September 21, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	

NRC STAFF'S APPLICATION FOR A STAY OF THE
EFFECTIVENESS OF LBP-09-24 PENDING COMMISSION REVIEW

INTRODUCTION

Pursuant to 10 C.F.R. § 2.342, the NRC staff ("Staff") hereby requests that the Commission stay the effectiveness of the Atomic Safety and Licensing Board's ("Board") Initial Decision of August 28, 2009.[1] The Staff is petitioning for review of the Initial Decision on the grounds that it is predicated on legal error, prejudicial procedural error, and clearly erroneous factual determinations.[2] A stay will preserve the NRC's five-year employment ban against Mr. Geisen, and will prevent Mr. Geisen from acting upon his stated intent to use this decision as a basis for seeking reconsideration of the three-year debarment from employment in the nuclear power industry imposed as a result of his criminal conviction for making false statements to the NRC in the Davis-Besse matter. Accordingly, the Staff seeks a stay of the Initial Decision while the Commission considers the Staff's petition for review.

BACKGROUND

On January 4, 2006, the Staff issued an immediately effective Order prohibiting Mr. Geisen from any involvement in NRC-licensed activities for a period of five years.[3] The Order

[1] *David Geisen*, LBP-09-24, 70 NRC ___ (slip op.) (Aug. 28, 2009) ("Majority" or "Initial Decision").

[2] *See* NRC Staff's Petition for Review of LBP-09-24 (Sept. 21, 2009).

[3] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), IA-05-052 (Jan. 4, 2006) (ML053560094) ("Order").

was predicated on the Staff's determination that Mr. Geisen "engaged in deliberate misconduct by deliberately providing FENOC and the NRC information that he knew was not complete or accurate in all material respects, a violation of 10 CFR 50.5(a)(2)."[4]

On February 23, 2006, Mr. Geisen submitted an Answer denying the NRC's charges and requesting a hearing,[5] and a proceeding was initiated before the Board. On February 1, 2007, the Commission ordered the NRC proceedings to be held in abeyance pending the outcome of a criminal proceeding against Mr. Geisen.[6] In October, 2007, Mr. Geisen was tried before a jury and convicted on three of the five counts contained in the indictment. On May 1, 2008, the district court sentenced Mr. Geisen to three years probation, during which Mr. Geisen was barred from employment in the nuclear power industry.[7]

On June 24, 2008, Mr. Geisen requested reinstatement of the ALSB proceeding on the Order, and a hearing was conducted from December 8 to 12, 2008. On August 28, 2009, the Board Majority issued its Initial Decision, finding that the Staff failed to prove by a preponderance of the evidence that Mr. Geisen provided inaccurate and incomplete information to the NRC, and setting aside the five-year employment ban. Chief Judge Hawkens dissented, finding that the Staff proved that Mr. Geisen deliberately provided inaccurate and incomplete

---

[4] *Id.* at 14. Specifically, the Order set forth six instances in which Mr. Geisen deliberately provided materially incomplete or inaccurate information to the NRC. *Id*.

[5] Answer and Demand for an Expedited Hearing (Feb. 23, 2006) ("Answer").

[6] *David Geisen*, CLI-07-06, 65 NRC 112, 120 (2007). On January 19, 2006, a federal Grand Jury in the Northern District of Ohio returned a five-count criminal indictment against Mr. Geisen for violating 18 U.S.C. §§ 1001 (False Statements) and 1002, based on many of the same facts as the Order. *Id*. at 2. The criminal charges, like the Order, claimed that Mr. Geisen deliberately provided materially incomplete or inaccurate information to the NRC on behalf of his former employer, FirstEnergy Nuclear Operating Company ("FENOC"), the licensee for the Davis-Besse Nuclear Power Station, in written responses and oral presentations regarding NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles," (Aug. 3, 2001) (Staff Ex. 8).

[7] Letter from Richard Hibey to the Board (June 24, 2008), Attachment C, Transcript of Sentencing Hearing, at 19-20 ("Sent. Tr.").

information in all six instances and that the five-year employment ban was reasonable and should be sustained.[8]

DISCUSSION

I. Legal Standards Governing a Request for a Stay

In deciding whether to issue a stay of a presiding officer's decision, the Commission considers the following factors:

> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) Whether the party will be irreparably injured unless a stay is granted;
>
> (3) Whether the granting of a stay would harm other parties; and
>
> (4) Where the public interest lies.

10 C.F.R. § 2.342(e). These criteria, which are identical to those applied by federal courts,[9] "are not prerequisites that must be met, but are interrelated considerations that must be balanced together."[10]

II. The Board's Ruling Warrants a Stay Based on a Balancing of the Factors in 10 C.F.R. § 2.342(e)

During the sentencing hearing following Mr. Geisen's criminal conviction, the district court judge indicated that if the NRC allowed Mr. Geisen to resume work in NRC-regulated activity, the judge would consider a request to amend the terms and conditions of his probation — specifically, the length of the employment ban.[11] Because the Initial Decision set aside the NRC's five-year employment ban, Mr. Geisen may now return to federal court to request

---

[8] *Dissenting Opinion of Judge E. Roy Hawkens*, LBP-09-24, 70 NRC ___ (slip op.) (Aug. 28, 2009) ("Dissent").

[9] *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[10] *Michigan Coalition of Radioactive Material Users, Inc., v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991); *see also CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).

[11] Sent. Tr. at 30.

rescission of the three-year ban imposed in his criminal proceeding.[12] As discussed more fully below, the Staff believes that a stay of the effectiveness of the Initial Decision pending Commission review is warranted based on the strong likelihood of reversal of the Board's decision, the potential for irreparable harm stemming from the decision, and the public interest.

A. The Likelihood of Success on the Merits of the Staff's Appeal Warrants a Stay

As outlined below and set forth at length in the Staff's Petition for Review, the Staff believes that it has an overwhelming likelihood of success on the merits given the Majority's reliance on legal standards that are unsupported or contrary to precedent, prejudicial procedural error, and clearly erroneous factual findings.

First, in holding that the Staff failed to prove Mr. Geisen knew that his statements to the NRC were inaccurate or incomplete when he made them,[13] the Majority required the Staff to meet a standard far higher than "more likely than not." In this regard, the Majority relied extensively on the following five additional factors to establish the knowledge element of the deliberate misconduct rule: (1) the wrongdoer is an expert on the particular matter;[14] (2) the wrongdoer is not busy with other important work during a relevant time period;[15] (3) the matter is within the wrongdoer's job description and permanent duties;[16] (4) the wrongdoer not only reads but also acts upon or otherwise responds to written communications in a way that satisfies a

[12] The NRC ban became effective on January 4, 2006 and was to run until January 4, 2011. Order at 1, 16. The federal court ban is in effect from May 1, 2008 until May 1, 2011. Sent. Tr. at 19-20.

[13] The parties stipulated that the statements at issue were inaccurate and incomplete and material to the NRC. Staff Ex. 77. Therefore, the sole issue in this proceeding was Mr. Geisen's knowledge of the inaccuracy and incompleteness. Initial Decision at 29.

[14] *See*, *e.g.*, Majority at 25, 60, 86, 126, 133.

[15] *See*, *e.g.*, Majority at 24, 57, 75, 88, 95, 96 n.147, 139 n.172, 141.

[16] *See*, *e.g.*, Majority at 12-13, 24, 60, 70, 88.

"Knowledge Hierarchy";[17] and (5) the wrongdoer knows not only the contents of a document but also its context and implications.[18] The Board cited no legal authority for these five factors or its Knowledge Hierarchy, and no expert testimony was presented during the hearing in support of these requirements. Furthermore, the Board never notified the parties that it was considering these unprecedented standards—let alone that they would be applied. Therefore, the Staff was deprived of the opportunity to present evidence that would address these standards. Because the Majority relied on these standards in evaluating the evidence and rendering its decision, the lack of notice substantially impacted the outcome of the proceeding and amounted to a significant prejudicial procedural error.

Second, in clear contradiction of legal precedent, the Majority improperly discounted the Staff's extensive circumstantial evidence of Mr. Geisen's knowledge and emphasized the absence of certain pieces of direct evidence. Majority at 27-28, 132-33. The Majority's determination contradicts established legal precedent supporting the view that a plaintiff may prove his case using either direct or circumstantial evidence, and that circumstantial evidence has the same probative value as direct evidence.[19] Moreover, the Majority's reliance on the absence of direct evidence ignores the "voluminous and compelling circumstantial evidence"

---

[17] *See*, *e.g.*, Majority at 31-33. Although the Knowledge Hierarchy was described in the section of the opinion that provided "the basic legal principles that govern [the Majority's] decision, including key ones about the acquisition of knowledge . . .," Majority at 8, the Majority cited no legal precedent or other support (*e.g.*, scientific treatise) as the basis for its Knowledge Hierarchy. The Staff submits that the Knowledge Hierarchy is not common knowledge appropriate for judicial notice but rather represents the Majority's opinion on psychological factors influencing a person's recall.

