

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD  
Before Administrative Judges:

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  
  
November 3, 2008

MEMORANDUM AND ORDER  
(Summarizing Conference Call)

For the reasons stated in our unpublished October 22, 2008 Notice and Order, we recently convened a conference call with the parties to this enforcement proceeding. Much was accomplished during that call, held on October 23, to move the proceeding along quickly, consistent with Mr. Geisen's entitlement under the agency's regulations to an expedited hearing in which to challenge the enforcement action taken against him. See 10 C.F.R. § 2.202(c)(1).<sup>1</sup> In this Memorandum, we summarize the steps taken, the agreements reached, and the schedule determined, during the conference call. The key aspect of that schedule is that the long-deferred evidentiary hearing will be held during the week of December 8, 2008,<sup>2</sup> in the agency's Rockville, Maryland Hearing Room (Tr. at 727-28).

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<sup>1</sup> More precisely, that regulation states that the requested hearing is to be "conducted expeditiously, giving due consideration to the rights of the parties."

<sup>2</sup> Notwithstanding the expedition achieved during the conference call, the hearing will still not be completed until nearly three years after the NRC Staff imposed (on January 4, 2006) an immediately-effective five-year ban on Mr. Geisen's employment in the nuclear industry. The reasons for the hearing delay are discussed in CLI-07-06, 65 NRC 112 (Feb. 1, 2007).

1. This phase of the proceeding was triggered by the parties' October 20 status report, which included the information that, upon the failure of the parties' lengthy attempts to settle the entire matter, counsel had "begun exploring areas of agreement which could limit the scope" of the hearing, and that counsel for Mr. Geisen had "expressed a desire to complete th[at] . . . hearing by the end of 2008." For the Board's part, the start of 2009 is expected to see the entire Licensing Board Panel facing dramatically increased workloads (Tr. at 685), thus also favoring holding the hearing by year's end. For these reasons, the teleconference was quickly convened; its agenda included the following items (Notice and Order, p. 2):

(1) the anticipated extent and complexity of any stipulation as to the scope of the issues to be addressed at the hearing; (2) the anticipated length of the hearing, both if a stipulation is reached as to its scope and if one is not reached; (3) the scope and duration of any prehearing discovery that might be needed; (4) the nature and timing of any projected prehearing written filings; (5) the resulting anticipated hearing dates; and (6) the nature and timing of the projected post-hearing written filings.

Each of those matters was discussed in full during the teleconference, as reflected in the Transcript thereof. The purpose of this Memorandum is to recount key decisions that were made and the schedule that resulted. We also note (see fn. 3) the occurrence of a subsequent development that must be resolved quickly if the schedule is to be met.

2. Before the hearing date could be set, a number of prehearing steps had to be completed. In that regard, the parties informed us that they were close to agreement upon a stipulation as to various matters that could simplify the hearing (Tr. at 685-87). They indicated that that stipulation might well be finalized within a couple of days (Tr. at 686, 724).

The next step involved the response Mr. Geisen owed to Staff discovery requests that had been made at an earlier stage of this proceeding (Tr. at 692). Because events had in some ways superseded the requests, Mr. Geisen was prepared to respond to their spirit by the end of

the month (Tr. at 693-94). He agreed, in the interest of expediting later steps, to move up that response to October 29 (Tr. at 722-23). He met that new target filing date.<sup>3</sup>

Planning forward from that date, the Staff indicated that its taking of Mr. Geisen's deposition could be done (in one day) during the week of November 10 (Tr. at 723, 731-33), for by then the Staff would have had 1½ weeks of preparation time following receipt of the written discovery responses (Tr. at 723-24) (which responses would be in addition to what the Staff had already had gleaned from prior interviews with, and testimony by, Mr. Geisen). For their part, counsel for Mr. Geisen were prepared to agree to forgo deposing the as-yet-unidentified Staff witnesses (with whose planned testimony they were entirely unfamiliar) (Tr. at 721).

At the conference (and at a previous one), considerable attention was devoted to the questions of (1) precisely which factual matters might be governed by the doctrine of collateral estoppel and (2) what difficulties were likely to arise in applying that principle to a proceeding whose scope is to be limited by an asserted dichotomy between "conduct" and "sanction" issues (Tr. at 690-91, 699-700, 701-05, 716-17). The Board informed the parties that, given the imperfectness of that split, it intended to avoid continuous arguments at the hearing about the extent to which a question, or an answer, should have been barred by collateral estoppel. Instead, our general approach would be, where the application of the doctrine is not perfectly clear, to admit the evidence subject to the objection, then to sort out all the objections (and the legitimacy of the related evidence) as part of the post-evidentiary-hearing written and oral presentations by counsel (Tr. at 703-06, 730). But in order to have the parties' general

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<sup>3</sup> "David Geisen's Second Supplemental Answers to NRC Staff's Interrogatories."

