

January 8, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF MOTION FOR STAY OF PROCEEDING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Nuclear Regulatory Commission Staff (“Staff”), on behalf of the Department of Justice (“DOJ”), requests that the proceeding be stayed until after completion of the criminal proceeding against Mr. Geisen. As discussed below, this motion is prompted by DOJ’s concern that depositions of witnesses to be used in this proceeding may prejudice the criminal case against Mr. Geisen. Because deposition discovery is scheduled to begin on January 16, 2007, the Staff respectfully requests expedited consideration of this motion.

BACKGROUND

On January 4, 2006, the Staff issued to Mr. Geisen an Order prohibiting him from any involvement in NRC licensed activities for a period of five years.¹ Thereafter, on January 19, 2006, Mr. Geisen was criminally indicted in the United States District Court for the Northern District of Ohio. The Staff Order and the criminal indictment concern facts and issues

¹ “Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately).”

which are inextricably intertwined.² Mr. Geisen was arraigned on January 27, 2006, and pled not guilty to the criminal charges against him. On February 23, 2006, Mr. Geisen filed an answer to the Staff Order and requested an expedited hearing.³

The Staff filed a motion requesting a stay of this proceeding on March 20, 2006, supported by an affidavit of Thomas Ballantine, a member of the trial team prosecuting Mr. Geisen.⁴ The Staff premised its motion on the grounds that (1) civil discovery in the administrative proceeding could have a detrimental effect on the criminal prosecution of Mr. Geisen, (2) the possibility that Mr. Geisen could invoke his Fifth Amendment rights could prejudice the Staff's ability to discover information necessary to pursue its enforcement action, and (3) the public interest required that the important allegations which are the subject of the criminal and administrative proceedings be fully heard and decided. First Stay Motion at 4.

This Board denied the Staff's request for stay in *In the Matter of David Geisen*, 63 NRC 523, 526 (2006). In doing so, the Board applied the factors set forth in *Oncology Services Corp.*, CLI-93-17, 38 NRC 44 (1993); namely (1) length of delay, (2) reason for delay, (3) prejudice to individual, (4) individual's assertion of right to hearing, and (5) risk of erroneous deprivation. *Geisen*, 63 NRC at 534 - 44. Notably, with regard to factor (1), the Board noted that it was considering a delay both undefined and lengthy if a stay was granted, *Id.* at 545. Regarding factor (2), the Board premised its analysis upon an assessment that the information balance was heavily skewed in favor of the government, *Id.* at 554, in contrast to situations

² In essence, both claim that Mr. Geisen deliberately provided incomplete or inaccurate information to the NRC on behalf of his former employer FirstEnergy Nuclear Operating Company, the licensee for the Davis Besse nuclear power reactor, in response to Bulletin 2001-01 "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" issued August 3, 2001.

³ "Answer and Demand for Expedited Hearing."

⁴ "NRC Staff Motion to Hold the Proceeding in Abeyance," ("First Stay Motion").

where 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” *Id.* at 555. Under these circumstances, the Board concluded that allowing Mr. Geisen to obtain information he would not be entitled to in defending against the criminal indictment through civil discovery would not alter the information balance to any degree that would be unfair to the government or put the government at a disadvantage. *Id.* at 554. Considering factor (3), the harm to Mr. Geisen from granting the stay, the Board took in account the financial harm to him, assuming that he would be able to return to his chosen career should the suspension order be vacated. *Id.* 556-57.

