

RA511634

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

March 30, 2006 (3:37pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of :
 :
 : IA-05-052
 :
 David Geisen :

**DAVID GEISEN'S OPPOSITION TO
THE NRC STAFF'S MOTION TO HOLD THE PROCEEDING IN ABEYANCE**

David Geisen, through undersigned counsel, respectfully submits the following opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance (Motion) in the above-captioned matter. In its Motion, the NRC Staff (Staff) seeks to abate indefinitely the proceeding it initiated against Mr. Geisen by filing an Order (Effective Immediately) Prohibiting Involvement in NRC-Licensed Activities (Order). The Staff seeks the delay to assist the U.S. Department of Justice (DoJ) in a criminal proceeding against Mr. Geisen, notwithstanding the fact that the Order resulted in the abrupt termination of Mr. Geisen's twenty-plus year career in the nuclear industry and in utter disregard of Mr. Geisen's right to an expedited resolution of this matter. Because the Staff cannot show a sufficiently compelling interest to justify the requested delay, the Board should deny the Staff's Motion.

BACKGROUND

David Geisen is forty-six years old. See Attachment A, Declaration of David Geisen. He lives in De Pere, Wisconsin with his wife of twenty-four years, Kathy, and their three children, Ashley, Nicholas, and Meg. From 1982 through 1988, Mr. Geisen served in the United States Navy, including an extended period as a Submarine Warfare Officer. Mr. Geisen joined First

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Energy Nuclear Operating Company (FENOC) in 1988 and was promoted through the ranks at FENOC over the next fourteen years.

In the summer and fall of 2001, Mr. Geisen was the Manager of Design Basis Engineering at FENOC's Davis-Besse Nuclear Power Station (Davis-Besse). During that period, FENOC submitted information to the Nuclear Regulatory Commission (NRC) in response to Bulletin 2001-01. Mr. Geisen was involved in the review of some of the information that FENOC submitted and also participated in meetings between members of the NRC staff and FENOC representatives. See Geisen Answer to NRC Order, February 23, 2006. At no time did Mr. Geisen approve the submission or communicate information to the NRC that he knew or believed to be inaccurate or misleading.

On March 6, 2002 while performing ultrasonic testing of the Control Rod Drive Mechanism nozzles on Davis-Besse's reactor pressure vessel head, FENOC discovered a cavity. FENOC and the NRC immediately commenced investigations, including Root Cause analyses and Augmented Inspection Team inspections, and Mr. Geisen was interviewed four times between March and June 2002 in connection with those investigations.

The NRC Office of Investigations (OI) also initiated an investigation. On October 29, 2002, Mr. Geisen was interviewed by Senior Special Agent Joseph Ulie, Special Agent Michele Janicki, and Senior Reactor Inspector James Gavula of the NRC. The sworn interview lasted for over four hours and the transcript of the interview covers 185 pages.

The OI report (No. 3-2002-006) was issued on August 22, 2003 and presented to the DoJ. Shortly thereafter, the DoJ commenced its own investigation in close coordination with the NRC. Together, DoJ attorneys and NRC agents interviewed scores of witnesses and analyzed thousands of pages of documents. The DoJ put more than forty (40) witnesses before a Grand

Jury in the Northern District of Ohio and recorded sworn testimony of those witnesses. On February 3, 2005, Mr. Geisen was interviewed by Assistant United States Attorney Christopher Stickan, Department of Justice attorneys Richard Poole and Thomas Ballantine, along with agents Ulie and Janicki, and inspector Gavula. That interview lasted close to five hours.

Mr. Geisen had no contact with DoJ or the NRC again until November 2005, when the DoJ offered Mr. Geisen a Deferred Prosecution Agreement. Under the terms of the offer, if Mr. Geisen agreed that he had made false statements to the NRC, cooperated with the government in its on-going investigations, and refrained from criminal activity for a period of one year, the DoJ agreed not to charge him with any criminal offense arising out of his role in FENOC's responses to Bulletin 2001-01. Mr. Geisen declined the offer because he refused to admit that he had made false statements to the NRC, believing always that he spoke truthfully to the NRC in his interactions with the Commission staff.

On January 3, 2006, Mr. Stickan called undersigned counsel to inquire again whether Mr. Geisen would enter into the Deferred Prosecution Agreement. In a telephone call the next day, counsel repeated that Mr. Geisen refused to enter into the agreement because he had not knowingly made false statements to the NRC and sought a meeting with the United States Attorney for the Northern District of Ohio to present Mr. Geisen's position. Mr. Stickan informed counsel that if Mr. Geisen did not agree to accept the government's offer, he would be indicted shortly. Counsel repeated that Mr. Geisen would not accept an offer that was predicated upon a statement of facts to which he could not agree.

That evening, Mr. Geisen was served with the NRC Staff's Order. The Order, issued more than three-and-a-half years after the start of the NRC OI investigation and more than three years after the NRC's first extended interview of Mr. Geisen, immediately barred him from work

in the nuclear industry based upon alleged acts that occurred between September 4 and November 9, 2001.

When the Order was issued, Mr. Geisen was employed as Supervisor of Nuclear Engineering at Kewanee Nuclear Power Plant (Kewanee), where he had worked without incident for three years since leaving FENOC voluntarily. Kewanee is owned and operated by Dominion Energy Resources, Inc. The next day, Mr. Geisen was placed on leave, was told that he was barred from entering Kewanee's premises, and was informed his employment status was being reviewed because of the NRC Order and the impact that it would have on his ability to perform his job functions. On January 26, 2006, Mr. Geisen was informed that his job was being posted because he was unavailable for work due to the NRC Order. On February 16, 2006, Mr. Geisen was informed that his employment was being terminated effective immediately, because the Order removed his ability to perform his job at Kewanee. See Attachment B, Letter to David Geisen from Lori Armstrong.

