UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

June 9, 2006 (10:21am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of	)	
	)	**Docket No. IA-05-052**
	)	
DAVID GEISEN	)	**ASLBP No. 06-845-01-EA**

DAVID GEISEN'S ANSWER OPPOSING THE NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF THE BOARD'S DENIAL OF MOTION TO HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW

Pursuant to 10 C.F.R. § 2.341(b)(3), David Geisen, through undersigned counsel, opposes the Staff of the Nuclear Regulatory Commission's ("Staff") request that the Commission review and overturn the Order[1] of the Atomic Safety and Licensing Board ("Board") denying the Staff's request to delay the proceeding against Mr. Geisen in the above-captioned matter ("Order"). Mr. Geisen also opposes the Staff's request that the Commission stay the effectiveness of the Order pending decision on the Staff's request for review. The Staff asks the Commission to second-guess, through a disfavored procedure that conflicts with long-standing Commission policy, a detailed, fact-driven decision of the Board in order to vindicate the interests of a non-party that steadfastly declined the Board's specific requests to participate in the process. The Commission should decline to do so.

BACKGROUND

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

[1] *See* Attachment A, Memorandum and Order, LBP-06-13, Docket No. IA-05-052 (May 19, 2006).

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> 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.

Order at 1. Mr. Geisen demanded the expedited hearing mandated by 10 C.F.R. § 2.202(c)(1). Following the uncontested grant of a hearing on the immediately-effective Order, the Staff filed a motion[2] ("Motion") asking the Board to hold in abeyance indefinitely the very action it brought against Mr. Geisen.

The Board set the Motion for oral argument and convened a pre-hearing conference with counsel, the content of which was memorialized in an order issued on March 27, 2006 ("March 27 Order").[3] The Board, concerned about the absence of factual support underlying the Staff's claims of prejudice in its motion, clearly advised both the Staff and counsel for Mr. Geisen that it would expect "detailed and case-specific reasons" that various factors[4] should be weighed either for or against abatement of the proceeding, and "strongly urged" that the Department of Justice (DoJ) representative, Thomas A. Ballantine, upon whose affidavit the Staff predicated its argument for abatement, be present at the hearing.

In his Opposition dated March 30, 2006 ("Opposition"),[5] Mr. Geisen set forth specific facts regarding his extensive interactions with NRC investigators and government prosecutors, defined the impact on him of the Staff's immediately-effective Order, and described relevant aspects of the on-going criminal proceeding in Federal District Court in Ohio. Opposition at 1-4.

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[2] *See* Attachment B, NRC Staff Motion to Hold the Proceeding in Abeyance (February 1, 2006).

[3] The relevant portion of the March 27 Order is reproduced in the Order at page 7.

[4] The Board recognized that the Commission's decision in *Oncology Servs. Corp.*, CLI-93-17, 38 NRC 44 (1993) ("*Oncology*") would govern its consideration of the issues raised in the Staff's motion, and directed the parties specifically to that opinion. March 27 Order at 7.

[5] *See* Attachment C, David Geisen's Opposition to the NRC Staff's Motion To Hold The Proceeding In Abeyance (March 30, 2006).

He then discussed the application of *Oncology* to those facts and demonstrated why each of the *Oncology* factors favored his right to be afforded the expedited hearing envisioned in 10 C.F.R. § 2.202(c)(1). Opposition at 5-18.

The Staff did not seek leave of the Board to file a reply to Mr. Geisen's Opposition.

The Board convened a hearing on the Motion on April 11, 2006. Contrary to the Board's specific recommendation, Mr. Ballantine did not appear at the hearing. The Board was "surprised" that Ballantine declined to appear, especially in light of its expression of concern during the prehearing conference regarding the "paucity of particularized support for the Government's motion and strong[] suggest[ion] that the Government bolster its presentation...a suggestion that the [Memorandum of Understanding between DoJ and NRC] authorizes [the Board] to make." Order at 42. Notwithstanding the absence of Mr. Ballantine or any other DoJ representative, the Board heard arguments from, and addressed questions to, counsel for the Staff and for Mr. Geisen throughout a hearing that lasted close to three hours. Near the close of the hearing, the Board provided the Staff with the opportunity either to challenge any of the factual assertions made by Mr. Geisen or to supplement its own factual assertions in support of its motion. The Staff declined the invitation. Order at 36 n. 120 (citing April 11 Tr. at 81-82.)

On May 19, 2006, the Board issued the Order, which consisted of a 43-page opinion signed by all three Judges and a five-page concurring opinion by Judge Hawkens.[6] The Board reviewed the factual and procedural record presented by the parties. Order at 3-7. It discussed at

[6] Notably, Judge Hawkens was a member of the Licensing Board that granted the Staff's request to hold an enforcement proceeding in abeyance in another case arising out of the events at Davis-Besse. *See, Andrew Siemaszko*, Memorandum and Order, CLI-06-12, Docket No. IA-05-021 (May 3, 2006). Judge Hawkens concurring opinion largely focused on the "material[] [factual] differen[ces]" between the instant case and *Siemaszko* which "weigh[ed] **decisively**" (emphasis added) against the Staff's request to hold Mr. Geisen's proceeding in abeyance.

length the legal standards that governed its decision. Order at 8-20. The Board exhaustively applied the facts that it found to the applicable law and concluded that "the balance of the factors [weighed] overwhelmingly against granting the requested delay and in favor of moving forward." Order at 20-42, 3. In so doing, the Board carefully considered the arguments of both parties as presented both in the written pleadings and at oral argument. Order, *passim*. It specifically cited the Staff's failure to demonstrate how its interests would be harmed if the proceeding were not abated and cited the severe financial and personal disruptions that Mr. Geisen suffers and would suffer if the proceeding were abated. Order at 26-36.

