December 22, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	ASLBP No. 06-845-01-EA

NRC STAFF MOTION FOR PRECLUSION OF CLAIMS AND DEFENSES NOT ADVANCED SPECIFICALLY IN DISCOVERY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the NRC Staff ("Staff") moves for the Board to issue an order precluding Mr. Geisen from raising claims and defenses at the hearing, and from introducing evidence related to those claims and defenses, which were not articulated in his supplemental interrogatory responses.

BACKGROUND

On January 4, 2006, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)" ("Order") to Mr. Geisen. On February 23, 2006, Mr. Geisen filed an "Answer and Demand for Expedited Hearing," ("Answer"). Mr. Geisen's Answer included some limited responses to the charges in the Staff's order, but primarily contained repetitive, general and all-inclusive denials. Thereafter, on August 8, 2006, Mr. Geisen provided his initial discovery disclosures pursuant to 10 C.F.R. § 2.704 (a).[1] Mr. Geisen provided lists of over 100 individuals who may have information relating, in whole or

[1] 10 C.F.R. § 2.704 (a) governs the scope of initial discovery disclosures for parties other than the Staff prior to any discovery requests. That subsection requires disclosure of the names of all individuals likely to have discoverable information relevant to disputed issues and all relevant documents. Subsection (c) requires additional and more specific pretrial disclosures, namely (I) the name of each witness to be used at hearing, (ii) the designation of those witnesses whose testimony may be presented by means of a deposition and the pertinent portions of any transcript, and (iii) the identification of each document or other exhibit to be offered at hearing.

in part, to disputed issues. Mr. Geisen did not provide the Staff with any documents in his initial disclosure, providing instead a listing of all of the documents that the Staff had provided in its mandatory disclosures.

Upon reviewing the general denials in Mr. Geisen's answer, the Staff propounded written contention interrogatories so it could ascertain the specific claims or defenses Mr. Geisen intends to present at the hearing.[2] The Staff requested this information so it could define specific issues and prepare to address these issues at the hearing. Therefore, the Staff requested Mr. Geisen's claims regarding each element of the violation alleged in the Order and the factual underpinning for each claim. In response to the Staff interrogatories, Mr. Geisen failed to provide any information regarding his claims or defenses, instead invoking his Fifth Amendment rights.[3]

Based on Mr. Geisen's failure to respond to its discovery requests, the Staff filed a motion to preclude Mr. Geisen from presenting at the hearing any claims or defenses not disclosed during written discovery, as well as any supporting witnesses or other evidence.[4] This motion was based on the Staff's fundamental right to obtain discovery in civil proceedings and the unfairness that would result if Mr. Geisen were permitted to surprise the Staff at hearing with claims not disclosed through the ordinary and proper course of discovery. On November 14, 2006, the Board presided at a hearing on the Staff's motion.

During the hearing, the Board recognized the prejudice to the Staff that could result if Mr. Geisen is permitted to advance claims and defenses at hearing without first disclosing them

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[2] "The NRC Staff's Interrogatories, Document Requests, and Requests for Admission," September 1, 2006.

[3] "David Geisen's Objections and Answers to NRC Staff's First Set of Interrogatories," October 3, 2006.

[4] "NRC Staff Motion For Stay of Proceeding Or In The Alternative For a Preclusion Order," October 27, 2006.

response to the Staff's written discovery. Recognizing the burden that would be placed on the Staff if inadequate discovery responses required it to anticipate every conceivable defense that could be advanced at hearing, the Board observed:

> You know, that's great and she could put together the whole case and tell us there's 100 possible witnesses, get prepared on all of them and they be worn down from lack of resources and then you'd eventually say 'Oh, our only defense is X.' You would have succeeded in putting them through a lot of work for no purpose. But why would we want to do that?

November 14, 2006, Hearing Transcript at 400. In response, counsel for Mr. Geisen assured the Board:

> Well, we don't want to do that, and I'm not going to buy into the notion that that's how I approach the drafting of a pretrial statement. I mean I have a responsibility to the Court, my client and the profession to do this thing on a proper and efficient basis, and that's what I would do.

Id. at 400-01.

