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	Docket No. IA-05-052
DAVID GEISEN	ASLBP No. 06-845-01-EA
	March 10, 2011

MEMORANDUM AND ORDER
(Denying Application for Attorneys' Fees)

This proceeding concerns an application by David Geisen, a former employee at the Davis-Besse Nuclear Power Station ("Davis-Besse"), for attorneys' fees and expenses pursuant to the Equal Access to Justice Act ("EAJA") in connection with his successful defense against the NRC Staff's immediately-effective Enforcement Order against him. The Board holds that (1) EAJA does not apply to NRC enforcement adjudications of this nature, and (2) even if EAJA did apply, the NRC Staff's position in this proceeding was "substantially justified" within the meaning of EAJA and, thus, any claim for attorneys' fees must fail.[1]

[1] We decline to resolve whether Mr. Geisen's EAJA application should also be denied on the ground that he failed to "incur" fees within the meaning of EAJA, because (1) his application fails in any event for either of the two above-mentioned reasons, and (2) as discussed in Part III, below, whether Mr. Geisen "incurred" fees is, in our view, a problematic issue.

I. Introduction

On September 27, 2010 -- and, as prescribed by 10 C.F.R. § 12.204(a), within 30 days of the Commission's decision upholding this Board's Majority Decision[2] setting aside the NRC Staff's immediately-effective Enforcement Order[3] against him -- Mr. Geisen applied for an award of over $250,000 in attorneys' fees pursuant to 10 C.F.R. Part 12, which implements EAJA.[4]

On October 27, 2010, the NRC Staff timely filed its Answer, taking the position that Mr. Geisen's application should be denied on four independent grounds: (1) EAJA does not (and thus 10 C.F.R. Part 12 cannot) apply to NRC enforcement actions; (2) Mr. Geisen has not demonstrated, as is required by EAJA, that he (rather than his former employer) actually "incurred" the costs for which he seeks an award; (3) Mr. Geisen has not documented the fees and expenses he is claiming; and (4) the NRC Staff's position on the merits of the case was "substantially justified" within the meaning of the statutory ban on recovery.[5]

Mr. Geisen timely filed a Reply on November 12, 2010, supplying therein additional arguments and exhibits. These included such things as his indemnification agreement with his Davis-Besse employer, FirstEnergy Nuclear Operating Company ("FENOC"), and the relevant attorneys' fees invoices, which had not been presented with the original Application.[6]

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[2] See CLI-10-23, 72 NRC __ (Aug. 27, 2010); LBP-09-24, 70 NRC 676 (2009).

[3] See Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006) [hereinafter Enforcement Order].

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

[5] See NRC Staff's Response in Opposition to David Geisen's Application for Award of Attorney's Fees (Oct. 27, 2010) at 1 [hereinafter NRC Staff Response].

[6] See David Geisen's Reply in Support of his Application for Award of Attorneys' Fees (Nov. 12, 2010) at 42 [hereinafter Geisen Reply]; Geisen Reply, Exh.1, Geisen Summary of Fees and Expenses Claimed Under EAJA (Nov. 12, 2010); Geisen Reply, Exh. 2, Declaration of Richard A. Hibey in Support of David Geisen's Application for Award of Attorneys' Fees (Nov. 12, 2010); Geisen Reply, Exh. 3, Undertaking (July 11, 2006).

Based on the new information contained in Mr. Geisen's Reply, the NRC Staff filed on November 22, 2010 a Request for Leave to Respond to Mr. Geisen's Reply, together with the corresponding Response itself.[7] The Board granted the NRC Staff permission to file its responsive brief.[8]

In a December 2, 2010 Order, the Board advised the parties that oral argument was necessary for the full and fair adjudication of this matter.[9] In that Order, the Board also notified the parties that in light of the expedited scheduling of the oral argument, and hence the limited preparation time afforded to counsel, the Board would defer, pending further order, any consideration of issues relating to the reasonableness of the particular amount of fees and expenses requested by Mr. Geisen.[10]

The Board heard oral argument on December 14, 2010 in the Atomic Safety and Licensing Board Panel's Hearing Room, located at the NRC Headquarters in Rockville, Maryland. Our reasoning for denying Mr. Geisen's claim appears below.

II. EAJA Coverage

EAJA, which is implemented by the NRC regulations contained in 10 C.F.R. Part 12, allows certain parties who prevail against the government in certain types of agency proceedings to recover attorneys' fees and other expenses incurred in connection with the proceeding unless the government's position was substantially justified, or other special

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[7] 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 [hereinafter NRC Staff Response to Reply].

[8] Licensing Board Order (Scheduling Oral Argument and Granting Request for Leave to Respond) (Dec. 2, 2010) at 2 (unpublished) [hereinafter Scheduling Order].

[9] Id. at 2–3.

[10] Id. at 3.

circumstances render an award unjust.[11] By its terms, EAJA applies to any "adjudication required by statute to be determined on the record" in which the government is represented by counsel.[12] Insofar as is relevant here, the NRC's regulations explain that the foregoing statutory language is meant to include "[a]dversary adjudications conducted by the Commission pursuant to any other statutory provision that requires a proceeding before the [NRC] to be so conducted as to fall within the meaning of 'adversary adjudication' under [EAJA]."[13]

EAJA provides four distinct definitions of "adversary adjudication," including, as pertinent here, "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."[14] In turn, section 554 of the APA applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[15]

The NRC Staff argues that, although Mr. Geisen's enforcement proceeding was conducted as an "on-the-record" matter with all the APA protections, it was not required by statute to be an APA section 554 proceeding, and thus that Mr. Geisen's application for attorneys' fees and expenses should be denied because neither EAJA nor 10 C.F.R. Part 12 applies to his enforcement proceeding.[16] In support of this position, the NRC Staff quotes the Commission's 1994 Statement of Considerations for the final rule promulgating the regulations

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[11] 5 U.S.C. § 504(a)(1); 10 C.F.R. § 12.101.

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

[13] 10 C.F.R. § 12.103. In addition, NRC regulations specify two other types of proceedings to which EAJA applies, neither of which is relevant here. See id.

[14] 5 U.S.C. § 504(b)(1)(C). The Supreme Court has explained that "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." Ardestani v. INS, 502 U.S. 129, 135 (1991). This limitation is a key one.

[15] 5 U.S.C. § 554(a). There are six exceptions to this definition, none of which is applicable here. See id.

