

January 23, 2007

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'S FILING IN OPPOSITION TO DAVID GEISEN'S
APPLICATION FOR THE ISSUANCE OF SUBPOENAS

INTRODUCTION.

In response to the Board's direction of January 22, 2003, the NRC Staff asks the Board to deny Mr. Geisen's request for subpoenas of NRC Staff personnel Doug Starkey and Ken O'Brien, as Mr. Geisen has failed to make the required showing that "exceptional circumstances" exist to warrant deposing them. Mr. Geisen is simply attempting to make an end run around the case schedule to which he agreed, so that he can gain privileged information to which he is not yet entitled.

BACKGROUND

On January 10, 2007, Mr. Geisen sent a letter (Geisen's January 10 Letter) to the NRC Staff, copied to the Board, that purported to satisfy a direction from the Board issued on January 8, 2007, but that also touched upon several extraneous matters. One of these extraneous matters concerned eleven individuals identified on page 3 of Geisen's January 10 letter (Eleven Individuals). The Eleven Individuals were cited in the Staff's Responses to Interrogatories, filed on October 3, 2006. Geisen's January 10 Letter stated that the Staff did not specifically identify the portions of the cited interviews and documents that contained relevant information, and asked the Staff to provide the following information: (1) identify which of the eleven individuals the Staff intends to call as witnesses in its case-in-chief, (2) identify the specific topics those persons are

expected to testify on, and (3) identify the specific portions of “the cited interviews, testimony or documents of such persons that are allegedly relevant to the issues in this matter.”¹

The Staff responded in a letter on January 12, 2007, (Staff’s January 12 Letter) pointing out that the information requested by Mr. Geisen was premature because such information is not required to be disclosed until the filings of the parties’ roadmaps on February 22, 2007, according to the schedule that Mr. Geisen agreed to and that was approved by the Board.² It is also worth noting that Geisen’s Supplemental Interrogatory Responses, filed December 15, 2006, did not cite the specific portions of relevant documents cited as the factual basis for Mr. Geisen’s interrogatory responses.

On January 15, 2007, Mr. Geisen sent two letters to the NRC Staff, the second of which (Geisen’s Second January 15 Letter) expressed an intent to depose Messrs. Starkey and O’Brien because they signed affidavits supporting certain of the Staff’s interrogatory responses, which were in some unspecified way related to the Eleven Individuals, and because the Staff would not provide the information requested in Geisen’s January 10 Letter. On January 17, 2007, the Staff responded in one letter (Staff January 17 Letter) to both of Geisen’s January 15 Letters, stating an intent to oppose Mr. Geisen taking depositions of Messrs. O’Brien and Starkey because they are enforcement officers, not persons with direct knowledge of the facts underlying our enforcement Order. On January 18, 2007, Mr. Geisen noticed depositions for Messrs. O’Brien and Starkey, which the Staff on January 19, 2007, stated would not be attended.

¹ Geisen’s January 10 Letter at 3.

² As stated in “Joint Motion for Adoption of Proposed Case Schedule,” Exhibit 1, filed on December 15, 2006, on February 22, 2007, “parties file their respective pre-hearing statements containing a roadmap of their case-in-chief, including names and addresses of all witnesses (exclusive of impeachment and rebuttal witnesses), deposition testimony to be presented, identification of hearing exhibits(exclusive of impeachment and rebuttal exhibits), identification of any non-rebuttal or non-impeachment evidence permitted under 10 C.F.R. § 2.711 and stipulations by the parties, if any.”

Mr. Geisen applied for subpoenas later that day, reiterating that he wished to depose Messrs. O'Brien and Starkey to discover (1) which of the Eleven Individuals the Staff intends to call as witnesses, (2) the specific topics or issues such persons would testify to and (3) the specific portions of any documents, interviews or testimony of such individuals that the Staff cited in its responses to interrogatories.³

DISCUSSION.

