RAS 11664

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-06-13

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

DOCKETED 05/19/06

SERVED 05/19/06

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of	Docket No. IA-05-052
DAVID GEISEN	ASLBP No. 06-845-01-EA
	May 19, 2006

MEMORANDUM AND ORDER
(Denying Government's Request to Delay Proceeding)

At the beginning of this year, having completed a several-year-long investigation, the NRC Staff issued an immediately-effective Enforcement Order to David Geisen, suspending him from any work in the regulated nuclear industry for five years, based on assertedly misleading reports he had filed in late 2001 while an employee of the Davis-Besse Nuclear Power Station in northwestern Ohio. The Staff's Order caused the termination of the work Mr. Geisen was then performing in the industry and the interruption of his chosen career.

Under the Commission's regulations, Mr. Geisen was entitled to seek a hearing before us to test the order's validity. He did so in timely fashion, and upon this Board's establishment, we granted his uncontested request in late March. Because the suspension order against him was immediately effective, the Commission's regulations mandate that our hearing be conducted "expeditiously."

Nonetheless, the NRC Staff at the behest of the United States Department of Justice (collectively referred to herein as "the Government") has filed a motion seeking to have us hold in abeyance our hearing process -- the vehicle for testing the job suspension order -- pending

the outcome of a criminal indictment, making similar allegations, filed against Mr. Geisen (and others) in federal district court in Ohio. Mr. Geisen has vigorously opposed any such delay, pointing to the ongoing deprivation of his livelihood and of the ability to pursue his chosen career, as well as other adverse impacts, being occasioned by the order he seeks to challenge.

Having studied all the briefs and having heard oral argument on April 11, we have concluded that the Government's reasons for seeking indefinite delay of Mr. Geisen's hearing fall far short of the "good cause" standard set by the Commission's regulations and defined by Commission and judicial precedents. There is, rather, essentially "no cause" for the delay being sought, for the Government's theories fail to show that, in actual practice, the prompt conduct of our hearing process would interfere with its prosecution of the criminal charges against Mr. Geisen.

In contrast, Mr. Geisen has shown that delaying his opportunity to challenge the immediately-effective Staff order in the civil enforcement proceeding pending before us would continue the harm of depriving him of his chosen livelihood and its anticipated income. As a consequence of that deprivation, he has been forced to use retirement savings to start a less-remunerative business, which involves travel that takes him away from his wife and high-school age children. All this damage is, of course, irreparable for as long as it continues.

In these circumstances, the law, the precedents, and the equities mandate the ruling we make today, namely, that the Government's motion seeking an indefinite delay be denied. The result is that both the administrative proceeding before us, and the criminal proceeding in federal district court, will continue apace, moving forward in parallel as such matters routinely do except in circumstances -- not shown by the Government to be present here -- where there is substantial justification for one or the other proceeding to be halted.

We begin this opinion by providing, in Part I, more detail about the controversy's origins. In Part II, we set out the Commission and judicial precedents that establish the framework for our decision, i.e., the factors we are to consider in determining whether the Government has shown "good cause" to put aside the Commission's regulatory mandate that matters such as this be conducted "expeditiously." From those premises, we proceed in Part III to apply those factors to the circumstances before us, with the result that we find the balance of the factors to be overwhelmingly against granting the requested delay and in favor of moving forward.

PART I

THE SETTING

On January 4, 2006, the NRC Staff issued an immediately-effective Enforcement Order (Order) to David Geisen, prohibiting him -- because of allegations arising from certain events (described below) that occurred at Davis-Besse -- from engaging in NRC-licensed activities for five years from the date of the Order.[1] When the Order was issued, Mr. Geisen was working at Dominion Energy's Kewaunee Nuclear Power Plant as Supervisor of Nuclear Engineering.[2] The very next day, as a result of the Order, Dominion placed Mr. Geisen on leave and prohibited him from entering the Kewaunee facility.[3]

Three weeks later, on January 26, 2006, Dominion notified Mr. Geisen that, because the Order prevented him from performing his job duties, it was posting his position as vacant.[4] In three more weeks, on February 16, 2006, Dominion terminated Mr. Geisen's employment, voluntarily paying him through the end of that month, while observing that his work had been

---

[1] David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2571 (Jan. 17, 2006).

[2] David Geisen's Opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance (Mar. 30, 2006) [hereinafter Geisen Opposition], Attach. A, Decl. of David Geisen (Mar. 30, 2006) ¶ 7.

[3] Id. ¶ 11.

[4] Id. ¶ 12.

appreciated and that he would be welcome to discuss possible re-employment were the Order to be lifted.[5]

The Order arose from events that transpired at the Davis-Besse Nuclear Power Station following the NRC's August 3, 2001, issuance of Bulletin 2001-001, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" [ADAMS Accession No. ML012080284] (Bulletin). At that time, Mr. Geisen was employed at the Davis-Besse facility by FirstEnergy Nuclear Operating Company (FENOC) as Manager of Design Basis Engineering.[6] According to the Order, the Bulletin required that FENOC (and all other pressurized water nuclear power reactor operators) provide the NRC with certain information about the structural integrity of the reactor pressure vessel head penetration nozzles.[7] The Bulletin also required that this information be submitted in written responses in accordance with 10 C.F.R. § 50.54(f), i.e., the responses needed to be "signed under oath or affirmation, to enable the Commission to determine whether or not the license should be modified, suspended, or revoked."[8]

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. Specifically, Mr. Geisen is accused of providing materially incomplete and inaccurate information by (1) concurring on written responses -- sent to the NRC on September 4, October 17, and October 30, 2001, in response to the Bulletin -- that Mr. Geisen knew contained incomplete and inaccurate information; and (2) assisting in the preparation and presentation of incomplete or inaccurate information during internal meetings on October 2 and October 10, 2001, and during meetings or teleconferences held with the NRC on October 3, October 11,

---

[5] Id. ¶ 13; Geisen Opposition, Attach. B, Letter from Lori J. Armstrong, Director Nuclear Engineering, Dominion Energy Kewaunee, Inc., to David Geisen (Feb. 16, 2006).

[6] Order, 71 Fed. Reg. at 2571.

[7] Id.

[8] Id. at 2571-72.

and November 9, 2001.[9] Based, in part, on this information, the NRC Staff allowed the Davis-Besse facility to operate until February 2002, instead of, as contemplated by the Bulletin, requiring that the plant be shut down by December 31, 2001, in order to perform inspections.[10]

After the Davis-Besse facility shut down in February 2002, FENOC discovered that boric acid leaking through nozzle cracks had eaten through the entire 6.63-inch-thick low-alloy steel portion of the reactor pressure vessel head, leaving the less than 1/3-inch-thick stainless steel cladding as the only reactor coolant system pressure boundary.[11] In March 2002, FENOC reported the large cavity to the NRC, which thereupon conducted an inspection of the facility.[12]

On April 22, 2002, the NRC Office of Investigation (OI) initiated an investigation to determine whether FENOC or any individual employees at the Davis-Besse facility had failed to provide complete and accurate information to the NRC in the responses to the Bulletin and during the related meetings and conference calls.[13] Upon completing its sixteen-month investigation, the OI issued a report on August 22, 2003, which was also referred to the United States Department of Justice (DOJ) and the United States Attorney for the Northern District of Ohio.[14] In the meantime, in October 2002, having been offered a lesser position at another

---

[9] Id. at 2574-75.

[10] Id. at 2575.

[11] Id. at 2572.

[12] Id. As it turned out, the plant remained shut down for two years in order to replace the damaged reactor vessel head and to make other safety improvements. NRC Press Release No. No. III-04-011, NRC Approves Davis-Besse Restart (Mar. 8, 2004), ADAMS Accession No. ML040680717.

[13] Order, 71 Fed. Reg. at 2572.

[14] Id. Eventually, FENOC agreed to pay the NRC a $5.45 million civil penalty and, as part of an agreement with the Department of Justice to defer prosecution of the company, acquiesced to $28 million in penalties, restitution, and community service projects. News Release, FENOC, "FirstEnergy Nuclear Operating Company Pays NRC Fine Bringing Regulatory Closure to Davis-Besse Reactor Head Issue" (Sept. 14, 2005); News Release, DOJ, "FirstEnergy Nuclear Operating Company to Pay $28 Million Relating to Operation of Davis-Besse Nuclear Power Station" (Jan. 20, 2006).

FENOC facility, Mr. Geisen instead went to work at Dominion's Kewaunee as a Quality Assurance/Quality Control Manager.[15]

On January 19, 2006, approximately two weeks after the NRC eventually issued its Order banning Mr. Geisen from the nuclear industry and nearly four years after the Davis-Besse problems came to light, Mr. Geisen was indicted in the United States District Court for the Northern District of Ohio for allegedly violating 18 U.S.C. §§ 1001 and 1002.[16] The indictment covers essentially the same issues and facts as the Order, and Mr. Geisen has pled not guilty to all charges.

In late February, exercising his right under 10 C.F.R. § 2.202, Mr. Geisen timely requested a hearing to contest the matters set out in the Order.[17] This Licensing Board was established on March 16 to consider Mr. Geisen's hearing request.[18] With the NRC Staff indicating on March 20 no objection thereto, we granted that request on March 27 (after holding a prehearing conference in this and other related proceedings on March 22).[19]

Although the NRC Staff did not oppose Mr. Geisen's hearing request, it simultaneously filed the motion currently at issue, requesting -- on behalf of the Department of Justice, which supplied an affidavit (discussed in Part III) outlining why it believed delay was necessary -- that we hold this enforcement proceeding in abeyance until the criminal proceeding ends. Mr. Geisen strongly opposed the Staff's motion and sought to move forward with this proceeding.

---

[15] Geisen Opposition, Attach. A, Decl. of David Geisen (Mar. 30, 2006) ¶ 7.

[16] NRC Staff Motion to Hold the Proceeding in Abeyance (Mar. 20, 2006) [hereinafter Staff Motion], Attach. A, Indictment, United States v. David Geisen, Rodney Cook, and Andrew Seimaszko, Case No. 3:06CR712 (Jan. 19, 2006).

[17] Answer and Demand for an Expedited Hearing (Feb. 23, 2006).

[18] 71 Fed. Reg. 14,958 (Mar. 24, 2006). Licensing Boards with the same membership are presiding over challenges to related Staff Enforcement Orders. See id. at 14,958-59 and n. 128, below.

[19] See Licensing Board Memorandum and Order Summarizing Conference Call (Mar. 27, 2006) at 2 (unpublished) [hereinafter March 27 Order].

We set oral argument on the Staff's motion for April 11, 2006.[20] In doing so, we informed the parties that we expected them both to provide us "detailed and case-specific reasons" with respect to the factors supporting their respective positions, and we "strongly urged" that the DOJ lawyer who supplied the affidavit in support of the requested delay be present.[21]

Specifically, in an Order dated March 27, we recounted our prehearing conference discussion in the following fashion, under the heading "Requiring Specificity on Abeyance Factors" (emphasis in original, footnotes omitted):

> In connection with the upcoming oral argument, we mentioned (Tr. at 28, 41-42) our concern -- triggered by the material the Staff has put before us here -- that both parties be prepared to provide some detail about the various factors that are to be considered in reaching a determination on the abeyance issue (see, e.g., Oncology Services Corp., CLI-93-17, 38 NRC 44, 59 (1993)). In that regard, we emphasized that the Staff should consider having present at the argument the Department of Justice representative upon whom they have been relying (Tr. at 29-30). While not going so far as to direct his presence, as the Memorandum of Understanding between the two agencies seems to contemplate we might do (Tr. at 50-51; MOU, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988)), the Board strongly urged that he be present. We indicated that an inability by the Staff to provide detailed and case-specific reasons underlying a Government claim that a particular factor weighs in favor of abeyance could well -- under principles such as those set out in the Oncology decision cited above -- result in a ruling that the Government not receive credit for that factor (Tr. at 28-30). The same principle applies, of course, to Mr. Geisen's presentation.

