

and review process. This is supported by the evidence with respect to several instances of conflict of interest, issues of misconduct and the lack of adherence to procedural requirements identified in the NUREG 1021 (NRC Standards for Administering Initial License Exams) and OLMC-500 (procedure for performing administrative reviews). The staff improperly discharged its duties with respect to the grading of the operating test due to inappropriate, unjustified grading that strays too far afield of their twin goal of equitable and consistent examination administration thus being arbitrary and an abuse of discretion.

I. BACKGROUND

1. The petitioner was an applicant for a SRO license at the Vogtle Electric Generating Plant in Waynesboro Georgia. She was administered the operating portion of the examination in March - April 2011. The exam team consisted of Jay Hopkins, Michael Meeks, and Phil Capehart of the Nuclear Regulatory Commission's, Region II.
2. In 2011's exam, 7 out of 10 individuals failed the written portion of the exam and one African-American female failed the written and operating portion of the exam (she is included in the seven above). The African-American female that failed both portions of the exam resigned from the company when she was not permitted to return for retesting.
3. The remaining six individuals passed the operating portion of the exam. The facility requested waivers on behalf of all six individuals on the "preliminary license" applications that were submitted to the upcoming 2012 NRC exam team (Michael Meeks, Phil Capehart and Mark Bates). Upon receipt of the waiver requests the 2012 NRC exam team contacted the facility via telephone and the waiver request for C

Smith (only) was withdrawn by the facility. Subsequently the facility submitted the final license application for C Smith without the waiver request requiring that she take all portions of the exam in 2012, to include the portions passed the previous year. The other five individuals final applications were submitted with a waiver request and later approved. The petitioner alleges that the individuals from the NRC exam team improperly influence the facility versus initiating processing the waiver request.

4. C Smith took the entire license examination March 2012. She was notified that she did not pass the simulator portion of the exam in May 2012. After receiving the results of her operating test, she discovered that the exam comments were not aligned with the actual events that occurred during the scenarios described.
5. C Smith requested an administrative review in June 2012 to re-grade the comments that were identified as inaccurate or unwarranted. The administrative review team determined that the denial should be sustained and the fairness review concluded that all allegations of bias were unsubstantiated.
6. After C Smith was granted a hearing demand, C. Smith determined that the NRC exam team improperly influenced the Administrative Review Team based on the information disclosed in the hearing file established by the NRC Staff.
7. EVIDENCE WAS NOT IMMEDIATELY DISCLOSED: After C. Smith's initial submittal in preparation for the hearing, an email was disclosed that contained information about concerns dealing with the activities in the Operator Licensing Office. The email dated Dec 12, 2012, identified that a female applicant was denied a waiver, received

unwarranted comments and the exam team went through extreme measures to make sure that the female applicant did not receive a license. The hearing file was disclosed in March 2012 and the email was not disclosed to C. Smith until May 31, 2012. This evidence was delayed and its contents were relevant to the appeal. This evidence was consistent with documentation that existed prior to its disclosure.

- The allegations presented by C Smith were consistent with details written in this email.
- The email stated that the guidance in the NUREG 1021 was not adhere to (NRC-021).
- The individual that wrote the email, Edwin Lea, also was aware of the “paper trail” associated with the failure of the applicant after headquarters was ready to suggest issuing a license (NRC-021)
- Mr. Lea stated that he heard several operator licensing examiners concerning the failure of a SRO applicant, 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 (NRC-025).
- C Smith’s allegations in this case were identified independent of having any knowledge of Mr. Lea’s emails.
- Several questions identified by Mr. Lea (BRD-013) were consistent with the comments and questions identified in several of C Smith’s documents.
- Mr. Lea’s personal opinion was that several of the comments were unwarranted (BRD013) (NRC-021).

- Mr. Lea’s personal opinion is relevant to this case because all Region II examiners are governed by the same procedures and should have the same interpretation.

8. When asked about the delayed disclosure of Mr. Lea’s email David Cylkowski (NRC Counsel) identified that “initially, Mr Subin and I , the initial attorneys working on this case, made a determination after looking at this email and after seeing that Mr. Lea had not been involved in the examination, had no personal first-hand knowledge of any of the interactions or any of the particularities of the exam itself, made the determination that, under the regulations, it was not relevant to the admitted contentions. And therefore it was not subject to disclose.” “Later on after we had discussions with our management in the OGC, our management determined that this is something that should be disclosed” (transcript, July 18, 2013, page 697 line 19-25; page 698, line 1-6).

II. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 1: WAIVER

9. All documents and procedures provided by the NRC identify that the candidate has the opportunity to be assessed for the waiver if only one portion of the exam was failed.

There was no indication that a waiver request would be discouraged.

- See exhibit CCS – 016, page 1, a - C Smith’s 2011 denial letter stating that because you pass the administrative/system/simulator operating test administered to you, you may request a waiver of that portion.

- See exhibit CCS – 005A, page 84, D.1.a. - refers to section D that states if an applicant failed only one portion of the site-specific initial licensing exam the region may waive those examination areas that were passed
- exhibit CCS – 017 - 10 CFR 55.35 b states that an applicant who passed either the written examination or operating test and failed the other may request in a new application on form NRC 398 to be excused from re-examination on the portions of the examination or test which the applicant has passed.
- Exhibit CCS – 018, page 2, paragraph 3 - the letter to the facilities VP stated “to permit timely NRC review and evaluation your staff should submit preliminary reactor operator and senior reactor operator license applications, medical certifications, and waiver request at least 30 days before the examination date.

10. The Facility Training Manager contacted the NRC informally via telephone. The NRC Exam Team recommended in May 2011 that C Smith not be granted a waiver. The decision was a consolidated decision among the 2011 exam team-based only on personal recommendation. No method of evaluation was described.

- Based on Phil Capehart’s email to the other examiners, (Exhibit CCS-001, page 16) Malcolm intended to contact Rick Brigdon in reference to if a waiver would be granted for a retake exam. “Malcolm has asked for input as to the status of future (operating portion of the exam) waivers for the Vogtle retake exam.”

- Philip Capehart notified the 2011 exam team members on May 2, 2011 at 2:59 PM, via email requesting input on who should receive waivers. (Exhibit CCS – 001, page 16)
- Michael Meeks responded 20 minutes later via email on May 2, 2011 at 3:19 PM, recommending that a waiver not be granted for C Smith. No method of evaluation can occur in 20 minutes. (Exhibit CCS – 001, page 17)
- No emails exist from Jay Hopkins and he did not sign the final 303 form. It was signed by Phil Capehart (this is not to imply that it is inappropriate to sign for Hopkins....this is to point out that no documentation bears Jay Hopkins signature) (waiver discussion, email, etc...) (All information about Jay Hopkins is provided via Michael Meeks and Phil Capehart).
- Philip Capehart notified Malcolm Widmann on May 3, 2011 at 7:39 AM. He identified “the only individual that all of us are in agreement about is Carla. Even though she passed the operating test portion, we would recommend a future waiver of this portion be denied” (exhibit CCS – 001, page 17). It took less than one day to decide the response to provide to the facility.
- Based on Michael Meeks affidavit, a discussion had already occurred with Jay Hopkins identifying that C. Smith passed when they thought that she would fail (NRC-006, page 14 – 15)
- After C Smith failed the written portion of the exam, a decision was made that C Smith would not likely be granted a waiver but she could retake the simulator portion of the exam. Phil Capehart testifies “so, on that standpoint, with the borderline passed/failed, that is why we were so forceful at that point that we will

need to see her again in the most performance-based and dynamic portion of the exam, see her again in a simulator in 2012 to make another determination” (transcript, July 18, 2013, page 479, line 22-25; page 480, line 1-3)

- Phil Capehart testifies “that was my standing at that point, and that’s what I told Mr. Meeks when he became the chief examiner for the next exam, that that was my reference” (identifying that he would require that a waiver be denied if C Smith applied for one) (transcript, July 18, 2013, page 480, line 6 – 9).
- Michael Meeks testifies “Sir during the timeframe of the emails that I spoke about, both in May and in August, we were not looking at number of comments the vis-a-vis anybody. Essentially, we were rereading and analyzing each of the individual applicants 303 forms.
- Phil Capehart testifies “I did not use any metrics. & I performed it based on professional judgment of the competency of the operator, based on the evaluation we performed at the time. (Transcript, July 18, 2013, page 516, line 8 – 15)

11. The NRC exam team was asked via email by the facility on June 7, 2011, which individuals they were willing to grant waivers for? (CCS-001, page 19) The initial request by the facility provided two groups of individuals. The first group was identified as individuals that “the facility was confident would receive waivers.” The second group was identified as individuals that “were still being evaluated” and that they were inquiring as to whether or not Region II would approve an Operating Exam waiver for

the other 3 individuals. C. Smith identified that the two groups were based on the correspondence from the NRC Exam Team.

a. C Smith identifies that the two groups in this email originated from a previous phone conversation with the training manager in May 2011. The initial conversation via telephone identified that C. Smith would not be granted a waiver.

- C. Smith testimony is “this email spanned from the conversation that occurred with the NRC, where they identified initially verbally with Rick Brigdon that I would not be provided a waiver” (transcript, July 17, 2013, page 220, line 23-25).
- Two other individual were later determined that they were also evaluating them, and those were the three people that was listed on the second half. All of those names were based on communications that came from the NRC” (transcript, July 17, 2013, page 221, line 3-8
- When Perry Tucker was asked "Can you elaborate, please, on what is meant here by "We're evaluating their status?" What evaluation was being done?" His reply was “Yes sir, I can. This was probably within a week of these three individuals listed returning to the current, putting them into the current licensing program that was getting ready for the spring 2012 exam. But evaluating their status means, you know, we're going to evaluate their performance on their previous NRC exam, and determine if we're going to spend the time and money to get them (transcript, July 17, 2013, page 294, line 14-25) prepared to go for another exam, and that's what that means. I mean we're not evaluating whether

or not we think NRC would give them a waiver or not” (transcript, July 17, 2013, page 295, line 1-4).

b. The NRC staff identifies that the two groups originated because the facility identified the candidates and the company was evaluating to determine if a waiver would be submitted by the company.

- Michael Meeks testifies “it appeared that the Vogtle training staff viewed Ms. Smith, as the email I think of June showed, in the second of the two groups of three, and we had been notified by Mr. Wainwright on several times specifically that they were not going to submit the operating test waiver (transcript, July 17, 2013, page 424, line 2 – 7). The other two individuals that were a part of the second group had a waiver submitted on their behalf. The deciding factor was based on the NRC’s willingness to grant waivers to the three individuals. If the email interpretation was accurate then the other two individuals would not have waivers submitted on their behalf.

12. The response by Michael Meeks identified that all other applicants “would have the operating test portion of the exam waived”(Exhibit CCS-001, page 22) and C. Smith would be “likely” denied. The waiver request would likely be denied based on personal opinion or versus a method of evaluation. The evaluation about the number of comments (in reference to the waiver) occurred during the administrative review, not during the actual time that the waiver was requested.

- The evaluation process was not uniform among applicants. NUREG 1021, ES102, (CCS-005A, page 34): Section B Statutes – 1. Atomic Energy Act of

1954 (42 U.S.C. 2137), as amended, requires that the NRC must prescribe uniform conditions for licensing individuals as operators of production and utilization facilities, determining the qualifications of these individuals, and issuing licenses to such individuals

- Mr. Lea (Region II examiner with 20 plus years of experience) looked through C Smith's 303 form from the 2011 exam and he looked at NUREG 1021. "After reviewing the comments associated with the scenarios, it was my interpretation or my conclusion that individual should have been granted a waiver based on the requirements identified in NUREG. And therefore a denial – – a waiver should have been granted". (Transcript, July 18, 2013, page 671, line 1 – 5)
- Michael Meeks testified that he had done the analysis of C. Smith's 303 form from the 2011 exam, but has no record of the decision. "I don't believe that there was a record kept sir." (transcript, July 18, 2013, page 473).
- Capehart comments on how the he determined that a waiver should not be granted based. He did not perform any metrics, it was based on his "personal opinion" (transcript, July 18, 2013, page 516, line 8 – 15).
- Initial hearing documents identified that the waiver was not granted due to the number of comments. No documentation exist to show that a method of evaluation was used (even for the email responses).
- No method of evaluation was described for the individuals that applied for **and** received waivers in 2012.
- During the hearing, initial testimony discussed the importance of the number of comments. Example: "So, in August, when I was reading this, the first thing

that came to me is, quite frankly, just the simple number of comments that are shown here on this page” (transcript, July 18, 2013, pg 474, line 5-8).

