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Title: Hearing ITMO Charlissa C. Smith

Docket Number: 55-23694-SP

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

Location: Augusta, Georgia

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: :

CHARLISSA C. SMITH : Docket No. 55-23694-SP
: ASLBP No. 13-925-01-SP-BD01

(Denial of Senior :

Reactor License) :

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Thursday, July 18, 2013

Meeting Room A

Augusta Public Library

823 Telfair Street

Augusta, Georgia

BEFORE:

RONALD M. SPRITZER, Chair

WILLIAM J. FROEHLICH, Administrative Judge

BRIAN K. HAJEK, Administrative Judge

1 APPEARANCES:

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8:58 a.m.

CHAIR SPRITZER: All right. Let's go on the record.

This is Ron Spritzer. We are convening again at approximately 9:00 a.m. on Thursday, July 18th. This is our second day of the evidentiary hearing in Ms. Smith's case against the NRC regarding the denial of her SRO license.

We are continuing with the examination of Messrs, Meeks, Capehart, and Bates.

WHEREUPON,

MICHAEL MEEKS, MARK BATES, AND PHILLIP CAPEHART having been called for examination and, having been previously duly sworn, were examined and testified as follows:

CHAIR SPRITZER: Good morning, gentlemen.

And I'll remind you that you're still under oath.

Let me return -- I apologize if I happen to cover some areas we talked about yesterday to some extent, but I don't have the transcript. So, there may be some overlap. I'll try to keep it to a minimum.

Let's go, if we could, to Exhibit CCS-005,

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1 the bottom of page 4. Maybe I have the wrong exhibit
2 number then. All right. Maybe NRC-5. I'm sorry.
3 Bear with me just a minute.

4 (Pause.)

5 Okay. That is CCS-015. Sorry, I missed
6 one number. And we are at the bottom of page 4. I
7 believe we were looking at this document yesterday.

8 Just one point of clarification. There
9 are several blocks in this email with little (b) (6) in
10 parenthesis. Can you tell me what, do you know what's
11 in those otherwise blank blocks and what (b) (6) refers
12 to?

13 MR. MEEKS: Yes, sir. What is in those
14 blocks would be the name for Mr. Wainwright, who would
15 have been the person that I spoke with, both when Mr.
16 Bates and I called him, when we asked the question
17 with the unsigned waiver as to why box 4.f had been
18 checked for Ms. Smith, and then, Mr. Wainwright was
19 the person who had called me back with the response
20 from the facility.

21 So, in the first paragraph, where those
22 blanks are, both of this would have been Mr.
23 Wainwright, sir.

24 CHAIR SPRITZER: And I take it this email,
25 you're sending it to Mr Ehrhardt and this connected

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1 with the so-called fairness review that was conducted
2 for Ms. Smith's application.

3 MR. MEEKS: Yes, sir, that is correct.

4 CHAIR SPRITZER: Now, Mr. Wainwright --
5 this may be a repetition -- but can you state for the
6 record what his areas of responsibility are, as you
7 understand them, at the Vogtle plant? Or let me
8 restate that. What his areas of responsibility were
9 during 2011 and 2012 at the Vogtle plant?

10 MR. MEEKS: Yes, sir. Mr. Wainwright's
11 position was the same for both of those two tests.
12 The Training Manager for the site at the time of the
13 first exam would have been Mr. Brigdon. Below him
14 would have been Mr. Gunn, who was the Operations
15 Training Supervisor. Below Mr. Gunn in the Operations
16 Training Management staff would have been Mr.
17 Wainwright. He was the one who was in charge of their
18 exam group, if you will, of writing all the various
19 test materials that would have been used for the NRC
20 exam.

21 And so, once we had our 120-day or
22 corporate notification call, essentially, Mr.
23 Wainwright became the point of contact, facility point
24 of contact, between nearly all information that we
25 would have with the Vogtle site. If you would like to

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1 reference the letter that we have, the corporate
2 notification letter, it specifies that the two parties
3 on the call, I believe it was Mr. Bates because he was
4 the Chief of record; I was just the Chief in training.
5 And it was Mr. Wainwright was the facility point of
6 contact. And I think we have that in our record. I
7 just don't know what that docket number is
8 specifically, sir.

9 But, once we had that corporate
10 notification call, from that point on, Mr. Wainwright
11 was my point of contact. So, anytime that we had
12 questions or that Vogtle had any issues, he was the
13 one that we would talk to.

14 This is one of the reasons why in the
15 emails which we showed yesterday, specifically the one
16 from June, that one was from Mr. Gunn, who was Mr.
17 Wainwright's supervisor. So, we hadn't had the 120-
18 day phone call. We hadn't, so to speak, set up the
19 relations of Mr. Wainwright as our principal point of
20 contact at that time.

21 CHAIR SPRITZER: Now was Mr. Wainwright
22 your principal point of contact for all issues
23 relating to the exam, including both who would be
24 taking the exam, requesting waivers, the content of
25 the exam? Was he responsible for all those issues?

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1 MR. MEEKS: Yes, sir. From the time of
2 the corporate notification on, he was my principal
3 point of contact. So, even for matters that were not
4 specifically related to writing/developing the test,
5 he would be the person that was the conduit for any
6 information back and forth within the development
7 process.

8 Outside of, so to speak, formal letters or
9 formal packages that would be sent, those would have
10 cover letters which would be signed by other members
11 of the Vogtle licensee. However, for the day-to-day
12 traffic, if you will, for the regular emails or the
13 phone calls, as we developed items, as he would have
14 questions, as we would have issues, as we worked
15 through things from the corporate notification point
16 forward, he was our point of contact, sir.

17 CHAIR SPRITZER: Now was one of his
18 responsibilities to submit to you Vogtle's proposed
19 operating exam and written exam for the 2012, March
20 2012 test?

21 MR. MEEKS: Yes, sir. He would have been
22 in charge of writing/developing that. And he would
23 have had those materials authorized by his management.
24 But he was ultimately the person who was the most
25 involved in that process, sir.

1 CHAIR SPRITZER: And was there anybody on
2 the exam team that was particularly involved in
3 working with him about the submission of the proposed
4 tests?

5 MR. MEEKS: Do you mean from the NRC team,
6 sir?

7 CHAIR SPRITZER: Yes, the NRC team.

8 MR. MEEKS: Yes, sir. During the process,
9 during the preparatory time from the time where we
10 start from the corporate notification call to the time
11 where we give the operating test, it's the job of the
12 Chief to liaison, if you will, and to do most of the
13 work preparatory to the actual test. So, the two
14 people that Mr. Wainwright was in contact with was
15 myself and Mr. Bates.

16 CHAIR SPRITZER: And that's because Mr.
17 Bates was the Chief Examiner for the March/April 2012
18 exam and you, as I understand it, were -- what's the
19 term? -- Chief Examiner in Training or --

20 MR. MEEKS: Essentially, yes, sir, I was
21 the Chief Examiner in Training. As part of our
22 qualifications, the final step to become a qualified
23 Chief Examiner on your own is that you must
24 essentially serve as a Chief under the supervision of
25 a previously-qualified Chief who has to essentially

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1 supervise everything that I would do. So, in a way,
2 Mr. Bates and I worked in lockstep, as it were,
3 through the process, sir.

4 CHAIR SPRITZER: Can you recall when the
5 Vogtle plant submitted the proposed exams to you for
6 review? Again, we're talking about the March/April
7 2012 exam.

8 MR. MEEKS: Sir, I don't know the precise
9 dates. Some of the dates would be listed in the
10 corporate notification letter, sir, if staff could
11 find it.

12 What I can say is that, if you look in the
13 NUREG-1021, which, sir, that's CCS-005a, and the
14 ES-201 Section, which is, generally speaking, covering
15 the process, the development process. So, ES-201, if
16 you look at the end of that section, sir, you'll see
17 there's a form -- I think it's 201-1 -- which lays out
18 the general timeline of the normal process. And the
19 timeline is based upon the date where we start the
20 operating test, and it has due dates as to dates prior
21 to that. And so, you'll see dates such as 120 days,
22 which is our corporate notification call.

23 We will have outlines which are due 75
24 days prior to the test. We will have what we call the
25 draft submission, which is due 45 days before the

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1 test. Preliminary applications are due 30 days before
2 the test. Final applications are due 14 days before
3 the test. And then, I think there's something at the
4 seven-day point, sir. But it lists it out. So, at
5 the very end of the Section ES-201, it is Form 201-1,
6 I believe. And so, the dates for this particular test
7 would have been tied to those due dates, sir.

8 CHAIR SPRITZER: As far as you can recall
9 for the March/April 2012 exam, were the deadlines
10 generally complied with?

11 MR. MEEKS: Sir, yes, but there was one
12 change. During the corporate notification call, we
13 had asked Mr. Wainwright if Vogtle would have been
14 able to provide what's called the 45-day submittal,
15 which is where they provide us with a full set of the
16 test, both the written exam and all the operating test
17 items.

18 We had set a date that was a little bit
19 earlier than the 45-day point. As I recall, Vogtle
20 asked us for slightly extra time on the written exam
21 because they wanted to do extra work validating it
22 before they brought it to us.

23 And so, there was a slight delay in
24 receiving the written exam. Ultimately, Mr.
25 Wainwright and Mr. Thompson drove it into us in a big

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1 box, and they handed it to us. But we had adequate
2 time to review it, sir.

3 CHAIR SPRITZER: When were the operating
4 and written exams finally approved by the NRC
5 examination team?

6 MR. MEEKS: Sir, the operating test
7 portion would have been approved by Mr. Widmann. He
8 would do that by signing certain QA forms, which are
9 part of the NUREG. They would be in Section ES-301.

10 The operating test portion would have been
11 authorized first. We still had work left to be done
12 to finalize on the written exam, and the written exam
13 was, I believe, approved slightly later. But Mr.
14 Widmann was the ultimate authority who would have
15 authorized both the operating test portion and the
16 written exam, sir.

17 CHAIR SPRITZER: Okay. Do you know when
18 he did that or not? In relation to when the exam
19 actually took place? I mean, does that typically
20 happen a few days before or months before?

21 MR. MEEKS: Yes, sir. It normally happens
22 probably the week prior to any last-minute changes on
23 one or two items. Normally, the operating test would
24 be authorized. We would provide the whole package to
25 Mr. Widmann. It would, then, have several signatures

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1 on the QA forms. And that is normally done probably
2 one to two weeks before the operating test, sir.

3 CHAIR SPRITZER: And is that also true for
4 the written exam? Are they typically approved, get
5 the final approval in the same timeframe?

6 MR. MEEKS: Written exams vary, sir.
7 Normally, the written exam will be given one or two
8 weeks, let's say, after the operating test. Due to
9 the detailed nature of the written exam going through
10 all 100 questions, sometimes we might need to
11 authorize the operating test first and, then, the
12 written exam might actually be authorized after the
13 operating test.

14 I don't specifically recall the timeframe
15 for the March 2012 Vogtle exam. However, Mr. Widmann
16 would have authorized the written exam, and then,
17 there would be a formal notification letter to the
18 facility, once he had signed the written exam, which
19 would formally notify them that they were authorized
20 to give the written exam, because we are not
21 physically present when the written exam is given at
22 the site, sir.

23 JUDGE HAJEK: What's the internal process
24 in the region for reviewing these exams and
25 authorizing them? I know what you have described.

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1 But what I didn't hear is the Chief Examiner reads
2 through every question and approves each question.
3 And then, it goes to Mr. Widmann, and does he read
4 through every question and revalidate the questions?
5 Or how does that work in terms of your interaction
6 with the plant and doing those approvals?

7 MR. MEEKS: Yes, sir. The process starts
8 at the 75-day point. If you see there what we call
9 the outlines, that's the first time that we see
10 details of what the facility is preparing for our
11 tests. So, they use the forms listed on this form,
12 which essentially gives us the titles and the topics
13 and the general structure of what the operating test
14 is going to be.

15 So, we have QA checks that we would, then,
16 do, reviewing to make sure that it meets all the
17 various requirements in the NUREG to, for instance,
18 make sure every applicant has the minimum number. On
19 the JPMs, we have to verify that each JPM goes to a
20 different safety function, so on and so forth. And
21 then, we give comments back to the facility normally
22 within a five-day period on those outlines.

23 At the 45-day period is when they send us
24 the full test, both the operating test with all the
25 details and the written exam with all the questions.

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1 So, the operating test, changes should have been made
2 from the comments when we sent them on the outlines.
3 When we see the written exam, our process is that we
4 fill out a very detailed form, which is known as the
5 ES-401-9 form, sir, if you want to call up that form.
6 That is in ES Section 401, and it's Form 401-9.

7 And on this form, sir, the Chief will go
8 through each and every question. There are a series
9 of checks that we have to do. We categorize each
10 question. We look for any flaws in this question.

11 And in the case for the March 2012 Vogtle
12 exam, and in any case where you have essentially a
13 Chief in training and a Chief of record, both
14 individuals will review all questions. So, I did a
15 review of all 100 questions, as did Mr. Bates, and
16 then, we compared notes. And we sent one copy to the
17 site that reflected both of our inputs, sir.

18 JUDGE HAJEK: So, at that point, you are
19 actually looking at each question and validating each
20 distractor? And then, basically, you two would
21 complete that?

22 MR. MEEKS: Yes, sir. Validating might
23 not be the proper term. The questions are validated
24 by the facility for technical accuracy. And then, we
25 look for technical accuracy, but we're also looking

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1 for psychometric attributes for any possible flaws
2 with the question, logical issues, and the various
3 checks that you see from this form, sir.

4 And beyond just what is listed on the
5 form, it is a very detailed review that we do. If you
6 would like -- I do not believe that it is part of the
7 hearing file -- but we could provide you with a copy
8 of the ES-401-9 form that we did for Vogtle. It's
9 about 60-65 pages, sir.

10 JUDGE HAJEK: And then, when you are
11 finished with that, it goes to the plant. It
12 eventually goes to Mr. Widmann. What actually does he
13 do? Is it primarily a signature or does he do the
14 same -- does he review the QA process that you've
15 done?

16 MR. MEEKS: Sir, there's one more step.
17 When we send this form to the licensee after we have
18 received the written exam at the 45-day point,
19 normally, it will take us maybe two-and-a-half, maybe
20 three weeks to go through everything and to send it
21 back to the licensee.

22 They, then, have to make changes to make
23 sure that any area where the written exam question
24 does not meet the standard listed in the NUREG, they
25 have to make changes. They might have minor changes

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1 to make based on recommendations that we have. They
2 might have major changes to make. And in some cases,
3 they might have to even totally change the questions
4 that they submit at the 45-day point.

5 After they have gone through their second
6 review and their changes, based on our comments with
7 the 401-9, they send us what we call the final
8 submission. And it's at that point that we will
9 normally meet with the facility individually.
10 Normally, they will come into Region II. We will put
11 up every single written question on a screen and, as
12 a team, both within the NRC and the facility, we will
13 go through every single question to verify that it's
14 good and it meets our standard. And it's only at the
15 end of that process that the test is preliminarily
16 finalized.

17 Once they send us the final copy with all
18 the various changes made from the 401-9 review, from
19 the in-office review that we have within the Region,
20 then, when Mr. Bates and I, as the Chief, are
21 satisfied that the test is ready to go, then we
22 forward it up to Mr. Widmann for his final signature.

23 It's my understanding that Mr. Widmann
24 might not look through every single question, but he
25 will spot-check certain questions. And I know on the

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1 Vogtle exam I think he might have come back and he
2 might have asked me questions on one or two issues
3 that he just wanted to have clarified.

4 So, I do not believe Mr. Widmann looks at
5 every single question. He might spot-check one or two
6 or he might look at a few. But that's our process,
7 sir.

8 MR. CAPEHART: I would like to add one
9 additional statement to yours that I think was
10 overlooked. You mentioned validation. We do not
11 validate the questions. The plant validates the
12 questions. So, when he was discussing the 401-9
13 issues and the discussion with the licensee, after
14 they make the changes that we reference against the
15 quality standards of the NUREG, they will take
16 operators that are under the Security Agreement to
17 practice taking those questions to see how well they
18 perform on those and see if there are any other issues
19 that arise. Then, they provide that information back
20 to the Chief Examiner to see if any other
21 modifications need to take place. So, there is a
22 back-and-forth process that goes on long before the
23 final product is delivered to the Branch Chief for his
24 approval.

25 JUDGE HAJEK: You mentioned the operators

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1 under, you said --

2 MR. CAPEHART: Security Agreement.

3 JUDGE HAJEK: -- Security Agreement. So,
4 I describe that group at times as somewhat of existing
5 on an island separate from the rest of the plant and
6 the training department. So that their exam is not
7 compromised.

8 How many people are in, typically, how
9 many staff members of the plant are part of that group
10 of secured, those who have signed the security form?

11 MR. BATES: It varies from site to site,
12 from exam to exam. I would say that it could vary by
13 as much as maybe on the low end 20 folks signed onto
14 the Security Agreement and maybe double that on the
15 high end for some plants.

16 Some of it depends on how many iterations
17 the validation takes, because they need unbiased
18 operators to continue to look at future revisions of
19 the exam. They can't use the same operators to get a
20 clean look at the exam.

21 So, anybody developing the exam, anybody
22 validating the exam has to be on that Security
23 Agreement. So, there is a fair amount of variability
24 from site to site, exam to exam.

25 JUDGE HAJEK: Did Mr. Wainwright have any

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1 of the responsibilities you referred to, validating
2 the exam and --

3 MR. MEEKS: Well, sir, Mr. Wainwright's
4 job would have been to coordinate that. So, he would
5 have worked with Operations. He would know who was in
6 his pool, if you will, of licensed operators that he
7 could draw on. And so, he would essentially
8 coordinate that validation, and then, he would be the
9 one who would be collecting the data that the
10 validators provided, and then, making any potential
11 changes to the written exam questions, sir.

12 JUDGE HAJEK: Did he sign the Security
13 Agreement that you mentioned?

14 MR. MEEKS: Yes, sir, he did.

15 JUDGE HAJEK: And what does that Security
16 Agreement require that he not do?

17 MR. MEEKS: Sir, would you please call up
18 CCS-005? It is in ES-201-1, and it's Form 201-3. So,
19 it's one or two pages after the timeline form that we
20 had up earlier. So, ES 201, I believe it's Form
21 201-3.

22 And, sir, basically, the first paragraph
23 or the very top paragraph on that form details all of
24 the duties of the individuals who would have to sign
25 into that form, sir.

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1 CHAIR SPRITZER: Now because of the
2 Security Agreement -- well, let me just ask the
3 general question. To your knowledge, did Mr.
4 Wainwright have any role at Vogtle in 2011 or 2012 in
5 deciding who, which plant employees would take the
6 operating exam?

7 MR. MEEKS: Sir, I do not have any
8 knowledge of the processes that Vogtle uses to choose
9 their class size. So, I really can't speak to that,
10 sir.

11 CHAIR SPRITZER: What about on deciding
12 who would apply for waivers? To your knowledge, do
13 you know whether he had any role in that?

14 MR. MEEKS: Beyond the fact that he had
15 stated to me that he had knowledge the facility was
16 not planning to submit the waivers, I don't believe
17 that Mr. Wainwright specifically would have been
18 someone who had decided that or not. No, sir. He
19 would have knowledge of it potentially, based on when
20 he spoke with us, but he would not have decided that.
21 That would have probably been made at a higher level,
22 sir.

23 CHAIR SPRITZER: So, to find out about
24 that, he would have to communicate with other people
25 in the plant?

1 MR. MEEKS: Yes, sir, that is my belief.

2 JUDGE HAJEK: But she was your primary
3 contact. In many of these emails and in your
4 statements you commented that you had several contacts
5 with Mr. Wainwright where the issue of Ms. Smith's
6 waiver had come up, and he had confirmed in every one
7 of those that there was not going to be a waiver
8 submission for her.

9 And then -- and I'm not recalling the date
10 -- but the situation was that you received preliminary
11 forms. You called him back at that time, and it took
12 him two days to confirm the answer he had been giving
13 to you over the past several months. Is that a fair
14 summary of what happened there?

15 MR. MEEKS: Yes, sir. Following the
16 corporate notification call, once again, when the --

17 JUDGE HAJEK: So, the 120-day call?

18 MR. MEEKS: Yes, sir. When we had set up
19 the fact that Mr. Wainwright was my principal point of
20 contact for all matters relating to this test, when
21 the concern over whether Ms. Smith would receive an
22 operating test waiver, when that came up in subsequent
23 talks, we were specifically looking at the class size.
24 And so, several times, as we went through our process,
25 when he would drop off things or we would talk, we

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1 would ask him, "Please keep us up-to-date. Has the
2 class size changed at all?" Because the class size
3 determines the minimum number of scenarios and the
4 number of events that we have to develop.

5 And so, since we had the situation where
6 we had a very large class size -- we started off, I
7 think, with about 24 applicants, and that was counting
8 the six retake applicants -- we were just simply
9 verifying when we did receive reports of how many
10 people would be taking the op test, how many people
11 would be taking the written exam. We just wanted to
12 verify in that count: are you counting Ms. Smith?
13 Are you still planning on her taking both parts? And
14 he said yes.

15 And so, those were the conversations that
16 we had subsequent to the corporate notification call.
17 And then, when we resigned applications, that's when
18 we initiated the call that we have referenced before
19 with him, sir.

20 CHAIR SPRITZER: You mentioned a 120-day
21 call. Is that the right term?

22 MR. MEEKS: Yes, sir, that's our phrasing.
23 Due to the timeline, it could be called, also, the
24 corporate notification call, and it is followed, once
25 we have set the various due dates with the facility,

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1 it is followed formally with a letter to the facility
2 licensee, sir.

3 MR. WACHUTKA: Your Honors, for the
4 record, the letter memorializing the corporate
5 notification call is CCS-018.

6 JUDGE HAJEK: So, you are having these
7 discussions about class size with Mr. Wainwright, is
8 that correct?

9 MR. MEEKS: Yes, sir.

10 JUDGE HAJEK: But he's not involved --
11 he's only involved with development of the test, not
12 with deciding on performance issues, so members of the
13 class that might affect class size, is that correct?

14 MR. MEEKS: Sir, during our preparation
15 time, we never talked about how the class was doing.
16 We never asked about how any applicants were doing.
17 It simply wasn't relevant. We were simply asking
18 about the overall numbers.

19 And so, that would probably be something
20 that he would know if the class size changed. We were
21 not asking about how is so-and-so doing. We simply
22 didn't know, and we didn't really get the final list
23 of who was going to be in the class until our prep
24 week, sir.

25 MR. BATES: But I would like to add that,

1 due to the nature of the Security Agreement and the
2 restrictions that that imposes, the folks with
3 knowledge of the exam, the folks that are on the
4 Security Agreement are very restricted in the
5 interaction that they can have with the class. It's
6 virtually zero. They cannot train them. They cannot
7 give them performance feedback. So, they are somewhat
8 removed from that aspect of the training and
9 preparation of the applicants.

10 JUDGE HAJEK: Okay. That part I think I
11 understand. I know I understand that part. But what
12 I'm not understanding relative to that, though, is why
13 Mr. Wainwright would be your expert contact on the
14 size of the class, if he's not to have any contact
15 with that element of the entire operation within the
16 Training Department. Why wouldn't you have a contact,
17 another contact, to talk about class size who would be
18 from outside of the development team?

19 MR. BATES: Some of those conversations
20 naturally fall out with the exam authors, which Mr.
21 Wainwright was the primary author of the exam, and Mr.
22 Meeks and myself. Because the amount of materials
23 that need to be developed are dependent on the class
24 size, so there was kind of a natural fit for a lot of
25 those conversations to take place: how many

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1 applicants will be taking the exam, then how much exam
2 material needs to be developed, so that everybody gets
3 the minimum required portions of the operating test,
4 both JPMS and the simulator scenarios.

5 JUDGE HAJEK: Okay. So, when you're
6 talking with him about class size and relating to how
7 many simulator scenarios you have to have and what the
8 crew size is going to be, and what the mix between
9 instant seniors, upgrade seniors, ROs, and the need
10 for surrogates is concerned, why does it continually
11 seem to come in those discussions that you have with
12 Mr. Wainwright that Ms. Smith might be one of the
13 wildcards in that system? I mean, why was she
14 different from anybody else in the class? You know,
15 we're going to have 22; we're going to have 24. It
16 shouldn't make a whole lot of difference who, but it
17 just seems in your communications that her name keeps
18 coming up.

19 MR. MEEKS: Well, sir, when we talked to
20 Mr. Wainwright about class size following the
21 corporate notification call, it was maybe once or
22 twice. So, it was not continually. It was maybe as
23 we're leading up into prep week, we knew that the
24 class was getting ready to take their audit, which
25 would be the final determining factor as to who would

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1 or would not sit for the NRC exam.

2 So, when we asked them, it was maybe once
3 or twice during the development process when he gave
4 us numbers, and those numbers changed potentially, we
5 were trying to clarify, because of Ms. Smith's status
6 as the applicant, that he had communicated to us that
7 they were not going to submit the operating test
8 waiver. The reason that her status mattered was that,
9 if she was going to take the operating test, then we
10 would have to factor that in. If she wasn't,
11 potentially there would be fewer simulator scenarios
12 and possibly fewer JPMS needed to be developed.

13 So, that was just the context of those
14 talks, and it was only once or twice, sir. It was not
15 a constant thing.

16 JUDGE HAJEK: I am still not clear on why
17 her name ever would have come up because it just seems
18 to me that whoever the candidate was that they might
19 have dropped at whatever time, prior to the audit
20 exam, at the time of the audit exam, it really
21 shouldn't have made any difference whatsoever.

22 MR. MEEKS: Well, the difference, again,
23 sir, is that I believe when Mr. Wainwright gave us
24 numbers, it was essentially numbers of people taking
25 the operating test, numbers of people taking the

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1 written, or he could have potentially said, "Well,
2 these are the retakes. These are the numbers of
3 people in HL-17." And we were just verifying, are we
4 counting correctly, so we have the minimum number?
5 And that was the only issue, sir.

6 JUDGE HAJEK: I understand. I understand
7 the need to count for the minimum number, so that you
8 can come up with the right mix of scenarios and the
9 right plan in terms of mixing SRO candidates with RO
10 candidates, and that sort of thing.

11 I'm just struggling, trying to understand
12 why her name ever would have come up, partially
13 because I believe in perhaps your response, one of
14 your responses to Mr. Widmann or Mr. Ehrhardt, you
15 explained how almost immediately after the 2011 exam
16 the examiners had a conversation about who might be
17 eligible for waivers and who might not be. I don't
18 know it was driven internally, but it looked from the
19 communications like it perhaps was driven by an
20 inquiry that may have come from the plant to Mr.
21 Widmann directly, and then, passed on down to the
22 examiners, asking who might receive waivers.

23 And it almost seems like a decision was
24 made internally that a waiver would have been
25 discouraged for Ms. Smith back in maybe April of 2011.

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1 And so, I'm confused as to why, if the decision had
2 already been made, why did it keep coming up after
3 that? And why did her name keep coming up in class
4 size discussions?

5 MR. MEEKS: Sir, it might be useful if you
6 would refer to NRC-013, which sets out kind of as a
7 timeline the series of emails, some of which we talked
8 about yesterday, sir. Maybe page 4.

9 JUDGE HAJEK: I only have one page. I'm
10 sorry.

11 MR. MEEKS: So, if you look at this email,
12 sir, this is an email from Mr. Capehart to myself.
13 This is the timeframe where the facility is looking to
14 potentially have a retake exam in the very short
15 timeframe following Ms. Smith's first exam and before
16 the March 2012. And so, this is right after we had
17 given the first exam. We had just finished
18 documenting things.

19 And essentially, what I believe happened
20 was that Mr. Brigdon, who was the Training Manager at
21 the time, had talked with Mr. Widmann, and they were
22 talking about the possibility: can we schedule this?
23 Do you have availability? How would you evaluate our
24 potentially six retake applicants?

25 And so, this is the phase at which we were

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1 working. We had just finished with the first test.
2 We had just finished the documentation.

3 And so, Mr. Capehart, as the Chief of that
4 exam, was essentially Mr. Widmann's point of contact.
5 He independently asked myself with this email, Mr.
6 Hopkins in a separate email, as to how we would
7 evaluate waiver for a possible retake exam.

8 And so, at this point, I had reviewed Ms.
9 Smith's 303. I had actually read the 303s for
10 everyone from the class. It's a typical practice
11 because you want to make sure that any comments that
12 you have for your applicants are reflected on the rest
13 of the class or that any comments that might be on
14 somebody else's applicant that had impact on yours
15 essentially fit, and that we don't miss anything and
16 that everything works well as a whole.

17 And so, when this email came out, I was
18 actually at a training class, and I responded to this
19 email in the followup email, which is the next page,
20 sir. And then, you have an email from Mr. Capehart to
21 Mr. Widmann, again, where he is stating that all three
22 of us, Mr. Hopkins, Mr. Capehart, and myself, believe
23 that, after looking at the class, when you're looking
24 at the potential for a retake exam, that we felt that
25 Ms. Smith's performance was a concern. And it was

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1 passing performance, but it was marginal performance.
2 It was not as good as the rest of the class. It was
3 not as good as what we saw with an average operator.

4 And so, all three of us fed that back to
5 Mr. Widmann, who then contacted Mr. Brigdon with our
6 input for the potential for the retake test. So, this
7 was the first, if you will, evaluation for that
8 retake.

9 The facility decided not to have that
10 retake, and they notified us. I think Phil, Mr.
11 Capehart, probably mentioned to me they're not going
12 to do the retake; the six retake applicants are going
13 to go with the next regularly-scheduled class.

14 And so, at that point, since I knew that
15 I was going to the Chief in Training for that next
16 class, I essentially became the point of contact at
17 that point.

18 So, having looked at the potential waiver
19 for the retake exam, if you move on to the next page,
20 sir, or the second page, the next email is the email
21 from Mr. Gunn to myself on June the 7th. The blacked-
22 out name at the top, sir, is Mr. Gunn. So, that would
23 be Mr. Wainwright's supervisor. He was the Operations
24 Training Supervisor, and this is the email where they
25 split out into two separate groups.

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1 The reason he was writing me was that,
2 during the end of the first exam, I had spoke with
3 both Mr. Gunn and Mr. Wainwright, and I had told them
4 that I was going to the Chief in Training for the next
5 exam. And so, that's why he was using me as a point
6 of contact.

7 And essentially, again, there was a delay,
8 there was a lag in my getting back to Mr. Gunn. And
9 so, if you look at the next email where I respond to
10 him, it's not until August.

11 And so, this is the point where the
12 second, if you will, evaluation happened. Now it has
13 been some time since we have given the first exam.
14 And now we are looking at the possibility of the
15 retake applicants who would have a decent time to go
16 through their retraining program, about a year. And
17 we looked again, now with the passage of time. What
18 I did was I went back through again and I reread all
19 of the 303s for those six applicants. And I wanted to
20 decide whether the opinions would have changed from
21 the time in May to the time in August.

22 And so, what happened to respond to Mr.
23 Gunn's email on August the 2nd, before that email went
24 out, we had had a meeting with Mr. Capehart, myself,
25 and Mr. Widmann to talk about the email that Mr. Gunn

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1 had sent to us. At that time, I had --

2 JUDGE HAJEK: I'm sorry, say that again.

3 You said, "We had a meeting with Mr. Capehart" --

4 MR. MEEKS: Myself and Mr. Widmann, sir.

5 JUDGE HAJEK: And the "we" is?

6 MR. MEEKS: The three of us, myself, Mr.
7 Meeks, Mr. Capehart, Mr. Widmann.

8 JUDGE HAJEK: Okay. Not Mr. Bates?

9 MR. MEEKS: No, sir. Mr. Bates was not
10 present at this meeting.

11 JUDGE HAJEK: Okay.

12 MR. MEEKS: So, when we had this meeting,
13 I had reviewed Ms. Smith's 303s. We provided detailed
14 comments to Mr. Widmann about why we believed that Ms.
15 Smith was not a good candidate for the operating test
16 waiver. We had concerns over how she had done on her
17 first exam, even though she had passed.

18 And that was at the time that Mr. Widmann
19 notified us that the language and the message that we
20 should send to the facility, because the email from
21 Mr. Gunn was well before our normal process -- this
22 is, again, in June -- so, it is well, well before we
23 would normally start off the typical exam development
24 process.

25 Mr. Widmann notified us that the message

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1 to the licensee would be that we would likely deny the
2 waiver, that we felt confident about the operating
3 test waivers for the five of the six applicants, but
4 for Ms. Smith we would likely deny. And that was
5 based upon our review of how she had done on the first
6 exam. She had demonstrated various weaknesses, and we
7 felt that it would be prudent to evaluate her, if she
8 were to retake the test.

9 And so, this is the second point, if you
10 will, where we're not thinking about the retake. Now
11 we're having the meeting. How would we evaluate?
12 What is our message to the licensee at this point?
13 And so, this is the meeting between Mr. Widmann, Mr.
14 Capehart, and myself, where we talk about the details
15 of how Ms. Smith did.

16 Before I sent this email --

17 JUDGE HAJEK: I'm sorry, I just want to
18 make sure that I'm clear on the date. So, that would
19 have been prior to August 16th?

20 MR. MEEKS: It would either have been that
21 day or probably the day before, yes, sir. So, this
22 would be August the 15th or August the 16th, when we
23 had that meeting.

24 JUDGE HAJEK: Okay. And I don't mean to
25 upset your train of thought process here, but on that

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1 day, then, August 15th or 16th, or so --

2 MR. WACHUTKA: Your Honor, I apologize.
3 If I could clarify real quick? I believe that the
4 email that's up on the screen now isn't the email Mr.
5 Meeks has been referring to.

6 JUDGE HAJEK: Sorry?

7 MR. WACHUTKA: If you go a couple of pages
8 down, it's an August 2nd email. So, I believe that
9 -- and Mr. Meeks can confirm -- I believe that the
10 date would be a day or two before August 2nd, not
11 August 16th.

12 MR. MEEKS: Yes, sir, I'm sorry. I was
13 looking here at the August 2nd email, and I didn't
14 realize it was on the screen. So, it would have been
15 either Tuesday, August the 2nd, or the day before.

16 JUDGE HAJEK: Okay. So, you had a meeting
17 between yourself, Mr. Capehart, and Mr. Widmann?

18 MR. MEEKS: Yes, sir.

19 JUDGE HAJEK: About the 1st of August?

20 MR. MEEKS: Yes, sir, concerning the
21 possibility of the operating test waivers for the
22 March 2012 exam.

23 JUDGE HAJEK: Okay. And it sounds like
24 the results of that meeting were that the decision was
25 made at that point to very -- I'm going to use my

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1 words here -- to very probably deny a waiver. And you
2 had done the analysis of her 303 from the 2011 exam at
3 that time or prior to that time, the 1st of August?

4 MR. MEEKS: Yes, sir. I had read the 303s
5 both in May for the retake, before I had left the
6 Region to go to my training class, and then, I reread
7 them in August because the passage of time had taken
8 place. So, yes, sir, I had reread all six applicants'
9 303s.

10 If you will, I will explain my reasoning,
11 if you will, as to why we would likely deny -- why I
12 made that recommendation, sir.

13 JUDGE HAJEK: Yes, I would appreciate
14 that, you doing that, yes. But, also, is there a
15 record of that decision at that time?

16 MR. MEEKS: Besides this email record, no,
17 sir, I do not believe so. That was just a meeting
18 between Mr. Capehart and myself. We had been part of
19 the previous team with our supervisor to determine how
20 would we respond to this email. So, it was a formal
21 meeting, and I do not believe that there was a record
22 kept, sir.

23 JUDGE HAJEK: Okay. Go ahead with what
24 you're --

25 MR. MEEKS: Sir, if you could call up

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1 CCS-007?

2 And so, once again, sir, this is the 303
3 documentation for the first exam Ms. Smith had. If
4 you would look at page 3, sir, to begin with?

5 So, in August, when I was reading this,
6 the first thing that came to me is, quite frankly,
7 just the simple number of comments that are shown here
8 on this page. Most of the applicants that we see will
9 have four, maybe five, comments. That would be a
10 rough estimate as the average number.

11 And so, what you see is 12 comments. And
12 so, just the simple number of the comments, the simple
13 fact that they're spread out through many different
14 rating factors, there doesn't seem to be one specific
15 problem. That was the first thing that I saw.

