuss what's reasonable
4 in the real world, these questions have been addressed
5 by the Commission. The Commission has state that even
6 pro se petitioners bear responsibility for reading and
7 receiving regulations.

8 CHAIRMAN ROSENTHAL: The Commission
9 addressed it in this particular situation where a
10 person is given an opportunity for a hearing under a
11 particular section which contained no other additional
12 requirements. And the individual is not alerted to
13 the fact that there might be other requirements.

14 Where has the Commission addressed the
15 situation that is even remotely akin to this?

16 MR. CYLKOWSKI: Your Honor, I'm not aware
17 of a situation in which the Commission has had
18 occasion to deal with a case exactly like this.

19 CHAIRMAN ROSENTHAL: Not exactly even
20 remotely resembles this?

21 MR. CYLKOWSKI: Well, Your Honor, I would
22 say that the Commission's -- First, the Federal
23 Register Act and, second, the Commission's.

24 CHAIRMAN ROSENTHAL: All right. We've
25 heard you on that. Why isn't this situation analogous

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1 to the enforcement actions that -- It seems to me that
2 there's not a lot of differences, but a matter of fact
3 between a proceeding such as this where the Staff
4 denies an individual a license which has a
5 considerable impact upon that person's career and the
6 case where the Staff imposes a civil penalty.

7 Now in the case of a civil penalty if
8 somebody is challenging a proposed assessment of a
9 civil penalty that person isn't required to, is he or
10 it, to meet the requirements of 2.309(f)(1)? They can
11 just come in and say, "We oppose it, the imposition of
12 the penalty, and this is our reason. We think that
13 your action in opposing this penalty was erroneously."

14 And now we have what seems to me to be a
15 carbon copy of that. The Staff denies an senior
16 reactor operating license application, something which
17 has impact for this individual, probably of even more
18 serious consequences than the imposition of a civil
19 penalty and was told you can demand a hearing under
20 the hearing of a section that has nothing to do with
21 2.309.

22 And in that case, all that individual has
23 to do is to indicate what ground is being assigned for
24 attacking the assessments. Why isn't it the same
25 thing here? To me, they're the same situation and

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1 they come quite remote from the situation in which
2 2.309 normally applies. And that's the case of a
3 license for a -- an application for a COL or a license
4 amendment application. I mean these two things seem
5 to me to very closely related. Do you disagree?

6 MR. CYLKOWSKI: I do, Your Honor. The
7 subject of an enforcement action is -- This is a case
8 where the Commission is taking action against an
9 individual or an entity in an attempt to remove or
10 oppose a penalty upon the person or entity.

11 CHAIRMAN ROSENTHAL: I understand that.

12 MR. CYLKOWSKI: Yes, sir. This is a case
13 where a person is applying for a license from the NRC.
14 The NRC after review is denying that license much like
15 --

16 CHAIRMAN ROSENTHAL: Well, you're giving
17 me the factual distinction which, of course, I
18 appreciate as I assume my colleagues do. But why
19 isn't it in the real sense a factual distinction
20 without a difference? I mean in both cases the NRC
21 Staff is taking action with regard to an individual or
22 to a corporation which has adverse effects for that
23 individual.

24 In one case, they're presumably going to
25 have to pay money. In the other case, they're not

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1 getting a license which would enable them to
2 presumably obtain greater compensation from their
3 employer and advance their career.

4 I mean if there is a factual distinction
5 we recognize that. But what is the real significance
6 of it? Aren't those two much closer in the case of
7 somebody, a member of the public, who is seeking to
8 challenge some construction permit application?

9 MR. CYLKOWSKI: Well, Your Honor, first I
10 would point out that the Commission explicitly brought
11 in reactor operator licensing proceeding in the 2004
12 amendments. The Commission specifically brought them
13 into being governed by Subpart C which 2.309 is a part
14 of. So the Commission has addressed this issue of
15 whether these proceedings are governed by those
16 regulations.

17 And, second --

18 ADMIN. JUDGE SPRITZER: Let me just ask.
19 I want to be clear. Are you telling us that if we go
20 back and look in the Federal Register we will see an
21 express statement from the Commission that says
22 "Reactor licensing proceedings are governed by
23 2.309(f) contention admissibility requirements"? Or
24 are you telling us simply that they say -- What I
25 wrote down was you said there's a statement to the

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1 effect they're governed by Subpart L which would be a
2 hearing procedure. Are you actually telling us there
3 is a specific statement from the Commission that says
4 "2.3099(f)(2) contention admissibility requirements
5 are henceforth to be applied to all protests of
6 reactor licensing actions"?

7 MR. CYLKOWSKI: But the latter sentence
8 that Your Honor narrated is not in this Federal
9 Register notice.

10 ADMIN. JUDGE SPRITZER: I didn't think so.

11 MR. CYLKOWSKI: Right. But what is in the
12 Federal Register notice, Your Honor, is stating that
13 reactor operator licensing under Part 55 is to be
14 governed by Subpart L. The regulation governing the
15 scope of Subpart L I believe is Section 2.1200 I
16 believe, Your Honor.

