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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 050-333-OM
	)	ASLBP No. 91-645-02-OM
NEW YORK POWER AUTHORITY	)	Facility Operating
	)	License No. DPR-59
(James A. FitzPatrick	)	E.A. 91-053
Nuclear Power Plant)	)	

In the Matter of	)	Docket No. 055-8615-SC
	)	ASLBP No. 91-646-02-SC
DAVID M. MANNING	)	Senior Reactor Operator
	)	License No. SOP-10561-1
Senior Reactor Operator	)	E.A. 91-054

NRC STAFF'S RESPONSES TO ANSWERS FILED IN RESPONSE TO ORDER  
MODIFYING LICENSE AND ORDER SUSPENDING LICENSE AND ORDER  
TO SHOW CAUSE WHY LICENSE SHOULD NOT BE REVOKED

I. INTRODUCTION

On May 2, 1991, the NRC Staff (Staff) issued an Order Modifying License (Effective Immediately) (NYPA Order) with respect to the James A. FitzPatrick Nuclear Power Plant (FitzPatrick). 56 Fed. Reg. 22022 (May 13, 1991). On May 31, 1991, Licensee, New York Power Authority (NYPA) filed its answer to that order<sup>1</sup>. Also on May 2, 1991, the Staff issued an Order Suspending License (Effective Immediately) and an Order to Show Cause Why License Should Not Be Revoked with respect to

<sup>1</sup> Answer of the New York Power Authority to Order Modifying License.

David M. Manning, Senior Reactor Operator (Manning Order). 56 Fed. Reg. 22020 (May 13, 1991). On June 6, 1991, Mr. Manning, through his counsel, filed an answer to the Manning Order<sup>2</sup>. In their answers, both NYPA and Mr. Manning requested hearings. On June 18, 1991, an Atomic Safety and Licensing Board was established to preside over both proceedings. In its Order of July 2, 1991, the Licensing Board directed the Staff to file responses to NYPA's and Mr. Manning's answers. Memorandum and Order (Directing Responses to Answers). In its Order, the Licensing Board noted that these two proceedings are related. *Id.* The Staff is, therefore, filing its response to NYPA's and Mr. Manning's answers in the form of one response.

## II. STAFF'S RESPONSE TO NYPA'S ANSWER TO ORDER MODIFYING LICENSE

### A. Background

On May 2, 1991, the Staff issued the NYPA Order. The Order Modifying License modified NYPA's facility license No. DPR-59 to prohibit Mr. David M. Manning, a licensed Senior Reactor Operator, from involvement in activities conducted pursuant to the facility license issued under 10 C.F.R. Part 50 without first receiving the approval of the Regional Administrator for Region I. This action was based on Mr. Manning's attempt to avoid detection of his drug use and to violate NYPA's fitness for duty program. The details of the actions on Mr. Manning's part, which precipitated the issuance of this order, are set forth in the NYPA Order. Due to Mr. Manning's actions, the Staff had significant concerns regarding Mr. Manning's integrity and trustworthiness.

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<sup>2</sup> Answer and Request for Hearing of David M. Manning (June 2, 1991).

Accordingly, the Staff modified NYPA's facility license pursuant to Sections 103, 161b, 161c, 161i, 161o, 182 and 186 of the Atomic Energy Act and the Commission's regulations in 10 C.F.R. § 2.204 and 10 C.F.R. Part 50.

On May 31, 1991, NYPA filed its answer to the Order Modifying License. In its answer, NYPA claimed that, pursuant to 10 C.F.R. Part 26, NYPA is the appropriate entity to decide whether reinstatement of an employee is appropriate after the employee has been suspended and referred to the Employee Assistance Program (EAP) as a result of testing positive for drug use. NYPA also claimed, apart from Part 26, that it had the authority to determine the ability of its employees to perform their duties. NYPA further argued that Mr. Manning's untrustworthiness is directly related to his substance abuse, and that he has been rehabilitated. NYPA argued that the Order Modifying License will undermine the effectiveness of the EAP by eroding employee confidence in that program. NYPA concluded by requesting reconsideration of or a hearing on the Order Modifying License. NYPA also requested that its answer be withheld from the public disclosure pursuant to 10 C.F.R. § 2.790. The Staff is currently reviewing NYPA's request.

