

March 20, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of ) IA-05-052  
 )  
DAVID GEISEN ) ASLBP No. 05-839-02-EA  
 )

NRC STAFF MOTION TO HOLD THE PROCEEDING IN ABEYANCE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Nuclear Regulatory Commission Staff (Staff) moves the Atomic Safety and Licensing Board for an order holding the above-captioned proceeding in abeyance until the conclusion of a criminal proceeding involving matters related to the enforcement action that is the subject of this proceeding.<sup>1</sup> The Staff is seeking this motion pursuant to the Memorandum of Understanding (MOU) between the NRC and the Department of Justice (DOJ), which reflects that the Staff will seek a stay of discovery and hearing rights during the regulatory proceeding to accommodate the needs of a criminal investigation or prosecution.<sup>2</sup>

BACKGROUND

David Geisen was previously employed as the Manager of Design Engineering at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by FirstEnergy Nuclear Operating Company (FENOC). On January 4, 2006, the Staff issued to Mr. Geisen, an Order Prohibiting

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<sup>1</sup> Pursuant to 10 C.F.R. § 2.323(b), counsel for the Staff contacted counsel for Mr. Geisen to attempt to resolve the issue. Counsel for Mr. Geisen opposes a stay of this proceeding.

<sup>2</sup> See MOU Between the NRC and DOJ, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988).

Involvement in NRC-Licensed Activities (Effective Immediately).<sup>3</sup> The Order prohibits Mr. Geisen from any involvement in NRC-licensed activities for a period of five years effective immediately. The Order alleges that Mr. Geisen violated 10 C.F.R. § 50.5(a)(2) by deliberately submitting information that he knew was incomplete and inaccurate in some respect material to the NRC. More precisely, Mr. Geisen is accused of deliberate conduct while doing the following:

- (1) concurring on written responses sent to the NRC under oath and affirmation on September 4, October 17, and October 30, 2001, (which responses contained information known by Mr. Geisen to be incomplete and inaccurate); and
- (2) preparing and presenting information during internal meetings on October 2 and 10, 2001, and during meetings or teleconferences held with the NRC on October 3, 11, and November 9, 2001, with knowledge that information presented in those meetings was incomplete and inaccurate.

Mr. Geisen responded on February 23, 2006, requesting a hearing on the Staff's Order and denying the allegations therein.<sup>4</sup>

On January 19, 2006, Mr. Geisen was indicted in the United States District Court for the Northern District of Ohio.<sup>5</sup> The indictment covers issues and facts that are inextricably intertwined with those covered by the Order at issue here. Specifically, the indictment accuses Mr. Geisen of the following:

- (1) Count 1: Mr. Geisen violated 18 U.S.C. §§ 1001-02 by knowingly and willfully concealing and covering up, and causing to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States. This allegation

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<sup>3</sup> See David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2571 (January 17, 2006) (hereafter "Order").

<sup>4</sup> See Answer and Demand for an Expedited Hearing *David Geisen, IA-05-052* (February 23, 2006).

<sup>5</sup> See Attachment A, *United States v. David Geisen, et al.*

involves a slew of submissions and representations, including the written responses sent to the NRC on September 4, October 17 and 30, and November 1, 2001, and the representations made to the NRC in meetings or teleconferences on October 3 and 11, 2001; and

- (2) Counts 2-5: Mr. Geisen violated 18 U.S.C. §§ 1001-02 by knowingly and willfully making and using, and/or causing others to make and use, false writings known to contain materially fraudulent statements on matters within the jurisdiction of the executive branch of the United States government in written responses to the NRC on October 17 and 30, and November 1, 2001.

Mr. Geisen was arraigned on January 27, 2006, and pled not guilty to the charges against him. All of the representations and submissions at issue in the criminal and NRC enforcement proceedings involve almost identical knowing and willful material misrepresentations of the condition of Davis-Besse's reactor vessel head in documents and presentations relied upon by the NRC, and of the nature and findings of previous inspections of the reactor vessel head.

#### DISCUSSION

##### A. Legal Standards Governing Stays of Proceedings

The Commission's regulations permit a presiding officer to stay a hearing of an immediately effective order when good cause exists.<sup>6</sup> The Commission has previously held in *Oncology Services Corp.*,<sup>7</sup> that the determination of whether good cause exists for a stay requires a balancing of competing interests. In balancing these interests, *Oncology* set out the following five factors: (1) the reason for the stay, (2) the length of the stay, (3) the affected individual's assertion of his right to a hearing, (4) harm to the affected person, and (5) the risk of an erroneous deprivation.<sup>8</sup> These factors are discussed below.

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<sup>6</sup> 10 C.F.R. § 2.202(c)(2)(ii).

<sup>7</sup> CLI-93-17, 38 NRC 44 (1993).

<sup>8</sup> *Id.* at 50.

B. Application of the *Oncology* Factors Favors a Stay.

1. Reasons for the Stay

Mr. Geisen's recent indictment and pending trial<sup>9</sup> necessitate a stay of this proceeding. As discussed in more detail below, because of the close similarity of facts and issues in both proceedings, discovery in this enforcement action could have a detrimental effect on the criminal prosecution of Mr. Geisen. Also, the possibility that Mr. Geisen will invoke his Fifth Amendment privilege against self-incrimination could prejudice the Staff's ability to discover information necessary to adequately pursue this enforcement action. Furthermore, the public interest demands that pursuit of the important allegations involved in both the criminal and enforcement proceedings not be thwarted.

a. Discovery in the enforcement proceeding could harm the criminal prosecution

The scope of discovery in an NRC enforcement proceeding is greater than the scope of discovery in a criminal proceeding. However, as discussed in more detail below, the criminal process already substantially favors defendants because of the Fifth Amendment right against self-incrimination, coupled with the prosecution's high burden of proof. The limited scope of discovery by defendants under the Federal Rules of Criminal procedure represents an attempt to balance against these advantages. The seminal case on staying parallel civil proceedings, *Campbell v. Eastland*, cited this concern while explaining the traditional justifications for the narrower scope of discovery in criminal litigation.<sup>10</sup> Because the criminal prosecution and the civil proceeding against Mr. Geisen involve substantially the same acts, issues, and evidence,

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<sup>9</sup> See Attachment B, Affidavit of Thomas T. Ballantine, Trial Attorney, March 20, 2006 (Ballantine Affidavit).

