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General Comment

See attached file.

Attachments

2014 05 14 NEI Comments on Proposed Changes to Deliberate Misconduct and Immediate Effectives Rules (FINAL)

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NUCLEAR ENERGY INSTITUTE

May 12, 2014

Ms. Annette Vietti-Cook
Secretary, U.S. Nuclear Regulatory Commission
Washington, DC 20555–0001
ATTN: Rulemakings and Adjudications Staff

Subject: Comments on Proposed Rule "Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders" (79 Fed. Reg. 8097, dated February 11, 2014; Docket ID NRC-2013-0132)

Dear Ms. Vietti-Cook:

On behalf of the nuclear energy industry, the Nuclear Energy Institute, Inc. (NEI)[1] appreciates the opportunity to comment on the NRC proposed rule revising both the agency's regulations addressing deliberate misconduct by licensees and other persons subject to NRC jurisdiction (the Deliberate Misconduct Rule) and its regulations addressing challenges to immediately effective orders. The proposed change to the Deliberate Misconduct Rule would add "deliberate ignorance" as a new basis on which the NRC can take enforcement action against individuals. The proposed changes to the regulations on immediately effective orders are intended to clarify that the NRC staff bears the burden of persuading the presiding officer that adequate evidence supports the grounds for an order and that immediate effectiveness is warranted. The proposed rule would also clarify that the presiding officer has authority to order live testimony to assist in its decision on a motion to set aside an order's immediate effectiveness. Our detailed comments on these proposed changes are set forth in the attachment to this letter.

As a preliminary matter, the NRC and the industry start from the same basic philosophy—those who engage in deliberate misconduct in "licensed activities," in the broadest sense of the phrase, have no place in the nuclear industry. The current Deliberate Misconduct Rule issued

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

in 1991 is well-founded, appropriately focused, and adequately protective. The Commission carefully formulated the current rule to apply "only in a very few significant or egregious cases," recognizing "that enforcement actions against individuals are significant actions that need to be closely controlled and judiciously applied." 56 Fed. Reg. 40,664, 40,675-76 (Aug. 15, 1991). As a result, the Commission specifically carved out knowing and deliberate violations as the only conduct subject to the rule, and made clear that the rule did not apply to violations involving only "careless disregard." *Id.* at 40,677, 40,679.

The current proposal to expand the Deliberate Misconduct Rule would undermine the Commission's 1991 decision to apply the rule "only in a very few significant or egregious cases." Under the subjective and vague deliberate ignorance standard proposed by the agency, the NRC staff could pursue cases more appropriately treated as matters of careless disregard or even negligence. In addition, the inherent subjectivity associated with the concept of deliberate ignorance would make the proposed rule difficult to apply and would likely trigger additional litigation.

Given the soundness of the current Deliberate Misconduct Rule, the proposed rule offers a solution without a problem. Commission precedent, public policy, and practical considerations all counsel against incorporating deliberate ignorance into NRC regulations. Moreover, adoption of this proposal would be premature when the U.S. Courts of Appeals are split on the appropriateness of the deliberate ignorance standard. Promulgating this standard could also discourage participation in NRC licensed activities and employment in the nuclear industry. For all these reasons, adopting the proposed rule would be inconsistent with the NRC's principles of good regulation and efforts to address the cumulative effects of regulations.

The industry's position on the proposed deliberate ignorance standard—as with the Commission's position in the 1991 rulemaking—does not condone egregious conduct. Rather, it is about applying sound policy and legal principles to appropriately focus the agency's enforcement resources. On balance, the risks associated with the proposed deliberate ignorance standard far outweigh the speculative assumption that this theory would apply in a particular case. Accordingly, because the proposed rule offers no clear legal, policy, or safety benefits to balance these shortcomings, we urge the NRC to retain the Deliberate Misconduct Rule in its current form.

With regard to the regulations addressing immediately effective orders, the proposed changes to the process for challenging such orders are a good start. The proposed rule appropriately addresses an ambiguity by indicating that while the licensee or other person to whom the Commission has issued the order bears the burden of going forward by filing a motion challenging immediate effectiveness, the NRC staff ultimately bears the burden of persuading the presiding officer that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted.

Notwithstanding this good start, the proposed rule does not go far enough to improve the immediately effective order process. In this regard, the Commission should make additional changes that reflect the significant impact that immediately effective orders can have on both NRC licensees and individuals. To be sure, the NRC must have authority to take immediately effective action to address imminent threats to public health and safety. But such orders should not be the norm. To reflect the seriousness with which immediately effective orders should be viewed and further improve the process, the Commission should require that all immediately effective orders contain more concrete detail—similar to the requirements in 10 CFR § 2.309(f)(2)—affirmatively demonstrating the grounds for the order and the need for immediate effectiveness. In addition to requiring greater detail, the Commission should clarify that immediately effective orders should be rare and should be narrowly tailored to address an imminent risk to public health and safety. The Commission also should ensure that the rule respects an individual's right against self-incrimination by clarifying that a person need not testify in an immediate effectiveness hearing and that the presiding officer should not draw any negative inference from this decision.

Although the Commission should continue to clarify the immediately effective order process, it should not remove procedural steps that help ensure a fair process. For example, the Commission should continue to require that the NRC staff file a written answer to a motion challenging an order's immediate effectiveness even if the presiding officer plans to take live testimony. The Commission also should not exempt the NRC staff from the need to file a motion for a stay pending Commission review if the presiding officer vacates an immediately effective order. These changes would unfairly "stack the deck" in the NRC staff's favor and should not be included in the final rule.

Thank you in advance for your consideration of these comments. If you have any questions or require additional information, please contact me (202-739-8140; ecg@nei.org) or Jonathan Rund (202-739-8144; jmr@nei.org).

