UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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September 23, 2013

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.1209 and the Atomic Safety and Licensing Board's (Board) Order of July 3, 2013,[1] the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) submits, its proposed findings of fact and conclusions of law in response to the claim by Charlissa C. Smith (Ms. Smith) that the NRC improperly denied her 2012 senior reactor operator (SRO) license application. The Staff respectfully submits that Ms. Smith's claim should be resolved in favor of the Staff. Specifically, this Board should rule as follows: (1) Ms. Smith did not prove by clear evidence that the Staff improperly discharged its duties by not processing a waiver requests on her behalf nor did Ms. Smith prove that the Staff would have granted such a request had one been processed; (2) Ms. Smith did not prove by clear evidence that there was a conflict of interest with respect to her 2012 simulator test or that the Staff was biased against her; (3) Ms. Smith did not prove by clear evidence that the Staff improperly discharged its duties with respect to the administrative review of her 2012 simulator test or how such an improper discharge would be causally related to her requested remedy of license issuance; (4) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her failure to diligently monitor primary plant parameters and initiate rod withdrawal; (5) Ms. Smith did not prove that

[1] Order (Memorializing July 1, 2013 Prehearing Conference), at 2 (July 3, 2013).

the Staff abused its discretion in downgrading her for her failure to properly block SI/SLI; (6) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her failure to locate the sludge mixing isolation valve handswitches during the RWST leak; (7) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her misdiagnosis that the standby EHC pump auto-start feature was malfunctioning; (8) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her misdiagnosis that control rods should be automatically inserting; (9) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her improper manual control of the normally automatic functions of 1TIC-0130; (10) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her failure to understand the saturation of FIC-0121; (11) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her failure to take pressurizer heaters to automatic; and (12) Ms. Smith did not prove that the Staff abused its discretion in downgrading her for her failure to properly manipulate the pressurizer PORV handswitch.

BACKGROUND

These findings of fact and conclusions of law address all of the material issues presented on the record with respect to Ms. Smith's claim that the NRC improperly denied her 2012 SRO license application.

DISCUSSION

I. Findings of Fact

A. Background

1. On March 7, 2011, Southern Nuclear Company (SNC) submitted a final, certified license application on behalf of Ms. Smith to the NRC Region II (Region II) for an Senior Reactor Operator (SRO) license for Vogtle Electric Generating Plant (Vogtle, the licensee

facility).[2]

2. A Senior Reactor Operator is the supervisor in the control room of a nuclear power plant.[3] In this role, the SRO must direct and ensure the proper execution of all power plant activities.[4] Most importantly, the SRO is responsible for immediately and accurately responding to any plant casualty that may arise.[5] The SRO's response in this regard is critical to ensuring the health and safety of the public.[6] As such, the NRC has developed a regimented program for individually licensing SRO applicants, who often study and practice for years before they are sufficiently qualified to receive a license.[7]

3. As part of this NRC individual licensing program, an SRO applicant must pass an operating test and a written examination in order to demonstrate that the SRO applicant "has learned to operate a facility competently and safely, and . . . has learned to direct the licensed activities of licensed operators competently and safety."[8]

4. The SRO operating test and written examination "shall" be prepared and evaluated according to 10 C.F.R. § 55.45 and C.F.R. § 55.43, respectively, and the criteria in NUREG-1021.[9]

5. An SRO operating test consists of a "walk-through" portion and a "simulator test" portion.[10] The walk-through portion of the operating test is further divided into "administrative

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[2] Exhibit NRC-009.

[3] *See* Transcript of Evidentiary Hearing in the matter of Charlissa C. Smith at 148 (July 17-18, 2013) ("Tr.").

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] 10 C.F.R. § 55.33(a)(2).

[9] 10 C.F.R. § 55.40(a).

[10] NUREG-1021, ES-301, 1.

topics" and "control room/in-plant systems."[11] "Administrative topics" implements items 9 through 12 of the 13 items required of operating tests by 10 C.F.R. § 55.45(a).[12] The applicant's competence in each topic is evaluated by administering job performance measures (JPMs) and asking specific "for cause" follow-up questions, as necessary.[13] SRO applicants are required to perform five administrative topics JPMs.[14] "Control room/in-plant systems" implements items 3, 4, 7, 8, and 9 of 10 C.F.R. § 55.45(a).[15] As with administrative topics, the applicant's competence regarding control room/in-plant systems is evaluated by administering JPMs with follow-up questions, as necessary.[16] SRO-instant applicants[17] are required to perform ten control room/in-plant systems JPMs.[18] Thus, SRO-instant applicants must perform 15 JPMs in total.

6. The simulator test portion of the operating test implements items 1 through 8 and 11 through 13 of 10 C.F.R. § 55.45(a).[19] The simulator test is especially important because it is "the most performance-based aspect of the operating test and is used to evaluate the applicant's ability to safely operate the plant's systems under dynamic, integrated conditions."[20] The simulator test is typically administered to a crew of three applicants, with one applicant acting as the Control Room Supervisor (CRS) (also referred to as Shift Supervisor (SS)), one

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[11] *Id*.

[12] *Id*. at 2.

[13] *Id*.

[14] *Id*. at 10.

[15] *Id*. at 3.

[16] *Id*.

[17] An "SRO-instant" applicant is an applicant applying for an SRO license who has not previously held a reactor operator license at the facility, as opposed to an "SRO-upgrade" applicant who has. NUREG 1021, Appendix F, 5. Some testing requirements are different for SRO-instant and SRO-upgrade applicants. *See, e.g*., NUREG-1021, ES-301, 14-16.

[18] NUREG-1021, ES-301, 14.

[19] *Id*. at 4.

[20] *Id*.

applicant acting as the Operator at the Controls (OATC) (also referred to as Reactor Operator (RO)), and one applicant acting as the Balance of Plant (BOP) operator (also referred to as Unit Operator (UO)).[21] However, surrogates can be used in the place of applicants as necessary.[22] At a minimum, an SRO applicant is required to be examined once in the CRS and OATC positions.[23] The simulator test crew performs in response to a set of scenarios in a replica of the facility's control room, when available. During these scenarios, an SRO-instant applicant must respond to one reactivity manipulation, one normal evolution, four instrument or component malfunctions, two major transients, and two technical specification (TS) evaluations.[24] The proficiency of the applicant's response related to six competencies is individually evaluated by the applicant's Examiner of Record.[25] These six competencies are each broken down into a number of specific rating factors (RF) that are considered during the grading process.[26]

7. For most operating tests, the licensee facility develops the entire test and submits the test to the NRC regional office for review and approval.[27] The Chief Examiner, along with assistance from the other two examiners, reviews the operating test, provides comments to the facility, and then evaluates the operating test at the facility to ensure that it meets the guidance in NUREG-1021, at which time the test is approved for administration.[28]

8. The simulator scenarios are developed to provide opportunities for each applicant to demonstrate all of the required competencies listed on NUREG-1021, Forms ES-

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[21] Exhibit NRC-002, 4.

[22] NUREG-1021, ES-301, 4.

[23] Exhibit NRC-002, 4.

[24] NUREG-1021, ES-301 at 26.

[25] *Id*. at 4.

[26] *Id*.

[27] *Id*.

[28] *Id*. at 5.

303-3 and ES-303-4, for RO and SRO applicants, respectively.[29] Simulator scenarios are constructed in accordance with the guidelines in NUREG-1021, ES-301, as well as Appendix D, "Simulator Testing Guidelines." Each scenario consists of various "events" which are outlined in Form ES-D-1.[30] Additionally, "all required operator actions" for each event are pre-scripted in Form ES-D-2.[31] The purpose of Forms ES-D-1 and ES-D-2 are to increase the likelihood that each applicant will have sufficient opportunities to demonstrate their competence in all the required areas during the simulator scenarios.[32] Also, they are intended to assist the examiner in evaluating the simulator test as it happens.[33]

9. After the operating test is approved for administration and the test schedule has been developed, the NRC examiners work with the licensee facility to administer the test. During administration of the simulator test, the examiners use the detailed descriptions of the scenarios in Forms ES-D-1 and ES-D-2 to direct the flow of events and identify any performance deficiencies of the applicant for whom they are the Examiner of Record. In doing so, examiners are required to record every error that reflects on the applicant's competency regardless of its consequences.[34]

10. After administration, both portions of the operating test are evaluated according to the procedures contained in NUREG-1021.[35] The goal of this evaluation is to determine "whether the applicant's level of knowledge and understanding meet the minimum requirements

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

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

[31] *Id*.

[32] *Id*. at 17.

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

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

[35] *Id*. at 1.

to safely operate the facility for which the license is sought."[36] Therefore, every error that reflects on an operator's competence is graded equally (with the exception of "critical task" errors, discussed below), irrespective of the consequences or potential consequences of the error.[37] Also, if an applicant makes an error or is about to make an error, and the error is corrected by another crew member performing a "peer check," the examiner is required to hold the applicant accountable for the consequences of the potential error, without regard to mitigation by the crew.[38]

11. The first step in evaluating an operating test is to create a record identifying each instance during the walk-through or simulator test portions of the operating test that may constitute a performance deficiency.[39] For the walk-through portion of the operating test, each administered JPM is graded as either "satisfactory" or "unsatisfactory" after taking into account any performance deficiencies identified during the JPM.[40] Generally, a JPM is unsatisfactory (1) if it is not completed within the required time, (2) if the "task standard" for the JPM is not accomplished by correctly completing all of the "critical steps," unless a critical step is initially missed, but then later performed so that the task standard is accomplished without degrading the condition of the system or the plant, or (3) if the responses to any performance-based follow-up questions reveal that the applicant's understanding is seriously deficient.[41] Even if the JPM is determined to be satisfactory because none of these criteria are met, NUREG-1021, ES-303 still requires examiners to document any performance deficiencies displayed by the

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

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

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

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

[40] *Id*. at 3.

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

applicant during the JPM.[42] This is because, since an examiner's licensing recommendation is subject to review by the Chief Examiner and the Region's management, the examiner's documentation "should contain sufficient detail so that the independent reviewer, responsible supervisor, and licensing official can make a logical decision in support of the examiner's recommendation to deny or issue the license."[43] Also, these comments are used to evaluate an applicant's overall performance if a future waiver evaluation is required and are used by the licensee facility to tailor remedial training for the applicant as needed.[44]

12. Once each individual JPM is assigned a satisfactory or unsatisfactory grade, a final grade for the entire walk-through portion of the operating test is determined by calculating the percentage of satisfactory JPMs, with a passing grade being 80% satisfactory or greater overall and 60% satisfactory or greater on the administrative topics JPMs.[45]

13. As for the simulator test portion of the operating test, each identified performance deficiency is first coded with the number and letter of the one or more rating factors (RFs) it most accurately reflects.[46] The one or more RFs that are selected are to be based on the "root cause" of the deficiency.[47] However, whenever possible, each performance deficiency is not to be assigned to "more than two different rating factors."[48] Once all of the performance deficiencies have been appropriately coded, then a grade for each RF is determined.[49] Since grading is based on competencies rather than consequences, "every error that reflects on an

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[42] *Id*. at 8.

[43] *Id*.

[44] NRC-002, 10.

[45] NUREG-1021, ES-303, 4.

[46] *Id*. at 3.

[47] *Id*.

[48] *Id*.

[49] *Id*. at 5.

operator's competence is considered equal."[50] Since all errors are equal, the grade for each RF is determined quantitatively based on the number of errors related to that RF. If an applicant performs activities related to a rating factor and makes no errors, then the RF is graded a score of 3.[51] If an applicant makes a single error related to a rating factor, then the RF is graded a score of 2 unless the error related to a "critical task," in which case a score of 1 is required.[52] If an applicant makes two errors related to a rating factor, then the RF is graded a score of 1 unless "a score of 2 can be justified . . . based on correctly performing another activity (or activities) related to the same rating factor."[53] This justification for increasing an RF score from 1 to 2 following two errors related to the RF must be documented.[54] Three or more errors generally requires an RF score of 1 regardless of compensatory actions.[55] Once each RF is graded, it is then multiplied by its associated "weighting factor."[56]

14. All of the weighted RF grades in a single competency are then summed together to obtain the overall grade for that competency.[57] This process is repeated for all six SRO competencies. An SRO applicant's overall performance on the simulator test is satisfactory if all of the six competency grades are greater than 1.80, or if the grade for Competency 4, "Communications and Crew Interactions," is less than or equal to 1.80 but greater than 1.00 and all of the other five competency grades are greater than or equal to 2.00.[58]

15. Vogtle, in conjunction with Region II, developed an operating test according to

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[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*. at 6.

[57] *Id*.

[58] *Id*.

these standards and, also according to these standards, Region II administered this operating test to Ms. Smith from March 16 to March 24, 2011.[59]

16. Ms. Smith was also administered the required SRO written examination on April 1, 2011.[60]

17. Ms. Smith failed the 2011 written examination and passed the 2011 operating test.[61] Therefore, Region II proposed to deny Ms. Smith's 2011 SRO application[62] and she was informed of this proposed denial in a letter dated May 9, 2011.[63]

18. Ms. Smith appealed the grading of the 2011 written examination,[64] but the appeal did not result in her examination score being changed from failing to passing and her proposed denial was confirmed.[65] Ms. Smith did not demand a hearing regarding this proposed denial within the specified time period and, therefore, the proposed denial became final.[66]

19. On March 12, 2012, SNC submitted a second final, certified license application on behalf of Ms. Smith to Region II for an SRO license for Vogtle.[67] This license application did not include a request that Ms. Smith's 2012 operating test be waived due to her passing the 2011 operating test.[68]

20. From March 26 to April 13, 2012, Ms. Smith was administered an SRO-instant

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[59] Exhibit CCS-007, 1.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] Exhibit CCS-016.

[64] Exhibit NRC-010.

[65] Exhibit NRC-001, 22-23.

[66] *Id*.

[67] Exhibit NRC-007. Unlike a preliminary draft application, a "final" application reflects the actual decision by a licensee facility to submit an applicant for an NRC operator licensing examination.

[68] *Id*.

operating test.[69]

21. On April 20, 2012, Ms. Smith was administered an SRO written examination.[70]

22. Ms. Smith passed the 2012 written examination and failed the 2012 operating test.[71] Specifically, she failed the simulator test portion of the operating test.[72] Therefore, Region II proposed to deny Ms. Smith's 2012 SRO application[73] and she was informed of this proposed denial in a letter dated May 11, 2012.[74]

23. On June 5, 2012, Ms. Smith submitted a request to NRC Headquarters (Headquarters) for an informal review of the grading of her 2012 simulator test by Region II, as well as an evaluation of her additional arguments that Region II should have granted her a waiver of the 2012 operating test and that her 2012 Region II examiners had been biased against her due to their knowledge of her prior performance on the 2011 operating test (hereafter "improper conduct claims").[75]

24. The Headquarters Operator Licensing and Training Branch (IOLB) Chief, John J. McHale was responsible for addressing this request.[76] When determining how best to address this request, Mr. McHale researched similar requests that the NRC had addressed in the past. He discovered an example from the year 2000 in which an informal review request alleging technical issues as well as bias issues was split into two parts.[77] Mr. McHale decided to

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[69] Exhibit CCS-045, 1.

[70] *Id*.

[71] *Id*.

[72] *Id*. An SRO operating test consists of two parts: a "walk-through" portion and a "simulator test" portion. NUREG-1021, ES-301, 1.

[73] Exhibit CCS-045, 1.

[74] Exhibit CCS-033.

[75] Exhibit NRC-015.

[76] *See* Exhibit NRC-040; Tr. at 614, 656.

[77] Tr. at 656; Exhibit NRC-017.

address Ms. Smith's request in a similar manner. Thus, he assigned Ms. Smith's technical grading claims to a three-person informal review panel and her improper conduct claims to the Region II Deputy Regional Administrator, Len Wert, who subsequently assigned them to an independent Region II management representative who had previously been qualified as an examiner, Frank Ehrhardt.[78]

25. On September 4, 2012, Mr. Ehrhardt, completed his investigation of Ms. Smith's improper conduct claims.[79] He concluded that Ms. Smith's claims could not be substantiated.[80]

26. On October 25, 2012, the informal review panel completed its investigation of Ms. Smith's technical grading claims.[81] Despite identifying some differences between how it had graded Ms. Smith's simulator test and how Region II had graded Ms. Smith's simulator test, overall the informal review panel sustained the Region II determination that Ms. Smith had achieved a failing grade on the 2012 simulator test.[82]

27. On November 15, 2012, Ms. Smith was provided with a summary of the results of the informal review panel's report concerning her technical claims and with Mr. Ehrhardt's report concerning her improper conduct claims.[83] She was informed that these reviews confirmed the proposed denial of her 2012 license application.[84]

28. On December 5, 2012, Ms. Smith demanded an adjudicatory hearing on the same issues raised in her informal review request as well as on an additional argument that the

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[78] *See* Tr. at 656; Exhibit CCS-022; Exhibit NRC-016.

[79] *See* Exhibit NRC-014.

[80] *Id*. at 3.

[81] *See* Exhibit CCS-037.

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

[83] Exhibit CCS-014.

[84] *Id*. at 1.

Staff had improperly discharged its duties in its treatment of her informal review request.[85]

29. On January 4, 2013, this Board was established to preside over Ms. Smith's hearing demand.[86]

30. On February 19, 2013, this Board granted Ms. Smith's hearing demand.[87]

31. On May 1, 2013, Ms. Smith submitted her statement of position and pre-filed testimony consisting of exhibits CCS-001 to CCS-078.

32. On May 31, 2013, the Staff submitted its statement of position and pre-filed testimony consisting of exhibits NRC-001 to NRC-058.

33. On June 30, 2013, Ms. Smith submitted a response to the Staff statement of position and pre-filed testimony consisting of exhibits CCS-079 to CCS-116.

34. On July 17-18, 2013, an evidentiary hearing was held in Augusta, Georgia. All of the Staff's and Ms. Smith's exhibits were admitted in evidence.[88] Also, Board exhibits BRD-001 to BRD-012 were admitted in evidence.[89] However, the Board held the evidentiary record open in order to provide the parties the opportunity to respond to an exhibit identified as BRD-013.[90]

35. On July 24, 2013, the Board notified the parties that it intended to admit in evidence exhibit BRD-013.[91]

36. On August 16, 2013, the Staff submitted exhibits NRC-059, NRC-060, NRC-061,

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[85] Charlissa C. Smith Request for Hearing (Dec. 5, 2012).

[86] Establishment of Atomic Safety and Licensing Board (Jan. 4, 2013).

[87] *Charlissa C. Smith* (Denial of Senior Reactor Operator License), LBP-13-03, 72 NRC __, __ (Feb. 19, 2013) (slip op. at 1).

[88] Tr. at 137, 139.

[89] Tr. at 141-43.

[90] Tr. at 712.

[91] Order (Admitting Board Exhibit BRD-013) (July 24, 2013).

and NRC-062 in response to BRD-013.[92]

37. On August 22, 2013, the Staff and Ms. Smith jointly filed transcript corrections with respect to the July 17-18 evidentiary hearing.[93]

38. On September 17, 2013, the Board adopted the parties' transcript corrections, admitted in evidence exhibits BRD-013 and NRC-059, and declined to admit in evidence NRC-060, NRC-061, and NRC-062.[94] The Board also closed the evidentiary record.[95]

B. Legal Standards

39. Ms. Smith's claim is that the Staff improperly denied her 2012 SRO license application.[96] The remedy that she seeks is for this Board to issue her an SRO license.[97]

40. Ms. Smith's arguments in support of her claim are as follows. First, in her Statements of Position 1, 2, and 3, she argues that the Staff improperly discharged its duties with respect to her 2012 operating test because (1) the Staff should have granted her a waiver of the 2012 operating test; (2) the Staff allowed her to be evaluated by a team of examiners in 2012 that was biased against her based on their knowledge of her 2011 operating test performance; and (3) the Staff improperly performed its administrative review of her informal review request.[98] Second, in her Statements of Position 4 through 12, she argues that Region II and the informal review panel made nine specific grading errors, due to bias or otherwise, with

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[92] NRC Staff Motion to Admit in Evidence Exhibits NRC-059, NRC-060, NRC-061, and NRC-062 (Aug. 16, 2013).

[93] Letter from Jeremy L. Wachutka to Administrative Judges (Aug. 22, 2013).

[94] Order (Adopting Joint Proposed Transcript Corrections, Granting in Part and Denying in Part Staff Motion to Admit Additional Exhibits, Admitting Board Exhibit 13, and Closing the Evidentiary Record) at 2, 7 (Sep. 17, 2013).

[95] *Id*. at 8.

[96] Exhibit CCS-076, 1; Tr. at 147.

[97] Exhibit CCS-116, 93. Ms. Smith testified that SNC had offered to place her back in the training program in order to prepare her for the 2013 SRO examination, but Ms. Smith elected not to go back to training stating that she "felt that if there was a target on my back now, it's going to be there next year." Tr. at 209.

[98] Exhibit CCS-076, 1-20.

respect to the scoring of her 2012 simulator test.[99]

41. 10 C.F.R. § 2.325 states "[u]nless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof."

42. This Board has explicitly stated that Ms. Smith bears the burden of proof in this proceeding.[100]

43. The Supreme Court and the Commission recognize the presumption that "governmental officials, acting in their official capacities, have properly discharged their duties" and that, in order to rebut this presumption, a petitioner's burden of proof involves the presentation of "clear evidence" to the contrary.[101]

44. Boards have employed various legal standards to evaluate whether Part 55 applicants have proven their arguments that NRC examiners erroneously graded portions of their operating tests. For instance, applicants may prevail in such arguments if they prove that a particular contested assessment of a deficiency was "inappropriate or unjustified"[102] or if the assessment was "arbitrary or an abuse of . . . discretion."[103]

45. In order to obtain the remedy of license issuance, the applicant must further demonstrate that, taken together, the assessments that have been proven to be "inappropriate or unjustified" or "arbitrary or an abuse of . . .discretion" would serve to change the applicant's

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[99] Exhibit CCS-076, 21-48.

[100] *See, e.g.*, Transcript of Pre-hearing Conference in the matter of Charlissa C. Smith at 109 (Jul. 1, 2013) ("[Ms. Smith] has the burden of proof in this [proceeding].").

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

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

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

final score from failing to passing.[104]

C. Witnesses Presented

46. Twelve witnesses testified during the evidentiary hearing. Their on-the-record credentials are summarized below.

47. Ms. Smith is currently employed by Southern Nuclear Company (SNC) as a member of the Vogtle Emergency Preparedness Group.[105] She has a B.S. in general chemistry.[106] She was an officer in the United States Army for six years, serving as a Nuclear, Biological, and Chemical Officer for three of those years.[107] Prior to her current employment, she was a nuclear chemistry technician for three years and a chemistry foreman for three years at Vogtle.[108]

48. Mr. Tucker is currently employed by SNC as the corrective actions program coordinator at Vogtle.[109] Prior to that, from September 2008 to January 2012, Mr. Tucker was the lead nuclear operations plant instructor responsible for the oversight of the initial SRO and reactor operator (RO) training programs at Vogtle.[110] He is a qualified SRO at Vogtle and has more than 30 years of nuclear power plant experience, including as a shift supervisor.[111]

49. Mr. Turner is currently employed by SNC as an SRO at Vogtle.[112] Prior to working at Vogtle, Mr. Turner served in the United States Navy's nuclear power program for ten

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[104] *See, e.g.*, *Calabrese*, LBP-97-16, 46 NRC at 87 (applicant arguing that he should have been assigned a grade of "2" instead of a grade of "1" with respect to a particular rating factor, and that this change would change his overall grade from failing to passing).

[105] Exhibit CCS-077.

[106] *Id.*; Tr. at 187.

[107] Exhibit CCS-077.

[108] *Id.*; Tr. at 188.

[109] Tr. at 257.

[110] CCS-002, 2.

[111] *Id*.

[112] Exhibit CCS-040, 1.

years and received an electrical engineering degree from The Citadel.[113] Mr. Turner participated on the same applicant crew as Ms. Smith for scenarios 7 and 6. At the time, Mr. Turner was participating as an applicant for an SRO license.

50. Mr. Waltower is currently employed by SNC as an RO at Vogtle.[114] Mr. Waltower is a combat veteran.[115] Mr. Waltower participated on the same applicant crew as Ms. Smith during all three of her scenarios.[116] At the time, Mr. Waltower was participating as an applicant for an RO license.

51. Mr. Meeks is currently employed by the NRC as a Senior Operations Engineer and is Chief Examiner qualified.[117] In this position, he leads NRC examination teams in the development, review, administration, and grading of initial licensed operator examinations. During his five years of experience with the NRC, he has developed, reviewed, administered, or graded over 15 such examinations. From 2004 to 2008, Mr. Meeks was employed by Entergy Nuclear Operations in the Operations department of the Indian Point 3 nuclear plant. While there, he trained as an SRO applicant, took, and passed, the SRO-instant examination, and was issued an SRO license by the NRC. Subsequently, he served for two years as an on-shift licensed SRO responsible for the safe operation of the plant. From 1996 to 2004, Mr. Meeks served as a nuclear-trained submarine officer in the United States Navy. Mr. Meeks received a B.S. in Marine Engineering from the United States Naval Academy in 1996.

52. Mr. Bates is currently employed by the NRC as a Senior Operations Engineer and is Chief Examiner qualified.[118] In this position, he leads NRC examination teams in the

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[113] *Id*.

[114] Exhibit CCS-041, 1.

[115] Tr. at 349.

[116] Exhibit CCS-041, 1.

[117] Exhibit NRC-030.

[118] Exhibit NRC-028.

development, review, administration, and grading of initial licensed operator examinations. During his ten years of experience with the NRC, he has developed, reviewed, administered, and graded dozens of such examinations. From 1994 to 2003, Mr. Bates was employed by Consumers Energy/Nuclear Management Company in the engineering and operations departments of the Palisades Nuclear Plant. He served as a neutronics and safety analysis engineer performing core design calculations, criticality analyses, and physics testing. He also trained as an SRO applicant, took, and passed, the SRO-instant examination, and was issued an SRO license by the NRC. As an SRO, Mr. Bates was responsible for the safe operation of the plant. Mr. Bates received a B.S. in Nuclear and Power Engineering from the University of Cincinnati in 1995 and an M.S. in Engineering Management from the Western Michigan University in 1999.

53. Mr. Capehart is currently employed by the NRC as a Senior Operations Engineer and is Chief Examiner qualified.[119] In this position, he leads NRC examination teams in the development, review, administration, and grading of initial licensed operator examinations. During his six years of experience with the NRC, he has developed, reviewed, administered, and graded dozens of such examinations. Mr. Capehart has also participated in the development and revision of NUREG-1021 as a member of the NRC and previously as a utility participant with the Nuclear Energy Institute. From 1985 to 2006, Mr. Capehart was employed by the Tennessee Valley Authority at the Browns Ferry Nuclear Plant, by Arizona Public Service Company at Palo Verde Nuclear Plant, and by General Public Utilities Nuclear Company at Oyster Creek Nuclear Plant. At each of these plants, Mr. Capehart took, and passed, an SRO examination and was issued an SRO certification. At Browns Ferry and Palo Verde, Mr. Capehart served as one of the plant's SRO instructors and examination authors. In this

[119] Exhibit NRC-029.

capacity, he developed various examinations that were subsequently approved by the NRC and he regularly communicated with the NRC and the Nuclear Energy Institute (NEI) regarding the interpretation of, and potential revisions to, NUREG-1021. From 1979 to 1985, Mr. Capehart served in the United States Navy as a nuclear-trained laboratory technologist. He received a B.S. in Applied Science & Technology with a focus on radiation protection from Thomas Edison State College in 1988.

54. Mr. Ehrhardt is currently employed by the NRC as the Chief of the Projects Branch 2 in Region II.[120] In this capacity, he is the direct supervisor of the NRC resident inspector staff at three reactor sites and is responsible for the planning, conduct, and evaluation of the inspection activities at these sites in accordance with the NRC's Reactor Oversight Process. From 2010 to 2012, Mr. Ehrhardt led NRC inspection teams conducting fire protection inspections at Region II facilities. From 2005 to 2010, Mr. Ehrhardt was a Senior Operations Engineer and Chief Examiner qualified. In this position, he led numerous NRC examination teams in the development, review, administration, and grading of initial licensed operator examinations. From 2000 to 2005, Mr. Ehrhardt was employed by Exelon Nuclear at Braidwood Nuclear Power Station. There he trained as an SRO applicant, took, and passed, the SRO examination, and was issued an SRO license by the NRC. As an SRO, Mr. Ehrhardt was responsible for the safe operation of the plant. From 1998 to 2000, Mr. Ehrhardt was a business manager for Commonwealth Edison, Nuclear Generation Group. From 1996 to 1998, Mr. Ehrhardt was the Director of Strategic Business Alliances for Illinova Energy Partners. From 1992 to 1995, Mr. Ehrhardt was a Reactor Engineer at the NRC, Region III, where he was responsible for writing and administering initial operator licensing exams and where he first qualified as Chief Examiner. From 1987 to 1992, Mr. Ehrhardt served as a nuclear-trained

[120] Exhibit NRC-058.

submarine officer in the United States Navy. He received a B.S. in Nuclear Engineering from the University of Illinois in 1985, an M.S. in Nuclear Engineering from the University of Illinois in 1987, and a Master of Management from Northwestern University in 1996.

55. Mr. Jackson is currently employed by the NRC as the Chief of the Operations Branch in Region I.[121] In this capacity, he is the direct supervisor of twelve operator examiners and is responsible for successfully implementing the operator licensing program in Region I through overseeing the development, review, administration, and grading of Region I operator examinations. He is qualified as an Operator Licensing Examiner. Mr. Jackson has also served as a senior resident inspector at Indian Point 3 and at Kewaunee. From 1990 to 2002, Mr. Jackson was employed by the Public Service Electricity and Gas of New Jersey at Salem Nuclear Generating Station and by Baltimore Gas and Electric at the Calvert Cliffs Nuclear Power Plant. At each of these plants, Mr. Jackson took, and passed, an SRO examination and was issued an SRO license by the NRC. Mr. Jackson held the positions of Shift Manager, Shift Technical Advisor (STA), and Control Room Supervisor (CRS). At Calvert Cliffs, Mr. Jackson also served as a simulator and classroom training instructor and at Salem, Mr. Jackson served for three years as the Site Training Director for Salem and Hope Creek stations. From 1985 to 1990, Mr. Jackson served as a nuclear-trained submarine officer in the United States Navy. He received a B.S. in Engineering from Widener University in 1985 and an M.S. in Engineering Management from George Washington University in 1998.

56. Mr. Widmann is currently employed by the NRC as the Chief of the Operations Branch 1 in Region II.[122] In this capacity, he is the direct supervisor of seven operator examiners and is responsible for successfully implementing the operator licensing program in Region II through overseeing the development, review, administration, and grading of Region II

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[121] Exhibit NRC-041.

[122] Exhibit NRC-011.

operator examinations. From 2004 to 2007, Mr. Widmann was a Branch Chief in the Region II Division of Reactor Projects responsible for implementing the NRC's inspection, enforcement, assessment, and emergency response functions for various nuclear power plants and responsible for overseeing the resident inspectors at these plants. From 1999 to 2004, Mr. Widmann served as a senior resident inspector at North Anna and V.C. Summer and from 1994 to 1999, he served as a resident inspector at Vogtle. From 1991 to 1994, Mr. Widmann served as a reactor systems engineer, responsible for conducting technical reviews of systems related to nuclear power plant protection. He received a B.S. in Mechanical Engineering from Drexel University in 1987.

57. Mr. McHale is currently employed by the NRC as the Chief of the Operator Licensing and Training Branch (IOLB) in Headquarters.[123] In this capacity, he is responsible for program oversight of the NRC's operator licensing program, which includes establishing rules, standards, plans, and policy. This also includes oversight of the NRC regional implementation of the operator licensing program. From 2006 to 2009, Mr. McHale served as a mechanical engineer at the NRC, responsible for evaluating licensing actions related to mechanical component in-service testing in accordance with 10 C.F.R. § 50.55a. From 1991 to 2006, Mr. McHale was employed by Constellation Energy at the Calvert Cliffs Nuclear Power Plant. During this time, his responsibilities included supervising a unit of mechanical and civil engineers with respect to the configuration management and design control of the power plant; supervising a unit of engineers responsible for the power plant's primary systems; and developing the training plan for the plant's engineering services. Prior to this, Mr. McHale trained as an SRO applicant, took, and passed, the SRO examination, and was issued an SRO license by the NRC. As an SRO, he served as a CRS and an STA. From 1982 to 1991, Mr.

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[123] Exhibit NRC-040.

McHale served as a nuclear-trained submarine officer in the United States Navy. He received a B.S. in Mechanical Engineering from the Unites States Naval Academy in 1982 and an M.S. in Mechanical Engineering from the Catholic University of America in 1983.