[18] *See*, *e.g.*, Majority at 21, 32, 58, 64-65, 112.

[19] *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."); *Doe v. U.S. Postal Serv.*, 317 F.3d 339, 343 (D.C. Cir. 2003) (the court "draw[s] no distinction between the probative value of direct and circumstantial evidence."). Moreover, here, the Majority did not merely give direct evidence greater weight than circumstantial evidence, but rather gave greater weight to the *absence* of direct evidence. *See* Majority at 132-33; Dissent at 57 n.43.

and "Mr. Geisen's own incriminating testimony" in the record that support the charges in the Order. *See* Dissent at 57 n.43.

Finally, the Majority incorrectly decided that collateral estoppel did not apply with respect to the charges related to Serial Letter 2744, one of the six instances of misconduct identified in the Order.[20] In doing so, the Majority ignored NRC precedent that requires application of collateral estoppel upon proof of the required elements unless there are "overriding competing public policy considerations."[21] Furthermore, even if this NRC precedent does not apply, and the Majority had the discretion to withhold collateral estoppel, it nevertheless failed to properly consider and weigh all relevant factors and therefore reached an erroneous result.

In addition to the legal errors described above, the Board also made several clearly erroneous factual determinations that are either inconsistent with, or contrary to, the evidentiary record. These errors are discussed at length in the Staff's Petition for Review, but three brief examples are provided here:

(1) The Majority found that the Staff did not provide sufficient evidence of Mr. Geisen's knowledge that Davis-Besse's inspection method could not view all of the nozzles on the reactor vessel head, Majority at 26-27, yet Mr. Geisen's own testimony directly contradicts this. Tr. at 1958-59.

(2) The Majority found that Mr. Geisen never viewed the videotapes of past inspections with Mr. Siemaskzo in running fashion, Majority at 98, *see also* Majority at 75-76, 139-40, but that if he had, "[such] a viewing . . . would have tainted his conduct over the next month." Majority at 139-40. In making this finding, the Majority ignored Mr. Geisen's testimony during his Office of Investigations interview in 2002, in which he stated that he viewed the videotapes. *See* Staff Ex. 79 at 108-09, 144-45. Mr. Geisen never stated that this viewing was limited to still frames. *Id*.

---

[20] The charges in the Order related to Serial Letter 2744 are based on some of the underlying statements charged in Counts 1, 3, and 4 of the criminal indictment, for which Mr. Geisen was found guilty. *See* NRC Staff Motion for Collateral Estoppel at 5-7 (Nov. 17, 2008).

[21] *Toledo Edison Co*. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 6 NRC 557, 563-64 n.7 (1977) ("absent overriding competing public policy considerations . . . an administrative agency is [not] free to withhold the application of collateral estoppel as a discretionary matter".).

(3) In finding that Mr. Geisen did not know of materially incomplete and inaccurate information in Serial Letter 2731, the Majority emphasized that Mr. Geisen was "not the FENOC manager responsible for ensuring the completeness and accuracy" of the letter's content, while ignoring the plain language of the Green Sheet, which Mr. Geisen signed off on, and Mr. Geisen's own testimony that he understood that all signatories to the Green Sheet were responsible for the completeness and accuracy of the document. Staff Ex. 10 at 3, Tr. at 1901-02; *see also* Dissent at 45 n.35.

B. The Threat of Harm to the Staff's Interests Warrants a Stay

A party seeking a stay must show that it faces "imminent, irreparable harm that is both 'certain and great.'"[22] Thus, in evaluating harm, courts look to three factors: (1) the substantiality of the injury alleged (*i.e*., how great the injury will be), (2) the likelihood of its occurrence (*i.e*., the certainty of injury), and (3) the adequacy of the proof provided.[23]

The Majority's flawed decision threatens to harm the Staff's interests in two ways. First, because the Staff believes that Mr. Geisen's misconduct was deliberate, the Staff has a continuing interest in ensuring that the five-year ban imposed on Mr. Geisen remains in force for its full term (until January 4, 2011). While Mr. Geisen is still subject to a three-year ban (until May 1, 2011) as a result of his criminal conviction, the Initial Decision allows Mr. Geisen "to seek employment in the nuclear industry forthwith." Majority at 120 n.158, 145. On September 8, 2009, Mr. Geisen's attorney sent a letter to the district court judge enclosing the Board's decision, stating that Mr. Geisen has "the solid prospect of reemployment" in the nuclear power industry, and informing the judge that, if Mr. Geisen can successfully resist the Staff's request for a stay, the Court will "immediately thereafter receive his request for lifting the

[22] *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (*citing Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985)).

[23] *Cuomo*, 772 F.2d at 977 (*citing Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). These factors apply to the evaluation of harm to the moving party (Factor 2) as well as harm to others (Factor 3). *Id*.

ban on his employment."[24] Therefore, it is certain that in the near term, absent a stay, Mr. Geisen will request termination of the employment ban which, if granted, will allow Mr. Geisen to obtain employment in the nuclear industry. Furthermore, Mr. Geisen has now presented the Majority's fatally flawed decision to the judge as a basis for reconsidering his criminal sentence. Absent a stay, should the district court decide to terminate Mr. Geisen's employment ban on this basis, the Majority's decision will have inappropriately interfered with the deliberations of the district court. Given Mr. Geisen's clear intent to seek reconsideration "immediately," this would likely occur before the Commission could rule on the Staff's appeal.[25]

Even assuming that interference with the district court's deliberations is not viewed as irreparable harm to the Staff because the outcome of a reconsideration hearing is unknown at this time,[26] the Staff believes that any weakness in this factor is offset by the "overwhelming" showing that the Majority's decision is likely to be reversed on the merits (*see* § II.A *supra*) and the strong public interest in a stay (*see* § II.C *infra*).[27] Although the Commission has stated that irreparable harm is the "most important" criterion for issuing a stay,[28] it has left open the possibility that an "overwhelming showing" on the merits can overcome a weak showing of

---

[24] Letter from Richard Hibey to the Honorable David A. Katz (Sept. 8, 2009) (Attachment 1). It is not clear whether both the Majority's decision and the dissent were enclosed. *Id*.

[25] *Cf*. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002) (stay granted because allegedly unlawful Board interference in tribal affairs would take place before the Commission has an opportunity to take corrective action).

[26] It is possible, for example, that the judge could decide that the ban was appropriate based on the outcome of the criminal proceeding, regardless of the Initial Decision, or that the judge could decide to delay a ruling pending the Commission's decision on the Staff's petition for review.

[27] Additionally, pursuant to 10 C.F.R. § 2.342(a), the Staff was required to seek a stay within 10 days of the issuance of the initial decision. If, instead, the Staff had waited until after Mr. Geisen actually sought reconsideration in the district court and the judge ruled on that request, the Staff would have risked a finding that the request for a stay was untimely.

[28] *United States Dept. of Energy* (High Level Waste Facility), CLI-05-27, 62 NRC 715, 718 (2005) (*citing Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994)).

irreparable harm.[29] This view is consistent with long-standing precedent in the D.C. Circuit and other federal courts, which have concluded that a particularly strong showing on one factor can compensate for a weak showing in other areas.[30] Furthermore, as long as Mr. Geisen remains under the district court's three-year debarment, a stay will not result in substantial harm to him.[31] Therefore, a balance of the equities does not weigh in Mr. Geisen's favor.

C. The Public Interest Warrants a Stay

When considering the four stay factors, the public interest is a "crucial" consideration that supersedes the interests of private litigants in cases involving the "administration of regulatory statutes designed to promote the public interest."[32] Indeed, the public interest can be the decisive factor in granting a stay.[33] The NRC's preeminent mission is to protect public health and safety in accordance with the Atomic Energy Act of 1954, as amended.[34] In order to fulfill this mission, the NRC requires licensees and their employees to abide by its regulations,

---

[29] *Dept. of Energy*, CLI-05-27, 62 NRC at 719; *Sequoyah Fuels*, CLI-94-9, 40 NRC at 7 (1994).

[30] *CityFed Financial Corp.*, 58 F.3d at 747; *see also Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (finding "considerable merit" in the D.C. Circuit's approach); *Griepentrog*, 945 F.2d at 153.

