

2. On that same day, the Staff issued similar orders to Dale Miller and Steven Moffitt. The orders to Messers. Miller and Moffitt form the basis for the above-captioned proceedings.

3. On January 19, 2006 a Grand Jury convened in the United States District Court for the Northern District of Ohio returned a five-count indictment against Mr. Geisen and two other individuals alleging false statements to the NRC in violation of 18 U.S.C. § 1001. The factual allegations set forth in the indictment are substantially similar to those set forth in the Order.

4. At his arraignment on February 1, 2006, Mr. Geisen pleaded not guilty and invoked his right to a speedy trial. Discovery has progressed since that date and the defendants are presently scheduled to file pre-trial motions on October 20, 2006.

5. On February 23, 2006, Mr. Geisen answered the Order, denying the allegations, and invoked his right to an expedited hearing pursuant to 10 C.F.R. § 202(c)(1).

6. On March 16, 2006, an Atomic Safety and Licensing Board was established in the *Geisen* matter.¹

7. The Staff, at the request of the Department of Justice, asked the Board to stay the proceedings against Mr. Geisen. After hearing argument from the parties, the Board declined to do so.

8. Thereafter, and again at the request of the Department of Justice, the Staff asked the Commission to grant interlocutory review of this Board's decision and to stay the

¹ The three members that comprise the Board in the instant matters also comprise the Board in the *Geisen* matter. For the sake of simplicity, this motion will not differentiate between the two Boards hereinafter.

proceedings against Mr. Geisen. Relying heavily upon the reasoning set forth by the Board, the Commission declined to do so.

9. On or about July 10, 2006, Sara Brock, counsel for the Staff, contacted counsel for Mr. Geisen and advised that the Staff wished to depose Mr. Geisen in connection with the *Miller* and *Moffitt* cases because Messrs. Moffitt and Miller had identified Mr. Geisen as a potentially knowledgeable person regarding certain contentions.

10. On July 19, 2006, counsel for Mr. Geisen requested that the Staff not seek a subpoena to depose Mr. Geisen immediately in the *Miller* and *Moffitt* matters for a myriad of reasons. See Letter from Richard A. Hibey to Sara E. Brock (July 19, 2006) (attached as Exhibit 1). The core of Mr. Geisen's position was that he should not be subjected to multiple depositions in the enforcement actions arising out of the events at Davis-Besse, and that he should not have to reach a critical decision regarding invocation or waiver of his Fifth Amendment rights before he received all of the discovery to which he is entitled under NRC rules. Counsel offered, in that letter, to explore a potential agreement with Jane Penny, counsel for Messrs. Miller and Moffitt, regarding the admission or use in the *Miller* and *Moffitt* matters of any deposition testimony that Mr. Geisen might give in his own proceeding. Counsel also advised the Staff that, if it compelled Mr. Geisen's appearance at a deposition in the *Miller* and *Moffitt* matters in the near-term, it would heighten the possibility that Mr. Geisen would be forced to invoke his Fifth Amendment rights and refuse to testify.

11. Mr. Geisen's counsel did not receive a response from the Staff to the July 19, 2006 letter until August 3, 2006, when Michael Spencer, counsel for the Staff, called counsel for Mr. Geisen, stated the Staff's intent to notice Mr. Geisen's deposition notwithstanding the issues raised in the July 19, 2006 letter and asked for dates on which he could notice Mr. Geisen's

deposition. Counsel for Mr. Geisen reiterated the various interests weighing against an immediate deposition including those raised in the July 19, 2006 letter to Ms. Brock and again requested that the Staff reconsider its request for an immediate subpoena.

12. Mr. Spencer declined to reconsider the Staff's position, based in part upon a tactical decision to depose Mr. Geisen last in his own matter -- a strategy that he stated was not compatible with the schedules in the *Miller* and *Moffitt* cases.² Mr. Spencer also promised, in telephone calls over the next couple of days, that he would not repeat questions from the first deposition in a later deposition of Mr. Geisen -- a promise that he suggested obviated Mr. Geisen's concern about multiple depositions. Counsel for Mr. Geisen expressed skepticism that Mr. Spencer could reasonably avoid repetitive questioning of Mr. Geisen and Mr. Spencer did not further explain how he thought such a process would work.

