

18256

April 11 1997  
DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

97 APR 11 P4:54

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
RALPH L. TETRICK	)	Docket No. 55-20726-SP
	)	
(Denial of Application for Senior	)	
Reactor Operator License)	)	

NRC STAFF'S REQUEST FOR ISSUANCE OF AN ORDER  
STAYING THE EFFECTIVENESS OF THE PRESIDING OFFICER'S  
DECISIONS IN THIS PROCEEDING (LBP-97-2 AND LBP-97-6)

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.788 and 2.1263, the NRC Staff ("Staff") hereby requests that the Commission issue an Order temporarily staying the effectiveness of the Presiding Officer's decisions in this proceeding,<sup>1</sup> pending the Commission's receipt and consideration of the Staff's petition for review of those decisions (which will be filed on or before April 16, 1997, pursuant to 10 C.F.R. §§ 2.786 and 2.1253). As more fully set forth below, a brief stay of the Presiding Officer's decisions is necessary in order to hold in abeyance the Presiding Officer's Order directing the Staff to issue a Senior Reactor Operator (SRO) license to Ralph L. Tetrick, the applicant in this proceeding. The requested stay would remain in effect only until such time as the Commission has had an opportunity to review the correctness of the Presiding Officer's determination that

<sup>1</sup> *Ralph L. Tetrick* (Denial of Application for Reactor Operator License), LBP-97-2, 45 N.R.C. \_\_\_\_ (Feb. 28, 1997); *Id.*, LBP-97-6, 45 N.R.C. \_\_\_\_ (Mar. 27, 1997).

0501

Mr. Tetrick's revised written examination score of 79.59% should be rounded up to the next highest integer, resulting in the necessary passing grade of "80 percent or greater."

### BACKGROUND

This informal adjudicatory proceeding involves the application for an SRO license filed by Ralph L. Tetrick, a reactor operator at Turkey Point Nuclear Generating Plant, Units 3 and 4 ("Turkey Point"), operated by Florida Power & Light Company ("FP&L").

In June 1996, Mr. Tetrick was administered an operating test and written examination, in accordance with 10 C.F.R. Part 55. The Staff initially determined that Mr. Tetrick had correctly answered 78 of the 100 questions on the written examination, for a score of 78% (Hearing File (HF) Item 15),<sup>2</sup> and proposed to deny his license application (HF Item 19). Mr. Tetrick then requested an informal Staff review of certain examination answers (HF Item 20). As a result of that review, the Staff deleted one question, resulting in a revised score of 78.8% -- which remained "below the minimum passing grade of 80%." (HF Item 26, at 5). The Staff therefore sustained its denial of Mr. Tetrick's SRO license application (*Id.* at 1).

On September 25, 1996, Mr. Tetrick filed a request for hearing on the Staff's denial of his license application. An informal proceeding was established in accordance with 10 C.F.R. Part 2, Subpart L; and the Presiding Officer granted Mr. Tetrick's hearing request by Memorandum and Order of October 21, 1996. Mr. Tetrick filed his written presentation on December 30, 1996, in which he challenged the grading of four

---

<sup>2</sup> The Hearing File was submitted by letter from Sherwin E. Turk to the Presiding Officer, dated November 7, 1997, in accordance with 10 C.F.R. § 2.1231.

questions on his written examination: Questions 63, 84, 90, and 96.<sup>3</sup> The Staff filed its written presentation in response to Mr. Tetrick on January 23, 1997.<sup>4</sup>

In an Initial Decision issued on February 28, 1997 (LBP-97-2, *supra*), the Presiding Officer upheld the Staff's grading of Questions 63, 84, and 90, but determined that Question 96 "is ambiguous and should be struck." *Id.*, slip op. at 15. As a result, the Presiding Officer determined that Mr. Tetrick had correctly answered 78 of 98 questions, for a revised score of 79.59%, which the Presiding Officer rounded up to 79.6%. *Id.* The Presiding Officer then stated as follows:

Staff has not addressed the question of the number of digits in the examination score that should be considered significant. Because I have not been directed to any governing guidance or regulation, I have decided that it is appropriate to round up the answer to the nearest integer. These tests are not so precise that tenths of a percent have any meaning. Consequently, Mr. Tetrick's score is 80 percent, which is a passing score. He shall, therefore, be granted a license as a Senior Reactor Operator.