Two weeks after the Staff issued the Order, Mr. Geisen was charged in a five-count indictment with making false statements to the NRC in violation of 18 U.S.C. § 1001. Not surprisingly, given the level of coordination between the NRC and the DoJ, the indictment virtually replicated the Order. Mr. Geisen pleaded not guilty to all of the charges at his arraignment on February 1, 2006. DoJ has unilaterally been providing discovery to Mr. Geisen and his co-defendants in accordance with the United States District Court for the Northern District of Ohio's open-file discovery procedures.

On February 23, 2006, Mr. Geisen filed an Answer to the Order, denying the allegations set forth in the Order and demanding an expedited hearing pursuant to 10 C.F.R. § 2.202(c)(1). On March 20, 2006, the Staff filed its Motion to Hold the Proceeding in Abeyance.

DISCUSSION

The Due Process Clause of the Fifth Amendment imposes constraints on governmental decisions which deprive individuals of property interests. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Where a governmental entity seeks to interfere with an individual's continuing employment relationship with an employer, it implicates a Constitutional property right protected by procedural due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985). The Staff's immediately effective Order, which bars Mr. Geisen from work in an industry in which he has been continuously employed since 1988, deprives him of such a right. See *FDIC v. Mallen*, 486 U.S. 230, 240 (1988). Accordingly, any such deprivation must comport with Constitutional Due Process protections.

Against this backdrop, the Nuclear Regulatory Commission's regulations permit the abatement of proceedings related to an immediately effective order only where the party seeking the stay can show a sufficiently compelling interest to justify a pre-hearing deprivation of a protected property interest. See 10 C.F.R. § 2.202(c)(2)(ii)(requiring "good cause), *Oncology Services Corp.*, 38 N.R.C. 44, 52 (1993)("we turn to the facts of this particular case to determine whether the staff has shown a sufficiently compelling interest to justify the delay in the post-suspension hearing."). In *Oncology Services Corp.*, the Commission found that five factors should be considered in determining whether a stay should be granted: (1) the length of the stay, (2) the reason for the stay, (3) the affected individual's assertion of his right to a hearing, (4) the harm to the affected person, and (5) the risk of an erroneous deprivation. Because each of the factors favors Mr. Geisen's right to be afforded the expedited hearing envisioned in 10 C.F.R. 2.202(c)(1), the Staff's Motion should be denied.

Application of the *Oncology Services Corp.* Principles

1. Length of the Stay

The Staff requests that the Board hold this proceeding in abeyance indefinitely. The Staff concedes it is “unable to provide the Board with a firm date by which the criminal proceedings involving Mr. Geisen will be finished,” but attempts to mitigate this fact by reference to a March 24, 2006 motions cutoff date and by suggesting that “any delay of the criminal trial will be at the behest of Mr. Geisen.” Motion at 12. Neither of the Staff’s cited grounds withstands scrutiny.

As the Staff either knew, or should have known through communication with Thomas Ballantine of DoJ, the March 24, 2006 motions date set by Magistrate Judge Armstrong at the defendants’ arraignments and was not a firm date. In fact, that date has already been vacated by joint motion of the parties. See Attachment C, Joint Motion. The parties have asked the Court to set a May 24, 2006 status hearing in order to address the state of discovery and presumably, to set a realistic motions schedule. The March 24, 2006 date cited by the Staff was vacated in light of the fact that Mr. Geisen’s co-defendant, Andrew Siemaszko, is presently seeking new criminal counsel. See Attachment D, Motion to Withdraw.

These two circumstances alone illustrate the error of the Staff’s contention that any “delay” of the criminal trial will necessarily be at the behest of Mr. Geisen. Motion at 12. Furthermore, Mr. Geisen is one of three co-defendants joined in the indictment. There is a strong preference in the federal system for the joint trial of defendants that are indicted together. *Zafiro v. United States*, 506 U.S. 534, 537 (1993); *United States v. Eniola*, 893 F.2d 383, 389 (D.C. Cir. 1990). Assuming that the present co-defendants remain joined for trial, scheduling and completion of a trial will depend upon the schedules of all three defendants, their counsel, and the prosecutors.

Finally, it would be unfair to penalize Mr. Geisen in the event he does require and request additional time to review and understand the enormous volume of discovery that the government has indicated that it intends to produce. As set forth above, DoJ has been preparing its case for over three years. It has conducted hundreds of interviews and has called over forty (40) witnesses before the Grand Jury. It has collaborated extensively with the NRC agents and investigators who have worked on this case since the cavity was discovered in 2002. Mr. Geisen was not privy to any of those witness statements, interviews, or Grand Jury transcripts throughout the duration of the DoJ investigation, and, indeed, has only begun to receive a fraction of that information in the past two months. To penalize him in this forum for insisting upon ample time to prepare a defense in the criminal case would be absurd.

2. Reason for the Stay

The Staff has sought this stay solely at the request of the DoJ, and solely in order to preserve a litigation advantage. Its position is predicated on the affidavit of Mr. Ballantine. There is nothing in Mr. Ballantine's affidavit that would justify staying this matter.