<sup>10</sup> 307 F.2d 478, 487 (5th Cir. 1962).

going forward with discovery in the instant case would give Mr. Geisen an unfair advantage over the government in the criminal trial. In addition to upsetting the balance of discovery maintained by the Federal Rules of Criminal Procedure, Mr. Geisen would also obtain access in the civil enforcement proceeding to discovery methods that, for policy reasons, are not allowed to defendants in criminal proceedings. Because of the above, going forward with the enforcement hearing and its related discovery at this time could negatively affect the criminal proceeding.

Discovery in a criminal trial is controlled by Rule 16 of the Federal Rules of Criminal Procedure, the Jencks Act,<sup>11</sup> and two decisions of the United States Supreme Court in *Brady v. Maryland*<sup>12</sup> and *Giglio v. United States*.<sup>13</sup> This body of law requires limited document production, prosecution disclosure of witness statements after testimony in court, and prosecution disclosure of exculpatory and impeachment evidence. Furthermore, Rule 16(b) requires reciprocal discovery, which allows the government to obtain from the defense documents and objects, reports of examinations and tests, and summaries of expert witnesses if those types of items are requested of the prosecution by the defense under Rule 16(a). The reciprocal and limited discovery allowed in criminal proceedings reflects the policy judgments behind Rule 16, which seek to “expand the scope of pretrial discovery’ while at the same time ‘to guard against possible abuses.’”<sup>14</sup>

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<sup>11</sup> 18 U.S.C. § 3500.

<sup>12</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>13</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>14</sup> *United States v. Iglesias*, 881 F.2d 1519, 1523 (9th Cir. 1989) (quoting Notes of Advisory Committee on 1966 Amendment to Fed.R.Crim.P. 16).

Although the prosecution uses an "open file" discovery process,<sup>15</sup> NRC regulations would still allow Mr. Geisen to obtain information in important ways not available in the criminal proceeding. Pursuant to 10 C.F.R. §§ 2.705-2.708, Mr. Geisen would be entitled to a full range of discovery methods including interrogatories, document requests, and depositions. Interrogatories are not allowed in criminal cases,<sup>16</sup> and depositions in criminal proceedings are not taken as a matter of right, as in civil cases. A criminal defendant can only depose a witness by a court order that a deposition be taken in order to preserve testimony for trial, and only if exceptional circumstances and the interests of justice require.<sup>17</sup>

In *Campbell v. Eastland*, the Fifth Circuit Court of Appeals stated that courts "should be sensitive to the difference in the rules of discovery in civil and criminal cases," which rules are supported by "[s]eparate policies and objectives."<sup>18</sup> As for the policy of limiting the discovery available to the defendant, the *Campbell* court said that "[a] litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit."<sup>19</sup> That closely similar issues are involved in Mr. Geisen's civil and criminal proceedings makes it all the more likely that civil discovery will result in otherwise unavailable information that would upset the careful balancing of interests reflected in the framework provided under the Federal Rules of Criminal Procedure.

Such information could also lead to the possible abuses cited by *Campbell* as motivating

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<sup>15</sup> This process allows defense perusal of all nonprivileged documents in the prosecution's files.

<sup>16</sup> See Fed. R. Crim. P. 16.

<sup>17</sup> See Fed. R. Crim. P. 15.

<sup>18</sup> *Campbell*, 307 F.2d at 487.

<sup>19</sup> *Id.*

the limitations on criminal discovery. One fear is that “broad disclosure” might lead to perjury or manufactured evidence.<sup>20</sup> Witness intimidation is another fear.<sup>21</sup> The criminal discovery rules allow prosecution witnesses not to speak with the defendant’s representatives, but these witnesses could be compelled to do so under the Commission’s regulations. The prosecution believes that this compulsion alone might be intimidating to their witnesses.<sup>22</sup>

Allowing this enforcement proceeding to go forward would also upset the balance of reciprocal discovery achieved by the criminal discovery rules. As the Fifth Circuit pointed out:

“[S]ince the self-incrimination privilege would effectively block any attempts to discover from the defendant, he would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant’s existing advantages.”<sup>23</sup>

These existing advantages, which include the right against self-incrimination and the prosecution’s burden of proving guilt beyond a reasonable doubt, tilts the balance of criminal prosecution in favor of defendants. The reciprocal nature of criminal discovery represents a policy decision not to let this balance tilt too far.

The prospect that a defendant will invoke his Fifth Amendment privilege in the civil proceeding increases to the extent that the civil issues mirror the criminal ones. For this reason, “[t]he most important factor at the threshold is the degree to which the civil issues

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<sup>20</sup> *Campbell v. Eastland*, 307 F.2d at 487 n.12 (quoting *Developments in the Law -- Discovery*, 74 Harv.L.Rev. 940, 1052 (1961)).

<sup>21</sup> *See id.*

<sup>22</sup> *See Ballantine Affidavit.*

<sup>23</sup> *Id.* at 487 n.12 (quoting *Developments in the Law -- Discovery*, 74 Harv.L.Rev. 940, 1052 (1961)).

overlap with the criminal issues.”<sup>24</sup> Courts are more likely to stay the civil proceedings when this overlap is close.<sup>25</sup> Moreover, the probability that self-incrimination, or invocation of the privilege against self-incrimination, will occur is at its greatest when the defendant has been indicted. Many courts, even when unwilling to grant a stay during the grand jury investigation, have found a stay necessary following indictment: “A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct.”<sup>26</sup>

A situation analogous to the circumstances here arises when civil enforcement actions are brought by the Securities and Exchange Commission and DOJ initiates parallel criminal proceedings. Those cases are often stayed to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal proceedings once an indictment has issued. As the D.C. Circuit Court of Appeals said in *Securities and Exchange Comm'n v. Dresser Industries, Inc.*, “the strongest case for deferring civil proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.”<sup>27</sup> *Dresser* acknowledged that sometimes the interests of justice require a stay because the noncriminal proceeding, if not deferred, might expand rights

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<sup>24</sup> Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (Pollack, J.) (hereafter, “Parallel Proceedings”).