The Board issued its ruling during the hearing on the Staff's motion. As relevant here, the Board directed the Staff and Mr. Geisen to negotiate a schedule for motions to compel discovery and for the future course of the case, specifically stated that "the claims and defenses part of that is to be first, rather than later." Tr. 418. By agreement of the parties, the date of December 15, 2006, was established for Mr. Geisen to determine whether to provide substantive information in response to written discovery requests and to file a statement of defenses that he may assert at hearing.[5] On that date, Mr. Geisen supplemented his responses to the Staff written discovery requests, including the Staff's interrogatories asking for his claims and defenses regarding each claim in the charges in the Order. Although Mr. Geisen's supplemental responses to the Staff's contention interrogatories fail to answer the specific

[5] *See*, "Consent Motion to Modify Current Schedule Pertaining to Certain Discovery-Related Events," December 8, 2006.

questions propounded by the Staff, they do disclose certain defenses that Mr. Geisen may present at the hearing and list documentary support for these contentions.[6]

Mr. Geisen's Statement of Defenses, also submitted on December 15, states that Mr. Geisen may present defenses at hearing that include the facts, witnesses and documents that are described in his supplemental interrogatory responses. The Statement of Defenses does not, however, contain any independent, specific information regarding any claims or defenses Mr. Geisen intends to present at the hearing nor any specification of evidentiary support for such claims. Instead, Mr. Geisen references his overly broad and inclusive Answer to the Staff Order and a 48-page position paper prepared on behalf of an entirely different entity, First Energy Nuclear Operating Company (FENNIC), represented by different counsel. Mr. Geisen also, for the first time, raises objections to the Staff's discovery responses to the Board and claims that the Staff will be unable to meet its burden of proof at the hearing.

Regarding the witnesses and documents that he intends to present at hearing, Mr. Geisen referred to his initial disclosures and stated "Counsel for Mr. Geisen hereby reaffirm their disclosure of such persons and documents and state that they might call such witnesses or offer such documents in support of the defense to the claims in the January 4, 2006. Whether counsel for Mr. Geisen calls such persons or offers such document will depend, in part, on whether NRC ever particularizes the basis for its claims against Mr. Geisen and what testimony is given during deposition discovery in this case." Thereafter, during a teleconference with the Board on December 20, 2006, counsel for Mr. Geisen represented that Mr. Geisen's initial discovery disclosures, as further clarified by his Statement of Defenses, satisfied not only with the requirements for initial disclosures in 10 C.F.R. § 2.704(a) but also the more specific pretrial disclosures of § 2.704(c), which requires disclosure of all witnesses, documents and deposition

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[6] "David Geisen's supplemental Answers to NRC Staff's First Set of Interrogatories Nos. 16 - 20 and 22 - 29," December 15, 2006.

testimony to be presented at hearing.[7] December 20, 2006, Telephone Conference Transcript at 465, 467.

DISCUSSION

As discussed below, Mr. Geisen's supplemental responses to the Staff's contention interrogatories specify certain defenses he may present at hearing and identify evidentiary support for those defenses. However, in his Statement of Defenses Mr. Geisen has improperly attempted to incorporate numerous other potential defenses by referencing his overly broad, generalized and inclusive denials in his Answer and a position statement prepared by other counsel on behalf of FENOC. Allowing Mr. Geisen to present defenses which he has not specifically articulated in response to the Staff's interrogatories would be highly prejudicial to the Staff and potentially disruptive to the upcoming hearing. Therefore, all defenses other than those advanced in his interrogatory responses should be precluded.

A. The Only Claims And Defenses Mr. Geisen Has Properly Raised Are Those Set Forth In His Supplemental Interrogatory Responses.

The Staff's purpose in propounding contention interrogatories to Mr. Geisen was to obtain specific statements as to his claims and defenses in order to narrow the potential issues at hearing and to obtain detailed information regarding the evidentiary support for his claims. To the extent that Mr. Geisen has provided supplemental responses to those interrogatories with specific statements of defenses and supporting evidence, this purpose has been achieved. However, to the extent that counsel for Mr. Geisen has attempted to include additional potential

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[7] Notably, Mr. Geisen's initial disclosure state they were submitted pursuant to 10 C.F.R. § 2.704(a) only. Further, the disclosure themselves - which consist of lengthy lists of individuals who "may have information relating, in whole or in part, to disputed issues and no documents whatsoever but instead a list of the Staff's mandatory disclosures-obviously do not comply with the additional requirements under subsection (c). Contrary to the representation of counsel, the Statement of Defenses does not provide any more specific information but merely references the earlier disclosure. Thus, any representation that the subsection (c) disclosure requirements have been satisfied should be rejected as an improper attempt to avoid complete and adequate pretrial disclosures consistent with counsel's earlier representations made during the hearing on the Staff's preclusion motion.

defenses without the specificity required in discovery by referencing his overly broad, generalized and inclusive Answer and the 48-page position paper prepared by FENOC in his Statement of Defenses, he is continuing to avoid his legitimate discovery obligations. This attempt to avail himself of innumerable other claims and defenses - including those he has never advanced himself but which were raised by counsel for an entirely different entity – should be rejected. Permitting such a tactic would undermine the purpose of discovery, which is to limit and define the issues for hearing.

