October 27, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF MOTION FOR STAY OF PROCEEDING OR
IN THE ALTERNATIVE FOR A PRECLUSION ORDER

INTRODUCTION

In accordance with 10 C.F.R. § 2.323, the NRC Staff moves that the Board stay this proceeding until the completion of the criminal case against Mr. David Geisen or, in the alternative, that the Board issue an order prohibiting Mr. Geisen, in opposition to summary disposition or at hearing, from introducing any evidentiary or factual information, including contentions, claims, and defenses, which Mr. Geisen has not provided to the Staff as of the close of the written discovery process in this proceeding.

BACKGROUND

On January 4, 2006, the NRC Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)" (Geisen Order) to Mr. David Geisen. The Order alleged that Mr. Geisen violated 10 C.F.R. § 50.5(a)(2) by submitting information material to the NRC that he knew to be incomplete or inaccurate, during the Fall of 2001, in responses to Bulletin 2001-01, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles," (Bulletin), issued August 3, 2001. These responses were submitted on behalf of his employer, FirstEnergy Nuclear Operating Company, the licensee for the Davis-Besse nuclear power reactor. On January 19, 2006, Mr. Geisen was criminally indicted in the United States

District Court for the Northern District of Ohio. The indictment covers issues and facts inextricably intertwined with those covered by the Order.[1] Mr. Geisen was arraigned on January 27, 2006, and pled not guilty to the charges against him.

On February 23, 2006, Mr. Geisen filed an "Answer and Demand for Expedited Hearing," (Answer) in this proceeding. Except for isolated instances, the Answer did not engage the specific allegations made in the Order. Rather, the Answer contained repetitive, general denials of the elements of 10 C.F.R. § 50.5(a)(2).

On March 20, 2006, the NRC Staff filed "NRC Staff Answer to Request for a Hearing," which did not oppose Mr. Geisen's hearing request, and "NRC Staff Motion to Hold the Proceeding in Abeyance" (First Stay Motion), the latter filed pursuant to a request from the Department of Justice (DOJ). The First Stay Motion requested a stay of the civil enforcement proceeding pending the outcome of the criminal trial on several grounds, a principal one being the potential harm to both the criminal and civil enforcement proceedings from an imbalanced civil enforcement discovery process, in which Mr. Geisen would gain discovery from the Staff while asserting his privilege against self-incrimination to avoid complying with his own discovery obligations.[2]

On March 30, 2006, Mr. Geisen filed his "Opposition to NRC Staff Motion to Hold the Proceeding in Abeyance" (First Stay Answer), and oral argument on the First Stay Motion was

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[1] 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 is supported by specified submissions and representations, including the written responses sent to the NRC on September 4, October 17 and 30, 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.

[2] *See* First Stay Motion at 7-12.

conducted on April 11, 2006. During oral argument, counsel for Mr. Geisen was asked whether Mr. Geisen would invoke his Fifth Amendment right against self-incrimination, and counsel replied that a decision had not yet been made.[3] However, counsel did state that he was prepared to engage in reciprocal discovery.[4]

Soon after the Staff made its initial disclosures on June 6, 2006, a Prehearing Conference was held on June 8, 2006. In that Conference, the subject of Mr. Geisen's disclosures to the Staff came up, and counsel for Mr. Geisen again said that they would meet their disclosure obligations. Counsel for Mr. Geisen said he would gladly turn over documents he would be using in his case-in-chief.[5]

The Staff made its initial disclosures, as required by 10 C.F.R. § 2.336(b), only a couple of weeks after issuance of the Board decision, turned over proprietary documents as soon as a protective order was entered, and has regularly made required hearing file updates to reflect the discovery of additional documents. The Staff's production consists of well over 15,000 documents. In contrast, Mr. Geisen has not disclosed a single document nor identified any documents withheld from disclosure. Instead, Geisen indicated that he was not "disclosing, *listing or describing* any information in his possession, custody, or control that is protected from disclosure by the attorney-client privilege, the attorney work-product doctrine or *other applicable statutory or common law privileges*."[6] Mr. Geisen nowhere clarified what these "other applicable" privileges might be, and no privilege log has been produced.

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[3] First Stay Motion Argument Transcript at 67.

[4] First Stay Motion Argument Transcript at 113 (lines 9-17), 114 (lines 6-9).

[5] Prehearing Conference Transcript at 123.

[6] *Id.* at 2 (emphasis added).

On August 2, 2006, the parties submitted a "Joint Status Report" that set forth the parties' proposed discovery schedule. The discovery schedule contemplated the mutual submission of written discovery requests on September 1, 2006, with responses due in thirty days. A ninety day period of fact discovery was contemplated following written discovery, with any expert discovery to follow fact discovery.

Written discovery requests were, in fact, concurrently submitted by the parties on September 1, 2006, (hereafter Geisen Written Discovery Requests and Staff Written Discovery Requests) and responses were concurrently submitted on October 3, 2006 (hereafter Geisen Responses and Staff Responses).[7] The interrogatories for both parties were directed, in part, at exploring the parties' contentions regarding claims made in the Order and the parties' bases for their contentions. Both parties also requested documents related to events at issue in the proceeding.

The Staff, with a significant expenditure of effort, provided substantial responses to Mr. Geisen's discovery requests. The Staff (1) turned over yet more documents to Mr. Geisen, (2) disclosed (whenever requested) its positions on contested matters, and (3) provided its factual basis for those positions. In response to many of the interrogatories, dozens of documents were cited as the factual basis for the Staff's position.[8]

Although Mr. Geisen requested, and received, responses to interrogatories seeking to probe the Staff's positions on contested issues, Mr. Geisen did not answer the Staff's interrogatories seeking to probe his positions on contested issues. The Staff, in its interrogatories, very precisely asked Mr. Geisen's position on every single element of every

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[7] Although the proposed schedule contemplated responses thirty days after September 1, 2006, the first weekday after this thirty day period was October 2, 2006. Because of a computer glitch on October 2, the parties agreed to delay the mutual filing of responses until October 3, 2006 at 1PM.

