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New York Power Authority

James Knubel
Senior Vice President and
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December 21 , 1999
IPN-99- 131

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555

SUBJECT: **Indian Point 3 Nuclear Power Plant**
Docket No. 50-286
Regulatory and Legal Analysis - Non Proprietary Version

References:
1. NYPA letter, J. Knubel to USNRC (IPN-99-105) dated September 29, 1999 regarding regulatory and legal analysis.
2. NYPA letter, J. Knubel to USNRC (IPN-99-107) dated September 30, 1999 regarding request to withhold information in accordance with 10 CFR 2.790.

Dear Sir:

At the request of the NRC staff, the Authority has prepared a version of the regulatory and legal analysis originally submitted with Reference 1 that does not contain personnel information and can be released to the public. A copy of this version of the analysis is attached. In Reference 2, the Authority asked that the analysis attached to Reference 1 be withheld from public disclosure in accordance with the provisions of 10 CFR 2.790(a)(6).

This letter includes no new commitments. If you have any questions, please contact me, or Ms. Charlene Faision, Director Nuclear Licensing at (914) 681-6306.

Very truly yours,

J. Knubel
Senior Vice President and
Chief Nuclear Officer

cc: Next page

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Attachments

I. NYPA Regulatory and Legal Analysis, Apparent Violation EA 99-13, Non-proprietary Version

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New York Power Authority
Regulatory and Legal Analysis

Apparent Violation EA 99-163
Non-Proprietary Version

I. Introduction

On August 17, 1999, the Nuclear Regulatory Commission (NRC) informed the New York Power Authority (NYPA) of the results of several investigations conducted at the Indian Point 3 Nuclear Plant (IP3) by the NRC's Office of Investigations (OI). The NRC identified one "apparent violation" of 10 C.F.R. 50.7 that it is considering for enforcement. The NRC characterized the facts and apparent violation as follows:

> "OI concluded that actions by [NYPA] management resulted in discrimination against the performance supervisor by withholding a merit bonus adjustment in 1998."
>
> ". . . although site management authorized an adjustment to the performance supervisor's merit bonus and corporate management approved the adjustment, the adjustment was withheld by Human Resources personnel."
>
> "The performance supervisor's involvement in ongoing internal and NRC investigations was a factor in the withholding of the bonus adjustment."

The NRC further amplified its understanding of this matter by correspondence of August 25, 1999, and NYPA presented clarifying information and its views on the issue at a predecisional enforcement conference held at NRC's Region I offices on September 17, 1999. NYPA takes the position that the facts of this matter do not constitute a violation of 10 C.F.R. 50.7.

An allegation of a violation of 10 C.F.R. 50.7, which prohibits discrimination against employees who raise safety issues or participate in NRC investigations, is a significant matter that NYPA management takes extremely seriously. As discussed at the predecisional enforcement conference, NYPA is committed to a Safety Conscious Work Environment (SCWE) at its nuclear stations -- that is, an environment in which all employees feel free to raise concerns without fear of harassment and other retaliation. NYPA has implemented programs and policies to achieve this goal, and has conducted culture surveys that demonstrate a significant measure of success. In this

context, and given the potential negative ramifications of a finding of a violation, NYPA believes this matter needs to be given careful consideration by the NRC.

Moreover, the apparent violation at issue is one that raises significant legal and policy issues. Again as discussed at the predecisional enforcement conference, Human Resources management became involved in this matter at the request of the concerned individual, acted to be responsive to [ ], and had no motive or intent to retaliate against [ ] for engaging in protected activities. Management acted to defer a proposed mid-year salary adjustment pending the completion of an active and ongoing internal review of the very issue of the salary increase amount -- thereby preserving the status quo until all the facts and issues were uncovered. This action was reasonable and prudent; a conclusion that it was a violation of Section 50.7 would create an untenable precedent for industry management.

Accordingly, the legal and regulatory principles that govern this matter are of the utmost importance. As indicated at the predecisional enforcement conference, NYPA is providing this paper to fully address its position on the proper application of 10 C.F.R. 50.7 in the present context. Based on a reasonable and careful application of the relevant legal principles, the NRC should conclude that there was no violation in this case.

