UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CHARLISSA C. SMITH	)	Docket No. 55-23694-SP
	)	
(Denial of Senior Reactor Operator License Application)	)	
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NRC STAFF STATEMENT OF POSITION CONCERNING THE CLAIM BY CHARLISSA C. SMITH THAT THE NRC IMPROPERLY DENIED HER 2012 SENIOR REACTOR OPERATOR LICENSE APPLICATION

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TABLE OF CONTENTS

Page

NRC-001
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INTRODUCTION

In accordance with 10 C.F.R. § 2.1207(a) and the Atomic Safety and Licensing Board's (Board) scheduling orders in this proceeding,[1] the Nuclear Regulatory Commission (NRC) Staff (Staff) hereby submits its Statement of Position (Statement) concerning the claim by Charlissa C. Smith (Ms. Smith) that the NRC improperly denied her 2012 senior reactor operator (SRO) license application. This Staff Statement is supported by the pre-filed written testimony of Mark A. Bates (Mr. Bates), Phillip G. Capehart (Mr. Capehart), Donald E. Jackson (Mr. Jackson), John J. McHale (Mr. McHale), Michael K. Meeks (Mr. Meeks) (Staff Testimony) (Exhibits NRC-002, NRC-003, NRC-004, NRC-005, NRC-006, respectively), and the exhibits cited therein.

[1] Order (Memorializing March 18, 2013 Teleconference and Establishing Procedures), at 2 (Mar. 20, 2013) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13079A401); Order (Granting Motion for Extension of Time) (Apr. 8, 2013) (unpublished) (ADAMS No. ML13098A318).

The Staff has carefully considered Ms. Smith's claim and the bases for her claim, as explained in her "Statements of Position" and "Prefiled Testimony on Statements of Position" documents (Exhibits CCS-075, CCS-076, respectively), the testimony of Perry Lamar Tucker (Mr. Tucker), James Newton Turner (Mr. Turner), and Rodney Antoine Waltower (Mr. Waltower) (Exhibits CCS-002, CCS-040, CCS-041, respectively), as well as the exhibits filed in support thereof. For the reasons set forth below and in the Staff Testimony filed herewith, the Staff respectfully submits that Ms. Smith's claim is lacking in merit and should be resolved in favor of the Staff. Ms. Smith has failed to provide in her pre-filed testimony and exhibits clear evidence that demonstrates that the Staff improperly discharged its duties with respect to the denial of her 2012 SRO license application.

BACKGROUND

Ms. Smith argues in her "Statements of Position" and "Prefiled Testimony on Statements of Position" documents (Exhibits CCS-075, CCS-076, respectively) that the Staff's denial of her 2012 SRO license application was improper because of "issues" with the "waiver process, examination process, and independent review."[2] She divides these three general "issues" into twelve separate "statements of position."[3] Ms. Smith's first statement of position is "processing the waiver request."[4] Her second statement of position is "conflict of interest."[5] Her third statement of position is "inadequate administrative review."[6] Her fourth through twelfth statements of position are specific arguments regarding the grading of her 2012 simulator test by either the NRC Region II (Region II) examiners or the informal review panel.[7] She claims

[2] Exhibit CCS-076, 1.

[3] *Id*.

[4] *Id*. at 2-10.

[5] *Id*. at 11-14.

[6] *Id*. at 15-20.

[7] *Id*. at 21-48.

that, because of these arguments, the Staff should have found that she had passed her 2012 operating test and thus that she satisfies all of the requirements for the issuance of an SRO license.[8]

The Staff Statement responds to each of these twelve arguments in turn in order to, first, demonstrate that in none of the arguments does Ms. Smith satisfy her burden of demonstrating by clear evidence that the Staff improperly discharged its duties and that this alleged improper discharge of duties caused the denial of her 2012 SRO license application, and second, affirmatively demonstrate that the Staff did discharge its duties related to Ms. Smith's 2012 SRO license application consistent with 10 C.F.R. Part 55, "Operators' Licenses," NUREG-1021, "Operator Licensing Examination Standards for Power Reactors," Revision 9, Supplement 1 (Exhibits CCS-005A, CCS-005B), OLMC-500, "Processing Requests for Administrative Reviews and Hearings" (Exhibit CCS-030) and past NRC precedent. Section I of the Staff Statement describes the legal standards relevant to operator license application denial proceedings associated with an applicant's failure of the operating test. Section II provides a roadmap summarizing the Staff position that, according to the relevant legal standards, Ms. Smith's arguments fail to justify her requested remedy of license issuance. Section III describes the required process for preparing, administering, and evaluating SRO-instant operating tests. Section IV, in response to Ms. Smith's Statement of Position 1, discusses the waiver request process and explains how the Staff's handling of Ms. Smith's 2012 SRO license application was consistent with 10 C.F.R. Part 55, NUREG-1021, and past NRC precedent. Section V, in response to Ms. Smith's Statement of Position 2, explains that there was no conflict of interest related to the evaluation of Ms. Smith's 2012 simulator test by Region II. Section VI, in response to Ms. Smith's Statement of Position 3, discusses the informal review process and explains how the Staff's handling of the informal review of Ms. Smith's 2012 SRO license

[8] *Id*. at 55.

application denial was consistent with 10 C.F.R. Part 55, NUREG-1021, OLMC-500, and past NRC precedent. Section VII, in response to Ms. Smith's Statements of Position 4-12, discusses each of Ms. Smith's technical arguments and demonstrates that they are without merit. Section VII also discusses Ms. Smith's non-contested errors in order to demonstrate that the only contested errors that are responsive to her requested remedy of license issuance are those having to do with SRO Competency 3, "Control Board Operations."[9]

For the reasons provided in this Staff Statement, as supported by the Staff Testimony and exhibits, Ms. Smith's claim that her 2012 SRO license application was improperly denied fails and, therefore, this Board should resolve the matter in favor of the Staff. Moreover, Ms. Smith's pre-filed testimony and exhibits fail to demonstrate that she has met her burden of clear evidence.

DISCUSSION

I. LEGAL STANDARDS

Ms. Smith claims that the Staff improperly denied her 2012 SRO license application by its actions related to her 2012 SRO operating test.[10] NRC case law dealing with the denial of operator licenses due to unsatisfactory operating test performance demonstrates that such a claim may only be successful if the Staff breached its duty in some fashion, generally through erroneous grading, and that, because of this breach of duty, the applicant's application was denied, generally through a passing score becoming a failing score.[11]

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[9] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 13.

[10] Exhibit CCS-076, 1.

[11] *See Michael A. Phillippon* (Denial of Senior Operator License Application), LBP-99-44, 50 NRC 347 (1999); *Randall L. Herring* (Senior Reactor Operator License for Catawba Nuclear Station), LBP-98-30, 48 NRC 355 (1998); *Frank J. Calabrese Jr.* (Denial of Senior Reactor Operator's License), LBP-97-16, 46 NRC 66 (1997); *Alfred J. Morabito* (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-10, 27 NRC 417 (1988).

Pursuant to 10 C.F.R. § 2.325, in order to prevail, the applicant has the burden of proving the elements of a claim.[12] With respect to the alleged breach of the duty owed by the Staff to Ms. Smith as an SRO license applicant, the applicant has a heightened burden of proof. The Supreme Court and the Commission recognize the presumption that "governmental officials, acting in their official capacities, have properly discharged their duties" and that, in order to rebut this presumption, a petitioner must present "clear evidence" to the contrary.[13] Therefore, not only does Ms. Smith bear the burden of proof, but, regarding the requirement that she prove that the Staff breached its duty with respect to her application, she must prove by clear evidence that the Staff's discharging of its duty was improper.

The Staff improperly discharges its duties with respect to the grading of an operating test if the grading is "inappropriate or unjustified"[14] or if the grading "stray[s] too far afield of the . . . twin goals of equitable and consistent examination administration" thus becoming "arbitrary or an abuse of discretion."[15] In assessing whether an applicant satisfies the burden of establishing that the Staff's determination of the applicant's performance was inappropriate, unjustified, arbitrary, or an abuse of discretion, the Board should consult NUREG-1021.[16]

The typical case dealing with an operator license application denial due to an operating test failure involves the applicant attempting to prove that the NRC Staff improperly graded some aspect of the operating test and that a proper grading of that aspect of the operating test would result in the applicant passing the operating test and thus satisfying the requirements for

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[12] 10 C.F.R. § 2.325 ("Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof.").

[13] *Louisiana Energy Services, L.P.* (Nat'l Enrichment Facility), CLI-06-22, 64 NRC 37, 49 n.48 (2006) (citing *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)).

[14] *Phillippon*, LBP-99-44, 50 NRC at 358 ("[T]he dispute between Mr. Philippon and the Staff comes down to the question whether Mr. Philippon has met his burden of establishing that the Staff's scoring of his performance . . . was inappropriate or unjustified.").

[15] *Calabrese*, LBP-97-16, 46 NRC at 86.

[16] *Phillippon*, LBP-99-44, 50 NRC at 358.

issuance of an operator license.[17] For instance, in the case of *Frank J. Calabrese Jr.*, the controversy came down to whether the applicant had proven that the Staff was incorrect in assigning him a grade of "1" for rating factor 4.B instead of a grade of "2" which would have changed his overall grade from failing to passing.[18] In analyzing this controversy, the Presiding Officer noted that he must remain "heedful of the discretion afforded the [S]taff in making its examination determinations."[19] However, the Presiding Officer also stated that he had the duty to ensure that the Staff exercised this discretion equitably and consistently.[20] The Presiding Officer made his final determination by comparing the Staff's grading with his own application of the guidance contained in NUREG-1021 to the record developed in the proceeding.[21] Through this comparison, the Presiding Officer determined that the Staff's grading of the petitioner, Mr. Calabrese, was "an entirely reasonable exercise of its decisionmaking authority in such examination scoring matters, and, in any event, not arbitrary or an abuse of the discretion afforded it in such matters."[22] Therefore, the Presiding Officer concluded that "applicant Calabrese has failed to meet his burden of showing that the staff incorrectly scored the operating test portion of his SRO examination" and thus that "the [S]taff's determination that he did not pass the operating portion of the examination is affirmed and his application for an SRO license is denied."[23]

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[17] However, a Board finding that an applicant had passed an operating test that was previously graded as a failure does not necessarily mean that the Board may immediately direct the issuance of a license, because there are other licensing requirements, such as health, that the Staff must also assess before issuing a license pursuant to 10 C.F.R. § 55.33. For a discussion of this distinction, see *Alfred J. Morabito* (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-16, 27 NRC 583 (1988).

[18] *Calabrese*, LBP-97-16, 46 NRC at 87.

[19] *Id*. at 86.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 89.

[23] *Id*. at 68.

Therefore, based on the relevant case law, in order to prevail, Ms. Smith must (1) prove by clear evidence that some aspect of the Staff's discharging of its duties with respect to her 2012 operating test was improper and (2) prove that, but-for this improper discharging of its duties, the Staff would have granted her 2012 SRO license application. This Staff Statement demonstrates that Ms. Smith does not, and cannot, satisfy these elements of her claim and, therefore, that her claim fails.

II. MS. SMITH'S CLAIM FAILS BECAUSE SHE HAS NOT BOTH (1) PROVEN BY CLEAR EVIDENCE THAT THE STAFF IMPROPERLY DISCHARGED ITS DUTIES AND (2) PROVEN THAT, BUT-FOR ANY SUCH IMPROPER DISCHARGE, HER 2012 SRO LICENSE APPLICATION WOULD HAVE BEEN GRANTED

A. Ms. Smith has not Proven by Clear Evidence that the Staff Improperly Discharged its Duties Related to her 2012 SRO License Application

Ms. Smith's waiver, bias, and grading arguments fail to rebut with clear evidence the presumption that the Staff, acting in its official capacity in reviewing her 2012 SRO license application, properly discharged its duties. On the contrary, as explained in detail in this Statement, all of the Staff actions related to Ms. Smith's 2012 SRO license application were consistent with 10 C.F.R. Part 55; NUREG-1021, whose guidance the Staff is bound to follow in preparing and evaluating operator license applications by 10 C.F.R. § 55.40(a);[24] OLMC-500; and past NRC precedent.

First, Ms. Smith's waiver arguments fail to prove by clear evidence a Staff breach of duty. The Staff requires, pursuant to 10 C.F.R. § 55.35(b) and NUREG-1021, ES-204, that a waiver request be submitted as part of a "new" and "final" license application."[25] The Region II Staff communicated this regulatory requirement to the licensee facility responsible for submitting Ms. Smith's 2012 SRO license application as part of the Staff's review of the licensee facility's

[24] 10 C.F.R. § 55.40(a) ("The Commission shall use the criteria in NUREG-1021 . . . to prepare . . . the operating tests required by § 55.45 . . . [and] to evaluate the . . . operating tests . . . .").

[25] 10 C.F.R. § 55.35(b); NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 1.

"preliminary" and "uncertified" license applications.[26] However, Ms. Smith's final, certified license application did not, in fact, request a waiver of the 2012 operating test.[27] Therefore, consistent with regulatory requirements, the Staff could not, and did not, grant Ms. Smith a waiver of the 2012 operating test.

Furthermore, even if the Staff had received an operating test waiver request on behalf of Ms. Smith as part of a new and final license application as required, the Staff would likely not have granted such a request. Consistent with 10 C.F.R. § 55.35(b) and NUREG-1021, ES-204, the Staff may "in its discretion" grant a waiver request if the Staff determines, on a "case-by-case" basis, that "sufficient justification" is presented in the request.[28] Ms. Smith presents only her performance on the 2011 operating test as her justification for a waiver.[29] However, the examiners of her 2011 operating test, Mr. Capehart and Mr. Meeks, testify that her performance on the 2011 operating test was such that they would not have recommended the exercise of Staff discretion to grant a waiver of Ms. Smith's 2012 operating test had a final waiver request based just on this performance been submitted.[30] Ms. Smith does not prove by clear evidence that such a determination would be arbitrary or an abuse of discretion. On the contrary, a comparison of Ms. Smith's 2011 operating test results to the results of those individuals previously granted waivers affirmatively demonstrates that this Staff conclusion would be consistent with past NRC precedent.[31]

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[26] Exhibit CCS-002 (Tucker Testimony), 4, 7-9; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-202, 5, 8.

[27] Exhibit NRC-007; Exhibit CCS-002 (Tucker Testimony), 5.

[28] 10 C.F.R. § 55.35(b); NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 2.

[29] Exhibit CCS-076, 3-7; Exhibit CCS-002 (Tucker Testimony), 14-15.

[30] Exhibit NRC-003 (Capehart Testimony), 3; Exhibit NRC-006 (Meeks Testimony), 15.

[31] Exhibit NRC-008.

For these reasons, Ms. Smith's waiver arguments do not demonstrate by clear evidence that the Staff abused its discretion in not granting her a waiver of her 2012 operating test.

Second, Ms. Smith's bias arguments fail to prove by clear evidence that the Staff improperly discharged its duties. The Staff Testimony and exhibits demonstrate that the evaluation of Ms. Smith's 2012 simulator test was not improperly influenced by any examiner knowledge of her 2011 operating test performance. Pursuant to NUREG-1021, the Region II Staff applied "sound judgment" [32] in assigning Mr. Bates to administer and evaluate Ms. Smith's 2012 simulator test because Mr. Bates had not been directly involved with her 2011 operating test or with the preliminary discussions regarding a potential waiver of her 2012 operating test. Furthermore, the evidence affirmatively demonstrates that Ms. Smith was treated equivalently to other applicants and, therefore, that there was no bias by the 2012 examiners against her.

Additionally, the Staff Testimony and exhibits demonstrate that the informal review of Ms. Smith's 2012 SRO license application denial was also free from bias. The informal review panel balanced the OLMC-500 guidance to remain impartial with the OLMC-500 guidance to accept input from the affected Region by not including any of the 2012 examiners as panel members, but still considering their input as part of the panel's deliberations.[33] Despite Ms. Smith's claim to the contrary, the consideration of this Region II input did not cause the informal review panel to undergo a "last minute change" in order to sustain Ms. Smith's failure of the simulator test.[34] Rather, the Staff Testimony and exhibits prove that the informal review panel determinations that caused Ms. Smith's failing grade on the simulator test to be sustained, specifically, the recognition of a failed open pressurizer power operated relief valve (PORV) event as a critical task and the identification of a rating factor 3.c. manual control error related to

[32] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 13.

[33] OLMC-500 (Exhibit CCS-030), 3, 6.

[34] Exhibit CCS-076, 17.

control of the letdown heat exchanger (1TIC-0130), were actually identified at the earliest meeting of the informal review panel before any potential "last minute" influence by Region II.[35] For these reasons, Ms. Smith's bias arguments do not demonstrate by clear evidence that the Staff improperly discharged its duties with respect to either the administration of her 2012 operating test or the informal review of her 2012 SRO license denial.

Third, Ms. Smith's grading arguments fail to prove by clear evidence a Staff breach of duty. Ms. Smith does not demonstrate that the grading of her simulator test, by either the Region II examiners or the informal review panel, was "inappropriate or unjustified"[36] or "strayed too far afield of the . . . twin goals of equitable and consistent examination administration" so that it was "arbitrary or an abuse of discretion."[37] On the contrary, the Staff Testimony and exhibits demonstrate that Ms. Smith's unsatisfactory grade on the operating test was appropriate and justified according to the NUREG-1021 guidance and the Staff's professional judgment. Therefore, Ms. Smith again does not satisfy the burden of proving her claim and her claim fails.

B. Many of Ms. Smith's Arguments that the Staff Improperly Discharged its Duties are Legally Insufficient because they are not Causally Related to the Requested Remedy of License Issuance

Ms. Smith's bias arguments, as well as most of her grading arguments, also fail because they are not causally related to her requested remedy of license issuance.

An SRO license application is only granted if the applicant passes the required operating test, proving that the applicant has learned "to operate [the] facility competently and safely, and . . . to direct the licensed activities of licensed operators competently and safely."[38] Therefore, in

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[35] *See* Exhibit CCS-065, 18.

[36] *Phillippon*, LBP-99-44, 50 NRC at 358.

[37] *Calabrese*, LBP-97-16, 46 NRC at 89.

[38] 10 C.F.R. § 55.33(a).

order to obtain the requested remedy of license issuance, Ms. Smith must demonstrate that, but-for the alleged improper discharge of its duties, the Staff would have found that she passed the operating test and demonstrated sufficient knowledge to competently and safely operate and direct the operation of the licensee facility. It is legally insufficient for Ms. Smith to simply point out alleged Staff improprieties without relating them to the requested remedy of license issuance.

Thus, Ms. Smith's argument that her 2012 operating test examiners were biased against her based on her 2011 operating test performance is non-responsive to her claim because Ms. Smith presents no evidence to prove that, if this alleged bias was removed, that she would have passed her operating test.[39] Similarly, she argues details unrelated to her claim such as the fact that the informal review took over 160 days contrary to the NUREG-1021 guidance that it will "generally" be completed within 75 days[40] and that the final informal review report provided to her did not specifically document how the panel had addressed all of her contentions contrary to the OLMC-500 guidance.[41] She also argues against many grading determinations without explaining how changing these determinations would change the denial of her 2012 SRO license application besides simply repeating the unsupported statement, "[c]onsider that each comment deducts points even if the comment is not warranted."[42] In fact, as discussed in

[39] Of course, this Board has the discretion to order remedies other than the remedy requested by Ms. Smith in response to the findings made during this proceeding. For instance, if the Board found that the alleged bias of the examiners made it so that Ms. Smith's 2012 simulator test was unfair (despite the fact that the simulator test was prepared by the licensee facility and the NRC in accordance with NUREG-1021 and despite the fact that the other SRO applicants took the same test), then the Board could order as a possible remedy that Ms. Smith be provided a re-test of only the simulator test and a waiver of all the other SRO requirements. However, such a hypothetically unfair test could not legally justify the remedy sought, which is the granting of an SRO license, because the finding of an unfair test does not mean that, but-for the alleged unfairness of the test, Ms. Smith would have passed the test and thus satisfied the operating test requirement for the issuance of an SRO license.

[40] Exhibit CCS-076, 15; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[41] Exhibit CCS-076, 15; OLMC-500 (Exhibit CCS-030), 10.

[42] Exhibit CCS-076, 25, 28, 31, 42, 43 n.149.

Section VII, below, only three grading issues identified by Ms. Smith could potentially affect the determination that she had failed the operating test and, thus, affect the issuance of an SRO license. Therefore, though this Staff Statement fully rebuts each of Ms. Smith's arguments, the majority of her arguments have no bearing on the outcome of this proceeding.

III. THE REQUIRED PROCESS FOR PREPARING, ADMINISTERING, AND EVALUATING SRO-INSTANT OPERATING TESTS

Pursuant to 10 C.F.R. § 55.33(a), initial applications for SRO licenses will be approved if, *inter alia*, the applicant passes a "written examination" and an "operating test." The SRO written examination and operating test "shall" be prepared and evaluated according to 10 C.F.R. § 55.43 and 10 C.F.R. § 55.45, respectively, and the criteria in NUREG-1021.[43] The revision of NUREG-1021 effective for both Ms. Smith's 2011 and 2012 SRO license applications is Revision 9, which was published in July 2004, and supplemented in October 2007.[44] Thus, NUREG-1021, Rev. 9, Supp. 1, is the document that establishes the policies, procedures, and practices that the Staff followed in the preparation, administration, and evaluation of Ms. Smith's 2011 and 2012 SRO written examinations and operating tests.

An SRO operating test consists of a "walk-through" portion and a "simulator test" portion.[45] The walk-through portion of the operating test is further divided into "administrative topics" and "control room/in-plant systems."[46] "Administrative topics" implements items 9

[43] 10 C.F.R. § 55.40(a).

[44] NUREG-1021 (Exhibits CCS-005A, CCS-005B).

[45] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 1.

Ms. Smith argues, without regulatory basis, that the operating test consists of the three co-equal portions of "Admin, Walkthrough and Simulator." Exhibit CCS-076 at 3, 10. However, NUREG-1021 explicitly divides the operating test into just two portions, "walk-through" and "simulator," of which, the walk-through portion is further divided into "administrative topics" and "control room/in-plant systems" sub-portions. NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 1.

[46] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 1.

through 12 of the 13 items required of operating tests by 10 C.F.R. § 55.45(a).[47] The applicant's competence in each topic is evaluated by administering job performance measures (JPMs) and asking specific "for cause" follow-up questions, as necessary.[48] SRO applicants are required to perform five administrative topics JPMs.[49] "Control room/in-plant systems" implements items 3, 4, 7, 8, and 9 of 10 C.F.R. § 55.45(a).[50] As with administrative topics, the applicant's competence regarding control room/in-plant systems is evaluated by administering JPMs with follow-up questions, as necessary.[51] SRO-instant applicants are required to perform ten control room/in-plant systems JPMs.[52] Thus, SRO-instant applicants must perform 15 JPMs in total.

The simulator test portion of the operating test implements items 1 through 8 and 11 through 13 of 10 C.F.R. § 55.45(a).[53] The simulator test is especially important because it is "the most performance-based aspect of the operating test and is used to evaluate the applicant's ability to safely operate the plant's systems under dynamic, integrated conditions."[54] The simulator test is typically administered to a crew of three applicants, with one applicant acting as the Control Room Supervisor (CRS) (also referred to as Shift Supervisor (SS)), one applicant acting as the Operator At The Controls (OATC) (also referred to as Reactor Operator (RO)), and one applicant acting as the Balance Of Plant (BOP) operator (also referred to as Unit Operator (UO)).[55] However, surrogates can be used in the place of applicants as necessary.[56]

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[47] *Id*. at 2.

[48] *Id*.

[49] *Id*. at 10.

[50] *Id*. at 3.

[51] *Id*.

[52] *Id*. at 14.

[53] *Id*. at 4.

[54] *Id*.

[55] Exhibit NRC-002 (Bates Testimony), 4.

At a minimum, an SRO applicant is required to be examined once in the CRS and OATC positions and a Reactor Operator (RO) applicant is required to be examined once in the OATC and BOP positions.[57] The simulator test crew performs in response to a set of scenarios in a replica of the facility's control room, when available. During these scenarios, an SRO-instant applicant must respond to one reactivity manipulation, one normal evolution, four instrument or component malfunctions, two major transients, and two technical specification (TS) evaluations.[58] The proficiency of the applicant's response related to six competencies is individually evaluated by NRC examiners.[59] These six competencies are each broken down into a number of specific rating factors (RF) that are considered during the grading process.[60]

For most operating tests, the licensee facility develops the entire test and submits the test to the NRC regional office for review and approval.[61] The Chief Examiner, along with assistance from the other examiners, reviews the operating test, provides comments to the facility, and then evaluates the operating test at the facility to ensure that it meets the guidance in NUREG-1021, at which time the test is approved for administration.[62]

The simulator scenarios are developed to provide opportunities for each applicant to demonstrate all of the required competencies listed on NUREG-1021, Forms ES-303-3 and ES-303-4, for RO and SRO applicants, respectively.[63] Simulator scenarios are constructed in accordance with the guidelines in NUREG-1021, ES-301, as well as Appendix D, "Simulator

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[56] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 4.

[57] Exhibit NRC-002 (Bates Testimony), 4.

[58] *Id*. at 26.

[59] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 4.

[60] *Id*.

[61] *Id*.

[62] *Id*. at 5.

[63] *Id*. at ES-303, 15-19.