[16] NRC Staff Response at 2–7.

implementing EAJA. After analyzing the relevant statutory provisions, the Commission stated "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 or a Program Fraud Civil Remedies Act hearing is covered by the EAJA."[17]

To further support its claim that EAJA does not apply to Mr. Geisen's enforcement proceeding, the NRC Staff relies upon Advanced Medical Systems, Inc. (One Factory Row Geneva, OH 44041). An Atomic Safety and Licensing Appeal Board ("Appeal Board") issued that decision in 1990, prior to the NRC's adoption of regulations implementing EAJA (10 C.F.R. Part 12), so that case was decided directly under EAJA.[18]

In Advanced Medical Systems, the Appeal Board reviewed an EAJA application for attorneys' fees arising from a materials license suspension proceeding.[19] Although it acknowledged that, upon initial examination, a materials license suspension proceeding appeared "to be precisely the type of proceeding to which Congress intended the EAJA to apply," the Appeal Board ultimately held that EAJA did not apply to such a proceeding, finding that "a materials license suspension proceeding is not an 'adversary adjudication' for purposes of the EAJA 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."[20]

In reaching that holding, the Appeal Board examined not only the legislative history of EAJA, but also the statutory language and legislative history of the Atomic Energy Act ("AEA"), along with the statutory language of the APA and pertinent case law. The Appeal Board concluded that "neither the [AEA] and its legislative history nor the APA and relevant case law

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[17] Equal Access to Justice Act: Implementation, 59 Fed. Reg. 23,119, 23,120 (May 5, 1994).

[18] See ALAB-929, 31 NRC 271 (1990).

[19] Id. at 276–77.

[20] Id. at 281–82.

reflect congressional intent that formal, on-the-record hearings conducted under section 554 of the APA are required for materials license suspension cases."[21]

The Appeal Board then considered "whether the EAJA nonetheless applies when the Commission conducts formal, on-the-record hearings in the absence of a statutory requirement for such."[22] It first examined the Administrative Conference of the United States ("ACUS") 1981 and 1985 Model Rules, which were designed to aid agencies in implementing their own respective EAJA regulations.[23] In both Model Rules, the ACUS rejected language that would have extended EAJA's applicability to proceedings in which an agency observes formal APA section 554 procedures as a matter of discretion.[24]

The Appeal Board also cited numerous federal appellate decisions that adopted the same principle in holding that EAJA does not apply when an agency merely voluntarily chooses to abide by formal APA section 554 procedures, despite lacking a statutory mandate to do so.[25] For instance, the Appeal Board quoted the decision in St. Louis Fuel and Supply Co. v. FERC, in which the District of Columbia Circuit held that:

> Congress wrote into EAJA a bright-line rule. Attorneys' fees may be awarded in adversary adjudications that are governed by APA section 554; they may not be awarded in adversary adjudications that Congress did not subject to that section.[26]

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[21] Id. at 288.

[22] Id.

[23] Id. at 288–89.

[24] See id. at 289.

[25] Id. at 289–91.

[26] Id. at 291 (quoting St. Louis Fuel and Supply Co. v. FERC, 890 F.2d 446, 451 (D.C. Cir. 1989)). As the NRC Staff correctly points out, this narrow interpretation of EAJA was subsequently confirmed by the D.C. Circuit in Friends of the Earth v. O'Reilly:

> [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

Based on the weight of judicial authority and the interpretations of the ACUS, the Appeal Board rejected a more liberal interpretation of EAJA, holding that:

> Despite the fact that, although not required by statute, the Commission conducts materials license suspension cases as formal, on-the-record hearings like those described by section 554 of the APA, the EAJA does not apply to such proceedings and may not serve as the basis for an award of attorney's fees.[27]

In justifying its narrow construction, the Appeal Board noted that because EAJA operates as a waiver of sovereign immunity it must be narrowly construed "to avoid creating a waiver of sovereign immunity that Congress did not intend."[28]

Finally, the Appeal Board rejected the notion that EAJA extends to cases where due process itself requires an APA section 554 hearing, 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."[29] The Appeal Board explained that "[i]nasmuch as litigants against the government manifestly have no constitutional right to be compensated out of public funds for their attorneys' fees, it cannot be doubted that Congress has the power to limit the reach of the EAJA in this fashion."[30]

> having 'compelled the augmentation.' It is similarly irrelevant that the . . . proceeding may be the functional equivalent of a section 554 hearing.

NRC Staff Response at 5–6 (quoting Friends of the Earth v. O'Reilly, 966 F.2d 690, 695 (D.C. Cir. 1992) (internal citations omitted)).

[27] Advanced Med. Sys., ALAB-929, 31 NRC at 291.

[28] Id. As the NRC Staff points out, the Appeal Board's application of sovereign immunity principles to EAJA was subsequently reiterated by the Supreme Court: "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." NRC Staff Response at 6 n.20 (quoting Ardestani, 502 U.S. at 137).

[29] Advanced Med. Sys., ALAB-929, 31 NRC at 291 n.14.

[30] Id.

The Appeal Board thus held that materials license suspension proceedings are not covered by EAJA even though the NRC may voluntarily choose to employ on-the-record formal procedures, because such proceedings are not required by statute to be APA section 554 on-the-record hearings.[31]

The rationale and ruling in Advanced Medical Systems are controlling here. In this regard, when the Appeal Panel was abolished in 1991, the Commission explicitly directed that the decisions of its Boards were still to carry precedential weight.[32]

Our view of the continuing vitality of the rationale in Advanced Medical Systems is informed by the Commission's recent interpretation of the procedural processes mandated by the AEA. Under the statute, the Commission is required to "grant a hearing upon the request of

