LBP-14-02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chair
William J. Froehlich
Brian K. Hajek

In the Matter of	Docket No. 55-23694-SP
CHARLISSA C. SMITH	ASLBP No. 13-925-01-SP-BD01
(Denial of Senior Reactor Operator License)	March 18, 2014

INITIAL DECISION

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In this Initial Decision, the Board resolves the claim of Charlissa C. Smith that the Nuclear Regulatory Commission Staff (Staff) unlawfully denied her 2012 application for a senior reactor operator (SRO) license. We also address her allegations that (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, acting on her request, improperly performed its administrative review of her 2012 operating test.

We agree with Ms. Smith that the Staff acted inconsistently with its own guidance and applied that guidance in a discriminatory manner when it denied her application for an SRO license in 2012. We further conclude that, had the Staff conducted its administrative review of the grading of the simulator portion of Ms. Smith's 2012 SRO exam in accordance with its guidance and in a fair and even-handed manner, Ms. Smith would have passed the 2012 simulator exam and, as she also passed the 2012 written exam and walkthrough exam, she should have received a license. We therefore direct the Staff to issue a SRO license to Ms. Smith, subject to the satisfaction of any other licensing requirements not considered in this proceeding, such as health, that the Staff must also assess before issuing a license pursuant to 10 C.F.R. § 55.33. The license shall be effective as of the date it is issued and shall be subject to the usual terms and conditions.[1]

I. PROCEDURAL HISTORY

In March/April 2011, Ms. Smith, an employee of the Southern Nuclear Operating Company (SNC) applied for and was tested for an SRO license at her place of employment, the

[1] See Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-16, 27 NRC 583 (1988).

Vogtle Electric Generating Plant.[2] The test was approved and administered by examiners from NRC Region II. Ms. Smith was one of six applicants who passed the walkthrough and simulator elements (the operating test) of the examination but failed the written test.[3] Because she did not pass both components, Ms. Smith was not eligible to receive an SRO license at that time.

In instances when an applicant passes the operating portion of an SRO examination but fails the written test, the NRC operator license testing procedures allow the reactor licensee to request a waiver so that when the SRO examination is next offered, the applicant need not retake the passed portion of the exam. SNC subsequently submitted preliminary waiver requests for all six of its employees who passed the operating portion of the 2011 test but failed the written portion. After a series of phone calls and emails among Region II examiners and staff at SNC, final waiver requests were submitted for all SNC applicants, except for Ms. Smith. Ms. Smith, thus, was the only SNC applicant who passed the simulator portion of the test in 2011 for whom a waiver was not requested. As a consequence, in March/April 2012, Ms. Smith retook both the operating test and the written test, this time failing the former and passing the

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[2] The Vogtle Electric Generating Plant is located in Burke County near Waynesboro in eastern Georgia near the South Carolina border. Unit 1 began commercial operation in May 1987. Unit 2 began commercial operation in May 1989. Each unit is capable of generating 1,215 megawatts (Mw) for a total capacity of 2,430 Mw. The plant is powered by pressurized water reactors (PWR) manufactured by Westinghouse. See SOUTHERN COMPANY – PLANT VOGTLE, *About Us*, available at http://www.southerncompany.com/about-us/our-business/southern-nuclear/vogtle.cshtml (last visited Mar. 16, 2014).

[3] See Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, to Charlissa C. Smith (Ex. CCS-014), Encl. 2, Independent Review of Contentions Related to Waiver Process and Examiner Bias at 10 (Nov. 15, 2012) [hereinafter Nov. 15 Denial Letter]. As a note, Ms. Smith self-paginated many of her exhibits. For ease of reference and for the purposes of this Order, the Board uses Ms. Smith's numbering system for any exhibit that she self-paginated.

latter.[4] The Staff informed Ms. Smith that it proposed to deny her SRO license application, and that she could seek an informal staff review of the grading of her examination.[5]

On June 5, 2012, Ms. Smith requested the NRC review the denial of her SRO license application in accordance with NUREG-1021, "Operator Licensing Examination Standards for Power Reactors."[6] In response, the Staff conducted an informal review of her allegations. In its November 15, 2012 Denial Letter, the Staff upheld its prior denial of Ms. Smith's SRO license application.[7] The Denial Letter stated that, if Ms. Smith did not "accept the proposed denial," she could, "within 20 days of the date of th[e] letter, request a hearing pursuant to 10 C.F.R. § 2.103(b)(2)."[8]

On December 5, 2012, Charlissa C. Smith timely filed, pursuant to 10 C.F.R. § 2.103(b)(2), a demand for a hearing, challenging the denial of her 2012 application for a SRO license.[9] Oral argument on the hearing demand was held on January 23, 2013[10] and on February 19, 2013, over the Staff's objection, the Board granted her demand for a hearing.[11]

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[4] See Form ES-303-1, Individual Exam Report: Charlissa Carlette' Smith (Ex. CCS-045) at 1 (Rev. 9) (May 10, 2012) [hereinafter Smith's Individual Exam Report].
[5] See Letter from Malcolm T. Widmann, Chief, Operation Branch 1, Division of Reactor Safety, to Charlissa C. Smith (Ex. CCS-033) (May 11, 2012) [hereinafter May 11, 2012 Widmann Letter].
[6] See Nov. 15 Denial Letter (Ex. CCS-014) at 10; see also NUREG-1021 "Operator Licensing Examination Standards for Power Reactors" (Exs. CCS-005A and 005B) at 231–34 (Rev. 9 July 2004 & Supp. 1 Oct. 2007) [hereinafter NUREG-1021]. Ms. Smith filed NUREG-1021 in two parts, exhibits CCS-005A and 005B. For the purposes of this Order, the Board uses Ms. Smith's exhibits, CCS-005A and 005B, when referring to NUREG-1021. As mentioned, Ms. Smith self-paginated several of her exhibits. For ease of reference, the Board refers to the re-pagination of these documents, including NUREG-1021.
[7] Nov. 15 Denial Letter (Ex. CCS-014) at 1.
[8] Id.
[9] See Licensing Board Order (Scheduling Oral Argument) (Jan. 9, 2013) (unpublished); see also Tr. at 1–52. Ms. Smith appeared pro se throughout this proceeding.
[10] Tr. at 1–52.
[11] Decision (Granting Demand for Hearing), LBP-13-03, 77 NRC 82, 98 (2013).

Thereafter, telephonic prehearing conferences were held on February 26, March 18, and July 1, 2013.[12]

The Board conducted an evidentiary hearing in Augusta, Georgia on July 17 and 18, 2013.[13] At the hearing, the NRC Staff presented eight witnesses and offered 59 exhibits. Ms. Smith testified and presented three additional witnesses and 121 exhibits. The Board also admitted 13 Board-sponsored exhibits.[14] Transcript corrections were proposed on August 22, 2013 and were approved by the Board on September 17, 2013.[15] On September 21, 2013,[16] September 23, 2013,[17] and September 29, 2013,[18] proposed findings of fact were filed. NRC Staff filed a motion to strike on October 7, 2013,[19] to which Ms. Smith filed a response on October 22, 2013.[20] The Board closed the evidentiary record on September 17, 2013.[21]

II. REGULATORY BACKGROUND

A. Operator licensing

Part 55 of the Commission's regulations establishes procedures and criteria for the issuance of licenses to operators and senior operators of nuclear facilities licensed under the

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[12] See Memorandum (Memorializing February 26, 2013, Teleconference) (Feb. 26, 2013) (unpublished); Order (Memorializing March 18, 2013 Teleconference and Establishing Procedures) (Mar. 20, 2013) (unpublished); Order (Memorializing July 1, 2013 Prehearing Conference) (July 3, 2013) (unpublished); see also Tr. at 53–128.
[13] See 78 Fed. Reg. 31,988 (May 28, 2013).
[14] Tr. at 141–43, 700; see also Licensing Board 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) (Sept. 17, 2013) (unpublished) [hereinafter Sept. 17 Board Order].
[15] See Sept. 17 Board Order at 2.
[16] The Petitioner's Propose[d] Findings of Fact and Conclusions of Law Regarding Statements of Position 1–12 (Sept. 21, 2013).
[17] NRC Staff Proposed Findings of Fact and Conclusions of Law (Sept. 23, 2013) [hereinafter Staff PFF].
[18] The Petitioner['s] Response to the NRC [Staff's] Propose[d] Findings of Fact and Conclusions of Law Regarding Statements of Position 1–12 (Sept. 29, 2013) [hereinafter Smith's Response to Staff PFF].
[19] 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 (Oct. 7, 2013).
[20] C. Smith's Response to NRC Staff Motion to Strike (Oct. 22, 2013).
[21] Sept. 17 Board Order at 8.

Atomic Energy Act of 1954 as amended or Section 202 of the Energy Reorganization Act of 1974, as amended.[22] Any individual who manipulates the controls of any facility licensed under parts 50, 52, or 54 of the agency's regulations is required to have an operators' license.[23]

An SRO is "any individual licensed under [10 C.F.R. Part 55] to manipulate the controls of a facility and to direct the licensed activities of licensed operators."[24] To obtain an SRO license, the applicant must pass both a written test and an operating test and meet the other requirements specified in 10 C.F.R. Part 55.2.[25] If an applicant passes only one of the two parts of the licensing test, he will not receive a license.

B. NUREG-1021

Section 55.40 of the regulations state the Commission shall use NUREG-1021 to prepare and evaluate licensing examinations.[26] NUREG-1021 specifies the Staff's policies, procedures, and practices for administering the initial and requalification written examinations and operating tests.[27] It lists both goals and specific procedures for the preparation, administration, and grading of the operator license examination. The procedures are generally set forth in chapters called "Examiner Standards." NUREG-1021 states that the goal of the tests is to determine "whether the applicant's level of knowledge and understanding meet the minimum requirements to safely operate the facility for which the license is sought."[28] NUREG-1021 further states that it is intended to "ensure the equitable and consistent administration of examinations for all applicants."[29]

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[22] See 10 C.F.R. § 55.1.
[23] See id. § 55.2.
[24] See id. § 55.4. The provisions of 10 C.F.R. Part 55 govern applications for Reactor Operator and SRO licenses. See id. § 55.1.
[25] See id. § 55.33(a); see also NUREG-1021 (CCS-005A) at 33.
[26] See 10 C.F.R. § 55.40.
[27] See generally NUREG-1021 (Ex. CCS-005A and 005B).
[28] NUREG-1021 (Ex. CCS-005A) at 141; see also 10 C.F.R. § 55.33(a)(2).
[29] NUREG-1021 (Ex. CCS-005A) at 13.

NUREG-1021 provides that the NRC's regional offices shall obtain approval from the Office of Nuclear Reactor Regulation (NRR) operator licensing program office at agency headquarters before knowingly deviating from the intent of any of the NUREG-1021 standards. Moreover, the regional offices are to obtain NRR program office[30] approval before undertaking any initiative that could undermine examination consistency among the regions.[31]

C. The waiver process

Under the agency's regulations and NUREG-1021 standards, an applicant who was denied a license after the first examination may elect to retake the tests. In this scenario, the regulations governing the application process provide that "[a]n applicant who has passed either the written examination or operating test and failed the other may request in a new application on Form NRC-398 to be excused from re-examination on the portions of the examination or test which the applicant has passed."[32] In effect, the applicant is able to request a waiver of the portion of the examination that he passed.

Applicants are directed to

> submit preliminary, uncertified license applications . . . for review by the NRC's regional office at least 30 days before the examination date. This will permit the NRC staff to make preliminary eligibility determinations, . . . evaluate any waivers that might be appropriate, and obtain additional information, if necessary, while allowing the facility licensee to finish training the applicants before the certified applications are due."[33]

To initiate a waiver request, the applicant must mark Item 4.f on the preliminary form NRC-398 and explain the basis for requesting a waiver in Item 17, "Comments."[34] The preliminary form NRC-398 need not be signed by either the applicant or the company that

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[30] Within the Office of Nuclear Reactor Regulation is a Division of Inspection and Regional Support which provides centralized management for several programs concerning operating power reactors including reactor inspection, performance assessment (the reactor oversight process), operational events, operator licensing, financial assessments, allegations, and international programs.
[31] See NUREG-1021 (Ex. CCS-005A) at 41.
[32] 10 C.F.R. § 55.35(b); see also NUREG-1021 (Ex. CCS-005A) at 84.
[33] NUREG-1021 (Ex. CCS-005A) at 72.
[34] Id. at 82.

employs the applicant.[35] The NRC regional office must review the preliminary applications "as soon as possible after they are received," including evaluating any waiver requests in accordance with NUREG-1021, ES-204.[36]

The final form NRC-398 is due at least 14 days before the examination date.[37] On the final NRC-398, "[t]he facility licensee's senior management representative on site must certify the final license application, thereby substantiating the basis for the applicant's waiver request."[38] The NRC regional office has the discretion to grant a waiver request "if it determines that sufficient justification is presented."[39]

D. Conflict of interest limitations

NUREG-1021 includes conflict of interest provisions that address the assignment of examiners to an examination team. Two such provisions are relevant here. First, "[t]he regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicant's retake operating test."[40] This specific prohibition is supplemented by a broader requirement, which directs that "[i]f an examiner is assigned to an examination that might appear to present a conflict of interest, the examiner shall inform his or her immediate supervisor of the potential conflict."[41] When informed of a potential conflict, the supervisor "must apply sound judgment to the facts of each case" and, if any doubt exists, "consult with regional management and/or the NRR operator licensing program office to resolve the issue."[42]

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[35] See Tr. at 281 (Tucker).
[36] NUREG-1021 (Ex. CCS-005A) at 73; see also id. at 47.
[37] Id. 73.
[38] Id. at 82.
[39] 10 C.F.R. § 55.35(b); see also NUREG-1021 (Ex. CCS-005A) at 84.
[40] NUREG-1021 (Ex. CCS-005A) at 53.
[41] Id. at 53.
[42] Id. at 52.

E. The operating exam

The operating exam consists of a plant walk-through and a simulator test.[43] "The walk-through portion of the operating test consists of two parts ('Administrative Topics' and 'Control Room/In-Plant Systems'), each focusing on specific knowledge and abilities (K/As) required for licensed operators to safely discharge their assigned duties and responsibilities."[44] For the Administrative Topics, "[t]he applicant's competence in each topic is evaluated by administering job performance measures (JPMs) and asking specific 'for cause' followup questions, as necessary, based on the applicant's performance. . . ."[45] Similarly, for Control Room/In-Plant Systems, "[t]he applicant's knowledge and abilities relative to each system are evaluated by administering JPMs and, when necessary, specific followup questions based on the applicant's performance of each JPM."[46]

The simulator test is administered on an NRC-approved or plant-referenced simulator.

> The simulator test is administered in a team format with up to three applicants (or surrogates) filling the RO and SRO license positions (as appropriate) on an operating crew. . . . This format enables the examiner to evaluate each applicant's ability to function within the control room team as appropriate to the assigned position, in such a way that the facility licensee's procedures are adhered to and that the limitations in its license and amendments are not violated. . . . Each team or crew of applicants is administered a set of scenarios designed so that the examiners can individually evaluate each applicant on a range of competencies applicable to the applicant's license level.[47]

F. Grading of the simulator exam

In NUREG-1021, ES-303, states that simulator examinations are to be graded in accordance with six performance-related competencies, stated here with minor clarification. The first four in the list are for Reactor Operator (RO) candidates. The last two are for SRO candidates. All six performance-related competencies are to be evaluated for candidates who

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[43] See id. at 102.
[44] Id.
[45] Id. at 103.
[46] Id. at 104.
[47] Id. at 105.

are being examined as Instant SRO candidates -- those SRO candidates (like Ms. Smith) who have not previously held RO licenses. These six are:

1. Interpretation and Diagnosis of instrumentation indications and plant conditions
2. Use of Plant Procedures
3. Control Board Operations
4. Communications and Crew Interactions
5. Directing Operations
6. Use of and Compliance with Technical Specifications[48]

Each competency is further divided into several Rating Factors (RFs) for grading purposes. Scores are given for each RF, and are then added together to provide a total score for each Competency. The range of scores is from 1 to 3 in each RF. The RFs are weighted within each Competency. To pass the simulator examination, a candidate must either

1. Score greater than 1.80 (out of a maximum of 3) in every evaluated Competency, or
2. Score at least 2.00 in competencies 1, 2, 3, 5, and 6 if Competency 4, Communications, is scored less than 1.80 but greater than 1.00.[49]

G. Administrative review of a license application denial

NUREG-1021 provides a procedure under which an applicant who has received an initial license application denial may request an administrative review of the denial.[50] In an instance such as this in which the applicant failed the operating exam, he may request an administrative review under ES-502 C.1.b. In such a case,

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[48] See id. at 142–49.
[49] Id. at 146. NUREG-1021 describes the competencies. See id. at 252–54. ES-303 Attachment Forms ES-303-1, the Individual Examination Report, and ES-303-3 and ES-303-4, worksheets for the RO and SRO simulator examinations, respectively, break down each competency into a number of specific rating factors (RFs) to be considered during the grading process. See id. at 150–59.
[50] Id. at 231–35.

> [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. The 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.[51]

Based on the findings and recommendations from this review, the NRR operator licensing program office will decide whether to sustain or to overturn the applicant's license examination failure.[52] NUREG-1021 ES-502 D.2.c., states that "[w]hen the NRR operator licensing program office has concurred in the results of the review, the NRC's regional office will . . . (2) review the examination results of the other applicants to determine whether any of the licensing decisions are affected. . . ."[53] This provision is intended to ensure that all applicants who took the same exam will be graded under the same criteria because, if the review panel modifies the criteria for the applicant who sought administrative review, the results of other applicants must be reviewed to determine whether they would be affected by the change.

H. Subpart L disclosure requirements

Because parties to a Subpart L proceeding[54] may not seek discovery from the other parties to the proceeding,[55] the Commission's regulations require all such parties to make periodic mandatory disclosures.[56] Each party and the NRC staff are required to make initial disclosures under paragraphs (a) and (b) of Section 2.336, based on the information and documentation then reasonably available to it. A party, including the NRC staff, is not excused from making the required disclosures because it has not fully completed its investigation of the

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[51] Id. at 234.
[52] Id.
[53] Id. at 235.
[54] See generally Subpart L – Informal Hearing Procedures for NRC Adjudications, 10 C.F.R. § 2.1200 et seq.
[55] Id. § 2.1203(d).
[56] Id. § 2.336(b).

case, it challenges the sufficiency of another entity's disclosures, or that another entity has not yet made its disclosures.[57] All disclosures under this section must be accompanied by a certification (in the form of a sworn affidavit) that all relevant materials required by this section have been disclosed, and that the disclosures are accurate and complete as of the date of the certification.[58] The duty of disclosure is continuing. Parties must update their disclosures every month after initial disclosures on a due date selected by the presiding officer in the order admitting contentions.[59] Disclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure update.[60]

The NRC Staff is also under a special obligation to create and to maintain a hearing file.[61] The NRC Staff has a continuing duty to keep the hearing file up to date.[62] A party, including the Staff, may be sanctioned for non-compliance with the disclosure regulations.[63] The presiding officer may impose sanctions on a party that fails to provide any document required to be disclosed, unless the party demonstrates good cause for its failure to make the disclosure.[64]

III. SCOPE AND STANDARD OF REVIEW

The Staff's November 15, 2012 Denial Letter stated that the decision was based upon two Staff administrative reviews.[65] The first, performed by an "Informal Review Panel" (the IRP), sustained Ms. Smith's failure of the 2012 operating exam.[66] The second Staff administrative review, referred to as the "fairness review," rejected her claims regarding the handling of a

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[57] Id. § 2.336(c).
[58] Id.
[59] Id. § 2.336(d).
[60] Id.
[61] Id. § 2.1203(a).
[62] Id. § 2.1203(c).
[63] Id. § 2.336(e)(1).
[64] Id. § 2.336(e)(2).
[65] See Nov. 15 Denial Letter (Ex. CCS-014) at 1.
[66] See id., Encl. 1, Summary of Informal Review Results Sustaining Failure of Operating Test at 3–9.

potential waiver of the 2012 operating exam and NRC examiner bias.[67] The results of both reviews were enclosed with the November 2012 Denial Letter.[68]

The Board's review of Ms. Smith's claims that the Staff unlawfully denied her application for an SRO license must be based on the November 2012 Denial Letter and the administrative reviews upon which it was founded. In Michel A. Philippon, the presiding officer stated that the Staff's decision at the conclusion of its administrative reviews is the final Staff position and "hence the only Staff position open to [the applicant] to challenge before the Presiding Officer."[69] Accordingly, the Staff "may not take a position or assert facts before the Presiding Officer contrary to a matter decided by the appeal board (i.e., the Staff itself) on [the applicant's] informal appeal absent an explicit confession of error."[70]

Although the Commission reversed the presiding officer's decision in Philippon, it did so because the presiding officer erred in concluding that the Staff had departed from the findings of its appeal board (the equivalent of the IRP in the present case). The Commission did not disagree with the presiding officer's ruling that the Staff could not defend its decision on a basis inconsistent with its own informal review. On the contrary, the Commission's analysis is fully consistent with that ruling.[71]

Consistent with this approach, other licensing boards have limited their review to those issues that were resolved against the license applicant in the Staff's informal review. For example, in Randall L. Herring,[72] the applicant received a grade of unsatisfactory on four topics of his operating test. The Staff's informal review determined that he had, in fact, answered two

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[67] See id., Encl. 2, Independent Review of Contentions Related to Waiver Process and Examiner Bias at 10–17.
[68] See id. at 1.
[69] Michel A. Philippon (Denial of Senior Operator License Application), LBP-99-44, 50 NRC 347, 377 (1999), rev'd on other grounds, CLI-00-3, 51 NRC 82 (2000).
[70] Philippon, LBP-99-44, 50 NRC at 378.
[71] See Philippon, CLI-00-3, 51 NRC at 85.
[72] Randall L. Herring (Senior Reactor Operator License for Catawba Nuclear Station), LBP-98-30, 48 NRC 355, 358 (1999).

of the topics satisfactorily. Therefore, the presiding officer only addressed the two answers that the Staff's review considered unsatisfactory. In Calabrese, the applicant initially failed both the written exam and the operating test.[73] The administrative review, however, determined he had passed the written exam. Therefore, the only issues before the presiding officer were those relating to the operating test.

We have an analogous situation here with respect to the grading of Ms. Smith's 2012 simulator exam. The IRP agreed with Ms. Smith that three alleged errors identified during the simulator exam should not have counted against her.[74] Thus, the Staff itself resolved those alleged errors in Ms. Smith's favor, and we therefore need not consider them further. We will thus limit the scope of our review to the determinations of the informal review that were adverse to Ms. Smith.

The Staff has not confessed error with respect to the grading issues the IRP resolved in Ms. Smith's favor (or any other issue).[75] It maintains, however, that Ms. Smith must prove that those IRP rulings in her favor were correct (i.e, that the Exam Team determinations on those issues were incorrect).[76] But, as the presiding officer in Philippon recognized, the result of the Staff's informal review is the position of the Staff, and thus it may not be questioned by the Staff in an adjudicatory proceeding absent a confession of error.[77] This proceeding is not a forum for the Staff to revisit issues that its informal review resolved in Ms. Smith's favor. Accordingly, Ms. Smith is not required to present evidence to justify Staff rulings that support her position. She is

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[73] Calabrese, LBP-97-16, 46 NRC 66, 68–69 (1997).
[74] The errors occurred during Scenario 7, Event 1; Scenario 3, Event 7; and Scenario 7, Event 6. See infra pages 64–81.
[75] Philippon, LBP-99-44, 50 NRC at 377 ("Silence is not a confession of error. Nor can there be an implied confession of error.").
[76] See NRC Staff Statement of Position Concerning the Claim by Charlissa C. Smith that the NRC Improperly Denied Her 2012 Senior Reactor Operator License Application (Ex. NRC-001) at 74–85 (May 31, 2013) [hereinafter Staff's Statement of Position].
[77] Philippon, LBP-99-44, 50 NRC at 378 ("Although the Staff . . . [is] free to carry on internecine warfare, [it is] not free to wage it in this adjudicatory proceeding where all elements of the Staff appear as a single party.").

required to meet her burden of proof only with respect to the Staff determinations that she challenges.

The standard of review in this case, as in most administrative proceedings, is a preponderance of the evidence, with the applicant or proponent of an order bearing the burden of proof.[78] This is consistent with 10 C.F.R. § 2.325 which states "[u]nless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof."[79] This Board has held that Ms. Smith bears the burden of proof in this proceeding.[80]

The Staff argues that the Supreme Court and the Commission recognize a 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.[81] For instance, the Staff acknowledges that applicants may prevail if they prove that a particular contested assessment of a deficiency was "inappropriate or unjustified"[82] or if the assessment was "arbitrary or an abuse of . . . discretion."[83] The Staff also states: "The Staff improperly discharges its duties with respect to the grading of an operating test if the grading is 'inappropriate or unjustified' or if the grading 'stray[s] too far afield of the . . . twin goals of equitable and consistent examination

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[78] "[T]he Commission has never adopted a 'clear and convincing' standard as the evidentiary yardstick in its enforcement proceedings, nor are we required to do so under the AEA or the APA. Typically, NRC administrative proceedings have applied a 'preponderance of the evidence' standard in reaching the ultimate conclusions after hearing in resolving a proceeding. . . . The 'preponderance' standard is also the one generally applied in proceedings under the APA." Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 302 n.22 (1994) (citations omitted), aff'd, Advanced Med. Sys., Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995).
[79] Staff PFF at 41.
[80] See, e.g., Tr. at 109 (J. Spritzer) ("[Ms. Smith] has the burden of proof in this [proceeding]."); see also Staff PFF at 42.
[81] Staff's Statement of Position (Ex. NRC-001) at 5 (quoting La. Energy Servs. L.P. (Nat'l Enrichment Facility), CLI-06-02, 64 NRC 37, 49 n.48 (2006)).
[82] Philippon, 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.").
[83] Calabrese, LBP-97-16, 46 NRC at 89; see also Staff PFF at 44.

administration' thus becoming 'arbitrary or an abuse of discretion.' In assessing whether an applicant satisfies the burden of establishing that the Staff's determination of the applicant's performance was inappropriate, unjustified, arbitrary, or an abuse of discretion, the Board should consult NUREG-1021."[84]

We agree with the Staff that NUREG-1021 standards should guide our review in this case. To be sure, NUREG documents do not generally establish regulatory requirements, but NUREG-1021 states that it is intended to "help NRC examiners and facility licensees [to] better understand the . . . initial and requalification [examination processes and to] ensure the equitable and consistent administration of examinations for all applicants."[85] The Commission issued NUREG-1021 "[t]o set forth consistent standards for operator and SRO examinations at various facilities."[86] In order to avoid a finding of arbitrary and capricious agency action, the Staff may not depart from its established policies, procedures, and practices without a reasonable explanation for the change.[87] We therefore agree with the presiding officer in Calabrese, as well as the Staff, that we may properly look to NUREG–1021 to determine whether the Staff has strayed too far from its stated goals of "equitable and consistent" examination administration,[88] and whether its actions were arbitrary or an abuse of discretion.

Moreover, pursuant to 10 C.F.R. § 55.40, the Commission "shall use the criteria in NUREG-1021, 'Operator Licensing Examination Standards for Power Reactors,' in effect six

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[84] Staff's Statement of Position (Ex. NRC-001) at 5 (quoting Calabrese, LBP-97-16, 46 NRC at 86).
[85] NUREG-1021 (Ex. CCS-005A) at 13.
[86] Herring, LBP-98-30, 48 NRC at 357.
[87] See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) ("Whatever the ground for the [agency's] departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action . . . ."); Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 291 (1st Cir. 1995); N. Cal. Power Agency v. F.E.R.C., 37 F.3d 1517, 1522 (D.C. Cir. 1994).
[88] Calabrese, LBP-97-16, 46 NRC at 86; cf. Ralph L. Tetrick (Denial of Application for Reactor Operator License), CLI-97-10, 46 NRC 26, 31–32 (1997) (because agency practice is one indicator of how agency interprets regulations, consistently held Staff view on operator testing policy matter will not be disturbed)).

months before the examination date to prepare the written examinations required by [10 C.F.R.] §§ 55.41 and 55.43 and the operating tests required by [10 C.F.R.] § 55.45." Thus, NUREG-1021 criteria that apply to the preparation of written examinations and operating tests are binding upon the Staff.

Accordingly, the Board will evaluate the evidence to determine whether the Staff discharged its duties in a "regular" manner, and whether or not Ms. Smith has shown that her treatment was inconsistent with NUREG-1021 or otherwise irregular, inequitable, arbitrary, or an abuse of discretion. While the Board recognizes that public officials are afforded a presumption of regularity in the discharge of their duties,[89] this presumption can be shifted upon the presentation of evidence showing official actions that are irregular. If the facts before the Board do not appear regular, then the presumption does not attach.[90] The presumption "does not help to sustain an action that on its face appears irregular. . . . [In fact,] the presumption operates in reverse. If it appears irregular, it is irregular, and the burden shifts to the proponent to show the contrary."[91]

IV. MS. SMITH'S STATEMENT OF POSITION

Ms. Smith's Statement of Position lists twelve issues.[92] Statement of Position 1 concerns the NRC's response to the preliminary waiver request. Ms. Smith states that (1) "[g]rade comparison between the students and the pass criteria contradict the decision to deny the waiver if submitted;" and (2) the Staff improperly contacted the facility to question the submittal of the preliminary waiver request rather than processing it according to their procedure. According to Ms. Smith, "[t]he NRC does not provide a valid justification as to why

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[89] See McIntyre-Handy v. West Telemarketing Corp., 97 F.Supp.2d 718, 727 (E.D. Va. 2000).
[90] See Collins v. Shinseki, 2013 WL 6000535 at *6 (Vet. App. 2013).
[91] U.S. v. Roses Inc., 706 F.2d 1563, 1567 (Fed. Cir. 1983).
[92] See [Smith's] Statements of Position (Ex. CCS-075) (May 1, 2013) [hereinafter Smith's Statement of Position]; [Smith's] Prefiled Testimony on Statements of Position (Ex. CCS-076) (May 1, 2013) [hereinafter Smith's Prefiled Testimony].