The Staff did not seek the Board's reconsideration of its Order, but rather petitioned the Commission for interlocutory review of the Order. The Staff also sought a stay of the Board-ordered proceeding pending review of the Order.

DISCUSSION

I. THE COMMISSION SHOULD DECLINE INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S DECISION.

Licensing Boards are the Commission's primary fact finding tribunals and Board legal rulings are affirmed where an appellant fails to raise an error of law or abuse of discretion that properly serves as grounds for reversal of a Board's decision. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858 (1975); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261 (2000). It is longstanding Commission policy that interlocutory appellate review of a Board's order is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1&2), CLI-94-15, 40 NRC 319 (1994). Indeed, the NRC Staff forcefully argued this very point, and

cited multiple cases in support thereof, in urging the Commission to deny summarily a petition for interlocutory review in *Siemaszko*.[7] *See*, *Siemaszko*, NRC Staff's Answer to Petition for Review of Board's Order at 4 (March 21, 2006). Here, however, despite the fact that the Board has conducted a comprehensive analysis of the facts, and carefully applied the controlling legal precedents, the Staff reverses its position and urges the Commission to engage in an "exceptional" review that flies "in the teeth of ... long-standing articulated Commission policy." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 15 (1983). Because the Staff cannot demonstrate that the Board's principled Order threatens immediate and irreparable impact to it, the Commission should decline to grant interlocutory review of the Board's decision.

A. <u>The Staff cannot demonstrate immediate and irreparable harm.</u>

Notwithstanding the general disfavor against interlocutory review, the regulations allow for such a review if a party can demonstrate that a ruling "[t]hreatens the party adversely affected by it with immediate and serious irreparable" harm. 10 C.F.R. § 2.341(f)(2)(i). As the Staff recently noted "mere generalized representations by counsel or unsubstantiated assertions regarding impact are insufficient to meet the stringent threshold for interlocutory review." *Siemaszko*, NRC Staff's Answer to Petition for Review of Board's Order at 4, citing *Sequoyah Fuels Corp.* (Gore, OK Site), CLI-94-11, 40 NRC 55, 61 (1994). Rather, the moving party must

[7] The Staff cites the Commission's review in *Siemaszko* as support for its argument that the Commission should grant interlocutory review in this case. Petition at 3. The Commission undertook review in *Siemaszko* because the Licensing Board's order in that case caused a structural change -- the indeterminate abatement of an enforcement proceeding -- that was "pervasive and unusual both in time and scope." *Siemaszko*, slip op. at 4. Here, the Order does not cause a similar harm, as it merely allows a proceeding initiated by the Staff to go forward consistent with the Commission's regulations. The Board took specific notice of the Commission's guidance in *Siemaszko* and applied those lessons to the facts of this case.

articulate "clear instances of immediate and tangible risks of irreparable impact." *Sequoyah,* 40 NRC at 62. In this case, the Staff simply cannot make such a showing.

1. The Staff fails to identify a specific "harm" it would incur if the proceeding that it initiated is allowed to proceed consistent with the Commission's regulations.

The Staff makes vague allegations regarding the harm it would incur if the Commission declines to review the Board's Order, but it fails to identify the specific or tangible harm it fears. Rather, it merely recycles the argument, initially made in its Motion, that "the prosecutors expect that an ongoing administrative case would alter th[e] balance" between the parties in a criminal case. Petition at 5-6. But the Board, after extensively reviewing the relevant facts in this particular case, rejected the same argument that the Staff makes here, as well as others that the Staff has elected not to repeat.

In its Motion, the Staff complained of two potential theories by which the Department of Justice could suffer harm if the enforcement proceeding continued. Motion at 4-9. The Board accurately characterized the Staff's alleged harms as "tainting" claims (that the civil discovery process could lead to the tainting of evidence through intimidation of witnesses, opportunity for perjury, or tampering with records), and "access" claims (that the civil discovery process could lead to Mr. Geisen obtaining access to evidence that would provide him an unfair advantage over the Government.) Order at 25-26. After acknowledging the "theoretical validity" of the Staff's arguments to parallel civil and criminal proceedings generally, the Board correctly noted that "they must be shown by the moving party to have some practical applicability to the particular circumstances of the case in order ... to prevail." Order at 27.

The Board analyzed the "tainting" claims first, *id.* at 26-29, and concluded that the Staff's "presentation on the tainting claim is so lacking in any foundation that we are surprised that it

was event put before us." *Id.* at 26. In its Petition, the Staff claims that the Board erred[8] by "requir[ing] DOJ to demonstrate actual harm to the criminal case, rather then the potential for harm..." Petition at 6. In fact, the Board did no such thing:

> We should clarify that in saying that 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.

