

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

DAVID GEISEN

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Docket No. IA-05-052

ASLBP No. 06-845-01-EA

NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF BOARD'S DENIAL OF
MOTION FOR STAY AND PETITION FOR A STAY PENDING REVIEW

Lisa B. Clark
Counsel for the NRC Staff

January 19, 2007

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INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.341(f)(2) and 2.342, the Nuclear Regulatory Commission Staff (Staff) petitions for interlocutory review of the Order of the Atomic Safety and Licensing Board (Board), dated January 12, 2007, denying the Staff's motion to stay the proceeding until Mr. Geisen's criminal trial is completed.¹ The motion, filed on behalf of the Department of Justice (DOJ) pursuant to the Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice,² was prompted by DOJ's concern that allowing this proceeding to continue could disadvantage the prosecution of the criminal case against Mr. Geisen. Among DOJ's reasons for raising this concern is the fact that depositions of witnesses in this proceeding, which are now imminent, would provide Mr. Geisen with discovery to which he is not entitled under the Federal Rules of Criminal Procedure and could unfairly prejudice the government in the criminal case. Because deposition discovery may begin as

¹ Order (Denying Governments's Request to Stay Proceeding).

² 53 Fed. Reg. 50317 (December 14, 1988).

early as the week of January 22–26, 2007, the Staff requests that the Commission grant an immediate housekeeping stay of the proceeding while this appeal is pending.

BACKGROUND

On January 4, 2006, the Staff issued to Mr. Geisen an immediately effective Order prohibiting him from any involvement in NRC-licensed activities for a period of five years.³ The Order was predicated on the Staff's determination that Mr. Geisen deliberately submitted to the NRC information he knew was incomplete and inaccurate in material respects. Thereafter, on January 19, 2006, the United States Attorney's Office for the Northern District of Ohio issued a five-count criminal indictment against Mr. Geisen based on facts that are essentially the same as those underlying the Staff's Order.⁴ 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's Order and requested an expedited hearing.⁵

On March 20, 2006, the Staff moved, on behalf of DOJ, for a stay of this administrative proceeding until Mr. Geisen's criminal trial is complete. The Staff's motion was supported by an affidavit prepared by a DOJ trial attorney,⁶ citing a concern that if the criminal and administrative proceedings were to go forward in parallel Mr. Geisen could use the administrative process to circumvent the more restrictive rules of criminal discovery. The Board denied that motion based on consideration of the factors set forth in *Oncology Services Corp.*, CLI-93-17, 38 NRC 44

³ "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)."

⁴ 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.

⁵ "Answer and Demand for Expedited Hearing."

⁶ Affidavit of Thomas T. Ballantine, Trial Attorney, Attachment B to "NRC Staff Motion to Hold the Proceeding in Abeyance."

(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. *David Geisen*, 63 NRC 523, 535 (2006). Notably, with regard to factor (1), the Board noted that the delay being sought was both undefined and lengthy. *Id.* at 545. Regarding factor (2), the Board premised its analysis upon a determination that the information balance was heavily skewed in favor of the government, in contrast to situations 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. Considering factor (3), the Board considered the financial harm Mr. Geisen would incur assuming that he would otherwise be able to return to his chosen career should the suspension order be vacated *Id.* at 556 - 57. The Board determined that factor (4) weighed against granting the stay and factor (5) weighed in favor of the stay, but did not afford either factor appreciable weight. *Id.* at 558 -59.

The Commission accepted interlocutory review and affirmed the Board's decision based on a weighing of the harm to Mr. Geisen and to DOJ. *David Geisen*, CLI-06019, 64 NRC 9 (2006). Regarding the harm to Mr. Geisen from granting the stay, the Commission noted that Mr. Geisen had lost his job by virtue of the enforcement order against him 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 observed that a supporting affidavit from DOJ which accompanied the Staff's motion contained generalities but lacked the supporting facts essential to justify a stay of proceedings. *Id.* at 12 - 13. The Commission acknowledged the Memorandum of Understanding between NRC and DOJ which recognizes the potential need to hold an enforcement proceeding in abeyance pending the conclusion of a parallel criminal case and, while it expressed its general inclination

to accommodate abeyance requests by DOJ, the Commission noted that such requests must be based on factual support, which it found lacking in DOJ's affidavit. *Id.* at 13 - 14.

On October 27, 2006, the Staff filed another motion to stay the proceeding, asking in the alternative that the Board issue a preclusion order preventing Mr. Geisen from presenting claims and defenses not disclosed in discovery.⁷ 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 because he had obtained both grand jury information unavailable to the Staff as well as the Staff's responses to his written discovery requests. Second Stay Motion at 1-9. Additionally, the criminal proceeding had progressed by that time to the point where it appeared likely 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; the criminal case is scheduled to begin April 17, 2007,⁸ and the enforcement hearing is scheduled to start March 7, 2005.

Based on these new circumstances, the Staff, in its October 27 Motion, addressed the five *Oncology* factors to determine 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. Second, the Staff argued that the Board would be impeded from compiling a full and complete adjudicatory record upon which to reach a fair and just decision. *Id.* at 13 - 15. This argument

⁷ "NRC Staff Motion for Stay of Proceeding or In the Alternative for a Preclusion Order" ("Second Stay Motion").

