

January 23, 2007 (8:58am)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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

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

Pursuant to 10 C.F.R. § 2.341(b)(3)<sup>1</sup>, David Geisen, through undersigned counsel, opposes the Nuclear Regulatory Commission Staff's (Staff) request that the Commission review and overturn the January 12, 2007 Order<sup>2</sup> of the Atomic Safety and Licensing Board (Board) denying the Staff's third motion to stay the proceeding against Mr. Geisen in the above-captioned matter. Mr. Geisen also opposes the Staff's request that the Commission stay the effectiveness of the Order pending decision on the Staff's request for review.

The Staff's Petition for Interlocutory Review (Petition) merely repeats arguments the Commission specifically rejected in denying a previous Staff petition and asks the Commission, again, to second-guess specific factual findings of the Board through a disfavored procedure that conflicts with long-standing Commission policy. It cites "new developments" the Board

<sup>1</sup> 10 C.F.R. § 2.341(b)(3) provides that Mr. Geisen's answer is due within 10 days of service of the Staff's Petition. Mr. Geisen has filed this answer the first business day following receipt of the Staff's Petition due to the importance of the issues raised herein both to Mr. Geisen and to the Commission's consideration of this case.

<sup>2</sup> The Board issued a summary written order on January 12, 2007, but more thoroughly articulated its factual findings and legal conclusions at the end of an extensive hearing on January 11, 2007. The complete transcript of the hearing is available on ADAMS at accession number ML070170220, and counsel respectfully submit that review of that transcript is critical to the Commissions' full understanding and evaluation of the issues involved.

specifically found were not, in fact, new, and alternately ignores and mischaracterizes the Board's detailed analysis of the Staff's (and the Department of Justice's) arguments. The Commission should deny interlocutory review and deny the Staff's request for a stay of the proceeding it initiated.

### DISCUSSION

The Petition represents the fifth time in ten months the Staff has sought the stay of a proceeding it initiated and it made immediately-effective against Mr. Geisen. Three times the Board has denied the Staff's motions.<sup>3</sup> Once before, the Commission has denied the Staff's petition.<sup>4</sup> The Commission should do so again, because the Staff has again failed to advance any claim of *legitimate* harm to either it or the Department of Justice that would outweigh Mr. Geisen's right to an expedited hearing.

In denying the Staff's first Petition, the Commission held "DOJ must provide factual justification for delaying our own adjudicatory process and for imposing on the enforcement target the additional financial, professional, emotional, and other burdens that perforce accompany a delay in the resolution of an enforcement proceeding." *In the Matter of David Geisen*, CLI-06-19, 64 NRC 9, 5-6 (2006)(*Geisen*, CLI-06-19). That holding affirmed the Board's rulings that "the party requesting the delay must provide detailed and specific reasons demonstrating some type of cognizable harm would result absent that relief." *In the Matter of David Geisen: Memorandum and Order* (Denying Government's Request to Delay Proceeding) LBP-06-13 at 15 (May 19, 2006)(*Geisen*, LBP-06-13)(emphasis in original), and "a Licensing

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<sup>3</sup> *In the Matter of David Geisen*, LBP-06-13 (2006); November 14, 2006 Hearing Transcript at 417-419; *Order* (Denying Government's Request to Stay Proceeding)(January 12, 2007).

<sup>4</sup> *In the Matter of David Geisen*, CLI-06-19, 64 NRC 9 (2006).

Board must separate remedial theories that find particularized support in the circumstances presented from those that do not.” *Geisen*, LBP-06-13 at 13 (citing *Siemaszko*, CLI-06-12) (“Staff’s mere assertion that it wishes to protect DOJ’s pending criminal prosecution ... does not, without more, justify holding our parallel administrative proceeding in abeyance”).

The Staff submitted an affidavit from Richard Poole of the Department of Justice in support of its latest motion to stay the case against Mr. Geisen. But while the Board recognized that the Staff’s motion “and [Poole’s] affidavit are much more eloquently and elegantly written than the papers were on the first stay motion”, it also expressed “concern” with “some of the these eloquent statements” and convened a hearing with Mr. Poole present “to explore with [Poole] whether [the eloquent statements] really have some substance behind them.” January 11, 2007 Hearing Transcript at 538 (January 11 Hearing Tr.). After a hearing that lasted over two hours, and included extensive discussion with Mr. Poole, the Board concluded:

In terms of harm to the Government, the motion and affidavit are lengthy and well written, but we think [that] there is nothing new there and what appears to be new does not withstand scrutiny. We say this recognizing that it’s clear Commission policy that we don’t lightly look behind what the Department of Justice says. There is a memorandum of understanding between the two agencies, and the Commission indicated they’d like to defer to them when possible. We think this is the case when it is not possible.