The Commission accepted interlocutory review and affirmed the Board’s decision denying the Staff’s stay request in *In the Matter of David Geisen* CLI-06-19, 64 NRC 9 (2006). The Commission based its decision on the relative harm to Mr. Geisen and DOJ which would result from granting the stay. Regarding the harm to Mr. Geisen from granting the stay, the Commission noted that he had lost his job by virtue of issuance of the enforcement order and that his employer had represented that it would be willing to consider re-employment should the order be lifted. *Id.* at 12. Regarding harm to DOJ if the stay was not granted, the Commission noted that the affidavit from DOJ contained generalities but without supporting facts—supporting facts which the Commission found essential in justifying an abeyance request. *Id.* At 12 -13. Based on the Memorandum of Understanding (MOU) between NRC and DOJ⁵ recognizing the potential need to hold an enforcement proceeding in abeyance pending the conclusion of a parallel criminal case, the Commission observed that it was generally inclined to accommodate abeyance requests by DOJ. *Id.* at 13. However, the Commission noted that such requests must be based on factual support, which it found lacking in DOJ’s affidavit. *Id.* at 13 - 14.

⁵ “Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice,” 53 Fed. Reg. 50,317, 50318 (December 14, 1988).

On October 27, 2006, the Staff filed another motion to stay the proceeding, asking in the alternative that the Board issue a preclusion order to prevent Mr. Geisen from presenting claims and defenses not disclosed in discovery.⁶ The Staff's motion was prompted by changed circumstances, including Mr. Geisen's failure to provide any information to the Staff in written discovery notwithstanding the Staff's substantial responses to Mr. Geisen's discovery requests. As detailed in the Staff's motion, Mr. Geisen had acquired a significant informational advantage relative to the Staff having obtained grand jury information which was not available to the Staff or the Board as well as Staff responses to written discovery requests. Second Stay Request at 1-9. Additionally, the criminal proceeding had progressed by that time such that it appeared likely that the criminal trial would begin at approximately the same time as the enforcement proceeding. *Id.* at 15. This has since proved to be the case since the criminal case has been set to go to trial on April 17, 2007, and the enforcement proceeding to begin on March 7, 2005.

Based on these new circumstances, the Staff addressed the five *Oncology* factors in determining the balance of interests of the government and the individual. Regarding factor (1), the Staff asserted two grounds. First, the Staff argued that it was prejudiced in its ability to pursue the enforcement action because of Mr. Geisen's failure to provide discovery based on his invocation of his fifth amendment rights. *Id.* at 11 - 13. Secondly, the Staff argued that the Board would be prevented from obtaining a full and complete adjudicatory record upon which to reach a fair and just decision. *Id.* at 13 - 15. This is due the fact that the Staff had learned that not only Mr. Geisen but also key witnesses would not be able to provide testimony due to their

⁶ "NRC Staff Motion for Stay of Proceeding or In the Alternative for a Preclusion Order" ("Second Stay Motion").

invocation of Fifth Amendment rights while the criminal case is pending.⁷ Additionally, neither the Staff nor the Board can be aware of information obtained during the grand jury investigation notwithstanding the fact that it has been disclosed to Mr. Geisen. Given the Board's stated interest in ensuring the truth and accuracy of information, the Staff argued that factor (1) weighed heavily in favor of the Staff.

Regarding the length of delay, factor (2), the Staff noted that because the criminal proceeding had progressed, the incremental delay was significantly diminished and this factor was no longer one of significance. *Id.* at 15 - 16. Similarly, the prejudice to Mr. Geisen factor (4), was diminished due to the fact that the criminal proceeding was likely to proceed in conjunction with the enforcement proceeding. *Id.* at 16 - 17. Thus, the weight to be afforded these factors had substantially changed since the filing of First Stay Motion, and the Staff argued that the overall balancing weighed in favor of granting the stay.

During oral argument on the Staff's motion, the Board did not grant a stay of the proceeding. Accordingly, the parties have agreed to an aggressive hearing schedule in order to complete the enforcement proceeding before commencement of the criminal trial.⁸ Under that schedule, deposition discovery is set to begin on January 16, 2007, with the hearing to commence on March 7, 2007, and proposed finding of fact and conclusions of law to be filed no later than March 30, 2007. This schedule is intended to permit issuance of Board decision before commencement of the criminal trial because of potential impact of the administrative

⁷ Specifically, counsel for Andrew Siemaszko and Rod Cook, both of whom were involved in the development of the same bulletin responses for which Mr. Geisen has been held responsible, have indicated that they will not respond to questions in depositions for the purpose of the Geisen enforcement proceeding.