[8] *See e.g.,* Staff Responses (interrogatory responses 13, 14, 15, 18, 20, 21, 22, and 24).

single violation alleged in the Order, and asked for his position on those issues. Mr. Geisen refused to provide his position on any contested issue, much less the factual basis for that position. Additionally, Mr. Geisen, to this date, has still not produced any documents to the Staff. Although counsel for Mr. Geisen has informed the Staff that their document production will be forthcoming, that production will be subject to the objections cited in their response to the Staff's Document Requests, including the catch-all "any applicable privilege" cited therein. After being queried by the Staff, counsel for Mr. Geisen acknowledged that these other applicable objections might include the privilege against self-incrimination.

DISCUSSION

Full and compete discovery is a necessary component of civil litigation, including NRC administrative proceedings concerning the validity of enforcement actions taken by the Staff.[9] The discovery process is designed to permit issues to be defined, clarified and narrowed so as to allow the parties to be thoroughly prepared to meet all possible issues.[10] Specifically, the impetus behind the civil discovery process is the desire to eliminate unfair surprise, to allow an efficient trial process, and otherwise to permit substantial justice.[11] In order to achieve these goals, discovery must be reciprocal.[12] As is now clear from the actions of Mr. Geisen, the Staff

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[9] *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947); "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2194-95 (January 14, 2004).

[10] *Id*. at 500-01 (commenting that one of the purposes of discovery was "to narrow and clarify the basic issues between the parties" and, further, "for the parties to obtain the fullest possible knowledge of the issues and facts before trial") (cited by *Shelak v. White Motor Co.,* 581 F.2d 1155, 1159 (5th.Cir. 1978) ("The rules [of civil discovery] are designed to narrow and clarify the issues and to give the parties mutual knowledge of all relevant facts, thereby preventing surprise.")).

[11] *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose, as we noted in [*Hickman*]. They together with pretrial procedures make a trial less of a game of blind man's bluff and more of a fair contest with the basic issues and facts disclosed to the fullest practicable extent.") (citing *Hickman*, 329 U.S. at 501).

[12] *Hickman*, 329 U.S. at 508 n. 8 (asserting the "'idea that discovery is mutual–that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position")

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will not be provided with discovery of virtually any information from Mr. Geisen, so long as the criminal proceeding against him is pending. Additionally, key witnesses for the Staff's case against Mr. Geisen will not be available to testify due to the pendency of criminal proceedings involving them.[13]

While the Staff has been denied any appreciable information from Mr. Geisen, the Staff has made extensive efforts to provide full disclosure of each of its claims and all supporting evidence. This one-sided discovery severely impedes the Staff's ability to proceed with further meaningful discovery through depositions. In its interrogatories, the NRC Staff requested that Mr. Geisen detail his contentions regarding each and every factual allegation set out in the Order against him. To each of these interrogatories, Mr. Geisen invoked his Fifth Amendment privilege. Without any inkling of Mr. Geisen's factual contentions, the NRC Staff is thus left to speculate as to what potential defenses he could raise when pursuing further discovery.[14] Thus, Mr. Geisen's invocation of the Fifth Amendment privilege places the future course of the discovery process in jeopardy of serious imbalance.[15] As the Staff anticipated in its initial stay motion, it is apparent that Mr. Geisen is using the NRC's discovery process to aid in his defense of the criminal proceeding by obtaining information he would not be entitled to under criminal

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[12](...continued)
(quoting Pike and Willis, "Federal Discovery in Operation," 7 Univ. of Chicago L.Rev. 297, 303 (1940)).

[13] Mr. Cook invoked his rights under the Fifth Amendment and declined to answer questions when deposed by the Staff on September 12, 2006. Similarly, counsel for Mr. Siemaszko has represented to the Staff that he would decline to answer questions if deposed by the Staff.

[14] *See SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-550 (S.D.N.Y. 1985).

[15] Federal courts recognize the possibility that, in a civil proceeding, the "invocation of the Fifth Amendment poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3rd.Cir. 1994) (cited by *LaSalle Bank Lake View, v. Seguban*, 54 F.3d 387, 390 (7th.Cir. 1995)). This prejudice is not necessarily mitigated by the fact that the adverse party has access to factual information, because the "purpose of discovery is not only to determine facts but to 'determine what the adverse party contends they are, and what purposes they will serve.'" *Cymaticolor,* 106 F.R.D. at 549 (citing *Weiner v. Bache Halsey Stuart, Inc.*, 76 F.R.D. 624 (S.D.Fla. 1977)).

discovery while preventing the Staff from obtaining any information necessary to prepare for hearing.[16] Contrary to earlier representations, it is now clear that he has no intention of engaging in reciprocal disclosure.

