

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/25/06

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SERVED 08/25/06

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Michael C. Farrar, Chairman
E. Roy Hawken
Nicholas G. Trikouros

In the Matter of

DAVID GEISEN

Docket No. IA-05-052

ASLBP No. 06-845-01-EA

August 25, 2006

ORDER

(Summarizing Conference Call,
Setting Time of Oral Argument,
Invoking In Camera Review,
and
Suggesting Discussions Among Counsel)

In this enforcement proceeding, which stems from events of several years ago involving the Davis-Besse Nuclear Power Station in northwestern Ohio, the Board held a prehearing telephone conference on August 17 for the purposes set out in our Notice of August 4, in which we indicated (p. 1) we would benefit from an early “clarification of certain matters, including . . . the need for such an extensive time for discovery as the parties envision.” In that Notice (p. 2), we also alerted the parties that during the conference call we would advise them “whether, in light of the Motion to Compel contemplated to be filed on behalf of Mr. Geisen by August 11, [the Board] expects to hold oral argument thereon.” The purpose of this Order is to summarize the action taken during the conference, all of which is more fully reflected in the transcript thereof, and to announce certain follow-up steps.

Having briefly examined the Motion to Compel, which seeks access to an unredacted copy of the August 22, 2003 report prepared by the NRC Staff’s Office of Investigations (OI), we informed the parties during the conference that it was virtually certain we would want to hold oral argument on that motion (Tr. at 152). That argument was set for Wednesday, September 6, and, as the Staff requested to accommodate its travel plans, was to begin in the morning

rather than in the afternoon as had first been contemplated (Tr. at 152-53). Having after the conference been presented with the Staff's responsive brief, filed on August 21, we hereby CONFIRM that argument will be held on Wednesday, September 6, in the Board's hearing room at the NRC's Rockville Headquarters. That argument, which should be concluded in under two hours, will begin at 10:00 A.M.¹

In connection with the oral argument, the Board inquired during the conference as to whether the rendering of a decision on the pending motion might be expedited were the Board to have available, if appropriate, the complete, unredacted version of the OI Report at issue for in camera inspection prior to the argument (Tr. at 165-66). Both parties agreed that could be a useful course to follow (Tr. at 166-67), and the Staff indicated that once notified it could provide such a copy on a day's notice (Tr. at 167-68). The Board now ADVISES (see Tr. at 168) that it does indeed wish to examine the OI Report in camera. To that end, we will, in the cover e-mail transmitting this Order to the parties, provide the Staff the necessary contact information for arranging secure hand-delivery early next week.

Our inquiry about the length of time the parties were seeking for the discovery process, and its seeming inconsistency with the discovery schedule presented and approved in two companion cases (Tr. at 157), elicited a simple answer. The Staff indicated it had not made an effort to reconcile the respective discovery schedules, but rather in each instance had essentially acceded to the wishes of the subject of the respective enforcement orders (Tr. at 157-59). The Staff had done so based on the familiar theory (which we have alluded to on more than one occasion) that pressing for expedition in these hearings is done for the benefit of the subject of the immediately-effective order, and that if the subject finds that other factors militate in favor of taking more time, that desire should ordinarily be accommodated (Tr. at 158).

¹ During the teleconference, we GRANTED Mr. Geisen's request, filed August 16 and consented to by the Staff, for a nunc pro tunc expansion of the page limits applicable to his motion, and GRANTED a correlative expansion as to the Staff's response (Tr. at 154-55).

The schedule the parties proposed was essentially as follows: (1) all written discovery requests will be exchanged by Friday, September 1, and replies to such requests will be served within thirty (30) days thereafter (i.e., by Monday, October 2); (2) deposition notices shall not be served until ten (10) days after the later of (i) the completion of that written discovery or (ii) the completion of proceedings on the pending Motion to Compel and the production by the Staff of any OI Report material it might thereby be compelled to produce; (3) all *fact* discovery will be completed within ninety (90) days of the completion date that eventuates from clause # 2, above; and (4) disclosure and discovery of *expert* testimony will not occur until completion of all fact discovery. Given the Staff's explanation (referred to above) for the seeming lack of consistency between this proposed schedule and those presented in the companion cases, and the explanation during the teleconference about the parties' contemplation as to the degree of need for expert testimony (Tr. at 159-60), we essentially ADOPT the schedule as presented by the parties. In doing so, however, we note below a modified approach that may alleviate a concern that arose in the companion cases.

Specifically, in response to a subpoena issued, at the Staff's request, to Mr. Geisen for purposes of taking his deposition on September 11 in the companion cases, Mr. Geisen moved therein on August 15 to quash the subpoena because, among other things, the timing of his deposition therein would be inconsistent with the timing of discovery in his own proceeding. We adverted to that late-breaking matter in this proceeding's August 17 teleconference because of its possible implications here (Tr. at 170-72). By doing so, we learned that the Staff had wanted to take Mr. Geisen's deposition on September 11 essentially because of the then-looming mid-September deadline for the completion of discovery in the companion proceedings (Tr. at 172).

The day after the teleconference, and as had been indicated would be done (Tr. at 158), the Staff filed (jointly with the subjects of each of those proceedings) motions seeking to extend the discovery deadlines therein to October 13. We have just granted that agreed-upon relief in each case (see Orders dated August 24). Relatedly, one of the reasons Mr. Geisen is urging

in support of quashing his subpoena has to do with his desire to review the unredacted OI Report before being deposed (see Tr. at 161, 163). With our now having decided to review the unredacted OI Report in advance of the oral argument, we foresee no hurdles likely to prevent us from rendering a decision on the pending Motion to Compel in advance of the October 2 date that -- under the discovery schedule just adopted herein (p. 3, above) -- would trigger the scheduling of depositions herein if the Motion to Compel issues are fully resolved, and any resulting production effected, by that juncture.

There is, then, some possibility that a brief deferral of the Geisen deposition would now enable that deposition to be taken prior to the new discovery completion date (October 13) in the companion proceedings but after Mr. Geisen has access to such parts of the OI Report -- if any there be -- that after oral argument we might determine were inappropriately redacted. We SUGGEST, then, that counsel in the three companion cases confer (with the NRC Staff initiating contact among counsel) in an attempt to resolve amicably the matter of the timing of the Geisen deposition (compare Tr. at 171-74). Failing that, we will rule on the pending Motion to Quash in the companion cases after our receipt of the response(s) thereto, due shortly.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawken
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 25, 2006

Copies of this Order were sent this date by e-mail transmission to counsel for the parties in this proceeding. Because of its ramifications for the companion enforcement proceedings involving Messrs. Miller and Moffitt, a copy is also being sent to their counsel.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DAVID GEISEN) Docket No. IA-05-052
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (SUMMARIZING CONFERENCE CALL, SETTING TIME OF ORAL ARGUMENT, INVOKING IN CAMERA REVIEW, AND SUGGESTING DISCUSSIONS AMONG COUNSEL) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 25th day of August 2006