⁸ As indicated in the "Joint Motion for Adoption of Proposed Case Schedule" filed December 15, 2006, and further described during the teleconference of December 20, 2006, the parties are in substantial, but not complete agreement on the hearing schedule.

decision on the criminal trial. December 20, 2006, teleconference Tr. at 423 - 24.

In accordance with that schedule, the Staff designated individuals to be deposed for the upcoming hearing and shared those with counsel for Mr. Geisen and DOJ. Based on a review of the Staff's deposition list, and the prospect of having witnesses to be used in the criminal proceeding subject to deposition and examination at hearing, DOJ requested the Staff to renew its request for stay of the proceeding until after completion of the criminal trial. DOJ has explained the potential harm to the criminal proceeding in an affidavit which is Attachment A to this filing.

DISCUSSION

Since the time of the Staff's First Stay Request, circumstances involving this proceeding have changed which substantially impact the weight afforded the five *Oncology* factors. The changed circumstances which had occurred by the filing of the Staff's Second Stay Request were thoroughly discussed therein and are not fully restated but incorporated herein. Since then, additional circumstances have occurred and DOJ has prepared a new affidavit detailing the harm to the pending criminal proceeding if the enforcement is allowed to proceed. These additional circumstances and considerations are addressed below in the context of each of the *Oncology* factors. Because the rationale behind those factors has been extensively addressed in this proceeding, the Staff will not describe them again in this filing.

Factual Application of the Oncology Standard

Given the informational advantage which has been obtained by Mr. Geisen by taking advantage of civil discovery against the Staff while invoking his Fifth Amendment rights and by virtue of grand jury secrecy requirements, DOJ has, in the attached affidavit, identified specific harm that could result if the enforcement hearing is allowed to proceed before the criminal trial begins. As indicated in that affidavit, DOJ perceives the harm to be so significant that

consideration has been given to asking the Staff to withdraw the enforcement order if this request for stay is not granted. Therefore, factor (1), reason for the delay, weighs heavily in favor of the stay.

Because the criminal trial against Mr. Geisen is imminent, the requested stay would be for a limited period of time. During much of the period of the stay, Mr. Geisen would be involved in a criminal trial and thus unable to work in NRC-licensed activities. The outcome of the trial could well render moot the need for the enforcement proceeding because a conviction could prevent Mr. Geisen from obtaining the security clearance required to be employed by NRC licensees. However, even if the Staff pursues the enforcement proceeding, it could begin on an expedited schedule immediately following the criminal trial. Given these considerations, factors (2), length of delay; and (4), prejudice to Mr. Geisen, should not be afforded significant weight. Similarly, factors (3), assertion of right to a hearing; and factor (5), risk of erroneous deprivation, have not previously been given significant weight by this Board although factor (5) generally weighs in favor of the stay.

Considering the overall balance of these factors, discussed further below, the Staff submits that the potential harm identified by DOJ in allowing depositions to proceed in the enforcement matter clearly tips the balance in favor of granting a stay of the proceeding.

I. Reason for Delay (Harm to Government from Denial of Relief)

DOJ requests that the instant proceeding be stayed to prevent the testimony of witnesses, who are expected to be used in the criminal proceeding, to be elicited, through deposition and testimony at hearing, before commencement of the criminal trial. As explained in the First Stay Request, depositions are not permitted as a matter of right in criminal proceedings. In contrast to civil cases, criminal defendants can only depose a witness by a court order that a deposition be taken, so as to preserve testimony for trial, and only if

exceptional circumstances are present and if required in the interest of justice.

See, Fed. R. Crim. P. 15. This follows from the general principle that discovery in criminal proceedings is more limited than that allowed in civil proceedings.⁹ Allowing depositions to proceed in the enforcement case will therefore allow Mr. Geisen to obtain discovery he would not be entitled to in a criminal case because he will be able to elicit testimony and cross examine witnesses important to the criminal prosecution.