58. The Board also requested to ask questions of Edwin Lea regarding his involvement with and knowledge of Ms. Smith's SRO license application denial.[124] Mr. Lea is currently employed by the NRC as a Senior Operations Engineer and is Chief Examiner qualified.[125] In this position, he leads NRC examination teams in the development, review, administration, and grading of initial licensed operator examinations. Mr. Lea began working in Region II as a Reactor Inspector in 1987 and qualified as an Examiner in 1990.[126] Prior to this, Mr. Lea worked for five years for a utility where he received an SRO certification and qualified as an STA.[127] He received a B.S. in Mechanical Engineering from Southern University.[128] Mr. Lea did not participate in or observe Ms. Smith's 2011 or 2012 operating tests.[129] His testimony is based on his after-the-fact review of documents having to do with Ms. Smith's 2012 operating test.[130]

D. Statement of Position 1: The Staff did not Improperly Discharge its Duties with Respect to Processing a Waiver Request for Ms. Smith

59. In her Statement of Position 1, Ms. Smith argues that she should have been granted a waiver of the 2012 operating test because the Staff should have processed the waiver request that accompanied her preliminary, uncertified license application instead of asking SNC

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[124] Transcript of Pre-hearing Conference in the matter of Charlissa C. Smith at 115 (Jul. 1, 2013).

[125] Tr. at 664.

[126] *Id*.

[127] *Id*. at 665.

[128] *Id*.

[129] Exhibit NRC-025, 2.

[130] *Id*.

whether the request was intentional.[131] Furthermore, Ms. Smith argues that, if the Staff had processed this waiver request, then her waiver request would have been granted because Ms. Smith's performance was comparable to other applicants who had been granted operating test waivers in the past.[132]

60. In 2009, Ms. Smith applied to, and was selected for, Vogtle's operator training program as an SRO-instant student.[133]

61. Ms. Smith was a member of the operator training program class called "Hot License 16" (HL-16), which was preparing twenty students for the March/April 2011 operator licensing exam[134]

62. As a member of HL-16, her full-time job was training in preparation for the SRO examination.[135]

63. The operator training program was two years in duration.[136] It covered the general fundamentals of nuclear power generation, nuclear power plant systems, and control room operations.[137]

64. Ms. Smith's overall performance in the operator training program placed her approximately in the middle of the HL-16 class.[138]

65. Toward the end of the two-year operator training program, its students were required to take a "company audit," which was a written examination and operating test developed and administered by Vogtle that was intended to mimic the actual NRC written

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[131] Exhibit CCS-076, 2.

[132] *Id*.

[133] Tr. at 189.

[134] Tr. at 168-69, 191.

[135] Tr. at 191.

[136] *Id*.

[137] Tr. at 189-91.

[138] Tr. at 192, 288.

examination and operating test.[139] Ms. Smith passed both the written and the operating HL-16 company audits.[140]

66. Of the twenty students originally selected for HL-16, ten students completed the SNC operator training program, including Ms. Smith.[141]

67. On March 7, 2011, SNC submitted operator license applications on behalf of these ten students to Region II.[142] Subsequently, these ten applicants took the operating test and written examination in March/April 2011.[143]

68. One applicant failed both the 2011 operating test and written examination. Six applicants, including Ms. Smith, passed the 2011 operating test but failed the written examination.[144]

69. The 70% failure rate on the 2011 Vogtle written examination was unusually high.[145] A root cause analysis determined that this high failure rate was due to a relatively new Vogtle licensee examination team, which administered to the applicants a company audit written examination that was significantly different from the actual, NRC-approved written examination that was later administered.[146]

70. With respect to the 2011 operating test, Ms. Smith's examiner of record, who is responsible for grading her simulator test performance, was Jay Hopkins.[147]

71. Mr. Hopkins' first impression of Ms. Smith's simulator test performance was that

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[139] Tr. at 192-93.

[140] Tr. at 193.

[141] Tr. at 191.

[142] *See, e.g.,* Exhibit NRC-009.

[143] *See, e.g.,* Exhibit CCS-007, 1.

[144] Tr. at 154, 382, 530-31.

[145] Tr. at 381-82.

[146] *Id*.

[147] Tr. at 478.

she had failed.[148]

72. However, after developing her individual examination report and assigning each of her demonstrated performance deficiencies to the most appropriate rating factor (RF), Mr. Hopkins determined that Ms. Smith had achieved a low, but passing, score.[149]

73. Despite achieving a passing score, Mr. Hopkins was still concerned that Ms. Smith had not demonstrated the level of competence that he typically associated with a passing performance. Therefore, he considered recommending that she be failed on the operating test according to NUREG-1021, ES-303, Section D.3.d, which grants examiners the discretion to "conclude that an applicant's performance is unacceptable even though the documented deficiencies would normally result in a passing grade."[150]

74. Mr. Hopkins discussed this option with Mr. Capehart, the Chief Examiner for the 2011 Vogtle test. Though Mr. Capehart did not have the authority to direct Mr. Hopkins one way or the other, he advised Mr. Hopkins to accept the numerical score because there was no precedent for using the discretionary authority provision of NUREG-1021 and thus doing so would require a significant amount of first-of-its-kind documentation.[151]

75. Ultimately, Mr. Hopkins decided against using the discretionary provision of NUREG-1021 to recommend that Ms. Smith's performance was unacceptable.[152] Part of the calculation that went into this decision was the fact that Ms. Smith had failed the written examination and so would not qualify for a license regardless of whether it was determined that she had passed the operating test.[153]

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[148] Tr. at 478.

[149] Tr. at 478.

[150] Tr. at 478-79.

[151] Tr. at 479.

[152] Tr. at 479-80.

[153] Tr. at 479-80, 482-83, 494.

76. Therefore, in late April/early May 2011, Ms. Smith's 2011 individual examination report was finalized to reflect that she had failed the written examination but had passed the operating test with a borderline passing score and many comments.[154]

77. On approximately May 2, 2011, shortly after the examiners had completed their development of each applicant's individual examination report and had informed SNC of these results, Rick Brigdon, the Vogtle training manager, contacted Mr. Widmann, the NRC branch chief responsible for the approval and grading of the 2011 Vogtle operating test and written examination.[155]

78. The purpose of this call was to discuss, in light of the large percentage of applicants that had failed the written examination but passed the operating test, the possibility of Region II approving a second, make-up written examination for these applicants before the next regularly scheduled examination to be administered in March/April 2012.[156]

79. In support of this possibility for a quick written examination re-test, Mr. Brigdon wanted to know which applicants, based on their performance on the 2011 operating test, would likely be granted an operating test waiver so that their passing of the proposed re-test of the written examination would constitute all that they needed to do to obtain their SRO or RO license.[157]

80. Mr. Widmann quickly forwarded this "very informal" request regarding the potential for operating test waivers to Mr. Capehart, the 2011 Chief Examiner, who then forwarded it to his two fellow 2011 examiners, Mr. Hopkins and Mr. Meeks.[158]

81. Unlike the scoring of the operating test, which is done according to the specific

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[154] *See* Exhibit CCS-007.

[155] Tr. at 156-57, 466-67, 619-20; *see* Exhibits NRC-013(U), 4-5, CCS-001, 17-18.

[156] Tr. at 155, 259, 385-86, 466-67, 619-20; *see* Exhibits NRC-013(U), 4-5, CCS-001, 17-18.

[157] Tr. at 259, 385-86, 466-67, 619-20; *see* Exhibits NRC-013(U), 4-5, CCS-001, 17-18.

[158] Tr. at 466-67, 619-20; *see* Exhibits NRC-013(U), 4, CCS-001, 17-18.

scoring guidance of NUREG-1021, ES-303,[159] the evaluation of a waiver request is done by looking holistically at the entirety of the applicant's operating test performance and subsequent remediation.[160] There is no standard to guide the Region's use of its case-by-case discretion to grant such a waiver besides the requirement that "sufficient justification" for the waiver be presented by the requestor.[161] For instance, there is no "cut score" below which, or set number of comments above which, a waiver request is always denied,[162] but waivers are also not automatically granted to all applicants that have previously passed an operating test.[163]

82. Therefore, in response to Mr. Widmann's inquiry, Mr. Capehart, Mr. Hopkins, and Mr. Meeks drew upon their years of training and experience as examiners, their first-hand observations of the applicants during the 2011 operating test, their development of the applicants' individual evaluation reports, and their subsequent review of each applicant's individual evaluation report to determine whether, without the submission of any specific remediation plans, waivers would likely be granted for each of the applicants.[164]

83. Mr. Capehart, Mr. Hopkins, and Mr. Meeks unanimously reached the conclusion that all of the applicants, except for Ms. Smith, would likely be granted a waiver of the operating test.[165]

84. Mr. Capehart, Mr. Hopkins, and Mr. Meeks all agreed that Ms. Smith's operating test performance was a concern because, though it was passing, it was marginal at best and was definitely not close to being as good as the rest of the Vogtle applicants who had passed or

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[159] See NUREG-1021, ES-303, 2-6.

[160] Tr. at 501-03.

[161] *Id*.; 10 C.F.R. § 55.35(b); NUREG-1021, ES-204, 2-3.

[162] Tr. at 633-34.

[163] Tr. at 215-16, 633-34, 675.

[164] Tr. at 466-68, 619-20; *see* Exhibits NRC-013(U), 4, CCS-001, 17-18.

[165] Tr. at 466-68, 619-20; *see* Exhibits NRC-013(U), 4, CCS-001, 17-18.

close to what the examiners had come to expect during their years of observing operating tests from the average applicant.[166]

85. This determination was provided to Mr. Widmann who, on approximately May 2, 2011, returned Mr. Brigdon's telephone call and informed him that, for a potential, early re-take examination, a waiver request for Ms. Smith would likely be denied, but waiver requests for the other five applicants would likely be granted.[167]

86. Mr. Brigdon communicated the results of this inquiry to the six applicants.[168] Ms. Smith stated, without substantiation, that Mr. Brigdon told her that SNC was still going to formally apply for a waiver on her behalf despite this preliminary evaluation that Region II would likely deny the request.[169] However, Ms. Smith declined to supply a written statement from Mr. Bridgon or to subpoena him in order to provide support for this assertion of what he had supposedly told her.

87. Later in May or early June 2011, SNC decided against pursuing a re-take examination before the next regularly scheduled examination to be administered in March/April 2012.[170]

88. Once the option of a quick re-test was no longer being considered, SNC had to determine what to do with the six applicants that had passed the 2011 operating test but failed the written examination. Specifically, SNC wanted to determine which applicants would likely be granted a waiver of the 2012 operating test with documented remediation so that, other than participating in an operating test remediation program, these applicants could concentrate on just preparing for the 2012 written examination. On the other hand, SNC also wanted to

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[166] Tr. at 467-68.

[167] Tr. at 620-21.

[168] Tr. at 156.

[169] Tr. at 156.

[170] Tr. at 155, 468.

determine which applicants would likely not be granted a waiver of the 2012 operating test so that SNC could take care to prepare these applicants for potentially retaking both the written examination and the operating test in anticipation of an operating test waiver not being granted.[171]

89. To this end, SNC divided the six applicants into two groups of three. The first group consisted of the three applicants for whom SNC was "confident that [it] will request an Operating Exam waiver." The second group consisted of the three applicants that SNC was less confident would receive a waiver of the operating test.[172] Ms. Smith was in this "less confident" group.[173]

90. SNC returned the three applicants in the "less confident" group, including Ms. Smith, to full-time training in order to prepare them to retake the written examination and the operating test. This was done by adding them to the operator training program class called "Hot License 17" (HL-17), which was already in the process of preparing a new group of students for the March/April 2012 exam.[174] SNC gave the other three applicants in the "confident" group only part-time training in order to remediate their operating test errors and prepare them to retake only the written examination.[175]

91. On June 7, 2011, within a week of placing the three applicants from the "less confident" group in HL-17, George Gunn, the Vogtle training supervisor who was subordinate to Mr. Brigdon, sent an email to Mr. Meeks, the Chief Examiner in training under Mr. Bates for the

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[171] Tr. at 259-60, 265-68, 297-98.

[172] Tr. at 468-69; *see* Exhibits NRC-013(U), 10, CCS-001, 19.

[173] Exhibits NRC-013(U), 10, CCS-001, 19.

[174] Tr. at 265, 294, 297-98; *see also* Exhibit CCS-002, 14 (preliminary application indicating that Ms. Smith's remedial training started in June 2011).

[175] Tr. at 298-99.

regularly scheduled March/April 2012 examination.[176]

92. This email discussed the division of the six applicants and asked the NRC to preliminarily evaluate whether a waiver of the operating test would likely be granted for each of these applicants.[177] This preliminary request was made so that SNC could "develop an appropriate recovery plan" even though SNC apparently understood that officially "these waiver requests should be documented on Form 398 when the license applications are submitted."[178]

93. Mr. Meeks did not respond to this email until August 2, 2011 due to scheduling and leave conflicts.[179]

94. In the meantime, on July 13, 2011, SNC sent a formal letter to Region II largely repeating Mr. Gunn's email of June 7, 2011.[180]

95. Though this letter was signed by the SNC vice president, Mr. Tynan, it was actually prepared by Mr. Gunn, the author of the similar June 7, 2011 email.[181] It is typical for the SNC vice president to sign written correspondence between Vogtle and Region II.[182]

96. This letter was likely sent because Mr. Gunn's email of June 7, 2011 had gone unanswered for more than a month. This is evidenced by the prior statements in Mr. Gunn's email that, "[i]f I need to follow up with a formal request (i.e. letter), please let me know so that I may submit it in a timely manner" and "[s]hould I submit a formal letter (signed by our VP) requesting evaluation of this request prior to submitting the Form 398 application?"[183]

97. Region II staff did not respond to this letter because it was considered to be "out

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[176] Tr. at 294; Exhibits NRC-013(U), 7, CCS-001, 19.

[177] Exhibits NRC-013(U), 7, CCS-001, 19.

[178] *Id*.

[179] Tr. at 386.

[180] Exhibit CCS-002, 18.

[181] Tr. at 263-65.

[182] Tr. at 650.

[183] Exhibits NRC-013(U), 7, CCS-001, 19.

of process" and not necessitating a reply. Region II staff read it as simply an early "heads-up" regarding SNC's intent to request operating test waivers for the listed individuals in the ordinary course of events (*i.e.*, on the pre-applications due 30 days before the March/April 2012 test).[184]

98. The SNC letter stated that it included attachments. The attachments are not part of the record and no witness affirmatively testified to what these attachments were. However, the Staff witnesses testified that the attachments could not be preliminary application forms with waiver requests because, at this early stage in the process, SNC could not possess the requisite remedial training information to write such preliminary applications and waiver requests.[185]

99. On August 1 or 2, 2011, Mr. Meeks began the process of addressing Mr. Gunn's email of June 7, 2011.[186]

100. Mr. Meeks and Mr. Capehart reread the individual examination reports for each of the six applicants. The other Region II examiner involved with the 2011 Vogtle operating test had since retired and so was not available to provide input during this review.[187] Mr. Meeks and Mr. Capehart both agreed that, even after this fresh review, Ms. Smith was not a good candidate for an operating test waiver.[188]

101. The factors that contributed to their reaching this conclusion were as follows. Ms. Smith had an unusually large number of comments.[189] She had 12 comments whereas the typical passing applicant would have four or five comments.[190] Additionally, these comments

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[184] Tr. at 648-50; *see* NUREG-1021, ES-201, 25.

[185] Tr. at 426-27.

[186] Tr. at 469-70.

[187] Tr. at 592, 618.

[188] Tr. at 469-70.

[189] Tr. at 474.

[190] *Id*.

were spread throughout many different rating factors (RFs), indicating that Ms. Smith's performance was weak in many respects.[191] There were also performance deficiencies that were not reflected in Ms. Smith's final score. For instance, she had four errors in RF 2.c.[192] Since three errors in a single RF result in the lowest possible score of a 1, the fourth error in RF 2.c. essentially did not count against Ms. Smith's final score.[193] Furthermore, Ms. Smith demonstrated two performance deficiencies in procedure usage during the feed-and-bleed portion of a particular procedure.[194] Since feeding-and-bleeding is an important task, Mr. Meeks found these errors to be particularly significant.[195] Finally, Mr. Meeks identified similar procedure usage deficiencies in Ms. Smith's job performance measure (JPM) comments.[196] This indicated to Mr. Meeks that Ms. Smith had a serious weakness with respect to procedure usage.[197]

102. It was clear to Mr. Meeks that Ms. Smith's performance was demonstrably worse than the performance of the other five applicants as well as worse than the performance of the average passing applicant.[198]

103. Mr. Meeks and Mr. Capehart did not review Ms. Smith's 2011 individual examination report again until after she had appealed her failure of the 2012 operating test.[199]

104. Subsequent to this review, Mr. Meeks and Mr. Capehart met with their supervisor, Mr. Widmann, and explained to him that, based on the applicants' performances as

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[191] *Id*.

[192] *Id*.

[193] Tr. at 474-75.

[194] Tr. at 475.

[195] Tr. at 475-76.

[196] Tr. at 476.

[197] Tr. at 476.

[198] Tr. at 477.

[199] Tr. at 485.

memorialized in their individual examination reports, they had concluded that a waiver request would likely be granted for all of the applicants except for Ms. Smith.[200]

105. Because this preliminary evaluation took place well before the start of the typical examination development process for the March/April 2012 examination and was not a final NRC determination, Mr. Widmann told Mr. Meeks to use the precise language in his response to Mr. Gunn that Ms. Smith was not likely to be granted a waiver based only upon her un-remediated performance on the 2011 operating test.[201]

106. Mr. Bates was not a part of this meeting.[202]

107. On August 2, 2011, following these discussions with Mr. Capehart and Mr. Widmann, Mr. Meeks emailed Region II's preliminary evaluations to Mr. Gunn.[203] The email stated the "preliminary answer[]" that "[f]or C. Smith, Region II would likely deny a waiver of the operating test portion of the exam."[204] For the other five applicants, an operating test waiver request would likely be approved as long as their applications "specif[ied] deficiencies (i.e. as noted in the last NRC exam) and the remedial training they did to correct these deficiencies."[205]

108. Though Mr. Bates was not a part of the discussion leading up to this preliminary evaluation, he was informed of the evaluation after the fact and was named in and cc'ed on the email to Mr. Gunn.[206] The purpose of this notification of Mr. Bates was to keep him generally apprised of the actions related to Vogtle's March/April 2012 examination because, though Mr. Meeks was acting as the Chief Examiner, Mr. Bates was officially the Chief Examiner with Mr.

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[200] Tr. at 470.

[201] Tr. at 470-73, 621-22.

[202] Tr. at 470.

[203] Exhibits NRC-013(U), 10, CCS-001, 22.

[204] *Id*.

[205] *Id*.

[206] Exhibits NRC-006, 17-18, NRC-013(U), 10, CCS-001, 22.

Meeks serving under his instruction.[207]

109. Based on his email to Mr. Gunn, Mr. Meeks expected that the applications for the five applicants whose waiver requests would likely be granted would be similar to one another. He also expected that Ms. Smith's application, if it did include a waiver request, would be different than the others, in that it would include more extensive details of her remediation program.[208]

110. Despite the fact that SNC and Region II had a close working relationship with respect to the operator licensing process and despite the fact that SNC management would commonly call Region II management with respect to any operator testing concerns, as was previously experienced with Mr. Brigdon's call to Mr. Widmann regarding the potential for an early written examination re-test, SNC did not question these preliminary determinations of August 2, 2011.[209]

111. Instead, in August 2011, after SNC received these preliminary determinations that the two applicants in the "less confident" group besides Ms. Smith would likely be granted waivers, SNC moved these two applicants from full-time training with HL 17 to weekly training with the three applicants that were in the "confident" group. This left Ms. Smith as the only one of the six applicants in full-time training with HL 17.[210] Thus, the Vogtle training program was preparing her to take the 2012 operating test "anticipating at the possibilities of not having a waiver."[211]

112. Ms. Smith trained as a part of HL-17 for 25 weeks in total.[212] This training also

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[207] Exhibit NRC-006, 17-18.

[208] Tr. at 409-411.

[209] Tr. at 593, 607-08, 615-18.

[210] Tr. at 168-70.

[211] Tr. at 268.

[212] Tr. at 268; *see* Exhibit CCS-002, 14.

included some remediation uniquely tailored to her weaknesses identified during the 2011 operating test so that an operating test waiver request could still be submitted,[213] which Mr. Tucker still intended to do.[214]

113. Later in August 2011, Mr. Tucker attended an examination writing conference at Region II.[215] Since Region II had never responded to the SNC letter of July 13, 2011, Mr. Tucker asked the Region II representatives what would be the best way for him to formally request waivers.[216]

114. On September 9, 2011, Mr. Gunn repeated his earlier question regarding the preliminary evaluation of waiver requests by responding to Mr. Meeks' August 2, 2011 email with an email stating "how would I go about finding out whether or not Region II will grant an operating exam waiver for the individuals submitted?"[217]

115. On September 27, 2011, Mr. Meeks responded, "I'm not sure I understand if you are asking a new question."[218] Then Mr. Meeks proceeded to repeat his response of August 2, 2011, that five of the six applicants would be granted waivers as long as their "applications demonstrate that they have completed a remedial training program to address deficiencies" but that "[f]or [Ms.] Smith, Region II would likely deny a waiver of the operating test."[219] Mr. Meeks stressed that these were "'preliminary' answers insofar as [Region II has] not received/evaluated the actual applications."[220]

116. Later on September 27, 2011, Mr. Gunn responded, "[t]hanks, I just wanted to

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[213] Tr. at 309-10.

[214] Tr. at 269.

[215] Tr. at 261.

[216] Tr. at 263

[217] Exhibits NRC-013(U), 13, CCS-001, 25.

[218] Exhibits NRC-013(U), 16, CCS-001, 28.

[219] Exhibits NRC-013(U), 16, CCS-001, 28.

[220] Exhibits NRC-013(U), 16, CCS-001, 28.

verify that we were all on the same page."[221]

117. On October 12, 2011, a "120-day telephone call" or "corporate notification call" was held between Region II and SNC.[222] The participants were, for Region II, Mr. Meeks and Mr. Bates and, for SNC, Mr. Wainwright and Thad Thompson.[223]

118. During this call, the Region II participants inquired about whether a waiver was going to be requested for Ms. Smith.[224] The purpose for this inquiry was to determine the number of applicants that would be taking the March/April 2012 operating test, so that such issues as the number of scenarios and events that would need to be developed could be resolved.[225] This was especially important for the March/April 2012 operating test because the projected class was especially large with approximately 24 applicants.[226]

119. In response, Mr. Wainwright, in his role as an SNC official, definitively stated that SNC did not intend to submit an operating test waiver request on behalf of Ms. Smith.[227]

120. Mr. Meeks and Mr. Bates contemporaneously shared this information with Mr. Widmann.[228] Ms. Smith separately verified that Mr. Wainwright never intended to submit a waiver request on her behalf.[229] There is no evidence on the record to contradict that Mr. Wainwright told Mr. Meeks and Mr. Bates during the 120-day telephone call that no waiver request would be submitted on behalf of Ms. Smith.

121. During and after the October 12, 2011, 120-day telephone call, Mr. Wainwright

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[221] Exhibits NRC-013(U), 21, CCS-001, 33.

[222] Tr. at 486-87; *see* Exhibit CCS-018.

[223] Tr. at 436.

[224] Tr. at 459-60.

[225] Tr. at 459-60, 461.

[226] Tr. at 459-60.

[227] Tr. at 429-30, 460.

[228] Tr. at 430.

[229] Tr. at 175-76, 211.

was Region II staff's only point of contact within SNC regarding the March/April 2012 examination.[230] Effectively, he was "the conduit for any information back and forth" between Region II and SNC.[231] Region II did not speak with anyone else from SNC regarding the March/April 2012 examination, nor did anyone other than Mr. Wainwright speak with Region II regarding the March/April 2012 examination.[232] For instance, Mr. Meeks testified that "the point of contact that we always used to send data, information back and forth was with Mr. Wainwright, and we never talked directly with Mr. Tucker."[233] Similarly, Mr. Tucker testified that "I never talked to anyone [at the NRC] directly, on waivers for anybody."[234]

122. In the early spring of 2012, the remedial training of the six applicants that had failed the 2011 written examination culminated in their taking company audits.[235] All six applicants took the written examination company audit and the three applicants in the "less confident" group also took the operating test company audit.[236] However, on the preliminary applications for these three applicants in the "less confident" group, Mr. Tucker only reported that they had passed a written examination company audit and not also that they had passed an operating test company audit.[237]

123. Ms. Smith testified that her performance on these company audits placed her in the "top five" of the HL-17 students.[238] She based this statement on informal discussions

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[230] *See* Tr. at 419, 429, 436, 443-45.

[231] Tr. at 445.

[232] *See* Tr. at 419, 429, 436, 443-45.

[233] Tr. at 436.

[234] Tr. at 268.

[235] Tr. at 310.

[236] Tr. at 310-13.

[237] Tr. at 312-13.

[238] Tr. at 197, 199.

among HL-17 students about their test scores.[239]

124. Ms. Smith and Mr. Tucker both testified that her performance had improved from the 2011 company audits, when she was in the middle of her class, to the 2012 company audits.[240]

125. In late February 2012, Mr. Tucker developed the preliminary license applications for the March/April 2012 applicants in order to satisfy the requirement that preliminary applications and waiver requests be submitted to the Region at least 30 days before the first examination date.[241]

126. Mr. Tucker included an operating test waiver request as part of the preliminary application for each of the six applicants that had passed the 2011 operating test but failed the 2011 written examination and each of these six waiver requests was identical.[242]

127. Mr. Tucker recognized that Region II had previously stated that it would likely deny a waiver request for Ms. Smith, but he purposefully included a waiver request anyway in order to make the Region formally deny the request.[243]

128. Mr. Tucker stated that the general purpose of submitting these preliminary applications was to "give the NRC time to look through [them] to make sure we're not going to have any issues"[244] and, if there were "any type of issues or something, [the NRC could] call you up" and resolve them before the applications were officially and finally signed.[245]

129. Tim Harris, the lead instructor for HL-17, showed Ms. Smith the preliminary

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[239] Tr. at 199.

[240] Tr. at 197, 289.

[241] Tr. at 272-73; s*ee* Exhibit CCS-018, 2.

[242] Tr. at 392.

[243] Tr. at 272-73.

[244] Tr. at 272.

[245] Tr. at 307.

license application developed on her behalf by Mr. Tucker and told her that it meant that SNC was requesting an operating test waiver on her behalf.[246]

130. On approximately February 23, 2012, Mr. Tucker mailed these preliminary applications to the NRC.[247]

131. Region II received these preliminary applications shortly thereafter and Mr. Meeks and Mr. Bates both reviewed each of them for errors.[248]

132. Mr. Meeks and Mr. Bates found an error on one pre-application other than Ms. Smith's and this was corrected by SNC.[249]

133. Upon reviewing Ms. Smith's preliminary applications, Mr. Meeks and Mr. Bates were surprised[250] to see that it included an operating test waiver request that was identical to the waiver requests included with the applications for the other five applicants that had passed the 2011 operating test but failed the 2011 written examintion.[251] Since Region II had informed SNC that it considered Ms. Smith's circumstances to be different than those of the other five applicants, Mr. Meeks and Mr. Bates had expected that a waiver request on her behalf would contain different and additional justification than a waiver request on their behalf.[252] Additionally, Ms. Smith's full-time remedial training with HL-17 was different than the other five applicant's once-a-week remedial training and Ms. Smith took both an operating test company audit and a written test company audit, but these differences were not reflected in any difference

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[246] Tr. at 157.

[247] Tr. at 173-74, 280-81; *see* Exhibit CCS-002, 4.

[248] Tr. at 411-13, 430-31.

[249] Tr. at 281-82.

[250] *See* Tr. at 277 (Mr. Tucker testified that "I guess it's like [Region II was] surprised we asked for a waiver on [Ms. Smith's] pre-app.").

[251] Tr. at 392.

[252] Tr. at 392-94, 409-411, 415.

between Ms. Smith's and their waiver requests.[253]

134. Furthermore, Mr. Wainwright had affirmatively told Mr. Meeks and Mr. Bates during the 120-day telephone call that SNC was not planning to request an operating test waiver on Ms. Smith's behalf.[254]

135. These factors, combined with the fact that the Vogtle employees holding the positions at Vogtle of operations training supervisor and training manager had recently changed, led Mr. Meeks and Mr. Bates to worry that the waiver request for Ms. Smith had been submitted by mistake or was a "cut and paste" error.[255]

136. Also, Mr. Meeks and Mr. Bates wanted to determine whether this waiver request was intentional because their planning for the required number of operating test scenarios and events up to that point in time had been based on the assumption that Ms. Smith would be taking the operating test.[256]

137. At this time, Mr. Meeks and Mr. Bates were not aware of the letter from the SNC vice president dated July 13, 2011, that purported to inform Region II that SNC intended to request waivers for all six of the applicants. However, even if they had known of this letter, it would not have affected their decision to contact Mr. Wainwright because Mr. Wainwright had told them on October 12, 2011, that SNC was not going to request a waiver on behalf of Ms. Smith.[257]

138. Mr. Meeks and Mr. Bates were not displeased at seeing this operating test waiver request, nor were they trying to avoid the process of reviewing such a request; they "just wanted to verify that [the waiver request] was correct data before [they] began the [review]

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[253] Tr. at 416-17.

[254] Tr. at 429-30, 460.

[255] Tr. at 415, 420.

[256] Tr. at 460, 462-63.

[257] Tr. at 425-429.

process"[258] because of the inconsistency between this request and their prior conversations with Mr. Wainwright.

139. Based on these concerns, before commencing their review of Ms. Smith's waiver request, Mr. Meeks and Mr. Bates called Mr. Wainwright.[259] Mr. Meeks and Mr. Bates asked Mr. Wainwright to discuss with the new Vogtle training management whether it had intended to submit the waiver request for Ms. Smith or whether the request had been made in error.[260]

140. Mr. Meeks and Mr. Bates asked Mr. Wainwright to "please get back to [them] in a day or two with the answer."[261] They were simply looking for "a yes or no answer, as to whether [they] should begin [the review] process."[262]

141. Although Mr. Meeks and Mr. Bates testified, as first-hand participants, that this was the extent of their conversation with Mr. Wainwright, Ms. Smith and Mr. Tucker believed, through second-hand information, inference, and speculation, that a different conversation had transpired. They believed that Mr. Meeks and Mr. Bates had communicated to Mr. Wainwright that a submission of a waiver request on behalf of Ms. Smith would cause some sort of delay.[263]

142. Mr. Tucker testified that he believed that there was a concern that, if a waiver request were submitted on behalf of Ms. Smith, it could not be evaluated in time to allow Ms. Smith to take the March/April 2012 examination and so she would have to take the next examination.[264] He testified that he was told by Mr. Thompson, Mr. Wainwright's subordinate, that Region II would not have "time to process [Ms. Smith's] application" which would "delay her

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[258] Tr. at 489-90, 422.

[259] Tr. at 411-12.

[260] Tr. at 420.

[261] Tr. at 420.

[262] Tr. at 433.

[263] Tr. at 218.

[264] Tr. at 218.

being able to take the exam" until the following year.[265] Thus, Mr. Tucker concluded that the sole reason that SNC ultimately did not submit a formal waiver request on behalf of Ms. Smith was the concern that doing so would make her miss the March/April 2012 examination.[266]

143. Ms. Smith testified that the concern was that, not only could her request not be evaluated in time for her to take the March/April 2012 examination, but that the evaluation of her request could possibly push back the examination date for the entire class.[267] Ms. Smith's basis for this testimony is her recounting of a conversation that she had with Robert Dorman.[268] Mr. Dorman is a Vogtle shift manager that was assigned as a mentor to Ms. Smith to help her through the SRO licensing process.[269] He subsequently helped her with the appeal process.[270] Mr. Dorman did not provide testimony in this matter.[271] There is no evidence on the record that Mr. Dorman had any direct interaction with Region II regarding Ms. Smith. Ms. Smith's testimony does not explain how her waiver request could have delayed the entire class, beyond the fact that she "was just pretty well told that it could possibly delay it."[272] Nor did Ms. Smith subpoena or obtain written testimony from Mr. Dorman to explain this.

144. Ms. Smith also testified that, at about this time, "someone unidentified at [Vogtle]" had told her that Region II had unequivocally denied her waiver request and thus that her final application could not include a waiver request.[273] There is no testimony on the record to corroborate this alleged hearsay communication between Region II and this unidentified person

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[265] Tr. at 275, 278-79, 285.

[266] Tr. at 285.

[267] Tr. at 218.

[268] Tr. at 218-19.

[269] Tr. at 283.

[270] Tr. at 283-84.

[271] Tr. at 218-19.

[272] Tr. at 219.

[273] Tr. at 165-66.

at Vogtle.[274]

145. Mr. Meeks stated that he did not know until this proceeding that there was a concern that submitting a waiver request on behalf of Ms. Smith could potentially cause her to miss the March/April 2012 examination or even delay the entire administration of the March/April 2012 examination. Mr. Meeks testified that he had never stated nor implied that a waiver request on behalf of Ms. Smith could cause a delay. Furthermore, he affirmatively testified that there would have been enough time to evaluate a waiver request submitted on behalf of Ms. Smith at the 30-day mark or even at the 14-day mark.[275] Specifically, he testified that NUREG-1021 addresses this situation and allows for an oral determination to suffice when there may not be sufficient time to develop a written determination before the test date.[276] Even Ms. Smith concluded that, due to this section of NUREG-1021, it would not have made sense for Mr. Meeks to make such a statement regarding delay to Mr. Wainwright.[277]

146. No one from SNC contacted Mr. Widmann to express concern with Mr. Meeks' and Mr. Bates' inquiry into the validity of the waiver request included with Ms. Smith's preliminary application, even though SNC had often reached out to Mr. Widmann in the past regarding operator licensing concerns.[278]

147. Within one or two days of Mr. Meeks and Mr. Bates calling Mr. Wainwright, Mr. Wainwright returned their call and stated that he had checked with the Vogtle training management and determined that the waiver request had been a mistake and that SNC was not going to submit an operating test waiver request as part of Ms. Smith's final, certified

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[274] Tr. at 166-67.

