

January 30, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF RESPONSE TO BOARD QUESTIONS

INTRODUCTION

On December 31, 2008, the Atomic Safety and Licensing Board (“Board”) requested the NRC Staff (“Staff”) to address two sets of questions on collateral estoppel and due process, either in its findings of fact and conclusions of law on January 16, 2009, or in a supplemental brief to be filed on Friday, January 30, 2009. By e-mail dated January 7, 2009, the Staff advised the Board and the parties that it would reply on the latter date. The Staff herein provides its response.

QUESTION 1. COLLATERAL ESTOPPEL

On November 17, 2008, the NRC Staff submitted a motion for collateral estoppel.<sup>1</sup> In it, the Staff moved for the Board to use collateral estoppel from the guilty verdict and underlying facts of Counts 1, 3, and 4 in *U.S. v. Geisen* to conclusively establish the Staff’s charge that Mr. Geisen knowingly provided materially inaccurate and incomplete information to the NRC in Serial Letter 2744. During the course of pre-hearing conferences, Mr. Geisen alerted the Staff of his intent to contest any motion for collateral estoppel on the ground that the trial judge gave the jury a deliberate ignorance

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<sup>1</sup> “NRC Staff Motion for Collateral Estoppel” (Nov. 17, 2008) (“Collateral Estoppel Motion”).

instruction.<sup>2</sup> As such, the Staff directly addressed the argument in its Motion. The Board has since asked a series of questions related to the deliberate ignorance instruction, which the Staff addresses below.

- i. Whether a conviction under the deliberate ignorance instruction satisfies the NRC Staff's deliberate misconduct standard, because pursuant to the instruction, a conviction would indicate that the jury found the defendant "knew that the submissions and presentations to the NRC concealed material facts or included false statements."

The Staff's collateral estoppel motion is based upon an analysis of the findings a reasonable jury would have made based on the evidence presented during the criminal trial. The Staff presented an analysis of the evidence in the criminal record which demonstrated that a reasonable jury would have concluded, beyond a reasonable doubt that Mr. Geisen knew that Serial Letter 2744 contained false statements and omitted material information. This evidence satisfied the deliberate misconduct standard by showing that Mr. Geisen knew that Serial Letter 2744 was inaccurate and incomplete when he concurred on its submission to the NRC. Because the issue decided by the jury was identical to an issue in this proceeding, the Board should find that the issue in this proceeding has been conclusively established by operation of law.

Because the Staff premised its motion on the grounds that collateral estoppel is warranted based on Mr. Geisen's actual knowledge, the Staff did not address the question of whether the evidence supported a finding by the jury that Mr. Geisen was guilty under the deliberate ignorance instruction. Answering that question would require an examination of the evidence in the criminal proceeding and an assessment of whether the evidence presented would lead a reasonable jury to find that Mr. Geisen (1)

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<sup>2</sup> *Transcript of Pre-Hearing Conference ITMO David Geisen* at 634-35 (July 21, 2008); *Transcript of Pre-Hearing Conference ITMO David Geisen* at 691 (Oct. 23, 2008).

was aware of a high probability that Serial Letter 2744 was inaccurate and incomplete and (2) deliberately closed his eyes to what was obvious. Because the application of collateral estoppel is premised upon a review of the factual record, it is not possible to definitively answer the question of whether collateral estoppel under the deliberate ignorance instruction can be applied to this proceeding. However, the Board need not reach that question since the evidence at the criminal trial unequivocally established that Mr. Geisen had knowledge of the inaccuracies and omissions in Serial Letter 2744 and that a reasonable jury would have so based its verdict.

- ii. Whether a conviction under the deliberate ignorance instruction precludes the conclusion that the jury found the defendant guilty of careless disregard, because the instruction stated that “carelessness, or negligence, or foolishness is not enough to convict,” but rather the jury must be “convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements.” Cf. United States v. Mari, 47 F.3d 782, 785-86 (6th Cir. 1995) (holding that the express terms of the Sixth Circuit Pattern Jury Instruction foreclose the possibility that a jury will convict a defendant based on what he should have known rather than on what he did know).