B. Staff's Response to NYPA's Answer

The Staff has carefully reviewed NYPA's response and has consulted with a medical expert in the field of drug rehabilitation. The Staff asserts that, despite NYPA's management responsibilities regarding its employees, the Staff has the authority under Section 161 of the Atomic Energy Act to modify NYPA's license.<sup>3</sup> NYPA further argued

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<sup>3</sup> Section 161 of the Atomic Energy Act of 1954, as amended, provides, in pertinent parts:

In the performance of its functions the Commission is authorized to-

(continued...)

that Part 26 gives it the authority to make decisions on the issue of whether reinstatement is appropriate after suspension and referral to the EAP. NYPA Answer at 6-9. However, as NYPA itself noted, the Order was not issued pursuant to Part 26, but rather on the ground that the Staff had serious concerns regarding Mr. Manning's trustworthiness. Order at 22021. Thus, where such concerns exist, it is within the Staff's authority to issue orders to alleviate those concerns. Section 161i, Atomic Energy Act.

The Staff agrees, based on expert medical opinion, with NYPA's assertion that Mr. Manning's attempts to conceal his drug abuse may be a symptom of his drug addiction. However, the Staff, based on consultations with its medical consultant, does not agree with NYPA's conclusion that Mr. Manning has been rehabilitated or that the symptoms associated with his drug use have been completely eradicated. A medical consultant to the Staff has advised the Staff that rehabilitation requires long-term abstinence accompanied by counselling and participation in support groups, among other measures. Although Mr. Manning's efforts to date appear to be successful, they are in the short-term, and the Staff cannot conclude that he has been rehabilitated. However,

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<sup>3</sup>(...continued)

b. establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property . . .

i. prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life and property . . .

the Staff is prepared to allow Mr. Manning perform Part 50 activities, subject to conditions that provide reasonable assurance of detection of a return by him to systematic use of illegal drugs. Therefore, the Staff will modify the NYPA Order to allow Mr. Manning to return to Part 50 activities upon specific conditions. The modified NYPA Order will provide, in substantial part that:<sup>4</sup>

1. For the next three years from the date of the Order, NYPA shall conduct drug tests of Mr. Manning and observe the collection of urine specimens provided by Mr. Manning in accordance with Section 2.4(f) of Appendix A, 10 C.F.R. Part 26 and its established procedures.<sup>5</sup> The period between each drug test shall not exceed a 90-day period with the 90-day period to begin the day after a test has been conducted.
2. For the next three years from the date of the Order, NYPA shall conduct observed drug tests of Mr. Manning on the first day back from any unexcused or unanticipated absence of more than two calendar days.

III. ORDER SUSPENDING LICENSE (EFFECTIVE IMMEDIATELY) AND  
ORDER TO SHOW CAUSE WHY LICENSE SHOULD NOT BE REVOKED

A. Background

On May 2, 1991, the Staff also issued the Manning Order. The Staff concluded, based on Mr. Manning's conduct, detailed in that Order, that it lacked the requisite reasonable assurance that Mr. Manning would comply with the Commission's regulations and would carry out his duties in a trustworthy manner. Also, pursuant to Section 186

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<sup>4</sup> A copy of the Staff's Modified Order will be served on the Licensing Board and parties upon its issuance by the Staff.

<sup>5</sup> The observed collection of urine specimens in accordance with § 2.4(f) of Appendix A, 10 C.F.R. Part 26 and NYPA's established procedures will hereinafter be referred to as observed drug tests.

of the Atomic Energy Act and 10 C.F.R. § 55.61(b) of the Commission's regulations, the Staff determined that, if at the time Mr. Manning's license was issued, the Staff had known of Mr. Manning's inability or unwillingness to refrain from substance abuse and if the Staff had known of Mr. Manning's willingness to attempt to circumvent compliance with the Commission's regulations, Mr. Manning's license would not have been issued. Order at 22021.

Mr. Manning answered the Order Suspending License and Order to Show Cause Why License Should Not Be Revoked on June 6, 1991. In his answer, Mr. Manning admitted the factual allegations of Sections I, II, III and V of the Order, but denied any inference that he was untrustworthy. Manning Answer at 3. Mr. Manning argued that his performance of his duties has been beyond reproach, that he has been rehabilitated, and that his attempt to defeat the drug testing program was a symptom of his former drug abuse. Manning Answer at 5-13. Mr. Manning further argued that the Staff lacked a rational basis for the issuance of its Order. Manning Answer at 14-16. Mr. Manning requested a hearing regarding the suspension and proposed revocation of his license. Mr. Manning also requested that his answer be withheld from public disclosure pursuant to 10 C.F.R. § 2.790. The Staff is currently reviewing his request.

