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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 PRE-HEARING CONFERENCE

6

7 In the Matters of:	‖	
8 DAVID GEISEN	‖	Docket No. IA-05-052
9 DALE L. MILLER	‖	Docket No. IA-05-053
10 STEVEN P. MOFFITT	‖	Docket No. IA-05-054
11 (Enforcement Actions)	‖	

12

13 Rockville, Maryland

14 Wednesday, March 22, 2006

15 The above-entitled conference was convened

16 telephonically and in room T-3B45 of White Flint

17 North, pursuant to notice, at 2:00 p.m.

18 BEFORE:

19 MICHAEL C. FARRAR, ASLBP Administrative Judge

20 E. ROY HAWKENS, ASLBP Administrative Judge

21 NICHOLAS G. TRIKOUROS, ASLBP Administrative Judge

22

23

24

25

1 APPEARANCES:

2 On Behalf of the Nuclear Regulatory Commission

3 Staff:

4 MARY C. BATY, ESQ.;

5 SARA E. BROCK, ESQ.; and

6 MICHAEL E. SPENCER, ESQ.

7 of: Office of the General Counsel

8 Mail Stop - O-15 D21

9 U.S. Nuclear Regulatory Commission

10 Washington, D.C. 20555-0001

11 On Behalf of Dale L. Miller and Steven P.

12 Moffitt:

13 JANE GOWEN PENNY, ESQ.

14 of: Killian & Gephart, LLP

15 218 Pine Street

16 P.O. Box 886

17 Harrisburg, Pennsylvania 17108-0866

18 On Behalf of David Geisen:

19 RICHARD A. HIBEY, ESQ.

20 of: Miller & Chevalier

21 655 15th Street, N.W., Suite 900

22 Washington, D.C. 20005-5701

23 ALSO PRESENT:

24 Jonathan Rund, ASLBP Staff

25 Karen Valloch, ASLBP Staff

1 P-R-O-C-E-E-D-I-N-G-S

2 (2:03 p.m.)

3 CHAIRMAN FARRAR: We're here in three

4 enforcement matters: David Geisen, Dale Miller, and

5 Steven Moffitt. This is Mike Farrar. I'm the

6 Chairman of the three licensing boards with me here in

7 our chambers off our Rockville, Maryland courtroom,

8 with my brother judges, Judge Hawkens and Judge

9 Trikouros.

10 I will say a little more about our

11 backgrounds in just a minute, but first let's have

12 everybody else on the call introduce themselves. For

13 Mr. Geisen?

14 MR. HIBEY: Mr. Geisen, Richard Hibey,

15 H-i-b, as in boy, e-y, Miller and Chevalier,

16 Washington, D.C.

17 CHAIRMAN FARRAR: Thank you, Mr. Hibey.

18 For Messrs. Miller and Moffitt?

19 MS. PENNY: Jane Penny, P-e-n-n-y, from

20 the law firm of Killian, K-i-l-l-i-a-n, and Gephart,

21 G-e-p-h-a-r-t, in Pennsylvania.

22 CHAIRMAN FARRAR: Thank you, Ms. Penny.

23 And for the NRC staff?

24 MS. BATY: Mary Baty, B-a-t-y. And Sara

25 Brock is listening, Sara Brock, B-r-o-c-k; and Michael

1 Spencer, S-p-e-n-c-e-r.

2 CHAIRMAN FARRAR: Thank you, Ms. Baty.

3 We also have here with us Jonathan Rund,
4 our law clerk, and Karen Valloch, who is our
5 administrative support person. I want to welcome all
6 of you and thank you for getting together with us on
7 such short notice and thank Karen for helping us pull
8 everything together.

9 If you are wondering who we are, our bios
10 are on the NRC Web site. Just to give you a quick
11 background on us, I started out in life as a law
12 clerk, then was a civil appellate in the Department of
13 Justice, spent seven years here at the agency on the
14 old unlamented appeal board, went into the private
15 sector in environmental management for nearly 20
16 years, and came back here five years ago, spent most
17 of that time on the private fuel storage case outside
18 of Salt Lake.

19 Judge Hawkens?

20 JUDGE HAWKENS: My legal background was a
21 law clerk followed by working on the appellate staff,
22 Civil Division, Department of Justice and then
23 arriving here.

24 CHAIRMAN FARRAR: He left out his nuclear
25 Navy background, which counts for something.

1 Judge Trikouros?

2 JUDGE TRIKOUROS: Thank you.

3 I'm the technical judge on these boards.
4 Prior to the ASLB, I was the managing partner of
5 Panlyon Technologies, an engineering consulting firm.
6 Prior to that, I was the head of Safety and Risk
7 Analysis for GPU Nuclear, which provided engineering
8 and operations support for Oyster Creek and Three Mile
9 Island.

10 CHAIRMAN FARRAR: Thank you, gentlemen.

11 Did someone just join the call? Is
12 everyone still on? Mr. Hibey?

13 MR. HIBEY: Yes, sir, still here.

14 CHAIRMAN FARRAR: Ms. Penny?

15 MS. PENNY: Indeed.

16 CHAIRMAN FARRAR: And the staff?

17 MS. BATY: Yes.

18 CHAIRMAN FARRAR: Okay. Fine. Let's go
19 ahead. Mr. Hibey, Ms. Penny, for your benefit and the
20 benefit of your clients, I'll give you the same little
21 speech I always start cases with. A lot of people
22 don't know who we are. I'm sure that you do. But
23 they say, "Well, are you part of the staff?" And the
24 answer is quite simply no.

25 We are appointed to our positions by the

1 give commissioners who head the agency. We are
2 appointed to particular cases by the chief judge of
3 the licensing board panel. We have no contact with
4 the Commission. They don't tell us how to write our
5 opinions. We don't ask their permission. If they
6 don't like them, they reverse them, just like in a
7 court system. And we have no relationship with the
8 staff outside of these cases.
9 To preserve our independence, we don't get
10 performance reviews. We don't get bonuses. We just
11 do our jobs like judges are supposed to. So you can
12 assure your clients that you have an independent
13 tribunal.
14 In terms of the relationship with the
15 staff, I recently put in the private fuel storage
16 case, 62 NRC at page 708, talking about the staff's
17 role and then saying we insist upon treating the NRC
18 staff the same as any other party at the hearing. In
19 particular, we subject the staff's evidence to the
20 same scrutiny as that of the other parties, citing
21 some previous language in the same case at 57 NRC 140
22 and then citing a case from 30 years ago, which I hate
23 to say I was involved in. So that has been our watch
24 word for 30 years.
25 And you can assure your clients that they

1 will get an independent and fair shake and we will
2 look at both parties' evidence and arguments with an
3 unbiased viewpoint.
4 With that, let's get into the merits.
5 After our order went out, we did get the staff's
6 motion for a stay in the Geisen proceeding or a motion
7 to hold it in abeyance. So we do have that in front
8 of us.
9 MS. PENNY: Your Honor, this is Jane
10 Penny. I was not on the service list for that. I
11 just want you to know. I was not aware of that.
12 CHAIRMAN FARRAR: Okay. Mr. Spencer, you
13 filed that, didn't you? Can you get that tonight to
14 Ms. Penny?
15 MS. BATY: Your Honor, Ms. Penny is not a
16 part of that proceeding, but we will forward a copy of
17 that.
18 CHAIRMAN FARRAR: Oh, yes, I know. I
19 wasn't suggesting that there is anything wrong with
20 not serving her.
21 MS. BATY: Okay.
22 CHAIRMAN FARRAR: But at least for now
23 let's try to keep everybody posted.
24 MS. BATY: Sure. No problem.
25 CHAIRMAN FARRAR: No, no, no, no. No

1 criticism intended.