- Later in the hearing the number of comments argument is “It’s not the number of comments, it’s the quality of the comments (transcript, pg 515).
- The chart constructed for NRC-008 does not consider details such as the number of scenarios to make an accurate comparison.

13. When explaining why C. Smith would be likely denied in the email. Michael Meeks explanation of the email response was that it was made based on a preliminary basis and could not reply with a definite answer until the actual waiver request was submitted. (See Exhibit CCS-001, page 28)

- Mr. Meeks response in the email stated “so they were preliminary answers insofar as we have not received/evaluated the actual applications.” He identified that he could not provide a definite answer absent the actual application/request.
- The reply in the same email about the other 5 candidates, stating “these five individuals **would have** the operating test portion approved by region II”. A definite reply was provided for the other applicants with instructions.
- Although the exam team was aware that C. Smith repeated the last portion of the class which is a repeat of all EOP’s, AOP’s, Simulator training, JPM training and written examination, they still described that actions would have been take to deny the waiver. This means that there was no form of remediation that existed to change their response to a waiver request if submitted.

14. Disagreement exists between C. Smith and the exam team about the facility's intent to submit a waiver.

- The facility invested a substantial sum of money to train C Smith, they have nothing to lose by submitting a waiver request even if they've been already told that it will be likely denied. (See transcript, July 17, 2013, page 423, page 204, page 267)
- The facility VP signed a letter stating that a waiver request was being submitted for all six applicants (including C Smith) (CCS-002, page 18). There was no distinction between the six individuals listed in the letter.
- When Perry Tucker was asked "to your knowledge, was there any reason that Southern decided not to submit a formal application for a waiver for Carla other than the problem of the delay?" His response was "the delay was the only reason" He also stated "the delay was solely the reason, since the NRC reported back that she wouldn't be able to take her exam with everybody else." (Transcript, July 17, 2013, page 284, line 25 and page 285 line 1-10).
- The letter signed by the VP was received by region II (NRC) (transcript, July 17, 2013, page 424 – 426).
- The facility submitted a waiver request on the preliminary application (CCS-002).
- The petitioner was at no time notified that the facility would not apply for a waiver of the operating test portion from 2011. C Smith's testimony: "I was told

this up until the day it was actually submitted.” (*Transcript page 157, line 17 through 18*)

- Mr. Tucker’s testimony identified that “but we had all along, it was our intent to apply for waivers for everybody that passed, any part that passed, and that included Carla.” (Transcript, July 17, 2013, page 265, line 20 – 22).
- The NRC Staff does not have any documentation as a record of the conversations that included discussions confirming that a waiver request would not be sent for C Smith (transcript, July 17, 2013, page 429-430).
- Mr. Tucker’s testimony when asked when the NRC said that she was not likely to get a waiver did it in any way change your company’s plans as to rather you would actually apply for her to get a waiver? He responded “it never changed our plans. I mean my words were we’re going to make them tell us they’re not going to give her a waiver, we’re going to apply for it (transcript, July 17, 2013, page 269, line 1 – eight).
- Mr. Tucker’s testimony stated “there was no mistake requesting a waiver on the preliminary application” (transcript, July 17, 2013, page 286, line 3 – 5).
- Mr. Tuckers testimony stated “if we had not been told there would be a delay, we would have requested a waiver” (transcript, July 17, 2013, page 285, line 18 – 21).

15. The fairness review identifies that the waiver was not granted due to the number of comments. This was not the justification used at the time that the response was provided that C Smith would not likely be granted a waiver.

- Mr. Phil Capehart testimony is “there is no standard for the number of comments”
- Phil Capehart’s testimony states “we don’t normally look at the number of comments at all. The only reason we look at these comments was because the appeal panel wanted us to go back and look at the fairness of comments and the simulator portion compared to everybody else” (transcript, July 18, 2013, page 498, 16 – 21).
- Looking at the number of comments will bias your analysis against a person that has a large number of comments (transcript, July 18, 2013, page 500, line 8 – 13)
- When Michael Meeks was asked “Is there any standard that you could use that you can refer us to for how many comments is too many?” His reply was “beyond the actual grading criteria of NUREG, no, sir, I do not know of any standard that provides the guidance as to the number of comments or how to evaluate a potential operating test waiver, no sir (transcript, July 18, 2013, page 503, line 22 – 25).
- When speaking of the 2011 exam that the waiver request was based on, Mr. Lea supports that some of the comments were not warranted. “Some of the comments really should not have even been written about.” (Transcript, July 18, 2013, page 671, line 16 – 25)
- Mr. Lea look at the comments and he identified “a lot of the comments I saw on that particular exam, it appeared to me that they were trying to find things to say

that she had made a mistake.” (Transcript, July 18, 2013, page 671, line 16-25 and page 672, line 1-2)

16. Reference was made to the number of comments on the JPMs for C. Smith was out of the norm. Yet when comparing the number of comments to 2011 and 2012 applicants, it was not abnormal among a group.

- Phil Capehart testifies about the normal number of J p.m. comments. He states “usually, we see maybe 1 to 3 comments for the overall J p.m. portion” (transcript, July 18, 2013, page 506, line 5 – 13).
- Several people in the 2011 and 2012 class received five or more comments on the J p.m. portion and no concerns were raised
- Comparison of personnel and the number of comments greater than 4

Operator B (2011): 7 comments and 2 unsats

Operator C (2011): 6 comments and 3 unsats:

Operator G (2012): 7 comments and 1 unsat

Operator H (2012): 7 comments and 1 unsat

Operator L (2012): 5 comments and 2 unsats

Operator M (2012): 6 comments and 0 unsats

Operator N (2012): 9 comments and 2 unsats

Operator P (2012): 5 comments and 1 unsat

Operator Q (2012): 6 comments and 2 unsats

Operator S (2012): 5 comments and 1 unsat

17. Grade comparison between the students and the pass criteria contradict the decision to deny the waiver if submitted.

- Review grades of personnel at the facility that requested waivers in 2011 based on Exhibit CCS-003. C Smith did well on the J p.m. portion of the operating test and operator C did well on the simulator portion of the operating tests but made the minimum score on the J p.m. portion of the test. Operator C was granted a waiver. Operator A and B grades were slightly higher on the simulator portion but C Smith scored higher on the J p.m. portion. Operator A and B were granted waivers.
- Note the grades on simulator portion
- Note the grades on the JPM portion
- Note the grade on the written portion
- Compare the grades of personnel in Region II based on Exhibit NRC-008, operator 37 received an average of 2.48

18. No precedence exist to justify weighing the simulator portion heavier

- No procedural guidance identifies the weight of the simulator portion in a waiver request.

19. The facility historically submitted a waiver for applicants that passed one portion of the exam (no reason existed for the facility not to submit a waiver for C. Smith). The NRC historically did not deny waivers.

- Mr. Tucker testified “I’m not aware of any applicant that we have not request a waiver for. That don’t mean we haven’t in the past, but I’m not aware of it.” (Transcript, July 17, 2013, page 293, line 12 – 13).
- When denying a waiver there is no reference to the number of comments identified in NUREG 1021.
- An RO applicant in 2010 from Farley was evaluated by Michael Meeks, (final recommendation signed by Mark Bates and Supervisor’s signature was Malcolm Whitman) and his average grade on the simulator portion of the exam was 2.48. C Smith’s average was 2.47. The RO applicant from Farley was granted a waiver in 2010.(CCS-071, page 94).
- When Mr. Whitman was asked if Jay Hopkins ever had any discussions that will him to exercise the authority that exist in NUREG to fail perhaps Ms. Smith on the 2011 exam, even though her score was passing. Mr. Whitman replied that he “didn’t have any direct discussions with Mr. Hopkins regarding that.”
- He also stated “my answer would have been to them, as it would be now, we are going to follow what the NUREG says to do. Mr. Whitman also says that I don’t typically go against a pattern that we have necessarily sent in making a precedent setting without conferring with my colleague, Mr. McHale. (And transcript, July 18, 2013, page 647).

20. After the submittal of the waiver on the preliminary NRC 398 form, the NRC exam team members Michael Meeks and Mark Bates contacted the facility to question the submittal. The justification for contacting the facility has changed throughout the legal documents. The NRC Exam Team has not provided a logical explanation to justify the telephone conversation.

- Initial response was that comments were missing on the preliminary NRC form submitted approximately February 2012. (CCS – 014, page 11; CCS – 104, page 4
- “The preliminary Form 398 did not include supporting information for a waiver request”(CCS – 015, page 4-5).
- After a copy of the preliminary NRC 398 form was presented as evidence, the NRC response changed to indicate that “more information” was expected.
- The exam team identifies that C Smith’s waiver requests submitted on the preliminary license application was a suspected cut and paste.
- The other applicant’s preliminary license applications were exactly the same. The waiver requests were not questioned. Their preliminary license application was also a cut and paste (transcript, July 17, 2013, page 415 – 417), each applicant had different remedial needs.
- The comments differed between applicants but the same justifications was acceptable for the other five applicants without question.

- C Smith's preliminary NRC 398 form did not contain any errors to facilitate contacting the facility.(Transcript, July 17, 2013, page 431)
- The exam team was expected to check the application for potential errors, verify the information in accordance with NUREG 1021, verify that the form is complete, and evaluate any waiver requests (transcript, July 17, 2013, page 430, line 18 – 25; page 431, line 1 – 3)

21. Inconsistent testimony about the preliminary NRC 398, and why the waiver request changed

- During the hearing, Michael Meeks and Mark Bates testified that they'd read the entire preliminary NRC 398 form, prior to contacting the facility (transcript, July 17, 2013, page 413, line 4 – 25).
- Mark Bates writes in the email dated August 29, 2012 to Frank Ehrhardt that "I do not recall looking at the prelim apps - I think Michael may have been the only one to look at those (CCS – 015, page 5). This is contradictory to his testimony at the hearing.
- Documentation/correspondence (and final report) with Frank Ehrhardt indicated that the examiners identified that the document was missing information in the comments block (CCS-014, page 11). The copy of the preliminary application shows that block 17 did contain comments. (CCS-002, page 14-15) Exhibit CCS-104, page 4 states: Initially, the licensee did submit a preliminary NRC Form 398, Personal Qualifications Statement Licensee on behalf of Ms. Smith with item 4f checked which would typically indicate a request to waive the

requirement to retake the Operating Test. However the preliminary form 398 did not include supporting information for a waiver request.

22. C. Smith received more additional training than the other five applicants requesting waivers. Meek was aware that C. Smith was a part of the next class and that remediation received included a repeat of all training associated with the simulators for an additional year (receiving more remediation than any other candidate requesting a waiver). Even with this knowledge of additional training, there was no change in the NRC exam team's position that a waiver would be likely denied.

- Meeks testimony stated that he received updates about C. Smith status in the class and reconfirmation that a waiver request would not be submitted for C. Smith. He was aware that she was receiving additional training (Transcript, July 17, 2013, page 412, 416).
- The NRC exam team would **not provide a definite** answer as to if the waiver would have been denied if it were submitted during the hearing. Sir, in the hypothetical case, if Mr. Wainwright, after my phone call with him, if he had called me back and said that they did intend to formally submit a waiver for the operating test for Ms. Smith, as I answered here, we would have followed the process that is laid out in ES-204. At that time, I would have reviewed Ms. Smith's 303. I would have consulted with Mr. Capehart and we would have made a recommendation based upon the 303 and the documentation that we had to my supervisor, Mr. Widmann. Based upon the documentation provided in Mr. Tucker's CCS-002 for Ms. Smith's case, we would likely have asked the

facility licensee for more information, potentially a more detailed training plan that would specifically show that they had addressed deficiencies noted, and any evaluation potentially that the facility licensee might have done, and would have likely consulted with the NRR program office (Transcript, July 17, 2013, page 410-411).

- The examiners could not provide examples or details of the circumstances that lead to the one waiver denial. And given the data in NRC-008, where I believe there was only one actually denied waiver identified, and I think that was Operator 47 in that list, the very last one in the table, clearly, there is not a lot of experience I don't know whether that is only in the Region or nationally in waiver denials. (Transcript, July 18, 2013, page 488)

23. The Exam Team's conversation with the company representative improperly influence the company to withdraw the waiver request. The conversation was beyond asking if the submittal was intentional.