Testing Guidelines." Each scenario consists of various "events" which are outlined in Form ES-D-1.[64] Additionally, "all required operator actions" for each event are pre-scripted in Form ES-D-2.[65] The purpose of Forms ES-D-1 and ES-D-2 are to increase the likelihood that each applicant will have sufficient opportunities to demonstrate their competence in all the required areas during the simulator scenarios.[66] Also, they are intended to assist the examiner in evaluating the simulator test as it happens.[67]

After the simulator test is prepared and the final list of applicants is received, the NRC Chief Examiner constructs a schedule that verifies that each applicant will have an opportunity to display competence in all of the required areas as well as stand each of the required positions for the requested license level.[68] As part of this scheduling process, the Chief Examiner must also balance the assignment of one examiner to each applicant, the minimization of the number of surrogate operators, and the requirement that no applicant receive more than one scenario beyond the minimum number of required scenarios.[69] Also, when scheduling examiners to applicants, the Chief Examiner must "apply sound judgment to the facts of each case" to avoid "conflict-of-interest" issues.[70] As an example of a sound solution to a potential conflict-of-interest issue, NUREG-1021 requires that, "[t]he regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicant's retake operating test."[71]

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[64] *Id*. at ES-301, 18.

[65] *Id*.

[66] *Id*. at 17.

[67] *Id*. at Appendix D, 3.

[68] *Id*. at ES-201, 12.

[69] *Id*.

[70] *Id*. at 13.

[71] *Id*. at 14.

After the operating test is approved for administration and the test schedule has been developed, the NRC examiners work with the licensee facility to administer the test. During administration of the simulator test, the examiners use the detailed descriptions of the scenarios in Forms ES-D-1 and ES-D-2 to direct the flow of events and identify any performance deficiencies of their assigned applicant. In doing so, examiners are required to record every error that reflects on an applicant's competency regardless of its consequences.[72]

After administration, both portions of the operating test are evaluated according to the procedures contained in NUREG-1021.[73] The goal of this evaluation is to determine "whether the applicant's level of knowledge and understanding meet the minimum requirements to safely operate the facility for which the license is sought."[74] Therefore, every error that reflects on an operator's competence is graded equally (with the exception of "critical task" errors, discussed below), irrespective of the consequences or potential consequences of the error.[75] Also, if an applicant makes an error or is about to make an error, and the error is corrected by another crew member performing a "peer check," the examiner is required to hold the applicant accountable for the consequences of the potential error, without regard to mitigation by the crew.[76]

The first step in evaluating an operating test is to create a record identifying each instance during the walk-through or simulator test portions of the operating test that may

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[72] *Id*. at ES-303, 5.

[73] *Id*. at 1.

[74] *Id*.; see also 10 C.F.R. § 55.33(a)(2).

[75] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 5. The potential or actual consequences of an applicant's errors are documented on Form ES-303-2 in accordance with NUREG-1021, ES-303, D.3.b., but they do not have any bearing on the applicant's grade and are only noted in case the examiner recommends a failure based on a serious error that would not normally result in a failing grade.

[76] *Id*. at Appendix E, 5.

constitute a performance deficiency.[77] For the walk-through portion of the operating test, each administered JPM is graded as either "satisfactory" or "unsatisfactory" after taking into account any performance deficiencies identified during the JPM.[78] Generally, a JPM is unsatisfactory (1) if it is not completed within the required time, (2) if the "task standard" for the JPM is not accomplished by correctly completing all of the "critical steps," unless a critical step is initially missed, but then later performed so that the task standard is accomplished without degrading the condition of the system or the plant, or (3) if the responses to any performance-based follow-up questions reveal that the applicant's understanding is seriously deficient.[79] Even if the JPM is determined to be satisfactory because none of these criteria are met, NUREG-1021, ES-303 still requires examiners to document any performance deficiencies displayed by the applicant during the JPM.[80] This is because, since an examiner's licensing recommendation is subject to review by the Chief Examiner and the Region's management, the examiner's documentation "should contain sufficient detail so that the independent reviewer, responsible supervisor, and licensing official can make a logical decision in support of the examiner's recommendation to deny or issue the license."[81] Also, these comments are used to evaluate an applicant's overall performance if a future waiver evaluation is required and are used by the licensee facility to tailor remedial training for the applicant as needed.[82]

Once each individual JPM is assigned a satisfactory or unsatisfactory grade, a final grade for the entire walk-through portion of the operating test is determined by calculating the

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[77] *Id*. at ES-303, 2-3.

[78] *Id*. at 3.

[79] *Id*. at 3-4.

[80] *Id*. at 8.

[81] *Id*.

[82] NRC-002 (Bates Testimony), 10.

percentage of satisfactory JPMs, with a passing grade being 80% satisfactory or greater overall and 60% satisfactory or greater on the administrative topics JPMs.[83]

As for the simulator test portion of the operating test, each identified performance deficiency is first coded with the number and letter of the one or more rating factors (RFs) it most accurately reflects.[84] The one or more RFs that are selected are to be based on the "root cause" of the deficiency.[85] However, whenever possible, each performance deficiency is not to be assigned to "more than two different rating factors."[86] Once all of the performance deficiencies have been appropriately coded, then a grade for each RF is determined.[87] Since grading is based on competencies rather than consequences, "every error that reflects on an operator's competence is considered equal."[88] Since all errors are equal, the grade for each RF is determined quantitatively based on the number of errors related to that RF. If an applicant performs activities related to a rating factor and makes no errors, then the RF is graded a score of 3.[89] If an applicant makes a single error related to a rating factor, then the RF is graded a score of 2 unless the error related to a "critical task," in which case a score of 1 is required.[90] If an applicant makes two errors related to a rating factor, then the RF is graded a score of 1 unless "a score of 2 can be justified . . . based on correctly performing another activity (or

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[83] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 4. This again supports the fact that the operating test only consists of a "walk-through" portion and a "simulator test" portion and is not "based on 3 areas (admin topics, walkthrough and simulator)" as claimed by Ms. Smith. Exhibit CCS-076, 10.

[84] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 3.

[85] *Id*.

[86] *Id*.

[87] *Id*. at 5.

[88] *Id*.

[89] *Id*.

[90] *Id*.

activities) related to the same rating factor."[91] This justification for increasing an RF score from 1 to 2 following two errors related to the RF must be documented.[92] Three or more errors generally requires an RF score of 1 regardless of compensatory actions.[93] Once each RF is graded, it is then multiplied by its associated "weighting factor."[94]

All of the weighted RF grades in a single competency are then summed together to obtain the overall grade for that competency.[95] This process is repeated for all six SRO competencies. An SRO applicant's overall performance on the simulator test is satisfactory if all of the six competency grades are greater than 1.80, or if the grade for Competency 4, "Communications and Crew Interactions," is less than or equal to 1.80 but greater than 1.00 and all of the other five competency grades are greater than or equal to 2.00.[96] Thus the communications competency is effectively weighed less than the other competencies.

IV. MS. SMITH'S STATEMENT OF POSITION 1: PROCESSING THE WAIVER REQUEST

A. The Staff Properly Discharged its Duties with Respect to Ms. Smith's 2011 SRO License Application

Ms. Smith first applied, via NRC Form 398, for an SRO license for Vogtle Electric Generating Plant (Vogtle, the licensee facility) on March 7, 2011.[97] She applied as an "SRO-

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[91] *Id*.

[92] *Id*. at 5, 8 ("[D]eviations from the nominal grading criteria must be explained in detail. For example, an examiner may conclude that an applicant's performance is acceptable despite exhibiting deficiencies that would normally result in an unsatisfactory grade (e.g., committing two or more errors related to the same simulator rating factor or failing to accomplish the task standard for a JPM).").

[93] *Id*. at 5.

[94] *Id*. at 6.

[95] *Id*.

[96] *Id*.

[97] Exhibit NRC-009.

instant" applicant as opposed to an "SRO-upgrade" applicant, because she had not previously been licensed as an RO.[98]

On April 1, 2011, Ms. Smith was administered an SRO written examination.[99] In order to pass the written examination, an SRO applicant must achieve a final grade of at least 80.00% overall, with 70.00% or better on the SRO-only items.[100] Ms. Smith earned a final grade of 79.59% overall with an SRO-only grade of 64.00%.[101] Therefore, Ms. Smith failed the written examination.[102]

Ms. Smith was also administered an SRO operating test from March 16 to March 24, 2011.[103] The examiners for Ms. Smith's 2011 operating test were Jay Hopkins, Examiner of Record, Phillip Capehart, Chief Examiner, and Michael Meeks.[104] Mr. Hopkins administered seven of the required 15 JPMs, Mr. Capehart administered six, and Mr. Meeks administered two.[105] Performance deficiencies were identified in six of these 15 JPMs with each of the three examiners identifying at least one performance deficiency.[106] Despite these deficiencies, Ms. Smith's performance in each JPM was evaluated as satisfying the criteria for satisfactory performance; therefore, the walk-through portion of Ms. Smith's 2011 operating test was graded to be overall satisfactory.[107]

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[98] NUREG 1021 (Exhibits CCS-005A, CCS-005B), Appendix F, 5.

[99] Exhibit CCS-007, 1.

[100] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-401, 31.

[101] Exhibit CCS-007, 1.

[102] *Id*.

[103] *Id*.

[104] *Id*. at 1-2.

[105] *Id*. at 2.

[106] *Id*.

[107] *Id*. at 1-2.

As her Examiner of Record, Mr. Hopkins was assigned to evaluate Ms. Smith's performance on the simulator test. Mr. Hopkins identified that Ms. Smith demonstrated twelve performance deficiencies on the simulator test.[108] Briefly, these performance deficiencies were that (1) Ms. Smith did not ensure the collection of complete information and, as a result, misdiagnosed that a loss of charging flow was due to a failed letdown back pressure instrument rather than a trip of the normal charging pump; (2) Ms. Smith did not correctly diagnose plant conditions based on control room indications by not recognizing that one rod bottom light was not lit and thus that its associated control rod, rod H-8, had not fully inserted; (3) Ms. Smith did not use procedures correctly by failing to actuate safety injection (SI) Train "A" as required by the procedures; (4) Ms. Smith did not use procedures correctly by skipping a required procedural step and incorrectly performing the next procedural step; (5) Ms. Smith did not use procedures correctly by failing to read the procedural criteria related to a specific procedural step; (6) Ms. Smith did not use procedures correctly by performing an out-of-order procedural step and by directing actions that were not called for by the procedure; (7) Ms. Smith did not locate and manipulate controls in an accurate and timely manner by incorrectly responding to a direction to check closed steam generator sample valves by checking closed steam generator blowdown isolation valves; (8) Ms. Smith did not demonstrate the ability to take manual control of automatic functions by manually closing a valve that had failed open and then incorrectly returning the valve to automatic which resulting in the valve re-opening; (9) Ms. Smith did not communicate in a clear, easily understood manner by failing to use proper three-way communications; (10) Ms. Smith did not keep the crew members informed of plant status by not holding a crew brief when one was required; (11) Ms. Smith did not ensure the receipt of clear, easily-understood communications from the crew by not providing an accurate repeat-back of

[108] *Id*. at 10-22.

information; (12) Ms. Smith did not solicit and incorporate feedback from the crew by not directing a crewmember to manually start pumps as required by procedures.[109]

According to NUREG-1021, each of these twelve identified performance deficiencies had to be assigned to the one or more RFs that it most accurately reflected based on the root cause of the deficiency.[110] Thus, the deficiencies were assigned to RFs 1.b., 1.d., 2.c., 2.c., 2.c., 2.c., 3.a., 3.c., 4.a., 4.b., 4.c., 5.c., respectively. Since a single error was made related to RFs 1.b., 1.d., 3.a., 3.c., 4.a., 4.b., 4.c., and 5.c., these RF's were given a score of 2. Since four errors were made related to RF 2.c., this RF was given a score of 1. Despite these errors, all six of the SRO competency grades were greater than 1.80; therefore, Ms. Smith's performance on the 2011 operating test was assessed to be "satisfactory."[111]

Because she had failed the written examination, Ms. Smith's 2011 SRO license application was initially denied.[112] In the initial denial letter provided to Ms. Smith, the Staff informed her that she may request an informal review or a hearing regarding the grading of the written exam, in accordance with NUREG-1021, ES-502.[113] The Staff also stated that "[b]ecause [Ms. Smith] passed the administrative/systems/simulator operating test administered to [her] from March 16-24, 2011, [she] may request a waiver of that portion."[114]

On May 20, 2011, in response to the Staff's initial denial letter, Ms. Smith requested that the NRC informally review three questions on her written examination.[115] On July 26, 2011, the NRC staff informed Ms. Smith that, in spite of the additional information that she had provided, it

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[109] *Id*.

[110] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 3, 5.

[111] Exhibit CCS-007, 1, 3.

[112] Exhibit CCS-016.

[113] *Id*.

[114] *Id*.

[115] Exhibit NRC-010.

still found that she did not pass the written examination. The Staff again informed her that she could, within 20 days, request a hearing regarding the grading of her written examination, after which time the initial denial of the application would become final. The Staff also restated that, because Ms. Smith had passed an operating test administered during the weeks of March 14, 2011 and March 21, 2011, she may request a waiver of that portion. Ms. Smith did not request a hearing within the specified time period and, therefore, the denial of her 2011 SRO license application became final.

B. The Staff Properly Discharged it Duties with Respect to any Potential Waiver of Ms. Smith's 2012 Operating Test

Despite the fact that Ms. Smith had passed her 2011 SRO operating test, there was no waiver of her 2012 SRO operating test because no such waiver was requested as part of a "new" and "final" license application and because, even if such a waiver had been requested, the request would have been properly denied by the Staff in its discretion.

The waiver of operator license requirements upon a subsequent re-application for an operator license, is governed by the 10 C.F.R. Part 55 and NUREG-1021. Specifically, 10 C.F.R. § 55.35(b) states that, "[a]n applicant who has passed either the written examination or operating test and failed the other may request" a waiver of re-examination on the portions of the examination or test which the applicant has passed. Such a request must be made "in a new application on Form NRC–398."[116] The Commission "may in its discretion grant the request" if it determines that "sufficient justification is presented."[117] Therefore, the waiver regulations consist of a procedural requirement and a substantive requirement.

Procedurally, a waiver request must be in the form of a "new application"[118] or "final license application."[119] Therefore, in order to obtain a waiver, the applicant must first actually

[116] 10 C.F.R. § 55.35(b).

[117] *Id*.

[118] *Id*.

request the waiver by "checking the appropriate block in Item 4.f on [the] NRC Form 398" license application and by "explain[ing] the basis" for the requested waiver in Item 17.[120] Additionally, the licensee facility's senior management representative on site must certify this new/final license application in order to "substantiat[e] the basis for the applicant's waiver request."[121] NUREG-1021 further specifies that an SRO license application "is not complete until both [NRC Form 398 and NRC Form 396] are filled out, signed by the appropriate personnel, and received by the NRC."[122]

Substantively, a waiver request is discretionary based upon a case-by-case review of the justification provided.[123] A request to waive examination areas that were previously passed is classified as a "routine" waiver request.[124] This means that the responsible Region may grant the request without first obtaining concurrence from the NRR Operator Licensing and Training Branch (IOLB).[125] The denial of all waiver requests, whether routine or otherwise, also does not require IOLB concurrence.[126] The responsible Region makes its determination regarding routine waiver requests "on a case-by-case basis"[127] and "may in its discretion grant the request, if it determines that sufficient justification is presented."[128] Upon deciding whether to grant or deny the routine waiver request, the responsible Region will promptly notify the

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[119] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 1.

[120] *Id*.

[121] *Id*.

[122] *Id*. at ES-202, 3.

[123] 10 C.F.R. § 55.35(b); NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 2.

[124] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 2, 3.

[125] *Id*. at 2.

[126] *Id*.

[127] *Id*.

[128] 10 C.F.R. § 55.35(b).

applicant in writing concerning the disposition of the request, and provide an explanation for any denial.[129]

Ms. Smith's argument that she should have been granted a waiver of the 2012 operating test does not satisfy either the procedural requirements or the substantive requirements of 10 C.F.R. § 55.35(b) and NUREG-1021. Therefore, her waiver argument fails.

1. A Waiver of the 2012 Operating Test was Never Requested on Behalf of Ms. Smith in the Manner Required by 10 C.F.R. Part 55 and NUREG-1021 and, therefore, no Waiver Could have been Granted

Procedurally, 10 C.F.R. § 55.35(b) requires an applicant who has passed either the written examination or operating test and failed the other to affirmatively request a waiver "in a new application on Form NRC-398." Ms. Smith never made such a request. As conceded by Ms. Smith,[130] the only "new application on Form NRC-398" that was submitted on her behalf was the application received by the NRC on March 12, 2012.[131] In this application, for item 4, "Type of Application," the boxes for "Reapplication" and "First Denial" were checked.[132] Box 4.f, "Waiver Requested," was also checked but the box below box 4.f having to do with requesting a waiver of an operating test was not checked; rather, only the "Other" waiver box was checked.[133] As explained under item 17, "Comments," this "Other" waiver request was for a waiver of the requirement that the Generic Fundamentals Examination (GFE) be passed within two years of the application.[134] Item 17 included no discussion of an operating test waiver

[129] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 2.

[130] Exhibit CCS-076, 2 ("The final license application was submitted (March 2012) without a waiver request for C. Smith.") (emphasis added); Exhibit CCS-002 (Tucker Statement), 5 ("[T]he "Certified" license application submitted did not include the [operating test waiver] request.") (emphasis added).

[131] Exhibit NRC-007.

[132] *Id*.

[133] *Id*.

[134] *Id*.

request.[135] This Form NRC 398 was completed fully and contained all the required signatures. These signatures included that of the facility licensee senior management representative on site,[136] as required by NUREG-1021.[137] Ms. Smith also signed this application, despite the fact that it did not request a waiver of the operating test, which request Ms. Smith now argues should have been reviewed and granted by Region II.

In response to this new application on Form NRC 398, Region II granted the requested waiver of the requirement to pass the GFE within two years of applying for a license.[138] Region II did not grant a waiver of the 2012 operating test because no such waiver was requested in the new and final Form NRC 398 as required by 10 C.F.R. § 55.35(b).

Despite this, Ms. Smith argues that an application on Form NRC 398 with a 2012 operating test waiver request was indeed submitted on her behalf and that the NRC improperly discharged its duties by not "processing it according to [NRC] procedure."[139] The application to which Ms. Smith is referring is included in the testimony of Mr. Tucker.[140] However, Ms. Smith concedes that this document is not a new/final application, as is required by 10 C.F.R. Part 55 and NUREG-1021, but, rather, that it is just a "preliminary" application.[141] A cursory analysis of the document confirms Ms. Smith's concession that it is "preliminary" instead of "final" because, contrary to NUREG-1021, the "Senior Management Representative on Site" signature block is blank.[142] Not only that, but all of the signature blocks, including where Ms. Smith was supposed

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[135] *Id*.

[136] *Id*.

[137] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 1.

[138] Exhibit NRC-012.

[139] Exhibit CCS-076, 7.

[140] Exhibit CCS-002 (Tucker Testimony), 14-15.

[141] Exhibit CCS-076, 7.

[142] Exhibit CCS-002 (Tucker Testimony), 14.

to sign, are blank.[143] Therefore, the Staff could not process this document and its 2012 operating test waiver request as a new/final application; the Staff could only treat it, according to NUREG-1021, as a preliminary application and waiver request to be preliminarily evaluated by the responsible Region in anticipation of the subsequent, required new/final request, which is exactly what the Region II Staff did.

Preliminary applications and waiver requests attached thereto are discussed in NUREG-1021. NUREG-1021 states that the licensee facility should be contacted by telephone and briefed at least 120 days before the scheduled examination date.[144] This brief should include, among other things, a discussion of the process "for submitting the license applications."[145] The process for submitting license applications involves first submitting "preliminary" license applications and then submitting "final" license applications.[146] Preliminary license applications are supposed to be submitted "for review by the NRC's regional office at least 30 days before the examination date."[147] Final license applications are supposed to be submitted at least 14 days before the examination date.[148] The purpose of this earlier sharing of "preliminary" license applications is to "permit the NRC staff to make preliminary eligibility determinations, process the medical certifications, evaluate any waivers that might be appropriate, and obtain additional information, if necessary" as soon as possible before the required submittal, 16 days later, of the "final" license applications on which the official NRC determinations must be made.[149] In

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[143] *Id*.

[144] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 6; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201-1.

[145] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 6.

[146] *Id*. at ES-201-1.

[147] *Id*.; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-202, 5

[148] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201-1.

[149] *Id*.; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-202, 5-6; NRC-006 (Meeks Testimony), 5.

response to these preliminary applications, the responsible Region may determine that "more information is necessary to make a waiver determination" and request that the licensee facility "supply additional information when it submits the final, certified license application."[150] Upon receiving the "final" applications at least 14 days before the examination date, and by 7 days before the examination date, the responsible Region completes its final "review[]" of the license applications and sends out "waiver letters" representing, as appropriate, its final waiver determinations.[151] At this time, the responsible Region also ensures that "the [List of Applicants] accurately reflects any examination waivers that may have been granted in accordance with ES-204."[152] Thus, the license application process uses "preliminary" license applications to help ensure the accuracy and timeliness of "final" license applications, while also ensuring that all final Staff determinations are based on the "final" license applications. Therefore, Ms. Smith's argument that her preliminary license application should have been processed as a final license application is inconsistent with the NUREG-1021 guidance and NRC practice.

Ms. Smith also argues that the Staff improperly discharged its duties with respect to the treatment of her preliminary license application; however, an analysis of the events surrounding her preliminary license application demonstrates that this argument is without merit.[153] After the 2011 licensing cycle, the licensee facility's nuclear operations training supervisor emailed Mr. Meeks regarding the possibility for 2012 operating test waivers for those individuals from the licensee facility, including Ms. Smith, who had passed the 2011 operating test but had failed the written test.[154] The supervisor divided these individuals into two categories: those for whom the licensee facility was "confident" that it would request waivers and those for whom the licensee

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[150] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-202, 8.

[151] *Id*. at ES-201-1.

[152] *Id*. at ES-202, 8.

[153] Exhibit CCS-076, 7-10.

[154] Exhibit CCS-002 (Tucker Testimony), 11-12.

facility was "presently evaluating" whether it would request waivers.[155] Ms. Smith was included in this second category.[156] Regarding the second category individuals, the supervisor asked if Region II "would evaluate the status of [these individuals] and indicate whether or not a waiver would be approved."[157]

Mr. Capehart collected the professional opinions of the 2011 examiners in response to this request.[158] Independently, he, Mr. Meeks, and Mr. Hopkins all stated that, based only on Ms. Smith's performance on the 2011 operating test, they would recommend that such a preliminary waiver request be preliminarily denied.[159] Armed with this information, Mr. Meeks, with the assistance of his branch chief, Mr. Widmann, concluded that the appropriate action was to respond to the licensee facility that Region II would likely deny a waiver request on behalf of Ms. Smith.[160] However, Mr. Meeks and Mr. Widmann also discussed that this determination was not final since it was based only on the Ms. Smith's 2011 operating test performance and a final determination could only be made in response to a final license application and waiver request because, until such an application and request is received, it is unknown what additional supporting information the licensee facility might submit.[161] For instance, it is possible that the final license application could justify Ms. Smith's waiver request based on her 2011 operating test performance as well as subsequent training focused on her 2011 operating test performance deficiencies, which would necessarily require the Staff to revisit its preliminary response to the preliminary request.

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[155] *Id*. at 12.

[156] *Id*.

[157] *Id*.

[158] Exhibit NRC-013, 5.

[159] *Id*.

[160] Exhibit NRC-006 (Meeks Testimony), 16-18.

[161] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-202, 8 ("The regional office may determine that . . . more information is necessary to make a waiver determination.").

Before providing this response to the licensee facility, Mr. Meeks discussed it with Mr. Bates. Although Mr. Bates was not involved with Ms. Smith's 2011 operating test, he was scheduled as the Chief Examiner of record for her 2012 operating test and so Mr. Meeks thought it best to keep him informed of all issues pertaining to the 2012 operating test.[162] Mr. Meeks and Mr. Bates did not discuss the details of Ms. Smith's 2011 operating test performance.[163] All that was discussed was the fact that the 2011 examination team was planning to respond to the licensee facility that, based only on Ms. Smith's 2011 operating test performance, Region II would likely deny a 2012 operating test waiver request.[164]

Following these discussions, on August 2, 2011, Mr. Meeks responded to the licensee facility stating that the Region II "preliminary answer[]" was that it "would likely deny a waiver of the operating test portion of the exam" for Ms. Smith.[165] On September 9, 2011, the licensee facility nuclear operations training supervisor requested additional clarification of this answer.[166] Before responding, Mr. Meeks discussed with Mr. Widmann and Mr. Bates his intention to essentially re-state the same answer that was provided in August.[167] Mr. Widmann and Mr. Bates concurred with this approach.[168] Subsequently, on September 27, 2011, Mr. Meeks replied to the licensee facility stating that, "[f]or C. Smith, Region II would likely deny a waiver of the operating test portion of the exam."[169] However, Mr. Meeks stressed that this was a "preliminary" answer because Region II had not "received/evaluated the actual

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[162] Exhibit NRC-006 (Meeks Testimony), 17.

[163] *Id*.

[164] *Id*.

[165] Exhibit CCS-002 (Tucker Testimony), 10.

[166] *Id*. at 9.

[167] Exhibit NRC-006 (Meeks Testimony), 18.

[168] *Id*.

[169] Exhibit CCS-002 (Tucker Testimony), 8.

applications."[170] The testimony of Mr. Tucker confirms that the licensee facility understood that this was only a preliminary determination and that "only with submittal of actual license applications would the waiver decision be formally evaluated and determined."[171]

On October 12, 2011, Mr. Meeks and Mr. Bates conducted the required 120-day telephone brief[172] with the licensee facility.[173] As part of this brief, Mr. Meeks and Mr. Bates explained the license application and waiver process.[174] Recalling the previous email discussions regarding the preliminary evaluation of a 2012 operating test waiver request for Ms. Smith, Mr. Meeks inquired about the licensee facility's intentions regarding the submission of a waiver request for her.[175] The licensee facility representative responded that the licensee facility did not intend to submit an operating test waiver request for Ms. Smith; instead, she was scheduled to attend remedial training in order to prepare for re-taking both the operating test and the written examination.[176]

Despite these multiple indications that the licensee facility did not intend to submit a 2012 operating test waiver request on behalf of Ms. Smith, the preliminary, uncertified license application submitted to Region II for Ms. Smith did indeed include such a waiver request.[177] This surprised Mr. Meeks because it was contrary to the licensee facility's previous assertions.[178] Furthermore, since all of the applications of those individuals that had failed the

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[170] *Id*. at 9.