13. Counsel for Mr. Geisen, believing that this was an issue that was properly resolved by the parties without resort to the Board, made once last effort to prevail upon the Staff to delay its application for a subpoena for Mr. Geisen's deposition.³ See Letter from Charles F. B. McAleer, Jr. to Michael A. Spencer (August 8, 2006) (attached as Exhibit 2). As evidenced by the Staff's request for to the Board for a subpoena compelling Mr. Geisen's appearance at a deposition,⁴ that effort failed.

² Counsel suggested to Mr. Spencer that the lack of a hearing date in the *Miller* and *Moffitt* cases undercut the logic of the Staff's position, but Mr. Spencer was unpersuaded.

³ In the August 8, 2006, letter, counsel for Mr. Geisen confirmed that if the Staff insisted on forcing this issue in the *Miller* and *Moffitt* matters that Mr. Geisen would invoke his Fifth Amendment rights and decline to testify.

⁴ See NRC Staff's Application For The Issuance Of A Subpoena to David Geisen (August 9, 2006) (attached as Exhibit 3).

14. On information and belief, the Subpoena was issued on August 9, 2006,⁵ and Mr. Geisen now moves the Board to quash the Subpoena.

ARGUMENT

The Board may grant a motion to quash a subpoena if the subpoena is unreasonable, 10 C.F.R. § 702(f)(1) or, in the alternative, may condition denial of the motion on just and reasonable terms. 10 C.F.R. § 702(f)(2). In this instance, the Board should quash the subpoena because the Staff's insistence on multiple depositions of Mr. Geisen before the close of discovery is unreasonable.

It is important that the Board understand that Mr. Geisen is not, by making this request, suggesting that he would waive his Fifth Amendment rights and testify at a deposition in the future. Indeed, since the parties' first appearance before this Board on April 11, 2006, counsel has candidly admitted that Mr. Geisen would quite likely invoke his right to remain silent given the criminal jeopardy that he faces following the joint NRC-DoJ investigation into the events that took place at Davis-Besse. While his liberty remains threatened by the pendency of the criminal case, Mr. Geisen would make a truly unorthodox decision were he to swear the oath and subject himself to an adversarial examination.

On the other hand, Mr. Geisen has, from the inception of the enforcement action against him, denied the charges against him and sought to vigorously defend himself. *See*, Answer to NRC Order (February 23, 2006), Opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance (March 30, 2006.) He invoked his right to an expedited hearing. He opposed the

⁵ Mr. Spencer asked if counsel for Mr. Geisen would accept service of the Subpoena, which counsel for Mr. Geisen agreed to do. On August 11, 2006, Mr. Spencer informed counsel for Mr. Geisen that the Subpoena was being served by registered mail. As of the filing hereof, counsel for Mr. Geisen has not received service of the Subpoena.

Staff's repeated attempts to stay the proceedings before the Board. He is clearly making considered decisions at each step of the proceedings rather than merely falling back upon a strategy of delay.

What Mr. Geisen has asked of the Staff, in relation to deposition testimony, is simply that the Staff agree to a reasonable process that does not unnecessarily infringe upon Mr. Geisen's Constitutional rights: (1) that he not be subjected to multiple depositions, and (2) that he not be asked to make a decision regarding the waiver of his Fifth Amendment rights before he has been provided the materials to which he is entitled by NRC rules.⁶

Frankly, the Staff's insistence on seeking a subpoena for a near-term deposition of Mr. Geisen in the *Miller* and *Moffitt* matters is perplexing, given that it would not yield any relevant evidence. As he has indicated, if forced to appear at a deposition in the *Miller* and *Moffitt* matters prior to the completion of discovery in his own case, Mr. Geisen will, on advice of counsel, invoke his Fifth Amendment right to silence and decline to testify. Given that Mr. Geisen is not a party in the *Miller* and *Moffitt* matters, the Staff could not reasonably ask the Board to draw an adverse inference against either Mr. Miller or Mr. Moffitt from Mr. Geisen's invocation.