II. Summary of Facts

The essential facts surrounding this matter, as known to NYPA, were presented at the predecisional enforcement conference. Rather than repeat all the facts here, the following provides an overview of the most important events and considerations.

1. The apparent violation at issue relates to a 1998 "merit increase" granted to the Performance Supervisor. In March 1998, in accord with the normal employee review cycle, [ ] received a merit increase (not a merit "bonus" as referenced in the NRC's letter) in an amount equal to [ ]% of [ ] 1997 base salary. [ ] had also received, in February 1998, a "staff incentive award" equal to [ ]% of base pay, paid into an employee savings plan.

2. A merit increase may be earned by an employee with either a "meets expectations" (ME) or "exceeds expectations" (EE) performance review. Merit increase amounts are determined each year by an employee's department manager in consultation with the site Human Resources (HR) representative and plant management (principally, the Site Executive Officer (SEO)). The merit increase is discretionary, not an entitlement; the amount is determined subjectively, and is not the result of any prescriptive formula.

3. Guidelines for determining merit increase amounts were established in a NYPA Salary Administration Policy. Merit increase amounts could be subjectively determined, subject to budgeted merit pool dollars and subject to the limitation that employees with an ME rating can reach the maximum of the salary range for the position but should not exceed the range. Performance is the driving factor in determining a merit increase, but supervisors also considered where the employee's base pay stood in the salary range for the employee's job (i.e., the "compa ratio"). The Salary Administration Policy in effect for the 1998 reviews also did not, by its terms, prohibit a department manager from considering overtime eligibility or overtime earnings in determining relative merit increases in a department (i.e., the merit increase percentages for each eligible employee).

4. The [ ]% merit increase granted to the Performance Supervisor in March 1998 was the product of normal discussions between the department manager, site HR, and the SEO. It was an increase greater than originally proposed by the department manager and it was accepted by site management as adequate and appropriate. It was based on the department manager's assessment of the Performance Supervisor's performance and ranking in base pay, relative to the other employees in the department. As an additional factor, the department manager considered the Performance Supervisor's eligibility for overtime (more favorable than others in the department) and actual total compensation paid (among the highest in the department).

5. The Performance Supervisor, in March 1998, was unhappy with the merit increase amount and complained to the site HR representative. [ ] implied that the amount was retaliation for [ ] exhibiting a "questioning attitude." The site HR representative looked into the matter. He questioned the department manager regarding the basis for the increase amount. In correspondence of April 21, 1998, he informed the Performance Supervisor that the merit increase amount was appropriate.

6. The Performance Supervisor continued to complain regarding this and other matters, up to the SEO. In early May 1998, the SEO met with the Performance Supervisor to discuss this and other issues, and subsequently asked the Director of Corporate Security to investigate.

7. Some time later, in late June 1998, the SEO learned that overtime eligibility and total compensation had been considered by the department manager as a factor justifying the [ ]% merit increase amount (the increase was lower than for others who did not make as much overtime, and who were not eligible for overtime on the same favorable terms as the Performance Supervisor). The SEO felt this to be an inappropriate consideration. He directed the site HR representative and General Manager - Operations (GMO) to consider an adjustment.

8. The site HR representative and GMO did consider an adjustment, but did not recommend one to the SEO. In a memorandum of July 15, 1998, the site HR representative provided his basis for concluding that the [ ]% increase was appropriate -- irrespective of overtime considerations. His conclusion was based on performance ratings and a comparison of the Performance Supervisor's increase to that of a comparable supervisor in the department.

9. In late July the SEO learned that no adjustment had been made on his earlier request. He continued to believe that an adjustment was in order, and therefore directed the site HR representative to process a "mid-cycle" adjustment of [ ]% to make the Performance Supervisor's merit increase equal to the merit budget pool for that year ([ ]%). This equated to a $[ ] adjustment for the year. The paper was processed, signed by the SEO, and signed by the Chief Nuclear Officer on the recommendation of the SEO. Corporate HR approval, however, was still required before the recommendation could become effective.

10. Meanwhile, back on May 21, 1998, apparently dissatisfied with results to date on [ ] complaints at the site, the Performance Supervisor brought a large number of allegations to the Senior Vice President (SVP) of HR at the NYPA corporate office. The issues included [ ] complaint regarding the [ ]% merit increase amount. In an attempt to be responsive to the issues, the SVP subsequently organized an internal investigation of the various issues raised by the Performance Supervisor. The review would be conducted under the auspices of the NYPA Inspector General. The Employee Relations Specialist (ERS) was given lead responsibility for the HR issues, including the complaint that the 1998 merit increase was too low and retaliatory.

11. At the very time this internal investigation was actively addressing the Performance Supervisor's allegations and concerns, the proposal from nuclear management to adjust upward the 1998 merit increase was sent to the SVP for the required HR approval. The ERS was aware of the proposal and considered it premature, since the ERS's review of the same issue, initiated at the impetus of the Performance Supervisor, was just beginning. The SVP also considered the proposed adjustment premature in view of the active and ongoing internal review. Following discussions at the HR level, and recognizing that any adjustment later determined to be appropriate would be made retroactive to March 1998, the SVP opted to preserve the status quo by placing the adjustment on hold.

12. There is no basis on which to conclude that the SVP or ERS had any retaliatory motive. Both believed the adjustment was premature precisely because of the active investigation of the issue initiated by the SVP in response to the Performance Supervisor's concerns.

13. The Performance Supervisor, in November 1998, filed a claim with the Department of Labor (DOL) under Section 211 of the Energy Reorganization Act. The Section 211 claim included a charge that the 1998 merit increase was retaliatory. Now in litigation, NYPA re-focused its internal reviews of the issues to address the DOL complaint. NYPA responded in January 1999, taking the position that the [ ]% merit increase amount was appropriately based upon legitimate considerations and was not retaliatory. DOL subsequently found no basis to conclude that there had been retaliation against the Performance Supervisor.

14. The ERS explained at the predecisional enforcement conference that the [ ]% merit increase was consistent with the department manager's assessment of the Performance Supervisor's performance, and with rankings of [the employee] in the department with respect to performance and "compa ratio" (that is, relative base pay). The proposed [ ]% adjustment was not justified and would have led to inequities in the department. The fact that the department manager had considered overtime eligibility and pay as additional justification for the merit increase does not alter these conclusions. The original [ ]% increase, from an HR perspective, was appropriate.

III. Issue

Whether the decision of the SVP to defer action on a proposed adjustment to the Performance Supervisor's 1998 merit increase, pending the results of an active ongoing internal investigation including the very issue of the size of the merit increase, constituted a violation of 10 C.F.R. 50.7.?

IV. Discussion

The analytical framework for assessing potential enforcement cases under 10 C.F.R. 50.7 was recently discussed in the report of the Millstone Independent Review Team (MIRT).[1] The MIRT concluded (at pages 3-4) that there are four elements of "critical importance:"

1. Did the employee engage in protected activity?

2. Was the employer aware of protected activity?

3. Was an adverse action taken against the employee?

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[1] Report of Review, "Millstone Units 1, 2, and 3: Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-0002, 1-96-007, 1-97-007, and Associated Lessons Learned" (March 12, 1999).

4. Was the adverse action taken because of the protected activity?

For the present matter, there is no dispute on the first two elements. The issue revolves entirely around elements three and four. The apparent violation appears to be premised on a conclusion that (1) there was adverse action because the proposed merit increase adjustment of July/August 1998 was "withheld by Human Resources personnel"; and (2) protected activity (specifically, "involvement in ongoing internal and NRC investigations") was a "factor" in the adverse action.

NYPA concludes that the decision to defer action on the proposed adjustment does not constitute a violation. The deferral decision was made during the normal HR review of an unusual, proposed mid-cycle adjustment. The deferral was an interim step, preserving the status quo, pending the results of an internal investigation into the facts and policies inherent in the matter. The internal investigation had been prompted by the Performance Supervisor's own overtures to the SVP. Once all the facts were known and the issues evaluated, any appropriate adjustment would be made. (In this case, it was eventually determined that no adjustment was appropriate and the proposed adjustment was never approved.) This deferral decision did not constitute "adverse action" and did not constitute "retaliation" taken "because of" protected activity.