17 ADMIN. JUDGE SPRITZER: Right.

18 MR. CYLKOWSKI: It states the requirements
19 of Subpart C will govern Subpart L proceedings unless
20 provided otherwise.

21 ADMIN. JUDGE SPRITZER: Okay. So I
22 understand then that Subpart L would be the logical
23 procedure for us to follow if we have a hearing. What
24 I'm not getting is whether there's any support for
25 your theory in the Federal Register statement of

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1 considerations I guess it would be to the effect that
2 we intend henceforth all reactor operator license
3 proceedings to be governed by the contention
4 admissibility requirements.

5 I understand there may not be a statement
6 one way or the other. I'm just asking you. Can you
7 help us out one way or the other on that?

8 MR. CYLKOWSKI: Your Honor's brief
9 indulgence.

10 ADMIN. JUDGE SPRITZER: Sure.

11 MR. CYLKOWSKI: Yes, Your Honor. Thank
12 you. So the Commission was clear that these
13 proceedings were to be governed by Subpart L.
14 Elsewhere in those statements of considerations and
15 this is at page 2221 of that notice.

16 ADMIN. JUDGE SPRITZER: 2021?

17 MR. CYLKOWSKI: 2221.

18 ADMIN. JUDGE SPRITZER: 2221, okay.

19 That's 69 FR 2221, okay.

20 MR. CYLKOWSKI: Yes, Your Honor. The
21 Commission made clear that the contention
22 admissibility requirements apply to all Subpart L
23 proceedings unless otherwise stated and I'll quote
24 from the notice. Paragraphs (f)(1) and (2) of Section
25 2.309 incorporate "the long-standing contention

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1 support requirements of former Section 2.714. No
2 contention will be admitted for litigation in any NRC
3 adjudicatory proceeding unless these requirements are
4 met."

5 CHAIRMAN ROSENTHAL: Read that again.

6 MR. CYLKOWSKI: "No contention will be
7 admitted for litigation in any NRC adjudicatory
8 proceeding unless these requirements are met."

9 CHAIRMAN ROSENTHAL: Well, what happens --
10 how do you square that with the fact that in
11 enforcement proceedings which are adjudicatory they're
12 not required to meet the contention requirement? I
13 don't see that you've come up with a specific, clearly
14 stated Commission directive to the effect that the
15 2.309(f) admissibility criteria apply into a
16 proceeding like this.

17 I mean you put a lot of things together by
18 patchwork, but it doesn't seem to me to be anything
19 directly in that statement you just read that seemed
20 to me to cover the enforcement proceedings which were
21 adjudicatory in character and which clearly are not
22 subject to it. In addition, are you familiar with a
23 recent proceeding before the Appeal Board involving
24 the Honeywell Corporation?

25 MR. CYLKOWSKI: I'm not overly familiar

1 with that.

2 CHAIRMAN ROSENTHAL: Well, in Honeywell as
3 I recall it the Honeywell Corporation was challenging
4 the refusal of the Commission staff to waive some
5 requirement with regard to the posting of a bond to
6 cover decommissioning costs.

7 And if I recall correctly in that case, Honeywell was
8 not subjected to the revisions of 2.309. It didn't
9 need to meet those requirements at all I think. If I
10 recall correctly it came forward. This was the basis
11 for its objection to the refusal to grant the waiver
12 and it went to hearing.

13 MR. CYLKOWSKI: Your Honor, it may be true
14 that that was an exemption case and there are not
15 hearings in exemption cases.

16 ADMIN. JUDGE SPRITZER: Let me just ask
17 one more so we're clear on the Staff's position. In
18 enforcement cases, is there any need to meet the
19 2.309(f)(2) contention admissibility requirements?

20 MR. CYLKOWSKI: No, Your Honor. The
21 Staff's position is not that.

22 ADMIN. JUDGE SPRITZER: So on the one hand
23 enforcement proceedings, but they are subject to Part
24 -- They are Part 2 proceedings. They are adjudicatory
25 proceedings as Judge Rosenthal has indicated. Is that

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1 correct?

2 MR. CYLKOWSKI: They are, Your Honor.
3 However, the enforcement proceedings also carry within
4 their own sets of requirements. And, Your Honor, I
5 would also -- In the 2004 rule change, the Commission
6 noted a change from the previous areas of concern
7 standard. Pleading requirement, there's an area of
8 concern standard.

9 And what the Commission called a
10 significant change from the then existing regulations
11 in noting the previous areas of concern standard the
12 Commission declared the requirement to proper
13 specific, adequately supported contentions are noted
14 to be admitted as a party is extended to informal
15 proceedings until Subpart L. And under Subpart L the
16 scope of Subpart L includes the Subpart C
17 requirements.