C. Smith was singled out and the facility was contacted to determine if the submittal was intentional."[93]

Ms. Smith's Statement of Position 2 maintains that, under the conflict of interest restrictions in NUREG-1021, Messrs. Meeks and Capehart should not have been assigned to her 2012 examination team because both individuals had been members of her 2011 operating exam team and had formed strong negative opinions about her at that time that necessarily influenced the grading of her 2012 operating exam.[94]

Ms. Smith's Statement of Position 3 contends that the IRP, after initially finding she had passed the simulator examination, was unduly influenced by the Region II Exam Team and Operator Licensing and Training Branch (IOLB) pressures. Ms. Smith alleges that the Exam Team initiated continual contact[95] with the IRP after the initial interviews, and also that the IOLB provided direction based on examiner comments to potentially sustain the failure.[96] She also objected that the IRP should not have included non-contested items in its review,[97] because non-contested items are not discussed in the NRC procedure for Processing Requests of Administrative Review and Hearings.[98] Non-contested items are those items that were not

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[93] Smith's Statements of Position (Ex. CCS-075) at 2.
[94] See id. at 2.
[95] See Vogtle Operating Exam Appeal (Ex. CCS-101) (Undated) [hereinafter Vogtle Operating Exam Appeal]; see also Grading Philosophy and Consistency (Ex. NRC-032) (Undated) [hereinafter Grading Philosophy and Consistency].
[96] See Email from Donald Jackson, Chief, Region 1, Operations Branch to David Muller & Chris Steely (Ex. CCS-059) (Oct. 16, 2012 2:01 PM) [hereinafter Oct. 16, 2012 Jackson Email] & Email from John McHale to Donald Jackson (CCS-059) (Oct. 16, 2012 11:22 AM) [Oct. 16, 2012 McHale Email]. As a note, CCS-059 contains two different emails.
[97] Smith's Statement of Position (Ex. CCS-075) at 3.
[98] OLMC-500: Processing Requests for Administrative Reviews and Hearings (Ex. CCS-030) (Dec. 2011) [hereinafter OLMC-500].

listed in her original request for a review of her original grading.[99] Finally, Ms. Smith complained that a complete grade sheet was not included with the Denial Letter.[100]

Ms. Smith's Statements of Position 4–12 concern alleged errors in the scoring of her 2012 operating exam during the administrative review.[101] Ms. Smith alleges that she was denied equal treatment because she was graded in a manner and held to a higher standard than her peers, in violation of NUREG-1021.[102] Ms. Smith maintains that she was "treated differently" from other license applicants,[103] and that she "has only requested to be treated equivalent to her peers."[104] Ms. Smith also alleged nine specific Staff errors in the grading of her 2012 operating exam.[105] Statements of Position 4 through 11 concern errors she also contested in the original review request of June 5, 2012.[106]

Statement of Position 12 concerns an error in Scenario 7, Event 5, in which Ms. Smith had taken a control switch for a Power Operated Relief Valve (PORV) initially to the open position before taking it to the close position.[107] Ms. Smith's original review request of June 5, 2012 did not contest this error. However, during its review, the IRP designated the error as related to a Critical Task, even though it had not been treated as such by the Exam Team in its development of and grading of her 2012 operating exam. In an analysis developed in preparation for the IRP review, the Exam Team changed its original position, claiming that it had

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[99] See Smith's Request for NRC Staff Review of 2012 Exam – Letter from Charlissa C. Smith to NRC Staff (Ex. CCS-034) (Undated) [Smith's 2012 Review Request Letter] and supporting material.
[100] Smith's Statement of Position (Ex. CCS-075) at 3 (referring to the Nov. 15 Denial Letter (Ex. CCS-014)).
[101] See Smith's Prefiled Testimony (Ex. CCS-076) at 21–48.
[102] Id. at 54–55. As a note, there is a blank sheet between pages 54 and 55 of this document.
[103] Smith's Prefiled Testimony (Ex. CCS-076) at 54.
[104] Id. at 54.
[105] Id. at 21–48.
[106] See generally Smith's 2012 Review Request Letter (Ex. CCS-034), wherein Ms. Smith noted seven (4, 5, 6, 7, 9, 10, 11) Statements of Position related to the grading of her 2012 operating examination.
[107] Form ES-303-1, Smith's Individual Examination Report: Charlissa Carlette' Smith (Ex. NRC-045) at 19 (Rev. 9) (Undated) [hereinafter Smith's Individual Exam Report].

"mis-graded" this event "because it was a failed critical task."[108] Accepting the Exam Team's reversal of its original position, the IRP stated that "[t]his review determined that the applicant's incorrect action . . . was related to a critical task . . . in accordance with NUREG-1021, Appendix D, Item D.1.a."[109] Because of this change by the IRP, Ms. Smith was assessed a greater scoring deduction for the error. This resulted in a downgrading of RF 3.a. to a 1 from what had earlier been a 2 in the IRP's assessment.[110] This single change resulted in the failure determination for Ms. Smith by the IRP.

In her Statement of Position 12, Ms. Smith maintained that (1) her error in operation of the PORV control switch should not have been re-evaluated by the IRP because she did not contest that error; (2) designating operation of the PORV control switch as a critical task during the informal review, six months after the simulator exam had been completed, violated the requirement that critical tasks be defined and identified in the examination outline distributed to examiners before the exam is given; and (3) the IRP failed to define the critical task as required by NUREG-1021, Appendix D, including failing to provide a measurable performance indicator to determine whether the critical task was performed correctly.[111]

In response to Ms. Smith's claims, the NRC Staff argues that it "properly and reasonably discharged its duties with respect to Ms. Smith's preliminary waiver request,"[112] there was no Staff bias or conflict of interest in the administrative review and a final waiver request was not actually denied because SNC did not submit a final waiver request for Ms. Smith. The Staff

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[108] Rating Factor 3.A.: Control Board Operations, Locate & Manipulate (Ex. CCS-039) at 3 (Undated) [hereinafter Rating Factor 3.A.].
[109] Memorandum from Donald Jackson, Chief, Operations Branch, Division of Reactor Safety, Region I, to Jack McHale, Operator Licensing and Training Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation (Ex. NRC-054) at 37–38 (Undated) [hereinafter NRC Panel Review Results].
[110] Letter from Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation, to Charlissa C. Smith (Ex. CCS-024) at 37 (Undated) [hereinafter Informal Review Results].
[111] Smith's Statement of Position (Ex. CCS-075) at 9–10.
[112] See Tr. at 151 (Wachutka).

maintains that all staff duties were discharged consistent with the requirements of 10 C.F.R. Part 55, the guidance in NUREG-1021 and OLMC-500,[113] past NRC precedent and common sense.[114]

V. RACIAL AND GENDER DISCRIMINATION

Ms. Smith is an African-American female. She has alleged from the start that she was treated differently than other examination candidates. The record indicates that of the ten license applicants in 2011, eight were men and two were women. Both women were African-American and both were denied licenses.[115] Ms. Smith was the only black female license applicant for the 2012 exam and was again denied a license. Currently, at Plant Vogtle, there are two female SROs but no African-American SROs.[116]

Nevertheless, this Board was established to conduct an adjudicatory licensing safety proceeding under 10 C.F.R. Part 2, Subpart L, procedures. It was not established to perform an investigation into the Staff's compliance with the antidiscrimination statutes and regulations impacting the operator licensing program. The NRC Staff maintains that "this Board does not have the authority to rule on issues of race or sex bias or discrimination."[117] The NRC Staff is correct that this proceeding was not established as a forum to adjudicate a racial or gender discrimination case. There is insufficient evidence in this record to make findings of racial or gender discrimination, and in any event we have not been empowered to do so.

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[113] Operator Licensing Manual Chapter (OLMC) is to provide additional guidance to the staff on the implementation of the requirements contained in NUREG-1021, "Operator Licensing Examination Standards for Power Reactors," Section ES-502, concerning the processing of applicant-requested administrative reviews and hearings. See OLMC-500 (Ex. CCS-030) at 1; see also NUREG-1021 (Ex. CCS-005A) at 231–35.
[114] Tr. at 151 (Wachutka).
[115] Tr. at 184, 186 (Smith).
[116] Tr. at 202 (Smith).
[117] Staff PFF at Para. 511.

VI. THE STAFF'S MOTION TO STRIKE

On September 21, 2013,[118] Ms. Smith filed proposed findings of fact and conclusions of law. The NRC Staff filed its proposed findings of fact and conclusions of law on September 23, 2013[119] and Ms. Smith filed a reply to the Staff's proposed findings of fact and conclusions of law on September 29, 2013.[120] NRC Staff filed a motion on October 7, 2013 requesting the Board to; (1) strike Ms. Smith's 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.[121] Ms. Smith filed a response to the Staff motion to strike on October 22, 2013.[122] The specific portions of Ms. Smith's reply to which the Staff objects deal with: 1) the educational background of the only other African-American female tested in 2011,[123] 2) the large number of examiner comments both African-American females received from the Region II examiners in 2011;[124] and 3) the level of scrutiny and the number of comments both received.[125]

Inasmuch as these three specific portions deal with the issue of racial or gender discrimination and we have concluded that racial and gender claims are beyond the scope of this adjudicatory proceeding, we grant the Staff's motion and strike the three identified passages in Ms. Smith's reply. As to the remainder of her reply, the Board has not considered it in this

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[118] The Petitioner's Propose[d] Findings of Fact and Conclusions of Law Regarding Statements of Position 1–12 (Sept. 21, 2013) [hereinafter Smith PFF].
[119] See generally Staff PFF.
[120] The Petitioner['s] Response to the NRC [Staff's] Propose[d] Findings of Fact and Conclusions of Law Regarding Statements of Position 1–12 (Sept. 29, 2013) [hereinafter Smith's Response to Staff PFF].
[121] See 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 (Oct. 7, 2013).
[122] C. Smith's Response to NRC Staff Motion to Strike (Oct. 22, 2013).
[123] See Smith's Response to Staff PFF at 5.
[124] See id. at 19.
[125] See id. at 27.

ruling. Accordingly, the Motion to Strike is moot as to the request to strike the reply in its entirety or permit the Staff to file its own reply.

VII. FINDINGS OF FACT AND BOARD ANALYSIS OF MS. SMITH's CLAIMS

A. Charlissa Smith's 2011 SRO license examination

01. Ms. Smith is currently employed by SNC as a member of the Vogtle Emergency Preparedness Group.[126] She holds a bachelor of science degree in general chemistry.[127] 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.[128] Prior to her current employment, she was a nuclear chemistry technician for three years and a chemistry foreman for three years at Vogtle.[129]

02. Ms. Smith worked in the Operations section at the Vogtle plant. Ms. Smith was approached by SNC to apply for the Senior Reactor Operator course.[130]

03. In 2009, Ms. Smith applied to, and was selected for Vogtle's operator training program as an SRO-instant student.[131]

04. 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.[132]

05. As a member of HL-16, her full-time job was training in preparation for the SRO examination.[133]

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[126] Affidavit of Charlissa C. Smith (Ex. CCS-077) at 1 (April 30, 2013) [hereinafter Smith's Aff.].
[127] Smith's Aff. (Ex. CCS-077) at 1; Tr. at 187 (Smith).
[128] Smith's Aff. (Ex. CCS-077) at 1.
[129] Id. at 1; Tr. at 188 (Smith); Staff PFF at Para. 47
[130] Tr. at 188 (Smith).
[131] SRO-Instant indicates the applicant has not previously held a Reactor Operator's license. See NUREG-1021 (Ex. CCS-005B) at 461; Staff PFF at Para. 60.
[132] Tr. at 168–69, 191(Smith); Staff PFF at Para. 61.
[133] Tr. at 191 (Smith); Staff PFF at Para. 62.

06. The operator training program was two years in duration. It covered the general fundamentals of nuclear power generation, nuclear power plant systems, and control room operations.[134]

07. Ms. Smith's overall performance in the operator training program placed her approximately in the middle of the HL-16 class.[135]

08. 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 examination and operating test.[136] Ms. Smith passed both the written and the operating HL-16 company audits.[137]

09. Of the twenty students originally selected for HL-16, ten students completed the SNC operator training program, including Ms. Smith.[138]

10. On March 7, 2011, SNC submitted operator license applications on behalf of these ten students.[139] Subsequently, these ten applicants took the operating test and written examination in March/April 2011.[140]

11. From March 16 to March 24, 2011, Ms. Smith was administered an SRO-instant operating test.[141] Her NRC examiners during this operating test were Jay Hopkins, Examiner of

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[134] Tr. at 189–91 (Smith); Staff PFF at Para. 63.
[135] Tr. at 192 (Smith), 288 (Tucker); Staff PFF at Para. 64.
[136] Tr. at 192–93 (Smith).
[137] Tr. at 193 (Smith); Staff PFF at Para. 65.
[138] Tr. at 191 (Smith); Staff PFF at Para. 66.
[139] See, e.g., NRC Form 398, Personal Qualification Statement – Licensee: Charlissa C. Smith (Ex. NRC-009) (Mar. 7, 2011).
[140] See, e.g., Form ES-303-1, Individual Examination Report: Charlissa C. Smith (Ex. CCS-007) at 1 (Rev. 9) (May 3, 2011) [hereinafter Smith's Individual Examination Report]; Staff PFF at Para. 66.
[141] See Smith's Individual Examination Report (Ex. CCS-007) at 1–2.

Record, Philip Capehart, Chief Examiner, and Michael Meeks.[142] Mr. Hopkins administered seven of the required 15 job performance measures (JPMs), Mr. Capehart administered six, and Mr. Meeks administered two.[143] As Ms. Smith's Examiner of Record, Mr. Hopkins was 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.[144]

12. The 2011 examiners acted as a team. They evaluated Ms. Smith as a unit and collectively agreed on the grading of the various scenarios and were unanimous in their final scoring of Ms. Smith.[145]

13. Ms. Smith passed the 2011 operating exam. She received "Satisfactory" on all the Administrative JPMs, "Satisfactory" on all the Systems Control Room JPMs, "Satisfactory" on all the In-Plant JPMs, and scored above 1.80 on each competency of the simulator test.[146] She received 2.50 on Interpretation/Diagnosis, 2.20 on Procedures, 2.33 on Control Board Operations, 2.00 on Communications, 2.80 on Directing Operations, and 3.00 on Technical Specifications.[147]

14. Ms. Smith was administered the required SRO written examination on April 1, 2011.[148]

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[142] Id. at 1–2.
[143] See id. at 2.
[144] See id. at 1, 10–22; see also Staff PFF at Para. 162.
[145] NRC Staff Testimony of Phillip G. Capehart Concerning the Claim by Charlissa C. Smith that the NRC Improperly Denied her Senior Reactor Operator License Application (Ex. NRC-003) at 2 (May 31, 2013) [hereinafter Capehart's Prefiled Testimony] ("Based on the consensus opinion of the 2011 examiner's [sic] we were in agreement that Ms. Smith should not receive a standard waiver for passing the operating portion of the 2011 examination . . . ."); see also id. at 6 ("The other two examiners and I were in agreement that Ms. Smith's performance was weak . . . .").
[146] Smith's Individual Examination Report (Ex. CCS-007) at 2–3.
[147] Id. at 2–3.
[148] See id. at 1; see also Staff PFF at Para. 16.

15. Ms. Smith had an overall score of 79.59 on the written examination.[149] She scored 84.93 on the Reactor Operator portion of the written test and 64.00 on the Senior Reactor Operator portion.[150] To pass the written examination, a SRO applicant must have an overall score of 80 and a score of 70 on the SRO part.[151]

16. Ms. Smith's scores on the 2011 examination are summarized in the Table below.[152]

C. Smith	2011 Examination	Grade	NRC Grader
Written Exam	84.93 / 64.00 / 79.59	Fail	P. Capehart
Walk Through (Overall)	Satisfactory Overall	Satisfactory	J. Hopkins
Administrative Topics	All 5 Satisfactory		
Systems: Control Rm.	All 7 Satisfactory		
Systems: In-Plant	All 3 Satisfactory		
Simulator	2.50/2.20/2.33/2.00/2.80/3.00	Pass	J. Hopkins
License Recommendation		Deny License	M. Widmann[153]

17. Mr. Capehart signed Ms. Smith's 2011 Form 303. Mr. Capehart checked "Fail" on Ms. Smith's Form 303 for the Written Examination and signed it on May 2, 2011. Mr. Capehart also checked "Fail" for the Final Recommendation on Ms. Smith's Form 303 on May 2, 2011.[154]

18. One applicant failed both the 2011 operating test and written examination. Six other applicants, including Ms. Smith, passed the 2011 operating test but failed the written examination.[155]

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[149] See Smith's Individual Examination Report (Ex. CCS-007) at 1.
[150] See id. at 1; see also Consolidated Grading Report for Comparison of Hot License 16 Personnel (JPM/Simulator/Written Exam Results) (Ex. CCS-003) [hereinafter Hot License 16 Results].
[151] NUREG-1021 (Ex. CCS-005A) at 210.
[152] Smith's Individual Examination Report (Ex. CCS-007) at 1–3.
[153] Malcolm T. Widmann is Branch Chief, Operation Branch 1, Division of Reactor Safety in Region II. See Statement of Professional Qualifications, Malcolm T. Widmann (Ex. NRC-011) (Undated).
[154] Smith's Individual Examination Report (Ex. CCS-007) at 1.
[155] See Tr. at 154 (Smith), 382 (Capehart), 530–31 (Capehart & Meeks); see also Staff PFF at Para. 68.

19. The 2011 operating examination had problems with validating the simulator scenarios and "was out of normal" in that it started with the JPMs first and the simulator scenarios second. Mr. Meeks testified that the written examination was also "out of the norm" in that "seven of the ten did not pass the written exam portion, and that is outside of the norm for a typical Region II test. . . ."[156]

20. The 70% failure rate on the 2011 Vogtle written examination was unusually high.[157] 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.[158]

21. Ms. Smith appealed the grading of the 2011 written examination,[159] but the appeal did not result in her examination score being changed from failing to passing and her proposed denial was confirmed.[160] Ms. Smith did not demand a hearing regarding this proposed denial within the specified time period and, therefore, the proposed denial became final.[161]

22. Of the ten license applicants in 2011, eight were men and two were women.[162] Both women were African-American and both were denied licenses.[163] Currently, there are no

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[156] Tr. at 381 (Meeks).
[157] See Tr. at 381–82 (Meeks).
[158] See Tr. at 381–82 (Meeks); see also Staff PFF at Para. 69.
[159] See Letter from Charlissa C. Smith to Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation (Ex. NRC-010) (May 20, 2011).
[160] See Staff's Statement of Position (Ex. NRC-001) at 22–23.
[161] See id. at 22–23.
[162] Tr. at 186 (Smith).
[163] Tr. at 184 (Smith), 531 (Capehart). See also BRD-006, noting the Region II examiners in 2011 for the only other African-American female candidate were P. Capehart and M. Meeks. As with Ms. Smith, Branch Chief, Malcolm Widmann signed the license denial.

African-American SROs at Plant Vogtle.[164] There are two female SROs.[165]

23. Despite her passing scores on all six competencies, Mr. Hopkins was "very surprised" that Ms. Smith passed the operating exam based on his own scoring of the six competencies,[166] and discussed with Mr. Capehart and Mr. Meeks the possibility of finding her operating exam performance unacceptable despite her passing scores.[167] Under NUREG-1021, "an examiner may conclude that an applicant's performance is unacceptable even though the documented deficiencies would normally result in a passing grade."[168] Mr. Capehart did not feel that course of action was reasonable, but he agreed to discuss the possibility with Mr. Widmann, the Branch Chief.[169] There was no precedent for such an action and it would have required extensive documentation.[170] After discussing the issue with Mr. Widmann, the 2011 examination team decided they would not take that path.[171] Thus, had Ms. Smith passed the written exam in 2011, she would have received an SRO license despite the Exam Team's concerns about her performance on the 2011 operating exam.[172]

B. The waiver request

24. Ms. Smith contends that the Staff improperly contacted SNC to question the submittal of the preliminary waiver request for Ms. Smith rather than processing it according to the NRC's procedure, causing SNC to change its plan and not submit the final waiver

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[164] Tr. at 202 (Smith).
[165] Tr. at 202 (Smith).
[166] See Email from Phillip Capehart to Janet Vincent & Malcolm Widmann (Ex. CCS-015) at 2 (Feb. 4, 2013 8:38 PM) [hereinafter Feb. 4, 2013 Capehart Email].
[167] Tr. at 478–79 (Capehart), 480 (Capehart & Meeks).
[168] NUREG-1021 (Ex. CCS-005A) at 148.
[169] Tr. at 479 (Capehart).
[170] Tr. at 479 (Capehart).
[171] Tr. at 479 (Capehart).
[172] See Tr. at 480–82 (Capehart).

request.[173] She also argues that the Staff lacked adequate justification for its position that it would deny the request for a waiver if one was submitted.[174] We address her arguments in turn.

1. The Staff unjustifiably discouraged SNC from submitting a final waiver request for Ms. Smith

25. Following the 2011 exam, the next operator examination at Vogtle was scheduled for March/April 2012. The NRC Region II examiners initially assigned to this examination were Mark Bates, Chief Examiner, Michael Meeks, Chief Examiner in Training, and Bruno Caballero.[175]

26. SNC contemplated developing a retake of the written examination for the six 2011 Vogtle applicants who had passed the operating test and failed the written examination.[176] In support of this possibility, in May 2011, SNC 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 one were requested.[177] Mr. Capehart, Mr. Hopkins, and Mr. Meeks informed 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.[178] Subsequently, Mr. Widmann provided this preliminary determination to SNC.[179]

27. 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

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[173] See Smith's Statement of Position (Ex. CCS-075) at 2.
[174] Id.
[175] See Scheduling the Exam and Examiner Independence (Ex. NRC-031) (Undated) at 1, 3. [hereinafter Binder Tab 3]; Staff PFF at Para. 165.
[176] See Tr. at 466–67 (Meeks).
[177] Tr. at 619–20 (Widmann).
[178] Tr. at 466–68 (Meeks), 619–20 (Widmann); see also The Carla Smith Waiver Process (Ex. NRC-013) at 4 (Undated) [hereinafter Smith Waiver Process]; Correspondence Regarding Vogtle NRC Exam Waiver Question (Ex. CCS-001) at 17–18 (April 30, 2013) [hereinafter Exam Waiver Question Correspondence].
[179] See Tr. at 619–20 (Widmann); see also Staff PFF at Para. 166 .

finished administering the 2011 examination, and not the 2012 Examination Team, which had not yet begun to develop the 2012 examination.[180]

28. Mr. Bates of the 2012 Examination Team did participate in this preliminary determination and consulted with both Mr. Meeks and Mr. Widmann concerning a waiver for Ms. Smith.[181]

29. 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.[182] 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.[183]

30. In August 2011 Mr. Caballero was replaced on the 2012 Exam Team by Mr. Capehart, an examiner from Ms. Smith's 2011 Exam Team.[184]

31. In June 2011, SNC requested from Mr. Meeks a preliminary evaluation of whether or not Region II would approve an Operating Exam waiver of the regularly scheduled March/April 2012 operating test.[185]

32. 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 who had observed Ms. Smith's 2011 operating test performance.[186] Mr. Meeks did not discuss this request with Mr. Hopkins,

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[180] See Tr. at 467–68 (Meeks); see also Staff PFF at Para. 167 (in part).
[181] See Exam Waiver Question Correspondence (Ex. CCS-001) at 25.
[182] See Tr. at 468 (Meeks).
[183] See Tr. at 468 (Meeks); see also Staff PFF at Para. 168.
[184] Binder Tab 3 (Ex. NRC-031) at 1, 4.
[185] Smith Waiver Process (Ex. NRC-013) at 7; Exam Waiver Question Correspondence (Ex. CCS-001) at 19; Staff PFF at Para. 169.
[186] Tr. at 469–70 (Meeks).

the third examiner who had observed Ms. Smith, because he had since retired.[187]

33. If Ms. Smith applied for an SRO license in 2012, she would have to retake the written exam and either obtain a waiver of the operating exam or retake that exam as well. Because of their concerns about Ms. Smith's performance on the 2011 operating exam, even though she passed, the Exam Team determined that they would "see her again in a simulator in 2012 to make another determination," which would require that Ms. Smith be denied a waiver of the operating exam if one were requested.[188]

34. Mr. Meeks and Mr. Capehart discussed this 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.[189] Mr. Widmann provided his approval subject to his direction that the language reflect that this was a preliminary, not a final, determination.[190]

35. Since Mr. Meeks was 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 that a waiver request would likely be denied.[191]

36. NUREG-1021 sets the passing grade on the operational portion of the RO/SRO and provides for the grant of a waiver for portions of the examination passed.[192] The evidence in the record unequivocally shows that SNC always requests a waiver for an employee who passed a portion of the examination.[193] Testimony from Mr. Tucker and Exhibit CCS-002

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[187] Tr. at 592 (Ehrhardt), 627–28 (Widmann); Staff PFF at Para. 170.
[188] Tr. at 479–80 (Capehart).
[189] Tr. at 469–70 (Meeks).
[190] See Tr. at 470–71 (Meeks), 621–22 (Widmann); see also Staff PFF at Para. 172.
[191] NRC Staff Testimony of Michael K. Meeks Concerning the Claim by Charlissa C. Smith that the NRC Improperly Denied Her Senior Operator License Application (Ex. NRC-006) at 17–18 (May 31, 2013) [hereinafter Meeks' Prefiled Testimony]; Staff PFF at Para. 173.
[192] See NUREG-1021 (Ex. CCS-005A) at 71.
[193] See Tr. at 265, 273–74, 277, 286, 292–93 (Tucker).

demonstrate that a preliminary waiver request was prepared and submitted for Ms. Smith.[194] The July 13, 2011 letter from T.E. Tynan, Vice President of Southern Company (Vogtle) further indicates SNC was affirmatively seeking a waiver for Ms. Smith.[195]

37. Ms. Smith's preliminary request for a waiver (Form 398) was received by Region II in February 2012. Mr. Meeks, Chief Examiner (in Training) for the 2012 examination and a member of the 2011 examination team that evaluated Ms. Smith, testified that consideration of Ms. Smith's preliminary waiver request was handled properly, consistent with NUREG-1021 and that neither he nor Region II personnel tried to dissuade SNC from submitting a final waiver request for Ms. Smith.[196] The evidentiary record in this case, especially the testimony of Mr. Tucker (the SNC employee who prepared the waiver requests for the 2011 candidates) indicates the opposite---that the processing of Ms. Smith's preliminary waiver request was anything but normal and was inconsistent with NUREG-1021.

38. NUREG-1021, Section ES-201 C.2.g discusses preliminary applications, stating that "[u]pon receiving the preliminary license applications, approximately 30 days before the examination date, the regional office shall review the applications in accordance with ES-202. In addition, the regional office shall evaluate any waiver requests in accordance with ES-204 to determine if the applicants meet the eligibility criteria specified in 10 C.F.R. 55.31."[197] Section C.2.a of ES-202 states the "NRC's regional office shall review preliminary applications as soon as possible after they are received. In that way, the regional office can process the medical certifications, evaluate and <u>resolve any waiver requests in accordance with ES-204</u>, and obtain from the facility licensee any additional information that might be necessary in order to support

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[194] <u>See</u> Affidavit of Perry L. Tucker (Ex. CCS-002) at 14 (April 25, 2013) [hereinafter Tucker's Aff.].
[195] <u>See</u> <u>id.</u> at 18.
[196] Meeks' Prefiled Testimony (Ex. NRC-006) at 3.
[197] NUREG-1021 (Ex. CCS-005A) at 47.

the final eligibility determinations."[198] Section C.2.b of ES-202 states, "[i]f the applicant is reapplying after a previous examination failure and license denial, the regional office shall evaluate the applicant's additional training to determine if the facility licensee made a reasonable effort to remediate the deficiencies that caused the applicant to fail the previous examination."[199]

39. Contrary to the provisions of NUREG-1021, the evidentiary record indicates there was no review of Ms. Smith's preliminary waiver request, nor was there an evaluation of her additional training to gauge the level of remediation she received. Instead, there were telephone calls from the Exam Team to SNC questioning why a preliminary waiver request had been submitted for Ms. Smith. In the words of Mr. Tucker, the preparer of the preliminary waiver requests, he was told that he had "stirred up a hornet's nest" at Region II by submitting the preliminary waiver request for Ms. Smith.[200] He was further told that, if SNC insisted on submitting a final waiver request for Ms. Smith, the processing of that request might delay the 2012 exam for all of SNC's RO and SRO license applicants.[201] Faced with these threats, SNC did not submit a final waiver request for Ms. Smith.[202]

40. Mr. Tucker unequivocally testified that, "it was our intent to apply for waivers for everybody that passed, any part that passed, and that included Carla [Ms. Smith]."[203] There is no credible explanation for the departure from SNC's practice of requesting waivers for all who passed a part of the exam, other than the pressure exerted by Region II not to submit a final request for Ms. Smith. Mr. Tucker summed it up clearly by stating, "I mean I just didn't understand why they seemed surprised we asked for it. I guess that's the best way for me to

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[198] Id. at 73 (emphasis added).
[199] Id. at 75.
[200] Tr. at 274 (Tucker).
[201] Tr. at 275 (Tucker).
[202] Tr. at 275 (Tucker).
[203] Tr. at 265 (Tucker).

state it, and I don't want to upset them. . . .I mean obviously, you know, you don't – the guy that's coming in to do the exam, you don't go, you don't want to be their enemies obviously. I mean that's just good business. You want to do things fair and right. That's all my ever intentions were."[204]

41. Having heard the testimony of the witnesses and reviewed the written evidence, the Board finds the testimony of Mr. Tucker credible. By contrast, the Board does not find credible Mr. Meeks' conflicting testimony that his calls to SNC were merely to determine if a mistake was made and that he did not discourage the filing of final Form 398 with a waiver request for Ms. Smith.

42. Further, the Region II examiners ignored a letter from the Site Vice President of Vogtle Electric Generating Plant requesting a waiver for Ms. Smith for two months. Vogtle Site Vice President Tynan requested, in writing, that if there were any questions concerning waivers for any SNC employees who passed one part of the examination and failed another, they should be directed to Mr. Gunn.[205]

43. As the Operations Training Supervisor, Mr. Gunn is the SNC management official with the authority to make decisions on waiver requests. The Region II examiners instead communicated with Mr. Wainwright and Mr. Thompson, subordinates to Mr. Gunn and Mr. Tynan.[206] The Region II Exam Team contacted persons within SNC whose responsibilities were to design and prepare examinations;[207] they did not communicate with the SNC officials who had the responsibility and authority to request waivers.

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[204] Tr. at 315–16 (Tucker).
[205] Tucker's Aff. (Ex. CCS-002) at 18.
[206] Tr. at 444 (Meeks).
[207] See Tr. at 443 (Meeks).

44. NUREG-1021 provides that a preliminary waiver request be submitted 30 days before the scheduled examination[208] and that the final waiver requests be submitted 14 days before the scheduled examination.[209] In the period between the submission of the preliminary waiver requests and the final waiver requests the Region II examination team called and wrote to the licensee concerning Ms. Smith. They did not inquire about any other of the applicants that passed the simulator portion of the 2011 examination; their repeated inquiries dealt solely with Ms. Smith.[210]

45. The facility submitted final waiver requests for all the individuals who took the licensing examination in 2011 and received a passing score on the operating test, except for Ms. Smith. All individuals for whom a waiver was requested received a waiver. Indeed, individuals with averaged competency scores of 2.55 and 2.58 in 2011 received waivers.[211] Further, in 2012, an applicant was graded with an average competency score of 2.46 on the simulator portion of the examination and was granted an SRO Instant license.[212] Ms. Smith's 2011 average competency score was 2.47 on her simulator examination.[213]

46. The Board concludes that the Staff improperly discouraged SNC from submitting the final Form 398 with a waiver request for Ms. Smith. The Exam Team went beyond its role of determining whether a waiver should be granted and actively dissuaded SNC from filing a final waiver request for Ms. Smith. This action was inconsistent with NUREG-1021's goal of

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[208] NUREG-1021 (Ex. CCS-005A) at 72.
[209] Id. at 73.
[210] See Tr. at 459–60 (Meeks).
[211] See Region II Seven Years' of Initial Licensed Operator Exam Data (Waiver 'Request' Issue) (Ex. NRC-008) (Undated) [hereinafter Region II Waiver Request Exam Data].
[212] See Staff Response to Board's Information Request 2 (Ex. BRD-003) (Undated) at 14.
[213] See Hot License 16 Results (Ex. CCS-003); see also Smith's Individual Examination Report (Ex. CCS-007) at 3.

