UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 030-05980-ML/ML-2
SAFETY LIGHT CORPORATION, et al.	)	030-05982-ML/ML-2
	)	
(Bloomsburg Site Decommissioning and License Renewal Denials)	)	(ASLBP No. 92-659-01-ML/ML-2)

NRC STAFF'S MEMORANDUM ON THE APPLICABLE STANDARD FOR LICENSING BOARD REVIEW OF THE DIRECTOR'S DECOMMISSIONING ORDER

INTRODUCTION

At the prehearing conference held on May 15, 1992, the Atomic Safety and Licensing Board presiding over this proceeding requested that the parties file legal memoranda addressing its question as to "what legal standard or test [the Licensing Board is] to apply in determining whether the Staff's decommissioning order should be sustained?" (Tr. 115-19).[1] This memorandum is filed in response to the Licensing Board's request. For the reasons which follow, the NRC Staff ("Staff") submits that the proper standard to be applied by the Licensing Board is whether the Director's decommissioning order is necessary or desirable to protect the

[1] This question had previously been posed by the Board in its Order of April 8, 1992 (Question 7, at pages 5-6).

public health and safety, or to minimize danger to life or property, as demonstrated by a preponderance of the reliable, probative and substantial evidence.[2]

DISCUSSION

In response to the Licensing Board's prior statement of this question (Order of April 8, 1992, at 5-6), the Staff recommended that the Board adopt a standard of review whereby the decommissioning order would be sustained unless it constituted an "abuse of discretion" or was "clearly unwarranted." The Staff stated as follows:

> The Licensing Board should sustain the Staff's 1992 Decommissioning Order if it determines that the criteria contained in that Order are necessary or desirable to protect the public health and safety or to minimize danger to life or property.[9]
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> [9] *See* Section 161b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201(b). The Decommissioning Order modifies the existing licenses and, as such, the standard for review should be whether the Staff's Order was clearly unwarranted or constitutes an abuse of discretion. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173 (1975); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978); *Advanced Medical Systems* (One Factory Row, Geneva, Ohio, 44041), LBP-90-17, 31 NRC 540, 544-45 (enumerating five applicable considerations).

Staff Response, at 8.

[2] In the Board's Order of April 8, 1992, the Board also requested the parties' views as to what standard should be applied "in determining whether the license renewal applications should be granted" (Question 2). In response to that question, the Staff indicated that the Licensees have the burden of demonstrating, by a preponderance of the evidence, that the renewal applications should be granted, regardless of whether the proceeding is conducted under Subpart G or Subpart L. "NRC Staff's Response to Licensing Board's Order of April 8, 1992," dated May 4, 1992 ("Staff Response"), at 3-4.

The three cases cited by the Staff in its prior response to the Board appeared to suggest that an order modifying a license should be reviewed under an abuse of discretion standard. Thus, in *Indian Point,* where a director had decided not to issue a show cause order in response to a petition under 10 C.F.R. § 2.206, the Commission ruled that a director's decision *to issue or to refuse to issue* a show cause order should be reviewed under an abuse of discretion standard, and identified five factors to be considered in any such review. CLI-75-8, *supra*, 2 NRC at 175.[3] In *Bailly*, the Commission applied this abuse of discretion standard in determining that the Director had not erred in denying four petitions to institute a show cause proceeding. More to the point, in *AMS*, the Licensing Board applied an abuse of discretion standard in reviewing a director's decision *to issue* a summary suspension order. LBP-90-17, *supra*, 31 NRC at 543-45. Moreover, this standard was recently applied in *Rhodes-Sayre & Associates, Inc.*, LBP-91-15, 33 NRC 268, 271-72 (1991), where the Licensing Board determined that the Staff had not abused its discretion in issuing an order to show cause why a license should not be revoked for non-payment of license fees.