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[31] Id. In reaching its holding, the Appeal Board in Advanced Medical Systems acknowledged legislative history that appears to conflict with that holding. Specifically, the staff of the congressional Joint Committee on Atomic Energy stated that "'[i]n cases involving license suspension or revocation, where the AEC's staff is cast in an accusatory role, the precautions prescribed by the Administrative Procedure Act should be carefully observed.'" Id. at 284 (quoting 1 Staff of Joint Committee on Atomic Energy, 87th Cong., 1st Sess., Improving the AEC Regulatory Process (Joint Comm. Print 1961)). The Joint Committee itself reiterated this view, stating that "'[w]ithout question, more formal procedures are required in contested cases, especially those involving compliance.'" Id. (quoting S. Rep. No. 1677, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Admin. News 2207, 2213) (emphasis added). Although the Appeal Board noted these statements, it summarily dismissed them on the ground that Congress' focus in drafting the AEA section 189(a) hearing requirements was on reactor safety and licensing issues, and thus "the few passing references in the legislative history to enforcement actions cannot reasonably support an inference that Congress affirmatively intended section 189a(1) to require a formal on-the-record hearing under the APA for a challenge to a materials license suspension." Id.; cf. Ardestani, 502 U.S. at 136 (only in rare cases does legislative history overcome the strong presumption that "the legislative purpose is expressed by the ordinary meaning of the [statutory language]") (internal quotation marks omitted). This Board is bound by the Appeal Board's ruling. It remains open to Congress, however, to consider whether that ruling comports with actual legislative intent (see n.55, below) and, if appropriate, to enact clarifying legislation that, consistent with above-cited legislative history, mandates APA section 554 hearings in AEA enforcement proceedings, thus ensuring "the precautions prescribed by the [APA will be] carefully observed" in AEA enforcement actions. See 1 Staff of Joint Committee on Atomic Energy, 87th Cong., 1st Sess., Improving the AEC Regulatory Process (Joint Comm. Print 1961).

[32] See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994); accord Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 n.33 (2009).

any person whose interest may be affected" by certain agency proceedings.[33] As the court of appeals pointed out in Citizens Awareness Network, Inc. v. United States, the NRC's predecessor agency, the Atomic Energy Commission ("AEC"), originally interpreted this as requiring formal APA section 554 on-the-record hearings.[34] However, beginning in 1982, the NRC started to relax the procedural requirements for certain types of proceedings.[35] This was then followed in January 1999 by a legal memorandum prepared by the NRC general counsel, concluding that the AEA did not mandate on-the-record hearings for reactor licensing proceedings and that the Commission therefore had the option of replacing the existing procedural requirements with more informal ones.[36]

Building on the January 1999 legal memorandum, in April 2001 the NRC published a notice of rulemaking that proposed major changes in the NRC's hearing procedures, along with an accompanying statement taking the position that section 189 of the AEA does not require on-the-record reactor licensing proceedings.[37] Aside from minor alterations, the final rule mirrored the proposed rule and took effect in February 2004.[38]

In Citizens Awareness Network, Inc., the petitioners challenged the NRC's new procedural rules, arguing that the AEA requires the NRC's licensing hearings to be on-the-record.[39] In doing so, the petitioners contended that the NRC had exceeded its authority in

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[33] 42 U.S.C. § 2239(a)(1)(A).

[34] Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 343 (1st Cir. 2004) (citing Hearings Before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong. 60 (1962) (letter of AEC Commissioner Loren K. Olsen)).

[35] Id. (citing In re Kerr-McGee Corp., CLI-82-02, 15 NRC 232, 235 (1982)).

[36] Id. at 344.

[37] Id.

[38] Id.

[39] Id. at 347.

promulgating the new procedural rules, and thus that the new rules should be held invalid.[40] The court found that the NRC's new procedural rules met the requirements for APA section 554 on-the-record formal hearings, but declined to resolve the question of whether the AEA in fact requires NRC hearings to be on-the-record.[41] In other words, the court did not address the validity of the NRC's interpretation of the AEA, which maintains that the formal APA on-the-record hearings are not required for NRC proceedings. Thus, the NRC's current reading of the AEA as not requiring formal APA on-the-record hearings -- a reading not set aside in Citizens Awareness Network, Inc. -- reinforces the Appeal Board's holding in Advanced Medical Systems.

Despite Advanced Medical Systems' seemingly dispositive holding, Mr. Geisen argues that this Board is not bound by that decision, claiming instead that "it is quite clear that the only holding from Advanced Medical Systems that definitely applies in this case -- assuming that Section 189 applies here at all -- is the [Appeal Board's] determination that the statute is 'ambiguous as to the sort of hearing that is required.'"[42] Moreover, Mr. Geisen points out that the materials license suspension proceeding in Advanced Medical Systems was governed by section 189 of the AEA, while here, in contrast, the statutory authority for the enforcement action is section 161(i)(3) of the AEA.[43]

The latter point is true. As Mr. Geisen acknowledges, however, the statutory language and legislative history of section 161 of the AEA are completely silent with regard to whether

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[40] See id. at 351.

[41] Id. at 348.

[42] Geisen Reply at 7 (quoting Advanced Med. Sys., ALAB-929, 31 NRC at 283); see also Tr. at 2503 ("MR. HIBEY: Well, what I'm suggesting is that the [Advanced Medical Systems] case should not be the authority or the point of departure for determining this question . . . .").

[43] Geisen Reply at 5–7.

proceedings under it must be governed by APA section 554.[44] Mr. Geisen concedes that "[i]n short, there is no authority in the statutes, case law or regulations that is dispositive on the issue."[45] Such a lack of clear statutory intent and legislative history, particularly in the context of a waiver of sovereign immunity, is precisely what ultimately led the Appeal Board in Advanced Medical Systems to conclude that proceedings conducted under section 189 of the AEA were not statutorily required to be conducted pursuant to APA on-the-record procedures.[46]

Mr. Geisen nevertheless asserts that, although the statutory language and legislative history of the AEA might not require enforcement proceedings under section 161 to be conducted in accordance with the procedural protections of section 554 of the APA, there remain alternative reasons for applying section 554 to such proceedings.

To begin, Mr. Geisen argues that EAJA should apply to this enforcement proceeding because it was in fact "an on-the-record hearing that was very much like a trial proceeding," regardless of whether or not it was statutorily required to be so.[47] This justification, however, runs headlong into precedent cited by both the NRC Staff and the Appeal Board in Advanced Medical Systems, which hold that an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether EAJA applies to a particular proceeding.[48]

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[44] Tr. at 2496–97.

[45] Geisen Reply at 10.

[46] As the Supreme Court repeatedly has admonished, "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed.'" United States v. Nordic Village Inc., 503 U.S. 30, 33 (1992) (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990), and United States v. King, 395 U.S. 1, 4 (1969)).

[47] Geisen Reply at 10.

[48] See, e.g., NRC Staff Response at 5–6 (citing Ardestani, 502 U.S. at 137; Friends of the Earth, 966 F.2d at 695); Advanced Med. Sys., ALAB-929, 31 NRC at 289–91 (citing St. Louis Fuel and Supply Co., 890 F.2d at 448–49; Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir. 1988); Smeldberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092–93 (7th Cir. 1984)); see also Ardestani, 502 U.S. at 134 (EAJA does not apply to to a proceeding that is "not governed by the

In an attempt to differentiate the case at hand, Mr. Geisen claims that much of the contrary precedent is based on a misplaced reading of the canon of sovereign immunity.[49] According to Mr. Geisen, many of the cases cited by the NRC Staff and the Appeal Board in Advanced Medical Systems are overly dependent on the tenet that waivers of sovereign immunity must be strictly construed. Mr. Geisen suggests that, instead, the contravening canon of statutory construction that "once Congress has waived sovereign immunity over certain subject matter, a court should be careful not to assume the authority to narrow the waiver that Congress intended" may be controlling in this case.[50] With this in mind, Mr. Geisen contends that

> if an argument can be made that a proceeding is required by statute to be determined on the record after opportunity for an agency hearing, the EAJA applies to that proceeding even without an unambiguous statement from Congress, as long as there is not an unambiguous statement from Congress to the contrary.[51]

Based upon this analysis, Mr. Geisen then claims that, because the Enforcement Order "immediately deprived [him] of his legally-protected right to earn a living," due process concerns mandated a formal APA section 554 on-the-record hearing.[52]

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provisions of § 554" even if the procedures governing the proceeding substantially conform "to the procedures required for formal adjudication under the APA").

[49] See Geisen Reply at 12–14.

[50] Id. at 12–13 (quoting Five Points Road Joint Venture v. Johanns, 542 F.3d 1121, 1124 n.3 (7th Cir. 2008) (internal citations omitted)).

[51] Id. at 13.

[52] See id. at 13–14. Counsel for Mr. Geisen elaborated on this point at oral argument:

> JUDGE FARRAR: So you're saying the procedure we followed in the Commission regs that directed that procedure were not optional to the Commission. They were required by the Constitution.
> MR. HIBEY: By the Due Process Clause of the Constitution.
> JUDGE FARRAR: And that's as good as being required by the Atomic Energy Act.
> MR. HIBEY: Yes.

Mr. Geisen's attempt to differentiate the case at hand from Advanced Medical Systems has more than a little plausibility. But his reliance on a due process theory must fail.

In claiming that hearings mandated by due process might require formal APA on-the-record hearings, Mr. Geisen cites City of West Chicago v. N.R.C. for the proposition that "if a formal adjudicatory hearing is mandated by the due process clause, the absence of the 'on the record' requirement will not preclude application of the APA."[53] But to the extent that proposition had initial validity, it has since been called into question (see n.53, above) and in any event was rejected by the Appeal Board in Advanced Medical Systems:

> [W]e 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. Inasmuch as litigants against the government manifestly have no constitutional right to be compensated out of public funds for their attorneys' fees, it cannot be doubted that Congress has the power to limit the reach of the EAJA in this fashion.[54]

Thus, the present case cannot be differentiated from Advanced Medical Systems on the basis of due process requirements.[55]

Tr. at 2500.

[53] City of West Chicago v. N.R.C., 701 F.2d 632, 644 n.11 (7th Cir. 1983) (citing Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)). The court in City of West Chicago, though, based this assertion on the court's ruling in Wong Yang Sung v. McGrath, which was overruled by Congress. Marcello v. Bonds, 349 U.S. 302, 310 (1955). Although Mr. Geisen acknowledges that Wong Yang Sung has been overruled, he contends that the relevant portions cited are still applicable here. See Geisen Reply at 13 n.52; Tr. at 2506. Given that Mr. Geisen's attempt to differentiate the present case from Advanced Medical Systems fails even if the relevant holdings of Wong Yang Sung are in fact binding on this Board, the Board will refrain from debating the precedential value of those holdings.

[54] Advanced Med. Sys., ALAB-929, 31 NRC at 291 n.14.

[55] Although we are bound by the holding in Advanced Medical Systems, we point out that, for us, the issue is not, as the Appeal Board reasoned, whether litigants in enforcement actions have a "constitutional right to be compensated out of public funds for their attorneys fees." Of course they have no such right. Rather, as we see it, the question involved here is whether Congress intended to make EAJA awards available only when the governing statute expressly mandates on-the-record hearings, to the exclusion of cases -- like Mr. Geisen's -- where such hearings are required by due process. The Appeal Board resolved that question in the affirmative. Were there no precedent binding on us, our legal analysis would start with noting

Furthermore, even if due process did mandate an on-the-record hearing conducted according to APA section 554 in this case, such procedural requirements stemming from the Constitution alone would not suffice to make Mr. Geisen eligible for an EAJA award.[56] As the Appeal Board in Advanced Medical Systems ruled, EAJA applies only when an adjudication is "required by statute," not when required by the Constitution, to be conducted on the record.[57] Thus, even if Mr. Geisen was entitled to an on-the-record hearing based on due process considerations (and we believe he was), under controlling precedent, EAJA would still not apply to that hearing unless it was also required by statute.[58]

Consequently, Mr. Geisen's attempt to differentiate the case at hand from the Appeal Board's ruling in Advanced Medical Systems fails. That rationale in that decision is thus binding on this Board. Because neither EAJA nor 10 C.F.R. Part 12 applies to Mr. Geisen's enforcement proceeding, his application for attorneys' fees and expenses under EAJA must be denied.

III. Incurring Fees

Under the NRC regulations implementing EAJA, for a prevailing applicant to recover attorneys' fees and expenses, the applicant must have incurred those fees and expenses in connection with the adversary adjudication in question. "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 position of the Commission over

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that no obvious reason appears for disfavoring impecunious litigants whose rights to an on-the-record hearing are required by a higher authority -- the Constitution -- rather than by a statute. But, as indicated earlier in note 31, that is a matter whose resolution resides with Congress, not with a subordinate adjudicatory tribunal.

[56] See Tr. at 2500–01.

[57] See Advanced Med. Sys., ALAB-929, 31 NRC at 291 n.14.

[58] See id. ("For, to repeat, the waiver of sovereign immunity contained in the EAJA is confined to situations in which there is a statutory requirement for such a hearing.") (emphasis in original).

which the applicant has prevailed was substantially justified."[59] This is in keeping with the EAJA authorizing statute, which allows a prevailing party to recover attorneys' fees and expenses incurred under EAJA: "[a]n 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."[60]

The NRC Staff contends that federal case law interpreting the term "incur" within the context of EAJA is "clear."[61] The NRC Staff claims that federal law unambiguously holds that "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."[62] In support of this argument, the NRC Staff cites to two federal appeals court decisions – United States v. Paisley and SEC v. Comserv Corporation.[63]

In Paisley, the Fourth Circuit was confronted with an EAJA application from five individuals who had successfully defended against a government action to recover a civil penalty from both them and their former employer.[64] The former employer advanced the attorneys' fees and expenses of four of the five individuals pursuant to agreements requiring them to repay the advancements unless Delaware law required their employer to indemnify

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[59] 10 C.F.R. § 12.105(a).