"ensur[ing] the equitable and consistent administration of examinations for all applicants."[214] On this record, it was also unjustified, arbitrary, and an abuse of discretion.

2. The Staff's error was prejudicial

47. Ms. Smith argues that the Staff lacked adequate justification for its position that it would likely deny a request for a waiver on her behalf if one had been submitted.[215] The Staff counters that, "even if [it] had received an operating test waiver request on behalf of Ms. Smith as part of a new and final license application as required, the Staff would likely not have granted such a request."[216] The Staff further argues that "Ms. Smith does not prove by clear evidence that such a determination would be arbitrary or an abuse of discretion."[217]

48. Given our ruling in the previous section that the Exam Team unjustifiably discouraged SNC from submitting a final Form 398 with a waiver request for Ms. Smith, the parties are in substance arguing whether that error was prejudicial. The idea behind the prejudicial error rule (also known as the harmless error rule) is that if the agency's error did not affect the outcome, it did not prejudice the petitioner.[218] In general, the burden of proving prejudicial error by a federal agency rests with the party challenging the agency's action.[219] However, this is "'not . . . a particularly onerous requirement.'"[220] It is sufficient "that the agency's error may have affected the outcome."[221] We think it clear that, by discouraging the submission of a final waiver request, the Exam Team affected the outcome. The Staff's denial of the waiver request was not inevitable, and the reasons it relies on to support its "likely" denial of a waiver are not persuasive.

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[214] NUREG-1021 (Ex. CCS-005A) at 13.
[215] Smith's Statement of Position (Ex. CCS-075) at 2.
[216] Staff's Statement of Position (Ex. NRC-001) at 8.
[217] Id.
[218] See Jicarilla Apache Nation v. U.S. Dept. of Interior, 613 F.3d 1112, 1121 (D.C. Cir. 2010).
[219] Shinseki v. Sanders, 556 U.S. 396 (2009).
[220] Jicarilla Apache Nation, 613 F.3d at 1121 (quoting Shinseki v. Sanders, 556 U.S. at 410).
[221] Charlton v. Donley, 846 F.Supp.2d 76, 85 (D.D.C. 2012). Accord Evans v. Perry, 944 F.Supp. 25, 29 (D.D.C. 1996).

49. The evidence clearly shows that a waiver denial is an extremely rare event.[222] Region II records indicate that only once in the past seven (7) years was a waiver request denied.[223] Staff witness Lea testified, "You know, granting a waiver is not automatic, but, again, I've never seen one not granted in Region II for an operating test. I have seen waivers denied. However, it was not for an operating portion of the test."[224] Thus, it is likely that if the applicant passes one portion she will be granted a waiver of the portion passed and be extended the opportunity to retake only the portion of the test which she failed.[225] Given that a waiver denial is such a rare event, discouraging submission of the final Form 398 with a waiver request is necessarily prejudicial.

50. The Staff claims only that it is "likely" it would not have granted Ms. Smith a waiver of the 2012 operating test had SNC submitted a final waiver request. That is sufficient to show that, had a final waiver request been filed, Ms. Smith might have received a waiver. As an applicant whose career will be significantly impacted by the Staff's action on her license application, she was entitled to a final Staff decision based on an evaluation of all relevant factors rather than a mere prediction that denial was "likely."

51. To justify a denial, moreover, the Staff would have to consider additional information. Mr. Meeks acknowledged that "[t]he basis of the decision to grant or deny the waiver is heavily weighed, as to the documentation that the facility licensee provides, as to what training has been given and the correction of any deficiencies that were noted on the previous exam. . . ."[226] Mr. Meeks further testified that information the facility provides as part of a certified license application regarding the applicant's retraining "would influence us as to our

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[222] See Region II Waiver Request Exam Data (Ex. NRC-008) at 3–10. Of the 47 waiver requests over the past seven years in Region II, only one waiver request was denied. See id.
[223] Region II Waiver Request Exam Data (Ex. NRC-008) at 10.
[224] Tr. at 675 (Lea).
[225] Region II Waiver Request Exam Data (Ex. NRC-008); Tr. at 675 (Lea).
[226] Tr. at 388 (Meeks).

determination as to whether to grant or to deny the waiver. . . ."[227] But the Exam Team's preliminary determination that it likely would not grant Ms. Smith a waiver could not have been based on that information because the Exam Team reached that determination before the preliminary application had been submitted. Moreover, the Exam Team never began to formally evaluate an operating test waiver for Ms. Smith after the preliminary application was submitted because Mr. Wainwright, after being called and asked by Mr. Meeks whether box 4.f being checked was a typo, notified them that the decision to submit a preliminary waiver request for Ms. Smith was a mistake.[228] Thus, the Exam Team did not evaluate the information supplied in Ms. Smith's preliminary application concerning her remediation training before it concluded she likely would not receive a waiver. To justify an actual decision denying a waiver, the Staff would have to evaluate this information.

52. We are also not persuaded by the Exam Team's asserted justification for its "likely" decision to deny Ms. Smith a waiver. An SRO applicant's overall performance on the simulator portion of the operating test is satisfactory if all of the six competency grades are greater than 1.80. Ms. Smith scored 2.00 or greater on all six competencies of the simulator portion of the operating test.[229] Given these scores, the Exam Team had no Examiner Standard justification under NUREG-1021 for deciding that it would likely deny her a waiver. The NRC Staff conceded that if Ms. Smith had passed the written portion of the examination in 2011 she would have been entitled to and would have been issued an SRO license in 2011.[230]

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[227] Tr. at 389 (Meeks).
[228] Tr. at 409 (Meeks).
[229] Ms. Smith received Satisfactory on all the Administrative Topics, Satisfactory on all the Systems Control Room topics. She received 2.50 on the Interpretation/Diagnosis segment, 2.20 on the Procedures segment, 2.33 on Control Board Operations segment, 2.00 on Communications segment, 2.80 on Directing Operations, and 3.00 on the Technical Specifications segment. See Smith's Individual Examination Report (Ex. CCS-007) at 3.
[230] See Tr. at 492 (Capehart).

53. NUREG-1021 states that "[i]f an applicant made an error with serious safety consequences, the examiner may recommend an operating test failure even if the grading instructions in Section D would normally result in a passing grade."[231] Ms. Smith passed the simulator portion of the test and no recommendation that she should have failed was made by any of the examiners. If Ms. Smith was below standard she could have/should have been failed (even though she had a passing score).

54. In 2011, Ms. Smith passed the operational portion of the RO/SRO test with an overall average grade of 2.47.[232] There are no guidelines for waivers in NUREG-1021.[233] Acknowledging there are no objective, quantitative criteria to evaluate whether to grant a waiver,[234] the NRC examiners cite the number of comments made during the simulator examination as justification for denial of a waiver. The Staff would have us find that, although Ms. Smith passed the operating test according to the criteria specified in NUREG-1021, the subjective opinions of the examiners and a criteria (number of comments) that is not mentioned in NUREG-1021 would have prevented Ms. Smith from receiving a routine waiver.

55. The number of comments on an operating test is not indicative of the level of performance on that operating portion of the examination nor is it criteria listed in NUREG-1021.[235] "The procedures contained herein require the examiner to evaluate each applicant's performance on the operating test and make a judgement [sic] as to whether the applicant's level of knowledge and understanding meet the minimum requirements to safely operate the facility for which the license is sought."[236] The fairness review confirms that "[t]he NRC's

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[231] NUREG-1021 (Ex. CCS-005A) at 141 (emphasis in original).
[232] Hot License 16 Results (Ex. CCS-003); Smith's Individual Examination Report (Ex. CCS-007) at 3.
[233] Tr. at 501–03 (Meeks); see also Staff PFF at Para. 81.
[234] See Feb. 4, 2013 Capehart Email (Ex. CCS-015) at 11; see also Tr. at 633–34 (McHale).
[235] See Meeks' Prefiled Testimony (Ex. NRC-006) at 29–30; see also Tr. at 295–98 (Tucker), 515 (Capehart).
[236] See NUREG-1021 (Ex. CCS-005A) at 141 (emphasis added).

examinations are not intended to distinguish among levels of competency or to identify the most qualified individuals, but to make reliable and valid distinctions at the minimum level of competency that the agency has selected in the interests of public protection."[237] Thus, once an applicant demonstrates by passing the operating exam that she meets the minimum requirements to safely operate the facility for which she seeks a license, she should receive a waiver of that exam if she must retake the written exam. Given that the Staff's operating exams are not intended to distinguish among levels of competency, the Staff may not justify its "likely" denial of a waiver on a comparison of Ms. Smith's operating exam scores with those of other applicants.

56. Moreover, the record evidence shows that an individual with a score only .01 higher than Ms. Smith was granted a waiver by Region II.[238] The record evidence also shows that an individual with a score .01 lower than Ms. Smith was granted a license by Region II.[239] Thus, Ms. Smith's 2011 scores would not have justified the Staff's "likely" denial of a waiver.

57. The record also indicates that the plant-administered audit exam is usually more difficult than the NRC exam.[240] Ms. Smith passed all of the company-administered audit examinations leading up to the NRC examinations in both 2011 and 2012.[241]

58. The Board therefore finds that Ms. Smith has clearly met her burden to show that the Exam Team committed prejudicial error by unjustifiably discouraging SNC from submitting a final Form 398 with a waiver request on her behalf.

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[237] Memorandum from Frank Ehrhardt, Branch Chief, Division of Reactor Projects, to John McHale, Branch Chief, Operating Licensing, Division of Inspection and Regional Support (Ex. NRC-014) at 7 (Sept. 4, 2012) [hereinafter Ehrhardt's Independent Review].
[238] Region II Waiver Request Exam Data (Ex. NRC-008) at 8. This individual failed one JPM while Ms. Smith did not fail any.
[239] Form ES-303-1, "V" Individual Examination Report (Ex. CCS-057) (Rev. 9) at 3 (May 10, 2012) [hereinafter "V" Individual Examination Report].
[240] See Tr. at 382 (Capehart).
[241] Tr. at 197 (Smith), 291 (Tucker).

C. The denial of an impartial examination team

59. Two of the 2012 examiners for Ms. Smith's retest were examiners from Ms. Smith's 2011 test. Mr. Capehart was Ms. Smith's Chief Examiner in 2011. Mr. Meeks was also a member of the 2011 exam team. Both evaluated Ms. Smith's simulator performance in 2011. Ms. Smith's Statement of Position 2 maintains that, under the conflict of interest restrictions in NUREG-1021, Messrs. Meeks and Capehart should not have been assigned to her 2012 Examination Team because both individuals had formed strong negative opinions about her at that time that necessarily influenced the grading of her 2012 operating exam.[242]

60. Mr. Capehart, the Chief Examiner in 2011, formally signed Ms. Smith's 2011 NRC Form 303. He "failed" Ms. Smith on the Written Examination and the Overall Examination.[243] Mr. Capehart advocated against granting Ms. Smith a waiver of the 2012 operating exam.[244]

61. Mr. Meeks, a member of the 2011 examination team, believed Ms. Smith to be an "unsafe operator" and advocated against giving Ms. Smith a waiver of the 2012 operating exam.[245]

62. Both Mr. Meeks and Mr. Capehart stated that going into the 2012 examination they believed (as did 2011 examiner of record, Mr. Hopkins) Ms. Smith to be an unsafe operator.[246] Mr. Meeks stated that Ms. Smith "stood out as being unsafe."[247] The entire 2011 examination team formed an opinion as to Ms. Smith's qualifications during the 2011 examination.[248] The 2011 examination team was unanimous in their evaluation of Ms. Smith's

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[242] Smith's Statement of Position (Ex. CCS-075) at 2.
[243] Id. at 1.
[244] See Tr. at 467, 470–71 (Meeks).
[245] See Tr. at 467, 470–71 (Meeks).
[246] See Feb. 4, 2013 Capehart Email (Ex. CCS-015) at 10–11.
[247] Tr. at 526–27 (Meeks).
[248] Tr. at 527 (Meeks) ("[A]ll three of us at the time where we were evaluating the retake exam agreed that the performance was very marginal, specifically on the simulator scenario portion.").

operation of the simulator.[249] The 2011 examination team likewise coordinated their recommendation as to the desirability of a potential waiver denial for Ms. Smith.[250] Since recommending denial of a routine waiver of a portion of the test that an applicant passed is admittedly a rare decision, those who recommend it must have very strong opinions and those strong opinions should preclude them from participating in retesting of that applicant.

63. NUREG-1021 states, "[t]he regional office shall not assign an examiner who failed an applicant on an operating test to administer any part of that applicant's retake operating test."[251] The Staff argues that the 2011 examination team (Hopkins, Meeks, Capehart) did not "fail" Ms. Smith on her operating examination, and therefore Meeks and Capehart were free to reexamine her again in 2012. The Staff ignores the conflict of interest limitation in NUREG-1021. The participation of Mr. Meeks and Mr. Capehart as examiners for Ms. Smith in 2012 was inconsistent with the additional requirement of NUREG- 1021 directing that "[i]f an examiner is assigned to an examination that <u>might appear to present a conflict of interest</u>, the examiner shall inform his or her immediate supervisor of the potential conflict."[252] When informed of a potential conflict, the supervisor "must apply <u>sound judgment</u> to the facts of each case," and, if any doubt exists, "consult with regional management and/or the NRR operator licensing program office to resolve the issue."[253] Because this requirement applies to any situation that might appear to present a conflict of interest, it is a substantially broader limitation than the specific prohibition against an examiner who failed an applicant on a previous operating test taking any part in that applicant's retake operating test.

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[249] Tr. at 466–68 (Meeks), 619–20 (Widmann); <u>see</u> Smith Waiver Process (Ex. NRC-013) at 4; Exam Waiver Question Correspondence (Ex. CCS-001) at 17–18.
[250] <u>See</u> Feb. 4, 2013 Capehart Email (Ex. CCS-015) at 2–3, 10–11.
[251] NUREG-1021 (Ex. CCS-005A) at 53.
[252] <u>Id.</u> (emphasis added).
[253] <u>Id.</u> at 52 (emphasis added).

64. Both Mr. Meeks and Mr. Capehart made clear through their statements and conduct that they had formed a belief Ms. Smith was an unsafe operator and, therefore, in their view she was not qualified to receive an SRO license.[254] As a practical matter, there is little meaningful difference between an examiner who fails an applicant and one who determines that the applicant is an unsafe operator and therefore not qualified to receive an SRO license. Moreover, the denial of a routine waiver request is tantamount to a failure. Dissuading a company from requesting a routine waiver is an even stronger indication of prejudgment. NUREG-1021 is written not only to prevent prejudgment but to prevent even the appearance of prejudgment. Therefore, the Board finds unavailing the Staff's assertion that Mr. Meeks and Mr. Capehart could serve on Ms. Smith's 2012 Exam Team because she was not failed by either of them (or by Mr. Hopkins) in 2011.

65. Equally troubling, after being informed of the appearance of a conflict of interest, Mr. Meeks and Mr. Capehart's immediate supervisor (Mr. Widmann) nevertheless approved their assignment to the 2012 Exam Team for Ms. Smith. Mr. Widmann's decision does not satisfy the "sound judgment" requirement of NUREG-1021[255] and resulted in a biased Exam Team in 2012.

66. NUREG-1021 is written to prevent prejudgment and even the appearance of prejudgment. Given the circumstances here the Board finds unavailing the Staff's response that Mr. Meeks and Mr. Capehart need not have been precluded by conflict of interest considerations from being on Ms. Smith's 2012 examination team because she was not 'failed' by either of them (or by Mr. Hopkins) in 2011 and that Mr. Widmann's determination to assign them to her 2012 examination team was consistent with the bias avoidance standards in NUREG-1021.

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[254] See Feb. 4, 2013 Capehart Email (Ex. CCS-015) at 2–3, 10–11; see also Tr. at 527 (Meeks); Exam Waiver Question Correspondence (Ex. CCS-001) at 3-4.
[255] Tr. at 522–23 (Meeks), 654–55 (Widmann & McHale).

67. Ms. Smith was entitled to an examination team in 2012 that had not already concluded that she was an unsafe operator. Neither Mr. Meeks nor Mr. Capehart should have taken any part in Ms. Smith's 2012 examination. Mr. Meeks and Mr. Capehart's participation in Ms. Smith's 2011 test, together with their strong opinions as to her performance and their efforts to prevent Ms. Smith from receiving a routine waiver, should have precluded them from evaluating Ms. Smith's 2012 retest.

68. The Staff also maintains that it satisfied the conflict of interest requirements because it assigned Mr. Bates, not Mr. Meeks or Mr. Capehart, to be Ms. Smith's examiner of record in 2012. The Board disagrees. Each examiner took notes on the communications and actions of all of the applicants to enhance the overall accuracy of the evaluation.[256] The record is clear that the examiners functioned as a team in grading each applicant.[257] The Staff testified, "[i]t is important to note that the examiners acted as a team, assisting each other with the evaluation of all the applicants."[258]

69. Mr. Capehart testified that "[t]he other two examiners and I were in agreement that Ms. Smith's performance was weak. . . ."[259] while Mr. Meeks testified, "All three examiners from 2011 exam agreed that Ms. Smith's performance, specifically on the simulator scenario portion, was poor enough to warrant additional evaluation."[260]

70. Following the 2012 simulator exam, the Exam Team, two of whom were on the 2011 examination team, assert, "[a]fter observing Ms. Smith on three scenarios during the first week of the exam, the exam team recognized that her performance was marginal. Therefore,

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[256] See NRC Staff Testimony of Mark A. Bates, Phillip G. Capehart, and Michael K. Meeks Concerning the Claim by Charlissa C. Smith that the NRC Improperly Denied her Senior Reactor Operator License Application (Ex. NRC-002) at 14 (May 31, 2013) [hereinafter Prefiled Testimony of Bates, Capehart & Meeks.
[257] See id. at 14–15.
[258] Id. at 14.
[259] Capehart's Prefiled Testimony (Ex. NRC-003) at 6.
[260] Meeks' Prefiled Testimony (Ex. NRC-006) at 16.

the team used this intermediate week to document her simulator performance while their observations were fresh in their minds. Following this first draft of grading, the examiners understood that her performance could possibly result in a failing grade on the simulator portion of the exam."[261]

71. Thus, the very composition of the Exam Team belies the Staff's assertion that "the assignment of Mr. Bates as Ms. Smith's examiner of record represented an added measure in the interest of assuring objectivity."[262] Ms. Smith was entitled to have all of the members of the examination team free from bias against her. The Staff failed in its obligation under NUREG-1021 to provide an examination team free of bias against Ms. Smith.

72. The Staff maintains that it is "unlikely" that examiner bias, even if it existed, could have affected the Exam Team's determination that Ms. Smith failed the simulator exam.[263] According to the Staff, "[t]he required criteria of NUREG-1021 have evolved over many years specifically in order to minimize the subjectivity of the NRC operator licensing process."[264]

73. This is at bottom another harmless error argument. The substance of the Staff's position is that, even if it was error to assign Mr. Meeks and Mr. Capehart to the Exam Team, the error was not prejudicial because it is "unlikely" that bias could have affected the result. We disagree. It is sufficient to defeat a claim of harmless error "that the agency's error may have affected the outcome."[265] Thus, the Staff cannot support a claim of harmless error by mere assurances that a prejudicial impact is "unlikely." Furthermore, the record of this case is replete with evidence of opportunity for biased examiners to affect the outcome of the simulator exam. For example, as we have seen, NUREG-1021 authorizes a waiver of the simulator exam for applicants who previously passed the exam, but it provides no standard to guide the exercise of

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[261] Prefiled Testimony of Bates, Capehart & Meeks (Ex. NRC-002) at 15 (emphasis added).
[262] Id. at 12.
[263] Staff's Statement of Position (Ex. NRC-001) at 52.
[264] Id.
[265] Charlton, 846 F.Supp.2d at 85.

that authority.[266] Similarly, as we discuss in more detail later, when an applicant has a RF score of 1 based on two errors, NUREG-1021, ES-303 D.2.b, allows the score to be increased to 2 if this can be justified based on the applicant correctly performing other activities related to the RF.[267] The examiner must decide whether there is adequate justification, but NUREG-1021 provides no specific criteria to determine when that is present. Also, the record evidence shows that the Exam Team encouraged the IRP to hold Ms. Smith to a higher standard by deviating from the pre-scripted Forms ES-D-1 and ES-D-2 and elevating a task (closing a PORV) to a critical task after the examination.[268] The record evidence further shows that the Exam Team encouraged the IRP to grade Ms. Smith more severely than other candidates by double counting her errors.[269] Thus, we find clear evidence to show prejudice to Ms. Smith from the assignment of a biased Exam Team.

D. The 2012 SRO license examination

74. Subsequent to the 2011 examination, Ms. Smith was placed in the next Vogtle training class, Hot License 17.[270] She received 25 weeks of daily full-time remediation to prepare to retake the examination in 2012.[271]

75. Ms. Smith was in the top five of the Hot License 17 class. There were 16-17 candidates in the class.[272]

76. Ms. Smith did very well in the simulator portion of the company's audit examination. Indeed, she did better on the 2012 company audit examination than she did in the 2011 company audit examination.[273]

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[266] See supra Para. 36, 49, 54, 55.
[267] See infra Para. 96, 102–05.
[268] See infra Para. 92–93, 145.
[269] See infra Para. 73, 99, 105, 156.
[270] Tr. at 193 (Smith).
[271] See Tr. at 194–95 (Smith).
[272] Tr. at 196 (Smith).
[273] See Tr. at 197 (Smith).

77. In 2012, Region II administered the operating test to Ms. Smith from March 26 to April 13.[274] Ms. Smith was also administered the required SRO written examination on April 20, 2012.

78. Ms. Smith passed the 2012 written test. Ms. Smith's 2012 written examination score was 89.00% overall, with a score of 92.00% on the SRO portion and 88.00% on the RO portion.[275]

79. In 2012, Ms. Smith was again denied a SRO license because she failed the simulator part of the operating exam. The summary scoring sheet for Ms. Smith's 2012 simulator examination, Form ES-303-1 (normally page 3 of the Individual Examination Report (IER)), is included below as Table 1. Because Ms. Smith's score on Competency 4, Communications, was 1.20, she could pass the simulator exam only if she scored 2.00 or above on all the other competencies. She failed to do so, scoring 1.70 on Competency 1, Interpretation/Diagnosis, and 1.99 on Competency 3, Control Board Operations. Ms. Smith therefore failed the 2012 Operating Exam.

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[274] See Smith's Individual Exam Report (Ex. CCS-045) at 1.
[275] See id.

NRC-045
Submitted: May 31, 2013

ES-303, Rev. 9 **Individual Examination Report** **Form ES-303-1**

PRIVACY ACT INFORMATION - FOR OFFICIAL USE ONLY

Applicant Docket Number: 55-23694

Senior Reactor Operator Simulator Operating Test Grading Details

Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Comment Page No.
1. Interpretation/Diagnosis					
a. Recognize & Attend	0.20	3	0.60		
b. Ensure Accuracy	0.20	**1**	**0.20**	**1.70**	8, 10
c. Understanding	0.30	**1**	**0.30**		12, 14
d. Diagnose	0.30	**2**	**0.60**		16
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**		18, 19, 20
b. Understanding	0.33	3	0.99	**1.99**	
c. Manual Control	0.33	**2**	**0.66**		21
4. Communications					
a. Clarity	0.40	**1**	**0.40**		23, 24, 25
b. Crew & Others Informed	0.40	**1**	**0.40**	**1.20**	26, 27
c. Receive Information	0.20	**2**	**0.40**		28
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**		29, 30, 31
b. Compliance	0.60	3	1.80	**2.20**	

[Note: Enter RF Weights (nominal, adjusted, or "0" if not observed (N/O)), RF Scores (1, 2, 3, or N/O), and RF Grades from Form ES-303-4 and sum to obtain Competency Grades.]

Table 1. Original Simulator Test Grading Sheet from 2012 Examination.[276]

[276] Smith's Individual Exam Report (Ex. NRC-045) at 3. This single page is taken from the complete 32 page IER that includes Form ES-303-1 and generally one page, identified in the Comment column, for each comment made by the examiners.

80. Ms. Smith's scores on both the written and operating examinations are summarized in the table below.

C. Smith	2012 Examination	Grade	NRC Grader
Written Exam	88.00 / 92.00 / 89.00	Pass	M. Meeks
Walk Through (Overall)	Satisfactory Overall	Satisfactory	M. Bates
Administrative Topics	All 5 Satisfactory		
Systems: Control Rm.	All 7 Satisfactory		
Systems: In-Plant	All 3 Satisfactory		
Simulator	1.70/3.00/1.99/1.20/3.00/2.20	Fail	M. Bates
License Recommendation		Deny License	M. Widmann

E. The administrative review of the grading of Ms. Smith's 2012 simulator exam

81. Following the 2012 Operator Licensing Examination, Ms. Smith was notified in a letter dated May 11, 2012, that she had failed the examination, that her license application would be denied, and that she could request either an informal staff review or a hearing within 20 days in writing by mail, implying either U.S. mail or private carrier.[277] In order to initiate a staff review, the letter stated:

> Your request must identify the portions of your examination that you believe were graded incorrectly or too severely. In addition, you must provide the basis, including supporting documentation (such as procedures, instructions, computer printouts, and chart traces) in as much detail as possible, to support your contention that certain of your responses were graded incorrectly or too severely.[278]

82. In response, Ms. Smith requested an NRC staff review in accordance with NUREG-1021, ES-502 C.1.b. (2),[279] in a two-part letter that included supporting material.[280] The

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[277] See May 11, 2012 Widmann Letter (Ex. CCS-033).
[278] Id. at 1.
[279] NUREG-1021 (Ex. CCS-005A) at 232.
[280] See Letter from Charlissa C. Smith to Director, Division of Inspection and Regional Support, NRR (Undated) (Ex. NRC-015); see also Smith's 2012 Review Request Letter (Ex. CCS-034). As a note, CCS-034 contains the same two pages as NRC-015 as well as some additional material. The letter is addressed to Director, Division of Inspection and Regional Support, in Washington, DC, in accordance with the instructions provided in the denial letter. The letter is not dated. Both complete parts of the letter were later uploaded to the EIE by Ms. Smith on January 7, 2013, according to her transmittal letter of that date (ML13007A033). Part 1 is ML13007A037 and Part 2 is ML13007A035.

NRC received Ms. Smith's request on June 5, 2012.[281]

83. The NRC Staff's guidance for conducting administrative reviews is in NUREG-1021 ES-502 and OLMC-500, Processing Requests for Administrative Reviews and Hearings, which provides three alternatives for selecting a review panel.[282]

> The Chief, IOLB, in consultation with the affected region and the IOLB staff, will determine whether to: (1) have an independent qualified examiner from one of the regions perform the review; (2) have IOLB perform the review; or (3) convene a three-person appeal panel to perform the review. Since all administrative review results are subject to final approval by IOLB, in order to enhance efficiency, IOLB will typically perform the review and document the results, taking into account any regional/examiner of record input. Option 1 might be necessary if IOLB does not have an examiner certified on the affected facility, and Option 3 might be appropriate for particularly complex or contentious cases.[283]

84. In accordance with NUREG-1021, the Chief of the Operator Licensing Branch in NRR (IOLB), John McHale, was responsible for addressing Ms. Smith's review request. 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 (hereinafter "improper conduct arguments"). He assigned the technical grading arguments to a three-person appeal panel to perform a scoring review and the improper conduct arguments to the Deputy Regional Administrator of Region II, Mr. Len Wert, to do a fairness review.[284]

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[281] The Nov. 15 Denial Letter (CCS-014) specifies this date of receipt. See Nov. 15 Denial Letter (Ex. CCS-014) at 1.
[282] See NUREG-1021 (Ex. CCS-005A) at 231–35; see generally OLMC-500 (Ex. CCS-030).
[283] OLMC-500 (Ex. CCS-030) at 3.
[284] See Tr. at 656 (McHale); Email from John McHale to Malcolm Widmann (Ex. CCS-022) (June 19, 2012 3:08 PM) [hereinafter June 19, 2012 McHale Email]; Letter from Malcolm T. Widmann to Charlissa C. Smith (Ex. NRC-016) (May 9, 2011); NUREG-1021 (Ex. CCS-005A) at 234. The fairness review is discussed infra at Para. 234–71

85. OLMC-500 states that, when a three-person panel is selected to perform the review, it "shall be impartial, i.e., it may include a representative from the affected region, but it will not include individuals involved with the applicant's licensing examination."[285]

86. Mr. McHale appointed Mr. Donald Jackson from NRC Region I as the chairman of the three-person review panel to evaluate the errors alleged by Ms. Smith in the scoring of her 2012 simulator exam.[286]

87. Mr. Jackson deliberately selected a panel that consisted entirely of individuals from outside Region II. In addition to Mr. Jackson, it included Mr. Chris Steely from Region IV and Mr. David Muller from Headquarters. Mr. Jackson testified that "I chose a group of people that were not, in my thought, were not influenced by Region II. So, I reached out to Region IV for a person and Headquarters for a person, just to ensure that there was absolutely no influence from Region II when we conducted this review."[287]

88. Ms. Smith identified her issues by referencing specific examiner comments identifying errors she allegedly made related to the competencies and rating factors for which the Examiner Standards require comments to be made in the ES-303 Individual Examination Report (IER). Ms. Smith identified grading concerns in three competencies detailed in NUREG-1021, ES-303, Section D.[288] She requested review of comments associated with Competency 1, Interpretation and Diagnosis (Comments on pages 8,10,12, and 14 of her IER), and Competency 3, Control Board Operations (Comments on pages 18, 20, and 21 of her IER).

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[285] OLMC-500 (Ex. CCS-030) at 3. As explained infra at Para. 234–71, a separate administrative review evaluated Ms. Smith's claims regarding the handling of a potential waiver of the 2012 operating exam and NRC examiner bias.
[286] See June 19, 2012 McHale Email (Ex. CCS-022).
[287] Tr. at 608–09 (Jackson).
[288] NUREG-1021 (Ex. CCS-005A) at 142–49.

She also requested a review of all the comments associated with Competency 4, Communications.[289]

89. Supporting material, provided in or with Ms. Smith's review request letter[290] and identified by reference to the IER examiner notes pages, identified seven specific events for review:

a. Trip of the operating Main Turbine EHC pump, Scenario 3, Event 5;[291]

b. Response to a Design Basis Accident (DBA) Steam Generator Tube Rupture, Scenario 3, Event 7;[292]

c. Controlling Pressurizer Pressure Channel PT-455 Fails High, Scenario 3, Event 4;[293]

d. Controlling Pressurizer Level Transmitter LT-459 Failed Low, Scenario 6, Event 4;[294]

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[289] Smith's 2012 Review Request Letter (Ex. CCS-034) at 3. This letter is identified as having been received on June 5, 2012.