<sup>25</sup> See *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995) (hereafter *Plumbers & Pipefitters*). See also *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y.1966) (“where both civil and criminal proceedings arise out of the same or related transactions the government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter”).

<sup>26</sup> *Plumbers & Pipefitters*, 886 F. Supp. at 1139. See also *In re Par Pharmaceutical, Inc.*, 133 F.R.D. 12, 13 (S.D.N.Y. 1990) (“The weight of the authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment”).

<sup>27</sup> 628 F.2d 1368, 1375-76 (1980).

of criminal discovery.<sup>28</sup>

In promulgating its rules on challenges to orders, the Commission included a provision allowing the presiding officer to stay a hearing for good cause,<sup>29</sup> explicitly noting that interference with a pending criminal prosecution is a "prime example" of good cause for staying an administrative hearing.<sup>30</sup> It is because of interference with the criminal proceeding that the Staff is requesting this stay, at the request of DOJ and consistent with the Memorandum of Understanding between the NRC and the Department of Justice.<sup>31</sup> This Memorandum reflects the Commission's judgment that when both the NRC and DOJ take action for violations arising out of the same facts, "the public health and safety would be enhanced" by coordination between the two agencies.<sup>32</sup> Commission policy, therefore, supports stays until resolution of parallel criminal processes.

- b. The possible invocation of Geisen's Fifth Amendment privilege may prejudice the Staff's ability to discover necessary information

The Staff's interest in this enforcement proceeding is likely to be prejudiced because of the substantial probability that Mr. Geisen will assert his Fifth Amendment privilege to avoid complying with his civil discovery obligations. The Staff's interest is a proper consideration in balancing the factors applicable to a stay analysis. Courts look at the interests of other parties to the civil proceeding, even private parties that do not represent the public interest, when

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<sup>28</sup> *Id.* See also *Maloney v. Gordon*, 328 F. Supp. 2d 508 (D.Del. 2004); *Securities and Exchange Comm'n v. Mutuals.com*, (unreported decision N.D.Tx. 2004) 2004 U.S. Dist. Lexis 13718.

<sup>29</sup> See Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20194, 20197 (May 12, 1992).

<sup>30</sup> *Id.*

<sup>31</sup> See MOU Between the NRC and DOJ, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988).

<sup>32</sup> See *id.* at 50318.

deciding whether to stay civil proceedings pending the outcome of a parallel criminal investigation.<sup>33</sup> As noted above, invocation of the privilege is considerably more likely here because Mr. Geisen has been indicted and because of the close overlap of issues between the criminal and enforcement proceedings.<sup>34</sup> Therefore, while Geisen would be allowed to take depositions and interrogatories, he could refuse to answer Staff's questions by invoking his privilege against self-incrimination. To the extent Mr. Geisen does not comply with his discovery obligations, the Staff will be operating at a disadvantage, and the policy objectives behind the broad discovery available in enforcement proceedings will not be satisfied.

c. The significant public interest could be harmed by concurrent criminal and enforcement proceedings

The very significant public interest in both the criminal and enforcement proceedings will likely be harmed if this proceeding is not stayed. The public interest is a factor looked at by courts in deciding whether stays are appropriate.<sup>35</sup> This comports with the policy of the Commission as well: In matters of scheduling, "the paramount consideration is where the broader public interest lies."<sup>36</sup>

The public interest in criminal prosecutions is great. As the Fifth Circuit said in *Campbell*: "Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil

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<sup>33</sup> See *Bridgeport Harbour Place I, LLC v. Ganim*, 269 F. Supp. 2d 6, 8 (D.Conn. 2002).

<sup>34</sup> See Discussion *supra* Part B.1.a.

<sup>35</sup> See *Bridgeport Harbour*, 269 F. Supp. 2d at 8.

<sup>36</sup> See *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 552 (1975).

claims or liabilities.”<sup>37</sup> Furthermore, a stay is “is even more appropriate when both [criminal and civil] actions are brought by the government,”<sup>38</sup> especially when the criminal proceeding is likely to vindicate the same public interest as the private suit.<sup>39</sup>

Although the public always has an important interest in all criminal and civil enforcement, the interest is heightened here. Mr. Geisen is charged with committing several felonies and is charged with serious violations of Commission regulations. The criminal statute’s goal to assure that accurate information is provided to the government reflects that both the integrity of government processes and the public health and safety are significant public interests implicated under the facts of this case. NRC actions against individuals are taken judiciously and only for deliberate misconduct,<sup>40</sup> but criminal prosecution of individuals for submitting false information to the NRC is an even rarer event. The decision by DOJ to pursue criminal actions supports a conclusion that the public interest favors allowing the criminal proceeding to go forward without any perturbations from the civil proceeding upsetting the framework for criminal actions.

Because of the great public interest in this matter, an accurate determination of fact and responsibility is essential. Discovery in both the criminal and enforcement contexts is designed to achieve such accuracy. The public’s interest in an accurate determination is undermined to the extent that normal discovery processes are altered, the prosecution is prejudiced in the criminal proceeding, or the Staff is prejudiced in the enforcement proceeding. Allowing discovery in the civil action to go forward only after completion of the criminal proceeding will

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<sup>37</sup> *Campbell*, 302 F.2d at 487.

<sup>38</sup> *Brock v. Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y.,1985).

<sup>39</sup> *See Par Pharmaceutical*, 133 F.R.D. at 14.