16 If you look at Rating Factor 2c,
17 Procedures, Correct Use, you will note that Ms. Smith
18 received a rating factor score of 1 for that, and you
19 will see the comment page numbers on the side. That
20 is 12 through 16, showing that Ms. Smith received four
21 comments there. So, if an applicant receives three
22 comments in a rating factor that are not associated
23 with the critical task, then you receive the lowest
24 score, which is a 1. Any more comments that the
25 person receives will be documented, but they do not

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1 lower the score because the lowest score is a 1. So,
2 that also is something that we don't normally see,
3 where there is more than three comments for one rating
4 factor.

5 Also, if you would look at, I believe,
6 page 15, this is, again, talking about the procedures
7 comments. And when I reviewed the comments, under
8 Procedure Usage, both on page 15 of 22 and finishing
9 up on page 16 of 22, and then -- excuse me -- on page
10 14 of 22 -- excuse me -- starting on page 14 of 22, 15
11 and 16 of 22, there are two procedure usage comments
12 related to performance of an EOP procedure which we
13 call FRH-1, titled "Loss of Secondary Heat Sink".

14 These were comments that were generated
15 based on errors that Ms. Smith made during what is
16 known as the feed-and-bleed portion of this procedure.
17 The feed-and-bleed portion is the last line of defense
18 when it comes to a loss of secondary heat sink.
19 You've tried to restore feedwater to your steam
20 generators by every possible means. And then, when
21 you have no other recourse, you have to go to what we
22 term feed-and-bleed cooling. So, it's a very critical
23 moment at that time. And I noted that Ms. Smith had
24 two documented errors at this time. So, I felt that
25 that had safety consequences. Even though they

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1 weren't critical tasks, they were errors that had been
2 made during a critical moment during the simulator
3 scenario.

4 And the final thing that I noted, if you
5 go back to page 2, sir, of this document, that's the
6 record of Ms. Smith's JPMs. You will note that Ms.
7 Smith did not fail any JPM. However, there are
8 several comments noted, and when I read those comments
9 -- for instance, if you go to page number 8, these are
10 comments about operations of a diesel generator. And
11 you will see that there are several errors in
12 procedure usage here. And so, I assessed that there
13 might be cross-cutting errors there or errors in
14 procedure uses that she demonstrated on a simulated
15 JPM here, which although it did not lead to a failure
16 of that JPM, it tended to verify in my mind that there
17 were serious issues with procedure usage, both during
18 a normal system operating procedure and during a very
19 serious casualty procedure, such as FRH-1.

20 And so, these were the basis of the
21 comments and the recommendations that I made to Mr.
22 Widmann with Mr. Capehart present as to the fact that
23 these are things that we didn't see with the other
24 five applicants. They performed better and, moreover,
25 just looking at this one person, we felt that it was

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1 something that we didn't see for the average
2 applicant. And so, that was our rationale behind
3 telling the facility licensee that we would likely
4 deny the waiver if it was asked for, sir.

5 JUDGE HAJEK: So, this was approximately
6 -- okay, I'm struggling with the dates a little bit
7 here. So, this was looking at the 303 before you went
8 away after Mr. Gunn's email was sent. And then, you
9 looked at it again when you came back prior to, at the
10 time of this August 1st meeting?

11 MR. MEEKS: Yes, sir, that is correct.

12 JUDGE HAJEK: Okay. But you also had
13 looked at her 303, I believe, contemporaneously with
14 the post-exam review and scoring with Mr. Hopkins, is
15 that correct?

16 MR. MEEKS: Yes, sir, Mr. Hopkins called
17 me and that would have been before the series of
18 emails in May.

19 JUDGE HAJEK: Okay. And your testimony or
20 responses, I think, to Mr. Ehrhardt were that Mr.
21 Hopkins wanted to have failed her, but he did not have
22 enough -- he didn't have the appropriate distribution
23 of these errors in order to lower the scores on the
24 competencies to enable a failure and wanted to take
25 advantage of the enabling paragraph in the NUREG.

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1 MR. CAPEHART: Can I respond to that
2 question?

3 JUDGE HAJEK: Yes. Sure.

4 MR. CAPEHART: As the Chief Examiner of
5 record, Mr. Hopkins and Mr. Meeks were functioning
6 with me as the Chief for that exam. Following the
7 simulator portion of the exam, Mr. Hopkins came to me
8 and expressed his concern that he believed at that
9 time that she had failed the simulator portion of the
10 exam. I referenced him at that time to go to the
11 NUREG, to the 303 section, and follow through with the
12 grading and the process, because we have seen this
13 several times in the past.

14 It is very difficult to fail the simulator
15 portion of the exam because of the weighted
16 distribution of the rating factors. You have to fail
17 in several different competency areas to even approach
18 a failure.

19 So, based on that process, he subsequently
20 came back to me and said, "Well, she passed per the
21 rating factor criteria. However, there is a statement
22 in the NUREG under the examiner standard 300 section,
23 which is on page 148, if you want to refer to that.
24 And under (d) there, about the third statement in, it
25 says, "An examiner may conclude that an applicant's

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1 performance is unacceptable even though the documented
2 deficiencies would normally result in a passing
3 grade."

4 And he inquired to me at that time, "Can
5 we use that statement to end up with a failure for the
6 simulator portion of the exam, even though it was
7 documented to be a pass?" And I told him that would
8 be precedent-setting; I personally did not feel that
9 that was reasonable, but I would talk to the Branch
10 Chief, Mr. Widmann, about that. I did not believe we
11 had a precedent to do that action. And we
12 subsequently decided that that was not the path we
13 were going to take.

14 CHAIR SPRITZER: Why? Did you actually
15 talk to Mr. Widmann about that possibility? What did
16 he say to you?

17 MR. CAPEHART: He basically stated the
18 same thing. "This would be precedent. We don't want
19 to go there because it would require so much
20 documentation," that he didn't feel like, with her
21 being borderline, at best we would wait and see.

22 And subsequently, as I said, she ended up
23 not passing the written exam. So, from that
24 standpoint, with the borderline pass/fail, that is why
25 we were so forceful at that point that we will need to

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1 see her again in the most performant and dynamic
2 portion of the exam, see her again in a simulator in
3 2012 to make another determination.

4 CHAIR SPRITZER: Which would require that
5 you deny a waiver, if she applied for one?

6 MR. CAPEHART: That was my standing at
7 that point, and that's what I told Mr. Meeks when he
8 became the Chief Examiner for the next exam, that that
9 was my reference.

10 MR. MEEKS: And, sir, if I could just
11 clarify, during the phone call that Mr. Hopkins had
12 with me, I do not believe that he ever stated that he
13 wanted to fail Ms. Smith. When he documented the 303
14 forms, and he went through the various errors,
15 essentially, what he told me was that he thought that
16 it would have resulted in a failure. And since the
17 numbers did not result in a failure, he was basically
18 wondering: is there any other pathway? Had Region II
19 ever done this before? But the performance was of
20 such a concern on his part that he called Mr. Capehart
21 and he talked about that with us.

22 JUDGE FROEHLICH: Mr. Capehart, in light
23 of the conversation you just relayed involving Mr.
24 Hopkins and, I guess, Mr. Widmann, had Ms. Smith
25 received, let's say, one point more on her written

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1 exam in 2011, she would have received the operator's
2 license, wouldn't she have?

3 MR. CAPEHART: That's correct.

4 JUDGE FROEHLICH: And would have you
5 raised a protest or done anything differently than
6 what happened here?

7 MR. CAPEHART: No, sir.

8 JUDGE FROEHLICH: I mean, the license
9 would have been issued had she gotten, I guess, one
10 more point on the written test?

11 MR. CAPEHART: That's correct, sir, but I
12 will reference that she originally didn't score as
13 high as you make it out to be, because there was two
14 portions that she has to pass for the written exam.
15 There's the overall portion, which you're referring to
16 was within one point, but the SRO, the only portion
17 she scored is 64. She has to receive a 70 to pass
18 that portion. So, she still would not have failed
19 with one more --

20 JUDGE FROEHLICH: Okay. Had she done 64
21 to 70 on the SRO portion --

22 MR. CAPEHART: Actually, she could have
23 passed the overall, but not passed the SRO, and she
24 would not have received a license.

25 JUDGE FROEHLICH: And then, in normal

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1 course, Region II would have issued her a license, had
2 those scores been slightly higher or somewhat higher
3 on the written side? In spite of the concerns you had
4 on the operating side, that license would have been
5 issued?

6 MR. CAPEHART: Correct.

7 CHAIR SPRITZER: Was it your intention --
8 I think you indicated you hadn't yet received the
9 written examination scores at the time you had this
10 discussion with Mr. Widmann about whether she should
11 possibly -- whether you should possibly take this
12 precedent-setting action of failing her on the
13 operating exam, even though her score was passing.

14 MR. CAPEHART: I would correct that. I'm
15 not sure that was before the written exam, because we
16 usually take several weeks to process the
17 documentation. Following the operating exam, the
18 written exam normally follows the operating exam
19 within a week or two. So, I believe we had already
20 finished the grading and the documentation of
21 everything, including the written exam, before I spoke
22 with Mr. Widmann. So, we already knew the
23 determination was that she had failed the written exam
24 and, then, the discussion of the potential waiver came
25 up later.

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1 CHAIR SPRITZER: Now was that a factor,
2 that is, that she had failed the written exam? Was
3 that a factor in your decision not to pursue what you
4 referred to as the precedent-setting action of also
5 failing her on the operating exam?

6 MR. CAPEHART: Based on the timeline, I
7 can't say for sure one way or the other. But, I mean,
8 it was obviously already in her mind that her
9 performance was borderline at best from the 2011 exam.
10 Like I can't state my frame of mind because of
11 -- actually, over those three weeks, we're processing
12 all the documentation from the 303. As you can see,
13 based on hers, there was 22 pages, I believe, of
14 documentation just for hers. We had 10 other
15 applicants and we had seven failures. So, there was
16 an extreme amount of documentation that occurred for
17 that exam. So, we weren't concentrating specifically
18 on her. We had a lot of other applicants we were
19 looking at.

20 CHAIR SPRITZER: Mr. Meeks, I have a
21 different question for you. Is the 303 form, is that
22 sometimes referred to as an Individual Examination
23 Report?

24 MR. MEEKS: Yes, sir. When we talk about
25 the 303s or the 303 forms, that is one of the other

1 terms used for that, yes, sir.

2 CHAIR SPRITZER: Can we have on the screen
3 CCS-014 at page 15? I believe this is the handwritten
4 page, 15. Well, yes, handwritten page 15.

5 Do you see the paragraph that begins, "The
6 Manager...."? And I take it this is Mr. Ehrhardt. It
7 says, "The Manager also determined that M. Meeks did
8 not review the Applicant's 2011 Individual Examination
9 Report before administering the 2012 examination in
10 order to ensure he remained unbiased." Do you see
11 that sentence?

12 MR. MEEKS: Yes, sir, I do.

13 JUDGE HAJEK: Is that a correct statement?

14 MR. MEEKS: Sir, I'm not sure just what
15 the timeline of what Mr. Ehrhardt wrote. Essentially,
16 once we had the August meeting and we had the round of
17 emails, that was the last time before we went to
18 actually give the 2012 test that I looked at Ms.
19 Smith's 303. So, that might be what Mr. Ehrhardt
20 meant by that.

21 Obviously, since I was a part of the first
22 exam, then I would have knowledge of her 303 during
23 that documentation process. So, strictly speaking, it
24 is not true that I had never seen it. It is, to be
25 more technically correct, the last time before I gave

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1 the 2012 operating test that I reviewed or read or
2 even essentially thought about the first 303 form was
3 in August, when we had the series of emails with Mr.
4 Gunn. Because, after that, when we had the corporate
5 notification call, Mr. Wainwright told us that they
6 weren't going to be putting in the operating test
7 waiver; there was no reason to go back and to look at
8 it. That was a previous exam. We were getting ready
9 for the next exam, and it just wasn't relevant data at
10 that time.

11 CHAIR SPRITZER: But if what I'm
12 understanding from this paragraph is true, Mr.
13 Ehrhardt said it's true, you would not, in fact, have
14 reviewed her Individual Examination Report in August
15 of 2011, as I think you had described to us at some
16 length earlier.

17 MR. MEEKS: Sir, I believe that the
18 statement here is referring to the fact that, in the
19 time leading up to the 2012 exam, I did not review her
20 first 303 forms. The last time that I looked at those
21 303 forms before the 2012 exam was during the
22 timeframe in that August meeting and, then, with those
23 emails, sir.

24 JUDGE HAJEK: What was the date of the
25 120-day phone call?

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1 MR. MEEKS: Sir, I think the letter is in
2 October of 2011.

3 Staff, if you could look at that, please?
4 It would reference the phone call date.

5 MR. WACHUTKA: Your Honor, CCS-018 states
6 that the telephone conversation was October 12th,
7 2011.

8 CHAIR SPRITZER: Is there any difference
9 between -- well, let me ask, was there a 120-day
10 meeting? Is there something distinct from the 120-day
11 call called a 120-day meeting or are they the same
12 thing, essentially?

13 MR. MEEKS: Sir, the first part of this
14 process is to have the conference call between the
15 Regional Office within the NRC and the facility
16 licensee representative. And so, that's what I'm
17 referring to as a corporate notification call or the
18 120-day call. That's the first step.

19 And then, this letter essentially
20 formalizes or finalizes the various arrangements and
21 due dates that we work out through that phone call,
22 sir.

23 CHAIR SPRITZER: But is there something
24 separate called a 120-day meeting, I guess is what I'm
25 trying to figure out.

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1 MR. MEEKS: I don't believe so, no, sir.
2 It is a conference call. In this case, it was myself
3 and Mr. Bates who had called Mr. Wainwright and Mr.
4 Thompson. And then, this is a letter that sets a
5 record, if you will, of the various due dates that the
6 facility agreed upon, and it set some of the policies
7 that we'll be following as we prepare the test, sir.

8 CHAIR SPRITZER: Is there any other
9 document you prepare besides the corporate
10 notification letter, either for public use or
11 internally, following that 120-day call?

12 MR. MEEKS: Sir, I'm not sure what you're
13 asking. Are you talking about documents for the exam
14 itself or --

15 CHAIR SPRITZER: No, just a document. Are
16 there any other documents memorializing or recording
17 the content of the 120-day conference call other than
18 the corporate notification letter?

19 MR. MEEKS: Sir, not on the part of the
20 NRC. I do not know what records might have been kept
21 by staff at Vogtle, sir.

22 JUDGE HAJEK: So, I am struggling to
23 understand the difference here -- and this, I think,
24 is what a lot of this is about -- between making a
25 statement to the plant that a waiver for Ms. Smith

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1 would likely be denied and making a statement to the
2 plant that would just say: submit the 398 and give us
3 a chance to evaluate it. And then deny the waiver.

4 Internally, relative to Region II offices,
5 what difference does it make whether you take the
6 actual action to deny a waiver? I'm looking at the
7 record of conversations here, and I get the impression
8 back that you're really working hard to keep the plant
9 from submitting a request for a waiver, so that you
10 don't actually have to take action to deny a waiver.

11 And given the data in NRC-008, where I
12 believe there was only one actually denied waiver
13 identified, and I think that was Operator 47 in that
14 list, the very last one in the table, clearly, there
15 is not a lot of experience -- I don't know whether
16 that is only in the Region or nationally -- in waiver
17 denials.

18 But it just seems, as we read the record,
19 that you didn't want to need to do that particular
20 process, denial process. Why should I read it
21 differently from that kind of inference or taking that
22 inference?

23 MR. BATES: If I can answer this a little
24 bit from a process standpoint, it's a benefit for the
25 facility licensee to understand that the other five

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1 would likely get the waiver because that allows them
2 to manage their training resources to prepare those
3 applicants on maybe the one part that they need to,
4 and not necessarily concentrate so hard with them on
5 the operating test portion.

6 So, it is kind of looking at it from the
7 other perspective; is that the benefit to the
8 licensee, we extend a courtesy occasionally to let
9 them know preliminary status, so that they can manage
10 training resources to decide how they need to prepare
11 their applicants for the upcoming exam.

12 So, the benefit would be for the other
13 five, knowing that they would likely receive a waiver
14 of the operating exam because that would change the
15 way that they would prepare them. It would change the
16 training resources needed to prepare them for the
17 exam.

18 JUDGE HAJEK: I think that I understand
19 that, and I think that is a very beneficial process
20 for you to provide to the plant. But it diverts us
21 from understanding what the reason was for not just
22 telling the plant, "Doggone it, get it over with.
23 Submit a 398."

24 What process was going to be followed that
25 you were trying to avoid? I'm inferring from what I

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1 read that -- I mean, it reads that way, and I need to
2 have my inference either changed or confirmed.

3 MR. MEEKS: Your Honor, we were not trying
4 to avoid anything. We were simply, with a phone call
5 which we made to Mr. Wainwright, we were trying to
6 verify information as to, given the fact that he had
7 told us several times that they were not going to
8 submit a waiver, and then, the fact that on the
9 unsigned application we saw that box checked,
10 essentially, we just wanted to verify that that was
11 correct data before we began the process, which wasn't
12 going to be burdensome necessarily. It was just
13 verification, at least in our mind.

14 We had several emails, obviously, before
15 this unsigned waiver. They were with other people
16 probably than the people who had developed the
17 unsigned waivers. And we were simply verifying data.
18 There was no burden. There was no attempt to
19 influence them not to submit. We were just verifying
20 data, sir.

21 JUDGE HAJEK: So, as Judge Froehlich
22 asked, Mr. Capehart, had she scored one more point --
23 and I understand she needed --

24 MR. CAPEHART: Needed more than one point.

25 JUDGE HAJEK: -- maybe four more points --

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1 MR. CAPEHART: Correct, three to four --

2 JUDGE HAJEK: -- concentrated in the SRO
3 category. Okay. I fully understand that.

4 So, let's say she had scored those four
5 points or had that different point distribution, and
6 had an 80. -- she had, I think a 79.9 or something
7 like that.

8 MR. CAPEHART: 79.59.

9 JUDGE HAJEK: Seventy --

10 MR. CAPEHART: 79.59.

11 JUDGE HAJEK: 79.59. So, if she had
12 scored an 80.59 with the 70 percent in the SRO
13 category, then she would have gotten a license, is
14 that correct?

15 MR. CAPEHART: Well, that's not as clear-
16 cut as you make it sound because you have to
17 understand the process. The reason why the number is
18 a weird number to begin with was because, following
19 the 2011 written exam, there were several post-exam
20 comments and some appeals that had to be followed up
21 with. So, she ended up getting back a point on the RO
22 portion of the exam because the question was dropped,
23 and there was a similar situation on some of the SRO
24 questions. So, actually, her score started out lower
25 than that. So, her score was raised based on those

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1 post-exam comments, but it still didn't end up being
2 a pass.

3 But, going directly to your question, yes,
4 if she had passed, gotten a significant number of
5 points back in the SRO only, that would have raised
6 her score above the minimum of 70, and ended up with
7 better than an 80 overall, and she would have passed
8 the written exam, and then, she would have
9 subsequently received a license, that's correct.

10 JUDGE HAJEK: And there would have been no
11 further discussion?

12 MR. CAPEHART: That's correct. We would
13 followed the process as written. That's why we have
14 the NUREG standard. It's cut scores. It's based on
15 overall performance. Like I say, we didn't like her
16 performance in the simulator operating arena. The
17 Examiner of record was adamant. He thought her
18 performance was borderline at best. He was surprised
19 that the overall rating factors weighed out with a
20 passing score and, like I said, wanted to use that
21 never-used section of the NUREG, which, in my opinion,
22 it's a subjective call of the NUREG, which is why it
23 is there.

24 It also has the comment in there that you
25 can go the other way. If someone passed, you can use

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1 your judgment, your professional judgment, to say,
2 even though they passed, you want to fail them, or
3 vice versa. So, it gives you either option in the
4 NUREG to go outside the scoring dynamic.

5 CHAIR SPRITZER: Has Region II ever used
6 that second option? That is, someone who failed,
7 passing someone who failed?

8 MR. CAPEHART: Not to my knowledge.

9 MR. BATES: And I would like to add that,
10 as an Examiner or Chief Examiner, we don't make the
11 licensing decision. The lowest level of authority to
12 make that licensing decision would be the Branch Chief
13 within Region II. So, discussions would take place on
14 performance, and it would be up to the Branch Chief to
15 decide whether or not any of the statements would
16 allow either a pass, when the numbers don't reflect
17 that, or a fail, when the numbers don't reflect that.
18 But those decisions would be up to the Branch Chief in
19 consultation with the exam team.

20 JUDGE HAJEK: You provided us with a lot
21 of data in NRC-008, with a lot of discussion about a
22 number of comments. And it was all directed or the
23 data was concentrated on folks who had received
24 waivers or who had applied for waivers. And except in
25 a single case, everyone had received a waiver.

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1 But kind of going back to the question I
2 just asked, had she scored greater than 80, she would
3 have gotten a license, and so --

4 MR. CAPEHART: I wouldn't say that that's
5 true necessarily. Like I said, as Mr. Bates stated,
6 I would not make that decision by myself. I would
7 submit the paperwork to our Branch Chief and then
8 discussion with him and the Examiner of record, who,
9 like I said, he was pretty upset by the way the
10 process worked. There may have been more forthcoming.
11 We didn't have to take that path, obviously, because
12 of the failure of the written exam.

13 JUDGE HAJEK: So, I have two questions.
14 I had one, but, you know, you caused me to have two,
15 which is okay.

16 So, how many times has there been a pass,
17 a marginal pass, on paper where the Branch Chief then
18 said, "Golly, this candidate is so marginal. Let's
19 just deny the license and have this candidate retake
20 the exam."?

21 MR. CAPEHART: In my six years I've never
22 had this occur. Normally, the average number of
23 comments is four to five. As Mr. Meeks stated
24 earlier, the overall pass rate is in the 90
25 percentile. So, we don't encounter this very often.

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1 I've never encountered it in my six years of scoring
2 exams.

3 JUDGE HAJEK: So, average number of
4 comments is four or five?

5 MR. CAPEHART: Yes, sir.

6 JUDGE HAJEK: So, if you have a candidate,
7 let's say -- I mean, where does the cutoff come in
8 saying, "Golly, these are too many comments."?

9 MR. CAPEHART: There is no standard for
10 number of comments. The standard is based on the
11 overall rating factor in competency areas. And if
12 they fall below 1.8 overall in the competency areas,
13 then that's a failing grade. There's also other
14 failure criteria in the 300 section of the NUREG.

15 JUDGE HAJEK: Yes. And so, you have no
16 standard where the number of comments are going to
17 cause, necessarily cause a failure?

18 MR. CAPEHART: Well, we do have a
19 standard.

20 JUDGE HAJEK: You do?

21 MR. CAPEHART: It's the 300 section of the
22 Examiner. We have an Examiner standard. It's based
23 on the distribution of the performance deficiencies in
24 those rating factors. And those performance
25 deficiencies are based on the comments that are

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1 annotated during the monitoring of the simulator
2 scenario performance.

3 CHAIR SPRITZER: Is that different from
4 the scoring? Or are you talking about the scoring
5 process?

6 MR. CAPEHART: That is the scoring
7 process, correct.

8 CHAIR SPRITZER: So, comments are factored
9 into the scoring for the simulator scenarios, right?

10 MR. CAPEHART: Well, they're just comments
11 until we follow up. That's why we caucus at the end
12 of the scenario to see if the comments are related to
13 performance deficiencies or they could be
14 misunderstanding on our part. It could be of a
15 technical nature. There could be followup discussion
16 to see what competency area, what rating factor, the
17 comment falls into. We may define it as a performance
18 deficiency, but we are not sure which rating factor it
19 falls into until we follow up with a followup question
20 to the applicant to see if it's a knowledge
21 deficiency, if it's a procedure usage deficiency, if
22 it's a communication error, those kinds of details.

23 MR. MEEKS: Sir, if --

24 CHAIR SPRITZER: I just want to follow up
25 with Mr. Capehart.

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1 That discussion you referred to takes
2 place between all the Examiners?

3 MR. CAPEHART: Correct.

4 CHAIR SPRITZER: Now when you say you're
5 trying to figure out whether a particular comment
6 rates being treated as a performance deficiency, is
7 that the same thing as rating it as -- what's the
8 term? -- critical or non-critical?

9 MR. CAPEHART: It could be. A critical
10 task is -- normally, we just grade on what's called
11 competencies. We don't grade on the results of the
12 error, whether it's significant or not. The only
13 exception to that would be a critical task. Then, the
14 NUREG speaks to the fact, if it's a critical task,
15 there is safety significance associated with that
16 grading. So, it weights heavier.

17 CHAIR SPRITZER: As I understand it, that
18 winds up being a two-point deduction. You go from a
19 three down to a one --

20 MR. CAPEHART: Correct.

21 CHAIR SPRITZER: -- if it's critical? If
22 it's non-critical --

23 MR. CAPEHART: If it's one comment, it's
24 go from a three to a two. If it's two comments in the
25 same area, it goes from a two to a one, unless you

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1 provide justification to give a point back. If it's
2 more than two, then it goes down to a one.

3 CHAIR SPRITZER: Now it sounds to me as
4 though the rating system is designed to factor in the
5 scoring, both the number of comments and their
6 content, their substance. Is that a fair statement?

7 MR. CAPEHART: That's a fair statement.

8 MR. MEEKS: Sir?

9 CHAIR SPRITZER: Let me continue with this
10 witness for a moment.

11 I want to understand, then, why do we
12 need, then, after we've done the scoring, which has
13 taken into account both the number of comments and
14 their substance, why do we then need to go back and
15 look again at the number of comments?

16 MR. CAPEHART: We don't normally look at
17 the number of comments at all. The only reason we
18 looked at those comments is because of this Appeal
19 Panel wanting us to go back and look at the fairness
20 of her performance in the simulator portion compared
21 to everybody else. So, the obvious way to do that is
22 look at all the number of all comments and to break
23 those comments down into the rating factors and
24 competencies that were distributed on the grading
25 form.

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1 CHAIR SPRITZER: When you say "this Appeal
2 Board," you mean this Board sitting here today or the
3 so-called informal Review Panel?

4 MR. CAPEHART: Oh, both.

5 CHAIR SPRITZER: Both?

6 One problem, it seems to me, there would
7 be with this comment-counting approach is let's take
8 somebody who gets a lot of non-critical comments; say
9 10. If I understand what you're telling me, they
10 would typically, assuming the comments are distributed
11 over a number of different rating factors, get 10
12 points, more or less, taken off.

13 MR. CAPEHART: That's not a good way to
14 look at it because, like I said, the reason why it's
15 very difficult to fail the simulator portion is
16 because, if you have 10 comments but they're
17 distributed over all the rating factors, you still end
18 up with a greater than 1.8 and you pass. So, you
19 could have a significant number of comments and still
20 not fail.

21 CHAIR SPRITZER: No, I understand that.

22 MR. CAPEHART: It just depends upon where
23 the grouping falls. So, if you have, for example, a
24 lot of comments, a lot of performance deficiencies
25 that exhibit themselves in the control board

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1 operations, then you possibly fall below the 1.8 in
2 that arena.

3 CHAIR SPRITZER: Sure. But I guess what
4 I'm getting at is this, and tell me what you think.
5 It seems to me, if you just look at the number of
6 comments as opposed to the rating system or the
7 scoring system, which requires you to look at both the
8 number and the content, if you just look at the number
9 of comments, aren't you going to bias your analysis
10 against somebody who gets a large number of
11 relatively-minor comments as compared to someone who
12 has maybe only a few comments, but they're more
13 serious and lead to higher scoring deductions?

14 MR. CAPEHART: Well, the NUREG takes that
15 into account. You know, we don't rate comments on
16 minor or major. The comments are based upon a noted
17 performance deficiency associated with a competency.
18 They are given the opportunity, and that's why we do
19 the validation upfront. We do the preparatory week,
20 which shows to distribute all the competency
21 evaluations among the different crew members, and they
22 have all been given the appropriate amount of
23 opportunities to exhibit.

24 Now sometimes they exhibit other
25 deficiencies that weren't even taken into account in

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1 the scenario because of their own activities that they
2 perform. So, obviously, if they performed something
3 that was outside of what we estimated them to do, and
4 it was incorrect, they still get deducted. They still
5 get a performance deficiency, a competency rating
6 factor downgrade for that area.

7 But it also takes into account like I
8 understand what you're saying, that some applicants
9 may receive a third scenario versus a second scenario.
10 But that has to do with the distribution of the
11 arrangement of the board operators relative to the
12 scheduling. We have certain criteria we have to meet,
13 but no operator will ever get more than one more than
14 the minimum number of scenarios that we need to have
15 them in the position to perform the proper evaluation.

16 MR. MEEKS: Your Honor, sir, if I could
17 maybe answer your question to Mr. Capehart in a
18 slightly different vein, I would say that when we are
19 scoring the test, when we're documenting it and we are
20 scoring it, we follow the process that is given in the
21 NUREG ES-301, which is based upon the numerical rating
22 factors and the number JPMS that are passed or failed.
23 That is how we score the test.

24 And once we have finished with that
25 scoring, if we are talking, for instance, about

1 looking at a potential operating test waiver, we want
2 to look beyond just those numbers. And so, it's not
3 that we're looking at the number of comments and we're
4 overlooking the scores. We're looking to see if the
5 scores could potentially mask a deeper performance
6 problem, such as was shown in the rating factor to
7 Charlie, where you have more than three deficiencies
8 that were non-critical.

9 So, any number of subsequent errors in
10 that rating factor would not show up on the score.

11 So, when we are looking at a waiver, we are outside
12 the strict bounds of our scoring mechanism; we look at
13 the overall performance. And so, we look at even a
14 JPM that was passed, there could have been errors
15 demonstrated. And so, that's where, when we say the
16 number of comments, that's the realm that we are using
17 it in.

18 We don't specifically use the number of
19 comments when we score the applicants, but when we are
20 overall looking at their performance for something
21 such as an operating test waiver request, obviously,
22 we wouldn't look at an operating test waiver for
23 anyone who would not have passed. So, it is only
24 those who are, if you will, marginal passing that we
25 would even really evaluate to the depth that we did.

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1 And so, we are using the number of comments in a way
2 as something of a metric of non-critical errors that
3 might not have shown up in the actual numbers.

4 CHAIR SPRITZER: The NUREG provides you
5 direction, very specific direction, on how to do the
6 scoring, does it not?

7 MR. MEEKS: Yes, sir, it does.

8 CHAIR SPRITZER: As I understand it,
9 though, it provides no direction on how you are to
10 evaluate a request for a waiver other than considering
11 the scoring.

12 MR. MEEKS: That is correct, sir. And so,
13 when we look at an applicant's documentation and the
14 record of how they performed, we want to look at the
15 overall performance, not just one area. We look at
16 every area. And we try to assess with our best
17 judgment as to whether it would be prudent or not to
18 grant an operating test waiver, sir.

19 CHAIR SPRITZER: Is there any standard
20 that you could use that you can refer us to for how
21 many comments is too many?

22 MR. MEEKS: Beyond the actual grading
23 criteria of the NUREG, no, sir, I do not know of any
24 standard that provides us with guidance as to number
25 of comments or how to evaluate a potential operating

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1 test waiver, no, sir.

2 MR. CAPEHART: Yes, I would also say it
3 doesn't have to do with the number of comments; it's
4 the significance of the errors that were made in the
5 comment area, the competencies that were evaluated.

6 CHAIR SPRITZER: All right. Just one more
7 question on this and I'll finish.

8 Wouldn't the significance of the comments
9 that you just mentioned already be reflected in the
10 scoring?

11 MR. CAPEHART: I would start by saying,
12 obviously, if it was a critical task, which there was
13 no critical task missed in our 2011 evaluation which
14 would have demonstrated itself by a more significant
15 downgrading or scoring in the rating factor area.
16 But, again, it depends upon -- that may not
17 necessarily be true because, obviously, are
18 communication errors a more significant competency
19 than board errors? No, they're not, and the NUREG
20 speaks to that. It talks specifically to the fact
21 that you need to show or demonstrate more errors in
22 communication for them to be weighted as heavy as
23 other areas or competencies, such as board operations
24 or directions, if you are the SRO.

25 MR. MEEKS: And then, sir, one other

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1 factor is that, when we are looking at someone's
2 overall performance on the operating test, for
3 instance, if you think about Ms. Smith's 303
4 documentation for the first exam, she did not fail any
5 JPMs. However, there were other comments that were
6 non-critical errors that were made.

7 And so, what we are trying to do is to
8 come up with a metric within the Region or as we
9 evaluate the overall performance as to number of
10 comments essentially relating somehow to number of
11 non-critical errors made.

12 CHAIR SPRITZER: Can we bring up CCS-003?

13 Have you seen this exhibit before? This
14 was prepared by Ms. Smith.

15 MR. MEEKS: Yes, sir.

16 CHAIR SPRITZER: Now, if I'm reading this
17 correctly, only one person on the 2011 exam got all
18 the administrative topics or had zero failures on
19 administrative topics, zero failures on the
20 walkthrough. And that was Ms. Smith, is that correct?

21 MR. CAPEHART: I can answer that. That's
22 correct. There was no unsatisfactory performance.
23 However, there were, as we said, several comments, six
24 comments on those JPM portions.

25 CHAIR SPRITZER: Had she got more comments

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1 on the JPM portion than any other --

2 MR. CAPEHART: I would have to defer. I
3 didn't do the analysis to see that, but that's a
4 significant number of comments.

5 CHAIR SPRITZER: Well, when you looked at
6 the comments, after you have considered her score in
7 light of the comments, where would you rank her in
8 terms of performance on the JPM and walkthrough
9 compared to the other applicants?

10 MR. CAPEHART: I did not perform an
11 analysis of that. I mean, it's a significant number
12 of comments. Usually, we see maybe one to three
13 comments for the overall JPM portion.

14 CHAIR SPRITZER: Did any of the either two
15 witnesses do that?

16 MR. MEEKS: Yes, sir, in my pre-filed
17 statement of testimony, NRC-006, I go through the
18 comparisons between Ms. Smith and the rest of that
19 class there.

20 CHAIR SPRITZER: And where would you rank
21 her based on that comparison?

22 MR. MEEKS: Well, sir, you have to look at
23 the various areas, and you have to assess how Ms.
24 Smith did. The fact that she did not fail any JPMS
25 means that she did not make any critical errors on

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1 those JPMs. So, the fact that she didn't vis-a-vis
2 the other applicants, I mean, that's a positive. The
3 fact that there are non-critical errors made, and some
4 of the other applicants, you know, also made non-
5 critical errors, that's something else that you have
6 to factor in. And that's not reflected in simply the
7 number of passes versus failings.

8 MR. BATES: If I may add, the pass/fail
9 criteria for job performance measures typically comes
10 down to whether or not an applicant correctly performs
11 a given number of what we term "critical steps" within
12 that JPM. An applicant can make several errors in the
13 process of performing a task, but still get a
14 successful rating or a satisfactory rating on a JPM.
15 They potentially could make several errors that would
16 reflect, had it been made during the simulator
17 scenarios, in one of the rating factors. However,
18 because they were able to use their procedures maybe
19 to correct the error, and in the process didn't do any
20 harm to the plant, in the end they are able to
21 traverse to the endpoint that them a satisfactory
22 grade. However, they potentially could have exhibited
23 several weaknesses in various operator competencies.

24 CHAIR SPRITZER: I understand all that,
25 but what I'm trying to figure out is how you take

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1 somebody who has gotten zero failures, the only person
2 in the class, this class, apparently, who got zero
3 failures on the administrative topics in the
4 walkthrough. So, she has done as well as you possibly
5 can do, as I understand it, is that correct, in terms
6 of not failing anything?

7 MR. MEEKS: Well, sir, she has not failed
8 anything, but she has made several errors that are not
9 critical. So, it's not perfect performance. There
10 were several deficiencies documented.

11 CHAIR SPRITZER: Can you tell me anything
12 other than it's kind of a subjective evaluation that
13 you do as to how you factor in the non-critical
14 comments to the lack of any failures and determine
15 where this person lies in terms of overall performance
16 compared to the other applicants.