Under these circumstances, it is apparent that if this proceeding is allowed to go forward before the criminal proceeding, the Staff would be forced to proceed without any pretrial disclosure of Mr. Geisen's defenses or positions or the factual underpinning for any position he may take during the hearing. While the Staff could proceed notwithstanding these deficiencies, the Staff would have no choice but to ask that the Board draw adverse inferences based on Mr. Geisen's decision to invoke his Fifth Amendment rights and to ask this Board to preclude him from presenting positions or evidence not disclosed through discovery, requiring adjudication upon a necessarily incomplete factual record. In civil proceedings, it is well settled that a party may not refuse to answer questions by invoking the Fifth Amendment without some consequence.[17] Thus, opposing parties are permitted to rely on adverse inferences as to the matters on which the individual refuses to testify.[18] Additionally, parties who do not disclose positions or evidence in discovery should not be permitted to raise them for the first time at hearing.[19]

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[16] *See, e.g., United States v. Certain Real Property and Premises Known as: 4033-4055 5th Ave., Brooklyn, NY*, 55 F.3d 78, 84 (1995) ("Since an assertion of the Fifth Amendment is an effective way to hinder discovery and provides a convenient method for obstructing a proceeding, trial courts must be especially alert to the danger that the litigant might have invoked the privilege primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties.").

[17] *Graystone Nash*, 25 F.3d at 191; *Flint v. Mullen*, 499 F.2d 100, 104 (1st.Cir. 1990); *see Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

[18] *See Baxter*, 425 U.S. at 318.

[19] *See Traficant v. Commissioner of IRS*, 884 F.2d 258, 265 (6th.Cir. 1989); *Dunkin' Donuts, Inc. v. Taseski*, 47 F.Supp.2d 867, 872-73 (E.D.Mich. 1999) ("[A] defendant may not use the fifth amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise at trial . . . Because claimant has asserted a fifth amendment claim in discovery, this court holds that he may not now waive the privilege and testify. Neither may he submit affidavits in opposition to the

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While the Staff believes that it would be entitled to such adverse inferences and preclusion should Mr. Geisen continue to refuse to answer any questions or engage in discovery, the Board would be required to reach a decision on this case upon a limited factual record. First, neither the Staff nor this Board can have any knowledge of what information was involved in the grand jury proceeding which produced a criminal indictment against Mr. Geisen. While the criminal case is pending, this prohibition restrains the Staff from using any of the investigators involved in the August 2003 Office of Investigations (OI) report as a witness or even a source of information to the Staff regarding the substance of their investigation. As an example of the impact of this prohibition, the Staff is prevented from relying on the extensive expert analysis that Senior Reactor Inspector Gavula prepared to demonstrate the incompleteness and inaccuracy of Davis-Besse's submissions and presentations to the NRC.[20] The difficulty in developing a factual record in this proceeding is further exacerbated by the fact that Ronald Cook and Andrew Siezmasko, both key witnesses to this proceeding, would also be unavailable to testify while the criminal trial is pending, by virtue of their decisions to invoke the Fifth Amendment.[21] The significance of Mr. Siemaszko's testimony is underscored in Mr.

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[19](...continued)
government's motion for summary judgment.") (quoting *United States v. Sixty Thousand Dollars in United States Currency*, 763 F.Supp. 909, 914 (E.D.Mich. 1991)). Additionally, the Supreme Court has stated that the fact that a party to a civil litigation may be forced to choose "between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled-self incrimination." *Williams v. Florida*, 399 U.S. 78, 83-84 (1970).

[20] Mr. Gavula's expert analysis is contained in OI Report Exhibit 140. This is because the OI investigators who were responsible for the investigation and preparation of the August 2003 report also participated in the investigation conducted by DOJ and the grand jury proceeding. Accordingly, the investigators are subject to grand jury secrecy provisions which, in the judgement of DOJ, extend to all substantive matters related to the OI or the DOJ investigation due to the difficulty of distinguishing which investigation was the source the investigators knowledge. DOJ has declined to request that the Staff be permitted to obtain any of this information while the criminal case is pending but has represented that it would seek disclosure to the Staff after the criminal case has ended.

[21] Notwithstanding their decisions in this proceeding, it is entirely possible that one or more of these individuals may choose to testify at the criminal trial. DOJ may reach an agreement with one or

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Geisen's motion in the criminal proceeding to sever his case from that of Mr. Siemaszko's.[22] If the enforcement proceeding is conducted before the criminal proceeding under these restrictions, it is possible that the Board could reach a decision only to find out during the criminal trial that it was not cognizant of important evidence.

In light of all these considerations, the NRC Staff moves that the Board stay this proceeding until the completion of the criminal case against Mr. Geisen or, alternatively, that the Board issue an order prohibiting Mr. Geisen from introducing any evidentiary or factual information, including contentions, claims, and defenses, which Mr. Geisen has not provided to the Staff as of the close of the written discovery process in this proceeding.[23]

I. The Board Should Stay This Proceeding Until Completion Of The Criminal Proceeding

A. Legal Standard For Stay Of A Civil Proceeding

Pursuant to10 C.F.R. § 2.202(c)(2)(ii), a presiding officer may stay an enforcement proceeding for good cause. The Commission, in *Oncology Services Corp*, CLI-93-17, 38 NRC 44 (1993), noted that a determination of good cause is a function of "the facts of a particular case and requires a balancing of the competing interests."[24] Further, to facilitate such

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[21](...continued)
more of the defendants to testify at the criminal trial. Additionally, an individual such as Mr. Siemaszko may well reach a different decision regarding the invocation of his Fifth Amendment rights when he is the subject of a criminal prosecution as opposed to being called as a witness in a civil proceeding to which he is not a party.

[22] *See* Memorandum of Points and Authorities in Support of David Geisen's and Rodney Cook's Joint Motion to Sever Defendants at 5 - 6, which explains that Mr. Siemazko has made a number of admissions that arguably support Mr. Geisen's criminal liability.

[23] The Staff believes that disclosure should be required before the next phase of discovery which would involve depositions so as to allow the Staff to define the issues which would be raised by Mr. Geisen during hearing and as to allow the Staff to determine what individuals may have knowledge relevant to those matters.