1. There was no adverse action taken against the [employee in question].

There is no dispute that the Performance Supervisor received a [ ]% merit increase in March 1998. ([ ] also received, in February 1998, the [ ]% employee incentive award that was granted to all eligible employees for work in 1997). Likewise, there is no dispute that [ ] complained to site management and, separately, to corporate HR regarding the amount of the increase. Cutting to the essence, for its part, nuclear management chose to address the situation by proposing an adjustment to the increase amount. However, the Performance Supervisor was not entitled to any adjustment until the SVP approved; and the SVP could not approve such an adjustment, mid-cycle, unless the increase was justified. By deferring the proposed adjustment, pending review of the issues, the Performance Supervisor was not denied anything [ ] was entitled to.

The proposed adjustment arrived at corporate HR without explanation or justification, shortly after the SVP had initiated an internal investigation that included the issue of the Performance Supervisor's merit increase. The interim decision to withhold the proposed mid-cycle adjustment pending further review did not change the Performance Supervisor's employment status. Nor did it impact on the then-current terms and conditions of [ ] employment -- which included [ ] new base salary, incorporating a [ ]% merit

increase approved by all required managers and made effective in March 1998. At most, this was an "interlocutory" or "mediate" decision that had no impact upon employment conditions. See Page v. Bolger, 645 F.2d 227 (4th Cir. 1981).

The Page case involved a claim of race discrimination under the Civil Rights Act (Title VII). Analogous to the requirement under Section 50.7 that there be "adverse action," the court in Page explained that the proper object of inquiry in a claim of disparate treatment under Title VII is whether there has been discrimination in "personnel actions" affecting employees. Id. at 223. The personnel action at issue, according to the court, was the decision denying the claimant the position sought. The court found other management decisions to be non-actionable, explaining:

> . . . it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . .Title VII. We hold here merely that among the latter are mediate decisions such as those concerning composition of the review committees in the instant case that are simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc.

Id. In the present case, the interim decision to defer the adjustment, as referenced in the apparent violation, was not an "end-decision" to hire, promote, or even deny the proposal. It was not a final action affecting [the employee's] conditions of employment.

Subsequently, corporate HR determined that a salary adjustment was not appropriate. There had been no "mistake" in calculating or determining the amount of the merit increase.[2] The adjustment that was proposed was based upon a sincere belief that overtime considerations should not have been a factor in deciding the original increase amount. However, there was no established policy that would support this. Moreover, HR concluded that this factor, while clearly considered, had a *de minimis* impact on the merit increase

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[2] NYPA also respectfully submits that, absent some clear "mistake" or misapplication of policy, it would be inappropriate for the NRC to "second-guess" the subjective determination of the amount of an annual merit increase. The final decision on the proposed merit increase, like the original [ ]% increase, should be beyond the NRC's review so long as there is a rational, non-retaliatory basis -- which there is, as presented at the predecisional enforcement conference.

amount. Conversely, the proposed adjustment would have led to a result out of line with the rest of the department. These conclusions underscore that, even when the proposal was finally denied, the Performance Supervisor was not denied anything that was rightfully [ ].

In other employment law settings it has been held that, in examining the "adverse action" element of a claim, the reviewer must assess the entire context of the case, and determine whether a reasonable person would find the action at issue to be "adverse" based upon all circumstances. See, e.g., Doe v. DeKalb County School District, 145 F.3d 1441, 1453 (11th Cir. 1998). In the present context, the SVP was a required sign-off for the proposed salary adjustment. Notwithstanding the prior approvals from nuclear management, the SVP had the authority and responsibility to review the matter before the increase was effective. To conclude that [the employee's] deferral decision was "adverse action" would imply that he had no discretion to take any action at that time other than approve the proposal, and that he was obligated to simply "rubber stamp" the recommendation from nuclear management. Such a conclusion would deny NYPA HR its valid function. In this context, his decision to withhold action pending review cannot be interpreted by a reasonable person as "adverse." Because the interim action cited in the apparent violation was not an adverse action, there could be no violation of 10 C.F.R. 50.7.

