

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12900

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

DOCKETED 01/23/07
SERVED 01/23/07

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of
DAVID GEISEN

Docket No. IA-05-052
ASLBP No. 06-845-01-EA
January 23, 2007

ORDER

(Ruling on Subpoenas Directed to Named Staff Employees)

1. The Board received last Friday evening, January 19, Mr. Geisen's application for issuance of subpoenas directed to two named NRC Staff employees, seeking their attendance at depositions to be held Wednesday, January 24. The reason given for seeking to depose those particular Staff employees was that they were the ones who had attested to the validity of the Staff's earlier answers to a number of interrogatories that Mr. Geisen had propounded to the Staff.

In further support of the subpoena application, Mr. Geisen filed yesterday morning (Monday, January 22) a related Praecipe by which our attention was called to a number of documents, including recent correspondence between the parties related to the ongoing discovery process (under the parties' jointly-proposed schedule, a five-week period from January 16 through February 20 had been reserved for the taking of depositions). Upon receipt of the Praecipe, the Board notified the parties by e-mail yesterday afternoon as follows:

In light of the arguments made and the Staff positions reflected in those filings, the imminence of the noticed depositions (the day after tomorrow), and in view of the provisions of 10 C.F.R. Sections 2.702(h) and 2.709(a)(1), the Staff is to respond in writing to Mr. Geisen's request by 2:00 PM tomorrow (Tuesday, January 23).

That response should address, among other things, whether the regulatory provisions cited above are intended to apply to enforcement proceedings (where the Staff might be viewed as playing a different role than it does in original licensing proceedings).

The Staff response was in fact filed in timely fashion, just before 2:00 PM today. As was the case when we recently requested that Mr. Geisen file a response on a quite-expedited basis (see Order of January 9, 2007 at 1 [providing a two-day response period to a stay motion], and Tr. at 532), the Board appreciates the Staff's efforts in this regard.

2. The Staff response takes the position that the cited regulations do indeed apply in enforcement proceedings, and thus that – barring a Board finding of “exceptional circumstances” – it is within the Staff's discretion as to which employees to designate for deposition here. Given the need for an immediate ruling on the requested subpoenas (for reasons not yet clear to us, the parties appear to have already let a good portion of the time for depositions slip away unused, in a proceeding in which an aggressive schedule must be rigorously adhered to in order to achieve the agreed-upon goal of starting the hearing on March 7), we accept – without deciding -- the Staff's regulatory interpretation.

Thus taking the Staff's position as a given, we start by simply pointing out the obvious – as is often the case,¹ context is critical to a resolution of the dispute before us. In an enforcement proceeding, it is the Staff that is the direct and only adversary of the enforcement target, and the proceeding focuses directly on the legitimacy of the Staff enforcement order.² The Staff must necessarily consider that context (again, assuming for this purpose the

¹ See, e.g., January 8, 2007 Order (Ruling on Staff's Preclusion Motion) at 2, 4.

² In contrast, it has been the rule for years in initial licensing actions that what is in issue is the legitimacy of the application, not the adequacy of the Staff's review. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985).

applicability of the regulations cited) in determining the nature of the different factors that bear on the exercise of its discretion as to which Staff employees to make available for depositions.

Here, the Board finds that there do exist, within the meaning of the regulation (10 C.F.R. § 2.709(a)(1)), exceptional circumstances to look behind the Staff's exercise of its discretion. The named employees appear to have played a central role in the formulation of a key Staff filing, i.e., the responses to Mr. Geisen's interrogatories. This, then, is not a situation where Mr. Geisen has targeted for deposition Staff employees who can be fairly seen to be not central to the controversy – for all that appears, in this exceptional circumstance they appear quite central. The Staff's apparent claim that the very people who attested to interrogatory responses lack direct, personal knowledge of the matters at stake here may turn out to be valid – but that claim itself, the Board concludes, presents an “exceptional circumstance” in this situation where the prospective deponents appear to have played a cardinal role in the interrogatory responses provided by the Staff.³

If the proposed deponents' lack of knowledge is proven true, then the depositions will be short ones. But they will have served the salutary purpose of not leaving unanswered the matters raised by Mr. Geisen's subpoena application, matters that would have the potential long-term to undercut the validity of the proceeding.

The Staff expresses a fear (Response at 4), however, that Mr. Geisen will use the depositions to seek “privileged attorney work-product and attorney-client information.” If that were to occur, it should be a simple matter for Staff counsel to raise the proper objection and direct the deponents not to answer, a step the Board would support.

³ The regulation provides one example of exceptional circumstances: “such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the [other] witnesses made available” Whether the present circumstances would also fit within this particular example cannot now be known – but by analogy, the role played by the prospective deponents in the interrogatory responses makes at least a prima facie case that they have some special knowledge.

