October 27, 2010

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 RESPONSE IN OPPOSITION TO DAVID GEISEN'S
APPLICATION FOR AWARD OF ATTORNEY'S FEES

On September 27, 2010, David Geisen filed an application[1] before the Atomic Safety and Licensing Board ("Board") for an award of attorney's fees under the Equal Access to Justice Act[2] ("EAJA") and 10 C.F.R. Part 12. Mr. Geisen's application should be denied because the EAJA and Part 12 do not apply to NRC enforcement adjudications. Further, even assuming arguendo that these applied to NRC enforcement adjudications, Mr. Geisen is not eligible to recover under the EAJA and Part 12 because Mr. Geisen has not demonstrated that he incurred the costs for which he is seeking an award of attorney's fees, nor has he submitted a "full documentation of the fees and expenses . . . for which an award is sought" as required by 10 C.F.R. § 12.203. Finally, even if Mr. Geisen is eligible to recover under the EAJA, he cannot recover any fees or expenses because the Staff's position was substantially justified.

[1] David Geisen's Application for Award of Attorney's Fees (Sept. 27, 2010) ("Application").

[2] 5 U.S.C. § 504.

DISCUSSION

The Equal Access to Justice Act, which is implemented by the NRC through 10 C.F.R. Part 12, allows parties who prevail against the government in certain agency proceedings to recover attorney's fees and other costs unless the government's position was substantially justified or special circumstances make an award unjust.[3] The EAJA applies to any "adjudication required by statute to be determined on the record" and in which the position of the government is represented by counsel.[4] In order to recover under the EAJA, an applicant must have actually incurred the costs for which the applicant is seeking an award.[5] The applicant "has the burden of establishing the reasonableness of its fee request."[6] In the instant case, Mr. Geisen is not entitled to attorney's fees because the EAJA does not apply to NRC enforcement adjudications. But, even if the EAJA did apply, Mr. Geisen has not demonstrated that he incurred the costs of his defense nor has he submitted a full documentation of fees and expenses to support his request. Finally, Mr. Geisen still cannot recover attorney's fees because the Staff's position was substantially justified.

I. The EAJA Does Not Apply to NRC Enforcement Adjudications

According to 10 C.F.R. § 12.103(a), the EAJA applies to three different types of proceedings, one of which is an "[a]dversary adjudication[] conducted by the Commission pursuant to any . . . statutory provision that requires a proceeding before the Nuclear Regulatory Commission to be so conducted as to fall within the meaning of 'adversary adjudication' under

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[3] 5 U.S.C. § 504(a)(1); 10 C.F.R. § 12.101.

[4] *See* 5 U.S.C. §§ 504(b)(1)(C) and 554.

[5] 5 U.S.C. § 504(a)(1); 10 C.F.R. § 12.105.

[6] *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004).

[the EAJA]." The EAJA defines "adversary adjudication" as "an adjudication under section 554 [of the Administrative Procedure Act ("APA")] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license."[7] Section 554(a) of the APA states that "[t]his section applies, according to the provisions thereof, in every case of adjudication *required by statute to be determined on the record* after opportunity for an agency hearing," with six exceptions not relevant here.[8]

In the 1994 Statements of Consideration for the final rule promulgating the regulations implementing the EAJA, the Commission stated that "it is not unreasonable to conclude that no NRC proceeding other than an appeal to a board of contract appeals under the Contract Disputes Act ("CDA") or a Program Fraud Civil Remedies Act ("PFCRA") hearing is covered by EAJA."[9] The Commission, however, did not close the door to potential applicants for attorney's

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[7] 5 U.S.C. § 504(b)(1)(C). As the Supreme Court explained in *Ardestani v. INS*, 502 U.S. 129, 135 (1991), "the most natural reading of the EAJA's applicability to adjudications 'under section 554' is that those proceedings must be 'subject to' or 'governed by' § 554," meaning that "the proceedings must be governed by the procedures mandated by the APA."

[8] 5 U.S.C. § 554(a) (emphasis added). *See also Equal Access to Justice Act: Implementation*, 59 Fed. Reg. 23,119, 23,120 (May 5, 1994).

[9] 59 Fed. Reg. at 23,120. The Commission has recognized that at the time of the EAJA's original implementation in 1980 it expressly excluded proceedings for the purpose of granting or renewing a license, but it did not contain an express exclusion for proceedings suspending, revoking, or amending a license, including for nuclear reactors. *Id.* In the 1982 *Kerr-McGee* case, the Commission concluded that section 189 of the AEA does not require formal, on-the-record hearings in materials license amendment proceedings. *Kerr-McGee* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 256 (1982). On appeal, the Seventh Circuit affirmed, finding "no . . . clear intention in the legislative history of the AEA" to require formal on-the-record hearings. *City of West Chicago v. NRC*, 701 F.2d 632, 641 (7th Cir. 1983). Although *West Chicago* was not an EAJA case, because the court found that section 189(a) of the Atomic Energy Act of 1954, as amended ("AEA"), does not require formal, on the record hearings in materials license amendment cases, that type of proceeding would therefore not fall within the EAJA's definition of "adversary adjudication."