The DOJ lawyer did not appear at the oral argument, the Staff having by letter informed us beforehand that he would not be present and having relayed to us his reasons for not appearing.[22] The argument was duly held, and the matter taken under advisement.

---

[20] March 27 Order at 4-5.

[21] Id. at 5.

[22] The relevant text of the letter is reproduced at pp. 42-43, below.

PART II

THE FACTORS

Under the Commission's regulations, hearings on immediately-effective orders are to be conducted "expeditiously."[23] Those regulations indicate, however, that a "presiding officer may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the . . . affected parties."[24] In this Part, we elaborate on the legal standards governing hearing delays.

In the Statement of Considerations adopting the good cause rule, the Commission explained that "the presiding officer will grant a delay only if there is an overriding public interest for the delay."[25] In applying this principle in Oncology Services Corp., where it found the delay justified, the Commission emphasized that the "determination of whether a delay is reasonable depends on the facts of a particular case and requires a balancing of the competing interests."[26]

More specifically, the Commission weighed five factors to determine whether there was good cause to delay a proceeding regarding an immediately effective license suspension order. As set out by the Commission in Oncology [27] and recently re-affirmed,[28] those five factors are:

---

[23] 10 C.F.R. § 2.202(c)(1).

[24] 10 C.F.R. § 2.202(c)(2)(ii) (emphasis added).

[25] Final Rule, Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,197 (May 12, 1992) (emphasis added) [hereinafter Immediately Effective Revisions].

[26] Oncology Services Corp., CLI-93-17, 38 NRC 44, 50 (1993).

[27] Id. at 50-51.

[28] Andrew Siemaszko, CLI-06-12, 63 NRC ___, ___ (slip op. at 4) (May 3, 2006). In Siemaszko, which we discuss passim, the Commission affirmed a Licensing Board's grant of an indefinite stay pending the outcome of a related federal criminal proceeding.

(1) the length of the delay; (2) the reason for the delay; (3) the risk that the ruling erroneously deprived the subject of its license (or other right in issue); (4) the subject's assertion of his or her right to a hearing; and (5) the prejudice to the subject.

Although the Commission recognized that the five factors it listed in Oncology are not necessarily exclusive,[29] and that others might come into play in other situations,[30] those factors do provide an appropriate framework for determining whether good cause exists in this case. Accordingly, we begin by examining, in the order most helpful here, the considerations pertinent to each of the Oncology factors.

---

[29] These factors are drawn from United States Supreme Court opinions determining whether certain trial delays were constitutional. See FDIC v. Mallen, 486 U.S. 230 (1988) (applying a five factor test to determine whether a delay in a post-suspension hearing violated Fifth Amendment due process); United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency, 461 U.S. 555 (1983) (applying four factors to determine whether a delay in a forfeiture proceeding violated the Fifth Amendment right against deprivation of property without due process); Barker v. Wingo, 407 U.S. 514 (1972) (applying a four factor test to determine whether a delay violated the Sixth Amendment right to a speedy trial). Quoting from one of these cases, the Commission observed that "none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." Oncology, CLI-93-17, 38 NRC at 51 (quoting $8,850, 461 U.S. at 565). The Commission also noted that in another of these cases, the Court stated that it "did not intend for its test to comprise the exclusive factors considered in every case" because a "'balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.'" Id. at 50 (quoting Barker, 407 U.S. at 530).

[30] For example, some courts have considered these factors: convenience in managing their caseload and efficiency in using their resources; the interests of non-parties; and the public interest. See, e.g., Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-25 (9th Cir. 1995); Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 903 (9th Cir. 1989); Hicks v. City of New York, 268 F. Supp. 2d 238, 241 (E.D.N.Y. 2003); Walsh Sec., Inc. v. Cristo Prop. Mgt., 7 F. Supp. 2d 523, 526-27 (D.N.J. 1998). None of these factors appears particularly relevant here although, in terms of Board efficiency, avoiding any further delay here might -- but might not -- provide an opportunity to consolidate Mr. Geisen's hearing with that of two other former Davis-Besse employees who were also the subjects of Staff Enforcement Orders but who were not indicted. See March 22 Tr. at 8-10, and n. 128, below.

1. Length of Delay

The length of the delay is an important factor in considering whether to postpone the hearing on an immediately effective order because the Commission's regulations require that such hearings be "conducted expeditiously."[31] Although expedition is judged against the circumstances in each case, it would -- by analogy to judicial decisions on stays -- normally be an abuse of discretion to order an indefinite delay when a lesser alternative is available.[32]

In Oncology, the Commission found there are "several points of reference" that are relevant when examining whether a delay is justified.[33] Specifically, the Commission examined: (1) the time between the alleged violation and the end of the requested delay, because it is relevant to the impact on the subject's ability to mount a defense; (2) the time between the issuance of the immediately effective order and the end of the requested delay, because it is relevant to the harm to the subject's interests; and (3) the total time of the requested delay because it is relevant to the reason for the delay.[34] (As will be seen in Part III, the second of these points proves the most significant here.)

Additionally, the Commission indicated that it is appropriate to consider the nature of the proceeding when measuring whether a given delay is reasonable. For example, "a delay may

---

[31] 10 C.F.R. § 2.202(c)(1).

[32] See Landis v. North American Co., 299 U.S. 248, 255 (1936) (noting that it would be an abuse of discretion to grant a "stay of indefinite duration in absence of pressing need"); In re Ramu Corp., 903 F.2d 312, 318-19 (5th Cir. 1990) ("discretionary stays . . . will be reversed when they are 'immoderate or of an indefinite duration'") (quoting McKnight v. Blanchard, 667 F.2d 477, 479 (5th Cir. 1982)); McSurely v. McClellan, 426 F.2d 664, 672 (D.C. Cir. 1970) ("an indefinite stay . . . should not be entered unless no alternative is available"). Cf. Siemaszko, CLI-06-12, 63 NRC at ___ (slip op. at 4) (recognizing, in the course of upholding an indefinite delay (see n. 28, above), that this Agency has "rarely, if ever, held an enforcement proceeding in abeyance for an indeterminate length of time").

[33] Oncology, CLI-93-17, 38 NRC at 52.

[34] Id.

require a strong justification in a proceeding to revoke a license which depends to a great extent on the testimony of witnesses," but "in a civil penalty proceeding where the penalty has not been paid and the proceeding depends less on witness testimony, a delay may need less justification."[35] In Oncology, the delay issue involved tacking an additional three months onto an existing eight-month-long delay in a license revocation proceeding that did depend on witness testimony; thus, a "strong justification" for the delay was required.[36] The Commission stated that in such a case, the aggregate eleven-month delay being sought (which it upheld) would be "tolerable only if Staff can demonstrate an important Government interest [supporting the delay] coupled with factors minimizing the risk of an erroneous deprivation."[37]

2. Reason for Delay

The Commission has instructed licensing boards passing upon delay requests to evaluate whether there is an overriding public interest requiring a delay.[38] In that regard, the Commission noted, in promulgating the regulations for challenging immediately effective orders, that a "prime example" of a delay that might be warranted is "the temporary need to halt the proceeding where continuation would interfere with a pending criminal investigation or jeopardize prosecution."[39] The Commission later stressed, however, that "the pendency of a criminal trial does not automatically toll the time for instituting a civil proceeding" because "it is necessary to look at the facts of a particular proceeding."[40]

---

[35] Id. at 53.

[36] Id.

[37] Id.

[38] Immediately Effective Revisions, 57 Fed. Reg. at 20,197; Oncology, CLI-93-17, 38 NRC at 53, 60.

[39] Immediately Effective Revisions, 57 Fed. Reg. at 20,197.

[40] Oncology, CLI-93-17, 38 NRC at 55.

Thus, in cases where the moving party demonstrates that the administrative enforcement proceeding will interfere with the criminal prosecution, a delay could be warranted. In cases where the moving party fails to demonstrate that the enforcement proceeding will interfere, however, a delay would not be warranted.

In other words, sometimes the pendency of a criminal prosecution necessitates delaying a parallel civil or administrative proceeding,[41] and sometimes it does not.[42] Other times, remedies short of complete abeyance might be appropriate.[43]

---

[41] See, e.g., Ashworth v. Albers Med., Inc., 229 F.R.D. 527 (S.D.W.V. 2005) (granting Government stay request in private civil suit); Benevolence Int'l Found. v. Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (granting Government stay request in suit challenging Department of Treasury asset-blocking order); Twenty First Century Corp. v. LaBianca, 801 F. Supp. 1007 (E.D.N.Y. 1992) (granting joint Government/co-defendant stay request in civil RICO fraud suit); St. Paul Fire & Marine Ins. Co. v. United States, 24 Cl. Ct. 513 (1991) (granting Government stay request in contract case); United States v. Funds Held in the Names or for the Benefit of Wetterer, 138 F.R.D. 356 (E.D.N.Y. 1991) (granting Government stay in civil forfeiture proceeding).

[42] See, e.g., In re Ramu Corp., 903 F.2d 312 (5th Cir. 1990) (granting writ of mandamus and lifting stay which was requested by the Government in civil forfeiture proceeding); SEC v. Saad, 229 F.R.D. 90 (S.D.N.Y. 2005) (denying Government-requested discovery protections in SEC civil enforcement proceeding); Horn v. District of Columbia, 210 F.R.D. 13 (D.D.C. 2002) (denying Government stay request in civil action); United States v. Geiger Transfer Serv., 174 F.R.D. 382 (S.D. Miss. 1997) (denying Government stay request in False Claims Act suit); In re Ross, 162 B.R. 860 (B. Ct. D. Idaho 1993) (denying Government stay request in tax suit); United States v. All Funds on Deposit in Any Account at Certain Financial Institutions Held in the Names of Certain Individuals, 767 F. Supp. 36 (E.D.N.Y. 1991) (denying Government stay request in civil forfeiture proceeding); C3, Inc. v. United States, 4 Cl. Ct. 790 (1984) (denying Government stay request in contract case).

[43] See, e.g., SEC v. Doody, 186 F. Supp. 2d 379 (S.D.N.Y. 2002) (granting Government stay request as it relates to disclosure of SEC interview transcripts and deposition of criminal witnesses); Harris v. United States, 933 F. Supp. 972 (D. Idaho 1995) (granting Government stay request but limiting it to confidential documents and compelled statements); United States v. Swissco Properties within the Southern District of Florida, 821 F. Supp. 1472 (S.D. Fla. 1972) (granting Government stay request only as it relates to disclosure of unidentified informants or case agents). See also Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 211 (1990) ("I should stress that a general stay of all civil discovery is not by any means the best option available to the court or to the litigants.") [hereinafter Parallel Civil & Criminal Proceedings].

In sum, in examining whether to delay an enforcement proceeding due to the pendency of a parallel criminal proceeding, there is no ready-made answer. Instead, a Licensing Board must separate remedial theories that find particularized support in the circumstances presented from those that do not.[44]

There are a number of different concerns that might cause either the criminal defendant or the Government prosecutor to seek delay of the civil proceeding. For example, the criminal defendant may seek a stay because of the pressures that the parallel proceedings place on the Fifth Amendment right against self-incrimination;[45] because of concerns that the prosecutors can use civil discovery as an end-around, evading the limits of the Federal Rules of Criminal Procedure to learn the basis of the criminal defense;[46] or because the burden of litigating on two fronts undermines the defendant's ability to present an adequate defense.[47]

The Government, often at the behest of the Department of Justice, may also seek to stay the civil side of parallel proceedings for a number of reasons. Generally, these reasons relate to concerns over the broader nature of civil discovery because, just as the Government

---

[44] See Oncology, CLI-93-17, 38 NRC at 55; Siemaszko, CLI-06-12, 63 NRC at ___ (slip op. at 7) (indicating, in the course of upholding an indefinite delay, that the "Staff's mere assertion that it wishes to protect DOJ's pending criminal prosecution . . . does not, without more, justify holding our parallel administrative proceeding in abeyance").