Were there time available, either before tomorrow's scheduled depositions or in the overall deposition schedule, the Board might, by convening another prehearing conference with the parties, be able to find some other approach that would resolve all these matters. In the situation before us, with the terms of the regulation having been met, it is likely to prove far more efficient, in terms of everyone's time and efforts, simply to let the depositions proceed, so that in less than 24 hours the matter will be put to rest.

For these reasons, the Board GRANTS Mr. Geisen's application for subpoenas. In furtherance of that ruling, the Board Chairman is signing the subpoenas contemporaneously with the issuance of this Order.

3. As the deposition process moves forward, the Board wishes to express its concern over the tone and content of recent correspondence between the parties. Until that point, the Board had been generally impressed with the professionalism exhibited by both adversaries in their efforts to advance the merits of their respective principals' positions while resolving with thoughtfulness and civility the procedural issues that came before them.

The Board fully expects a return to that mode of operation. As the Board has often said, and as litigants here and elsewhere have often demonstrated, the parties can resolve in cooperative fashion, far more sensibly than can the Board in adversary fashion, the myriad of procedural tangles that arise in the course of a contested proceeding. In that regard, the Board recently addressed, in its January 8 Order (Ruling on Staff's Preclusion Motion) at 1,

the issue as to how the Staff will be able, through the discovery process, to receive fair notice of the defenses Mr. Geisen will be urging at trial, in a manner sufficient to guide the Staff in the upcoming conduct of depositions and then in the presentation of its case at trial.

Having considered the matter, the Board went on (at 3) to put Mr. Geisen on notice that

if it turns out that Mr. Geisen later attempts to present particular defenses about which he has not provided fair notice in some reasonable manner, he should be precluded from doing so. In

effect, then, the pending Staff motion – although not meritorious on its own terms – has established the predicate for a subsequent Staff motion premised on the later actual emergence of a non-noticed defense, if such an occurrence were to take place.

In furtherance of that same objective (see also Tr. of November 14 oral argument at 375, 379-80), the Board concluded (at 5-6, emphasis added, original emphasis deleted) by taking the remedial step of requiring that Mr. Geisen

identify, more specifically than he has done thus far, which of the large number of his potential witnesses he now intends to place primary reliance upon. This will tend to assure that, as the Staff determines how to approach the scheduling of depositions in terms of the relatively short time available and the large universe of possible witnesses, it can do so in a manner calculated to serve the ends of justice, not to cause the waste of resources. Cf. 10 C.F.R. § 2.332(c)(3)-(4); Fed. R. Civ. P. 16(a)(3)-(4). To that end, Mr. Geisen is directed to provide the Staff within the next two days, i.e., by Wednesday, January 10, a list of the ten witnesses who counsel in good faith believes are most central to his defense (as he now, at the end of written discovery, fairly appreciates its contours, and regardless of whether, as to a particular listed witness, he plans to conduct his own direct examination or simply to cross-examine if the witness is called by the Staff).

We did not, at that time, apply a similar requirement to the Staff, there appearing to be no need to do so.

The Board believes that there is no need for remedial action at this time with respect to the Staff's making available the "right" set of its employees for deposition. Rather, we rest with bringing to the Staff's attention that, at hearing, we will apply to it the same standards that, as indicated in the material quoted above, will apply to Mr. Geisen – the failure of either party to provide fair notice in some reasonable fashion as to the nature of its case, thereby depriving its adversary of the opportunity to use the deposition period to obtain appropriate discovery, will provide a predicate for that adversary to bring to the Board a motion to preclude the offending party from presenting documentary evidence or oral testimony as to which the adversary was precluded of a fair opportunity to obtain appropriate discovery.

The Board is fully confident that, having been so advised, the parties will resume their efforts to resolve any pending discovery matters in a cooperative fashion. The Board thus trusts that no further action on its part will be necessary as to this type of matter.

Accordingly, the application for subpoenas for the testimony of Staff employees Kenneth O'Brien and Robert D. Starkey at the offices of Mr. Geisen's counsel tomorrow, Wednesday, January 24, 2007, at 10:00 AM and 12:00 noon respectively, is GRANTED. Whether or not counsel are able to obtain the originals of those signed subpoenas prior to the scheduled depositions, the parties are to treat the subpoenas as in full force and effect.

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
January 23, 2007

Copies of this Order were sent this date by e-mail transmission to counsel for the parties.

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 (RULING ON SUBPOENAS DIRECTED TO NAMED STAFF EMPLOYEES) 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 23rd day of January 2007