The Statement of Defenses submitted by Mr. Geisen contains, in large part, statements that are improper responses to the Staff discovery requests. Placing these statements in a pleading entitled "Statement of Defenses" rather than interrogatory responses does not relieve Mr. Geisen from his discovery obligations. When responding to discovery, a party is required to provide answers that are responsive, full, complete and unevasive. *Ferrara v. Balistrere & Di Maio Inc.* 105 FRD 147, 2 FR Serv3d 333 (D Mass 1985). Neither Mr. Geisen's initial Answer nor the position paper prepared by FENOC meet this standard. Therefore, Mr. Geisen cannot properly rely on them as a presentation of his claims and defenses. This was illustrated in the Seventh Circuit which found interrogatory responses inadequate where the plaintiff "cut and pasted" responses he had previously provided to defendants in another proceeding. *Thomas Consol. Indus. v. Herbst (In re Thomas Consol. Indus.)*, 456 F.3d 719, 721 (7th Cir. 2006). That is essentially what Mr. Geisen's counsel has done here, except that Mr. Geisen's "cut and pasted" responses were not even prepared by counsel for Mr. Geisen himself. Because counsel only invokes general defenses and relies on the FENOC document, Mr. Geisen's "Statement of Defenses" would be considered non-responsive, if not evasive, and therefore an improper discovery response. *See* Fed. R. Civ. P. 37, "Failure to Make Disclosures or Cooperate in Discovery; Sanctions," at (a)(3) ("For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or

respond."). Mr. Geisen should not be allowed to effectively subvert his discovery obligations by placing this type of improper response in a "Statement of Defenses".

The remainder of Mr. Geisen's Statement of Defenses consists of allegations that the Staff cannot meet its burden of proof and has not set forth sufficient grounds to sustain the Order or the sanction imposed in its discovery. Since the Staff will necessarily have the burden of proving its case during the hearing, restating this fact is not equivalent to advancing a defense. The Seventh Circuit, for example has deemed such a response "totally inadequate." *In re Thomas Consol. Indus.*, 456 F.3d at 721. There, the plaintiff was asked to identify the facts and documents in support of its allegation of willful and wanton conduct. Consolidated replied, "The evidence will show that the documents discovered in this case and the actions of these defendants were knowing and willing and wanton," essentially restating the elements of proof. The court rejected that answer as inadequate: "Tautology is no substitute for facts and documents. These kinds of answers could rightly be treated as total failures to answer, and thus the dismissal could be upheld. . . ." *Id.* at 725.

Mr. Geisen also, for the first time, objects to the particularity of the Staff's discovery responses. To the extent Mr. Geisen objects to the Staff's responses, the proper avenue to contest those responses is through a motion to compel, not by raising objections in a Statement of Defenses. Thus, these claims are improperly styled as defenses and should be rejected as such.

B. Preclusion Is The Appropriate Remedy For Any Claims Or Defenses Mr. Geisen Has Not Properly Advanced In Discovery.

The Board has already considered case law related to preclusion, having considered this precedent in connection with the Staff's Second Motion for a Stay of Proceedings. To summarize, courts recognize that, even in cases where a party invokes his Fifth Amendment privilege against self-incrimination, it may be appropriate to preclude that party from introducing

certain claims or defenses at trial when he fails to raise those claims or defenses in discovery. *SEC v. Graystone Nash, Inc.*, 25 F.3d 187 (3d Cir. 1994).. "[A] civil litigant's invocation of the privilege against self-incrimination during the discovery process is far from costless. It will, for example, always disadvantage opposing parties–at least to some extent–since it keeps them from obtaining information they could otherwise get." *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, (2d Cir. 1995). Where a party conducts discovery without knowing the content of privileged matter, such as the opposing party's claims and defenses, that party is placed at a disadvantage if those claims and defenses are suddenly presented at trial. "The opportunity to combat the newly available testimony might no longer exist, a new investigation could be required, and orderly trial preparation could be disrupted." *Graystone Nash*, 25 F.3d at 191.