Nor could the Staff expect to advance its case against Mr. Geisen through an invocation of his rights in the *Miller* and *Moffitt* matters. Assuming, *arguendo*, that the Staff notes Mr. Geisen's deposition at the end of discovery in his case, an earlier invocation in another matter

⁶ Indeed, discovery in Mr. Geisen's matter, while moving expeditiously, remains at a fairly early stage pending resolution of issues address in Mr. Geisen's Motion to Compel (August 11, 2006) recently filed. As that Motion sets forth, the materials that Mr. Geisen seeks are at the core of the Staff's allegations of the wrongfulness of Mr. Geisen's actions. In a case such as this, where Mr. Geisen stands accused of making false and misleading statements, the importance of understanding the nuances of the Staff's position is obvious.

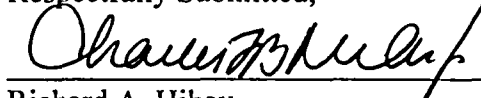
would be of no moment. If Mr. Geisen were to invoke his Fifth Amendment rights again, the Staff could seek an adverse inference based upon that invocation.⁷ If he were to testify, the fact that he had invoked his right to silence at a previous proceeding prior to his receipt of relevant discovery materials would be irrelevant and a request for an adverse inference would be improper.

Finally, the Board should quash the subpoena because the cost and hardship that would be imposed upon Mr. Geisen to fly to the Washington, D.C. area from Wisconsin simply to invoke his right to silence would be unreasonable. The Board is well aware of Mr. Geisen's present employment and financial situation.⁸ There is no reason to exacerbate that situation when no relevant evidence will result.

WHEREFORE, for the foregoing reasons, counsel respectfully request that this Motion be granted and that the Subpoena be QUASHED. A proposed Order is attached hereto.

Dated: August 15, 2006

Respectfully Submitted,



Richard A. Hibey
Charles F. B. McAleer, Jr.
Andrew T. Wise
Matthew T. Reinhard
MILLER & CHEVALIER CHARTERED
655 15TH Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for David Geisen

⁷ Mr. Geisen would oppose such an inference for the reasons stated at the April 11, 2006 hearing, but it is premature to repeat and expound upon those arguments at the present time.

⁸ These issues have been discussed in Mr. Geisen's matter. *See*, Opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance, Attachment A; Memorandum and Order (Denying Government's Request to Delay Proceeding), LBP-06-13, at 37; Transcript of April 11, 2006 hearing at 81-84 (attached as Exhibit 4).

CERTIFICATION OF GOOD FAITH EFFORTS

I HEREBY CERTIFY, pursuant to 10 C.F.R. § 2.323(b), that counsel for David Geisen communicated with NRC Staff on several occasions, both in writing and orally, in a good faith effort to resolve the dispute that is the subject of this Motion. Some of those communications are described in or attached to this Motion. Despite those efforts, the parties were not able to resolve the dispute prior to the filing of this Motion.


Charles F. B. McAleer, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of August, 2006, a copy of the foregoing Motion to Quash Subpoena was delivered, via electronic mail and first-class mail to the following persons:

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Charles F. B. McAleer, Jr.



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RICHARD A. HIBEY
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July 19, 2006

**BY E-MAIL
AND REGULAR MAIL**

Sara E. Brock, Esquire
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O-15 D21
Washington, D.C. 20555-0001

Re: *In The Matter Of David Geisen*
IA-05-052, ASLBP No. 05-839-02-EA
Before the Atomic Safety and Licensing Board

Dear Sara:

You informed me that Steven P. Moffitt and Dale L. Miller had identified Mr. Geisen as a potentially knowledgeable person regarding certain contentions in their respective matters and that you accordingly would like to depose Mr. Geisen in those matters.¹ You asked whether I would consent to a deposition of Mr. Geisen in those matters. I indicated that I did not have sufficient information at the time to respond to your request but that I would do so by Thursday, July 20.

