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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 Trikourous whose technical background includes 30 years experience in the nuclear industry including founding

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1 and operating a consulting company involved in nuclear
2 plant design, licensing and safety analysis. Counsel
3 for the Parties, Mr. Geisen.

4 MR. HIBEY: Your Honor, Richard Hibey for
5 Mr. Geisen. With me is my colleagues, Andrew Wise and
6 Matthew Reinhard.

7 JUDGE FARRAR: Glad to have you all with
8 us. For the NRC staff.

9 MR. SPENCER: Yes. I'm Michael Spencer
10 and with me, co-counsel, is Sara Brock and we also
11 have Jim Luehman from the staff, Deputy Director,
12 Office of Enforcement.

13 JUDGE FARRAR: Glad to have you with us.
14 Mr. Ballantine from the Department of Justice is not
15 here. We have your letter of April 6th setting out
16 why he's not coming.

17 MR. SPENCER: Yes Your Honor.

18 JUDGE FARRAR: Let me say a word about
19 that letter to make the record clear. We never said
20 we wanted him here to talk about matters that he's not
21 allowed to disclose given the ethics and professional
22 responsibility rules at the Department of Justice. We
23 wanted him here to talk about the factors that are at
24 issue here including how the Speedy Trial Act works,
25 how open file discovery works and to walk us through

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1 the criminal process so we could see how it tied into
2 this.

3 So I don't know where he got the
4 conclusion that he, I guess, orally gave to you that
5 you repeated in your letter that he couldn't come
6 because of these sensitive areas. Even if he was
7 concerned, he could have shown up and he could have
8 let us know whenever we got into areas that he was
9 reluctant to discuss. If he didn't show up, he could
10 have sent his own letter to you and you could have
11 just sent a cover memo having his explanation rather
12 than yours in front of us.

13 The whole thing seems at least to me, the
14 best word I can think of, is peculiar, but here we
15 are. If he had a criminal case and a civil case
16 pending in a United States District Court, he would
17 have shown up to explain to the District Judge why
18 your motion should carry the day. He is located at
19 main Justice in D.C. rather than Ohio. Is that
20 correct?

21 MR. SPENCER: Yes Your Honor.

22 JUDGE FARRAR: Okay. We'll go ahead on
23 the basis of his letter and we'll discuss later during
24 the argument what, if anything, that means for the
25 case and we understand about the Memorandum of

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1 Understanding. So you did your part. You sent us the
2 letter. So you're fine.

3 Before starting, I want to explain for the
4 benefit of any of you in the audience who haven't been
5 to oral arguments before. We have the written briefs
6 of the parties where they've laid out their arguments.
7 This is not the time for them to make speeches. We
8 are the ones who ask for oral argument. It's a time
9 for us to ask questions to try to probe into the
10 strengths and weaknesses of their case, make sure we
11 know everything we need to know to write a decision
12 when it's over. So you'll see countless
13 interruptions.

14 Don't take that as rudeness on our part.
15 That's the way oral arguments go. Do not read into
16 our questions what way you think we may be leaning on
17 the case. We may ask questions to develop points to
18 be devil's advocates. Any questions we ask are the
19 province of the person questioning and are not
20 necessarily the same questions the other judges would
21 have asked.

22 We have set this for a half hour aside,
23 but we have nothing more important to do than get to
24 the bottom of this. So we will be liberal with the
25 time periods. We hope to get it done in 90 minutes,

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1 but if it takes longer, that's fine.

2 Please speak into the microphones because
3 this is being televised internally and the cameras are
4 voice activated and that's the podium is a little off-
5 center in order to take care of the camera angles.

6 Mr. Spencer, are you going to argue?

7 MR. SPENCER: Yes Your Honor.

8 JUDGE FARRAR: It's your motion. Go
9 ahead.

10 MR. SPENCER: Your Honors, the Criminal
11 Procedure Rules --

12 JUDGE FARRAR: Do you want to use the
13 podium?

14 MR. SPENCER: Do you wish me to?

15 JUDGE FARRAR: Yes please.

16 MR. SPENCER: Okay.

17 JUDGE FARRAR: Let me say one more thing
18 before you start. Today's argument deals with whether
19 the staff's enforcement proceeding against Mr. Geisen
20 should go forward. It has nothing to do with the
21 merits of that case or the merits of the criminal
22 case. It's just -- I don't want to say "just a
23 scheduling matter" or "a procedural matter" but it has
24 nothing to do with the merits of the case. So don't
25 read anything into our questions as reflecting

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1 anything about the merits about which we know nothing.

2 Go ahead, Mr. Spencer.

3 MR. SPENCER: Your Honors, the Criminal
4 Procedure Rules have been crafted by criminal law
5 experts to serve the special demands of criminal
6 trials. Allowing this enforcement proceeding to go
7 forward would give to Mr. Geisen discovery tools not
8 available to him in a criminal proceeding,
9 specifically, depositions and interrogatories.

10 The Federal Rule of Criminal Procedure 15
11 governs the use of depositions at criminal cases.
12 Depositions in criminal cases are highly disfavored
13 and are only allowed in very limited circumstances,
14 specifically when used to preserve testimony at trial
15 and only when exceptional circumstances in the
16 interest of justice so require. Furthermore, as the
17 Advisory Committee notes and the case law makes clear,
18 depositions are simply not allowed for adverse party
19 witnesses.

20 The Advisory Committee notes give the
21 reasons behind this limitation. The notes
22 accompanying the 1974 Amendment state that the
23 principal objective behind the limited deposition
24 exception is "the preservation of evidence for use at
25 trial. It is not to provide a method of pretrial

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1 discovery or primarily for the purpose of obtaining a
2 basis for later cross examination of an adverse
3 witness."

4 JUDGE FARRAR: That's great in a criminal
5 case, but you all brought a civil enforcement
6 proceeding and make it immediately effective and cost
7 this gentleman his job which he's out of at this
8 moment. So whatever you may say about how the
9 criminal trials ordinarily proceed, what does that
10 have to do with the situation we have here
11 particularly -- Go ahead.

12 MR. SPENCER: Well, Your Honors, we issued
13 the order because the NRC has a public health and
14 safety mandate and we have to protect the public
15 health and safety.

16 JUDGE FARRAR: No problem.

17 MR. SPENCER: And the Department of
18 Justice have their own interests and they have to
19 prosecute criminal cases.

20 JUDGE FARRAR: No problem.

21 MR. SPENCER: Now --

22 JUDGE FARRAR: Why can't the two go
23 forward together particularly when the Commission has
24 a rule that says when you all make something
25 immediately effective the subject of that order is

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1 entitled to expeditious consideration?

2 MR. SPENCER: Your Honor, the Commission
3 has recognized that proceedings for orders can be
4 stayed for good cause and the Commission in a final
5 rule specifically brought up the possibility of a
6 criminal proceeding or a criminal investigation as
7 good cause.

8 JUDGE HAWKENS: And, Mr. Spencer, why in
9 this particular case, would allowing the civil
10 procedure to go forward work on unfair advantage for
11 Mr. Geisen in the criminal proceeding which is what --
12 That's basically your point, isn't it?

13 MR. SPENCER: Yes, that's the most
14 important point. The criminal proceeding is the most
15 important. Essentially, Mr. Geisen would get
16 information to which he's not entitled in the criminal
17 proceeding and because of the Fifth Amendment
18 privilege against self-incrimination, he would gain an
19 advantage over the prosecution. The prosecution --

20 JUDGE HAWKENS: Now let me ask you this.
21 When you say he would get information he would not
22 otherwise be entitled to, it seems to me that the NRC
23 and the company probably have investigated this very
24 thoroughly and every individual who's likely to be
25 interviewed has probably been interviewed

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1 exhaustively. Why would allowing Mr. Geisen an
2 additional opportunity to interview these individuals
3 give him an unfair advantage?

4 MR. SPENCER: Your Honor, the Criminal
5 Procedure Rules were drafted with in mind the fact
6 that the defendant had a Fifth Amendment privilege
7 against self-incrimination and the prosecution carried
8 the very high burden.

9 JUDGE FARRAR: He's been interviewed five
10 times, four times, whatever.

11 MR. SPENCER: Well, Your Honor --

12 JUDGE FARRAR: This is not an organized
13 crime case where you have one squealer who's afraid
14 and you have no idea what the RICO Enterprise has been
15 doing. You and the Department of Justice have
16 investigated this for three years which is why each of
17 these cases gets decided on its own facts. You have
18 all the information unless you tell us differently.
19 He has nothing. Where is the unfair advantage?

20 MR. SPENCER: Your Honor, I guess I have
21 two things to respond to what you just said. First,
22 regarding interviews of Mr. Geisen, in the answer to
23 our motion, Mr. Habey brings up the interview
24 conducted in February of 2005 and that interview was
25 conducted by, according to Mr. Habey, employees of DOJ

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1 and employees of NRC. But as I understand it, we do
2 not have access to the transcript of that interview
3 because the NRC employees involved therein were
4 working for the Department of Justice in a grand jury
5 investigation and the grand jury's secrecy rules
6 prohibit them from revealing that information to us.

7 JUDGE FARRAR: Wait. They interviewed him
8 outside of the presence of the grand jury.

9 MR. SPENCER: I'm not sure what. I'm just
10 going by what Mr. Habey said in his Answer.

11 JUDGE FARRAR: And if Mr. Ballantine were
12 here, he would be able to help us on this point,
13 wouldn't he?

14 MR. SPENCER: Your Honor, I think the
15 grand jury secrecy rules still apply even if the grand
16 jury term is over. So there are limitations on what
17 he could reveal.

18 JUDGE FARRAR: So you have no interviews
19 in your files. The NRC investigative people have no
20 interviews in their files of Mr. Geisen.

21 MR. SPENCER: Your Honor, we do have
22 interviews in our files, but we do not have the
23 interview that Mr. Habey pointed out in 2005 which
24 would have been after the years of pouring over
25 documents and looking at other witness interviews and

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1 sort of being able to focus our questions right on
2 specific matters of concern to us and moreover, no NRC
3 counsel was involved in any interview of Mr. Geisen.

4 JUDGE FARRAR: No NRC counsel.

5 MR. SPENCER: Attorney.

6 JUDGE FARRAR: You had NRC investigative
7 people.

8 MR. SPENCER: Yes, we had NRC
9 investigative people, but the NRC staff which is
10 wishes to in this enforcement proceeding if it goes
11 forward, once it does go forward, whether it goes
12 forward now or later, to depose Mr. Geisen, asking
13 questions, using NRC attorneys.

14 JUDGE HAWKENS: And if he represented, you
15 don't know whether he will be willing to make this
16 representation. But if he represented, he would not
17 be invoking his right to the Fifth Amendment
18 privilege. How would that factor weigh in your
19 argument?

20 MR. SPENCER: Your Honor, I'm not sure
21 whether he would be able to do that.

22 JUDGE HAWKENS: I ask you assuming he did
23 that.

24 MR. SPENCER: Well, I'm unsure whether you
25 can pre-waive your Fifth Amendment privileges. I'm

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1 not sure if that's Constitutional. I'm not a criminal
2 law expert.

3 JUDGE HAWKENS: Can you answer the
4 question given the hypothetical?

5 MR. SPENCER: Okay. Given the
6 hypothetical and if he actually carried forth his
7 promise and we're not sure of that, it would still
8 give him information that he could use at the criminal
9 trial that he's not entitled to at the criminal trial.

10 JUDGE HAWKENS: And what information is
11 that?

12 MR. SPENCER: Being able to depose
13 witnesses, the answers he would get from those
14 witnesses, interrogatories. Now there are certain
15 problems --

16 JUDGE HAWKENS: Let me ask you this
17 question. These are individuals who the NRC or the
18 company have not previously interviewed or say the
19 prosecutors have not interviewed. So it's not already
20 in the prosecution file that will be made available to
21 him during the open file process in the criminal
22 proceeding.

23 MR. SPENCER: I'm not aware of who he
24 would be willing to or wanting to depose or wanting to
25 interrogate with written interrogatories.

1 JUDGE HAWKENS: Let me ask you this.

2 JUDGE FARRAR: But -- Go ahead.

3 JUDGE HAWKENS: You make it sound like the
4 opportunity presented to engage in depositions is such
5 an important factor generally that there should be a
6 bright line rule that a civil proceeding should always
7 be deferred pending the completion of the criminal
8 proceeding. We know that's not true.

9 MR. SPENCER: Your Honor, I --

10 JUDGE HAWKENS: That's right. You would
11 concede that in each case the facts have to be
12 weighed, evaluated, to determine whether a civil
13 proceeding should be stayed.

14 MR. SPENCER: Your Honor, I agree that it
15 is --

16 JUDGE HAWKENS: Now given that, what I'm
17 looking for and I'm open to your answer, but I want to
18 know why, not in generalities, but I want to know why
19 in this particular case allowing him to interview
20 former co-employees I presume they would be would be
21 detrimental to the criminal trial.

22 MR. SPENCER: Okay, I'll get to that, Your
23 Honor. First, the drafters of the Criminal Procedural
24 Rules, they are experts at criminal law and they were
25 tasked with the responsibility of crafting these rules

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1 and they decided that depositions should not be
2 allowed for adverse party witnesses because they did
3 not think that depositions should be used for pretrial
4 discovery or as a basis for later cross examination.

5 Now as to specifics, possibilities that
6 might occur during a deposition, Mr. Geisen's attorney
7 would in effect get a practice cross examination. Now
8 depositions are a confrontational process. Leading
9 questions can be used. A witness who went through a
10 deposition might be less willing to testify at a
11 criminal trial or might be less --

12 JUDGE FARRAR: Wait, wait, wait. This is
13 not an organized crime case. This is not where on
14 deposition you ask the squealer what school do your
15 kids attend and what hour do they walk home from that
16 school. That would intimidate somebody and they may
17 disappear and not testify.

18 What about this case would lead any of
19 these, I assume mostly the witnesses are either NRC
20 staff people who are in meetings or fellow employees
21 of Mr. Geisen's, what is possibly going to intimidate
22 them? Yes, going through a deposition is an
23 unpleasant experience. But what's going to intimidate
24 them from showing up at a hearing?

