

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

February 25, 2009

ORDER
(Concerning Oral Argument)

Our Order of February 13, 2009, instructed the parties to reserve the morning of Tuesday, March 3, for a possible oral argument. As the parties were informally advised earlier this week, this will confirm that the Board will indeed hold oral argument that day in our Rockville, Maryland, hearing room, beginning at 10:00 a.m. and concluding by noon. The NRC Staff having the burden of proof, its counsel will argue first, and may be afforded an opportunity for rebuttal before the close of the argument.

In our February 13 Order we indicated we might choose to identify in advance particular areas of inquiry that we wish to explore at the argument. Without intending to limit the scope of the subjects that may arise, but to provide counsel the opportunity to prepare on subjects that now appear might prove significant to our decision, we advise them to focus attention on the following:

- The applicability of collateral estoppel, including whether the intentional component of the NRC's "deliberate misconduct" standard is satisfied by a conviction based on deliberate ignorance. See United States v. Heredia, 483 F.3d 913, 920 (9th Cir. 2007) (en banc);

- Whether, for purposes of applying collateral estoppel, it matters not if the jury concluded Mr. Geisen had knowledge to a 100% certainty, or if it concluded he had knowledge to a high probability of certainty (i.e., deliberate ignorance theory), because either conclusion satisfies the element of knowledge the Staff must show in this proceeding;
- The limitations, if any, on the Staff's claim that any due process concerns during the investigatory or enforcement phases of this case may be disregarded because the Staff is "just the prosecutor" and the Board's adjudication operates to eliminate any such concerns (NRC Staff Response to Board Questions at 8-9 (Jan. 30, 2009)), in circumstances where, because of prosecutor-induced action, over 60% of Mr. Geisen's prosecutor-imposed sentence will have been served before the Board decision can be issued;
- The applicability of doctrines from criminal cases that prosecutorial misconduct can taint a verdict notwithstanding the adjudicatory role of the court;
- For purposes of the Sarbanes-Oxley analogy, the necessity under that statute to prove actual knowledge to obtain a conviction, notwithstanding the purpose behind the law (see NRC Staff Proposed Findings of Fact and Conclusions of Law at 8 (Jan. 16, 2009));
- The significance of the testimony from the criminal trial (Staff Ex. 71) upon which the Staff relies to show Mr. Geisen's knowledge (Staff Proposed Findings at 49-50, ¶¶ 5.108, 5.110, 5.112);
- The apparent absence of any factual questions about certainty of guilt in nearly all other NRC cases in which an enforcement order was made immediately effective (see Staff Proposed Findings, Attachment 1);
- The role of determinations of demeanor credibility in our evaluation of the testimony of Mr. Geisen and other witnesses from the evidentiary hearing; and

- The need for the Board to reconcile the competing "truths" advanced by Mr. Martin and Mr. Geisen, assuming their demeanor and other indicia convince us that both are telling the truth as they see it.

Independent of the above questions, each party should structure its main presentation to address the deficiencies asserted by the other side to exist in its position, and to highlight the deficiencies it sees in the other side's position.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA by E. Roy Hawkens for:/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 25, 2009

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

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (CONCERNING ORAL ARGUMENT) 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 Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 25th day of February 2009