[290] Note that Smith's 2012 Review Request Letter (Ex. CCS-034) has supporting material only for the first event detailed here. Other supporting material was provided as required, but is not included as exhibits. An example is a 76 page document titled Smith Filed Contentions Part 2 Applicant Response to NRC Comments. This document includes plant procedures, plant system descriptions to help with the review, candidate explanations for each event, and examiner comments. These materials have been selectively summarized in exhibit NRC-018, which is further identified in testimony, Jackson's Prefiled Testimony (Ex. NRC-004) at 8, as being the Rev. 1 of the final Review Panel report in response to the review requested in CCS-034. See Letter Ho K. Nieh, Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation to Charlissa C. Smith (Ex. NRC-018) (Undated) [hereinafter Nieh's Response to Smith Letter]

[291] Smith's 2012 Review Request Letter (Ex. CCS-034) at 3, 10, 18; Smith's Individual Exam Report (Ex. CCS-045) at 8.

[292] Smith's 2012 Review Request Letter (Ex. CCS-034) at 3, 10; Smith's Individual Exam Report (Ex. CCS-045) at 10.

[293] Smith's 2012 Review Request Letter (Ex. CCS-034) at 3, 10; Smith's Individual Exam Report (Ex. CCS-045) at 12.

[294] Smith's 2012 Review Request Letter (Ex. CCS-034) at 3, 10; Smith's Individual Exam Report (Ex. CCS-045) at 14.

e. Raise Power in Accordance with Procedure, Scenario 7, Event 1;[295]

f. Reactor Water Storage Tank (RWST) Sludge Mixing Line Pipe Break, Scenario 7, Event 6; and[296]

g. Loss of Cooling to Letdown Heat Exchanger (TE-0130 fails low), Scenario 7, Event 3.[297]

90. The Informal Review Panel (IRP) first met as a team from June 25-27, 2012, in a private conference room at the NRC's Region II office in Atlanta, Georgia.[298] The Region II Exam Team provided the IRP with reference material before that meeting. The reference materials included:

a. A summary of the 2011 Vogtle examination documentation and Ms. Smith's IER from that exam;

b. IERs for the two members of Ms. Smith's crew who took the 2012 simulator examination scenarios with her;

c. Clean copies of the three simulator scenario detailed descriptions (Forms ES-D-1 and ES-D-2 for Scenarios 3, 6, and 7);

d. A tabbed binder (14 tabs) prepared by the Region II Exam Team containing descriptions of the events Ms. Smith contended in greater detail than previously recorded on the official IERs, along with a description of the Region II grading philosophy, and other supporting material related to the 2012 operating examination; and

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[295] Smith's 2012 Review Request Letter (Ex.CCS-034) at 3, 10; Smith's Individual Exam Report (Ex. CCS-045) at 18.
[296] Smith's 2012 Review Request Letter (Ex.CCS-034) at 3, 10; Smith's Individual Exam Report (Ex. CCS-045) at 20.
[297] Smith's 2012 Review Request Letter (Ex. CCS-034) at 3, 10; Smith's Individual Exam Report (Ex. CCS-045) at 21.
[298] NRC Staff Testimony of Donald E. Jackson Concerning the Claim by Charlissa C. Smith that the NRC Improperly Denied her Senior Reactor Operator License Application (Ex. NRC-004) at 3 (Undated) [hereinafter Jackson's Prefiled Testimony].

e. Rough notes from each examiner recorded during the simulator scenarios.[299]

91. The IRP met for a day and a half reviewing the contentions and the documentation provided by the Exam Team. The results of this review were recorded on large flip charts.[300] On the afternoon of the second day, the IRP interviewed the Exam Team to request clarification of questions they had, and to obtain additional insights on Ms. Smith's performance. On the third day the IRP used information from the interview with the Region II Exam Team, plus re-reviews of the reference materials to answer any previous panel member questions. The IRP then roughed out determinations of the rating factors against which her documented and contested errors should be assessed.[301]

1. The Exam Team's belated identification of a new critical task

92. The binders supplied by the Exam Team included documents in which the Exam Team stated its positions concerning Ms. Smith's allegations of error.[302] But the Exam Team also advocated changing the grading of the simulator exam in ways that would further reduce Ms. Smith's scores. The first such change concerned Scenario 7, Event 5, in which Ms. Smith took a control switch for a PORV initially to the open position before taking it to the close position.[303] For this error in connection with a non-critical task, she was assessed a one point reduction to RF 3.a. on her IER, form ES-303-1.[304] Ms. Smith's original review request of June 5, 2012 did not contest this error. But in the binder document addressing Rating Factor 3.a., the

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[299] Id. at 4–5.
[300] Id. at 6 (referring to Notes on Interpret/Diagnose Scenario 3/Event 5 (Ex. CCS-065) (Undated)).
[301] Jackson's Prefiled Testimony (Ex. NRC-004) at 7.
[302] See, e.g., Smith Waiver Process (Ex. NRC-013); Binder Tab 3 (Ex. NRC-031); Rating Factor 1.B.: Interpretation/Diagnosis, Ensure Accuracy (Ex. NRC-033) (Undated); Factual Sequence of Events (Ex. NRC-037) (Undated) [hereinafter Factual Sequence of Events]; The 2011 Vogtle License Exam (Ex. NRC-046) (Undated). A list of all the documents that the Exam Team included in the binders appears in Jackson's Prefiled Testimony. See Jackson's Prefiled Testimony (Ex. NRC-004) at 5 n.8.
[303] Smith's Individual Exam Report (Ex. NRC-045) at 19.
[304] Id. at 3, 19.

Exam Team changed its position, claiming that it had "mis-graded" this event "because it was a failed critical task."[305] An error on a critical task must be assessed a two-point reduction. The Exam Team maintained that the low RF score it had assigned to RF 3.a. (1 out of a maximum of 3) was reinforced by its new determination that Ms. Smith's error was related to a critical task.[306]

93. Mr. Bates of the Exam Team revisited this issue in his email to Mr. Muller on July 5, 2012, barely one week after the IRP had its meeting in Atlanta. In transmitting Revision 6 of the Exam Team's regrade of Ms. Smith's 2012 operating exam,[307] Mr. Bates stated that the "[t]he exam team missed an opportunity during exam development to code this error as a critical task on Form ES-D-2. It was recognized during grading that the error was related to a critical task, but due to the fact that three errors were already assigned to Rating Factor 3.a., there would be no impact on the score."[308] The Staff provided no record of this alleged earlier recognition and reasoning, and the Board has found none in the evidentiary record. All of the evidence the Board has reviewed shows that the Exam Team's interest in coding Ms. Smith's error on Scenario 7, Event 5, as the failure of a critical task arose after Ms. Smith filed her administrative appeal.

94. To understand why maintaining Ms. Smith's low score on RF 3.a. was of such importance to the Exam Team, we must revisit Table 1. As that table shows, Ms. Smith scored 1.20 on Competency 4, Communications. Therefore, to pass the exam, she had to score 2.00 or above on the other competencies. She failed to do so, and accordingly failed the exam, because she scored 1.70 on Competency 1, Interpretation/Diagnosis, and 1.99 on Competency 3, Control Board Operations. Her score on Competency 3 resulted from her score of 1 on RF

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[305] Rating Factor 3.A. (Ex. CCS-039) at 3.
[306] Id. at 4.
[307] See Email from Mark Bates to David Muller (Ex. CCS-062) (July 5, 2012 2:50 PM) [hereinafter July 5, 2012 Bates Email] (referencing Vogtle Operating Exam Appeal (Ex. CCS-101) as the referenced attachment).
[308] Vogtle Operating Exam Appeal (Ex. CCS-101) at 12.

3.a.; if her score on that RF increased to either 2 or 3, she would score above 2.00 on Competency 3. If her score on Competency 1 also increased to 2.00 or greater, she would pass the exam. Those changes were more than a theoretical possibility. As shown in Table 2, the IRP's first simulator test grading sheet, the IRP did increase Ms. Smith's score on RF 3.a. to 2, with the result that her score on Competency 3 increased to 2.33. The IRP also increased her score on Competency 1 to 2.20. Had this been her final grading sheet, Ms. Smith would have passed the Operating Exam and received a SRO license.

95. The IRP eventually agreed that Ms. Smith's error in failing to immediately close the PORV during Scenario 7, Event 5, should be treated as the failure of a critical task. Explaining its determination, the IRP stated "[t]his review determined that the applicant's incorrect action during Scenario 7, Event 5 (Pressurizer Pressure Transmitter (PT-456) Failed High causing PORV to Open, PORV Block Valve Failed to Automatically Close) was related to a critical task. During this event, the applicant incorrectly operated a PORV hand switch, which resulted in the PORV remaining open. Approximately 30 seconds later, the applicant was directed to close the PORV by the [shift supervisor], at which point the applicant successfully closed the PORV. This was considered an error associated with a critical task in accordance with NUREG-1021, Appendix D, Item D.1.a,, in that if 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."[309]

2. <u>The Exam Team's proposal that Ms. Smith be subject to a more critical grading approach than other applicants</u>

96. NUREG-1021, ES-303 D.2.b, which provides directions for grading of simulator examinations, authorizes but does not require errors to be assigned to more than one Rating

[309] Letter from Donald Jackson, Chief, Operations Branch, Division of Reactor Safety, Region 1, to Jack McHale, Chief, Operator Licensing and Training Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation (Ex. CCS-037) at 37–38 (Oct. 25, 2012) [hereinafter NRC Panel Review Results].

Factor (RF).[310] In its grading of Ms. Smith's 2012 simulator exam, consistent with Region II grading policy, the Exam Team had been very careful to assign only the one RF identified as the root cause for any single performance error for every candidate in the class. That Region II policy was expressly affirmed in the document entitled "Vogtle Operating Exam Appeal"[311] sent from Mr. Bates to Mr. Muller on July 5, 2012.[312] The document emphasized that, to ensure fairness, the Region II grading policy of assigning one error to only the RF determined to be the root cause had been applied consistently to all members of the 2012 operating exam class, including Ms. Smith (Carla):

> Another point worth noting is that errors were not double-counted for any applicant, including Carla. If we had double-counted (assigned an error to more than one rating factor) errors only for Carla, then we would have been applying a different standard to Carla as compared to the other applicants. The exam team applied the exact same criteria to Carla for what was considered an error and for how those errors were assigned to only the root cause rating factor.[313]

97. That equal-treatment policy was also clearly stated in another Exam Team document that explained the "grading philosophy" applied to the 2012 operating exam.[314] The Exam Team reported that it "decided to only place each error in one rating factor that was most closely related to the root cause of the error, although [NUREG-1021] allowed for up to two different rating factors to be documented under normal circumstances."[315]

98. In spite of this twice-stated equal-treatment grading philosophy, the Exam Team backed away from this approach early in the IRP process, suggesting instead that Ms. Smith -- and only Ms. Smith -- should be graded under the more critical method of assigning errors to multiple RFs. Following the June 25-27 meeting, the Exam Team provided the IRP with a

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[310] Jackson's Prefiled Testimony (Ex. NRC-004) at 4.
[311] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1.
[312] July 5, 2012 Bates Email (Ex. CCS-062) (identifying an attachment as VG 2012-301 Carla Regrade After Appeal rev 6.docx).
[313] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1 (emphasis added).
[314] Grading Philosophy and Consistency (Ex. NRC-032) at 2.
[315] Id. at 2.

suggested regrade of Ms. Smith's simulator examination in its document entitled "Vogtle Operating Exam Appeal."[316] This document from Mr. Bates begins with a description of the Exam Team's general grading approach for the entire class.[317] The email transmitting the document stated that "[w]e still remain committed to our original licensing decision, but within this file you will be able to see options that could be used in a more critical evaluation."[318]

99. The "Vogtle Operating Exam Appeal" document included a more detailed explanation of the grading of Ms. Smith's 2012 examination than the Exam Team had provided in its original ES-303 Individual Examination Report for Ms. Smith.[319] The Exam Team also described ways in which Ms. Smith's performance could have been graded more critically so as to lower her overall scores on three competencies, even though doing so would require double counting errors for Ms. Smith and thus applying a different standard to her as compared to the other applicants.[320] The Exam Team explained that, although it had not assigned errors to more than one RF, lower grading would have been permissible under NUREG-1021 because it allows errors to be assigned to more than one RF factor. [321]

100. To explain how the Exam Team's suggested new approach would impact the grading, we will take as an example the Exam Team's proposed regrading of Competency 1, Interpretation/Diagnosis.[322] Ms. Smith's original scores on that competency were as follows:[323]

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[316] See Vogtle Operating Exam Appeal (Ex. CCS-101).
[317] Id. at 1.
[318] July 5, 2012 Bates Email (Ex. CCS-062).
[319] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1–3.
[320] See id. at 4–20.
[321] See id. at 1.
[322] See id. at 4–8.
[323] Id. at 4.

A. Original Scoring of Competency 1

Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Comment Page No. from original 303
1. Interpretation/Diagnosis					
a. Recognize & Attend	0.20	3	0.60		
b. Ensure Accuracy	0.20	1	0.20	1.70	8, 10
c. Understanding	0.30	1	0.30		12, 14
d. Diagnose	0.30	2	0.60		16

The last column identifies the pages of Ms. Smith's IER, Form ES-303-1,[324] which report the errors that led to the score reductions ("hits") for each RF. For example, Ms. Smith received a 2-point reduction on RF 1.b, Ensure Accuracy (i.e., a score of 1). This resulted from errors identified on pages 8 and 10 of her IER. Each error resulted in a 1-point hit. Because of the Exam Team's policy of applying each error to only one RF, those two errors were applied to only RF 1.b. Thus, those errors are not allocated to any other RFs on the IER grade sheet. See Table 1, last column.

101. The Exam Team's suggested more critical grading approach in response to Ms. Smith's appeal[325] would have changed the scoring as shown below:

B. Potential Scoring of Competency 1 (Re-evaluation in response to appeal)

Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Cross Ref Below
1. Interpretation/Diagnosis					
a. Recognize & Attend	0.20	2	0.40		A
b. Ensure Accuracy	0.20	1	0.20	1.50	B, C, D
c. Understanding	0.30	1	0.30		E, F, G
d. Diagnose	0.30	2	0.60		H

The capital letters in the last column refer to errors documented in the IER that the Exam Team proposed allocating to the Competency 1 RFs under the proposed stricter grading approach.[326]

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[324] Smith's Individual Exam Report (Ex. NRC-045).
[325] Vogtle Operating Exam Appeal (Ex. CCS-101) at 8.
[326] Id.

For example, the error identified by the letter “A” is on page 18 of the IER. It occurred during Scenario 7, Event 1, and under the IER it was allocated to RF 3.a. Under the Exam Team's proposed stricter grading approach, however, it would also be allocated to RF 1.a, to which no error was allocated in the original grading. This would impact the scoring by reducing Ms. Smith's score of RF 1.a from 3 to 2, which in turn reduced her score on Competency 1 to 1.50.

102. As the immediately previous tables also show, the Exam Team’s stricter grading approach increased the number of errors attributed to RFs 1.b and 1.c from 2 to 3. The additional errors would not decrease the RF scores of 1, because that is the lowest possible RF score. But those changes nevertheless would have had an effect on the grading. When an applicant has a RF score of 1 based on two errors, NUREG-1021, ES-303 D.2.b, allows the score to be increased to 2 if this can be justified based on the applicant correctly performing other activities related to the RF. Three or more errors, by contrast, generally require a score of 1, regardless of correct actions taken relative to the same RF.[327] Under the Exam Team’s “Re-evaluation in response to [Ms. Smith's] appeal,” three errors rather than two would have been allocated to RFs 1.b and 1.c, which would mean that the potential grading increase under ES-303 D.2.b would not be possible.

103. The Exam Team's proposal of a more critical evaluation for Ms. Smith was partly in response to this potential for increasing Ms. Smith's RF scores based on her correctly performing other activities related to the RF. In an email to Mr. Jackson dated July 18, 2012, Mr. Muller of the IRP outlined his plan for reviewing the grading of Ms. Smith's 2012 operating exam and preparing a draft decision for review by the other IRP members.[328] He stated that, once he had assigned all errors to RFs, he would determine whether the resulting score would be a 2 or a 1. Although three errors in the same RF would require a score of 1, he explained

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[327] NUREG-1021 (Ex. CCS-005A) at 145.
[328] Email from David Muller to Donald Jackson (Ex. CCS-035) (July 18, 2012 7:39 AM) [hereinafter July 18, 2012 Muller Email].

that "[t]wo errors in a RF score of 1 will likely result in a score of 2 because I am thinking that the applicant likely did something correct in that RF elsewhere during the simulator exam." The Exam Team was aware that the IRP was considering applying ES-303 D.2.b to increase Ms. Smith's scores on some RFs.[329] In its "Vogtle Operating Exam Appeal" document, the Exam Team attempted to justify its failure to grant Ms. Smith any credit for the activities she had performed correctly based on undocumented errors that it argued should be counted against her under its proposed stricter grading approach.[330]

104. The Exam Team also proposed adding additional undocumented hits in other competencies. On Competency 2, Procedures, Ms. Smith achieved the maximum possible score of 3 on all the RFs in the original scoring. The Exam Team, however, proposed adding hits to RFs 2.a and 2c., thereby reducing her overall score on that competency from 3.00 to 2.30.[331] On Competency 3, Control Board Operations, the Exam Team proposed adding an additional hit to RF 3.b, which would reduce the overall score on that competency from 1.99 to 1.66.[332] On Competency 4, Communications, the Exam Team proposed adding three new hits to Competency 4.b, thereby precluding the application of ES-303 D.2.b.[333] On Competency 5, Directing Operations, Ms. Smith achieved the maximum possible score of 3 on all the RFs in the original grading. The Exam Team, however, proposed adding two hits to RF 5.b and one hit to RF 5.d, thereby reducing her overall score on the competency from 3.00 to 2.50.[334]

105. The Exam Team's suggestion that the IRP apply "a more critical evaluation" to Ms. Smith, like its advocacy of adding a new critical task, was an attempt to revise the grading approach after the appeal had been filed to ensure that the failure would be sustained. The

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[329] See Vogtle Operating Exam Appeal (Ex. CCS-101) at 2–3.
[330] See id.
[331] Id. at 9.
[332] See id. at 11–13.
[333] See id. at 14–17.
[334] See id. at 18–19.

Exam Team advocated applying a different and stricter grading standard to Ms. Smith than had been applied to the other applicants who took the 2012 operating exam, which would both decrease her RF scores directly and also prevent her receiving credit under ES-303 D.2.b for actions she performed correctly. The Exam Team, however, failed to justify departing from its stated policy of grading Ms. Smith under the same standards that were applied to the other applicants.[335]

3. The IRP's draft and final decisions

106. The first draft IRP decision included a cover letter and a document entitled, "INFORMAL REVIEW RESULTS – CHARLISSA C. SMITH SENIOR REACTOR OPERATOR APPLICANT, VOGTLE ELECTRIC GENERATING PLANT."[336] The cover letter and page one of this draft stated that Ms. Smith "did not pass the [simulator] test."[337] However Mr. Muller began working from a report issued in another case, so it is not clear that those statements represented a conclusion regarding Ms. Smith.[338] The draft did not include a conclusion or a grade sheet in support of any such conclusion.[339] We therefore cannot determine what tentative decision, if any, the IRP may have reached at this point.

107. The next two IRP draft decisions[340] and accompanying correspondence[341] show that, at the time, the result of the review was that Ms. Smith passed. The first of these two draft decisions begins with a draft letter from Ho K. Nieh, Director of the Division of Inspection and

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[335] Id. at 1.
[336] See Nieh's Response to Smith Letter (Ex. NRC-018).
[337] Id. at 1, 4.
[338] Tr. at 554 (Jackson).
[339] Nieh's Response to Smith Letter (Ex. NRC-018); Staff PFF at Para. 248.
[340] Informal Review Results (Ex. CCS-024); Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle (Ex. CCS-066) (Undated) [hereinafter Informal Review Results – Rev. 1].
[341] Email from David Muller to John McHale, Donald Jackson, & Chris Steely (Ex. CCS-023) (Sept. 20, 2012 4:01 PM) [hereinafter Sept. 20 Muller Email]; Email from David Muller to Donald Jackson, Chris Steely & John McHale (Oct. 3, 2012 12:09 PM) (Ex. CCS-029) [hereinafter Oct. 3, 2012 Muller Email].

Regional Support, notifying Ms. Smith that, after review, the Staff determined that she passed the operating test and would be issued an SRO license.[342] The draft letter was followed by a new draft 35-page version of the Informal Review Results document (hereafter Rev.0).[343] Both the draft cover letter and Rev. 0 are undated. An email accompanying the documents is dated September 20, 2012, indicating that they must have been prepared on or before that date. The email requests comments on the draft and states that "[e]ven if the panel did not toss out some errors and changed up some RFs (and assigned some new ones), the applicant still would have passed, based upon the simple fact that TWO errors in a RF does not equal a score of '1.'"[344]

108. In Rev. 0, as well as in later IRP reports, the IRP partially agreed with Ms. Smith and disagreed with the original grading concerning three of the specific events for which she sought review.[345] In particular, the IRP partially agreed with Ms. Smith's arguments and concluded that she had been incorrectly graded regarding Scenario 3, Event 7, "[Design Basis Accident] Steam Generator Tube Rupture on [Steam Generator] #1"; Scenario 7, Event 1, "Raise Power in accordance with Procedure 12004-C, Power Operation (Mode 1)"; and Scenario 7, Event 6, "[Reactor Water Storage Tank] Sludge Mixing Line Pipe Break with Failue [sic] to Automatically Isolate."[346] Accordingly, the IRP did not assign any error to Ms. Smith for her performance during those contested events.[347] In subsequent versions of the IRP's report, those determinations did not change.[348]

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[342] Informal Review Results (Ex. CCS-024) at 1.
[343] Id. at 3.
[344] Sept. 20 Muller Email (Ex. CCS-023).
[345] The specific events for which Ms. Smith sought review are identified in Para 89, supra, and in Section IV. Ms. Smith's Statement of Position.
[346] See Informal Review Results (Ex. CCS-024) at 7–10, 19–22, and 22–25.
[347] See id. at 9, 21, 24.
[348] See Informal Review Results – Rev. 1 (Ex. CCS-066) at 7, 19, 22; see also NRC Panel Review Results (Ex. CCS-037) at 8, 20, 23; see generally Smith's Compilation of Grading Changes (Ex. CCS-082) (Undated) [hereinafter Smith's Compilation of Grading Changes].

109. In Rev. 0, as well as in later IRP reports, the IRP reviewed not only the specific grading errors alleged by Ms. Smith but also errors that she did not contest. The IRP referred to these additional comments as "non-contested errors". Rev. 1 states:[349]

> In 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. In particular, there were five errors documented in the original NRC grading (per the applicant's Individual Examination Report) that were re-examined and integrated into the overall re-grade of the applicant. The results of this review are presented below:

Non-Contested Error	Agree with Original Grading?	Affected RF
1. Scenario 6, Event 6: Power Reduction Due to High Vibrations on "B" MFPT	YES	1.d
2. Scenario 7, Event 5: Pressurizer Pressure Transmitter (PT-456) Failed High causing PORV to Open, PORV Block Valve Failed to Automatically Close	YES	3.a
3. Scenario 3, Event 4: Controlling Pressurizer Pressure Channel PT-455 Failed High	YES	6.a
4. Scenario 6, Event 4: Controlling Pressurizer Level Transmitter (LT-459) Failed Low	YES	6.a
5. Scenario 7, Event 5: Pressurizer Pressure Transmitter (PT-456) Failed High causing PORV to Open, PORV Block Valve Failed to Automatically Close	YES	6.a

The table identifies the non-contested errors and the specific rating factor to which the IRP assigned each error. The first non-contested error is related to incorrectly ordering the lowering of control rods to correct a temperature deviation. The second is associated with incorrect manual control of a PORV manual control switch. The remaining three are associated with recognition of Technical Specification requirements. The table also shows that in each instance the IRP agreed with the original grading.[350] Subsequent versions of the IRP's report contain the same table and accompanying text.[351] Thus, this aspect of the IRP's analysis did not change.

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[349] Informal Review Results (Ex. CCS-024) at 35 (emphasis in original).
[350] Id. at 36.
[351] Informal Review Results – Rev. 1 (Ex. CCS-066) at 37; NRC Panel Review Results (Ex. CCS-037) at 37.

110. Rev. 0 states that none of Ms. Smith's errors was related to a critical task.[352] It also reports that

> From this review, all RFs which had two assessed errors [non-critical] were given a score of "2". This is because there were many other scenario events where there were no documented applicant errors (per the applicant's original grading as contained in her Individual Examination Report), such that other activities were correctly performed related to the RFs with two assessed errors (i.e., RFs 1.c, Interpretation/Diagnosis—Understanding; 4.a, Communications—Clarity; Communications—Crew & Others Informed; and 5.b, Directing Operations—Oversight).[353]

The report lists 16 scenario events for which Ms. Smith committed no documented errors.[354]

111. The IRP prepared several draft grading sheets (Form ES-303-1). The earliest of these appears at the end of Rev. 0.[355] This grading sheet was made available to Ms. Smith only after her successful challenge to the Staff's claim of deliberative process privilege for this and related documents.[356] As shown in Table 2 below, the grading sheet in Rev. 0 gave Ms. Smith passing scores in all competences.

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[352] Informal Review Results (Ex. CCS-024) at 36.
[353] Id. at 36 (emphasis in original).
[354] See id.
[355] See id. at 37.
[356] See Licensing Board Order (Granting Motion to Compel Discovery) (Apr. 24, 2013) (unpublished).

REVISED SIMULATOR OPERATING TEST GRADING SHEET:

ES-303 3.b Form ES-303-1

PRIVACY ACT INFORMATION — FOR OFFICIAL USE ONLY

Applicant Docket Number: 55-23694 Page 1 of 1

Senior Reactor Operator Simulator Operating Test Grading Details

Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Comment Page No. (See previous page)
1. Interpretation/Diagnosis					
a. Recognize & Attend	0.20	3	0.60		
b. Ensure Accuracy	0.20	2	0.40	2.20	
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	2.60	
c. Correct Use	0.40	2	0.80		
3. Control Board Operations					
a. Locate & Manipulate	0.34	2	0.68		
b. Understanding	0.33	3	0.99	2.33	
c. Manual Control	0.33	2	0.66		
4. Communications					
a. Clarity	0.40	2	0.80		
b. Crew & Others Informed	0.40	2	0.80	2.40	
c. Receive Information	0.20	2	0.80		
5. Directing Operations					
a. Timely & Decisive Action	0.30	3	0.90		
b. Oversight	0.30	2	0.60	2.70	
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	

Table 2. IRP Simulator Test Grading Sheet (Rev. 0) showing Ms. Smith passing.[357]

[357] Informal Review Results (Ex. CCS-024) at 37.

112. Although the first page of Rev. 0 contained the earlier boilerplate statement that "the applicant did not pass the operating test,"[358] the grading sheet, conclusion, and accompanying email[359] confirm that at this point the result of the IRP review was that Ms. Smith passed the simulator exam and the operating test.

113. Emails among IRP panel members in September 2012 show that they were in agreement with the draft report passing Ms. Smith and were prepared to send it forward to Mr. McHale for his approval.[360] Although some of the emails suggest changes to the report, they concerns details that would not change the final result. An email from Donald Jackson dated September 28 states: "Just a few comments of mine, please incorporate these and Steely's, and then let's get this to Jack [IOLB Chief John McHale] . . . ASAP."[361] We are thus not persuaded by Mr. Jackson's claim that early revisions had "no significance."[362] Mr. Jackson himself acknowledged that "there were periods of time in the September timeframe of 2012 that I believed that we were going to make a recommendation to headquarters that Ms. Smith passed the operating exam."[363]

114. On October 3, 2012, in an email entitled "Vogtle Appeal -- look for additional hits,"[364] Mr. Muller distributed to the IRP the latest draft of the Informal Review Results document (Rev. 1).[365] The new grading sheet (Table 3 below) and conclusion still indicated that Ms. Smith passed, although her simulator scores were lower.[366]

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[358] Id. at 1.
[359] Sept. 20 Muller Email (Ex. CCS-023).
[360] Id.; Email from Chris Steely to David Muller (Ex. CCS-026) (Sept. 26, 2012 3.36 PM); Steely Appeal Comments (Ex. CCS-027) (Undated); Email from Donald Jackson to David Muller (Ex. CCS-028) (Sept. 28, 2012 8:58 AM) [hereinafter Sept. 28, 2012 Jackson Email].
[361] Sept. 28, 2012 Jackson Email (Ex. CCS-028).
[362] Tr. at 559 (Jackson).
[363] Tr. at 556 (Jackson).
[364] Oct. 3, 2012 Muller Email (Ex. CCS-029).
[365] Informal Review Results – Rev. 1 (Ex. CCS-066); Staff PFF at Para. 261.
[366] Informal Review Results – Rev. 1 (Ex. CCS-066) at 35–36; Staff PFF at Para. 267.

REVISED SIMULATOR OPERATING TEST GRADING SHEET:

ES-303 **3.b** **Form ES-303-1**

Applicant Docket Number: 55-xxxxx Page 1 of 1

Senior Reactor Operator Simulator Operating Test Grading Details

Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Comment Page No. (See previous page)
1. Interpretation/Diagnosis					
a. Recognize & Attend	0.20	3	0.60		
b. Ensure Accuracy	0.20	2	0.40	1.90	
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	2.60	
c. Correct Use	0.40	2	0.80		
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	2	0.80		
b. Crew & Others Informed	0.40	2	0.80	2.40	
c. Receive Information	0.20	2	0.80		
5. Directing Operations					
a. Timely & Decisive Action	0.30	3	0.90		
b. Oversight	0.30	2	0.60	2.70	
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	

[Note: Enter RF Weights (nominal, adjusted, or "0" if not observed (N/O)), RF Scores (1, 2, 3, or N/O), and RF Grades from Form ES-303-4 and sum to obtain Competency Grades.]

Table 3. Second IRP Simulator Test Grading Sheet (Rev. 1) showing Ms. Smith passing.[367]

[367] Informal Review Results – Rev. 1 (Ex. CCS-066) at 36. Note: there is an error in the

This was also the first grading sheet in which Ms. Smith's error on Scenario 7, Event 5, in which she failed to immediately close the PORV, was treated by the IRP as the failure of a critical task.[368] Nevertheless, Mr. Muller, in describing the impact of this and other "additional hits" he had applied, reported "OVERALL GRADING IMPACT: APPLICANT STILL PASSES, competency scores drop but still passes."[369] Later the same day, Mr. Muller sent Mr. Jackson an email enclosing Rev. 1, indicating that he had modified the grading "a bit" by adding additional hits, reiterating that the PORV error was now a critical task, and stating that "if you are OK with the overall grading . . . , pass on to Region II."[370]

115. Rev. 1 included the language from Rev. 0 quoted in Paragraph 110, supra, explaining that "all RFs which had two assessed errors (non-critical) were given a score of '2.'"[371] Rev. 1 also lists the same 16 scenario events for which Ms. Smith committed no documented errors.[372]

116. The next revision of the Informal Review Report (Rev. 2)[373] was undated, like the earlier versions. Rev. 2 no longer contained the original statement on its first page that "the applicant did not pass the operating test."[374] The Staff acknowledges that it contained the same grading of the contested and non-contested errors as Rev. 1.[375] It also contained the same language describing the failed-open pressurizer PORV as a critical task.[376] However, Rev. 2 no longer contained the discussion regarding the grading of RFs with two assessed

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Competency 4 calculation and the overall score should be 2.00.
[368] Informal Review Results – Rev. 1 (Ex. CCS-066) at 34.
[369] Oct. 3, 2012 Muller Email (Ex. CCS-029).
[370] Email from David Muller to Donald Jackson (Ex. CCS-031) (Oct. 3, 2012 3:34 PM) [hereinafter Oct. 3, 2012 Muller's "Vogtle Appeal" Email].
[371] Informal Review Results – Rev. 1 (Ex. CCS-066) at 34.
[372] Id. at 35.
[373] Informal Review Results – Rev. 2, Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Ex. CCS-067) (Undated) [hereinafter Informal Review Results – Rev. 2].
[374] See id. at 1.
[375] Staff PFF at Para. 270.
[376] Informal Review Results – Rev. 2 (Ex. CCS-067) at 33.

errors and it also did not include a grading sheet. Nevertheless, because the grading did not change between Rev. 1 and Rev. 2 and the grading sheet for Rev. 1 shows Ms. Smith passing, we conclude that Rev. 2 was also consistent with her passing.

