

RAS 12941

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

DOCKETED
USNRC

January 22, 2007 (10:43am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. IA-05-052

DAVID GEISEN

ASLBP No. 06-845-01-EA

January 19, 2007

DAVID GEISEN'S APPLICATION FOR THE ISSUANCE OF SUBPOENAS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.702(a) of the Commission's regulations, David Geisen requests that the Atomic Safety and Licensing Board (Board), designated in the above-captioned proceeding, issue the subpoenas, attached hereto, requiring Messrs. Kenneth O'Brien and Robert Starkey to attend and give testimony at a deposition.

DISCUSSION

On October 3, 2006, the Staff of the Nuclear Regulatory Commission (Staff) served responses to Mr. Geisen's interrogatories in this matter. Attached to those responses were affidavits signed by Kenneth O'Brien (Enforcement and Investigations Officer Region III U.S. Nuclear Regulatory Commission) and Robert Starkey (Senior Enforcement Specialist U.S. Nuclear Regulatory Commission Headquarters). Messrs. O'Brien and Starkey, under oath, stated that they had reviewed the answers to interrogatories and that those answers were "correct to the best of [their] information

TEMPLATE = SECY-023

SECY-02

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and belief.”¹

On January 10, 2007, counsel for Mr. Geisen sent the Staff a letter noting that six (6) different individuals were identified in the Staff's interrogatory answers as having assisted in the preparation or review of documents relating to this proceeding and another eleven (11) individuals was further identified in the responses. Because the Staff's interrogatory responses regarding these individuals failed to identify to what documents these individuals reviewed, how their knowledge was relevant to this matter, and whether any of the individuals were expected to testify at the hearing on this matter, counsel for Mr. Geisen requested the Staff to state a) whether they intended to call any of these individuals as witnesses; b) the specific topics or issues such individuals would testify to; and c) identify the specific portions of any documents, interviews, or testimony of such individuals that are relevant to this matter.

On January 12, 2007, the Staff sent counsel for Mr. Geisen a letter categorically refusing to provide this information. The Staff maintained that the information sought by counsel in its January 10, 2007, letter would not be provided by the Staff until it submitted its pre-hearing statement on February 22, 2007.

Left with no means to determine what, if any, relevant information is possessed by the individuals identified in the Staff's interrogatory responses, counsel for Mr. Geisen responded to the Staff's letter on January 15, 2007, requesting, *inter alia*, dates to depose Messrs. Starkey and O'Brien since they verified the interrogatory responses at issue. On January 17, 2007, the Staff replied stating that Messrs. Starkey and

¹ Counsel will file with the Board, no later than Monday January 22, 2006, copies of Messrs O'Brien's and Starkey's affidavits, as well as all correspondence referenced, *infra*, between counsel for Mr. Geisen and the Staff.

O'Brien did not have "direct knowledge of matters relevant to the enforcement proceeding" and the Staff would therefore "oppose your attempts to depose them."

In response, on January 18, 2007, counsel for Mr. Geisen sent the Staff a letter noticing Messrs. Starkey and O'Brien for deposition on January 24, 2007. See Exhibit E, attached hereto. Having heard no response from the Staff as to whether Messrs. Starkey and O'Brien would be presented for deposition, on January 19, 2007, counsel for Mr. Geisen sent the Staff an email, asking the Staff to confirm that Messrs. Starkey and O'Brien would be presented for deposition on January 24, and, if not, that the Staff alert counsel for Mr. Geisen as soon as possible so he could take appropriate action. Later on January 19, 2007, the Staff emailed counsel and indicated that Messrs. Starkey and O'Brien "will not appear for deposition on Wednesday, January 24."

Messrs. Starkey and O'Brien submitted sworn affidavits in this matter in connection with the Staff's interrogatory responses. When Mr. Geisen attempted to understand the potential relevance of the numerous individuals identified in the Staff's responses, the Staff refused to provide any more information, and stated that such information would only be revealed in the Staff's pre-hearing filing -- after the period for depositions has closed. Seeking to avoid unnecessary delay and cost, Mr. Geisen properly noted the deposition of Messrs. Starkey and O'Brien, to inquire as to their knowledge of the matters set forth in the interrogatory responses, a perfectly proper discovery tool given their verification of the interrogatory responses. Nonetheless, the Staff contends that Messrs. Starkey and O'Brien should not be produced because their knowledge is not "relevant to the enforcement proceeding."

Mr. Geisen is, quite simply, unable to comprehend how Messrs. Starkey and

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NUCLEAR REGULATORY COMMISSION

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DAVID GEISEN

ASLBP No. 06-845-01-EA

TO:

KENNETH O'BRIEN

Enforcement and Investigations Officer

Region III U.S. Nuclear Regulatory Commission

c/o

Michael A. Spencer

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop: O-15 D21

Washington, DC 20555-0001

YOU ARE HEREBY COMMANDED to appear to testify
at a deposition in the above captioned proceeding to be conducted at:

Miller & Chevalier, Chtd.
655 15th St., N.W.
Suite 900
Washington, D.C. 20005

On the 24th day of January, 2007 at 10:00 a.m.

LICENSING BOARD

BY ORDER OF THE ATOMIC SAFETY AND

BY: _____
Michael Ferrar, Chairman ASLB

Date

COUNSEL FOR DAVID GEISEN:

/s/

Richard A. Hibey
Charles F. B. McAleer, Jr.
Andrew T. Wise
Matthew T. Reinhard
MILLER & CHEVALIER CHARTERED
655 15TH Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for David Geisen

10 C.F.R. 2702(f)

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may:

- (1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or
- (2) Condition denial of the motion on just and reasonable terms.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

Docket No. IA-05-052

DAVID GEISEN

ASLBP No. 06-845-01-EA

TO:

ROBERT D. STARKEY

Senior Enforcement Specialist

Nuclear Regulatory Commission

c/o

Michael A. Spencer

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop: O-15 D21

Washington, DC 20555-0001

YOU ARE HEREBY COMMANDED to appear to testify at a deposition in the above captioned proceeding to be conducted at:

Miller & Chevalier, Chtd.

655 15th St., N.W.

Suite 900

Washington, D.C. 20005

On the 24th day of January, 2007 at 12:00 p.m.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY: _____

Michael Ferrar, Chairman ASLB

Date

COUNSEL FOR DAVID GEISEN:

/s/

Richard A. Hibey
Charles F. B. McAleer, Jr.
Andrew T. Wise
Matthew T. Reinhard
MILLER & CHEVALIER CHARTERED
655 15TH Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for David Geisen

10 C.F.R. 2702(f)

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may:

- (1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or
- (2) Condition denial of the motion on just and reasonable terms.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 19th day of January, 2007, copies of the foregoing were served on the following persons by first-class mail, postage prepaid, as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**):

Michael C. Farrar * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: mcf@nrc.gov

E. Roy Hawkens * **
Chief Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: erh@nrc.gov

Nicholas G. Trikouros * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: nqt@nrc.gov

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Margaret Parish * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: map4@nrc.gov

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-Mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication *

