

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
New York Power Authority)	Docket No. 50-333
James A. FitzPatrick)	License No. DPR-59
Nuclear Power Plant)	Enforcement Action
)	No. 91-053
)	ASLRP No. 91-645-02-OM

RESPONSE OF THE NEW YORK POWER AUTHORITY
TO OBJECTIONS OF DAVID M. MANNING
TO SETTLEMENT AGREEMENT

PRELIMINARY STATEMENT

On October 7, 1991 the New York Power Authority (NYA) and NRC Staff jointly filed an application seeking Board approval of a Settlement Agreement concerning the May 2 and August 9, 1991 Orders against the James A. FitzPatrick Nuclear Power Plant 10 C.F.R. Part 50 license. The settlement was reached after giving due consideration to the best interests of the public, the concerns of the parties, and the benefits of securing a prompt resolution of this matter.

By Memorandum and Order dated October 16, 1991, in view of the related proceeding concerning David M. Manning's 10 C.F.R. Part 55 license, this Board afforded Mr. Manning an opportunity to comment on the Settlement

Agreement. Mr. Manning submitted Objections Of David M. Manning to Proposed Settlement Agreement (Objections), dated October 24, 1991. NYPA submits this response to the Objections and asserts that Mr. Manning's Objections are based on erroneous assumptions and conclusions.

Mr. Manning ignores the fact that he is subject to at least two separate sources of regulation: (1) by the NRC under Part 55 and (2) by his employer, NYPA, which has independent responsibilities under its Part 50 license, generally, and pursuant to federal regulation (i.e., 10 C.F.R. Part 26), specifically. Given this circumstance, Mr. Manning can be required to comply with two sets of requirements in order to satisfy both entities that he is fit for duty. There is no indication whatsoever that the requirements NYPA is imposing on Mr. Manning are incompatible with those the Board may impose with regard to the Part 55 license. Accordingly, there is no justification for Mr. Manning's argument that the Part 55 requirements, when established, should preempt those established by NYPA.

Furthermore, Mr. Manning points to nothing in the Settlement Agreement that is detrimental to the public interest. Had he alleged that the public would be benefitted by the Board's refusal to approve the settlement, his demand that the matter not be disposed of

in the manner suggested may merit consideration. See 10 C.F.R. §2.203. Instead, since Mr. Manning's suggested substitute language would further no interest other than his own, his comments should be accorded little, if any weight. In contrast, "due weight" should be accorded to the position of NRC Staff (*id.*), which, together with NYPA, has moved for approval of the Settlement Agreement.

ARGUMENT

I.

THE SETTLEMENT WOULD NOT RENDER A NULLITY A SIGNIFICANT PORTION OF MR. MANNING'S PART 55 HEARING

A. The NYPA Follow-Up Drug Testing Plan is Independent of Any Such Plan Ordered Regarding the Part 55 License

Mr. Manning claims that the settlement "would render a nullity a significant portion of his hearing - Mr. Manning could prevail in the hearing before the Board but still be subject to the drug testing program demanded by Staff" It is possible that, as a result of the hearing on the Order modifying Mr. Manning's Part 55 license (the Manning Order), Mr. Manning could succeed in reducing the Part 55 drug testing requirement, but still find himself subject to a more restrictive, NYPA-established drug testing program as a result of the

Settlement Agreement. As noted above, that is a consequence of his being regulated by two entities, the NRC on the Part 55 license, and NYPA, as his Part 50 employer, applying the Part 26 regulation and the FitzPatrick Fitness for Duty (FFD) Program. Mr. Manning points to no statutory or regulatory requirements directing that he be subject to only one drug testing program.

Regardless of the action taken on the Manning Order, NYPA still has the responsibility to oversee its work force. Even a determination by the NRC that Mr. Manning is fit to retain his Part 55 senior operator license, with or without drug testing conditions (a highly improbable event), does not end the matter. That is just the first hurdle for Mr. Manning to surmount. The decision as to whether or not Mr. Manning is returned to the FitzPatrick control room, once the NRC certifies him as (in its view) fit, still rests with NYPA. Therefore, whatever action the NRC takes regarding the Manning Order will have no effect on the larger issue -- providing FitzPatrick management with adequate assurance that Mr. Manning is fit to return to work. The assurance NYPA has demanded of Mr. Manning is reflected in Paragraph 3 of the Settlement Agreement. For Mr. Manning to continue to work at FitzPatrick, whether in the Planning Department or (if

permitted by the NRC and NYPA) as a reactor operator, and regardless of any less stringent follow-up plan imposed by the Board, Mr. Manning will have to comply with the follow-up drug testing plan required by NYPA.

B. NYPA Has the Authority to Devise the Follow-Up Plan Set Forth in Paragraph 3 of the Settlement Agreement

The NRC has required, in 10 C.F.R. Part 26, that all licensees of nuclear power plants establish and implement written policies and procedures designed to assure a reliable and trustworthy work force and a drug-free workplace. Consistent with NRC regulation, the FitzPatrick plant has a FFD Program which was accepted by Mr. Manning's labor union. Both Part 26 and the FitzPatrick FFD Program direct NYPA to establish a follow-up program for a person such as Mr. Manning who seeks to return to unescorted access status.