18 CHAIRMAN ROSENTHAL: But there's nothing
19 -- I want to be absolutely clear about this -- in the
20 terms of the regulations which specifically state that
21 an individual as Ms. Smith here challenging the denial
22 of a reactor operator's license must meet the
23 provisions of 2.309. There's nothing that
24 specifically does that. You're just doing this by
25 patchwork and inference. Is that correct?

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1 MR. CYLKOWSKI: Your Honor, I wouldn't
2 call it patchwork. It's true that --

3 CHAIRMAN ROSENTHAL: Answer my question.
4 All right. We'll withdraw the "patchwork and
5 inferences." Is there anything that specifically
6 provides that Ms. Smith challenging the failure to
7 give her a senior reactors operator's license must
8 meet these various criteria of 2.309? Is there
9 anything that in so many words states that?

10 MR. CYLKOWSKI: No, Your Honor. There is
11 no single sentence that states that.

12 CHAIRMAN ROSENTHAL: Thank you. That's
13 all.

14 ADMIN. JUDGE SPRITZER: Just a couple if
15 I might. One or two -- Sorry. Go ahead.

16 MR. CYLKOWSKI: Those aren't stated for
17 other proceedings that are governed by Subpart C,
18 Subpart and therefore Subpart C.

19 ADMIN. JUDGE SPRITZER: For enforcement
20 proceedings that we were just talking about under
21 2.202(c) there's again the reference to demanding a
22 hearing.

23 Now I take it in the enforcement context
24 demand a hearing means demand a hearing in the normal
25 sense of the English language. That is you have a

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1 right to a hearing. If you demand one, you'll have
2 one. Why shouldn't that interpretation also apply to
3 the similar language in 2.103 that also uses the term
4 "demand a hearing" as opposed to merely "request a
5 hearing"?

6 MR. CYLKOWSKI: Yes, Your Honor. And the
7 Staff would maintain that enforcement proceedings are
8 a fundamentally different kind of proceeding than an
9 application for a license which is says in proceedings
10 involving applications for licenses 2.309 clearly
11 applies.

12 ADMIN. JUDGE SPRITZER: Clearly applies.

13 CHAIRMAN ROSENTHAL: Clearly applies.
14 Yes, you just told me -- I mean you're using the term
15 clearly rather loosely here because just you just told
16 me I thought that there was nothing in the regulations
17 that in so many words put a proceeding like this under
18 2.309.

19 MR. CYLKOWSKI: Your Honor, this
20 application for license should be treated the same as
21 any other application for a license or an application
22 for a facility license. That's what this is most
23 analogous to. And that's governed by 2.309 as this
24 is.

25 CHAIRMAN ROSENTHAL: I think we've

1 probably exhausted this subject.

2 As far as you're concerned even though in
3 this very section that governs here, 2.103, the
4 Commission gifted from request which was in there
5 initially the demand. And as a practical matter there
6 is no meaning to that at all. It had no significance
7 at all because either way the hearing requester,
8 demander, whichever it is, must comply with 2.309.

9 They made that change, but it was entirely
10 meaningless. Do I understand that to be your
11 position?

12 MR. CYLKOWSKI: Your Honor, as it regards
13 the 2.309 requirements there is --

14 CHAIRMAN ROSENTHAL: Well, as to what
15 regard might it have significance? If it doesn't have
16 significance for the standpoint of 2.309, for what
17 does it have significance?

18 MR. CYLKOWSKI: Your Honor, I'm not sure
19 what significance it has. But I can say that unless
20 provided otherwise --

21 CHAIRMAN ROSENTHAL: How could it have
22 significance in any other respect? I mean the whole
23 notion is getting an evidentiary hearing. And so if
24 it doesn't serve any purpose of getting an evidentiary
25 hearing. Because you've got all of these obstacles to

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1 overcome in either event it would seem to me that the
2 position necessarily is that it was a meaningless
3 change.

4 MR. CYLKOWSKI: Your Honor, may I consult
5 quickly please?

6 (Pause.)

7 Your Honor, the Staff would maintain -- It
8 would point back to the regulatory language which
9 states that --

10 CHAIRMAN ROSENTHAL: All right. We've
11 heard you on that. All right. Let me change gears
12 for a minute.

13 ADMIN. JUDGE SPRITZER: Before you, just
14 one more. I did find some language in the regulations
15 themselves that at least at first blush might seem to
16 help support your position. This is 2.300, Scope of
17 Subpart C.

18 Provisions of this subpart apply to all
19 adjudications conducted under the authority of the
20 Atomic Energy Act, the Energy Reorganization Act of
21 1974 and 10 CFR Part 2. So if we're in 10 CFR Part 2,
22 and I read this literally, then presumably all of
23 Subpart C applies including 2.309(f). Is that
24 consistent with your position or is that the way you
25 read 2.300?

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1 MR. CYLKOWSKI: Yes, Your Honor.