117. Rev. 3 was the next revision of the Informal Review Report.[377] The Staff states that the differences between this revision and exhibit CCS-067 are simply editorial.[378] Rev. 3 was therefore also consistent with Ms. Smith passing. It was prepared on October 10, 2012 and sent to Region II for comments on October 11, 2012.[379]

118. We find the Staff's statement of only editorial changes between Rev. 2 and Rev. 3 to be correct. However there is one editorial change that should be noted. This is the correction in the analysis statement for the IRP's removal of a communications clarity error in Rating Factor 4.a. This change was detailed by Ms. Smith as she tracked the changes among the sequence of revisions.[380]

119. In Rev. 0, the IRP removed one communications error for Scenario 6, Event 4, in which Ms. Smith directed the OATC to perform Immediate Operator Actions (IOAs) that were not actually in the procedure for response to the event. The OATC clearly understood what the direction was and told Ms. Smith as SS that the required response did not have any IOAs.[381] Yet the examiners assigned an error to Ms. Smith for this direction stating

> The applicant was downgraded in this competency because she did not communicate in a clear, accurate, and easily understood manner when she provided direction to the UO to perform Immediate Operator Actions that did not exist for the failure of LT-459.[382]

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[377] See Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Ex. NRC-019) (Undated) [hereinafter Informal Review Results – Draft]; Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Ex. CCS-102) (Undated).
[378] Staff PFF at Para. 277.
[379] Id.
[380] Smith's Compilation of Grading Changes (Ex. CCS-082) at 5, 12, 17, 27.
[381] See Smith's Individual Exam Report (Ex. CCS-045) at 24; see also Form ES-D-1, App. D – Scenario 6 Outline (Ex. CCS-054) at 83 (Undated).
[382] Smith's Individual Exam Report (Ex. CCS-045) at 24.

120. The IRP in Rev. 0 agreed with the applicant rather than the original grading and removed the error assessment:

> The applicant requested reconsideration of this apparent error based upon her assertion that directing immediate operator actions did NOT hinder procedure entry or performance, cause any confusion, effect event diagnosis, and ultimately, had no adverse consequences. This review agreed with the applicant, and determined that no error should be assessed in this case. When an event occurs, this review determined that it is not an error for a SS to "generically" request the performance of immediate operator actions, even if the specific event does not have immediate operator actions.[383]

121. In Rev. 2, the analysis wording was changed to read "[t]his review disagreed with the applicant, and determined that an error should be assessed in this case."[384] But in the follow-up Rev. 3 three days later, it was changed back to read, "[t]his review disagreed with the original grading, and determined that no error should be assessed in this case."[385]

122. Region II sent a detailed response and critique to Rev. 3 in a document entitled *Region II Recommendations/Comments on the "Final" Independent Review Panel Document, October 12, 2012.*[386] It is clear to the Board from reading this document that the "'Final' Independent Review Panel Document" had Ms. Smith passing the simulator exam. The Staff argues that as the document sent to the Region was cleaned up to eliminate all reasons for changing the grading and did not include any statement of pass/fail or a grade sheet, it was a clean copy submitted to the Region for technical comments without a pass/fail indication. But the Exam Team would have little difficulty using the error analyses in Rev. 3 to determine whether the result was a pass or fail. Region II certainly would not have put together this 10-page detailed response and critique unless Ms. Smith passing was at least probable at this point.

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[383] Informal Review Results (Ex. CCS-024) at 30. The last sentence was removed without explanation from later versions of the report but the grading was not changed. See generally Smith's Compilation of Grading Changes (Ex. CCS-082)
[384] Informal Review Results – Rev. 2 (Ex. CCS-067) at 28.
[385] Informal Review Results – Draft (Ex. NRC-019) at 28–29.
[386] Region II Recommendations/Comments on the "Final" Independent Review Panel Document (Ex. CCS-060) (Oct. 12, 2012) [hereinafter Region II Recommendations].

123. The Region II document begins:

> This response to the Review Panel's conclusion is intended to show the NRR Program Office, the most accurate evaluation of the applicant's performance. The following conclusions by Region II's Exam Team are based on the observation of three examiners with extensive Industry and NRC experience. Region II considered the Review Panel's Report in combination with the Exam Team's first hand observation of the applicant's performance and applied the guidance of NUREG-1021 to provide the Program Office with an accurate evaluation that is defensible by the only three examiners that actually observed the applicant's performance.
>
> The Region II Exam Team concluded, with the opportunity of hindsight and deeper evaluation, that the initial evaluation as documented in the denial was largely accurate. The Region II Exam Team did, however, agree with some aspects of the Review Panel's Report for assigning some errors to additional rating factors. Region II's final conclusion is that the original denial should be sustained.[387]

This introduction is followed by specific recommendations as to how the Panel should change its analysis of Ms. Smith's performance so that the failure would be sustained.[388] The Region II document concludes with a chart detailing the exam team's suggested grading of Ms. Smith's 2012 operating test (Table 4 below), which would sustain the failure.[389]

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[387] Id. at 1.
[388] See id. at 2–11.
[389] Id. at 11.

Region II Recommendations/Comments on the "Final" Independent Review Panel Document, October 12, 2012

REGION II RECOMMENDATIONS (as of 10/12/12)					
Senior Reactor Operator Simulator Operating Test Grading Details					
Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Comment Page No.
1. Interpretation/Diagnosis					
a. Recognize & Attend	0.20	3	0.60	1.70	
b. Ensure Accuracy	0.20	1	0.20		EHC, SI/SLI
c. Understanding	0.30	1	0.30		PHtr, FIC121
d. Diagnose	0.30	2	0.60		CR Auto Op
2. Procedures					
a. Reference	0.30	3	0.90	3.00	
b. EOP Entry	0.30	3	0.90		
c. Correct Use	0.40	3	1.20		
3. Control Board Operations					
a. Locate & Manipulate	0.34	1	0.34	1.66	PORV^{CT}, Tave, RWST
b. Understanding	0.33	2	0.66		TE130
c. Manual Control	0.33	2	0.66		TE130
4. Communications					
a. Clarity	0.40	1	0.40	1.20	F121, IOA, SI #s
b. Crew & Others Informed	0.40	1	0.40		SM, SM
c. Receive Information	0.20	2	0.40		ACCW 3-way
5. Directing Operations					
a. Timely & Decisive Action	0.30	3	0.90	2.50	
b. Oversight	0.30	2	0.60		FIC-121 to auto
c. Solicit Crew Feedback	0.20	3	0.60		
d. Monitor Crew Activities	0.20	2	0.40		PZR Htrs F/U
6. Technical Specifications					
a. Recognize and Locate	0.40	1	0.40	2.20	3 errors (not contested)
b. Compliance	0.60	3	1.80		

Table 4. Region II Grading Recommendations to the Independent Review Panel.[390]

[390] Id.

124. Shortly afterwards, on October 16, the IRP received direction from Mr. McHale regarding disposition of the Region II comments, including instructions on how error assignments could be rearranged to sustain the failure.[391] Mr. McHale said: "What I think will be critical to the overall outcome is the RF assignment of the second error related to Scenario 7, Event 3, TE-0130 fails low (original comment 21/panel report p. 25/attached R-2 feedback item G). With that shift, plus the PORV critical error, the failure would be sustained based on Control Board Ops and dismissing the Tave, SI block, and immediate action comm. errors probably don't matter."[392] This email further recommended that the IRP contact "Mark Bates to discuss any questions and determine if anything provided changes any of your recommendations."[393]

125. To explain why the shift in the RF assignment of the second error related to Scenario 7, Event 3 would sustain the failure, it is necessary to refer first to the October 12 Region II document. The IRP had associated the error with RF 1.c and RF 3.c. Region II, however, argued that "the most appropriate grading of this event is to assign one non-critical error to RF 3.c and a second non-critical error associated with 3.b, 'Control Board Operations – Understanding.'"[394] Next, it is necessary to return to Table 3, the most recent grading sheet in our evidentiary record.[395] In Competency 3, Ms. Smith had a score of 1 in RF 3.a. (because designating the PORV error as associated with a critical task), 3 in RF 3.b. (i.e., no assigned errors), and 2 in RF 3.c. Her overall grade in Competency 3 was 1.99, which was sufficient to support a pass as long as her other competency scores were also above 1.80, as they were. But reassigning the second error related to Scenario 7, Event 3 from RF 1.c. (to which the Exam

[391] Oct. 16, 2012 McHale Email (Ex. CCS-059).
[392] Id. (emphasis added).
[393] Id. (emphasis added).
[394] Region II Recommendations (Ex. CCS-060) at 6.
[395] Informal Review Results – Rev. 1 (Ex. CCS-066) at 36.

Team had originally recommended the IRP assign this "second hit" in their Binder Tab 14[396]) to RF 3.b. would reduce the latter score to 2, which would in turn reduce her overall grade in Competency 3 to 1.66. This is shown in Table 4, above, Region II's proposed grading sheet. With that change, the failure would be sustained regardless of Ms. Smith's scores on the other competencies. Thus, as Mr. McHale stated, with that shift, plus the PORV critical error, the failure would be sustained based on Competency 3 regardless of any IRP rulings on other issues.

126. After reviewing the Region II input and Mr. McHale's instructions, the IRP prepared Rev. 4,[397] which was in agreement with three of the Region II recommendations[398] and sustained the failure. It reflects, among other things, the change advocated by Region II and supported by Mr. McHale: the second error related to Scenario 7, Event 3 was reassigned from RF 1.c. to RF 3.b.[399] And the IRP's removal of the communications error associated with generically directing IOAs[400] being reinserted due to Region II's recommendation[401] did not matter as Mr. McHale stated.[402]

127. Mr. Jackson, on October 25, 2012, submitted the Final Informal Review Results document to Mr. McHale.[403] It did not include a grade sheet, but it sustained the failure.

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[396] See Rating Factor 3.C.: Control Board Operations, Manual Control (Ex. NRC-038) at 2 (Undated). On page 2, 1.b is incorrectly listed but clearly meant to be 1.c and accepted as 1.c by the IRP. See id. at 2.
[397] Informal Review Results – Charlissa C. Smith Senior Reactor Operator Applicant, Vogtle Electric Generating Plant (Ex. CCS-069) (Undated) [hereinafter Informal Review Results – Rev. 4].
[398] Staff PFF at Para. 280.
[399] Informal Review Results – Rev. 4 (Ex. CCS-069) at 25.
[400] See Informal Review Results (Ex. CCS-024) at 30.
[401] See Region II Recommendations (Ex. CCS-060) at 8–9.
[402] See Oct. 16, 2012 McHale Email (Ex. CCS-059).
[403] NRC Panel Review Results (Ex. CCS-037); Tr. at 560 (Jackson); Email from David Muller to Donald Jackson (Ex. CCS-063) (Oct. 23, 2012 12:37 PM); Email from John McHale to David Muller (Ex. CCS-064) (Nov. 1, 2012 11:16 AM).

128. The final IRP simulator test grade sheet, Form ES-303-1 (Table 5 below), was included with the Staff's testimony filed on May 31, 2013.[404] It reflects the Rev. 4 changes that sustained the failure. Ms. Smith's score on RF 3.b. is now 2 and her overall score on Competency 3 is now 1.66, precisely as recommended by Region II and supported by Mr. McHale. Likewise, her score on RF 4.a. is 1 and her overall score on Competency 4 is 1.60.

[404] Staff's Statement of Position (Ex. NRC-001) at 122–23.

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

Table 5. Final Review Panel Grade Sheet, Form ES-303-1.[405]

[405] Id.

129. In a letter dated November 15, 2012, Ms. Smith was notified of the results of her review request of June 5, 2012 (the 2012 Denial Letter). The letter states, "[f]ollowing an independent review of the additional information you supplied, the staff has determined that you did not pass the simulator operating test. The results of our review are enclosed."[406] In fact, only a summary of the review results was enclosed.[407]

130. Enclosure 1 to the 2012 Denial Letter, as labeled, simply includes a summary of the regrading, "for the sake of brevity,"[408] and only provides the detail regarding Competency 3, included below. Since the grade for this competency is less than 1.80, the conclusion of the Independent Review Panel was that Ms. Smith "did NOT pass the [2012] Operating Test."[409] As noted in the right hand column of the Table, comments are included detailing the Panel's findings/reasoning for Competency 3.

Competency Area 3 Results:

Applicant Docket Number: 55-23694					Page 1 of 1
Senior Reactor Operator Simulator Operating Test Grading Details					
Competencies/ Rating Factors (RFs)	RF Weights	RF Scores	RF Grades	Comp. Grades	Comment Page No.
3. Control Board Operations					
a. Locate & Manipulate	0.34	1	0.34	1.66	See below
b. Understanding	0.33	2	0.66		
c. Manual Control	0.33	2	0.66		

Table 6. Independent Review Panel final results regarding Competency 3.[410]

131. Because the 2012 Denial Letter and its Enclosures included only a summary of the Competency 3 re-grading and no other competency results, Ms. Smith sent an email to Mr.

[406] Nov. 15 Denial Letter (Ex. CCS-014) at 1.
[407] See id. at 2–9.
[408] Id. at 4.
[409] Id. at 3.
[410] Id. at 4.

McHale on November 19, 2012, informing him she had received the Denial Letter and asking for a complete grade sheet.[411] Mr. McHale responded by email later that day, stating:

> A revised Form ES-303-1 was not prepared as part of this administrative review. . . . As an administrative review, it was not necessary to prepare a new grading sheet, but rather to focus on how reviewed areas could potentially result in a different outcome from the original grading. Where the review agreed with the original grading for assignment of errors to rating factors, there would be no change to the original grading. For rating factors where there were differences, the review evaluated the results of those outcomes on the pass/fail decision. As detailed in the enclosure to our response, our review of your performance in Competency Area 3, "Control Board Operations," resulted in sustaining failure of the operating test.[412]

132. This response from Mr. McHale is contradicted by the completed ES-303-1 forms developed during the IRP process (Tables 2 and 3, supra). As Mr. Jackson acknowledged in his pre-filed testimony: "Using the first revision of the panel report as a starting point, subsequent revisions to the panel report did typically include a complete re-grade of Ms. Smith's simulator scenario examination, by incorporating errors made by Ms. Smith (from her original NRC grading) that she did not contest."[413] Mr. McHale was involved throughout the IRP process and should have known this.

4. Board ruling on Ms. Smith's claim that the IRP's review was not independent or impartial

133. Ms. Smith's Statement of Position 3 contends that the IRP, after initially finding she had passed the simulator examination, was unduly influenced by the Region II Exam Team and IOLB pressures. Ms. Smith alleges that the Exam Team initiated continual contact with the IRP after the initial interviews, and also that the IOLB provided direction based on examiner comments to sustain the failure.

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[411] Sept. 14 McHale Email and Corresponding Emails (Ex. CCS-038) [hereinafter Sept. 14, 2012 McHale Email and Corresponding Emails] (includes November 19, 2012 Email from Smith to McHale and several Email exchanges between Smith and McHale, referenced as FOIA-2013-0206, at 5).
[412] Sept. 14, 2012 McHale Email and Corresponding Emails (Ex. CCS-038) at 5.
[413] Jackson's Prefiled Testimony (Ex. NRC-004) at 8.

134. In response, the Staff points out that, under the guidance in OLMC-500, "during an appeal panel review, the panel must 'establish and maintain communications with the affected region [and IOLB], in order to ensure that the review results include regional and IOLB input.'"[414] The Staff further argues that "there is no expectation that the informal review panel will remain strictly 'independent' of the affected region and its examiners by somehow walling itself off from input from these sources."[415] According to the Staff, the IRP did no more than obtain necessary information from the Exam Team and consider input from the IOLB and the Region, as it was permitted to do.

135. We recognize that a review panel must obtain necessary information from the Exam Team. But the Staff's documents confirm that the review is nevertheless to be independent. The scoring review is referred to in Staff exhibits and testimony as "informal," "independent," and sometimes both. For example, in the November 15, 2012, denial letter, both terms are used.[416] Enclosure 1 to the denial letter is entitled *Summary of Informal Review Results Sustaining Failure of Operating Test*, but it also states in its first paragraph that "[t]his review was conducted by an independent panel of NRC staff from other NRC regions and headquarters . . . ."[417] The next page also refers to "[t]he independent review."[418] Other than in the title, the word informal is never used again, and the review describes itself and its process five times to have been independent.[419] The scoring review was thus intended to be conducted by a panel that was independent of the Exam Team, and it was described to Ms. Smith in those terms.

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[414] Staff's Statement of Position (Ex. NRC-001) at 59 (quoting OLMC-500 (Ex. CCS-030) at 6).
[415] Staff's Statement of Position (Ex. NRC-001) at 68–69.
[416] See, e.g., Nov. 15 Denial Letter (Ex. CCS-014) at 1–2.
[417] Id. at 3.
[418] Id. at 4.
[419] Id. at 3–4.

136. The Staff acknowledges that NUREG-1021 and OLMC-500 require that the informal review panel "remain 'impartial' meaning that although it 'may include a representative from the affected region,' it may not 'include individuals involved with the applicant's licensing examination.'"[420] The question, then, is whether the review panel impartially and objectively evaluated the information it received and reached its own decision, or whether it was unduly influenced by pressure from the Region and/or the IOLB.

137. The IRP draft reports (including the grading sheets to the extent we have them or have been able to reconstruct them) between September 20 and October 11 show Ms. Smith passing. We must therefore determine whether the shift in the IRP's decision-making process from a pass to a failure was reached independently or as the result of pressure from the IOLB and the Region. The key documents in this analysis are Region II's detailed comments of October 12 and Mr. McHale's October 16 email, discussed in paragraphs 124–25 above. The email endorsed the critical grading change recommended by Region II which ensured that Ms. Smith would fail regardless of other rulings in her favor by the IRP. Notwithstanding the Staff's arguments, we view Mr. McHale's message not as a recommendation or advice, but an implicit instruction to the IRP to adopt the grading change advocated by Region II. And that is exactly what the IRP did. We find no contemporaneous evidence in the record to show that the IRP engaged in any independent analysis of the critical changes recommended by the Region and endorsed by Mr. McHale. Moreover, rather than encouraging the IRP to reach its own independent decision, Mr. McHale instructed the IRP members that if they had any questions they should contract Mr. Bates. Far from being an objective or neutral source of information, Mr. Bates was a member of the Exam Team advocating the critical grading change in question so that the failure would be sustained.

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[420] Staff's Statement of Position (Ex. NRC-001) at 69 (quoting OLMC-500 (Ex. CCS-030) at 3; NUREG-1021 (Ex. CCS-005A) at 234).

138. Our conclusion is further supported by what happened next. As we have previously explained, the Staff provided Ms. Smith with only a limited part of the final Informal Review Results document, and, when she asked for more information, misinformed her that no complete grading sheet had been prepared. Thus, the Staff deliberately failed to provide Ms. Smith with information that was essential to her ability to understand the decision that had been reached and to appeal the IRP's decision if she chose to do so. That is not the action of an organization that has just performed an impartial and objective review, and it completely undercuts the credibility of the Staff's assurances that it handled Ms. Smith's appeal fairly.

139. Further evidence that the review was neither impartial nor independent is provided in an email from Mr. Jackson to Mr. McHale dated October 7, attaching Rev. 2 (CCS-067).[421] Mr. Jackson states that "the attached document is ready for Region II comments" and that "[o]nce Region II comments are reviewed and incorporated, I will re-submit to you with a short cover letter."[422] Because the Region II comments would almost certainly come from the Exam Team, the IRP must have intended to incorporate in its decision the comments of the examiners whose decision the panel was reviewing. This was far more than requesting necessary factual information from the Exam Team. It allowed the Exam Team to participate in writing the decision that decided whether their grading of Ms. Smith was correct.

140. We therefore agree with Ms. Smith that the IRP's final decision was unduly influenced by the Region II Exam Team and IOLB pressures.

F. Board findings on Ms. Smith's objections to the grading of her 2012 simulator exam

141. The Denial Letter stated that "[i]f you do not accept the proposed denial, you may, within 20 days of the date of this letter, request a hearing pursuant to 10 CFR 2.103 (b)(2).

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[421] See Email from Donald Jackson to John McHale (Ex. CCS-032) (Oct. 7, 2012 10:05 AM) [Oct. 7, 2012 Jackson Email]; see also Staff PFF at 273.
[422] Oct. 7, 2012 Jackson Email (Ex. CCS-032) (emphasis added).

Submit your request in writing . . . ."[423] On December 5, 2012, Ms. Smith timely filed, pursuant to 10 C.F.R. § 2.103(b)(2), a demand for a hearing, challenging the denial of her 2012 application for a SRO license.[424]

142. Table 7 below identifies Ms. Smith's Statements of Positions 4–12 by the specific event to which each relates. Table 7 also compares the Exam Team's original grading for each contested event with the IRP's final grading of each such event.

[423] Nov. 15 Denial Letter (Ex. CCS-014) at 1.
[424] Charlissa C. Smith Request for Hearing (Dec. 5, 2012) [hereinafter Dec 5, 2012 Request for Hearing].

Smith Position Number	Scenario and Event Number	Brief Event Description	2012 Exam Rating Factors[425]	IRP Assigned Rating Factors[426]
4	S7E1	Raise Power, Maintain Tave	3.a.	None
5	S3E7	SG Tube Rupture with Premature SI/SLI Blocking Direction	1.b.	None
6	S7E6	RWST Line Break, Delay in Closing Valves	3.a.	None
7	S3E5	Main Turbine EHC Pump Trips with a Failure of Standby Pump to Auto Start	1.b.	1.d., 5.c.
8	S6E6	Incorrect category of Diagnosis for Auto Rod Control	1.d.	1.d.[427]
9	S7E3	Loss of Cooling to Letdown HX, Mis-operation of Valve Controller	3.c.	3.c., 3.b.
10	S6E4	Controlling Pzr Level Channel Fails Low	1.c.	1.c., 5.b.
11	S3E4	Controlling Pzr Pressure Channel Fails High	1.c.	1.c., 2.c., 5.d.
12	S7E5	Controlling Pzr Pressure Channel Fails High, PORV Opens, Mis-operation of Valve Control	3.a.	3.a. CT

Table 7. Errors challenged by Ms. Smith in her Statements of Position 4–12.

143. Table 7 shows that the IRP agreed with Ms. Smith's Statements of Positions 4, 5, and 6. Accordingly, the IRP did not assign the contested errors that were the subject of those Statements of Position to any rating factors. Because the IRP resolved those contested errors in favor of Ms. Smith, and the Staff has not argued that the IRP's determinations in favor of Ms.

[425] See Smith's Individual Exam Report (Ex. CCS-045) at 8, 10, 12, 14, 16, 18, 19, 20, 21. On each of these pages is discussion of the review items.
[426] NRC Panel Review Results (Ex. CCS-037) at 3, 8, 11, 17, 20, 23, 27, 37. On each of these pages is discussion of the review items.
[427] Region II Recommendations (Ex. CCS-060) at 11. Statement of Position 8 was not addressed in the IRP's Final Report except that they listed it in on page 37 in the table of uncontested items since it was not listed in Ms. Smith's letter of December 5, 2012 (CCS-034 at 3). It was addressed in the July 5, 2012, comments from Mr. Bates to Mr. Muller with a recommendation to keep it the same as in the original grading. See Vogtle Operating Exam Appeal (Ex. CCS-101) at 7–8. It also was not addressed in the October 12, 2012, recommendation from the Exam Team to the IRP except to have left it unchanged in the examination team's ES-303-1 grade sheet.

Smith were erroneous, we will treat those contested errors as having been resolved in favor of Ms. Smith.[428]

144. Although the IRP decisions concerning Ms. Smith's Statements of Position 4, 5, and 6 were to her benefit, the IRP made several significant changes to the scoring procedure that offset the benefit she received from the IRP's determinations on those contested errors and resulted in the IRP sustaining the determination that she did not pass the 2012 Vogtle operating exam. Those changes included, first, the assignment of individual errors to multiple rating factors. Specifically, as shown in Table 7, for the scenario events corresponding to Smith Statements of Positions 7, 9, 10, and 11, the IRP assigned Ms. Smith's errors on those events to two or more rating factors, although the Exam Team had assigned each of those errors to only one rating factor.

145. In addition, the IRP designated the event corresponding to Ms. Smith's Statement of Position 12 ("Controlling Pzr Pressure Channel Fails High, PORV Opens, Mis-operation of Valve Control") as a critical task, even though it had not been designated a critical task on the IER.

146. Ms. Smith's Statements of Position allege a number of errors in the grading of her 2012 Simulator Exam. The Board, however, finds it necessary to review only some of her arguments to decide whether she passed the Exam. First, we consider her allegation that the IRP graded her performance on the 2012 Simulator Exam at a more critical level than the other applicants who took that exam, in violation of NUREG-1021.[429] Second, we evaluate Ms. Smith's arguments concerning the PORV control switch error. These include her arguments in her Statement of Position 12 that (1) her error in operation of the PORV control switch should not have been re-evaluated by the IRP because she did not contest that error; (2) that

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[428] See supra discussion at pages 14–19.
[429] Smith's Prefiled Testimony (Ex. CCS-076) at 54–55.

designating operation of the PORV control switch as a critical task during the informal review, six months after the simulator exam had been completed, violated the requirement that critical tasks be defined and identified in the examination outline distributed to examiners before the exam is given; and (3) that the IRP failed to define the critical task as required by NUREG-1021, Appendix D, including failing to provide a measurable performance indicator to determine whether the critical task was performed correctly.[430]

1. The IRP arbitrarily graded Ms. Smith under different and more critical criteria than those applied to the other applicants who took the 2012 simulator exam

a. The first denial of equal treatment: double-counting of errors solely for Ms. Smith

147. The IRP changed the grading approach so that, for Ms. Smith, individual errors could be counted against more than one rating factor. This change was applied solely to Ms. Smith; all of her peers were graded under the Exam Team's standard that applied each error to only one rating factor. As the Exam Team acknowledged, "[i]f we had double-counted (assigned an error to more than one rating factor) errors only for Carla, then we would have been applying a different standard to Carla as compared to the other applicants."[431] That is exactly what the IRP did when it changed the grading standard solely for Ms. Smith: it applied a different and more critical standard to Ms. Smith than that applied to the other license applicants. This was an arbitrary and unjustified departure from the goal of NUREG-1021 to "ensure the equitable and consistent administration of examinations for all applicants."[432]

(i) The grading change

148. Both the Exam Team and the Review Panel followed the same guidance from NUREG-1021, ES-303 D.1.d: "Whenever possible, attempt to identify the root cause of the

[430] Smith's Statement of Position (Ex. CCS-075) at 9–10.
[431] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1.
[432] NUREG-1021 (Ex. CCS-005A) at 13.

applicant's deficiencies and code each deficiency with no more than two different rating factors. However, one significant deficiency may be coded with additional rating factors if the error can be shown, consistent with the criteria in Section D.3.b, to be relevant to each of the cited rating factors."[433]

149. These criteria were applied differently, however, by the Exam Team in its grading of the 2012 operating examination and by the IRP during its review. For the 2012 Vogtle operating exam, the Exam Team decided in accordance with Region II policy that it would assign an error to only a single rating factor, the one determined to be the root cause of the error. This decision is explained in the General Grading Approach section of the July 5, 2012, email from Mr. Bates to Mr. Muller, including its justification in NUREG-1021.[434]

150. Mr. Widmann's hearing testimony confirmed his Region's approach to operating examination grading. He stated "Region II believes that going after the root cause gets to the underlying element that an applicant that failed would have to be remediated on. So, we feel that represents best that person's error."[435]

151. Although the Exam Team was very careful to explain its policy of assigning each error to only the root cause rating factor for the entire class in their July 5, 2012 document,[436] they changed their approach during the informal review. In their October 12, 2012 response to the IRP,[437] when they were confronted with the IRP's recommendation that Ms. Smith should have passed her simulator examination, they continually endorsed the "double-counting" of RFs, sometimes concurring with the IRP's selection of RFs and sometimes recommending a different

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[433] NUREG-1021 (Ex. CCS-005A) at 143.
[434] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1.
[435] Tr. at 638 (Widmann).
[436] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1.
[437] Region II Recommendations (Ex. CCS-060).

distribution, but never advising that single counting, the Standard for Region II,[438] should be used for Ms. Smith as it had been for all other applicants in her class.

152. The IRP followed a grading policy under which it would, when deemed appropriate, assign the same error to multiple rating factors. Mr. Jackson, in his pre-hearing written testimony, also referred to ES-303 D.1.d as being the justification for the IRP having coded deficiencies to more than one Rating Factor.[439] Mr. Jackson confirmed that the application of deficiencies to more than one Rating Factor[440] is the approach followed in Region I and Region IV.[441] He stated, "I can tell you for Region I every applicant that sits for an exam in my Region, that is how we apply NUREG-1021. If it is appropriate to put it over two or more rating factors for an error, we do that routinely."[442] Thus, Ms. Smith was re-graded by the IRP under the grading approach followed in Regions I and IV rather than that applied in Region II, the region in which she was seeking a license.

153. Both the application of NUREG-1021, ES-303 D.1.d by Region II, and its different application in Regions I and IV, constitute permissible readings of that provision. But the fact that NUREG-1021 is applied differently outside of Region II is not an appropriate reason for the IRP to have applied the Examiner Standards to Ms. Smith differently from how they are normally applied in Region II. Ms. Smith, after all, was applying for a license in Region II, not in Region I or Region IV. Because NUREG-1021 directs equity and consistency in the administration of examinations for all applicants, she should have been graded consistently with all other Region II applicants and all other applicants in the 2012 licensing class. Instead, Ms. Smith was held to a different and more critical standard than not only all the other members of her licensing class, but all other licensing applicants in Region II.

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[438] Tr. at 638 (Widmann).
[439] Jackson's Prefiled Testimony (Ex. NRC-004) at 4.
[440] Tr. at 575–76 (Jackson).
[441] Tr. at 577, 586–88 (Jackson).
[442] Tr. at 587 (Jackson).