Having now reviewed the initial disclosures in the *Moffitt* and *Miller* matters and having considered your request, I cannot consent to a deposition of Mr. Geisen in the *Moffitt* and *Miller* matters. Indeed, if subpoenas were issued to Mr. Geisen in those matters, I would move to quash or modify the subpoenas pursuant to 10 C.F.R. § 2.702 because I do not believe that it is proper or necessary to depose Mr. Geisen in those matters at this time.

As you consider whether to seek subpoenas to depose Mr. Geisen in the *Moffitt* and *Miller* matters, I offer the following for your consideration in the hope that we can obviate the need for a motion to quash or modify any such subpoenas:

1. It is unclear at this time whether Messrs. Moffitt and Miller will actually call Mr. Geisen to testify at the hearing in their respective matters. Since the current discovery cut-off in

¹ See *In the Matter of Steven P. Moffitt*, IA-05-054, ASLBP No. 06-847-03-EA and *In the Matter of Dale L. Miller*, IA-05-053, ASLBP No. 06-846-02-EA ("*Moffitt* and *Miller* matters")

Sara E. Brock, Esquire
July 19, 2006
Page 2

those matters is at least eight weeks away, and since no hearing dates have been set in those matters, I do not see the urgency of deposing Mr. Geisen in those matters now.

2. I do not think it is proper, and I will oppose any attempt by NRC Staff, to depose Mr. Geisen more than once in these NRC debarment proceedings, especially given the pendency of criminal proceedings against Mr. Geisen. The only proceeding in which it would be potentially necessary or appropriate to depose Mr. Geisen is the above-referenced matter. In the event that counsel for Messrs. Moffitt and Miller ultimately decides to seek testimony from Mr. Geisen in the *Moffitt* and *Miller* matters, I am hopeful that we could reach some sort of agreement regarding the admission or use in the *Moffitt* and *Miller* matters of any deposition testimony that Mr. Geisen may give in his own proceeding. If you like, I would be happy to begin exploring that possibility with counsel for Messrs. Moffitt and Miller.

3. As set forth in my letter to Michael Spencer dated June 19, 2006, there are significant issues relating to NRC Staff's initial disclosures in the above-referenced matter, including NRC Staff's assertion of various privileges, and it is necessary and appropriate to resolve those issues before any deposition of Mr. Geisen. Any attempt by NRC Staff to depose Mr. Geisen in the *Moffitt* and *Miller* matters before those issues have been resolved in Mr. Geisen's matter, and before any improperly withheld information has been disclosed to Mr. Geisen, would be profoundly unfair to Mr. Geisen.

4. Under the circumstances described in paragraphs 1-3 above, any attempt by NRC Staff to depose Mr. Geisen at this time in the *Moffitt* and *Miller* matters will only heighten the possibility that Mr. Geisen will have no choice but to invoke his rights under the Fifth Amendment to the United States Constitution in an effort to avoid any unfair and improper self-incrimination. It will serve no useful purpose for the NRC Staff unnecessarily and prematurely to create the circumstances under which Mr. Geisen will have no choice but to refuse to provide substantive testimony in the *Moffitt* and *Miller* matters. The complexity of these issues (as noted by the panel in the last hearing) militates against a rush to depose Mr. Geisen in the *Moffitt* and *Miller* matters.

Sara E. Brock, Esquire
July 19, 2006
Page 3

I would be happy to discuss the foregoing with you at your convenience. It is my hope that, upon reflection, you will conclude that it serves no proper purpose at this time to seek a subpoena for Mr. Geisen's deposition testimony in the *Moffitt* and *Miller* matters.

Sincerely,



Richard A. Hibey

cc: Andrew T. Wise, Esq.
Matthew T. Reinhard, Esq.
Charles F. B. McAleer, Jr., Esq.