<sup>40</sup> *See Policy Statement, Revision of the NRC Enforcement Policy*, 65 Fed. Reg. 25368, 25385 (May 1, 2000).

help assure the proper balance between the public and individual interests.

2. Length of the Stay

The Staff requests the Board to hold this proceeding in abeyance rather than proposing a stay of any set duration because it is unable to provide the Board with a firm date by which the criminal proceedings involving Mr. Geisen will be finished. This stay should last until the earliest of (1) the completion of Mr. Geisen's criminal trial, (2) a guilty plea or other agreement between Mr. Geisen and DOJ, or (3) advice from DOJ that a stay is no longer necessary in the public interest. Although no trial date has been set, the court has set a motions date of March 24, 2006,<sup>41</sup> and the Staff will inform the Board whenever it becomes aware of the date for trial. This date is obviously subject to influences beyond the Staff's control, but Mr. Geisen's Sixth Amendment right to a speedy trial and the protections of the Speedy Trial Act help to minimize the length of time this proceeding need be held in abeyance.<sup>42</sup> Any delay of the criminal trial will be at the behest of Mr. Geisen.

A delay until conclusion of the criminal proceeding is reasonable in light of the overriding public interest in protecting the scope of criminal discovery. In *Oncology*, the Commission upheld a stay of 11 months<sup>43</sup> in a proceeding involving an immediately effective order

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<sup>41</sup> See Ballantine Affidavit.

<sup>42</sup> 18 U.S.C. § 3161(c)(1) ("In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs"). Because filing of the indictment preceded arraignment, the seventy day period runs from the arraignment date of February 1, 2006.

<sup>43</sup> See *Oncology Services Corp.*, LPB-93-20, 38 NRC 130 (1993) (The Staff was granted a total stay of 11 months in *Oncology*: the Order was issued on January 20, 1993 and the final stay was granted through December 6, 1993).

suspending a license.<sup>44</sup> Other courts have upheld longer stays, even up to four years.<sup>45</sup> Delaying this proceeding until conclusion of the criminal trial is well within the realm of acceptable delay.

3. Mr. Geisen's Assertion of His Right to a Hearing

The third factor in the *Oncology* balancing test is Mr. Geisen's assertion of the right to a hearing. The Staff does not dispute that Mr. Geisen has requested a prompt hearing, but this factor does not weigh greatly in his favor. In looking closely at *Barker v. Wingo*,<sup>46</sup> the U.S. Supreme Court decision from which the *Oncology* Commission derived this factor,<sup>47</sup> it becomes apparent that this factor is concerned with "the [party]'s responsibility to assert his right"<sup>48</sup> and the extent to which the failure to assert that right should count against the party in light of the other *Barker* factors.<sup>49</sup> In the instant case, Mr. Geisen has asserted his right to a prompt hearing. This assertion is simply "strong evidentiary weight" for Mr. Geisen's desire for such a hearing and his compliance with procedural requirements.

4. Prejudice to Mr. Geisen

Under *Oncology*, prejudice analysis looks at both the prejudice to the party's ability to

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<sup>44</sup> See *Oncology*, 38 N.R.C. 44.

<sup>45</sup> See *United States v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908, 917 (2d Cir. 1990) (forfeiture action commenced after stay of almost four years).

<sup>46</sup> *Barker v. Wingo*, 407 U.S. 514 (1972).

<sup>47</sup> See *Oncology*, 38 N.R.C. at 58.

<sup>48</sup> *Barker*, 407 U.S. at 531.

<sup>49</sup> See *id.* at 532 ("emphasiz[ing] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial"); *and id.* at 531 ("Whether and how a defendant asserts his right is closely related to the other factors we have mentioned"); *and id.* at 529 (making the assertion of the right to a speedy trial a factor instead of a rigid requirement because of uncertainty as to the circumstances in which the right is waived).

mount an adequate defense to the order and prejudice to the party's private interest.<sup>50</sup>

- a. There is little prejudice to Mr. Geisen's ability to mount an adequate defense

Because of the prosecution's use of open file discovery, Mr. Geisen will have access to almost all of the documents that could be discovered in the enforcement proceeding. Furthermore, the prosecutor plans to complete disclosures by March 24, well before the Staff would be required to disclose any documents under 10 C.F.R. § 2.336. As for access to witnesses and the possibility that their memories may fade, the few months delay for the criminal trial will likely make little difference. As the Commission stated in *Oncology*, "the extent of prejudice from any potentially faded memories is far from clear."<sup>51</sup>

- b. The prejudice to Geisen's private interest will be of limited duration

The nature of the private interest is simple enough as it relates to Mr. Geisen's ability to gain employment in the nuclear industry. At the moment, this ability suffers from a legal bar that can only be lifted by resolution of the enforcement proceeding in his favor; therefore, he can be prejudiced to the extent that he continues to be barred from employment involving NRC-licensed activities while resolution of this proceeding is delayed. This proceeding can move to resolution of the civil ban on Mr. Geisen's employment immediately following either completion of the criminal proceeding or an indication from DOJ that a further stay is not needed to preserve the integrity of the criminal proceeding. As pointed out above, the Speedy Trial Act ensures that any prejudicial delay is kept to a minimum.<sup>52</sup> It is in part for this reason

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<sup>50</sup> *Oncology*, 38 N.R.C. at 51.

<sup>51</sup> *Oncology*, 38 N.R.C. at 51 (citing *Barker*, 407 U.S. at 534, which said after a five year period between the crime and the trial that "[t]he trial transcript indicates only two very minor lapses of memory--one on the part of a prosecution witness--which were in no way significant to the outcome").