154. Furthermore, the Staff did not comply with the requirement of NUREG-1021 ES-502 D.2.c., which provides that "[w]hen the NRR operator licensing program office has concurred in the results of the review, the NRC's regional office will . . . (2) review the examination results of the other applicants to determine whether any of the licensing decisions are affected. . . ."[443] At no time did Region II review the results of the other applicants who took the 2012 Vogtle operating examination to determine whether those licensing decisions would be affected by the grading changes that the IRP made for Ms. Smith. For the IRP to change the grading approach for Ms. Smith, it had to comply with this provision of NUREG-1021 to ensure that all license applicants in her class would be subject to the same grading policy. It was arbitrary and an abuse of discretion for the IRP and the Region not to have complied with this provision, regardless of the statement by Mr. Jackson that his panel was charged only with evaluating Ms. Smith.[444]

(ii) The impact of the grading change

155. The change in RF grading from that done by the Region II Exam Team and that done by the IRP is shown in Table 7. The Exam Team assigned Ms. Smith's error on Scenario 3, Event 5, to RF 1b, but the IRP assigned it to both RFs 1.d and 5.c. The Exam Team assigned Ms. Smith's error on Scenario 7, Event 3, to RF 3.c., but the IRP assigned it to both RFs 3.c and 3.b. The Exam Team assigned Ms. Smith's error on Scenario 6, Event 4, to RF 1.c., but the IRP assigned it to both RFs 1.c and 5.b. The Exam Team assigned Ms. Smith's error on Scenario 3, Event 4, to RF 1.c, but the IRP assigned it to both RFs 2.c. and 5.d.

156. The double counting contributed to failing Ms. Smith on Competency 3, Control Board Operations, by reducing her grade on that competency below the passing grade of 1.80. As shown in Table 1, the Exam Team's simulator operating test grading sheet from the 2012

[443] NUREG-1021 (Ex. CCS-005A) at 235.
[444] Tr. at 579–80 (Jackson).

examination gave Ms. Smith a passing grade of 1.99 on Competency 3. This reflected the Region II policy of assigning an error to only one Rating Factor. In particular, the Exam Team assigned Ms. Smith's error in Scenario 7, Event 3 (Loss of Cooling to Letdown HX, Mis-operation of Valve Controller) to Rating Factor 3.c (Control Board Operations, Manual Control). See Table 7. Because this was a non-critical error, and Ms. Smith had no other errors assigned to Rating Factor 3.c, her score on that Rating Factor was reduced from 3 to 2. The Exam Team did not assign any of her errors to Rating Factor 3.b (Control Board Operations, Understanding), so her score on that Rating Factor was 3. The Exam Team assigned three separate errors to Rating Factor 3.a. (Control Board Operations, Understanding), which reduced her score on that Rating Factor to 1. See Table 7. Multiplying Ms. Smith's scores on the respective Rating Factors by the weights assigned to each of those factors yields the passing score of 1.99 on Competency 3. See Table 1.

157. The IRP, however, assigned Ms. Smith's error in Scenario 7, Event 3, to both Rating Factors 3.b and 3.c. See Table 7. This change reduced Ms. Smith's score on both Rating Factors 3.b and 3.c to 2. The change reflected the double-counting grading approach implemented by the IRP during its review. Because of the reduced score on Rating Factor 3.b, Ms. Smith's overall score on Competency 3 was reduced to a failing score of 1.66. See Tables 5 and 6.

158. Thus, because of the double-counting grading standard implemented by the IRP, Ms. Smith was graded under a more critical standard than the rest of her class, and this more critical standard in fact lowered her score on the simulator part of the 2012 operating exam.

(iii) The Staff fails to provide a persuasive justification for changing the grading standard solely for Ms. Smith

159. The Staff states that it conducted "a complete, *de novo* re-grading of Ms. Smith's simulator test."[445] The Staff claims that such a complete re-grading is authorized by OLMC-500.[446] The Staff thus asserts the right to comprehensively re-grade Ms. Smith's simulator exam, even if this includes applying grading standards to her that are more strict than (1) those applied to the other applicants in her class and (2) those applied generally in Region II.

160. The Staff overstates its authority. Certainly the administrative review panel may correct errors made in the administration and grading of the applicant's simulator exam. But the IRP did not claim, nor could it, that by single-counting errors the Exam Team had inappropriately scored the competencies. Instead, the IRP substituted the double-counting of errors standard employed in NRC Regions I and IV, despite the fact that Ms. Smith was seeking a SRO license for the Vogtle Plant in Region II. This change was unjustified, arbitrary, and inconsistent with the purpose of NUREG-1021 that grading standards be applied to "ensure the equitable and consistent administration of examinations for all applicants."[447] Consistent with that purpose, the Exam Team originally graded all applicants in the 2012 Plant Vogtle exam class under the same grading standards. As the Exam Team stated, it "applied the exact same criteria to Carla for what was considered an error and for how those errors were assigned to only the root cause rating factor" in order to ensure that she was graded consistently with other applicants in her exam class.[448] We see no good reason, nor has the Staff provided any, why an applicant who files an administrative appeal forfeits her right to be graded under the same appropriate grading standard that was applied to other members of her exam class and other applicants in her region.

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[445] Staff PFF at Para. 234.
[446] Id. at Para. 233.
[447] NUREG-1021 (Ex. CCS-005A) at 13.
[448] Vogtle Operating Exam Appeal (Ex. CCS-101) at 1.

161. Unlike the Staff, we find nothing in OLMC-500 that authorized the IRP to substitute a grading standard used in Regions I and IV for the grading standard appropriately applied in Region II to an applicant seeking a license in that region. As described by the Staff, "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.'"[449] But that statement is followed by additional language which shows that the review panel is not endowed with unlimited re-grading authority. In particular, with respect to the simulator exam, the reviewer must determine "whether the competencies were appropriately scored."[450] There would be no reason to direct such a determination if the reviewer were authorized to make "a complete, de novo re-grading of an applicant's simulator test"[451] even when the competencies were appropriately scored by the examiners. The obvious import of this instruction, then, is that to the extent the competencies were appropriately scored by the examiners, the review panel should not alter the scoring. Because the Exam Team's single-counting of errors was an appropriate scoring method, the IRP had no justification for substituting a double-counting of errors standard merely because it would have applied that standard had Ms. Smith been seeking a license in Region I or Region IV. Moreover, because Ms. Smith was not seeking a SRO license in either of those regions, the IRP's action was unjustified, arbitrary, and an abuse of discretion.

162. Furthermore, even had the IRP concluded that the single-counting of errors is an inappropriate scoring standard, the Region would have been obligated under NUREG-1021 ES-502 D.2.c., to review the examination results of the other applicants to determine whether any of

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[449] Staff PFF at Para. 233 (citing OLMC-500 (Ex. CCS-030) at 8–9).
[450] OLMC-500 (Ex. CCS-030) at 9.
[451] Staff PFF at Para. 234.

the licensing decisions would be affected by a change to a different scoring method.[452] Thus, in order to grade Ms. Smith under the standard applied in Regions I and IV, the Staff had to be willing to re-grade the other applicants under the same standard. By arbitrarily failing to comply with that provision, the Staff ensured that Ms. Smith would be graded under a different standard than all other members of her class, thus denying her equal treatment and abusing its discretion.

163. The Staff's second argument to attempt to justify the double-counting of errors solely for Ms. Smith acknowledges that the double-counting standard was "more strict" than the single-counting standard applied to the other applicants in her 2012 class.[453] The Staff maintains, however, that this more critical grading standard for Ms. Smith was balanced to some unspecified extent by what it terms the "more lenient" grading standard that the IRP allegedly applied under NUREG-1021, ES-303 D.2.b.[454] As previously explained, ES-303 D.2.b allows a RF score based on two (but not three) errors to be increased from a 1 to a 2 if this can be justified based on the applicant correctly performing other activities related to the same RF.[455] The Exam Team gave Ms. Smith no such credit. But, according to the Staff, the IRP, in applying ES-303 D.2.b, "always consider[ed] two errors against an RF to constitute a score of a '2' based on the assumption that another related activity was correctly performed."[456] The Staff claims that the IRP's application of the more critical double-counting standard to Ms. Smith and its allegedly more lenient application of ES-303 D.2.b "may very well balance each other out . . . ."[457]

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[452] See supra Para. 154.
[453] Staff PFF at Para. 257.
[454] Id.
[455] See supra Para. 102.
[456] Staff PFF at Para. 257.
[457] Id. at Para. 275.

164. We reject this argument for several reasons. First, we disagree with the Staff's claim that the IRP applied a more lenient grading standard under ES-303 D.2.b than the Exam Team.[458] On the double-scoring of errors issue, we have clear evidence of a substitution by the IRP of the grading policy used in Regions I and IV for that generally used in Region II. By contrast, we have no persuasive evidence to show that Region II has a clearly defined policy for the application of ES-303 D.2.b, and, if so, what that policy is. Ms. Smith's IER, Form ES-303-1, contains no explanation of whether, or how, the Exam Team applied the grading standard in ES-303 D.2.b.[459] Even though Ms. Smith's IER grade sheet shows several RF scores of 1 based on two errors assigned to the RF,[460] the IER provided no explanation of whether or how the Exam Team applied the standard. Nor do we have any other evidence to reliably establish a Region II policy on that issue.

165. The only explanation for the Exam Team's decision not to give Ms. Smith any credit for correct actions was provided in documents that the Exam Team generated after Ms. Smith filed her request for informal review. The Exam Team stated that, even though it assigned Ms. Smith's error to only one rating factor, "the association with other rating factors was used as justification for placing a score of '1' in some rating factors where only two errors were documented."[461] The Exam Team produced a "Table of Errors and Related Rating Factors," which it argued supported this justification for not increasing any of Ms. Smith's RF scores from 1 to 2, as permitted under ES-303 D.2.b.[462]

166. Similarly, in its "Vogtle Operating Exam Appeal" document, the Exam Team argued:

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[458] Staff PFF at Para. 257.
[459] Smith's Individual Exam Report (Ex. CCS-045).
[460] See Table 1.
[461] Grading Philosophy and Consistency (Ex. NRC-032) at 2.
[462] Id. at 7.

> Although the examiners only documented errors on the applicant's original Form 303 under the rating factor most closely associated with the root cause of the applicant's deficiency, the examiners considered the elements of other errors and their relationship to these rating factors as justification for not assigning a score of "2" when only two rating factors were documented.[463]

This argument does not mention a general Region II policy of not increasing RF scores from 1 to 2. Rather, it asserts that in Ms. Smith's case no such increase was justified because of her "other errors and their relationship to these rating factors. . . ."[464]

167. We also disagree with the Staff's argument that the IRP had a policy of automatically converting a RF score of 1 to a 2 whenever only two errors were involved, without specifically considering whether such a change was justified. If that were true, then the IRP would have ignored the Exam Team's argument for not increasing Ms. Smith's RF scores. But in fact the IRP gave detailed consideration to the Exam Team's "Table of Errors and Related Rating Factors" (which the IRP referred to as the "Table of other errors") in its grading. Mr. Muller, in an email to Mr. Jackson dated October 3, stated:

> For the past several days, I have been reviewing RII's "Table of other errors" to see if additional rating factors could be affected. I have been eliminating any "new" information, but just trying to see for the events where the applicant had problems, if additional hits against rating factors seem justified. I will forward to you and Chris Steely the results of that review. Then if we agree to additional "hits", I will incorporate them into the write-up, along with comments I already have from you and Chris.[465]

Mr. Jackson confirmed that the IRP considered the Exam Team's "Table of other errors."[466] However, he stated that the Table did not change the final grading.[467]

168. We also do not agree that the IRP, in applying ES-303 D.2.b, "always consider[ed] two errors against an RF to constitute a score of a '2' based on the <u>assumption</u> that

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[463] Vogtle Operating Exam Appeal (Ex. CCS-101) at 2.
[464] <u>Id.</u> at 2–3.
[465] <u>See</u> Email from David Muller to Chris Steely (Oct. 3, 2012 11:42 AM) (Ex. CCS-020).
[466] Tr. at 582–83 (Jackson).
[467] Tr. at 583–84 (Jackson).

another related activity was correctly performed."[468] The record shows that the IRP did not simply assume that Ms. Smith performed correct actions in related activities. Rather, the IRP reviewed Ms. Smith's IER and concluded that "there were many other scenario events where there were no documented applicant errors (per the applicant's original grading as contained in her Individual Examination Report), such that other activities were correctly performed related to the RFs with two assessed errors."[469] Although later versions of the Informal Review Results document omitted that statement, this does not mean that the IRP changed its conclusion. Rather, Mr. Jackson decided that the document should be "limited to addressing how each of the errors was dispositioned."[470]

169. Thus, we reject the Staff's claim that the IRP applied a grading standard under which a RF score of 1 based on two errors was automatically increased to a 2. Instead, we find that the IRP identified correct actions that Ms. Smith performed related to RFs to which two errors had been assigned and concluded that the scoring increase was justified despite the Exam Team's contrary arguments. This was not the application of a more lenient grading standard than that employed by the Exam Team (even assuming it had such a standard), but rather the result of the IRP's different evaluation of the question whether the increases were justified. That different evaluation fails to justify singling out Ms. Smith for a grading change -- double-counting of errors -- that was not applied to any other applicant in her examination class.

170. In addition, the IRP's action of increasing Ms. Smith's scores from a 1 to a 2 in three RFs did not "balance . . . out"[471] the full negative impact of double-counting her errors. The IRP increased Ms. Smith's scores from a 1 to a 2 in RFs 1.c., 1.d., and 4.b., because of

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[468] Staff PFF at Para. 257 (emphasis added).
[469] Informal Review Results – Rev. 1 (Ex. CCS-066) at 34-35 (emphasis in original). The same statement is in Rev. 0. See Informal Review Results (Ex. CCS-024) at 36.
[470] Oct. 7, 2012 Jackson Email (Ex. CCS-032).
[471] Staff PFF at Para. 275.

positive actions coupled with only two identified errors in each of those RFs.[472] In those specific RFs, the scoring increase from a 1 to a 2 did offset the impact of the double-counting of errors. But this was not true in Competency 3, Control Board Operations. Pursuant to its double-counting of errors policy, the IRP assigned Ms. Smith's error in Scenario 7, Event 3, to both RFs 3.b and 3.c, causing her scores on both those RFs to be reduced from 3 to 2. As a result, Ms. Smith's overall score on Competency 3 was reduced from a passing score of 1.99 to a failing score of 1.66.[473] There was not and could not have been any increase in the RF score of 1 in Competency 3.a. because it resulted from an error associated with a critical task, which requires a score of 1.[474] Thus, in Competency 3, there was not, and could not have been, any application of the 1 to 2 scoring increase to offset the negative impact of the double-counting of errors.

(iv) Conclusion

171. The Board therefore concludes, on the basis of clear and largely undisputed evidence, that the IRP's action in changing the scoring procedure so as to apply double-counting of errors solely to Ms. Smith was an arbitrary and unjustified departure from the intent of NUREG-1021 to "ensure the equitable and consistent administration of examinations for all applicants."[475] The Staff's action ensured that Ms. Smith would be graded under a different standard than applied to all other members of her class, thus denying her equal treatment.

172. Eliminating the double counting of errors, however, does not result in Ms. Smith passing the simulator part of the 2012 operating exam. This is because Ms. Smith's score on Competency 4, Communications, was 1.60. See Table 5. Therefore, to pass, she required a minimum score of 2.00 on all other competencies, not just a passing score on those other

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[472] See Jackson's Prefiled Testimony (Ex. NRC-004) at 17.
[473] See supra Para. 105, 125-28.
[474] NUREG-1021 (Ex. CCS-005A) at 145.
[475] Id. at 13.

competencies. Eliminating the double counting of Ms. Smith's error in Scenario 7, Event 3, would return her overall score on Competency 3 to 1.99, the score she received on the original 2012 simulator operating test grading sheet, because her score on Rating Factor 3b would revert to 3. See Table 5. But she would still fail the simulator part of the operating exam because she needed scores of 2.00 on all competencies other than Competency 4. In other words, she would still fail the operating exam because of the .01 point deficiency on Competency 3. The Board must therefore consider another grading change made by the IRP that also impacted the scoring of Competency 3, the IRP's decision to redefine closing a Power Operated Relief Valve (PORV) as a critical task. We address that issue next.

b. The second denial of equal treatment: designation of a new critical task solely for Ms. Smith

173. The IRP made a second important change to the scoring. This change concerned Ms. Smith's error in taking a PORV control switch initially to the open position before taking it to the closed position during Scenario 7, Event 5.[476] The IRP agreed with the Exam Team that the error should have been assessed, and it also agreed with the Rating Factor assessed by the Exam Team. But, although the examination outline did not refer to the event as including a critical task[477] and Ms. Smith's error had not been graded by the Exam Team as the failure of a critical task,[478] the IRP nevertheless determined that Ms. Smith's initial incorrect operation of the control switch was a failure of a critical task.[479]

174. As with the double counting of errors, this change was made solely for Ms. Smith. For all other members of her 2012 operating exam class, closing the PORV control switch was not designated a critical task. This was the case not only for the specific scenario

[476] See Table 7 of this Order; see also Smith's Prefiled Testimony (Ex. CCS-076) at 46–48.
[477] Form ES-D-1, App. D – Scenario 7 Outline (Ex. CCS-047) (Undated) [hereinafter Bates's Notes].
[478] Smith's Individual Exam Report (Ex. NRC-045) at 19.
[479] NRC Panel Review Results (Ex. CCS-037) at 37–38.

(#7) performed by Ms. Smith's crew and two other crews,[480] but also in a second scenario (#4) performed by one other crew two weeks later with no corrective changes having been made to the scenario outline.[481] In both Scenario 7 and Scenario 4, had the time-critical task not been completed successfully, the reactor would have scrammed, and malfunctions scheduled later in the scenarios could not have been evaluated.

175. Nothing in the record indicates that Region II at any time reviewed the results of the other applicants who took the 2012 Vogtle operating examination to determine whether those licensing decisions would be affected if closing the PORV had been designated a critical task for all applicants, rather than solely for Ms. Smith. Thus, as with the double counting of errors change, the Staff failed to follow NUREG-1021, ES-502 D.2.c. Even though the Exam Team claimed in its analysis developed for the IRP that it had "mis-graded" this event "because it was a failed critical task,"[482] it never attempted to correct the alleged mis-grading of this event for any applicant other than Ms. Smith.

176. There is at least one other applicant whose simulator exam score would have been reduced if correctly closing the PORV had been defined as a critical task for all applicants, rather than only for Ms. Smith. The applicant designated to be the shift supervisor (SS) for Scenario 7, Event 5, failed to instruct Ms. Smith how to close the valve or even which valve (PORV or Block Valve) to close. For this communication error, the SS applicant received a reduction to RF 4.a (Communications, Clarity).[483] But the SS applicant's communications error

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[480] Binder Tab 3 (Ex. NRC-031) at 5.
[481] Form ES-303-1, "O" Individual Examination Report (Ex. CCS-091) at 18 (June 30, 2013); Form ES-303-1, "P" Individual Examination Report (Ex. CCS-103) at 19 (June 30, 2013) [hereinafter "P" Individual Examination Report]; Binder Tab 3 (Ex. NRC-031) at 6.
[482] Rating Factor 3.A. (Ex. CCS-039) at 3.
[483] "V" Individual Examination Report (Ex. CCS-057) at 12.

was not attributed to a critical task even though it concerned the same event and same action – closing the PORV -- that was designated a critical task for Ms. Smith.[484]

177. If the SS applicant's error had been treated consistently with Ms. Smith's error in the same event, and thus graded as associated with a critical task, his communication competency score would have been reduced.[485] If his other errors during the simulator exam had been subject to double-counting, as Ms. Smith's errors were, his score on the simulator part of the operating exam might have been further reduced. But those changes were not made to the scoring of his simulator exam, only to the scoring of Ms. Smith's exam. The SS applicant passed the 2012 exam, received a SRO license, and is now working as a shift supervisor in the control room for the Vogtle Plant. Ms. Smith failed the simulator part of the 2012 exam, was denied a SRO license, and thus may not work as an SRO in the Vogtle control room.

178. We do not suggest that the SS applicant should not have received a SRO license or that we have any doubt about his qualifications. The point of this example is to demonstrate the arbitrariness and inequity of applying different grading standards to different applicants. Had Ms. Smith's error in connection with Scenario 7, Event 5 been graded by the IRP consistently with how the SS applicant's error in the same event was graded by the Exam Team, it would not have been graded as the failure of a critical task and she also would have passed the simulator exam, received a SRO license, and would be eligible to work as a shift supervisor in the control room for the Vogtle Plant.[486]

179. As with the double counting of errors issue, the result of designating the closing of the PORV a critical task solely for Ms. Smith was that the IRP graded her under a stricter standard than that applied to other applicants in her examination class. Because of this change by the IRP, Ms. Smith was assessed a greater scoring deduction for her error in initially failing to

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[484] Id.
[485] See id. at 3, 12.
[486] See infra Para. 214.

close the PORV. This resulted in a down grading of RF 3.a. to a 1 from what would have been a 2, as required by NUREG-1021 ES-303 D.2.b.[487] See Tables 5 and 6.

180. The Board therefore concludes, on the basis of clear and largely undisputed evidence, that the IRP's action in designating a critical task solely for Ms. Smith was an arbitrary and unjustified departure from the intent of NUREG-1021 to "ensure the equitable and consistent administration of examinations for all applicants."[488] The Staff's action ensured that Ms. Smith would be graded under a different standard than applied to all other members of her class, thus denying her equal treatment.

181. This single change by the IRP, which was accompanied with little supporting analysis, resulted in the failure determination for Ms. Smith on the 2012 Vogtle Operating Exam. Eliminating that change results in RF scores for competencies 3.a, 3.b, and 3.c of 2, 2, and 2, respectively, and a grade for Competency 3 of 2.00. See Table 6. Because Ms. Smith scored a 1.60 in Competency 4, Communications, she was required to score 2.00 or higher in the other five competencies, which is now indicated. See Table 5. Given that Ms. Smith meets the scoring requirements of NUREG-1021, ES-303 D.2.b., and since she received Satisfactory scores on all 15 of her JPMs, the Board finds that she passed the 2012 Operating Exam. And, because she received a passing score on her 2012 Senior Reactor Operator written examination, the Board finds that Ms. Smith satisfied the operating and written examination requirements for a SRO license.

182. The Board further concludes that, had the IRP graded Ms. Smith's performance on the 2012 Vogtle Operating Exam by using the same standards applied to the other applicants -- thus eliminating both the double counting of errors and the designation of closing the PORV as a critical task -- Ms. Smith would have received RF scores for competencies 3.a.,

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[487] NUREG-1021 (Ex. CCS-005A) at 145.
[488] Id. at 13.

3.b., and 3.c. of 2, 3, and 2, respectively, and thus a grade of 2.33 on Competency 3, Control Board Operations. See supra Tables 6 and 7; Paragraph 94.

183. This further confirms that Ms. Smith meets the scoring requirements of NUREG-1021, ES-303 D.2.b., for the simulator examination. As before, because she received satisfactory scores on all 15 of her JPMs and a passing score on her 2012 Senior Reactor Operator written examination, Ms. Smith satisfied the operating and written examination requirements for a SRO license.

2. Board review of Ms. Smith's other challenges to the IRP's determination that she made an error associated with a critical task.

184. If, contrary to our determination above, the IRP could permissibly re-define closing the PORV as a critical task solely for Ms. Smith, we would then have to consider Ms. Smith's other arguments challenging the IRP's determination that she made an error associated with a critical task.

a. Re-scoring of a non-contested item

185. Ms. Smith did not contest five errors noted on her Form 303-1 from her IER, including her incorrect operation of the PORV control switch. The IRP considered not only errors that Ms. Smith contested, but also errors that were not contested. These included such issues as three Technical Specification omissions or misunderstandings and, most importantly, the issue whether closing the PORV control switch should be a critical task.[489]

186. Ms. Smith states[490] that OLMC-500, the NRC procedure entitled "Processing Requests for Administrative Reviews and Hearings," addresses requirements for assessing contested test items[491] but makes no mention of non-contested test items. She is correct. She

[489] See NRC Panel Review Results (Ex. NRC-054) at 37; see also NRC Panel Review Results (Ex. CCS-037).
[490] Smith's Prefiled Testimony (Ex. CCS-076) at 18.
[491] OLMC-500 (Ex. CCS-030) at 8–9.

infers from this that non-contested test items should not be reviewed.[492] Further, IRP panel member David Muller said in an email on July 18, 2012, before he drafted the "first revision" that he would "[r]eview the errors the applicant did not contest but that were documented by Region II in the original individual examination (grade) report. Hopefully, nothing will change here (and I am a bit hesitant to change things the applicant did NOT contest), and the errors and the RFs assigned by Region II were appropriate."[493]

187. Despite Mr. Muller's understandable concern, the Board finds that the IRP could permissibly consider non-contested items if necessary for a complete evaluation of Ms. Smith's performance on the 2012 Simulator Examination. Though not explicitly stated in OLMC-500, review of non-contested test items is provided for in Section E.1, Review Guidance, which states that "[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."[494] However, since the IRP chose to review and rule on the non-contested items, at a minimum, its review should have been conducted and documented with the same level of analysis as the contested items.

b. Failure to comply with NUREG-1021 standards related to critical tasks

188. We therefore consider Ms. Smith's other arguments related to this issue. We begin by reviewing the definition of a critical task. We then review the record of Scenario 7, Event 5; the potential impact on operation of the reactor; and how Ms. Smith's performance was graded and validated. We then examine Ms. Smith's argument that designating operation of the PORV control switch as a critical task during the informal review, six months after the simulator exam had been completed, violated the requirement that critical tasks be defined in the

[492] Smith's Prefiled Testimony (Ex. CCS-076) at 18.
[493] July 18, 2012 Muller Email (Ex. CCS-035).
[494] OLMC-500 (Ex. CCS-030) at 9.

examination outline distributed to examiners before the exam is given.[495] Finally, we evaluate her argument that the IRP failed to define the critical task as required by NUREG-1021, Appendix D, including failing to provide a measurable performance indicator to determine whether the critical task was performed correctly.[496]

(i) Definition of a critical task

189. NUREG-1021, Appendix D.1, specifies that a Critical Task (CT) must have four elements, summarized below:[497]

1. Safety Significance.

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. If an automatically actuated plant system would have been required to mitigate the consequences of an individual's incorrect performance, or the performance necessitates the crew taking compensatory action that would complicate the event mitigation strategy, the task is safety significant. Performance that prevents degradation of a fission product barrier may be a CT.

2. Cueing

An external stimulus must prompt at least one operator to perform the task. Cueing may include a verbal direction by or reports from other crew members, procedural steps, or an indication of a system or component malfunction by meters or alarming devices.

3. Measurable Performance Indicator

A measurable performance indicator consists of positive actions that an observer can objectively identify taken by at least one member of the crew.

4. Performance Feedback

[495] Smith's Statement of Position (Ex. CCS-075) at 9–10.
[496] Id.
[497] NUREG-1021 (Ex. CCS-005B) at 424.

At least one member of the crew must receive performance feedback, that is, information about the effect of the crew member's actions or inaction on the CT.

(ii) The record of the event

190. Scenario 7 Event 5 lasted just under 30 minutes on the morning of Tuesday, March 27, 2012, [498] but only the first 30 seconds of the event are important to this issue. At the moment of Scenario 7, Event 5 initiation, the reactor was operating at about 30 percent power.[499] The crew had essentially completed actions related to Event 4 and Ms. Smith was in the process of withdrawing control rods as directed by the SS to maintain the directed temperature band. Table 8 contains all the pertinent pressure data for evaluating the event and crew responses.

[498] "Tuesday First" Scenario Outline (Ex. CCS-058) at 52, 60.
[499] Id. at 1.

Parameter	Value (psig)	Normal Action
Normal Reactor Operating Pressure	2235	
Pressurizer High Pressure	2385	Reactor trips
Over-pressure Set Point	2335	PORV 456 opens
Lowering Pressure Set Point	2315	PORV 456 automatically closes
Lowering Pressure Set Point	2185	Block Valve automatically closes
Pressurizer Low Pressure	≤1960	Reactor trips
Pressurizer Low Pressure	≤1870	Safety injection initiation
Pressurizer Relief Tank High Pressure	8	Alarm
Pressurizer Relief Tank Disk ruptures	100	
Pressurizer Relief Tank High/Low Level	High 88% Low 57%	Alarm
Pressurizer Relief Tank High Temperature	115 degrees Fahrenheit	Alarm

Table 8. Vogtle Pressure Protection System Set Points and Actions.[500]

[500] The figures in the Table are based upon data of which the Board took official notice. The Board issued an order pursuant to 10 C.F.R. § 2.337(f) notifying the parties that it intended to take such notice and gave the parties the opportunity to controvert the data. See Licensing Board Order (Taking Official Notice) (Jan. 30, 2014) (unpublished). The Staff filed its own Motion controverting some of the data and providing other data that the Staff believed to be correct. See NRC Staff Motion Controverting, in Part, the Board's Taking Official Notice of Facts and Requesting that the Board take Official Notice of Additional Relevant Facts (Feb. 10, 2014) [hereinafter "Staff's Official Notice Motion"]. The Board has accepted the data supplied by the Staff and has used it in the Table when it was different from the data initially noticed by the Board. The Board also grants the Staff's request to take official notice of the additional facts set forth in its Motion.

191. Simulator data shows that at the very moment Ms. Smith was moving control rods at 08:18, the instrument malfunction for the controlling Pressurizer Channel Pressure Indicator 456 was inserted.[501] This resulted in PORV 456 fully opening due to the false high pressure indication and actual pressurizer pressure immediately dropping on the three other channels.[502]

192. According to examiner notes from Mr. Bates and Mr. Meeks, as pressure began to drop Ms. Smith took the Immediate Operator Actions to close the spray valves, close the PORV, and operate the pressurizer heaters appropriately. However, she had incorrectly operated the hand switch for the PORV, which the examiners had not seen, and she turned to look at the Shift Supervisor (SS). As pressure continued to drop, according to the examiner notes and their later testimony, the SS loudly said "Carla, shut that valve!"[503] This declaration probably occurred 15 seconds into the event due to the Block Valve not having closed at 2185 psig,[504] rather than some 30 seconds later as reported in her IER.[505] Pressure continued to decrease, bottoming out at about 2147 psig about 25 seconds into the event, after which it began to steadily rise.[506] By 30 seconds into the event, pressure was essentially stable and very slowly rising back to normal while the crew addressed the subsequent operator actions in

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[501] See Excel Spreadsheet (Ex. CCS-074) at cells Ay3177-BB3178 and DK3177-DP3178. Relative to cell content, each row represents about one second in time. Columns AY through BB have pressurizer pressure channel data, and Columns DE through DT have control rod position data. CCS-074 is available in Portable Document Format (PDF) on the NRC's Agencywide Documents Access and Management System (ADAMS). See ADAMS Accession No. ML13232A116. The PDF version of CCS-074 does not contain the cell information that the Board cites. Thus, the Board admits the Excel spreadsheet version of CCS-074 as CCS-074-01. The Board will provide the Office of the Secretary with an electronic version of CCS-074-01 so that the information can be accessible to the public.
[502] Excel Spreadsheet (Ex. CCS-074-01) at cells AY3177–BB3178.
[503] "Tuesday First" Scenario Outline (Ex. CCS-058) at 52; see also Bates's Notes (Ex. CCS-047) at 76.
[504] Excel Spreadsheet (Ex. CCS-074-01) at cells AY3191-BB3194.
[505] Smith's Individual Exam Report (Ex. CCS-045) at 19.
[506] Excel Spreadsheet (Ex. CCS-074-01) at cells AY3202–BB3204.