⁸ A backup date of July 16, 2007, was also established in the event that potential conflicts for defense counsel in the criminal case are not resolved.

was based on new information the Staff had obtained that, in addition to Mr. Geisen, some of the Staff's key witnesses would refuse to provide testimony based on their invocation of Fifth Amendment rights.⁹

Regarding factor (2), the length of delay, the Staff noted that because the criminal proceeding had progressed, the incremental delay had diminished significantly and this factor was no longer significant. *Id.* at 15 - 16. Similarly, the Staff argued that the prejudice to Mr. Geisen, factor (3), 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. While there was no impact on the remaining factors - (4) and (5) - those had not been afforded any appreciable weight by the Board in considering the previous stay motion.

During oral argument on November 14, 2006, the Board denied a stay of the proceeding. The parties thereafter agreed to an aggressive hearing schedule which contemplates completion of the enforcement proceeding before commencement of the criminal trial. Under the present hearing schedule, deposition discovery could begin as early as January 16, 2007, with the hearing to commence March 7, 2007.¹⁰ Proposed findings of fact and conclusions of law are to be filed no later than March 30, 2007. This schedule was adopted to accommodate the Board's stated intention to issue its decision before the criminal trial because of potential

⁹ 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 those individuals will not respond to questions in depositions obtained in the course of the Geisen enforcement proceeding.

¹⁰ Currently, the first deposition scheduled by agreement between the parties will be held on January 29, 2007. However, additional depositions will be scheduled and the parties are considering dates during the week of January 22 - 26, 2007.

impact the administrative decision could have on the criminal case. December 20, 2006, teleconference Tr. at 423 - 24.

Subsequently, in accordance with the hearing schedule, the Staff designated individuals it intends to depose in this matter and shared that list with counsel for Mr. Geisen and DOJ. After reviewing the Staff's deposition list and considering the prospect of having witnesses for the criminal trial subject to deposition and examination in the administrative proceeding, DOJ asked the Staff to renew its request for stay of this proceeding until the criminal trial is complete. DOJ also provided the Staff with an affidavit explaining the reasons for its concern that allowing deposition discovery and the administrative hearing to proceed could create an unfair advantage to Mr. Giesen in the criminal case.¹¹ As stated in the affidavit, DOJ is concerned that Mr. Geisen may use the depositions and hearing in the NRC's enforcement proceeding to create an incomplete and misleading record which defense counsel could use to unfairly disadvantage the government during the criminal proceeding. Affidavit at ¶ 6. As DOJ noted, because the Staff, unlike Mr. Geisen, is not in possession of grand jury information, including transcripts of witness testimony, the Staff could be unaware of potential inconsistencies and unable to correct the record by asking clarifying questions as the depositions take place. *Id.* Counsel for Mr. Geisen, on the other hand, can use his knowledge of the grand jury information to steer these depositions in directions designed to create inconsistencies between a witness's deposition testimony and his or her prior statements. Tr. at 539. Thereafter, Mr. Geisen will be able to use this testimony to impeach witnesses at his criminal trial, potentially leading to factual misunderstandings and confusion by the jury. Affidavit at ¶ 6.

¹¹ Affidavit of Richard Poole, Senior Trial Attorney, ("Affidavit"), Attachment to "NRC Staff Motion for Stay of Proceeding" ("Third Stay Motion"), January 8, 2007.

Prompted by DOJ's concern, the Staff filed its Third Stay Motion requesting that the Board stay the administrative proceeding until after completion of the criminal trial. The Staff pointed out that circumstances had substantially changed since the time the first stay motion had been filed, thereby significantly changing the relative weight of the *Oncology* factors which now weigh even more in favor of the stay. Specifically, the Staff relied on and incorporated by reference the arguments presented in the second stay motion,¹² and, significantly, upon the harm detailed in the new DOJ affidavit. Third Stay Motion at 6. With regard to harm to the government, the Staff cited the prospect that Mr. Geisen could use his informational advantage resulting from his knowledge of grand jury information to establish a testimonial record which is inconsistent with grand jury testimony and potentially inaccurate or misleading. *Id.* at 7 - 10. As the Staff observed, this testimony could, nevertheless, be used by Mr. Geisen to impeach witnesses in the criminal case. Further, this testimony could form the basis for the Board's factual findings which could potentially be used by Mr. Geisen to the disadvantage of DOJ by, for example, arguing for collateral estoppel of factual issues in the criminal case.

After oral argument on January 11, 2007, the Board issued a ruling from the bench denying the Staff's Motion. The next day, January 12, 2007, the Board issued a written Order memorializing that ruling as announced during the hearing.¹³ The Board based its ruling on a weighing of the harm that to Mr. Geisen compared to the harm to the Government. Tr. at 614. First, in assessing the harm to Mr. Geisen, the Board, based on its belief that the date of April 17, 2007, for the criminal trial was still speculative, said that it was not prepared to grant the requested stay as it would result in more than a two-year delay in Mr. Geisen's "exercise of

¹² The Staff elaborated on this point when questioned by the Board during oral argument, explaining that the previous arguments had been incorporated by reference to avoid a complete restatement of its previous arguments. Tr. at 534.

¹³ Order (Denying Government's Request to Stay Proceeding).

his rights.” Tr. at 614 - 15. Regarding harm to the government, the Board expressed its view that nothing new had been presented and there was no cognizable harm to the government. Tr. at 615, 619. As to the statements by DOJ regarding the manner in which Mr. Geisen could use depositions in the enforcement case to his advantage in the criminal trial, the Board stated that there was no way to predict precisely how the criminal trial would proceed and, in any event, “that’s part of being a trial lawyer, to deal with impeachment and rehabilitation of your witnesses. . . we don’t think that’s the kind of activity that rises to harm to the Government.” Tr. At 617.