2 ADMIN. JUDGE SPRITZER: And I guess the
3 problem I keep coming back to though is if that's true
4 why aren't enforcement proceedings. I mean it just
5 seems to me, giving you a hint of my thinking on this,
6 that there might appear to be a kind of superficial
7 plain meaning reading here.

8 The problem is when you start trying to
9 work it through and understand to work through that
10 interpretation you come up with a result that doesn't
11 make any sense. And that would mean that enforcement
12 proceedings also have to meet the contention
13 admissibility requirements. Yet it seems clear that's
14 not what the Commission had in mind either.

15 So we wind up with kind of a muddle as
16 opposed to something that's clear. Do you have any
17 thoughts on that?

18 MR. CYLKOWSKI: Yes, sir. 2.300 does say
19 these requirements apply unless specifically stated
20 otherwise.

21 ADMIN. JUDGE SPRITZER: In this subpart
22 which would be Subpart C.

23 MR. CYLKOWSKI: Yes, Your Honor.

24 ADMIN. JUDGE SPRITZER: Is there any part
25 of the Subpart C that says enforcement proceedings are

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1 excluded from contention admissibility requirements
2 and 2.309(f)(2)?

3 MR. CYLKOWSKI: Your Honor, I'm not aware
4 of any specific provisions to that effect, no.

5 ADMIN. JUDGE SPRITZER: All right.

6 MR. CYLKOWSKI: However, I would point
7 that Section 2.202 in that section does carry with it
8 several procedural requirements that I think can
9 fairly be read to supplement or substitute for
10 conflicting requirements elsewhere.

11 ADMIN. JUDGE SPRITZER: Well, it does say
12 if the answer -- This is 2.202(c). "If the answer
13 demands a hearing, the Commission will issue an order
14 designating the time and place of hearing." We don't
15 have that in 2.103. Is that one of the differences
16 you're referring to?

17 MR. CYLKOWSKI: That's correct, Your
18 Honor.

19 ADMIN. JUDGE SPRITZER: All right. On the
20 other hand, you might think that in an enforcement
21 case we need to get a hearing pretty quickly because
22 somebody may be incurring penalties or may be subject
23 to an immediate compliance requirement that we don't
24 give them a hearing date right away. There may be
25 some very serious consequences. Maybe that's not

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1 quite so obvious in the reactor operator licensing
2 context.

3 MR. CYLKOWSKI: That's potentially
4 correct, Your Honor. And I would say whatever the
5 reasons are Section 2.202 does contain this provision
6 that's not contained in the provisions regarding
7 reactor operator license proceedings.

8 ADMIN. JUDGE SPRITZER: Let's suppose we
9 think that this is kind of a muddle. That is the
10 question whether the contention admissibility
11 requirements do apply. I get some support from that
12 from the fact that your own letter didn't mention
13 anything about 2.309. I would have to think that the
14 Staff if it really wanted to direct someone to
15 2.309(f)(2) or contention admissibility requirements
16 would have put that in the letter. It wouldn't have
17 been difficult and it seems to me to be a rather
18 obvious thing to do.

19 Do you have any explanations as to why it
20 wasn't in the letter apart from the fact of whether
21 you think it was required to be or not? Do you have
22 any understanding of why the letter doesn't refer to
23 that?

24 MR. CYLKOWSKI: Your Honor, I personally
25 cannot make representations on that.

1 CHAIRMAN ROSENTHAL: Do you know offhand
2 whether denial letters such as the one involved here
3 would be routinely reviewed in the Office of General
4 Counsel before they're filed or before they're
5 submitted and mailed?

6 MR. CYLKOWSKI: Your Honor, my
7 understanding is they're not and my understanding is
8 that this letter was not reviewed by General Counsel's
9 office.

10 CHAIRMAN ROSENTHAL: If I could shift
11 gears for a minute and let's assume for the sake of
12 argument that we determined that 2.309 does not apply
13 here. In that circumstance, does the Staff agree that
14 Ms. Smith is entitled to the hearing that she demands?

15 MR. CYLKOWSKI: Actually, Your Honor's
16 question is if 2.309 --

17 CHAIRMAN ROSENTHAL: I'm assuming that she
18 did not need to meet. Assuming that we hold contrary
19 to the Staff's position that 2.309 does not apply, I'm
20 asking you whether in that circumstance the Staff
21 would agree that she has enough set forth in her
22 hearing demand to enable her to obtain an evidentiary
23 hearing on the question as to whether denial of her
24 application was warranted.

25 MR. CYLKOWSKI: If I could have Your

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1 Honor's brief indulgence.

2 (Pause.)

3 Your Honor, the Staff's understanding is
4 that not to belabor the point, but Section 2.309 does
5 apply. So to ask what would be the case if it didn't
6 apply in the lack of the controlling regulations, the
7 Staff can't speak to it.

8 CHAIRMAN ROSENTHAL: Why not? I mean
9 you've read her papers and I've now asked you to make
10 an assumption that 2.309 doesn't apply. You've read
11 her papers. You're familiar with what she said.