[171] *Id*. at 4.

[172] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 6-7.

[173] Exhibit NRC-006 (Meeks Testimony), 19.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] Exhibit CCS-002 (Tucker Testimony), 14-15.

[178] Exhibit NRC-006 (Meeks Testimony), 20.

2011 operating test contained waiver requests identical to the waiver request attached to Ms. Smith's license application, Mr. Meeks suspected that Ms. Smith's waiver request might represent a "cut-and-paste" error by which the licensee facility accidently attached the same request to Ms. Smith's application that it was attaching to the other applications.[179] Based on this reasonable suspicion of error, Mr. Meeks called the licensee facility to ensure that it had actually changed its mind regarding Ms. Smith and that its waiver request on her behalf was intentional.[180] The existence of this reasonable suspicion of error defeats Ms. Smith's assertion that, by contacting the licensee facility rather than unquestioningly processing her preliminary waiver request, the Region II Staff improperly "singled [her] out."[181] During the telephone call between Mr. Meeks and the licensee facility, the licensee facility could not provide an immediate answer to this inquiry and Mr. Meeks requested an answer as soon as possible, because Region II would need to start its preliminary evaluation of Ms. Smith's preliminary waiver request in order to ensure that the final Staff determination would be completed by the NUREG-1021 deadline of 7 days before the examination date.[182] Within a day or two later, the licensee facility informed Mr. Meeks that it had not intended to submit the waiver request as part of Ms. Smith's license application.[183] Based on this representation, the Region II Staff halted its preliminary evaluation of Ms. Smith's preliminary waiver request. Subsequently, the licensee facility verified the accuracy of this representation by submitting a final license application for Ms. Smith that did not include an operating test waiver request.[184] Therefore, the processing of an operating

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[179] *Id*.

[180] *Id*.

[181] Exhibit CCS-076, 2.

[182] Exhibit NRC-006 (Meeks Testimony), 47.

[183] *Id*.

[184] Exhibit NRC-007.

test waiver request on behalf of Ms. Smith was not required and, thus, the Region II Staff properly discharged its duties with respect to Ms. Smith's 2012 SRO license application.

In conclusion, as conceded by Ms. Smith, her final 2012 SRO license application did not satisfy the procedural requirements of 10 C.F.R. § 55.35(b) for a waiver of the 2012 operating test because it did not include such a waiver request.[185] Therefore, no waiver of Ms. Smith's 2012 operating test could have been granted. Additionally, despite Ms. Smith's assertions to the contrary, the Staff did not improperly discharge its duties with respect to its evaluation of her preliminary license application which did include an operating test waiver request.[186] Rather, the Staff acted consistent with NUREG-1021 by (1) discussing the license application and waiver processes with the licensee facility early in the preparation of the 2012 operating test; (2) providing the licensee facility with a preliminary evaluation of Ms. Smith's preliminary waiver request but noting that more information was needed as part of her final license application before this evaluation could be finalized; and (3) bringing to the licensee facility's attention aspects of Ms. Smith's preliminary license application that, based on previous interactions with the licensee facility, it was reasonable to believe were erroneous. Therefore, the Staff properly discharged its duties in not reaching a final determination regarding a waiver of Ms. Smith's 2012 operating test and, thus, Ms. Smith's Statement of Position 1 fails.

2. Even if the Procedural Requirements of a Waiver Request had been Satisfied, the Substantive Requirements of 10 C.F.R. § 55.35(b) and NUREG-1021 would not have been Satisfied

Even if the Staff had made a final determination regarding a waiver request for Ms. Smith's 2012 operating test, this final determination would have properly been that Region II would not have exercised its discretion to grant such a request. 10 C.F.R. § 55.35(b) states that the Commission "may in its discretion grant the [waiver] request, if it determines that sufficient justification is presented." NUREG-1021 states that routine waivers, such as operating test

[185] Exhibit CCS-076, 2.

[186] Exhibit CCS-076, 7-10.

waiver requests, may be granted or denied on a case-by-case basis by the responsible Region without IOLB concurrence.[187] The justification for the requested operating test waiver in Ms. Smith's preliminary license application was simply that she had, "[p]assed all categories of the Operating test given from March 16-24, 2011."[188] Thus, the justification was Ms. Smith's performance on the 2011 operating test. The Staff Testimony and exhibits demonstrate that this justification would have likely been considered insufficient for Region II to grant a waiver request had Ms. Smith properly submitted one.[189] The Staff Testimony and exhibits also demonstrate that a decision to deny a waiver request would have been consistent with past NRC practices and not arbitrary or an abuse of discretion.[190] Therefore, Ms. Smith's Statement of Position 1 again fails.

On her 2011 operating test, Ms. Smith demonstrated twelve performance deficiencies during the simulator test portion and six performance deficiencies during the walk-through portion.[191] At first blush, her operating test performance stood out to all three of the examiners as one of the two least competent performances and as well below the average of the other performances of the 2011 applicants.[192] Immediately after the administration of the 2011 operating test, the three examiners discussed that Ms. Smith and the other poorly performing applicant may have failed the simulator test, which surprised the examiners because they rarely observe failures of the simulator test.[193] As Ms. Smith's examiner of record, Mr. Hopkins was responsible for developing her 2011 examine grade sheet using NUREG-1021, Form ES-303-1,

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[187] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 2.

[188] Exhibit CCS-002 (Tucker Testimony), 15.

[189] Exhibit NRC-003 (Capehart Testimony), 3-5; Exhibit NRC-006 (Meeks Testimony), 16-19.

[190] Exhibit NRC-006 (Meeks Testimony), 29-37; Exhibit NRC-008.

[191] Exhibit CCS-007.

[192] Exhibit NRC-006 (Meeks Testimony), 13; *see also* Exhibit NRC-003 (Capehart Testimony), 5.

[193] Exhibit NRC-006 (Meeks Testimony), 13.

as soon as possible after administering the operating test.[194] Despite the fact that Ms. Smith's performance appeared to all three examiners to have been below the required competency standards, Mr. Hopkins' grading of Ms. Smith's performance deficiencies according to the NUREG-1021 grading instructions resulted in a passing grade.[195] However, NUREG-1021 also permits the examiner of record to recommend an operating test failure even if the NUREG-1021 grading instructions would otherwise result in a passing grade if the applicant made an error with "serious safety consequences."[196] Because Ms. Smith's performance was so poor, especially with respect to an event that involved a loss of the secondary heat sink in which Ms. Smith demonstrated multiple performance deficiencies with using the required emergency operating procedures,[197] Mr. Hopkins considered invoking this alternative means of failure.[198] Mr. Hopkins discussed this possibility with the two other examiners, Mr. Meeks and Mr. Capehart, as well as his branch chief, Mr. Widmann.[199] Ultimately, Mr. Hopkins decided not to fail Ms. Smith by this alternative means, but the fact that he and the other examiners even considered doing so, when the process is rarely ever used, indicates that the examiners believed that Ms. Smith's performance on the operating test, though passing, was indeed borderline competent. Therefore, the later preliminary determination that Region II would likely grant waivers to all of the licensee facility's applicants that failed the 2011 operating test, except for Ms. Smith and the other poorly performing applicant (who was not eligible for a waiver because she also failed the written test), was not arbitrary or an abuse of discretion; rather, it

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[194] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 1.

[195] Exhibit CCS-007, 1-3.

[196] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 1.

[197] Exhibit CCS-007, 14-16.

[198] Exhibit NRC-006 (Meeks Testimony), 14-15.

[199] *Id*.

was consistent with the examiners' independent professional opinions of the performances of these applicants.

Not only would a denial of a waiver request for Ms. Smith's 2012 operating test have been consistent with the independent professional opinions of all three of the examiners that witnessed Ms. Smith's performance on the 2011 operating test, it would also have been consistent with past NRC practices. As stated above, 10 C.F.R. Part 55 and NUREG-1021 permit the granting or denying of routine waiver requests solely at the discretion of the responsible Region as determined on a case-by-case basis.[200] No additional guidance related to the waiver of operating tests is provided. However the Region II Staff considered that, of the two portions that make up the operating test, the simulator test portion and the walk-through test portion,[201] the simulator test portion should be weighed more heavily during an evaluation of a waiver request. This exercise of the Staff's discretion to weigh the simulator test more than the walk-through test is supported by NUREG-1021, which indicates that the simulator test is of greater importance than the walk-through test because, it is "the most performance-based aspect of the operating test and is used to evaluate the applicant's ability to safely operate the plant's systems under dynamic, integrated conditions."[202] Also, according to NUREG-1021, the simulator test implements more of the 13 items required by 10 C.F.R. 55.45(a) to be sampled by operating tests (11 items) than the walk-through test (8 items).[203] Furthermore, as the only part

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[200] 10 C.F.R. 55.35(b); NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-204, 2.

[201] Ms. Smith argues, without regulatory basis, that the operating test consists of the three co-equal portions of "Admin, Walkthrough and Simulator." Exhibit CCS-076, 3, 10. However, NUREG-1021 explicitly divides the operating test into just two portions, "walk-through" and "simulator," of which, the walk-through portion is further divided into "administrative topics" and "control room/in-plant systems" sub-portions. NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 1.

Ms. Smith also argues, without regulatory basis, that the written examination should be considered as part of the evaluation of an operating test waiver request. Exhibit CCS-076, 5-6. However, considering the written examination does not make any sense because the issue at hand is only whether the operating test should be waived.

[202] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 4.

of the operating test that involves a team, only the simulator test can provide insight into the SRO competencies of directing shift operations and communicating and interacting with the crew.[204] Finally, the scope of the simulator test is necessarily broader than the scope of the walk-through test and, thus, is appropriate to weigh more heavily. The SRO walk-through test consists of only 15 JPMs, each of which focuses on one discrete task or specific assessment separate from the integrated whole of the power plant.[205] On the other hand, each simulator test scenario consists of multiple events, occurring in real-time, which affect one another and the plant as a whole.[206] For instance, scenarios 3, 6, and 7, in which Ms. Smith was involved, consisted of nine, eleven, and twelve events, respectively, for a total of many more authentic, dynamic events than the 15 artificial, static JPMs. Also, during all of the simulator events, an applicant can demonstrate a performance deficiency that can affect the applicant's grade, whereas, during JPMs, the only deficiency that can generally affect the applicant's grade is a failure to accomplish the task standard by correctly completing all of the critical steps; all other deficiencies are merely comments that do not affect the walk-through grade.[207] Therefore, it was not arbitrary or an abuse of discretion for the Region II Staff to weigh Ms. Smith's performance on the simulator test more than her performance on the walk-through test when making its preliminary evaluation of her preliminary waiver request.

A comparison of Ms. Smith's 2011 simulator test performance with the simulator test performance of those applicants that had been granted waivers of the operating test since 2005 demonstrates that Ms. Smith's simulator test score was significantly lower, and that her number

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[203] *Id*. at 2-4.

[204] *Id*. at 18-19.

[205] *Id*. at 2-3.

[206] *Id*. at 4.

[207] *Id*. at ES-303, 3-5.

of comments on the simulator test was significantly higher, than theirs.[208] During the period from 2005 to 2011, not including the applicants from the Vogtle 2011 examination, Region II granted 39 waiver requests for RO and SRO operating tests.[209] The average competency score for all these granted waiver requests was 2.85, and 2.81 for just the SRO-instant applicants, like Ms. Smith.[210] Ms. Smith's average competency score of 2.47 is significantly lower than this, especially considering that the grading scale ranges only from 1.00 to 3.00.[211] Furthermore, Ms. Smith had many more simulator test comments (12) than the average of those applicants previously granted waivers (2.23 (for all granted waiver requests)/3.44 (for SRO-instant granted waiver requests)).[212]

When compared to her fellow 2011 Vogtle applicants that were granted waivers, Ms. Smith's simulator test results are still demonstrably worse. Her average simulator score (2.47) is significantly lower than the average of the 2011 Vogtle applicants granted waivers (2.73 (for all granted waiver requests)/2.85 (for SRO-instant granted waiver requests) and her average number of simulator comments (12) is significantly higher than the average of the 2011 Vogtle applicants granted waivers (3.60 (for all granted waiver requests)/2.50 (for SRO-instant granted waiver requests)).[213] As for one-on-one comparisons, SRO applicants such as Ms. Smith should only be compared to other SRO applicants, not RO applicants, because SRO applicants are held to a higher standard than RO applicants. According to NUREG-1021, "SRO applicants . . . will be examined for the highest on-shift position for which the SRO's license is applicable (e.g., shift supervisor)"; therefore, unlike RO applicants, SRO applicants should "demonstrate

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[208] Exhibit NRC-008.

[209] *Id*.

[210] *Id*. at 1.

[211] *Id*.

[212] *Id*.

[213] *Id*.

their supervisory abilities and an attitude of responsibility for safe operation, and are expected to assume a management role during plant transients and upset conditions while taking the simulator operating test."[214] In four of the six competencies, Ms. Smith's score was lower than both of the scores of the two Vogtle SRO-instant applicants granted waivers in 2011.[215] In only one of the six competencies, did Ms. Smith achieve a score higher than one of the two SRO applicants granted waivers.[216] However, this SRO applicant achieved an overall average score of 2.90, which is significantly higher than Ms. Smith's average of 2.47.[217] Even compared to the RO applicants who were granted waivers based on standards more lenient than those that would apply to Ms. Smith as an SRO applicant, Ms. Smith's average score (2.47) was lower than theirs (2.55, 2.58).[218]

With respect to all 44 applicants granted waivers by Region II from 2005 to 2011, including the other 2011 Vogtle applicants, Ms. Smith's average competency score was not equal to or greater than a single applicant's score who had been granted a waiver. Ms. Smith's average competency score (2.47) is even less than the average competency score of the only applicant since 2005 to have a waiver request denied (2.55), and Ms. Smith also had more simulator performance deficiencies (12) than this individual (6).

Ms. Smith faults the Staff for citing these statistics because "[i]t is impossible to make a comparison about the number of comments when some applicants had 2 scenarios and others had 3 scenarios."[219] It is true that this variation in the number of scenarios may skew the statistics related to the total number of simulator comments. However, this concern is mitigated

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[214] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 7.

[215] Exhibit CCS-003.

[216] *Id*.

[217] *Id*.

[218] *Id*.

[219] Exhibit CCS-076, 2.

by using the average of the number of simulator comments for applicants receiving a waiver from 2005 to 2011, which would tend to balance any variations between applicants with two scenarios and applicants with three scenarios. Additionally, even if Ms. Smith was the only applicant to have received comments on three, rather than two, scenarios, her number of comments would still be significantly greater. Subtracting an entire third of her 12 comments in order to account for her being evaluated in three scenarios instead of two would result in a total of 8 comments which is still significantly greater than the average number of comments for applicants receiving waivers between 2005 and 2011 (2.23 (for all granted waiver requests)/3.44 (for SRO-instant granted waiver requests)) and the average number of comments for 2011 Vogtle applicants receiving waivers (3.60 (for all granted waiver requests)/2.50 (for SRO-instant granted waiver requests)).[220] Finally, Ms. Smith's 3- versus 2-scenario argument does not in any way call into question the comparison of the average competency scores because these values are not affected by the number of simulator test scenarios.

Finally, many of the comments made on Ms. Smith's walk-through test, though they did not affect the fact that all of her JPMs were graded to be satisfactory, did also indicate to Region II that Ms. Smith was not a good candidate for a waiver. First, many of the deficiencies identified by the JPM comments were repeated during the simulator test, indicating to the examiners that Ms. Smith had some deeply rooted performance problems.[221] Second, the sheer number of comments that she was assessed was greater than is historically seen in applicants whose waiver requests are granted. For instance, on her 10 "control room/in-plant systems" JPMs, Ms. Smith was assessed 5 comments whereas the average Region II SRO-instant applicant granted a waiver from 2005 to 2011, exclusive of the Vogtle 2011 applicants,

[220] Exhibit NRC-008, 1.

[221] Exhibit NRC-006 (Meeks Testimony), 13-14.

was only assessed 0.89 comments on these 10 JPMs.[222] Similarly, her 5 comments on the 10 "control room/in-plant systems" JPMs was greater than the average of 3.00 comments on these 10 JPMs assessed against her fellow 2011 Vogtle SRO-instant applicants.[223]

Therefore, by whatever measure, Ms. Smith's simulator test performance, though passing, was both qualifiedly and quantifiably worse than any other applicant's simulator test performance that had been granted a waiver since 2005 and worse even than the only applicant that had been denied a waiver since 2005. The Staff Testimony and exhibits demonstrate that the simulator portion of the operating test is the best indication of the outcome-determinative question of whether an applicant possesses the minimum knowledge and understanding to safely operate the facility.[224] The Staff Testimony and exhibits also demonstrate that Ms. Smith performed worse on the simulator test than applicants previously granted waivers. Based on this evidence and on the fact that the granting of a waiver is left to the discretion of the Region on a case-by-case basis, it would not have been an abuse of discretion, nor can Ms. Smith prove that it would have been an abuse of discretion, for Region II to have denied Ms. Smith's waiver request.

Since Ms. Smith did not request a waiver in accordance with the requirements of 10 C.F.R. Part 55 and NUREG-1021, and since any such waiver, were one submitted, would have been denied based on the professional opinion of the examiners and the fact that Ms. Smith's performance on the 2011 simulator test was significantly worse than the performance of those individuals who had previously been granted waivers, Ms. Smith's Statement of Position 1 waiver argument fails.

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[222] Exhibit NRC-008, 1.

[223] *Id*.

[224] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 7.

V. MS. SMITH'S STATEMENT OF POSITION 2: CONFLICT OF INTEREST

A. There was no Conflict of Interest Related to the Evaluation of Ms. Smith's 2012 Operating Test by Region II

In Statement of Position 2, Ms. Smith alleges that there was a conflict of interest related to her 2012 operating test and that it was not addressed as required by NUREG-1021.[225] The Staff Testimony and exhibits demonstrate that, not only has Ms. Smith failed to prove this claim by clear evidence, but that there was in fact no conflict of interest related to Ms. Smith's 2012 operating test.

NUREG-1021 imposes personnel restrictions in order to prevent situations involving a "conflict-of-interest."[226] These personnel restrictions are that "an examiner who failed an applicant on an operating test [shall not be assigned] to administer any part of that applicant's retake operating test" and that an examiner previously employed by a licensee facility and involved in training the current license applicants shall not be assigned to develop or administer the written examinations or operating tests for those applicants.[227] In listing these specific personnel restrictions, however, NUREG-1021 also recognizes that "[i]t is impossible to define criteria that anticipate every possible conflict-of-interest issue."[228] Therefore, in potential conflict of interest situations for which NUREG-1021 has no specifically defined guidance, NUREG-1021 charges the responsible Region to "apply sound judgment to the facts of each case" in order to prevent a conflict of interest.[229]

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[225] Exhibit CCS-076, 11.

[226] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 13.

[227] *Id*. at 14.

[228] *Id*. at 13.

[229] *Id*.

Ms. Smith's 2011 SRO license application was denied because, although she passed the operating test, she failed the written examination.[230] 10 C.F.R. § 55.35(a) states that after a first failure to pass the written examination or operating test, or both, an applicant may file a new application two months after the date of denial of the first application. Since Ms. Smith's new application did not include a waiver request of the previously passed operating test, Ms. Smith was required to take both the written examination and operating test in 2012. In assigning examiners to Ms. Smith's 2012 operating test, Region II acted in accordance with the NUREG-1021 guidelines by first determining that Ms. Smith's situation did not implicate any of the specifically defined personnel restrictions in NUREG-1021 and then properly exercising "sound judgment" in order to avoid a conflict of interest.

Ms. Smith's situation did not implicate the specific personnel restrictions of NUREG-1021 because she did not fail her 2011 operating test.[231] Therefore, none of the examiners that could have been assigned to her 2012 operating test could have satisfied the NUREG-1021 personnel restriction of "an examiner who [had] failed an applicant on an operating test."[232] Similarly, none of the potential examiners for Ms. Smith's 2012 operating test had previously been employees at the licensee facility and involved with Ms. Smith's training. Therefore, there was no conflict of interest related to Ms. Smith's 2012 operating test according to the specifically defined criteria of NUREG-1021.

As required by NUREG-1021 when its specifically defined criteria do not apply to a situation, but there may be the potential for the existence or appearance of bias, Region II exercised "sound judgment" to the facts of Ms. Smith's situation in order to ensure that there would be no conflict of interest by taking into account, when assigning examiners to Ms. Smith,

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[230] Exhibit CCS-007, 1.

[231] *Id*.

[232] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 13.

which examiners had previously been assigned to Ms. Smith's 2011 operating test and their role during her 2011 operating test.

The examiners of Ms. Smith's 2011 operating test were Mr. Hopkins, examiner of record (*i.e.*, the examiner assigned to evaluate an applicant during the simulator test and complete the applicant's Individual Examination Report), Mr. Capehart, chief examiner, and Mr. Meeks.[233] As her examiner of record, Mr. Hopkins evaluated the bulk of Ms. Smith's 2011 operating test by evaluating all of her simulator scenarios and seven of her 15 JPMs. The remaining JPMs were evaluated by Mr. Capehart, who evaluated six JPMs, and Mr. Meeks, who evaluated only two JPMs.[234]

Due to scheduling and personnel availability, the three examiners assigned to the Vogtle 2012 operating test were Mr. Bates, chief examiner, Mr. Capehart, and Mr. Meeks.[235] The determination of which applicants will perform which scenarios as well as which of the examiners will be assigned as the examiner of record for each applicant is usually made by the responsible Region in a generic manner, meaning that draft schedules are developed based on the level of license for which the applicant is applying (*e.g.*, RO, SRO-instant, *etc.*) and not based on the applicants' names.[236] Additionally, the scheduling process for the simulator test involves carefully balancing the requirements to assign one examiner to each applicant, minimize the number of surrogate operators, and ensure that no applicant receives more than one scenario beyond the minimum number of required scenarios.[237] The generic schedule for the 2012 Vogtle simulator test was developed in this manner.[238] Once the generic schedule

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[233] Exhibit CCS-007, 1-2.

[234] *Id*. at 2.

[235] Exhibit NRC-006 (Meeks Testimony), 38.

[236] *Id*.

[237] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-201, 12.

[238] Exhibit NRC-006 (Meeks Testimony), 38-39.

was completed, specific names were randomly assigned to the generic applicant positions and examiner positions.[239] Thus, Ms. Smith was randomly assigned to generic position "I2," as an SRO-instant applicant who would be administered two scenarios in the SRO position and one scenario in the OATC position.[240]

However, recognizing that Ms. Smith had previously taken the 2011 operating test, Region II decided that, instead of randomly assigning her examiner of record, the Region should specifically assign Mr. Bates as her examiner of record.[241] Mr. Bates was chosen as Ms. Smith's examiner of record because the two other available examiners, Mr. Capehart and Mr. Meeks, had been involved in Ms. Smith's 2011 operating test, and, even though neither had been her 2011 examiner of record, had evaluated a large portion of her 2011 operating test, or had graded her as anything other than satisfactory, the Region believed that this assignment was the most sound way to avoid even the appearance of bias.[242] Unlike Mr. Capehart and Mr. Meeks, Mr. Bates was not involved with the administration of Ms. Smith's 2011 operating test, he specifically did not review any documentation related to Ms. Smith's 2011 operating test before administering her 2012 operating test, and he did not participate in the preliminary evaluation of Ms. Smith's preliminary waiver request besides being informed, without specific details, of the preliminary Staff response to the licensee facility on the matter.[243] At no time before or during the administration of Ms. Smith's 2012 simulator test, or during the grading of her 2012 simulator test, did any of the 2011 examiners discuss Ms. Smith's 2011 operating test performance with Mr. Bates.[244] As for the remainder of Ms. Smith's 2012 operating test, Mr.

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[239] *Id*.

[240] *Id*.

[241] *Id*.

[242] *Id*.

[243] Exhibit NRC-006 (Meeks Testimony), 17-19, 39-41

[244] *Id*. at 41.

Bates was assigned to administer five JPMs, Mr. Capehart was assigned to administer two, and Mr. Meeks was assigned to administer eight.[245]

By specifically assigning Mr. Bates as Ms. Smith's examiner of record, responsible for evaluating her entire simulator test, and by only assigning Mr. Capehart and Mr. Meeks to administer ten of Ms. Smith's JPMs, Region II exercised sound judgment in an attempt to avoid the potential for the existence or appearance of bias. Therefore, contrary to Ms. Smith's arguments, the Region II Staff did act according to the NUREG-1021 conflict of interest guidelines with respect to her 2012 operating test.

Not only did Region II properly adhere to the NUREG-1021 conflict of interest guidelines in order to avoid the potential for bias, but the Staff Testimony and exhibits demonstrate that there was, in fact, no bias related to Ms. Smith's 2012 operating test.

First, Ms. Smith argues that, because Mr. Capehart and Mr. Meeks were part of her 2011 operating test examination team and because they had stated that her preliminary waiver request would likely be denied, they could not have fairly evaluated her 2012 operating test and so should have been replaced with other examiners who, like Mr. Bates, were not associated with her 2011 operating test or her preliminary waiver request.[246] However, the facts of the 2012 operating test disprove this claim. Ms. Smith failed her 2012 operating test because of her failure of the simulator test portion of the operating test.[247] Mr. Capehart and Mr. Meeks did not evaluate her simulator test performance, this was done by her examiner of record, Mr. Bates.[248] Therefore, any potential bias on the part of Mr. Capehart or Mr. Meeks could not be causally

[245] Exhibit CCS-045, 2.