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CHARLES F.B. MCALEER, JR.
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cmcaleer@mlchev.com

August 8, 2006

**BY FACSIMILE
AND ELECTRONIC MAIL**

Michael A. Spencer, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O-15 D21
Washington, D.C. 20555-0001

Re: *In The Matter Of David Geisen*
IA-05-052, ASLBP No. 05-839-02-EA
Before the Atomic Safety and Licensing Board

Dear Michael:

This letter briefly summarizes your recent communications with me regarding NRC Staff's continuing request to depose Mr. Geisen in the *Moffitt* and *Miller* matters¹ and provides you with Mr. Geisen's current position on that issue.

By way of background, we sent a letter to Sara Brock on July 19 responding to NRC Staff's informal request to depose Mr. Geisen in the *Moffitt* and *Miller* matters. In that letter, we identified several factors that we believe militate against NRC Staff seeking a deposition of Mr. Geisen in those matters at this time, and we offered, among other things, the possibility of a dialogue with counsel for Messrs. Moffitt and Miller that might defer, or obviate altogether, the need for a deposition of Mr. Geisen in those matters. We also informed you that "any attempt by NRC Staff to depose Mr. Geisen at this time in the *Moffitt* and *Miller* matters will only heighten the possibility that Mr. Geisen will have no choice but to invoke his rights under the Fifth Amendment to the United States Constitution in an effort to avoid any unfair and improper self-incrimination."

Last Thursday, August 3, you informed me that you had received our July 19 letter but that it did not persuade you to withdraw your request for an immediate deposition of Mr. Geisen in the *Moffitt* and *Miller* matters. With respect to our concern over Mr. Geisen being deposed multiple times in these proceedings, you said that you had made a tactical decision to depose Mr. Geisen in his case after you had deposed all other witnesses and that the timing of such a

¹ *In the Matter of Steven P. Moffitt*, IA-05-054, ASLBP No. 06-847-03-EA and *In the Matter of Dale L. Miller*, IA-05-053, ASLBP No. 06-846-02-EA ("*Moffitt* and *Miller* matters").

deposition would not be compatible with the schedule in the *Moffitt* and *Miller* matters, even though you do not have hearing dates yet in those matters. Accordingly, you reiterated your desire to depose Mr. Geisen now in the *Moffitt* and *Miller* matters and a second time later in his own case.

In subsequent telephone calls on August 4 and August 7, you indicated that the possibility of discussions with counsel for Messrs. Moffitt and Miller regarding the need for and timing of a deposition in those cases would not cause you to change your position and that you were not able or willing at this time to identify any specific topics as to which you intend to depose Mr. Geisen in the *Moffitt* and *Miller* matters. As to the latter point, you stated that you do not intend to repeat any questions to Mr. Geisen in the second deposition in his own proceeding, but you did not explain specifically how you would avoid going over the same areas covered in the first deposition, especially in the likely event that written discovery and questioning of other witnesses in Mr. Geisen's proceeding reveal new facts or information, which presumably was the underlying rationale for your tactical decision to depose Mr. Geisen at the end of the discovery period in his case.

We have been clear from the start of the proceedings against Mr. Geisen on two core propositions: (1) that Mr. Geisen should only be deposed once, and not twice, and (2) that Mr. Geisen should not have to reach a critical decision regarding invocation or waiver of his Fifth Amendment rights before he has received all discovery to which he is entitled by NRC rules. Your insistence on an immediate deposition of Mr. Geisen in the *Moffitt* and *Miller* matters, when NRC Staff has withheld from Mr. Geisen critical information in the August 2003 Office of Investigations Report on the grounds of privilege and before Mr. Geisen has been able to conduct essential fact discovery, ignores both of Mr. Geisen's concerns for purely strategic reasons.²

Given the absence of a hearing date in the *Moffitt* and *Miller* matters, this issue can and should be resolved by agreement of counsel. Your present position, however, precludes any such agreement. Accordingly, if you still intend to force this issue in the *Moffitt* and *Miller* matters, Mr. Geisen will invoke his Fifth Amendment rights and decline to testify at a deposition in those matters. We will also move immediately to quash any subpoena that you may obtain to depose Mr. Geisen in those matters, and we will bring that motion to the Board at the earliest possible opportunity, including the teleconference with the Board presently scheduled for August 17. If you decide to seek a subpoena for Mr. Geisen in the *Moffitt* and *Miller* matters, we request that you to do so promptly. We could then use the September 6 motion date tentatively set aside by the Board in Mr. Geisen's case for argument on our motion to quash.

² It is unclear what strategic advantage NRC Staff would gain through this tactic, as Mr. Geisen's invocation of his Fifth Amendment rights in the *Moffitt* and *Miller* matters would not result in any negative inference being drawn against either defendant in those matters.

Michael A. Spencer, Esq.
August 8, 2006
Page 3

Please call me if you have any questions regarding the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read "Char", with a long, sweeping horizontal line extending to the right.

Charles F. B. McAleer, Jr.

cc: Richard A. Hibey, Esq.
Andrew T. Wise, Esq.
Matthew T. Reinhard, Esq.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

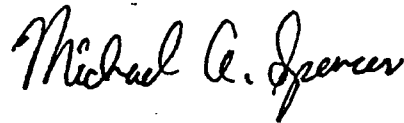
¹The Staff recognizes that these proceedings have not been consolidated. However, for administrative convenience the Staff desires a subpoena covering both proceedings since Mr. Geisen has been identified as a person with information relevant to both proceedings.

inaccurate; (3) concurred on Serial 2731, submitted September 4, 2001, for which submission Mr. Miller is the subject of an enforcement action claiming he deliberately submitted information material to the NRC that was known to be incomplete and inaccurate; and (4) concurred on Serial 2735, submitted October 17, 2001, for which submission Mr. Moffitt is the subject of an enforcement action claiming he deliberately submitted information material to the NRC that was known to be incomplete and inaccurate. Furthermore, Mr. Geisen was also identified as a person with relevant information on disputed issues by both Mr. Moffitt and Mr. Miller in their initial disclosures.

CONCLUSION

For the above stated reasons, the Staff requests the Board to issue the attached subpoena to Mr. Geisen.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael A. Spencer".

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

Dated at Rockville, Maryland
this 9th day of August, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matters of:

DALE L. MILLER

and

STEVEN P. MOFFITT

TO: David Geisen

c/o Charles F.B. McAleer

Miller & Chevalier

655 Fifteenth Street, N.W.

Suite 900

Washington, D.C. 20005-5701

Docket No. IA-05-053

ASLBP No. 06-846-02-EA

Docket No. IA-05-054

ASLBP No. 06-847-03-EA

YOU ARE HEREBY COMMANDED to appear to testify at a deposition in the
above-captioned proceeding
to be conducted at the U.S. Nuclear Regulatory Commission Headquarters,
One White Flint North Building, Room 016-B2
11555 Rockville Pike, Rockville, MD 20852
on the 11th day of September, 20 06 at 9:30 AM .

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY: Michael Farrar, Chairman ASLB

Date

ATTORNEY FOR THE NRC STAFF:

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

TELEPHONE: 301-415-8393/301-415-1324/301-415-4073

.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.

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

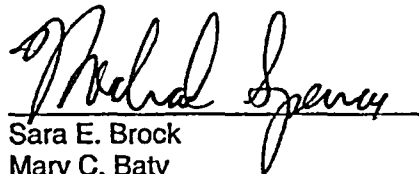
Docket No. IA-05-054
ASLBP No. 06-847-03-EA

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
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A handwritten signature in cursive script, reading "Michael A. Spencer", written over a horizontal line.