Sincerely,

Ellen C. Ginsberg

Ellen C. Ginsberg

Attachment

cc: Mr. Andrew Pessin, OGC, NRC

NUCLEAR ENERGY INSTITUTE COMMENTS ON NRC PROPOSED RULE AMENDING DELIBERATE MISCONDUCT RULE AND HEARINGS ON CHALLENGES TO IMMEDIATE EFFECTIVENESS OF ORDERS (79 Fed. Reg. 8097; Docket ID NRC-2013-0132)

I. Overview of Comments

The Nuclear Energy Institute, Inc. (NEI)[1] appreciates the opportunity to comment on the U.S. Nuclear Regulatory Commission's (NRC or Commission) notice of proposed rulemaking to amend the regulations addressing (1) deliberate misconduct by licensees and other persons subject to NRC jurisdiction (the Deliberate Misconduct Rule), and (2) challenges to immediately effective orders. Proposed Rule, Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders, 79 Fed. Reg. 8097 (Feb. 11, 2014). The proposed change to the Deliberate Misconduct Rule[2] would "incorporate the concept of 'deliberate ignorance' as an additional basis on which to take enforcement action against persons who violate any of the NRC's Deliberate Misconduct Rule provisions." *Id.* at 8097. The proposed changes to the regulations addressing immediately effective orders are intended to "clarify that the NRC staff has the burden of persuasion in showing that adequate evidence supports the grounds for the order and that immediate effectiveness is warranted," and "clarify the authority of the NRC's presiding officer to order live testimony in resolving these challenges." *Id.*

As discussed in detail below, the NRC should not adopt the deliberate ignorance standard. The proposal to expand the Deliberate Misconduct Rule would undermine the Commission's 1991 decision to judiciously apply the rule in only the most serious cases. The inherent subjectivity associated with deliberate ignorance would also make this standard difficult to apply in practice. Moreover, the only justification offered for adopting this new standard is the NRC staff's inability to invoke collateral estoppel in the *Geisen* proceeding. However, the proposed rule incorrectly assumes that *Geisen* was a deliberate ignorance case. Although *Geisen* was actually not a deliberate ignorance case, even if it were, one case in the almost 25 years since the NRC issued the Deliberate Misconduct Rule does not justify expanding the rule.

With regard to the regulations addressing immediately effective orders, the proposed changes to the process for challenging such orders are a good start. But the proposed rule does not go

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[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

[2] The NRC Deliberate Misconduct Rule is codified in 10 CFR Parts 30, 40, 50, 52, 60, 63, 70, 71, 72, 76 and 110.

far enough to improve the process. In this regard, the Commission should make additional revisions that reflect the significant impact that immediately effective orders have on licensees and individuals. Although the Commission should continue to clarify the immediately effective order process, it should not remove procedural steps that help ensure a fair process.

II. The Commission Should Not Incorporate "Deliberate Ignorance" into the Deliberate Misconduct Rule

The proposed rule would amend the Deliberate Misconduct Rule to include "deliberate ignorance"[3] as a new basis on which the NRC can take enforcement against individuals. 79 Fed. Reg. at 8098, 8101. To prove deliberate ignorance under this new standard, the NRC would need to show that a person (1) subjectively believes there is a high probability that a fact exists and (2) takes deliberate actions to avoid learning of that fact. According to the proposed rule, this change is needed because the NRC identified "deficiencies" in the Deliberate Misconduct Rule in the parallel U.S. Department of Justice (DOJ) criminal prosecution and NRC enforcement proceeding involving Mr. David Geisen, a former employee at the Davis-Besse Nuclear Power Station. *Id.* at 8098. In his criminal trial, a jury convicted Mr. Geisen of submitting false statements to the NRC after the jury was instructed that it could find him guilty if he "either knew that he was submitting false statements or if he acted with deliberate ignorance of their falsity." *Id.* Because NRC's Deliberate Misconduct Rule does not cover "deliberate ignorance," the NRC staff was unable to take advantage of collateral estoppel in the NRC enforcement proceeding before an Atomic Safety and Licensing Board. After holding an evidentiary hearing, the Licensing Board found that the NRC staff had not carried its burden to demonstrate that Mr. Geisen committed the knowing misrepresentation alleged in the enforcement order. *David Geisen*, LBP-09-24, 70 NRC 676, 794 (2009). The Commission upheld this decision on appeal. *David Geisen*, CLI-10-23, 72 NRC 210 (2010).

As discussed in more detail below, the Commission should not incorporate the proposed deliberate ignorance standard into NRC regulations.

A. The Proposed Rule Fails to Provide a Compelling Justification for Incorporating "Deliberate Ignorance" into NRC's Regulations

The proposed rule offers no compelling reason for incorporating "deliberate ignorance" into NRC's regulations. When the Commission adopted the Deliberate Misconduct Rule, it explicitly recognized that the rule and enforcement against individuals should be judiciously applied and

[3] In federal court, "deliberate ignorance" is sometimes called "willful blindness," "conscious avoidance," or more colloquially, the "ostrich" jury instruction. *United States v. Alston-Graves*, 435 F.3d 331, 338 (D.C. Cir. 2006). The deliberate ignorance concept is most commonly used in drug possession cases where the defendant purports not to know, for example, what is in a package that someone asks them to deliver in secretive fashion. *See, e.g.*, *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc) (defendant found driving car with strong scent used to mask marijuana odor).

limited to egregious cases.[4] As a result, the Commission specifically carved out knowing and deliberate violations as the only conduct subject to the rule, and made clear that the rule did not apply to violations involving only "careless disregard" or negligence.[5] The NRC now proposes to expand the type of conduct that would fall under the rule even though it has not provided a basis to conclude that there is a significant pattern or likelihood of the type of conduct postulated, or that the Commission's original basis for excluding such conduct from the rule is no longer valid. To the contrary, the history of NRC enforcement matters suggests that there are likely to be few—if any—cases that fall into the very limited fact pattern under which the deliberate ignorance theory might apply. Thus, the proposed rule appears to offer a solution to a non-existent problem.

