

December 1, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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'S MOTION TO ADOPT PRE-HEARING AND HEARING SCHEDULE

INTRODUCTION

The NRC Staff moves that the Board adopt its version of the Pre-Hearing and Hearing Schedule (Attachment 1) rather than the version proposed by counsel for Mr. Geisen (Attachment 2).¹ The Staff's version incorporates all scheduling issues that are uncontested between the parties, but also provides that (1) on or before December 11, 2006, the NRC Staff has the right to file any and all appropriate motions regarding Mr. Geisen's production of documents; (2) as of December 15, 2006, Mr. Geisen will have to disclose all of his claims, contentions, and defenses, including the factual basis for each claim, contention, or defense; (3) as of February 22, 2007, the parties will submit pre-filed written testimony and pre-hearing statements, containing all information required by 10 C.F.R. §§ 2.704(b)–(c) and 2.711(b), along with any stipulations; (4) as of March 5, 2007, the parties will submit pre-filed written rebuttal testimony or, alternatively, statements of rebuttal testimony and supporting exhibits to be presented during the hearing, consistent with 10 C.F.R. §§ 2.704(b)–(c) and 2.711; and (5) on March 19, 2007, the hearing in this proceeding will commence.

¹ The Staff has worked diligently with Mr. Geisen in attempting to prepare a schedule that provides both parties with full discovery and an expedited hearing. See letters from Lisa Clark to Charles F.B. McAleer, Jr. dated October 19, 2006 (Attachment 3); November 9, 2006 (Attachment 4); and November 29, 2006 (included as part of Attachment 1). Nonetheless, the Staff and Mr. Geisen have been unable to reach full agreement on certain issues critical to discovery and the conduct of the hearing.

BACKGROUND

On August 2, 2006, the NRC Staff and Mr. Geisen submitted to the Board a Joint Status Report setting forth a schedule for discovery in this proceeding. The Joint Status Report, which was approved by the Board, required the parties to submit written discovery requests by September, 1, 2006 and any responses within thirty days. On September 1, 2006, the Staff submitted to Mr. Geisen a series of interrogatories, requests for admission, and document requests. Mr. Geisen, in turn, submitted to the NRC Staff interrogatories and document requests. Both parties filed responses on October 3, 2006.

The Staff made every attempt to comply with Mr. Geisen's discovery requests, turning over additional documents, detailing its positions, and citing evidentiary support for its positions.² Mr. Geisen, in contrast, for the most part attempted to avoid discovery. Mr. Geisen refused to answer any of the Staff's Requests for Admission, invoking his Fifth Amendment privilege. He also refused to answer the vast majority of the Staff's interrogatories, again invoking the Fifth Amendment, and also raising other privilege claims.

With respect to the Staff's Document Request, Mr. Geisen asserted on October 3, 2006 that he would produce discoverable documents "at a reasonable date, time and place." Mr. Geisen eventually delivered a single box of documents to the Staff, but not until November 29, 2006, almost three full months after the Staff made its initial discovery request. Even now, it appears Mr. Geisen may be continuing to withhold discoverable documents from the Staff. For example, Mr. Geisen refuses to provide the Staff with copies of documents he claims have been disclosed previously in other proceedings, even though many of those documents appear to have been disclosed only in proceedings where the Staff is not a party and, therefore, does not necessarily have access to the documents.

² See *e.g.*, Staff Responses (Interrogatory Responses 13, 14, 15, 18, 20, 21, 22 and 24).

DISCUSSION

The Staff and Mr. Geisen disagree on two prehearing issues: the extent to which Mr. Geisen must disclose his claims and defenses on December 15, 2006, and the date by which the Staff must file any additional motion to compel disclosure of documents Mr. Geisen continues to withhold improperly. The Staff and Mr. Geisen also disagree on the date the hearing will commence, as well as on whether the Board will accept pre-filed direct and rebuttal testimony and thereby minimize the time spent obtaining such testimony at the hearing.

A. The Board Should Require Mr. Geisen to Provide Full Discovery by December 15, 2006

Both parties agree that by December 15, 2006 Mr. Geisen must provide the Staff with notice of his claims and defenses. The Staff believes that Mr. Geisen must be required to respond to its outstanding discovery requests to the extent they require disclosure of all the claims and defenses he intends to present at the hearing. Responses to Staff interrogatories requesting claims and defenses is necessary if the Staff is to narrow the issues for hearing, focus its future discovery efforts, and move as quickly as possible to a hearing. Counsel for Mr. Geisen, on the other hand, has proposed that the Staff receive nothing more than “a list of defenses that Mr. Geisen *may* present in his case-in-chief at the hearing with an identification of his *possible* case-in-chief witnesses and documents relating to the defenses.” (Emphases added.) The list would be “signed by counsel for Mr. Geisen, not Mr. Geisen,” and “would be based on non-privileged information known to counsel for Mr. Geisen on the date of service.”

