UNITED STATES OF AMERICA
RAS 12957 NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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

CLI-07-06

MEMORANDUM AND ORDER

Once again, we are faced with the question whether to hold this enforcement proceeding in abeyance pending the outcome of a parallel criminal proceeding against Mr. David Geisen.[1] For the second time, the NRC Staff petitions us for interlocutory review of a Licensing Board order[2] denying a Staff motion to hold this proceeding in abeyance.[3] The challenged Board order concluded that the United States Department of Justice ("DOJ") had "fail[ed] to 'provide factual justification for delaying our . . . adjudicatory process and for imposing on [Mr. Geisen] the additional financial, professional, emotional, and other burdens that perforce accompany a delay in the resolution of [this] enforcement proceeding.'"[4] We grant the Staff's Petition and reverse the Board's order.

[1] We faced this same question last year when the case was in a different procedural posture, and responded in the negative. *David Geisen*, CLI-06-19, 64 NRC 9 (2006).

[2] "Order (Denying Government's Request to Stay Proceeding)" (Jan. 12, 2007) ("January 12th Order").

[3] NRC Staff's Motion for Stay of Proceeding at 8 (Jan. 8, 2007) ("Staff's Motion").

[4] January 12th Order at 1 n.2, quoting CLI-06-19, 64 NRC at 13.

BACKGROUND

This proceeding stems from the NRC Staff's Enforcement Order of January 16, 2006, immediately suspending Mr. Geisen from performing any work in the nuclear industry for five years. The Staff based its Enforcement Order on the finding that Mr. Geisen had engaged in deliberate misconduct by providing information that he knew was incomplete or inaccurate in some respects material to the NRC, a violation of 10 C.F.R. § 50.5(a)(2).

Concurrent with the Staff's enforcement investigation and action, DOJ was investigating criminal charges against Mr. Geisen, based on the same set of facts as those underlying the Staff's Enforcement Order. In early 2006, DOJ obtained a felony indictment of Mr. Geisen, charged him with concealing material information from the NRC and providing the NRC with false documents -- crimes similar to the regulatory violations alleged in the Enforcement Order.

Given the similarity of the enforcement and criminal proceedings, DOJ asked the NRC Staff in March of 2006 to move that the Board hold the enforcement case in abeyance, pending the conclusion of the criminal case. The Staff filed the requested abeyance motion, but the Board denied it and we affirmed the Board's decision.[5]

In January of 2007, DOJ made this same request a second time, and provided an affidavit from Mr. Richard Poole (an attorney on DOJ's litigation team prosecuting Mr. Geisen) to support the requested motion.[6] The Staff filed the motion and affidavit, Mr. Geisen filed a brief opposing the motion, and the Board then heard oral argument on the matter. On January 12, 2007, the Board issued an order denying the Staff's motion. The Staff has now submitted a Petition for Interlocutory Review ("Staff's Petition") of that order, which Mr. Geisen opposes. On January 23rd, we issued a housekeeping stay of the proceeding pending our issuance of a decision on the merits of the Staff's Petition.[7]

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[5] *David Geisen*, LBP-06-13, 63 NRC 523, *aff'd*, CLI-06-19, 64 NRC 9 (2006).

[6] Affidavit of Richard Poole, Senior Trial Attorney (Jan. 8, 2006) ("Poole Affidavit"), attached to Staff's Motion.

[7] Today's decision renders moot Mr. Geisen's January 24th motion to vacate the housekeeping stay.

DISCUSSION

As we observed in CLI-06-19, "[t]he question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution 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)."[8] A petition seeking review of an order granting or denying such an abeyance motion meets our standard for interlocutory review because the appealed order would have an "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision."[9] Therefore, as we did in CLI-06-19, we grant the NRC Staff's Petition, and we rule below on the merits of the abeyance question.

Were the facts, arguments and procedural posture of this case the same today as they were when we denied the Staff's first abeyance motion last year,[10] we would summarily deny the instant motion. However, those factors are not the same.

In analyzing the abeyance question, we balance here the risk of harm Mr. Geisen could suffer from an abeyance order against the risk of harm DOJ could suffer from the NRC Staff moving forward in its enforcement hearing – the same approach we took in our last decision in this proceeding. We find that DOJ's claim of potential harm is now more concrete and tangible than it was when we issued CLI-06-19, and that the balance of harms to DOJ and Mr. Geisen has shifted. This shift places the proceeding in the posture to which we referred in CLI-06-19 when we authorized the Staff to re-raise and the Board to reconsider the abeyance issue: "If, at a later point in the enforcement proceeding, the NRC Staff (at DOJ's behest) presents the Board with specific claims of harm to the ongoing criminal proceeding, the Board is free to reconsider the abeyance question."[11]

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[8] CLI-06-19, 64 NRC at 11 (footnote omitted).

[9] 10 C.F.R. § 2.342(f)(2)(i).

[10] CLI-06-19.

[11] 64 NRC at 14.

1. *Potential harm to DOJ.* Given the Memorandum of Understanding between the NRC and DOJ regarding the potential need to hold our enforcement proceedings in abeyance pending the conclusion of DOJ's parallel criminal cases,[12] we are generally inclined to accommodate an abeyance request from DOJ as long as it provides "at least *some* showing of potential detrimental effect on [its parallel] criminal case."[13] Indeed, we made such an accommodation in *Siemaszko* last year, stating that "[w]e do not lightly second-guess DOJ's views on whether, and how, premature disclosure might affect its criminal prosecutions."[14] DOJ's latest affidavit here presents more concrete and tangible information than did the earlier DOJ affidavit which we criticized in CLI-06-19, and more information even than the DOJ affidavit which we accepted in *Siemaszko*.[15] Also, the Staff's briefs and both the Staff's and the DOJ representative's discussions at the Board's oral argument hearing have likewise been more informative than they were last year.[16] We find that DOJ has met its burden to provide "at least *some* showing" of potential harm.

We give great weight to DOJ's argument that the enforcement hearing in this proceeding is not currently scheduled to end until a mere 25 days prior to the start of the criminal trial and that the shortness of this period will interfere with DOJ's ability to prepare for the criminal trial. DOJ further indicates that the current and impending *pre*-hearing activities will likewise interfere with its efforts to prepare its witnesses for the criminal trial. These are

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[12] Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50,317, 50,318 (§ II) (Dec. 14, 1988).

[13] *Andrew Siemaszko*, CLI-06-12, 63 NRC 495, 502 (2006) (emphasis in original).

[14] *Id.* at 504. DOJ is rightly concerned that some defendants will attempt to use the Commission's more relaxed discovery rules to gain information unavailable to them through the Federal Rules of Criminal Procedure. We are loath to permit a criminal defendant to use our procedures to do an end-run around rules prescribed by the Supreme Court and implicitly approved by Congress. *Id.*

[15] *See id.* at 503 ("[T]he weight to be given the Staff's reason for seeking an abeyance turns on the quality of the *factual* record – *i.e.*, DOJ's . . . affidavits supporting this and earlier delays" (emphasis in original)).

[16] This is not to denigrate the considerable contributions that Mr. Geisen's counsel has also made to the record regarding this abeyance motion. But his client does not carry the burden of proof here.

certainly significant "changed circumstances" -- in that the criminal trial dates, the hearing dates, the designated deposition period, and the list of potential deponents were not set until many months after we issued CLI-06-19.