Order at 30.

The Board analyzed the "access" claims second, *id.* at 31-36, and concluded that "the access concern is essentially weightless in the situation before us." *Id.* at 28. As with the "tainting" claims, the Board carefully weighed the Staff's arguments against the facts of the case. It reviewed the cases that the Staff cited in support of its argument, and acknowledged the Commission's recent policy statement regarding deference to DOJ's views in *Siemaszko.* *Id.* at 32, 36. And given the unique facts and circumstances of this case, *id.* at 32-34, the Board concluded that "any harm to the Government's criminal prosecution that might occur from

[8] Section II of the Petition addresses considerations that are not relevant to the Staff's request that the Commission grant interlocutory review of the Order. The merits of the Order become relevant only if the Commission decides to undertake that review. *Oncology Services Corp.*, 37 NRC 419 (1993). This is why the Commission has held that absent a demonstration of irreparable harm, the fact that legal error may have occurred does not justify interlocutory review given the longstanding Commission policy against it. *Georgia Power Co.*, 40 NRC 319 (1994). If the Commission does grant interlocutory review, Mr. Geisen requests the right to file a brief that focuses on the factors set forth in *Oncology.* In the event that the Commission decides not to allow further briefing on these issues, Mr. Geisen incorporates by reference the points and authorities set forth in the Opposition.

excessive discovery if -- over the Government's objection -- the civil proceeding moves forward, has to be viewed as miniscule in the circumstances of this case." Id. at 31.[9]

The Commission should defer to the Board's factual analyses regarding the lack of actual harm that the criminal prosecution of Mr. Geisen would suffer if the civil enforcement proceeding were to proceed. See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001)(noting that the Commission has repeatedly declined to second-guess plausible Board decisions that rest upon carefully rendered factual findings.) The Staff set forth, both in the Motion and in oral argument, its argument regarding harm. The Board comprehensively reviewed that argument and, on principled grounds, rejected it.

The Staff fails, in its Petition, to bring forth any other argument of harm.[10] Instead, the Staff simply argues that the affidavit filed in this matter by Mr. Ballantine, in light of the Commission's decision in *Siemaszko*, should suffice. That argument ignores significant factual distinctions between this matter and *Siemaszko*.

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[9] The Board also contrasted the lack of harm suffered by the government with the specific and severe harm suffered by Mr. Geisen as a result of the Staff's immediately-effective order. Order at 36-37. The Board noted Mr. Geisen's loss of career and the hardships caused to Mr. Geisen even given his efforts to secure alternative employment. Finally, the Board specifically found that further delay would "exacerbate the 'financial and personal devastation' that the Order caused." *Id.* at 37.

[10] Perhaps in light of the Board's admonition that the Staff's initial "tainting" argument was completely lacking in foundation, the Staff now makes the remarkable assertion that "[t]he potential for witnesses to be less forthcoming and to potentially shape or alter testimony based on the experience of being deposed does not rely on any misconduct by the defendant, but is a natural outgrowth of the adversarial process." Petition at 6-7. This suggestion ignores the moral force of the taking of a testimonial oath and the fact that this country's civil legal system is founded upon a model in which witnesses frequently testify at trial after having participated in depositions. Federal Rules of Civil Procedure 30, 32. Indeed, many of the witnesses that will testify at Mr. Geisen's criminal trial will have testified already before the Office of Investigations, the facility licensee, and the Grand Jury in this matter (in proceedings conducted by the prosecutors, but closed to Mr. Geisen or his counsel.) A federal judge would certainly greet with derision any argument by Mr. Geisen that those individuals were "less forthcoming" or prone to "shape or alter testimony" based solely upon that experience.

In *Siemaszko*, the Staff submitted five separate affidavits from Mr. Ballantine, four of which were filed under seal. *Siemaszko*, slip op. at 7-8. Here, the Staff filed just the single affidavit, and did not supplement the record despite the Board's specific "admonition that more would likely be needed." Order at 27 n. 95.

In *Siemaszko*, the Commission noted that one of the affidavits, which remains under seal, included "detailed factual justifications" for the stay. *Siemaszko*, slip op. at 8. Here, Mr. Ballantine's affidavit consisted of "rote incantations" that were "couched in conclusory, non-case-specific terms." Order at 25, 27 n.95.

In *Siemaszko*, the Licensing Board, after reviewing the affidavits in that matter, determined (by a two-to-one vote) that the "concerns about excessive discovery weighed in favor of holding the enforcement proceeding in abeyance." *Siemaszko*, slip op. at 7. Here, the Board (which included a member, Judge Hawkens, that ruled in favor of the Staff in *Siemaszko*) unanimously found that the "representations made by the DOJ's Mr. Ballantine have <u>not even come close</u>" to showing that the Staff's theoretical concerns have practical applicability to the particular circumstances of the case. Order at 27 (emphasis added).

Because the Staff simply cannot demonstrate that any tangible harm would be caused if the Order were allowed to take effect, the Commission should deny interlocutory review.