The Board also found that the present case could not be compared to *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), in which the plaintiff used the criminal case as a “dodge” to avoid his own civil discovery obligations while at the same time taking advantage of civil discovery to obtain information from the government, because Mr. Geisen did not bring this case. Tr. At 618. While the Board acknowledged the Memorandum of Understanding between the NRC and DOJ addressing parallel proceedings and the Commission’s statement that it generally deferred to DOJ, the Board concluded that doing so was not possible in this case. Tr. at 615.

DISCUSSION

The Staff asks that the Commission accept interlocutory review, reverse the Board’s ruling and stay the enforcement proceeding until after completion of Mr. Geisen’s criminal trial. Further, because the harm the Staff seeks to avoid will result from conducting depositions that are scheduled to begin as early as next week, the Staff requests that the Commission grant an immediate housekeeping stay of the proceeding pending the resolution of this appeal.

The Commission may, in its discretion, grant interlocutory review of a Board’s decision if the party can demonstrate that the issue for which it seeks review “threatens the party adversely affected by it with immediate and irreparable impact, which as a practical matter, could not be

alleviated through a petition for review of the presiding officer's final decision" or "affects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R.

§ § 2.341(f)(2)(i); (f)(2)(ii). The Commission may also take interlocutory review as an exercise of its "inherent authority over agency adjudicatory proceedings." *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 26–27 (2004). The Staff respectfully submits that this case is appropriate for interlocutory review because the Board's decision threatens the government with both immediate and irreparable harm. As the Commission concluded in accepting interlocutory review of the Board's ruling on the Staff's first stay motion, "[t]he question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal proceeding is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot)." *David Geisen*, CLI-06-19, 64 NRC 9, 11 (2006). That same question is presented again, and the Staff asks that the Commission grant this petition to avoid the immediate and irreparable harm that will result if a stay of proceedings is not granted.

The Staff submits that in denying its Motion for Stay the Board erred in analyzing the relative harm to the government and to Mr. Geisen resulting from the requested stay. Specifically, instead of considering the *Oncology* factors in light of current circumstances, the Board relied on its previous analysis of the *Oncology* factors after finding that no new or cognizable harm had been identified by DOJ and that the harm to Mr. Geisen was unchanged. Tr. 615 - 620. In doing so, the Board failed to properly account for new developments in this case which have a substantial impact on the weight which should be afforded those factors. This new developments include the following: (1) Mr. Geisen has now stated definitively that he will invoke his Fifth Amendment rights and, on that basis, denied the Staff any significant discovery and refused to testify at the hearing; (2) the Staff has identified thirteen witnesses it

expects to depose and Mr. Geisen has identified an additional thirteen individuals he may wish to depose,¹⁴ (3) other individuals whom the Staff intends to depose and call as witnesses at the hearing, including Andrew Siemaszko and Rodney Cook, have also indicated they will invoke their Fifth Amendment rights; (4) the trial in Mr. Geisen's criminal case is now imminent, with trial set to begin April 17, 2007, approximately one month after the hearing in this case is scheduled to begin; and (5) given that the trial date in the criminal matter is very close to the hearing date in this matter, there is an increased likelihood that the present proceeding will interfere with DOJ's preparation of witnesses for the criminal case. The Staff also submits that the Board overstated the extent to which the stay would harm Mr. Geisen's interests by failing to consider the limited duration of the incremental delay that the stay would cause and applied a standard for granting a stay in parallel proceedings—a standard under which the Staff must show "extraordinary" need for a stay—that is at odds with the standard established by the Commission.

A. The Board Erred in Weighing the Harm to Mr. Geisen and the Government Resulting From the Requested Stay

The Staff submits that the Board erred in finding that the relative weight of the *Oncology* factors - those found by the Commission to apply to stay motions - has not changed since the

¹⁴ See Attachment A, Letter from Charles F. B. McAleer, Jr. to Lisa Clark, January 10, 2007. In designating this number of potential deponents, by Mr. Geisen appears to be using the civil discovery process to gain an advantage at his criminal trial. Although counsel for Mr. Geisen previously stated with regard to depositions, "there may be one or two that we'll take," counsel by this letter has significantly expanded the number of potential deponents. This very belated disclosure raises the very real possibility that Mr. Geisen will be taking depositions primarily with a view to his criminal trial. Defense counsel also stated definitively, in a teleconference with the Board on December 20, 2006, that Mr. Geisen intends to invoke his Fifth Amendment rights and decline to testify on his own behalf at the administrative hearing. That decision may compromise Mr. Geisen's chance of prevailing at the hearing given that the Staff will seek, and the Board will be free to draw, adverse inferences from his failure to testify. However, that decision has the corresponding effect of immunizing Mr. Geisen from giving testimony that could prove damaging at his criminal trial.

Staff's first stay request. As discussed below, circumstances have substantially changed since that time and a proper application of the *Oncology* factors now weighs heavily in favor of granting a stay. In particular, the harm to DOJ resulting from denial of a stay has increased significantly, while the harm to Mr. Geisen resulting from a brief stay of this proceeding has diminished.