[45] See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (holding that the Fifth Amendment does not prevent the trier of fact from making an adverse inference "where the privilege is claimed by a party to a civil cause"); Keating v. Office of Thrift Supervision, 45 F.3d 322, 325 (9th Cir. 1995) (instructing that "the extent to which the defendant's fifth amendment rights are implicated" should be considered in deciding whether to stay a civil proceeding); SEC v. Dresser Industries, 628 F.2d 1368 (D.C. Cir. 1980) (noting that the "noncriminal proceeding, if not deferred might undermine the party's Fifth Amendment privilege against self-incrimination").

[46] United States v. Kordel, 397 U.S. 1, 11-12 (1970) (suggesting constitutional violations may arise if the Government brought a civil action "solely to obtain evidence for its criminal prosecution"); Dresser, 628 F.2d at 1375 (suggesting a stay would be justified where there is agency bad faith or malicious Government tactics).

[47] See, e.g., Keating, 45 F.3d at 325 (considering "the burden which any particular aspect of the proceedings may impose on defendants" when deciding whether to stay a parallel civil proceeding).

may be tempted to use the civil process to strengthen its criminal case, the criminal defendant may also seek to use the civil system for an improper purpose. Often-given examples are that increased discovery in the civil proceeding would provide opportunity for intimidation of the prosecution's witnesses; would encourage perjury, or the manufacturing or destruction of evidence; and would give the criminal defendant an unfair advantage because the privilege against self-incrimination can turn civil discovery into a one-way street useful only to the criminal defendant.[48]

In considering the reason for the requested delay, it is important to consider which party initiated the civil action and which party is seeking relief from its going forward.[49] For example, in Campbell v. Eastland, the criminal defendant, not the Government, initiated the civil suit[50] and

---

[48] See Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) (instructing that "a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases" and that "[s]eparate policies and objectives support these different rules"); Nakash v. DOJ, 708 F. Supp. 1354, 1365-66 (S.D.N.Y. 1988) (observing that Government stays are requested "because of concerns that (1) the broad disclosure of the essentials of the prosecution's case may lead to perjury and manufactured evidence; (2) the revelation of the identity of prospective witnesses may create the opportunity for intimidation; and (3) the criminal defendants may unfairly surprise the prosecution at trial with information developed through discovery, while the self-incrimination privilege would effectively block any attempts by the Government to discover relevant evidence from the defendants") (citing Founding Church of Scientology v. Kelley, 77 F. R. D. 378, 380-81 (D.D.C. 1977)); Parallel Civil & Criminal Proceedings, 129 F.R.D. at 210 ("The question presented is whether the policy underlying the limited scope of discovery under the criminal rules justifies withholding legitimate discovery in these civil litigations. That policy is rooted in concerns about possible perjury, manufacture of false evidence and intimidation of confidential Government informants.").

[49] See Parallel Civil & Criminal Proceedings, 129 F.R.D. at 201 ("it is important to remember who is seeking relief in one or the other of the parallel cases").

[50] Campbell, 307 F.2d at 490. The statement there (307 F.2d at 487) that "[a]dministrative policy gives priority to the public interest in law enforcement" has occasionally been cited for the proposition that a stay of the civil proceeding is always appropriate when there is a parallel criminal proceeding. See, e.g., Staff Motion at 10-11. As Judge Pollack has pointed out, however, "[t]hose who read Judge Wisdom's dicta to require a stay of civil proceedings are in error." Parallel Civil & Criminal Proceedings, 129 F.R.D. at 202. It may have been such a misreading of Campbell, where the civil action was not brought by the Government and did not further the public interest, that led to one of the Government's mistaken arguments here -- i.e., that a criminal case involves the public interest while a civil case always involves only a private interest -- an argument we address in n. 113, below.

then requested discovery to obtain documents that would not be available in the criminal proceeding; the court concluded that there were strong indications that the civil suit was brought only to obtain these documents and thus, at the Government's instance, denied the discovery request. Similarly, in a case where the Government filed both a False Claims Act and a criminal indictment, part of the court's justification for denying the Government's request for a stay was because "it [was] the Government that . . . created the conflict between the civil and criminal cases by simultaneously filing those actions."[51]

Regardless of which party requests the delay, simply reciting one of the above mentioned principles does not entitle the moving party to relief. As we explicitly advised the litigants here (see p. 7, above), the party requesting the delay must provide detailed and specific reasons demonstrating some type of cognizable harm would result absent that relief.[52]

For example, in Oncology, the Commission affirmed the Licensing Board's approval of a delay that was granted because the premature release of witness interview transcripts and documentary information would interfere with an NRC Office of Investigation (OI) ongoing investigation into possible incomplete or inaccurate statements by the licensee's employees

---

[51] United States v. Geiger Transfer Serv.,174 F.R.D. 382, 385 (S.D. Miss. 1997).

[52] Ramu, 903 F.2d at 320 (holding that the moving party "should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient" and that "[a]ny determination of 'good cause' . . . must be accompanied by specific findings of fact and determinations that the [moving party] will suffer specific forms of prejudice"); United States v. Thirteen Machine Guns & One Silencer, 689 F.2d 861, 864 (9th Cir. 1982) (holding that the Government's delay in instituting a forfeiture action violated due process right to a prompt hearing because, inter alia, "conclusory allegations that a forfeiture action would jeopardize its criminal prosecution are clearly not sufficient"); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (finding indefinite postponement of civil proceeding to be unreasonable because a party seeking to postpone civil discovery has the burden to make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements") (emphasis added).

and officials.[53] The Commission found that the agency's "strong interest in ensuring truth and accuracy of information provided to the Commission" would be undermined if the personnel were given the opportunity "to tailor their testimony or statements in subsequent interviews so as to explain previous statements in order to avoid culpability or conform testimony with the testimony of others who have been interviewed."[54] There, the OI had indicated in an affidavit that it anticipated conducting an additional twenty-five interviews before it concluded its investigation.[55]

In contrast, where the moving party fails to demonstrate some type of specific harm that would result from allowing the proceeding or discovery to continue, delays are routinely denied.[56] In discussing the need for a detailed and specific reason for delay, the Fifth Circuit has explained:[57]

---

[53] Oncology, CLI-93-17, 38 NRC at 55. Here, all investigations are over (see pp. 5-6, above).

[54] Id. at 54-55.

[55] Id. at 56.

[56] See, e.g., Ramu, 903 F.2d at 320 (lifting stay because the Government failed to demonstrate prejudice to a pending criminal case or investigation); Dresser, 628 F.2d at 1384 (finding that the enforcement subpoena does not inappropriately interfere with the criminal process because the only alleged prejudice caused by "the parallel nature of the proceedings is speculative and undefined"); Horn, 210 F.R.D. at 16 ("claim of 'likely . . . interference' falls far short of the showing of 'hardship or inequality' required to establish . . . good cause"); Geiger, 174 F.R.D. at 385 ("the mere relationship between criminal and civil proceedings, and the resulting prospect that discovery in the civil case could prejudice the criminal proceeding, does not establish the requisite good cause for a stay"); Volmar Distrib. v. New York Post Co., 152 F.R.D. 36, 40 (S.D.N.Y. 1993) ("speculation about death or witness intimidation is simply insufficient to overcome the real probability of substantial prejudice"); Digital Equip. Corp. v. Currie Enters., 142 F.R.D. 8, 14 (D. Mass. 1991) ("[c]onclusory allegations of potential abuse or simply the opportunity for the plaintiff to exploit civil discovery are generally unavailing to support a motion for stay"). See also SEC v. Oakford Corp., 181 F.R.D. 269, 272-73 (S.D.N.Y. 1998) ("the happenstance that in defending themselves against the serious civil charges that another Government agency has chosen to file against them they obtain certain ordinary discovery that will also be helpful in the defense of their criminal case, there is no cognizable harm to the Government in providing such discovery beyond its desire to maintain a tactical advantage").

[57] Ramu, 903 F.2d at 320 (citations omitted).

> Since any relationship between criminal and civil cases raises the prospect of civil discovery abuse that can prejudice the criminal case, good cause requires more than the mere possibility of prejudice. . . . The [moving party] should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient. Any determination of "good cause" that warrants a stay simply must be accompanied by specific findings of fact and determinations that the [moving party] will suffer specific forms of prejudice.

The Commission applied this requirement of specificity in Oncology, finding it had been met by one side but not by the other.[58] This point was emphasized again in Siemaszko, where the Commission stated that "the weight to be given the Staff's reason for seeking an abeyance turns on the quality of the factual record."[59]

3. Prejudice to Individual

To ensure that a hearing delay comports with the requirements of due process, the decision to grant a delay requested by the Government must "take into consideration not only the interests of the Government but of the persons affected by the order as well."[60] In the case of an immediately-effective enforcement order, this requires considering the potential prejudice that the delay will cause to the subject of the order, including prejudice to the subject's ability to defend against the charge and prejudice to the subject's private interests as a result of the order.[61]

---

[58] Compare Oncology, CLI-93-17, 38 NRC at 54-56 (holding that the Government's affidavit contained "adequate specificity"), with id. at 59 (finding that the defendant's harm was not adequately detailed because of the lack of financial specificity).

[59] CLI-06-12, 63 NRC at ___ (slip op. at 8) (emphasis in original).

[60] Immediately Effective Revisions, 57 Fed. Reg. at 20,197. See generally Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[61] Oncology, CLI-93-17, 38 NRC at 59.

The first aspect of this factor, the impact on one's ability to mount a defense in the enforcement proceeding, is relevant because during the delay witnesses may forget details or relocate and documents may be moved, stored, transferred, lost, or destroyed.[62] Furthermore, in a complex case, a party has an interest in getting an early start on discovery to ensure the judicious use of resources.[63] A delay does not, however, always prejudice the subject's ability to proffer evidence and prepare its case,[64] and, to gain credit for that type of harm, the party opposing the delay must make an affirmative showing that its ability to mount a defense will be compromised by the delay.[65]

The second part of this factor, the prejudice to private interests, requires an analysis of the impacts that the enforcement order has on the private interests of the subject of the order, including any financial and reputational harm.[66] Harm to these private interests varies depending on the subject and the scope of the enforcement order.[67] Therefore, as with the prejudice to the ability to defend against the order, the harm to financial and reputational interests must be specifically established.[68]

---

[62] See id.; Southwest Marine, Inc. v. Triple A Machine Shop, Inc., 720 F. Supp. 805, 809 (N.D. Cal. 1989) ("[w]itnesses relocate, memories fade, and persons allegedly aggrieved are unable to seek vindication or redress for indefinite periods of time on end").

[63] In re CFS-Related Securities Fraud Litigation, 256 F.Supp. 2d 1227, 1239 (N.D. Okla. 2003) (finding that granting a stay and preventing early discovery in a complex case is prejudicial).

[64] See Oncology, CLI-93-17, 38 NRC at 59; Barker, 407 U.S. at 521 ("deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself").

[65] Compare Oncology, CLI-93-17, 38 NRC at 59 (party opposing the stay failed to argue the delay would prejudice its defense), with Finlay Testing Laboratories, Inc., LBP-88-1A, 27 NRC 19, 25-26 (1988) (party opposing the stay succeeded in showing prejudice due to relocation of witnesses and difficulty retrieving documents).

[66] Oncology, CLI-93-17, 38 NRC at 59.

[67] The Supreme Court has "repeatedly recognized the severity of depriving someone of his or her livelihood." FDIC v. Mallen, 486 U.S. 230, 243 (1988) (citing cases).

[68] Oncology, CLI-93-17, 38 NRC at 59-60.