2 Let's start with our list of eight matters

3 that we put in our pre-hearing order. And there's

4 nothing written in stone about that. Oh, and, by the

5 way, this is intended to be very preliminary. If we

6 can reach any conclusions today, fine. But if any of

7 you have to go back to your clients and check, that's

8 certainly permissible when we're on such short notice

9 here.

10 We'll start with the first question. Have

11 any of you thought about consolidation?

12 MS. PENNY: Your Honor, this is Jane

13 Penny. I probably would be a natural because I

14 represent two individuals here. Unfortunately, their

15 cases are so different that I hesitate to recommend

16 consolidation.

17 Mr. Miller's covers a very brief period in

18 August of 2001. Mr. Moffitt's enforcement order

19 covers a period in 2000, then in September of 2001

20 through October of 2001. His evidence tends to pick

21 up where Mr. Miller's leaves off. So I don't know

22 that it would do any good to consolidate the two of

23 them. And there are different witnesses and

24 documents.

25 CHAIRMAN FARRAR: Thank you, Ms. Penny.

1 That is really what we were getting at. I was
2 operating on the maybe naive assumption that a lot of
3 the background in the case would be the same witnesses
4 and then you might just have a little bit different
5 for each one, but you're saying that is not the case.
6 MS. PENNY: They really seem quite
7 different at this point. I will be delighted to
8 revisit the subject, obviously.
9 CHAIRMAN FARRAR: All right. Take a look
10 at that.
11 Mr. Hibey, we have the different situation
12 with your client having been indicted and the staff's
13 motion to hold that in abeyance. Well, let me ask the
14 staff a question first. Is the Department of Justice
15 inquiry closed?
16 MS. BATY: Your Honor, we're not aware of
17 any additional action from the DOJ investigation. We
18 are not aware of anything in that area.
19 CHAIRMAN FARRAR: Okay. Thank you, Ms.
20 Baty.
21 Then, Mr. Hibey, we then have the other
22 two subjects not indicted, your client indicted. Does
23 that argue against consolidation or have you thought
24 about that at all?
25 MR. HIBEY: I have not thought about it,

1 to be honest with you, Your Honor. I had perceived
2 that because my client was indicted and the other two
3 gentlemen who are before this panel were not, that it
4 was likely that I would be descending his case severed
5 from the others, but I can't give you any principled
6 reason why I thought that might happen.
7 CHAIRMAN FARRAR: Do you represent him in
8 the criminal case also?
9 MR. HIBEY: Yes, I do.
10 CHAIRMAN FARRAR: Okay. Has the staff
11 thought about this at all?
12 MS. BATY: Yes, Your Honor, we have
13 thought about it. And we agree with Ms. Penny that it
14 really isn't appropriate given that there are
15 differences in the cases of Mr. Miller and Mr.
16 Moffitt. They shouldn't be consolidated. We wouldn't
17 expedite the process to consolidate those two cases.
18 And, as you mentioned at the beginning,
19 the staff has made a motion to stay the Geisen
20 proceeding. If that request is granted, that would
21 put Mr. Geisen's case on a substantially different
22 schedule, making that not a good idea to consolidate.
23 CHAIRMAN FARRAR: All right. Let me jump
24 way, way ahead. All I'm asking for is a ballpark here
25 in terms of our own resources. Is the staff able to

1 say at all how many witnesses you might put on in each
2 of the cases and how many of those would be the same
3 witness?
4 Obviously I'm looking at how many weeks of
5 trial do we have and what efficiencies, if any, would
6 be gained. Do you have any idea how many witnesses
7 you're talking about?
8 MS. BATY: No. Sorry.
9 CHAIRMAN FARRAR: Okay.Ms. Penny, do you
10 have any idea or is that --
11 MS. PENNY: I would like to be able to
12 think about that one as well.
13 CHAIRMAN FARRAR: Okay. And, Mr. Hibey,
14 why don't you think about that also?
15 MR. HIBEY: Thank you, Your Honor.
16 CHAIRMAN FARRAR: Well, then, let's not do
17 anything with consolidation now given what has just
18 been said, but let's all keep it in the back of our
19 minds if there are efficiencies to be gained. We
20 would like to do that, but if there are no
21 efficiencies and not a lot of overlap and counsel
22 doesn't want to do it, we wouldn't force it on you
23 unless there were some enormous overriding reason. So
24 we'll just hold that for the time being.
25 Turning to the second question -- and any

1 of you feel free if something we say isn't clear or
2 needs elaboration or you have an additional thought to
3 add, feel free to jump in. Our purpose here is to try
4 to get our arms around the cases and start to figure
5 out how we do a road map and a schedule. So don't
6 hold back on any information we need to have.
7 Are you aware there was an intervention in
8 the Siemazsko case? Are you aware of any
9 interventions that might be filed in this case?
10 MS. PENNY: Jane Penny, Your Honor. I am
11 not aware of any. I have had no inquiries myself.
12 MR. HIBEY: This is Dick Hibey. I am not
13 aware of any either, Your Honor.
14 CHAIRMAN FARRAR: Okay.
15 MS. BATY: This is Mary Baty for the
16 staff. We are not aware of any either. It is really
17 too late for interventions at this point.
18 CHAIRMAN FARRAR: I don't mean to comment
19 on the second part, but I'll take that as your
20 opinion, which you're entitled to. And I think we all
21 understand that when interventions are late, they have
22 to have good cause and so forth.
23 Do us a favor, though. If any of you hear
24 of anything, tell the people they had better hurry up
25 and tell us what is on their mind because, Ms. Baty,

1 all right. If the time has passed by, then the more
2 time that passes by, the less good cause there
3 certainly would be.
4 Third question in our order. Are there
5 any related matters? I meant by that, I think, any
6 other criminal matters? And the staff has represented
7 that they don't know about any or are not aware of the
8 Department of Justice thinking about doing anything
9 else. Ms. Penny, do you have anything different in
10 that regard?
11 MS. PENNY: I fervently hope the
12 Department of Justice is not interested in my clients,
13 Your Honor.
14 CHAIRMAN FARRAR: Okay. The fourth
15 question, maybe the staff could start. I've never had
16 an enforcement case before. Tell us how discovery
17 works.
18 Oh, I should have mentioned at the very
19 beginning all three of these orders are immediately
20 effective, which brings into play the regulation that
21 talks about an expeditious hearing. And so we're
22 certainly on that track, which is why we called you
23 together on two days' notice.
24 There is a new regulation that was an
25 appendix added last year. So if you all have the 2005

1 gray copy of the Code of Federal Regulations, Title X,
2 it's not in there. It's in the brand new orange or
3 decorator would have to tell me what color that is.
4 It's appendix B to 10 CFR Part 2.
5 MS. PENNY: I have it, Your Honor, yes.
6 CHAIRMAN FARRAR: You have it, Ms. Penny?
7 MS. PENNY: Yes.
8 CHAIRMAN FARRAR: And you see there model
9 milestones.
10 MS. PENNY: I did, indeed.
11 CHAIRMAN FARRAR: Now, those are for a
12 regular enforcement proceeding. I assume when we are
13 told to do whatever expeditious means, it means that
14 we should try to meet those targets in the model
15 milestones if at all possible.
16 Do you have that in front of you, Mr.
17 Hibey?
18 MR. HIBEY: No, I do not, Your Honor.
19 CHAIRMAN FARRAR: Well, within 100 days of
20 the enforcement order, we are supposed to issue an
21 order on the hearing that looked like we had had a lot
22 of time, but you all I think got 30-day extensions of
23 time, which is certainly legitimate. And then the
24 case took 21 days from the time it was filed somewhere
25 in the agency until this Board was appointed.