Further, he will be able to establish a testimonial record in a forum in which the criminal prosecutors will be unable to protect their interests through asserting objections, redirecting or correcting testimony. This is a concern to DOJ because the Staff will be required to present its enforcement case without the benefit of information obtained through the extensive grand jury investigation in this case. Thus, it is entirely possible that the testimony elicited during depositions and at hearing may, unknown to the Staff, be incomplete or inaccurate. However, due to grand jury secrecy requirements, DOJ would be unable to advise the Staff when and in what manner to correct the record. This could result in an incomplete, inaccurate and potentially misleading record before this Board. Such a record could be used to the disadvantage of DOJ during the criminal trial. Such a record could also be the premise for improper findings by this Board, findings which could be further used to the disadvantage of DOJ during the criminal trial.

Aside from the possibility that the Staff may, in unknowing error, elicit incomplete or inaccurate testimony from witnesses, it is now clear that the individuals who are currently the subject of criminal indictment will decline to testify while their criminal case is pending.

⁹ A discussion of the legal underpinnings for the policy under which criminal defendants are permitted more limited discovery than civil litigants is described in the Staff's First Stay Motion at 4 -9, and cited with approval in *Geisen*, LBP-06-13, 63 NRC at 552 (2006).

Because the criminal case is presumptively more significant in the eyes of each criminal defendant, the decision to testify will necessarily depend on the status of that case and not this enforcement proceeding. Thus, it is all but inconceivable that any criminal defendant would take the risk of harming his criminal case by testifying in this enforcement proceeding.

Thereafter, depending on circumstances surrounding the criminal trial, a defendant may nevertheless make the decision to testify during the criminal case. This raises the possibility that the record presented before this Board is later shown to be incomplete or inaccurate during the criminal proceeding. However, as explained by DOJ, Mr. Geisen could potentially use the testimonial record and findings of this Board to DOJ's disadvantage during the criminal trial, even if they are inaccurate or misleading by virtue of being based on incomplete information.

Thus, harm to the government's criminal case in allowing the enforcement hearing to proceed first could result from the informational disadvantage to the Staff, and ultimately that as well of the Board, as compared to Mr. Geisen, who holds this informational advantage as the result of the written civil discovery process in this proceeding and by virtue of the grand jury secrecy requirements. Mr. Geisen has been provided extensive discovery from the Staff in mandatory disclosures and in response to his interrogatories and request for document production. In contrast, Mr. Geisen initially declined to provide any information to the Staff in discovery, invoking his Fifth Amendment rights. Only after being forced to provide a statement of claims and defenses or face a potential preclusion order did counsel for Mr. Geisen provide any, albeit extremely limited, responses to the Staff's interrogatories.¹⁰ In large part, however, the Staff's discovery requests remain unanswered. In addition, the Staff does not have

¹⁰ "David Geisen's Supplemental Answers to NRC Staff's First Set of Interrogatories Nos 16 - 20 and 22 - 29." In that filing Mr. Geisen continued to decline to answer questions invoking his Fifth Amendment rights, and provided only very limited responses to certain interrogatories.

knowledge of the information obtained during the grand jury proceeding which led to Mr. Geisen's criminal indictment, although this information has been provided to Mr. Geisen.

II. Length of Stay

Since the time of the Staff's First Stay Request, a trial date of April 15, 2007, has been established for the criminal trial. By adopting an extremely aggressive schedule, the enforcement proceeding is currently scheduled to begin on March 7, 2007. Based on that hearing schedule, a stay issued now would mean a delay of only approximately three months considering that written discovery has now been largely completed and deposition discovery could begin immediately following completion of the criminal trial. Importantly, much of that time would be consumed by the criminal trial during which Mr. Geisen would be unlikely to be looking for employment in NRC licensed facilities. Of course, if Mr. Geisen is found guilty in the criminal trial, the enforcement proceeding would become moot because the conviction itself would prevent him from obtaining employment in NRC-licensed activities.