In Oncology, for example, although the movant licensee averred that the immediately-effective suspension order resulted in a loss of business and financial harm, the Commission indicated that because the "degree of lost business or financial harm" resulting from the order was "unclear," the movant had demonstrated only moderate or minimal harm to its interests.[69] Similarly, in Siemaszko, where the individual who was the subject of a suspension order (which was not immediately effective) had already left the industry, there was no establishment of harm to his property interests.[70] In contrast, in Finlay Testing Laboratories, the licensee put a dollar value on its total and monthly lost revenue and the Licensing Board had no difficulty concluding that the requested delay would cause further "financial and personal devastations."[71]

4. Individual's Assertion of Right to Hearing

The timely assertion of the right to a hearing is a relevant factor because "failure to assert the right will make it difficult for [the party opposing the delay to] prove that he was denied a speedy trial."[72] Thus, in an NRC enforcement proceeding, the "vigorous opposition to any stay of the proceeding and [a] constant insistence on a prompt full adjudicatory hearing are entitled to strong weight" and militate against the requested delay.[73]

The Commission went on in Oncology to note that the failure, before the hearing on the merits, to challenge an order's immediate effectiveness under 10 C.F.R. § 2.202(c)(2)(ii), was not necessarily crucial to this fourth factor because it could involve simply a strategic decision to

---

[69] Id. (emphasis added). In addition, the order suspending company operations had since been relaxed in two respects: first on an ad hoc basis to allow treatment of needy patients, and second on a general basis as to certain company locations. Id. at 47, 60.

[70] CLI-06-12, 63 NRC at __ (slip op. at 10-11).

[71] LBP-88-1A, 27 NRC at 25.

[72] Barker v. Wingo, 407 U.S. 514, 532 (1972).

[73] Oncology, CLI-93-17, 38 NRC at 58.

avoid delaying the eventual resolution of the merits. In other words, because pursuing the interim remedy "could delay ultimate resolution of the final controversy," the challenger "could hasten resolution . . . by requesting only a hearing on the merits," which could be an "attractive" strategic option in some circumstances.[74] This, it was held, would not detract from a party's assertion that a delay interferes with its right to a hearing; therefore, such a party would still be "entitled to all of the benefit that this factor may provide."[75]

5. Risk of Erroneous Deprivation

The decision on whether good cause exists for a delay must be "consistent with the due process rights" of the order's target "and other affected parties."[76] The "risk of erroneous deprivation" -- i.e., the risk that the immediately-effective order erroneously suspended the subject's license or other vested interest -- is one factor used to determine whether procedural due process is met when a property interest is at stake.[77] In that regard, the Commission's regulations allow the subject of an order to challenge its immediate effectiveness, prior to the hearing on the merits, on the grounds that it "is not based on adequate evidence but on mere suspicion, unfounded allegations, or error."[78]

The Statement of Considerations for the rule governing challenges to immediately-effective orders specifically discussed whether this test satisfied due process concerns.[79] The Commission concluded that the adequate evidence test "does not violate due process" and

---

[74] Id. at 58.

[75] Id.

[76] 10 C.F.R. § 2.202(c)(2)(ii).

[77] See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976).

[78] 10 C.F.R. § 2.202(c)(2)(I).

[79] Immediately Effective Revisions, 57 Fed. Reg. at 20,195-97.

does strike the "reasonable balance between the government and the private interests" involved.[80] In Oncology, the Commission reaffirmed this principle and found that -- because the subject of the enforcement order had been given the opportunity to challenge whether there was "adequate evidence" of the detailed allegations to justify the order's immediate effectiveness and chose not to exercise that opportunity -- the risk of erroneous deprivation was reduced, such that this factor weighed in favor of the delay request.[81]

Having set out the factors which provide a framework for our decision, we next turn to their application to the specific circumstances before us.

[80] Id. at 20,196.

[81] Oncology, CLI-93-17, 38 NRC at 57.

PART III

THE RESULT

As may be extracted from the foregoing, the critical issues to be determined when deciding an abeyance motion involve what we would call "relative harm." That is, the moving party will argue that unless a delay of the length being sought (Factor # 1, "length of delay") is granted, that party (or here, the entity for which it is speaking) will suffer certain types of harm to its interests (Factor # 2, "reason for delay"). The party opposing the motion will argue that if such a delay were granted, that party would suffer certain other types of harm to its interests (Factor # 3, "prejudice to individual"). At least implicit in the precedents is a recognition that those are ordinarily the crucial factors.

In that vein, the other factors (# 4, "assertion of hearing right," and # 5, "risk of erroneous deprivation") would typically be given less weight (unless, for example, the assertion was dilatory or perfunctory, or -- based on some unusual early but abbreviated insight into the merits (cf. Immediately Effective Revisions, 57 Fed. Reg. at 20,196-97) -- the risk can be shown to be either quite high or vanishingly low. In the circumstances presented here, where it turns out the balance of the first three factors tilts overwhelmingly in one direction, we would expect the other two factors -- again, absent extraordinary facts or insights that do not exist here -- to be insufficient to affect the outcome.

Accordingly, we devote most of our attention to an analysis of where, given the length of the delay being sought, the "relative harm" lies. We thus focus intensely on (1) whether, and if so to what extent, the Government has shown that not granting such delay (of this administrative proceeding which it brought) will harm it (in the criminal proceeding which it also brought), versus (2) whether, and if so to what extent, granting that same delay will harm Mr. Geisen. Given the outcome of that analysis, we need to pay only relatively little attention to the other two factors.

Factor # 1 -- "Length of Delay".

This is an important factor here, where the civil enforcement order being contested is already in effect and the Government is seeking the delay. In Oncology, both the Licensing Board and the Commission were concerned that an incremental series of delays for defined periods, each apparently of legitimate duration, were adding up to too long a period.[82]

Here, the Government has requested an indeterminate delay, which at one point was seemingly portrayed as brief, but which we now understand would be both undefined and lengthy. In support of its position, the Government has cited instances where delays of particular duration, one as long as four years, were accepted by adjudicators.

But examination of each cited decision reveals that the reasonableness of the length of the delay can be determined only in light of the relative harm thereby being inflicted and/or avoided.[83] For example, the four-year stay cited by the Government was reasonable, despite the fact that the court found that four years was "lengthy," precisely because (1) the parallel civil proceedings may have required that the Government turn over "sensitive information," and (2) the defendant was not prejudiced by the delay.[84]

With respect to the anticipated length of the projected delay here, the Government's brief (Staff Motion at 12, n. 42) -- relying on an affidavit prepared by one of the federal prosecuting attorneys, Thomas T. Ballantine of the Department of Justice -- focused our attention on the Speedy Trial Act's mandate that the criminal trial start within 70 days of arraignment (18 U.S.C. § 3161(c)(1)) and pointed out that Mr. Geisen's arraignment had taken place on February 1, 2006. We still find troubling (see April 11 Tr. at 33-34) that the

---

[82] See Oncology, CLI-93-17, 38 NRC at 52, and LBP-93-10, 37 NRC 455, 460 (1993).

[83] See Oncology, CLI-93-17, 38 NRC at 52-53.

[84] United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 917 (2d Cir. 1990).

Government would so carelessly leave it open to us to infer that the criminal trial would be held in April and thus that the delay being sought was quite short.[85] Probing deeper into the procedural aspects of the criminal proceeding has revealed that the delay being sought is of indefinite duration, and will likely stretch at least a year -- and possibly well beyond -- from the date of the Order.[86]

In examining how long a delay would be "too long," we thought that where, as here, the challenged suspension order is in force and is of five years duration, the Government would concede that a five-year delay in its resolution would be too long. It would, however, not do so.[87] On the other hand, had the Government been correct in its apparent implication that the criminal trial would be conducted speedily and would be concluded by this summer, we might have viewed the corresponding delay as reasonable.

Rather than try to ascertain a specific delay length -- between the above-noted extremes -- that would pass muster, we look instead at the case's general posture: (1) the events at issue

---

[85] In our March 27 Order, we had (in n. 7) taken

> the opportunity to re-emphasize . . . the concern we expressed (Tr. at 40-42) implicating the level of candor and/or thoroughness thus far evident in the Government's presentation insofar as it touches on the workings and impact of the Speedy Trial Act, 18 USC § 3161. With respect to the projected length of the stay the Staff is seeking to obtain, we expect at the oral argument to be given accurate and complete descriptions both of that Act's provisions and of their application in the Geisen criminal proceeding.

[86] See April 11 Tr. at 34 (observing that the time to file motions was, by the court's order, excluded from the Speedy Trial Act calculations, and that the time such motions are under consideration is, by the statute's own terms, automatically so excluded); and 62-63, 95-96 (noting the possibility of a "complex case" designation and further excludable time). See also Geisen Opposition at 6 (indicating that the March 24 motions date was not a firm one and that the May 24 status hearing date will likely set a more "realistic motions schedule").

[87] April 11 Tr. at 37-38.

are already over 4½ years old, owing to the length of the Government's investigations; (2) the criminal case is threatening to move slowly;[88] and (3) we face the prospect -- if we granted the relief the Government seeks -- of delaying all prehearing activities herein until after the criminal trial is concluded. From what we have gleaned from the parties about the prospects for the criminal case (see April 11 Tr. at 35, 63), that would leave us as well over a year from the date of the immediately-effective Order before we could even start our prehearing/hearing process. This could mean that, by virtue of the delay, Mr. Geisen would have served at least twenty percent of the contested sixty-month suspension in limbo before our review process was even launched.

Given the degree to which that order is prejudicing Mr. Geisen's choice of career, stream of earnings, and pursuit of happiness[89] (see Factor # 3, below),[90] the delay requested would end up of far too long a duration unless justified by an important -- and specifically stated and supported -- governmental need or interest. As will be seen, the Government did not provide support for any such need or interest, relying instead on rote incantations having no apparent relationship to the circumstances and posture of the two actions the Government has brought against Mr. Geisen.

As will become clear, the notion that all prehearing progress should be put on hold at the Government's behest is, in light of the other factors, simply indefensible. The decision we reach allows us to begin to make progress in this civil proceeding, perhaps all the way to an

---

[88] See n. 86, above.

[89] Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring) (noting that the "right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence" and that it "is a large ingredient in the civil liberty of the citizen").

[90] In contrast, in the Siemaszko proceeding the subject of the enforcement order had already left the industry when the order was issued, so even if that order had been immediately effective -- which it was not -- it would not have had the practical impact upon him that the order herein had -- and still has -- upon Mr. Geisen. CLI-06-12, 63 NRC at ___ (slip op. at 10).

expeditious conclusion (barring developments that might justify delay of some later stage, were a party then to be threatened with genuine aggrievement).

In refusing to authorize a delay of indeterminate but lengthy duration, we do not give weight to, but simply note the existence of, the possibility (see p. 18, above) that the passage of time might threaten to cut away at the quality of the evidence, as witnesses pass on, become forgetful, or otherwise become unable to present testimony as lucid as they might have earlier.[91] Here, the Government's investigation had already been underway a long time -- several years -- before the immediately-effective suspension order was issued and the indictments were handed down. But with Mr. Geisen not expressing undue concern that delay will diminish the quality of the evidence (April 11 Tr. at 84), we put that possibility aside as non-specific and do not credit it under Factor # 3, notwithstanding our own concern that -- to protect the probative value of the underlying fact-based evidence -- delaying the full discovery and presentation of that evidence in an already long-drawn-out proceeding should be avoided where possible.[92]

Factor # 2 -- "Reasons for Delay" (Harm to Government from Denial of Relief).

The Government presents two main arguments that evoke serious concerns about the negative impact the continuation of this civil enforcement proceeding could have on the district

---

[91] In Oncology, CLI-93-17, 38 NRC at 53, the Commission mentioned this possibility but at a later point seemed to discount it (id. at 59, citing the five years that elapsed in Barker without apparent impact on witnesses). See also Siemaszko, CLI-06-12, 63 NRC at ___ (slip op. at 6, 10).