The proposed rule cites only one instance where the deliberate ignorance rule might have applied—the *Geisen* matter. But *Geisen* was not a deliberate ignorance case. The NRC's *Geisen* order alleged *actual knowledge* of the falsity of statements submitted to the NRC, not that Mr. Geisen took deliberate action to remain ignorant of relevant facts.[6] The record in the *Geisen* proceeding also shows that the NRC staff pursued this actual knowledge theory based on the facts of the case and not based on the Deliberate Misconduct Rule's limits. For example, the NRC staff repeatedly argued in *Geisen* that "the facts point to actual knowledge" rather than deliberate ignorance.[7] The Licensing Board agreed with this assessment and similarly made clear that no evidence put before it fit a deliberate ignorance fact pattern. *Geisen*, LBP-09-24, 70 NRC at 719. As the Board explained, *Geisen* "is not a case in which an alleged drug runner disclaims knowledge of what is in the package he is delivering, and a

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[4] Final Rule, Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,675-76 (Aug. 15, 1991) (explaining that "the Commission expects to apply individual sanctions only in a very few significant or egregious cases," that the Deliberate Misconduct Rule would apply only in "relatively rare instances," and "that enforcement actions against individuals are significant actions that need to be closely controlled and judiciously applied").

[5] 56 Fed. Reg. at 40,677, 40,679. *See also id.* at 40,675 ("As the rule was originally proposed, it would be utilized only in those cases involving willfullness [sic], defined by Commission policy as including deliberate actions and those violations resulting from careless disregard. In light of the comments received and further consideration of the desirable scope of the rule, the Commission has modified the rule to apply only to any person who engages in deliberate misconduct, or deliberately submits incomplete or inaccurate information, as provided in the rule."). "Careless disregard" is sometimes referred to as "carelessness," "recklessness," or "callous indifference."

[6] *See* David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2571, 2573-74 (Jan. 17, 2006).

[7] Oral Argument Re David Geisen, Tr. at 2397 (Mar. 3, 2009) (ML090690301). *See also id.* at 2394 (NRC staff counsel stating, "we think that it is actual knowledge and we think that the evidence pointing to actual knowledge is much stronger than any evidence that may in any way point to deliberate ignorance."); NRC Staff Motion for Collateral Estoppel at 23 (Nov. 17, 2008) (ML083240028) ("Regardless of the fact that acting with deliberate ignorance falls outside the Deliberate Misconduct Rule, the evidence reasonably shows that Mr. Geisen was convicted based upon his actual knowledge, as opposed to any deliberate ignorance on his part.").

finding of a 'high probability' that he knew would fit the fact pattern, while any disclaimer would be inherently lacking in credibility. Instead, the entire basis of the defense here was that, upon close analysis, it can be established that Mr. Geisen 'actually believe[d] that' the information he was submitting was true." *Id.* at 721 n.90. Thus, an expanded Deliberate Misconduct Rule would not have applied in the *Geisen* proceeding and the proposed rule's reliance on *Geisen* does not support expanding the rule. In other words, the proposed rule's assertion that "deficiencies in the Deliberate Misconduct Rule became apparent" in the parallel NRC and DOJ *Geisen* proceedings is incorrect. 79 Fed. Reg. at 8098.

Moreover, in *Geisen*, the deliberate ignorance theory was only relevant to whether the Licensing Board would apply collateral estoppel based on a criminal conviction after the jury returned a general verdict that did not distinguish between the actual knowledge and deliberate ignorance jury instructions proffered in the criminal case. As such, Mr. Geisen did not "escape" an NRC enforcement order because the Deliberate Misconduct Rule was too narrow. The order was not upheld because the Licensing Board found that the NRC staff had not carried its burden of proof to demonstrate that Mr. Geisen committed the knowing misrepresentation alleged in the enforcement order. The NRC staff was not prejudiced by not being able to take advantage of collateral estoppel. Rather, this simply meant that when Mr. Geisen challenged the enforcement order, the NRC staff was obligated to make its deliberate misconduct case before the Licensing Board. The Commission should not view this scenario as some unfair or additional burden imposed upon the NRC staff, but rather as the NRC staff's expected responsibility when issuing an enforcement order. Certainly, the NRC staff should not be able to dispense with this responsibility solely to ensure NRC and DOJ proceedings "are carried out in a consistent manner." 79 Fed. Reg. at 8099.

Although *Geisen* was not a deliberate ignorance case, even if it were, one case in the almost 25 years since the NRC issued the Deliberate Misconduct Rule does not justify expanding the rule. In fact, the absence of such cases validates the Commission's 1991 assessment when issuing the Deliberate Misconduct Rule that "the range of actions that would subject an individual to action by the Commission *does not differ significantly* from the range of actions that might subject the individual to criminal prosecution." 56 Fed. Reg. at 40,675 (emphasis added). In other words, citing a single case (and an arguable one at that) where the NRC *might* have applied a deliberate ignorance theory does not undermine the current rule.

Furthermore, public policy counsels against adopting this aspect of the proposed rule. The only justification the NRC proffers for adopting the deliberate ignorance standard is the NRC staff's inability to invoke collateral estoppel as a matter of legal expedience in *Geisen*. In that case, the NRC staff unsuccessfully attempted to prove actual knowledge that statements made to the NRC were false and ultimately lost the case before an independent Licensing Board. It is poor policy to retrofit the Deliberate Misconduct Rule merely to try to square it with the circumstances of a unique, isolated, and long-concluded proceeding. No policy concern exists because the jury in the criminal action may have concluded that Mr. Geisen had actual knowledge that statements made to the NRC were false while the Board concluded otherwise.

