

November 26, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF RESPONSE TO DAVID GEISEN'S  
MOTION REGARDING STANDARD OF PROOF

INTRODUCTION

On November 24, 2008, Mr. Geisen filed a motion asking, for the first time, that the Board apply a clear and convincing standard of proof in this enforcement proceeding.<sup>1</sup> For the reasons stated below, the Staff opposes Mr. Geisen's motion.

DISCUSSION

Mr Geisen has improperly waited until the eve of the hearing to ask that the standard of proof established by the Commission for enforcement proceedings – preponderance of the evidence – be abandoned for this case. Therefore, the motion should be denied on the basis that it was filed too late. Additionally, Mr. Geisen's motion should be denied because he fails to demonstrate any basis for this Board to depart from the Commission's determination that the preponderance of the evidence standard shall be applied to enforcement hearings.

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<sup>1</sup> "Motion of David C. Geisen Regarding Appropriate Standard of Proof I Evidentiary Hearing," November 24, 2008.

1. Mr. Geisen's Motion is Untimely

Mr. Geisen's motion to alter and raise the Staff's burden of proof was filed well past the ten-day rule established in 10 C.F.R. § 2.323(a).<sup>2</sup> This motion should have been filed as soon as Mr. Geisen was granted a hearing on the enforcement order. Since then, there have been countless opportunities for Mr. Geisen to have raised this issue, yet it was only done with two weeks to go before the beginning of the evidentiary hearing. Notably, Mr. Geisen remained silent on this issue even during discussions on procedural and legal matters such the standard of review for enforcement sanctions and the application of collateral estoppel.<sup>3</sup> Mr. Geisen provides no justification for filing his motion at this late date, and the Board should dismiss it.

Because Mr. Geisen has waited until now to raise this issue, granting the motion would be highly prejudicial to the Staff. The Staff has now nearly completed trial preparation. Many of the decisions the Staff made in preparation for this proceeding were done with the expectation that the preponderance of the evidence standard would apply. If the Staff had expected that a clear and convincing standard would apply, the Staff would likely have come to different conclusions regarding discovery, witnesses, and pre-hearing filings. Shifting to a higher burden of proof for the Staff at this late stage of the hearing would force the Staff to request a postponement in order to allow the Staff to reconsider its trial strategy.

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<sup>2</sup> 10 C.F.R. 2.323(a) calls for motions to be filed "no later than ten (10) days after the occurrence or circumstances from which the motion arises."

<sup>3</sup> See, Transcript, Pre-hearing Conference ITMO David Geisen, Monday, July 21, 2008.

2. Standard of Proof in NRC Enforcement Proceedings is Preponderance of the Evidence

The Commission has clearly stated that under the Administrative Procedure Act (“APA”) it is appropriate to apply the preponderance of the evidence standard in enforcement cases. The Commission addressed this exact issue in the 1991 Statement of Consideration for the Enforcement Policy, stating that the customary standard to be applied in enforcement actions is preponderance of the evidence, even in cases involving individual wrongdoing.<sup>4</sup> Further, in *Advanced Medical Systems, Inc.*, a case

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<sup>4</sup> Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991), in which the Commission stated the following:

Comment: The NRC is using the wrong evidentiary standard of ‘preponderance of the evidence’ for determining whether wrongdoing has occurred such that an order should be issued against an individual. Citing *Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification* . . . the commenter believes that in cases against individuals, where findings can cause serious injuries to reputation, the evidence must be ‘clear and convincing.’

Response: The preponderance of the evidence standard is the one customarily applied in Commission proceedings, including proceedings against individuals. It is the standard of proof proscribed in the legislative history of the Administrative Procedure Act (APA) . . . It is the standard applied in cases brought under the APA, including, e.g., those proceedings where an agency seeks to remove a federal employee for misconduct . . .

In the *Leak Rate Data Falsification* case the Board departed from that standard because of the unique circumstances of that case. In determining that it would use the ‘clear and convincing’ standard for some, but not all issues, the Board stated that it was doing so ‘as a matter of discretion.’ The Board’s decision to apply the ‘clear and convincing’ standard to findings of manipulation and falsification was based not only on the fact that the findings were likely to have strong reputational impacts, but also on the fact that those findings involved the most serious memory difficulties in the proceeding due to the fact that the proceeding was conducted some 7 to 8 years after the incidents giving rise to the inquiry, due to circumstances beyond the Board’s control.