[60] 5 U.S.C. § 504(a)(1) (emphasis added). The underlying purpose of EAJA is twofold: (1) "to eliminate financial discincentives for those who would defend against unjustified governmental action"; and thereby (2) "to deter the unreasonable exercise of Government authority." See Ardestani, 502 U.S. at 138.

[61] NRC Staff Response at 7.

[62] Id.

[63] Id. at 7 n.24.

[64] United States v. Paisley, 957 F.2d 1161, 1163 (4th Cir. 1992).

them.[65] In reviewing the case, the court determined that Delaware law unconditionally required the individuals' former employer to indemnify them for all of their attorneys' fees and expenses.[66] As a result, the court denied the individuals' EAJA application, 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."[67]

Similarly, in Comserv, the Eighth Circuit was faced with an EAJA application from an indemnified corporate officer who successfully defended against an action brought by the Securities and Exchange Commission ("SEC").[68] Under the indemnification agreement, the officer's former employer, as part of a severance agreement, agreed to and did pay the officer's legal fees and expenses related to the litigation in that case.[69] Based on the indemnification agreement, the court held that the officer had not incurred the fees in question, as required under EAJA, and thus that "the fee-deterrent-removal purpose of EAJA would not be served by an award of fees to an individual whose fees are fully paid by a noneligible organization."[70]

The NRC Staff points out that, as of February 2002, Mr. Geisen -- similar to the employees in Paisley and Comserv -- had an indemnification agreement with his former employer, FENOC, that covers Mr. Geisen's legal fees and expenses relating to the NRC investigation into Mr. Geisen's involvement in the Davis-Besse incident and the subsequent

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[65] See id.

[66] Id. at 1163–64.

[67] Id. at 1164.

[68] SEC v. Comserv Corp., 908 F.2d 1407, 1409–10, 1413–14 (8th Cir. 1990).

[69] See id. at 1413.

[70] Id. at 1416.

litigation.[71] Consequently, the NRC Staff urges that "[b]ecause 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,' he therefore cannot recover any award under the EAJA."[72]

Although the NRC Staff claims that the meaning of "incur" in the context of EAJA is clear, "[n]either EAJA nor the legislative history provides a definition of the word 'incur[,]'"[73] and courts of appeals have interpreted and applied the term differently. For instance, although the Fourth Circuit and the Eighth Circuit, through Paisley and Comserv, have held that otherwise eligible applicants who have been indemnified by an inelgible third party have not "incurred" fees under EAJA, the Seventh Circuit and the Federal Circuit have held that eligible applicants who have had their fees paid by ineligible third parties did "incur" fees under EAJA.[74] In his

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[71] NRC Staff Response at 8. FENOC explained the extent of the indemnification agreement in a letter to Mr. Geisen in February of 2002:

> 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 expectations, you did not engage in deliberate misconduct.

NRC Staff Response, Exh.1, Letter from Lew W. Myers, FENOC Chief Operating Officer, to David C. Geisen at 1 (Feb. 24, 2002).

[72] NRC Staff Response at 9 (citing Paisley, 957 F.2d at 1164) (internal citation omitted).

[73] Comserv, 908 F.2d at 1413; see also Ed. A. Wilson, Inc. v. General Services Admin., 126 F.3d 1406, 1408 (Fed. Cir. 1997).

[74] See, e.g., United States v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 383 (7th Cir. 2010) (stating that an award of attorneys' fees under EAJA can include fees paid by a third party liability insurer); Wilson, 126 F.3d at 1410 ("both the union employee and the insured can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums"); cf. Morrison v. C.I.R., 565 F.3d 658, 666 (9th Cir. 2009) ("when a third party who has no direct interest in the litigation pays fees on behalf of a taxpayer, the taxpayer 'incurs' the fees so long as he assumes: (1) an absolute obligation to repay the fees . . . ; or (2) a contingent obligation to pay the fees in the event that he is able to recover them").

Reply, Mr. Geisen notes the lack of accord among the Circuits on this issue and emphasizes the similarities between Mr. Geisen's situation and the cases from the Seventh Circuit and the Federal Circuit addressing situations where attorneys' fees were paid for by insurance policies.[75]

In United States v. Thouvenot, Wade, & Moerschen, Inc., the Seventh Circuit determined that an applicant whose attorneys' fees and expenses were paid by an insurance policy is nonetheless entitled to recover fees under EAJA: "an award of attorneys' fees under the Equal Access to Justice Act can include fees incurred by the party's liability insurer."[76] The Seventh Circuit analogized a policyholder to an applicant who pays his legal fees using money borrowed from an otherwise ineligible wealthy relative on the condition that the applicant would pay the loan back if he is successful and receives a fee award.[77] According to the Seventh Circuit, the policyholder would still be entitled to recover those legal fees under EAJA, because "[n]othing in the Equal Access to Justice Act suggests a purpose to prevent such a contractual agreement, or more broadly, to discourage the purchase of liability insurance."[78] The court reasoned that "in an actuarial sense the cost of the defense, to the extent borne by the insurance company, is a cost that the insured paid for, just as he would have paid a lawyer for his defense had he had no

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Further adding to the uncertaintly of the meaning of the term "incur" is legislative history "which suggests that awards to pro bono organizations were contemplated by Congress." Comserv, 908 F.2d at 1415. Based on that history, many courts have "held that where a pro bono attorney 'forgives' a fee to a client unable to afford legal expenses, that client is eligible for an EAJA award on the basis of that arrangement with the attorney." Id. (citing cases).

[75] Geisen Reply at 16–21.

[76] Thouvenot, 596 F.3d at 383.

[77] Id.

