LBP-13-03

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chair
Ronald M. Spritzer
Brian K. Hajek

In the Matter of	Docket No. 55-23694-SP
CHARLISSA C. SMITH	ASLBP No. 13-925-01-SP-BD01
(Denial of Senior Reactor Operator License)	February 19, 2013

DECISION
(Granting Demand for Hearing)

Before this Atomic Safety and Licensing Board is the timely December 5, 2012, demand of Charlissa C. Smith, filed pursuant to 10 C.F.R. § 2.103(b)(2), for a hearing on the November 15, 2012, denial of her application for a Senior Reactor Operator (SRO) license. The demand is opposed by the Nuclear Regulatory Commission (NRC) Staff. For the reasons stated in this decision, the hearing demand is granted.

I. BACKGROUND

An SRO is "any individual licensed under [10 C.F.R. Part 55] to manipulate the controls of a facility and to direct the licensed activities of licensed operators."[1] To obtain an SRO license, the applicant must pass both the written examination and the operating test and meet the other requirements specified in 10 C.F.R. Part 55.[2]

[1] 10 C.F.R. § 55.4.
[2] Id. § 55.33(a); see Operator Licensing Examination Standards for Power Reactors, NUREG-1021, at ES-101-1 (rev. 9 July 2004 & supp. 1 Oct. 2007) (ADAMS Accession Nos. ML 042320438, ML072970315) [hereinafter NUREG-1021]. The provisions of 10 C.F.R. Part 55 govern applications for Reactor Operator and SRO licenses. 10 C.F.R. § 55.1.

Should, however, an applicant pass only one of the two examinations, she will not receive a license. In that circumstance, the applicant may elect to retake the tests. In this scenario, the regulations governing the application process provide that "[a]n applicant who has passed either the written examination or operating test and failed the other may request in a new application on Form NRC-398 to be excused from re-examination on the portions of the examination or test which the applicant has passed."[3] Effectively, the applicant is able to request a waiver of the portion of the examination that she passed. In making such a request, the applicant must mark the appropriate box on form NRC-398 and provide supporting comments.[4] Additionally, "[t]he facility licensee's senior management representative on site must certify the final license application, thereby substantiating the basis for the applicant's waiver request."[5] Once the waiver request has been signed by both the applicant and the licensee and has been submitted, the NRC has the discretion to grant the request "if it determines that sufficient justification is presented."[6]

In March 2011, Ms. Smith took the written examination and the operating test for an SRO license at her place of employment, the Vogtle Electric Generating Plant.[7] She failed the written examination and passed the operating test.[8] Because she did not pass both components, Ms. Smith was not eligible to receive an SRO license at that time.

After the March 2011 test results were received, the Chief Examiner and Examiner of Record determined that Ms. Smith was not a good candidate for a waiver of the operating test

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[3] 10 C.F.R. § 55.35(b); see NUREG-1021, at ES-204-3.
[4] NUREG-1021, at ES-204-1.
[5] Id.
[6] 10 C.F.R. § 55.35(b); see NUREG-1021, at ES-204-3.
[7] Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, NRC, to Charlissa C. Smith (Nov. 15, 2012), enclosure 2, at 1 (ADAMS Accession No. ML12307A152) [hereinafter Denial Letter].
[8] Demand for Hearing (Dec. 5, 2012) at 1; Denial Letter, enclosure 2, at 1–2; see NRC Staff's Response to Ms. Charlissa C. Smith's Request for Hearing on Denial of Application for [an SRO] License (Dec. 31, 2012) at 3 [hereinafter NRC Response].

should she decide to retake the examination.[9] The assigned reason was that her performance on that test in 2011 was "marginal or borderline."[10] In August 2011, Southern Nuclear Operating Co., Inc. (licensee), the owner of the Vogtle facility, e-mailed Michael Meeks, who was the Chief Examiner on the evaluation team for the 2012 examination, and inquired as to whether Region II would approve a waiver for Ms. Smith.[11] After talking with persons with knowledge of the 2011 examination, Mr. Meeks responded that, should a waiver request be submitted for Ms. Smith, the Region II office would likely deny it.[12] As to the other persons who also failed the written examination and passed the operating test, Mr. Meeks stated that they would likely receive "routine waivers approved by Region II."[13] Ultimately, the final form NRC-398 submitted to the NRC jointly by Ms. Smith and the licensee did not request a waiver.[14]