1. The Board Improperly Dismissed Or Disregarded The Harm to DOJ

In assessing the harm to the government if a stay is not granted, the Board focused on DOJ's claim that without the stay of the present proceeding, Mr. Geisen will obtain the deposition testimony of many individuals who will be called as witnesses at his criminal trial and use that opportunity to develop inconsistent statements that can be exploited for impeachment purposes during the criminal proceeding. After initially acknowledging DOJ's unique expertise in this area,¹⁵ however, the Board proceeded to disregard the harm which DOJ had described by interposing its judgment that the harm would be insignificant or easily remedied. Tr. 563, 613. In doing so, the Board erred in improperly assessing the harm to the criminal prosecution for the reasons detailed below. However, even more fundamentally, the Board erred by not deferring to DOJ's judgment in an area where DOJ undisputedly has expertise. This is not a situation where DOJ has made generalized claims of harm that are not factually supported, the situation the Commission found was presented by the Staff's first stay request. Here, DOJ has identified specific, factual reasons for its determination that allowing depositions to proceed would harm its criminal prosecution. In these circumstances, the Board should defer to DOJ's judgement, not second guess it, consistent with the Commission's policy of accommodating such requests by DOJ when factually supported. *Geisen*, CLI-06-19, 64 NRC at 13–14.

¹⁵ See Transcript of November 14, 2006 Oral Argument at pp. 311–12; Transcript of January 11, 2007 Oral Argument at pp. 537–38.

a. DOJ Has Identified Harm Resulting From Inconsistent Witness Statements

Without a stay of this proceeding, Mr. Geisen may obtain the deposition testimony of up to twenty-six individuals, all of whom may be potential witnesses in the criminal case.

Mr. Geisen would not be entitled to that testimony under the Federal Rules of Criminal Procedure. Under those rules, a criminal defendant can depose a witness only by court order, only if the deposition is necessary to preserve testimony for trial, and only if exceptional circumstances are present and the deposition is required in the interest of justice.

Fed. R. Crim P. 15. As to the harm to DOJ, Mr. Richard Poole, Senior Trial Attorney for DOJ, explained, “a great number of those witnesses are people who [DOJ] would also expect to testify at trial in the criminal case, [and] their testimony will be significant.” (Tr. 547.) Given that many of the deponents have previously made sworn statements to the NRC’s Office of Investigation and before the grand jury in the criminal proceeding, this would be, for some potential witnesses, the third time they have given statements in this matter. Mr. Geisen will also obtain the testimony at hearing of witnesses. That will be, for some witnesses, the *fourth* time they have given sworn statements in this proceeding. This repeated questioning of individuals who may testify at the criminal trial greatly increases the likelihood that there will be inadvertent discrepancies in their testimony that Mr. Geisen’s counsel could exploit in the criminal case by undermining the credibility of government witnesses. At the January 11, 2007 Oral Argument, Mr. Poole explained how this repeated questioning will likely harm DOJ and why this particular case presents a heightened risk for DOJ:

All right, I think it’s a common place in litigation that when you have witnesses making statements on multiple occasions, they’re going to come out differently. There are going to be inconsistencies. The inconsistencies can arise because of misrecollection, confusion about the question that was asked, and so it’s always a concern when you have multiple verbatim statements of a witness that are developed prior to trial.

Now this case presents that issue with the added twist that these are statements that are going to be elicited by the very same counsel who is going to represent David Geisen as a defendant at the criminal trial. So he'll have the opportunity to seek those inconsistencies and develop them as fully as possible and at trial of the criminal case, to use the transcript developed in the depositions in this case to impeach that same witness at trial. That's one practical concern that we have.

(Tr. 539.) Mr. Poole further explained that DOJ's routine practice in criminal cases is to seek to minimize inconsistencies resulting from faulty recollection by having witnesses re-read their grand jury testimony prior to trial. Without the opportunity to review testimony with witnesses, there is a significant risk of harm to DOJ. As Mr. Poole stated:

. . . I'm hurt if that's a government witness and I'm trying to persuade the jury that this witness knows what he's talking about and he's made inconsistent statements in a circumstance in which he hasn't had the opportunity [to review his grand jury testimony]. You see, when we prepare for trial, I mean we have these witnesses re-read the Grand Jury transcript before they testify so they recall their earlier testimony. You know, these events happened more than five years ago and the Grand Jury testimony may have happened several years ago, closer in time to the original events.

And the likelihood of developing these inconsistencies at trial is less because of that. In this circumstance, we're creating inconsistencies where none might otherwise exist[.]

(Tr. 563-64.) Because the Staff does not have access to grand jury materials, it will not be able to use that testimony to refresh the recollections of witnesses before they testify at depositions and at the hearing in the administrative proceeding. Given that a number of years have elapsed since those witnesses testified before the grand jury, the risk of inconsistencies in their testimony is quite high.

The Board suggested that any harm resulting from inconsistent witness statements could be overcome at the criminal trial simply by asking witnesses to explain the reasons for any inconsistencies (Tr. 563, 617). But that overlooks the fact that, in what counsel for Mr. Geisen

had initially described as a “cross examination case” for the defense,¹⁶ those inconsistencies will likely be at the heart of the defense strategy. Further, the Board appears to underestimate the effect those inconsistencies could have on the jurors’ assessments of a witness’s credibility. The jury, unlike the Board, will almost certainly lack the technical expertise or experience in NRC processes that might allow it to understand the significance of such inconsistencies. Counsel for Mr. Geisen would almost certainly request a jury instruction stating that jurors can take into account any inconsistencies when assessing the credibility of witnesses, creating the risk that a verdict in the criminal case may ultimately rest on inconsistent statements developed during depositions or at the hearing in this administrative proceeding.

b. DOJ Has Identified Harm Resulting From An Administrative Record Which is Incomplete and Potentially Inaccurate and Misleading

The Staff must present its enforcement case without the benefit of information obtained through the extensive grand jury investigation, information that has already been provided to Mr. Geisen. The Staff must also present its case without the benefit of full discovery by virtue of the fact that Mr. Geisen has invoked his Fifth Amendment rights. Thus, it is entirely possible the Staff will not know whether certain testimony elicited during depositions or at the hearing is incomplete or inaccurate. Due to grand jury secrecy requirements, however, DOJ will be unable to advise the Staff when and in what manner to correct the record. Tr. 569-70. This could result in a record before the Board that is potentially misleading or inaccurate. As explained above, such a record could very well produce inconsistent witness statements, and those inconsistencies could be used to the disadvantage of DOJ during the criminal trial. The record could also mislead the Board in making its factual findings, which could then be used by Mr.

