

December 31, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
CHARLISSA C. SMITH) Docket No. 55-23694-SP
)
(Denial of Senior Reactor)
Operator License Application))

NRC STAFF'S RESPONSE TO MS. CHARLISSA C. SMITH'S REQUEST FOR HEARING ON
DENIAL OF APPLICATION FOR A SENIOR REACTOR OPERATING LICENSE

INTRODUCTION

On December 5, 2012 the Nuclear Regulatory Commission staff (~~NRC Staff~~) received through Federal Express overnight mail an undated letter from Ms. Charlissa C. Smith (~~Ms. Smith~~ or ~~Petitioner~~) requesting a hearing.¹ The Request for Hearing challenges the NRC Staff's denial of Ms. Smith's application for a Senior Reactor Operator (~~SRO~~) license. The NRC Staff hereby files its response to Ms. Smith's Request for Hearing.

Despite instructions from the Office of the Secretary's staff to Ms. Smith to file her request for a hearing via NRC's Electronic Information Exchange (~~EIE~~), she has not yet done so. Nor has she shown good cause why she should be exempt from the NRC's EIE filing requirements.² The failure to file via NRC's EIE system is itself sufficient to warrant dismissal of her request for a hearing.³

¹ Letter from Charlissa C. Smith to Office of the Secretary and Associate General Counsel for Hearings, Administration, and Enforcement (Dec. 2012) (~~Request for Hearing~~).

² All documents filed in NRC adjudicatory proceedings, including a request for hearing, must be filed in accordance with the NRC E-Filing rule. 72 Fed. Reg. 49139 (Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the approved procedures. Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request,

The NRC Staff's denial of Ms. Smith's application for an individual SRO license resulted from her failure of the operating test portion of an SRO examination. Ms. Smith challenges the SRO license denial on the grounds that she should have been granted a waiver from the operating test portion of the 2012 SRO Examination and that the failed operating test was assessed incorrectly due to bias.⁴ Because Ms. Smith did not file her request in accordance with the NRC's E-Filing rules by the regulatory deadline, and because she did not submit an admissible contention—each of her assertions is either immaterial to the findings the NRC must make to support the license denial or is not supported by an adequate factual basis—the Request for Hearing should be denied.

BACKGROUND

Ms. Smith was an applicant for an individual SRO license at the Vogtle Electric Generating Plant (~~Vogtle~~), the reactor ~~licensee~~ in Burke County, Georgia.⁵ Under 10 C.F.R. § 55.33(a)(2), an applicant must pass both a written examination and an operating test to qualify for an SRO license.⁶ Each applicant is assigned an examiner of record for the operating test

in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants.

³ Filings after the deadline will not be entertained absent a determination by the presiding officer that the filing party has demonstrated good cause for failure to file by the deadline. 10 C.F.R. § 2.309(c)(1). Ms. Smith's filing would not be considered timely as she has not requested an exemption from the EIE requirements prior to the deadline for filing.

⁴ Request for Hearing at 1. The Request for Hearing does not include page numbers. All references to specific pages in the Request for Hearing relate to the 15-page document received by the NRC Staff from Ms. Smith.

⁵ Ms. Smith was an ~~—SRO~~ instant candidate," meaning that she did not have prior experience as a reactor operator (~~RO~~). An applicant may apply for an SRO license as an ~~SRO~~-instant candidate" if the applicant meets the specified educational and/or experience requirements (*e.g.*, degree in engineering, military reactor experience, *etc.*) and receives RO training and SRO training.

⁶ See also 10 C.F.R. § 55.43 (establishing requirements for SRO written examinations); 10 C.F.R. § 55.45 (establishing requirements for operating tests).

who serves as the exclusive evaluator of that applicant's performance on the dynamic simulator portion of the operating test.⁷ Other examiners provide input from their observations of other portions of the operating test to the examiner of record.

Ms. Smith first attempted to qualify for an SRO license in March 2011. Jay Hopkins, Michael Meeks, and Phillip Capehart of the Region II NRC Staff served as the examination team evaluating Ms. Smith, with Mr. Hopkins serving as the examiner of record.⁸ As the NRC examiner of record, Mr. Hopkins was the sole evaluator of Ms. Smith's performance on the dynamic simulator portion of the operating test.⁹ Ms. Smith passed the March 2011 operating test; however, she failed the written examination and thus did not qualify for an SRO license.¹⁰

If an applicant for an SRO license fails only one portion of the examination, the Region may waive those examination areas that were passed.¹¹ After the 2011 examination was complete, a facility licensee representative sent an email to the Region II NRC Staff asking whether the NRC would approve a waiver of the operating portion of the test for Ms. Smith if the facility licensee submitted a request for such a waiver.¹² As Mr. Capehart and Mr. Hopkins had assessed [Ms. Smith's] performance as marginal or borderline and informed the Operator Licensing Branch Chief . . . that [Ms. Smith] was not a good candidate to receive a waiver of any

⁷ See NUREG-1021, Operator Licensing Examination Standards for Power Reactors, Rev. 9, Supplement 1, effective as of October 2007 at ES-302 § D.1.d (~~NUREG-1021~~) (~~simulator operating tests consisting of multiple scenarios shall not be divided among examiners~~).

⁸ Letter from Ho K. Nieh, Director of Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, to Charlissa C. Smith, Enclosure 2 at 5 (Nov. 15, 2012) (ADAMS Accession No. ML12307A152) (~~Independent Waiver/Bias Review~~).

⁹ *Id.* (noting that Mr. Hopkins administered ~~All~~ "Simulator Scenarios" during Ms. Smith's 2011 operating test).

¹⁰ Vogtle Power Station – NRC Examination Results Summary – Examination Report Nos. 05000424/2011301 and 05000425/2011301 (May 10, 2011), Enclosure (ADAMS Accession No. ML111310263).

¹¹ NUREG-1021 at ES-204 § D.1.a.

¹² Independent Waiver/Bias Review at 4.

future operating test,”¹³ the Region II NRC Staff informed the facility licensee representative that it would likely deny such a waiver request.¹⁴ At no time, however, did any of the examiners conducting the 2011 or 2012 examinations [communicate to the facility licensee that] they could not or should not submit a waiver request on behalf of” Ms. Smith.¹⁵

Ultimately, the sponsoring licensee determined not to submit a waiver request on behalf of Ms. Smith.¹⁶ Initially, the licensee did submit a preliminary NRC Form 398, “Personal Qualifications Statement: Licensee,” on behalf of Ms. Smith with Item 4.f. checked, which would typically indicate a request to waive the requirement to retake the operating test.¹⁷ However, the preliminary Form 398 did not include supporting information for a waiver request.¹⁸ Recalling the earlier correspondence regarding a potential waiver request for Ms. Smith, NRC Staff contacted the facility licensee to confirm whether the indicated waiver request was intentional.¹⁹ In response, the [Vogtle] representative responded that they had checked Item 4.f. in error and did not intend to request a waiver of the operating test on behalf of” Ms. Smith.²⁰ Thereafter, in March 2012, Vogtle submitted a final Form 398 on behalf of Ms. Smith that did not have Item 4.f. checked and therefore did not request a waiver of the operating test.²¹

After repeating SRO training, Ms. Smith applied for and again attempted to qualify for an SRO license in 2012. Mr. Mark Bates of the NRC Staff was assigned as Ms. Smith’s

¹³ *Id.* at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.* at 2.

examiner of record and evaluated Ms. Smith's performance on the dynamic simulator scenario portion of the operating test.²² Based on her performance, Ms. Smith failed the dynamic simulator scenario portion of the operating test and therefore was unable to qualify for an SRO license.²³

Ms. Smith requested an informal review of her operating test assessment, which the NRC Staff received on June 5, 2012.²⁴ The Region II Staff's informal review of Ms. Smith's operating test assessment determined that the applicant exhibited numerous performance problems during her simulator operating test, and that ultimately, she did NOT pass the Simulator Operating Test.²⁵ In addition, NRC management at NRC Region II conducted an independent review of Ms. Smith's assertions of examiner bias and determined that these claims were unsubstantiated.²⁶

In her Request for Hearing, Ms. Smith challenges these determinations. Ms. Smith argues (1) that she should have been granted a waiver from the requirement to take the operating test portion again in 2012, (2) that her grade on the operating test should be adjusted to a passing score because the NRC examiners on the examination team were biased against

²² *Id.* at 5. Under NUREG-1021 at ES-201 § D.1.a (Jul. 2004), "The regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicant's retake operating test." Because Ms. Smith did not fail the 2011 operating test, Mr. Meeks or Mr. Capehart could have evaluated her 2011 operating test performance as well.

²³ Vogtle Power Station – NRC Examination Results Summary – Examination Report Nos. 05000424-12-301 & 05000425-12-301 (May 11, 2012), Enclosure at 2 (ADAMS Accession No. ML12136A442).

²⁴ Letter from Ho K. Nieh, Director of Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, to Charliisa C. Smith (June 19, 2012) (ADAMS Accession No. ML12170A578).

²⁵ Letter from Ho K. Nieh, Director of Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, to Charliisa C. Smith, Enclosure 1 at 1 (Nov. 15, 2012) (ADAMS Accession No. ML12307A152) ("Summary of Informal Review").

²⁶ Independent Waiver/Bias Review at 8.

her and held her to an unfairly high standard, and (3) that the informal review of her operating test assessment was unsatisfactory.²⁷

DISCUSSION

I. Timeliness

Under 10 C.F.R. § 2.103(b)(2), an applicant who receives notice of a proposed license denial must file a request for hearing within twenty days of the notice date. Such requests shall be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption permitting an alternative filing method²⁸ or unless the entire filing is in optical storage media format.²⁹ A party seeking an exemption from the E-Filing requirement must submit the exemption request with its first filing in the proceeding³⁰ and must show good cause as to why it cannot file electronically.³⁰ In addition, hearing requests . . . filed after the deadline . . . will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause.³¹ The Commission has clarified that failure to comply with our pleading requirements for late filings constitutes sufficient grounds for rejecting . . . hearing requests.³²

²⁷ Request for Hearing at 1 (I am requesting a hearing on the basis that a waiver for the operating test was not properly considered and once required to retake the Operating Test, the simulator portion was graded/assessed incorrectly.”); see also *id.* at 12-14 (arguing that NRC examiners were biased); *id.* at 9-12 (arguing that the Region II review of her operating test assessment was flawed).

²⁸ 10 C.F.R. § 2.302(a).

²⁹ 10 C.F.R. § 2.302(g)(1).

³⁰ 10 C.F.R. § 2.302(g)(4).

³¹ 10 C.F.R. § 2.309(c)(1). “Good cause” for failure to file by the deadline requires a showing that: (i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information.” *Id.*

³² *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009); see also *id.* at 272 (Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.”).

The NRC Staff sent Ms. Smith notice that it was sustaining the proposed license denial on November 15, 2012.³³ Thus, the deadline for Ms. Smith to file a request for hearing in this matter in accordance with the NRC's electronic filing rules was December 5, 2012. The Office of the Secretary and the Associate General Counsel for Hearings, Enforcement & Administration received Ms. Smith's request for hearing on December 5, 2012. Ms. Smith submitted the Request for Hearing via Federal Express overnight mail as an undated letter, rather than via the NRC's EIE system. Furthermore, Ms. Smith did not request an exemption from the requirement to file her submission via the EIE system. Because Ms. Smith did not file the Request for Hearing in accordance with the E-Filing requirements or request an exemption from those requirements by December 5, 2012, the Request for Hearing is late. Furthermore, because Ms. Smith has not demonstrated good cause for failure to properly file by the deadline, the Request for Hearing should not be entertained under 10 C.F.R. § 2.309(c)(1). Therefore, the Request for Hearing should be denied.

II . Contention Admissibility Requirements

In addition to meeting timeliness requirements, a request for hearing must also meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Under this section, a request for hearing 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;

³³ Letter from Ho K. Nieh, Director of Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, to CharliSSa C. Smith (Nov. 15, 2012) (ADAMS Accession No. ML12307A152).

(v) Provide a concise statement of the alleged facts . . . which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing . . .; [and]

(vi) [P]rovide sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact.³⁴

Thus, a contention is inadmissible if it is either immaterial to the findings the NRC must make to support the challenged action or not supported by an adequate factual basis.

In order to show that a contention is material, a requestor must show that ~~the~~ subject matter of the contention would impact the grant or denial of the license application at issue in the proceeding.³⁵ In other words, materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding, i.e., that some significant link exists between the claimed deficiency" and the challenged license denial.³⁶

Additionally, although the requirement to demonstrate an adequate factual basis does not require requestors ~~to~~ "prove their case" in the initial request for hearing, it does require them to provide ~~sufficient~~ alleged factual or legal bases to support the contention, and to do so at the outset.³⁷ A requestor may not submit ~~a~~ vague, unparticularized [contention], unsupported by alleged fact . . . and documentary support.³⁸ Mere ~~g~~eneral assertions or conclusions will not

³⁴ Though the procedural regulations in 10 C.F.R. Part 2, Subpart C sometimes speak in terms of reactor licensee or materials licensee regulation, they apply equally to a request for hearing on the denial of an SRO license. See 10 C.F.R. § 2.300 (~~The provisions of this subpart apply to all adjudications conducted under the authority of . . . 10 C.F.R. Part 2, unless specifically stated otherwise in this subpart.~~).

³⁵ *Energy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

³⁶ *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 953 (2009) (citations omitted).

³⁷ *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

³⁸ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 414 (2007) (quotations omitted).

suffice.”³⁹ Simply ~~stat[ing]~~ a conclusion . . . without providing a reasoned basis or explanation for that conclusion is inadequate” to establish a material dispute.⁴⁰ Thus, a contention ~~will~~ be ruled inadmissible if the [requestor] has offered no tangible information, . . . but instead only bare assertions and speculation.”⁴¹

Because the sponsoring facility licensee, Vogtle, chose not to formally request an operating test exam waiver for Ms. Smith, her contention that she should have been granted a waiver from the requirement to take the 2012 operating test is immaterial to the findings the NRC must make to support its denial of an SRO license. In addition, Ms. Smith’s contentions that her operating test grade should be adjusted to a passing score and that the informal review of her operating test assessment was insufficient are not supported by an adequate factual basis. Thus, Ms. Smith has presented no admissible contention, and the Request for Hearing should be denied.

A. Assertion that Petitioner Should have Received a Waiver is Not Material to the Findings the NRC Must Make to Support Denial of an SRO License and Is Not Supported by an Adequate Factual Basis

Ms. Smith contends ~~that~~ a waiver for the operating test was not properly considered.”⁴² She argues that while she ~~was~~ never formally evaluated for a waiver,”⁴³ it was the sponsoring licensee’s intent to submit a waiver request on her behalf prior to submission of the final Form 398.⁴⁴ Because this contention is neither material to the findings the NRC must make to support

³⁹ *Id.*

⁴⁰ *USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 471 (2006).*

⁴¹ *Fansteel, Inc. (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003)* (internal quotations omitted).

⁴² Request for Hearing at 1.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4-5.

the action involved in this proceeding nor supported by an adequate factual basis, it is inadmissible.⁴⁵

Ms. Smith's challenge to not being granted a waiver on the grounds that the sponsoring licensee's initial intent was to request the waiver is not material to the findings the NRC is required to make to support the SRO license denial. To the contrary, the best evidence of the facts reflects that the sponsoring licensee elected not to formally seek a waiver on behalf of Petitioner in the final Form 398. Therefore, the sponsoring licensee's preliminary or inchoate intent is not material. NUREG-1021 does not provide for NRC Staff evaluation of a waiver request absent certification of the request by the facility licensee.⁴⁶ The NRC Staff received the final Form 398 from the facility licensee, and that submission did not request a waiver of the 2012 operating test requirement for Ms. Smith. As the final Form 398 submitted by the licensee did not include a certified waiver request for Ms. Smith, the NRC was not required to make findings reflecting the NUREG-1021 waiver criteria in order to support its denial of an SRO license to Ms. Smith.⁴⁷ Thus, Ms. Smith's challenge to not being granted a waiver is immaterial to the findings the NRC is required to make to support the license denial and is inadmissible.⁴⁸

Ms. Smith's assertion that the NRC Staff inappropriately influenced the licensee's decision not to submit the waiver request⁴⁹ lacks an adequate factual basis. The Request for Hearing cites no document indicating that the NRC Staff ever communicated to the facility licensee that it was prohibited from submitting a waiver request on behalf of Ms. Smith. None of

⁴⁵ 10 C.F.R. § 2.309(f)(1)(iv), (vi).

⁴⁶ NUREG 1021 at ES-204 § C.1.b ("The facility licensee's senior management representative on site must certify the final license application, thereby substantiating the basis for the applicant's waiver request.").

⁴⁷ *Id.* at ES-204 § D.1.

⁴⁸ 10 C.F.R. § 2.309(f)(1)(iv).

⁴⁹ See Request for Hearing at 5 ("It is highly unlikely that a company would submit this information consistently for a period of time and suddenly change the intent to request a waiver unless there was some type of influence."); see also *id.* (describing NRC Staff actions as "inappropriate").

the email conversations cited in the Request for Hearing provide a basis for concluding that the NRC inappropriately influenced the sponsoring licensee. As Ms. Smith notes, the NRC Staff ~~“stress[ed]”~~ to the facility licensee that its prediction that it would deny the waiver request was based on ~~“preliminary answers insofar as [the NRC Staff has] not received/evaluated the actual applications.”~~⁵⁰ None of the documents Ms. Smith cites support anything other than that the sponsoring licensee did not intend to request a waiver for Ms. Smith at the time it submitted the final Form 398. With ~~“no tangible information”~~ supporting Ms. Smith’s assertions of inappropriate influence, they amount to the sort of ~~“bare assertions and speculation”~~ that the Commission holds inadmissible.⁵¹

B. Assertion that the Operating Test Grade Should be Adjusted to a Passing Score is Not Supported by an Adequate Factual Basis

Ms. Smith also contends that ~~“once required to retake the Operating Test, the simulator portion was graded/a[ss]essed incorrectly”~~ due to biased examiners.⁵² Ms. Smith argues that (1) Mr. Bates, Mr. Meeks, and Mr. Capehart were all involved in both the 2011 and 2012 operating test evaluations⁵³ and (2) Mr. Bates, the examiner of record assigned to Ms. Smith for the dynamic simulator portion of the 2012 operating test, ~~“graded [Ms. Smith] with a higher level of scrutiny.”~~⁵⁴ The Commission recognizes the ~~“presumption that governmental officials, acting in their official capacities, have properly discharged their duties.”~~⁵⁵ A claim of examiner bias

⁵⁰ *Id.* at 2.

⁵¹ *Fansteel*, CLI-03-13, 58 NRC at 203.

⁵² Request for Hearing at 1.

⁵³ *Id.* at 12-13.

⁵⁴ *Id.* at 6. It is unclear from the Request for Hearing whether Ms. Smith argues that she was graded more severely than she was graded during her 2011 operating test or that she was graded more severely than other applicants participating in the 2012 operating test. In any event, Ms. Smith does not provide an adequate factual basis for either of these claims.

⁵⁵ *Louisiana Energy Services, L.P.* (Nat’l Enrichment Facility), CLI-06-22, 64 NRC 37, 49 n.48 (2006) (citing *Nat’l Archives and Record Admin. V. Favish*, 541 U.S. 157, 174 (2004)); see also *Eastern*

must therefore include factual support sufficient to overcome this presumption in order to be admissible.

However, Ms. Smith's contention that her operating test grade should be adjusted due to examiner bias is not supported by such an adequate factual basis and is therefore inadmissible.⁵⁶ The Request for Hearing includes no specific factual support for Ms. Smith's assertion of examiner bias. To the contrary, the NRC Staff took steps even beyond those required by NUREG-1021 to ensure examiner objectivity. NUREG-1021 requires that "[t]he regional office . . . not assign an examiner who failed an applicant on an operating test to administer any part of that applicant's retake operating test."⁵⁷ Because Ms. Smith did not fail the 2011 operating test, the NRC Staff was permitted to assign any examiner of record to assess her performance on the dynamic simulator portion of the 2012 operating test. By assigning Mr. Bates as the examiner of record for Ms. Smith's retake, however, the NRC Staff avoided even the appearance of bias. For the same reason, Mr. Bates was not directly involved in the response to the licensee regarding a potential waiver application for Ms. Smith. In any event, Ms. Smith has provided no evidence that any examiner's involvement in either the 2011 or 2012 operating test resulted in bias affecting her SRO exam assessment.

Furthermore, Ms. Smith has provided no tangible information supporting her assertion that Mr. Bates graded [her] with a higher level of scrutiny."⁵⁸ This claim therefore amounts to the sort of "bare assertion[] and speculation" that cannot overcome the presumption that the

Testing and Inspection, Inc., LBP-96-9, 43 NRC 211, 225 n.9 (1996) (noting "the accepted presumption that a government officer can be expected faithfully to execute his or her official duties" (citing *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926))).

⁵⁶ 10 C.F.R. § 2.309(f)(1).

⁵⁷ NUREG-1021 at ES-201 § D.1.a.

⁵⁸ Request for Hearing at 6.

examiners ~~properly~~ discharged their duties”⁵⁹ and thus does not provide an adequate factual basis for the contention.⁶⁰

C. Assertion that the Informal Review of Petitioner’s Operating Test Assessment was Insufficient is Not Supported by an Adequate Factual Basis

Finally, Ms. Smith argues that the informal review of her operating test grade lacked ~~sufficient~~ data to support the denial.”⁶¹ In support, Ms. Smith claims that the reviewers (1) ~~removed some comments” and wrote a new comment[]”;~~ (2) ~~changed the original test outline by defining an error as being a critical task”;~~ and (3) only ~~responded to one [of Ms. Smith’s] comment[s] out of seven.~~⁶²

However, this contention lacks the adequate factual basis required by 10 C.F.R. § 2.309(f)(1) and is therefore inadmissible. Ms. Smith’s assertion that reviewers ~~removed some comments” and wrote a new comment[]”~~ does not support her conclusion that the review panel erred in affirming her failure of the operating test. Upon reviewing the operating test assessment, the review panel identified additional errors in Ms. Smith’s operating test performance beyond what was assigned in the original grading and adjusted the score accordingly.⁶³ The score remained below a passing level after the panel’s adjustment.⁶⁴ Ms. Smith has provided no factual basis for concluding that this adjustment was erroneous.

Similarly, Ms. Smith’s complaint that the review panel identified an error as a critical task does not support her contention that the review was insufficient or lacked supporting data.

⁵⁹ *Nat’l Enrichment Facility*, CLI-06-22, 64 NRC at 49 n.48.

⁶⁰ *Fansteel*, CLI-03-13, 58 NRC at 203.

⁶¹ Request for Hearing at 9.

⁶² *Id.*

⁶³ Summary of Informal Review at 2. “[T]he review determined that there were errors associated with the applicant’s performance that were linked with additional rating factors beyond those noted in the original grading documentation. Beyond the additional error assigned to Competency 3, Control Board Manipulations, . . . there were additional errors that were associated with Competency 2, Procedures, and Competency 5, Directing Operations.” *Id.*

⁶⁴ *Id.* at 1-2.

NUREG-1021 includes in its definition of “critical task” any operation that prevents degradation of any barrier to fission product release.”⁶⁵ NUREG-1021 also states that “[an applicant] begin[s] to make an error that is corrected by a peer checker, [the applicant] will be held accountable for the consequences of the potential error without regard to mitigation by the crew.”⁶⁶ During Ms. Smith’s operating test, she committed an error that was corrected by the shift supervisor. In actual operation, if the error were not corrected, it would have resulted in a small break loss of coolant accident, representing a degradation of the reactor coolant system fission product barrier.⁶⁷ While this error was not originally designated as a critical task, the review panel concluded that it should have been classified as such and adjusted Ms. Smith’s grade accordingly.⁶⁸ Again, the Request for Hearing provides no factual basis for concluding that this adjustment was erroneous.

Finally, Ms. Smith’s assertion that the review panel only responded to one of her comments is incorrect. In fact, “in order to facilitate the re-grading as requested by [Ms. Smith], it was necessary for [the] review to examine all aspects of the applicant’s original NRC simulator scenario grading, not just the grading contested by the applicant.”⁶⁹ For the sake of brevity, however, the review report “only include[d] a detailed discussion of Competency 3, ‘Control Board Operations’ (which resulted in [Ms. Smith’s] examination failure).”⁷⁰ Thus, Ms. Smith’s contention that the review lacked sufficient data because it only considered one comment is not supported by an adequate factual basis.

⁶⁵ NUREG-1021 at Appendix D § D.

⁶⁶ *Id.* at Appendix E § E.

⁶⁷ Summary of Informal Review at 3.

⁶⁸ *Id.* at 2-3.

⁶⁹ *Id.* at 1 (emphasis in original).

⁷⁰ *Id.* at 2.

CONCLUSION

Because Ms. Smith has not timely filed her request via the NRC's EIE system and has not submitted an admissible contention, the Request for Hearing should be denied.

Respectfully submitted,

/Signed (electronically) by/

David M. Cylkowski
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15 D21
Washington, DC 20555
Telephone: (301) 415-1631
E-mail: David.Cylkowski@nrc.gov

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
CHARLISSA C. SMITH)	Docket No. 55-23694-SP
)	
(Denial of Senior Reactor)	
Operator License Application))	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRC STAFF'S RESPONSE TO CHARLISSA C. SMITH'S REQUEST FOR HEARING ON DENIAL OF APPLICATION FOR A SENIOR REACTOR OPERATING LICENSE dated December 31, 2012, has been served over the Electronic Information Exchange, the NRC's E-Filing System, this 31st day of December, 2012.

/Signed (electronically) by/
David M. Cylkowski
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1631
David.Cylkowski@nrc.gov
Date of Signature: December 31, 2012