[24] CLI-93-17, 38 NRC 44, 50 (1993); *see also Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th.Cir. 1989) ("A court must decide whether to stay civil proceedings in the face of parallel criminal proceedings in light of the particular circumstances and competing interests involved in
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determination, the Commission promulgated five guiding factors gleaned from two Supreme Court cases: (1) the reason for the delay, (2) the length of the delay, (3) the affected individual's assertion of his right to a hearing, (4) prejudice to the affected person, (5) and the risk of erroneous deprivation.[25] The Commission made it clear that these factors were not to be treated as exclusive or as solely and individually determinative, but "[r]ather, 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."[26] In addition to those five guiding factors, courts have taken into consideration other factors when warranted by the circumstances of a case, such as "the convenience of a court in the management of its cases" and "the interest of the public."[27] In these circumstances, the Board should consider the impact of Mr. Geisen's broad invocation of the Fifth Amendment privilege against self-incrimination on the Staff's ability to obtain in discovery the information necessary to allow an efficient and fair proceeding, when analyzing the first factor, the reason for the stay. As the following step-by-step Oncology analysis will evidence, the NRC Staff asserts that the balance of competing interests weighs in favor of staying the proceeding until the conclusion of the criminal proceeding against Mr. Geisen.

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[24](...continued)
the case.") (quoting *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C.Cir. 1980)).

[25] *Id.* (citing *FDIC v. Mallen* 486 U.S. 230, 242 (1988) and *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8.850) in United States Currency*, 461 U.S. 555 (1983)).

[26] *Id.* at 51.

[27] *Molinaro*, 889 F.2d at 903 (including as guiding factors "the convenience of the court in the management of its cases, and the efficient use of judicial resources," and "the interest of the public.") (cited by "Memorandum and Order (Denying Government's Request to Delay Proceeding)," 63 NRC 523, LBP-06-13, 9); see also *Keating v. Office of Thrift* Supervision, 45 F.3d, 324-25 (9th.Cir. 1995); *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).

B. Factual Application Of The Oncology Standard

To grant a stay of this proceeding, the Board would have to find that a stay of the proceeding, including discovery, is appropriate, pursuant a balance of the competing interests in the case, by determining whether good cause has been established. To establish good cause, the Staff, consistent with the analytical structure set out in *Oncology*, submits reasons why the proceeding should be held in abeyance until the completion of the criminal case against Mr. Geisen.

1. First Factor Of Oncology: Reason For The Delay

The Staff asserts that good cause exists for granting a stay of the proceeding to allow the development of a full and complete factual record upon which this Board may reach a fair and just decision. This end can be accomplished only if the Staff is allowed the opportunity to obtain discovery from Mr. Geisen and to present testimony from key witnesses on the facts at issue in this proceeding. Absent a stay, the Staff will also be prejudiced in its ability to present an adequate yet focused record to counter any claims or defenses which may be presented by Mr. Geisen at hearing.

a. Prejudice To The Staff's Ability To Obtain Information Necessary To The Efficient And Fair Course Of The Proceeding.

Through broad invocation of the Fifth Amendment privilege, Mr. Geisen has refused to answer Staff Interrogatories that go directly to the heart of this proceeding, such as (1) Mr. Geisen's role in submitting information to the NRC regarding FENOC's responses to Bulletin 2001-01, (2) Mr. Geisen's participation in any meetings, discussions or communications relating to FENOC's responses to Bulletin 2001-01, and (3) any documents, photographs, and video recordings Mr. Geisen received and/or reviewed relating the RPV head.

The NRC Staff has also been deprived of any knowledge of Mr. Geisen's defenses, claims, or contentions regarding the factual allegations set out in the Order against him beyond

the broad and general statements in his answer to the Order. Notwithstanding the fact that the NRC Staff has information regarding the factual allegations set out in the Order, the Staff is denied any insight into Mr. Geisen's claims, defenses or contentions regarding those facts. Without this knowledge, the Staff is unable to pursue a legitimate aim of discovery, to obtain "not only the ascertainment of facts but also determination of what the adverse party contends they are and what purpose they will serve so that issues may be narrowed, trial simplified, and expenses conserved."[28] Thus, even though the underlying factual information "may already be known or accessible to the propounding party," "courts have consistently held that a party may propound interrogatories calling for the disclosure of the opposing parties, specific position as to the facts."[29]

The NRC Staff is significantly impeded in its ability to test his contentions, claims, or defenses in the further course of the discovery process, for the simple reason that the Staff does not know what they are. Without such knowledge, the Staff is unable to efficiently tailor the further course of discovery, but rather is left to speculate as to what Mr. Geisen's claims, contentions, and defenses may be and to attempt to address each and every possibility.[30] For instance, Mr. Geisen might contend that he was unaware of, as of a certain date, the amount of boric acid deposits left on the RPV head after the last inspection and cleaning. In order to proceed at hearing without unfair surprise and prejudice to the Staff, the Staff would need to be able to test such contention with focused deposition questions directed to Mr. Geisen and, additionally, each and every other person likely to have information regarding that contention.

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[28] *Baim & Blank, Inc. v. Philco Distributors, Inc.*, 25 F.R.D. 86, 87 (E.D.N.Y. 1957) (quoted in *Cymaticolor*, 106 F.R.D. at 549 and *United States v. Beatrice Food Co,* 52 F.R.D. 14, 19 (D.Minn. 1971)).

[29] *Beatrice Food Co.*, 52 F.R.D. at 19 (citing *United States v. Article of Drug*, 43 F.R.D. 181 (D.Del. 1967)).