III. Assertion of Right To A Hearing

As the Commission recently observed, this factor is "merely procedural, and consequently is of little importance when balancing real-life equities" [footnote omitted].¹¹ The Staff does not dispute that Mr. Geisen promptly asserted his right to a hearing, but in light of the significance of the potential harm from not granting a stay, his assertion of his hearing rights does not affect the balancing of interests.

IV. Prejudice to Mr. Geisen

Under this factor, the Board evaluates two forms of prejudice: (1) Prejudice to Mr. Geisen's ability to defend against the charges in the enforcement order and (2) prejudice to

¹¹ *In the Matter of Andrew Siemaszko*, CLI-06-12, 63 NRC 495, 506 (2006).

Mr. Geisen's private interests.¹² In considering the First Stay Motion, the Board did not give weight to this factor because Mr. Geisen did not seem unduly concerned that the delay would "diminish the quality of the evidence."¹³

Mr. Geisen's private interest that is prejudiced by the enforcement order is his ability to obtain employment in NRC-licensed activities. However, Mr. Geisen will be on trial in the criminal proceeding against him beginning in April 2007, and could begin employment until after completion of that trial. In the event he is convicted of the charges against him, he will be unable to obtain employment in NRC-licensed activities by virtue of the conviction. Should he be exonerated, the Staff would likely reconsider pursuing its enforcement action. Even should the Staff proceed with a hearing on the enforcement order, the proceeding could begin immediately after the criminal trial and on the expedited schedule similar to that already established. This would minimize any prejudice to Mr. Geisen's private interests. This factor, therefore, does not carry any substantial significance given the imminence of the criminal trial.

V. Risk of Erroneous Deprivation

As the Board noted in deciding the First Stay Motion, this factor weighs, on balance, in favor of the Staff. *Geisen*, LBP- 06-13, 63 NRC at 558 - 59. While the Board credited Mr. Geisen's rejection of a deferred prosecution agreement as indicative of some belief that he could prevail in the criminal and civil enforcement proceedings, it found this was more than counterbalanced by the fact that Mr. Geisen failed to challenge the immediate effectiveness of the order and the fact that he was indicted by a grand jury. *Id.*

¹² *Oncology*, CLI-93-17, 38 NRC at 59.

¹³ *In the Matter of David Geisen*, LBP-06-13, 63 NRC 523, 547-48. The Board also noted that the Commission in *Oncology* seemed to discount this form of prejudice, *Id.* At 547, n. 91.

CONCLUSION

Based on the reasons presented in the attached affidavit submitted on behalf of DOJ in light of the factors governing granting a stay discussed above, the Staff requests that the Board stay the enforcement proceeding be until after completion of the criminal proceeding against Mr. Geisen. Because the harm identified by DOJ would result from permitting depositions in this proceeding which are currently scheduled to begin on January 16, 2007, the Staff requests that the Board rule expeditiously on this motion.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for the NRC Staff

Dated at Rockville, MD
this 8th day of January, 2007

January 8, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DAVID GEISEN) IA-05-052
) ASLBP No. 05-839-02-EA
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AFFIDAVIT OF RICHARD POOLE, SENIOR TRIAL ATTORNEY

1. I have served as a prosecutor with the United States Department of Justice since January 1983. Within the department, I have been a Senior Trial Attorney at the Environmental Crimes Section of the Environment and Natural Resources Division since January 2001. Among my assignments, I am part of a trial team prosecuting employees and a contractor of the FirstEnergy Nuclear Operating Company (FENOC) for concealing material information and presenting false documents to the Nuclear Regulatory Commission (NRC). I submit this affidavit in support of the application of NRC Staff to renew the Board's earlier stay of the above-captioned proceeding.