*Id.* at 615.

The Board noted that it anticipated both that witnesses would be deposed and that Mr. Geisen might invoke his Fifth Amendment right when it denied the first stay motion. *Id.* at 615-616. It rejected the government’s allegation that Mr. Geisen held an “information advantage” over the government “given the enormous wealth of information that has already been generated and created in this case, particularly given the four-year head start that the Government had.” *Id.* at 617, *see also* 616.

Finally, the Board turned to the government's argument that it could be harmed by Mr. Geisen's counsel creating a misleading record in the administrative proceeding and then using that record to the disadvantage of the Department of Justice in the criminal proceeding. The Board noted it had "giv[en] the Department of Justice the opportunity to explain logistically how that would work and what it would mean" and DOJ "fell short of demonstrating that." *Id.* Moreover, Judge Farrar noted paragraph 12 of Mr. Poole's affidavit, in which Mr. Poole stated "the present circumstances 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 [of Justice] seek [dismissal of the administrative case]" was "one of the least justifiable statements, speaking for myself, that I've ever seen in a government brief." *Id.* at 618-619.

Against that backdrop, it is extraordinary that the Staff argues "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." Petition at 11. The Board rejected the Staff's request upon finding Mr. Poole's "factual support" was actually just generalities couched in conclusory (and unjustifiable) language. This exercise of discretion by the Board is consistent with the Commission's guidance, *see Geisen*, CLI-06-19 at 4-5, and should therefore be upheld.

I. THE COMMISSION SHOULD NOT DISTURB THE BOARD'S FACTUAL FINDINGS AND CONCLUSION OF LAW.

Mr. Geisen set forth the legal standards governing the Commission's review of a Licensing Board's order in his Answer Opposing the Staff's first Petition for Interlocutory Review. *In the Matter of Geisen*, ASLBP No. 06-845-01-EA, docket no. IA-05-052 (June 9,

2006). Because the Petition merely recites the same arguments as the Staff's first petition, counsel will not repeat arguments with which the Commission is familiar but only highlight those principles relevant to the Commission's review of the Petition.

Licensing Boards are the Commission's primary fact finding tribunals and Board legal rulings are affirmed where an appellant fails to raise an error of law or abuse of discretion that properly serves as grounds for reversal of a Board's decision. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858 (1975); *Private Fuel Storage, L.L.C.* (Private Fuel Storage Facility), CLI-00-21, 52 NRC 261 (2000). It is longstanding Commission policy that interlocutory appellate review of a Board's order is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994). See also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983) (interlocutory review is "exceptional" and "[flies] in the teeth of [] longstanding [] Commission policy.") "Mere generalized representations by counsel or unsubstantiated assertions regarding impact are insufficient to meet the stringent threshold for interlocutory review." *In the Matter of Andrew Siemaszko*, NRC Staff's Answer to Petition for Review of Board's Order at 4 (citing *Sequoyah Fuels Corp.* (Gore, OK site), CLI-94-11, 40 NRC 55, 61 (1994)). The Staff cannot meet this high threshold because the Board's denial of the Staff's third Motion to Stay was carefully-reasoned and grounded in factual findings the Board reached after extensive review of the issues and exhaustive evaluation of the government's claims.

A. The Board properly rejected the government's claims regarding the potential for harm from inconsistent witness statements.

The Staff argues that “[w]ithout 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.” Petition at 12. Regardless of the dubious validity of that statement,<sup>5</sup> the Board found the potential for a witness to provide testimony that is inconsistent with testimony given at a later criminal trial was both conjectural and not “the kind of activity that rises to harm to the Government.” January 11 Hearing Tr. at 617. The Board was correct.

First, it is pure speculation that a witness that testifies more than once about his or her recollections of events will testify inconsistently. Presumably, because each instance of testimony is given under oath, the witness will endeavor to testify truthfully and completely. It is far from certain that on the core issues of the enforcement action and the criminal case against Mr. Geisen a witness will materially alter his or her testimony in different settings.