All that means is that, as the case was presented to different triers-of-fact, the criminal prosecutors made their case and the NRC staff did not. At most, the different results reached in the criminal and enforcement proceedings created an appearance problem. But when there are valid explanations for different results in different proceedings, the rare instances of divergent results are easy to justify and do not require a rule change. The Board and Commission decisions in *Geisen* provided the requisite explanation for the different results. Any lingering concern about "optics" does not outweigh the countervailing concern associated with the perception that the NRC needs to change its rules when the staff does not prevail.

The agency's proposal to add the deliberate ignorance standard to NRC regulations is also unsound as a practical matter. The facts necessary to prove a deliberate ignorance case are often tantamount to proof of actual knowledge. Cases presenting evidence of deliberate ignorance will usually contain circumstantial evidence allowing an inference of actual knowledge, which makes the need for this rule exceedingly rare.[8] Nor is the deliberate ignorance standard needed for its potential deterrent impact, given the existing threat of criminal sanctions and the NRC's routine referral of all substantiated willful wrongdoing to DOJ. NRC's policy of automatic DOJ referral colors NRC investigations and enforcement, and makes this additional deterrent unnecessary. In the rare instance when an individual has engaged in improper conduct beyond the reach of the current Deliberate Misconduct Rule, the agency can still issue sanctions to the company regarding the individual and the company can then take action to address NRC's concern.[9]

In summary, one case, at most, in almost 25 years is an exceedingly weak basis to modify the current rule, particularly when that one result may be explained by something other than the Deliberate Misconduct Rule's scope. The proposed rule offers no viable rationale that supports expanding the rule to incorporate the deliberate ignorance concept. To the contrary, Commission precedent, public policy, and practical considerations all counsel against incorporating deliberate ignorance into NRC regulations.

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[8] *See* Robin Charlow, Willful Ignorance and Criminal Culpability, 70 Tex. L. Rev. 1351, 1360 (1991) ("A case that contains evidence of willful ignorance will usually also contain circumstantial evidence that a reasonable person would have known. From such evidence the jury may infer that the particular defendant knew. Similarly, proof that a defendant appeared deliberately to avoid knowledge could be circumstantial evidence from which to infer that the defendant really did know but pretended not to know.").

[9] Although the NRC previously found that it may be necessary to issue orders to individuals to address situations where an individual seeks employment with a different company (56 Fed. Reg. at 40,672), the widespread electronic availability of enforcement actions and other technological advancements make the issuance of orders to licensees a much more viable option than it was in 1991.

B. It Would Be Premature to Adopt the Proposed Rule Because Judicial Precedent in this Area Is Unsettled

Even if the NRC were inclined to incorporate "deliberate ignorance" into the Deliberate Misconduct Rule, it would be premature to do so at this time. As the proposed rule aptly recognizes, the U.S. Court of Appeals for the D.C. Circuit, the circuit with a special expertise in federal administrative law,[10] has not embraced the theory. 79 Fed. Reg. at 8102. Expressing concern about the trend to equate "deliberate ignorance" with "knowledge," the D.C. Circuit has stated that "[i]t makes obvious sense to say that a person cannot act 'knowingly' if he does not know what is going on. To add that such a person nevertheless acts 'knowingly' if she intentionally does not know what is going on is something else again." *United States v. Alston-Graves*, 435 F.3d 331, 337 (D.C. Cir. 2006). The D.C. Circuit's views on the deliberate ignorance standard decisions should carry particular weight on this issue as it is the only court that always has jurisdiction and venue to consider challenges to an NRC enforcement order. 28 U.S.C. §§ 2342(4), 2343.

Moreover, the Supreme Court case the NRC cites in support of the proposed rule is not directly applicable. In *Global-Tech Appliances, Inc. v. SEB, S.A.*, 131 S. Ct. 2060 (2011), the Supreme Court discussed the current trend of applying deliberate ignorance in criminal cases. But *Global-Tech Appliances* was a patent case, not a criminal case. *See id.* at 2063. As such, the Court was not briefed on and did not decide whether to endorse the deliberate ignorance standard for all criminal cases requiring the government to prove knowledge. *See id.* at 2073 (Kennedy, J., dissenting) (noting that *Global-Tech Appliances* is a civil case where the Court "has received no briefing or argument from the criminal defense bar, which might have provided important counsel on this difficult issue" of whether to endorse the deliberate ignorance standard). Moreover, "although most Courts of Appeals have embraced willful blindness, counting courts in a circuit split is not [the Supreme] Court's usual method for deciding important questions of law." *Id.*

Given that *Global-Tech Appliances* was not a criminal case and that the appellate courts have not universally accepted deliberate ignorance as equivalent to actual knowledge, it would be premature for the NRC to codify deliberate ignorance in its regulations at this time. Because the deliberate ignorance theory would rarely, if ever, be the only basis by which the NRC could take enforcement action, any delay experienced by waiting for the federal courts to reach alignment on this risk-prone theory would not harm the NRC's enforcement regime.

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[10] *See* Richard J. Pierce, Jr., The Special Contributions of the D.C. Circuit to Administrative Law, 90 Geo. L.J. 779, 779-86 (2002) (discussing the D.C. Circuit's important role in administrative law decision-making).

C. The Proposed "Deliberate Ignorance" Rule Would Increase the Risk of Violations Based on Carelessness or Negligence, Would Be Difficult to Apply, and Could Result in Additional Litigation

A Commission decision to promulgate the proposed rule would conflict with the Commission's 1991 decision to exclude from the Deliberate Misconduct Rule violations based on careless disregard and negligence. In *United States v. Alston-Graves*, 435 F.3d at 340-42, the D.C. Circuit emphasized that the deliberate ignorance standard confuses knowledge with carelessness and negligence. As the court explained:

> One problem with the various formulations of this instruction is that the jury might convict a defendant for acting recklessly—a problem the drafters of the Model Penal Code recognized—or even for acting negligently. Negligence and recklessness are not the same as intentional and knowing conduct. We have held in a civil context that a defendant acts with extreme recklessness if he "encountered 'red flags,' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct." Yet willful blindness instructions have been justified when "record evidence reveals 'flags' of suspicion that, uninvestigated, suggest willful blindness."