The Staff submits that the disclosure proposed by Mr. Geisen would be of no value in narrowing the issues for hearing. The Staff is entitled to learn from Mr. Geisen himself what claims and defenses he intends to raise at the hearing; a list of defenses prepared by counsel is insufficient to apprise the Staff of Mr. Geisen’s actual intentions and would in no way be binding on Mr. Geisen. Further, because the list would be based on only “non-privileged information,”

the list could very well include defenses that counsel, through attorney-client communications, knows Mr. Geisen does *not* intend to raise at the hearing. The disclosure proposed by Mr. Geisen is also problematic because a list of defenses that Mr. Geisen “may” present could be nothing more than a laundry list that would in no way help the staff anticipate the defenses Mr. Geisen intends to raise at the hearing. A list of “possible” witnesses could include many individuals whom Mr. Geisen has no intention of calling at the hearing; such a list would potentially require the Staff to depose many individuals unnecessarily.

The Staff also wishes to emphasize that a statement of Mr. Geisen’s claims and defenses, whether signed by counsel or by Mr. Geisen himself, cannot substitute for discovery in accordance with the Commission’s rules. The Staff is filing a separate motion today asking the Board to clarify that the type of statement Mr. Geisen has proposed cannot be considered a substitute for full discovery. Such a statement does not constitute an adequate answer to the Staff’s written discovery requests, which seek Mr. Geisen’s positions on specific issues relating to claims in the January 17, 2006 Enforcement Order. To the extent Mr. Geisen refuses to comply with its discovery requests, the Staff will seek to preclude Mr. Geisen from introducing evidence at the hearing that would have been properly disclosed in discovery. The Staff will seek preclusion notwithstanding any statement it receives setting forth Mr. Geisen’s claims and defenses in a general sense.

B. Given that Mr. Geisen Failed to Disclose Any Documents to The Staff Prior to November 29, 2006, the Board Should Set a December 11, 2006 Deadline for the Staff’s Motion to Compel Document Production

On September 1, 2006, the Staff filed a discovery request asking Mr. Geisen to disclose certain documents relevant to the pending case. Even though Mr. Geisen agreed to produce such documents within thirty days of receiving the Staff’s request, he failed to provide any documents to the Staff until two days ago, November 29, 2006, at 5:20 p.m. Along with those documents, Mr. Geisen included a list specifying the Bates ranges of other documents in his

possession, but which he will *not* be providing to the Staff. Mr. Geisen claims these documents have been disclosed to the NRC in other proceedings. However, Mr. Geisen did not provide a log summarizing the contents of any withheld documents, or even indicate how many documents are covered by the ranges. In addition, Mr. Geisen withheld eleven other documents for which Mr. Geisen's counsel is "continuing to assess what protections or privileges may apply. . . ."

The Staff is reviewing the recently-disclosed documents and accompanying list to determine whether it will file a motion to compel Mr. Geisen to produce additional documents. The Staff asks that it be granted until Monday, December 11, 2006, to decide whether it needs to file such a motion; Mr. Geisen is requesting a deadline of Friday, December 8, 2006. The Staff submits that allowing it to review the documents and list for one additional weekend is entirely appropriate given Mr. Geisen's long delay in producing documents for Staff review. Also, although Mr. Geisen is withholding numerous documents based on his claim they were produced previously, the Staff is unable to determine how many documents Mr. Geisen is withholding, the nature of those documents, and in what proceedings they many have been disclosed. Finally, given that counsel for Mr. Geisen is himself continuing to review certain documents to determine whether privileges apply, the Staff does not yet have all information relevant to filing a motion to compel. Because the Staff's proposed deadline for filing a motion to compel is only two weekend days later than the deadline proposed by Mr. Geisen's counsel, adopting the Staff's schedule on this issue would not delay proceedings before the Board.