But more importantly, even if a witness does make statements in the enforcement action that prove to be inconsistent with that witness' later testimony in the criminal case, that is simply not the type of “harm to the Government” that justifies the abatement of an enforcement

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<sup>5</sup> The Staff makes the statement that “Mr. Geisen appears to be using the civil discovery process to gain an advantage at the criminal trial.” Petition at 10 n.14. Later, the Staff refers to “Mr. Geisen’s decision to depose thirteen individuals...” Petition at 16. Both of these statements are misleading. The Staff fails to note that Mr. Geisen has, at this point, a week into the period for depositions, noticed the deposition of two witnesses, both of whom verified answers in the Staff’s discovery responses and neither of whom is likely to be a witness in the criminal case. Counsel for Mr. Geisen has indicated on multiple occasions the defense does not anticipate many depositions in this matter, and that remains true. The letter attached to the Staff’s Petition does not indicate that Mr. Geisen intends to depose thirteen witnesses, it merely places the Staff on notice that those individuals might be relevant to Mr. Geisen’s defense. In accord with the spirit of the Board’s January 8, 2007 Order intended to guarantee the Staff sufficient information upon which to prepare its case, Mr. Geisen provided the letter. The Staff has mischaracterized counsel’s representation in order to manufacture prejudice in support of its Petition. It also fails to mention, of course, that the great majority of the witness depositions that occur in the enforcement proceeding will be noticed and taken *by the Staff*.

proceeding where the sanction sought by the Staff has already been imposed.<sup>6</sup> Review of *Oncology Services Corp.*, CLI-93-17, 38 NRC 44 (1993) supports that conclusion.

In *Oncology*, the Commission affirmed the Licensing Board's approval of a delay granted because the premature release of witness interview transcripts and documentary information would interfere with an ongoing NRC Office of Investigations (OI) inquiry into possible incomplete or inaccurate statements by the licensee's employees and officials. *Id.* at 54-55. The Commission found the agency's "strong interest in ensuring the truth and accuracy of information provided to the Commission" would be undermined if the personnel were given the opportunity "to tailor their testimony or statements in subsequent interviews so as to explain previous statements in order to avoid culpability or to conform testimony with the testimony of others who have been interviewed." *Id.* In that circumstance, OI indicated it anticipated conducting an additional twenty-five interviews before it concluded its investigation. *Id.* at 56. Clearly, the Commission's legitimate concern was with the integrity of the ongoing investigation and with the potential for the tailoring of testimony by the targets of the investigation.

Similarly, courts have granted stays where the prospect existed of a criminal defendant using the civil system for an improper purpose. *See Geisen*, LBP-06-13, at 13-14 (citing cases and listing examples of prohibited purposes such as intimidation of witnesses, subornation of perjury, manufacture or destruction of evidence, and exploitation of civil discovery processes.) In this case, the Board has expressly, and repeatedly, held that Mr. Geisen has not pursued the expedited hearing to which he is entitled for any such improper purpose. *Id.* at 27-31, 34-36;

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<sup>6</sup> In the event a witness does materially alter his or her testimony on different occasions, such discrepancies ought to cause a responsible prosecutor to re-evaluate that witness' credibility and assess whether that witness does support the case against the defendant. Indeed, the Board noted this seemingly self-evident proposition. January 11 Hearing Tr. at 569.

January 11 Hearing Tr. at 543, 618. The Staff brought the enforcement action against Mr. Geisen. The Staff made the Order immediately effective, thereby invoking the NRC regulation requiring hearings regarding immediately effective enforcement orders to be held expeditiously. *See Geisen*, CLI-06-19 at 3 (citing 10 C.F.R. § 2.202(c)(1)).

While the Staff and DOJ are careful not to state their position so crudely, what the government seeks in the Petition is nothing more than a tactical litigation advantage in the criminal case at the expense of Mr. Geisen's Constitutional right to Due Process in the enforcement action. The Board recognized as much. January 11 Hearing Tr. at 543-544. Without question, Mr. Poole and his DOJ colleagues would prefer to minimize the number of times witnesses called by the prosecution at the criminal trial speak prior to that testimony. But where the Staff has imposed substantial burdens on the subject of an immediately-effective enforcement order, DOJ's preferences must yield to that subject's Constitutional rights. The Board's denial of the Staff's Motion to Stay reflects the Board's correct conclusion that the Commission's regulations regarding expeditious resolution of immediately effective enforcement orders cannot not yield to DOJ's desire to maintain a purely tactical advantage at a future criminal trial.