25 MR. SPENCER: Your Honor, even if it does

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1 not intimidate them from showing up at a hearing, it
2 could shape their testimony if there were certain
3 contentious issues, embarrassing moments, at
4 deposition that were previewed at deposition. They
5 might be less willing to testify about that at trial
6 or even change the way they testify about that.

7 JUDGE FARRAR: Let's talk about this case.
8 You all investigated this case for four years. You
9 have all the documents that are relevant. You've
10 talked to all the people. This is not a case where
11 the Government is starting, doesn't know what the
12 criminal enterprise was up to. So the criminal
13 enterprise has all the facts and you have no facts and
14 you have to balance that.

15 This is a case where you and Department of
16 Justice at least until you tell us differently have
17 everything and he presumably has nothing. So we're
18 having a lot of trouble with the unfairness aspect of
19 letting him find out what the case is about. You have
20 all the documents he signed. Right?

21 MR. SPENCER: Your Honors, we have
22 documents that were in his possession that have been
23 disclosed to us.

24 JUDGE FARRAR: Were you on the conference
25 call the other day?

1 MR. SPENCER: Yes I was.

2 JUDGE FARRAR: In the three cases and one
3 of your colleagues said there's 19,000 documents that
4 you all are searching through now.

5 MR. SPENCER: Yes.

6 JUDGE FARRAR: And I heard Ms. Penny (PH)
7 sign when that number came out because that creates a
8 problem for her and her clients. So we're really
9 having trouble with this unfairness. We understand
10 how the criminal rules work in a criminal case, but
11 when you read all the commentators, read all the
12 judicial decisions, when you have a civil and criminal
13 case going on together, there is no hard and fast rule
14 that says that criminal case takes precedence.

15 In fact, I think I read in one of the
16 decisions that when SEC is involved and they're going
17 after a fraudulent stockbroker, the SEC insists that
18 the civil case go first because it's more important to
19 them to stop the fraud being perpetrated on the public
20 and the stockholders than to put the person in jail.
21 They will get to putting them to jail later. The IRS
22 likes the criminal case to go first because they don't
23 need your taxes right now. They'll get them
24 eventually.

25 All these cases are different. So when

1 you just tell us how the criminal rules ordinarily
2 work that doesn't help us solve this case.

3 MR. SPENCER: Well, Your Honor, I would
4 like to respond to something you said. You mentioned
5 the SEC wants the civil case to go first. The IRS
6 wants the case delayed. The Commission agreed in the
7 Memorandum of Understanding to seek stays when
8 requested by the Department of Justice and felt that
9 would be in the best interest of enforcing the
10 Commission's regulations.

11 JUDGE FARRAR: Yes, the memorandum of
12 understanding says you'll carry the Department of
13 Justice's water when they want a stay. But the
14 Commission's regulations say you don't get a stay
15 without good cause. The Commission in the
16 Indiana/Pennsylvania Oncology case says, yes, all
17 these factors that emerge from all these other cases,
18 those are the factors you look at and so you have to
19 show me good cause. You can't stand here and say the
20 Department of Justice wants it and I wonder how badly
21 they want it if they're not here arguing for it.

22 MR. SPENCER: Well, Your Honor, I guess
23 the point I was trying to make was that the
24 Commission, the particular Commission, has recognized
25 that it is often in the best interest of the NRC to

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1 have the criminal proceeding go first and so my
2 response to you had more to do with the nature of the
3 public interest. In an SEC case if the public
4 interest calls for going with the civil case first,
5 then that's a factor that the court should consider.
6 At the NRC, the Commission has decided that it is
7 often best for the criminal case to go first. So that
8 is a factor that should --

9 CHAIRMAN RYAN: When did the Commission
10 decide that?

11 MR. SPENCER: In this Memorandum of
12 Understanding that was signed by the Chairman of the
13 Commission, I believe.

14 CHAIRMAN RYAN: No, that's an
15 understanding with the Department of Justice that the
16 two agencies will work this out and you will carry
17 their water and visa versa. That doesn't bind us or
18 the Commission to say what should be done in
19 individual.

20 Let me ask you this. Is there anything
21 illegal or otherwise abhorrent about both cases going
22 forward together? Sometimes in the decisions we've
23 read, the stay motion is denied. So there's nothing
24 wrong with both cases going forward, is there?
25 Nothing inherently wrong?

1 MR. SPENCER: There is nothing inherently
2 wrong, Your Honor. It does come down to a balancing
3 test and it comes down to balancing the important
4 criminal interest with the individual interest and a
5 criminal proceeding represents the interest of the
6 entire public. The integrity of criminal trials are
7 very important to the public and it's hard to
8 speculate about exactly what abuses or problems might
9 occur at a criminal proceeding if depositions and
10 interrogatories are allowed in this enforcement
11 proceeding.

12 JUDGE FARRAR: Suppose we denied your
13 motion without prejudice to you coming back and
14 saying, your motion for an open-ended stay, and said
15 okay, we'll deny your motion without prejudice to you
16 coming back if something bad happens during the
17 discovery process. Come back in and seek relief.
18 Don't some of the courts suggest that that's the right
19 approach to these?

20 MR. SPENCER: Your Honor, if something bad
21 happens and it already has happened, then we can't go
22 back and change it and, second, we might not discover
23 that it's happened. It might be something that the
24 NRC or the prosecution just doesn't know that there
25 is, might never discover that there was an abuse or if

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1 there was a problem or that had a bad effect upon the
2 proceeding.

3 JUDGE FARRAR: Tell me something that's
4 going to happen that's going to hurt the criminal
5 case? In this context of this case, what could
6 happen? Give me any example of what could happen that
7 could really hurt the criminal case. Yes, he'll get
8 more information than he might have in the criminal
9 case, but I thought criminal cases are about a search
10 for truth.

11 And I think I remember when I was at the
12 Department of Justice myself the phrase was "The
13 Government wins when justice is done" not the
14 paraphrase of it "when the Government wins, justice is
15 done." What is wrong with having a criminal trial
16 where people have more facts rather than less?

17 MR. SPENCER: Your Honor, there are many
18 people who believe that criminal trials and criminal
19 proceedings should use more wide-open discovery, but
20 the drafters of the Rules of Criminal Procedure and
21 the Supreme Court and the U.S. Congress decided
22 against that. They decided to have limitations.

23 JUDGE FARRAR: But you're giving open --
24 But the Justice Department is doing open file
25 discovery in this case which I don't find anywhere in

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1 the rules. They don't have to do that. Why are they
2 doing that?

3 MR. SPENCER: I've not had represented to
4 me why they are using open file discovery.

5 JUDGE FARRAR: And see, again that's the
6 disadvantage we're at because I don't think any of us
7 have ever handled a criminal case. I don't think
8 either of you have, but if Mr. Ballantine were here,
9 he could answer that question for us.

10 MR. SPENCER: Your Honor, I would like to
11 point out that it shouldn't be held against the
12 prosecution if it decides to disclose more
13 information. The Criminal Procedure Rules only demand
14 certain disclosures and discovery be made and I
15 believe that I'm recalling the Jencks Act that the
16 idea as drafted in Criminal Rule 26.2 is not that
17 disclosures have to be made only after direct
18 examination. The drafter said if the prosecution
19 wishes to disclose them early, that's fine. But the
20 decision is left in the hands of the prosecutors who
21 best know their case and who best know what might
22 happen in their case and best know what fears they
23 might have.

24 JUDGE HAWKENS: Mr. Spencer, I just want
25 to tell you. The Board, and I believe I'm speaking on

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1 behalf of the Board, agrees with you there's a
2 compelling public interest in criminal prosecution and
3 ensuring that goes forward unimpeded and that the
4 defendant does not have any unfair advantage that were
5 not contemplated by the Federal Rules of Criminal
6 Procedure.

7 Having said that, I've heard what you've
8 said about the possible unfair advantages that may
9 occur here if the civil proceeding goes forward. But
10 to me, it's all been in the realm of possibilities,
11 speculation and conjecture and is there anything --
12 What is your response to that? I mean you said
13 earlier that it's hard to speculate about the possible
14 impact of going forward with the civil proceeding on
15 the criminal proceeding and I agree with that. But
16 here we're dealing with a situation where the burden
17 is on you to demonstrate why the public interest
18 outweighs the private interest.

19 For me for you to succeed, at least, on
20 that particular factor in making a showing is you're
21 going to have to rely on something other than the bare
22 possibility, something that's specific to Mr. Geisen
23 why he would or what particular witnesses he might
24 unduly influence or intimidate or what in his
25 background or what in this particular case would

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1 suggest that he might take advantage of the civil
2 proceeding and use it to an unfair advantage in the
3 criminal proceeding?

4 MR. SPENCER: Your Honor, speaking
5 hypothetically, it would be difficult if not
6 impossible for the prosecution to come here and say
7 here are witnesses X, Y and Z and they are subject to
8 influence or intimidation. That would be suicidal.

9 And I think that a lot of these cases,
10 they talk about looking at the factors, case specific
11 analysis, but they generally do not, not according to
12 my research, often do not require very specific "this
13 witness has this problem" or "this particular
14 defendant is definitely going to do this or is very
15 likely to do this." That simply doesn't occur and I
16 haven't read that in the cases. They may occur in
17 some cases, but in the majority of cases, I don't see
18 that.

19 JUDGE HAWKENS: But under your rule, what
20 you're asking is a bright line rule. In every
21 situation, the civil defendant is going to have a
22 discovery advantage he would not have in the criminal
23 context. So what you're saying is that in every case
24 the reason for this stay would militate in favor of
25 the NRC of staying the civil case.

1 MR. SPENCER: No Your Honor. There are
2 different factors that are involved. One is the
3 overlap of issues and evidence and facts and
4 allegations in the criminal and civil enforcement
5 proceedings. Here it's the same. The allegations in
6 both proceedings involve dishonesty, involve
7 willfulness, involve knowing actions. So there is
8 just a close alignment here that might not be present
9 in other proceedings.

10 Now Oncology, if you look at the
11 Commission decision in Oncology, they based their
12 decision upon possible harm to an OI investigation.
13 Now possible harm to a criminal investigation was
14 mentioned, but the Commission in Oncology decided not
15 to base its reasoning upon that and it did so for a
16 very important reason.

17 To give some background, the licensing
18 board in Oncology relied upon certain civil forfeiture
19 cases with a parallel criminal proceeding ongoing and
20 on review, the Commission looked at those decisions
21 and said the following: "In forfeiture proceedings,
22 a pending criminal proceeding provides strong support
23 for delay of a civil forfeiture proceeding" and then
24 it gave certain reasons why this is so.

25 Why did the Commission say this? The

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1 Commission looked at the possible effects of criminal
2 and civil and the enforcement proceedings might have
3 on one another. In particular, the Commission noted
4 that in forfeiture cases, the civil proceeding could
5 interfere with the criminal one by "either providing
6 opportunities to the claimant to discover the details
7 of a contemplated or pending criminal prosecution or
8 serving to estoppelate all criminal proceedings."

9 The Commission also noted the effect of
10 the criminal proceeding on the enforcement proceeding
11 by stating that "if the Government prevails in the
12 criminal case and forfeiture is part of the sentence,
13 a civil forfeiture proceeding will be rendered
14 unnecessary because of the close alignment of facts,
15 issues and allegations here between civil forfeiture
16 proceeding and the criminal proceeding just as reasons
17 apply here with great force."

18 JUDGE HAWKENS: Tell me precisely which of
19 those reasons apply here and why.

20 MR. SPENCER: Well, Your Honor, looking at
21 the first reason, providing an opportunity to the
22 claimant to discover the details of the contemplated
23 or pending criminal prosecution. That's one.

24 JUDGE HAWKENS: And what -- I'm not sure
25 why that militates in favor of you here. Why did that

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1 militate in favor?

2 MR. SPENCER: Because they would be --

3 JUDGE HAWKENS: You're going to have open
4 file discovery. Soon he's going to know everything
5 that is going to be brought against him in the
6 criminal proceeding.

7 MR. SPENCER: Your Honor, he has access to
8 documents, but many of those documents, even
9 interviews, were interviews by the other party. I'm
10 sure that he would like, if he could, to depose
11 witnesses to fill in the gaps of his own knowledge.

12 JUDGE HAWKENS: Wouldn't you be there or
13 somebody from the General Counsel's Office be there
14 for each of the depositions?

15 MR. SPENCER: I believe so, Your Honor.
16 But -

17 JUDGE HAWKENS: Wouldn't your presence,
18 your preparation, your discussion with them be a
19 factor that would militate against your concern about
20 intimidation?

21 MR. SPENCER: Well, Your Honor, first, he
22 can still get the information and we are concerned
23 about him actually getting the information and filling
24 in and having a litigation advantage over the
25 prosecution.

1 JUDGE HAWKENS: Explain that to me. Why
2 are you afraid that he will have too much information
3 in the criminal process?

4 MR. SPENCER: Your Honor, the --

5 JUDGE HAWKENS: Why would that work in
6 unfairness?

7 MR. SPENCER: Your Honor, the drafters of
8 the Criminal Procedure Rules apparently -- I would
9 think that we should give them credit for drawing up
10 a fair set of rules, at least, fair in their judgment
11 and they are the criminal law experts and they were
12 tasked with drawing up these rules. Now if you give
13 one side an opportunity that the other side doesn't
14 have, that's inherently unfair.

15 JUDGE FARRAR: And that carries a lot of
16 weight in a case in which there's a criminal case
17 pending and the defendant phonies up some civil
18 litigation, and some of the cases deal with that, to
19 try to get a discovery advantage. This fellow was hit
20 by you. He didn't bring the civil action. You all
21 brought him in and again as I said at the beginning,
22 we're not talking about the merits here, you may have
23 had good and sufficient reason to bring the civil
24 enforcement action and to make it immediately
25 effective and deprive him of his job.

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1 But let's not -- So why isn't it very
2 natural that he's trying to, he wants that case to
3 move forward because he has, if I remember the cases
4 correctly, a Fifth Amendment property right in his job
5 and so he has an interest in going forward with that.
6 You have a public interest. The Department of Justice
7 has a public interest in punishing crime and this may
8 be a case where the two go forward together. You
9 agree he has a Fifth Amendment property right in his
10 job.