<sup>52</sup> See Discussion *supra* Part B.2.

that “[t]he strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned.”<sup>53</sup>

5. Risk of Erroneous Deprivation

The final *Oncology* factor to consider is the risk of erroneous deprivation, or, phrased another way, “the likelihood that the interim decision was mistaken.”<sup>54</sup> This factor weighs in the Staff’s favor. Although the Order’s immediate effectiveness means that Mr. Geisen faces a current bar to employment in the nuclear industry, the risk that this limitation is based in error is not great. As the Commission stated in *Oncology*, “of particular relevance” to assessing the risk of erroneous deprivation is the opportunity the adversely affected party has under 10 C.F.R. § 2.202(c)(2)(i) to challenge the order’s immediate effectiveness.<sup>55</sup> This opportunity allows challenges to those immediately effective orders that are most likely erroneous, that is, those orders that are based, not on “adequate evidence,” but upon “mere suspicion, unfounded allegations, or error.”<sup>56</sup>

Our adversarial system depends upon the parties to pursue potential remedies to the fullest extent consistent with their interests. That Mr. Geisen decided to forego an avenue allowing a quick challenge to the Order’s evidentiary basis is a tacit recognition that the chances for success through that avenue would not have been substantial.

Commission precedent agrees with this view. *Oncology* noted that the licensee failed in that case either to challenge the immediate effectiveness of the order or to allege in its

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<sup>53</sup> Parallel Proceedings, 129 F.R.D. at 203 (citing lack of prejudicial delay to civil litigants because of the Speedy Trial Act.).

<sup>54</sup> *Oncology*, 38 N.R.C. at 51 (quoting *FDIC v. Mallen*, 486 U.S. 230, 242 (1988), from which the erroneous deprivation factor was derived). This prong of the analysis focuses solely on the likelihood of error, not the negative consequences that might flow from such an error, which is considered under the prejudice prong.

<sup>55</sup> *Oncology*, 38 N.R.C. at 57.

<sup>56</sup> See 10 C.F.R. § 2.202(c)(2)(i).

pleadings that the order lacked an adequate basis.<sup>57</sup> *Oncology* further pointed out that because the order provided detail regarding the Staff's reasons and bases for both ordering the suspension and making it immediately effective, the licensee had the opportunity to challenge any or all of the Staff's findings.<sup>58</sup> In the instant case, Mr. Geisen, was presented with a highly detailed order giving numerous reasons and bases for both the penalty and its immediate effectiveness. Mr. Geisen, like the licensee in *Oncology*, failed to pursue his right under 10 C.F.R. § 2.202(c)(2)(i) to challenge the adequacy of the order's evidentiary basis. For the above reasons, the risk of erroneous deprivation is not high, and the erroneous deprivation factor weighs in favor of the Staff's request to hold the proceeding in abeyance.

#### CONCLUSION

The factors discussed above clearly establish that good cause exists to hold the proceeding in abeyance. Under the circumstances of this case, the balancing of the factors the Commission endorsed in *Oncology* clearly comes down on the side of staying this proceeding. Therefore, the Staff's motion should be granted.

Respectfully submitted,



Michael A. Spencer  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 20<sup>th</sup> day of March, 2006

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<sup>57</sup> *Oncology*, 38 N.R.C. at 57.

<sup>58</sup> *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION TO HOLD THE PROCEEDING IN ABEYANCE" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 20<sup>th</sup> day of March, 2006.

Michael C. Farrar \* \*\*  
Administrative Judge, Chair  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555-0001  
E-Mail: [m.cf@nrc.gov](mailto:m.cf@nrc.gov)

E. Roy Hawkens \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555-0001  
E-Mail: [erh@nrc.gov](mailto:erh@nrc.gov)

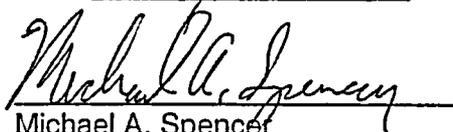
Nicholas G. Trikouros \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555-0001  
E-Mail: [ngt@nrc.gov](mailto:ngt@nrc.gov)

Adjudicatory File \*  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555

Richard A. Hibey \* \*\*  
Miller & Chevalier Chtd.  
655 15th St. NW, Suite 900  
Washington, D.C. 20005-5701  
E-Mail: [rhibey@milchev.com](mailto:rhibey@milchev.com)

Office of Commission Appellate Adjudication \*  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555

Office of the Secretary \* \*\*  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555  
E-mail: [hearingocket@nrc.gov](mailto:hearingocket@nrc.gov)

  
Michael A. Spencer  
Counsel for NRC Staff

# **ATTACHMENT A**

2006 JAN 19 PM 4:21  
CLEVELAND

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
DAVID GEISEN,  
RODNEY COOK, and  
ANDREW SIEMASZKO,  
  
Defendants.

) INDICTMENT  
) **3:06CR712**  
) CASE NO.  
)  
) JUDGE **JUDGE KATZ**  
)  
) Title 18, Sections 1001 and 2, United  
) States Code  
)  
)  
)

The Grand Jury charges:

Introduction

At all times relevant to this Indictment:

1. The Davis-Besse Nuclear Power Station ("Davis-Besse") was a nuclear power plant, located in Oak Harbor, Ohio, in the Northern District of Ohio, operated by the FirstEnergy Nuclear Operating Company, Inc. ("FENOC"), an Ohio Corporation. FENOC held a license to operate Davis-Besse, issued by the Nuclear Regulatory Commission ("NRC").
2. The defendant, DAVID GEISEN, was employed by FENOC as an engineering manager.

3. The defendant, ANDREW SIEMASZKO, was employed by FENOC as a Systems Engineer with responsibility for the reactor coolant system at Davis-Besse.

4. The defendant, RODNEY COOK, was a contractor-consultant employed by FENOC over several years, in part to assist with regulatory compliance matters at Davis-Besse.

5. When operating, Davis-Besse generated energy by using a nuclear chain reaction to heat a solution of water and boric acid, called "reactor coolant," to approximately 600 degrees Fahrenheit. The reactor coolant was contained in a "reactor pressure vessel" and maintained at approximately 2,000 pounds per square inch of pressure. Heat from the reactor coolant was used to make steam to drive turbines that turned electric generators.