¹⁶ See Transcript of November 14, 2006 Oral Argument at p. 370 (“This is going to be a cross examination case. We don’t believe they can make their burden of proof.”)

Geisen to the disadvantage of DOJ by, for example, claiming that collateral estoppel should apply to the criminal case. See Affidavit at ¶ 6.

Aside from the possibility that the record may contain incomplete, inaccurate or inconsistent statements from witnesses, it is now clear that Mr. Geisen's codefendants in his criminal trial will decline to testify in this proceeding while their criminal cases are pending. Some of those individuals may decide to testify at Mr. Geisen's criminal trial or their own trials, however, raising the possibility that during the criminal proceeding evidence will be introduced that shows the record upon which the Board based its findings was incomplete or inaccurate. As Mr. Poole states in his Affidavit, and as he explained at Oral Argument, Mr. Geisen and his codefendants could potentially use the testimonial record or findings reached by the Board in this proceeding to DOJ's disadvantage during their criminal trials regardless of whether the record and findings are complete or accurate. Affidavit at ¶ 6; Tr. 560.

c. DOJ Has Identified Harm Due to Interference with DOJ's Ability to Prepare Witnesses for Trial

In his Affidavit, Mr. Poole explains that depositions in this administrative proceeding will encroach upon DOJ's pre-trial planning by making critical witnesses unavailable for trial preparation in the criminal case. Affidavit at ¶ 11. At the January 11, 2007 Oral Argument, Mr. Poole twice elaborated on this point and explained why this administrative proceeding might interfere significantly with preparations in the criminal case:

Well, with respect to that, let me say this. That we have a pretty significant practical problem preparing for trial while the hearing and depositions are going on.

....

Well, you know the problem is when you bring in a witness to prepare for a trial, typically they're coming in as volunteers. You can't tell them, you know, here's your night. I'm going to spend more time than that preparing for trial, and pre-trialing witnesses.

Tr. 554, 557-58. The risk that this proceeding will interfere with DOJ's trial preparations has recently increased because of Mr. Geisen's decision to depose thirteen individuals and the uncertainty as to how many witnesses Mr. Geisen will call at the hearing. As the Board noted at Oral Argument, it had scheduled the hearing to finish by March 21st in order to provide a twenty-five day open period before the criminal trial commences on April 17th. Tr. 557.

That schedule was based in part on defense counsel's statement, during the November 14, 2006 Oral Argument, that "there may be one or two [depositions] that we'll take."¹⁷ However, at the January 11, 2007 Oral Argument the Board seemed to recognize that an end date of March 21st may no longer be realistic, and for the first time the Board contemplated beginning *and then staying* the administrative hearing if it lasts longer than the originally anticipated two weeks and runs close to the start of the criminal trial. Tr. 620.

Given the uncertainty as to how many witnesses will be called at the hearing and how long the hearing will last, there is a significant risk this proceeding will interfere with DOJ's pre-trial preparations. This potential harm was not considered by either the Board or the Commission at the time of the Staff's First Motion for Stay.

2. The Board Erred in Assessing the Harm to Mr. Geisen Resulting from a Stay

Since the Staff filed its First Stay Request in March 2006, a trial date of April 17, 2007, has been set in Mr. Geisen's criminal matter. The enforcement proceeding against Mr. Geisen is presently scheduled to begin March 7, 2007. Given that written discovery in this proceeding has now been largely completed and deposition discovery could begin immediately following

¹⁷ Transcript of November 14, 2006 Oral Argument at p. 366. Even more recently, during a December 20, 2006 teleconference, counsel for Mr. Geisen gave no indication they would seek to depose anywhere near thirteen individuals. When the Board specifically asked whether they might depose as many as ten witnesses, counsel replied, "At this point, I would highly doubt that it will be anywhere near that number. It may be somewhere from zero to five." The Board responded, "All right. Then, that's certainly doable in five weeks, that number of witnesses, I would think, though we encourage you on that." (Tr. at 434.)

completion of the criminal trial, the Staff would now require a stay of only approximately three months should the case go forward as scheduled.¹⁸ Therefore, in contrast to the circumstances that existed when the first stay request was made, any stay granted now would be of very limited duration, and this fact significantly diminishes the harm to Mr. Geisen's interests. Also significant to this factor is that much of the stay would be consumed by the criminal trial, which is expected to last six weeks, during which time it is highly unlikely Mr. Geisen would be able to seek or engage in employment in NRC-licensed facilities. Accordingly, it is not realistic to expect that Mr. Geisen would experience any incremental financial harm due the grant of the requested stay.

For these reasons, the change in circumstances since the first stay request have significantly reduced the harm to Mr. Geisen. The Board erred in failing to take this into account, instead finding that the harm to Mr. Geisen was unchanged. This error resulted from the Board's failure to consider only the incremental delay that would result from the limited duration of the stay. Instead, the Board analyzed the harm to Mr. Geisen in the context of the time involved in initiating and completing the entire administrative adjudicatory process. The Staff submits that the Board in doing so improperly analyzed the extent and nature of the harm to Mr. Geisen resulting from the stay.