Id. at 340 (citations and footnotes omitted). Although the proposed rule does not address this point, the D.C. Circuit is not alone in its concern about carelessness or negligence being mistaken as (or conflated with) deliberate ignorance. Even those circuits that recognize the deliberate ignorance theory stress the substantial risk of confusion and resulting criminalization of ordinary negligence. For example, in the appeal of Mr. Geisen's criminal conviction, the U.S. Court of Appeals for the Sixth Circuit emphasized that it has "cautioned that [the deliberate ignorance] instruction should be used sparingly because of the heightened risk of a conviction based on mere negligence, carelessness, or ignorance."[11] In addition to the courts, legal commentators agree that deliberate ignorance confuses knowledge with carelessness or negligence.[12]

These court and commentator opinions demonstrate that adoption of the proposed deliberate ignorance standard would blur any meaningful distinction between conduct subject to the Deliberate Misconduct Rule and conduct that is not—such as careless disregard and ordinary

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[11] *United States v. Geisen*, 612 F.3d 471, 486 (6th Cir. 2010). *See also Alston-Graves*, 435 F.3d at 341 & n.10-11 (citing cases from other U.S. Courts of Appeals stating that the deliberate ignorance instruction is "rarely appropriate," or only proper in "rare circumstances" or "rare cases"; others are "wary" of giving the instruction or advise it should only be given "sparingly").

[12] *See, e.g.*, Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. Crim. L. & Criminology 191, 227-34 (1990) (arguing that deliberate ignorance is really careless disregard in disguise and also presents the risk of convictions based on negligence).

negligence. Confusion over the deliberate ignorance standard's application could result in violations based on evidence and inferences similar to that which would be relied upon in cases of careless disregard or negligence. In other words, the deliberate ignorance standard has the potential to be applied in an overly-broad fashion that captures less significant violations based on careless disregard or negligence (*e.g.*, failing to follow-up or recognize the significance of "red flags"). This is contrary to the existing rule and the Commission's 1991 decision to exclude from the Deliberate Misconduct Rule violations based on carelessness and negligence. That decision was well-founded and the proposed rule provides no reason to depart from this practice.

Moreover, expanding the Deliberate Misconduct Rule will create problems by applying a new standard that requires the agency to confront issues that are not well settled in the criminal law. The complex, legalistic deliberate ignorance standard will be difficult to apply and will promote unnecessary and wasteful litigation without a counterbalancing benefit to the public. As a practical matter, the subjective intent standard will be difficult to apply in NRC investigations, which would make it readily subject to dispute and litigation. For example, the domain of careless disregard ("reckless disregard or callous . . . indifference for one's responsibilities") and deliberate ignorance ("deliberate action to remain ignorant of whether the act . . . causes a violation") both encompass an individual's mental abdication of personal responsibility for safety. The difference is subtle, if not merely theoretical. As a result, the change will likely create confusion among NRC investigators, who will need extensive and sophisticated legal analysis to apply the rule in actual cases. The risks associated with a subjective and vague standard clearly outweigh any benefit involved with attempting to ensure that the NRC's enforcement authority is identical to DOJ's prosecutorial authority.

D. The Proposed "Deliberate Ignorance" Rule Would Discourage Participation in Licensed Activities and Employment in the Nuclear Industry

An additional concern regarding the proposed rule is that the heightened risk of violations based on mere negligence or carelessness could have a chilling effect on the willingness of individuals to participate in licensed activities, and thus serve as a disincentive to employment in the nuclear industry. As discussed above, the Deliberate Misconduct Rule establishes a high threshold for what constitutes "deliberate misconduct" and has never been applied to acts resulting from negligence or careless disregard, which the Commission understood included "a situation in which an individual blinds himself or herself to the realities of whether a violation has occurred or will occur." Proposed Rule, Willful Misconduct by Unlicensed Persons, 55 Fed. Reg. 12,374, 12,375 (Apr. 3, 1990). In that rulemaking, the Commission highlighted its "concern" that a broad rule would create a "perception" that might serve as a disincentive to employment in the nuclear industry. 56 Fed. Reg. at 40,675. In response to this and other concerns, the Commission narrowed the final rule so that it did not cover violations resulting from careless disregard. Consistent with the Commission's prior concern about disincentivizing

participation in the nuclear industry, the NRC should not adopt the deliberate ignorance standard, particularly when there is no need to do so.[13]

E. The NRC Lacks Guidance on the "Deliberate Ignorance" Standard

Even with good guidance—of which there is none[14]—adoption of the proposed "deliberate ignorance" standard would still capture cases more appropriately treated as careless disregard or negligence. While not sufficient to solve this and the other problems identified above, clear guidance (including fact-pattern examples) would help to minimize the extent to which the rule is misapplied. To be clear, NEI does not support broadening the Deliberate Misconduct Rule by adding the deliberate ignorance concept. Should the Commission decide to codify this standard, however, it should not make the final rule effective until it first publishes draft guidance for public comment and then finalizes that guidance. Such guidance (as well as the statement of considerations for the final rule) should emphasize that the deliberate ignorance theory should only be applied in exceedingly rare circumstances. Because the deliberate ignorance concept is subject to confusion and abuse, the rule should require that the Director of the Office of Enforcement formally certify to the Commission that he or she has reviewed its application prior to issuing any violation relying on it. The Commission should also provide specific examples of what would and what would not be included within the deliberate ignorance concept, to help minimize confusion on the part of the NRC staff and the regulated community. For example, in the context of the heavily regulated nuclear industry, the deliberate ignorance standard may present substantial confusion when an individual fails to ask a question that, in hindsight, an investigator feels the subject "should have" asked. Such a case would represent a significant lessening of NRC's deliberate misconduct standard to include careless disregard or negligence, which the Commission previously decided it would not apply to unlicensed individuals. Thus, the Commission should make clear that the

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[13] This proposed change could also impact numerous submittals to the NRC and result in an unintended cumulative effect on licensees and vendors by imposing significant burdens on company officers to verify information prior to submittal to the NRC. Under the proposed rule, the NRC could attempt to hold officers personally liable for all material errors that could conceivably have been prevented by additional verification. To avoid such liability, officers may begin documenting why they believe that all unverified information is in compliance. This unintended consequence of the proposed rule could cause the scope of information in internal verification packages associated with submittals to the NRC to grow exponentially, with no corresponding safety improvement.

