

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 REPLY TO DAVID GEISEN'S ANSWER OPPOSING THE NRC STAFF'S  
PETITION FOR INTERLOCUTORY REVIEW OF DENIAL OF STAFF STAY MOTION

INTRODUCTION

On January 19, 2007, the NRC Staff ("Staff") filed a petition for interlocutory review of the Licensing Board's decision denying a stay of the proceeding on the Staff's enforcement order until after completion of Mr. Geisen's criminal trial based on the same underlying facts.<sup>1</sup> On January 22, 2007, Mr. Geisen filed his opposition to the Staff's motion.<sup>2</sup> Pursuant to 10 C.F.R. § 2.341(b)(3), the Staff hereby files its response to Mr. Geisen's opposition.

DISCUSSION

Mr. Geisen, in his opposition to the Staff's stay motion,<sup>3</sup> has misrepresented the Staff's position and actions leading to this appeal in several respects. This is the second stay that the Staff has requested on behalf of the Department of Justice ("DOJ"), the first one having been filed over nine months earlier and under very different circumstances, at a time when the enforcement proceeding was in its early stages.<sup>4</sup> This renewed request the second request - was prompted by DOJ because of

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<sup>1</sup> "NRC Staff's Petition for Interlocutory Review of Board's Denial of Motion for Stay and Petition for a Stay Pending Review," January 19, 2007, ("Petition").

<sup>2</sup> "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 of the Proceeding," ("Opposition").

<sup>3</sup> "NRC Staff Motion For Stay of Proceeding," January 8, 2007, ("Motion for Stay").

<sup>4</sup> Between those filings, the Staff filed "NRC Staff Motion for Stay of Proceeding or in the Alternative for a Preclusion Order" on October 27, 2006. That motion requested relief based on Mr. Geisen's repeated failure to provide any discovery in contrast to the Staff's extensive discovery disclosures, not on the grounds raised in the instant Petition. Although the Board declined to the stay the proceeding, it essentially granted the Staff's request for preclusion of claims or evidence if not disclosed by Mr. Geisen in discovery.

changed circumstances in the case that threaten to cause imminent harm to DOJ's criminal prosecution. Thus, contrary to Mr. Geisen's characterization, the Staff has not sought to stay this proceeding five times and this request does not represent a practice of "endlessly relitigating Board decisions." Opposition at 2, 16. Indeed, the Board itself acknowledged in its ruling on the first stay request that changed circumstances could occur which might justify a renewed request for stay, explicitly stating that its denial was "without prejudice to either side's right to return to us in the future - if a side can point to real, practical (as opposed to theoretical, ephemeral) damage to its position that would transpire if the proceeding moved to the next step - and to seek to delay all or a part of a subsequent stage."<sup>5</sup> That is precisely what the Staff and DOJ have done in this stay request.

Mr. Geisen again misrepresents the actions of the Staff by making the remarkable claim that the Staff misrepresented the contents of a letter from counsel for Mr. Geisen to the Staff which the Staff actually attached to its Petition in order to fabricate prejudice to DOJ. Opposition at 6. As the letter states, counsel for Mr. Geisen identified thirteen potential witnesses in addition to the thirteen deponents identified by the Staff, saying "[c]ounsel for Mr. Geisen may depose each of the foregoing persons in this matter. . . . Thus, Mr. Geisen's own statements indicate that as many as twenty-six witness depositions could be conducted."<sup>6</sup> Mr. Geisen also falsely implies that the Staff has been dilatory in pursuing deposition discovery. Opposition at 17. Contrary to Mr. Geisen's suggestion, the Staff has now scheduled all of its depositions, expending substantial effort to ensure that all will be completed within the scheduled discovery period proposed by the parties.<sup>7</sup> Turning to the merits of Mr. Geisen's opposition, the Staff addresses Mr. Geisen's arguments below.

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<sup>5</sup> *David Geisen*, LBP-06-13, 63 NRC 523, 561 (2006).