1 And I apologize to you for that. I don't
2 know why that happened. I've asked the chief judge to
3 look into it because certainly something that is
4 supposed to be on an expeditious schedule, we don't
5 want to lose 21 days.
6 So it says within 100 days of the
7 enforcement order, which would be April 14th, we're
8 supposed to issue an order on the hearing request. I
9 think we can issue that since, if I'm correct, the
10 staff agrees there should be hearings here. Correct?
11 MS. BATY: Yes, that's correct, Your
12 Honor.
13 CHAIRMAN FARRAR: Right. So we would
14 anticipate getting out an order by Friday, Monday at
15 the worst, recounting what happens in this call. That
16 would then if no one objects, you know, grant the
17 hearing request. Then under these model milestones,
18 that date becomes the triggering date for a number of
19 other things. The first thing is within 25 days, we
20 have to set a schedule for the proceeding. That ought
21 to be fairly easy given what we will accomplish today.
22 Discovery is supposed to be complete
23 within 145 days. So that would be 145 days from, say,
24 Friday or Monday. So that brings me back to question
25 number four, which I will address to the staff

1 initially.

2 When you have an enforcement case where

3 there has been so much investigation and communication

4 and so forth, does that allow for discovery to be

5 shortened dramatically from what you would have in a

6 reactor licensing case or tell me your experience with

7 that?

8 MS. BATY: I'm not sure that I understand

9 the question, but it shouldn't affect the -- I don't

10 have an experience with that. Can I have a moment to

11 confer? I need to discuss this with Ms. Brock.

12 CHAIRMAN FARRAR: Yes. Hold on. Let me

13 make sure you understand the question.

14 MS. BATY: Okay.

15 CHAIRMAN FARRAR: In other words, I had in

16 the back of my mind that because the government has

17 conducted so much in the way of investigations

18 already, that the need for discovery by the staff

19 might be a shortened form compared to what you would

20 do in an ordinary piece of litigation, where, you

21 know, everybody starts knowing nothing.

22 And I don't know how much on the other end

23 the subjects of the order have been able to learn what

24 the government has been doing. So after the staff

25 addresses the question, I'll ask private counsel to

1 address it also.

2 But go ahead, Ms. Baty. Go ahead and

3 confer. You understand the question?

4 MS. BATY: Yes. Yes, I do.

5 CHAIRMAN FARRAR: Yes. Go ahead.

6 (Whereupon, the foregoing matter went off

7 the record briefly at 2:24 p.m.)

8 MS. BATY: I've conferred. I guess our

9 experience has been that we do need time. It does

10 take a substantial amount of discovery in enforcement

11 proceedings. However, we're willing to work out a

12 joint discovery schedule to see things go along.

13 We also would like a point of

14 clarification. If you are to grant the hearings, the

15 staff would like to have the Geisen proceeding stayed,

16 at least temporarily stayed, until the Board has had

17 an opportunity to rule on the motion to stay the

18 proceeding.

19 CHAIRMAN FARRAR: You anticipate us. What

20 we were going to ask later, Ms. Baty -- and thank you

21 for that answer -- was ask Mr. Hibey how long he

22 needed to respond to your motion to hold in abeyance.

23 And based on that, we were going to today set a date

24 for oral argument on that motion.

25 We don't know what he is going to say, but

1 if the Siemazsko matter was a close case -- and I
2 define close case by the fact that that board -- oh,
3 I should have mentioned that. Judge Hawkens is a
4 member of that board.
5 The fact that that board stayed the
6 proceeding by a two to one vote defines it for me as
7 a close case. And Mr. Siemazsko's order had not been
8 immediately effective. Mr. Geisen's is. So, if
9 anything, that makes it a closer case.
10 So we were going to go ahead and set oral
11 argument today. And obviously the proceeding would
12 not move along until we decide that motion.
13 MS. BATY: That's acceptable. Thank you.
14 CHAIRMAN FARRAR: Okay.
15 MS. BATY: Staff is prepared to set a date
16 for oral argument.
17 CHAIRMAN FARRAR: Okay. Then you and Ms.
18 Penny are in position to work out a discovery
19 schedule, you're suggesting?
20 MS. BATY: Yes. We have been in contact
21 with Ms. Penny to discuss discovery and also a
22 protective order.
23 CHAIRMAN FARRAR: Now, is that a
24 protective order -- I saw that footnote in your
25 papers. Is that a protective order to make sure that

1 only her clients get the information, not anybody
2 else?
3 MS. BATY: Yes, that's correct.
4 CHAIRMAN FARRAR: Yes. Okay. Then why
5 don't you and she do that? Well, let's continue.
6 Let's continue down this model milestone matter.
7 Mr. Hibey, this would certainly affect
8 you. If we do not hold your proceeding in abeyance,
9 then you would pick up the same kind of schedule, --
10 MR. HIBEY: That's correct.
11 CHAIRMAN FARRAR: -- you know, maybe
12 lagging behind just a little.
13 After discovery, ten days after that, it
14 says motions for summary disposition are due. And 80
15 days after that, I guess that's time for a reply and
16 time for the Board to think about it, presiding the
17 Board issues decisions on motion for summary
18 disposition.
19 My experience outside of when I was a law
20 clerk was with summary disposition in the private fuel
21 storage case, where I spent a lot of time denying
22 summary disposition on some very complicated aircraft
23 and seismic issues.
24 And in the end, I said, why do we spend so
25 much time? Those were battles of experts. And there

1 was just no reason for anybody to give summary
2 disposition a lot of effort because they had to go to
3 trial.
4 Is this the kind of case with fact
5 witnesses who have a different recollection of events,
6 where we ought to decide now or have a plan now that
7 probably we are not going to entertain summary
8 disposition motions?
9 MS. PENNY: Your Honor, this is Jane
10 Penny. I would not want to rule it out.
11 CHAIRMAN FARRAR: Okay.
12 MS. PENNY: I would like to keep it on the
13 agenda if possible.
14 CHAIRMAN FARRAR: Okay. Yes. The reason
15 for ruling it out was not to deprive your clients of
16 an opportunity, but it's a huge block of time, this
17 model milestone.
18 MS. PENNY: Perhaps we could shorten that
19 or get back to you on that.
20 CHAIRMAN FARRAR: Okay. Again, the person
21 entitled to the expeditious hearing, people entitled
22 to it, are your clients, not the staff. So delay in
23 your instance is more acceptable than delay by the
24 staff or by the Board not attending to its affairs.
25 MS. PENNY: Your Honor, we appreciate

1 this. This case is very complex. There are a lot of
2 technical issues --
3 CHAIRMAN FARRAR: Is that Ms. Penny?
4 MS. PENNY: -- that may take some time.
5 So I am concerned about being too hasty for my
6 clients' good. So I appreciate that consideration.
7 CHAIRMAN FARRAR: Okay. Then let's hold
8 that for now.
9 Then ten days after summary disposition,
10 we are supposed to have a pre-hearing conference where
11 we set the schedule for the remainder of the
12 proceeding. And 30 days after that, written testimony
13 is filed.
14 And then it doesn't say anything we get 90
15 days after the hearing closes to write a decision,
16 which I think if you want to plan way, way ahead, that
17 would be 4 weeks for proposed findings, 3 weeks for
18 reply findings, and 6 weeks for us to write a
19 decision. That's some time off.
20 Is this a case where we are going to have
21 written testimony? Most of our detailed scientific,
22 theoretical cases, you get written testimony because
23 the evidence is so complex. Is this the kind of case
24 that we could save time down the road by foregoing
25 written testimony? What does the staff think about

1 that?

2 MS. BATY: Your Honor, this is Mary Baty.

3 We can see it down the road, but, you know, until we

4 get further discovery, we don't really know at this

5 point.

6 CHAIRMAN FARRAR: And I know a lot of

7 these questions are unfair in the sense of they're way

8 down the road. We just started two days ago. But I

9 just wanted to put all of these in front of you that

10 at every opportunity, we want to look for

11 opportunities to save time and the fact that it was

12 done differently in the private fuel storage case or

13 in some other complicated cases doesn't mean that

14 here, where the milestones are short and the subjects

15 are entitled to a expeditious hearing, that we want to

16 look for every opportunity to shorten things.

17 Speaking of that, Ms. Penny, I want you to

18 put this in some paper somewhere. And I gathered some

19 of it from your answer. Is this an appropriate

20 question to ask you, what your clients' employment

21 situation is right this minute?

22 MS. PENNY: Yes, Your Honor. One of the

23 reasons I had asked that this call be private, Mr.

24 Miller currently does not have employment.

25 CHAIRMAN FARRAR: How old is he?

1 MS. PENNY: Mr. Moffitt is still employed.
2 CHAIRMAN FARRAR: How old is Mr. Miller?
3 MS. PENNY: Your Honor, he's older than I
4 am. Very few people are. I think he's in his late
5 50s.
6 CHAIRMAN FARRAR: I've got you beat, but
7 go ahead.
8 MS. PENNY: All right. Good.
9 CHAIRMAN FARRAR: You said late 50s?
10 MS. PENNY: Yes, Your Honor.
11 CHAIRMAN FARRAR: At some point we want
12 you to file that because I think -- and how about Mr.
13 Moffitt?
14 MS. PENNY: Mr. Moffitt is very early 50s.
15 He is still employed, not in the same capacity.
16 CHAIRMAN FARRAR: But there was something
17 in your papers that he was in sales in the industry.
18 And was there a question about whether the immediately
19 effective order made him quit that job?
20 MS. PENNY: Your Honor, he was removed
21 from that position and is currently filling positions
22 as needed.
23 CHAIRMAN FARRAR: In the same company?
24 MS. PENNY: Yes, Your Honor.
25 CHAIRMAN FARRAR: Good.

1 MS. PENNY: His pay has been reduced, his
2 responsibilities reduced, but he still has some
3 employment.
4 CHAIRMAN FARRAR: Okay. Mr. Hibey, do you
5 care to tell us about your --
6 MR. HIBEY: My client, Your Honor, is I
7 think about 40. He's in his early 40s with 2
8 children, one of whom I think has finished her
9 studies. The other is in high school. I'm told he
10 has three children. My mistake.
11 And he was removed from his position and
12 is out of the industry, the nuclear industry,
13 altogether.
14 CHAIRMAN FARRAR: Removed. As I
15 understood your papers, he had been working --
16 MR. HIBEY: Yes.
17 CHAIRMAN FARRAR: -- until the --
18 MR. HIBEY: Until the order.
19 CHAIRMAN FARRAR: Until the order. So he
20 was removed from that company?
21 MR. HIBEY: Yes. And he is not in the
22 nuclear business at all now. I think he's trying to
23 latch on into another business where he can continue
24 to earn a livelihood.
25 CHAIRMAN FARRAR: All right. And I ask

1 those questions, of course, because the regulation
2 says expeditious and doesn't define what expeditious
3 means exactly, but I assume one of the factors in how
4 hard you push has to do with -- and you all can argue
5 this at the appropriate time -- what the person's
6 situation is. If everyone was fully and gainfully
7 employed, then that may call for less expedition than
8 if they are not.
9 Does staff have any thoughts on that? I'm
10 thinking ahead here.
11 MS. BATY: Not at this point, Your Honor.
12 CHAIRMAN FARRAR: Okay. All right. Let's
13 get back. We've covered the first four questions. We
14 kind of jumped ahead there, but thank you for the
15 information you have given us.
16 Number five, what plans, if any, the
17 parties may have for filing of preliminary motions or
18 other pleadings. We do have the staff's motion to
19 hold in abeyance in the Geisen matter. Is there
20 anything else that will be coming in soon other than
21 discovery-related?
22 MS. PENNY: Jane Penny, Your Honor. Not
23 on my part. I presume there might be some discovery
24 issue at some point. There often is. I'm going to
25 try to work with staff as much as I possibly can. But

1 I'm not anticipating filing any motions at this time.
2 CHAIRMAN FARRAR: All right. Mr. Hibey,
3 when will you be responding if the rules give you
4 seven days or ten days?
5 MR. HIBEY: The rules I think give me ten
6 days, Your Honor. And, if you will excuse me for
7 asking, rather than looking it up myself for this
8 phone call purposes, do we count the ten days in the
9 same way that they count the ten under the federal
10 rules?
11 CHAIRMAN FARRAR: It's a little different.
12 It depends on you get five extra days when service is
13 by mail. Rather than argue about that, why --
14 MR. HIBEY: We got served on the 20th. We
15 were hoping to file within ten days as appropriately
16 calculated.
17 CHAIRMAN FARRAR: Yes. Staff, have you
18 got somebody? You served him electronically, right?
19 MS. BATY: Yes, Your Honor. The staff
20 served Mr. Hibey electronically. We anticipate the
21 date being the 31st of March.
22 CHAIRMAN FARRAR: Okay. So it's the 30th
23 of March?
24 MS. BATY: Yes.
25 CHAIRMAN FARRAR: Mr. Hibey, this is a

1 crucial motion for your client.

2 MR. HIBEY: We will file our opposition on

3 the 30th of March.

4 CHAIRMAN FARRAR: Well, what I was going

5 to suggest is if you need any more time, rather than

6 file an extension, what I would like to know is let's

7 make sure we get a --

8 MR. HIBEY: Yes, Your Honor.

9 CHAIRMAN FARRAR: You can hardly get a

10 more crucial motion at the outset of the case.

11 MR. HIBEY: I agree.

12 CHAIRMAN FARRAR: And so I would like to

13 make sure you have enough time because then we can go

14 ahead and set an oral argument date without having you

15 have to come in and ask for an extension. Do you need

16 a little more time or --

17 MR. HIBEY: Your Honor, I am reasonably

18 confident that we can meet that deadline.