In paragraph six of his affidavit, Mr. Ballantine claims that Mr. Geisen may use the administrative process to circumvent the more restrictive rules of discovery and then speculates how that might be possible. The balance he purports "would be upset" is based on the fervent, but legally unenforceable, desire of the government that no witness speak to Mr. Geisen's lawyers. In short, he opposes Mr. Geisen exercising his right to depose witnesses in this proceeding. Mr. Ballantine does not attempt to factor into the balancing equation the enormous impact the debarment order imposes upon Mr. Geisen while simultaneously denying him an opportunity to defend himself. In paragraph seven, Mr. Ballantine decries the prospect of Mr. Geisen exercising his constitutional right to remain silent under the Fifth Amendment while at

the same time he is deposing witnesses. The Staff then uses this utterly indefensible proposition to justify its position on abatement, claiming in the process that assertion of one's constitutional right to remain silent is evidence of non-compliance with one's discovery obligations.

a. *The NRC-DoJ Memorandum of Understanding*

On the first page of its Motion, the Staff writes that it is "seeking this motion pursuant to the Memorandum of Understanding (MOU) between the NRC and the Department of Justice." Motion at 1. As an initial matter, though, it is important to recognize that the MOU may be the *motivation* for the request, but it is in no way a *justification* for the request. Indeed, there is nothing in the current circumstances of this case that warrants abatement of this proceeding simply because there is an MOU in place between DoJ and the NRC. It would appear that DoJ consented to the initiation of this action since it preceded by a matter of days the return of the indictment. The indictment represents the government's indication that its investigation of Mr. Geisen has concluded. Now, the NRC and DoJ are pursuing their peculiar interests after a period of collaboration. There is nothing, therefore, to be derived here from the fact that the MOU exists.

b. *Potential Harm to the Criminal Prosecution due to Disclosure of Evidence.*

The Staff complains of the potential harm to the prosecution from the enforcement action it has initiated here. It makes the extraordinary assertion that the Constitutional protections against self-incrimination and conviction based upon proof beyond a reasonable doubt skews the criminal process "substantially [in the] favor[] [of] defendants." Motion at 4. That would certainly be news to a criminal defendant who faces prosecution by a United States government that undeniably "starts with a great advantage in investigative resources." *Campbell v. Eastland*, 307 F.2d 478, 485 (5th Cir. 1962).

Nevertheless, the Staff cites *Campbell v. Eastland* as support for its position that the discovery available to Mr. Geisen via the administrative proceeding would place the DoJ at an unfair disadvantage in the criminal case. *Campbell*, however, involved parties whose situations and positions were diametrically opposite to the positions of Mr. Geisen, the NRC, and the DoJ, and reached policy conclusions in a case where the discovery rules were different both on the books and in practice.

Eastland's lawyer sought a delay of the presentation of a client's case to the Grand Jury so that he could either convince the United States Attorney to decline prosecution or, in the alternative, so that Eastman could enter a pre-indictment plea. *Id.* at 481. The United States Attorney agreed to that delay. In the meantime, Eastland brought a civil action and immediately moved for discovery of documents then in the custody of the United States Attorney in connection with the criminal proceeding which were protected from production to Eastland by operation of the Jencks Act. *Id.* at 482. The Fifth Circuit found that Eastland's actions lead to "a fair inference ... that the filing of the [civil] suit..., or at least the filing of the motion for discovery, was a tactical maneuver to enable the taxpayer to gain advance information on the criminal case." *Id.* at 483. It followed that allowing a civil action to proceed with unfettered discovery of documents that would be protected from production in a criminal proceeding was "an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings." *Id.* at 488.

The Court did recognize though what the Staff ignores -- that whether the government is the moving party or the defending party in the civil suit fundamentally affects the analysis. *Id.* at 489. Whereas it would be "unconscionable to allow [the Government] to undertake prosecution

and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense” in a situation where the Government was the moving party, “such rationale has no application in a civil forum where the Government is not the moving party.” *Id.*

The Court held that in some situations it may be appropriate to stay the civil proceeding, but that “[i]n others it may be preferable for the civil suit to proceed -- unstayed.” *Id.* at 487. The Court’s reasoning compels the conclusion that where the government chose the timing, terms, and forum of the civil action, brought an action that immediately impacted an individual’s Constitutionally-protected interests, and is not the target of a litigant’s efforts to subvert discovery rules, it would be inappropriate to stay the civil suit over the defendant’s objection.

The discovery rules and practices before the Fifth Circuit in *Campbell v. Eastland* were significantly different from those at issue in this case. The Staff places great weight in the supposed “balance of reciprocal discovery achieved by the criminal discovery rules” and cites *Campbell v. Eastland* and a Harvard Law Review article from 1961 as support. Motion at 7. But at the time *Campbell* was decided (1962) and the article was written, the Federal Rules of Criminal Procedure did not afford the government any right of discovery from the defendant. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 216 n.2 (1951)(quoting 1948 version of Rule 16 still in effect in 1962.) Thus, the “defendant’s *existing* advantages” do not exist today and should not factor into the analysis. Motion at 7 (emphasis added)