Again, the Board need not reach this question because the jury convicted Mr. Giesen on the grounds that he knew that the NRC submissions were inaccurate and incomplete. As outlined above, the Staff has demonstrated that a reasonable jury would have found that the evidence demonstrated Mr. Geisen’s knowledge beyond a reasonable doubt. Therefore, collateral estoppel applies on that basis.

- iii. Even assuming that a conviction under the Sixth Circuit’s deliberate indifference instruction would provide a basis for collateral estoppel, whether the NRC Staff has waived such an argument based on its representation (mentioned above) in its November 17 Motion. But cf. Brief of David C. Geisen in Response to Board’s Order Dated June 30, 2008 at 4 (July 7, 2008) (“While [Mr. Geisen] does not concede the issue of whether he knowingly made false statements to the NRC, he does recognize that the conviction removes that issue from the Board’s consideration.”).

As the above discussion indicates, it is not necessary to address the question of waiver by either the Staff or Mr. Geisen because the Staff strongly believes that the record and evidence demonstrates that the jury convicted Mr. Geisen because they found that he had actual, positive knowledge and acted contrary to that knowledge. Therefore, any reviewing judge/court/Board must find the conviction based upon actual knowledge.

### QUESTION 2. DUE PROCESS/ARBITRARINESS

The Board has asked whether the investigatory and enforcement processes followed by the Staff violated Mr. Geisen's due process rights. Additionally, the Board has asked whether procedural due process concerns are raised because of the immediacy of the sanction imposed by the enforcement Order. Finally, the Board has asked whether the overall impact of any procedural shortcomings in the Staff's enforcement processes may be deemed arbitrary even if the individual steps in the process appear permissible.

These questions concern the adequacy of NRC procedures to protect individuals subject to immediately effective orders from erroneous deprivation of life, liberty or property. The Fifth and Fourteenth Amendments of the U.S. Constitution prohibit the government from depriving individuals of those rights without due process of law. "The fundamental requisite of due process of law is the opportunity to be heard."<sup>3</sup> Due process requires that an individual who has been deprived of life, liberty or property be afforded a hearing "at a meaningful time and in a meaningful manner."<sup>4</sup> The essential rights that must be provided consistent with due process are:

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<sup>3</sup> *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

<sup>4</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

(1) “timely and adequate notice detailing the reasons for [the action]”;

(2) “an effective opportunity [for the adversely affected] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally”;

(3) retained counsel, if desired;

(4) an “impartial” decisionmaker;

(5) a decision resting “solely on the legal rules and evidence adduced at the hearing”;

(6) a statement of reasons for the decision and the evidence relied on.<sup>5</sup>

For NRC enforcement actions, these due process rights are afforded by adjudicatory hearings normally held before the Atomic Safety and Licensing Board. For enforcement orders, which are made immediately effective in order to protect the public health and safety,<sup>6</sup> individuals may obtain a hearing on a challenge to the immediate effectiveness of the order after issuance.<sup>7</sup> These procedures allow individuals subject to immediately effective orders to ask that the order be set aside on the ground that it is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.<sup>8</sup> The motion must state the reasons for setting aside the order with particularity and be accompanied by affidavits or other evidence.<sup>9</sup> The Staff is required to respond to the

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<sup>5</sup> *Id.* at 325, fn.4, citing *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970).

<sup>6</sup> 10 C.F.R. § 2.202(a)(5).