2. <u>Any theoretical harm that could occur would be neither "immediate" nor "irreparable."</u>

The Staff must not only establish that harm would occur absent Commission intervention, but also that the harm would be immediate and irreparable. 10 C.F.R. § 2.341(f)(2)(i). The Staff's entire presentation on immediacy and irreparability consists of the following statement: "[the] harm is not speculative. If the Board's decision is not reversed and a stay is not granted,

the proceeding will move into discovery. At that point, the damage will have been done." It is well-established that mere generalizations by counsel are not enough to satisfy the movant's burden to prove that alleged harm (which the Staff sees is Mr. Geisen's taking of discovery) would be immediate and irreparable. *Sequoyah Fuels Corp.*, 40 NRC at 61; *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 & 2), ALAB-735, 18 NRC 19, 23-24 (1983).

If the Commission declines to grant interlocutory review, this proceeding will move, per the regulations, into discovery. The discovery process is limited by the Commissions rules and will be overseen by the Licensing Board. Clearly, the first discovery event -- the Staff's service of its initial document disclosures -- will not cause any harm to the government, as the Staff has agreed, with approval from the Department of Justice, to make those disclosures prior to the Commission's resolution of the Staff's Petition. Petition at 9. In the event that future developments were to present a genuine risk of specific, cognizable harm to either party, the Board made clear that it would entertain requests for relief. *See* Order at 25-26 ("[t]he decision we reach allows us to begin to make progress in this civil proceeding, perhaps all the way to an expeditious conclusion (barring developments that might justify delay of some later stage, were a party then to be threatened with genuine aggrievement); *id.* at 40 n.127 ("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"); *id.* at 42 ("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...") Given these facts, it is clear that any potential harm would be neither "immediate" nor

"irreparable" such that the Commission should undertake the extraordinary step of granting interlocutory review.

3. Any "harm" would not affect the NRC, and because DoJ failed to participate in the process, notwithstanding the Board's explicit requests, any speculative "harm" to it should not cause the Commission to grant interlocutory review.

It is clear the "harm" the Staff predicts would affect only the Department of Justice and not the NRC (or the NRC Staff.) Indeed, the NRC has a strong interest in expediting hearings on enforcement matters.[11] The Staff notes in the first sentence of its Petition that it is made "at the request of the Department of Justice." Petition at 1. Later, in its discussion, the Staff submits that the Board's ruling "threatens the Department of Justice's criminal prosecution with immediate and serious irreparable impact." *Id.* at 3. In the Order, the Board noted 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." Order at 36 n.114 (emphasis omitted).

The Commission is empowered to grant interlocutory review at the request of a party if that party demonstrates that it would be adversely affected with immediate and serious irreparable impact. *See* 10 C.F.R. § 2.341(f)(2)(i)(emphasis added). The regulations do not appear to contemplate that such an extraordinary remedy would be granted to a party seeking to

[11] See, Changes to Adjudicatory Process, Final Rule, 69 Federal Register 2182, Nov. 14, 2004: "The Commission has had longstanding concern that the adjudicatory process in 10 C.F.R. Part 2, subpart G, associated with licensing and enforcement actions, is not as effective as it could be...[A]ll too frequently their use resulted in protracted costly proceedings." *Id.* Changes to Part 2 were intended to expedite resolution of ASLB proceedings, e.g. 10 C.F.R. § 2.334.

vindicate the interests of a non-party.[12] Indeed, it is well-settled that one seeking to appeal an issue must have participated and taken all timely steps to correct the error, *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1&2), ALAB-583, 11 NRC 447 (1980), and that lack of participation below will increase the movant's already heavy burden of demonstrating that interlocutory review is necessary. *Public Service Co. of New Hampshire*, 18 NRC at 175-6.

Those principles apply with significant force in this situation. After the Staff filed its Motion, the Board made clear, both orally and in writing, that it found the Staff's presentation to be lacking in particularized support and strongly suggested that the Staff both bolster is presentation and have a DoJ representative appear at the hearing. Order at 41. Mr. Ballantine (or any other DoJ representative) declined to appear, for reasons that the Board found inconsistent with their understanding of procedures. Order at 41-42. But, in addition to declining the Board's specific invitation to attend the hearing, the DoJ also failed to offer any additional information to the Board, notwithstanding that the Board had explicitly set forth the areas in which the Staff's initial presentation was insufficient. *See* March 27 Order at 5-6. The DoJ repeatedly failed to participate in the proceedings before the Board in the face of clear suggestions that it do so. That failure makes the present claim of "immediate and irreparable" harm ring hollow, for if the DoJ perceived any real harm, it would have found a way to present

[12] The existence of a Memorandum of Understanding (MOU) between DoJ and the NRC does not affect this analysis, for the MOU does not unite the DoJ and NRC into a single party. While it does recognize the potential benefit of coordination between the agencies in investigations involving the same factual matters, the MOU explicitly recognizes that the NRC and DOJ have distinct statutory responsibilities. The Board examined the MOU in the course of considering the Staff's Motion, and properly concluded that "[i]f 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." Order at 27 n.93.

facts consistent with the Board's suggestion. It certainly should make it impossible for the Staff to establish the existence of "most compelling circumstances" that would cause the Commission to ignore its own longstanding policy and undertake a disfavored, discretionary interlocutory appellate review. *Carolina Power & Light Co.*, 51 NRC at 299.