Notwithstanding the existence of the foregoing authority, however, upon further consideration the Staff believes that those cases are best understood as describing the type of review to be undertaken at a "threshold" stage in a proceeding -- where the issue is whether sufficient cause existed to warrant the issuance or non-issuance of an order, and where a

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[3] The issues identified by the Commission to be considered in such a review are: (1) whether the statement of reasons given permits rational understanding of the basis for his decision; (2) whether the Director has correctly understood governing law, regulations, and policy; (3) whether all necessary factors have been considered, and extraneous factors excluded, from the decision; (4) whether inquiry appropriate to the facts asserted has been made; and (5) whether the Director's decision is demonstrably untenable on the basis of all information available to him. CLI-75-8, 2 NRC at 175.

Commission decision on the merits is not yet appropriate; in contrast, the cases suggest that such a standard would be inappropriate for use in a review to determine, upon the conclusion of evidentiary proceedings, whether the order should be sustained. *See Indian Point, supra,* CLI-75-8, 2 NRC at 175; *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-73-38, 6 AEC 1082, 1084 (1973) (summary enforcement decision) (*cited* in *Indian Point, supra*); *AMS, supra,* LBP-90-17, 31 NRC at n.10 and 544 (finding that *Indian Point* provides "an appropriately limited review of a discretionary decision at the initial stages of an administrative action").[4]

This interpretation of the *Indian Point* doctrine is consistent with the Commission's decision in *Nuclear Regulatory Commission* (Licensees Authorized to Possess or Transport Strategic Quantities of Special Nuclear Materials), CLI-77-3, 5 NRC 16 (1977). There, the Commission indicated that the *Indian Point* review to determine whether a decision not to issue a show cause order was an "abuse of discretion" or "clearly unwarranted," constitutes "essentially a deferral to the staff's judgment on the facts relating to a potential enforcement action, in order to avoid premature commitment by the Commission on factual issues" which "the Commission might later be called upon to review." *Id.* at 19-20 and n.6.

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[4] The Commission's authority to issue orders to protect the public health and safety is established, in part, in section 161b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201b. That section provides that in the performance of its functions, the Commission is authorized to:

> . . . establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property . . . .

Consistent with this interpretation, the *Indian Point* standard has been held to be appropriate for use in determining, at the threshold of a proceeding and without prejudice to a decision on the merits, whether a Staff order was properly made "immediately effective." *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 678-79 (1979). The proper use of the "abuse of discretion" standard in immediate effectiveness reviews was elaborated upon in *AMS, supra,* 31 NRC at 556-57.[5]

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[5] A similar standard was recently codified in 10 C.F.R. § 2.202, where the Commission established procedures for the expedited review of an order's "immediate effectiveness." In such a review, the presiding officer is now required to uphold the immediate effectiveness of an order if, on consideration of the evidence presented by the Staff, he finds "adequate evidence" to support the order and its immediate effectiveness. The Commission explained this standard as follows:

> [I]n the context of the rule, adequate evidence is deemed to exist when facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest.

Statement of Consideration, "Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective," 57 *Fed. Reg.* 20194, 20196 (May 12, 1992). The Commission further stated:

> *[T]he adequate evidence test is not a standard for determining the merits of an immediately effective order. The test is for use only upon challenge of immediate effectiveness at the outset of the proceeding,* to protect the person or persons named in the order against having to comply with arbitrary staff action *prior* to a hearing on the merits. In other words, *it serves merely as a preliminary procedural safeguard against the NRC staff's taking immediately effective action* based on *clear error, unreliable evidence, or unfounded allegations.*

Id. at 20196-197; emphasis added.

Upon further consideration of this matter, the Staff has concluded that the use of an "abuse of discretion" or "clearly unwarranted" standard would be inappropriate in this proceeding. Rather, further examination of applicable law demonstrates that the correct standard to be applied is whether an order is supported by "a preponderance of the evidence." Indeed, the Commission has stated as much, in explaining recent amendments to its regulations permitting enforcement action against non-licensed entities and individuals:

> The preponderance of the evidence standard is the one customarily applied in Commission proceedings, including proceedings against individuals. It is the standard of proof prescribed in the legislative history of the Administrative Procedure Act (APA). . . .

