

June 14, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of  
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF'S BRIEF REPLYING TO DAVID GEISEN'S ANSWER TO PETITION  
FOR INTERLOCUTORY REVIEW OF BOARD'S DENIAL OF MOTION TO  
HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW

INTRODUCTION

On May 31, 2006, the NRC Staff (Staff) filed a "Petition for Interlocutory Review of Board's Denial of Motion to Hold the Proceeding in Abeyance and for a Stay Pending Review" (Staff Petition) of the Atomic Safety and Licensing Board's (Board's) May 19, 2006, "Memorandum and Order (Denying Government's Request to Delay Proceeding) (LBP-06-13)" (Board Order). *Geisen*, LBP-06-13, slip op, ML061390312. The Staff Petition contends that the Board erred in denying the motion to hold the Geisen enforcement proceeding in abeyance and that the Board Order should be reversed. The Staff Petition also requested a stay of the enforcement proceeding pending review by the Commission. On June 9, 2006, David Geisen filed his "Answer of David Geisen opposing the NRC Staff's Petition for Interlocutory Review and for a Stay Pending Review" (Geisen Answer), which opposed both the petition for review and the stay request. Pursuant to 10 C.F.R. § 2.341(b)(3), the Staff hereby replies to the Geisen Answer.

DISCUSSION

While the Staff believes its initial filing adequately addresses most of the issues raised in the Geisen Answer, two of the claims made in that filing require a reply. Specifically, we

address below the claims that the Staff's stay request was untimely and that the Staff could not properly file a petition for review at the request of the Department of Justice (DOJ).

1. The NRC Staff's Motion for a Stay Pending Review Was Not Untimely

The Staff properly and timely filed its application for a stay pending review on May 31, 2006. The Board Order of which the Staff seeks review was issued on May 19, 2006. In NRC adjudicatory proceedings, service of orders is made by the Office of the Secretary. The Certificate of Service attached to the Board Order clearly states that "LB Memorandum and Order (Denying Government's Request to Delay Proceeding) (LBP-06-13) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution." See *Geisen*, LBP-06-13, slip op., ML061390312. Pursuant to 10 C.F.R. §2.306 whenever service is through first class mail, 5 days are added to the prescribed period. Mr. Geisen has confused the courtesy copy of the Board Order sent by the Board Chairman to the parties via email, with the official service of the Board Order by the Office of the Secretary. In actuality the Staff had until June 5, 2006, to file an application for a stay pending review.

2. The NRC Staff Properly Filed a Petition for Interlocutory Review at the Request of the Department of Justice

Pursuant to the Memorandum of Understanding (MOU) between the NRC and DOJ, the Staff is explicitly instructed to seek a stay of discovery and stay of an NRC administrative hearing when requested by DOJ. See MOU, 53 FR 50317 (1988) ("Such cooperation at the staff level shall include the seeking of a stay, upon DOJ's request, of discovery and hearing rights during the regulatory proceeding for a reasonable period of time to accommodate the needs of a criminal investigation or prosecution, provided that DOJ supports such action with appropriate affidavits or testimony as requested by the presiding officer.") The Staff appropriately followed this Commission-approved policy by filing the Motion to hold the proceeding in abeyance with the Presiding Officer.

Mr. Geisen attempts to argue that interlocutory review cannot be granted to vindicate the interests of a non-party and that the DOJ is a non-party. See Geisen Answer at 11-12.

Mr. Geisen is correct that the Staff has no independent interest in delaying the proceeding. However, as a party to this proceeding under the Commission's regulations, it is appropriate for the Staff to act to implement the policies put forth by the Commission. As instructed by the MOU with DOJ, which was approved by the Commission and signed by the Chairman of the Agency, and consistent with longstanding agency practice, it is the Staff's responsibility to seek a stay to protect the government's interests when requested by DOJ. Mr. Geisen's cramped reading of the regulations would imply that whenever the Staff seeks a stay at the request of DOJ, as contemplated in the MOU, it would be precluded from filing a petition for review given that DOJ would normally not be an independent party to any NRC proceeding.

#### CONCLUSION

For the above reasons, the Staff properly petitioned for interlocutory review at the behest of DOJ and the Staff's request for a stay was timely. For the reasons set forth in detail in the Staff Petition, the Commission should grant both those requests.

Respectfully submitted,

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Michael A. Spencer  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 14<sup>th</sup> day of June, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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DAVID GEISEN ) Docket No. IA-05-052  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF REPLYING TO DAVID GEISEN'S ANSWER TO PETITION FOR INTERLOCUTORY REVIEW OF BOARD'S DENIAL OF MOTION TO HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW" 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 14th day of June, 2006.

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