

March 28, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

REQUEST MOTION TO COMPEL DISCLOSURE OF ITEMS ON ATTACHMENT 2:  
PRIVILEGE LOG SUBMITTED ON March 21, 2013

Pursuant to 10 C.F.R. § 2.323, the Petitioner request a motion to disclose eight documents withheld from disclosure as listed in Attachment 2, Privilege Log submitted by the NRC on March 21, 2013<sup>1</sup>. The documents are as follows: ML13071A261, ML13071A228, ML13070A067, ML13070A050, ML13070A070, ML13071A226, ML13070A072, and ML13070A074. The NRC Staff has listed these documents as being protected from disclosure by the deliberative process privilege. The reason for assessing the claim of privilege to these documents is due to relevance to the original issues discussed in the hearing demand submitted on Dec 5, 2012<sup>2</sup>. Those issues identified that seven contentions were submitted to request an administrative review of the examination and were not responded to.<sup>3</sup> It was also believed that the review focused on finding additional comments to sustain the failure<sup>4</sup> versus determining if

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<sup>1</sup> ML13080A505 – Attachment 2, Privilege Log submitted by NRC Staff

<sup>2</sup> ML12361A329 – CharliSSa Smith hearing demand submitted on Dec 5, 2012

<sup>3</sup> ML12361A329 – Page 9 “Instead the review responded to one comment out of seven” “did not specifically respond to any of the other issues brought up”

<sup>4</sup> ML12361A329 – Page 11 “instead the review focused on finding additional comments to sustain the failure”

the petitioner met the requirements of Title 10, Section 55.33(a) of the Code of Federal Regulations for the approval of the license application. The NRC staff was contacted per the Commission's Regulations governing motions, 10 C.F.R. § 2.323(b), the moving party's is required to make a sincere effort to contact the other parties to resolve the issues in the motion. The NRC Staff's position was that the staff will oppose any motion seeking disclosure of the Privileged Documents.

### Introduction

In reviewing the public disclosures submitted by the NRC Staff on March 21, 2013, emails were discovered determining that the initial recommendation of the independent review panel was the Petitioner passed the simulator examination<sup>5</sup>. The email communications discussed review notes or appeal comments for the appeal review document.<sup>6</sup> An attachment to one of those emails<sup>7</sup> identified comments that were consistent with a draft document determining that the operating test was passed.<sup>8</sup> This validates that the review panel made a recommendation or decision consistent with issuing a reactor operator license. The items protected by the Privilege Log are the responses to the recommendation, to include an appeal by Region II. Days after the previously mentioned email communication, another email titled "Vogtle Appeal – look for additional hits" incorporated additional (new) comments that deducted more points. The response after incorporating those "revised hits" was "OVERALL GRADING IMPACT:

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<sup>5</sup> ML13079A350 –email response "even if the panel did not toss out some errors and changed up some RF's, the applicant still would have passed"

<sup>6</sup> ML13071A211 and ML13071A217 - Email

<sup>7</sup> ML13071A214 –attachment to email (ML13071A211), review of the appeal provided by this individual listed comments that made reference to "page 15 item #2 control band is 2250-2250 should be 2220- 2250" and "page 24, Item #2....." Four document were compared side by side. ML13079A352, ML13079A344, ML13079A399, ML13079A359 – one document was a pass letter, the other three documents were several revision of denial letters. The comments provided by the attachment from the email were only consistent with the pass letter. In other words, the reference made to page 15 on all four documents were compared and the pass letter was the only document that had an item #2 with the typo 2250-2250 (same logic for reference to page 24). This gives the impression that this was the intended recommendation of the panel

<sup>8</sup> ML 13079A352 – Pass letter

APPLICANT STILL PASSES, competency score drop but still passes”.<sup>9</sup> Later that day another rough draft was produced modifying the grading again, and more recommended changes<sup>10</sup>. Four days later an email was sent by the Independent Review’s Panel Chairman to the Chief Operator of Licensing and Training Branch Division on Inspections and Regional Support (NRR). The Panel Chairman states “*Per our conversation, I reframed the panels role in this review such that it is limited to addressing how each of the errors was dispositioned*” In addition the email stated “*You have my verbal recommendation on **how the final grading should shake out** and this recommendation is aligned with the panels recommendation. Once Region II’s comments are reviewed and incorporated, I will resubmit to you with a short cover letter. Please let me know if this meets your needs*”<sup>11</sup> Region II put together a recommendation in response to the review panels conclusion (further supporting that the review boards original recommendation was to overturn the denial)<sup>12</sup>. They identified that they observed the applicant performance and that the denial should be sustained. All emails or their associated attachments surrounding this change are encompassed in those emails protected under the Privilege Log.

### Discussion

It does not appear that a decision was being made. As illustrated above the decision was made for the independent review team and they were expected to align with the expected result. The decision is expected to be based on the outcome of the grading sheet by the Independent Review Team. Instead the grading results were reported and the review team was realigned to ensure the grades “shaked out” as expected. The modification of comments continued until the final results changed from “pass” to “fail”. It is questionable if the items on the Privilege Log meet the requirements of the Deliberative Process Privilege. It appears that the decision was made for the Independent Review Team. In addition these documents are relevant to the

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<sup>9</sup> ML13070A068 – Email

<sup>10</sup> ML13070A069 – Email

<sup>11</sup> ML13071A225 - Email

<sup>12</sup> ML13071A242 – page 1, Region II recommendations

petitioner's contentions. The petitioner alleges that she was treated differently by Region II examiners, and a new process has been eliminated that was intended to provide due process by allowing a team independent of influence by Region II to review the data provided and make an objective decision. Instead the petitioner was essentially re-graded by Region II examiners in the independent review. It is believed that the information encompassed in the emails and attachments are directly related to the issues identified by the petitioner in regard to being evaluated by an equal standard.