[14] The absence of draft guidance issued in parallel with the proposed rule is puzzling and contrary to Commission policy. Memorandum from Annette L. Vietti-Cook, Secretary, to R. W. Borchardt, Executive Director for Operations, Staff Requirements – SECY-11-0032 – Consideration of the Cumulative Effects of Regulation in the Rulemaking Process at 1 (Oct. 11, 2011) ("The staff should publish draft guidance with proposed rules and publish final guidance with the final rule. The EDO should promptly inform the Commission of any instances, and the associated reasons, where a proposed rule package will be provided to the Commission without having completed the draft guidance. Exceptions to this approach should be very limited and approved by the Commission."). The proposed rule contains no reference to the NRC staff justifying or the Commission approving an exception to this policy for this proposed rule.

deliberate ignorance standard, if adopted, would only be appropriate in rare instances where there is direct evidence that a person consciously avoided acquiring knowledge. *See Alston-Graves*, 435 F.3d at 341-42.

If the Commission proceeds with this rulemaking—which it should not—it should also provide examples of circumstances that are categorically excluded (*i.e.*, safe harbors) from treatment as active avoidance, potentially including unexpected travel, cancellation of meetings by others, and not applying unusual follow-up. Even with guidance, the deliberate ignorance standard presents a significant risk that the NRC Office of Investigation (OI) will often apply hindsight to say, "if only he had investigated in response to red flags, he would have known" or, "an experienced nuclear worker should have known," and conclude that the failure to act was an affirmative dereliction of duty. The Commission should make clear that the deliberate ignorance standard would not be met where there is only circumstantial evidence that an individual is highly involved or experienced with an issue or a facility's operation, and there is merely deliberate indifference to a known risk and no active effort to avoid relevant knowledge. *See Global-Tech Appliances*, 131 S. Ct. at 2071.

III. The NRC's Process for Imposing and Challenging an Immediately Effective Order Should Be Reformed

The proposed rule would amend 10 CFR § 2.202, "Orders," to clarify that in a challenge to an order's immediate effectiveness: (1) the licensee or other person to whom the Commission has issued the order bears the burden of going forward with evidence that the order is not based on adequate evidence; and (2) the NRC staff bears the burden of persuading the presiding officer that adequate evidence supports the grounds for an immediately effective order and that immediate effectiveness is warranted. 79 Fed. Reg. at 8098, 8101. The proposed rule would also clarify that the presiding officer has authority to order live testimony to assist in its decision on a motion to set aside an order's immediate effectiveness. *Id.*

The proposed rule notes that the *Geisen* proceeding highlighted ambiguities about whether the NRC staff has the burden of persuasion if there is a challenge to an order's immediate effectiveness. 79 Fed. Fed. at 8101. Proposed 10 CFR § 2.202(c)(2)(vi) appropriately addresses this ambiguity by indicating that while the licensee or other person to whom the Commission has issued the order bears the burden of going forward by filing a motion challenging immediate effectiveness, the NRC staff ultimately bears the burden of persuading the presiding officer that sufficient evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted. However, as discussed in more detail below, the proposed rule does not go far enough in addressing other deficiencies in the process for issuing and challenging immediately effective orders.

A. Immediately Effective Orders Should Be Rare, Contain Greater Detail, and Be Narrowly Tailored to Address an Imminent Risk to Public Health and Safety

The NRC Licensing Board majority in the *Geisen* case highlighted the need to clarify the appropriate burdens in challenges to immediately effective orders. *See, e.g.*, *Geisen*, LBP-09-24, 70 NRC at 779 (pointing out "severe limitations that the text of the regulation appears to place on the scope of that hearing" challenging an immediately order). The Licensing Board majority, however, also emphasized that the NRC staff appears to "ritualistically" issue immediately effective enforcement orders by reciting "the 'need to protect the health and safety of the public' without even attempting to explain in *concrete terms* how that important value might come in play" in the specific case at hand. *Id.* at 780 (emphasis added). The Licensing Board posed the following question:

> In licensing cases, prospective intervenors are called upon to spell out their views in great detail just to get a contention heard. Should not the Staff have to explain, in advance and in some detail, why a nuclear industry worker's career must be destroyed before he is given a chance to be heard before an independent adjudicator?

Id. Judge Farrar provided an additional statement highlighting the need for additional changes to the regulation governing immediately effective orders, particularly in cases where the NRC immediately bans an individual from the industry.[15] As Judge Farrar noted, these cases can involve "career death sentences" and have "extraordinary negative impacts" on an individual's "financial status, career development, and family life." *Id.* at 796 (Farrar, J., additional views). Given these significant impacts, Judge Farrar offered three observations that the Commission should consider as it seeks to improve the process for resolving challenges to immediately effective orders:

(1) While the NRC must have the authority to immediately ban an individual who "creates the potential for an imminent threat to the public health and safety," immediately effective orders should not be viewed "as a *routine means to impose on the accused punishment for past action*, but as an *extraordinary measure to protect the public against potentially dangerous future wrongdoing*. As such, it cannot be viewed as the norm, but rather as an exception that is allowed—and tolerated—only when needed." *Id.* at 798.