19 CHAIRMAN FARRAR: All right. Then let's

20 go with the without an extension March 30th. Staff

21 does not have a right to file a reply, correct?

22 MS. BATY: Yes, that's correct, Your

23 Honor.

24 CHAIRMAN FARRAR: Hold on. Let me check

25 with my brother judges here.

1 (Whereupon, the foregoing matter went off
2 the record at 2:39 p.m. and went back on the record at
3 2:40 p.m.)
4 CHAIRMAN FARRAR: We're back on. We're
5 thinking of Tuesday, the 11th. Before we set that
6 date, let me tell you what we're thinking about on
7 argument.
8 I have read the Siemazsko papers. I've
9 read the Commission's oncology decision, the outfit up
10 in Indiana, PA. And they talk about certain factors,
11 but the decisions they cite seem to indicate that each
12 case is different and the factors may be different in
13 different cases.
14 And then the Commission was kind of
15 critical of the company for saying, "Well, it had a
16 financial impact on it, but the company didn't specify
17 what that financial impact is."
18 I know reading some of the Siemazsko
19 papers, that board has not been always happy with the
20 level of detail they have gotten, particularly from
21 the Department of Justice. So let's make this clear.
22 Mr. Hibey, we want your brief to go into
23 some detail on the factors that you think important.
24 I guess the way I look at it is -- and I've talked to
25 my colleagues about this. These factors are not yes

1 or no factors. You know, there's --

2 MR. HIBEY: We didn't do them as such,

3 Your Honor.

4 CHAIRMAN FARRAR: Yes. I just want to

5 make sure everyone understands that, that the harm to

6 the government's criminal case is not a yes or no.

7 What degree of harm?

8 And on the injury to the subject of the

9 order, you know, it may make a difference. Is he

10 well-employed or not employed? And all of those

11 factors, you can look at them as a matter of degree.

12 So we want your brief to be very thorough.

13 And then, rather than reserve time for a

14 reply brief from the staff, we want the staff to come

15 into that argument ready to address those matters and,

16 in particular, to the extent that there has been

17 criticism in the Siemazsko case of the level of detail

18 from the Department of Justice.

19 I think, Ms. Brock, there was one occasion

20 where the board asked you a question in that oral

21 argument where -- and I understand. Again, this is

22 not criticism. You're here carrying the Department of

23 Justice's water under your memorandum of

24 understanding. And you make certain representations

25 on their behalf. And most times that may be

1 sufficient.

2 In this case, you may wish to consider --

3 we can't tell you how to run your case. You may wish

4 to consider having the fellow who gave you the

5 affidavit for the Department of Justice at the oral

6 argument in front of us with you because if we ask you

7 a question about level of detail and you are unable to

8 answer it, that will be your only opportunity to

9 answer it. And if you can't give us a level of detail

10 which justifies counting that factor in your favor or

11 less on the other side's favor than we would, then we

12 are going to move on.

13 So we leave it up to you as to whether you

14 want to have him here. If you just want to come, you

15 know, that's between you and them. But we have been

16 known to ask some penetrating questions in the course

17 of oral arguments. And this is a very important

18 matter. And so we urge you to consider that.

19 MR. HIBEY: Your Honor?

20 MS. BROCK: This is Ms. Brock. We

21 understand. We will take that back and to confer with

22 the Department of Justice.

23 MR. HIBEY: Your Honor, may I inject a

24 thought on that point?

25 CHAIRMAN FARRAR: Yes, sir?

1 MR. HIBEY: If I understand the procedures
2 correctly, my opposition will necessarily be directed
3 at the motion and all of its attendant papers and
4 citations from authorities.
5 CHAIRMAN FARRAR: Right.
6 MR. HIBEY: If indeed the Justice
7 Department or some other representative of the
8 government is coming into the proceeding to give
9 information to the court before decision but after the
10 papers have been filed, I would respectfully request
11 the opportunity to cross-examine that person who is
12 going to be providing additional factual information.
13 CHAIRMAN FARRAR: What does the staff
14 think about that suggestion? And before you answer,
15 I have been involved in proceedings here where
16 intervenors come in and they file something and the
17 staff and the applicant oppose it and the intervenor
18 tries to supplement its documents and the staff and
19 applicant say, "Sorry. You only had one chance."
20 It seems to me that Mr. Hibey is raising
21 an analogous argument here. You had a chance to file
22 a brief. What I am talking about is we want to make
23 sure we get this right. If you bring in something
24 beyond what you have provided us before, he's saying
25 he needs to take a crack at it.

1 So let me reframe his question that way
2 and ask you what you think about it.
3 MS. BROCK: Yes. This is Ms. Brock. I'm
4 on all four cases.
5 To the extent that if we were to bring
6 somebody in to testify in an oral argument, I would
7 agree that Mr. Hibey would have the right to
8 cross-examine him. I don't anticipate doing that.
9 And I agree that any argument we make, he
10 has the right to respond to it. And to the extent
11 that he believes that we were to raise new issues at
12 the oral argument that hadn't been in our brief, I
13 agree that he would have the right to either respond
14 to them or move to have them struck. But I don't
15 anticipate making any arguments beyond responding to
16 his brief that we have not already made.
17 And I will confer with the Department of
18 Justice about whether or not they want to be present
19 for the oral argument.
20 CHAIRMAN FARRAR: Okay. Mr. Hibey, you
21 have raised the question. It seems to me you have got
22 it on the table. You have protected your client's
23 interest. And, rather than us make any ruling now
24 since we don't know what is going to emerge on that
25 day of argument, we will carry your suggestion along

1 with us --

2 MR. HIBEY: Thank you, Your Honor.

3 CHAIRMAN FARRAR: -- and see to it that

4 your client's interests are not harmed, whichever way

5 the oral argument takes us.

6 Hold on a minute here while I confer with

7 my brethren.

8 (Whereupon, the foregoing matter went off

9 the record at 2:48 p.m. and went back on the record at

10 2:49 p.m.)

11 CHAIRMAN FARRAR: Back on the record. I

12 am always happy to learn that I am speaking not for

13 myself but for all of us.

14 So we will do that. Mr. Hibey, you have

15 made your point. And we will bear it in mind. But I

16 urge both sides, you also, Mr. Hibey. And, again,

17 this may turn out not to be a close case, but it seems

18 to me if Siemazsko was a close case, this is closer or

19 it looks like it has the potential to be closer.

20 And so this is not three out of five

21 factors when. This is what is precisely the weight of

22 each of those factors. And we want to be ready to do

23 that and move ahead.

24 Well, then how does Tuesday, April 11th

25 sound for the oral argument?