[246] Exhibit CCS-076, 12-13.

[247] Exhibit CCS-045, 1.

[248] *Id*.

related to Ms. Smith's simulator test failure.[249] Additionally, in the portions of Ms. Smith's operating test that they did evaluate, Mr. Capehart and Mr. Meeks exhibited no signs of bias; rather, they actually graded Ms. Smith more favorably than they had in 2011. In 2011, Mr. Capehart and Mr. Meeks combined to evaluate eight of Ms. Smith's JPMs, finding them all to be satisfactory but noting four comments.[250] In 2012, Mr. Capehart and Mr. Meeks combined to evaluate slightly more JPMs (10) and yet still found them all to be satisfactory with even less comments (3).[251] If these examiners were actually biased against Ms. Smith, as she claims, then the opposite would be expected to be true. Therefore, Ms. Smith has not provided clear evidence to support her argument that she failed her 2012 simulator test because Mr. Capehart and Mr. Meeks were biased against her based on her performance on the 2011 operating test.

Furthermore, a comparison of the 2012 examiners' grading of Ms. Smith and their grading of her fellow applicants demonstrates that Ms. Smith, despite her argument to the contrary, was indeed treated "equivalent to the other candidates."[252] As illustrated by the following table, the four comments assessed to Ms. Smith on the walk-through portion of the operating test were similar to comments assessed to other applicants performing the same JPMs.

Applicant	**Admin JPM c**	**Systems JPM a**	**Systems JPM d**	**Systems JPM g**
Ms. Smith	Pass w/ Comment	Pass w/ Comment	Pass w/ Comment	Pass w/ Comment
Operator H	Pass w/ Comment		Pass w/ Comment	Pass w/ Comment
Operator G		Pass w/		Pass w/

[249] Ms. Smith states that all three examiners must consult after each scenario, but provides no evidence, let alone clear evidence, that this consultation somehow resulted in a bias of Mr. Capehart or Mr. Meeks affecting the simulator grading of Mr. Bates. Exhibit CCS-076, 14.

[250] Exhibit CCS-007, 2.

[251] Exhibit CCS-045, 2.

[252] Exhibit CCS-076, 12.

		Comment		Comment
Operator M	Pass w/ Comment		Pass w/ Comment	Pass w/ Comment
Operator N			Pass w/ Comment	Pass w/ Comment
Operator U			Pass w/ Comment	Pass w/ Comment
Operator O			Pass w/ Comment	
Operator S		Pass w/ Comment	Pass w/ Comment	
Operator Q		Pass w/ Comment	Pass w/ Comment	
Operator J			Pass w/ Comment	
Operator R		Pass w/ Comment	Pass w/ Comment	
Operator L		Pass w/ Comment		

[253]

Additionally, as illustrated by the following table, each of the performance deficiencies identified by Region II for Ms. Smith and its RF assignment was similar to a performance deficiency assessed against another applicant and its RF assignment. In fact, in many cases, the exact same error was assigned to the exact same rating factor. In other cases, the only differences between comments were due to the applicants standing different positions within the crew.

Rating Factor	**Ms. Smith Individual Examination Report Page Number**	**Applicant Individual Examination Report Page Number for Similar Comment / Examiner of Record**
1.b	8	Operator S Pg 9 / Bates Operator M Pg 11 / Capehart
1.b	10	Operator N Pg 17 / Capehart
1.c	12	The use of a similar threshold for all applicants can be seen generally via other comments in this table.

[253] Exhibit CCS-021. The exhibit also contains the relevant pages from each listed applicant's Individual Examination Report in order to directly demonstrate the similarity between the comments assessed against each of these listed applicants and the comments assessed against Ms. Smith.

1.c	14	Operator Q Pg 13 / Bates Operator S Pg 10 / Bates Operator V Pg 10 / Meeks Operator R Pg 8 / Meeks Operator L Pg 9 / Capehart
1.d	16	Operator Q Pg 12 / Bates Operator V Pg 11 / Meeks
3.a	18	Operator Q Pg 14 / Bates Operator V Pg 14 / Meeks
3.a	19	The use of a similar threshold for all applicants can be seen generally via other comments in this table.
3.a	20	Operator S Pg 11 / Bates Operator N Pg 15 / Capehart Operator V Pg 7 / Meeks Operator M Pg 10 / Capehart Operator U Pg 7 / Meeks
3.c	21	Operator O Pg 10 / Bates
4.a	23	Operator L Pg 13 / Capehart
4.a	24	Operator V Pg 12 / Meeks
4.a	25	The use of a similar threshold for all applicants can be seen generally via other comments in this table.
4.b	26	Operator Q Pg 15 / Bates Operator S Pg 12 / Bates
4.b	27	Operator Q Pg 15 / Bates Operator S Pg 12 / Bates
4.c	28	Operator N Pg 18 / Capehart Operator V Pg 13 / Meeks
6.a	29	Operator P Pg 14 / Meeks Operator P Pg 15 / Meeks
6.a	30	Operator S Pg 13 / Bates
6.a	31	Operator Q Pg 16 / Bates Operator V Pg 15 / Meeks Operator R Pg 10 / Meeks

[254]

The fact that other applicants were assessed similar comments/RFs for similar performance deficiencies on similar JPMs/scenarios rebuts Ms. Smith's claim of bias.

Finally, the actions of Mr. Bates during the grading of Ms. Smith's simulator test demonstrate that he was not biased against Ms. Smith. When it became apparent to Mr. Bates

[254] Exhibit CCS-021. The exhibit also contains the relevant pages from each listed applicant's Individual Examination Report in order to directly demonstrate the similarity between the RFs assessed against each of these listed applicants and the RFs assessed against Ms. Smith.

that the performance deficiencies that he had identified would result in a failing grade for Ms. Smith, he went beyond the requirements of NUREG-1021 and obtained independent reviews of the Individual Examination Report that he had developed from two senior examiners and one examiner, all three of whom had previously held SRO licenses, in order to ensure that Ms. Smith's performance was accurately described and characterized and that the failure determination complied with the NUREG-1021 guidelines.[255] None of these independent reviewers expressed a concern that Mr. Bates' assessment of Ms. Smith's performance was somehow unfair or that it treated Ms. Smith differently than any other applicant with her performance deficiencies would have been treated.[256]

Ms. Smith was also provided in the hearing file with an email from a Region II licensing examiner, Edwin Lea, discussing Ms. Smith's 2012 operating test.[257] In this email, Mr. Lea stated his personal opinion that Ms. Smith should not have been required to take the 2012 operating test and that Ms. Smith's Region II examiners convinced the informal review panel to sustain Ms. Smith's failure of the 2012 operating test.[258] However, the evidence demonstrates that Mr. Lea did not participate in either of Ms. Smith's 2011 or 2012 SRO license applications or in the preliminary discussions regarding the potential for a waiver of her 2012 operating test.[259] He had no first-hand knowledge of Ms. Smith's 2011 or 2012 SRO license applications or of the preliminary discussions regarding the potential for a waiver of her 2012 operating

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[255] Exhibit NRC-014, 8.

[256] *Id*.

[257] Exhibit NRC-021.

[258] *Id*. In his affidavit, Mr. Lea also "speculat[es]" that Frank Ehrhardt in particular, the individual assigned to assess Ms. Smith's waiver and bias contentions separately from the informal review panel, was also initially not in agreement with the denial of Ms. Smith's application but was then subsequently convinced to agree by the Region II examiners. Exhibit NRC-025 (Lea Affidavit), 3. However, Mr. Ehrhardt's affidavit rebuts this speculation by stating that, "neither the examiners involved in Ms. Smith's 2011 or 2012 examination, nor any member of NRC management, explicitly or implicitly attempted to influence the outcome and I reached my conclusions based on my independent review." Exhibit NRC-026, 2-3.

[259] Exhibit NRC-025 (Lea Affidavit), 1; Exhibit NRC-027 (Widmann Affidavit), 2.

test.[260] He did not see any of the emails related to the subject of the waiver of Ms. Smith's 2012 operating test or any of the waiver requests submitted on behalf of Ms. Smith.[261] He also did not speak with anyone with such first-hand knowledge.[262] In fact, his entire opinion is based on (1) a review of the documentation associated with Ms. Smith's 2011 operating test,[263] (2) his "hear[ing] conversations between several operator licensing examiners concerning the failure [of Ms. Smith] discussing how to write up the failure of the operating test such that the decision would not be overturned by Headquarters during the appeal process,"[264] and (3) a conversation with an operator licensing administrative assistant that led him to "speculat[e]" that the informal review "was not in initial agreement with the denial" and only came to agree with the denial after considering input from Ms. Smith's Region II examiners."[265] Therefore, this email is an uninformed, personal opinion based largely on hearsay and second-hand comments. Balanced against the weight of the evidence presented above, this single, unsubstantiated opinion does not prove by clear evidence that Ms. Smith was improperly treated differently than other applicants.

Because Region II complied with the conflict of interest guidelines of NUREG-1021 and because the Staff Testimony and exhibits overwhelmingly demonstrate that Ms. Smith was treated equivalently with the other applicants, Ms. Smith's Statement of Position 2 fails.

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[260] Exhibit NRC-025 (Lea Affidavit), 2; Exhibit NRC-027 (Widmann Affidavit), 2.

[261] *Id*. at 3.

[262] *Id*. at 2; Exhibit NRC-027 (Widmann Affidavit), 2.

[263] Exhibit NRC-025 (Lea Affidavit), 2.

[264] *Id*.

[265] *Id*. at 3.

B. Preparing, Administering, and Evaluating Ms. Smith's Operating Test according to the Detailed Requirements of NUREG-1021 Means that it is Unlikely that Bias could have Affected the Determination that Ms. Smith's Performance was Unsatisfactory

Ms. Smith argues that any potential bias of her 2012 examiners is critical because the simulator test is "very subjective," so that even a small possibility of bias could invalidate the preparation, administration, and evaluation of a simulator test.[266] However, this statement is not correct. 10 C.F.R. § 55.40(a) requires the Commission to "use the criteria in NUREG-1021 . . . to prepare . . . [and] to evaluate the . . . operating tests." The required criteria of NUREG-1021 have evolved over many years specifically in order to minimize the subjectivity of the NRC operator licensing process. Today, NUREG-1021 provides an equitable and consistent testing process in which applicants are quantitatively rated against established criteria; not qualitatively evaluated against examiner expectations or the performance of other applicants.[267] Therefore, the preparation, administration, and evaluation of simulator tests is not "very subjective" and as long as the responsible Region adheres to the requirements in NUREG-1021, there is a presumption that the Region properly discharged its duties with respect to the simulator test. Besides her unsubstantiated statement regarding subjectivity, Ms. Smith presents no evidence, let alone clear evidence, to rebut this presumption or demonstrate that the NUREG-1021 process is insufficient. Furthermore, the Staff Testimony and exhibits demonstrate that Region II adhered to the NUREG-1021 process in its preparation, administration, and evaluation of Ms. Smith's 2012 operating test. Therefore, in addition to the fact that Ms. Smith's bias argument fails because there is no proof of actual bias, Ms. Smith's bias argument also fails because Region II adhered to the requirements of NUREG-1021 and thus a bias-free evaluation is presumed.

Today, NUREG-1021 grades each individual RF quantitatively based on the number of performance deficiencies related to that RF and not qualitatively based on the examiner's

[266] Exhibit CCS-076, 11.

[267] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-101, 1.

subjective evaluation of the applicant's performance related to that RF.[268] However, this was not always the case. Initially, the grading of the simulator test was based primarily on "subjective" or "professional" judgment.[269] Over time, the Staff developed more objective standards to decrease the potential for the different grading of applicants for similar licenses. For instance, a previous revision of the worksheet used to grade SRO simulator tests, ES-303-4, described each RF and then described qualitatively what a grade of a "3" or a "2" or a "1" meant for that RF and left it to the professional judgment of the examiner to determine which numerical grade best applied to the identified performance deficiency.[270] Thus, an RF for "procedural use" was presented as:

4. COMPLIANCE WITH AND USE OF PROCEDURES

DID THE APPLICANT:

....

(b) USE PROCEDURES CORRECTLY, including following procedural steps in correct sequence, abiding by procedural cautions and limitations, selecting correct paths on decisions blocks, and correctly transitioning between procedures?

3	2	1
Accurately and promptly executed procedural steps	Minor errors, but made necessary corrections in a timely fashion	Significant errors impeded or slowed recovery or degraded plant unnecessarily

[271]

In July 2004, the NRC published NUREG-1021, Revision 9, with the goal of "clarify[ing] the grading criteria for the simulator operating test to improve objectivity and ensure proper emphasis on competence."[272] As a result, today the same RF is presented as:

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[268] *Id*. at ES-303, 5.

[269] *Morabito*, LBP-88-10, 27 NRC at 449.

[270] *Calabrese Jr.*, LBP-97-16, 46 NRC at 87.

[271] *Id.*

[272] NUREG-1021 (Exhibits CCS-005A, CCS-005B), iii.

2. Comply with and Use Procedures and References

Rating Factors	Weighting Factors		RF Scores	RF Grades Comp.	Grade
….					
(c) Did the applicant USE PROCEDURES CORRECTLY, including following procedural steps in correct sequence, abiding by procedural cautions and limitations, selecting correct paths on decisions blocks, and correctly transitioning between procedures?[273]	N/O	= 0	3		
	Nominal	= 0.40	2		
	(a) or (b) N/O	= 0.57	1		

The difference is that now the examiner doesn't have the discretion to assign a grade to an RF based on a qualitative analysis of the associated performance deficiency; rather, each RF is quantitatively determined by the number of performance deficiencies that implicate that RF. This replaces imperfect examiner judgment with a set formula where every error is equal and it is the number of errors that determines the RF grade.[274] Thus, zero errors related to the RF results in an RF score of 3; one error results in an RF score of 2, unless the error related to a "critical task," in which case a score of 1 is required; two errors results in an RF score of 1 unless a score of 2 can be justified based on the documented correct performance of another activity (or activities) related to the same rating factor; and three or more errors generally requires an RF score of 1 regardless of compensatory actions.[275] In this manner, the current revision of NUREG-1021 minimizes the ability of bias to affect the grading of RFs. However, this still leaves two areas in which examiner bias may be able to affect a licensing decision, the identification of performance deficiencies and the determination of how these deficiencies are to be assigned to RFs.

The potential for bias to affect the identification of deficiencies is minimized by the rigorous simulator scenario development process. In order to ensure consistent and equitable decision making, NUREG-1021 fully describes every step in the preparation, administration, and

[273] *Id*. at ES-303, 17.

[274] *Id* at 5.

[275] *Id*.

evaluation of simulator tests, and even requires that each of these steps be reviewed by a second party.[276] Any deviation from the intent of NUREG-1021 or any undertaking that could undermine simulator test consistency, by either the licensee facility or the Region, requires IOLB approval.[277]

Simulator scenarios are developed in accordance with the criteria in NUREG-1021, ES-301, and Appendix D. The purpose of these criteria is to "enhance the consistency and validity of the . . . simulator operating tests."[278] Primary among these criteria is the use of Forms ES-D-1 and ES-D-2 to script out, as much as possible, every required operator action for each scenario. Form ES-D-1 documents and briefly describes all of the events that constitute a given scenario and is used as a planning tool to ensure that each applicant will have the opportunity to demonstrate the full range of required competencies.[279] Form ES-D-2 explains in detail each event including the cues that will be provided to the operators, a chronological listing of the actions and communications that the operators are required to make in response to these cues, the references that the operators are required to use, and an explanation of when the event is considered complete.[280] The required actions in the ES-D-2 script include such actions as "opening, closing, and throttling valves; starting and stopping equipment; raising and lowering level, flow, and pressure; making decisions and giving directions; acknowledging or verifying key alarms and automatic actions."[281] Also, to the extent possible, the description of the required actions is supposed to provide "set points and other parameters" in order to "provide an

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[276] *Id*. at ES-201, 2.

[277] *Id*.

[278] *Id*. at Appendix D, 1.

[279] *Id*. at Appendix D, 3.

[280] *Id*.

[281] *Id*. at ES-301, 18.

objective method for evaluating the operators' performance."[282] Additionally, a blank column is placed to the left of each required action so that the examiners may enter at which time the required action was performed or note that it wasn't performed.[283] Each scenario and its associated Forms ES-D-1 and ES-D-2 are assessed for quality by both the writer (which is generally the licensee facility) and a separate reviewer (which is generally the responsible Region).[284] A scenario is adequate if it satisfies the requirements of NUREG-1021, ES-301-4, "Simulator Scenario Quality Checklist," and the five qualitative attributes and ten quantitative attributes of NUREG-1021, Appendix D.[285] Finally, before being used for the first time, every scenario is validated in real-time in a simulator.[286]

This demonstrates that the scenarios used as part of simulator tests are scripted out in great detail. As a result, no matter who the applicant or who the examiner may be for a specific scenario, the guidelines provided to the examiner in Forms ES-D-1 and ES-D-2 against which the examiner is supposed to assess the performance of the applicant are always the same for that scenario. Therefore, NUREG-1021 minimizes, to the greatest extent practicable, the potential for an examiner to grade one applicant differently than another applicant when using the same Forms ES-D-1 and ES-D-2.

As for the ability of bias to affect the assignment of identified performance deficiencies to specific RFs, this is minimized by the clear descriptions for each RF provided in NUREG-1021, ES-303-3 and ES-303-4 for RO applicants and SRO applicants, respectively. These RF descriptions are written so that, to the extent possible, they do not overlap. Furthermore, NUREG-1021 recognizes that a single performance deficiency may implicate more than one RF

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[282] *Id*. at Appendix D, 3.

[283] *Id*.

[284] *Id*. at ES-301, 18.

[285] *Id*.; *Id*. at Appendix D, 4-12.

[286] NUREG-1021 (Exhibits CCS-005A, CCS-005B), Appendix D, 4.

and thus each RF description is not intended to match exactly every possible performance deficiency.[287]

The minimization of the potential effects of bias is further ensured by the NUREG-1021 requirement that the chief examiner must arrange a meeting of the examination team members after the simulator scenarios are completed so that the examiners may "compare notes to ensure that the documentation for applicants on the same operating crew is consistent and mutually supportive."[288] NUREG-1021 stresses that "it is essential that the simulator operating test documentation is consistent and mutually supportive for all applicants in an operating crew" and thus requires that "[o]perating errors that involve[] more than one applicant should be noted by each applicant's evaluating examiner."[289] Additionally, the evaluations of the various examiners are only recommendations, which must later be approved by independent chief examiner and supervisor reviews. The chief examiner will review the grading of each operating test to verify that the examiner's comments appropriately support his or her recommendation and to ensure that the operating test meets the requirements of NUREG-1021, ES-301.[290] Then the responsible supervisor will review the entire package.[291] If the chief examiner makes a final recommendation contrary to an examiner recommendation, then concurrence must be obtained from the responsible supervisor.[292]

Since the Staff Testimony and exhibits demonstrate that the Region II examiners involved with Ms. Smith's 2012 operating test were not biased against Ms. Smith based on any knowledge of her 2011 operating test, and since all of the provisions of NUREG-1021 which

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[287] *Id*. at ES-303, 3.

[288] *Id*. at ES-303, 2.

[289] *Id*. at ES-303, 3.

[290] *Id*. at ES-303, 2.

[291] *Id*.

[292] *Id*.

were developed specifically to ensure the equitability and consistency of operating tests were followed by Region II, Ms. Smith's Statement of Position 2 fails.

VI. MS. SMITH'S STATEMENT OF POSITION 3: INADEQUATE ADMINISTRATIVE REVIEW

A. The Informal Review of Ms. Smith's 2012 SRO License Denial was not Fashioned, as Ms. Smith alleges, so as to Ensure a Determination that Ms. Smith Failed the Simulator Test

Ms. Smith also argues that the Staff improperly discharged its duties with respect to the informal review of the denial of her 2012 SRO license application because the informal review panel, she alleges, had initially concluded that she had passed the simulator test, but then selectively re-graded her entire test in order to find a way to fail her in response to the allegedly "unnecessary influence" of Region II memorialized in an October 12, 2012 memorandum entitled "Region II Recommendations/Comments on the 'Final' Independent Review Panel Document."[293] The Staff Testimony and exhibits demonstrate (1) that there was never a final conclusion of passing that was later changed in such a manner so as to ensure that Ms. Smith's final grade would be failing; rather, the drafting of the informal review report was a continuous process reflecting continuous panel member deliberations; and (2) that, although the informal review panel made some changes to its report in agreement with recommendations received from Region II, none of these changes caused Ms. Smith's failure; rather, the informal review panel determinations that caused her failure were discussed at the very earliest stages of the informal review process. Therefore, there is no clear evidence that the informal review panel improperly discharged its duties with respect to the review of Ms. Smith's 2012 SRO license application denial and Statement of Position 3 fails.

The NRC Staff's guidance for the informal reviews of operator license examination failures is contained in NUREG-1021, ES-502, and OLMC-500. Typically, upon receipt of a request from an applicant for an informal review, IOLB notifies the affected NRC regional office

[293] Exhibit CCS-076, 15, 18, 52, 54 (Statement of Position 3a., 3b., and 3c.); Exhibit CCS-060.

of the request, and sends an acknowledgement letter to the applicant.[294] IOLB then determines whether to (1) review the appeal internally, (2) have the regional office review the appeal, or (3) convene a three-person informal review panel to review the appeal.[295] As stated in OLMC-500, Option 3 may be appropriate for "particularly complex or contentious cases."[296] If it is determined that an informal review panel will be used for the review then the Chief, IOLB, "in consultation with all the NRC Regions," will determine the make-up of the panel.[297] The informal review panel normally consists of two certified examiners and a designated chairperson, usually a regional branch chief or a regional or IOLB senior examiner.[298] The panel must be "impartial," meaning that it may include a representative from the affected region, but it will not include individuals "involved with the applicant's licensing examination."[299] For operating test reviews, the review must evaluate "the examiner's comments, the examination report, the test that was administered, and the contentions and supporting documentation provided by the applicant or facility licensee."[300] OLMC-500 states that, during an appeal panel review, the panel must "establish and maintain communications with the affected region, in order to ensure that the review results include regional and IOLB input."[301] Based on the findings and recommendations from the review, and "taking into account any regional and/or examiner of record input," IOLB

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[294] OLMC-500 (Exhibit CCS-030), 1.

[295] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4; OLMC-500 (Exhibit CCS-030), 3.

[296] OLMC-500 (Exhibit CCS-030), 3.

[297] *Id*.

[298] *Id*.; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[299] OLMC-500 (Exhibit CCS-030), 3; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[300] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[301] OLMC-500 (Exhibit CCS-030), 6.

will decide whether to sustain or overturn the applicant's license examination failure.[302] This decision must be signed out by the Director, Division of Inspection and Regional Support (DIRS).[303] Then, the applicant is notified in writing "of the results of the review."[304] This entire process is generally to be completed within 75 days of receiving the request.[305]

On May 11, 2012, the NRC informed Ms. Smith of its initial denial of her SRO license application.[306] As in its denial of her 2011 SRO license application, the NRC informed Ms. Smith that she could request an informal review or a hearing regarding the denial.[307] On June 5, 2012, Ms. Smith requested an informal review of her operating test.[308]

In response to this request, IOLB determined (1) that an informal review panel should be constituted to assess Ms. Smith's contentions regarding the grading of her 2012 simulator test and (2) that an independent NRC manager and qualified examiner separate from both the Region II examiners of Ms. Smith's operating test and IOLB should assess Ms. Smith's contentions regarding the lack of an opportunity to request a waiver of the 2012 operating test and examiner bias.[309] Splitting the review of technical claims and improper conduct claims is consistent with past NRC precedent.[310]

In accordance with OLMC-500, John McHale, the Chief, IOLB, determined that the informal review panel would consist of two examiner-qualified subject matter experts, David

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[302] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4; OLMC-500 (Exhibit CCS-030), 1, 3.

[303] OLMC-500 (Exhibit CCS-030), 1.

[304] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[305] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4; OLMC-500 (Exhibit CCS-030), 1.

[306] Exhibit CCS-033.

[307] *Id*.

[308] Exhibit NRC-015.

[309] Exhibit CCS-022; Exhibit NRC-016; Exhibit NRC-014.

[310] *See* Exhibit NRC-017.

Muller of IOLB and Christopher Steely of Region IV, and one operator licensing branch chief, Donald Jackson, Chief of the Region I Operations Branch, as the chairperson.[311] As required by NUREG-1021 and OLMC-500, the informal review panel did not include any individuals "involved with the applicant's licensing exam."[312] However, so as to avoid even the appearance of a conflict of interest, the informal review panel did not include any individuals from Region II at all.[313]

After their selection, the three informal review panel members each reviewed a complete copy of Ms. Smith's review request.[314] In accordance with OLMC-500, a complete copy of Ms. Smith's review request was also transmitted to Region II.[315] The informal review panel members recognized that, pursuant to OLMC-500, they must keep Region II informed of the informal review and accept input from Region II related to the informal review.[316] This is especially necessary with respect to the informal review of simulator test failures because, in these instances, the responsible region's examiners are the only NRC witnesses to the actual test.[317] However, the informal review panel also recognized that this required interaction with Region II could not be so great as to make the informal review panel no longer "impartial" of the affected region.[318] Therefore, as described below, the informal review panel acted to ensure that, though it would evaluate the input of Region II as witness testimony, it would retain all final judgment to itself.

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[311] Exhibit NRC-016.

[312] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4; OLMC-500 (Exhibit CCS-030), 3.

[313] Exhibit NRC-005 (McHale Testimony), 4.

[314] Exhibit NRC-004 (Jackson Testimony), 3.

[315] OLMC-500 (Exhibit CCS-030), 2.