DOJ explains that "a great number of [the same] witnesses" will be called to testify in both the enforcement and criminal proceedings against Mr. Geisen,[17] and that DOJ will therefore have great difficulty in preparing for a criminal trial while a parallel hearing and depositions are taking place.[18] According to DOJ, the up-to-26 depositions in the enforcement case during the months leading up to the criminal trial's April 16th starting date will make critical witnesses unavailable for its own trial preparation.[19] Even under the best of circumstances, DOJ expects to need more than the currently-expected 25 days between the two hearings in which to prepare its witnesses for trial.[20] And DOJ's problem will be further exacerbated if the enforcement hearing extends beyond March 21 -- a prospect that both the NRC Staff and the Licensing Board consider quite possible.[21]

A major contributing factor to this possible runover is a recent development for which Mr. Geisen's counsel are themselves responsible: the significant increase in the number of Mr. Geisen's potential depositions in our enforcement proceedings. When the Board set the current "very aggressive" discovery schedule and hearing date,[22] it did so with the understanding that Mr. Geisen would depose between zero and five individuals.[23] Even with

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[17] Transcript of Oral Argument Hearing ("Tr.") Tr. 547 (Poole) (Jan. 11, 2007). *See also* Poole Affidavit at 2.

[18] Tr. 554 (Poole).

[19] Poole Affidavit at 5; Staff's Petition at 15-16. *See generally* NRC Staff's Reply to David Geisen's Answer Opposing the NRC Staff's Petition for Interlocutory Review of Denial of Staff Stay Motion at 4 (Jan.24, 2007) ("Staff's Reply").

[20] Tr. 557-58 (Poole).

[21] *See* Tr. 619-620 (Farrar, J.); Staff's Petition at 16.

[22] Tr. 556 (Clark).

[23] *See* Staff's Petition at 16, referring to both the November 14, 2006 Oral Argument transcript at 366 (zero to two people), and also the December 20, 2006 teleconference

(continued...)

those small numbers, the Board's "very aggressive" schedule still ran a significant risk of allowing too little time for the parties to complete all depositions prior to the hearing.[24] Then, on January 10, Mr. Geisen's counsel increased the estimate to as many as thirteen deponents.[25]

Although Mr. Geisen's attorney later attempted to downplay this recent increase, he never disowned it outright. Instead, he offered a vague statement that he "has indicated on multiple occasions [that] the defense does not anticipate many depositions in this matter, and that remains true," and that the McAleer letter "merely places the Staff on notice that [13] individuals might be relevant to Mr. Geisen's defense."[26] Nevertheless, Mr. McAleer's letter speaks for itself -- "Counsel for Mr. Geisen may depose each of the foregoing [13] persons in this matter, and we would appreciate receiving from you available dates for the NRC witnesses listed above."[27]

This showing of the potential (or even likely) inability of DOJ to adequately prepare its witnesses for the criminal trial would, without more, be sufficient in our view to conclude that DOJ has met its burden of proof under CLI-06-19 and *Siemaszko*. But there is more. Some prosecution witnesses will have already testified under oath four times before taking the stand

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[23](...continued)
transcript at 434 (where Mr. Geisen's counsel estimated the depositions he would need at "somewhere from 0 to 5").

[24] *See* Tr. 556 (Clark).

[25] *See* Letter from Charles F. B. McAleer, Jr., to Lisa B. Clark (Jan. 10, 2007) ("McAleer letter"), appended to Staff's Petition as Attachment A (listing 13 potential deponents). *See also* Staff's Reply at 2 & nn. 6, 7 (referring to those 13 potential deponents, plus the depositions of the two additional Staff employees).

[26] David Geisen's Answer Opposing the NRC Staff's Petition for Interlocutory Review at 6 n.5 (Jan. 22, 2007) ("Geisen's Opposition").

[27] McAleer letter at 2.

in the criminal trial[28] and, in some cases, they gave their prior testimony years earlier.[29] In this context, there is a danger that there will be inadvertent discrepancies due to a lack of time for DOJ to review testimony with witnesses prior to trial.

