

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Beginning on or about July 10, 2006, the Staff sought the consent of Mr. Geisen, through his counsel, to schedule his deposition in the above captioned matters. Counsel to Mr. Geisen refused to state a preferred location or date, but rather maintained that Mr. Geisen should not be deposed. On August 9, 2006, in the absence of any expressed preferences of Mr. Geisen regarding dates or locations, the Staff filed “NRC Staff Application for the Issuance of a Subpoena” (Subpoena Application). On August 15, 2006, Mr. Geisen filed his “Motion to Quash Subpoena” (Motion).

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. Geisen's testimony is relevant to both the Steven P. Moffitt (*Moffitt*) and Dale L. Miller (*Miller*) proceedings. Mr. Geisen is a former manager of Design Engineering at Davis-Besse and, as such, was directly supervised by Mr. Moffitt and also took part with him in various presentations at the NRC regarding Davis-Besse's responses to NRC Bulletin 2001-01. As discussed below, Mr. Geisen's motion should be denied because: 1) the Fifth Amendment does not shield Mr. Geisen from being deposed in these administrative proceedings; 2) The mere existence of the *Geisen* proceeding does not shield Mr. Geisen from deposition in the *Moffitt* and *Miller* proceedings; and 3) the NRC Staff will accommodate Mr. Geisen's choice of location.

1. The Fifth Amendment does not shield Mr. Geisen from being deposed in these proceedings

It is well established that a witness in 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 Fifth Amendment, but lacks an across the board right to refuse to testify. *See State v. Lougin*, 749 P.2d 173, 176 (Wash.App. 1988) For a witness to assert the Fifth 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 with specific support 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 relieved of the burden of testifying on his mere declaration that to answer he would necessarily risk incriminating himself. It is for the court to determine whether his silence is justified, and to require him to answer if it

clearly appears to the court that he is mistaken that a response would endanger him. See *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

In the instant deposition, Mr. Geisen must appear and invoke the Fifth Amendment with respect to specific questions, as relevant, in order to create a record that can later be assessed by the tribunal. There are questions the NRC Staff intends to ask Mr. Geisen for which it is not readily apparent that the answers would incriminate him. The Staff intends to ask Mr. Geisen to explain the role of his direct supervisor, Mr. Moffitt, in preparing the responses to NRC Bulletin 2001-01. Mr. Geisen is a key witness in the *Moffitt* proceeding. Even his refusal to respond to certain questions yields relevant information. Notably, it establishes a record of the questions to which he refused to respond, such that Mr. Geisen cannot later testify on those same matters when called as a witness in the *Moffitt* hearing.

2. The existence of the *Geisen* proceeding does not shield Mr. Geisen from deposition in the *Moffitt* proceeding

Mr. Geisen has proffered no case law to support his proposition that the very existence of the *Geisen* proceeding should shield him from deposition as a fact witness in the *Moffitt* or *Miller* proceedings. The proceedings are separate. Notably all parties opposed consolidation when it was suggested by the Board early on in these proceedings.¹ Mr. Geisen and Mr. Moffitt's cases do substantially overlap and in many respects consolidating them would be more efficient. Unfortunately, while Mr. Moffitt has attempted to move his case along quickly, vigorously engaging in discovery, Mr. Geisen has not followed the same course of action. Notably, Mr. Geisen waited over two months from the time the Board denied the Staff's Motion to Hold the Proceeding in Abeyance to file his initial disclosures.² Mr. Geisen failed to include a

¹ See at Prehearing Conference Transcript at 8-12 (March 22, 2006).

² See *David Geisen* LBP-06-13, slip op. (May 19, 2005); "Initial Discovery Disclosure of David Geisen," (July 28, 2006).

single document with what purported to be his initial discovery disclosure. Mr. Geisen then requested until September 1, 2006 to file written interrogatories. To the extent that Mr. Geisen wishes to delay the *Geisen* proceeding, the Staff has no objection. However, the Staff cannot delay discovery in the *Moffitt* proceeding due to delays in Mr. Geisen's proceeding as a result of his own tactical decisions.³

As discussed above, Mr. Geisen's testimony is necessary to illuminate important matters in the *Moffitt* and *Miller* proceedings and the Staff intends to depose him for that purpose. The Staff is not attempting to circumvent the discovery schedule in the *Geisen* proceeding. At the time the Staff filed its Subpoena Application it was faced with a September 15, 2006 discovery deadline in the *Moffitt* and *Miller* proceedings. That deadline has now been moved to October 15, 2006. Therefore, the Staff is quite willing to reschedule the deposition of Mr. Geisen for the first week of October, a date within the *Geisen* deposition time-frame. The Staff is not, however, willing to forego any deposition of Mr. Geisen in the *Geisen* proceeding. In order to depose Mr. Geisen in the *Geisen* proceeding, the Staff needs full answers to its interrogatories. The Staff may also need to depose any other third party witnesses that Mr. Geisen identifies prior to taking Mr. Geisen's deposition in the *Geisen* proceeding. The Staff cannot agree, at this date, to waive any further deposition of Mr. Geisen in the *Geisen* proceeding. Nor is the Staff aware of any precedent for the proposition that deposing a witness in one proceeding precludes deposition in a separate proceeding.

3. The NRC Staff will Accomodate Mr. Geisen's Choice of Location

The NRC Staff scheduled the deposition of Mr. Geisen at NRC Headquarters in Rockville, Maryland because Mr. Geisen's counsel is located in Washington, D.C. and the Staff

³ For example, Mr. Geisen could have filed his initial disclosures the same day the Staff did, June 7, 2006. Both parties could have then filed written interrogatories on June 26, 2006 with responses due in 14 days, as provided by 10 CFR § 2.706. Depositions would then have started on or about July 10, 2006, which would have placed the *Geisen* matter on an identical schedule to the *Moffitt* matter.

assumed that Mr. Geisen would desire to have his counsel present at the deposition.⁴ Pursuant to 10 C.F.R. § 2.702, the NRC Staff will fund Mr. Geisen's accommodation and travel to NRC Headquarters. If Mr. Geisen would prefer to be deposed in the vicinity of his current residence, the Staff is willing to comply with such a request. Another possible location is in the vicinity of the Davis-Besse Nuclear Power Plant, where Mr. Geisen was employed at the time of the events in question and where the Staff is already conducting many depositions.⁵

CONCLUSION

It appears undisputed that Mr. Geisen's testimony is relevant to the *Moffitt* and *Miller* proceedings. Mr. Geisen cannot invoke the Fifth Amendment to avoid appearing to testify, and the existence of the *Geisen* proceeding does not protect him from deposition in the *Moffitt* and *Miller* proceedings. Accordingly, his motion to quash should be denied.

Respectfully Submitted,

/RA by Sara E. Brock/

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Michael A. Spencer
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 28th day of August, 2006

⁴ Despite requests by the Staff to counsel for Mr. Geisen for a preferred location and date for the deposition, counsel to Mr. Geisen refused to propose a location or date, and simply continued to assert that Mr. Geisen's deposition should not be taken.

⁵ If the location is moved the Staff may need to adjust the time and date of the deposition.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matters of)

DALE L. MILLER)

) Docket No. 1A-05-053
) ASLBP No. 06-846-02-EA

STEVEN P. MOFFITT)

) Docket No. 1A-05-054
) ASLBP No. 06-846-02-EA
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO MOTION TO QUASH SUBPOENA ISSUED TO DAVID GEISEN" 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 28th day of August, 2006.

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