[92] Compare, where the license application hearing would involve not the recounting of past events but rather expert opinion testimony still being formulated, the delay discussion in the Appendix to Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 708-14 (Feb. 24, 2005, as redacted Oct. 28, 2005), affirmed as to merits, CLI-05-19, 62 NRC 403 (2005), appeal pending, sub nom. Utah v. NRC (D.C. Cir. # 05-1420).

court criminal case.[93] One is that the civil discovery process could lead to the tainting of evidence in the criminal case, corrupting it through intimidation of witnesses, opportunity for perjury, or tampering with records (Aff. ¶ 6, Staff Motion at 6-7). The other is that the civil discovery process could lead to the defendant's obtaining access to evidence that would provide him an unfair advantage over the Government (Aff. ¶ 6, Staff Motion at 7).[94]

As has been seen in our earlier discussion of the factors to be considered (pp. 13-14, above), both of these arguments certainly have theoretical validity. But no matter how serious the concerns underlying them, they must be shown by the moving party to have some practical applicability to the particular circumstances of the case in order for it to prevail.

The representations made by the DOJ's Mr. Ballantine have not even come close to making such a showing here.[95] Indeed, the Government's presentation on the "tainting" claim is

---

[93] Before addressing the Government's main arguments, we dismiss at the outset its apparent claim (Staff Motion at 10-12; April 11 Tr. at 11) that, apart from the specifics of a case, a criminal proceeding should take precedence over our enforcement proceedings because the Commission itself has approved a policy of giving primacy to the criminal case at the cost of deferring the civil/administrative one. The only authority cited for this remarkable proposition -- remarkable in that it would seem to fly in the face of both (1) the case-specific principles the Commission adopted in its Oncology decision, and (2) the mandate to move expeditiously that the Commission put in the agency's regulations -- is the Commission's endorsement of the Memorandum of Understanding with the Department of Justice. 53 Fed. Reg. 50,317 (Dec. 14, 1988). But examination of the MOU (id. at 50,319, Part III.C.3) reveals that, far from expressing any view as to the procedural outcome in any particular instance, the Commission merely agreed generally that the Staff would present to Licensing Boards the Justice Department's arguments as to the procedural outcome that Department favored in each case. As Mr. Geisen's counsel aptly put it, the MOU provides only "motivation," not "justification," for the Government's motion. Geisen Opposition at 8.

Consequently, the MOU is not at all helpful on this point. If the Government is to succeed in obtaining delay, it can only be by virtue of matters specific to this case, not of the mere existence of the MOU's general provisions about the relationship between the agencies.

[94] In the Oncology proceeding, the Government sought delay so as to avoid the enforcement proceeding's interfering with other ongoing, incomplete investigations. CLI-93-17, 38 NRC at 53-54. Whatever the course to follow when investigations are still pending (see pp. 15-16, above, text accompanying nn. 53-55), all such investigations have been completed here -- so no basis for delay exists on grounds the investigatory process must be protected.

[95] The Government's affidavit is couched in conclusory, non-case-specific terms, so much so that it led to our pre-argument admonition that more would likely be needed (see p. 7, above). More was not forthcoming, as we point out herein.

so lacking in any foundation that we are surprised that it was even put before us. And the "access" concern is essentially weightless in the situation before us.

Tainting of Evidence. All recognize that allowing certain civil cases to go forward might create the potential to harm the search for truth in a related criminal case by tainting the evidence otherwise expected to be available therein. For example, allowing prospective Government witnesses to be deposed (or even to be identified) by those in position to intimidate them explicitly or implicitly -- through threats of physical violence, of workplace demotion or harassment, or of some other form of physical, financial, or emotional retaliation -- might lead to the witness tailoring or limiting his testimony, professing an inability to remember the incidents in question, or disappearing from view entirely.

There is before us no indication that any such circumstances or forebodings exist here, and every indication that they do not. In the first place, Mr. Ballantine's supporting affidavit is phrased in the subjunctive, referring to practices that "may" occur.[96] This is not surprising, for the Government pointed to nothing about the circumstances of this case that "would likely" lead to such practices. Specifically, we were given no indication whatsoever that any aspect of Mr. Geisen's current status puts him in position to intimidate any witnesses. To the contrary, the outlines of the proceeding -- in terms of the roles of the various participants at the time of the incidents, their earlier opportunities during the long investigations to converse and to interact with each other, and their lack of current workplace association with their previous employer and with each other -- lead us to precisely the opposite conclusion: such practices can only be viewed as very unlikely to occur during the course, or as a result, of this proceeding.[97]

---

[96] The affidavit says, on this point, only that "Mr. Geisen may use the administrative process to circumvent rules of criminal discovery" and that administrative depositions "may be intimidating." Staff Motion, Attach. B., Affidavit of Thomas T. Ballantine, Trial Attorney ¶ 6 (Mar. 20, 2006) (emphasis added).

[97] Notably, the Board specifically inquired whether the Government had any factual basis suggesting that "Mr. Geisen ever tried to shape or influence the testimony of others or that he was less than forthcoming in the [investigatory] interviews conducted by the NRC" (April 11 Tr. at 105). The Government responded in the negative (id. at 106). Of course, if the Government had available information on this score it chose not to supply us, notwithstanding our repeated admonitions that its arguments would not be credited unless it presented particularized factual support (March 22 Tr. at 28-30; March 27 Order at 5), it cannot be heard to complain of its failure to obtain the requested relief. See also p. 7, above.

That the Government failed to make a genuine "intimidation" showing is confirmed by the position taken in its brief and at oral argument, viz., that merely having to appear at a deposition is intimidating in itself.[98] To be sure, deponents generally do not enjoy, and may even dread, the prospect of being questioned intensely, in a perhaps-hostile atmosphere.[99] But that natural pre-deposition unease -- i.e., the transitory discomfort, just from having to testify at all, that is always inherent in the discovery or trial process -- has nothing to do with the kind of particularized, forceful intimidation involving threats of extra-deposition retaliation that the law is concerned with, threats that could be communicated, subtly or otherwise, as part of the run-up to, or conduct of, the deposition, with the specific intent of causing the subsequent tainting, alteration, or disappearance of substantive evidence. Again, the Government has told us nothing (1) about Mr. Geisen's past conduct or current existence that would support the notion of retaliation, or (2) about any prospective witnesses who fear such retaliation from him.

Another serious theoretical concern is that civil discovery can lead to perjury in the criminal case, via enabling a defendant to tailor his testimony, and that of his confederates, to jibe with, or to work around, what he learns about the state of the Government's knowledge. But here, the Government has already completed years of investigatory work, including numerous interviews of the defendant and of his co-workers. Given the number of their statements already on the record, then regardless of what they might now learn about the Government's case, any opportunity for them -- undetected -- to adjust their testimony by

---

[98] Staff Motion at 7 (citing Ballantine affidavit); April 11 Tr. at 17-18.

[99] We think it fair to surmise that, for similar reasons and more, the same can be said of any prospective deponents in this administrative proceeding who, as current or former Davis-Besse employees, were already subjected to interrogations by Government investigators.

perjuring themselves is obviously long past. When given an opportunity to demonstrate otherwise, the Government (the moving party upon whom the burden falls) failed to do so.[100]

We should clarify that in saying the Government needed to "demonstrate otherwise," we are in no way insisting that the Government establish that perjury -- or in the prior example, intimidation -- would necessarily take place. What we are saying is that, as the movant, the Government must establish at least that conditions exist in this proceeding that would allow the defendant, were perjury or intimidation on his mind, to proceed into the civil discovery process with some chance of success in that regard. Instead, when pressed, the Government was not even able to hypothesize how that could occur in the setting, and given the history, of this proceeding.[101] In that regard, Mr. Ballantine -- the representative of the real party in interest as the DOJ proponent of the delay request -- declined to appear before us, much less to enlighten us (see pp. 42-43, below).

The Government fares no better on the "tampering" theory. The serious concern in this regard is that a defendant -- after learning in a civil proceeding about the nature of the Government's evidence of his possible crime -- may then be able to alter evidence in his possession or control to provide a defense to the charges, or to undercut the evidence against him. This concern would be particularly troubling, for example, where a defendant was, and still is, the Chief Executive Officer, the Chief Financial Officer, or the Chief Information Officer (or some other functionary with access to, or control over, company files), at an organization associated with the alleged criminal activity. Such an "insider" would thereby have the

---

[100] Upon being asked whether there was "evidence in the record that would suggest Mr. Geisen ever tried to shape or influence the testimony of others or that he was less than forthcoming in the interviews conducted by the NRC during the investigation," the Staff responded that it "cannot point you to any specific fact about Mr. Geisen that he's -- that I'm aware of that he's made statements in his interviews that we can somehow put for you as evidence." April 11 Tr. at 17-18.

[101] April 11 Tr. at 26. We do not discount the possibility that there may be situations in which the Government would not want to reveal publicly the nature of the witness intimidation or other mischief that it fears could occur. If such a situation were to arise, however, the Government would be capable of bringing the matter to our attention under seal, as was done in the Siemaszko proceeding, and it might be that we would even act on the information ex parte if the public interest required it. Given the posture of the case, it is not surprising that no such approach was made or suggested here.

opportunity, as civil discovery unfolded, to alter or to destroy existing company paper records or electronic files, or to fabricate and to backdate new documents, all done to bolster his position.

Again, the theory behind this concern is legitimate. But it is entirely inapplicable here -- for Mr. Geisen has not been employed at Davis-Besse for several years, and the Government gave us no indication as to how he might employ knowledge gained through civil discovery to alter paper documents or electronic files that he has no control over whatsoever and which the Government has long-since obtained through its several-year-long investigation.[102] This claim too, then, borders on the specious.

Access to Evidence. Although one of its concerns was over the tainting of evidence, the Government takes a notably different tack in presenting another concern, i.e., that allowing civil discovery to proceed would allow the defendant to acquire valid evidence to which he would not otherwise have access. In support of this proposition, the Government stressed in its moving papers and at oral argument that (1) the drafters of the Federal Rules of Criminal Procedure created a careful, thoughtful balance as to just how much discovery a defendant could obtain, and (2) the scope of such discovery is more limited than civil discovery. The Government concludes therefrom that we should not permit anything to go forward that might alter that balance.[103]

---

[102] The Staff's arguments relating to manufacturing evidence came only in the discussion of general considerations. See, e.g., Staff Motion at 7 ("One fear is that 'broad disclosure' might lead to . . . manufactured evidence.") (citing Campbell, 307 F.2d at 487 n.12); April 11 Tr. at 48 ("there are general factors, traditional justifications for limitations on criminal discovery and those include . . . manufacture of evidence"). Further, after counsel for Mr. Geisen confirmed the Board's suspicion that "we're not talking about manufactured evidence, because he's no longer at Davis-Besse and he can't jigger the e-mails," the Staff remained silent on the issue. See April 11 Tr. at 75.

[103] Although discovery is more limited in criminal than in civil cases, it should be noted that today criminal discovery is much more expansive than it was when the Campbell case was decided in 1962. Professor Wright retraces the history of discovery in criminal cases in his criminal procedure treatise, stating: *[footnote continued on next page]*

The Government's premises are true, so far as they go.[104] But there are at least two reasons why the Government's proposed conclusion, that the civil proceeding must be delayed, does not follow here.[105]

The first is that in this very case, as explained to us by the Government at oral argument (April 11 Tr. at 42-43), the defendant is already scheduled to receive more discovery, and earlier in the trial, than the Criminal Rules contemplate, by virtue of the U.S. Attorney's adoption of an "open file" discovery process not required by the Criminal Rules but not uncommon in federal criminal practice. To be sure, that disclosure practice is a voluntary one the U. S. Attorney has chosen to follow. But that process is taking, or already has taken, place,[106] and to

---

[footnote continued from previous page]

> When the First Edition of this Treatise was published in 1969, significant discovery in criminal cases had been available in the federal system for less than three years. The debate about criminal discovery was still vigorous. . . . By 1982, when the Second Edition was published, it said that "the debate is much more subdued, if indeed it is not over." Now that we have entered a new millennium it is clear that the debate is over. Discovery in criminal cases is a matter of course.