[78] Id.

insurance."[79] Although the Seventh Circuit based its analysis in the context of insurance, it noted that it could not "see what difference it makes who the indemnitor is."[80]

Similarly, in Ed. A. Wilson, Inc. v. General Services Administration, the Federal Circuit noted that "[g]enerally, 'awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards."[81] Specifically, the court found that courts typically allow applicants to recover EAJA awards in cases where their counsel appears pro bono (see n.74, above), as well as cases where applicants are represented by counsel salaried by their union.[82] After comparing the cases where counsel was salaried by an applicant's union with the cases where counsel was paid for under an applicant's insurance policy, the court could ascertain no material distinction between the two: "both the union employee and the insured can be viewed as having incurred fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums."[83] Furthermore, the Federal Circuit found that denying EAJA awards in insurance contexts would undermine the dual purposes of EAJA by both maintaining financial deterrents for those who would want to challenge unjust government action and not deterring unreasonable government actions.[84]

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[79] Id.

[80] Id.

[81] Wilson, 126 F.3d at 1409 (quoting Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir. 1977)).

[82] Id.

[83] Id. at 1410.

[84] See id. Mr. Geisen concedes, however, that the Federal Circuit specifically distinguished its reasoning from those cases involving attorneys' fees paid for as a result of corporate indemnification agreements: "'It is [the applicant's] exposure to increased premiums and our view that it effectively incurred attorney fees by prepaying them via its premium payments that distinguishes this case from [cases in which the applicant's fees were paid by his employer].'" Geisen Reply at 19 (quoting Wilson, 126 F.3d at 1411) (alterations in Geisen Reply).

Relying on the decisions in Thouvenot and Wilson, Mr. Geisen claims that he did, in fact, "incur" attorneys' fees and expenses for the purposes of EAJA, and thus that his application for legal fees under EAJA should be granted.[85] He equates a company's indemnification agreement with an insurer's policy terms, thus concluding that his application should be treated the same as one where an applicant's counsel was paid by an insurer, viz., "instead of money, [Mr. Geisen] exchanged the performance of his duties for the protection of the company if the performance of those duties resulted in his involvement in a proceeding against the government."[86] Moreover, he argues that a denial of an EAJA award based on his indemnification agreement would undermine the dual purposes of EAJA because "[i]f the government knows in advance that an individual has insurance [or other indemnification], it can take unreasonable or extreme positions with impunity."[87] Mr. Geisen thus asserts that, contrary to the NRC Staff's claim, it is not entirely clear whether an applicant who is indemnified by an ineligible third party might still be said to have "incurred" fees for the purposes of EAJA.[88]

Although the NRC Staff is correct in noting that Paisley and Comserv, the only cases directly on point, both denied EAJA awards based on indemnification agreements,[89] this fails adequately to account for the other federal appellate decisions in which courts found that applicants whose fees were paid by otherwise ineligible third parties were nonetheless entitled to EAJA awards.

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[85] See Geisen Reply at 20–21.

[86] Id. at 21.

[87] Id.

[88] In Thouvenot, the Seventh Circuit noted the split among the circuits on this issue, which led it to the analogy (discussed above in text accompanying n.77) concerning indemnification by a wealthy relative. See Thouvenot, 596 F.3d at 383 ("But the issue is a recurrent one that has divided the circuits to have considered it . . . .").

[89] See NRC Staff Response to Reply at 3–5; Tr. at 2554, 2560–61.

On the other hand, the Board is not convinced that Mr. Geisen's position is correct. Although Mr. Geisen relies upon federal appellate cases allowing EAJA awards even when attorneys' fees were paid by an ineligible third party, none of the cases he cites specifically involves employment indemnification agreements.[90]

For Mr. Geisen to succeed in receiving an award of attorneys' fees and expenses under EAJA, all four of the NRC Staff's independent arguments against his entitlement to that award (see Part I, above) must fail; in other words, finding validity in any one of those independent arguments would defeat Mr. Geisen's EAJA application. As indicated above, this Board has already concluded that Mr. Geisen's application for legal fees should be denied because EAJA does not apply to Mr. Geisen's enforcement proceeding. Furthermore, the Board believes, as explained in the next part of this decision, that Mr. Geisen's application must also be rejected on the ground that the NRC Staff's position was substantially justified. Given the two alternative independent grounds for disposing of this case, and the apparent circuit-split and resulting confusion concerning the scope of the term "incur" under EAJA, the Board declines to pass judgment on the issue of whether Mr. Geisen "incurred" attorneys' fees and expenses within the meaning of EAJA.[91]

IV. Substantial Justification

Even if EAJA did apply to Mr. Geisen's enforcement proceeding (but see Part II, above) and he did in fact "incur" the attorneys' fees and expenses in question, Mr. Geisen's EAJA application would still fail because the NRC Staff's position in the enforcement proceeding was substantially justified.

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[90] At oral argument, counsel for Mr. Geisen acknowledged that there were no cases directly on point that support his position. See Tr. at 2537. The NRC Staff also found no cases specifically involving employment indemnifications that support Mr. Geisen's position. See Tr. at 2560.

[91] It is similarly unnecessary for the Board to address the NRC Staff's arguments challenging the specifics of the filing, adequacy, and reasonableness of Mr. Geisen's fee request. See NRC Staff Response at 9–12; NRC Staff Response to Reply at 7–10.

Under EAJA, a prevailing party is not entitled to an award for attorneys' fees and expenses if "the position of the Commission over which the applicant has prevailed was substantially justified."[92] By definition, the position of the government includes "the position taken by the [agency Staff] in the adversary adjudication [and] the action or failure to act by the [agency Staff] upon which the adversary adjudication is based."[93] According to the Supreme Court, for the purposes of EAJA, the government's position should be considered substantially justified if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact."[94] Thus, for the NRC Staff's position in this case to have been substantially justified, it did not have to be "'justified to a high degree,'" but instead only had to be "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person."[95]

In determining whether the government's position was substantially justified, courts must look to the totality of the circumstances.[96] Thus, the Board "must examine the government's conduct in both the prelitigation and litigation contexts."[97] In doing so, however, the Board "does not make separate determinations regarding each stage but 'arrive[s] at one conclusion that

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[92] 10 C.F.R. § 12.105(a). Under EAJA, the government bears the burden of establishing that its position was substantially justified. Id.; Scarborough v. Principi, 541 U.S. 401, 414 (2004).

[93] 10 C.F.R. § 12.105(a).

[94] Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988).

[95] Id. at 565. The Supreme Court in Pierce equated this with the "reasonable basis both in law and fact" standard that had been applied previously by a majority of federal appellate courts. Id. at 565–66.

[96] Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993).