On October 31, however, the Staff sent Mr. Geisen a letter indicating a number of respects in which it believed the above-entitled response was non-responsive or otherwise inadequate. Mr. Geisen responded by letter today. That controversy, if not quickly resolved by the parties, will likely be the subject of another Board ruling in short order. For now, that matter is not addressed in this Memorandum's recounting of the result of the October 23 prehearing teleconference.

positions on that issue spelled out before the hearing, the Staff will file a motion regarding the application here of the collateral estoppel doctrine by November 17, with Mr. Geisen's reply due November 26 (Tr. at 730-31). Both briefs are to be limited to 10 pages (Tr. at 731).

To make the parties' prehearing document-creation burden as light as possible as compensation for the rapid pace of the prehearing phase, and in light of the nature of the issues, the Board – with the parties' concurrence – departed from the custom followed in most other cases by deciding that they would not file any written direct testimony of their proposed witnesses in advance (Tr. at 700, 724-25). Similarly, the Board indicated it would not require the filing of extensive prehearing briefs (Tr. at 700-01).<sup>4</sup>

By eliminating those two time-consuming steps, it became possible to set the hearing for the week of December 8, rather than delay it into next year. In order for the Board to prepare for the hearing in some other fashion (i.e., without the benefit of prefiled written direct testimony and prehearing briefs), the parties agreed that, for us to become familiar with the background of the case, we should read the Transcript of the federal district court criminal trial (Tr. at 701, 726). In addition, we directed the parties to file by the middle of the week before the trial a short (3 pages or less) outline of the case they expected to prove at the hearing (Tr. at 725-26).

3. We recognize that the foregoing schedule requires the parties to conduct the remainder of the prehearing phase more rapidly than they would have to otherwise, and that this may cause them some inconvenience. But the very notion of an "expedited" hearing means that the regular order of business is to be accelerated. As we explained, the test of whether a particular expedited hearing process should be adopted is not whether counsel are "satisfied"

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<sup>4</sup> With the prehearing filings thus foreshortened, the Board referred briefly to the likely need for extensive post-hearing filings (Tr. at 733). The determination of what will then be needed was deferred until the end of the evidentiary hearing (Tr. at 733-34).

with it, but whether the steps taken are, in the overall context of the proceeding, “sufficient” to achieve fairness.<sup>5</sup>

Indeed, at one point the Board raised, in the interest of expedition, the possibility of eliminating the taking of depositions entirely (Tr. at 699, 718-19). After all, such a step is authorized – indeed, mandated – under those of the agency’s regulations that govern other types of proceedings (see 10 C.F.R. § 2.1203(d)), and thus cannot be characterized as inherently unfair, at least so long as some other reasonable discovery opportunity has been made available. Arguably, the barring of depositions here, in an effort to accommodate Mr. Geisen’s justifiably-expressed preference for expedition (and the Board members’ upcoming schedules), would – if anything – have hampered Mr. Geisen’s preparation far more than it would the Staff’s, in that (1) the government has already had several opportunities to question Mr. Geisen (who took the witness stand in the criminal proceeding), both formally and informally, while (2) Mr. Geisen has not had the opportunity to depose the Staff witnesses.

During the teleconference, the Staff objected to eliminating depositions (Tr. at 719), while Mr. Geisen did not (Tr. at 721). Happily, the current schedule -- as developed and

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<sup>5</sup> See Tr. at 709-10, and fn. 1, above (requiring that we “giv[e] due consideration to the rights of the parties”). Our judgment is that – in light of Mr. Geisen’s understandable desire to proceed as quickly as possible, and the familiarity with his position and statements that the government has acquired through its interviews and his testimony -- the schedule set out above provides due consideration to each party’s rights and interests and will result in a fair proceeding.

expedited with the parties' cooperation -- was able to accommodate the Staff's taking of Mr. Geisen's deposition. Thus, the issue of forgoing any depositions became moot.

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Accordingly, the prehearing and hearing schedule discussed during the teleconference, and recounted above, is ADOPTED.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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E. Roy Hawkens  
ADMINISTRATIVE JUDGE

*/RA/*

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Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
November 3, 2008

Copies of this Memorandum and Order were sent this date by e-mail transmission to counsel for Mr. Geisen and for the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of  
DAVID GEISEN

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Docket No. IA-05-052

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SUMMARIZING CONFERENCE CALL) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 3rd day of November 2008