The Commission has since cited *West Chicago* to support subsequent adoption of informal procedures in most of the Commission's proceedings. In the Statements of Consideration for its 2004 (continued. . .)

fees to raise the issue of EAJA coverage, but did require that they "make a good faith argument that the proceeding in which they have been involved falls under EAJA."[10] Mr. Geisen, however, has failed to make any argument at all regarding why he believes his enforcement proceeding falls under the EAJA.

Further, in 1990, prior to the NRC's adoption of regulations implementing the EAJA, the NRC decided an attorney's fees case directly under the EAJA.[11] The Atomic Safety and Licensing Appeal Board ("ALAB")[12] held that the EAJA did not apply to a materials license suspension proceeding, finding that it "is not an 'adversary adjudication' . . . because the Atomic Energy Act of 1954, as amended, does not require such a hearing to be on the record pursuant to APA section 554."[13] The ALAB went on to state that "[a]lthough these enforcement

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rulemaking, which expanded the use of informal procedures to all but a handful of proceedings, the Commission stated its belief "that formal, on-the-record hearings are not required by the AEA, except for the initial licensing of the construction and operation of a uranium enrichment facility under Section 193 of the AEA." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2192 (Jan. 14, 2004). This supports the conclusion that the EAJA does not apply in any NRC proceedings other than uranium enrichment facility licensing or proceedings under the CDA and PFCRA. In the same rulemaking, the Commission decided "as a matter of discretion" to retain formal, on-the-record hearings for certain types of proceedings, one of which is enforcement proceedings. 69 Fed. Reg. at 2192, 2203. However, despite this discretionary retention of on-the-record proceedings for enforcement actions, the fact remains that the statutory language in section 189(a) of the AEA does not *require* an "on-the-record" hearing pursuant to section 554 of the APA. Absent such a requirement, the EAJA simply does not apply.

[10] 59 Fed. Reg. at 23,120.

[11] *Advanced Medical Systems, Inc.* (One Factory Row Geneva, OH 44041), ALAB-929, 31 NRC 271 (1990) ("*AMS*"). After *AMS* was decided, the NRC promulgated 10 C.F.R. Part 12 to implement the EAJA. The essential statutory language in the EAJA and the APA has not changed since *AMS*.

[12] Although the ALAB was abolished in 1991, its decisions still carry precedential weight. *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 n.33 (2009).

[13] *AMS*, ALAB-929, 31 NRC at 282. Mr. Geisen's proceeding was an enforcement action against an unlicensed individual, not a licensee. In actions against individuals, orders are issued under the authority of section 161 of the AEA. Revisions to Procedures to Issue Orders; Deliberate Misconduct by (continued. . .)

proceedings are uniformly trial-type adjudications akin to those conducted under section 554 of the APA, the Atomic Energy Act does not require that they be such."[14] The ALAB ultimately concluded that:

> [N]either the AEA and its legislative history nor the APA and relevant case law reflect congressional intent that formal, on-the-record hearings conducted under section 554 of the APA are required for materials license suspension cases. Similarly, the Commission's regulations, case law, and precedent – while affording licensees such formal hearings in enforcement proceedings – are not the equivalent of a statutory requirement for an on-the-record hearing.[15]

The ALAB also addressed the question of whether the EAJA "nonetheless applies when the Commission conducts formal, on-the-record hearings in the absence of statutory requirements for such."[16] The ALAB cited several federal appellate decisions holding that the EAJA does not apply when an agency voluntarily provides for formal hearing procedures equivalent to a section 554 hearing, despite the lack of a statutory mandate for a section 554 hearing.[17] A subsequent D.C. Circuit decision confirmed this:

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Unlicensed Persons, 56 Fed. Reg. 40,664, 40,665 (Aug. 15, 1991). In particular, section 161(i)(3) of the AEA authorizes the Commission to "prescribe such . . . orders as [the Commission] may deem necessary . . . to govern any activity authorized pursuant to this chapter . . . in order to protect health and to minimize danger to life or property." 42 U.S.C. § 2201(i)(3). Because section 161 does not contain any language related to hearing rights, an individual's right to a hearing in an enforcement proceeding must originate in section 189(a) of the AEA.

[14] *AMS*, ALAB-929, 31 NRC at 282.

[15] *Id*. at 288.

[16] *Id*.

[17] *Id*. at 290, citing *St. Louis Fuel Supply Co. v. FERC*, 890 F.2d 446 (D.C. Cir. 1989); *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988); *Smedberg Machine & Tool, Inc. v. Donovan*, 730 F.2d 1089 (7th Cir. 1984). The ALAB also cited *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (en banc) as contrary authority, but *Escobar Ruiz* was later overruled in *Ardestani v. INS*, 502 U.S 129, 132 n.1, 139 (1991).

> [A] proceeding is an adversary adjudication under the EAJA only if Congress intended that the proceeding be 'subject to' section 554. An agency's decision to 'add protections matching those of' section 554 is irrelevant absent Congress's having 'compelled the augmentation.' It is similarly irrelevant that the . . . proceeding may be the functional equivalent of a section 554 hearing.[18]

Finally, the ALAB, again citing federal appellate decisions, found that because the EAJA operates as a waiver of sovereign immunity, its language must be strictly construed, and as such, attorney's fees "may not be awarded in adversary adjudications that Congress did not subject to that section."[19] This view was later upheld by the Supreme Court.[20] The ALAB also addressed the issue of hearings required by due process, stating that "we have discovered nothing in the legislative history of the EAJA or the pertinent case law to suggest a congressional intent to extend the EAJA to cases in which due process, rather than a statute, requires an APA section 554 hearing."[21]

In summary, neither the AEA, its legislative history, or the APA suggests that NRC enforcement proceedings are required to be "on the record" hearings governed by section 554 of the APA. Moreover, the EAJA is a partial waiver of sovereign immunity that must be strictly construed in favor of the government. Accordingly, despite the fact that the NRC voluntarily conducts such proceedings using formal procedures similar to those prescribed by section 554, neither the EAJA nor 10 C.F.R. Part 12 apply to Mr. Geisen's enforcement proceeding. Mr.

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[18] *Friends of the Earth v. O'Reilly*, 966 F.2d 690, 695 (D.C. Cir. 1992) (internal citations omitted).

[19] *AMS*, ALAB-929, 31 NRC at 291, quoting *St. Louis Fuel and Supply Co.*, 890 F.2d at 451.

[20] *Ardestani*, 502 U.S. at 137 ("EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.").

[21] *AMS*, ALAB-929, 31 NRC at 291 fn.14.

Geisen has failed to articulate any reason for why his enforcement proceeding falls under the EAJA; therefore, Mr. Geisen cannot recover attorney's fees.

II. Mr. Geisen is Not Eligible to Recover Under the EAJA

A. Mr. Geisen Has Not Demonstrated that He Incurred Attorney's Fees and Expenses

The EAJA specifically requires the *applicant* to have "incurred" attorney's fees and expenses in connection with the adversary adjudication at issue.[22] The rationale underlying the award of attorney's fees is "to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority."[23] Federal case law interpreting 5 U.S.C. § 504(a)(1) is clear: an individual who is a prevailing party meeting the financial qualification of the EAJA is ineligible to receive an EAJA award when that individual was not responsible for the costs of the attorney's fees.[24]

The NRC's regulations state that:

> A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or a significant and discrete substantive portion of the proceeding, unless the

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[22] 5 U.S.C. § 504(a)(1) states that, "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses *incurred by that party* in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." (emphasis added).

[23] *Ardestani*, 502 U.S. at 138.

[24] *See e.g., U.S. v. Paisley*, 957 F.2d 1161, 1164 (4th Cir. 1992), *cert. denied*, 506 U.S. 822 (1992) (holding that "a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act"); *SEC v. Comserv Corp.*, 908 F.2d 1407, 1416 (8th Cir. 1990) (concluding that an individual who was indemnified by his employer was not entitled to an award under the EAJA because he did not incur the fees and the purpose of the EAJA "would not be served by an award of fees to an individual whose fees are fully paid by a noneligible organization.").

> position of the Commission over which the applicant has prevailed was substantially justified.[25]

Although text does not expressly identify *the applicant* as the individual who must have actually incurred the fees and expenses, the NRC promulgated 10 C.F.R. Part 12 under the authority of the EAJA, which does specifically identify the applicant. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[26] Further, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[27] Thus, although the EAJA is more direct in its statement requiring the applicant to have actually incurred the fees, because the EAJA is the implementing statute the NRC's administrative authority is specifically limited to that granted under the EAJA.

As of February 2002, Mr. Geisen was subject to an indemnification agreement provided by his former employer, FirstEnergy Nuclear Operating Company ("FENOC"), which appears to cover Mr. Geisen's legal fees stemming from the NRC's investigation into the Davis-Besse incident.[28] Mr. Geisen, who "bears the burden of proving that he has incurred legal fees under

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[25] 10 C.F.R. § 12.105(a).

[26] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[27] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 842-43 (1984).

[28] *See* Attachment 1, Letter from Lew Myers, FENOC, to David C. Geisen (Feb. 24, 2002), which states as follows:

> With respect to any ongoing investigations, should you be asked to testify by the NRC Office of Investigations, or become involved in any review into your role in these events, FirstEnergy will make available to you expert outside counsel, at the Company's expense, to represent you personally in any investigation, unless it is later determined by the Company that you engaged in deliberate misconduct. At this juncture, the Company determined that although your performance fell below its

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the EAJA,"[29] has not provided any documentation indicating that this agreement is no longer in effect, or that it does not cover the fees for the NRC proceeding. Because Mr. Geisen appears to have been indemnified by his former employer, and thus did not suffer any deterrent effect on his "willingness and ability to litigate meritorious . . . defenses against the Government,"[30] he therefore cannot recover any award under the EAJA.

B. Mr. Geisen Failed to Submit Full Documentation of Fees and Expenses

The NRC regulations require the Board to determine "the reasonableness of the fee sought."[31] In determining reasonableness, the adjudicating officer is to consider a number of factors, including the time actually spent representing the applicant and the time reasonably spent in light of the difficulty or complexity of the issues in the proceeding.[32] Applicants for attorney's fees under the EAJA "bear[] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates" and "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims."[33] In addition, the applicant "has the burden of establishing the reasonableness of its fee request," and must provide "supporting documentation . . . of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably

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expectations, you did not engage in deliberate misconduct.