[30] *See Cymaticolor*, 106 F.R.D. at 550 (noting that information obtained through discovery regarding defendant's defenses and denials would have "a definite impact on the course of the SEC's discovery and should have been obtained at the outset of discovery").

Beyond that, Mr. Geisen's claims, contentions, or defenses may very well impact the proper scope and extent of expert testimony that the NRC Staff feels necessary to develop and present at hearing.

The search for the truth in a civil proceeding depends upon the opposing parties being able to fully and vigorously present their own cases and, further, to be able to bring to light the weaknesses of the other party's factual propositions.[31] Thus, the purpose of discovery in acivil proceeding is to afford parties not only the tools to further develop their own cases, but also to learn what arguments the opposing party plans to make at hearing.

These reasons weigh in favor of a stay of this proceeding until the completion of the criminal case against Mr. Geisen.

b. The Public Interest In The Development Of A Full Factual Record

When the circumstances of a case warrant, an NRC adjudicatory tribunal, just as a federal court, is free to insert as an additional factor into its equitable calculus of whether or not to grant a stay of a civil proceeding the valid interests of the public in the course, conduct, and conclusion of a proceeding.[32] The NRC Staff asserts that one such valid public interest is the development of a factual record upon which this Board can reach informed and just findings of fact and reach a just and fair decision. This interest would best be served by a stay of the enforcement proceeding until the completion of the criminal proceeding.

Because of the decision by key witnesses and Mr. Geisen to invoke their Fifth Amendment privilege, the Staff will be forced to rely only on prior statements of those individuals

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[31] *See Proctor & Gamble Co.*, 356 U.S. at 682; *Hickman*, 329 U.S. at 500-01; *Beatrice Foods Co.*, 52 F.R.D. at 19; *Baim & Blank*, 25 F.R.D. at 87.

[32] *See, e.g., Microfinancial Inc., v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 78 (1st.Cir. 2004); *Molinaro*, 889 F.2d at 903.

made during the OI investigation of this case and related matters.[33] While these statements support the Staff's claims in the Enforcement Order, they cannot be tested, supplemented or explained through the discovery process or at hearing.

Additionally, the Staff will seek to obtain adverse inferences against Mr. Geisen for those matters on which he refuses to answer questions based on his invocation of his Fifth Amendment rights. Because the invocation of the Fifth Amendment privilege can, as here, have the effect of disadvantaging the opposing party, courts have the authority to remedy the resulting prejudice by drawing adverse inferences against the party asserting the privilege.[34] While disposition of this proceeding with the aid of adverse inferences would validate the underlying effect of the Order, the NRC Staff acknowledges that such a disposition would be predicated upon a factual record that is not as complete as otherwise possible and, thus, would even further limit the Board's ability to fully address the full factual merits of the case. The Board has indicated previously in this proceeding that there is a "strong interest in ensuring truth and accuracy of information."[35] Consistent with that strong interest, a finding by the Board on the full and complete factual merits of this case would be in the best interest of the NRC, as well as that of the public in general, as opposed to a disposition based upon an incomplete and assumed factual record. This is particularly true in light of the possibility that a decision rendered in this proceeding in favor of Mr. Geisen, without the benefit of the documents and

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[33] Mr. Siemaszko also made relevant statements in connection with a claim filed before the Department of Labor.

[34] *See Baxter*, 425 U.S. at 318 ("the Fifth Amendment does not forbid adverse inferences against parties . . . when they refuse to testify in response to probative evidence offered against them") (construed in *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n. 5 (1977) and cited with approval in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 286 (1998)); *see also In re Carp*, 340 F.3d 15, 23 (1st.Cir. 2003); *SEC v. Colello*, 139 F.3d 674, 677-78 (9th.Cir. 1998); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 678 (1st.Cir. 1996); *United States v. Stelmokas*, 100 F.3d 30, 310-11 (3rd.Cir. 1996); *LaSalle Bank Lake View*, 54 F.3d at 390; *Graystone Nash*, 25 F.3d at 191.

[35] "Memorandum and Order (Denying Government's Request to Delay Proceeding)," 63 NRC 523, LBP-06-13, 16 (citing *Oncology,* CLI-93-17, 38 NRC at 55).

testimony uncovered by the grand jury investigation, could have an adverse impact on DOJ's ability to prosecute its criminal case against Mr. Geisen through the operation of collateral estoppel.[36]

c. Conclusion Of The First Oncology Factor: Reason For The Delay

In light of the aforementioned reasons, the NRC Staff asserts that the first Oncology factor, reason for the delay, weighs significantly in favor of the NRC Staff.

2. Second Oncology Factor: Length Of The Stay

In light of the circumstances of this proceeding and in order to sufficiently rectify the existing and potential unfair prejudice to it, the NRC Staff requests that the Board, as a matter of discretion, hold this proceeding in abeyance until completion or resolution of the criminal case against Mr. Geisen. The NRC Staff acknowledges that it cannot specify, with any degree of certainty, when the criminal proceeding would occur. The NRC Staff notes, though, that DOJ will soon be responding to motions filed on behalf of Mr. Geisen in the criminal matter, and that DOJ has represented to the Staff that it is prepared to go forward with the trial in late winter. In the instant proceeding, the date for filing motions to compel on written discovery has been extended until November 10, 2006. Since this is only the first stage of discovery, it appears likely that the enforcement hearing would not commence until late winter as well.[37] Thus, a stay

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[36] Courts have held that administrative determinations can have the same preclusive effect as judgments of a court, *Long v. United States Dept. of Air Force*, 751 F.2d 339, 343 (10th.Cir. 1984), and that civil judgments can have preclusive effect on criminal proceedings, *United States v. Rogers*, 960 F.2d 1501, 1507 (10th.Cir. 1992). Thus, principals of collateral estoppel could be implicated in any subsequent criminal proceeding.