As a result of this comment, the Enforcement Policy, which states that ‘An enforcement action (involving an individual) will normally be taken only when there is little doubt that the individual understood, or should have understood, his or her responsibility \* \* \*’ has been modified. The Policy now uses the term ‘satisfied’ rather than ‘little doubt’. The previous language may have implied an incorrect standard of proof expected before taking action. What is required is that the staff be satisfied that the individual fully understood or should have understood his or her responsibility.)

addressing the standard to be applied to the review of the immediate effectiveness of an order, the Commission again cited the APA in determining the correct standard.<sup>5</sup> The Commission declined to apply the clear and convincing standard to judge the immediate effectiveness of an order, but went on to make the more general comment that:

The only authority cited for [the licensee's] proposition is a Licensing Board decision adopting as a matter of discretion a "clear and convincing" test in a special hearing on falsification of data related to operation of the Three Mile Island Unit 2 reactor. *Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-15, 25 NRC 671, 690-91 (1987), *aff'd* on other grounds, CLI-88-2, 27 NRC 335 (1988). Notwithstanding a licensing board's discretionary application of the standard in a single case, the Commission has never adopted a "clear and convincing" standard as the evidentiary yardstick in its enforcement proceedings, nor are we required to do so under the AEA or the APA. Typically, NRC administrative proceedings have applied a "preponderance of the evidence" standard in reaching the ultimate conclusions after hearing in resolving a proceeding. See, e.g., *Radiation Technology Inc.*, ALAB-567, 10 NRC 533, 536 (1979); *Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons*, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991). The "preponderance" standard is also the one generally applied in proceedings under the APA. See *Steadman v. SEC*, 450 U.S. 91, 101-02 (1981) (preponderance of evidence standard governs APA on-the-record proceedings).<sup>6</sup>

Thus, for enforcement cases, the Commission has expressed its clear desire for the APA to govern,<sup>7</sup> thus applying the preponderance of the evidence standard.<sup>8</sup>

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<sup>5</sup> *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-06, 39 NRC 285, 302 n.22 (1994).

<sup>6</sup> *Id.*

<sup>7</sup> The Commission has also articulated that this standard should also apply to Staff enforcement decisions. 56 Fed. Reg. at 40,673 (where the Commission changed the standard for taking an enforcement action from "little doubt" to "satisfied").

<sup>8</sup> Mr. Geisen cited a third case, *Piping Specialists, Inc. and Forrest L. Roudebush*, LBP-92-25, 36 NRC 156, 186 (1992). Although *PSI* did consider the two *TMI* factors, while (continued. . .)

The application of the preponderance of the evidence standard in agency enforcement proceedings was explicitly approved by the Supreme Court in *Steadman v. Securities and Exchange Commission*, 451 U.S. 91, 101 S.Ct. 999 (1981). In that case, the SEC permanently barred Mr. Steadman from associating with any investment advisor or affiliating with any registered investment company after finding that he had violated securities laws. 451 U.S. at 94 – 102. The Court rejected Mr. Steadman’s argument that the SEC should have been held to a higher standard of proof because of the severity of the sanctions which could be imposed and the circumstantial and inferential nature of the evidence used to prove intent to defraud. *Id.* at 95. After examining the language of the APA, the Court found that the preponderance of the evidence of standard was the one Congress intended to establish. *Id.* Based on the Court’s reasoning, it follows that the standard of proof should not be shifted according the specific sanction proposed for a given enforcement case. Therefore, the Board should apply the standard sanctioned by the Commission – preponderance of the evidence.

3. TMI Is Distinguishable from This Enforcement Hearing

Mr. Geisen bases his motion on TMI,<sup>9</sup> where the Licensing Board applied a clear and convincing standard of proof in an unprecedented, discretionary proceeding held at the direction of the Commission. TMI was not an enforcement hearing but a legislative-

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(. . .continued)

also adding a third factor – public interest in safety – three aspects of that case show that it has no precedential value: (1) it was a licensing board decision that has never been followed; (2) the board declined to apply the clear and convincing standard; and finally (3) it was decided before *Advanced Medical Systems, Inc.* and thus did not benefit from the Commission’s clear guidance in the latter case.

<sup>9</sup> Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC, 671 (1987) (“TMI”).

type hearing subject to special procedures formulated by Commission.<sup>10</sup> The proceeding was held to investigate and “develop the facts surrounding the reactor coolant system (“RCS”) leak rate data falsifications at Three Mile Island, Unit 2,”<sup>11</sup> not to reach any enforcement decision. Thus, the case does not establish a precedent for the standard of proof in enforcement cases.