C. Pre-filed Testimony is Essential to a Well-Focused and Expeditious Hearing

The Staff proposes that the parties submit pre-filed written testimony and pre-hearing statements consistent with 10 C.F.R. § § 2.704(b) and (c) and 10 C.F.R. § 2.711(b). The Staff also proposes that the parties be allowed to submit pre-filed rebuttal testimony or, in the alternative, statements of rebuttal testimony and supporting exhibits, as specified by these same

regulations.³ The Staff does not propose that a witness's pre-filed testimony would substitute entirely for his or her testimony at the hearing. Rather, all witnesses would be made available at the hearing for examination by the Board and for cross-examination by the opposing party.

Pre-filed testimony is important because it will reduce significantly the amount of time the parties spend at the hearing on direct examination and rebuttal. By accepting pre-filed testimony, the Board avoids a protracted hearing with lengthy questioning of expert and Staff witnesses. The Board and the parties will be able to prepare questions based on the pre-filed testimony, which will likewise result in narrower and less extensive questioning. The hearing should be more manageable, with less need for the Board to rule on evidentiary issues during the hearing.

Counsel for Mr. Geisen objects to pre-filed testimony, preferring that the Board hear the live testimony of each witness. It is difficult to see how this method of taking testimony is consistent with Mr. Geisen's professed goal of an expedited hearing. Further, counsel has not identified any way in which Mr. Geisen will be prejudiced by pre-filed testimony. Counsel would still have the opportunity to cross-examine the Staff's witnesses at the hearing. In fact, given that counsel would have access to each witness's testimony before the hearing, his cross-examination of the Staff's witnesses would seemingly benefit from pre-filed testimony.

³ The Board has stated its understanding that the proceedings in Mr. Geisen's case will be governed by Subpart G. See Licensing Board Memorandum and Order Summarizing Conference Call (Granting All Hearing Requests, Setting Oral Argument on Staff's Abeyance Motion, and Addressing Related Matters) (March 27, 2006).

D. A Hearing Date of March 19, 2007 Best Balances the Staff's Right to Full and Fair Discovery Against Mr. Geisen's Interest in an Expedited Hearing

The Staff proposes that the hearing commence March 19, 2007. To the extent the Board accepts pre-filed testimony, the Staff anticipates it will need no more than a week to present its case-in-chief. The Staff therefore submits there is a high likelihood the hearing could be concluded by March 23, 2007. At that time Mr. Geisen's criminal trial, scheduled to begin April 16, 2007, would still be more than three weeks away. A three-week hiatus should be more than sufficient to ensure the present proceeding does not encroach upon Mr. Geisen's criminal trial.

In considering when the hearing should commence, the Board must take into account Mr. Geisen's dilatory tactics throughout discovery. The parties face a March 2007 hearing not because of inaction on the part of the Staff, but because Mr. Geisen has denied the Staff access to the very information that would allow it to move quickly to a hearing. He has refused to answer even those requests for admission that inquire about basic, publically available information, and he had failed to respond to the Staff's request that he reconsider that position. Until two days ago, Mr. Geisen had failed to produce a single document in response to the Staff's specific request for such materials. In addition, he did not disclose any of his objections to the Staff's discovery responses until November 30, 2006, preventing any possibility that these could have been resolved between the parties.

The burden is on the Staff to prove the January 17, 2006 Enforcement Order should be affirmed. Given that Mr. Geisen refuses to provide the Staff with the discovery to which it is entitled under the Commission's rules—and absent any order by this Board compelling Mr. Geisen to provide additional discovery—the Staff will have to be exceedingly thorough in preparing for the hearing. If counsel for Mr. Geisen is allowed to present a broad statement of legal defenses and thereby avoid preclusion, the Staff will have to prepare extensively because

it will have no way of knowing what claims and defenses Mr. Geisen will assert at the hearing, what witnesses he will call, or what documents he will introduce in support of his positions. The Staff will therefore have to ensure it does not overlook potentially relevant evidence as it conducts depositions, prepares testimony for the hearing, and otherwise builds its case. The Staff will effectively have to anticipate and rebut *any* claim or defense Mr. Geisen might raise. This will obviously take considerable time, and even a March 19, 2007 start date appears ambitious given the motions, responses, and Board decisions that will need to issue to ensure an orderly hearing. In this regard, the Staff notes that the current schedules proposed by the parties will likely need to be expanded to account for the filing of summary disposition motions as contemplated by counsel for Mr. Geisen.

CONCLUSION

By adopting the Staff's attached schedule, the Board will resolve the disagreements between the Staff and Mr. Geisen in the most appropriate manner and fully accommodate the interests of the parties and the Board in securing a fair, expedited, and well-focused hearing.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 1st day of December, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO ADOPT PRE-HEARING AND HEARING SCHEDULE" 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 1st day of December, 2006.

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