*Id.* at 16. The Presiding Officer accordingly directed the Staff to an SRO license to Mr. Tetrick. *Id.* at 16-17.

On March 10, 1997, the Staff filed a motion for reconsideration of the Presiding Officer's Initial Decision, which was narrowly directed to the Presiding Officer's determination to round up Mr. Tetrick's score from 79.59% to the next integer, resulting

---

<sup>3</sup> See Letter from Ralph L. Tetrick to Sherwin E. Turk, dated December 30, 1996.

<sup>4</sup> See "Written Presentation of NRC Staff," and the attached "Affidavit of Brian Hughes and Thomas A. Peebles," dated January 23, 1997.

in a passing grade for Mr. Tetrick.<sup>5</sup> The Staff's motion was supported by affidavit and by extensive documentation which together demonstrated, *inter alia*, that:

(a) Pursuant to Commission guidance in NUREG-1021,<sup>6</sup> applicants must achieve a minimum passing grade or "cut score" of "80% or greater" in order to pass a written examination;

(b) the Staff has historically interpreted and applied this standard to require a score of 80%, without rounding up -- and has denied RO and SRO license applications where examination scores of 79.6%, 79.7% and 79.8% had been achieved;<sup>7</sup>

(c) the Commission, in broad terms, recently provided implicit approval of the Staff's existing policy, in approving a proposed revision of NUREG-1021, clarifying that the "80% or greater" standard requires a score of "80.00%";<sup>8</sup> and

---

<sup>5</sup> See "NRC Staff's Motion for Reconsideration," and the attached "Supplemental Affidavit of Brian Hughes," dated March 10, 1997.

<sup>6</sup> See NUREG-1021, Rev. 7, Supp. 1, "Operator Licensing Examiner Standards" (June 1994), ES-402, page 5 of 6; *Id.*, ES-401, page 6 of 7; *Id.*, ES-501, page 3 of 24 (Motion for Reconsideration, Attachment 2).

<sup>7</sup> See Motion for Reconsideration, Attachment 4.

<sup>8</sup> See SECY-96-206, "Rulemaking Plan for Amendments to 10 CFR Part 55 to Change Licensed Operator Examination Requirements," Enclosure 2 at 24 (Sept. 25, 1996) (Motion for Reconsideration, Attachment 5); and the related Staff Requirements Memorandum (SRM) of December 17, 1996 (Motion for Reconsideration, Attachment 6).

(d) the Staff has now revised NUREG-1021, clarifying that the "80% or greater" standard requires a minimum score of 80.00%.<sup>9</sup>

Also on March 10, 1997, along with its Motion for Reconsideration, the Staff filed a request that the Presiding Officer temporarily stay the effectiveness of his Initial Decision pending review of that decision.<sup>10</sup> By Order dated March 12, 1997, the Presiding Officer imposed a brief housekeeping stay, to allow time for Mr. Tetrick to respond to the Staff's stay request; and by Order dated March 21, 1997, the Presiding Officer directed the Staff to respond to the following questions:

1. Is it appropriate to introduce new authority in a motion for reconsideration when that authority might have been introduced into the proceeding prior to my first decision?
2. Is Mr. Tetrick correct that the guidance contained in NUREG-1021 Revision 8 is not applicable to the facts of this case?<sup>11</sup>

On March 25, 1997, the Staff filed its response to these questions,<sup>12</sup> in which the Staff indicated, *inter alia*, that prior to its receipt of the Initial Decision, it had no reason to believe that the Presiding Officer would raise and decide the question of "rounding up"

---

<sup>9</sup> See NUREG-1021, Interim Rev. 8, at ES-401 and Appendix E (Jan. 1997) (Motion for Reconsideration, Attachment 7).

<sup>10</sup> See "NRC Staff's Request for Issuance of an Order Staying the Effectiveness of the Presiding Officer's Initial Decision (LBP-97-2)," dated March 10, 1997.

<sup>11</sup> "Memorandum and Order (Grant of Housekeeping Stay)," dated March 21, 1997, at 2 (extending the earlier housekeeping stay until March 26, 1997).