Another issue, was the second denial letter was sent to the petitioner that did not respond to each of the contentions submitted when the Independent Review was requested. Detailed documents were produced during this administrative review to explain the independent panel's position but those details were not disclosed in the final product, the second denial letter<sup>13</sup>. The administrative review procedure states<sup>14</sup>: "In all cases, each applicant's contentions will be addressed below....." (see remainder of document for details). This supports that the document<sup>15</sup> should have addressed all of the submitted contentions. Examples of other contentions on the operating test, submitted in the past, were consistent with this standard<sup>16</sup>. If the work (answering the contentions) was done then the results should have been reported. The public disclosures contained several full reports answering each contention submitted by the petitioner (one report recommended passing the petitioner, four others were variations of a denial of the license)<sup>17</sup>. The emails and documents protected by the privilege log contain the information identifying when the reports went from a full report to an abbreviated report. The

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<sup>13</sup> ML13007A036 – Second Denial Letter Results from the review that were sent to C. Smith, only 2 items discussed, one was not contended

<sup>14</sup> ML13072A185- OLMC-500, December 2011, Processing Request for Administrative Reviews and Hearings, See page 10 requires all contentions to be addressed, see page 11 - FOR OPERATING SCENARIO EVENTS, provide.....

<sup>15</sup> "Document" is referring to the second denial letter

<sup>16</sup> Example of contention response by the NRC answering all the submitted contentions: see attachment 1-originated from pages 339 – 384 from FOIA 2013-099\*\*\*\*also note that this review does not evaluate comments that were not submitted – C. Smith review looked at all comments for additional reductions.

<sup>17</sup> ML13079A352, ML13079A344, ML13079A399, ML13079A359, ML13079A367 – all examples of the document in the public disclosure list. These documents discuss the response to the contention, normally the final document would be attached to the denial letter.

progress and changes of those documents during the review are encompassed in the Privilege Log items. This information will explain when and why the report was shortened, and why procedure requirements to report the responses to the contentions were blatantly ignored.

### Conclusion

It is believed that the items listed on the Privilege Log will shed light on the reason why the decision of the Independent Review Board quickly changed, as well as the inadequate responses provided for the contentions.. Several emails were received when the conclusion was complete and ultimately resulted in the final outcome. The items on the Privilege Log are the responses by email (and attachments) to a decision that was made by the Independent Review Board. These items will identify that the grading is subjective and not based on the examination process . These items will also explain why the administrative review sustained the failure when initial information concluded that the applicants overall grade was passing. The public documents disclosed support that email response indicated a passing score, follow-up emails would add additional comments (consider that each comment equal points deducted) after the emails, protected by the Privilege Log, were received. Additional changes occurred, resulting in more comments and modification of the grading, in some cases the score was still passing<sup>18</sup>. Access to the documents are relevant to the issues discussed in the hearing demand (prior to any access to these documents) that mentioned the vagueness of the independent review, failure to respond to all contentions submitted<sup>19</sup>, removal of comments from the original grade sheet with no explanation<sup>20</sup>, failure to produce a final grade sheet<sup>21</sup>, changes to the testing outline to reflect critical task that were not previously identified<sup>22</sup>, identifying new comments<sup>23</sup> and identifying that the applicant made too many errors although they were not disclosed<sup>24</sup>, determining if level of fairness was applied (basis for the all issues encountered),

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<sup>18</sup> ML13070A068 - email

<sup>19</sup> ML12361A329 Original Hearing request page 9 (statement referencing the issues stated in the documents)

<sup>20</sup> ML12361A329 Original Hearing request page 11 (statement referencing the issues stated in the documents)

<sup>21</sup> ML12361A329 Original Hearing request page 9 and 15 (statement referencing the issues stated in the documents)

<sup>22</sup> ML12361A329 Original Hearing request page 9 (statement referencing the issues stated in the documents)

<sup>23</sup> ML12361A329 Original Hearing request page 9 (statement referencing the issues stated in the documents)

<sup>24</sup> ML12361A329 Original Hearing request page 9 (statement referencing the issues stated in the documents)

identify an influence on the outcome and determine if the number of modifications were reasonable. Continuously reviewing, adding comments and modifying the grading (especially when early on it was identified that the applicant passed) gives the perception that a specific outcome was desired. In conclusion the petitioner requests disclosure of the eight items previously mentions as they are relevant to the issues encountered throughout the entire exam process that is currently being challenged.

Respectfully,

Charlissa Smith

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing REQUEST MOTION TO COMPEL DISCLOSURE OF ITEMS ON ATTACHMENT 2: PRIVILEGE LOG SUBMITTED ON March 21, 2013 was provided to the NRC's Electronic Information Exchange for service to those individuals on the service list for this proceeding.

[Original signed by Charlissa Smith]

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Dated at Grovetown, Ga  
this 28 day of March 2013

# ATTACHMENT 1