6. Davis-Besse's normal operating cycle included outages at approximately two-year intervals, during which the lid to the reactor vessel, called the "reactor vessel head," was removed to allow the removal of spent nuclear fuel rods and the insertion of new fuel rods. The reactor vessel head was removed from the vessel during the 10th refueling outage ("RFO") in 1996, the 11th RFO in 1998, the 12th RFO in 2000, and the 13th RFO in 2002.

7. Operators used control rods to regulate the plant's energy output. When lowered into the reactor core, the control rods absorbed neutrons that would have otherwise sustained the nuclear chain reaction. Control rod drive mechanisms ("CRDM" or "CRDMs") were used to raise and lower the control rods within the reactor core through nozzles that penetrated and were welded to the reactor vessel head. There were sixty-nine nozzles in total, but only sixty-one nozzles had CRDMs attached to them.

8. On August 3, 2001, the NRC issued Bulletin 2001-01, which addressed a problem with CRDM nozzles that could lead to unsafe conditions at pressurized water reactors, like Davis-Besse. The Bulletin explained that the kind of weld used to attach CRDM nozzles to the

reactor vessel head could cause nozzles to crack. It also explained that this problem had been seen in France in the early 1990's and had been found in the United States in December 2000. In 2001, other plants in the United States also discovered cracked CRDM nozzles.

9. Although the NRC and the nuclear industry had considered the impact of nozzle cracks in the early 1990's, the Bulletin noted that recent discoveries had changed the NRC's understanding of the problem for two reasons. First, dangerous circumferential cracks had shown up earlier than expected. Second, the cracks caused only small deposits of boric acid residue on the reactor vessel head, contrary to previous NRC guidance that had suggested that leaking nozzles would produce substantial amounts of boric acid residue. The deposits were left behind when water evaporated from reactor coolant that had leaked onto the head. Small boric acid deposits came to be known as "popcorn" deposits, because of their size and shape. In light of this new information, the NRC Bulletin questioned whether the visual examinations then in use were adequate to detect nozzle cracking.

10. The Bulletin explained NRC expectations regarding future nozzle inspections and required plants to answer questions to help the NRC determine the extent of the nozzle crack problem at reactors in the United States. All facilities holding licenses to operate pressurized water reactors were required to report their nozzle inspection history and plans for future inspections. Facilities deemed to have the highest risk of nozzle cracking—including Davis-Besse—were required to provide detailed information about recent inspections of their reactor vessel heads and a description of anything that impeded those inspections. The highest-risk facilities were also required to report whether they intended to inspect their reactor vessel heads prior to December 31, 2001, and, if not, to provide information demonstrating that continued operation beyond that date would not violate regulatory requirements.

11. The defendants, DAVID GEISEN, ANDREW SIEMASZKO, and RODNEY COOK, together with others known to the grand jury, prepared responses to the Bulletin which were submitted to the NRC on the dates listed below. These responses were part of a scheme to persuade the NRC to agree that Davis-Besse could operate safely after December 31, 2001. The scheme involved making false and misleading statements and concealing material information about both the quality of past reactor vessel head inspections and the condition of the reactor vessel head. Before they were submitted, the responses were forwarded for review and approval to the defendants listed below, among others, and each signed an "NRC Letters Review and Approval Report" (also called a "greensheet") that indicated that he had received and approved the submission:

Date	Title	Signed By
September 4, 2001	Serial Letter 2731, Response to NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Head Penetration Nozzles" ("Serial Letter 2731")	DAVID GEISEN RODNEY COOK
October 17, 2001	Serial Letter 2735, Supplemental Information in Response to NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Head Penetration Nozzles" ("Serial Letter 2735")	DAVID GEISEN ANDREW SIEMASZKO RODNEY COOK
October 30, 2001	Serial Letter 2741, Responses to Requests for Additional Information Concerning NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" ("Serial Letter 2741")	DAVID GEISEN RODNEY COOK
October 30, 2001	Serial Letter 2744, Submittal of Results of Reactor Pressure Vessel Head Control Rod Drive Mechanism Nozzle Penetration Visual Examinations for the Davis-Besse Nuclear Power Station ("Serial Letter 2744")	DAVID GEISEN RODNEY COOK

Date	Title	Signed By
November 1, 2001	Serial Letter 2745, Transmittal of Davis-Besse Nuclear Power Station Risk Assessment of Control Rod Drive Mechanism Nozzle Cracks ("Serial Letter 2745")	DAVID GEISEN RODNEY COOK

12. Based on the information contained in the Serial Letters, the NRC agreed to FENOC's proposal that it be allowed to operate Davis-Besse beyond December 31, 2001. On December 4, 2001, the NRC sent FENOC a letter agreeing to Davis-Besse's continued operation until February 16, 2002.

13. On February 16, 2002, Davis-Besse shut down for refueling and inspection. On March 8, 2002, the reactor vessel head was discovered to have significant degradation, in the form of a corrosion hole. Subsequent investigation revealed that a crack in nozzle three, at the top of the reactor pressure vessel head, had allowed boric acid to leak onto the head, where it attacked the carbon steel head, causing a six-inch deep corrosion cavity.

14. NRC regulations required its licensees to ensure that information provided to the NRC be complete and accurate in all material respects. Title 10, Code of Federal Regulations, §50.9.

15. These introductory allegations are hereby re-alleged and incorporated by reference in Counts 1 through 5 of this Indictment.

COUNT 1

The Grand Jury charges:

1. From on or about September 4, 2001, through on or about February 16, 2002, in Oak Harbor, Ohio, in the Northern District of Ohio and elsewhere, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully conceal and cover up, and cause to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head.