In addition to the regulation requiring the establishment of a follow-up drug testing plan, NYPA has the authority, as Mr. Manning's employer, to administer all applicable FitzPatrick policies and procedures. The conditions set forth in Paragraph 3 of the Settlement Agreement represent a proper exercise of NYPA's management discretion to establish the conditions under which Mr. Manning may continue his employment at FitzPatrick.

II.

THE SETTLEMENT AGREEMENT DOES
NOT DENY MR. MANNING ANY CONSTITUTIONAL
OR STATUTORY RIGHT TO A FAIR AND
IMPARTIAL HEARING

A. The Agreement Does Not Require NYPA to Impose the
Conditions Sought by NRC Staff

The statement that NYPA would be required by the settlement to impose the conditions sought by NRC Staff is misleading. It is accurate that the follow-up drug testing plan provided in Paragraph 3 of the Settlement Agreement contains the testing schedule in the August 9, 1991 Modified Order. When that Order was issued, NYPA's principal objection was that the testing schedule appeared in the form of an Order against the FitzPatrick license, and, as such, usurped NYPA's management responsibilities. Once NYPA and NRC Staff came to an understanding and were able to address each other's concerns, a settlement was possible. NYPA reviewed Mr. Manning's work record and other information regarding drug rehabilitation. NYPA concurred with the follow-up drug testing plan reflected in the August 9 Modified Order. This plan is presently being adhered to under the FitzPatrick FFD Program.

Thus, it should be clear that the conditions of the Settlement Agreement are not simply those sought by NRC Staff. They are the conditions which NYPA has

purposefully adopted. NYPA requires compliance with these conditions in order for Mr. Manning to continue to do work pursuant to NYPA's Part 50 license.

B. The Settlement Will Have No Effect On Mr. Manning's Ability to Have a Fair and Impartial Hearing Concerning His Part 55 License

The settlement concerns the FitzPatrick Part 50 license. This matter is independent of the question of the appropriateness of the Manning Order. No action taken by NYPA and NRC Staff in attempting to resolve the instant issue prevents Mr. Manning from having a fair and impartial hearing on his Part 55 Order. Mr. Manning has pointed to nothing to the contrary. Regardless of any agreement reached by his employer and NRC Staff concerning the FitzPatrick Part 50 license, the hearing on the Manning Order may go forward. Mr. Manning may still present his witnesses, challenge adverse witnesses, and argue against the imposition of the restrictions placed upon him with regard to the Manning Order. In sum, Mr. Manning will still have his "day in court." Mr. Manning's vague and unsubstantiated assertion that some unarticulated constitutional and/or statutory right is being impinged is without merit.

III.

MANNING'S SUBSTITUTE LANGUAGE SERVES
NO USEFUL PURPOSE AND UNDERCUTS
NYPA'S RIGHTS AS AN EMPLOYER

Mr. Manning suggests that "a proper settlement ... would be to eliminate paragraph '3' thereof and to substitute language that would obligate NYPA to provide the drug testing program for Mr. Manning as set forth in the Modified Manning Order and any future orders of the Board in regards thereto."

Any language along the lines of that suggested by Mr. Manning would (a) attempt to remove management responsibility from NYPA and place it in the hands of a third party and (b) be meaningless because, as stated above, NYPA will, in any event, implement the plan it feels is appropriate (i.e., the one set out in Paragraph 3).

IV.

THE PLAN CONTAINED IN THE SETTLEMENT
AGREEMENT IS NOT IMMUTABLE

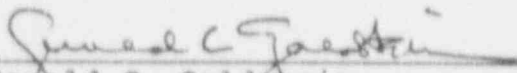
Paragraph 3 of the Settlement Agreement enables NYPA to deviate, with NRC concurrence, from the testing schedule it established for Mr. Manning. Thus, if NYPA receives credible evidence that the testing schedule has

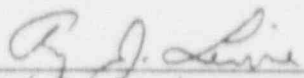
become inappropriate for Mr. Manning, a mechanism is in place for the follow-up drug testing plan to be amended. Evidence that may be developed at Mr. Manning's hearing on the Manning Order could well constitute information which brings about a reconsideration of the terms of the NYPA-mandated follow-up drug testing plan.

CONCLUSION

For the foregoing reasons, Mr. Manning's request that the Board deny NYPA's and NRC Staff's joint motion for approval of the Settlement Agreement should be denied, and the Settlement Agreement should be approved.

Respectfully submitted,


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Dated: November 4, 1991
New York, New York

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the RESPONSE OF THE NEW YORK POWER AUTHORITY TO OBJECTIONS OF DAVID M. MANNING TO SETTLEMENT AGREEMENT in the above-captioned proceeding have been served on the following by first-class mail, postage prepaid on this 4th day of November, 1991. Where indicated by asterisk, service was also made by Express Mail.

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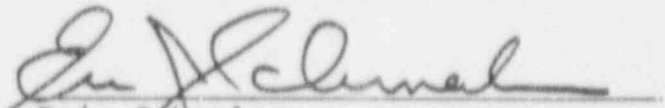
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