

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

December 2, 2010

ORDER

(Scheduling Oral Argument and Granting Request for Leave to Respond)

On September 27, 2010, within 30 days of the Commission's decision upholding this Board's majority decision setting aside the NRC Staff's immediately effective Enforcement Order against David Geisen, Mr. Geisen applied for an award of over \$250,000 in attorneys' fees pursuant to 10 C.F.R. Part 12, which implements the Equal Access to Justice Act ("EAJA").¹ On October 27, 2010, the NRC Staff timely filed its Answer, advancing four independent grounds for opposing Mr. Geisen's Application.²

Mr. Geisen timely filed his Reply on November 12, 2010, including therein additional arguments and exhibits, such as Mr. Geisen's indemnification agreement and attorneys' fees

¹ See David Geisen's Application for Award of Attorneys' Fees (Sept. 27, 2010) at 1.

² See NRC Staff's Response in Opposition to David Geisen's Application for Attorney's Fees (Oct. 27, 2010) at 1.

invoices, which were not present in the original Application.³ Based on the new information contained in Mr. Geisen's Reply, the NRC Staff filed a Request for Leave to Respond to Mr. Geisen's Reply and the corresponding Response itself on November 22, 2010.⁴ In light of the additional information provided by Mr. Geisen in his Reply, the Board hereby GRANTS the NRC Staff permission to file its responsive brief.

Under 10 C.F.R. § 12.306, determination of whether to make an EAJA award is typically expected to be based solely on the written record. However, 10 C.F.R. § 12.306 permits "further proceedings, such as an informal conference, oral argument, [or] additional written submissions" when "necessary for full and fair resolution of the issues arising from the application." After reviewing the parties' briefs, the Board has determined that oral argument is necessary for the full and fair adjudication of this matter.

Accordingly, the Board will hear oral argument on December 14, 2010, commencing at 9:30 am EST, and expecting to conclude around noon. The oral argument will be held in the Atomic Safety and Licensing Board Panel's Rockville Hearing Room, located on the third floor of Two White Flint North, 11545 Rockville Pike, Rockville, Maryland.

At oral argument, the Board intends to focus its inquiry on the following issues: (1) whether EAJA applies to NRC enforcement adjudications of this nature; (2) whether Mr. Geisen actually incurred fees for purposes of EAJA and whether, in light of the fee arrangements, an award would benefit him; and (3) whether the focus of the "substantial justification" test should be on (i) the merits of the NRC Staff's position at the trial and/or (ii) the support for the NRC

³ See David Geisen's Reply in Support of his Application for Award of Attorneys' Fees (Nov. 12, 2010) at 42 [hereinafter Reply]; Reply, Exh. 1, Geisen Summary of Fees and Expenses Claimed Under EAJA (Nov. 12, 2010); Reply, Exh. 2, Declaration of Richard A. Hibey in Support of David Geisen's Application for Award of Attorneys' Fees (Nov. 12, 2010); Reply, Exh. 3, Undertaking (Nov. 12, 2010).

⁴ See NRC Staff's Request for Leave to Respond to David Geisen's Reply in Support of his Application for Award of Attorney's Fees (Nov. 22, 2010) at 1–2; NRC Staff's Response to David Geisen's Reply in Support of his Application for Award of Attorney's Fees (Nov. 22, 2010) at 1.

Staff's issuance of the immediately effective order, and to the extent an evaluation must be made of the latter, whether that order was substantially justified. In light of the expedited scheduling of this oral argument, and hence the limited preparation time afforded to counsel, the Board will defer, pending further order, any consideration of issues relating to the reasonableness of the particular amount of fees and expenses that Mr. Geisen is requesting.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 2, 2010

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 ORDER (Scheduling Oral Argument and Granting Request for Leave to Respond) 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 2nd day of December 2010