2. The action taken with respect to the proposed merit increase adjustment was not taken because of protected activity.

Even if the NRC were to construe the interim decision of the SVP to withhold the proposed salary increase as "adverse action," the NRC still must find that there was no violation. The action was taken, not because of any protected activity, but for legitimate, non-discriminatory reasons -- with no intent whatsoever to harass or otherwise retaliate.

Section 50.7 (d) (emphasis added) provides in relevant part:

> Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activity. An employee's engagement in protected activities does not automatically render him or her immune from . . . adverse action dictated by non-prohibited considerations.

In this case, as was discussed at length at the predecisional enforcement conference, the SVP had no motive or intent to retaliate or intimidate. He was exercising reasonable, prudent, and fair business discretion to preserve the status quo on the proposed adjustment, pending a full evaluation of the merits. Therefore, there was no violation of Section 50.7.

a. There was no retaliation, intimidation, or "chilling effect."

The apparent violation at issue relates to an act of alleged retaliation. This was not a "hostile work environment" case. Accordingly, first and foremost, to conclude that there was retaliation, or that the adverse action was taken "because the employee has engaged in protected activity," there should be a finding of intent to retaliate or intimidate. However, this was most decidedly not the case. Nowhere in the NRC's statement of the apparent violation, or in the supplementary statement of August 25, 1999, is there any indication that any employee of NYPA acted with a retaliatory *animus*. It is therefore inappropriate to conclude that there was retaliation.

Indeed, in this case, as the SVP discussed at the predecisional enforcement conference, the motivating factor for the decisions he made regarding the Performance Supervisor's concerns was a desire to be responsive. For example, when contacted by the Performance Supervisor, the SVP promptly scheduled a meeting at the Performance Supervisor's request to discuss [ ] concerns. Following the meeting, he promptly initiated a comprehensive internal investigation into those concerns. These actions are indicative of concern for the fair treatment of the Performance Supervisor, and cannot support a finding of retaliatory intent.

Similarly, the ERS tasked with the HR issues met with the Performance Supervisor and began to fully and fairly evaluate the issue of the 1998 merit increase. The review became complicated by issues related to whether overtime eligibility and compensation could be factors in deciding merit increase amounts, and by numerous other allegations and concerns. All evidence shows that the ERS attempted to pursue each and every issue in a full and fair manner. While in hindsight it is always possible to find lessons on how to do things more efficiently and communicate better, it is not possible in this case to find any ill motive or intent to punish.

In the entire context of issues raised by the Performance Supervisor, DOL found no basis to conclude that there was retaliation. In all but the present apparent violation, the NRC's OI found no basis to conclude that there was retaliation. Indeed, the facts suggest that in all likelihood the Performance Supervisor was not even aware of the merit increase adjustment proposed by nuclear management. This being the case, the non-public interim decision could have no "chilling effect" on the Performance Supervisor or any

other employee. Moreover, deferring a $[ ] adjustment provided no gain to NYPA. To find retaliation in this lone, narrow decision would simply defy the facts, the total context, and logic. The NRC should conclude on this basis alone that there was no violation of Section 50.7.

b. The action taken was based on legitimate business reasons, not on protected activity.

For a violation to occur, the NRC must establish that the adverse action was taken "because the employee has engaged in protected activity." 10 C.F.R. 50.7(d). Thus, there must be a causal link between the adverse action and the protected activity. This does not exist in the present situation. As stated in Section 50.7, "engagement in protected activities does not render the employee immune from. . . adverse action dictated by non-prohibited considerations." In this case, the interim deferral action of the SVP was based entirely on "non-prohibited considerations." The decision was fair, reasonable, and legitimate.