1 MR. HIBEY: It's good on my calendar, Your
2 Honor.
3 CHAIRMAN FARRAR: Ms. Baty, are you all
4 ready?
5 MS. BATY: Are you talking to me, sir?
6 CHAIRMAN FARRAR: Yes.
7 MS. BATY: Your Honor, this is Mary Baty.
8 The staff would be prepared to argue on the 11th,
9 April 11th.
10 CHAIRMAN FARRAR: All right. Mr. Hibey,
11 you are local, right?
12 MR. HIBEY: Yes, Your Honor.
13 CHAIRMAN FARRAR: Let's do 10:00 o'clock,
14 half-hour aside, but that half-hour might expand a
15 little depending on where we go with it. Yes, 10:00
16 o'clock on Tuesday, April 11th.
17 And you can assume that we will have
18 thoroughly read the briefs and thoroughly checked the
19 citations. And you won't need to spend a lot of
20 introductory time familiarizing us with the case.
21 MR. HIBEY: Your Honor, the venue is?
22 CHAIRMAN FARRAR: Oh, yes. I'm sorry.
23 The headquarters complex is right south of the White
24 Flint Metro station on Rockville Pike. We are in the
25 southernmost of the two buildings, the shorter one,

1 third floor.

2 We have a very nice courtroom here. Talk

3 to Karen Valloch, and she will tell you how. We'll

4 make sure we get you into the building.

5 MR. HIBEY: Yes. I know where that is

6 generally. And I can get there.

7 CHAIRMAN FARRAR: Our order will have the

8 hearing location and stuff in it, but it will be here

9 at our hearing, 10:00 o'clock on Tuesday, the 11th.

10 All right. Ms. Penny, I think or staff

11 said you would work on discovery schedule. Again, the

12 private fuel storage case was hotly contested. The

13 parties didn't like each other's positions, but the

14 lawyers managed to get along well.

15 And there were a lot of witnesses, a lot

16 of cross-country discovery. And they worked out

17 almost everything themselves. And I remember once

18 they called late on a Friday afternoon and I wasn't

19 here. And it was a very important thing where a

20 witness had gotten sick. And the message I got was,

21 "Oh, he's not there. Well, let's work it out

22 ourselves."

23 And, you know, you all can work out a more

24 sensible system than we can. So you do your best to

25 resolve things yourselves. If we need to referee, we

1 will, but you know these cases way better than we do.
2 And so we count on your good instincts to work out a
3 discovery schedule.
4 MS. PENNY: Your Honor, I will adhere to
5 that. I would only ask that I be absolved from
6 participating in anything next week. I am going to be
7 out of the office. I wish I could tell you I was in
8 trial, but I am not. I am on vacation. But I will
9 assiduously attend to this scheduling on returning
10 April 1 and will give it top priority.
11 CHAIRMAN FARRAR: That was Ms. Penny?
12 MS. PENNY: Yes.
13 CHAIRMAN FARRAR: Okay. Then you deal
14 with the staff. Again, having these milestones in
15 mind --
16 MS. PENNY: I intended to use them as
17 guidance, Your Honor.
18 CHAIRMAN FARRAR: Yes. But our goal is
19 let's beat them. I mean, again, we don't want to
20 limit your case. It's your client at risk. So if you
21 don't want to beat them, that's your choice, but if
22 you come up with a sensible schedule that beats it and
23 get the staff to agree, let's go ahead because I would
24 certainly like to save some time, particularly given
25 that the staff and the Department of Justice have had

1 a long investigation going. If they can save time on
2 their end, that would be helpful.
3 MS. PENNY: Your Honor, just for
4 clarification, I'm afraid the time is going to be on
5 my end because I have not seen the documents in this
6 case yet.
7 CHAIRMAN FARRAR: Okay.
8 MS. PENNY: I'm starting out at ground
9 zero other than being aware of what has been posted,
10 some general documents, the questions that were asked
11 to my clients. I have to play catchup here, and I
12 will.
13 CHAIRMAN FARRAR: Okay. And that's the
14 kind of thing, Ms. Baty. You know, I don't know what
15 the general practice is in this kind of proceeding
16 where the government starts with a big, long
17 investigation, but anything you can do that's
18 analogous to the open files that they do in a criminal
19 case would certainly be helpful.
20 In fact, I think -- is it for the Yucca
21 Mountain proceeding the rules -- I'll never live long
22 enough to be on that. So I haven't studied those
23 rules, but there I think they have sharing of
24 documents much more than regular discovery. Am I
25 right there?

1 MS. BATY: Your Honor, this is Ms. Baty.
2 Pursuant to 2336, the staff will make its mandatory
3 disclosure within 30 days after you grant the hearing
4 request. So if that's tomorrow, we will work to and
5 we will meet the 30-day disclosure deadline. We will
6 meet it.
7 We are working hard to review the
8 documents for privilege and get them indexed in
9 anticipation of your grant of a hearing.
10 CHAIRMAN FARRAR: Okay. That is a good
11 start. If you can beat the 30, fine, but I understand
12 the need to protect privilege and safeguards or any
13 other kind of information. So I appreciate that.
14 Let's skip number six for a minute here
15 and jump to seven. Staff witnesses I suppose are
16 mostly here. Are we looking at a hearing here or are
17 there enough people from the facility who would
18 testify that we would want to go to Toledo or Sandusky
19 or Cleveland for all or part of the hearing? Does
20 anyone have any thoughts on that?
21 MR. HIBEY: This is Dick Hibey. My sense
22 is that there are two relatively centralized locations
23 or centers where witnesses might be located, one being
24 here in this area, one being out near the plant. And
25 I don't know quite how to weight that.

1 CHAIRMAN FARRAR: In reactor licensing
2 cases, there was always a strong bias in favor of
3 being out in the locality, even if your scientific
4 witnesses were from all around the country with the
5 public interest in licensing cases. There was always
6 supposed to be an effort to go out there.
7 Again, in the private fuel storage
8 proceeding, we ended up with so much safeguards
9 information, the hearing couldn't be open and we had
10 to come back here anyhow.
11 Will there be public interests in this so
12 that you would opt for the Ohio environs so the public
13 could observe it or is that satisfied by having the
14 reporter from the Plain Dealer come to our hearing
15 room if he or she wants to? Does staff have any
16 thoughts?
17 MS. BATY: Your Honor, the staff does not
18 have a position on the amount of publicity or where it
19 should be held. I mean, we travel.
20 CHAIRMAN FARRAR: Let's all just, I mean
21 --
22 MR. HIBEY: I suppose -- excuse me, Your
23 Honor. Forgive me.
24 CHAIRMAN FARRAR: No. Go ahead.
25 MR. HIBEY: I suppose there would be less

1 occasion for publicity back here, thereby rendering
2 relatively pristine the community from which a jury
3 pool will be drawn in a criminal case.
4 CHAIRMAN FARRAR: Okay. Assuming we went
5 ahead before the criminal case, yes. Okay.
6 MR. HIBEY: I mean, not knowing exactly
7 the schedule of things, I guess it's something for me
8 to say out loud anyway.
9 CHAIRMAN FARRAR: All right. Let's all
10 bear that in the back of our mind. Maybe we can split
11 the proceeding so that you have a session that is
12 mostly Ohio witnesses and a session that is mostly
13 D.C. witnesses.
14 MR. HIBEY: Yes.
15 CHAIRMAN FARRAR: So, again, we just
16 wanted to start thinking about this in advance, but
17 people would keep that in mind. We have an excellent
18 facility here that is ours for the having, rather than
19 having to beg or borrow a courtroom out there. So
20 sometimes it's more convenient here, but if there is
21 a reason to go to Ohio, we will certainly do that.
22 Your mention, Mr. Hibey, of the criminal
23 proceeding reminded me of the speedy trial act. And
24 there were some representations by the Department of
25 Justice through the staff about motions being filed on