- Michael Meeks affidavit (NRC-006, page 21) states I told Mr. Wainwright that the purpose of the call was to clarify the status of Ms. Smith's preliminary license application, because we had not expected to see a waiver request for her operating test. I reminded Mr. Wainwright about the previous emails with Mr. Gunn; that our position in those emails was that we would "likely deny" an operating test waiver for Ms. Smith; and that he had told us before that Vogtle did not intend to submit an operating test waiver for Ms. Smith—these were the

reasons we had not expected to see the waiver request (for the operating test). I asked Mr. Wainwright to check with his management to determine if they did specifically intend to submit an operating test waiver for Ms. Smith, or if an oversight had occurred and they did not intend to submit a waiver.

- The Exam Team’s supervisor said not to discourage the submittal. Michael Meeks affidavit states that “Mr. Widmann also told me that we were not in any way to discourage the facility licensee from submitting a waiver request for Ms. Smith—if they wanted to.” (NRC-006, page 18)
- The waiver submittal for C. Smith irritated the NRC Exam Team. Mr. Tucker’s Testimony stated that he received a phone call from one of the gentlemen on the exam team (Vogtles Exam Team) and his words were “it was like I stirred up a hornet’s nest by asking for a waiver for Carla” (Transcript, July 17, 2013, page 274, line 21 – 23).
- All other applicant’s preliminary applications were accepted with no question or attempted contact with the facility to question the intent. See transcript, July 17, 2013, page 282, line 4 – 9: Did the NRC ever indicate that processing those other waiver requests were caused delay?..... “I never heard of any statement of the other applications causing delay for waivers like that”.
- When asked “were you begin to get the feeling that somebody was unduly upsetting the NRC, because of the continued confusion about the waiver?” Mr. Tucker’s testimony stated “yeah. I mean I just didn’t understand why they seem surprised we asked for it. I guess that’s the best way for me to state it, and I

don't want to upset them"..... "You don't want to be their enemies obviously"
(Transcript, July 17, 2013, page 315, line 14 – 25).

24. The company withdrew the waiver because they were told there was not enough time to process the waiver.

- Mr. tuckers testimony stated "they wouldn't have time to process her application therefore that would delay her being able to take the exam and of course there's no exam time slot available for a delayed exam and we subsequently decided that the certified signed application, signed a couple of weeks later, we would not request a waiver (Transcript, July 17, 2013, page 275, line 1 – 12).
- Mr. Tucker testified that "if we had not been told there would be a delay, we would have requested the waiver in the certified application" (Transcript, July 17, 2013, page 285, line 18 – 21)

25. There were numerous updates about C. Smith's status in the class. The updates were specific to C. Smith. There was no value in continuing to receive updates about C. Smith. According to the exam team's testimony if the waiver request occurred 30 days or 14 days prior to the exam there would still be enough time to process the waiver.

- Michael Meeks testifies that the reason her status mattered was that, if she was going to take the operating test, then we would have to factor that in (Transcript, July 18, 2013, page 464, line 8 – 10).

- C. Smith status was equivalent to any other student status. The NRC Exam Team has already establish that they would not likely granted a waiver for C. Smith. Knowing that their intent is not to grant the waiver, then the only alternative would be to take both parts of the test. C. Smith taking both parts of the test is equivalent to another student taking both parts of the text. If another student failed the class prior to the NRC exam it would have the same impact of C. Smith failing or not taking the NRC exam.
- Michael Meeks testifies “we were trying to verify the information as to, given the fact that he had told us several times that they were not going to submit a waiver, and then, the fact that on the unsigned application we saw that box checked, essentially, we wanted to verify that was correct data before we began the process, which wasn’t going to be burdensome necessarily.” (Transcript, July 18, 2013, page 490, line 3-13)

26. If the NRC Exam Team did not operate outside of procedural requirements (and precedence) to pursue denying C. Smith a waiver, she would have been issued a license in 2012.

- C. Smith would have been issued a license in 2011 if she did not fail the written portion despite their position to deny the waiver. If they would have granted a license, why wouldn’t they grant a waiver? Region II would have issued a license had her scores been slightly higher on the written side. In spite of the concerns they had about the operating test (Transcript, July 18, 2013, page 482, line 1 – 5).

- Phil Capehart testifies if she had passed, gotten a significant number of points back in the SRO. that would have raised a score above the minimum of 70, and ended up with better than 80 overall, and she would have passed the written exam, and then, she would have subsequently received a license, that's correct (Transcript, July 18, 2013, page 492, line 3 – 9).
- If the waiver were approved C. Smith would have received a license in 2012 because she would have been required to only take the written portion. In 2012, C. Smith received an 89 overall and a 92 on the SRO portion (highest SRO score).

III. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 2: CONFLICT OF INTEREST

27. Judgment of the 2012 Exam Team was flawed prior to the 2012 exam that may have affected the administration and the results of the exam.

- C. Smith and the 2011 applicant that failed the operating test were both identified as the worst operators (NRC – 006, page 13; NRC – 046, page 1, bottom sentence). They were also the only 2 African American females during 2011 and 2012 (Both females in 2011 and C. Smith only in 2012) (Transcript, July 17, 2013, page 184). Vogtle has no African American female SRO's (Transcript, July 17, 2013, page 202). Both applicants experience similar issues both years in the simulator. (CCS-116, pg17-pg18)

- Michael Meeks affidavit reveals details of a discussion with the 2011 examiner of record for C Smith and he identified that the individual desire to invoke a procedural item that allows an individual to be failed even if they meet the pass criteria (NRC-006, page 14)
- Phil Capehart testifies that he also had conversation with the 2011 examiner of record for C Smith identifying a desire to invoke a procedural item that allows an individual to be failed even if a the pass criteria. (Transcript, July 18, 2013, pages 478-479)
- Mark Bates was present during conversation about C. Smith (during waiver discussions)(CCS-001, pg 1 & pg 25-email), he was present on the 120 day phone call (Transcript, July 18, 2013, page 487), and he was present during conversations with Greg Wainwright). Mark Bates was associated with too many conversations about the waiver to prevent drawing an early conclusion.
- Malcolm Widmann was the supervisor for the 2011 and 2012 Exam Team members. He was a part of the initial conversations about C. Smith and was also exposed to the conversations.
- Malcolm Widmann endorse that the comments are accurate and that “the Exam Team is the only people that saw these applicants in the simulator.” (Transcript, July 18, 2013, page 642, line 13-16)
- Malcolm Widmann was aware of the Exam Team’s opinion of C. Smith, he was a part of the meetings that included these discussions (CCS-001, page 1).

- No assessment was done to determine if the examiners impression affected the administration, performance, evaluation or the results of the exam (2011 & 2012). Despite the conversations involving all Exam Team members, the supervision felt that there were no issues with conflict of interest.
- Malcolm Whitman testifies that he would not have made any adjustments to the exam line up, even if C Smith had failed the operating test in 2011. (Transcript, July 18, 2013, page 625-628 and 653-655)

28. The original 2012 exam team (Bates, Meeks, and Caballero) was changed prior to the administration of the exam (August 2011). The change replaced a new member (Caballero) with a member from the 2011 exam (Capehart). The justification for the change was not a strong justification.

- Exhibit CCS – 001, page 20, in an email from Philip Capehart to Michael Meeks it states that "he (Capehart) will be replacing Bruno on this exam to allow him more time to prep the Farley exam he is chiefing".

29. The 2011 examiners had strong opinions about C. Smith. Returning those two individuals meets the definition for conflict of interest.

- NUREG 1021 (CCS-005A, page 52-53)

D. Personnel Restrictions

It is impossible to define criteria that anticipates every possible conflict of interest issue. Supervisors must apply sound judgment to the fact of each case. If any doubt exists regarding a particular case, the supervisor should consult with regional management and/or the NRR operator licensing program office to resolve the issue.

1. NRC Examiners

- a. The regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicants retake operating test.
- b. If an examiner was previously employed by a facility licensee (or one of its contractors) and was significantly involved in training the current license applicants, the regional office will not assign that examiner any direct responsibilities for developing or administering written examinations or operating tests at that facility. Regional management will control other in-office examination activities concerning the facility, such as technical consultation and quality reviews of examinations.
- c. **If an examiner is assigned to an examination that might appear to present a conflict of interest, the examiner shall inform his or her immediate supervisor of the potential conflict. Such notifications should include the following information:**
 - **The nature and extent of previous personal and professional relationships with the applicants**
 - **Anything that could affect the administration, performance, evaluation or results of the examination**
 - **Anything that could create the appearance of a conflict of interest**

30. Mark Bates was the new member of the exam team and was assigned to examine C.

Smith in the simulator portion of the exam. He was included/present in discussions about C. Smith. This interaction provided influence for Mark Bates to form an opinion of C. Smith prior to the 2012 exam. Email/statements written by exam team members identify discussions that included Mark Bates in the list of individuals present.

- Meeks consulted with Capehart, Hopkins, Wideman and Bates to formulate a consolidated response from the region. (Exhibit CCS – 001, page 1). This comment does not differentiate Bates from the other individuals.
- Mark Bates was the chief examiner with Michael Meeks as the Chief examiner under instruction. This affiliation also cause Mark Bates to be present at various

times when discussion about the waiver for C. Smith occurred. “A previously-qualified Chief who has to essentially supervise everything that I would do. SO in a way, Mr. Bates and I worked in lockstep, as it were, through the process, Sir.” (Transcript, July 18, 2013, page 446-447)

31. Prior to the 2012 exam, Michael Meeks had a personal interest in C Smith’s progress in the 2012 class, this interest presents a conflict of interest. There was no individual interests in any other class member.

- Mr. Meeks asked if a waiver would be submitted for C. Smith on the 120 day phone call. (NRC-006, page 26, Answer 19)
- Mr. Meeks asked about C. Smith’s status (no other student this pose with this familiarity from their future examiner). (NRC-006, page 20)
- All other applicants had the advantage of having no familiarity with their examiner, to include no periodic updates.
- C. Smith status in comparison to the other applicant would have the same impact. C. Smith status was specifically questioned (by name) (Transcript, July 18, 2013, pages 464-466)

32. The individuals involved in the administrative review identified that there is no procedural guidance to conduct a fairness review, and no criteria for identifying who will perform the investigation. The NRC Staff has no concerns with conflict of interest with regard to previous professional relationships in this example.

- It would still be expected to make sound choices when determining who should perform the investigation.
- When administering an exam in accordance with NUREG 1021 it identifies that the examiners having previous professional relationships cannot evaluate the applicant (CCS-005A, page 53). Although this is guidance for the exam, it was not applied for the investigation (this is a general concept that should be the same in all applications of the definition)
- McHale discusses “obviously, the personal and professional relationships with applicants, you know, when somebody used to work for a utility and now works for the NRC, and is going to administer an examination, you certainly wouldn’t want to have a former coworker being examined, and those type of elements are in there (transcript, July 18, 2013, page 655, line 1 – 5). The reference to professional relationships is provided here as an issue but the professional relationship was not in the issue when performing the investigation/fairness review.

33. A pattern exist in which documentation is not consistent with the actual occurrences

- The documentation identifies that the call included Mark Bates and Greg Wainwright. (CCS-018, page 1 v/s NRC-006, page 19)
- The documentation identifies that a waiver request can be sent 30 days prior to the exam (no reference is made in the document about the additional conversation indicating that a waiver would not be submitted) (CCS-018, page 2)

- The testimony identifies that the 120 day phone call **also included** Michael Meeks and Thad Thompson but the corporate letter memorializing the conversation does not include their names. (CCS-018, page 1 v/s NRC-006, page 19) (Transcript, July 17, 2013, page 436)
- Meeks testimony identifies that the facility was asked if they intended to submit a waiver request for C Smith, but the corporate letter memorializing the conversation does not include this information. (NRC-006, page 20 v/s CCS-018)

34. The statements provided by Michael Meeks and Mark Bates to the fairness review investigator were inconsistent.

35. The results of the fairness review identified that Michael Meeks did not review C Smith's 2011 results prior to the 2012 exam. This gives the impression that Michael Meeks did not read C Smith's 2011 exam. Testimony reveals that he did read the 2011 exam results. The statements provided by Michael Meeks and Mark Bates to the fairness review investigator were inconsistent.

- Frank Ehrhardt reported in the fairness review "he did not review her 2011 results prior to the 2012 exam" (CCS – 014, page 13, paragraph 3, page 15, paragraph 3).
- Mr. Meeks also identifies in his statement to Frank Ehrhardt "no I did not review the applicants (2011) Docket file or (2011) ES – 303 before administering the (2012) Vogtle operating test" (CCS – 015, page 12).

Mr. Meeks testimony reveals that he did review C Smith's 2011 results prior to the 2012 exam (transcript, July 18, 2012, page 467, line 8 – 10).

- Mr. Meeks testimony states “obviously, since I was a part of the first exam, then I would have knowledge of her 303 during that documentation process. So strictly speaking, it is not true that I had never seen it.” (Transcript, July 18, 2013, page 484)

36. Mr. Meeks identifies in the fairness review that the reason the facility was contacted was because information was missing from the comment section of the preliminary NRC 398 form. The statements provided by Michael Meeks and Mark Bates to the fairness review investigator were inconsistent.

- Documentation provided in email responses from Mr. Meeks states “ I don't remember if they provided any justification for the waiver on the preliminary application” (CCS – 015, page 4).
- Mr. Meeks testimony identified that Mr. Meeks and Mr. Bates both read the entire preliminary NRC 398 form that was submitted by the facility around February 23, 2012. (Transcript, July 17, 2013, page 413)
- Mark Bates identifies “I don't recall looking at the prelim apps-I think Michael may have been the only one to look at those. (CCS-015, page 5)

37. Frank Ehrhardt's assignment as the fairness review investigator met the definition of a conflict of interest due to his professional relationship with all exam team members prior to the exam.

- Review of CCS-117, CCS-118, CCS-119, CCS-120, CCS-121 are letters from the NRC database that identify examples of affiliation with all of the examiners that he investigated.
- Procedural guidance defining conflict of interest should be the same definition in all applications (CCS-005A, page 53 - If an examiner is assigned to an examination that might appear to present a conflict of interest, the examiner shall inform his or her immediate supervisor of the potential conflict. Such notifications should include the following information: The nature and extent of previous personal and **professional relationships** with the applicants)
- When Mr. Ehrhardt was asked if he participated in any exam teams with the individuals that were investigated as a part of the fairness review his response was "I have". I've participated with Mr. Bates in an exam team, and I've participated with Mr. Capehart in an exam team, and approximately I believe, the 2008 – 2009 time. (Transcript, July 18, 2013, page 599, line 3 – 10)
- Mr. Ehrhardt was asked if the fact that you knew them and had worked with them in the past speak to your lack of bias. His response was "I believe I was unbiased in it." (Transcript, July 18, 2013, page 599, line 17 – 25)

- Frank Ehrhardt identifies that he had no routine communication or contact with the exam team since 2009 but documentation shows that Frank Erhardt participated in an exam team was Mark Bates in 2011 (1 year prior to the investigation). (CCS-121)

38. The NRC Exam Team's method described to the fairness review investigator, for determining the number of scenarios assigned to each applicant in the 2012 exam is inconsistent. It would be more challenging for the NRC Exam Team to collect more comments without the third scenario. This issue would not occur if the Exam Team did not have prior knowledge of C. Smith (did not know who she was).

- Mr. Meeks describes the method used to determine the number of scenarios for each applicant in CCS – 015, page 13. It is also described in the exam teams joint affidavit (NRC –002, page 9-12). But the method described has a different “end result” when performed with the actual names of the 2012 applicants. (CCS-083)
- C. Smith provides an exhibit with the actual names of the applicants (CCS-083). When the names are matched to the identifiers as described in the exam team statement and affidavit (NRC-002, page 9-12), C. Smith should have been designated as I3 (because she is the third name from the top in reverse alphabetical order).
- Based on the redacted version of the simulator schedule C. Smith's name was switched with Operator U (NRC-002, page 12-chart). Operator U's name is after C Smith's name in normal alphabetical order. Meaning that in reverse

alphabetical order Operator U should have been the second name from the top.
Operator U should have been designated I2.

- By switching Operator U with C. Smith, C. Smith was now required to perform three scenarios instead of two. If the names were not switched C. Smith would have only received two scenarios.
- The schedule was provided to the facility prior to the NRC Exam Team's arrival. The pre-designated assignments of the scenarios (in a bias manner) prior to the NRC Exam Team's arrival supports that bias behaviors were present before the exam was administered.
- Assigning a third scenario allowed more opportunities to document more comments (CCS-116, page 18)
- Operator U performed Scenario 6 and Scenario 7 (CCS-084, page 8 and 10). If the third scenario (Scenario 3) were not assigned C. Smith would have passed competency 1-Interpretation/diagnosis because comments on page 8, 10 and 12 (CCS-045) would not exist (remember that all three of these comments are in dispute due to lack of accuracy anyway). Competency number 3 - control board operation has two very weak comments, two of the comments have simulator data that clearly identifies contradictions to support the removal of the comment and the administrative review team removed those two comments. If the two comments left on the final grade sheet would have remained (CCS-045) comment on page 19 and 21) C. Smith would have pass the overall exam (even if the exam team would have made the PORV critical).

39. NRC Management rejects the possibility that conflict of interest can exist. The NRC Staff members fail to recognize the conflict of interest guidance identified in their procedures for band c, typically only recognizing “a” (“The regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicants retake operating test.”) (CCS-005A, pages 52-53 See Below) No consistency exists on when to apply the procedural guidance for conflict of interest (see below).

NUREG 1021 (CCS-005A, page 52-53)

D. Personnel Restrictions

It is impossible to define criteria that anticipates every possible conflict of interest issue. Supervisors must apply sound judgment to the fact of each case. If any doubt exists regarding a particular case, the supervisor should consult with regional management and/or the NRR operator licensing program office to resolve the issue.

1. NRC Examiners

- a. The regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicants retake operating test.
- b. If an examiner was previously employed by a facility licensee (or one of its contractors) and was significantly involved in training the current license applicants, the regional office will not assign that examiner any direct responsibilities for developing or administering written examinations or operating tests at that facility. Regional management will control other in-office examination activities concerning the facility, such as technical consultation and quality reviews of examinations.
- c. If an examiner is assigned to an examination that might appear to present a conflict of interest, the examiner shall inform his or her immediate supervisor of the potential conflict. Such notifications should include the following information:
 - The nature and extent of previous personal and professional relationships with the applicants
 - Anything that could affect the administration, performance, evaluation or results of the examination
 - Anything that could create the appearance of a conflict of interest

- Conflict of interest was considered when selecting the panel members to perform the review. (Transcript, July 18, 2013, page 536-537)
- Malcolm Widmann discussed the re-assignment of C. Smith’s examiners, if a waiver were denied. Widmann: Since Mr. Hopkins was the Examiner of record for the 2011 exam, and the NUREG prohibits me from having that person on the exam, and that certainly was the case because he had retired by that time, for the 2012 exam not necessarily I would not have changed out the team. (Transcript, July 18, 2013, page 627-628)
- John McHale was asked how he would advise Mr. Widmann. Mr. Mchale replied “But I would think we would probably just handle as we did at this time, that we would involve, if at all possible, another Examiner of record, just to maintain, again, eliminate any appearance that there could be a conflict.” (Transcript, July 18, 2013, page 629)
- Selection of Frank Ehrhardt to perform the investigation was a conflict of interest.
- Review Team communications with the NRC Exam Team was a conflict of interest.

IV. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 3: INFORMAL REVIEW

40. Prior to starting the review, the review team interviewed C. Smith’s 2012 examiners in Atlanta. During the visit at the exam team provided binders with added information that was not in the original notes. The binders were not included as listed documents in the

procedural guidance to be reviewed during the Administrative Review. (CCS-030, page 8)

See CCS-098 as an example

See CCS-081 as an example

41. Exam team member Mark Bates contacted the review team member David Mueller and provided a document identifying how he could have graded C. Smith (CCS-062, CCS-101). In this document he also identified that the philosophy for all the other applicants was to apply one comment per error. This document states “within this file you will be able to see options that could be used in a more critical evaluation” (CCS-062). This was not consistent with the standard applied to the rest of the class (resulting in C. Smith being graded at a higher level).

- Mark Bates contact with David Muller (CCS-062 and CCS-101) is not consistent with procedural guidance that identifies that the review panel will be impartial. ie....It may include a representative from the affected region, but it will not include individuals involved with the applicants licensing examination. (CCS-030, page 3d)
- When Don Jackson was asked “If that contact had occurred (in reference to CCS-062), would that have been appropriate contact at that early stage in the review?” His response was “it would depend on what the context of that contact was. If they were resolving again, a specific piece of information that we needed, I would think that would not be inappropriate. If there was some attempt

to influence how the panel was ruling on one specific item, then it could potentially be inappropriate” (Transcript, July 18, 2013, page 563, line 12 – 18)

- The contact with Mark Bates was not to resolve any information, it was an opportunity for Mark Bates to provide David Muller with a document. This contact according to Don Jackson is inappropriate. This contact is also inappropriate based on OLMC-500 reference to remaining impartial (CCS-030, page 3, d).

42. The review team initially concluded that C. Smith passed the exam. The NRC Staff identifies that the pass letter was never the final conclusion and that it was a draft. The conclusion will always be a draft until approved by the IOLB. The pass letter was the final conclusion of the review team until the exam team members intervened.

- See Exhibit CCS – 082 for a detailed account of email communications and the effect on the final grading.
- Review Exhibit CCS –013, note the usage of the word “review” in the email. “It states “this will help with clarifying our stance to region II and NRR management when it is reviewed”
- This email response (CCS-013) occurred after the pass letter (CCS-024) was emailed (CCS-023) to all the Review Team members.
- The review team identifies that the document stating that C Smith passed was not the review team’s final decision. This comment is contradictory to the document produced by the Region II Exam Team titled “Region II

Recommendation Comments on the “Final” Independent Review Panel document” (CCS-060).

- If the Review Team’s final document indicated that C. Smith’s denial would be sustained, then it would not be logical to send a document stating that the denial should be sustained.

43. Initial email communications between the review team members indicated that the members were all **in support** (including Don Jackson) of the document stating that C. Smith passed the Simulator Examination.

- Email CCS-023 was sent to the panel members on Sept 20, 2012 and has the attachment identifying that C. Smith passed. No other document was sent out, containing attachments until October 3, 2012.
- See CCS–082, page 7 through 9 to view the email conversations indicating that the review was coming to an end and that the members of the team were in support of the document indicating that C. Smith passed.
- Don Jackson testimony in the hearing support the email conversations mentioned above concluding that the team was in support of issuing a license to C. Smith. Don Jackson’s testimony stated “and I will tell you, there were periods of time in September timeframe of 2012 that I believed that we were going to make a recommendation to headquarters that Ms. Smith passed the Operating Exam.” (Transcript, July 18, 2013, page 566, lines 9-13)

44. Email communication identified that the communications suddenly changed to indicate that the review team was looking for additional comments. These comments occurred after the email titled “Region II Appeal” and dated October 3, 2013 (CCS-020). The additional comments continued until the review team had enough comments to sustain the denial should.

- The 2012 Exam Team was very persistent in ensuring that the review team had documents (produced by the Exam Team) to utilize during the panel’s review (binders, interview, email to David Muller (CCS-062 & CCS-101), contact with NRR/IOLB John Mchale (CCS-059 & CCS-060).
- The 2012 Exam Team’s persistence was equivalent to the persistence used in communications with the facility to determine if a waiver would be submitted for C. Smith.

45. The NRC Staff argument that the review team’s addition comment and discussions about the PORV and TE – 130 were independent of the exam team members contradicts documentation presented.