[275] Tr. at 518-19.

[276] Tr. at 518-19.

[277] Tr. at 219.

[278] Tr. at 593-94, 597-98, 607-08.

application.[279] Mr. Meeks understood this to mean that Mr. Wainwright had spoken to the Vogtle operations training supervisor, Mr. Acree, who had recently replaced Mr. Gunn, and the Vogtle training manager, Mr. Brown, who had recently replaced Mr. Brigdon.[280]

148. Although Mr. Wainwright appears to be the only individual who could explain how his conversation with Mr. Meeks and Mr. Bates was interpreted and how this affected the SNC position on submitting a waiver request on behalf of Ms. Smith, Ms. Smith did not obtain his testimony, because, as she stated at hearing, "it seemed like there was a lot of avoidance about providing any of the details that occurred with the conversation over the phone with the NRC."[281]

149. Based on this representation by Mr. Wainwright to Mr. Meeks that the waiver request submitted on behalf of Ms. Smith on her preliminary application was a mistake, Region II did not evaluate it.

150. At about this same time, Mr. Tucker's "training manager requested that [he] send in the certified application without a request for a waiver" and Mr. Tucker did as he was instructed.[282]

151. Mr. Tucker testified that, "[t]he NRC had no say-so in whether [Ms. Smith's] certified application was going to ask for a waiver or not. They had no influence as far as directly saying yea or nay. It was all strictly because we were concerned about the delayed exam [for Ms. Smith], as I stated earlier."[283]

152. The final, certified application for Ms. Smith, received by Region II, did not include an operating test waiver request.[284] Despite the fact that Ms. Smith had wanted to

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[279] Tr. at 420, 434.

[280] Tr. at 434-35.

[281] Tr. at 211.

[282] Tr. at 284.

[283] Tr. at 309.

[284] Exhibit NRC-007.

request a waiver, she signed the final, certified application knowing that it did not include a waiver request.[285] Therefore, the best evidence of record is that no final, official SNC request contained a waiver request for Ms. Smith.

153. The waiver of operator license requirements upon a subsequent re-application for an operator license, is governed by 10 C.F.R. § 55.35(b) and NUREG-1021. Specifically, 10 C.F.R. § 55.35(b) states that, "[a]n applicant who has passed either the written examination or operating test and failed the other may request" a waiver of re-examination on the portions of the examination or test which the applicant has passed. Such a request must be made "in a new application on Form NRC–398."[286] The Commission "may in its discretion grant the request" if it determines that "sufficient justification is presented."[287] NUREG-1021 states that a waiver request must be in the form of a "final license application."[288] Therefore, in order to obtain a waiver, the applicant must first actually request the waiver by "checking the appropriate block in Item 4.f on [the] NRC Form 398" license application and by "explain[ing] the basis" for the requested waiver in Item 17.[289] Additionally, the licensee facility's senior management representative on site must certify this new/final license application in order to "substantiat[e] the basis for the applicant's waiver request."[290] NUREG-1021 further specifies that an SRO license application "is not complete until both [NRC Form 398 and NRC Form 396] are filled out, signed by the appropriate personnel, and received by the NRC."[291]

154. Since there was no operating test waiver request included in Ms. Smith's final,

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[285] Tr. at 165-67.

[286] 10 C.F.R. § 55.35(b).

[287] *Id*.

[288] NUREG-1021, ES-204, 1.

[289] *Id*.

[290] *Id*.

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

certified license application that satisfied these requirements, Region II did not evaluate a waiver of Ms. Smith's 2012 operating test.[292]

155. Therefore, Ms. Smith took the operating test during the March/April 2012 examination.[293] Ms. Smith failed this operating test and her SRO license application was denied.[294]

156. Ms. Smith testified that, after learning that she had failed the 2012 operating test, she spoke with Mr. Wainwright for the first time about the actions related to her waiver request. She stated that Mr. Wainwright informed her that "it was not intended to submit a waiver for [her]."[295]

157. Ms. Smith further testified that she thought that Mr. Wainwright was hiding information.[296] However, Ms. Smith did not attempt to secure the testimony of Mr. Wainwright under oath[297] even though she was apparently aware that the Board could provide her with subpoenas and did, in fact, obtain subpoenas for other witnesses.[298]

158. After the proposed denial of her 2012 SRO license application, SNC informed Ms. Smith that, if she was interested, she could join the next operator training program class and take the SRO-instant examination a third time in March/April 2013.[299]

159. Ms. Smith rejected this offer, stating that "there was a target on [her] back."[300]

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[292] Tr. at 421.

[293] *See* Exhibit CCS-045, 1.

[294] *Id*.

[295] Tr. at 175-76, 211.

[296] Tr. at 176.

[297] Tr. at 211.

[298] *See, e.g.*, Request a Modification to Subpoena (Jul. 1, 2013) (ADAMS Accession No. ML12182A169).

[299] Tr. at 209.

[300] Tr. at 209.

Instead, she pursued an administrative review of the proposed denial[301] and then, when the administrative review substantiated the proposed denial,[302] she pursued the instant proceeding.[303]

160. Based on these facts, the Board should find that Ms. Smith has not proven by clear evidence that the Staff improperly discharged its duties with respect to the processing of a waiver request for her.

E. Statement of Position 2: There was no Staff Bias or Conflict of Interest

161. In her Statement of Position 2, Ms. Smith alleges that there was a conflict of interest related to her 2012 operating test and that it was not addressed as provided by NUREG-1021.[304] Ms. Smith argues that this alleged conflict of interest was due to the knowledge of the 2012 examiners of her 2011 operating test performance which caused them to form an opinion that was biased against her.[305] Ms. Smith concludes that this alleged bias resulted in her being treated differently than other applicants through the "unfair practice[] to accumulate comments on [her] final examination that were not warranted . . . creatively written [and] inaccurate" and which, in turn, resulted in the "deduct[ion of] enough points to fail [her]."[306] Due to the facts presented below, this Board should rule in favor of the Staff on these arguments.

162. From March 16 to March 24, 2011, Ms. Smith was administered an SRO-instant

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[301] Exhibit NRC-015.

[302] Exhibit CCS-014.

[303] Charlissa C. Smith Request for Hearing (Dec. 5, 2012).

[304] Exhibit CCS-076, 11.

[305] Exhibit CCS-076, 11.

[306] Exhibit CCS-076, 11, 13-14.

operating test.[307] Her examiners during this operating test were Mr. Hopkins, Examiner of Record, Mr. Capehart, Chief Examiner, and Mr. Meeks.[308] Mr. Hopkins administered seven of the required 15 job performance measures (JPMs), Mr. Capehart administered six, and Mr. Meeks administered two.[309] As Ms. Smith's Examiner of Record, Mr. Hopkins was also assigned to evaluate the entirety of her performance during the simulator portion of the operating test, write her individual examination report, and recommend whether she passed or failed the operating test.[310]

163. On April 1, 2011, Ms. Smith was administered an SRO written examination.[311]

164. Ms. Smith ultimately failed the 2011 written examination and passed the 2011 operating test.[312] Therefore, Region II proposed to deny Ms. Smith's 2011 SRO application.[313]

165. The next operator examination at Vogtle was scheduled for March/April 2012 and the Region II examiners assigned to this examination were Mr. Bates, Chief Examiner, Mr. Meeks, Chief Examiner in Training, and Bruno Caballero.[314]

166. As stated in Section I.D. *supra*, SNC contemplated developing a retake written examination for the 2011 Vogtle applicants who had passed the operating test and failed the written examination.[315] In support of this possibility, in May 2011, they asked Mr. Widmann, who asked the 2011 examiners, Mr. Capehart, Mr. Hopkins, and Mr. Meeks, to make a preliminary evaluation of which of these applicants would likely be granted a waiver of the operating test if

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[307] Exhibit CCS-007, 1.

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

[309] *Id*. at 2.

[310] *Id*. at 1, 10-22.

[311] *Id*. at 1.

[312] *Id*.

[313] *Id*.

[314] Exhibit NRC-031, 1, 3.

[315] Tr. at 466-67.

one were requested.[316] Mr. Capehart, Mr. Hopkins, and Mr. Meeks unanimously recommended to Mr. Widmann that all of the applicants except for Ms. Smith would likely be granted a waiver of the operating test based solely on their 2011 operating test performance.[317] Subsequently, Mr. Widmann provided this preliminary determination to SNC.[318]

167. Mr. Bates and Mr. Caballero of the 2012 examination team did not participate in this May 2011 preliminary determination because it was directed to the 2011 examination team, which had just finished administering the 2011 examination, and not the 2012 examination team, which had not yet begun to develop the 2012 examination.[319]

168. SNC ultimately decided not to pursue a retake written examination before the regularly scheduled March/April 2012 examination and informed Region II of this decision.[320] At this point, the duties of the 2011 examination team of Mr. Hopkins, Mr. Capehart, and Mr. Meeks were complete and the SNC point of contact regarding operator license examinations became Mr. Meeks, the Chief Examiner in Training for the 2012 examination team of Mr. Meeks, Mr. Bates, and Mr. Caballero.[321]

169. In June 2011, SNC requested from Mr. Meeks a preliminary evaluation of whether Ms. Smith would likely be granted a waiver of the regularly scheduled March/April 2012 operating test.[322]

170. On August 1 or 2, 2011, in response to SNC's June 2011 request, Mr. Meeks discussed the request with Mr. Capehart, the other examiner that had observed Ms. Smith's

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[316] Tr. at 619-20.

[317] Tr. at 466-68, 619-20; *see* Exhibits NRC-013(U), 4, CCS-001, 17-18.

[318] Tr. at 619-20.

[319] Tr. at 467-68.

[320] Tr. at 468.

[321] Tr. at 468.

[322] Exhibits NRC-013(U), 7, CCS-001, 19.

2011 operating test performance.[323] Mr. Meeks did not discuss this request with Mr. Hopkins, the third examiner that had observed Ms. Smith, because he had since retired.[324]

171. Mr. Meeks and Mr. Capehart drew upon their years of training and experience as examiners, their first-hand observations of Ms. Smith during the 2011 operating test, their development of Ms. Smith's and her fellow 2011 Vogtle applicants' individual examination reports, and a fresh review of all of the applicants' individual examination reports to determine that, without the submission of any specific remediation plans, a waiver would likely not be granted for Ms. Smith.[325]

172. Mr. Meeks and Mr. Capehart discussed this preliminary determination with their supervisor, Mr. Widmann, in order to get his approval before responding to SNC that a waiver request for Ms. Smith would likely be denied.[326] Mr. Widmann provided his approval subject to his direction that the language of the response be carefully crafted to reflect that this was a preliminary, not a final, determination.[327]

173. Since Mr. Meeks was only the Chief Examiner in Training, he also sought the approval of Mr. Bates, the actual Chief Examiner for the Vogtle 2012 examination, before providing this preliminary determination to SNC.[328]

174. Mr. Meeks did not discuss any details of Ms. Smith's performance on the 2011 operator examination with Mr. Bates; rather, in much more general terms they discussed that the 2011 examination team had recommended to Mr. Widmann to not grant a waiver to one applicant out of six potential re-applications, that this was only a preliminary evaluation, and that

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[323] Tr. at 469-70.

[324] Tr. at 592, 618.

[325] Tr. at 470.

[326] Tr. at 469-70.

[327] Tr. at 470-71, 621-22.

[328] Exhibit NRC-006, 17-18.

the preliminary evaluation would be phrased using the term "would likely deny."[329]

175. Mr. Bates indicated that he would defer to this preliminary determination of the 2011 examination team and gave Mr. Meeks his permission to respond to SNC's request in this manner.[330]

176. Subsequently, on August 2, 2011, Mr. Meeks informed SNC, via email, that "[f]or [Ms.] Smith, Region II would likely deny a waiver of the operating test portion of the exam."[331] He also stated in this email that he had discussed this position with Mr. Widmann and Mr. Bates.[332] Both Mr. Widmann and Mr. Bates were cc'ed on this email.[333]

177. In August 2011, due to scheduling conflicts, Mr. Caballero had to be replaced on the Vogtle March/April 2012 examination team by Mr. Capehart.[334]

178. Mr. Bates and Mr. Meeks, as Chief Examiner and Chief Examiner in Training, respectively, were responsible for planning the administration of the Vogtle March/April 2012 operating test. They recognized both (1) that Mr. Meeks and Mr. Capehart had served as examiners during the Vogtle March/April 2011 examination and (2) that there was the potential for an applicant from this previous examination, Ms. Smith, to retake the operating test in March/April 2012. Therefore, they affirmatively evaluated whether the assignment of Mr. Meeks and Mr. Capehart to Ms. Smith's 2012 operating test violated any of the NUREG-1021 conflict of interest prohibitions.[335]

179. With respect to conflicts of interest, the NUREG-1021 guidelines prohibit the

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[329] *Id*.

[330] *Id*.

[331] Exhibits NRC-013(U), 10, CCS-001, 22.

[332] Exhibits NRC-013(U), 10, CCS-001, 22.

[333] Exhibits NRC-013(U), 10, CCS-001, 22.

[334] Exhibit NRC-031, 1, 4.

[335] Tr. at 520-23.

assignment of an "examiner who failed an applicant on an operating test" to administer any part of that applicant's retake operating test.[336]

180. Mr. Bates and Mr. Meeks determined that this prohibition did not apply to Ms. Smith's situation because Ms. Smith did not fail the 2011 operating test.[337] They also determined that this prohibition did not apply to Ms. Smith's situation because, in 2011, neither Mr. Meeks nor Mr. Capehart were the "examiner who failed" Ms. Smith.[338] The only person with this authority was Mr. Hopkins because, as Ms. Smith's Examiner of Record, he was the only examiner authorized to sign the "Signature" block to recommend that Ms. Smith either passed or failed the 2011 operating test.[339]

181. NUREG-1021 also prohibits the assignment of an examiner previously employed by the facility licensee and significantly involved with the training of a current license applicant from administering any part of that applicant's operating test.[340]

182. Mr. Bates and Mr. Meeks determined that this prohibition did not apply to Ms. Smith's situation because neither they, nor Mr. Capehart were previously employed by SNC and provided training to Ms. Smith.[341]

183. Mr. Bates and Mr. Meeks also evaluated whether the assignment of the three of them to Ms. Smith's 2012 operating test would have the appearance of a conflict of interest, and, if so, which measures could be taken to prevent any such conflict of interest.[342]

184. The NUREG-1021 guidelines provide that an examiner should inform his

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[336] NUREG-1021, ES-201, 14.

[337] Tr. at 520; *see* Exhibit CCS-007, 1.

[338] Tr. at 528-29.

[339] Tr. at 528-30; *see, e.g.*, Exhibit CCS-007, 1.

[340] NUREG-1021, ES-201, 14.

[341] Exhibit NRC-001, 43.

[342] Tr. at 521-22.

immediate supervisor if his assignment to an examination might appear to present a conflict of interest.[343] NUREG-1021 provides that any such potential conflict of interest can be resolved by applying sound judgment to the facts of the case.[344]

185. Mr. Bates and Mr. Meeks believed that Mr. Meeks' and Mr. Capehart's involvement with Ms. Smith's passing performance on the 2011 operating test and with the recommendation that she not be granted a waiver of the 2012 operating test did not appear to present a conflict of interest pursuant to NUREG-1021.[345]

186. Specifically, Mr. Meeks did not "believe that knowledge of how an applicant did on a prior test . . . would be a conflict of interest when you're looking at grading a future test."[346]

187. Mr. Meeks explained that it is not uncommon for such a situation to exist. For instance, when an applicant who had previously been qualified as a reactor operator (RO) later applies for an SRO-upgrade license, he may be evaluated by one or more of the same examiners that had evaluated him during his previous RO operating test.[347]

188. Despite this belief, however, in an overabundance of caution, Mr. Bates and Mr. Meeks notified their immediate supervisor, Mr. Widmann, of the potential for a conflict of interest with respect to Ms. Smith were she to take the operating test in March/April 2012.[348]

189. Mr. Widmann, Mr. Bates, and Mr. Meeks determined that the assignment of Mr. Bates as Ms. Smith's Examiner of Record would constitute a sound exercise of judgment to prevent any potential that this situation might present a conflict of interest.[349]

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[343] NUREG-1021, ES-201, 14.

[344] NUREG-1021, ES-201, 13.

[345] Tr. at 521-22.

[346] Tr. at 521.

[347] Tr. at 521-22.

[348] Tr. at 522-23.

[349] Tr. at 522-23.

190. They reasoned that Mr. Bates was free of any potential bias towards Ms. Smith because he was not involved with Ms. Smith's 2011 operating test, he did not review Ms. Smith's 2011 individual examination report, and he did not partake in the decision-making process behind the May 2011 or August 2011 preliminary determinations that a waiver request for Ms. Smith's 2012 operating test would likely be denied.[350] Therefore, they concluded that having Mr. Bates evaluate the entirety of Ms. Smith's simulator test and numerous of Ms. Smith's JPMs as well as write Ms. Smith's individual examination report would cure any conflict of interest concerns.[351]

191. As a result, when Ms. Smith was administered her second SRO-instant operating test from March 26 to April 13, 2012, her examiners were Mr. Bates, Examiner of Record and Chief Examiner, Mr. Meeks, Chief Examiner in Training, and Mr. Capehart.[352] Mr. Bates administered five of the required 15 JPMs, Mr. Meeks administered eight, and Mr. Capehart administered two.[353] As her examiner of record, Mr. Bates was also assigned to evaluate the entirety of Ms. Smith's performance during the simulator portion of the operating test, write her individual examination report, and recommend whether she passed or failed the operating test.[354]

192. In addition to her argument that the assignment of examiners to her 2012 operating test violated the conflict of interest guidance provided in NUREG-1021, Ms. Smith also argues that her assigned examiners treated her differently than the other Vogtle 2012 operator license applicants by engaging in "unfair practices to accumulate comments on [her]

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[350] Tr. at 520, 522-23, 528.

[351] Exhibit CCS-001, 8.

[352] Exhibit CCS-045, 1-2.

[353] *Id*. at 2.

[354] *Id*. at 1, 8-32.

final examination that were not warranted . . . creatively written [and] inaccurate."[355]

193. Mr. Bates, Mr. Meeks, and Mr. Capehart testified that they always "apply[] an equal standard to all applicants so that [their] grading [is] fair and without bias."[356]

194. Mr. Meeks and Mr. Capehart testified that they approached Ms. Smith's 2012 operating test with a positive impression of Ms. Smith knowing that she had had 25 weeks of training since she had previously passed, though with a borderline grade, her 2011 operating test.[357]

195. In fact, on the portions of Ms. Smith's 2012 operating test that they had administered, Mr. Meeks and Mr. Capehart actually graded Ms. Smith more favorably than they had in March/April 2011. In 2011, Mr. Capehart and Mr. Meeks combined to evaluate eight of Ms. Smith's JPMs, finding them all to be satisfactory but noting four comments.[358] In 2012, Mr. Capehart and Mr. Meeks combined to evaluate slightly more JPMs, for a total of ten, and yet still found them all to be satisfactory with even less comments, for a total of only three comments.[359]

196. Ultimately, Ms. Smith was assessed four JPM comments and 18 simulator test comments on the March/April 2012 operating test.[360]

197. These comments were similar to comments given to other Vogtle 2012 applicants. In exhibits CCS-021 and NRC-043, each of Ms. Smith's JPM and simulator test comments are reproduced alongside reproductions of similar comments given to other applicants in her Vogtle 2012 class. These comparisons are summarized in the following tables.

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[355] Exhibit CCS-076, 11, 13-14.

[356] Exhibit NRC-002, 18.

[357] Tr. at 529.

[358] Exhibit CCS-007, 2.

[359] Exhibit CCS-045, 2.

[360] Exhibit CCS-045, 2-3.

Applicant	Admin JPM c	Systems JPM a	Systems JPM d	Systems JPM g
Ms. Smith	Pass w/ Comment	Pass w/ Comment	Pass w/ Comment	Pass w/ Comment
Operator H	Pass w/ Comment		Pass w/ Comment	Pass w/ Comment
Operator G		Pass w/ Comment		Pass w/ Comment
Operator M	Pass w/ Comment		Pass w/ Comment	Pass w/ Comment
Operator N			Pass w/ Comment	Pass w/ Comment
Operator U			Pass w/ Comment	Pass w/ Comment
Operator O			Pass w/ Comment	
Operator S		Pass w/ Comment	Pass w/ Comment	
Operator Q		Pass w/ Comment	Pass w/ Comment	
Operator J			Pass w/ Comment	
Operator R		Pass w/ Comment	Pass w/ Comment	
Operator L		Pass w/ Comment		

Rating Factor	Ms. Smith Individual Examination Report Page Number	Applicant Individual Examination Report Page Number for Similar Comment / Examiner of Record
1.b	8	Operator S Pg 9 / Bates Operator M Pg 11 / Capehart
1.b	10	Operator N Pg 17 / Capehart
1.c	12	The use of a similar threshold for all applicants can be seen generally via other comments in this table.
1.c	14	Operator Q Pg 13 / Bates Operator S Pg 10 / Bates Operator V Pg 10 / Meeks Operator R Pg 8 / Meeks Operator L Pg 9 / Capehart
1.d	16	Operator Q Pg 12 / Bates Operator V Pg 11 / Meeks
3.a	18	Operator Q Pg 14 / Bates Operator V Pg 14 / Meeks
3.a	19	The use of a similar threshold for all applicants can be seen generally via other comments in this table.
3.a	20	Operator S Pg 11 / Bates Operator N Pg 15 / Capehart Operator V Pg 7 / Meeks Operator M Pg 10 / Capehart Operator U Pg 7 / Meeks
3.c	21	Operator O Pg 10 / Bates
4.a	23	Operator L Pg 13 / Capehart
4.a	24	Operator V Pg 12 / Meeks
4.a	25	The use of a similar threshold for all applicants can be seen

		generally via other comments in this table.
4.b	26	Operator Q Pg 15 / Bates Operator S Pg 12 / Bates
4.b	27	Operator Q Pg 15 / Bates Operator S Pg 12 / Bates
4.c	28	Operator N Pg 18 / Capehart Operator V Pg 13 / Meeks
6.a	29	Operator P Pg 14 / Meeks Operator P Pg 15 / Meeks
6.a	30	Operator S Pg 13 / Bates
6.a	31	Operator Q Pg 16 / Bates Operator V Pg 15 / Meeks Operator R Pg 10 / Meeks

[361]

198. When it became apparent to Mr. Bates that, according to the scoring guidelines of NUREG-1021, ES-303, these 18 simulator test comments would result in a failing grade for Ms. Smith, he actually went beyond the guidance in NUREG-1021 and obtained peer reviews of his draft of Ms. Smith's individual examination report.[362] He had two senior examiners and one examiner, all three of whom had previously held SRO licenses and two of whom had previously worked for utilities as trainers, review Ms. Smith's individual examination report.[363] The purpose of this peer review was to ensure that the identified deficiencies were clearly described and that they were each assessed to the appropriate rating factor (RF).[364]

199. None of these reviewers expressed a concern that any of the identified deficiencies were inappropriate or that they were assessed to the wrong RF.[365]

200. Ms. Smith also argues that she was treated differently than other applicants because she was administered three scenarios during her 2012 simulator test instead of two

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[361] Exhibits CCS-021, NRC-043.

[362] Tr. at 595-96; Exhibit NRC-014, 8.

[363] *Id*.

[364] *Id*.

[365] *Id*.

scenarios, which is the minimum required by NUREG-1021.[366]

201. Although NUREG-1021 states that the minimum number of scenarios required for an SRO simulator test is two, it also explicitly allows for applicants to be given one scenario more than this minimum [367]

202. The determination that Ms. Smith would be administered three scenarios instead of two was made in a generic manner, meaning that the draft schedules for the Vogtle 2012 class were developed based on the level of license for which each applicant was applying (*e.g.*, RO, SRO-instant, *etc*.) and not based on the applicant's name.[368]

203. Of the eight SRO-instant applicants in 2012, a total of six of them, including Ms. Smith, were administered three scenarios.[369]

204. Other than Ms. Smith, all six of these applicants that were administered three scenarios passed the simulator test despite being administered three scenarios.[370]

205. Finally, in her response to the Staff's initial pre-filed written testimony, Ms. Smith implicitly raised, for the first time, the possibility of race or sex discrimination as another source of bias.[371] She did not previously include the possibility of race or sex discrimination in her request for a hearing[372] or in her initial pre-filed written testimony.[373]

206. Ms. Smith did not directly assert race or sex discrimination or bias as a specific cause of action, but simply implied in her reply the possibility of race or sex bias in the following, single paragraph.

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[366] Exhibit CCS-116, 10.

[367] NUREG-1021, ES-201, 12.

[368] Exhibit NRC-002, 4.

[369] *See* NRC-031, 5-6.

[370] *See* Exhibit BRD-003, 13-14.

[371] Exhibit CCS-116, 17-18.

[372] *See* Charlissa C. Smith Request for Hearing (Dec. 5, 2012).

[373] *See generally* Exhibit CCS-076.

> The NRC Staff continues their discussion by pointing out that C. Smith's performance stood out to all three examiners as one of the two least competent performances. C. Smith notices that the Exam Team has commented several times in their statements and affidavits about the individual that was failed in 2011. They have written statements to identify that C. Smith and other individual were the worst operators. C Smith is not certain as to why they continue to discuss this individual's performance especially since the appeal is in reference to C Smith's performance. My assumption is that the is Exam Team would like to create the impression that no bias existed with C. Smith because she was not the only individual identified as being below average. **Because the Exam Team continues to mention this individual it may be important to note that C. Smith shares some common characteristics with this individual that was failed in 2011 on the Simulator Exam. C. Smith & the individual were both identified as weak contenders, C. Smith & the individual were essentially examined by the same Exam Team members and C. Smith & the individual are both African-American females**. This individual also identified that she encountered numerous issues during the administration of her exam in 2011.[374]

207. Other than her personal speculation in this single paragraph, Ms. Smith presented no evidence in her hundreds of pages of exhibits and pre-filed testimony or in her direct testimony to support that the NRC examiners possessed or acted on any racial or sexual bias or discriminatory intent. Ms. Smith also presented no argument as to how this Atomic Safety and Licensing Board proceeding is the proper forum in which to address race or sex discrimination issues.

208. The only evidence on the record related to race or sex was elicited by the Board's questioning. The response to this questioning placed on the record that, at Vogtle, there are approximately 40 licensed SROs,[375] including three African American males[376] and two non-African American females.[377] Additionally, there are approximately 35-40 licensed

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[374] Exhibit CCS-116, 17-18 (emphasis added).

[375] Tr. at 202.

[376] Tr. at 214.

[377] Tr. at 202.

ROs,[378] including one African American male and one non-African American female.[379]

209. These raw numbers in of themselves establish nothing. Assumptions, speculation, or suspicion about what these numbers mean is not a substitute for clear evidence. Moreover it is the Vogtle facility licensee, not the NRC examiners, that has control and responsibility over the recruitment, selection pool, and training of operator license applicants.[380]

210. Therefore, there is not sufficient evidence to make a finding of fact that Ms. Smith's SRO license application was denied because of sex or race bias or discriminatory intent.

211. Based on these facts, the Board should find that Ms. Smith has not proven by clear evidence that there was a conflict of interest or that the Staff was biased against her.

F. Statement of Position 3: The Informal Review Panel did not Improperly Discharge its Duties with Respect to the Administrative Review of Ms. Smith's 2012 Simulator Test

212. On June 5, 2012, Ms. Smith submitted a request to Headquarters for an administrative review of the grading of her 2012 simulator test, as well as an evaluation of her additional arguments that Region II should have granted her a waiver of the 2012 operating test and that her 2012 Region II examiners had been biased against her due to their knowledge of her performance on the 2011 operating test.[381]

213. NUREG-1021 and Operator Licensing Manual Chapter 500, "Processing Requests for Administrative Reviews and Hearings" (OLMC-500) provide the Staff guidance regarding administrative reviews and hearings related to license application denials.[382]

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[378] Tr. at 215.

[379] Tr. at 214.

[380] Of further note is the fact that the one African American male and the one non-African American female identified as among the ROs at Vogtle both received their RO licenses during the Vogtle 2012 examination despite having the same examiners as Ms. Smith.

[381] Exhibit NRC-015.

[382] NUREG-1021, ES-502, 1; OLMC-500.

214. NUREG-1021 states that, "[i]f an applicant fails the operator licensing . . . operating test . . . and receives a proposed license denial letter . . . the applicant has 20 days . . . to . . . [r]equest that the NRC administratively regrade the . . . operating test . . . in light of new information to be provided by the applicant."[383] It concludes that, "[i]f the NRC administratively reviews a failure and determines that the applicant did not provide sufficient basis to justify passing grades on all sections of the licensing examination, the NRC will issue a letter to the applicant sustaining the proposed denial."[384]

215. Upon receiving an administrative review request, "[t]he NRR operator licensing program office will determine whether to (1) review the appeal internally; (2) have the regional office review the appeal, or (3) convene a three-person board to review the applicant's documented contentions."[385]

216. In accordance with NUREG-1021, the Chief of the Operator Licensing Branch in NRR, Mr. McHale, was responsible for addressing Ms. Smith's request.[386]

217. Mr. McHale determined the appropriate format for the administrative review of Ms. Smith's request by reviewing past agency precedent. In doing so, he found that a similar situation in which an applicant made both technical grading and bias arguments had occurred in the year 2000 and, in response, the NRC had investigated these arguments separately.[387]

218. Therefore, Mr. McHale separated Ms. Smith's technical grading arguments from her arguments having to do with the processing of a waiver request and the alleged bias of her 2012 examiners based on their knowledge of her 2011 operating test performance (hereafter "improper conduct arguments"). He assigned the technical grading arguments to a three-person

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[383] NUREG-1021, ES-502, 2.

[384] *Id*.

[385] *Id*. at 4.

[386] *See* Exhibit NRC-040; Tr. at 614, 656.

[387] Tr. at 656; Exhibit NRC-017.

informal review panel and the improper conduct arguments to the Deputy Regional Administrator of Region II, Len Wert.[388]

219. He assigned the improper conduct arguments to Mr. Wert because Region II personnel would have the best access to the relevant witnesses and documents and because the normal point of contact for allegations of improper conduct by a Region's employees is that Region's Deputy Office Director.[389]

220. NUREG-1021 states that "[an] appeal board will normally be composed of a branch chief and two examiners or subject matter experts; it may also include a representative from the affected region, but no one who was involved with the applicant's licensing examination."[390]

221. Consistent with this guidance, Mr. McHale reached out to the Operations Branch Chiefs at each region besides Region II to determine whether any of them would be available to chair the informal review panel.[391]

222. The Operations Branch Chief for Region I, Mr. Jackson, volunteered to chair the informal review panel.[392]

223. To fill the remaining two positions on the informal review panel, Mr. McHale and Mr. Jackson sought qualified individuals that were not from either Region I or Region II.[393] They also sought an individual with experience dealing with operator licensing appeals.[394] Using these criteria, they selected Christopher Steely, a Chief Examiner-qualified individual from

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[388] *See* Tr. at 656; Exhibits CCS-022, NRC-016; NUREG-1021, ES-502, 4.

[389] Tr. at 656-58.

[390] NUREG-1021, ES-502, 4.

[391] Tr. at 535-36.

[392] Tr. at 536.

[393] Tr. at 536-37.

[394] Tr. at 536-37.

Region IV, and David Muller, an Examiner-qualified individual from Headquarters who had previously worked with operator licensing appeals, as the informal review panel's two subject matter experts.[395]

224. To perform the review of the improper conduct arguments, Mr. Wert selected Mr. Ehrhardt, Branch Chief of the Region II Division of Reactor Projects.[396]

225. OLMC-500 states that, "[i]f the affected region conducts the review, the affected region shall . . . [e]nsure that the review is not performed by any examiners involved with the applicant's original licensing examination. This will ensure that the review is conducted in an impartial fashion."[397]

226. Mr. Ehrhardt was selected, in part, because he was previously Chief Examiner qualified and because he had previously worked as a senior operations engineer, making him very knowledgeable about the operator licensing process at issue.[398] He was also selected because, as a manager outside the chain of command of the Region II examiners that administered Ms. Smith's 2012 operating test, he could conduct an impartial investigation.[399]

227. Mr. Ehrhardt testified that he in fact conducted his investigation in an impartial fashion.[400] He stated that during the three and a half years prior to conducting the investigation, he had had no routine interaction with Ms. Smith's 2012 examiners.[401] During the 2008-2009 timeframe, Mr. Ehrhardt did participate with Mr. Bates on one exam team and with Mr. Capehart

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[395] Tr. at 536-37.