11 MR. SPENCER: Yes Your Honor. I agree to
12 that. I guess I would have to respond first that, for
13 example, Campbell v. Eastland, now that was a case in
14 which the court said it was a fair inference that a
15 motion was brought. The court did not specifically
16 say that the whole case was brought necessarily, but
17 even the motion for discovery was brought in order to
18 gain this advantage.

19 Now here -- Now first of all, that was
20 only one of nine factors that were relied upon by
21 Campbell v. Eastland, one of the nine. But, second,
22 in this proceeding, Mr. Geisen is seeking to go
23 forward at all speed. In the criminal proceeding, he
24 filed a joint motion for a two month delay and in his
25 answer to our motion, he said he might require more

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1 delay in the criminal proceeding. So --

2 JUDGE FARRAR: I thought he did that
3 because his co-defendant, Mr. Siemaszko had to get new
4 counsel.

5 MR. SPENCER: But, Your Honor, the joint
6 motion actually represented three different reasons.

7 JUDGE FARRAR: Okay.

8 MR. SPENCER: One was for Mr. Siemaszko to
9 get new counsel. One was for discovery to be
10 completed. And the other for the counsel to digest
11 all the discovery that was coming to them.

12 JUDGE FARRAR: Now if you all -- If the
13 one side, the Government, has had three years to
14 investigate this, does it come as a shock to you that
15 private counsel would need some time to digest those
16 same 19,000 documents before they defend their client
17 in a criminal case?

18 MR. SPENCER: Your Honor, that would not
19 be a surprise to me, but he is seeking to go forward
20 here very expeditiously and he is seeking a delay in
21 the criminal trial and as long as that possibility can
22 happen, then the effect would be to give him sort of
23 these practice cross examinations through depositions
24 and interrogatories in order to prepare for the
25 criminal trial and, second, when I drafted the motion,

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1 I was not aware that this delay would occur. Since
2 then, it appears that the criminal trial could be far
3 off. It could take longer than maybe perhaps in this
4 civil enforcement proceeding.

5 JUDGE FARRAR: Who drafted the footnote
6 that said he was arraigned on a certain date and under
7 the Speedy Trial Act, he'd be tried 70 days later?

8 MR. SPENCER: I drafted that based upon
9 the affidavit from Mr. Ballantine.

10 JUDGE FARRAR: But Mr. Ballantine knew at
11 that point, I assume, since he's handling the criminal
12 case and you're not that the judge had already taken
13 off the 70 day clock the time allotted for filing
14 motions and that the Speedy Trial Act itself takes off
15 the clock the time that motions are under submission.
16 I mean that footnote led us to think "Hey, no big deal
17 here. The trial is going to be in April."

18 MR. SPENCER: Well, Your Honor, the
19 motions can be -- I know that the clock has tolled for
20 motions. I'm not aware that an order came down or I
21 wasn't aware of an order that came down that said that
22 before March 20th that the judge has tolled the clock.
23 I thought that the joint measure was filed after our
24 motion filing and that it wasn't, the judge did not
25 accept their request for delay until later.

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1 JUDGE FARRAR: That's because you not
2 handling the criminal case didn't have reason to look
3 at the docket entries which I'm sure Mr. Ballantine
4 looked at and which we've looked at and the docket
5 entries show that what was in the criminal case showed
6 that that time was off the clock.

7 MR. SPENCER: What time, Your Honor?

8 JUDGE FARRAR: The time to March, when the
9 judge said you have until March 24th to file motions.
10 There's a notation in the docket entries that I think
11 I correctly read is indicating that time was off the
12 70 day clock. Now I wouldn't expect you to know that,
13 but I would expect Mr. Ballantine to know that.

14 MR. SPENCER: I was not aware of that,
15 Your Honor.

16 JUDGE FARRAR: Let's -- Go ahead.

17 JUDGE HAWKENS: I was just going to say.
18 We've sort of beat the reason for the stay to death.
19 If you could go to the next factor and what I would
20 like you to address is the length of stay and why that
21 factor would or would militate in NRC staff's favor.

22 MR. SPENCER: Well, Your Honor, there have
23 been cases. Oncology was delayed 11 months. There
24 have been forfeiture cases that have been delayed
25 longer.

1 JUDGE HAWKENS: Earlier a few minutes ago
2 in response to a question by Judge Farrar, you said
3 the criminal trial could still be a long way off. Do
4 you have any better estimate for when it may be and
5 what its length may be?

6 MR. SPENCER: Your Honor, I called the
7 Department of Justice's attorneys on Friday to try to
8 get their best estimate and Richard Poole who has a
9 lot of experience in these kinds of trials, he gave me
10 an estimate that it would take at least six months for
11 this case to go to trial, but he's not sure if it
12 would take longer, how much longer. He can't foresee
13 complications, but he's basing this upon cases in his
14 experience that are of like complexity. I believe Tom
15 Ballantine doesn't have experience with this kind of
16 case, with this complex case.

17 JUDGE HAWKENS: So we're talking a minimum
18 of six months before it goes to trial and that's a
19 minimum. We really don't have a close on it.

20 MR. SPENCER: There is no close on it,
21 Your Honor.

22 JUDGE HAWKENS: If it came to the five
23 year point and the criminal trial had not yet
24 completed, would that be an unreasonable delay?

25 MR. SPENCER: Five years from when? Five

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1 years from the bringing of the indictment?

2 JUDGE FARRAR: No, five years from the
3 date of your enforcement order.

4 JUDGE HAWKENS: Which are pretty close.

5 MR. SPENCER: Five years from the
6 enforcement order?

7 JUDGE FARRAR: Yes.

8 MR. SPENCER: Our order was issued this
9 year.

10 JUDGE FARRAR: Right, and suppose the
11 criminal trial didn't happen for five years and the
12 criminal trial, you know the judge is managing it.
13 There's a Speedy Trial Act, but there's a lot of
14 motions, there's a lot of this, there's a lot of that.
15 New counsel has to come in and suppose the criminal
16 trial isn't for five -- Suppose we grant you the
17 indefinite stay you're asking for and the criminal
18 trial didn't happen for five years. Would we have
19 kind of conundrum there?

20 MR. SPENCER: Well, Your Honor, five years
21 is a very long time and the longer the time --

22 JUDGE FARRAR: No, no. You're missing my
23 point. Five years is the length of the immediately
24 effective enforcement order costing him his job. So
25 if we grant you a stay for five years, some might say

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1 we've done him an injustice.

2 MR. SPENCER: Your Honor, as Judge Hawkens
3 has pointed out, it's a balancing test. Now this
4 Board --

5 JUDGE FARRAR: Wait. You're going to tell
6 me what's there to -- He's deprived of his job for
7 five years. The Commission says he gets expedited
8 consideration when you ask for a hearing. We say,
9 "Sorry, friend. Come back in five years." At that
10 point, isn't the case moot? He's been out of his job
11 for five years. He's done and you're telling me to
12 balance.

13 MR. SPENCER: Your Honor, this Board can
14 monitor the proceedings. It can require status
15 reports from the staff. It can decide on its own that
16 it will be stayed indefinitely, but if this Board
17 decides sua sponte or upon motion of Mr. Geisen to
18 have the proceeding go forward, then it would go
19 forward.

20 JUDGE FARRAR: But you don't concede here
21 today that five years is too long in a case where the
22 guy is suspended for five years. You don't concede
23 that.

24 MR. SPENCER: That is a judgment for you,
25 but I would concede that it would be a very long time

1 and it would be a factor weighing very heavily in Mr.
2 Geisen's favor.

3 JUDGE HAWKENS: That's a fair response.
4 It could definitely weigh in his favor.

5 JUDGE HAWKENS: Can you discuss the harm
6 to Mr. Geisen please in your view and how that should
7 weigh in the balance?

8 MR. SPENCER: Well, Your Honor, our --

9 JUDGE HAWKENS: He is to be conceded that
10 he's been deprived of a property interest.

11 MR. SPENCER: Yes Your Honor.

12 JUDGE HAWKENS: A very serious
13 deprivation.

14 MR. SPENCER: Yes Your Honor. The
15 significance of this deprivation to him depends upon
16 the length he is unable to find work or if he is able
17 to find work, the nature of that work and how much
18 money he's able to make with that work. So if he
19 could not find any job at all for several years, that
20 would definitely be of great harm to him. But if --

21 JUDGE FARRAR: So you're saying that when
22 it comes to weigh that factor, the job loss, that the
23 job loss counts for something, but the aftermath also
24 has to be considered. Is he's sitting home depressed
25 and on medication or is he out working making as good

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1 or better money than he was making here? In other
2 words, that would make that factor weigh less if he's
3 very gainfully employed to the extent of his
4 abilities.

5 MR. SPENCER: Yes Your Honor. It's fact
6 specific and I guess you talked about an indefinite
7 stay and perhaps he'd be out of work for five years.
8 If this Board decided to grant an indefinite stay but
9 monitored what goes on, then he might get a job in
10 another month. Well, currently he is working for
11 himself and I'm not sure how much income he's
12 receiving from that, but the Board could monitor --

13 JUDGE FARRAR: I'm sure Mr. Hibey knows.
14 We're going to ask him that.

15 MR. SPENCER: But the Board could monitor
16 developments and if many more months go on and he has
17 no job at all or he's not able to make a living and
18 provide for himself, then that I think the Board would
19 definitely consider in his favor. But if he's able to
20 get another job, that should count less in his favor.
21 And by having an indefinite stay with the Board
22 monitoring events, the Board can sort of see how
23 things fall out.

24 JUDGE FARRAR: So you're saying that --
25 Assume for the moment that he didn't do the things

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1 that you all are accusing of him and that's a huge
2 assumption, but in other words, the emotional upheaval
3 of being wrongfully accused you're saying that only
4 goes so far if the financial consequences of that are
5 not severe. In other words, he may be very upset that
6 he's been put upon by the Government in his mind, but
7 if he's gainfully employed somewhere else, we can only
8 go so far with the emotional distress kind of factor.

9 MR. SPENCER: Yes Your Honor. Now, Your
10 Honors, Mr. Hibey makes certain arguments regarding
11 the erroneous deprivation. I would like to point out
12 first the fact that an indictment has been handed
13 down, also serves along with the NRC's procedures for
14 immediately effective orders, the ability to challenge
15 those. That an indictment being handed down by grand
16 jury is also a factor to be considered in erroneous
17 deprivation.

18 Now Oncology didn't involve an indictment,
19 but the Supreme Court case which Oncology cited for
20 the erroneous deprivation did and that case the
21 Supreme Court said in FDIC v. Mallon "Moreover and
22 perhaps most significantly, there is little likelihood
23 that the deprivation is without basis. The returning
24 of the indictment establishes that an independent body
25 has determined that there is probable cause to believe

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1 that the officer has committed a crime punishable by
2 imprisonment for a term in excess of one year." And
3 then in another place, "The finding of probable cause
4 ..."

5 JUDGE HAWKENS: I think we agree with you
6 on that point. You don't have to read any further.

7 MR. SPENCER: Okay. Your Honor, Mr.
8 Geisen also makes the point in his answer to our
9 motion that the prosecution has offered to non-
10 prosecution offer somehow tends to show that the order
11 against Mr. Geisen is erroneous or that it should
12 weigh his favor in the erroneous deprivation factor
13 and that is not the case. First, the offer from the
14 prosecution according to Mr. Hibey was conditioned on
15 an admission to Mr. Geisen that he made false
16 statements to the NRC and that would be used against
17 him in this enforcement proceeding and it would
18 conclusively demonstrate the facts that are at issue
19 here. The second, the offer --

20 JUDGE FARRAR: So you're saying that maybe
21 it wasn't a noble stand but a strategic one.

22 MR. SPENCER: Yes Your Honor. Second, the
23 offer had other conditions such as cooperating with
24 the investigation and so the prosecution wasn't saying
25 you're not guilty and we want you to go free. The

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1 prosecution has certain conditions placed upon his
2 offer as represented by Mr. Hibey.

3 JUDGE FARRAR: Let me ask you. Let's back
4 up just a little. When the NRC enforcement people
5 interviewed him, did they advise him of his Fifth
6 Amendment rights or when you sign on as a nuclear
7 plant employee, is that like a policeman and you have
8 to respond?

9 MR. SPENCER: Your Honor, I am not aware
10 of that. I could ask co-counsel or Mr. Luehman. They
11 might have the information.

12 JUDGE FARRAR: Go ahead.

13 (Discussion off the record.)

14 MR. SPENCER: Your Honor, I've been
15 advised that it's not the normal process for that kind
16 of warning to be given and we do not believe it
17 occurred in this case.

18 JUDGE FARRAR: Okay. Do you know if the
19 prosecution make its open file disclosures by March 24
20 as we were told was scheduled?

21 MR. SPENCER: Your Honor, I talked to the
22 prosecution on Friday and this is what they told me.
23 They told me that they have electronic documents and
24 paper documents and they said they've contacted Mr.
25 Geisen regarding paper documents trying to set up a

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1 schedule for him to go through their paper documents.
2 As for electronic documents as I understand it, the
3 concordance, a certain database containing the files
4 that the NRC has developed, that has already been
5 turned over to Mr. Geisen and there are other files
6 that I guess remain to be turned over, but they're not
7 at issue here. They don't come into play in our
8 enforcement proceeding.

9 JUDGE FARRAR: Thank you. You were
10 concerned about the exercise of the Fifth Amendment
11 right. In a civil case or isn't it true that in a
12 civil case unlike a criminal case the finder of fact
13 can draw a negative inference from the exercise of the
14 Fifth Amendment right?

15 MR. SPENCER: Your Honor, I believe that
16 to be the case. I'm not sure what the fact finders
17 here would do if the fact finders decided not to draw
18 a negative inference.

19 JUDGE FARRAR: No. In other words, in a
20 criminal case, you're not permitted, you're never
21 permitted to draw that inference.

22 MR. SPENCER: Of course.

23 JUDGE FARRAR: We would be, depending on
24 circumstances, to draw that inference.

25 MR. SPENCER: I believe that's the case.

1 I'm not sure. I haven't done research on that. I
2 don't know if there's any Commission specific decision
3 that says that you cannot draw that inference.

4 JUDGE FARRAR: Tell me why you care if he
5 testifies. It seems to me you have documents he
6 signed and you have facts developed by other people
7 and if the two don't match up, if he signed, made
8 representations that you can show weren't true, why do
9 you need him to testify?