Charles Alan Wright, Federal Practice & Procedure: Federal Rules Of Criminal Procedure § 252 (3d ed. 2000). Thus, to the extent that the concerns in cases such as Campbell arose from the great disparity between the scope of criminal and civil discovery, that gulf has since been narrowed.

[104] See Siemaszko, CLI-06-12, 63 NRC at ___ (slip op. at 7).

[105] We need only note in passing that there are instances, involving other agencies, wherein the Government seeks not the relief it wants here but the converse: to have the criminal proceeding held in abeyance while it pursues the civil proceeding. Perhaps the best example involves SEC enforcement orders -- which are not immediately effective -- seeking to shut down fraudulent securities sales operations. In such instances, the Government has been known to argue that the greater public interest is in quickly depriving the defrauders of any further opportunity to bilk their customers, and that the criminal case, seeking to punish them for their transgressions, can wait. Again, that line of decisions simply demonstrates that whether to proceed with the civil or the criminal case first, or to let both move forward apace, depends on the particular circumstances. Even the Campbell decision explicitly recognized that there will be some occasions wherein both proceedings ought to move forward together.

[106] We were advised at oral argument that the open-file process was underway and expected to be concluded in April (April 11 Tr. at 42-43). The Staff conceded (Staff Motion at 14) that in many respects that process was the equivalent of the party disclosures required in the enforcement proceeding before us by 10 C.F. R. § 2.336. Presumably, Mr. Geisen has been using the time that this matter has been under advisement to become familiar with the voluminous documentary evidence.

that extent, the normal balance which the Government would have us hold sacrosanct has already been disturbed by its own action.

Far more important, as we discuss below, any "harm" to the Government's criminal prosecution that might occur from "excessive" discovery if -- over the Government's objection -- the civil proceeding moves forward, has to be viewed as minuscule in the circumstances of this case.[107] Specifically, here the Government investigated for at least three years the circumstances surrounding an incident that was meticulously documented, in the files of both the NRC Staff and of the highly regulated nuclear plant operating organization under whose aegis the alleged offenses occurred (and which presumably had to make all its records available to the Government).

As a result, the Government is in possession of some 19,000 documents[108] related to the activities that underlie the civil and criminal charges, and has already interviewed the alleged perpetrators, as well as their co-employee witnesses, several times (and has not advised us that on any of those occasions the targets declined to answer any of the inquiries). The targets of the investigations are no longer employed in the organization within which their alleged misdeeds occurred, and the Government did not even allege that the targets' information base is anything other than paltry compared to the Government's.

In other words, the information balance here is skewed heavily in favor of the Government. In these circumstances, allowing the target of criminal and civil proceedings brought against him by the Government to obtain -- in the course of challenging expeditiously the immediately-effective civil enforcement order -- information he would not receive in defending against the criminal indictment, does not alter that information balance to any degree that might properly be called unfair to the Government or that to any degree puts the

---

[107] To be sure, we recognize that a demonstration of far more substantial harm might be made in other situations (see n. 109, below). And, of course, here the Government can renew its motion for delay, or seek other appropriate relief, if circumstances arise that demonstrate that as to particular, specific aspects of civil discovery, the criminal case may be jeopardized absent action by the Board.

[108] March 22 Tr. at 44.

Government at a disadvantage. That it might do so in entirely different circumstances does not provide us reason to grant the relief the Government seeks in these circumstances.[109]

What we have, then, is precisely what Judge Rakoff[110] pointed to in Oakford:[111]

> the happenstance that, in defending themselves against the serious civil charges that another Government agency has chosen to file against them, [the targets] obtain certain ordinary discovery that will also be helpful in the defense of their criminal case, [creates] no cognizable harm to the Government . . . beyond its desire to maintain a tactical advantage.

On its face, satisfying that Government tactical desire is not a good enough reason to visit upon Mr. Geisen the attendant serious harm it would do him, harm we discuss in the next section.

We do recognize that courts have occasionally, as in Campbell, granted the Government's request to delay a civil proceeding when that proceeding has been brought, not by the Government in furtherance of the public interest, but by the accused criminal defendant for the express or transparent purpose of creating a discovery opportunity he would not otherwise have. Other considerations that can trigger delays in such cases are situations in which the balance of knowledge is close, and in which the accused intends to avoid discovery of his position by declining to answer reciprocal questions put to him. Again, we are not faced with anything like those considerations -- Mr. Geisen did not bring this proceeding, it was

---

[109] It is easy to envision cases in which, for example, (1) a targeted criminal enterprise has been operating in secret for many years, and (2) the Government's informant has been able to bring some evidence of its crimes to the attention of Government investigators, while leaving most of the critical evidence in the possession and control of the criminal enterprise. To give that enterprise access to full discovery in a civil proceeding of what the Government has learned -- while the targeted individuals block the Government's reciprocal discovery by exercising their Fifth Amendment right to decline to provide testimony at deposition -- would threaten unfairly to widen even more the knowledge disparity under which the Government is operating in such a circumstance.

Numerous other similar examples could be listed. But that type of circumstance -- the hypothesis upon which the Government builds its pending motion for relief -- simply does not exist here. Instead, what is before us is its nearly polar opposite.

[110] Judge Rakoff is well-acquainted with the law of white-collar crime, having, inter alia, (1) served for seven years as a federal prosecutor in the U.S. Attorney's office for the Southern District of New York, where he now sits, including two years as chief of business and securities fraud prosecutions; and (2) co-authored the book RICO: Civil and Criminal Law (1989 & 2005 supp.), including Chapter 11, "Civil and Criminal RICO: Parallel Proceedings." He also lectures on the subject at Columbia Law School.

[111] 181 F.R.D. at 272-73.

brought against him; the balance of knowledge favors the Government by a wide margin;[112] and he has already answered questions put to him by Government investigators.[113]

---

[112] At oral argument, the Government suggested that that balance may not be as we see it, because the voluminous investigatory file compiled as the matter made its way to the grand jury would -- because of grand jury secrecy rules -- be unavailable to the lawyers for the NRC Staff who would be supporting the enforcement order before us, even though it was compiled with the assistance, or at least in the presence, of NRC investigators, and outside the presence of the grand jury. April 11 Tr. at 48-49, 85-87. On this score, we were operating at a disadvantage in that DOJ counsel, familiar with criminal proceedings generally, declined to appear to address this, or any other, topic. See p. 7, above.

In any event, counsel for Mr. Geisen advised us that his view was the opposite of what was represented by the Government (April 11 Tr. at 55-56). His view seems to be confirmed by a reading of Rule 6 of the Federal Rules of Criminal Procedure -- which (1) covers only "grand jury matter[s]" and (2) even then provides an explicit process for obtaining the approval of the federal district judge supervising the grand jury to release such matters for certain purposes, which may well include agency adjudicatory enforcement proceedings such as this one. Indeed, at oral argument Staff counsel eventually conceded that any access restrictions could be lifted by the federal district judge (April 11 Tr. at 48-49).

Presumably, then, the Staff will have access in this civil enforcement proceeding to prior statements, including Mr. Geisen's even if he declines to be deposed -- a not-entirely risk-free option for him, in that it could lead us to draw certain negative inferences (April 11 Tr. at 67-68).

[113] In this connection, it bears mention at this juncture that there is no merit in the Government's argument that the criminal prosecution should take precedence because the public interest is at stake there, while the challenge to the civil enforcement order is intended to vindicate only a private interest. Were those premises true, the argument might have some merit -- but it is built on an inaccurate depiction of what is at stake in the two proceedings here.

In this regard, the Government saw fit here to vindicate the public interest by proceeding in two forums simultaneously, by way of both: (1) a criminal indictment to punish the alleged offender; and (2) a civil enforcement to remove him -- effective immediately -- from a position in which the Government feared he could engage in similar (alleged) misdeeds harming the public health and safety. Both of these mechanisms, it is fair to say, were intended to protect the public interest as the Government saw it. Compare the Campbell analysis in n. 50, above, where the civil action brought by the criminal defendant did involve only a private interest.

Looked at in that light, although Mr. Geisen's defense against the indictment and challenge to the order are both intended to protect his private interests, both are also an integral part of the judicial scenario by which the public interest is defined. In that regard, Mr. Geisen may or may not succeed in the two proceedings brought against him. But both proceedings were brought by the Government to vindicate the public interest, and viewed in that perspective, Mr. Geisen's efforts to clear himself are a part of the overall process by which the public interest is ultimately defined and vindicated through adjudication.

To be sure, this vindication can be achieved in the criminal proceeding in federal district court. But it also can be achieved in the administrative proceeding before this Licensing Board: for if the NRC Staff can prove to us that Mr. Geisen should not be allowed to work in the industry, the public interest will be vindicated in that fashion; on the other hand, if the NRC Staff cannot carry its burden of proof, then the public interest will be vindicated in a different fashion, by restoring a person's property right -- protected by the Constitution -- to make a livelihood by pursuing his chosen career free from unwarranted Government interference.

That such a result would also further Mr. Geisen's private interests does not make the matter less worthy of the expeditious consideration the Commission promised. Indeed, if the rule were as the Government would appear to want it -- i.e., all hearings on the merits of immediately-effective civil administrative orders were to be indefinitely delayed pending the outcome of related criminal cases -- serious due process implications would result, beyond those addressed by the existence of 10 C.F.R. § 2.202(c)(2)(ii).

In sum, the Government has failed to bring forward specific support (see nn. 52 and 56, above, and accompanying text) for its generalized argument that its criminal prosecution will be harmed by denying the delay it seeks.[114] We are conscious of what the Commission recently described as the "long-established policy . . . of deferring to DOJ when it seeks a delay" of the kind sought here, and of "not lightly second-guess[ing] DOJ's views on whether, and how, premature disclosures might affect its criminal prosecutions."[115] But to be entitled to that deference, DOJ must come forward, in public or if necessary in secret, with something of substance that is tailored to the circumstances of the case at hand. We do not here second-guess DOJ's views; rather, we are compelled to hold that it presented no views of substance.

In sharp contrast, Mr. Geisen has with specificity pointed to concrete and irreparable harm he will endure were we to grant the sought delay, which would deprive him indefinitely of any opportunity to challenge the Staff's order. We turn now to that matter.

Factor # 3 -- "Prejudice" (Harm to Mr. Geisen from Grant of Delay).

The Staff Order was immediately effective, and it had immediate impact. Quite simply, it cost Mr. Geisen a job and a career in which he was apparently well regarded.[116] Although he has taken steps to support his family in another fashion, his present business is not a financial substitute for the career he lost.[117] And if the suspension order is vacated, he can seek to go back to work that would not only provide him more financial income but would allow him to return to his chosen career[118] -- for his former employer has stated its readiness to consider him

---

[114] It bears mention here that the Government's motion does not -- nor could it -- suggest that allowing the criminal proceeding to go forward would hamper the Staff's pursuit of the enforcement order. All that is at stake here is the converse.

[115] Siemaszko, CLI-06-12, 63 NRC at ___ (slip op. at 9).

[116] See Geisen Opposition, Attach. B, Letter from Lori J. Armstrong, Director Nuclear Engineering, Dominion Energy Kewaunee, Inc., to David Geisen (Feb. 16, 2006).

[117] April 11 Tr. at 81-82, indicating his income is at half its former level.

[118] See Greene v. McElroy, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable Governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"). See also n. 89, above.

for re-employment if his suspension is removed.[119] In the meantime, his new situation affects his family adversely in three important ways -- by substantially reducing the family's income and savings, by requiring extensive travel while two children are in high school, and by reducing medical insurance needed for a child's illness.[120] Based on these facts, we find that further delay would exacerbate the "financial and personal devastation"[121] that the Order caused, and therefore that the prejudice factor weighs heavily against the requested delay.