[396] Tr. at 589.

[397] OLMC-500, 4.

[398] Tr. at 589, 658.

[399] Tr. at 589, 593.

[400] Tr. at 599-600.

[401] Tr. at 592-93.

on another exam team.[402] However, Mr. Ehrhardt testified that this minimal past association did not affect the development of his investigation because he was now a manager and not a peer of Mr. Bates and Mr. Capehart.[403]

228. The informal review panel chaired by Mr. Jackson never had any contact with Mr. Ehrhardt; their investigations proceeded separately and in parallel.[404]

229. NUREG-1021 states that, "[f]or operating tests, the review shall evaluate the examiner's comments, the examination report, the test that was administered, and the contentions and supporting documentation provided by the applicant . . . ."[405]

230. OLMC-500 states that, "IOLB will . . . establish and maintain communications with the affected region, in order to ensure that the review results include regional/examiner of record input."[406] Furthermore, "[t]he results of all administrative reviews will be approved by IOLB and signed out by the Director, DIRS, taking into account any input from the affected region and/or examiner of record."[407] If a panel conducts the review, "the affected region will be responsible for answering questions and providing assistance as requested by . . . the panel."[408] This assistance "may include providing preliminary assessments for some of the contested test items."[409] Also, during an appeal panel review, "the panel will establish and maintain communications with the affected region and IOLB, in order to ensure that the review results include regional and IOLB input."[410]

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[402] Tr. at 600.

[403] Tr. at 599-600.

[404] Tr. at 547.

[405] NUREG-1021, ES-502, 4.

[406] OLMC-500, 3.

[407] *Id*.

[408] *Id*. at 4.

[409] *Id*.

[410] *Id*. at 6.

231. Consistent with this guidance, the informal review panel accepted the Region II examiners' comments responding to Ms. Smith's arguments. Region II provided this input to the informal review panel in a series of binders. The informal review panel also collected Ms. Smith's and her fellow Vogtle 2012 applicants' individual examination reports, the outlines and examiner notes for the simulator test scenarios administered to Ms. Smith, the simulator data for these scenarios, and Ms. Smith's contentions and supporting documents.[411]

232. Mr. Jackson thought of the informal review panel as an adjudicatory body, in that it weighed Ms. Smith's testimony and supporting documents against the testimony and supporting documents of the Region II examiners to develop a factual record of the simulator test.[412] Where there was confusion with either party's testimony, the informal review panel would ask specific, pointed questions.[413]

233. OLMC-500 states that, "[u]pon determining the applicant's actual actions during the contested test items, the reviewer(s) shall utilize the grading policies contained in NUREG-1021, ES-303, to re-grade the contested portion(s) of the operating test."[414] Then, "[u]pon determining an outcome for all contested test items, the reviewer(s) shall utilize NUREG-1021, ES-303 to determine the applicant's overall operating test score based on the remaining test items."[415]

234. Therefore, once the factual record was developed, the informal review panel, based on its understanding of the NUREG-1021 grading criteria and its expertise, conducted a complete, *de novo* re-grading of Ms. Smith's simulator test.[416] First it re-graded the contested

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[411] Tr. at 540-43.

[412] Tr. at 541-44.

[413] Tr. at 542, 546-47, 550.

[414] OLMC-500, 8-9.

[415] *Id*. at 9.

[416] Exhibit NRC-004, 7.

errors in order to document its response to Ms. Smith's request;[417] then it re-graded the non-contested errors in order to determine Ms. Smith's overall simulator test score. Mr. Jackson believed that this process resulted in the most accurate grading of Ms. Smith's simulator test.[418]

235. Though differing on some details, the panel's review agreed with Region II that Ms. Smith had failed the simulator test.[419]

236. The specifics of this informal review process were as follows.

237. From June 25-27, 2012, the informal review panel met for the first time in person in a private conference room at the Region II office in Atlanta, Georgia.[420]

238. During the first day and a half of deliberations, the informal review panel constructed a record of the events that occurred during Ms. Smith's 2012 simulator test through reviewing Ms. Smith's extensive arguments submitted as part of her review request, the binders developed by Region II in response to these arguments, the individual examination reports for Ms. Smith and the other applicants in her class, testing outlines and examiner notes, and simulator data.[421]

239. Once it had developed a preliminary factual record, the informal review panel determined whether, based on this record, Ms. Smith's actions associated with her contentions demonstrated performance deficiencies.[422] Then the informal review panel preliminarily assigned each identified performance deficiency to the appropriate RF or RF(s) pursuant to NUREG-1021, ES-303.[423] These preliminary determinations were documented on large flip

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[417] *See* OLMC-500, 10 ("In all cases, each of the applicant's contentions will be addressed . . . .").

[418] Tr. at 552.

[419] *See* Exhibit CCS-037.

[420] Tr. at 542; Exhibits NRC-016, NRC-004, 5.

[421] Tr. at 541-43, 552; Exhibit NRC-004, 5-6.

[422] Exhibit NRC-004, 6.

[423] *Id*.

charts.[424]

240. Some determinations could not be made because the Region II binders did not sufficiently address all of Ms. Smith's issues.[425] Therefore, the informal review panel developed "very pointed" questions that it asked of the 2012 examiners during the second half of day two.[426] The informal review panel did not have to ask follow-up questions of Ms. Smith because it didn't think that it needed any clarifications from her with respect to her contentions.[427]

241. On the third and final day, the informal review panel updated its earlier preliminary findings and developed a likely response for each simulator scenario event whose grading Ms. Smith had contested and a likely assignment of RFs for each contested performance deficiency.[428]

242. On June 27, 2012, when the informal review panel meeting concluded, numerous issues remained unresolved.[429] The informal review panel still needed to re-grade the non-contested portions of the simulator test in order to determine Ms. Smith's final grade.[430] The informal review panel still needed to assess a document in the Region II binders entitled, "Cross Reference Table of Errors and Related Rating Factors" to determine whether this would affect their preliminary determinations.[431] The informal review panel still needed to answer the question raised during the meeting of whether the closing of a failed-open pressurizer power

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

[425] Tr. at 546-47.

[426] Tr. at 543-44, 546, 550; Exhibit NRC-004, 6.

[427] Tr. at 546-47.

[428] Exhibit NRC-004, 7.

[429] *Id*.

[430] Tr. at 553-54; Exhibit NRC-004, 7.

[431] Tr. at 582-84; Exhibit NRC-032, 7.

operated relief valve (PORV) was a critical task.[432] Finally, the informal review panel still needed to develop a written report.[433]

243. Mr. Muller was given the task of developing the panel's written report.[434] He did this based on the preliminary determinations made during the June 25-27, 2012 meeting and the continuous input of the other two panel members.[435]

244. While developing the written report, at periodic intervals, Mr. Muller would save different revisions of the report with different file names.[436] Therefore, there are multiple versions of this report on the record. However, other than the final version signed by Mr. Jackson, all of these other versions constituted part of the evolving and incomplete deliberative pre-decisional process of the panel working through the grading issues.[437]

245. On July 5, 2012, at about the time that Mr. Muller started writing the informal review panel's report, Mr. Bates emailed him.[438] This email included as an attachment a "more condensed version" of the information previously provided to the panel in the Region II binders responding to Ms. Smith's contentions.[439] This email also referred to previous correspondence in which Mr. Bates provided Mr. Muller with electronic copies of the documents that were in the Region II binders.[440]

246. In order to develop the informal review report, Mr. Muller first created an initial

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[432] Exhibit CCS-065, 18.

[433] Tr. at 553-54; Exhibit NRC-004, 7-8.

[434] Tr. at 554.

[435] Tr. at 554.

[436] Tr. at 554-55.

[437] Tr. at 553.

[438] Tr. at 573; Exhibit CCS-062.

[439] Exhibits CCS-062, CCS-101.

[440] Tr. at 573, 585; Exhibit CCS-062.

draft report based on the format of previous informal review reports.[441]

247. The earliest version of the informal review panel report on the record is exhibit NRC-018. It was a working outline that Mr. Muller used to provide the panel members with the opportunity to review and comment on the proposed disposition of each of the contested errors.[442]

248. Exhibit NRC-018 only addressed the contested errors and not the non-contested errors. It did not include a conclusion or a grade sheet in support of any such conclusion.[443]

249. The cover letter included with Exhibit NRC-018 and page one of this draft of the report stated that Ms. Smith "did not pass the [simulator] test."[444] This draft agreed with the Region II grading of all of the contested events except that it did not assess a performance deficiency to scenario 3, event 7 (SI/SLI block),[445] changed an RF 1.c. performance deficiency to RF 2.c. and RF 5.b. performance deficiencies in scenario 3, event 4 (PT-455 fails high),[446] added an RF 5.b. performance deficiency to scenario 6, event 4 (LT-459 fails low),[447] did not assess a performance deficiency to scenario 7, event 1 (Tave out of band),[448] did not assess a performance deficiency to scenario 7, event 6 (RWST leak),[449] and added an RF 1.c. performance deficiency to scenario 7, event 3 (TE-0130 fails low).[450]

250. The next revision of the report on the record is exhibit CCS-024.

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[441] Tr. at 554; Exhibits NRC-004, 8, NRC-018.

[442] Exhibit NRC-004, 8.

[443] Exhibit NRC-018.

[444] *Id*. at 1, 4.

[445] *Id*. at 10.

[446] *Id*. at 15.

[447] *Id*. at 19.

[448] *Id*. at 22.

[449] *Id*. at 25.

[450] *Id*. at 28.

251. Unlike exhibit NRC-018, the cover letter of exhibit CCS-024 stated that Ms. Smith "passed the operating test."[451] However, page one of this draft of the report still contained the same language as exhibit NRC-018 that "the applicant did not pass the operating test."[452]

252. The grading of the contested errors was unchanged between exhibits NRC-018 and CCS-024.

253. Exhibit CCS-024 added a review of non-contested errors because "[i]n order to complete the re-grading as requested by applicant, it was necessary for this review to examine all aspects of the applicant's original NRC simulator scenario grading, not just the grading contested by the applicant."[453] This involved re-grading five specific non-contested errors.[454] The informal review panel agreed with the original grading of each of these non-contested errors.[455]

254. Exhibit CCS-024 also included a discussion that all RFs which had been assessed two errors were given a point back for a final score of a "2" instead of a "1" because it was assumed that other activities were correctly performed related to these RFs even though no such other activities were documented by the Region II examiners.[456]

255. This discussion is referring to the NUREG-1021 grading criteria which states that, "[i]f an applicant makes two errors related to a rating factor, circle an 'RF Score' of '1' for that rating factor unless a score of '2' can be justified (and documented as discussed in Section D.3, below) based on correctly performing another activity (or activities) related to the same rating

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[451] Exhibit CCS-024, 1.

[452] *Id*. at 3.

[453] *Id*. at 35 (emphasis in original).

[454] *Id*.

[455] *Id*.

[456] *Id*. at 36.

factor."[457]

256. The NUREG-1021 grading criteria also specify that each identified performance deficiency may be assigned more than one RF.[458]

257. Mr. Jackson explained that there was a conflict between how the informal review panel interpreted these criteria and how Region II interpreted these criteria.[459] Region II would only assign each performance deficiency to just one RF, but would always consider the implications of these performance deficiencies on other RFs when determining whether two errors against a single RF should constitute a score of a "1" or a "2."[460] As a result, Region II did not document any instances where Ms. Smith's RFs with two performance deficiencies should have been increased from a "1" to a "2."[461] However, in its review, the informal review panel would assign a single performance deficiency to more than one RF if appropriate, but it would also always consider two errors against an RF to constitute a score of a "2" based on the assumption that another related activity was correctly performed, even though no such performance was recorded by Region II.[462] Therefore, both approaches are more strict in grading the applicant in one respect (*i.e*., the informal review panel assigning performance deficiencies to more than one RF and Region II, because of other exhibited performance deficiencies, not increasing an RF with two errors from a "1" to a "2") and more lenient in grading the applicant in another respect (*i.e*., the informal review panel increasing all RFs with two errors from a "1" to a "2" and Region II assigning each performance deficiency to only one RF).

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[457] NUREG-1021, ES-303, 5.

[458] *Id*. at 3.

[459] Tr. at 568.

[460] Exhibit CCS-101, 1-3.

[461] *Id*.

[462] Tr. at 568-69; *see also* Exhibit CCS-025.

258. Using this methodology and the re-grading of both the contested and the non-contested errors, the informal review panel developed a preliminary grade sheet[463] and stated that, according to this grade sheet, "the applicant passed the simulator operating test."[464]

259. Separately, on September 4, 2012, the independent qualified examiner, Frank Ehrhardt, completed his investigation of Ms. Smith's improper conduct claims.[465] He concluded that Ms. Smith's claims could not be substantiated.[466]

260. On October 3, 2012, after the development of exhibit CCS-024 on which Mr. Steely and Mr. Jackson provided editorial comments,[467] Mr. Jackson contacted Mr. Muller asking him whether the informal review report was complete.[468] Mr. Muller replied that, "[f]or the past several days, I have been reviewing [Region II's] 'Table of other errors' to see if additional rating factors could be affected."[469] By this, Mr. Muller was referring to a document in the Region II binders that was presented to the informal review panel in Atlanta entitled, "Cross Reference Table of Errors and Related Rating Factors."[470]

261. Later on October 3, 2012, Mr. Muller distributed to the informal review panel the latest draft of the report, exhibit CCS-066, which took into account the information from this table.[471]

262. Page one of exhibit CCS-066 was identical to page one of exhibit CCS-024 and

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[463] Exhibit CCS-024, 37.

[464] *Id*. at 36.

[465] *See* Exhibit NRC-014.

[466] *Id*. at 3.

[467] *See* Exhibits CCS-026, CCS-027, CCS-028.

[468] Exhibit CCS-020.

[469] *Id*.

[470] Tr. at 582-84; Exhibit NRC-032, 7.

[471] Exhibits CCS-029, CCS-031.

still included the statement that Ms. Smith "did not pass the operating test."[472]

263. The substantive differences between exhibits CCS-024 and CCS-066 regarding the contested errors were that, in exhibit CCS-066, after assessing the Table of Errors from the Region II binders,[473] the informal review panel assigned performance deficiencies identified during scenario 3, event 5 to RFs 1.d. and 5.c. instead of to RF 1.b., and added a performance deficiency of RF 1.c. to scenario 3, event 4.

264. The non-contested errors were treated identically in exhibits CCS-024 and CCS-066.[474]

265. The same discussion regarding the grading of "2" for all RFs with two assessed errors was included in both exhibits CCS-024 and CCS-066.[475]

266. Exhibit CCS-066 also answered the question left unresolved during the informal review panel's meeting in Atlanta as to whether the failed-open pressurizer PORV was a critical task.[476] It stated that, in accordance with NUREG-1021, Appendix D, item D.1.a., the failed-open pressurizer PORV of scenario 7, event 5 was a critical task because "[i]f left uncorrected, the applicant would have allowed a small break loss of coolant accident to continue (degraded fission product barrier), which would have required an automatic reactor trip and safety injection to mitigate."[477]

267. Despite these changes, exhibit CCS-066 still stated on its last page that, "it was determined that the applicant passed the simulator operating test" and still included a grade

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[472] Exhibit CCS-066, 1.

[473] Exhibits CCS-020, CCS-029, CCS-031.

[474] Exhibits CCS-024, 35, CCS-066, 33.

[475] Exhibits CCS-024, 36, CCS-066, 34.

[476] *See* Exhibit CCS-65, 18.

[477] Exhibit CCS-066, 34.

sheet reflecting this.[478]

268. Exhibit CCS-067 was the next revision of the informal review report.

269. Exhibit CCS-067 no longer contained the original statement from exhibit NRC-018 on its first page that "the applicant did not pass the operating test."[479]

270. Exhibit CCS-067 contained the same grading of the contested and non-contested errors as exhibit CCS-066 and it also contained the same language describing the failed-open pressurizer PORV as a critical task.

271. However, exhibit CCS-067 no longer contained the discussion regarding the grading of RFs with two assessed errors or a grade sheet.[480] It also did not contain a conclusion as to whether Ms. Smith had passed or failed, whereas, since exhibit CCS-024, the conclusion, "[a]s a result of this review, it was determined that the applicant passed the simulator operating test" was included.[481]

272. The purpose of these edits was to remove all determinations of whether Ms. Smith had passed or failed and the scoring calculations used to support these determinations. This made it so that the informal review panel did not have to discuss its grading policy of assuming that, whenever two errors existed in a single RF, the RF grade of a "1" would be increased to a "2." Instead, the report now focused only on Ms. Smith's performance deficiencies and their RF assignments.[482]

273. This purpose is revealed in an October 7, 2012 email from Mr. Jackson to Mr. McHale. Mr. Jackson attached exhibit CCS-067 to this email and stated that "I believe the

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[478] *Id*. at 35-36.

[479] Exhibit CCS-067, 1.

[480] Exhibit CCS-067.

[481] *See* Exhibits CCS-024, CCS-066.

[482] *See* Exhibit CCS-032.

attached document is ready for Region II comments."[483] Mr. Jackson then explained that the section on the grading of RFs with two assessed errors was removed because the informal review was "limited to addressing how each of the errors was dispositioned" and not a debate on the proper way to implement the NUREG-1021 policy of "a positive action erasing an error, and adjusting a rating factor grade from 1 to 2," on which the informal review panel and Region II differed.[484]

274. In the email, Mr. Jackson also stated, "[y]ou have my verbal recommendation on how the final grading should shake out, and this recommendation is aligned with the panel's recommendation."[485] His recollection of this statement was that he had thought that the latest draft of the informal review report, exhibit CCS-067, would result in Ms. Smith failing because of her Competency 3 score.[486]

275. Mr. Jackson testified that he did not think that the differing interpretations of the informal review panel and Region II regarding whether one performance deficiency should be assigned to more than one RF and how this relates to the evaluation of two errors in a single RF as either a score of a "1" or a score of a "2" resulted in an unfair review of Ms. Smith's simulator test.[487] He stated that the informal review panel was charged with re-grading Ms. Smith's simulator test according to its members' interpretation of NUREG-1021.[488] Therefore, the final grade of the informal review panel represented how its members, individuals from Headquarters, Region I, and Region IV, would have graded Ms. Smith's performance had they

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[483] Exhibit CCS-032.

[484] Tr. at 567-70; Exhibits CCS-032, CCS-101.

[485] Exhibit CCS-032.

[486] Tr. at 571-72.

[487] Tr. at 576.

[488] Tr. at 576-77.

actually been present during her simulator test.[489] The informal review panel did not grade Ms. Smith to a higher standard than her peers, just to the correct standard in the view of the informal review panel members.[490] Thus, Mr. Jackson concluded that, "[t]he final document that was signed by myself reflects the panel's not any harder, not any easier, but . . . most accurate grading" of Ms. Smith's simulator test.[491] Also, the different grading approaches by the informal review panel and by Region II are both more strict in one respect and more lenient in another respect, so that these different grading approaches may very well balance each other out and result in the same ultimate conclusion of passing or failing. This was the case with Ms. Smith where, despite their different approaches and different specific scorings, both the informal review panel and Region II determined that Ms. Smith had failed the simulator test.[492]

276. Mr. McHale transmitted exhibit CCS-067 to Region II for comment.

277. Exhibit NRC-019/CCS-102 was the next revision of the informal review report. The differences between this revision and exhibit CCS-067 are simply editorial.[493] Exhibit NRC-019/CCS-102 was prepared on October 10, 2012 and was also sent to Region II for comments on October 11, 2012.

278. On October 12, 2012, Region II developed its input on the informal review panel report entitled "Region II Recommendations/Comments on the 'Final' Independent Review Panel Document."[494] This document discussed how Region II would have graded each contested event and how this grading would have been reflected in a grade sheet .[495] It was

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[489] Tr. at 577.

[490] Tr. at 580.

[491] Tr. at 581.

[492] Tr. at 638.

[493] Exhibit NRC-019.

[494] Exhibit CCS-060.

[495] *Id*.

emailed to Mr. McHale on October 16, 2012 who then emailed it to Mr. Jackson.[496]

279. In his email transmitting the Region II comments, Mr. McHale summarized these comments. In doing so, he stated that, "[w]hat I think will be critical to the overall outcome is the RF assignment of the second error related to Scenario 7, Event 3, TE-0130 fails low (original comment 21/panel report p. 25/attached [Region II] feedback item G). With that shift, plus the PORV critical error, the failure would be sustained based on Control Board [Operations]."[497] This was a statement of fact and not a request that Mr. Jackson change the informal review report in this manner in order to fail Ms. Smith. This is supported by the later direction given to Mr. Jackson by Mr. McHale to "determine if anything provided changes any of your recommendations."[498] Therefore, Mr. McHale, as the representative of IOLB, was implementing the OLMC-500 guidance that the informal review panel consider input from the affected Region,[499] but he made sure to leave the decision of how to utilize that input up to the informal review panel.

280. After reviewing the Region II input consistent with OLMC-500,[500] exhibit CCS-069 was the next draft developed and it was in agreement with three of the Region II recommendations.[501] Specifically, in scenario 3, event 4 the performance deficiency assigned to RF 5.b. was changed to RF 5.d.; in scenario 7, event 3 the performance deficiency assigned to RF 1.c. was changed to RF 3.b (*i.e.*, the 1TIC-0130 "understanding" error was moved from the "Interpretation/Diagnosis" competency to the "Control Board Operations" competency); and

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[496] Exhibit CCS-059.

[497] *Id*.

[498] *Id*.

[499] OLMC-500, 6 ("During an appeal panel review, the panel will establish and maintain communications with the affected region and IOLB, in order to ensure that the review results include regional and IOLB input.").

[500] OLMC-500, 6.

[501] Exhibit CCS-069.

in scenario 6, event 4, two errors were assessed to RF 4.a. instead of one.[502]

281. Like exhibit CCS-067, exhibit CCS-069 retained the language describing the failed-open pressurizer PORV as a critical task and it did not include a discussion of two errors in a single RF, a conclusion, or a grade sheet.[503]

282. Exhibit CCS-037 is the final signed revision of the informal review panel report. The only changes made in this final revision from exhibit CCS-069 were that it included an "overall conclusion" at the end of the document stating that Ms. Smith did not pass the simulator test because her Competency 3 grade was less than 1.80 and it also included a partial grade sheet demonstrating that Ms. Smith's Competency 3 grade was 1.66.[504]

283. The final revision, as with the earlier revisions, agreed with Region II's grading of all of the non-contested errors with the exception of identifying the failed-open pressurizer PORV of scenario 7, event 5 to be a critical task.[505]

284. The disagreement over how to grade an RF with two errors did not have to be discussed because Ms. Smith's failure was based on a single critical error in RF 3.a. and a single error in RF 3.b. and RF 3.c.[506]

285. Mr. Jackson testified that he believed this to be "the most accurate grading of [Ms. Smith's] performance."[507]

286. Also, upon determining that the final decision of the informal review panel would be to sustain Ms. Smith's failure of the simulator test, Mr. Jackson looked at her performance

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[502] *Id*.

[503] *Id*.

[504] Exhibit CCS-037.

[505] Exhibit CCS-037, 35-36; Tr. at 561.

[506] Exhibit CCS-037, 36.

[507] Tr. at 552.

holistically to make sure that this not an inappropriate conclusion.[508] He concluded that, in his many years as a shift manager on a similar Westinghouse pressurized water reactor, as an experienced SRO, as a trainer, a director of training, and as an examiner, the panel's final recommendation to sustain Ms. Smith's failure was correct.[509]

287. Based on these facts, the Board should find that Ms. Smith has not proven by clear evidence that the Staff improperly discharged its duties with respect to the administrative review of her 2012 simulator test failure.

G. Statement of Position 4: The Staff's Downgrading of Ms. Smith for her Failure to Diligently Monitor Primary Plant Parameters and Initiate Rod Withdrawal was Not an Abuse of Discretion

288. At 07:24:28,[510] scenario 7, event 1 began with Ms. Smith being tasked, as Operator at the Controls (OATC), to raise reactor power.[511] This involved, in part, withdrawing control rods.[512] Ms. Smith was directed by the Control Room Supervisor (CRS) to withdraw rods in a manner that would maintain Average Temperature (Tave) within 2 ^{o}F of Reference Temperature (Tref).[513]

289. At 07:28:40, Ms. Smith withdrew rods 2.5 steps.[514]

290. At 07:36:50, Ms. Smith withdrew rods 3 steps.[515] Tave was 563.88 ^{o}F and Tref was 563.43 ^{o}F.[516]

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[508] Tr. at 581-82.

[509] Tr. at 581-82.

[510] Exhibit CCS-058, 14.

[511] *Id*. at 4, 145.

[512] *Id*. at 4.

[513] Exhibit NRC-002, 35.

[514] Exhibit CCS-058, 14.

[515] *Id*.

[516] *Id*.

291. At 07:39:48, Ms. Smith raised the turbine load.[517] Tave was 564.765 °F and Tref was 563.43 °F.[518]

292. At 07:45:16, the malfunction initiating event 2 was inserted.[519]

293. During the course of events 2 and 3, Tave trended steadily downward.[520]

294. Ms. Smith states that during event 3, she requested a rod withdrawal to raise Tave but was prevented from performing the rod withdrawal by the initiation of event 4, which occurred when the NSCW fan tripped at 08:11:20.[521] However, none of the contemporaneous, detailed notes of the three examiners observing the scenario reflect this assertion.[522]

295. Event 4 ran from 08:11:20 to 08:18:02 and did not involve any participation by Ms. Smith as OATC.[523] However, as indicated by examiner notes, Ms. Smith did not request a rod withdrawal until approximately 08:18.[524]

296. The performance of this rod withdrawal was interrupted by event 5.[525] Ms. Smith's operator actions with respect to event 5 were completed by about 08:19, but the procedural actions related to event 5 continued until about 08:31.[526]

297. During this period of time, Ms. Smith was not otherwise occupied and yet did not request a rod withdrawal.[527]

298. The examination team commented to one another that it had been a long time

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[517] *Id*.

[518] *Id*.

[519] *Id*. at 21.

[520] Exhibit NRC-002, 35.

[521] Exhibits CCS-076, 21, CCS-058, 44.

[522] *See* Exhibits CCS-058, CCS-047, NRC-022.

[523] *See* Exhibit NRC-002, 35-36; Exhibit CCS-058, 52.

[524] *See* Exhibit CCS-047, 76.

[525] *Id*.

[526] Exhibits CCS-058, 51, 57, NRC-002, 36.

[527] Exhibit NRC-002, 36.

since she had monitored the primary plant parameters.[528]

299. At approximately 08:32, Tave drifted out of band.[529]

300. Ms. Smith did not demonstrate that she had noticed that Tave had drifted out of band because she did not report this fact to the CRS.[530]

301. It wasn't until about five minutes later, at 08:37, that Ms. Smith requested a rod withdrawal to return Tave to within band.[531]

302. Before this rod withdrawal, Tave reached a maximum deviation of 2.3 ^{o}F from Tref.[532]

303. The examiner of record determined that Ms. Smith had had multiple opportunities to request a rod withdrawal to prevent Tave drifting out of band. Specifically, Ms. Smith could have requested a rod withdrawal starting at 08:11, but waited until 08:18 and could also have requested a rod withdrawal starting at 08:19 but waited until 08:37, at which point Tave had already drifted out of band.[533] The examiner of record also determined that Ms. Smith had failed to diligently monitor primary plant parameters throughout this 40 minute period.[534]

304. Therefore, using form ES-303-4, the examiner of record assigned Ms. Smith's error of not diligently monitoring Tave and, thus, allowing it to drift out of band, to RF 3.a., which asks "[d]id the applicant LOCATE AND MANIPULATE CONTROLS in an accurate and timely manner?"[535]

305. The examiners also assessed Operator V, the CRS for this scenario, an RF 3.a.

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[528] *Id*. at 36-37.

[529] *Id*. at 36.

[530] *Id*.

[531] Exhibit CCS-058, 60.

[532] Exhibit NRC-002, 35.

[533] *See id*. at 35-37.

[534] *Id*. at 38.

[535] *Id*. at 37; NUREG-1021, ES-303, 18.

error for the same reason.[536]

306. The informal review panel did not identify Ms. Smith's failure to diligently monitor Tave as a performance deficiency because it accepted as true her claim that she twice requested to withdraw control rods, as opposed to the examiner notes which identified only one such request, and thus was locating and manipulating controls in a timely manner.[537]

H. Statement of Position 5: The Staff's Downgrading of Ms. Smith for her Failure to Properly Block SI/SLI was Not an Abuse of Discretion

307. Scenario 3, event 7 is a response to a steam generator tube rupture.[538]

308. The outline for scenario 3, event 7 states that the Unit Operator (UO) is expected to block low pressurizer pressure Safety Injection/Steam Line Isolation (SI/SLI) when "pressure < 2000 psig (P-11)"[539] It also states that the crew should check "[pressurizer] pressure – LESS THAN 2000 PSIG."[540]

309. The "P-11" language in the outline refers to an interlock, which receives input from three pressurizer pressure instruments. When two of these three inputs are less than 2000 psig, the P-11 interlock actuates, allowing SI/SLI to be blocked.[541]

310. The status of P-11 is provided to the operators by a single interlock status light that is readily visible in the control room.[542] During plant operations at normal operating pressure (*i.e.*, greater than 2000 psig), the P-11 status light is not lit.[543] The P-11 status light will illuminate when conditions allow for blocking SI/SLI (*i.e.*, when two out of three pressurizer

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[536] Exhibit NRC-002, 36.

[537] Exhibit CCS-037, 22-23; Tr. at 543-44.

[538] Exhibit CCS-043, 5.

[539] Exhibit CCS-043, 5 (emphasis added).

[540] *Id*. at 63.

[541] *See* Tr. at 356-57; Exhibit NRC-002, 22.

[542] Exhibit NRC-002, 22.

[543] *Id*.

pressure instruments lower to less than 2000 psig).[544]

311. During scenario 3, event 7, Ms. Smith, as the CRS, was responsible for directing the response to the steam generator tube rupture in accordance with the appropriate procedure. This procedure stated that "WHEN [pressurizer] pressure is less than 2000 psig and the high steam pressure rate alarms are clear, THEN block low steamline pressure SI/SLI by performing Step 12.d."[545]

312. Ms. Smith attempted to comply with the requirement of ensuring that pressurizer pressure was less than 2000 psig before attempting to block SI/SLI by reading a single digital gauge for pressurizer pressure, which was fed from only one of the four pressurizer pressure instruments.[546]

313. Ms. Smith directed the block of SI/SLI based on this digital gauge reading less than 2000 psig and her belief that the analog gauges for all four instruments were "all on the same line" so that the digital gauge being less than 2000 psig was representative of all of the pressurizer pressure instruments being less than 2000 psig.[547]

314. Ms. Smith did not look at the P-11 status light before directing the SI/SLI block for the first time, despite understanding that the P-11 interlock dictates whether SI/SLI may be successfully blocked.[548]

315. The SI/SLI block was not successful.[549]

316. After this failed attempt, Ms. Smith looked at the P-11 status light and noticed that P-11 did not indicate that pressurizer pressure was less than 2000 psig (*i.e.*, it was not

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[544] *Id*. at 22-23.

[545] *See* Exhibit CCS-037, 11.

[546] Tr. at 358-60.

[547] Exhibit CCS-043, 80-81; Tr. at 358-59.

[548] Tr. at 357, 360.

[549] *Id*.

illuminated).[550]

317. After P-11 indicated that pressurizer pressure was less than 2000 psig, another block was attempted and this block was successful.[551]

318. Using form ES-303-4, the examiner of record assigned Ms. Smith's error of attempting to block SI/SLI without first observing the status of the P-11 interlock to determine whether pressurizer pressure was less than 2000 psig to RF 1.b., which asks "[d]id the applicant ensure the collection of CORRECT, ACCURATE, and COMPLETE information and reference material on which to base diagnoses?"[552]

319. The informal review panel did not identify as an error Ms. Smith's failure to determine the status of P-11 before directing the SI/SLI block because the procedure only stated that she should check if "[pressurizer] pressure is less than 2000 psig" and did not specifically detail that she should determine fact this by looking at the P-11 status light.[553]

I. Statement of Position 6: The Staff's Downgrading of Ms. Smith for her Failure to Locate the Sludge Mixing Isolation Valve Handswitches during the RWST Leak was Not an Abuse of Discretion

320. At 08:53:14, Ms. Smith, as OATC, reported the receipt of ALB06-E04, Refueling Water Storage Tank (RWST) low level alarm, to the crew.[554] RWST level was 93.8% and lowering.[555]

321. Mr. Waltower, as the Unit Operator (UO), stated that the sludge mixing isolation valves should have closed automatically on the low level alarm.[556]

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[550] Exhibit CCS-043, 81 (In response to post-scenario follow-up questioning, Ms. Smith stated that, "P-11 was not exactly in the same spot" as the digital pressure gauge.).

[551] *See* Exhibit CCS-037, 11.

[552] NUREG-1021, ES-303, 17.

[553] Exhibit CCS-037, 10-11.

[554] Exhibit CCS-047, 76.

[555] *Id*.

[556] Tr. at 362-63.