17 MR. MEEKS: Well, sir, one of the reasons
18 why number of comments is a potential metric, if you
19 will, as to how an applicant performs when you're
20 trying to look at the JPM performance vis-a-vis a
21 simulator scenario performance, is to understand that,
22 even if an applicant were to, let's say, pass every
23 single JPM and make non-critical errors that are
24 documented on the 303 forms, had those same errors
25 hypothetically been made during the simulator

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1 scenario, then those same errors would have resulted
2 in a downgrade in the score.

3 So, although they did not result in a
4 direct failure of an individual JPM, again, trying to
5 relate/compare the overall performance, I use the term
6 "metric" looking at non-critical errors, because,
7 obviously, a critical error on a critical step of a
8 JPM would result in a failure.

9 So, essentially, trying to come up with a
10 quantitative measure, looking at the number of
11 comments, if you had a non-critical error comment made
12 on a JPM -- let's say a simulator control room JPM --
13 and that same error would have been made during the
14 dynamic simulator scenario, then we would have
15 documented that and it would have resulted in a
16 downgrade. However, since it was a JPM, that same
17 error doesn't show up in the scores or the pass/fail
18 rating, sir.

19 CHAIR SPRITZER: Does the grading system
20 set forth in the NUREG authorize you to do that when
21 you are computing the score for the simulator grades?

22 MR. MEEKS: No, sir, I'm not talking about
23 the formal grading/scoring process. What I'm talking
24 about is, when we're evaluating the overall
25 performance for something such as this, when we're

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1 talking about granting a routine operating test
2 waiver.

3 CHAIR SPRITZER: Now, looking at the
4 waiver using the methodology you just described, is
5 that something you developed just for Ms. Smith? Or,
6 to your knowledge, has that been used for any other
7 waiver applicant?

8 MR. MEEKS: Sir, during the timeframe of
9 the emails that I spoke about, both in May and in
10 August, we were not looking at number of comments vis-
11 a-vis anybody. Essentially, we were rereading and
12 analyzing each of the individual applicant's 303
13 forms.

14 It was only subsequent to that, as we were
15 making preparations for this hearing, that we
16 developed Table NRC-008 and, subsequently, I believe
17 it's Board 003 with the follow-on data that you asked
18 for, sir.

19 So, it is only for the Board that we have
20 had this data. We do not normally go into such depth.
21 Essentially, what the chart NRC-008 is trying to show,
22 that there are deficiencies that are not explicitly
23 noted when you're only looking at pass/fail or on the
24 numbers of the simulator scenario rating factor
25 scores, sir.

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1 JUDGE HAJEK: Let me go back to Mr.
2 Capehart and my question that we were discussing: had
3 she received a 70 in the SRO and an 80, at that point
4 in time the license would have been granted? Most
5 likely or --

6 MR. CAPEHART: I would have not made the
7 decision. That would have been up to my Branch Chief.
8 You know, you have to make a professional judgment and
9 provide inputs to make a licensing basis on the
10 competency of the operator. Like I said, the Examiner
11 of record felt very strongly that she did not perform
12 at a minimal competency level. But that would have
13 been discussion at that point, if we had reached that
14 point. We never had that discussion, as I said,
15 because, upon concluding that she had not passed the
16 written examination --

17 JUDGE HAJEK: I understand.

18 MR. CAPEHART: -- we made the
19 determination that we would see her again anyway.

20 JUDGE HAJEK: Have you ever had that
21 discussion with any other candidate and made a
22 decision that a license should not be granted?

23 MR. CAPEHART: No, sir, I've never had
24 this happen before.

25 JUDGE HAJEK: Are you aware of anyone else

1 -- that is, throughout the country -- who has ever had
2 that?

3 MR. CAPEHART: I think there was one in
4 our Region, if I'm not mistaken. I would have to
5 defer to the two other examiners here. I don't know
6 of one.

7 JUDGE HAJEK: So, I want to kind of
8 compare operators who passed the exam a little bit.
9 Your table that you prepared, NRC-008, I understand
10 the purpose of that was to look at waivers, waiver
11 candidates specifically. But one of the emphases in
12 that table is that Ms. Smith had an average of 2.47
13 score on her competencies in 2011 and had, I think, 12
14 total comments on the simulator exam. They were
15 actually in the testimony. There were two numbers
16 there given to us. One was that she had nine, and
17 another that she had twelve, but I think twelve is the
18 correct number.

19 But, if I look at other candidates who
20 have passed -- so, she had a 2.47 -- and Mr. Meeks had
21 probably the most descriptive language to describe the
22 reason that she would have likely been denied a waiver
23 was that she was an unsafe operator, and there was a
24 concern about public health and safety. And I think
25 that was carried a little bit too far in some of its

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1 other descriptions that aren't attributed to him. But
2 the emphasis there was on the 2.46, the 12 comments,
3 the six comments in JPMs.

4 So, if I look at another candidate who
5 might have passed, or let's say who actually did pass,
6 a 2.47, 12 comments -- six comments, is that what it
7 was on JPMs?

8 MR. MEEKS: Yes, sir. There were six
9 total. There was one comment on the admin JPMs, and
10 then, there were five on the system --

11 JUDGE HAJEK: Five on the other. So,
12 that's a measure, in your mind, of an unsafe,
13 potentially unsafe, operator?

14 MR. MEEKS: Sir, not just based on the
15 numbers or the number of comments, but based upon
16 watching how that individual did during the operating
17 test. So, it's more than just numbers. It's more
18 than just comments. It's what errors were made. You
19 have to look at it overall.

20 So, numbers are one metric, but we also
21 read the comments and we can make a judgment as to, is
22 this comment kind of a high-level comment? Is it more
23 of a minor comment? Because we don't document based
24 on the consequences of a comment. We document and we
25 grade based on the competencies.

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1 So, there may be comments that lower
2 someone's number, some of them, from our professional
3 judgment, might be more serious and some might be more
4 minor. So, it's not just the numbers or the metrics.
5 It's an overall assessment based on our best
6 professional judgment as to whether it would be
7 prudent or not to reevaluate someone on a followup
8 exam.

9 JUDGE HAJEK: But if a person has, let's
10 say, an average score of 2.46, below what Ms. Smith
11 had, and has 10 comments on this 10 -- that's two less
12 than her -- on the simulator exam, has six comments on
13 JPMS, two of which might have been critical, causing
14 them to fail two JPMS, but passed their written exam,
15 that person then gets a license or would he have been
16 reviewed in the Region and a decision carefully made
17 as to whether the license should be granted?

18 I had the feeling from Mr. Capehart that,
19 well, if you have a 2.46 -- and I'm putting words in
20 your mouth; I don't mean to do that. I am just making
21 my evaluation based upon what you said earlier. If a
22 person has passed the simulator exam with an average
23 score of 2.46, he has passed the walkthrough, having
24 failed two JPMS -- you can fail three and still pass,
25 but we'll just fail two -- and had a greater than 80

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1 percent score, he still gets a license. And the
2 quality of his comments will never be questioned. Is
3 that correct?

4 MR. CAPEHART: Well, first of all, you're
5 mentioning metrics that we normally don't do. Like I
6 said, we only performed these metrics for this pending
7 case.

8 JUDGE HAJEK: I understand that.

9 MR. CAPEHART: And you are correct in that
10 if the person performed well, but, again, you keep
11 going back to the number of comments. It's not the
12 number of comments. It's the quality of the comments.

13 JUDGE HAJEK: The quality of the comments.

14 MR. CAPEHART: It has to do with the
15 safety significant of the errors. If he has 20
16 comments in communications, so be it. I mean, they're
17 communication errors. They are probably all minor in
18 nature. They don't reflect his performance or safety
19 significance of that performance and not necessarily
20 relate back to is he going to be a competent operator.

21 We're supposed to make a professional
22 judgment on the competency of the operator. Are they
23 competent to operate a nuclear plant? Especially,
24 it's even more significant when we're talking about an
25 instant Senior Reactor Operator who may have little to

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1 no experience as a previous reactor operator.

2 JUDGE HAJEK: Uh-hum, but the metrics that
3 I've referred to are in a way really your metrics.
4 NRC-008 is your metrics. NRC made a decision to
5 create this table of metrics. The Board did not as
6 for that. That was done initially, I believe, in Mr.
7 Ehrhardt's fairness review.

8 MR. CAPEHART: There were questions asked
9 internally in comparison. I did not perform that
10 comparison when I made my -- when he asked me for the
11 consideration of whether or not I would grant a waiver
12 or not, my opinion of that matter. I did not perform
13 any metrics. I performed it based on my professional
14 judgment of the competency of the operator, based on
15 the evaluation we performed at the time.

16 CHAIR SPRITZER: I think we've kept people
17 here a bit longer than perhaps we should have.

18 I should note we have to be out of here by
19 five o'clock today, because although we have the room
20 until 6:00, Mr. Welke has to clear out the technology,
21 so other people can get in here at 6:00.

22 I think we're going to caucus among
23 ourselves and see if we can move things along a little
24 bit, so we can, as planned, finish today. So, we may
25 take a little longer than five minutes, but we'll be

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1 back as soon as we can.

2 (Whereupon, the foregoing matter went off
3 the record at 10:43 a.m. and went back on the record
4 at 10:58 a.m.)

5 CHAIR SPRITZER: All right, if we can go
6 back on the record?

7 We have, as I indicated, conferred. I'm
8 sure the witnesses will be disappointed to learn that
9 we have cut down substantially the number of questions
10 we have to ask you. That includes questions the Board
11 was going to ask. It is also going to include
12 questions Ms. Smith proposed and the staff proposed.
13 But, if we're going to finish today, we have got to be
14 economical.

15 I do have a few more. The preliminary
16 application, the Form 398, that was sent in with Ms.
17 Smith, which included the waiver request, I take that
18 was sent in within the 30-day time requirement
19 identified in the NUREG. And we can bring up
20 CCS-005a, page 47, if you want to refer to that.

21 MR. MEEKS: Yes, sir. To my knowledge,
22 the package with all of the applicants' unsigned Form
23 398s and 396 and all the various documentation that
24 the facility likes to see sent in, it was within those
25 timelines, sir.

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1 CHAIR SPRITZER: Would there have been
2 time to process Ms. Smith's application, waiver
3 application, even if the decision had been to deny it?

4 MR. MEEKS: Yes, sir, there was time, had
5 Mr. Wainwright called us back and said, "Yes, we have
6 changed our mind. We are going to formally submit."
7 We would have had time to process that waiver, sir.

8 CHAIR SPRITZER: But you didn't start
9 actually processing the waiver before that event,
10 which, in fact, of course, never happened?

11 MR. MEEKS: Yes, sir. Essentially, when
12 we first saw the unsigned Form 398 and we called Mr.
13 Wainwright, we had not started any kind of process yet
14 and we were going to wait for the phone call back
15 before we began to evaluate anything regarding a
16 possible operating test waiver, sir.

17 CHAIR SPRITZER: Now the deadline for the
18 final Form 398, I think you said that was 14 days
19 before the exam, but correct me if I'm misremembering.

20 MR. MEEKS: Yes, sir, 14 days per ES Form
21 201-1.

22 CHAIR SPRITZER: If the final 398 had come
23 in, to your surprise, with a request for a waiver for
24 Ms. Smith, would you have had time to process it then?

25 MR. MEEKS: Yes, sir, we would have had

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1 time. If you look into the NUREG-1021, Section
2 ES-204, where it talks about the process of how the
3 Region evaluates a routine waiver, one of the options
4 is that, even if time is short, we could potentially
5 call the licensee rather than the normal means, which
6 is a formal letter. And so, had it come in at the 14-
7 day point, then we would have had time to process that
8 waiver and we would have been able to hold the class
9 as scheduled with Ms. Smith present, sir.

10 CHAIR SPRITZER: And would your answer be
11 the same, whether the action on the waiver request was
12 to grant it or to deny it? That is, that you had
13 sufficient time to do that?

14 MR. MEEKS: Yes, sir. What I'm assuming
15 by that question is that, if the final signed
16 application had that waiver box checked, and had it
17 only contained the justification in the unsigned
18 application, I'm assuming in my answer that we would
19 be able to receive from the licensee any further data
20 that we needed from them. Answering based upon that
21 assumption, yes, sir, we would have had enough time.

22 CHAIR SPRITZER: All right. Let's go to
23 page 53 of this same document. That is CCS-005a, page
24 53, at the top. Bear with me just a moment.

25 Now the provision 1.a at the top here,

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1 "The Regional Office shall not assign an Examiner who
2 failed an applicant on an operating test to administer
3 any part of that applicant's retake operating test."

4 Let's go to CCS-001, page 8.

5 Let me ask Mr. Meeks first. Is it your
6 position that you did not administer any part of Ms.
7 Smith's retake operating test?

8 MR. MEEKS: No, sir, I did. I
9 administered several JPMs and I was part of the team
10 that evaluated her on the simulator scenario, sir.

11 CHAIR SPRITZER: Now, if we go look at --
12 again, this is CCS-001, page 8, top full paragraph,
13 second sentence. You are referring, I believe, to the
14 same language we were just talking about in the NUREG.

15 "Keeping the intent of this requirement in
16 mind, as shown above, M. Bates was intentionally
17 assigned as Carla Smith's Examiner of record." And
18 you have underlined the word "intent". What do you
19 mean by "intent"? What "intent" are you referring to
20 there?

21 MR. MEEKS: Sir, the guidance in the NUREG
22 specifically talks about someone who has failed the
23 operating test. In this case, Ms. Smith did not fail
24 it. However, with the potential that she would be
25 retaking the operating test, we felt that it would be

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1 prudent and in the best judgment to verify that Mr.
2 Bates, who had not been part of her first exam, would
3 be the evaluator for the bulk of 2012 exam and her
4 Examiner of record for the simulator scenarios, which
5 were the principal area of concern from the first
6 test, sir.

7 CHAIR SPRITZER: All right. Let's go
8 back, if we can, to the NUREG, the same page, that is,
9 page 53 of Exhibit CCS-005a, and look at paragraph
10 1.c.

11 It says, among other things, "If an
12 Examiner is assigned to an examination that might
13 appear to present a conflict of interest, the Examiner
14 shall inform his or her immediate supervisor of the
15 potential conflict."

16 Do you believe, based on your views that
17 you have expressed here today and yesterday about Ms.
18 Smith's performance on the 2011 operating exam, that
19 you have a situation that might appear to present a
20 conflict of interest, such that you should have
21 contacted your supervisor about it?

22 MR. MEEKS: No, sir, I do not believe
23 knowledge of how an applicant did on a prior test is
24 something that would be a conflict of interest when
25 you're looking at grading a future test. For

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1 instance, any upgrade SRO has previously taken a test
2 as an RO, and it might have been several years prior
3 to, but that doesn't prevent us from sending back the
4 same personnel to evaluate that person, who saw that
5 person perform on the previous test.

6 So, I do not believe that it is a
7 conflict. However, having said that, not specifically
8 due to this section of the NUREG, but just as practice
9 for this test, we did keep my supervisor, Mr. Widmann,
10 notified of our decision to use Mr. Bates specifically
11 for Ms. Smith during our development process. That
12 was something that we talked about. We wanted to make
13 sure Mr. Bates was as free of bias as we possibly
14 could, and we just felt that, not specifically to this
15 section of the NUREG, we just felt that that was
16 prudent, sir.

17 CHAIR SPRITZER: So, since you concluded
18 you did not have a situation that might appear to
19 present a conflict of interest, I take it you did not
20 follow the specific instructions that are in this
21 paragraph 1.c. Am I interpreting your testimony
22 correctly?

23 MR. MEEKS: Specifically, sir, we notified
24 Mr. Widmann when we knew that the team would be Mr.
25 Capehart, myself, and Mr. Bates. There was a

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1 changeout in our team membership, and Mr. Capehart had
2 to fill in for the person who had previously been
3 scheduled as the third person. When we knew that that
4 was a possibility, we had spoken with Mr. Widmann and
5 notified him that we would verify that Mr. Bates would
6 serve as Ms. Smith's Examiner of record for the 2012
7 exam, sir.

8 CHAIR SPRITZER: All right. I think I
9 understand your response, but I just want to get one
10 thing clear. I read -- it was in one of the, I
11 believe it was in the response to the informal review
12 request -- a statement which appeared to be
13 attributable to you to the effect that, in your view,
14 Ms. Smith was unsafe. Do you recall such a statement?

15 MR. MEEKS: Yes, sir. To be precise,
16 that's an answer to Ehrhardt's fairness review.

17 CHAIR SPRITZER: Do you believe an
18 operator -- or excuse me -- an Examiner who has
19 concluded on the basis of a prior exam that a
20 particular individual would be an unsafe operator has
21 at least a potential conflict of interest that they
22 ought to notify their supervisor about before being on
23 the exam team?

24 MR. MEEKS: Sir, you have to realize the
25 timeframe in which that comment was made. The comment

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1 that Ms. Smith was potentially unsafe was made
2 following the 2012 exam, and it was following the
3 beginnings of the informal panel appeal process.
4 Therefore, I made that comment in the context of both
5 her first exam and the second exam. And so, the
6 timing of that doesn't specifically mean that I felt
7 that she was an unsafe operator before the 2012 exam.
8 And so, there was no conflict, sir.

9 CHAIR SPRITZER: All right. So, based on
10 the 2011 exam, it's your testimony that you had not
11 reached any conclusion whether she was or was not a
12 safe operator?

13 MR. MEEKS: Your Honor, I felt in my best
14 professional judgment, based upon how she had
15 performed on her first test and the documentation,
16 that it was prudent, if a waiver of an operating test
17 had been asked for, that it was prudent to reexamine
18 Ms. Smith on the followup exam. And that was the same
19 decision made by Mr. Hopkins and by Mr. Capehart and
20 validated by Mr. Widmann.

21 JUDGE HAJEK: I am almost thinking I would
22 like you to repeat that, what you just said. I think
23 what you said -- let me repeat it back to you -- is
24 that you felt it was prudent to reexamine her, and
25 that was your professional opinion and the

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1 professional opinion of Mr. Hopkins and, also, Mr.
2 Capehart and Mr. Widmann. And that was a decision, is
3 what I heard you say. Is that correct?

4 MR. MEEKS: I don't recall whether I used
5 the "decision" word, but that was the judgment that
6 was formed at the time that I am referring to
7 specifically, which would have been the May emails
8 where we are looking at the possibility of a retake
9 exam. Specifically, Mr. Hopkins, myself, and Mr.
10 Capehart, all three agreed that, if an operating test
11 waiver for Ms. Smith had been asked for for that
12 retake exam, that we would recommend denial of that;
13 that it would likely be denied for that retake.

14 CHAIR SPRITZER: Let's go to CCS-001,
15 handwritten page 4, which also happens to be the real
16 page 4, and the second sentence.

17 By the way, let me just ask, we have
18 talked a lot about this document. This was, as I
19 understand it, a request for information from Mr.
20 Ehrhardt in connection with the fairness review?

21 MR. MEEKS: Yes, sir, that is correct.

22 CHAIR SPRITZER: And when we see, for
23 example, on this Question No. 2 that appears on page
24 4 the names "Capehart, Bates, and Meeks," in
25 parentheses, does that indicate that the response is

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1 being filed on behalf of all three of you?

2 MR. MEEKS: No, sir. Sorry. The question
3 is from Mr. Ehrhardt to us, and the parentheses means
4 that he is asking for answers from all three of us,
5 sir.

6 CHAIR SPRITZER: So, is what's on page 4,
7 is that answer for all three of you or some subset of
8 your group?

9 MR. MEEKS: No, sir, that is just my
10 response to Mr. Ehrhardt.

11 CHAIR SPRITZER: All right. So, when I'm
12 looking at the answer to Question No. 2, that's your
13 personal response and not necessarily a response on
14 behalf of Mr. Bates or Mr. Capehart?

15 MR. MEEKS: Yes, sir.

16 CHAIR SPRITZER: All right. Now the
17 second sentence in the second full paragraph says, for
18 me, "In addition to the large number of documented
19 deficiencies, the basis of my recommendation to not
20 grant Carla a routine waiver was because Carla's
21 performance on the simulator scenarios (2011 exam)
22 stood out as being unsafe." Was that, in fact, your
23 view based on the 2011 exam, as you state there?

24 MR. MEEKS: Sir, if you look at the full
25 answer, the first paragraph, I'm following upon the

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1 previous answer that I had. So, if you would scroll
2 up to the previous paragraph, as I said in that final
3 paragraph, all three of us at the time where we were
4 evaluating the retake exam agreed that the performance
5 was very marginal, specifically on the simulator
6 scenario portion.

7 And if you scroll down, as I detailed
8 before, when I make a comment such as "unsafe,"
9 specifically what I'm talking about would be the
10 performance on the simulator scenario, such as during
11 the FRH-1 events that I referenced previously, which
12 is when we have a critical challenge to a vital safety
13 function in the core. One is only in the FRH-1
14 procedure when there is an extreme challenge to the
15 heat sink critical safety function.

16 So, in that case, there is a challenge to
17 the safety of the plant. And to make errors while you
18 are performing such a procedure, there is a potential
19 to be an unsafe operator.

20 But to use the word "unsafe operator," you
21 also have to tie that to a particular timeframe. For
22 instance, before I was trained, I was an unsafe
23 operator, too. It's not a pejorative term. It is not
24 used as a term of bias. It is simply evaluating how
25 that applicant performed when it came to safety-

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1 related tasks, tasks that have a safety consequence.
2 And so, that is the context of my comment, sir.

3 CHAIR SPRITZER: All right. I don't have
4 anything further.

5 JUDGE FROEHLICH: I just wanted to clarify
6 with perhaps Mr. Bates and Mr. Capehart. Under the
7 provisions of the NUREG-1021, had Ms. Smith failed the
8 2011 exam, you would have been precluded from being on
9 her review team in 2012, is that correct?

10 MR. BATES: I was not involved with the
11 2011 exam at all. I had no involvement with the 2011
12 exam.

13 JUDGE FROEHLICH: Oh, I am sorry. I'm
14 sorry. Mr. Meeks and Mr. Capehart -- my apologies --
15 the same question. Had Ms. Smith failed the simulator
16 portion of the 2011 exam, Mr. Meeks and Mr. Capehart,
17 under the provisions of the NUREG-1021 would have been
18 precluded from being Examiners in her 2012 exam, is
19 that correct?

20 MR. CAPEHART: That's not correct.

21 JUDGE FROEHLICH: Okay. Please explain.

22 MR. CAPEHART: You up previously the NUREG
23 criteria for the ethics criteria. Only the Examiner
24 of record would have been precluded from reexamining
25 her, based on the specific details of that, and that

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1 was Mr. Hopkins, who was not present for the 2012
2 exam.

3 So, by the ruling criteria of the NUREG,
4 either one of us could have been her Examiner of
5 record. We went above and beyond those criteria to be
6 prudent to have Mr. Bates be her Examiner of record.

7 JUDGE FROEHLICH: And the fact that the
8 scoring of the exams, and I guess the meeting of the
9 minds as to her performance in 2011, wouldn't give an
10 appearance, in your opinion, that there was some kind
11 of prejudgment or bias or an appearance in the 2012
12 exam?

13 MR. CAPEHART: I didn't feel so.
14 Obviously, if the NUREG is worded the way it is, it
15 has obviously taken that consideration into effect, to
16 say that, no, actually, our impression would be that
17 we went in thinking her performance would be improved.
18 So, we didn't go in with any preconceptions other than
19 her performance would be better than last time. She
20 has spent a significant amount of time between the
21 2011 exam and the 2012 exam. So, why wouldn't her
22 performance be better?

23 But we were not involved. We wanted to
24 make sure that we were removed from any reference to
25 that issue. So, we made sure that we weren't even her

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1 Examiner of record at that point, even though, again,
2 in accordance with the NUREG, we could have been.

3 JUDGE FROEHLICH: So, your answer implies
4 that, just as long as the Examiner of record is not
5 the same person as the previous year, there's no
6 problem?

7 MR. CAPEHART: That's correct. Under 1.a,
8 it says, "The Regional Office shall not assign an
9 examiner who failed the applicant." That would have
10 been the Examiner of record who failed her.

11 JUDGE FROEHLICH: I assume you will agree
12 with that analysis and that approach to interpreting
13 the NUREG?

14 MR. MEEKS: Yes, sir.

15 JUDGE FROEHLICH: All right. One moment,
16 please.

17 Going back to the 2011 exam, the number of
18 people who failed the written exam was how many?

19 MR. CAPEHART: Six.

20 JUDGE FROEHLICH: Six failed the written?

21 MR. CAPEHART: Oh, I'm sorry, it was
22 seven, right. Seven. I'm sorry, sir.

23 JUDGE FROEHLICH: Seven failed the
24 written?

25 And in 2011, on the operating portion of

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1 the exam, what were the number of people who failed?

2 MR. CAPEHART: I believe there was two
3 people.

4 JUDGE FROEHLICH: Two people failed?

5 MR. MEEKS: Your Honor, no, sir. I
6 believe on the first exam there was one individual who
7 had failed the operating test portion and the written
8 exams. So, there were seven total who had failed the
9 written exam. Of those seven, one also failed the
10 operating test, sir.

11 MR. CAPEHART: That is correct, yes.

12 JUDGE FROEHLICH: Okay. And that
13 individual who failed the operating exam in 2011, was
14 that a female?

15 MR. CAPEHART: Yes, it was.

16 JUDGE FROEHLICH: And the race of that
17 female?

18 MR. CAPEHART: I believe she was Black,
19 sir.

20 JUDGE FROEHLICH: Black? Okay. Thank
21 you.

22 CHAIR SPRITZER: All right. Thank you,
23 gentlemen.

24 We'll now proceed, if we can, to the next
25 group of witnesses, Messrs. Jackson and Ehrhardt.

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1 WHEREUPON,

2 DONALD JACKSON AND FRANK EHRHARDT

3 having been called for examination and, having been
4 previously duly sworn, were examined and testified as
5 follows:

6 CHAIR SPRITZER: Good morning, gentlemen.

7 Both of you have been sworn previously,
8 and you are, of course, still under oath.

9 Why don't you identify yourselves for the
10 record, starting on my left?

11 MR. JACKSON: Okay. My name is Donald
12 Jackson. I'm the Chief of the Operations Branch at
13 NRC Region I. That is counterpart to Malcolm Widmann
14 in the Northeast part of the country. I was the
15 Chairman of the administrative review portion of this.

16 And a little bit about my background. I
17 was an NRC-Licensed Senior Reactor Operator at the
18 Calvert Cliffs Nuclear Plant. I was also an NRC-
19 licensed Senior Reactor Operator Shift Manager and
20 Training Director at the Salem Nuclear Power Station,
21 which is also a Westinghouse pressurized water
22 reactor.

23 Before I get started, I did want to, in
24 preparation for this testimony, I did find an
25 inconsistency across our documents, and it does

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1 involve my pre-filed testimony. I would like to call
2 that to your attention.

3 CHAIR SPRITZER: Very well.

4 MR. JACKSON: It's under NRC Exhibit 004
5 on page 11.

6 CHAIR SPRITZER: All right.

7 MR. JACKSON: Page 11, down toward the
8 bottom of the page, where it says, "Just prior to
9 developing the final revision, upon the procedurally-
10 directed review of the Region II input...." There was
11 actually a third rating factor that was changed as a
12 result of that, and it is involved with Scenario 7,
13 Event 3, which is the TiC-130 issue, and that changed
14 from Rating Factor 1c to 3b.

15 The following statement it says, "However,
16 it should be noted that these changes made by the
17 panel for Region II did not impact." I have not done
18 an analysis with that third extra comment, as to
19 whether that statement is still true. So, I would
20 like to retract that particular statement.

21 That's it.

22 CHAIR SPRITZER: Very good. Thank you for
23 pointing that out.

24 MR. EHRHARDT: My name is Frank Ehrhardt.
25 I'm currently, and was at the time of performing the

1 fairness review which I performed, Branch Chief in the
2 Division of Reactor Projects. I have regulatory
3 oversight for the operating Southern Company Nuclear
4 Plants.

5 Prior to that, I was a Senior Inspector in
6 the Engineering Branch performing fire protection
7 inspections. Prior to that, I was an Examiner and a
8 Chief Examiner in Region II conducting examinations,
9 and I was qualified on Westinghouse, General Electric,
10 B&W, and combustion engineering plants.

11 Prior to coming to Region II, I was a
12 licensed Senior Reactor Operator at the Braidwood
13 Exelon Plant on shift. Other nuclear experience,
14 prior to that, I was an Examiner in Region III in the
15 early 1990s for approximately three years. And before
16 that, I was a nuclear-trained submarine officer.

17 JUDGE HAJEK: Okay. We are going to start
18 with Mr. Jackson.

19 Would you describe for us, please, the
20 establishment of your Review Panel? I do understand
21 some of this is in your pre-filed testimony. I'm
22 looking for a little bit more detail. I've got a
23 number of questions about the establishment. I can go
24 through them one at a time or let you describe them
25 yourself.

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1 But I would like you to start by
2 explaining, relative to its establishment, what is the
3 organization structure within all of OLB with IOLB and
4 Headquarters and then the Regions in the reporting
5 throughout that structure, please.

6 MR. JACKSON: Sure. What I will do is --
7 the dates involved are the Headquarters Program Office
8 received a request for an informal review from Ms.
9 Smith. And on June 19th, we formed the informal
10 panel.

11 Basically, the request goes to our
12 Headquarters office, which Mr. McHale will talk about
13 a little bit later. But Mr. McHale is also a Branch
14 Chief, and his function is to coordinate all the
15 program activities associated with the Operator
16 Licensing Program. I am an arm of that for the
17 Northeast in Region I, as Mr. Widmann is an arm for
18 that in Region II. There's four Regions associated
19 with the NRC. Each of the Regions has a Branch Chief
20 that's responsible for the implementation of the
21 program in each one of the Regions.

22 So, in forming the panel -- and I don't
23 want to speak directly for Mr. McHale -- but I think
24 we had enough conversations; I'm confident about what
25 I am saying.

1 In forming the panel, he had a number of
2 options to resolve Ms. Smith's contentions, one of
3 them being to form a panel under a potentially
4 contentious and/or complicated type of a review. This
5 was certainly complicated. There was a large number
6 of contentions to review, and they were very
7 technically-complicated.

8 So, Mr. McHale, in accordance with the
9 OLMC-500 process, assigned a Branch-Chief-level
10 individual to run the panel. At the time, looking at
11 Region IV, Region III, Region II, the Region III
12 Branch Chief was unavailable to perform that function
13 because he was performing other duties. That left
14 Region I and Region IV. And I volunteered to take the
15 lead for the review of the panel.

16 In that conversation, I wanted, since I
17 was going to be leading the panel, I wanted two
18 different things. One, I wanted an Examiner on the
19 panel that was not associated with Region II or Region
20 I because, then, that would be influenced by folks
21 that work directly for me. So, we ended up with a
22 Region IV Examiner that was on the panel, and he
23 happened to be Chief-Examiner-qualified also.

24 Another piece of this was I saw that this
25 was going to be quite a bit of documentation and work

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1 after the panel met to get to the final document and
2 recommendation at Headquarters. And we have little
3 experience of doing that process. So, I wanted a
4 qualified Examiner from Headquarters that deals with
5 appeals on a regular basis to be available on the
6 panel to be able to do the documentation portion and
7 be involved in the panel.

8 So, that was how the panel was made up,
9 was a Branch Chief volunteered to the Chairperson. I
10 selected a person from outside my Region, outside
11 Region II, to also participate on the panel that was
12 an Examiner, and then, we included a qualified
13 Examiner from the Headquarters Program Office to be on
14 the panel.

15 JUDGE HAJEK: In that structure of
16 Headquarters and the four Regions, do you directly
17 report to Mr. McHale or are you in a parallel
18 position?

19 MR. JACKSON: From a programmatic
20 standpoint, it would be a dotted-line peer
21 relationship. I report to the Division management in
22 the Division of Reactor Safety and NRC Region I, who
23 reports to the Regional Administrator of Region I.

24 But, being that it is a program being
25 administered by Headquarters, I have a dotted-line

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1 peer relationship to Mr. McHale, who is the Branch
2 Chief for the IOLB Branch in Headquarters. So, if I
3 have questions concerning how to implement the
4 program, I would not go to my supervision in the
5 Region. I would go to the Headquarters Program Office
6 through Mr. McHale to get that answered.

7 JUDGE HAJEK: Okay. And so, were you
8 directly contacted by Mr. McHale? I understand what
9 you explained about a Branch Chief was being searched
10 out; the Region III Branch Chief was not available.
11 And then, you used the terminology that you
12 volunteered for this.

13 So, why did you volunteer? Or were you
14 pressured in any way to take this on?

15 MR. JACKSON: Absolutely not. At the time
16 that we were looking at doing this, I did have the
17 time available to do that function. And frankly, it
18 was of interest to me. And I did not have the actual
19 contention package in my possession yet, but I think,
20 if I remember correctly, the way it occurred was every
21 two weeks we have a phone call between all of the
22 Branch Chiefs from the four Regions and Headquarters
23 to go over common issues and to make sure that we're
24 all doing things consistently.

25 In that phone call, I believe Mr. McHale

1 said, "Hey, have we received an appeal? We are going
2 to need to set up to resolve this appeal? We believe
3 we are going to be selecting a panel to do this. I
4 need one of the Branch Chiefs to step forward and do
5 that." And I stepped forward to do that.

6 JUDGE HAJEK: Now I'm also having a little
7 bit of -- well, not a little bit -- considerable
8 amount of difficulty understanding the charge of the
9 panel and the use of the term "independent" and how
10 that governs the action of the Review Panel. Because
11 this word, as I was reading the NUREGs, as I read 10
12 CFR or NUREG-1021 or OLMC-500, I don't really see that
13 word actually stated. But there seems to be a clear
14 understanding that the panel was being or was meant to
15 have been independent because of other documentation,
16 other emails and statements made.

17 Would you review the word? You know, what
18 does this word mean? What is the difference between
19 independent review, a separate review, informal
20 review?

21 MR. JACKSON: Sure. My understanding of
22 this -- and this is the understanding I carried
23 through the process -- was this was an administrative
24 review and an informal review, which meant we were not
25 in front of a hearing like we are today.

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1 Independence and integrity in that review
2 to me meant that, in the end, when I made a
3 recommendation at Headquarters on the final
4 disposition of Ms. Smith's contentions and the final
5 grading for the exam, that it would be truly
6 independent, meaning it was the panel's determination
7 of the final grading, utilizing input from
8 documentation and conversations with Region II.
9 Because, again, the panel did not observe any of the
10 activities associated with the operating exam for Ms.
11 Smith.

12 So, in setting up the activities of the
13 panel, we attempted to review things that were on the
14 record first, until we got to a point where there were
15 inconsistencies that we needed to discuss with the
16 Examiners. And then, late in the process, there is a
17 portion of the process that ensures that management
18 and the Region II Examiners get to review what we have
19 come up with to ensure that it is accurate.

20 So, in the end, the final document that I
21 signed to Mr. McHale that included the panel's
22 recommendation was something that I independently
23 endorsed of Region II, and I still stand behind the
24 grades as they sit today in my pre-filed testimony.

25 JUDGE HAJEK: So, from an independence

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1 perspective in your process perspective then, I think
2 what I understood you to say was that there's a place
3 in the process for input from the Examiners in Region
4 II.

5 MR. JACKSON: Correct.

6 JUDGE HAJEK: The first step was to
7 perform your own completely separate, independent
8 analysis, having received considerable input,
9 actually, with all these binders that were provided to
10 you.

11 MR. JACKSON: Correct.

12 JUDGE HAJEK: And then, to consult the
13 Examiners again after that initial review in order to
14 correct potential errors or inconsistencies and
15 possible misunderstandings?

16 MR. JACKSON: Let me take one of the
17 specific contentions that Ms. Smith had. First of
18 all, you mentioned there was considerable input from
19 the binders. There was also considerable input and
20 very valuable input from Ms. Smith in the contention
21 writeup. It had a lot of detail in it.

22 I will give an example of how one of those
23 specific contentions played out through our panel, and
24 then, how we had to seek some questions from Region II
25 before we left for Region II. What we did was we made

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1 the decision that, first of all, we couldn't do this
2 over teleconference. We needed to meet face-to-face
3 as a panel at least once.

4 And our main purpose at the beginning was
5 to go through the contentions that were in Ms. Smith's
6 appeal package. When we met face-to-face in Atlanta,
7 it was in a separate conference room outside of the
8 operating area that the Examiners habitated at Region
9 II.