[37] *See* "Joint Status Report" at 4-5 (August 2, 2006). The Joint Status Report explains that, after this current written discovery period, there will be a ninety day fact discovery period, and perhaps an expert discovery period after that. The fact discovery period, however, would not start until 10 days after *the later* of the following events: (1) the completion of all proceedings on the Geisen motion to compel an unredacted OI report (including any appeal of the Board's Order); (2) any production of documents or information pursuant to a Board Order on the motion to compel; or (3) the completion of written discovery. In light of these provisions, and making the optimistic assumption that the latest of these events will happen by the beginning of December, the fact discovery period might not be completed until mid-March,

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of this proceeding is likely to be of a limited duration, and this factor should not weigh heavily in the Board's decision.

3. Third Oncology Factor: Assertion Of A Right To A Hearing

As the Commission has noted, this factor is "merely procedural, and is consequently of little importance when balancing real-life equities."[38] The NRC Staff does not dispute that Mr. Geisen promptly asserted his right to a hearing in this proceeding - which the Staff did not oppose - but in light of the substantive significance of the reasons for a stay discussed above, Mr. Geisen's assertion of his hearing rights does not affect the competing balance of interests.

4. Fourth Oncology Factor: Prejudice to Mr. Geisen

Under this factor set out in Oncology, the Board is directed to evaluate two forms of prejudice: (1) prejudice to Mr. Geisen as to his ability to defend against the charges in the Order or (2) prejudice to Mr. Geisen's private interests.[39] The Board noted the first form of prejudice in its decision on the First Stay Motion, but did not give weight to it because Mr. Geisen did not seem unduly concerned that the delay would "diminish the quality of the evidence."[40]

As for the second form of prejudice, the Staff appreciates that Mr. Geisen's private interests have been impacted by the Enforcement Order and that this weighs against granting a stay.[41] However, the weight to be accorded to this factor should depend on the incremental

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[37](...continued)
and there will almost certainly be a period of expert discovery after that.

[38] *Andrew Siemaszko*, CLI-06-12, 63 NRC 495, 506.

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

[40] "Memorandum and Order (Denying Government's Request to Delay Proceeding)," LBP-06-13, 63 NRC 523, 547-48. The Board also noted that the Commission in *Oncology* seemed to discount this form of prejudice, *see* 63 NRC at 547 n.91 (citing *Oncology*, 38 NRC at 59).

[41] Mr. Geisen has argued that the Staff decision to make the Order immediately effective was made in conjunction with DOJ's decision to issue a criminal indictment, implying this was a governmental decision to deprive Mr. Giesen from his chosen profession. In response, the Staff notes that the decision

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harm to Mr. Geisen. This harm is lessened because it is now evident that the criminal proceeding is progressing and may begin at approximately the same time as the commencement of this enforcement proceeding.[42]

5. Fifth Oncology Factory: Risk Of Erroneous Deprivation

As the Board noted in its decision on the First Stay Motion, the final factor of the Oncology standard, the risk of erroneous deprivation, weighs on balance, in favor of the Staff.[43] The Board did credit Mr. Geisen's rejection of the deferred prosecution agreement as indicative of some belief that he could prevail in the criminal and civil enforcement proceedings. However, the Board found that this was more than counterbalanced by the fact that Mr. Geisen failed to challenge the immediate effectiveness of his Order and that he was indicted by a grand jury,[44] which considerations have been credited by the Commission and the Supreme Court, respectively.[45] Although the Board did not greatly credit the erroneous deprivation factor, it found that the factor favored the Staff.

C. Conclusion Of The Oncology Standard: The Board Should Rule In Favor Of The NRC Staff's Motion For Stay

Even though some factors, as indicated, favor Mr. Geisen, when the relative weight of each

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[41](...continued)
to issue the Enforcement Order was made solely by the Staff and was in no way coordinated with, reviewed or otherwise decided in consultation with DOJ. Further, the Staff's decision was based solely upon a determination that immediate action was necessary to ensure safe operation of nuclear facilities which depends on the NRC's ability to rely on individuals to comply with regulatory requirements and provide complete and accurate information to licensees and the NRC. Fundamentally, the Staff's responsibility is to ensure the public health and safety, and the immediate effectiveness of the Order was not driven by any actions of DOJ or any desire to deprive Mr. Geisen of his livelihood.

[42] *See* footnote 37.

[43] 63 NRC at 559.

[44] *Id.* at 558-59 (also crediting the fact that the grand jury indicted Mr. Geisen while not indicting two of his co-workers who were subject to enforcement orders).

[45] *See Oncology*, 38 NRC at 57, *and Mallen*, 486 U.S. at 244.

factor is taken into consideration, the combined, final weight of the Oncology analysis supports the NRC Staff's motion to hold this proceeding in abeyance until the completion of the criminal case against Mr. Geisen.

II. If The Proceeding Is Not Stayed, The Board Should Impose A Preclusion Order Against Mr. Geisen

If the Board does not grant the Staff's request to stay this proceeding, the Board should, as an appropriate equitable remedy, impose a preclusion Order against Mr. Geisen barring him from offering any evidentiary or factual information, including contentions, claims, and defenses, which have not been disclosed as of the close of the written discovery process in this proceeding. The conclusion of the written discovery process is the proper date by which Mr. Geisen should be compelled to decide what matters he will decline to answer based on assertion of his Fifth Amendment privilege, because after that date the Staff would be forced into the deposition process without any reasonable means to guide and tailor the course of that process in a way that is meaningful or useful to the Staff.[46]

A. Presentation And Factual Application Of The Legal Standard For Issuance Of A Preclusion Order

As a general principle, a party asserting the Fifth Amendment privilege "may not use the [privilege] to shield herself from opposition's inquiries only to impale [adverse parties] with surprise testimony at trial."[47] If a party waives the Fifth Amendment privilege in opposition to summary disposition or at trial – at the "eleventh hour", after the normal course of the discovery process has concluded – that waiver may unfairly surprise an adverse party with factual

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[46] *See Beatrice Food Co,* 52 F.R.D. at 19; *Baim & Blank*, 25 F.R.D. at 87.