1 March 24th. But I don't know that there was any
2 mention that the docket entries reflect that the judge
3 had already stayed the running of the speedy trial act
4 pending the filing of those motions and that the act
5 automatically stays the running of the 70 days while
6 the motions are under consideration.
7 So that's one of the items we will want to
8 talk about at that oral argument, just exactly what is
9 the status of the criminal proceeding.
10 The fact that there is a speedy trial act
11 doesn't necessarily mean that the trial will be
12 speedy. In fact, I think the judge -- Mr. Hibey, has
13 there been any suggestion by the judge he was going to
14 declare it a complex case?
15 MR. HIBEY: We haven't even appeared
16 before the judge. So far we have appeared only before
17 a magistrate judge for arraignment who set the date
18 for motions. Said date has been extended to May 24th.
19 All appropriate calculations under the speedy trial
20 act and all appropriate waivers are in place as a
21 result.
22 CHAIRMAN FARRAR: The last we heard was
23 March 24th.
24 MR. HIBEY: No. It's been moved, Your
25 Honor. If it hasn't been moved, it will be moved

1 because when she set the date, she anticipated it
2 would be moved. I believe the parties have agreed to
3 all of this.
4 I speak about that almost as if I were
5 uninvolved. I have to say I was. One of my
6 colleagues handled it. But I am certain that the
7 matter was agreed upon between the government and
8 ourselves to kick it to the 24th, May.
9 CHAIRMAN FARRAR: Okay.
10 MR. HIBEY: And I am sure also that the
11 judge would endorse that stipulation.
12 CHAIRMAN FARRAR: Well, I hope both sides
13 will be ready to focus on that, either in the papers
14 that are going to be filed or on the oral argument
15 because, again, one of the factors is what is the
16 length of the delay. And so it's becoming more
17 apparent that the fact that there exists a speedy
18 trial act only sets up the question. It doesn't
19 provide the answer. So let's make sure we focus on
20 that.
21 MR. HIBEY: We'll have the precise
22 information on this for you.
23 CHAIRMAN FARRAR: Okay. Thank you.
24 We haven't touched on number six yet from
25 our order, but are there any other questions before we

1 get into what our next steps are, which number six
2 kind of talks about.
3 Anything else under number eight there
4 that any counsel would want to bring to our attention?
5 MS. PENNY: This is Jane Penny, Your
6 Honor. I have nothing right now.
7 CHAIRMAN FARRAR: All right.
8 MR. HIBEY: Nothing, Your Honor.
9 CHAIRMAN FARRAR: The staff?.
10 MS. BATY: Yes. We have a question about
11 do you want our mandatory disclosures. Does the board
12 want? I mean, do you want to receive a copy of our
13 mandatory disclosure documents?
14 CHAIRMAN FARRAR: That 30-day thing where
15 you give them to them?
16 MS. BATY: Yes. Do you want to receive a
17 copy of them as well? Some boards have. Some boards
18 haven't. That's why we raise the question.
19 CHAIRMAN FARRAR: Yes. Hold on. Let me
20 talk to my colleagues.
21 (Whereupon, the foregoing matter went off
22 the record at 3:05 p.m. and went back on the record at
23 3:06 p.m.)
24 CHAIRMAN FARRAR: We're back on the record
25 here. Ms. Baty, how much material are we talking

1 about? In other words, we would like to become
2 familiar with the case.
3 Well, wait a minute. Ms. Penny, do you
4 have any? This would be kind of the government's side
5 of the case. Would you have any objection to us
6 seeing it?
7 MS. PENNY: Not at all.
8 MS. BATY: Your Honor, you asked how much?
9 CHAIRMAN FARRAR: Yes. How many file
10 cabinets are we talking about or --
11 MS. BATY: We're talking about sort of
12 18,000 documents, rough estimate. We have about
13 19,000 documents that we're reviewing, reviewing for
14 privilege and indexing. So it's a lot.
15 CHAIRMAN FARRAR: Why don't you give us
16 the 50 we need to see?
17 MS. BATY: I would like that edited
18 version, too, Your Honor.
19 CHAIRMAN FARRAR: Then why don't we hold
20 on a second.
21 (Whereupon, the foregoing matter went off
22 the record at 3:07 p.m. and went back on the record at
23 3:08 p.m.)
24 CHAIRMAN FARRAR: Back on the record. A
25 couple of questions. We have some concern. Well,

1 first off, is the material also available
2 electronically on a CD-ROM or something?
3 MS. BATY: Yes, Your Honor. This is Mary
4 Baty. Yes, it will be CD-ROM mostly, not all of it,
5 but most of it will be.
6 CHAIRMAN FARRAR: Okay. One concern I
7 have, I mean, we want to get familiar with the case,
8 but there is a concern that if we get engrossed or
9 imbued in this material and then later have a trial,
10 that we may have trouble segregating what we learned
11 from the trial and what we learned from stuff that
12 wasn't in the trial, although when you go to have your
13 citations, you find out that it wasn't in evidence.
14 So maybe we will forgo it now.
15 Let me ask another question. I think the
16 rule says 30 days or such time as the board may set.
17 I assume the staff has been working on this ever since
18 the Siemazsko case came in. Is there any way we could
19 speed up the 30 days?
20 I hate to order you to do that since I
21 don't have the 19,000 documents in front of me and
22 that can be a massive undertaking. But, by the same
23 token, if it's possible to accelerate -- you know, the
24 staff made these orders effective immediately. That
25 triggers the expeditious hearing request. So it would

1 seem that anything the staff could do to save some
2 time on the 30 days would be time well-saved.
3 Is that something you all can talk to your
4 people, Ms. Baty, and see if you can speed that up?
5 MS. BATY: Your Honor, we are working on
6 it. We have added several more attorneys to the team
7 reviewing documents. And we will get them to Ms.
8 Penny as soon as possible. But I doubt that we can
9 get it done in less than the 30 days. It really
10 doesn't seem possible.
11 CHAIRMAN FARRAR: Is it possible to do
12 sequential, give her a batch, you know, in 10 days, a
13 batch in 20 days, and the rest in 30? Would that help
14 you, Ms. Penny?
15 MS. PENNY: Your Honor, it's hard to say
16 with that number of documents. I would just as soon
17 have an accurate representation of what I am going to
18 need. So I am reluctant to pressure the staff at this
19 point. If I'm getting good material properly indexed,
20 maybe it would be better not to rush it.
21 CHAIRMAN FARRAR: Okay. Thank you for
22 that candid observation.
23 Ms. Baty, what we will do is in our order,
24 we will simply put down that you will do it in 30 days
25 or such earlier time as you may be able to achieve.

1 Is that all right?

2 MS. BATY: Yes, that's fine. Will do.

3 CHAIRMAN FARRAR: And if you can do it,

4 fine. But if you can't, Ms. Penny is willing to live

5 with that in the interest of getting a good set of

6 documents.

7 Any other matters before we turn back to

8 item number 6 here?

9 (No response.)

10 CHAIRMAN FARRAR: Then what we have is

11 under item 6, Mr. Hibey's brief in on the 30th, the

12 oral argument on the 11th, our order memorializing

13 this conference and granting the three hearings going

14 out Friday, if possible, Monday if not. And that will

15 trigger all of the periods in those model milestones

16 as well as the staff's 30-day period.