10 We first got to know each other and met
11 each other and stated: here's the purpose of why
12 we're here in Atlanta. And we were focusing mainly on
13 trying to get through the contentions that were in
14 front of us because that was going to be the most
15 complicated piece going back and forth between Ms.
16 Smith's documentation and documentation that was
17 compiled by the Region.

18 And what we did was we had a quick meeting
19 with the Operations Examiners, just to lay out what
20 the process was going to be, that we were going to be
21 going through each of these contentions without Region
22 II input with the documentation that was available to
23 us, both from Ms. Smith and from Region II. And then,
24 if we needed, at a later point in time we would meet
25 with them to resolve those questions.

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1 So, one specific example had to do with
2 one of the contentions involving the allowance of Ms.
3 Smith, of allowing average reactor coolant temperature
4 to decrease over a 40-minute period of time. Ms.
5 Smith made good points in her contention that, first
6 of all, it was not a significant deviance from what
7 the Senior Reactor Operator had asked her to maintain.
8 But, more importantly, she had attempted a couple of
9 times to withdraw control rods to restore average
10 coolant temperature. In her testimony, it was at
11 least a couple of times. And she also had statements
12 from people that were in the simulator with her that
13 it was at least a couple of times.

14 We looked at the Examiner's notes, and we
15 could really only find one time that it was documented
16 that she attempted to pull rods. We had some
17 simulator data that appeared like there may have been
18 a second time that she attempted to pull rods. So,
19 there was a question there as to whether it was once
20 or twice, and there was also multiple malfunctions
21 occurring during that time period.

22 So, that was one of the questions that was
23 held to the side kind of in a parking lot format
24 until, when we had a chance to meet with the
25 Examiners, we would ask that question. When we posed

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1 that question to the Examiners, specifically, "Do you
2 remember a second time where Ms. Smith received
3 direction from the Control Room Supervisor candidate
4 to pull rods to restore temperature?", they could not
5 recollect whether that specifically occurred or not.

6 So, in the end, the panel looked at Ms.
7 Smith's contention writeup, the statements of the
8 people that were in the simulator, what we could
9 review in conversation with the Examiners. And we
10 made the decision to remove that error from her
11 grading. And there were two other -- there were three
12 total contentions that we actually removed from the
13 grading.

14 And that was part of the process, was
15 going through reading the documents, and then,
16 discussing with the Examiners specific questions, not
17 unlike what we're doing today. And that was one of
18 the examples that made it all the way through the
19 process and actually ended up getting removed from her
20 grading.

21 I don't know if that answers your question
22 or not, but that's how we involved at least when we
23 were in Atlanta the discussions with the Examiners.

24 JUDGE HAJEK: Okay. But, in terms of that
25 particular error, I think what I understood you to say

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1 was that the Examiners did not have anything in their
2 record of additional rod movements, but Ms. Smith had
3 in her material that she provided to you some record
4 or statement that she attempted to move rods.

5 MR. JACKSON: Yes, if I remember
6 correctly, she had a statement, and then, she also had
7 signed statements --

8 JUDGE HAJEK: Signed statements from
9 Waltower --

10 MR. JACKSON: -- by folks who were in the
11 simulator with her.

12 JUDGE HAJEK: -- and Turner on that?

13 MR. JACKSON: That's correct.

14 JUDGE HAJEK: Okay. We'll come back to
15 the sequence. Okay? I think you said that's all --
16 so, your explanation there, and I am really focusing
17 on independence, your focus there was that you had
18 data that came in at the very beginning from both Ms.
19 Smith and from the Examiners. And I absolutely feel
20 that's very appropriate.

21 But my question is, how often, in order to
22 maintain independence, how often and when is it
23 acceptable to receive information coming in and to go
24 back to individuals to ask for additional information
25 throughout this process in order to maintain your

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1 independence from the Examiners of record?

2 MR. JACKSON: My opinion on that would be
3 that anytime a question came up where you could not
4 resolve an issue between Ms. Smith's contention and
5 what was documented by the Examiners who actually
6 observed the exam, if a question cannot be resolved
7 between those two, it would be appropriate to ask the
8 Examiners a specific question around the objective
9 evidence associated with that, since, again, the panel
10 was not present for the simulator scenario. And
11 there's only one group of people that were there
12 actually observing the performance.

13 JUDGE HAJEK: Okay. I understand the
14 Examiners were the only NRC representatives who were
15 present, and Ms. Smith provided data. And the
16 Examiners came back with their explanation when you
17 went back to them. And they actually provided data or
18 an explanation, a more detailed explanation,
19 considerably later.

20 But what about going back to Ms. Smith to
21 ask for enhancement of her data? Did you ever do
22 that?

23 MR. JACKSON: I don't believe that -- I'm
24 trying to go through my head now of what specific
25 questions we ended up asking the Examiners. I don't

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1 believe there was any clarification needed on any
2 specific issues associated with Ms. Smith's
3 contentions, meaning if we were at an impasse on
4 understanding where to put a rating factor or whether
5 an error existed or not, it was fairly clear from Ms.
6 Smith's contention writeup the information we needed
7 to consider as a panel.

8 JUDGE HAJEK: Okay. Did your work and Mr.
9 Ehrhardt's work, did that take place in parallel?

10 MR. JACKSON: It took place in parallel
11 and was separate. Mr. Ehrhardt did not contact me
12 anytime during his business. I did not contact Mr.
13 Ehrhardt while we were conducting the panel. When Mr.
14 Ehrhardt's fairness review came out, I was made aware
15 of it and did read it, but that was after the fact.

16 JUDGE HAJEK: Did he have the benefit of
17 any of the work of your panel?

18 MR. EHRHARDT: I can answer that. I did
19 not. I was not aware of the results of his panel,
20 and, as Mr. Jackson said, I was not in contact with
21 him. The efforts occurred parallel in time, but
22 separate.

23 JUDGE HAJEK: Your final report came out
24 a couple of months in advance of the Review Panel's
25 report, I think, correct?

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1 MR. EHRHARDT: Yes, sir. My input to Mr.
2 McHale, the cover memo, I sent my input to him while
3 I believe, at least I was told Mr. Jackson and his
4 group were still working on their portion.

5 JUDGE HAJEK: Yes, the date I have is
6 September 4th.

7 MR. EHRHARDT: That sounds correct, sir,
8 yes.

9 JUDGE HAJEK: Reading in ES-501, Section
10 E.2.a -- do you want me to find that for you? --
11 501-5a. I don't have the page number, 2.a. 209?

12 Okay. The last paragraph of the section,
13 E.2.a, it states at the top, "The Appeal Board may
14 include a representative from the affected Region, but
15 no one who was involved with the Applicant's license
16 exam."

17 Is that what defines, also, your
18 independence?

19 MR. JACKSON: I believe that is what is in
20 the guidance to assist with maintaining independence,
21 yes.

22 JUDGE HAJEK: Okay. In the last paragraph
23 -- and I think I must be referring down to -- it
24 details what should be reviewed. It does not include
25 providing the exam team an opportunity to review the

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1 panel results. And I don't have the exact notes of
2 that paragraph.

3 But it does not include an opportunity to
4 review the panel results, add additional explanation,
5 or recommend changes to the panel results. So, I'm
6 wondering how your process fit within the lack of
7 direct --

8 MR. JACKSON: I am not seeing -- maybe I'm
9 missing where that is.

10 JUDGE HAJEK: It doesn't say -- I'm sorry.

11 MR. WACHUTKA: Your Honor, it should be
12 ES-502, not 501, where the screen is.

13 JUDGE HAJEK: I am sorry?

14 MR. WACHUTKA: It is ES-502, but the
15 screen has it on ES-501.

16 MR. CYLKOWSKI: I believe it's page 234 of
17 the document.

18 JUDGE HAJEK: Thank you.

19 It is. It's at the bottom of page ES-502.
20 It's, yes, okay, that paragraph that says, "For
21 operating tests, the review shall evaluate the
22 Examiners' comments, the examination report, the test
23 that was administered, and the contentions and
24 supporting documentation provided by the applicant or
25 facility licensee, including system descriptions,

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1 operating procedures, logs." It does not include
2 input from the exam team in this paragraph.

3 MR. JACKSON: Well, it says, "For
4 operating tests, the review shall evaluate Examiners'
5 comments, the examination report, the test that was
6 administered, and the contentions and supporting
7 documentation provided by the applicant or facility
8 licensee."

9 There's also in OLMC-500 an opportunity
10 for the Region, which would include the Examiners, to
11 review the final review from the panel. But we did
12 end up with a number of questions after the first day
13 and a half that could not be resolved by the material
14 that was in front of us. So, very pointed questions
15 were asked of the Examiners on a number of issues, and
16 I don't believe that precludes specific questions
17 being asked of the Examiners, because, again, we would
18 be left with not being able to make a decision on some
19 of the issues and rating factors if we could not
20 discuss with -- not discuss -- ask specific questions
21 of the Examiners who were present during the exam.

22 JUDGE HAJEK: Okay. And then, OLMC-500,
23 on page 8, and this is CCS-030, states on page 8, that
24 "If the applicant's version of events disagrees with
25 the Examiners' version," which, clearly, is the

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1 situation that we had, "signed written statements from
2 the Examiner of record may be required."

3 Were those obtained? In other words, when
4 you went back to the Examiners to get clarification,
5 was this a recorded process?

6 MR. JACKSON: We did not involve signed
7 written statements by the Examiners.

8 JUDGE HAJEK: Okay. And then, further on
9 page 8, it states, "The reviewers are generally
10 expected to utilize the Examiners' version of events
11 in conducting the review unless there is impartial
12 evidence to the contrary, including simulator
13 recordings."

14 Did you obtain simulator recordings?

15 MR. JACKSON: We were able to use
16 simulator input on a couple of items, actually, one
17 being the issue with whether or not Ms. Smith and the
18 operator at the controls position maneuvered control
19 rods. We were actually able to see with rod position
20 whether one step was utilized or not. I believe that
21 may have been the only point in time that we utilized
22 records from the simulator. But I'm not totally
23 positive of that because we did have simulator data
24 available to us.

25 What we did is we went through each one of

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1 the conventions one at a time, and we utilized all of
2 the material that was available to us. And the one
3 that comes to mind is the one specifically with
4 manipulating control rods. I know we had some
5 simulator data available for that.

6 JUDGE HAJEK: Well, Ms. Smith, in her
7 rebuttal testimony or her rebuttal exhibit, says
8 included additional graphical evidence. Is it too
9 late to consider that?

10 MR. JACKSON: The panel has made its
11 recommendation to Headquarters. And again, the
12 grading that's in the submittal for this hearing, I
13 believe that to be the most accurate grading of her
14 performance on that particular period of time.

15 JUDGE HAJEK: Is that the grade sheet that
16 you're referring to in NRC-001, page 122, I think it
17 is?

18 MR. JACKSON: I would have to see that.
19 I was actually referring to NRC-004. I'm trying to
20 find the page. Page 16 and 17 of NRC-004.

21 JUDGE HAJEK: Okay. That's the same as
22 what I was referring to in NRC-001, and they copied
23 off from that. Okay.

24 Okay. Now I need some help with the
25 timeline because we have a number of documents that

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1 are panel review documents identified as informal
2 review results. And I found in almost, quite frankly,
3 almost everything that we're reviewing there seems to
4 be a general practice of not including dates on
5 things, and it makes it very difficult to look at what
6 has been going on in the process.

7 But we have Rev 1, Rev 2, Rev 3, Rev 4,
8 Rev 5. There are exhibits associated with the
9 CCS-066, -067, -069, NRC-019, CCS-024. What are the
10 dates on all these different Revs, and what resulted
11 in the changes from one Rev to another?

12 MR. JACKSON: Sure. First of all, the
13 final revision that had my signature on it was the
14 panel's final result. Anything previous to that was
15 part of the deliberative pre-decisional process of
16 working through the document.

17 There were specific points in time we
18 wanted to get first because the bulk of the work was
19 going to be, from a documentation standpoint was
20 writing up what findings we found when we were in
21 Atlanta specific to Ms. Smith's contention. We
22 recognized upfront that was going to be the bulk of
23 the work.

24 We also made an assumption leaving Atlanta
25 that we were going to look at the non-contested items

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1 as a portion of the review, so that we had a complete
2 and accurate recommendation to the Program Office as
3 to the final results of this review.

4 So, the first revision, actually including
5 the second revision, was just when Mr. Muller, who was
6 a part of the panel, was doing the basic documentation
7 work of the work that we did in Atlanta. So, I
8 believe what Mr. Muller did was take a previous
9 document from another review and just began working
10 within that document. So, it was not a clean piece of
11 paper. I believe he took the format from another
12 review and began working on the section of the
13 document that had to do with what we reviewed in
14 Atlanta associated with the contentions that Ms. Smith
15 had.

16 That involved at least the first revision,
17 and this went through the summertime period of 2012.
18 It was a lengthy process to generate this review.

19 We began to look at, between Revision 2
20 and Revision 3 --

21 JUDGE HAJEK: I'm sorry. I'm sorry. What
22 was the date on that then?

23 MR. JACKSON: I don't have -- there are no
24 dates for this. When Mr. Muller felt he had a
25 significant amount of data and didn't want to lose

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1 that, he saved that as a revision and moved on to
2 another revision and kept writing. So, again, these
3 were working documents. No decisions were being made
4 within these working documents. No dates were
5 associated with them because they were a flowing
6 period of time where these documents were being
7 generated, just when the individual felt that that was
8 a point in time who was developing it to go ahead and
9 begin another revision because something maybe
10 significant had changed or he just wanted to save it
11 to make sure he didn't lose his work. He moved on to
12 the next revision.

13 So, there were no real dates associated
14 with the documents because they were not issued.
15 There is a date associated with the final document
16 because that is the document that was no longer pre-
17 decisional or a working document. And that's the one
18 that I signed.

19 JUDGE HAJEK: But the pre-decisional
20 documents, I understand what you're saying, I think,
21 but at least Rev 1 had been distributed as a draft,
22 and possibly outside of your Review Panel. And then,
23 Ms. Smith's document CCS-024 is similar to Rev 1 in
24 that Rev 1 had a scoresheet, a complete scoresheet,
25 like you just referred to in your testimony that you

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1 pointed out here.

2 Rev 2, the version that I have that was
3 one of the privileged logs, I don't believe that
4 particular -- oh, it is an exhibit, -067 -- that Rev
5 2 does not have a complete scoresheet. In fact, it
6 has no scoresheet at the end of it. It does change at
7 the end to have a record of the non-contested items
8 and how you treated those. You make an initial
9 comment there.

10 Ms. Smith's CCS-024, I have no idea when
11 or where that was generated.

12 And then, the same with the other internal
13 documents. And I think your words in your testimony
14 is that one was building on another.

15 MR. JACKSON: Correct.

16 JUDGE HAJEK: But it really doesn't
17 appear, if you look at them, that they're really not
18 building. There are some rather significant changes.
19 Rather than builds, they are revisions of policy, I
20 think, as I read through them.

21 And so, the dates, to me in my mind,
22 become important when I look at the inputs that you
23 also received later on. And that is the reason that
24 I'm asking this question about dates. And so, I hope
25 you can help me a little bit in following that

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1 internal path of Rev 1 through the final version.

2 MR. JACKSON: I don't have dates that one
3 revision was complete and another revision was
4 started, especially for the first three revisions. I
5 know that Revision 4 was sent to Region II, and that
6 date was October 9th of 2012.

7 JUDGE HAJEK: Okay. So, Rev 4, there were
8 significant changes made from Rev 1 on down to Rev 4.
9 By Rev 4, I believe Rev 4 is CCS-069.

10 MR. JACKSON: I have -067 here.

11 JUDGE HAJEK: Sixty-seven. I'm sorry. I
12 want to look at the last page of it.

13 So, the last page of CCS-067 -- -067 you
14 have?

15 MR. JACKSON: That's what I have on a
16 timeline that we developed. I don't know if that's
17 correct or not.

18 JUDGE HAJEK: I have that as being Rev 2,
19 and I could be wrong in having given that, but I have
20 it as Rev 2.

21 This has no grade sheet associated with
22 it. Is that correct?

23 MR. JACKSON: I don't have that document
24 in front of me. I mean, I can take a look up here, I
25 guess. The answer to that question would be yes if

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1 there is not one up there.

2 JUDGE HAJEK: Yes, there is no grade sheet
3 on -067. And what you see up there is the non-
4 contested errors, which it appears that -- and I think
5 this is consistent throughout the Revs, this table, as
6 I recall. Is that your recollection? And we can look
7 at CCS-069, the same -- I have -069 as being Rev 4.
8 And if I go down to the bottom of -069, there's only
9 this one table.

10 MR. JACKSON: Like I say, the non-
11 contested errors came in an early revision, somewhere
12 between Revision 1 and Revision 2.

13 JUDGE HAJEK: Okay. And it was between
14 Revision 1, as I look at these different documents,
15 and Revision 2 that the grade sheet disappeared?

16 MR. JACKSON: But, again, I want to go
17 back to the basic premise that there was one
18 individual working on taking a compilation of a
19 significant amount of data that we generated in
20 Atlanta and trying to put that into the body of this
21 review.

22 The fact that this individual called a
23 revision "a revision" and moved on to another revision
24 really at this point has no significance. When we get
25 into the later revisions, including the final

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1 revision, I think it has significance, because we got
2 to the point where I had a product that was prepared
3 to where we could get formal comments from Region II,
4 per the OLMC-500 process.

5 There could have been literally 100
6 revisions of this, depending on the author stopping,
7 deciding he wanted to save the work that he had,
8 calling it the next revision, stopping, calling it the
9 next revision. There's no significance applied to the
10 different revisions that are in this process, up until
11 the late revisions, approximately Revisions 5 and 6.

12 And again, I speaking for Mr. Muller in
13 that case because he was the one that was writing the
14 documentation for this review and saving what he
15 called revisions. My understanding of what he did was
16 he got a body of work together, stopped and called it
17 a revision, saved it, so he didn't lose his work,
18 moved on to another revision. So, there was not a
19 significant event that occurred between each one of
20 these revisions other than calling it another revision
21 and saving it in the drive, so he didn't lose his
22 work.

23 JUDGE HAJEK: Okay. You just mentioned
24 Rev 6. I haven't seen Rev 6. And which document is
25 your final document?

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1 MR. JACKSON: It should be under CCS-037.
2 It actually would have a signature on it, my signature
3 at the top of it. And I have an ML number of that
4 helps, but I have it as CCS-03 -- yes, that would be
5 the final document right there.

6 JUDGE HAJEK: Okay. CCS-037?

7 MR. JACKSON: Yes, that is it.

8 JUDGE HAJEK: That is it?

9 MR. JACKSON: There is one document that
10 has my signature next to it, and that's it.

11 JUDGE HAJEK: Okay. This document does
12 not have a review sheet associated with it or a final
13 scoresheet rather. It has only a scoresheet for
14 Competence 8-3. Is that correct?

15 MR. JACKSON: That is correct.

16 JUDGE HAJEK: And it has the previous
17 table that we saw with the non-contested errors?

18 MR. JACKSON: Correct.

19 JUDGE HAJEK: Okay. So, you considered
20 the non-contested errors, and they did not affect a
21 change in grading? Is that I understand the table in
22 CCS-037, page 37?

23 MR. JACKSON: That's the one. This table,
24 the non-contested error table?

25 JUDGE HAJEK: Yes.

1 MR. JACKSON: That did affect the final
2 grade in the exam, specifically, Scenario 7, Event 5,
3 associated with the PORV. That caused the rating
4 factor at the bottom for 3.a to be considered a
5 critical task and go to a rating factor score of 1.

6 JUDGE HAJEK: This table says that you
7 agree with the original grading.

8 MR. JACKSON: I'm sorry, I'm missing where
9 you're taking that from.

10 JUDGE HAJEK: Okay. I'm on CCS-037.

11 MR. JACKSON: Yes.

12 JUDGE HAJEK: The top table here. And you
13 said the PORV was changed to a critical task, which I
14 did see that discussion. But this table doesn't say
15 that it affected -- I don't read this table as it
16 affecting the grading.

17 MR. JACKSON: We agreed, the panel agreed
18 that it was an error. The panel did determine
19 separately that it was a critical task. It had not
20 been previously determined by Region II. So, I guess
21 maybe we should have a different category up there
22 that says whether the critical task or non-critical
23 task. We did agree with Region II that it was an
24 error that occurred.

25 JUDGE HAJEK: But the table states, as I

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1 read it, that it did not agree with original grading.

2 MR. JACKSON: I guess, again, we agreed
3 with the way that that error was documented by Region
4 II. However, we had separately identified that that
5 was a critical task, which is shown in the overall
6 conclusion, the next box there, which shows 3.a as
7 being a 1. And then, there is a paragraph right after
8 that.

9 JUDGE HAJEK: Okay. And I did notice here
10 in this paragraph that you state, Approximately 30
11 seconds later, the Applicant was directed to close the
12 PORV by the SS." And I guess I can ask, where did
13 that time lapse, that amount of time come from?

14 MR. JACKSON: That was picked up in the
15 original review we did in Atlanta. I can't remember
16 the specific documentation, but I believe it came from
17 the Examiners' notes.

18 JUDGE HAJEK: So, that would be on your
19 whiteboard, if I were to go back and look at that?

20 MR. JACKSON: It should be on the
21 whiteboard. I'm not positive of that, but I know we
22 carried forward -- if asked on the street how long did
23 it take, the answer was 30 seconds, and we picked that
24 up somewhere in the documentation.

25 JUDGE HAJEK: Okay. Now you began your

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1 work, your panel was established in June.

2 MR. JACKSON: Correct.

3 JUDGE HAJEK: And Ms. Smith has indicated
4 to the Board that Mr. Bates directly contacted David
5 Muller on July 5th. Do you have an awareness of that
6 contact?

7 MR. JACKSON: I don't recollect that
8 contact, no.

9 JUDGE HAJEK: If that contact had
10 occurred, would that have been an appropriate contact
11 at that early stage in the review?

12 MR. JACKSON: It would depend on what the
13 context of that contact was. If they were resolving,
14 again, a specific piece of information that we needed,
15 I would think that would not be inappropriate. If
16 there was some attempt to influence how the panel was
17 ruling on one specific issue, then it could
18 potentially be inappropriate.

19 JUDGE HAJEK: When did the Region II staff
20 receive copies of your whiteboards?

21 MR. JACKSON: The Region II staff, well,
22 they would have received it as a part of this hearing
23 file process when it went into the hearing file. But
24 I don't believe Region II was ever exposed to the
25 whiteboard. Or they weren't whiteboards; they were

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1 flipchart --

2 JUDGE HAJEK: Flipcharts?

3 MR. JACKSON: -- documents.

4 JUDGE HAJEK: Okay. They were called
5 whiteboards.

6 MR. JACKSON: We actually, when we had the
7 short meeting after we had reviewed for a day and a
8 half the material at Region II, we specifically went
9 to a separate piece of paper, wrote down our
10 individual specific questions, and hid the
11 determinations that we had made during that first day
12 and a half. So, I don't believe, up until this
13 hearing evolution and disclosing documents for that,
14 I don't believe Region II had ever seen the
15 flipcharts. Because we generated those. Mr. Muller
16 put them in his suitcase and went back to Washington
17 with them, and I don't think they saw the light of day
18 until we scanned them in as a part of this process.

19 JUDGE HAJEK: Okay. I want to go back to
20 Rev 1 briefly. And my question is simply about the
21 grade sheet that is included at the end of Rev 1. So,
22 I understand it's a working document and that this was
23 probably created -- and I'm inferring here from your
24 testimony a few minutes ago -- this was probably
25 created only by Mr. Muller?

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1 MR. JACKSON: That would have only been
2 created by Mr. Muller. I will tell you we attempted
3 at the end of deliberations before we left Atlanta,
4 and we were running short on time -- I guess the
5 natural tendency is, gee, where did we end up with
6 this after all of our discussions over the first three
7 days? And we started to try to put together the
8 chart, but we couldn't. It got to a point
9 mathematically where you had to try to pull in the
10 non-contested items. And we got to a point where it
11 just became too complicated.

12 And I think that is where Mr. Muller in
13 one of his early revisions, once he could sit down and
14 actually work through the process of doing the
15 grading, that's where I think that came from. But I
16 don't have that here in the Rev 1. We're on the same
17 Revs here. Do you have that that I can actually take
18 a look at?

19 JUDGE HAJEK: Yes, we should have Rev 1,
20 and that would be, I believe that that is CCS-066.
21 And it would be the last page, about the last page.

22 MR. JACKSON: Okay. Yes, I have that.

23 JUDGE HAJEK: Yes, it's page 36, the last
24 page.

25 MR. JACKSON: I have that in front of me.

1 JUDGE HAJEK: Okay. And this has her
2 passing.

3 MR. JACKSON: The document that is here
4 currently has grades on it that would indicate a
5 passing grade. However, it was not the final review
6 that was endorsed by the panel.

7 JUDGE HAJEK: Okay.

8 MR. JACKSON: And I will tell you, there
9 were periods of time in the September timeframe of
10 2012 that I believed that we were going to make a
11 recommendation to Headquarters that Ms. Smith passed
12 the operating exam. That was going through my mind as
13 we were going through this revision process.

14 JUDGE HAJEK: Now, by October 7th, you had
15 sent an email to Mr. McHale, and that is Exhibit
16 CCS-032. And in this email, you state that the
17 document is ready -- this is October 7th -- it's ready
18 for Region II comments. But there's an attachment
19 here, or there should have been an attachment here,
20 because it says, "I believe the attached document is
21 ready," but I don't believe we have a copy of that
22 attachment.

23 MR. JACKSON: I think the revision that
24 went to Region II is under NRC-019 or CCS-102. It
25 should be the same document.

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1 JUDGE HAJEK: NRC-019?

2 MR. JACKSON: NRC-019, that's correct.

3 JUDGE HAJEK: Okay. Now there are a
4 number of comments in this email from you. One is
5 that, "Per our discussion" -- so, I infer that's a
6 discussion between you and Mr. McHale, is that
7 correct?

8 MR. JACKSON: I'm trying to find that.

9 JUDGE HAJEK: Yes, and it says, "I
10 believe, per our" -- this is on the --

11 MR. JACKSON: Got it. I see it.

12 JUDGE HAJEK: It's the second sentence.
13 "I reframed the panel's role such that it is limited
14 to addressing how each of the errors was
15 dispositioned." Can you explain your meaning there?

16 MR. JACKSON: That's actually predicated
17 on the next sentence, which says, "I understand the
18 final grading and how to apply the concept of a
19 positive action erasing an error and adjusting a
20 rating factor from 1 to 2 is an IOLB policy decision
21 that is under review."

22 In NUREG-1021, there is a provision under
23 each rating factor, if an individual only makes two
24 errors, that would typically bring you from a 3 to a
25 2 to a 1. But, if you can show that an individual did

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1 a positive action under that rating factor, that
2 grade, that score can actually go from a 1 back to a
3 2.

4 And in this period of time, that was not
5 being consistently applied. It was being applied by
6 our panel, but it had not been applied, the
7 justification had not been generated by Region II in
8 their grading of the exam. So, there were a number of
9 conflicts between how we had utilized this specific
10 portion of NUREG 1021.

11 In the final grading of the panel, which
12 is reflected in my pre-filed testimony under NRC-004,
13 that grading sheet does show how to apply two errors,
14 going from a 1 back to a 2. We did evaluate that as
15 a part of the overall grading.

16 JUDGE HAJEK: I'm curious about the
17 statement about it being IOLB policy decisions that is
18 under review for two reasons. One is that, in
19 NUREG-1021, is that not the official policy, period?

20 MR. JACKSON: The panel believed that was
21 the correct policy and we applied that.

22 JUDGE HAJEK: And is that the way that,
23 had this exam initially been administered in Region I,
24 it would have been graded?

25 MR. JACKSON: If Region I had graded the

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1 exam, that process of, if two errors were made in a
2 specific rating factor, if a positive action could be
3 justified in that specific rating factor or on another
4 event, you can maneuver the score from a 1 back to a
5 2 with justification. And we do apply that in NRC
6 Region I.

7 JUDGE HAJEK: So, if there's
8 justification, you can maneuver a 1 back to a 2?

9 MR. JACKSON: Correct.

10 JUDGE HAJEK: If the Examiners are not
11 required to make comments, positive comments, then
12 where do you get the justification in order to be able
13 to move or do the balance in the grading to get it
14 back from a 1 up to a 2?

15 MR. JACKSON: Right. The practice in
16 implementing NUREG-1021, at the end of the scoring
17 process if you end up having two errors in a rating
18 factor, we consider whether or not that should be
19 moved back from a score of a 1 to a score of 2 for
20 that particular rating factor, if a positive action
21 can be clearly identified during the course of a
22 scenario.

23 And if you look at the content of the
24 rating factors and the number of things, the number of
25 items that an individual does in the simulator, it

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1 usually is not very difficult to find a positive
2 action that was done in a particular rating factor.

3 So, say under communications, so many
4 communications occur during the course of two
5 simulator scenarios, if two negative items were
6 identified and that got the score down to a 1, it's
7 almost assured that you would find multiple examples
8 of positive communications that would move that back
9 to a score of 2.

10 And my understanding of NUREG-1021 is that
11 you would document that, that you made that decision,
12 and change the score. In NRC-004, my pre-filed
13 testimony does show that for that final grading chart.

14 JUDGE HAJEK: It is sounding to me as
15 though that is a very subjective application in the
16 grading process. And I say that because there is, I
17 think to paraphrase your words, there are a lot of
18 communications that take place. And so, not to be
19 able to document, or even shortly after the fact, that
20 a candidate made a positive communication that would
21 offset a particular negative or a communication error
22 or miscommunication, it would seem rather improbable
23 that that could not be done.

24 MR. JACKSON: I would agree with that.

25 JUDGE HAJEK: And relative to that being

1 a IOLB policy under review, that was the policy in
2 2011, in 2012, and continues to be the policy today.
3 NUREG-1021 has not been updated and changed --

4 MR. JACKSON: That is correct.

5 JUDGE HAJEK: -- in any way.

6 And then, David Muller sent an email to
7 Mr. McHale on September 20th -- this is CCS-025 --
8 stating to McHale, Jackson, and Steely -- Mr. Steely
9 being the third panel member -- "The Applicant still
10 would have passed, based upon the simple fact that two
11 errors in RF does not equal a score of 1."

12 And so, this is still prior to your
13 October 7th, I think you said, transmittal to Mr.
14 McHale of the report that says: let's get input from
15 the Region II Examiners.

16 And then, the third statement in your
17 short email of CCS-032 is, "You have my verbal
18 recommendation" -- this is October 7th -- "on how the
19 final grading should shake out, and this
20 recommendation is aligned with the panel's
21 recommendation."

22 So, where were you at this point in time?

23 MR. JACKSON: I'm going to be honest with
24 you. I believe at that point in time that we had the
25 grade specifically under the area of control board

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1 manipulations as being a failure. That's my
2 recollection of where we were October 7th.

3 JUDGE HAJEK: And in CCS-027, this was --
4 I don't want to get into -- I'll rest. Okay? I don't
5 want to get into analyzing individual scenario errors.
6 We talked about that yesterday. So, that was my last
7 question.

8 MR. JACKSON: Okay.

9 CHAIR SPRITZER: This would be a
10 convenient time to take a break for lunch, I believe.
11 So, why don't we adjourn at this point? I don't know;
12 is it realistic to try to get back by 1:15? That
13 would be about 50 minutes from now. Why don't we
14 shoot for that, but we won't start without any of the
15 parties' representatives and, of course, we won't
16 start without the witnesses.

17 (Whereupon, the foregoing matter went off
18 the record for lunch at 12:24 p.m. and went back on
19 the record at 1:14 p.m.)

20

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 1:14 p.m.

3 CHAIR SPRITZER: Let's proceed.

4 Okay. Mr. Jackson --

5 MR. JACKSON: Yes, sir?

6 JUDGE HAJEK: I would like to go back to
7 the question I asked earlier about the contact from
8 Mark Bates on July 5th. This is Exhibit CCS-062. It
9 is basically a one-page email with an attachment.
10 You're one of the copies on this particular
11 attachment.

12 And it states -- this is David Muller --
13 and it says, "Earlier we provided a bunch of files to
14 construct the books that we have put together. One of
15 the items here is the attached file. It contains the
16 following information: a summary of our grading
17 approach, justification of our original grading, more
18 critical evaluation, documenting explicitly additional
19 errors that were handled in a more implicit manner
20 during the original grading."

21 And this attachment is CCS-101, and I
22 believe this was provided in other forms as well. But
23 I have it here as CCS-101, their general grading
24 approach.

25 And in this general grading approach, if

1 you go down to the middle of page 1, "Applying this
2 above guidance, in an effort to be fair to the
3 applicant, the exam team went to great lengths to
4 identify the root cause of the Applicant's
5 deficiencies and attempted to assign each error to
6 only the rating factor that most closely reflected the
7 underlying deficiency observed during the error. It
8 was acknowledged during discussions with the exam
9 team, independent reviewers, and the Branch Chief that
10 some of these could be documented under two or more
11 rating factors. However, these errors were each
12 assigned to only one rating factor, even though
13 NUREG-1021 clearly allows an error to be documented
14 under two rating factors under normal circumstances,
15 and more than two for more significant deficiencies.
16 This approach should be noted as a response to the
17 Applicant's appeal that the exam team graded her exam
18 in an overly-critical manner."

19 So, I believe that this is the exam team's
20 description of how they graded all 22 candidates who
21 took the exam. Is that your understanding of what
22 this is and how this was presented?

23 MR. JACKSON: I mean, at the very least,
24 I would understand that to apply to Ms. Smith because
25 that would be the context of how this would apply. I

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1 mean, I would understand that to be that's how they do
2 the grading, per NUREG-1021.

3 JUDGE HAJEK: Okay. So, you don't
4 understand this one to mean that they applied this to
5 everyone in the class?

6 MR. JACKSON: I would infer that, yes.

7 JUDGE HAJEK: Okay. But your review, in
8 your review, it was very clear from I think Rev 1 on
9 through that your review panel applied the guidance in
10 NUREG-1021 to enable applying individual errors to
11 multiple rating factors.

12 MR. JACKSON: That is correct.

13 JUDGE HAJEK: And I know there are a
14 number of times in your review report where you have
15 clearly done that, as you have just indicated.

16 So, this was the guidance, the general
17 grading approach used for the exam in 2012 by the
18 examining team, this document here. And then, after
19 October 7th, you provided the current version, current
20 to October 7th, to Region II or to -- I'm sorry -- you
21 sent it to John McHale. And apparently, he also sent
22 it down to Region II. And Region II responded with a
23 document on the 12th of October.

24 In that document, the exam team
25 essentially endorsed your approach to applying a

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1 single error to multiple rating factors.

2 MR. JACKSON: Yes, Your Honor.

3 JUDGE HAJEK: So, my question here is,
4 since the grading method was changed, the grading
5 method for Ms. Smith's review, Ms. Smith's
6 examination, was changed from the practice by the exam
7 team applied to the entire class of enabling a single
8 error to be charged only to one rating factor. You
9 changed it in your Review Panel to the 1021 guidance,
10 enabling it to be applied to two rating factors.

11 And since the exam team endorsed that
12 method, is that not treating her differently from the
13 way all of the other candidates had been treated?

14 MR. JACKSON: I don't know if I can speak
15 to how Region II thought about that. I would say that
16 the panel was very clear on how to apply NUREG-1021.
17 For instance, for the Senior Reactor Operator
18 candidate in the Senior Reactor Operator position, if
19 there is an error made associated with manipulation of
20 a control, typically, if it's an understanding error,
21 there would be an error with understanding, but, then,
22 also, potentially, another error with directing
23 operations since the individual was in the SRO point.

24 So, I guess my point is we were charged
25 with looking at, independently looking at the grading

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1 of Ms. Smith's exam. This is how the Region IV
2 individual, the Headquarters Examiner, and myself
3 would apply NUREG-1021 to the situation that we saw.

4 So, again, the process that we utilized in
5 Atlanta was we tried to understand from Ms. Smith's
6 very detailed contention, along with the Examiners'
7 note and what was documented on the exam, tried to
8 ascertain what actually happened without actually
9 being there, and then, applied our understanding of
10 NUREG-1021 to what would have been observed by my
11 panel in the simulator to determine the appropriate
12 grading.