Statement of Consideration, "Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons," 56 *Fed. Reg.* 40664, 40673 (Aug. 15, 1991).

The use of a "preponderance of the evidence" standard in Commission enforcement proceedings appears to have been first enunciated in *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-315, 3 NRC 101, 110-11 (1976). There, the Appeal Board held that, once the Staff comes forward with a *prima facie* case in a show cause proceeding, the respondent company is "required to bear the ultimate burden of proof; *i.e.*, to persuade the Board by a preponderance of the evidence that the relief demanded was in fact not appropriate."[6] Subsequently, the "preponderance" standard was reiterated in *Radiation Technology, Inc.* (Lake

[6] The dissent of Dr. Quarles in *Midland* placed the ultimate burden of proof upon the Staff and intervenors, but agreed that the proper standard is "a preponderance of the evidence." *Id.*, 3 NRC at 117-18. Subsequent decisions appear to have adopted Dr. Quarles' view of the law, placing the ultimate burden of proof in an enforcement proceeding upon the Staff, as the proponent of the order in question.

Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533 (1979), a proceeding on the proposed imposition of a civil penalty. There, the Appeal Board held:

> The Director is not the ultimate fact finder in civil penalty matters. Commission regulations afford one from whom a civil penalty is sought the right to a hearing on the charges against it. 10 C.F.R. 2.205(d) and (e). At that hearing, the Director must prove his allegations by a preponderance of the reliable, probative, and substantial evidence. It is the presiding officer at that hearing, not the Director, who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted. 10 C.F.R. 2.205(f). *Cf., Brennan* v. *Occupational Safety and Health Com'n,* 487 F.2d 438, 441-42 (8th Cir. 1973) (Secretary of Labor's proposed civil penalties under the Occupational Safety and Health Act final where accepted but subject to an administrative hearing and *de novo* review if contested).

Id., 10 NRC at 536-37 (footnotes omitted).

This principle was reaffirmed in *Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980), where the Appeal Board stated as follows:

> *Radiation Technology* teaches that . . . the adjudicatory hearing in a civil penalty proceeding is essentially a trial *de novo.* Subject only to observance of the principle that the penalty assessed by the I&E Director constitutes the upper bound of the penalty which may be imposed at that hearing, the Administrative Law Judge (and this Board and the Commission on review) may substitute their own judgment for that of the Director. . . .

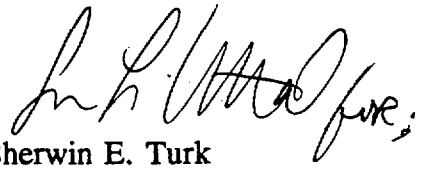
Accord, Hurley Medical Center (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 222, 224 (1987) (*de novo* hearing, at which Staff must support its burden of proof by a preponderance of the reliable, probative, and substantial evidence); *Consolidated X-Ray Service Corp.* (P.O. Box 20195, Dallas, Texas), ALJ-83-2, 17 NRC 693, 705-06 (1983) (same); *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 470, 474 n.33, 477 n.46 (1987) (*de novo* hearing and burden of proof); Id.,

ALJ-87-3, 25 NRC 345, 349-50 (1987) (same); *see generally, Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification,* LBP-87-15, 25 NRC 671, 675, 690-91 (1987) (adopting the "preponderance" standard except as to certain issues for which a "clear and convincing" standard was adopted). These decisions indicate that in a proceeding held to determine whether an enforcement order should be sustained as necessary or desirable to protect the public health and safety or to minimize danger to life or property, the proper standard is whether the order is supported by a preponderance of the reliable, probative and substantial evidence.

CONCLUSION

In light of the authority cited above, the Staff submits that the appropriate standard for hearing on the decommissioning order in this proceeding is whether, consistent with section 161b of the Atomic Energy Act, as amended, that order is necessary or desirable to protect the public health and safety, or to minimize danger to life or property, as demonstrated by a preponderance of the reliable, probative and substantial evidence.

Respectfully submitted,



Sherwin E. Turk
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Trial Attorney

Dated at Rockville, Maryland
this 30th day of June, 1992