II. THE COMMISSION SHOULD DENY THE STAFF'S REQUEST TO STAY THE EFFECTIVENESS OF THE BOARD'S ORDER PENDING A RULING ON THE STAFF'S PETITION FOR REVIEW.

The Staff has also requested that the Commission stay the effectiveness of the Order pending a ruling on the petition for review. "Interlocutory appeals or petitions to the Commission are not devices for delaying or halting Licensing Board proceedings[.]" *Sequoyah Fuels Corp. and Gen. Atomics* (Gore, OK Site), CLI-94-09, 40 NRC 1, 6 (1994). Consequently, the "stringent" four-part test governing the Commission's consideration of a request for a stay "makes it difficult for a party to obtain a stay of any aspect of a Licensing Board proceeding," and "only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission." *Id.* In this case, the Staff's request fails on both procedural and substantive grounds, and should therefore be denied.

A. Timeliness

The Staff's request for a stay is untimely. The Order was issued on May 19, 2006, and was transmitted to the parties by electronic mail. As such, any motion for a stay was required to be filed by May 30, 2006. *See*, 10 C.F.R. §§ 2.306, 2.342. The Staff's request for a stay was filed on May 31, 2006.

B. The Staff cannot demonstrate the required elements necessary to support its request for a stay.

Even should the Commission decide to grant interlocutory review, the Staff's request for a stay should be denied because the Staff can neither demonstrate that it will be irreparably

injured unless a stay is granted nor can it make a strong showing that it is likely to prevail on the merits. *See* 10 C.F.R. § 2.342(e).[13]

1. The Staff will not be irreparably injured if a stay is not granted.

Although no single factor is dispositive, "the most crucial is whether irreparable injury will be incurred by the movant absent a stay." *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981). General assertions, in conclusory terms, of alleged harmful effects are insufficient to demonstrate entitlement to a stay. *Public Service Co. of Oklahoma* (Black Fox Station, Units 1&2), ALAB-505, 8 NRC 527, 530 (1978). The Staff's arguments regarding irreparable injury warranting a stay are not materially different than its arguments regarding immediate and irreparable impact warranting interlocutory review. For the reasons set forth more fully above, section I.A. *supra*, the Staff simply cannot establish the likelihood of irreparable injury on the specific facts of this case.

2. The Staff has not made a strong showing that it is likely to prevail on the merits.

A second factor the Commission will consider in evaluation of a motion for a stay is "[w]hether the moving party has made a strong showing that it is likely to prevail on the merits." 10 C.F.R. § 2.342(e)(1). Where there is no showing of irreparable injury absent a stay, an "overwhelming" showing of likelihood of success on the merits is required for the movant to prevail. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5

[13] Because the Staff cannot carry its burden on the irreparable injury and likelihood of success prongs, it is not necessary for the Commission to give lengthy consideration to balancing the other two factors set forth in 10 C.F.R. § 2.342(e). *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985). To the extent that the Commission were to consider those factors, however, the third factor (harm to other parties) weighs heavily in Mr. Geisen's favor, see Order at 35-36, and the fourth factor (where the public interest lies) weighs against the Staff given that the NRC's rule providing expedited hearings for immediately effective orders is based on Constitutional due process concerns. See Section I, *supra*.

N.R.C. 1185, 1186-89 (1977). See also *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n. 8 (1985)(requiring a "virtual certainty of success on the merits.") In order to satisfy this significant burden, the movant must present compelling and specific arguments detailing the reasons it will prevail. Simply listing the possible grounds for reversal will not suffice. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621 (1977). Mere expressions of confidence or expectation of success on the merits by counsel are too speculative and insufficient. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 196 (1985).

For the reasons set forth throughout section I, *supra.*, the Order is a thorough, careful, and correct application of the relevant law and regulations to the specific facts and circumstances presented in this case. Given the deference due to Licensing Board decisions, especially in fact-driven situations, *see Carolina Power & Light Co.*, 53 NRC at 382, the likelihood that the Staff will succeed on the merits is minimal, at best. The fact that the Staff claims a single legal error in the Petition (that the Board erred by "requir[ing] DOJ to demonstrate actual harm to the criminal case, rather then the potential for harm..." Petition at 6) and that the claim is based upon a clearly incorrect reading of the Order, *see supra* at 7, furthers that conclusion.

Because the Staff cannot satisfy the stringent standard required to justify a stay, the Commission should deny that request and allow the enforcement proceeding that the Staff initiated against Mr. Geisen to proceed under the supervision and direction of the Licensing Board.

CONCLUSION

The Commission should decline interlocutory review of the Order because the Staff cannot show that it would suffer immediate and irreparable harm in the absence of such a review. The Commission should not impose a stay pending its consideration of the Petition because the Staff also cannot make a strong showing that it is likely to prevail on the merits. In fashioning the Order, the Board faithfully applied Commission and judicial precedents, including the Commission's guidance in *Siemaszko*, to carefully-found facts. It properly concluded that an indefinite abatement of the enforcement proceeding against Mr. Geisen -- a proceeding that the Staff initiated with an order that the Staff elected to make immediately-effective -- would unfairly deprive Mr. Geisen of a Constitutionally-protected property right without due process and without justification. The Commission should defer to its fact-finding tribunal and should allow this proceeding to go forward in accordance with the Commissions' rules and under the supervision of the Licensing Board.