[29] *U.S. Securities and Exchange Comm'n v. Zahareas*, 374 F.3d 624, 630 (8th Cir. 2004).

[30] *U.S. v. Paisley*, 957 F.2d at 1164.

[31] 10 C.F.R. § 12.106(c).

[32] *Id*.

[33] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

expended."[34] Under the NRC's regulations, an applicant must submit, with the application, "full documentation of the fees and expenses."[35] The documentation must include:

> A separate itemized statement . . . for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rates at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided.[36]

In addition, "[t]he adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, pursuant to § 12.306 of this part."[37]

Contrary to the requirements stated above, Mr. Geisen has provided no documentation whatsoever for the fees he claims. Mr. Geisen's application simply states that he requests an award in the amount of $258,187.50 based on 3,442.5 hours of work payable at the NRC regulatory maximum of $75 per hour.[38] It is impossible for the Board to "determine with a high degree of certainty"[39] that these fees were reasonable when there is no documentation at all to support the request.[40] Further, without documentation specifically delineating the hours spent on particular tasks, the Staff is prevented from addressing the reasonableness of the fee request.[41]

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[34] *Role Models*, 353 F.3d at 970 (internal quotations omitted).

[35] 10 C.F.R. § 12.203.

[36] *Id*.

[37] *Id*.

[38] Application at 1.

[39] *Role Models*, 353 F.3d at 970.

[40] *See* 10 C.F.R. § 12.106(c); *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d (continued. . .)

Some circuit courts have held that in EAJA challenges, a wholesale denial of attorney's fees and expenses can be appropriate where documentation is "manifestly inadequate."[42] Some courts have allowed supplementation of EAJA applications after successfully meeting the 30-day timeliness deadline, but Mr. Geisen's initial filing is so lacking in detail that any such request should be denied outright. Although represented by experienced counsel, Mr. Geisen made no showing whatsoever to support his claim of 3,442.5 hours of work expended on his enforcement proceeding.

Without any type of actual documentation or receipts, the Staff is unaware of what Mr. Geisen has actually incurred, or is under strict obligation to pay, for his defense. Because 10 C.F.R. § 12.105 prescribes that applicants may only receive an award for fees and expenses "incurred," it is necessary to know exactly how much Mr. Geisen paid to his attorneys to ensure that the $258,187.50 is not in excess of that. Further, without documentation, there is no way to know whether any of the 3,442.5 hours claimed represent time spent on the federal criminal trial and subsequent appeal, hours which Mr. Geisen may not receive attorney's fees.

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1319, 1327 (D.C. Cir. 1982) (stating that "sufficiently detailed information about the hours logged and the work done . . . is essential not only to permit the [court] to make an accurate and equitable award but to place government counsel in a position to make an informed determination as to the merits of the application").

[41] If the Board allows Mr. Geisen to cure the defects in his application and provide appropriate documentation, the Staff requests an opportunity to address the reasonableness of the request once that information is provided.

[42] *Nat'l Ass'n of Concerned Veterans, 675 F.2d*. at 1331 n.19. *See also Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (affirming complete denial of "outrageously excessive" fee claim); *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993) (applying *Brown v. Stackler* specifically in the context of 42 U.S.C. § 1988 claims).

Finally, Mr. Geisen apparently plans to apply for "reasonable attorney expenses associated with the defense of the NRC proceeding, which have yet to be fully determined" and "will be submitted as soon as possible."[43] Both Mr. Geisen's unsupported request for attorney's fees and his placeholder for yet-to-be determined "reasonable attorney expenses" should be denied for failing to meet the requirements of 10 C.F.R. § 12.203.

III. Even if Mr. Geisen is Eligible Under the EAJA, the Staff's Action Was Substantially Justified

Mr. Geisen asserts in his application for attorney's fees that "the analysis set forth in the Initial Decision makes clear that the Staff's position was not substantially justified."[44] Mr. Geisen also states that "the Staff, at the behest of the Department of Justice, unreasonably protracted the proceeding in a manner that unnecessarily increased the cost of Mr. Geisen's defense."[45] Contrary to Mr. Geisen's general assertions, for the reasons discussed below, the Staff's position was substantially justified throughout the proceeding. Accordingly, the Board should deny Mr. Geisen's application for attorney's fees.

A. Applicable Legal Standard

The EAJA does not require an award of attorney's fees to a prevailing party if the adjudicator "finds that the position of the agency was substantially justified . . . ."[46] The Supreme Court has held that, for the purposes of the EAJA, the term "substantially justified" does not mean "justified to a high degree," but instead means "'justified in substance or in the main' – that

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[43] Application at 1.

[44] *Id.* at 2.

[45] *Id*. at 2-3.

[46] 5 U.S.C. § 504(a)(1); 10 CFR § 12.101.

is, justified to a degree that could satisfy a reasonable person."[47] Equivalently, the government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact."[48] The government, in this case the Staff, bears the burden of establishing that its position was substantially justified.[49]

A judgment against the government on the merits does not create a presumption that the government's position was not substantially justified.[50] The legal standard for assessing substantial justification – reasonableness – is "separate and distinct" from the legal standard that governed the merits phase of a proceeding.[51] Thus, the substantial justification inquiry "may not be collapsed into [the] antecedent evaluation of the merits. . . ."[52] Instead, "an independent evaluation through an EAJA perspective is required" in order to ensure that Congress' intent "not to permit a prevailing party automatically to recover fees" is honored.[53]

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[47] *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

[48] *Id*. at 566 n.2. Prior to the Supreme Court's decision in *Underwood*, most federal appellate courts had adopted a "reasonable basis in law and fact" standard for substantial justification. *Id*. at 565.