The flaw in the Board's reasoning was expressed during the oral argument, when it characterized the harm from the stay as the total amount of time that it would take for Mr. Geisen to obtain a final decision from the Board following a hearing on the validity of the Staff's enforcement order. It was based on this exaggerated view of the harm resulting from the

¹⁸ The Staff would note that, even if the trial is moved to July, the backup date for the criminal trial, the stay would still be of a limited duration. Further, although the Board suggested that the April trial date is unlikely to be met, this was pure speculation; neither DOJ nor Mr. Geisen has provided any reason to conclude the trial is likely to be delayed.

stay that the Board concluded that the remedy the Staff was seeking was “extraordinary.” Tr. 615, 653. This was clear error. Up until this point in time, Mr. Geisen has been afforded a timely hearing in accordance with the Commission’s regulations. The fact that this administrative process, which includes full civil discovery, has taken a year to reach this point is simply the result of the normal hearing process. Mr. Geisen has not in any way been harmed up this point by any delay on the part of the Staff, and in fact has obtained a rapid and aggressive hearing schedule to which the Staff has fully complied. The time during which the harm, if any, resulting from the stay may occur is very narrow and specific—the time during which the proceeding would be held in abeyance to allow for completion of the criminal proceeding. By compounding the time during which the stay would be in effect with the much longer time it will take for the administrative process to be completed the Board exaggerated and improperly over-emphasized the harm to Mr. Geisen. The Board’s error on this point is evidenced by its statement that “[i]f we waited now and the trial date slipped and went to July or later, we’d be looking at even more than a two-year delay in his exercise of his rights, and we’re not prepared to do that.” Tr. at 615.

The fact is that Mr. Geisen has been afforded every opportunity to exercise his rights and has obtained a timely hearing. The Board’s frustration that even a timely hearing can take over one year is misdirected here when the Staff has been denied any stay of the proceeding. Thus, the Board’s statement that “there is continuing harm to Mr. Geisen from not being able to get his expedited hearing,” Tr. at 619, evidences the improper basis for the Board’s decision. The only proper grounds for finding harm is the Board’s secondary premise, from “being barred from work in the nuclear industry.” *Id.* Under the circumstances here, this harm is significantly diminished by the fact that the criminal proceeding is now imminent. Quite simply, since Mr. Geisen will be the subject of a criminal prosecution during the very limited time of the stay

it is hardly realistic to assume that he would be able to simultaneously obtain and work in NRC-licensed activities.

Even if the trial were delayed until July 2007, it is highly unlikely Mr. Geisen could return to his prior employment in the interim. In denying the Staff's First Stay Motion, the Board, and subsequently the Commission, relied on a letter from Mr. Geisen's former employer stating that Mr. Geisen's employment was being terminated because of the Staff Order banning him from NRC-licensed activities.¹⁹ However, the letter actually tells Mr. Geisen that, in addition to the Staff Order, ". . . 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." (Emphasis added.) The cited letter therefore does not establish that the Staff Order alone has prevented Mr. Geisen from returning to his prior employment. Rather, Mr. Geisen's criminal indictment is cited as another "circumstance" that supported termination of his employment. Therefore, it cannot be assumed that resolution of the administrative proceeding in Mr. Geisen's favor will necessarily mean he will be able to return to employment in NRC-licensed activities. This is significant because extending the Staff's Order by granting a stay until the criminal trial is complete would not necessarily prejudice Mr. Geisen by preventing him from returning to his prior position: Mr. Geisen's criminal indictment alone may be a bar to his re-employment.

B. The Board Applied An Improper Standard To The Staff's Stay Request

At the January 11, 2007 Oral Argument, the Board appears to have created and applied a new and significantly higher standard in determining whether to grant a stay, presumably because of its determination that the Staff was requesting an "extraordinary" remedy.

¹⁹ See, *David Geisen*, CLI-06-19, 64 NRC at 12, *citing* LBP-06-13, 63 NRC at 531, 557, *citing* a February 16, 2006, letter from Lori J. Armstrong, Director of Nuclear Engineering at Dominion Energy Kewaunee, Inc., to David Geisen.

The Board at one point stated that it wanted to know, not just whether circumstances have changed since the Staff first requested a stay on behalf of DOJ, but whether new and unforeseen circumstances exist, asking whether there were “new, materially different” factors from those it had considered before. Tr. 560, 609. The Board implied that, to the extent a potential harm was anticipated by the Board at the time of the first stay request, the fact that events have subsequently occurred so that the harm is now imminent does not constitute any change in circumstances that could alter the Board’s initial weighing of the *Oncology* factors. The Board also suggested that, because the Order barring Mr. Geisen from NRC-licensed activities was made immediately effective, the Staff needed to show “extraordinary” justification for a stay. Tr. 543.

The Staff submits that the Board erred in failing to consider changed circumstances since the first stay request regardless of whether they were unexpected. At the time of the first request, it was still unknown whether Mr. Geisen would invoke his Fifth Amendment rights in this proceeding. Mr. Geisen has since invoked those rights, and it is now clear he will provide the Staff with only minimal written discovery, refuse to be deposed, and refuse to testify at the hearing and yet seek to depose individuals who may be witnesses at the criminal trial. Other circumstances that have changed since the Staff’s first stay request include the following: (1) a trial date is no longer uncertain, and a stay would not required holding this proceeding in abeyance indefinitely; (2) Mr. Geisen has recently provided the Staff with a list of thirteen individuals he intends to depose in this matter, and the Staff has previously submitted its own list of thirteen deponents, giving DOJ a much better understanding of the extent to which depositions could compromise its criminal case against Mr. Geisen; (3) Mr. Geisen’s codefendants in the criminal matter have now stated definitively that they will also invoke their Fifth Amendment rights in this matter; and (4) because the criminal trial date is so close in time

to the administrative hearing, there is an increased risk the hearing will interfere with DOJ's trial preparations, or with the trial itself. Tr. 547. All of these circumstances affect the *Oncology* factors which govern the consideration of a stay request and should have been taken into account in the Board's analysis.