- Binders provided included reference to another rating factor for TE-130- understanding (NRC-038, page 2)(CCS-079, page 3&4)
- The Exam Team provides a joint affidavit that identifies their discussions about the PORV being a critical task, with the review team members. (CCS-002, page 40)

- Mark Bates contacts a Review Team member shortly after the Review Panel left Atlanta. His contact included an email with a document identifying how he could have graded C Smith. Mark Bates also indicated that the class was graded based on one comment per error but NUREG 1021 allows the assignment of more than one comment per error. (CCS-062 and CCS-101)
- Region II Exam Team contacted John McHale and submitted another document to recommend how C. Smith should be graded (CCS-059 & CCS-060). This document differed slightly from the original document submitted to the Review Team (CCS-062 & CCS-101). The changes were updated to change some of the rating factors to ensure that the point distribution would result in a sustained denial. (CCS-082, page 28)

46. As the Review Team searched for additional comments (CCS-029 & CCS-031), Region II Exam Team members produced a document identifying their disagreement with the independent review team's final conclusion. This document was sent to the panel by John Mchale (CCS-059) and the document contained a write up indicating how they believe that C. Smith should be grade.

- Review CCS-060 "Region II Recommendation/Comments on the "Final" Independent Review Panel document."
- In Johns Mchale's email (CCS-059) he identifies the comment that originated from CCS-060 and it is the comment that caused the denial to be sustained. John McHale's email states "what I think will be critical to the overall outcome is the RF assignment of the second error related to Scenario 7, Event 3, TE – 130

fails low (original comment 21/panel report page 25/**attached Region II feedback item G**). With that shift plus the PORV critical error, the failure would be sustained based on control board ops and dismissing the Tave, as I block, and immediate action communication errors probably don't matter.

- The bolded item came from CCS-060 – this was the final comment that generated enough points to sustain the denial (see CCS-082)

47. Procedural guidance was not followed when reporting the final results. C. Smith was denied the ability to challenge the process because the results were not disclosed.

- In the original documents a grade sheet was included in the document. During the course of several revisions to the administrative review team's document, the grade sheet was removed (compare CCS-066 & CCS-067). OLMC-500 identifies to "re-grade the contested portions of the operating test." (CCS-030, page 8)
- OLMC-500 requires that the applicant received an answer to each contention that was submitted, C. Smith was provided an answer to one contention, a new comment was written and a non-contested comment was changed to a critical task.
- C. Smith was unaware of the procedural requirements for performing Administrative Reviews when she received her results in Nov 2012. When she contacted the NRR/IOLB John McHale to request a copy of the final grade sheet, his response was that "As an Administrative Review, it was not necessary

to prepare a new grading sheet, but rather to focus on how reviewed areas could potentially result in a different outcome for the original grading. (CCS-038, page 5) John McHale provided contradictory information in comparison to the procedure OLMC-500(CCS-030, page 9)

- The administrative review team did not have enough points to sustaining the failure through revision 3 and through October 16, 2012. The Exam Team's document that was submitted to the NRR/IOLB resulted/provided the comment needed to sustain the failure for C. Smith license application.(CCS-082)
- Conversations occurred between John McHale and Don Jackson discussing the identification of the final comment (from the Exam Team's document, CCS-059 & CCS-060) that would cause the denial to be sustained (this comment was identified by John McHale)
- Don Jackson changes his testimony identifying that a comment was not included in his testimony and that he has not done an analysis to determine its impact on the final grading (transcript, July 18, 2013, page 533, line 15 – 20).
- The final letter only addressed one of the contentions that was submitted. OLMC-500 (CCS-030, page 10) states "In all cases, each of the applicants contentions will be addressed as below.....See CCS-014, page 3-9-only one contention was addressed.
- OLMC-500(CCS-030, page 10 "d") states: To enhance clarity, the review detail should contain an overall summary section including the exam date; the date of the applicant review request, the applicant's original score and the applicant's revised score. The entire grade sheet/information was not reported.

48. OL MC – 500 does not support receiving examiner of record input when a Review Panel is the selected choice to perform the review. The procedure identifies that the review team is to remain impartial and that individuals involved with the applicant’s licensing exam cannot be involved (CCS-030, page 3, d).

- Review OLMC – 500 (CCS – 030, page 5-6, b), under section D (RESPONSIBILITIES AND DETAIL PROCESS INSTRUCTIONS) #3: Appeal Panel. During an Appeal Panel Review the panel should conduct and document the review in accordance with the guidance in Section E. During the 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. This section of the procedure does not mention the examiner of record.

49. Discussions existed between the NRR/IOLB John McHale and Don Jackson about the expected outcome of the administrative review.

- Refer to emails between John McHale and Don Jackson – Review CCS-082, page 15 and page 23. Review the red marking pointing out how the determination of the outcome was not driven by the final grading.

50. Influence on the final outcome, occurred due to inappropriate contact between the review team and the exam team. This contact was contradictory to procedural

requirements identifying that the review team was expected to remain impartial.

Contact continued after initial information was gathered.

- OL MC – 500 page 8, and this is (CCS –030) “if an applicant’s version of events disagrees with the examiners version” (which, clearly, is the situation that we had) “signed written statements from the examiner of record may be written”
- Mr. Jackson stated “we did not involve a signed written statement by the examiners” (transcript, July 18, 2013, page 550-551)

51. The review team operating outside of procedural requirements. If the review team would have remained within the boundaries of procedural requirements, the denial would not have been sustained.

- Procedural requirements identified that **contested items** will be re-graded (CCS-030, page 8 “f” & “i”). The re-grade included non-contested items. OLMC states “the reviewer shall utilize the grading policies contained in NUREG 1021 to re-grade the contested portion of the Operating Test.” (CCS-030, page 8 “i”)
- When conducting the review, the review team was outside of procedural guidance when the exam team was interviewed in person. Written statements were expected to be obtained when there was disagreement.(CCS-030, page 8.f.vii)
- When Don Jackson was asked “if the review panel had not re-graded or look at the elements other than what Ms. Smith originally filed for review for the informal review, the panel would have not sustain her failure? (reference to non-

contested) Mr. Jackson's testimony was "I believe that is true" (transcript, July 18, 2013 page 585 (start at line 18) – page 586 (end at line 5)

52. Frank Ehrhardt's fairness review only questioned the individuals from the Exam Team to determine if C. Smith was treated fairly. In addition Mr. Ehrhardt investigation lacked a questioning attitude and made no attempts to obtain information, even if it was contradictory,

- Frank Ehrhardt received statements from Mark Bates, Michael Meeks, and Phil Capehart (CCS-001, CCS-015) (Transcript, July 18, 2013, page 594, line 11 – 16)
- Frank Ehrhardt interviewed Malcolm Whitman on the subject (transcript, July 18, 2013, page 593, line 14 – 15).
- Frank Ehrhardt did not speak with anyone at the facility or get statements (see transcript, July 18, 2013, page 593, line 8 – 25)
- Frank Ehrhardt did not investigate the information provided about the preliminary NRC 398 form. (Transcript, July 18, 2013, page 604, line 16-18)
- When Frank Ehrhardt was asked about having any concerns on how the preliminary 398 were reported to him. His response was "it's different than what I expected to see until I had actually seen the preliminary 398 yesterday, as I mentioned earlier. Yes I was not expecting to see anything in that justification block." (Transcript, July 18, 2013, line 1 – 12)

53. Frank Ehrhardt's fairness review was biased based on his previous participation on Exams Team's with C. Smith's 2011 & 2012 examiners.

- When Mr. Ehrhardt was asked "within the chain of command with the work responsibilities **did you have contact or interaction with Mr. Meeks, Mr. Bates, and Mr. Capehart over the last three or four years?**" Mr. Ehrhardt's response was "in the context of our contact with them it was with regard to the fairness review in obtaining information for that. The year and a half prior to that I was a Branch Chief, I am a Branch Chief in the Division of Reactor Projects. So there is no routine contact between myself and those three individuals. And for the two years prior to that, I was a Senior Inspector conducting fire protection inspections and **there was no routine contact** and the conduct of that, my function there, either. (Transcript, July 18, 2013, page 592 -593)
- Frank Ehrhardt testifies when asked "if he has participated in any examination teams with any of the individuals that he's investigating as part of the fairness review?" His reply is "I have participated with Mr. Bates in an exam team, and I've participated with Mr. Capehart in an exam team, and approximately, I believe, the 2008 – 2009 time frame." (Transcript, July 18, 2013, page 599, line 7-10)
- CCS – 117 is a copy of a letter to the Robinson facility. This document identifies that Frank Erhardt participated on an exam team with Mark Bates in 2007.
- CCS – 118 is a copy of a letter to the Catawba facility in 2009. This document identifies that Michael Meeks was in training during this time. It clearly identifies

that Frank Erhardt was a part of this exam team and he assisted in provided the training needed to qualify Michael Meeks as an examiner.

- CCS – 119 identifying that Frank Ehrhardt recertified Jay Hopkins as an examiner in 2008. Not only was Frank Ehrhardt familiar with the exam team members from 2012, but this letter confirms that he (Frank Erhardt) was also familiar with C. Smith’s 2011 simulator examiner/examiner of record, Jay Hopkins
- CCS – 120 is a letter to the Surry facility in 2009. The document identifies that Frank Ehrhardt participated on an exam team with Mark Bates in 2009.
- CCS – 121 is a letter to Surry facility in 2011. The document identifies that Frank Erhardt participated in an exam team with Mark Bates in 2011.
- The exhibits presented (CCS 117 – CCS – 121) show a long history of participations in exam teams, as well as being the trainer for the individuals that he investigated. Frank Ehrhardt also testified that he has participated on exam teams with Phil Capehart (transcript, July 18, 2013, page 599, line 7 – 10)
- Frank Ehrhardt does not believe that the previous professional relationship is a conflict of interest (transcript, July 8, 2013, page 599, line 17-25)
- CCS – 121 is contradictory to the statement that he made identifying that he had not had no routine contact in the past three or four years. He and Mark Bates had been a part of an Exam Team together the year prior, in 2011.

54. The examples provided by the NRC Staff are not equivalent examples of the issues and concerns identified by C. Smith.

- In the example of Frank J Calabrese Jr., it did not contain elements of an individual that was denied a waiver, an individual required to retake the entire examination after passing one of the sections, experiencing issues during the administration of the exam or experiencing influence and bias from the exam team during the administrative review.

55. Don Jackson identified that he used NUREG 1021 to evaluate the Administrative review.

- Use of NUREG 1021 does not exclude procedural guidance in OLMC-500.
- Portions of OLMC-500 were not followed during the review of C. Smith operating exam (review of non-contested was included). OLMC-500 states: “upon determining the applicants actual actions during the contested test items, the reviewer shall utilize the grading policies contained in NUREG 1021, ES-303, to re-grade the contested portions of the Operating Test.” (CCS-030, page 8-9)
- Strict adherence to OLMC-500 would have resulted in a passing grade for C. Smith on the operating exam. Don Jackson’s affidavit states “I do agree with Ms. Smith that if the panel had not reviewed items not contested by Ms. Smith in her request for an informal review, then the panel would not have sustained her failure. (NRC-004, page 24-25)

56. Based on NUREG 1021, ES-502 AND OLMC-500 the administrative review is expected to re-grade the portions of the test that are contested by the applicant.

C. Smith’s administrative review re-graded portions of the test that were not contested.

- NUREG 1021, ES-502 does not provide any guidance to re-grade the entire exam. ES – 502 provides instructions for the applicant requesting the administrative review. It says “the applicant’s request for administrative review must identified the **items for which additional review is requested** and must include documentation supporting the items in contention” (CCS-005A, PAGE 232). This sentence is specifically discussing items that are requested for additional review.
- In CCS-030, page 8, I, it states upon reviewing the applicant’s actual actions during the contested test items, the reviewer shall utilize the grading policies contained in NUREG 1021, ES 303, to re-grade the contested portions of the Operating Test.

57. The discussion of the word independent is a moot point.

- McHale discusses the use of the word independent view and how it was this you some times and require case. “Again Sir, I think in this case the independent review – – I will look at the – – I think of the reason why – – the use of the word “independent” I think is misused a lot. Again, this has two pieces to it. We talked about there was a Region II reviewer for the bias concern”(Transcript, July 18, 2013, page 660)
- Mr. McHale provides his argument about the misuse of the word independent. But the final report that was submitted to C. Smith by the NRC in 2012 also used of the word “independent.” (CCS-014, page 1)

V. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 4: TAVG/TREF - SCENARIO 7, EVENT 1 (PAGE 18 OF CCS – 045)

58. This comment states that for 40 minutes no attempts were made to adjust temperature. Simulator data factually supports that at least one manipulation was attempted.