[49] 10 CFR § 12.105(a); *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). The agency's position includes both the agency's position in the adversary adjudication and the agency's underlying action or failure to act upon which the adjudication is based. 5 U.S.C. § 504(b)(1)(E); 10 CFR § 12.105(a).

[50] *Scarborough*, 541 U.S. at 415; *Underwood*, 487 U.S at 569.

[51] *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986). *Rose* was decided in 1986, prior to the Supreme Court's articulation of "substantially justified" in *Underwood*. Therefore, in *Rose*, the D.C. Circuit refers to its then-applicable standard for substantial justification, which was "slightly more than reasonable." *Rose*, 806 F.2d at 1807. Although that standard is no longer valid, *Rose* is still valid precedent for the propositions asserted here.

[52] *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D. C. Cir. 2005) (quoting *Cooper v. United States R. R. Ret. Bd*., 24 F.3d 1414, 1416 (D.C. Cir. 1994)).

[53] *Rose*, 806 F.2d at 1087.

When defending an EAJA claim, the government must demonstrate the reasonableness of its litigation position as well as its prior actions that led to the litigation.[54] The substantial justification determination is to be made based on the administrative record of the proceeding for which an award of fees is sought.[55] In assessing the reasonableness of the government's position, the adjudicator must consider the "totality of the circumstances."[56] The adjudicator "does not make separate determinations regarding each stage but 'arrive[s] at one conclusion that simultaneously encompasses and accommodates the entire civil action."[57]

B. The Staff's Position Was Substantially Justified

Mr. Geisen's assertion that "[t]he analysis set forth in the Initial Decision makes clear that the Staff's position was not substantially justified" ignores well-settled case law which holds that an adjudicator may not simply rely on its analysis on the merits to determine whether the government's position was substantially justified.[58] Instead, the Board must conduct an independent evaluation, applying a different and less stringent standard – reasonableness – to its determination.[59] Such an evaluation of the record in this case leads to the conclusion that the Staff's position was at all times reasonable – and thus substantially justified.

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[54] *Role Models*, 353 F.3d at 967; *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000).

[55] 10 C.F.R. § 12.306(a); *see also* 5 U.S.C. § 504(a)(1).

[56] *Roanoke River Basin v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993), *cert. denied*, 510 U.S. 864 (1993).

[57] *U.S. v. Hallmark Constr. Co*., 200 F.3d 1076, 1081 (7th Cir. 2000) (citations omitted); *see also Jackson v. Chater*, 94 F.3d 274, 278 (7th Cir. 1996) (stating that the EAJA "does not allow for discrete findings as to each of these temporally distinct elements").

[58] *Taucher*, 396 F.3d at 1173-1174; *Cooper*, 24 F.3d at 1416.

[59] *Rose*, 806 F.2d at 1087.

1. The Order Was Substantially Justified

The Staff's decision to issue the Order[60] to Mr. Geisen had a reasonable basis in law and fact. The NRC's regulations authorize the Staff to issue orders to licensed and unlicensed individuals, and to make those orders immediately effective.[61] Issuance of an immediately effective order requires "adequate evidence" – a standard akin to "probable cause for an arrest, warrant, or preliminary hearing."[62] Immediately effective orders "may be based on preliminary investigations or other emerging information that is reasonably reliable and indicates the need for immediate action . . . ."[63] Moreover, the adequate evidence standard "does not suggest an absence of controversy over such evidence or over the need for immediate action."[64] Rather, the standard is a "preliminary procedural safeguard against the Staff's ordering immediately effective action based on 'clear error, unreliable evidence, or unfounded allegations.'"[65]

The Order to Mr. Geisen provided a detailed recitation of the factual basis for the inaccurate and incomplete information, Mr. Geisen's role in providing the information to the NRC, and the materiality of the information.[66] Those facts were developed during an extensive

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[60] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006) (ML053560094) ("Order").

[61] 10 CFR § 2.202.

[62] *Advanced Medical Systems* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 301 (1994). Adequate evidence exists "when facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe the charges are true and that the order is necessary to protect the public health, safety, or interest." *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*. at 302.

[66] Order at 1-15.

investigation that was subject to broad agency oversight.[67] Based on the results of the investigation, the Staff concluded there was adequate evidence that Mr. Geisen had engaged in deliberate misconduct and that the public interest required issuance of the immediately effective Order.[68] Mr. Geisen did not challenge the immediate effectiveness of the Order, although he was informed of his right to do so, and the Staff's decision to initiate enforcement proceedings is entitled to substantial deference.[69] Therefore, the Staff's action was reasonable.