322. A field operator reported to the control room that the leak was downstream of the sludge mixing isolation valves and that the position of the sludge mixing valves could not be determined.[557]

323. Mr. Waltower's statement and this report should have indicated to the crew members that the sludge mixing isolation valves had failed to automatically close and needed to be manually closed in order to stop the leak.[558]

324. At this time the reactor was stable and Ms. Smith was not required to make any control manipulations as OATC.[559]

325. The examiner testimony and notes indicate that, even with all of this information, neither Ms. Smith nor the other members of her crew suggested that the valve positions should be manually verified by looking at the switches and indications in the control room.[560] This verification of the valve positions would have taken just a few seconds and it would have confirmed the crew's knowledge of the cause of the leak (*i.e.*, that the leak was progressing because the sludge mixing isolation valves did not automatically shut).[561]

326. The factual dispute between the Region II examiners and the crew members, as made clear during the evidentiary hearing,[562] is whether, during the 19 minute delay between when the alarm came in and when the valves were shut, the crew members actually knew the location of the switches and indications in the control room. The examiners inferred that the crew members did not know this since none of the crew members went to, or recommended going to, the location of the switches and indications to verify their belief that the RWST was

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[557] Tr. at 363; Exhibit NRC-002, 42.

[558] Exhibit NRC-002, 42.

[559] Tr. at 323.

[560] *Id.*; Exhibit NRC-002, 41-42.

[561] Exhibit NRC-059, 11.

[562] *Compare* Tr. at 322-347 *with* Exhibit NRC-002, 41-44; *see also* Tr. at 364.

leaking because the sludge mixing isolating valves had failed to automatically shut until the CRS pointed to this location on the piping and instrumentation diagram (P&ID).[563] The crew members maintain that they always knew the location of the switches and indications but did not go to this location until they had found the appropriate procedure that would allow them to operate the switches.[564]

327. At 09:12:25, the UO closed the sludge mixing isolation valves using the switches in the control room.[565]

328. The RWST level stabilized at 86.3%.[566]

329. Using form ES-303-4, the examiner of record assigned Ms. Smith's error of failing to speak up[567] regarding the location of the switches and indications, for which the examiner believed that the crew members were actively searching, to RF 3.a., which asks "[d]id the applicant LOCATE AND MANIPULATE CONTROLS in an accurate and timely manner?"[568]

330. This RF 3.a. error was also assigned to the other two members of the crew and to the members of other crews.[569] Specifically, six applicants received similar comments on this event, two of which were serving in the OATC position.[570] In fact, this performance deficiency was so pervasive that Mr. Meeks discussed it at the Region II informal exit meeting with the licensee facility.[571]

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[563] See Exhibits CCS-045, 20, NRC-002, 42.

[564] See*, e.g.*, Tr. at 328-29.

[565] Exhibit CCS-047, 77.

[566] *Id*.

[567] Mr. Tucker testified that he expected that an applicant, even while monitoring reactivity, would "speak up and offer comments and input." Tr. at 305.

[568] NUREG-1021, ES-303, 18.

[569] Exhibit CCS-076, 28.

[570] Exhibit NRC-002, 44.

[571] Exhibits NRC-002, 43, NRC-023.

331. The informal review panel agreed that Ms. Smith could have provided additional assistance in getting the RWST sludge mixing isolation valves closed, even while monitoring the plant, but that she was not required to provide this assistance.[572] Therefore, it concluded that Ms. Smith, as OATC, should not have been assigned an error for this failure to help.[573]

J. Statement of Position 7: The Staff's Downgrading of Ms. Smith for her Misdiagnosis that the Standby EHC Pump Auto-Start Feature was Malfunctioning was Not an Abuse of Discretion

332. At the outset of scenario 3, event 5, the main turbine generator electrohydraulic control fluid (EHC) Pump A was running with EHC Pump B in standby, meaning that Pump B was aligned to automatically start to raise EHC system pressure if EHC system pressure lowered to 1400 psig for any reason.[574] If EHC system pressure lowered to 1100 psig for any reason, the turbine generator would trip (*i.e.*, stop running).[575] With EHC Pump A running, EHC system pressure was being maintained well above these setpoints at its expected operating pressure, which is 1600 psig.[576]

333. At 11:30:49, EHC Pump A tripped (*i.e.*, stopped running)[577] and, as a result, EHC system pressure began slowly decreasing from its expected operating pressure of 1600 psig.[578]

334. Ms. Smith was informed of the EHC Pump A trip by the Unit Operator.[579]

335. At 11:32:20, Ms. Smith directed the Unit Operator to manually start the standby EHC Pump, EHC Pump B, in order to restore EHC system pressure.[580]

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[572] Exhibit CCS-037, 26-27.

[573] *Id*. at 27.

[574] Exhibits CCS-048, 1, CCS-043, 31.

[575] Exhibit CCS-043, 31.

[576] *Id*. at 32.

[577] *Id*. at 78.

[578] *Id*. at 27.

[579] *Id*. at 78.

[580] *Id*. at 32, 78.

336. The Unit Operator manually started EHC Pump B and EHC system pressure returned to 1600 psig.[581]

337. Thus, EHC Pump B was manually started approximately two minutes after EHC Pump A tripped.

338. Test runs of this particular event in this particular simulator, before the event was administered to the Vogtle 2012 applicants, demonstrated that once the running EHC pump was tripped, it would take "several minutes" for EHC system pressure to decrease 100 psig from 1600 psig to 1500 psig at which point the hydraulic fluid low pressure alarm would actuate.[582]

339. It would then take an additional "several minutes" for the EHC system pressure to further decrease by another 100 psig from 1500 psig to 1400 psig at which point the standby EHC pump is designed to automatically start.[583]

340. Thus, it would have taken several minutes followed by an additional several minutes from the time that EHC Pump A tripped to the time that EHC system pressure would have decreased to 1400 psig and EHC Pump B would have been expected to automatically start.

341. Since EHC Pump B was started one minute and 31 seconds after EHC Pump A tripped and since EHC system pressure could not have decreased to the automatic start setpoint of 1400 psig during this time period, Ms. Smith could not have had any indications that the auto-start feature of the standby pump was malfunctioning.[584]

342. Despite this fact that there was no evidence that the auto-start feature of EHC Pump B was malfunctioning, Ms. Smith directed clearance and tagging to investigate the auto-

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[581] *Id*.

[582] Exhibits NRC-002, 20-21, CCS-043, 27.

[583] Exhibits NRC-002, 20-21, CCS-043, 78.

[584] Exhibit NRC-059, 3.

start feature EHC Pump B.[585]

343. In post-scenario follow-up questioning, Ms. Smith was asked whether EHC Pump B had automatically started, to which she correctly responded that it had not.[586] Ms. Smith was also asked whether EHC Pump B should have automatically started, to which she responded that it should have.[587]

344. Ms. Smith's actions in directing clearance and tagging to investigate the auto-start feature of EHC Pump B and her statement that EHC Pump B should have automatically started, demonstrated that Ms. Smith had diagnosed a failure of the EHC Pump B auto-start feature.

345. The examiner of record evaluated this as a diagnosis error because Ms. Smith had jumped to the conclusion that the EHC Pump B auto-start feature had failed without ensuring the collection of correct, accurate, and complete information on which to base this diagnosis.[588] Ms. Smith should have verified the extent to which EHC system pressure had decreased before concluding that the auto-start feature of the standby EHC pump was malfunctioning.[589] Ms. Smith could have easily done this by asking the UO to report EHC system pressure or by simply walking to the control board and reading the appropriate gauge herself.[590]

346. Furthermore, since the time required for EHC system pressure to decrease to the auto-start setpoint of 1400 psig was greater than the time during which Ms. Smith manually started EHC Pump B, Ms. Smith would not have been able to collect any information to support

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[585] Exhibit CCS-043, 82.

[586] *Id*.

[587] *Id*.

[588] *See* NUREG-1021, ES-303, 17.

[589] Exhibit NRC-059, 3.

[590] *Id*.

the diagnosis that the auto-start feature of EHC Pump B was malfunctioning, had she looked for such information.[591]

347. For failing to ascertain EHC system pressure before concluding that the auto-start feature of EHC Pump B was malfunctioning, Ms. Smith was assessed an RF 1.b. error.

348. The informal review panel also assessed as a performance deficiency the fact that Ms. Smith incorrectly believed that the standby EHC pump should have automatically started.[592] The informal review panel assigned this error to RF 1.d., which asks "[d]id the applicant correctly INTERPRET/DIAGNOSE plant conditions based on control room indications?"[593] The informal review panel also identified as a performance deficiency the fact that Ms. Smith did not solicit any information from her crew on her incorrect determination that the standby EHC pump should have automatically started.[594] This performance deficiency was assigned to RF 5.c, which asks, "[d]id the applicant SOLICIT and INCORPORATE FEEDBACK from the crew to foster an effective, team-oriented approach to problem solving and decision making?"[595]

K. Statement of Position 8: The Staff's Downgrading of Ms. Smith for her Misdiagnosis that Control Rods Should be Automatically Inserting was Not an Abuse of Discretion

349. In scenario 6, event 6, the turbine vibrations experienced at the turbine operated main feed pump B (MFPT B) increased to greater than 6 mils which forced the crew to rapidly reduce power and then trip (*i.e.*, stop) MFPT B.[596]

350. During the rapid power reduction, Ms. Smith, as the shift supervisor (SS), was

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[591] *Id*. at 4-5.

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

[593] NUREG-1021, ES-303, 17.

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

[595] NUREG-1021, ES-303, 19.

[596] Exhibit CCS-054, 2, 35-36.

expected to direct the use of automatic rod control and then maintain oversight and verify that automatic rod control was responding as expected.[597]

351. The expected response of automatic rod control is that the rods will automatically insert when Tave is 1.5 °F greater than Tref.[598]

352. Therefore, Ms. Smith, in her supervisory role, and the OATC both monitored Tave and Tref to continually evaluate the correct response of the rod control system during the rapid power reduction.[599]

353. With Tave 2 °F lower than Tref, both Ms. Smith and the OATC thought that control rods should be automatically inserting, because they both accidently inverted the Tave and Tref points (*i.e.*, they thought that Tave was approximately 2 °F higher than Tref).[600]

354. Based on this belief, Ms. Smith incorrectly directed the OATC to take manual control of the control rods and insert them 5 steps.[601]

355. The OATC took manual control of the control rods and inserted them 5 steps.[602]

356. Following this manual insertion, the control rods still did not begin to automatically insert. Therefore, the OATC took manual control of the control rods once more and began to insert them 5 more steps.[603]

357. During this second insertion, Ms. Smith stated “no - Tave was already cold.”[604] Shortly thereafter, ALB12-A5, TAVE/TREF DEVIATION, alarmed.[605]

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[597] Exhibits CCS-054, 36, CCS-045, 16.

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

[599] *Id*.

[600] Exhibits CCS-076, 33-34, CCS-045, 16.

[601] Exhibits CCS-045, 16, CCS-054, 84.

[602] Exhibit NRC-002, 33.

[603] *Id*.

[604] *Id*.; Exhibits CCS-045, 16, CCS-054, 85.

[605] Exhibits CCS-045, 16, CCS-054, 85.

358. Using form ES-303-4, the examiner of record assigned Ms. Smith's error of directing that control rods be taken to manual and inserted while Tave was lower than Tref to RF 1.d., which asks "[d]id the applicant correctly INTERPRET/DIAGNOSE plant conditions based on control room indications?"[606] Ms. Smith did not correctly interpret/diagnose plant conditions (*i.e.*, that control rods should not be automatically inserting) based on control room indications (*i.e.*, control room indications of Tave and Tref) because she improperly calculated the deviation between these two values.[607]

359. The informal review panel also identified this as a performance deficiency and also assigned it to RF 1.d. for the same reasons as the Region II examiners.[608]

L. Statement of Position 9: The Staff's Downgrading of Ms. Smith for her Improper Manual Control of the Normally Automatic Functions of 1TIC-0130 was Not an Abuse of Discretion

360. In scenario 7, event 3, the Letdown Heat Exchanger temperature instrument, TE-0130, failed low.[609] For a temperature instrument to "fail low" is a technical term meaning that the temperature instrument has stopped working and is instead outputting a signal of the lowest possible temperature reading.

361. TE-0130 provides its temperature output to a controller, 1TIC-0130, which automatically maintains Letdown Heat Exchanger temperature by throttling a temperature control valve, TV-0130, as necessary based on this input.

362. Because TE-0130 failed low, the input received by 1TIC-0130 was that system temperature was low, and, therefore, 1TIC-0130 signaled TV-0130 to begin to throttle closed in order to raise system temperature.

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[606] *See* NUREG-1021, ES-303, 17.

[607] Exhibits CCS-045, 16, NRC-002, 32-35.

[608] Exhibit CCS-037, 37.

[609] Exhibit CCS-047, 2.

363. However, since system temperature wasn't actually low, this throttling closed of TV-0130 caused a high temperature alarm to come in at 07:54:52.[610]

364. As OATC, Ms. Smith acknowledged the alarm, but did not take any actions to take manual control of 1TIC-0130 in order to decrease Letdown Heat Exchanger temperature and return it to within the system's normal operating temperature band.[611] Ms. Smith also did not recommend to the CRS that she could manually control letdown temperature.[612]

365. At 08:01:54, approximately seven minutes after the alarm annunciated, Ms. Smith made the statement, "[t]he only thing we can do is contact [clearance and tagging] to get [the temperature element] fixed."[613]

366. At 08:02:45, approximately one minute later, the CRS directed Ms. Smith to take manual control of 1TIC-0130 in order to decrease the outlet temperature and return it to within the normal operating band.[614]

367. When Ms. Smith began manipulating 1TIC-0130 in response to this direction, she initially attempted to decrease outlet temperature by pressing the up arrow.[615] She apparently thought that this would throttle open TV-0130 and thus lower temperature.[616]

368. However, the CRS immediately informed her that the arrows represent temperature, thus the up arrow increases temperature, it doesn't throttle open TV-0130 to lower temperature.[617]

369. Following the CRS's guidance, Ms. Smith eventually established manual control

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[610] *Id*. at 75.

[611] Exhibits CCS-045, 21, NRC-002, 45.

[612] *Id*.

[613] Exhibits CCS-047, 75, NRC-002, 45.

[614] *Id*.

[615] *Id*.

[616] *Id*.

[617] *Id*.

of letdown temperature within band.[618]

370. After the scenario, Ms. Smith was asked to explain her response to the malfunction. She stated that she initially pressed the up pushbutton, and then corrected her actions and pushed the down pushbutton.[619]

371. Using form ES-303-4, the examiner of record assigned Ms. Smith's error of incorrectly controlling 1TIC-0130 in manual by pressing the up pushbutton instead of the down pushbutton to RF 3.c., which asks, "[d]id the applicant demonstrate the ability to take MANUAL CONTROL of automatic functions?"[620]

372. The informal review panel agreed that Ms. Smith's pressing of the up pushbutton instead of pressing the down pushbutton constituted an RF 3.c. error.[621]

373. The informal review panel also assessed as a separate RF 3.b. error Ms. Smith's failure as the OATC to take manual control of 1TIC-0130.[622] The informal review panel concluded that the fact that Ms. Smith had failed to take manual control until she was directed to do so by the CRS ten minutes after TE-0130 had failed low and the fact that Ms. Smith's only input on the situation was the misleading statement that, "the only thing we can do is contact [clearance and tagging] to get [the temperature element] fixed" demonstrated that Ms. Smith did not understand the 1TIC-0130 system operation.[623]

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[618] *Id*.

[619] Exhibits CCS-047, 79, NRC-002, 45.

[620] Exhibit CCS-045, 21; NUREG-1021, ES-303, 18.

[621] Exhibit CCS-037, 29.

[622] *Id*.

[623] *Id*. at 30-31.

M. Statement of Position 10: The Staff's Downgrading of Ms. Smith for her Failure to Understand the Saturation of FIC-0121 was Not an Abuse of Discretion

374. In scenario 6, event 4, the pressurizer level instrument, LT-459, failed low over 10 minutes.[624] This means that the level instrument stopped working and, instead, output a continually decreasing pressurizer level signal.

375. Pressurizer Master Level Controller, LIC-459, is a controller that controls pressurizer level by calculating the program level at which pressurizer level should be maintained due to current plant conditions, comparing this level to the level reading of a pressurizer level instrument, and then sending a signal to FIC-0121 to increase charging flow if the actual pressurizer level input is lower than the calculated program level or decrease charging flow if the actual pressurizer level input is greater than the calculated program level.

376. Various pressurizer level instruments are available to provide input to the LIC-459 controller, however, the output of only one pressurizer level instrument is aligned to LIC-459 at any one time.

377. At the outset of scenario 6, event 4, the output of LT-459 was aligned to LIC-459.[625]

378. As the output of LT-459 lowered below the program level calculated by the LIC-459 controller, it direct the FIC-0121 controller to increase charging flow in an attempt to return pressurizer level to its program level.[626] However, since LT-459 was outputting an erroneously low signal, FIC-0121 was actually raising pressurizer level higher than program level.

379. At 08:32:14, the pressurizer low level deviation alarm came in[627] alerting the crew that there was a deviation between the output of the aligned pressurizer level instrument and

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[624] Exhibit CCS-054, 2.

[625] *Id*.

[626] *Id*. at 2, 18.

[627] *Id*. at 83.

the program level.

380. At 08:34:33, the OATC informed Ms. Smith, who was the CRS, that LT-459 had failed low.[628]

381. At 08:35:57, Ms. Smith directed that the OATC take FIC-0121 to manual and manually control the rate of charging flow and, thus, pressurizer level.[629]

382. Ms. Smith directed that the OATC select an unaffected pressurizer level instrument as the input to LIC-459 instead of LT-459.[630]

383. Before taking manual control of FIC-0121, pressurizer level had actually been above program level for several minutes.[631] Once an unaffected pressurizer level instrument was selected, LIC-459 recognized this deviation and thus signaled FIC-0121 to demand less charging flow.[632] The controller was effectively saturated by this demand for less charging flow and would only become unsaturated once pressurizer level was maintained at program level for a sufficient amount of time.[633]

384. At 08:54:21, Ms. Smith directed the OATC to place FIC-0121 in automatic.[634]

385. As a result of taking the controller to automatic while still saturated, charging flow rapidly lowered.[635]

386. In response, the OATC took FIC-0121 back to manual.[636]

387. The UO informed Ms. Smith that he believed that FIC-0121 had failed.[637]

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[628] *Id*.

[629] *Id*. at 19, 83.

[630] *Id*. at 19, 84.

[631] Exhibit CCS-045, 14.

[632] *Id*.

[633] *Id*.

[634] Exhibit CCS-054, 84.

[635] Exhibit CCS-045, 14.

[636] *Id*.

388. After the scenario, the examiner of record asked Ms. Smith if there was a problem with FIC-0121.[638] Ms. Smith stated that the charging control valve was closing and that it should not have been closing because pressurizer level was on program.[639]

389. The examiner of record identified this as a performance deficiency because Ms. Smith's action directing that FIC-0121 be returned to automatic and her answer to follow-up questioning that charging should not have decreased because pressurizer level was at program level demonstrated that she did not understand that FIC-0121 could become saturated as a result of pressurizer level being above program level for an extended amount of time.[640]

390. This lack of understanding of saturation was assigned to RF 1.c., which asks "Did the applicant's directives and actions demonstrate an UNDERSTANDING of how the PLANT, SYSTEMS, and COMPONENTS OPERATE AND INTERACT (including set points, interlocks, and automatic actions)?"[641]

391. The informal review panel also identified this as a performance deficiency and also assigned it to RF 1.c. for the same reasons as the examiner of record.[642]

N. Statement of Position 11: The Staff's Downgrading of Ms. Smith for her Failure to take Pressurizer Heaters to Automatic was Not an Abuse of Discretion

392. In scenario 3, event 4, the controlling pressurizer pressure instrument, PT-455, failed high.[643] This means that the pressure instrument stopped working and instead outputted a signal of the highest possible pressure reading.

(footnote continued . . .)

[637] *Id*.

[638] *Id*.; Exhibit CCS-054, 87.

[639] *Id*.

[640] Exhibit CCS-045, 14.

[641] *Id*.; *see* NUREG-1021, ES-303, 17.

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

[643] Exhibit CCS-048, 4.

393. This pressure reading caused power operated relief valve (PORV) 455A to open and both pressurizer sprays to fully open, which, in turn, caused pressurizer pressure to rapidly lower.[644]

394. In response to this occurrence, the crew entered the procedure 18001-C.[645]

395. The OATC correctly performed the immediate operator actions of this procedure, which include closing pressurizer spray valves, closing the affected PORV, and operating heaters as necessary to restore pressure.[646]

396. Subsequently, at 11:07:00, Ms. Smith, as CRS, directed the OATC to select an unaffected pressurizer pressure instrument in accordance with 18001-C, Step C7.[647]

397. This removed the failed pressurizer pressure instrument, PT-455, from the control circuit and, as a result, the pressurizer pressure system was again functioning normally.[648]

398. Since the pressurizer pressure system had been returned to normal, Step C8.b directed that the crew return the pressurizer heater to automatic.[649]

399. However, at 11:08:29, instead of following this step, Ms. Smith stated that the crew would wait to place heaters in automatic.[650] She also stated that, "I do not think heaters are operating properly" and that "[t]aking heaters back to auto may not be what we want."[651]

400. A couple of minutes later at 11:10:22, she directed the OATC to "[g]o ahead and

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[644] Exhibit CCS-043, 4.

[645] *Id*.

[646] *Id*.

[647] *Id*. at 23.

[648] Exhibit NRC-002, 26-27.

[649] Exhibit CCS-043, 23.

[650] *Id*. at 23, 78.

[651] Exhibit CCS-043, 78.

take pressurizer heaters to on," to which the OATC replied, "I am maintaining pressure."[652] After this communication, the OATC did not take any action to change the configuration of the pressurizer heaters (*i.e.*, he continued to control them in manual).[653]

401. Shortly thereafter, Ms. Smith stated to the OATC that "[n]ow we can take heaters to auto."[654] The OATC did not verbally respond to this direction; instead, without further communication, he placed the "A" backup heaters to ON (*i.e.*, he continued to control the heaters in manual and did not take them to automatic).[655]

402. Despite having directed the OATC to take automatic control of heaters, Ms. Smith permitted the OATC to manually control pressurizer heaters for the remainder of the scenario.[656]

403. After the scenario, Ms. Smith was asked to explain why she allowed pressurizer heaters to be maintained in manual control.[657] Ms. Smith stated that she was uncomfortable taking pressurizer heaters to automatic because pressure was high within its procedurally directed control band and she wanted to wait for pressure to get lower before taking the heaters to automatic.[658]

404. The examiner of record identified Ms. Smith's action of keeping pressurizer heaters in manual and her response explaining that this was to prevent an increase in pressure as a performance deficiency because this action and response demonstrated that Ms. Smith did

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[652] *Id*. at 78.

[653] *Id*.

[654] *Id*.

[655] *Id*.

[656] Exhibit CCS-045, 12.

[657] Exhibit CCS-043, 82.

[658] *Id*.

not understand how the plant systems and components operate and interact.[659]

405. For instance, taking heaters to automatic would have energized the heaters, but this would not have caused pressurizer pressure to exceed the upper end of the procedurally directed control band of 2250 psig. Pressurizer pressure was 2248 psig and lowering when Ms. Smith reached step C8.[660] Pressurizer sprays will always dominate the pressure control balance when competing with pressurizer heaters.[661] Therefore, taking heaters to automatic at this time would have had no impact on pressure control because the OATC had the ability to control pressure with spray in MANUAL. Similarly, with spray control in AUTO, pressurizer pressure would again be maintained within band even if pressurizer heaters were taken to AUTO at 2248 psig.

406. Furthermore, the control systems for pressurizer heaters are actually designed so that the heaters energize when a sufficiently high pressurizer level deviation, including the 5% above program level identified in this instance, exists in order to ensure that water in-surge into the pressurizer will be returned to saturation conditions.[662]

407. Therefore, Ms. Smith was mistaken in thinking that heaters should not be taken to automatic in order to prevent them from energizing and prevent pressure from exceeding the control band. Her examiner of record assigned this performance deficiency to RF 1.c., which asks, "[d]id the applicant's directives and actions demonstrate an UNDERSTANDING of how the PLANT, SYSTEMS, and COMPONENTS OPERATE AND INTERACT (including set points, interlocks, and automatic actions)?"[663]

408. The informal review panel also identified this as a performance deficiency and

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[659] Exhibit CCS-045, 12.

[660] Exhibit NRC-044, 12.

[661] Exhibit NRC-002, 29.

[662] *Id*.

[663] Exhibit CCS-045, 12; *see* NUREG-1021, ES-303, 17.

also assigned it to RF 1.c. for the same reasons as the examiner of record.[664]

O. Statement of Position 12: The Staff's Downgrading of Ms. Smith for her Failure to Properly Manipulate the Pressurizer PORV Handswitch was Not an Abuse of Discretion

409. In scenario 7, event 5, the controlling pressurizer pressure instrument, PT-456, failed high.[665] This means that the pressure instrument stopped working and instead outputted a signal of the highest possible pressure reading.

410. This pressure reading caused PORV 456 to open and both pressurizer sprays to fully open, which, in turn, caused pressurizer pressure to rapidly lower.[666]

411. In response to this occurrence, the crew entered the procedure 18001-C.[667]

412. Ms. Smith, as OATC, was responsible for performing the immediate operator actions of this procedure, which include closing pressurizer spray valves, closing the affected PORV, and operating heaters as necessary to restore pressure.[668]

413. Immediate operator actions such as these are required to be completed without requesting permission of, or requiring assistance from, other crewmembers.[669]

414. Ms. Smith immediately and correctly closed the pressurizer spray valves.[670]

415. She then attempted to close the affected PORV, but she manipulated the PORV switch in the open direction instead of the closed direction and thus the PORV remained open.[671]

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

[665] Exhibit CCS-058, 2.

[666] *Id*. at 51

[667] *Id*.

[668] *Id*.

[669] Exhibit NRC-002, 39.

[670] *Id*.

[671] *Id*.; Tr. at 235, 238, 240-42.

416. She then took the pressurizer heaters to the ON position.[672]

417. Ms. Smith did not recognize that she had manipulated the PORV switch in the wrong direction or that pressurizer pressure continued to lower.[673]

418. Approximately 30 seconds later, the CRS loudly told Ms. Smith to "shut that valve!"[674]

419. After this direction from the CRS, Ms. Smith noticed for the first time that the block valve upstream of the PORV had not automatically closed at 2185 psig.[675]

420. In response to the CRS's direction, Ms. Smith finally closed the PORV to halt the pressure decrease.[676]

421. The examiners identified as a performance deficiency the fact that Ms. Smith had intended to close the PORV but took the PORV handswitch to open instead of close and assigned it to RF 3.a., which asks, "did the applicant LOCATE AND MANIPULATE CONTROLS in an accurate and timely manner?"[677]

422. The informal review panel also identified this as a performance deficiency and also assigned it to RF 3.a. for the same reasons as the examiner of record.[678]

423. Though this required operator action was not labeled as a critical task on the associated Forms ES-D-1 and ES-D-2, the informal review panel, in accordance with the criteria of NUREG-1021, Appendix D, determined that it was, in fact, a critical task and graded it as

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[672] Tr. at 239.

[673] Tr. at 240.

[674] Exhibits CCS-058, 52, NRC-002, 39.

[675] Tr. at 243, 48; Exhibit CCS-058, 52.

[676] Exhibit NRC-002, 39.

[677] Exhibit CCS-045, 19; NUREG-1021, ES-303, 18.

[678] Exhibit CCS-037, 37.

such.[679]

P. Non-Contested Performance Deficiencies

424. In addition to the performance deficiencies contested in Ms. Smith's statements of position 4 through 12, Ms. Smith was assessed numerous other performance deficiencies by both her examiner of record and the informal review panel. She was assessed one RF 4.a. error,[680] two RF 4.b. errors,[681] one RF 4.c. error,[682] and three RF 6.a. errors.[683] Ms. Smith has not provided any evidence as to why these specific performance deficiencies were assessed in error.

Q. The Region II and Informal Review Panel Simulator Grade Sheets both Indicate that Ms. Smith Failed the Simulator Test

425. The examiner of record and the informal review panel each used NUREG-1021 Form ES-303-4 in order to assign each of the identified performance deficiencies to the appropriate RF or RFs.

426. Although NUREG-1021 explicitly allows for a performance deficiency to be assigned to more than one RF,[684] the examiner of record only assigned each performance deficiency to the single RF most closely reflecting the underlying deficiency.[685]

427. As a result, the examiner of record assigned Ms. Smith's performance deficiencies to the following RFs: 1.b, 1.b, 1.c, 1.c, 1.d, 3.a, 3.a, 3.a, 3.c, 4.a, 4.a, 4.a, 4.b, 4.b, 4.c, 6.a, 6.a, 6.a.

428. Even though the examiner of record did not assign an individual performance

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

[680] Exhibits CCS-045, 25, CCS-037, 36.

[681] Exhibits CCS-045, 26-27, CCS-037, 33-34.

[682] Exhibits CCS-045, 28, CCS-037, 35.

[683] Exhibits CCS-045, 29-32, CCS-037, 37.

[684] NUREG-1021, ES-303, 3.

[685] *See* Exhibit CCS-101, 1.

deficiency to more than one RF, he noted the implications of each performance deficiency for all of the RFs and took this into account when determining whether two performance deficiencies in an RF should result in a score of a "1" or be increased to a score of a "2" as is permitted by NUREG-1021 if written justification is provided by the examiner of record.[686] Because Ms. Smith's performance deficiencies implicated additional weaknesses with respect to each of the RFs with two performance deficiencies, the examiner of record could not justify increasing the score for these RFs from a "1" to a "2." Therefore, each of Ms. Smith's RFs with two performance deficiencies was given a score of a "1." As a result, her grade sheet was developed as follows.

429. Since a single performance deficiency was assigned to RFs 1.d, 3.c, and 4.c, these RFs were given a score of 2.[687] Since two performance deficiencies were assigned to RFs 1.b, 1.c., and 4.b., but other performance deficiencies implicated additional weaknesses with respect to these RFs, these RFs were given a score of 1 and not increased to a score of 2.[688] Since three performance deficiencies were assigned to RFs 3.a., 4.a., and 6.a., these RFs were given a score of 1.[689]

430. Taken together, Ms. Smith's final grade sheet from the Region II examiner of record was as follows:

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[686] NUREG-1021, ES-303, 5; Exhibit CCS-101, 1-3.

[687] NUREG-1021, ES-303, 5.

[688] *Id*.

[689] *Id*.

Competency/ Rating Factors	RF Weights	RF Scores	RF Grades	Comp. Grades
1. Interpretation/Diagnosis				
a. Recognize & Attend	0.20	3	0.60	
b. Ensure Accuracy	0.20	1	0.20	1.70
c. Understanding	0.30	1	0.30	
d. Diagnose	0.30	2	0.60	
2. Procedures				
a. Reference	0.30	3	0.90	
b. EOP Entry	0.30	3	0.90	3.00
c. Correct Use	0.40	3	1.20	
3. Control Board Operations				
a. Locate & Manipulate	0.34	1	0.34	
b. Understanding	0.33	3	0.99	1.99
c. Manual Control	0.33	2	0.66	
4. Communications				
a. Clarity	0.40	1	0.40	
b. Crew & Others Informed	0.40	1	0.40	1.20
c. Receive Information	0.20	2	0.40	
5. Directing Operations				
a. Timely & Decisive Action	0.30	3	0.90	
b. Oversight	0.30	3	0.90	3.00
c. Solicit Crew Feedback	0.20	3	0.60	
d. Monitor Crew Activities	0.20	3	0.60	
6. Technical Specifications				
a. Recognize and Locate	0.40	1	0.40	

b. Compliance	0.60	3	1.80	2.20

431. Since all six of her competency grades were not greater than 1.80, Ms. Smith failed the simulator test.[690] Furthermore, since the grade for Competency 4, "Communications and Crew Interactions," was less than or equal to 1.80 but greater than 1.00 then all of the other five competency grades would have to have been greater than or equal to 2.00 for Ms. Smith to have passed.[691]

432. Instead of assigning each performance deficiency to only one RF, the informal review panel assigned each performance deficiency to more than one RF when doing so was appropriate, as is permitted by NUREG-1021.[692]

433. The differences between the RFs assessed by the Region II examiner of record and the RFs assessed by the informal review panel were that (1) in addition to assessing an RF 1.c. error related to scenario 3, event 4, the informal review panel also assessed an RF 2.c. error and an RF 5.d. error, (2) the informal review panel assessed an RF 1.d. error instead of an RF 1.b. error related to scenario 3, event 5, (3) the informal review panel assessed an additional RF 5.c. error related to scenario 3, event 5, (4) the informal review panel did not assess an RF 1.b. error related to scenario 3, event 7, (5) the informal review panel assessed an additional RF 5.b. error related to scenario 6, event 4, (6) the informal review panel did not assess an RF 3.a. error related to scenario 7, event 1, (7) the informal review panel assessed an additional RF 3.b. error related to scenario 7, event 3, (8) the informal review panel did not assess an RF 3.a. error related to scenario 7, event 6, and (9) the informal review panel determined that the RF 3.a. error related to scenario 7, event 5 was a critical task.