B. The Board properly rejected the government's claims regarding the potential for an "inaccurate and misleading record."

After advancing the argument that the DOJ would be "harmed" by inconsistent witness statements, the Staff goes on to argue that DOJ would be harmed by an administrative record which is incomplete and potentially inaccurate and misleading. It is surprising the Staff chose to repeat this argument, since Judge Farrar described it as "stunning" and unjustifiable. January 11

Hearing Tr. at 618-619. In an effort to resuscitate it, the Staff ignores the facts developed before the Board and misrepresents the contents of Mr. Poole's affidavit.

First, the Staff suggests the record before the Board could be misleading or inaccurate because the Staff will not have access to information obtained before the grand jury. The Staff does not mention, of course, that the Board addressed this exact argument at the January 11, 2007 hearing and noted if there had never been a criminal case brought, the Staff would present the case on the record it developed through discovery and the hearing. January 11 Hearing Tr. at 535-536. Nor does the Staff mention that DOJ could have requested an order from the District Court allowing it to provide grand jury transcripts to the Staff, but chose not to pursue such an Order. January 11 Hearing Tr. at 561-563, 616.

Second, the Staff suggests "[t]he record could also mislead the Board in making its factual findings, which could then be used by Mr. Geisen to the disadvantage of the DOJ by, for example, claiming that collateral estoppel should apply to the criminal case. *See* Affidavit at ¶ 6." Petition at 14-15. Remarkably, the words "collateral estoppel" do not appear anywhere in Mr. Poole's affidavit, much less in paragraph six.<sup>7</sup> And when he was asked about collateral estoppel at the January 11, 2007 hearing, the following exchange occurred:

CHAIRMAN FARRAR: Are you at all concerned about -- I don't think the brief mentioned it, are you at all concerned about collateral estoppel?...

MR. POOLE: Well, you know it's interesting, NRC staff showed us the collateral estoppel argument that they wanted to make. And my first reaction to it was, well that's ridiculous, that's not going to work. Then I went and looked at the cases and it seemed, it seemed much more real after I looked at the cases. I mean, as I recall, they're limited cases and not from the relevant jurisdictions, but although I've never seen that happen personally, it presents some concern.

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<sup>7</sup> In this respect, it is noteworthy that the Staff did not choose to attach Mr. Poole's affidavit to its filing, but did choose to attach a largely unrelated letter from Mr. Geisen's counsel to Lisa Clark.

January 11 Hearing Tr. at 574.

Later, Mr. Poole stated “[y]ou know, as a criminal lawyer, I mean the concept of collateral estoppel in one of my cases is, is so foreign to me that I, I find it difficult to answer your question, but I appreciate the spirit in which you asked it. *Id.* at 575. For the Staff now to argue to the Commission that DOJ has identified collateral estoppel as a potential harm resulting from the Board’s denial of the Motion to Stay is specious, at best.

Finally, the Staff suggests the record at the enforcement proceeding could be incomplete or inaccurate because Mr. Geisen has invoked his Fifth Amendment rights.<sup>8</sup> The Staff argues this development is “new.” Petition at 9-10. But that is not accurate. At the hearing on the Staff’s first motion for a stay in April 2006, the Staff argued, and the Board acknowledged, that Mr. Geisen would likely invoke his Fifth Amendment right not to testify. April 11, 2006 Hearing Transcript at 11, 43, 67-68, 77. The Board’s resulting Order reflected that the Board viewed Mr. Geisen’s prospective invocation as neither a trivial issue nor a remote one. *Geisen*, LBP-06-13, at 13 n.45; 14; 34 n.109; 35 n.112. Finally, the Commission, in denying the Staff’s first Petition, acknowledged the Staff’s argument that Mr. Geisen might invoke his Fifth Amendment rights. *Geisen*, CLI-06-19 at 5 n.22. In denying the Staff’s third motion for a stay, the Board ruled the Staff’s claim that Mr. Geisen’s Fifth Amendment invocation was new “does not withstand scrutiny.” January 11 Hearing Tr. at 615-616.

The Commission should summarily reject this argument by the Staff.