- Contradictory information in comparison to the simulator data was reported for this comment. (CCS-045, page 18)

59. The final grade sheets comment did not reflect that C. Smith attempted to correct the temperature deviation twice and each time the manipulation was interrupted by a failure under the control of the examiners. Review CCS-093 and CCS-092

- The first attempt to correct the temperature deviation was interrupted by the failure of the NSCW fan.
- The second attempt to correct the temperature deviation was interrupted by the pressurizer pressure failure.
- A minimum of one manipulation can be proven with corresponding simulator data, the individual grade sheet does not reflect this attempt.

60. C. Smith's crew started with a deviation that was closer to 2F than any other crew. This required C Smith crew to make a temperature adjustment and left the crew with less time to adjust the deviation than maybe other crew.

- Review exhibit CCS – 092 for comparison

61. On the second attempt to correct the temperature deviation, a manipulation was already in progress when the next failure was put in place by the Exam Team. C. Smith's crew was the only crew that encountered failures that coincided with manipulations that were in progress. Review CCS-092.

62. If the intent was to evaluate the control temperature, a reasonable amount of time to control the RCS temperature was not provided.

- Based on NUREG 1021 "too short a time between malfunctions may mask the effects of a particular malfunction and divert the operator's attention. This shortcut the observer's ability to evaluate the operator's response may be prejudicial to a fair evaluation." (CCS – 005 page 416)

63. Malfunctions under the control of the exam team, prevented the manipulation needed to maintain the temperature requirement.

- Addressing the temperature deviation could not occur with failures in progress.

64. The temperature comment (CCS-045, page 18) was removed by the Administrative Review Team during the appeal process.

NOTE: To clarify a comment (Transcript, July 18, 2013, page 562) referencing the PORV comment "approximately 30 seconds later, the applicant was directed to close the PORV by the SS". This comment is not correct because it did not take 30 seconds to close the valve or to be corrected by the SS. The entire evolution that included redirecting, diagnosing, responding to the failures, the actual error, and closing the valve, took less

than 30 sec (approx. 26 sec). A review of the simulator data for the time period (CCS-074) identified that the time pressure dropped (indicating that the failure occurred) to the time that the pressure recovered (indicating that the valves close) was less than 30 seconds.

- The actual comment states (CCS – 045, page 19): approximately 30 seconds after the initiation of the failure. “After the initiation **of the failure**”, not “30 seconds after the error.”
- This information can be validated by reviewing the simulator data for scenario 7 (CCS-074 - C. Smith’s crew simulator data). Take note the time that PT 455, 456, 457 and 458 lowers (Pressurizer pressure) and the time that the pressure values stop lowering.

VI. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 5: SLI/SI BLOCK - SCENARIO 3, EVENT 7 (PAGE 10 OF CCS – 045)

65. SI/SLI block can be attempted once pressurizer pressure is less than 2000 PSIG. This comment stated that the block was attempted when pressurizer pressure was greater than 2000 PSIG. Simulator data factually supports (based on the time reported in the examiner notes) that pressurizer pressure was less than 2000 PSIG.

- Contradictory information reported for this comment supports that the examiners obtain the 2007 PSIG value from the RCS digital meter. Pressurizer pressure is the correct meter(s). Review CCS-042 and CCS-044.

66. The examiner reports that pressurizer pressure was at 2007 PSIG, and that the applicant thought pressurizer pressure was at 1998 PSIG.

- Review of the simulator data shows that those two values were reading at the same time (based on the examiner notes) from two different meters. (See CCS-042)
- The NRC Exam Teams value of 2007 PSIG originated from the PT 428 – RCS digital pressure meter (incorrect meter)(See CCS-042)
- C. Smith’s value identified originated from the correct meter PT – 457 Pressurizer pressure digital meter (correct meter)

67. The examiners data originated from the wrong digital meter. The Exam Team’s notes and the simulator data support that the data collected and reported on the final grade sheet came from the RCS pressure reading.

- Mark Bates has RCS pressure at 2007 PSIG, written in his notes (CCS-043, page 63).
- Phil Capehart has RCS pressure at 2007 PSIG, written in his notes (NRC-044, page 36).
- The Simulator Data confirms that RCS pressure was reading at 2007 PSIG, the same time that pressurizer pressure was reading 1998 PSIG. (CCS-042)

68. The examiners notes indicate that **RCS pressure** was equal to 2007 PSIG, when the data was transferred to the final grade sheet there was no reference made to RCS pressure. The information that originated from the examiners notes was reported on

the final documentation as **pressurizer pressure** was equal to 2007 PSIG (versus RCS Pressure). The error was likely discovered prior to reporting it on the final exam report.

- The wrong information was recorded in the rough notes (by the examiners) during the exam
- It was obviously recognized at some point because the source (RCS) changed on the final report but the pressure value (2007 PSIG) did not.

69. When the pressure was less than 2000 PSIG, the P-11 bi-stables did not extinguish, as expected (indicating that the block can occur). The bi-stables extinguished at 1950 PSIG. This was an abnormal response by the simulator.

- The simulator did not respond as expected and the crew responded with alternate indications to accomplish the task as expected per NUREG 1021, appendix E (CCS-005B, page 455), part E, #1: “If you believe that the simulator is not responding properly, you should make decisions and recommendations on the basis of the indications available.”
- Mr. Leas review of the information identified the following questions: In the expected response, we stated that the applicant was “expected to direct that low steam line pressure SI/SLI be blocked when pressurizer pressure was less than 2000 psig as indicated by P-11 status lights” in accordance with procedure 19030-c,” Step 12. (BRD-013, page 2) Note the procedure did not say as indicated by P-11 status lights, it stated:

- 1) Check if low steamline pressure SI/SLI should be blocked:

_a) Steam Dumps – AVAILABLE.

_b) PRZR pressure – LESS THAN 2000 PSIG. (BRD-013, page 2)

70. This comment was removed during the administrative review by the review team.

VII. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 6: RWST - SCENARIO 7, EVENT 6 (PAGE 20 OF CCS - 045)

71. The event was not described accurately on the final grading sheet comments (CCS-045, page 20). The comment description identified that the crew did not know the location of the RWST sludge mixing valves. The crew was aware of the location of the valves.

- C. Smith's crew member assigned as the unit operator, Rodney Waltower testifies "there was no question of where the valves were on the QPCP. There was no question where the valves were in the plant. There was no question on how they operate. It was simply finding the SOP that was vacant. To go back there and say okay, start the pump and close the two valves (transcript, July 17, 2013, page 329, line 1 - 17).

72. The testing outline (ES-D-1) identifies that the verifiable actions require the "Unit Operator" to perform the actions to close the RWST sludge mixing valves.(CCS-046, page 5, Event 6) The grading criteria was extended to include C Smith's position although her position is not included.

- NUREG 1021, ES 302 (CCS-005A, page 131) states the examiner is expected to administer the plan operating test in accordance with the prepared and approved walk-through test outlines and simulator scenarios (ES – D – 1, scenario outline and ES – D – 2, required operator actions).
- Assigning a comment to a position not included on the testing outline would require the same consistency on other event's.
- No comments were reported for other events (outside of the RWST event) or scenarios where the opposite position received a comment for not making a suggestion when the other position did not perform as expected.
- Mr. Lea's review of the comment identified the following questions: You say that the applicant as the RO was not expected to leave the control board, therefore not expected to go and locate the valves..... She is not expected to know the actions of the ARP from memory. If the BOP pulled the ARP, then the BOP should have read the actions identified in the ARP and performed the actions not the applicant. (BRD-013, page 2)
- Mr. Lea identifies that the write-up is not very good. The applicant should not have been downgraded in this area (BRD-013, page 3).

73. On the 2011 exam, an error occurred in which an individual did not find a valve on the back panel. In this case, the entire crew was not penalized.

- See Exhibit CCS-010, page 10 - the individual was expected to perform a complete CVI (containment ventilation isolation-prevents a release to the public from containment), the applicant could not locate the valve.
- See Exhibit CCS-009 (Operator D) and Exhibit CCS-007(C. Smith). The individuals that was a part of this crew did not receive a comment.
- Philosophy differs in 2011 in comparison to the 2012 RWST comment. In 2012 the entire crew received a comment and the valve was closed.

74. On the 2012 exam, the assignment of the RWST the comments was not consistent among all crews that exhibited issues with the valves. The examiner exit notes that were presented to the facility upon completion of the operating exam stated that all crews had a problem with finding the RWST valves (NRC – 023, page 3, #15).

- All crews had a problem but all crews did not receive a comment.
- Review exhibit CCS – 097 to identify all individuals that received this scenario and all individuals that received a comment note that one crew/three individuals did not receive a comment.
- Does not support the twin concept of equitable and consistent administration the grading.

75. The testing outline was approved by the NRC exam team prior to the administration of the exam. The original intent did not include the reactor operator position as the individual expected to address the event. Prior to the exam, the NRC Exam Team did

not change this to reflect a “crew” event (meaning that all positions are responsible for the event).

- NUREG 1021, page 131, 2ND paragraph, (e), identifies that the examiner is expected to administer the plan operating test in accordance with the prepared and approved testing outline (CCS-005A, page 131)
- C Smith was assigned the responsibility of reactivity control. The comment extended to include C Smith’s as an evaluated position. The facility trains the operators to focus on reactivity control and not to be burdened with the additional responsibility of considering and recommending actions related to the problem or failure.
- Mr. Tucker’s testimony is “even if it’s on the operators control Board, either the operator at the control does a turnover to the unit operator, while they go focus on the event. In other words somebody always has a full focus on reactivity. (Transcript, July 17, 2013, page 302)
- The details about the RWST comment were not consistent with the actual details. The comment as written identified that the crew did not know the location of the valves. In actuality the location of the valves was known, the additional time incurred was due to trying to find procedural guidance to close the valves.
- A crew members testified that the RWST comment was not accurate: There were comments in there that were inaccurate, I believe. I don’t have them in front of me. Like the RWST one specifically. Made it seem like we were lost,

we were all lost and that wasn't true. (Transcript, July 17, 2013, page 374, line 7-11)

- C. Smith's complaint is that the description of the event was not accurately described. The details of the event was that the SS and UO were unaware of the location of the valves. The delay in time was the crew trying to find the SOP to close the valve. C. Smith had no reason to offer the input to close the valves because this was already discussed between the SS and the UO.

76. C. Smith was not ask any follow-up questions in reference to this comment by Mark Bates (CCS-047, page 32-35, page 76(bottom), page 77 (top), page 80 – no question were asked about the RWST).

- NUREG 1021, ES302, (CCS-005A, PAGE 138), M, states "if an applicant did not perform as expected, the examiner should note the applicant actions or (lack there of) next to or below the expected action and follow up with the appropriate question after the simulator scenario is complete."
- No notes about the applicant's action or lack of actions were identified in Mark Bates notes for the RWST comment.
- If an error occurred then based on procedural guidance follow-up questioning should have occurred.

77. This comment was removed during the administrative review by the review team.

VIII. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 7: EHC - SCENARIO 3, EVENT 5 (PAGE 8 OF CCS – 045)

78. The basis for this comment is not equivalent to the objective of the event identified in the testing outline (CCS-048, page 5 and page 28-33). The exam team changed the criteria after the test was complete, this changed the criteria of the planned operating tests.

- NUREG 1021, CCS-005A, page 131, E, states the examiner is expected to administer the plan operating test in accordance with the prepared and approved walk-through test outline. The examiner shall document every aspect of each applicant's performance were later evaluation, but they should not use the applicants unplanned actions and statements to displace any part of the plan operating test.

79. The testing outline objectives and actions expected to be evaluated for this event are based on starting the standby EHC pumped prior to 1100 PSIG before it causes a turbine trip (CCS-048, page 5). This criteria was met.

- Mr. Lea's had similar questions during his review of this comment. "In the expected actions we say two things. First we say that the applicant was expected to recognize that the standby EHC pump did not automatically start after the running pump tripped and EHC pressure reached 1400 psig". "We then say "Alternatively, the applicant was expected to recognize shortly after running

the EHC pump tripped that the standby pump would be required and its automatic start was imminent and thereby preemptively direct the standby EHC pump to be started prior to its automatic start setpoint (1400) being reached.” Which action must the applicant perform to successfully complete the task or address the event of the scenario? In one sentence the applicant should start the pump after the EHC pump tripped AND pressure reached 1400 psig. In the next sentence we say that the applicant should start the pump SHORTLY after the EHC pump trips? Did we not identify this as an expected response once the running pump tripped? This appeared to be the corrected response. (BRD-013, page1)

80. There is no supporting data, such as a number value, in the examiners notes to support determining that the applicant’s actions were incorrect. Nor did the examiner request a copy of a chart to indicate when the pump was started.

- NUREG 1021, ES302, (CCS-005A, PAGE 139, P), states if the applicant did not perform as expected, the examiner should ask the simulator operator to provide copies of the logs, charts and other materials that may be required after leaving the facility to evaluate and document the applicant’s performance. The examiner of record shall retain all documentation related to any operating test failure until the proposed denial because final license is issued.

- If the action was unexpected (alarm did not come in added in post review- NRC-033, NUREG 1021 (CCS-005A, page 138, m) say is if an applicant does not perform as expected, the examiner should note the applicant actions (or lack there of) next to or below the expected action. No notes taken at the time of the exam indicate that the alarm did not come in as expected. (NRC-033, page 3-13)
- The justification for the comments is based on the words “several” minutes (not a defined amount of time), identified in the testing outline. (NRC-033, page 1 @ bottom and page 3)
- No way to validate the amount of time used to address the failure, no chart collected or requested by the examiner.
- No way to validate if the timeline or the amount of time used to address the failure is accurately reported by the examiners in the rough notes. Exhibit CCS – 093, page 6 – 8, points out suspicious issues with examiner notes. Lines are faint or missing on one page of notes (in comparison to the other pages) from the same scenario. The date was written in the top right-hand corner of notes written during a scenario..... Half of the notes have one date and the other half of the notes; have a different date for the same scenario.
- Mr. Leas questions were as follows At no point in our write up did we say what EHC pressure was. What was pressure? (BRD-013, page 1)

81. The applicant performed actions in conjunction with the required operator actions identified in the testing outline. Based on NUREG 1021 guidance there was no basis for asking follow-up questions.

- Mr. Lea’s review of the document asked the following questions: It would appear to me that the applicant recognized that the standby pump tripped and directed actions to start pump. We then asked a follow-up question and downgraded the applicant based on the answer provided. We went on to say that the applicant “incorrectly diagnosed that EHC pressure had dropped below 1400 psig, which is the standby EHC pump automatic start setpoint.” Did you ask the applicant to show you what the pressure was when the pump was directed to be tripped? We went on to say that the applicant “demonstrated a weakness in her ability to obtain accurate EHC pressure data on which to base her diagnosis.” There is no indication that we asked her to identify where she got her reading from……. It is my opinion that the applicant should not have been downgraded. (BRD-013, page 1)

82. This comment reported on the final grade sheet stated that the applicant’s started the pump because she believed that the standby pump did not start. The examiner did not ask the applicant “to explain her directives”.

- See CCS – 043 (page 82, at the bottom) to review the questions asked Mark Bates about the EHC pumped.

- Mark Bates or Phil Capehart do not have any information in their rough notes to support if the pressure dropped below the set point for the standby pump to start. (NRC-033)
- When the administrative review started, binders were provided for the review team that included extra information that was not written in the original rough notes. Reference to an alarm (that comes in at 1500 psig) was written in the binders (post exam) for the EHC pumped. This was not written in the original notes. (CCS-098)
- Crew member supports that the EHC alarm did illuminate (Transcript, July 17, 2013, page 365, line 15-19)

IX. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 8: TAVG TEMP - SCENARIO 6, EVENT 6 (PAGE 16 OF CCS – 045)

83. There is no disagreement that an error occurred. However the examiner incorrectly categorized this comment as a “diagnose” error under rating factor 1.d. By placing this comment in a different rating factor, more points could be deducted from the category.

- If this comment had been placed under any other rating factor, the category would result in a passing score.
- Subjectivity was used in the placement of rating factors.
- Review for appropriate coding under competencies “ensuring accuracy”, “directing operations” or “procedure usage”. Description of the event more closely related to the competencies.

84. When the comment was reported on the final grade sheet, information was left out causing the appearance that C. Smith diagnosed the issue independently and directed the actions independently. (Review CCS-040, page 4)

- No reference is made in the comment about the previous communications that occurred between the SS and the RO prior to the inserting of the rods (CCS-045, page 16). Nor do the ROs comments include any of the communications that occurred prior to the inserting rods. (CCS-057, page 11)

85. C Smith's comment does not meet the definition of diagnose.

- Diagnose is defined as to recognize by signs and symptoms, to diagnose the condition, to analyze the cause or nature of the problem.
- The reactor operator identified the problem, meaning that he diagnosed the issue. The root cause of the error was the reactor operator misdiagnosed that rods were not operating properly. As a result of the diagnosis, rods were taken to auto at. Operator V did not receive a comment for "diagnosis". Operator V received a comment for "manual control" (CCS-057, page 11).
- At the time that the reactor operator identified the issue, C. Smith (as the shift supervisor) had entered an abnormal operating procedure (AOP). The abnormal operating procedure was called rapid down power - at that time she was managing the priorities of the crew based on the procedural guidance.

- The exam team is implying that C. Smith was required to manage the operating crew, maintain oversight and diagnose each operator's board. This does not meet the definition of a crew.

86. The incorrect action was directed based on incorrect information. However C. Smith recognized the error quickly and self-corrected the issue.

X. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 9: TE-130 - SCENARIO 7, EVENT 3 (PAGE 21 OF CCS – 045)

87. There is no disagreement that an error occurred. The disagreement is that C Smith was not assigned to address the failure. The comment as written gives the impression that C Smith was assigned to respond to the failure. In actuality C Smith was assigned to monitor reactivity.

- The comment was written to identify that C. Smith failed to take manual control of the controller. (CCS-045, page 21)
- When the comment was evaluated by the Review Panel, the evaluators could not recall if the direction was provided by the SS to monitor reactivity (CCS – 014, page 8, see #1 at top of page).
- The examiners identified that C. Smith was in the vicinity of the TE 130 controller the entire time. C. Smith has signed statements from the other **members** of the exam team. Both members indicated that C Smith was

assigned to monitor reactivity and that she was **not** in the vicinity of the controller (CCS-040 and CCS-041).

88. C. Smith identified the failure although assigned to monitor reactivity. Mark Bates write in his notes “Certainly appeared that Carla made correct diagnosis” (NRC-052, page 75)
89. “The only thing we can do is contact C&T to get TE Fixed” This quote was taken out of context. It was intended to assist the shift supervisor in identifying that the information needed to address the component was not in the abnormal operating procedure (AOP) (CCS-040). (Transcript, July 17, 2013, page 248-252)
90. The event cannot be described without using the word “manipulate” or “manipulate in the wrong direction” yet the comment was identified under the competency for “manual control” on the final grading sheet versus “locate and manipulate.”
91. The assignment given to C. Smith by the SS change the expected response. This change was outside of C Smith’s control because she was not the supervisor.
- Referred to. Tucker statement that one operator addresses the failure in the other monitors reactivity. (Transcript, July 17, 2013, page 302-305)
92. The manipulation error of TE 130 in the wrong direction was equivalent to the error made with the comment on page 19. The categorization of the two comments were

different. By changing the comment to a different category, more points could be deducted from C Smith's grade.

- If this comment were removed and applied to the appropriate category it would increase C. Smith's grade to 2.32 in Control Board Operations.

93. The independent panel wrote a new/second comment for TE130 (that the individual did not understand). Because the Review Panel wrote a new comment, C. Smith had two comments for one error. By adding an additional comment, C Smith was now held to a standard that allowed her to receive more than one comment for each error versus the philosophy used for the rest of her peers (one comment per error).

- The example/recommendation documents provided by the exam team during the administrative review identified this comment on more than one occasion.
- The exam team's reference to "lack of understanding" (to justify adding a second comment for the TE130 comment during the review) was identified in the interviews, the binders (NRC-038), the document provided to David Muller in an email (CCS-062 AND CCS-101) and in the document provided to the NRR/IOLB John McHale (CCS-060).
- See CCS – 079, page 3-6 to review the exam team's first recommendation to add TE 130 as a comment for competency 1C-understanding.
- The Administrative Review Team considered the addition of the comment for TE 130 (understanding) as noted on the whiteboard (CCS-079, page 8) notes.
- Review CCS-080, page 10 to see Mark Bates influenced adding the additional TE 130 comment under the competency 1C – understanding.

Note: the exam teams consistency in identifying that C. Smith should have received an additional comment for competency 1C – understanding

- Region II Exam Team submitted a document (CCS-060), dated October 12, 2012, to the NRR/IOLB John McHale. The exam team disagreed with the final conclusion of the review team. In the previous documents (CCS-101) the Exam Team members recommended an additional comment under the competency 1C – understanding. In this document (CCS-060) the exam team makes a recommendation that the comment under competency 1C – understanding, should be changed to 3C-understanding. By changing their previous recommendation, this would disperse the points to a new location that was sustain the denial (moving the points around).
- The appearance is that the exam team’s recommendations are not based on identifying the correct rating factor. The appearance is that the recommendation is based on placing the comment in a location that will removed enough points to cause or sustain a denial

XI. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 10: FIC-121 - SCENARIO 6, EVENT 4 (PAGE 14 OF CCS – 045)

94. The original comment did not reference the amount of time that the controller remained in manual. By referencing the time (18 minutes) it would show that consideration was given to allow the controller to stabilize. The comment gives the

impression that the controller was taken to manual, and returned to automatic too soon (CCS-045, page 14).

95. All required operator actions were performed in accordance with the testing outline.
- A review of the examiners rough notes will identify that all actions that occurred were written in the testing outline. This includes placing the controller in automatic and then returning it back to manual. Based on the testing outline this was an expected response.(CCS-054, page 84) v/s (CCS-054, page 18-20)
 - CCS – 052, page 21, see steps D9 AND D10. Step D9C is pressurizer level controller to auto – the controller was taken to auto after 18 minutes. Step D10 check pressurizer level is maintained by auto control - the controller started to close meaning it was not maintaining properly. The next step required is the “RNO” for step D10. Maintain pressurizer level using manual control - our crew took pressurizer level that to manual control. All actions were performed as written in the testing outline.
96. The examiners placed another failure in (PT 508) before the current event was complete and while the controller was being returned to automatic.(Review CCS-100) Placing the next failure at the same time that the controller was being addressed distracts the crew.
- This action was not consistent with the timing for other crews. All other crews were given an opportunity to respond or they were moved to the next event before attempting to place the controller in automatic.(Review CCS-099)

- If the examiners were still evaluating the response to event number four then there is no justification for moving to event number five. NUREG 1021, appendix D, page 5, last paragraph (CCS-005B, page 416) : too short a time between malfunctions may mask the effects of a particular malfunction and divert the operators attention. This shortcuts the observers ability to evaluate the operators response to the earlier malfunction and may be pre-judicial to a fair evaluation.
- CCS-005B, page 414, 1st paragraph states that a well-crafted scenario should flow from event to event, giving the operator sufficient time in each of that analyze what happened, evaluator the consequences of their actions (or in action), assigned a priority to the event given the existing plant conditions and determine a course of action.

97. Inconsistencies within the notes do not support the simulator data. The examiners notes identifies a timeline stating that PT 508 was addressed first and that the crew returned the FIC 121 controller to automatic after the PT 508 failure. This information is inaccurate. C Smith identified that the FIC 121 controller was placed in automatic at the same time that PT 508 failed. FIC 121 controller initially remained stable and as soon as PT 508 was addressed, the controller for FIC 121 started to close.

- A review of exhibit CCS –100 shows that the sequence of events does not support the timeline written in the exam teams rough notes.

98. According to the examiner notes, 18 minutes past before C. Smith's crew attempted to return the FIC 121 controller back to automatic. Inconsistencies exist between the other crews, in reference to the amount of time before the exam team moved to the next failure. (CCS-099)

- Group 2, had the controller in manual for 12 minutes before the exam team moved to the next failure, the group did not have an opportunity to attempt to return the controller back to automatic to test their competency.
- Group 3 had the controller in manual for 8 minutes when they attempted to return the controller back to automatic and shortly afterwards the exam team moved to the next failure.(CCS-099)
- Review CCS – 099, for a detail comparison on how the other two crews did not experience any simultaneous actions while addressing their failures for the same event.
- Why did the review team allow so much more time to pass for C Smith's group?
Was the additional time to allow the attempt to occur?
- NUREG 1021 (CCS-005A, page 148, bottom paragraph) states extending the time between malfunctions so that no operator activity is in progress may cause undue stress. During an examination, the operators expect something to occur; too much time between events should be avoided.

XII. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 11: PRESSURIZER HEATERS - SCENARIO 3, EVENT 4 (PAGE 12 OF CCS – 045)

99. The examiners identifying that the applicant thought to heaters were not operating properly is not a true statement.

- If the applicant felt that the heaters were not operating properly, then there would be no attempt/discussion about returning the heaters to automatic.

100. The heaters were left in manual because the previous condition existed (PZR level was greater than 5%). Because the previous condition still existed, when the heaters would be returned to automatic it would cause the heaters to automatically energize. The heaters would cause the pressure to increase and it would exceed the procedural guidance. It was explained to the examiner that the heaters had automatic actions that were affected by two systems. The two systems was the previous failure (pZR level) and the current failure (pressurizer pressure).

- By maintaining the heaters in manual, it would allow an opportunity for the pressurizer level from the previous condition to lower below 5%. Once the pressurizer level from the previous condition is below 5% and the heaters are returned to automatic there would not be an increase in pressure because the heaters would not energize.

101. Consistency does not exist between comments.

- In the FIC 121 comment C Smith was penalized for not considering that the controller was saturated - identifying that the controller should have remained in manual. In this comment the response of the heaters was taken into consideration and a penalty was imposed.

- Operator V was expected to take a hand switch back to its normal position in another scenario on the testing outline (See CCS-046, page 3, event 3, realign through the demin and page 16, #3 “when letdown temperature is restored, return 1 – TV – 129 to the demin position”.) When this operator decided to leave the hands which in the manual position he was not penalized (CCS-057, page 6-15 no comments).

XIII. FINDING OF FACT AND CONCLUSIONS OF LAW FOR STATEMENT OF POSITION 12: PORV - SCENARIO 7, EVENT 5 (PAGE 19 OF CCS – 045)

102. This comment was not originally contested to the NRC when a request for a review was performed. There was not enough points to sustain the failure, until changes to non-contested item were used. .

- Changes to the non-contested items was not authorized in accordance with procedural guidance. OLMC – 500 provides instructions to “re-grade contested” items.(CCS-030, page 8)
- NUREG 1021, ES 502 provides guidance for the applicant to request an appeal. The instructions direct the applicant to provide materials for items that are contested.(CCS-005A, page 232)

103. The applicant was manipulating control rods when the pressurizer pressure failure was initiated by the exam team. No other crews was in progress of manipulating control rods or any other manipulation when the next failure was put in place.

- See CCS – 092 for comparison of simulator data. This exhibit compares all three crews and C Smith’s crew was the only crew to receive a failure while a manipulation was in progress.

104. The applicant initially took the hand switch to the wrong position and was corrected by a team member. In the administrative review this comment was change to a critical task citing that a LOCA was in progress.

- The review team identified the error as critical although it was corrected within seconds and C Smith did not have an opportunity to self correct.
- C Smith did recognize that the block valve did not close, meaning that the worst case scenario could not be assumed unless there was a failure to manually close the block valve.
- A LOCA was not in progress, the PORV valves created a path to the PRT (tank).

105. The comment was not listed as a critical task on the original testing outline. The change in criteria was identified six months after the completion of the examination in the applicant actions are already known.

106. Although the PORV comment was not contested and should not have been re-grade, there was no detailed analysis done for the PORV comment during the administrative review. The final document from the Review Team did not have an analysis for the PORV comment (CCS-037, page 38). The document reported to C.

Smith (CCS-014, page 4-5) did have an analysis. Who performed this analysis? This is not what the Review Team submitted.

- All other comments (although they were not reported to C Smith) contained an analysis to describe the review team's evaluation of the comments.
- The last-minute addition of the PORV, was not a planned evolution, due to the absence of an analysis from the Review Team.

107. The NRC identifies that if an applicant is about to make an error and an incorrect action or inaction is corrected by a teammate, the examiner is required to hold the applicant accountable for that error.(NRC-001, page 82) To support this statement the NRC refers to NUREG 1021 (CCS-005B, page 455), appendix E, part E, item 4: members of the operating team or crew should perform peer checks in accordance with the facilities licensee's procedures and practices, non-crew members and NRC examiners will not perform this function. However you if you begin to make an error that is corrected by a peer checker, you will be held accountable for the consequences of the potential error without regard to mitigation by the crew.

- The error made by C Smith was not in conjunction with a peer check.
- C Smith was responding to abnormal plant conditions, and immediate operator actions.

108. The exam team cannot consider the worst case scenario, if the PORV was not Failed Open. There was a second method to ensure the path was close.

- The examiner wrote in his notes that C. Smith identified that the second path failed to operate properly, supporting that she recognized the unexpected

position of the block valve. Notes say C→R BV456 did not close.(NRC-052, page 76)

109. Identifying that an objective as a critical task requires more than just meeting the definition of safety significant.

- CCS – 005B, page 426, #2 states to avoid assigning the critical task designation to generic task that has safety significant but do not meet all the criteria required to identify a critical task.(NRC-052, page 4 and 26-31-do not identify any critical task)
- After the administrative review, No changes were identified to the original testing outline to identify an update that listed the requirements to make a task critical.

110. The PORV was identified as “failed open” by the NRC Staff.(NRC-001, page 116, 2nd paragraph) The PORV was not failed open in C. Smith’s scenario.

- The PORV was responding as expected. It was responding to a failed pressure instrument. The PORV was capable of being operated when needed.
- If the PORV were failed open then it would meet the requirement for a critical task.

111. NUREG 1021, (CCS-005B, PAGE 426) has a section identified as CRITICAL TASK AS GENERIC SAFETY TASK. It provides guidance on determining if an action is critical. It states: avoid assigning the CT (critical task) designation to generic task that has safety significant but do not meet all of the criteria required to identify a critical

task. The PORV comment does not meet the definition of a critical task under this section.

- NUREG 1021, (CCS-005B, PAGE 426) states taking manual control of an automatic safety system qualifies as a CT only if the auto initiation feature fails to work. It is then safety significant for the crew to take manual actions as the plant conditions clearly indicate that an automatic action should have occurred and did not.
- PORV 456's auto initiation feature did not fail to work. PRV 456 auto initiation responded as expected to the failed pressure instrument.
- NRC – 024 provides an example of a failed open PORV identified as a critical task. This example includes a failed open PORV, not a PORV that opens because the instrument fails. The difference between the two is that the failed open PORV cannot be manipulated and the PORV that opens because of the instrument failure can be manipulated. The PORV in this example (NRC-024) meets the criteria in NUREG 1021 (CCS-005, page 426) because the auto initiation feature failed to work.

112. Changing the PORV to a critical task during the administrative review was influenced by the exam team.

- A review of CCS – 079, provides details of how the exam team's input influence the administrative review team.
- Discussions about the PORV becoming a critical task started during the interviews with the exam team.

- Mark Bates provided a document to the review team via email identifying how he could have graded C. Smith harsher.(CCS-062 and CCS-CCS-101) The document contained recommendations identifying that the PORV should have been critical.
- Binders were provided to the review team members that also contained recommendations. The PORV becoming a critical task was identified in the binders.(CCS-039, page 3)

113. NUREG 1021 (Exhibit CCS-005B, page 414) identifies that all CT shall be flagged in a manner that makes them apparent to the individual who will be administering the operating test (e.g., by using underlines, astericks, or bold type), and the measurable performance indicators shall be identified. When possible set points and other parameters should be included to provide an objective method for evaluating the operators performance.

XIV. COMMUNICATION COMMENTS

114. C. Smith disagreed with the communication comments.
- The communication comments were used in excess, and due to separation in time there is no way to validate if the information was true.
 - The communication comments were not warranted.
 - The use of the communication comments allows an increase in the criteria for all other competencies. If a score less than 1.8 is achieved in the communications

competency then the criteria changes requiring a score greater than 2.0 in all other competencies to pass the simulator portion of the exam.(CCS-005A, page 146)

CONCLUSION

The petitioner has experienced several instances in this entire process where she was not treated fairly. The processes identified in the regulations are flawed when applied. The issues encountered at the regional level were very unexpected and unexplainable. However, the regulations as written give the impression that if a concern existed that an outside entity was available to address the concern. Unfortunately this exam and appeal process has failed at so many levels. All the failures lead to a concept that the NRC examiners are not fallible. This is not to make the accusation that all examiners are flawed, this is to say that when information is contradictory to factual data then concern should be imminent.

Even in the petitioner's pursuit to exercise options identified in the NUREG-1021 for disagreement with a license denial, she was still challenged with fair cooperation. The issues experienced included: 1) The NRC Staffs attempt to have C. Smith's hearing request thrown out because she failed to properly submit and request a hearing. The only issue with these circumstances is that C. Smith following the instructions that were provided to her via mail by the staff. 2) The NRC staff failure to report the emails submitted by Edwin Lea in a timely

manner. It was initially identified that they did not feel that this disclosure met the requirements for disclosure in the hearing files. After further management review the document was disclosed.

The exam is a final product of the NRC Examiners. Malcolm Whitman mentions how the exam is still the NRC's product in the end" (transcript, July 18, 2013, page 617, line 21 – 25). The NRC is required to approve the exam prior to administering. C. Smith results lack alignment with the criteria approved by the NRC before administering the exam. Several comments were not identified as required or expected operator actions. NUREG 1021 expects the examiner to administer the exam as identified in the testing outline.

The test relies heavily on judgment and does not protect an applicant when the examiner comments are not reported accurately and issues are encountered. John McHale speaks about how the NRC relies on the professional judgment of the examiners. He says "we train and certify them and we rely on them, based on the fact that collectively within the region they have seen hundreds of candidates, that they make an assessment based on the available information. (Transcript, July 18, 2013, page 37, line 1 – 8). Malcolm Widmann discusses "that the exam team is the only people that saw these applicants in the simulator. They make great efforts to document the error as they see it in the proper place". (Transcript, July 18, 2013, page 642, line 13 – 21). If the expectation is to rely on the examiners judgment then it should also be followed

up with quantifiable and factual data. The allegations in this case are not based on one peculiar event but several peculiar events. Mr Widmann is suggesting that examiners judgment supersedes evidence that is contrary to the conclusion. Three opportunities existed in which C Smith would have received a Senior Reactor Operator License (waiver, exam, review), if the exam team or review team applied rules that were consistent with procedural guidance. The first instance is when the exam team influence the facility when they attempted to submit a waiver on behalf of C Smith. During the hearing we learn that this is an action that is rarely pursued and the team did not have an established standard to evaluate. The second instance is when the exam team lacked procedural adherence and consistency between crews during the administration of the exam in 2012. The third instance is the review team's inability to remain impartial during the administrative review and lacked adherence to procedural guidance.

C Smith's qualifications are equivalent to the individuals that receive waivers in 2012. In 2011 the license application included a signature by Phil Capehart for Jay Hopkins stating that C Smith passed the simulator portion of the exam. In 2012 the license application included a signature by Michael Meeks stating that C Smith passed the written portion of the exam. It is very unlikely that an individual was performing at a high level in the 2012 training class and suddenly is identified as the least competent operator. C. Smith has been denied a Senior Reactor Operator License, based on personnel behavior that are outside

of her control. Mr. Lea was asked if C Smith fell in the 3 to 4% of people who actually failed the simulator. His response was “in my opinion I will say that she is not one of the people should have failed the exam (Transcript, July 18, 2013, page 711, line 10-16). Mr Lea also stated that “you've heard that she would be an unsafe operator. I tend to disagree” (Transcript, July 18, 2013, page 711, line 23-24).

C Smith was not provided uniform conditions in comparison to her peers or in comparison to the procedural guidance. NUREG 1021, ES102, (CCS-005A, page 34): Section B Statutes – 1. Atomic Energy Act of 1954 (42 U.S.C. 2137), as amended, requires that the NRC must prescribe uniform conditions for licensing individuals as operators of production and utilization facilities, determining the qualifications of these individuals, and issuing licenses to such individuals . It is request that the Board rule in favor of C. Smith.

Sincerely

Charlissa Smith