Respectfully Submitted,

Richard A. Hibey (atw

Richard A. Hibey
Andrew T. Wise
Matthew T. Reinhard
Counsel for David Geisen

Dated: June 9, 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of David Geisen's ANSWER OPPOSING THE NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF THE BOARD'S DENIAL OF MOTION TO HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW in the above-captioned matter have been served on this 9th day of June, 2006, on the following persons via email as indicated by an (*) and by regular mail as indicated by an (**):

Office of the Secretary (*), (**)
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20005
E-mail: hearingdocket@nrc.gov

Michael A. Spencer (*), (**)
E-mail: mas8@nrc.gov
Sara Brock (*), (**)
Email: seb2@nrc.gov
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555-0001

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

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

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

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

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

Andrew T. Wise

ATTACHMENT A

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

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

LBP-06-13

DOCKETED
USNRC

May 19, 2006 (2:15pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

SERVED 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

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[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,

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[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

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[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.

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[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.

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[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:

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[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.

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[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

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[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]

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[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]

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[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

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[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

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[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

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[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]

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[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]

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[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]

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[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

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[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

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[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.

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[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

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[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

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[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

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[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

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[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

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[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]

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[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

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[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

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[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]

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[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

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[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

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[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

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[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]

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[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

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[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]

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[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

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[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

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[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.

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[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.

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[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

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[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.

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[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

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

E. Roy Hawkens *
ADMINISTRATIVE JUDGE

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].

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[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,

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[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

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[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.

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[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

Evangeline S. Ngbea
Office of the Secretary of the Commission

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

ATTACHMENT B

March 20, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF MOTION TO HOLD THE PROCEEDING IN ABEYANCE

INTRODUCTION

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

BACKGROUND

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

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

[2] *See* MOU Between the NRC and DOJ, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988).

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

(1) concurring on written responses sent to the NRC under oath and affirmation on September 4, October 17, and October 30, 2001, (which responses contained information known by Mr. Geisen to be incomplete and inaccurate); and

(2) preparing and presenting information during internal meetings on October 2 and 10, 2001, and during meetings or teleconferences held with the NRC on October 3, 11, and November 9, 2001, with knowledge that information presented in those meetings was incomplete and inaccurate.

Mr. Geisen responded on February 23, 2006, requesting a hearing on the Staff's Order and denying the allegations therein.[4]

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

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

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

[4] *See* Answer and Demand for an Expedited Hearing *David Geisen, IA-05-052* (February 23, 2006).

[5] *See* Attachment A, *United States v. David Geisen, et al.*

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

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

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

DISCUSSION

A. Legal Standards Governing Stays of Proceedings

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

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[6] 10 C.F.R. § 2.202(c)(2)(ii).

[7] CLI-93-17, 38 NRC 44 (1993).

[8] *Id.* at 50.

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

1. Reasons for the Stay

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

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

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

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[9] *See* Attachment B, Affidavit of Thomas T. Ballantine, Trial Attorney, March 20, 2006 (Ballantine Affidavit).

[10] 307 F.2d 478, 487 (5th Cir. 1962).

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

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

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[11] 18 U.S.C. § 3500.

[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

[13] *Giglio v. United States*, 405 U.S. 150 (1972).

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

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

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

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

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[15] This process allows defense perusal of all nonprivileged documents in the prosecution's files.

[16] *See* Fed. R. Crim. P. 16.

[17] *See* Fed. R. Crim. P. 15.

[18] *Campbell*, 307 F.2d at 487.

[19] *Id.*.

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

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

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

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

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

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

[21] *See id.*

[22] *See* Ballantine Affidavit.

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

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

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

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[24] Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (Pollack, J.) (hereafter, "Parallel Proceedings").

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

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

[27] 628 F.2d 1368, 1375-76 (1980).

of criminal discovery.[28]

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

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

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

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

[29] *See* Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20194, 20197 (May 12, 1992).

[30] *Id.*

[31] *See* MOU Between the NRC and DOJ, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988).

[32] *See id.* at 50318.

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

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

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

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[37] *Campbell*, 302 F.2d at 487.

[38] *Brock v. Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y.,1985).

[39] *See Par Pharmaceutical*, 133 F.R.D. at 14.

[40] *See* Policy Statement, Revision of the NRC Enforcement Policy, 65 Fed. Reg. 25368, 25385 (May 1, 2000).

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

2. Length of the Stay

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

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

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[41] *See* Ballantine Affidavit.

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

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

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

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

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

4. Prejudice to Mr. Geisen

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

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[44] *See Oncology*, 38 N.R.C. 44.

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

[46] *Barker v. Wingo*, 407 U.S. 514 (1972).

[47] *See Oncology*, 38 N.R.C. at 58.

[48] *Barker*, 407 U.S. at 531.