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<sup>8</sup> The Staff makes a similar argument with regard to Mr. Geisen’s codefendants in the criminal case, but Fifth Amendment invocations by Mr. Geisen’s codefendants cannot honestly be called “new developments.” For example, Mr. Cook’s counsel indicated to the Staff in July 2006 that Mr. Cook would invoke his privilege in the *Miller* and *Moffitt* enforcement matters. Counsel is not aware of whether Mr. Siemaszko’s counsel made a similar representation, but certainly the prospect that a defendant in a pending criminal case would invoke his Fifth Amendment right to silence in an enforcement case against another person is neither novel nor was it unanticipated by the Board.

- C. The Board properly rejected the government's claims regarding interference with the DOJ's ability to prepare witnesses for trial.

The Staff argues for the first time in its Petition that depositions in the administrative case will encroach upon DOJ's ability to prepare for trial in the criminal case. While Mr. Poole included a vague reference to scheduling concerns at the end of the 11<sup>th</sup> paragraph on the fifth page of his affidavit, it was not an issue the Staff incorporated into its third Motion for Stay. Indeed, the Board characterized the argument as "buried" and "like ...a throw in." Mr. Poole provided no specifics, and did not represent, because he could not, that the enforcement case had made a single witness unavailable to the prosecutors. Nor could Mr. Poole provide specifics with any credibility, given that the April 17, 2007 "trial date" to which the Staff refers throughout the Petition remains unsettled and subject to a number of factors, including the availability of the Judge and counsel and the resolution of still outstanding pre-trial motions. *See* section D, *infra*.

In order to strengthen this novel argument, the Staff argues "[t]he risk that this proceeding will interfere with DOJ's trial preparation 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." Petition at 16 (emphasis added). Of course, this predicate condition has not in fact occurred, as the Staff knows, and runs contrary to counsel for Mr. Geisen's representations, of which the Staff is well aware. *See* note 5, *supra*.

The Board has consistently indicated its willingness to defer to the District Court if actual scheduling conflicts arise. And the Board has also indicated:

Mr. Hibey did represent here that he had every intention of going forward on the schedule. We take that representation very seriously, each one of us here, and fully expect them to comply with that and work with the Staff cooperatively to ensure that we can meet the schedule.

January 11 Hearing Tr. at 608. To which the Staff responded “[w]ell, the Staff has every intention of going forward and meeting the schedule as it is stated.” *Id.*

The Commission should not be misled by the Staff’s dire predictions of the administrative case interfering with DOJ’s ability to prepare witnesses for the criminal trial.

D. The Board properly evaluated the harm to Mr. Geisen resulting from a stay.

Finally, the Staff argues that the Board erred in assessing the harm to Mr. Geisen resulting from a stay. This argument, like the prior ones, is based largely upon a misreading of facts that the Board properly considered.

Part of the Staff’s argument assumes the criminal trial will begin on April 17, 2007 and therefore “the Staff would now require a stay of only approximately three months should the case go forward as scheduled.” Petition at 17. In fact, though, the Board recognized a number of events that could prevent the trial from starting in April. First, as Mr. Poole admitted at the January 11, 2007 hearing, the trial judge has set two possible trial dates -- one in April and one in July -- because a lawyer for Mr. Siemaszko had a conflict with the April date. January 11 Hearing Tr. at 551, 583. Second, the trial court is presently considering motions by each of the defendants to sever the trials of the now-joined defendants and the resolution of those motions could result in further delay. *Id.* at 553. Finally, the Board made the unremarkable observation that events outside of the control of District Judges can result in unanticipated delays.

The Board did not, as the Staff suggests, conclude that the April trial date is “unlikely to be met.” Petition at 17 n.18. It did, with good reason, refuse to accept as a given the Staff’s suggestion that the April trial date was definite and rejected the Staff’s related argument that any delay resulting from a stay would be only three months in duration. Specifically, the Board ruled:

First, the trial date of April 16th for the federal criminal trial seems to us still speculative. That could slip for any number of reasons, and, unfortunately, we won't know that for some time. Even if it went forward, if we stopped today, we would lose two months of preparation before our trial, the time of our trial.

We'd have to wait for what looks like it would be a lengthy criminal trial. Then, we'd start up again. And depending on how you count, we would cost Mr. Geisen at least another eight months, perhaps more, before we'd have a decision.

January 11 Hearing Tr. at 614.

