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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'89 OCT 25 P1:54

ATOMIC SAFETY AND LICENSING APPEAL PANEL

FRONT OF DEPT. CASE  
DOCKETING & SERVICE  
BRANCH

Christine N. Kohl, Chairman

October 25, 1989  
(ALAB-923)

SERVED OCT 25 1989

|                             |   |                     |
|-----------------------------|---|---------------------|
| In the Matter of            | ) |                     |
|                             | ) |                     |
| MAURICE P. ACOSTA, JR.      | ) | Docket No. 55-08347 |
|                             | ) |                     |
| Operator License No. 6010-2 | ) |                     |
| (EA 88-164)                 | ) |                     |

MEMORANDUM

On September 28, 1989, the Licensing Board issued its initial decision in this proceeding involving the NRC staff's suspension of and refusal to renew the reactor operator's license held by Maurice P. Acosta, Jr., an employee of Southern California Edison Company (SCE) who was authorized to operate the controls of the reactors at the San Onofre Nuclear Generating Station (SONGS), Units 2 and 3. See LBP-89-26, 30 NRC \_\_\_\_\_. The basis for the staff's order was that Mr. Acosta's documented history of using illegal drugs "suggests a pattern of behavior and lack of sound judgment that may be inimical to the public health and safety." 53 Fed. Reg. 24,383, 24,384 (1988). Consequently, the staff stated that it

does not have the necessary reasonable assurance that [Mr. Acosta] will carry out his duties in the future with sufficient alertness and ability to safely operate SONGS and observe all applicable

D502

requirements including obligations imposed by SCE's policies and procedures, as well as the NRC's requirements.

Ibid. After a formal hearing, the Licensing Board upheld the staff's action.

No one has appealed the Licensing Board's decision.<sup>1</sup> In the absence of an appeal, it has long been our customary practice in cases involving the licensing of nuclear facilities to review on our own "any final disposition . . . that either was or had to be founded upon substantive determinations of significant safety or environmental issues." Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-571, 10 NRC 687, 692 (1979) (emphasis in original). Economic issues, intervention requests, and procedural matters, however, ordinarily are excluded from such sua sponte review. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 908 (1982), review declined, CLI-83-2, 17 NRC 69 (1983). The instant case, in which the Licensing Board sustains a staff decision to suspend and not to renew a reactor operator's license, falls more properly into the latter category of

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<sup>1</sup> Under the Commission's Rules of Practice, any notice of appeal from LBP-89-26 should have been filed (i.e., mailed) no later than October 17, 1989. See 10 C.F.R. §§ 2.762(a), 2.710.

cases.<sup>2</sup> That is, where an operator's license has effectively been terminated, the issues generally involve that individual operator's rights alone and are essentially economic and procedural in nature, rather than raising questions that implicate the public health and safety or environment.

Accordingly, an appeal board will not be established to conduct any sua sponte review in this case or others where a licensing board decision upholds the staff's suspension, revocation, failure to renew, or other termination of a reactor operator's license under 10 C.F.R. Part 55. Where a licensing board decision reinstates or grants an individual operator's license and there are no appeals from such decision, however, an appeal board will be designated to conduct sua sponte review of any significant public health and safety or environmental issues.<sup>3</sup> See generally Long

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<sup>2</sup> Midland itself did not readily fit into either the "review" or "no review" category. Nonetheless, an appeal board conducted sua sponte review because the case raised serious questions about the integrity of the NRC's hearing process. 16 NRC at 908.

<sup>3</sup> Two relatively recent cases involved decisions by a single administrative judge (rather than a licensing board) that granted reactor operators' licenses. See David W. Held (Senior Reactor Operator License for Beaver Valley Power Station, Unit 1), LBP-88-22, 28 NRC 176 (1988); Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-10, 27 NRC 417, as modified, LBP-88-16, 27 NRC 583, vacated as moot, CLI-88-4, 26 NRC 5 (Footnote Continued)

Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 250 (1989) (the purpose of sua sponte review is "protection of the public interest in general (as opposed to a particular litigant's interest) by providing another independent level of review of significant health, safety, and environmental issues on which a substantial evidentiary record already exists").

Under 10 C.F.R. § 2.760(a), the Licensing Board's decision in LBP-89-26 will become the Commission's final decision in this matter on October 30, 1989, unless the Commission itself directs otherwise.

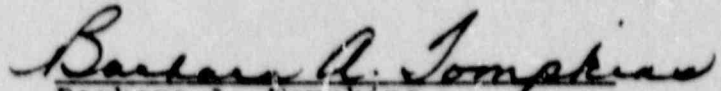
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(Footnote Continued)

(1988), reconsideration denied, CLI-89-16, 30 NRC \_\_\_\_ (August 16, 1989). No appeal board was established to conduct sua sponte review in those cases because the Commission initiated them by individual orders as informal proceedings, over which appeal boards had no jurisdiction. This differs from the formal "show cause" adjudication before a three-member licensing board that Mr. Acosta received and in which there is appeal board jurisdiction. See 10 C.F.R. § 2.700 et seq.

The Commission now has pending a proposed rulemaking, that would make all proceedings for the grant, renewal, or licensee-initiated amendment of an operator's license subject to the newly promulgated informal hearing procedures in 10 C.F.R. Part 2, Subpart L, 54 Fed. Reg. 8269 (1989). See 54 Fed. Reg. 17,961 (1989). Appeal boards have jurisdiction in Subpart L proceedings. 10 C.F.R. § 2.1255. Thus, if the proposed rules are enacted, future cases like Held and Morabito would be subject to appeal board review.

FOR THE APPEAL PANEL CHAIRMAN\*

  
Barbara A. Tompkins  
Secretary to the Appeal Panel

\* This memorandum is issued pursuant to the Appeal Panel Chairman's authority in 10 C.F.R. § 2.787(a), (b)(2).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

MAURICE P. ACOSTA, JR.

(Operator License No. 6010-2  
EA 88-164)

Docket No.(s) 55-08347

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing AB MEMORANDUM (ALAB-923) 10/25 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this  
25 day of October 1989

*Patty Anderson*  
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Office of the Secretary of the Commission