It was, we might surmise, in anticipation of precisely such a situation that the Commission directed that, generally, any hearing sought for the purpose of challenging an immediately-effective enforcement order be conducted "expeditiously." But the Government would instead have it that it can, after a long wait, instantaneously take away Mr. Geisen's job and then force him to bide his time before he can be heard to defend against those charges.[122]

This we cannot permit absent an overriding public interest. There being none, for us to grant the Government's requested open-ended delay[123] would trammel Mr. Geisen's due process rights.[124]

---

[119] Geisen Opposition, Attach. B, Letter from Lori J. Armstrong, Director Nuclear Engineering, Dominion Energy Kewaunee, Inc., to David Geisen (Feb. 16, 2006).

[120] April 11 Tr. at 81-82. In relying upon factual information Mr. Geisen furnished us at the oral argument, we note that we had specifically given both sides the opportunity (and a directive) to supplement their written filings in that regard. March 27 Order at 5, quoted herein at p. 7. Mr. Geisen took advantage of that opportunity, while the Government did not. In addition, late in the argument we asked the Government if it wished to have the opportunity after the argument either (1) to challenge Mr. Geisen's factual assertions, or (2) to bolster its own assertions. The Government declined both opportunities. April 11 Tr. at 98, 107-08.

[121] See the discussion of Finlay, p. 19, above.

[122] In contrast, during the periods of delay in Oncology, steps were taken to alleviate the impact of the immediately-effective order upon the company and its needy customers (see n. 69, above). No analogous measures appear on the horizon in this very different situation.

[123] See n. 127, below.

[124] Mr. Geisen has pointed to -- and the Government concedes the existence of -- the doctrine that he has a constitutionally protected right not to be deprived of his job without due process. April 11 Tr. at 31. The merits of the underlying facts -- about which we have no knowledge and express no opinion -- may or may not result in his recovering his career. But, under the principles we set out herein, he has to be given an early opportunity to attempt to achieve that result, absent a demonstration of an important governmental interest to the contrary.

Factor # 4 -- "Protection of Interest".

As the Commission recognized in Oncology, this factor is satisfied by Mr. Geisen's action in timely requesting a hearing and in strenuously opposing any delay in the merits being heard. When we place this factor on the scale, it militates against granting the delay, given Mr. Geisen's timely and vigorous challenge, and notwithstanding his decision (see April 11 Tr. at 68-69) not to challenge the Order's immediate effectiveness (see p. 19-20, above, indicating that such a decision does not diminish the credit for this factor). As we indicated at the outset, however (p. 22, above), this factor does not alter the balance appreciably, in view of the wide disparity already created by the "relative harm" factors. It is thus not necessary to our decision to indicate precisely how much weight it adds.

Factor # 5 -- "Erroneous Deprivation".

This factor calls upon us to evaluate the extent of the risk that Mr. Geisen may have been erroneously deprived of his livelihood. This necessarily would involve a degree of speculation, but the accuracy of that exercise does not seem critical in our circumstances. For, as mentioned above (p. 22), the balance in this case weighs so decisively in Mr. Geisen's favor based on the first three factors, that it could not be altered by this factor.

Were this a closer case, we would start our analysis of this factor with the Government assertion (April 11 Tr. at 40-41) that the likelihood of error in the Staff's enforcement order is diminished by the grand jury indictment, which is said to provide an independent assessment of the merits of the case.[125] Of course, a defendant has no right to present evidence to a grand jury, or to rebut the Government's evidence, so the indictment represents only a finding of probable cause (roughly equivalent to the "adequate evidence" standard that would support the Order's immediate effectiveness), and does not necessarily point to guilt. Under Mallen, the fact of the indictment does count in the Government's favor, as does, under Oncology, the

[125] See Mallen, 486 U.S. at 244 (a grand jury's return of an indictment based on the same facts underlying an immediately effective order "demonstrates that the [order] is not arbitrary").

failure of Mr. Geisen to challenge the immediate effectiveness of the Order.[126] Moreover, the weight to be given this factor here may be increased by a consideration the Government did not mention, namely, that the Government saw fit to indict Mr. Geisen but not certain other co-workers who were also the subject of enforcement orders.

On the other hand, Mr. Geisen says (Geisen Opposition at 17-18; April 11 Tr. at 59-60) that his case for erroneous deprivation is bolstered by the fact that he turned down a deferred prosecution offer from the Department of Justice that would have guaranteed him no prison time if he would admit to the acts alleged. To be sure, accepting that offer -- and thereby ensuring he would avoid prison -- would have also ensured the inexorable disruption of his livelihood, by eliminating any opportunity to challenge the resulting Staff order. But following that course would have saved him the expenditure of time and resources fighting the charges, as well as the overarching threat of prison time. Under this factor, then, we credit him to this extent: he has some belief in his innocence, or at least in his ability to keep the Government from establishing his guilt before a jury, and in his ability in this forum to redeem his career.

Balancing the considerations on both sides, this factor favors the Government. But unless there were facts present or insights available that reduced the level of speculation on this factor (see p. 22, above) and thus increased the weight inherent in our assessment, we would assign it minimal impact on the overall balance regardless of which side it favored. Given the disparity created by the other factors, we find it does not significantly alter the overall balance.

Viewed in the light of the above analyses, the overall balance is driven by the overwhelming weight we attach to the first three factors -- in requesting an indefinite delay, the

---

[126] As has been seen, Oncology teaches that the failure to challenge the Order's immediate effectiveness is not crucial as to the fourth factor, for there may be strategic reasons to omit that step in seeking a hearing, but it nonetheless has weight as to the fifth factor. 38 NRC at 57. As seen in the text later on this page, however, the usually speculative nature of the "risk" factor operates to discount that fifth factor's impact on the overall balance.

Government has failed to show concretely how, in actual practice, its interests will be harmed by having the hearing before us proceed in the ordinary course, while Mr. Geisen has pointed to the serious disruptions to his life that will continue until he has a chance to vindicate himself. In the final analysis, then, our roadmap is clear -- both cases, civil and criminal, can and should proceed simultaneously, on their own pathways, thereby leading to the earliest possible resolution of both, while protecting Mr. Geisen's interests and not harming any the Government has specified.

Accordingly, the Government's abeyance motion is hereby DENIED.[127] The temporary pendente lite stay we previously granted (see March 27 Order at 4-5) now EXPIRES by its own terms.

Of course, at some point, the pathways of the two proceedings may conflict, most likely if the time for both trials approaches contemporaneously. If and when such a scheduling conflict does arise, the U.S. District Court and this Board will be able to entertain the parties' suggestions as to which case should yield, if one must do so. The point is that there now exists no good reason why one must do so, and there is every reason why neither should do so.

---

[127] We considered but rejected the Government's last-minute suggestion (April 11 Tr. at 99) that we grant a delay of defined, limited length that would be subject to renewal, as opposed to an indefinite delay. In the first place, the Government has shown no basis for any delay (beyond the abbreviated stay we granted for the period this matter was under submission). In addition, we would take such action only if there were some expectation that circumstances would change in the future and that the delay request would not need to be renewed. In the circumstances before us, granting a defined-length delay, and then renewing it when presented later with the same circumstances, would be to succumb to incrementalism (see p. 23, above), i.e., to doing in predictable, seemingly less-offensive stages, what we could not do in one entirely unjustified leap.

Instead, we are denying the requested delay, thereby placing the burden on the Government (or on Mr. Geisen) to come back to us, if circumstances do change, to establish that a delay is then justified, or to seek particularized, limited relief to address a discrete problematic situation if one emerges.

Put another way, we stand ready to work with the parties to accommodate their interests and that of the federal district court. For now, the parties should move forward, as expeditiously as circumstances permit.

In that connection, we assume that, given the discovery production the Staff has already made at the end of April in two related civil enforcement proceedings where no criminal charges were pending,[128] it can move more quickly herein than would be normal (i.e., in less than the thirty days allotted by 10 C.F.R. § 2.336) to take the steps we relieved it of pending our disposition of its motion (see March 22 Tr. at 46-47). The Staff is to advise us and Mr. Geisen by 3:00 PM on Thursday, May 25, 2006, of its intentions in that regard.

We hasten to repeat (see n. 124, above) that, in pointing to Mr. Geisen's life disruptions, we have nothing before us that would allow us to express any opinion -- and we intimate none -- on the merits of the Staff's case against him and on whether his challenge to the enforcement order will be successful. All we are saying is that, given the relative harm involved, he is entitled to proceed with that challenge sooner, rather than later; under the Constitution's protections, as implemented by the Commission's regulations, Mr. Geisen is entitled to challenge the Staff's allegations early on. As should be obvious from what we have written, we view the applicable principles and precedents as creating in us a clear duty to reject delay on that score,[129] and to see to it that the hearing before us, to which Mr. Geisen is entitled, proceeds as expeditiously as the complexity of the matter and the volume of the documents will allow.

---

[128] See Dale Miller, IA-05-053, ASLBP NO. 06-846-02-EA, and Steven Moffitt, IA-05-054, ASLBP NO. 06-847-03-EA, both presided over by Licensing Boards with the same makeup as this one (see n. 18, above).

[129] Cf. In re Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (mandamus may lie where there is a clear duty to act and the agency has unreasonably delayed the contemplated action). Further, it may be that any decision to delay indefinitely a hearing on the merits of an immediately-effective order would be subject to judicial review as a final agency action. See, e.g., Shoreham-Wading River Cent. Sch. Dist. v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991); Massachusetts v. NRC, 924 F.2d 311, 321-22 (D.C. Cir. 1991).

We also repeat (see n. 114, above) that the Staff has never suggested that moving forward in both forums would have any deleterious effect on the Staff's ability to present the administrative case to us. In any event, our denial today of the Government's requested delay is without prejudice to either side's right to return to us in the future -- if a side can point to real, practical (as opposed to theoretical, ephemeral) damage to its position that would transpire if the proceeding moved to the next step -- and to seek to delay all or a part of a subsequent stage.[130]

In conclusion, we believe it important to express certain additional thoughts about the Government's representation and its presentation. As noted in Part I, above, we addressed, during a prehearing teleconference on March 22, the matter of the paucity of particularized support for the Government's motion and strongly suggested that the Government bolster its presentation and, to that end, have a key DOJ representative appear before us, a suggestion that the MOU authorizes us to make.

In light of our having made these comments, we were surprised to receive from the Government, shortly before the oral argument, a letter containing the NRC Staff's recounting of the reasons the DOJ's Mr. Ballantine is said to have provided the Staff for not attending the argument.[131] That letter recited why Mr. Ballantine had said he was absenting himself, as follows:

> The affidavits filed by DOJ in support of the Staff's efforts to seek a stay are reviewed by the Professional Responsibility Officer of the Environmental Crimes Section to ensure there are no violations of ethics rules or DOJ policies. Both the Department's United States Attorney's Manual, which governs attorney conduct internally, and the Rules of Professional Conduct applicable to the pending criminal matters, specify the categories of information a

---

[130] See n. 127, above.

[131] Letter from Michael Spencer, Counsel for NRC Staff, to Administrative Judges (April 6, 2006).

> prosecutor may properly disclose about a pending criminal case. (USAM 1-7.500 & 1-7.520, Ohio Disciplinary Rule 7-107). At oral argument, the Professional Responsibility Officer's review of the prosecutor's statements, which the Environmental Crimes Section believes to be necessary, would be impossible.

Thus, Mr. Ballantine did not appear at the argument (April 11 Tr. at 5). As already observed, a number of topics arose that might have benefitted from his participation (id. at 13, 24, 34).

We appreciate the need, where criminal proceedings are involved, for DOJ ethics officers to approve written materials, or to supervise out-of-court statements. But the last sentence of the letter would have us believe that Justice lawyers, whether at headquarters or in United States Attorney's offices -- responsible for regularly appearing in over 100 federal courthouses around the country -- cannot, because of the inability to get ethics pre-clearance, offer any extemporaneous analysis in response to an adjudicatory body's inquiries about a matter pending before it that is related to a pending criminal case. We do not understand that to be the fact.