[47] *Guiterrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st.Cir. 1989) (quoted by *Graystone Nash*, 25 F.3d at 191); *accord Dunkin' Donuts*, 47 F.Supp.2d at 872-73 (citing *Sixty Thousand Dollars in United States Currency*, 763 F.Supp. at 914).

evidence as to which the adverse party had no prior knowledge.[48] As the Third Circuit Court of Appeals elaborated in *SEC v. Graystone Nash*, regarding this possibility of unfair prejudice,

> In a civil trial, a party's invocation of the privilege may be proper, but it does not take place in a vacuum; the rights of the other litigant are entitled to consideration as well. One of the situations in which that concern comes into play arises when one party invokes the Fifth Amendment during discovery, but on the eve of trial changes his mind and decides to waive the privilege. At that stage, the adverse party having conducted discovery and prepared the case without the benefit of knowing the content of the privileged matter–would be placed at a disadvantage. The opportunity to combat the newly available testimony might no longer exist, a new investigation could be required, and orderly trial preparation could be disrupted. In such circumstances, the belated waiver of the privilege could be unfair.[49]

Such is the case in this proceeding. The NRC Staff has no knowledge of any of Mr. Geisen's claims, contentions or defenses regarding the factual allegations set out in the Order against him, nor, additionally and correspondingly, the evidentiary underpinnings of any of his potential claims, contentions, or defenses. If Mr. Geisen, in opposition to summary disposition or at hearing, were to waive the privilege and assert any or all of his claims, contentions, or defenses, along with accompanying evidentiary support, any and all of these would come at the unfair expense and surprise of the NRC Staff. As Mr. Geisen has asserted the Fifth Amendment privilege to Staff interrogatories regarding each and every of the factual allegations of deliberate misconduct set out in the Order, the introduction of any of Mr. Geisen's claims, contentions, or

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[48] *E.g., Certain Real Property and Premises Known as: 4033-4055 5th Ave., Brooklyn, NY*, 55 F.3d at 85 (". . . particularly if the litigant's request to waive comes only at the 'eleventh hour' and appears to be part of a manipulative, 'cat-and-mouse approach' to the litigation, a trial court may be fully entitled, for example, to bar a litigant from testifying later about matters previously hidden from discovery through an invocation of the privilege.") (citing *In re Edmond*, 934 F.2d 1304, 1308-09 (4th.Cir. 1991) (striking defendant's affidavit in favor of summary judgment because defendant have invoked the Fifth Amendment privilege at deposition); *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st.Cir. 1990) ("We hold that the district court had ample authority to strike [claimant's] affidavit [in opposition to summary judgment] after he invoked the Fifth Amendment and refused to answer the government's deposition questions.); *Sixty Thousand Dollars in United States Currency*, 763 F.Supp. at 913-14 (barring claimant from "testify[ing] at trial or factually oppos[ing] the government's motion for summary judgment).

[49] 25 F.3d at 191.

defenses would unfairly surprise the Staff, unless the waiver of the privilege were to occur during the proper and regular course of the discovery process.

To remedy this kind of prejudice, a court has the discretion to issue a preemptive order prohibiting a party, who invoked the privilege, from later waiving it (possibly after a specified date set by the court) to the unfair surprise and disadvantage of one or more adverse parties.[50] A preclusion order should be "reasonably and appropriately tailored"[51] to the fit the careful balance of the parties' competing interests,[52] and, thereby, "the detriment to the party asserting it should be no more than necessary to prevent unfair and unnecessary prejudice to the other side."[53] Thus, the scope of a preclusion order must be "directly related to the scope of the asserted privilege"[54] and the order should not impose costs upon the invoking party so "high as to force abandonment of the privilege."[55]

While there is general adherence to this standard among the federal courts, there are variances in the ways in which courts have chosen to evaluate unfair prejudice and the remedies courts have fashioned.[56] Some courts, concerned primarily with unfair prejudice as

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[50] *See Certain Real Property and Premises Known as: 4033-4055 5th Ave., Brooklyn, NY*, 55 F.3d at 85 (citing In re Edmond, 934 F.2d at 1308-09); *Graystone Nash*, 25 F.3d at 191-92; *Parcels of Land*, 903 F.2d at 43; *Sixty Thousand Dollars in United States Currency*, 763 F.Supp. at 913-14; *Cymaticolor*,106 F.R.D. at 549-50.

[51] *Certain Real Property and Premises Known as: 4033-4055 5th Ave., Brooklyn, NY*, 55 F.3d at 86.

[52] *Graystone Nash*, 25 F.3d at 192.

[53] *Id.*

[54] *Traficant*, 884 F.2d at 265 (citing *Spevack*, 385 U.S. at 515).

[55] *Id.* (citing *Cymaticolor*, 106 F.R.D. 545 and *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364 (M.D.Pa. 1979)).