Further, the reasoning used by the Board in applying the higher standard of proof does not apply to this proceeding. The Board in TMI chose to apply the clear and convincing standard only to findings of manipulation and falsification as a matter of discretion, applying the preponderance of the evidence standard to all other findings. The Board chose to apply the higher standard for those findings because they (1) would likely have strong reputational impacts, and (2) tended to involve matters that posed the greatest memory difficulties. While these factors may superficially appear to be applicable here, the present enforcement proceeding is distinguishable from TMI in many important respects.

First, TMI was a Commission-crafted proceeding in need of a standard of proof where there was no governing precedent. As stated above, the standard of proof in enforcement proceedings has always been preponderance of the evidence and that standard should not be altered by circumstances specific to a particular case. To do so would create uncertainty in the Staff’s enforcement process as well as the hearing process.

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<sup>10</sup> Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, CLI-85-18, 22 NRC 877, 878 (1985).

<sup>11</sup> One of the two dissenters went so far as to call the to-be-conducted *TMI* hearing “some sort of ersatz legislative proceeding.” *Id.* at 884.

Second, as the TMI Board correctly stated, the case did involve the potential for reputational impact; however, those whose reputations could be injured were not afforded a sufficient ability to defend their actions against any potential adverse decisions because the TMI hearing was not an enforcement proceeding. The individuals who were investigated in TMI were not afforded the procedural safeguards afforded in an enforcement hearing conducted under the Commission's Subpart G procedures. In TMI's legislative-style hearing, the TMI Board alone called witnesses; petitioners were only involved to the extent of developing an adequate record; and counsel were prohibited from communicating with those witnesses prior to their appearance at the hearing.<sup>12</sup> No discovery was conducted.<sup>13</sup>

Subpart G procedures call for formal, trial-like adjudicatory proceedings. These procedures allow Mr. Geisen to learn relevant facts through discovery, call witnesses and question them, cross-examine Staff witnesses, and present his case through oral argument and written filings before the Board. In contrast, the legislative-type hearing permitted none of those procedural safeguards. As the Commission recently acknowledged, legislative-types of proceedings are not well suited for a hearing where a presiding official must "resolv[e] disputes of fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, or where the motive or intent of the party or eyewitness is at issue."<sup>14</sup> Accordingly, enforcement hearings are conducted under the Subpart G hearing provisions which provide the greatest procedural safeguards to the individual requesting the hearing.

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<sup>12</sup> *Id.* at 684-856.

<sup>13</sup> *Id.* at 685.

<sup>14</sup> Changes to Adjudicatory Process; Part II, 69 Fed. Reg. 2182, 2192 (Jan. 14, 2004).

Third, although the TMI Board was not empowered to take any enforcement action based on its recommended decision, the Staff was still charged with providing a recommendation to the Commission regarding what actions, if any, it should take based on the decision.<sup>15</sup> That included whether to initiate enforcement or licensing actions with respect to any of the individuals involved.<sup>16</sup> Further, the Commission acknowledged that the decision could also be used “in evaluating whether an individual’s operator license should be renewed.”<sup>17</sup> Although the facts found would not be binding in any subsequent enforcement or licensing proceeding, the Commission-enforced denial of opportunity for appellate review points to a need for a higher standard to provide some measure of procedural safeguard.<sup>18</sup> Again, that need is not present in the instant case.

Finally, the time delay in TMI is not analogous to the one at issue in this case. The TMI Board was tasked with essentially acting as NRC Office of Investigation (“OI”) investigators to determine the ultimate facts of the case seven years after they occurred. Here, OI began its investigation on April 22, 2002, almost immediately following the discovery of the cavity, and concluded that investigation slightly over a year later. Memories were fresh and the investigation did not “depend[] on strained and faded memories.”<sup>19</sup> Thus, the rationale supporting the clear and convincing standard does not apply here.

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<sup>15</sup> Three Mile Island Unit 2 Leak Rate Data Falsification, CLI-85-18, 22 NRC at 883-84.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 884 n.3.

<sup>18</sup> *Id.* at 883.

<sup>19</sup> *TMI*, LBP-87-15, 25 NRC at 690.

CONCLUSION

For the reasons stated above, the Board should deny Mr. Geisen's motion and apply the preponderance of the evidence standard of proof.

Respectfully submitted,

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Lisa B. Clark  
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Dated at Rockville, MD  
this 26<sup>th</sup> day of November, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO DAVID GEISEN'S MOTION REGARDING STANDARD OF PROOF" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 26th day of November, 2008.

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