In considering what constitutes prejudice justifying preclusion of claims or defenses, the Third Circuit recently emphasized that "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial" to support preclusion. *Ware v Rodale Press, Inc.*, 322 F.3d 218, 222 (3d Cir. 2003). In reaching this conclusion the court relied on earlier Third Circuit precedent rejecting a party's argument that the district court "should not have dismissed its claim . . . unless the harm to the other parties amounted to 'irremediable prejudice'"). *Curtis T. Bedwell and Sons, Inc. v. Int'l Fidelity Ins. Co.*, 843 F.2d 683, 693-94 (3d Cir. 1988). The court instead found that even remediable prejudice can support preclusion in circumstances amounting to unfairness. *Id.*

The Seventh Circuit has also recently affirmed that prejudice is a key factor in determining whether preclusion is appropriate based on a party's failure to comply with discovery. *David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003). The court held that a number of factors should guide a court's analysis in determining whether a party's failure to comply with discovery justifies the exclusion of evidence. The factors enumerated by the court are fully consistent with the analysis directed by *Graystone Nash* and *4003-4005 5th Ave.* The court

stated that it will consider: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *Id.* at 857. The Staff submits that, applying these factors, a preclusion order is clearly warranted. The Staff will focus on the first three factors, given that any decision by Mr. Geisen decision to introduce new claims and defenses would clearly be "willful" given that he has been placed on notice that the Staff is seeking preclusion.

1. The Staff Would Be Prejudiced If Mr. Geisen Raises New Claims Or Defenses.

The Staff would be highly prejudiced if Mr. Geisen attempts to raise claims or defenses during the hearing he has not previously specifically disclosed to the Staff in response to its contention interrogatories. To prepare its case for hearing given the aggressive hearing schedule, the Staff will need to focus, and possibly limit, its questioning at the depositions. Mr. Geisen's continuing attempt to avail himself of innumerable potential defenses without specifically disclosing them in discovery denies the Staff the very information it needs to narrow its areas of inquiry, focus its questioning, and take depositions expeditiously.

If Mr. Geisen is permitted to keep open the possibility of raising any potential defense at hearing by incorporating the general denials in his Answer and a position paper developed for FENOC in his Statement Defenses, the Staff would be forced to depose or call witnesses unnecessarily. There are approximately 19,000 documents involved in this case, and from those documents the Staff has to select a comparatively small number to aid in the presentation of its case. Without knowing all the claims and defenses Mr. Geisen will assert at the hearing, the Staff may be unable to effectively limit the documents essential to the presentation of its case.

Even if some of the prejudice to the Staff could be mitigated at the hearing, either by the drawing of adverse inferences or by other Board actions, preclusion is still the most appropriate remedy for Mr. Geisen's failure to fully disclose his claims and defenses. Granting preclusion is the only sure way to ensure that the Staff is not surprised by defenses not disclosed with sufficient particularity in discovery. Mr. Geisen has had ample opportunity to respond to the Staff's interrogatories. To the extent he attempts, at the hearing, to raise claims or defenses not previously disclosed, he would introduce a great deal of uncertainty into the hearing. The Board would have to rule on the admissibility of the newly raised claim or defense. Also, depending on the substance of the newly raised claim or defense, the Staff could quite reasonably be expected to ask for a stay to conduct additional discovery.

2. The Staff Would Be Unable To Cure Any Prejudice Resulting From Mr. Geisen Raising New Claims And Defenses Without A Stay Of The Hearing.

Given the aggressive hearing schedule, the Staff simply will not have enough time to respond to any claims or defenses beyond those specified in Mr Geisen's supplemental interrogatory answers. The Staff is ready to begin taking depositions. Depositions are critical to the Staff's trial preparation, and before the Staff starts taking depositions it must know all Mr. Geisen's claims and defenses. These claims and defenses will serve as a roadmap for depositions, allowing the Staff to know who to depose, what questions to ask, and, more generally, what information must be derived through its questioning of deponents.

To the extent Mr. Geisen were allowed to raise claims or defenses which have not been articulated with sufficient specificity in discovery, the Staff would likely be required to seek a stay to investigate such claims and essentially start discovery over again. In addition, the Staff might seek to revise its witness list and submit additional documents at the hearing. The difficulties caused by a party belatedly asserting defenses are well recognized by the courts. *See Graystone Nash*, 25 F.3d at 191 (noting that when a party that had previously asserted its

Fifth Amendment privilege seeks to waive the privilege and testify at trial, "a new investigation could be required, and orderly trial preparation could be disrupted"). It is the Staff's understanding that the Board seeks to mitigate these difficulties; the Board can accomplish that by issuing an order precluding Mr. Geisen from raising at the hearing claims and defenses he has not advanced specifically in discovery.

CONCLUSION

For the reasons stated above, the Board should preclude Mr. Geisen from raising claims and defenses at the hearing, and from introducing evidence related to those claims and defenses, except those articulated in his supplemental interrogatory responses.

Respectfully submitted,

Lisa B. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 22nd day of December, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR PRECLUSION OF CLAIMS AND DEFENSES NOT ADVANCED SPECIFICALLY IN DISCOVERY" 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 22nd day of December, 2006.

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