AOP 18001-C. These latter actions ended for this event when the SS made his crew brief at about 08:44.[507]

193. The failure of Block Valve 8000B to close, as noted in the title of event, was due to a preloaded malfunction.[508] PORV 456 and Block Valve 8000B are in series on a three inch diameter line from the pressurizer to a tank known as the Pressure Relief Tank (PRT). The PRT has a pressure-relief disk that by design will rupture at 100 psig, spilling primary system water into containment.[509] According to Table 8, supra, if neither the PORV nor the Block Valve had closed, an alarm should have occurred when pressure in the PRT reached 8 psig, and the reactor scram would have occurred at 1960 psig in the Pressurizer. There is no record of the former, and clearly the latter did not happen given that pressure bottomed out at about 2147 psig.

194. The maximum satisfactory close stroke time for PORV Block Valve HV-8000B is 23 seconds.[510] Therefore, had the pre-loaded Block Valve failure not been present, the Block Valve would have automatically closed in 23 seconds or less after pressure reached 2185 psig. The maximum satisfactory close stroke time for the PORV 456 is 2.5 seconds.[511] Thus, the Board concludes that Ms. Smith actually ended the event at about the same time as the Block valve would have had it been operational. Further, the first procedural step after the Immediate Operator Actions is usually for the crew to verify those Actions. Indeed, normally a crew is performing such verification in real-time even as they will formally soon perform the procedure

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[507] "Tuesday First" Scenario Outline (Ex. CCS-058) at 60.
[508] Form ES-D-1, App. D – Scenario 7 Outline (Ex. CCS-046) at 1 (Undated) [hereinafter Scenario 7 Outline].
[509] Tr. at 245–46 (Smith); Table 8.
[510] See NRC Staff Motion Controverting, In Part, the Board's Taking Official Notice of Facts and Requesting that the Board Take Official Notice of Additional Relevant Facts at 4 (Feb. 10, 2014).
[511] Id.

step. This verification step is documented in Form ES-D-2.[512] But no credit was given in any examiner documentation for this step having been completed.

(iii) Exam team grading

195. Following each scenario, the examiners first caucus to discuss what they observed and to coordinate follow-up questions they may need to ask the crew members. During the question period for Scenario 7, Ms. Smith told Mr. Bates, who had not seen the error occur, that she had first taken the PORV hand switch in the wrong direction.[513] Mr. Bates, in assessing a deduction for this error, recorded on Ms. Smith's Individual Examination Report:

> The applicant correctly diagnosed that PT-456 failed high and immediately closed the pressurizer spray valves. However, she did not immediately close the affected PORV, or its associated PORV Block Valve, and PRZR pressure continued to lower. Approximately 30 seconds after initiation of the failure, the Senior Reactor Operator loudly directed, "Shut that valve!" The applicant then closed the PORV to halt the pressure decrease. After the scenario, the applicant was asked to explain her response to the PT-456 failure. The applicant stated that she had initially manipulated the PORV switch in the wrong direction. The applicant was downgraded in this competency because she did not manipulate the PORV handswitch in an accurate manner.[514]

195. The IRP, however, misreported this event when they stated that "[a]pproximately 30 seconds later [i.e., after she turned the hand switch in the wrong direction] the applicant was directed to close the PORV by the SS . . . ."[515] In fact, the SS did not provide instruction on how to close the valve or even which valve (PORV or Block Valve) to close, a communication for which he received an error to RF 4.a (Communications, Clarity).[516] According to the Individual Examination Report for the applicant who was assigned the SS role for Scenario 7, Event 5 (the SS is referred to as the SRO; Ms. Smith is the RO):

> The applicant, as Senior Reactor Operator (SRO), was expected to clearly state verbal direction to the control room operators, including using proper plant nomenclature. . . . When PI-456 failed high, the Reactor Operator (RO) correctly closed the PRZR spray

[512] Scenario 7 Outline (Ex. CCS-046) at 27.
[513] Vogtle Operating Exam Appeal (Ex. CCS-101) at 12.
[514] Smith's Individual Exam Report (Ex. CCS-045) at 19.
[515] NRC Panel Review Results (Ex. CCS-037) at 38.
[516] "V" Individual Examination Report (Ex. CCS-057) at 12.

> valves, but then incorrectly turned the PRZR PORV switch to the "OPEN" position (thinking that she was closing the valve). When the PORV did not go closed, and with PRZR pressure lowering rapidly, the RO turned to the SRO for guidance. At this point, the applicant stated "SHUT THAT VALVE!" without giving any further nomenclature or clarification as to which valve he wanted to be closed. The RO then closed the PORV.[517]

Despite the inadequate direction from the SS, Ms. Smith as the OATC took the switch in the proper direction and closed the PORV,[518] demonstrating that she understood the action required of her without specific instruction. The SS provided an update for entering AOP 18001-C in less than one minute after initiation of the event.[519]

197. We therefore reject the argument that Ms. Smith should be denied credit for closing the PORV because her action was prompted by the SS.[520] This was not an instance where an error was "corrected by a peer checker."[521] The SS corrected Ms. Smith to the extent of indicating that a valve needed to be closed, but he failed to identify the valve or how to close it. Cueing, which is an essential element of a critical task, may include a verbal direction by or reports from other crew members.[522] We find that the SS's non-specific direction to "shut that valve" was a permissible type of cueing and should not have been used to support failure of a critical task.

198. We also reject the IRP's assumption that, but for the SS's intervention, Ms. Smith would have "allowed a small break loss of coolant accident to continue (degraded fission

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[517] Id. (emphasis added). The examiners' notes are not entirely consistent on this issue. Mr. Meeks' notes report that the SS stated "Carla, shut that valve." "Tuesday First" Scenario Outline (Ex. CCS-058) at 52. Mr. Bates' notes report the same statement, but they also state that the SS gave Ms. Smith specific direction to the close the PORV. Bates's Notes (Ex. CCS-047) at 76. Mr. Meeks' version must have prevailed, because the IER for the SS states that he did not provide clear direction to close the PORV. "V" Individual Examination Report (Ex. CCS-057) at 12. Both Mr. Meeks and Mr. Bates signed the IER for the SS. Id. at 1. The IER for the SS represents the Exam Team's final evaluation of his actions, and we therefore consider it conclusive of any conflict in the examiners' notes.
[518] Bates's Notes (Ex. CCS-047) at 76.
[519] "Tuesday First" Scenario Outline (Ex. CCS-05) at 52.
[520] Rating Factor 3.A (Ex. CCS-039) at 4.
[521] NUREG-1021 (Ex. CCS-005B) at 455.
[522] Id. at 424.

product barrier), which would have required an automatic reactor trip and safety injection to mitigate."[523] Ms. Smith intended to close the PORV.[524] Thus, the IRP's assumed course of events would have required that Ms. Smith be inattentive to the need to close the PORV or the Block Valve after initially turning the PORV control switch to the open position. The evidence before the Board shows that she was attentive to the situation.[525] At the time the error occurred, she was performing a series of immediate operator actions, including closing the sprays, closing the PORV, and taking the heaters to the on position. She intended to close the PORV but initially took the switch to the open position.[526] Within this short time span, she realized that the Block Valve had not operated properly and announced this to the Unit Operator.[527] She knew that the next action would be to operate the manual block valve control to make it perform its function but, before she could take that corrective action, the SS intervened.[528]

199. The outline for Scenario 7, Form ES-D-2, specifies concerning Event 5 that "[t]he OATC will be required to manually close PORV 456 or [Block Valve] HV-8000B to prevent a Reactor trip."[529] Thus, either action is an acceptable means of responding to the pressurizer instrument failure.

200. The IRP assumed that Ms. Smith, absent the SS's intervention, would not have closed either the Block Valve or the PORV in time to prevent an automatic reactor trip and safety injection. Given that Ms. Smith was aware of the block valve failure and the operator action needed to compensate for that failure at the time of the SS's intervention, we find it more likely that, absent the intervention, she would have manually shut the Block Valve well before a reactor trip or safety injection.

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[523] NRC Panel Review Results (Ex. CCS-037) at 38.
[524] Tr. at 240 (Smith).
[525] Tr. at 238-48 (Smith).
[526] Tr. at 239-40 (Smith).
[527] Tr. at 242-43 (Smith); Bates's Notes (Ex. CCS-047) at 76.
[528] Tr. at 243, 247–48 (Smith).
[529] Scenario 7 Outline (Ex. CCS-046).

201. Attempting to rely on precedent, the Staff reaches all the way back to 2005 for an error it alleges is "substantively identical to the error committed by Ms. Smith."[530] However, the error committed in 2005 was that the applicant, while performing Emergency Operating Procedure steps, failed to verify that all steam generator PORVs were closed, and "was subsequently inattentive to the ongoing cooldown, which continued for another 7 minutes to 494° F. The cooldown was stopped when the BOP (the other board operator on the crew) informed the applicant that the . . . PORV was still open and the SRO directed the applicant to close the associated block valve."[531] Ms. Smith, on the other hand, was attentive to the actions she was required to perform, was aware that either the PORV or the Block Valve needed to be closed, and closed the PORV without specific direction from the SS. The problem was resolved in less than thirty seconds from the initiation of the instrument failure.

202. The Board therefore concludes that the IRP erred in stating that the SS directed Ms. Smith to close the PORV, in denying her credit for her correct action, and in failing to take into account that she likely would have closed the Block Valve had the SS not intervened. Moreover, we find no evidence that her initial error had adverse, let alone serious, safety consequences, nor have we found any evidence that it resulted in any significant degradation of the plant or in the mitigative capability of the plant.

(iv) <u>The IRP arbitrarily deviated from Scenario 7, Event 5, as it had been reviewed, approved, and validated</u>

203. Ms. Smith argues that designating operation of the PORV control switch as a critical task during the informal review, six months after the simulator exam had been

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[530] Staff's Statement of Position (Ex. NRC-001) at 115.
[531] Letter from Bruce A. Boger, Division of Inspection Program Management, Office of Nuclear Reactor, to Mr. [Unnamed Applicant] (Ex. NRC-020) at 9 (March 10, 2005).

completed, violated the requirement that critical tasks be defined in the examination outline distributed to examiners before the exam is given.[532]

204. The Staff acknowledges that "every required operator action should be included on Form ES-D-2 and that all critical tasks 'shall be flagged in a manner that makes them apparent to the individuals who will be administering the operating test' including 'set points and other parameters . . . to provide an objective method for evaluating the operators' performance.'"[533] But the Staff maintains that the Form ES-D-2 is only an initial indicator of critical tasks and the examiners are free to designate any task on the Form as critical whenever they conclude that it satisfies the definition.[534]

205. The Staff's position that critical tasks need not be designated in advance of the examination conflicts with the statement of its own witness, Mr. Ehrhardt, in his Fairness Report. He explained that examiners have little discretion in how simulator exams are administered because

> initial examinations are highly pre-scripted, with critical tasks, steps, and key performance elements <u>explicitly determined and documented in advance</u> in consultation with facility training representatives. Therefore, there is little, if any, opportunity to hold any applicant to a higher standard of performance than another.[535]

Under the Staff's argument, however, critical tasks can be designated after the exam is administered and even during the administrative review, without consulting facility training representatives. This creates ample opportunity to hold one applicant to a higher standard of performance than another, as in fact happened with Ms. Smith.

206. We agree with Mr. Ehrhardt that under NUREG-1021 critical tasks are to be determined and documented in advance of the simulator exam in consultation with facility

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[532] Smith's Statement of Position (Ex. CCS-075) at 9–10.
[533] Staff's Statement of Position (Ex. NRC-001) at 116 (quoting NUREG-1021 (Ex. CCS-005B) at 414).
[534] Staff's Statement of Position (Ex. NRC-001) at 116–17.
[535] Ehrhardt's Independent Review (Ex. NRC-014) at 8 (emphasis added).

training representatives. This is necessary to ensure that critical tasks are developed and approved consistently with NUREG-1021's detailed quality assurance process for developing and validating simulator scenarios. Pursuant to ES-301, "Preparing Initial Tests," Section D.5.d., critical tasks be included in each scenario. It further indicates that the critical tasks are to be included on Form ES-301-4, the Simulator Scenario Quality Checklist.[536] Section D.5.f. requires they be listed on Forms ES-D-1 and ES-D-2, complete with all required actions.[537] These are the forms "that examiners will use to administer the simulator operating tests."[538] "Every required operator action should be included on Form ES-D-2; this is particularly important for the critical tasks . . . and other verifiable actions and behaviors that will provide a useful basis for evaluating the operators' competence. All [critical tasks] shall be flagged in a manner that makes them apparent to the individuals who will be administering the operating test . . . and the measurable performance indicators shall be identified."[539]

207. The critical tasks identified on the Form ES-D-2 will have been reviewed and validated under NUREG-1021's quality assurance process. Under that process, the operating exams are first prepared and reviewed by the licensee and then are submitted to the NRC Region for review and approval.[540] NUREG-1021, ES-301 D.1,[541] details the process and forms to be used by the plant and as well as the plant's internal procedures to be followed before the examination outlines and proposed testing materials are transmitted to the NRC Region. This includes an independent internal review by plant management. Thus, at least two levels of quality checks will have been completed before the examinations are sent to the NRC along with the necessary forms.

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[536] NUREG-1021 (Ex. CCS-005A) at 117.
[537] Id. at 119.
[538] Id. at 118.
[539] Id. (Ex. CCS-005B) at 414 (emphasis omitted).
[540] Id. (Ex. CCS-005A) at 106, 129.
[541] Id. at 106–18.

208. Once received by the NRC Region, the Exam Team is to perform an additional set of reviews in accordance with ES-301 E.2.[542] By this time, appropriate interactions with the plant will have occurred to assure requirements are met. Reviews will have continued and the Chief Examiner will provide the examination package to the Operator Licensing Supervisor for further review and approval.[543]

209. The responsible NRC supervisor will assure all concerns are met and necessary changes are made, and then sign the Form ES-301-3, the "Operating Test Quality Checklist."[544] Per paragraph E.3.c., this signature would not be provided "until he or she is satisfied that the examination is acceptable to be administered."[545] Among the findings required on the "Operating Test Quality Checklist" is that "[i]t appears that the operating test will differentiate between competent and less-than-competent applicants at the designated license level."[546] By this point in the process at least four detailed reviews and approvals will have been performed.

210. To implement the process just described, a rigorous Quality Assurance process was followed and documented for the 2012 Vogtle operating examinations. All of the scenarios, including the designated critical tasks, were subjected to a rigorous quality check and validation before the simulator examinations were administered. This process began with notification of the plant dated October 21, 2011, addressed to Mr. Tom E. Tynan, Vice President, confirming that his staff would prepare both the operating test and written examination, and providing a schedule for the process.[547]

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[542] Id. at 120.
[543] Id. at 121.
[544] Id.
[545] Id.
[546] Id. at 125.
[547] See Letter from Bruno L. Caballero, Acting Chief, Operations Branch 1, Division of Reactor Safety, to Tom E. Tynan, Vice President, Southern Nuclear Operating Company, Inc., Vogtle Electric Generating Plant (Ex. CCS-018) (Oct. 21, 2011).

211. Mr. Meeks, the NRC Chief Examiner in Training, stated that prior to the scenarios being sent to NRC, his plant contact, Mr. Wainwright, "would have had those materials authorized by his management."[548] Mr. Meeks further stated that Region II Branch Chief Widmann had signed these forms and that "Mr. Widmann was the ultimate authority who would have authorized both the operating test portion and the written exam. . . ."[549]

212. Having been reviewed through this quality assurance process, the approved Scenario 7 Event 5, "PRZR PT-456 fails high resulting in PORV 456 failing open and block valve HV-8000B failure to auto close," was detailed throughout the scenario outline form, ES-D-1, and the Required Operator Actions Form, ES-D-2,[550] that were used during three administrations of the scenario, each time being used for three candidates by each of the three members of the Exam Team.[551] The ES-D-2 provides further clarification of the event, stating: "PRZR pressure channel PI-456 will fail high with the PORB [sic] Block Valve HB-8000B failing to close in automatic on low RCS pressure of 2185 psig. The [Operator at the Controls] OATC will be required to manually close PORV 456 or HV-8000B to prevent a Reactor trip."[552] This is repeated on all six pages needed to describe the expected operator and crew actions for the event.[553] No mention is made of this being a critical task.

213. Thus, throughout the extensive process of developing, reviewing, and validating the simulator exam, closing the PORV during Scenario 7, Event 5, was not designated as one of the critical tasks on which applicants were to be tested. The Exam Team accordingly had no basis for its belated claim that it "mis-graded" Ms. Smith's error in not immediately closing the PORV. On the contrary, when the Exam Team assessed Ms. Smith a one point reduction to RF

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[548] Tr. at 445 (Meeks).
[549] Tr. at 449 (Meeks).
[550] See Scenario 7 Outline (Ex. CCS-046).
[551] Id.
[552] Id. at 27.
[553] Id. at 27–32.

3.a. for an error in connection with a non-critical task,[554] it acted in accordance with Scenario 7, Event 5 as validated under the NUREG-1021 procedures.

214. It was only after the extensive quality assurance process had been completed, the 2012 operating exam had been administered and graded, Ms. Smith had filed her administrative appeal, and the IRP review process had begun that closing the PORV or Block Valve during Scenario 7, Event 5 was for the first time declared to be a critical task. This change was accompanied by no analysis, statement, or demonstration from the IRP, but was encouraged by both the Exam Team[555] and IOLB management.[556] Even then, it was designated a critical task only for Ms. Smith; neither the Exam Team nor the IRP evaluated how the change might affect the grading of other applicants.

215. The IRP's decision to declare a new critical task during the administrative appeal effectively bypassed the extensive quality assurance process for the development of simulator scenarios. Of all the members of her class, only Ms. Smith was subject to a critical task that had not been validated through that process. The quality assurance process cannot plausibly be construed as merely one option for the development of simulator scenarios and critical tasks. The intent of NUREG-1021 is that "[e]very facet of the operating test, including the walk-through JPMs and simulator scenarios, should be planned, researched, validated, and documented to the maximum extent possible <u>before the test is administered</u>."[557]

216. To the extent the IRP believed it was required to designate as a critical task any operator action it thought satisfied the definition, it was mistaken. In fact, the effect of the IRP's action was to exceed the recommended number of critical tasks in Scenario 7. Form ES-301-4, the Simulator Scenario Quality Checklist, specifies the target quantitative number of critical

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[554] Smith's Individual Exam Report (Ex. NRC-045) at 3, 19.
[555] Vogtle Operating Exam Appeal (Ex. CCS-101) at 12.
[556] <u>See</u> Oct. 16, 2012 Jackson Email (Ex. CCS-059); Oct. 16, 2012 McHale Email (Ex. CCS-059).
[557] NUREG-1021 (Ex. CCS-005A) at 110 (emphasis added).

tasks to be 2 – 3 per scenario.[558] Three critical tasks are detailed for Scenario 7 on page 6 of the scenario outline, Form ES-D-1.[559] The same number of critical tasks were included in the other scenarios on which Ms. Smith was tested. For Scenario 6, there are three critical tasks listed on page 5 of the scenario outline,[560] and for Scenario 3, three are listed on page 6.[561] Ms. Smith made no errors related to any of the listed critical tasks she performed.[562]

217. The evidence confirms that, throughout the process of developing, administering, and grading the simulator exam there was no identified need to designate an additional critical task beyond those already identified on the Form ES-D-2. After the quality assurance reviews and approvals, Scenario 7 was used three times for different crew evaluations.[563] Once the examinations were complete and grading had been done back in the Region II office, but prior to issuance of the license denial to Ms. Smith, "the exam team sought independent reviews from two Senior Operations Engineers and one Operations Engineer, all having previously held senior reactor operator licenses. Comments from these reviews were largely incorporated into the final documentation."[564] These later reviews obtained by the chief examiner were confirmed during the Fairness Review completed by Mr. Ehrhardt,[565] who also detailed the reasoning and process behind obtaining post-exam reviews.[566] There is no indication that either the use of Scenario 7 for the other candidates or the post-exam review of the documentation completed by the Exam Team indicated that a change from the scenario outline to include an added critical task was warranted.

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[558] NUREG-1021 (Ex. CCS-005A) at 126.
[559] Scenario 7 Outline (Ex. CCS-046) at 6.
[560] Form ES-D-1, App. D – "Monday 1st" Scenario 6 Outline (Ex. CCS-050) at 9 (Undated).
[561] Form ES-D-1, App. D – Scenario 3 Outline (Ex. CCS-048) at 6 (Undated).
[562] Informal Review Results (Ex. CCS-024) at 36.
[563] Binder Tab 3 (Ex. NRC-031) at 5.
[564] Prefiled Testimony of Bates, Capehart & Meeks (Ex. NRC-002) at 17.
[565] Ehrhardt's Independent Review (Ex. NRC-014) at 8.
[566] Tr. at 595–97 (Ehrhardt).

218. NUREG-1021, ES-303 D.3.a., requires that simulator scenarios be finalized and updated after being run during an operating test to reflect changes to aid in future scenario preparation.[567] No evidence was provided to indicate this had been done, even though, according to the Exam Team, "[t]he exam team missed an opportunity during exam development to code this error as a critical task on Form ES-D-2. It was recognized during grading that the error was related to a critical task. . . ."[568] The "Clean copies of the simulator scenarios that were used to examine Ms. Smith"[569] and that were provided to the IRP for their review had no modifications or notations to indicate this event as a critical task.[570]

219. The Board finds that, given some ten separate reviews of Scenario 7, Event 5; its use in three operating examinations for a total of nine applicants; and an Examiner Standard requirement to appropriately change and finalize scenario content; had Ms. Smith's simulator exam incorrectly omitted a critical task the error would have been identified before the 2012 operating exam was administered, and certainly before the IRP began its review. The Board concludes that the only plausible explanation for the Exam Team's belated identification of its alleged mis-grading is that doing so was necessary in order to assure that the failure of Ms. Smith would be sustained.

220. The Staff argues that it did no more than take the event description in the Form ES-D-2 for Scenario 7, Event 5 and classify it as a critical task because it already contained all the necessary elements to permit such a classification.[571] In fact, the Staff did a good deal more than that. As noted, the Form ES-D-2 states that when the pressurizer pressure channel PI-456 fails high with the PORV 456 opening and Block Valve HB-8000B failing to close in automatic

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[567] NUREG-1021 (Ex. CCS-005A) at 146.
[568] Vogtle Operating Exam Appeal (Ex. CCS-101) at 12.
[569] Jackson's Prefiled Testimony (Ex. NRC-004) at 5.
[570] Form ES-D-1, App. D – Scenario Outline (Ex. NRC-051) (Undated).
[571] See Staff's Statement of Position (Ex. NRC-001) at 114–17; Prefiled Testimony of Bates, Capehart & Meeks (Ex. NRC-002) at 40.

on low RCS pressure of 2185 psig, "the Operator at the Control[s] (OATC) will be required to manually close PORV 456 or HV-8000B to prevent a Reactor trip."[572] But the Staff redefined the event to require closing the PORV or Block Valve to prevent a small break loss of coolant accident (LOCA) from continuing.[573] Neither the Form ES-D-1 nor the Form ES-D-2 refers to a small break LOCA or the continuation of such an accident.[574] Thus, during the administrative review, the Staff actually rewrote the event description and then designated the rewritten event as a critical task.

221. The change in the event description, as much as the creation of a new critical task, was crucial to the result in this case. Under the description in the Form ES-D-2, even had taking the PORV or Block Valve hand control switch to the closed position been properly designated a critical task, there could be no failure unless the OATC failed to close the PORV or Block Valve in time to prevent a reactor trip. As we have explained, Ms. Smith, acting without specific direction from the SS, closed the PORV in time to prevent a reactor trip. And, had the SS not intervened, her actions demonstrate that she likely would have closed the Block Valve in time to prevent a reactor trip. But, by rewriting the event description to require closing the PORV or Block Valve to prevent a small break LOCA, the Staff made it much easier to find a failure because the small break LOCA began when the PORV opened on the pressurizer instrument failure and continued as long as the PORV remained open.[575] Thus, under the new description, anything other than immediately closing the PORV or Block Valve could be deemed the failure of a critical task.

222. This leads to another reason why critical tasks should not be declared for the first time during an administrative appeal. By then, the applicant's performance has already

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[572] See Scenario 7 Outline (Ex. CCS-046) at 27–32.
[573] See NRC Panel Review Results (Ex. CCS-037) at 38.
[574] See Scenario 7 Outline (Ex. CCS-046) at 1–2, 4, 27–32.
[575] See Staff's Statement of Position (Ex. NRC-001) at 114 ("[A] failed open pressurizer PORV is essentially a small loss of coolant accident (LOCA).").

occurred. An administrative review panel could therefore tailor the critical task to the performance of that applicant. This would open the door to abuse that would be incompatible with the goal of equitable and consistent administration of examinations for all applicants.

223. The Staff argues that "OLMC-500 explicitly recognizes that an informal review can analyze after-the-fact whether an action is critical."[576] In fact, OLMC-500 states that "the reviewer(s) shall examine the validity of the contested operating test items, including whether critical steps were in fact critical, and whether the associated JPM guides/scenario guides were technically and psychometrically correct."[577] Thus, a review panel may review a critical step, if contested by the applicant, to determine whether it was correctly designated critical. There is no corresponding provision authorizing the panel to review non-critical tasks at the behest of the exam team or on its own initiative to determine whether they should be declared critical during the administrative appeal.

224. Finally, we are not persuaded by the Staff's argument from precedent. The Staff has not identified any instance in which a task was defined as non-critical during a simulator examination and through the grading process but then designated a critical task during an administrative appeal.[578]

225. The Board therefore concludes that the IRP arbitrarily imposed on Ms. Smith a new critical task that had not been approved as such under the NUREG's quality assurance and validation process. Designation of a new critical task during the administrative appeal was inconsistent with the precepts of NUREG-1021 and was unjustified, arbitrary, and an abuse of discretion.

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[576] Staff's Statement of Position (Ex. NRC-001) at 117 (citing OLMC-500 (Exhibit CCS-030) at 9).
[577] OLMC-500 (Exhibit CCS-030) at 9.
[578] Staff's Statement of Position (Ex. NRC-001) at 115.

(v) The IRP failed to provide a measurable performance indicator consistent with NUREG-1021

226. We next consider Ms. Smith's argument that the IRP failed to provide a measurable performance indicator to determine whether its newly declared critical task was performed correctly.[579] The Staff argues that the IRP's measurable performance indicator, which Mr. Jackson defined as "taking the PORV hand switch or the PORV block valve hand switch to 'closed,'"[580] was consistent with NUREG-1021.[581]

227. A measurable performance indicator consists of positive actions that an observer can objectively identify taken by at least one member of the crew.[582] Taking a PORV control switch to the closed position can be observed by an examiner. But the requirement of objective verifiability also requires a clear and objective identification of the specific standard of performance that must be met.

> The NRC and facility licensee should review each critical task to ensure that it is objective. For example, "If pressure falls below 1400 psi, start pump xyz," is a performance measure that is not objective. The operator performing this task could conceivably start the pump when pressure reaches zero psi and still not violate the performance measure stated in the procedure, even though the facility licensee expects the operator to start the pump sooner. The NRC and facility licensee should agree in writing that the limits for each CT are acceptable before the requalification examination begins. For the example given above, adding an acceptable pressure tolerance (e.g., within 200 psi) would clarify the standard of performance that is expected.[583]

228. Thus, a general performance measure such as starting a pump that is not linked to any objective standard of performance fails the test of objectivity and is not an acceptable measurable performance indicator, even though it can be observed. Without an objective standard of performance, such as a specific pressure tolerance that is not to be exceeded, the examiner lacks an objective basis on which to determine whether the applicant's performance is

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[579] Smith's Statement of Position (Ex. CCS-075) at 9–10.
[580] Jackson's Prefiled Testimony (Ex. NRC-004) at 33.
[581] Staff's Statement of Position (Ex. NRC-001) at 114–15.
[582] NUREG-1021 (Ex. CCS-005B) at 425.
[583] Id.

acceptable. Similarly, when the IRP defined the measurable performance indicator as taking the PORV hand switch or the PORV block valve hand switch to closed but failed to provide a performance measure to identify the point at which such action must occur, it failed to provide an objective standard of performance. Because of its omission of an objective performance measure, the IRP could define any error in failing to close the PORV or Block Valve as a failure, even if the error was corrected within a period that would have been acceptable to the facility licensee. To be consistent with NUREG-1021, the measurable performance indicator should have been based on an objective performance measure that would have provided specific guidance to the examiner concerning not only what must occur (closing the PORV or Block Valve) but when it must occur.

229. The IRP could not have solved this problem by restating the measurable performance indicator as taking the PORV hand switch or the PORV block valve hand switch to the closed position to prevent a small break LOCA from continuing. As previously stated, the small break LOCA began when the PORV opened on the pressurizer instrument failure and continued as long as the PORV remained open.[584] Thus, adding the reference to preventing a small break LOCA from continuing would not provide an objective measurable performance indicator. There would still be no objective standard of performance defining when the PORV or Block Valve must be closed.

230. The second problem with the IRP's measurable performance indicator is that there is no evidence to show that it was developed in conjunction with the licensee. As the NUREG-1021 text quoted above indicates, the measurable performance indicators are to be developed based on the licensee's expectations for operation of the facility. When a critical task is developed through the NUREG-1021 quality assurance and validation process, the licensee

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[584] See Staff's Statement of Position (Ex. NRC-001) at 116 ("[A] failed open pressurizer PORV is essentially a small loss of coolant accident (LOCA)").

will be involved in preparing the exam and can specify an objective standard of performance for the critical task that is consistent with the facility's requirements. For example, SNC could have specified an acceptable tolerance for pressurizer pressure or an acceptable time period for successfully completing the critical task. But when a critical task is created for the first time during an administrative appeal without the participation of the facility licensee, the measurable performance indicator may well not be consistent with the licensee's requirements.

231. Mr. Jackson stated that closing a pressurizer PORV has been labeled as a critical task for a simulator examination given at the Salem Nuclear Generating Station in 2010.[585] In that event the reactor was already tripped when the malfunction was inserted. The cue was given that pressure was lowering. The RO was required to close the Block Valve upstream of the stuck-open pressurizer PORV prior to actuation of automatic safety injection.[586] Initiation of automatic safety injection provides a measurable performance indicator to objectively determine whether the critical task was performed as required. The IRP failed to provide such an objective performance measure for Ms. Smith's examination.

232. Because the IRP failed to define a measurable performance indicator consistent with NUREG-1021, its conclusion that Ms. Smith failed a critical task was unjustified, arbitrary, and an abuse of discretion.