(2) An order must provide adequate and plausible reasons for its immediate effectiveness, and is inadequate if it "fails to provide, with any specificity, how or why" the allegations warrant an individual's "immediate dismissal" from their position in the industry. *Id.* at

[15] Judge Trikouros did not disagree with Judge Farrar's additional statement but thought that, given its "lack of authority now to remedy the situation," the Licensing Board "should rest with briefly calling the matter to the Commission's attention." *Id.* at 780.

803-04. In other words, an order is inadequate if all it does is "merely assert[], without explaining" why there is an imminent public health and safety concern. *Id.*

(3) An immediately effective order must demonstrate that it is narrowly tailored to protect public health and safety (*i.e.*, it must demonstrate that there are not lesser measures short of a "career death sentence" where the individual might continue working in the industry). *Id.* at 805-07.

To address these concerns, cure the deficiency in the current regulations, and improve the process for challenging immediately effective orders, the Commission should require that all immediately effective orders contain more concrete detail—similar to the requirements in 10 CFR § 2.309(f)(2)—affirmatively demonstrating the grounds for an immediately effective order and showing that immediate effectiveness is necessary. This would better inform the licensee or other person to whom the Commission has issued the order of the basis for the order and whether a challenge to the order is appropriate. With more detail, the recipient of the order would be better positioned to evaluate, for example, whether the order's immediately effective requirements are narrowly tailored to remove a credible risk of significant harm to public health and safety or common defense and security.

The requirement for more detail in an immediately effective order should make clear that in cases where the NRC staff elects to impose immediate effectiveness, it must also release to the individual or licensee the OI report and all evidence upon which the decision was based (including all evidence supporting the theory of risk to public health and safety or common defense and security). The current process is unfair because it requires an individual or licensee to challenge the staff's basis to which they have not been afforded any opportunity to review. As a result, the existing process leaves the individual or licensee no alternative other than to attack the investigation's adequacy—essentially questioning the OI investigator's competence.

In requiring that an enforcement order contain more detail, however, the Commission should also confirm that the requirement in 10 CFR § 2.202(c)(2)(i) that a motion "state with particularity the reasons why the order is not based on adequate evidence" does not mean that a motion should be measured against the contention requirements. In other words, the final rule should make clear that motions to challenge immediate effectiveness are not subject to the requirements in 10 CFR § 2.309(f)(2) and may appropriately lack "particularity," especially when the enforcement order omits relevant information or sufficient detail.

Aside from requiring more detail in an immediately effective order, the Commission should further define "adequate evidence" for immediate effectiveness challenge purposes. At a minimum, "adequate evidence" should require a showing of "substantial evidence," which is the standard that a federal court reviewing an order's immediately effectiveness would apply.[16]

[16] *See* 5 U.S.C. § 706(2)(E); *see also Capital Produce Co. v. United States*, 930 F.2d 1077 (4th Cir. 1991) (holding that a federal agency was required to give notice and opportunity to achieve

However, the Commission should raise that burden to require a showing of "clear and convincing evidence," especially in cases where an immediately effective order takes extraordinary measures that significantly impact careers and livelihoods.

The Commission has previously suggested that the adequate evidence standard applied to a motion challenging an order's immediate effectiveness requires something akin to a showing of "probable cause necessary for an arrest, a search warrant, or a preliminary hearing," and that such a showing is less than the preponderance of the evidence standard. Final Rule, Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,196 (May 12, 1992). Probable cause is generally the standard in these criminal contexts. However, in criminal cases imposing pretrial detention because the accused is a "danger to the community," the government must, among other things, prove in an adversarial hearing by clear and convincing evidence that no release conditions can reasonably assure the community's safety. 18 U.S.C. § 3142(c), (f). Similarly, in the NRC context, the clear and convincing standard is appropriate when significant liberty and property interests are at stake, such as when an immediately effective order threatens an individual's livelihood or a company's license to conduct business.[17] In such cases, the legal standard should be akin to emergency injunctive relief and should be used only in those very rare circumstances where the evidence is both clear and compelling, and where not acting immediately risks significant harm to the health and safety of the public or the common defense and security. Removing an individual's livelihood or a company's license to conduct business before judgment is a significant government action and should not be taken lightly. Thus, the Commission should revisit the current standards for issuing and challenging immediately effective orders beyond the minor proposed adjustments.

To address these issues, the Commission should add the following sentence to 10 CFR § 2.202(a)(5):

> An immediately effective order must provide: (i) a concrete explanation of the basis for the immediately effective order and that immediate effectiveness is warranted; and (ii) a concise statement of the alleged facts or expert opinions which support the NRC's position on immediate effectiveness and on which the NRC intends to rely at hearing, together with references to the specific sources and documents on which the NRC intends to rely to support its position on the issue (including any Office of

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compliance before suspending a license because "substantial evidence" did not support the conclusion that the licensee acted willfully).

[17] *See Geisen*, LBP-09-24, 70 NRC at 805-07 (citing 18 U.S.C. § 3142(c), (f), which allows the imposition of pretrial detention if the accused is a "danger to the community" upon a showing by the government "by clear and convincing evidence that no conditions of release can reasonably assure the community's safety").

> Investigations reports and interview transcripts). An immediately effective order must also demonstrate that its requirements are necessary for and narrowly tailored to address public health, safety, or interest.

In addition, the references to "adequate evidence" in 10 CFR § 2.202 should be replaced with the phrase "clear and convincing evidence."

The Commission should also remove the reference to willful violations in 10 CFR § 2.202(a)(5). The NRC's central mission is to protect public health and safety and the common defense and security against radiological hazards. Nothing in the Atomic Energy Act or the Administrative Procedure Act requires that the NRC make an order immediately effective solely based on the violation's willfulness, even if it has authority to do so. Importantly, there is also no indication that all cases of willfulness require that an individual or licensee take immediate action in order to restore reasonable assurance that the public health and safety is protected. This revision would allow the NRC to take immediate action where a violation's willfulness presents an imminent risk to public health and safety but would also help ensure that the NRC appropriately focuses its resources.

