

October 7, 2013

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 MOTION TO STRIKE PETITIONER'S REPLY  
TO THE NRC STAFF'S PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW OR, IN THE ALTERNATIVE, TO FILE A STAFF REPLY

INTRODUCTION

On September 29, 2013, CharliSSa C. Smith filed a reply (Reply)<sup>1</sup> to the U.S. Nuclear Regulatory Commission (NRC) staff's (Staff) September 23, 2013, proposed findings of fact and conclusions of law.<sup>2</sup> Pursuant to 10 C.F.R. § 2.323(a), the Staff files this motion requesting that the Atomic Safety and Licensing Board (Board) either (1) strike the Reply in its entirety because the Board's scheduling orders did not state that Ms. Smith could submit such a reply, (2) strike the specific portions of the Reply that constitute new proposed facts and arguments, or (3) allow the Staff to file a reply to Ms. Smith's proposed findings of fact and conclusions of law.<sup>3</sup>

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<sup>1</sup> The Petitioners [sic] Response to the NRC's Propose [sic] Findings of Fact and Conclusions of Law Regarding Statements of Position 1-12 (Sep. 29, 2013) ("Reply").

<sup>2</sup> NRC Staff Proposed Findings of Fact and Conclusions of Law (Sep. 23, 2013).

<sup>3</sup> The Petitioners [sic] Propose [sic] Findings of Fact and Conclusions of Law Regarding Statements of Position 1-12 (Sep. 21, 2013).

## BACKGROUND

This Board was established on January 4, 2013, to preside over Ms. Smith's demand for a hearing regarding the denial of her 2012 Senior Reactor Operator (SRO) license application.<sup>4</sup> On February 19, 2013, the Board granted Ms. Smith's hearing demand.<sup>5</sup> Subsequently, the Board directed Ms. Smith to file her statement of position, pre-filed testimony, and exhibits by May 1, 2013, the Staff to file its statement of position, pre-filed testimony, and exhibits by May 31, 2013, and Ms. Smith to reply within thirty days after receipt of the Staff's filing.<sup>6</sup>

On July 1, 2013, after the parties had filed in accordance with this first scheduling order, the Board promulgated a second scheduling order.<sup>7</sup> The second scheduling order confirmed the scheduling of an evidentiary hearing for July 17-18, 2013.<sup>8</sup> It also directed Ms. Smith and the Staff to simultaneously "file proposed findings of fact and conclusions of law sixty days after receipt of the transcript of [this] evidentiary hearing."<sup>9</sup> It did not state that Ms. Smith had the opportunity to reply to the Staff's proposed findings of fact and conclusions of law.

During the evidentiary hearing, Board Chairman Spritzer repeated the second scheduling order's direction regarding the filing of proposed findings of fact and conclusions of law by stating that, "30 days from transcript availability for corrections to the transcript . . . then, once that 30 days expires, another 30-day clock will start running for . . . proposed findings of fact [and] conclusions of law . . . [a]nd once we get everybody's proposed findings, we will get

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<sup>4</sup> Establishment of Atomic Safety and Licensing Board (Jan. 4, 2013).

<sup>5</sup> *Charlissa C. Smith* (Denial of Senior Reactor Operator License), LBP-13-03, 72 NRC \_\_\_, \_\_\_ (Feb. 19, 2013) (slip op. at 1).

<sup>6</sup> See Order (Memorializing March 18, 2013 Teleconference and Establishing Procedures) (Mar. 20, 2013); Order (Granting Motion for Extension of Time) (Apr. 8, 2013).

<sup>7</sup> See Order (Memorializing July 1, 2013 Prehearing Conference) (Jul. 3, 2013).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 2.

an opinion out as soon as we are able to.”<sup>10</sup> Again, there was no mention that Ms. Smith had the opportunity to reply to the Staff’s proposed findings of fact and conclusions of law.