We respectfully disagree with the Board's suggestions that such inconsistencies could easily be overcome by DOJ asking the witness(es) to explain the reasons for them.[30] The defense may well try to use them to cast doubt on the prosecution witnesses' credibility and thereby to diminish the jury's willingness to find Mr. Geisen "guilty beyond a reasonable doubt."[31] Moreover, the jurors will likely lack the technical expertise and experience needed to understand the significance or insignificance of the various inconsistencies.[32] The Federal Rules of Criminal Procedure do not authorize the taking of pretrial witness depositions for

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[28] Sworn statements to both the NRC's Office of Investigations and the Grand Jury, the proposed depositions in this proceeding, and the Board's adjudicatory hearing. *See* Staff's Petition at 12.

[29] *See* Staff's Petition at 13.

DOJ's potential harm is exacerbated further by the fact that Mr. Geisen's counsel can cross-examine the NRC Staff's witnesses, both at depositions and the NRC hearing, with full knowledge of the contents of the Grand Jury transcripts. The Staff's lack of access to the Grand Jury testimony and DOJ's inability to advise the Staff as to that testimony preclude the Staff from preventing or correcting inconsistencies between witnesses' testimony before the Grand Jury and their later testimony at either an enforcement-related deposition or the enforcement hearing itself. Poole Affidavit at 3; Staff's Petition at 6, 13, 14; Staff's Motion at 8. Moreover, the resulting flaws in the NRC adjudicatory record could serve as the basis for improper factual findings by the Board -- findings which Mr. Geisen could likewise use to his advantage during the criminal trial. *See* Staff's Motion at 8, 9; Staff Petition at 7, 14-15. These are valid DOJ concerns. But their weight is diminished somewhat by the fact that DOJ chose to follow its usual practice of not asking the District Court to release the Grand Jury transcripts to DOJ and the NRC Staff (*see* Tr. 616 (Farrar, J.); Geisen's Opposition at 5 n.3; ; Staff's Reply at 4 n.10), despite being asked to do so by the NRC Staff (Tr. 599 (Clark); Staff's Reply at 4 n.10). Factfinding at the NRC hearing may be further distorted by Mr. Geisen's (and other witnesses') invocation of the Fifth Amendment privilege against self-incrimination. When we considered the abeyance question previously, that privilege had not yet been invoked.

[30] *See* Tr. 550, 563, 594, 617 (Farrar, J.).

[31] *See* Tr. 563-64 (Poole); Staff's Petition at 14.

[32] *See* Staff's Petition at 14.

discovery purposes "because it unbalances the system in a manner that was considered prejudicial to the government."[33]

2. *Potential harm to Mr. Geisen.* The Geisen Enforcement Order was immediately effective, and certainly contributed to Mr. Geisen's loss of his job.[34] Our regulations require that hearings regarding immediately effective enforcement orders be held expeditiously.[35] When we first considered this factor in the summer of 2006, Mr. Geisen's enforcement proceeding was in a very different posture. We were faced then with only general arguments about Mr. Geisen being deprived of the opportunity of employment in his chosen line of work. Today, the arguments regarding that deprivation are more focused, and the related facts are more specific.

Last March, the Staff filed its first abeyance motion when the case was in its infancy, only five weeks after Mr. Geisen had successfully requested an expedited hearing. Even by the time we issued CLI-06-19 last July, discovery had barely begun, the possibility of depositions was still remote, and no one knew when the United States District Court would conduct Mr. Geisen's criminal trial. Today, by contrast, the parties have almost completed written discovery, are poised to immediately begin depositions of up to 26 identified individuals, and the District Court has set both tentative and fallback trial dates of April 16 and July 16, 2007, respectively. We are therefore in a better position today than we were last summer to evaluate the severity of the possible harm Mr. Geisen would suffer from a grant of the Staff's abeyance motion. For the reasons set forth below, we believe the severity is entitled to less weight than we gave it last year.

We were faced last year with a request for an abeyance of indefinite duration, until the end of a then-unscheduled criminal trial. By contrast, as noted above, the District Court has now set tentative and fallback dates for trial. Holding our enforcement proceeding in abeyance from today until the estimated conclusion of the criminal trial in late May, Mr. Geisen's delay

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[33] *See* Tr. 541. *See generally* Fed. R. Crim. P. 16.

[34] *See* Letter from Lori J. Armstrong, Director Nuclear Engineering, Dominion Energy Kewaunee, Inc., to Davis Geisen (Feb. 16, 2006), appended as Attachment B to Mr. Geisen's Opposition to the NRC Staff's Motion to Hold the Proceeding in Abeyance (March 30, 2006).

[35] 10 C.F.R. § 2.202(c)(1).

would run for only four months (late January through late May), and his enforcement hearing would therefore presumably conclude in late July instead of late March.[36] This delay is, therefore, not only more precise (four months vs. indefinite) but also less severe than the delay we declined to impose on Mr. Geisen in CLI-06-19. This conclusion would stand even were the start of the criminal trial postponed from April until July, though the difference in severity would be less. Due to the more precise information regarding the delay (four months vs. indefinite), we accord less weight here to the severity of the potential harm to Mr. Geisen than we accorded it in CLI-06-19.

That weight is further diminished by Mr. Geisen's decision not to challenge the immediate effectiveness of his enforcement order, as our rules permit.[37] His decision weakens (though it does not completely undermine) his claim that the enforcement action has deprived him of the opportunity to work in his chosen profession -- a claim that is a necessary predicate to his current claim that a delay in the enforcement action continues to deny him that same opportunity.

Finally, we note that Mr. Geisen's firing stemmed only partially from the NRC enforcement order. It also stemmed from a Grand Jury indictment. Mr. Geisen's opportunity for re-employment can likely occur only if *both* the enforcement and criminal actions have concluded in Mr. Geisen's favor. The letter by which Mr. Geisen was fired makes this clear:

> While in effect, the NRC Order removes your qualifications to perform your job at Kewaunee Power Station. Additionally, 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. . . . When and if you are able to regain the legal status necessary to be considered for work at Kewaunee, please know that you are welcome to contact us to discuss the possibility of future re-employment.[38]

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[36] We recognize that the criminal trial could be postponed until July (or even later) for any number of reasons. However, we have to make a decision here based on the best information currently available to us. If circumstances change significantly, we are amenable to considering a motion from Mr. Geisen to lift today's abeyance.

[37] 10 C.F.R. § 2.202(c)(2)(i)).

[38] *See* Armstrong letter, *supra* note 34 (emphasis added).

A victory by Mr. Geisen in the enforcement proceeding would therefore be a necessary, but probably not a sufficient, condition for the removal of the harm of which he complains. Consequently, an abeyance of the enforcement case cannot, by itself, be viewed as the sole cause of delay in Mr. Geisen's opportunity for re-employment with an NRC licensee.[39]

CONCLUSION

We find that the potential harm to Mr. Geisen has decreased since our assessment of it last summer, and that the potential harm to DOJ is more imminent and tangible. We conclude that the possible harms to DOJ now outweigh those to Mr. Geisen. And we also conclude that DOJ has easily met its required light burden to make "at least *some* showing of potential detrimental effect on the criminal case."[40] Consequently, we

(i) *reverse* the Board's denial of the Staff's motion to hold this enforcement proceeding in abeyance,

(ii) *grant* the motion for abeyance, and

(iii) *vacate* our January 23rd housekeeping stay.

However, we reiterate that, if circumstances change significantly, we are amenable to considering a motion from Mr. Geisen to lift today's abeyance.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of February, 2007.

[39] This may appear to contradict our statement in CLI-06-19 that the assurance Mr. Geisen received from the Kewaunee facility's management that he would be considered for a job there "was premised *solely* on the lifting of the Commission's Enforcement Order." 64 NRC at 12 (emphasis added). To the extent we suggested that the Grand Jury indictment of Mr. Geisen played no role in his firing, we correct that implication today.

[40] *Siemaszko*, CLI-06-12, 63 NRC at 502 (emphasis in original).