(vi) Conclusion

233. The Board concludes that the IRP's determination that Ms. Smith made an error associated with a critical task was inconsistent with NUREG-1021, unjustified, arbitrary, and an abuse of discretion. Referring to Table 6, this change in the scoring of Ms. Smith's 2012 Operating Exam results in RF scores for 3.a., 3.b, and 3.c of 2, 2, and 2, respectively, and a grade for Competency 3 of 2.00. Because Ms. Smith scored a 1.60 in Competency 4,

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[585] Jackson's Prefiled Testimony (Ex. NRC-004) at 33 (citing Operator Training Program (Ex. NRC-057) at 256, 263).
[586] Operator Training Program (Ex. NRC-057) at 256, 263.

Communications, she was required to score 2.00 or higher in the other five competencies, which is now indicated. See Table 5. This would be true even if the IRP permissibly applied double-counting of errors solely to Ms. Smith. Given that Ms. Smith meets the scoring requirements of NUREG-1021, ES-303 D.2.b., and since she received Satisfactory scores on all 15 of her JPMs and a passing score on her 2012 Senior Reactor Operator written examination, the Board finds that Ms. Smith should have received a passing grade for the simulator examination.

G. The fairness review

234. In Ms. Smith's June 5, 2012 request for an administrative review, she alleged improper conduct on the part of the NRC Staff examiners in processing her preliminary waiver request and bias on the part of her 2012 examiners based on their knowledge of her 2011 operating test performance.[587] She reiterated these allegations in her December 5, 2012 letter[588] in which she requested a hearing on the results of the administrative review provided to her in the denial letter sent on November 15, 2012.[589] In her Statements of Position, Position 1 concerns handling of the waiver. Position 2 concerns the conflict of interest of the examiners assigned to her 2012 Exam Team.[590] These two positions were addressed in Enclosure 2 of the denial letter.[591]

235. As previously explained, the three-person IRP, which was assigned to review Ms. Smith's grading arguments, consisted of individuals from outside Region II. On the other hand, Mr. Wert, the Deputy Regional Administrator for Region II, selected Frank Ehrhardt, a Branch

[587] Smith's 2012 Review Request Letter (Ex. CCS-034) at 1.
[588] Dec 5, 2012 Request for Hearing at 1–6.
[589] Nov. 15 Denial Letter (Ex. CCS-014).
[590] Smith's Statement of Position (Ex. CCS-075) at 1–2.
[591] Nov. 15 Denial Letter (Ex. CCS-014) at 10.

Chief from Region II, to perform the fairness review.[592] Testimony indicates the IRP never had any contact with Mr. Ehrhardt and their investigations proceeded separately and in parallel.[593]

236. Mr. Ehrhardt's informal review consisted of interviews of Region II examiners and their immediate supervisor, Mr. Widmann.[594] Mr. Ehrhardt also reviewed emails.[595]

237. On September 4, 2012, Mr. Ehrhardt, completed his investigation of Ms. Smith's improper conduct claims. He concluded that Ms. Smith's claims could not be substantiated.[596]

H. Board findings on Ms. Smith's objections to the fairness review

238. Ms. Smith challenges the fairness of the fairness review. She disagrees with the conclusions reached in the fairness review because she contends Mr. Ehrhardt was biased[597] and the review he conducted was superficial.[598] She alleges the review lacked a "questioning attitude" and made no attempts to obtain contradictory information. She also argues that Mr. Ehrhardt's recent working relationships with the examiners he was investigating should preclude him from being an independent or informal reviewer of "fairness."[599]

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[592] Tr. at 589, 612 (Ehrhardt).
[593] Tr. at 547 (Jackson); Tr. at 547 (Ehrhardt).
[594] NRC Staff Testimony of Frank J. Ehrhardt Concerning the Claim by Charlissa C. Smith that the NRC Improperly Denied Her Senior Reactor Operator License Application (Ex. NRC-026) at 2 (May 30, 2013) [hereinafter Ehrhardt's Prefiled Testimony].
[595] Tr. at 591 (Ehrhardt).
[596] Staff PFF at Para. 25.
[597] Smith PFF at Para. 53 ("Frank Ehrhardt's fairness review was biased based on his previous participation on [Exam Teams] with C. Smith's 2011 & 2012 examiners.").
[598] Id. at Para. 52 ("Frank Ehrhardt's fairness review only questioned the individuals from the Exam Team to determine if C. Smith was treated fairly. In addition[,] Mr. Ehrhardt investigation lacked a questioning attitude and made no attempts to obtain information, even if it was contradictory[.]")
[599] See Letter from Robert C. Haag, Chief of Operations Branch, Division of Reactor Safety to Bo Clark, Training Manager, H.B. Robinson Steam Electric Plant, Progress Energy Carolinas, Inc., regarding Operator Licensing Examination Approval (Ex. CCS-117) (Jun. 21, 2007) [hereinafter Haag Letter]; Letter from Malcolm T. Widmann, Chief of Operations Branch, Div. of Reactor Safety to J.R. Morris, Site Vice President, Duke Power Company, LLC, regarding NRC Operator License Examination Report (Ex. CCS-118) (Feb. 5, 2009) [hereinafter Widmann's Catawba Letter]; Memorandum from Malcolm T. Widmann, Chief of Operations Branch, Div. of Reactor Safety to Kathy H. Gibson, Associate Director, Training and Development, Office of Human Resources regarding Re-Certification of Operator Licensing Examiner (Ex. CCS-119)

239. The Staff states 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. 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.[600]

240. Mr. Ehrhardt's prefiled testimony states that he "was assigned by Region II management to independently assess Ms. Smith's contention of bias in regard to administration of the 2012 examination."[601] At hearing he was asked, if he had contact or interaction with Mr. Meeks, Mr. Bates and Mr. Capehart over the last three or four years. He denied any routine contact saying, "there was no routine contact between myself and those three individuals."[602]

241. At hearing Mr. Ehrhardt was asked if he had participated on any examination teams with any of the individuals that he was investigating as part of the fairness review. He testified that he "participated with Mr. Bates in an exam team, and I've participated with Mr. Capehart in an exam team, in approximately, I believe, the 2008 – 2009 timeframe."[603]

242. In reality, Mr. Ehrhardt participated on an exam team with Mr. Bates in 2007 at

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(Feb. 11, 2009) [hereinafter Limited Re-Certification of Hopkins], Letter from Malcolm T. Widmann, Chief of Operations Branch, Div. of Reactor Safety to David A. Heacock, President and Chief Nuclear Officer Virginia Electric and Power Co. regarding NRC operator License Examination (Ex. CCS-120) (Aug. 14, 2009) [hereinafter Widmann's Surry Letter] and Letter from Malcolm T. Widmann, Chief of Operations Branch, Div. of Reactor Safety to T. Preston Gillespie, Jr, Site Vice President, Duke Energy Carolinas, LLC, regarding NRC Examination Report (Ex. CCS-121) (Jun. 14, 2011) [hereinafter Widmann's Oconee Letter] (all of which address certifications where Mr. Ehrhardt was an examiner).

[600] Staff PFF at Para. 226.

[601] Ehrhardt's Prefiled Testimony (Ex. NRC-026) at 1–2.

[602] Tr. at 593 (Ehrhardt).

[603] Tr. at 599 (Ehrhardt).

the Robinson facility[604] and in 2009 and 2011 at the Surry facility.[605]

243. Although Mr. Ehrhardt testified his collaborations took place in the 2008-2009 time frame, he served on the Oconee examination team as recently as May 2011 with Mr. Bates.[606]

244. Mr. Ehrhardt did not acknowledge that he worked with Mr. Bates both in 2007 and 2011.

245. Mr. Ehrhardt did not acknowledge that he ever worked with Mr. Meeks.[607]

246. Mr. Ehrhardt participated on an exam team with Mr. Meeks in 2008 at the Catawba facility.[608]

247. In 2008, Mr. Ehrhardt was instrumental in the recertification of Jay Hopkins (the 2011 examiner of record for Ms. Smith) as an operator licensing examiner.[609] "Mr. Hopkins interacted extensively with Region II Chief Examiner, Mr. Frank Ehrhardt, during the Farley operating examination. Mr. Ehrhardt recommended the re-certification based upon on-the-job observations."[610]

248. Mr. Ehrhardt did not acknowledge that he worked with Mr. Hopkins in 2008.

249. Mr. Widmann was the approving official on at least four operator license examinations in which Mr. Ehrhardt collaborated with Mr. Meeks, Mr. Hopkins, or Mr. Bates.[611]

250. Mr. Ehrhardt's testimony did not fully indicate the scope of his interactions, the number of interactions, or the dates of the interactions he had with individuals he was to investigate for alleged bias.

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[604] See Haag Letter (Ex. CCS-117).
[605] See Widmann's Surry Letter (Ex. CCS-120).
[606] See Widmann's Oconee Letter (Ex. CCS-121).
[607] See Tr. at 592–93 (Ehrhardt).
[608] See Widmann's Catawba Letter (Ex. CCS-118).
[609] See generally Limited Re-Certification of Hopkins (Ex. CCS-119).
[610] Limited Re-Certification of Hopkins (Ex. CCS-119) at 1.
[611] See Widmann's Catawba Letter (Ex. CCS-118); Limited Re-Certification of Hopkins (Ex. CCS-119); Widmann's Surry Letter (Ex. CCS-120); Widmann's Oconee Letter (Ex. CCS-121).

251. Mr. Ehrhardt did not reveal his work responsibilities or his interactions with Mr. Meeks, Mr. Bates, and Mr. Capehart as reflected in Exhibits CCS-117 through CCS-121. Mr. Ehrhardt also did not disclose his prior work responsibilities with Mr. Widmann or Mr. Hopkins.

252. Mr. Ehrhardt's prior working relationships with the Region II examiners in this case undermines the efficacy of the review that he conducted. He was neither independent nor was he impartial. His prior working relationships should have precluded him from the investigation of allegations made against his prior colleagues.

253. Mr. Ehrhardt concluded that Ms. Smith did not receive a waiver for the operating test portion of the Vogtle 2012 initial license examination because SNC did not request a waiver on behalf of the applicant[612] and that Ms. Smith's contention that the examiners discouraged the licensee from requesting a waiver of the operating test portion of the Vogtle 2012 initial license examination was unsubstantiated.[613]

254. It is undisputed that SNC did not submit a final waiver request for Ms. Smith. Unlike Mr. Ehrhardt, however, we found clear evidence that the examiners discouraged SNC from requesting a waiver of the operating test portion of the Vogtle 2012 initial license examination. Section VII(B)(1), supra.

255. We are not persuaded by Mr. Ehrhardt's different conclusion because his fairness review of the waiver issue was substantively flawed and incomplete.

256. Ms. Smith alleged that the 2011 examiners from Region II actively dissuaded the licensee from requesting a waiver for her.[614] The licensee prepared Ms. Smith's preliminary

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[612] Ehrhardt's Independent Review (Ex. NRC-014) at 11.
[613] Id.
[614] Id. at 3.

waiver request. The preliminary waiver request had box 4.f checked and included a justification in Block 17.[615]

257. Region II received the preliminary waiver request from the licensee for Ms. Smith. When Mr. Ehrhardt conducted his fairness review he tried to obtain the licensee's preliminary waiver request for Ms. Smith from the Region II files. He did not have access to and did not see her preliminary Form 398.[616] He was informed that Region II did not retain preliminary waiver requests.[617]

258. Mr. Meeks told Mr. Ehrhardt that the preliminary waiver request for Ms. Smith was the result of a licensee oversight or a typo.[618] Mr. Bates told Mr. Ehrhardt that Mr. Meeks also told him that the licensee said the waiver request for Ms. Smith's was a typo.[619] He took them at their word and made no further inquiry. Mr. Ehrhardt did not request a copy of the preliminary waiver request from the licensee.[620] Mr. Ehrhardt did not request a copy of the preliminary waiver request from Ms. Smith.

259. At the hearing Mr. Ehrhardt acknowledged, "[m]erely checking a box when you don't intend to, to me, could be considered a typo. If you add the comments to it, I would say perhaps didn't intend to submit a waiver, but I'm not sure I would label as merely a typo."[621]

260. The record evidence clearly shows that there was justification included in the preliminary waiver request[622] and that the facility licensee intended to request a waiver for Ms. Smith.[623] Mr. Ehrhardt's independent fairness inquiry did not pursue this issue adequately.

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[615] Tucker's Aff. (Ex. CCS-002) at 14–16.
[616] Tr. at 591, 603 (Ehrhardt).
[617] Tr. at 591, 604 (Ehrhardt).
[618] Feb. 4, 2013 Capehart Email (Ex. CCS-015) at 5; Tr. at 600 (Ehrhardt).
[619] Tr. at 603 (Ehrhardt).
[620] Tr. at 604 (Ehrhardt).
[621] Tr. at 605 (Ehrhardt).
[622] Tucker's Aff. (Ex. CCS-002) at 14–16.
[623] Tr. at 275 (Tucker).

He did not investigate the information provided in the preliminary NRC 398 forms.[624] It was only at the hearing that he reviewed Ms. Smith's preliminary Form 398, stating, "… it's different than what I expected to see until I had seen actually the preliminary 398 yesterday, as I mentioned earlier. Yes, I was not expecting to see anything in that justification block."[625]

261. Mr. Ehrhardt's prefiled testimony states he "spoke directly with P. Capehart, M. Meeks, and M. Bates."[626] At hearing he testified he also spoke with Mr. Widmann.[627] He did not interview Mr. Hopkins, the Examiner of Record for Ms. Smith's 2011 examination. Mr. Ehrhardt was not aware of the licensee's perspective on the waiver request.[628] He did not interview anyone from Vogtle to investigate the emails and numerous phone calls between the 2011 Exam Team and SNC staff concerning a waiver for Ms. Smith.[629] Mr. Ehrhardt also did not interview Ms. Smith.

262. The Board concludes that Mr. Ehrhardt's prior working relationships with all of Ms. Smith's examiners should have disqualified him from conducting the fairness review. The Board also finds his review of the waiver issue inadequate because it did not go beyond questioning fellow examiners in Region II and their supervisor. He did not interview Ms. Smith or anyone from SNC as to Ms. Smith's allegations that the Region II examiners discouraged SNC from submitting a waiver request on her behalf.

263. Mr. Ehrhardt's fairness review concluded that "that the Chief Examiner's assessment of the applicants' performance with respect to suitability for a waiver was consistent with the guidelines contained in NUREG-1021 as well as past practice within Region II.[630]

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[624] Tr. at 604 (Ehrhardt).
[625] Tr. at 607 (Ehrhardt).
[626] Ehrhardt's Prefiled Testimony (Ex. NRC-026) at 2.
[627] Tr. at 593 (Ehrhardt).
[628] Tr. at 606 (Ehrhardt).
[629] Tr. at 592–93 (Ehrhardt).
[630] Ehrhardt's Independent Review (Ex. NRC-014) at 6.

264. There are no guidelines for waivers in NUREG-1021.[631] Denial of a waiver is not consistent with past practice in Region II. Exhibit NRC-008 indicates only one waiver request denial in the past seven years.[632] Mr. Ehrhardt himself looked at three years of Region II data and was unable to find a single instance where an operating test waiver was denied. During that period, 33 operating test waivers were granted.[633]

265. Mr. Ehrhardt's fairness review found that "the simulator test competency scores for those individuals who were granted waivers to those of the applicant and determined that the applicant's simulator test competency scores were, overall, significantly lower than any of the scores for those individuals who were granted waivers."[634] The record evidence, however, shows that an individual with a score only .01 higher than Ms. Smith was granted a waiver by Region II.[635] The record evidence also shows that an individual with a score .01 lower than Ms. Smith was granted a license by Region II.[636]

266. The fairness review acknowledges that "[t]he NRC's examinations are not intended to distinguish among levels of competency or to identify the most qualified individuals, but to make reliable and valid distinctions at the minimum level of competency that the agency has selected in the interests of public protection."[637] Given that Ms. Smith established the minimum level of competency by passing the 2011 operating exam, Mr. Ehrhardt failed to provide a valid reason for singling her out for a likely denial of an operating test waiver in 2012.

267. Mr. Ehrhardt was also assigned by Region II management "to independently assess Ms. Smith's contention of bias in regard to administration of the 2012

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[631] Tr. at 501–03 (Meeks); see also Staff PFF at Para. 81.
[632] Region II Waiver Request Exam Data (Ex. NRC-008). Of the 47 waiver requests over the past seven years in Region II, only one waiver request was denied. See id.
[633] Ehrhardt's Independent Review (Ex. NRC-014) at 6.
[634] Id.
[635] Region II Waiver Request Exam Data (Ex. NRC-008) at 8.
[636] "V" Individual Examination Report (Ex. CCS-057) at 3.
[637] Ehrhardt's Independent Review (Ex. NRC-014) at 7.

examination."[638] Mr. Ehrhardt determined that Ms. Smith was examined fairly, in a normal fashion, and in accordance with the guidelines contained in NUREG-1021[639] and concluded that Ms. Smith's allegation of bias by examiners in administering or evaluating her operating test was unsubstantiated.[640]

268. The fairness review states that initial examinations are highly pre-scripted, with critical tasks, steps, and key performance elements explicitly determined and documented in advance in consultation with facility training representatives. We agree in general with that statement. Mr. Ehrhardt goes on to conclude, however, that "there is little, if any, opportunity to hold any applicant to a higher standard of performance than another."[641] The record in this case shows that there are indeed such opportunities. The record evidence shows that the Exam Team encouraged the IRP to hold Ms. Smith to a higher standard by deviating from the pre-scripted administration and elevating a task (PORV) to a critical task after the examination.[642] The record evidence also shows that the Exam Team encouraged the IRP to grade Ms. Smith more severely than other candidates by double counting her errors.[643]

269. Mr. Ehrhardt's fairness review "determined that M. Meeks did not review the applicant's 2011 Individual Examination Report before administering the 2012 examination in order to ensure he remained unbiased."[644] At hearing, however, Mr. Meeks testified that both he and Mr. Capehart had reviewed the six retake applicants [including Ms. Smith's] 2011 Form 303s and "talked in detail" with Mr. Widmann about whether to grant waivers. Mr. Meeks

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[638] Ehrhardt's Prefiled Testimony (Ex. NRC-026) at 1–2.
[639] Ehrhardt's Independent Review (Ex. NRC-014) at 11.
[640] Id.
[641] Ehrhardt's Independent Review (Ex. NRC-014) at 8.
[642] See supra Para. 173–83.
[643] See supra Para. 73, 156, 174–82.
[644] Ehrhardt's Independent Review (Ex. NRC-014) at 9.

further testified that "when we reviewed Ms. Smith's 303 forms was that her performance on that test was, from our viewpoint, much worse than the other five."[645]

270. At hearing Mr. Meeks further testified, "I had read the 303s both in May for the retake, before I had left the Region to go to my training class, and then, I reread them in August because the passage of time had taken place. So, yes, sir, I had reread all six applicants' 303s."[646]

271. The statement in the fairness report that Mr. Meeks did not review Ms. Smith's Individual Examination Report and that not reviewing the report ensured he remained unbiased is clearly erroneous. Moreover, the fairness review fails to mention that Mr. Meeks, in response to questions propounded by Mr. Ehrhardt, stated based on his knowledge of Ms. Smith's performance during the 2011 simulator exam that she "was unsafe" and that he would not want his family to live near a plant where she was the SRO on duty.[647] Ignoring this information, the fairness report relied on the fact that the Examiner of Record, Mr. Bates, did not participate in Ms. Smith's 2011 examination.[648] But, as we have previously explained, Ms. Smith was entitled to an exam team free of bias against her, not just an Examiner of Record who had not participated in the 2011 exam.[649]

272. Accordingly, we find that the fairness report's review of the bias issue is seriously flawed and its conclusion is unjustified and arbitrary.

I. NRC Staff compliance with 10 C.F.R. § 2.1203

273. On December 12, 2012 Mr. Edwin Lea, a Region II examiner sent an email entitled "Failure of SRO Applicant in RII" to Michael Johnson, Director of the Office of Nuclear

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[645] Tr. at 387 (Meeks).
[646] Tr. at 473 (Meeks).
[647] Exam Waiver Question Correspondence (Ex. CCS-001) at 4.
[648] Ehrhardt's Independent Review (Ex. NRC-014) at 8.
[649] See supra Para. 59–73.

Reactor Regulation (NRR), with copies to Ho Nieh[650] and John McHale.[651] The email states that, "I believe that RII person[nel] involved in the denial of the license went to extreme measures to make sure that the young lady [Ms. Smith] would not receive a license based on failing the operations portion of the examination."[652] The email continues, "[I]f you look at the paper trail/conversations associated with the failure of the applicant, you will find that after individuals in Headquarters were ready to suggest issuing a license to the applicant, the individuals from RII involved in failing the applicant went back and came up with additional comments to support a failure. Many of the actions taken by RII show how determined [they/we] were to make sure that the Region's proposed denial was upheld."[653]

274. Ms. Smith complains of the NRC Staff's failure to timely disclose the email.[654] Although this is not one of Ms. Smith's Statements of Position, we will examine the issue because of the importance of compliance with disclosure requirements in licensing board proceedings.

275. The Commission's regulations at 10 C.F.R. § 2.1203 and the Board's March 20, 2013 order required initial disclosure of all relevant documents in this case by March 21, 2013.[655]

276. The NRC Region II staff turned Mr. Lea's email over "to OGC when they turned over their initial possible hearing file disclosures."[656]

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[650] Director, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation.
[651] Chief, Operator Licensing and Training Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation.
[652] Email from Edwin Lea to Michael Johnson (Ex. NRC-021) (Dec. 12, 2012 7:57 AM) [hereinafter Dec. 12 Lea Email].
[653] Id.
[654] See Smith PFF at Para. 83–84.
[655] Licensing Board Order Memorializing March 18, 2013 Teleconference and Establishing Procedures (Mar. 20, 2013) [hereinafter Board's March 20, 2013 Order].
[656] Tr. at 698 (Cylkowski).

277. The NRC Staff's March 21, 2013 initial disclosure did not include Mr. Lea's December 12, 2012 email to Michael Johnson, Director of NRR, with copies to Ho Nieh and John McHale.

278. The NRC Staff informed the Board that "its March 21, 2013 submissions include all documents required to be disclosed at this time."[657]

279. The NRC Staff (OGC) did not disclose Mr. Lea's December 12, 2012 email until May 29, 2013.[658]

280. At hearing, the NRC Staff counsel stated that it [the NRC Staff] believed the email "was not relevant to the admitted contention".[659]

281. Mr. Lea's December 12, 2012 email is clearly relevant to the issues in this case. Although it does not mention Ms. Smith by name, it refers to the allegations raised by Ms. Smith arising from her efforts to obtain a SRO License from Region II.[660] It also addresses the "extreme measures" to which, in Mr. Lea's opinion, Region II personnel went to sustain the denial of Ms. Smith's license application.[661]

282. The NRC Staff has an obligation to lay all relevant materials before the Board to enable it to adequately dispose of the issues before it.[662] All parties, including the Staff, are

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[657] See Letter from David Cylkowski, Counsel for NRC Staff, to Charlissa C. Smith Licensing Board (March 22, 2013).
[658] Letter from Lloyd Subin, Counsel for NRC Staff, to Charlissa C. Smith Licensing Board (May 30, 2013) at 1 ("[T]he Staff also submits the May 29, 2013 testimony of Edwin Lea concerning the claim by Charlissa C. Smith that the NRC improperly denied her senior reactor operator application license (Attachment 2) also intended to be filed, with the May 29th filing.")
[659] Tr. at 698 (Cylkowski).
[660] Dec. 12 Lea Email (Ex. NRC-021).
[661] Id.
[662] Consol. Edison Co. (Indian Point Nuclear Generating Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977); La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 n.18 (1983), citing Indian Point, CLI-77-2, 5 NRC at 15. See generally Tenn. Valley Auth. (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC 1387 (1982); Allied-Gen. Nuclear Srvs, et al. (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 680 (1975).

obligated to bring any significant new information to the Board's attention.[663]

283. The NRC Staff violated the requirements of 10 C.F.R. § 2.1203 and the Board's March 20, 2013 order in this case that required initial disclosure of all relevant documents by March 21, 2013.[664]

284. An agency of the government must scrupulously observe the rules, regulations or procedures which it has established.[665]

285. Mr. Lea's December 12, 2012 email and his testimony at the hearing shed light on a number of the controversies in this case. It is troubling that the NRC Staff did not disclose Mr. Lea's December 12, 2012 email until May 29, 2013, more than two months after initial disclosures were due and only two days before Ms. Smith's direct testimony was due to be filed. The Staff's claim that the email is not relevant is clearly erroneous. We know of no legitimate reason for the Staff to withhold this document. The fact that Mr. Lea's allegations are detrimental to the Staff position that Ms. Smith was treated fairly is not a basis to withhold relevant documents. Ms. Smith alleges she was treated differently from other SRO candidates, that she was graded more harshly than her peers, and that the informal/independent review was flawed. The NRC Staff, on the other hand, urges us to find that Ms. Smith was treated fairly by Region II in the grading of her examination, that the IRP performed its functions objectively and that the investigation of her bias claims was objectively reviewed. Staff witness Lea asserts,

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[663] Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 197 n.39 (1983), rev'd in part on other grounds,CLI-85-2, 21 NRC 282 (1985), citing Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 & 3), ALAB-677, 15 NRC at 1394 (1982); Union Elec. Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1210 n.11 (1983); Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152–53 n.46 (1993).

[664] See 10 C.F.R. § 2.1203 ("(b) The hearing file consists of . . . any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action. . . . (c) The NRC staff has a continuing duty to keep the hearing file up to date. . . ."); Board's March 20, 2013 Order at 1–2.

[665] See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1970).

however, "that R[egion] II person[nel] involved in the denial of the license went to extreme measures to make sure that the young lady [Ms. Smith] would not receive a license. . . ."[666] We find Mr. Lea's testimony compelling because of his years of experience in Region II and his impartiality. Mr. Lea's observations corroborate many of the findings the Board has made after review of the evidence and testimony in this proceeding.[667]

286. Staff witness Lea has been administering examinations for the NRC for over 23 years.[668] He testified he has never met Ms. Smith, and reached his conclusions regarding her unfair treatment by the agency solely by reviewing the documentation of her performance on the operating test.[669] Mr. Lea took the dramatic step of alerting Mr. Michael Johnson, the Director of NRR of his concerns with the treatment Ms. Smith received. He testified to conversations among examiners in Region II, whereby the examiners spoke of their efforts "to make sure that, once the failure was presented to Headquarters, that it would not be overturned."[670] This statement, although not determinative, is relevant to Ms. Smith's allegations that the Exam Team had excessive influence on the outcome of her administrative appeal.

VI. CONCLUSIONS OF LAW AND REMEDY

A. Board conclusions on Ms. Smith's objections to the grading of her 2012 simulator exam

The Board concludes that the Staff violated NUREG-1021 and its goals of equitable and consistent examination administration when it changed the scoring procedure so as to apply more stringent criteria to Ms. Smith than were applied to other applicants in her examination class. Such actions were also inappropriate, unjustified, arbitrary, and an abuse of discretion.

As to the double counting of errors issue, both the Exam Team's approach and that

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[666] Dec. 12 Lea Email (Ex. NRC-021).
[667] See supra Para. 46, 48, 137–40.
[668] Tr. at 664 (Lea).
[669] Tr. at 667 (Lea).
[670] Tr. at 669 (Lea).

applied by the IRP, when considered in isolation, are permissible applications of NUREG-1021, ES-303 D.1.d. An error may permissibly be assigned to only one rating factor, as the Exam Team did, but it is also permissible to assign one error to two or more rating factors. But the Staff may not change the scoring procedure so as to apply a different and more stringent scoring procedure to one applicant unless it applies to the rest of the class. Thus, because the Exam Team followed the Region II policy of assigning one error to only one RF, that policy could not be changed for Ms. Smith unless it was changed for the entire class. The IRP failed to follow this rule. When the IRP deviated from the Exam Team's scoring procedure by assigning errors to two rating factors rather than only one RF, it changed the scoring procedure solely for Ms. Smith. This change meant that the IRP graded her under a different and more stringent scoring procedure than that applied to other members of her class. This violated the requirement of consistency, under which all members of the same class should be evaluated under the same scoring procedure.

The IRP violated the same requirement of consistency when it made closing the PORV a critical task solely for Ms. Smith. That action was also inappropriate and unjustified, arbitrary, and an abuse of discretion under NUREG-1021.

Had the administrative review graded Ms. Smith's operating exam consistently with the standards applied to other applicants and as required by NUREG-1021, she would have passed the 2012 operating exam. She passed the 2012 written exam. She therefore satisfied the operating and written examination requirement for a SRO license.

The Board further concludes that the IRP's determination that Ms. Smith made an error associated with a critical task was inconsistent with NUREG-1021, unjustified, arbitrary, and an abuse of discretion. Absent that IRP error, Ms. Smith would have passed the 2012 operating exam. She therefore satisfied the operating and written examination requirement for a SRO license on that basis as well.

B. Board conclusions on Ms. Smith's claims of mishandling of the waiver request, conflict of interest, and biased administrative review

The Board has found that the Staff, without justification, discouraged SNC from submitting a request for a routinely issued waiver of the 2012 operating exam for Ms. Smith, denied her an impartial examination team, and failed to provide an impartial administrative review. The Staff argues that even if we find for Ms. Smith on those issues, we may not grant her a license on the basis of any of those claims because they are not causally related to the license denial. The Staff acknowledges, however, that

> [T]his Board has the discretion to order remedies other than the remedy requested by Ms. Smith in response to the findings made during this proceeding. For instance, if the Board found that the alleged bias of the examiners made it so that Ms. Smith's 2012 simulator test was unfair . . . then the Board could order as a possible remedy that Ms. Smith be provided a re-test of only the simulator test and a waiver of all the other SRO requirements.[671]

Because we have concluded that Ms. Smith is entitled to a SRO license based on her successful challenge to the scoring of her 2012 simulator exam, we need not reach this issue. We note, however, that had Ms. Smith not prevailed on her scoring arguments she would certainly be entitled to a remedy on her unfair conduct arguments.

CONCLUSION

The Staff is directed to issue a SRO license to Ms. Smith, subject to the satisfaction of any other licensing requirements not considered in this proceeding, such as health, that the Staff must also assess before issuing a license pursuant to 10 C.F.R. § 55.33. The license shall be effective as of the date it is issued and shall be subject to the usual terms and conditions.[672]

In accordance with 10 C.F.R. § 2.1210, this partial initial decision will constitute a final decision of the Commission forty (40) days after its issuance unless: (1) a party files a petition for Commission review within twenty five (25) days after service of this initial decision; or (2) the

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[671] Staff's Statement of Position (Ex. NRC-001) at 11 n.39.
[672] See generally Morabito, LBP-88-16, 27 NRC 583.

Commission directs otherwise. Within twenty five (25) days after service of a petition for Commission review, parties to the proceeding may file an answer supporting or opposing Commission review. A party who seeks judicial review of this decision must first seek Commission review, unless otherwise authorized by law.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

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ADMINISTRATIVE JUDGE

/RA/

William J. Froehlich
ADMINISTRATIVE JUDGE

/RA/

Brian K. Hajek
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 18, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CHARLISSA C. SMITH	)	Docket No. 55-23694-SP
	)	
(Reactor Operator License for Vogtle	)	
Electric Generating Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Atomic Safety and Licensing Board's INITIAL DECISION** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland,
this 18th day of March, 2014