Manner and Means of Scheme

The defendants employed the following tricks, schemes and devices:

2. On or about September 4, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter 2731 to be forwarded to the NRC. The defendant, ANDREW SIEMASZKO, drafted portions of the Serial Letter, which were reviewed and approved by the defendants, DAVID GEISEN and RODNEY COOK. In Serial Letter 2731, the defendants described reactor vessel nozzle and head inspections, and limitations to accessibility of the bare metal of the reactor vessel head for visual examinations. In so doing, they deliberately omitted critical facts concerning the inspections and limitations on accessibility. In addition, they also falsely stated that the inspections complied with the requirements of Davis-Besse's "Boric Acid Corrosion Control Program."

3. On or about October 3, 2001, the defendants, DAVID GEISEN and RODNEY COOK, and other FENOC employees, held a telephone conference with NRC staff employees to discuss concerns of the staff regarding inspections described in Serial Letter 2731, which were

conducted during the 11th RFO (in 1998) and the 12th RFO (in 2000). During this telephone conference, the defendant, DAVID GEISEN, falsely stated that in 2000 FENOC had conducted a "100% inspection" of the reactor vessel head with the exception of some areas [five or six nozzles] where inspection was precluded because of "flange leakage." In fact, at least twenty-four nozzles were blocked from view because of boric acid.

4. On or about October 11, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and others met with Technical Assistants of NRC Commissioners and falsely represented as a "fact" that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type deposits using video recordings from 11RFO or 12RFO."

5. On or about October 16, 2001, the defendant, RODNEY COOK, sought information from Davis-Besse personnel about whether it was true that visual inspections of some nozzles had been done during 11 RFO and 12 RFO, but had not been recorded on videotape. In 11 RFO the entire inspection was recorded on videotape and there were no unrecorded visual inspections. On or about October 17, 2001, the defendants, RODNEY COOK and ANDREW SIEMASZKO, approved Serial Letter 2735 with an attached table that falsely stated that there were 10 nozzles that had satisfactory visual inspections during 11 RFO, such that no video record was required of the nozzles.

6. On or about October 17, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter 2735 to be forwarded to the NRC. This submission conceded that portions of the reactor vessel head were obscured by boric acid in inspections during the 11th RFO (in 1998) and 12th RFO (in 2000) but falsely represented that in the inspection during the 10th RFO (in 1996) the entire reactor pressure vessel head was inspected. The submission attached a table prepared by the defendant, ANDREW SIEMASZKO,

-8-

that falsely stated that the entire reactor pressure vessel head was inspected during the 10th RFO and that the video recording of that inspection was void of head orientation narration.

7. On or about October 24, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and other FENOC employees met with NRC staff employees and represented that "all but 4 nozzle penetrations were inspected in 1996," and "[a]ll CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 10 RFO, 11RFO or 12RFO," and "[a] review of visual recordings as well as eye-witness accounts served as the means of the inspection."

8. Between on or about October 22, 2001, and October 30, 2001, the defendant, RODNEY COOK, deleted sections of Serial Letter 2741 that he was drafting, which truthfully stated that areas of the reactor pressure vessel head would not be viewable in the upcoming 13 RFO because of "pre-existing boric acid crystal deposits."

9. On or about October 30, 2001, the defendants, DAVID GEISEN and RODNEY COOK, caused Serial Letter 2741 to be forwarded to the NRC. The submission repeated and expanded on representations made in Serial Letters 2731 and 2735, including the representations that inspections were made in accordance with Davis-Besse's Boric Acid Corrosion Control Program, and included representations contained in a table prepared by the defendant, ANDREW SIEMASZKO, that the entire reactor vessel head was inspected during the 10th RFO and that the video of that inspection was void of head orientation narration. Serial Letter 2741 also stated that "[f]ollowing 12RFO, the [reactor pressure vessel] head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results."

10. On or about October 30, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter Number 2744 to be forwarded to the NRC. This submission included photographs taken from the videotapes of the inspections of the reactor vessel head, indicating that the photographs were "representative" of the condition of the reactor vessel head, but which omitted portions of the videos showing substantial deposits of boric acid.

11. On or about November 1, 2001, the defendants, DAVID GEISEN and RODNEY COOK, caused Serial Letter 2745 to be forwarded to the NRC. This submission, entitled "Davis-Besse Nuclear Power Station Risk Assessment of Control Rod Drive Mechanism Nozzle Cracks," expressly relied on false representations about the 1996 head inspection that were previously made in Serial Letters 2735 and 2741. The "risk assessment" contained in this submission used statistical techniques to convince the NRC that allowing Davis-Besse to operate until the Spring of 2002 would pose little risk of damage to the reactor core. The risk assessment was based, in part, on the stated, false assumption that "100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head."

12. On or about November 14, 2001, in Rockville, Maryland, the defendants, DAVID GEISEN and ANDREW SIEMASZKO, and other FENOC employees met with NRC staff employees at NRC headquarters to discuss prior head inspections, among other things.

13. On or about November 28, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and other FENOC employees made a presentation to the NRC staff to propose a February 16, 2002, shutdown date, and provided statistical information expressly relying on false representations previously made in Serial Letters 2735 and 2741 to argue that the risk of damage to the reactor core was low.

14. On or about November 29, 2001, the defendant, DAVID GEISEN, made a presentation to the FENOC Company Nuclear Review Board ("CNRB"), and falsely represented that a qualified visual inspection was performed in 1996 and that all but four CRDM nozzle penetrations were inspected.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 2

The Grand Jury further charges:

On or before October 17, 2001, in Oak Harbor, Ohio, in the Northern District of Ohio, and elsewhere, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2735, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

- A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendants then well knew, significantly fewer than 65 nozzles were viewed;
- B. "[i]n 1996, during 10 RFO, the entire RPV head was inspected," whereas, as the defendants then well knew, the entire head had not been inspected during the 10th refueling outage;
- C. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, as the defendants then well knew, the 10th refueling outage inspection video included head orientation narration;

- D. "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendants then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and
- E. "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas, as the defendants then well knew, a substantial layer of boric acid remained, which would impede future inspections.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 3

The Grand Jury further charges:

On or before October 30, 2001, in the Northern District of Ohio, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2741, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

- A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendants then well knew, significantly fewer than 65 nozzles were viewed.
- B. "[i]n 1996 during 10 RFO, the entire RPV head was inspected," whereas, as the defendants then well knew, the entire reactor vessel head had not been inspected during the 10th refueling outage;

- C. “[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated,” whereas, as the defendants then well knew, the 10th refueling outage inspection video included the head orientation narration;
- D. “[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program,” whereas, as the defendants then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and
- E. “[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results,” whereas, as the defendants then well knew, a substantial layer of boric acid remained, which would impede future inspections.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 4

The Grand Jury further charges:

On or before October 30, 2001, in the Northern District of Ohio, the defendants, ANDREW SIEMASZKO and DAVID GEISEN, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2744, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

- A. "[i]n 1996 during 10 RFO, 100% of nozzles were inspected by visual examination," whereas, as the defendants then well knew, significantly fewer than 100 percent of the nozzles were inspected during the 10th refueling outage;
- B. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated by nozzle number," whereas, as the defendants then well knew, the 10th refueling outage inspection video included head orientation narration;
- C. "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection," whereas, as the defendants then well knew, the pictures were not representative, the head was not relatively clean in 1996, and a good inspection was not completed;
- D. "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint," whereas, as the defendants then well knew, no action had been taken in 1996 to verify whether the boric acid was active or wet and, thus, not a corrosion threat;
- E. "these attached pictures are representative of the condition of the drives and the heads" during the inspection during the 11th refueling outage, whereas, as the defendants then well knew, the referenced pictures were not representative of that inspection; and
- F. "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives," whereas, as the defendants then well knew, other images

from the 2000 inspection showed that the extent of boron buildup on the head was much greater than what was depicted in the photo of nozzle number 19.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 5

The Grand Jury further charges:

On or before November 1, 2001, in the Northern District of Ohio, the defendants, RODNEY COOK, ANDREW SIEMASZKO, and DAVID GEISEN, did knowingly and willfully cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2745, that contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

"[d]uring 10RFO, in spring of 1996, the entire head was visible so 100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head,"

whereas, as defendants then well knew, many more than the center four nozzles were not inspected.

All in violation of Title 18 United States Code, Sections 1001 and 2.

United States v. David Geisen, et al.

A TRUE BILL.

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FOREPERSON

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GREGORY A. WHITE  
UNITED STATES ATTORNEY

# **ATTACHMENT B**

March 20, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
DAVID GEISEN

)  
)  
)  
)  
)  
)

IA-05-052  
ASLBP No. 05-839-02-EA

AFFIDAVIT OF THOMAS T. BALLANTINE, TRIAL ATTORNEY

1. I am employed by the United States Department of Justice and have served as a Trial Attorney in the Environmental Crimes Section of the Environment and Natural Resources Division since October of 2000. Among my assignments, I am part of a trial team prosecuting employees and a contractor of the FirstEnergy Nuclear Operating Company (FENOC) for concealing material information and presenting false documents to the Nuclear Regulatory Commission (NRC). I submit this affidavit in support of the application of the staff of the NRC to extend a stay of the above-captioned proceeding.

2. On January 19, 2006, a federal grand jury in the Northern District of Ohio returned an Indictment in United States v. David Geisen et al. David Geisen is named as a defendant in all five counts of that Indictment. The Indictment alleges that Mr. Geisen and others concealed material information from the NRC and provided the NRC with false documents in response to NRC's Bulletin 2001-01, which sought information about past inspections of control rod drive mechanism nozzles at FENOC's Davis-Besse Nuclear Power Station and other pressurized water reactors. I understand that the conduct alleged in the Indictment also forms the basis for the above-captioned proceeding.

3. On February 1, 2006, Mr. Geisen was arraigned. The magistrate judge set a

March 20, 2006

motions date of March 24, 2006. No trial date has been set.

4. "Open-file" discovery has begun and the government expects it will be able to complete most of its discovery obligations in advance of the motions date. These include the obligation to provide: general discovery under Rule 16 of the Federal Rules of Criminal Procedure, exculpatory Brady material (if any), and witness statements under the Jencks Act.

5. I understand that Mr. Geisen is also entitled to discovery in the above-captioned matter, and that such discovery exceeds that which he is entitled under the Federal Rules of Criminal procedure or that which will be produced under "open file" discovery in this case. In particular, I understand that he would be entitled to depose witnesses and to compel answers to interrogatories.

6. The prosecution team in this case believes that the interests of justice would not be served if the criminal and administrative proceedings regarding Mr. Geisen were to go forward in parallel. The prosecutors are concerned that Mr. Geisen may use the administrative process to circumvent the more restrictive rules of criminal discovery. Those rules carefully balance the rights and obligations of the parties to a criminal case, in recognition of the government's obligation to prove its case beyond a reasonable doubt. The prosecutors expect that an ongoing administrative case would alter that balance. For instance, witnesses in a criminal case may choose whether to speak with a defendant's representatives, but can be compelled to appear for administrative depositions. That compulsion alone may be intimidating to witnesses who expect to testify at a criminal trial.

7. In most criminal cases, defendants choose to exercise their privilege against self-incrimination. The prosecution expects that Mr. Geisen would do so in the above-captioned proceeding, which would permit him lopsided discovery advantages in both the criminal case and the administrative case.

8. One of Mr. Geisen's co-defendants, Andrew Siemaszko, has sought a hearing in a related administrative action. The Board in that case is holding Mr. Siemasko's hearing in

March 20, 2006

abeyance until his criminal case is resolved.

9. For these reasons, the trial team believes that the ends of justice require that they above-captioned proceeding be held in abeyance until the criminal trial is finished. I will inform the NRC staff immediately when a trial date is set.

10. Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



Thomas T. Ballantine  
Trial Attorney  
Environmental Crimes Section  
United States Department of Justice

3/20/06  
Date