In April 2012, Ms. Smith retook both the operating test and the written examination, this time failing the former and passing the latter.[15] This prompted her to request, on June 5, 2012, an informal administrative review of the denial of her SRO license application in accordance with NUREG-1021.[16] Ms. Smith's assertions before the informal review panel, as characterized by the Staff, concerned "1) the manner in which [the] examiners conducting the 2012 examinations applied the guidelines of NUREG-1021 concerning operating test waivers and 2) examiner bias."[17]

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[9] Denial Letter, enclosure 2, at 3.
[10] Id.
[11] Demand for Hearing at 12; see Denial Letter, enclosure 2, at 4; NRC Response at 3. Mr. Meeks was not involved with Ms. Smith's 2011 examination. Demand for Hearing at 12.
[12] Demand for Hearing at 2, 13.
[13] Id. at 2.
[14] Id. at 3–4. Originally, Ms. Smith marked the appropriate box on form NRC-398 to request a waiver. Id. at 4. After the waiver request was received, the licensee received a phone call from the NRC asking if the waiver request was an error. Id. The licensee confirmed this and withdrew the waiver request. Id. Part of the alleged rationale for withdrawing the request was that a waiver could not be processed in time for the next examination. Id.
[15] Demand for Hearing at 6; Denial Letter, enclosure 2, at 1.
[16] See Denial Letter at 1; NUREG-1021, at ES-502-1 to -4.
[17] Denial Letter, enclosure 2, at 1.

In response to Ms. Smith's request, the Staff conducted an informal administrative review of her allegations.[18] In a November 15, 2012, letter, the Staff detailed its findings and ultimately upheld the NRC's prior denial of Ms. Smith's SRO license application.[19] Specifically, the letter concluded that Ms. Smith "did not receive a waiver . . . because the facility licensee did not request a waiver on [her] behalf," that her claim that the "examiners discouraged the facility licensee from requesting a waiver . . . is unsubstantiated," and that her "contention of bias by examiners in administering or evaluating her operating test is unsubstantiated."[20]

The denial letter stated that, if she did not "accept the proposed denial" Ms. Smith could, "within 20 days of the date of th[e] letter, request a hearing pursuant to 10 C.F.R. 2.103 (b)(2)."[21] The letter instructed that a hearing request must be submitted in writing to the NRC's Office of the Secretary, with a copy to the Associate General Counsel for Hearings, Enforcement, and Administration at a specified address.[22] The letter further explained that, if Ms. Smith wished to submit her request "via private courier (e.g., FedEx, UPS)," she should use an alternative address.[23] Also, the letter stated that "[f]ailure on your part to request a hearing within 20 days constitutes a waiver of your right to demand a hearing."[24] The letter made no mention of any other requirement that would affect Ms. Smith's right to demand a hearing. On December 5, 2012, 20 days after the date of the denial letter, Ms. Smith's demand for a hearing, sent via Federal Express, was received by the NRC.[25]

In her hearing demand, Ms. Smith makes a number of allegations concerning both the April 2012 test and the NRC's informal administrative review .[26] As to the test, she first alleges that the NRC employed a non-standard waiver denial procedure reflecting an overly subjective

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[18] See generally id.
[19] See generally id.
[20] Id. enclosure 2, at 8.
[21] Id. at 1. The provisions of 10 C.F.R. § 2.103(b) are set forth infra Part II.
[22] Id.
[23] Id.
[24] Id. at 2.
[25] See Demand for Hearing.
[26] Id.

process.[27] She also claims that the examiners for her second operating test prejudged her qualifications based on their perception of her performance on the first operating test, and that under the NRC's procedures this presented a conflict of interest that should have led to a different examination team for the second test.[28] She further alleges that, during the operating test, she received a higher level of scrutiny than other applicants.[29] And she states the examination requirements were changed from those provided in the preapproved test outline, making it more likely she would fail.[30] Concerning the NRC's informal administrative review, Ms. Smith claims the reviewers were unresponsive to her claims, improperly altered the terms of a certain portion of the examination, and inappropriately provided new comments regarding her examination performance in addition to those originally recorded by the examiners.[31]

In its response, the Staff contends that Ms. Smith's hearing demand should be denied because its contents do not meet the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).[32] The Staff maintains that Ms. Smith's allegations are not supported by an adequate factual basis and that her waiver claim is "not material to the findings the NRC must make to support denial of an SRO license."[33]

On January 23, 2013, the Board held oral argument on the hearing demand and the opposition thereto. After setting forth its position that the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1) apply to hearing demands related to the denial of SRO licenses, the Staff acknowledged that "[t]here is no single sentence" that directly states that Ms. Smith's filings had to meet the requirements of Section 2.309.[34] When asked what result would come if Section

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[27] Id. at 3–6.
[28] Id. at 5–6.
[29] Id. at 6.
[30] Id. at 6–8.
[31] Id. at 9.
[32] The provisions of 10 C.F.R. § 2.309(f)(1) are set forth infra Part II.
[33] NRC Response at 8–14.
[34] Tr. at 27.