13 So, I don't if that gets at what you're
14 looking --

15 JUDGE HAJEK: I understand exactly what
16 you have said. Yes, you have applied the NUREG-1021
17 guidelines effectively the way NUREG-1021 is generally
18 meant to be applied.

19 As I understand this CCS-101 general
20 grading approach, this is the way that the Examiners
21 of this class approached this exam. And it's
22 different. It is being a little -- it's not applying
23 NUREG-1021 to the extent that NUREG-1021 allows an
24 error to be charged. It's being a little more
25 conservative in favor of the candidates, is the way I

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1 understand this paragraph below the letter "B" that's
2 up there.

3 MR. JACKSON: I could infer that, yes. I
4 will tell you that you mentioned looking across were
5 other candidates or other applicants graded the same.
6 There were a couple of instances where we were
7 concerned with, okay, well, how was this particular
8 error graded amongst the other folks. And we did pull
9 the records of the exam from other folks that took the
10 exam specifically around the sludge valve issue, the
11 not closing the AOVs within a sufficient period of
12 time, just to confirm that each of the crew members,
13 the other crew that didn't do this correctly also
14 received the same treatment, and we felt that they did
15 receive the same treatment. So, we did compare
16 grading across individuals, too.

17 JUDGE HAJEK: But not necessarily to
18 change the grading method across the entire exam that
19 those other individuals had taken. You looked at
20 individual events to see if Ms. Smith's crew, then,
21 was graded uniformly relative to the other two crews
22 that took that --

23 MR. JACKSON: Right. But that was really
24 in the vein of looking at how that would apply to Ms.
25 Smith's --

1 JUDGE HAJEK: Really drilling-in on one
2 item there.

3 MR. JACKSON: Correct.

4 JUDGE HAJEK: Okay. But would you say
5 it's a correct inference here that you applied the
6 NUREG-1021 guidance to enable one error to be charged
7 against two rating factors?

8 MR. JACKSON: Yes.

9 JUDGE HAJEK: Okay. So, if that was a
10 standard, then, applied to Ms. Smith, let me extend
11 that a bit to the paragraph in NUREG-1021 ES-502,
12 Section D.2.c, and it's page 235.

13 Okay. Where it states, "When the NRR
14 Operator Licensing Program Office has concurred in the
15 results of the review, the NRC's Regional Office will,
16 one, issue a license if the proposed denial was
17 overturned; two, review the examination results of the
18 other applicants to determine whether any of the
19 licensing decisions are affected."

20 So, doesn't this mean that the other 21
21 candidates should have had this same standard applied
22 to them?

23 MR. JACKSON: I do not know. It would
24 appear from the wording that the answer to that
25 question is yes, but, again, the charge of the panel

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1 was to review Ms. Smith's contentions and determine
2 the grading, correct grading, for her operating exam,
3 and make a recommendation to the Program Office, which
4 we did.

5 JUDGE HAJEK: Okay. So, I think I said
6 this -- I'm not sure -- but with your review team, and
7 I understand the charge as you've expressed it; it was
8 to review her grading. And you applied the NUREG-1021
9 standard. But, in the end here, in having applied
10 that standard differently from the way that the entire
11 rest of the class had the standard applied to them,
12 then she was graded in the end post-review-team or
13 following the review really at a higher standard?

14 MR. JACKSON: I would say I don't see it
15 like that. Again, the review team gathered the
16 information, vetted the information, and then, applied
17 as a team of three people across the Regions and
18 Headquarters, applied the standard the way we had been
19 trained and the way it reads in the standard; received
20 input from Region II, per the OLMC-500 standard. We
21 vetted that input. There was a number of pieces of
22 information that came from Region II between Revision
23 5 and Revision 6 that the panel considered. We
24 accepted three of the items out of eight or nine or
25 ten items to get to the final grading in the exam.

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1 The final document that was signed by
2 myself reflects the panel's not any harder, not any
3 easier, but accurate -- we believed that when that
4 document went as a recommendation to Mr. McHale at
5 Headquarters, that that panel of three folks that had
6 different backgrounds, we believed that we applied
7 NUREG-1021 correctly, accurately, and we had the most
8 accurate grading that we could.

9 And I will tell you that I did stand
10 back -- you know, in the end, there was a lot of
11 things that went on over a several month period. In
12 the end, I looked at the document and I said, okay,
13 with my experience, having been a Shift Manager on a
14 similar Westinghouse pressurized water reactor, and I
15 have been a Senior Reactor Operator, very experienced,
16 would I feel correct in licensing an individual that
17 does not know how to operate a controller in the
18 control room and with a leak going on, a fission
19 product barrier breach from the reactor coolant
20 system, cannot take the simple manipulation of taking
21 a valve that's open and taking it to the closed
22 position? Those kind of things absolutely have to be
23 relied upon by a licensed Senior Reactor Operator.

24 So, I looked at it by the letter of the
25 law of NUREG-1021 and I looked at it holistically as

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1 a many, many year licensed operator, trainer, Director
2 of Training, and Examiner. And I fully endorsed what
3 the panel developed as the final recommendation to
4 NRR, based off both of those.

5 JUDGE FROEHLICH: Mr. Jackson, I had a
6 question on Exhibit CCS-020. In there, there is an
7 email from Mr. Muller to you. And it says that, "For
8 the past several days, he had been reviewing Region
9 II's Table of Other Errors." What is this Table of
10 Other Errors? Do you recall what he is referring to?

11 MR. JACKSON: Yes. When we conducted the
12 Atlanta portion of the review, we became aware of not
13 only what was graded and documented on the actual
14 grading that Region II did, but there were other
15 errors that had been documented that did not, in their
16 opinion, rise to the level of an error that would be
17 documented under a rating factor for her final rating.

18 And we were interested in trying to
19 understand whether we agreed with that cut line that
20 they made a decision that that would not be tabulated
21 as an error in the final grading. So, we did look at,
22 I guess I would call them these below-the-line errors
23 that the exam team identified.

24 JUDGE FROEHLICH: And this Table of
25 Errors, this is some kind of a charter, something that

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1 Region II prepared for you or the Examiners prepared
2 for you? Or what's the origin of it?

3 MR. JACKSON: It was something that the
4 Region II Examiners prepared. It has been a long time
5 since I looked at it, but I remember a chart that had
6 a number of "X's" on it, and the "X's" showed here are
7 ones that we tabulated as errors on grading the exam
8 and here are some other observations that we had that
9 we considered below the line. And I don't think we
10 pulled any of those into the grading at all. But
11 there was a table that was tabulated of other things
12 that occurred that I guess in Region II's opinion were
13 below the line to document as an error.

14 JUDGE FROEHLICH: Is this a table that you
15 asked them to prepare or did they just say, "Hey,
16 while you're doing your independent review, look at
17 these additional errors or these other errors."?

18 MR. JACKSON: I think it was more the
19 latter. It was presented to us that, "Here is a
20 table. Here is how we -- you know, in the entirety of
21 the body of work over several scenarios, here are all
22 the errors that we saw. Here are the ones that made
23 it under rating factors. Here's some things that
24 occurred that did not." And I think that's how it was
25 presented.

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1 And again, the panel looked at it just in
2 as far as was there anything that we needed to
3 consider in this. Going back, I don't believe there
4 was. I think everything that made it onto the final
5 panel's recommendation for pass/fail did not include
6 anything from that Table of Other Errors, according
7 to --

8 MR. WACHUTKA: Your Honor, this is NRC
9 Exhibit 032, the final page, if you want to look at
10 that. It is part of the binders that were given to
11 the informal Review Panel in Atlanta.

12 JUDGE FROEHLICH: Okay. Thank you,
13 Counsel.

14 They were given to you in Atlanta? And
15 so, you had these things to work with because they
16 were given to you in Atlanta. They sent it to you
17 again, even though you already had it, because they
18 wanted you to note, I guess, these other errors that
19 didn't show up? Is that what it is? Or they wanted
20 to remind you that you had this? I'm just going to
21 the independence of your review.

22 MR. JACKSON: Right.

23 JUDGE FROEHLICH: I understood your
24 testimony to be such that, when you had a question or
25 there was a discrepancy, you would get in contact with

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1 the inspectors or the Region, and they would clarify
2 or clear it up. I just wondered if this fell into
3 that situation.

4 MR. JACKSON: My recollection of that is,
5 again, since it was Atlanta, the people that came
6 there for the review came from Dallas, Texas,
7 Philadelphia, and Headquarters. I think we all flew
8 there. And taking the binder back that had all of the
9 documentation from the exam, including this document
10 right here, we just asked them, "Hey, can you send
11 that to us electronically?" I think that's how we got
12 it for our review at Headquarters. But I know I
13 didn't carry that binder back with me because I do the
14 rollaway. I don't think I had the ability to actually
15 carry that on the plane. So, I think we asked for
16 that to be electronically sent to us, if I remember
17 correctly.

18 JUDGE FROEHLICH: Okay. If the Review
19 Panel had not regraded or looked at elements other
20 than what Ms. Smith had originally filed for review,
21 for informal review, the panel would have not
22 sustained her failure, is that correct?

23 MR. JACKSON: We're saying if we did
24 not --

25 JUDGE FROEHLICH: If you didn't go

1 beyond --

2 MR. JACKSON: Not with the non-contested
3 items.

4 JUDGE FROEHLICH: Right.

5 MR. JACKSON: I believe that is true.

6 JUDGE FROEHLICH: Okay. So, all right.

7 Thank you.

8 CHAIR SPRITZER: Mr. Jackson, I just have
9 one question for you, or I think it will only be one
10 question, to follow up on your discussion with Judge
11 Hajek.

12 When you changed the grading approach, so
13 that you could count one error against two rating
14 factors -- well, let me back up a minute. If you had
15 not done that, if you had not changed the grading
16 approach such that one error could be counted against
17 two rating factors, if you had stayed with the
18 approach that Region II originally followed of
19 counting only one error, one error against only one
20 rating factor, how would that have affected Ms.
21 Smith's grading?

22 MR. JACKSON: I don't have an answer to
23 that question, and mainly it is because the panel as
24 a whole, that's how we knew how to apply NUREG-1021.
25 So, I don't think, up until right this second, I don't

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1 think we ever considered that angle to that question.

2 We applied the NUREG as we would apply it
3 for any other person. I mean, I can tell you for
4 Region I every applicant that sits for an exam in my
5 Region, that is how we apply NUREG-1021. If it is
6 appropriate to put it over two or more rating factors
7 for an error, we do that routinely.

8 CHAIR SPRITZER: I may have misunderstood
9 your earlier testimony then. Under the approach you
10 applied to Ms. Smith during the administrative review
11 that you've been talking about, could you apply one
12 error to more than two rating factors or only to a
13 maximum of two?

14 MR. JACKSON: You can apply it to more
15 than two.

16 CHAIR SPRITZER: You could?

17 MR. JACKSON: The NUREG says that, if it's
18 of a significant nature and it very clearly applies to
19 more than two, you can do that. But, certainly, two
20 is within -- you can apply it to more than two rating
21 factors.

22 CHAIR SPRITZER: But, for whatever reason,
23 Region II, when it graded Ms. Smith originally, and
24 all the other applicants, apparently, only applied one
25 error to one rating factor, as I understand your

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1 testimony.

2 MR. JACKSON: That is correct. And I can
3 say that the three individuals that were on the
4 administrative review, that is how we applied
5 NUREG-1021.

6 CHAIR SPRITZER: Well, on the
7 administrative review, as I understand it, you applied
8 an approach under which you could count one error
9 against more than one rating factor.

10 MR. JACKSON: Correct.

11 CHAIR SPRITZER: Whereas, if I understand
12 your testimony, Region II -- maybe I confused Region
13 I and Region II earlier -- Region II, in grading Ms.
14 Smith and the other applicants, applied an approach
15 under which one error could count against only one
16 rating factor.

17 MR. JACKSON: That is correct.

18 CHAIR SPRITZER: All right. Thank you.

19 I believe we have some questions for Mr.
20 Ehrhardt.

21 JUDGE FROEHLICH: Just a few.

22 Mr. Ehrhardt, we heard from Mr. Jackson
23 how he was chosen for this assignment. How did you
24 come to be chosen to head up your portion?

25 MR. EHRHARDT: Yes, sir. I was assigned

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1 a fairness review by Mr. Len Wert. He is the Deputy
2 Regional Administrator of Region II, and he told me
3 that the Headquarters Operator Licensing Branch had
4 received correspondence that an applicant who was
5 denied a license had alleged bias on the part of the
6 Examiners. And he directed me to perform a fairness
7 review, and he said the letter describing the
8 Applicant's contentions would be forthcoming, that I
9 would receive it.

10 And he told me that I was selected because
11 I had recent experience as an Examiner/Chief Examiner
12 and because I was not in the chain of command
13 specifically within the Division that the Operator
14 Licensing Examiners are in at Region II. I am and was
15 at the time within the Division of Reactor Projects,
16 and not within the Division of Reactor Safety.

17 JUDGE HAJEK: Excuse me. Could you move
18 the microphone just a little bit closer? Thank you.

19 JUDGE FROEHLICH: In your charge to
20 conduct this fairness review, what was your
21 understanding of the elements, of the allegations of
22 bias that were raised by Ms. Smith?

23 MR. EHRHARDT: Specifically relative to
24 the bias, my understanding was that she was alleging
25 that the Examiners who conducted her 2012 examination

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1 were biased to grade her more severely because of
2 their knowledge of her 2011 performance on that
3 examination.

4 JUDGE FROEHLICH: Were there any other
5 allegations or examples of bias that were
6 investigated?

7 MR. EHRHARDT: Not other aspects of bias.
8 The other two areas that I did investigate had to do
9 with she did not understand why she had to take the
10 2012 operating test, and she alleged that the exam
11 team told the licensee that a waiver would not be
12 approved, and she was exploring that.

13 JUDGE FROEHLICH: And did you investigate
14 those allegations as well?

15 MR. EHRHARDT: Yes, I did.

16 JUDGE FROEHLICH: Okay. When did you
17 begin, well, I guess, when were you assigned to the
18 report? When did you begin and when was it concluded?

19 MR. EHRHARDT: I recall being assigned in
20 the summer of 2012, approximately June, I believe.
21 And I believe I concluded or was wrapping up the
22 fairness review in the August timeframe, and that the
23 report or the results of my review were transmitted to
24 Mr. McHale -- I think we mentioned that earlier --
25 early September.

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1 And that NRC-014, Fairness Review, I
2 believe contains a memo to Mr. McHale that would
3 support that date.

4 JUDGE FROEHLICH: Did your review include
5 investigation of the Form, I guess, 398 from Ms.
6 Smith, whether there was check, where there wasn't a
7 check, preliminary and final forms?

8 MR. EHRHARDT: I looked at her final Form
9 398, and, yes, I did look to see if the box on the
10 final Form 398 for a waiver of the operating test was
11 checked, as well as if there was anything in the --
12 and I don't recall the block number -- but the
13 supporting information that would justify that, if it
14 had been checked.

15 I did not have access or I didn't see her
16 preliminary Form 398s in her docket file. I think it
17 may have been mentioned earlier it's standard practice
18 not to retain those.

19 JUDGE FROEHLICH: Did you review the
20 emails and the telephone calls, to the extent there
21 were, between the Examiners and the Vogtle Plant on
22 the question of waiver?

23 MR. EHRHARDT: Yes, I did. The copies of
24 the emails were provided to me. And so, I reviewed
25 the copies of the emails. I had asked for written

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1 responses to questions I had prepared for Mr. Meeks,
2 Mr. Bates, and Mr. Capehart on that topic, and I
3 followed up on the written responses. They provided
4 me with in some instances verbal questions about those
5 responses.

6 JUDGE FROEHLICH: Did you make contact or
7 reach out and speak with or correspond with Mr.
8 Hopkins?

9 MR. EHRHARDT: I did not. Mr. Hopkins at
10 that point had retired from the NRC.

11 JUDGE FROEHLICH: When did he retire, if
12 you know?

13 MR. EHRHARDT: I don't know the answer to
14 that, sir.

15 JUDGE FROEHLICH: Okay. Since this
16 investigation was to look into forms of bias, and it's
17 referred to as an independent review, I guess, in your
18 testimony, within the chain of command or within your
19 work responsibilities did you have contact or
20 interaction with Mr. Meeks, Mr. Bates, and Mr.
21 Capehart over the last three or four years?

22 MR. EHRHARDT: In the context of my
23 contact with them, it was with regard to the fairness
24 review and obtaining information for that. The year
25 and a half prior to that, I was a Branch Chief, I am

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1 a Branch Chief in the Division of Reactor Projects.
2 So, there is no routine contact between myself and
3 those three individuals. And for the two years prior
4 to that, I was a Senior Inspector conducting fire
5 protection inspections and there was no routine
6 contact in the conduct of that, my function there,
7 either.

8 JUDGE FROEHLICH: As part of your review
9 and your investigation, did you speak with or get
10 statements from any officials at Plant Vogtle?

11 MR. EHRHARDT: I did not. And specific to
12 the waiver request or the issues of the waiver, as you
13 mentioned or questioned me on, I had seen copies of
14 the emails. And I also interviewed Malcolm Widmann on
15 that subject. The reason I interviewed Mr. Widmann is
16 because, in my experience as a former Examiner, if the
17 licensee feels strongly about a decision that a member
18 of the examination team is likely to make or
19 recommend, that they will either informally appeal or
20 question at the Branch Chief level, the boss, if you
21 will, for the Examiners, why that decision was made.

22 When I interviewed Mr. Malcolm to ask him
23 if he had any contact with the Vogtle facility about
24 why waivers were likely to be denied or what the
25 Examiner's logic was, he indicated that they had not

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1 contacted him.

2 JUDGE FROEHLICH: Okay. Did you secure
3 independent written statements from each of the
4 Examiners, as was done in the McGuire case?

5 MR. EHRHARDT: I'm not familiar with the
6 McGuire case, sir. So, I don't know what specifically
7 was provided.

8 JUDGE FROEHLICH: Then, the question would
9 be, did you get independent written statements from
10 each of the Examiners as part of your investigation?

11 MR. EHRHARDT: Yes, I did. I believe one
12 of those statements has been up here previously as an
13 exhibit, and it was from Mr. Bates. What you saw and
14 asked the question on earlier regarding the names in
15 parentheses that would appear after the questions,
16 that's what represented that.

17 JUDGE FROEHLICH: Okay. As part of the
18 fairness investigation, did you find a practice or any
19 instance in the past where the Region had reached out
20 to a plant and told them the likelihood or
21 unlikelihood of an applicant being granted a waiver?

22 MR. EHRHARDT: I didn't interview other
23 Examiners or Chief Examiners in that regard. I know
24 from my experience as a Chief Examiner that I had made
25 that comment following administration of tests at

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1 utilities.

2 JUDGE FROEHLICH: Did you come across any
3 instances where a preliminary waiver was requested and
4 the Region reached out to the plant to ask if it were
5 a mistake?

6 MR. EHRHARDT: I want to make sure I
7 answer your question accurately. What I can tell you
8 is that -- and I know I have done it myself -- I have
9 contacted the licensee because of information on their
10 398s that I questioned or was questioning how they
11 were supporting it, and asked them, again, did they
12 intend to apply for a waiver for an individual.

13 I think your question is specific to the
14 operating test, and in my experience I don't remember
15 specifically if it was regarding operating tests.

16 JUDGE FROEHLICH: Okay. In I guess your
17 report, you state that, "Prior to issuing a license
18 denial to the Applicant, the Chief Examiner obtained
19 independent reviews of the Applicant's individual
20 examination report from two Senior Examiners and one
21 Examiner."

22 Can you put names with the titles or job
23 descriptions for me?

24 MR. EHRHARDT: I can. The individuals
25 that I'm referring to there are Gerry Laska, who is a

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1 Senior Examiner and a Chief Examiner; Bruno Caballero,
2 who is also a Senior Examiner and a Chief Examiner,
3 and Dave Lanyi, who I believe at the time was an
4 Examiner. All three of them have held SRO licenses,
5 and two of the three of them had worked for utilities
6 in a training capacity.

7 JUDGE FROEHLICH: "And the purpose of
8 having these reviews by these gentlemen was to ensure
9 that the Applicant's performance was accurately
10 described and characterized, and that the Examiners'
11 assessment of the Applicant's performance complied
12 with the guidelines contained in NUREG-1021." That's
13 your testimony?

14 MR. EHRHARDT: That's correct. The
15 context there is that it is not uncommon for a Chief
16 Examiner to ask somebody who has not been involved in
17 the examination to review the ES-303s, the writeups,
18 if you will, to say: did I miss something? Is there
19 something that's confusing to you? Is there something
20 I didn't support?

21 JUDGE FROEHLICH: How can someone who
22 didn't view the examination speak to the accuracy of
23 the Applicant's performance, that the Applicant's
24 performance was accurately described?

25 MR. EHRHARDT: What would perhaps trigger

1 something on that is if a comment that was made on,
2 for example, the simulator exam did not appear to
3 support the rating factor that it was assigned to.

4 JUDGE FROEHLICH: I think your report also
5 concludes towards the end of it that "The Applicant's
6 contention that Examiners discouraged the facility
7 licensee from requesting a waiver for the operating
8 test portion of the Vogtle 2012 initial license exam
9 is unsubstantiated."

10 What do you make of the emails saying that
11 it would not likely be granted? Don't you think that
12 would discourage a licensee from asking?

13 MR. EHRHARDT: The way I'm interpreting
14 your question and that statement is discouragement is,
15 I guess if you will, an emotion or, you know, it's in
16 the eyes of the beholder. I've had instances myself,
17 again, where some licensees, I've given them
18 information that perhaps a question or an exam overall
19 is unsatisfactory or that a waiver would likely be
20 denied. And they will, again, contact the Branch
21 Chief to appeal that. They did not in this case,
22 based on my interviews with Mr. Widmann. Or go ahead
23 and perhaps submit a portion of the exam regardless.

24 So, what I concluded was that, again, a
25 waiver was not requested and that the exam team here

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1 told them that it was unlikely to be granted, but they
2 didn't tell them not to submit it or that they would
3 just flat-out not approve it, if it was submitted.

4 JUDGE FROEHLICH: I also read, I guess, in
5 the final report a paragraph that reads as follows:
6 "Initial examinations are highly prescribed with
7 critical tasks and key performance elements determined
8 in advance with facility training representatives.
9 There is little, if any, opportunity to hold any
10 single applicant to a higher standard of performance.
11 The review found that Applicant was examined fairly
12 and in a normal fashion."

13 Is this a unique paragraph or is this a
14 stock paragraph that is used when independent reviews
15 are conducted?

16 MR. EHRHARDT: I'll answer that in two
17 parts or I will try to dissect it. I don't know with
18 respect to independent reviews because this is the
19 only review that I've done.

20 The paragraph comes from the Examiner's
21 Standard and discussing the background of what the
22 operating test is and what it is designed to do.

23 Maybe somebody else can help me with this.
24 I believe it comes from -- there's a background
25 section in the back of the standard, Appendix D. I

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1 don't remember exactly, but it does come out of 1021,
2 NUREG-1021.

3 JUDGE FROEHLICH: Okay. Have you
4 participated in any examination teams with any of the
5 individuals that you were investigating as part of
6 this fairness review?

7 MR. EHRHARDT: I have. I've participated
8 with Mr. Bates in an exam team, and I've participated
9 with Mr. Capehart in an exam team, in approximately,
10 I believe, the 2008-2009 timeframe.

11 JUDGE FROEHLICH: So, you knew these
12 individuals and you had worked with these individuals
13 before you began the independent review of their
14 actions in this instance, in this case?

15 MR. EHRHARDT: That's correct, a number of
16 years before I was asked to do the review.

17 JUDGE FROEHLICH: Does the fact that you
18 knew them and had worked with them in the past speak
19 to your lack of bias or approaching this
20 independently?

21 MR. EHRHARDT: I went into this trying to
22 look at the data and I asked the questions, and I
23 believe I was unbiased in it. That's my view as a
24 manager. Especially at the management level now, that
25 is the expectation, that I'm a manager, not a peer, as

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1 a Branch Chief.

2 JUDGE FROEHLICH: Okay. Thank you.

3 CHAIR SPRITZER: Mr. Ehrhardt, let's bring
4 up Exhibit CCS-015, and specifically page 5 at the
5 bottom.

6 Do you want to take a minute and look at
7 the two emails at the bottom of the page, one
8 apparently from you to Mark Bates, dated August 29,
9 2012, and the one immediately above it I take to be
10 Mr. Bates' reply to you of the same date.

11 MR. EHRHARDT: Uh-hum.

12 CHAIR SPRITZER: Is that an accurate
13 description?

14 MR. EHRHARDT: It is, sir.

15 CHAIR SPRITZER: Now you say "Michael".
16 Who is Michael?

17 MR. EHRHARDT: Mr. Meeks. Excuse me.

18 CHAIR SPRITZER: Okay. And he had stated,
19 I take it to you, that "Carla's preliminary 398 had 4F
20 checked for a waiver of the op test, and that this was
21 basically a typo or oversight on the licensee's part;
22 i.e., they did not intend to request a waiver of the
23 op test." Is that a correct statement of what Mr.
24 Meeks told you?

25 MR. EHRHARDT: It is.

1 CHAIR SPRITZER: When and how did he tell
2 you that?

3 MR. EHRHARDT: It was -- and I would like
4 to, if we have it, I think we have Mr. Meeks' response
5 to my written questions.

6 CHAIR SPRITZER: Okay.

7 MR. EHRHARDT: I would be going off of
8 memory if I answered it without either looking at that
9 -- it's either in there or it was verbal, and I don't
10 know which one.

11 CHAIR SPRITZER: Okay. I believe his
12 response or the response to your various questions was
13 CCS-001.

14 MR. EHRHARDT: That's how it's labeled on
15 my exhibit list, sir, yes, CCS-001.

16 CHAIR SPRITZER: And if you would tell us
17 what page you would like to look at, we can try to
18 accommodate you.

19 MR. EHRHARDT: Okay. If you would scroll
20 down, please? Scroll down more, please. And some
21 more, please. And to the next question, please. It
22 would be labeled with a "3", presumably. Down to 4,
23 please.

24 Sir, I'm not seeing it in the written
25 testimony. And from that, I'm concluding it was a

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1 verbal discussion.

2 CHAIR SPRITZER: All right. And you go on
3 to state in your email, the email that you sent to Mr.
4 Bates, "Do we still have the form" -- I take it that's
5 referring to the preliminary 398 form for Carla Smith?

6 MR. EHRHARDT: If you would give me a
7 minute to read the sentence?

8 (Pause.)

9 That's correct. I was looking to see if
10 we did, by chance, have the preliminary Form 398
11 somewhere.

12 CHAIR SPRITZER: And then, why did you
13 want to look at the preliminary Form 398?

14 MR. EHRHARDT: Because I wanted to see if
15 what was on the form matched what he told me.

16 CHAIR SPRITZER: And what would you have
17 -- well, let me go on to the next sentence. "Do you
18 remember if they provided any justification" --

19 MR. EHRHARDT: Uh-hum.

20 CHAIR SPRITZER: -- "in block 17 for a
21 waiver of the opt test? (I would think not,
22 supporting the typo conclusion.)"

23 Was that what you were looking for, to see
24 if they had provided a justification in block 17?

25 MR. EHRHARDT: Yes. My thought process at

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1 the time was perhaps they had provided justification
2 in addition to checking the block or provided
3 justification and not checked the block. I really
4 wanted to see, based on looking at the form myself,
5 what was on it. That was the goal of the questioning.

6 CHAIR SPRITZER: But when you say, "I
7 would think not." My understanding of reading that is
8 you thought it was unlikely they had provided the
9 justification in block 17.

10 MR. EHRHARDT: It was, based on what I had
11 learned from Mr. Meeks regarding their intent. So, it
12 was an editorial comment, but I still wanted to see
13 what they had.

14 CHAIR SPRITZER: All right. Now in the
15 email immediately above, this is Mr. Bates responding
16 to your email, he says, "That is correct. Michael
17 told me that the licensee had stated that it was a
18 typo on their part."

19 I've tried to figure out what "That is
20 correct" says is correct. One possibility is that
21 they did provide a justification in block 17. The
22 other was they didn't provide a justification in block
23 17, supporting the typo conclusion. If you can
24 interpret what he said? I don't know whether you can
25 or not.

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1 MR. EHRHARDT: I'm trying to. Would you
2 scroll up, please, on that? What I'm looking at to
3 try to figure this out is the date and time stamps on
4 the email to see what the order is.

5 No, the email above doesn't shed any light
6 on that, sir, for me.

7 CHAIR SPRITZER: All right. Now he tells
8 you, "We do not keep preliminary unsigned
9 applications. There is no requirement in the NUREG to
10 retain these."

11 So, it is the case, then, that you never
12 actually did see, prior to completing your fairness
13 review, the preliminary Form 398F for Carla Smith?

14 MR. EHRHARDT: That's correct. I only saw
15 the final Form 398 for Ms. Smith.

16 CHAIR SPRITZER: Did you think about
17 asking the licensee for the preliminary Form 398F?

18 MR. EHRHARDT: I did not.

19 CHAIR SPRITZER: Since you've been
20 involved in this litigation, have you seen that
21 document, the preliminary Form 398F that was
22 apparently submitted on behalf of Carla Smith?

23 MR. EHRHARDT: Yes. I believe we
24 discussed it yesterday and it was up on the screen.

25 CHAIR SPRITZER: And, in fact, block 17 is

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1 completed on that?

2 MR. EHRHARDT: That's correct, from what
3 I recall, yes.

4 CHAIR SPRITZER: And there's also -- well,
5 you've seen the entire form?

6 MR. EHRHARDT: Yes. Yes, sir.

7 CHAIR SPRITZER: You know what it looks
8 like?

9 MR. EHRHARDT: Yes, sir.

10 CHAIR SPRITZER: Based upon your review of
11 the entire form, do you think it is accurate today to
12 say that the application for a waiver on behalf of Ms.
13 Smith could fairly be characterized as a typo?

14 MR. EHRHARDT: Well, before I saw the
15 form, if you would have asked me what I expected to
16 see on the form, it was a block checked, but I was not
17 aware that there was justification provided in block
18 17. Merely checking a block when you don't intend to,
19 to me, could be characterized as a typo. If you add
20 the comments to it, I would say they perhaps didn't
21 intend to submit the waiver, but I'm not sure I would
22 label as merely a typo.

23 CHAIR SPRITZER: All right. I don't have
24 anything more for this witness. Do either of you?

25 JUDGE HAJEK: If you would scroll up to

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1 the next email above this one, which is from you to
2 Michael Meeks? And this is continuing on the same
3 topic about the content of the form.

4 In the middle here of the first paragraph,
5 now Mr. Meeks reports to you. I don't remember if
6 they provided any justification for the waiver on the
7 preliminary application. So, this is just what we've
8 been talking with.

9 And also, there was another email, and I
10 was just looking at what we had here, so I don't have
11 the other one here. But I think Mr. Bates had said
12 that only Michael had looked at, had actually seen
13 these preliminary forms, the preliminary 398s.

14 But in the testimony yesterday they both
15 had seen them, and they had both seen this
16 justification. So, I'm confused as to why that
17 information wasn't correctly passed on to you at this
18 time. Do you have any concern about that?

19 MR. EHRHARDT: Well, I am trying to recall
20 what you are describing, and I'm struggling to come
21 up-to-speed on remembering that. Could you repeat
22 your question, please?

23 JUDGE HAJEK: Well, my question is, having
24 seen the 398 yesterday --

25 MR. EHRHARDT: Uh-hum.

1 JUDGE HAJEK: -- having heard the
2 testimony yesterday that Mr. Meeks and Mr. Bates had
3 both reviewed all of the 398s together, and then,
4 having been told that this was a typo and there was no
5 justification in box 17, does that raise any concerns
6 on your part about the information that was provided
7 to you during your review?

8 MR. EHRHARDT: It's different than what I
9 expected to see until I had seen actually the
10 preliminary Form 398 yesterday, as I mentioned
11 earlier. Yes, I was not expecting to see anything in
12 that justification block.

13 JUDGE HAJEK: And going back to what you
14 said about, if a plant had a concern about what they
15 were being told, they would generally go to the Branch
16 Chief.

17 MR. EHRHARDT: That's correct.

18 JUDGE HAJEK: And so, simply because of
19 that experience, you did not feel there was a need to
20 contact the plant? In light of Mr. Tucker's testimony
21 yesterday, it seemed like there was great concern at
22 the plant about being pressurized not to submit a
23 waiver request because they had been contacted so
24 often about it.

25 MR. EHRHARDT: My experience, again, is if

1 they know that we are likely to deny a waiver and
2 that's an issue for them, that it is not unlikely that
3 they will call the Branch Chief directly. Based on
4 yesterday's testimony, I was not aware of their great
5 concern at this time.

6 CHAIR SPRITZER: Mr. Jackson, you will be
7 delighted to know I do have a few more questions for
8 you before we let you go.

9 Would it have been possible to fully
10 review Ms. Smith's contentions without information
11 from Region II?

12 MR. JACKSON: No.

13 CHAIR SPRITZER: And without information
14 from the Examiners?

15 MR. JACKSON: No.

16 CHAIR SPRITZER: I'm not sure you can
17 answer this question, but I'll ask it anyway. What
18 standard did you use when reviewing Ms. Smith's
19 contentions?

20 MR. JACKSON: Well, I used, again, from
21 the outset of the administrative review, I chose a
22 group of people that were not, in my thought, were not
23 influenced by Region II. So, I reached out to Region
24 IV for a person and Headquarters for a person, just to
25 ensure that there was absolutely no influence from

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1 Region II when we conducted this review.

2 The standard -- can you hit the question
3 one more time? I'm mixing up the last two questions,
4 I think.

5 CHAIR SPRITZER: The question as written
6 says, "What standard did you use when reviewing Ms.
7 Smith's contentions?"

8 MR. JACKSON: Okay. Again, pulled a team
9 together that was impartial or separate from Region
10 II. We, as a team, utilized NUREG-1021 as the
11 standard as we know how to apply it and how we have
12 been trained to apply it. And frankly, there's not a
13 person on the team -- I believe Chris Steely has been
14 a licensed operator. I know I was a licensed operator
15 twice. We, as a team, recognized how important this
16 whole process is to Ms. Smith. So, there was an
17 upfront thought that this is very important, that we
18 were going to take the time that it needed to go
19 through the very complicated contentions that were
20 there, and in the end to do the right thing and to
21 apply the NUREG-1021 to the best that we believed that
22 it could be applied.

23 And again, the final version, the final
24 recommendation that was made to Mr. McHale for NRR to
25 utilize was utilizing the standard NUREG-1021 to the

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1 best of our ability to get to what we thought was the
2 correct licensing decision for this individual for
3 this particular point in time.

4 CHAIR SPRITZER: What do you understand
5 OLMC-500 to mean at the top of page 6 where it states,
6 "During an appeal panel review, the panel will
7 establish and maintain communications with the
8 affected Region and IOLB in order to ensure that the
9 review results include Regional and IOLB input."?

10 MR. JACKSON: Can we pull that up, please?

11 CHAIR SPRITZER: Sure. Top of page 6.

12 MR. JACKSON: I guess my initial thought
13 to that, and the way we applied it, was I was
14 conducting this review to provide a recommendation to
15 Mr. McHale in IOLB. So, if he had specific parameters
16 that he wanted us to utilize, he would have provided
17 that. So, I did provide updates to Mr. McHale, where
18 we were at in this process. And I informed him, "Here
19 is how we plan to conduct the process. We plan to
20 meet face-to-face in Atlanta. Here's why I think we
21 need to do that. Here's what we want to accomplish."

22 And I wanted a person specifically from
23 Headquarters that had experience in this process.
24 That was part of the interfacing with IOLB. And
25 frankly, the part where it says, "Establish and

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1 maintain communications with the affected Region," you
2 can't do the review in a vacuum. So, I had Ms.
3 Smith's side of the story, for lack of a better term,
4 her contentions. And we needed a lot of input from
5 the folks that were actually in the simulator watching
6 the evaluation, whether that be verbal or what was in
7 their exam record, to ensure that when we backed up
8 and applied NUREG-1021, that we clearly understand as
9 if we were there what actually occurred in the
10 simulator.