<sup>7</sup> 10 C.F.R. § 2.202(c)(i).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

motion within five days, and the motion must be decided by the presiding officer expeditiously.<sup>10</sup>

These procedural safeguards were established by the Commission following the adoption of the deliberate misconduct rule,<sup>11</sup> which clarified that unlicensed individuals could be subject to immediately effective enforcement actions.<sup>12</sup> In promulgating that regulation, the Commission explicitly determined that the requirements of due process were satisfied. The Commission said:

Due process does not require a rule that leaves the Commission impotent to act to protect the public health, safety, or interest, while its decision is being challenged by affected parties. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 299-302 (1981); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). Due process requires only that an opportunity be granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Matthews v. Eldridge*, 424 U.S. 319 (1976). What is meaningful depends on appropriate accommodation of the competing interests involved. These include the importance of the private interest and the length of finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved.<sup>13</sup>

The Commission concluded that allowing individuals expeditious hearings on the question of whether the immediate effectiveness of an enforcement order was based on

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<sup>10</sup> *Id.* It should be noted that Mr. Geisen decided not to challenge or request a hearing to set aside the immediate effectiveness of the enforcement order. *Transcript of Oral Arguments ITMO David Geisen* at 68-69 (Apr. 11, 2006).

<sup>11</sup> Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194 (May 12, 1992).

<sup>12</sup> Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673, 40,679 (Aug. 15, 1991).

<sup>13</sup> 57 Fed. Reg. at 20,196.

adequate evidence struck a reasonable balance between governmental and private interests.<sup>14</sup> Specifically, the Commission noted that the rule permitted timely action to protect public health and safety while providing protection against pre-hearing actions that are unfounded.<sup>15</sup>

Given this general background on due process requirements and immediately effective enforcement actions, the Staff addresses the Board's questions below.

- i. Whether the process employed by the Enforcement Panel was fundamentally flawed in such a manner that violated Mr. Geisen's due process rights. See *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (touchstone of due process is protection of the individual against arbitrary action of government); see also *Hensley v. Wilson*, 850 F.2d 269, 276-77 (6<sup>th</sup> Cir. 1988) (where decider relied strictly on investigator's statement without making the information provided to it, as minimum due process requires it to do.), and see *Kyle v. Hanberry*, 677 F.2d 1386, 1389 (11<sup>th</sup> Cir 1982) ("to make a decision based on the factual evidence presented, part of a disciplinary committee's task must be to make a bona fide evaluation of the credibility and reliability of that evidence" without which an arbitrary determination would result).

As discussed above, the due process rights of individuals subject to enforcement actions are protected by the NRC's adjudicatory process. For this reason, the NRC's adjudicatory process is designed to satisfy the fundamental due process rights of adequate notice, a neutral decision maker, an opportunity to make an oral presentation, an opportunity to present evidence, a chance to confront witnesses and evidence used against the individual, right to counsel and a decision based on the record with a statement of the reasons for the decision. To satisfy the requirement for a neutral decision maker, hearings are conducted before members of the ASLBP who are not part of or under the authority of the Staff.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 20,197.

The processes leading up to the issuance of an enforcement action include the gathering and assessment of factual information, the determination of whether any violations have occurred, and the assessment of the appropriate sanction under the relevant circumstances. These processes do not afford any hearing rights because the right to a fair and impartial hearing is satisfied through the adjudicatory process, not the internal enforcement process that leads to an enforcement action.

In this respect, the issuance of an enforcement action is similar to criminal processes such as the filing of charges, or the issuance of an indictment, against an individual. Courts, not prosecutors, conduct hearings on criminal charges. Similarly, in NRC proceedings, the Staff does not conduct hearings on enforcement orders; instead, that role is reserved to the presiding officers who maintain neutrality by remaining independent of the Staff.

Due process requirements dictate the hearing rights that must be afforded to individuals. Therefore, they necessarily apply to the agency's hearing procedures, not the processes that govern the Staff's enforcement decision-making. Whether Mr. Geisen was denied due process must therefore be determined based on the hearing rights he was afforded, not the internal processes followed by the Staff.<sup>16</sup> The hearing rights afforded to Mr. Geisen, like all individuals who are the subject of immediately effective enforcement actions, are governed by Commission regulations.

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<sup>16</sup> See *Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533 (1979). There, the Appeal Board rejected a claim that the actions of the Director of Enforcement violated due process because he relied on off-the-record, *ex-parte* reports. The Appeal Board held that the Director was required to give written notice of specific violations and consider responses in deciding whether penalties were warranted, but was not obliged to hold a formal preliminary hearing before pressing charges. *Id.* at 537. Finding that an impartial hearing was held at which the company's constitutional rights were fully protected, the Appeal Board found no want of due process of law in the Director's decision to press charges. *Id.* at 537-38.