B. Staff's Response to Mr. Manning's Answer

The Staff has carefully reviewed Mr. Manning's response. The Staff believes that it did have a rational basis for the issuance of the Manning Order based on the results of its investigation. Based on expert medical advice, the Staff agrees that Mr. Manning's attempt to conceal his drug addiction may have been a symptom of his drug use. However, the Staff does not agree with Mr. Manning's conclusion that he has been



rehabilitated. Based on advice from the Staff's medical consultant, the Staff believes that Mr. Manning's efforts to date, however successful, represent only detoxification and short-term abstinence. Rehabilitation requires long-term abstinence accompanied by counselling and participation in support groups, among other measures. Accordingly, the Staff is not prepared to conclude that Mr. Manning has been rehabilitated and meets the medical requirements of 10 C.F.R. § 55.33(a)(1). Thus, the Staff is not prepared to lift the suspension of his Senior Reactor Operator license. The Staff has determined, however, that Mr. Manning's license should not be revoked at this time. The Staff will modify its original order to allow Mr. Manning the opportunity to return to activities authorized by his license after a minimum period of three years of accelerated drug testing and counselling. The modified order will provide, in substantial part, that:<sup>6</sup>

1. The license shall remain suspended for a minimum of three years from the date of the Order. Mr. Manning may apply to have his license reinstated or renewed upon a showing that he has complied with the remaining provisions of the Order and by submitting a "Certification of Medical Examination by Facility Licensee," on NRC Form 396.
2. Mr. Manning shall participate in a drug testing program conducted by the Facility Licensee or a third party mutually acceptable to Mr. Manning and the Staff, that includes:
  - a. Random observed drug tests at least once every seven days for the first year after the date of the Order;

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<sup>6</sup> A copy of the Modified Order will be served on the Licensing Board and parties upon its issuance by the Staff.

- b. Random observed drug tests at least once every 14 days for the second year after the date of the Order;
- c. Random observed drug tests at least once every 30 days for the third year after the date of the Order.
- d. For three years after the date of the Order, observed drug testing on the first day back from any unexcused or unanticipated absence of more than two calendar days.

NYPA or a mutually acceptable third party shall conduct these drug tests in accordance with established procedures under 10 C.F.R. Part 26.

3. Mr. Manning shall continue participation in, and attendance at, self-help group meetings (such as Alcoholics Anonymous/Narcotics Anonymous) at least three times per week for three years after the date of the Order.

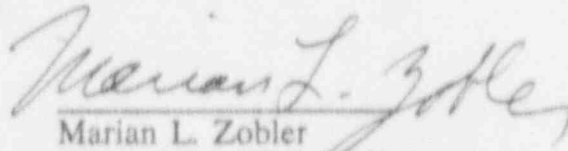
4. Mr. Manning shall, for the purposes of monitoring his progress, attend an initial interview and follow-up sessions with a qualified, professional, drug counselor who is mutually acceptable to both Mr. Manning and the Staff. These follow-up sessions shall occur every other week for one year after the date of issuance of the Order and at least once a month for the next two years.

5. Mr. Manning shall undergo complete neurological and neuro-psychological testing by a qualified clinician, mutually acceptable to Mr. Manning and the Staff, no later than 90-days after the effective date of the Order, and again within six months prior to applying for renewal or reinstatement of his license as a Reactor Operator or Senior Reactor Operator under 10 C.F.R. Part 55. These tests will include neurologic procedures and CAT scans as appropriate.



6. Mr. Manning shall, prior to return to 10 C.F.R. Part 55 licensed activities, meet with NRC senior management and an NRC medical consultant.

Respectfully submitted,

  
Marian L. Zobler  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 16th day of July, 1991

## BOARD 16 P6:00

) Docket No. 055-8615-SC  
) ASLBP No. 91-646-02-SC  
) Senior Reactor Operator  
) License No. SOP-10561-1  
) E.A. 91-054

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSES TO ANSWERS FILED IN RESPONSE TO ORDER MODIFYING LICENSE AND ORDER SUSPENDING LICENSE AND ORDER TO SHOW CAUSE WHY LICENSE SHOULD NOT BE REVOKED" in the above-captioned proceedings have been served on the following by deposit in the United States mail, first class, postage prepaid, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of July 1991:

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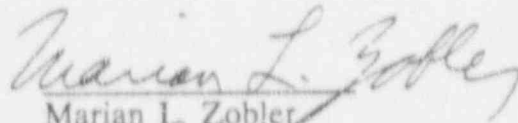
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