11 And after having done it and volunteered
12 to do it, that is a very difficult thing to do because
13 you are making decisions that have drastic impact on
14 an individual's life. And you know that when you're
15 doing it. And it also affects nuclear safety, and
16 you're trying to do that without actually having been
17 there. That's hard. So, I think that's what that
18 means. You have to have communication because you
19 weren't there.

20 CHAIR SPRITZER: All right. I don't think
21 I have anything further for either witness; neither
22 did my fellow -- oh, sorry, one more.

23 JUDGE FROEHLICH: I would like to go back
24 and follow up on something we were talking about, Mr.
25 Ehrhardt.

1 I think you mentioned a Mr. Len Wert in
2 one of your answers as the individual who assigned you
3 to your portion of the review, is that correct?

4 MR. EHRHARDT: That is correct.

5 JUDGE FROEHLICH: And does Mr. Len Wert
6 report to Mr. McHale? Is he in that chain of command?

7 MR. EHRHARDT: He is not.

8 JUDGE FROEHLICH: Tell me, please, how
9 your position, Mr. Wert's position, and Mr. McHale fit
10 in, fit together.

11 MR. EHRHARDT: Okay. I report to the
12 Division Director for the Division of Reactor Projects
13 in Region II. And the Director of the Division of
14 Reactor Projects reports to Victor McCree, who is the
15 Regional Administrator. Len Wert, he is the Deputy
16 Regional Administrator. And Mr. McHale, I don't know
17 specifically who he reports to now; reports to a
18 Director. DIRS is the acronym, Inspection -- and I
19 don't honestly know what the rest of it stands for.
20 Mr. McHale can probably fill that in, who ultimately
21 reports to an Office Director at NRR.

22 JUDGE FROEHLICH: Do you know who decided
23 to divide up the review into two portions, you know,
24 one that would be handled by a team, or whatever; one
25 that would be investigated by yourself?

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1 MR. EHRHARDT: No, I don't know if that
2 was some kind of collective decision between the
3 Region and the Program Office or if there was an
4 individual who decided that.

5 CHAIR SPRITZER: All right, gentlemen, I
6 believe we are finished with you. Why don't we take
7 a five-minute break? And we will proceed with the
8 next two witnesses, Mr. Widmann and Mr. McHale.

9 (Whereupon, the foregoing matter went off
10 the record at 2:12 p.m. and went back on the record at
11 2:22 p.m.)

12 CHAIR SPRITZER: All right. I think we're
13 ready go back on the record.

14 Good afternoon, gentlemen.

15 Both of you have been sworn already. I
16 remind you that you are still under oath.

17 WHEREUPON,

18 JOHN McHALE AND MALCOLM WIDMANN

19 having been called for examination and, having been
20 previously duly sworn, were examined and testified as
21 follows:

22 CHAIR SPRITZER: Can you tell us who you
23 are?

24 MR. McHALE: Yes, Your Honor. My name is
25 John McHale. I also go by "Jack" in a lot of the

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1 documents.

2 I am the Chief of the Operator Licensing
3 Branch in NRR, which is the Office of Nuclear Reactor
4 Regulation at NRC Headquarters, otherwise designated
5 as IOLB in many of the paperwork. I am just under
6 four years in that position.

7 Prior to that, I was a Branch Chief in one
8 of the Engineering Divisions in NRR. And prior to
9 that I was employed at a licensing facility in
10 engineering and also held an SRO license. And prior
11 to that, I was a nuclear-trained Navy submarine
12 officer.

13 MR. WIDMANN: Good afternoon.

14 Malcolm Widmann. I'm the Chief for the
15 Operations Branch One out of Atlanta, Region II, in
16 the Division of Reactor Safety.

17 Prior to being in this position, I was the
18 Chief for the Division of Reactor Projects over the
19 TVA sites and, prior to that, over the Southern
20 Company sites.

21 Prior to being in that position, I was the
22 Senior Resident at both North Anna and VC Summer
23 sites, as well as the Resident at Vogtle and qualified
24 at Sequoia. And I had a number of other jobs within
25 the agency prior to coming into Region II.

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1 CHAIR SPRITZER: Very well.

2 JUDGE HAJEK: I would like to go to the
3 issue of influence on the plant by the Examiners in
4 the Region. And, Mr. McHale, let me direct to you
5 because I understood you to say you held an SRO
6 license at a plant. So, you have plant experience?

7 MR. McHALE: Yes, Your Honor, I have.

8 JUDGE HAJEK: From that experience, if the
9 NRC representative is contacting several times
10 indicating that in this case here, but it might apply
11 in other areas as well, that an action that the plant
12 would like to perform is likely to be denied by the
13 Commission, how does the plant respond to that, in
14 your experience? How would you have been responding
15 to that?

16 MR. McHALE: Well, Your Honor, again, I
17 wasn't in a licensing position that I was in a
18 position that had regular contact with the NRC.
19 Speaking hypothetically, I'm assuming that, depending
20 on the nature of the relationship of the NRC with the
21 licensee in a process such as operating licensing,
22 there is a lot of collaboration and back-and-forth
23 communications just to develop the exam and schedule
24 it. But I think those type of conversations would
25 probably be routine because I think it is a total

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1 ongoing exchange of information. So, I'm not sure
2 that in that case -- I think it would be something
3 that either side would explore to get at a common
4 understanding of.

5 Again, on the other side, I think if a
6 licensing action maybe that was more isolated or
7 something that may be a more contentious issue -- I
8 should say that -- where there is less collaboration
9 on it, then maybe there would be at different approach
10 to it.

11 JUDGE HAJEK: Well, this was a licensing
12 issue.

13 MR. MCHALE: Yes, sir, I understand that.
14 And, I mean, I'm talking about like a license
15 amendment request for tech specs, you know, more of a
16 broader plant thing, as opposed to this operator
17 licensing process, which is just by its nature very
18 collaborative, and there is a constant exchange of
19 information between the licensee and the Regional
20 Examiner.

21 JUDGE HAJEK: So, am I understanding you
22 to say that, because the Examiners work closely with
23 the plant personnel to develop a license, a licensing
24 exam, that you would have looked upon that type of a
25 comment coming from the NRC side as being general

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1 banter rather than --

2 MR. WIDMANN: I will answer that. I will
3 answer that, Judge.

4 The area of operating licensing is
5 probably one of the more unique activities, regulatory
6 activities we undertake. In my prior positions in
7 prior activities, you know, in the Division of Reactor
8 Projects, say, it is understood between the regulatory
9 body and the licensee where everybody stands. It is
10 much more black and white. The regulations are what
11 they are. You follow the regulations or we will have
12 a different kind of a discussion.

13 In the area of operator licensing, it is
14 very normal for Examiners to discuss with licensees
15 during the development of an exam and communicate with
16 them on the daily activity, whether email, phone
17 calls. There will be times it changes, but it is very
18 common for me to talk on the phone with my
19 counterparts at the sites.

20 So, this area is much more of a
21 negotiation when you understand that they're
22 developing the exam and we're approving the exam. You
23 know, it's still our product in the end, and that exam
24 has to meet the requirements and meet the regulations,
25 as well as the NUREG. So, there is a lot of give-and-

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1 take, as Mr. McHale said.

2 JUDGE HAJEK: Okay. So, without trying to
3 follow, if you will permit, not to try to pull up
4 every document here --

5 MR. WIDMANN: I would agree.

6 JUDGE HAJEK: You were, according to pre-
7 filed documents and testimony, you apparently were
8 contacted by someone at the plant. And I would take
9 it that, since the contact came -- and that person was
10 not identified to us because the documentation had
11 been redacted. So, some person at the plant -- and I
12 would guess it would have been at the Training Manager
13 level -- contacted you early in the timeframe of,
14 let's say, shortly post-exam period of 2011, maybe in
15 May, and asked you about potential waivers. And you
16 asked your employees, Mr. Meeks, Mr. Hopkins, who
17 apparently had already retired by that time perhaps --

18 MR. WIDMANN: No, not by that time.

19 JUDGE HAJEK: -- not by that time? -- and
20 Mr. Capehart whether the six candidates would be
21 granted waivers for their operating exams that they
22 had passed.

23 MR. WIDMANN: Yes, that would not be a
24 normal phone call for me to entertain that question
25 from a Training Manager.

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1 JUDGE HAJEK: Okay. From Mr. Ehrhardt's
2 testimony, I gathered that that would be the case.

3 And so, you asked Messrs. Meeks, Capehart,
4 and Hopkins for their recommendations there. And the
5 written testimony that I saw was that -- and right now
6 I don't recall, but it probably doesn't matter --
7 either Mr. Capehart -- I think it was Mr. Capehart
8 sent emails out, he says, to Mr. Hopkins and to Mr.
9 Meeks. And in his email, he said, "You know, we need
10 to get this information back to Mr. Widmann because he
11 wants to get the answer back to the plant."

12 Is that the way that you recall things
13 happening, that they had a conversation?

14 MR. WIDMANN: Yes, I mean, we had a lot of
15 conversations. So, for me to get back to a licensee
16 is standard practice. I don't like for us to drag
17 feet in getting back with them. I like to be
18 responsive to requests.

19 This was a very, very informal request of,
20 "Hey, is this something you guys would even think
21 about?" So, it wasn't with any decisions behind it,
22 no commitment behind it. It was let's take a look.
23 Let's see what we think, and let's just have a
24 discussion.

25 JUDGE HAJEK: So, you had a discussion

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1 after that, after Mr. Capehart got his responses from
2 Mr. Meeks and Mr. Hopkins, and the three of you had
3 sat down, then, to discuss the wording that should be
4 provided back to the plant of -- it sounded like it
5 was very precise.

6 MR. WIDMANN: Well, I mean, we have to be
7 precise in many of the things we do. The questions
8 have to be precise. The exam needs to meet the
9 requirements. So, in responding to a request like
10 that, it was, I think the recommendation from the team
11 was we need to proceed carefully because we are not
12 committing to something. We don't want to roll it
13 out, and we're not making judgment right now.

14 But we were asked to give them feedback.
15 We were asked the question, and I wanted to answer the
16 question.

17 JUDGE HAJEK: So, the answer was to likely
18 deny?

19 MR. WIDMANN: I don't remember the exact
20 words. I don't know that I spoke to them or they
21 spoke to them. I don't remember speaking those words
22 exactly. But it was along that line.

23 JUDGE HAJEK: Along that line? Okay.
24 Well, those words were the words that are very clearly
25 in the testimony here --

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1 MR. WIDMANN: Uh-hum, yes.

2 JUDGE HAJEK: -- "likely deny".

3 MR. WIDMANN: That's what's in the emails;
4 I understand.

5 JUDGE HAJEK: Yes. But you don't remember
6 actually using them. So, those are words that perhaps
7 the Examiners themselves came up with that were
8 acceptable.

9 MR. WIDMANN: Oh, I mean, I have a lot of
10 conversations. I don't remember the details of every
11 conversation. But whether I used those exact words or
12 not, I may have; I just can't tell you in all honesty
13 with 100 percent accuracy I said it exactly that way.

14 JUDGE HAJEK: The other part of the phrase
15 that was in the testimony was, without remediation, we
16 would likely deny, but I didn't see anything in the
17 testimony that it was ever said to the plant people
18 that, "You know, if you provide remediation for her,
19 then we might change our" -- the word "remediation,"
20 in other words, was never provided to the plant as a
21 potential justification for granting a waiver?

22 MR. WIDMANN: At the time of the request,
23 it would solely be based on performance in the 303s.
24 I wouldn't ask for remediation or a remediation
25 package at that point because it wasn't a formal

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1 request. So, having a discussion about remediation
2 and what you need to do, the plant understands how
3 they need to meet the requirements and would have to
4 provide that if they're going to proceed down that
5 path. This question was a simple question. This is
6 something you guys were to entertain.

7 JUDGE HAJEK: So, why would you not just
8 tell them, "We will deny the waiver."?

9 MR. WIDMANN: Because that's a decision.
10 That sounds like a final decision to me, the way you
11 phrased it.

12 JUDGE HAJEK: Yes, it sounds like a final
13 decision the way I phrased it, yes.

14 MR. WIDMANN: Yes, sir.

15 JUDGE HAJEK: So, why not just make the
16 decision early on?

17 MR. WIDMANN: Because I wouldn't want to
18 commit to that decision because it's the right to go
19 ahead and submit the waiver if they choose to.

20 JUDGE HAJEK: Wouldn't it have been
21 advantageous to encourage them to submit the waiver
22 request that early on their part?

23 MR. WIDMANN: When they request that early
24 -- they are not to submit the waiver request that
25 early. They were just after the 2011 exam. They

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1 hadn't even decided what they were doing with their
2 applicants or what applicants they would put up. I
3 mean, that would be a bit premature.

4 JUDGE HAJEK: I'm curious that certainly
5 in the entire country, as well as Region II, there
6 have been a number of waiver requests, and very few of
7 those waiver requests apparently have been denied.
8 And we don't have history -- and maybe you do -- on
9 the one person whose waiver request had been denied
10 that was on NRC-008. Operator 47 is what I am
11 recalling. Do you recall what happened with that
12 particular operator?

13 MR. WIDMANN: I don't, only because I
14 wasn't in my current position at the time because I
15 was put on assignment for another job in a temporary
16 Deputy Director position. So, that decision, and what
17 was behind that decision, was done without me in the
18 loop on that particular one. I had an actor at that
19 time.

20 JUDGE HAJEK: If a waiver request is
21 denied, which the words "we don't have precedent for
22 this, evaluating this or evaluating that," I've heard
23 several times yesterday and today, if a waiver request
24 is denied and the candidate, like Ms. Smith did, sat
25 again for an exam, now in Ms. Smith's case her waiver

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1 request was not denied. But if she had applied for a
2 waiver and if it had been denied, what would the
3 process for choosing the exam team, assigning the exam
4 team to her retake have been?

5 MR. WIDMANN: It most likely would have
6 been impacted because I am in control of that
7 schedule. I had the responsibility to assign the
8 teams, to make sure that we're meeting the regulations
9 and the right members were on the team. And that
10 means that the right members are going for the right
11 technologies and the availability is there and they
12 can do their tasks.

13 So, if we were truly there, I was aware of
14 what the teams were with this case and made a
15 conscious decision to go with the teams I had. And if
16 the circumstances had changed, I would have to revamp
17 that schedule, which happens, and I would have to mix
18 Examiners and reassign Examiners and try to fit it in.
19 That impact would also have an impact on the plant
20 potentially because our exam schedule is very, very
21 tight. The requests are made years in advance, and we
22 lock into what we're going to do and when we're going
23 to do it. I'm working currently on 2015 and 2016
24 exams right now, scheduling.

25 So, the flexibility to move exams or

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1 reschedule or make up a new team could have an impact
2 for both sides. And the licensee understands that.

3 JUDGE HAJEK: So, am I understanding
4 correctly, then, that had Ms. Smith actually applied
5 for a waiver, that is, the final 398 had come in with
6 a waiver request, and if your Examiners or if your
7 assessment in Region II would then have been to deny
8 the waiver request, I believe I heard you say that
9 would impact the exam team.

10 MR. WIDMANN: No, sir. No, what you asked
11 me was, had she failed, would that impact the
12 Examiners I had on this team? In the circumstances
13 that were here, she had passed. And would I have
14 accepted the request for a waiver and could I process
15 it in time, yes, if that's your question.

16 JUDGE HAJEK: Okay. I guess I wasn't
17 clear then. Okay. So, hypothetically, if she had
18 requested the waiver officially, the final 398 --

19 MR. WIDMANN: Uh-hum.

20 JUDGE HAJEK: -- if that had been filed
21 with a request for a waiver, and in accordance with
22 the requirement that it be filed on time, so that you
23 could have the requisite time to assess it, and your
24 assessment chose to deny the waiver request, would
25 that have affected the exam team if the plant would

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1 have put her up the way they did put her up?

2 MR. WIDMANN: No, sir.

3 JUDGE HAJEK: So, if the waiver had been
4 denied, you would look at that as, okay, she is just
5 another candidate and she takes the exam like
6 everybody else, and we don't have to be concerned
7 about the exam team being changed in any way?

8 MR. WIDMANN: Well, I gave you the
9 explanation of the team being changed if circumstances
10 were different, and I'm not sure I'm understanding
11 your question. Now are you proposing to me that the
12 circumstances were different or what they were for
13 her?

14 JUDGE HAJEK: No, I'm proposing, if the
15 situation arose --

16 MR. WIDMANN: Yes, sir.

17 JUDGE HAJEK: -- had arisen where whenever
18 the 30-day limit was -- let's say February 1st, when
19 the 398s had been required, okay, is that a reasonable
20 date for that exam? So, the 398s came in on the 1st
21 of February, and they had a request for a waiver. Box
22 4F had been properly checked. Box 17 had been filled-
23 in, and the justification for the waiver request had
24 been written in that box.

25 MR. WIDMANN: Uh-hum.

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1 JUDGE HAJEK: And your team accepted that
2 398 and, then, did an assessment and concluded that
3 you would make the decision to deny the waiver?

4 MR. WIDMANN: Yes, sir.

5 JUDGE HAJEK: Ms. Smith, at that point in
6 time, could with plant concurrence still take the
7 exam, the entire exam?

8 MR. WIDMANN: Yes, sir.

9 JUDGE HAJEK: That would be the intent.

10 My question is, if that was the situation,
11 the waiver came in, your team made a decision to deny
12 the waiver, your Region. You had concurrence from
13 IOLB, from Mr. McHale to do that. Would that have had
14 an impact on who the exam team is, was?

15 MR. WIDMANN: I don't believe so because
16 the exam team administers the operating test, and her
17 waiver would have been for the written.

18 Excuse me. I said that wrong. Yes, I
19 did.

20 JUDGE HAJEK: Go ahead.

21 MR. WIDMANN: Actually, I would have to
22 look at it because I would want to make sure that I'm
23 following the NUREG for meeting the requirements for
24 what Examiners would be on it. Since Mr. Hopkins was
25 the Examiner of record for the 2011 exam, and the

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1 NUREG prohibits me from having that person on the
2 exam, and that certainly was the case because he had
3 retired by that time, for the 2012 exam not
4 necessarily I would not have changed out the team.

5 JUDGE HAJEK: Yes, there's really no
6 precedent for how to handle that in your Region,
7 except for the Operator 47 that we don't know --

8 MR. WIDMANN: Right.

9 JUDGE HAJEK: -- what happened back then.

10 MR. WIDMANN: Yes, but I wouldn't
11 necessarily, but I would look at it and I would
12 probably consult with Mr. McHale and make sure that
13 we're meeting intent. If the need be, I would make a
14 change, but I think I can follow the rules and not
15 make a change.

16 JUDGE HAJEK: And, Mr. McHale, how would
17 you advise from the Program Office perspective on
18 that?

19 MR. McHALE: Your Honor, from the Program
20 Office, again, I think we would refer back to the
21 conflict of interest and issues that were highlighted
22 earlier in the NUREG. Again, if the exam was not
23 failed the first time, that's the situation that is
24 specifically called out. It doesn't speak to the case
25 that you brought up where there was no initial exam

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1 failure; however, a waiver was denied. But I would
2 think we would probably just handle as we did at this
3 time, that we would involve, if at all possible,
4 another Examiner of record, just to maintain, again,
5 eliminate any appearance that there could be a
6 conflict. So, I think Mr. Widmann and I would have
7 that discussion and see what the options were.

8 Again, it is something that is not
9 explicitly described in the NUREG, other than under
10 the more general avoiding the appearance of a
11 conflict.

12 JUDGE HAJEK: So, in fact, the way that
13 Region II handled this situation with it not being a
14 failure and a waiver not being requested was to assign
15 an Examiner who had not been part of the prior team to
16 actually be the Examiner of record?

17 MR. McHALE: Yes, Your Honor. And again,
18 in my view, that's going above and beyond the minimum
19 because I think, as the words are stated in the NUREG,
20 because Ms. Smith did not fail the 2011 operating
21 test, and there was no waiver requested, there was no
22 prohibition against using the Examiner that failed her
23 the first time because that person does not exist
24 because she did not fail.

25 JUDGE HAJEK: Right.

1 MR. McHALE: So, assigning Mr. Bates I
2 think was prudent on the staff's part to just avoid
3 going anywhere near that line.

4 JUDGE HAJEK: Now we addressed this a
5 little bit earlier with Mr. Jackson, I think. The
6 NUREG is pretty explicit, it seems, about the Examiner
7 -- well, I don't think the NUREG is explicit, but the
8 interpretation seems to be quite explicit, that it
9 speaks, the interpretation speaks to the Examiner of
10 record.

11 MR. McHALE: Yes, sir, it does.

12 JUDGE HAJEK: But we have heard yesterday
13 and today so much about examining being a team effort,
14 that I am having a difficult time understanding the
15 difference really between -- and now, I'm speaking to
16 a failure, because I think that is kind of what we're
17 talking about here.

18 If you have a candidate who had failed the
19 exam, the NUREG requires, as has been stated, the
20 Examiner of record to be different. But, with all the
21 discussion of it being a team effort, it is not clear
22 to me how the Examiner of record is clearly an
23 independent person in administering an exam.

24 MR. McHALE: Again, Your Honor, I think
25 that maybe the better word is impartial. It has to be

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1 an impartial exam process. It can't be independent
2 because, as you said, if the Examiner of record and
3 the other Examiners caucus, it is not completely
4 independent.

5 However, it is possible, again, to
6 maintain impartiality, that you would not assign the
7 individual that documented and signed the ES-303 form
8 for the candidate, documented the failure, had that
9 failure reviewed by management. Although there is
10 collaboration, it is that individual that is assigned
11 to that candidate and writes up. The final evaluation
12 gets approved through the Region's chain of command.
13 So, again, I don't think that -- I think it is focused
14 properly on that individual.

15 The other thing that it brings into
16 question is just the practicality of things, as Mr.
17 Widmann referred to, the scheduling and, also, the
18 particular technology of the plant is going to require
19 certain Examiners to be available. And it may just
20 not be possible to change out an entire examination
21 team anytime there is one of these issues that comes
22 up. But we certainly can ensure that the Examiner of
23 record, again, the one that is performing the
24 documentation, signing the forms that ultimately get
25 reviewed by the regional management, that they would

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1 not readminister a test that was failed.

2 JUDGE HAJEK: So, in Region II -- and I'm
3 addressing you, Mr. McHale, still -- in Region II, in
4 NRC-008, that was the table of waivers that had been
5 requested and approved. So, they have little
6 experience in ever -- it's too strong a word -- in
7 denying waivers. They have little experience in
8 actual denying waivers.

9 So, you go back to almost at least five
10 years since a waiver had been denied before. What's
11 the national experience?

12 MR. McHALE: Your Honor, I can't speak to
13 specific numbers, but I would say nationally it's
14 about equivalent. The denial of these operating test
15 waivers is fairly rare. And filtering into that is
16 just the very small number of people that, again, fail
17 operating tests. So, again, we're talking about ones
18 that would be on that borderline. Roughly, for the
19 operating test nationwide over the past 10 years, for
20 reactor operators the pass rate has run between
21 approximately 96 to 100 percent, and for the SROs
22 about 94 to 98 percent.

23 So, just looking at that -- and that
24 includes both the job performance measure and the
25 simulator test -- the experience is that most failures

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1 on the operating test occur because of job performance
2 measure failures. So, reasonably, you could say, just
3 as a rough estimate, that perhaps 3 percent of all the
4 candidates across the U.S. that take a licensing exam
5 may fail the simulator test. Four hundred, roughly,
6 candidates a year for initial licensing could be a set
7 of 12 people. And again, not all of those would
8 necessarily request waivers and have them denied. So,
9 it is a very small set that we're starting with. And
10 then, when you work down into how many of those would
11 actually apply and be denied, it's a very small
12 number. So, it is a very rare occurrence, and I would
13 say that's true nationally.

14 JUDGE HAJEK: And since it is such a low
15 occurrence, can you comment on the criteria that might
16 be applied for reviewing a waiver request?

17 MR. McHALE: Yes, Your Honor, I'll
18 comment. Again, the NUREG-1021 requirements do not
19 state explicit requirements. We have talked a lot
20 about number of comments and things like that, average
21 scores. And those were prepared, I think, just to try
22 to give some perspective. But there is nothing in the
23 NUREG that is specific to that.

24 And I think it could become problematic to
25 give a cut score type of thing for those because, as

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1 we talked about, comments are not equal. It's really
2 this is one of these areas -- and it happens
3 throughout NUREG-1021 processes -- where you rely on
4 the professional judgment of the Examiners. We train
5 and certify them, and we rely on them, based on the
6 fact that collectively within the Region they have
7 seen hundreds of candidates, that they make an
8 assessment based on the available information.

9 Again, look at what happened on the exam
10 in question, look at the errors that were documented.
11 What is the significance of those? Is there a safety
12 nexus? And then, if we do get into an actual request
13 that comes in from the facility, look at what did the
14 facility propose for remediation plan, what is the
15 candidate's result in completing that remediation
16 plan? Is there an audit test? Is there something
17 that we can look at to refine that assessment at the
18 final application stage to say yes or no on a waiver?

19 But, right or wrong, there is nothing in
20 NUREG-1021 that says, if you do an exam and don't miss
21 a critical task, you automatically get a waiver. Or
22 if your score is at least above a 2.5, you don't. We
23 don't have that in there.

24 JUDGE HAJEK: Okay. Let me change the
25 topic just a little bit. Mr. Jackson's report came to

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1 you, is that correct? And in that report, as I am
2 sure you heard the discussion of how to apply errors
3 to multiple rating factors, and the Region -- maybe,
4 Mr. Widmann, let me ask this of you first.

5 MR. WIDMANN: Sure.

6 JUDGE HAJEK: So, the exam team put
7 together a document early on in the appeal process
8 that described how they applied errors to rating
9 factors in this exam and in the 2012 exam. And they
10 were very clear to state that they worked diligently
11 to take an error and find and identify the single
12 root-cause rating factor that that error should apply
13 to. And they were further diligent to assure that
14 they applied that rating or that error to only the
15 single root-cause rating factor.

16 I infer from that document that that was
17 for the entire class. Is that --

18 MR. WIDMANN: That is correct.

19 JUDGE HAJEK: That is correct? Okay.
20 Then, if that was the case, when the report, Mr.
21 McHale, came to you, the final report, and indicated
22 that that process that had been applied to the entire
23 class had actually been changed during the review
24 process, for Ms. Smith's examination to apply
25 correctly, the allowance of the NUREG to apply a

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1 single error to multiple rating factors -- and I think
2 I recall in the report that they were quite clear that
3 they only went up to two. They didn't go beyond two.

4 MR. McHALE: That is correct, Your Honor.
5 I think there was a maximum of two.

6 JUDGE HAJEK: Only two rating factors.
7 But, if they applied the NUREG-permissible method of
8 applying a single error to only two or up to two
9 rating factors, isn't that evaluating Ms. Smith at a
10 different level than the rest, the other 21 candidates
11 had been evaluated at?

12 MR. McHALE: I don't believe so, Your
13 Honor, because, again, the administrative Review Panel
14 was reviewing Ms. Smith's examination and no one
15 else's. So, what they did was, taking the raw data,
16 if you will, from the exam itself as it was originally
17 presented, as it was administered, all of the input
18 that Ms. Smith provided, the input that the examiners
19 provided, and looking at that, they took the input
20 and, then, as a group themselves, they say, well, let
21 us apply the NUREG as we see fit and as we believe it
22 would be appropriate and classify all of the errors.

23 And it is possible that an Examiner, a
24 reviewing Examiner, could determine that it was more
25 appropriate to have it apply to two rating factors as

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1 opposed to one, just like they may have concluded
2 that, well, we're not going to hold this person
3 accountable for certain other errors. And it is just
4 they wanted to be as accurate as they could in their
5 assignment or their assessment of how to apply the
6 NUREG to Ms. Smith's exam. It didn't have anything to
7 do with the other exams that were already
8 administered. They were applying an accepted NUREG
9 process to the data that they had collected in coming
10 up with a recommendation.

11 So, I look at it as different people
12 looking at the same set of information, applying the
13 process, and the variabilities that are built into it,
14 to come to the conclusion that they did. It doesn't
15 imply that I think Ms. Smith was treated any
16 differently than the other Examiners. It is just an
17 administrative review of what initially took place and
18 their opinion on how it should shake out, based on
19 their application of the NUREG. So, it is just, I
20 think, a natural course of these reviews.

21 Just for reference, in past reviews
22 there's often a comment where the rating factor
23 changes from one to another, in the opinion of the
24 reviewer. So, again, it is another set of eyes
25 considering the information, making their best

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1 assessment as they can on the criteria in the NUREG.
2 And sometimes there are variations in the outcome.

3 MR. WIDMANN: Your Honor, I would also
4 like to add that the NUREG, as you saw, does not
5 require that we put it in two areas. It requires us
6 to go after the root cause. Region II believes that
7 going after the root cause gets to the underlying
8 element that an applicant that failed would have to be
9 remediated on. So, we feel that represents best that
10 person's error.

11 We could have chose to go to two areas and
12 lead to a little different grading maybe. But the
13 bottom line is the grading led to a failure. The end
14 of the review of the administrative review report also
15 led to a failure, regardless of the fact that it had
16 grading that was representative in two areas.

17 But, again, it is not a requirement that
18 we do that. It is in with a variance of what the
19 words are in the NUREG to allow us to do that, if we
20 choose.

21 JUDGE HAJEK: I understand that the NUREG
22 gives you flexibility in applying an error to anywhere
23 from one to three, apparently, rating factors. But
24 the fact is that your Examiners -- and I'm not
25 criticizing the choice certainly to apply an error to

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1 only one rating factor, and that being the rating
2 factor. I think it is a very good process to identify
3 the root cause certainly and make that type of an
4 application.

5 My question is, if that is the chosen
6 process, and that is the process that was chosen for
7 the entire class of 21 or 22 students or applicants,
8 then, even during the review, should not that process
9 have been adhered to, independent of what the NUREG
10 permits?

11 MR. WIDMANN: Well, I would like to answer
12 the question and put a perspective on, when we're
13 talking about adding dual comments or putting a
14 comment in two different areas, you're not talking
15 that that will occur with every area. In fact, the
16 truth of the matter is it happens in very rare cases
17 where there may be only two, maybe three, comments in
18 an entire Form 303 that has multiple pages where you
19 will see an error reflected in two areas. So, it is
20 not a widespread, oh, geez, if you applied this to
21 everybody, it would result in 15 more errors that you
22 didn't see before. That would not be the case. It
23 may result in one, two, you know, a very small number.
24 So, it is not as large as you think it may be or may
25 be left with the impression of. Using the standard as

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1 it is written and applying it that way, you may result
2 in an extra error, but that error not necessarily is
3 going to add up or change your grading overall.

4 JUDGE HAJEK: Well, I wonder if the review
5 team would review the process again and apply the
6 original standard of one error, only one error being
7 applied to only one rating factor, if that would --
8 simply because that was the standard that was applied
9 across the board for the exam, if that would change
10 the results. Of course, that requires another look at
11 the review by the review panel at their report.

12 MR. WIDMANN: I can't answer that
13 question, but all I can offer you is you would have to
14 look at how many areas actually got affected. But
15 they still resulted in a failure. I think the main
16 errors that were made were maintained, and that,
17 ultimately, the failure was recommended from that
18 report to Mr. McHale.

19 JUDGE HAJEK: I think I just asked this
20 question, but I'll read it, just for formality here.
21 The question, to either one of you, I think we just
22 discussed it: did the fact that the Review Panel
23 assigned an error to multiple rating factors impact
24 the determination of the failing grade?

25 MR. McHALE: And again, I think, Your

1 Honor, we would have to look at where the numbers came
2 out for that, but also recognize that we did not
3 constrain the panel in advance to limit themselves to
4 following the exact methodology that Region II used.
5 We gave them the instructions to look at the
6 information and grade it as the panel would apply the
7 NUREG.

8 JUDGE HAJEK: Yes. I see another way to
9 look at this is that, if the Review Panel were asked
10 to review the final report, and the assignment of
11 rating factors -- or I'm sorry -- of errors to
12 multiple rating factors, since the analysis enabled
13 them to assign an error to multiple rating factors,
14 then there would also or could also be a subjective
15 choice made, could there not, as to, let's say we have
16 to go back to assigning an error to only one rating
17 factor. And you have Rating Factor A and Rating
18 Factor B, and you know if you apply it to A, it's a
19 pass; if you apply it to B, they accumulate there and
20 we have a definite failure. There is that
21 subjectivity. And I would be very curious to see how
22 that would all shake out.

23 So, actually, that's the terms, I think,
24 that were used in some of the emails. You know, how
25 is this going to shake out?

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1 MR. MCHALE: But it is not as simple -- I
2 mean, you could say at a very simple level, if I just
3 took the second ones away, then, yes, the scores were
4 going to go up. But if you had to look at, okay,
5 well, where is the one place that this belongs, you're
6 right. As it stacks within the rating factors, where
7 they fall is how the grades will come out. So, you're
8 right, Your Honor, it is much more complex than just,
9 if you eliminate them, the grades will go up. But if
10 you reassign them with the choice of one, and only
11 one, that is another exercise. And that's why I can't
12 tell you right now where it would come out.

13 MR. WIDMANN: Your Honor, I would also
14 offer, just as a reminder, that the exam team is the
15 only people that saw these applicants in the
16 simulator. They made great efforts to document the
17 error as they see it in the proper place. The review
18 team is separate to that and removed from that. And
19 they do not have the same observations or comments and
20 necessarily in the same level of detail that the
21 Examiners would have captured it and remember it as.

22 So, it can impact where they put something
23 and make it appear to this panel that it changed
24 things. You guys are changing it up or bearing it or
25 adding. And I don't think so. I think if you dug at

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1 the core of the issues, I think they all remain, and
2 I think the failures stand in both cases.

3 JUDGE HAJEK: You brought up the issue of
4 the Examiners being the only ones in the simulator at
5 the time to see the performance. And that raises, it
6 reminds me of the discussion that we had yesterday
7 about contemporaneous note-taking that was made.

8 So, the Examiners were the only ones in
9 the room. They performed their contemporaneous note-
10 taking. And yet, we heard from two other candidates
11 who sat where you gentlemen are sitting now yesterday
12 who said that their recollection, which they felt was
13 quite clear, indicated that the notes that the
14 Examiners took contemporaneously were not necessarily
15 accurate relative to what actually happened.

16 And Ms. Smith has provided graphical
17 documentation from the simulator that has, I think,
18 evolved a little bit because she provided one set,
19 apparently, early on, and then, that was looked at by
20 the review team, I think. And then, she provided a
21 more detailed set of graphical evidence after that.

22 So, I'm not sure of whether the
23 contemporaneous note-taking is sufficient to make the
24 assertion that what the exam team said was exactly
25 what happened.

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1 MR. WIDMANN: My response to you, Your
2 Honor, would be that these gentlemen in this case are
3 professionals; they're good at what they do. They
4 have done it hundreds and hundreds of times. We rely
5 heavily on what they see and hear and document.

6 If you were in the Applicant's position,
7 as the people you had testifying yesterday, and Ms.
8 Smith, it is a very pressure-packed situation to be
9 in. And what you recall and what you think happened
10 and what you think you said and what you really said
11 could be different. All I can offer you is the
12 affidavits that my staff and the NRC staff has offered
13 as contradictory evidence to what the other
14 applicants, and now operators, stated yesterday.

15 My staff has taken a lot of time and
16 effort and detail to document what they saw and review
17 of their data and their notes, and have laid out that
18 story for you all.

19 CHAIR SPRITZER: This question is probably
20 for you, Mr. Widmann. When a company requests that an
21 applicant take an operating exam and a written exam,
22 does the company have to pay the NRC for that?

23 MR. WIDMANN: I am sorry, sir. Would you
24 restate that?

25 CHAIR SPRITZER: A new area. We haven't

1 talked about this yet.

2 MR. WIDMANN: Okay.

3 CHAIR SPRITZER: Who pays when a company
4 wants an applicant to be tested for an SRO license?

5 MR. WIDMANN: They do, sir.

6 CHAIR SPRITZER: And does it vary
7 depending on whether they are taking both the
8 operating and the written exam or just one of those
9 exams?

10 MR. WIDMANN: We are talking retake then?

11 CHAIR SPRITZER: Well, let's start at the
12 beginning --

13 MR. WIDMANN: Okay.

14 CHAIR SPRITZER: -- the initial exam which
15 would necessarily involve --

16 MR. WIDMANN: Yes, the initial exam, any
17 cost incurred for getting an applicant trained and
18 ready for ultimately the NRC exam, that cost is up to
19 the licensee.