To the extent the Board found that circumstances have not changed because some of these events were foreseeable at the time of the first stay request, this conclusion does not withstand scrutiny. The fact that they may not be entirely unexpected does not mean that circumstances have not changed. To the extent that the Board found that it need not consider changed circumstances that it foresaw at the time it denied the first stay request, the Staff submits that the Board is improperly relying on an analysis of the *Oncology* factors which was conducted without a full appreciation of the current circumstances in this case. When the Board denied the Staff's initial stay motion, discovery in this matter was still in its early stages, the prospect of depositions was remote and there was no way to predict when the criminal trial would be held. The Board could not anticipate all of the events that have occurred since then and, even to the extent that it did anticipate certain developments, it could not predict the extent and nature of their impact on Mr. Geisen's or the government's interests.

The Board also suggested that any harm to DOJ resulting from denial of a stay remains "speculative" because at the criminal trial DOJ could overcome difficulties caused by inconsistent witness statements either through impeachment of Mr. Geisen's witnesses or rehabilitation of its own witnesses. Tr. 540-41, 569. The Staff submits that the possibility DOJ will be able to successfully address inconsistent witness statements does not render the harm caused by such statements less tangible—what is "speculative" is whether DOJ will be able to overcome that harm. Further, in focusing on whether DOJ would be able to overcome evidentiary problems at trial, the Board comes close to suggesting the Staff must show *actual*

harm to DOJ's case before a stay will be granted. Such reasoning is inconsistent with the *Oncology* analysis, which examines the prospective harm to the parties if a stay is not granted, and would support denying a stay in almost all instances.

Finally, the Board appeared to suggest that a stay would be an “extraordinary” remedy because the Staff, not Mr. Geisen, was responsible for initiating the civil proceeding.

Tr. 543, 607. Although some courts have considered a party's status as plaintiff or defendant in deciding whether to stay a civil proceeding, in the absence of any evidence that the party is seeking a stay for improper purposes most courts refuse to rely on “the wooden plaintiff-defendant distinction” in deciding whether to grant a stay request. See *Afro-Lecon v. United States*, 820 F.2d 1198, 1206 (Fed. Cir. 1987). Rather, in each case the court balances the interest of the party seeking the stay against the prejudice to the opposing party. Applying this analysis, courts and administrative tribunals have granted the government's stay requests even where the government was the prosecuting party in both civil and criminal cases. *E.g.*, *United States v. One Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y. 1966); *Pitt-Des Moines, Inc.*, 17 BNA OSHC 1936, 1997 CCH OSHD ¶ 31,273 (1997). In the present proceeding, the Board should have applied the *Oncology* analysis, weighing DOJ's interest in obtaining a stay of limited duration against any possible prejudice to Mr. Geisen, without giving special consideration to the government's status as the prosecuting party in both the civil and criminal cases.²⁰

²⁰ The Memorandum of Understanding between the NRC and DOJ necessarily contemplates that, where there are parallel proceedings involving the two agencies, the government will be the prosecuting party in both the civil and criminal cases. Nowhere does the Memorandum suggest that the government's status as prosecutor is a factor that should be considered in determining whether to stay an NRC proceeding to accommodate DOJ.

CONCLUSION

For the reasons stated above, and based on the specific harm identified by DOJ in an affidavit from Richard Poole, Senior Trial Attorney at DOJ, the Staff asks the Commission to grant interlocutory review and reverse the Board decision denying the Staff's motion to stay the enforcement proceeding until Mr. Geisen's criminal trial has finished. Because much of the harm identified by DOJ would result from permitting depositions in this proceeding, and because depositions are scheduled to begin within days, the Staff asks that the Commission grant an immediate housekeeping stay of the proceeding during the pendency of this appeal.

Respectfully submitted,

/RA by Lisa B. Clark/

Lisa B. Clark
Counsel for the NRC Staff

Dated at Rockville, MD
this 19th day of January, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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'S PETITION FOR INTERLOCUTORY REVIEW OF BOARD'S DENIAL OF MOTION FOR STAY AND PETITION FOR A STAY PENDING REVIEW" 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 19th day of January, 2007.

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

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

Nicholas G. Trikourous * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
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, Esq. **
Charles F.B. McAleer, Jr., Esq.
Andrew T. Wise, Esq.
Mathew T. Reinhard, Esq.
Miller & Chevalier
655 Fifteenth Street, N.W., Suite 900
Washington, D.C. 20005-5701
E-Mail: rhbey@milchev.com
awise@milchev.com
mreinhard@milchev.com

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

Margaret Parish * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: map4@nrc.gov

Libby Perch * **
Board Staff
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: emp1@nrc.gov

/RA by Lisa B. Clark/

Lisa B. Clark
Counsel for the NRC Staff

Attachment A



MILLER & CHEVALIER
CHARTERED

655 FIFTEENTH STREET, N.W., SUITE 900
WASHINGTON, D.C. 20005-5701
202.626.5800 FAX: 202.628.0858
WWW.MILLERCHEVALIER.COM

CHARLES F.B. MCALEER, JR.
202.626.5963
cmcaleer@mlchev.com

January 10, 2007

BY ELECTRONIC
AND REGULAR MAIL

Lisa B. Clark, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O-15 D21
Washington, D.C. 20555-0001

Re: *In The Matter Of David Geisen*
IA-05-052, ASLBP No. 05-839-02-EA
Before the Atomic Safety and Licensing Board

Dear Lisa:

We are writing to you as directed by the Board in paragraph 4 of its Order dated January 8, 2007.