In an attempt to bolster its argument regarding the expansion of discovery rights, the Staff cites to *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) as support for the proposition that “the strongest case for deferring civil proceedings is where the party under indictment for a serious offense is required to defend a civil or administrative matter involving the same matter.” Motion at 8 (*citing* 628 F.2d at 1375). But the Staff has both turned that case

on its head and selectively misquoted its language. *Dresser* involved a case where a putative corporate defendant sought to quash a Securities and Exchange Commission (SEC) subpoena because the DoJ was simultaneously conducting a grand jury investigation into the conduct referenced in documents covered by the subpoena. *Dresser*, 628 F.2d at 1370. The SEC was not seeking the stay, nor was the SEC complaining of potential adverse effects on the DoJ investigation via *Dresser*'s discovery of information. The Court eventually declined *Dresser*'s request to block the SEC proceeding, but discussed circumstances that might justify a stay in reaching its conclusion. The Staff's citation to *Dresser* is extracted from that section of the opinion, but the Staff failed to cite the entire sentence. The Staff wrote "*Dresser* acknowledged that sometimes the interests of justice require a stay because the noncriminal proceeding, if not deferred, might expand rights of criminal discovery." Motion at 8-9. The actual quote from the case is:

The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege and self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.

Dresser, 628 F.2d at 1376 (emphasis added.) Rule 16(b) sets forth the defendant's reciprocal disclosure obligations to the government. Clearly, this section of the *Dresser* opinion dealt solely with damage to the defendant's case and not with damage to the government's case, as the Staff has suggested. Since it has nothing to do with a claim of damage to the government, *Dresser* has no place in this discussion.¹

¹ The Staff also cites *United States v. Iglesias*, 881 F.2d 1519 (9th Cir. 1989) for the proposition that the limitations upon criminal discovery set forth in Rule 16 seek "to guard against possible abuses." Motion at 5, n.14. This quotation is taken completely out of context and misapplied by the Staff. *Iglesias* was a drug case wherein the defendant sought the production of internal, preliminary lab test notes after the government had already produced the final Drug Enforcement Agency lab report. *Id* at 1521. It did not
(footnote continued on next page)

Finally, the open file discovery practices that will govern Mr. Geisen's criminal case provide for the early disclosure of Rule 16 and *Brady* materials, as well as witness statements under the Jencks Act, 18 U.S.C. 3500. Thus, most, if not all, of the documents at issue in *Campbell* would be discoverable through the criminal case in an open file jurisdiction. Indeed, in attempts to establish another prong of its argument, the Staff concedes, "[b]ecause 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." Motion at 14. The Staff's initial reason for the stay -- that discovery in the administrative proceeding would yield Mr. Geisen volumes of discovery that he would otherwise be withheld from him -- simply does not withstand scrutiny.

c. *Potential harm to the criminal prosecution due to "possible abuses."*

The Staff next advances three alternative potential harms to the criminal case if the administrative proceeding that it initiated is allowed to proceed: perjury, manufactured evidence, and witness intimidation. Motion at 7. These sensational allegations are completely baseless.

There is, quite simply, no basis upon which to suggest that Mr. Geisen would engage in the subornation of perjury or the manufacture of evidence. The investigations that preceded both the criminal indictment and the issuance of the Order against Mr. Geisen began in 2002 and stretched through the end of 2005. Unlike a case involving a street crime, there was little mystery in the identity of the persons the NRC and DoJ were interviewing. Mr. Geisen, for some period after the start of the investigations, worked on a daily basis with the majority of the "witnesses." There has been no suggestion through the course of the investigation that he ever

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involve a parallel proceeding and the Ninth Circuit was not addressing any issue similar to the ones before this Board. *Iglesias* simply has no application to this case.

attempted to shape or influence the testimony of others or manufacture evidence in any regard. We challenge the Staff to prove otherwise.

The Staff further argues that the “prosecution witnesses” could be intimidated if compelled to comply with discovery requests under the Commission’s regulations. Aside from the obvious absurdity of such a claim, it is based upon a view of witnesses that has been soundly rejected. “Witnesses ... are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.” *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966). The fact that the DoJ spoke with individuals during its investigation and possessed the ability to compel their testimony before the Grand Jury does not make those individuals “their witnesses.” Motion at 10. And while it is true that individuals are free to choose whether to speak with the defense prior to trial, a government lawyer that instructs an individual not to speak with the defense infringes upon “elemental fairness and due process.” *Gregory*, 369 F.2d at 188 .

Mr. Geisen intends to depose witnesses in this proceeding, as he is entitled to do pursuant to 10 C.F.R. § 2.705. The Staff offers no valid reason to abridge that right. Mr. Ballantine’s affidavit euphemistically addressed the government’s concerns about Mr. Geisen exercising his discovery rights in this proceeding. In the context of this case, the balance should not be struck in favor of the government. The government initiated the proceeding; the government has interviewed everyone it is satisfied it had to talk to; it has locked witnesses’ stories in through the use of the Grand Jury to which, of course, Mr. Geisen was not a party; it has interviewed countless others who were not brought before the Grand Jury and whose information might not be available to Mr. Geisen, save for this proceeding. Unlike *Campbell v. Eastland*, Mr. Geisen did not initiate the administrative action as a pretext for exercising discovery rights. Unlike the

Grand Jury where Mr. Geisen had no right of examination of witnesses that the government prepared for testimony, the government will be party to any deposition that Mr. Geisen notices in this proceeding. We perceive no disadvantage to the government that the Board should recognize and factor against Mr. Geisen.

d. *Harm to the Administrative Proceeding through Invocation of Mr. Geisen's Fifth Amendment Privilege.*

While Mr. Geisen is undeniably afforded the Constitutional protection against self-incrimination, the Staff exaggerates the breath of that protection and overestimates the impact an invocation would have upon the administrative proceeding.