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

RAS 11534

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: David Geisen Enforcement Proceeding
Oral Arguments

Docket Number: 1A-05-052

Location: Rockville, Maryland

Date: Tuesday, April 11, 2006

DOCKETED
USNRC

April 13, 2006 (11:38am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Work Order No.: NRC-962

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SECY-02

1 UNITED STATES OF AMERICA

2
3 NUCLEAR REGULATORY COMMISSION

4
5 -----*

6 IN THE MATTER OF: ATOMIC SAFETY AND

7 LICENSING BOARD

8 DAVID GEISEN Docket Number: IA-05-052

9 ENFORCEMENT PROCEEDING

10 ORAL ARGUMENTS

11 -----*

12
13
14
15 Tuesday, April 11, 2006

16
17 The conference came to order, pursuant
18 to notice, at 10:00 a.m.

19
20 Before:

21
22 JUDGE MICHAEL FARRAR

23 JUDGE E. ROY HAWKENS

24 JUDGE NICHOLAS TRIKOUROS

25

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P-R-O-C-E-E-D-I-N-G-S

10:00 a.m.

JUDGE FARRAR: On the record. It's 10:00 a.m. and I'm advised that Counsel for Mr. Geisen was delayed downstairs. So we'll just wait a moment for them to arrive.

(Pause.)

JUDGE FARRAR: Off the record.

(Whereupon, the foregoing matter went off the record at 10:02 a.m. and went back on the record at 10:06 a.m.)

JUDGE FARRAR: On the record. Good morning. We're gathered today to hear oral argument on the NRC staff's motion to hold this administrative enforcement proceeding against David Geisen in abeyance pending the outcome of a related Federal criminal proceeding pending against him in the northern district of Ohio where he was an employee of the Davis-Besse Nuclear Plant.

By way of introductions, I'm Mike Farrar, the Lawyer Chairman of this Board. With me are Judge Roy Hawken also a lawyer who came to us after over 18 years at the Department of Justice and Nick Trikouros whose technical background includes 30 years experience in the nuclear industry including founding

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1 JUDGE FARRAR: Mr. Hibey, I don't think we
2 have any more questions, so why don't you take as much
3 time as you need to make any points you hadn't made so
4 far.

5 MR. HIBEY: I think I hear somebody
6 calling my name which means that I must have missed
7 something. If you'll indulge me a moment, I'll see
8 what these guys want.

9 (Pause)

10 MR. HIBEY: We have a 21st Century answer
11 to the question of his economics because apparently
12 the client has e-mailed -- he expects that his yearly
13 income will project to roughly half of the salary he
14 earned at Dominion. He has lost benefits. He is now
15 self-employed. That is a relevant issue for him
16 because what you don't know is that his son, Nicholas,
17 approximately 16 or 17 years old, was diagnosed last
18 year with non-Hodgkins lymphoma. Happily, the young
19 man is recovering but he is under strict medical
20 regiments as part of that recovery.

21 JUDGE FARRAR: Does he indicate there, I
22 assume he would have the COBRA-continued health
23 insurance coverage for 18 months or whatever?

24 MR. HIBEY: I expect that he does but --

25 JUDGE FARRAR: Haven't they helped or

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1 haven't they changed the pre-existing condition rules
2 from where they -- the dismal rules they had 10, 15
3 years ago?

4 MR. HIBEY: The answer is, I don't know.
5 I'm probably the last person to ask in that regard,
6 but I should also tell you that his wife works. And
7 she has some coverage but it's not as comprehensive as
8 what he enjoyed, so the additional proximate cost per
9 month is now about \$500.00. The work now requires
10 considerable travel to different states, thus, taking
11 him away from his wife and family in which two of the
12 children are high school age.

13 And the business that he's working in that
14 I just described to you having to do with
15 refrigeration and gaskets and things is a business
16 that he had to purchase and he used his 401(k) funds,
17 some of them at least, to buy the business so that he
18 could have something to -- gainfully to pursue. With
19 respect -- that's all I have on his economics.