Within 60 days after the availability of the transcript of the evidentiary hearing, both parties filed their proposed findings of fact and conclusions of law. Within five days of the Staff’s filing of its proposed findings of fact and conclusions of law, Ms. Smith filed the instant reply. The Reply states that it was submitted “[i]n accordance with 10 CFR 2.712(a)(3)” but does not indicate where in the scheduling orders the Board provided the opportunity for such a reply.<sup>11</sup>

### DISCUSSION

A review of the Board’s scheduling orders and statements demonstrates that (1) when the Board has permitted reply briefs, it has explicitly stated that they may be filed and (2) the Board did not explicitly state that Ms. Smith could file a reply to the Staff’s proposed findings of fact and conclusions of law. On the contrary, the Board’s statements indicated that the simultaneous filing of the proposed findings of fact and conclusions of law would complete the adversarial phase of this proceeding.<sup>12</sup> Therefore, admitting the Reply is not consistent with the Board’s scheduling orders.

Furthermore, as the Board made clear in a recent order denying a Staff motion to admit additional exhibits into the record, for a filing outside of those filings explicitly permitted in the Board’s scheduling orders, the proponent of the filing must provide an “adequate explanation” why “good cause” exists for the Board to admit such filings.<sup>13</sup> Ms. Smith has not provided any

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<sup>10</sup> Transcript of Evidentiary Hearing in the Matter of Charlissa C. Smith at 714 (Jul. 17-18, 2013) (“Tr.”).

<sup>11</sup> Reply at 1.

<sup>12</sup> See Tr. at 714.

<sup>13</sup> 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 4-5 (Sep. 17, 2013). In this instance, the Staff sought to admit additional exhibits into evidence while the record remained open but after the evidentiary hearing. The Board declined to admit these exhibits into evidence because the Board schedule did not provide for the filing of additional

explanation why good cause exists for the Board to admit the Reply. As a result, just as the Staff's additional exhibits were not admitted into the record, Ms. Smith's reply containing new proposed facts and arguments should also not be admitted.

Additionally, Ms. Smith should not be granted the right to reply to the Staff's proposed findings of fact and conclusions of law by 10 C.F.R. § 2.712(a).<sup>14</sup> Section 2.712(a)(1)-(3) provides the default, three-step filing process for proposed findings of fact and conclusions of law, which is that (1) the party with the burden of proof files within 30 days after the record is closed, (2) the other parties file within 40 days after the record is closed, and (3) the party with the burden of proof files a reply within five days thereafter. This three-step filing process applies unless "otherwise ordered by the presiding officer."<sup>15</sup> In this proceeding, the Staff submits that the Board's second scheduling order effectively replaced the three-step filing process of 10 C.F.R. § 2.712(a) with a one-step, simultaneous filing process without the opportunity to reply. Therefore, Ms. Smith should not be permitted to reply under the default filing process of 10 C.F.R. § 2.712(a).

In the alternative, if the Board exercises its discretion and modifies its scheduling orders to allow Ms. Smith to reply, then the Staff requests that, as a matter of fairness, it be allowed five days to reply to Ms. Smith's proposed findings of fact and conclusions of law.<sup>16</sup>

Finally, Ms. Smith's reply contains new proposed facts and arguments, which the Staff submits should be stricken.<sup>17</sup> The Commission has stated that, "[i]n Commission practice, and

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(footnote continued . . .)

testimony after the close of the hearing and the Staff did not provide "adequate explanation of why the testimony could not have been filed before the hearing" so that "good cause" existed to modify the Board's schedule. *Id.*

<sup>14</sup> As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted Ms. Smith to resolve the issues raised in this motion. Ms. Smith stated that she would oppose this motion because she believes that the Reply was in compliance with 10 C.F.R. § 2.712(a)(3).

<sup>15</sup> 10 C.F.R. § 2.712(a).

<sup>16</sup> As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted Ms. Smith to resolve this issue and Ms. Smith stated that she would oppose this motion.

in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”<sup>18</sup> To allow otherwise would “unfairly deprive other participants of an opportunity to rebut the new claims.”<sup>19</sup> A motion to strike is the appropriate mechanism for enforcing this general legal principle.<sup>20</sup> Additionally, proposed findings of fact and conclusions of law must be confined to the material issues of fact and law “presented on-the-record, with exact citations to the transcript of record and exhibits in support of each.”<sup>21</sup> Thus, Boards have granted motions to strike new proposed facts and arguments from proposed findings of fact and conclusions of law when the proponent of the new information does not “provide[] an adequate reason to reopen the record to include th[e] new material.”<sup>22</sup>

Contrary to Commission practice and regulations, Ms. Smith’s reply contains new proposed facts regarding the 2011 Vogtle applicant who failed both the operating test and the written examination. Ms. Smith provides new background information on this individual that is not a part of the record and she does not provide an adequate reason to reopen the record to include this information.<sup>23</sup> Therefore, the Staff moves to strike the information on page 5, from line 15, starting with “Mrs.” to line 19, ending with “ML03314055).”