<sup>12</sup> See "NRC Staff's Response to Memorandum and Order of March 21, 1997," dated March 25, 1997.



or that this issue was relevant in this proceeding, since it had not been raised previously by Mr. Tetrick, by his examination grade, or by the Presiding Officer.

On March 27, 1997, the Presiding Officer denied the Staff's motion for reconsideration and request for a stay.<sup>13</sup> Significantly, the Presiding Officer declined to consider the merits of the Staff's Motion for Reconsideration, on the grounds that the Staff should have reasonably anticipated that he would reach and decide the question of whether "rounding up" is appropriate. *Id.* at 2, 5. Even more significantly, the Presiding Officer "recognize[d] that Mr. Tetrick will be granted a license while other candidates, with scores between 79.5% and 80%, were denied a license," *Id.* at 4 -- but found this to be of little consequence in that (a) "a 0.41% difference in score" is unlikely to affect public health and safety, and (b) the grading of examinations in the future will be governed by Revision 8 of NUREG-1021. *Id.* at 5.

#### DISCUSSION

The Staff respectfully submits that the Presiding Officer (a) improperly determined to disregard the Staff's motion for reconsideration, (b) incorrectly decided a question of law -- without first seeking the parties' views -- as to how to interpret the Commission's "80% or greater" standard established in NUREG-1021, and (c) applied

---

<sup>13</sup> See "Corrected Copy of Memorandum and Order (Denial of Reconsideration, Stay), LBP-97-6, 45 NRC \_\_\_\_ (March 27, 1997) ("Corrected Decision). The Presiding Officer's Corrected Decision supersedes his "Memorandum and Order (Denial of Reconsideration, Stay)," dated March 27, 1997. In addition to adding an "LBP" issuance number, the Corrected Decision extensively revises page 5 of the prior decision.

a lower and non-uniform<sup>14</sup> standard to the grading of Mr. Tetrick's examination as compared to other persons whose RO and SRO license applications were denied, in established Staff practice, whose scores of between 79.5% and 80% were determined not to meet the "cut score" or "80% or greater" standard specified in NUREG-1021.

Accordingly, the Staff intends shortly to file a petition seeking Commission review of the Presiding Officer's decisions; and a brief stay of the effectiveness of the Presiding Officer's decisions is needed to afford sufficient time for Commission review of that petition before the Staff is required to comply with the Presiding Officer's directive to issue an SRO license to Mr. Tetrick.

A. Legal Standards Governing the Issuance of A Stay

Pursuant to 10 C.F.R. 2.788(e), in determining whether to grant an application for a stay, the Commission is to consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

It is well established that in the absence of a showing of irreparable harm, a movant must make a strong showing on the other factors in order to obtain the requested stay. *See,*

---

<sup>14</sup> Such uniformity is required by statute: Section 107 of the Atomic Energy Act, as amended, requires the Commission to "prescribe uniform conditions for licensing individuals as operators." 42 U.S.C. § 2137(a).

*e.g., Sequoyah Fuels Corp (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).*<sup>15</sup>

1. Likelihood of Success on the Merits

As set forth above, and as will be more fully explained in the Staff's petition for review, the Presiding Officer's determination to disregard the Staff's motion for reconsideration and to round up Mr. Tetrick's revised examination grade from 79.59% to 80% (a) is contrary to existing Commission guidance, set forth in NUREG-1021, that a minimum grade of 80 percent or greater must be achieved; (b) is contrary to established Staff practice, whereby the Staff routinely denies license applications where the individuals' scores are less than this minimum "cut score" of 80 percent (including those instances in which applicant scores are between 79.5 and 80 percent); (c) is contrary to the Commission's recent SRM approving the issuance of NUREG-1021, Interim Rev. 8, which, among other matters, clarifies that the minimum grade of 80% specified in NUREG-1021 requires a score of 80.00%; and (d) would result in non-uniform treatment of Mr. Tetrick as compared to other RO and SRO applicants. For these reasons, as described above and as will be more fully explained in the Staff's petition for review, the Staff believes there is a strong likelihood of success on the merits of its petition.