I. Legal Background

Proceedings on enforcement orders are conducted under Part 2 of 10 C.F.R., Part 2, Subpart G unless all parties agree otherwise.⁴ Per 10 C.F.R. § 2.709(a)(1), the NRC Staff, in any proceeding in which it is a party, must make "available one or more witnesses ... for oral examination at the hearing or on deposition regarding any matter, not privileged, that is relevant to the issues in the proceeding." However, the deposition of any "named NRC personnel" can only be compelled "upon a showing 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 witnesses made available"⁵

II. Depositions of O'Brien and Starkey Would Be Contrary to the Regulations

Applying the express terms of 10 C.F.R. § 2.709(a)(1), Mr. Geisen's request for the subpoena of Mr. Starkey and Mr. O'Brien must fail, as Mr. Geisen fails to manifest the "exceptional circumstances" such that would warrant the deposition of either of the two named NRC personnel. Mr. Geisen has not demonstrated that either Messrs. Starkey or O'Brien have direct, personal knowledge of a material issue not known by

³ "David Geisen's Application for the Issuance of Subpoenas," at 2.

⁴ 10 C.F.R. 2.310(b).

⁵ 10 C.F.R. 2.709(a)(1).

other witnesses made available by the Executive Director of Operations (EDO).⁶

Mr. Geisen has identified six other current NRC employees he may wish to depose, the depositions of whom the Staff does not object to because they have direct knowledge of the Fall 2001 events underlying the Staff's enforcement order.

Mr. Geisen, by his own admission, is simply seeking privileged attorney work-product and attorney-client information, attempting to access through Messrs. O'Brien and Starkey the minds of the Staff's case attorneys. In its October 3, 2006, responses to Mr. Geisen's interrogatories, the Staff asserted attorney work-product objections generally,⁷ and specifically with respect to Mr. Geisen's requests for the identity of witnesses.⁸ Mr. Geisen never provided the information he now desires from the Staff, and he agreed to a schedule in which that information would not be provided until February 22, 2007.⁹ If Mr. Geisen truly found the Staff's Interrogatory Responses objectionable, he should have moved for relief at some point in the last three and one-half months, and he should have recognized the same deficiencies in his own Supplemental Interrogatory Responses.

III. Subpart G Regulations Apply to Enforcement Proceedings

The Board requested the Staff's position on whether 10 C.F.R. §§ 2.702(h) and 2.709(a)(1) were intended to apply to enforcement proceedings. According to 10 C.F.R. 2.310(b), Subpart G regulations apply to enforcement proceedings as a default matter. If the Commission intended other rules to apply to enforcement proceedings, it would have created them, or crafted an exception in §§ 2.702 and 2.709. In fact, an instance

⁶ Counsel for the NRC Staff has confirmed with both gentleman that they did not have involvement in the Fall 2001 events that are the subject of this enforcement proceeding.

⁷ See "NRC Staff Responses and Objections to David Geisen's First Set of Interrogatories and Requests for Production of Documents and Things," October 3, 2006, at 2.

⁸ *Id.* at 21 (Responding to Geisen interrogatory 4).

⁹ See "Joint Motion for Adoption of Proposed Case Schedule," Exhibit 1, December 15, 2001.

of the Commission crafting a specific exception in Subpart G for enforcement proceedings can be found in 10 C.F.R. 2.711(d).

In any event, depositions in enforcement proceedings should not be taken of Staff employees who have no direct knowledge of the matters underlying the enforcement order solely for the purpose of gaining privileged information.

CONCLUSION

In light of the foregoing, the Board should deny Mr. Geisen's request for subpoenas of NRC Staff personnel Doug Starkey and Ken O'Brien, as Mr. Geisen has failed to make the required showing that "exceptional circumstances" exist to warrant the deposition of each individual.

Respectfully submitted,

/RA by Michael A. Spencer/

Michael A. Spencer
Counsel for the NRC Staff

Dated at Rockville, MD
this 23rd day of January, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S FILING IN OPPOSITION TO DAVID GEISEN'S APPLICATION FOR THE ISSUANCE OF SUBPOENAS" 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 23rd day of January, 2006.

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