[97] United States v. Hallmark Constr. Co., 200 F.3d 1076, 1080 (7th Cir. 2000) (citation omitted); see also Role Models America, Inc. v. Brownlee, 353 F.3d 962, 967 (D.C. Cir. 2004) ("The government, however, must demonstrate the reasonableness not only of its litigation position, but also of the agency's actions . . . .").

simultaneously encompasses and accommodates the entire civil action.'"[98] This determination is made on the basis of the written record, and, in this case, oral argument.[99]

Consequently, a judgment against the government on the merits, such as is the case here, does not create a presumption that the government's case was not substantially justified.[100] "While a court's 'merits reasoning may be quite relevant to the resolution of the substantial justification question,' we have cautioned that '[t]he inquiry into the reasonableness of the Government's position . . . may not be collapsed into our antecedent evaluation of the merits.'"[101] Instead, the legal standard governing the determination of substantial justification -- reasonableness -- is "separate and distinct" from the legal standard used in assessing the merits phase of a proceeding.[102]

Applying the reasonableness standard to the totality of circumstances before us, we conclude that the NRC Staff's position was substantially justified. Although a majority of this Board ultimately ruled against the NRC Staff, finding it had not demonstrated by a preponderance of the evidence that Mr. Geisen had committed the alleged knowing misrepresentations, statements from the Majority Opinion, Dissenting Opinion, Commission Opinion, and Mr. Geisen's criminal case (see text accompanying nn.128–29, below) all indicate that a reasonable person could believe that the NRC Staff's position was in fact correct.

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[98] Hallmark, 200 F.3d at 1080 (quoting Jackson v. Chater, 94 F.3d 274, 278 (7th Cir. 1996)).

[99] 10 C.F.R. § 12.306(a).

[100] Scarborough, 541 U.S. at 415 ("Congress did not, however, want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case ….'") (citations omitted); Pierce 487 U.S. at 569 ("Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified.").

[101] Halverson v. Slater, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (quoting F.J. Vollmer Co., Inc. v. Magaw, 102 F.3d 591, 595 (D.C. Cir. 1996)).

[102] Id.; Fed. Election Comm'n v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

Mr. Geisen disagrees, claiming instead that "the Staff's overreach in the issuance of the [Enforcement] Order and in its litigation positions show that its actions were not substantially justified."[103] Specifically, Mr. Geisen asserts that the accusations against him contained in that Order were "without any basis in fact or law,"[104] and that, consequently, the NRC Staff's litigation position "was condemned to failure by wooden adherence to what preceded it."[105]

Under the agency's regulations, the NRC Staff is authorized to issue immediately effective enforcement orders to both licensed and unlicensed individuals in certain circumstances.[106] The standard that must be met before issuing an immediately effective enforcement order is one of "adequate evidence," which is akin to the test for probable cause.[107] According to this standard, immediately effective enforcement orders must be "based on preliminary investigation or other emerging information that is reasonably reliable and indicates the need for immediate action."[108] Nonetheless, the Commission has made clear that "[t]his standard does not suggest an absence of controversy over such evidence or over the need for immediate action."[109]

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[103] Geisen Reply at 3.

[104] Id. at 24.

[105] Id. at 41.

[106] See 10 C.F.R. § 2.202.

[107] Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 301 (1994).

[108] Id. According to the Commission, adequate evidence is deemed to exist

> 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 that the charges are true and that the order is necessary to protect the public health, safety, or interest.

Id. (quoting Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20, 196 (May 12, 1992)).

[109] Id.

Although it was ultimately found to be insufficient to sustain the underlying charge, the evidence contained in the Enforcement Order was on its face adequate to make the initiation of the proceeding substantially justified.[110] In the Enforcement Order, the NRC Staff details the incomplete and inaccurate responses it received regarding Davis-Besse, Mr. Geisen's involvement with those responses, and the material nature of those responses.[111] Highlighted in the Enforcement Order were seven specific examples that, in the NRC Staff's view, demonstrated Mr. Geisen's awareness of the state of the Davis-Besse reactor head, thereby strongly implying that Mr. Geisen knowingly conveyed inaccurate and incomplete information to the NRC in his responses concerning the reactor head.[112] These seven specific examples were the result of an extensive investigation, subject to broad agency oversight, that was conducted over the course of multiple years. Even the Majority of the Board, in ruling against the NRC Staff, found that "it is fully understandable why the Staff investigation would, at its outset, have focused on Mr. Geisen as a likely source of the falsified information."[113]

To be sure, members of this Board had misgivings about the process leading up to the issuance of Mr. Geisen's Enforcement Order.[114] Even the NRC Staff itself admits that the process leading up to the issuance of the Enforcement Order in this case "could have been

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[110] What some of the evidence stated on its face did not, however, necessarily capture the true situation. For instance, the Majority ultimately found that the document containing John Martin's interview with Mr. Geisen, which at first seemed to establish requisite knowledge, was "irrefutably inconsistent with the body of other evidence about Mr. Geisen's activities in August of 2001, and thus can carry no weight, notwithstanding the inherent credibility of its author." LBP-09-24, 70 NRC at 741, 744 (emphasis in original).

[111] See Enforcement Order.

[112] Id. at 4–6.

[113] LBP-09-24, 70 NRC at 786.

[114] See n.110, above; Tr. at 2567; LBP-09-24, 70 NRC at 852 n.45 (Hawkens, J., dissenting) (noting that the NRC Staff had "ample time" prior to the issuance of the immediately-effective Enforcement Order to have provided Mr. Geisen with some type of predeprivation hearing); accord id. at 801 n.11 (Farrar, J., separate statement).

better."[115] Whatever may be said, however, about the launching of the Enforcement Order, we conclude that the evidence on which it was based was facially adequate to render the initiation of the proceeding substantially justified within the meaning of EAJA.

After the Enforcement Order was issued, Mr. Geisen and the NRC Staff entered into a lengthy stipulation whereby Mr. Geisen acknowledged that certain statements he had made to the NRC concerning the Davis-Besse reactor head were in fact false.[116] The crux of the litigation phase of the enforcement proceeding, therefore, was to determine whether Mr. Geisen in fact knew that these statements were false at the time that he made them. Because findings concerning personal knowledge are "'entirely factual'"[117] and largely dependent on witness credibility,[118] a five-day evidentiary hearing was conducted.[119] During the evidentiary hearing, the NRC Staff presented numerous witnesses, reports, memoranda, emails, and photos in an attempt to show that Mr. Geisen's inaccurate statements to the NRC were made with a "deliberate" and "knowing" state of mind.[120] Although a Majority of the Board ultimately ruled in favor of Mr. Geisen, the Majority noted that the NRC Staff Counsel had produced an "abundance of circumstantial evidence" and praised them for a "commendable effort."[121]

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[115] Tr. at 2570.