434. In total, the RFs assessed by the informal review panel were 1.c., 1.c., 1.d., 1.d.,

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[690] *Id*. at 6.

[691] *Id*.

[692] *Id*. at 3.

2.c., 3.a. (critical), 3.b., 3.c., 4.a., 4.a., 4.a., 4.b., 4.b., 4.c., 5.b., 5.c., 5.d., 6.a., 6.a., 6.a.

435. However, the informal review panel assumed that for each RF with two performance deficiencies, Ms. Smith had correctly performed another activity related to that same RF, even though no such activity had been documented by the examiner of record,[693] and even though the examiner of record purposefully did not increase Ms. Smith's score in these RFs from a 1 to a 2 because he thought that she had exhibited other weaknesses in these RFs.[694] As a result, the informal review panel scored all RFs with two performance deficiencies as a "2" instead of as a "1." Therefore, the informal review panel developed Ms. Smith's grade sheet as follows.

436. Since a single error was made related to RFs 2.c., 3.b., 3.c., 4.c., 5.b., 5.c., 5.d. these RFs were given a score of 2.[695] Since a single critical task error was made related to RF 3.a., this RF was given a score of 1.[696] Since two performance deficiencies were assigned to RFs 1.c., 1.d., and 4.b., and since the informal review panel assumed that Ms. Smith had correctly performed another activity related to these same RFs, the score of 1 for these RFs was increased to a score of 2.[697] Since three errors were made related to RFs 4.a., and 6.a., these RFs were given a score of 1.[698]

437. Taken together, Ms. Smith's final grade sheet from the informal review panel was as follows:

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[693] *See id*. at 5.

[694] Exhibit CCS-101, 1-3.

[695] NUREG-1021, ES-303, 5.

[696] *Id*.

[697] *Id*.

[698] *Id*.

Competency/ Rating Factors	RF Weights	RF Scores	RF Grades	Comp. Grades
1. Interpretation/Diagnosis				
a. Recognize & Attend	0.20	3	0.60	
b. Ensure Accuracy	0.20	3	0.60	2.4
c. Understanding	0.30	2	0.60	
d. Diagnose	0.30	2	0.60	
2. Procedures				
a. Reference	0.30	3	0.90	
b. EOP Entry	0.30	3	0.90	2.6
c. Correct Use	0.40	2	0.80	
3. Control Board Operations				
a. Locate & Manipulate	0.34	1	0.34	
b. Understanding	0.33	2	0.66	1.66
c. Manual Control	0.33	2	0.66	
4. Communications				
a. Clarity	0.40	1	0.40	
b. Crew & Others Informed	0.40	2	0.80	1.60
c. Receive Information	0.20	2	0.40	
5. Directing Operations				
a. Timely & Decisive Action	0.30	3	0.90	
b. Oversight	0.30	2	0.60	2.30
c. Solicit Crew Feedback	0.20	2	0.40	
d. Monitor Crew Activities	0.20	2	0.40	
6. Technical Specifications				
a. Recognize and Locate	0.40	1	0.40	

b. Compliance	0.60	3	1.80	2.20

Since all six of her competency grades were not greater than 1.80, Ms. Smith failed the simulator test.[699] Furthermore, since the grade for Competency 4, "Communications and Crew Interactions," was less than or equal to 1.80 but greater than 1.00 then all of the other five competency grades would have to have been greater than or equal to 2.00 for Ms. Smith to have passed.[700]

438. Despite the fact that the Region II examiner of record and the informal review panel interpreted the grading guidance of NUREG-1021, ES-301, pages 3 and 5 differently, they both ultimately agreed that Ms. Smith did not achieve a passing score on the 2012 simulator test.

II. Conclusions of Law

A. Background

439. Based on the proposed findings of fact clearly and concisely set forth in Section I.A., *supra*, the Board should find, as a matter of law, that the record is complete and closed, and, thus, that it may rule on Ms. Smith's claim that the NRC improperly denied her 2012 SRO license application.

B. Legal Standards

440. Based on the proposed findings of fact clearly and concisely set forth in Section I.B., *supra*, the Board should find, as a matter of law, the following.

441. Ms. Smith's claim that the NRC improperly denied her 2012 SRO license application is based on two types of arguments – "improper discharge" arguments and "technical grading" arguments.

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[699] *Id*. at 6.

[700] *Id*.

442. In her Statements of Position 1, 2, and 3, Ms. Smith essentially argues that government officials at the NRC, acting in their official capacities, did not properly discharge their duties with respect to the potential for a waiver of her 2012 operating test, the potential for bias of her 2012 examiners, and the potential for bias during the subsequent administrative review of her 2012 operating test.

443. Therefore, pursuant to 10 C.F.R. § 2.325 and Commission precedent, Ms. Smith bears the burden of proving these improper discharge arguments by "clear evidence."[701]

444. Ms. Smith's Statements of Position 1, 2, and 3 are not supported by the record and Ms. Smith has not met her burden of demonstrating them by clear evidence.

445. Furthermore, in order to obtain her requested remedy of license issuance, Ms. Smith must prove that these arguments are causally related to the denial of her 2012 SRO license.[702] Thus, with respect to her bias arguments, she bears the burden of proving that, but-for the alleged bias of the Region II examiners and the alleged bias of the informal review panel members, she would have attained a passing score on the 2012 simulator test.

446. Ms. Smith attempts to satisfy this requirement that she prove causation with her Statements of Position 4 through 12.

447. In her Statements of Position 4 through 12, Ms. Smith essentially argues that, because of the alleged bias identified in her Statements of Position 2 and 3, government officials at the NRC erroneously graded specific aspects of her 2012 simulator test.[703]

448. Pursuant to 10 C.F.R. § 2.325 and Board precedent, Ms. Smith bears the burden of proving these "technical grading" arguments by demonstrating that each contested Staff

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

[702] *See, e.g.*, *Calabrese*, LBP-97-16, 46 NRC at 87 (applicant arguing that he should have been assigned a grade of "2" instead of a grade of "1" with respect to a particular rating factor, and that this change would change his overall grade from failing to passing).

[703] Exhibit CCS-076, 21-48.

grading was "inappropriate or unjustified"[704] or "arbitrary or an abuse of . . . discretion"[705] and then demonstrating that changing these gradings would change her final simulator test score from failing to passing.[706]

449. Ms. Smith's Statements of Position 4 through 12 are not supported by the record and Ms. Smith has not met her burden of proving these arguments.

450. As a consequence of these legal standards, the Board's role in this proceeding is to make two determinations. First, the Board must determine whether the record contains "clear evidence" that the Staff, acting in its official capacity, did not properly discharge its duties by not processing Ms. Smith's preliminary waiver request and whether, if it had processed this request, it would have granted Ms. Smith a waiver of the 2012 operating test. Second, the Board must determine whether the record contains evidence that proves, whether due to clearly-proven bias or otherwise, that a sufficient number of the Staff grading decisions identified in Statements of Position 4 through 12 were "inappropriate or unjustified"[707] or "arbitrary or an abuse of . . . discretion"[708] to change Ms. Smith's simulator test score from failing to passing.

C. Witnesses Presented

451. Based on the proposed findings of fact clearly and concisely set forth in Section I.C., *supra*, the Board should find, as a matter of law, the following.

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

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

[706] *See, e.g.*, *Calabrese*, LBP-97-16, 46 NRC at 87 (applicant arguing that he should have been assigned a grade of "2" instead of a grade of "1" with respect to a particular rating factor, and that this change would change his overall grade from failing to passing).

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

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

452. The Board should find that all of the witnesses are qualified as fact witnesses to the extent that their testimony concerns first-hand information. However, greater weight must be given to the testimony of the examiners whose entire role during the simulator test was to observe the actions of the applicants and how these actions compared to the actions that the examiners were anticipating them to take according to Forms ES-D-1 and ES-D-2. On the other hand, lesser weight must be given to the testimony of the applicants who were in a high-stress situation responding to a series of events for which they had no advance warning. Furthermore, based on experience alone, it must be expected that the examiners' observations during the simulator test would be more accurate than those of the applicants.

453. The Board should find that all of the witnesses are not qualified as fact witnesses to the extent that their testimony concerns second-hand information.

454. The Board should find that Mr. Tucker, Mr. Meeks, Mr. Bates, Mr. Capehart, Mr. Lea, Mr. Ehrhardt, Mr. Jackson, Mr. Widmann, and Mr. McHale are qualified as expert witnesses to the extent that their testimony concerns information within their fields of expertise as individuals experienced in preparing, administering, and grading operator licensing examinations. Although they are all qualified as expert witnesses with respect to the grading of operating tests in general, the testimony of Mr. Meeks, Mr. Bates, and Mr. Capehart must be given greater weight when it comes to the specific grading of Ms. Smith's operating test because only they actually observed her performance during the operating test.

455. The Board should find that Ms. Smith, Mr. Turner, and Mr. Waltower are not qualified as expert witnesses in the fields of experienced licensed operators or examiners and are, therefore, not qualified to testify in this proceeding other than as fact witnesses to issues within their first-hand experience. Ms. Smith is not a licensed operator. Mr. Turner is a newly licensed SRO. Mr. Waltower is a newly licensed RO. None of these three witnesses is qualified to provide an expert opinion regarding the preparation, administration, or grading of operator licensing examinations. None of these three witnesses has any experience as an examiner for

operator licensing examinations. Their opinions on such matters should not be entertained by this Board. Furthermore, when providing their non-expert opinions as applicants, these three witnesses are inherently biased in favor of obtaining a license rather than indifferently evaluating the preparation, administration, and grading of the operating test of which they were a part. Finally, since their role was to take a demanding test and generally remain oblivious of the examiners, their testimony regarding the performance of the examiners should be given little weight.

D. Statement of Position 1: The Staff did not Improperly Discharge its Duties with Respect to Processing a Waiver Request for Ms. Smith

456. Based on the proposed findings of fact clearly and concisely set forth in Section I.D., *supra*, the Board should find, as a matter of law, that Ms. Smith did not prove by the requisite "clear evidence" that the Staff acted improperly in asking Mr. Wainwright whether the inclusion of a waiver request with Ms. Smith's preliminary application was intentional and then, relying on his response that it was unintentional and the fact that Ms. Smith's final, certified application did not include a waiver request, in not processing an operating test waiver request on behalf of Ms. Smith.

457. Ms. Smith did not satisfy this burden of proof in part because she did not obtain on the record the testimony necessary to prove that the Staff acted improperly in not processing the waiver request included with her preliminary application. Instead, she attempted to satisfy this burden of proof, or at least shift it to the Staff, using arguments which rely on her personal suspicion, conjecture, speculation, assumption, and innuendo.

458. All of the testimony agrees that the controversy regarding the processing of Ms. Smith's waiver request boils down to what was communicated between Region II and SNC. Mr. Meeks and Mr. Bates testified that, starting with the 120-day telephone call on October 12, 2011, Region II's only contact with SNC with respect to the 2012 examination, including the

potential for an operating test waiver on behalf of Ms. Smith, was Mr. Wainwright.[709] Mr. Meeks testified that "the point of contact that we always used to send data, information back and forth was with Mr. Wainwright, and we never talked directly with Mr. Tucker."[710] Similarly, Mr. Tucker testified that "I never talked to anyone [at the NRC] directly, on waivers for anybody."[711] Ms. Smith also testified that she never spoke directly with Region II,[712] and that Mr. Wainwright was the point of contact with Region II during the 120-day telephone call.[713] Ms. Smith did not identify anyone other than Mr. Wainwright who had spoken directly with Region II during or following the 120-day telephone call.

459. Mr. Meeks and Mr. Bates testified that Mr. Wainwright communicated to them during the 120-day telephone call that SNC did not intend to submit an operating test waiver request on behalf of Ms. Smith.[714]

460. Mr. Meeks and Mr. Bates testified that, upon receiving a waiver request for Ms. Smith as part of her preliminary license application, they asked Mr. Wainwright to confirm whether the waiver request was intentional, because, among other reasons, Mr. Wainwright had previously told them that no waiver request would be submitted on behalf of Ms. Smith.[715]

461. Mr. Meeks and Mr. Bates testified that, a day or two later, Mr. Wainwright contacted them and stated that the waiver request was actually a mistake and that it should not be processed by Region II.[716]

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[709] *See* Tr. at 419, 429, 436, 443-45 (Mr. Wainwright was "the conduit for any information back and forth" between Region II and SNC.).

[710] Tr. at 436.

[711] Tr. at 268.

[712] Tr. at 212.

[713] Tr. at 177.

[714] Tr. at 429, 460.

[715] Tr. at 420-21.

[716] *Id*.

462. Mr. Wainwright's statement was substantiated by the fact that the final, certified license application submitted by SNC on behalf of Ms. Smith did not contain an operating test waiver request.[717]

463. Despite the fact that these communications were a significant part of the Staff's pre-filed testimony,[718] and despite the fact that Ms. Smith had the power to request subpoenas from this Board to force witnesses to testify under oath[719] or to obtain sworn written statements from SNC officials, Ms. Smith did not obtain Mr. Wainwright's testimony or sworn written statement for the record.

464. Apparently, Ms. Smith failed to obtain Mr. Wainwright's testimony for the record because she believed that it would support the Staff's testimony. Specifically, Ms. Smith testified that Mr. Wainwright had told her that "it was not intended to submit a waiver for [Ms. Smith]."[720] This supports the first-hand testimony of Mr. Meeks and Mr. Bates that their only contact with SNC, Mr. Wainwright, had informed them that the submission of a waiver request with Ms. Smith's preliminary license application was unintentional. However, instead of understanding this statement plainly or getting Mr. Wainwright to explain this statement under oath, Ms. Smith implies that there is a vast conspiracy against her by both SNC officials and the NRC staff in Region II and Headquarters. Thus, Ms. Smith, without substantiation, characterized Mr. Wainwright as being evasive and "hiding information"[721] and testified that she had "a target on [her] back."[722] None of the evidence of record supports such a conspiracy.

465. By purposefully not obtaining the testimony of the individual who could actually

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[717] Exhibit NRC-007.

[718] *See* Exhibit NRC-006, 19-22.

[719] *See, e.g.*, Request a Modification to Subpoena (Jul. 1, 2013) (ADAMS Accession No. ML12182A169).

[720] Tr. at 176.

[721] Tr. at 176.

[722] Tr. at 209.

testify to the truth of the matter in controversy, Ms. Smith unnecessarily makes her entire argument regarding the processing of the waiver request rely on her personal version of hearsay evidence.[723] Relying solely on such evidence when non-hearsay, first-hand evidence is available, but appears to be contrary to one's position, cannot be considered to be "clear evidence."

466. Furthermore, as government officials presumed to act properly in discharging their official duties, it is not the Staff's burden to prove what communications transpired between Region II and SNC or to disprove Ms. Smith's unsubstantiated, personal claims of Region II's improper discharging of its duties.[724] Nor does Ms. Smith, as an operator license applicant, possess the necessary experience and qualifications regarding the development, administration, and grading of operator license examinations to have her personal impressions on these topics override the direct testimony of Staff experts in the field.

467. Therefore, this Board should deny Ms. Smith's waiver argument.

468. The Board should also find, as a matter of law, that Ms. Smith did not prove by the requisite "clear evidence" that, but for the Staff's failure to process a waiver request on her behalf, her 2012 operating test would have been waived. Instead, the record demonstrates that Ms. Smith's 2011 operating test performance was especially weak, supporting the conclusion that, had the Staff processed a waiver request on behalf of Ms. Smith, there is no clear evidence that that request would have been granted.

469. Granting waiver requests is discretionary based upon a case-by-case review of

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[723] *See, e.g.,* Tr. at 212-13 (Chair Spritzer stated that "your comments today regarding communications between NRC and Southern Nuclear Operating about the possibility of a waiver, that's all based on secondhand information . . . .").

[724] *See, e.g.*, Tr. at 429-30 (Chair Spritzer asking Mr. Meeks whether the Staff had any contemporaneous documents that could prove that Mr. Wainwright had stated that SNC would not be submitting a waiver request on behalf of Ms. Smith).

the justification provided.[725] A request to waive examination areas that were previously passed is classified as a "routine" waiver request.[726] This means that the responsible Region may grant the request without first obtaining concurrence from the NRR Operator Licensing and Training Branch (IOLB) at Headquarters.[727] The denial of all waiver requests, whether routine or otherwise, also does not require IOLB concurrence.[728] The responsible Region makes its determination regarding routine waiver requests "on a case-by-case basis"[729] and "may in its discretion grant the request, if it determines that sufficient justification is presented."[730] If additional information is required to reach a decision on a waiver request, the responsible Region will request the necessary information from the facility licensee.[731] Upon deciding whether to grant or deny the routine waiver request, the responsible Region will promptly notify the applicant in writing concerning the disposition of the request, and provide an explanation for any denial.[732] If time is too short to notify the applicant in writing before the examination date, the responsible Region may notify the facility training representative by telephone concerning the disposition of the waiver request and then later provide a written response to the applicant.[733]

470. After Ms. Smith's 2012 application was denied and in preparation for this proceeding, the Staff compiled all of the quantitative data from the past seven years of Region II examples of initial operator applicants that had failed the written examination but passed the

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[725] 10 C.F.R. § 55.35(b); NUREG-1021, ES-204, 2.

[726] NUREG-1021, ES-204, 2, 3.

[727] *Id*. at 2.

[728] *Id*.

[729] *Id*.

[730] 10 C.F.R. § 55.35(b).

[731] NUREG-1021, ES-204, 2.

[732] *Id*.

[733] *Id*.

operating test and then requested a waiver of the operating test.[734] At the Board's request, the Staff subsequently expanded this data compilation to include the same information for all of the Vogtle SRO and RO candidates that passed both the written examination and the operating test during this same period of time.[735]

471. This compilation of data was not used by the Staff in reaching its preliminary determinations in May 2011 and August 2011 that an operating test waiver request on behalf of Ms. Smith that was based only on her performance on the March/April 2011 operating test would likely be denied.[736] In fact, it would have been improper to base a waiver determination strictly on such numbers, because the waiver determination is a subjective one without a "cut score"; it should be based upon an examiner's years of training and experience, first-hand observations of the applicant, and a close reading of all of the comments on the applicant's individual evaluation report, not simply based on the number of comments and the numerical grading that resulted from these comments.[737]

472. However, this compilation of data does demonstrate that denying an operating test waiver request for Ms. Smith would not have been an improper discharge of the Staff's duties, because, at least quantifiably, it appears that Ms. Smith's 2011 simulator test performance was worse than previous performances for which a waiver was granted.

473. During the period from 2005 to 2011, not including the applicants from the Vogtle 2011 examination, Region II granted 39 waiver requests for RO and SRO operating tests.[738] The average competency score for all of these granted waiver requests was 2.85, and 2.81 for

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[734] Tr. at 380; *see* Exhibit NRC-008.

[735] Tr. at 141-42; *see* Exhibit BRD-003.

[736] Tr. at 510.

[737] Tr. at 501-04, 510, 512-14, 633-34.

[738] Exhibit NRC-008.

just the SRO-instant applicants, like Ms. Smith.[739] Ms. Smith's average competency score of 2.47 is significantly lower than this, especially considering that the grading scale ranges only from 1.00 to 3.00.[740] Furthermore, Ms. Smith had 12 simulator test comments, many more than the average of those applicants previously granted waivers, which was 2.23 for all those applicants granted waiver requests and 3.44 for SRO-instant applicants granted waiver requests.[741]

474. Ms. Smith's simulator test results are also numerically worse than those of her fellow 2011 Vogtle applicants who were evaluated by the same examiners, but who were subsequently granted waivers. Her average simulator score of 2.47 is significantly lower than the average of the 2011 Vogtle applicants granted waivers, which was 2.73 for all those applicants granted waivers and 2.85 for SRO-instant applicants granted waivers.[742] Her 12 simulator test comments is significantly higher than the average of the 2011 Vogtle applicants granted waivers, which was 3.60 for all applicants granted waivers and 2.50 for SRO-instant applicants granted waivers.[743]

475. In four of the six competencies, Ms. Smith's score was lower than both of the scores of the two Vogtle SRO-instant applicants granted waivers in 2011.[744] In only one of the six competencies, did Ms. Smith achieve a score higher than one of the two SRO-instant applicants granted waivers.[745] However, this SRO-instant applicant achieved an overall

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[739] *Id*. at 1.

[740] *Id*.

[741] *Id*.

[742] *Id*.

[743] *Id*.

[744] Exhibit CCS-003.

[745] *Id*.

average score of 2.90, which is significantly higher than Ms. Smith's average of 2.47.[746]

476. With respect to all 44 applicants granted waivers by Region II from 2005 to 2011, including the other 2011 Vogtle applicants, Ms. Smith's average competency score was not equal to or greater than a single applicant's score who had been granted a waiver.[747] Ms. Smith's average competency score of 2.47 is even less than the average competency score of the only applicant since 2005 to have been denied a waiver, which was 2.55, and Ms. Smith's 12 simulator test comments were more than this individual's 6.[748]

477. When compared to all of the Vogtle operator license applicants since 2005, including those that passed both the operating test and the written examination, Ms. Smith's operating test results are still in the bottom percentile of this large group.

478. Ms. Smith's average simulator score of 2.47 was less, and her 12 simulator comments was greater, than the average of the other Vogtle SRO-instant applicants' average simulator scores of 2.81 and their 3.36 average number of simulator comments.[749]

479. Only one applicant that had been granted an SRO-instant license since 2005 had simulator test data comparable to Ms. Smith's.[750] Whereas Ms. Smith had an average score of 2.47 and 12 simulator test comments, this applicant had an average score of 2.46 and 10 simulator test comments.[751]

480. However, it is unknowable whether this applicant would have been granted a waiver of the operating test, because no such determination was required since this applicant also passed the written examination with a score of 91.00% and thus satisfied the requirements

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[746] *Id*.

[747] Exhibit NRC-008.

[748] *Id*. at 10.

[749] Exhibit BRD-003, 1.

[750] *Id*. at 14.

[751] *Id*.

for license issuance.[752]

481. Again, the standard for evaluating whether an applicant passes the simulator test is different than the standard for evaluating whether an applicant will subsequently be granted a waiver of the operating test. The former uses a regimented formula according to NUREG-1021, ES-303, the latter is a holistic, discretionary, case-by-case determination based on the professional judgment of the examiners, their first-hand observations of the applicant's performance, and their review of the applicant's individual examination report.[753]

482. Thus, when evaluating Ms. Smith's 2011 operating test performance in May 2011 and August 2011 to preliminarily determine whether Ms. Smith would likely be granted a waiver, Mr. Meeks looked at many diverse aspects of Ms. Smith's 2011 operating test performance, as described above, to reach the conclusion that she would not.

483. In conclusion, though a waiver determination could not be made, and was not made, based on the data compilations of exhibits NRC-008 and BRD-003, these compilations demonstrate that a Staff determination to deny a waiver request on behalf of Ms. Smith, were one submitted, would not have been arbitrary or capricious. Therefore, Ms. Smith cannot prove by clear evidence that the Staff would have improperly discharged its duties had it not granted an operating test waiver request submitted on her behalf.

E. Statement of Position 2: There was no Staff Bias or Conflict of Interest

484. Based on the proposed findings of fact clearly and concisely set forth in Section I.E., *supra*, the Board should find, as a matter of law, that Ms. Smith did not prove by the requisite "clear evidence" that the Staff acted improperly in assigning two examiners to her 2012 operating test, Mr. Meeks and Mr. Capehart, that were also assigned to her 2011 operating test, and one examiner, Mr. Bates, that was not involved with her 2011 operating test but knew that

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[752] *Id*.

[753] Tr. at 501-04, 510, 512-14, 633-34.

she was taking the operating test for a second time. This finding should be based on the following reasons.

485. First, the assignment of Mr. Meeks, Mr. Capehart, and Mr. Bates to Ms. Smith's 2012 operating test did not violate NUREG-1021, ES-201, Section D, Paragraph 1.a., because none of these examiners were an "examiner who failed an applicant on an operating test"[754] since Ms. Smith had not failed the 2011 operating test and since the only examiner who would have had the authority to fail her on the 2011 operating test would have been Mr. Hopkins, her 2011 Examiner of Record, not Mr. Meeks, Mr. Capehart, or Mr. Bates.

486. Second, the assignment of Mr. Meeks, Mr. Capehart, and Mr. Bates to Ms. Smith's 2012 operating test did not violate NUREG-1021, ES-201, Section D, Paragraph 1.b., because none of these examiners were previously employed by Vogtle and significantly involved with Ms. Smith's training.[755]

487. Third, the assignment of Mr. Meeks, Mr. Capehart, and Mr. Bates to Ms. Smith's 2012 operating test did not violate NUREG-1021, ES-201, Section D, Paragraph 1.c., because these examiners informed their immediate supervisor, Mr. Widmann, of the extent of their previous involvement with Ms. Smith.

488. Fourth, Mr. Widmann applied sound judgment to these facts by assigning Mr. Bates as Ms. Smith's Examiner of Record.[756] Mr. Bates was not involved with Ms. Smith's 2011 operating test, he did not review Ms. Smith's 2011 individual examination report, and he did not partake in the decision-making process behind the May 2011 and August 2011 preliminary determinations that a waiver request for Ms. Smith's 2012 operating test would likely be denied. As Ms. Smith's Examiner of Record, Mr. Bates would evaluate the entirety of her simulator test,

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[754] NUREG-1021, ES-201, 14.

[755] Exhibit NRC-001, 43.

[756] Tr. at 522.

write her individual examination report, and recommend whether she had overall passed or failed the operating test. Also, Mr. Bates was assigned to evaluate five of Ms. Smith's 15 JPMs. Therefore, the assignment of Mr. Bates as Ms. Smith's Examiner of Record and examiner for five JPMs effectively cured any potential conflict of interest consistent with the guidance of NUREG-1021.

489. Based on the proposed findings of fact clearly and concisely set forth in Section I.E., *supra*, the Board should also find, as a matter of law, that Ms. Smith did not prove by the requisite "clear evidence" that her assigned examiners treated differently than the other Vogtle 2012 applicants by engaging in "unfair practices to accumulate comments on [her] final examination that were not warranted . . . creatively written [and] inaccurate."[757]

490. There is no clear evidence on the record that demonstrates that Ms. Smith was treated differently than other applicants due to bias.

491. For each claim of bias that Ms. Smith made on the record, the Staff included on the record a legitimate, nondiscriminatory explanation for her treatment. Ms. Smith has not proven that any of these explanations were pretextual.

492. For instance, Ms. Smith argued that she was treated in a biased manner because she was administered three scenarios during her 2012 simulator test instead of two scenarios.[758]

493. The Staff explained that, although NUREG-1021 states that the minimum number of scenarios required for an SRO simulator test is two, it explicitly allows examiners to give an SRO-instant applicant three scenarios for the purpose of scheduling simulator scenarios that minimize the number of surrogate operators required.[759]

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[757] Exhibit CCS-076, 11, 13-14.

[758] Exhibit CCS-116, 10.

[759] NUREG-1021, ES-201, 12.

494. This determination of which SRO-instant applicants would be administered two scenarios and which would be administered three was done in a generic manner, meaning that the draft schedules for the Vogtle 2012 class were developed based on the level of license for which each applicant was applying (*e.g.*, RO, SRO-instant, *etc*.) and not based on the applicant's name.[760]

495. Furthermore, of the eight SRO-instant applicants in 2012, a total of six of them, including Ms. Smith, were administered three scenarios.[761] Therefore, by being administered three scenarios, Ms. Smith was actually being treated more like the other applicants than she would have been had she been administered only two scenarios.

496. Ms. Smith did not present clear evidence that this explanation was pretextual.

497. Ms. Smith also claimed that the Region II examiners treated her in a biased manner because they gave her creatively written comments."[762]

498. In response, the Staff provided exhibit NRC-043, as well as a chart based on this exhibit, correlating the comments on Ms. Smith's individual examination report to similar comments on other Vogtle 2012 applicants' individual examination reports. This correlation demonstrates that the Staff was not making up comments unique to Ms. Smith. Instead, the Staff was assessing similar comments to Ms. Smith for exhibiting deficiencies similar to those exhibited by other applicants. Ms. Smith earned a failing grade simply because she exhibited more of these deficiencies and not because of any Staff bias against her.

499. Instead of actually addressing the facts represented by this exhibit and chart, Ms. Smith attempted to explain them away as being pretextual according to the following theory.

> The Exam Team's discussion about comparing the comments between members of the class do [sic] not eliminate the possibility

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[760] Exhibit NRC-002, 4.

[761] *See* NRC-031, 5-6.

[762] Exhibit CCS-076, 11, 13-14.

> of bias. The Exam Team has participated in more than one examination. They are knowledgeable enough to know that the easiest way to prove bias would be to show the variations in the write up's. With that in mind these examiners wrote these comments to ensure that similar comments were encountered between groups. Referencing the similarities between other students write up's are [sic] another attempt by the NRC Staff to divert the attention to something that gives a different perception. If the outcome was preplanned then the examiners expected that the denial would be challenged. In turn, they would ensure similarities in the comments existed.[763]

This theory is wholly unsubstantiated and implies that there is a vast conspiracy throughout the entire NRC whose goal is to deny Ms. Smith's SRO license application.[764] Such a theory cannot overturn the Supreme Court presumption, recognized by the Commission, that government officials, such as the NRC Staff, acting in their official capacity have properly discharged their duties.[765] It is Ms. Smith's burden to present "clear evidence" to rebut this presumption, not to present a conspiracy theory in an attempt to shift this burden and force the Staff to somehow disprove the existence of such a conspiracy.[766] The Staff cannot disprove the existence of something that does not exist. The above argument is not clear evidence and, therefore, Ms. Smith's bias argument fails.

500. Ms. Smith also relies heavily on the statements of Mr. Lea to prove that her 2012 examiners improperly discharged their duties with respect to her.[767]

501. The evidence demonstrates that Mr. Lea did not participate in either of Ms. Smith's 2011 or 2012 SRO license applications or in the preliminary discussions regarding the

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[763] Exhibit CCS-116, 31-32.

[764] Ms. Smith's argument would require that the 2011 examiners, the 2012 examiners, Region II management, the informal review panel, and Headquarters management all plotted and agreed to ensure that she failed both the 2011 and 2012 examinations.

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

[766] *Id*.

[767] Exhibit CCS-116, 4-8.

potential for a waiver of her 2012 operating test.[768] He had no first-hand knowledge of Ms. Smith's 2011 or 2012 SRO license applications or of the preliminary discussions regarding the potential for a waiver of her 2012 operating test.[769] He did not see any of the emails related to the subject of the waiver of Ms. Smith's 2012 operating test or any of the waiver requests submitted on behalf of Ms. Smith.[770] He also did not speak with anyone with such first-hand knowledge.[771]

502. Mr. Lea did not have a role or speak with anyone that had a role in the administrative review of Ms. Smith's 2012 SRO license application denial.[772]

503. Additionally, in his 23 years of administering operator licensing examinations, he has evaluated approximately 10 to 15 waiver requests,[773] and he has "never denied a waiver on an operating test of an individual who had passed the test previously."[774] Instead, his personal view is that "if the individual passed the operating test the first time, there should be a very great likelihood that they will be granted a waiver."[775] Furthermore, Mr. Lea apparently believes that it is permissible for an SRO applicant such as Ms. Smith to become sufficiently capable to direct the operation of the facility at some point in time after SRO license issuance.[776]

504. During his testimony, Mr. Lea could not identify any specific statements that he allegedly overheard regarding the write-up of Ms. Smith's 2012 operating test failure that

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[768] Exhibit NRC-025, 1; Exhibit NRC-027, 2; Tr. at 665-66.

[769] Exhibit NRC-025, 2; Exhibit NRC-027, 2.

[770] Exhibit NRC-025, 3.

[771] *Id*. at 2; Exhibit NRC-027, 2; Tr. at 667.

[772] Tr. at 666.

[773] Tr. at 674.

[774] Tr. at 673.

[775] Tr. at 678.

[776] Tr. at 711.

aroused his suspicion.[777] Furthermore, though he stated that his reading of Ms. Smith's 2011 operating test documentation confirmed this suspicion of her possible mistreatment, he could also not identify a specific example from this documentation that led him to this belief.[778] Suspicion alone is not clear evidence.

505. This Board should find that Mr. Lea's personal opinions based largely on speculation do not amount to clear evidence of an improper discharge of Staff duties with respect to Ms. Smith.

506. Finally, the Board should find, as a matter of law, that it does not have the authority to conduct an adjudicatory review of issues of race or sex bias or discrimination with respect to Ms. Smith's license denial and that, even if it did, Ms. Smith has not provided any evidence of such bias or discrimination.

507. Title IV of the Energy Reorganization Act of 1974, as amended (ERA), states that "[n]o person shall on the ground of sex . . . be denied a license under . . . any program or activity carried on or receiving Federal assistance under any subchapter of this chapter."[779]

508. 10 C.F.R. § 2.111 implements title IV of the ERA by stating that "[n]o person shall on the grounds of sex . . . be denied a license, standard design approval, or petition for rulemaking (including a design certification) . . . or be subjected to discrimination under any program or activity carried on or receiving Federal assistance under the Act or the Energy Reorganization Act of 1974."

509. Title IV of the ERA further provides that this prohibition will be enforced "through agency provisions and rules similar to those already established, with respect to racial and other

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[777] Tr. at 686-87 (To which Judge Hajek stated, "You are being very general there.").

[778] Tr. at 672-73, 679, 692.

[779] ERA, Sec. 401.

discrimination, under Title VI of the Civil Rights Act of 1964."[780] However, this enforcement mechanism "is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminate."[781]

510. The NRC rules referred to as "similar to those already established . . . under Title VI of the Civil Rights Act of 1964" by the ERA are provided in 10 C.F.R. Part 4, which states that it implements "[t]he provisions of title VI of the Civil Rights Act of 1964 . . . and title IV of the Energy Reorganization Act of 1974 . . . ."[782]

511. This Board was established to conduct an adjudicatory licensing safety proceeding under 10 C.F.R. Part 2, Subpart L, procedures.[783] It was not established to perform a 10 C.F.R. Part 4, Subpart A, adjudicatory proceeding. Therefore, this Board does not have the authority to rule on issues of race or sex bias or discrimination. The proper forum for such claims is a duly constituted 10 C.F.R. Part 4, Subpart A, proceeding[784] or a Federal court.[785]

512. However, even if the Board were so authorized, there is no evidence on the record to support a Title VI cause of action for race or sex discrimination.

513. Title VI prohibits only intentional discrimination.[786]

514. In general, intentional discrimination can be proven by either "direct evidence" or "indirect evidence."[787]

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[780] *Id*.

[781] *Id*.

[782] 10 C.F.R. § 4.1.

[783] *See* Establishment of Atomic Safety and Licensing Board (Jan. 4, 2013).

[784] *See* 10 C.F.R. §§ 4.61 to 4.64.

[785] *See* ERA, Sec. 401 (the remedy of litigating sex discrimination claims under Title IV of the ERA "is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminate"). Such other legal remedies include the private right to sue under Title VI of the Civil Rights Act of 1964. *See* Alexander v. Sandoval 532 U.S. 275, 280 (2001) ("It is . . . beyond dispute that private individuals may sue to enforce [Title VI of the Civil Rights Act of 1964].").

[786] Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

[787] Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004).

515. Direct evidence is strong evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action."[788]

516. Indirect evidence is weaker evidence that must be proven by a three-step process.[789] First, the plaintiff bears the burden of establishing a *prima facie* case of discrimination.[790] Once the plaintiff establishes such a *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the defendant's challenged action.[791] Then the burden of proof shifts back to the plaintiff to prove that this reason was in fact pretextual.[792]

517. The only evidence on the record is testimony that, at Vogtle, there are approximately 40 licensed SROs[793] including 3 African American males[794] and 2 non-African American females.[795] Additionally, there are approximately 35-40 licensed ROs[796] including one African American male and one non-African American female.[797]

518. This is neither direct evidence of any particular NRC examiners possessing discriminatory intent toward Ms. Smith, nor is it *prima facie* indirect evidence of discriminatory intent. At the most, it might be argued to be speculation of a disparate impact. However, the

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[788] *Id*.

[789] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

[790] *Id*. at 802.

[791] *Id*.

[792] *Id*. at 804.

[793] Tr. at 202.

[794] Tr. at 214.

[795] Tr. at 202.

[796] Tr. at 215.

[797] Tr. at 214.

Supreme Court has directly ruled that disparate impact is not a cause of action under Title VI.[798]

519. For these reasons, Ms. Smith has not met her burden of proving by "clear evidence" that the Staff improperly discharged its duties by assigning Mr. Bates, Mr. Meeks, and Mr. Capehart to her 2012 operating test. Therefore, Ms. Smith's Statement of Position 2 should be resolved in favor of the Staff.

F. Statement of Position 3: The Informal Review Panel did not Improperly Discharge its Duties with Respect to the Administrative Review of Ms. Smith's 2012 Simulator Test

520. Based on the proposed findings of fact clearly and concisely set forth in Section I.F., *supra*, the Board should find, as a matter of law, that Ms. Smith did not prove by the requisite "clear evidence" that the Staff improperly conducted its informal review of her waiver, bias, and technical grading complaints.

521. Ms. Smith has not provided clear evidence that the Region II examiners somehow exerted undue influence on the informal review panel. Rather, the informal review panel's interaction with the Region II examiners was consistent with NUREG-1021 and OLMC-500.

522. OLMC-500 states that, if a panel conducts the review, "the affected region will be responsible for answering questions and providing assistance as requested by . . . the panel."[799] This assistance "may include providing preliminary assessments for some of the contested test items."[800] Also, during an appeal panel review, "the panel will establish and maintain communications with the affected region and IOLB, in order to ensure that the review results include regional and IOLB input."[801]

523. Therefore, the informal review panel acted consistent with this guidance when it

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[798] *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001).

[799] OLMC-500, 4.

[800] *Id*.

[801] *Id*. at 6.

reviewed Region II's binders responding to Ms. Smith's claims, provided to the panel on June 25, 2012, including the table in these binders entitled, "Cross Reference Table of Errors and Related Rating Factors."[802] It was also reasonable for the informal review panel to review a Region II summary of these binders provided to it shortly thereafter on July 5, 2012. Finally, it was consistent with OLMC-500 for the informal review panel to accept input from Region II on the final draft of the informal review report, specifically exhibits CCS-067 and NRC-019/CCS-102, and then make changes to the informal review report after considering this input.

524. Similarly, Ms. Smith has not provided clear evidence that the investigation of her improper conduct claims was somehow inappropriate.

525. Ms. Smith's improper conduct claims were investigated by the Region II. OLMC-500 states that, "[i]f the affected region conducts the review, the affected region shall . . . [e]nsure that the review is not performed by any examiners involved with the applicant's original licensing examination. This will ensure that the review is conducted in an impartial fashion."[803]

526. Region II ensured that the review was not performed by any examiners involved with Ms. Smith's licensing examination by selecting Mr. Ehrhardt to conduct the review.

527. Mr. Ehrhardt was not one of Ms. Smith's examiners or in the same chain of command as Ms. Smith's examiners. During the 2008-2009 timeframe, Mr. Ehrhardt did participate with Mr. Bates on one exam team and with Mr. Capehart on another exam team.[804] However, during the three and a half years prior to conducting the investigation, he had had no routine interaction with Ms. Smith's 2012 examiners.[805] Moreover, he was a manager and not a

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[802] Tr. at 582-84; Exhibit NRC-032, 7.

[803] OLMC-500, 4.

[804] Tr. at 600.

[805] Tr. at 592-93.

peer of Mr. Bates and Mr. Capehart.[806]

528. Finally, the fact that the informal review panel and the Region II examiners interpreted the grading guidelines of NUREG-1021 differently is not clear evidence that the informal review panel improperly discharged its duties.

529. The informal review panel and Region II disagreed on two aspects of grading the simulator test. Region II believed that each performance deficiency should only be assigned to one RF but that the implications of each performance deficiency for other RFs could be used to justify not increasing an RF with two errors from a score of "1" to a score of "2."[807] The informal review panel believed that each performance deficiency should be assigned to more than one RF as appropriate but that the score of an RF with two errors should be increased from a "1" to a "2" if the applicant could have demonstrated competency in that RF elsewhere.

530. Both of these approaches are reasonable interpretations of the NUREG-1021 guidance.

531. Both of these approaches are more strict in one respect and more lenient in another respect.

532. Therefore, there is no clear evidence that either Ms. Smith's evaluation by the Region II examiners or by the informal review panel was improper or biased.

533. Rather, the record demonstrates that Ms. Smith's performance was given two separate evaluations under two separate, reasonable interpretations of NUREG-1021, and it was confirmed to be a failure by both.

534. In conclusion, Ms. Smith has not proven by clear evidence that the Staff improperly conducted its informal review of her waiver, bias, and technical grading arguments.

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[806] Tr. at 599-600.

[807] *See* Exhibit CCS-101, 1-3.

G. Statement of Position 4: The Staff's Downgrading of Ms. Smith for her Failure to Diligently Monitor Primary Plant Parameters and Initiate Rod Withdrawal was Not an Abuse of Discretion

535. Based on the proposed findings of fact clearly and concisely set forth in Section I.G., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[808] or "arbitrary or an abuse of . . . discretion."[809]

536. The examiner of record identified the fact that Ms. Smith had multiple opportunities to request a rod withdrawal, but only once requested a rod withdrawal and, thus, allowed Tave to drift out of band, as a performance deficiency assessed to RF 3.a. for failing to locate and manipulate controls in a timely manner.[810]

537. Ms. Smith attempted to prove that this assessment was unjustified by arguing that she did diligently monitor primary plant parameters as demonstrated by the fact that she attempted twice, not once, to withdraw rods.[811]

538. She provided her own testimony and the testimony of the other two members of her crew, Mr. Turner[812] and Mr. Waltower,[813] to prove that she had attempted to withdraw control rods twice. She testified that she had attempted to withdraw control rods between 08:05 and 08:11 in addition to the attempt at 08:18 recorded by the examiners, but was prevented from withdrawing rods at this time by the insertion of a casualty.[814]

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

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

[810] Exhibits NRC-002, 37, CCS-045, 18.

[811] Exhibits CCS-076, 21, CCS-116, 50-51.

[812] Exhibit CCS-040, 3.

[813] Exhibit CCS-041, 3.

[814] Exhibit CCS-116, 51.

539. Simulator data supports the fact that Ms. Smith attempted to withdraw control rods at 08:18.[815] However, Ms. Smith provides no simulator data to support her claim that she attempted to withdraw control rods between 08:05 and 08:11.[816]

540. Instead, whether this attempt to withdraw control rods occurred, and, thus, whether the RF 3.a. performance deficiency was unjustified, boils down to conflicting testimonies. On one side, Ms. Smith, Mr. Turner, and Mr. Waltower testify that there was a second attempt between 08:05 and 08:11. On the other side, Mr. Bates, Mr. Meeks, and Mr. Capehart testify that there was no second attempt.

541. The testimony of Ms. Smith, Mr. Turner, and Mr. Waltower was developed weeks after the simulator test. The testimony of Mr. Bates, Mr. Meeks, and Mr. Capehart is supported by their personal notes taken at the time of the simulator test.

542. When there is a direct conflict between the contemporaneous notes of the examiners and the later testimony of the applicants, the contemporaneous notes of the examiners should prevail for the following reasons.

543. First, these notes were generated as the event happened, whereas the testimony of the applicants was developed weeks later.

544. Second, the examiners have years of training and experience and have evaluated dozens of simulator tests. It is their practice to record in their notes all significant occurrences during the simulator test as they happen and the manipulation of control rods is definitely such a significant occurrence. On the other hand, during the simulator test, the applicants are being subjected to an intensely stressful situation. It is much less likely that they will comprehend all of the details of the simulator test, let alone recall them with particularity weeks later.

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[815] *See* Exhibit CCS-092.

[816] *See* Exhibit CCS-116, 50.

545. Ms. Smith also argued that the assessment of this RF 3.a. performance deficiency was unjustified because she alleged that she was prevented from stopping Tave from drifting out of band by the examiners' insertion of casualties.[817]

546. This argument, however, is not relevant to the assessment of the RF 3.a. performance deficiency. The examiner of record did not assess an error to Ms. Smith for failing to maintain Tave within band,[818] he assessed an error to Ms. Smith for not diligently monitoring primary plant parameters as indicated by the fact that she only once attempted over a 40-minute period to withdraw rods.[819]

547. For these reasons, Ms. Smith has not proven that the Region II examiners acted arbitrarily or abused their discretion in identifying a performance deficiency related to her failure to attempt to manipulate controls in a timely manner to keep Tave within band. Therefore, this Board should resolve Ms. Smith's Statement of Position 4 in favor of the Staff.

H. Statement of Position 5: The Staff's Downgrading of Ms. Smith for her Failure to Properly Block SI/SLI was Not an Abuse of Discretion

548. Based on the proposed findings of fact clearly and concisely set forth in Section I.H., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[820] or "arbitrary or an abuse of . . . discretion."[821]

549. Ms. Smith only used one digital indication of pressurizer pressure and did not look at the P-11 status light before concluding that pressurizer pressure was less than 2000 psig

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[817] Exhibits CCS-076, 21, CCS-116, 50, 52.

[818] *See* Exhibit CCS-116 (Ms. Smith argued that "[t]he root cause of this comment was the insertion of the failures that prevented the manipulation.").

[819] Exhibit NRC-002, 37.

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

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

and directing the SI/SLI block. The examiner of record identified this as a performance deficiency assessed to RF 1.b. for failing to ensure the collection of complete information on which to base diagnoses.[822]

550. Ms. Smith argues that the identification of an RF 1.b. performance deficiency by the examiner of record was inappropriate, because he "made an error in assessing that the block was attempted at the wrong time."[823] The error that she claims was made was that the examiner thought that the pressurizer pressure digital gauge read 2007 psig, when this was the reading of the reactor coolant system (RCS) digital gauge and the pressurizer pressure digital gauge actually read 1998 psig.[824] Thus, reasons Ms. Smith, since the pressurizer pressure digital gauge read less than 2000 psig, the SI/SLI block should have been successful and the fact that it wasn't successful can only be attributed to "an abnormal issue with the simulator" and not any performance deficiency on her part.[825]

551. This argument does not prove that the Region II assessment of an RF 1.b. error was inappropriate or unjustified; on the contrary, it illustrates that Ms. Smith possesses a continuing and fundamental misunderstanding of the P-11 interlock. Just because the digital pressurizer pressure gauge read less than 2000 psig, does not mean, as Ms. Smith asserts, that the blocking of SI/SLI should have been successful and that the failure of the block must have been due to a simulator error.[826] The P-11 interlock prohibits the blocking of SI/SLI unless two-out-of-three pressurizer pressure instruments read less than 2000 psig, not unless one digital pressurizer pressure gauge reads less than 2000 psig.[827] Therefore, Ms. Smith's

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[822] Exhibit CCS-045, 10.

[823] Exhibit CCS-076, 25.

[824] *Id*. at 24.

[825] *Id*.

[826] *Id*.

[827] Exhibit NRC-002, 24-25.

argument proves that she still does not understand the complete information that must be collected in order to properly diagnose when SI/SLI can be blocked, and that the Region II identification of an RF 1.b. performance deficiency is indeed appropriate and justified.

552. Ms. Smith also argues that the SI/SLI block was unsuccessful, not because she failed to verify the status of P-11, but because the P-11 interlock in the simulator was not operating properly.[828] Ms. Smith provides no evidence to support this argument.[829] The examiners testified that the operation of the P-11 interlock in the simulator was verified before the administration of Ms. Smith's simulator test.[830] It is also noteworthy that neither of the other two applicant crews had any issue with P-11 operation when the same scenario was administered during that same day.[831] Furthermore, even if the simulator P-11 status light was malfunctioning, this does not change the fact that Ms. Smith did not attempt to collect information from this status light before attempting to block SI/SLI, which is the reason why she was downgraded.

553. Mr. Lea's arguments that the assessment of this performance deficiency was unjustified are fully rebutted in Exhibit NRC-059, pages seven through ten. Mr. Lea did not participate in Ms. Smith's simulator test and, therefore, has no first-hand knowledge of her performance during the simulator test.[832] Thus, Mr. Lea's expert opinions should be afforded less weight than the expert opinions of those examiners that actually observed Ms. Smith during her simulator test and evaluated her based on these first-hand observations.

554. For these reasons, Ms. Smith has not proven that the Region II examiners acted arbitrarily or abused their discretion in assessing her an RF 1.b. performance deficiency for

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[828] Tr. at 360-61.

[829] Tr. at 361.

[830] Exhibit NRC-002, 25.

[831] *Id*.

[832] Exhibit NRC-025, 2.

failing to ensure the collection of complete information by looking at only one indication of pressurizer pressure and not observing the P-11 status light before diagnosing that SI/SLI could be blocked. Therefore, this Board should resolve Ms. Smith's Statement of Position 5 in favor of the Staff.

I. Statement of Position 6: The Staff's Downgrading of Ms. Smith for her Failure to Locate the Sludge Mixing Isolation Valve Handswitches during the RWST Leak was Not an Abuse of Discretion

555. Based on the proposed findings of fact clearly and concisely set forth in Section I.I., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[833] or "arbitrary or an abuse of . . . discretion."[834]

556. Despite being provided with all of the information necessary to reach the conclusion, if she had had sufficient knowledge, that the leak of the RWST could be stopped using handswitches in the control room, Ms. Smith did not make this conclusion known to the other members of her crew. This indicated to the examiner of record that Ms. Smith did not know the location of these handswitches. Therefore, the examiner of record identified this as a performance deficiency assessed to RF 3.a. for failing to locate controls in an accurate and timely manner.[835]

557. Ms. Smith argues that this should not have been a performance deficiency as to her because, as OATC, operating the sludge mixing isolation valve handswitches was not her job, but the job of the Unit Operator.[836] This argument misunderstands a fundamental policy of

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

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

[835] NUREG-1021, ES-303, 18.

[836] Exhibit CCS-076, 26.

simulator tests that, "[i]f [an applicant] recognize[s], but fail[s] to correct, an erroneous decision, response, answer, analysis, action, or interpretation made by the operating team or crew, the examiner may conclude that [the applicant] agree[s] with the incorrect item" and will also be held accountable.[837]

558. Additionally, Ms. Smith argues that she was ordered to monitor reactivity and, therefore, that she could not have operated the handswitches.[838] She states that "to the extent possible [she] did assist the [Unit Operator] and [CRS] by monitoring trends and updating the [CRS] on the status."[839] However, RF 3.a., requires both the "manipulat[ing]" of controls and the "locat[ing]" of controls.[840] Monitoring the reactivity of a concededly stable plant[841] is not such an all-encompassing task that Ms. Smith could not have demonstrated her ability to "locate" controls by making a recommendation to the crewmembers regarding where the sludge mixing isolation valve handswitches were located.[842] In fact, her training instructor, Mr. Tucker, would have expected Ms. Smith to speak up in just such a situation.[843]

559. Ms. Smith also states that the almost twenty-minutes delay was not due to the crew's lack of knowledge of the location of the handswitches, as recorded by the examiners, but due to finding the correct procedure, as supported by the testimony of the CRS, James Newton Turner.[844] The Board should resolve this factual disagreement in favor of the Staff because all three examiners contemporaneously noted in their post-scenario caucus that the delay was due

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[837] NUREG-1021, Appendix E, 5.

[838] Exhibit CCS-076, 26.

[839] *Id*.

[840] NUREG-1021, ES-303, 18.

[841] Tr. at 323-24.

[842] Tr. at 304-305; *see* Exhibit NRC-002, 41.

[843] Tr. at 304.

[844] Exhibits CCS-076, 26, CCS-040, 3.

to the ignorance of the crewmembers to the existence of the control room handswitches,[845] while only one applicant, after weeks of not thinking about the event, testified to the contrary.[846] Also, the Staff testimony demonstrates that, had the crew known of the existence and location of the handswitches, the event would not have taken twenty minutes to resolve.[847]

560. Ms. Smith also argues that, because her performance deficiency was not accounted for on the Forms ES-D-1 or ES-D-2, the Staff was prevented from assessing this performance deficiency against her in the first place.[848] As explained in detail in Section II.M *infra*, this argument fails because, despite Ms. Smith's assertions to the contrary, Forms ES-D-1 and ES-D-2 do not limit examiner discretion to identify performance deficiencies whenever they occur. Rather, Forms ES-D-1 and ES-D-2 provide for the examiner's reference a script of only the "required operator actions" that must be performed for the successful completion of an event and not a listing of all of the possible performance deficiencies that the examiners may choose from when administering a specific event.[849] Any action, or inaction, may be a performance deficiency if it demonstrates a weakness of the applicant with respect to the minimum knowledge and understanding required to safely operate the facility, not just those actions discussed on the Forms ES-D-1 and ES-D-2.[850]

561. Ms. Smith faults the examiners for assessing a performance deficiency without first asking follow-up questions.[851] She argues that this lack of follow-up questioning supports her theory that this performance deficiency was "added later to increase the number of

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[845] Exhibit NRC-002, 42-43.

[846] Exhibit CCS-040, 3.

[847] *See* Exhibit NRC-002, 41-42.

[848] Exhibit CCS-076, 27. *See also* such arguments in Ms. Smith's Statements of Position 7 and 10.

[849] NUREG-1021, ES-301, 18.

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

[851] Exhibit CCS-076, 28.

comments."[852] However, the examiners did not ask follow-up questions regarding this situation because, during the post-scenario caucus, they determined that enough evidence already existed to determine that the error was required to be placed in RF 3.a. due to the applicants displaying weakness with locating the handswitches.[853] This determination was based on the applicants discussing the valves' auto close feature and being informed by the field operator that the leak location was downstream of the sludge mixing isolation valves, but never discussing or going to the location of the sludge mixing isolation valve handswitches in the control room.[854] Since the applicants' actions demonstrated that none of them initially knew the location of the handswitches, the examiners determined that there was no need for follow-up questioning.[855] Furthermore, once the CRS finally determined the location of the handswitches, all of the crewmembers learned where they were located and so after-the-fact questioning would not have been effectual in determining the level of knowledge that existed beforehand.[856]

562. Finally, Ms. Smith cannot support her assertion that this performance deficiency was assigned to her "later to increase the number of comments" because it was assigned contemporaneously to all the members of her crew and to the members of other crews that demonstrated a similar weakness.[857] Also, this weakness was discussed with the licensee facility right after the administration of the simulator tests.[858]

563. Mr. Lea's arguments that the assessment of this performance deficiency was unjustified are fully rebutted in Exhibit NRC-059, pages 11 through 14. Mr. Lea did not

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[852] *Id*.

[853] Exhibit NRC-002, 41-42.

[854] *Id*.

[855] *Id*.

[856] *Id*.

[857] Exhibit CCS-076, 28.

[858] Exhibit NRC-023, 3.

participate in Ms. Smith's simulator test and, therefore, has no first-hand knowledge of her performance during the simulator test.[859] Thus, Mr. Lea's expert opinions should be afforded less weight than the expert opinions of those examiners that actually observed Ms. Smith during her simulator test and evaluated her based on these first-hand observations.

564. For these reasons, Ms. Smith has not proven that the Region II examiners acted arbitrarily or abused their discretion in identifying a performance deficiency related to her failure to locate the sludge mixing isolation valve handswitches in a timely manner when it appeared that her crew was searching for them and when informing her crew of their location would not have distracted Ms. Smith from her duties as OATC to monitor the plant, which was stable at the time. Therefore, this Board should resolve Ms. Smith's Statement of Position 6 in favor of the Staff.

J. Statement of Position 7: The Staff's Downgrading of Ms. Smith for her Misdiagnosis that the Standby EHC Pump Auto-Start Feature was Malfunctioning was Not an Abuse of Discretion

565. Based on the proposed findings of fact clearly and concisely set forth in Section I.J., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[860] or "arbitrary or an abuse of . . . discretion."[861]

566. Ms. Smith was assessed an RF 1.b. performance deficiency for failing to determine EHC system pressure and yet concluding that the automatic start mechanism of EHC Pump B was malfunctioning.

567. Ms. Smith concedes that, after she had directed the UO to manually start the

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[859] Exhibit NRC-025, 2.

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

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

standby pump, she had requested that "[clearance and tagging] look at the EHC pump because it should have automatically started."[862] Reaching this conclusion that EHC Pump B "should have automatically started" without determining whether pressure had decreased to 1400 psig is exactly why Ms. Smith was assessed a performance deficiency.

568. Ms. Smith argues that she should not have been assessed a performance deficiency because she interprets the testing outline Forms ES-D-1 and ES-D-2[863] to mean that all that was required of her was to manually start EHC Pump B before the turbine would trip at 1100 psig and that, since she did this, she should not be assessed any errors related to the event.[864]

569. As explained in detail in the Section II.M *infra*, this argument fails because it relies upon a misunderstanding of the purpose of Forms ES-D-1 and ES-D-2. These forms provide a script of all of the required applicant actions; they do not presume to include, and thus limit, the entire universe of applicant mistakes that may be made in the process of attempting to perform these required actions.[865] Thus, in actuality, every error assessed by an examiner will not be on a Form ES-D-1 or ES-D-2, because these forms only include required operator actions, which are, by definition, not errors.[866]

570. Ms. Smith also argues that she should not have been assessed a performance deficiency because the Staff cannot prove that EHC system pressure was greater than 1400 psig when she manually started EHC Pump B.[867] Additionally, Ms. Smith asserts that the

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[862] Exhibit CCS-076, 30.

[863] *See* Exhibit CCS-043, 5, 27.

[864] Exhibit CCS-076, 29-31 (Ms. Smith argues that, whether she misdiagnosed that the pressure had dropped below 1400 psig is a moot point because the objective of starting EHC Pump B in order to prevent a turbine trip was accomplished).

[865] *See* NUREG-1021, ES-301, 18.

[866] *Id*.

[867] Exhibit CCS-076, 29-32.

examiners could not have known EHC system pressure at this time because they were too far from the appropriate gauge to read it.[868]

571. This argument fails because it is Ms. Smith that bears the burden of proving that the system pressure was less than 1400 psig in order to demonstrate that the Staff's assessment of her performance deficiency was arbitrary.

572. Ms. Smith does not satisfy this burden of proof because nowhere does she provide evidence that EHC system pressure was less than 1400 psig at the time of her order to start the standby pump. Rather, Ms. Smith faults the examiners for not recording sufficient "numbers or values" and for not having "proof" or "data" that Ms. Smith's version of events is incorrect.[869] This is *per se* insufficient evidence.

573. Instead, the evidence on the record tends to prove that EHC system pressure was greater than 1400 psig at the time that Ms. Smith manually started EHC Pump B and, thus, that the assessment of her performance deficiency was not arbitrary.

574. During the preparation week when the examiners evaluated all of the dynamic simulator material in the Vogtle simulator, an evaluation took place specifically on the time required for EHC system pressure to decrease to the point where ALB20-D05, HYD FLUID LO PRESS, would alarm at 1500 psig following the EHC Pump A trip.[870] The Form ES-D-2 states that it would take "several minutes" for ALB20-D05 to alarm.[871] During the preparation week, the examiners ran this event without starting the standby EHC pump so that they could ensure the accuracy of this statement.[872] Their tests verified that this statement was correct.[873] Since it

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[868] *Id*. at 29.

[869] *Id*. at 31.

[870] Exhibit NRC-002, 20.

[871] Exhibit CCS-048, 28.

[872] Exhibit NRC-002, 21.

[873] *Id*.

takes “several minutes” for ALB20-D05 to alarm at 1500 psig, it must, necessarily, take a time greater than several minutes for system pressure to decrease further to the standby pump automatic start setpoint of 1400 psig.

575. Furthermore, during the event, as directed by the script provided in Form ES-D-2, the examiners were indeed monitoring ALB20-D05, which they could easily observe from anywhere within the Main Control Room.[874] As reflected in all of the examiners’ notes, ALB20-D05 did not alarm before Ms. Smith directed the start of the standby EHC pump.[875] Since ALB20-D05 did not alarm and since its setpoint is 1500 psig, it follows that EHC system pressure could not have been as low as 1400 psig at the time that Ms. Smith manually started EHC Pump B in order to allow for an accurate diagnosis of the EHC Pump B automatic start mechanism.

576. Since the ALB20-D05 did not alarm, and since only one minute and 31 seconds had elapsed, it is impossible that Ms. Smith gave the order to start the standby EHC pump after the automatic start setpoint of 1400 psig was reached.

577. The testimony of Mr. Waltower states that, “[w]hile [Ms. Smith] was reviewing the procedure I did observe the annunciator [setpoint of 1500 psig] for the EHC pressure illuminate.”[876]

578. The evidence of the contemporaneous examiner notes and the testimony of the examiners contradicts this. Furthermore, even if this were true, it would only be evidence to support the fact that EHC system pressure may have decreased to 1500 psig. It is not evidence of the outcome determinative issue, which is whether EHC system pressure decreased to 1400 psig.

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[874] *Id*.

[875] *Id*.

[876] *Id*.

579. Mr. Lea's separate arguments that the assessment of this performance deficiency was unjustified are fully rebutted in Exhibit NRC-059, pages three through seven. Mr. Lea did not participate in Ms. Smith's simulator test and, therefore, has no first-hand knowledge of her performance during the simulator test.[877] Thus, Mr. Lea's expert opinions should be afforded less weight than the expert opinions of those examiners that actually observed Ms. Smith during her simulator test and evaluated her based on these first-hand observations.

580. For these reasons, Ms. Smith has not proven that the Region II examiners acted arbitrarily or abused their discretion by assessing an RF 1.b. performance deficiency for Ms. Smith's failure to observe EHC system pressure before diagnosing that the automatic start feature of EHC Pump B was malfunctioning. Therefore, this Board should resolve Ms. Smith's Statement of Position 7 in favor of the Staff.

K. Statement of Position 8: The Staff's Downgrading of Ms. Smith for her Misdiagnosis that Control Rods Should be Automatically Inserting was Not an Abuse of Discretion

581. Based on the proposed findings of fact clearly and concisely set forth in Section I.K., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[878] or "arbitrary or an abuse of . . . discretion."[879]

582. Ms. Smith was assessed an RF 1.d. performance deficiency by both Region II and the informal review panel for improperly diagnosing that control rods should have been automatically inserting based on the control room indications of Tave and Tref.

583. Ms. Smith admits that her actions constituted a performance deficiency but

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[877] Exhibit NRC-025, 2.

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

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

disagrees with the assignment of the performance deficiency to RF 1.d.[880] She argues that the performance deficiency would be better assigned to RF 1.b., RF 5.d., or RF 2.c.[881]

584. RF 1.d. states, "[d]id the applicant correctly INTERPRET/DIAGNOSE plant conditions based on control room indications?"[882]

585. RF 1.b. states, "[d]id the applicant ensure the collection of CORRECT, ACCURATE, and COMPLETE information and reference material on which to base diagnoses?"[883]

586. RF 5.d. states, "[d]id the applicant ensure that CORRECT AND TIMELY ACTIVITIES (including diagnosis, procedural implementation, and control board operations) were carried out BY THE CREW?[884]

587. RF 2.c. states, "[d]id the applicant USE PROCEDURES CORRECTLY, including following procedural steps in correct sequence, abiding by procedural cautions and limitations, selecting correct paths on decisions blocks, and correctly transitioning between procedures?"[885]

588. This argument fails because, first of all, Ms. Smith is an operator license applicant and has no experience or qualification to interpose her personal, non-expert opinion of how performance deficiencies should be assigned to RFs over the expert opinions, developed through years of training and experience, of the three Region II examiners, one Region I Branch Chief, one Region IV examiner, and one IOLB member who all agreed that this particular performance deficiency should be assigned to RF 1.d.

589. Second, this argument fails because Ms. Smith does not prove that the

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[880] Exhibit CCS-076, 33.

[881] *Id*. at 33-36.

[882] NUREG-1021, ES-303, 17.

[883] *Id*.

[884] *Id*. at 19.

[885] *Id*. at 17.

assignment of her performance deficiency to RF 1.d. by both Region II and the informal review panel was arbitrary or an abuse of discretion; rather, the record demonstrates that their assignment of Ms. Smith's performance deficiency to RF 1.d. was appropriate and justified.

590. Ms. Smith's specifically identified performance deficiency was her "incorrect[] direct[ion] [that]control rods be placed in manual and . . . insert[ed] when Tave was lower than Tref, which resulted in the TAVE/TREF DEVIATION alarm."[886] This error in directing the manual insertion of control rods was the direct result of Ms. Smith's incorrect interpretation/diagnosis that control rods were not automatically inserting, but should be automatically inserting based on the measurements of Tave and Tref that were being monitored in the control room.[887] Therefore RF 1.d. is an appropriate RF.

591. It is true that, contrary to RF 1.b., Ms. Smith also did not ensure the collection of "complete information" on which to base this incorrect diagnosis because she did not use, or direct the RO to use, the installed plant instruments to independently confirm the digital temperature measurements that were being monitored for Tave and Tref.[888] However, this error is a separate performance deficiency that was not cited by Region II or the informal review panel. Attempting to prove that her actions could have been classified as two separate performance deficiencies does not satisfy Ms. Smith's burden of proof, which is to prove that the assessment of the performance deficiency to RF 1.d. was an abuse of discretion.

592. Ms. Smith's incorrect direction to manually insert control rods was not caused, contrary to RF 5.d., by her failure to ensure "correct and timely activities . . . by the crew."[889] Ms. Smith concedes that she personally viewed the measurements of Tave and Tref and came

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[886] Exhibits CCS-045, 16; CCS-037, 35.

[887] *Id*.

[888] Exhibit NRC-002, 33-34.