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

mount an adequate defense to the order and prejudice to the party's private interest.[50]

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

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

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

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

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[50] *Oncology*, 38 N.R.C. at 51.

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

[52] *See* Discussion *supra* Part B.2.

that "[t]he strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned."[53]

5. Risk of Erroneous Deprivation

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

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

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

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

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

[55] *Oncology*, 38 N.R.C. at 57.

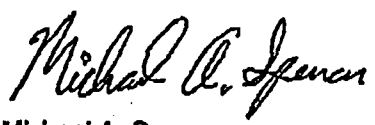
[56] *See* 10 C.F.R. § 2.202(c)(2)(i).

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

CONCLUSION

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

Respectfully submitted,



Michael A. Spencer
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of March, 2006

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[57] *Oncology*, 38 N.R.C. at 57.

[58] *Id.*

March 20, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of	)	
	)	
DAVID GEISEN	)	IA-05-052
	)	
	)	

CERTIFICATE OF SERVICE

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

Michael C. Farrar * **
Administrative Judge, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555-0001
E-Mail: mcf@nrc.gov

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

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

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

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

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

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

Michael A. Spencer
Counsel for NRC Staff

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User Name: awise

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ATTACHMENT C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

Application of the *Oncology Services Corp.* Principles

1. Length of the Stay

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

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

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

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

2. Reason for the Stay

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

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

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

a. *The NRC-DoJ Memorandum of Understanding*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(footnote continued on next page)

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

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

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

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

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(footnote continued from previous page)
involve a parallel proceeding and the Ninth Circuit was not addressing any issue similar to the ones before this Board. *Iglesias* simply has no application to this case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. The Harm to David Geisen

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

The Staff concedes in its Motion that Mr. Geisen "can be" prejudiced to the extent that he continues to be barred from employment involving NRC-licensed activities while resolution of this proceeding is delayed. The prejudice that Mr. Geisen has suffered and continues to suffer as a direct result of the Order and will continue to suffer as long as resolution of the proceeding is delayed is hardly conjectural. He was terminated from his job at Kewanee because the Order

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

5. The Risk of an Erroneous Deprivation

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

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

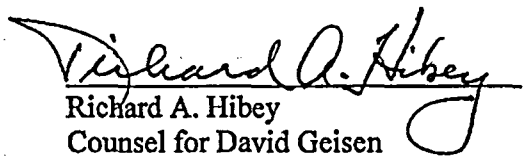
following comprehensive discovery, says little about his chance of ultimately prevailing and more about his faith in the fairness of a summary process.

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

CONCLUSION

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

Respectfully Submitted,



Richard A. Hibey
Counsel for David Geisen

Dated: March 30, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of David Geisen's REPLY AND OPPOSITION TO THE NRC STAFF'S MOTION TO HOLD THE PROCEEDING IN ABEYANCE in the above-captioned matter have been served on this 30th day of March, 2006, on the following persons via email as indicated by an (*) and by regular mail as indicated by an (**):

Office of the Secretary (*), (**)
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20005
E-mail: hearingdocket@nrc.gov

Michael A. Spencer (*), (**)
MAS8@nrc.gov
Sara Brock (*), (**)
SEB2@nrc.gov
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555-0001

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

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

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

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

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

Richard A. Hibey

Richard A. Hibey

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DECLARATION OF DAVID GEISEN

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

I have personal knowledge of the following facts:

1. My birth date is January 25, 1960.

2. I reside at 1749 Hawthorne Heights Drive, De Pere, Wisconsin 54115-8330.

3. I have been married to Kathleen Geisen (nee Bondowski) since 1982. Together we have three children: Ashley Elizabeth, Nicholas David, and Meg Therese.

4. I graduated from Marquette University in 1982 with a BS in Civil Engineering. I received an MBA in Finance from Bowling Green State University in 1995.

5. From 1982 through 1988, I served in the United States Navy. I graduated in the top half of my class from the Navy Nuclear Power School and Prototype. I then attended Navy Submarine School before serving for approximately thirty months as a Submarine Warfare Officer aboard the USS Nathanael Greene. For the last two years of my service in the Navy, I was the Navy Recruiting Command Area Five NUPOC Coordinator. In that position, I was awarded a Navy Commendation Medal and six Navy Recruiting Gold Wreaths.

6. After leaving the U.S. Navy, I began work for First Energy Nuclear Operating Company (FENOC) at the Davis-Besse Nuclear Power Station. From 1988 through 2002, I held the following positions:

   May 1988- June 1994: Senior System Engineer
   June 1994-June 1996: Candidate in Senior Reactor Operator training program
   July 1996- March 2000: Supervisor - Electrical & Controls Systems Engineering
   March 2000-May 2002: Manager Design Basis Engineering

7. In October 2002, FENOC offered me a lesser position at Perry Nuclear Power Plant. I declined that offer, and instead began work for Nuclear Management Company at the Kewaunee Nuclear Power Plant. I started at Kewaunee as Quality Assurance/Quality Control Manager and later transferred to Supervisor Nuclear Engineering. I performed my employment without incident until January 5, 2006.