[56] *Compare Graystone Nash*, 25 F.3d at 192 (agreeing with the approach that the calculation of unfair prejudice should be limited, as part and parcel of a careful balancing standard, to those evidentiary / factual issues to which the prejudiced adverse party does not already possess or could not obtain in

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the product of the unavailability of evidentiary and factual materials, have limited the scope of preclusion orders to withheld materials not already in possession of the prejudiced party or not to be obtainable from other sources.[57] For example, the court in *FTC v. Kitco of Nevada, Inc.*, as explained by the Third Circuit Court of Appeals in *Graystone Nash*, "decided that a complete ban on defense testimony was not justified because the plaintiff, Federal Trade Commission, had received some information from the defendant about specific areas of inquiry. Hence, the Commission had not been unfairly surprised nor prejudiced by the defendant's last minute waiver."[58]

However, neither the holding in *Kitco of Nevada* nor the holding in *Graystone Nash* focused on unfair prejudice as a result of the unavailability of the invoking party's contentions, claims, and defenses. Because that prejudice is present here, it is more appropriate to focus on the case, *SEC v. Cymaticolor Corp.*, which dealt explicitly with that particular source of prejudice stemming from invoking the Fifth Amendment. In that case, the defendant, Mr. Green, refused to answer many of the SEC's interrogatories on the basis of the Fifth Amendment privilege, and, in the process of so doing, failed to disclose information regarding his claims, contentions, or defenses.[59] In response, the SEC moved that the District Court issue a total preclusion order that would prevent him "from offering into evidence any matters relating to the factual bases for

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[56](...continued)
discovery from other available sources) *with Cymaticolor*, 106 F.R.D. at 549-50 (granting a preclusion order including, within the scope of the order, issues possibly already within the possession / knowledge of the adverse party).

[57] *See Graystone Nash*, 25 F.3d at 192 (citing with approval *FTC v. Kitco of Nevada*, Inc., 612 F.Supp. 1282, 1291 (D.Minn. 1985) and *Young Sik Woo v. Glanz*, 99 F.R.D. 641, 653-54 (D.R.I. 1983)).

[58] *Graystone Nash*, 25 F.3d at 192; *see Kitco of Nevada*, 612 F.Supp. at 1291.

[59] *Cymaticolor*, 106 F.R.D. at 550.

his denials and defenses."[60] The defendant, in opposition, urged the District Court to limit the preclusion order to evidence which the SEC had not received from other sources.[61] The District Court granted the SEC's motion as proposed, declining to limit the preclusion order, finding, instead, that an adverse party may be unfairly surprised even though the party has access, or will likely have access, to the requested information from other sources. In reaching this decision, the District Court stated as follows:

> Green's proposal regarding a limited order of preclusion is contrary to one of the purposes of discovery [which] is to ascertain the position of the adverse party on the controverted issues....Thus, it is irrelevant that the party seeking discovery already knows the facts as to which he seeks discovery. While the limited preclusion order would eliminate surprise regarding the existence of the evidence, surprise may still occur regarding the defendant's theory and use of the evidence. Such a limited preclusion order might reduce the trial to a "game of blind man's bluff" and less of "a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Thus, the preclusion order must include evidence that the SEC may have obtained from other sources.[62]

In light of the similarities between Mr. Green's broad invocation of the Fifth Amendment privilege and that of Mr. Geisen's in this proceeding, it would be appropriate and proper for the Board to adopt as a remedy an order similar in scope and nature to that issued by the District Court in *Cymaticolor*. In this proceeding, as in *Cymaticolor*, Mr. Geisen's broad invocation of the Fifth Amendment privilege has deprived the NRC Staff of factual information and, additionally, has deprived the NRC Staff of any of Mr. Geisen's contentions or claims in response to the factual allegations set out in the Order against him. Even though the NRC Staff has factual information relating to matters in the Enforcement Order, that information alone, as previously noted, will not be able to provide access to Mr. Geisen's defenses, denials, or

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[60] *Id.* at 549.

[61] *Id.*

[62] *Id.* at 549-50 (internal citations omitted).

contentions.[63] As it now stands, any contention or defense that Mr. Geisen might put forward would necessarily come as a complete and unfair surprise to the NRC Staff.[64] For these reasons, a preclusion order barring Mr. Geisen from waiving the privilege after the close of the written discovery process is wholly appropriate in this proceeding.

B. Conclusion: If The Proceeding is not Stayed, The Board Should Impose A Preclusion Order Against Mr. Geisen

The Board should impose, as an appropriate equitable remedy to cure potential unfair prejudice to the NRC Staff, a preclusion order barring Mr. Geisen from waiving the Fifth Amendment privilege as to any factual issue, contention, claim, or defense to which he has not already waived the privilege and disclosed to the Staff as of the close of the written discovery process.

CONCLUSION

For the foregoing reasons, the Board should stay this proceeding until the completion of the criminal case against Mr. Geisen or, alternatively, issue an order prohibiting Mr. Geisen from introducing any evidentiary or factual information, including contentions, claims, and defenses, which Mr. Geisen has not disclosed to the Staff as of the close of the written discovery process in this proceeding.

Respectfully submitted,

/RA by Lisa B. Clark/

Lisa B. Clark
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Counsel for the NRC Staff

Dated at Rockville, MD
this 27th day October, 2006

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[63] *See Beatrice Foods Co.*, 52 F.R.D. at 19; *Baim & Blank,* 25 F.R.D. at 87.

[64] *See Certain Real Property and Premises Known as: 4033-4055 5th Ave., Brooklyn, NY*, 55 F.3d at 85; *Graystone Nash, 25 F.3d at 191-92*; *Parcels of Land*, 903 F.2d at 43; *Sixty Thousand Dollars in United States Currency*, 763 F.Supp. at 913-14.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR STAY OF PROCEEDING OR IN THE ALTERNATIVE FOR A PRECLUSION ORDER" 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 27th day of October, 2006.

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