The Fifth Amendment only protects an individual against compelled testimonial communications. *Fisher v. United States*, 425 U.S. 391, 408 (1976). It does not provide protection against acts such as the production of documents unless the act of production communicates something to the state. *United States v. Hubbell*, 167 F.3d 552, 568 (D.C Cir. 1999). Therefore, depending on how the Staff's document discovery demands were fashioned, the Fifth Amendment would likely have little effect on that part of the discovery process.

The Staff also argues that Mr. Geisen could invoke the Fifth Amendment and refuse to answer the Staff's questions, which would result in the Staff "operating at a disadvantage." Motion at 16. If there is a disadvantage, it is one that the Staff certainly was aware existed when it chose to issue an immediately effective order nearly simultaneously with the return of a criminal indictment. But that choice notwithstanding, it is not clear that any such "disadvantage" exists. Mr. Geisen has been interviewed by three NRC representatives on two separate occasions. The first of these interviewed was transcribed, under oath, and comprehensive. The second interview, conducted last year, was extremely comprehensive, and occurred after the NRC investigators had spent close to three years analyzing documents and interviewing

witnesses. Both interviews focused on the exact issues and events detailed in the Order. It is hard to imagine any area of the administrative case that the Staff will present on which Mr. Geisen has not already been deposed by NRC representatives.

e. *Harm to the "Public Interest" by Concurrent Proceedings.*

The Staff's advances the public's interest in criminal and civil enforcement as the final reason that its request for a stay should be granted. This argument is unpersuasive.

First, the Staff submits the stay is especially appropriate in this instance because both actions are brought by the government and the criminal proceeding is likely to vindicate the same public interest as the civil action. Motion at 11. This position only has merit if the Staff agrees to be bound by the result of the criminal trial if a stay is granted, will dismiss the Order and the prohibitions upon Mr. Geisen's work in the industry in the event of an acquittal, and will affirmatively urge his reinstatement to employment with his former employer.

Second, the Staff stresses the public health and safety issues and the rarity of criminal prosecutions of individuals for submitting false information to the NRC. DoJ's and NRC's actions are more telling of their assessment of the seriousness of the alleged offenses here than their invocation of the health and safety mantra. The NRC waited close to four years before bringing any type of administrative action against any individual associated with the events at Davis-Besse in the summer and fall of 2001. During that time, it permitted Mr. Geisen to continue work in the nuclear industry both at FENOC and later at Kewanee. In fact, DoJ offered to decline prosecution of Mr. Geisen altogether if Mr. Geisen agreed to a statement of facts that conformed to the government's theory of the case. These are not actions that support the Staff's hyperbolic assertion that the greater public interest in health and safety requires a stay of a proceeding that it initiated.

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

Mr. Geisen promptly and unambiguously asserted his right to an expedited hearing when he filed his Answer. As noted in the Staff's motion, he also opposed a stay of this proceeding when the Staff sought his consent to its Motion. Motion at 1, note 1. Still, though, the Staff argues that "this factor does not weigh greatly in his favor." Motion at 13. That conclusion ignores the Commission's explicit holding in *Oncology Services Corp.*:

According to the Court in *Barker [v. Wingo, 407 U.S 514 (1972)]*, "the more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to *strong evidentiary weight* in determining whether the defendant is being deprived of the right." Analogously, the [I]licensee's vigorous opposition to any stay of the proceeding and its constant insistence on a prompt full adjudicatory hearing [is] entitled to *strong weight*.

38 N.R.C. 44, 58 (emphasis added, internal citation omitted.)

4. The Harm to David Geisen

In *Oncology Services Corp.*, the Commission recognized that "potential prejudice to the [I]licensee [includes] both prejudice to its ability to defend against the charges in the order and prejudice to its interest to conduct activity under its license." *Id.* at 59. In this case, where the affected party is not a licensee but rather an individual, the harm is more acute because the prejudice is not an "interest to conduct activity under a license" but quite literally the basic ability to maintain a livelihood through continued employment in the specialized area in which he has been trained and has practiced virtually his entire adult working life.

The Staff concedes in its Motion that Mr. Geisen "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. The prejudice that Mr. Geisen has suffered and continues to suffer as a direct result of the Order and will continue to suffer as long as resolution of the proceeding is delayed is hardly conjectural. He was terminated from his job at Kewanee because the Order

prohibited him from performing his duties. Each day of further delay while the Order remains immediately effective is a day that Mr. Geisen is barred indefinitely from earning a living in the employment in which he is trained and qualified and has worked for years.

5. The Risk of an Erroneous Deprivation

The Staff's entire argument on this prong of the test rests on the fact that Mr. Geisen did not challenge the immediate effectiveness of the Order. Motion at 15-16. While the Commission in *Oncology Services Corp.* did conclude that the licensee's failure to challenge the immediate effectiveness of the Order in that situation "reduced" the risk of erroneous deprivation, it also recognized that a party challenging such an order could "hasten resolution of the controversy by requesting only a hearing on the merits," and could make the legitimate strategic decision to forego the time-consuming process of challenging the immediate effectiveness of an Order to focus instead on the "ultimate resolution of the final controversy." *Oncology Services Corp.*, 38 N.R.C. at 58. This is not a novel legal proposition. *Beacon Hill CBO II, Ltd. v. Beacon Hill Asset Mgmt. LLC*, 249 F.Supp.2d 268 (S.D.N.Y. 2003)(failure to seek a preliminary injunction on a claim does not concede that the claim lacks merit.)