For immediately effective enforcement actions, the Commissions regulations allow the affected individual to request an expedited hearing to set aside the immediate effectiveness of the order on the ground that it was not based on adequate evidence.<sup>17</sup> This hearing is designed to protect individuals against enforcement actions that are not based on adequate evidence, but on mere suspicion, unfounded allegations or error.<sup>18</sup> Mr. Geisen, however, decided not to request a hearing to set aside the immediate effectiveness of the enforcement order.<sup>19</sup> Therefore, he waived his right to challenge the immediate effectiveness of the order on those grounds.

Ultimately, Mr. Geisen was afforded the merits hearing he requested under 10 C.F.R. § 2.202(c), during the week of December 8-12, 2008. That hearing satisfied his due process rights to present his case with assistance of counsel, make an oral presentation and confront the evidence and witnesses against him, and to obtain a written decision from a neutral decision maker, which will be forthcoming.

- ii. Whether the immediacy of the penalty imposed by the Enforcement Order raises procedural due process concerns under the Supreme Court's balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (fundamental requirement of due process is an opportunity to be heard at a meaningful time in a meaningful way). Compare *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (professor, who had not tenure rights to continued employment, was not deprived of "liberty" when he was not rehired but remained as free as before to seek another employment opportunity) with *Goldberg v. Kelley*, 397 U.S. 254 (1970) (procedural due process requires a pretermination evidentiary hearing be held when deprivation of Constitutional interests occurs).

The Commission addressed this question when promulgating revisions to Part 2 to allow expedited hearings for challenges to immediately effective orders on the

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<sup>17</sup> 10 C.F.R. § 2.202(c)(2)(i).

<sup>18</sup> *Id.*

<sup>19</sup> *Transcript of Oral Arguments ITMO David Geisen* at 68-69 (Apr. 11, 2006).

grounds that the Staff's action was based on adequate evidence.<sup>20</sup> The Commission allows individuals to request a hearing to set aside the immediate effectiveness at the time the individual files an answer to the order or earlier.<sup>21</sup> In the Statement of Consideration, the Commission specifically addressed a comment that an individual subject to an immediately effective enforcement order may suffer a loss of employment prior to a hearing on the merits.<sup>22</sup> The Commission explained that it was necessary for the NRC to have the flexibility to take protective action without unnecessary administrative and procedural impediment.<sup>23</sup> Because the public health and safety was of paramount concern, the Commission determined that any right to a prior hearing on the merits would have to give way to the government's need to take rapid and effective action to protect the public.<sup>24</sup>

As previously stated, although Mr. Giesen answered the order, he specifically chose not to ask that the immediate effectiveness be set aside.<sup>25</sup> Therefore, he consciously waived his right to challenge the Staff's decision to make the enforcement sanction immediately effective. Ultimately, he was afforded with the merits hearing that he requested although the hearing was delayed by the Commission in order to ensure that the criminal proceeding against Mr. Geisen was not impeded. This very situation

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<sup>20</sup> See 57 Fed. Reg. 20,194.

<sup>21</sup> See 10 C.F.R. § 2.202(c)(2)(i).

<sup>22</sup> 57 Fed. Reg. at 20,195.

<sup>23</sup> 57 Fed. Reg. at 20,196.