[889] NUREG-1021, ES-303, 19.

to the conclusion that the control rods should be automatically inserting.[890] Despite this fact that she had reached an independent diagnosis of the situation, Ms. Smith argues that it was the RO's job, not hers, to diagnose whether the control rods were properly inserting and, thus, that RF 5.d. was the correct assessment of her error.[891] This argument illustrates that Ms. Smith misunderstands her duties as an SRO applicant. NUREG-1021 states that, "SRO applicants, whether upgrade or instant, will be examined for the highest on-shift position for which the SRO's license is applicable (e.g., shift supervisor), regardless of the position to be assigned when licensed"; therefore, "SRO applicants should demonstrate their supervisory abilities and an attitude of responsibility for safe operation, and are expected to assume a management role during plant transients and upset conditions while taking the simulator operating test."[892] Thus, Ms. Smith cannot place the blame for an incorrect diagnosis wholly on the RO and assign to herself, the RO's supervisor on the crew and an SRO applicant, only an RF 5.d. error for, as she puts it, "incorrectly verifying the information provided."[893] Furthermore, Ms. Smith may be held accountable for the errors conducted by her fellow crew members because, according to the instructions given to all applicants before taking the simulator test, "[i]f you recognize, but fail to correct, an erroneous decision, response, answer, analysis, action, or interpretation made by the operating team or crew, the examiner may conclude that you agree with the incorrect item."[894] Therefore, this argument does not prove that the assessment of this performance deficiency to RF 1.d. was an abuse of discretion.

593. Ms. Smith's incorrect direction to manually insert control rods was also not an RF

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[890] Exhibit CCS-076, 33-34 (Ms. Smith "quickly looked at the two [temperature measurements] and verified that they did [differ by] greater than 1.5F . . . and directed the RO to insert rods manually.").

[891] *Id*. at 34-35.

[892] NUREG-1021, ES-301, 7.

[893] Exhibit CCS-076, 35.

[894] NUREG-1021, Appendix E, 5.

2.c. failure to "use procedures correctly."[895] Ms. Smith did use the procedure correctly. Procedure 18013-C, "Rapid Power Reduction," directs the operator to diagnose whether "rods [are] inserting as required."[896] Ms. Smith performed this diagnosis by observing whether control rods were inserting and then looking at the temperature difference between the indications of Tave and Tref. Ms. Smith did not skip this step or mis-read this step, rather, she incorrectly performed the diagnosis directed by this step, which, again, is an RF 1.d. error.[897]

594. Ms. Smith argues that her performance deficiency should be treated the same as a performance deficiency by Operator R, which was assigned to RF 2.c.[898] However, Operator R's performance deficiency is not analogous to Ms. Smith's performance deficiency. Operator R's performance deficiency was that he followed a procedural step that was not applicable to his situation.[899] Specifically, Operator R briefed that step 4.1.15 of UOP 12004-C would be followed, but this was incorrect because this step is only valid for conditions before the turbine is placed in service and synchronized, and in this case the turbine was already placed in service and synchronized.[900] Ms. Smith did not follow an inapplicable procedural step, she followed the correct step, but simply improperly executed the diagnosis directed by that step. Therefore, Operator R's situation is not proof that the assignment of Ms. Smith's performance deficiency to RF 1.d. was an abuse of discretion.

595. Finally, even if Ms. Smith's incorrect direction to manually insert control rods could be assigned to RFs other than RF 1.d., this does not mean that the Staff's RF 1.d. assessment was arbitrary or an abuse of discretion. First, as explained above, Ms. Smith's

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[895] NUREG-1021, ES-303, 17.

[896] Exhibit CCS-051, 4.

[897] NUREG-1021, ES-303, 17.

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

[899] Exhibit NRC-002, 34.

[900] *Id*.

performance deficiency does satisfy the description of RF 1.d. Second, there is no requirement that a single performance deficiency be assigned to only one RF; rather, NUREG-1021 explicitly states that a performance deficiency may be assigned to more than one RF.[901] Therefore, Ms. Smith's argument that her performance deficiency could have also been assigned to RFs 1.b., 5.d., or 2.c., does not support her claim that an RF 1.d. assignment of her performance deficiency was arbitrary or an abuse of discretion.

596. For these reasons, Ms. Smith has not proven that both the Region II examiners and the informal review panel acted arbitrarily or abused their discretion in identifying an RF 1.d. performance deficiency related to her improper diagnosis that control rods should have been automatically inserting. Therefore, this Board should resolve Ms. Smith's Statement of Position 8 in favor of the Staff.

L. Statement of Position 9: The Staff's Downgrading of Ms. Smith for her Improper Manual Control of the Normally Automatic Functions of 1TIC-0130 was Not an Abuse of Discretion

597. Based on the proposed findings of fact clearly and concisely set forth in Section I.L., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[902] or "arbitrary or an abuse of . . . discretion."[903]

598. Ms. Smith was assessed an RF 3.c. performance deficiency by both the Region II examiners and the informal review panel for failing to demonstrate the ability to take manual control of the normally automatic functioning of the 1TIC-0130 controller and maintain Letdown Heat Exchanger temperature within band.

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[901] NUREG-1021, ES-303, 3.

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

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

599. Ms. Smith admits that she demonstrated a performance deficiency by improperly pressing the up arrow when she should have pressed the down arrow.[904] However, she disagrees with the assignment of the performance deficiency to RF 3.c. by both Region II and the informal review panel.[905] She argues that the performance deficiency would be better assigned to RF 3.a.[906]

600. This argument fails because, first of all, Ms. Smith is an operator license applicant and has no experience or qualification to interpose her personal, non-expert opinion of how performance deficiencies should be assigned to RFs over the expert opinions, developed through years of training and experience, of the three Region II examiners, one Region I Branch Chief, one Region IV examiner, and one IOLB member who all agreed that this particular performance deficiency should be assigned to RF 3.c.

601. Second, this argument fails because Ms. Smith does not prove that the assignment of her performance deficiency to RF 3.c. by both Region II and the informal review panel was arbitrary or an abuse of discretion; rather, the record demonstrates that their assignment of Ms. Smith's performance deficiency to RF 3.c. was appropriate and justified.

602. Ms. Smith argues that her performance deficiency for improperly manipulating 1TIC-0130 should be assigned to RF 3.a. because her performance deficiency for improperly manipulating the pressurizer PORV was assigned to RF 3.a.[907] and, in her opinion, these performance deficiencies are "equivalent."[908] Ms. Smith makes this argument without any expert knowledge or any reference to the descriptions in NUREG-1021, Form ES-303-4, of the RFs at issue. However, applying the expert opinions of the Staff and the descriptions of these

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[904] Exhibit CCS-076, 37.

[905] *Id*.

[906] *Id*.

[907] Exhibit CCS-045, 19.

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

RFs to both performance deficiencies demonstrates that RF 3.a. is the appropriate RF for the pressurizer PORV error whereas RF 3.c. is the appropriate RF for the 1TIC-0130 error.

603. RF 3.a. states, "[d]id the applicant LOCATE AND MANIPULATE CONTROLS in an accurate and timely manner?"[909]

604. RF 3.c. states, "[d]id the applicant demonstrate the ability to take MANUAL CONTROL of automatic functions?"[910]

605. The distinction between these two RFs is that RF 3.c. specifically assesses an applicant's ability to control a plant parameter by manually controlling the system that normally controls that parameter in automatic, whereas RF 3.a. has to do with the general accuracy and timeliness of all other control manipulations.[911]

606. Letdown Heat Exchanger outlet temperature is a plant parameter that is normally controlled by the automatic operation of the 1TIC-0130 controller, which throttles TV-0130, as appropriate, to maintain outlet temperature within an established program band.[912] However, in scenario 7, event 3, the TE-0130 temperature input to this controller failed low so that, though outlet temperature was still being automatically maintained by 1TIC-0130, it was being automatically maintained to the wrong actual temperature.[913] Therefore, Ms. Smith was directed to take 1TIC-0130 out of automatic control and then maintain the outlet temperature within band by manually controlling the throttling of TV-0130.[914] This manual control of a system that is otherwise normally controlled automatically to maintain a plant parameter is typical of an RF 3.c.

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[909] NUREG-1021, ES-303, 18.

[910] *Id*.

[911] Exhibit NRC-002, 45-46.

[912] *Id*. at 46.

[913] *Id*.

[914] Exhibit CCS-045, 21.

task.[915]

607. Whereas 1TIC-0130 is a controller that, under normal conditions, maintains a plant parameter automatically, a PORV is a safety feature that only operates in abnormal/emergency situations, specifically, in order to relieve an over-pressure situation.[916] Unlike a controller such as 1TIC-0130, a pressurizer PORV is not the automatic component that controls its associated plant parameter under normal conditions, that is, the pressurizer PORV is not used to automatically control primary pressure; this is done by pressurizer heaters and spray.[917] Thus, taking manual control of pressurizer heaters and spray would be analogous to taking manual control of the Letdown Heat Exchanger outlet temperature, but closing an opened pressurizer PORV would not.[918]

608. In scenario 7, event 5, the PT-456 pressure input to the pressurizer PORV failed high resulting in the PORV perceiving that an emergency over-pressure situation existed and, thus, opening in order to relieve this perceived situation.[919] Unlike being ordered to take 1TIC-0130 out of automatic and manually control the Letdown Heat Exchanger outlet temperature, in this situation, Ms. Smith's responsibility was to immediately respond by closing the pressurizer PORV.[920] The difference between these two situations is that one involves manually manipulating a controller in order to replicate how that controller would automatically perform under normal circumstances to maintain a plant parameter, whereas the other involves a one-time overriding of an automatic safety function unrelated to the normal maintenance of a plant parameter.

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[915] Exhibit NRC-002, 46.

[916] *Id*.

[917] *Id*.

[918] *Id*.

[919] Exhibit CCS-045, 19.

[920] *Id*.

609. Therefore, Region II and the informal review panel did not act arbitrarily or abuse their discretion in assigning Ms. Smith's pressurizer PORV performance deficiency to RF 3.a. and her 1TIC-0130 performance deficiency to RF 3.c.

610. In addition to arguing that her 1TIC-0130 performance deficiency assigned to RF 3.c. by both Region II and the informal review panel should have been assigned to RF 3.a., Ms. Smith also argues that the additional assignment of this performance deficiency to RF 3.b. by the informal review panel was an abuse of discretion.[921]

611. Ms. Smith argues that this assessment of an RF 3.b. performance deficiency was an abuse of discretion because she "was not assigned to respond to the failure," and that, instead, this response was the UO's job.[922] However, Ms. Smith was not assessed the RF 3.b. error by the informal review panel because she had failed to take manual control of 1TIC-0130 in response to the failure, she was assessed this error because she did not understand that she could take manual control.[923] This is demonstrated by the fact that, instead of taking manual control or even recommending that the crew could take manual control, Ms. Smith stated that "[t]he only thing we can do is call [clearance and tagging] to get the [temperature element] fixed."[924]

612. Assigning this performance deficiency to RF 3.b. is also consistent with past NRC practice. For instance, an informal review decision from March 10, 2005, found that an RF 3.b. performance deficiency should be assessed against an operator who demonstrated a lack of understanding by not recommending that a control valve that had failed in automatic could be

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

[922] *Id*.

[923] Exhibit CCS-037, 31.

[924] *Id*.

taken to manual control.[925] Additionally, once Ms. Smith was directed to take manual control by the CRS, her actions further demonstrated that she did not understand how 1TIC-0130 operated because she purposefully pressed the up arrow when she intended to decrease outlet temperature.[926] Therefore, her argument that an RF 3.b. error was inappropriate or unjustified fails.

613. In the alternative, Ms. Smith argues that she did, in fact, understand that 1TIC-0130 could be manually controlled and did understand how it was controlled, as demonstrated by her correct answers to post-event questioning regarding the operation of 1TIC-0130.[927] However, Ms. Smith was assessed an RF 3.b. error because she did not understand the operation of 1TIC-0130 at the time that the high outlet temperature alarm first came in. After this alarm came in, and after Ms. Smith had to be ordered to take manual control of 1TIC-0130, and after Ms. Smith improperly manipulated 1TIC-0130, the CRS explained to her how 1TIC-0130 operated.[928] Therefore, even though Ms. Smith understood how 1TIC-0130 operated by the time of her post-event questioning, she had already demonstrated a lack of understanding on this subject earlier.

614. For these reasons, Ms. Smith has not proven that the Region II examiners and the informal review panel acted arbitrarily or abused their discretion in assigning her performance deficiency related to her improper manual control of the normally automatic functioning of 1TIC-0130 to RF 3.c. instead of RF 3.a. Also, Ms. Smith has not proven that the informal review panel acted arbitrarily or abused its discretion in assessing her an RF 3.b. error for demonstrating a misunderstanding of the operation of 1TIC-0130. Therefore, this Board

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

[926] Exhibit CCS-045, 21.

[927] Exhibit CCS-076, 39.

[928] Exhibit CCS-045, 21.

should resolve Ms. Smith's Statement of Position 9 in favor of the Staff.

M. Statement of Position 10: The Staff's Downgrading of Ms. Smith for her Failure to Understand the Saturation of FIC-0121 was Not an Abuse of Discretion

615. Based on the proposed findings of fact clearly and concisely set forth in Section I.M., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[929] or "arbitrary or an abuse of . . . discretion."[930]

616. Ms. Smith was assessed an RF 1.c. performance deficiency by both the Region II examiners and the informal review panel for demonstrating a failure to understand that the signal from the LIC-459 controller to the FIC-0121 controller could become saturated.

617. Ms. Smith argues that there was no performance deficiency because the Forms ES-D-1 and ES-D-2 describe that the FIC-0121 controller was supposed to be returned to automatic and thus, Ms. Smith's taking the FIC-0121 controller to automatic was consistent with the expected operator actions.[931] This argument does not satisfy Ms. Smith's burden of proving that the Staff identification of the performance deficiency was inappropriate or unjustified.

618. First, Ms. Smith was not downgraded for her action of taking the FIC-0121 controller to automatic, she was downgraded because this action, in combination with her answer to post-scenario follow-up questioning, demonstrated that she did not understand how FIC-0121 operated, specifically, she did not understand that the signal from the LIC-459 controller to the FIC-0121 controller could become saturated as a result of pressurizer level

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

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

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

being above program level for an extended amount of time.[932]

619. Second, whether a particular applicant action is included in Forms ES-D-1 or ES-D-2 does not dictate whether that action can be identified as a performance deficiency. On the contrary, NUREG-1021 explicitly states that Forms ES-D-1 and ES-D-2 only provide a listing of the required correct applicant actions; they do not provide an exhaustive listing of the universe of possible incorrect applicant actions.[933] Therefore, just because Ms. Smith's incorrect action of taking FIC-0121 to automatic while it was receiving a saturated signal is not listed in Forms ES-D-1 or ES-D-2 does not mean that it is not a performance deficiency, as Ms. Smith argues. Rather, examiners are required to record "any and all" potential performance deficiencies on the operating test.[934] The only ones of these potential performance deficiencies that cannot later be used for grading purposes are those that the applicant made in response to parts of the planned operating test that were substituted or replaced after the development of the final Forms ES-D-1 and ES-D-2 because those previously planned portions were determined to be invalid or impossible to perform or simulate.[935] There were no such substitutions of the planned parts of Ms. Smith's simulator scenarios with unplanned parts.[936] Therefore, all of the identified performance deficiencies from Ms. Smith's simulator test may be used to determine her competency grades and Ms. Smith's arguments that Forms ES-D-1 and ES-D-2 control which performance deficiencies may be identified are not persuasive.[937]

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[932] Exhibits CCS-045, 14, CCS-037, 19-20.

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

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

[935] *Id*.

[936] Exhibit NRC-002, 22.

[937] *See also* such arguments in Ms. Smith's Statements of Position 6 and 7.

620. Ms. Smith also argues that the Staff improperly inserted an error in the simulation while she was still coping with the error related to the FIC-0121 controller.[938]

621. First, this argument is non-responsive because Ms. Smith does not explain how this alleged Staff action was causally related to any downgrading of her simulator test. Ms. Smith was downgraded because of her answer after the scenario that demonstrated that she did not understand the concept of saturation.[939] This answer was not caused by any sort of stress that Ms. Smith may have been subjected to due to allegedly overlapping events; it merely demonstrated an underlying understanding deficiency.

622. Second, despite Ms. Smith's claim to the contrary, the Staff did not insert a new failure while a previous failure was still being addressed. The plant was stable when the examiners called for the next event to be triggered because FIC-0121 was being controlled satisfactorily in manual.[940] It was only once the next event was triggered with the insertion of the failure of PT-508 that Ms. Smith then directed that FIC-0121 be returned to auto instead of prudently realizing that FIC-0121 was being satisfactorily controlled in manual and attending to the more pressing issue of the PT-508 failure.[941] Thus, by returned FIC-121 to auto at this moment, Ms. Smith demonstrated both a lack of understanding of saturation and a lack of competent supervisory oversight.[942] She caused a second transient (uncontrolled loss of charging flow) to occur simultaneously with the PT-508 failure.[943] Therefore, it was Ms. Smith, not the Staff, that caused two failures to be inserted at once.

623. For these reasons, Ms. Smith has not proven that the Region II examiners and

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[938] Exhibit CCS-076, 41.

[939] Exhibit CCS-045, 14.

[940] Exhibit NRC-002, 31.

[941] *Id*.

[942] This is why the informal review panel also assigned her performance deficiency to RF 5.b. as well as RF 1.c. Exhibit CCS-037, 19-20.

[943] Exhibit CCS-037, 20.

the informal review panel acted arbitrarily or abused their discretion in finding that she did not understand that the signal from the LIC-459 controller to the FIC-0121 controller could become saturated and assigning this performance deficiency to RF 1.c. Therefore, this Board should resolve Ms. Smith's Statement of Position 10 in favor of the Staff.

N. Statement of Position 11: The Staff's Downgrading of Ms. Smith for her Failure to take Pressurizer Heaters to Automatic was Not an Abuse of Discretion

624. Based on the proposed findings of fact clearly and concisely set forth in Section I.N., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[944] or "arbitrary or an abuse of . . . discretion."[945]

625. Ms. Smith was assessed an RF 1.c. performance deficiency by both the Region II examiners and the informal review panel for mistakenly thinking that heaters should not be taken to automatic in order to prevent pressure from exceeding the control band.[946]

626. Ms. Smith argues that this performance deficiency was inappropriate or unjustified because she did understand the pressurizer pressure system.[947] She states that she "did not at any time [incorrectly] believe that the Pressurizer Pressure system was not operating properly."[948] However, this unsubstantiated assertion is directly contradicted by the record developed by the examiners.[949] At 11:07:00, Ms. Smith directed the OATC to select an

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

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

[946] Exhibits CCS-045, 12, CCS-037, 16, CCS-043, 82 (Ms. Smith was uncomfortable taking heaters to auto because the plant was "high in the [pressure] band.").

[947] Exhibit CCS-076, 44.

[948] *Id*.

[949] Exhibit CCS-043, 78.

unaffected pressure instrument in accordance with 18001-C, Step C7.[950] In doing so, the failed pressure instrument was removed from the control circuit and the pressurizer pressure system was again functioning normally.[951] However, instead of returning the pressurizer heaters to automatic as would be directed by one who understood that the pressurizer pressure system was functioning normally, Ms. Smith decided to wait and explicitly stated that, "I do not think heaters are operating properly . . . taking heaters back to auto may not be what we want."[952]

627. Ms. Smith also argues that her delay in taking pressurizer heaters to automatic itself demonstrates that she understood the operation of the pressurizer pressure system.[953] She states that such a delay was desired because she was "tak[ing] into consideration that because of the high level from the Pressurizer Level system, heaters would come on if they were taken to automatic" and this would "cause a rapid increase in pressure" that would "caus[e] the Pressurizer Pressure to exceed the procedural band of 2220 – 2250 psig."[954]

628. However, as explained in Section I.N. *supra*, this argument is factually incorrect. Ms. Smith argues that pressure could not be maintained under 2250 psig with heaters energized, but this misunderstands the design of the pressurizer pressure system in which cooler water sprays, which serve to decrease pressure, will always overpower the effects of the heaters, which serve to increase pressure.[955] Therefore, even with all heaters energized, the operators could control pressure less than 2250 psig. Ms. Smith also argues that heaters should not be energized until pressurizer level is less than 5% above program level.[956]

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[950] *Id*. at 23.

[951] Exhibit NRC-002, 26-27.

[952] Exhibit CCS-043, 78.

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

[954] *Id*.

[955] Exhibit NRC-002, 29.

[956] Exhibit CCS-076, 44.

However, this too is factually incorrect. Pressurizer heaters are specifically designed to energize when pressurizer level is 5% above program level in order to ensure that water insurge into the pressurizer will be maintained under saturation conditions.[957]

629. Therefore, Ms. Smith was not downgraded for "tak[ing] into consideration" the consequences of taking the pressurizer heaters to automatic, as she alleges,[958] but for incorrectly understanding those consequences, which is an RF 1.c. error.[959]

630. Finally, Ms. Smith argues that the assessment of this performance deficiency was not consistent with the assessment of performance deficiencies for other applicants.[960] Specifically, she identifies that "Operator V" was not downgraded for leaving the TV-129 handswitch in the "divert" position instead of returning it to the "demin" position.[961]

631. This example is not analogous to Ms. Smith's performance because Operator V did not demonstrate any misunderstanding of the demineralizer system.[962] Rather, Operator V consciously kept the demineralizers bypassed for the valid reason of waiting until chemistry personnel could evaluate placing the demineralizers back in service.[963] Ms. Smith, on the other hand, did not understand that keeping the pressurizer heaters in manual did not serve any valid purpose.

632. For these reasons, Ms. Smith has not proven that the Region II examiners and the informal review panel acted arbitrarily or abused their discretion in assigning her an RF 1.c. performance deficiency for not understanding the operation of the pressurizer pressure system.

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[957] Exhibit NRC-002, 29.

[958] Exhibit CCS-076, 45.

[959] *See* NUREG-1021, ES-303, 17.

[960] Exhibit CCS-076, 45.

[961] *Id*.

[962] Exhibit NRC-002, 28.

[963] *Id*.

Therefore, this Board should resolve Ms. Smith's Statement of Position 11 in favor of the Staff.

O. Statement of Position 12: The Staff's Downgrading of Ms. Smith for her Failure to Properly Manipulate the Pressurizer PORV Handswitch was Not an Abuse of Discretion

633. Based on the proposed findings of fact clearly and concisely set forth in Section I.O., *supra*, the Board should find, as a matter of law, that Ms. Smith has not satisfied her burden of proving that the contested Staff grading was "inappropriate or unjustified"[964] or "arbitrary or an abuse of . . . discretion."[965]

634. Ms. Smith was assessed an RF 3.a. performance deficiency by both the Region II examiners and the informal review panel for intending to close the PORV but improperly manipulating the PORV handswitch in the open direction instead of in the close direction.

635. Ms. Smith concedes that she demonstrated a performance deficiency by taking the PORV handswitch to the wrong direction.[966]

636. However, she argues that this performance deficiency should not have been assessed as being a critical task because (1) the Staff did not demonstrate how the response to the failed-open PORV was a critical task and (2) the response to the failed-open PORV could not be considered to be a critical task because it was not listed as a critical task on the Form ES-D-1 and ES-D-2.[967]

637. Ms. Smith's argument that the failed-open PORV could not be considered a critical task because the Staff has not shown how the critical task criteria of Appendix D were met is legally insufficient. Ms. Smith bears the burden of proving that the failed-open PORV was not a critical task in order to demonstrate that the Staff grading was arbitrary. She cannot

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

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

[966] Exhibit CCS-076, 46.

[967] *Id*. at 46-47.

satisfy this burden of proof or shift it to the Staff simply by stating that the Staff's explanation at Exhibit CCS-037, pages 37 to 38, was insufficient.

638. Regardless of this procedural error, Ms. Smith's argument also fails on the merits because the record demonstrates that the failed-open PORV event satisfies all of the Appendix D criteria.

639. A critical task is defined as a task that has four elements: safety significance, cueing, measurable performance indicators, and performance feedback.[968]

640. "Safety significance" means that the task must be "essential to safety."[969] A task is essential to safety if "its improper performance or omission by an operator will result in direct adverse consequences or significant degradation in the mitigative capability of the plant."[970] Such adverse consequences include the "degradation of any barrier to fission product release."[971] A critical task may involve the crew responding to "prevent inappropriate actions that create a challenge to plant safety."[972]

641. "Cueing" means that an external stimulus must prompt at least one operator to perform the critical task.[973] The cue is not required to identify that the task to be performed is a critical task.[974] Appropriate cues include, "indication of a system or a component malfunction . . . by meters or alarming devices."[975]

642. "Measurable performance indicators" means "positive actions that an observer

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[968] NUREG-1021, Appendix D at 13-14.

[969] *Id*. at 13.

[970] *Id*.

[971] *Id*.

[972] *Id*.

[973] *Id*. at 14.

[974] *Id*.

[975] *Id*.

can objectively identify taken by at least one member of the crew."[976] Measurable performance indicators include such things as "control manipulations"[977] but not more difficult to identify qualities such as "understanding."[978]

643. "Performance feedback" means that at least one crewmember must be provided with information about the effect of the crew's actions on inaction on the critical task.[979]

644. This Board should find that the record demonstrates that responding to a failed-open pressurizer PORV is a critical task because it has all four of these elements.

645. First, responding to a failed-open pressurizer PORV has safety significance because this response is essential to safety in that its improper performance will result in direct adverse consequences or significant degradation in the mitigative capability of the plant. Specifically, not closing a failed-open pressurizer PORV creates a challenge to plant safety because the failed-open pressurizer PORV, accompanied by its associated block valve also failing open, creates a path for coolant to leave the primary system to the pressure relief tank, which constitutes a fission product barrier breach and a loss of coolant accident.[980] If allowed to continue, this would require an automatic reactor trip and safety injection to mitigate.[981] Otherwise, this loss of coolant accident would result in the uncovering of the core, core meltdown, and fission product release.[982]

646. Second, this event was appropriately cued because Ms. Smith was able to

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[976] *Id*.

[977] *Id*.

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

[979] *Id*. at 15.

[980] Tr. at 245-46. The PORV defines the boundary of the reactor coolant system; therefore, regardless of the existence of the pressure relief tank, a fission product barrier breach and a loss of coolant accident exists whenever the PORV and its associate block valve are open and not just when they are open long enough for the pressure relief tank to rupture.

[981] *Id*.; Exhibit NRC-004, 13-14.

[982] Exhibit NRC-004, 13-14.

determine from plant indications that the pressurizer PORV had opened.[983] Ms. Smith also concedes that the event did not lack proper cueing.[984]

647. Third, this event involved measurable performance indicators because the operator response involved the control manipulation of closing the pressurizer PORV, which an observer could, and did, objectively identify.[985] Ms. Smith states that, "I do believe that the measurable performance indicators were not identified";[986] however, the ES-D-2 for scenario 7 clearly identified that the OATC is expected to "[c]lose affected [pressurizer] PORV."[987]

648. Fourth, this event involved performance feedback because plant indications provided the crew with information about the effect of the closing of the pressurizer PORV. Specifically, after closing the PORV, pressurizer pressure stopped decreasing.[988] Ms. Smith concedes that "feedback occurred."[989]

649. Therefore, the required operator response to a failed-open pressurizer PORV satisfies the NUREG-1021 definition of a critical task.[990]

650. Ms. Smith's second argument is that closing the failed-open pressurizer PORV cannot be a critical task because it was not identified as a critical task on Forms ES-D-1 and ES-D-2.

651. It is true that all required operator actions should be documented and all critical

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[983] Exhibit CCS-047, 76.

[984] Tr. at 236.

[985] *See* Exhibit CCS-047, 76.

[986] Tr. at 236.

[987] Exhibit CCS-047, 26.

[988] Exhibit NRC-002, 40.

[989] Tr. at 237.

[990] This determination is supported by the fact that Forms ES-D-1 and ES-D-2 for other simulator tests have labeled failed-open pressurizer PORV events as critical task. *See, e.g.,* Exhibit NRC-024, 3, 16.

tasks should be identified on a Form ES-D-2.[991]

652. However, the purpose of this documentation is not for the benefit of the applicant or to make a final listing of what is a performance deficiency and what is a critical task, but as an aid for the examiner in administering and later grading the simulator test. This is supported by the fact that NUREG-1021 states that critical tasks "help the examiner to focus on those tasks that have a significant impact on the safety of the plant or the public"[992] and states that critical tasks are labeled to "make[] them apparent to the individuals who will be administering the operating test."[993] This is further supported by the fact that Forms ES-D-1 and ES-D-2 are generally only used by the NRC and the licensee facility and an applicant only ever sees these forms after their operator license application has been denied.[994] Finally, OLMC-500 explicitly recognizes that an informal review can analyze after-the-fact whether an operator action was critical.[995] Therefore, the record demonstrates that the purpose for labeling critical tasks is to assist examiners and not to determine once and for all whether a required operator action is critical.

653. Furthermore, if the determination of whether a required operator action was a critical task simply boiled down to whether it was labeled as such instead of whether it satisfied the four requirements of Appendix D, as Ms. Smith asserts, then this would lead to inequitable and inconsistent grading determinations. For instance, if a critical task was labeled as such on some Forms ES-D-1 and ES-D-2 but was not labeled as such on others, then the grading of these operating tests would differ just because of the differences in these forms and not because of the substantive difference of their scenarios. Similarly, if a required operator action

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[991] NUREG-1021, ES-301, 18.

[992] NUREG-1021, Appendix D, 12 (emphasis added).

[993] NUREG-1021, Appendix D, 3 (emphasis added).

[994] *See* Exhibit NRC-002, 5.

[995] OLMC-500, 9.

was accidentally labeled as a critical task, and an applicant demonstrated performance deficiencies related to this action, then the RF to which the deficiency was assigned would have to be scored as a "1" even if a later argument was made that the action was not critical according to Appendix D.

654. Thus, although Region II erred in not labeling the required operator actions related to the failed-open pressurizer PORV as critical tasks, this error does not somehow make it so that these actions are not in actuality critical tasks.

655. For these reasons, Ms. Smith has not proven that the Region II examiners and the informal review panel acted arbitrarily or abused their discretion in assigning her an RF 3.a. performance deficiency for intending to close the pressurizer PORV but improperly manipulating the PORV handswitch in the open direction instead of in the close direction. Furthermore, Ms. Smith has not proven that the informal review panel acted arbitrarily or abused its discretion in determining that this performance deficiency was related to a critical task. Therefore, this Board should resolve Ms. Smith's Statement of Position 12 in favor of the Staff.

P. Non-Contested Performance Deficiencies

656. Based on the proposed findings of fact clearly and concisely set forth in Section I.P., *supra*, the Board should find, as a matter of law, that, since Ms. Smith has not contested the listed performance deficiencies, they are considered to be admitted as against Ms. Smith and their assessment is not at issue in this proceeding.

657. Furthermore, even if the assessment of these performance deficiencies was at issue in this proceeding, Ms. Smith has not provided any evidence on the record to prove that their assessment by the Staff was "inappropriate or unjustified"[996] or "arbitrary or an abuse of . . .

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

discretion."[997]

658. Therefore, Ms. Smith cannot satisfy her burden of proof with respect to the assessment of these performance deficiencies and, thus, this Board cannot overturn the assessment of these performance deficiencies.

Q. The Region II and Informal Review Panel Simulator Grade Sheets both Indicate that Ms. Smith Failed the Simulator Test

659. Based on the proposed findings of fact clearly and concisely set forth in Sections I.A. through 1.P., *supra*, the Board should find, as a matter of law, (1) that Ms. Smith did not prove by the requisite "clear evidence" that the Staff improperly discharged its duties in developing the simulator grade sheets provided in Section I.Q. and (2) that Ms. Smith did not prove that any of the individual performance deficiencies included in these simulator grade sheets was "inappropriate or unjustified"[998] or "arbitrary or an abuse of . . . discretion."[999]

660. Therefore, the Board should conclude that Ms. Smith has not satisfied her burden of proving that both the Region II and the informal review panel grading of 2012 simulator test was improper.

661. As a result, since both of these simulator grade sheets represent failing scores, the Board should conclude that Ms. Smith failed her 2012 simulator test and, thus, that her 2012 SRO license application was properly denied.

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

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

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

CONCLUSION

The record does not contain clear evidence that the Staff, acting in its official capacity, did not properly discharge its duties by not processing the waiver request included in the preliminary application, but not the final application, submitted on behalf of Ms. Smith. The best evidence of record reflects that a waiver request was not in fact requested by SNC for Ms. Smith. Even if the Staff had processed such a request, the evidence on the record demonstrates that the Staff would have denied the request. Furthermore, the record does not contain evidence that proves, whether due to clearly-proven bias or otherwise, that a sufficient number of the Staff grading decisions identified in Ms. Smith's Statements of Position 4 through 12 were "inappropriate or unjustified"[1000] or "arbitrary or an abuse of . . . discretion"[1001] to change Ms. Smith's 2012 simulator test score from failing to passing. Therefore, this Board should rule in favor of the Staff in regard to Ms. Smith's claim that the Staff improperly denied her 2012 SRO license application.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 23rd day of September, 2013

[1000] *Phillippon*, LBP-99-44, 50 NRC at 358 ("[T]he dispute between Mr. Philippon and the Staff comes down to the question whether Mr. Philippon has met his burden of establishing that the Staff's scoring of his performance . . . was inappropriate or unjustified.").

[1001] *Calabrese*, LBP-97-16, 46 NRC at 89.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW dated September 23, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 23rd day of September, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 23rd day of September, 2013