20 I'm being urged to -- I'm being reminded
21 therefore, to urge upon you, Judge Hawkens in response
22 to your question about depositions, the NRC will be
23 present at those depositions. It's likely the
24 Department of Justice will be present, although I
25 can't be assured of that, since their appearance is

1 now quite select apparently. And with respect to the
2 use of any of those materials, I mean, they're going
3 to be subject to the control ultimately of the court
4 there or here as to, you know, how we advance whatever
5 is adduced through deposition testimony. So it is not
6 as though we are having a sort of exclusive advantage
7 of star chambering anybody that we choose to depose.

8 JUDGE FARRAR: Let me make sure I
9 understand the representations you made about the
10 financial matters. While we were here your associates
11 e-mailed him and those are the representations he made
12 in response?

13 MR. HIBEY: They're looking at you,
14 gentlemen.

15 MR. REINHARD: Your Honor, I can speak to
16 that. We e-mailed his wife, through our experience
17 has been very familiar with his financial situation.

18 JUDGE FARRAR: So she --

19 MR. REINHARD: She responded.

20 JUDGE FARRAR: You e-mailed them while we
21 were sitting here. She responded.

22 MR. REINHARD: That's right.

23 MR. WISE: Yes, your Honor, she responded
24 and her e-mail indicated she was on the phone with Mr.
25 Geisen, who was traveling for work and he was relaying

1 this information to her, her with us.

2 JUDGE FARRAR: All right, thank you. Mr.
3 Hibey, do you have anything more?

4 MR. HIBEY: I don't believe so, your
5 Honor. I'm prepared to submit.

6 JUDGE FARRAR: Okay, thank you.

7 JUDGE HAWKENS: I have one final question.
8 In discussing the harm to your client, you didn't
9 discuss the factor of potential harm to his ability to
10 defend himself in the civil proceeding if the criminal
11 proceeding goes forward first. Do you foresee any
12 harm in that regard?

13 MR. HIBEY: If the criminal case were to
14 go before the civil case? No, I'm not sure that I can
15 identify specifically -- would you indulge me a
16 moment, I'd like to consult with my colleagues on
17 that?

18 (Pause)

19 MR. HIBEY: In response to your question,
20 the answer is no.

21 JUDGE HAWKENS: Thank you.

22 JUDGE FARRAR: Mr. Hibey, you consulted
23 with your colleagues here: I neglected to mention at
24 the beginning of your argument the fourth gentleman
25 here is Jonathan Rund our law clerk whom we rely on to

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1 the same extent you do --

2 MR. HIBEY: Indeed.

3 JUDGE FARRAR: -- on your associates
4 there.

5 MR. HIBEY: I hope your reliance is as
6 well-placed as mine.

7 JUDGE FARRAR: Then we will thank you for
8 your presentation. Mr. Spencer, we'll hear from you.

9 MR. HIBEY: May I make just one last point
10 because --

11 JUDGE FARRAR: Oh, sure.

12 MR. HIBEY: -- apparently even though
13 there's no right of reply, in writing they apparently
14 have one orally. If there's any effort to bring
15 forward any information from the Justice Department at
16 this stage of the proceeding relative to this motion,
17 I simply want to renew my request for the opportunity
18 to cross examine any new information that is put
19 before the court on this point.

20 JUDGE FARRAR: Well, let's see what they
21 say and depending on what they say, we'll ask you for
22 further comment right now.

23 MR. HIBEY: Thank you. Go ahead, Mr.
24 Spencer.

25 MR. SPENCER: I have several comments to

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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 Matters of:

DALE L. MILLER

STEVEN P. MOFFITT

:
:
: Docket No. IA-05-054
: ASLBP No. 06-846-02EA
:
:
: Docket No. IA-05-054
: ASLBP No. 05-8457-03EA

[PROPOSED] ORDER GRANTING MOTION TO QUASH SUBPOENA

Upon motion of David C. Geisen to quash the Subpoena dated August 9, 2006 for his deposition in the above-captioned matters, it is hereby ordered, pursuant to 10 C.F.R. § 2.702(f), that the Subpoena dated August 9, 2006 is hereby QUASHED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Rockville, Maryland
_____, 2006

By _____
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE