

August 15, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matters of)	
)	
DALE L. MILLER)	Docket No. IA-05-053
)	ASLBP No. 06-846-02-EA
)	
STEVEN P. MOFFITT)	ASLBP No. 06-846-02-EA
)	Docket No. IA-05-054
)	

NRC STAFF OPPOSITION TO MOTION TO QUASH
SUBPOENA ISSUED TO RODNEY COOK

INTRODUCTION

On August 9th, 2006 the Board issued an Order requiring any responses to a Motion to Quash the subpoena to Rodney Cook dated August 3, 2006 be filed by August 15, 2006. The Staff hereby files its opposition to the Motion to Quash.

BACKGROUND

On July 10, 2006, after conferring with Counsel to Mr. Cook regarding a mutually agreeable date for his deposition, the NRC Staff applied for a subpoena for the deposition of Mr. Rodney Cook.¹ That same day the NRC Staff forwarded the application for the subpoena by electronic mail to Counsel to Mr. Cook. On July 13, 2006, Special Agent Craig Hayden of the NRC Office of Investigations personally served the subpoena on Christine Haskins of the law firm of Gordon & Ermer.² Accompanying the subpoena was a cover letter from NRC Staff Counsel. On July 26, 2006, Counsel to Mr. Cook sent a letter to counsel to the NRC Staff

¹ See "NRC Staff's Application for the Issuance of a Subpoena," dated July 10, 2006.

² See Staff Proof of Service, attached as Exhibit A.

through regular U.S. mail requesting that the NRC Staff withdraw its subpoena to Mr. Cook.³

This letter was not received by the NRC until August 1, 2006. Upon receipt the NRC Staff contacted Counsel to Mr. Cook and advised that the NRC Staff would not withdraw the subpoena. On August 3, 2006, Mr. Cook filed his "Motion to Quash Subpoena" (Motion). As of the filing of this response, the NRC Staff has not received a copy of the Motion from Mr. Cook.⁴

DISCUSSION

Pursuant to 10 C.F.R. § 2.702 the testimony of a non-party at a deposition can be compelled based upon a showing of general relevance of the testimony or evidence sought. It is undisputed that Mr. Cook's testimony is relevant to both the Steven P. Moffitt (Moffitt) and Dale L. Miller (Miller) proceedings. Mr. Cook was a contractor in the regulatory affairs department of Davis-Besse. Mr. Cook was responsible for preparing the Davis-Besse response to NRC Bulletin 2001-01, the response which is at issue in these proceedings. In his Motion, Mr. Cook argues that he has the right to refuse to testify at deposition pursuant to the 5th Amendment and that requiring Mr. Cook to travel to Maryland when he is a resident of Tennessee is unfair. As discussed below, Mr. Cook's Motion should be denied because; 1) the 5th Amendment does not shield Mr. Cook from being deposed in these proceedings, 2) the NRC Staff will accommodate Mr. Cook's choice of location, and 3) his Motion is untimely.

1. The 5th Amendment does not shield Mr. Cook from being deposed in these proceedings

It is well established that a witness to a proceeding may not refuse to appear or be sworn as a witness based on the 5th Amendment. A witness has a right to refuse to answer specific questions based on the 5th Amendment, but does not have the right to refuse to testify.

³ See Letter from John F. Conroy to Mary C. Baty, dated July 26, 2006.

⁴ The NRC Staff received a copy of the Motion from the Board Law Clerk on August 8, 2006. The Certificate of Service reflects that it was sent by first class mail to the NRC Staff, and lists an incorrect zip code, 20585, which may be the reason why the NRC Staff has yet to receive a copy of the motion from Mr. Cook.

See State v. Lougin, 749 P.2d 173, 176 (Wash.App. 1988). For a witness to assert the 5th Amendment in a civil context he must do so with sufficient particularity to allow an informed ruling on his assertion of the privilege. *See North River Ins Co. v. Stefanou*, 831 F.2d 484, 486-487 (4th Cir. 1987). The privilege must be asserted in specifics sufficient to provide the court with a record upon which to decide whether the privilege has been properly asserted as to each question. *See Id.* The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken. *See Hoffman v. United States*, 341 US 479, 486 (1951).

In the instant case Mr. Cook must appear and invoke the 5th Amendment as to specific questions in order to create a record that can later be assessed by the tribunal. There are many questions which the NRC Staff intends to ask Mr. Cook that could not possibly tend to incriminate him. For example, a disputed fact in the Miller proceeding is whether or not Mr. Miller supervised Mr. Cook for purposes of responding to NRC Bulletin 2001-01. The NRC Staff contends that Mr. Miller supervised Mr. Cook. Mr. Miller contends that Mr. Wuokko supervised Mr. Cook.⁵ Mr. Cook is in the best position to know who his supervisor was in August, 2001, and it is not readily apparent how answering a question of this nature could incriminate Mr. Cook.⁶

⁵ *See Dale L. Miller's Answers to Interrogatories and Requests for Admissions*, June 30, 2006 at 40.

⁶ Neither Mr. Miller nor Mr. Wuokko were criminally indicted.

2. The NRC Staff will Accommodate Mr. Cook's Choice of Location

The NRC Staff scheduled the deposition of Mr. Cook at NRC Headquarters in Rockville, MD because Mr. Cook's counsel, Mr. Conroy, is located in Washington DC and the Staff understood that Mr. Cook desired to have Mr. Conroy present at the deposition. Pursuant to 10 C.F.R. § 2.702, the NRC Staff is funding Mr. Cook's travel to NRC Headquarters. If Mr. Cook would prefer to be deposed in the vicinity of Tennessee, the NRC Staff will comply with this request. Alternatively, the NRC Staff is conducting many depositions in the vicinity of the Davis-Besse Nuclear Power Plant, where Mr. Cook was employed at the time of the events in question, and will gladly conduct Mr. Cook's deposition there.⁷

3. The Motion is Untimely

Pursuant to 10 C.F.R. § 2.702(f) a person who desires to quash a subpoena must move promptly to quash. 10 C.F.R. § 2.323(a) requires that motions be made no later than ten days after the occurrence or circumstance from which the motion arises. In the instant case, the NRC Staff forwarded the application for a subpoena to Mr. Cook on July 10, 2006, via electronic mail. The NRC Staff then served the subpoena on July 13, 2006 via hand-delivery. Mr. Cook's motion to quash was due no later than July 24, 2006. Rather than filing a timely motion to quash, or contacting the NRC Staff to discuss the matter, Mr. Cook sent a letter to Counsel to NRC Staff dated July 26, 2006 through U.S. mail requesting withdrawal of the subpoena. Mr. Cook did not file his motion to quash until August 3, 2006, twenty days after his receipt of the subpoena. This type of delay is not the prompt motion to quash contemplated by NRC rules and his motion should be denied on this ground alone.

⁷ If the location is moved the NRC Staff will need to change the date of the deposition in order to make arrangements for a meeting space for the deposition in an alternate location.

CONCLUSION

Since Mr. Cook cannot invoke the 5th Amendment to avoid being called to testify, his motion to quash should be denied. Moreover, since his motion to quash was untimely, it should be denied. The deposition of Mr. Cook should be held, as scheduled, on August 23, 2006.

Respectfully Submitted,

/RA by Sara E. Brock/

Sara E. Brock
Mary C. Baty
Michael A. Spencer
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 15th day of August, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matters of)	
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DALE L. MILLER)	Docket No. IA-05-053
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO MOTION TO QUASH SUBPOENA ISSUED TO RODNEY COOK" 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 15th day of August, 2006.

Michael C. Farrar * **
Administrative Judge, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555-0001
E-Mail: mcf@nrc.gov

Nicholas G. Trikouros * **
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E. Roy Hawken * **
Chief Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555-0001
E-Mail: erh@nrc.gov

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
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E-mail: hearingdocket@nrc.gov

Adjudicatory File *
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John F. Conroy, Esquire
Gordon & Ermer
Two Lafayette Center
1133 21st Street N.W.
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Washington, D.C. 20036-3354

/RA/

Sara E. Brock
Counsel for NRC Staff



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

July 12, 2006

John F. Conroy, Esquire
Gordon & Ermer
Two Lafayette Center
1133 21st Street, NW, Suite 450
Washington, D.C., 20036-3354

Dear Mr. Conroy:

Enclosed is the subpoena issued to your client by the Atomic Safety and Licensing Board, Rodney M. Cook, on July 11, 2006. The subpoena commands his presence for deposition in the Dale L. Miller and Steven P. Moffitt proceedings on August 21, 2006, at 10:00 a.m. at the U.S. Nuclear Regulatory Commission Headquarters in Rockville, Maryland. Mr. Cook will be entitled to a witness fee and travel costs. We will be in touch about travel arrangements.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary C. Baty".

Sara E. Brock
Mary C. Baty
Michael A. Spencer

Enclosure: Atomic Safety and Licensing Board Subpoena for Rodney M. Cook

cc: Jane G. Penny

The original copy of the attached subpoena
was served on Christine Haskins of the above
noted law firm on 7/13/06 at approximately 10:10 a.m.
Craig Hayden, Special Agent, NRC-OI
CRAIG HAYDEN

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matters of:

DALE L. MILLER

&

STEVEN P. MOFFITT

Docket No. IA-05-053
ASLBP No. 06-846-02-EA

Docket No. IA-05-054
ASLBP No. 05-8457-03-EA

TO: Rodney Cook
c/o John F. Conroy, Esq.
Gordon & Ermer
Two Lafayette Center
1133 21st St. NW, Suite 450
Washington, D.C. 20036-3354

YOU ARE HEREBY COMMANDED to appear to testify at a deposition in the
above captioned proceedings
to be conducted at the United States Nuclear Regulatory Commission
Headquarters, One White Flint Building, 11555 Rockville Pike, Room O 14-B10
in the city of Rockville, Maryland
on the 21st day of August, 2006 at 10:00 A.M.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY:

Michael C. Farrar
Michael Farrar, Chairman ASLB

July 11, 2006

ATTORNEY FOR THE NRC STAFF:

Sara E. Brock

TELEPHONE: 301-415-8393

10 C.F.R. 2.702(f)

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena is issued, the presiding officer,

or, if he is unavailable, the Commission may:

(1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) Condition denial of the motion on just and reasonable terms.