17 Is that right, Ms. Baty? That's --

18 MS. BATY: Well, just a clarification that

19 the 30 days doesn't apply to Mr. Geisen's pleading.

20 CHAIRMAN FARRAR: Right. We will grant

21 the hearing as to him, but all other matters will be

22 deferred pending the outcome of the oral argument.

23 MS. BATY: Yes. That is what the staff is

24 requesting.

25 CHAIRMAN FARRAR: Yes. I know that's

1 right. We had indicated that before. And we'll make
2 sure we put that in there.
3 MS. BATY: Thank you.
4 CHAIRMAN FARRAR: Anything else?
5 (No response.)
6 CHAIRMAN FARRAR: Let's go off the record
7 for just a moment here.
8 (Whereupon, the foregoing matter went off
9 the record at 3:13 p.m. and went back on the record at
10 3:14 p.m.)
11 CHAIRMAN FARRAR: Mr. Hibey, refresh me on
12 the criminal law. You don't have to announce at any
13 time until the trial is over, the criminal trial is
14 over, whether your client is going to testify, right?
15 MR. HIBEY: That's correct, Your Honor.
16 CHAIRMAN FARRAR: Okay. I'm thinking in
17 terms of the discovery and the suggestion in the
18 Siemazsko case that discovery could take place of him
19 first to see if he was going to exercise his Fifth
20 Amendment privilege or not. If any of that is
21 relevant, put that in your brief.
22 MR. HIBEY: Yes. That's an issue that is
23 raised in the papers. And my intention is to address
24 it. To the extent that it was raised and dealt with
25 by the panel in the Siemazsko case, we will

1 incorporate that as well into our position on that
2 subject.
3 CHAIRMAN FARRAR: All right. I was struck
4 in reading the Commission's decision in the oncology
5 case, that it appeared there that the immediately
6 effective penalty was negotiated from time to time.
7 As there were patients who needed cancer treatment,
8 the company was allowed to give treatment to some of
9 them.
10 Ms. Baty, have you had discussions with
11 either Ms. Penny or Mr. Hibey about the breadth of
12 your immediately effective ban? In other words, are
13 there positions that these gentlemen might hold that
14 are kind of a middle ground or they're not outside the
15 industry, where the immediate impact on them, on their
16 lives might be less significant, but the values which
17 the staff is trying to protect, namely that they don't
18 want people accused of these things being in the midst
19 of reactor operations? Is that something you all have
20 had discussions with about what types of jobs might be
21 permissible in the short term?
22 MS. BATY: No. Your Honor, we haven't had
23 any discussions, but the staff would be willing to
24 consider specific requests.
25 CHAIRMAN FARRAR: Yes. I hadn't thought

1 of that until I saw the oncology case and the company
2 was banned and then people needed cancer treatments
3 and they said, "Okay. You know, treat those people."
4 And so that's not coming from us as a Board but just
5 trying to be aware of everything that's at stake here.
6 So what you're saying is if Mr. Penny or
7 Mr. Hibey called you and said, you know, "Here's a job
8 offer my client has" that may be close to the line of
9 your order, that is something you would be willing to
10 talk to them about?
11 MS. BATY: We would be willing to do that.
12 We would review it on a case-by-case basis.
13 CHAIRMAN FARRAR: Yes. Okay. Fine. I
14 just wanted to just mention that in case that's a call
15 that either one of the outside counsel would want to
16 make to you at some point.
17 Then I think we've covered everything we
18 wanted to.
19 (Whereupon, the foregoing matter went off
20 the record at 3:19 p.m. and went back on the record at
21 3:20 p.m.)
22 CHAIRMAN FARRAR: Back on. We have a
23 couple of other questions. In the memorandum of
24 understanding, Ms. Baty, there is a provision there
25 that the presiding officer can ask for not only

1 affidavits or we can ask for affidavits or testimony.
2 So when you talk to the Department of Justice people,
3 please remind them that that is what the matter, what
4 your memorandum of understanding with them calls for
5 and tell them that we are very interested.
6 I think I said earlier today that we
7 couldn't tell you how to do your business and whether
8 they have to come, if that was your choice, reading
9 the memorandum of understanding, which obviously we're
10 not a party to, but it seems to contemplate that some
11 respect could be given to the wishes of the presiding
12 officer. So I hope you will make that request to them
13 in the most forceful terms.
14 MS. BATY: We will do what we can, Your
15 Honor.
16 CHAIRMAN FARRAR: Okay.
17 JUDGE HAWKENS: This is Roy Hawkens. Ms.
18 Baty, I have a question for you. I know that none of
19 the parties here today are challenging the immediately
20 effective aspect of the orders. Just as a matter of
21 curiosity, I was trying to see if there was any
22 obvious distinction between making Siemazsko's order
23 not immediately effective in contrast to these. Can
24 you shed any light on that for me?
25 MS. BATY: Your Honor, I was not involved

1 in the Siemazsko proceeding. So I would have to get
2 back to you on that.
3 JUDGE HAWKENS: Fortunately, Ms. Brock is
4 here with you.
5 MS. BATY: Yes.
6 JUDGE HAWKENS: Can she shed any light?
7 MS. BROCK: That is correct.
8 JUDGE HAWKENS: I'm sorry?
9 MS. BROCK: Your Honor, this is Ms. Brock.
10 The different orders reflect the concerns that the
11 enforcement staff had about the different individuals
12 and also the timing of when they were issued and
13 whether the staff felt that there was an immediate
14 public health and safety reason such that it requires
15 them to make the set of orders immediately effective.
16 JUDGE HAWKENS: All right. Thank you.
17 MR. HIBEY: Which is definitely something
18 we are going to take on in the pleadings.
19 CHAIRMAN FARRAR: All right. I think,
20 then, let me thank everybody for gathering on such
21 short notice for your wisdom and candor in stating
22 your positions. This is a very important matter I
23 think from both viewpoints, the staff exercising its
24 concern over the public health and safety to make sure
25 that things are done properly, but their orders, we

1 recognize, have a dramatic impact on the lives of
2 these three people.
3 If the orders deserve to be upheld at the
4 end of the day, they will be upheld. And if they
5 don't deserve to be upheld, they won't be upheld. And
6 we just want to indicate that we understand the
7 importance of this to both sides.
8 We look forward to working with you in as
9 expeditious as fashion as we can. And we urge you to
10 keep up the candor and, you know, assure that we get
11 the most thorough viewpoints you can because this is
12 an urgent matter that is very important to both sides.
13 So if there is nothing else for the good
14 of the order, we thank you for joining us and look
15 forward to working with you over the next period of
16 time. Thank you very much.
17 MR. HIBEY: Thank you, Your Honor.
18 MS. BATY: Thank you, Your Honor.
19 MS. PENNY: Thank you, Your Honor.
20 (Whereupon, the foregoing matter was
21 concluded at 3:25 p.m.)
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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: PREHEARING CONFERENCE ENFORCEMENT ACTIONS ITMO GEISEN, MILLER & MOFFIT

Docket Number: IA-05-052, 053, AND 054

Location: ROCKVILLE, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

ERIC HENDERIXSON
Official Reporter
Neal R. Gross & Co., Inc.