10 MR. SPENCER: Your Honor, why the NRC
11 staff wants him?

12 JUDGE FARRAR: Yes.

13 MR. SPENCER: Depositions and testimony at
14 hearing or both?

15 JUDGE FARRAR: Yes.

16 MR. SPENCER: Your Honor, as I said
17 earlier, the earlier interviews did not have NRC
18 counsel present. As I understand it, they were
19 conducted early before the OI report came out and we
20 did not have the advantage of pouring over the 20,000
21 documents and sort of piecing together all of the
22 facts. That's what I understand it. So we would like
23 to with the knowledge we've gained focus our questions
24 and have more specific questions directed at Mr.
25 Geisen.

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1 JUDGE FARRAR: Why wasn't it more
2 important to the NRC, and assuming the fellow did what
3 he's accused of, to get him out of the nuclear plant
4 because we don't want people who make
5 misrepresentations working in nuclear plants? Why
6 wasn't there more of a public interest in that than in
7 finding him criminally liable?

8 MR. SPENCER: Your Honor --

9 JUDGE FARRAR: Because this is like the
10 SEC case. They say we'll get to the criminal case,
11 but we can't have these people out there defrauding
12 the public. It seems to me if he did what you all say
13 he did it was really important to get him out of the
14 plant.

15 MR. SPENCER: Your Honor, the normal
16 enforcement procedure as I've been told is that once
17 a referral has been made to the Department of Justice
18 the NRC attempts to wait for the Department of Justice
19 to go forward with this criminal investigation and
20 indictment because we go forward with an enforcement
21 proceeding. But there was the -- I think this is
22 mentioned in the Memorandum of Understanding. It
23 mentions the fact that the NRC though might have to
24 because of statute of limitations problems or other
25 reasons might want to go forward earlier. Sometimes

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1 we have great interests as well as prosecution and we
2 felt we had to go forward with an immediately
3 effective order and not wait.

4 JUDGE HAWKENS: Mr. Spencer, I think
5 somebody from the NRC staff may have answered this
6 question during the telephone conference, but does the
7 NRC staff contemplate any further enforcement actions
8 or are any more investigations pending regarding
9 possible disciplinary action arising from this
10 incident?

11 MR. SPENCER: Your Honor, I would like to
12 confer on that just to make sure.

13 JUDGE FARRAR: Go ahead.

14 (Discussion off the record.)

15 MR. SPENCER: Your Honor, I've been told
16 that there's no anticipated action, but we're always
17 open to any new allegations that might come forward or
18 anything that might turn up at the criminal trial that
19 we are just unaware of at the moment.

20 JUDGE HAWKENS: In your motion at page 12,
21 you said, you represented, "Any delay at the criminal
22 trial will be at the behest of Mr. Geisen" suggesting
23 that the Government would not responsible for any
24 delays in the criminal proceeding. That's to me an
25 important representation but a pretty breathtaking

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1 one. Can you -- Are you willing to stand by that?
2 The Government will not be responsible for any delays
3 in the criminal proceeding.

4 MR. SPENCER: Your Honor, I suppose if the
5 Government files a motion on its own and there are no
6 other motions currently in consideration by the court
7 at the same time, then that might be a case in which
8 the prosecution would actually cause the delay. I
9 guess I was thinking more -- I know it was a
10 categorical statement and it was incorrect in the fact
11 that it was categorical. I was considering I guess
12 the 20,000 documents and the time it would take to
13 digest all of that information. I apologize to the
14 Court.

15 JUDGE HAWKENS: All right. Thank you.

16 JUDGE FARRAR: Mr. -- Go ahead.

17 JUDGE TRIKOUROS: I'd like to jump in here
18 finally. I've been listening to a lot of these legal
19 arguments and I have a few questions and I'd like to
20 make sure that I understand in summary fashion what
21 was said. With respect to the reasons for the stay,
22 I assume you're arguing that there's no benefit with
23 respect to document discovery. I think that's what
24 I've been hearing, but there is a benefit with respect
25 to the depositions that would be available.

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1 MR. SPENCER: Yes Your Honor.

2 JUDGE TRIKOUROS: And with respect to
3 depositions, there are two factors, the intimidation
4 factor and the new information factor.

5 MR. SPENCER: Well, Your Honor, there are
6 general factors, traditional justifications for
7 limitations on criminal discovery and those include
8 perjury, manufacture of evidence and witness
9 intimidation. Now for depositions specifically, the
10 Advisory Committee Notes to Rule 15 mention, I will
11 read this to make sure I get it correctly, that
12 "depositions are not meant to provide a method of
13 pretrial discovery," so they're not intended for use
14 by Mr. Geisen to gain information, "and they're not to
15 be used for the purpose of obtaining a basis for later
16 cross examination of an adverse witness." So that
17 would be exactly what would happen if depositions were
18 to go forward here.

19 JUDGE TRIKOUROS: And with respect to the
20 transcripts of the grand jury, you're saying those
21 were not available to you at all. All of those
22 interviews associated with the grand jury are not
23 available to you at all.

24 MR. SPENCER: That's what I've been told
25 and the grand jury secrecy rules should prevent the

1 Department of Justice from handing them over to us
2 without getting an order from the District Court in
3 Ohio.

4 JUDGE TRIKOUROS: But all the transcripts
5 from the NRC investigation over the three year period
6 are available to you.

7 MR. SPENCER: Any interview, any document,
8 that was produced to us or that we produced as part of
9 our own investigation, our own employees working for
10 us and not for the Department of Justice, that is
11 available to us. I believe that most, if not all, of
12 that occurred before the release of the OI report
13 which is in 2003.

14 JUDGE TRIKOUROS: And is it my
15 understanding that Mr. Geisen worked for a period
16 perhaps of years, I don't remember the exact dates
17 that he transferred to Kewaunee, but in the period
18 prior to his transferring to Kewaunee, he did work
19 with all of the people we're talking about on a daily
20 basis, had access to them any time he wanted, could
21 discuss anything he wanted with them over a multiple
22 month period at least. Is that true?

23 MR. SPENCER: Your Honor, I'm not sure of
24 what exact dates he worked there or not. I do not
25 have that in my memory, but he is able to talk to

1 people. He's able to -- He's not prohibited from
2 talking to possible witnesses, but criminal trials do
3 not provide for the compelled testimony in which the
4 witness is told you must talk to us and you must
5 answer our questions and the questions are often
6 leading, putting words in the witness's mouth.

7 JUDGE TRIKOUROS: I understand, but he did
8 have access to these people for quite a length of
9 time.

10 MR. SPENCER: I would assume so.

11 JUDGE TRIKOUROS: With respect to the
12 length of stay, my understanding of everything that
13 transpired is that it's indeterminate.

14 MR. SPENCER: Yes Your Honor. But the
15 Board could, as I said earlier, decide that it would
16 grant an indefinite stay and monitor events and either
17 decide upon motion by Mr. Geisen or on its own decide
18 sua sponte to have the enforcement proceeding go
19 forward.

20 JUDGE TRIKOUROS: I understand what our
21 options are. All right. With respect to the harm to
22 Mr. Geisen, in summary fashion again, you're saying
23 that it would depend entirely on whether he could get
24 another job and make sufficient money as opposed to
25 you're not giving any credit to the fact that one is

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1 losing their chosen professional. Do you see that as
2 a factor at all?

3 MR. SPENCER: Your Honor, I definitely see
4 that as a factor, but it's one factor. The monetary
5 damage to him is another factor. So there's a
6 difference between I guess when someone has no job and
7 is unable to provide for their family or when one has
8 some income stream or has some ability to provide for
9 their family. That just depends upon the particular
10 facts.

11 JUDGE TRIKOUROS: Okay. Thank you.

12 JUDGE FARRAR: Let me ask you again about
13 those Department of Justice interviews. I know that
14 when you bring someone in front of the grand jury
15 that's all secret and so forth, but I thought that
16 before you come to the grand jury and you're just
17 doing preliminary interviews that there's nothing that
18 would be preclude one arm of the government from
19 turning those over to another arm of the government
20 Am I wrong?

21 MR. SPENCER: If it's not before the grand
22 jury, then I think that's true. But let's say that a
23 grand jury investigation has occurred, then even if a
24 certain fact was gleaned beforehand if telling the
25 fact, and I don't know how this might be, but if it

1 would somehow reveal something about grand jury
2 proceedings, then you couldn't do it. You would have
3 to either not say it or phrase in some way, but that's
4 speculation. But you are correct as I understand the
5 law as I've done my own research.

6 JUDGE FARRAR: Okay. We've gone way over
7 your time. It's not your fault. Why don't you wrap
8 up if there's some other points you want to make and
9 then you can either tell us now or on rebuttal what
10 remedies short of a stay would protect most the
11 interests you've urged here, but would also let Mr.
12 Geisen get on with things. But you can save that for
13 rebuttal if you'd like.

14 MR. SPENCER: Your Honor, I would like to
15 save that for rebuttal.

16 JUDGE FARRAR: Go ahead and wrap up with
17 anything else you think we need to focus on.

18 MR. SPENCER: Your Honor, I have no
19 further specific points to make. I would just say
20 that the criminal proceeding represents the whole
21 public interest and it's a tremendously important
22 interest and this Board should be very mindful of that
23 in deciding upon our motions. Thank you, Your Honors.

24 JUDGE FARRAR: Thank you. Mr. Hibey,
25 we'll try to make your time up there as uncomfortable

1 as Mr. Spencer's was.

2 MR. HIBEY: It comes with the territory
3 I'm afraid, Your Honor. May it please the Court.
4 Again, my name is Richard Hibey and I represent David
5 Geisen. I'd like to make a few things clearer if you
6 don't mind with respect to this situation.

7 First of all, yes, there is a loss of
8 employment, but as Judge Trikouros just pointed out,
9 this is a loss of livelihood. The man is now
10 manufacturing and replacing refrigerator door and
11 drawer gaskets for food service providers, this after
12 20 years as a nuclear engineer and included service in
13 the nuclear Navy. This is something that I think is
14 a very important factor to take into account given the
15 strategic posture that the NRC has chosen to take here
16 by causing this man to be debarred, if you will, from
17 working in a nuclear regulatory industry and then in
18 the same breath claim that the matter where this would
19 all be worked, be put before a court for decision,
20 should be abated.

21 Indeed, after four years of time from the
22 moment that the cavity was found, this man continued
23 to work in the business. He continued at Davis-Besse
24 until he left and went up to Kewaunee. So for that
25 entire period of time, he was employed as he had been

1 trained as a nuclear engineer.

2 In the questioning that was interposed by
3 the Court at the beginning of this oral argument
4 addressing the question of whether this enforcement
5 proceeding --

6 JUDGE FARRAR: Before you move off the
7 other point, should it matter to us giving you the
8 benefit of what you just said he's doing something
9 that's not his chosen professional and that counts for
10 something, should it be a relevant factor that how
11 well is he doing in this other work even though that's
12 not what he chooses to do? Is he doing good, bad or
13 indifferent? Is that a factor that we should look
14 into?

15 MR. HIBEY: Well, the answer is it
16 probably is and one has to take into account whether
17 he's crying all the way to the bank I would assume.

18 JUDGE FARRAR: Right.

19 MR. HIBEY: On the other hand, if anyone
20 --

21 JUDGE HAWKENS: And in furtherance of
22 that, I'm sorry to interrupt, are you comfortable, are
23 you willing, to provide in details is there a
24 significant income disparity between what he had on
25 his last job and his current job?

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1 MR. HIBEY: This is job of self-
2 employment. So it's what he can earn after he is able
3 to develop the business of manufacturing these things
4 and installing them. I don't know what the economics
5 of the business are. He's only been at it now for the
6 few months since he was debarred.

7 JUDGE FARRAR: How long would it take you
8 to furnish us that because it seems to me if we're
9 asking the Government for details on all the factors
10 it relies on rather than kind of generic concerns we
11 should know this fact also?

12 MR. HIBEY: If we can reach him today,
13 we'll have the information to you today.

14 JUDGE FARRAR: Okay.

15 MR. HIBEY: The next point I wanted to
16 address is the interview of February 2005 of Mr.
17 Geisen by the Department of Justice and NRC
18 investigators. I took it that the panel was
19 interested in exactly the configuration of that
20 particular event which took place over a period of
21 several hours in Cleveland in the month of February of
22 '05. It is not subject to grand jury secrecy I think
23 as Judge Farrar pointed out because this was not a
24 proceeding before the grand jury.

25 This information is certainly useable by

1 investigators who were in attendance at that
2 particular hearing or interview. I can tell you that
3 because I was there the interview was conducted by an
4 assistant U.S. attorney, Christopher Sticken, who is
5 now identified as the lead prosecutor in the case in
6 Toledo, Richard Poole, Environment Crimes, a section
7 of the Criminal Division of the Department of Justice,
8 Thomas Ballantine, who does live and breathe when he
9 is not executing affidavits, Mr. Ulie, Ms. Janicki, is
10 it, and an Inspector Gavula, all of the NRC. All of
11 these people asked questions of Mr. Geisen very
12 intensively over I would take it to be approximately
13 a six hour period.

14 JUDGE FARRAR: And you said one of those
15 people was an NRC staff.

16 MR. HIBEY: Three of them, the last three
17 I named -

18 JUDGE FARRAR: Great.

19 MR. HIBEY: -- are all employees of the
20 NRC. Those are the persons who come to mind. I don't
21 think there was anybody else there from the Government
22 who participated in that interview. The interview was
23 not transcribed. There is no transcript of the
24 interview. The parties were left to taking notes. So
25 interestingly, I would anticipate that we will receive

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1 a copy of the interview notes that were taken by the
2 Government because these are statements of the
3 Defendant and would be turned over in the course of
4 the criminal discovery.

5 JUDGE FARRAR: Was Mr. Geisen advised by
6 any of the Government people present of a Fifth
7 Amendment right?

8 MR. HIBEY: My recollection is that there
9 was an admonition to the effect that his testimony or
10 his statements should be truthful. Because counsel
11 was present, the litany of admonitions one dreams
12 about in the interview of a prospective defendant
13 wasn't really executed.

14 I will tell you on the prior occasion that
15 he was interviewed by the NRC and that was reduced to
16 transcript. We were, of course, not present. We had
17 not come into the case. No one was aware that that
18 was a situation to address. At the time of that
19 interview, he was admonished that he should tell the
20 truth and not commit perjury and no other admonitions
21 were given to him at that time. So I want to make it
22 very clear that the interview in February of '05 which
23 occupied the interest of the panel in questioning was
24 conducted in the manner I've just described.

25 With respect to the Memorandum of

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1 Understanding --

2 JUDGE FARRAR: Hold on. Before you get to
3 that, how about the offer that was made to him to
4 plead to the criminal case? Is Mr. Spencer correct
5 that had he taken that offer he would have almost
6 certainly lost his industry job and had no recourse?

7 MR. HIBEY: Well, I think what Mr. Spencer
8 is suggesting is that by virtue of admitting which is
9 what they were requiring in favor of not prosecuting
10 him at all that if he were to admit that he knowingly
11 and intentionally lied to the NRC it would be a
12 relatively simple and straightforward case for the
13 staff to make before a panel.

14 JUDGE FARRAR: Right.

15 MR. HIBEY: That he should have certain
16 actions taken, adverse actions taken, against him.
17 But what you have to remember in weighing that
18 particular fact is that in refusing to accept a deal
19 which ensured no criminal jeopardy they have now
20 decided to come after him with the full force of the
21 United States Government first by taking this action
22 to debar him and then a few weeks later indicting him
23 and placing him in jeopardy of his liberty.

24 JUDGE FARRAR: So you're saying or are you
25 suggesting that while that wasn't the greatest deal in

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1 the world he was offered he should get some credit for
2 turning it down because had he taken that deal he
3 would saved exposure to a criminal prosecution and
4 whatever penalties and prison time could have weighed
5 in there and he would have saved a lot of counsel fees
6 and he could have said, "This is going to cost me my
7 job in the industry. So I'll just have to go do
8 something else." So you're saying he should get some
9 credit for turning down that deal.

10 MR. HIBEY: Yes, because it is a
11 protestation of his innocence. I've been in the
12 business long enough to know that people who are in
13 jeopardy of the criminal law are very concerned about
14 their liberty and you take that in a culture which is
15 dominated by the federal sentencing guidelines whether
16 they are mandatory or permissive you can forget that.

17 Every judge sitting today unless he's over
18 the age of about 85 knows only one way in which to
19 impose a sentence in the federal criminal system and
20 that's under the sentencing guidelines. You have
21 opinions out there where judges are saying "Oh, sure.
22 Booker and Fan Fan say they're no longer mandatory,
23 but we're going to presume that they are perfectly
24 right and acceptable philosophically and precisely to
25 their articulation." And that says to me that these

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1 people, that every person who's in jeopardy of the
2 criminal law, faces the prospect of jail today. The
3 man had the opportunity to walk away from that
4 entirely and he chose not to do it because he couldn't
5 do it. It's a protestation of innocence and that
6 should be factored in as well.

7 JUDGE HAWKENS: We can factor that into
8 the fifth factor, the risk of erroneous deprivation.
9 What would be helpful to me, Mr. Hibey, is if you
10 would be at this point you start addressing the other
11 factors as well.

12 MR. HIBEY: Sure. Yes Your Honor.

13 JUDGE TRIKOUROS: Before you do, just one
14 question.

15 MR. HIBEY: Please.

16 JUDGE TRIKOUROS: All of those notes that
17 you talked about from the interview that you were a
18 party to, would they be available to you under the
19 criminal side of discovery as opposed to the civil
20 side of discovery?

21 MR. HIBEY: Yes Your Honor.

22 JUDGE TRIKOUROS: They would?

23 MR. HIBEY: Yes. Under Rule 16, the
24 statements of a defendant must be turned over and so
25 one of the things the Government will do is look at

1 every document that contains a statement that the
2 defendant made to the Government and so identified,
3 would turn those over. It's a mandatory provision of
4 Rule 16 of the Federal Rules of Criminal Procedure.
5 I think it's 16(a).

6 JUDGE FARRAR: Mr. Hibey, how long is this
7 criminal case going to go on?

8 MR. HIBEY: The short answer is I don't
9 know. And perhaps I should address the procedural
10 aspects of the criminal case because I think that will
11 be helpful to your deliberations. Now this case was
12 arraigned in, time flies --

13 JUDGE FARRAR: February something.

14 MR. HIBEY: February, early February I
15 believe. A motion stay was set by the magistrate
16 judge for March 24th at which time she stated that she
17 understood that this stay would not hold, but that in
18 the interest of the Court having continued supervisory
19 control over the management of the case she would set
20 March 24th knowing full well that the parties would
21 apply to the Court for another date for the cutoff of
22 motions.

23 So as we approached the 24th of March, the
24 Government, Mr. Ballantine, as a matter of fact,
25 contacted us and as a result of that conversation he

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1 drafted a joint motion to advance or continue to
2 cutoff date to a date in May of this year. It does
3 not appear in the papers, but I can represent to this
4 panel that there's every expectation that that date
5 won't be met either and that because discovery will
6 not have been completed. It is generally the practice
7 in the Federal Criminal System that a substantial, if
8 not all, of the documentary discovery be completed
9 before a court will entertain the motions.

10 JUDGE FARRAR: Is this a complex case or
11 whatever the magic word is under the Speedy Trial Act
12 so that you have no clock running at all?

13 MR. HIBEY: It has not been declared such.
14 The parties have not been invited to address the
15 question. It is not unusual in these circumstances
16 ultimately for the parties to agree that it is a
17 complex case in order to take the clock off and spare
18 the court the calculations of what is excludeable time
19 and what isn't so that we could be about the business
20 of getting all this done.

21 JUDGE HAWKENS: Are you sufficiently
22 familiar with the record to tell us what your judgment
23 is whether it should or should not be a complex case?

24 MR. HIBEY: I think I would respond to it
25 this way that if the Court were to ask if we would

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1 care to have this as a complex case, we wouldn't stand
2 in the way of that. The matter, it is a case that has
3 considerable volume and there's always a degree of
4 complexity in these matters. So it would always
5 benefit from not having to work under the perceived
6 pressure of deadlines as imposed by the Speedy Trial
7 Act.

8 But the parties haven't advanced to the
9 point where we are concerned about those things to the
10 point of discussing those concerns. It might come up.
11 It might not.

12 JUDGE HAWKENS: Mr. Spencer indicated that
13 although he doesn't have a firm answer for when the
14 trial would start, it would be at the soonest six
15 months. How would you respond to that? Is that
16 accurate? Do you think it would be longer or less?

17 MR. HIBEY: I think it will be longer. I
18 mean not only do we have the issue of discovery which
19 is far from complete, there are the pretrial motions
20 practice which I'm sure will take up a considerable
21 amount of time with the court and then the court has
22 to decide these things.

23 JUDGE FARRAR: How current is that judge
24 on submitted matters? If you have complicated
25 prehearing, pretrial, motions, is he or she someone

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1 who addresses them quickly or are they liable to sit
2 there awhile?

3 MR. HIBEY: I don't know. He's a senior
4 judge. I think he has taken seniority within the past
5 eight years, but I can't tell you when and I don't
6 know what his case load is in his district?

7 JUDGE FARRAR: Are the civil and criminal
8 cases here substantially enough identical in terms of
9 the documents and statements involved and the
10 misrepresentations alleged that you could prepare for
11 both at the same time without great conflict or if we
12 went ahead with the civil enforcement, would you all
13 be saying we have to hold off the criminal case then?
14 Can we move forward on both in your judgment?

15 MR. HIBEY: Yes.

16 JUDGE FARRAR: Do both in parallel?

17 MR. HIBEY: I think we can move forward on
18 both. I would agree that there is a similarity in the
19 factual pattern. There might be a slight difference
20 in what was charged between the counts in the
21 indictment and the counts that appear in the papers
22 before this panel. But in essence, we're talking
23 about the same situation. The only significant
24 difference between the two proceedings is the one, the
25 Government must prove the case beyond a reasonable

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1 doubt. The other has the ankle-high standard of
2 preponderance of the evidence and we just have to deal
3 with that.

4 JUDGE FARRAR: Does that difference
5 preclude us from putting the collateral estoppel
6 doctrine to any beneficial use here? I mean, there's
7 no way to say, okay, we'll go with one rather than the
8 other and you'll be bound by the outcome, because
9 sometimes you're bound. In other words, if the
10 government wins the criminal case, you're going to
11 lose the civil enforcement case, but not vice versa.

12 MR. HIBEY: I suppose if we lose the
13 criminal case, then the collateral estoppel doctrine
14 would apply with considerable force once the
15 conviction had been finalized which addressed the
16 whole appellate aspect of it.

17 JUDGE FARRAR: Right.

18 MR. HIBEY: My guess is that if we were to
19 prevail before this panel on the case, certainly we
20 would urge the government to rethink its position in
21 the criminal case.

22 JUDGE FARRAR: Can you introduce that if
23 they don't rethink their position, can you introduce
24 that somehow in the criminal case?

25 MR. HIBEY: I don't believe we can but I

1 can only promise you the issue would be researched to
2 a fare-the-well if we were ever to prevail here but I
3 -- my immediate reaction is that it probably doesn't
4 work that way. Which, you know, brings up the fact
5 that, you know, there are separate interests here that
6 the government purportedly is advancing. I mean, I
7 have my own view about that. I think this is nothing
8 more than a squeeze play on us and a reaction to the
9 fact that we told them no to a deferred prosecution
10 agreement but stepping back from that for a moment,
11 these are the separate interests that purportedly the
12 government is advancing and we're prepared to defend
13 as to both.

14 We also point out that the memorandum of
15 understanding recognizes the independence and
16 separateness of the interests and we look at cases and
17 recognize that courts have, from time to time, not
18 abated one case in favor of another but said that they
19 both should go forward. It seems to me that --

20 JUDGE HAWKENS: If you were to tell me
21 your strongest several cases to support your argument
22 that the private interest outweighs the public
23 interest or the public interest here is de minimus,
24 what would those cases be?

25 MR. HIBEY: Well, I would say that cases

1 that we discussed are at the core of the thinking that
2 we are advancing here. We take issue with the
3 interpretation that was done by the NRC with respect
4 to for example, to Campbell v. Eastland (phonetic).
5 We don't think that the case of Iglesias applies here
6 at all. What you have here is a situation here the
7 die has been cast. An indictment has been returned.
8 You have an action taken by the staff. Everything now
9 is locked in. There is no fluidity. There is no
10 situation that needs to be somehow controlled.
11 Everything is done.

12 These people have had four, almost five
13 years to investigate this matter and, believe me, they
14 have.

15 JUDGE HAWKENS: Do you anticipate your
16 client, if we went forward with the civil proceeding,
17 would be invoking his privilege against self-
18 incrimination?

19 MR. HIBEY: Well, at this point, we're not
20 going to say that he isn't and that we have to take
21 into account the circumstances not only here but
22 before the criminal court and we understand the risks
23 associated with asserting the Fifth Amendment in a
24 civil -- a non-criminal proceeding.

25 JUDGE HAWKENS: The risk being that the

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1 Board could take an adverse interest, an adverse
2 inference based on his --

3 MR. HIBEY: That the Board will be asked
4 to take an adverse interest and that the Board will be
5 urged not to do so under the circumstances of this
6 case because we think there is an ample basis for the
7 court not to do so, but we understand the risk.

8 JUDGE TRIKOUROS: You did not mount a
9 challenge to the immediate effectiveness of the
10 enforcement order. I'd like to understand two things.
11 Well, first of all, why you did not and number two, if
12 you believe that the scenario of events that
13 transpired from the date the enforcement order was
14 issued would be any different had you take that
15 challenge?

16 MR. HIBEY: We didn't -- we didn't do that
17 because we understood that these people had a four-
18 year head start in putting together their case, so we
19 needed the time to understand what their evidence is.
20 The fact that he'd been booted out of the industry is
21 something we simply had to deal with and we want to be
22 sure that we get this the way we want to. Namely, we
23 want to win it. So we made a calculated decision not
24 to take the absolute fast track approach that was
25 available in favor of our getting the evidence,

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1 learning about it sufficiently and being prepared
2 mount our attack against it at the appropriate time.

3 JUDGE TRIKOUROS: Do you think the
4 scenario would be any different if you had mounted a
5 challenge? Would he have still lost his position?

6 MR. HIBEY: Oh, yes.

7 JUDGE TRIKOUROS: Is that a given for you?

8 MR. HIBEY: It's a total given for me,
9 your Honor, to be honest with you. These companies
10 that run these power plants are absolutely -- I mean,
11 they become creative in their notion of how to comply
12 and satisfy the NRC at every turn. I think that's
13 very good in certain circumstances, especially when
14 there's a legitimate issue regarding public health and
15 safety. But when you get to something like this,
16 which is absolutely no threat to the public health and
17 safety but nevertheless is being pressed with the
18 vigor that we are witnessing here, that's another
19 issue all together.

20 JUDGE HAWKENS: May I ask you a question?
21 Would it make a difference if the staff had made this
22 order not immediately effective? Do you think the
23 industry would have, in an effort to go overboard, to
24 be creative and please the NRC they would have said,
25 "Sorry, we're going to release you"?

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1 MR. HIBEY: I wouldn't surprise me, but I
2 don't know.

3 JUDGE HAWKENS: How about the effect of
4 the indictment alone, do you think if we did not have
5 this pending enforcement order, that would have an
6 impact on his employability in the industry?

7 MR. HIBEY: I think it would have an
8 impact. In candor, I'd have to say that it would --
9 that it might, but what it would give me is the
10 opportunity to go to the employer and say, "He's
11 presumed innocent and there is a trial that's going to
12 come up. And since it took them four years to indict
13 him and in that four-year time, he has performed
14 without incident in the business, it seems to me and
15 you can indulge him the presumption of innocence that
16 the court otherwise or the law otherwise imposes and
17 let him have his job until such time as he may not
18 have it.

19 But we don't have the flexibility when you
20 have this business, simply pulling his ticket and then
21 abating the action. It's wrong.