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(footnote continued . . .)

<sup>17</sup> As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted Ms. Smith to resolve this issue and Ms. Smith stated that she would oppose this motion.

<sup>18</sup> See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (citing *Amgen, Inc. v. Smith*, 357 F.3d 103, 117 (D.C. Cir. 2004) (stating that the D.C. Circuit Court of Appeals has “repeatedly held that an argument first made in a reply brief ordinarily comes too late for our consideration”).

<sup>19</sup> *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>20</sup> See, e.g., *id.* at 729.

<sup>21</sup> 10 C.F.R. § 2.712(c).

<sup>22</sup> See *Piping Specialists, Inc.* (Byproduct Materials License No. 24-24826-01), LBP-92-25, 1992 WL 24992, at \*2 n.3 (1992).

<sup>23</sup> Reply at 5.

Ms. Smith also provides new arguments regarding this individual. In her reply to the Staff's statement of positions, Ms. Smith stated that this individual "encountered numerous issues during the administration of her exam in 2011."<sup>24</sup> In her proposed findings of fact and conclusions of law, Ms. Smith stated that both she and this individual "experience[d] similar issues both years in the simulator."<sup>25</sup> Now, Ms. Smith, for the first time in the Reply, attempts to explain these vague, conclusory, and unsupported assertions from her previous filings.<sup>26</sup> Since Ms. Smith does not provide an adequate reason to reopen the record to include this new explanation, the Staff moves to strike the information on page 19, from line 1, starting with "both" to line 4, ending with "page 1-36"; and on page 27, from line 8, starting with "In" to line 11, ending with "comments."

#### CONCLUSION

Ms. Smith's reply should not be admitted because, pursuant to 10 C.F.R. § 2.712(a), the Board established in its scheduling orders its own process for the filing of proposed findings of fact and conclusions of law, which required the simultaneous filing of proposed findings of fact and conclusions of law by both parties 60 days after the availability of the hearing transcript and did not provide for replies. Therefore, in order to have her reply admitted, Ms. Smith should have provided an adequate explanation demonstrating good cause to admit the Reply. Since Ms. Smith did not provide this explanation, the Board should deny admission of the Reply.

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<sup>24</sup> Exhibit CCS-116, 17-18.

<sup>25</sup> The Petitioners [sic] Propose [sic] Findings of Fact and Conclusions of Law Regarding Statements of Position 1-12 at 26 (Sep. 21, 2013).

<sup>26</sup> Reply at 18-19, 27. It is unknown how Ms. Smith justifies her assumption that this individual's low score and high number of comments was due to a biased evaluation because Ms. Smith does not explain what knowledge or evidence she possesses to support this claim besides pointing to this individual's Individual Examination Report and deeming the comments therein as being "of an insignificant nature" and "not substantiated with factual data" and concluding that they were instead included "for the sake of increasing the number of comments." *Id.* Ms. Smith is not an expert in the field of evaluating simulator tests. Ms. Smith presents no evidence to substantiate the bad faith that she attributes to the comments given to this individual. Ms. Smith is not an advocate for this individual and the evaluation of this individual in 2011 is not material to this proceeding.

In the alternative, if the Board modifies its scheduling orders to allow Ms. Smith's reply, then the Staff respectfully requests the opportunity to file a reply to Ms. Smith's proposed findings of fact and conclusions of law within five days. Additionally, if the Board admits Ms. Smith's reply for any reason, the Staff respectfully requests that the Board not consider her new proposed facts and arguments regarding the 2011 Vogtle applicant who failed both the operating test and the written examination and strike the specific lines in the Reply identified by the Staff.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 7th day of October, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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CHARLISSA C. SMITH ) Docket No. 55-23694-SP  
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF MOTION TO STRIKE PETITIONER'S REPLY TO THE NRC STAFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OR, IN THE ALTERNATIVE, TO FILE A STAFF REPLY dated October 7, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 7th day of October, 2013.

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 7th day of October, 2013