2. On January 19, 2006, a federal grand jury in the Northern District of Ohio returned an Indictment in United States v. David Geisen et al. David Geisen is named as a defendant in all five counts of that Indictment. The Indictment alleges that Mr. Geisen and others concealed material information from the NRC and provided the NRC with false documents in response to NRC's Bulletin 2001-01. That Bulletin sought information about past inspections of

January 8, 2007

control rod drive mechanism nozzles at FENOC's Davis-Besse Nuclear Power Station and other pressurized water reactors. I understand that the conduct alleged in the Indictment also forms the basis for the above-captioned proceeding.

3. Mr. Geisen was arraigned on February 1, 2006. After the arraignment, the United States furnished voluminous discovery to criminal defense counsel. Defendants have filed motions and the government has responded pursuant to a briefing schedule which is now complete. A hearing on the motions has been scheduled for February 6, 2007. Trial is presently scheduled to occur on April 16, 2007, with a backup date of July 16, 2007, if a potential conflict for Mr. Geisen's local defense counsel and another defendant's local counsel is not resolved.

4. I understand that Mr. Geisen is also entitled to discovery in the above-captioned matter, which includes the power to depose witnesses. I have been informed by NRC Staff that the NRC will seek to depose and present approximately thirteen witnesses, and that Mr. Geisen's counsel will be free to cross-examine these witnesses, both at the depositions and at the hearing before the this Board. The witnesses that NRC Staff plans to depose include numerous witnesses who will be critical to the government's criminal case. Further, I am informed that Mr. Geisen may seek to depose additional witnesses not yet named. Such discovery exceeds that which he is entitled under the Federal Rules of Criminal Procedure.

5. Further, based on my experience, in most criminal cases defendants choose to exercise their privilege against self-incrimination. We are informed by NRC Staff that Mr. Geisen and his co-defendants in the criminal case, Andrew Siemaszko and Rodney Cook, now have all, through counsel, informed NRC Staff that they intend to invoke their Fifth Amendment right to decline to answer questions at depositions. Mr. Geisen's privilege against self-incrimination must be respected, but if depositions were to proceed in these circumstances, Mr.

Geisen would gain lopsided discovery advantages in both the criminal case and the administrative case. Such advantages would dissolve if the order of these proceedings were reversed.

6. Allowing this proceeding to go forward in these circumstances is likely to create an incomplete and misleading record which defense counsel may then use to unfairly disadvantage the government in the criminal proceeding. Mr. Geisen's counsel has access to transcripts of proceedings from the criminal investigation that the prosecution team cannot legally provide to the NRC Staff, absent a court order. Mr. Geisen's counsel will be free to cross-examine witnesses at depositions and at the hearing before this Board with knowledge gained from his review of those transcripts. As a result, NRC Staff will be at a distinct disadvantage in their efforts to ensure that the record is complete and accurate. Moreover, the Staff's theory of the case and approach to it may differ from the Department of Justice. The resulting record of each witness's testimony will certainly contain differences from the testimony elicited at the criminal trial. That record will be available to criminal defense counsel on cross-examination. Since the criminal case will be tried before a jury, this record, and the Board's findings, may lead to factual misunderstandings and confusion by the jury at the trial.

7. The prosecution team believes that the interests of justice would not be served if the criminal and administrative proceedings regarding Mr. Geisen were to continue to go forward in parallel. In such circumstances, it is appropriate to give priority to the criminal case. In Campbell v. Eastland, 307 F.2d 478 (5th Cir.), cert denied 375 U.S. 975 (1963), Judge Wisdom, speaking for the Fifth Circuit Court of Appeals, explained that the distinct discovery rules applicable to related criminal and civil cases require a policy decision about which case should be litigated first. The court noted that administrative policy generally gives priority to the public

interest in law enforcement, and that “a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.” Id. at 487. Further, the reason that criminal cases should be afforded a higher priority is 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 his criminal suit.” Id. Accord, In re Ivan F. Boesky SEC Litig., 128 F.R.D. 47, 48-49 (S.D.N.Y. 1989); SEC v. Dresser Industries, 628 F.2d 1368, 1375-1376 (D.C. Cir. 1980), cert denied 449 U.S. 993 (1980); Founding Church of Scientology v. Kelly, 77 F.R.D. 378, 381 (D.D.C 1977).