2. Irreparable Injury in the Absence of A Stay

The Staff's petition for review will seek, in essence, a determination by the Commission that Mr. Tetrick's examination score of 79.59% does not constitute a passing

---

<sup>15</sup> These standards incorporate the criteria for granting a stay set forth in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). See, *e.g., Sequoyah Fuels, supra; Seabrook, supra*. As stated in 10 C.F.R. § 2.1263, the standards in § 2.788(e) are applicable in informal adjudicatory proceedings conducted under 10 C.F.R. Part 2, Subpart L.



grade. In the absence of a stay pending the Commission's resolution of this issue, the decisions below stand in conflict with the Staff's established practice of requiring RO and SRO applicants to achieve a minimum score of 80.% and is likely to disrupt the continued implementation of this policy -- and could lead to the filing of other requests to "round up" the scores of other candidates whose license applications have been denied for failing to achieve a score of 80%. Accordingly, this factor supports the imposition of a temporary stay, in order to permit timely Commission review of the decisions below.

3. Harm to Other Parties

The only other party to this proceeding is Mr. Tetrick. Mr. Tetrick will not be substantially harmed by the imposition of a brief stay, *pendente lite*. Even if the Initial Decision is upheld by the Commission, any delay in the issuance of a license to Mr. Tetrick pending the Commission's review of this narrow issue is likely to be of short duration and will not result in significant or irreparable harm to him. Indeed, the opposite is true: If the Staff is required to comply with the Presiding Officer's Order directing the Staff to issue a license to Mr. Tetrick prior to the issuance of the Commission's decision in this matter, any subsequent decision by the Commission to rescind that Order could cause a disruption in Mr. Tetrick's assigned responsibilities and in the performance of his duties at Turkey Point. Accordingly, this factor supports the issuance of a stay.

4. Where the Public Interest Lies

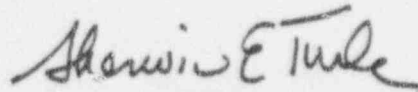
In the absence of a stay, the Presiding Officer's decisions may introduce confusion on the part of persons who apply (or who previously applied) for an RO or

SRO license, as to the precise grade they are required to achieve on their written examinations to qualify for an NRC license -- 79.5% as specified in the Presiding Officer's Initial Decision, or 80% as specified in NUREG-1021. This is not a matter of mere theoretical interest; as set forth in the Supplemental Affidavit of Brian Hughes, filed March 6, 1997 (at ¶ 7), each year the Staff administers hundreds of written examinations to persons seeking an RO or SRO license. Each of those persons is instructed that a minimum grade of 80% must be achieved in order to pass the examination. *See, e.g.,* NUREG-1021, Appendix E, page 1 of 5 (Motion for Reconsideration, Attachment 7). Further, as stated above, pending the Commission's review of these decisions, the Staff's implementation of the Commission's statutory responsibility to administer operator license requirements on a "uniform" basis may well be disrupted. Accordingly, the public interest favors the issuance of a stay, pending completion of the Commission's consideration of the Staff's petition for review.

CONCLUSION:

For the reasons set forth above, the Staff respectfully submits that the Commission should stay the effectiveness of the Presiding Officer's decisions in this proceeding, pending the completion of its review of those decisions.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sherwin E. Turk". The signature is fluid and cursive, with the first name "Sherwin" and last name "Turk" clearly distinguishable.

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 11th day of April, 1997

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE COMMISSION

'97 APR 11 P4:54

In the Matter of )

RALPH L. TETRICK )

(Denial of Senior Reactor  
Operator License) )

Docket No. 55-20726-82

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REQUEST FOR ISSUANCE OF AN ORDER STAYING THE EFFECTIVENESS OF THE PRESIDING OFFICER'S DECISIONS IN THIS PROCEEDING (LBP-97-2 AND LBP-97-6)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 11th day of April 1997.

Peter B. Bloch, Presiding Officer\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Adjudicatory File\* (2)  
Atomic Safety and Licensing Board  
Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

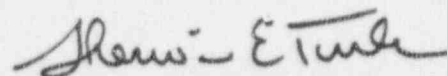
Dr. Peter S. Lam\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Atomic Safety and Licensing Board  
Panel\*  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Mr. Ralph L. Tetrick  
18990 S.W. 270 Street  
Homestead, Florida 33031

Docketing and Service Branch  
Office of the Secretary\* (16)  
Mail Stop: OWFN-16 G15  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Office of Commission Appellate  
Adjudication\*  
Mail Stop: OWFN-16 G15  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555



Sherwin E. Turk  
Counsel for NRC Staff