12 Why aren't we entitled to get an answer as
13 to whether the Staff would agree that if she didn't
14 need to meet this requirements her demands should be
15 granted? I don't understand why the Staff can't take
16 a position.

17 MR. CYLKOWSKI: Your Honor, assuming an
18 absence of pleading requirements, it seems that if
19 there were no pleading or filing requirements that Ms.
20 Smith was required to meet, then any filing would
21 entitle her to a hearing. But that isn't the case
22 here. There are --

23 CHAIRMAN ROSENTHAL: Well, I understand
24 your position that she has to meet these requirements.
25 But the point is that that's an issue which is before

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1 this Board. So I think it a perfectly legitimate
2 question to ask whether the Staff agrees that absent
3 the necessity to meet the 2.309 requirements Ms. Smith
4 would be entitled to a hearing.

5 MR. CYLKOWSKI: Yes, Your Honor. Absent
6 the pleading requirements, Ms. Smith's pleading would
7 be admitted.

8 CHAIRMAN ROSENTHAL: All right. Thank
9 you.

10 Anything else to add?

11 (Off the record discussion.)

12 ADMIN. JUDGE SPRITZER: Let's assume that
13 your argument is correct and we agree that contention
14 admissibility requirements apply. I've read through
15 Ms. Smith's initial filing several times. I know we
16 have some things that came in after that.

17 But just looking at that document, it
18 seems to me to set forth a number of facts. If I
19 believed everything she said -- that is I accepted all
20 the facts she mentions is true -- isn't there at least
21 a question whether the denial of her license is
22 lawful?

23 MR. CYLKOWSKI: Your Honor, the standard
24 isn't the same motion for summary judgment or
25 something where --

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1 ADMIN. JUDGE SPRITZER: Well, it's lesser
2 than a motion for summary judgment, but it's more than
3 a motion for dismiss in Federal court. I understand
4 that.

5 MR. CYLKOWSKI: Yes, sir.

6 ADMIN. JUDGE SPRITZER: Let's assume I
7 conclude -- As I said, there are certainly a lot of
8 facts in this pleading. Wouldn't you agree with at
9 least that much?

10 MR. CYLKOWSKI: Your Honor, the Commission
11 has addressed that and said it's not a matter of
12 assuming facts in the Petitioner's favor. It's a
13 matter of whether the Petitioner has submitted the
14 required documentary support largely. And Ms. Smith
15 did not submit documentary support.

16 ADMIN. JUDGE SPRITZER: Where is that? I
17 must have missed that in 3.09(f)(2).

18 CHAIRMAN ROSENTHAL: I don't think they
19 necessarily have to submit documents, do they?

20 MR. CYLKOWSKI: Your Honor, I point to the
21 Palisades case and this is COI 0718 where the
22 Commission stated that petitioners may not submit
23 contentions absent documentary support. Mere general
24 assertions will not suffice.

25 CHAIRMAN ROSENTHAL: No. General

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1 assertions, but it's not my understanding that there
2 has to be documents. I mean if they set forth certain
3 facts, for example, that are conceded or certain facts
4 that of which official notice can be taken. Where is
5 there an absolute requirement that a contention must
6 be supported by some form of document? If it's in the
7 regulations, that comes as a decided surprise to me.

8 MR. CYLKOWSKI: Your Honor, I didn't mean
9 to make the claim that a document of support is
10 necessary to establish the factual basis. In this
11 case when we look at really the three main parts to
12 Ms. Smith's request for hearing, they are not
13 supported by the required factual basis.

14 ADMIN. JUDGE SPRITZER: This 2.309(f) I
15 believe this is -- Sorry. I've been referring to
16 (f) (2). I really should have been referring to
17 (f) (1).

18 CHAIRMAN ROSENTHAL: (f) (1) yeah.

19 ADMIN. JUDGE SPRITZER: (f) (1) (v),
20 "provide a concise statement of the alleged facts or
21 expert opinions which support the
22 requester's/petitioner's position on the issue and on
23 which the petitioner intends to rely the hearing."
24 Just taking that part and leaving aside the document
25 issue for the moment, don't you think she's at least

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1 done that much? I understand you don't agree with the
2 facts. But hasn't she at least told us what they are?

3 MR. CYLKOWSKI: Your Honor, the provision
4 go on to state "together with references."

5 ADMIN. JUDGE SPRITZER: No, I understand
6 that, but just the first part. Do you agree she's
7 done that much? We'll move onto the next part.

8 MR. CYLKOWSKI: No, Your Honor. In many
9 cases, Ms. Smith has not provided even alleged facts
10 that support her contentions. For example, Ms.
11 Smith's argument that the examiners were biased and
12 graded her too harshly isn't support even doctrine she
13 cites or the fact that she includes them there.

14 CHAIRMAN ROSENTHAL: All right. If I
15 recall correctly, somewhere in here the explanation
16 that was given for the unwillingness to give her a
17 waiver on her first passing the hands-on examination
18 was to the effect that her passing it was marginal.
19 Didn't she then provide in her submission some of the
20 grades that she had received on the hands-on test
21 which suggested I think offhand that it might not have
22 been that marginal?