22 JUDGE FARRAR: If I remember correctly,
23 the company paid a large fine to the NRC enforcement
24 people and a larger fine to the Department of Justice.
25 In paying that, did they concede what pattern of

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1 worker, manager or officer level conduct they were
2 pleading guilty for or did they just say, "Well, we,
3 the company, screwed up, and we admit it", or did they
4 concede that some particulars happened at one or
5 another level?

6 MR. HIBEY: The company did not plead
7 guilty. The government extended to them a deferred
8 prosecution agreement in exchange for which they paid
9 several millions of dollars, but I believe the key
10 language in the deferred prosecution agreement was to
11 the effect that the company agreed that the government
12 could prove that certain personnel of the company had
13 knowingly made false statements to the NRC.

14 I believe that's a paraphrase but it's
15 reasonably close. I think that's what they said. I
16 believe also there is a provision in the deferred
17 prosecution agreement to the effect that the company
18 in its continuing cooperation mode with the government
19 will be prepared to contradict any defense taken by an
20 individual who is charged with a false statement.

21 If you'll indulge me a moment, I just want
22 to get confirmation from those whose memories are
23 better than mine.

24 JUDGE FARRAR: All right, let me ask
25 another question. We were speaking a moment ago about

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1 inferences that might be drawn if your client declined
2 to testify. Are we allowed to and if so, should we
3 draw any inferences from Mr. Ballentine's (phonetic)
4 failure to appear here? Let me expand on that
5 question before you answer.

6 The government has said in its briefs, you
7 -- they have this witness intimidation factor. If
8 this was an organized crime case and we'll use a name
9 from the past, they had the goods on John Gotti but
10 they were afraid if the civil case went forward, he
11 would intimidate the two squealer witnesses. I assume
12 Mr. Ballentine would have been over here -- not that
13 we would be involved in that kind of case, but he
14 would be over here pounding the table, saying, "You
15 cannot let this civil case go forward".

16 The fact that he didn't come from downtown
17 to do that, is there an inference there that maybe
18 this was just a form motion they filed and the staff
19 has this deal where they have to carry out the Justice
20 Department's orders and was it worth it to him to come
21 out here? Does that say something about the case or
22 are we not allowed to think those thoughts?

23 MR. HIBEY: You might be allowed to think
24 those thoughts. I'm not sure I am. On the other
25 hand, I'm not so sure I would be as charitable as you

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1 are in formulating the question about what inferences,
2 if any, this panel could take from Mr. Ballentine's
3 non-appearance here. The reality is, if he had a
4 problem, he would be here. The idea that we're
5 talking about witness intimidation in a case such as
6 this is ludicrous.

7 There is no evidence and that's all we
8 should be talking about here is whether there is any
9 evidence of witness intimidation. There -- the short
10 answer is, they don't want us to have any discovery
11 rights that exist here by virtue of an action that we
12 didn't initiate.

13 JUDGE FARRAR: Is that a big difference
14 that we can discern from all the cases, that when the
15 civil action is brought by -- not by the government,
16 but by the government -- the target of the
17 government's action, that that -- I mean, I came away
18 that that's a huge factor.

19 MR. HIBEY: It should be. Campbell v.
20 Eastland is the perfect example of that. In that
21 case, the defense lawyer slowed rode the government,
22 said, "Listen, give me an opportunity to come in here
23 and make the case why this taxpayer shouldn't have to
24 be criminally charged with all sorts of fraudulent
25 conduct", and made, I think, a personal appeal to the

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1 United States attorney himself and the US attorney in
2 that instance, said, "All right, I'll give you the
3 time", and then the minute he gave them the time, he
4 went and filed a lawsuit and sought discovery. No
5 wonder the case turned out the way it did. I mean,
6 how much bad faith and abuse of the equities can you
7 put into one case under these circumstances.

8 I mean, if you want to contrast something,
9 I'd begged the U.S. attorney to meet me, and he
10 wouldn't.

11 JUDGE FARRAR: Let me ask you this, if we
12 deny the staff's motion, do you have any suggestions
13 for conditions we might put on that, that would
14 alleviate some of the government's professed concern
15 or are you just seeking a flat-out denial of their
16 motion?

17 MR. HIBEY: I don't understand what the
18 government's professed concerns are. If there is a
19 professed concern that legitimately ought to be
20 addressed, we will not stand in the way of trying to
21 work out an accommodation in that respect but your
22 Honor, I've waiting -- now I've read through these
23 pleadings and I listened to the argument and I simply
24 cannot find a legitimate concern that credibly needs
25 to be taken into account by this panel before it

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1 decides the question of allowing this enforcement
2 proceeding to go forward.

3 If there's one that is of concern to any
4 member of the panel, I'm happy to speak to it but if
5 we're not talking about witness intimidation and we're
6 not talking about the sequestration of witnesses which
7 is basically what they're trying to do here --

8 JUDGE FARRAR: And we're not talking about
9 perjury, because the fellow has been interviewed any
10 number of times.

11 MR. HIBEY: Yes.

12 JUDGE FARRAR: And we're not talking about
13 manufactured evidence, because he's no longer at
14 Davis-Besse and he can't jiggle the e-mails or --

15 MR. HIBEY: That's correct.

16 JUDGE FARRAR: -- or foul up documents or
17 whatever.

18 MR. HIBEY: That's right. I mean, what
19 else is there.

20 JUDGE TRIKOUROS: Let me understand the
21 scheduling aspect of this. Assuming for the sake of
22 argument, that the civil hearing goes forward, would
23 there be an overlap between the civil and the
24 criminal? How would that work in terms of --

25 MR. HIBEY: The cases would run on a

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1 parallel track. If we had a proceeding -- let's
2 assume we had a proceeding scheduled, pick a date, May
3 7th, that the parties here had to come back to court
4 for something and I got a notice from the District
5 Court that said, "You're wanted in Toledo on May 7th",
6 we would notify the court in Toledo informally. We
7 would simply say we have an appearance scheduled
8 elsewhere on that date, and the court would then
9 select another date.

10 Now, I will tell you that if -- if the
11 court were to inquire what that appearance was and we
12 indicated it was before the NRC, the court might
13 express a view that it has seniority by virtue of its
14 lifetime appointment and we might be coming back here
15 and asking that the matter be moved to the 9th.

16 JUDGE TRIKOUROS: Right.

17 MR. HIBEY: But that's how it would work.

18 JUDGE TRIKOUROS: And do you perceive any
19 benefit, pro or con, with respect to that? Is that
20 problematic at all?

21 MR. HIBEY: Well, it's going to be a lot
22 of work but we have a lot to deal with here and we're
23 prepared to move on it, and what the benefits are --
24 we only count our benefits in very small ways, mainly
25 favorable rulings.

1 JUDGE HAWKENS: I don't find the staff's
2 concern to be a trivial one that if you go forward
3 with the civil proceeding, you will be entitled to
4 expansive discovery and they, in turn, may be
5 confronted with a stone wall of claiming Fifth
6 Amendment privilege. How would that impact on the
7 litigation? I understand earlier you said it's a --
8 we could draw adverse inferences but certainly you
9 would oppose any adverse inference to be drawn.

10 MR. HIBEY: Yes, yes.

11 JUDGE HAWKENS: But it certainly is not a
12 trivial concern of theirs.

13 MR. HIBEY: Well, it is -- yes, it is not
14 a trivial concern of theirs. I think it's a trivial
15 concern of yours. They don't want us to be able to
16 interview witnesses. They want witnesses to be able
17 to say to us as they most often do, "I'm sorry, I
18 don't want to talk to you". "But you've talked to the
19 government". "Yes, I've talked to the government, but
20 I don't want to talk to you". And they want that --
21 they would like to have that kind of become law of
22 this case. Never mind that we have, you know, juris
23 prudence such as the Clifton Gregory case which we
24 cited to you that says that witnesses belong to no
25 one.

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1 And while it is their freedom to say they
2 don't want to talk to us, if there are ways to compel
3 their testimony, within the law, then compel it we
4 will, and a subpoena to testify at a deposition is
5 certainly a time honored and recognized way of doing
6 it.

7 With respect to pleading the right to
8 remain silent in a civil proceeding, that is not
9 without its risks.

10 JUDGE HAWKENS: It's a huge risk to the
11 extent -- depending on how expansively he avails
12 himself of that right.

13 MR. HIBEY: That's exactly correct,
14 because it cannot be asserted globally. If a
15 prosecutor says to me, "I want your man in", I could
16 say to him, "He's asserting his right to remain
17 silent", and that should end the matter of his
18 appearance or not. In a civil case, that's not the
19 case. In a civil case, they can indulge in a practice
20 which I think is intellectually, morally, ethically,
21 but unfortunately, not legally dishonest. They can
22 ask questions one by one and ask them in any form they
23 wish and then turn around and say, "He didn't answer,
24 therefore, infer against him". It's a horrible
25 practice, but they can do it and we have to deal with

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1 it.

2 We're prepared to deal with it. We're
3 prepared to deal with it on this record, on these
4 facts, when you have someone who's been interviewed by
5 the authorities at least a half dozen times.

6 JUDGE FARRAR: Am I wrong to think of the
7 case this way, in other words, the government is
8 concerned about you getting this unfair advantage.
9 Somehow I'd be more sympathetic to that if all the
10 facts about the alleged crime were in the possession
11 of your client and the corrupt enterprises he was
12 dealing with, not that he was by in my hypothetical,
13 and now he was going to get the -- the government
14 knows nothing except they've got their one witness
15 they uncovered somewhere and now the subject is going
16 to get all this discovery and not give any himself and
17 now the government is going to be even at a worse
18 disadvantage.

19 I find myself starting to look at the case
20 less sympathetically when the government is in control
21 of all the information and your client is in control
22 of nothing other than copies of his e-mails that he
23 may have sent or reports he may have signed. And so,
24 am I wrong to say, well, yeah, you'll get an
25 advantage, but it's a tiny advantage in the context of

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1 the case? Is that the wrong way to go off on --

2 MR. HIBEY: I don't think so. It's a
3 question of leveling the playing field here. They've
4 got a four-year head start on us. They've interviewed
5 the world, we haven't. You're going to find that it's
6 the dynamics of people working in a plant, in a
7 facility, signing off on documents one after the
8 other, not all in the same room at the same time.
9 There's going to be -- there's going to be a little
10 bit from Column A and a little bit from Column B and
11 it ends up on a page and somehow somebody then signs
12 off on it and there are consequences that flow from it
13 and they're going to ask you to derive the most
14 sinister inferences from that kind of conduct.

15 Yet we have not pieced that together.
16 We're not in a position to do so, have not been in a
17 position to do that until now. They are going to drop
18 19,000 pages on us or more, I don't know and that's
19 only the stuff they're willing to give us. So, I
20 mean, I think that the idea of an unfair advantage is
21 simply -- is simply not made here. I mean, they go so
22 far as to say that in a criminal case, we have these
23 spectacular advantages that somehow we enjoy. Well,
24 I'll tell you, that's news to those of us who've been
25 practicing criminal law for almost 40 years.

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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

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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

1 make, your Honor. One, regarding the 2005 interview,
2 it has been represented to me by the Office of
3 Enforcement that it happened after the Grand Jury was
4 convened and it was convened in November of 2003.
5 That the Office of Enforcement agents, Euli Janecki
6 (phonetic) and Gavula (phonetic) are agents of the
7 Grand Jury and that the DOJ views the Grand Jury
8 secrecy rules as prohibiting them from giving any
9 information regarding facts they have developed after
10 the Grand Jury was convened.

11 JUDGE FARRAR: Prohibits them from giving?

12 MR. SPENCER: Any -- to us to you without
13 an order from the court.

14 JUDGE FARRAR: Oh, okay, so your people
15 somewhere in that building have the information but
16 they can't give it to you -- if we went ahead with
17 this enforcement case, you would not have that
18 information.

19 MR. SPENCER: Unless we had the court --

20 JUDGE FARRAR: Yes, but the starting
21 position is --

22 MR. SPENCER: We would not have that
23 information.

24 JUDGE FARRAR: Okay, so we have to
25 separate the NRC staff from those who are agents of

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1 the Grand Jury who can't even talk to you.

2 MR. SPENCER: Yes, your Honor.

3 JUDGE FARRAR: Thank you for that.

4 MR. SPENCER: Also, I have a point to make
5 concerning collateral estoppel. When I filed the
6 motion, I didn't consider if both proceedings went on
7 at the same time. Perhaps the enforcement proceeding
8 would finish first but as I understand how collateral
9 estoppel works normally, if the fact-finder found that
10 by a preponderance of evidence, the NRC did not meet
11 its burden on facts knowing and willfulness then that
12 would have an estoppel effect at the criminal trial.
13 I'm not -- I haven't researched this enough to know if
14 there's any prohibition specifically on using criminal
15 fact-finding -- I mean, civil fact-finding in criminal
16 cases.

17 I believe that in Oncology, I think I
18 cited this to the Board, that one of their reasons for
19 thinking that an enforcement proceeding was stronger
20 than forfeiture cases had to do with the civil
21 proceeding could interfere with the criminal one by
22 quote "either providing opportunities to the claimant
23 to discover the details of a contemplated or pending
24 criminal prosecution or serving to estoppelate
25 criminal proceedings". So I'm not sure if they were

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1 correct or if the law has changed, but I think it's a
2 concern that's important.

3 And I believe that that's a very important
4 concern because the Department of Justice has
5 conducted its investigation with an eye to upholding
6 the public interest in criminal law enforcement and I
7 think it would not be proper to have those matters
8 decided in an NRC enforcement proceeding.

9 Now, turning to Mr. Hibey's
10 characterization of the significance of turning down
11 the prosecution's offer; the NRC staff would simply
12 say that we have no idea what was going through Mr.
13 Geisen's mind when he made that decision. Maybe he
14 thought he was not likely to be indicted or maybe he
15 doesn't want to admit he's wrong. I mean these are --
16 we can't read his mind. We don't know what he was
17 thinking.

18 As for the delay in our taking action, I
19 don't know if that's a concern of the Board or not, to
20 any members of the Board; but the -- our delay in
21 taking the action, we were waiting to act with our --
22 until our attorneys and staff had fully reviewed the
23 record and we were sure we could go forward and there
24 was no evidence that would tend to exonerate Mr.
25 Geisen or the other individuals against whom orders

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1 were issued. Now, as --

2 JUDGE FARRAR: But the length of time is
3 kind of lurking out there. I mean, in Oncology the
4 outfit injured a patient and 10 days later they -- you
5 know, their license was lifted. I know this is a
6 complicated case. The whole -- and we know the
7 general history of the whole proceeding, but now that
8 you mention it, it seems that the more egregious and
9 plain the violation was, the quicker you all would
10 have acted because you don't want -- you correctly
11 don't want a quote "bad actor" sending in things from
12 a nuclear power plant that you can't rely on.

13 MR. SPENCER: Your Honor, as I understand
14 it, our normal procedure after a referral to the
15 Department of Justice is to wait, but you are correct
16 that public health and safety is an important concern.
17 Now, even though that is a very important concern,
18 it's also important to the NRC to get the right
19 people. So it would not do the NRC any good to let's
20 say make a quick decision and issue orders against
21 people who weren't culpable and maybe let people who
22 were culpable go free.

23 Also, I would -- as for the prejudice to
24 Mr. Geisen having to do with a delay, I would bring up
25 the fact that if both proceedings go on at the same

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1 time, there may be delays caused by that. Each
2 proceeding will require its own actions, will require
3 its own hearings and that may cause both proceedings
4 to be delayed. Now, if the criminal trial is allowed
5 to go forward first, then Mr. Geisen will have had
6 access to all of the different documents and witnesses
7 that will be presented at the criminal trial, time to
8 digest this, time to form defenses, time and
9 opportunity to cross examine witnesses.

10 He'd be well prepared to proceed
11 expeditiously in the civil enforcement proceeding and
12 we would be able to do so as well. And so that could
13 cut down on some of the time and make the civil
14 enforcement proceeding proceed expeditiously even if
15 stayed.

16 JUDGE HAWKENS: The same argument could be
17 made if we went forward with the civil case.

18 MR. SPENCER: Well, your Honor, that is a
19 possibility but I would say that the criminal
20 proceeding has been recognized by the courts to be the
21 more important proceeding. It vindicates the public
22 interest in a way with tools that are not available to
23 the NRC.

24 JUDGE FARRAR: Where do you get that from
25 because I started these cases remembering something

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1 that happened when I was a law clerk many, many years
2 ago. And I had a recollection from then that yeah,
3 the criminal case is always first but as we read the
4 cases, there's no such doctrine and you know, I
5 started with that bias that I thought there was such
6 a doctrine. I finish reading the cases and I don't
7 see in the cases there's such a doctrine.

8 Sometimes the criminal case has to go
9 first because of the factors peculiar to that case.
10 And sometimes it doesn't because of the factors
11 peculiar to that case. So I don't get you're coming
12 back to the position that I started with and found
13 wanting.

14 MR. SPENCER: Your Honor, I'm not saying
15 that the criminal case always goes first. I'm just
16 saying that the interest in the criminal proceeding is
17 more important and I can site -- I sited in our motion
18 Campbell v Eastland. Do you wish me to read back --

19 JUDGE FARRAR: No, because that case was
20 a phony action, if I can use that word, brought by the
21 criminal defendant for the sole purpose of getting
22 discovery. This guy would prefer the proceeding
23 didn't happen and in none of the cases I read was
24 there a regulation by the group involved by the
25 government agency involved in the civil case that when

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1 an immediately effective order is issued, it shall --
2 the hearing shall be given expeditious consideration.

3 Why doesn't that almost on its own be the
4 critical factor here?

5 MR. SPENCER: Your Honor, I believe that
6 the same -- in Oncology you had the same -- you had an
7 immediately effective order as well. And so that
8 would -- if the position were adopted by the Board, it
9 would be in conflict with Oncology.

10 JUDGE FARRAR: Well, in Oncology they said
11 the company didn't -- the Commission said, "Here's the
12 factors", and the company didn't come in and say what
13 the financial harm was and the Commission or somebody
14 on the staff was periodically saying, "We know what
15 kind of business your company is in, and so when
16 patients come in who need this treatment, we'll lift
17 the stay to let you give them the treatment".

18 I mean, what that says to me -- what
19 Oncology says to me is the Commission has recognized
20 and told us to follow the factors that are relevant in
21 the cases pretty much as the court decisions have and
22 that each case is different. So these general
23 principles of what happens, of what controls, don't
24 really go a long way here.

25 MR. SPENCER: Well, your Honor, I think

1 it's a balancing test and it's what occurs in the law
2 and it's no hard and fast rule because there's just so
3 many different fact that occur.

4 JUDGE FARRAR: And we should do that
5 balancing to the best of our ability.

6 MR. SPENCER: Yes, your Honor.

7 JUDGE FARRAR: Okay, let me ask you a
8 couple of things -- go ahead.

9 MR. SPENCER: Sorry.

10 JUDGE FARRAR: No, no, no, go ahead.

11 MR. SPENCER: I just would like to respond
12 to something you said about Campbell v Eastland about
13 bringing the phony case, and I think the -- if you
14 read the case -- well, as I've read the case, it
15 appeared that the court was more concerned about the
16 effect of allowing the discovery to go forward than
17 the intent behind bringing the case. Now, it was a
18 factor in their decision, yes, one of nine, but as --
19 I will quote from the case.

20 "We take the view that whether or not the
21 suit as distinguished from the emotion was bona fide
22 the effect of granting the motion, the effect, was to
23 give pre-trial discovery of documents denied the
24 taxpayer in the criminal case. The order nullified
25 the effect of Section 3500. It was an open invitation

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1 to taxpayers under criminal investigation to subvert
2 the civil rules and to a device for obtaining pre-
3 trial discovery against the government in criminal
4 proceedings."

5 And in the special concurrence by Judge
6 Bell in the same case, it was a very short concurrence
7 but he said simply -- let's see if I -- I don't
8 believe I have the quotation here but he said
9 something along the lines of the effect of allowing
10 this discovery to go forward would be tantamount to
11 allowing civil discovery in a criminal proceeding
12 something we do not have the authority to do.

13 JUDGE FARRAR: But that was in --

14 MR. SPENCER: Campbell v Eastland, the
15 special concurrence of judgment.

16 JUDGE FARRAR: Right, but it was a long
17 time ago before -- before as much discovery as is now
18 allowed is allowed and as great a jurist as Judge
19 Wisdom was, and I had the privilege to serve in the
20 same building that he did, that decision has come in
21 for some criticism, and besides the fact that the
22 rules have changed since then.

23 JUDGE HAWKENS: Wasn't there evidence also
24 that the plaintiff in that case was clearly -- there
25 was a clear inference that he was trying to manipulate

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1 the two proceedings so that that's in fact, what he
2 could do, use the expansive discovery in the civil
3 proceeding to an unfair advantage in the criminal
4 proceeding, whereas here, we don't have the plaintiff
5 wishing to go forward with the civil proceeding. He's
6 being required to go forward with it because you have
7 the enforcement action pending.

8 MR. SPENCER: Your Honor --

9 JUDGE HAWKENS: He no longer has a job and
10 all he's asking for is the prompt opportunity to go
11 forward and challenge the immediately effective order.

12 MR. SPENCER: Well, your Honor, he wants
13 to promptly go forward with the civil enforcement
14 proceeding but at the same time, he's filing a joint
15 motion seeing the two-month delay. He said he might
16 seek more delay. He said he would not oppose
17 certification of the criminal case as complex, which
18 might involve more delays.

19 JUDGE HAWKENS: I'm glad you brought that
20 up. What would the government's position be on that?
21 He said he wouldn't object if the government didn't
22 object. Presumably the District Court would view it
23 as a complex case and the Speedy Trial Act would not
24 be triggered.

25 MR. SPENCER: From my discussions with the

1 Department of Justice attorneys I only know that they
2 haven't asked for it. I don't know or I'm not aware
3 of any preference on their part.

4 JUDGE HAWKENS: Nineteen thousand
5 documents which are involved in this case alone, that
6 would suggest it's a reasonably complex case before
7 us.

8 MR. SPENCER: Your Honor, I don't have the
9 experience. It sounds complex to me, but I'm just not
10 sure how things will work in the criminal proceeding.
11 Now, as for possible remedies, you asked us to think
12 of those. And I was at the telephone conference and
13 as I recall, we did offer -- we said that we would be
14 open to any offers or any presentations made by Mr.
15 Geisen or the other individuals about lifting
16 immediate effectiveness or crafting the immediate
17 effectiveness to allow them to perhaps -- well, we
18 said that we would be open to whatever they had --
19 would bring to us and I'm not aware that they have
20 approached us on that.

21 JUDGE FARRAR: That's where I asked about
22 the immediate effectiveness and whether there wasn't
23 some room for some job that he might do that's -- but
24 that's past now. He's got this new business and
25 there's -- I'm not surprised they wouldn't have come

1 to you. He's where he is, right?

2 MR. SPENCER: Well, your Honor, if he has
3 another opportunity come up, I mean, I'm just saying
4 we would be open to that.

5 JUDGE FARRAR: Okay.

6 MR. SPENCER: We would agree to a speedy
7 schedule after the criminal trial. We're okay with
8 document disclosures.

9 JUDGE FARRAR: After the criminal trial.

10 MR. SPENCER: After the criminal trial.

11 JUDGE FARRAR: How about before? Didn't
12 even Campbell suggest that some discovery could be
13 allowed while -- in the civil case while the criminal
14 case was going on?

15 MR. SPENCER: Your Honor, we would not be
16 opposed to the document disclosures under 2.336, I
17 believe, so --

18 JUDGE FARRAR: Suppose we did all that.
19 Instead of sitting around doing nothing in the case,
20 we did some document disclosure and maybe held the
21 depositions till later on? I mean, you know, we've
22 got this -- you know, what you're asking for is an
23 open-ended lengthy -- let me ask you before I forget
24 this, do you want any opportunity to check the
25 validity of the representations Mrs. Geisen has made

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1 to us or can we accept those for purposes of the case?

2 MR. SPENCER: We'll accept those
3 representations, your Honor.

4 JUDGE FARRAR: Okay, thank you.

5 JUDGE HAWKENS: I want to understand that
6 you just said that the staff had no objection to
7 complying with a mandatory disclosure requirements in
8 the regulations?

9 MR. SPENCER: Yes. Actually, can I confer
10 with counsel for a moment?

11 JUDGE HAWKENS: Sure.

12 (Pause)

13 MR. SPENCER: Your Honor, I've been told
14 that, perhaps, I should clarify that we would be
15 willing to go forward with document disclosures under
16 2.336 if Mr. Geisen would also go forward with any --
17 with his disclosures. As for the representations
18 made about how much money he makes and the other
19 personal circumstances, we accept those but do not
20 necessarily accept what other characterizations he's
21 made in his answer to our motion or his arguments just
22 to clarify.

23 JUDGE FARRAR: But the facts Ms. Geisen
24 relayed to us, we can take the facts as true.

25 MR. SPENCER: We would not oppose that.

1 JUDGE FARRAR: Okay.

2 MR. SPENCER: And as for --

3 JUDGE FARRAR: I'm sorry, you're right.

4 You don't know those to be -- you don't know anything
5 about those facts but you're not asking for an
6 opportunity to challenge.

7 MR. SPENCER: Correct, your Honor. And as
8 -- we have one other thing to say. The Board has been
9 concerned about having an indefinite stay. And we
10 move to hold the order on abeyance for an indefinite -
11 - indefinitely, move to hold the proceeding in
12 abeyance indefinitely because we didn't want to
13 continuously come to the Board and ask for more
14 delays. But we would find it acceptable to have an
15 initial stay of say six months subject to a request
16 for a further extension.

17 JUDGE FARRAR: But the further extension
18 would be automatic. As the criminal case is going on,
19 you're going to say, "Oh, criminal case is still going
20 on". I mean, what you're really asking for, and I
21 don't blame you for asking, is that you get a stay of
22 the civil case till the criminal case is over.

23 MR. SPENCER: That is true, your Honor,
24 but --

25 JUDGE FARRAR: You and we all wish the

1 criminal case was over earlier, but it ain't going to
2 be and you'll be back. So if we give you a six month
3 stay, we're fooling ourselves and saying, "Ah, we only
4 gave him a short stay, he'll be back".

5 MR. SPENCER: Well, if you only give us a
6 six month stay, then you only gave us a six month stay
7 and you could always decide later on to reject our
8 motion.

9 JUDGE FARRAR: The facts won't be any
10 different then, I don't think.

11 JUDGE HAWKENS: Is it possible that if at
12 that point the criminal trial were in an advanced
13 stage in the proceeding, Mr. Ballentine would no
14 longer think that a stay of the administrative
15 proceeding would be necessary?

16 MR. SPENCER: That's --

17 MR. HUGHES: Is that the possibility
18 you're pointing to and saying, we could re-examine it
19 every six months?

20 MR. SPENCER: Well, your Honor, there are
21 several possibilities. One, there would be more
22 information about how many motions have been filed,
23 how much of a delay there is, how far the proceeding
24 is going forward, whether a trial date has been set.
25 That's one thing that several months from now, six

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1 months from now we could come back and perhaps give
2 the Board more information about.

3 The -- Mr. Pool said it would take at
4 least six months. I mean, possibly it could take a
5 little less but we would just have that more -- we
6 would have the extra information that we don't have
7 right now.

8 JUDGE FARRAR: Mr. Spencer, I was thinking
9 aloud while Mr. Hibey had the floor about what Mr. --
10 about inferences that might pop into a person's mind
11 about Mr. Ballentine not being here, the obvious one
12 being, if he really believed in this motion, if this
13 enforcement proceeding was really going to mess up his
14 criminal case, he'd be over here. Should we -- do you
15 want me to purge those thoughts from my mind or tell
16 me what to do with them.

17 MR. SPENCER: Yes, your Honor. We do wish
18 that. Whether the Department of Justice attorney
19 shows up or not is not a factor considered in
20 Oncology. It's not a factor considered in the cases
21 that I've read. Perhaps you're aware of others.