[316] *Id*. at 1, 3.

[317] Exhibit NRC-005 (McHale Testimony), 7.

[318] Exhibit NRC-016; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4; OLMC-500 (Exhibit CCS-030), 3.

The informal review panel met in person for the first time from June 25-27, 2012 in a private conference room at the Region II office in Atlanta, Georgia.[319] Besides a 15-minute introductory meeting with the Region II Operations Branch staff, the informal review panel remained separate from the Region II staff for the first day and a half of deliberations.[320] During this time, the informal review panel first focused on determining what had actually happened during the simulator scenario events where Ms. Smith's recounting of the facts differed from the facts as reflected in the examiners' notes.[321] Once it had developed a preliminary factual record, the informal review panel determined whether, based on this record, Ms. Smith's actions demonstrated performance deficiencies.[322] Then the informal review panel preliminarily assigned each identified performance deficiency to the appropriate RF or RF(s) pursuant to NUREG-1021, ES-303.[323] These preliminary determinations were documented on large flip charts.[324]

While making its preliminary determinations based on the written record of Ms. Smith's simulator test, the informal review panel gathered questions that could not be resolved based on the written record alone.[325] During the second half of day two, the informal review panel interviewed Ms. Smith's Region II examiners in order to help resolve these questions.[326]

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[319] Exhibit NRC-016; Exhibit NRC-004 (Jackson Testimony), 5.

[320] Exhibit NRC-004 (Jackson Testimony), 5.

[321] *Id*.

[322] *Id*. at 6

[323] *Id*.

[324] Exhibit CCS-065. The first 13 pages represent the first day and a half of the panel meeting, and pages 14-18 are error summaries performed on the third day of the panel meeting. Exhibit NRC-004 (Jackson Testimony), 6.

[325] *Id*.; Exhibit CCS-065, 1-13.

[326] Exhibit NRC-004 (Jackson Testimony), 6.

On the third and final day of the panel meeting, the informal review panel used the information from its interview of Ms. Smith's Region II examiners along with a re-evaluation of the written record to attempt to address all its unresolved questions.[327] The informal review panel then updated its earlier preliminary findings regarding Ms. Smith's performance deficiencies and their RF assignments. As before, this determination was performed without any Region II personnel present, and was documented using large flip charts.[328] In this manner, the panel determined, as demonstrated on the flip charts, a likely response for each simulator scenario event whose grading Ms. Smith contested and a likely assignment of RFs to each contested performance deficiency.[329] However, the flip charts still included unanswered questions.[330] For instance, the flip charts include the question of whether the closing of a failed open pressurizer PORV is a critical task.[331] The flip charts also do not discuss how the informal review panel's identification of performance deficiencies and how its RF assignments would affect Ms. Smith's final grade.[332] Most importantly, the flip charts demonstrate that the critical informal review panel determinations that led to the eventual finding that Ms. Smith had failed the simulator test, specifically the fact that the PORV performance deficiency was a critical task and that the 1TIC-0130 performance deficiency should be assigned to RF 3.c., were made at this earliest phase of the informal review process and not in response to later Region II input, as alleged by Ms. Smith.[333]

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[327] *Id*. at 7.

[328] Exhibit CCS-065, 14-18.

[329] *Id*.

[330] *Id*.

[331] *Id*. at 18.

[332] Exhibit CCS-065.

[333] *Id*. at 18; Exhibit CCS-076, 16, 52.

The subsequent development of the informal review panel's report demonstrates that the report was gradually compiled through panel member deliberations and appropriate consideration of Region II input and that the ultimate determination that Ms. Smith had failed her 2012 simulator test was based on findings made during the review panel meeting and not on the later Region II input, as alleged by Ms. Smith. In order to draft the informal review report, the panel first created an initial draft report based on the format of previous informal review reports.[334] This initial draft (Revision 1) was a working outline that the informal review panel used to provide its members with the opportunity to review and comment on the proposed disposition of each of Ms. Smith's contentions as well as the proposed performance deficiencies and their RF assignments associated with the disposition of these contentions.[335] This is supported by the fact that Revision 1 only contains a determination regarding each of the contested events, but no discussion of non-contested events, and does not contain a conclusion at the end of the document or a grade sheet in support of any such conclusion.[336]

Once the panel members had submitted their input with respect to the contested events, the non-contested events were preliminarily re-graded so that a draft grade sheet could be developed and a preliminary pass/fail determination could be made.[337] Thus, the next draft of the report (Revision 2) included a re-grade of the non-contested portions of the simulator test and a grade sheet.[338] The cover letter, conclusion, and grade sheet of Revision 2 state that Ms. Smith had passed based on the re-grade of both the contested and non-contested portions of the simulator test. However, like Revision 1, page one of Revision 2 still states that Ms. Smith

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[334] Exhibit NRC-004 (Jackson Testimony), 8; Exhibit NRC-018.

[335] Exhibit NRC-004 (Jackson Testimony), 8.

[336] Exhibit NRC-018.

[337] Exhibit NRC-004 (Jackson Testimony), 7-8.

[338] Exhibit CCS-024.

had not passed and the dates cited in the cover letter and report are left incomplete.[339] Therefore, contrary to Ms. Smith's assertion that this revision represents a conclusion of the informal review panel, Revision 2 was merely another draft based on a preliminary re-grading of the non-contested portions of the simulator test. It was developed, not as a final step, but rather to solicit review panel member comments regarding the grading of the contested and non-contested portions of the simulator test and the resultant final grade, whereas Revision 1 solicited comments regarding only the contested portions of the simulator test.[340]

Following this draft, additional revisions to the informal review report were produced (Revisions 3 – 6)[341] as panel members assessed Region II input pursuant to the OLMC-500 guidance that "the panel will establish and maintain communications with the affected region . . . in order to ensure that the review results include regional . . . input."[342] This process culminated in the production of the final informal review report.[343] Page one of Revision 3 retained the Revision 1 and Revision 2 statement that Ms. Smith "did not pass the operating test" but Revision 3 also retained the Revision 2 concluding statement at the end of the document that "[a]s a result of this review, it was determined that the applicant passed the simulator operating test."[344] Again, this inconsistency, along with a date on page one being left incomplete, indicates that Revision 3 was also a non-final draft.[345] The substantive differences between Revision 2 and Revision 3 are that, in Revision 3, after assessing Region II input,[346] the informal

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[339] *Id*.

[340] Exhibit NRC-004 (Jackson Testimony), 8.

[341] Exhibits CCS-066, CCS-067, NRC-019, CCS-069, respectively.

[342] OLMC-500 (Exhibit CCS-030), 6.

[343] Exhibit CCS-037.

[344] Exhibit CCS-066, 1, 35.

[345] *Id*.

[346] Exhibit CCS-029.

review panel assigned performance deficiencies identified during scenario 3, event 5 to RFs 1.d. and 5.c. instead of RF 1.b. only; added a performance deficiency of RF 1.c. to scenario 3, event 4; and determined the failed open pressurizer PORV event to be a critical task.[347] The substantive differences between Revision 3 and Revision 4 are that, in Revision 4, the discussion at the end of the document regarding the grading of RFs with two assessed errors is removed and no grade sheet is included.[348] The differences between Revision 4 and Revision 5 are simply editorial.[349] Before the development of Revision 6, the informal review panel received the input from Region II entitled, "Region II Recommendations/Comments on the 'Final' Independent Review Panel Document."[350] This input discusses how the Region would have graded each contested event.[351] Subsequently, Revision 6 was drafted and was in agreement with three of these Region II recommendations. Specifically, in scenario 3, event 4 the performance deficiency assigned to RF 5.b. was changed to RF 5.d.; in scenario 7, event 3 the performance deficiency assigned to RF 1.c. was changed to RF 3.b; and in scenario 6, event 4, two errors were assessed to RF 4.a. instead of one.[352] After Revision 6, the only changes made to the final revision were that the final revision included an "overall conclusion" at the end of the document describing that Ms. Smith did not pass the simulator test because her Competency 3 grade was less than 1.80 and also included a partial grade sheet demonstrating that Ms. Smith's Competency 3 grade was 1.66.[353]

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[347] *Id*.

[348] Exhibit CCS-067.

[349] Exhibit NRC-019.

[350] Exhibit CCS-060.

[351] *Id*.

[352] Exhibit CCS-069.

[353] Exhibit CCS-037.

Thus, the changes made in Revisions 3 and 6 were indeed made following an assessment by the informal review panel of Region II input as identified by Ms. Smith.[354] However, as discussed below, despite Ms. Smith's assertions to the contrary,[355] this consideration of Region II input is not necessarily improper; rather, it is consistent with OLMC-500 as long as it does not affect the "impartial[ity]" of the informal review panel[356] and the Staff Testimony and exhibits demonstrate that the informal review panel's determination sustaining Ms. Smith's license denial was not partial. As discussed in Section VII, the contested performance deficiencies that changed Ms. Smith's grade from passing to failing were the recognition of a failed open pressurizer PORV event as a critical task and the identification of an RF 3.c. manual control error related to control of the letdown heat exchanger (1TIC-0130). The RF 3.c. manual control error related to 1TIC-0130 was assessed in the very first draft of the informal review report and was in each subsequent revision.[357] Also, both potential changes to the grading of Ms. Smith's simulator test were actually identified at the earliest meeting of the informal review panel before the undue Region II influence alleged by Ms. Smith.[358] Therefore, Ms. Smith has not proven by clear evidence that these outcome-determinative findings were the result of improper Region II influence causing a final informal review panel conclusion of passing to change to failing. On the contrary, the development of the informal review report appears to be have been a continuous, gradual process whose final product was based on the findings made during the panel meeting and the appropriate consideration of Region II input. Therefore, Ms. Smith's Statement of Position 3 fails.

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[354] Exhibit CCS-076, 51-52.

[355] Exhibit CCS-076, 15, 18, 52, 54.

[356] OLMC-500 (Exhibit CCS-030), 3, 6.

[357] Exhibit NRC-018, 25.

[358] Exhibit CCS-065, 18.

B. Despite Ms. Smith's Claims to the Contrary, the Informal Review Panel's Acceptance of Input from the Affected Region and its Re-grading of her entire Simulator Test are Consistent with NUREG-1021, OLMC-500, and Past NRC Precedent

Ms. Smith faults the informal review panel for accepting Region II input and for re-grading the non-contested portions of her simulator test.[359] This argument fails because, in taking these actions, the informal review panel was simply acting in accordance with NUREG-1021, ES-502, OLMC-500, and past NRC precedent.

The NUREG-1021 guidance regarding the informal review process takes up less than two pages.[360] Therefore, OLMC-500 was developed "to provide additional guidance to the staff on the implementation of the requirements contained in NUREG-1021 . . . Section ES-502, concerning the processing of applicant-requested administrative reviews and hearings."[361] In doing so, OLMC-500 explains that IOLB typically performs informal reviews and documents their reports, "taking into account any regional/examiner of record input."[362] It further encourages obtaining input from the affected region by stating that, "IOLB will . . . establish and maintain communications with the affected region, in order to ensure that the review results include regional/examiner of record input"[363] and that, "[d]uring an appeal panel review, the panel will establish and maintain communications with the affected region and IOLB, in order to ensure that the review results include regional and IOLB input."[364]

These statements in OLMC-500 demonstrate that, despite Ms. Smith's argument to the contrary, there is no expectation that the informal review panel will remain strictly "independent" of the affected region and its examiners by somehow walling itself off from input from these

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[359] CCS-076, 15 (Statement of Position 3b., 3d.).

[360] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4-5.

[361] OLMC-500 (Exhibit CCS-030), 1.

[362] *Id*. at 1.

[363] *Id*. at 3.

[364] *Id*. at 6.

sources. Rather, NUREG-1021 and OLMC-500 only require that the informal review panel remain "impartial" meaning that although it "may include a representative from the affected region," it may not "include individuals involved with the applicant's licensing examination."[365] Even if the informal review panel was required to be completely independent of the affected region and examiners, it is clear that the informal review process itself could not be walled off in this fashion because OLMC-500 also requires that the final approval for the informal review come from the Director, DIRS, who, in providing such approval, must "tak[e] into account any input from the affected region and/or examiner of record."[366]

Finally, in NUREG-1021 and OLMC-500, the term used for the review of license denials is "administrative review" or "informal review" not "independent review" as Ms. Smith erroneously claims in her pleadings.[367] Therefore, Ms. Smith's argument that "[t]he Exam Team should not have been permitted to participate in the 'independent review' as identified in [NRC] procedure" has no basis.[368]

Ms. Smith also faults the informal review panel for re-grading non-contested portions of the simulator test. She argues that by stating, "[u]pon determining the applicant's actual actions during the contested test items, the reviewer(s) shall utilize the grading policies contained in NUREG-1021, ES-303, to re-grade the contested portion(s) of the operating test," OLMC-500 requires the informal review panel to only re-grade those portions of the simulator test that are contested.[369] However, this argument does not take into account the entirety of the paragraph from which it is excerpted. Specifically, the last sentence of the paragraph states, "[u]pon

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[365] *Id*. at 3; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[366] OLMC-500 (Exhibit CCS-030), 3.

[367] OLMC-500 uses the term "administrative review." NUREG-1021 uses the terms "administrative review" and "informal review" interchangeably. Neither document ever uses the term "independent review." This Staff Statement uses the term "informal review."

[368] Exhibit CCS-076, 17.

[369] *Id*. at 18; OLMC-500 (Exhibit CCS-030), 8.

determining an outcome for all contested test items, the reviewer(s) shall utilize NUREG-1021, ES-303 to determine the applicant's overall operating test score based on the remaining test items."[370] This sentence is ambiguous as to whether the "remaining test items" should be re-graded or whether their grades should simply be retained, because NUREG-1021, ES-303 details the entire grading process and not just the summing of RFs in order to achieve a final score. Despite this ambiguity in OLMC-500, NUREG-1021, ES-502 more clearly indicates that an informal review entails a complete re-grading of the simulator test. It implies that the review shall include an evaluation of all aspects of the simulator test by broadly stating that reviews include evaluations of "the examiner's comments, the examination report, the test that was administered, and the contentions and supporting documentation provided by the applicant or facility licensee" and not just evaluations of "those questions that the applicant is contesting" as is the case for the informal reviews of written examinations.[371] This is the definitive statement of the scope of an informal review because "[i]f there is disagreement between [OLMC-500] and [NUREG-1021] ES-502, ES-502 will provide the acceptable practice."[372] Therefore, at the very least, Ms. Smith has not proven by clear evidence that it was improper for the informal review panel to completely re-grade her 2012 simulator test.

Even if neither NUREG-1021, ES-502, nor OLMC-500 provided guidance relevant to whether an informal review entails a complete re-grade of a simulator test, common sense would lead one to believe that a complete re-grade must be performed. The purpose of any informal review is to determine the validity of a requestor's contentions and to determine whether, taking into account these contentions, the license denial was proper.[373] Since the

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[370] OLMC-500 (Exhibit CCS-030), 9.

[371] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[372] OLMC-500 (Exhibit CCS-030), 1.

[373] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4; *Calabrese*, LBP-97-16, 46 NRC at 86-89.

simulator test is a dynamic series of events, each contested portion cannot be viewed in isolation. In order to determine what happened during the contested portion of the simulator test, the informal review panel must review the record before the contested portion to determine how it came about and after the contested portion to determine its consequences. In doing so, the informal review panel cannot willfully blind itself to other performance deficiencies that occurred during these windows of time but that were missed by the original examiners. Ignoring these performance deficiencies just because they were not specifically raised by the requestor would transform the informal review process into a narrow evaluation of requestor claims of error, instead of a broad double-check of the validity of the NRC decision to deny an operator license application. Therefore, the intent of the informal review process requires a review of the entire simulator test and not just the portions identified by the requestor.

Finally, the review of the non-contested portions of Ms. Smith's simulator test is consistent with past NRC precedent. For instance, in a 2005 informal review, "based on the applicant's previous contentions, and for completeness," the NRC "examined all the applicant errors to assess the root causes and grading."[374] After a detailed examination of the root causes of the uncontested errors, the informal review concluded that the RFs assigned by the examiners, RF 1.c. and RF 3.b., were incorrect and that the proper RFs were RF 1.a. and RF 3.a.[375] In this way, the informal review panel affected a change in the applicant's final score due to a review of a non-contested portion of the simulator test.

For these reasons, Ms. Smith has not proven by clear evidence that the Staff did not properly discharge its duties by accepting input from Region II and by re-grading the non-contested portions of her simulator test.

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[374] Exhibit NRC-020, 9-10.

[375] *Id*.

C. Ms. Smith's Arguments Related to the Informal Review are not Causally Related to the Requested Remedy of License Issuance

Even if, despite the Staff Testimony and exhibits to the contrary, the re-grade of Ms. Smith's 2012 simulator test was in fact not impartial, or if its inclusion of evaluations of non-contested portions of the simulator test was in fact improper, these errors would still not justify the requested remedy of license issuance. Before an SRO license may be issued, the applicant's performance on the simulator test must demonstrate that the applicant possesses the minimum knowledge and understanding to safely operate the licensee facility.[376] These arguments concerning an impartial formal review and a formal review limited to only the applicant's contentions, even if true, do not demonstrate that Ms. Smith possesses the minimum knowledge and understanding required for license issuance.

Ms. Smith's remaining Statement of Position 3 arguments are similarly flawed. Ms. Smith faults the informal review for taking over 160 days when NUREG-1021, ES-502 states that an informal review will "generally" be completed within 75 days.[377] Ms. Smith also faults the informal review panel for not transmitting to her the complete review results or a complete final grade sheet.[378] It is true that the informal review of Ms. Smith's contentions took longer than is generally expected (though it should be apparent from the testimonies, exhibits, and other filings in this matter that Ms. Smith's 11 original contentions, including unique bias and waiver contentions, were not of the general fare). It is also true that, though all of Ms. Smith's 11 contentions were evaluated in great depth, she was not transmitted a complete review report or a complete final grade sheet. However, none of these alleged errors constitute grounds on which Ms. Smith's failing grade could be changed to passing and therefore are non-responsive

[376] 10 C.F.R. § 55.33(a)(2); NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 1.

[377] Exhibit CCS-076, 15; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-502, 4.

[378] Exhibit CCS-076, 15.

to her claim. The creation of an informal review panel does not bestow on Ms. Smith any additional legal rights or remedies associated with the activities of the panel.

VII. MS. SMITH'S STATEMENTS OF POSITION 4 THROUGH 12: GRADING ARGUMENTS

Ms. Smith argues that the Region II examiners and the informal review panel improperly discharged their duties by improperly grading various aspects of her 2012 simulator test.[379] However, the Staff Testimony and exhibits demonstrate that the Region II examiners prepared, administered, and evaluated Ms. Smith's 2012 simulator test in accordance with the requirements in 10 C.F.R. Part 55 and NUREG-1021 and that the informal review panel re-evaluated Ms. Smith's 2012 simulator test in accordance with the requirements in 10 C.F.R. Part 55, NUREG-1021, and OLMC-500. Ms. Smith was evaluated during three scenarios, Scenario 3, Scenario 6, and Scenario 7. Forms ES-D-1 and ES-D-2 were developed for, and used during the administration of, each of these scenarios.[380] While observing Ms. Smith's performance in these scenarios, her Region II examiner of record identified eighteen performance deficiencies based on his professional knowledge and with assistance from the Forms ES-D-1 and ES-D-2.[381] After reviewing the entire record of Ms. Smith's 2012 simulator test and considering the contentions made by Ms. Smith in her request for an informal review, the informal review panel identified twenty performance deficiencies.[382] Both evaluations resulted in a failing grade.[383] Therefore, both the Region II examiners and the informal review panel concluded that Ms. Smith had not demonstrating that her "level of knowledge and

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[379] *Id*. at 21-48.

[380] Exhibits CCS-048, CCS-052, CCS-046, respectively.

[381] Exhibit CCS-045.

[382] Exhibit CCS-037.

[383] Exhibit CCS-045; Exhibit CCS-037.

understanding meet the minimum requirements to safely operate the facility for which the license is sought" and that her 2012 SRO license application must be denied.[384]

The Staff's grading of an operating test is improper if it was "inappropriate or unjustified"[385] or if the grading "strayed too far afield of the . . . twin goals of equitable and consistent examination administration" thus becoming "arbitrary or an abuse of discretion."[386] Ms. Smith has not proven that either the Region II examiners or the informal review panel acted arbitrarily or abused its discretion in determining that she had failed her 2012 simulator test. Rather, as described below, the Staff Testimony and exhibits demonstrate that the Staff grading of Ms. Smith's 2012 simulator test was appropriate and justified, and was consistent with 10 C.F.R. Part 55, NUREG-1021, and OLMC-500 as well as the grading of other applicants' simulator tests. Therefore, Ms. Smith's arguments regarding grading errors fail.

A. Contested Performance Deficiencies

1. Smith Statement of Position 4 – Scenario 7, Event 1

Scenario 7 (S7), Event 1 (E1) is described on the ES-D-1 as, "[r]aises power in accordance with UOP-12004-C."[387] As part of this event, Ms. Smith, as Operator At The Controls (OATC), was directed by the Control Room Supervisor (CRS) to make the required reactivity adjustments to maintain Average Temperature (Tave) within 2 ^{o}F of Reference Temperature (Tref) during a power ascension from 29%.[388] However, Ms. Smith allowed Tave

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[384] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 1.

[385] *Michael A. Phillippon* (Denial of Senior Operator License Application) LBP-99-44, 50 NRC 347, 358 (1999) ("[T]he dispute between Mr. Philippon and the Staff comes down to the question whether Mr. Philippon has met his burden of establishing that the Staff's scoring of his performance . . . was inappropriate or unjustified.").

[386] *Calabrese*, LBP-97-16, 46 NRC at 86.

[387] Exhibit CCS-046, 1.

[388] Exhibit NRC-002 (Bates Testimony), 35.

to drop approximately 2.3 °F below Tref after the power ascension was suspended.[389] Tave trended downward for approximately 40 minutes before reaching the maximum deviation of 2.3 °F, at which time Ms. Smith withdrew control rods and brought Tave back within the directed control band.[390] Ms. Smith's examiner of record identified this as a performance deficiency and assigned it to RF 3.a. for failure to "locate and manipulate controls in an accurate and timely manner"[391] to obtain the desired system response of maintaining the Tave/Tref deviation within the directed 2°F band.

Despite Ms. Smith's arguments to the contrary, the Staff Testimony and exhibits demonstrate that she had multiple opportunities to withdraw control rods "in an accurate and timely manner" to prevent violation of the Tave/Tref deviation band, but, not only did she not take advantage of these opportunities, it appeared that she neglected her responsibility as OATC to actively monitor Tave and Tref. Mr. Meeks' contemporaneous notes indicate that Ms. Smith first withdrew rods at 07:36:50 and did not attempt to withdraw rods again until 08:18:02, or approximately 40 minutes later.[392] In the interim, she neglected to monitor Tave and Tref.[393] For the entirety of event 3, which ran from 07:54:54 to 08:11:20,[394] Ms. Smith remained in the vicinity of TE-0130 and did not actively monitor Tave and Tref, let alone request a rod withdrawal.[395] Ms. Smith states that she requested a rod withdrawal which was interrupted by the initiation of event 4 with the tripping of the NSCW fan.[396] However, none of the

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[389] *Id*.

[390] *Id*.

[391] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 18.

[392] Exhibit CCS-058, 14, 52.

[393] Exhibit NRC-002 (Bates Testimony), 35.

[394] Exhibit CCS-058, 28, 44.

[395] Exhibit CCS-058, 44, 52; Exhibit NRC-002 (Bates Testimony), 35-36.

[396] Exhibit CCS-076, 21.

contemporaneous, detailed notes of the three examiners observing the scenario reflect this assertion.[397] Event 4 ran from 08:11:20 to 08:18:02 and did not involve any participation by Ms. Smith as OATC.[398] However, as indicated by examiner notes, Ms. Smith waited until 08:18 to request a rod withdrawal.[399] This rod withdrawal was interrupted by event 5.[400] Ms. Smith's operator actions with respect to event 5 were completed by about 08:19, but the procedural actions related to event 5 continued until about 08:31.[401] Again, during this period, Ms. Smith was not otherwise occupied and yet still did not request a rod withdrawal.[402] At approximately 08:32, Tave drifted out of band.[403] Still, it wasn't until five minutes later, at 08:37, that Ms. Smith requested, for only the second time since 07:36, a rod withdrawal.[404]

This reconstruction of events based on the testimony and contemporaneously developed notes of the three examiners demonstrates that Ms. Smith had multiple opportunities to request a rod withdrawal, but that she did not take advantage of these opportunities and was overall insufficiently attentive to her OATC responsibility for maintaining Tave within band. As a result, over the course of an hour, Tave drifted out of band. This constitutes an RF 3.a. performance deficiency because Ms. Smith, as OATC, failed to manipulate controls in a timely manner so as to avoid a violation of the Tave/Tref deviation band.

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[397] Exhibits CCS-058; CCS-047, NRC-022.

[398] *See* Exhibit NRC-002 (Bates Testimony), 35-36.

[399] Exhibit CCS-058, 52.

[400] *Id*.

[401] Exhibit CCS-058, 51, 57; NRC-002 (Bates Testimony), 36.

[402] Exhibit NRC-002 (Bates Testimony), 36.

[403] *Id*.

[404] Exhibit CCS-058, 60.

Though Ms. Smith's assertion that the insertion of event 5 disturbed her one request to withdraw control rods while Tave was still within band is true,[405] it is not true that this insertion caused Ms. Smith's performance deficiency such that the performance deficiency should not be counted against Ms. Smith. She had opportunities before this request as well as opportunities after this request to prevent Tave from drifting out of band. For instance, after her event 5 immediate operator actions were complete, she still had a period from approximately 08:19 to 08:32 during which she could have requested rod withdrawal and prevented a violation of the Tave/Tref band.[406]

Additionally, by assigning Ms. Smith an RF 3.a. error, the examiners treated Ms. Smith consistently with other applicants. For instance, the SRO for this scenario, Operator V, was also assessed an RF 3.a. error for allowing Tave to drift out of band.[407]

The informal review panel did not identify Ms. Smith's failure to maintain Tave within band as a performance deficiency because it accepted as true her argument that she twice requested to withdraw rods, as opposed to the examiner notes which identified only one such request.[408] However, in this proceeding, unlike in the informal review process, Ms. Smith must demonstrate by clear evidence that the Staff improperly discharged its duties in assessing her grades and, because the Staff Testimony and exhibits cited above demonstrate that Ms. Smith had multiple opportunities to request rod withdrawal and was insufficiently attentive to the Tave/Tref deviation, Ms. Smith cannot satisfy this burden of proof. Therefore, Ms. Smith's Statement of Position 4 argument fails.

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[405] Exhibit CCS-076, 21.

[406] Exhibit CCS-058, 51, 57; *see also* NRC-002 (Bates Testimony), 36.

[407] Exhibit NRC-002 (Bates Testimony), 36.

[408] Exhibit CCS-037, 22-23.

2. Smith Statement of Position 5 – Scenario 3, Event 7

Form ES-D-1 describes S3, E7 as a steam generator tube rupture.[409] As part of the response to this event, Ms. Smith, as CRS, after verifying that the pressurizer pressure digital gauge read less than 2000 psig, directed the OATC to block low pressurizer pressure Safety Injection/Steam Line Isolation (SI/SLI).[410] However, this action was not initially successful because, though the gauge used by Ms. Smith read less than 2000 psig, the P-11 interlock, which prevents the blocking of SI/SLI unless two-out-of-three pressurizer pressure instruments read less than 2000 psig, was not cleared.[411] Since Ms. Smith only referenced one indication of pressurizer pressure and did not reference the P-11 interlock status light before first attempting to block SI/SLI, the examiners determined that she had demonstrated a performance deficiency and they assigned this performance deficiency to RF 1.b. for failure to ensure the collection of complete information.[412]

When reviewing the record in a light most beneficial to Ms. Smith, the informal review panel decided not to identify her failure to review the P-11 status light as a performance deficiency.[413] Though an SRO applicant is required to fully understand plant conditions by utilizing all applicable indications before ordering actions like blocking SI/SLI, the procedures that Ms. Smith was following only stated that pressurizer pressure should be less than 2000 psig, and did not include the fact that this is indicated by the P-11 status light.[414] Therefore, the

[409] Exhibit CCS-048, 2.

[410] Exhibit NRC-002 (Bates Testimony), 22-23.

[411] *Id*.; Exhibit CCS-045, 10.

[412] Exhibit NRC-002 (Bates Testimony), 23.

[413] Exhibit CCS-037, 10.

[414] Exhibit CCS-037, 11.

informal review panel concluded that the benefit of the doubt would require allowing Ms. Smith to use any single indication of pressurizer pressure less than 2000 psig.[415]

Ms. Smith argues that the identification of an RF 1.b. performance deficiency by the Region II examiners was incorrect, because they "made an error in assessing that the block was attempted at the wrong time."[416] The error that she claims was made was that the examiners thought that the pressurizer pressure digital gauge read 2007 psig, when this was the reading of the reactor coolant system (RCS) digital gauge and the pressurizer pressure digital gauge actually read 1998 psig.[417] Thus, reasons Ms. Smith, since the pressurizer pressure digital gauge read less than 2000 psig, the SI/SLI block should have been successful and the fact that it wasn't successful can only be attributed to "an abnormal issue with the simulator" and not any performance deficiency on her part.[418]

This argument does not prove that the Region II assessment of an RF 1.b. error was inappropriate or unjustified; on the contrary, it illustrates that Ms. Smith possesses a continuing and fundamental misunderstanding of the P-11 interlock. Just because the digital pressurizer pressure gauge read less than 2000 psig, does not mean, as Ms. Smith asserts, that the blocking of SI/SLI should have been successful and that thus the failure of the block was due to a simulator error.[419] The P-11 interlock prohibits the blocking of SI/SLI unless two-out-of-three pressurizer pressure instruments read less than 2000 psig, not unless the digital pressurizer pressure gauge reads less than 2000 psig.[420] Therefore, Ms. Smith's argument proves that she still does not understand the complete information that must be collected in order to properly

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[415] *Id*. at 10-11.

[416] Exhibit CCS-076, 25.

[417] *Id*. at 24.

[418] *Id*.

[419] *Id*.

[420] Exhibit NRC-002 (Bates Testimony), 24-25.

diagnose when SI/SLI can be blocked, and that the Region II identification of an RF 1.b. performance deficiency is indeed appropriate and justified.

Furthermore, Ms. Smith has failed to prove that the failed SI/SLI block was due to simulator error and not due to her own performance error in not observing the status of the P-11 light. On the contrary, the Staff Testimony proves that the simulator was fully functional and responded as was expected during this scenario.[421] Prior to being administered, the scenario, including the accuracy of the P-11 interlock, was validated by numerous licensed operators, training staff, and NRC examiners.[422] Neither of the other two applicant crews had any issue with the operation of the P-11 interlock when the same scenario was administered during the same day as Ms. Smith's simulator test.[423] Finally, the licensee facility is required to maintain its simulator in accordance with ANSI/ANS-3.5-1985, "American National Standard Nuclear Power Plant Simulators for Use in Operator Training," which requires that the licensee test the simulator from full power all the way down to cold conditions, which would include blocking SI/SLI when appropriate.

For these reasons, Ms. Smith has not proven by clear evidence that the Region II examiners acted arbitrarily or abused their discretion in assigned an RF 1.b. performance deficiency to her failure to observe the status of the P-11 interlock before ordering the block of SI/SLI. Therefore, Ms. Smith's Statement of Position 5 argument fails.

3. Smith Statement of Position 6 – Scenario 7, Event 6

S7, E6 is described on the ES-D-1 as, "RWST sludge mixing line pipe break with auto closure failure."[424] As part of this event, Ms. Smith, as OATC, was expected to know that the RWST sludge mixing isolation valves (1-LT-0991 and 1-LT-0990) are designed to automatically

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[421] *Id*. at 25.

[422] *Id*.

[423] *Id*.

[424] Exhibit CCS-046, 2.

close on RWST low level alarm ALB06-E04.[425] Ms. Smith was also expected to know that the handswitches for these isolation valves are located on the control room back panel QPCP and can be operated in case of auto closure failure.[426] Therefore, though not expected to physically leave the control boards for which she was responsible as OATC, Ms. Smith was expected to assist the crew in locating and closing the sludge mixing isolation valves in a timely manner following the annunciation of ALB06-E04.[427]

After reporting receipt of ALB06-E04 to the crew, Ms. Smith did not further advise the crew that, as part of their response to the alarm, they needed to ensure that the sludge mixing isolation valves had closed automatically.[428] During this event the Unit Operator stated to Ms. Smith that the sludge mixing valves should have closed on low RWST level, but Ms. Smith still did not recommend that the crew check closed the associated control room handswitches.[429] The entire crew, including Ms. Smith, demonstrated a performance deficiency by allowing the RWST leak to continue for approximately 19 minutes when the only action required to isolate the leak was to use the control room handswitches to close the sludge mixing isolation valves.[430]

Ms. Smith's performance deficiency was assigned to RF 3.a., "locat[ing] and manipulat[ing] controls in an accurate and timely manner"[431] because Ms. Smith's performance demonstrated that she could not locate the control room handswitches for the sludge mixing

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[425] Exhibit CCS-045, 20.

[426] *Id*.

[427] *Id*.

[428] *Id*.

[429] *Id*.

[430] *Id*.

[431] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 18.

isolation valves in a timely manner.[432] All of the crewmembers discussed that the sludge mixing isolation valves should have automatically closed on ALB06-E04.[433] However, instead of checking closed the associated handswitches in the control room, the crew dispatched operators to the location of the leak and the report back from the field was that the leak was "downstream of the sludge mixing valves."[434] This plainly indicated that the sludge mixing valves were not closed and that the leak could be prevented simply by closing the valves.[435] Despite this guidance, it took almost twenty minutes with the RWST leaking before any crewmember acknowledged that the sludge mixing isolation valves could be closed from the control room.[436] This first acknowledgement was made by the CRS who determined that there were indeed remote handswitches for the sludge mixing isolation valves in the control room.[437]

Ms. Smith argues that her sitting idly by while the RWST leaked should not have been a performance deficiency as to her because, as OATC, operating the sludge mixing isolation valve handswitches was not her job, but the job of the Unit Operator.[438] This argument misunderstands that, failing to correct an erroneous decision, response, answer, analysis, action, or interpretation made by another crewmember may indicate that Ms. Smith agreed with the incorrect action or inaction and should also be held accountable. Additionally, Ms. Smith argues that she was ordered to monitor reactivity and therefore she could not have operated the handswitches.[439] She states that "to the extent possible [she] did assist the [Unit Operator] and

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[432] Exhibit CCS-045, 20.

[433] *Id*.

[434] Exhibit NRC-002 (Bates Testimony), 42.

[435] *Id*. at 41.

[436] *Id*.

[437] *Id*. at 42.

[438] Exhibit CCS-076, 26.

[439] Exhibit CCS-076, 26.

[CRS] by monitoring trends and updating the [CRS] on the status" meaning that she simply read off the constantly lowering RWST water level without helping to solve the problem.[440] However, RF 3.a., requires both the "manipulat[ing]" of controls and the "locat[ing]" of controls.[441] Monitoring reactivity is not such an all-encompassing task that Ms. Smith could not have demonstrated her ability to "locate" controls by making a recommendation to the crewmembers regarding where the sludge mixing isolation valve handswitches were located.[442]

Ms. Smith also states that the almost twenty-minutes delay was not due to the crew's lack of knowledge of the location of the handswitches as recorded by the examiners, but due to finding the correct procedure as supported by the testimony of the CRS, James Newton Turner.[443] This Board should resolve this factual disagreement in favor of the Staff because all three examiners contemporaneously noted in their post-scenario caucus that the delay was due to the ignorance of the crewmembers to the existence of the control room handswitches,[444] while only one applicant, after weeks of not thinking about the event, testified to the contrary.[445] Also, the Staff Testimony demonstrates that, had the crew known of the existence and location of the handswitches, the event would not have taken twenty minutes to resolve.

Ms. Smith also argues that, because her performance deficiency was not accounted for on the Forms ES-D-1 or ES-D-2, the Staff was prevented from identifying this performance deficiency in the first place.[446] As explained in detail in the Staff response to the Smith Statement of Position 12, this argument fails because, despite Ms. Smith's assertions to the

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[440] *Id*.

[441] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 18.

[442] *See* Exhibit NRC-002 (Bates Testimony), 41.

[443] Exhibit CCS-076, 26; Exhibit CCS-040, 3.

[444] Exhibit NRC-002 (Bates Testimony), 42-43.

[445] Exhibit CCS-040, 3.

[446] Exhibit CCS-076, 27. See also such arguments in Smith Statements of Position 7 and 10.

contrary, Forms ES-D-1 and ES-D-2 do not limit examiner discretion to identify performance deficiencies whenever they occur. Rather, Forms ES-D-1 and ES-D-2 provide for the examiner's reference a script of only the "required operator actions" that must be performed for the successful completion of an event and not a listing of all the possible performance deficiencies that the examiners may choose from when administering a specific event.[447] Any action, or inaction, may be a performance deficiency if it demonstrates a weakness of the applicant with respect to the minimum knowledge and understanding required to safely operate the facility, not just those actions discussed on the Forms ES-D-1 and ES-D-2.[448]

Ms. Smith faults the examiners for assessing a performance deficiency without first asking follow-up questions.[449] She argues that this lack of follow-up questioning supports her theory that this performance deficiency was "added later to increase the number of comments."[450] However, the examiners did not ask follow-up questions regarding this situation because during the post-scenario caucus they determined that enough evidence already existed to determine that the error was required to be placed in RF 3.a. due to the applicants displaying weakness with locating the handswitches.[451] This determination was based on the applicants discussing the valves' auto close feature and being informed by the field operator that the leak location was downstream of the sludge mixing isolation valves, but never discussing or going to the location of the sludge mixing isolation valve handswitches in the control room.[452] Since the applicants' actions demonstrated that none of them initially knew the location of the

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[447] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 18.

[448] *Id*. at ES-303, 2-3.

[449] Exhibit CCS-076, 28.

[450] *Id*.

[451] Exhibit NRC-002 (Bates Testimony), 41-42.

[452] *Id*.

handswitches, the examiners determined that there was no need for follow-up questioning.[453] Furthermore, once the CRS finally determined the location of the handswitches, all of the crewmembers learned where they were located and so after-the-fact questioning would not have been effectual in determining pre-event knowledge.[454]

Finally, Ms. Smith cannot support her assertion that this performance deficiency was assigned to her "later to increase the number of comments" because it was assigned contemporaneously to all the members of her crew and to the members of other crews that demonstrated a similar weakness.[455] Specifically, six applicants received similar comments on this event, two of which were serving in the OATC position.[456] In fact, this performance deficiency was so pervasive that Mr. Meeks discussed it at the Region II informal exit meeting with the licensee facility.[457] Therefore, Ms. Smith's argument that she was treated unfairly in this manner is without basis.

In conclusion, Ms. Smith does not prove by clear evidence that the examiners abused their discretion in assessing a performance deficiency for her lack of knowledge related to the location of the sludge mixing isolation valves handswitches. Assessing this performance deficiency was appropriate and justified. It was also done consistently among all of the applicants that demonstrated this deficiency. Therefore, Ms. Smith's Statement of Position 6 fails.

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[453] *Id*.

[454] *Id*.

[455] Exhibit CCS-076, 28.

[456] Exhibit NRC-002 (Bates Testimony), 44.

[457] Exhibit NRC-002 (Bates Testimony), 43; Exhibit NRC-023.

4. Smith Statement of Position 7 – Scenario 3, Event 5

S3, E5 is described on the ES-D-1 as, "[m]ain Turbine EHC Pump A trips with failure of standby EHC pump to automatically start."[458] In response to the EHC Pump A trip, Ms. Smith, as CRS, correctly directed the start of the standby pump.[459] Since this direction was given before the 1400 psig EHC system pressure setpoint for the automatic start of the standby pump was reached, it could not be known whether the automatic start feature of the standby pump was operational.[460] However, after giving this direction, Ms. Smith directed Clearance & Tagging (C&T) to investigate the auto-start feature on the standby pump.[461] After the scenario, Ms. Smith explained that she thought that the standby pump should have automatically started before she had it manually started.[462] Through these actions and statements, Ms. Smith demonstrated that she did not know the setpoint of the EHC standby pump automatic start feature and yet diagnosed the failure of the automatic start feature. Since this error involved a failure to obtain complete and accurate information on which to base a diagnosis, the examiners assigned it to RF 1.b.[463]

The informal review panel also assessed as a performance deficiency the fact that Ms. Smith incorrectly believed, and stated to the examiner of record after the scenario was completed, that the standby EHC pump should have automatically started.[464] The informal review panel assigned this error to RF 1.d. as a failure to properly interpret/diagnose plant

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[458] Exhibit CCS-048, 1.

[459] Exhibit CCS-045, 8.

[460] *Id*.

[461] *Id*.

[462] *Id*.

[463] *Id*.

[464] Exhibit CCS-037, 6-7.

conditions.[465] The informal review panel also identified as a performance deficiency the fact that Ms. Smith did not solicit any information from her crew on her incorrect determination that the standby EHC pump should have automatically started. This performance deficiency was assigned to RF 5.c, "Directing Operations—Solicit Crew Feedback".[466]

Ms. Smith concedes that, after she had the standby pump manually started, she requested that "C&T look at the EHC pump because it should have automatically started."[467] She also concedes that, after the scenario, she responded in the affirmative to the examiner's question as to whether the EHC standby pump should have auto-started.[468] There is nothing wrong with starting the standby pump manually before its automatic start setpoint; however, Ms. Smith's action calling C&T and her answer that the standby pump should have automatically started indicate that Ms. Smith manually started the standby pump because she thought that its automatic start feature was inoperable.[469] Such an assessment would only be correct if system pressure had lowered below the automatic start setpoint of 1400 psig before Ms. Smith had ordered the manual start of the standby pump. Since Ms. Smith does not prove by clear evidence that system pressure was less than 1400 psig at the time of her actions, she cannot prove that the Staff improperly discharged its duties in identifying a performance deficiency for her improper diagnosis of the standby pump automatic start feature being inoperable.

First, Ms. Smith's Statement of Position 7 fails because it is Ms. Smith that bears the burden of proving that the system pressure was less than 1400 psig in order to show that the Staff did not properly discharge its duties in assessing this performance deficiency. Ms. Smith does not satisfy this burden of proof because nowhere does she provide evidence that system

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[465] *Id*.

[466] *Id*.

[467] Exhibit CCS-076, 30.

[468] *Id*. at 32.

[469] Exhibit NRC-002 (Bates Testimony), 20.

pressure was less than 1400 psig at the time of her order to start the standby pump. Rather, Ms. Smith faults the examiners for not recording sufficient "numbers or values" and for not having "proof" or "data" that Ms. Smith's version of events is incorrect.[470] This is *per se* insufficient evidence and therefore the Smith Statement of Position 7 fails.

Second, Ms. Smith faults the identification of this performance deficiency because this particular performance deficiency, diagnosing a failure of the automatic start feature on insufficient indications, is not included in Forms ES-D-1 or ES-D-2.[471] This is not a cognizable examiner impropriety, but rather a misunderstanding of the purpose of Forms ES-D-1 and ES-D-2. These forms provide a script of all the required applicant actions; they do not presume to include, and thus limit, the entire universe of applicant mistakes that may be made in attempting to perform these required actions.[472] Thus, in actuality, every error assessed by an examiner will not be on a Form ES-D-1 or ES-D-2, because these forms only include required operator actions, which are, by definition, not errors.[473] Therefore, Smith Statement of Position 7 fails.

Finally, Ms. Smith cannot satisfy her burden of proof because the record affirmatively demonstrates that system pressure must have been greater than 1400 psig at the time of Ms. Smith's order. During the preparation week when the examiners evaluated all of the dynamic simulator material in the Vogtle simulator, an evaluation took place specifically on the time required for EHC pressure to lower to the point where ALB20-D05, HYD FLUID LO PRESS, would alarm at 1500 psig following the EHC pump trip.[474] The Form ES-D-2 states that it would take "several minutes" for ALB20-D05 to alarm.[475] During the preparation week, the examiners

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[470] Exhibit CCS-076, 31.

[471] *Id*. at 29-32. See also such arguments in Smith Statements of Position 6 and 10.

[472] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 18.

[473] *Id*.

[474] Exhibit NRC-002 (Bates Testimony), 20.

[475] Exhibit CCS-048, 28.

ran this event without starting the standby EHC pump so that they could ensure the accuracy of this statement.[476] Their tests verified that this statement was correct.[477] Since it takes "several minutes" for ALB20-D05 to alarm at 1500 psig, it must, necessarily, take a time greater than several minutes for system pressure to lower further to the standby pump automatic start setpoint of 1400 psig.

During the event, as directed by the script provided in Form ES-D-2, the examiners were monitoring ALB20-D05, which they could easily observe from anywhere within the Main Control Room.[478] ALB20-D05 did not alarm before, as recorded on all of the examiners' Forms ES-D-2, Ms. Smith directed the start of the standby EHC pump at one minute and thirty-one seconds after the EHC pump trip.[479] One minute and thirty-one seconds is a much shorter amount of time than it took for system pressure to drop to 1500 psig in practice runs of the simulation.[480] Since the ALB20-D05 alarm had not illuminated, and since only one minute and thirty-one seconds had elapsed, it is impossible that Ms. Smith gave the order to start the standby EHC pump after the automatic start setpoint of 1400 psig was reached.

Though Ms. Smith does not rely on it in her Statement of Position 7 argument, the testimony of Mr. Waltower contradicts the one minute and thirty-one second time recording of the examiners.[481] In this testimony Mr. Waltower states that, "[w]hile [Ms. Smith] was reviewing the procedure I did observe the annunciator [setpoint of 1500 psig] for the EHC pressure illuminate."[482] First, since the setpoint of the annunciator is 1500 psig, this is not clear evidence

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[476] Exhibit NRC-002 (Bates Testimony), 21.

[477] *Id*.

[478] *Id*.

[479] *Id*.

[480] *Id*.

[481] Exhibit CCS-041, 3.

[482] *Id*.

that Ms. Smith ordered the start of the standby pump after system pressure dropped below 1400 psig. Second, the recording of the examiners should be given more credence than the testimony of Mr. Waltower because the recording of the examiners was made contemporaneously and it is agreed upon by all three examiners, whereas the Mr. Waltower testimony was provided weeks after the event and is uncorroborated.

For these reasons, Ms. Smith has not proven that the Region II examiners and the informal review panel acted arbitrarily or abused their discretion in identifying performance deficiencies related to her diagnosis of the automatic start feature of the EHC standby pump.

5. Smith Statement of Position 8 – Scenario 6, Event 6

S6, E6 is described in ES-D-1 as "[p]ower reduction due to MFPT B high vibrations."[483] As part of this event, Ms. Smith, as the CRS, was expected to monitor valid indications of average temperature (Tave) and compare it to reference temperature (Tref) in order to effectively monitor automatic control rod insertion during the resultant power reduction.[484] Control rods automatically insert when Tave is 1.5 ^{o}F greater than Tref.[485] Thus, procedure 18013-C, "Rapid Power Reduction," provides guidance to monitor the Tave/Tref deviation using IPC computer point UT-0495 to ensure that automatic insertion happens at this setpoint.[486] However, this indication was not accurate during the event due to the failure of the Loop 1 HL NR RTD earlier in the scenario.[487] Therefore, Ms. Smith and the RO monitored points UT-0420 and UT-0496 to evaluate the correct response of the rod control system. [488]

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[483] Exhibit CCS-052, 2.

[484] Exhibit CCS-045, 16

[485] Exhibit CCS-076, 33.

[486] Exhibit CCS-045, 16.

[487] *Id*.

[488] *Id*.

During the initial portion of the power reduction, Tave was actually lower than Tref.[489] With Tave approximately 2 °F lower than Tref, both Ms. Smith and the OATC thought that control rods should be automatically stepping in, because they accidently inverted the Tave and Tref points (*i.e.*, thought that Tave was approximately 2 °F *higher* than Tref).[490] Therefore, Ms. Smith incorrectly directed the OATC to take manual control of the control rods and insert them 5 steps.[491] The OATC began the insertion and Ms. Smith stated "no - Tave was already cold."[492] Shortly thereafter, ALB12-A5, TAVE/TREF DEVIATION, alarmed.[493]

After the scenario, Ms. Smith was asked why she had directed taking rods to manual.[494] She stated that taking rods to manual was a bad idea.[495] The examiner also asked which temperature indications she was monitoring.[496] She stated that the normal average temperature indication was impacted by the HL RTD failure so she chose the lowest of the loop Tave values.[497]

Ms. Smith was assessed a performance deficiency because she incorrectly directed that control rods be taken in manual and inserted while Tave was lower than Tref, which resulted in the TAVE/TREF DEVIATION alarm.[498] This performance deficiency was assigned to RF 1.d. because Ms. Smith did not correctly interpret/diagnose plant conditions (*i.e.*, that control rods

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[489] *Id*.

[490] *Id*.; Exhibit CCS-076, 33-34.

[491] Exhibit CCS-045, 16.

[492] *Id*.

[493] *Id*.

[494] *Id*.

[495] *Id*.

[496] *Id*.

[497] *Id*.

[498] *Id*.

should not be automatically inserting) based on control room indications (*i.e.*, control room indications of Tave and Tref) because she improperly calculated the deviation between these two values.[499]

The informal review panel also identified this as a performance deficiency and also assigned it to RF 1.d. for the same reasons as the Region II examiners.[500]

Ms. Smith admits to the performance deficiency related to her miscalculation of the Tave/Tref deviation but argues that it should not have been assigned to RF 1.d., but rather to RF 1.b., RF 5.d., or RF 2.c.[501] RF 1.d. states, "[d]id the applicant correctly INTERPRET/DIAGNOSE plant conditions based on control room indications?"[502] RF 1.b. states, "[d]id the applicant ensure the collection of CORRECT, ACCURATE, and COMPLETE information and reference material on which to base diagnoses?"[503] RF 5.d. states, "[d]id the applicant ensure that CORRECT AND TIMELY ACTIVITIES (including diagnosis, procedural implementation, and control board operations) were carried out BY THE CREW?[504] RF 2.c. states, "[d]id the applicant USE PROCEDURES CORRECTLY, including following procedural steps in correct sequence, abiding by procedural cautions and limitations, selecting correct paths on decisions blocks, and correctly transitioning between procedures?"[505] This argument fails because Ms. Smith does not provide clear evidence that the Staff's assignment of her performance deficiency to RF 1.d. was arbitrary or an abuse of discretion; rather, the Staff Testimony and exhibits demonstrate that the Staff's assignment of Ms. Smith's performance

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[499] *Id*.

[500] Exhibit CCS-037, 37.

[501] Exhibit CCS-076, 36.

[502] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 17.

[503] *Id*.

[504] *Id*. at 19.

[505] *Id*. at 17.

deficiency to RF 1.d. was appropriate and justified. Additionally, the specifically identified performance deficiency does not satisfy the definitions of RFs 1.b., 5.d., or 2.c. Finally, although other aspects of Ms. Smith's actions during this event could have justified the identification of additional performance deficiencies in different competencies, this fact does not somehow invalidate the RF 1.d. performance deficiency graded against Ms. Smith.

Ms. Smith's specifically identified performance deficiency was her "incorrect[] direct[ion] [that]control rods be placed in manual and . . . insert[ed] when Tave was lower than Tref, which resulted in the TAVE/TREF DEVIATION alarm."[506] This error in directing the manual insertion of control rods was the direct result of Ms. Smith's incorrect interpretation/diagnosis that control rods were not properly automatically inserting based on the measurements of Tave and Tref that were being monitored.[507] Therefore RF 1.d. is an appropriate RF.

It is true that Ms. Smith also did not ensure the collection of "complete information" on which to base this incorrect diagnosis because she did not use, or direct the RO to use, the installed plant instruments to independently confirm the digital measurements that were being monitored, which is relevant to RF 1.b.[508] However, this error is a <u>separate</u> performance deficiency that was not cited by the examiners, not a better alternative assessment of Ms. Smith's incorrect direction to manually insert control rods, as she claims.[509]

Similarly, Ms. Smith's incorrect direction to manually insert control rods was not caused by her failure to ensure correct and timely activities by the crew under RF 5.d. Ms. Smith concedes that she personally viewed the measurements of Tave and Tref and came to the conclusion that the control rods should be automatically inserting.[510] Despite this fact that she

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[506] Exhibit CCS-045, 16.

[507] *Id*.

[508] Exhibit NRC-002 (Bates Testimony), 33-34.

[509] Exhibit CCS-076, 36.

[510] Exhibit CCS-076, 33-34.

had reached an independent diagnosis of the situation, Ms. Smith argues that it was the OATC's job, not hers, to diagnose whether the control rods were properly inserting and thus that RF 5.d. was the correct assessment of her error.[511] This argument illustrates a basic misunderstanding of the responsibilities of the SRO applicant. NUREG-1021 states that, "SRO applicants, whether upgrade or instant, will be examined for the highest on-shift position for which the SRO's license is applicable (e.g., shift supervisor), regardless of the position to be assigned when licensed"; therefore, "SRO applicants should demonstrate their supervisory abilities and an attitude of responsibility for safe operation, and are expected to assume a management role during plant transients and upset conditions while taking the simulator operating test."[512] Thus, Ms. Smith cannot place the blame for an incorrect diagnosis on the OATC and assign her error simply to RF 5.d "Directing Operations – Monitor Crew Activities"[513] as a failure of "[]correctly verifying the information provided."[514] Furthermore, failing to correct an erroneous decision, response, answer, analysis, action, or interpretation made by another crewmember may indicate that Ms. Smith agreed with the incorrect action or inaction and should also be held accountable.

Ms. Smith's incorrect direction to manually insert control rods was also not an RF 2.c. failure to "use procedures correctly."[515] Ms. Smith did use the procedure correctly. Procedure 18013-C, "Rapid Power Reduction," states "[v]erify rods inserting as required."[516] Ms. Smith completed this step by observing the Tave/Tref deviation and indications of rod insertion. Ms. Smith did not skip this step or mis-read this step, rather, she incorrectly performed the diagnosis

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[511] CCS-076, 34-35.

[512] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-301, 7.

[513] *Id*. at ES-303, 13.

[514] Exhibit CCS-076, 35.

[515] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 17.

[516] Exhibit CCS-051, 4.

directed by this step, which, again, is an RF 1.d. error.[517] This failure to properly perform a diagnosis required by the procedure is not analogous to the Operator R situation cited by Ms. Smith.[518] Operator R was assessed an RF 2.c. error not because he incorrectly made a diagnosis directed by a procedural step like Ms. Smith, but because he followed a procedural step that was not applicable to his situation.[519] Specifically, Operator R briefed that step 4.1.15 of UOP 12004-C would be followed, but this was incorrect because this step is only valid for conditions before the turbine is placed in service and synchronized, and in this case the turbine was already placed in service and synchronized.[520] Therefore, Ms. Smith's error is neither an RF 2.c. error nor analogous to Operator R's RF 2.c. error.

Finally, even if Ms. Smith's incorrect direction to manually insert control rods could be assigned to RFs other than RF 1.d., this does not mean that the Staff's RF 1.d. assessment was arbitrary or an abuse of discretion. First, as explained above, Ms. Smith's performance deficiency does satisfy the description of RF 1.d. Second, there is no requirement that a single performance deficiency be assigned to only one RF; rather, NUREG-1021 explicitly states that a performance deficiency may be assigned to more than one RF.[521] Therefore, Ms. Smith's argument that her performance deficiency could also be assigned to RFs 1.b., 5.d., or 2.c., does not support her claim that an RF 1.d. assignment of her performance deficiency was arbitrary or an abuse of discretion.

In conclusion, Ms. Smith does not demonstrate by clear evidence that the Staff improperly discharged its duty in assigning her incorrect direction to manually insert control rods to RF 1.d. Therefore, Ms. Smith's Statement of Position 8 fails.

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[517] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 17.

[518] Exhibit CCS-076, 35-36.

[519] Exhibit NRC-002 (Bates Testimony), 34.

[520] *Id*.

[521] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 3.

6. Smith Statement of Position 9 – Scenario 7, Event 3

S7, E3 is described on the ES-D-1 as "Loss of Cooling to Letdown Heat Exchanger (TE-0130 fails low)."[522] As part of this event, Ms. Smith, as OATC, was expected to diagnose the failure of TE-0130, Letdown Heat Exchanger Outlet Temperature, and manually control TV-0130 using controller 1TIC-0130, LETDOWN HX OUTLET TEMP.[523]

When TE-0130 failed low, Ms. Smith acknowledged the associated alarms (ALB07-F04 & ALB07-B04), but did not take any actions to manually control letdown temperature, and also did not recommend to the CRS that she could manually control letdown temperature.[524] Approximately seven minutes after the first alarm annunciated, Ms. Smith made the statement, "[t]he only thing we can do is call C&T to get the [temperature element] fixed."[525] Approximately one minute later, the CRS directed Ms. Smith to take manual control of 1TIC-0130 and control the outlet temperature.[526] When Ms. Smith began manipulating 1TIC-0130 in manual control, she initially attempted to lower outlet temperature by pressing the up arrow.[527] She apparently thought that this would throttle open TV-0130 and thus lower temperature.[528] However, the CRS immediately informed her that the arrows represent temperature, thus the up arrow increases temperature, it doesn't throttle open TV-0130 to lower temperature.[529] Following the

[522] Exhibit CCS-046, 2.

[523] Exhibit CCS-045, 21.

[524] *Id*.

[525] *Id*.

[526] *Id*.

[527] *Id*.

[528] *Id*.

[529] *Id*.

CRS's guidance, Ms. Smith eventually established manual control of letdown temperature within band.[530]

Through her incorrect manipulation of the 1TIC-0130 controller that was corrected due to help from the CRS, Ms. Smith demonstrated a performance deficiency in taking manual control of a normally automatic operation.[531] Therefore, this performance deficiency was assigned to RF 3.c.[532] The examiner also considered assessing an RF 3.b. performance deficiency because, by stating that the only response to the alarm was to replace the temperature sensor instead of recommending that she take manual control of 1TIC-0130, Ms. Smith demonstrated a lack of understanding that the system could be operated manually.[533] However, Region II did not ultimately assess this error.[534]

The informal review panel, on the other hand, did interpret the events of S7, E3 as constituting two performance deficiencies.[535] By incorrectly stating that "the only thing we can do is call C&T to get the [temperature element] fixed," instead of recommending manual control of 1TIC-130, Ms. Smith demonstrated a lack of understanding, and this performance deficiency was assigned to RF 3.b, "Control Board Operations—Understanding."[536] Then, after being affirmatively directed to take manual control of 1TIC-130, Ms. Smith incorrectly operated the controller in manual, and this performance deficiency was assigned to RF 3.c, "Control Board Operations—Manual Control."[537]

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[530] *Id*.

[531] *Id*.

[532] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 18.

[533] Exhibit NRC-002 (Bates Testimony), 45.

[534] Exhibit CCS-045, 21.

[535] Exhibit CCS-037, 29-31.

[536] *Id*.

[537] *Id*.

Ms. Smith does not contest the fact that, when directed to control Letdown Heat Exchanger Outlet Temperature manually, she did not demonstrate the ability to take manual control of this otherwise automatic function because she improperly manipulated its associated controls.[538] However, she does contest the assignment of this performance deficiency to RF 3.c.[539] Her reasoning is that her improper manipulation of the controls associated with the pressurizer PORV was assigned to RF 3.a.[540] and so her improper manipulation of 1TIC-0130 should also be assigned to RF 3.a because these errors are "equivalent."[541] Ms. Smith makes this argument without any reference to the descriptions in ES-303-4 of the RFs at issue. However, applying the descriptions of these RFs to both situations demonstrates that RF 3.a. is the appropriate RF for the pressurizer PORV issue whereas RF 3.c. is the appropriate RF for the 1TIC-0130 issue.

RF 3.a. states, "[d]id the applicant LOCATE AND MANIPULATE CONTROLS in an accurate and timely manner?"[542] RF 3.c. states, "[d]id the applicant demonstrate the ability to take MANUAL CONTROL of automatic functions?"[543] The distinction between these two descriptions is that RF 3.c. specifically assesses an applicant's ability to control a plant parameter by manually controlling the system that normally controls that parameter in automatic, whereas RF 3.a. has to do with the general accuracy and timeliness of all other control manipulations.

Letdown heat exchanger outlet temperature is a plant parameter that is normally controlled by the automatic operation of the 1TIC-0130 controller, which throttles TV-0130 as

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[538] Exhibit CCS-076, 38.

[539] *Id*. at 38-39.

[540] Exhibit CCS-045, 19.

[541] Exhibit CCS-076, 38-39.

[542] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 18.

[543] *Id*.

appropriate.[544] However, in S7, E3, the TE-0130 temperature input to this controller failed low so that, though system temperature was still being automatically maintained by 1TIC-0130, it was being automatically maintained to the wrong actual temperature.[545] Therefore, Ms. Smith was directed to take 1TIC-0130 out of automatic control and then maintain the system temperature within band by manually controlling the throttling of TV-0130.[546] This manual control of a system that is otherwise normally controlled automatically to maintain a plant parameter is typical of an RF 3.c. task.[547]

Whereas 1TIC-0130 is a controller that normally maintains a plant parameter automatically, a PORV is a safety feature that only operates in abnormal/emergency situations, specifically, in order to relieve an over-pressure situation.[548] Unlike a controller such as 1TIC-0130, a pressurizer PORV is not the automatic feature that controls its associated plant parameter, that is, the pressurizer PORV is not used to automatically control primary pressure; this is done by pressurizer heaters and spray.[549] Thus, taking manual control of pressurizer heaters and spray would be analogous to taking manual control of the letdown heat exchanger outlet temperature, but closing an opened pressurizer PORV would not.[550]

In S7, E5, the PT-456 pressure input to the pressurizer PORV failed high resulting in the PORV perceiving that an emergency over-pressure situation existed and thus opening in order to relieve this perceived pressure.[551] Unlike being ordered to take 1TIC-0130 out of automatic

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[544] Exhibit NRC-002 (Bates Testimony), 46.

[545] *Id*.

[546] Exhibit CCS-045, 21.

[547] Exhibit NRC-002 (Bates Testimony), 46.

[548] *Id*.

[549] *Id*.

[550] *Id*.

[551] Exhibit CCS-045, 19.

and manually control the letdown heat exchanger outlet temperature, in this situation, Ms. Smith's responsibility was to immediately respond by closing the pressurizer PORV.[552] The difference between these two situations is that one involves using a controller in order to replicate the otherwise expected automatic performance of that controller to maintain a plant parameter, whereas the other involves a one-time overriding of an automatic function unrelated to the normal maintenance of a plant parameter. Therefore, the Staff did not act arbitrarily or abuse its discretion in assigning Ms. Smith's pressurizer PORV performance deficiency to RF 3.a. and her 1TIC-0130 performance deficiency to RF 3.c.

In addition to arguing that her 1TIC-0130 performance deficiency should have been assigned to RF 3.a. instead of RF 3.c., Ms. Smith also argues that no performance deficiency should have been assigned to RF 3.b. by the informal review panel.[553] In arguing against this performance deficiency assessment, Ms. Smith again uses as an excuse her statement that she "was not assigned to respond to the failure," and that, instead, this response was the UO's job.[554] However, Ms. Smith was not assigned an RF 3.b. error because she failed to take manual control in response to the failure, she was assigned this error because she did not understand that she could take manual control (*i.e.,* she stated that the only solution was to contact C&T).[555] Assessing an RF 3.b. error for this performance deficiency is also consistent with past NRC practice. For instance, an informal review decision from March 10, 2005, found that an RF 3.b. performance deficiency should be assessed against an operator who demonstrated a lack of understanding by not recommending that a control valve that failed in automatic could be taken to manual control.[556] Additionally, Ms. Smith's actions demonstrated

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[552] *Id*.

[553] Exhibit CCS-076, 38 (Statement of Position 9.b).

[554] *Id*.

[555] Exhibit CCS-037, 31.

[556] Exhibit NRC-020, 9-10.

that she didn't understand the operation of 1TIC-0130 because she purposefully pressed the up arrow when she intended to decrease outlet temperature.[557] Therefore, her argument that an RF 3.b. error was inappropriate or unjustified fails.

In the alternative, Ms. Smith argues that she did in fact understand that 1TIC-0130 could be manually controlled and how it was controlled, as demonstrated by her correct answers to post-event questioning regarding 1TIC-0130.[558] However, the performance deficiency was assigned because Ms. Smith did not understand the operation of 1TIC-0130 at the time that the high outlet temperature alarm came in. That Ms. Smith possessed this understanding after the event is irrelevant, because the CRS explained the operation of the controller to her during the event.[559]

For these reasons, Ms. Smith fails to demonstrate that the Staff assignment of performance deficiencies to RFs 3.b., and 3.c. because of her lack of understanding of the operation of 1TIC-0130 and her inability to take manual control of the automatic functions of 1TIC-0130 was arbitrary or an abuse of discretion.

7. Smith Statement of Position 10 – Scenario 6, Event 4

S6, E4 is described in the Form ES-D-1 as, "[c]ontrolling PRZR level channel LT-459 fails low over 10 minutes resulting in FIC-0121 raising charging flow."[560] As part of this event, Ms. Smith was expected to understand the impact of the LT-459 failure on charging flow and to direct the crew to place the charging flow controller, FIC-0121, to manual and then to select an unaffected pressurizer level channel in accordance with procedure 18001-C, Section D, "Failure of Pressurizer Level Instrumentation."[561] Taking FIC-0121 to manual before selecting an

[557] Exhibit CCS-045, 21.

[558] Exhibit CCS-076, 39.

[559] Exhibit CCS-045, 21.

[560] Exhibit CCS-052, 2.

[561] Exhibit CCS-045, 14.

unaffected pressurizer level channel was necessary to avoid a rapid lowering of charging flow because pressurizer level had been above setpoint for several minutes due to the LT-459 failure, thereby causing the controller output signal to demand less charging flow.[562] It was expected that FIC-0121 would be maintained in manual until the controller output signal would maintain charging flow at an acceptable level (*i.e.* until the controller became "unsaturated").[563] Returning FIC-0121 to automatic too soon would result in a rapid lowering of charging flow.[564]

In response to the LT-459 failure, Ms. Smith directed taking the charging flow controller to manual and then directed selecting an unaffected pressurizer level channel.[565] The controller was in manual for approximately 18 minutes with a level deviation signal building in.[566] However, before the controller was sufficiently unsaturated so that it would control charging flow at a rate that would provide adequate flow through the regenerative heat exchanger, Ms. Smith directed the OATC to return FIC-0121 to automatic.[567] As a result of taking the controller to automatic while still saturated, charging flow rapidly lowered.[568] In response, the OATC took FIC-0121 back to manual.[569] The BOP informed Ms. Smith that he believed that FIC-0121 had failed.[570] After the scenario, the examiner asked Ms. Smith if there was a problem with FIC-0121.[571] Ms. Smith stated that the charging control valve was closing and that it should not

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[562] *Id*.

[563] *Id*.

[564] *Id*.

[565] *Id*.

[566] Exhibit NRC-002 (Bates Testimony), 30.

[567] *Id*.

[568] *Id*.

[569] *Id*.

[570] *Id*.

[571] *Id*.

have been closing because pressurizer level was on program.[572] The examiners identified this as a performance deficiency because Ms. Smith's actions demonstrated that she did not understand that charging flow would decrease due to the controller's response to pressurizer level being above setpoint for such a long time (*i.e.*, saturation).[573] This lack of understanding of saturation was assigned to RF 1.c.[574]

The examiners also identified two additional performance deficiencies in communications because, after directing the OATC to take FIC-0121 to manual, Ms. Smith held a crew brief and incorrectly stated that the controller was in automatic.[575] Also, in response to the failure of LT-459, Ms. Smith directed the BOP to perform immediate operator actions, but no such immediate operator actions exist.[576] These examples of unclear communications were both assigned to RF 4.a.[577]

The informal review panel identified the same three performance deficiencies.[578] It also identified as one additional performance deficiency Ms. Smith's directing that FIC-0121 be returned to automatic during the crew response to another alarm, even though charging rate was being sufficiently maintained in manual.[579] This complicated overall plant recovery demonstrating that Ms. Smith did not provide sufficient direction and guidance to facilitate crew performance and thus the error was assigned to RF 5.b, "Directing Operations—Oversight."[580]

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[572] *Id*.

[573] Exhibit CCS-045, 14.

[574] *Id*.

[575] *Id*. at 23.

[576] *Id*. at 24.

[577] *Id*. at 23, 24.

[578] Exhibit CCS-037, 19-20, 31-33.

[579] Exhibit CCS-037, 19-20.

[580] *Id*.

Ms. Smith argues that there was no RF 1.c. or RF 5.b. performance deficiency with regard to saturation because the Forms ES-D-1 and ES-D-2 describe that the FIC-0121 controller was supposed to be returned to automatic but do not mention when the controller is supposed to be returned to automatic.[581] This argument does not satisfy Ms. Smith's burden of proving that the Staff identification of the performance deficiency was inappropriate or unjustified. First, Ms. Smith was not downgraded for failing to return the controller to automatic; she was downgraded for failing to correctly return the controller to automatic, because she returned the controller to automatic without considering or understanding the effect of this action on the plant and on the crew's response to a recently entered transient.[582]

Second, whether a particular applicant action is included in Forms ES-D-1 or ES-D-2 does not dictate whether that action can be identified as a performance deficiency. On the contrary, NUREG-1021 explicitly states that Forms ES-D-1 and ES-D-2 only provide a listing of the required correct applicant actions; they do not provide an exhaustive listing of the universe of possible incorrect applicant actions.[583] Therefore, just because Ms. Smith's incorrect action of taking FIC-0121 to automatic while it was saturated and while the plant was responding to another transient is not listed in Forms ES-D-1 or ES-D-2 does not mean that it is not a performance deficiency, as Ms. Smith argues. Rather, examiners are required to record "any and all" potential performance deficiencies on the operating test.[584] The only ones of these potential performance deficiencies that cannot later be used for grading purposes are those that the applicant made in response to parts of the planned operating test that were substituted or

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[581] Exhibit CCS-076, 40-41.

[582] Exhibit CCS-045, 14; Exhibit CCS-037, 19-20.

[583] NUREG-1021 (Exhibits CCS-005A, CCS-005B), xviii ("B.3 has been edited to state that Form ES-D-2 should include every required, rather than expected, operator action.) (emphasis added).

[584] *Id*. at ES-302, 3 ("The examiner must take sufficient notes to facilitate thorough documentation of any and all applicant deficiencies in accordance with ES-303. The examiner must be able to cross-reference each comment to a specific JPM, simulator event, or for-cause followup question.") (emphasis added).

replaced after the development of the final Forms ES-D-1 and ES-D-2 because those previously planned portions were determined to be invalid or impossible to perform or simulate.[585] There were no such substitutions of the planned parts of Ms. Smith's simulator scenarios with unplanned parts.[586] Therefore, all of the identified performance deficiencies from Ms. Smith's simulator test may be used to determine her competency grades and Ms. Smith's "incomplete Forms ES-D-1 and ES-D-2" arguments fail.[587]

Ms. Smith also argues that the Staff improperly inserted an error in the simulation while she was still coping with the controller error.[588] First, this argument is non-responsive because Ms. Smith does not explain how this alleged Staff action was causally related to any downgrading of her simulator test. Ms. Smith was downgraded because of her answer after the scenario that demonstrated that she did not understand the concept of saturation.[589] This performance deficiency was not caused by any sort of stress that Ms. Smith may have been subjected to due to allegedly overlapping events; it was an understanding deficiency. Second, despite Ms. Smith's claim to the contrary, the Staff did not insert a new failure while a previous failure was still being addressed. The plant was stable when the examiners called for the next event to be triggered because FIC-0121 was being controlled satisfactorily in manual.[590] It was only once the next event was triggered with the insertion of a failure of PT-508 that Ms. Smith then directed that FIC-0121 be returned to auto instead of prudently realizing that FIC-0121 was being satisfactorily controlled in manual and attending to the more pressing issue of the PT-508

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[585] *Id*.

[586] Exhibit NRC-002 (Bates Testimony), 22.

[587] See also such arguments in Smith Statements of Position 6 and 7.

[588] Exhibit CCS-076, 40.

[589] Exhibit CCS-045, 14.

[590] Exhibit NRC-002 (Bates Testimony), 31.

failure.[591] Thus, by returned FIC-121 to auto at this moment, Ms. Smith demonstrated both a lack of understanding of saturation and a lack of competent supervisory oversight.[592] She caused a second transient (uncontrolled loss of charging flow) to occur simultaneously with the PT-508 failure.[593] Therefore, it was Ms. Smith, not the Staff, that caused two failures to be inserted at once.

For these reasons, Ms. Smith fails to prove by clear evidence that the Staff assignment of performance deficiencies related to her response to the failed-low LT-459 was arbitrary or an abuse of discretion.

8. Smith Statement of Position 11 – Scenario 3, Event 4

S3, E4 is described on the ES-D-1 as, "[c]ontrolling PRZR Pressure channel PT-455 fails high."[594] As part of the response to this event, Ms. Smith, as CRS, entered 18001-C, Section C, and performed all required steps except for ensuring that pressurizer heaters were correctly returned to automatic.[595] When Ms. Smith reached Step C8.b, which requires that heaters be taken to automatic, she stated that the crew would wait to place heaters in automatic.[596] She also stated that, "I do not think heaters are operating properly" and that "Taking heaters back to auto may not be what we want."[597] A couple of minutes later, however, she directed the OATC to "Go ahead and take pressurizer heaters to on," to which the OATC replied, "I am maintaining pressure."[598] After this communication, the OATC did not take any action to change the

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[591] *Id*.

[592] Exhibit CCS-045, 14; Exhibit CCS-037, 19-20.

[593] Exhibit CCS-037, 20.

[594] Exhibit CCS-048, 4.

[595] Exhibit CCS-045, 12.

[596] *Id*.

[597] Exhibit CCS-043, 78.

[598] *Id*.

configuration of the pressurizer heaters.[599] Shortly thereafter, Ms. Smith again stated to the OATC that "Now we can take heaters to auto."[600] The OATC did not verbally respond to this direction; instead, without further communication, he placed only the "A" backup heaters to ON (*i.e.*, manual control).[601] Despite having ordered automatic control, Ms. Smith permitted the OATC to manually control pressurizer heaters for the remainder of the scenario.[602] After the scenario, Ms. Smith was asked to explain her actions pertaining to pressurizer heater operation.[603] Ms. Smith stated that she did not want to place heaters to automatic until pressure was lower.[604] The examiners identified this as a performance deficiency because, even though the pressurizer pressure control system was functioning properly after an unaffected channel had been selected and even though taking the heaters to automatic was required by 18001-C, Step C8.b, Ms. Smith did not ensure that pressurizer heaters were taken to automatic.[605]

The examiners assigned this performance deficiency to RF 1.c., which relates to the applicant's "understanding of how the plant, systems, and components operate and interact (including set points, interlocks, and automatic actions)."[606] The examiners considered identifying additional performance deficiencies because, among other errors, Ms. Smith directed actions to be carried out, but these directions were not complied with and Ms. Smith did not address this situation.[607]

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[599] *Id*.

[600] *Id*.

[601] Exhibit CCS-045, 12.

[602] *Id*.

[603] *Id*.

[604] *Id*.

[605] *Id*.

[606] *Id*.; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 17.

[607] *See* Exhibit NRC-002 (Bates Testimony), 27-28.

The informal review panel also assessed an RF 1.c. error for Ms. Smith's incorrect belief that the pressurizer heaters were not operating properly.[608] In addition, the informal review panel assessed an RF 2.c. error, because Ms. Smith did not implement Procedure 18001-C, step C8, correctly by not taking the pressurizer heaters to automatic control as required, and an RF 5.d. error, because Ms. Smith did not ensure that her order to take pressurizer heaters to automatic was carried out.[609]

In response, Ms. Smith first argues that the assessment of an RF 1.c. error was inappropriate or unjustified because she did understand the pressurizer pressure system.[610] She states that she "did not at any time [incorrectly] believe that the Pressurizer Pressure system was not operating properly."[611] However, this unsubstantiated assertion is directly contradicted by the record developed by the examiners.[612] At time 11:07:00, Ms. Smith directed the OATC to select an unaffected channel on PS-455F in accordance with 18001-C, Step C7.[613] In doing so, the failed pressure channel was removed from the control circuit and the pressurizer pressure system was again functioning normally.[614] However, instead of returning the pressurizer heaters to automatic as would be directed by one who understood that the pressurizer pressure system was functioning normally, Ms. Smith decided to wait and explicitly stated that, "I do not think heaters are operating properly . . . taking heaters back to auto may not be what we want."[615]

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[608] Exhibit CCS-037, 14-16.

[609] *Id*.

[610] Exhibit CCS-076, 44.