The second part of the Staff's argument regarding harm to Mr. Geisen raises yet another new argument for the first time on appeal.<sup>9</sup> Specifically, the Staff argues that "[e]ven if the trial were delayed until July 2007, it is highly unlikely Mr. Geisen could return to his prior employment in the interim." Petition at 19. This statement is based upon the Staff's interpretation of a letter from Mr. Geisen's former employer that was submitted along with Mr. Geisen's opposition to the Staff's first motion to stay the proceeding in April 2006. The Board reviewed that letter in considering the Staff's first motion to stay and concluded that "[Mr. Geisen's] former employer has stated its readiness to consider him for re-employment if his suspension is removed." *Geisen*, LBP-06-13, at 36-37. The Commission reviewed that letter and, in contrasting Mr. Geisen's situation from that of Mr. Siemaszko's, held:

By contrast, the Board noted that Mr. Geisen has been assured that his most recent nuclear employer would welcome the opportunity to discuss re-employment if the Commission's Enforcement Order is lifted. This employment-related assurance came nearly a month *after* the Grand Jury Indictment, yet the assurance was premised solely on the lifting of the Commission's Enforcement Order, not on Mr. Geisen's winning the criminal proceeding. Hence, a direct causal nexus exists between the Enforcement Order and Mr. Geisen's firing - a nexus not present in Mr. Siemaszko's situation.

*Geisen*, CLI-06-19 at 4.

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<sup>9</sup> The Commission should be strongly disinclined to entertain this argument by the Staff because it could have been, but was not, put before the Board. *Puerto Rico Electric Power Authority* (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

Aside from the fact the Staff's argument is procedurally barred because it was not raised before the Board, it is also wrong, and has been expressly contradicted by both the Board and the Commission.

Finally, the Staff's entire argument regarding harm to Mr. Geisen somehow ignores the fact that Mr. Geisen has already suffered significant harm by operation of the Staff's issuance of an immediately-effective Order. As the Commission noted in its July 2006 Memorandum and Order denying the Staff's first petition, the burdens placed upon an enforcement target include "financial, professional, emotional, and other" costs. *Geisen*, CLI-06-19 at 5. Indeed, Mr. Geisen has suffered, and continues to suffer, each of these burdens since the start of this proceeding over a year ago. *Id.* at 6, n.27; *Geisen*, LBP-06-13 at 36-37. The Staff's Petition argues for an assessment of "harm to Mr. Geisen" that ignores that history completely. Such an assessment is improper. As the Board correctly concluded:

You can always look at a stay and say, well, it would just be a little bit more time. He has suffered a lot already. And what is a few more weeks or months. But in a five-year sentence, getting close to two years, we've already passed the one-year mark, or about the one-year mark. We cannot discount the harm to him from not being able to exercise his right to challenge the Staff order against him.

If 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.

January 11 Hearing Tr. at 615.

The Staff does not get to reset the clock by filing successive motions to stay a proceeding it initiated, nor should the Commission only consider the harm that will inure to Mr. Geisen from the resolution of this motion through the end of the administrative case. The Board made thoroughly-reasoned and principled findings regarding the harm to Mr. Geisen from a stay of this proceeding. *Id.* The Commission should defer to those findings. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001)(noting that the

Commission has repeatedly declined to second-guess plausible Board decisions that rest upon carefully rendered factual findings.)

E. The Board did not apply an improper standard to the Staff's stay request.

Finally, the Staff advances the argument that the Board “created and applied a new and significantly higher standard in determining whether to grant a stay.” Petition at 19. This argument has no support in the record. Rather, what is clear is that the Board was exasperated by the Staff's re-filing of a motion the Board had considered and denied on multiple occasions, and wanted to know what, if anything, had changed that supported the filing of such repetitive pleadings. Indeed, as the Board set the question to Mr. Poole:

We have to apply a balance of test here. If we're going to grant the relief requested, we're going to have to find the reason for delay outweighs the harm to Mr. Geisen.

Now we went through this balancing in the past. We reached the decision at that point and it was affirmed by the Commission. So to prevail here, you're going to [have] to demonstrate why now the scales have shifted and I'm wondering we've been talking about the reason for delay, why is that factor now entitled to greater weight than it was back when we addressed it previously and the Commission affirmed?

January 11 Hearing Tr. at 546-547.

The government was unable to answer that question to the satisfaction of the Board.

The Staff claims the Board “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.” Petition at 20. This claim, again, misrepresents the record. In fact, the Board described the *remedy* of a stay as “extraordinary.”<sup>10</sup> January 11

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<sup>10</sup> Certainly, the Staff cannot quibble with the Board's conclusion that depriving an individual of his livelihood and then indefinitely suspending that individual's ability to challenge the correctness of that deprivation is “extraordinary.”