In an e-mail from Brett Klukan dated December 29, 2006, NRC Staff stated its intent to depose the following persons in this matter:

1. David Geisen
2. Steven Moffitt
3. Dale Miller
4. Prasoon Goyal
5. Guy Campbell
6. Steve Fyfitch
7. Mark McLaughlin
8. David Lockwood
9. Ken Byrd
10. Peter Mainhardt
11. John Martin
12. Randall Rossomme
13. Charles Daft

As we have indicated, Mr. Geisen will invoke his Fifth Amendment rights in the event that he is deposed. Given NRC Staff's intent to depose the remaining twelve individuals, counsel for Mr. Geisen accordingly deems them as "central witnesses" to Mr. Geisen's defense,

whether through cross-examination in NRC Staff's case-in-chief or direct examination in Mr. Geisen's case-in-chief.

In addition to the deponents whom NRC Staff has identified so far, it appears that the following additional persons might also be relevant and/or important to Mr. Geisen's defense at the hearing in the above-referenced matter, either because NRC Staff apparently intends to call such witnesses or there is a substantial possibility that counsel for Mr. Geisen will call such witnesses should the need for a defense case-in-chief arise after NRC Staff has rested its case:

1. Andrea D. (Lee) Valentin
2. Allen Hiser
3. Melvin Holmberg
4. Stephen Sands
5. Robert Rishel
6. John Cunnings
7. William Bateman
8. Andrew Siemaszko
9. Rodney Cook
10. Kevin Zellers
11. Douglas Simpkins
12. Dale Wuokko
13. Glenn McIntyre

Counsel for Mr. Geisen may depose each of the foregoing persons in this matter, and we would appreciate receiving from you available dates for the NRC witnesses listed above.

With respect to Messrs. McIntyre and Wuokko, we understand that they were informed approximately two months ago that the NRC Office of Investigations had made a decision not to take enforcement action against them relating to the events at Davis-Besse that are involved in this matter. Based on our review of NRC Staff's disclosures, document production and interrogatory responses in this matter, it appears that NRC Staff has never disclosed or produced to us any information or documents relating in any way to the decision by the NRC Office of Investigations concerning Messrs. McIntyre and Wuokko, including any communications with them or their representatives. If you believe NRC Staff has done so, please provide us the date and reference information for such disclosure or production. If NRC Staff has not done so, we request immediate disclosure and production of any such information or documents pertaining to Messrs. McIntyre and Wuokko and any other person whose testimony or interview NRC Staff may seek to introduce at the hearing in this matter.

The following individuals were cited by the Staff for their involvement in the preparation and/or review of documents pertaining to this proceeding. In the event that the veracity or content of those documents become an issue, their roles may become relevant.

1. Kenneth G. O'Brien

2. Robert D. Starkey
3. James Gavula
4. Joseph Ulie
5. Michele Janicki
6. James G. Luehman

NRC Staff also identified in their answers to Interrogatories the following additional persons:

1. Theo S. Swim
2. Richard Mattson
3. Michael Shepherd
4. Dave Gudger
5. Gregory Gibbs
6. Howard W. Bergendahl
7. Gerald M. Wolf
8. David R. Cofflin
9. Douglas E. Kilian
10. Robert E. Donnellon
11. Roger W. Huston

Since NRC Staff did not provide any information in their Answers to Interrogatories identifying the portions of the cited interviews and documents that allegedly contain relevant information, we are unable at this time to determine whether such persons might be central witnesses for Mr. Geisen's defense, whether through direct or cross examination. Please let us know by close of business on Friday, January 12 the following: (a) whether NRC Staff intends to call the foregoing persons as witnesses in NRC Staff's case-in-chief; (b) the specific topics or issues as to which those persons are expected to testify; and (c) the specific portion(s) of the cited interviews, testimony or documents of such persons that are allegedly relevant to the issues in this matter.

The information contained in this letter is subject to the following conditions and qualifications:

1. Counsel for Mr. Geisen reserves the right to identify additional "central witnesses" as deposition and other discovery in this matter proceeds. It is quite possible that the identities and/or significance of additional witnesses which are unknown or uncertain at this time might become known or certain only as additional discovery, including deposition testimony, occurs.

2. Counsel for Mr. Geisen has not sought to identify herein any witnesses whose testimony will be used solely for impeachment or rebuttal purposes. Obviously, until we know what testimony is actually presented at the hearing in this matter, we cannot make such determinations.

3. By identifying persons in this letter, counsel for Mr. Geisen does not admit or concede that such persons, in fact, have relevant and admissible testimony regarding the issues for the hearing in this matter. Counsel for Mr. Geisen expressly reserves the right to object to and oppose the introduction of any testimony or evidence that is neither relevant nor properly admissible at the hearing in this matter.

Please let me know if you have any questions regarding the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read "Chas", with a long horizontal stroke extending to the right.

Charles F. B. McAleer, Jr.

cc: Richard A. Hibey, Esq.
Andrew T. Wise, Esq.
Matthew T. Reinhard, Esq.