<sup>24</sup> *Id.*

<sup>25</sup> "Answer and Demand for an Expedited Hearing" (Feb. 23, 2006); *Transcript of Oral Arguments ITMO David Geisen* at 68-69 (Apr. 11, 2006).

was contemplated by the Commission in the Part 2 rulemaking. On this subject, the Commission said:

The Commission agrees with the thrust of these comments to the effect that a grant of any delay in the proceeding should take into consideration not only the interests of the government but of the persons affected by the Order as well. The rule is premised on that principle. It is contemplated that, under the rule, the presiding officer will grant a delay only if there is an overriding public interest for the delay. A prime example would be the temporary need to halt the proceeding where continuation would interfere with pending criminal investigation or jeopardize prosecution. . . The rule, as adopted, allows for proper consideration to be given to the public interest as well as the interests of the persons affected by the immediately effective order.<sup>26</sup>

Thus, the Commission has determined that, consistent with due process considerations, enforcement actions necessary to protect public health and safety may be taken without a prior hearing. However, individuals subject to such actions may obtain an expedited hearing to ensure that the Staff's action is not based on clear error, unreliable evidence, or unfounded allegations.<sup>27</sup> The Commission has also noted that a hearing on the merits of the enforcement action may be delayed consistent with due process, but only when necessary because of an overriding public interest.<sup>28</sup> Here, Mr. Geisen was afforded a fair and impartial hearing on the merits of the enforcement order. Therefore, there are no procedural due process concerns for the Board to adjudicate.

- iii. Whether, even if individual steps in a process appear to be permissible, the overall impact of the totality of their shortcomings can nonetheless be deemed arbitrary. See *Steel Tank Barge H1651 v. United States*, 272 F. Supp 658 (E.D.La. 1967).

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<sup>26</sup> 57 Fed. Reg. at 20,197.

<sup>27</sup> 10 C.F.R. § 2.202(c)(2)(i); see also 57 Fed. Reg. at 20,194, 20,197.

<sup>28</sup> 57 Fed. Reg. at 20,197.

In *Steel Tank Barge*, the Court found that procedural due process safeguards, although sufficient in normal circumstances, were not adequate under the peculiar facts of that situation.<sup>29</sup> In NRC proceedings, as discussed above, the Commission has established procedural rules to govern adjudicatory hearings it has deemed sufficient to satisfy due process. Those procedures were complied with in this proceeding and, as a consequence, Mr. Giesen was afforded a fair and impartial hearing. Absent any claim that those procedures were inadequate in any respect under the circumstances in this case, there is no basis on which to expect that the final adjudicatory decision in the case will be arbitrary.

Respectfully submitted,

*/RA/*

Lisa B. Clark  
Shahram Ghasemian  
Kimberly A. Sexton

dated at Rockville, MD  
this 30th day of January, 2009

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<sup>29</sup> 272 F.Supp. at 662.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BOARD QUESTIONS" 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 30th day of January, 2009.

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: [Mike.Farrar@nrc.gov](mailto:Mike.Farrar@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: [Roy.Hawkens@nrc.gov](mailto:Roy.Hawkens@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: [Nicholas.Trikouros@nrc.gov](mailto:Nicholas.Trikouros@nrc.gov)

Office of Commission  
Appellate Adjudication \* \*\*  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
Washington, D.C. 20555  
Email: [OCAAMAIL.Resource@nrc.gov](mailto:OCAAMAIL.Resource@nrc.gov)

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

Richard A. Hibey, Esq. \*\*  
Charles F.B. McAleer, Jr., Esq.  
Andrew T. Wise, Esq.  
Mathew T. Reinhard, Esq.  
Miller & Chevalier  
655 Fifteenth Street, N.W., Suite 900  
Washington, D.C. 20005-5701  
E-mail: [rhibey@milchev.com](mailto:rhibey@milchev.com)  
[awise@milchev.com](mailto:awise@milchev.com)  
[mreinhard@milchev.com](mailto:mreinhard@milchev.com)

Office of the Secretary \* \*\*  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
Washington, D.C. 20555  
E-mail: [Hearing.Docket@nrc.gov](mailto:Hearing.Docket@nrc.gov)

Johanna Thibault \* \*\*  
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: [Johanna.Thibault@nrc.gov](mailto:Johanna.Thibault@nrc.gov)

Karen Volloch\* \*\*  
Board Staff  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [Karen.Volloch@nrc.gov](mailto:Karen.Volloch@nrc.gov)

*/RA/*

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Lisa B. Clark  
Counsel for the NRC Staff