[116] LBP-09-24, 70 NRC at 689.

[117] Id. at 707–08 (quoting Ziegler v. Connecticut General Life Insurance Co., 916 F.2d 548, 553 (9th Cir. 1990)).

[118] CLI-10-23, 72 NRC at __ (slip op. at 16).

[119] LBP-09-24, 70 NRC at 689.

[120] See id. at 695–99.

[121] Id. at 786–87.

The evidence presented by the NRC Staff was sufficiently abundant that it persuaded a member of this Board to issue a detailed Dissenting Opinion in which he found that the NRC Staff's position was correct.[122] The Dissent stated:

> I would sustain the charge in the Enforcement Order [] because a preponderance of the evidence shows Mr. Geisen acted knowingly when he provided the NRC with materially incomplete and inaccurate information regarding the scope and efficacy of the Davis-Besse nozzle inspections. That Mr. Geisen had such knowledge is based on an abundance of record evidence that Mr. Geisen concedes he read, closely reviewed, discussed, or approved.[123]

That the Dissenting Opinion contained a thorough analysis in favor of the NRC Staff's position prima facie supports a conclusion that a "reasonable person could think" -- the test adopted by the Supreme Court (see text accompanying n.94, above) -- the NRC Staff's position to be correct.

If more were needed to confirm that the NRC Staff's position was substantially justified, it was provided when the Commission ultimately affirmed this Board's ruling. In doing so, the Commission repeatedly noted the strength of the NRC Staff's position. At numerous points throughout its opinion, the Commission reiterated the close nature of the case, indicating that it seemingly could have gone either way. The Commission made this explicit when it stated that:

> Indeed, we have no doubt that based on the record, the Board permissibly could have inferred that Mr. Geisen knowingly misled the NRC, and that the outcome of this proceeding plausibly could have been different. But this is not a reason to reverse the majority. In as hard-fought a case as this, we would not expect the record to support one party only. The fact that the majority accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision.[124]

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[122] Id. at 809–57 (Hawkens, J., dissenting).

[123] Id. at 824.

[124] CLI-10-23, 72 NRC at __ (slip op. at 15).

In support of this position, the Commission pointed to the plethora of evidence submitted by both the NRC Staff and Mr. Geisen -- a five-day oral hearing, hundreds of pages of documentary evidence, transcripts from investigative interviews, and a related criminal case.[125]

The Commission again emphasized the close nature of Mr. Geisen's case, and hence the strength of the NRC Staff's position, when it stated that

> [b]ased on the record, the Board might well have determined that Mr. Geisen's testimony was not credible and ruled in favor of the Staff. But this possible alternative resolution of the case does not equate to finding no evidence in the record supporting the majority's view.[126]

Even the Commission's conclusion, which affirmed the Board's Order in favor of Mr. Geisen, acknowledged the strength of the NRC Staff's position when it stated that it would uphold the Majority's Decision "[r]egardless of whether we would have made the same findings as the majority were we in its position."[127]

Additionally, while not dispositive of the issue of whether the NRC Staff's position was substantially justified, the Board cannot completely disregard that Mr. Geisen was convicted of criminal charges in conjunction with this proceeding. Specifically, prior to the conclusion of the enforcement proceeding in question, Mr. Geisen was convicted on three criminal counts of concealing a material fact and making a false statement to the NRC in violation of 18 U.S.C §§ 1001 and 1002.[128] On appeal, the Sixth Circuit affirmed Mr. Geisen's conviction.[129] These criminal convictions stemmed from essentially the same written and oral communications that formed the basis of the NRC Staff's position in this enforcement proceeding.

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[125] Id. at __ (slip op. at 15–16).

[126] Id. at __ (slip op. at 36–37).

[127] Id. at __ (slip op. at 37).

[128] See United States v. Geisen, 612 F.3d 471, 475 (6th Cir. 2010).

[129] Id.

To be sure, it seemed plain from the transcript of the Hearing on the Motion to Set Aside the Jury Verdict that the district judge entertained some doubt about the soundness of that verdict[130] (and a Majority of this Board found that it was not bound, under the doctrine of collateral estoppel, by the district court's judgment[131]). Nonetheless, that judgment, and its subsequent affirmation by the Sixth Circuit, provides additional support for concluding that the NRC Staff's position -- in parallel with that of the prosecutors' -- was substantially justified.

Thus, although this Board and the Commission both declined to adopt the NRC Staff's position in Mr. Geisen's enforcement proceeding, a review of the prelitigation and litigation phases of Mr. Geisen's enforcement proceedings, along with the statements from the Majority Opinion, the Dissenting Opinion, the Commission, and Mr. Geisen's criminal proceeding in this matter, indicates that the NRC Staff's position in this proceeding was substantially justified. This provides a second independent ground for denying Mr. Geisen's EAJA application.

V. Conclusion

For the reasons stated above, Mr. Geisen's application for attorneys' fees pursuant to EAJA and 10 C.F.R. Part 12 is hereby DENIED.

In accordance with 10 C.F.R. § 12.308, this decision will constitute final agency action on Mr. Geisen's EAJA application 40 days after its issuance, unless: (1) a party files a petition for Commission review within 15 days of the issuance of this decision; or (2) the Commission, at its discretion, determines that review is warranted within 40 days of the issuance of this

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[130] See United States v. Geisen, 2008 WL 1840759, at *1 (N.D. Ohio Apr. 22, 2008) (acknowledging that this was a "close case").

[131] LBP-09-24, 70 NRC at 711.

decision.[132] A party who seeks judicial review of this decision must first seek Commission review, unless otherwise authorized by law.[133]

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 10, 2011

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

[132] 10 C.F.R § 12.308; 10 C.F.R. § 2.341(b)(1). Section 12.308 states that the review process for EAJA proceedings is governed by 10 C.F.R. § 2.786, but the latter section no longer exists in the current regulations. Because section 2.786 previously contained the general rules governing the timing of appeals, we assume the reference in section 12.308 should be to 10 C.F.R. § 2.341.

[133] See 10 C.F.R. § 12.308(a).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Denying Application of Attorneys' Fees) (LBP-11-08) 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 10th day of March 2011