Mr. Geisen sat through two lengthy interviews with NRC representatives. He fully and candidly explained his actions and his reasoning during the relevant time period, and even offered retrospective impressions about why events unfolded as they did. He reviewed and opined upon scores of documents that were placed in front of him by NRC and DoJ investigators. At the end of lengthy investigation, the NRC issued an Order that virtually ignored all the statements he made and lodged factually deficient allegations that demonstrated the investigators had ignored his testimony. That he did not rush to file a written document challenging the basis for the Order, but rather chose to invoke his right to an expedited hearing

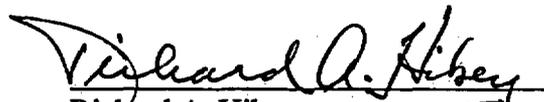
following comprehensive discovery, says little about his chance of ultimately prevailing and more about his faith in the fairness of a summary process.

Other facts demonstrate the presence of a significant risk of erroneous deprivation should the proceeding be held in abeyance. The significance of the deferred prosecution agreement offer and the lengthy period that the Staff waited before initiating proceedings are addressed extensively in section (3), above. But perhaps the most telling fact is this: Mr. Geisen faces a significant period of incarceration and monetary fine if he is convicted in the criminal case. He was offered a deal by the government under which he was guaranteed no conviction, no jail time, and no fine, in return for an admission that he knowingly made false statements to the NRC. He is a veteran of the U.S. Navy who is married with three children. He stands to lose enormously if he is convicted. He declined the government's offer. It is difficult to imagine a more pronounced and unambiguous protestation of innocence.

CONCLUSION

For the reasons set forth above, as well as any others that might appear to the Board following oral argument, the Staff's motion to hold the proceeding in abeyance should be denied.

Respectfully Submitted,


Richard A. Hibey
Counsel for David Geisen

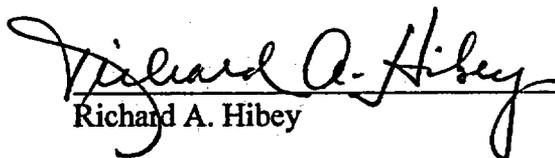
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Richard A. Hibey

ATTACHMENT A

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of :
 :
 : **IA-05-052**
 :
David Geisen :

DECLARATION OF DAVID GEISEN

In connection with the above-captioned matter, David Geisen makes the following declaration.

I have personal knowledge of the following facts:

1. My birth date is January 25, 1960.
2. I reside at 1749 Hawthorne Heights Drive, De Pere, Wisconsin 54115-8330.
3. I have been married to Kathleen Geisen (nee Bondowski) since 1982. Together we have three children: Ashley Elizabeth, Nicholas David, and Meg Therese.
4. I graduated from Marquette University in 1982 with a BS in Civil Engineering. I received an MBA in Finance from Bowling Green State University in 1995.
5. From 1982 through 1988, I served in the United States Navy. I graduated in the top half of my class from the Navy Nuclear Power School and Prototype. I then attended Navy Submarine School before serving for approximately thirty months as a Submarine Warfare Officer aboard the USS Nathanael Greene. For the last two years of my service in the Navy, I was the Navy Recruiting Command Area Five NUPOC Coordinator. In that position, I was awarded a Navy Commendation Medal and six Navy Recruiting Gold Wreaths.
6. After leaving the U.S. Navy, I began work for First Energy Nuclear Operating Company (FENOC) at the Davis-Besse Nuclear Power Station. From 1988 through 2002, I held the following positions:

May 1988- June 1994: Senior System Engineer

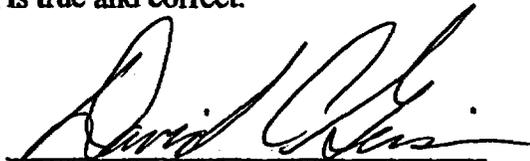
June 1994-June 1996: Candidate in Senior Reactor Operator training program

July 1996- March 2000: Supervisor - Electrical & Controls Systems Engineering

March 2000-May 2002: Manager Design Basis Engineering

7. In October 2002, FENOC offered me a lesser position at Perry Nuclear Power Plant. I declined that offer, and instead began work for Nuclear Management Company at the Kewaunee Nuclear Power Plant. I started at Kewaunee as Quality Assurance/Quality Control Manager and later transferred to Supervisor Nuclear Engineering. I performed my employment without incident until January 5, 2006.
8. I have been interviewed on six different occasions by persons investigating the circumstances surrounding FENOC's discovery of a hole in the reactor pressure vessel head at Davis-Besse and/or FENOC's responses to NRC Bulletin 2001-01. Included in these interviews were an interview with Senior Special Agent Joseph Ulie, Special Agent Michele Janicki, and Senior Reactor Inspector James Gavula on October 29, 2002 and an interview with Ulie, Janicki, Gavula, Assistant United States Attorney Christian Sticks, Department of Justice Attorneys Richard Poole and Thomas Ballantine on February 3, 2005.
9. In November 2005, the Department of Justice offered me a deferred prosecution agreement. I refused to accept that offer because it required that I admit I knowingly made false statements to the NRC which proposed admission was untrue.
10. On January 4, 2006, I received a copy of the NRC Staff's Order Prohibiting Involvement in NRC-Licensed Activities.
11. On January 5, 2006, I was informed by my Supervisor, Lori Armstrong, that I was being placed on leave and that I was not allowed to enter the Kewaunee facility due to the NRC Order.
12. On January 26, 2006, I received notice from Ms. Armstrong that Dominion was posting my position because the NRC Order disabled me from performing my job duties.
13. On February 16, 2006, I was informed by Ms. Armstrong that I was being terminated, effective immediately, because the NRC Order removed my qualifications to perform my job at Kewaunee.
14. I am now self-employed as the owner and primary operator of a business called Commercial Gaskets of Wisconsin, Inc., which manufactures and replaces refrigeration door and drawer gaskets for food service providers.