Hearing Tr. at 543. It never suggested the Staff needed to make an extraordinary showing in order to gain that remedy.

There should be little question on the Commission's part that this Licensing Board understands the law it is bound to follow and takes that duty seriously. The Board's order on the Staff's initial stay motion ran forty-nine pages and included an extensive discussion of *Oncology* and other relevant cases. 63 NRC 532, *passim*. It applied those cases to a meticulous set of factual findings. *Id.* Indeed, the Commission described it as a "carefully-reasoned decision." *Geisen*, CLI-06-19 at 3. There is no support in the record for the Staff's suggestion that the Board disregarded its obligation to apply the *Oncology* factors in reaching its latest decision.

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

The Staff has also requested that the Commission "grant an immediate housekeeping stay of the proceeding while this appeal is pending." Petition at 2. This request should be denied because the Staff cannot make a strong showing that it is likely to prevail on the merits. 10 C.F.R. § 2.342(e)(1). "Interlocutory appeals or petitions to the Commission are not devices for delaying or halting Licensing Board proceedings." *Sequoyah Fuels Corp. and Gen. Atomic*s (Gore, OK Site), CLI-94-09, 40 NRC 1, 6 (1994). The Staff's request for a stay is nothing more than an alternate method of seeking the primary relief the Board has already denied, albeit with a different name.

This request is consistent with the Staff's recent practice of endlessly relitigating Board decisions. After the Commission's denial of the Staff's first petition, the Staff returned to the Board with a second Motion for Stay, which was denied after an extensive hearing before the Board on November 14, 2006. In its second Motion for Stay, the Staff also asked the Board to

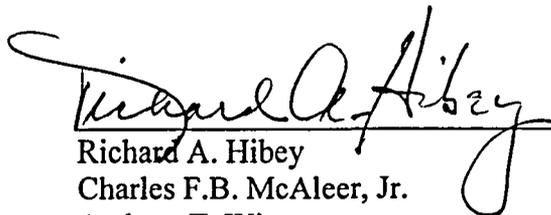
enter a preclusion order against Mr. Geisen, which the Board denied. The Staff then filed a second motion for preclusion of claims and defenses, which the Board denied. The same day the Order on the Staff's second preclusion motion was issued, the Staff filed its third motion for a stay of the proceeding. After ordering expedited briefing on the Staff's motion and convening an extensive hearing that included the appearance of two lawyers from the Department of Justice, the Board denied the Staff's third motion. The present Petition followed.

Simultaneously, while suggesting that the present schedule might not allow for the completion of deposition testimony, the Staff has not taken a single deposition, instead cancelling depositions set for January 22 and 23, 2007 despite the availability of all counsel and the prospective deponent.

### CONCLUSION

The Staff filed this case. The Staff made it immediately effective. Mr. Geisen is entitled to proceed toward the expedited hearing he is guaranteed by the Commission's regulations. The Board has ruled, on multiple occasions, that the government has not identified specific, cognizable harm to the government that tips the balance of the *Oncology* factors in favor of a stay. The Commission should defer to its fact-finding tribunal and should allow this proceeding to go forward in accordance with the Commissions' rules and under the supervision of the Licensing Board.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Richard A. Hibey". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline that extends to the right.

Richard A. Hibey  
Charles F.B. McAleer, Jr.  
Andrew T. Wise  
Matthew T. Reinhard  
Counsel for David Geisen

Dated: January 22, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that copies of DAVID GEISEN'S ANSWER OPPOSING THE NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF THE BOARD'S DENIAL OF MOTION TO HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW in the above-captioned matter have been served on this 22nd day of January, 2007, on the following persons via email as indicated by an (\*) and by regular mail as indicated by an (\*\*):

Michael C. Farrar \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
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E. Roy Hawkens \* \*\*  
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Atomic Safety and Licensing Board  
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Nicholas G. Trikouros \* \*\*  
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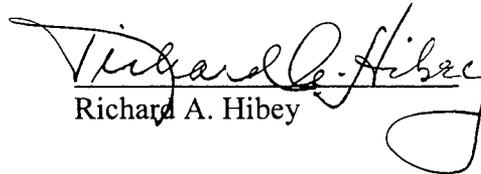
Adjudicatory File \*  
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Margaret Parish \* \*\*  
Board Law Clerk  
Atomic Safety and Licensing Board Panel  
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Office of the Secretary \* \*\*  
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