In any event, we were struck by the Government's rote incantation, in its written and oral presentations, of important principles and serious concerns that have applicability and force in other contexts but simply have no bearing here.[132] At the end of the day, the Government's sole argument was the unsupported and non-particularized assertion that the enforcement proceeding should be delayed to protect DOJ's pending criminal prosecution.

---

[132] Cf. Fed. R. Civ. P. 11(b) (regarding the implicit certification that claims presented are, inter alia, warranted by existing law and have evidentiary support), and 10 C.F.R. §§ 2.304(c) and 2.314(a).

As the Commission has admonished, however, the "Staff's mere assertion that it wishes to protect DOJ's pending criminal prosecution . . . does not, without more, justify holding our parallel administrative proceeding in abeyance." Siemaszko, CLI-06-12, 63 NRC at __ (slip op. at 7). Such a "mere assertion" being essentially all we were given here to counter the serious harm to Mr. Geisen, the Government's motion therefore had to be denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

[original signed by]
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

[original signed by]
E. Roy Hawkens *
ADMINISTRATIVE JUDGE

[original signed by]
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

* Judge Hawkens' concurring opinion, which the other Board members endorse, follows at 45-49.

Rockville, Maryland
May 19, 2006

Copies of this Memorandum and Order were sent this date by e-mail transmission to counsel for Mr. Geisen and for the NRC Staff.

Concurring Opinion of Judge Hawkens

I concur fully in the Board's opinion. Having been a member of the Siemaszko Licensing Board majority whose decision granting the NRC Staff's request to hold an enforcement proceeding in abeyance was just affirmed by the Commission, I write separately to emphasize my agreement with the Board's conclusions that the facts in this case: (1) are materially different than the facts in Siemaszko; and (2) weigh decisively against granting the NRC Staff's request to hold the enforcement proceeding in abeyance.

In the instant case, the Board received an affidavit in support of the requested abeyance from Mr. Thomas Ballantine, who is a Department of Justice ("DOJ") attorney on the trial team prosecuting Mr. Geisen. In his affidavit, Mr. Ballantine asserted, inter alia, that the decision in Siemaszko was a basis for holding this case "in abeyance until the criminal trial is finished" (Staff Motion, Attach. B, Affidavit of Thomas T. Ballantine at 2-3 (Mar. 20, 2006)). Contrary to Mr. Ballantine's assertion, Siemaszko is distinguishable from this case in critical respects.[133]

Mr. Siemaszko was alleged to have deliberately provided materially incomplete and inaccurate information in condition reports while working at the Davis-Besse Nuclear Power Station in 2001. Based on his alleged misconduct, the NRC Staff issued Mr. Siemaszko an enforcement order barring him from employment in the nuclear industry for five years. The order was not made immediately effective. Thereafter, Mr. Siemaszko was criminally indicted, and the NRC Staff – at the behest of the DOJ attorney prosecuting the criminal case – moved to hold the enforcement proceeding in abeyance pending final disposition of the criminal case. The Board granted the NRC Staff's motion, and the Commission affirmed. See Licensing Board Memorandum and Order (Granting the NRC Staff's Motion to Hold this Proceeding in Abeyance) (Mar. 2, 2006) (unpublished) [hereinafter Board Siemaszko Order], aff'd, CLI-06-12, 63 NRC __ (May 3, 2006) [hereinafter Commission Siemaszko Order].

---

[133] The NRC Staff – to its credit – refrained from advancing an argument in support of Mr. Ballantine's Siemaszko-related assertion.

A pivotal difference between this case and Siemaszko is that Mr. Siemaszko suffered no cognizable harm as a result of the enforcement order. The enforcement order issued to Mr. Siemaszko was *not* immediately effective, and he was *not* working in the nuclear industry when the order was issued in any event.[134] Moreover, the parties in Siemaszko agreed that the subsequently issued criminal indictment was a superseding event that eclipsed any adverse impact the order might conceivably have had on Mr. Siemaszko's employment prospects. Thus, as a matter of fact and law, the enforcement order had *no* adverse impact on Mr. Siemaszko's employment or employment prospects in the nuclear industry. See Board Siemaszko Order at 3-4; Commission Siemaszko Order at 10.

In sharp contrast, Mr. Geisen's enforcement order – *which was immediately effective* – inflicted an immediate and serious injury on his constitutionally protected property interest. See FDIC v. Mallen, 486 U.S. 230, 240 (1988) (an individual's employment relationship is a property right protected by the Fifth Amendment). Mr. Geisen was working in the nuclear industry when the Staff issued the enforcement order. As a matter of fact and law, the order mandated his immediate discharge and rendered him unemployable in that industry for five years. The severity of that injury requires no extended discussion (see id. at 243) (Supreme Court has "repeatedly recognized the severity of depriving someone of his . . . livelihood"), and it materially distinguishes this case from Siemaszko.

Additionally, unlike Siemaszko, this record does not compel the conclusion that the subsequently issued criminal indictment was a superseding event that eclipsed the injury inflicted by the enforcement order. As mentioned above, Mr. Geisen's enforcement order commanded his immediate discharge from his job in the nuclear industry. Nothing in this record suggests that,

---

[134] When the NRC Staff issued the enforcement order to Mr. Siemaszko in April 2005, he had not been employed in the nuclear industry for over two and one-half years. His former employer at the Davis-Besse Nuclear Power Station discharged him in September 2002 based on his misconduct. See Board Siemaszko Order at 4 n.4; Commission Siemaszko Order at 10.

absent the order, the subsequently issued criminal indictment would have resulted in Mr. Geisen's discharge. Rather, the record supports the opposite conclusion.

In particular, uncontested record evidence indicates that Mr. Geisen was a valued employee, and that his employer would not have discharged him but for the order that, as a matter of law, rendered him unqualified to continue working in the nuclear industry. See Geisen Opposition, Attach. B, Letter from Lori J. Armstrong, Director Nuclear Engineering, Dominion Energy Kewaunee, Inc., to David Geisen (Feb. 16, 2006). Notably, the employer wished Mr. Geisen "the best in resolving the pending legal matters," and it invited him to "contact [Dominion Energy Kewaunee, Inc.] to discuss the possibility of future re-employment" once he regained the legal status necessary to work there again (ibid.). Thus, on this record, we cannot conclude that the criminal indictment supplanted the serious and continuing injury caused by the enforcement order.

Finally, I find it significant that the NRC Staff – in its brief urging the Commission not to disturb the Board's Siemaszko Order – appears to recognize that the situation in Siemaszko is materially different than the present situation. The NRC Staff said (NRC Staff's Answer to Petition for Review of the Board's March 2, 2006 Order to Hold the Proceeding in Abeyance and Accompanying Brief at 4 n.4 (Mar. 21, 2006)):

> Since the Order against Mr. Siemaszko is not immediately effective, the instant case is distinguishable from situations in which a licensee is subject to an immediately effective suspension order. In those circumstances, a licensee's due process interest in a prompt hearing may well be threatened by a stay, and thus the licensee would have demonstrated irreparable impact . . . .

The Staff's depiction of an entity who has been injured by an "immediately effective suspension order" describes precisely the situation of Mr. Geisen, whose "due process interest" will suffer "irreparable" harm absent an expedited enforcement proceeding (ibid.). As the Staff correctly acknowledged, such a situation – i.e., Mr. Geisen's situation – is "distinguishable" from Siemaszko (ibid.).

In this case, moreover, there is no serious question that the facts weigh decisively against granting the NRC Staff's request to hold the enforcement proceeding in abeyance. The record conclusively shows that the potential harm to Mr. Geisen from holding the enforcement proceeding in abeyance far outweighs the potential harm to DOJ (and therefore to the public) from going forward.

As the Board's opinion explains, the cumulative weight of the following factors weighs heavily in favor of going forward with the enforcement proceeding: (1) the serious and continuing harm to Mr. Geisen's constitutionally protected property interest caused by the immediately effective enforcement order; (2) the fact that the NRC Staff seeks an open-ended delay of indeterminate length;[135] and (3) the fact that Mr. Geisen timely asserted his right to challenge the enforcement order.

In light of the above factors, it was incumbent on DOJ – if it wished to hold the enforcement proceeding in abeyance – to provide fact-specific reasons demonstrating an "overriding public interest for the delay" (Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,197 (May 12, 1992)). Mr. Ballantine's perfunctory affidavit fell far short of making the "particularized showing" that was needed in this case to delay the enforcement proceeding (Oncology Services Corp., CLI-93-17, 38 NRC 44, 60 (1993)).[136]

In reviewing Mr. Ballantine's affidavit, this Board was mindful of the Commission's "long-established policy – memorialized in a formal Memorandum of Understanding – of deferring to

---

[135] As the Commission indicated in Siemaszko, a request to hold an enforcement proceeding in abeyance for an indeterminate length of time is extraordinary and is "rarely" granted (Commission Siemaszko Order at 4).

[136] As explained in the Board's opinion, the factor regarding the extent of the risk that Mr. Geisen may have suffered an erroneous deprivation has no significant impact on the overall balance here.

DOJ when it seeks a delay in our enforcement proceedings pending the conclusion of DOJ's own criminal investigations or proceedings" (Commission Siemaszko Order at 9). To say that we will not lightly second-guess DOJ's views, however, is not to say that we will blindly accept as dispositive DOJ's hypothetical and non-particularized assertions. As the Commission stated in Siemaszko, "the weight to be given [to a] reason for seeking an abeyance turns on the quality of the *factual record* – i.e., DOJ's . . . affidavits supporting th[e] . . . delay" (id. at 8). Here, even according Mr. Ballantine's affidavit the full measure of deference it is owed, the reasons he proffered in support of an indeterminate delay lack factual applicability to the circumstances of this case and, accordingly, are entitled to minimal weight.[137]

The NRC Staff – hampered by an inadequate affidavit from DOJ – failed to satisfy its burden of showing "good cause" (10 C.F.R. § 2.202(c)(2)(ii)) in the form of "an overriding government interest" (Oncology, CLI-93-17, 38 NRC at 60) for delaying the enforcement proceeding.

In these circumstances, were we to grant the Staff's motion to hold the enforcement proceeding in abeyance for an indeterminate length of time, we would be acting in patent derogation of Mr. Geisen's "due process rights" (10 C.F.R. § 2.202(c)(2)(ii)). On this record, we have a clear regulatory duty – as well as a constitutional obligation – to conduct Mr. Geisen's enforcement proceeding expeditiously. I therefore concur in the Board's decision denying the NRC Staff's request to hold the enforcement proceeding in abeyance.

---

[137] The Memorandum of Understanding between the NRC and DOJ states that the DOJ attorney will provide "appropriate [supporting] affidavits or testimony as requested by the presiding officer" (53 Fed. Reg. 50,317, 50,319 (Dec. 14, 1988)). Here, the theoretical reasons in Mr. Ballantine's affidavit that purported to support delay were simply inadequate when measured against the weighty countervailing reasons militating against delay. This Board gave Mr. Ballantine the opportunity to cure this deficiency, encouraging him to attend oral argument to clarify and particularize the assertions in his affidavit. See Licensing Board Memorandum and Order Summarizing Conference Call at 5 (Mar. 27, 2006) (unpublished) (Board "strongly urged that [Mr. Ballantine] be present [at oral argument] . . . to provide detailed and case-specific reasons" for the requested delay); accord March 22 Tr. at 29-30, 51. Mr. Ballantine declined our invitation. See April 11 Tr. at 5-6.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	
(Enforcement Action)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING GOVERNMENT'S REQUEST TO DELAY PROCEEDING) (LBP-06-13) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
E. Roy Hawkens
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Bradley W. Jones, Esq.
Sara E. Brock, Esq.
Michael A. Spencer, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Richard A. Hibey, Esq.
Miller & Chevalier Chtd.
655 Fifteenth Street, NW, Suite 900
Washington, DC 20005-5701

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of May 2006