B. The Commission Should Further Clarify the Process for Immediate Effectiveness Hearings

Proposed 10 CFR § 2.202(c)(2)(ii) appropriately allows the presiding officer to order live testimony when doing so would facilitate a decision on a motion to set aside an order's immediate effectiveness. But the NRC also should clarify that the person challenging the order need not testify in any immediate effectiveness hearing, and should prohibit the presiding officer from drawing any negative inference if the person challenging the order decides not to testify. The NRC staff's practice of referring every substantiated wrongdoing case to the DOJ for possible criminal prosecution makes every person subject to an immediately effective order also a potential criminal defendant. As a result, testifying to challenge the order's immediate effectiveness may require that an individual compromise his or her Constitutional right against self-incrimination. The subject of the order should have the ability to present live witness testimony, but not be required to testify and potentially negatively impact his or her parallel criminal defense. Absent this requirement, the process would be fundamentally unfair.[18]

As it applies to the NRC staff, the immediate effectiveness hearing regulation should require live testimony from those members of the NRC staff with actual knowledge of the underlying facts (in most cases the OI investigator), as well as the person who assessed the alleged risk of significant harm to public health and safety or common defense and security. Absent this requirement, the NRC staff could put forward an Office of Enforcement staff member with little

[18] The Commission could mitigate this unfairness by revisiting the policy of referring all cases involving wrongdoing to DOJ and instead requiring that the NRC staff take a hard look at whether sufficient evidence actually warrants referral in a given case.

or no actual knowledge of any of the issues and withhold individuals with actual knowledge.[19] This practice would be fundamentally unfair and would undercut the NRC's credibility. If the NRC staff fails to provide witnesses with actual knowledge on issues relevant to immediate effectiveness, the presiding officer should find that the NRC staff did not meet its burden of proof and should vacate the order's immediate effectiveness.

Finally, the final rule should clarify that when the presiding officer orders live testimony to resolve a motion to set aside the immediate effectiveness of an order, parties may cross-examine witnesses if cross-examination would assist the presiding officer in deciding the motion. To address this point, 10 CFR § 2.202(c)(2)(ii) should include the following sentence: "If the presiding officer orders live testimony, the parties shall be afforded the opportunity for cross-examination when it would assist in the presiding officer's decision on the motion to set aside the immediate effectiveness of the order."

C. The NRC Staff Should Be Required to File a Written Answer to a Motion Challenging an Order's Immediate Effectiveness

The proposed revision to 10 CFR § 2.202(c)(2)(iii) to allow the NRC staff to reply to a motion orally at the hearing rather than on paper before the hearing would allow the staff to "ambush" the individual or licensee, and deprive them any meaningful opportunity to challenge the staff's theory. This incongruity, where the NRC staff need not file a written response, would hinder the presiding officer in ruling on the motion and create an opportunity to "sandbag" the individual or licensee challenging the order. If the NRC staff's case for immediate effectiveness is indeed compelling, preparing a brief, even in 5 days, should not present an unreasonable burden. In any case, a few days' delay would usually pose a lesser harm to the affected individual or licensee. This proposed change would undermine the immediate effectiveness hearing's fairness. To avoid this unfairness, 10 CFR § 2.202(c)(2)(iii) should be revised as follows:

> ~~In cases where the presiding officer orders live testimony, the NRC staff may present its response through live testimony or by a written response; if the NRC staff chooses to respond in writing, it shall respond within 5 days of the receipt of the presiding officer's order granting live testimony. Otherwise, t~~ The NRC staff shall respond in writing within 5 days of the receipt of a motion to set aside the immediate effectiveness of the order ~~that does not include a motion to order live testimony or the presiding officer's order denying a motion for live testimony~~.

The final rule should also make clear that the NRC staff's answer to the motion cannot expand the scope of arguments set forth in the original immediately effective order. In other words, the NRC staff answer may not be used as a vehicle to introduce new bases or support, may not

[19] *See, e.g.*, 10 CFR § 2.1207(b)(4) ("Testimony for the NRC staff will be presented only by persons designated by the Executive Director for Operations or his delegee for that purpose.").

expand the scope of arguments set forth in the order, and may not attempt to cure an otherwise deficient order. Instead, the NRC staff's answer must focus narrowly on the legal or factual arguments raised in the motion.[20]

D. A Presiding Officer Decision Vacating an Immediately Effective Order Should Not Be Stayed Automatically Pending Commission Review

Given the potentially serious negative impacts resulting from an immediately effective order, proposed 10 CFR § 2.202(c)(2)(viii) sets the burden backwards. If the presiding officer finds that the NRC staff failed to present sufficient evidence and sets aside an immediately effective order, that decision should not be automatically stayed. The NRC staff should have to meet the customary standards for a stay in 10 CFR § 2.342, and should be required to satisfy this burden through objective evidence (*i.e.*, citation to the OI report, any transcripts, or other evidence collected during the investigation). This standard poses no significant burden to the NRC staff because normally it should have prepared all of the same information. No stay should be automatic, and in fact should be rare and only granted when there is real risk to the public.

To address this issue, the last sentence of 10 CFR § 2.202(c)(2)(viii) should be revised as follows:

> . . . . The presiding officer will promptly refer an order setting aside immediate effectiveness to the Commission and such order setting aside immediate effectiveness will not be <u>stayed unless the NRC staff files and the Commission grants a motion for a stay under § 2.342</u> ~~effective pending further order of the Commission~~.

The final rule should also resolve the conflict between proposed 10 CFR § 2.202(c)(2)(iv) and (viii). Specifically, 10 CFR § 2.202(c)(2)(iv) states there should be no "referred rulings or certified questions to the Commission" for immediate effectiveness purposes, whereas 10 CFR § 2.202(c)(2)(viii) states "[t]he presiding officer will promptly refer an order setting aside immediate effectiveness to the Commission."

[20] *Cf. Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).