23 Now who knows? That's an allegation. She
24 set forth certain facts. Now maybe there's an answer
25 to that. Maybe there's an explanation. But I don't

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1 understand why that again assuming that 2.309 applies
2 why that isn't enough to entitle her to a hearing on
3 the credibility of the explanation that was provided
4 for the refusal to give her the waiver? Well, she
5 didn't apply for the waiver it turned out, but for the
6 message that was given to the employer that the
7 waiver, if sought, would be almost certainly denied.

8 And then there are other things in there.
9 I mean it seems to me that given the nature of this
10 case even if 2.309 does apply that she's come forth
11 with factual allegations. They're not the type, many
12 of them, that's going to be supported by some expert
13 affidavit that's enough to get her over the 2.309
14 hurdle.

15 Otherwise, it seems to me that it would be
16 almost impossible for somebody in Ms. Smith's position
17 to ever get a hearing on a denial. In other words,
18 this invitation that was given her in the denial
19 letter was in fact a rubber sandwich. It had no
20 meaning.

21 MR. CYLKOWSKI: Your Honor, first to point
22 specifically to the waiver issue, Ms. Smith's
23 contention insofar as she contends not receiving a
24 waiver and being denied a waiver, the Staff never had
25 occasion to deny her a waiver. No waiver request was

1 submitted.

2 CHAIRMAN ROSENTHAL: Why was that? Might
3 that not have been simply because when the employer
4 inquired as to what would be the Staff's reaction to
5 a waiver application on its part, it was told forget
6 about it as a practical matter I mean for all we know.
7 And we don't know that because we haven't taken
8 evidence that the reason that no waiver application
9 was filed was that the employer regarded that as an
10 exercise in futility in view of what it had been told.

11 MR. CYLKOWSKI: Well, Your Honor, Ms.
12 Smith needs to provide at least a factual basis for
13 the conclusion that the facility licensee had that in
14 mind or came to that conclusion. And here what she's
15 provided is this communication that you're referring
16 between the facility licensee and the Staff in which
17 the Staff responded that it would likely deny a
18 waiver.

19 But this was a preliminary decision and it
20 couldn't make any decision until it received a final
21 waiver request. And that final waiver request was
22 never submitted.

23 CHAIRMAN ROSENTHAL: And we don't know why
24 it wasn't, do we?

25 MR. CYLKOWSKI: No, Your Honor.

1 CHAIRMAN ROSENTHAL: And there's no way
2 that Ms. Smith can read the minds of her employers
3 either.

4 ADMIN. JUDGE SPRITZER: She also alleges
5 that her employer was -- That she in fact -- and these
6 are alleged facts. You may contest them, but they
7 seem to me to be pretty clearly alleged facts -- was
8 at least somewhere in the middle in terms of the
9 results of the people that had taken the previous
10 operator's exam and passed. Yet she was told or the
11 employer was told she would not be granted a waiver
12 while such a claim was not made or such a statement
13 was not made as to the other people who had passed
14 before and they were in fact later granted waivers.

15 That seems to me -- I understand they're
16 alleged facts -- that that's all the rules require to
17 at least raise a question in mind of what is the
18 reason that the employer was told that she wasn't
19 going to be granted a waiver which seems to me a
20 perfectly obvious factual question that we need to
21 look into.

22 I certainly understand the NRC Staff may
23 have a different position than her interpretation.
24 But isn't that a factual issue that relates to the
25 question of whether this was a good faith response to

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1 the employer or whether there really was some
2 subjective concern on the Staff's part, a subjective
3 belief on the Staff's part, that somehow even though
4 she had passed she just wasn't the kind of person they
5 were comfortable licensing.

6 MR. CYLKOWSKI: Well, Your Honor, the way
7 the waiver request sort of played out at issue is not
8 necessarily what was in the Staff's mind or the
9 Staff's reasons. It needs to be the facility
10 licensee's reasons for not submitting the waiver
11 request. And at that point, Ms. Smith needs to come
12 forward in the beginning with some factual basis for
13 concluding that the Staff unduly influenced or
14 improperly influence the licensee into not submitting
15 the waiver request. The decision whether to submit
16 that request is entirely within the facility
17 licensee's power. And when the time came to make the
18 final decision they did not submit the request.

19 ADMIN. JUDGE SPRITZER: Again, looking at
20 the facts she's alleged and drawing reasonable
21 inferences from those facts that we can draw in her
22 favor, I mean one could conclude that the employer was
23 deterred by what the Staff told her. And that on its
24 face there is no obvious reason why the Staff told her
25 she would not get a waiver while other people would

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1 who in fact eventually did get a waiver. So doesn't
2 that raise a question of whether the Staff proceeded
3 in a nonarbitrary manner in the way they acted on her
4 application?

5 MR. CYLKOWSKI: First, Your Honor, if the
6 question is really this close, I think the Staff as
7 public officials are granted the presumption of good
8 faith and regularity. So Ms. Smith I would say has an
9 additional pleading burden to give some factual basis
10 to overcome that presumption.

11 And really all she's submitted are these
12 communications between the facility licensee and the
13 Staff. And the Staff's communication is to the effect
14 of we can't tell you for sure until we get the final
15 waiver request. At this point, we would likely deny
16 it.

17 But the last thing the Staff says is we
18 can't make any determination until we get a final
19 request. And that basis or alleged basis is certainly
20 not enough to overcome the presumption of good faith
21 and regularity.

22 ADMIN. JUDGE SPRITZER: I agree with you.
23 If that's all they had said, that would be true. But
24 that doesn't appear at least under allegations or
25 alleged facts. It appears they did do a great deal

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1 more than that. They told the employer, "We're not
2 going to grant this waiver" or "at least it's unlikely
3 we're going to grant this waiver."

4 I understand that would be qualified by
5 the need to see the formal application and act on
6 that. But again drawing reasonable inferences in her
7 favor from the company's perspective they're not
8 likely to want to irritate the NRC by submitting a
9 waiver request for somebody they've been already been
10 told is unlikely to be granted one. Wouldn't that be
11 an inference we could draw in her favor at this point?

12 MR. CYLKOWSKI: Your Honor could draw the
13 inference that of maybe the facility licensee's
14 reasoning. But to the extent that Ms. Smith is
15 alleging improper behavior, improper influence on the
16 part of the Staff there's been no alleged facts or
17 factual basis to support that.

18 The only piece that really even goes to
19 that is this phone call that Ms. Smith discusses where
20 she hasn't provided the contents of the phone call.

21 CHAIRMAN ROSENTHAL: I'm not going to
22 pursue this any further. But I just want as a closing
23 comment on this that the more I hear about this large
24 burden that you're imposing upon her, all of these
25 things that she had to do, the more it seems to me

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1 that the denial letter which just said "Dissatisfied
2 with this and you've got 20 days to appeal" and saying
3 nothing more was at least misleading. But we've heard
4 you out on this.

5 Do you have any further questions in this
6 area?

7 ADMIN. JUDGE SPRITZER: No.

8 CHAIRMAN ROSENTHAL: Do you have anything?

9 ADMIN. JUDGE HAJEK: Yes. The only other
10 comment I'd make is that the Staff also allegedly made
11 a comment that they would not have an opportunity to
12 completely evaluate the waiver request if it was made
13 because there just wasn't enough time. And I assume
14 that amount of time issue was the amount of time
15 between when the next exam for the plant was scheduled
16 and the time that the telephone discussions had taken
17 place. Is that correct?

18 MR. CYLKOWSKI: If I may consult briefly,
19 Your Honor, to answer that.

20 (Pause.)

21 Your Honor, I'm not sure that that's
22 correct. I'm not sure if that's correct.

23 ADMIN. JUDGE HAJEK: So that would be an
24 item that you would also have required her to
25 determine during the 20 days that she's been provided

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1 to fully respond to this final denial letter. I don't
2 see how that could be accomplished.

3 MR. CYLKOWSKI: Your Honor, excuse me. If
4 Your Honor could clarify, when you say that would be
5 an item we would --

6 ADMIN. JUDGE HAJEK: That would be an
7 additional item that you would have expected her to
8 have made final determination on during that 20 day
9 period that you allow her to have to make this her
10 response to the final denial letter.

11 There's an awful lot of work for her to
12 document all of these allegations that she has within
13 in a 20 day period. It seems quite unreasonable as
14 far as what I'm inferring from your comments.

15 MR. CYLKOWSKI: Your Honor, this process
16 did start months ago with Ms. Smith's request for the
17 informal review by the NRC Staff. So Ms. Smith has
18 had these documents available to her, really the
19 universe of documents available to her, for months
20 before she filed the request for hearing.

21 CHAIRMAN ROSENTHAL: How much time
22 normally does a hearing requester get to file the
23 request?

24 MR. CYLKOWSKI: In non --

25 CHAIRMAN ROSENTHAL: Well, in the normal

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1 case, somebody is challenging -- reads some notice in
2 the Federal Register of an application for a COL.
3 What's the period of time that they're given to --

4 MR. CYLKOWSKI: Sixty days, Your Honor.

5 CHAIRMAN ROSENTHAL: How many?

6 MR. CYLKOWSKI: Sixty days, Your Honor.

7 CHAIRMAN ROSENTHAL: Sixty days. And in
8 this case they get as Judge Hajek pointed out a third
9 of that time. Isn't that another reason that one
10 might question the application of 2.309(f)(1)? The 20
11 day period isn't a lot. All of these things that you
12 say she has to do, 60 days is what the ordinary
13 hearing requester gets. Her demand has to be put in
14 20 days. Isn't that -- Any inferences to be drawn
15 from that?

16 MR. CYLKOWSKI: Your Honor, first, the 20
17 days are a regulatory requirement.

18 CHAIRMAN ROSENTHAL: I don't dispute that
19 it's a regulatory requirement. I know that. But what
20 I'm asking is whether an inference can be drawn as to
21 whether given the fact that it is only 20 days that
22 the burden on the demand requester would have be
23 deemed something less than the obligation that's
24 imposed upon somebody that has a full 60 days.

25 MR. CYLKOWSKI: No, Your Honor. There are

1 other proceedings, other kinds of proceedings, with
2 the 20 day requirement such as license transfer, such
3 as transfer proceedings, that are submitted to -- are
4 subjected to the same 20 day requirement. And
5 furthermore this is an instance where, and just an
6 instance, but this is the type of case where these
7 documents are available to the Petitioner for quite
8 some time before the final denial.

9 CHAIRMAN ROSENTHAL: Yes, but she doesn't
10 get the absolute denial until November 15th which
11 tells her that she's got this 20 days in which to
12 challenge it.

13 Okay. Do you have anything further?

14 ADMIN. JUDGE HAJEK: Yes, another question
15 I have is that other requesters in other proceedings
16 that might have 60 days or 30 days they also have an
17 opportunity to request an extension of that time. And
18 Ms. Smith being a pro se individual, not a lawyer with
19 a lot of experience with NRC processes, could also
20 have requested an extension. Is that not correct?

21 MR. CYLKOWSKI: Yes, Your Honor. Ms.
22 Smith could have requested an extension of time and if
23 she needed additional time was welcome to make that
24 request.

25 CHAIRMAN ROSENTHAL: But that didn't

1 appear in the denial letter, did it, that she could
2 seek an extension?

3 MR. CYLKOWSKI: No, Your Honor. I don't
4 believe that that provision was in the denial letter.

5 ADMIN. JUDGE SPRITZER: Are you familiar
6 with the Commission's past practices that is prior to
7 the change in the regulations in 2004 with regard to
8 denial of SRO licenses? There were a number of cases
9 as I understand it prior to that time.

10 MR. CYLKOWSKI: Yes, sir. I'm somewhat
11 familiar with those cases. However, I would also
12 submit the 2004 rule changes fundamentally affect.

13 ADMIN. JUDGE SPRITZER: Okay. What was
14 the practice prior to 2004 at least as far as the
15 issue of contention admissibility? Were there any
16 contention admissibility requirements applied to those
17 type of cases?

18 MR. CYLKOWSKI: Before the 2004 rule
19 change, my understanding is no, Your Honor.

20 ADMIN. JUDGE SPRITZER: So they just went
21 straight to hearing as an enforcement case would go.
22 They would demand a hearing and you would go off and
23 have an evidentiary hearing as opposed to an oral
24 argument on contention admissibility.

25 MR. CYLKOWSKI: May I consult?

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1 ADMIN. JUDGE SPRITZER: Certainly.

2 MS. UTTAL: Judge, would you mind if I
3 answered that?

4 ADMIN. JUDGE SPRITZER: Sure. Why don't
5 you state your name for the record?

6 MS. UTTAL: Susan Uttal.

7 ADMIN. JUDGE SPRITZER: Okay.

8 MS. UTTAL: Mr. Cylkowski has only been
9 with the agency for a few months. I handled a few of
10 the older cases. Subpart L which was for informal
11 proceedings before that required areas of concerns.
12 You would have to raise your areas of concern. They
13 weren't quite contentions, but you did have to raise
14 several areas of concern or at least one area of
15 concern with your request for hearing.

16 ADMIN. JUDGE SPRITZER: All right. Was
17 that applied to cases involving denial of SRO
18 licenses?

19 MS. UTTAL: Yes, denial of SRO and RO
20 licenses and it was an informal proceeding with no
21 testimony being taken. It was all on the papers. And
22 it was one judge with a helper judge.

23 CHAIRMAN ROSENTHAL: Anything further?

24 (No verbal response.)

25 All right. I think at this point we

1 understand your position. Ms. Smith has been standing
2 by patiently.

3 Ms. Smith, you've heard the discussion
4 with Staff counsel. Do you have any comments?

5 MS. SMITH: No, Your Honor.

6 CHAIRMAN ROSENTHAL: All right. Well, if
7 there's nothing further from Ms. Smith. Anything
8 further from the Board?

9 ADMIN. JUDGE SPRITZER: I don't have
10 anything.

11 ADMIN. JUDGE HAJEK: No.

12 CHAIRMAN ROSENTHAL: All right. At this
13 point, the Board will take this matter under
14 submission.

15 MR. CYLKOWSKI: Thank you, Your Honor.

16 ADMIN. JUDGE SPRITZER: Thank you.

17 CHAIRMAN ROSENTHAL: Off the record.

18 (Whereupon, at 11:13 a.m., the above
19 entitled matter was concluded.)
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