8. I have been interviewed on six different occasions by persons investigating the circumstances surrounding FENOC's discovery of a hole in the reactor pressure vessel head at Davis-Besse and/or FENOC's responses to NRC Bulletin 2001-01. Included in these interviews were an interview with Senior Special Agent Joseph Ulie, Special Agent Michele Janicki, and Senior Reactor Inspector James Gavula on October 29, 2002 and an interview with Ulie, Janicki, Gavula, Assistant United States Attorney Christian Stickan, Department of Justice Attorneys Richard Poole and Thomas Ballantine on February 3, 2005.

9. In November 2005, the Department of Justice offered me a deferred prosecution agreement. I refused to accept that offer because it required that I admit I knowingly made false statements to the NRC which proposed admission was untrue.

10. On January 4, 2006, I received a copy of the NRC Staff's Order Prohibiting Involvement in NRC-Licensed Activities.

11. On January 5, 2006, I was informed by my Supervisor, Lori Armstrong, that I was being placed on leave and that I was not allowed to enter the Kewanee facility due to the NRC Order.

12. On January 26, 2006, I received notice from Ms. Armstrong that Dominion was posting my position because the NRC Order disabled me from performing my job duties.

13. On February 16, 2006, I was informed by Ms. Armstrong that I was being terminated, effective immediately, because the NRC Order removed my qualifications to perform my job at Kewaunee.

14. I am now self-employed as the owner and primary operator of a business called Commercial Gaskets of Wisconsin, Inc., which manufactures and replaces refrigeration door and drawer gaskets for food service providers.

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

_____
David Geisen

Executed on: March 30, 2006

<YiF>603782.1</YiF>

7. In October 2002, FENOC offered me a lesser position at Perry Nuclear Power Plant. I declined that offer, and instead began work for Nuclear Management Company at the Kewaunee Nuclear Power Plant. I started at Kewaunee as Quality Assurance/Quality Control Manager and later transferred to Supervisor Nuclear Engineering. I performed my employment without incident until January 5, 2006.

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

David Geisen

Executed on: March 30, 2006

ATTACHMENT B

Dominion Energy Kewaunee, Inc.
N490 Highway 42, Kewaunee, WI 54216-9511

Dominion®

February 16, 2006

David Geisen
1749 Hawthorne Heights
DePere, WI 54115

Dear Dave:

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

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

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

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

Sincerely,

Lori J. Armstrong
Director Nuclear Engineering

ATTACHMENT C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED:

Vernelis K. Armstrong
U.S. Magistrate Judge

CERTIFICATE OF SERVICE

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

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

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

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

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

/s/ Thomas T. Ballantine

ATTACHMENT D

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

CRIMINAL DEFENSE

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

LORAIN COUNTY:

600 BROADWAY
LORAIN, OHIO 44052
TELEPHONE:

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

FACSIMILE:
(440)244-0811

RECEIVED

MAR 2 4 2006

Miller & Chevalier

March 20, 2006

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

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

Dear Sir/Madam:

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

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

Thank you for your time and consideration.

Very truly yours,

James M. Burge

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

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

In support of this motion, counsel sets forth that,

1. He is currently seeking the office of Judge of the Lorain County Court of Common Pleas;

2. If successful, he will be unable to participate in the preparation and trial of this matter and to provide defendant with the effective assistance of counsel;

3. Since defendant's arraignment on January 27, 2006 and before, counsel has cooperated with the government in response to its duces tecum subpoena issued to defendant, and the government has acknowledged receipt of all discovery that defendant is able to provide, to date;

4. Counsel has received discovery provided by the government and has furnished the same to defendant's counsel in a related matter, Billie P. Garde, 1707 L. Street, N.W. Suite 500, Washington, D.C. 20036, Phone: 202-289-8990, who has indicated her inclination to represent defendant in this matter, with co-counsel;

5. Defendant is aware of the difficulty of present counsel in proceeding further in defendant's representation;

LAW OFFICE
JES M. BURGE CO., L.P.A.
600 BROADWAY
LORAIN, OHIO 44052
(440) 244-1808
(440) 324-7881
FAX
(440) 244-0811

6. Counsel has referred Attorney Garde to another attorney, acceptable to defendant, to act as lead counsel in this matter;

7. Counsel has put the government on notice of all of the above facts; and,

8. It is in defendant's best interest and in the interest of justice that this motion be granted to obviate any delay in the trial of this matter which may be required should counsel be elected to office.

II

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

Counsel so moves for the following reasons:

1. The discovery process is not yet complete; and,

2. The extensive discovery provided by each party has been too voluminous to evaluate for the purpose of completing pretrial motion practice.

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

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

LAW OFFICE
JAMES M. BURGE CO., L.P.A.
600 BROADWAY
LORAIN, OHIO 44052
(440) 244-1808
(440) 324-7881
FAX
(440) 244-0811

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

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

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

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

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

Andrew Siemaszko
3638 Lost Oak Dr.
Spring, Texas 77388

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

James M. Burge
Attorney for Defendant

LAW OFFICE
JAMES M. BURGE CO., L.P.A.
600 BROADWAY
LORAIN, OHIO 44052
(440) 244-1808
(440) 324-7881
FAX
(440) 244-0611