<sup>6</sup> These would be in addition to the depositions Mr. Geisen seeks of Staff employees involved in the preparation of interrogatory responses who have no first-hand knowledge of the events on which the enforcement order was based.

<sup>7</sup> In the process of scheduling depositions of thirteen witnesses in a three-week period to allow for this appeal, the Staff has necessarily had to reschedule certain depositions. Because Mr. Geisen has yet to schedule any depositions of the thirteen potential additional witnesses he has identified, it appears highly questionable whether he would have been able to comply with the discovery deadline even if this appeal had not been filed.

I. DOJ Has Identified Proper Grounds for a Stay

At the outset, Mr. Geisen misrepresents the Board's findings by falsely attributing Judge Farrar's use of the terms "stunning" and "unjustified" to DOJ's claim that Mr. Geisen could use the depositions in the enforcement proceeding to gain an unfair advantage in the criminal trial. Opposition at 8. The transcript is clear that Judge Farrar made those statements with regard to DOJ's statement in its affidavit that the potential harm to the criminal case was sufficiently serious that DOJ would consider whether to seek dismissal of the administrative complaint in the event that the stay request was denied.

Tr. 618 - 19.

Mr. Geisen then attempts to diminish the harm identified by DOJ in allowing him the opportunity to elicit sworn testimony in the enforcement proceeding as an attempt by DOJ to seek a tactical advantage in the criminal trial. Opposition at 8. In truth, however, it is Mr. Geisen who is using the enforcement proceeding to gain a tactical advantage. As explained by DOJ in its affidavit and during the oral hearing, Mr. Geisen has transcripts of grand jury testimony that are not available to the Staff and can use the upcoming depositions to develop inconsistencies which, however innocent, can be used to undermine the credibility of witnesses during the criminal trial. On the other hand, the Staff is unaware of the content of the grand jury transcripts and is thus unable, in practical terms, to prevent him from taking unfair advantage of the discovery process.

Allowing Mr. Geisen this opportunity is manifestly unfair to DOJ and should not be permitted in this proceeding. As for Mr. Geisen's attempt to distinguish this practice from what he deems "improper" practices, the Staff submits that Mr. Geisen's ability to use his informational advantage to develop testimony that is inconsistent, however innocent the inconsistency and truthful the testimony, to undermine the credibility of government witnesses would be no less improper than the other examples of exploitation of the civil discovery process he cites.<sup>8</sup> It is exactly this type of exploitation - in which individuals use the civil discovery process to gain an unfair advantage in a criminal trial - that courts have

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<sup>8</sup> Mr. Geisen concedes that the civil system should not be permitted to be used for improper purposes such as intimidation of witnesses, subordination of perjury and the manufacture or destruction of evidence.

sought to redress in granting stays.<sup>9</sup> Permitting him to use the NRC's enforcement process in this manner is improper and should be prevented regardless of the fact that the government deemed it necessary to pursue both administrative and criminal proceedings.

DOJ, in its affidavit, has identified additional, specific and appropriate grounds for harm if the stay is not granted based on (1) the potential of a misleading record and, consequently, Board findings based on misinformation and (2) the very real prospect that the administrative proceeding will interfere with its ability to prepare for the criminal trial. Mr. Geisen's attempt to refute DOJ's claims by repeating the Board's observation that this harm would not have arisen if a criminal case had not been initiated. Opposition at 9, is beside the point - here grand jury testimony has been obtained on the same issues that cannot be shared with the Staff or the Board.<sup>10</sup> Such parallel-proceedings complications can occur and have long been recognized<sup>11</sup> and dealt with by this agency without compromising DOJ's criminal process or NRC's civil enforcement. Mr. Geisen's additional attempts to undercut these claims based on superficial and trivial matters, such as where DOJ placed particular claims in its affidavit and the fact that DOJ first used the term "collateral estoppel" while explaining its concerns during oral argument, evidence his lack of any substantive argument with DOJ's specific claims of harm.<sup>12</sup>

## II. The Board Over-Emphasized The Harm to Mr. Geisen and Applied an Improper Standard

With regard to the Staff's argument that the Board improperly evaluated the harm to Mr. Geisen

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<sup>9</sup> See, e.g., *Campbell v. Eastland*, 307 F.2d 478, 487 (5<sup>th</sup> Cir. 1962) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit"), *cited with approval*, *U.S. v. Kordel*, 397 U.S. 1, 12 n.27 (1970) ("Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution.").