[611] *Id*.

[612] Exhibit CCS-045, 12.

[613] Exhibit CCS-043, 23.

[614] Exhibit NRC-002 (Bates Testimony), 26-27.

[615] Exhibit CCS-043, 78.

Second, Ms. Smith argues that her delay in taking pressurizer heater to automatic itself demonstrates that she understood the operation of the pressurizer pressure system.[616] She states that such a delay was desired because she was "tak[ing] into consideration that because of the high level from the Pressurizer Level system, heaters would come on if they were taken to automatic" and this would "cause a rapid increase in pressure" that would "caus[e] the Pressurizer Pressure to exceed the procedural band of 2220 – 2250 psig."[617] However, this argument regarding the desirability of energizing heaters is, in of itself, another demonstration of Ms. Smith's misunderstanding of the system. The control systems for pressurizer heaters are actually designed so that the heaters energize when a sufficiently high pressurizer level deviation, including the 5% above program level identified in this instance, exists to ensure that water in-surge into the pressurizer will be returned to saturation conditions.[618] Additionally, Ms. Smith's concern that the energizing of the pressurizer heaters would cause pressurizer pressure to exceed the upper end of the procedurally directed control band of 2250 psig is unfounded. The examiner notes demonstrate that pressurizer pressure was 2248 psig and lowering when Ms. Smith reached step C8.[619] Pressurizer sprays will always dominate the pressure control balance when competing with pressurizer heaters.[620] Therefore, taking heaters to automatic at this time would have had no impact on pressure control because the OATC had the ability to control pressure with spray in MANUAL. Similarly, with spray control in AUTO, pressurizer pressure would again be maintained within band even if pressurizer heaters were taken to AUTO at 2248 psig. Hence, the fact that Ms. Smith did not take heaters to automatic demonstrates that Ms. Smith misunderstood the pressure control system and her argument in

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[616] Exhibit CCS-076, 44-45.

[617] *Id*.

[618] Exhibit NRC-002 (Bates Testimony), 29.

[619] Exhibit NRC-044, 12.

[620] Exhibit NRC-002 (Bates Testimony), 29.

favor of delay further demonstrates that she still misunderstands the system. Therefore, Ms. Smith was not downgraded for "tak[ing] into consideration" the consequences of taking the pressurizer heaters to automatic, as she alleges,[621] but for incorrectly understanding these consequences, or how "the plant, systems, and components operate and interact" which is an RF 1.c. error.[622]

Finally, Ms. Smith argues that the assessment of this performance deficiency was not consistent with the assessment of performance deficiencies for other applicants.[623] Specifically, she identifies that "Operator V" was not downgraded for leaving the TV-129 handswitch in the "divert" position instead of returning it to the "demin" position.[624] This example is not analogous to Ms. Smith's performance because Operator V did not demonstrate any misunderstanding of the demineralizer system.[625] Rather, Operator V consciously kept the demineralizers bypassed for the valid reason of waiting until chemistry personnel could evaluate placing the demineralizers back in service.[626] Ms. Smith, on the other hand, did not understand that keeping the pressurizer heaters in manual did not serve any valid purpose because the pressurizer pressure system was functioning normally.

For these reasons, Ms. Smith does not prove by clear evidence that the assessment of a performance deficiency regarding her understanding of the operating of the pressurizer heaters was inappropriate or unjustified or that it was arbitrary or an abuse of discretion as compared to the grading of other applicants.

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[621] Exhibit CCS-076, 45.

[622] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 17.

[623] *Id*.

[624] *Id*.

[625] Exhibit NRC-002 (Bates Testimony), 28.

[626] *Id*.

9. Smith Statement of Position 12 – Scenario 7, Event 5

S7, E5 is described on the ES-D-1 as, "PRZR PT-456 fails high resulting in PORV 456 failing open and block valve HV-8000B failure to auto close."[627] As part of this event, Ms. Smith, as CRS, was expected to diagnose a failure of PT-456, and correctly perform the immediate operator actions of procedure 18001-C, "Systems Instrumentation Malfunction," Section C, which include closing pressurizer spray valves, closing the affected PORV, and operating heaters as necessary to restore pressure.[628] Immediate operator actions are required to be completed without requesting permission of, or requiring assistance from, other crewmembers.[629]

Ms. Smith correctly diagnosed that PT-456 had failed high and immediately closed the pressurizer spray valves.[630] However, she did not immediately close the affected PORV, or its associated PORV Block Valve, and PRZR pressure continued to lower.[631] Approximately 30 seconds after initiation of the failure, the CRS loudly directed, "Shut that valve!"[632] Ms. Smith then closed the PORV to halt the pressure decrease.[633] After the scenario, Ms. Smith was asked to explain her response to the PT-456 failure.[634] Ms. Smith stated that she had initially manipulated the PORV switch in the wrong direction.[635] The examiners identified this as a

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[627] Exhibit CCS-046, 2.

[628] Exhibit CCS-045, 19.

[629] *Id*.

[630] *Id*.

[631] *Id*.

[632] *Id*.

[633] *Id*.

[634] *Id*.

[635] *Id*.

performance deficiency and assigned it to RF 3.a. because Ms. Smith did not "LOCATE AND MANIPULATE CONTROLS in an accurate and timely manner."[636]

The informal review panel also identified this as a performance deficiency and also assigned it to RF 3.a.[637] Though this required operator action was not labeled as a critical task on the associated Forms ES-D-1 and ES-D-2, the informal review panel, in accordance with NUREG-1021, Appendix D, determined that it was, in fact, a critical task and graded it as such.[638]

Though Ms. Smith does not contest that her failure to perform the required immediate operator action to close the pressurizer PORV and prevent a small loss of coolant accident is a performance deficiency, she argues that it is not a critical task.[639] First, she states that this performance deficiency could not be a critical task because the Staff did not identify how the critical task criteria of Appendix D were met.[640] This argument is legally insufficient. As the party alleging that a government agency improperly discharged its duties, Ms. Smith bears the burden of proving, by clear evidence, that the critical task criteria were not met, not vice-versa. This burden of proof is not met by Ms. Smith's statement that the Staff "did not consider if [the failure to close the pressurizer PORV] fully met all the requirements" of a critical task.[641] Therefore, this argument fails.

Even if this argument was not legally insufficient, it substantively fails because the closing of a failed open pressurizer PORV is a critical task as demonstrated by NUREG-1021 and past NRC practice.

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[636] *Id*.; NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 18.

[637] Exhibit CCS-037, 37.

[638] *Id*. at 37-38.

[639] Exhibit CCS-076, 46-48.

[640] *Id*. at 47.

[641] *Id*.

NUREG-1021 states that, "[o]n the initial licensing examinations, [critical tasks] provide a basis for the individual operator competency evaluations because they help the examiner to focus on those tasks that have a significant impact on the safety of the plant or the public."[642] A critical task is defined as a task that has four elements: safety significance, cueing, measurable performance indicators, and performance feedback.[643] "Safety significance" means that the task must be "essential to safety."[644] A task is essential to safety if "its improper performance or omission by an operator will result in direct adverse consequences or significant degradation in the mitigative capability of the plant."[645] Such adverse consequences include the "degradation of any barrier to fission product release."[646] A critical task may involve the crew responding to "prevent inappropriate actions that create a challenge to plant safety."[647]

"Cueing" means that an external stimulus must prompt at least one operator to perform the critical task.[648] The cue is not required to identify the task as critical.[649] Appropriate cues include, "indication of a system or a component malfunction . . . by meters or alarming devices."[650]

"Measurable performance indicators" means "positive actions that an observer can objectively identify taken by at least one member of the crew."[651] Measurable performance

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[642] NUREG-1021 (Exhibits CCS-005A, CCS-005B), Appendix D, 12.

[643] *Id*. at 13-14.

[644] *Id*. at 13.

[645] *Id*.

[646] *Id*.

[647] *Id*.

[648] *Id*. at 14.

[649] *Id*.

[650] *Id*.

[651] *Id*.

indicators include such things as “control manipulations”[652] but not more difficult to identify qualities such as “understanding.”[653]

“Performance feedback” means that at least one crewmember must be provided with information about the effect of the crew’s actions on inaction on the critical task.[654]

Responding to a failed open pressurizer PORV is a critical task because it has all four of these elements. First, responding to a failed open pressurizer PORV has safety significance because this response is essential to safety in that its improper performance will result in direct adverse consequences or significant degradation in the mitigative capability of the plant. Specifically, not closing a failed open pressurizer PORV degrades a barrier to fission product release because a failed open pressurizer PORV is essentially a small loss of coolant accident (LOCA).[655] If allowed to continue, this LOCA would require an automatic reactor trip and safety injection to mitigate.[656] Otherwise, the LOCA would result in the uncovering of the core, core meltdown, and fission product release.[657] It is worth noting, that the accident at Three Mile Island was, in part, due to a failed open pressurizer PORV.[658] Ms. Smith was expected to prevent this challenge to plant safety by immediately closing the failed open pressurizer PORV. This event was appropriately cued because Ms. Smith was able to determine from plant indications that the pressurizer pressure sensor had failed and that the pressurizer PORV had opened. This event involved measurable performance indicators because the operator response involved the control manipulation of closing the pressurizer PORV, which an observer

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[652] *Id*.

[653] *Id*. at 14-15.

[654] *Id*. at 15.

[655] Exhibit NRC-004 (Jackson Testimony), 13-14.

[656] *Id*.

[657] *Id*.

[658] *Id*.

could objectively identify and which required response was listed on the Form ES-D-2. Finally, this event involved performance feedback because plant indications provided the crew with information about the effect of the closing of the pressurizer PORV. Specifically, after closing the PORV, pressurizer pressure recovered, and PRT parameters stabilized.[659] Therefore, this event satisfies the NUREG-1021 definition of a critical task.

Defining a failed open pressurizer PORV as a critical task is also supported by past NRC precedent. For instance, an informal review decision from March 10, 2005 discussed a failed open PORV event.[660] This event required the operator to manually close SG PORVs.[661] The operator properly manipulated the controls to close the SG PORVs; however, the operator did not verify that all the SG PORVs actually closed and so did not notice that one of the PORVs failed open.[662] The informal review determined that, by not accurately completing the control manipulation due to not checking the PORV's position after the controller had been manipulated, the operator demonstrated an RF 3.a. error.[663] Also, though it had been labeled as such, the informal review confirmed that this was an error on a critical task.[664] Since, this error is substantively identical to the error committed by Ms. Smith, grading Ms. Smith's error to be an RF 3.a. critical task error is consistent with past NRC precedent. Additionally, other Forms ES-D-1 and ES-D-2 for other simulator tests label events involving a failed open pressurizer PORV as critical tasks.[665]

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[659] *Id*.

[660] Exhibit NRC-020, 9-10.

[661] *Id*.

[662] *Id*.

[663] *Id*. at 7.

[664] *Id*.

[665] *See, e.g.,* Exhibit NRC-024, 3, 16.

Finally, Ms. Smith's conclusive statement that "[i]t is obvious that this adjustment [of recognizing that the failed open pressurizer PORV event is a critical task] occurred due to the desire to find additional comments" is verifiably false.[666] This theory is proven incorrect by the flip chart notes taken during the very first meeting of the informal review panel.[667] At the time that these notes were taken, it was impossible for the informal review panel to have known whether its review of Ms. Smith's performance would result in a passing or failing grade, let alone whether some portion of her simulator test would have to be identified as a critical task in order to justify a failing grade. And yet, as part of the flip chart notes having to do with the RF to be assigned to the pressurizer PORV performance deficiency, the informal review panel wrote, "Make sure closing PORV not critical. [ES-D-2] says no, but not stopping a LOCA perhaps is critical by Westinghouse guidance."[668] Therefore, there is no merit to Ms. Smith's argument that the critical task designation was made specifically to find a way late in the review process to ensure that Ms. Smith would fail the simulator test.

Ms. Smith's second argument is that closing the failed open pressurizer PORV could not be a critical task because it was not identified as a critical task on Forms ES-D-1 and ES-D-2. It is true that every required operator action should be included on Form ES-D-2 and that all critical tasks "shall be flagged in a manner that makes them apparent to the individuals who will be administering the operating test" including "set points and other parameters . . . to provide an objective method for evaluating the operators' performance."[669] However, Ms. Smith is incorrect in arguing form over substance and claiming that a critical task is made a critical task by its labeling as a critical task.[670] This cannot be correct. As described above, NUREG-1021,

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[666] Exhibit CCS-076, 48.

[667] Exhibit CCS-065.

[668] *Id*. at 18.

[669] NUREG-1021 (Exhibits CCS-005A, CCS-005B), Appendix D, 3.

[670] Exhibit CCS-076, 47.

Appendix D defines a critical task as a task that satisfies the elements of safety significance, cueing, measurable performance indicators, and performance feedback.[671] It does not state that a critical task that satisfies these criteria must also be labeled as a critical task in order to be a critical task. Rather, it is apparent from the context of the critical task labeling requirements that labeling is not intended to make a task a critical task, but it is intended to assist the examiner in his administration of the simulator test and in his later evaluation of the applicant's performance on the simulator test.[672] Also, the definition of critical task itself supports this interpretation because it explains that the purpose of critical tasks is to "help the examiner" to focus on those tasks that have a significant impact on the safety of the plant or the public.[673] The fact that labeling is for the benefit of the examiner, and not to definitively determine what is a critical task, is further supported by the fact that Forms ES-D-1 and ES-D-2 are generally only used by the NRC and the licensee facility and an applicant only ever sees these forms after their operator license application is denied.[674] Finally, OLMC-500 explicitly recognizes that an informal review can analyze after-the-fact whether an action is critical.[675] Therefore, Ms. Smith's argument that an otherwise critical task according to the definition of NUREG-1021, Appendix D, cannot be enforced as a critical task if it is not so labeled on Forms ES-D-1 and ES-D-2 fails because the labeling of these forms is to assist the examiner in administering and evaluating the simulator test and not to inform the applicant of what is a critical task.

Ms. Smith's labeling argument, if accepted, would also lead to inequitable and inconsistent grading determinations contrary to Ms. Smith's statement that "[t]he entire reason

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[671] NUREG-1021, Appendix D, 13-14.

[672] *Id*. at 3.

[673] *Id*. at 12.

[674] *See* Exhibit NRC-002 (Bates Testimony), 5.

[675] OLMC-500 (Exhibit CCS-030), 9.

for developing a test outline prior to the test is to ensure that an applicant is treated fairly."[676] NUREG-1021 is a public document available to all applicants to review before taking their operating test. Therefore, applicants must be able to rely on its Appendix D definition of critical task to determine for themselves what may be a critical task during their simulator test. However, this reliance on the NUREG-1021 definition of critical task would be upset by any individual Form ES-D-1 or ES-D-2 that was mistakenly labeled with respect to critical tasks. For instance, if a critical task was labeled as such on some Forms ES-D-1 and ES-D-2 but was not labeled as such on others, then the grading of these operating tests would differ because of the differences in the forms and not because of the substantive difference of their scenarios. Similarly, if a set of actions was accidentally labeled as being related to a critical task, and an applicant demonstrated performance deficiencies on these actions, then the RF assigned to the deficiency would have to be scored as a "1" even though the actions were not actually critical. Therefore, Ms. Smith's labeling argument is nonsensical. Thus, although Region II erred in not ensuring that the critical tasks related to the closure of the failed open pressurizer PORV were labeled as critical tasks, this error does not somehow make it so that these actions are not in actuality critical tasks.

For these reasons, Ms. Smith has not demonstrated by clear evidence that the Staff assessment of an RF 3.a. critical task error related to her failure to close a failed open pressurizer PORV was arbitrary or an abuse of discretion.

B. Non-contested Performance Deficiencies

In addition to the above contested performance deficiencies, Ms. Smith was assessed numerous additional performance deficiencies by both her examiner of record and the informal review panel. She was assessed one RF 4.a. error,[677] two RF 4.b. errors,[678] one RF 4.c. error,[679] and three RF 6.a. errors.[680]

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[676] Exhibit CCS-076, 47.
[677] Exhibit CCS-045, 25; Exhibit CCS-037, 36.

C. Based on the Identified Performance Deficiencies and the Assigned RFs, both the Region II Examiners and the Informal Review Panel Determined that Ms. Smith Failed the Simulator Test

1. The Final Simulator Test Grade Determined by the Region II Examiners

The RFs assessed by the Region, in total, were 1.b, 1.b, 1.c, 1.c, 1.d, 3.a, 3.a, 3.a, 3.c, 4.a, 4.a, 4.a, 4.b, 4.b, 4.c, 6.a, 6.a, 6.a. Since a single performance deficiency was assigned to RFs 1.d, 3.c, and 4.c, these RFs were given a score of 2.[681] Since two performance deficiencies were assigned to RFs 1.b, 1.c., and 4.b., the examiners were required to give Ms. Smith a score of 1 for these RFs unless a score of 2 could be justified based on Ms. Smith correctly performing another activity related to the same RF.[682] The examiners could not justify increasing the score for these RFs from 1 to 2 and, therefore, Ms. Smith was scored a 1. Since three performance deficiencies were assigned to RFs 3.a., 4.a., and 6.a., the examiners were required to give Ms. Smith a score of 1 for these RFs.[683] Taken together, Ms. Smith's final grade sheet from the Region II examiners was as follows:

Competency/ Rating Factors	RF Weights	RF Scores	RF Grades	Comp. Grades
1. Interpretation/Diagnosis				
a. Recognize & Attend	0.20	3	0.60	
b. Ensure Accuracy	0.20	1	0.20	1.70
c. Understanding	0.30	1	0.30	
d. Diagnose	0.30	2	0.60	

[678] Exhibit CCS-045, 26-27; Exhibit CCS-037, 33-34.

[679] Exhibit CCS-045, 28; Exhibit CCS-037, 35.

[680] Exhibit CCS-045, 29-32; Exhibit CCS-037, 37.

[681] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 5.

[682] *Id*.

[683] *Id*.

2. Procedures				
a. Reference	0.30	3	0.90	
b. EOP Entry	0.30	3	0.90	3.00
c. Correct Use	0.40	3	1.20	
3. Control Board Operations				
a. Locate & Manipulate	0.34	1	0.34	
b. Understanding	0.33	3	0.99	1.99
c. Manual Control	0.33	2	0.66	
4. Communications				
a. Clarity	0.40	1	0.40	
b. Crew & Others Informed	0.40	1	0.40	1.20
c. Receive Information	0.20	2	0.40	
5. Directing Operations				
a. Timely & Decisive Action	0.30	3	0.90	
b. Oversight	0.30	3	0.90	3.00
c. Solicit Crew Feedback	0.20	3	0.60	
d. Monitor Crew Activities	0.20	3	0.60	
6. Technical Specifications				
a. Recognize and Locate	0.40	1	0.40	
b. Compliance	0.60	3	1.80	2.20

Since all six of her competency grades were not greater than 1.8, Ms. Smith failed the simulator test.[684]

[684] *Id*. at 6.

2. The Final Simulator Test Grade Determined by the Informal Review Panel

The differences between the RFs assessed by Region II and the RFs assessed by the informal review panel are that (1) in addition to assessing an RF 1.c. error related to S3, E4, the informal review panel also assessed an RF 2.c. error and an RF 5.d. error, (2) the informal review panel assessed an RF 1.d. error instead of an RF 1.b. error related to S3, E5, (3) the informal review panel assessed an additional RF 5.c. error related to S3, E5, (4) the informal review panel did not assess an RF 1.b. error related to S3, E7, (5) the informal review panel assessed an additional RF 5.b. error related to S6, E4, (6) the informal review panel did not assess an RF 3.a. error related to S7, E1, (7) the informal review panel assessed an additional RF 3.b. error related to S7, E3, (8) the informal review panel did not assess an RF 3.a. error related to S7, E6, and (9) the informal review panel determined that the RF 3.a. error related to S7, E5 was a critical task.

As a result of these differences, the RFs assessed by the informal review panel, in total, were 1.c., 1.c., 1.d., 1.d., 2.c., 3.a. (critical), 3.b., 3.c., 4.a., 4.a., 4.a., 4.b., 4.b., 4.c., 5.b., 5.c., 5.d., 6.a., 6.a., 6.a. Since a single error was made related to RFs 2.c., 3.b., 3.c., 4.c., 5.b., 5.c., 5.d. these RF's were given a score of 2.[685] Since a single critical task error was made related to RF 3.a., this RF was given a score of 1.[686] Since two performance deficiencies were assigned to RFs 1.c., 1.d., and 4.b., the informal review board was required to give Ms. Smith a score of 1 for these RFs unless a score of 2 could be justified based on Ms. Smith correctly performing another activity related to the same RF.[687] The informal review board assumed that she did correctly perform another activity related to each of these RFs (even though no such performance was recorded by the examiners as is normally required) and increased the score

[685] *Id*. at 5.

[686] *Id*.

[687] *Id*.

for each of these RFs from 1 to 2.[688] Since three errors were made related to RFs 4.a., and 6.a., these RFs were given a score of 1.[689] Taken together, Ms. Smith's final grade sheet from the informal review panel was as follows:

Competency/ Rating Factors	RF Weights	RF Scores	RF Grades	Comp. Grades
1. Interpretation/Diagnosis				
a. Recognize & Attend	0.20	3	0.60	
b. Ensure Accuracy	0.20	3	0.60	2.4
c. Understanding	0.30	2	0.60	
d. Diagnose	0.30	2	0.60	
2. Procedures				
a. Reference	0.30	3	0.90	
b. EOP Entry	0.30	3	0.90	2.6
c. Correct Use	0.40	2	0.80	
3. Control Board Operations				
a. Locate & Manipulate	0.34	1	0.34	
b. Understanding	0.33	2	0.66	1.66
c. Manual Control	0.33	2	0.66	
4. Communications				
a. Clarity	0.40	1	0.40	
b. Crew & Others Informed	0.40	2	0.80	1.60
c. Receive Information	0.20	2	0.40	
5. Directing Operations				
a. Timely & Decisive Action	0.30	3	0.90	

[688] *See* Exhibit NRC-004 (Jackson Testimony), 17 ("A score of 2 was awarded with a positive action coupled with 2 errors in the rating factor per NUREG 1021 ES-303.").

[689] NUREG-1021 (Exhibits CCS-005A, CCS-005B), ES-303, 5.

b. Oversight	0.30	2	0.60	2.30
c. Solicit Crew Feedback	0.20	2	0.40	
d. Monitor Crew Activities	0.20	2	0.40	
6. Technical Specifications				
a. Recognize and Locate	0.40	1	0.40	
b. Compliance	0.60	3	1.80	2.20

Since all six of her competency grades were not greater than 1.8, Ms. Smith failed the simulator test.[690]

D. Because Ms. Smith does not Contest the Identified Performance Deficiencies Assessed to the Communications Competency, Ms. Smith must Prove that, but for an NRC Improper Discharge of duty, her other Competency Scores would have all been Greater than or Equal to 2.00

In order to pass the simulator test, an SRO applicant must either (1) obtain grades greater than 1.80 in all six competencies or (2) obtain a grade of less than or equal to 1.80 but greater than 1.00 in Competency 4 and grades of greater than or equal to 2.00 in all of the five other competencies.[691]

Ms. Smith does not contest the performance deficiencies identified by both the Region II examiners and the informal review panel and assigned to RFs 4.a., 4.a., 4.a., 4.b., 4.b., 4.c. Since a single error was made related to RF 4.c., this RF must be scored a 2.[692] Since two performance deficiencies were assigned to RF 4.b., this RF must, at best, be scored a 2.[693] Since three errors were made related to RF 4.a., this RF must be scored a 1.[694] Therefore, Ms. Smith has admitted to at least a Competency 4 grade of 1.60.

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[690] *Id*. at 6.

[691] *Id*.

[692] *Id*. at 5.

[693] *Id*.

[694] *Id*.

Since Ms. Smith's Competency 4 grade must be 1.60, at best, in order to prevail in her claim that she should have been granted an SRO license, Ms. Smith must prove that, but for improper Staff grading, all of her other competency scores would have been greater than or equal to 2.00.[695] Therefore, although the Staff addresses all of Ms. Smith's grading arguments, most of these arguments are irrelevant because they do not affect a competency grade change from below 2.00 to greater than or equal to 2.00. Ms. Smith's only three claims that would affect such a change are her Competency 3 claims that the closure of a failed open pressurizer PORV is not a critical task, that her performance deficiency related to the manual operation of 1TIC-0130 should have been assigned to RF 3.a., not RF 3.c., and that she should not have been assessed an RF 3.b. error related to her understanding of 1TIC-0130.

The Staff Testimony and exhibits demonstrate that the closure of a failed open pressurizer PORV is a critical task and that Ms. Smith's performance deficiencies related to 1TIC-0130 were due to a misunderstanding of the operation of the controller, which is an RF 3.b. error, and an inability to control in manual the normally automatic functions of the controller, which is an RF 3.c. error. Therefore, without addressing Ms. Smith's other individual grading arguments, it can be determined that her overall grading argument fails to prove that her SRO license application should have been granted.

[695] *Id*. at 6.

CONCLUSION

The reasons discussed above and the testimony filed herewith demonstrate that Ms. Smith's claim that the Staff improperly discharged its duties in denying her 2012 SRO license application because of alleged improprieties related to the waiver process, conflicts of interest, the informal review process, and the grading of her 2012 simulator test is not proven by clear evidence and/or is not proven to be causally related to the requested remedy of license issuance. Therefore, Ms. Smith's claim fails and the merits of this proceeding should be decided in favor of the Staff.

Respectfully submitted,

/Signed (electronically) by/

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF STATEMENT OF POSITION CONCERNING THE CLAIM BY CHARLISSA C. SMITH THAT THE NRC IMPROPERLY DENIED HER 2012 SENIOR REACTOR OPERATOR LICENSE APPLICATION dated May 31, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 31st day of May, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 31st day of May, 2013