2. The Staff's Litigation Position Was Substantially Justified

The Staff's position during the litigation phase of the proceeding also had a reasonable basis in law and fact. Before the hearing, Mr. Geisen stipulated that he had provided inaccurate or incomplete information to the NRC in various documents, and that the information was material to the NRC.[70] Thus, the only factual issue remaining in dispute was whether Mr. Geisen had knowingly provided false information.[71] Findings regarding a person's knowledge or state of mind "depend, as a general rule, largely on that witness's credibility."[72]

The Board majority acknowledged that the Staff provided "an abundance of circumstantial evidence" in support of its position.[73] Indeed, the Staff provided enough evidence

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[67] Tr. at 2036-2049, 2096-97, 2146 (Hearing, Dec. 12, 2008).

[68] *See, e.g.*, Tr. at 2072-79, 2276-77 (Hearing, Dec. 12, 2008).

[69] *Advanced Medical Systems*, CLI-94-6, 39 NRC at 301.

[70] NRC Staff Exhibit 77.

[71] *David Geisen*, CLI-10-23, 72 NRC ___ (Aug. 27, 2010) (slip op. at 9) ("CLI-10-23") (stating that Mr. Geisen's state of mind was "a critical issue in this proceeding"); *id.* (slip op. at 16) ("This enforcement action turns on Mr. Geisen's state of mind: whether he knew that the information presented to the NRC . . . was false").

[72] *Id.* at 16.

[73] *David Geisen*, LBP-09-24, 70 NRC ___ (Aug. 28, 2008) (slip op. at 134) ("LBP-09-24"); *see also* NRC Staff Proposed Findings of Fact and Conclusions of Law at 22-78 (Jan. 16, 2009).

to convince Chief Judge Hawkens that the Staff had proved its case by a preponderance of the evidence, as explained in his dissent.[74] Also, the Commission explicitly recognized that "based on the record, the Board permissibly could have inferred that Mr. Geisen knowingly misled the NRC, and . . . the outcome of this proceeding plausibly could have been different."[75] Thus, the Board majority's finding that Mr. Geisen was a credible witness, and the resulting decision to give more weight to Mr. Geisen's testimony than to the Staff's evidence, does not make the Staff's position unreasonable. Had the Board found Mr. Geisen's testimony not credible, the Board may reasonably have found that the Staff proved its case.[76]

The other issue in dispute was the applicability of collateral estoppel to establish Mr. Geisen's knowledge with respect to Serial Letter 2744.[77] The Board recognized that under the circumstances collateral estoppel could apply.[78] In fact, Chief Judge Hawkens, in his dissent, concluded that it did apply, and that Mr. Geisen's arguments against its application lacked merit.[79] The Board's ultimate decision declining to apply collateral estoppel does not mean that the Staff's position was unreasonable.[80]

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[74] LBP-09-24, 70 NRC at ___ (slip op.), Dissenting Opinion of Judge E. Roy Hawkens at 21-57.

[75] CLI-10-23, 72 NRC at ___ (slip op. at 15); *see also id*. (slip op. at 36).

[76] *See American Wrecking Corp. v. Secretary of Labor*, 364 F.3d 321, 326 (D. C. Cir. 2004) (concluding that, where the testimony of a contractor's supervisor stood against the testimony of the Secretary's experts, it was not unreasonable for the Secretary to pursue a charge of willfulness when that charge might prevail if the supervisor's testimony were to be discredited).

[77] LBP-09-24, 70 NRC at ___ (slip op. at 33).

[78] *Id.* at ___ (slip op. at 34); *see also* Tr. at 703, 725 (Pre-Hearing Conference, Oct. 23, 2008); Tr. at 748 (Pre-Hearing Conference, Nov. 25, 2008).

[79] LBP-09-24, 70 NRC at ___ (slip op.), Dissenting Opinion of Judge E. Roy Hawkens at 6-21. Chairman Jaczko found the dissent's view on collateral estoppel persuasive. CLI-10-23, 72 NRC at ___ (slip op. at 56) (dissent of Chairman Jaczko).

[80] *Underwood*, 487 U.S at 569. With respect to both the factual and legal issues, the vigorous, (continued. . .)

Although the Board majority did not rule in the Staff's favor, and the Commission upheld the Board majority's initial decision on appeal, neither decision on the merits controls the ultimate finding on substantial justification.[81] As explained above, and further supported by the extensive record in this case, including the Staff's proposed findings of fact,[82] the Staff's litigation position was at all times reasonable, and thus was substantially justified.

C. The Staff Did Not "Unreasonably Protract" the Proceeding

Mr. Geisen also asserts that "the procedural history of this case compels the conclusion that the Staff, at the behest of the Department of Justice, unreasonably protracted the proceeding in a manner that unnecessarily increased the cost of Mr. Geisen's legal defense."[83] It is not clear for what purpose Mr. Geisen has made this unsupported assertion. While the NRC's EAJA regulations provide that an applicant's award "will be reduced or denied if the *applicant* has unduly or unreasonably protracted the proceeding,"[84] there is no comparable provision applicable to the NRC. Further, Mr. Geisen has not explained how, if at all, this assertion would affect the substantial justification determination. Finally, although the regulations permit an applicant to "include any other matters that the applicant wishes the Commission to consider in determining whether, and in what amount, an award should be

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(. . .continued)

lengthy dissent supporting the Staff's position indicates that "a reasonable person could believe the Staff's position was correct;" i.e., that the Staff's position was substantially justified. *See id*. at 565 n.2.

[81] *Taucher*, 396 F.3d at 1173-74; *Cooper*, 24 F.3d at 1416.

[82] NRC Staff Proposed Findings of Fact and Conclusions of Law (Jan. 16, 2009).

[83] Application at 2-3.

[84] 10 C.F.R. § 12.105(b) (emphasis added).

made,"[85] Mr. Geisen's assertion should not be considered, because the Staff's stay requests were reasonable and did not unreasonably protract the proceeding.

The Staff's stay requests were reasonable because, according to the terms of a Memorandum of Understanding between the Department of Justice ("DOJ") and the NRC, the NRC shall seek a stay upon the request of DOJ.[86] The first stay was requested shortly after DOJ initiated a criminal proceeding against Mr. Geisen based largely on the same factual circumstances as the enforcement proceeding. In denying the first stay request, the Board found that DOJ had failed to adequately demonstrate in its affidavit the potential detriment to its case; therefore, the balance of harms weighed in Mr. Geisen's favor.[87] The second stay request was made in January 2007, when it appeared that Mr. Geisen's hearing would be conducted immediately before the criminal trial. In its affidavit, DOJ outlined specific concerns with respect to potential harm to the criminal case against Mr. Geisen if the NRC hearing were to proceed as scheduled. The Commission, reversing the Board's initial denial of the request, granted the stay, finding that DOJ had made an adequate showing of harm and that the balance of harms had shifted in DOJ's favor.[88]

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[85] 10 C.F.R. § 12.201(d).

[86] Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50,317 (Dec. 14, 1988) ("MOU"). The MOU specifically addresses the "potential need to hold [NRC] enforcement proceedings in abeyance pending the conclusion of DOJ's parallel criminal cases." *David Geisen*, CLI-07-06, 65 NRC 112, 115 (2007). The Commission has indicated that it is "generally inclined to accommodate an abeyance request from DOJ" as long as DOJ provides an adequate showing of detrimental effect on its criminal case. *Id*.

[87] *David Geisen*, LBP-06-13, 63 NRC 523, 559 (2006), *aff'd* CLI-06-19, 64 NRC 9 (2006).

[88] *Geisen*, CLI-07-06, 65 NRC at 115.

The stay requests also did not "unreasonably protract" the proceeding. The Staff's first stay request was filed concurrently with the Staff's Answer to Mr. Geisen's request for hearing,[89] and the Board's decision denying the stay was issued two months later.[90] After the Board denied the stay, and before the Commission ruled on the Staff's appeal, the Staff promptly began to comply with its discovery obligations.[91] At that point in the proceedings, a two-month delay was not unreasonable. With respect to the second stay, there is no question that it delayed Mr. Geisen's hearing; however, the delay was not unreasonable because the Commission found it appropriate to grant the stay.[92]

CONCLUSION

As explained above, Mr. Geisen may not recover any attorney's fees or expenses for a number of reasons. First, the EAJA and Part 12 do not apply to NRC enforcement adjudications. Second, Mr. Geisen is not eligible to recover under the EAJA and Part 12 because Mr. Geisen has not demonstrated that he incurred the costs for which he is seeking an award of attorney's fees, nor has he submitted documentation of his fees and expenses. Finally, even if Mr. Geisen

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[89] NRC Staff Answer to Request for Hearing at 1 n.3 (Mar. 20, 2006); NRC Staff Motion to Hold the Proceeding in Abeyance (Mar. 20, 2006).

[90] Memorandum and Order (Denying Government's Request to Delay Proceeding) (May 19, 2006).

[91] For instance, a few weeks after the Board's decision, the Staff provided its initial disclosures to Mr. Geisen, and during the next several months, the Staff provided numerous updates to its disclosures, entered into a protective order and disclosed protected documents, and responded to Mr. Geisen's interrogatories. *See* NRC Staff Motion for Stay of Proceeding or in the Alternative for a Preclusion Order at 3-5 (Oct. 27, 2006).

[92] *Geisen*, CLI-07-06, 65 NRC at 115.

is eligible to recover under the EAJA, he cannot recover any fees or expenses because the Staff's position was substantially justified.

Respectfully submitted,

/RA by Kimberly A. Sexton/

Kimberly A. Sexton
Marcia J. Simon
Counsel for the NRC Staff

Dated at Rockville, Maryland,
this 27th day of October, 2010

ATTACHMENT 1

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Morgan Lewis
COUNSELORS AT LAW

Timothy P. Matthews
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October 8, 2002

CONFIDENTIAL
10 CFR 2.790 MATERIAL

VIA FEDERAL EXPRESS

Mr. Richard C. Paul
Director, Office of Investigations
Region III
U.S. Nuclear Regulatory Commission
801 Warrenville Road, Suite 255
Lisle, Illinois 60532

Re: In the Matter of NRC Investigation Case No. 3-2002-006

Dear Mr. Paul:

This provides the information you requested during our October 3, 2002 telephone conversation. Specifically, Enclosure 1 contains copies of letters sent to sixteen FENOC employees which document FENOC's personnel actions relative to those individuals in connection with Davis-Besse reactor pressure vessel head wastage. (Production numbered 2S5-00001 through 2S5-00016.) FENOC took two personnel actions against individuals that did not involve sending letters. FENOC suspended the services of Mr. Rod Cook, a contractor not an employee, and therefore FENOC did not send Mr. Cook a personnel letter. In addition, Mr. Campbell did not receive a letter. Finally, you asked the current employment status of nine individuals. That information is set forth in Enclosure 2.

It is my understanding that all of the materials submitted by FENOC to date will be withheld from public disclosure under the investigation exemption of the Freedom of Information Act. Additionally, this letter and its enclosures contain confidential personnel-file information, disclosure of which would constitute an unwarranted invasion of personal privacy. Accordingly, FENOC requests that this letter and the appropriately-marked enclosures be withheld from public disclosure under 10 CFR 2.790(a)(6).

Please do not hesitate to contact me should you have any questions after your review of this information.

Sincerely,

Timothy P. Matthews

Enclosures

cc: Joseph M. Ulie (without enclosures)
Michele Janicki (without enclosures)

10 CFR 2.790

FENOC

FirstEnergy Nuclear Operating Company

5501 North State Route 2
Oak Harbor, Ohio 43449

Lew W. Myers
Chief Operating Officer

419-321-7599
Fax: 419-321-7582

September 24, 2002

Mr. David C. Geisen
[redacted]

Dear Mr. Geisen:

Re: Personnel Action

The purpose of this letter is to confirm the discussion with James Powers, Robert Schrauder, and Fred Giese that took place last week regarding the Company's personnel action and to provide a summary for the basis of that action. In that meeting on Tuesday, September 17, 2002, you were informed that your actions in connection with the Davis-Besse reactor pressure vessel head fell below Company expectations.

Principally, your role in the review and preparation of the Company's responses to NRC Bulletin 2001-01 resulted in incomplete and inaccurate information being submitted to the NRC. After learning that the initial Bulletin response did not accurately represent the physical restrictions on access to the Davis-Besse vessel head or the previous inspection history, you failed to take steps necessary to ensure the accuracy of subsequent written and oral communications on the same subject. Those subsequent written submittals and oral presentations to the NRC in fall 2001 failed to accurately communicate the plant's inspection history which formed the baseline for the Company's technical arguments.

Based on these deficiencies in your performance, the Company has decided that you should not remain in your current position. You have been given an offer to continue your employment with the Company as Consultant, Nuclear at the Perry Nuclear Power Plant. It is considered to be an offer because it involves at least one of the following: a reduction in current base salary; a relocation of your residence; or a commute of more than one hour each way and is more than 30 minutes longer than your current commute. If you decline this offer, you will remain eligible for severance benefits in accordance with the FirstEnergy Severance Benefits Plan.

With respect to any ongoing investigations, should you be asked to testify by the NRC Office of Investigations, or become involved in any review into your role in these events, FirstEnergy will make available to you expert outside counsel, at the Company's expense, to represent you personally in any investigation, unless it is later determined by the Company that you engaged in deliberate misconduct. At this juncture, the Company has determined that although your performance fell below its expectations, you did not engage in deliberate misconduct.

If you have any questions regarding this matter, please contact me.

Sincerely,

2S5-00011

ATTACHMENT 2

October 26, 2010

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

AFFIDAVIT OF JOSEPH M. ULIE

I, Joseph M. Ulie, hereby state as follows:

1. I am employed by the U.S. Nuclear Regulatory Commission (NRC) as a Senior Special Agent in the Office of Investigations (OI), Region III.

2. I was the lead investigator from OI for the NRC's investigation into the potential willful violations of NRC requirements stemming from the Davis-Besse reactor pressure vessel (RPV) head degradation incident. The investigation was initiated on April 22, 2002, and was closed on August 22, 2003. The purpose of this affidavit is to provide, per 10 C.F.R.§12.302(c), a supporting affidavit for the introduction into the record of a September 24, 2002, letter from Lew W. Myers to David C. Geisen.

3. On October 3, 2002, Richard C. Paul, former Field Office Director, OI, Region III, made a telephone request to Jay M. Gutierrez, attorney for FirstEnergy Nuclear Operating Company (FENOC), for copies of the letters sent to each of the 18 individuals that FENOC took personnel actions against following the RPV head incident. FENOC, however, took two personnel actions against individuals that did not involve sending letters.

4. On October 8, 2002, Timothy P. Matthews, attorney for FENOC, provided to Mr. Paul a letter enclosing sixteen letters signed by Lew W. Myers, Chief Operating Officer, FENOC, addressed to various FENOC personnel. One of the sixteen letters, addressed to

David C. Geisen and dated September 24, 2002, was received by the NRC having a Bates stamp No. 2S5-00011.

5. The two letters provided in Attachment 1 contain the cover letter from Mr. Matthews to Mr. Paul and also the personnel action letter from Mr. Myers to Mr. Geisen.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

This affidavit was executed on this 26th day of October, 2010, at Lisle, Illinois.

Joseph M. Ulie

Joseph M. Ulie

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
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO DAVID GEISEN'S APPLICATION FOR AWARD OF ATTORNEY'S FEES" 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 27th day of October, 2010.

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/RA/

Kimberly A. Sexton
Counsel for the NRC Staff