I declare under penalty of perjury that the foregoing is true and correct.


David Geisen

Executed on: March 30, 2006

ATTACHMENT B



February 16, 2006

David Geisen
1749 Hawthorne Heights
DePere, WI 54115

Dear Dave:

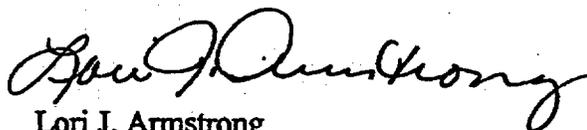
Although the U.S. Nuclear Regulatory Commission's Order prohibiting your involvement in all NRC-licensed activities for a period of five years is subject to challenge, it is our understanding it will remain in effect for an indefinite period that, even under the best of circumstances, will likely be many months if not longer. While in effect, the NRC Order removes your qualifications to perform your job at Kewaunee Power Station. Additionally, the federal grand jury indictment you have received may also impact the duration of your inability to work for the Company.

Because of these circumstances, the Company regrets that it must terminate your employment effective the date of this letter. Although not required by any of its policies or plans related to severance, the Company has decided to provide you with salary continuation through the end of February 2006.

Heather Powell, Human Resources Generalist for the Company, is available to assist you with any questions you may have concerning benefits coverage or any other matters related to the conclusion of your employment. She may be reached at 920-388-8232.

We appreciate the service you provided to the station, and wish you the best in resolving the pending legal matters. When and if you are able to regain the legal status necessary to be considered for work at Kewaunee, please know that you are welcome to contact us to discuss the possibility of future re-employment.

Sincerely,



Lori J. Armstrong
Director Nuclear Engineering

ATTACHMENT C

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

United States of America, : Criminal No. 3:06-cr-00712-DAK
v. : JOINT MOTION
Geisen et al. : U.S. Magistrate Judge
: Vernelis K. Armstrong
:

Now come the undersigned for the government and defendants who advise the court, pursuant to prior order, that the status of this case is as follows:

Additional time is required to complete discovery, to prepare effectively for trial, and for Mr. Siemaszko's new counsel to begin his representation. This is the first request for an extension. The undersigned propose that the court schedule a status conference in two months, on May 24, 2006, at which time counsel will better able to assess when their trial preparation will be complete.

The delay caused by this request is excludable for the following reasons pursuant to the indicated statutory authority:

As the court is aware from the Indictment, this case arose in the context of the operation and regulation of a nuclear power plant, both of which are unusual and complex. The government represents that the case involves well in excess of 20,000

documents, many of which involve technical discussions regarding nuclear power plant engineering, operation, and management. The government is diligently producing those materials, mostly in electronic format. It will necessarily take significant time for counsel to assess how the materials fit into the case and to determine whether there are novel questions of fact or law that apply to it.

In addition, Mr. Siemaszko has recently engaged new defense counsel. His receipt of discovery in this case has been delayed by the transition.

Pursuant to 18 U.S.C. § 3161(h)(8)(A), the court may grant a continuance based on findings that the ends of justice served by a continuance outweigh the best interest of the public and the defendant in a speedy trial. Section 3161(h)(8)(B) presents the factors, among others, which a judge shall consider in making an ends of justice determination. These include: whether the case is so unusual or complex that it is unreasonable to expect adequate trial preparation within the usual time limits, (18 U.S.C. § 3161(h)(8)(B)(ii)), and whether the regular schedule would deny the defendants or the government continuity of counsel or effective preparation in less complex or unusual cases, (18 U.S.C. § 3161(h)(8)(B)(iv)).

Based on the representations and authorities above, the undersigned ask that this court find that the ends of justice

served by granting an additional two month continuance outweigh the best interest of the public and the defendant in a speedy trial.

/s/Thomas T. Ballantine, Esq.
Attorney for Government

/s/Richard Hibey, Esq.
Attorney for Defendant Geisen
(signed per telephonic consent)

/s/John Conroy, Esq.
Attorney for Defendant Cook
(signed per telephonic consent)

/s/Charles Boss, Esq.
Attorney for Defendant Siemaszko
(signed per telephonic consent)

IT IS SO ORDERED:

Vernelis K. Armstrong
U.S. Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Joint Motion was served via facsimile and U.S. mail this 24th day of March, 2006, to counsel for defendants addressed as follows:

John F. Conroy, Esq.
Gordon & Ermer
Two Lafayette Center, Suite 450
1133 21st Street, NW
Washington, DC 20036-3354
F: 202-223-0120

Richard A. Hibey, Esq.
Miller & Chevalier Chartered
655 Fifteenth Street, N.W., Suite 900
Washington, DC 20005-5701
F: 202-628-0858

James M. Burge, Esq.
James M. Burge Co., L.P.A.
600 Broadway St.
Lorain, Ohio 44052
F: 440-244-0811

Charles Boss, Esq., will be served through the electronic filing system.

/s/ Thomas T. Ballantine

ATTACHMENT D

JAMES M. BURGE CO., L.P.A.