22 JUDGE FARRAR: Well, what I was aware of
23 is that in another case, Mr. Ballentine filed some
24 affidavits and the Board was after him, "We've got to
25 have more, we've got to have more". We had a pre-

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1 hearing conference and we didn't order him to be here
2 even though we might have had the authority, because
3 we thought he'd have good enough sense that if we
4 said, "We really would be helped here by having you
5 here", I can't imagine when I worked at the Department
6 of Justice and Judge Hawkens worked with the
7 Department of Justice, that we wouldn't have shown up.
8 It's just beyond -- it's beyond imagination. And we
9 certainly would have showed up if that was a really
10 important matter to us. I want to be fair to you and
11 tell you the thoughts that are roaming around. If you
12 tell me those are illicit thoughts that I shouldn't be
13 having during Holy Week, I'll be happy to, you know,
14 to purge them, but --

15 JUDGE HAWKENS: If I could interject, we
16 understand that he likely made that decision of you
17 all and you don't view you as being in any way
18 responsible in his absence but it does certainly
19 impact on our ability to ask questions, your ability
20 to respond to questions when he's not here but on the
21 other hand, there's also a presumption, a strong
22 presumption that administrative regularity when it
23 comes to reviewing the affidavits of government
24 officials. And his mere absence shouldn't -- you need
25 not by his absence alone infer something untoward in

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1 the light of a facially plausible and presumptively
2 regular affidavit.

3 MR. SPENCER: Yes, your Honor, and as I
4 understand it, I think it was pointed out in the
5 letter to the Board, every affidavit they filed so far
6 has gone through their ethics advisor, who goes
7 through it to make sure that they don't inadvertently
8 say something they're not supposed to say. They want
9 to make sure that their criminal proceeding is not
10 prejudiced in any way and they don't want to do
11 anything that could possibly have any detrimental
12 effect on it. And I think that is the reason behind
13 their caution.

14 JUDGE FARRAR: So even though we thought
15 we were asking about matters that didn't trench on
16 that, there are things we might have asked about --
17 well, okay, I got it. Anything else you wanted to say
18 in rebuttal, Mr. Spencer?

19 MR. SPENCER: No, your Honor, if the Board
20 has no further questions.

21 JUDGE TRIKOUROS: I just have one question
22 and there may be an obvious legal answer to this. If
23 there is, just give it to me but you issued the
24 enforcement order a couple of weeks around the time of
25 the indictment with the understanding that we'd be

1 here doing all of this. You had waited years prior to
2 issuing an enforcement order. When you issued it, you
3 made it immediately effective. Why didn't you wait
4 further to issue the enforcement order and we would
5 have avoided all of this?

6 MR. SPENCER: Well, your Honor, I think
7 there are several reasons and factors. First, we
8 issued the enforcement order before the Grand Jury
9 decided upon an indictment and we did not know -- we
10 don't have information on the Grand Jury proceedings
11 and the Grand Jurists control their own votes. So we
12 did not know for sure that there would be indictments.
13 There are some people that -- there's one person,
14 Rodney Cook, who's been indicted but we didn't go
15 against with an order. So it's not like we knew
16 exactly what they were going to do.

17 Second, there are competing reasons. We
18 have a policy of -- as for the delay. We have this
19 policy that after we send, refer a matter over to the
20 Department of Justice, we try to wait for them to
21 resolve their criminal matter before we go forward
22 with our enforcement matters in order to avoid
23 something like this. But then we have our Public
24 Health and Safety Mandate and then we would have the
25 Statute of Limitations which would be coming around

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1 the corner later this year. And so all these
2 different factors sort of have to be weighed and
3 there's no way you can really satisfy every desire but
4 you just have to make the best decision you can.

5 JUDGE TRIKOUROS: So I might take it that
6 the Statute of Limitations was a big factor in what
7 happened.

8 MR. SPENCER: Can I have a moment?

9 (Pause)

10 MR. SPENCER: Your Honor, for this
11 specific order, the Statute of Limitations would run
12 some time this fall but as for our decision to issue
13 the order in January, that was a result of our trying
14 to comply with our Public Health and Safety Mandate
15 after a thorough review of the facts. Do you have
16 any other questions, your Honor?

17 JUDGE HAWKENS: I have one quick one. In
18 Mr. Geisen's response pleading on page 12 or 13, he
19 suggested the staff should be challenged to show any
20 evidence in the record that would suggest Mr. Geisen
21 ever tried to shape or influence the testimony of
22 others or that he was less than forthcoming in the
23 interviews conducted by the NRC during the
24 investigation. Now, if there was evidence of that,
25 I could certainly see there was a very strong factual

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1 basis for your concern that he might intimidate
2 witnesses during the discovery process or maybe try to
3 shape his own testimony based on the discovery in the
4 criminal context. Can you -- is there anything in the
5 record that you can point me to?

6 MR. SPENCER: We cannot point you to any
7 specific fact about Mr. Geisen that he's -- that I'm
8 aware of that he's made statements in his interviews
9 that we can somehow put for you as evidence.

10 JUDGE HAWKENS: Or otherwise try to
11 intimidate other witnesses or --

12 MR. SPENCER: We have no -- I'm not aware
13 of anything --

14 JUDGE HAWKENS: You're not aware of
15 anything.

16 MR. SPENCER: -- concerning witness
17 intimidation.

18 JUDGE HAWKENS: Thank you.

19 JUDGE TRIKOUROS: I have one more
20 question. Where are you getting the date for the
21 Statute of Limitations? Is it a regulation or
22 statute?

23 MR. SPENCER: Your Honor, it's -- I've
24 been told it's a statute. I believe it's five years
25 and the acts that are at issue here occurred in

1 October and November of 2001. And so -- and I think
2 perhaps earlier. So I think even into September, so
3 the clock would start running on at least some of
4 those in September of this year as I understand it.
5 Thank you, your Honors.

6 JUDGE FARRAR: Mr. Spencer, oh, are we
7 going to receive from you in the next day or two a
8 request to file additional information from the
9 Department of Justice?

10 MR. SPENCER: Your Honors, we were
11 contemplating that if you had specific questions, we
12 could --

13 JUDGE FARRAR: You're familiar with the
14 rules about interveners filing contentions and not
15 getting a second chance in licensing proceedings?

16 MR. SPENCER: Yes, your Honor.

17 JUDGE FARRAR: I assume that if anything
18 comes in that you all want to supplement what was said
19 here, that you would meet the same good cause standard
20 that your colleagues impose on interveners in
21 licensing proceedings and it would be an especially
22 difficult showing of good cause because we invited the
23 Justice Department to be here. So can we safely
24 assume that barring something really drastic, that we
25 can have the case submitted now?

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1 MR. SPENCER: We don't plan to file
2 anything, your Honor.

3 JUDGE FARRAR: Okay, Mr. Spencer, I argued
4 a lot of cases when I was at the Department of Justice
5 not as many as Judge Hawkens. This was a difficult
6 case for you plus the fact that you're carrying water
7 for somebody else. I hope that you won't run into
8 many in the future that are this difficult. You did
9 an admirable job with some very difficult questions.
10 As you know, we take our business, not ourselves, but
11 our business very seriously and the intensity of our
12 questions had nothing to do with you but with our
13 desire to get to the bottom of the matter. So you did
14 a fine job for which we commend you.

15 MR. SPENCER: Thank you, your Honor.

16 JUDGE FARRAR: Mr. Hibey?

17 MR. HIBEY: May I have the privilege to
18 approach?

19 JUDGE FARRAR: Yes, certainly.

20 MR. HIBEY: I was asked what inferences
21 the panel is free to draw from Mr. Ballentine's
22 absence and --

23 JUDGE HAWKENS: I think you gave a very
24 prudent response but I look forward to hearing your
25 follow-up.

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1 MR. HIBEY: I did give one and, you know,
2 prudence would dictate that I just leave it alone.
3 However, there were some things that were said here
4 just now that I think bear a response and that's why
5 I'm taking the time of the panel to do so.

6 In coming to a conclusion about what
7 inferences you might derive, the issue of the
8 presumption of regularity with respect to Mr.
9 Ballentine's indictment was raised in a question by
10 Judge --

11 JUDGE FARRAR: His affidavit, not his
12 indictment.

13 MR. HIBEY: I'm sorry, I guess that was a
14 Freudian slip.

15 JUDGE FARRAR: Talk about illicit
16 thoughts. We'll pardon you for having that one sneak
17 in.

18 MR. HIBEY: Thank you for that correction.
19 Your Honor, may I suggest that the presumption of
20 regularity goes to the form of documents rather than
21 the content. I think the content must still stand and
22 be judged by -- on its merits without regard to the
23 formality of the document which presents those
24 statements. So I don't believe that any greater
25 legitimacy attends what Mr. Ballentine had to say in

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1 his affidavit simply because it was an affidavit.

2 It's a position taken by him as a
3 representative of the Department of Justice. We think
4 it's -- we've attacked it. We ask the panel to
5 consider our challenge to it. In attempt to maintain
6 a certain level of non-vitriol in addressing these
7 points, another issue that was addressed here was
8 about the fact that this affidavit or any other
9 letters from -- containing the position of the Justice
10 Department had been vetted by its ethics officer and
11 that there were certain constraints that Justice
12 Department lawyers have with respect to discussion of
13 cases that have been indicted and they proceeded to
14 cite in the United States Attorney's Manual and from
15 the Ohio disciplinary considerations or rules of
16 professional responsibility for the State of Ohio.

17 Those particular citations miss the mark
18 widely. Each one of those provisions has to do with
19 public statements that the United States Attorney and
20 the professional rules must comply with in giving
21 publicity concerning an action it has taken. It was
22 raised to an art form if you don't mind the
23 digression. In the years when Rudy Guiliani was the
24 U.S. Attorney and he would bring the press in, lock
25 the door so they couldn't get to the telephones until

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1 he was done. He'd have all of his agents up there.
2 They'd all have their hands in front of them and there
3 would be this great announcement of an indictment and
4 then a rather meticulous going through of the
5 allegations of the indictment, all in compliance with
6 the U.S. Attorney's manual and presumably with the
7 Code of Professional Responsibility. That's go
8 nothing to do with what we're here about.

9 We're in a courtroom and they're
10 attempting to defend long distance a position that
11 basically shuts down our rights in a proceeding that
12 we didn't bring. As a check against that, I pose the
13 following rhetorical question; what question, if any,
14 did this panel put to this -- I was going to say
15 prosecutor -- prosecutor that implicated the ethics of
16 the Department of Justice or any lawyer for the
17 government that would have made it difficult to
18 respond to this court with respect to any of its
19 questions? And the answer is, well, it's a rhetorical
20 question, I'm not here to give you the verbal answer.

21 Why did they issue the order when they did
22 was the question from Judge Trikouros. The answer
23 was, "We weren't sure when the Grand Jury would
24 indict". I believe that Mr. Spencer truly believes
25 that because he doesn't know any more. But there's a

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1 bridge somewhere to be sold to all of you if you
2 believe that for a minute, that there was a complete
3 coordination between the NRC and the Justice
4 Department who have worked joined at the hip for four
5 years to bring these proceedings about. Waiting for
6 the Department of Justice, the public health, how do
7 they account for the fact that this man had been
8 working for four years in this industry in responsible
9 jobs and nothing was done concerning him in that time
10 frame.

11 Only now, after he refuses to play ball
12 and sign off on a deferred prosecution agreement that
13 he all of a sudden is charged and an enforcement
14 proceeding is brought against him. The public health
15 has never been at risk with respect to him or in this
16 case. And so in the end, when they say that the
17 public health drives their determinations, may I
18 respectfully suggest that that is not a legitimate
19 basis to explain the actions they have taken by
20 bringing this case to begin with and most certainly by
21 seeking its abatement at this time. I have nothing
22 else to add, thank you, your Honors for the time.

23 JUDGE FARRAR: Thank you. Oh, go ahead.

24 JUDGE HAWKENS: Mr. Hibey a question for
25 you. The staff had indicated that they would be

1 willing to comply with the regulatory mandatory
2 disclosure requirements provided. You likewise
3 complied with those requirements. That seems to me a
4 very reasonable approach and something which would
5 provide you and your client with a massive amount of
6 documents which would at least allow us to go forward
7 somewhat with this proceeding. Would you be willing
8 to make a reciprocal disclosure?

9 MR. HIBEY: Well, you know, if we're
10 obligated to do so, we will. I mean, you know, our
11 problem here is not the timing of these documents,
12 which sooner or later they're going to turn over to us
13 and the fact that they say, "Well, we'll turn them
14 over if you reciprocate." We have reciprocal
15 obligations of discovery in the criminal case. If
16 there are reciprocal obligations under your rules, no
17 problem. That's not what this is about.

18 This is about the essential right that we
19 have to discovery. It doesn't move the case
20 significantly one way or the other. In order to
21 assess whether the case is going to move in a manner
22 contemplated by the rules and in the face of the
23 actions that have been taken against us right now, we
24 have to take into account the full panoply of
25 discovery rights that are available to us and the only

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1 abridgement of those rights would be justified if
2 there were a unique circumstance in the case that
3 would support that.

4 We don't think that there has been a case
5 made for any special circumstance to abridge those
6 rights. If they want reciprocal discovery, we'll be
7 engaged in reciprocal discovery, but we don't want an
8 abridgement of our discovery rights. We're behind the
9 ball enough as it is.

10 JUDGE FARRAR: Thank you, Mr. Hibey. Mr.
11 Spencer, did Mr. Hibey's comments trigger in you an
12 unavoidable urge to speak again?

13 MR. SPENCER: No, your Honor.

14 JUDGE FARRAR: Okay, thank you. With that
15 then, we will take the case under advisement. We will
16 -- it's a complex case with a lot of factors and a lot
17 of principles to consider. We will do our best to
18 have a ruling for you by the end of the month, Friday,
19 April 28th, but that's not a guarantee. The case
20 should move expeditiously but that's a quick time to
21 get an opinion out that explains why we do what we do.
22 So we will do our best. If we don't make that date,
23 there are travel things that interfere during the next
24 week, so it will be a little while. It might be a
25 couple of weeks after that but we will do our best to

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1 get you something by April 28th.

2 With that, the case is submitted. Off the
3 record.

4 (Whereupon, at 12:46 p.m. the hearing in
5 the above-entitled matter concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

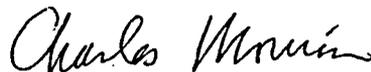
Name of Proceeding: David Geisen Enforcement

Proceeding - Oral Arguments

Docket Number: IA-05-052

Location: Rockville, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Charles Morrison
Official Reporter
Neal R. Gross & Co., Inc.