2.309 were not to apply to Ms. Smith's hearing demand, the Staff responded that "[a]bsent the pleading requirements, Ms. Smith's pleading would be admitted."[35]

II. RELEVANT REGULATORY PROVISIONS

10 C.F.R. § 2.103(b), which authorizes Ms. Smith to demand a hearing on the denial of her SRO license, provides, in relevant part:

> If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, finds that an application does not comply with the requirements of the Act and this chapter he may issue a notice of proposed denial or a notice of denial of the application and inform the applicant in writing of:
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> (1) The nature of any deficiencies or the reason for the proposed denial or the denial, and
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> (2) The right of the applicant to demand a hearing within twenty (20) days from the date of the notice or such longer period as may be specified in the notice.[36]

10 C.F.R. § 2.309(f)(1), relied upon by the Staff to bar Ms. Smith's demand for a hearing, was added to the regulations in the 2004 revision of the NRC Rules of Practice.[37] It provides:

> A request for hearing . . . must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must: (i) Provide a specific statement of the issue of law or fact to be raised or controverted, (ii) Provide a brief explanation of the basis for the contention; (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position . . .; (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.[38]

III. ANALYSIS

One key fact is undisputed. Ms. Smith did exactly what was required of her by the directions provided in the Staff's denial letter: she filed a timely demand for a hearing with the

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[35] Id. at 36.
[36] 10 C.F.R. § 2.103(b).
[37] See 69 Fed. Reg. 2182.
[38] 10 C.F.R. § 2.309(f)(1).

NRC pursuant to 10 C.F.R § 2.103(b)(2) via Federal Express. In response, the Staff initially argued that her hearing demand should be denied because (1) she failed to file electronically through the agency's Electronic Information Exchange, as required by 10 C.F.R. § 2.302; and (2) her demand failed to satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).[39] The Staff later abandoned its objection to the manner in which the hearing demand was filed.[40] The second argument, however, remains before the Board. We reject that argument for two reasons, each of which is sufficient to support our ruling. First, as explained in Section A below, the contention admissibility requirements do not apply to hearing demands submitted under Section 2.103(b)(2). Second, as explained in Section B, Ms. Smith lacked actual and constructive notice of the contention admissibility requirements the Staff now asserts she was required to satisfy.

A. Section 2.103(b)(2) unequivocally grants Ms. Smith "[t]he right . . . to demand a hearing within twenty (20) days from the date of the [denial notice]."[41] By contrast, the requirement of Section 2.309(f)(1) to file contentions, and thus the requirement to satisfy the contention admissibility requirements, applies only to "hearing requests" and "petitions to intervene."[42] This case obviously does not involve a petition to intervene. Thus, for the Staff's argument to apply, the Board would have to conclude that a hearing "demand" filed as of right under Section 2.103(b)(2) is a "hearing request" under Section 2.309(f)(1).

The Board declines to adopt such an interpretation because it would conflict with the ordinary meaning of the English language: manifestly, "demand" and "request" are not synonyms and therefore cannot be given, as the Staff would have it, the same meaning and effect. A person authorized to make a "demand" is generally understood to have the right to the matter that is the subject of the demand. Thus, 10 C.F.R. §§ 2.202(a)(3) and (c), which like

[39] NRC Response at 1–2, 6–9.
[40] NRC Staff Reply to Ms. Charlissa Smith's Response to NRC Staff Request to Deny Hearing Request (Jan. 10, 2013) at 1–2. In any event, the Staff's objection was without merit.
[41] 10 C.F.R § 2.103(b)(2) (emphasis added).
[42] Id. § 2.309(f)(1).

Section 2.103(b)(2) authorize a "demand" for a hearing, are understood to confer the right to a hearing.[43] One authorized to make a "request," by contrast, is merely given permission to ask for something, not to demand it.[44] The usual rule of regulatory interpretation is that "different language is intended to mean different things," and thus a demand for a hearing is not to be treated as a mere request for a hearing.[45]

Although the application of this precept may be suspended if the purpose or regulatory history behind the language shows that no difference was intended,[46] here the available evidence shows that the difference in wording was deliberate. When it was initially promulgated more than a half-century ago, Section 2.103(b)(2) called for the filing of a hearing "request" within 30 days of receipt of the denial letter.[47] Less than two years thereafter, the provision was amended to substitute "demand" for "request" and to reduce the filing deadline to its present 20 days.[48] It is extremely unlikely that the Commission would have changed "request" to "demand" if it thought the two words meant the same thing. The shortened filing deadline further confirms that the two words are not synonymous. The Commission evidently concluded that, because an applicant denied an operator's license (or a byproduct, source, special materials, or facility license) would be entitled to demand a hearing under Section 2.103(b)(2), rather than merely request a hearing, no more than 20 days would be required to prepare a document that would satisfy the conditions precedent to obtaining the hearing. Notably, that is also the period allotted for the filing of challenges to enforcement orders that impose some sanction (e.g., the

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[43] See Memorandum and Order (Response to Order), James L. Shelton (Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)), No. IA 95-055 EA 95-101 (Jan. 23, 1996).
[44] See Webster's Third New Int'l Dictionary 1929 (1976).
[45] Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 72 (1994) (citing United States v. Stauffer Chemical Co., 684 F.2d 1174, 1186 (6th Cir. 1982), aff'd, 464 U.S. 165 (1984)).
[46] Id. at 73 n.19.
[47] 27 Fed. Reg. 377, 378–79 (Jan. 8, 1962).
[48] 28 Fed. Reg. 10,151, 10,152 (Sept. 17, 1963).

imposition of a civil penalty) for some asserted violation of the Commission's regulations.[49] As Staff counsel expressly conceded at oral argument, one demanding a hearing on a challenge to an enforcement order need not comply with the Section 2.309(f)(1) requirements.[50]

The text of Section 2.309(f)(1) provides still further reason for concluding that it has no applicability here. As noted above,[51] the Section requires, inter alia, that the request for hearing "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[52] Someone such as Ms. Smith, who is herself the applicant for a license, could never meet this standard because it would require her to show a genuine dispute with her own application. The requirement to demonstrate a dispute with the application confirms that the standards in Section 2.309(f)(1) are intended for those seeking to intervene in a licensing proceeding initiated by another, not for someone such as Ms. Smith who has herself applied for a license from the NRC.

The Board therefore concludes that a hearing "demand" under Section 2.103(b)(2) is not a "hearing request" under Section 2.309(f)(1). The Staff's contrary position not only ignores the meaning of those terms, but would create a fundamental inconsistency in the regulations. A person subject to an enforcement order is entitled to "demand" a hearing under 10 C.F.R. §§ 2.202(a)(3) and (c), just as one denied an operator's license is entitled to "demand" a hearing under Section 2.103(b)(2). But, as noted, the Staff concedes that a demand for a hearing under Sections 2.202(a)(3) and (c) is not subject to Section 2.309(f)(1) requirements. Thus, if we were to adopt the Staff's interpretation, we would in effect be holding that the term "hearing request" in Section 2.309(f)(1) is equivalent to a hearing "demand" under Section 2.103(b)(2), but not to a hearing "demand" under Sections 2.202(a)(3) and (c). Such an inconsistent interpretation of the word "demand" would violate the rule of construction that "equivalent words have equivalent

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[49] 10 C.F.R. § 2.202(a).
[50] Tr. at 25.
[51] See supra Part II.
[52] 10 C.F.R. § 2.309(f)(1)(vi).

meaning when repeated in the same statute."[53] Moreover, the Staff has not pointed to a material difference for present purposes between, on the one hand, challenges to enforcement orders and, on the other, challenges to the denial of applications for reactor operator licenses. And there is none. In both instances, the Staff action is directed at one (or in the case of the enforcement order possibly more than one) individual or entity. And, although one is coercive and the other is not, they both adversely affect the recipient.

On the other hand, there is a marked distinction between Section 2.103(b)(2) hearing demands (and Section 2.202(c) enforcement order challenges as well) and the matters to which Section 2.309(f)(1) indisputably does apply. When, for example, an application for a Part 52 combined license (COL) is filed with the Commission, the Staff publishes a notice of opportunity for hearing in the Federal Register that, as previously noted, directs prospective hearing requesters to the Section 2.309(f)(1) requirements. In addition, the notice will provide a period of 60 days for the filing of a hearing request that meets those requirements—three times the period allotted to Ms. Smith under Section 2.103(b)(2).

The reasons for imposing the Section 2.309(f)(1) requirements in that setting have been explained by the Commission[54] and scarcely have application here. Unlike the denial of an SRO license application or an enforcement order, a COL application threatens no immediate physical or financial injury to any person or entity. If there is an injury, it will occur years later in the event the license is issued and the proposed facility is constructed and begins operation. And over the years in the Commission's view there were too many instances of evidentiary hearings being held on safety or environmental contentions that turned out to be without any

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[53] Cohen v. de la Cruz, 523 U.S. 213, 220 (1998) (citing Ratzlaf v. United States, 510 U.S. 135, 143 (1994)). Although here we are concerned with agency regulations, not a statute, the rules of interpretation applicable to statutes are equally germane in determining a regulation's meaning. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 143, rev'd on other grounds, CLI-96-13, 44 NRC 315 (1996).

[54] See 69 Fed. Reg. 2182.

possible substance.[55] Thus, Section 2.309 requires the petitioner to make a showing, in the manner prescribed therein, of potential harm from the proposed Staff action and to establish that the hearing request concerns issues worthy of further exploration. Here, however, the Staff action has already taken place, and it has an immediate adverse impact upon Ms. Smith's advancement in her chosen profession. It is therefore not surprising that an applicant denied an SRO license has the right to demand a hearing, rather than being required to negotiate the contention admissibility requirements and a possible appeal in the event a hearing is granted[56] before she can obtain a hearing.

During the January 23 oral argument, the Staff contended that 10 C.F.R. § 2.1200, which provides the scope of Subpart L, supports its claim that the contention admissibility standards of 10 C.F.R. § 2.309(f)(1) apply to hearing demands brought pursuant to 10 C.F.R. § 2.103(b)(2).[57] The Staff asserted that because Subpart L may be used in proceedings regarding operator licenses and because Subpart C, which includes the Section 2.309(f)(1) contention admissibility standards, applies in Subpart L proceedings, Section 2.309(f)(1) must apply to operator licensing cases.[58] This circuitous argument fails to aid the Staff's position. For it to do so, Section 2.1200 would have to alter the text of Section 2.309(f)(1) to make it apply to a "hearing demand" filed under Section 2.103(b)(2). But nothing in Section 2.1200 either instructs or permits us to rewrite the text of any regulation in Subpart C. Instead, it requires that we apply the Subpart C regulations according to their own terms. Thus, Section 2.1200 merely leads us back to the question whether a hearing "demand" under Section 2.103(b)(2) is a "hearing request" within the meaning of Section 2.309(f)(1). For the reasons already explained, we conclude that it is not.

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[55] See, e.g., id. at 2182, 2188.
[56] See 10 C.F.R. § 2.311(d)(1).
[57] Tr. at 22.
[58] Id. at 21–23.

At oral argument, the Staff also cited several passages in the explanatory statement accompanying the 2004 revision of the Rules of Practice that allegedly indicated that Section 2.309(f)(1) applies to Section 2.103(b)(2) hearing demands.[59] We find nothing in those statements that supports the Staff's argument that one entitled to demand a hearing under Section 2.103(b)(2) must provide contentions that meet the requirements of Section 2.309(f)(1). That issue is simply not addressed in the statements cited by the Staff.[60] As the Staff eventually acknowledged, there is "no single sentence" in the Federal Register notice in question that provides explicit support for that proposition.[61]

It is therefore not surprising that, until this case, both before and after the arrival on the scene of Section 2.309 as part of a substantial revision of the Commission's Rules of Practice in 2004, there appeared to be no question that a hearing demand under Section 2.103(b)(2) had to do no more than meet the prescribed filing deadline and specify the reasons why the demander deemed the denial of the sought operator's license to have been unjustified.[62] So long as at

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[59] See Tr. at 10–11 (citing 69 Fed. Reg. at 2206, 2188); Tr. at 23 (citing 69 Fed. Reg. at 2221); Tr. at 26 (discussing 69 Fed. Reg. at 2201–02).

[60] For example, the Staff noted the Commission's intent to require "specific, adequately-supported contentions in order to be admitted as a party . . . to informal proceedings under Subpart L." Tr. at 26 (discussing 69 Fed. Reg. at 2201–02). But, as we have explained, although Section 2.309(f)(1) provides that persons who file a "request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised," it does not impose a comparable requirement upon those who file demands for hearing under either 10 C.F.R. §§ 2.202(a)(3) and (c) or Section 2.103(b)(2). Nothing in the Commission's explanatory statement suggests otherwise. That the Commission was not addressing demands for a hearing is confirmed by the Commission's statement that it "continues to believe that a request for hearing/petition to intervene should include proposed contentions." 69 Fed. Reg. at 2202. Nowhere does the Commission state that a demand for a hearing under Section 2.103(b)(2) should include proposed contentions, and the regulatory text makes clear that no such requirement exists.

[61] Tr. at 27.

[62] See, e.g., David B. Kuhl, II (Denial of Senior Reactor Operator License) LBP-09-14, 70 NRC 193 (2009); Memorandum and Order (Establishing Schedule for the Case), Shaun P. O'Hern (Denial of Reactor Operator's License), No. 55-32442-SP (Oct. 19, 1998); Memorandum and Order (Hearing File and Specification of Claims), Randall L. Herring (Operator License for Catawba Nuclear Station), No. 55-22234-SP (June 30, 1998); Memorandum and Order (Ruling on Request for Hearing, Emerick S. McDaniel (Denial of Application for Reactor Operator License), No. 55-21849-OT (June 25, 1996); cf. Order Granting Hearing and Federal Register

least one of the assigned reasons was facially plausible, the matter proceeded to consideration on the merits. As recently as 2009, the Staff seemingly had a different view of the matter when it was confronted in the Kuhl proceeding with the only other challenge to the denial of an SRO license application that has been submitted following the enactment of Section 2.309.[63] Without any reference to that Section, the Staff informed the Board that it did not oppose the grant of the hearing request although it intended to file a motion to dismiss or for summary disposition at a later time.[64]

Neither in its written submission nor at oral argument did the Staff explain why we should not give effect to its apparent acknowledgement just four years ago in the Kuhl proceeding that Section 2.309(f)(1) has no application to reactor operator licensee proceedings.[65] In that connection, the Staff further conceded at argument that, in common with enforcement proceedings, before 2004, SRO licensing proceedings were subject to no contention requirement.[66] Now, the Staff would have it, the Commission, without expressly so providing, has subjected Section 2.103(b) proceedings to stringent pleading requirements while leaving the analogous enforcement proceedings free of any such requirement.

Notice of Opportunity to Intervene, Advanced Medical Systems, Inc. (1020 London Road Cleveland, OH), No. 30-16055-ML (Nov. 4, 1998).

[63] See Kuhl, LBP-09-14, 70 NRC 193.

[64] Id. at 195 ("The NRC Staff . . . did not oppose Mr. Kuhl's hearing request, but stated that the Staff intended to file a motion to dismiss or motion for summary disposition at a later time."); see NRC Staff Response to David B. Kuhl's Request for Hearing, David B. Kuhl, II (Denial of Senior Reactor Operator License), No. 55-62335-SP (June 22, 2009) at 2 ("An applicant for a senior reactor operator license who desires a hearing on a denial of a license application must file a request for hearing within twenty days of the date of the notice of the denial. 10 C.F.R. § 2.103(b)(2). Mr. Kuhl filed the instant hearing request within the appropriate time limit. Therefore, the NRC Staff does not object to the hearing request."). Ultimately, the Kuhl Board concluded that, because "[a]ny SRO license is 'limited to the facility for which it is issued'" and because Mr. Kuhl no longer worked for the facility for which he requested a license, it need not reach the merits of his case and dismissed the hearing request as moot. Kuhl, LBP-09-14, 70 NRC at 196.

[65] See Kuhl, LBP-09-14, 70 NRC at 195.

[66] Tr. at 50.

For the reasons we have explained, the Board declines to adopt such an unreasonable construction of the regulations. Instead, we conclude that the contention admissibility standards of Section 2.309(f)(1) do not apply to a hearing demand made under Section 2.103(b)(2).

B. Had the Board agreed with the Staff's construction of the regulations, we would have had to address a second issue: the Staff's insistence that, despite the absence of any reference to Section 2.309(f)(1) requirements in the Staff's denial letter, Ms. Smith had constructive knowledge of that Section and its application to her case.[67] We disagree with the Staff on that issue as well.

To adopt the Staff's thesis that this pro se individual should have been aware of Section 2.309(f)(1) and its application (according to the Staff) to her hearing demand, we must hold that, upon receiving the denial letter, Ms. Smith was required to take the following steps to ensure that her hearing demand would receive favorable treatment:

First, she had to consult Section 2.103(b)(2) to determine whether there was anything therein regarding the required content of the challenge, characterized in that section as a "demand" rather than simply a "request" for a hearing.

Second, finding nothing in the section imposing any specific content requirements, Ms. Smith was then obliged to recognize the possibility that such requirements might nonetheless exist in some other Commission regulation, not referred to in either the denial letter or Section 2.103(b)(2).

Third, following up on this possibility, it then became incumbent upon Ms. Smith to comb through the entire Part 2 of the Commission's regulations in search of provisions therein that conceivably might apply to the required content of her hearing demand even though not called to her attention in either the denial letter or the regulation cited therein.

Fourth, after such an exhaustive examination of Part 2 taking her ultimately to Section 2.309(f)(1), it was then Ms. Smith's obligation to appreciate that, even though that

[67] Tr. at 12–13.

Section did not expressly bring her hearing demand within its reach, there might be some Commission pronouncement published in the Federal Register that might have that effect.

Fifth, it then became Ms. Smith's responsibility both to locate in the Federal Register the items upon which the Staff relies here and to construe them, as does the Staff, as subjecting the hearing demand to the Section 2.309(f)(1) requirements.

Sixth, and lastly, within whatever time might be left of the 20-day filing period (there was no mention in the denial letter that an extension of that period might be sought, let alone that the Staff might consent to an extension) Ms. Smith had to prepare and to file a hearing demand that would satisfy in full measure each of the requirements imposed by Section 2.309(f)(1).

It is beyond cavil that the imposition of such an impossible burden upon Ms. Smith would not be merely unjustified but patently unreasonable. There is simply no basis for a good faith assertion that Ms. Smith was not entitled to take the denial letter at face value, i.e., to assume that her hearing demand need only set forth, as she has done, the reasons why she believed the denial of her SRO license application was unwarranted.[68] In the final analysis, the matter comes down to this: the Staff is endeavoring to saddle Ms. Smith with the consequences of its having improvidently furnished her a denial letter that, insofar as of present relevance, contained apparent boilerplate that was incomplete and perforce misleading. (We were told at oral argument that the letter had not been reviewed by the Office of the General Counsel before being sent to Ms. Smith.)[69] That simply does not accord with concepts of fundamental fairness and (although we need not reach the question here) might well counter hearing rights granted under Section 189a of the Atomic Energy Act.[70]

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[68] See Heckler v. Cmty. Health Servs., 467 U.S. 51, 61 n.13 (1984) (citing Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."); Menges v. Dentler, 33 Pa. 495, 500 (1859) ("Men naturally trust in their government, and ought to do so, and they ought not to suffer for it.")).

[69] Tr. at 34.

[70] 42 U.S.C. § 2239(a)(1)(A).

The Board finds it instructive that, in notices published in the Federal Register providing the public with the opportunity to seek a hearing on, e.g., applications for licenses to build and to operate nuclear power facilities, the Staff routinely alerts the reader regarding the required content of a hearing request. Here we are not concerned with a member of the general public seeking the denial on asserted safety or environmental grounds of an application for a license or license amendment. In sharp contrast, the Board has before it a person protesting Staff action that not only is directed to her alone, but, in addition, has a potentially large impact on her professional career. Surely such a person is entitled to at least as much solicitude when it comes to the identification of the requirements she must satisfy to obtain a hearing.

In addition, Section 2.103(b) requires the appropriate office director to "inform" the applicant of the right to demand a hearing. If the applicant indeed must comply with Section 2.309(f)(1), but the office director failed to comply with his responsibility to "inform" the applicant of such a requirement, then surely the agency cannot take advantage of the applicant's ignorance of information the agency itself was obligated to provide.[71]

The Staff evidently disagrees. It argues that, because the 2004 rule changes were published in the Federal Register, Ms. Smith is charged under the Federal Register Act, 44 U.S.C. § 1507, with constructive knowledge that the contention admissibility requirements of Section 2.309(f)(1) apply to her hearing demand, even though the Staff's denial letter referred only to Section 2.103(b)(2).[72] It is true that Section 1507 provides that publication of a regulation in the Federal Register constitutes notice to all persons residing in the United States.[73] Thus, even one lacking actual notice may be charged with constructive notice of

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[71] See Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), LBP-95-7, 41 NRC 323, 328 (1995) (noting the NRC Staff's acknowledgement that the time for the applicant to request a hearing should be tolled until the Section 2.103(b) notice was issued, where the Staff had failed to provide the required Section 2.103(b) notice).
[72] See Tr. at 12–14.
[73] See Consol. Edison Co. (Indian Point, Unit No. 2), LBP-82-1,15 NRC 37, 40 (1982).

regulations published in the Federal Register.[74] But, as we explained in Section III(A) above, it is far from clear from the text of the 2004 regulations that the contention admissibility requirements of Section 2.309(f)(1) apply to a "hearing demand" under Section 2.103(b)(2). We may not rely on the Federal Register notice to put Ms. Smith on constructive notice of a requirement that the Board itself cannot discern in the regulations.[75]

We need add only that we appreciate that the Commission justifiably expects that all applicable provisions of the Rules of Practice will be observed in adjudicatory submissions. It is reasonable to assume, however, that it also expects the Staff to turn square corners with those with whom it deals, including applicants for SRO licenses.[76] As seen, the denial letter here fell far short of meeting that responsibility, and the Staff has assigned no good reason why Ms. Smith should nonetheless pay the price for the letter's patent deficiencies.

C. At oral argument, the Staff agreed that, should the Board conclude that Section 2.309(f)(1) was inapplicable here, the hearing demand raised sufficient concrete issues relating to the denial of Ms. Smith's SRO license application to warrant the demand being granted.[77] It is clear from the summary of the content of the demand set forth in Part I, supra, that such agreement was required. Among other issues that are worthy of further exploration is the credibility of the Staff's claim that Ms. Smith had marginally passed the operating portion of the SRO licensing examination taken in 2011.[78] As noted above, supra Part I, that claim was the

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[74] Dominion Nuclear Connecticut (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 & n.60 (2005).
[75] See California v. FERC, 329 F.3d 700, 706–07 (9th Cir. 2003); North Ala. Express, Inc. v. United States, 585 F.2d 783, 786 (5th Cir. 1978).
[76] "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting).
[77] Tr. at 35–36.
[78] NRC Response at 3–4. According to Ms. Smith, her score on the simulator portion of the operating test was 2.47 on a 3.0 scale, with the minimum passing score being 1.8. Hearing Demand at 2.

asserted basis of the Staff's unwillingness to give Ms. Smith the waiver accorded to other similarly situated SRO license applicants.

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For the foregoing reasons, Ms. Smith's hearing demand must be, and hereby is, granted. In the interest of expediting the further proceedings in this matter, to be conducted under the provisions of Subpart L of the Commission's Rules of Practice,[79] the Board will hold a telephone conference with the parties at 10:00 a.m. (EST) on Tuesday, February 26, 2013.[80] Its

[79] See 10 C.F.R. § 2.310(a). The regulations provide that "proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to part[] . . . 55 . . . of this chapter may be conducted under the procedures of subpart L of this part." 10 C.F.R. § 2.310(a). Part 55 governs operators' licenses. See 10 C.F.R. §§ 55.1–55.2. Therefore, unless the parties request a hearing pursuant to Subpart N, see 10 C.F.R. § 2.310(h), the Board will hold a hearing pursuant to the procedures announced in Subpart L. Note that enforcement proceedings are distinct from those dealing with Part 55. See 10 C.F.R. §§ 2.200–2.206. Enforcement proceedings, unlike the proceeding here, are typically conducted pursuant to the procedures in Subpart G. 10 C.F.R. § 2.310(b); see also 10 C.F.R. § 2.700 (providing the scope of Subpart G).

[80] Instructions regarding access to the telephone conference will be provided to the parties at a later date.

purpose will be to refine the issues to be addressed at the hearing and to discuss any other matters bearing upon the hearing that might require consideration at this point.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
Alan S. Rosenthal
ADMINISTRATIVE JUDGE, CHAIR

/RA/

_____
Ronald M. Spritzer
ADMINISTRATIVE JUDGE

/RA/

_____
Brian K. Hajek
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 19, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CHARLISSA C. SMITH	)	Docket No. 55-23694-SP
	)	
	)	
(Reactor Operator License for Vogtle Electric Generating Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **DECISION (Granting Demand for Hearing) LBP-13-03** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Clara I. Sola]
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Dated at Rockville, Maryland
this 19th day of February, 2013.