The MIRT discussed this causal link element of a Section 50.7 violation in its report, and framed the question as whether the protected activity was a "contributing factor" to the adverse action. MIRT Report, at pages 4,8. In framing the question, however, the MIRT recognized that a "contributing factor" must be more than a mere consciousness of protected activity, and that protected activity must be a factor greater than the equivalent of adding "a drop of water into the ocean." The MIRT defined a plausible analytical standard as:

> . . . knowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take adverse action.

Id. at 8. This standard is not met in the present circumstances.

The protected activity in this case was the Performance Supervisor raising safety and retaliation concerns to NYPA management and to the NRC, and participating in OI investigations. For purposes of this analysis, we can assume that the company personnel involved in the proposed salary adjustment

were aware of the former, and that they had some general awareness of the latter. MIRT element 4 requires more. It requires, by a preponderance of the evidence, a finding of some motive or impetus "relating to the protected activity" that was a meaningful factor leading to the adverse action. Here, both the SVP and the ERS have stated their view that the salary adjustment was premature, due to the active, ongoing investigation of the issue. The Performance Supervisor's *involvement in protected activity* was not a meaningful factor in their belief that deferring the proposed adjustment was the most prudent course.

At NYPA, nuclear management was not, and is not, the final approval on a proposal for a salary increase such as the unusual, mid-cycle adjustment at issue here. Corporate HR has a legitimate role in reviewing such a proposal, and the SVP -- in making the interim decision to defer action -- was fulfilling that role in this case. The proposal came to corporate HR with no documented explanation or justification. It addressed a matter pending a review that the SVP had himself initiated at the request of the concerned individual. Common sense dictated that the adjustment should be deferred until such time as all the facts were evaluated -- particularly where, as here, any increase later determined to be appropriate would be made retroactive to March 1998. There was no motivation or impetus to punish any employee for protected activity. To respond effectively to the Performance Supervisor's claim of salary discrimination, the SVP had to await the conclusion of the ongoing internal investigation involving that very issue.

In this sense, the Performance Supervisor in this case was treated no differently than any other similarly situated NYPA employee. Had NYPA been conducting a review of another employee's annual merit increase (for example, by NYPA's Dispute Resolution Process) at a time when an adjustment to that increase was requested, that adjustment in all likelihood would also have been deferred pending conclusion of the investigation. That result would follow even if that employee had never raised any safety concerns or never engaged in any protected activity. In short, informed and prudent decision making is a legitimate, non-discriminatory reason for NYPA's actions. It does not, and in the circumstances of the case cannot, amount to an act of retaliation.

The SVP's actions were also perfectly in accord with the NRC's May 1996 Policy Statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation." 61 Fed. Reg. 24336 (May 14, 1996). The Policy Statement recognizes, as one means to the goal, an "open-door" policy that allows the employee to bring a concern to a higher level manager. Id. at 24338, col. 3. The SVP offered an "open door" to the Performance Supervisor in this case, by agreeing to meet in May 1998. The Policy Statement speaks to the involvement of senior management in cases of alleged discrimination, with management "reviewing the particular facts and evaluating or reconsidering the action." Id. at 24339, col. 2. Again, this is

precisely what the SVP did in this case. He initiated an investigation and took steps to determine whether the merit increase was appropriate. And, finally, the Policy Statement even suggests a "holding period" whereby the licensee would maintain the pay and benefits of an employee alleging retaliation. Id. at col. 3. While the scenario contemplated is different from the present case, the policy considerations are the same. The SVP in this case held the "status quo" pending a thorough review of the salary issue. NYPA concludes that these actions should not be interpreted as a violation of the law.

V. Conclusion

The complete record in this case shows that NYPA personnel and management, including the ERS and SVP, acted in a fair and professional manner to be responsive to a concerned individual. The SVP, free of any retaliatory motive or impetus, made a reasonable business decision to defer on a proposed adjustment, pending an investigation of the facts. His decision was later vindicated, as internal reviews concluded that the Performance Supervisor had received a fair merit increase in March 1998, and [ ] was never denied anything to which [ ] had an entitlement. In this context, the NRC cannot conclude that there was any violation of 10 C.F.R. 50.7.