<sup>10</sup> Notwithstanding an earlier Staff request and the Board's exhortations, DOJ, as a matter within its discretion, has not asked the court for authority to release Grand Jury information to the Staff or the Board

<sup>11</sup> See, Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50317 (December 14, 1988).

<sup>12</sup> Incongruously, Mr. Geisen also argues that the decision by Mr. Geisen and his co-defendants to invoke their Fifth Amendment rights and decline to testify is not "new," presumably because it was not entirely unexpected. Although the Staff is at a loss to understand how this relates to the propriety of the harm alleged by DOJ, these developments could not be predicted in advance with certainty, and were certainly new in that they happened after the time the initial stay request was denied.

resulting from a stay, Mr. Geisen again fails to refute the substance of the Staff's claims. Instead, he asks, without substantive foundation, that the Commission to reject one of the Staff's supporting arguments - that Mr. Geisen could not realistically obtain employment in NRC-licensed activities while being criminally prosecuted for making false claims to the NRC - on the grounds that it was presented for the first time on appeal. Opposition at 13. This is, however, simply untrue as evidenced by the Staff's argument in the stay motion that Mr. Geisen would not be able to pursue employment in NRC-licensed activities during the criminal trial.<sup>13</sup> As for Mr. Geisen's remaining arguments, he does no more than restate the error made by the Board by asking the Commission to consider all financial, professional, emotional and other costs to Mr. Geisen from the issuance of the enforcement order instead of the proper standard - the harm resulting from granting the limited stay of the proceeding requested by the Staff.

Later, in arguing against the Staff's claim that the Board applied an improperly high standard in determining whether to grant the Staff's stay request, Mr. Geisen points out that the Board deemed the remedy of a stay to be extraordinary. Opposition at 15. This very statement evidences the Board's over emphasis on the perceived harm to Mr. Geisen and the basis for the correspondingly high standard that the Board applied in requiring justification for harm to DOJ if the enforcement proceeding is allowed to proceed. Contrary to Mr. Geisen's claim, the Staff is not arguing that the Board did not understand the factors to be applied in deciding whether to grant a stay, Opposition at 16. Rather, it is the Staff's position that the Board improperly applied those factors by considering the harm to Mr. Geisen from the focusing on the impact on Mr. Geisen during the entire time in which he has been subject to the

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<sup>13</sup> The Staff's motion for stay directly addressed this point, stating that this fact minimized the harm to Mr. Geisen's private interests during the time the stay would be in effect. Stay Motion at 11. While the Staff did not explicitly point out the ambiguity of the letter from Mr. Geisen's employer, this letter was cited by the Commission when ruling on the first stay motion for the proposition that Mr. Geisen had been assured that his previous nuclear employer would discuss re-employment if the enforcement order was lifted notwithstanding the criminal indictment against him. *David Geisen*, CLI-06-18, 64 NRC 9, 12 (2006). assessing the harm to Mr. Geisen. Even if that interpretation of the letter is still accepted, it is self evident that Mr. Geisen could not resume his previous nuclear employment during a criminal trial in which he is defendant facing charges that he made false statements to the NRC.

enforcement order - which substantially less than the harm resulting from the limited stay requested, particularly considering that during the period of the stay Geisen will be the defendant in a criminal trial.

CONCLUSION

For the reasons stated above, the Staff asks that the Commission accept interlocutory review, reverse the decision of the Board and grant the requested stay.

Respectfully submitted,

***/RA by Lisa B. Clark/***

Lisa B. Clark  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 24<sup>th</sup> day of January, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO 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 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 24<sup>th</sup> day of January, 2007.

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