20 CHAIR SPRITZER: No, but I was talking
21 about the exam itself. Do they actually pay the NRC
22 to administer the exam

23 MR. WIDMANN: I wouldn't answer that, as
24 they don't pay us directly, but there is cost
25 associated with them to develop that exam --

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1 CHAIR SPRITZER: Okay.

2 MR. WIDMANN: -- if that's what you're
3 referring to.

4 CHAIR SPRITZER: But just for the
5 Examiner's time, when they're administering an exam to
6 an applicant, is there any cost to the company for the
7 NRC's time?

8 MR. WIDMANN: Indirectly. I mean, all the
9 licensees are billed, as you know, sir. So, yes,
10 indirectly, I guess you could say that, but certainly
11 I guarantee you Mr. Bates didn't get a check while he
12 was there.

13 CHAIR SPRITZER: No, I understand that.

14 MR. WIDMANN: Okay.

15 CHAIR SPRITZER: I wasn't suggesting
16 anything like that, no.

17 (Laughter.)

18 I wasn't suggesting that anybody was paid.

19 MR. WIDMANN: Okay. No, I mean,
20 indirectly, that's the only way I can answer that
21 question.

22 CHAIR SPRITZER: All right. Now we have
23 heard testimony that Mr. Hopkins was considering
24 making a request, I take it to you, to exercise the
25 authority that exists in the NUREG to perhaps fail Ms.

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1 Smith on the 2011 operating exam, even though her
2 score was passing. Do you recall any discussions with
3 him or any of the other 2011 exam team members about
4 that?

5 MR. WIDMANN: I didn't have an direct
6 discussions with Mr. Hopkins regarding that. I did
7 get that from other team members, that it was
8 something that they were discussing among themselves.
9 I never got a formal request to take a look at that
10 and review that. So, on the formal end of it, I
11 didn't entertain it because it was never proposed to
12 me. I just understood afterwards that it was
13 something they were thinking about whether they could
14 pursue. And my answer would have been to them, as it
15 would be now, we are going to follow what the NUREG
16 says to do.

17 CHAIR SPRITZER: Well, the NUREG gives you
18 discretion, but it doesn't tell you what you have to
19 do.

20 MR. WIDMANN: That's right, and I don't
21 typically go against a pattern that we have
22 necessarily set in making a precedent-setting without
23 conferring with my colleague, Mr. McHale. There would
24 be more discussion than just me or decision than just
25 by me.

1 CHAIR SPRITZER: But you don't have a set
2 policy against considering such requests, do you?

3 MR. WIDMANN: Certainly not.

4 CHAIR SPRITZER: Yesterday we had some
5 discussion about a July document sent by the Vice
6 President of Southern concerning waiver requests for
7 six people, including Carla Smith. I can bring the
8 document back up or --

9 MR. WIDMANN: Yes, sir, I know it.

10 CHAIR SPRITZER: You may remember it. Do
11 you know what happened to that document?

12 MR. WIDMANN: All I can tell you, in
13 preparing for this hearing, when we started to pull
14 testimony together, we went through docket files
15 looking for requested information. Part of getting
16 ready for the hearing, part of the FOIA request, that
17 we came across that letter.

18 Myself and Mr. Franke, who is my colleague
19 in Atlanta, another Chief, remember the letter and
20 remember that the letter was an unsolicited letter.
21 It was a letter that didn't request he or I to take
22 any action, and it didn't request a response of any
23 sort.

24 The letter was made just as an early
25 heads-up, I guess. It was a letter that I would

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1 consider to be out of process. I have no way to
2 handle that letter, no way to process anything that
3 was in that letter.

4 CHAIR SPRITZER: Do you recall anything
5 about what was in the letter?

6 MR. WIDMANN: What I remember is the six
7 applicants that they were considering, and that they
8 were informing us that they may pursue a waiver for
9 these applicants. And I would not entertain that as
10 something in process.

11 CHAIR SPRITZER: Why don't we take a quick
12 look at it, though? It is CCS-002, page 18, I
13 believe. It actually says that Southern is
14 submitting, in accordance with NUREG-1021, a request
15 for waiver for the operating exam portion of the
16 initial license examination, et cetera.

17 Now we don't know the term; it seems to be
18 a mystery what the attachments were. But is it your
19 testimony that, in submitting this request, stating
20 that they're submitting this request, they're not
21 doing anything that requires an action by your office?

22 MR. WIDMANN: That is correct.

23 CHAIR SPRITZER: What would they have to
24 do?

25 MR. WIDMANN: They would have to submit a

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1 398, sir.

2 CHAIR SPRITZER: All right. And do you
3 know one way or the other? I mean, we do have the
4 statement "attachments". Nobody seems to have seen
5 the attachments. Do you know --

6 MR. WIDMANN: No, sir. Again, this letter
7 is outside of process. I never saw a letter like this
8 before.

9 CHAIR SPRITZER: All right.

10 MR. WIDMANN: I think yesterday you had a
11 question over the vice president signing this letter
12 and why was that, and why wouldn't we respond.

13 CHAIR SPRITZER: Uh-hum.

14 MR. WIDMANN: I would like to add, for the
15 purpose of the testimony, I receive documents from the
16 vice president all the time. It is standard practice.
17 Sometimes they are addressed to me; sometimes they are
18 addressed to the senior management team in the Region.
19 And sometimes the documents go to the Examiners
20 themselves. In this case, it is very typical for the
21 Branch Chief to receive a document from the vice
22 president, per the protocol of the NUREG.

23 CHAIR SPRITZER: Let's go to CCS-005a,
24 page, handwritten page 52. We will start at the
25 bottom of the page.

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1 I just want to make sure I understand your
2 understanding of the conflict-of-interest provisions.

3 MR. WIDMANN: Yes, sir.

4 CHAIR SPRITZER: If you look at the
5 bottom, Section D, "Personal Restrictions," it says,
6 "It is impossible to define criteria that anticipate
7 every possible conflict-of-interest issue.

8 Supervisors must apply sound judgments to the facts of
9 each case."

10 Now, if we go on to the next, the top of
11 the next page, we have Section 1.a. And that is the
12 provision I think you were talking about earlier,
13 indicating that "The Regional Office shall not assign
14 an Examiner who failed an applicant on an operating
15 test to administer any part of" the applicant's retake
16 operating test, "that applicant's retake operating
17 test."

18 If I understand your testimony, your view
19 of this is it only applies to the Examiner of record,
20 No. 1. And it only applies to that individual if the
21 applicant was actually failed on the operating test.
22 Am I understanding your testimony correctly?

23 MR. WIDMANN: The second part of your
24 question, that it only applies to the failed
25 applicant, that would be correct. I don't believe I

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1 said the Examiner of record, and I don't remember your
2 other words you said, and only --

3 CHAIR SPRITZER: Well, rather than trying
4 to recollect your testimony, why don't I just ask you?
5 Does this apply -- assume an applicant has failed on
6 an initial operating exam. They come back for a
7 retake. Does this provision only apply to the
8 Examiner of record on the first exam?

9 MR. WIDMANN: Yes, sir.

10 CHAIR SPRITZER: And does it only apply if
11 on the first exam the applicant was actually failed?

12 MR. WIDMANN: Yes, sir.

13 CHAIR SPRITZER: All right. Now there are
14 some other provisions, looking down at Subsection c of
15 Section 1, that talk about, if an Examiner is assigned
16 to an examination that might appear to present a
17 conflict of interest, the Examiner shall inform his or
18 her immediate supervisor of the potential conflict.

19 In your view, does that add anything to
20 the previous provision that we were just talking
21 about, 1.a?

22 MR. WIDMANN: Certainly.

23 CHAIR SPRITZER: What does it add?

24 MR. WIDMANN: Well, if the applicant had
25 failed, I would want to look at it closely, the

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1 Examiner situation, what occurred, and whether there
2 could be any appearance of a conflict of interest.
3 So, I would take a close look at that and make sure
4 I'm trying to adhere to the words that are in the
5 NUREG.

6 CHAIR SPRITZER: Would an Examiner who
7 happened to be on the previous exam, not the Examiner
8 of record, but an Examiner who was on the previous
9 exam team for the first exam -- let's assume the
10 applicant technically passed, but the Examiner has
11 deep reservations about the performance of this
12 individual. Would that be an issue that, in your
13 mind, might appear to present a conflict of interest?

14 MR. WIDMANN: Not necessarily, sir.

15 CHAIR SPRITZER: Well, possibly?

16 MR. WIDMANN: Anything is possible, sir.

17 CHAIR SPRITZER: All right. How would you
18 make that -- how would you determine whether a
19 possible conflict of interest exists?

20 MR. WIDMANN: Well, I think I would have
21 to have conversations with the involved members. I
22 would be looking at their experience, their
23 comfortableness with it personally as well as
24 professionally. And then, I would probably even go
25 again to talk to Mr. McHale about what the intent of

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1 these paragraphs were and make sure that I'm not
2 misunderstanding something or misapplying something.

3 CHAIR SPRITZER: Now did that occur with
4 respect to MS. Smith's two operating exams?

5 MR. WIDMANN: On the first one in 2011,
6 she didn't fail. So, no, that conversation didn't
7 happen. However, I did have a keen awareness of the
8 environment and the situation, and again, looked at my
9 schedule and looked at who the exam team was, and
10 cautiously chose to leave the team in place, although
11 the team was actually configured slightly differently
12 coming into 2012, and there was a last-minute change.
13 Even with that change, I was still comfortable that we
14 could be unbiased, that we could apply the exam per
15 the NUREG.

16 CHAIR SPRITZER: Mr. McHale, do you have
17 any different understanding of these provisions that
18 we have just been looking at?

19 MR. McHALE: No, Your Honor. I think,
20 again, it tends to a boilerplate statement that is at
21 the end. Again, as I said earlier, you can't possibly
22 address every possible conflict of interest that comes
23 up. So, this is, I'll call it, a catchall at the end.

24 Obviously, the personal and professional
25 relationships with applicants, you know, when somebody

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1 used to work for a utility and now works for the NRC,
2 and is going to administer an examination, you
3 certainly wouldn't want to have a former coworker
4 being examined, and those type of elements are in
5 there.

6 And then, the other ones are more or less
7 the things that Mr. Widmann said. You would have to
8 assess, talk to the Examiners, find out if there were
9 specific issues, if any statements had been said, and
10 evaluate those, again, to avoid that appearance of a
11 conflict of interest.

12 JUDGE FROEHLICH: While we are on the
13 subject of conflict of interest, could I just move to
14 the Review Panel, the independent Review Panels that
15 were created, one for the technical side and one for
16 the bias questions?

17 MR. MCHALE: Yes, Your Honor.

18 JUDGE FROEHLICH: I see that in the
19 creation of the technical review, you went to great
20 lengths to have someone from Region I, someone from
21 IV, or whatever, and these people had no interaction
22 with any of the parties beforehand. And I think that
23 certainly fits within my definition of an independent
24 review.

25 Can you tell me why, for the bias review,

1 an individual was selected who had prior working
2 relationships, served on teams with the individual who
3 was evaluating his former colleagues?

4 MR. McHALE: Yes, Your Honor. Again, I'll
5 just restate for the technical review it is not an
6 independent review. It's an administrative review,
7 and the goal is impartiality.

8 This added dimension for the bias and
9 fairness review, as we call it, that certainly isn't
10 a normal part of the appeal request that we get. In
11 this case, what we chose to do was follow a precedent
12 that took place in the year 2000 with an exam at the
13 McGuire Station, where, again, there were some
14 allegations of improper conduct on the part of the
15 Examiners, and then, there were also technical issues.

16 And as was the case there, we split it up
17 into two separate review groups, so that the technical
18 people could deal with those issues without being
19 distracted by the other.

20 In the 2000 example, a Region II manager
21 from a different part of the organization conducted
22 the review. We chose to do that the same this time.

23 There were, I guess, two main reasons that
24 that comes to be advantageous. The first is that,
25 because the independent separate, organizationally-

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1 separate manager, is in the Region, he has access to
2 the individuals that he needs to discuss the situation
3 with, has access to the documents, and is also
4 familiar with the protocol within the Region for how
5 situations are handled. So, there is an advantage to
6 having someone locally to do that. And again, the
7 organizational separation in the past has been
8 sufficient to ensure that it is a fair review.

9 The second part of that is, when we
10 receive anything that hints at possible improper
11 action by the staff, we involve the agency's Inspector
12 General. And the point of contact for that within
13 most of the office levels within the NRC is at the
14 Deputy Office Director level. So, in this case, the
15 Deputy Regional Administrator of Region II, Mr. Wert,
16 has been mentioned. It would normally be referred to
17 him as the point of contact to refer it to the
18 Inspector General. And also, at that point, he could
19 be the one to assign the manager within the Region to
20 look at it.

21 So, the fact that it went to the Region
22 is, I think, based mostly on the access to the
23 pertinent information and people and, secondly,
24 because in this case there's that allegation against
25 contact-with-the-staff issue, that that is the normal

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1 appropriate point of contact for that.

2 JUDGE FROEHLICH: I think I understand
3 what you are saying, why it should come from the
4 Region. Let's take it one step further at keeping in
5 the appearance of bias, taking into consideration
6 appearance of impropriety. Why select someone from
7 within that Region who had a prior working
8 relationship with the individuals he or she is
9 investigating?

10 MR. MCHALE: Again, Your Honor, I think,
11 again, I can't speak for why Mr. Wert selected Mr.
12 Ehrhardt. But I think in this case, because, as we
13 have heard over the last couple of days, this operator
14 licensing process and the nuances of NUREG-1021 can be
15 somewhat daunting, so I think it was very advantageous
16 to have someone with a strong understanding of this
17 process that we're talking about. So that, when we
18 talk about Form 398s and waivers and the timeline and
19 the 120-day calls, and all the jargon that we throw
20 out, that, again, it is very advantageous to have
21 someone with a knowledge of this program.

22 And the fact that Mr. Ehrhardt may have
23 worked with some of the Examiners years ago, I think
24 there is enough separation in time and, also, as he
25 mentioned, his management position in a different part

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1 of the organization, that I think that, again, the
2 organization is mature enough that that would be
3 adequate separation.

4 JUDGE FROEHLICH: And one last, I guess,
5 series. On that example that you gave about the
6 McGuire Station in the year 2000, that was in Region
7 II?

8 MR. MCHALE: Yes, Your Honor, it was.

9 JUDGE FROEHLICH: Okay. And did that case
10 also involve a woman who alleged bias treatment?

11 MR. MCHALE: Yes, Your Honor, it did.

12 JUDGE FROEHLICH: Would you know the race
13 of that woman?

14 MR. MCHALE: I do not know.

15 JUDGE FROEHLICH: Do you know?

16 MR. WIDMANN: No, sir.

17 JUDGE FROEHLICH: Okay. Thank you. That
18 is all I have. That is all I have for these folks.

19 JUDGE HAJEK: I will ask, also, about the
20 McGuire review. So, this was submitted by NRC as an
21 exhibit. The first line of this NRC-017 says,
22 "Attached are the results of the Region II independent
23 review." So, I go back to my earlier questions with
24 Mr. Jackson. I'm so confused by these terms:
25 "independent," "informal," "administrative".

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1 MR. McHALE: Again, sir, I think in this
2 case the independent review -- I will look at the --
3 I think that the reason why -- the use of the word
4 "independent" I think is misused a lot. Again, this
5 has two pieces to it. We talked about there was a
6 Region II reviewer for the bias concerns --

7 JUDGE HAJEK: Yes.

8 MR. McHALE: -- and then, there was also,
9 I believe, in this case a separate Region II Examiner
10 that performed the technical review.

11 JUDGE HAJEK: It states that down in the
12 third paragraph, if you can just roll it up a little
13 bit, a little bit more.

14 MR. McHALE: All right. So, the technical
15 review, that was one of the other options of the three
16 for conducting the technical review. So, in the cover
17 letter, it's from the Division Director in Region II.
18 And, in my opinion, we shouldn't have said
19 "independent review" of the appeal package. It could
20 have an administrative review, plus a fairness review,
21 whatever type of words you want to use. But, again,
22 the manual chapter and the NUREG talk about, for the
23 most part, administrative review. It has been
24 referred to as an informal review process in earlier
25 documents. But, again, especially with an operating

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1 test, it can not be independent. It can be impartial,
2 and that is what we strive to do.

3 But because, again, as we have talked
4 about the Examiners of record, the Examiners were the
5 only ones to actually witness the performance in the
6 simulator, we really rely on their input. It would be
7 impossible to perform this review without that. So,
8 maintaining total independence is just not practical
9 for an operating test review. And again, I can't
10 agree with the choice of that word in the first
11 sentence on this letter.

12 JUDGE HAJEK: Well, this is 13 years ago.
13 So, you've had 13 years to get it right, it seems.

14 Let me go back to one final question. On
15 Mr. Ehrhardt's review -- and this I think is NRC-014
16 -- at the very last page he has three findings at the
17 bottom. And the middle bullet states, "The
18 Applicant's contention that Examiners discouraged the
19 facility licensee from requesting a waiver of the
20 operating test portion of the Vogtle 2012 initial
21 license exams is unsubstantiated."

22 Now Mr. Ehrhardt didn't address this
23 bullet, but in talking with him about that a little
24 while ago, he commented that, if the plant had a
25 concern here, they would have contacted Mr. Widmann

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1 because that would have been the normal protocol for
2 such a contact.

3 But my question to you is here's a
4 situation where the plant felt that they were
5 discouraged, people at the plant. At least we heard
6 from Mr. Tucker that they felt quite discouraged from
7 submitting a waiver, and they were concerned
8 especially because they have this close relationship
9 between the exam teams at the Region and -- the exam
10 team at the plant and the exam team in the Region.

11 But it seems a little difficult for me to
12 understand that an investigation into this claim of
13 bias would only talk to inside people, that is, people
14 inside the organization that has the claim coming
15 against them, and not get direct testimony from the
16 individuals who are claiming at the bias.

17 Can you speak to that? Is that normal
18 practice within the NRC?

19 MR. McHALE: Sir, actually, I cannot tell
20 you what is normal practice for conducting a fairness
21 review like that. Again, I think we discussed what
22 the issues were in advance that Mr. Ehrhardt was going
23 to look at. I did not dictate how that would be done.
24 I know the Region has processes for looking into these
25 types of things, and I understand that may have been

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1 used as guidance to loosely formulate how this review
2 was conducted.

3 But, again, I cannot speak to the decision
4 to contact the facility or not and what the
5 relationship was between the facility and the
6 Operations Branch that would either have made that
7 something that was not necessary or that it would be
8 necessary. So, I really don't know what those
9 interrelationships are in Region II.

10 CHAIR SPRITZER: All right. Thank you,
11 gentlemen.

12 We will now move to our next and last
13 witness, Mr. Lea.

14 Why don't we take a five-minute break?
15 Come back as soon as possible, and we will, hopefully,
16 finish up, get everybody home, out of here by five
17 o'clock, if we can.

18 (Whereupon, the foregoing matter went off
19 the record at 3:35 p.m. and went back on the record at
20 3:41 p.m.)

21 WHEREUPON,

22 EDWIN LEA, JR.

23 having been called for examination and, having been
24 previously duly sworn, was examined and testified as
25 follows:

1 CHAIR SPRITZER: Would you state your name
2 for the record, sir?

3 MR. LEA: My name is Edwin Lea, Jr.

4 CHAIR SPRITZER: And how are you presently
5 employed?

6 MR. LEA: I'm employed with the Nuclear
7 Regulatory Commission. I have been working in Region
8 II since 1987. I started off as a Reactor Inspector.
9 I qualified as an Examiner in 1990. I am currently a
10 Senior Operations Engineer.

11 CHAIR SPRITZER: What are the
12 responsibilities of a Senior Operations Engineer?

13 MR. LEA: My responsibilities are to
14 administer exams in accordance with NUREG-1021.

15 CHAIR SPRITZER: How long, approximately,
16 have you been administering exams, whether as a Senior
17 Operations Engineer or under any other title?

18 MR. LEA: I've been administering exams
19 for 23 plus or minus a few months, years, plus or
20 minus a few months.

21 CHAIR SPRITZER: Does that include people
22 applying for SRO licenses?

23 MR. LEA: Yes, it does.

24 CHAIR SPRITZER: And also, people applying
25 for RO licenses?

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1 MR. LEA: Yes, it does, Your Honor.

2 CHAIR SPRITZER: I don't think we had a
3 statement of qualifications provided for you. So, I
4 would like to go into just a few other areas. This is
5 not to test your memory, just to find out a little bit
6 more about you.

7 Can you tell us what your educational
8 background is?

9 MR. LEA: I have a mechanical engineering
10 degree from Southern University in Baton Rouge,
11 Louisiana. I worked for five years for a utility.
12 While working for the utility, I qualified as a Shift
13 Technical Advisor. What that meant is that I had a
14 certification as a Senior Reactor Operator. During
15 that time, I took a lot of training associated with
16 reactor operators and reactor operations. Also, I
17 qualified with the NRC as a BWR and a PWR examiner.
18 And that required me taking classes at the Technical
19 Training Center in Chattanooga.

20 CHAIR SPRITZER: I'm familiar with that.
21 Very well.

22 Now, as I understand your affidavit, you
23 were personally not involved in either any of the
24 exams administered to Charlissa Smith, is that
25 correct?

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1 MR. LEA: That's a true statement. I was
2 not personally involved.

3 CHAIR SPRITZER: And you did not have a
4 role in the -- what is it called? -- the
5 administrative review process that eventually ensued
6 when she followed an appeal of our license denial?

7 MR. LEA: I did not have a role.

8 CHAIR SPRITZER: Okay. And you didn't
9 have a role in so-called fairness review?

10 MR. LEA: I did not.

11 CHAIR SPRITZER: But you did at some
12 point, it sounds like, learn about Ms. Smith's SRO
13 license application and the outcome of her application
14 and her examinations, is that true?

15 MR. LEA: That is a true statement. I did
16 learn about her application or the exam that she had
17 been administered. And this was before the final
18 outcome had been made.

19 CHAIR SPRITZER: Okay. Was that her exam
20 in 2011?

21 MR. LEA: This was the exam that was
22 administered in 2012. However, as a result of looking
23 at the exam that was administered in 2012, I also
24 looked at the exam that was administered to her in
25 2011.

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1 CHAIR SPRITZER: What did you look at?

2 MR. LEA: I looked at the package, the
3 documentation that documented her performance on the
4 operating test.

5 CHAIR SPRITZER: Would that include the
6 document that's been referred to as an ES-303?

7 MR. LEA: That's correct.

8 CHAIR SPRITZER: Did you talk to anyone in
9 Region II about what had happened during her 2011
10 exam?

11 MR. LEA: I did not talk to anyone in
12 Region II.

13 CHAIR SPRITZER: Or did you talk to anyone
14 in Region II about her 2012 exam, the content?

15 MR. LEA: I did not talk to anyone in
16 Region II about her 2012 exam.

17 CHAIR SPRITZER: Have you ever talked to
18 Ms. Smith personally?

19 MR. LEA: I've never talked to Ms. Smith.
20 I guess when we came here Wednesday, that was my first
21 contact with Ms. Smith.

22 CHAIR SPRITZER: You're not a friend or a
23 relative of hers?

24 MR. LEA: I have no idea who she is. I
25 could walk by her on the street and would not have

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1 known her.

2 CHAIR SPRITZER: Okay. Let me take you to
3 a document. I believe it's NRC-021.

4 MR. LEA: Yes, I don't have --

5 CHAIR SPRITZER: It will be up on the
6 screen in a minute. There we go.

7 Do you recognize this document?

8 MR. LEA: Yes, I do, Your Honor.

9 CHAIR SPRITZER: And what is it

10 MR. LEA: It's an email that I sent to Mr.
11 Johnson discussing concerns that I had with the
12 operating licensing practices in Region II,
13 specifically associated with the licensing or the
14 denial of a license associated with Mrs. Johnson --
15 I'll take that back -- with Mrs. Smith, Ms. Smith.

16 CHAIR SPRITZER: And who is Michael
17 Johnson? What is his role at the NRC?

18 MR. LEA: I think his position is up
19 there. He's Deputy EDO Director, I think. I'm not
20 really sure.

21 CHAIR SPRITZER: Sure. Now you say in the
22 start of the second paragraph of this document,
23 NRC-021, "I believe that RII personnel" -- I assume
24 that refers to Region II -- "involved in the denial of
25 the license went to extreme measures to make sure that

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1 the young lady would not receive a license based on
2 failing the operations portion of the examination."

3 The young lady, I take it that is Ms.
4 Smith?

5 MR. LEA: That's correct.

6 CHAIR SPRITZER: And how did you come to
7 the conclusion that, as you put it, the RII personnel
8 involved in the denial of the license went to extreme
9 measures to make sure that the young lady would not
10 receive a license based on failing the operations
11 portion of the examination?

12 MR. LEA: That was after listening to
13 conversation between the Examiners in the Region and
14 some of those Examiners that were involved in the exam
15 as well as some of the Examiners that were not
16 involved in the exam.

17 CHAIR SPRITZER: And what did you hear?

18 MR. LEA: Basically, I heard them discuss
19 what they needed to do in order to make sure that,
20 once the failure was presented to Headquarters, that
21 it would not be overturned.

22 CHAIR SPRITZER: And this is with
23 reference to the 2012 examination?

24 MR. LEA: In reference to the 2012
25 examination, that's correct.

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1 CHAIR SPRITZER: Can you be any more
2 specific about what you heard them say needed to be
3 done?

4 MR. LEA: Well, I just heard them. They
5 were talking among themselves in the hallway. They
6 were talking about the things that they needed to make
7 sure that they captured in their writeups. They also
8 talked about the fact that they needed to make sure
9 that whoever reviewed the information had sufficient
10 information not to question what they had done. They
11 also talked about the fact that the individual had not
12 been granted a waiver on previous exams. And I
13 overheard some of the people saying that, "Yes, I
14 would not have given her a waiver as well."

15 CHAIR SPRITZER: Now in the next sentence
16 you say, "In doing so, I believe the guidance
17 identified in NUREG-1021, "Operator Licensing
18 Examination Standards for Power Reactors," Revision 9,
19 Supplement 1, was not adhered to."

20 MR. LEA: That is a true statement, Your
21 Honor. What I had done, I had gone back and I had
22 looked at NUREG and I also looked at her 303 form from
23 the 2011 exam. And after reviewing the comments
24 associated with these scenarios, it was my
25 interpretation or my conclusion that the individual

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1 should have been granted a waiver based on the
2 requirements identified in NUREG. And therefore, a
3 denial -- a waiver request should have been granted.

4 CHAIR SPRITZER: What provisions in
5 NUREG-1021 did you think were relevant to the waiver
6 issue?

7 MR. LEA: Well, as far as us looking at
8 the evaluation, it says that we have the discretion to
9 grant a waiver, based on the fact that they had passed
10 the initial exam portion of the test. And this
11 individual had, in fact, passed that particular
12 portion of the test, the operating portion of the
13 test.

14 CHAIR SPRITZER: And you said you looked
15 at the comments?

16 MR. LEA: Yes, that's true, Your Honor.
17 I looked at the comments, and some of the comments, to
18 me, they were not warranted. Some of the comments
19 really should not have even been written about.

20 Also, after I looked at all of those
21 comments, to try and apply my professional opinion, I
22 looked at the comments associated with the 2012 exam.
23 I looked at those probably within the last month or
24 so. I looked at those. And a lot of the comments I
25 saw on that particular exam, it appears to me that

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1 they were trying to find things to say that she made
2 a mistake.

3 One of the examples, you guys, it was
4 presented here this week, specifically, the RWST one,
5 where I guess there were some valves; the valves
6 should have automatically gone closed, but the valves
7 didn't. And when I looked at it, I looked at the
8 position that she was in and I also looked at the
9 position of the individual who was tasked in the
10 scenario for handling that and addressing that. And
11 when I looked at it, I felt that her actions were
12 appropriate. However, they downgraded her because of
13 her actions.

14 CHAIR SPRITZER: All right. You have
15 given me that one example from the 2012 exam of what
16 you considered an inappropriate comment for
17 downgrading. What about from 2011? Can you recall
18 any specific example?

19 MR. LEA: You know, I really can't recall
20 any specific examples, but I went over the entire
21 package. In looking at the comments for the various
22 scenarios, I felt that there were comments that really
23 weren't warranted.

24 And I also looked at the comments in the
25 JPMs. I saw a lot of cases where they had made

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1 comments that the applicant had made an error.
2 However, it was not a critical error. And she
3 completed the task as required.

4 CHAIR SPRITZER: Now you, in your own
5 work, have you had the opportunity -- well, the
6 occasion; let me put it that way -- have you had
7 situations where you had to pass on a request for a
8 waiver for someone who had passed an operating exam --

9 MR. LEA: Yes, I have.

10 CHAIR SPRITZER: And what role, if any, do
11 the comments play in deciding, for you, what role do
12 the comments play in deciding whether a waiver should
13 or should not be granted?

14 MR. LEA: I will go back and I will read
15 the comments that have been provided, both on the
16 operating test as well as the comments that are
17 provided on the JPMS. And I would look to see how
18 severe the comments are. And typically, well, to be
19 honest with you, I have never denied a waiver on an
20 operating test of an individual who had passed the
21 test previously.

22 CHAIR SPRITZER: Can you tell me
23 approximately how many times you have passed on such
24 waiver requests?

25 MR. LEA: I can't tell you. I can't give

1 you an exact number.

2 CHAIR SPRITZER: I don't need an exact
3 number. I'm just thinking rough. Are we talking five
4 or ten or fifty?

5 MR. LEA: Now I've been doing this for
6 over 23 years. I'm pretty sure there's probably, you
7 know, 10, 15. I'm not really sure.

8 CHAIR SPRITZER: Okay. In general, do you
9 have any idea how common it is or uncommon for
10 somebody to be granted a waiver who has passed an
11 operating exam and is doing a retake exam on the
12 written part?

13 MR. LEA: Could you repeat that one more
14 time?

15 CHAIR SPRITZER: Do you have any idea
16 within Region II generally, not just your own
17 experience, how common it is for someone to be granted
18 a waiver of the operating exam if they passed on a
19 previous occasion.

20 MR. LEA: I don't know of any situation
21 where we have denied a waiver on the operating exam in
22 Region II, other than this one.

23 CHAIR SPRITZER: So, were you surprised
24 when you heard that Ms. Smith had been denied a
25 waiver?

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1 MR. LEA: Yes, I was.

2 CHAIR SPRITZER: Now it is true, is it
3 not, that granting a waiver is not automatic?

4 MR. LEA: You know, granting a waiver is
5 not automatic, but, again, I've never seen one not
6 granted in Region II for an operating test. I have
7 seen waivers denied. However, it was not for an
8 operating portion of the test. It was for some other
9 requirement associated with the operator licensing
10 process.

11 CHAIR SPRITZER: Now it's true that the
12 Examiner has discretion whether or not to grant a
13 waiver? Is that accurate?

14 MR. LEA: That's a true statement.

15 CHAIR SPRITZER: Do you have an
16 understanding of -- is there any guidance in Region II
17 on how to exercise this discretion?

18 MR. LEA: No, there is no guidance.

19 CHAIR SPRITZER: Is it ever discussed at
20 meetings of Examiners, what we should be looking for
21 or what we should be looking at in passing on waiver
22 requests for operating exams?

23 MR. LEA: Well, as far as passing on the
24 waiver request --

25 CHAIR SPRITZER: Yes, right.

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1 MR. LEA: -- are you talking about within
2 our own meetings?

3 CHAIR SPRITZER: Yes.

4 MR. LEA: Or are you talking about within
5 the meetings with the licensee?

6 CHAIR SPRITZER: Oh, yes. No, I think I
7 am referring to the meetings within Region II, just
8 NRC people.

9 MR. LEA: No, we don't really have any
10 meetings where we have discussed that.

11 CHAIR SPRITZER: Okay. All right. What
12 about with licensees? Do you tell them what is
13 required for a --

14 MR. LEA: Yes, we give them some very
15 general information as to what's required for a
16 waiver. We tell them to -- say, for instance, for the
17 operating test, we tell them that they have to provide
18 us with a waiver request and documentation of what has
19 been done to assure that the deficiencies have been
20 addressed.

21 We also talk to them as far as waivers are
22 concerned. A lot of times they may request waivers
23 for the amount of time that the individual has been on
24 site, how long he has been in the Operations
25 Department. What we will end up doing, when those

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1 particular waivers are requested, we will tell them
2 that, "Yes, we will grant you a waiver. However, you
3 will not be issued a license until the NUREG
4 requirements are completely satisfied." And it may be
5 six months on shift, or something like that. But the
6 license will not be administered or put into effect
7 until those requirements are met.

8 CHAIR SPRITZER: And I think you mentioned
9 remedial efforts by --

10 MR. LEA: Training?

11 CHAIR SPRITZER: Remedial training.

12 MR. LEA: Yes, I mean, like the forms that
13 you put up today. Whenever a licensee requests a
14 waiver, they are required to show what type of
15 training that individual has had since the
16 administration of the test and what type of additional
17 training has been provided to show us that they now
18 meet the requirements, and they should be granted a
19 waiver.

20 CHAIR SPRITZER: In your opinion, is it
21 possible to determine whether an individual is likely
22 to get a waiver or not without knowing what the
23 remedial training they have had consists of?

24 MR. LEA: No.

25 CHAIR SPRITZER: Why not?

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1 MR. LEA: Well, I guess that is two
2 things. It depends on what the waiver is asking. And
3 I guess let me back up.

4 CHAIR SPRITZER: Okay.

5 MR. LEA: My opinion is that, if the
6 individual passed the operating test the first time,
7 there should be a very great likelihood that they will
8 be granted a waiver.

9 Go ahead.

10 CHAIR SPRITZER: Have you seen, on the 303
11 form, did you see Ms. Smith -- this is from the 2011
12 exam -- did you see Ms. Smith's scores on the
13 simulator portion of the 2011 operating exam?

14 MR. LEA: I looked at the scores. I
15 looked at the writeups.

16 CHAIR SPRITZER: Okay. Was there anything
17 that struck you about her scores, the numerical
18 scores?

19 MR. LEA: Well, the thing that struck me
20 about the scores was the fact that I did not
21 personally believe -- again, this is based on my
22 experience -- I did not personally believe that the
23 writeups supported the scores that were given.

24 CHAIR SPRITZER: Can you give me any
25 specific examples of --

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1 MR. LEA: You know what? I can't give you
2 any specific examples because there were so many
3 comments made on her writeup.

4 JUDGE FROEHLICH: Is that large number of
5 comments that you just referred, is that part of the
6 extreme measures that you referred to in your email?

7 MR. LEA: I think when I said the extreme
8 measures, it was based on, I guess for the 2012 exam,
9 and there were conversations that I overheard, again,
10 that we need to make sure that we, I guess you would
11 say, dot the "i's" and cross the "t's" to make sure
12 that this individual is not granted a license.

13 CHAIR SPRITZER: Sorry. Go ahead.

14 JUDGE FROEHLICH: Sorry.

15 Now you sent this email on December 12th
16 to Michael Johnson. Was he Deputy EDO at that time or
17 was he Office Director, head of NRR?

18 MR. LEA: I'm not sure what his position
19 was at the time. I think I may have looked at the org
20 chart, and I was trying to decide who I should send it
21 to, just to make sure that they were aware of some of
22 the things that were going on in Region II.

23 JUDGE FROEHLICH: Did you ever hear back
24 from Mr. Johnson, Mr. Nieh, or Mr. McHale?

25 MR. LEA: Oh, I heard back from Mr.

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1 Johnson, I think, in an email that he sent me. He
2 said that he felt that this was significant enough
3 that he would forward it on to, I guess, the Office of
4 Investigation.

5 CHAIR SPRITZER: Would that be the Office
6 of Inspector General?

7 MR. LEA: Yes.

8 JUDGE FROEHLICH: In your career, have you
9 written many such emails to office heads or Deputy
10 EDOS?

11 MR. LEA: You mean emails of this nature?

12 JUDGE FROEHLICH: Yes, emails of this
13 nature.

14 MR. LEA: Operator licensing, no.

15 JUDGE FROEHLICH: Have you ever --

16 MR. LEA: No, I don't recall. Pardon me?

17 JUDGE FROEHLICH: I'm saying, have you
18 ever been so taken by a series of events that you shot
19 off an email to the highest echelons of the --

20 MR. LEA: Well, this is probably the first
21 email that I have sent off, but I have contacted
22 members of management, but not through an email;
23 through formal letters I have.