8. Subsequent to Campbell, Benevolence Intern. Foundation v. Ashcroft addressed the balancing of interests where a civil case is pending following return of a criminal indictment. 200 F.Supp.2d 935 (N.D. Ill. 2002). The Benevolence decision concluded that the civil matter in that case should be stayed in its entirety while the criminal case went forward.

9. The Benevolence court looked to whether civil discovery would allow a criminal defendant to circumvent the “restrictive rules of criminal discovery.” Id. at 940. The rules of criminal procedure have carefully balanced the rights and obligations of the parties to a criminal case, in light of the government’s ultimate obligation to prove its case beyond a reasonable doubt. Allowing Mr. Geisen’s criminal defense counsel to participate in depositions in this matter allows him to make an end run around well-established criminal discovery rules.

10. The Benevolence court next looked to the convenience of the courts in the management of their cases, noting that a criminal proceeding could moot a related civil proceeding. Id. Here, the Indictment charges that Mr. Geisen with knowingly and willfully making and using false writings in a matter within the jurisdiction of the NRC, and a conviction

on some or all of the counts in the Indictment could moot part or all of these proceedings, because (a) a conviction at trial may serve as a collateral estoppel as to elements of the offense charged in the administrative proceeding, and (b) a felony conviction in the criminal case would make it impossible for him to obtain a security clearance, and thus would prevent him from gaining employment at an NRC-licensed facility.

11. Finally, the Benevolence court considered that “administrative policy gives priority to the public interest in law enforcement.” Id. at 941 (quoting Campbell). A grand jury voted to indict Mr. Geisen for knowingly and willfully making and using false writings in a matter within the jurisdiction of the NRC. The unambiguous public interest in enforcing criminal laws prohibiting such conduct justifies the priority given to criminal proceedings under Campbell and Benevolence. Moreover, as a practical matter, conducting depositions and a hearing in the months leading up to the April 16, 2007 trial date will make critical witnesses unavailable for trial preparation in the criminal case.

12. In the event that the request to stay this proceeding is denied, it will be necessary for the Department of Justice to consider whether to ask the NRC Staff to seek dismissal of the administrative complaint against Mr. Geisen. This remedy would be consistent with the priority accorded to criminal proceedings, but the Department has deferred considering such a request, because we are informed that NRC Staff would be barred from refile after the conclusion of the criminal case. The present circumstance – in which Mr. Geisen’s criminal defense counsel will have the opportunity to create a potentially incomplete and misleading record before the Board using their lopsided informational advantage, and then to use that record at the criminal trial – may compel the Department to seek such a drastic remedy. We submit that under the circumstances, a stay which accords the criminal prosecution the priority which Campbell and

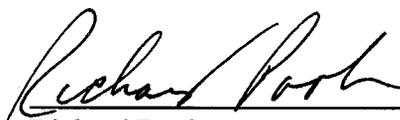
January 8, 2007

Benevolence allow would better serve the ends of justice.

13. One of Mr. Geisen's co-defendants, Andrew Siemaszko, has sought a hearing in a related administrative action. The Board in that case is holding Mr. Siemaszko's hearing in abeyance until his criminal case is resolved.

14. For these reasons, the trial team believes that the ends of justice require that they above-captioned proceeding be held in abeyance until the criminal trial is finished.

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



Richard Poole
Senior Trial Attorney
Environmental Crimes Section
United States Department of Justice

January 8, 2007
Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR STAY OF PROCEEDING" and "AFFIDAVIT OF RICHARD POOLE, SENIOR TRIAL ATTORNEY" 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 8th day of January, 2007.

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