CRIMINAL DEFENSE

JAMES M. BURGE
LESLIE M. BURGE (1909-1988)
SUSAN CRUZADO BURGE
SHIMANE K. SMITH

RECEIVED

MAR 24 2006

Miller & Chevalier

LORAIN COUNTY :

600 BROADWAY
LORAIN, OHIO 44052
TELEPHONE:

(440) 244-1808
(440) 324-7881

FACSIMILE:
(440)244-0811

March 20, 2006

United States District Court
Northern District of Ohio
Clerk of Courts
1716 Spielbusch Avenue
Toledo, Ohio 43624

Re: United States v. David Geisen, et al.
Case No. 3:06CR712

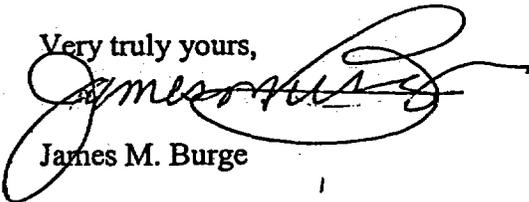
Dear Sir/Madam:

Enclosed please find an original and two copies of a motion to withdraw as counsel in regard the above matter.

Kindly file and return one copy with your time-stamp, in the enclosed, self-addressed, stamped envelope.

Thank you for your time and consideration.

Very truly yours,


James M. Burge

JMB/jr

Enc.

cc: Richard A. Hibey, Esq.
John F. Conroy, Esq.
Billie P. Garde, Esq.
Christian H. Stickan, Esq.
Thomas T. Ballantine, Esq.
Andrew Siemaszko

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, : CASE NO. 3:06CR712
Plaintiff, : JUDGE KATZ
Vs. : MOTION TO WITHDRAW
DAVID GEISEN, et al. : AS COUNSEL
Defendants. :

Now comes James M. Burge, attorney for defendant Andrew Siemaszko, and moves the court for an order withdrawing his name as counsel of record for defendant.

In support of this motion, counsel sets forth that,

1. He is currently seeking the office of Judge of the Lorain County Court of Common Pleas;
2. If successful, he will be unable to participate in the preparation and trial of this matter and to provide defendant with the effective assistance of counsel;
3. Since defendant's arraignment on January 27, 2006 and before, counsel has cooperated with the government in response to its duces tecum subpoena issued to defendant, and the government has acknowledged receipt of all discovery that defendant is able to provide, to date;
4. Counsel has received discovery provided by the government and has furnished the same to defendant's counsel in a related matter, Billie P. Garde, 1707 L. Street, N.W. Suite 500, Washington, D.C. 20036, Phone: 202-289-8990, who has indicated her inclination to represent defendant in this matter, with co-counsel;
5. Defendant is aware of the difficulty of present counsel in proceeding further in defendant's representation;

6. Counsel has referred Attorney Garde to another attorney, acceptable to defendant, to act as lead counsel in this matter;
7. Counsel has put the government on notice of all of the above facts; and,
8. It is in defendant's best interest and in the interest of justice that this motion be granted to obviate any delay in the trial of this matter which may be required should counsel be elected to office.

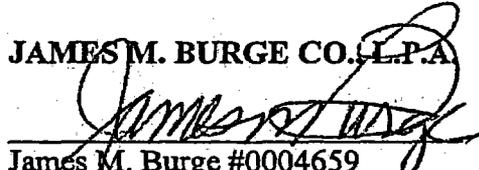
II

Counsel further moves the court to enlarge the time period for the filing of pretrial motions from March 24, 2006 to a date acceptable to defendant and to the government.

Counsel so moves for the following reasons:

1. The discovery process is not yet complete; and,
2. The extensive discovery provided by each party has been too voluminous to evaluate for the purpose of completing pretrial motion practice.

JAMES M. BURGE CO., L.P.A.


James M. Burge #0004659
Attorney for defendant
600 Broadway
Lorain, Ohio 44052
Telephone: 440-244-1808

A copy of the foregoing motion has been served upon the following parties by certified mail, return receipt requested, this 20th day of March, 2006:

Richard A. Hibey, Esq.
Miller & Chevalier Chartered
655 Fifteenth St., N.W. Suite 900
Washington, D.C. 20005-5701

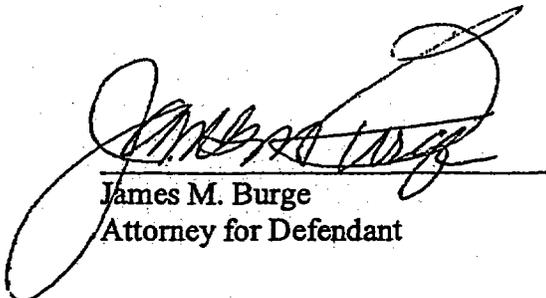
John F. Conroy, Esq.
Gordon & Ermer
Two Lafayette Center
1133 21st St., NW, Suite 450
Washington, D.C. 20036-3354

Billie P. Garde, Esq.
1707 L Street, NW, Suite 500
Washington, D.C. 20036

Christian H. Stickan, Esq.
Assistant U.S. Attorney
400 United States Courthouse
801 West Superior Ave.
Cleveland, Ohio 44113

Andrew Siemaszko
3638 Lost Oak Dr.
Spring, Texas 77388

Thomas T. Ballantine, Esq.
Assistant U.S. Attorney
P.O. Box 23984
Washington, D.C. 20026



James M. Burge
Attorney for Defendant