24 CHAIR SPRITZER: About anything related to
25 Ms. Smith or --

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1 MR. LEA: No, no, no, no, no, nothing
2 related to Ms. Smith, no.

3 JUDGE FROEHLICH: All right. Now tell me
4 a little bit about how the Branch is set up. The
5 Branch meeting that you were referring to, that is
6 whose Branch?

7 MR. LEA: We have a Branch meeting with
8 both Branches, Branch 1 and Branch 2.

9 JUDGE FROEHLICH: And the head of Branch
10 1 and Branch 2 would be?

11 MR. LEA: The head of Branch 1 is Malcolm
12 Widmann. The head of Branch 2 is Mark Franke.

13 JUDGE FROEHLICH: And at these Branch
14 meetings, aside from the Branch Chiefs, who attends?

15 MR. LEA: The entire Branch attends.
16 Every once in a while, very, very seldom might you get
17 a Division Director or a Deputy Division Director to
18 attend.

19 JUDGE FROEHLICH: And at this Branch
20 meeting, how did the discussion begin, or whatever?
21 How did it come up that you're talking about, I guess,
22 people who are passing or failing the operating
23 license exams?

24 MR. LEA: Well, for every Branch meeting
25 that we have, what they typically do is they put out

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1 an agenda, and we'll go to the meetings. And we will
2 go down the list of what is on the agenda. Every once
3 in a while, in some of the previous meetings, we would
4 discuss the status of the Vogtle appeal. And in
5 discussing those, a lot of times we would just say
6 it's ongoing. And we would have those types of
7 discussion.

8 On this particular one, in the email where
9 I said we did our self proud, we had gotten down to
10 the point in the agenda where we were talking about
11 the Vogtle exam. At that point, Mr. Widmann said to
12 those guys, the individuals, he said, "Hey, we did our
13 self proud on the exam."

14 Also, prior to that, I think the
15 individuals who had administered the exam had done the
16 work to, I guess, prove that it was a failure. They
17 were given an award in our current events. And the
18 Regional Administrator said that "This is for the work
19 that you've done on the Vogtle exam." And they
20 announced the awards to those individuals.

21 CHAIR SPRITZER: Have you seen the
22 testimony filed by Mr. Widmann in this case where he
23 states that he was only referring to work done to
24 prepare or to provide various documents to the Review
25 Panel, and not to the ultimate result of deciding that

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1 Ms. Smith was properly failed in 2012?

2 MR. LEA: Your Honor, I have seen no
3 documentation associated with this exam, nor have I
4 been approached or talked to about anything associated
5 with this exam other than I think Mr. Subin, who
6 called me and talked about my affidavits. Of course,
7 the only other person that I passed this on to, I did
8 pass it on to my Branch Chief, Mr. Franke.

9 CHAIR SPRITZER: Well, I'll represent to
10 you that Mr. Widmann's position, as I understand it,
11 is that, when he said, "We did ourselves proud," he
12 was referring only to providing documents to the
13 informal Review Board, and not to the results of the
14 exam. Does that cause any change in your
15 interpretation?

16 MR. LEA: No, it does not.

17 CHAIR SPRITZER: Why not?

18 MR. LEA: It does not cause any change in
19 my interpretation of what I heard in the meeting.

20 CHAIR SPRITZER: Okay. When was the
21 meeting in -- well, it looks like the meeting was
22 sometime around -- what? -- December 2012 or before
23 that?

24 MR. LEA: Yes, it was sometime November or
25 December of 2012. I can't tell you the exact date.

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1 CHAIR SPRITZER: By that time, do you know
2 whether the informal Review Panel had made its
3 decision concluding that Ms. Smith was properly denied
4 a license?

5 MR. LEA: You know, I'm not sure. I don't
6 know.

7 JUDGE FROEHLICH: In your Branch, how many
8 Examiners are there?

9 MR. LEA: I'm not really sure how many
10 Examiners we have, how many qualified Examiners,
11 because we have just gotten in some new Examiners and
12 we have also just qualified some Examiners. So, if
13 you want a total number, I don't have a total number
14 for you.

15 JUDGE HAJEK: Can you clarify the
16 organization for me, please? You're an Examiner in
17 Region II?

18 MR. LEA: That's correct.

19 JUDGE HAJEK: I thought Mr. Widmann was
20 the Branch Chief?

21 MR. LEA: There are two Branch Chiefs in
22 Region II.

23 JUDGE HAJEK: You just said your Branch
24 Chief was Mr. --

25 MR. LEA: Well, my Branch Chief is Mark

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1 Franke.

2 JUDGE HAJEK: Mark Franke?

3 MR. LEA: Yes.

4 JUDGE HAJEK: That's what I just heard you
5 say.

6 MR. LEA: Mark Franke is my Branch Chief.

7 JUDGE HAJEK: Okay. So, what's the
8 relationship between Mark Franke and Malcolm Widmann
9 in terms of office organization?

10 MR. LEA: They're equal.

11 JUDGE HAJEK: So, who's in charge of all
12 operator licensing in Region II?

13 MR. LEA: Who's in charge of all operator
14 licensing?

15 JUDGE HAJEK: Yes.

16 MR. LEA: Well, both Branch Chiefs are in
17 charge of a certain number of examiners. Who is in
18 charge of all license operator exams? I guess it
19 would be the DIRS Director. He's in charge. You
20 know, the hierarchy. But, as far as from a Branch
21 Chief position, it would be Mark Franke and Malcolm
22 Widmann.

23 JUDGE HAJEK: Okay. So, are the Branches
24 basically the same organizationally? You do both --
25 you said you're qualified in BWR and PWR both?

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1 MR. LEA: Right, I do both BWR and PWR,
2 that's correct.

3 JUDGE HAJEK: Okay. So, does Mr. Widmann
4 handle all PWRs and --

5 MR. LEA: No, no, it's not broken --

6 JUDGE HAJEK: It's not broken down that
7 way?

8 MR. LEA: It isn't.

9 JUDGE HAJEK: It is just numerically?

10 MR. LEA: Well --

11 JUDGE FROEHLICH: Are they divided by
12 plant? I mean, the Vogtle testing, is that done by
13 Branch Once or Branch Two, or how are they --

14 MR. LEA: No, it could be an Examiner from
15 either Branch.

16 JUDGE FROEHLICH: I see. Okay.

17 MR. LEA: And it varies from year to year.

18 CHAIR SPRITZER: Mr. Lea, you spoke
19 earlier about Examiners talking about what they needed
20 to include in a writeup in order to sustain Ms.
21 Smith's license denial. Can you give me an example of
22 any specific statements that they made?

23 MR. LEA: You know, I have no specific
24 statements as to what they made. Again, I said I
25 overheard conversations where they talked about the

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1 fact that they needed to do certain things as far as
2 documentation.

3 JUDGE HAJEK: You are being very general
4 there. I guess we are trying to get you to be a lot
5 more specific because I can imagine an exam team
6 getting together periodically and talking about their
7 writeups. Just like the caucuses at the end of a
8 scenario, you go back to the office a week later and
9 you look at your notes. And your notes say, "I
10 believe that this person made a statement during the
11 exam" -- or I'm sorry -- "during the scenario at 12
12 minutes after 9:00, but I'm not really confident that
13 I know who that statement was made to." And so, you
14 go to a fellow Examiner and you talk about that. You
15 know, hey, that's fine. You know, that's an okay
16 conversation.

17 But what I'm understanding from you is
18 that there must have been conversation that went
19 beyond that, sufficiently beyond it that it caused a
20 reaction on your part as to what they were talking
21 about and the way that they were talking about it.
22 Can you be more specific?

23 MR. LEA: You know, I can't be very
24 specific. All I can tell you is that, again, like I
25 said, I heard them talk about it. There were times

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1 where they felt that they were not going to have the
2 various people that were looking at the exams agree
3 with them.

4 I know someone in the office told me that
5 they were afraid that IOLB was not going to agree with
6 us. And also, Frank Ehrhardt had some concerns and
7 was told that they had started to collect additional
8 information to send out to the various parties that
9 were involved in order to provide additional evidence
10 to support or booster our case.

11 JUDGE HAJEK: So, am I to interpret that
12 as meaning that you overheard conversations of them
13 enhancing their comments?

14 MR. LEA: Yes, and I talked directly to
15 our LAN Administrator who was putting together
16 information for them.

17 JUDGE HAJEK: Okay. You talked directly
18 to the Atlanta --

19 MR. LEA: No, our LAN, Operator Licensing
20 Assistant.

21 JUDGE HAJEK: Yes. Oh, okay. And your
22 Operator Licensing Assistant told you what? Or why
23 did you have a conversation with her? Why didn't you
24 have a conversation instead with Mr. Franke?

25 MR. LEA: Why did I not have a

1 conversation with Mr. Franke?

2 JUDGE HAJEK: Yes, why did you choose the
3 Administrative Assistant instead of the --

4 MR. LEA: I had gone to her to ask her if
5 there was some documentation or who the individual
6 was, because I had no idea who they were talking
7 about. And that was when I pulled the files to review
8 it.

9 And I guess you asked the question why did
10 I not talk to Mr. Franke?

11 JUDGE HAJEK: Well, if you had a concern
12 about what you were overhearing in the hallways, I'm
13 trying to ask, you know, how did you make the
14 decisions you made in how you were going to handle
15 what you heard? And what I think I heard you say was
16 you decided to talk to the Administrative Assistant.

17 MR. LEA: I asked her --

18 JUDGE HAJEK: Why didn't you go to your
19 boss?

20 MR. LEA: Why did I not go to my boss?
21 Because I wanted to look at the information
22 firsthand --

23 JUDGE HAJEK: Okay.

24 MR. LEA: -- to come to a conclusion. And
25 I may have talked to another Examiner. I may have

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1 spoke to Rick Baldwin. I may have mentioned it to
2 him, that I didn't think what they were doing was
3 right or what they had done was right, by not
4 initially granting here a waiver.

5 And at some point in time during the
6 process, and it may have been much later, I talked to
7 Mr. Franke. And again, it may have been much, much
8 later that I told him that I had some concerns.

9 JUDGE HAJEK: What was his reaction?

10 MR. LEA: What was his reaction? I told
11 him that I did not agree, and he may have said, "Let
12 me look into it." He may have. I don't really
13 remember.

14 JUDGE HAJEK: But you never got back into
15 the discussion, is that what I'm hearing you say, with
16 him?

17 MR. LEA: I never got back into the
18 discussion with him. Again, like I said, it may have
19 been much, much later in the process.

20 JUDGE HAJEK: So, the first time, so you
21 brought this up one level above, that is, with Mr.
22 Franke?

23 MR. LEA: No, probably the first person
24 that I spoke to or that I emailed about it was, maybe
25 have been Mr. Johnson. And again, I may have talked

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1 to Rick Baldwin about --

2 JUDGE HAJEK: Wait, wait, wait, wait. Mr.
3 Gunn?

4 MR. LEA: No, Mr. Johnson.

5 JUDGE HAJEK: Mr. Johnson?

6 MR. LEA: Yes.

7 JUDGE HAJEK: Okay. I'm sorry. Go ahead.
8 And then, Rick --

9 MR. LEA: Again, I may have spoken to Rick
10 because maybe early on they may have been discussing
11 some things with Rick. They don't discuss stuff with
12 me.

13 JUDGE HAJEK: They don't?

14 MR. LEA: The Examiners. Most of the
15 Examiners don't discuss stuff with me.

16 JUDGE HAJEK: Why?

17 MR. LEA: Why? Could we not go there? I
18 guess because a lot of times I have a different
19 opinion from what they have.

20 JUDGE HAJEK: Uh-hum.

21 CHAIR SPRITZER: Let me ask, Ms. Smith, do
22 you have the numbers, the exhibit numbers for your
23 303s? Oh, we've got them here? Okay. Sorry.

24 Let's start with CCS-007, and I'm going to
25 represent to you, Mr. Lea, this is Ms. Smith's ES-303

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1 form from her 2011 operating exam. Does this look
2 like the document you reviewed at some point?

3 MR. LEA: If that's the exam. It was the
4 final; it was in her folder. It had been signed.

5 CHAIR SPRITZER: Okay. We can scroll down
6 through this document maybe slowly. Go to the next
7 page, if you can. Okay.

8 Can you recall, looking at this form here
9 today, can you recall any specific evaluations that
10 you remember being concerned about?

11 MR. LEA: Well, first of all, I didn't
12 just open up the files and start looking at the
13 comments that they had made. I actually pulled out
14 the actual JPMs. I pulled out the procedures, and I
15 followed the procedures and the JPMs step-by-step.

16 And for me to sit here and tell you today
17 what steps I found to be difficult or not performed
18 correctly, I can't do that. Again, it wasn't
19 something that I just did in five minutes that I sat
20 there and did it.

21 CHAIR SPRITZER: Okay.

22 MR. LEA: It was an evaluation.

23 CHAIR SPRITZER: How long did it take you?
24 Do you remember?

25 MR. LEA: It took me probably about two to

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1 three days just to get an understanding of what was
2 actually going on. Because, again, when I got into,
3 for instance, the scenarios, I looked at the comments
4 that they provided. I also looked at what was
5 identified in the expected operator actions. I also
6 looked at what was identified in the procedures
7 themselves. What actions did we expect the operators
8 to take?

9 So, again, I don't know if you have ever
10 seen a scenario. A scenario might be 40, 50, or 60
11 pages, one scenario with that many expected operator
12 actions.

13 JUDGE HAJEK: So, as you went through
14 these documents, were you taking notes?

15 MR. LEA: On some of them I did. On some
16 of the scenarios I did. And I just made comments
17 because I actually ran them off. I just made some
18 comments on some of them. I did make some comments on
19 probably the 2012 exam, written.

20 CHAIR SPRITZER: So, do you have these
21 documents available that you could present as an
22 exhibit?

23 MR. LEA: You know, I've got something
24 here, yes. I've got some things from the 2012 exam
25 where I wrote my comments and I was trying to get an

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1 understanding of why they wrote their comments.
2 Basically, on some of the scenarios, I have like
3 Scenario 3, Event 5. I have Scenario 3, Event 7;
4 Scenario 7, Event 6. I've got some different things,
5 but it's not a complete list. This was just for my
6 own notes.

7 CHAIR SPRITZER: Is this a document we can
8 mark as an exhibit here and keep? Or is this your
9 only copy of it?

10 MR. LEA: I've got it on my thumb drive.
11 I mean, it's just something that I wrote in my
12 evaluation. I have no problems with you taking it.

13 CHAIR SPRITZER: Well, if you wouldn't
14 mind handing it up here, we'll make it an exhibit.

15 JUDGE HAJEK: Yes, so, Mr. Lea, I have a
16 couple of questions. So, this document that you just
17 handed to Judge Spritzer, is that the extent of this
18 analysis that you've done?

19 MR. LEA: No, no, I've got --

20 JUDGE HAJEK: You've got tons of --

21 MR. LEA: No, I've looked at other things.
22 I've read them. Again, for me to go through and hit
23 everything step-by-step -- what I was trying to do was
24 to get an understanding of why we feel the individual,
25 why we made the comments that we made. And this was

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1 for my own satisfaction. There were some comments
2 that they made that I felt were not justifiable.
3 There were also comments that they made that I felt
4 were, indeed, justifiable.

5 JUDGE HAJEK: But you only have this one
6 two-page document -- or I don't know how many pages
7 are there, but is that right? Is it two pages? Oh,
8 no, sorry. Three pages.

9 MR. LEA: And again, that's what I so
10 happen to have with me. You know, again, I ran off
11 the procedures. I ran off the scenarios. Again, some
12 of them were 50, 60, 70 pages. Do I have comments on
13 everything? I may have gone through and marked up
14 some things that I felt warranted comments.

15 JUDGE HAJEK: And did you share that,
16 those comments in such detail, with management? I
17 mean, you said you went and you talked to Mr. Franke.

18 MR. LEA: I told him that I had some
19 comments. I said that I had been contacted about an
20 affidavit. It was after that that I told him that I
21 was going to look at some of the 2012 writeups. And
22 at that point in time, I did not pass on those
23 comments to him.

24 JUDGE HAJEK: So, you said you were
25 contacted about an affidavit?

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1 MR. LEA: Yes, I was.

2 JUDGE HAJEK: Your email here to Mr.
3 Johnson was dated December 12th, 2012. When were you
4 contacted about an affidavit?

5 MR. LEA: Well, I guess the date I was
6 contacted Mr. Subin would know. He was the one that
7 -- Lloyd Subin, he was the person that contacted me.
8 And I guess it was probably May timeframe, April/May.
9 I'm not really sure of the date.

10 JUDGE HAJEK: So, I can tell your our
11 dates that we have. So, your email was December 12th?

12 MR. LEA: Yes.

13 JUDGE HAJEK: The Board got involved in
14 this proceeding I think sometime in January.

15 MR. LEA: Okay.

16 JUDGE HAJEK: The staff turned in a
17 hearing docket file of discovery materials sometime in
18 March. Your email was not included in that hearing
19 file docket back in March. And we never heard of you
20 until May 29th.

21 Now why, if this information clearly was
22 in the hands, that is, not your affidavit, but your
23 email was copied to -- I don't know how to pronounce
24 this name -- "Nee, Mr. Nee," Nieh, N-I-E-H?

25 MR. LEA: Yes, I guess, yes.

1 JUDGE HAJEK: And John McHale?

2 MR. LEA: Yes.

3 JUDGE HAJEK: And you said that Mr.
4 Johnson did get back to you?

5 MR. LEA: He did get back to me, and he
6 turned it over to, I guess, the IG, the Inspector --
7 yes.

8 JUDGE FROEHLICH: Perhaps counsel for
9 staff can answer Judge Hajek's question and explain
10 why the email from Mr. Lea was not in the initial or
11 the second -- it didn't show up until the third
12 required disclosure. I think that's what you're
13 asking, Judge Hajek?

14 JUDGE HAJEK: Yes. In fact, I thought it
15 was kind of strange in a way relative to the way it
16 came in because it came in, first, like two days
17 before, two days early. And that is the email and the
18 affidavit.

19 MR. CYLKOWSKI: Yes, sir. This is David
20 Cylkowski for the staff, and I can explain sort of the
21 transactions that occurred here.

22 Initially, Mr. Subin and I, the initial
23 attorneys working on this case, made a determination
24 after looking at this email and after seeing that Mr.
25 Lea had not been involved in the examination, had no

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1 personal firsthand knowledge of any of the
2 interactions or any of the particularities of the exam
3 itself, made the determination that, under the
4 regulations, it was not relevant to the admitted
5 contention. And therefore, it was not subject to
6 disclosure.

7 Later on in late May --

8 JUDGE HAJEK: Excuse me.

9 MR. CYLKOWSKI: Yes.

10 JUDGE HAJEK: I'm sorry. So, that would
11 have been prior to the disclosures in March?

12 MR. CYLKOWSKI: I believe so, Your Honor.
13 The staff did turn this to OGC when they turned over
14 their initial possible hearing file disclosures.

15 Later on, after we had discussions with
16 our management in OGC, our management determined that
17 this is something that should be disclosed. It was
18 immediately disclosed, and it was disclosed, as you
19 said, two days before the actual update. So, it was
20 highlighted when it was disclosed, and that was due to
21 a determination by our management.

22 CHAIR SPRITZER: Mr. Lea, the document you
23 handed me previously, do you have thumb drive with you
24 that has the document on it? My technical person over
25 here prefers an electronic version if you're willing

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1 to share that with us. If not, we'll use the document
2 you've given me.

3 MR. LEA: I do have it with me. Is that
4 permissible for me to share that? I mean, I have
5 already shared it with you. So, I do have it with me.

6 CHAIR SPRITZER: If you wouldn't mind.
7 Does it require a password or something like that
8 to --

9 MR. LEA: Yes, it does.

10 CHAIR SPRITZER: Can we go ahead and hand
11 that to Mr. Welke over here? We can get it marked for
12 identification.

13 What I think we'll do, we realize neither
14 of the parties have seen this document before. So,
15 we're not going to ask you to decide what your
16 position is on it until you have had a chance to look
17 at it. We'll just mark it for identification here,
18 and we'll have to decide how to deal with it after
19 today, I suspect.

20 But, if you wouldn't mind right now
21 handing it to the gentleman over here and telling him
22 what he needs to know, typing in what he needs to get
23 access to it?

24 MR. WACHUTKA: Also, Your Honor, the
25 testimony discussed is Mr. Franke and the interactions

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1 with Mr. Franke. We have Mr. Franke present, if you
2 would like to ask him any questions about that.

3 CHAIR SPRITZER: Well, the chances we will
4 get to any more witnesses today are slim to non-
5 existent, I'm afraid. We are about 28 minutes away
6 from departure. But we probably will keep the record
7 open. So, we would be willing to consider that.

8 MR. WACHUTKA: Okay, Your Honor.

9 CHAIR SPRITZER: Why don't we go back and
10 we will just keep this document. It will be Board
11 Exhibit 013 for identification. All right. The
12 document will be Board Exhibit 013 for identification.
13 The Board will keep custody of it. We will get copies
14 to the parties, if we can, today, certainly as soon as
15 we can. And we will decide hereafter what to do with
16 it, whether it can be admitted or should be admitted
17 as an exhibit.

18 [Whereupon, the document was marked
19 as Board's Exhibit No. 013 for
20 identification.]

21 CHAIR SPRITZER: Let's move on then.

22 Now, in the third -- do we still have
23 Exhibit 021 up? We do. In the third paragraph, it
24 begins, "If you look at the paper trail, conversations
25 associated with the failure of the Applicant, you find

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1 that after individuals in Headquarters were ready to
2 suggest issuing a license to the Applicant, the
3 individuals from Region II involved in failing the
4 Applicant went back and came up with additional
5 comments to support a failure."

6 Now does this statement about individuals
7 and Headquarters being ready suggest issuing a
8 license, do you know whether that -- well, what does
9 that refer to? Do you know what process, how it came
10 about that the individuals in Headquarters were ready
11 to suggest issuing a license to the Applicant?

12 MR. LEA: Again, this was after talking to
13 the OLA. And I may have asked the question if she
14 knew what was going on with the appeal. She informed
15 me at that point in time that the Region was getting
16 really nervous because there were indications that the
17 parties involved in the Headquarters review of it were
18 going to issue her a license.

19 CHAIR SPRITZER: Why would the Region be
20 nervous? I mean, the appeal process does what it
21 does. It's no skin off their back, so to speak, I
22 wouldn't think.

23 MR. LEA: Why would the Region be nervous?

24 CHAIR SPRITZER: Yes.

25 MR. LEA: Because, in the light of certain

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1 individuals within the Region, the fact that they had
2 a failure was perhaps a feather in their cap.

3 CHAIR SPRITZER: How? Can you explain
4 that to me? Why would one consider a failure a
5 feather in one's cap?

6 MR. LEA: Well, it doesn't happen very
7 often, to be very honest with you. But, to them, it
8 was probably a status symbol, that we were doing an
9 outstanding job by failing an individual. That's --

10 CHAIR SPRITZER: Are there any specific
11 individuals who, in your view, felt that way? Can you
12 identify anybody?

13 MR. LEA: I can't identify anybody per se,
14 and I'd rather not identify anyone.

15 JUDGE HAJEK: Well, you're talking about
16 the exam team here. You know, there are only three
17 people on the exam team, and you've certainly brought
18 this issue into question there.

19 MR. LEA: It makes them look good in the
20 eyes of management.

21 JUDGE HAJEK: And management in this case
22 that you're referring to is Mr. Widmann and Mr.
23 Franke?

24 MR. LEA: The Region. The Region. The
25 fact that --

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1 JUDGE HAJEK: The Region Administrator?
2 At that level? What level are you talking about?

3 MR. LEA: What level am I talking about?

4 JUDGE HAJEK: Yes.

5 MR. LEA: I would have to say that we
6 believe, and I believe, that as far as operator
7 licensing, certain Operating Licensing Branch Chiefs
8 are concerned, that's a feather in their cap. And to
9 have their people identify and to be able to have it
10 sustained and not overturned, it shows the value.

11 CHAIR SPRITZER: Mr. Lea, with regard to
12 the document you've handed up to me -- it's the
13 document we have marked for identification as Board
14 Exhibit 013 -- can you tell me approximately when this
15 analysis was done?

16 MR. LEA: I probably did that within the
17 last month.

18 CHAIR SPRITZER: Within the last month?
19 All right.

20 MR. LEA: Yes.

21 CHAIR SPRITZER: And the scenarios and
22 events described in the document, are they from the --

23 MR. LEA: That's --

24 CHAIR SPRITZER: -- let me finish the
25 question -- from Ms. Smith's 2012 exam or her 2011

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1 exam?

2 MR. LEA: That's from 2012.

3 CHAIR SPRITZER: Well, all right. Did you
4 attempt to bring this document to anyone's attention
5 until now?

6 MR. LEA: I did not attempt to bring it to
7 anyone's attention other than I did inform my Branch
8 Chief that I was looking at some of the comments.

9 CHAIR SPRITZER: Did he have any reaction
10 to that?

11 MR. LEA: His reaction was, "I understand
12 that you're looking at the comments." And I think it
13 was so late in the game, because I had already
14 provided an affidavit. And I told him that I felt
15 that it was something that I had to do, and I told him
16 that I just wanted to let him know. I told him I
17 didn't expect him to do anything about it, but I did
18 have some concerns based on what had already taken
19 place.

20 I mean, they had already issued, I guess,
21 the final denial to her. I'm not sure. Or we had
22 basically made up our mind as to what we were going to
23 do.

24 CHAIR SPRITZER: Now you've been here, I
25 believe, for the past two days listening to the

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1 testimony, and I assume you have viewed at least some
2 of the exhibits that have been put up on the screen?

3 MR. LEA: Yes, I have.

4 CHAIR SPRITZER: Has anything you have
5 heard at this hearing altered your opinion one way or
6 another in any respect?

7 MR. LEA: As far as my personal opinion?

8 CHAIR SPRITZER: Opinions that you've
9 testified to so far today.

10 MR. LEA: No, they haven't. In fact,
11 there have been some things that have been said that
12 has probably led me to have a stronger opinion?

13 CHAIR SPRITZER: In what way?

14 MR. LEA: In what ways? I guess in
15 listening to some of the testimonies provided by the
16 Applicant and her witness. Also, listening to some of
17 the testimonies provided by a representative of the
18 NRC, I felt that some of the items or some of the
19 areas that we downgraded her in, we really should not
20 have downgraded her in those areas. There were areas
21 that we downgraded her in where she was not
22 responsible for the malfunction, and she was following
23 the directions of whoever the SRO was at the time.

24 CHAIR SPRITZER: What specifically?

25 MR. LEA: Again, I have to go back to the

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1 RWST, when I go back to that particular one, and I
2 could be wrong, but I think she may have been in the
3 RO position. She was assigned or instructed to
4 monitor the reactivity. And I think it was stated
5 that, when the alarm came in, she said what the alarm
6 was. At that point in time, the individual who was
7 the unit operator acknowledged what the alarm was,
8 pulled the ARP. And I don't know if it was given to
9 the RO, I mean the SRO, but the SRO specifically, I
10 guess, told this individual to monitor reactivity.

11 At that point in time, there may have been
12 discussions between the Senior Reactor Operator and
13 the Unit Operator as to what was going on. Anyway, I
14 guess that particular event or scenario was one of the
15 times in which I saw that she was downgraded in an
16 area where she should not have been downgraded.

17 There was also another instance dealing
18 with she was bypassing or inhibiting P11. And I know
19 when I had looked at the writeup that we provided,
20 what I saw was that we said pressure was going down;
21 it was approximately 207. And what she said in the
22 writeup, and this is what I read, that it was 1998.
23 I asked myself the question: what position was she
24 in? What was she reading? She was reading, I would
25 think, from what I gather, the display that she had

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1 next to her, where she could actually see, and it was
2 digital.

3 And there were some other things far off
4 that, you know, I asked myself the question. I said
5 those gauges were over where an RO or a Unit Operator
6 would have read those. It was not gauges that you
7 could stand back over and look at it, you know, the
8 increments, and say blah, blah, blah. It was exactly
9 -- but, in my opinion, she was going by what was
10 available to her with 1998, and she directed the
11 individual to inhibit ADS, I mean inhibit the P11, the
12 block associated with P11.

13 And when he went to inhibit the block, it
14 did not inhibit. And she waited. I don't know long
15 she waited because I don't remember. It wasn't very
16 long. Because the guy said like "It won't inhibit."
17 And then, I don't know how much later she provided --
18 "Hey, try it again." When he tried it, I guess maybe
19 it was the second time, he was able to inhibit it.

20 So, in my mind, she had taken the
21 appropriate action. She had looked at the
22 instrumentation that was there and told me that it
23 was. And what we said, at no point in time did we say
24 what the pressure was. We said it was going down. It
25 was "at approximately," and approximately could be a

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1 pretty wide range. When you say it was at
2 approximately 207, and we never said how long it was
3 or how fast it was going down at that time or the rate
4 of decrease in pressure that would have been gotten
5 from someplace else.

6 And that was another example where I said,
7 well, why is she really being hit on this? Again,
8 there was some examples, other examples --

9 JUDGE HAJEK: Let me pursue that one for
10 just a moment. It happens to be one that we had a
11 discussion on a little bit yesterday also.

12 So, you're saying that the documentation
13 that you looked at, that you're recalling and
14 describing right now, is documentation that you looked
15 at within the last month or --

16 MR. LEA: Yes, within the last month.

17 JUDGE HAJEK: Are you comparing that
18 documentation to conversations that you overheard?

19 MR. LEA: No. I wasn't comparing that to
20 conversation. That was just my looking at the
21 documentation.

22 JUDGE HAJEK: Okay. So, earlier in your
23 testimony, however, you said that you overheard
24 conversations by the Examiners talking among
25 themselves that they needed to make sure that their

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1 writeups were such that there would definitely be no
2 reason for anybody else to take a look at this and
3 overturn their failure.

4 MR. LEA: Yes, and that's a true
5 statement.

6 JUDGE HAJEK: And so, what I'm trying to
7 get at here is you believe that the writeup, even
8 though you looked at it only a month ago, this is
9 really the final, final writeup? This is the writeup
10 that they had completed well before the Review Panel
11 began to take a look at it, would it not be?

12 MR. LEA: I'm not sure. I'm not sure when
13 it was actually completed. I do know that after the
14 writeup was submitted that they, then, went back and
15 looked for additional information.

16 JUDGE HAJEK: Okay. I need to follow up
17 on understanding what you said. After the writeup was
18 initially submitted, you're talking about once they
19 completed the 303 writeup and submitted it, they went
20 back again to find more information?

21 MR. LEA: From what I was told by our LAN,
22 they were in the process of putting together some
23 additional information to send up.

24 JUDGE HAJEK: I see. That timeframe was?

25 MR. LEA: After -- before the decision was

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1 made at Headquarters, I guess, to deny the license.
2 There was a time period there when --

3 JUDGE HAJEK: If I would project that
4 maybe it was the first week in October, does that
5 sound --

6 MR. LEA: I don't know. I am not sure.

7 JUDGE HAJEK: Okay.

8 CHAIR SPRITZER: Are there any other new
9 or different conclusions you've drawn after listening
10 to the testimony for the past two days, other than
11 what you've already told me about?

12 MR. LEA: No, there are no more
13 conclusions or no different conclusions.

14 CHAIR SPRITZER: As for the conclusions in
15 NRC-021, the email, have those changed at all as a
16 result of anything you have heard today?

17 MR. LEA: You know, I haven't gone back
18 and looked at them. And to be very honest with you,
19 and this is just the way I kind of do business, I will
20 look at them. I will set them aside, and then, I will
21 go back and look at them again to make sure that I
22 addressed my concerns to the best of my ability. And
23 if I need to change those concerns, it is something
24 that I would change and I would make comments on it
25 for myself.

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1 JUDGE FROEHLICH: Mr. Lea, based on what
2 you heard as testimony today and yesterday, and your
3 review of the materials that you had seen back in
4 Region II, does Ms. Smith's performance on the
5 examination put her in that 3 to 4 percent group of
6 people who fail the reactor? I mean, is she, in your
7 professional opinion, a danger, a dangerous or unsafe
8 operator? Is she among the 4 percent or so of people
9 who should properly fail the operator exam?

10 MR. LEA: In my opinion, I would say that
11 she is not one of the people who should have failed
12 the exam. Let me just say, in listening to some of
13 the things she said, there were some things that she
14 did not adequately answer, but there are things that
15 I reviewed that indicated that she would be a safe
16 operator.

17 And I may be running my mouth a little bit
18 too much, but one of the things that was said the
19 other day, well, yesterday and today, is that, when
20 you go into the control room, you don't know 100
21 percent of the things. You work as a team; you learn.

22 I guess my answer is that I think --
23 you've heard that she would be an unsafe operator. I
24 tend to disagree.

25 JUDGE FROEHLICH: I don't have anything

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1 else.

2 CHAIR SPRITZER: All right. Thank you,
3 Mr. Lea, for your testimony.

4 MR. LEA: Thank you.

5 CHAIR SPRITZER: We are finally at the
6 end, I believe.

7 A couple of notes. As I indicated, I
8 think, at the pre-hearing conference, 30 days from
9 transcript availability will be the deadline for
10 corrections to the transcript.

11 The record, I believe, automatically or
12 under the regulations remains open at least until that
13 point. We'll consider the issue raised. If the staff
14 still wants to suggest that we might want to talk to
15 Mr. Franke, that might be something we would look
16 into.

17 MR. WACHUTKA: Also, Your Honor, the NRC
18 staff would like to reserve the right to argue the
19 admissibility of this Board Exhibit 013.

20 CHAIR SPRITZER: Certainly. Since you
21 haven't seen it yet, we'll give you the opportunity to
22 do that, and we'll address any objections at the
23 appropriate time. Since the record remains open, that
24 shouldn't be a problem.

25 Unless anybody has anything else, I think

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1 we're just about done. There's one other -- are there
2 any other procedural matters we need to talk about
3 before we leave?

4 MR. WACHUTKA: Yes, Your Honor, there's a
5 couple of administrative items for the NRC staff.

6 When we admitted exhibits into evidence
7 early on, we said that there was an NRC-036
8 unredacted, and it appears that that hasn't been
9 submitted. But one does exist, and we will submit it
10 next week.

11 CHAIR SPRITZER: Very good.

12 MR. WACHUTKA: And also, we stated that
13 there was an NRC-06 unredacted. And what we meant to
14 say was NRC-017 unredacted. So, that should clear up
15 the record, though.

16 CHAIR SPRITZER: Very good. Thank you.

17 Ms. Smith, did you have anything to add of
18 a procedural nature?

19 MS. SMITH: I don't have anything to add,
20 Your Honor.

21 CHAIR SPRITZER: One thing I will note --
22 we have mentioned this before, I believe, in one of
23 our orders -- but, in the event the parties would
24 choose to pursue settlement, you can do that by
25 contacting the Chief Judge, who is available to assign

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1 someone other than this group of judges to preside
2 over any settlement discussions, if you think that
3 would be of any value.

4 So, yes, just to reiterate, 30 days from
5 transcript availability for corrections to the
6 transcript. And then, once that 30 days expires,
7 another 30-day clock will start running for findings
8 of fact, conclusions of law, proposed findings of
9 fact, conclusions of law.

10 I think, Ms. Smith, you asked me at the
11 pre-hearing conference about that you were unfamiliar
12 with what those are. There is a rule that talks about
13 them. Unfortunately, I believe it's in the 700s. It
14 sets out the specific requirements for proposed
15 findings of fact, conclusions of law. Yes, 2.712, 10
16 CFR 2.712. That's, I think, pretty much what we told
17 you at the pre-hearing conference, but I would advise
18 you to take a look at that.

19 Very well. Thank you for all your
20 efforts. This has certainly been an interesting case.
21 And once we get everybody's proposed findings, we will
22 get an opinion out as soon as we are able to.

23 Thank you.

24 (Whereupon, at 4:56 p.m., the proceedings
25 in the above-entitled matter were adjourned.)