[31] If the Commission were to stay the effectiveness of the Initial Decision, Mr. Geisen would be unable to request reconsideration of his sentence until the Commission rules on the petition for review. However, if a stay is not granted, even if Mr. Geisen seeks reconsideration of his sentence based on reinstatement by the NRC (*i.e*., based on the result of the Initial Decision), the outcome of reconsideration is uncertain. That uncertainty detracts from a finding that Mr. Geisen would be harmed.

[32] *Virginia Petroleum Jobbers*, 259 F.2d at 925; *see also Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 616 (D.C.Cir 1980) (*quoting Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552 (1937)) (the public interest is "uniquely important" and, therefore, "'[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'").

[33] See *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 376 (2008) (public interest in allowing the Navy to conduct realistic training exercises outweighed plaintiff's asserted harms and was a determinative factor in the stay calculus); *Exxon Corp. v. Esso Worker's Union*, 963 F.Supp 58, 60 (D. Mass 1997) (public interest was the decisive factor in granting a stay, pending appeal, of reinstatement of an employee who was fired after a positive drug test).

[34] 42 U.S.C. § 2012(d). Courts have found public safety to be the overriding public interest in deciding whether to grant injunctive relief in cases involving radioactive waste disposal and issuance of licenses for nuclear reactors. *Griepentrog*, 945 F.2d at 155; *State of Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir. 1986).

including the requirement to provide complete and accurate information, 10 C.F.R. § 50.5(a)(2). Therefore, it is unquestionably in the public interest to ensure that NRC regulations are adhered to and to take appropriate enforcement action when they are violated.[35]

The Staff imposed an immediately effective five-year ban on Mr. Geisen because his inaccurate and incomplete statements in the Davis-Besse matter, in violation of 10 C.F.R. § 50.5(a)(2), were "of very high safety and regulatory significance."[36] Despite the Majority's conclusion in the Initial Decision, the Staff maintains that the record clearly demonstrates Mr. Geisen's deliberate misconduct and that a full five-year ban is necessary and appropriate to prevent recidivism and to serve as a deterrent. Therefore, the effectiveness of the Initial Decision, which allows him to "seek employment in the nuclear industry forthwith," Majority at 120, should be stayed pending Commission review.

CONCLUSION

For the reasons set forth above, the Staff respectfully requests that the Commission enter a stay of the effectiveness of the Initial Decision, pending the Commission's consideration of the Staff's Petition for Review.

Respectfully submitted,

/RA/

Marcia J. Simon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of September, 2009

[35] *See Hamlin Testing Laboratories, Inc. v. AEC*, 337 F.2d 221, 222 (6th Cir. 1964) ("the public interest is critically involved" in cases involving the Commission's regulations).

[36] Order at 15; s*ee also* Tr. at 2105-2110; Dissent at 60-61.

ATTACHMENT 1

Letter from Richard Hibey to the Honorable David A. Katz (Sept. 8, 2009)

MILLER
CHEVALIER

Richard A. Hibey
Member
(202) 626-5888
rhibey@milchev.com

September 8, 2009

VIA FEDERAL EXPRESS

Honorable David A. Katz
United States District Court
for the Northern District of Ohio
307 United States Court House
1716 Spielbusch Avenue
Toledo, OH 43604-1363

Re: *United States v. David Geisen, No. 3:06CR712 (Katz)*

Dear Judge Katz:

Enclosed herewith is the decision of the Nuclear Regulatory Commission's (NRC) Atomic Safety and Licensing Board ("Licensing Board") in the Matter of David Geisen on August 28, 2009. The Licensing Board ordered Mr. Geisen's license to practice nuclear engineering in the industry regulated by the NRC be reinstated *instanter*.

The NRC Staff will be appealing the decision to the NRC and applying to it for a stay. While this undoubtedly will delay Mr. Geisen's request to you for terminating the three year employment ban imposed on him at sentencing, he remains committed to seeking that relief as soon as possible.

At sentencing (Tr. p.30 lines 4-16) we were advised that if NRC reinstated Mr. Geisen and he had an opportunity for reemployment, lifting the ban would be considered. Mr. Geisen has the solid prospect of reemployment in the (NRC) regulated industry once the restraints are lifted. Thus, if Mr. Geisen is successful in resisting the NRC Staff's request for a stay of the Licensing Board's order, the Court will immediately thereafter receive his request for lifting its ban on his employment.

Sincerely,

Richard A. Hibey

Encls.
cc: Thomas Ballantine, Esquire (without enclosure)